FULL PROTECTION OF FUNDAMENTAL RIGHTS

I. INTRODUCTION

The Supreme Court in *Griffin v. Illinois*[1] and *Douglas v. California*[2] held that equal justice requires the state to provide a transcript and an attorney to indigent defendants for appeal. These decisions, while holding there is no due process right to an appeal,[3] have guaranteed indigents the opportunity to gain full appellate review of their convictions by recognizing an equal protection right to effectuate a right to an appeal established by a state. At least until the decision of the Court in *Edwards v. California*,[4] racial discrimination in jury selection was the only area of criminal law where there were equal protection decisions.[5] The extension of the equal protection concept beyond criminal and civil cases involving racial discrimination to cases where the discrimination was based on economic classification was perhaps spurred by *Brown v. Board of Education*.[6] The disrepute into which substantive due process had fallen[7] may also have been a factor in the Court's recent reliance upon equal protection in the criminal law area.

The equal protection theory which has emerged following *Brown v. Board of Education* is not easily susceptible to precise definition. It lacks continuity, having no direct line of precedent and apparently no historical justification. The Court has said it will not be "confined to historic notions of equality . . . [because] [n]otions of what constitutes equal treatment for purposes of the Equal Protection Clause *do* change."[8] How notions of equality have changed and, more impor-

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1 351 U.S. 12 (1956). The Court held that Illinois must provide petitioners with a transcript or "find other means of affording adequate and effective appellate review to indigent defendants." *Id.* at 20.

2 372 U.S. 353 (1963). The Court held that petitioners were entitled to appointed counsel for their first appeal as of right.

3 Douglas v. California, 372 U.S. 353, 365 (1963) (Harlan, J., dissenting); Griffin v. Illinois, 351 U.S. 12, 18 (1956).

4 314 U.S. 160, 184-85 (1941) (Jackson, J., concurring). *See also* Dowd v. United States *ex rel.* Cook, 340 U.S. 206 (1951) and Cochran v. Kansas, 316 U.S. 255 (1942), both cases where prisoners were prevented from initiating appeals by prison regulations or official's conduct.

5 *See* notes 11, 50-53, *infra.*

6 347 U.S. 483 (1954). *See* Cox, *Foreword: Constitutional Adjudication and the Promotion of Human Rights*, 80 HARV. L. REV. 91, 94-95 (1966).

7 *See* Tussman & tenBroek, *The Equal Protection of the Laws*, 37 CALIF. L. REV. 341, 364 (1949) [hereinafter cited as Tussman].

8 Harper v. Virginia Bd. of Elections, 383 U.S. 663, 669 (1966).

tantly, how they will continue to change cannot be determined until a theory of equal protection is formulated. Two methods of analysis are possible in the area of criminal equal protection: first, an examination of the historical circumstances of the passage and ratification of the fourteenth amendment accompanied by a retrospective reconstruction of the purpose or intent of the equal protection clause considered in light of the contemporary system of criminal justice; second, a case by case analysis of recent decisions, with an attempt to construct a model theory capable of rationalizing the cases and predicting future results. A third alternative, hypothecating original purpose and discerning its evolution through a more or less continuous line of precedent into a contemporary formulation, is not available in the area of criminal equal protection.

II. Historical Definition

Despite the Court's reluctance to consider the history of the amendment, the research of tenBroek, James, Fairman, Bickel, and Harris[9] has demonstrated that an historical analysis leads to some conclusions about the purpose of the amendment which are useful today. The amendment, viewing the privileges and immunities, due process, and equal protection clauses as a unit,[10] was at a minimum intended to assure that the Southern states would not deprive the recently freed Negro of his civil rights. Although the full extent of these rights is not clear, they included the rights enumerated in the Civil Rights Act of 1866:[11]

> to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens, and shall be subject to like punishment,

9 J. tenBroek, Equal Under Law (1965) [hereinafter cited as tenBroek]; J. James, The Framing of the Fourteenth Amendment (1956). [hereinafter cited as James]; Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights?—The Original Understanding*, 2 Stan. L. Rev. 5 (1949) [hereinafter cited as Fairman]; A. Bickel, Politics and the Warren Court (1966) [hereinatfer cited as Bickel]; R. Harris, The Quest for Equality (1960) [hereinafter cited as Harris].

