Nebraska Law Review

Volume 51 | Issue 3 Article 8

1972

In Forma Pauperis: *Boddie v. Connecticut* and the Nebraska Statute

Dennis J. Burnett
University of Nebraska College of Law

Comment

IN FORMA PAUPERIS: *BODDIE v. CONNECTICUT* AND THE NEBRASKA STATUTE

I. INTRODUCTION

An indigent, even though he may have suffered the most grievous injuries and have the most obvious right to redress for his injuries, may not be able to enter the court system. Even when an indigent can find an attorney to handle the case, the filing fee and the service of process fee often stand as insurmountable barriers which effectively bar the indigent from the court room. This, however, is no longer the plight of the indigent in Nebraska due to the recent passage of a comprehensive *in forma pauperis* statute.[1] The passage of this *in forma pauperis* statute was prompted in part by the recent expansion of constitutional *in forma pauperis.* An understanding of constitutional *in forma pauperis* is therefore essential for an understanding of the Nebraska statute.

II. BACKGROUND

The constitutional right to proceed *in forma pauperis,* founded on the equal protection and due process clauses of the Fourteenth Amendment, was originally limited to felony defendants,[2] but as the case law grew, its application expanded from felony to all criminal proceedings.[3] Because this concept had not been applied to civil cases the courts began using a civil-criminal distinction to determine when a constitutional right of *in forma pauperis* existed.[4] This civil-criminal distinction became blurred as the interpretation of the Fourteenth Amendment was broadened to include *coram nobis*[5] and *habeus corpus*[6] proceedings. The concept of a criminal action in the civil-criminal distinction was thus expanded to include any action in which a person's freedom from incarceration is the primary subject. Nevertheless, the civil-criminal distinction has been discredited by the extension of *in forma pauperis* in the case of *Boddie v. Connecticut.*[7]

---

1 L.B. 1120, 82d Neb. Leg. Sess., 2d Sess. (1972). L.B. 1120 was passed with an emergency clause by a vote of 46-0-3 on March 21, 1972. It was signed into law on March 22, 1972 by Governor J. James Exon.

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

3 Mayer v. City of Chicago, 92 S. Ct. 410 (1971).

4 Brown v. Chastain, 416 F.2d 1012, 1026 (5th Cir. 1969).

5 Lane v. Brown, 372 U.S. 477 (1963).

6 Gardner v. California, 393 U.S. 367 (1969).

7 401 U.S. 371 (1971).

III. *BODDIE v. CONNECTICUT*

Mrs. Boddie sought a divorce in Connecticut. Her attempts to file and to obtain service of process were frustrated by her inability to pay the statutory fee. The state court would not waive either the filing or the service of process fee because Connecticut did not have an *in forma pauperis* statute. Mrs. Boddie then brought suit in federal court seeking a judgment declaring such filing and service of process fee statutes unconstitutional as applied to indigents in divorce cases. She also sought injunctive relief against the state officials.[8]

Following an adverse decision[9] Mrs. Boddie perfected an appeal to the United States Supreme Court. The Court in a majority opinion by Justice Harlan held that the combination of (1) the "fundamental"[10] importance of divorce and (2) the resort to a court as an "exclusive precondition"[11] to the adjustment of this interest raises the due process right to be heard. State action, absent a countervailing and overriding interest, denying a person access to its courts solely because of inability to pay is a denial of the right to be heard and is therefore unconstitutional.[12]

There are three subjects which need to be examined more fully in light of the holding in *Boddie*: (1) civil cases; (2) indigency; (3) costs.

A. Civil Cases

Justice Harlan started with the proposition that the due process clause of the Fourteenth Amendment guarantees a person who is forced into court a "meaningful opportunity to be heard."[13] The defendant in any type of action must be given an opportunity to be heard because he is forced to defend his interests in court.[14] Plaintiffs are not usually deemed to possess the protection of the due process clause grant of an opportunity to be heard because there are alternatives to invocation of the court system for settlement of private disputes.[15] However, the plaintiff in an action for divorce is in a position similar to a defendant because of the state monopoly over the means of marriage dissolution.

