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Civil Procedure—Filing Fees—Indigents: Washington Courts Have Inherent Poer to Waive Filing Fees for Indigents in Civil Actions.—O'Connor v. Matzdorff, 76 Wash. Dec. 2d 759, 458 P.2d 154 (1969)

anon

RECENT DEVELOPMENTS

CIVIL PROCEDURE—FILING FEES—INDIGENTS: WASHINGTON COURTS HAVE INHERENT POWER TO WAIVE FILING FEES FOR INDIGENTS IN CIVIL ACTIONS.—*O'Connor v. Matzdorff*, 76 Wash. Dec. 2d 759, 458 P.2d 154 (1969).

Mrs. Glennie O'Connor's sole source of support for herself and five children was a $325 monthly grant from the Washington State Department of Public Assistance. Through her attorney she tendered a complaint for replevin and damages[1] in the amount of $215.50 to the judge and clerk of the Yakima Justice Court, and filed a motion and affidavit for leave to proceed in forma pauperis.[2] The judge and his clerk refused to accept the complaint and issue notice of suit to the named defendants on the grounds that she had not paid the statutorily prescribed court fees of $3.50.[3] Mrs. O'Connor then began an original proceeding in the Washington Supreme Court to obtain a writ of mandamus ordering the respondents to accept and file her complaint without payment of any fees. Her petition for a writ of mandamus was tendered to the clerk of the supreme court without the filing fees re-

1. Mrs. O'Connor claimed that a former landlord had wrongfully taken and disposed of some of her furniture and other personal property.

2. The term "in forma pauperis" as used in this note refers to the procedure of allowing a poor person to sue or bring an action without being required to pay a court fee.

3. WASH. REV. CODE § 3.16.070 (1961):

> Fees of nonsalaried justices. The fees and compensation of justices of the peace shall be as follows, to wit:
>
> When each case is filed the sum of two dollars shall be paid by the plaintiff, which said sum shall include the docketing of the cause, the issuing of notice and summons, the trial of the case and the entering of the judgment.

WASH. REV. CODE § 27.24.070 (1969):

> Additional filing fees. In each county pursuant to this chapter, the clerk of the superior court shall pay from each fee collected for the filing in his office of every new probate or civil matter, including appeals, abstracts or transcripts of judgments, the sum of three dollars for the support of the law library in that county, which shall be paid to the county treasurer to be credited to the county law library fund. There shall be paid to each justice of the peace in every civil action commenced in such court where the demand or value of the property in controversy is one hundred dollars or more, in addition to the other fees required by law the sum of one dollar and fifty cents as fees for the support of the law library in that county which are to be taxed as part of costs in each case:
>
> (1) By each person instituting an action, when the first paper is filed;
>
> (2) By each defendant, other adverse party, or intervenor, appearing separately when his appearance is entered on his first paper filed.
>
> The justice of the peace shall pay such fees so collected to [the] county treasurer to be credited to the county law library fund.

Although $3.50 seems to be a small amount, to one who is strictly budgeted on a welfare grant, it is money not available. *See* text accompanying notes 19-21 *infra*.

quired by Supreme Court Rule on Appeal 10[4] along with her request for leave to proceed in forma pauperis. The court granted Mrs. O'Connor's petition to proceed in forma pauperis in the supreme court, and issued mandamus directing the Justice of the Peace to exercise his discretionary powers to determine whether justice court fees should be waived. *Held*: All Washington state courts have the inherent power to waive both statutorily prescribed court fees and court rules pertaining to fees where a civil action is brought by an indigent in good faith and presents an issue of probable substance. *O'Connor v. Matzdorff*, 76 Wash. Dec. 2d 759, 458 P.2d 154 (1969).

Prior to this decision, the federal government and a number of states had enacted statutes empowering their courts to waive court fees for

4. WASH. SUP. CT. R.O.A. 10:

> The clerk shall not file any paper on the part of any party to a proceeding until the statutory docket fees, chargeable against such party have been paid . . .

