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COMMENT/In Forma Pauperis and the Civil Litigant

*Nulli vendemus, nulli negabimus,
aut differemus, rectum vel justiciam.**

The door to the courthouse is always open. The criminal is compelled to pass through; the civil litigant does so by choice. But once inside, some voluntary litigants, namely the poor, may find the “open door” illusory—that a fair trial, axiomatic in America, is often the final step in a long and expensive climb. For that class civil justice appears a luxury when faced with the need for an attorney, the filing fee, the costs of personal or substituted service of process, expenses for depositions, witness fees, court reporters and the like. The array of expenses looks increasingly formidable to a would-be plaintiff as the realization dawns that if he fails the defendant’s costs may well be assessed against him.

The traditional relief for this problem is the power of the courts to permit a poor person to proceed without prepayment of costs—“in forma pauperis.” But “without prepayment of costs” usually refers to the official fees of the court itself. The statutes and the courts are too often silent about the unofficial costs of civil litigation. For example, in the District of Columbia where divorce proceedings must be adversary even if uncontested, if a low income wife seeks to file a complaint for absolute divorce and cannot afford an attorney, she may be aided by an attorney from a local legal aid program. A petition for leave to proceed in forma pauperis may be filed in her behalf. If the petition is granted, she may have been saved the filing fee but little else. If the petition is denied, she will have no recourse except to pay the fee. If she cannot, she will be unable to obtain the divorce. Her attorney can reasonably argue that her access to the court has been denied because of her poverty and that she has a right to a divorce if she meets the statutory prerequisites.

This comment will examine the nature of in forma pauperis relief historically and as it exists in the various jurisdictions today. Further, since the relief provided by in forma pauperis statutes is merely the top of the iceberg—providing for the waiver of fees and costs on the surface but leaving the bulk of the problem submersed by not delineating which costs and fees

* “We will sell to none, we will deny to none, we will delay to none, either right or justice.” The Magna Carta, 1 Hen. 3, c. 29, § 2(b) (1225).

are to be waived—the types of court expenses waived in the various jurisdictions will be examined. The District of Columbia is used as a sample jurisdiction because the problem is more acute there than in any other. The District not only has an *in forma pauperis* statute but it has, in its divorce statute, an anomalous situation which, because of costs over which the courts have no control, so diminishes the effectiveness of the *in forma pauperis* relief as to render it practically useless. Lastly, the constitutional implications of a system which may deny access to the courts to civil litigants are examined within the framework of the Equal Protection and Due Process Clauses. Justice Douglas has put the problem in the following light:

It is part of the larger problem regarding the inability of indigent and deprived persons to voice their complaints through the existing institutional framework, and vividly demonstrates the disparity between the access of the affluent to the judicial machinery and that of the poor in violation of the Equal Protection Clause.¹

The Origins of In Forma Pauperis

Relief *in forma pauperis* probably originated with the Magna Carta and its tenets of basic fairness. Prior to 1495, poor persons were able to prosecute actions and pursue remedies without prepayment of fees in the courts of equity, the ecclesiastical courts and before the Council, including the Star Chamber and the Court of Requests.² Fees in those days were paid for services and the issuance of writs necessary to pursue the cause of action, hence providing incomes for both court officials and judges. It was accepted that these fees would be waived for those who would take a *pauperis* oath.³

In forma pauperis relief was extended to the common law courts in 1495 by a statute⁴ which entitled paupers to writs without payment and assignment of counsel without fee.⁵ By this time most of the judges sitting in the courts of both law and equity were salaried; but the clerks were not and as a result the *in forma pauperis* relief was not popular with them.⁶ Ownership of assets

1. *Williams v. Shaffer*, 385 U.S. 1037 (1967) (dissent).

2. See Maguire, *Poverty and Civil Litigation*, 36 HARV. L. REV. 361, 363-73 (1923). See generally *In re Lee*, 64 Okla. 310, 168 P. 53 (1917).

3. I F. POLLACK & F. MAITLAND, *THE HISTORY OF ENGLISH LAW* 195 (2d ed. 1952); see Note, *Litigation Costs: The Hidden Barrier to the Indigent*, 56 GEO. L.J. 516, 518 (1968). There is an academic argument whether paupers who were nonsuited and failed to pay the resulting costs were punished. Some authorities claim they were whipped, 58 COLUM. L. REV. 832, 842 n.73 (1958), citing 23 Hen. 8, c. 15 (1532), while others claim there was no officer to do the whipping and the whole theory was "at most a judicial gloss." 31 HARV. L. REV. 485, 486 (1918), citing *Anonymous*, 91 Eng. Rep. 433 (K.B. 1697) and *Munford v. Pait*, 82 Eng. Rep. 1093 (K.B. 1677).

4. 11 Hen. 7, c. 12.

5. 4 W. HOLDSWORTH, *HISTORY OF ENGLISH LAW* 538 (1924).

6. Most judges were salaried by the 12th century but the clerks remained de-

valued in excess of five pounds distinguished the affluent from the pauper.⁷ The determination of whether a petitioner was a pauper was made in open court and it has been suggested that this was a prime reason for the slow and piecemeal processing of petitions for the privilege.⁸ Although extension of the relief was not a panacea for the problem of a poor litigant facing a plethora of fees and costs, it at least put the remedy at the disposal of the courts and later had precedential value for the courts of the American colonies.

The American colonial courts followed the English system of collecting fees at the commencement of proceedings and seemed to have taken the forma pauperis proceeding as a necessary appendage to the fee system.⁹ There is a dearth of early cases on the subject, probably because of the relative affluence of the colonists and the low court costs. Among the poor it is likely that few found it expedient to resort to the formal legal processes and its attendant expenses to redress their grievances.

Technical Requirements

Forma pauperis relief is available to the poor in both civil and criminal proceedings in most jurisdictions either through express provisions of statute¹⁰ or through court-developed extensions of the common law.¹¹ The types of fees and costs that are waived, however, differ radically among jurisdictions. In some only the filing fees are forgiven while in more liberal jurisdictions both fees and costs are waived.¹² Although there is little question that the courts have the power to waive their own fees, there has been considerable controversy over which, if any, of the costs can be forgiven short of a statutory mandate.¹³ New York, for example, has not only waived all fees paid to court officials but has also provided that the cost of court reporters and attorneys fees be paid from state funds in cases in forma pauperis.¹⁴ Recently

pendent on the fees for their services until the mid-nineteenth century. See Note, *Litigation Costs: The Hidden Barrier to the Indigent*, 56 GEO. L.J. 516, 518 (1968).

7. Maguire, *Poverty and Civil Litigation*, 36 HARV. L. REV. 361, 376 (1923).

8. *Id.* at 378.

9. See, e.g., *McClenahan v. Thomas*, 6 N.C. 247 (1813); *Hickey v. Rhine*, 16 Tex. 577 (1856).

10. See statutes listed *infra* notes 19-23; *Bradford v. Southern Ry.*, 195 U.S. 243 (1904); *Harrison v. Stanton*, 146 Ind. 366, 45 N.E. 582 (1896); *Howe v. Federal Sur. Co.*, 161 Okla. 144, 17 P.2d 404 (1932).

11. E.g., *Martin v. Superior Court*, 176 Cal. 289, 168 P. 135 (1917); *Hickey v. Rhine*, 16 Tex. 577 (1856).

12. See generally Annot., 6 A.L.R. 1281 (1920); 20 AM. JUR. 2d *Costs* § 47 (1965).

13. "Fees" are paid by litigants to officers of the court and are usually prescribed by statute, while "costs" include all the expenses of litigation. See Goodhart, *Costs*, 38 YALE L.J. 849 (1929); 27 CALIF. L. REV. 352, 353 n.6 (1939).

