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Indigent Access to Civil Courts: The Tiger Is at the Gates

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NOTES

Indigent Access to Civil Courts: The Tiger Is at the Gates*

Let a man have his hat knocked over his eyes, and the law will zealously espouse his cause—will mulct his assailant in a fine and costs, and will do this without charge. But if [the offence is noncriminal], he is politely referred to a solicitor, with the information that the offence committed against him is actionable: which means, that if rich he may play double or quits with Fate; and that if poor he must go without even this chance of compensation.

H. SPENCER, SOCIAL STATICS 109 (rev. ed. 1893).

The Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics.

Lochner v. New York, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting).

1. INTRODUCTION

The accusation that justice in America has become a luxury has been heard with increasing frequency in recent years. An often criticized aspect of this perceived discrimination is that the poor are systematically deprived of effective access, and frequently of any access at all, to the judicial process by the varied and burdensome expenses of civil litigation.[1] Although these financial barriers have been subjected to in-

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1. *See, e.g.*, Goodpaster, *The Integration of Equal Protection, Due Process Standards, and the Indigent's Right of Free Access to the Courts*, 56 IOWA L. REV. 223 (1970); Silverstein, *Waiver of Court Costs and Appointment of Counsel for Poor Persons in Civil Cases*, 2 VAL. U.L. REV. 21 (1967); Willging, *Financial Barriers and the Access of Indigents to the Courts*, 57 GEO. L.J. 253 (1968); Note, *Litigation Costs: The Hidden Barrier to the Indigent*, 56 GEO. L.J. 516 (1968). Litigation expenses are only one of several related barriers preventing the poor from the effective utilization of potential legal remedies. *See generally* P. WALD, LAW AND POVERTY: 1965, at 42-46 (1965); Barvick, *Legal Services and the Rural Poor*, 15 U. KAN. L. REV. 537, 539-41 (1967); Carlin & Howard, *Legal Representation and Class Justice*, 12 U.C.L.A.L. REV. 381, 423-29 (1965). These additional barriers, which include lack of both public and professional education about, and willingness to utilize, existing legal opportunities, present a significant obstacle in themselves, an obstacle greatly magnified when coupled with existing financial barriers. *See* note 19 *infra*.

creasingly successful attacks in the courts, the extent to which they have been lowered remains unclear. Nevertheless, an examination of the steps already taken to alleviate the problem of the indigent civil litigant raises hopes for the eventual establishment of a financially unrestricted right of access to the civil courts.

Three distinct means of removing the financial barriers to the judicial process have been developed to aid indigent civil litigants: in forma pauperis statutes;[2] a common-law judicial power to allow in forma pauperis proceedings in the absence of statute; and a constitutional right of access to the courts.[3] An evaluation of the comparative utility, both present and potential, of each of these three approaches requires that the financial obstacles facing the indigent civil litigant be initially defined and described. Although the myriad differences in court structure and procedural requirements of the many jurisdictions within this country make an accurate and comprehensive catalogue of the financial burdens of civil litigation virtually impossible, litigation costs may fairly be divided into four general classes: fees; costs; bonds; and expenses.[4]

Fees. This class encompasses the various out-of-pocket payments statutorily exacted for the performance of some act that serves as a condition precedent to the institution or continuation of litigation. Included within this class are payments into a court fund for the services

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The financial barrier to civil court access is not limited in effect to the poor; for a penetrating discussion of some of the financial burdens imposed on civil litigants above the poverty level see B. CHRISTENSEN, LAWYERS FOR PEOPLE OF MODERATE MEANS: SOME PROBLEMS OF AVAILABILITY OF LEGAL SERVICES (1970), *reviewed,* Cohen, 24 VAND. L. REV. 433 (1971); Tollett, 24 VAND. L. REV. 447 (1971). There has, indeed, been some judicial recognition of the interrelationship of the latter problem with that of the indigent. Hotel Martha Washington Management Co. v. Swinick, 66 Misc. 2d 833, 835-37, 322 N.Y.S.2d 139, 142-43 (App. T. 1971), contains a brief but intriguing debate on the propriety of judicial concern with this subject.

2. "In forma pauperis" designates a proceeding "in the manner of a pauper" in which the litigant is allowed to pursue his claim or defense without payment of fees or liability for costs.

3. These have been the only tools employed to attack directly the financial barriers to civil court access. The many other programs designed to improve the position of the poor litigant, including such efforts as the establishment of small claims courts, specialized administrative agencies, and legal aid societies, which have had only an indirect and haphazard effect on financial obstacles, are beyond the scope of this Note.

4. Because of their unending variety, and the case-by-case treatment afforded them by the Supreme Court in the criminal costs cases, *see* note 46 *infra,* litigation expenses are uniquely susceptible to "intellectual balkanization." Solomon, *"This New Fetish for Indigency": Justice and Poverty in an Affluent Society,* 66 COLUM. L. REV. 248, 252 (1966). The 4 classifications chosen in the text are, except for the creation of a fourth class for security bonds, largely a restatement of those propounded in one of the earliest attempts to bring order out of the cost chaos. Dayton, *Costs, Fees, and Expenses in Litigation,* 167 ANNALS 32 (1933). These 4 classifications emphasize the interests in the existence of each of these financial burdens against which the indigent litigant's access interest must compete. Different conclusions by the classifier about the legal problems presented by financial barriers will result in different classification systems. *See, e.g.,* Willging, *supra* note 1, at 271-81; Note, *supra* note 1, at 517.

of court officials, as in the case of filing fees, or private persons, as in jury fees, and payments directly to private individuals for the performance of such court-ordered functions as service of process by publication. In a judicial structure dominated by concepts of personal sovereignty, the fee system was both logically and jurisprudentially sound; fees constituted the only source of compensation for those who performed the necessary functions of the judicial process in their delegated exercise of the royal prerogative. Requiring the payment of fees as a condition of access to the courts, however, is open to serious question in a popular sovereignty committed to the principle of equal justice for all. With few exceptions, fees no longer represent direct compensation for the performance of official functions, but rather constitute a frequently unsuccessful attempt to fund the judicial process at the expense of those who employ it.[5] Allowing a pricing mechanism to limit the availability of even those services for which fees must be paid directly to private parties may be challenged as an anomalous abdication of the state's responsibility to provide an equally accessible means of conflict resolution to all its citizens. Free market concepts appear quite inapplicable to the services provided by legal notice newspapers, "private" stenographers, and "private" marshals, for these are in effect industries subsidized by the court system, for whose pricing policies the state may be viewed as directly answerable. Such considerations have apparently discouraged justifications of the modern fee system as an economically sound charge by the state for providing judicial services to its citizens; required fee payments most often have been justified as a means of allocating the state's scarce judicial resources among the too numerous claims of its citizens.

Costs. Included within this class are the litigation expenses of an opponent that will be taxed against the unsuccessful litigant at the conclusion of his suit. Costs statutes embody a principle of compensation for expenses incurred in protecting a just legal claim. Nevertheless, an early restrictive judicial attitude toward awarding costs, a collection of arbitrary statutes fixing unrealistically low schedules of allowable costs, and a discouraging frequency of judgment-proof opponents have combined to make the taxation of costs a compensatory remedy so generally inadequate that there is frequently no attempt at collection.[6] As a result,

5. Dayton, *supra* note 4, at 40-41. Although the statistics are clearly long out of date, the inadequacy of a fee system to provide continued financial support for judicial operations remains a general pattern. *See, e.g.,* 1970 PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES, ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES 201-02.

6. Dayton, *supra* note 4, at 35-40.

costs usually have little *in terrorem* effect on the indigent litigant.[7]

Bonds. Security bonds may be divided into two subclasses. The first group includes deposits into court to guarantee the eventual payment of costs in the event of an adverse judgment. These requirements, which were instituted because of the high rate of default on costs judgments, are a theoretically sound extension of the compensatory rationale underlying the taxation of costs. Nevertheless, the harsh impact of cost bond requirements on an indigent who has a meritorious legal claim but lacks sufficient funds or credit to have his claim adjudicated seems unjustifiable in light of the generally insubstantial compensation provided by costs awards. This consideration may explain the greater frequency of cost bond requirements in appellate courts, because there is special logical force to the assumption that a successful trial litigant has a just legal claim that merits extra protection against litigational harassment.

The second class of security bonds comprises those required to regain or maintain possession of contested property pending trial of certain narrowly defined possessory actions, primarily eviction or replevin proceedings. Because the subject matter of the actions in which these bonds are required is usually limited to the right of possession, failure to post bond will result in a de facto adjudication of the possessory dispute; the practical effect of a possessory bond requirement is thus that of an absolute condition precedent to a judicial resolution of the underlying controversy.[8] Unlike cost bonds the amount of these bonds is fixed neither by statute nor the anxieties of one's opponent; rather, the amount is determined by the value of the subject matter of the litigation. Although possessory bonds are obviously designed to protect the opponent's interest in what may be adjudged his property, this provides merely a partial explanation for the prevalence of such statutory requirements; of greater significance is the state's interest in employing these security bonds as a substitute for the peace-endangering practice of physically repossessing the contested property. Because the actions in which possessory bonds are required involve a high frequency of indigent litigation, this bond cost is a far more significant obstacle to civil court access than the restricted statutory scope of the requirements might indicate.

Expenses. This classification consists of those out-of-pocket expenditures necessary to the successful conduct of a civil suit but not

7. The English practice has been to require, when merited, the payment of truly compensatory "substantial" costs. The probability that an opponent will be required to pay for the entire litigation has apparently encouraged meritorious indigent litigation. *See generally* Goodhart, *Costs*, 38 YALE L.J. 849 (1929).

8. *Cf.* Fuentes v. Shevin, 407 U.S. 67, 84 n.14 (1972).

required by judicial or statutory order.[9] The largest and most common expenditures in this class are fees for attorneys' services, which may be a practical necessity, but, at least at the trial level, are usually not affirmatively required by the state. Other common expenses arise from the preparation of evidence, pretrial discovery procedures, and reimbursement of witnesses.

II. IN FORMA PAUPERIS STATUTES

In forma pauperis statutes, enacted by roughly half the states and the federal government,[10] are the most widely recognized of the three means by which the indigent civil litigant may successfully negotiate the financial barriers to judicial access. There are two basic types of in forma pauperis statutes: security bond waivers and fee waivers. The first exempts the litigant from liability for costs, thereby allowing him to present his case without depositing otherwise required bonds;[11] a very few states have extended relief from security requirements to allow waiver of eviction or replevin bonds.[12] The second basic statutory type dispenses with otherwise required fee payments; such statutes rarely reach fees other than those paid into a court fund, and none contains a mechanism for easing the burden of expenses beyond providing for assignment of counsel.[13] These two types of in forma pauperis statutes may reflect differing legislative judgments concerning the state's duty to litigants. The security statutes prevent an opponent from denying the indigent an opportunity to be heard, but do not allow the indigent the use of the judiciary without compensation for its services. Conversely, states with fee waiver statutes adopt an essentially neutral position neither denying a hearing to the poor litigant nor circumscribing the rights

9. Dayton, *supra* note 4, at 32, would include within this class such intangible losses as the destruction of goodwill and the interruption of commercial activities. Although similar intangible losses arguably may be caused to the indigent, they hardly can be considered subject to legislative or judicial remedy without a radical departure from the existing understanding of the duty of the state vis-à-vis the judicial process.

10. Silverstein, *supra* note 1, at 33. Note, *supra* note 1, at 523, suggests that nearly two-thirds of the states allow some form of in forma pauperis proceeding if court rules are taken into account.

11. *E.g.*, KAN. STAT. ANN. § 60-2001(b) (1964); KAN. STAT. ANN. §§ 20-2510, 59-2214, 61-2501 (Supp. 1971); *see* note 17 *infra*.

12. One of the few is North Carolina. N.C. GEN. STAT. § 1-112 (1969).

13. *E.g.*, KY. REV. STAT. ANN. § 453.190 (1969); UTAH CODE ANN. § 21-7-4 (1969). *But see* LA. CODE CIV. PRO. ANN. art. 5185(2) (West Supp. 1972) (allowing waiver of compulsory direct witness fee payments). *See also* note 17 *infra*. Most states provide that a successful litigant who has proceeded in forma pauperis is obligated to repay previously waived fees out of the costs recovered from the other party. *E.g.*, KY. REV. STAT. ANN. § 453.200 (1969); UTAH CODE ANN. § 21-7-6 (1969).

of his opponent. Despite the inference of divergent legislative judgments that may be drawn from these two statutory types, the striking similarity of most present in forma pauperis statutes to the original enactments of the Tudor kings[14] suggests that their disparate results were largely unintended by the state legislatures.[15] Since neither type of statute alone provides effective relief for the poor litigant in a jurisdiction in which both fees and security bonds are required, unthinking adherence to historical models seems to be the only explanation for the failure of all but a very few jurisdictions with in forma pauperis statutes to value the indigent's access interest above the interests of both his opponent and the state by enacting combined fee and security waiver legislation.[16]

On the whole, existing in forma pauperis statutes provide questionable protection for the indigent litigant: the scope of their application is frequently limited and varies considerably from jurisdiction to jurisdiction;[17] a sizable and largely unreviewable discretion to permit statu-

14. A Mean to Help and Speed Poor Persons in Their Suits, 11 Hen. 7, c.12 (1495) (fee waiver); An Act That the Plaintiff Being Nonsuited, Shall Yield Damages to the Defendants in Actions Personal, By the Discretion of the Justices, 23 Hen. 8, c.15 (1531) (exempting pauper litigants from liability for costs).

15. The suggestion that enacting legislatures were little concerned with the plight of the indigent litigant is reinforced by the historical pattern of the enactments. Security waiver legislation has usually accompanied the enactment of costs statutes; on these occasions, both the costs and waiver statutes were patterned on early English counterparts. Fee waiver statutes were generally enacted by legislatures of newly created governmental bodies; these statutes were enacted as elements of an entire procedural code, usually fashioned with reference to the procedural rules formerly in force in the jurisdiction.

16. *E.g.*, WIS. STAT. ANN. § 271.29 (Supp. 1972).

17. *See* Silverstein, *supra* note 1, at 33-36; Note, *supra* note 1, at 523-32. These authorities are no longer wholly reliable; although significant change has been infrequent, amendment, reorganization, enactment, and repeal of various state provisions has been common in recent years. Nevertheless, the general conclusions drawn by these commentators remain valid.

