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Maryland Law Review

Requiring Indigent Seeking Divorce To Pay Cost Of Service By Publication Held Denial Of Equal Access To Courts

Jeffreys v. Jeffreys

Plaintiff, living on public assistance, obtained leave of court to prosecute her divorce action as a poor person. Unable to locate her husband, she was granted court permission to have process served by

2. Leave was applied for and obtained in accordance with N.Y. CIV. PRAC. LAW § 1101(a) (McKinney 1963):

Upon motion of any person, the court in which an action is triable, or to which an appeal has been or will be taken, may grant permission to proceed as a poor person. The moving party shall file his affidavit setting forth the amount and sources of his income and listing his property with its value; that he is unable to pay the costs, fees and expenses necessary to prosecute or defend the action or to maintain or respond to the appeal; the nature of the action; sufficient
Publication. Plaintiff then sought a court order requiring the City of New York to pay the expense of this publication. In its initial ruling on the matter rendered with the consent of the City, the court determined that the New York in forma pauperis statute required the City to pay this $300 expense. Realizing that this ruling may have established a costly precedent, the court granted the City's motion to withdraw its consent and relitigate the issue. On rehearing, contrary to its initial ruling, the court determined that the expense of publication was not a "cost," "fee" or "expense" within the meaning of the in forma pauperis statutes since it was an "auxiliary expense" of litigation payable to persons other than public officers. The City, therefore, was not required by statute to pay this expense. The court further concluded that it lacked the inherent discretionary power to direct payment of auxiliary expenses from public funds unless the Constitution so mandated. Such a mandate was found to exist.

In deciding that the equal protection clause of the fourteenth amendment required the court to direct the City to pay the publication costs, the court first discussed the nature of divorce actions. The court distinguished divorce proceedings from other civil actions on the basis that the latter may be resolved out of court while a divorce may only be granted by "due judicial proceedings." The court likened the state's role as an indispensable party in matrimonial actions to the state's role in criminal cases. Then, reasoning from analogous decisions pertaining to the indigent criminal defendant's right of equal access to appellate review, particularly Griffin v. Illinois, the court determined that the cost of publication was an effective barrier to an indigent's access to the court — the only means whereby she could procure a divorce — and held that she was consequently "denied the equal protection of the laws guaranteed to her by the State and Federal Constitutions." To remedy this unconstitutional denial of access to
court, the court directed the City of New York to pay the publication expense from public funds.\textsuperscript{10}

Publication of service represents a substantial expense confronting the indigent seeking a divorce. Attorney's fees are another major expense in divorce actions; however, the recent formation of legal aid agencies has significantly alleviated the cost of counsel for the poor, especially in urban areas.\textsuperscript{11} The indigent civil litigant is further excused from paying various other court fees and costs pursuant to in forma pauperis statutes in force in many states. While these reforms have made it easier for the indigent to enforce many of his rights in the civil courts, the expense of publication often poses a virtually insurmountable barrier for a poor person seeking a divorce. \textit{Jeffreys} represents a major step in tearing down this barrier.

The historical background of in forma pauperis proceedings reveals that very early the Court of Chancery permitted paupers to prosecute an action without payment of costs.\textsuperscript{12} The first legislation was an English statute enacted during the reign of Henry VII.\textsuperscript{13} It provided that one who proved his poverty to the satisfaction of the chancellor could have an original writ and writs of subpoena without costs.\textsuperscript{14} This statute, which remains as part of the common law of a few states,\textsuperscript{15} furnished the fundamental concept for those in forma pauperis statutes which have subsequently been enacted in other states.\textsuperscript{16}

\textsuperscript{10} A provision in the poor persons' statutes confers upon the court similar authority to order the county or city treasurer to pay a stenographer (not a public official) the fee for preparing a transcript of a civil trial. \textit{N.Y. Civil Pract. Law} § 1102(b) (McKinney 1963).