14. N.Y. CIV. PRAC. LAW § 1102(a)-(d) (McKinney Supp. 1969).

a lower New York court expanded that already liberal practice to include the costs of publication where the defendant in a divorce case could not be found and the statute required notice for absent defendants.¹⁵ Louisiana, on the other hand, has taken the stricter view of the waiver of costs beyond the bare fees paid to court officials. The Louisiana Supreme Court in *State ex rel. Clark v. Hillebrandt*,¹⁶ ordered the lower court to waive the fees for issuance of a subpoena but would not waive the deposit to cover the expenses actually required to secure the attendance of the witnesses.

Proponents of the strict interpretation of in forma pauperis statutes argue that for the court to extend the relief to auxiliary expenses such as attorneys' fees, transcript preparation, supersedeas bonds, witness fees, deposition costs, expert witness fees and the like would open a Pandora's box to let out a never ending stream of costs.¹⁷ There are many costs over which the court has little or no effective control. Adding to this the inability of the courts to marshal funds without a legislative appropriation to make payment for a "necessary service" on behalf of a poor person, the forma pauperis relief becomes somewhat less than the panacea that it might appear. Argument against strict interpretation is founded on the Equal Protection Clause of the Constitution and states simply that no man can be denied access to the courts through court imposed barriers based on the ability to pay.¹⁸

In ruling on forma pauperis petitions courts initially must consider whether a petitioner meets the jurisdiction's poverty criteria. What constitutes poverty differs among jurisdictions, but generally, statutory worth limits are low. The Arkansas statute, for example, requires that a petitioner be worth not over \$10.00 excepting wearing apparel for himself and his family and the matter in issue.¹⁹ Hawaii requires petitioners to be worth less than

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

16. 244 La. 742, 154 So. 2d 384 (1963).

17. Brief for John Alexander as Amicus Curiae, *Jones v. Jones*, No. 4866 (D.C. Ct. App., filed Oct. 31, 1968).

18. Recently attorneys for the Neighborhood Legal Services Program (NLSP) filed a complaint in the case of *Byrd v. Greene*, Civil No. 2729-69 (D.D.C., filed Sept. 26, 1969) challenging Rule 5(a) of the Domestic Relations Branch of the District of Columbia Court of General Sessions. That rule requires the plaintiff in an uncontested divorce case to deposit a \$100.00 fee with the clerk of the court before the court will exercise its power to appoint an attorney pursuant to D.C. CODE § 16-918 (1967), which requires appointment of an attorney to defend in such a case and makes the plaintiff responsible for the appointed attorney's fee. Termed "arbitrary, capricious and unreasonable" and "an invidious and irrational discrimination" against indigent plaintiffs who are denied the right to due process of law, NLSP attorneys argue that the rule "withdraws from each judge the discretionary determination which is necessary to insure due process of law and proper justice" by requiring a deposit of \$100.00 with the court before filing a motion to appoint an attorney for an absent defendant.

19. ARK. STAT. ANN. § 27-402 (1962). The Arkansas statute is reminiscent of the English statute of a century ago which only considered those who were worth

\$25.00.²⁰ New York has amended its rule which set the standard at \$300.00 in cash or available property, not including wearing apparel and furniture for the applicant and his family, to a more liberal requirement that the petitioner merely set forth the "amount and sources of his income" so that the court may decide his need.²¹ Where there is no express provision in the statute for the poverty criterion the decision is left to the court²² which, in turn, devolves to the opinion of a busy trial judge. Guidance is scarce. Many judges look to the federal in forma pauperis statute which merely provides that a person must make "affidavit that he is unable to pay such costs or give security therefor."²³ This statute was examined by the Supreme Court in *Adkins v. E.I. duPont de Nemours & Co.*²⁴ There, Justice Black stated:

We cannot agree with the court below that one must be absolutely destitute to enjoy the benefit of the statute. . . . To say that no persons are entitled to the statute's benefits until they have sworn to contribute to payment of costs, the last dollar they have or can get, and thus make themselves and their dependents wholly destitute, would be to construe the statute in a way that would throw its beneficiaries into the category of public charges.²⁵

Consideration of local conditions should, in the last analysis, be the guideline for the judge in his decision as to whether the petition in front of him shows poverty sufficient to waive the fees. Both state and federal governments publish cost of living and average income levels for most areas in the United States and it would not be improper for clerks of the courts to be furnished with such information for the judge's reference.

The second consideration undertaken by the court in deciding whether to grant forma pauperis relief is the merit of the alleged cause of action. Here the discretion of the court is much narrower. The federal standard, for example, allows the judge to dismiss an in forma pauperis petition if he considers the petitioner's cause of action frivolous or malicious.²⁶ In *Ellis v. United States*,²⁷ the Supreme Court held that indigents seeking leave to

less than £5, except for wearing apparel and the matter at issue, poor enough to proceed in forma pauperis. See *Perry v. Walker*, 63 Eng. Rep. 396 (Ch. 1844).

20. HAWAII REV. LAWS § 229-8 (1955).

21. N.Y. CIV. PRAC. LAW § 199, as amended, N.Y. CIV. PRAC. LAW § 1101(a) (McKinney 1963).

22. *E.g.*, D.C. CODE § 15-712 (1967): "When satisfactory evidence is presented . . . that the plaintiff . . . is indigent . . ." Examples of jurisdictions in which the decision is left to the trial judge are: COLO. REV. STAT. ANN. § 33-1-3 (1963); ILL. ANN. STAT. ch. 33, § 5 (Smith-Hurd Supp. 1969); KY. REV. STAT. ANN. § 453.190 (1969); VA. CODE ANN. § 14-180 (1956); W. VA. CODE ANN. § 59-2-1 (1966).

23. 28 U.S.C. § 1915 (1964).

24. 335 U.S. 331 (1948).

25. *Id.* at 339.

26. 28 U.S.C. § 1915(d) (1964).

27. 356 U.S. 674 (1958).

appeal in forma pauperis should be granted leave "[u]nless the issues raised are so frivolous that the appeal would be dismissed in the case of a non-indigent litigant."²⁸ The states allow the judges to consider the merits of each case in the threshold sense of at least determining whether the complaint states a claim upon which relief could be granted.²⁹ In *Majors v. Superior Court*,³⁰ the California Supreme Court discussed the discretionary power of the trial courts to allow in forma pauperis proceedings under that state's common law: "Its discretion . . . should be exercised with a view to confine the privilege most strictly to those who, having a substantial right to enforce or preserve, are absolutely unable otherwise to so do, and who, once having been admitted to proceed in forma pauperis, diligently pursue a course free from unreasonable delay or vexatious conduct of any kind."³¹

In Forma Pauperis in the Several States

Thirty-four jurisdictions, including the federal government and the District of Columbia, have set up in forma pauperis relief either through formal constitutional or statutory provisions or by adherence to common law principles. The federal in forma pauperis statute³² has been repeatedly interpreted by the federal courts to be the basis of a privilege rather than a right.³³ Among the states, the in forma pauperis relief has had a mixed background. Rhode Island, for example, makes it a constitutional right.³⁴ The Massachusetts constitution has a similar provision.³⁵ The Oklahoma Supreme Court, on the other hand, construed a similar provision in that state's constitution as "[not] intended to guarantee the right to litigate entirely without expense to the litigants, nor to impose upon the public the entire burden of the expense of the maintenance of the courts."³⁶

During the years of the development of the common law rule allowing suits by the poor without the prepayment of costs, the states have been worried about wholesale invasion of their tribunals by those claiming inability to

28. *Id.* at 675.

29. *E.g.*, COLO. REV. STAT. ANN. § 33-1-3 (1963); ILL. ANN. STAT. ch. 33, § 5 (Smith-Hurd Supp. 1969). *See* 9 U. FLA. L. REV. 65 (1956).