10 Harris at 35-36, 44.

11 See Bickel at 256-58; Fairman at 45-48, 138-139; Harris at 35, 40; James at 179; Roche, *Equality in America: The Expansion of a Concept*, 43 N.C.L. Rev. 249, 259 (1965) [hereinafter cited as Roche]; tenBroek at 202-203. The Civil Rights Act of 1866 was passed under the authority granted Congress by the 13th Amendment. But the 14th Amendment was passed, in part, to insure the constitutionality of the Civil Rights Act of 1866.

> pains, and penalties, and to none other, any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding.[12]

The emphasis of the framers was on protection or benefit of the laws which any government must afford to its citizens and persons subject to its laws. The state itself was instituted to guarantee these natural rights.[13] The thesis that government is instituted to guarantee at least a fundamental minimum of protection through law to its citizens can be traced to the Abolitionist background of the Radical Republican framers.[14] The Abolitionist movement justified its political objectives by proclaiming that the fundamental or natural rights of man were guaranteed by the Constitution and found their expression in the Declaration of Independence, the Magna Charta, natural law, and Christianity.[15]

In the congressional debates over the amendment and during the ensuing election campaign of 1866 the supporters of the fourteenth amendment distinguished between civil rights, which were to be included within the amendment's ambit, and political and social rights, which were excluded from the amendment's protection.[16] The terms civil, political, and social rights were never clearly defined or distinguished in debate. But the ambiguity of the distinction made is not the relevant factor for purposes of formulating a generalized theory of equal protection which is meaningful today. Specific inclusions or exclusions in the various categories should not determine decisions which are made in the context of existent conditions.[17] It is important that not all rights or legal consequences fell within the scope of the fourteenth amendment, but only those rights of such fundamental importance that all governments have an affirmative duty to secure them for all men within their jurisdictions.[18]

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12 14 Stat. 27, § 1 (1866); 42 U.S.C. § 1982 (1964).

13 HARRIS at 1, 43-44.

14 JAMES at 183-84; TENBROEK at 29, 49-54, 119.

15 HARRIS at xiii and 1 *passim*; TENBROEK at 51-52, 213-15, 232; Fairman at 138.

16 JAMES at 163, 200-01; TENBROEK at 238.

17 *See* BICKEL at 248-61.

18 *See* HARRIS at 1, 22-23, 43-44; TUSSMAN at 341-42; JAMES at 106; TENBROEK at 51, 117-19, 222-23, 237. tenBroek is the most vigorous exponent of the protection theory of the fourteenth amendment. His research revealed that in the debates over the fourteenth amendment the authority of Congress

> to secure to all persons "equal protection in the rights of life, liberty, and property," the qualifying word "equal" was almost entirely forgotten and "protection" [was] treated as if it stood alone. . . . The essential element of

The imprecise definition and absence of specific enumeration of the civil rights sought to be guaranteed by the fourteenth amendment (and the equal protection clause)[19] can be explained by the political situation which confronted the Radical Republican sponsors of the amendment. Thaddeus Stevens and other Radical Republicans began the 39th session of Congress desiring legislation to enfranchise the Negro.[20] There was a practical as well as a moral reason for Negro enfranchisement—maintenance of a Radical Republican majority in Congress through the votes of the recently freed slaves.[21] But the Republicans were fearful that such legislation would not gain Congressional or popular approval;[22] therefore the goal of enfranchisement was temporarily abandoned, and sections 2 and 3 of the fourteenth amendment were adopted as a compromise interim solution.[23] Section 2 reduced the representation of states which excluded twenty-one year old males from voting, and section 3 excluded certain former Confederate officials from participation in the political process. The compromise was a result of a pragmatic decision to seek the possible and educate the public in the meantime.[24] The Radical Republican leadership felt that the general language of section 1 was all that the country would accept. Specific guarantees were a political liability, and a possible limitation on future congressional action.[25]

