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Constitutional Law - Post-Conviction Due Process - Right of Indigent to Review of Non-Constitutional Trial Errors

Robert C. Casad S.Ed.
University of Michigan Law School

COMMENTS

CONSTITUTIONAL LAW—POST-CONVICTION DUE PROCESS—RIGHT OF INDIGENT TO REVIEW OF NON-CONSTITUTIONAL TRIAL ERRORS—The past thirty years have seen a steady expansion in the concept

of procedural due process under the Fourteenth Amendment.[1] One of the most notable advances has been made in the realm of post-conviction procedure.[2] Although a state is not required by the Constitution to provide appellate courts or a right of appeal at all,[3] it must provide some "clearly defined method" whereby a person can present to a state court of last resort his claim that he was denied some constitutional right at his trial.[4]

The purpose of this comment is to examine a new development in post-conviction due process: *Griffin v. Illinois*.[5] This case announces a new principle of constitutional right under the Fourteenth Amendment based on an almost indistinguishable combination of due process and equal protection elements.[6]

I. *Griffin v. Illinois: The Right to "Adequate and Effective" Appellate Review*

Petitioners Griffin and Crenshaw were tried together and convicted of armed robbery in the Criminal Court of Cook County, Illinois. They immediately filed a motion in the trial court asking that a certified copy of the entire record, including the stenographic transcript, be furnished to them without cost. They alleged that they had no funds with which to purchase the transcript and court records, that the documents were needed in order to prosecute an appeal, and that failure of the court to provide the documents would violate the due process and equal protection clauses of the Fourteenth Amendment. Illinois law provides that indigent defendants sentenced to death may obtain a free transcript to assist their appeals,[7] but this privilege is not extended to other criminal defendants. Petitioners, not being sentenced to death, failed to qualify for a free transcript under that provision. The Illinois Post-Conviction Hearing Act[8] provides for free transcripts for persons who desire to appeal denial of relief under its provisions, but only

1 Green, "The Bill of Rights, the Fourteenth Amendment, and the Supreme Court," 46 MICH. L. REV. 869 (1948).

2 See Boskey and Pickering, "Federal Restrictions on State Criminal Procedure," 13 UNIV. CHI. L. REV. 266 (1946); 53 COL. L. REV. 1143 (1953).

3 McKane v. Durston, 153 U.S. 684 (1894).

4 Young v. Ragen, 337 U.S. 235 (1949).

5 351 U.S. 12 (1956).

6 Some other advances in procedural due process have arisen out of cases where due process and equal protection were likewise commingled. See Moore v. Dempsey, 261 U.S. 86 (1923); Powell v. Alabama, 287 U.S. 45 (1932). See also Wilson, "The Merging Concepts of Liberty and Equality," 12 WASH. & LEE L. REV. 182 (1955).

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

8 Id., §§826-832.

constitutional trial errors can be raised under the act. Petitioners did not contend that the errors they wished to appeal involved any constitutional questions, and so this first motion was not made under the Post-Conviction Hearing Act. The trial court denied this first motion without a hearing.

They then filed a petition under the Post-Conviction Hearing Act, alleging that there were manifest non-constitutional errors in their trial and that they were entitled to have their convictions set aside on appeal. They charged that they were denied their right to full appellate review solely because of their poverty, since the trial court had refused them a free transcript, and that this was a denial of due process and equal protection. Their petition was denied without a hearing, and the Illinois Supreme Court affirmed on the ground that no substantial constitutional questions (the only kind of questions that could be raised under the Post-Conviction Hearing Act) had been presented. Their petition for certiorari to the United States Supreme Court was granted.[9]

Illinois law gives every person convicted in a criminal trial the right to review by writ of error.[10] But this review extends only to errors contained in the "mandatory record"[11] unless the defendant supplies the appellate court with a "bill of exceptions," and this bill must include the transcript of those portions of the trial where the errors charged occurred. The "mandatory record" does not include such important sources of error as motions and rulings of the trial court, evidence heard, instructions, etc. Thus the only way full review can be had is by providing a bill of exceptions.[12] To obtain such a bill of exceptions, the defendant must procure a stenographic transcript, for which he must pay unless he has been sentenced to death. At one time the Illinois courts granted review on the basis of a "bystanders' bill of exceptions," which was compiled from the memory of persons in attendance at the trial and certified as correct by the judge; but the "bystanders' bill" has fallen into disuse since the advent of court stenography. Moreover, the Illinois Supreme Court has ruled that even if "bystanders' bills" are still recognized, they are not, as a practical matter, available to an incarcerated indigent.[13] Petitioners, then, as indigents, had no way of securing review of non-constitutional trial errors

9 349 U.S. 937 (1955).
10 Ill. Rev. Stat. (1955) c. 38, §769.1.
11 This consists of indictment, arraignment, plea, verdict, and sentence.
12 People v. Loftus, 400 Ill. 432, 81 N.E. (2d) 495 (1948).
13 People v. Joyce, 1 Ill. (2d) 225, 115 N.E. (2d) 262 (1953).

unless they were given a free transcript from which they could construct a bill of exceptions.