---

8 286 F. Supp. 968 (D. Conn. 1968).
9 *Id.* at 974.
10 401 U.S. at 383 (1971).
11 *Id.*
12 *Id.* at 374.
13 *Id.* at 377.
14 *Id.*
15 *Id.* at 375.

> Thus, although they assert here due process rights as would-be plaintiffs, we think appellant's plight, because resort to the state courts is the only avenue to dissolution of their marriages, is akin to that of defendants faced with exclusion from the only forum effectively empowered to settle their disputes. 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. For both groups this process is not only the paramount dispute-settlement technique, but, in fact, the only available one.[16]

Justice Harlan labeled this as an "exclusive precondition."[17] Because of this and the "fundamental"[18] nature of divorce, the due process right to be heard extends to the divorce plaintiff.

However, Justice Brennan in a concurring opinion questioned the validity of the distinction between the plaintiff in a divorce proceeding and a plaintiff in other civil actions.

> A State has an ultimate monopoly of all judicial process and attendant enforcement machinery. As a practical matter, if disputes cannot be successfully settled between the parties, the court system is usually [quoting the majority opinion] "the only forum effectively empowered to settle their disputes. 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."[19]

Justice Brennan goes on to state that "The right to be heard in some way at some time extends to all proceedings entertained by courts. The possible distinctions suggested by the Court today will not withstand analysis."[20]

Justice Douglas, in a concurring opinion, felt that the case should have been decided under the equal protection clause which bans any invidious discrimination based on poverty.[21] Justice Douglas also objected to the notion that due process may be premised upon a notion of "fundamental" importance. He felt that this would be a revival of the highly subjective due process interpretation which has been discarded.[22]

Justice Black, dissenting in this and a subsequent opinion,[23] felt that the Court was overruling *Cohen v. Beneficial Industrial Loan*

---

[16] *Id.* at 376-77.
[17] *Id.* at 383.
[18] *Id.*
[19] *Id.* at 387.
[20] *Id.* at 387-88.
[21] *Id.* at 385.
[22] *Id.* at 384.
[23] Meltzer v. C. Buck & Co., 402 U.S. 954 (1971) (order of the Supreme Court after the *Boddie* decision denying certiorari in eight cases seeking relief on similar grounds).

Corp.[24] and thereby doing away with the civil-criminal distinction altogether. Without the civil-criminal distinction there is no reasonable classification, and therefore all civil cases come under the protection of the due process clause. Justice Black reasoned that a divorce could not be distinguished from other civil actions because it involved a "fundamental" interest.

> Society generally places a high value on marriage and a low value on the right to divorce. And since *Boddie* held that the right to divorce was "fundamental," I can only conclude that almost every other kind of legally enforceable right is also fundamental to our society.[25]

Black also reasoned that the " 'exclusiveness' of the judicial process as a remedy is no limitation at all. The States and the Federal Government hold the ultimate power of enforcement in almost every dispute."[26]

The power of the criticisms by Justice Black and Justice Douglas of the "fundamental" interest requirement cannot be denied. Not only is such a requirement arbitrary and lacking in any possible constitutional precision,[27] but it is also contrary to prior holdings of the court.[28] The fundamental interest requirement should not stand.

The "exclusive precondition" requirement must also be criticised for vagueness and lack of clarity. Justice Harlan seems to say in his opinion that when no available "recognized, effective"[29] alternative means of private dispute settlement other than the court system remain, then the indigent plaintiff has a right to be heard. As Justice Brennan and Justice Black have pointed out, almost every case would meet these criteria. On the other hand, a possible construction of "exclusive precondition" would be that the formality of judicial approval was mandatory for the resolution of that particular problem.[30] Such a construction would not only be an