Since the rendering of the *O'Connor* opinion, the Washington Supreme Court has amended this rule's successor (WASH. SUP. CT. R.O.A. I-10) to read in part as follows:

> (a) Requirement. The clerk shall not file any paper on the part of a party to a proceeding until the statutory docket fee, chargeable against such party, has been paid or the party has been authorized to proceed without the payment of fee.
> (1) *Waiver in Civil Cases.*
> . . . .
> (iii) Indigent Cases. Upon a petition to proceed without the payment of a docket fee supported by an affidavit showing to the satisfaction of the Chief Justice petitioner does not have the means to pay the docket fee and that the appeal is in good faith and not frivolous, the Chief Justice may waive the requirement of a docket fee.

WASH. CT. APP. R.O.A. 10 has been similarly amended. Both Rules are reported in 77 Wash. Dec. 2d at 518-20 (1970). WASH. REV. CODE § 2.32.070 (1956):

> The clerk of the supreme court shall collect the following fees for his official services:
> Upon filing his first paper or record and making an appearance in the supreme court, the appellant shall pay to the clerk of said court a docket fee of five dollars.
> Upon making his appearance in the supreme court, the respondent in any appealed case shall pay to the clerk a fee of two dollars.
> The applicant or petitioner in any special proceeding in the supreme court, upon making his appearance, shall pay to the clerk thereof a fee of three dollars.
> The respondent in a special proceeding, and each respondent appearing separately therein, at the time of his appearance shall pay to the clerk a fee of one dollar.
> For copies of opinions of the supreme court, ten cents per folio.
> For certificates showing admission of an attorney to practice law one dollar, except that there shall be no fee for an original certificate to be issued at the time of his admission.
> The foregoing fees shall be all the fees connected with the appeal or special proceeding.
> No fees shall be required to be advanced by the state or any municipal corporation, or any public officer prosecuting or defending on behalf of such state or municipal corporation.
> For all services for which no fee is herein prescribed, the clerk of the supreme court shall receive the same fees as are prescribed for clerks of the superior courts for like services.

the poor in civil actions,[5] but American courts have been somewhat reluctant to recognize an inherent power to do so.[6] In *Martin v. Superior Court*,[7] however, the California court reasoned that the early common law of England embraced the privilege of proceeding in forma pauperis, and that, since the California State Constitution incorporated the common law into the laws of California, the privilege existed in that state.[8] The Supreme Court of Texas also found that the Texas courts had an inherent power to waive court fees, but its statement was only dictum since a statute authorizing waiver had already been enacted.[9]

The *O'Connor* court concluded that, with regard to Supreme Court Rule on Appeal 10[10] which requires the clerk of the supreme court to collect statutorily prescribed court fees, there exists within the court an inherent power to waive the requirements of its own rules. The court reasoned that the power to make rules carries with it an implied power to waive them or to make an exception where justice so requires.[11]

Apparently, unconcerned by the lack of authority in other states, the Washington court also found that the power to waive fees prescribed by statute existed inherently in the courts at common law. The court's reasoning is not clearly stated in the opinion,[12] but may be deduced from a reading of the authorities cited.

5. *See* Note, *Litigation Costs: The Hidden Barrier to the Indigent*, 56 GEO. L.J. 516, 523 (1968) which notes that thirty-two states, the District of Columbia, and the federal government have either statutes or court rules which enable the courts to waive fees. The federal statute, 28 U.S.C. § 1915 (1964), provides for in forma pauperis proceedings in federal courts for both civil and criminal actions. Indigence and good faith are prerequisites, and courts may dismiss actions that are frivolous or malicious. The state statutes afford a general privilege of proceeding in forma pauperis, but all circumscribe the privilege with various qualifications. *See* text accompanying notes 54-59 *infra*.

6. *See* Silverstein, *Waiver of Court Costs and Appointment of Counsel for Poor Persons in Civil Cases*, 2 VALPARAISO U.L. REV. 21, 30-31 (1967).