The Supreme Court held that review had been unconstitutionally denied to the petitioners. A state is not required to provide appellate review,[14] but if appeal is allowed at all it must be extended equally to all persons. "Destitute defendants must be afforded as adequate appellate review as defendants who have money enough to buy transcripts."[15]

Most of the cases in which the Court has extended the Fourteenth Amendment's protections in the area of criminal procedure have found their bases in the requirements of the due process clause. In some of these landmark cases the question of "fundamental fairness" has been colored by a strong element of "unreasonable discrimination,"[16] but despite their equal protection aspects these cases have been decided and accepted by the profession as rulings of procedural due process.[17] The *Griffin* case also presents a blending of due process and equal protection elements, but it is not so clear that the ruling here is one of due process. Part of the uncertainty stems from the fact that a majority of the Court could not be mustered in support of any one of the four opinions of the case. The majority justices, although noting the presence of both equal protection and due process elements, did not clearly say which of the two is the more basic. Justice Black's opinion, in which three other justices joined, expressed the view that the ". . . 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,"[18] and applied this view to the *Griffin* case by concluding that "[t]here is no meaningful distinction between a rule which would deny the poor the right to defend themselves in a trial court and one which effectively denies the poor an adequate appellate review accorded to all who have money enough to pay the costs in advance."[19] Does this mean that the case may be regarded as either a due process or as an equal protection ruling, or does it mean that

14 McKane v. Durston, 153 U.S. 684 (1894).

15 Principal case at 19. Justice Black wrote the majority opinion, joined by Chief Justice Warren and Justices Douglas and Clark. Justice Frankfurter concurred separately.

16 See note 6 supra.

17 There have been a few of these "blended" cases decided on the equal protection issue. See Strauder v. West Virginia, 100 U.S. 303 (1880); Cochran v. Kansas, 316 U.S. 255 (1942).

18 Principal case at 17. Emphasis supplied.

19 Id. at 18.

the concurrent presence of both elements is the crucial factor? There is no specific language in the opinion to indicate the answer. However, the overall impression given by Justice Black's opinion corresponds more closely to the traditional due process analysis than to the usual equal protection analysis. He regards equal justice as "the central aim of our entire judicial system,"[20] and matters so fundamental as that are usually considered to be the substance of due process. The import of Justice Black's opinion, then, seems to be that an unreasonable discrimination in the dispensation of criminal justice—at trial or appellate levels—is an arbitrary denial of fundamental fairness which the due process clause will not permit. The case, in this view, turned on the combined incidence of both equal protection and due process factors, with the latter predominating.

Justice Frankfurter wrote a separate opinion concurring in the new rule formulated in the chief opinion but expressing the view that the new rule should not be given a retroactive effect. He, too, pointed out both the equal protection and due process aspects of the case,[21] and, like Justice Black, he did not clearly designate one or the other aspect as the primary one. However, Justice Frankfurter seemed to focus more of his attention on the unreasonableness of the discrimination inherent in Illinois' post-conviction procedure. There is language in his opinion which conveys the impression that Justice Frankfurter considered the equal protection issue the dominant one—perhaps a sufficient one—for the disposition he made of the case.[22] Perhaps this is an additional reason for his separate concurrence. If the differences, however, between the Black view and the Frankfurter view are as clearcut as the difference between due process and equal protection, probably Justice Frankfurter would have placed more specific emphasis on the point of distinction. His concurrence in the disposition of the case does not help to resolve the uncertainty, since the disposition of the case would be the same under either due process or equal

[20] Id. at 17.

[21] "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 punishments, 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 authorize the imposition of conditions that offend the deepest presuppositions of our society." Principal case at 21-22.

[22] "When the case again reaches the Illinois Court, that court may, of course, find within the existing resources of Illinois law means of according to petitioners effective satisfaction of their constitutional right not to be denied the equal protection of the laws." Principal case at 25.

protection. If equal protection is regarded as the dominant theme in Justice Frankfurter's analysis, his view seems to be this: while differentiations based on financial ability may not violate the equal protection clause in some situations,[23] such a discrimination is unreasonable and offensive when exercised in the administration of criminal justice. This view likewise rests on the concurrence of both equal protection and due process elements, but here the former are dominant.