---

[24] 337 U.S. 541 (1949).
[25] 402 U.S. 954, 957-58 (1971).
[26] *Id.* at 956.
[27] 401 U.S. 371, 393 (1971).
[28] *Id.* at 384.
[29] "Recognized" in the context of the majority opinion appears to mean that the method of private dispute settlement must be a legitimate means provided by law. "Effective" would seem to mean that the method of dispute settlement would give a result acceptable to both parties or be final and binding on both parties.
[30] "Even if 'exclusive precondition' meant that the formality of judicial approval was mandatory, the *Boddie* rationale would go far beyond divorce. Citizens generally must resort to courts for adoptions, to probate a will, to obtain a discharge in bankruptcy, for child custody

arbitrary enforcement of due process but also contrary to the language in Justice Harlan's opinion. Unfortunately it does not appear which construction the court is using. Nevertheless, *in form pauperis* has been expanding under the *Boddie* doctrine.[31]

B. INDIGENCY

In *Boddie v. Connecticut* there was no dispute as to Mrs. Boddie's inability to pay the filing and service of process fees.[32] The Court, therefore, did not have to decide the issue. Unfortunately, it appears that the Supreme Court has never defined indigency or inability to pay.[33] The federal courts have developed a definition of inability to pay or indigency for the purpose of determining a criminal defendant's due process right to be heard. The court in *Bramlett v. Peterson*[34] stated a test for determing indigency: "A finding of inability to pay counsel must be made if at the time of the determination the accused is substantially inhibited by a lack of means."[35] The concern is that an assertion of a right or claim will be inhibited by the fee or cost. If the assertion of the right or claim is substantially inhibited, then the fee or cost must be waived. What is a substantial inhibition of an assertion of a right?

---

determinations, to clear title to land *in rem*, to obtain an adjudication of incompetency, to change a name, and other matters. It would be extremely arbitrary to limit *Boddie* to these particular kinds of disputes." 402 U.S. 954, 957 n. 2 (1971) (Black, J., dissenting).

31 *In forma pauperis* was extended to hearings on bankruptcy under the *Boddie* doctrine in *In re* Kras, 331 F. Supp. 1207 (E.D.N.Y. 1971) and *In re* Naron, 334 F. Supp. 1150 (D. Ore. 1971). *But see In re* Garland, 428 F.2d 1185 (1st Cir. 1970).

32 401 U.S. at 372.

33 "A difficulty we encounter at the outset is defining indigence. The Supreme Court has not to our knowledge ever defined the term, although the court has used it in literally hundreds of decisions. It is true that the Supreme Court and numerous lower courts have construed the meaning of indigence as used in the federal *in forma pauperis* statute, . . . and in the Criminal Justice Act of 1964, . . . but these cases are not much help in defining indigence in the constitutional sense. . . . In only one case we have found has the Supreme Court ruled that a particular petitioner was indigent in the constitutional sense and therefore entitled to proceed *in forma pauperis* in a criminal case. Seals v. Alabama, 380 U.S. 254, . . . (1965) . . . . The court's five-line *per curiam* decision states a holding but does not give any reasons in support of it." *In re* Smith, 323 F. Supp. 1082, 1091 (D. Colo. 1971).

34 307 F. Supp. 1311 (M.D. Fla. 1969).

35 *Id.* at 1324; *See* Whittington v. Gaither, 272 F. Supp. 507, 512 (N.D. Tex. 1967).

The court in *Ivey v. Holman*,[36] in determining the substantial inhibition of an assertion of a right, stated: "The general principles therein stated [*Adkins v. E. I. Du Pont de Nemours Co.*[37]] with reference to indigency are applicable upon the question of a defendant being entitled to the appointment of counsel."[38] In the *Adkins* case the Supreme Court construed the federal *in forma pauperis* statute and developed a working definition of indigency for its application: the indigent does not have to be impoverished to file *in forma pauperis;* he must only show that he cannot pay the costs and at the same time still provide himself with the necessities of life.[39]

A similar definition of inability to pay was reached by the court in *In re Smith*.[40] The court set out a constitutional definition of indigency for the purpose of determining the due process and equal protection rights of persons filing in bankruptcy.