7. 176 Cal. 289, 168 P. 135 (1917).

8. The court noted that an early English statute provided for the privilege, and thus was part of the common law adopted by California. Nevertheless, said the court, the privilege pre-dated this statute and

> . . . was in fact exercised as one of the inherent powers of the courts themselves, quite independently of any statute.

168 P. 135, 137 (1917).

9. Hickey v. Rhine, 16 Tex. 576 (1856).

10. WASH. SUP. CT. R.O.A. 10, *supra* note 4 (now as amended WASH. SUP. CT. R.O.A. I-10, *supra* note 4).

11. 76 Wash. Dec. 2d 759, 766, 458 P.2d 154, 158 (1969).

12. *Id.* at 769, 458 P.2d at 159. The court comes to this conclusion after a lengthy two page citation from Annot., 6 A.L.R. 1281 (1920), but gives little indication of the reasoning process used to reach this result.

The procedure of waiving fees for the poor existed at a very early period, as is evidenced in the statute 11 Hen. VII, c. 12 (1495), but the case of *Brunt v. Wardle*[13] indicates that this procedure existed even prior to the enactment of the statute:[14]

> But, after all, is St. 11 Henry VII, chap. 12, anything more than confirmatory of the common law? In the learned report of the Serjeants' case by my Brother Manning . . . a case is referred to that occurred twenty years before the passing of that act, from which it appears that at common law if a party would swear that he could not pay for entering his pleadings, the officer was bound to enter them gratis . . . .

The Washington court apparently concluded that, since the first statute authorizing a systematic fee structure was enacted in 1278,[15] and the procedure for waiving fees was not codified until 1495, a judicially-created power to waive statutorily prescribed fees must have existed at common law.

The Washington court found no clearly-expressed legislative intent to pre-empt this inherent power,[16] despite the fact that a statute specifically provides for an in forma pauperis privilege for an indigent criminal defendant on appeal[17] but not for appeals in a civil suit. Therefore, the court reasoned that in the absence of any indication of a contrary legislative intent, the judiciary must have retained its common law power to waive statutorily prescribed court fees.

However, the court imposed standards on the exercise of this inherent power and left the day-to-day application of the rule largely to the discretion of the trial judges.

The standards are vague ones. The first requirement is that a person be indigent. Indigence, as defined by the *O'Connor* court, is[18]

> . . . a state of impoverishment or lack of resources . . . which, when realistically viewed in the light of everyday practicalities substantially and effectively impairs or prevents his pursuit of his remedy. (Citation omitted.)

13. 133 ENG. REP. 1254 (C.P. 1841).
14. *Id.* at 1257.
15. Statute of Glouster, 6 EDW. 1, c. 1, (1274). *See also* Maguire, *Poverty and Civil Litigation*, 36 HARV. L. REV. 361, 366 (1923).
16. 76 Wash. Dec.2d at 766, 458 P.2d at 158.
17. WASH. REV. CODE § 2.32.080 (1956).
18. 76 Wash. Dec. 2d at 764, 458 P.2d at 156-57.

A person on relief is presumed by the court to be indigent,[19] since welfare payments are designed to provide only the basic necessities of life, such as food, clothing, and shelter, and no amount is allocated for court fees.[20] Absolute destitution is not required; rather, the petitioner's financial condition must be "viewed in light of everyday practicalities."[21] This would seem to suggest that if he were required to deprive himself and his family of just one of the necessities of life in order to pay the court fee, then he would be considered indigent.

Although this test of indigency appears to be fairly lenient, its fairness in application could vary greatly among the individual judges who require as much or as little proof as he feels is needed. Moreover, the individual seeking to establish indigence has the burden of affirmatively satisfying the judge's standard.

