Fordham Urban Law Journal

Volume 4, *Issue* 3 1975 *Article* 3

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Abstract

The marriage institution is the basic unit in the anatomical composition of American society as it exists today. The right to marry and the right to divorce when marriage fails have long been held in the highest esteem by our nation's courts. But some citizens of the State of New York are judicially denied the right to terminate their marriages because they are indigents. The court has denied indigents their requested assignments of counsel when the assistance of counsel was unquestionably necessary for prospective matrimonial litigants. The first problem posed by that holding is that it operates as a virtual denial of counsel to indigent matrimonial litigants. Moreover, regardless of whether the assignment of counsel is mandatory or discretionary, some provision for compensating such counsel is required if there is to be a viable system of providing representation for the indigent matrimonial litigant in new York. As a result, indigent matrimonial litigant are being denied meaningful access to the courts and the Court should declare a constitutional right to counsel in matrimonial litigation.

KEYWORDS: marriage, matrimonial, litigation, assignment of counsel, indigent, In re Boyd, In re Smiley, constitution, divorce, marry

NOTES

TOWARDS A CONSTITUTIONAL RIGHT TO COUNSEL IN MATRIMONIAL LITIGATION

I. Introduction

The marriage institution is the basic unit in the anotomical composition of American society as it exists today. The right to marry and the right to divorce when marriage has failed have long been held in the highest esteem by our nation's courts.[1] But some citizens of the State of New York are judicially denied the right to terminate their marriages because they are indigents.

In *In re Boyd*[2] 61 indigent residents of Bronx County applied for assignment of counsel to advise and represent them in divorce actions without fee. The New York Supreme Court stated that section 1102(a) of the Civil Practice Law and Rules (CPLR) expressly authorizes an assignment of counsel;[3] that such assignments were within the "broad discretionary power" of the court in matrimonial actions;[4] and that the assistance of counsel was unquestionable necessary for these prospective matrimonial litigants.[5] Yet the court denied the requested assignments of counsel.[6]

The fate of the applicants was controlled by the constitutional decision of the New York Court of Appeals in *In re Smiley*[7] that

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1. *E.g.*, Boddie v. Connecticut, 401 U.S. 371 (1971); Loving v. Virginia, 388 U.S. 1 (1967); Estin v. Estin, 334 U.S. 541 (1948); Williams v. North Carolina, 325 U.S. 226 (1945).
2. 174 N.Y.L.J. 10 (Sup. Ct. Nov. 6, 1975).
3. N.Y. Civ. Prac. Law § 1102(a) (McKinney Supp. 1975) reads: "The court in its order permitting a person to proceed as a poor person may assign an attorney." Such statutes codify the inherent power of the courts to appoint an attorney on a discretionary basis. *In re* Smiley, 36 N.Y.2d 433, 438, 330 N.E.2d 53, 55, 369 N.Y.S.2d 87, 91 (1975); People *ex rel.* Acritelli v. Grout, 87 App. Div. 193, 195-96, 84 N.Y.S. 97, 100-01 (1st. Dept. 1903), *aff'd*, 177 N.Y. 587, 70 N.E. 1105 (1904).
4. *In re* Smiley, 36 N.Y.2d 433, 441, 330 N.E.2d 53, 88, 369 N.Y.S.2d 87, 94 (1975).
5. The Court stated:

   .Unquestionably, the assistance of counsel is necessary for these prospective matrimonial litigants. . . . [A]ssistance of counsel is particularly important in matrimonial proceedings not only to protect the parties in any litigation but in any settlement negotiations regarding child custody and child support as well.

174 N.Y.L.J. at 10 (citation omitted).
6. *Id.*
7. 36 N.Y.2d 433, 330 N.E.2d 53, 369 N.Y.S.2d 87 (1975).

article eleven of the CPLR affords no absolute right to assignment of counsel in poor person applications.[8] The *Smiley* court concluded that discretionary assignment of counsel in appropriate cases was all that was constitutionally required.[9]

The first problem posed by the decision in *Smiley* is that it operates as a virtual denial of counsel to indigent matrimonial litigants. Moreover, regardless of whether the assignment of counsel is mandatory or discretionary, some provision for compensating such counsel is required if there is to be a viable system of providing representation for the indigent matrimonial litigant in New York.

II. Sixth Amendment Right to Counsel in Criminal Cases

The indigent's right to counsel in criminal cases is based upon the sixth amendment of the United States Constitution[10] which is applicable to the states through the fourteenth amendment. In *Powell v. Alabama*[11] the United States Supreme Court held that the failure to provide effective counsel in a capital case violated the sixth amendment and was a deprivation of due process. The Court held that the assistance of counsel in a capital case was within the "fundamental principles of liberty and justice which lie at the base of all our civil and political institutions."[12]

The Supreme Court in *Gideon v. Wainwright*[13] extended this protection to those accused of a felony.[14] Ultimately, in *Argersinger v. Hamlin*,[15] the right to counsel was granted to defendants charged with misdemeanors.[16] At present the criminal defendant has the right to counsel in all cases in which there is the possibility of a deprivation of his personal liberty through the criminal prosecution of the state.