A further explanation for the vague definition of civil rights was the framing process of the amendment itself. The amendment was framed in secret by the Joint Committee on Reconstruction, called the Committee of Fifteen,[26] and the votes required for its passage were assured by party caucus, also held in secret.[27] In the limited debate immediately preceding House and Senate approval, relatively little discussion centered on the equal protection clause or the first section of the amendment. Because of the general agreement that the first section would constitutionalize the Civil Rights Act of 1866 and the immediate political volatility of sections 2 and 3, little

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the "equal protection" which Congress was empowered to provide was thus protection, and equality was subordinate.

Id. at 211. *Cf.* Fairman at 65, 138-39.

19 *See* BICKEL at 236.

20 JAMES at 20.

21 *See* JAMES at 3-20; Roche at 258.

22 JAMES at 4-20, 53-54.

23 JAMES at 183.

24 BICKEL at 260; JAMES at 53-54, 185; Roche at 258.

25 *See* BICKEL at 258-60; JAMES at 71, 201.

26 JAMES at 55.

27 JAMES at 149-50.

was said about the first section.[28] Throughout the entire 39th session the Radical Republican sponsors steadfastly maintained that the rights guaranteed by the amendment were not new, but that the amendment merely allowed Congress to enforce existent civil rights.[29]

The expected immediate application of the amendment is subject to contradictory interpretations to the extent that there was disagreement as to specific civil rights guaranteed by the first section.[30] Then, as today, white racism was a dominant factor in the American society.[31] Ironically, as the amendment which incorporated the concept of equality into the constitution was being debated, the Senate galleries were segregated.[32] During the debates several western senators rose to make it clear that they did not consider Chinese or Indian Americans to be persons within the scope of the amendment.[33] Reflecting this situation were statements made in debate and during the campaign that the amendment would have no effect or would not apply in the North.[34]

Even if the existing social structure was hostile to full Negro participation in American society, and it is assumed that the anticipated effect of the first section, including the equal protection clause, was restricted to guaranteeing the rights contained in the Civil Rights Act of 1866,[35] the broad framework of the amendment was intentionally inclusive—protecting all persons.[36] The concept that government is instituted to guarantee at least certain fundamental rights to all men equally became a part of the Constitution.[37] Today, the specific rights protected by the amendment in 1868 are not important to the solution of contemporary problems, because the historical context of 1968 is different.[38]

III. Early Supreme Court Interpretation

The passage of the amendment itself, with the congressional enforcement powers of section 5, was a manifestation of distrust for

28 Bickel at 252; Harris at 35.

29 Fairman at 25-26; James at 84-85; tenBroek at 232.

30 Bickel at 260; Fairman at 138; James at 191; Harris at 36-37.

31 See James at 180; Roche at 254; Report of the Nat'l Advisory Comm'n on Civil Disorders 91 (1968).

32 James at 67.

33 Harris at 28, 39.

34 James at 185, 191.

35 See notes 11 and 12 *supra* and accompanying text.

36 Bickel at 257. But *cf.* Fairman at 31-32.

37 See note 18 *supra.*

38 *See* Bickel at 256-47, 260-61; Fairman at 32.

the Court which had rendered the *Dred Scott* decision.[39] In the *Slaughter-House Cases*[40] the Court was presented with its first opportunity to construe the fourteenth amendment, and its response was to adopt the most restrictive interpretation possible. Bingham, the principal draftsman of section 1, had placed great emphasis upon the privileges and immunities clause, which the Court eviscerated.[41] Moreover, the Court circumscribed the scope of the equal protection clause in a dictum: "We doubt very much whether any action of a State not directed by way of discrimination against the negroes as a class, or an account of their race, will ever be held to come within the purview of this provision."[42] The Court did not view the fourteenth amendment as working any fundamental change in the preexisting state-federal government relationship, nor as any pervasive change in the duties which government owed the individual.[43]