30. 181 Cal. 270, 184 P. 18 (1919).

31. *Id.* at 277, 184 P. at 22.

32. 28 U.S.C. § 1915 (1964).

33. *Williams v. Field*, 394 F.2d 329 (9th Cir.), *cert. denied*, 393 U.S. 891 (1968); *Weller v. Dickson*, 314 F.2d 598 (9th Cir.), *cert. denied*, 375 U.S. 845 (1963); *Morris v. Igoe*, 209 F.2d 108 (7th Cir. 1953).

34. R.I. CONST. art. I, § 5. *See Lewis v. Smith*, 21 R.I. 324, 43 A. 542 (1899); *Spalding v. Bainbridge*, 12 R.I. 244 (1879).

35. MASS. CONST. Pt. 1, art. XI.

36. *In re Lee*, 64 Okla. 310, 312, 168 P. 53, 55 (1917), construing OKLA. CONST. art. 2, § 6.

pay the costs. Indiana rejected any common law right to remit fees in the case of *Hoey v. McCarthy*,³⁷ in which it was said:

It is manifestly the duty of the courts to see to it that justice is not allowed to fail, and that no one is denied the opportunity of asserting his rights under the law because he is an object of charity; but it is equally their duty not to encourage unnecessary and fruitless litigation, or to allow the public treasury to be opened, merely to harass persons against whom speculative claims, in which no merit is apparent, may be asserted.³⁸

Since California did not have a statute or a constitutional provision for forma pauperis proceedings, the courts there seemed particularly concerned that their interpretation of the common law rule not be misconstrued. In *Jenkins v. Superior Court* the court warned, "[a]pplications for leave to sue in forma pauperis are not to be encouraged."³⁹ A year later the same court warned that "[t]he right to sue or defend in forma pauperis is of such nature that, unless it is carefully guarded, it is most susceptible of abuse."⁴⁰

Certain types of actions have been proscribed as not being within the purview of in forma pauperis statutes. Divorce is the one cause of action held in some state statutes to fall outside the relief of forma pauperis. Tennessee, for instance, does not permit in forma pauperis petitions for actions for absolute divorce but does allow petitions to waive fees to be filed in actions for limited divorce.⁴¹ Louisiana and Georgia, however, have completely ruled out divorce as a cause of action in which a pauper can petition the court to waive fees.⁴²

A survey of the in forma pauperis relief among the states is illusory unless note is taken of the particular "fees and costs" which are waived on behalf of the indigent petitioner. The term "costs" as used here is an all-inclusive term which will embrace a number of categories. Probably the two largest areas at which in forma pauperis relief is aimed are the official court fees set by the legislature or, through delegation of authority, by the courts and the auxiliary or incidental costs which are ancillary but necessary to prosecute or defend a case and follow it through on appeal. A third area, which rarely falls within the relief available to paupers, consists of attorneys' fees. It should be further emphasized here that the costs discussed are those incurred in civil litigation only. Criminal costs are often similar but there is a basic constitutional difference because of the threat of incarceration.⁴³

37. 124 Ind. 464, 24 N.E. 1038 (1890).

38. *Id.* at 466, 24 N.E. at 1039.

39. 98 Cal. App. 729, 730, 277 P. 757, 758 (1929).

40. *Rucker v. Superior Court*, 104 Cal. App. 683, 286 P. 732 (1930).

41. TENN. CODE ANN. § 20-1629 (Supp. 1969).

42. LA. CODE CIV. PRO. ANN. art. 5181 (West 1961); GA. CODE ANN. § 24-3413 (1959).

43. *See, e.g., Griffin v. Illinois*, 351 U.S. 12 (1956).

Costs differ in nomenclature from jurisdiction to jurisdiction and, in fact, from law office to law office. Costs of a semi-official nature which are usually collected by clerk's offices include the filing fees for complaints and motions, marshal fees for service of process, fees for the issuance of subpoenas and writs of attachment, for certification of official documents, jury fees, trial fees, payment for the attendance of a court reporter and the like. These are the fees which are usually waived by the trial court when a *forma pauperis* petition is granted. Whether a successful plaintiff will be required to compensate the court out of the judgment awarded differs according to jurisdiction.⁴⁴

The auxiliary or incidental costs are ever present in litigation and are necessary for the proper development of the litigant's case. These are the expenses which make the cost of going to court prohibitive for the indigent. Few poor people today cannot scrape together or borrow the filing fees necessary to initiate civil litigation,⁴⁵ but when faced with the prospect of paying out costs that pyramid as the cause of action gets more complicated or hotly contested, indigent persons (in fact, many so-called "middle class" persons) prefer to stay at home and not risk the money. These auxiliary (or "incidental") costs include such things as witness fees, expenses for arranging the taking of depositions, publication costs, costs of transcribing court proceedings by court reporters, expert witness fees, fees for special process servers, costs for investigatory services and for the production of evidence. Some of these costs may be within the control of the court, at least indirectly, but several of them are payable to persons wholly unconnected with the court. Expenses such as costs for investigators and special sorts of evidence, as well as the copy rate for court reporters in some jurisdictions, and the costs of depositions are not under the control of the court. Yet without these services an indigent litigant may be seriously hampered in the prosecution of his case. Even those expenses which can be controlled by the court are usually surrounded with due process problems which preclude their being waived unless there are funds available to the court to pay for the services rendered the poor. Probably the best example of auxiliary, yet indispensable, costs are the publication costs which must be paid in order to satisfy the notice requirements for absent defendants or parties in certain types of *in rem* proceedings. Obviously, the due process requirement for notice cannot be waived.⁴⁶ The court can only control the method by which publication is accomplished. Even then, publication is usually prescribed by statute⁴⁷ and

44. See generally 20 AM. JUR. 2d *Costs* § 47 (1965).

45. For instance, the filing fee for a complaint in the Small Claims Branch of the District of Columbia Court of General Sessions is \$1.00.

46. *Mullane v. Central Hanover Trust Co.*, 339 U.S. 306 (1950).

47. See, e.g., D.C. CODE §§ 13-336 to -340 (1967).

is subject to nothing more than de facto compliance.

When publication is through privately owned publications such as newspapers and the various law reporter services, the charges for the service are set by the publishers⁴⁸ and cannot be tampered with by the courts. To force a newspaper to publish a notice without payment would be a patent denial of property without due process of law. Yet denying an indigent access to the courts only because of inability to pay the costs of publication smacks of denial of equal protection of the laws. This problem was dealt with in New York in *Jeffreys v. Jeffreys*.⁴⁹ A suit was filed by Mrs. Jeffreys against her husband for abandonment after 14 years of marriage. There were nine children born to the parties. Mrs. Jeffreys was on public assistance and thereby qualified to proceed in forma pauperis. Upon her affidavit that she was unable to locate her husband for purposes of personal service, her counsel (serving without fee from the Legal Services Program of the Office of Economic Opportunity) moved to have the court waive the \$300.00 cost of publication. The court considered the New York in forma pauperis statute and similar statutes in other states and concluded that there was no authority in the statutes for payment of auxiliary costs such as publication expenses. The court examined Mrs. Jeffreys' claim to a divorce and found it "a right of substantial magnitude . . . [because] only through the courts may redress or relief be obtained." Further, by reasoning that the only dissolution of marriage was through "due judicial proceeding" which could not be held unless the defendant was served either in person or by publication, the court arrived at the conclusion that the publication "hurdle is an effective barrier to . . . access to the courts." As such, the court held Mrs. Jeffreys "had been denied the equal protection of the laws guaranteed to her by the state and federal constitutions."⁵⁰ It must be noted however, that the court in the *Jeffreys* case had available funds provided by the New York legislature.⁵¹ Most other courts are not that fortunate. Had the court in *Jeffreys* not had a "safety valve" source of funds to tap, it is doubtful whether the same result would have been reached. The court could only

48. In the District of Columbia the charges range between \$0.81 per line in *The Washington Post* to \$0.50 per line in *The Daily Washington Law Reporter*.

