Cornell Law Review

Volume 43
Issue 1 *Fall 1957*

Article 1

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CORNELL
LAW QUARTERLY

VOLUME 43 FALL, 1957 NUMBER 1

THE GRIFFIN CASE—POVERTY AND THE FOURTEENTH AMENDMENT

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In *Griffin v. Illinois*,[1] the United States Supreme Court decided that an indigent man, convicted of armed robbery, was deprived of constitutional rights by a failure of the State of Illinois to provide him with a free transcript needed for an appeal.

Illinois law allows an appeal as a matter of right. In the circumstances of Griffin's case a transcript was needed for the exercise of that right. If Griffin had had money, he could have bought the transcript. If he had been sentenced to death; or if he had claimed constitutional error in his trial; or if he had claimed an error appearing on the face of the common law "mandatory record"; Illinois would have given him his transcript free. But he had no money; he was sentenced to prison, not death; and he complained of nothing but non-constitutional errors at his trial. Therefore, in the circumstances of his case, appeal was barred by poverty.

Like every affirmation of the constitutional rights of even a single member of a free people, the *Griffin* decision brings new vigor to our democracy. But this particular decision, in our opinion, does much more. It portends a major advance in the federal supervision of the administration of justice by the states of the nation, under the fourteenth amendment.[2] It promises to stand with *Powell v. Alabama*[3] (the Scottsboro cases) as a milestone in the treatment of the poor and friendless by the courts of our land. Although on its facts it involves solely a poor man's

† See Contributors' Section, Masthead, p. 66, for biographical data.

1 351 U.S. 12, rehearing denied, 351 U.S. 958 (1956). One Crenshaw was tried and convicted with Griffin; and he joined with Griffin in the legal proceedings. Since all relevant facts in Crenshaw's case were the same, we shall, for simplicity, treat the case as though one man only was involved.

2 Section 1 of this Amendment (of 1868) reads:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. [1] No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; [2] nor shall any State deprive any person of life, liberty, or property, without due process of law; [3] nor deny to any person within its jurisdiction the equal protection of the laws. (Numbering ours.)

3 287 U.S. 45 (1932).

need of a transcript for appeal, its reasoning is broad enough to apply to many other of the injustices arising from the poverty of litigants in our courts. The importance of the *Griffin* case arises from the fact that for the first time the Supreme Court has addressed itself squarely to the impact of poverty on constitutional rights under the due process and equal protection clauses of the fourteenth amendment.

THE DECISION AND THE OPINIONS

Griffin had been tried and convicted of armed robbery in the Criminal Court of Cook County, Illinois, and sentenced to a long prison term. Thereafter he moved in that court, as a poor person, for a free stenographic transcript of his trial, with which to appeal.

Illinois law provides that "writs of error in all criminal cases are writs of right and shall be issued of course."[4] But to use this right to obtain direct review for the correction of errors claimed to have occurred at a trial, a plaintiff in error must provide a stenographic transcript, which forms the basis for the bill of exceptions.[5] He must pay for such a transcript[6] unless he falls within one of three exceptions: (1) a sentence to death;[7] (2) an application for a writ of error to correct an error appearing in the common law "mandatory record" (consisting merely of indictment, arraignment, plea, verdict, and sentence);[8] or (3) an application to correct a constitutional error (federal or state) in the proceedings which resulted in his conviction.[9]

Griffin's motion for a free transcript to make an effective appeal possible was denied by the Criminal Court of Cook County without a hearing and without an opinion. Griffin then petitioned that court for the same relief under the Illinois Post-Conviction Hearing Act.[10] This statute had been added in 1949 to furnish a non-technical post-conviction procedure by which a person in prison could assert substantial denial of his rights, under the Federal or State Constitution, occurring in the proceedings which resulted in his conviction. His petition under this act was also dismissed.

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4 Ill. Rev. Stat. c. 38, § 769.1 (1955).

5 Ill. Rev. Stat. c. 110, § 101.65 (1955), Supreme Court Rule 65 (being former Ill. Rev. Stat. § 259.70A, Rule 70A (1955), with minor changes not here material.)

6 Ill. Rev. Stat. c. 37, § 163b (1955).

7 Ill. Rev. Stat. c. 38, § 769a (1955).

8 See 351 U.S. 12, 13, n.2, citing People v. Loftus, 400 Ill. 432, 81 N.E.2d 495 (1948) and other authorities. The writ of certiorari pending in the Loftus case was dismissed after the Illinois decision. 337 U.S. 935 (1949).

9 Post-Conviction Hearing Act of 1949, Ill. Rev. Stat. c. 38, §§ 826-32 (1955). A free transcript is authorized in any case arising under this act, if the presiding judge finds the prisoner's petition sufficient to require an answer, and if the state's attorney or the court so instructs the court reporter; or if a petition for writ of error is filed (a procedure which the act authorized). Ill. Rev. Stat. c. 37, § 163f and c. 38, § 832 (1955).

10 See note 9 supra.

Griffin's next move was to file a petition for a writ of error in the Supreme Court of Illinois. He thereby sought review of the dismissal by the lower court of his petition under the Post-Conviction Hearing Act.[11] This petition was denied by the Illinois Supreme Court, with a simple recital that it presented "no substantial constitutional question . . . ." None of the facts alleged were denied by Illinois.[12] Upon application, the United States Supreme Court granted certiorari,[13] and appointed as counsel for the petitioner Mr. Charles A. Horsky.[14]

By its decision in *Griffin v. Illinois*, the United States Supreme Court vacated the judgment of the Supreme Court of Illinois and remanded the case with instructions to accord Griffin some adequate means of appeal, by giving him a free transcript or otherwise.[15] This decision was simple, but the Justices' opinions were not. The five Justices who made up the majority did not completely agree in theory. Four joined in the opinion of Justice Black. Justice Frankfurter, in a separate opinion, concurred in the result and in much of the reasoning, though with some elaboration and with two important differences which we shall need to mention. The four dissenters were also divided: Justices Burton and Minton produced a short dissenting opinion in which Justices Reed and Harlan joined. But Harlan also dissented in a longer opinion which elaborated the reasons of the others and added one ground peculiar to himself.

Prior Federal Decisions on Poverty and the Fourteenth Amendment

All four opinions in *Griffin* treat poverty as the central theme of the case.[16] The issue may be put thus: Is it a deprivation of an individual's

[11] The last section of that act, Ill. Rev. Stat. c. 38, § 832 (1955) authorizes such review of any final judgment under that act.

[12] 351 U.S. at 13.

[13] 349 U.S. 937 (1955).

[14] 349 U.S. 949 (1955). Mr. Horsky is a distinguished member of the District of Columbia Bar who has handled many important civil liberties cases. No discussion of the Griffin case would be complete without a tribute to the magnificent brief of Messrs. Horsky, Schafer and Wofford. It is outstanding in respect to its legal and factual research as well as its presentation.

[15] 351 U.S. at 20. The Supreme Court of Illinois thereupon vacated its own judgment of affirmance, i.e., its denial of Griffin's petition for writ of error under the Post-Conviction Hearing Act, and remanded the case to the Criminal Court of Cook County, with directions to vacate its judgment in the proceedings thereunder. But the judgment of conviction was not to be disturbed. Instead, the trial court was told to order the court reporter to transcribe his notes and deliver a copy of the transcript without charge, so that Griffin could proceed with his appeal (presumably by writ of error from the judgment of conviction).

At the same time the Supreme Court of Illinois discussed amendments to its rules made so as to order the furnishing, upon a showing of indigence, of a transcript at the state's expense to any person sentenced to prison after April 23, 1956 (the date of the United States Supreme Court's decision in Griffin); and also to any person so sentenced before that date who should apply before March 1, 1957. People v. Griffin, 9 Ill. 2d 164, 137 N.E.2d 485 (1956). Ill. Rev. Stat. c. 110, § 101.65-1 (Supreme Court Rule 65-1) (1956).

[16] This does not overlook the fact that Harlan's dissenting opinion urged that the issue ought to have been avoided. 351 U.S. at 29-34.

fundamental constitutional rights to so administer justice as to condition the assertion of basic legal rights on the ability to pay?