More serious objections may be raised to the other two conditions—good faith[22] and probable merit.[23] Again, the indigent is subject to wide discretion of the trial judge, which is virtually unhampered except for an exceptionally vague rule. A suit which one judge views as being in bad faith and without merit may be seen by another as in good faith and meritorious, especially where there is no objective or definite standard to be followed. And these conditions discriminate against the poor, since one able to pay the court fees is not required to affirmatively show his good faith or the probable merit of his case.

By contrast, the federal statute[24] and several of the state statutes[25]

19. *Id.* at 763, 458 P.2d at 156.
20. *See* Silverstein, *Waiver of Court Costs and Appointment of Counsel for Poor Persons in Civil Cases*, 2 VALPARAISO U.L. REV. 21, 40 n.100 (1967).
21. 76 Wash. Dec. 2d at 763-64, 458 P.2d at 157.
22. 76 Wash. Dec. 2d at 772, 458 P.2d at 162. The court does not state whether this requirement is based on an objective or subjective standard, but probably intended it to be subjective.
23. *Id.* at 722, 458 P.2d at 162.
24. 28 U.S.C. § 1915 (1964), authorizes federal courts to waive fees for a person who makes an affidavit that he is unable to pay such costs . . . . Such affidavit shall state the nature of the action, defense, or appeal and affiant's belief that he is entitled to redress.
25. *E.g.*, ORE. REV. STAT. § 21.600(2) (1967):
If at any time it appears to the satisfaction of the court or the judge thereof, from the affidavit of the party . . . that he cannot pay the trial fee . . . .
UTAH CODE ANN. § 21-7-3 (1969):
Any person may institute, prosecute, defend, and appeal any cause in any court in this state by taking and subscribing before any officer authorized to administer an oath, the following: I —, do solemly swear (or affirm) that owing to my poverty I am unable to bear the expenses of the action or legal proceedings which I am about to commence, and that I verily believe I am justly entitled to the relief sought by such action, legal proceedings or appeal.

call only for an affidavit by an individual to establish his indigency. Only if the affidavit is successfully challenged, will the case of the indigent be dismissed.[26] The federal statute also contains a provision which gives the federal courts the power to dismiss frivolous cases.[27] This discretion is to be exercised with great restraint. The complaint is to be dismissed only if one who had paid the fees could have expected the same treatment.[28] Moreover, a recent decision of the Third Circuit indicates that the lower courts must grant a hearing to consider the probative value of the allegations of the complaint prior to such dismissal.[29] These procedures attempt to guarantee that an indigent proceeding under the federal statute will receive the same consideration from federal courts as is received by one who pays the fees.

In Washington there is unfortunately no such guarantee; indeed, the court has created a separate set of especially ambiguous rules for that group of citizens who cannot afford to litigate even the most meritorious claim without a waiver of fees. The prime objective of the court in further developing and defining adequate guidelines for the trial courts should be to eliminate this double standard. Prima facie

W. VA. CODE ANN. § 59-2-1 (1966):
. . . a poor person, within the meaning of this section, shall be one who shall make and file in the court, . . . , an affidavit stating that he is pecuniarily unable to pay the fees . . . .
WASH. SUP. CT. R.O.A. I-10 has just recently been amended to require in the case of appeals only an affidavit showing indigency, good faith and probable merit to the satisfaction of the Chief Judge—likewise WASH. CT. APP. R.O.A. 10. Both are reported in 77 Wash. Dec. 2d at 518-20 (1970). *See* note 4 *supra*.

26. *See, e.g.*, 28 U.S.C. § 1915(d) (1964): "The court . . . may dismiss the case if the allegation of poverty is untrue . . ."
W. VA. CODE ANN. § 59-2-1 (1966): "If any person shall swear falsely in such affidavit . . . shall be guilty of false swearing and, upon conviction thereof, shall be punished as provided by law for such offense."
UTAH CODE ANN. § 21-7-7 (1969): "If it is made to appear to the court by affidavit that the affidavit or affirmation is untrue . . . frivolous or malicious or without merit, the court may . . . [require] such affiant to appear . . . to show cause, if any he has, why his action or appeal should not be dismissed. Should the court be of the opinion that the affidavit or affirmation is untrue . . . the court . . . may dismiss it."