\textsuperscript{11} Mrs. Jeffreys was represented by counsel from the Legal Services Program of the Office of Economic Opportunity, and the court acknowledged that this was a test case designed to make new law through the courts under the Program. 296 N.Y.S.2d at 77 & n.1. For a discussion of the purposes of the Program see \textit{Shriver, Law Reform and the Poor}, 17 Am. U.L. Rev. 1 (1967). A similar case has been filed by the Baltimore Legal Aid to test the constitutionality of requiring indigents to pay court costs and an examiner's fee in a divorce action in Maryland. \textit{Joyner v. State}, No. 42724A (Cir. Ct. No. 2, Balt., filed July 16, 1969).

\textsuperscript{12} 1 E. Daniel, \textit{Pleadings and Practice of the High Court of Chancery} 38 (6th Am. ed. 1894).

\textsuperscript{13} Statute of Westminster, 11 Hen. 7, c. 12 (1494). England has since provided more extensive relief for the indigent civil litigant in the Legal Aid and Advice Bill of 1949 (12 & 13 Geo. 6, c. 51), discussed in Comment, \textit{The British Legal Aid and Advice Bill}, 59 Yale L.J. 320 (1950).

\textsuperscript{14} The required proof under the statute was that the pauper be not worth five pounds, exclusive of his wearing apparel and the matters involved in the litigation. \textit{Perry v. Walker}, 1 Colly. 229, 63 Eng. Rep. 396 (1844). The statute further provided for the appointment of "learned Counsel and Attorneys," who were to serve without reward. For a discussion of the right to counsel under contemporary standards, see Comment, \textit{The Right to Counsel in Civil Litigation}, 66 Colum. L. Rev. 1322 (1966). Standards under existing in forma pauperis statutes are discussed in Note, \textit{Litigation Costs: The Hidden Barrier to the Indigent}, 56 Geo. L.J. 516, 524-27 (1968).

\textsuperscript{15} McClennahan v. Thomas, 6 N.C. (2 Murph.) 175 (1813); Cowan v. City of Chester, 2 Del. Co. 234 (C.P. Pa. 1884). According to \textit{1 Alexander's British Statutes} 346 (Coe's ed. 1912), it is still in force in Maryland. The only other statutory in forma pauperis provision in Maryland provides that the deposit for the costs of the clerk and sheriff need not be made by a plaintiff who satisfies the judge by affidavit that he is unable to pay the deposit and whose attorney certifies that the action is meritorious. \textit{Md. Ann. Code} art. 24, § 10(b) (1966). These fees must, however, eventually be paid; only the initial deposit is deferred.

\textsuperscript{16} For a resume of the scant significant reforms of in forma pauperis legislation in the United States subsequent to the American Revolution, see \textit{Silverstein, Waiver of Court Costs and Appointment of Counsel for Poor Persons in Civil Cases}, 2 Valparaiso U.L. Rev. 21, 30-31 (1967).
It has been held that courts have the inherent power to remit fees in forma pauperis where the legislature has enacted no laws concerning such relief. The right to proceed in forma pauperis has been provided legislatively in a majority of the jurisdictions. Thirty-two states, the District of Columbia, and the federal government have by statute or court rule implemented means whereby an impoverished individual may seek judicial remedies without paying court costs and fees. Where a legislature has enacted specific relief provisions, it would seem that a court could fashion no further relief unless under some constitutional compulsion.

The costs and fees from which the pauper is excused vary considerably among the states. Although many states forgive the fees for service of summons accomplished by court or public officers in all civil cases for an indigent, only Ohio is reported to provide for payment of the cost of procedural notice by newspaper publication.