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8. 174 N.Y.L.J. at 10.

9. 36 N.Y.2d at 438, 330 N.E.2d at 55, 369 N.Y.S.2d at 91. *See* 4 HOFSTRA L. REV. 139 (1975).

10. U.S. CONST. amend. VI.

11. 287 U.S. 45 (1932).

12. *Id.* at 67.

13. 372 U.S. 335 (1963).

14. The Supreme Court's opinion did not restrict the right to counsel announced in *Gideon* to felony cases alone. *See* Note, *The Indigent's "Right" to Counsel in Civil Cases*, 43 FORDHAM L. REV. 989, 989-90 (1975).

15. 407 U.S. 25 (1972).

16. *Id.* at 37. Several states had already extended the *Gideon* decision to offenses less serious than felonies. See Note, *supra* note 14, at 990 n.8.

The sixth amendment expressly applies only to criminal cases.[17] However, on several occasions the Supreme Court has used both due process and equal protection to expand the rights of criminal defendants in situations not covered by the sixth amendment.

In *Griffin v. Illinois*[18] the Supreme Court held that due process and equal protection required that an indigent defendant be furnished a free transcript for appellate review. To deny a defendant materials necessary for an appeal solely because of his inability to pay was considered to be an invidious discrimination.[19]

In *Douglas v. California*[20] the Supreme Court decided that the due process clause of the fourteenth amendment required the assignment of counsel for a criminal defendant's appeal.[21] In holding that the fourteenth amendment due process clause may afford a right to counsel beyond that granted by the sixth amendment, the Supreme Court has raised the possibility that the due process clause may require the extension of similar rights to civil litigants despite the absence of a sixth amendment mandate.[22]

Since the due process clauses of both the fifth and fourteenth amendments are concerned with deprivations of life, liberty, and property there seems to be no justification for any civil-criminal distinction in the application of the rights which are constitutionally mandated by due process. If the guarantees of the Bill of Rights apply equally to civil as well as criminal proceedings, the rights applicable through those amendments cannot be restricted to criminal cases alone.[23]

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17. U.S. CONST. amend. VI reads in part: "In all criminal prosecutions, the accused shall . . . have the Assistance of Counsel for his defense." *See, e.g.*, United States v. Wilcox, 507 F.2d 364 (4th Cir. 1974), *cert. denied*, 420 U.S. 979 (1975); Hullom v. Burrows, 266 F.2d 547 (6th Cir.), *cert. denied*, 361 U.S. 919 (1959).

18. 351 U.S. 12 (1956).

19. *Id.* at 18.

20. 372 U.S. 353 (1963).

21. *Id.* at 357-58. A state requirement that appointment of counsel on appeal was merely discretionary was found to unjustly discriminate against the indigent on the basis of wealth. The Supreme Court held this to be an unconstitutional line between the "rich and poor." *Id.* at 358.

22. *See* Sandoval v. Rattikin, 395 S.W.2d 889, 895 (Tex. Civ. App. 1965) (Sharpe, J., dissenting), *cert. denied*, 385 U.S. 901 (1966); Note, *The Right to Counsel in Civil Litigation*, 66 COLUM. L. REV. 1322 (1966).

23. Inker & Perretta, *A Child's Right to Counsel in Custody Cases*, 55 MASS. L. Q. 229, 236 (1970). It has been contended that certain mandatory rights afforded criminal defendants, such as the right to counsel, are even more of a necessity in civil cases. Since a judge

III. The Erosion of Civil-Criminal Distinctions

The trend has been clearly toward the rejection of the distinction between civil and criminal cases for the purpose of applying the protections of the due process clauses of the fifth and fourteenth amendments to indigent litigants.

By far the most litigated area of the law in which fourteenth amendment due process has been applied to require the mandatory assignment of counsel for indigents has been in child custody cases.[24] In *State v. Jamison*[25] the Supreme Court of Oregon held that there was a right to counsel in child custody cases which required that an indigent mother whose parental rights were being terminated be assigned counsel even though by statute such appointments were formerly discretionary.[26] In *Danforth v. State Department of Health and Welfare*[27] the Maine Supreme Court held that an indigent parent seeking to regain custody of a child from a state welfare department was denied due process by the state's refusal to assign counsel.[28] The court rejected the civil-criminal distinctions that may be made on the basis of the sixth amendment right to counsel in criminal cases.[29] Due process comes into operation whenever the consequences of the action seriously affect a person's fundamental rights.[30] In the *Danforth* case the possibility of a parent being deprived of the custody of a child was held to be a punishment potentially more severe than imprisonment.[31]

In certain classes of civil cases the fundamental rights of litigants are often no less in jeopardy than the rights of a criminal defendant who is brought to trial. In recognition of this fact, the Supreme

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in a civil case must be neutral, the amount of protection he can extend to an unrepresented indigent is limited because of a possible charge of bias. Note, *supra* note 22, at 1331-32.