If these interpretations of the two majority opinions are accurate, the precise significance of the *Griffin* case in constitutional law is still in doubt, since a majority of the Court does not clearly support any one view. Nevertheless, it is an important new development that must be reckoned with, and it cannot be examined without first drawing some conclusion as to what it says. Accordingly, the analysis that follows treats the case on the basis of what seems to be the "least common denominator" of both majority opinions, viz., the coincidence of strong elements of both due process and equal protection.

II. *The Meaning of the Griffin Case*

If the *Griffin* case had decided that all states which extend the right of appeal to all must provide the right to proceed on appeal in forma pauperis to indigents, the question of its effect would not be too complicated. But the case does not go that far. The majority opinion was careful to add, "We do not hold, however, that Illinois must purchase a stenographer's transcript in every case where a defendant cannot buy it. The Supreme Court [of Illinois] may find other means of affording adequate and effective appellate review to indigent defendants."[24] The case, then, lays down the proposition that indigents must be afforded *as* "adequate and effective appellate review" as other criminal defendants; it does not prescribe the *same* review procedure. The majority opinion suggests the possibility that a return to "bystanders bills of exceptions" might fulfill this requirement, but it does not otherwise elaborate on what will be considered "adequate and effective." It simply remands the question to the Illinois court with the implicit direction to try again, stating "We are confident that the State will provide corrective rules to meet the problem which this case

23 Cf. Clark v. Titusville, 184 U.S. 329 (1902). Cf. also Sholley, "Equal Protection in Tax Legislation," 24 VA. L. REV. 229 at 256 et seq. (1938).

24 Principal case at 20.

lays bare."[25] The question of what review procedures will be considered "adequate and effective" can receive an authoritative answer only in future decisions. The fact, however, that the decision in the *Griffin* case was such a close one indicates that future decisions may well find procedures "adequate and effective" which do not go much farther than the Illinois system in providing appellate review for indigents.

One other statement in the majority opinion may prove troublesome. What was meant by Justice Black's reservation that, "We do not hold . . . that Illinois must purchase a stenographer's transcript in every case where a defendant cannot buy it"?[26] This phrase may imply merely that a stenographer's transcript may not always be necessary to secure equally "adequate and effective" review, and this probably is the meaning Justice Black intended, judging from the context in which the phrase appears. On the other hand, the phrase "not . . . in every case" could be interpreted as a holding that the scope of review required by the *Griffin* case may vary, as in the "right to counsel" cases, with the nature of the crime with which the defendant is charged. In support of this interpretation it may be pointed out that the conviction from which appeal was sought in the *Griffin* case was for "armed robbery." That crime in Illinois is a very serious one,[27] carrying a maximum penalty of life imprisonment and subjecting a person convicted thereof to certain civil disabilities.[28] If the *Griffin* decision is regarded as essentially a due process ruling, it may be said that the seriousness of the crime there involved might require more leniency in providing appeal in the interest of "fundamental fairness" than would be demanded if a lesser crime were charged. The nature of the crime charged is an important factor in determining whether a criminal defendant is entitled to free counsel.[29] Should it not be likewise a factor in determining his right to a free appeal? Even if the *Griffin* case finds its support solely in the equal protection clause, can it be said that a classification based on the severity of the crime charged is unreasonable? This sort of classification has been upheld in the "right to counsel" cases.[30]

If this line of argument is accepted by the federal courts in

25 Ibid.
26 Ibid.
27 Ill. Rev. Stat. (1955) c. 38, §501.
28 Id., §587.
29 Betts v. Brady, 316 U.S. 455 (1942).
30 Ibid.

future cases, the meaning of the *Griffin* case will be uncertain indeed. To follow the analogy of the right to counsel cases would entail deciding the right of indigent defendants to free appellate review on a case by case basis. In view of the narrow division of the Court on the question, as indicated by the four separate opinions in the *Griffin* case, a case by case approach would set post-conviction due process adrift in a sea of uncertainty, for the absence of one member of the Court in the consideration of any given petition for relief under the ruling of the *Griffin* case could cause a different result in the disposition of that petition. States would be left uncertain as to whether their post-trial procedures complied with due process requirements, and individual defendants would be uncertain as to their rights.