Just seventeen years after the passage of the fourteenth amendment the scope of the equal protection clause was further limited by the introduction of the state action doctrine in the *Civil Rights Cases*.[44] The congressional power of enforcement under section five was limited to those situations where affirmative action by state legislature, judiciary, or executive had denied protection of the law to the Negro.[45] The Civil Rights Act of 1875 had provided for full and

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39 Scott v. Sandford, 60 U.S. (19 How.) 393 (1856); *see* BICKEL at 260; JAMES at 184.

40 83 U.S. (16 Wall.) 36, 73-74 (1872).

41 Colgate v. Harvey, 296 U.S. 404 (1935) is the only Supreme Court case which has upheld a privileges and immunities claim. *Colgate* was overruled in Madden v. Kentucky, 309 U.S. 83, 92-93 (1940). Fairman at 25-26, 139; Harris at 82 n.1.

42 83 U.S. (16 Wall.) 36, 81 (1872).

43 [We] do not see in those amendments any purpose to destroy the main features of the general system. Under the pressure of all the excited feeling growing out of war, our statesmen have still believed that the existence of the States with powers for domestic and local government, including the regulation of civil rights—the rights of person and of property—was essential to the perfect working of our complex form of government, though they have thought proper to impose additional limitations on the States, and to confer additional power on that of the Nation. *Id.* at 82.

44 109 U.S. 3, 13 (1883). *See* HARRIS at 44.

45 109 U.S. at 10-11:

It is absurd to affirm that, because the rights of life, liberty and property (which include all civil rights that men have), are by the amendment sought to be protected against invasion on the part of the State without due process of law, Congress may therefore provide due process of law for their vindication in every case. *Id.* at 13.

equal enjoyment of accomodations, inns, and public conveyances.[46] The Court held that the Act was unconstitutional because it

> step[ped] into the domain of local jurisprudence, and [laid] down rules for the conduct of individuals in society towards each other, and impose[d] sanctions for the enforcement of those rules, without referring in any manner to any supposed action of the State or its authorities.[47]

Justice Bradley's opinion is predicated upon a view which had gained ascendency by 1883—the Civil Rights Act of 1875 discriminated against the white man:[48]

> When a man has emerged from slavery, and by the aid of beneficent legislation has shaken off the inseparable concomitants of that state, there must be some stage in the progress of his elevation when he takes the rank of a mere citizen, and ceases to be the special favorite of the laws, and when his rights as a citizen, or a man, are to be protected in the ordinary modes by which other men's rights are protected.[49]

The early criminal law equal protection cases, *Ex parte Virginia*,[50] *Strauder v. West Virginia*,[51] *Virginia v. Rives*,[52] and *Neal v. Delaware*[53] dealt with the exclusion of Negroes from jury service because of color. Their rationale is markedly different than that propounded in the *Slaughter-House Cases* and the *Civil Rights Cases*. In *Strauder* the court said that the post-Civil War amendments had a:

> common purpose; namely, securing to a race recently emancipated, a race that through many generations had been held in slavery, all the civil rights that the superior race enjoy . . . Discriminations against them had been habitual . . . . The colored race, as a race, was abject and ignorant, and in that condition was unfitted to command the respect of those who had superior intelligence. Their training had left them mere children, and as such they needed the protection which a wise government extends to those who are unable to protect themselves.[54]

There is no recognition by the Court of an affirmative duty of govern-

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46 18 Stat. 335 (1875).
47 109 U.S. 3, 14 (1883).
48 Roche at 259; HARRIS at 89.
49 109 U.S. 3, 25 (1883)
50 100 U.S. 339 (1879).
51 100 U.S. 303 (1879).
52 100 U.S. 313 (1879).
53 103 U.S. 370 (1880).
54 100 U.S. 303, 306 (1879). *Cf. id.* at 307-08.

ment to afford to all persons certain fundamental rights.[55] *Plessy v. Ferguson*,[56] also premised upon a theory of racial inferiority,[57] was the culmination of the immediate post-Civil War Court's restrictive interpretation of the equal protection clause in the area of personal rights.[58]

IV. Rejection of the State Action Limitation

Brown v. Board of Education[59] marks the beginning of the Supreme Court's reformulation of the fourteenth amendment equal protection theory.[60] The theory which the Court is developing implicitly eschews the limitations imposed by the state action doctrine[61] and has applied equal protection to discriminations based on classifying factors other than race.

