CONSTITUTIONAL LAW—APPLICATION OF 14TH AMENDMENT GUARANTEES TO CIVIL LITIGATION—*Harrington v. Harrington*, 269 A.2d 310 (Me. 1970).

Gertrude Harrington must have been somewhat surprised when Mertland and Glenys Harrington, former in-laws, brought suit against her for forcible entry and detainer of her house in Friendship, Maine. Mrs. Harrington had used Mertland and Glenys Harrington as signatories when buying the house, since both she and her former husband were minors at the time of the sale. The defendant was not, however, without defense. A Maine statute made provision for pleading equitable title in oneself in this type of proceeding, but the statute also presented a difficulty to Gertrude Harrington. It required the defendant to deposit with the court a sum of money before such a defense could be pleaded.[1] Gertrude Harrington was indigent and Maine had no provision for in forma pauperis proceedings. She nevertheless filed an affidavit with the court, stating that her answer was sincere but that, due to her poverty, she could not comply with the statute. The trial court, notwithstanding the merits of the case, held against the defendant for failure to comply with the statute.[2]

Mrs. Harrington appealed to the superior court and again met difficulty. Another Maine statute required funds to be deposited for appeal of title dispute cases.[3] The superior court refused to review the case because of the defendant's lack of statutory performance.[4]

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1 ME. REV. STAT. ANN. ch. 14, § 6006 (1964):

> When the defendant claims title in himself or in another person under whom he claims the premises, he shall, except as otherwise provided, recognize in a reasonable sum to the plaintiff, with sufficient sureties, conditioned to pay all intervening damages and costs and a reasonable rent for the premises. The plaintiff shall in like manner recognize to the defendant, conditioned to enter the action in the Superior Court within 30 days and to pay all costs adjudged against him. If either party neglects so to recognize, judgment shall be rendered against him.

2 Harrington v. Harrington, 269 A.2d 310, 312-13 (Me. 1970). It is of interest to note here that although the statute requires recognizance from both litigants, the trial court held against the defendant for noncompliance even though the plaintiffs had not complied themselves.

3 ME. REV. STAT. ANN. ch. 14, § 6008 (1964):

> Either party may appeal from a judgment to the Superior Court as in other civil actions. When the plaintiff appeals, he shall recognize in manner aforesaid to the defendant, except as otherwise provided, conditioned to enter the action and to pay all costs adjudged against him. When the defendant appeals, he shall recognize in like manner to the plaintiff, conditioned to enter the action and to pay all intervening costs and such reasonable rent of the premises, as the judge shall adjudge, if the judgment is not reversed.

4 269 A.2d at 313.

Gertrude Harrington was not easily deterred. She appealed to the Supreme Judicial Court of Maine, urging that the statutes in question violated the due process and equal protection clauses of the Maine[5] and United States Constitutions. In an opinion based primarily on equal protection, the supreme judicial court ruled that the statutes were repugnant to both constitutions and suggested that the Maine Legislature adopt an in forma pauperis procedure in this type of action particularly, or in all civil suits generally.[6]

Institution of the in forma pauperis proceeding is the traditional answer to the problems of the indigent litigant; the ideal of equal justice for all is at least as old as the Magna Charta.[7] The English Chancery Courts with their less formalized procedures were more amenable to the implementation of the Magna Charta's equal justice ideal, and the granting of writs free of cost to the poor became the unwritten maxim.[8] The procedure was made statutory and therefore applicable to the law courts in 1495; the impoverished could, by taking a pauper's oath, have counsel provided and court costs waived.[9]

The in forma pauperis procedure was transported to the colonies as a portion of the common law. Thirty-two states, the federal government and the District of Columbia have affirmatively adopted the procedure through statute.[10] The particular statutes vary widely as to eligibility and coverage so that the procedure can certainly not be considered a panacea for the procedural infirmities encountered by the indigent litigant.[11]

New Jersey had in forma pauperis proceedings until 1951 when the statute containing the procedure was revised and mention of in forma

5 No person shall be deprived of life, liberty or property without due process of law, nor be denied the equal protection of the laws, nor be denied the enjoyment of his civil rights or be discriminated against in the exercise thereof. ME. CONST. art. 1, § 6-A.