49. 58 Misc. 2d 1045, 296 N.Y.S.2d 74 (Sup. Ct. 1968); see 37 FORDHAM L. REV. 661 (1969).

50. 58 Misc. 2d at 1056, 296 N.Y.S.2d at 87. A New Jersey Superior Court recently held that the Equal Protection Clause of the fourteenth amendment forbids that an indigent wife seeking a divorce who was not required to pay other fees be required to pay a \$60.00 publication fee. The court said: "It becomes a subterfuge to provide a procedure for indigents to secure divorces and then make relief hinge upon payment of a cost which the plaintiff is unable to pay." *Suber v. Suber*, 38 U.S.L.W. 2169 (Aug. 25, 1969).

51. 58 Misc. 2d at 1057, 296 N.Y.S.2d at 88; see *Munkelwitz v. Welfare Dep't*, 280 Minn. 377, 159 N.W.2d 402 (1968).

directly regulate the actual cost of publication through regulations limiting the number of days required for publication or the number of newspapers in which the notice must be placed. That this position might be tenuous was noted at the outset by Judge Sobel when he recognized that the City of New York was asking for an expanded opinion from him so that the city would have something upon which to base an appeal in the higher court.⁵²

Another type of cost which may be only auxiliary as far as an *in forma pauperis* statute is concerned, but certainly not auxiliary to a person faced with the expense, is the attorney's fee. While the court must appoint an attorney to defend in criminal cases,⁵³ the same requirement is not present in civil cases. Several publicly and privately sponsored organizations either employ or have rosters of volunteer attorneys to help indigent plaintiffs file and pursue an action. But if a would-be plaintiff who is poor does not happen to have the benefit of one of these organizations, the court will not help. He can proceed *pro se* or stay home. An indigent defendant is in the same position. If he meets an organization's criteria, a volunteer attorney may help him defend without fee; if he does not, he can choose not to appear and possibly suffer a default or he can risk a defense *pro se*. The most difficult problem comes in causes of action which, because of a statutory requirement for appearance of defendant or his counsel before the case can go forward, cannot be resolved by default. Divorce actions in the District of Columbia are of this type.⁵⁴

If the defendant cannot be served because he cannot be found or does not choose to appear, a District of Columbia divorce plaintiff must execute an affidavit to such effect and comply with the statutory provisions for substituted service by publication. The plaintiff must then provide funds for a court-appointed attorney to represent the absent defendant in accordance with the statute.⁵⁵ To accomplish this the plaintiff must deposit \$100.00 in advance with the clerk of the court before his motion to appoint an attorney to defend may be filed.⁵⁶ After the motion is filed, the court appoints an attorney from a list of available counsel maintained by the clerk. When

52. 58 Misc. 2d at 1047, 296 N.Y.S.2d at 77.

53. *Gideon v. Wainwright*, 372 U.S. 335 (1963).

54. D.C. CODE § 16-918 (1967):

In all uncontested divorce cases, and in any other divorce or annulment case where the court deems it necessary or proper, a disinterested attorney shall be assigned by the court to enter his appearance for the defendant and actively defend the cause. The attorney shall receive such compensation for his services as the court determines to be proper, which shall be paid by the parties as the court directs.

55. *Id.*

56. The \$100.00 fee was set by the judges of the Domestic Relations Branch of the Court of General Sessions as the minimum payment for appointed attorneys on January 15, 1962 by a memorandum addressed to the Chief Deputy Clerk of that Branch.

the case is finished the appointed attorney is awarded the \$100.00 held on deposit. Without deposit of the fee, the case remains in a "limbo" status until the local rules operate to dismiss it for not being at issue.⁵⁷ It is obvious that such a requirement puts a poor plaintiff at a disadvantage, but it is equally clear that the court cannot constitutionally compel counsel to serve without fee. The rule for prepayment of the fee is a practical solution to preclude members of the bar from having to pursue successful but indigent plaintiffs for the fee after entry of judgment. Suggestions that the court maintain a list of "volunteer" attorneys who would be willing to serve without fee begin to wear thin when the volume factor is considered. Of the nearly 4000 actions filed in 1969 in the Domestic Relations Branch of the District of Columbia Court of General Sessions, the court was asked to rule on 815 motions for appointment of an attorney by plaintiffs whose defendant spouse was either absent or unwilling to defend. \$81,500 was accordingly put on deposit to pay appointed counsel. It is reasonable to assume that this requirement for an advance deposit causes a substantial number of would-be plaintiffs to delay bringing an absolute divorce complaint until they have accumulated enough for the deposit. Some might be permanently precluded from bringing such an action. However, other forms of relief are available to indigent spouses such as separate maintenance or a limited divorce which do not require appointed counsel to defend at the expense of plaintiff. It may be that the problem could be resolved by the threat of court-enforced separate maintenance forcing the defendant into court with a retained attorney.

If the court were to begin appointing volunteer attorneys without providing compensation, the appointments would probably consume so much of those attorneys' time that they might soon become reluctant to cooperate.⁵⁸ The criminal courts in both the United States District Court and the District of Columbia Court of General Sessions, as well as the Juvenile Court, are constantly making assignments in matters which must have defense counsel by constitutional mandate.⁵⁹ The Court of Appeals for the District of Columbia Circuit appoints new counsel to brief and perfect the appeal, if any is noted. It is illusory to analogize the generosity of the bar in providing counsel to make appellate arguments on behalf of criminal defendants in the rarefied atmosphere of a Circuit Court of Appeals with the probable availability of

57. D.C. CT. GEN. SESS. (DOM. REL.) R. 13.

58. See Ryan, *The Lawyer's Albatross—Giving Free Time*, 35 D.C.B.J. 32 (Aug.-Oct. 1968). Judge Ryan suggests that appointed or donated time of attorneys should be made deductible as a charitable contribution under INT. REV. CODE of 1954, § 170(c)(1).

59. U.S. CONST. amend. VI; *In re Gault*, 387 U.S. 1 (1967); *Gideon v. Wainwright*, 372 U.S. 335 (1963).

counsel to defend in a divorce case which is a voluntary civil action. Criminal defense appointments are compensated under the Criminal Justice Act which allows up to \$500.00 per case to appointed counsel.⁶⁰ There is no legislative appropriation for appointment of attorneys in civil actions. The legal profession is the only one which expects its members to work for nothing.⁶¹

The volunteer list proposal is further blunted by the fact that many of the attorneys who would naturally be called upon by the court to defend are the very ones bringing the action on behalf of an indigent plaintiff—usually on a petition in forma pauperis. Organizations furnishing legal advice and services to the poor are largely staffed by volunteer attorneys who would most probably be the same ones appearing on any volunteer list. To preclude any suggestion of collusion or breach of legal ethics, the Neighborhood Legal Services Program and the Legal Aid Society, two of the primary sources of legal aid to the poor in the District, have customarily refused to permit their attorneys to represent both sides of a case.

If the District of Columbia statute⁶² were construed to require that the court appoint uncompensated counsel in divorce cases involving indigent plaintiffs, there is a possibility that there would be a constitutional impediment. In *Bedford v. Salt Lake County*,⁶³ the Utah Supreme Court considered a state statute which required the appointment by the court of defense counsel in proceedings to have a defendant involuntarily hospitalized as mentally incompetent. Finding that the requirement for the services of an attorney without a provision for his fee constituted an unconstitutional taking of property without due process of law, the court said:

Until the legislature provides a method by which a lawyer can be paid for compulsory services to an indigent person, a statute requiring such services is unconstitutional as requiring one to give services (a form of property) without just compensation being paid therefor. It matters not that the service is to be rendered to one other than the state. It would still be an involuntary taking by the state.

