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In Re Smiley

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IN RE SMILEY

CONSTITUTIONAL LAW—*Due Process Right to Counsel—Indigents do not have the right to appointed counsel in matrimonial actions.* 36 N.Y.2d 433, 330 N.E.2d 53, 369 N.Y.S.2d 87 (1975).

> The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel.[1]

Must an indigent in a matrimonial action be provided with counsel in order to have an effective opportunity to be heard as required by the due process clause of the fourteenth amendment? The New York State Court of Appeals, in *In re Smiley*,[2] has answered in the negative. This decision will operate to dramatically limit the opportunities of poor people to participate meaningfully in civil litigation.

The appellants in this case, Rhoda Smiley and Betty Monroe, were originally represented by Cornell Legal Aid. Legal Aid, however, moved for permission to withdraw as counsel because of conflicts of interest.[3] The trial court permitted the appellants to proceed as poor persons under section 1102(a) of the New York Civil Procedure Law and Rules,[4] appointed legal counsel, and directed that counsel be paid by the county. Upon an appeal brought by the county, the appellate division reversed, and held that although the appellees had an absolute right to counsel, the trial court was without authority to require the county to provide compensation.[5] In reviewing this case, the court of appeals thus had to resolve two distinct, but related issues. First, is there a constitutional right to counsel in a matrimonial action? Second, if there is such a right, does a court have the power to direct that money be paid from the public treasury to assure such representation?

Criminal defendants charged with conduct which might lead to a jail sentence have a judicially recognized right to counsel.[6] This right arises long before trial[7] and continues through to parole

1. Powell v. Alabama, 287 U.S. 45, 68-69 (1932).
2. 36 N.Y.2d 433, 330 N.E.2d 53, 369 N.Y.S.2d 87 (1975).
3. In addition to the appellants, Cornell Legal Aid represented parties who were either co-respondents or major witnesses in the action. *In re* Smiley, 36 N.Y.2d 433, 446, 330 N.E.2d 53, 61, 369 N.Y.S.2d 87, 98 (1975) (Fuchsberg, J., dissenting).
4. N.Y.C.P.L.R. § 1102(a) (McKinney 1963).
5. *In re* Smiley, 45 App. Div. 2d 785, 356 N.Y.S.2d 733 (3d Dep't 1974).
6. Argersinger v. Hamlin, 407 U.S. 25 (1972).
7. Miranda v. Arizona, 384 U.S. 436 (1966).

revocation hearings.[8] Although a civil litigant often stands to lose as much or more than a criminal defendant, the right to counsel has historically been found to be inapplicable where the court action did not contemplate the imposition of criminal sanctions.[9] An indigent might have been required to appear before a tribunal which would resolve disputes concerning his or her basic rights relating to homeland,[10] the custody of a child,[11] or the disposition of property[12] without the advice of one trained in the craft of safeguarding such rights—an attorney.

Apparent in recent cases, however, is a growing concern for the indigent's right to counsel in quasi-criminal and civil proceedings.[13] Certain jurisdictions have declared that indigents have a right to appointed counsel in both civil contempt[14] and civil commitment[15] proceedings. Other courts have held that parents have a right to counsel in custody,[16] dependency,[17] and neglect[18] hearings. Moreover, the United States Supreme Court, in a series of decisons that parallel the genesis of the right to counsel in criminal cases,[19] has given every indication that a constitutional man-

8. Mempa v. Rhay, 389 U.S. 128 (1967).

9. *See generally* Comment, *The Indigent's Right to Counsel in Civil Cases*, 76 YALE L.J. 545 (1967); Note, *The Right to Counsel in Civil Litigation*, 66 COLUM. L. REV. 1322 (1966).

10. *See, e.g.*, Japanese Immigrant Case, 189 U.S. 86 (1903); Ungar v. Seaman, 4 F.2d 80, 82 (8th Cir. 1924). For a good discussion of the right to counsel at various stages of deportation proceedings, see Gordon, *Right to Counsel in Immigration Proceedings*, 45 MINN. L. REV. 875 (1961).