6 269 A.2d at 316.

7 "To no one will we sell, to no one will we refuse or delay, right or justice." Magna Charta ch. 40 (1215).

8 1 E. DANIELL, PLEADING AND PRACTICE OF THE HIGH COURT OF CHANCERY 37-39 (6th Am. ed. 1894).

9 11 Hen. VII, c. 12 (1495); *see* Comment, *Litigation Costs: The Hidden Barrier to the Indigent*, 56 GEO. L.J. 516, 519 (1968).

10 *See* Note, *Proceedings In Forma Pauperis*, 9 U. FLA. L. REV. 65 (1956); Jeffreys v. Jeffreys, 58 Misc. 2d 1045, 1048, 296 N.Y.S.2d 74, 79 (Sup. Ct. 1968).

11 *See* ARK. STAT. ANN. § 27-402 (1962) (limiting the procedure only to those whose total worth is less than $10 other than wearing apparel); COLO. REV. STAT. ANN. § 33-1-3 (1963) (interpreted as exempting appeals from justice to county courts in Spain v. Murry, 77 Colo. 197, 235 P. 338 (1925)); GA. CODE ANN. § 24-3413 (1959) (exempting divorce actions); VA. CODE ANN. § 14.1-183 (1950) (interpreted as exempting all appeals in Tyler v. Garrison, 120 Va. 697, 91 S.E. 749 (1917)); 28 U.S.C. § 1915 (1964) (making an affidavit the only requirement).

pauperis deleted from the new statute.[12] The proceeding, however, has made a recent reappearance in the form of sweeping court rules.[13]

The equal protection argument has been applied predominantly to the problems of the poor in criminal, rather than civil, proceedings for several practical reasons. The in forma pauperis statutes in the civil area were enacted much earlier than those in the criminal area, so that the rights of indigent criminal defendants were probably considered to be more in need of judicial attention and protection. Also, only a fraction of civil litigants, but a majority of criminal defendants, are indigent.[14] Moreover, it is obvious that of the fraction of civil litigants who are indigent, a much smaller fraction are plaintiffs, and of the statutes which inhibit free access, many more work against a civil plaintiff rather than a civil defendant. Logically then, the issue of equal protection clause application is also of greater magnitude in criminal causes on a purely quantitative basis.

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12 *See* Severa v. Severa, 22 N.J. Super. 267, 268, 91 A.2d 895 (Ch. 1952), which states: "The above cited section of the Revised Statutes [2:26-2] not having been enacted by chapter 334 of the Laws of 1951, was . . . repealed." The old statute which the court was referring to read as follows:

> Every poor person having a cause of action shall, at the discretion of the court before which he would sue, have any process according to the nature of his case without paying therefor; and the court shall, in its discretion, assign to such poor person counsel, attorneys, and other officers necessary to prosecute his action, all of whom shall perform their respective duties therein without fee or reward; and every poor person who is plaintiff in any such action shall not be compelled to pay costs.

N.J. REV. STAT. § 2:26-2 (1937).

13 In New Jersey, R. 1:13-2 provides as follows:

> Except when otherwise specifically provided by these rules, whenever any person by reason of poverty seeks relief from the payment of any fees provided for by law which are payable to any court or clerk of court, any court upon the verified application of such person, which application may be filed without fee, may in its discretion order the payment of such fees waived. In any case in which a person is represented by a legal aid society, an Office of Economic Opportunity legal services project, the Office of Public Defender, or counsel assigned in accordance with these rules, all filing fees shall be waived by the clerk without the necessity of a court order.