The statute . . . cannot be sustained. . . . If and when the legislature feels that counsel must be appointed other than at the

60. 18 U.S.C. § 3006A (1964).

61. In 1967, Judge (now Chief Justice) Burger wrote: "historically professions have differed from other honorable pursuits such as that of the grocer, the bricklayer or the carpenter, in that a profession lays claim at least to placing duty ahead of private gain. A profession is expected to enforce high standards of conduct, to share discoveries and learning freely, and to teach young members of the calling." Burger, *A Sick Profession*, 27 FED. B.J. 228, 234 (1967).

62. See D.C. CODE § 16-918 (1967).

63. 22 Utah 2d 12, 447 P.2d 193 (1968).

instance of the judge, then the legislature must provide the means with which to pay for that service.⁶⁴

The Harris Case

The anomalous situation in the District of Columbia with respect to the costs and fees waivable through court discretion,⁶⁵ the problem of publication and appointment of an attorney for an absent defendant, and the divorce statute proscribing divorce by default were all at issue in the case of *Harris v. Harris*,⁶⁶ recently decided by the United States Court of Appeals for the District of Columbia Circuit.

Helen Harris requested leave of the trial court to file a complaint against her husband for an absolute divorce without prepayment of the filing fee. Her petition alleged that because of her poverty she was unable to pay the \$10.00 filing fee necessary to lodge the complaint and further alleged that she believed she had a substantial claim and would prevail.⁶⁷ In her complaint for an absolute divorce on the ground of voluntary separation for more than one year without cohabitation⁶⁸ she alleged a continuous separation since 1955. The petition in forma pauperis was denied by the trial judge without comment.⁶⁹ Mrs. Harris' attorneys then filed a petition with the trial court for permission to proceed on appeal in forma pauperis from the denial of that same relief at the trial level. Again relief was denied by the judge who delivered a written opinion setting forth his reasons.⁷⁰ Noting that the petitioner did not provide a "financial statement detailing expenses, as well as income and obligations," the judge refused to find the poverty necessary to warrant the use of forma pauperis relief, stating *inter alia*:

Defendant here . . . [is] a resident of the State of Pennsylvania. In all probability, the court will next be asked to appoint counsel to represent the defendant. Under court procedure, the party moving for such appointment is responsible for the attorney's fee of appointed counsel. Should this petitioner be allowed to proceed in forma pauperis, the court [will] be faced with the inability to compensate counsel appointed to represent the defendant. The taxpayers of the District of Columbia in effect are being asked to

64. *Id.* at 15, 447 P.2d at 195.

65. Pursuant to D.C. CODE § 15-712 (1967).

66. No. 22266 (Jan. 14, 1970).

67. Mrs. Harris' petition in forma pauperis stated that she had a take home salary of \$70.00 per week, no savings, real property or automobile and was the sole support of herself and two children. Brief for Appellant at 2, *id.*

68. D.C. CODE § 16-904(c) (1967).

69. See unpublished opinion denying leave to proceed in forma pauperis, *Harris v. Harris*, Misc. No. 4-68 (D.C. Ct. Gen. Sess., Dom. Rel. Br., June 28, 1968).

70. *Harris v. Harris*, Misc. No. 4-68 (D.C. Ct. Gen. Sess., Dom. Rel. Br., June 28, 1968).

underwrite the plaintiff's petition as well as this appeal. We are not presented here with the horrible situation where possibly discretion ought to be exercised to allow relief because a hostile situation exists which is detrimental to the health of the petitioner, as well as the children. Here the parties have created a situation by their own act. They separated voluntarily. The taxpayers of the District of Columbia did not ask these two people to get married. They did not ask them to separate. They should not be made to underwrite the legal procedures to terminate the relationship.⁷¹

The trial court decision was appealed to the District of Columbia Court of Appeals and that court, in a brief order, held that waiver of prepayment of costs was within the discretion of the trial court and that the tendered record disclosed no plain abuse of discretion.⁷² The United States Court of Appeals for the District of Columbia Circuit reversed and remanded the case with orders that Mrs. Harris be permitted to proceed in forma pauperis.⁷³

Mrs. Harris attacked the lower court decision and its affirmance on four fronts: that the applicable in forma pauperis statute does not exclude divorce from its coverage;⁷⁴ that the trial court erred in the factual determination that Mrs. Harris was not poor enough to warrant exercise of its discretion in allowing her to proceed;⁷⁵ that Mrs. Harris was denied equal protection of the laws, the courts effectively having denied the remedy of a divorce by the imposition of substantial costs;⁷⁶ and finally, that effective relief for the poor demands that the circuit court rule on the right to waiver of counsel fees and publication costs in addition to the filing fees.⁷⁷ The brief filed by the American Civil Liberties Union as amicus curiae went further and argued that there is a constitutional right to proceed in forma pauperis in divorce cases if the circumstances warrant it and that the District's forma pauperis statute was unconstitutional as applied to the appellant; it allowed the trial judge, in his discretion, to deny her equal protection of the laws.⁷⁸

The counter-argument by the attorney appointed by the court to represent the position of the appellee was that in passing on in forma pauperis petitions, the trial court must use sound discretion⁷⁹ and one of the elements of that discretionary judgment is that of the public policy of the jurisdiction which had been found by higher courts to disfavor divorce.⁸⁰ Further, appellee

71. *Id.* at 1-2.

72. *Harris v. Harris*, No. 3888 (Aug. 6, 1968).

73. *Harris v. Harris*, No. 22266 (Jan. 14, 1970).

74. Brief for Appellant at 9, *id.*

75. *Id.* at 21.

76. *Id.* at 28.

77. *Id.* at 41.

78. *Id.* Brief for ACLU at 8, 11.

79. *Id.* Brief for Appellee at 8.

80. *Id.* at 11, citing *Gage v. Gage*, 89 F. Supp. 987 (D.D.C. 1950).

examined the constitutional issue and argued that the constitutional guarantee of equal protection of the laws has never been extended to all civil litigation and particularly not to divorce litigation.⁸¹ With regard to appointment of counsel and the publication costs, the argument was tendered that neither can be waived by the court, nor can the court order payment of public funds to satisfy those requirements when no such funds exist. It was advanced that determinations which involve the expenditure of funds from the public treasury are for the legislature.⁸²

In finding for Mrs. Harris, the circuit court first held that the proper test for poverty under the District's forma pauperis statute is the same as the test under the federal statute,⁸³ that the pauper's relief "is not limited to those who are public charges or absolutely destitute."⁸⁴ The court further noted that in forma pauperis relief should extend to the "full range of civil remedies . . . including what appear to be meritorious cases for divorce,"⁸⁵ and held that the trial judge cannot, by use of a public policy argument (to require a showing of a useful social purpose), set up more restrictive grounds for divorce than are prescribed by the statute. Once the pauper meets the bare statutory requirements for divorce, he is entitled to that relief regardless of his ability to pay the costs.⁸⁶ Except for a passing nod to the ACLU's equal protection argument, the court side-stepped any constitutional question and decided that the right to divorce in the District has a basis in statute, regardless of any constitutional right.