The wide variations in the scope of existing provisions for in forma pauperis relief may best be seen by comparing some of the specific statutes. The Arkansas statute is limited to plaintiffs who are not worth $10 over and above necessary wearing apparel, and may not be invoked in the chancery courts of certain counties nor in any slander, libel, or malicious prosecution suit. If these highly restrictive conditions are met, the indigent may proceed "without paying any fees to the officers of the court" and may have assigned counsel. ARK. STAT. ANN. §§ 27-401 to -405 (1962). Colorado allows any poor party to proceed in any court "without the payment of costs, and thereupon such person shall have all the necessary writs, process and proceedings . . . without charge." COLO. REV. STAT. ANN. § 33-1-3 (Supp. 1965). The Florida statute is limited to "insolvent and poverty stricken" plaintiffs seeking to sue in the county in which they reside; a plaintiff who meets the extensive certification requirements is then allowed to proceed without "prepayment of costs to any judge, clerk, sheriff or constable in the county." FLA. STAT. ANN. § 57.081 (1969). Hawaii has, in effect, two in forma pauperis statutes. A plaintiff in district court who claims less than $25 in an action where no property is seized under an attachment is permitted, upon an oath of inability to pay, to proceed without prepayment of any costs except witness fees; the court does, however, possess discretion to tax these costs against the plaintiff if he loses at trial upon the merits. HAWAII REV. LAWS § 633-11 to -15 (1968). A much broader statute gives any magistrate or judge

tory in forma pauperis proceedings rests in the trial judge;[18] and the infrequency with which these statutory rights are actually invoked has

the power to waive prepayment of, reduce, or remit costs where they "appear onerous." HAWAII REV. LAWS § 607-3 (1968). The Illinois statute is quite similar to Colorado's, but it additionally allows "all appearances" without charge and provides for assigned counsel. ILL. ANN. STAT. ch. 33, §§ 5-6 (Smith-Hurd Supp. 1972). Kansas allows only the waiver of cost bonds for indigent plaintiffs in magistrate (applicable only to residents), probate, or district court; the only fee which may be waived entirely is the supreme court docket fee. KAN. STAT. ANN. § 60-2001(b) (1964); KAN. STAT. ANN. §§ 20-2510, 59-2214, 60-2701, Rule 2, 61-2501 (Supp. 1971). Kentucky's statute is limited to residents, to whom it provides assigned counsel and "all needful services and process" from all officers of the court. KY. REV. STAT. ANN. § 453.190 (1969). Louisiana has one of the most extensive of the state statutes. Its chief limitations are to citizens or aliens domiciled in the state for more than 3 years and to all actions except those "for a divorce or for a separation from bed and board." LA. CODE CIV. PRO. ANN. art. 5181 (West Supp. 1972). *But see* note 113 *infra.* The statute explicitly allows waiver of prepayment of and deposit of security for all court officer, witness, jury, and appellate writ fees, although it provides that "[n]o public officer is required to make any cash outlay to perform any duty imposed on him" by the statute. LA. CODE CIV. PRO. ANN. art. 5185 (West Supp. 1972). The most intriguing aspect of the statute is its statement of policy: "The privilege granted by this Chapter shall be restricted to litigants who are clearly entitled to it . . . so that the fomentation of litigation by an indiscriminate resort thereto may be discouraged, without depriving a litigant of its benefits if he is entitled thereto." LA. CODE CIV. PRO. ANN. art. 5182 (West 1961). The Mississippi statute applies only to citizen plaintiffs; it allows waiver of prepayment of fees and deposit of security for costs at the trial level. MISS. CODE ANN. § 1574 (1957). In North Carolina, an indigent plaintiff may proceed at the trial level without payment of fees to officers of the court, N.C. GEN. STAT. § 6-24 (1969), and without providing a prosecution bond, N.C. GEN. STAT. § 1-110 (Supp. 1971). An indigent defendant to an eviction action may defend without posting bond, N.C. GEN. STAT. § 1-112 (1969); any indigent party may appeal without providing security, but no appellate fees are waived. N.C. GEN. STAT. § 1-288 (Supp. 1971). The Oklahoma statute waives all fee payments to officers of the court, including appellate transcript preparation charges and the deposit for notice by publication, at the trial level, including trials de novo in the courts of general jurisdiction; statutory bonds are unaffected by the statute. OKLA. STAT. ANN. tit. 28, §§ 152, 155.1-157 (Supp. 1971). South Carolina has a unique provision that authorizes the remission of court costs in circuit or inferior courts in only 2 counties. S.C. CODE ANN. § 10-1604 (1962). The Tennessee statute waives the required posting of cost bonds for resident plaintiffs desiring to prosecute actions for other than false imprisonment, malicious prosecution, slanderous words, and absolute divorce. TENN. CODE ANN. § 20-1629 (Supp. 1971). West Virginia's in forma pauperis statute provides a sweeping exemption from the payment of fees and costs; there is no express provision exempting the indigent litigant from posting bonds, nor from the payment of costs at the appellate level, but the bond statutes vest wide discretion in the judge. W. VA. CODE ANN. §§ 59-1-36, 59-2-1 (1966). *See also* notes 24-27 *infra* and accompanying text; notes 85, 87 *infra.*

18. *See, e.g.,* ARK. STAT. ANN. § 27-403 (1962) (court must be "satisfied of the facts alleged [in the petition to proceed in forma pauperis], and that the applicant has a meritorious cause of action. . . ."); FLA. STAT. ANN. § 57.081 (1969) (vesting power to certify insolvency in clerk of court, reviewable by the court upon refusal); ILL. ANN. STAT. ch. 33, § 5 (Smith-Hurd Supp. 1972) (if "satisfied" of petitioner's poverty and inability to pay costs, "the court may, in its discretion," allow proceeding in forma pauperis). Appellate challenges to trial court denials as abusive of discretion are costly and rarely made, and when made are rarely successful. *See, e.g.,* Hollier v. Broussard, 220 So. 2d 175, 178 (La. Ct. App. 1969) (trial court's discretion should not be disturbed in the absence of abuse); Standley v. Western Auto Supply Co., 319 S.W.2d 924, 926 (Mo. Ct. App. 1959) (disposition of motion to proceed in forma pauperis rests within the sound discretion of the trial court). *But see* Crawford v. Government Employees' Ins. Co., 219 So. 2d 241 (La. Ct.

effectively allowed them to atrophy.[19] The major reason for the present general inadequacy of the statutory in forma pauperis remedy, however, is that the basic pattern about which this relief is structured has hardly altered since the enactment of the first in forma pauperis statute in 1495.[20] Enactments and amendments have generally been sporadic,[21]

App. 1969) (reversing trial court denial to student subsisting largely on loans). A few courts have attempted to establish guidelines for the exercise of discretion at the trial level. *See, e.g.*, Hollier v. Broussard, 220 So. 2d 175, 177 (La. Ct. App. 1969) ("the general approach . . . is to balance against income the needs of living and of paying other debts and expenses, and then to determine whether the residual income (or savings or surplus property) is adequate to pay the expected costs of litigation or to furnish a bond therefor."); *cf.* Silverstein, *supra* note 1, at 34, 44 n.116 (indicating that Kentucky judges habitually follow the old English rule allowing in forma pauperis proceedings only to those litigants who have less than £5 exempt from execution).

Another source of the ultimate judicial dominance over the allowance of in forma pauperis relief is found in the many decisions attempting to fill perceived lacunae in the statutory provisions. *See* Annot., 33 A.L.R. 731 (1924) (discussing the judicially created doctrine that a litigant represented by an attorney on a contingent fee basis was disqualified from in forma pauperis relief); Annot., 156 A.L.R. 956 (1945) (discussing decisions denying in forma pauperis treatment to litigants who had not paid the costs of an earlier suit); Annot., 11 A.L.R.2d 607 (1950) (discussing denials of in formal pauperis applications because of the nonindigence of an attorney or other nonparty); Annot., 98 A.L.R.2d 292 (1964) (discussing judicial determinations of the amenability to waiver of specific costs and fees). *See also* Duniway, *The Poor Man in the Federal Courts*, 18 STAN. L. REV. 1270, 1277-84 (1966); Silverstein, *supra* note 1, at 45-49.

19. Silverstein, *supra* note 1, at 42-45, 49-50, contains a summary of the results of a questionnaire survey conducted by the American Bar Foundation. State court judges demonstrated a widespread lack of knowledge about in forma pauperis statutes in effect in their jurisdictions; some of the judges confessed ignorance about the statutes while others denied the existence of such provisions. Those judges who indicated some familiarity with the statutes also replied that the great majority of those few cases in which these provisions were invoked were either habeas corpus proceedings, actions involving indigent prisoners, or suits under the Uniform Reciprocal Enforcement of Support Act. The ABF also surveyed a number of legal aid offices and received a similarly discouraging response. The ABF concluded that the results of the surveys "tend to show that, with few exceptions, available waiver procedures are little known and seldom used." *Id.* at 44. *See also* Schmertz, *The Indigent Civil Plaintiff in the District of Columbia: Facts and Commentary*, 27 FED. B.J. 235, 238-41, 251-53 (1967). This article contains a statistical analysis of the incidence and results of in forma pauperis proceedings in the District of Columbia over a 5-year period. In less than one-half of one percent of the federal district court cases did a litigant press a conventional civil claim in forma pauperis. Similar minimal utilization of waiver provisions was apparent in the other courts in the District. Moreover, the inadequacy of the in forma pauperis remedy in and of itself was indicated by the astonishingly high failure rate of these proceedings; over one-half of these cases were dismissed before trial or resulted in summary judgment for the nonindigent party, and only one resulted in a victory for the indigent in a trial on the merits. The results of this investigation reinforce Silverstein's conclusion that present "in forma pauperis procedures are not of much use to a poor person unless some one else, some one more sophisticated, sets the machinery in motion for him." Silverstein, *supra* note 1, at 45.

20. A Mean to Help and Speed Poor Persons in Their Suits, 11 Hen. 7, c. 12 (1495).

21. Nearly 400 years of increasing discontent with its operation passed before the English fee waiver statute was first revised. Maguire, *Poverty and Civil Litigation*, 36 HARV. L. REV. 361, 373-79 (1923). In forma pauperis legislation was virtually nonexistent in America throughout the nineteenth century. *Id.* at 381-82. There was no federal in forma pauperis statute before 1892, and its limitations as first enacted were legislatively removed only after extensive, wasteful litigation.

and the changes that have been made from the early English model for the most part have been directed at the removal of only the most obvious original flaws.[22] Contemporary statutes thus continue to present the fundamental structural inadequacies of the English enactment—the absence of a readily administrable mechanism for limiting in forma pauperis relief to qualified applicants with meritorious claims and the lack of adequate provisions to ensure that the qualifying claimant obtains full and effective access to the courts.[23] Notable exceptions to this pattern may, however, be found in two recent state enactments. West Virginia has adopted a provision shifting the administrative burden of determining eligibility for statutory relief to a body better suited to such evaluations by making the waiver of all statutory fees mandatory whenever an in forma pauperis applicant submits a certification of poverty "by the chief executive officer of a duly chartered legal aid society."[24] Of potentially greater significance, however, is the New Hampshire statute,[25] the most recent of the state enactments. In addition to the traditional provisions for discretionary waiver of fees for an applying pauper, the statute provides for mandatory waiver whenever the applicant "is represented by a legal aid society, a federally funded legal services project, or counsel assigned in accordance with the rules of the court."[26] This remarkable provision shifts the great bulk of the administrative burden of evaluating in forma pauperis applications from the courts to organizations functioning under the statute as special-purpose

Duniway, *supra* note 18, at 1271-77. The comparatively liberal federal statute was not widely copied by the more parsimonious state legislatures. The Standing Committee on Legal Aid Work of the American Bar Association drafted a "Poor Litigant's Statute" in 1924, but it failed to stimulate interest in the state legislatures and was never enacted in any jurisdiction. For the text of the statute see Standing Committee on Legal Aid Work, *Report*, 49 A.B.A. REP. 384, 386 (1924) (first draft); 50 A.B.A. REP. 451, 456 (1925) (second draft). A renewed effort was proposed without success in 1941. Standing Committee on Legal Aid Work, *Report*, 66 A.B.A. REP. 252, 253 (1941). Apart from the widespread enactment of the Uniform Reciprocal Enforcement of Support Act, which contains a limited in forma pauperis provision (§ 15 of the 1958 Act) there is no discernible pattern to the state enactments. Even the URESA provision is not uniformly enacted. *See, e.g.*, MASS. ANN. LAWS ch. 273A, §§ 15, 15A (1968) (distinguishing between actions in which Massachusetts is the initiating and responding state; in the latter case the petitioner may avoid payment of service of process fees if the initiating state has a similar provision and if the petitioner files an affidavit of good faith, inability to pay, and a lack of assets worth over $100 with certain exclusions).

22. *See, e.g.*, N.Y. CIV. PRAC. LAW § 1101 (Practice Commentary) (McKinney 1963) (abolishing the limitation to plaintiffs with assets below $300).

23. Maguire, *supra* note 21, at 398-404, points out these and other weaknesses and offers some suggested changes which, despite the passage of nearly half a century, remain remarkably persuasive. *See also* Duniway, *supra* note 18, at 1282-87.

24. W. VA. CODE ANN. § 59-1-36 (1966).

25. N.H. REV. STAT. ANN. § 499:18-b (Supp. 1972).

26. *Id.*

administrative agencies, for whose existence and continued operation the state has little or no financial responsibility. New Hampshire may thus have reduced its total expenditures of time and money, eliminated duplication of legal aid efforts by the judiciary, and created a more efficient in forma pauperis procedure, with only a minimal reduction of the state's ability to control access to its courts. Although the specific relief afforded by the New Hampshire statute is fairly limited in scope,[27] the concept on which the statute rests represents a healthy departure from previous legislative patterns. Moreover, it is likely that the courts rarely will grant discretionary applications under this statute without sending the unrepresented litigant to a qualifying organization, thereby further assuring that he will be able to make more effective use of the judicial process.

Because the scope of relief that can be provided by in forma pauperis statutes is limited only by the legislatures' unwillingness to expend public funds for the benefit of the poor litigant, legislation has clearly the greatest potential for ameliorating the condition of the indigent seeking access to the civil courts. Legislative inertia, judicial antagonism,[28] and administrative obstructionism,[29] however, present formidable obstacles to the realization of this potential.

III. THE COMMON-LAW REMEDY

Indigent would-be litigants in jurisdictions without in forma pauperis statutes, or with statutes that are inadequate, predictably have looked to the courts for relief. Until recently, the only theory suggested to support judicial alleviation of financial burdens was that the received English common law included an inherent judicial power to dispense with costs, fees, bonds, and even certain expenses. The few available historical records that touched on this matter indicate that common-law, equity, and ecclesiastical courts often exercised such powers in the

27. The statute permits the waiver of only those "fees provided by law which are payable to any court, clerk of court, or sheriff." Fees paid directly to private parties, expenses, and bond requirements are unaffected by the statute. *Id.*

28. *See* Earls v. Superior Court, 6 Cal. 3d 109, 111 n.3, 490 P.2d 814, 816 n.3, 98 Cal. Rptr. 302, 304 n.3 (1971) (trial court had automatically refused all in forma pauperis applications for preceding 5 years); Blood, *Injunction Bonds: Equal Protection for the Indigent*, 11 S. TEXAS L.J. 16, 23 (1969); Duniway, *supra* note 18, at 1277-80; Silverstein, *supra* note 1, at 51-53; Stumpf & Janowitz, *Judges and the Poor: Bench Responses to Federally Financed Legal Services*, 21 STAN. L. REV. 1058, 1069-72 (1969).

29. *See, e.g.*, Humphrey v. Mauzy, 181 S.E.2d 329 (W. Va. 1971) (clerk of court refused to file final judgment in an in forma pauperis proceeding because filing fee not paid; mandamus issued). Several state statutes provide criminal penalties for failure to perform official acts for an in forma pauperis litigant. *See, e.g.*, UTAH CODE ANN. § 21-7-6 (1969).

absence of statute.[30] This interpretation of historical evidence has, moreover, been endorsed by the English courts.[31] Nevertheless, a common-law judicial power to allow proceedings in forma pauperis has been recognized by few American courts. Several early cases seemed to announce such a power in rejecting, on behalf of poor litigants, demands of security for costs.[32] Despite their apparent extensibility to a waiver of fees, none of these cases has served to establish a firm precedential foundation for the development of an effective common-law form of proceeding for the indigent litigant.[33] The majority of courts,[34] moreover, including the United States Supreme Court,[35] expressly denied the existence of such a power. Only California was able to develop a truly effective common-law remedy. In the leading case of *Martin v. Superior Court*,[36] the California Supreme Court explicitly relied on the English precedents to uphold the power, and duty, of state courts of record to remit statutory jury and court reporter fees. Following *Martin*, the California courts have extended the common-law relief to

30. The best concise summary of the historical evidence may be found in Maguire, *supra* note 21, at 363-79.

31. *See, e.g.*, Brunt v. Wardle, 133 Eng. Rep. 1254 (C.P. 1841).