In addition to its effect in creating uncertainty, other objections can be made to the analogy of the right to counsel cases. In the first place, it is clearly not the approach contemplated by the opinions of Justices Black and Frankfurter. The general meaning of both opinions is that *any* defendant entitled by law to review of trial errors may not be denied such review solely by reason of his poverty. It is the right to appeal that is significant, not the character of the crime charged. Moreover, there is a fundamental distinction between the right to counsel cases and the *Griffin* type of situation. While it is undeniable that the assistance of skilled counsel may be of inestimable value to a defendant, the presence of counsel is not a *sine qua non* to access to the courts, as was the availability of the transcript in the *Griffin* case. Indeed, in cases where the existence of an attorney has been necessary to give incarcerated criminals access to the courts, this has been held an unconstitutional denial of equal protection.[31] If any analogy to the right to counsel area is drawn, it should be limited to those cases where access to the courts could be had *only* through an attorney. The better interpretation of the *Griffin* case, then, is that it requires a state to provide appellate review for indigent criminal defendants equivalent to that provided for other criminal defendants.[32] The seriousness of the crime should not be deter-

31 Cochran v. Kansas, 316 U.S. 255 (1942). See also United States ex rel. Bongiorno v. Ragen, (N.D. Ill. 1944) 54 F. Supp. 973, affd. (7th Cir. 1944) 146 F. (2d) 349, cert. den. 325 U.S. 865 (1945).

32 Justice Harlan's dissenting opinion expresses the view that to require some defendants to pay for services which are given to others free involves a discrimination equally as invidious as the one which denies services to those who cannot pay for them but extends them to those who can.

minative, except as it may bear on the question of "adequacy" of the appeal.

Will the principle of the *Griffin* case be given application in review of civil cases? There is little room to doubt that the majority opinions contemplated its application to criminal cases only. The Fourteenth Amendment, however, guarantees that property as well as life and liberty shall not be taken without due process of law. A civil litigant who has exhausted his own resources in a trial to preserve his property, or who has been deprived of his resources by the judgment itself, is in a position analogous to that of an indigent convict. To refuse him the right to a review of the adverse judgment simply because he cannot pay the costs of appeal in advance when such appeal is granted to others similarly situated but better endowed would seem to involve, in principle, the same denial of due process and equal protection as that claimed by petitioners Griffin and Crenshaw. There are, however, at least two factors which may serve to distinguish the case of the indigent civil litigant. First, our legal system has traditionally been inclined to regard "personal" rights, such as life and liberty, as entitled to more deference than property rights,[33] i.e., the process that is "due" in order to protect life and liberty may be more extensive than that required to protect property. Since only five of nine justices found an unconstitutional deprivation in the *Griffin* case, where the petitioner's personal liberty was at stake, it would not be safe to assume that a majority of the Court would find a violation of the Fourteenth Amendment under the same circumstances if property rights only were involved.[34] Secondly, the unconstitutional elements in the *Griffin* case resulted solely from the action (or inaction) of official state agents. The Fourteenth Amendment serves to protect individual rights against infringement by the state government, not infringement by individuals. While it is true that a civil adjudication of property rights by a state is "state action" within the meaning of the Fourteenth Amendment,[35] the state's role in the resultant deprivation of one party's property is purely mediatory. The state does not act *both* as party *and* as

[33] An example of this tendency may be found in the tort law doctrine which limits the amount of force that may be used against the person of a trespasser where only property interests are jeopardized by the trespass. ". . . [T]he law has always placed a higher value upon human safety than upon mere rights in property. . . ." PROSSER, TORTS 133 (1941).

[34] This situation might occur in a criminal case as well if the defendant were fined rather than imprisoned.

[35] Shelley v. Kraemer, 334 U.S. 1 (1948).

mediator, as it does in the criminal cases. The state may well be required to go to greater lengths to insure fairness in situations where it opposes the asserted rights of an individual in both of these capacities. Therefore, it may not be an "invidious discrimination" to deny the right of appeal to an indigent civil litigant, even though the sole basis of the denial is his poverty, and even though an indigent criminal defendant would be entitled to appeal in like circumstances. Justice Harlan, however, considered the civil situation to be indistinguishable from that presented in the *Griffin* case: "Thus, if requiring defendants in felony cases to pay for a transcript constitutes a discriminatory denial to indigents of the rights of appeal available to others, why is not a similar denial in misdemeanor cases or, for that matter, civil cases? It is no answer to say that equal protection is not an absolute, and that in other than criminal cases the differentiation is 'reasonable.' The resulting *classification* would be invidious in all cases, and an invidious classification offends equal protection regardless of the seriousness of the consequences."[36] This argument has merit, but it is directed solely at the question of equal protection. He fails to consider the due process aspect of the case in this particular statement. The distinction between the due process and equal protection elements here is not so clear as to justify an extension of the doctrine to civil cases when that extension considers only one element to the exclusion of the other. Any extension of the doctrine of the *Griffin* case should be limited to cases where due process and equal protection are similarly fused, and it should be applied only in criminal cases.