The court evidently foresaw further litigation challenging the practice of prepayment of court-appointed attorneys' fees, interpreted by the lower court to be required by statute.⁸⁷ Recognizing that the question had not been presented on appeal and was "only lurking in the background," the court nevertheless said: "In indigent cases the court should request members of the bar of the court to represent such persons on an uncompensated basis."⁸⁸ This action will significantly increase the appointment load on attorneys who are already overburdened by appointments from higher courts.⁸⁹ At the time of the *Harris* decision, Neighborhood Legal Services Program attorneys estimated there were between 500 and 600 in forma pauperis petitions ready to be filed and that a conservative estimate of the number projected for

81. *Id.* at 17.

82. *Id.* at 35, 36.

83. 28 U.S.C. § 1915 (1964).

84. *Harris v. Harris*, No. 22266 at 6 (D.C. Cir., Jan. 14, 1970).

85. *Id.*

86. *Id.* at 8.

87. See discussion p. 200 *supra*.

88. No. 22266 at 10.

89. See discussion p. 201 *supra*.

filing in the next year will be 1000.⁹⁰ It is reasonable to assume that a substantial number of these will have to result in uncompensated attorney appointments by the court.

Although the court reached out to decide the attorney appointment question in *Harris*, the request of the appellant for a decision on waiver of publication costs was turned down. Recognizing that the costs of publication are paid to privately owned newspapers and therefore beyond the direct control of the courts, the court suggested that lower courts lower the effective costs in indigent cases by limiting the number of times the notice must appear and the number of media in which notice must appear.⁹¹

The Boddie Case

A similar, but distinguishable, situation was faced by a three-judge United States district court panel in Connecticut in *Boddie v. Connecticut*.⁹² There a class action was brought against the state by a group of women on state welfare who claimed that, because of statutory filing fees and other costs incidental to the obtaining of a divorce in that jurisdiction, they were unable to obtain divorces and thus had been denied the equal protection of the laws guaranteed by the Constitution.⁹³ One reason for distinguishing this case from cases such as the *Harris* case in the District of Columbia is the fact that Connecticut has no in forma pauperis statute and is one of the states where there has been no extension of the relief through the common law. The three-judge panel framed the question: "May a state limit access to its civil courts and particularly in this instance, to its divorce courts, by the requirement of a filing fee or other fees which effectively bar persons on relief from commencing actions therein?"⁹⁴

In meeting the plaintiff's argument that a right to a divorce is comparable to the right of freedom from imprisonment due to unjust conviction and the right to habeas corpus relief, the court found a basic difference between the right to freedom from imprisonment and the right to access to civil courts to adjudicate claims to money or property or to adjust marital status. The court said:

90. Petition of Amicus Curiae for Rehearing or in the Alternative for an En Banc Hearing No. 22266. It is estimated that this number of cases would increase the case load of the Domestic Relations Branch of the Court of General Sessions by 25 percent. See discussion p. 201 *supra*.

91. No. 22266 at 11.

92. 286 F. Supp. 968 (D. Conn. 1968), *prob. juris. noted*, 395 U.S. 974 (1969) (No. 1553, 1968 Term; renumbered No. 265, 1969 Term).

93. The filing fee in Connecticut for a divorce was found by the court to be \$45.00. 286 F. Supp. at 972.

94. *Id.*

There are distinctions between the cases involving imprisonment, denial of voting rights and the ordinary civil actions. The relative importance of the subject with respect to which equality is sought must . . . be taken into account. The right to freedom from unjust imprisonment and the right of franchise were of particular concern to the framers of the Constitution and the Bill of Rights and the post-Civil War amendments. Moreover, in the criminal, habeas corpus and eviction cases there is some direct . . . action involved, not present in most private civil actions, a factor which may have some weight in denying the state a right to discriminate in the first mentioned type of action by fee requirements. In the ordinary civil (including divorce) case the state has no such direct participation, merely providing the judicial machinery for determination of the disputes.⁹⁵

The court granted the state's motion to dismiss noting that the state legislature might be well advised to take measures to provide in forma pauperis relief to its poorer residents.

The Constitutional Questions

Arguments against the constitutionality of the application of in forma pauperis statutes such as the one in the District of Columbia can be founded on the Equal Protection Clause of the fourteenth amendment and the Due Process Clause of the fifth and fourteenth amendments with some common ground between the two.

Justice Douglas, in *Harper v. Virginia Board of Elections*,⁹⁶ stated for the majority:

We agree, of course, with Mr. Justice Holmes that the Due Process Clause of the Fourteenth Amendment "does not enact Mr. Herbert Spencer's Social Statics" (*Lochner v. People of New York*, 198 U.S. 45, 75). Likewise, the Equal Protection Clause is not shackled to the political theory of a particular era. In determining what lines are unconstitutionally discriminatory, we have never been confined to . . . a fixed catalogue of what was at a given time deemed to be the limits of fundamental rights.

* * *

Notions of what constitutes equal treatment for purposes of the Equal Protection Clause *do* change.⁹⁷

But the change to which Mr. Justice Douglas referred has not reached very far into the field of civil litigation. To be sure the Court has found that due process and equal protection call for procedures which do not permit dis-

95. *Id.* at 973.

96. 383 U.S. 663 (1966).

97. *Id.* at 669.

crimination on the basis of the ability of a litigant to bear the costs of litigation when the charge is a *criminal* one and involves the threat of incarceration.⁹⁸ In criminal matters, it is always the "State" or the "People" versus the defendant. With the government as a prosecutor, the court can make certain that the defendant is afforded every opportunity to defend. If the government refuses to let the defendant operate on an even par, the court can simply refuse to hear the case until the problem is rectified.

For the most part civil litigation is voluntary, at least on the part of the plaintiff, and the court cannot control the cause of action or the relative equality of the defendant's ability to operate in an adversary atmosphere. But equal access to the courts was provided in specific terms in the Civil Rights Act of 1870,⁹⁹ and that Act was the impetus for the fourteenth amendment. The Court in *Truax v. Corrigan*¹⁰⁰ held that equal access to the *civil* courts was among the fourteenth amendment's primary objectives: "*that they should have like access to the courts of the country for the protection of their persons and property, the prevention and redress of wrongs, and the enforcement of contracts.*"¹⁰¹ But it is argued that equal access does not include equalization of economic conditions—conditions that the courts cannot control: "A man of means may be able to afford the retention of an expensive, able counsel not within reach of a poor man's purse. Those are contingencies of life which are hardly within the power, let alone the duty, of a State to correct or cushion."¹⁰² The Court, over a strong dissent by Justice Douglas, has declined a subsequent opportunity to broaden access to the courts for indigent persons by denying certiorari to a Georgia eviction case which would have presented the problem head-on.¹⁰³

Equal Protection

Can a natural disadvantage become enough of a legal disadvantage to cause the courts to find constitutional difficulties because of the alleged denial of equal protection of the laws? The law did not create the condition of pov-

98. *Long v. District Court*, 385 U.S. 192 (1966) (free transcript for habeas corpus proceeding); *Gideon v. Wainwright*, 372 U.S. 335 (1963) (right to counsel in state criminal proceedings); *Smith v. Bennett*, 365 U.S. 708 (1961) (waiver of filing fees in habeas corpus proceeding); *Burns v. Ohio*, 360 U.S. 252 (1959) (waiver of filing fees in state court criminal appeals); *Eskridge v. Washington Prison Bd.*, 357 U.S. 214 (1958) (application of *Griffin* retroactively); *Griffin v. Illinois*, 351 U.S. 12 (1956) (right to transcript in state criminal appeals).

99. Ch. 114, § 16, 16 Stat. 144, 42 U.S.C. § 1981 (1964).

100. 257 U.S. 312 (1921).

101. *Id.* at 334, citing *Barbier v. Connolly*, 113 U.S. 27 (1885).

102. *Griffin v. Illinois*, 351 U.S. 12, 23 (1956) (Frankfurter, J., concurring). See also *Douglas v. California*, 372 U.S. 353 (1963).