There is an astonishing want of authority on this question, a question whose answer one familiar with our theory of government but not with our case law might expect, to find at the very core of our system of law. Ours is a nation dedicated to the proposition that all men are created equal. This is not the jejune proposition that they are equal in ability, but rather the proposition that they are equal in their claims that the states and nation exist for each of them and for his welfare, not he for any state or nation. Our Bill of Rights and fourteenth amendment may be read in the light of this dedication. They dictate that a man need not be nobleman, courtier, official, or Croesus, to get a "square deal" from any government. Neither race nor creed nor sex nor low estate should bar an American from the enjoyment of constitutional privileges, immunities, due process, and equal protection of the laws.

If these be our principles, a mere lack of money should never be a reason for the Law to treat any man differently or unfairly. Since millions of people[17] lack sufficient money for their everyday needs, one might expect the law books to be filled with decisions concerning the constitutional effects of poverty. In fact, the opposite is true. Among the thousands of cases dealing with constitutional rights, there seem to be only a handful which touch this subject even tangentially. In the digests and the indexes dealing with the fourteenth amendment there is no topic nor heading such as "poverty." There are headings for "due process," "equal protection" and "privileges and immunities," and many subheads like "race," "creed," and "sex." But nothing for that "poverty" which must in fact be the most ubiquitous of all the grounds of deprivation and discrimination.

Early legal thinking equated poverty with viciousness. This made it hardly a basis for a claim of constitutional right. Such an attitude, perhaps derived from the medieval poor laws, was expressed in 1837 in an opinion of the United States Supreme Court in *City of New York v.*

[17] The tragic sweep of penury in a wealthy nation should need no documentation. But a handful of figures may serve to make it vivid:

One family out of every five, or about eight million families, had incomes in 1954 of $2,000 or less; one out of every eleven, of $1,000 or less. About two-thirds of the low-income families are non-farm families. The heads of a majority of the low-income families are employed wage-earners. About 4,800,000 persons live alone and have less than $1,000 of income a year.

These national data are borrowed from a Message of the Governor [of the State of New York] Attacking the Problems of Low Incomes. Legislative Document No. 15 (1956). They are based on Census Bureau studies.

Miln,[18] which referred to "the moral pestilence of paupers" against which a port was free to protect itself. This phrase was explicitly repudiated, however, by the same Court in *Edwards v. California*[19] a century later. Justice Byrnes, for a majority of five, held that an old California statute making it a misdemeanor to assist the entry into that state of a known indigent violated the commerce clause. The Court said that whatever was the prevailing notion in 1837, "we do not think that it will be now seriously contended that because a person is without employment and without funds he constitutes a 'moral pestilence.' Poverty and immorality are not synonymous."[20]

Justice Douglas' concurring opinion, joined in by Justices Black and Murphy, said that, whether human migrations were commerce or not, the right to migrate was one springing from national citizenship and so was protected by the privileges and immunities clause of the fourteenth amendment. To hold otherwise, he said,[21] would

> introduce a caste system utterly incompatible with the spirit of our system of government. It would permit those who were stigmatized by a State as indigents, paupers, or vagabonds to be relegated to an inferior class of citizenship. It would prevent a citizen because he was poor from seeking new horizons in other States.

But it was Justice Jackson, in a separate concurring opinion, who spoke most forcefully to the constitutional problem of poverty. Turning away from the commerce clause, he relied entirely upon the rights of national citizenship; and upon the hopes held out by the fourteenth amendment and the remnants of those hopes still left after judicial erosion. About poverty he said:[22]

> Does "indigence" as defined by the application of the California statute constitute a basis for restricting the freedom of a citizen, as crime or contagion warrants its restriction? We should say now, and in no uncertain terms, that a man's mere property status, without more, cannot be used by a state to test, qualify, or limit his rights as a citizen of the United States. "Indigence" in itself is *neither a source of rights nor a basis for denying them. The mere state of being without funds is a neutral fact—constitutionally an irrelevance,* like race, creed, or color. I agree with what I understand to be the holding of the Court that cases which may indicate the contrary are overruled . . . . (Emphasis added.)
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> I think California had no right to make the condition of Duncan's [the migrant's] purse, with no evidence of any violation by him of any law or social policy which caused it, the basis of excluding him or of punishing one who extended him aid.

[18] 11 Pet. 102, 142 (1837). This decision was probably overruled by Henderson v. City of New York, 92 U.S. 259 (1875).
[19] 314 U.S. 160, 177 (1941).
[20] Ibid.
[21] Id. at 181.
[22] Id. at 184-85.

Thus Jackson emphasized the constitutional impact in *Edwards v. California,* of poverty standing alone, unmixed with other elements such as illiteracy, stupidity, or membership in an oppressed minority, which often go with it.

A similar approach to the legal relevance of poverty is to be found in *Boykin v. Huff.* Although the case was decided on other grounds, Justice Rutledge, then Associate Justice of the Court of Appeals for the District of Columbia, writing for a unanimous court, said:[23]

> When the life or the liberty of the citizen is at stake on a serious criminal charge, and appeals are given as a matter of right to those who are able to pay for them, it may be doubted (though as to this we express no opinion) whether they can be withheld from indigent persons solely on the ground of their poverty or otherwise than so as to give them substantially equal protection with more fortunate citizens. The right of appeal, though statutory, is not insubstantial, and its statutory origin does not make it a matter of such small consequence that it may be given or withheld arbitrarily. (Footnote omitted.)

Only one other line of authority, so far as we can find, is directly relevant to the constitutional effect of poverty, per se. This consists of cases on the question whether, in a federal habeas corpus proceeding, the objection that all state remedies have not been exhausted as required for this proceeding, can be met by showing that the prisoner had no money with which to pursue them. This may, at first, look like a purely procedural question. But when it is remembered that federal habeas corpus is often the last opportunity to vindicate fundamental constitutional rights, and that it exists largely for that purpose, it seems clear that to deny this remedy because poverty prevents meeting one of its requirements, is to deprive a poor man of the right itself *because he is poor.*

In *Markuson v. Boucher,*[24] a petitioner asking a federal district court for habeas corpus had alleged[25] that he could not afford to prosecute a writ of error from the state court to the United States Supreme Court.[26] The writ had issued; but, after a hearing, had been discharged. The Court, by Justice McKenna, unanimously affirmed the discharge, but without discussing petitioner's poverty.

A quarter century later, in 1925, in spite of the fact that the Court had made no specific reference to poverty, this case was cited as au-

[23] 121 F.2d 865, 872 (1941).
[24] 175 U.S. 184 (1899).
[25] Id. at 185.
[26] Treated at that time as the final step in state remedies which had to be exhausted. For a history of the oscillations of this rule, see Justice Reed's opinion in Darr v. Burford, 339 U.S. 200, 204-14 (1950).

thority for a Supreme Court dictum that lack of means, even if proved, would be no reason for relaxing the requirement of exhaustion of state remedies. This dictum appeared in a unanimous opinion by Justice Sutherland in *United States ex rel. Kennedy v. Tyler*.[27]

The lower federal courts have sometimes interpreted these two Supreme Court cases as compelling the harsh rule that a man too poor to pursue his state remedies fails, for that reason, to be eligible for federal habeas corpus. In Kentucky, for example, in 1941 two cases held that lack of funds, or any other personal reason for not taking full advantage of the state's judicial machinery, did not excuse the prisoner from so doing.[28] Eight years later the second circuit took the same position in a per curiam opinion in *United States ex rel. Rheim v. Foster*,[29] relying on the United States Supreme Court decision in *United States ex rel. Kennedy v. Tyler*.

The next year in *Willis v. Utecht*[30] the eighth circuit agreed, on the then recently enacted section 2254 of the Judicial Code.[31] The United States District Court for the Northern District of California, in a 1956 case, appears to be the court which has most recently adopted this harsh view.[32]

But more liberal voices seem now to prevail. These began by relying on little authority but much common sense. As early as 1944, in *Potter v. Dowd*[33] the seventh circuit held (by a divided court and over a strong dissent) that a poor person with little education, who was unable to hire counsel or to pay for a record for his state appeal, was eligible for federal habeas corpus.

The sixth circuit, the very court which had affirmed the Kentucky

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[27] 269 U.S. 13, 19 (1925).

