University of Richmond Law Review

Volume 6 | Issue 1 Article 13

1971

In Forma Pauperis Relief- An Endless Road?

In Forma Pauperis Relief—An Endless Road?—*In Re Smith*

At early common law, a pauper seeking judicial relief prayed to the English Justices in Eyre for a cost-free deliverance.[1] Today, the prayer is the same but the deliverance is provided through in forma pauperis statutes.[2]

The origin of in forma pauperis relief has been traced as far back as Magna Carta.[3] Historians follow the then new and vague concept through the period of the Justices in Eyre into the early Chancery Courts.[4] Today, in the United States, the rights of the indigent are outlined in a federal statute which provides:

> 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.[5]

This statute attempts to provide relief to those whose poverty would otherwise deny them an adequate defense in criminal cases, and it allows

---

[1] *See* 24 Seld. Soc. xxvi, xxviii (1912).

[2] Today, in the United States, many states have provided statutes which allow indigents access to the courts without paying certain fees and costs normally required. Whether the courts, in the absence of statutory authority, have inherent power to permit suits to be brought by poor persons is a matter on which there is a split of authority. For many years, the majority of jurisdictions have held that the right to sue in forma pauperis depends upon statutory authorization. *See* Roy v. Louisville N.O. & T.R.R., 34 F. 276 (6th Cir. 1888); Harrison v. Stanton, 146 Ind. 366, 45 N.E. 582 (1896). *See also* Annot., 6 A.L.R. 1281 (1920). A few jurisdictions have taken the view that there is a common law right to sue in forma pauperis and statutory authorization is not necessary. *See* Martin v. Superior Court, 176 Cal. 289, 168 P. 135 (1917). *See also* Annot., 6 A.L.R. 1281 (1920). In any case, the granting or refusing of permission to proceed in forma pauperis is a matter committed to the sound discretion of the court. *See* Wood Preserving Corp. v. United States, 347 F.2d 117 (4th Cir. 1965).

[3] *See* W. McKechnie, Magna Carta: A Commentary on the Great Charter of King John 395 (2d ed. 1914).

[4] *See* 1 E. Daniell, Pleading and Practice of the High Court of Chancery 38 (6th rev. ed. 1894). During the reign of Henry VII, the rights of the poor took a more definite shape with the adoption of a statute (11 Hen. VII ch. 12) that provided in forma pauperis relief in common law courts, and entitled paupers to writs of assignment of counsel without payment of fees or costs. *See* 4 W. Holdsworth, A History of English Law 538 (1924).

[5] 28 U.S.C. § 1915(a) (1964).

these individuals access to a tribunal for the redress of wrongs and litigation of their claims.[6]

The rights of the indigent to proceed in forma pauperis have also been steadily advanced and enhanced through case law. This has been particularly true in the area of criminal law, however the advancement on the civil side has been noticeably slower.

The landmark case of *Griffin v. Illinois*[7] provided the cornerstone for the rapid growth of the indigent's rights in the criminal area.[8] In that case the United States Supreme Court held that when a state requires transcripts for a full appellate review of a criminal case, it must, consonant with due process and equal protection, provide such transcripts to indigents without charge.[9] Until recently, the reasoning and spirit of *Griffin* has been confined to the criminal field.[10] However, in *Harper v. Virginia Board of Elections*,[11] the Supreme Court took a bold step[12] and applied *Griffin* principles to a civil case. In *Harper*, the Court held that a state poll tax was an unreasonable classification based on wealth which denied to the indigent the right to vote, and was therefore in violation of the equal protection clause.[13] A further extension of *Griffin* into the civil area was brought about through the recent case of *Boddie v. Connecticut*,[14] where the appellants were seeking a divorce but could not pay the court fees and costs because of their impoverished condition. The Court held that they were unreasonably denied access to the courts and were therefore denied due process of law.[15]

6 *See* Tate v. United States, 359 F.2d 245 (D.C. Cir. 1966); Dotson v. United States, 287 F.2d 868 (10th Cir. 1961); Fletcher v. Young, 222 F.2d 222 (4th Cir. 1955).