11. *See, e.g.*, People v. Dotson, 46 Cal. 2d 891, 299 P.2d 875 (1956).

12. *See, e.g.*, Sandoval v. Rattikin, 395 S.W.2d 889 (Tex. Civ. App. 1965), *cert. denied*, 385 U.S. 901 (1966).

13. *See, e.g., In re* Gault, 387 U.S. 1 (1967) (the right to counsel is applicable to juvenile delinquency hearings notwithstanding the fact that such proceedings are nominally civil in nature).

14. United States v. Sun Kung Kang, 468 F.2d 1368 (9th Cir. 1972); Otton v. Zaborac, 525 P.2d 537 (Alaska 1974).

15. Heryford v. Parker, 396 F.2d 393 (10th Cir. 1968); Lessard v. Schmidt, 349 F. Supp. 1078 (E.D. Wis. 1972), *vacated and remanded*, 414 U.S. 473 (1974), *order reissued*, 379 F. Supp. 1376 (E.D. Wis. 1974); People *ex rel.* Rogers v. Stanley, 17 N.Y.2d 256, 217 N.E.2d 636, 270 N.Y.S.2d 573 (1966); People v. Collman, 9 Ore. App. 476, 497 P.2d 1233 (1972).

16. Lemaster v. Oakley, 203 S.E.2d 140 (W. Va. 1974).

17. Cleaver v. Wilcox, 499 F.2d 940 (9th Cir. 1974).

18. People v. Brown, 49 Mich. App. 358, 212 N.W.2d 55 (1973); Friensz v. Caha, 190 Neb. 347, 208 N.W.2d 259 (1973); *In re* Ella B., 30 N.Y.2d 352, 285 N.E.2d 288, 334 N.Y.S.2d 133 (1972); State v. Jamison, 251 Ore. 114, 444 P.2d 15 (1968).

19. In the criminal area, the Supreme Court first ruled that an indigent could not be denied the right to be effectively heard, Powell v. Alabama, 287 U.S. 45 (1932); and subsequently held that court fees could not be used to block access to the courts, Griffin

date to provide counsel to indigents in matrimonial actions is not long in coming.

In *Boddie v. Connecticut*[20] the Supreme Court declared that if a state is to fulfill the promise of the due process clause of the fourteenth amendment, it must afford to all individuals a meaningful opportunity to be heard.[21] Speaking for the majority, Justice Harlan reasoned that because of the basic position of marriage in our society, and because the state exercises a monopoly over the means of terminating this relationship, "due process prohibit[s] a state from denying access to its courts by individuals who seek judicial dissolution of their marriage because of inability to pay."[22] Thus, a Connecticut statute requiring payment of filing fees and costs without regard for the litigant's financial ability to make such payments, was held to be unconstitutional because it effectively precluded indigents from being able to obtain a divorce.[23]

The Supreme Court has also stated that once in court, due process would be denied if a civil litigant were refused the right to be heard entirely,[24] or denied the right to employ his or her own counsel.[25] In the context of criminal cases, the Court has held that the right to be meaningfully heard includes the right to appear by counsel.[26] That a layman's lack of skill is no less damaging to his chances to be effectively heard in a civil action than in a criminal action has also been recognized by the Court.[27]

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v. Illinois, 351 U.S. 12 (1956). The next step was the recognition of a constitutional right to appointed counsel in criminal cases, Gideon v. Wainwright, 372 U.S. 335 (1963).

20. 401 U.S. 371 (1971).

21. *Id.* at 377.

22. *Id.* at 374.

23. *Id.* at 382.

24. Hovey v. Elliot, 167 U.S. 409 (1897).

25. In Powell v. Alabama, 287 U.S. 45, 69 (1932) (dictum) the Court noted:

> If in any case, civil or criminal, a state or federal court were arbitrarily to refuse to hear a party by counsel, employed by and appearing for him, it reasonably may not be doubted that such a refusal would be a denial of a hearing, and, therefore, of due process in the constitutional sense.