[28] Ex parte Sharpe, 36 F. Supp. 386, 388 (W.D. Ky. 1941) and Ex parte Stonefield, 36 F. Supp. 453, 456-57 (W.D. Ky. 1941). In each opinion Judge Miller relied upon the two United States Supreme Court cases mentioned in the text; and also cited three circuit court of appeals decisions. The only one of the three containing any mention of poverty is Ex parte Novotny, 88 F.2d 72 (7th Cir. 1937) which does not appear to turn on that point. Judge Miller's decisions were affirmed by the sixth circuit: Sharpe, at 121 F.2d 448 (1941); and Stonefield, at 124 F.2d 23 (1941). For the subsequent history of the Sharpe litigation, through many phases but ones which did not directly involve the point of poverty, see 135 F.2d 974 (6th Cir. 1943) and 142 F.2d 213 (6th Cir. 1944).

[29] 175 F.2d 772 (2d Cir. 1949). The case was before Swan and Chase, Circuit Judges, and J. Joseph Smith, District Judge. A motion for leave to file a petition for writ of certiorari was denied, 338 U.S. 857, rehearing denied, 338 U.S. 888 (1949).

[30] 185 F.2d 210 (8th Cir. 1950), cert. denied, 340 U.S. 915 (1951).

[31] 62 Stat. 967 (1948), 28 U.S.C. § 2254 (1952). The Revisers' Note states that this new section was intended to codify existing law. Its second paragraph says, "an applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise by any available procedure, the question presented." Willis v. Utecht was followed, though with evident reluctance, in Kubus v. Swenson, 120 F. Supp. 379, 380-81 (D. Minn. 1954).

[32] Application of Meek, 138 F. Supp. 327 (N.D. Cal. 1956).

[33] 146 F.2d 244 (7th Cir. 1944).

District Court decisions ten years earlier, agreed with the seventh by 1951, when in *Dolan v. Alvis,* it said[34] in a per curiam opinion,

> If a prisoner is without funds or unable to obtain them, and may not present his case on appeal to a state court or file a petition for a writ of habeas corpus without prepayment of fees that he is unable to make, he would not be precluded from filing a petition for a writ of habeas corpus in a federal court on the ground that he has not exhausted his remedies in the state courts, for in such a case, he must be held to have exhausted such remedies.

Later in 1951 a suggestion of the liberal view appeared in an opinion of the United States Supreme Court in *Jennings v. Illinois.*[34a]

In 1953 the second circuit, in *United States ex rel. Martin v. Walker,*[35] without mentioning its earlier *Rheim* opinion, affirmed per curiam a Connecticut district court's decision below, and adopted its opinion. The opinion thus adopted by the second circuit has a strangely ambivalent effect on our question. The district court had accepted jurisdiction after the Connecticut Supreme Court of Errors had refused to entertain an appeal from petitioner's conviction, because of the lack of a printed record which he could not afford. Thus the district court found poverty a sufficient ground to excuse failure to exhaust Connecticut remedies. Nevertheless it found the same circumstances an insufficient ground for the prisoner's claim of deprivation of constitutional right. (The *Griffin* case had not yet been decided; and the district court's opinion on this point reads like the dissenting opinions in *Griffin.*)

Whatever the true significance of the *Martin* case, the second circuit has in one case seemed to swing completely into line with the recent majority trend, relying in part on *Martin* for doing so. In *United States ex rel. Embree v. Cummings,*[36] Judge Lumbard, for a unanimous court, said:

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[34] 186 F.2d 586, 587 (6th Cir. 1951). Here (as in United States ex rel. Rheim v. Foster holding the opposite, see note 29 supra) certiorari was denied, 342 U.S. 906 (1952). Dolan v. Alvis was followed in the Sixth Circuit by Rhea v. Edwards, 136 F. Supp. 671, 676 (M.D. Tenn. 1955), aff'd, 238 F.2d 850 (6th Cir. 1956) for the reasons stated in the opinion in the court below.

[34a] 342 U.S. 104, 109-11 (1951).

[35] 203 F.2d 563 (2d Cir. 1953), affirming 111 F. Supp. 455 (D. Conn. 1952) on the lower court's opinion and the authority of Brown v. Allen, 344 U.S. 443 (1953); Darr v. Burford, 339 U.S. 200 (1950); and Connecticut v. Reddick, 139 Conn. 398, 94 A.2d 613 (1953). The court consisted of Circuit Judges A. Hand, Chase and Clark. The cases cited fall short of making clear the points on which the second circuit intended to differ with the Connecticut district judge or to supplement his opinion.

[36] 233 F.2d 188, 189 (2d Cir. 1956). The court was composed of Circuit Judges Lumbard, Medina and Waterman, none of whom had sat in the Martin case; see note 35 supra. On the same day on which the Cummings case was decided, similar decisions were made by the same court in United States ex rel. St. John v. Cummings, 233 F.2d 187 (2d Cir. 1956) and United States ex rel. Rhyce v. Cummings, 233 F.2d 190 (2d Cir. 1956). The first sentence of this quotation from Judge Lumbard's opinion was quoted with approval in Matter of Sears, 152 F. Supp. 55, 58 (S.D. Cal. 1957), although on the facts habeas corpus was denied.

> Where the only state remedies are inaccessible to a prisoner because of his poverty, his failure to pursue those remedies does not bar him from applying to the federal courts for relief. The Supreme Court suggested as much in Jennings v. State of Illinois, 1951, 342 U.S. 104, 109-11 . . . . where it pointed out that federal habeas corpus may be available where the petitioner is barred from appealing his conviction by his inability to pay the costs required by state law. And we have so held in United States ex rel. Martin v. Walker, 2 Cir., 1953, 203 F.2d 563, affirming D.C.D. Conn. 1952, 111 F. Supp. 455. Courts in other circuits have similarly held that if state remedies are not available to an indigent prisoner he may proceed in the federal court. Robbins v. Green, 1 Cir., 1954, 218 F.2d 192; Dolan v. Alvis, 6 Cir., 1951, 186 F.2d 586, certiorari denied 1952, 342 U.S. 906 . . . . Contra: Willis v. Utecht, 8 Cir., 1950, 185 F.2d 210, certiorari denied 1951, 340 U.S. 915 . . . .

But more recent decisions make it doubtful how far this court has really gone.[37]

As indicated by Judge Lumbard, above, the first circuit had also reached the same position two years earlier, in *Robbins v. Green*.[37a]

Thus the first, sixth, and seventh circuits agree; the second is doubtful; the eighth is opposed. But it is to be noted that all these decisions are couched in terms of the requirements for federal habeas corpus to interfere in state proceedings, and not in terms of the constitutional law of the fourteenth amendment.

The Constitutional Doctrine and Rule of the Griffin Decision

The *Griffin* opinions announce constitutional policy on a question which the Supreme Court has never squarely faced before. They say clearly, and for the first time, that a state may not condition a person's assertion of basic legal rights on financial ability.

We are fortunate to have had such an important issue faced so decisively. This good fortune springs both from the "clean" character of the record on appeal and from the plain speaking of the majority and minority opinions.

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[37] United States ex rel. Jordan v. Martin, 238 F.2d 623 (2d Cir. 1956), a per curiam decision in which Judge Lumbard himself participated, explicitly denied that the Rheim case had been overruled by a "group of recent cases . . . still before this court undecided." The reference is bewildering, since the Embree group of cases which seemed to overrule Rheim seemed to have been completely decided six months before. We know of no other cases which could have overruled Rheim. See United States ex rel. Kozicky v. Fay, 148 F. Supp. 479 (S.D.N.Y. 1957). Possibly the Jordan decision was influenced by the facts that a New York prisoner was involved and that in New York appeals in forma pauperis exist; whereas in Connecticut, from which the Embree cases came, no such procedure exists. People ex rel. Milo v. Jackson, 148 F. Supp. 757 (N.D.N.Y. 1957). Both these recent district court cases followed Rheim and Jordan and, like them, were also cases coming from New York. If this should be the difference between Embree and Rheim it suggests a similarity between the group of cases from New York and the federal-convict Johnson case to be discussed below, pp. 21-22.

[37a] 218 F.2d 192, 195-96 (1st Cir. 1954).

The record presented the issue of poverty in complete isolation, as if in the test tube of a chemical laboratory. It was uncontaminated by such factors as the ignorance or illiteracy of the man or the hostility of the crowd; factors which have accompanied poverty in so many cases, the Scottsboro cases[38] for example. Griffin might have been the popular idol of the crowd; he might have been a learned doctor of jurisprudence; it would not have mattered. All that mattered was his lack of money.

