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Comments and Casenotes

INDIGENT COURT COSTS AND BAIL: CHARGE THEM TO EQUAL PROTECTION

By ALAN R. SACHS

> Ask not what singular charm the men of democratic ages find in being equal, or what special reasons they may have for clinging so tenaciously to equality rather than to the other advantages which society holds out to them: equality is the distinguishing characteristic of the age they live in; that, of itself, is enough to explain that they prefer it to all the rest.*

The adoption of the fourteenth amendment to the Constitution of the United States was society's response to an era characterized by racial discrimination. The embodiment of the equal protection clause within the amendment was society's attempt to vitiate that discrimination and to place all men, regardless of race, upon equal footing before the law. It was not surprising, therefore, that, when the Supreme Court was first called upon to interpret the equal protection clause in the *Slaughter-House Case*,[1] it propounded: "We doubt very much whether any action of a State not directed by way of discrimination against the Negroes as a class, or on account of their race, will ever be held to come within the purview of [the equal protection] . . . provision."[2] Yet, as generations passed, the doubt cast by the *Slaughter-House Cases* was slowly but surely dispelled, and the equal protection clause developed from what Mr. Justice Holmes once labeled "the usual last resort of constitutional arguments"[3] into a powerful buttress to be used against any type of unreasonable discrimination.[4]

The scope of this article, however, is limited to the role that the equal protection clause has played and still must play in alleviating discrimination in modern criminal procedure.[5] More specifically, it is the purpose of this article to trace the evolution and implementation of the equal protection clause in the effort to end discrimination against the indigent criminal defendant in the two closely interrelated areas of appellate review and bail.

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* ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA (1835–1840; trans. Henry Reeves, 1838–1840).

1. 83 U.S. 36 (1872).
2. *Id.* at 81.
3. Buck v. Bell, 274 U.S. 200, 208 (1927).
4. See, *e.g.*, notes 7, 13 and 14 *infra*.
5. Mr. Chief Justice Warren has appropriately stated:

> The quality of a nation's civilization can be largely measured by the method it uses in the enforcement of its criminal law. When those methods result in arbitrary inequality because of race, indigence or otherwise, the nation as a whole suffers as well as those who are the victims of the inequality.

Attorney General Kennedy's National Conference on Bail and Criminal Justice (1964).

The Supreme Court's various interpretations of the equal protection clause led to what was labeled as a paradox:[6] the equal protection of the laws was held to be a "pledge of the protection of equal laws,"[7] but at the same time it did ". . . not require things which [were] different in fact or opinion to be treated in law as though they were the same."[8] As a result, the Supreme Court took a middle stand and found certain legislative discrimination to be constitutionally tolerable.[9] Discrimination was constitutionally tolerable if it rested upon a reasonable classification,[10] and classification was reasonble if it was "based upon some real and substantial distinction, bearing a reasonable and just relation to the things in respect to which such classification [was] imposed," and if it was not "arbitrarily made without any substantial basis."[11] The constitutional guarantee of the equal protection of the laws thus came to be defined negatively; that is, there was no denial of equal protection of the laws if there was no invidious discrimination. If "class legislation . . . [carried] out a public purpose [and if] it affect[ed] alike all persons similarly situated,"[12] the classification was reasonable, the discrimination constitutionally tolerable, and there was no denial of equal protection of the laws.

Yet this essentially negative rule requiring reasonable classification did not answer a more fundamental question in the interpretation of the clause. Although the equal protection clause prohibited the creation of inequalities by the enactment of invidiously discriminatory legislation, how was the clause to be interpreted in relation to existing inequalities — those inequalities not created by legislation, but those inequalities intrinsic to society, such as wealth and indigence, which in and of themselves resulted in the denial to indigents of those procedures to which the non-indigent had access?[13]

This was the question before the Supreme Court when, for the first time, it decided the impact of poverty on constitutional rights arising under the fourteenth amendment in the fountainhead case of

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6. Tussman and ten Broek, *The Equal Protection of the Laws*, 37 CALIF. L. REV. 341, 344 (1949).

7. Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886).

8. Tigner v. Texas, 310 U.S. 141, 147 (1940).

9. The Court, in upholding the constitutionality of a Texas anti-trust law that made it a crime to conspire to fix the retail price of beer, but not a crime to conspire to fix the retail price of agricultural products or live stock in the hands of the producer or raiser, said: "The equality at which the 'equal protection' clause aims is not a disembodied equality. The Fourteenth Amendment enjoins 'the equal protection of the laws,' and laws are not abstract propositions." *Ibid.*

10. Southern Ry. Co. v. Greene, 216 U.S. 400 (1909); Missouri v. Lewis, 101 U.S. 22 (1879); Barbier v. Connolly, 113 U.S. 27 (1885). *Cf.* Hernandez v. Texas, 347 U.S. 475 (1954); Steward Machine Co. v. Davis, 301 U.S. 548 (1937). The Court, in *Missouri v. Lewis*, recognized that the equal protection clause contemplated

> . . . persons and classes of persons. It [had] not respect to . . . regulations that [did] not injuriously affect or discriminate between persons or classes of persons within [the area] for which such regulations [were] made. . . . It means that no person or class of persons shall be denied the same protection of the laws which is enjoyed by other persons or other classes in the same place and under like circumstances.

Missouri v. Lewis, 101 U.S. 22, 30–31 (1879).