24. *See, e.g.*, Note, *Parents' Right to Counsel in Dependency and Neglect Proceedings*, 49 IND. L.J. 167 (1973); Note, *The Indigent Parent's Right to Appointed Counsel in Actions to Terminate Parental Rights*, 43 U. CIN. L. REV. 635 (1974).

25. 251 Ore. 114, 444 P.2d 15 (1968).

26. *Id.* at 116-17, 444 P.2d at 16-17.

27. 303 A.2d 794 (Me. 1973).

28. *Id.* at 800-01.

29. *Id.* at 799-800; *see* Note, *supra* note 14, at 996.

30. Note, *The Indigent's Expanding Right to Appointed Counsel*, 37 ALBANY L. REV. 383, 395 (1973).

31. 303 A.2d at 800; *accord, In re* Ella B., 30 N.Y.2d 352, 285 N.E.2d 288, 334 N.Y.S.2d 133 (1972) (parent's concern for the liberty of a child involves a fundamental right and interest).

Court has used due process and equal protection "to require the provision by the state of . . . trial related services in certain coercive situations."[32]

IV. Fourteenth Amendment Due Process in Matrimonial Litigation

In *Boddie v. Connecticut*[33] indigent spouses who wanted to sue for divorce but were unable to pay the court fees and costs for service of process required for the commencement of litigation[34] sought a declaration that such fee requirements were an unconstitutional denial of access to the courts.[35]

The Supreme Court held that the fee requirements were violative of due process and equal protection and, as such, were an unconstitutional denial of access to the courts to prospective indigent matrimonial litigants.[36] The Court emphasized the importance of due process in matrimonial litigation:[37]

> Our conclusion is that, given the basic position of the marriage relationship in this society's hierarchy of values and the concomitant state monopolization of the means for legally dissolving this relationship, due process does prohibit a State from denying, solely because of inability to pay, access to its courts to individuals who seek judicial dissolution of their marriages.

The Supreme Court noted that marriage "involves interests of

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32. Boddie v. Connecticut, 401 U.S. 371 (1971) (waiver of filing fees for indigent seeking divorce); *In re* Gault, 387 U.S. 1 (1967) (counsel at juvenile delinquency hearing); Douglas v. California, 372 U.S. 353 (1963) (counsel for indigent at appellate level); Griffin v. Illinois, 351 U.S. 12 (1956) (free transcript for appellate review); *see* Note, *Parents' Right to Counsel in Dependency and Neglect Proceedings, supra* note 24, at 168-69.

In certain other areas courts have recognized a right to counsel for indigents. United States v. Sun Kung Kang, 468 F.2d 1368 (9th Cir. 1972) (right to counsel in civil contempt proceeding); *accord*, Heryford v. Parker, 396 F.2d 393 (10th Cir. 1968) (right to counsel at civil commitment proceeding); People *ex rel.* Rogers v. Stanley, 17 N.Y.2d 256, 217 N.E.2d 636, 270 N.Y.S.2d 573 (1966). *But see* Brown v. Lavine, 37 N.Y.2d 317, 333 N.E.2d 374, 372 N.Y.S.2d 75 (1975) (no right to counsel for recipient of public assistance at administrative hearing to discontinue aid). For a discussion of the state of the right to counsel in probation hearings, see 27 MERCER L. REV. 325 (1975).

33. 401 U.S. 371 (1971).

34. The average cost to a litigant being $60.00 of which $45.00 was pavable to the clerk of the court and an average of $15.00 was payable to the sheriff for service of process. *Id.* at 372.

35. *Id.; see* Note, *A First Amendment Right of Access to the Courts for Indigents*, 82 YALE L.J. 1055 (1973).

36. 401 U.S. at 374.

37. *Id.*

basic importance in our society."[38] Moreover, the Court was unaware of any jurisdiction where marriages may be dissolved without invoking the state's judicial machinery.[39]

Because the state courts were the only avenue to the dissolution of petitioners' marriages,[40] the *Boddie* court concluded that resort to the judicial process by these plaintiffs "is no more voluntary in a realistic sense than that of the defendant called upon to defend his interests in court."[41] If indeed the position of matrimonial litigants before the courts so closely approximates that of a criminal defendant, it is not unreasonable to perceive the application of a due process right to counsel in matrimonial cases which is analagous to the protections afforded the criminal defendant by the sixth amendment.[42]

In *Boddie* the Supreme Court struck down as a denial of due process the fee requirements which were payable to the state as a condition to access to the courts in a matrimonial action.[43] In so doing the Court clearly implied that any and all barriers to access to the courts in matrimonial actions were vulnerable to attack on the basis of due process.