As the court has extended the ambit of the equal protection clause beyond racial discriminations to other areas of inequality, a dilution of the state action doctrine has occurred. In the racial area the Court has abandoned all but the rhetoric of state action. The doctrine has always been an ambiguous concept. It has been sixty-two years since the court has held the fourteenth amendment inapplicable in a case of racial discrimination on the ground that there was no affirmative state action involved.[62] Although the Court upheld the Civil Rights Act of 1964 by reference to the commerce clause, rather than the equal protection clause,[63] there are many recent cases where the nature of the relationship between the state and the discrimination was at best tenuous, if the state action doctrine is viewed as a

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55 *See* note 18 *supra*.

56 163 U.S. 537 (1896).

57 *See id.* at 551-52; Roche at 264-65.

58 From 1873 to 1937 there was an expansion of the equal protection clause to protect business and property interests from state discriminatory action. In that period 76.9% of all equal protection cases before the Supreme Court dealt with legislation affecting economic interests. Only 14.2% of the equal protection cases raised questions of racial discrimination. Criminal cases dealt with procedural problems and were an insignificant proportion of the total number of equal protection claims decided. Harris at 59.

59 347 U.S. 483 (1954).

60 *See* Goldberg, *Equality and Governmental Action*, 39 N.Y.U.L. Rev. 205, 208 (1964); Cox, *Foreword: Constitutional Adjudication and the Promotion of Human Rights*, 80 Harv. L. Rev. 91, 92-93 (1966).

61 See text at note 71 *infra*.

62 Black, *Foreword: "State Action," Equal Protection, and California's Proposition 14*, 81 Harv. L. Rev. 69, 89 (1967).

63 Katzenbach v. McClung, 379 U.S. 294, 304-305 (1964); Heart of Atlanta Motel,

restriction on the scope of equal protection. In *Burton v. Wilmington Parking Authority*[64] the equal protection clause was held to forbid discrimination by a privately owned restaurant which was located in a building owned and operated by a state agency for public purposes.[65] The Court in *Reitman v. Mulkey*[66] held that article I, section 26 of the California Constitution (providing that individual homeowners could sell to whomever they wished, closing the purchase on the basis of whatever criteria the owner felt relevant) denied equal protection of the laws.[67] This decision seems more consistent with a theory postulating governmental obligation to take affirmative steps to protect its citizens from discrimination, rather than a state action theory.[68] As originally conceived the state action limitation prevented Congress from pre-empting the states' exercise of its police powers. It accomplished this purpose by requiring discriminatory exercise of state police power before the equal protection clause could be invoked by Congress as a constitutional basis for legislation pursuant to section 5 of the fourteenth amendment.[69] In *Reitman* the Court was presented with a state constitutional amendment which was a limitation on the exercise of state police power, the practical effect of which was to allow individuals to discriminate against Negroes while engaging in property transactions. The state refused to guarantee or positively command non-discriminatory property transfers. Although distinctions made between action and inaction may become attenuated, it seems clear that the Court's decision rejects that part of the state action doctrine which is predicated upon non-intervention by a federal branch of government into the domain of state police power, where the issue is whether or not such power should be exercised. Moreover, the decision means that a state, in the area of property transfers, cannot by constitutional provision allow individuals to make transactions as they please, at least where the

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Inc. v. United States, 379 U.S. 241, 258 (1964).

64 365 U.S. 715 (1961).