> [W]e think it fair to state that a person who cannot afford to live from day to day and also pay the cost of a court filing fee is indigent. . . . To require that a person seeking access to court be so destitute as to be unable to maintain himself from day to day would deny access as surely as does the filing fee requirement.[41]

Maintenance from day to day would seem to mean that the affiant would not have to miss a rent payment and risk eviction, mortgage a home,[42] or sell meager possessions (grave site, automobile or household furnishings).[43] "The public would not be profited if relieved of paying costs of a particular litigation only to have imposed on it the expense of supporting the person thereby made an object of public support."[44]

Taken together these cases provide a constitutional minimum standard: if, at the time when the plaintiff attempts to assert a right or claim, the amount of the fee or cost would deprive him or his family of any of their necessities or otherwise make him unable to maintain himself or his family from day to day, then the fee or cost is a substantial inhibition of his right to be heard and must be set aside.

---

[36] 222 F. Supp. 869 (N.D. Ala. 1963).

[37] 335 U.S. 331 (1948).

[38] 222 F. Supp. 869, 870 n. 2 (N.D. Ala. 1963).

[39] 335 U.S. at 339 (1948).

[40] 323 F. Supp. 1082 (D. Colo. 1971).

[41] *Id.* at 1092.

[42] Adkins v. E. I. du Pont de Nemours Co., 335 U.S. 331, 335 (1948).

[43] *In re* Smith, 323 F. Supp. 1082, 1092 (D. Colo. 1971).

[44] Adkins v. E. I. du Pont de Nemours Co., 335 U.S. 331, 339 (1948).

C. Costs

There are essentially two types of costs: (1) the expenses of litigation payable to a public officer, and (2) the expenses of litigation payable to persons other than public officers. The court has the power to control public servants and may therefore enjoin a clerk, sheriff or court reporter from collecting costs from an indigent where there is a conflict with due process.[45] But the court faces a more difficult problem with the second category of costs. Courts do not have the power to order a newspaper to print a service of process without compensation or to compel private service associations to perform without charge.[46] On the other hand, the expenditure of public monies is considered to be the exclusive domain of the legislature.[47] Generally, courts are not considered to be empowered to order expenditures without special legislative sanction.[48] It is equally clear from *Boddie* that any requirement for a cost of the second category must be waived by the state when it is in conflict with the indigent plaintiff's right to be heard. In *Boddie* the plaintiff had to at least be given the opportunity to perfect service by registered mail and posted notice.[49] But without a legislative appropriation the court can go no further than to waive the public officers' cost requirement.[50]

IV. NEBRASKA'S *IN FORMA PAUPERIS* STATUTE

Since it had been recognized that constitutional *in forma pauperis* was expanding to civil cases as well as criminal cases, a comprehensive *in forma pauperis* statute was drafted for presentation to the Nebraska Unicameral.[51] The statute which has been passed is designed to cover all types of cases before all courts in the State of Nebraska, conform to the constitutional standards of indigency

---

45 Jeffreys v. Jeffreys, 58 Misc. 2d 1045, 296 N.Y.S.2d 74 (Sup. Ct. 1968).

46 U.S. Const. amend. V: "No person shall . . . be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation."

47 Knowlton v. Moore, 178 U.S. 41, 109 (1900).

48 *In re* Karren, 276 Minn. 554, 150 N.W.2d 24 (1967).

49 401 U.S. 371, 382 (1971).

50 Contrary to Black's opinion that all costs, including attorney fees, must be provided, there is a difference between telling a state that it cannot convict a person unless the elements of an adequate defense are provided and telling a state to pay for publication in a newspaper. The court can let a criminal go free, but it cannot force a legislature to appropriate money.

51 L.B. 1120, 82d Neb. Leg. Sess., 2d Sess. (1972) was originally drafted by the Lincoln Legal Services for presentation to the Judiciary Committee of the Nebraska Legislature.

developed in case law,[52] and cover all necessary costs. The Nebraska statute is set out below by individual section with corresponding explanatory text[53] and criticism.

LEGISLATIVE BILL 1120[54]

> Section 1. Any court of the State of Nebraska, or of any county or municipality shall authorize the commencement, prosecution or defense of any suit, action or proceeding, civil or criminal, or appeal therein, without prepayment of fees and costs or security, by a person who makes an affidavit that he is unable to pay such costs or give security. Such affidavit shall state the nature of the action, defense or appeal and affiant's belief that he is entitled to redress.
>
> An appeal may not be taken in forma pauperis if the trial court certifies in writing that it is not taken in good faith.

