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Constitutionality of Cost and Fee Barriers for Indigent Litigants: Searching for the Remains of Boddie after a Kras-Landing

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NOTES

CONSTITUTIONALITY OF COST AND FEE BARRIERS FOR INDIGENT LITIGANTS: SEARCHING FOR THE REMAINS OF BODDIE AFTER A KRAS-LANDING

Boddie v. Connecticut[1] held that requiring the payment of a filing fee before an indigent could proceed in a divorce action violated due process standards. Justice Harlan, writing for the majority, cautiously attempted to distinguish divorce from other civil actions through a two-pronged analysis, stressing both the importance of the marriage relationship and the absence of alternative means of dissolving it:

> [G]iven 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.[2]

Harlan's narrow opinion left unanswered the question of *Boddie's* application to an indigent's right to invoke the judicial process in other civil actions. There are three possible approaches to this access question: (1) procedural due process, in which the indigent's right to be heard is the paramount consideration; (2) substantive due process, concentrating on whether the asserted claim affects a fundamental right; and (3) a variation of the second approach, which conceives of access to the judicial process itself as a fundamental right because of the unique role played by the judiciary in individual dispute resolution. Although Harlan's opinion suggests that he was utilizing the second approach,[3] lower courts have not strictly adhered to his analysis in expanding *Boddie* to actions other

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1. 401 U.S. 371 (1971).
2. *Id.* at 374.
3. Justices Douglas and Brennan, in separate concurring opinions, criticized Harlan's reliance upon substantive due process. 401 U.S. at 386, 387 (Brennan, J., concurring); *id.* at 383, 384 (Douglas, J., concurring). According to Justice Douglas the majority opinion put

> "flesh" upon the Due Process Clause by concluding that marriage and its dissolution are so important that an unhappy couple who are indigent should have access to the divorce courts free of charge. . . . The question historically has been whether the right claimed is "of the very essence of a scheme of ordered liberty. . . . That makes the test highly subjective and dependent on the idiosyncrasies of individual judges."

Id. at 385 (citations omitted).

than divorce.[4] Moreover, they have applied *Boddie* to other costs and fees besides initial filing fees.[5]

Recently, the Supreme Court limited the scope of *Boddie* in *United States v. Kras,*[6] a case which concerned the right of an indigent to proceed *in forma pauperis* in a bankruptcy action. This note will focus on lower courts' expansion of *Boddie* and the effect of *Kras* on these decisions.

JUDICIAL RESPONSE TO BODDIE

Despite Justice Harlan's effort to articulate the distinction between divorce and other civil actions, some lower courts have formulated the issue in terms of the indigent's fundamental right to gain access to the judicial process.[7] In holding that a bankruptcy filing fee violated due process standards, the United States District Court for Colorado, in *In re Smith,*[8] stated:

> [W]e believe that what is at stake here is not simply bankruptcy but access to court. So viewed, the question presented takes on a greater significance, at least for those of us who are trained in the law and who regard the legal system as fundamental to our way of life.[9]

Analogizing the filing fee to the poll tax struck down in *Harper v. Virginia State Board of Elections,*[10] the court felt that the judiciary function was

> at least as important as the electoral process. Both are preservative of rights, and both are potentially destructive of them. . . . In our scheme of things, the quality of individual life, which depends in part upon the vindication of private rights, is surely of an importance comparable to the principle of majority rule.[11]

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4. *See* cases cited note 8 *infra*. *See, e.g.,* notes 9-12 *infra* & text accompanying.
5. *See* notes 31-40 *infra* & text accompanying.
6. —— U.S. ——, 93 S. Ct. 631 (1973).
7. *In re* Smith, 341 F. Supp. 1297 (N.D. Ill. 1972); Application of Ottman, 336 F. Supp. 746 (E.D. Wis. 1972); *In re* Naron, 334 F. Supp. 1150 (D. Ore. 1971); *In re* Kras, 331 F. Supp. 1207 (E.D.N.Y. 1971); *In re* Smith, 323 F. Supp. 1082 (D. Colo. 1971).
8. 323 F. Supp. 1082 (D. Colo. 1971). Although this is a pre-*Boddie* case, the court indicated its awareness that probable jurisdiction had been noted in *Boddie*. *Id.* at 1091.
9. 323 F. Supp. at 1087.
10. 383 U.S. 663 (1966). *Harper* held that a poll tax was unconstitutional as violative of the equal protection clause. In *Harper,* the Court stated that voting was a fundamental right since it was "preservative of other basic civil and political rights." *Id.* at 667.
11. 323 F. Supp. at 1087.