65 *Id.* at 725. See Comment, *Sit-Ins and State Action—Mr. Justice Douglas, Concurring*, 14 STAN. L. REV. 762, 765 (1962) for the view that the equal protection clause should not have been controlling in *Burton*.

66 387 U.S. 369 (1967).

67 *Id.* at 378-79, 380-81.

68 *Cf.* Black, *Foreword: "State Action" Equal Protection, and California's Proposition 14*, 81 HARV. L. REV. 69, 97-98 (1967): "regardless of original meaning" there should be a "constitutional obligation resting on the states to quest after practical racial equality. . . ."

69 *See* Civil Rights Cases, 109 U.S. 3, 11, 14 (1883).

effect is to discriminate against irrationally defined groups of potential purchasers.[70] The implication is that the State has an affirmative duty to assure every person the opportunity to purchase property. Such an affirmative duty is consistent with an historical interpretation of the original understanding of the framers of the fourteenth amendment,[71] and it is inconsistent with the state action doctrine, because it "federalizes" local law governing property transfers.[72]

V. Affirmative State Duties in the Criminal Process

The ultimate abandonment by the Court of the rhetoric and substance of the state action doctrine and the substitution of a theory recognizing an affirmative duty of the state to guarantee the protection of the law to each individual should also be the basis of a modern theory of criminal equal protection. The Court in *Griffin v. Illinois*[73] was apparently satisfied with the rhetoric of state action because it found discriminatory state action in the existence of a state appellate process which was inaccessible to indigent defendants.[74]

Justice Harlan in dissent argued that the real discriminator is the poverty of the indigent defendant and that the State had no constitutionally-imposed obligation to correct inequalities in economic circumstance.[75]

When *Griffin* is analyzed within the framework of the traditional state action-equal protection concept, Harlan's critique has merit in that it focuses on the real issue presented. An equal protection claim prior to *Griffin* was based upon one of two theories. A classification was unconstitutional either because it was unreasonable or because it was an invidious discrimination.[76] A classification was reasonably related to its purpose if it included all persons similarly situated with respect to the purpose of the legislation or state activity.[77] A classification was invidious if the classification was an expression

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70 *See generally* Black, *Foreword: "State Action," Equal Protection, and California's Proposition 14*, 81 Harv. L. Rev. 69 (1967).

71 See note 18 *supra*.

72 See text at note 47 *supra*.

73 351 U.S. 12 (1956).

74 *Id.* at 18-19.

75 *Id.* at 34-35 (Harlan, J., dissenting).

76 *See generally* Tussman, *supra* note 7.

77 *Id.* at 346. McGowan v. Maryland, 366 U.S. 420, 426 (1961) illustrates the traditional application of the equal protection test which merely requires that there be no rational basis, reasonably conceived, to justify the classification.

"of hostility or antagonism to certain groups of individuals."[78] The Illinois statute was not unconstitutional on its face, or as applied, by either of these standards.[79] The statute merely required the criminal appellant to provide the appellate court with a bill of exceptions or report of the trial proceedings to gain full direct appellate review.[80] Nonetheless, the Court in *Griffin* found an unconstitutional discrimination.

The Court began with the premise that a defendant's financial resources should not be a factor in determining guilt or innocence at *trial*.[81] To this premise the Court added the assumption that there was no rational difference between a denial of a fair trial and a denial of adequate *appellate review*.[82] The conclusion, drawn by syllogism, was that "[d]estitute defendants must be afforded as adequate appellate review as defendants who have money enough . . . ." to obtain such reviews.[83] Thus the decision does not rest upon a rational basis test directed at the relationship between the classification employed and the purpose of the law.[84] The thrust of the rationality argument is that no distinction may be made between the right to trial and the right to appeal.