17. Martin v. Superior Court, 176 Cal. 289, 168 P. 135 (1917). An indigent laborer sought to have the jury fees excused in his action to recover damages for the wrongful death of his minor daughter. The Supreme Court of California held that courts have the authority, notwithstanding statutes requiring prepayment of court fees, to remit those fees for a pauper since California had adopted the English common law and since "the power of the English common-law courts to remit fees on petition in forma pauperis did not have its origin in any statute, but was in fact exercised as one of the inherent powers of the courts themselves, quite independently of statute." Id. at 137. Thus, it is arguably within the judge's discretion to forgive payment of court fees in any jurisdiction (such as Maryland) that has adopted the common law of England and has not specifically denied this discretion by statute. But see Campbell v. Chicago & N.W. Ry., 23 Wis. 490 (1868). One state's constitution has been interpreted as guaranteeing an indigent plaintiff the right to proceed in forma pauperis upon proof that he cannot furnish surety for costs. Lewis v. Smith, 21 R.I. 324, 43 A. 542 (1899), construing R.I. CONST. art. I, § 5: "Every person within this state ought to find a certain remedy, by having recourse to the laws, for all injuries or wrongs which he may receive in his person, property, or character. He ought to obtain right and justice freely and without purchase, completely and without denial; promptly and without delay; conformably to the laws." The New York Constitution contains no similar provision although it does guarantee the right to due process and equal protection. See also Lasseter v. Lee, 68 Ala. 287 (1880) ; Schade v. Luppert, 17 Pa. County Ct. 460 (1896) ; Dillingham v. Putnam, 109 Tex. 1, 14 S.W. 303 (1890) ; City of Manitowoc v. Manitowoc & N. Traction Co., 145 Wis. 13, 129 N.W. 925 (1911). But see Beyerback v. Juno Oil Co., 42 Cal. 2d 11, 265 P.2d 609 (1957).


20. For a detailed discussion of specific statutes, see Note, Litigation Costs: The Hidden Barrier to the Indigent, 56 Geo. L.J. 516, 527-32 (1968). The most widely adopted reform of in forma pauperis procedures is the UNIFORM RECIPROCAL ENFORCEMENT OF SUPPORT ACT (1952 & 1958 versions), which affords the court discretion to waive, among other fees and costs, all fees for service of process in actions falling within the scope of the act. § 14 (1952 version); § 15 (1958 version). All states plus the District of Columbia have adopted one of the two versions. 9C UNIFORM LAWS ANN. 9-10 (Supp. 1967).


None of the in forma pauperis laws envelops all the fees incident to a civil action. It might be expected that legal aid agencies would have funds available to provide relief from those expenses not defrayed by the state. But such is not the case according to responses to an American Bar Foundation questionnaire. Few offices had any funds available for such purpose, and only Little Rock, Arkansas, included newspaper charges for legal notices in "basic court costs" paid by the office for the client. But even when an office has funds available to defray the incidental expenses of civil litigation, the purposes for which they may be used frequently do not include divorce cases.

Jeffreys is representative of recent litigation to determine what costs are actually waived under various in forma pauperis statutes. If these statutes are construed liberally, courts are less likely to be confronted with constitutional issues. Such an approach led the Court of Appeals for the First Circuit to conclude that the federal statute permitted waiver of the removal bond which is required to secure the costs incurred by the removal proceedings should it be found that the case was improperly removed to the federal court. And another lower New York court, notwithstanding Jeffreys, has ruled that the cost of publishing summons in an annulment action was a cost within the meaning of the statute. But where statutes are construed not to include a particular expense or where no statute exists, courts will have to squarely face the constitutionality of requiring an indigent to pay it.

Under existing laws the burden of paying the publication expense of service of notice is shouldered by the litigant. The weight of this burden varies considerably among the cities and states. While, from a practical viewpoint, the high cost of publication in New York City reported in Jeffreys seems to have a harsher effect on the indigent than lesser sums in other locales, the amount should be of no con-

23. Silverstein, Waiver of Court Costs and Appointment of Counsel for Poor Persons in Civil Cases, 2 VALPARAISO U.L. Rev. 21, 38 (1967). The American Bar Foundation sent questionnaires to legal aid offices in order to gather information about the in forma pauperis proceedings in several jurisdictions.

24. Id. at 39.

25. Id. at 38-39.


29. "If service is by publication, costs of printing vary quite widely in different cities, the lowest being $10.00 or less in Phoenix, Little Rock, and Knoxville and the highest $100.00 in Hartford and $150.00 in New York City." Silverstein, Waiver of Court Costs and Appointment of Counsel for Poor Persons in Civil Cases, 2 VALPARAISO U.L. Rev. 21, 40-41 (1967). Md. R.P. 105(d)(1) requires such notice to be published once in each of four successive weeks. A recent inquiry by the Maryland Law Review revealed that the cost of service by publication in the City of Baltimore approximates seventy dollars, depending upon the length of the notice, if published in The Daily Record, the Baltimore area legal newspaper.
stitutional significance. Although arguments may be advanced that requiring an indigent seeking a divorce to pay the publication cost is violative of the privileges and immunities clause or the due process clause of the fourteenth amendment, a declaration of the requirement's unconstitutionality would most firmly be grounded upon the equal protection clause. "The resurrection of a wider-ranging review when fundamental personal interests are at stake has come under the guise of equal protection rather than substantive due process."