32. M'Clenahan v. Thomas, 6 N.C. 247 (1813) (treating 23 Hen. 8, c. 15 (1531), which absolved a pauper from liability for costs, as part of the received common law); Eakert v. McCord, 21 Pa. County Ct. 333, 336 (1898) (indicating that the Pennsylvania Supreme Court in 1807 had reported the English costs waiver statute to be in force in the commonwealth); Spalding v. Bainbridge, 12 R.I. 244 (1879) (relying in part on a provision of the state constitution guaranteeing the right to obtain justice freely and without purchase); Hickey v. Rhine, 16 Tex. 577 (1856) (asserting in dictum a "general power, independent of statute," to refuse demands for security).

33. Each of these cases was limited by its factual or legal setting. The *M'Clenahan* holding was cast in the limited terms of a construction of the North Carolina costs statute. In *Eakert*, the demand for security for costs was an obvious ploy to avoid litigation by the defendant; the court could, moreover, have accomplished the same result by a liberal construction of Pennsylvania's existing security statute, as had been done 20 years earlier in Wendell v. Simpson, 7 Weekly Notes of Cases 31 (Montgomery County C.P. 1879). The holding in *Spalding* was expressly limited to cost bonds by the court's reliance on a statute making a dismissal for failure to post bonds discretionary as inconsistent with and superior to the peremptory terms of the bond requirement. The *Hickey* dictum was only the third of 3 suggested grounds for refusal of the bond demand; the court had already implied a waiver of the bond by the demanding party and had indicated that the existing Texas in forma pauperis statute could have been construed to provide relief. *Hickey's* only subsequent appearance as precedent was to support a finding of waiver by the demanding party. State v. Gutschke, 149 Tex. 292, 233 S.W.2d 446 (1950). It is probable that the major reason that these cases failed to support a fully developed common-law remedy was that they represented a special attitude toward costs. As one Pennsylvania court stated in a further expansion of *Eakert* to protect nonresident plaintiffs: "It is a less hardship for a successful defendant to lose his costs than for a poor plaintiff to be denied justice." Willis v. Willis, 20 Pa. Dist. 720, 721 (Erie County C.P. 1911).

34. Campbell v. Chicago & N. Ry., 23 Wis. 490 (1868), is typical of the brevity with which most courts rejected the suggestion of this remedy.

35. Bradford v. Southern Ry., 195 U.S. 243, 251 (1904).

36. 176 Cal. 289, 168 P. 135 (1917).

the waiver of all statutory fees required to be paid into court funds at both the trial and appellate levels,[37] and have also exercised their power to reject demands for statutorily guaranteed cost bonds in both trial and appellate courts.[38]

The generally laudatory reception of the *Martin* decision by legal scholars[39] had no apparent impact on other courts. Only with recent pressure for the declaration of a constitutional right of access to the civil courts[40] has the common-law remedy experienced a renaissance. Since 1967, the courts of at least four states have recognized an inherent power to waive filing fees[41] in the face of an indigent party's assertion of equal protection or due process arguments; significantly, only one court based its holding on the English precedents. Although this rediscovery of the common law indubitably will provide some relief for the poor litigant, its potential significance seems limited. Reliance on "inherent" powers out of a sense of expediency may well prove as insubstantial a foundation for truly effective relief as the early costs security cases. The determination of appropriate circumstances for the invocation of this power, moreover, may impose an administrative burden on the courts at least as great as that of most in forma pauperis statutes.[42] More importantly,

37. *See, e.g.*, Ferguson v. Keays, 4 Cal. 3d 649, 484 P.2d 70, 94 Cal. Rptr. 398 (1971).

38. Roberts v. Superior Court, 264 Cal. App. 2d 235, 70 Cal. Rptr. 226 (1968) (appellate cost bond); Bank of America Nat'l Trust & Sav. Ass'n v. Superior Court, 255 Cal. App. 2d 575, 63 Cal. Rptr. 366 (1967) (nonresident plaintiff's cost bond); County of Sutter v. Superior Court, 244 Cal. App. 2d 770, 53 Cal. Rptr. 424 (1966) (cost bonds demanded of resident plaintiff refused).

39. *See* R. SMITH, JUSTICE AND THE POOR 29-30 (3d ed. 1924); Grinnell, *Have Massachusetts Courts Inherent Common Law Power To Permit Suits In Forma Pauperis?—A Question of Construction under Article XI of the Bill of Rights*, 4 MASS. L.Q. 323 (1919) (urging adoption of the *Martin* rationale by the Massachusetts courts); Maguire, *supra* note 21, at 384-85 (commenting that the common-law remedy "is something, but not nearly enough"); 31 HARV. L. REV. 485 (1918).

40. *See* notes 46-57 *infra* and accompanying text.

41. Myers v. Archuleta, 1 CCH POV. L. REP. ¶ 662.953 (Idaho Dist. Ct. 1971) (waiver of defendant's filing fee); Casper v. Huber, 85 Nev. 474, 456 P.2d 436 (1969) (waiver of appellate filing fees), *cert. denied*, 397 U.S. 1012 (1970); Jeffreys v. Jeffreys, 58 Misc. 2d 1045, 1051, 296 N.Y.S.2d 74, 82 (Sup. Ct. 1968) (recognizing "inherent power" in dictum), *rev'd on other grounds*, 38 App. Div. 2d 431, 330 N.Y.S.2d 550 (1972); O'Connor v. Matzdorff, 76 Wash. 2d 589, 458 P.2d 154 (1969) (announcing a broad fee waiver power, based on historical evidence), *noted in* 45 WASH. L. REV. 389 (1970); *cf.* Coonce v. Coonce, 356 Mass. 690, 255 N.E.2d 330 (1970) (relying on a statutory grant of all powers of equity and ecclesiastical courts to uphold probate court's fee waiver power). *Contra*, Sloatman v. Gibbons, 104 Ariz. 429, 454 P.2d 574 (1969) (no inherent power to remit fees), *vacated on other grounds*, 402 U.S. 939 (1971); State *ex rel.* Caulk v. Nichols, 267 A.2d 610 (Del. Super. 1970) (no inherent common-law power in justice of the peace to waive appeal bond), *aff'd*, 281 A.2d 24 (Del. 1971), *appeal dismissed*, 408 U.S. 901 (1972); Ortwein v. Schwab, 498 P.2d 757, 761-62 (Ore. 1972) (no inherent fee waiver power).

42. *See* 45 WASH. L. REV. 389, 392-95 (1970) (criticizing the standards of "indigence," "good faith," and "probable merit" established in O'Connor v. Matzdorff, 76 Wash. 2d 589, 458 P.2d 154 (1969)).

no court has announced a willingness to rely on the common-law remedy to order the payment from the public treasury of expenses, or even of fees required by law to be paid directly to third parties.[43] The common-law remedy may, however, be significantly more useful to the indigent than most contemporary in forma pauperis statutes, because, as it is described by some courts,[44] the inherent power of waiver is not susceptible to the arbitrary restrictions on applicability[45] that frequently vitiate the statutory remedy.

IV. THE CONSTITUTIONAL REMEDY: BODDIE V. CONNECTICUT

The argument that there exists a constitutionally protected right of financially unrestricted access to the civil courts had its genesis in a series of Supreme Court criminal decisions,[46] commencing with *Griffin v. Illinois*.[47] In *Griffin*, the Court discerned interdependent due process and equal protection violations in situations "where the kind of trial a man gets depends on the amount of money he has."[48] Because of the special criminal procedure aspects of *Griffin* and its progeny, however, any extension to civil litigation[49] of their apparent underlying rationale

43. *See, e.g.*, Jeffreys v. Jeffreys, 58 Misc. 2d 1045, 1048-51, 296 N.Y.S.2d 74, 79-82 (Sup. Ct. 1968) (no inherent power to order payment of "auxiliary expenses" out of public funds), *rev'd on other grounds*, 38 App. Div. 2d 431, 330 N.Y.S.2d 550 (1972); Rucker v. Superior Court, 104 Cal. App. 683, 286 P. 732 (1930) ("no legal mode of requiring payment" to official court reporter for trial transcript to be used for an appeal); *cf.* Casper v. Huber, 85 Nev. 474, 456 P.2d 436 (1969) (impliedly no inherent power to assign counsel), *cert. denied*, 397 U.S. 1012 (1970). *But cf. In re* Karren, 280 Minn. 377, 159 N.W.2d 402 (1968) (ordering payment for transcript in juvenile court appeal without statutory authorization in order to prevent vitiation of statutory in forma pauperis appeal remedy). *See also* R. SMITH, *supra* note 39, at 100-02 (urging the revival of the early common-law practice of assigning counsel to all meritorious poor litigants).

44. *See, e.g.*, Martin v. Superior Court, 176 Cal. 289, 296, 168 P. 135, 138 (1917) (arbitrary limitation of in forma pauperis relief to courts of limited jurisdiction would be reproachful); O'Connor v. Matzdorff, 76 Wash. 2d 589, 604-06, 458 P.2d 154, 162-63 (1969) (limitation of in forma pauperis relief to appellate courts and courts of general jurisdiction would be anachronistic).

45. *See* note 17 *supra*.

46. *E.g.*, Burns v. Ohio, 360 U.S. 252 (1959) (invalidated appellate filing fee requirement as applied to indigent petitioner); Smith v. Bennett, 365 U.S. 708 (1961) (invalidating filing fees for habeas corpus petitions on equal protection grounds alone); Douglas v. California, 372 U.S. 353 (1963) (requiring assignment of counsel for an appeal as of right); Roberts v. LaVallee, 389 U.S. 40 (1967) (a per curiam opinion requiring the state to furnish free transcript of preliminary hearing despite seeming availability of arguably adequate substitute).

47. 351 U.S. 12 (1956) (announcing indigent criminal appellant's right to a free transcript in the absence of other means of affording adequate and effective appellate review).

48. *Id.* at 19.

49. Habeas corpus proceedings, to which *Griffin* was applied in Smith v. Bennett, 365 U.S. 708 (1961), are technically treated as civil actions for procedural purposes. The Court, however, noted in *Smith* that the issue there presented was not the state's ability to condition civil court access but rather its right to detain indigent prisoners without a hearing because those prisoners were unable to pay the requisite fee. *Id.* at 711-12. The Court expressly narrowed its holding to

of invalid wealth discrimination seemed problematic[50] until the Court, in *Harper v. Virginia Board of Elections*,[51] invalidated a state poll tax on equal protection grounds. Although the precise theoretical bases for the holdings in *Harper*[52] and the criminal cases[53] are far from clear,

exclude other civil actions involving civil rights, and even other habeas corpus proceedings not brought by indigent convicted prisoners. *Id.* at 713.

50. *Compare* Qua, *Griffin v. Illinois*, 25 U. CHI. L. REV. 143, 149-50 (1957) (concluding that *Griffin* would not be applicable to civil cases generally) *with* Recent Development, *Poverty and Equal Access to the Courts: The Constitutionality of Summary Dispossess in Georgia*, 20 STAN. L. REV. 766, 770-72 (1968) (no inherent limitation in *Griffin* to criminal cases).

51. 383 U.S. 663 (1966).

52. The majority opinion, authored by Mr. Justice Douglas, seems at some points to declare the poll tax invalid under an "old" equal protection test of conceivable rational purpose. "Voter qualifications have no relation to wealth nor to paying or not paying this or any other tax." *Id.* at 666. Other statements indicate that the tax was subjected to strict scrutiny and invalidated under "new" equal protection standards. "In this context—that is, as a condition of obtaining a ballot—the requirement of fee paying causes an 'invidious' discrimination . . . ." *Id.* at 668. Support for an understanding of *Harper* as a "new" equal protection decision can be found in the Court's emphasis on prior decisions establishing the right to vote as fundamental. *Id.* at 667 (relying on Yick Wo v. Hopkins, 118 U.S. 356, 370 (1886), and Reynolds v. Sims, 377 U.S. 533, 561-62 (1964)).

53. The key to the reasoning of the plurality opinion in *Griffin* is the observation that "our own constitutional guaranties of due process and equal protection both call for procedures in criminal trials which allow no invidious discriminations between persons and different groups of persons." 351 U.S. at 17. The plurality found invidious discrimination in the denial to petitioners, solely because of their indigence, of the appellate review of convictions made available by the state to the more wealthy. Viewed in the light of the Court's narrow holding in Smith v. Bennett, 365 U.S. 708 (1961), *see* note 49 *supra*, the plurality opinion apparently discerned due process violations in the state's continuing deprivation of the convicts' liberty by arbitrarily foreclosing an established opportunity to be heard. *Cf.* Hovey v. Elliot, 167 U.S. 409 (1897). Nevertheless, the main thrust of the plurality opinion seems directed toward the equal protection argument. *See generally* Michelman, *Foreword: On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7, 19-33 (1969). This incisive article subjects the Court's "new" equal protection decisions to strict scrutiny and concludes that the rhetoric of invalidating invidious wealth discrimination misrepresents the Court's basic approach to the deprivations caused by economic inequality. The article emphasizes the signal importance of the rights at issue in *Harper* and *Griffin*—the rights to vote and to be free from abuse of the criminal process—in the Court's invalidation of the required fee payments. "It is uninformative at best, and very likely misleading as well, to defend such exceptional holdings through formulas of disparagement ('invidious' or 'suspect classification;' 'lines . . . drawn on the basis of wealth;' 'discrimination against the indigent') which apply nonselectively to the pricing practice and refer not at all to any exceptional attributes in the excepted commodities." *Id.* at 28. Herein lies the major hurdle confronting the equal protection argument for a financially unrestricted right of civil court access; although the Court has held that the right to fair treatment by the judicial process (once it has obtained the jurisdictional power to deprive the litigant of his disputed rights) is fundamental, the Court has never recognized a fundamental right to set the judicial machinery in motion. Even within the judicial process, moreover, equal protection demands for affirmative state equalization of the disparity created by economic disadvantages in the ability to utilize that process effectively find little support in the Court's past decisions. Despite egalitarian rhetoric, *see* text accompanying note 48 *supra*, the Court has yet to attack on equal protection grounds de facto wealth classifications resulting from other than a state fee payment requirement (*Harper*) or the establishment by the state of inferior alternative procedures for the indigent (*Griffin* et al.). These limitations are unrelated to the "state action" requirement; the establishment of civil courts with conditions upon access should surely be sufficient state action to justify application of the fourteenth amendment.

these decisions were seized upon by several commentators as laying the foundation for a constitutional attack upon financial barriers to civil court access.[54] This attack was generally unsuccessful in the state and lower federal courts,[55] although there were a few cases in which an equal protection argument prevailed.[56] Finally,[57] in 1971, the Supreme Court partially answered the access question. In *Boddie v. Connecticut*,[58] the Court invalidated, as applied to indigent plaintiffs,[59] a state requirement that filing and service of process fees be paid as a condition precedent to the maintenance of a divorce action.[60] The *Boddie* holding is remarkably clear;[61] the constitutional theory upon which that holding rests, and upon which subsequent access litigation must therefore rest at least in part, is not. The majority opinion, by Mr. Justice Harlan, was founded entirely on due process considerations. Mr. Justice Brennan, in a concurring opinion, relied on the equal protection-due process rationale underlying *Griffin*. Mr. Justice Douglas, also concurring, based his conclusions solely on equal protection grounds.[62] Because these various theories could have significantly different effects as applied to subsequent access cases, it is necessary to examine each in some detail.

The majority's analysis was founded upon the basic constitutional obligation of the state to administer its judicial determinations of legal rights so as to provide "each individual that process which, in the light of the values of a free society, can be characterized as due."[63] Recogniz-

54. *See, e.g.*, Goodpaster, *supra* note 1; Note, *Discriminations Against the Poor and the Fourteenth Amendment*, 81 HARV. L. REV. 435, 450-52 (1967).