27. 28 U.S.C. § 1915(d) (1964): "The court . . . may dismiss the case . . . if satisfied that the action is frivolous or malicious."

28. Reece v. Washington, 310 F.2d 139, 140 (9th Cir. 1962):
This authority is to be exercised with great restraint, and generally only where it would be proper to dismiss the complaint sua sponte before service of process if it were filed by one tendering the required fees.

29. Kelly v. Butler Bd. of Comm'r, 399 F.2d 133, 134 (3rd Cir. 1968):
Moreover, several recent decisions of this court . . . require in cases like the instant one, the lower court must grant a hearing so that the facts underlying the allegations of the appellant's complaint may be fully developed and considered.

proof of indigency should be satisfied by an affidavit signed by the alleged indigent; only if the affidavit is adequately challenged, should he be required to come forth with further evidence. The requirements of good faith and probable merit should be eliminated as unnecessary, for existing civil rules suffice to insure that harrassing or frivolous litigation is prevented.[30] These improvements would enable a poor person to receive, as nearly as possible, the same consideration in Washington courts that is given to one with better financial resources. Furthermore, it would minimize the possibility that a judge, while purporting to act within his sound discretion, could unjustly deny an indigent access to the courts.

It should be noted that the *O'Connor* court recognized only a conditional privilege of access to the court for the poor; it did not deal with federal constitutional questions which might have established access to the courts free from financial barriers as a matter of right.[31]

The strongest argument under the Federal Constitution is that the imposition of court fees is a denial of equal protection of the laws as guaranteed by the fourteenth amendment.[32] The Washington court, however, implied that the instant case involved no issue of equal protection, distinguishing it on the ground that the cases cited by plaintiff

30. WASH. SUPER. CT. CIV. R. 56(c) provides that a motion for summary judgment will be granted if it is shown ". . . there is no genuine issue as to any material fact . . . ." Also WASH. SUPER. CT. CIV. R. 12(c) provides for a judgment on the pleadings where the proper motion is made. In additions, ABA CANONS OF PROFESSIONAL ETHICS No. 30 states:

> The lawyer must decline to conduct a civil cause or to make a defense when convinced that it is intended merely to harass . . . . His appearance in court should be deemed equivalent to an assertion on his honor that in his opinion his client's case is one for proper judicial determination.

31. 76 Wash. Dec. 2d at 733, 458 P.2d at 162:

> We need not consider at this time the constitutional arguments presented, inasmuch as we are of the opinion that the court below has the power to waive court fees and grant the petitioner the relief which she seeks.

32. U.S. CONST. amend. XIV, § 1:

> . . . Nor shall any state . . . deny to any person within its jurisdiction the equal protection of the laws.

See Petitioner's Brief for Mandamus at 34-43, O'Connor v. Matzdorff, 76 Wash. Dec. 2d 759, 458 P.2d 154 (1969) which suggests two additional arguments: (1) that filing fee statutes deprive indigents of their right to petition for a redress of grievances in violation of the first and fourteenth amendments of the United States Constitution, and (2) that filing fee statutes deprive indigents of a hearing required by the due process clause of the fourteenth amendment of the United States Constitution.

were criminal in nature. It noted[33] that in these criminal cases a person's liberty was at stake, unlike in the civil dispute at hand.[34]

While this is true, the fourteenth amendment makes no distinction between criminal and civil laws, but embraces all laws. Further, a line of recent cases involving the equal protection clause deals more with court procedure—filing fees, transcripts, appeals, habeas corpus—than with criminal procedure.[35] In fact, in one of these cases,[36] despite argument by the State of Iowa that the habeas corpus proceeding was civil, the United States Supreme Court nevertheless applied the equal protection clause. Thus, although the equal protection argument was avoided in *O'Connor* by resort to the traditional judicial preference to avoid constitutional issues whenever possible, the opinion would have been more satisfactory if the equal protection argument had been reached and the case had been considered and resolved along the analytical lines suggested below.