11. Southern Ry. Co. v. Greene, 216 U.S. 400, 417 (1909).

12. Barbier v. Connolly, 113 U.S. 27, 32 (1885).

13. See note 70 *infra* and accompanying text.

Griffin v. Illinois.[14] The statute in *Griffin* differed from all others previously invalidated on equal protection grounds in that neither on its face did it invidiously discriminate, nor had it been arbitrarily applied.[15] Yet, in effect, the statute denied the class of indigent criminals from perfecting full appellate review as if it had expressly so provided. The majority of the Court, speaking through Mr. Justice Black, held that the denial to indigents in non-capital cases of the right to a free transcript, which was necessary in order to obtain full review,[16] was a denial of the equal protection of the laws because only non-indigents could buy a transcript and obtain full appellate review.[17] In opposition to the majority's holding, however, a fundamental difference in principle as to the meaning of the equal protection clause was clearly evidenced by the dissent.[18] As the dissent saw the issues, no denial of equal protection of the laws existed:

> [C]ertainly Illinois does not deny equal protection to convicted defendants when the terms of appeal are open to all, although some may not be able to avail themselves of the full appeal because of their poverty. Illinois is not bound to make the defendants economically equal before the bar of justice.[19]

Mr. Justice Harlan in his own dissent added that the majority opinion produced "the anomalous result that a constitutional admonition to the states to treat all persons equally means in this instance that Illinois

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14. 351 U.S. 12 (1956). Petitioners in *Griffin* were convicted of armed robbery. Immediately after their conviction, they filed a motion alleging indigency, asking that a stenographic transcript of the trial proceedings be furnished them without cost, since it was necessary to provide the appellate court with a bill of exceptions in order to get full appellate review, and such a bill could not be prepared without a transcript of the trial proceedings. *Id.* at 13. By Illinois law, a free transcript was provided to indigents under a death sentence, but in all other criminal cases, those defendants who needed a transcript had to purchase it themselves. The trial court denied petitioners' motion despite protests that to do so would deny them the equal protection of the laws.

15. *Cf.* Yick Wo v. Hopkins, 118 U.S. 356 (1886). The Court in holding a San Francisco ordinance invalid as denying equal protection of the laws by conferring on a supervisor the ". . . naked and arbitrary power to give or withhold consent [from the giving of an application to build and carry on a laundry business within the city limits] . . ." stated:

> Though the law itself be fair on its face and impartial in appearance . . . if it is applied and administered by public authority with an evil eye and unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution.

Id. at 373–74.

16. The Court conceded that due process did not require the state to provide appellate review at all, but went on to say:

> . . . [T]hat is not to say that a State that does grant appellate review can do so in a way that discriminates against some convicted defendants on account of their poverty. . . . [A]t all stages of the proceedings the . . . Equal Protection Clause protect[s] persons like petitioners from invidious discriminations.

351 U.S. at 18.

17. The majority decision was also based upon due process grounds. Mr. Justice Frankfurter concurred on equal protection grounds. *But see* Willcox & Bloustein, *The Griffin Case — Poverty and the Fourteenth Amendment*, 43 CORNELL L.Q. 1, 12 (1957).

18. Four Justices dissented: Burton, Harlan, Minton, and Reed. Harlan also wrote a separate dissenting opinion.

19. 351 U.S. at 28.

must give to some what it requires others to pay for."[20] He then sharpened the issue, stating:

> [T]he real issue . . . is not whether Illinois has discriminated but whether it has the duty to discriminate . . . [This] is not the typical equal protection question of the reasonableness of a "classification" on the basis of which the State has imposed legal disabilities, but rather the reasonableness of the State's failure to remove natural disabilities. The Court holds that the failure of the State to do so is constitutionally unreasonable in this case although it might not be in others.[21]

There was the rub! The majority and minority differed as to the very nature of our judicial system and the role that the Supreme Court should play in our democratic society.[22] The majority of the Court found in favor of Griffin because it felt that it was the duty of the state to provide its citizens with the practical means for securing equal justice under the Constitution. Without these means justice was sheer theory. Only if the means were provided could justice be realistically carried out. On the other hand, the minority of the Court felt that the state's duty to its citizens was fulfilled if it made justice available to them. While the majority felt that the state had an affirmative constitutional duty to overcome the effect of poverty, the minority did not.[23]

The Court had weighed the state interests concerned[24] against the seriousness of the invidious classification and had found the scales so overbalanced as to necessitate affirmative state action to restore

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20. *Id.* at 34. It was Harlan's contention that the decision amounted to an affirmative discrimination in favor of the poor by giving to the indigent free what the affluent was forced to buy.

21. *Id.* at 35–36. Harlan's reasoning stemmed from his analogy to the requirement of tuition at a state university. He contended that while exclusion of indigents per se from free state universities would deny them equal protection of the laws, the requirement of tuition fees, which would have the practical effect of excluding indigents, would not. Thus, if the imposition of payment were not an invidious classification in the case of state universities, it should not be so regarded here. But the denial of appellate review because of indigence was considered by the Court to lay on a different plane than that of indigents' attendance at state universities:

> The provision of applied justice is an essential function of the State even under the most conservative political theory. It is of the essence of citizenship that a person have access to the state's legal institutions. Without this he is without full citizenship. . . . We cannot conceive of a man as truly a citizen if he is too poor to have access to the courts, we can, however, conceive of him as truly a citizen if he is too poor to receive [an education at a State University]. [A] state which . . . provides *all* its citizens with applied justice is . . . only giving all men that which is the most basic function of government, the provision of legal process.