The court thus considered "access to the courts" as important, irrespective of the nature of the claim.[12]

Some courts have considered the bankruptcy filing fee problem in terms of both general access to the courts and the indigent's fundamental right to a discharge in bankruptcy.[13] This latter approach emphasizes that a bankruptcy adjudication is as important to the indigent as a divorce proceeding. For example, *In re Naron*[14] held that there is no due process reason for attempting to distinguish between the right to a divorce and the "right to be judicially liberated from harassment by general creditors."[15] In addition to bankruptcy, courts have found that access to judicial process for the resolution of other disputes is a fundamental right. These include landlord-tenant disputes,[16] child neglect proceedings,[17] civil commitment proceedings,[18] and claims for welfare benefits.[19]

The second-prong of the *Boddie* holding stressed the state monopolization of the means for dissolving the marriage relationship. In *Meltzer v. G. Buck LeCraw & Co.*,[20] the Supreme Court denied certiorari in a series of lower court cases which had refused to expand *Boddie* to other civil actions.[21] Justice Black, the lone dissenter in *Boddie*, also

12. The phrase "access to court" does for us have a meaning: it denotes access to the broad and intricate scheme for private dispute—settling and the enforcement of public and private rights. . . . [B]y regarding the problem as access for a particular purpose, the generality "access to court" is so broken down and divided into less significant parts that the broad phrase itself is reduced to insignificance. It is our conviction that the generality has meaning and poses a problem worthy of consideration that leads us to reject a narrow view.

323 F. Supp. at 1089.

13. *In re* Smith, 341 F. Supp. 1297 (N.D. Ill. 1972); Application of Ottman, 336 F. Supp. 746 (E.D. Wis. 1972); *In re* Naron, 334 F. Supp. 1150 (D. Ore. 1971); *In re* Kras, 331 F. Supp. 1207 (E.D.N.Y. 1971).

14. 334 F. Supp. 1150 (D. Ore. 1971).

15. *Id.* at 1152.

16. Hotel Martha Washington Management Co. v. Swinick, 66 Misc. 2d 833, 322 N.Y.S.2d 139 (App. T. 1971).

17. Cleaver v. Wilcox, —— F. Supp. ——, 40 U.S.L.W. 2658 (N.D. Cal. Feb. 22, 1972); *In re* B., 30 N.Y.2d 352, 285 N.E.2d 288, 334 N.Y.S.2d 133 (1972); State v. Jamison, —— Ore. ——, 444 P.2d 15 (1968).

18. Lessard v. Schmidt, —— F. Supp. ——, 2 Pov. L. Rptr. ¶ 16, 255, at 16,720 (E.D. Wis. Oct. 18, 1972); State v. Collman, —— Ore. ——, 497 P.2d 1233 (Ore. App. 1972).

19. Bacon v. Graham, 348 F. Supp. 996 (D. Ariz. 1972).

20. 402 U.S. 954 (1971).

21. *In re* Garland, 402 U.S. 966 (1971) (bankruptcy filing fees); Kaufman v. Carter, 402 U.S. 964 (1971) (denied court-appointed counsel in termination of parental rights suit); Meltzer v. C. Buck LeCraw, 402 U.S. 945 (1971) (requirement that indigent tenant resisting eviction risk forfeiture of double rent); Bourbeau v. Lanchaster, 402 U.S. 941 (1971) (right to an appeal in a child guardianship case); Lindsey v. Normet, 402 U.S. 941 (1971) (required indigent to post double bond rent payments before taking an appeal); Sloatman v. Gibbons, 402 U.S. 939 (1971) (lower court held *Boddie* did not apply to installment payments of filing fee in divorce action); Frederic v. Schwartz, 402 U.S. 937 (1971) (right of indigent to make an appeal in welfare action);

dissented to this denial of certiorari.[22] Speaking to Harlan's monopolization argument, Black reasoned that "the judicial process is the exclusive means through which almost any dispute can ultimately be resolved short of brute force."[23] Consequently, according to Black, in almost every civil action the state monopolizes the only realistic means for resolving a dispute. Lower courts have accepted this argument in applying *Boddie*.[24]