A state has power to classify its citizens into various groupings for a variety of purposes,[37] but the equal protection clause requires such groupings or classifications to be reasonable and consistent with legitimate state interests.[38] A reasonable classification is one which includes all persons similarly situated with respect to the purpose of the law.[39]

At the outset, then, the classification created by the fee statutes must be defined. These statutes do not expressly discriminate against indigents as a class by specifically excluding them from bringing civil court actions; yet, *Griffin v. Illinois*,[40] and the line of cases which fol-

33. 76 Wash. Dec. 2d at 773, 458 P.2d at 162.

34. *See* Boddie v. Connecticut, 286 F. Supp. 968, 972 (1968). In this case a statute imposing as $45 filing fee in a divorce action was challenged on the basis that it was a violation of the fourteenth amendment and the equal protection clause. Many of the same arguments mentioned in the text were used in the district court, which refused to accept them. The Supreme Court noted jurisdiction in 395 U.S. 974 (1969), and the case is presently listed on the docket as number 265. It was argued on Dec. 8, 1969.

35. *See* notes 40 & 41 *infra*.

36. Smith v. Bennett, 365 U.S. 708, 711 (1961).

37. *See* Truax v. Raich, 239 U.S. 33, 41, 43 (1915).

38. *Id.* at 41-42.

39. *See*, Tussman & tenBroek, *The Equal Protection of the Laws*, 37 CALIF. L. REV. 341, 346 (1949) [hereinafter cited as Tussman & tenBroek]; *See also*, F. S. Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920):

> But the classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation so that all persons similarly circumstanced shall be treated alike.

40. 351 U.S. 12 (1956) (requirement of payment for transcript necessary for criminal appeal violates equal protection).

lowed it,[41] demonstrate that the practical effect of requiring fees in the judicial process is to exclude the poor as a class from the courthouse.[42]

It can be shown that a classification based on wealth has no reasonable relationship to the legitimate purposes of the fee statutes.[43] The two major objectives of these statutes seem to be (1) to discourage frivolous suits, and (2) to provide revenue to support the operation of the courts. As to the first objective, the statutes create a classification which is in some respects under-inclusive and in other respects over-inclusive. They are under-inclusive insofar as their purpose is to eliminate frivolous suits,[44] for [45]

> [t]here is no rational basis for assuming that an indigent's motion for leave to appeal will be less meritorious than those of other defendants. Indigents must have the same opportunity to invoke the discretion of the [court].

Not all persons who bring frivolous suits are indigent; persons who have finances adequate to pay the filing fee are just as likely to initiate meritless actions. The statutes are also over-inclusive, for they undoubtedly prevent some poor persons from filing meritorious claims. Where a law is both under-inclusive and over-inclusive, the United States Supreme Court has been reluctant to allow it to stand.[46]

As for the second objective, the classification has no indispensable relationship to the fiscal purpose of the statutes. The fees collected

41. In the following post-*Griffin* cases, statutes or court practices requiring various payments by individuals to either the state or to other individuals were held to violate fourteenth amendment equal protection clause: Burns v. Ohio 360 U.S. 252 (1959) (payment of filing fee in order to appeal); Smith v. Bennett, 365 U.S. 708 (1961) (payment of filing fee in order to pursue a writ of habeas corpus); Douglas v. California, 372 U.S. 353 (1963) (denial of appointment of counsel for an indigent on appeal); Lane v. Brown, 372 U.S. 477 (1963) (payment for transcript on a writ of error *coram nobis*); Long v. Dist. Court of Iowa, 385 U.S. 192 (1966) (payment for a transcript for appeal after denial of a habeas corpus petition, in a habeas corpus proceeding).