103. *Williams v. Shaffer*, 385 U.S. 1037 (1967) (denying cert. to 222 Ga. 334, 149 S.E.2d 668 (1966)).

erty and cannot remedy the natural disadvantages that follow from it. But when a natural disadvantage becomes a legal disadvantage, it is argued, the law must remove any unnatural barriers which have been raised either through judicial administration or through legislative enactments.¹⁰⁴ The argument was made in the *Harris* case that the trial court's denial of the petition to proceed in forma pauperis had the effect of depriving petitioner of her statutory right to a divorce under the laws of the District of Columbia and that such a deprivation further created a discrimination between indigents and nonindigents, thus denying indigents equal protection of the laws in violation (in the case of the District) of the fifth amendment.¹⁰⁵

Traditionally, equal protection arguments were used to limit the power of the states to discriminate among its citizens. Equal protection of the law was a right guaranteed every citizen and the equality cut through to the application of those laws as well as the substance.¹⁰⁶ But there are natural differences between groups and natural differences lead to a difference in problems faced by these groups. "Exact equality is no prerequisite of equal protection of the laws within the meaning of the Fourteenth Amendment."¹⁰⁷ The legislature necessarily gives special treatment to a class of citizens when legislation is aimed directly at their common problem.¹⁰⁸ All legislation is "discriminatory" in this sense. As long as there is a reasonable relationship to a legitimate governmental purpose, any incidental "discrimination" is not a denial of equal protection.¹⁰⁹ Things different in fact may be treated differently in law.¹¹⁰ There is a presumption that any classification drawn by a legislature is based on reasonableness and if any set of facts can be found to support the legislative reasoning, the court will assume those facts were the basis for the classification.¹¹¹ Classifications must be based on real and substantial distinctions, however, which bear a reasonable and just relation to the things in respect to which the classification is imposed.¹¹² It has been suggested that the test to determine if there has been a denial of equal protection of the laws is one of over-inclusiveness (where the law in-

104. See Note, *Litigation Costs: Hidden Barrier to the Indigent*, 56 GEO. L.J. 516, 534 (1968).

105. Brief for the ACLU Fund as Amicus Curiae at 7-8, *Harris v. Harris*, No. 22266 (D.C. Cir., Jan. 14, 1970).

106. *Yick Wo v. Hopkins*, 118 U.S. 356 (1886).

107. *Norvell v. Illinois*, 373 U.S. 420, 423 (1963).

108. See, e.g., *Atchison, T. & S. F. R.R. v. Matthews* 174 U.S. 96 (1899).

109. See *Martin v. Walton*, 368 U.S. 25 (1961); *Skinner v. Oklahoma*, 316 U.S. 535 (1942); *Truax v. Corrigan*, 257 U.S. 312 (1921); *Yick Wo v. Hopkins*, 118 U.S. 356 (1886); *Barbier v. Connolly*, 113 U.S. 27 (1885).

110. *Rinaldi v. Yeager*, 384 U.S. 305, 309 (1966). See generally *Goesaert v. Cleary*, 335 U.S. 464, 466 (1948).

111. *McLaughlin v. Florida*, 379 U.S. 184, 191 (1964); *Lindley v. Natural Carbonic Gas Co.*, 220 U.S. 61, 78-79 (1911).

112. *Southern Ry. v. Greene*, 216 U.S. 400, 417 (1910).

cludes more than it was designed to) or under-inclusiveness (where the legislation leaves out something or someone who is affected by the problem).¹¹³

In discussing the type of discrimination proscribed by the Equal Protection Clause, the Supreme Court has brushed aside natural classifications based on such things as age, fitness, sex, weight and geographic locations,¹¹⁴ and concentrated on discrimination which they term "invidious" or "hostile."¹¹⁵ This type of discrimination may be found in a showing of clear and intentional or purposeful discrimination in the unequal application of a statute fair on its face to those who are entitled to be treated alike.¹¹⁶ But a classification (or barrier, impediment or condition) is not invalid as "hostile" or "invidious" because of simple inequality—there must be an arbitrariness involved.¹¹⁷

But when that "simple inequality" causes the deprivation of a right guaranteed a citizen by the Constitution, the Court has held that the state has the responsibility to correct it so as to restore that right. In *Griffin v. Illinois*¹¹⁸ the Court faced the question of whether the state had to furnish an indigent prisoner with a transcript for purposes of appeal when the Illinois statute required such a transcript to perfect any appeal. The Court found Griffin's right to a fair trial had been denied by the state's refusal to give him appellate review without a transcript. The Court said:

Surely no one would contend that either a State or the Federal Government could constitutionally provide that defendants unable to pay court costs in advance should be denied the right to plead not guilty or to defend themselves in court. Such a law would make the constitutional promise of a fair trial a worthless thing. . . . In criminal trials a State can no more discriminate on account of poverty than on account of religion, race, or color.

* * *

There can be no equal justice where the kind of a trial a man gets depends on the amount of money he has. Destitute defendants must be afforded as adequate appellate review as defendants who have money enough to buy transcripts.¹¹⁹

113. See Tussman & tenBroek, *The Equal Protection of the Laws*, 37 CALIF. L. REV. 341 (1949).

114. *Prince v. Massachusetts*, 321 U.S. 158 (1944) (age); *New York ex rel. Bryant v. Zimmerman*, 278 U.S. 63 (1928) (number of members in organization); *Ocampo v. United States*, 234 U.S. 91 (1914) (geographic location); *Collins v. Texas*, 223 U.S. 288 (1912) (fitness for business license); *Williams v. Walsh*, 222 U.S. 415 (1912) (effect of time on statute); *Muller v. Oregon*, 208 U.S. 412 (1908) (sex).

115. *Norvell v. Illinois*, 373 U.S. 420, 422 (1963); *Welch v. Henry*, 305 U.S. 134 (1938); *Barbier v. Connolly*, 113 U.S. 27 (1885).

116. *Snowden v. Hughes*, 321 U.S. 1 (1944); see *Yick Wo v. Hopkins*, 118 U.S. 356 (1886).

117. *International Harvester Co. v. Missouri*, 234 U.S. 199 (1914).

118. 351 U.S. 12 (1956).

119. *Id.* at 17, 19.

With that decision, the Court added a new perspective to equal protection. States may now be required to alleviate inequalities that are natural and are not the product of discriminatory policies.¹²⁰ There was no arbitrary classification in *Griffin*, nor was the statute discriminatory on its face. There was no "hostile" attempt to apply the statute in a manner calculated to exclude Griffin. There was simply a state statute, neutral on its face which, when applied, spotlighted a case where there was accidental inequality. But since there were sensitive constitutional rights involved, the Court brushed aside the traditional test of "invidious" or "hostile" discrimination and said, in effect, that any inequality that results in deprivation of rights will be a violation of the Equal Protection Clause.

