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The Emerging Right of Legal Assistance for the Indigent in Civil Proceedings

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THE EMERGING RIGHT OF LEGAL ASSISTANCE FOR THE INDIGENT IN CIVIL PROCEEDINGS

> If we are to keep our democracy, there must be one commandment: Thou shalt not ration justice.
>
> Learned Hand[1]

After the Supreme Court declared in *Gideon v. Wainwright*[2] that indigents have a constitutional right to appointed counsel in criminal cases, attention turned to the possibility that a similar right could be found for civil litigants.[3] Although there is no explicit constitutional guarantee of counsel for the civil litigant, the due process clause, which protects property rights as well as personal freedoms, arguably mandates that there be a right to professional representation of all citizens in all courts.[4] The inability of most laymen to effectively present even a rudimentary case on their own behalf indicates that without counsel a meaningful opportunity to be heard is impossible, and an adverse judgment could thus constitute a deprivation of property without due process of law.[5]

This thesis has not met with widespread judicial acceptance. A significant number of recent state and federal decisions, however, have dealt with the question of appointing counsel in civil cases. This note will examine these recent decisions in an effort to provide a framework for analyzing the desirability and constitutional necessity of appointing counsel for indigent civil litigants. After attempting to show that the distinction between civil and criminal cases is an inappropriate basis for determining the need for counsel, an effort will be made to demonstrate constitutional support for supplying indigents with legal assistance in all civil cases. In addition, several specific objections likely to be raised to such a broad expansion of the right to counsel will be considered with an analysis of the merits of each such argument.

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[1] Hand, *Thou Shalt Not Ration Justice,* 9 NLADA BRIEFCASE 3, 5 (1951) (address before the Legal Aid Society of New York).

[2] 372 U.S. 335 (1963).

[3] Comment, *The Right to Counsel in Civil Litigation,* 66 COLUM. L. REV. 1322 (1966) [hereinafter cited as *Right to Counsel*]; Note, *The Indigent's Right to Counsel in Civil Cases,* 76 YALE L.J. 545 (1967) [hereinafter cited as *Indigent's Right*].

[4] *Cf.* Boddie v. Connecticut, 401 U.S. 371 (1971) (an indigent divorce litigant cannot be denied access to the courts for failure to pay required court costs). *See also* notes 16-21 and accompanying text *infra.*

[5] Powell v. Alabama, 287 U.S. 45 (1932).

I. THE CIVIL-CRIMINAL DISTINCTION

A. Due Process

The reason most often relied upon for not appointing counsel on behalf of the indigent civil litigant is the belief, based upon a literal analysis of the Constitution, that there is a distinction between the requirements of due process in criminal and civil proceedings.[6] In *Gideon v. Wainwright*[7] the Court based the requirement of counsel in criminal cases upon the guarantees of the sixth amendment and upon the peculiarly coercive nature of a criminal trial. Concluding that the right to counsel in criminal cases is "fundamental and [therefore] essential to a fair trial,"[8] the requirement was held to be made obligatory upon the states by the due process clause of the fourteenth amendment.

In *Argersinger v. Hamlin*,[9] the Court held that, although *Gideon* involved a felony, its due process rationale is broad enough to require appointment of counsel in any trial where the accused stands a chance of being deprived of his liberty.[10] Yet, despite the Court's rejection of the contention that due process only requires appointment of counsel when the defendant stands a chance of being convicted of a major crime, the lack of a seventh amendment guarantee of counsel was said to prevent an application of the decision to the civil litigant despite the similarity of interests at stake in misdemeanor and civil actions.[11] While this would indeed appear to be the position of most courts today, substantial reason exists to challenge its validity.

Historical analysis indicates that the due process clause need not be read as limited to the literal requirements of the sixth amendment, and that the Court's reliance on the lack of a counsel requirement in the seventh amendment may be misplaced. The drafters of the Constitution and the Bill of Rights borrowed much from the English judicial system during a time when counsel was appointed for indigents in England's *civil* courts as a matter of course.[12] Indeed, in England in 1789 it was the criminal defendant who was frequently forced to face the tribunal unassisted by counsel, even if he had the means to retain an attorney. It is not surprising, then, that the framers found a specific guarantee of counsel neces-

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[6] *See, e.g.*, Spears v. United States, 266 F. Supp. 22 (S.D.W. Va. 1967) (civil litigant has only a privilege, not a right, to request discretionary appointment of counsel); *In re* Robinson, 8 Cal. App. 3d 783, 87 Cal. Rptr. 678 (1970), *cert. denied*, 402 U.S. 964 (1971) (civil-criminal distinction cannot be ignored); Dear v. Locke, 128 Ill. App. 2d 356, 262 N.E.2d 27 (1970) (denial of counsel in civil proceedings is not a denial of due process or equal protection).

[7] 372 U.S. 335 (1963).

[8] *Id.* at 340.

[9] 407 U.S. 25 (1972).

[10] *See generally Right to Counsel, supra* note 3, at 1331. Both *Gideon* and *Argersinger* drew support from Powell v. Alabama, 287 U.S. 45 (1932), in which the Court held that the right to counsel in criminal cases is an outgrowth of the constitutional right to a hearing.

[11] *See* notes 27-32 and accompanying text *infra*.

[12] *Right to Counsel, supra* note 3, at 1325-27.

sary only for criminal trials; there was simply no need to reaffirm the rights already routinely enjoyed in the civil courts.