7 351 U.S. 12 (1956).

8 *See, e.g.*, Gardner v. California, 393 U.S. 367 (1969); Roberts v. LaVallee, 389 U.S. 40 (1967); Anders v. California, 386 U.S. 738 (1967); Swenson v. Bosler, 386 U.S. 258 (1967); Long v. District Court, 385 U.S. 192 (1966); Rinaldi v. Yeager, 384 U.S. 305 (1966); Draper v. Washington, 372 U.S. 487 (1963); Lane v. Brown, 372 U.S. 477 (1963); Douglas v. California, 372 U.S. 353 (1963); Smith v. Bennett, 365 U.S. 708 (1961); Burns v. Ohio, 360 U.S. 252 (1959); Eskridge v. Washington State Bd. of Prison Terms & Paroles, 357 U.S. 214 (1958).

9 *See* 351 U.S. 12, 19 (1956).

10 *See* note 8 *supra*.

11 383 U.S. 663 (1966).

12 The *Harper* decision was a bold step by the United States Supreme Court because, prior to that time, *Griffin* had been confined strictly to criminal cases. The *Harper* decision opened up a new dimension that was anticipated and carefully avoided by the *Griffin* Court. *See* 383 U.S. 663, 670-79 (Black, J., dissenting).

13 *See* 383 U.S. 663, 665-70 (1966).

14 401 U.S. 371 (1971).

15 *Id.* at 382.

The most liberal extension of *Griffin* into the civil field is illustrated by a recent Colorado case, *In re Smith*.[16] Smith, a bankrupt, was denied a request to proceed under the Bankruptcy Act in the status of in forma pauperis. The United States District Court held that Smith was denied the "fundamental interest" of "access to court," and that such a denial was in violation of the due process and equal protection clauses of the United States Constitution.[17] The court found this to be "analogous" [18] to *Boddie*, and proceeded on the reasoning that a state could not, consistently with the equal protection clause, make its judicial processes available to some and deny those processes to others simply because the latter could not pay a filing fee.

On its face, *In re Smith* appears to be a logical and proper extension of *Griffin*; however, a closer inspection reveals that this case represents an erroneous, unwarranted, and abusive expansion of *Griffin*, which could have the effect of opening a Pandora's box in the area of civil litigation.[19]

In the cases following *Griffin*, one test used by the courts has involved weighing the state's interests in obtaining costs and filing fees,[20] versus the "type of right" that would be threatened or denied because of the fee requirement.[21] In all of the cases that have discussed fee requirement, the state's interests and reasons for requiring such a charge have been predictably consistent.[22] However, the "type of right" involved

---

16 323 F. Supp. 1082 (D. Colo. 1971).

17 *Id.* at 1089.

18 *Id.* at 1090.

19 *See* Boddie v. Connecticut, 401 U.S. 371 (1971), wherein Justice Douglas in a concurring opinion applauded the further extension of *Griffin* and stated that he could ". . . not see the length of the road we must follow," but he indicated that *Griffin* could easily be expanded in any area that the Court deemed of "sufficient importance" (which may even include free fishing licenses for indigents). *Id.* at 385.

The detrimental ramifications of this "endless road" approach are obvious. Given free access to the courts in almost every conceivable civil situation, indigents would flood the already overcrowded courts with an endless amount of frivolous litigation.

20 In all of these cases the issue involved either a fee charge or a requirement that the indigent purchase certain items or services that he could not afford.

21 *Compare* cases cited note 8 *supra* (criminal cases) *with* Boddie v. Connecticut, 401 U.S. 371 (1971) *and* Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966) (civil cases).

22 The reasons most often cited for maintaining filing fees are: (1) they raise revenue, (2) they discourage frivolous litigation, and (3) they keep the system more self sufficient than it would be if no fee were charged. *See* Boddie v. Connecticut, 401 U.S. 371 (1971). *See also* Shaeffer, *Proceedings in Bankruptcy In Forma Pauperis*, 60 COLUM. L. REV. 1203, 1205-08 (1969).

has varied constantly, and it is this "type of right" which distinguishes the *Griffin* case from the *Smith* case.