Nor have the lower courts been able to discern a compelling state interest to offset the right to access to the judicial arena.[25] In the bankruptcy area for instance, the major justfications for a filing fee requirement are that it is needed to maintain a self-financing system, to prevent frivolous claims, and to avoid the inherent difficulty of disproving an allegation of indigency.[26] When faced with a self-financing justification for the fee in *Boddie,* Justice Harlan had said:

> none of these considerations [including the states' interest in allocating its financial resources] is sufficient to override the interest of these plaintiff-appellants in having access to the only avenue open for dissolving their allegedly untenable marriages.[27]

A similar conclusion has been approved in the bankruptcy area by the lower courts.[28]

District courts have also rejected the contention that the fee requirement was necessary to prevent frivolous claims:

> [T]here is presently in effect a mechanism fully adequate for discouraging frivolous petitions which waste the time of the bankruptcy court—namely, the established principle that the effect of a dismissal of a bankruptcy proceeding for whatever reason bars by res judicata an attempt to have the scheduled debts discharged in any subsequent proceeding.[29]

Beverly v. Scotland Urban Enterprises, Inc., 402 U.S. 936 (1971) (required tenant to post bond before making an appeal).

22. 402 U.S. at 954. Although Black disagreed in *Boddie* he argued that
> [if *Boddie*] is to continue to be the law, it cannot and should not be restricted to persons seeking a divorce. It is bound to be expanded to all civil cases.

Id. at 954 n.1.

23. 402 U.S. at 957.

24. *See, e.g.,* Application of Ottman, 336 F. Supp. 746, 748 (E.D. Wis. 1972); *In re* Kras, 331 F. Supp. 1207, 1212 (E.D.N.Y. 1971).

25. Bacon v. Graham, 348 F. Supp. 996, 1000 (D. Ariz. 1972) (cost of subpeona bond in welfare benefits case); *In re* Kras, 331 F. Supp. 1207, 1213-15 (E.D.N.Y. 1971) (bankruptcy filing fee); Dorsey v. City of New York, 66 Misc. 2d 464, 465, 321 N.Y.S.2d 129, 130 (Sup. Ct. 1971) (publication costs in divorce action).

26. *In re* Kras, 331 F. Supp. 1207, 1213-15 (E.D.N.Y. 1971).

27. 401 U.S. at 381.

28. *In re* Kras, 331 F. Supp. 1207, 1213-14 (E.D.N.Y. 1971); *In re* Smith, 323 F. Supp. 1082, 1088 (D. Colo. 1971).

29. *In re* Kras, 331 F. Supp. 1207, 1215 (E.D.N.Y. 1971).

The third justification, i.e., the difficulty of disproving an allegation of indigency, is a problem in any *in forma pauperis* action. In a bankruptcy proceeding, however, such a determination could be made simultaneously with the bankruptcy adjudication since the referee would have the necessary information to make this decision.[30]

Expanding *Boddie,* courts have decided not only what substantive interests are to be protected, but also what expenses other than filing fees constitute barriers to effective enjoyment of these interests. In *Dorsey v. City of New York,*[31] the court, relying upon *Boddie,* ordered that the state, rather than the indigent plaintiff, pay the required costs of service by publication in a divorce action. Such a fee was held to conflict with the plaintiff's right to be heard upon her asserted right to a divorce.[32]

The divorce action is not the only context in which auxiliary expenses have been struck down under the *Boddie* rationale. In *Bacon v. Graham,*[33] a three-judge court, in a suit to recover welfare benefits, decided that a statutory requirement of payment of witness fees and allowances prior to the issuance of a subpeona violated due process and equal protection. Citing *Boddie,* the court argued that such a requirement was a tariff imposed upon the use of the subpeona power.[34]

In *Hotel Martha Washington Management Co. v. Swinich,*[35] a case which, like *Bacon,* required state payment of witness fees, the court also took a first step towards the appointment of counsel in civil cases. Relying on both the due process and equal protection clauses, the court held that the *Boddie* rationale included the right to counsel in an eviction action between landlord and tenant.[36] The court maintained that the fourteenth amendment required that counsel be appointed so that an indigent tenant may defend effectively his right to remain in possession of his property.[37]

Perhaps the strongest case for the application of *Boddie* is the case

30. "A scrutiny of the bankrupts' financial affairs is basic to the proceeding and thus, we think, appropriate in considering the question of indigence." *In re* Smith, 323 F. Supp. 1082, 1091 (D. Colo. 1971).

31. 66 Misc. 2d 464, 321 N.Y.S.2d 129 (Sup. Ct. 1971).