Moreover, while ostensibly based upon the sixth amendment, *Gideon* was explicitly tied to the due process clause of the fourteenth amendment. The Court held that because a layman appearing *pro se* could not be assured a fair trial, the assistance of counsel was a fundamental right incorporated into the due process clause.[13] The Court's decision to view due process as requiring counsel for the purpose of securing a fair trial, however, makes it difficult to analyze the fourteenth amendment in terms of criminal cases alone. As was apprehensively noted by Justice Roberts speaking for the majority in *Betts v. Brady*,[14]

> [A]s the fourteenth amendment extends the protection of due process to property as well as to life and liberty, . . . logic would require the furnishing of counsel in civil cases involving property.[15]

Thus, since the Court has determined in *Gideon* that the interests protected by the fourteenth amendment can only be preserved at a trial concerning life and liberty, when the citizen is represented by counsel, logic indicates that civil property rights should receive the same protection. A mechanistic reliance on the differences between the sixth and seventh amendments is, at best, an oversimplified method of determining the requirements of due process. Indeed, the Court did not so rely in *Gideon;* instead, the Court tied the right to appointed counsel for indigent criminal defendants to the fourteenth amendment. Furthermore, a number of recent court decisions suggest that the due process requirement of counsel for a fair trial embraces certain civil proceedings as well as the criminal trial.

In *Boddie v. Connecticut*,[16] the Court prohibited a state from denying indigents access to its divorce courts because of their inability to pay court costs. The Court held that, absent a countervailing state interest of overriding significance, the due process clause requires that persons forced to settle their claims through the judicial process be given a meaningful opportunity to be heard.[17] Although the Court sought to limit the application of *Boddie* to its facts,[18] it should be recognized that a meaningful

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[13] 372 U.S. at 342.

[14] 316 U.S. 455 (1942) (denied the right to appointed counsel; *Betts* was overruled in *Gideon*).

[15] *Id.* at 473.

[16] 401 U.S. 371 (1971).

[17] *Id.* at 377.

[18] The Court was careful to warn as to the narrowness of its decision. Only those unusual legal matters like marriage and divorce which require use of the court system for settlement were to be affected. There is considerable question as to the validity of such a limitation, however. Justice Douglas, for example, felt *Boddie* should have been decided on the basis of equal protection rather than due process (401 U.S. 371, 383) (Douglas, J., concurring in result). Douglas pointed out that over the past several years the Court has applied a stricter scrutiny where the classification in question was based on "suspect criteria" and that, while these criteria are not definable with mathematical precision, rather definite guidelines have neverthe-

opportunity to be heard is an established component of due process[19] which can only be guaranteed by supplying counsel to those who cannot afford to retain their own.[20] Therefore, a meaningful opportunity to be heard is mandated by the fourteenth amendment in civil litigation whenever there is a potential deprivation of life, liberty, or property.[21]

Boddie was narrowly construed by the New York Court of Appeals in *Matter of Smiley*.[22] In holding against an indigent woman who sought appointed counsel for her divorce action, the Court reversed the trend of earlier New York cases[23] and found that there was no constitutional authority for appointment of counsel in civil cases.[24] Chief Justice Breitel, speaking for the court, rejected the idea that *Boddie* was controlling and expressed concern that if such a right to counsel were found, it might place an undue burden on the bar which might be itself a constitutional violation.[25]

However, *Smiley* should not be read to dispose of the argument that due process requires the appointment of counsel in civil cases.[26] The

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less developed, including poverty. *See* Griffin v. Illinois, 351 U.S. 12 (1956). *See also* Roe v. Wade, 410 U.S. 113 (1973). *But see* San Antonio v. Rodriguez, 411 U.S. 1 (1973).

[19] *See, e.g.*, Goldberg v. Kelly, 397 U.S. 254, 267-68 (1970); Armstrong v. Manzo, 380 U.S. 545, 552 (1965); Grannis v. Ordean, 234 U.S. 385 (1914).

[20] *See* Argersinger v. Hamlin, 407 U.S. 25 (1972); Gideon v. Wainwright, 372 U.S. 335 (1963); Powell v. Alabama, 287 U.S. 45 (1932).

[21] *Boddie* invalidated, at least in certain cases, court costs that amount to barriers to court access. It may be argued that a lawyer's fee is a court cost imposed by the state and as such should be invalidated as an impediment to a meaningful opportunity to be heard. *See* Meltzer v. C. Buck LeCraw & Co. (Indigents' Cases), *cert. denied*, 402 U.S. 954 (1970) (Black, J., dissenting); Rodriguez v. Rosenblatt, 58 N.J. 281, 277 A.2d 216 (1971); Matter of Smiley, 36 N.Y.2d 433, 330 N.E.2d 53, 369 N.Y.S.2d 87 (1975) (Jones, J., dissenting); Matter of Ella B., 30 N.Y.2d 352, 285 N.E.2d 288, 334 N.Y.S.2d 133 (1972); People *ex rel.* Menechino v. Warden, 27 N.Y.2d 376, 267 N.E.2d 238, 318 N.Y.S.2d 449 (1971); Vanderpool v. Vanderpool, 74 Misc. 2d 122, 344 N.Y.S.2d 572, *rev'd on other grounds*, 40 App. Div. 1030, 339 N.Y.S.2d 657 (1973).

[22] 36 N.Y.2d 433, 330 N.E.2d 53, 369 N.Y.S.2d 87 (1975).

[23] Deason v. Deason, 32 N.Y.2d 93, 296 N.E.2d 229, 343 N.Y.S.2d 321 (1973); Matter of Bartlett, 76 Misc. 2d 1087 (Sup. Ct. 1973); Vanderpool v. Vanderpool, 74 Misc. 2d 122, 344 N.Y.S.2d 572, *rev'd on other grounds*, 40 App. Div. 1030, 339 N.Y.S.2d 657 (1973).

[24] 36 N.Y.2d 433, 330 N.E.2d 53, 369 N.Y.S.2d 87 (1975). The court reasoned that despite petitioner's claims to the contrary, Boddie v. Connecticut, 401 U.S. 371 (1971) does not imply an obligation on the part of the state to assign or compensate counsel as a matter of right in private litigation since counsel is not a condition of access and indigents do have alternative practical resources. 36 N.Y.2d at 440, 330 N.E.2d at 57, 369 N.Y.S.2d at 92.

[25] 36 N.Y.2d at 441, 330 N.E.2d at 57, 369 N.Y.S.2d at 93.