III. *Impact of the Griffin Case*

A. *On state practice.* Unless the *Griffin* principle is carried over into the area of civil review, it probably will not cause any immediate, significant changes in the practice of most states. In twenty-nine states free transcripts are already provided as of right to indigents convicted of non-capital crimes.[37] Of the remaining nineteen, five states have, by statute, expressly given the trial courts discretionary power to provide such transcripts. Two more apparently have made transcripts available on a similar basis by decision or by interpretation of statutes relating to reimbursement of ap-

[36] Principal case at 35.

[37] Id. at 33.

pointed counsel.[38] The procedures already provided in states where the free transcript is available at the discretion of the trial court will probably be "adequate and effective" so long as the trial courts grant the transcript in every case where there is a reasonable basis for appeal, for the *Griffin* case probably does not require free review to be given to defendants who have no reasonable basis for appeal, or who do not present a good faith claim for relief.[39] The right to a free transcript is discretionary with the trial judge in the federal courts,[40] and this procedure has never been held to violate Fifth Amendment due process. It therefore appears that only eleven states have no provision for making free transcripts available on a satisfactory basis.

Even the practice in these eleven states, however, may not need to be changed.[41] In the *Griffin* case, not only were petitioners denied a free transcript, but that transcript was *necessary* in order to secure a full appellate review. It will only be those states who not only deny the free transcript, but who also require a transcript for review, that will be forced by the *Griffin* case to modify their practice. For example, if a state permits the use of the "bystanders bill of exceptions" in lieu of appeal based on the transcript, this would probably satisfy the standard set forth in Justice Black's opinion.

As to the situation in Illinois, counsel for the state expressed the belief in the *Griffin* case that if the treatment of petitioners violated the due process and equal protection clauses, the Illinois Post-Conviction Hearing Act entitles them to a free transcript.[42] While this may be true, it would seem to be an unnecessarily complicated process. That act, by its terms, applies only to a "person imprisoned in the penitentiary who asserts that in the proceedings which resulted in his conviction there was a substantial denial of his rights under the Constitution of the United States or of the State of Illinois or both. . . ."[43] Overlooking the limitation of the act's coverage to persons "imprisoned in the penitentiary," it will

38 See principal case at 33, n. 4. See, generally, annotation, "Right of indigent defendant in a criminal case to aid of state as regards new trial or appeal," 100 A.L.R. 321 (1936).

39 See note 62 infra.

40 28 U.S.C. (1952) §§1915 (b), 753 (f).

41 The Attorney General of Kansas has expressed the opinion that the Griffin case requires Kansas courts to provide free transcripts to indigent criminal defendants for appeal purposes. 5 KAN. L. REV. 132 (1956). The opinion also discusses the question of possible retroactive effect of the Griffin ruling and the practical question of who must bear the cost of the free transcript.

42 Principal case at 16.

43 Ill. Rev. Stat. (1955) c. 38, §826.

be noted that it applies only to the situation where there has been a substantial denial of constitutional rights "in the proceeding which resulted in his conviction." Griffin and Crenshaw did *not* assert that there was any denial of constitutional rights in their trial. Under the Supreme Court's ruling, no unconstitutionality was involved until *after* the conviction had been rendered and the petitioners had moved for a free transcript. Even if the phrase "proceeding which resulted in . . . conviction" can be interpreted to include the motion for a free transcript, there is no denial of a constitutional right until the judge overrules the motion. Only then could a defendant file a petition under the Post-Conviction Hearing Act. But this second proceeding, under the act, cannot, of itself grant a petitioner the free transcript. It can only determine whether or not a constitutional right has been denied. If the hearing court rules that a constitutional right has been denied, it can "enter an appropriate order with respect to the judgment or sentence in the former proceedings and such supplementary orders as to rearraignment, retrial, custody, bail, or discharge as may be necessary and proper."[44] Presumably, all that the hearing court can do, if it should find for a petitioner like Griffin and Crenshaw, is to order the trial court to order the transcript. The circular character of this process seems wholly unnecessary, particularly since the court which hears the petition under the Post-Conviction Hearing Act is the same court which rendered the conviction and the denial of the motion for a free transcript.[45] Probably no real harm will be done by this procedure, since the whole thing can doubtless be accomplished at one sitting, but it would probably be better simply to empower the trial court to provide the transcript on the first motion, if no satisfactory existing means are found.