In deciding that Griffin must have his appeal, therefore, on the clear and simple record before it, the Court had to lay down the clear and simple, but momentous, rule that poverty alone cannot bar the right to appeal from a conviction for a serious crime.

The Reasoning of the Court

The four Justices for whom Black spoke thought that Illinois had denied both due process and equal protection. The four dissenters thought that it had denied neither. Frankfurter's concurring opinion, which of course was crucial, said that Illinois had denied equal protection. He may have meant that, by denying equal protection in this kind of case, it had denied due process as well. We think he did. But others doubt or disagree;[39] and there is room for such doubt.

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38 Powell v. Alabama, 287 U.S. 45, 50-52 (1932).

39 Justice Walter V. Schaefer of the Supreme Court of Illinois, writing for his court in People v. Griffin on its remand, said that Illinois had erred in believing that no federal constitutional question was involved. He said that equal protection had been violated and perhaps due process. 9 Ill. 2d 164, 137 N.E.2d 485 (1956). But Judge Schaefer thinks that cases of this sort are more correctly classed as equal-protection cases than as due-process cases. He said in "Federalism and State Criminal Procedure," 70 Harv. L. Rev. 1, 10 (1956) that the United States Supreme Court had based its decision of the Griffin case "largely, if not entirely, upon the equal protection clause." In Betts v. Brady, 316 U.S. 455 (1942), the Supreme Court had said that due process did not command a state to furnish counsel to indigent defendants in all non-capital cases, but only in cases of hardship. Justice Roberts, writing therein for the court had distinguished earlier cases on the ground that in them state statutes had required the appointment of counsel. "As a basis of distinction under the due process clause," Judge Schaefer remarked, "the reference to state statutes is mysterious. It has meaning, it seems to me, only in terms of equal protection of the law."

Professor Charles Fairman agrees that the basis of Frankfurter's Griffin opinion is equal protection. In the same number of the Harvard Law Review as that in which Judge Schaefer's article appears, in "The Supreme Court 1955 Term" he said (at p. 126) "Mr. Justice Frankfurter, . . . agreed only that the equal protection clause was violated." He repeated this opinion (at p. 128), saying that Frankfurter and the four dissenters agreed that there was no violation of due process. He spoke with approval of this opinion, although he noted that it "overlooks the doctrine that a state may not attach arbitrary conditions to the grant of a privilege."

Most law review commentators consider that the Griffin decision was based both on due process and on equal protection. 34 Texas L. Rev. 1083 (1956); 17 Ohio St. L.J. 553 (1956); 30 Temp. L.Q. 61 (1956); 10 Vand. L. Rev. 141 (1956); 55 Mich. L. Rev. 413 (1957).

Mr. Justice McCarthy, in People v. Jackson, 2 Misc. 2d 521, 152 N.Y.S.2d 893 (Herkimer County Ct. 1956), in holding that the Griffin Case required the county to pay for a transcript, put its holding on both due process and equal protection without distinction. This decision was disapproved in People v. Brown, — App. Div. —, 158 N.Y.S.2d 1003 (4th Dep't 1957).

Black said that,

> our own constitutional guaranties of due process and equal protection both call for procedures in criminal trials which allow no invidious discriminations between persons and different groups of persons. Both equal protection and due process emphasize the central aim of our entire judicial system—all people charged with crime must, so far as the law is concerned, "stand on an equality before the bar of justice in every American court."[39a]

He drove this home with the illustrative point that to require the payment of court costs before allowing a not guilty plea, or before allowing a defense, would be patently unconstitutional.

Thus four Justices considered equality of treatment and the absence of arbitrary discrimination to be a part of due process as surely as a part of equal protection. If there could be doubt of this, Black's next point would dispel it. He conceded—perhaps too readily—that appellate review of criminal convictions is not one of the minimum guaranties of decency exacted by due process.[40] Discrimination is a part of denial of due process, just as it is a part of denial of equal protection. Denial to all equally of a privilege which due process does not in absolute terms exact, may come to violate due process if the denial is arbitrarily applied to some persons but not to others.[41] And yet arbitrary discrimination is the traditional way of violating the equal protection clause. Thus, the two concepts overlap.[42]

This point reached, we may now suggest that Frankfurter's concurring opinion did not really differ on the theory of decision. He started his opinion by agreeing, most emphatically, with Black that due process does

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39a 351 U.S. 12, 17 (1956).

40 He cites McKane v. Durston, 153 U.S. 684, 687-88 (1894), decided soon after the first procedures for review of criminal cases had been established in our federal courts, and only five years after such review was authorized there for serious crimes. See United States v. Sanges, 144 U.S. 310, 319-22 (1892); 70 Harv. L. Rev. 1, 2 (1956). We suggest that McKane v. Durston might be decided differently today. In the same opinion in which Black asserts that appeal is no part of due process, he cites a note in 42 Harv. L. Rev. 566 (1929) to show that a substantial proportion of criminal convictions are reversed on appeal. 351 U.S. 12, 18-19 n.14. He levels the argument at the unfairness and inequality of denying review to the poor. He seems to ignore its showing of the fundamental unfairness of denying review to all—rich and poor alike. We submit that Frankfurter makes a similar mistake, 351 U.S. 12, 20-21, in taking a categorical position that due process, while the "least frozen concept of our law," has yet not thawed enough to feel the fundamental, shocking unfairness which would result today from a complete denial of review of criminal judgments.

41 Wieman v. Updegraff, 344 U.S. 183 (1952). See Cole v. Arkansas, 333 U.S. 196, 201-02 (1948); Frank v. Mangum, 237 U.S. 309, 327 (1915). The United States Supreme Court has said ". . . the concepts of equal protection and due process, both stemming from our American ideal of fairness, are not mutually exclusive. The 'equal protection of the law' is a more explicit safeguard of prohibited unfairness than 'due process of law,' and therefore, we do not imply that the two are always interchangeable phrases. But, as this Court has recognized, discrimination may be so unjustifiable as to be violative of due process . . . ." Bolling v. Sharpe, 347 U.S. 497, 499 (1954) (Warren, Ch. J. for a unanimous Court).

42 See Wilson, "The Merging Concepts of Liberty and Equality," 12 Wash. & Lee L. Rev. 182 (1954).

not exact any right to appeal from a conviction for crime.[43] Nor is equal protection violated, he continued, by classification per se. Nothing prohibits a classification which allows appeals from death sentences but not from lesser sentences. If Illinois allowed no appeal either to the pauper or to the millionaire, unless sentenced to death, there would be no violation of equal protection or due process. Not of equal protection, because this classification is reasonable; not of due process, as we have seen, because no appeal at all need be allowed.

Then came a passage which, in the light of this introduction, seems to us to show that Frankfurter, not less than the other four Justices who decided the *Griffin* case with him, thought that Illinois had violated due process as well as equal protection:

> But neither the fact that a State may deny the right of appeal altogether nor the right of a State to make an appropriate classification, based on differences in crimes and their punishment, nor the right of a State to lay down conditions it deems appropriate for criminal appeals, sanctions differentiations by a State that have no relation to a rational policy of criminal appeal or authorizes the imposition of conditions that offend the deepest presuppositions of our society. Surely it would not need argument to conclude that a State could not, within its wide scope of discretion in these matters, allow an appeal for persons convicted of crimes punishable by imprisonment of a year or more, only on payment of a fee of $500.[44]

It will be noted that this passage included a statement that: ". . . the fact that a State may deny the right of appeal altogether . . . [does not authorize] the imposition of conditions that offend the deepest presuppositions of our society." This is the language of due process, which Frankfurter wisely rolls together, inextricably, with language of equal protection. We submit that Frankfurter's view is not in disagreement with Black's—that it is only an elaboration of it.

It is true, of course, that Frankfurter was thinking in terms which emphasized the equal protection facet of the rights at bar. He closed this part of his argument, in fact, with words which showed this; he said that Illinois may find effective means within the existing resources of its law "of according to petitioners effective satisfaction of this constitutional right not to be denied the equal protection of the laws."[45] And in 1951, in *Jennings v. Illinois*,[46] Frankfurter had remarked in a dissenting opinion that refusal of a stenographic transcript might raise a question under "the Fourteenth Amendment, and more particularly of its Equal Protection clause."[47]

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43 351 U.S. at 20-21.
44 Id. at 21-22.
45 Id. at 25.
46 342 U.S. 104 (1951).
47 Id. at 114.