The rationality argument is often used by the Court in extending due process to areas previously thought not to be protected by due process safeguards.[85] But the comparison of trial with appeal as they relate to indigency was without precedent. The Court's premise that guilt or innocence at trial should not be contingent on the defendant's financial resources was not itself part of the decisional law at

78 Tussman at 358. *See* Loving v. Virginia, 388 U.S. 1, 11 (1967).

79 Comment, *Indigent Court Costs and Bail: Charge Them to Equal Protection*, 27 MD. L. REV. 154, 156 (1967). *But cf.* 351 U.S. at 17 n. 11.

80 The State of Illinois conceded in argument that petitioners needed a transcript in order to obtain adequate appellate review. 351 U.S. at 16.

81 *Id.* at 17-18.

82 *Id.* at 18.

83 *Id.* at 19.

84 *See* Note, *Discriminations Against the Poor and the Fourteenth Amendment*, 81 HARV L. REV. 435, 441-42 (1967) suggesting that Illinois might have argued that the filing fee was to deter frivolous appeals. However, this argument would certainly have been rejected by the Court. *Cf.* Coppedge v. United States, 369 U.S. 438, 449 (1962). It seems apparent that the purpose of the Illinois statute was to make available an adequate record for appeal, but the effect of its administration was to place the financial burden of obtaining a transcript on the individual defendant, rather than on the state, except for the statutory exceptions made for capital cases or cases raising important state or federal constitutional questions.

85 *Cf.* Kadish, *Methodology and Criteria in Due Process Adjudication—A Survey and Criticism*, 66 YALE L.J. 319, 333-34 (1957).

the time of *Griffin*.[86] The comparison was not simply an extension of the equal protection clause to a new area, but a complete reformulation of equal protection doctrine. The Court in *Griffin* recognized a constitutionally imposed duty to provide the indigent defendent with the protection of the law.[87] This theory of government is a radical departure from that underlying the state action-equal protection theory.

The equality concept adopted by the court in *Griffin* and extended in *Douglas v. California*[88] is a comparison between the ability of selected classes of individuals to utilize the appellate process. The Court selected the group defined by indigency and compared that group's ability to utilize the appellate process with that of the class defined by wealth. The Court assumed that the class denominated "rich" defendants is able to maximize the benefits that a model appellate process can afford any criminal defendant.[89] This analysis, carried to its ultimate extension, would require that every defendant have the same or substantially the same realizable potential to maximize the benefits to defendants obtainable from the model appellate process.

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86 *See* Willcox & Bloustein, *The Griffin Case—Poverty and the Fourteenth Amendment*, 43 CORNELL L.Q. 1, 3-5 (1957).

87 See Cox, *Foreword: Constitutional Adjudication and the Promotion of Human Rights*, 80 HARV. L. REV. 91, 93 (1966); Willcox & Bloustein, *The Griffin Case—Poverty and the Fourteenth Amendment*, 43 CORNELL L.Q. 1, 16 (1957); Goldberg, *Equality and Governmental Action*, 39 N.Y.U.L. REV. 205 (1964). Former Justice Goldberg said that the Court in Griffin was "laying to rest the notion that equal protection requires only equal laws and that the state is never obliged to equalize economic disparities. . . ." Goldberg, *supra* at 218.

88 372 U.S. 353 (1963).

89 In *Griffin* the Court assumed that the petitioners could have alleged reversible errors. 351 U.S. at 16. The benefit denied petitioners was the ability to present their allegations of reversible error to the appellate court, because they were unable to draft a bill of exceptions without a copy of their transcripts. In *Douglas* the Court again argued by analogy, this time from the right to a free transcript on appeal to the right to assistance of counsel on appeal. The Court said: "In either case the evil is the same: discrimination against the indigent. For there can be no equal justice where the kind of an appeal a man enjoys 'depends on the amount of money he has.'" 372 U.S. at 355 (citation omitted). Again the defendant's ability to present alleged reversible error to an appellate court was the benefit denied the indigent. *Id.* at 356. The state has an affirmative duty

> to provide the indigent as adequate and effective an appellate review as that given appellants with funds—the State must provide the indigent defendant with means of presenting his contentions to the appellate court which are as good as those available to a nonindigent defendant with similar contentions.