43 CORNELL L.Q. 1, 16 (1957).

22. See 43 CORNELL L.Q. 1, 13–17 (1957).

23. *Ibid.*

24. The state's objectives in providing free transcripts only to indigents convicted of capital offenses were two fold: (a) It saved the state much needless expense in providing stenographic transcripts to all indigents no matter how insignificant the offense for which they were convicted. (b) "[T]hat as the cost . . . of a transcript is a significant deterrent to frivolous appeals by non-indigents; and that as indigents are not subject to this self-regulating mechanism, they will impose a heavy burden upon the state unless their appeals are subject to some form of control." 113 U. PA. L. REV. 1125, 1158 (1965) (footnotes omitted).

the equilibrium.[25] However, the Court was not oblivious to the potential impact of its decision upon the federal-state relationship. Thus, the exact affirmative action demanded was left to Illinois to determine,[26] the only qualification being that it afford the indigent as "adequate and effective appellate review"[27] "as those who have money enough to buy transcripts."[28]

The *Griffin* rule was the first step in a conscious response by the Supreme Court to eliminate the invidious effect of state statutes governing criminal procedure. Since it had become a truism that "federal authority operate[d] in areas where a uniform and national standard should obtain . . . ,"[29] it appeared that the Supreme Court had declared a universal principle — the principle that discrimination, even when not affirmative, on the basis of indigence was a violation of the fourteenth amendment. Perhaps the Court was motivated by its recent application of the equal protection clause in the Negro egalitarian revolution,[30] but whatever the reason, the indigent was now equipped with a tool to aid him in his quest for equal justice.

Soon after *Griffin,* it was held that a state trial court's refusal to give indigent defendants a free trial transcript (which foreclosed appellate review) on the ground that justice would not be promoted and that no grave or prejudicial errors occurred during trial was a denial of the equal protection of the laws, since, without a preliminary ruling by the trial court, there was a right to full appellate review by all defendants who could afford the expense of a transcript.[31] The following year, the Court applied the *Griffin* rule in holding it to be a violation of the fourteenth amendment for an indigent to be foreclosed from access to the second phase of appellate review by requiring the payment of a filing fee before the state supreme court would hear an appeal.[32] In *Draper v. Washington,*[33] a state practice, which was used to screen applications by indigents for transcripts, was held to be invalid even though a transcript was not required for full appellate review, where a non-indigent could obtain a more complete appellate review with a transcript. The *Draper* Court made it clear beyond a doubt that it was now the "*duty* of the State . . . to provide the indigent as adequate and effective an appellate review as that given appellants with funds. The state [had to] provide the indigent defendant with means of presenting his contentions to the appellate court which

25. *But cf.* Hirabayshi v. United States, 320 U.S. 81 (1943); Korematsu v. United States, 323 U.S. 214 (1945) (The Court weighed racial discrimination against national security during the Second World War and held the national interest to prevail.).

26. The Court held that a stenographic transcript was not required in every case where an indigent could not buy one. A bystander's bill of exceptions could be used in some instances as well as other methods of reporting trial proceedings. 351 U.S. at 20.

27. *Cf.* Norvell v. Illinois, 373 U.S. 420 (1963) ("Exact equality is no prerequisite of equal protection of the laws within the meaning of the Fourteenth Amendment." *Id.* at 423.).

28. 351 U.S. at 19.

29. Brennan, *Some Aspects of Federalism,* 39 N.Y.U.L. REV. 945, 946 (1964).

30. See, *e.g.,* Brown v. Board of Education, 347 U.S. 483 (1954).

31. Eskridge v. Washington, 357 U.S. 214 (1958).

32. Burns v. Ohio, 360 U.S. 252 (1959).

33. 372 U.S. 487 (1963).

[were] as good as those available to a non-indigent defendant with similar contentions."[34]

The requirements that the indigent have equal access to and as adequate and effective appellate review as the non-indigent, moreover, were not limited to direct appeals by indigents from criminal convictions, but were held applicable to post-conviction proceedings as well. In *Smith v. Bennett*,[35] the Supreme Court held that a state's failure to extend the privilege of the writ of habeas corpus to indigent defendants by requiring a filing fee was violative of the equal protection clause. "Respecting the State's grant of a right to test their detention, the Fourteenth Amendment weighs the interests of rich and poor criminals in equal scale, and its hand extends as far to each."[36]

Although *Smith v. Bennett* marked the first application of the equal protection clause in the state post-conviction procedural area, the Court's sweeping language was indicative that the full weight of *Griffin* was yet to be felt. In *Lane v. Brown*,[37] a convicted murderer, sentenced to death, filed a petition for a writ of error coram nobis in his Indiana trial court. After a hearing at which the defendant Brown was represented by the Public Defender, the court denied relief. The Public Defender, finding no error or errors committed at the hearing, refused to represent Brown in perfecting an appeal to the Indiana Supreme Court. Brown's subsequent application to the trial court for appointment of counsel and free transcript in the coram nobis hearing was denied because the Public Defender, the only person under Indiana law who could request and procure a free transcript in a coram nobis hearing for an indigent, refused to do so. Brown sought habeas corpus in the federal district court, which reversed the Supreme Court of Indiana, and the court of appeals affirmed. The Supreme Court, affirming the court of appeals, held that the refusal of the Indiana Public Defender to procure a transcript, which was required for an appeal from the denial of the writ of coram nobis, was a denial of the equal protection of the laws in view of the fact that such an appeal could have been maintained by those who had funds to procure a transcript. The defect with such a procedure, the Court explained, was that it produced the anomalous result of "confer[ring] upon a state officer outside the judicial system power to take from an indigent all hope of any appeal at all."[38] As in the case of direct appeals,[39] the state's effective preclusion of indigents from appellate review of post-conviction proceedings after the state had previously provided one review on the

34. *Id.* at 496. The Court affirmed the principle announced in *Griffin* that the state need not "purchase a stenographer's transcript in every case where a defendant cannot buy it," 351 U.S. at 20, but held that the record before the Supreme Court of Washington composed solely of the hearing of the motion for a free transcript of the record was not of "sufficient completeness" as to afford the petitioners as adequate and effective a review of their claims of error as that which a non-indigent had by providing a transcript. See also Coppedge v. United States, 369 U.S. 438 (1962).