The issue is one of logomachy.

We have indulged, nevertheless, in this textual consideration of Frankfurter's views because it is a matter of great moment whether he reads the due process clause more narrowly than do the rest of the majority.[48]

DISSENT

The objections to the holding were impressive. They persuaded four Justices, and there is no clear legal demonstration which can show why they did not prevail. One or more may prevail in the future, though it may be hoped that this will be in cases dealing with less fundamental liberties. The key to the *Griffin* decision is not in the reasons voiced. It was in the conviction felt, by five of nine, that it was an indecency, in a nation of free people, to bar a poverty stricken man from a chance to show that his government had convicted the innocent. The dissenters' reasons must be looked at, realistically, not as bad reasons but as reasons not good enough to prevail.

Justices Burton and Minton, on behalf of all four dissenters, argued, first, that as giving no appeal would admittedly be due process, giving appeals on differing terms can hardly deny due process.[49] To prescribe special privileges for a defendant charged with a capital offense is traditional and reasonable, and does not violate equal protection. In this, Burton and Minton attacked a straw man; for the majority do not deny it.[50]

But the dissenters came to grips with the real issue when they said:

> . . . certainly Illinois does not deny equal protection to convicted defendants when the terms of the 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 its bar of justice.[51]

Justice Harlan concurred with the Burton-Minton opinion, but added three points. The first complained of the failure of the record to present with sufficient clarity and definiteness the broad constitutional question decided.[52]

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48 For an example of an opinion which raises the legal consequences of the question whether Griffin involved equal protection as well as due process see District Judge Chesnut in United States v. Sanders, 142 F. Supp. 638, 645 (D. Md. 1956).

49 351 U.S. at 27. See id. at 19 and Black's n.16 for his answer and an eloquent quotation from Jeffries v. State, 9 Okla. Crim. 573, 576, 132 Pac. 823, 825 (1913).

50 Id. at 27-28. The majority placed no reliance upon the special provisions by Illinois for poor persons sentenced to death. Black ignored it. Frankfurter mentioned it, id. at 21, but merely as a case in which, as Burton and Minton say, differentiation is proper.

51 Id. at 28.

52 Justice Harlan would have remanded to the Illinois courts so as to learn the precise nature of the claim before deciding. The record showed simply that Griffin needed a transcript. Harlan was left in doubt whether this need was a matter of law or a matter of fact. If of law, the claim was in error because of the possibility, recognized by Illinois

Secondly, Harlan dealt with equal protection. He elaborated upon the ideas expressed in the sentences we have quoted from the Burton-Minton opinion. He added that the majority would hold Illinois constitutionally required to discriminate affirmatively in favor of the poor by giving them free what it makes the affluent buy. Elsewhere, the charging of a fee for a privilege is not a constitutional wrong. Tuition charges are allowed at a state university, although excluding "indigents" by name would not be.

If in felony cases, what of misdemeanors? If in criminal cases, what of civil cases? The gravity of the consequences, Harlan concluded, can not be the test in an equal protection case. Either the classification is reasonable or it is not. But the majority turns to a novel question: the reasonableness of Illinois' failure to remove natural difficulties. This, however, is the language of due process; it is a consideration out of place in equal protection.[53]

Coming at last to due process, Harlan urged that Illinois had acted beyond the call of constitutional duty. Illinois had given review 130 years ago; it had given official court reporters seventy years ago; thirty years ago it had given free transcripts to paupers sentenced to death; and four years ago, to all paupers claiming constitutional errors in their convictions. If it had never set out upon this road, the majority of the Court could find nothing unconstitutional in its course. How could this long road of progress lead to a denial of due process of law?

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cases, of using a narrative or "bystander's bill" of exceptions. If of fact, nothing is alleged but poverty; and before deciding, the Court should know "the circumstances underlying the conclusory allegation of 'need.'" The Court ought not to take judicial notice, as it apparently does, of the inadequacy of methods of appeal alternative to that based on a transcript. The decision is too important; it will affect the law of at least nineteen states which do not provide free transcripts in these cases; it will create "a host of problems." But Harlan noted that he alone took this view. 351 U.S. at 29-33. The other eight justices were influenced, as indicated by Black's opinion, by the fact that counsel for Illinois had said, in oral argument, "There isn't any way that an Illinois convicted person in a non-capital case can obtain a bill of exceptions without paying for it." Id. at 13-14 n.4; see also nn.2, 3. Frankfurter remarked that ". . . it would savor of disrespect to the Supreme Court of Illinois for us to find an implication in its unqualified rejection of the claims of the petitioners that an effective review other than by bill of exceptions [which they could not afford] could be had in the present situation." Id. at 25; see also 22, 24-25. Study of the briefs and record in the Griffin case suggests another question which the dissenters might have raised, but did not: might not the order of the Supreme Court of Illinois, finding no constitutional question involved in the writ of error, have meant that it found no constitutional question raised by "the proceedings which resulted in [Griffin's] conviction" within the meaning of those words of the Illinois Post-Conviction Hearing Act? If so, the decision was on a point of state law, so that no federal question was involved; in that case some other method of raising Griffin's constitutional claim would have had to be devised. See Jennings v. Illinois, 342 U.S. 104, 111-12, 115-16 (1951); Young v. Ragen, 337 U.S. 235, 236-37 (1949). But no one raised this difficulty, not even the Supreme Court of Illinois after remand. Perhaps no one had quite the heart to suggest that after the many failures by Illinois to provide required protection for federal constitutional rights, there was still a "hole" in its Post-Conviction Hearing Act. See, for some of the history of the failures, "Post-Trial Remedies: the Illinois Merry-Go-Round Breaks Down," 46 Ill. L. Rev. 900 (1952).

[53] 351 U.S. at 34-36.

There is no such constitutional right to an appeal as there is to a trial. "Rather the constitutional right under the due process clause is simply the right not to be denied an appeal for arbitrary or capricious reasons."[54] Economy may be unenlightened, but no one could call it arbitrary. States have generally provided for criminal appeals before they have provided for appeals in forma pauperis. It has never been suggested that this was unconstitutional. Nor does the unfairness by itself deny due process. Making an indigent pay for a transcript if he wants one is not "shocking to the universal sense of justice."[55]

Harlan's effort to draw a sharp line in criminal procedure, between due process and equal protection, is a singularly sterile one. The two concepts differ more in emphasis than in content.[56] Due process emphasizes fundamental unfairness; equal protection stresses comparison with other persons whom the state may treat better.

But equal protection is heavily affected by fundamental unfairness. The conventional limitations—that the discrimination must, to offend, be either intentionally discriminatory in purpose or else arbitrary in effect[57]—do not apply where the discrimination results in something that shocks the fundamental sense of justice.[58]

Due process, on the other hand, can not be considered intelligently other than by comparisons: comparisons with what is customary and acceptable, in the state and elsewhere; comparisons, conscious or subconscious, with what the judge feels would be fair treatment of himself were he wrongfully accused, iguorant, poor and friendless; and comparisons with a happy ideal thought of by the judge as embodying the perfect administration of justice.

In addition to their differences over the technical meaning of the fourteenth amendment, the majority and minority of the Court differed, in reality, upon a much more basic question, involving the nature of our legal institutions and their role in a democratic state.

The majority must have supported Griffin's claim because they thought that the state owes it to its citizens to *provide* them with practical means for securing justice under the constitution. Without these means, such justice is sheer theory. Only with them can it become actual, applied justice. On the other hand, the minority must have denied Griffin's claim because they thought that the state owes its citizens no more than to

54 Id. at 37.
55 Quoted from Betts v. Brady, 316 U.S. 455, 462 (1942).
56 See note 41 supra quoting Bolling v. Sharpe, 347 U.S. 497, 499 (1954).
57 Fairman, 70 Harv. L. Rev. 83, 126 (1956).
58 See 55 Mich. L. Rev. 413, 416-18, 422 (1957).

make justice *available* to them. These major premises must have been what led the majority to its particular holding that Illinois was required to *provide* a free transcript or other means for Griffin's appeal; and the minority to its particular opinion that Illinois did enough by making an appeal *available* to him if he could afford it. The majority thought, in other words, that the state had a constitutional duty to overcome the effect of poverty on the availability of appeal. The minority thought not.