In *Griffin*, and in the criminal cases that followed, the defendant was in danger of losing his life or liberty because the state had accused him of a crime and was threatening him with death or incarceration. A right to appeal and thereby protect these interests was found to be paramount to any state interest in fees, and could not be denied simply because the defendant was too poor to afford a transcript. This *Griffin* reasoning seems to lose some of its clarity and cogency when it is applied in civil cases because the "type of right" in civil matters is weaker and less urgent than the "type of right" found in criminal cases. There is no threat to life or liberty in civil litigation. There are however, other types of rights of lesser magnitude that are still considered to be of such "fundamental interest" that they outweigh the state's interest in requiring a filing fee. One such right is the right to obtain redress for a wrong. If an injury is received, the indigent should not be denied access to the courts, and redress where justified, simply because he is too poor to pay the court costs.[23] Likewise, an individual should not be denied the right to vote simply because he has no funds to pay the required poll tax.[24] Another "type of right" in the civil field is the right to a divorce.[25] When one seeks a divorce he is seeking a change in status. There is no threat to life or liberty, and often there is no injury involved for which the party is seeking redress. This "right" to a divorce appears to be the weakest "type of right" discussed thus far. Nevertheless, the Court in *Boddie* held that the right of access to the courts to seek a divorce outweighed the state's interests in collecting a filing fee.[26] It should be noted however, that the Court stated that its decision did not determine that access to the courts is a right guaranteed to all individuals in all types of civil situations.[27] The Court was most careful to explain that indigents could obtain free access to the courts in divorce cases because the courts were the *only* avenues open for dissolving marriages.[28]

Although the right of access to a court in divorce cases is clearly distinguishable from the right of access in bankruptcy cases, the court in

---

[23] *See* note 6 *supra.*

[24] *See* Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966).

[25] *See* Boddie v. Connecticut, 401 U.S. 371 (1971); Jeffreys v. Jeffreys, 58 Misc. 2d 1045, 296 N.Y.S.2d 74 (1968).

[26] *See* Boddie v. Connecticut, 401 U.S. 371 (1971).

[27] *Id.* at 382.

[28] *Id.* at 380-82.

Smith, a bankruptcy case, based its decision on what it called the "analogous problem" [29] in *Boddie*, a divorce case. The only analogy that can be drawn between these two cases is that in each case the plaintiff was seeking a change in status. Access to court to obtain a status change may be more correctly catagorized as a "privilege" rather than a "right," and is consequently more likely to be outweighed by the state's interests in filing fees than the stronger types of rights discussed previously. The "privilege" to be declared a bankrupt is even weaker than the "privilege" to change marital status because the entire basis of the latter type of case revolves around the fact that the state is the *only* body that can create the status of marriage, and the state, through its courts, is the *only* avenue available when relief is sought to change that status.[30] Surely the parties could not legally decide between themselves to cancel the marriage contract. However, in a situation involving insolvency, the bankrupt individual can legally resolve his obligations with his creditors in any number of ways.[31] Unlike the married couple, the bankrupt can negotiate with the other party to his contract and can cancel it or change the duties and obligations involved in the contract. The bankrupt has other means of relief, and access to the courts is *not* the *only* avenue open to him. The state is not responsible for the individual's bankruptcy, nor does the state require the bankrupt individual to proceed through its courts to remedy his unfortunate situation. The state merely provides the individual with the "privilege" of coming into court and being officially declared a "bankrupt." This "privilege," however, can be limited with reasonable conditions, such as a justifiable filing fee.

In the case of *In re Garland*,[32] the First Circuit was faced with the identical issue raised in *Smith*. The court found the filing fee to be a reasonable and legitimate state interest which outweighed the indigent's right of free access to the courts to claim bankruptcy.[33] The court, stat-

---

29 *See* In re Smith, 323 F. Supp. 1082 (D. Colo. 1971).

30 *See* note 28 *supra*.

31 An action in contract may be settled in or out of court. The terms of a typical out-of-court settlement could range from an extension of time in which the debtor could make payment, to a total extinction of the debt for alternate consideration or simply gratuitously.