The equal protection clause was originally intended to secure equal rights of citizenship for the Negro during Reconstruction. Although the equal protection clause has been extended to strike down all unreasonable discriminations by a state, it has retained its greatest vitality when applied to discriminatory state action against the Negro. Throughout its century of existence, the equal protection clause appears to have been primarily utilized by minorities as an effective prevention from suppression and infringement of their civil rights by a majority-controlled state. The minorities seeking its protection and the rights which they seek to protect change with history. In Harper v. Virginia Board of Elections, wherein the court determined the state poll tax to be in contravention of the equal protection clause, Justice Douglas declared:


31. "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States . . ." U.S. Const. amend. XIV, § 1.


33. "... nor deny any person within its jurisdiction the equal protection of the laws . . ." U.S. Const. amend. XIV, § 1. "No person shall be denied the equal protection of the laws of this state or any subdivision thereof," N.Y. Const. art. I, § 11. For a discussion of the probable inapplicability of the privileges and immunities and due process clauses to the situation, see Note, Litigation Costs: The Hidden Barrier to the Indigent, 56 Geo. L.J. 516, 533-34, 543-44 (1968).


37. See, e.g., Loving v. Virginia, 388 U.S. 1 (1967) (statutory scheme designed to prevent interracial marriages); McLaughlin v. Florida, 379 U.S. 184 (1964) (criminal statutes which imposed a penalty for cohabitation between a Negro and a white person who were not married and none for cohabitation between those of the same race); Brown v. Board of Educ., 347 U.S. 483 (1954) (de facto segregation of white and Negro children in public schools); Shelley v. Kraemer, 334 U.S. 1 (1948) (judicial enforcement of racially restrictive covenants in deeds).


... the Equal Protection Clause is not shackled to the political theory of a particular era. In determining what lines are constitutionally discriminatory, we have never been confined to historic notions of equality. ... Notions of what constitutes equal treatment for purposes of the Equal Protection Clause do change.  

Equal protection of the laws does not dictate that every law must apply equally to every citizen. Because not all people are afflicted with the same problems, legislatures may, in order to remedy individual problems, classify its citizens according to common problems. Although every classification is, from the perspective of pure logic, discriminatory, those that are reasonable do not violate the constitutional command of equal protection. "But the classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike."  

In determining the constitutionality of requiring an indigent to pay the cost of service by publication, it is necessary to ascertain the purposes underlying the requirement, the classification of persons affected by the requirement, and the reasonableness of such classification with respect to the purposes. The legislative objectives are then to be balanced against the resultant encroachment on individual rights. Despite its questionable value in many situations, it is reasonably clear that due process would not allow a legislature to eliminate notice entirely by dispensing with the minimal requirement of publication of notice when the defendant spouse cannot be located. But the requirement of publication alone delineates no objectionable classification, for it applies with equal force and effect to both the wealthy and the impoverished. Rather it is the requisite payment of the expense of newspaper publication that creates a practical distinction between rich and poor upon its application. The primary purpose of requiring a litigant to bear the cost appears to be simply to avoid the alternative