The minority's view might be illustrated in this way: As a poor man, Griffin was doubtless deprived of many things besides his appeal; proper medical care, for instance. Would anyone argue that Illinois owes a constitutional duty to provide medical care to the poor? If not, how can anyone argue that it owes a constitutional duty to provide a kind of legal care?

The majority does not answer this argument in terms; but an answer is implicit in the position they take, viz., basic legal services are not of the same order, in our theory of government, as basic medical services. 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; he is a helpless victim of the government's monopoly of force. That this rather theoretical-sounding statement may in actual fact be true far too often, makes it very urgent, in human terms, to strive against it.

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 adequate medical care.

A state which provides its citizens with medical care we term a welfare state. It has *extended* the role of government to provide for the social welfare of its people. And if we dislike welfare states, we may repeat the adage that "that government is best which governs least."

But a state which does no more than to provide *all* its citizens with applied justice is *not* extending the role of government to novel fields but rather only giving all men that which is the most basic function of government, the provision of legal process.

These considerations show a sound constitutional basis for the majority's position in *Griffin*—a position which may be epitomized in Black's phrase:

> Surely no one would contend that either a State or the Federal Government could constitutionally provide that defendants unable to pay court costs in advance should be denied the right to plead not guilty or to defend themselves in court.[59]

[59] 351 U.S. at 17.

There would be no similar constitutional bar to a state's requiring payment for medical services rendered, or to its charging tuition at a state university. Contrary to Harlan's suggestion,[60] there is no contradiction in holding it unconstitutional to require money from the poor for legal services while holding it constitutional to require money from them for educational or medical services. These last are services of a different order. Equal access to the processes of law is embedded in our constitution and in every democratic constitution, as a necessary element in the relationship between the citizen and his government.

Of course the minority does not, in terms, deny the unique constitutional character of a state's duty to give applied justice. Harlan complains against a state's being required to discriminate in favor of the rich.[61] He concedes that this discrimination may be reasonable; but makes requiring it sound verbally absurd by bringing the point into the part of his opinion devoted to equal protection of the laws. Yet neither he nor the other dissenting Justices directly challenge Frankfurter's assertion that a state could not exact $500 for an appeal.[62] The dissenters thus do not challenge the constitutional need for applied justice; but they fail in imaginativeness when it comes to realizing what this need implies in the actual workings of the courtroom.

The Decision's Effect on Charges for Transcripts and Appeal Costs, Etc.

The direct and immediate effect of the decision, to the extent that it is enforced, will be that a state which allows criminal appeals only at some cost must make some similar relief available to a convict who shows poverty. The state must bring within the convict's financial reach, any required transcript (or equivalent); and pay for him, or waive, appeal bond premium, filing fees for appeal, and other such expenses. The required costs of preparing record and briefs might seem also to be included; without these, there could in many cases be no appeal at all, before April 1956. At least since April 1956[63] the fourteenth amendment requires that the state see that the convict is not barred from court review solely by his own economic condition.

On the narrow application of the *Griffin* case, a mixed reception is already apparent. (1) The Supreme Court of Illinois, as we have seen, has given the decision full and cordial effect, by prompt amendment of

60 Id. at 35.
61 Id. at 34-35.
62 Id. at 22.
63 The question of the retroactive effect of the Griffin case raised by Frankfurter's concurring opinion will be briefly touched below.

its rules.[64] (2) In June of 1956 the Supreme Court of Oregon reached a similar result in *Barber v. Gladden*,[65] though more grudgingly. It held that because of *Griffin* the requirement of an appeal bond and fees for filing an appeal in that court must be waived. The judges of that court were "forced, not by [their] own reasoning, but by the necessary implications" of *Griffin*,[66] to that conclusion; they could not "in good conscience be parties to judicial nullification or 'interposition' which could result in forty-nine purported authorities on constitutional issues instead of one."[67] They expressed the thought that the United States Supreme Court would "not carry its ruling to such coldly logical extreme as would disrupt the accepted judicial procedures of the 48 states."[68] The fact that the *Barber* case was a civil action for habeas corpus rather than a criminal appeal was of no moment; if anything, since habeas corpus was the method for raising constitutional questions, the case was a stronger case even than the *Griffin* case.

(3) The Court of Appeals of Kentucky has also taken cognizance of *Griffin*. In *Meredith v. Kentucky*,[69] decided in December of 1956, the court cited it in connection with a comment that a "bystander's bill" was "not an entirely desirable way of presenting the record in an appeal from conviction of a capital offense."[70] But nobody had asked the stenographer to take full stenographic notes; and the accused had had counsel at the trial. Clearly nothing could be done.

(4) The Attorney General of Kansas, in a letter of July 19, 1956, published by the University of Kansas Law Review,[71] has suggested that *Griffin* requires delivery of a free transcript to the convict if needed for a direct appeal, but only if that appeal is not late for *any* reason; *Griffin* does not apply to habeas corpus proceedings. There is no statutory authority in Kansas for doing what the United States Supreme Court says must be done. Until legislation comes, the county wherein the trial occurs must probably bear the cost. Certainly *not* the Office of the Attorney General.

(5) But New York is the state, thus far, where the most frequent notice of the *Griffin* case appears to have been taken by the judges. Its decisions are worthy of attention because they suggest some more of the probable outlines of the application of the doctrine of the *Griffin* case.

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64 See note 15 supra.
65 — Ore. — (1956), 298 P.2d 986.
66 Id. at 990.
67 Id. at 989.
68 Id. at 990.
69 — Ky. — (1956), 296 S.W.2d 705.
70 Id. at 707.
71 5 Kan. L. Rev. 132 (1956).

New York is one of the many states which, according to the United States Supreme Court, had already "provided aid for convicted defendants who have a right to appeal and need a transcript but are unable to pay for it." For this, Black's opinion cited Section 456 of the New York Code of Criminal Procedure.[72] That section provides that upon conviction for an indictable crime and upon service of a notice of appeal therefrom, the stenographer must transcribe the minutes of the trial at the county's expense and deliver a certified copy to the clerk of the court where the conviction was obtained. But, except in capital cases, New York statutes do not provide for the *giving* of a free copy of this transcript to the convict or his attorney.[73] Nevertheless, two enthusiastic county judges, shortly after the *Griffin* decision, read it as requiring that a free copy be thus furnished. *People v. Jackson* ordered that done in Herkimer County Court, in June 1956;[74] *People v. Strong* did the same in Kings County, in September of the same year.[75]

But the appellate division for the fourth department, which includes Herkimer County, was quick, in *People v. Brown*,[76] to repudiate *People v. Jackson*. It granted a motion to appeal on the original record and on handwritten briefs; but it denied the part of the motion which sought an order that the court furnish a transcript of the trial minutes gratis, saying:

> Neither this Court nor the Court of original jurisdiction has power to furnish to a defendant, gratis, a transcript of the minutes of trial, after trial, except in cases where the judgment is of death or of life imprisonment following a recommendation of a jury pursuant to section 1045-a of the Penal Law . . . [citing the authorities mentioned in our footnote 73 above] Any holding to the contrary, as in People v. Jackson . . . we do not approve.

And three days before this fourth department decision, Judge Barshay had reversed his own decision, on reargument, in *People v.*

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72 351 U.S. at 19 and n.15.

73 N.Y. Code Crim. Proc. §§ 308, 485. People v. Raymondi, 180 Misc. 973, 43 N.Y.S.2d 217 (Kings County Ct. 1943) (Liebowitz, J.).

74 2 Misc. 2d 521, 152 N.Y.S.2d 893 (Herkimer County Ct. 1956) (McCarthy, J.). Professor McKay, in 31 N.Y.U.L. Rev. at 1366-67 (1956), says of this decision, "The first case to bring New York practice into conformity with [the Griffin case] followed within less than two months in People v. Jackson."

75 159 N.Y.S.2d 351 (1956) (Barshay, J.). In People v. Lumpkin, 158 N.Y.S.2d 610 (N.Y. County Ct. Gen. Sess. 1956), Judge Capozzoli had implied that he would read the Griffin case as requiring the furnishing of a free copy of a transcript to the convict. But he denied the motion for that relief because no actual need for these minutes was shown by the motion. An appeal had been taken already and had been dismissed. He noted that New York State provides for an appeal by an indigent defendant as a poor person, a course not open to Griffin in Illinois.