55. *E.g., In re* Garland, 428 F.2d 1185 (1st Cir. 1970), *cert. denied*, 402 U.S. 966 (1971); Boddie v. Connecticut, 286 F. Supp. 968 (D. Conn. 1968), *rev'd*, 401 U.S. 371 (1971); Tamburro v. Trama, 59 Misc. 2d 488, 299 N.Y.S.2d 528 (Westchester County Ct. 1969).

56. *In re* Smith, 323 F. Supp. 1082 (D. Colo. 1971); Jeffreys v. Jeffreys, 58 Misc. 2d 1045, 296 N.Y.S.2d 74 (Sup. Ct. 1968), *rev'd on other grounds*, 38 App. Div. 2d 431, 330 N.Y.S.2d 550 (1972).

57. The Court had previously denied certiorari, over a strong dissent, in Williams v. Shaffer, 385 U.S. 1037 (1967) (Warren, C.J., Douglas & Brennan, JJ., dissenting), which presented the issue in the context of a required eviction stay bond. The *Boddie* decision was reached only after a second argument.

58. 401 U.S. 371 (1971).

59. The Court indicated that filing fee requirements were valid exercises of state power, but were invalid when they operated to deprive the indigent litigants of their constitutionally protected right to due process.

60. Connecticut had no in forma pauperis statute and did not recognize the common-law remedy.

61. "[W]e hold only that a State may not, consistent with the obligations imposed on it by the Due Process Clause of the Fourteenth Amendment, pre-empt the right to dissolve this legal relationship without affording all citizens access to the means it has prescribed for doing so." 401 U.S. at 383.

62. Mr. Justice Black filed the lone dissenting opinion, commenting: "This is a strange case and a strange holding." *Id.* at 389. *But see* note 110 *infra* and accompanying text.

63. 401 U.S. at 380.

ing that the Supreme Court "has seldom been asked to view access to the courts as an element of due process,"[64] the majority decided that would-be litigants "faced with exclusion from the only forum effectively empowered to settle their disputes"[65] were entitled to the same constitutional protection accorded involuntary defendants by the due process clause. Crucial to the determination that the *Boddie* plaintiffs were entitled to a procedural due process evaluation of the financial barriers that prevented their access to the divorce courts was the state's monopoly over marriage and its dissolution. Because the *Boddie* petitioners had no recognized, effective alternative to a state court proceeding, the state's refusal to adjudicate their claimed right to a divorce amounted to a de facto adjudication of that right—an adjudication that could withstand constitutional challenge only if the petitioners had been given a meaningful opportunity to be heard. The filing fee requirement, as applied to indigent would-be plaintiffs, clearly operated to deny a hearing; the majority was thus forced to consider the state's contention that fee-conditioned access was nevertheless constitutionally adequate because the state interest in the discouragement of frivolous litigation and the conservation of scarce judicial resources outweighed plaintiffs' interests in a hearing on their claimed right to a divorce. The frivolous litigation argument was rejected, in part upon grounds relating to the posture of the case as presented to the Court,[66] in part upon no-rational-relationship grounds,[67] and in part because of the existence of reasonable, alternative deterrents.[68] Of greater significance, the resource allocation argument was flatly rejected on the authority of *Griffin*.[69]

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64. *Id.* at 375.

65. *Id.* at 376.

66. That appellants sought to bring their divorce actions in good faith was not disputed by the state.

67. The majority opinion stated that there is "no necessary connection between a litigant's assets and the seriousness of his motives in bringing suit." 401 U.S. at 381. In a curious footnote to this statement, the majority attempted to distinguish Cohen v. Beneficial Loan Corp., 337 U.S. 541 (1949) (upholding the state's right to require security deposits of shareholders of less than a minimum percentage of the stock of the corporation on whose behalf they sought to bring a derivative suit), as involving only the validity of a statute on its face. 401 U.S. at 381 n.9. Not only is this reading of *Cohen* questionable, *see id.* at 392 (Black, J., dissenting), but the majority expressly declined to distinguish *Cohen* on the more obvious basis of the difference in the character of the desired litigation. *See* note 144 *infra*.

68. The majority suggested as reasonable alternatives "penalties for false pleadings or affidavits, and actions for malicious prosecution or abuse of process, to mention only a few." *Id.* at 382. This remark seems to be aimed directly at state legislatures. *Cf.* Mars v. Luff, 186 S.E.2d 768 (W. Va. 1972) (requiring filing of divorce petition without fee payment upon affidavit of poverty although affiants' own testimony contradicted affidavit; if affiants could in fact pay, "they should be prosecuted for false swearing").

69. The *Griffin* plurality opinion did not mention the resource allocation argument, thus

Despite the majority's adherence to established procedural due process methodology, by which a meaningful opportunity to be heard is protected from the state's summary adjudicatory powers,[70] two Justices[71] perceived a debilitating substantive element in the Court's reliance on the "fundamental" societal importance of the marital relationship in declaring a state statute invalid. If the majority opinion does in fact represent a re-emergence of substantive due process, that term surely must represent something other than the economic determinism of *Lochner v. New York*,[72] or even an anti-incorporationist search for rights "implicit in the concept of ordered liberty."[73] The societal value placed upon the marital relationship was indeed used by the majority in the balancing of interests required once the deprivation of a hearing had been found. The "nature of . . . the private interest . . . affected,"[74] however, has long been recognized as a necessary due process variable to be weighed in the constitutional balance. The majority may have departed from earlier due process decisions[75] with its finding of "state action that adjudicates important rights"[76] in the state's *refusal to adjudicate* a dispute that private parties themselves cannot resolve without action by the state. To characterize this departure as a kind of strict scrutiny triggered by the character of the disputed right is to confuse the reality of due process methodology with the form of equal protection.[77]

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allowing the inference that the plurality either found no rational relationship between resource allocation and the duty to provide a fair trial or determined that the petitioners' interest outweighed the state's. If the latter was the case, one would expect the *Boddie* majority to have required a new balancing of interests. If the former is the correct interpretation of *Griffin*, however, the transplantation of this concept into the civil litigation context could have far-reaching effects.

70. *E.g.*, Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950); Hovey v. Elliott, 167 U.S. 409 (1897).

71. 401 U.S. at 385 (Douglas, J., concurring); *Id.* at 393-94 (Black, J., dissenting).

72. 198 U.S. 45 (1905).

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

74. "[C]onsideration of what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by governmental action." Cafeteria Workers Local 473 v. McElroy, 367 U.S. 886, 895 (1961).

75. *Griffin* may be read as recognizing due process violations in a refusal to adjudicate. *See* note 53 *supra*.

76. Goldberg v. Kelly, 397 U.S. 254, 262 (1970).

77. As Michelman, *supra* note 53, emphasizes, "new" equal protection invalidations require the infringement of a fundamental interest. As Justice Douglas recognized in *Harper*, however, the Supreme Court has not "restricted due process to a fixed catalogue of . . . fundamental rights." 383 U.S. at 669. The mechanic of "new" equal protection invalidation, moreover, appears to differ markedly from due process methodology. Once a "fundamental interest" and "invidious discrimination" have been found, "new" equal protection appears to endow the affected fundamental interest with an absolute quantum of protection, unrelated to any relative scale of values of

The majority limited its declaration of a constitutional right of access to civil disputes that can legitimately be resolved only by the courts. To Mr. Justice Brennan, this limitation was insupportable under both due process and equal protection standards.[78] Because the "State has an ultimate monopoly of all judicial process and attendant enforcement machinery,"[79] and because any civil dispute, whether or not within an area of law wholly under state control, may result in a stalemate that can be resolved only by resort to the courts, Justice Brennan reasoned that a denial of access in any such situation is tantamount to an adjudication of the disputed rights without a hearing. Similarly, from an equal protection viewpoint, preconditioning the dispensation of justice upon the prepayment of a fee is an unjustifiable abdication of the duty of the courts to dispense equal justice to rich and poor alike. Restating this second argument in more customary "new" equal protection terms,[80] access to the courts is a fundamental right which the state may deny to a segment of the population only upon the showing of a compelling state interest. Mr. Justice Douglas also reached his conclusions through a "new" equal protection approach; however, he found strict judicial scrutiny to be required not by the presence of a fundamental interest but rather because the state had invidiously discriminated on the basis of wealth by creating a class defined by the "suspect" parameter of poverty.[81]

V. Possible Expansion of the Constitutional Right of Access

Although *Boddie* represents a signal triumph for the indigent civil litigant, the narrow scope of the holding falls far short of establishing a

interests, against which the state's interest must be shown to be compelling if it is to prevail. No such absolutist approach seems to inform the traditional procedural due process balancing of interests, which proceeds instead on a generalized case-by-case investigation of competing values. *See generally* Michelman, *supra* note 53. The unfortunate confusion of due process and equal protection standards has led some courts to speak of *Boddie* as establishing an "overriding significance" test indistinguishable from the equal protection "compelling interest" test. *See, e.g.*, Chidsey v. Guerin, 443 F.2d 584 (6th Cir. 1971); Wymelenberg v. Syman, 328 F. Supp. 1353, 1356 (E.D. Wis. 1971).

78. Justice Black later reached a similar conclusion in Meltzer v. C. Buck LeCraw & Co., 402 U.S. 954 (1971) (Black, J., dissenting from denial of certiorari). *See* notes 108-10 *infra* and accompanying text.

79. 401 U.S. at 387.

80. *See* Shapiro v. Thompson, 394 U.S. 618, 634 (1969).

81. Justice Douglas analogized this discrimination to discrimination based on race. Although he implies that racial discrimination need not infringe the exercise of a fundamental right to be invalid under equal protection standards, the race discrimination cases are better viewed as involving the fundamental right to be free from racial discrimination. No other member of the Court has suggested the existence of a fundamental right to be free from economic discrimination. *See generally* Michelman, *supra* note 53.

general constitutional guarantee of financially unrestricted access to the civil courts. *Boddie* does, however, provide a sound foundation—in practice, if not in articulation—for the gradual development of such a right. The challenge will be to apply the *Boddie* rationale in successive cases so as to invalidate serially the remaining financial barriers to civil court access. This gradual expansion of the scope of *Boddie's* protection for the indigent litigant can be achieved only by an erosion of the two primary limiting criteria in that case: the requirement of a state monopoly over the subject matter of the desired litigation and the specific financial barriers that the case involved.

A. Subject Matter Expansion

Mr. Justice Brennan stated unequivocally that he would place no restrictions on the subject matter extension of *Boddie* to areas other than divorce litigation. Although Justice Douglas made no similarly explicit statement, it is difficult to find any limiting criteria in his condemning as invidiously discriminatory state procedures to which otherwise identically qualified poor litigants are denied the access available to the more wealthy. Consideration of the possible subject matter expansion of *Boddie's* applicability therefore must focus on the defining criterion of the majority opinion's due process rationale—the absence of "recognized, effective alternatives"[82] to a civil court proceeding.

Minimally, *Boddie* will require a due process evaluation of financial restrictions on state court access in all areas of civil litigation requiring formal judicial approval of a voluntary alteration in legal status—including, for example, adoption proceedings[83] and adjudications of incompetency.[84] Because of the presence of an identical governmental monopoly over dispute resolution, *Boddie* ought similarly to require a due process evaluation of financial barriers to the enforcement of rights created and governed wholly by federal statute. The sweeping applicability of the federal in forma pauperis statute,[85] however, will at present

82. 401 U.S. at 376.

83. *Cf. In re* Adoption of a Child by M.W., 116 N.J. Super. 506, 283 A.2d 109 (1971) (implying that *Boddie* applies to adoption proceedings although rejecting requested relief).

84. *See* Meltzer v. C. Buck LeCraw & Co., 402 U.S. 954, 957 n.2 (1971).

85. "Any court of the United States may authorize the commencement, prosecution or defense of any suit, action or proceeding, civil or criminal, or appeal therein, without prepayment of fees and costs or security therefor, by a person who makes affidavit that he is unable to pay such costs or give security therefor." 28 U.S.C. § 1915(a) (1970). The statute expressly provides that the indigent may have a trial transcript, service of process, witnesses, and assigned counsel. 28 U.S.C. §§ 1915(b)-(d) (1970). There are deficiencies in the statute as interpreted by the courts. *See, e.g.*, S.O.U.P., Inc. v. FTC, 449 F.2d 1142 (D.C. Cir. 1971) (holding that, despite the amendment applying the statute to "persons" rather than "citizens," the statute does not allow in

allow this issue to arise only[86] in voluntary petitions for discharge in bankruptcy, which are expressly preconditioned on the payment of referees' fees.[87] Prior to *Boddie,* the two courts that had considered the constitutionality of this statutory access limitation reached opposite conclusions; a similar conflict appears in the post-*Boddie* decisions. This disparity of result is not a product of divergent judicial values imposed on a balancing process, but rather of significantly different methods of approaching the problem. The two pre-*Boddie* decisions considered the access question solely in equal protection terms. In deciding *In re Garland,*[88] a federal circuit court determined that bankruptcy does not involve a fundamental right[89] and that the required referee's fee does not constitute an invidious discrimination. The court therefore applied an "old" equal protection test, and found a rational basis for the discriminatory effects of the filing fee in the congressional decision to charge the voluntary bankrupt for the discharge process in order to make the bankruptcy system self-supporting. In *In re Smith,*[90] however, a federal district court characterized access to the civil courts as a fundamental right requiring the application of "new" equal protection standards. Reasoning that the filing fee operated to deny this right to indigent petitioners and that the government's financial interest in avoiding subsidization of indigent bankruptcies was not compelling, the court held the fee violative of the petitioners' equal protection rights. Subsequent to *Boddie,* at least six federal district court decisions[91] have declared the

forma pauperis proceedings by corporations); note 87 *infra.* For a discussion of the standard of indigency under the statute see Adkins v. E.I. DuPont de Nemours & Co., 335 U.S. 331 (1948).

86. *But cf.* Chidsey v. Guerin, 443 F.2d 584 (6th Cir. 1971) (involving bond requirement for appeal from order of Secretary of Agriculture).

87. 11 U.S.C. §§ 36(b)(2), 32(c)(8), 68(c)(1), 95(g) (1970). Despite the seemingly unrestricted language of 28 U.S.C. § 1915(a) (1970), only one court has allowed a voluntary bankruptcy proceeding under the in forma pauperis statute. *In re* Passwater, 2 CCH Pov. L. Rep. ¶ 15,075 (S.D. Ind. 1971); *cf. In re* Read, 2 CCH Pov. L. Rep. ¶ 15,079 (W.D.N.Y. 1971) (applying 28 U.S.C. § 1915 (1970) only after finding fee unconstitutional). *But see In re* Smith, 323 F. Supp. 1082, 1084-85 (D. Colo. 1971) (demonstrating congressional intent to exclude bankruptcy proceedings).

88. 428 F.2d 1185 (1st Cir. 1970), *cert. denied,* 402 U.S. 966 (1971).

89. *But see* O'Brien v. Trevethan, 336 F. Supp. 1029 (D. Conn. 1972) (stating that the right to a fresh start in life by a discharge in bankruptcy is fundamental).

90. 323 F. Supp. 1082 (D. Colo. 1971) (Arraj, C.J.). The court's approach to the access problem is essentially the same as that of Justice Brennan in *Boddie,* but rather more forcefully presented.