Section one prescribes the method for petitioning the court for authorization to proceed *in forma pauperis*. The comparable section in the federal *in forma pauperis* statute has been construed by the Supreme Court to mean that when the affidavit is in the language of the statute it should ordinarily be accepted unless questioned by the opposing party or perceived by the judge to be a flagrant misrepresentation.[55] The general affidavit serves two purposes: (1) procedurally it lightens the burden on the court because it is unnecessary to have a hearing on every affidavit; (2) it avoids arbitrary and borderline decisions which deny worthy affiants the right to proceed.[56] The use of a general affidavit tends to insure liberality as well as uniformity of treatment for all affiants.

There may be some question as to whether a bond is covered under the provisions of section one. However, a bond is a type of security and should be covered by this section.

The statute also commendably takes the further step, possibly not required by the due process or equal protection clauses, of providing an appeal *in forma pauperis*. The second paragraph of

---

[52] *Supra* notes 32-44 and accompanying text.

[53] A similar explanatory text was prepared by the author of this note for the use of the Judiciary Committee of the Nebraska Legislature when L.B. 1120 was introduced. Any criticism has been subsequently added.

[54] The primary source used in drafting this statute was the federal *in forma pauperis* statute: 28 U.S.C. § 1915 (1964).

[55] Adkins v. E. I. du Pont de Nemours Co., 335 U.S. 331 (1948); Gift Stars, Inc. v. Alexander, 245 F. Supp. 697 (S.D.N.Y. 1965).

[56] Adkins v. E. I. du Pont de Nemours Co., 335 U.S. 331 (1948). *See* Note, *Poverty In Federal In Forma Pauperis Proceedings and as a Requirement for Legal Aid,* 1950 WIS. L. REV. 734.

section one reduces the possibility of an appeal for improper purposes at the expense of the public.[57]

> Section 2. In any civil or criminal case the court shall, upon filing of a like affidavit, direct the responsible officer of the court to issue and serve all the necessary writs, process and proceedings, and perform all such duties without charge.

Section two is a codification of the inherent power of the court to control its officers.[58] This section applies mainly to clerks, sheriffs and court reporters. However, special compensation is made for the preparation of transcripts in section six of this statute.

> Section 3. In any civil or criminal case the court shall, upon the filing of a like affidavit, direct that the expense of process by publication, if such process is required by the court, be paid by the county in the same manner as other claims are paid.

Section three is intended to give the court the option to substitute a cheaper service of process where applicable. Payment for service of process by publication would at least be made where other means of service prove to be unsuccessful.

> Section 4. In any civil or criminal case the court may, upon the filing of a like affidavit, order witnesses to be subpoenaed, if the court finds that they have evidence material and necessary to the case, and that they are within the judicial district in which the court is held, or within one hundred miles of the place of trial. In such case the process and the fees of the witnesses shall be paid by the county in the same manner as other claims are paid.

Section four expressly states two conditions that have to be met before a witness may be called. The first condition is that the evidence the witness would give is "material and necessary." If other sufficient evidence is available to prove the fact then the witness may not be called by the court. Secondly, the evidence to be presented must be essential to the development of the case. These conditions insure that only the most necessary expenditures will be made. Surely there are enough safeguards in this section to make it unnecessary to give a judge the discretionary power to refuse to call the witness. It may be of no practical difference since it would probably be an abuse of discretion to refuse to call a witness who meets the requirements of this section. The provision for restriction of the area[59] from which a witness may be called

---

[57] *But see* Eskridge v. Washington, 357 U.S. 214, 215 (1958) where in a criminal appeal a statute providing for a transcript "if in his [the judge's] opinion justice will thereby be promoted" was struck down.

[58] *See* note 45 and accompanying text, *supra.*

[59] The source for this limitation is COLO. REV. STAT. ANN. § 39-7-29 (1963).

may prove to be too restrictive. In any case, that provision should be interpreted to mean that a witness within either area may be called. This would allow witnesses to be called from within large judicial districts and from other judicial districts if within one hundred miles of the forum district. To avoid any undue hardship the "place of trial" could be interpreted to include the entire judicial district, not merely the site of the courthouse.