32. By statute, the state has built a money obstacle to such dissolution by requiring in circumstances such as these, the service of a summons by newspaper publication, necessitating the expenditure of funds not available to all. This obstacle is an effective barrier to poor persons access to the courts for this relief. 66 Misc. 2d at 465, 321 N.Y.S.2d at 130. *See also* Hart v. Superior Ct., 2 Pov. L. Rptr. ¶ 15,095, at 16,131 (Ariz. Ct. App. Dec. 30, 1971); Deason v. Deason, —— Misc.2d ——, 2 Pov. L. Rptr. ¶ 15,834, at 16,519 (App. Div. July 6, 1972); Jeffreys v. Jeffreys, 58 Misc. 2d 1045, 296 N.Y.S.2d 74 (Sup. Ct. 1968). *But cf.* Lloyd v. Third Dist. Ct., —— Utah ——, 40 U.S.L.W. 2726 (May 5, 1972).

33. 348 F. Supp. 996 (D. Ariz. 1972).

34. *Id.* at 999.

35. 66 Misc. 2d 833, 322 N.Y.S.2d 139 (App. T. 1971).

36. *Id.* at 835, 322 N.Y.S.2d 141.

37. *Id.*

in which an indigent is the defendant in a civil action. According to the majority in *Boddie,* a potential plaintiff frequently has many available alternatives less drastic than litigation to settle most disputes. However, once judicial process is invoked, a defendant in an action has only the judicial proceeding to resolve the matter. Short of default, he cannot avoid the costs involved in defending a lawsuit, such as attorney fees, depositions, and witness fees. Concern for defendants caught in this situation was expressed in *Boddie.*[38]

Since *Boddie,* lower courts have begun to recognize defendants' rights, at least in instances where the state has brought the original action.[39] In a child neglect proceeding, for example, the court held that an indigent defendant had a right to appointed counsel, arguing that

> [a] parent's concern for the liberty of the child, as well as for his care and control, involves too fundamental an interest and right to be relinquished to the state without an opportunity for a hearing, with assigned counsel. . . .[40]

When the state is the plaintiff, fairness under due process dictates even closer scrutiny under *Boddie,* since the state is taking advantage of built-in cost and fee barriers in a system provided and maintained by the state itself. Moreover, with almost unlimited resources, a state can confront an indigent defendant with the best available counsel, pervasive discovery measures, and the ability to finance a lengthy trial.

Boddie Revisited: Kras v. United States

The Bankruptcy Act of 1898 allowed an indigent to seek a discharge by proceeding *in forma pauperis.*[41] With the major revampment of the bankruptcy system in 1946,[42] Congress made the payment of a filing fee by the voluntary bankrupt a condition precedent to any discharge of debts.[43] However, indigents were allowed to cover their filing fees through installment payments before discharge.[44] The reason given for

38. 401 U.S. at 376.

39. *In re* B., 30 N.Y.2d 352, 285 N.E.2d 288, 344 N.Y.S.2d 133 (1972) (child neglect); State v. Collman, —— Ore. ——, 497 P.2d 1233 (Ore. App. 1972) (civil commitment); State v. Jamison, —— Ore. ——, 444 P.2d 15 (1968) (termination of parental rights).

40. *In re* B., 30 N.Y.2d 352, 356, 285 N.E.2d 288, 290, 334 N.Y.S.2d 133, 136 (1972).

41. Bankruptcy Act, ch. 541, §§ 40(c), 51(2), 30 Stat. 556, 558-59 (1898).

42. Referees Salary Act, ch. 512, 60 Stat. 323 (1946) (codified in scattered sections of 11 U.S.C.).

43. 11 U.S.C. §§ 32(b), (c)8, 68(c)(1), 95(g) (1970).