91. *In re* Haddock, 2 CCH Pov. L. Rep. ¶ 15,565 (D. Conn. 1972) (relying wholly on *Boddie*); *In re* Smith, 341 F. Supp. 1297 (N.D. Ill. 1972); Application of Ottman, 336 F. Supp. 746 (E.D. Wis. 1972); *In re* Naron, 334 F. Supp. 1150 (D. Ore. 1971); *In re* Read, 2 CCH Pov. L. Rep. ¶ 15,079 (W.D.N.Y. 1971) (relying wholly on *Boddie*); *In re* Kras, 331 F. Supp. 1207 (E.D.N.Y. 1971); *cf. In re* Passwater, 2 CCH Pov. L. Rep. ¶ 15,075 (S.D. Ind. 1971) (allowing in forma pauperis proceeding, seemingly in order to avoid constitutional issue). *See also* O'Brien v.

Bankruptcy Act's fee requirement unconstitutional as it applies to indigent petitioners. Surprisingly, all but two of these courts based their conclusions primarily on the *Smith* "new" equal protection approach and invoked due process considerations only as a secondary justification for invalidation. This reluctance to rely heavily on a due process argument may have resulted from doubts concerning the applicability of the *Boddie* rationale to bankruptcy proceedings—doubts which proved decisive in the referee's decision upholding the fee requirement in *In re Partilla.*[92] The point of departure in the *Partilla* opinion was its characterization of the bankruptcy process not as a truly adversary court proceeding, but as a governmentally provided administrative service whose only beneficiary in a no-asset case is the petitioner; because the bankruptcy court must discharge a petitioner who complies with the statutory requirements, bankruptcy proceedings thus are judicial proceedings only in the sense that they are administered through the federal courts. *Partilla* held not only that bankruptcy proceedings lacked the adjudicatory element[93] necessary for application of procedural due process criteria to the referee's fee, but also that the voluntary petitioner seeks only to avail himself of a conditional privilege extended by Congress as an act of legislative grace rather than to exercise a legal right.

Partilla is almost unique among post-*Boddie* decisions in its apparent understanding of the defining criteria of the *Boddie* majority's due process mechanic. Nevertheless, the conclusions drawn in *Partilla* are open to substantial question. The right/privilege distinction upon which those conclusions were partially based has been significantly eroded in recent years. In *Goldberg v. Kelly,*[94] the Supreme Court summarily rejected the distinction as applied to welfare benefits, holding that "[s]uch benefits are a matter of *statutory entitlement* for persons qualified to receive them."[95] This emphasis on statutory entitlement should prove adequate to demonstrate an enforceable legal right of the voluntary bankruptcy petitioner, whose status is explicitly defined as one of entitlement in section 4(a) of the Bankruptcy Act.[96] Moreover, the adju-

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Trevethan, 336 F. Supp. 1029 (D. Conn. 1972) (dictum declaring referee's orders transmittal fee invalid on due process grounds).

92. 2 CCH POV. L. REP. ¶ 13,885 (S.D.N.Y. 1971). *See also In re* Malevich, No. Bk29-71 (D.N.J., April 21, 1971).

93. The referee apparently reasoned that even in an uncontested divorce, the court must find an affirmative legal right to a dissolution of the marriage, while a bankruptcy referee may refuse a discharge only if he finds that the negative technical requirements of the Act have not been met.

94. 397 U.S. 254 (1970).

95. *Id.* at 262 (emphasis added). The Court cited with approval Reich, *Individual Rights and Social Welfare: The Emerging Legal Issues,* 74 YALE L.J. 1245, 1255 (1965).

96. "Any person . . . shall be entitled to the benefits of this title as a voluntary bankrupt."

dicative element, whose supposed absence was so strongly emphasized in *Partilla,* is as clearly present in a bankruptcy proceeding as in an uncontested divorce action; in each the only function of the court is the essentially nondiscretionary exercise of its exclusive power to declare the indigent moving party legally released from an otherwise inescapable situation.

Any subject matter extension of *Boddie* beyond disputes whose resolutions, even when consensual, may be effectuated only by judicial imprimatur will require an increasingly narrow redefinition of "recognized, effective alternatives" for accomplishing by private means the aims of would-be litigants. This will necessitate recognition of the principle that the only actual or theoretical possibilities that are significant in assessing the applicability of due process standards are those alternative remedies that are as equally effective and legally acceptable as a civil suit. Acceptance of this proposition was implicit in the majority opinion in *Boddie*; neither the legally acceptable but ineffective alternatives of a separation or a continuation of the marital relationship, nor the practically effective but legally discountenanced options of nonsupport, desertion, or illicit cohabitation with another were advanced as viable alternatives to securing an unfettered right to remarry through divorce. The extent to which the state will recognize private substitutes for the judicial resolution of disputes, however, will vary inversely with the extent of governmental involvement in those controversies. Governmental involvement may be either direct, when the state is, or has become, the party opposing the would-be litigant, or indirect, when there is a substantial governmental interest in regulating the exercise of rights upon which a dispute focuses.

Direct state involvement in controversies between individuals is not a static element. Landlord-tenant relationships, for example, may be subject to extensive state regulatory legislation, but seldom directly involve the state as a party to the formation, continuation, or dissolution of a private lease agreement. Once lease covenants are allegedly breached and the injured party institutes judicial proceedings, however, the state becomes directly involved in the controversy. Since the state will at that point refuse to recognize any extrajudicial attempt by the defendant to protect his rights, "the judicial proceeding becomes the only effective means of resolving the dispute at hand,"[97] and the subject

11 U.S.C. § 22(a) (1970). If this is viewed as a liberty right, *see* note 89 *supra,* the voluntary petitioner arguably would have a stronger claim to access if an equal protection test is used than the welfare recipients in *Goldberg v. Kelly,* whose interest was characterized as a property right. *See* Dandridge v. Williams, 397 U.S. 471 (1970).

97. 401 U.S. at 376.

matter criterion of *Boddie* is thus satisfied. Since this coalescence of threatened deprivation and lack of alternatives will occur whenever direct state involvement is invoked by bringing suit against an indigent person, it seems clear that *Boddie* should require a due process evaluation of the financial barriers facing all indigent civil defendants.[98] The element of invoked direct state involvement deserves special consideration because it should also prove sufficient to guarantee a due process evaluation of the cost barriers to the unsuccessful defendant's prosecution of an appeal. Similarly, the unsuccessful civil plaintiff should be entitled to a due process scrutiny of the financial barriers to appellate access because he, too, no longer has an alternative arena in which to press his claim and to which the state will accord recognition in contradiction to its own res judicata determination that his position is insufficient.[99] *Boddie* can also be extended to protect indigents seeking to proceed against either the state itself or a state agency or official on the basis of *inherent* direct state involvement. Again, such an expansion can be achieved by an emphasis on the lack of effective alternatives to civil suit. As a practical matter, the alternatives available to any dissatisfied party, in all but the limited class of private disputes that can be resolved by retaking wrongfully held personalty, entail either the cooperation of his adversary or the invocation of the adjudicative and enforcement powers of the state. Thus, when the adversary is the state itself, a refusal to adjudicate operates equally as a refusal to cooperate, and therefore leaves the indigent with no recognized alternative remedy. From a slightly different perspective, the state's refusal to adjudicate the dispute indirectly affirms the status quo created by the action of the state, and therefore operates as a denial of the indigent's claim to relief that is equivalent to the practical adjudication of the would-be plaintiffs' right to divorce in *Boddie*.[100]

98. *Cf.* State *ex rel.* Caulk v. Nichols, 281 A.2d 24 (Del. 1971), *appeal dismissed*, 408 U.S. 901 (1972) (denying relief from bond requirements after discussion of relator's access interest); Myers v. Archuleta, 1 CCH POV. L. REP. ¶ 662.953 (Idaho Dist. Ct. 1971) (common-law waiver powers invoked, but unconstitutionality of defendant's filing fee noted).

99. Recognition of the direct state involvement inherent in the aftermath of an unsuccessful prosecution or defense of a civil suit might also justify the independent invalidation of financial barriers to appellate access on equal protection grounds similar to those involved in the criminal appeals cases. *See* notes 49, 53 *supra*. In each case, the state may be viewed as enforcing its lower court deprivation of the appellant's rights by denying him the review of those rights available to the more affluent.

100. One argument raised in the lower court by the *Boddie* plaintiffs that was virtually ignored by both courts might have special force in suits against the state. The plaintiffs contended that the fee requirement infringed their first amendment right to petition for a redress of grievances. Boddie v. Connecticut, 286 F. Supp. 968, 970 (D. Conn. 1968). A similar argument was advanced and ignored in *In re* Smith, 323 F. Supp. 1082, 1084-85 (D. Colo. 1971). This argument was

Both inherent and invoked direct state involvement are present when judicial review of a determination by a state administrative agency is denied.[101] A state provision that conditions judicial review of administrative determinations upon the payment of a fee seems clearly to satisfy the defining criteria of *Boddie*—the subject matter of the dispute is a state-created right; the state has provided an exclusive mechanism for the resolution of the dispute; and the state is involved in the dispute directly through both the executive and judicial branches, as well as indirectly through the legislature.[102]

Although the factual situation in *Boddie* presented elements of both direct and indirect state involvement, the Court emphasized the latter—the great extent of the state's concern with and regulation of marriage and its dissolution. It may be helpful to describe this state concern as elevating marriage to the status of a "public right." The "public right" characterization may serve two useful functions. First, the distinction between "public" and "fundamental" rights should help to forestall the nascent lower and state court confusion of the *Boddie* due process approach and the "new" equal protection compelling interest

rejected summarily in Ortwein v. Schwab, 498 P.2d 757 (Ore. 1972) (welfare appeal filing fee), and Jones v. Aciz, 289 A.2d 44, 55 (R.I. Sup. Ct. 1972) (denying waiver of appeal bond for trial de novo of eviction proceeding).

101. When the "adversary party" in the administrative proceedings is an agency of the government, as in a welfare hearing, the indigent would-be appellant should be able not only to argue that his interests should be accorded great weight on the due process scale, but he also should be able to advance a fairly convincing equal protection challenge to judicial review cost barriers. *Cf.* Say v. Smith, 5 Wash. App. 677, 491 P.2d 687 (1971) (concurring opinion stating bond requirement in welfare appeal violative of equal protection). When, however, the adversary in the hearing is a private party and the cost requirement on review is a security bond to protect that party's interest, as in a zoning appeal, state involvement is diminished and equal protection considerations lose much force. *But cf.* Damaskos v. Board of Appeal, 267 N.E.2d 897, 902 (Mass. 1971) (partially remitting a zoning appeal bond for a nonindigent by statutory construction; the decision indicated that both equal protection and due process considerations might otherwise have been required).

102. The Supreme Court was confronted with this situation in a case involving welfare recipients who were impeded by statutory filing fees in their attempts to challenge a state welfare commission ruling. Frederick v. Schwartz, 296 F. Supp. 1321 (D. Conn. 1969). The Court vacated an adverse lower court decision and remanded for consideration in light of *Boddie*. 402 U.S. 937 (1971). This disposition of the case is perhaps of less significance than might appear, however, since the lower court had based its decision on the precedent of its own earlier adverse decision in *Boddie*. *Compare* Huffman v. Boersen, 406 U.S. 337, 338 (1972) (per curiam) (Douglas, J., concurring) (appeal bond invalid under *Boddie*); Gatling v. Butler, 52 F.R.D. 389 (D. Conn. 1971) (invalidating filing fee for juvenile delinquency appeal); Dorsey v. Hammond, 336 F. Supp. 380 (D. Md. 1971) (waiver of filing fee and state payment for printed record in welfare appeal held constitutionally required under *Griffin* and *Boddie* by Maryland Court of Appeals), *with* Chidsey v. Guerin, 443 F.2d 584 (6th Cir. 1971) (upholding double value bond for appeal from order of U.S. Secretary of Agriculture); Ortwein v. Schwab, 498 P.2d 757 (Ore. 1972) (upholding filing fee for welfare appeal against both due process and equal protection challenges).

test.[103] Although the results reached by application of these two disparate methodologies may be the same when the contested right is indeed fundamental, like the right to vote,[104] recognition of a due process right to litigate a given case does not mean that state restrictions upon the underlying contested right must be justified by a "compelling" state interest; thus due process recognition should not be withheld out of a fear that all fee-payment restraints on the exercise of the contested right will thereby be removed. It surely would be foolhardy to argue, for example, that the combined precedential force of *Boddie* and *Harper* now forbids the required payment of marriage license fees by indigents. Secondly, an emphasis on the public quality of the asserted rights should properly direct attention from the extent of the government's procedural regulation to the depth of the government's interest in their substantive existence. This distinction can perhaps be made more meaningful by considering as two examples the Federal Employers' Liability Act and the fourteenth amendment. The former provides detailed procedures regulating the method of litigating a dispute that essentially involves only a common-law tort right and thus is amenable to all the possibilities for extrajudicial resolution that attend any common-law controversy. The latter, however, creates substantive rights of citizenship, whose enforcement and protection must be a primary concern of national and state governments; these rights, whether or not deemed "fundamental," are therefore clearly "public." Thus, although governmental interest in the protection of railroad employees is clearly evidenced by FELA, the primacy of the fourteenth amendment permits no recognition of alternatives to civil litigation that fail to provide fully equal remedies for the violation of civil rights. The question of *Boddie's* applicability to a constitutional claim solely because of indirect state involvement, however, seldom will be presented, largely because most such claims will involve the state directly as the opposing party. Moreover, a state court challenge to purely private discrimination under the thirteenth amendment could still fall outside the *Boddie* rationale because of the ready availability of the federal courts—with their sweeping in forma pauperis statute—as alternative fora. There is, however, an intriguing possible application of *Boddie* to a public-right claim; it has been suggested[105] that a would-be plaintiff who has no adequate state

103. *See* note 77 *supra.*

104. Bynum v. Connecticut Comm'n on Forfeited Rights, 410 F.2d 173 (2d Cir. 1969) (invalidating filing fee requirement as applied to indigent ex-convict seeking to regain his franchise).

105. Note, *The Constitutional Implications of the Jurisdictional Amount Provision in Injunction Suits Against Federal Officers,* 71 COLUM. L. REV. 1474 (1971).

court remedy[106] cannot constitutionally be barred from a federal forum by the 10,000-dollar jurisdictional amount. Whatever may be the merits of this position, it is most probable that the Court will avoid confronting the issue—and thus the possibility of a confrontation with Congress—and will instead avail itself of another, less disruptive means of disposing of any such challenge.[107]

A gradual subject matter expansion of the *Boddie* due process rationale to statutorily regulated private claims of a common-law nature conceivably could be achieved through either of two theoretical approaches to the access issue. The first would be to infer from extensive regulation of basic common-law rights a governmental intent to create a new statutory public right to replace the old common-law action, and then to infer from that creation a state refusal to recognize private substitutes for the enforcement of the right through the judicial process. The second approach would be to infer from the fact of regulation a legislative determination that the previous remedies, which have become the alternatives to judicial resolution after enactment of the statutory regulations, were ineffective; hence, as a matter of substantive law, these remedies could not be considered as recognized alternatives. The former approach might prove more suitable in challenging financial barriers that block access to state court prosecution of claims under a remedial federal statute like FELA; the latter, however, would be more suited to support an attack on cost requirements in actions, such as eviction or replevin proceedings, in which the statutory regulation was presumably an exercise of the state's police power designed to prevent the socially undesirable results of peace-endangering private remedies. Each of these suggested approaches, however, is vulnerable to the argument that the regulatory statute was designed merely to reform the pre-existing judicial mechanism for resolving the affected disputes.

Although no court has yet attempted to push *Boddie* to the outer limits of purely private contract or negligence claims, two Justices have stated that they see no limiting criteria whatever within the reasoning of the *Boddie* majority. In his concurrence, Mr. Justice Brennan rejected the majority's implied suggestion that purely private suits may always be settled out of court, adopting the more pragmatic view that the institution of a nonfrivolous lawsuit is almost by definition the result

106. *See* Murray v. Vaughn, 300 F. Supp. 688, 695 (D.R.I. 1969) (extending jurisdiction under 28 U.S.C. § 1331 (1970) in suit to enjoin federal officials despite serious question of failure to meet jurisdictional amount requirement, impliedly to avoid article III, § 2, and fifth amendment challenges).