The Uniform Post-Conviction Procedure Act,[46] promulgated in 1953, goes farther than the Illinois act. States adopting the uniform act probably need have little fear that their procedures will not be "adequate and effective" under the commands of the *Griffin* case. The uniform act not only attempts to provide a "clearly defined method by which . . . claims of federal right" may be raised, in accordance with the command of the Court in *Young v. Ragen*;[47] it also grants the same type of hearing for any other collateral attack "upon any ground of alleged error heretofore

[44] Id., §831.
[45] Id., §826.
[46] HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, 1955, p. 209. See also 69 HARV. L. REV. 1289 (1956).
[47] 337 U.S. 235 (1949).

available under a writ of *habeas corpus,* writ of *coram nobis,* or other common law or statutory remedy. . . ."[48] Even this broad coverage, however, would make the scope of the uniform act no broader than that of Illinois if there were not some other features of the uniform act which serve to expand its applicability. Section 5 of the uniform act contains very liberal provisions for review where the petitioner is "proceeding as a poor person." This provision provides that "all necessary costs and expenses" incident to review, expressly including printing, stenographic services, and attorney's fees, shall be paid for a petitioner who is himself unable to pay.[49] Moreover, the hearing judge under the uniform act is empowered to make such orders, supplementary to his ruling on the judgment and sentence, as "may be necessary and proper."[50] By virtue of these powers, the hearing judge could forward the case directly for appeal of the non-constitutional trial errors and could also provide the necessary services free. There would be no need for the circular steps which the Illinois act seems to entail.

B. *On federal practice.* One effect of the *Griffin* case on federal practice is that it appears to create a new area in which federal habeas corpus is available to correct state procedural defects. Heretofore, federal habeas corpus has been granted only where constitutional trial errors were charged. Now federal courts may grant habeas corpus in situations like that in the *Griffin* case even when the only trial errors alleged are of a non-constitutional character. This development yields the strange result that federal courts could set free a prisoner whose trial was conducted in conformance with due process of law.

The federal habeas corpus law authorizes granting the writ where a prisoner is "in custody in violation of the Constitution . . . of the United States."[51] It might be argued that this does not authorize federal habeas corpus in a *Griffin* type situation. The petitioners there were in custody pursuant to an order of a duly authorized court, and the order was entirely within the court's jurisdiction. No violations of the petitioners' constitutional rights occurred in the course of the trial. They were therefore committed to custody in conformance with due process by the judgment of conviction entered against them. It might be urged that any violations of their constitutional rights occurring subsequently

[48] Uniform Post-Conviction Procedure Act, §1. See note 46 supra.
[49] Id., §5. See note 46 supra.
[50] Id., §7. See note 46 supra.
[51] 28 U.S.C. (1952) §2241.

would have no effect on the validity of their "custody." This argument, however, overlooks the fact that petitioners claimed a *right to release* from that custody, and this right was denied them in violation of the Constitution. In other words, after their motion for free appeal had been denied, solely because of their poverty, petitioners were then in custody in violation of the Constitution, and they then became eligible for habeas corpus in the federal courts.[52]

Assuming that federal habeas corpus is available to an indigent prisoner claiming an unconstitutional denial of the right of appeal, what disposition can the federal district court make of the case? The law provides that the federal court shall ". . . dispose of the matter as law and justice require."[53] If the federal court determines that the petitioner's right of appeal has been unconstitutionally denied, does "law and justice" require that he be set free? This result does not seem to be called for. All that has been determined is that petitioner has a right to appeal. The federal court has no power to set aside the judgment of conviction when it is found to contain no constitutional errors. Other prisoners are not set at large while their appeals are pending. But what other disposition can the federal court make? It has no power to make positive demands upon the state courts. All that can be done by the federal court is to order the future release of the prisoner if the state has not removed the obstacles to his appeal within a stated reasonable time. Under such an order, if the state fails to remove the obstacles, federal habeas corpus will set free a prisoner whose incarceration had been effected by a conviction which no one challenges as lacking in due process. It cannot be denied that this is a new departure.[54]

The changes wrought by this new feature of federal habeas corpus may not, however, be too far-reaching in practical effect. As we have seen, most states probably will encounter little difficulty in providing "adequate and effective" review to indigent criminals under their existing laws. Moreover, even among those few states which still may not provide the proper opportunity for review in

52 Of course, they were not fully entitled to seek federal habeas corpus until they had appealed, and the state supreme court had affirmed, the denial of the motion. See 28 U.S.C. (1952) §2254. They might also be required to apply to the United States Supreme Court for certiorari (as Griffin and Crenshaw, in fact, did) before applying for federal habeas corpus. See Darr v. Burford, 339 U.S. 200 (1950).

53 28 U.S.C. (1952) §2243.

54 See Holtzoff, "Collateral Review of Convictions in Federal Courts," 25 BOST. UNIV. L. REV. 26 (1945). In the situation presented in the text, the question would be raised as to whether the prisoner so released could be subsequently re-tried.

the first instance, it is very unlikely that any would fail to heed the federal court's directive. Such non-compliance would ultimately be more costly for the state, for the costs of appeal would not be so great as the cost to the state if the prisoner were to be re-tried after his release by the order of the federal court.