35. 365 U.S. 708 (1961).

36. *Id.* at 714.

37. 372 U.S. 477 (1963).

38. *Id.* at 485.

39. See Burns v. Ohio, 360 U.S. 252 (1959).

merits was held to be a breach of the constitutional guarantee of the equal protection of the laws.

The latest Supreme Court pronouncement in this area, *Long v. District Court of Iowa*,[40] holding that an available and easily furnished transcript must be provided to an indigent in order to enable him to perfect an appeal from an adverse hearing upon a writ of habeas corpus, makes it clear that *Griffin*, in the future, will require that a free transcript or other "adequate alternative" be provided the indigent on appeal of any post-conviction proceeding from which an appeal is fully available to the non-indigent.

The *Griffin* requirement of affirmative state action was thus made applicable to all types of state appeals. Implementation of that requirement, however, fell into an area of administrative procedure that the Court was not well fitted to handle. It involved an area which was previously left almost entirely to state regulation. It was the state which was immediately concerned with the guilt or innocence of the criminal defendant, be he indigent or affluent, and it was the state which regulated its criminal procedure in a manner most expedient to its needs.[41] Although it was recently urged that since ". . . equality demands uniformity of rules . . . [and] uniformity [of rules] cannot exist if there are multiple rule makers . . . the objective of equality can be achieved only by the elimination of authorities not subordinate to the central power . . .,"[42] the tenor of the Court's decisions evidenced a conscious effort to fit the new principle into the concept of federalism. In each case, it was left to the state to provide the necessary means for full appellate review. The state was never restricted to providing only transcripts. This occurred not only through the Court's recognition of the fact that there was a legitimate state interest involved, but also because the Court felt that the state could best deal with the attendant economic and administrative problems.

While the Supreme Court was laboring over the question of the requirement of equal protection of the laws in state cases, the same question presented itself in the federal arena. Here, however, the question was one step further removed. There was no equal protection clause in the fifth amendment. But this did not hamper the Supreme Court from effectively requiring the equal protection of the laws in federal as well as state courts.[43] The equal protection clause prohibited invidious discrimination. The fundamental fairness requirement of the fifth

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40. 385 U.S. 192 (1966).

41. See generally Schaefer, *Federal and State Criminal Procedure*, 70 HARV. L. REV. 1 (1956).

42. 78 HARV. L. REV. 143, 144 (1964).

43. See Malloy v. Hogan, 378 U.S. 1 (1964). The Court, in applying the privilege against self-incrimination to the states, declared: "It would be incongruous to have different standards determine the validity of a claim of privilege based on the same feared prosecution, depending on whether the claim was asserted in a state or federal court. Therefore, the *same standards* must determine whether an accused's silence in *either a federal or state* proceeding is justified." *Id.* at 11. (Emphasis added.) See also Hurd v. Hodge, 334 U.S. 24 (1948). The Court, after indicating that equal protion is a ". . . part of the public policy of the United States," said that it would violate this policy ". . . to permit federal courts in the Nation's capital to exercise general equitable powers to compel action denied the state courts where such action has been held to be violative of the guaranty of the equal protection of the laws." *Id.* at 35.

amendment's due process clause also dictated that once a privilege was granted, it could not be arbitrarily applied to some while withheld from others.[44] This was what Mr. Chief Justice Taft intimated when he said: ". . . the due process clause . . . tends to secure equality of law in the sense that it makes a required minimum of protection for everyone's right of life, liberty, and property, which Congress . . . may not withhold. Our whole system of law is predicated on the general, fundamental principle of equality of application of the law."[45] There was the overlap which existed between due process and equal protection through which the Court found the requirements of equal protection to be implicit in the fifth amendment. In practicality, it became the rule in the federal courts that a denial of equal protection violated the fundamental fairness required by due process.[46]

Although in federal courts appeal from a district court's judgment of conviction was a matter of right,[47] the defendant had to first provide the court of appeals with a transcript and record on appeal.[48] The affluent individual, having been able to purchase his transcript and to docket his appeal, the court of appeals proceeded to hear the appeal on the merits, if it had not already been dismissed on motion by the Government.

If a defendant could not afford to purchase a transcript and record on appeal, he could perfect his appeal only by applying for leave to appeal in forma pauperis.[49] The application, however, was subject to

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44. See, *e.g.*, Dunn v. United States, ___ F.2d ___ (1967).