[26] Indeed, Breitel makes it clear that his decision was influenced by his perception of a lack of implementation power on the part of the courts. 36 N.Y.2d at 438-39, 330 N.E.2d at 56, 369 N.Y.S.2d at 91-92. Thus, while noting with concern the problems of the indigent and the constitutional questions involved, the *Smiley* decision is based upon the section of the New York State constitution (art. XVI, § 1) that gives the authority for the expenditure of funds to the legislature rather than the judiciary. If the Supreme Court found a constitutional right to counsel, that decision would take precedence over the New York constitution's limitations by virtue of the supremacy clause. U.S. CONST. art. VI.

New York court failed to see the significant parallels between civil and criminal cases that indicate that there is a valid constitutional basis for establishing the right to counsel in civil cases under the due process clause. It is just as difficult for a layman to successfully present his case in a civil action as it is in a criminal proceeding. Indeed, the Supreme Court has long recognized this fact with regard to retained counsel.

> If in any case, civil or criminal, a . . . court were arbitrarily to refuse to hear a party by counsel, employed by and appearing for him, it . . . would be a denial of a hearing and, therefore, of due process in the constitutional sense.[27]

The concerns that affect criminal defendants are also present in civil proceedings. The civil litigant is unfamiliar with the rules of evidence and procedure, does not know how to research and present the law, and has no training in the marshalling and presenting of facts.

Moreover, while the argument that criminal sanctions are more severe than typical civil sanctions, entitling the criminal defendant to greater protection, may have validity with regard to some civil proceedings, this distinction is not universally true. Several decisions have recognized that the consequences involved in certain civil proceedings are threats to fundamental interests no less important than freedom.[28] Included in this category are proceedings where personal liberty is, in fact, very much at stake: parole revocations,[29] juvenile hearings, habeas corpus proceedings, civil commitments, custody hearings,[30] and other matters in which "certain nominally civil causes can result in a severe deprivation of liberty."[31]

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[27] Powell v. Alabama, 287 U.S. 45, 69 (1932).

[28] *See, e.g.*, Kennedy v. Meacham, 382 F. Supp. 996 (D.C. Wyo. 1974) (no constitutional right to counsel unless the action has the characteristics of being essentially criminal or penal in nature); Carter v. Kaufman, 8 Cal. App. 3d 783, 87 Cal. Rptr. 678 (1970) (under the rationale of *In re* Gault, 387 U.S. 1 (1967), counsel needs to be provided in cases denominated "civil" that are basically criminal in nature).

[29] In Gagnon v. Scarpelli, 411 U.S. 778 (1973), the Court held that there was no *per se* right to appointed counsel in probation or parole revocation proceedings. But, insofar as its applicability to civil trials in a broader sense is concerned, *Gagnon* can be distinguished on several grounds and thus read as not precluding the rights of civil indigents other than those facing the revocation proceedings mentioned. For example, the Court's chief concern was the fear that the nontrial atmosphere of parole and probation revocation hearings would be jeopardized by the introduction of counsel. The Court noted that the discretionary atmosphere allows the parole board to be more "attuned to the rehabilitative needs" of the probationer or parolee. Yet, in most civil cases, the very issue under consideration is that of a full blown trial with all its formalities. Thus, even if there is a benefit to appearing *pro se* in a revocation hearing, there is no such corresponding benefit for most civil litigants.

An even stronger refutation of the applicability of *Gagnon* is the Court's statement that its decision was tailored to persons who are probationers and parolees only because they have been convicted of a crime. This was held to justify a "more limited due process right" than that owed an accused at his initial trial. Because a civil litigant, like the criminal defendant awaiting his first trial, is yet untainted by a court decision against him, no reason exists to limit him to this more limited degree of due process.

[30] *See* part II *A infra.*

[31] *Right to Counsel, supra* note 3, at 1332.

All of these actions have a common thread running through them. In each, the state employs

> the judicial mechanism it has created to enforce society's will upon an individual. . . . [As a result, such] cases by [their] very nature resemble a criminal proceeding.[32]

Recalling that it was this very spectre of a lone citizen facing the vast machinery of justice that led to the Court's decision in *Gideon* to require counsel for the indigent criminal defendant as a matter of due process, the applicability of that argument to civil cases makes it evident that the civil-criminal distinction is not an appropriate method of determining the limits of the fourteenth amendment. Rather, due process should be read to require counsel for at least some indigents in our nation's civil courts. The question is whether fundamental fairness requires that *all* civil litigants be provided with counsel as a matter of due process. This will be considered in part II.

B. Equal Protection

Differing availability of counsel for the rich and the poor may deny equal protection under the law by allowing the rich a more meaningful opportunity to be heard in court.[33] Despite the Court's lack of reliance on equal protection in deciding on the breadth of the right to counsel in *Gideon,* a recent line of cases suggests that such a basis would not be inappropriate.

1. The Griffin-Douglas "Equality" Principle[34]—In *Griffin v. Illinois,*[35] the Court held that the inability to pay for a required trial transcript could not bar a defendant from taking an appeal. The Court stated that "there can be no justice where the kind of trial a man gets depends on the amount of money he has."[36] There was no majority opinion in *Griffin,*[37] but its underlying principle has been broadly applied.[38]

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[32] Meltzer v. C. Buck LeCraw & Co. (Indigents' Cases), *cert. denied,* 402 U.S. 954 (1970) (Black, J., dissenting).

[33] *Right to Counsel, supra* note 3, at 1333; *Indigent's Rights, supra* note 3, at 550.

[34] Y. KAMISAR, W. LAFAVE & J. ISRAEL, MODERN CRIMINAL PROCEDURE 67 (4th ed. 1974).

[35] 351 U.S. 12 (1956).

[36] *Id.* at 19. *Griffin* and Douglas v. California, 372 U.S. 353 (1963), guarantee rights on appeal to the convicted criminal defendant who has already had a trial at which to make his case. These same rights are denied to the civil litigant at his original trial. *See Indigent's Right, supra* note 3, at 550:

> The relative importance of criminal appeal and civil trial in our constitutional scheme is suggested by the reminder in *Griffin* that due process does not require the states to have any appellate system at all (351 U.S. 12 at 18, 20-21). It is difficult to imagine the Court holding that the entire system of civil trial courts is similarly dispensable.