107. *See generally* Note, *supra* note 105.

of an exhaustion of private alternative remedies. In a later opinion, Mr. Justice Black urged a far more fundamental justification for recognizing a right of access broad enough to invalidate any payment requirement applied to an indigent litigant seeking to press his legal claim. Justice Black's fundamental observation was that, as "[e]very law student learns in the first semester of law school,"[108] legal rights have meaning only to the extent that the state will enforce them. From this premise he reasoned that the *Boddie* majority's emphasis on the exclusivity of the judicial remedy for divorce plaintiffs "is no limitation at all,"[109] because unhampered access to the judicial process is the only means by which disputed rights can be meaningfully protected. He concluded: "In my view, the decision in *Boddie v. Connecticut* can safely rest on only one crucial foundation—that the civil courts of the United States and each of the States belong to the people of this country and that no person can be denied access to those courts, either for a trial or an appeal, because he cannot pay a fee, finance a bond, risk a penalty, or afford to hire an attorney."[110]

B. The Financial Barrier Expansion

Prior to considering the constitutional validity of the various classes of financial barriers to civil court access, it is necessary to realize that the rights imperiled by financial obstacles, even in suits within the subject matter ambit of the *Boddie* majority's due process rationale, are not necessarily coextensive with those affected by a criminal prosecution; the felt necessity of sedulously protecting the criminal defendant from any abuse of state prosecutorial powers embodied in the Constitution may not apply to civil litigation. For this reason, consideration of the applicability of *Boddie* to various financial barriers must be prefaced with the caveat that the catalogue of procedural rights constitutionally guaranteed to the criminal defendant by past Supreme Court decisions may not be assumed to have been automatically guaranteed to the civil litigant by force of the *Boddie* decision. Each class of financial burdens must be examined to determine whether it is invidiously discriminatory or otherwise threatens a fundamental interest sufficiently to demand strict judicial scrutiny; whether the state nevertheless may be able to demonstrate a compelling interest in maintaining the requirement; and whether "the precise nature of the government function involved"[111] is

108. Meltzer v. C. Buck LeCraw & Co., 402 U.S. 954, 956 (1971).
109. *Id.*
110. *Id.* at 955-56.
111. Cafeteria Workers Local 473 v. McElroy, 367 U.S. 886, 895 (1961).

such as to make the cost requirements meet the standards of due process.[112]

1. *Fees.—Boddie* holds unequivocally that the state may no longer demand payment of a filing fee by an indigent plaintiff as an absolute condition precedent to suit for divorce.[113] This is not to suggest, however, that *Boddie* invalidated all filing fee requirements; the constitutional status of such fees in contexts other than divorce litigation may be open to question. One specific area in which this question seems likely to arise is the challenge to the referee's fee requirement in voluntary bankruptcy petitions.[114] It might be argued in defense of the fee that "the entry of the United States into the installment credit business"[115] presently provides the indigent petitioner a meaningful opportunity to be heard because it allows him up to nine months after filing his petition to raise the requisite 50-dollar fee.[116] This position loses its force, however, when applied to the continuously impoverished petitioner. Dismissal of a voluntary petition for failure to pay the required fee is generally assumed, through principles of res judicata, to bar a subsequent discharge of the previously scheduled debts.[117] As a result, the indigent petitioner is actually faced with the threat of a binding adjudication that entails consequences far more severe than the mere continuance of the status quo that followed the state's denial of a hearing in *Boddie*. Even if the Judicial Conference's proposal that a dismissal for nonpayment of fees be without prejudice unless otherwise stated[118] were adopted, it is unlikely that a previously dismissed petitioner would find

112. The due process discussion of financial barriers must proceed on 2 assumptions; first, that the desired litigation will be found to fall within the subject matter limits of *Boddie;* and secondly, that the indigent's interest in some way will involve the reasonable necessities of normal life. Positing a uniformly heavy weight on the indigent's side of the constitutional balance does not indicate that the *Boddie* majority's due process approach reduces to something of a compelling interest test; the presumption is rather one of necessity for orderly discussion, and is supported by the great preponderance of indigent litigation.

113. *Cf.* Robertson v. Robertson, 261 So. 2d 336 (La. Ct. App. 1972) (invalidating the Louisiana in forma pauperis statute's express exclusion of divorce actions as void on its face).

114. *See* notes 87-96 *supra* and accompanying text. Because the referee's fee is as "invidiously discriminatory" and as effective in blocking court access as any other financial barrier, the only remaining question of its possible validity would arise under a due process balancing approach.

115. *In re* Barlean, 279 F. Supp. 260 (D. Mont. 1968).

116. 11 U.S.C., General Order in Bankruptcy 35, § 4(a) (1970).

117. *See* Perlman v. 322 W. Seventy-Second St. Co., 127 F.2d 716 (2d Cir. 1942); *In re* Barlean, 279 F. Supp. 260 (D. Mont. 1968); *In re* McDonald, 61 F. Supp. 133 (D. Mass. 1945). *See generally* 1 W. COLLIER, BANKRUPTCY ¶ 2.48 (14th ed. 1971).

118. COMMITTEE ON RULES OF PRACTICE AND PROCEDURE OF THE JUDICIAL CONFERENCE OF THE UNITED STATES, PRELIMINARY DRAFT OF PROPOSED BANKRUPTCY RULES AND OFFICIAL FORMS UNDER CHAPTERS I TO VII OF THE BANKRUPTCY ACT 42 (1971). The Committee would also, however, reduce the maximum allowable time for paying the fee to 6 months. *Id.* at 12.

the court willing to allow him a second discretionary installment period in which to pay the fee; as a practical matter, the continuously indigent petitioner thus would remain liable to his creditors, just as the would-be plaintiffs in *Boddie* remained legally bound to unwanted spouses. Indeed, the assumption that availability of the nine-month installment period alone operates to render meaningful the petitioner's opportunity to be heard may itself be subject to direct challenge.[119] Although the voluntary petitioner is adjudicated a bankrupt at the time of filing, he is effectively denied the substantial legal benefit of this adjudication—a fresh start in life—until he pays for his discharge. This circumstance strongly suggests that the prepayment hearing and adjudication is no more than a meaningless formality until the fees are paid.[120] A possible justification for the present anomalous situation of a petitioner too poor to "go bankrupt" is the governmental interest in preventing the abuses that originally led to the passage of the Referees' Salary Act of 1946,[121] which not only abolished the fee system of referee compensation but also repealed the then-existing in forma pauperis provisions of the Bankruptcy Act. The very real evils of the former compensation system, however, were largely unrelated to the in forma pauperis provision; a close examination of the Referees' Salary Act discloses only two logical bases for the present payment-conditioned discharge.[122] The first of these is a continuing desire to make the bankruptcy system self-supporting—a desire that not only seems impossible to achieve without a sizable increase in the present fee amounts,[123] but that is also irrelevant to a consideration of the due process rights of the bankrupt under the *Boddie* interpretation of *Griffin*.[124] The second possible justification for maintaining the present procedure is the governmental desire to avoid the potentially destructive administrative burdens of adjudicating in forma pauperis eligibility and monitoring the future collectibility of deferred fee payments. This argument, however, also seems insufficient

119. *Cf.* Earls v. Superior Court, 6 Cal. 3d 109, 490 P.2d 814, 98 Cal. Rptr. 302 (1971) (rejecting the contention that in forma pauperis divorce proceedings may be disallowed because the indigent will eventually be able to accumulate sufficient savings to pay filing fees; "Indigents are entitled not merely to access to the courts but to timely access. They may not be subjected to unreasonable delays in securing fundamental rights solely by reason of their poverty.").

120. *Cf.* Armstrong v. Manzo, 380 U.S. 545, 552 (1965) (the opportunity to be heard "must be granted at a meaningful time and in a meaningful manner").

121. Act of June 28, 1946, ch. 512, 60 Stat. 323 (codified in 11 U.S.C.).

122. *See* Shaeffer, *Proceedings in Bankruptcy In Forma Pauperis*, 69 COLUM. L. REV. 1203 (1969).

123. U.S. JUDICIAL CONFERENCE, REPORT OF PROCEEDINGS 202 (1970). "[T]he principle of a self-supporting bankruptcy system is outmoded and should be abandoned." *Id.*

124. *See* note 69 *supra* and accompanying text.

to overbalance the petitioner's interest. Bankruptcy courts are uniquely suited to determine the financial status of in forma pauperis petitioners; moreover, the significant administrative delays occasioned by the present installment system[125] could be reduced appreciably by granting an immediate in forma pauperis discharge and following it, if the referee's fees were not simply waived, by periodic checks on the bankrupt's ability to repay.[126] Although the Supreme Court declined an opportunity to consider the validity of the Bankruptcy Act's fee requirement by denying certiorari in *In re Garland,*[127] it has responded to the increasing pressure of inferior court challenges and allowed an appeal from one of the recent lower court invalidations.[128]

The constitutional status of required payments other than filing fees may also be suspect under the rationale of the *Boddie* majority. The majority's discussion of reasonable, less expensive alternatives to official service of process and notice by publication[129] may indicate that, in the absence of significantly less expensive alternatives, the state's justification for requiring these payments—that the expenditures for notice

125. COMMITTEE ON RULES OF PRACTICE AND PROCEDURE, *supra* note 118, at 13 (proposing a reduction of the standard fee payment deferral period to 4 months with a maximum of 6 months because the "administrative cost of installments in excess of 4 is disproportionate to the benefits conferred, and prolongation of the period of payment beyond 6 months after bankruptcy causes undesirable delays in administration").

126. *But see In re* Garland, 428 F.2d 1185, 1188 (1st Cir. 1970) (suggesting that an investigation of true indigence would be a heavy administrative burden). *Garland* also suggests that the predicted cost to the bankruptcy system of total waiver of fees in no-asset cases would be about $3,000,000 annually. *Id.*

127. 402 U.S. 966 (1971).

128. *In re* Kras, 331 F. Supp. 1207 (E.D.N.Y. 1971), *prob. juris. noted,* 40 U.S.L.W. 3385 (Feb. 22, 1972). Two reflections on the indigent's interest in a voluntary bankruptcy must be noted. The *Garland* court suggested that "no-asset" bankrupts were either trying to conceal true assets or were hoping first to rid themselves of their creditors in the expectation of future assets. Such a misanthropic outlook hardly seems justified. In *Kras,* petitioner is seeking a bankruptcy discharge to thwart the condemnatory references of his former employer, an insurance company several thousand dollars of whose premiums petitioner claims were stolen from him. If these proceeds were in fact stolen, the *Garland* court's rejection of bankruptcy's avowed purpose of giving petitioners a fresh start in life seems especially harsh. A second aspect of the draconian opinion in *Garland* was its insistence that utter destitution was the standard of indigence that ought to be employed if in forma pauperis proceedings in bankruptcy were to be constitutionally required. This view was considered and emphatically rejected in *In re* Smith, 323 F. Supp. 1082, 1091-92 (D. Colo. 1971). *Smith* suggested a far more reasonable constitutional standard of indigence—the inability to "afford to live from day to day and also pay the cost of a court filing fee . . . ." *Id.* at 1092.

129. "[W]e think that reliable alternatives exist to service of process by a state-paid sheriff if the State is unwilling to assume the cost of official service. This is perforce true of service by publication which is the method of notice least calculated to bring to a potential defendant's attention the pendency of judicial proceedings. . . . We think in this case service at defendant's last known address by mail and posted notice is equally effective as publication in a newspaper." 401 U.S. at 382.

and process are necessary to protect the due process rights of the other party to the litigation and should therefore be made by the party who has occasioned the necessity for protection—might have prevailed. In view of the obvious thrust of the *Boddie* majority's reasoning, such an interpretation seems forced as it applies to fees paid to an agency of the court.[130] This class of fees is distinguishable, however, from those required by statute to be paid to private parties. The distinction, which of necessity rests on the state's asserted inability to control the amount of the "private" costs,[131] as well as its financial disinterest in their payment, does not seem material for equal protection purposes because these costs are unquestionably state requirements operating to withhold equal access to the judicial process from the poor. It may, however, have constitutional significance under the *Boddie* majority's due process test. The due process argument would be that since these fees are required not for any direct state benefit but rather for the protection of the state's citizens, they possess a greater weight in the due process balance—a weight sufficient to offset the necessitating party's right to be heard;

130. Subsequent cases appear to bear this out. *See, e.g.*, Joyner v. Maryland, 1 CCH Pov. L. REP. ¶ 662.38 (Md. Cir. Ct. 1971) (no discussion of alternatives to remission of court costs despite search for alternatives to extrajudicial payments); Wilson v. Wilson, 218 Pa. Super. 344, 280 A.2d 665 (1971) (remission of fees and court costs and free service of process allowed without discussion of alternatives); *cf.* Indigent Divorce—Administrative Memorandum, 2 CCH Pov. L. REP. ¶ 13,932 (Pa. C.P. 1971) (adopting as part of standard procedure payment of any service fees). *But see* Lloyd v. Third Judicial Dist. Court, 27 Utah 2d 322, 495 P.2d 1262 (refusing to allow indigent divorce plaintiff to proceed without payment of costs of publication because of lack of statutorily permitted less expensive alternatives), *on remand from* 404 U.S. 1035 (1972).

Those courts that have accepted the constitutional obligation to provide plaintiffs with the necessary service upon their opponents have in turn been faced with the difficult problem of deciding how and to whom to allocate the financial burden. The confusion in the lower courts in New York is instructive. It was at first assumed that payment of publication costs should be made from city and county treasuries in Dorsey v. City of New York, 66 Misc. 2d 464, 321 N.Y.S.2d 129 (Sup. Ct. 1971). This decision was overturned in Jackson v. Jackson, 37 App. Div. 2d 953, 326 N.Y.S.2d 224 (1971), in which the First Department ruled that the state must bear the expense and that, because the state was not a party to the divorce proceeding, plaintiff's only remedy was to sue the state in the Court of Claims. This position was subsequently adopted by the Second Department in Jeffreys v. Jeffreys, 38 App. Div. 2d 431, 330 N.Y.S.2d 550 (1972). The Third and Fourth Departments, however, continued to adhere to the view that payment of publication costs was the burden of the city or county. Deason v. Deason, 39 App. Div. 2d 331, 334 N.Y.S.2d 236 (1972); McCandless v. McCandless, 38 App. Div. 2d 171, 327 N.Y.S.2d 896 (1972). Meanwhile, county supreme courts occasionally followed the suggestion advanced in *Boddie* and ordered service by mailing to defendant's last known address, a solution condemned as violative of state law by all 4 departments. *See, e.g.*, Prince v. Prince, 69 Misc. 2d 410, 329 N.Y.S.2d 963 (Sup. Ct. 1972).