26. Chandler v. Fretag, 348 U.S. 3, 9-10 (1954), *citing* Powell v. Alabama, 287 U.S. 45 (1932).

27. Brotherhood of R.R. Trainmen v. Virginia *ex rel* Virginia State Bar, 377 U.S. 1, 7 (1964). The Court stated that "[l]aymen cannot be expected to know how to protect their rights when dealing with practiced and carefully counselled adversaries . . . ."

For the arguments of two commentators that the average uncounselled indigent is at a greater disadvantage in a civil than in a criminal case see Botein, *Appointed Counsel for the Indigent Civil Defendant: A Constitutional Right Without a Judicial Remedy?*, 36

In *Deason v. Deason,*[28] the New York Court of Appeals relied upon the *Boddie* rationale to conclude that poor persons can not be required to pay the costs generated by the service of notice by publication. Following the spirit of the *Deason* decision, many lower New York courts have held that indigents have a constitutional right to assigned counsel in matrimonial litigation.[29]

Despite such strong precedents, the *Smiley* court chose to distinguish between the right to counsel of a criminal defendant and that of a matrimonial litigant. The court acknowledged that in state prosecutions involving a potential loss of liberty, the constitutional rights to counsel and to due process of law require the appointment of a lawyer if the person so jeopardized is unable to provide one for him or herself.[30] The court stated, however, that no similiar right applied in civil litigation.[31] *Boddie* and *Deason* were distinguished on the ground that they each involved payment of court fees which denied the party *access* to the legal system.[32] According to the court, the constitutional infirmity involved in *Boddie* and *Deason* was that the court fees precluded indigents from initially asserting their claims in a court of law.[33] While conceding that in certain types of matrimonial litigation, counsel would be essential to the full exercise of one's rights,[34] the court maintained that the assistance of a lawyer could not be interpreted as a legal precondition for access to the judicial system.[35]

The distinction between access to the legal system and the right to have counsel once in court as a means of defining the parameters of due process has been strongly criticized by both courts[36] and commentators.[37] The gravamen of this criticism is, as

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BROOKLYN L. REV. 368, 370 (1970); Comment, *The Indigent's Right to Counsel in Civil Cases*, 76 YALE L.J. 545, 548 (1967).

28. 32 N.Y.2d 93, 296 N.E.2d 229, 343 N.Y.S.2d 321 (1973).

29. *In re* Smiley, 45 App. Div. 2d 785, 356 N.Y.S.2d 733 (3d Dep't 1974); Jacox v. Jacox, 43 App. Div. 2d 716, 350 N.Y.S.2d 434 (2d Dep't 1973); Bartlett v. Kitchin, 76 Misc. 2d 1087, 352 N.Y.S.2d 110 (Sup. Ct. St. Lawrence County 1973); Vanderpool v. Vanderpool, 74 Misc. 2d 122, 344 N.Y.S.2d 572 (Sup. Ct. Kings County 1973).

30. *In re* Smiley, 36 N.Y.2d 433, 437, 330 N.E.2d 53, 55, 369 N.Y.S.2d 87, 90 (1975).

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

32. *Id.* at 440, 330 N.E.2d at 56-57, 369 N.Y.S.2d at 92.

33. *Id.* at 440, 330 N.E.2d at 57, 369 N.Y.S.2d at 92.

34. *Id.*

35. *Id.*

36. Bartlett v. Kitchin, 76 Misc. 2d 1087, 352 N.Y.S.2d 110 (Sup. Ct. St. Lawrence County 1973); Vanderpool v. Vanderpool, 74 Misc. 2d 122, 344 N.Y.S.2d 572 (Sup. Ct. Kings County 1973), *rev'd*, 43 App. Div. 2d 716, 350 N.Y.S.2d 435 (2d Dep't 1974).

37. Comment, *The Indigent's Right to Counsel in Civil Cases*, 76 YALE L.J. 545

Judge Jones suggested in his dissenting opinion in *Smiley*, that access to the judicial system should not be narrowly construed as merely liberty to approach. It should instead be interpreted more broadly so as to encompass the right to an effective presence and participation in the legal process.[38] As one lower New York court has observed:[39]

> Access must be viewed in the context of due process. In criminal matters defendants do not have access insuring due process unless represented by counsel. (Citation omitted.) So, too, in civil matters, access that denies due process does not meet constitutional standards.
>
> Indigent matrimonial defendants denied equal protection of the law do not have access to the courts simply because they are brought in by plaintiff. Access that denies equal protection is not the access contemplated by due process. *Presence is distinguished from access—the two are not equatable.* Presence without equal protection of the law remains only presence; it does not ripen into access. (Emphasis in original.)