[37] Justice Black announced the Court's decision in a four-man plurality opinion; Justice Frankfurter concurred specially.

[38] *See* Tate v. Short, 401 U.S. 395 (1971) (indigent convicted of offenses punishable by fine only cannot be jailed a sufficient time to satisfy fines); Roberts v. LaVallee, 389 U.S. 40 (1967) (per curiam) (indigent defendant entitled to a free transcript of preliminary hearing for use at trial, even though both defendant and his lawyer attended the preliminary hearing); Burns v. Ohio, 360 U.S. 252 (1959) (a state cannot require an indigent defendant to pay a filing fee before permitting him to appeal).

Later, in *Douglas v. California*,[39] the Court found that state appointment of attorneys for indigent criminal defendants taking their first appeal is constitutionally required. The Court reasoned that, since a layman attempting to write his own appeal is participating in nothing more than a "meaningless ritual," while the rich man has a meaningful appeal, failure to appoint counsel for the indigent would be a denial of equal protection. The implication of this holding is that the denial of appointed counsel to an indigent defendant amounts, under our adversary system, to denial of the defendant's constitutional guarantee of equal protection under the law.[40] Denial of counsel in a civil action would be no less a case of abridging equal protection than it is in a criminal proceeding. In both cases, the monied litigant has a skilled professional laboring on his behalf while the indigent must perform tasks acknowledged to be beyond the capabilities of laymen.[41] This amounts to treating the poor as second class citizens, a distinction the Court has refused to allow.[42]

The most far-reaching application of the *Griffin-Douglas* equality principle occurred in *Mayer v. Chicago*.[43] There, the Court held that, based upon *Griffin*, an indigent criminal defendant could not be denied a "record of sufficient completeness" to permit proper consideration of his claims simply because he was convicted of a mere ordinance violation. The Court rejected the city of Chicago's contention that, since the defendant was subject only to a fine rather than imprisonment, his interests in receiving a transcript were outweighed by the state's fiscal and other interests in not burdening the appellate process.[44] *Griffin* is not, said the Court, a balance between the needs of the accused and the interests of society but is rather a "flat prohibition against pricing indigent defendants out of as effective an appeal as would be available to others able to pay their own way."[45] This logic supports the application of the *Griffin-Douglas* principle to the indigent in a civil proceeding as well, since the civil litigant frequently faces a judgment as large as any fine faced by a criminal defendant. Indeed, there are civil actions which threaten more drastic penalties than

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[39] 372 U.S. 353 (1963).

[40] *See* Kamisar & Choper, *The Right to Counsel in Minnesota: Some Field Findings and Legal-Policy Observations*, 48 MINN. L. REV. 1, 7-8 (1963):

> Reading [*Douglas*] for all it may be worth, [indigents] may find they have also been awarded absolute rights to assigned counsel . . . *everywhere* a rich man may appear with counsel.

See Roberts v. LaVallee, 389 U.S. 40 (1967). *But see* Ross v. Moffitt, 417 U.S. 600 (1974) and note 48 *infra*. *See also* Israel, *Gideon v. Wainwright: The "Art" of Overruling*, 1963 SUP. CT. REV. 211, 247.

[41] *See generally* part II *B infra*.

[42] *See, e.g.*, Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966) (striking down a state poll tax).

[43] 404 U.S. 189 (1971).

[44] *Id.* at 196. The Court stated:

> The size of a defendant's pocketbook bears no more relationship to his guilt or innocence in a nonfelony than in a felony case, calling such a distinction "unreasoned" and proscribed by the fourteenth amendment.

[45] *Id.* at 196-97.

those faced by the criminal defendants who receive counsel as a result of *Mayer,*[46] such as losing the custody of one's child as a result of being found an incompetent parent.

In *Ross v. Moffitt,*[47] however, the Court gave the *Griffin-Douglas* principle a more restricted reading. The Court declined to require a state to appoint counsel for indigents who, having been convicted of a criminal offense and having lost their appeal, wanted a second discretionary appeal from the conviction. Although the long range implications of the *Ross* decision are not yet clear, it may at least be said that the present Court has determined that it is unwilling to let the *Griffin-Douglas* principle expand indefinitely. The Court stated:

> [T]here are obviously limits beyond which the equal protection analysis may not be pressed without doing violence to principles recognized in other decisions of this Court. The Fourteenth Amendment does not require absolute equality or precisely equal advantages . . . nor does it require the State to equalize economic conditions . . . . It does require that the State appellate system be free of unreasoned distinctions . . . and that indigents have an adequate opportunity to present their claims fairly within the adversarial system.[48]

Since no precise guidelines as to which distinctions were to be considered reasonable were offered by the Court, it may be supposed that, after the extension of *Griffin* in *Mayer,* the Court decided that it had to stop somewhere and that a second appeal, arguably "noncritical," was as good a place as any since the defendant would still be guaranteed a fair trial and at least one appeal. Such a limitation would be inapplicable to the civil litigant who has yet to have his day in court at all. The Court's repeated emphasis on the appellant having already had assistance of counsel at trial and during his first appeal leaves the basic equal protection argument for counsel in civil litigation unaffected. Nevertheless, the now somewhat confused direction of the *Griffin-Douglas* line of cases indicates that the Court may be very hesitant to rely on this rationale in other areas without persuasive theoretical advocacy.

2. *State Action*—Even without the problems raised by *Ross,* it may be argued that framing the appeal for appointed counsel in civil cases in terms of the recognition of a suspect distinction ignores one of the re-

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[46] *See* note 28 *supra.*

[47] 417 U.S. 600 (1974).

[48] *Id.* at 612. At least one commentator believes that *Ross v. Moffitt* will have a drastic effect on the *Griffin-Douglas* line of cases:

> The "equality" principle once loomed as an awesome weapon, one with almost unlimited range, but—now that *Moffitt* is on the books—on many procedural frontiers this once treasured weapon may *add nothing* to what the indigent defendant or prisoner has in his legal arsenal.