42. That the practical effect of filing fees is to deny the poor access to the courts is implicit in the following language from Griffin v. Illinois, 351 U.S. 12, 18 (1956):

> There is no meaningful distinction between a rule which would deny the poor the right to defend themselves in a trial court and one which effectively denies the poor an adequate appellate review accorded to all who have money enough to pay the costs in advance.

43. *See* Rinaldi v. Yeager, 384 U.S. 305, 309 (1966).

44. *See* Tussman & tenBroek, *supra* note 39, at 348.

45. Burns v. Ohio, 360 U.S. 252, 257-58 (1959).

46. *See* Rinaldi v. Yeager, 384 U.S. 305, 310 (1966). *See also* Comment, *Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065, 1087 (1969).

do not form a substantial portion of the total cost of operating the judicial system, and their elimination in the case of indigents would not have a substantial negative effect. Nor would the additional expenditures caused by indigent suits be great when compared to the social costs of denying poor persons access to the courts.[47]

A classification on the basis of wealth may possibly not be prohibited per se, but if such a classification endangers a fundamental right, then it is subject to close scrutiny and only a compelling state interest can justify it.[48] Access to the courts is a fundamental right,[49] and fee requirements deny this right to that class of citizens who are indigent. Thus, it follows that this discrimination according to wealth is not reasonably related to the objectives of the fee statutes, and there would appear to be no compelling state interest which could justify such a classification.

Finally, Washington's fee statutes may have presented the court with an example of "invidious discrimination" against the poor in the sense that term is used by Justice Harlan in his dissent in *Griffin*. His view was that certain classifications are invalid per se regardless of

47. An official in the office of the Washington State Administrator for the Courts, Olympia, Washington, informed the author that in Washington's most populous county (King) all revenues, including fees, for the juvenile and superior courts equaled $518,270.00 in 1968, while expenditures amounted to $3,351,852.00. For the Seattle, Washington justice courts, the head clerk reported that revenues, including fees, were $87,391.00 for 1968 as against expenditures of $297,896.00. Fees thus constitute a relatively small percentage of operating expenses. The reduction in fee revenues by reason of waiver of indigent fees would be slight, since it may be assumed that few poor persons are presently paying court fees (seeing as by definition to do so would require foregoing a necessity of life). Some increase in expenditures may be anticipated due to filing of indigent suits made possible by the fee waiver. However, even if these added costs were regarded as substantial (which is unlikely), the state still may not pursue its fiscal goals by means of invidious discrimination against poor persons. *See* note 51 and accompanying text *infra*.

48. *See* Comment, *Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065, 1122 (1969).

49. Access to the courts can be viewed as "fundamental" in two possible ways. First, it can be argued that a right of access to the courts is essential to ensure that justice is equally available to all. Perhaps, just as in *Griffin* and the cases following it (*see* notes 40 & 41 *supra*), a right of access is not a constitutional right, but it is one which should be recognized if our judicial system is to fulfill a meaningful role in our society.

Alternatively, it can be argued that a right to access is a constitutionally guaranteed right to petition for redress of grievances under the first amendment. NAACP v. Button, 317 U.S. 415 (1963), established the right to petition the courts for redress of grievances, at least where the liberties of assembly, speech and political expression are concerned. And United Mine Workers v. Illinois State Bar Ass'n, 389 U.S. 217, 222 (1967), seems to recognize such a right. It is true that these cases lend themselves to other interpretations, but the first amendment right to petition for redress of grievances is repeatedly mentioned in each of them.

their reasonable relationship to legitimate state objectives, and an invidious discrimination or classification offends equal protection regardless of the consequences.[50] According to Justice Harlan, the Supreme Court has equally condemned laws which expressly discriminate between rich and poor and laws of more general applicability which in reality treat the poor more harshly than the rich. Supportive of this view, the Court in *Shapiro v. Thompson*,[51] a welfare case, recognized that while a state has a valid interest in preserving the fiscal integrity of its programs, it may not accomplish such a goal by invidious distinctions between classes of citizens.