44. *Id.* § 68(c)(1). But Congress ignored

> the plight of the debtor who is totally without resources. Further, however, it ignore[d] the fact that with the fee system gone, there would be no reason for the "widespread practice of demanding payment ultimately."

the abolition of the *in forma pauperis* provision was the fact that in many cases referees had ultimately managed to collect the filing fees from indigent bankrupts. This fact led Congress to believe that no such provision was necessary.[45]

The constitutionality of requiring a filing fee in a bankruptcy action was considered in *United States v. Kras*.[46] Resurrecting Justice Harlan's emphasis upon the particular importance of the marriage relationship and the "state monopolization" of the means for obtaining a divorce, a closely divided Court refused to extend *Boddie* to the bankruptcy filing fee. Writing for the majority, Justice Blackmun remarked that:

> [t]he denial of access to the judicial forum in *Boddie* touched directly, as has been noted, on the marital relationship and on the associational interests that surround the establishment and dissolution of that relationship. On many occasions we have recognized the fundamental importance of these interests under our Constitution. . . . Kras' alleged interest in the elimination of his debt burden, and in obtaining his desired new start in life, although important and so recognized by the enactment of the Bankruptcy Act, does not rise to the same constitutional level.[47]

The dissenters disagreed with the majority on this point. They felt that the emphasis on the fundamentality of the right to a divorce as compared with the right to a discharge in bankruptcy was misplaced.[48] Instead, Justice Stewart, speaking for the dissenters, stressed the existence of governmentally imposed obligations and state monopolization of the means to satisfy these obligations.

> [A] party to a marriage remains under serious and continuing obligation imposed by the State, which cannot be removed except by judicial dissolution of the marital bond. . . .
>
> . . . .
>
> Similarly . . . [the] bankrupt is bankrupt precisely for

Schaeffer, *Proceeding in Bankruptcy In Forma Pauperis*, 69 COLUM. L. REV. 1203, 1209 (1969) [hereinafter cited as Schaeffer]. Why must payment of the fee be a condition precedent to discharge? Why not allow a claim for the filing fee to survive the bankruptcy decree? Under such a system, the discharged bankrupt would be in a much better position to make payment. The lower courts, which found bankruptcy filing fees unconstitutional, adopted this solution. *See, e.g., In re* Kras, 331 F. Supp. 1207, 1213 (E.D.N.Y. 1971); *In re* Smith, 323 F. Supp. 1082, 1093 (D. Colo. 1971).

45. S. REP. No. 959, 79th Cong., 2d Sess. 7 (1946). Schaeffer, *supra* note 44, offers further insight into the factors contributing to the repeal of this privilege.

46. —— U.S. ——, 93 S. Ct. 631 (1973).

47. *Id.* at ——, 93 S. Ct. at 637-38.

48. *Id.* at ——, 93 S. Ct. at 643 n.7 (Stewart, J., with whom Douglas, Brennan & Marshall, JJ., join, dissenting).

> the reason that the State stands ready to exact all of his debts. . . .
>
> And in the unique situation of the indigent bankrupt, the government provides the only effective means of his ever being free of these government imposed obligations.[49]

Justice Marshall, in a separate dissent, went further and argued that the more appropriate question was whether the indigent was entitled to court access in all civil actions:

> I view the case as involving the right of access to the courts, the opportunity to be heard when one claims a legal right, and not just the right to a discharge in bankruptcy.[50]

Several further criticisms can be made of Justice Blackmun's approach to the question of whether the right to bankruptcy is a fundamental right. First, assuming *arguendo* that divorce is fundamentally more important than bankruptcy, it does not necessarily follow that an indigent should be denied access to the bankruptcy court. Nowhere in *Boddie* was the need for a divorce pinpointed as the "minimum" fundamental interest protected by the due process clause. Second, the majority's argument that dissolution of the marital relationship is more important than the right to a discharge in bankruptcy is unconvincing. Historically, courts and legislatures have not felt that the right to a divorce was particularly important.[51] Why divorce has assumed such a constitutional role whereas the right to gain a discharge in bankruptcy is denied equal importance is not apparent. This question is left unanswered in *Kras*.

The majority also thought that the state had no monopoly over the dissolution of the creditor-debtor relationship.

> However unrealistic the remedy may be in a particular situation, a debtor . . . may adjust his debts by negotiated agreement. . . . At times the happy passage of the applicable limitation period, or other acceptable creditor arrangement, will provide the answer.[52]

This argument offers little solace to the indigent totally without assets.

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49. *Id.* at ——, 93 S. Ct. at 642-43.
50. *Id.* at ——, 93 S. Ct. at 646 (Marshall, J., dissenting).
51. [I]t is a difficult transition to make between the seemingly fundamental right to form basic family associations and the right to disassociate and break up the family relationship. The family break-up has been declared against public policy by the courts.

Comment, *In Forma Pauperis and the Civil Litigant*, 19 CATH. U. OF AM. L. REV. 191, 213 (1969). *See also* Foster, *Marriage: A "Basic Civil Right of Man,"* 37 FORD. L. REV. 51, 77 (1968).