Y. KAMISAR, POVERTY, EQUALITY AND CRIMINAL PROCEDURE: FROM GRIFFIN V. ILLINOIS AND DOUGLAS V. CALIFORNIA TO ROSS V. MOFFITT (1976) (teaching materials prepared for Constitutional Law Desk Assessment Course, National College of District Attorneys).

quirements of any equal protection claim, a showing of state action.[49] This argument does not apply with equal force to all civil cases, however. The participation of the government in certain state-initiated proceedings provides the required state action in some cases denominated as "civil."[50] Moreover, even where the government is not a party to the suit, the civil litigant is exposed to the coercive judicial machinery of the government. The government's readiness to enforce all court judgments arguably constitutes state action within the meaning of the fourteenth amendment.[51]

II. SCOPE OF THE RIGHT TO COUNSEL IN DIFFERENT CIVIL ACTIONS

Although the above arguments demonstrate significant parallels between the civil and criminal justice systems, the rationale for supplying counsel to indigents may be seen to vary in different types of civil cases. Certain actions, such as child-custody hearings, bear a striking procedural resemblance to criminal trials and deal with similarly fundamental rights such as the preservation of the family unit. While many of the same considerations justify providing counsel for indigents in a tort action, the absence of a "fundamental interest" demonstrates a lesser parallel to criminal proceedings for such actions.

A. Government-Initiated Proceedings

Government-initiated civil proceedings have many of the elements of criminal trials. The lay citizen faces the government's massive bureaucratic machinery, complete with lawyers and investigators, and typically finds himself feeling helpless and alone. Perhaps the best illustration of the necessity for counsel encountered by a civil litigant in this situation is the child neglect hearing.[52] The courts in such cases have recognized the necessity of protecting fundamental rights, such as the sanctity of the whole family unit, from being infringed upon by the government without allowing every possible protection to those subject to the courts' decrees.[53]

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[49] *See, e.g.*, Shelley v. Kraemer, 334 U.S. 1, 13 (1948). *But see* Silard, *A Constitutional Forecast: Demise of the "State Action" Limit on the Equal Protection Guarantee*, 66 COLUM. L. REV. 855 (1966). The requirement of showing state action applies to the due process clause of the fourteenth amendment as well.

[50] *E.g.*, custody and neglect proceedings, commitments, parole and probation revocation.

[51] Shelley v. Kraemer, 334 U.S. 1 (1948) (state enforcement of property rights must be exercised within the boundaries defined by the fourteenth amendment).

[52] *See* 6 RUTGERS-CAMDEN L.J. 623, 629 n.43 (1975).

[53] In State v. Jamison, 251 Ore. 114, 117, 444 P.2d 15, 17 (1968), the court stated:

> It would be unconscionable for the state forever to terminate the parental rights of the poor without allowing such parents to be assisted by counsel.

Such rights should include appointed counsel for those too poor to retain their own.[54]

It has been suggested that the introduction of counsel in these "otherwise informal proceedings" would lead to a "substantial criminalization" of the custodial determination process by making the parties adversaries instead of seeking in common the solution that is "best for the child."[55] Yet serious fault can be found with such a position. In *Matter of Ella B.*,[56] the New York Court of Appeals held that the state is an adversary in such a proceeding and it, therefore, would be fundamentally unfair to seek removal of a child from an indigent parent without according the parent the right to assistance of court appointed and compensated counsel.[57] The rationale of the child custody cases applies to any case where

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[54] *See* Cleaver v. Wilcox, 499 F.2d 940 (9th Cir. 1974); Chambers v. District Court, 261 Iowa 31, 152 N.W.2d 818 (1967) (right of appeal without right to appointed counsel is a mere sham and fails to meet constitutional requirements); Danforth v. State Dep't of Health & Welfare, 303 A.2d 794 (Me. 1973); Matter of Ella B., 30 N.Y.2d 352, 285 N.E.2d 288, 334 N.Y.S.2d 133 (1972) (child custody "too fundamental an interest" to be relinquished to the state without the opportunity for a hearing with assigned counsel if necessary).

[55] Similar arguments are made with respect to parole revocation proceedings. *See* note 28 *supra*.

[56] 30 N.Y.2d 352, 285 N.E.2d 288, 334 N.Y.S.2d 133 (1972).

[57] 30 N.Y.2d at 356, 285 N.E.2d at 290, 334 N.Y.S.2d at 136. The judge of the family court, after reading the petition (alleging neglect) to the appellant, spoke to her as follows:

> You may be represented by an attorney in this proceeding, in which case you must obtain one yourself, and pay for him out of your own funds, or you may waive an attorney and either admit or deny the facts in the petition if you want. Do you want an attorney?
> Mrs. B.: No.
> The Court: Do you admit the facts in the petition?
> Mrs. B.: Yes, I do.

Thereupon, without further ado, the judge stated that he was "going to find that [the appellant's daughter] is a neglected child and will continue the child in custody of the Child Protective Services." An order was entered adjudicating her a neglected child and directing that she be placed in the petitioner's custody. In a footnote, the court of appeals stated:

> Not a word had been said to the appellant that she might lose the custody of the child. Indeed, as the colloquy between the judge and her made clear, she believed that she would be permitted to take the child home and, after the judge indicated that the child was to be taken from her, she made a feeble, and unsuccessful, attempt to set forth circumstances which might have provided a basis for a meritorious defense in the hands of an attorney.