Although the Washington Supreme Court in *O'Connor* did not consider these constitutional issues, and even though it placed unfair restrictions on the poor person's right of access to the courts, it must be admitted in all fairness that the decision could have been even less progressive. At least, the alternative which it chose is preferable to a flat declaration that the issue is a legislative matter;[52] there was no certainty that a statute authorizing an in forma pauperis proceeding in civil cases would have been enacted in the near future, or even that any group was lobbying for such an enactment. Moreover, the court did not drastically circumscribe the privilege of proceeding in forma pauperis as has been done in other states. For example, the *O'Connor* decision inferentially grants the privilege of proceeding without payment of fees at both the trial and the appellate levels,[53] while various statutes in other jurisdictions limit the privilege to the trial court only.[54] Moreover, the court did not, as has been done elsewhere, draw a distinction between plaintiffs and defendants,[55] put a specific mone-

50. 351 U.S. 12, 35 (1956).

51. 394 U.S. 618, 633 (1969).

52. *See* Boddie v. Connecticut, 286 F. Supp. 968, 974 (1968).

53. This inference is based on the fact that Mrs. O'Connor was allowed to pursue her case on appeal without having to pay the required supreme court filing fee. 76 Wash. Dec. at 773, 458 P.2d at 162. In addition, the court states that the supreme court, the superior courts, and the justice courts all possess the power to waive fees. Id. at 775, 458 P.2d at 163. Since announcing the decision in this case, the supreme court amended the Rules on Appeal for both the supreme court and the appellate court to provide a procedure for handling appeals where the appellant claims to be entitled to proceed without payment of the filing fee. Note 4 *supra*.

54. *E.g.*, COLO. REV. STAT. ANN. § 33-1-3 (1963); MD. ANN. CODE art. 24 § 10(b) (1966); VA. CODE ANN. § 14.1-183 (1964).

55. *E.g.*, MD. ANN. CODE art. 24 § 10(b) (1966); TENN. CODE ANN. § 20-1629 (Supp. 1968).

tary limitation on the privilege,[56] exclude certain types of actions such as slander[57] or divorce,[58] or limit the scope of the privilege to citizens of Washington State.[59]

The *O'Connor* court recognized the potential danger of injustice posed by court fees, and, to alleviate the inequity of the fee system, the court ruled that in certain circumstances Washington courts have inherent power to waive such fees for indigents. Yet, the plight of the indigent plaintiff or defendant is largely left to the mercy of the individual judge's discretion. The vagueness of the standards upon which exercise of the power is conditioned exposes just claims of the poor to many uncertainties. And, the burden of showing indigency, good faith, and probable merit is placed only on parties who are poor.

The fundamental goal of the judicial process is the provision of a forum for the just resolution of all legal disputes, whether they are between the state and an individual or between two individuals. No dispute can be justly resolved by the courts if their response to a request for adjudication differs according to the size of a party's pocketbook. The courts must be able to say to all parties: "To no one will we sell, to no one will we deny, . . . right or justice."[60] Thus, hopefully, the *O'Connor* decision is only an intermediate step towards the eventual recognition that a person, even in a civil suit, may not in any way be denied access to the dispute settlement procedure of our society on account of his financial situation.

56. *E.g.*, TENN. CODE ANN. § 20-1629 (Supp. 1968); MASS. ANN. LAWS ch. 273A, § 15A (1968); ARK. STAT. ANN. § 27-401 (1962).
57. *E.g.*, TENN. CODE ANN. § 20-1629 (Supp. 1969).
58. *E.g.*, GA. CODE ANN. § 24-3413 (1959).
59. *E.g.*, MISS. CODE ANN. § 1574 (1956); KY. REV. STAT. ANN. § 453.190 (1969).
60. Griffin v. Illinois, 351 U.S. 12, 16-17 (1956), *quoting from* Magna Carta.