A disturbing consequence of this court of appeals decision is that it will operate to prevent a large number of New York residents from enforcing a fundamental right[40] in an area in which they are totally at the mercy of the state.[41] The result in *Smiley*

(1967); Note, *The Right to Counsel in Civil Litigation*, 66 COLUM. L. REV. 1322 (1966).

38. 36 N.Y.2d 433, 443, 330 N.E.2d 53, 59, 369 N.Y.S.2d 87, 96 (1975) (Jones, J., dissenting).

39. Vanderpool v. Vanderpool, 74 Misc. 2d 122, 124-25, 344 N.Y.S.2d 572, 575-76 (Sup. Ct. Kings County 1973).

40. That marriage involves fundamental rights has already been established by the Supreme Court. *See, e.g.*, Loving v. Virginia, 388 U.S. 1 (1967); Skinner v. Oklahoma *ex rel.* Williamson, 316 U.S. 535 (1942); Meyer v. Nebraska, 262 U.S. 390 (1923).

See also 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, 232 (1970), where it is noted:

> Yet, at least in theory, few changes of legal status are as important as a change in marital status. The poor person's ability to contract and deny responsibility for contracts, to remarry, to regularize extra-marital relationships, to clarify the status of children and intestate inheritance rights, and generally to be free of the many strong twisted tentacles of a dead marriage are all deeply affected by marital status. In this sense, the right to have a legal imprimatur on changes in marital relationship is an extremely important right.

41. State statutes dictate who may marry; by whom the marriage may be performed; the obligations of the parties during marriage; the grounds for separation or divorce and the obligations of the parties after the termination of the marriage. For all purposes the State is very much a "partner" to a marriage and a "party" in a matrimonial action.

Jeffreys v. Jeffreys, 58 Misc. 2d 1045, 1051, 296 N.Y.S.2d 74, 82 (Sup. Ct. Kings County 1968), *rev'd on other grounds*, 38 App. Div. 2d 431, 330 N.Y.S.2d 550 (2d Dep't 1972).

is due, in part, to the fear of the court that the recognition of a right to counsel in divorce proceedings would logically necessitate the recognition of the right for indigents in all civil suits.[42] The United States Supreme Court has, however, already distinguished between the state's role in matrimonial actions and other types of civil litigation:[43]

> Without a prior judicial imprimatur, individuals may freely enter into and rescind commercial contracts, for example, but we are unaware of any jurisdiction where private citizens may covenant for or dissolve marriages without state approval. Even where all substantive requirements are concededly met, we know of no instances where two consenting adults may divorce and mutually liberate themselves from the constraints of legal obligations that go with marriage, and more fundamentally the prohibition against remarriage, without invoking the State's judicial machinery.

Thus, the involvement of the state in matrimonial actions is much more substantial than that in most other types of civil litigation. This distinction could have been used by the *Smiley* majority to distinguish the right to counsel in divorce actions

42. 36 N.Y.2d 433, 440-41, 330 N.E.2d 53, 57-58, 369 N.Y.S.2d 87, 93-94 (1975).

43. Boddie v. Connecticut, 401 U.S. 371, 376 (1971). Subsequent Supreme Court decisions construing *Boddie* support the view that litigation involving the marital relation is easily distinguishable from that involving other civil actions. In United States v. Kras, 409 U.S. 434 (1972), the Court upheld a statutory provision requiring the payment of filing fees as a precondition to the consideration of a petition seeking a discharge in bankruptcy. The Court based its decision on the fact that access to judicial relief was not the only conceivable remedy available—a debtor is free to enter into a private agreement with his or her creditors to discharge the obligations. The Court distinguished *Boddie*, noting that bankruptcy, unlike marriage, is not a privilege safeguarded by the Constitution.