76 3 App. Div. 2d 696, 158 N.Y.S.2d 1002 (4th Dep't 1957). See also People v. Moylan, 162 N.Y.S.2d 479 (Bronx County Ct. 1956), and People v. Cadogan, 163 N.Y.S.2d 190 (Queens County Ct. 1956).

Strong. This he did on the ground that the appellate division for the second department, having full knowledge of the *Griffin* case, had decided otherwise in *People v. Strong* itself, on a motion to it for leave to appeal as a poor person and for a free copy of the trial minutes.[77]

These decisions are not very articulate, but they seem to emphasize the indefiniteness of the mandate which was given by the United States Supreme Court to the State of Illinois. Both Black and Frankfurter were careful to stress the fact that their Court was not ordering the *giving* of minutes but the giving of real review.[78] In the same month in which *People v. Brown* and *People v. Strong* (II) were decided, the New York Court of Appeals decided a case which, without mentioning *Griffin*, gives support to our view that it is enough for New York State to make the minutes available in a public office without handing a free copy to the convict or his counsel—but with the crucial proviso that the circumstances of the particular case be such that the convict or his counsel can make effective use of the public copy. This case is *People v. Kalan*.[79] In a per curiam opinion the court said, of a unanimous affirmance by the second department of a conviction for larceny,

> When this appellant filed his appeal, as of right, in the court below it was apparent that he was penniless, and unable to employ counsel or to pay for a transcript of the trial minutes; that he was in prison and physically unable to inspect the transcript of the minutes which had been filed in the Clerk's office of Queens County pursuant to section 456 of the Code of Criminal Procedure. While we do not decide that failure to appoint counsel will always constitute a deprivation of constitutional rights, we nonetheless hold that, under the circumstances of this case, refusal to assign counsel upon defendant's request prevented an effective use of the right to appeal in violation of the constitutional guarantees of due process and equal protection. N.Y. Const. art. I, §§ 6, 11.
>
> The judgment should be reversed and the appeal remitted to the Appellate Division for further proceedings in accordance with this opinion.

Note that the constitutional rights mentioned were those of due process and equal protection under the provisions of the New York State Constitution alone. The court evidently thought it unnecessary to reach the federal question or the *Griffin* case.

These decisions teach that the goal of adequate opportunity for review, not in theory but in actuality, may be reached by many valid routes. The filing of a copy of the needed transcript, without charge to the convict,

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[77] People v. Strong, 159 N.Y.S.2d 352 (1957). The decision of the second department to which Judge Barshay refers does not seem to have been reported.

[78] 351 U.S. at 20 and 25, respectively. For a North Dakota application of this point see State v. Moore, — N.D. —, 82 N.W.2d 217 (1957).

[79] 2 N.Y.2d 278, 140 N.E.2d 357, 159 N.Y.S.2d 480 (1957).

in a public office,[80] may under favorable circumstances be one such route; it will not be such a route if the circumstances make the aid thus tendered illusory.

(6) One other type of case, to which *People v. Kalan* points, is a type somewhat similar to those cases discussed above, which deal with exhaustion of state remedies as a requirement for federal habeas corpus. This is the type of case involving a federal convict who seeks to appeal to a federal court of appeals. Poverty is often one of his difficulties. But the federal statutes and rules provide aid on the condition that he convince the trial judge that he has good grounds for his appeal. Section 1915 of Title 28 of the United States Code authorizes a permission to appeal in forma pauperis. If this is granted, section 753(f) authorizes a free transcript. But section 1915(a) provides that "an appeal may not be taken in forma pauperis if the trial court certifies in writing that it is not taken in good faith."

We did not, in our survey of the judicial treatment of poverty before *Griffin,* discuss the multitude of cases which have arisen under this section. They do not quite present the "test tube" situation wherein a convict is prevented from appealing, or seriously handicapped in appealing, by poverty unmixed with any other element. Here the element of the merits of the appeal intrudes. In these cases the courts denying appeals have failed to notice the discrimination against the poor, resulting from letting the rich appeal as a matter of course while screening the appeals of the poor for "good faith."

The late Judge Jerome Frank, always an eloquent champion of the impoverished litigant,[81] wrote an eloquent dissent in *United States v. Johnson* in the second circuit.[82] The defendant, Johnson, convicted and sentenced in the Federal District Court for the Eastern District of New York, gave notice of appeal and simultaneously petitioned the trial court for leave to appeal in forma pauperis, his poverty being undenied. The trial judge refused the petition, for lack of merit, saying in the words of the statute that the appeal was "not taken in good faith." The de-

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[80] That stenographic minutes of a trial filed with the clerk of court upon the service of a notice of appeal pursuant to Code Crim. Proc. § 456 are public records, was stated in New York Post Corp. v. Leibowitz, 286 App. Div. 760, 147 N.Y.S.2d 782 (2d Dep't 1955), motion for leave to appeal granted, 2 N.Y.2d 705 (1956). The appellate division cited N.Y. Public Officers Law § 66; this, among other things, requires the clerk of court in such a case to make certified copies available, for proper fees.

[81] Frank, Courts on Trial 94-99 (1949); Frank, "White Collar Justice," Sat. Eve. Post, July 17, 1943, p. 27; Frank, "Administration of Criminal Justice," 15 F.R.D. 95, 100-01 (1953).

[82] 238 F.2d 565, 567 (2d Cir. 1956). See also United States v. Farley, 238 F.2d 575 (2d Cir. 1956) and United States v. Branch, 238 F.2d 577 (2d Cir. 1956) decided the same day by the same court; and United States v. Farley, 242 F.2d 338 (2d Cir. 1957); Gershon v. United States, 243 F.2d 527 (8th Cir. 1957).

fendant then petitioned the Court of Appeals for the Second Circuit for the relief denied below. Judge Hincks, for the majority, denied the motion on the ground that the *Griffin* case "was not addressed to the problems involved in frivolous appeals."[83]

Frank dissented. He considered that while the *Griffin* case involved the due process clause of the fourteenth amendment, it was equally applicable to the federal system since a due process clause appears in the fifth amendment also. Therefore the *Griffin* case now bans discrimination against a would-be appellant in the federal courts because of his poverty. Requiring a poor man to get a certificate of merit is in itself a discrimination, unless the poor man is given an appeal on the merits from a denial of the certificate. It must be remembered that a judge who has presided at a trial is likely to think that it was conducted impeccably. The upper court cannot usually decide effectively whether the denial of a certificate was arbitrary, unless a transcript can be presented; without that, it cannot really decide whether the appeal is frivolous. Deprivation of this chance of reversal is punishment—of anyone erroneously convicted—"for the crime of poverty."

Griffin is a splendid step, Judge Frank said; but it will need a great deal of implementing. A rich nation should not boggle at the cost and effort required—"shudder away from" it, in Frank's vivid words—to furnish complete justice. England and the Scandinavian countries do it, often to an extent undreamed of here. We are false to our ideals in not doing it. Legislation would be needed for a thoroughgoing change; but to a large degree already "the Statutes and the precedents . . . authorize us to do justice . . . ." So dissented Judge Frank in one of his last opinions.

In *Johnson v. United States*,[84] the United States Supreme Court, in a per curiam opinion, vacated the second circuit's judgment, on the ground that the court of appeals should have assigned counsel to assist the defendant in prosecuting his application for leave to appeal in forma pauperis. This was a course which Judge Frank had also urged in his dissent.

The cost of printing briefs and records on appeal is another item which seems quite clearly to fall within the ambit of the *Griffin* decision, although the United States Supreme Court did not expressly consider it. New York and a minority of states require printing although there are some exceptions,[85] since 1954 the appellate division has discretion to

[83] 238 F.2d at 566.
[84] 352 U.S. 565 (1957).
[85] See Institute of Judicial Administration, Criminal Appeals (1954), Tables IV, V and VI

relax the printing requirements.[86] The third department has allowed typewritten papers since that year. Motions, in forma pauperis, for leave to appeal on the original transcript and typewritten briefs have been granted sparingly. However, since *Griffin,* we have reason to believe that these motions are being treated more liberally.