> Section 5. In any civil or criminal case the court shall, upon filing of a like affidavit, direct that the expenses of printing the record on appeal, if such printing is required by the appellate court, be paid by the county in the same manner as other claims are paid.

Section five encourages substitutes for printing of the record on appeal. If other alternatives are not made available then the printing will be paid.[60]

> Section 6. In any civil or criminal case the court shall, upon filing of a like affidavit, order transcripts to be furnished without cost if the suit or appeal is not frivolous, but presents a substantial question, and if the transcript is needed to prepare, present or decide the issue presented by the suit or appeal. Such costs shall be paid by the county in the same manner as other claims are paid.[61]

Section six allows the transcript to be furnished only when a substantial legal question is involved, and the issue cannot be presented without the transcript. This prevents unnecessary preparation of transcripts at public expense.

> Section 7. In any civil or criminal case on appeal, upon the filing of a like affidavit, the court shall direct that the expense of printing of the appellate briefs, if such printing is required by the court, be paid by the county in the same manner as other claims are paid.
>
> Section 8. The court may dismiss the case or permit the affiant to proceed upon payment of costs if the allegation of poverty is untrue, or if the court is satisfied that the action is frivolous or malicious.

Section eight is primarily intended to prevent abuse of the *in forma pauperis* provision. The discretionary word "may" is used in order to allow for compensation of non-substantive errors in the allegation of poverty where it appears that the affiant would nevertheless be entitled to proceed *in forma pauperis* under section one of this act. The term "frivolous" is used in the sense that the court should examine merely whether the claim states a cause of action. The case should be dismissed only if it is so frivolous that

---

[60] On the subject of alternatives to transcripts, bills of exceptions and printing of the record on appeal see Draper v. Washington, 372 U.S. 487 (1963).

[61] This section was adopted from 28 U.S.C. § 753(f) (1965).

it would be dismissed in the case of a non-indigent litigant.[62] However, when the court finds that the affiant is not entitled to proceed *in forma pauperis* under section one, it has the discretion of: (1) dismissing the case and forcing the plaintiff to start over; or (2) allowing the case to be continued after payment of costs. In determining which of these alternatives to use the court should consider the time and costs already incurred. Thus a case nearing judgment should not be as readily dismissed as a case in its formative stages.

> Section 9. In the event any person prosecutes or defends an action or proceeding in forma pauperis successfully, any and all cost deferred by the court under the provisions of this act shall be first satisfied out of any money paid in satisfaction of judgment.

Section ten provides for cost recoupment when the affiant is successful. This section does leave one important question unanswered. Are the costs paid by the county taxable to the losing party as in other actions? It would seem logical that those costs paid by the county which are normally taxable to the losing party should be so taxed. Otherwise, a heavier burden would be placed upon a successful indigent than on other litigants. Those costs normally not awarded should then be satisfied out of any judgment. This construction of the statute would leave the litigants in the same position that they now occupy at the end of trial under our cost system.

> Section 10. Anyone who fraudulently invokes the privileges of this act shall be guilty of perjury and shall, upon conviction thereof, be punished as provided in section 28-701, Reissue Revised Statutes of Nebraska, 1943.
>
> Section 11. Since an emergency exists, this act shall be in full force and take effect, from and after its passage and approval, according to law.

V. CONCLUSION

Nebraska has enacted one of the most comprehensive *in forma pauperis* provisions in the United States. It covers costs in all proceedings before all courts in the State of Nebraska, with only one notable exception—attorney fees. Hopefully this gap will eventually be filled. In the meantime, Nebraska can be proud that it has taken the initiative to insure that all persons, regardless of wealth, are indeed equal before the law.

Dennis J. Burnett '73

---

[62] Ellis v. United States, 356 U.S. 674 (1958). *See* Note, *In Forma Pauperis and the Civil Litigant,* 19 CATH. U. L. REV. 191, 195 (1965).