A more subtle question raised by the *Griffin* case is that of its meaning and effect for purposes of federal practice itself. Will the *Griffin* ruling necessitate any changes in the rights accorded indigents convicted in the federal courts? At first sight it would seem that no significant changes will be necessary. A federal statute provides: "Any court of the United States may authorize the commencement, prosecution or defense of any suit, action or proceeding, civil or criminal, or appeal therein, without prepayment of fees and costs or security therefor, by a citizen who makes affidavit that he is unable to pay such costs or give security therefor."[55] This provision would seem to provide amply for "adequate and effective" review for indigents. But to make sure there is no chance of effective denial of these rights, it is elsewhere provided that "fees for transcripts furnished in criminal or habeas corpus proceedings to persons allowed to sue, defend, or appeal in forma pauperis shall be paid by the United States. . . ."[56] From these provisions it is clear that the federal practice contemplates equal opportunities for indigents. This has not always been the result in practice. These provisions have been held[57] *not* to entitle an indigent petitioner to a free transcript for use in preparing a motion to vacate under section 2255 of the federal judicial code.[58] Such a holding, however, does not run contrary to the *Griffin* ruling, for a transcript is not absolutely necessary to the prosecution of a motion to vacate under section 2255. It is a convenience, of course, to be able to comb the transcript for possible errors, but access to the courts is available without it.[59]

The *Griffin* case will, however, involve a considerable change in the theory under which federal practice extends equal rights to indigents. It is clear that the federal courts have heretofore regarded in forma pauperis proceedings as a matter of privilege, not of right. "The right to appeal from a final decision of the District Court is a matter of right, [but] the right to appeal as a poor person, without being required to prepay fees and costs in

55 28 U.S.C. (1952) §1915 (a).
56 Id., §753 (f).
57 United States v. Stevens, (3d Cir. 1955) 224 F. (2d) 866.
58 28 U.S.C. (1952) §2255.
59 But see 104 UNIV. PA. L. REV. 552 (1956).

the appellate court, is regulated by statute."[60] This theory has persisted largely because federal law gives the trial court power to deny the privilege of in forma pauperis appeal by certifying that the appeal is not taken "in good faith."[61] This discretion of the trial court is not necessarily inconsistent with the due process requirement of the *Griffin* case.[62] If an indigent convict is denied appellate review only when he does not appeal in good faith, he can scarcely have been denied "adequate and effective" review commensurate with that available to non-indigents. The federal judges have generally been careful to resolve every doubt in favor of the petitioner before ruling that his appeal is taken in bad faith.[63] Neither due process nor equal protection would seem to require a court to hear bad faith appeals.

The fact that federal courts sometimes will grant the right to appeal in forma pauperis, but refuse the right to a free transcript,[64] is not in contradiction to the principle of the *Griffin* holding. Such a transcript is not essential to appeal in the federal courts. "Bystanders' bills of exceptions" are permitted, though little used in this day when free transcripts are liberally granted.[65]

So far we have assumed that if the *Griffin* doctrine is due process for the states, it will also be due process for the federal government, demanded by the Fifth Amendment. The Court has not previously held the states to stricter procedural requirements in the name of due process than those prevailing in federal practice. Even if the *Griffin* case is interpreted as announcing a rule of equal protection alone, this would not seem to deny it status as a constitutional requirement in federal courts. The absence of a federal equal protection clause has often been met by including

60 United States ex rel. Rasmussen v. Ragen, (7th Cir. 1945) 146 F. (2d) 516. See also Clough v. Hunter, (10th Cir. 1951) 191 F. (2d) 516.

61 28 U.S.C. (1952) §1915(a).

62 The recent case of Johnson v. United States, (2d Cir. 1956) 25 U.S. Law Week 2213, upholds this conclusion. In that case an indigent defendant argued that the Griffin ruling required that he be provided a free transcript, despite the trial court's certification that his appeal was not taken in good faith. The court of appeals refused to review the trial court's certification unless defendant could show that the trial judge had acted in bad faith in refusing the transcript. Judge Frank dissented. Only if a transcript were before the court of appeals, he said, could it determine whether or not the trial court acted in good faith. Therefore, in Judge Frank's view, refusal of a free transcript to defendant denied him adequate and effective review commensurate with that provided for non-indigents. This view must rest upon the fact that a transcript is "necessary." Such a view seems to overlook the availability of the "bystanders bill of exceptions"—a measure authorized by Judge Frank himself in United States v. Sevilla, (2d Cir. 1949) 174 F. (2d) 879—as a means for providing a record for appellate review in federal courts. See note 65 infra.