The unique position of matrimonial matters in the courts was reaffirmed in a recent New York Supreme Court matrimonial case, *Jeffreys v. Jeffreys*.[44]

> [A]n action for divorce is fundamentally different from actions in contract or concerning real property. The latter may be brought or not brought; they may be settled out of court. But our State Constitution . . . mandates that divorces may be granted only by due judicial proceedings.[45]

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38. *Id.* at 376; *see, e.g.*, Loving v. Virginia, 388 U.S. 1 (1967); Skinner v. Oklahoma, 316 U.S. 535 (1942); Meyer v. Nebraska, 262 U.S. 390 (1923).

39. 401 U.S. at 376. For a discussion of the relationship between state monopolization of the power to grant divorce as opposed to that of other areas of the law such as bankruptcy and appropriate due process protection, see Note, *The Heirs of Boddie: Court Access For Indigents After Kras and Ortwein*, 8 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 571 (1973).

40. N.Y. CONST. art. 1 § 9 is a typical example of state monopolization of divorce actions and reads in part: "[N]or shall any divorce be granted otherwise than by due judicial proceedings . . . ."

41. 401 U.S. at 376-77.

42. *Cf.* Comment, *Providing Legal Services for the Middle Class In Civil Matters: The Problem, The Duty and a Solution*, 26 U. OF PITT. L. REV. 811, 824 (1965) in which the author states that the minimal requirements of due process are notice and a fair hearing.

43. 401 U.S. at 374.

44. 58 Misc.2d 1045, 296 N.Y.S.2d 74 (Sup. Ct. 1968), *rev'd on other grounds*, 38 App. Div. 2d 431, 330 N.Y.S.2d 550 (1972).

45. *Id.* at 1051, 296 N.Y.S.2d at 82.

V. New York Marital Law Decisions After *Boddie*

The New York courts have cautiously probed the area of due process rights of indigent matrimonial litigants. At first the New York Court of Appeals seemed to indicate a readiness to follow the implicit mandate for expansion of such rights which was apparent in the *Boddie* decision. In *Deason v. Deason*[46] the court unanimously held that in a matrimonial action an indigent's cost of service of process by publication should be borne by the local governing unit even though the expense in question was payable to a third party, *i.e.* newspapers, rather than to the state.[47] The rationale of *Boddie* was deemed controlling because the effect of indigency was the same in each case: a denial of access to the courts.[48]

Boddie and *Deason* involved the payment of fees rather than the issue of the assignment of counsel, but the implication was inescapable that the payment of fees was not the only unconstitutional barrier which denied indigents of due process.[49] Due process, as stated by the Supreme Court in *Boddie,* requires at a minimum that "persons forced to settle their claims of right and duty through the judicial process must be given a meaningful opportunity to be heard."[50] However, the Supreme Court has recognized that "[t]he right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel."[51] Therefore the right to counsel in matrimonial cases can arguably be seen as an integral element of the right to access to the courts.

With the potential far-reaching ramifications of both the *Boddie* and *Deason* cases as precedents, it was only a matter of time until a constitutional decision on the issue of mandatory assignment of counsel would have to be made.

That question was decided by the New York Court of Appeals in

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46. 32 N.Y.2d 93, 296 N.E.2d 229, 343 N.Y.S.2d 321 (1973).

47. *Id.* at 94-95, 296 N.E.2d at 230, 343 N.Y.S.2d at 322.

48. *Id.* The court reasoned as such despite the fact that *Boddie* did not decide that state or local government should bear the cost of publication and that the Legislature had not spoken on the issue.

49. The cost of retaining counsel can be considered to foreclose a party's meaningful opportunity to be heard and therefore to be a denial of due process. *In re* Robinson, 8 Cal. App. 3d 783, 87 Ca. Rptr. 678 (Ct. App. 1070), *cert. denied,* 402 U.S. 954 (1971).

50. 401 U.S. at 377.

51. Powell v. Alabama, 287 U.S. 45, 68-69 (1932). *See also In re* Ella B., 30 N.Y.2d 352, 285 N.E.2d 288, 334 N.Y.S.2d 133 (1972) in which the same reasoning was applied to an indigent's right to counsel in a civil custody case.

In re Smiley.[52] In *Smiley* both an indigent plaintiff wife and an indigent defendant wife applied to have the County of Tompkins, New York, either provide them with counsel or compensate counsel retained by them. After examining the history of the sixth amendment decisions, the court of appeals concluded: "These cases recognize that the right to counsel in criminal cases means . . . that in the event of inability by a defendant to provide his own counsel . . . the State must provide counsel . . . ."[53] The court of appeals held that no similar provision applies to "private litigation,"[54] and that there would be no assignment of counsel in matrimonial actions as a matter of constitutional right in New York.[55]

While the court of appeals noted that it was within the power of the courts to assign counsel in appropriate civil cases, the court stated "there is no absolute right to assigned counsel; whether in a particular case counsel shall be assigned lies instead in the discretion of the court."[56]

The court indicated that the Legislature had not provided for publicly compensated counsel in civil litigation and, absent such action, the courts of New York did not have power to appropriate and provide funds for assignments of counsel in matrimonial cases.[57]

By emphasizing the lack of action on the part of the Legislature the court allowed the practical consideration of the lack of funds to influence its decision as to whether there indeed was a constitutional right to counsel in divorce actions. The court seemed to rule not on the issue of whether due process required a right to counsel in matrimonial actions, but on whether such a right and its concomitant cost could be afforded.