In Ortwein v. Schwab, 410 U.S. 656 (1972) (per curiam), the Court rejected the assertion that a state statute requiring the payment of a $25 filing fee in order to obtain judicial review of certain administrative actions denied poor persons due process of law under the rationale of *Boddie*. The Court again noted that its decision in *Boddie* was predicated upon the fact that the marital relationship involves the exercise of fundamental constitutional rights.

The refusal of the Court to extend the rationale of *Boddie* to cases involving issues of less constitutional significance than the marital relationship would have provided strong precedent for limiting the consequences of a contrary result than was reached in *Smiley*. As noted by a lower New York court:

> [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 (art. I, § 91 [*sic* § 9]) mandates that divorces may be granted only by "due judicial proceedings."

Jeffreys v. Jeffreys, 58 Misc. 2d 1045, 1051, 296 N.Y.S.2d 74, 82 (Sup. Ct. Kings County 1968), *rev'd on other grounds*, 38 App. Div. 2d 431, 330 N.Y.S.2d 550 (2d Dep't 1972).

from that in other types of civil litigation. The court of appeals, instead, chose to rely upon its tenuous legal concept of access because of its fear that a contrary result would inevitably lead to a right to free legal assistance in all areas of civil litigation. The majority reasoned that such a state of affairs would overburden both the private bar and the public treasury.[44]

Having initially determined that there was no constitutional right to counsel in divorce proceedings,[45] the court opined that in the absence of enabling legislation, the judiciary lacked authority to direct that compensation be paid out of the public treasury;[46] the decision to make expenditures for this purpose was deemed to be one to be made only by the legislature.[47] The court, however, neglected to consider other resources which might have been available had it decided that counsel should be provided.[48] The *Smiley* majority did not feel compelled to explore these alterna-

44. *In re* Smiley, 36 N.Y.2d 433, 440-41, 330 N.E.2d 53, 57-58, 369 N.Y.S.2d 87, 93-94 (1975). The *Smiley* court suggested that the burden placed on the private bar by assignments under C.P.L.R. § 1102(a) might constitute a violation of the constitutional rights of lawyers. Only four jurisdictions have adopted this minority viewpoint. Instead, the majority of courts have held that these appointments pass constitutional muster either because no taking has occurred (defense of paupers is traditionally a service performed by the bar), or because the bar is merely doing a service owed to the public. *See* Menin v. Menin, 79 Misc. 2d 285, 289, 355 N.Y.S.2d 721, 726 (Sup. Ct. Westchester County 1974); Honore v. Washington State Bd. of Prisoners on Terms & Paroles, 77 Wash. 2d 660, 677-78, 466 P.2d 485, 495-96 (1970); *See also* Annot., 21 A.L.R.3d 819 (1968).

Of the four minority jurisdictions only Missouri, State v. Green, 470 S.W.2d 571 (Mo. 1971), and Kentucky, Bradshaw v. Ball, 487 S.W.2d 294 (Ct. App. Ky. 1972), have held that appointment of uncompensated counsel violates the federal constitution. Indiana requires compensation of assigned counsel only because of a state constitutional provision, Webb Auditor, & Co. v. Baird, 6 Ind. 13 (1853). Utah courts have taken the position that mandatory service without compensation violates the federal constitution only in civil cases, Bedford v. Salt Lake County, 22 Utah 2d 12, 447 P.2d 193 (1968).

New York case law, contrary to the view suggested by the court in *Smiley*, supports the position that a court may constitutionally appoint uncompensated counsel. People v. Monahan, 17 N.Y.2d 310, 313, 217 N.E.2d 664, 666, 270 N.Y.S.2d 613, 615 (1966); People v. Wittenski, 15 N.Y.2d 392, 396-97, 207 N.E.2d 358, 360-61, 259 N.Y.S.2d 413, 416-17 (1965); *In re* Sullivan, 297 N.Y. 190, 195-96, 78 N.E.2d 467, 469-70 (1948). Counsel must serve whenever his or her previously arranged professional engagements will permit. People v. Thompson, 205 App. Div. 581, 582, 199 N.Y.S. 868, 869 (2d Dep't 1923).