63 See Parsell v. United States, (5th Cir. 1955) 218 F. (2d) 232.

64 Morris v. Igoe, (7th Cir. 1953) 209 F. (2d) 108.

65 Miller v. United States, 317 U.S. 192, 601 (1942); United States v. Sevilla, (2d Cir. 1949) 174 F. (2d) 879.

the rights secured against state infringement by the Fourteenth Amendment equal protection clause among those secured against federal infringement in the Fifth Amendment due process clause.[66] Thus, equal protection rights have sometimes been treated as constitutional demands on the federal system as well as on the states. The *Griffin* case gives no indication that the equalization principle it sets forth is to be considered as a "privilege of citizens of the United States" rather than a due process requirement. Unless, then, the Court intended the *Griffin* principle to apply to the states only, which does not seem likely, it should now be regarded as a right guaranteed against federal infringement by the due process clause of the Fifth Amendment.

One interesting example of the effect of the holding might be noted. Due process is a right of every person. Its protection is not limited to citizens.[67] Therefore, the right of an indigent alien to "adequate and effective" review should be protected by the due process clause in the same degree as the right of an indigent citizen. This is not the case under current federal practice. It will be recalled that section 1915 of the federal judicial code[68] limits the right to proceed in forma pauperis to "citizens." Section 753 (f)[69] extends free transcripts only to "persons allowed to sue, defend, or appeal in forma pauperis." Thus aliens are denied the right to appeal in forma pauperis and the right to a free transcript.[70] This is not quite the same situation as that posed by the *Griffin* case, but it seems to involve the same principle. An indigent alien is denied as "adequate and effective" review as other persons similarly situated, not because of his poverty, since the federal practice compensates for inequalities in wealth, but solely because of his alienage. Is this "due process" consistent with the *Griffin* opinion? It would seem not. Due process extends to aliens and citizens alike. Therefore alienage is not a reasonable basis of classification on which to deny a right which has been declared to be guaranteed by the due process clause.

Of course, the *Griffin* case did not say that in forma pauperis appeal is mandatory. "Bystanders bills" may substitute for a

[66] See Antieau, "Equal Protection Outside the Clause," 40 CALIF. L. REV. 362 (1952); Wilson, "The Merging Concepts of Liberty and Equality," 12 WASH. & LEE L. REV. 182 (1955).

[67] ". . . nor shall any person . . . be deprived of life, liberty, or property, without due process of law. . . ." U.S. CONST., Amend. V.

[68] 28 U.S.C. (1952) §1915 (a).

[69] 28 U.S.C. (1952) §753 (f).

[70] DeMaurez v. Swope, (9th Cir. 1938) 100 F. (2d) 530; United States v. Sevilla, (2d Cir. 1949) 174 F. (2d) 879.

stenographer's transcript in federal courts. Free counsel can be appointed for aliens.[71] This was the manner in which appeal was provided for the defendant alien-indigent in *United States v. Sevilla.*[72] But there was no way in which the "filing fee" in the appellate court could be paid for Sevilla—that much he had to provide from his own resources. Perhaps the review provided in the *Sevilla* case could be considered "adequate and effective." But what if he had been so poor that he could not even pay the $25 filing fee? If this were the case, the situation would be indistinguishable from the *Griffin* case.[73] Sevilla would be deprived of the right to appeal enjoyed by others solely because of his poverty. A case is conceivable, then, under today's federal practice where "adequate and effective" appellate review may be denied an indigent criminal defendant solely because of his poverty.

The fact that free appeal is not provided for aliens—at least not on the same basis as for citizens—indicates that appeal has not in fact been a matter of right in the federal courts. The theory of appeal will be changed as a result of the *Griffin* case, even though there may be little effective impact in actual practice.

Summary

The *Griffin* case is an amalgam of equal protection and due process elements. It is a novel development in theory, but the immediate changes it will impose in actual practice will probably fall far short of being revolutionary. Most states already provide procedures for review which, with very little alteration, will probably conform to that demanded by the *Griffin case.* The existing federal practice (with minor exceptions) probably goes farther than is required in providing equal opportunities for review to indigents. It is impossible to speculate on the ultimate impact of the *Griffin* case on the future course of constitutional law. Certainly it goes farther than any case to date in imposing a constitutional duty on the states to equalize the economic circumstances of its citizens. But whether this equal protection aspect of the case will have individual vitality when separated from the strong due process element which was present in the *Griffin* case will remain to be answered in the future.[74]

Robert C. Casad, S.Ed.

71 28 U.S.C. (1952) §1915(d); United States v. Sevilla, (2d Cir. 1949) 174 F. (2d) 879.
72 (2d Cir. 1949) 174 F. (2d) 879.
73 The conclusion seems inescapable unless the $25 would be considered de minimis.
74 See Wilson, "The Merging Concepts of Liberty and Equality," 12 WASH. & LEE L. REV. 182 (1955).