131. *See* Harris v. Harris, 424 F.2d 806, 813 (D.C. Cir.), *cert. denied*, 400 U.S. 826 (1970) (a pre-*Boddie* decision ordering minimum allowable notice because state had no other way to control the cost). Because the free market pricing concept implicit in this distinction is in many instances inapplicable, *see* text following note 5 *supra*, it should be possible to argue that the state is directly answerable for the pricing policies of these private parties.

moreover, when the state is powerless to reduce the cost of protecting the indigent's opponent, it is unreasonable, hence not constitutionally required, to permit the indigent necessitating party to escape this burden entirely and thrust it instead on the otherwise uninvolved state fisc.[132]

A greater danger in placing undue emphasis on *Boddie's* discussion of less expensive alternatives may lie in the state's potential willingness to reduce the extent of its obligation to assume the indigent's financial burden by dispensing "cut-rate justice" to indigent litigants. Indications of such an attitude may be found in recent decisions. In *Hotel Martha Washington Management Co. v. Swinick,*[133] a New York appellate court remanded for a determination of the necessity to the presentation of the defendant's case of certain witnesses whose fees and subpoena expenses the court had determined would have to be borne by the state. In a Maryland case, an indigent divorce plaintiff was denied a statutory election of a more expensive alternative to a hearing of her case before a judge.[134] The latter decision is also one of many to find, on the authority of *Boddie,* that the state could validly provide a less expensive method of serving process than that generally required of nonindigent plaintiffs.[135] Although these decisions may have been quite reasonable, a pattern of such notice short cuts could conceivably raise constitutional questions involving both due process and equal protection charges that systematic state lowering of notice standards adversely affects the rights of defendants in actions brought by indigent plaintiffs. Such collateral attacks on procedural grounds, even if unsuccessful, would subject the indigent to time-consuming and potentially harassing extraneous litigation that could in turn raise constitutional questions about the adequacy of the protection given the indigent litigant by the state's original as-

132. *Cf.* Cohen v. Board of Supervisors, 20 Cal. App. 3d 236, 97 Cal. Rptr. 550 (1971) (where state has assumed no responsibility for notice by publication, divorce plaintiff cannot make state pay these fees; service by mail suggested as only possible remedy).

133. 66 Misc. 2d 833, 322 N.Y.S.2d 139 (App. T. 1971).

134. Joyner v. Maryland, 1 CCH Pov. L. Rep. ¶ 662.38 (Md. Cir. Ct. 1971). Plaintiff had requested the services of an examiner-master in lieu of a hearing before a judge. *But cf.* Dorsey v. Hammond, 336 F. Supp. 380 (D. Md. 1971) (reporting order of Maryland Court of Appeals refusing petitioner's request to appeal on typewritten extract of record and ordering state to pay for full printed briefs and record; added state expenses held insufficient reason for departure from established, salutary court rule); Hart v. Superior Court, 16 Ariz. App. 184, 492 P.2d 433 (1971) (ordering county to pay for transcript).

135. *See also* Lynch v. Lynch, 1 CCH Pov. L. Rep. ¶ 662.801 (Cal. Super. 1971) (allowing notice by mail "because" plaintiff was indigent); Miserak v. Terrill, 285 A.2d 753, 755 (Vt. Sup. Ct. 1971) ("manner of service . . . rests wholly within the power of the trial court"). *But see* Hart v. Superior Court, 16 Ariz. App. 184, 492 P.2d 433 (1971) (requiring the county to pay full publication costs because Arizona had no law authorizing service by mail; court refused to read *Boddie* as overcoming fabric of state's procedural rules).

sumption of the publication fees. Moreover, procedural short cuts may be subject to direct constitutional attack. When the state provides alternative means of satisfying procedural requirements, the indigent's forced election of the less expensive procedure would seem to call for a determination that the assigned procedure assures the indigent as much protection as the one forbidden him. It may be argued, however, that the forced election has deprived the indigent of his right to the equal protection of the laws even when the elected alternative adequately safeguards his due process rights, if it can be shown that the forbidden alternative would have given him a more effective opportunity to present his case.[136]

2. *Costs.*—Despite the vulnerability of fee barriers under the *Boddie* rationale, it is difficult to perceive in the case any foundation for attacking the taxation of costs. Under due process standards, costs appear to be constitutionally permissible both because they do not operate to deny an opportunity to be heard[137] and because the indigent's interest in being free from the chilling effects of costs seems hardly to outweigh the interest of all litigants in being compensated for the expense of litigational vexation. Further, neither of the equal protection arguments advanced in the *Boddie* concurring opinions provides support for a costs challenge, primarily because costs statutes do not establish conditions of access nor do they affect rich and poor differently in any meaningful way.

Superficially similar to the costs problem is the question whether the state may constitutionally condition the indigent's access to its civil courts upon his promise of eventually repaying the fees that the state is required by *Boddie* to assume. The essential distinction between costs and deferred fees, however, is that the deferred fee liability is exacted, not to protect any interest of the indigent's opponent, but rather to safeguard the state treasury. This problem confronted the federal courts that invalidated payment of the referee's fee as a condition precedent to obtaining a voluntary discharge in bankruptcy. These courts have concluded that it is proper to embody in the referee's final order, if the discharge is granted, "an order resembling a judgment for costs"[138] to

136. In *Griffin* a transcript was ordered because the more wealtby could have one, despite the Court's recognition of the principle that the state had no duty even to provide an appeal process. Presumably the inferior review first given the *Griffin* petitioners would have raised no constitutional issue had a better alternative not existed.

137. *Cf. In re* Adoption of a Child by M.W., 116 N.J. Super. 506, 283 A.2d 109 (1971) (upholding costs judgment of state investigatory agency wbere grant of adoption was not conditioned upon payment).

138. *In re* Smith, 323 F. Supp. 1082, 1093 (D. Colo. 1971). *See* notes 90-91 *supra* and accompanying text.

become effective only upon a subsequent improvement in the petitioner's financial status that would enable him to pay the fee without undue hardship. There is no apparent constitutional objection to such an indefinite deferral of required fee repayment. The indigent has been allowed free access to the courts in order to pursue his legal claim to final adjudication and is subjected to no unequal treatment when his eventual repayment of costs is conditioned upon his ability to repay. When, however, repayment is deferred for a fixed time or made a precondition to the exercise of other rights, different constitutional issues arise. If, for example, the courts were to retain the power of a *capias* execution[139] or a contempt commitment for nonpayment of costs at the end of the deferral period, the indigent litigant would seem to have both a convincing equal protection argument and a valid contention that, by requiring him to risk loss of liberty as a condition of access to the civil courts, the state has failed to meet the minimum standards of due process.[140] A similar contention doubtlessly would prevail when the state is able to levy upon the indigent's property for the amount of the deferred costs at the expiration of the fixed repayment period. The problems raised by establishing repayment of costs as a condition precedent to the exercise of other rights are presented most vividly in a recent Indiana divorce case[141] in which the court, after originally allowing plaintiff to proceed in forma pauperis, issued an order forbidding the subsequent issuance of a marriage license to either party until the accrued costs of the divorce action had been paid by defendant. When plaintiff appealed this order on due process and equal protection grounds, the court revised its order to assess the costs to both parties jointly and severally but left the marriage license provision intact. In view of the Supreme Court's frequent characterization of marriage as a fundamental right,[142] and its apparent definition of divorce as an action to secure the right to remarry,[143] this order probably would fail to withstand either a due process or an equal protection attack. Nevertheless, were the right involved less "fundamental" than marriage, it is arguable that the state could validly add as a condition of its exercise the repayment of outstanding court costs.

139. *See* Yoder v. County of Cumberland, 278 A.2d 379 (Me. 1971).

140. *Cf.* Strange v. James, 323 F. Supp. 1230 (D. Kan. 1971) (a criminal case invalidating state procedure for collecting expense of assigned counsel from indigent prisoner as chilling sixth amendment right), *aff'd on other grounds*, 407 U.S. 128 (1972).

141. Anderson v. Anderson, 1 CCH Pov. L. REP. ¶ 662.48 (Ind. Cir. Ct. 1971).

142. *E.g.*, Loving v. Virginia, 388 U.S. 1 (1967); Skinner v. Oklahoma *ex rel.* Williamson, 316 U.S. 535, 541 (1942).

143. 401 U.S. at 376.

3. *Security bonds.*—The applicability of *Boddie* to security bonds is beset with difficulties. The litigational interests subject to bond demands are of infinite variety; the complexity of the problem, moreover, is increased significantly by jurisdictional differences in the statutory requirements. Thus, treatment of the constitutional validity of bond requirements must be restricted to general considerations. In the discussion that follows there will be no attempt to segregate cost bond considerations from those involved in possessory bond challenges. Although possessory bond cases more sharply present the competing interests in the conduct of the underlying litigation, and more strongly emphasize the procedural posture of the parties, the fundamental obstacles facing a challenge to the underlying security bond justification of disinterested state protection of an opposing party are virtually identical in both cost and possessory bond cases.[144]

The constitutional status of requiring defendants' security bonds in eviction and replevin actions presents perhaps the thorniest problem in the right-of-access thicket. In an eviction proceeding, the defendant will be summarily dispossessed of his home and left without shelter for himself and his family unless—depending on the particular statutory requirement—he provides security for the rental payments as they accrue, the entire rental value for the estimated duration of the litigation, or twice the entire rental value. In a replevin action, the defendant must likewise post a re-replevin bond for the value, or more often twice the value, of the replevied goods or forego their possession, which may entail the loss of livelihood,[145] for the duration of the litigation. Yet without provision of security, the eviction plaintiff, who may himself be far from affluent, may lose the rental value of the premises for the duration of the litigation and undergo the risk of damage or destruction to his property; the replevin plaintiff faces the same dangers, magnified by the greater ease of disposability and concealment of movable property.

Due process and equal protection attacks on defendants' security bonds will each begin with the observation that there is no essential distinction between the criminal defendant faced with the potential loss of liberty and property, and the eviction/replevin defendant faced with the loss of property upon which the reasonable enjoyment of his liberty

144. When the state's interest in a cost bond requirement is not merely representative, however, a very different conclusion may be compelled. For example, in light of the clear presentation of the competing interests in Cohen v. Beneficial Loan Corp., 337 U.S. 541 (1949), it seems quite likely that exclusionary security requirements for minority stockholders seeking to institute derivative suits would continue to withstand attack on due process grounds.

145. *See, e.g.*, Bell v. Burson, 402 U.S. 535 (1971).

may depend. Due process methodology would then require a determination whether, under the circumstances, the security bond procedures afford the indigent defendant a meaningful *opportunity* to be heard, although in fact these procedures operate to deny him a present hearing. The factors to be weighed would be the defendant's interest in retaining the property pending final adjudication and the governmental interest to be served by insisting on the bond procedure, which perforce would in large part represent that of the plaintiff in protecting his rights to the property.[146] Similarly, equal protection analysis would necessitate a determination whether the interest of the state as representative of the plaintiff is sufficient to compel approval of the state's discrimination against the indigent defendant's interest in presenting his case. Because the balance of interests that seems to be required by both due process and equal protection will shift as different variables are introduced, it is unlikely that any court would venture a blanket approval or disapproval of security bond requirements; a case-by-case approach, using either equal protection or due process criteria, seems far more likely. Only one court has held the requirement of a security bond to be an unconstitutional deprivation of fourteenth amendment rights as applied to an indigent defendant, and that case involved a challenged deed construction rather than an alleged default in payment.[147] Defendant was unable to present her claim in the dispossessory action because she was too poor to post a bond, and for the same reason was unable to appeal from the resultant summary judgment. Although the court invalidated the bond requirement on equal protection grounds, the opinion appears to have adopted a narrow definition of "state interest" that excluded the state's representation of the plaintiff's interest. It is arguable that this restrictive definition was both incorrect and unnecessary, for there is no indication in the opinion of any circumstance involving danger to the property or loss of income sufficient to make the plaintiff's interest in the security overriding. Other cases have avoided the constitutional issue. One federal district court, for example, has issued a temporary restraining order to arrest eviction proceedings pending determination by a three-judge federal court of the constitutionality of security bonds.[148] A lower state court has also discussed the constitutional issues raised by bond requirements under a replevin statute, but, because of the tremendous impact that a declaration of invalidity would have on commercial transactions and existing security interests assumed

146. *See* Jones v. Aciz, 289 A.2d 44 (R.I. Sup. Ct. 1972) (discussing the competing interests).
147. Harrington v. Harrington, 269 A.2d 310 (Me. 1970).
148. Hayes v. Fellowship Gardens, Inc., 1 CCH POV. L. REP. ¶ 2355.21 (N.D. Ind. 1971).

in reliance on existing protection procedures, the court refused to pass on the constitutional question and instead reserved it for review on appeal.[149] The issue has been only partially resolved by the Supreme Court. In a challenge to a forcible entry and detainer statute requiring security for the rental value pending trial and double security on appeal, the Court invalidated the second increment of the appeal bond as having no necessary connection with the extent of appellee's risk of loss, but did not question the bond requirement in the eviction proceedings.[150] This treatment of the basic bond challenge was ambiguous, however, in that the Court dealt with the problem solely in terms of equal protection and emphasized that it was not considering the validity of the statute as applied.[151] Moreover, the Court failed to articulate any readily applicable standards by which to evaluate defendants' bond requirements.

Despite the difficulties in generalizing about the constitutional validity of defendants' security bonds, certain distinctions can be made. Supersedeas bonds required in eviction proceedings, for example, appear more open to attack then re-replevin bonds, both because a defendant's interest in shelter is generally greater, and certainly no less, than in his personal possessions, and because the danger to plaintiff's permanent possessory right is less when the property cannot be concealed or removed. A plaintiff's affirmative interest in possession of the realty during the litigation, however, also is greater than his interest in the possession of contested personalty; while the primary value of realty is in rents, personalty can rarely be rented and, when sold, its "used" condition reduces its value considerably. A fair distinction might therefore be drawn between those eviction cases in which the defendant claims absolute ownership vis-à-vis the plaintiff and those in which the defendant challenges the collectibility of an admitted continuing money obligation, on grounds, for example, that his lessor has not performed repair covenants. In the latter cases, which might be expected to predominate among those involving indigent defendants, there appears to be no constitutional argument against requiring that the admittedly owed rental payments be deposited into a court-administered escrow fund as they become due;[152] it is not likely, however, that there would

149. Almor Furniture & Appliances, Inc. v. Macmillan, 116 N.J. Super. 65, 280 A.2d 862 (Dist. Ct. 1971).

150. Lindsey v. Normet, 405 U.S. 56 (1972).

151. The Court apparently did not consider a possible unconstitutional application to the tenants, who were admittedly indigent, because the lower court had declared the statute unconstitutional on its face. *Lindsey* may also be distinguishable because the statutory scheme provided for a rudimentary hearing before an ouster of the tenant would be authorized. *See* Fuentes v. Shevin, 407 U.S. 67, 85 n.15 (1972).

152. *Cf.* Cockrell v. B & S Concrete Supply, 477 S.W.2d 9 (Tenn. 1972) (upholding required deposit of workmen's compensation settlement before challenge to award is permitted).

be a compelling interest in requiring these payments to be made in a lump sum before trial.[153] A similar conclusion could be reached in replevin cases when the indigent defendant seeks to withhold conditional sales payments in order to force consideration of such complaints as breach of warranty or truth-in-lending violations. When ownership is at issue, however, a different approach seems called for. The Court might well accept the constitutional validity of security requirements when the danger to plaintiff's interest is significant or when defendant's claim of ownership is frivolous or harassing. Rather than rely on an endless case-by-case adjudication of the merits of requiring security in a variety of circumstances, however, the Court could more easily, in accordance with its recent due process decisions,[154] require that security be ordered only after a preliminary hearing on the existence and extent of the threat to plaintiff's property interest. Such a procedure has recently been mandated by a federal circuit court,[155] with apparent success.[156]

The replevin or summary dispossession plaintiff appears to occupy a fundamentally different status than a defendant to such actions. The plaintiff comes voluntarily into court, and thus cannot call upon the essential resemblance to the unwilling defendant that lay at the root of the *Boddie* majority's reasoning. Because, however, a convincing argument may be made that the procedural posture of the parties does not necessarily reflect a true aggressor-defender relationship,[157] a more important distinction between the parties must be noted. The eviction/replevin plaintiff is not protecting a present possessory interest, but is rather actively attempting to obtain summary state aid in depriving the defendant of the peaceable enjoyment of the contested property. Thus, although the defendant's possession may in fact be wrongful, a security bond is required—not to allow the plaintiff to maintain a possessory status quo, and thereby protect existing rights dependent upon possession—but rather to effect, through seizure or eviction, a radical shift in the parties' existing rights without a prior adjudication that such

153. *See* Thompson v. Mazo, 421 F.2d 1156 (D.C. Cir. 1970); note 155 *infra* and accompanying text.