45. Truax v. Corrigan, 257 U.S. 312, 332 (1921).

46. This becomes apparent when the following sequence of cases is studied. In Hirabayshi v. United States, 320 U.S. 81 (1943), Chief Justice Stone clearly implied that Congressional legislation, which classifies according to race, may be so discriminatory as to violate the due process clause of the fifth amendment. While the majority of the Court in Korematsu v. United States, 323 U.S. 214 (1944) held the national security interest to outweigh what might otherwise amount to invidious classification (classification according to race), Mr. Justice Murphy's dissent was emphatic that racial classification by Congress deprived "all those within its scope of the equal protection of the laws as guaranteed by the Fifth Amendment." *Id.* at 234–35. In United States v. Petrillo, 332 U.S. 1 (1947), the petitioners contended that a Congressional statute denied equal protection of the laws to radio broadcasters as a class and for this reason violated the due process clause. The Supreme Court reversed the district court and held that Congress had not transgressed the "limits of the power" to enact laws that did "not apply equally to all classes, groups, and persons, . . . in the provisions of the statute which are here attacked." *Id.* at 9. This opinion of Mr. Justice Black came "close to an open avowal that the due process clause embodies all of the classification requirements of the equal protection clause of the Fourteenth." 37 CALIF. L. REV. 341, 363 (1949). And in Bolling v. Sharpe, 347 U.S. 497 (1954), the Court, in holding racial segregation in the public schools of the District of Columbia to be a denial of due process, explicitly read the guarantees of equal protection into the fifth amendment's due process clause. *Contra,* Detroit Bank v. United States, 317 U.S. 329 (1943) ("[The Fifth Amendment] . . . provides no guarantee against discriminating legislation of Congress." *Id.* at 337.)

47. FED. R. CRIM. P. 37(a).

48. FED. R. CRIM. P. 39(b).

49. 28 U.S.C. § 1915 (1964):

> (a) 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. . . .
>
> An appeal may not be taken in forma pauperis if the trial court certifies in writing that it is not taken in good faith.
>
> (b) In any . . . criminal case the court may, upon the filing of a like affidavit, direct the expense of printing the record on appeal, . . . be paid by the United States. . . .

denial by the trial judge upon his certification that the appeal was not taken in "good faith," *i.e.*, when the defendant sought appellate review of frivolous issues.[50] Yet, if an indigent appealed from the district court's certification that his appeal was not taken in good faith, would he be afforded a free transcript in order to enable his counsel to establish the existence of non-frivolous issues before the court of appeals? This was the question reached in *Johnson v. United States*,[51] in which the Supreme Court held that the defendant, whose application for leave to appeal in forma pauperis had been denied by the district court, could seek identical relief from the court of appeals, which was required to assign counsel and assure the defendant of an "adequate means of presenting a fair basis for determining whether the District Court's certification was warranted,"[52] whenever the substance of the defendant's grounds for appeal could not be adequately ascertained from the face of the application. If the court of appeals was able to find the existence of non-frivolous issues, it would then grant leave to appeal in forma pauperis, and subsequently dispose of the appeal on the merits. But, the *Johnson* Court emphasized, the court of appeals could not treat the preliminary proceeding as tantamount to an appeal on the merits and decide whether or not to grant leave to appeal by appraising the entire case on terms of whether or not reversible error appeared.

To be sure, the *Johnson* decision was an adoption of the *Griffin* rule into the federal system. But the indigent in perfecting an in forma pauperis appeal remained at a distinct disadvantage as compared to the non-indigent. The *Johnson* case put the burden upon the appellant to show the trial court's certification was not warranted. However, in *Coppedge v. United States*,[53] the Supreme Court was presented with an opportunity to review its decision in *Johnson*. *Johnson* was affirmed to the extent that it was held that the indigent must be given a "record of sufficient completeness"[54] in order to enable him to demonstrate that the district court's certification of lack of good faith was in error, but, over the strong dissent of Justices Harlan and Clark, the burden

50. Ellis v. United States, 356 U.S. 674 (1958). Yet, "unless the issues raised [by the indigent seeking leave to appeal in forma pauperis were] so frivolous that the appeal would be dismissed in the case of a non-indigent litigant, . . . the request of an indigent for leave to appeal in forma pauperis must be allowed." *Id.* at 675. This seems to be consistent with the *Griffin* rule, for if an indigent is denied appellate review only when he presents frivolous issues, it could hardly be said that he was denied as "adequate and effective" appellate review as that available to non-indigents.

51. 352 U.S. 565 (1957). The indigent defendant there argued that the *Griffin* rule required that he be given a free stenographic transcript despite the trial court's certification of lack of good faith. The court of appeals refused to review the trial court's certification unless the defendant could show that the trial judge had acted in bad faith in refusing the transcript. The Supreme Court reversed. Here, as in *Griffin*, petitioner, having been denied a transcript by the trial court, was effectively cut off from appellate review when it was available to all non-indigents who could afford a transcript. Obviously, an adequate record was necessary for the defendant on appeal, since without it, the court of appeals could not determine whether or not the trial court's certification was in error.

52. *Id.* at 566; *accord*, Farley v. United States, 354 U.S. 521 (1957).

53. 369 U.S. 438 (1962). The petitioner in *Coppedge* was denied leave to appeal in forma pauperis in both the district court and court of appeals before the Supreme Court granted certiorari.

54. *Id.* at 446.

was shifted to the Government to prove the frivolity of the indigent's claim of error.[55] It was now up to the Government "in opposing an attempted criminal appeal in forma pauperis to show that the appeal [was so] lacking in merit that the Court would dismiss the case on motion of the Government had . . . [the appeal] been filed [by a non-indigent]."[56] Since it was not the practice of a court of appeals to screen paid appeals for frivolity without the benefit of hearing argument and reviewing an adequate record of the trial proceedings, the indigent could not be denied the same right by putting the burden on him to establish non-frivolity. The Supreme Court, in reaching its decision in *Coppedge,* cited *Griffin*[57] and declared that it was "impelled by considerations beyond the corners of 28 U.S.C. § 1915, considerations that it is our duty to assure to the greatest degree possible, within the statutory framework for appeals created by Congress, equal treatment for every litigant before the bar."[58] That was strong equal protection language, intended to make it clear that in the future the *Griffin* rationale would be the yardstick for measuring the application of federal statutory in forma pauperis appeals.