40. 383 U.S. at 669. As an example of changing notions of equality, Justice Douglas noted that the "separate-but-equal" doctrine of Plessy v. Ferguson, 163 U.S. 537 (1896), was overruled with respect to education in Brown v. Board of Educ., 347 U.S. 483 (1954). 41. See, e.g., Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61 (1911), where the Supreme Court held reasonable a classification prohibiting the pumping of mineral waters and carbonic acid gas for the purpose of vending it apart from the waters as distinguished from permitting such pumping for other purposes where the legislative purpose was to prevent the waste and impairment of the state's natural mineral waters. 42. "It is the essence of a classification that upon the class are cast ... burdens different from those resting upon the general public. ... Indeed, the very idea of classification is that of inequality. ..." 43. See Note, Litigation Costs: The Hidden Barrier to the Indigent, 56 GEO. L.J. 516, 536 (1968). 44. See Note, Litigation Costs: The Hidden Barrier to the Indigent, 56 GEO. L.J. 516, 536 (1968). 45. See, e.g., Armstrong v. Manzo, 380 U.S. 545 (1965); Blinn v. Nelson, 222 U.S. 1 (1911). But see 20 SYR. L. REV. 973, 977 (1969).
of defraying the expense by use of state funds. An additional justification is the prevention of frivolous suits. With respect to the purpose of avoiding disbursement of state funds, there is no question that the classification — all litigants seeking a divorce — reasonably accomplishes that purpose. As compared to the purpose of preventing groundless divorce actions, however, the classification fails to attain its objective because only poor persons are effectively prevented; furthermore, the broad classification is defective for it applies with equal force to those whose claims are not frivolous. Thus, the classification of all persons seeking a divorce is arguably unreasonable when compared with the goal of preventing frivolous divorce actions since it both includes more persons than only those whose claims are frivolous and fails to include many whose claims are frivolous. Since this broad classification reasonably accomplishes only the purpose of protecting state coffers, the constitutionality of requiring the indigent to pay the newspaper charges for publication may depend upon whether the achievement of this goal outweighs the rather effective barrier to the indigent's access to the courts for the obtaining of a divorce.

When fundamental personal interests are at stake, courts frequently resort to the balancing method of determining constitutionality under the equal protection clause by weighing the legislative purpose of a law against its impairment of individual rights. Preferential treatment is accorded to personal interests as opposed to economic interests. Certainly one's right, albeit state granted and controlled, to associate and disassociate with another in the relationship of husband and wife should be deemed a very personal interest.

46. "[A] State . . . may protect itself so that . . . public moneys [are] not needlessly spent." Griffin v. Illinois, 351 U.S. 12, 24 (1956) (Frankfurter, J., concurring). In the English court system, fees were paid by the litigants for writs and services performed by the court officials to defray the cost of administering the judicial machinery and to provide incomes to judges and court officers. Although the two justifications for the fee system have for the most part disappeared, fees continue to be charged as vestiges of a past era. Note, Litigation Costs: The Hidden Barrier to the Indigents, 56 Geo. L.J. 516, 518-19 (1968). Since the publication cost is not paid to the court or state, the requirement is unlikely rooted in the traditional fee system.

47. See Lowe v. Kansas, 163 U.S. 81, 85 (1896).

48. Those persons whose incomes are slightly greater than the income levels of indigency and those whose incomes might be considered moderate may also be deterred from commencing a frivolous divorce suit; however, they at least have the opportunity to exercise a choice.


50. Cf. Note, Litigation Costs: The Hidden Barrier to the Indigents, 56 Geo. L.J. 516, 536 (1968). Both of these purposes were considered legitimate by the court in Boddie v. Connecticut, 286 F. Supp. 968, 973 (D. Conn. 1968), in requiring an indigent to pay a filing fee for a divorce; but the court failed to discuss whether the classification was appropriate to achieve these goals.


52. "[T]he different treatment of personal interests seems to rest upon a belief that they are simply more important than others." Developments in the Law, Equal Protection, 82 Harv. L. Rev. 1065, 1128 (1969).

Under the fundamental interests theory a classification may be held invalid even though it is not invidious and even though it is reasonably related to a legitimate public purpose. A court applying this theory will weigh the benefits flowing from pursuit of the state's objective against the detriments resulting from the impairment of a basic personal interest. 54

The personal interest involved in divorce is impaired by requiring an indigent to pay the publication cost which results in denial of access to courts. In a recent decision the Supreme Court declared the Virginia antimiscegenation statutes unconstitutional, one of which "automatically voids all marriages between 'a white person and a colored person' without any judicial proceeding. . . ." 55 The problem in Jeffreys is the reverse: the indigent is unable to enter the courthouse to void the marriage. But common to both is the lack of access to courts impairing the personal interests of the parties.