The Effect Upon Assignment of Counsel

There is a probability that the *Griffin* decision will eventually be construed to require a state to furnish reasonably competent counsel to all indigent persons accused of serious crimes.[86a]

Realistically this should be inevitable. There is no protection against wrongful conviction like a good criminal lawyer. As Justice Sutherland said in *Powell v. Alabama*:

> The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence. If that be true of men of intelligence, how much more true is it of the iguorant and illiterate, or those of feeble intellect.[87]

A system of justice which undertakes, as a part of its fundamental philosophy, to protect all individuals from the risks of false conviction, simply must provide counsel to all those in need. Otherwise no meaningful trial is offered.

Since the classic discussion in *Powell v. Alabama,* the right to counsel has been looked upon solely in terms of the requirements of due process. The "fair trial standard" which the court has applied in right to counsel cases is a due process standard. The *Griffin* case suggests a new departure.[88] By that same legal alchemy by which the failure to provide a transcript has been held to violate *both* the due process and equal protection clauses, failure to provide counsel may likewise be seen in the

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86 N.Y. Rules of Civil Practice, rule 234 as amended.

86a Griffin has already been held to require a federal court to advise an infant of his right to counsel in a juvenile delinquency proceeding. Shioutakon v. District of Columbia, 236 F.2d 666, 670 (D.C. Cir. 1956).

87 287 U.S. 45, 68-69 (1932).

88 Justice Schaefer in "Federalism and State Criminal Procedure," 70 Harv. L. Rev. 1, 9-10 (1956), discusses this point.

double perspective of due process and equal protection. A person accused of a serious crime who is without counsel to defend him on account of poverty is not receiving that protection of the law which those who can afford counsel receive. Thus, even though, of itself, the failure to provide counsel may not be violative of the due process clause, in conjunction with the violation of equal protection, there is a constitutional wrong of sufficient moment to fall afoul of the fourteenth amendment.

Mr. Robert C. Casad, in the Michigan Law Review,[89] suggests that the *Griffin* decision extends only to unjust discriminations which completely shut the court's door in the face of the poor person. Only when counsel are a *sine qua non* of getting into court at all, he says, should the appointment of counsel become a requirement of due process. But could there be a more sophistical legal fiction? "Law addresses itself to actualities," said Justice Frankfurter in the *Griffin* case,[90] and this theme runs through Black's and Frankfurter's opinions. Can it be supposed that these devoted and clear-sighted Justices, and those who concurred with them, will now say that there is a difference in kind between giving a convict no hearing at all and giving him a hearing under a killing handicap? Will not the failure to provide an adequate hearing, like the failure to provide an adequate appeal, run afoul of both the equal protection and due process clauses?

A small fraction of criminal convictions are appealed. Therefore the number of cases in which injustice can be done by denying or restricting appeal is relatively small. The number of cases in which injustice is done by failing to provide counsel at trial is very much greater.[91]

To condone the second but condemn the first would be a retrogression to the sort of legal fiction for which modern and realistic judges would blush in shame. It would be a sort of judicial recidivism. It would be to take shelter from the inconvenient realities by a comfortable reliance on the fiction that so long as the accused can be brought to the court, due process is not concerned with the condition in which he may be brought there.

As students of the administration of criminal justice, the authors must, in honesty, urge a further point which they know will seem radical to many. Counsel must not only be appointed; counsel must be paid. And counsel must have funds for the preparation of the defendant's case. The bland assumption that counsel, from sheer sense of duty, from pleasure in being chosen, from desire to make a reputation, will do their

89 55 Mich. L. Rev. at 420.
90 351 U.S. at 23.
91 See Beaney, The Right to Counsel in American Courts c. 4 and Appendices I and II (1955) for a discussion of the right to counsel as interpreted by state courts and for tabular treatment of the comparative provisions of the forty-eight states.

utmost for their "shotgun" clients, is often no more than a pious hope. In many instances they will; and will dig into their own pockets to do what urgently needs doing to win a client's case. Lawyers are professional people; therefore many of them will do these things. But lawyers are also businessmen; therefore many will not do these things. Many who sincerely intend to do their utmost for assigned clients will in actuality do something less than their utmost, because of the competing demands of regular clients upon their limited supply of time. This is human nature. Who denies its effects is living in a dream world.

Thus in 1943 the late Judge Augustus Hand, in a report to the Judicial Conference of Senior Circuit Court Judges, made the statement which is now a classic in this field:

> It is clear that when cases of poor persons needing defense become numerous and occur repeatedly, the voluntary and uncompensated services of counsel are not an adequate means of providing representation. To call on lawyers constantly for unpaid service is unfair to them and any attempt to do so is almost bound to break down after a time. To distribute such assignments among a large number of attorneys in order to reduce the burden upon anyone, is to entrust the representation of the defendant to attorneys who in many cases are not proficient in criminal trials, whatever their general ability, and who for one reason or another cannot be depended upon for an adequate defense. Too often under such circumstances the representation becomes little more than a form.[92]

Retroactivity

Frankfurter's opinion, alone, asserts that the rule of the *Griffin* case is new law and should not operate retroactively. He fears jail deliveries. He urges that courts are not impaled on the horns of the dilemma, of either following bad precedent for the sake of stability or, alternatively, of changing a rule retroactively. Since no other judge agreed, and since Harlan commented that Black's opinion was not so limited, it would seem that when a case arises presenting the problem of retroactivity the Court will decide that *Griffin* did have a retroactive effect. The Illinois Supreme Court took this view.[93]

On the merits, Frankfurter's theory is irresistible, that no inexorable logic demands that case law be retroactive. There is no metaphysical block which prevents saying that judges make law, so long as they do it in homeopathic doses. But a brief inspection of the cases which Frankfurter cites and some of the many others on this subject suggest to us the advantage of a selective approach. If reliance on then existing law is an important factor, retroactivity will perhaps *not* be indulged in. But if it

92 As quoted in Brownell, Legal Aid in United States p. 138 (1951).

93 See note 15 supra. For an adoption and application of Frankfurter's theory, see Shioutakon v. District of Columbia, supra note 86a at 670, and Matter of Schaeffer, 126 A.2d 870 (Mun. Ct. of App. D.C. 1956).

is not, retroactivity will be more likely. There may be many other factors involved, and a judge will, according to the selective approach which seems to us most reasonable, have to weigh all these factors in deciding. To obviate the danger which Justice Frankfurter fears would arise if a retroactive effect should be given to the *Griffin* rule, Judge Schaefer of Illinois has advocated a system of screening, for merit, applications for writs of federal habeas corpus by state convicts.[94] Perhaps some similar procedure could both protect individual rights and prevent a flooding of the courts.

CONCLUSION

Perhaps petitioner Griffin's name was fated. The creature of fable which bore that name had the head and wings of an eagle, "the bird of freedom," while it had the more earthbound body of a lion. We have examined here some of the first consequences of the narrow holding of *Griffin*. But its broader influences can hardly be foreseen. It is of the very genius of our common law that a principle such as is embodied in the *Griffin* case can find fruition only in the work of thousands of individual judges and other lawmakers. To the extent that the principle of the *Griffin* case finds acceptance it will constitute a new charter of freedom for the poor. It will be years, perhaps decades, however, before we can know whether the *Griffin* "eagle" will fly or will remain earthbound.

Some cases expand and grow; other cases wither and die. Griffin will meet vast obstacles: inertia, complacency, economy, bitter resentment. The resentment is already at hand. The General Assembly of Georgia recently adopted a resolution seeking the impeachment of six of the Justices of the United States Supreme Court, for "attempting to subvert the Constitution of the United States, and . . . giving aid or comfort to the enemies of the United States. . . ." To explain this attack the Resolution was followed by criticism of fifteen decisions by the United States Supreme Court. The first decision mentioned is the *Griffin Case*. The General Assembly of Georgia said of it:

> The effect of this decision is to place upon each of the states the duty of guaranteeing the financial ability of every communist and felon to exercise constitutional rights.[95]

If this be its effect, the *Griffin* case does indeed fulfill the constitutional guarantee that *all* persons, including communists and felons, have equal access to the process of law.

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[94] See Schaefer, "Federalism and Criminal Procedure," 70 Harv. L. Rev. 1, 25 (1956).

[95] A Resolution Requesting Impeachment of Six Members of the United States Supreme Court, adopted February 22, 1957. The legislature of Florida adopted a similar though less scathing resolution also mentioning the Griffin case. 1956 Florida Sessions Laws at 401. See also, State ex rel. Hawkins v. Board of Control, — Fla. —, 93 So. 2d 354, 357 (1957) (U.S. Supreme Court appeal pending).