Also, R. 4:79-2 specifically provides for waiver of trial fees in matrimonial actions. Test cases of the scope of these rules are, except for one notable decision in the chancery division, somewhat sparse. In that case, Suber v. Suber, 38 U.S.L.W. 2169 (N.J. Ch. 1969), the court held that the equal protection clause of the fourteenth amendment forbids an indigent wife seeking divorce, who was not required to pay other fees, to be required to pay a $60 publication fee. The court said:

> It becomes a subterfuge to provide a procedure for indigents to secure divorces and then make relief hinge upon payment of a cost which the plaintiff is unable to pay.

38 U.S.L.W. at 2169.

14 *See* Silverstein, *Defense of the Poor in Criminal Cases in American State Courts*, REPORT OF AMERICAN BAR FOUND. (1965).

Griffin v. Illinois[15] was the landmark decision with regard to equal protection and the indigent accused. Griffin wished to appeal his conviction of armed robbery, but because of his indigency he could not obtain the transcript required for appeal. Illinois law provided for free transcripts on appeal in capital cases or if the defendant claimed constitutional error, but Griffin was in neither category. The Supreme Court held, however, that Griffin was denied a basic right due to his indigency and that the equal protection clause had therefore been violated. Thus, *Griffin* placed poverty in the same area constitutionally as race, color, religion and national origin. Although the statute involved was neutral on its face and was not applied by the state in a manner which was purposely discriminatory, it became discriminatory when applied equally to unequal groups—the rich and the poor.[16]

The broad egalitarian principle thus set forth in *Griffin* invited extension which was not long in arriving.[17] The rationale of *Griffin* was applied in various cases and resulted in the principles that filing fees should be waived for indigents seeking appeal;[18] free counsel should be appointed for indigents both at the trial level[19] and on appeal;[20] the state need not be reimbursed out of prison wages for the cost of transcripts necessary for appeal;[21] free transcripts should be provided for the appeal of habeas corpus proceedings;[22] and, more recently, indigents should not be imprisoned for longer than the statutory maximum for failure to pay the fine when sentenced to both fine and imprisonment,[23] and indigents should not be imprisoned at all for inability to pay a fine.[24]

Various arguments have been made against the application of equal protection to indigents in civil litigation. For example, *Griffin* mandates that for equal protection to be violated the indigent must be denied a basic right.[25] When an impoverished accused experiences

15 351 U.S. 12 (1956).

16 *Id.* at 17-18; *see* Willcox & Bloustein, *The Griffin Case—Poverty and the Fourteenth Amendment*, 43 CORNELL L.Q. 1 (1957).

17 *See* Comment, *Equal Protection and the Indigent Defendant: Griffin and Its Progeny*, 16 STAN. L. REV. 394 (1964).

18 Smith v. Bennett, 365 U.S. 708 (1961).

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

20 Douglas v. California, 372 U.S. 353 (1963).

21 Rinaldi v. Yeager, 384 U.S. 305 (1966).

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

23 Williams v. Illinois, 399 U.S. 235 (1970).

24 Tate v. Short, 39 U.S.L.W. 4301 (Mar. 2, 1971); *In re* Antazo, 3 Cal. 3d 100, 473 P.2d 999, 89 Cal. Rptr. 255 (1970). *See also* Note, *Equal Protection Clause—Imprisonment of Indigent for Nonpayment of Fine Declared Unconstitutional*, 2 SETON HALL L. REV. 504 (1971).

25 351 U.S. at 19-20.

procedural difficulties due to his indigency, the basic right in jeopardy is, of course, freedom of the person. The "Gravity of Consequences"[26] argument maintains that while a loss in criminal litigation destroys this basic right, a loss in civil litigation would not be so devastating.[27]

Another argument against the civil application of fourteenth amendment guarantees is based on the lack of "state action".[28] In criminal cases the government is a party and a governmental purpose is sought to be achieved; in civil cases, however, the government is not a party and there is no specific governmental purpose involved. Therefore, since the courts do not become involved until after litigation is begun, the requisite state action is lacking with respect to civil litigation,[29] so that the equal protection clause is inapplicable.