32 428 F.2d 1185 (1970).

33 *Id.* at 1188. It is a well settled constitutional doctrine that the equal protection clause does not prohibit a state from discriminating. However, it does require that such discrimination be reasonably related to a legitimate government objective. *See* Martin v. Walton, 368 U.S. 25 (1961); Flemming v. Nestor, 363 U.S. 603 (1960); Skinner v. Oklahoma, 316 U.S. 535 (1942); Truax v. Corrigan, 257 U.S. 312 (1921); Lindsley v.

ing that a bankruptcy discharge is not a "fundamental right," held that a denial of free access in such circumstances did not violate the due process or equal protection clauses of the United States Constitution.[34] The First Circuit indicated that there is actually no denial of access to "court" in bankruptcy cases because a bankruptcy proceeding is more administrative than judicial in nature,[35] and although it is administered in a "court," that "court" and the procedures involved are so distinct[36] from any other civil proceeding in the judicial system that a valid comparison cannot be drawn. This distinction is just another example of the differences in the "types of rights" involved in these cases, and it provides a further illustration of the relative weakness of the so-called "right" of free access to the courts to claim voluntary bankruptcy. Clearly, this is the weakest "right" brought under the *Griffin* reasoning thus far, and it is therefore more likely to be outweighed by any legitimate and reasonable state interest in filing fees. The *Garland* court found that this "right" was outweighed by the state's interest.[37]

The *Smith* decision represents a dangerous and unwarranted expansion of *Griffin*. The logical extension of *Smith* would provide free legal representation, investigative personnel, witness fees, court costs, damages, etc., to all indigents in any civil action they may wish to pursue. Hopefully, other jurisdictions will instead adopt reasoning similar to that used

Natural Carbonic Gas Co., 220 U.S. 61 (1911); Yick Wo v. Hopkins, 118 U.S. 356 (1886); Barbier v. Connolly, 113 U.S. 27 (1885).

[34] *See* In re Garland, 428 F.2d 1185, 1187 (1970). It may seem unreasonable or illogical to require a "bankrupt" to pay a filing fee, but when one considers the substantial benefit received by the bankrupt through the Bankruptcy Act, this small filing fee (usually less than $50.00) is hardly unreasonable or repressive. Payments may even be made by installments. *See* 11 U.S.C. §§ 68(c)(1), 80 (1970). The *Smith* court wisely suggested that the obligation to pay the filing fee should not be permanently discharged but should arise again if and when the individual is no longer an indigent and can pay the fee without undue hardship. *See* In re Smith, 323 F. Supp. 1082, 1093 (D. Colo. 1971).

It should also be noted that Congress abolished the in forma pauperis proceedings formerly allowed in bankruptcy cases; therefore, this specific expression of Congress takes precedence over the more general provisions contained in 28 U.S.C. § 1915(a) (1964). *See* S. REP. No. 959, 79th Cong., 2d Sess. 7 (1946).

[35] *See* In re Garland, 428 F.2d 1185, 1188 (1970).

[36] *Id.* at 1187. *See also* Saint Regis Paper Co. v. Jackson, 369 F.2d 136, 141 (5th Cir. 1966). Even the *Smith* court recognized this distinction and stated that a bankruptcy proceeding more resembled interpleader than it did ordinary civil litigation. *See* In re Smith, 323 F. Supp. 1082, 1090 (D. Colo. 1971).

[37] *See* note 33 *supra*.

by the *Garland* court and limit in forma pauperis relief to cases involving "fundamental interests." [38]

D. C. E.

[38] Discrimination based on poverty has been considered "invidious discrimination" in certain cases where a "fundamental interest" was at stake. In *Harper*, the Supreme Court held that the right to vote was a "fundamental interest." *See also* Shapiro v. Thompson, 394 U.S. 618 (1969). *See generally* Michelman, *On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7 (1969). The issue raised in all of these cases is whether the "type of right" sought to be protected is of such significant importance to be classified as a "fundamental interest." The *Garland* and *Smith* courts disagreed on the definition of "fundamental interest."