52. —— U.S. at ——, 93 S. Ct. at 638.

Such a debtor has nothing to offer a creditor in a voluntary composition. As Justice Stewart observed, "[the creditors'] only hope is that eventually [the debtor] might make enough income for them to attach."[53] Although, in general, there are acceptable alternatives to a discharge in bankruptcy, they are useless for an assetless debtor like Kras. Thus the Court in *Kras* was evidently satisfied with "unrealistic" alternatives in these types of situations. Surely, Justice Harlan would not have pressed the monopolization point to this extreme.

Finally, since the Court found no fundamental right involved, the majority utilized a "rational basis" test and concluded that the filing fee requirement was reasonable in that it served to make the bankruptcy system self-financing and the installment payments were well within the means of the individual indigent.[54] Justice Marshall bitterly disputed this latter contention, stating that even minimal installment payments of $1.92 per week were beyond the financial reach of the "desperately poor."[55]

Effects of Kras: Is Boddie Dead?

In an extensive per curium opinion handed down since *Kras,* the Supreme Court, again divided five to four,[56] cast further light on the problem of judicial access. In *Ortwein v. Schwab*[57] the *Kras* majority reaffirmed *Kras* in holding that a state court is not required to waive its filing fee requirement in an action challenging the reduction of an indigent's welfare benefits. The majority concluded that the availability of an administrative forum was an acceptable alternative to the judicial process.[58] Thus the court refused to recognize a fundamental right to the judicial process, reasoning that due process does not even require that a state maintain an appellate system.[59] In response, two of the dissenting Justices offered a variation of the due process argument. Justices Douglas[60] and Marshall[61] argued that due process required a judicial decision after an adverse administrative action on a question of law. Justice Douglas criticised the majority, saying that

> . . . we are concerned in this case not with appellate review of a judicial determination, but with initial access to the courts

53. *Id.* at ——, 93 S. Ct. at 643.
54. *Id.* at ——, 93 S. Ct. at 638-40.
55. *Id.* at ——, 93 S. Ct. at 645.
56. The split was identical to that in *Kras* with Justices White, Blackmun, Powell, Rehnquist, and Chief Justice Burger in the majority and Justices Douglas, Brennan, Stewart, and Marshall in dissent.
57. 41 U.S.L.W. 3473 (U.S. Mar. 5, 1973).
58. *Id.* at 344.
59. *Id.*
60. *Id.*
61. *Id.* at 3474-75.

> for review of an adverse administrative determination . . . [T]he majority sub silentio answers a question this court studiously has avoided—whether there is a due process right to judicial review.[62]

The threshold questions in both *Boddie* and *Kras* as well as in *Ortwein* were whether the particular issue sought to be litigated concerned a fundamental right and whether the state had a monopoly over the means for resolving the dispute. In *Boddie*, the Court found both of these elements present, whereas in *Kras* the Court concluded that neither existed. It thus remains uncertain whether the finding of a fundamental right alone would be sufficient to strike down fee and cost barriers under due process analysis. After *Kras*, access to the judicial process cannot be considered a fundamental right. However, if the particular issue sought to be adjudicated does touch a fundamental right, and the state monopolizes the means of resolving the dispute, then further inquiry into what costs and fees other than initial filing fees are included under the *Boddie* rationale is relevant.

Initial filing fees are clearly within the scope of the *Boddie* decision. Yet all costs and fees of litigation may not be covered. A theoretical objection might be made to extending due process analysis to include certain payments made to third parties. In *Lester v. Lester*,[63] in which *Dorsey v. City of New York*[64] and *Hotel Martha Washington Management Co. v. Swinich*[65] were held not to apply to expenses incurred for a stenographic transcript of a deposition, the court stated that

> since the failure of the state to provide a poor litigant with a free transcript of a deposition taken before the trial in no way denies him access to the courts, the *Boddie* decision is not directly applicable.[66]

The court suggested that alternative means for obtaining the necessary information were available, such as tape recordings and attorney's notes.[67] However, the court conceded that if these alternatives proved ineffective, state payment of expenses would be necessary "to guarantee an indigent party *effective* as well as equal access to the courts."[68] Two

62. *Id.* at 3474.
63. 69 Misc. 2d 528, 330 N.Y.S.2d 190 (Sup. Ct. 1972).
64. 66 Misc. 2d 464, 321 N.Y.S.2d 129 (Sup. Ct. 1971). *See* text accompanying notes 32-33 *supra*.
65. 66 Misc. 2d 833, 322 N.Y.S.2d 139 (App. T. 1971). *See* text accompanying notes 36-38 *supra*.
66. 69 Misc. 2d at 531, 330 N.Y.S.2d at 194.
67. *Id.*
68. *Id.* at 532, 330 N.Y.S.2d at 194.

criteria for deciding when a particular expense must be paid by the state are suggested by this case. First, is the particular expense "reasonably needed to protect or assert the right"?[69] Secondly, are there other less expensive means available?