30 N.Y.2d at 357, 285 N.E.2d at 290, 334 N.Y.S.2d at 136.

Several states have enacted legislation that does provide for the appointment of counsel in neglect and dependency proceedings. COLO. REV. STAT. § 19-1-106(1)(b) (1973) (cases of delinquent children, cases of children in need of supervision or cases when the termination of parental rights is stated as a possible remedy in the summons); CONN. GEN. STAT. ANN. § 17-66b(b) (1975) (appointment in proceedings on behalf of neglected, uncared-for, or dependent children); IDAHO CODE § 16-1631 (1974) (upon request, court shall appoint counsel at county expense); IOWA CODE § 232.28 (1969) (right to appointment in cases for neglected, dependent and delinquent children); KAN. STAT. ANN. § 38-820 (1973) (no order depriving parental rights in neglected or dependent children without the assignment of counsel at county expense);

the government seeks to deny an indigent person's rights. Courts have, in such cases, appointed counsel to protect not only such obviously fundamental rights as the sanctity of the family, but the fiscal and proprietary interests of the citizen as well.[58] Counsel has thus been appointed for hearings concerned with revocation of driver's licenses,[59] welfare benefits,[60] and tenant evictions.[61]

B. Privately Initiated Proceedings

1. "Private" vs. "Public" Lawsuits—Some of the parallels between civil and criminal cases do not pertain to those litigants in court by choice. But the philosophy behind appointment of counsel for indigents is also applicable beyond those situations in which the indigent is hailed into court by the government. The civil court system serves as the primary mechanism for settling private disputes as well as enforcing state regulations.[62] Justice Black, dissenting in the *Indigents' Cases,* made the following statement:

> The States and the Federal Government hold the ultimate power of enforcement in almost every dispute. Every law student learns in the first semester of law school that property, for instance, is "valuable" only because the State will enforce the collection of rights that attach to its ownership . . . . Similarly, the wrong that gives rise to a right of damages in tort exists only because society's lawmakers have created a standard of care and a duty to abide by that standard . . . . Thus, the judicial process is the exclusive means through which almost any dispute can ultimately be resolved short of brute force.[63]

Since the state plays the critical role in every proceeding in which one party seeks to assert a superior right over another, counsel must be pro-

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N.D. CENT. CODE § 27-20-26 (1974) (right to appointed counsel at all stages of juvenile proceedings); OKLA. STAT. tit. 10, § 1109(b) (1975) (appointment upon request if termination of parental rights is a possible remedy and without request if court deems it appropriate to protect the child); S.D. COMPILED LAWS ANN. § 26-8-21 (1969) (discretionary power of the court); UTAH CODE ANN. § 55-10-96 (1974) (right to counsel at every stage of the proceeding).

In those states providing a discretionary right to counsel, some courts appoint counsel grudgingly and in few instances. *See Indigent's Right, supra* note 3, at 545.

[58] American Chinchilla Corp., 1 CCH Pov. L. REP. ¶ 659.30, FTC Dkt. No. 8774 (Dec. 23, 1969) (right to counsel upheld at an administrative hearing before the FTC upon fundamental fairness and concern for the rights of litigants).

[59] Alexander v. City of Anchorage, 490 P.2d 910, 913 (Alas. 1971).

[60] Aiello v. Ott, 1 CCH Pov. L. REP. ¶ 659.982 (Mass. Sup. Ct. 1969) (equal protection held to prohibit discrimination between persons who can afford counsel and those who cannot in complicated administrative appeals cases). *See also* Goldberg v. Kelly, 397 U.S. 254, 278-79 (1970) (Black, J., dissenting) (without appointing counsel to those who cannot afford it, the right to retain counsel is a meaningless one in welfare cases since recipients are too poor to hire their own advocates).

[61] Hotel Martha Washington v. Swinick, 66 Misc. 2d 833, 322 N.Y.S.2d 139 (Sup. Ct. 1971) (right of appointed counsel upheld for tenant who, in a suit for nonpayment of rent, wished to defend her right to remain in possession).

[62] *See* Boddie v. Connecticut, 401 U.S. 371, 375-76 (1971).

[63] Meltzer v. C. Buck LeCraw & Co. (Indigents' Cases), *cert. denied,* 402 U.S. 954, 956-57 (1970) (Black, J., dissenting).

vided in privately initiated actions if the citizen's interests are to be protected against government-aided imposition.

That the Supreme Court has not adopted this point of view is evidenced by its decision in *Boddie v. Connecticut*[64] where it concluded that divorce, unlike most disputed matters in society, is monopolized by the state's judicial system since it is literally impossible to settle the question of marital status without a court decree. In instances where there is no similar state "monopolization," said the Court, recourse to judicial machinery for dispute settlement may be useful and desirable, but it is not mandated by the Constitution.[65] In *United States v. Kras,*[66] Chief Justice Burger provided an example of a dispute that could be settled without court involvement. Bankruptcy, noted Burger, is not the only method available to a debtor for the adjustment of his legal relationship with his creditors; rather, many debtors work out binding private adjustments with creditors.

Boddie and *Kras* are shortsighted because they ignore the fact that effective settlement of any dispute depends upon enforcement in the courts.[67] The private bankruptcy settlement referred to by Chief Justice Burger, for example, would doubtless be rejected by the creditors involved if they did not have the potential of court enforcement of the agreement's terms at their disposal. Whenever a dispute cannot be privately settled between the parties, the court system is usually the only forum effectively empowered to settle the dispute.[68] Indeed, the majority opinion in *Boddie* itself lends credence to such an interpretation. It would be inconsistent for the Court on the one hand to insist that marriage deserves a set of protective rights since its settlement is uniquely monopolized by the state court system, while at the same time noting that without a legal system structured to enforce a set of rules defining each of the various rights and duties of its citizens social order and cohesion are impossible.[69] By arguing that it is the ability to seek regularized resolution of conflicts that makes individuals capable of interdependent action, the Court gives support to the view that no type of lawsuit is really more monopolized by the state than any other.

Boddie and *Kras* also suggest that the right to have a marriage dissolved is a fundamental right deserving special constitutional protection[70] since the inability to dissolve one's marriage impairs the freedom to pursue other protected associational activities.[71] Actions such as bankruptcy, while important, were held not to rise to the same constitutional level.

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[64] 401 U.S. 371 (1971).

[65] *See also* Matter of Smiley, 36 N.Y.2d 433, 444 n.1, 330 N.E.2d 53, 59 n.1, 369 N.Y.S.2d 87, 96 n.1 (1975) (Jones, J., dissenting).