154. *E.g.*, Goldberg v. Kelly, 397 U.S. 254 (1970); Sniadach v. Family Finance Corp., 395 U.S. 337 (1969).

155. Bell v. Tsintolas Realty Co., 430 F.2d 474 (D.C. Cir. 1970) (permitting order to tenant to prepay rent into court escrow fund only on motion of landlord and after notice and opportunity for oral argument). *See also* Jack Spring, Inc. v. Little, 50 Ill. 2d 351, 280 N.E.2d 208 (1972) (eviction appeal bonds invalidated on both state and federal constitutional grounds; "use and occupancy" bonds impliedly authorized).

156. *See* Cooks v. Fowler, 437 F.2d 669, *modified*, 455 F.2d 1281 (D.C. Cir. 1971); Blanks v. Fowler, 437 F.2d 677 (D.C. Cir. 1970).

157. *See* Note, *The Indigent's Right to Counsel in Civil Cases*, 76 YALE L.J. 545, 555 (1967).

a shift is merited. Given this inherent distinction, and the existence of what could be found to be a reasonable alternative for the indigent plaintiff in an action for money damages, it is conceivable that the *Boddie* due process argument would not affect these plaintiff's security requirements. Although it is possible that both the Douglas and Brennan equal protection tests might find that strict scrutiny is required in this situation, it is nevertheless plausible that the state might demonstrate an interest in the protection of its citizens' existing possessory rights that is sufficiently compelling, when coupled with the indigent plaintiff's alternative protection of suing for damages, to sustain the security requirements.

Appeal bonds are superficially identical to plaintiffs' security bonds, in that they represent security required of a party attacking the status quo; indeed appeal bonds are subject to the special justification that the status being attacked is that of a judicially determined legal right.[158] This reasoning appears to underlie the short judicial shrift given indigent challenges to appeal bond requirements.[159] Appeal bond requirements, however, present three considerations that do not arise in the area of plaintiff's security bonds. First, in the special case of an unsuccessful replevin or eviction defendant who wishes to remain in possession pending an appeal, there is no readily apparent rationale for treating the appeal bond any differently than the original security bond, except, perhaps, for any re-evaluation necessary to reflect the judicial support for plaintiff's claim. Secondly, the appeal bond frequently provides the appellee with two elements of protection—indemnification for his costs in defending an unsuccessful appeal and security for the amount of his judgment at the trial level. The cost element is subject to the same criticisms that may be aimed at the cost component of the second value of a double value defendant's security bond,[160] and the judgment-security element is susceptible to attack as an unreasonable bar to appellate access since it requires the indigent who seeks to pursue a presumably meritorious appeal to guarantee his opponent greater protection than the opponent would have by reason of his unappealed and potentially unenforceable judgment. Thirdly, and most importantly, the appeal bond is open to direct attack under *Boddie*. The indigent appellant, unlike the indigent plaintiff, is already enmeshed in the judicial process and is subject to a binding adverse determination of his rights when faced with this security requirement. His legal status is thus

158. *See* Damaskos v. Board of Appeal, 267 N.E.2d 897, 900 (Mass. 1971).

159. *See, e.g.*, State *ex rel.* Caulk v. Nichols, 281 A.2d 24 (Del. 1971), *appeal dismissed*, 408 U.S. 901 (1972).

160. *See* Lindsey v. Normet, 405 U.S. 56 (1972).

analogous to that of the indigent criminal defendant unable, solely because he is too poor to take advantage of payment-conditioned opportunities established by the state, to obtain appellate review which is as adequate as that available to a wealthier man. The argument that the indigent civil appellant ought not to be heard to complain because he has already been granted a trial on the merits is subject to the caustic observation of one judge that systematic denial of appeals "could make . . . trials less satisfactory than a determination of guilt by a litmus paper test."[161]

4. *Expenses.*—The distinctions between due process and equal protection approaches should prove useful in considering the state's potential constitutional duty to assign counsel[162] and assume other expenses of civil litigation. Of the three theories advanced in *Boddie*, Justice Douglas's provides perhaps the weakest support for a duty to assume expenses. Because there has been no state action to effect a poverty classification, it would be extremely difficult to argue that the state has indulged in an invidious discrimination merely by allowing civil litigants to be represented by counsel or to invoke the aid of the state in discovery procedures. Justice Brennan's equal protection argument[163] might prove to be of greater assistance. If representation by counsel could be proved an essential element of court access, not merely from a practical viewpoint, but rather from an understanding that the judicial process contains an inherent and overwhelming structural bias against the unrepresented litigant, the Court might well find an affirmative state duty to remove this unequal, state-created bar to effective access. Once this major hurdle is cleared, it would be relatively easy for the Court to expand the state's affirmative equal protection duty to make all "essential" elements of the judicial mechanism effectively available to all.

In considering the application of due process methodology to the problem of expenses, little reliance should be placed on the criminal rights cases because of their direct governance by the express commands of the Bill of Rights. This does not, however, imply that the due process approach, in the hands of a purposive Court, could not reach expenses

161. Jeffreys v. Jeffreys, 58 Misc. 2d 1045, 1054 n.3, 296 N.Y.S.2d 74, 85 n.3 (Sup. Ct. 1968) (Sobel, J.).

162. *See* Note, *The Right to Counsel in Civil Litigation*, 66 COLUM. L. REV. 1322 (1966); Note, *supra* note 157.

163. Justice Brennan discussed only fee barriers, and did not suggest that purely de facto wealth discrimination not resulting from a pricing mechanism of the state would raise the same issues he found in *Boddie*. Nevertheless, his rationale did not necessarily require such a limited position. *See also* Michelman, *supra* note 53.

by characterizing them as necessary to a meaningful opportunity to be heard.[164] Nevertheless, the development of a sweeping state duty to assume the expenses of indigent litigation is, at best, unlikely. There is, however, a possibility that the state may be constitutionally required in certain circumstances to provide the indigent with counsel. When the indigent, either as defendant or involuntary plaintiff, is forced into civil court to protect an interest that involves the necessities of continued existence, it is quite conceivable that the Court would find that the balance of competing interests requires the state to provide counsel.[165] One lower state court seems to have adopted this approach in holding that the state must provide counsel to an indigent defendant in an eviction proceeding;[166] the Supreme Court has declined the opportunity to consider the issue.[167] It should be noted that a different constitutional issue is presented when a statute that authorizes the state to assume an indigent's expenses does not cover a specific litigant because of restrictions on applicability. Although the due process issue seems very similar, this disparate state treatment of similarly situated indigents could provide a sufficiently active state classification to call for strict judicial scrutiny, and, in the absence of a compelling state interest, ultimately result in invalidation of the restrictions as violative of equal protection.[168]

C. *Conclusion*

In the wake of Mr. Justice Black's stirring vision of a judicial system wholly devoid of financial barriers to access,[169] it is appropriate to consider the probability of achieving this goal as a result of the Court's decision in *Boddie*. Although this assessment must be unusually speculative because of recent changes in the Court's personnel, there are

164. *Cf.* Lester v. Lester, 69 Misc. 2d 528, 330 N.Y.S.2d 190 (Sup. Ct. 1972) (dictum indicating government payment for pretrial depositions would be required if necessary for indigent party's *effective* access and if inexpensive substitute unavailable).

165. *See In re* B., 30 N.Y.2d 352, 285 N.E.2d 288, 334 N.Y.S.2d 133 (1972) (requiring assigned counsel in child neglect proceedings).

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

167. Kaufman v. Carter, 402 U.S. 964 (1971), *denying cert. to* 8 Cal. App. 3d 783, 87 Cal. Rptr. 678 (1970). *But see* 402 U.S. at 960 (indicating that *Kaufman* should be viewed as a quasi-criminal case).

168. Following this reasoning to an extreme, City of New York v. Wyman, 66 Misc. 2d 402, 321 N.Y.S.2d 695 (Sup. Ct.), *aff'd on other grounds*, 37 App. Div. 2d 700, 322 N.Y.S.2d 957 (1971) (per curiam), *rev'd mem.*, 30 N.Y.2d 537, 281 N.E.2d 180, 330 N.Y.S.2d 385 (1972), concluded that the State of New York may not limit its assumption of the expense of indigents' abortions to situations in which abortion is medically indicated.

169. *See* text accompanying note 110 *supra*.

some fairly clear indications of the direction in which the Court is moving. Perhaps the most obvious trend is the Court's growing disenchantment with "new" equal protection as a remedial adjudicatory tool.[170] Although a significant withdrawal from its past ground-breaking decisions does not seem probable, the Court seems likely to find only limited new application for those decisions. Thus, even if Justice Brennan's characterization of access to court as a fundamental right were to be adopted, it is improbable that the Court would require more under the equal protection aegis than invalidation of required fee payments to court officials. *Boddie, Griffin,* and *Harper* demand no more.[171] The prospects for a continued expansive utilization of the due process clause are more difficult to estimate, largely because the death of Mr. Justice Harlan has removed that clause's staunchest supporter from the Bench. Although the Court's recent extensions of the applicability of procedural due process criteria[172] generally have commanded more than a bare majority, and although these decisions bear little resemblance to Justice Harlan's anti-incorporation "concept of ordered liberty" opinions, it is nevertheless problematic whether the Court is prepared to implement fully the possibilities of the new due process mechanic as articulated by Mr. Justice Harlan's majority opinion in *Boddie.* Assuming, however, that the Court is unwilling to ignore *Boddie's* fertile potential, a proper expansion of that rationale will require certain preparatory steps. The most important of these will be for the Court to recognize and define the mechanic employed in the majority opinion as a more easily administrable "test," with careful emphasis on placing the "fundamental" quality of the *Boddie* plaintiffs' asserted right in its proper perspective. Moreover, the Court must apply *Boddie* to establish general procedural guidelines and to avoid the image of limited case-by-case adjudication. That there is a very real practical necessity for the Court to ensure a precise development of the *Boddie* rationale can be seen by observing the present general failure to understand the requirements of that approach at the state and lower federal court levels.[173] If the Court does choose to develop the possibilities opened by the *Boddie* decision, and if this approach is adopted, as it surely would be, by other courts, this due process methodology should provide a principled, incre-

170. *See, e.g.,* Dandridge v. Williams, 397 U.S. 471 (1970).

171. It should be noted, however, that "new" equal protection is still commonly applied in lower federal and state courts; several more years will pass before these judicial bodies fall in line with the Court's recent reluctance.

172. *E.g.,* Bell v. Burson, 402 U.S. 535 (1971); Wisconsin v. Constantineau, 400 U.S. 433 (1971).

173. *See* note 77 *supra.*

mental expansion of the access rights of the indigent civil litigant.

A rather enigmatic indication of the possibilities for future invalidation of the financial barriers faced by the indigent civil litigant was presented by the Supreme Court's denial of certiorari in five access cases just two months after the *Boddie* decision was announced. Involved in those cases were challenges to the bankruptcy referee's fee,[174] appellate filing fees[175] and security bonds,[176] double-rent eviction bonds,[177] and a state refusal to provide counsel at a child dependency hearing.[178] The significance of the Court's refusal to hear these challenges is not readily apparent; at least two of the cases[179] presented factual situations that would have seriously obstructed consideration of the constitutional issue, and only the bankruptcy case was represented by a thorough lower court opinion disposing of the constitutional challenge. On the same day, moreover, the Court vacated two decisions that denied a right of access[180] and set another,[181] involving a challenge to the bond requirements and procedural limitations of a summary dispossession statute, for argument. If any conclusion may be drawn from this ambiguous action, it can only be that the Court feels no compulsion to effect a hasty and sweeping revision in court cost structures.

There is a broad spectrum of possible justifications for the Court's apparent decision to go slowly in fashioning a full constitutional right of access to the civil courts. One uncharitably disposed toward this hesitance might choose to characterize the Court as hopeful of avoiding the issue and leaving it instead to the mercies of the lower and state courts, or perhaps as desirous of undercutting *Boddie* without forthrightly overruling it. Justice Black was probably nearer the mark with his suggestion in dissent that the Court hoped to soften the impact on state judicial systems by a gradual extension of the right of access, perhaps thereby allowing state legislatures to forestall litigation through the enactment of truly effective in forma pauperis statutes.[182] There may be, however, an even more important reason for a slow implementation of the *Boddie* rationale. *Boddie* represents an attempt to preserve the

174. *In re* Garland, 402 U.S. 966 (1971).

175. Bourbeau v. Lancaster, 402 U.S. 964 (1971).

176. Beverly v. Scotland Urban Enterprises, Inc., 402 U.S. 936 (1971).

177. Meltzer v. C. Buck LeCraw & Co., 402 U.S. 954 (1971).

178. Kaufman v. Carter, 402 U.S. 964 (1971).

179. *Meltzer* involved both mootness problems and intervening state legislative action; access was not the basic issue in *Kaufman*. *See* note 167 *supra*.

180. Frederick v. Schwartz, 402 U.S. 937 (1971); Sloatman v. Gibbons, 402 U.S. 939 (1971).

181. Lindsey v. Normet, 402 U.S. 941 (1971).

182. Meltzer v. C. Buck LeCraw & Co., 402 U.S. 954, 956 (1971).

integrity of the American judicial system by making it more accessible to all. There is, however, an equally important threat to the integrity of the judicial process—"the law's delay." Although the majority was able in the narrow context of divorce litigation to reject out of hand the asserted state interest in conserving judicial resources, it might well have been unable to ignore as easily the practical threat of unlimited state subsidization and administration of indigent litigation had it announced the broad principles urged in concurrence.[183] The state's financial interest[184] seems abstractly to lack countervailing force when compared with an individual's right of access to the one societal organism that is truly "preservative of all rights,"[185] but if unlimited access to the civil courts would in fact result in lack of effective access for all, it is difficult to perceive any net gain in removing the financial barriers to civil litigation. Thus the Court's apparent decision to implement *Boddie* gradually may have the salutary effect of opening the courthouse doors only as much as may practically be possible and, at the same time, of forcefully encouraging legislative investigation and implementation of the structural reforms necessary to make "equal justice for all" a realistic possibility.*

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183. *See id.*

184. Saari, *Open Doors to Justice—An Overview of Financing Justice in America*, 50 JUDICATURE 296 (1967), however, indicates that state governments in 1962 spent less than 0.6% of total expenditures on the civil and criminal courts combined.

185. Yick Wo v. Hopkins, 118 U.S. 356, 370 (1886).

* After the preparation of this Note, the United States Supreme Court reversed, in a 5-4 decision, the district court decision in *In re* Kras, 331 F. Supp. 1207 (E.D.N.Y. 1971) (invalidating referee's fee in voluntary bankruptcy) (discussed in notes 91 and 128 *supra*). United States v. Kras, 41 U.S.L.W. 4117 (U.S. Jan. 10, 1973). The significance of this decision for future constitutional right of access claims is unclear; although the majority opinion, authored by Mr. Justice Blackmun, offered several grounds for its rejection of respondent's due process and equal protection arguments, it made no attempt to redefine the parameters of *Boddie* or to establish guidelines for adjudicating future access challenges. Forceful dissenting opinions criticizing the majority's purported distinction of *Boddie* were filed by Justices Stewart and Marshall. Justices Douglas and Brennan also dissented on equal protection grounds.