Notwithstanding the state's vast power to regulate marriage and divorce, 66 its powers are not without constitutional boundaries. 67 "The fact that the legislature might entirely abolish the right of access to the courts for purposes of divorce and annulment does not imply the power to make the exercise of those rights conditional upon a surrender of constitutional guarantees." 68 A state may not impose unconstitutional conditions on the exercise of a right even though the right is granted entirely at the pleasure of the state. 66

Increased recognition by the courts that poverty adversely affects a person's ability to exercise his rights in the judicial process commenced in the sphere of criminal procedure. In Griffin v. Illinois, 69

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56. "Marriage . . . has always been subject to the control of the legislature. That body prescribes the age at which parties may contract to marry, the procedure or form essential to constitute marriage, the duties and obligations it creates, its effect upon the property rights of both, present and prospective, and the acts which may constitute grounds for its dissolution." Maynard v. Hill, 125 U.S. 190, 205 (1888). See Reynolds v. United States, 98 U.S. 145 (1878); Crane v. Meginnis, 1 Gill & Johns. 463, 474 (Md. 1829). See generally Monahan, State Legislation and Control of Marriage, 2 J. FAMILY L. 30 (1962).
57. Although "marriage is a social relation subject to the State's police power . . . the State does not contend in its argument before this Court that its powers to regulate marriage are unlimited notwithstanding the commands of the Fourteenth Amendment. Nor could it do so. . . ." Loving v. Virginia, 388 U.S. 1, 7 (1967).
58. People v. Connell, 2 Ill. 2d 332, 118 N.E.2d 262, 267 (1954), wherein the court declared a legislative act unconstitutional that required a person to file a written intention to file a complaint sixty days before filing the complaint for divorce because the delay was interposed before jurisdiction is obtained and, therefore, the litigant's right to seek immediate redress in court is violated.
59. Cf. Power Mfg. Co. v. Saunders, 274 U.S. 490 (1927), where it was decided that a foreign corporation, by obtaining permission to do business in a state, need not subject itself to an unconstitutional statute which allows an action to be brought against a foreign corporation in any county of the state but restricts venue for a domestic corporation to the county in which the domestic corporation does business; Hanover Fire Ins. Co. v. Harding, 272 U.S. 494 (1926), where the Supreme Court held that, even though a state may forbid a foreign corporation to do business within its jurisdiction, a state may not make past compliance with an unconstitutional tax a condition precedent to renewal of the license.
60. 351 U.S. 12 (1956).
the Supreme Court ordered the state to provide transcripts of criminal trials free to indigents since the state required a transcript for full appellate review. Although the state was under no duty to provide for an appeal from criminal convictions, where the state chose to afford this privilege, it could not discriminate in a practical manner against those unable to pay the cost of a transcript. Justice Black, speaking for four members of the Court, stated that “[t]here can be no equal justice where the kind of trial a man gets depends on the amount of money he has.” Griffin imposed an affirmative duty upon the state to alleviate the natural disadvantages resulting from poverty when an indigent’s basic civil rights are denied by state action.

The Griffin principle has been extended into other areas of criminal procedure: court-appointed counsel on appeal, transcripts of habeas corpus hearing, and filing fees in habeas corpus and on appeal. Justice Douglas clearly indicated in Douglas v. California that “[a]bsolute equality is not required. . . . But where the merits of the one and only appeal an indigent has as of right are decided without benefit of counsel, we think an unconstitutional line has been drawn between rich and poor.” Mrs. Jeffreys likewise has only one way of obtaining a divorce — through the courts. The courts’ awareness of poverty’s effect on the exercise of civil rights has expanded beyond the criminal procedure sphere. In Harper v. Virginia Board of Elections, the Supreme Court held that a state poll tax violated the equal protection clause as an unreasonable classification based on wealth. In this application of the Griffin doctrine to the right of franchise, the Court declared, “Lines drawn on the basis of wealth or property . . . are traditionally disfavored.”