The *Griffin* decision was a criminal law case. It was ten years before the Court extended equal protection arguments to the natural inequalities of wealth, which resulted in alleged deprivations of rights in the civil area. The Equal Protection Clause has been applied to civil cases frequently¹²¹ but almost entirely in the area of a citizen's right to vote. In *Harper v. Virginia Board of Elections*,¹²² the Court found the right to vote was denied some Virginia citizens because of a state poll tax which applied to everyone and which was not intentionally discriminatory. The statute was found to violate the Equal Protection Clause because it denied the basic right to vote because of the natural barrier of poverty. But it is a long step from the right to vote to the right to bring civil litigation, such as an action for divorce. Other rights have been argued to be equal to the right to vote in the eyes of the Constitution but the Court has declined to rule on them. Such a case was *Hackin v. Arizona*¹²³ in which Justice Douglas wrote a spirited dissent when the appeal was dismissed for want of a substantial federal question:

[T]he Fourteenth Amendment ensures equal justice for the poor in both criminal and civil actions. . . . But to millions of Americans who are indigent and ignorant—and often members of minority groups—these rights are meaningless. . . . They suffer discrimination in housing and employment, are victimized by shady consumer sales practices, evicted from their homes at the whim of the landlord, denied welfare payments, and endure domestic strife without hope of the legal remedies of divorce, maintenance, or child custody decrees.¹²⁴

But the court has refused to find that indigence alone is a source of rights¹²⁵

120. See Note, *The Supreme Court, 1955 Term*, 70 HARV. L. REV. 83, 127 (1956).

121. See, e.g., *Gray v. Sanders*, 372 U.S. 368 (1963); *Baker v. Carr*, 369 U.S. 186 (1962); *Bynum v. Connecticut Comm'n on Forfeited Rights*, 410 F.2d 173 (2d Cir. 1969).

122. 383 U.S. 663 (1966).

123. 389 U.S. 143 (1967).

124. *Id.* at 144-45. See also *Williams v. Shaffer*, 385 U.S. 1037 (1967).

125. *Edwards v. California*, 314 U.S. 160, 184 (1941) (Jackson, J., concurring).

and any attempt to do so would probably result in a parade of broken dreams and blunted opportunities for things a man with \$50.00 can do that a man without \$50.00 cannot. It seems quite likely, nevertheless, that the Court will select more and more cases of the variety suggested by Justice Douglas in his *Hackin* dissent because of the challenges directed at state (and court) fees of various types as they affect the poor.¹²⁶ Equal protection will probably be the basis of any Court decision by which the traditional lines will be redrawn. As Mr. Justice Douglas warned in *Harper*, “[n]otions of what constitutes equal treatment for purposes of the Equal Protection Clause do change.”¹²⁷

Due Process

The Due Process Clause of the fourteenth amendment “tends to secure equality of law in the sense that it makes a required minimum of protection for every one’s right of life, liberty and property”¹²⁸ Although a more difficult argument to advance because of lack of precedent, the substantive due process clauses of the fourteenth and fifth amendments may provide a surer route to constitutional vindication of the rights of the poor to civil remedies through the courts. The three theories that have been advanced by constitutional scholars as having been used by the Court are the absorption theory, the penumbra theory and the “implicit in ordered liberty” theory.¹²⁹ Examining each of these briefly to compare the rights of the poor in the light of past Court interpretations, it is evident that the absorption theory cannot apply here because that theory suggests the incorporation of each of the specific guarantees contained in the Bill of Rights under the mantle of due process as found in the fourteenth amendment.¹³⁰ The rights that are in discussion here are not specifically enumerated in the Bill of Rights so this theory cannot apply. The penumbra theory broadens the absorption theory to include other rights with which the state cannot interfere. Such a right is the right to privacy in the marital relationship as found in *Griswold v. Connecticut*¹³¹ and the right to marry in *Loving v. Virginia*.¹³²

126. *Boddie v. Connecticut*, 286 F. Supp. 968 (D. Conn. 1968), *prob. juris. noted*, 395 U.S. 974 (1969) (No. 1553, 1968 Term; renumbered No. 265, 1969 Term); *Sanks v. Georgia*, 225 Ga. 88, 166 S.E.2d 19, *prob. juris. noted*, 395 U.S. 974 (1969) (No. 1554, 1968 Term; renumbered No. 266, 1969 Term) (posting of bond in dispossessory warrant proceeding).

127. *Harper v. Virginia Bd. of Elections*, 383 U.S. 663, 669 (1966).

128. *Truax v. Corrigan*, 257 U.S. 312, 332 (1921).

129. See Note, *Discriminations Against the Poor and the Fourteenth Amendment*, 81 HARV. L. REV. 435, 438 (1967).

130. See *Klopfer v. North Carolina*, 386 U.S. 213, 222 (1967); *Adamson v. California*, 332 U.S. 46, 74-75 (1947) (Black, J., dissenting).

131. 381 U.S. 479, 484-85 (1965).

132. 388 U.S. 1, 12 (1967).

This theory may have value, especially as an analogy to the area of divorce. The third theory is that the state cannot impinge on rights that are implicit in ordered liberty because those rights are so fundamental.¹³³ But in the area of divorce, for instance, it 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.¹³⁴ The family break-up has been declared against public policy by the courts.¹³⁵ It can hardly be maintained that the right to a divorce in the face of adverse public policy is so "fundamental" that the state may not control it both by statute and through the courts by something as minimal as a fee for the filing of a complaint.

Conclusion

It is not difficult to define the problems of the poor in pursuing their rights in the civil courts. The expense of civil litigation has made civil justice a luxury. But it is too simple an answer to poke a finger at the courts and assert that the injustice can both be identified and remedied there. The courts are traditionally passive forums and the remedies for every civil injustice may not lie with them. The legislatures are the more likely bodies to implement far-reaching reform. But the interests of the poor are not always foremost in the mind of legislatures and the poor have neither the organizational nor financial ability to command the attention that is paid other causes. It is probable that it will take the Supreme Court to unravel and resolve this anomaly of civil litigation, but such a decision will necessarily be restricted to the context under which it is brought and it is likely that the *in forma pauperis* remedies (or lack of them) in the states may be several years away from Supreme Court scrutiny.

In the meantime, a number of remedies would seem available to both the courts and the legislatures to ameliorate the problem. The courts, for their part, should take the initiative to waive or reduce fees which act as barriers to the pursuit of civil litigation if such fees have been left to their discretion by the legislature. The judge who must make the crucial decision whether a person may proceed without cost or at reduced cost should have financial standards available to him upon which to base his decision. Bar associations may be the most valuable conduit of ideas both to the court and to legislative bodies as well as sources for volunteer attorneys and information for the courts. Any criterion for financial qualification of *in forma pauperis*

133. *Palko v. Connecticut*, 302 U.S. 319, 325 (1937).

134. Foster, *Marriage: A "Basic Civil Right of Man,"* 37 *FORDHAM L. REV.* 51, 52 (1968).

135. See *Maynard v. Hill*, 125 U.S. 190 (1888); *Gage v. Gage*, 89 F. Supp. 987 (D.D.C. 1950).

petitioners should be made public although it must be recognized that the facts and circumstances of each petitioner's financial situation can vary greatly. Qualified law students might be used on a voluntary basis to assist in certain types of civil causes of action, saving a poor person the cost of an attorney.

The legislature, if it does not grant the courts the power to set their own fees, should consider expressly granting the courts the power to waive fees. Perhaps the most far-reaching type of remedy that a legislature might implement is to make funds available for payment of the unofficial costs which make the expenses add up. These funds could be dispensed in much the same manner as is done with Criminal Justice Act appropriations.¹³⁶ If the American Bar Association or some like body were to work out a model in forma pauperis statute, many legislatures might be more willing to accept it rather than hammer out piecemeal efforts of their own.

It is also possible that the in forma pauperis remedy itself may have outlived its usefulness. This old English relief has been grafted to a modern system of civil procedure and remedy. It is submitted that most of the causes of action to which the poor are party could be solved in a quasi-legal framework which could be regulated by the courts, but which would be free of charge. Perhaps the system which creates the costs should be modified to permit causes of action in various civil areas to be pursued without cost before specialists appointed by the bar or by the court with the right to appeal to a court of law.

One of the first steps in providing a solution to a problem is to define its boundaries. Once it is realized that payment of incidental costs is a very real part of the relief that in forma pauperis is supposed to provide, a long step has been taken toward that axiomatic fair trial.

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136. 18 U.S.C. § 3006A (1964).