The court of appeals in *Smiley* narrowly construed both *Boddie* and *Deason* to apply only to the particular facts of those cases: a

52. 36 N.Y.2d 433, 330 N.E.2d 53, 369 N.Y.S.2d 87 (1975).

53. *Id.* at 437, 330 N.E.2d at 55, 369 N.Y.S.2d at 90.

54. *Id.* at 438, 330 N.E.2d at 55, 369 N.Y.S.2d at 90.

55. The *Smiley* majority did not feel compelled to consider alternate measures that might be necessary to provide counsel for indigents because of its assumption that effective representation could be accomplished through the assignment of uncompensated counsel or legal aid. 4 HOFSTRA L. REV. 139, 145-146 (1975).

56. 36 N.Y.2d at 438, 330 N.E.2d at 55, 369 N.Y.S.2d at 91.

57. *Id.* at 439, 330 N.E.2d at 56, 369 N.Y.S.2d at 92. In 1974 a bill was presented to the New York Legislature which would have provided for the compensation of assigned counsel for matrimonial defendants. However, no action was taken. Menin v. Menin, 79 Misc. 2d 285, 288 n.1, 359 N.Y.S.2d 721, 725 n.1 (Sup. Ct. 1974).

state could not restrict *access* to its courts in matrimonial actions by exacting certain fees from prospective indigent matrimonial litigants.[58] Since counsel was not an absolute condition for *access* to the courts, the *Smiley* court held that *Boddie* could not be used to impose an obligation on the part of the state to assign or compensate counsel as a matter of constitutional right.[59]

The court realizing that assistance of counsel would be essential in certain matrimonial actions, stated that the indigent litigant in such cases had recourse to legal aid[60] and other agencies which, in the City of New York "handle annually a large number of matrimonial cases."[61] Anticipating that such facilities might become hopelessly over-taxed, the court stated that in such a case the aggrieved party could look only to the Legislature "which has the power to appropriate the funds required for publicly-compensated counsel."[62]

The *Smiley* court refused to recognize a significant distinction between the status of matrimonial litigants and others who appear before the courts in civil actions.[63] The court stated: "In short, the problem is not peculiar to matrimonial litigation. The horizon does not stop at matrimonial or any other species of private litigation."[64] In doing so, the court ignored the fact that the Supreme Court in *Boddie* drew a clear distinction between matrimonial and other civil litigation. In fact, the Court in *Boddie* could not distinguish matrimonial litigants from criminal defendants for the purpose of due process protection of their rights.[65] The failure to recognize the spe-

58. 36 N.Y.2d at 439, 339 N.E.2d at 56, 369 N.Y.S.2d at 92.

59. *Id.*

60. For a discussion of the inadequacy of the legal aid system which operates with both public and private funds to cope with the increasing needs of the poor, see Note, *supra* note 22.

61. 36 N.Y.2d at 440, 330 N.E.2d at 57, 369 N.Y.S.2d at 93.

62. *Id.* The court of appeals stated:

> If more is required, the relief must be provided by the Legislature. The fundamental is that the courts constitute but one branch of government. The absence of appropriated funds and legislation to raise taxes under our State constitutional systems, as in the rest of the Union, is not a judicially-fillable gap.

Id. at 441-42, 330 N.E.2d at 58, 369 N.Y.S.2d at 94.

63. *Cf.* Boddie v. Connecticut, 401 U.S. 371, 374 (1971); Jeffreys v. Jeffreys, 58 Misc.2d 1045, 1051, 296 N.Y.S.2d 74, 82 (Sup. Ct. 1968).

64. 36 N.Y.2d at 441, 330 N.E.2d at 57, 369 N.Y.S.2d at 93.

65. *See* text accompanying notes 42-44 *supra*.

cial status of matrimonial litigation is simply without basis in the law.[66]

In actuality the failure of the Legislature to provide funds for the compensation of assigned counsel was the basis for the court's refusal to declare a mandatory right to counsel in matrimonial cases. The court was unwilling to place the burden of representing indigent matrimonial litigants upon the private bar without the "possibility of . . . compensation."[67]

The *Smiley* decision by the court of appeals was not without dissent. Judge Jones and Judge Wachtler would have recognized the right of indigents to the assistance of counsel in seeking dissolution of their marriages.[68] Judge Jones interpreted the majority's position as an "impermissible retreat" from the fundamental principles recognized in *Boddie* and *Deason*.[69]

In criticizing the court's narrow interpretation of those two cases, Judge Jones urged the court to take heed of the due process implied in *Boddie* and *Deason*.[70]

> I find nothing in either case to warrant any conclusion that it is only certain barriers that are to be eliminated or that hinderance to the availability of the judicial process is to be eliminated only if to do so will entail an economic burden of modest dimension . . . .