While the Court in *Coppedge* required a "record of sufficient completeness" concerning an indigent's pro se claim of errors to be furnished on appeal of the trial court's certification of lack of good faith, *Hardy v. United States*[59] held that the indigent was entitled to a free copy of the balance of the transcript if his appellate counsel was not the lawyer who represented him at trial. The concurrence felt that a full transcript should be given even if counsel on appeal were the same as that at trial. It concluded that the whole process of screening

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55. *Id.* at 447–48.
56. *Id.* at 448.
57. *Id.* at 447 n.13.
58. *Id.* at 446–47. The dissent of Justices Clark and Harlan evidenced a different analysis of the meaning of equal protection in federal courts. They believed that the fifth amendment prohibited "only such discriminatory legislation as amounts to a denial of due process." *Id.* at 460. Concluding that it was not fundamentally unfair to require the indigent seeking an appeal in forma pauperis to show that he was seeking review of a non-frivolous issue, the dissent stated: "[We] see no constitutional impediment to asking one who seeks a free ride to show that he is not just a joy rider." *Ibid.* This seems to be correct upon a due process analysis, but the equal protection clause, defined by *Griffin,* and as it has been read into the fifth amendment by previous decisions of the Court, required that indigents be not discriminated against as a class. Thus, the indigent's appeals could not be preliminarily screened without oral argument and without a record on appeal by placing the burden on the indigent to show non-frivolity since this was not the practice in dealing with non-indigent appeals.
59. 375 U.S. 277 (1964). Although professedly acting upon a statutory basis in arriving at its final conclusion, it was apparent that a middle link in the chain of the Court's reasoning was attached to the Constitution. As counsel on appeal for non-indigents served as an advocate, it would be a denial of equal representation and thus fundamentally unfair if counsel for indigents were held to a lesser standard. The attorney for the non-indigent with a complete transcript was able to search the entire record for errors to raise on appeal which could be noticed by the court of appeals, although they were not brought to the attention of the trial court. FED. R. CRIM. P. 52(b). For the indigent's counsel to thus properly serve in his constitutional capacity as advocate, it was necessary that he too be provided with a full transcript. The concurrence of Justices Goldberg, Warren, Brennan, and Stewart would have extended the holding to provide free full transcripts to counsel on appeal even if he were the same counsel at trial — for only then could he "discharge his full responsibility of preparing the memorandum supporting the application to proceed in forma pauperis." *Id.* at 288.

in forma pauperis appeals should be eliminated and found "no *a priori* justification . . . for considering [in forma pauperis appeals] as a class, to be more frivolous than [paid appeals]."[60]

After *Hardy,* it was apparent that given the proper case, the "record of sufficient completeness" demanded by *Coppedge* would require that a complete transcript be provided to all indigents on appeal of the trial court's certification of bad faith.[61] The concurrence's suggestion that the appellate screening for frivolity of indigent claims of error be entirely eliminated would seem to be the most expedient solution to the whole problem. At the present time there is no denial of equal protection by the trial court's certification of lack of good faith, because a full review with complete transcripts is available to the indigent with the burden upon the government to establish frivolity; thus, the federal courts are accomplishing in two steps, in the case of indigents, the result accomplished by one step in the case of non-indigents.

As it has been seen, the equal protection clause has grown from ". . . the usual last resort of constitutional argument"[62] into an effective weapon that is now being used to combat discrimination against the indigent. And as it has been shown, the *Griffin* rule, in prohibiting discrimination against indigents as a class, went so far as to require affirmative action to be taken by federal as well as state courts. The principle declared by *Griffin* resulted from the weighing of conflicting interests and from a conscious effort by the Supreme Court to attempt to place the indigent in a position of apparent equality with the non-indigent, at least in the area of ensuring complete accessibility of appellate review to the indigent. In most instances, the Court was able to fit the principle snugly into the concept of federalism by allowing the states to implement the rule by means most expedient to their own systems of criminal procedure. The *Griffin* rule, however, was only a beginning. *Griffin* limited this beginning to the area of access to appellate review. This is where the Court finds itself today. Tomorrow presents another area for the potential applicability of *Griffin:* the area of bail.

The situation in which the accused indigent has found himself in regard to his right to bail is essentially the same as that in which the indigent in the pre-*Griffin* cases found himself in regard to his right to appeal. The indigent before *Griffin* was denied access to appellate review because he did not have the funds with which to purchase a transcript. The accused or convicted indigent is now denied access to bail because he does not have the funds to secure a bond.[63]

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60. *Id.* at 295.

61. Considering the fact that the federal *Coppedge* rule of "sufficient completeness" was applied in the parallel state case of Draper v. Washington, 372 U.S. 487 (1963), the Court will probably now require at least those states, which allow its appellate courts to notice spa sponte plain or fundamental error, to furnish indigents with free complete transcripts.

62. See note 3 *supra* and accompanying text.

63. *Cf.* United States v. Rumrich, 180 F.2d 575 (2d Cir. 1950) (per curiam). The court said: "A person arrested upon a criminal charge, who cannot give bail, has no recourse, but to move for trial." *Id.* at 576.