The ABA CODE OF PROFESSIONAL RESPONSIBILITY, EC 2-2, (1975) states, *inter alia*, that "[e]very lawyer, regardless of professional prominence or professional workload, should find time to participate in serving the disadvantaged" because it is an obligation of the profession.

45. *In re* Smiley, 36 N.Y.2d 433, 438, 330 N.E.2d 53, 55, 369 N.Y.S.2d 87, 90 (1975).

46. *Id.* at 439, 330 N.E.2d at 56, 369 N.Y.S.2d at 92.

47. *Id.*

48. *Id.* at 441, 330 N.E.2d at 57, 369 N.Y.S.2d at 93-94. *See also* text accompanying n.60 *infra*.

tive measures because of its assumption that, as a practical matter, the representation of indigents has been effectively accomplished through discretionary court assignment of uncompensated counsel and by the efforts of legal aid societies.[49] The majority is, of course, correct that a discussion of available means to provide the poor with counsel in civil cases would be purely academic if existing institutions did, in fact, fulfill the legal needs of the poor.[50] However, available evidence suggests that they do not.[51]

The usefulness of legal aid organizations was greatly exaggerated by the *Smiley* court. Publicly financed legal aid apparently works well in other countries,[52] but in the United States, a lack

49. *Id.* at 439, 330 N.E.2d at 56, 369 N.Y.S.2d at 91. The *Smiley* court had already decided that no right to appointed counsel in civil cases could be gleaned from either the sixth amendment or the due process clause when it added its remarks about the sufficiency of legal services for the poor. Though merely dictum in the majority opinion, the issue of the adequacy of existing legal aid was critical to Judge Fuchsberg's dissenting analysis of the role of due process in the context of an indigent's right to counsel in civil cases. He agreed with fellow dissenter, Judge Jones, that the appellants in the instant case had a due process right to counsel. However, Judge Fuchsberg did not argue that this right to appointed counsel encompasses all matrimonial litigants. Whether due process mandates free legal assistance should, according to Judge Fuchsberg, be determined on a case-by-case basis. The question to be asked by the trial court is whether appointed counsel is necessary to provide appellants with meaningful access to the courts. If so, the constitutional privilege arises.

Judge Fuchsberg agreed with the majority in its suggestion that matrimonial actions and other civil suits are, as far as the rights of indigents are concerned, generally indistinguishable. However, he could not agree with the majority's conclusion that such a premise precludes the recognition of a constitutional right to court-appointed counsel in matrimonial cases; instead, Judge Fuchsberg concluded that the right must also extend to other areas of civil litigation where fundamental interests are at stake.

Although Judge Fuchberg's reasoning has merit, as a practical matter, trial judges would inevitably be overburdened by having to decide whether due process requires a lawyer in a particular case. The judicial time wasted in these types of decisions will outweigh the relatively slight burden imposed on lawyers. If the case is simple enough that it can be handled without a lawyer, the small amount of time spent by a lawyer will be outweighed by the time wasted at both the trial and appellate levels in deciding the due process claim.

50. *See* Note, *The Right to Counsel in Civil Litigation*, 66 COLUM. L. REV. 1322, 1323 (1966).

51. *See* Carlin & Howard, *Legal Representation and Class Justice*, 12 U.C.L.A. L. REV. 381 (1965); Wice & Suwak, *Current Realities of Public Defender Programs: A National Survey and Analysis*, 10 CRIM. L. BULL. 161 (1974); Note, *The Right to Counsel in Civil Litigation, supra* note 50.

The utter ineptitude of indigent plaintiffs who proceed without counsel has also been documented. *See* Schmertz, *The Indigent Civil Plaintiff in the District of Columbia: Facts and Commentary*, 27 FED. B.J. 235, 243 (1967).