Draper v. Washington, 372 U.S. 487, 496 (1963).

Use of the equal protection clause to cover situations within the appellate process not previously judged by an equal protection standard may depend primarily upon the definitions of the class considered. Arguably, the entire class of defendants denominated not-wealthy and defined by the characteristic inability to maximize the benefits of the appellate process are denied the equal protection of the laws.[90] An extension of the equal protection doctrine to the trial process might then require the states to make available to all but wealthy defendants investigative aids, the services of expert witnesses, and clerical assistance in trial preparation or any other items or services which would allow the defendant to maximize his ability to use the trial process. The Court's theory invites expansion into areas previously not judged by an equal protection standard through semantic inclusion and exclusion.

The weakness in the Court's equal protection theory is that it does not focus upon the protection of fundamental rights which the state must provide each person within its jurisdiction. The effect of *Griffin* and *Douglas* is to compel the states to provide transcripts and attorneys for indigents on direct appeal, but that result is reached by a semantic jingle which diverts attention from the right protected to the criteria which define the class protected by the equal protection clause in the particular case. The Court in *Griffin* explicitly adhered to the holding in *McKane v. Durston*[91] that there is no due process right to appeal.[92] But the Court went on to discuss the importance of the review of the trial level determination of guilt or innocence through the appellate process.[93] The effect of the holding in *Griffin* and *Douglas* is that the Court *sub silentio* holds that the right to appellate review is of fundamental importance in our society today.[94] There may be some areas within the appellate process in which the

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90 *See* Goldberg, *Equality and Governmental Action*, 39 N.Y.U.L. REV. 205, 221-22 (1964); Cox, *Foreword: Constitutional Adjudication and the Promotion of Human Rights*, 80 HARV. L. REV. 91, 92 (1966).

91 153 U.S. 684, 687-88 (1894).

92 Griffin v. Illinois, 351 U.S. 12, 18 (1956).

93 All of the States now provide some method of appeal from criminal convictions, recognizing the importance of appellate review to a correct adjudication of guilt or innocence. *Id.* at 18.

94 *See generally* Note, *Discriminations Against the Poor and the Fourteenth Amendment*, 81 HARV. L. REV. 435, 438 (1967); Cox, *Foreword: Constitutional Adjudication and the Promotion of Human Rights*, 80 HARV. L. REV. 91, 93-95 (1966); Willcox & Bloustein, *The Griffin Case—Poverty and the Fourteenth Amendment*, 43 CORNELL L.Q. 1, 15-16 (1957).

State has room to vary specific incidents or aspects of the appellate process, but a State cannot refuse the fundamental right of appellate process it provides for the protection of liberty. The standard by which the operation of a particular State appellate process is to be measured is full or equal application to every defendant.[95] It is, therefore, the affirmative duty of the State to provide some kind of appellate process. That obligation generates the specific duty of a state to provide transcript or counsel, because they are an integral and indispensible part of any criminal appellate process a State might devise.

The equality standard adopted by the Court in *Griffin* and *Douglas* is too broad. If generalized it would require that any time a state guarantees or affords a right, that right must be equal. But not all laws are required to be equal.[96] Equality, proportionate or mathematical, becomes meaningful only in the context of the right sought to be exercised. Therefore, the criminal equal protection cases can be rationalized only if it is recognized that a two step test has been employed by the Court. First, it must be determined whether the right sought to be exercised by the defendant (*e.g.*, the duty of the state to provide an appellate process) is of such fundamental importance that it should be protected by the equal protection clause. Second, if the right falls within the scope of the equal protection clause, the Court must determine whether or not the individual defendant is precluded from exercising the right because the benefits to the defendant of the existing appellate structure are not made equally or fully available to all defendants.

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95 Griffin v. Illinois, 351 U.S. 12, 19 (1956); Douglas v. California, 372 U.S. 353, 357-58 (1963).

96 *See, e.g.*, Barbier v. Connolly, 113 U.S. 27, 31 (1885).