The eighth amendment to the Constitution of the United States provides that "Excessive bail shall not be required. . . ."[64] This has been interpreted to connote a constitutional right to bail.[65] Since this is so, two immediate questions present themselves: (1) Is the setting of bail at any amount, in the case of an indigent, "excessive" per se, and therefore a violation of the eighth amendment? (2) Is the indigent denied the equal protection of the laws because he is denied pre-trial liberty solely on account of his poverty, when that liberty is freely accessible to the affluent?

Although the precise question as to whether bail is "excessive" per se if the defendant cannot meet it has never been directly decided by the Supreme Court, the Court has indicated that bail is not "excessive" when set at an amount higher than the defendant can meet, if the amount set is reasonable.[66] An amount set is reasonable if it is an amount, in the opinion of the Court, necessary to assure the accused's presence at trial.[67] This stems from the fact that a primary purpose of bail is to assure the presence of the accused at trial; bail can never be set in an attempt to keep the accused in jail.[68] Thus, in any case, if the bail set is reasonable, it is not constitutionally "excessive."

The question presented as to the applicability of the equal protection clause in the area of bail is the next question with which we must concern ourselves. The first intimation that the *Griffin* rule might apply to the financial barriers erected by the bail system came from the dissenters in *Griffin* itself. They queried: ". . . some [accused] can afford bail, some cannot. Why fix bail at any reasonable sum if a poor man can't make it?"[69] The minority in *Griffin* would have us believe that the indigent is not being discriminated against at all, that the bond is not intended to discriminate against the poor, but only to give the state some security that the accused will appear for trial. But here, as in *Griffin,* the indigent is nonetheless being denied a right available to the non-indigent.[70] The effect of this denial, moreover, results in a greater injustice in the area of bail, than it did in

64. U.S. CONST. amend. VIII.

65. Carlson v. Landon, 342 U.S. 524, 554–55 (1952) (Black and Burton, J.J., dissenting); United States v. Motlow, 10 F.2d 657 (7th Cir. 1926). *Contra,* Carlson v. Landon, 342 U.S. 524 (1952) (civil action for deportation). *Cf.* Ward v. United States, 76 S. Ct. 1063 (1956) (Frankfurter, Circuit Justice) ("The bail must be of an amount to 'ensure the presence of the defendant.' Impliedly, the likelihood that bail within tolerable limits will not insure this justifies denial of bail." *Id.* at 1066.).

66. *E.g.,* Stack v. Boyle, 342 U.S. 1 (1951).

67. *Id.* at 5.

68. Reynolds v. United States, 80 S. Ct. 30 (1959) (Douglas, Circuit Justice); Stack v. Boyle, 342 U.S. 1 (1951); United States v. Lawrence, 26 Fed. Cas. 887 (C.C.D.C. 1835).

69. Griffin v. Illinois, 351 U.S. 12, 29 (1956).

70. ". . . The first act of the magistrate is to exact security from the defendant, or, in case of refusal, to incarcerate him. . . . It is evident that such [a procedure] is hostile to the poor and favorable only to the rich. The poor man has not always a security to pledge. . . ." 1 DE TOCQUEVILLE, DEMOCRACY IN AMERICA 55–56 (Bradley ed. 1963); see Pelletier v. United States, 343 F.2d 322 (D.C. Cir. 1965). Chief Justice Bazelon dissenting said: "It is an invidious discrimination to deny appellant release because of his poverty. . . ." *Id.* at 323. See also Butler v. Crumlish, 229 F. Supp. 565 (E.D. Pa. 1964), where the court stated: "The theoretical equality of the right to bail when all are not financially equal thus has become in reality a deep and wounding social inequality, increasingly oppressive to the poor and the vagrant." *Id.* at 568; dissent of Chief Justice Bazelon in Pannell v. United States, 320 F.2d 698

Griffin. The indigent accused, who under our system of justice is presumed to be innocent, is subject to the punitive aspects of detention. The effect of remaining incarcerated will probably result in the loss of his job, of his respect in the community, and in ill feelings toward his family, even if the indigent is subsequently acquitted.[71] In addition, the accused indigent's defense is put to a serious handicap. He will not be free to help locate important witnesses. He will not have the opportunity to frequently contact his attorney. And if detention has resulted in the loss of the indigent's job, he may not be able to even retain an attorney. The indigent who is denied the right to bail will feel the effect at the most important level of criminal procedure — at the trial level, where if the accused were adequately and effectively defended, there would exist no need for appellate review at all.

The best indication to date that the *Griffin* rule might apply in the field of bail is the dictum expounded by Mr. Justice Douglas while serving as circuit justice in the cases of *Bandy v. United States*.[72] In 1960,[73] Douglas stated: "We have held that an indigent defendant is denied equal protection of the laws if he is denied an appeal on equal terms with other defendants, solely because of his indigence."[74] He then asked: "Can an indigent be denied freedom, where a wealthy man would not, because he does not happen to have enough property to pledge for his freedom?"[75] He continued: "It would be unconstitutional to fix excessive bail to assure that a defendant will not gain his freedom. . . . Yet in the case of an indigent defendant, the fixing of bail in even a modest amount may have the practical effect of denying his release."[76] In 1961,[77] Douglas reconsidered the question he posed in 1960 and said: ". . . [N]o man should be denied release because of indigence. . . . A man is entitled to release on personal recognizance . . . [unless the Government] . . . overcome[s] heavy presumptions favoring freedom."[78] Bandy's petition for certiorari, however, was denied by the Supreme Court,[79] and although it is not proper to draw

(D.C. Cir. 1963) ("[The] release [of the indigent defendant] is barred because of . . . financial condition. . . . [This is an] unconstitutional discrimination against the poor." *Id.* at 701–02).