[66] 409 U.S. 434 (1973) (denying claim of a debtor to file for bankruptcy without paying the filing fees).

[67] Comment, *The Heirs of Boddie, Court Access for Indigents After Kras and Ortwein,* 8 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 571, 578-79 (1973).

[68] Boddie v. Connecticut, 401 U.S. 371, 387 (1971) (Brennan, J., concurring in part). *See* note 62 *supra.*

[69] 401 U.S. at 374.

[70] *See* part II *A supra.*

[71] United States v. Kras, 409 U.S. 434, 444-45 (1973).

But if the Court holds that the right to a divorce is fundamental in light of the high value our society places on an intact marriage, then almost every other kind of legally enforceable right must also be fundamental to our society. As Justice Black stated in his *Indigents' Cases* dissent,

> [I] cannot believe that my Brethren would find the rights of a man with both legs cut off by a negligent railroad less "fundamental" than a person's right to seek a divorce.[72]

The fundamental rights label should be eliminated as a stumbling block to the Court's eventual decision on appointed counsel. It is as inappropriate as the civil-criminal dichotomy.

It may be argued that counsel should only be appointed in civil cases where the issues are too complicated for the petitioner to represent himself effectively. In *Gagnon v. Scarpelli*[73] the Court held that appointment of counsel for probation revocation proceedings was appropriate in circumstances where the lower court's ruling was based on a determination that the issues were complex and difficult for the layman to comprehend, and the litigant lacked the capability to speak effectively for himself. Relying on *Gagnon,* the New Hampshire Supreme Court held in *Duval v. Duval*[74] that the determination of the need for appointed counsel should be made on a case-by-case basis. The granting of appointed counsel, the court stated, "depends . . . on circumstances which show that the defendant would be treated unfairly if the assistance of counsel were not provided."[75]

The case-by-case approach was discarded with respect to criminal litigants in *Gideon v. Wainwright.*[76] It was then revived in *Gagnon* because the Court decided that a lesser degree of protection is owed to convicted criminals on appeal than during trial. This rationale is inapplicable in the civil setting, however. A civil litigant, like the criminal defendant awaiting his first trial, is as yet untainted by a court decision against him. No reason exists to limit him to the narrower degree of due process allowed by the

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[72] 402 U.S. 954, 958 (1970). This opinion is apparently shared by at least two other presently sitting Justices. Justice Brennan, concurring in *Boddie v. Connecticut,* stated:

> I see no constitutional distinction between appellants' attempt to enforce their state statutory right [divorce] and an attempt to vindicate any other right arising under federal or state law.

401 U.S. 371, 387 (1971).

Justice Marshall, dissenting in *United States v. Kras,* also stated:

> [T]he majority's focus on the relative importance in the constitutional scheme of divorce and bankruptcy is misplaced. What is involved is the importance of access to the courts, either to remove an obligation that other branches of the government stand ready to enforce . . . or to determine claims of right. . . .

409 U.S. at 462 n.4.

Additionally, Justice Douglas, now retired, has stated in his *Indigents' Cases* dissent: "When indigency is involved I do not think there is a hierarchy of interests." 402 U.S. at 961.

[73] 411 U.S. 778 (1973). *See* note 28 *supra.*

[74] 322 A.2d 1 (N.H. 1974).

[75] *Id.* at 4.

[76] 372 U.S. 335 (1963).

Court in *Gagnon*. Moreover, by arguing that counsel should only be appointed where the litigant cannot adequately defend his own interests, the New Hampshire court makes the dangerous assumption that certain types of litigation can be competently handled by laymen. This assumption is incorrect. As the Court recognized in *Powell v. Alabama*[77] some individuals are unable to manage even the least complex type of case without professional assistance. Those who are unable to afford counsel are likely to be the least prepared to present their own cases.[78] For them, denial of counsel prevents meaningful access to court and infringes upon their right to due process.[79]

It is unrealistic, in the face of *Boddie's* requirement that all persons have a right to meaningful and effective access to courts, to conclude that the principles of equal justice will be served by requiring anyone to proceed without a lawyer merely because he or she is unable to afford one. "[T]here cannot be meaningful access to the judicial process until every serious litigant is represented by competent counsel."[80]

In *United States v. Nenna*,[81] the court indicated that appointment of counsel should only be considered in those civil cases that appear to have merit lest the courts be flooded with nuisance suits. There is no concommitant requirement that people of means, who can retain a lawyer to press any claim they please, no matter how frivolous, make a demonstration of merit prior to proceeding in court.[82] Such a requirement would raise ob-

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[77] 287 U.S. 45, 68-69 (1932).

[78] Matter of Smiley, 36 N.Y.2d 433, 448 n.2, 330 N.E.2d 53, 62 n.2, 369 N.Y.S.2d 87, 100 n.2 (1975) (Fuchsberg, J., dissenting):

> While there is, of course, no precise correlation between a person's level of affluence and his level of education, on a statistical basis low income persons are likely to be those least prepared by their own educational background to litigate actions *pro se*.

[79] 36 N.Y.2d at 450-51, 330 N.E.2d at 64, 369 N.Y.S.2d at 102. (Fuchsberg, J., dissenting). Justice Fuchsberg outlined some of the complex processes that must be faced by any lay applicant for a divorce (or, presumably, any other civil action):

> [He] must first decide whether it is preferable to obtain a divorce or an annulment. If the former, the party must select the best ground for obtaining the divorce.... It is also necessary to marshal evidence, and abide by technical requirements of proof.... Also, as in any civil case, a command of the rules of procedure and skill in presenting facts are essential.... [I]f there is a dispute over support, pretrial investigative tools may be essential for discovering resources.... Frequently, expert witnesses must be examined. The judge must often depend on counsel for the effective investigation, organization, and presentation of the facts since the law's only guide is the vaguely worded standard of the "best interests of the child."

[80] Meltzer v. C. Buck LeCraw & Co. (Indigents' Cases), *cert. denied*, 402 U.S. 954, 959 (1970) (Black, J., dissenting).