The extension of equal protection guarantees into the civil arena, however, has commenced. The "substantial right" theory made its first appearance outside the criminal area in *Harper v. Virginia Board of Elections*.[30] In *Harper,* the right to vote was considered of such great magnitude that affixing to it a monetary fee (poll tax), no matter how nominal ($1.50 was the amount in question), was considered to be a denial of equal protection.[31] *Harper* is also notable in that it represents, except for developments in the area of criminal litigation, the first and last time the Supreme Court has decided the issue of the denial of a basic civil right due to indigency. The right of free access to the courts must necessarily be considered as substantial as the right to vote, if *Griffin* principles are to be applied fully to civil litigation.

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26 *See* Note, *The Right to Counsel in Civil Litigation,* 66 COLUM. L. REV. 1322, 1332 (1966).

27 *But see id.* at 1333:

> [C]ivil cases undoubtedly arise in which a deprivation of "property" causes consequences as grave as a loss of liberty. The struggling employee, for example, may well find a wage attachment or confiscation of his tools as onerous in securing employment as a criminal conviction. Moreover, the citizen who permanently loses his home, a government job, a required license, or unemployment benefits may, in many circumstances, receive a more crippling blow than the criminal who serves a jail sentence.

28 *See* The Civil Rights Cases, 109 U.S. 3 (1883).

29 *But see* Shelley v. Kraemer, 334 U.S. 1 (1948), where plaintiffs sought to have private agreements respecting the use or occupancy of real estate based on race, declared unconstitutional. The Supreme Court held that since there was no state action when two individuals made an agreement, the fourteenth amendment was inapplicable. The Court further held, however, that the enforcing of these agreements by state courts was sufficient state action to bring such a case within the fourteenth amendment. *See also* Silard, *A Constitutional Forecast: Demise of the "State Action" Limit on the Equal Protection Guarantee,* 66 COLUM. L. REV. 855 (1966).

30 383 U.S. 663 (1966).

31 *Id.* at 667-68.

Two cases have decided the issue of free transcripts on appeal of proceedings to terminate parental rights. In *Chambers v. District Court of Dubuque County*,[32] the Supreme Court of Iowa held that an indigent was entitled to free counsel and transcript on appeal.[33] The decision was a unique one for Iowa, accomplished via a latitudinarian interpretation of the Iowa statute respecting appeal.[34] In *In re Karren*,[35] the Minnesota Supreme Court decided that upon appeal of a civil judgment terminating her parental rights, an indigent was entitled to have the cost of the transcript borne by the Department of Welfare.[36] *Karren* relied only slightly on equal protection, but stated that the welfare statute which provided for "other necessities of life"[37] was applicable to the cost of the necessary transcript.[38]

Both cases represent initial steps toward civil application of the fourteenth amendment, but both must be viewed as being of somewhat limited significance. In the first place, since the cases involved appeals, the indigents were already in court at the trial level. The state machinery was involved and lack of state action could not be rationally argued by the opposition. Second, both cases, though they did make mention of the importance of family unity, viewed the actual right of substantial magnitude involved to be that of appeal.[39] Since the right of appeal had been statutorily granted in both cases, the arguments were considerably buttressed. Neither court was forced to struggle with rights not expressly granted by statute or constitution.

Alleged exclusionary practices at the trial level were challenged in *Harris v. Harris*[40] where, in a divorce action, plaintiffs petitioned that minimum attorney's fees be waived and that publication costs for notice purposes be provided by the government.[41] The United States Court of Appeals for the District of Columbia decided that the particular in forma pauperis statute did apply to divorce actions but that pub-

32 261 Iowa 31, 152 N.W.2d 818 (1967).

33 *Id.* at 35, 152 N.W.2d at 821.

34 *Id.*

35 280 Minn. 377, 159 N.W.2d 402 (1968).