Other factors can also be suggested. Is the expense *de minimus*? Will the particular expense tend to deter indigents from bringing the original suit?[70] Finally, is there a legitimate purpose served by the cost or fee requirement?[71]

A second objection to extending *Boddie* to auxiliary expenses owed to third parties is that these expenses are not directly imposed by the state but are a product of the market system.[72] These costs do not deprive the indigent of the right to be heard on his claim, but only hinder him in presenting his best case. However, this argument ignores the fact that the paramount consideration after *Boddie* and *Kras* is the right to fully adjudicate a particular claim in order to protect a specific fundamental interest, rather than merely the right to be heard on the claim. These other expenses may be just as likely to frustrate the enjoyment of the fundamental right as the initial filing fee. Moreover, this second objection also obscures the fact that the state maintains a system with built-in cost factors which tend to give an advantage to wealthy parties. The purpose of the judicial system is defeated just as effectively as in the filing fee instance if the wealth of the parties dictates the outcome of litigation.

Boddie and *Kras* may also have importance with regard to fees totally outside of the judicial arena. If marriage is indeed a fundamental right, can a state require a fee for the marriage license?[73] If such a fee is constitutional then the anomolous result is that the right to divorce is pro-

69. Goodpaster, *The Integration of Equal Protection, Due Process Standards, and the Indigent's Right of Free Access to the Courts,* 56 IOWA L. REV. 223, 264 (1970) [hereinafter cited as Goodpaster].

70. The test should be whether . . . a fundamental right or important interest will be effectively lost if allowed to be litigated only when the holder of the right pays the cost associated with the litigation.

Goodpaster, *supra* note 69, at 263-64.

71. *See* Lindsey v. Normet, 405 U.S. 56 (1972). *But cf.* Spring v. Little, 50 Ill. 2d 351, 280 N.E.2d 208 (1972). In *Lindsey* the Court struck down a state statute requiring that a double bond be posted by tenants appealing an eviction order:

> While a state may properly take steps to insure that an appellant post adequate security before an appeal to preserve the property at issue, to guard a damage award already made, or to insure a landlord against loss of rent if the tenant remains in possession, the double-bond requirement here does not effectuate these purposes. . . .

405 U.S. at 77.

72. *See* Michelman, *Foreward: On Protecting the Poor through the Fourteenth Amendment,* 83 HARV. L. REV. 7, 19-33 (1969).

73. *Cf.* Anderson v. Anderson, 1 POV. L. RPTR. ¶ 662.48, at 1598 (Ind. Cir. Ct. May 27, 1971) (*Boddie* was held not to apply to waiver of costs of the preceding divorce action which were required to be paid before a marriage license could be issued)..

tected but the right to marry is not. Drivers licenses, permits to carry a weapon, and security deposits for utility companies[74] also arguably affect fundamental rights.

CONCLUSION

While *Kras* makes it clear that access to the judicial system is not, by itself, a fundamental right, *Boddie* nevertheless retains precedential value for allowing wider and better indigent participation within the judicial process. Although *Kras* has foreclosed the extension of *Boddie* into the bankruptcy field, other areas besides divorce still exist where both a fundamental interest and state monopolization may be found. Once these two features are found, the numerous fees pyramided upon the filing fee will be suspect under the *Boddie* rationale.

Certain civil suits brought by the state against indigent defendants are perhaps the most pressing cases demanding the extension of *Boddie*. These include civil contempt proceedings, condemnation suits, and child neglect actions, all of which concern rights that would most likely be found fundamental. When the state can capitalize upon the indigency of a defendant, the "fairness" element of the due process doctrine seems particularly violated.

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74. *See* Note, *Cash Deposits—Burdens and Barriers in Access to Utility Services*, 7 HARV. CIV. RIGHTS—CIV. LIB. L. REV. 630, 644 (1972).