The constitutionality of requiring an indigent seeking a divorce to pay certain fees has been decided by two other courts. In Boddie v. Connecticut, decided prior to Jeffreys, a similar issue of requiring payment of a filing fee for divorce was resolved against the welfare women who sought a declaration of the requirement’s unconstitutionality. In denying the applicability of Griffin and Harper to the situation, the three-judge federal district court reasoned that there was a distinction between imprisonment and denial of voting rights and ordinary civil actions, the first two being “of particular concern to the framers of the Constitution and Bill of Rights and the post-Civil War amendments.” But the original intention of the framers of the equal protection clause was to secure individual rights in civil matters as well as in criminal prosecutions; thus, there is a consti-

61. Id. at 19.
66. Id. at 357.
68. Id. at 668.
69. 286 F. Supp. 968 (D. Conn. 1968). Motion for leave to proceed in forma pauperis on appeal to the Supreme Court has been granted. 89 S. Ct. 2138 (1969).
70. 286 F. Supp. at 973.
tutional concern for the civil litigant as well as for the criminal defendant embodied in those constitutional provisions mentioned in Boddie. Another factor considered by the court in Boddie was that the direct state action present in criminal cases was absent in a divorce action. While the state action affecting divorce is perhaps not of the same degree, the vast legislative control over divorce, including the requirement of published notice in an appropriate case, represents significant state action. 72 Jeffrey, contrary to Boddie, considered divorce to be considerably more than an ordinary civil case and characterized the state as acting in a third-party capacity to protect its interests. 73 The Jeffrey opinion refers to Boddie as representing "a laudable abstention attitude by a federal court." 74 Boddie is distinguishable from Jeffrey in that Connecticut has no in forma pauperis laws providing any relief for the poor from costs in the civil courts; concluding that it had no inherent power to grant such relief, the court decided that any change must come from the legislature. 75

In Suber v. Suber, 76 decided subsequent to but apparently independent of and without reliance on Jeffrey, requiring a plaintiff on public assistance to pay the sixty dollar publication cost in a divorce action was declared unconstitutional. The Suber opinion summarily distinguished Boddie on the basis that New Jersey had by statute eliminated all costs in a divorce action except the publication fee. As in Jeffrey, Suber was grounded upon the Griffin doctrine that once a privilege is granted, a state may not impose unreasonable distinctions based upon indigency that impede open and equal access to the courts. "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." 77

Whether or not a state forgives by statute other court fees and costs for indigents seeking a divorce should not be determinative of the constitutionality of requiring the payment of the publication expense. In either situation an effective barrier prevents the indigent's access to the divorce court. The existence or non-existence of other impediments should not affect the constitutionality of this barrier. In Griffin the Court struck down the barrier of a costly transcript even though other impediments existed at the time, such as lack of court-appointed counsel on appeal, an impediment subsequently removed as also unconstitutional. 78 Thus, the Jeffrey court would probably reach the same conclusion were it in a state, such as Maryland, 79 where little or no in forma pauperis relief was provided.

Whether this impediment is considered unconstitutional will largely depend upon the courts' willingness to extend the Griffin doctrine into

74. 296 N.Y.S.2d at 87.
77. Id. at 4-5.
79. See note 15 supra.
the civil sphere. In a somewhat analogous situation, the Supreme Court declined to review the constitutionality of an eviction statute which requires a tenant to furnish a security bond before he can defend on the merits his rights against a dispossessory warrant. 80 Tenants lacking sufficient funds are evicted without a previous hearing solely because they cannot afford the security bond to cover the amount of rent the landlord claims is due. However, although temporarily ousted, the tenant may regain any loss he suffers if he subsequently can prove at a trial that he was entitled to possession. Furthermore, an evicted indigent may perhaps obtain another place in which to live while a divorce may be had only through the courts. Loss of tenancy affects one's economic interests while being unable to obtain a divorce impairs personal interests which are traditionally accorded preferential treatment. 81 Thus, the problem in Jeffrey v. Jeffrey is more akin to the problem in Griffin; both affect personal liberties and interests and in both redress may be had only through the judicial system. 82

Eliminating the publication cost requirement for those unable to afford it would unquestionably increase the number of divorces among the impoverished. But the financial burden of divorce has not in the past improved the social and family life of the poverty-stricken. 83 And permitting a divorce is predicated on the notion that the state no longer has any interest in preserving the marriage; 84 therefore, society will not suffer by this increase but may indeed benefit if the welfare woman is free to remarry a husband who can support her and her children.