The difference in character of the particular obstacle considered in *Smiley, i.e.*, the right to assignment of counsel, from the more basic obstacle of the fee requirements considered in *Boddie* and *Deason*, appears to be the only explanation for the difference in the results of the two cases. The court of appeals saw no conflict in providing indigents with an opportunity to be heard without insuring that it be a meaningful one. Judge Jones, in commenting upon this situation, stated:[71]

> To my mind it is both artificial and constitutionally impermissible to say that the State may not deny "access" . . . but, entrance having been permitted, the State may then deny effective presence and participation . . . .

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66. Justice Black in his dissent in *Boddie* intimated that he would not give marital actions any special preference over other types of civil litigation. 401 U.S. at 389.

67. 36 N.Y.2d at 441, 330 N.E.2d at 57, 369 N.Y.S.2d at 94.

68. *Id.* at 442, 330 N.E.2d at 58, 369 N.Y.S.2d at 94 (Jones, J., dissenting).

69. *Id.*, 330 N.E.2d at 58, 369 N.Y.S.2d at 95.

70. *Id.*

71. *Id.* at 443, 330 N.E.2d at 59, 369 N.Y.S.2d at 96.

"[T]he right to be heard would be 'of little avail if it did not comprehend the right to be heard by counsel.' "

Judge Jones contended that the judiciary had the responsibility and power to find a right to counsel in matrimonial cases and leave the determination of how the required legal services shall be made available to the Legislature.[72] Judge Jones stated it was the function of the courts to declare the right to counsel in matrimonial litigation; it was for the Legislature to consider what would be the most practical method of providing that right.

In holding that there was no constitutional right to counsel in divorce actions because of their "private" nature, the court of appeals has construed *Boddie* too narrowly. In *Boddie* the Supreme Court explicitly noted that state monopolization of the means of obtaining a divorce made resort to the courts by matrimonial litigants no more voluntary than that of a criminal defendant defending his interests in court.[73] If this is the correct analysis of the nature of an action for divorce, there is a constitutional right to counsel in divorce actions brought by indigents.

Secondly, as Judge Jones stated in his dissent, the failure of the Legislature to provide the funds necessary to finance assignments of counsel in matrimonial actions has no real bearing on whether or not such assignments are constitutionally required. If a mandatory right to counsel in matrimonial cases is indeed constitutionally required, the court must enunciate that right and leave the practical matter of financing such assistance to the Legislature.

If the courts of New York would provide a very liberal discretionary assignment of counsel in all actions where there was a reasonable possibility of prejudice to an unrepresented litigant's rights, the rights of indigent matrimonial litigants could still be adequately protected. But this has not occurred.

VI. The Adverse Consequences of Smiley

The adverse consequences of the *Smiley* decision under conditions as they presently exist in New York were made all to a clear in *In re Boyd*.[74]

72. *Id.* at 443-44, 330 N.E.2d at 60, 369 N.Y.S.2d at 97.
73. 401 U.S. at 376-77.
74. 174 N.Y.L.J. 10 (Sup. Ct. Nov. 6, 1975).

In *Boyd* 61 indigent plaintiffs filed ex parte applications to proceed as poor persons in actions for divorce and to obtain assignment of counsel to advise and represent them in such actions without fee. Because the operative facts and legal issues presented were shared in common by all the applicants, their suits were consolidated for disposition by the supreme court.[75]

The applications were prepared and submitted pro se with the help of the Legal Aid Society.[76] Each application was supported by an affidavit of the applicant setting forth his or her[77] name and address, the date and place of marriage, the names and ages of any minor children, the amount and sources of income and property, a statement showing the duration of residency in New York State, a statement of facts showing a cause of action for divorce, and an account of the applicant's unsuccessful efforts to obtain counsel for the purpose of initiating an action for divorce. Each application was accompanied by an affirmation of the Attorney-in-Charge of the Legal Aid Society's Neighborhood Office stating that he had examined the facts of each case and believed there was merit to the proposed action, and, despite the fact that the applicant qualified for the free legal services of the Society, the office was unable to accept the case because of a lack of resources and personnel.[78] The court then granted the applications to the extent that the parties were permitted to proceed as poor persons under article eleven.[79] The requests for assignment of counsel, however, were denied; supreme court Judge Cotton noting that he was bound by the decision of the court of appeals in *Smiley* that there was no mandatory right to counsel in divorce actions.[80]

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75. 174 N.Y.L.J. at 10.