71. See generally Rankin, *The Effect of Pretrial Detention*, 39 N.Y.U.L. REV. 641 (1964); Foote, Marble and Wooley, *Compelling Appearance in Court: Administration of Bail in Philadelphia*, 102 U. PA. L. REV. 1031 (1954).

72. 81 S. Ct. 197 (1960); 85 S. Ct. 11 (1961). For the extensive history of the *Bandy* case, see Foote, *The Coming Constitutional Crisis in Bail*, 113 U. PA. L. REV. 1125, 1154 n.274 (1965).

73. 81 S. Ct. 197, 198 (1960). Bandy, who couldn't give security for his bail set at $5,000 by the district court, petitioned for his "release on personal recognizance" under rule 46(a)(2) of the Federal Rules of Criminal Procedure, pending the disposition of his petition for certiorari in the Supreme Court.

74. *Id.* at 197.

75. *Id.* at 198.

76. *Ibid.* However, Justice Douglas denied the petition for release without prejudice and sent the case back to the district court where he felt the facts could be better explored.

77. 82 S. Ct. 11 (1961). After the district court refused to lower the $5,000 bail or release Bandy on personal recognizance, he again petitioned Douglas.

78. *Id.* at 13. But Justice Douglas again refused Bandy's application for release and held that when relief granted by a single Justice would render moot Bandy's petition for certiorari before the Supreme Court, in which he asked for review of the court of appeals' denial of reduction of bail, relief would not be granted.

79. 368 U.S. 852 (1961).

conclusions on the merits of a claim by the denial of certiorari, it seemed that the Court was just not ready to accept Douglas' dictum and extend the *Griffin* rule into the area of bail. This can possibly be partially explained by the Court's reluctance to impose too many socio-economic burdens upon state and federal courts at one time and by the need for effective means of implementing the principle to be declared.[80]

But between 1961 and today, an important pronouncement of the Supreme Court in the area of appellate review evidenced a distinct parallel between those equal protection cases and the problem posed by the indigent's right to bail. In *Lane v. Brown*,[81] the Court invalidated an Indiana statute by which the transcript required for an appeal from a denial of a writ of coram nobis could be obtained by an indigent only in the discretion of the Public Defender. The vice found by the Court in this procedure was that it ". . . confer[red] upon a state officer outside the judicial system power to take from an indigent all hope of any appeal. . . ."[82] In bail practice, the same vice is present: ". . . the professional bondsmen hold the keys to the jail in [their] pockets. . . . The bad risks, in the bondsmen's judgment, and the ones who are unable to pay the bondsmen's fee, remain in jail."[83] It would seem that a practice held to be unconstitutional in the area of appellate review should likewise be held unconstitutional in the area of bail.

Although there is a distinct scarcity of cases in this field, it is apparent that when the Court is ready to extend the principle announced in *Griffin*, the area of bail will be an enticing forerunner. When the inequities bestowed upon the indigent due to his denial of bail are placed upon today's scales of justice and weighed against the interest of the state, *i.e.*, the need to assure an accused's presence at trial, the scales, to be sure, will tip in favor of the indigent. The deterrent of serious punishment for "jumping bail,"[84] and the effectiveness

80. *But see* COMMITTEE ON RULES OF PRACTICE AND PROCEDURE OF THE JUDICIAL CONFERENCE OF THE UNITED STATES, RULES OF CRIMINAL PROCEDURE FOR THE UNITED STATES DISTRICT COURTS, Proposed Amendment 46(d) (2d Prelim. Draft 1964):

> The Commissioner or judge or justice, having regard to the considerations set forth in subdivision (c), may require one or more sureties, may authorize the acceptance of cash or bonds or notes of the United States in an amount equal to or less than the face amount of the bond, or may authorize the release of the defendant without security upon such conditions as may be prescribed to ensure his appearance. Each person admitted to bail shall have called to his attention the penalties imposed by law for willful failure to appear in accordance with the terms of the bail.

81. See note 32 *supra*.

82. 372 U.S. at 485.

83. Pannell v. United States, 320 F.2d 698, 699 (D.C. Cir. 1963) (Wright, J., concurring).

84. See, *e.g.*, 18 U.S.C. § 3146 (1964):

> Whoever, having been admitted to bail for appearance before any United States Commissioner or court of the United States, incurs a forfeiture of bail and willfully fails to surrender himself within thirty days following the date of such forfeiture, shall, if the bail was given in connection with a charge of felony or pending appeal or certiorari after conviction of any offense, be fined not more than $5,000 or imprisoned not more than five years, or both; or, if the bail was given in connection with a charge of committing a misdemeanor, or for appearance as a witness, be fined not more than $1,000 or imprisoned not more than one year or both.

of modern police practices in locating and apprehending fugitives from justice are sufficient means through which the state and federal government can be assured of the bailed defendant's presence at trial. In the words of an eminent authority in the field of criminal procedural reform:

> The words "excessive bail" [found in the eighth amendment] . . . must be given an interpretation consistent with the *Griffin* rule as forbidding any financial discrimination against the accused. Such an interpretation pierces the literal guarantee and focuses upon the fundamental interests with which the amendment is concerned: the right not to be punished before conviction and the right not to be prejudiced before trial.[85]

In conclusion, it can be said that this is only the beginning. The equal protection clause has grown in its application and it will continue to grow, slowly but surely, case by case, until the equality of treatment in criminal procedure demanded by our system of law will be secure to all.

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85. Foote, *The Coming Constitutional Crisis in Bail,* 113 U. PA. L. REV. 1125, 1180 (1965).