Should those statutes which require the indigent to pay the publication cost for notice of a divorce suit be declared unconstitutional, a state could make several responses. It might simply disallow any

80. Williams v. Shaffer, 385 U.S. 1037 (1967). The state court held the issue moot since the tenants had already been evicted. 222 Ga. 334, 149 S.E.2d 668 (1966). Dissenting from the denial of certiorari, Justice Douglas declared:

The effect of the security statute is to grant an affluent tenant a hearing and to deny an indigent tenant a hearing. The ability to obtain a hearing is thus made to turn upon the tenant's wealth. On numerous occasions this Court has struck down financial limitations on the ability to obtain judicial review.... It is true that these cases have dealt with criminal proceedings. But the Equal Protection Clause of the Fourteenth Amendment is not limited to criminal prosecutions. Its protections extend as well to civil matters.

385 U.S. at 1039 (citations omitted).

81. See note 52 supra and accompanying text.

82. Cf. In re Karren, 159 N.W.2d 402 (Minn. 1968), where it was held that an indigent who appeals from a civil judgment terminating her parental rights is entitled to a free transcript of the proceedings in juvenile court.

83. It may be argued that economic compulsion to remain married and the expense of divorce serve the socially desirable purpose of promoting family stability. In our society, however, such rarely is the case. In real life, the parties become estranged, and when able to do so form new informal family relationships. Poverty usually promotes extra-legal action rather than a resignation to and endurance of an intolerable situation. The poor resort to desertion and propagate illegitimate children in large measure because law has priced itself out of the market.


84. See, e.g., Dougherty v. Dougherty, 187 Md. 21, 48 A.2d 451 (1946).
notice by publication and instead require personal service in any divorce action. This extreme solution would preclude the obtention of a divorce from any spouse who has disappeared. Or the state might provide free publication for all regardless of financial status. Neither of these solutions is likely to engender much public or legislative support. The probable approach would be to use the existing in forma pauperis structure and include publication costs as an item to be paid by the state under court direction upon establishing personal poverty. In his opinion in *Jeffreys*, Justice Sobel recognized the burden his decision would impose upon the City and recommended that publication requirements be reduced and newspaper rates be fixed by agreement.

*Jeffreys* is a logical extension of the *Griffin* doctrine into the sphere of civil law. Affirmance of *Jeffreys* would not result in a constitutional mandate that the state must pay all the expenses and provide counsel for poor litigants in all civil actions, for in no other civil matter are such intimate personal interests involved. Marriage and its dissolution are far more closely related to criminal procedures than other civil matters because of the important role played by the state in protecting its interests in marriage and divorce. Matrimonial matters are subject to comprehensive state regulation and remedy may be sought only through the courts. Indeed, the state's interest, as exemplified by vast regulations, and the individual's personal interest in marriage and divorce approach an equality with similar interests in the criminal process.

It is not hard to understand the cynicism of the people of the ghetto towards our legal system as an outlet for grievances and disputes. A person charged with a criminal offense is brought before the bar of justice expeditiously. He is given a free trial, free lawyer and, if necessary, free appeals. Yet a deserted woman, who feels as imprisoned as a convict and who may be able to free society of the burden of supporting her if she could remarry, is denied the relief of our courts. It is unjust to give better treatment to those who break society laws than to those who attempt to live by the rule of law and order.

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86. 296 N.Y.S.2d at 89. The *Suber* court left to the state's discretion the administrative problem of which department of the state should pay the cost of publication. The court did make an interesting suggestion:

> This entire question would be moot if the same newspaper which screams with selfrighteous indignation at the injustices practiced on the poor was to waive publication costs on certification of indigency by the Legal Services Corporation.

Newspapers make a large portion of their profits on legal advertising. In comparison with that large amount of business, the number of *in forma pauperis* divorces is miniscule. The number of those cases requiring publication is still smaller. This cost could easily be absorbed.

87. The court noted, "Such a holding by a trial court in a test case such as this serves merely the purpose of moving the issue to those appellate courts which must finally determine it." 296 N.Y.S.2d at 87.