52. Dworkin, *The Progress and Future of Legal Aid in Civil Litigation*, 28 MOD. L. REV. 432 (1965); Schweinburg, *Legal Assistance Abroad*, 17 U. CHI. L. REV. 270 (1950); Utton, *The British Legal Aid System*, 76 YALE L.J. 371 (1966).

of adequate funding has minimized the success of the efforts by such programs to make the legal system accessible to the indigent.[53] It has been estimated that only a small portion of those who need legal help in other than criminal matters ever reach out for it.[54] The small number who actually do seek assistance put such a tremendous strain on the system that its overall effectiveness can be seriously questioned.[55] Matrimonial actions, in particular, are very often put on the bottom of the list of priorities. Many legal aid organizations do not even accept such cases.[56]

The issue of whether indigents[57] have a constitutional right to counsel in a matrimonial action is not an academic question for the many indigents living in New York. In denying this right by resort to a meaningless distinction between legal access and effective participation, the *Smiley* court has neglected the plight of those who are by virtue of their poverty, effectively locked into a marriage. A wealthier person seeking release from an unsuccessful marriage need only hire an attorney.[58] Thus, any just solution must take into account not only the economic realities which concerned the *Smiley* court,[59] but also basic fairness to the litigant.

Declaring a right to counsel for indigents in matrimonial actions need not open the floodgates for the same right in all other types of civil litigation. That marriage and divorce are fundamental rights of all Americans, and that the state exercises an effec-

53. Carlin & Howard, *Legal Representation and Class Justice*, 12 U.C.L.A. L. REV. 381, 408-11 (1965); Wice & Suwak, *Current Realities of Public Defender Programs: A National Survey and Analysis*, 10 CRIM. L. BULL. 161, 182-83 (1974); Comment, *The Indigent's Right to Counsel in Civil Cases*, 76 YALE L.J. 545, 546 (1967); Note, *The Right to Counsel in Civil Litigation*, *supra* note 50.

54. Carlin & Howard, *Legal Representation and Class Justice*, 12 U.C.L.A. L. REV. 381, 408-17 (1965).

55. *See* note 53, *supra*.

56. Carlin & Howard, *supra* note 53, at 413-15.

57. What constitutes indigency is a broad question and out of the scope of this note. For a general discussion of this topic see Annot., 51 A.L.R.3d 1108 (1973); Note, *Representation of Indigents in California—A Field Study of the Public Defender and Assigned Counsel Systems*, 13 STAN. L. REV. 522, 545-48 (1961).

58. Perhaps because of moralistic attitudes to marriage, indifference to the circumstances of the poor, and the general neglect that faces unorganized interests in the United States, the law has made divorces too expensive for the poor to obtain, while effectively permitting them for the affluent.

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, 232 (1971).

59. *In re* Smiley, 36 N.Y.2d 433, 440-41, 330 N.E.2d 53, 57-58, 369 N.Y.S.2d 87, 93-94 (1975).

tive monopoly over the means of exercising these rights, are two factors that can provide the rationale for limiting this constitutional mandate.

The court's fear of usurping legislative power by ordering the state or county to pay counsel fees, however, is well-founded.[60] Initially, to meet this constitutional burden, the court could rely on its power to appoint non-compensated counsel by mandating that it would be an abuse of discretion under section 1102(a) of the Civil Practice Law and Rules for judges not to appoint a lawyer to represent indigents in a matrimonial action.[61] Hopefully, legislative enactments—as in the criminal field—would closely follow.[62] In the absence of such legislative or judicial action, however, the amount of money a person has will indeed continue to determine the kind of justice that he or she will be afforded.

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60. It should be noted that the legislatures around the country have done little to solve the financial aspects of the problem of the indigent civil litigant. Less than four million dollars was spent in 1966 to finance the operation of all legal aid organizations in the United States handling civil cases. This is less than two-tenths of one percent of the total expenditures for legal services in this country in that same year. Carlin & Howard, *Legal Representation and Class Justice*, 12 U.C.L.A. L. REV. 381, 410 (1967).

61. *See* Brounsky v. Brounsky, 33 App. Div. 2d 1028, 308 N.Y.S.2d 72 (2d Dep't 1970).

62. *In re* Smiley, 36 N.Y.2d 433, 455, 330 N.E.2d 53, 67, 369 N.Y.S.2d 87, 106 (1975) (Fuchsberg, J., dissenting).