76. The Legal Aid Society's Bronx Neighborhood Office maintains a substantial docket of matrimonial matters totalling hundreds of cases each year and is apparently the only facility in Bronx County presently rendering free legal services in divorce matters. *Id.*

77. Fifty-three of the applicants were women; eight were men. *Id.*

78. The attorney's affirmation detailed the office's inability to accept the cases at bar. The Bronx office currently possesses an active docket in excess of 300 matrimonial matters, with a further waiting list of 600 other individuals who have been given appointments at the rate of 20 per week through February, 1976. *Id.* These facts, combined with the added consideration that matrimonial matters are but one of the many areas of the law handled by the 10-attorney office, presented a clear showing of the office's inability to accept the cases at bar.

79. *Id.*

80. *Id.*

After examining the ability of both the private bar and legal aid in Bronx County to accommodate the discretionary assignment of the applicant's cases, Judge Cotton concluded that it was not a realistic option to compel members of the bar to accept uncompensated assignment of these cases.[81] Such assignment would impose an intolerable burden on the Bronx matrimonial bar in the volume presented here.[82]

The court, stating that the situation was "an unfortunate reflection of the chronically inadequate legal services resources available to the indigent population of the Bronx,"[83] refused to compel legal aid to represent these applicants.[84]

Judge Cotton had the discretionary power to assign counsel in poor person actions. But no public or private agency capable of giving constitutionally adequate assistance to the applicants existed.[85] In short, absent funding there could be no assignment of counsel in Bronx County, discretionary or otherwise. The court of appeals' decision in *Smiley*, when considered in the light of the situation presented in *Boyd*, acts effectively to deny indigents the assistance of counsel in even the most necessary cases.[86]

The facts in *Boyd* are illustrative of the common problem and they present a cold truth: the present facilities of public and private legal aid programs are grossly inadequate to accept assignment of the volume of indigent matrimonial cases that exist.[87] At the time of the *Boyd* case, the ten-attorney Bronx Neighborhood Legal Aid

81. *Id. See In re* Smiley, 36 N.Y.2d 433, 441, 330 N.E.2d 53, 58, 369 N.Y.S.2d 87, 94 (1975); Vanderpool v. Vanderpool, 74 Misc. 2d 122, 344 N.Y.S.2d 572 (Sup. Ct. 1973). *But see* Bartlett v. Kitchin, 76 Misc. 2d 1087, 1091, 352 N.Y.S.2d 110, 114 (Sup. Ct. 1973).

82. 174 N.Y.L.J. at 10.

83. *Id.*

84. *See* note 78 *supra* and accompanying text.

85. In Wallace v. Kern, 392 F. Supp. 834 (E.D.N.Y.), *rev'd* 481 F.2d 621 (2d Cir. 1973), *cert. denied*, 420 U.S. 947 (1975) the court stated that legal aid lawyers could not handle more than 40 cases at any one time and still satisfy the constitutional mandate of effective assistance of counsel. *See* Note, *Caseload Ceilings on Indigent Defense Systems to Ensure Effective Assistance of Counsel*, 43 U. CIN. L. REV. 185, 188 (1974).

86. In eleven of the cases in *Boyd* the applicants were unable to read or speak the English language. Since under N.Y. CIV. PRAC. LAW § 2101(b) (McKinney 1968) all papers must be prepared and filed in the English language it would seem to be incumbent upon the court to appoint counsel in these cases. In recognition of this Judge Cotton stated: "For these prospective litigants, the prospect of proceeding without counsel was effectively foreclosed." 174 N.Y.L.J. at 10.

87. *See* note 78 *supra* and accompanying text.

Office possessed an active docket in excess of 300 matrimonial matters, with a further waiting list of 600 other individuals.[88]

Since the practice is to give criminal matters preference over matrimonial and other civil cases, the existing facilities in the Bronx were undisputably inadequate to accept the assignment of the 61 cases at the bar.[89]

VII. Attorney Compensation and the Need For Legislative Reform

The problem of attorney compensation is central to the establishment of a right to counsel in matrimonial litigation, whether such right is mandatory or discretionary. The refusal of the court to assign indigent matrimonial cases to either the private bar or legal aid is based solely on the lack of resources. Assigning such cases without hope of compensation to the matrimonial bar presents the possibility of violating the constitutional rights of the lawyers so assigned.[90]

The fifth amendment of the United States Constitution prohibits the taking of property without just compensation.[91] It has traditionally been held that attorneys in undertaking the practice of law impliedly consent to accept the responsibility of representing those who by reason of their indigency cannot adequately provide for retained counsel.[92] In a typical illustration of this reasoning one New York court has stated: "Attorneys, unlike newspaper editors . . . are officers of the court."[93] A growing number, but still a minority of jurisdictions,[94] have held that an attorney appointed by the court

88. 174 N.Y.L.J. at 10.

89. The simple solution is to take the worthy cases first come, first served, until competancy is imperiled, then close the doors. Samore, *Legal Services For the Poor*, 32 ALBANY L. REV. 509, 514 (1968). This is exactly the effect of the *Boyd* decision.