[81] 274 F. Supp. 508 (S.D.N.Y. 1967).

[82] Although a frivolous case will likely be attacked by demurrer or summary judgment, the monied litigant nevertheless has the means to attempt to win his lawsuit. *Cf. Proceedings of the National Judicial Conference on Standards for the Administration of Criminal Justice* (1972), 57 F.R.D. 299, 309 (1973), where Justice Day stated:

> [I] can never remember a case, really never, in a long life at the Bar,... where if the money was there the appeal was so frivolous that

vious questions of equal protection and certainly of equal access, the very point addressed by the Supreme Court in *Boddie*. The rationale of the *Boddie* opinion led to a rejection of such a requirement:

> [T]here [is] no necessary connection between a litigant's assets and the seriousness of his motives in bringing suit. . . . Moreover, other alternatives exist . . . as a means for conserving the time of the courts and protecting parties from frivolous litigation, such as penalties for false pleadings or affidavits, and actions for malicious prosecution or abuse of process, to mention only a few.[83]

More importantly, even if such a requirement were to pass constitutional muster, it would be virtually impossible to administer. It would again necessitate the use of the case-by-case analysis rejected by the Court as unworkable in *Gideon*.

The temptation to draw the line at providing counsel to "voluntary" litigants is also unwise. Whether a party happens to be a plaintiff or a defendant is often determined by chance. In the case of an incompatible husband and wife, for example, it would often be, under a defendant-only counsel system, in the interest of each to persuade the other to file divorce papers first. The winner of such a war of nerves would emerge with a lawyer while the loser would get none.[84]

While such a result would not be a step toward greater justice,[85] the problem need not be abandoned as insoluble. Rather, a general right to counsel can, and perhaps should, be tempered by denying government aid in those cases that can be handled on a contingent fee basis.

III. APPOINTED COUNSEL AS A STRAIN ON THE SYSTEM

The fear of enormous costs is one of the major stumbling blocks preventing the courts from appointing counsel for indigents.[86] The Supreme Court labored under the same fear with respect to extending appointed counsel to indigents charged with crimes in *Gideon* and *Argersinger*. Speaking for the majority in *Argersinger*, Justice Douglas rejected the contention that the nation's legal resources were insufficient to implement the extension of court-appointed counsel to defendants charged with misdemeanors. After assessing the number of currently practicing attorneys and law students expected to be graduated, Douglas concluded that the number necessary to implement the extension would be insignificant by comparison.[87]

> the lawyer couldn't make it. I'm not suggesting nobody ever stood up and said grandly, "Take away that $10,000; there's nothing to this case; I will not appeal it." Maybe that happened, but maybe there are angels in the balcony, too.

[83] 401 U.S. at 381-82. *See* part I *B supra.*

[84] *Indigent's Right, supra* note 3, at 555.

[85] *Right to Counsel, supra* note 3, at 1333-34.

[86] *Indigent's Right, supra* note 3, at 551.

[87] Argersinger v. Hamlin, 407 U.S. 25, 37 n.7 (1971).

Chief Justice Burger concurred, observing that while the Court's holding would add large new burdens to an already overtaxed profession, the dynamics of the legal profession are such that it will rise to the burdens placed upon it.[88] Justice Brennan offered concrete suggestions as to where the needed legal resources might come from.[89] The same arguments support the feasibility of extending the right to appointed counsel once again, this time to include civil cases. Currently available studies indicate the burden placed on society and the profession would not be as unendurable as some anticipate.[90]

Moreover, the Court should recognize that, since the judicial system is the primary dispute-settling mechanism of our society, it is both necessary and desirable to spend whatever is required to enable maximum effective access to the courts. The professional responsibility of a lawyer as an officer of the court to accept appointments to defend the poor[91] should not be disregarded. Section EC 2-25[92] of the Code of Professional Responsibility should be utilized to a greater extent to meet the burdens that will be placed on the system. As Justice Black remarked in his dissenting opinion in the *Indigents' Cases,*

> [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 [civil] disputes.[93]

Whatever the economic impact of providing legal services to the poor may be, that impact does not dilute the right of indigents to be represented by counsel in civil cases.

IV. CONCLUSION

Strong constitutional support can be found for the right of indigents to counsel in civil cases. Recent Supreme Court cases provide support for some of the basic constitutional theories. Decisions such as *Boddie v. Connecticut* may serve another function as well. In the hands of a purposive Court, *Boddie's* guarantee of access could serve as the type of signalling device the Court has used in the past to indicate a coming major change in policy. If that is the case, the Court will likely be un-

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[88] *Id.* at 44. (Burger, C.J., concurring).

[89] *Id.* at 40. In his concurring opinion, Justice Brennan stated:

> Law students as well as practicing attorneys may provide an important source of legal representation for the indigent . . . . [M]ore than 125 of the country's 147 accredited law schools have established clinical programs in which faculty-supervised students aid clients in a variety of civil and criminal matters.

[90] *See* Note, *Dollars and Sense of an Expanded Right to Counsel,* 55 IOWA L. REV. 1249 (1970). *See also* Samore, *Legal Services for the Poor,* 32 ALBANY L. REV. 509 (1968).

[91] *See, e.g.,* People v. Sims, 131 Ill. App. 2d 327, 266 N.E.2d 536 (1970).

[92] Section EC 2-25 provides: "Every lawyer, regardless of professional prominence or professional workload, should find time to participate in serving the disadvantaged."

[93] 402 U.S. at 956.

willing to declare an unlimited right to counsel. Rather, there are indications[94] that such a guarantee might be limited to proceedings that deal with rights considered by the Court to be fundamental. Such an intermediate position would not be entirely undesirable for at least two reasons. It would allow the system to adjust to the change in an orderly fashion, a fact that would make the decision easier for the Court. Additionally, it may be supposed that later analysis would likely lead to expansion of the right to other civil cases, much as *Argersinger* expanded *Gideon.*

—Jeffrey M. Mandell

[94] *See* United States v. Kras, 409 U.S. 434 (1973).