36 The case has an interesting procedural history. When first heard by the Minnesota Supreme Court, the petition was denied. 276 Minn. 554, 150 N.W.2d 24 (1967). When the case was moved to the United States Supreme Court as a test, however, the Welfare Department capitulated and petitioned the Minnesota Supreme Court to allow it to pay the cost of the transcript. 280 Minn. 377, 159 N.W.2d 402 (1968). The case was then dismissed by the United States Supreme Court as moot. 392 U.S. 918 (1968).

37 MINN. STAT. § 261.15 (1967) (repealed 1961).

38 280 Minn. at 380, 159 N.W.2d at 404.

39 261 Iowa at 34, 152 N.W.2d at 820; 280 Minn. at 378, 159 N.W.2d at 403.

40 424 F.2d 806 (D.C. Cir. 1970) (a consolidated action).

41 *Id.* at 809.

lication costs, paid to newspapers and not to an arm of the court, were not covered by the statute.[42]

Harris was followed by the case of *Lee v. Habib*,[43] where the same court reasoned that the actual right of substantial magnitude in civil litigation was free access to the courts[44] and not, as earlier cases seemed to suggest, the specific type of relief sought by the litigant. Thus, it should be of no import if the suit in question involves custody, divorce, eviction or presumably negligence, as long as the indigent's right to free access to the courts is being impaired.

The New York Supreme Court took an alternative view on the issue of publication costs in the case of *Jeffreys v. Jeffreys*,[45] where it was decided that the failure of the applicable in forma pauperis statute to make provision for the payment of publication expenses worked as a denial of equal protection:

> We have erected by statute a money hurdle . . . by requiring in many circumstances the service of a summons by publication . . . . This hurdle is an effective barrier to Mrs. Jeffreys' access to the courts. The loss of access to the courts in an action for divorce is a right of substantial magnitude when only through the courts may redress or relief be obtained . . . .
>
> I hold that she has been denied the equal protection of the laws guaranteed to her by the State and Federal Constitutions.[46]

The *Jeffreys* court noted that state action is evident since the state is a party to all marriages, and that any expense, either direct or auxiliary, which inhibits free access due to indigency could effectively deny equal protection.[47]

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42 *Id.* at 813. *See* Comment, *In Forma Pauperis and the Civil Litigant*, 19 CATH. U.L. REV. 191, 203 (1969).

43 424 F.2d 891 (D.C. Cir. 1970). *Lee v. Habib* was decided approximately two months after *Harris*. Ostensibly, there is little difference in effect between the two opinions since both were decided on the basis of coverage of the District of Columbia statute. *Lee*, however, contains a lengthy discussion of whether transcripts for the indigent are constitutionally rather than statutorily mandated. Subsequent to this discussion, however, the court notes:

> Moreover, despite the compelling arguments which can be marshalled to show that transcripts are constitutionally required for civil appeals presenting substantial issues, our holding today is not such a ruling. Instead, mindful of our obligation to avoid reaching the constitutional issues whenever possible, we proceed to consider the applicable federal and District of Columbia statutes, impelled—if not compelled—to equalize the opportunities of rich and poor to obtain appellate review.

Id. at 902.

44 *Id.* at 901.

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

46 *Id.* at 1056, 296 N.Y.S.2d at 87.

47 *Id.* at 1056-57, 296 N.Y.S.2d at 87-89; *see* Note, 37 FORD. L. REV. 661 (1969).

Harrington is in accord with *Jeffreys,* in that it also places emphasis on free access:

> Court procedures, at the trial level or in appellate review, even though the result of statutory requirement, which in and of themselves invidiously discriminate between rich and poor impair guarantees of equal justice which the Constitution was designed to protect. This is equally so in civil litigation as in criminal prosecutions. An indigent litigant may have more at stake in a civil case than in a criminal case. Furthermore, equal access to the civil courts was among the Fourteenth Amendment's primary objectives.[48]

Moreover, *Harrington* considers that the monetary fees placed on free access by the state are sufficient state action both at the trial level and on appeal:

> Such State action spells unequal justice in an area of great magnitude to the impecunious but of minor importance in terms of State purposes. The security provisions of 14 M.R.S.A. §§ 6006 and 6008 have effectively barred the instant defendant from equal access to the court in its eviction process at the trial and appeal level.[49]

The true import of *Harrington,* however, is that it is the first decision by a state court of last resort holding that rectification of the procedural infirmities encountered by indigent civil litigants is constitutionally required. *Chambers, Karren, Harris* and *Lee* were all based on statute. *Jeffreys* answered the question of constitutional requirement in the affirmative but was decided by an intermediate appellate court. The nonexistence of an in forma pauperis statute in Maine obviously necessitated the constitutional basis of the opinion and *Harrington* will stand as a benchmark to states where no statute has yet been enacted.

United States Supreme Court consideration is the ultimate answer to the question of fourteenth amendment application to civil litigation,[50] but the issue at that level is compounded by the doctrine of "states' rights". The Supreme Court refused to review the issue, despite an ardent dissent by Justice Douglas, in a Georgia eviction case in 1967.[51] *Sanks v. Georgia,*[52] another Georgia eviction case, has been recently decided. The Court, noting its responsibility to decide cases on grounds other than constitutional if possible, held that it was

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48 269 A.2d at 314.

49 *Id.* at 316.

50 Comment, 19 CATH. U. L. REV. 191, *supra* note 42, at 213.

51 Williams v. Schaffer, 385 U.S. 1037 (1967).

52 225 Ga. 88, 166 S.E.2d 19, *prob. juris. noted,* 395 U.S. 974 (1969) (No. 1554, 1968 Term, renumbered No. 266, 1969 Term, renumbered No. 28, 1970 Term).

inappropriate to decide the issues originally raised (the possible unconstitutionality of a Georgia statute requiring tenants to deposit into the court a bond equal to twice the contested rent in summary dispossess actions) since a new Georgia statute had been enacted.[53]

The Court has also recently decided *Boddie v. Connecticut*,[54] involving divorce and payment of publication costs by indigents. The Court mandated that publication costs must be provided by the state, but based its opinion on due process rather than equal protection grounds and earnestly limited the case to its particular circumstances. Justice Harlan, writing for the majority, stated:

> In concluding that the Due Process Clause of the Fourteenth Amendment requires that these appellants be afforded an opportunity to go into court to obtain a divorce, we wish to re-emphasize that we go no further than necessary to dispose of the case before us, a case where the *bona fides* of both appellants' indigency and desire for divorce are here beyond dispute. We do not decide that access for all individuals to the courts is a right that is, in all circumstances, guaranteed by the Due Process Clause of the Fourteenth Amendment so that its exercise may not be placed beyond the reach of any individual, for, as we have already noted, in the case before us this right is the exclusive precondition to the adjustment of a fundamental human relationship. The requirement that these appellants resort to the judicial process is entirely a state-created matter. Thus we 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.[55]

It is this state of affairs which adds another degree of importance to *Harrington*; federal timidity, if it exists at all, will probably be inversely proportional to action by the states in the area. *Harrington* represents the first judicial mandate to the legislature to institute in forma pauperis proceedings. It represents perhaps the most significant treatment of the problem by the state judiciary both in its reasoning and in the fact that such unprecedented action was taken at all.

Griffin teaches that when an economic condition (indigency) exists because of natural socio-economic inequalities, and becomes a legal barrier outweighing the legitimate state interest to the contrary, such an economic condition must be compensated and the legal barrier

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53 39 U.S.L.W. 4171 (Feb. 23, 1971).

54 39 U.S.L.W. 4294 (Mar. 2, 1971).

55 *Id.* at 4297.

thereby abrogated.[56] For purposes of civil litigation, the line of demarcation will probably be placed somewhere between bearing the expense of the transcript on appeal and the supplying of bus fare to the courthouse. The exact answer will be supplied by case development.

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[56] 351 U.S. at 19. *See* Note, *Discrimination Against the Poor and the Fourteenth Amendment*, 81 HARV. L. REV. 435, 440 (1967).