90. *In re* Smiley, 36 N.Y.2d 433, 441, 330 N.E.2d 53, 58, 369 N.Y.S.2d 87, 94 (1975); Menin v. Menin, 79 Misc. 2d 285, 359 N.Y.S.2d 721 (Sup. Ct. 1974).

91. U.S. CONST. amend. V.

92. Jackson v. State, 413 P.2d 488 (Alaska 1966); Weiner v. Fulton County, 113 Ga. App. 343, 148 S.E.2d 143 (2d Div.), *cert. denied*, 385 U.S. 958 (1966).

93. Bartlett v. Kitchin, 76 Misc.2d 1087, 1091, 352 N.Y.S.2d 110, 114 (Sup. Ct. 1973). *See* Note, *supra* note 14, at 1002 n.80.

94. Indiana, Iowa, and Wisconsin have for some time recognized an enforceable right to compensation. Knox County Council v. State *ex rel.* McCormick, 217 Ind. 493, 29 N.E.2d 405 (1940); Ferguson v. Pottawattamie County, 224 Iowa 516, 278 N.W. 223 (1938); County of Dane v. Smith, 13 Wis. 585 (1861). *But see* Woodbury County v. Anderson, 164 N.W.2d 129 (Iowa 1969); Green Lake County v. Waupaca County, 113 Wis. 425, 89 N.W. 549 (1902).

to represent an indigent has a right to be compensated.[95]

The New Jersey Supreme Court in *State v. Rush*[96] held that the State rather than the private bar had the duty to compensate assigned counsel in a criminal case.[97] The trend is toward a recognition of this principle;[98] but as yet, the principle has not been carried over to the area of civil assignments.[99] Two New York appellate cases have held that without provision by the legislature the courts have no power to provide compensation for assigned counsel in matrimonial litigation.[100] However, in *Vanderpool v. Vanderpool*[101] a trial court held that it was the responsibility of local government to compensate such assigned counsel. The *Vanderpool* court stated that the burden of representing an indigent wife should not be imposed upon private counsel without consent.[102]

Clearly, the provision of funds for the assignment of counsel is crucial to any system created to provide representation for indigents whether it is discretionary or otherwise. While the courts have the power to declare an absolute right to counsel in matrimonial actions or to assign counsel on a discretionary basis, the practical problem of financing such representation can be disposed of only by the Legislature.[103] In the *Boyd* case assignment of counsel was denied because of a lack of resources and for no other reason. It is difficult to imagine more needy cases. Eleven of the applicants in *Boyd* were unable to speak or read the English language.[104] Unquestionably

95. Note, *supra* note 14, at 1005; *see, e.g.*, Menin v. Menin, 79 Misc. 2d 285, 359 N.Y.S.2d 721 (Sup. Ct. 1974); Bedford v. Salt Lake County, 22 Utah 2d 12, 447 P.2d 193 (1968). The right of assigned counsel to compensation was implicitly recognized by the Supreme Court in Gagnon v. Scarpelli, 411 U.S. 778 (1973). The Court in considering the right to counsel of an indigent in a parole revocation hearing noted that one factor to be considered in requiring the assistance of counsel is "the financial cost to the State." *Id.* at 788.

96. 46 N.J. 399, 217 A.2d 441 (1966).

97. *Id.* at 412, 217 A.2d at 448.

98. *See* Bradshaw v. Ball, 487 S.W.2d 294 (Ky. 1972); State v. Green, 470 S.W.2d 571 (Mo. 1971).

99. *See* Note, *supra* note 14, at 1004.

100. Cerami v. Cerami, 44 App. Div. 2d 890, 355 N.Y.S.2d 861 (4th Dept. 1974); Jacox v. Jacox, 43 App. Div. 2d 716, 350 N.Y.S.2d 435 (2d Dept. 1973).

101. 74 Misc. 2d 122, 344 N.Y.S.2d 572 (Sup. Ct. 1973).

102. *Id.* at 125, 344 N.Y.S.2d at 574.

103. *See* note 62 *supra*. Other legislatures have acted to provide compensation for assigned counsel in civil matters. *See, e.g.*, 18 U.S.C. § 3006A (1970); FLA. STAT. ANN. § 925.035 (1973); N.Y. JUDICIARY LAW § 35(1)(a),(2) (McKinney 1968), *as amended*, (McKinney Supp. 1975).

104. 174 N.Y.L.J. at 10.

those applicants were effectively denied the guarantee of *Boddie*; "meaningful access" to the courts.[105]

VIII. Conclusion

Indigent matrimonial litigants are being denied meaningful access to the courts. The expense of providing such access does not justify the failure of the courts to require appointment of counsel for deserving indigent litigants. The failure of the New York Legislature to face the pressing problem of financing assignments of counsel is likewise intolerable. These problems as illustrated by *Boyd* make it incumbent upon the court of appeals to reconsider its decision in *Smiley* and declare a constitutional right to counsel in matrimonial litigation.

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105. *Id.*