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Constitutional Law

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INTRODUCTION

In the last thirty years, the equal protection clause[1] has been largely transformed. Once a point of reference for courts striking down schemes of economic regulation which they regarded as unreasonable or unwise, it is now primarily a source of constitutional standards in the areas of civil rights, reapportionment, and rights of indigents accused of crime.[2] These standards are of immense legal and social consequence.[2a] Since the landmark case of *Brown v. Board of Educ.*[3] their development—characterized by Professor Philip B. Kurland as "the rise of egalitarianism"[4]—has been paralleled by an increasing attention to the claims of equality in our country's political discourse and activity;[5] and without doubt legal rule and societal concern have interacted sharply.

This article considers the state and federal cases[5a] of the past year decided on a basis of equal protection principles, and indicates to some degree their present centrality in constitutional adjudication. In attempting this review, the author has focused with special intensity on two innovative decisions. One of these concerns congressional power to implement equal protection guarantees; the other deals with sentencing practices adversely affecting indigent criminals.

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1. U.S. Const. amend. XIV, § 1, provides: "nor [shall any State] deny to any person within its jurisdiction the equal protection of the laws." The parallel provision in New York Const. art. I, § 11, is: "No person shall be denied equal protection of the laws."

2. Although it applied the separate but equal formula to educational facilities, Missouri ex rel. Gaines v. Canada, 305 U.S. 337 (1938) may be regarded as the start of the assault on state sponsored segregation. The case was roughly coincident with the Court's shift toward greater permissiveness in judging state regulatory schemes. See generally Harris, The Quest for Equality, 57-81 (1960). Use of the equal protection clause to invalidate political apportionments and criminal procedures disadvantaging the indigent came later. Baker v. Carr, 369 U.S. 186 (1962); Griffin v. Illinois, 351 U.S. 12 (1956).

The transformation suggested by the text is, of course, not absolute. Earlier cases, important ones, had applied the equal protection clause to prohibit racial discrimination, e.g., Yick Wo v. Hopkins, 118 U.S. 356 (1886), Strauder v. West Virginia, 100 U.S. 303 (1880); and classification for taxation or economic regulation is still subject to a limited equal protection test, see, e.g., Morey v. Doud, 354 U.S. 457 (1957).

2a. Since the original writing of this piece, Professor Archibold Cox has published an illuminating and perceptive analysis of the meaning and significance of the Court's work in the area of equal protection. It is particularly helpful in putting last term's cases into a broader context. Cox, The Supreme Court Forward: Constitutional Adjudication and the Promotion of Human Rights, 80 Harv. L. Rev. 91 (1966).

3. 347 U.S. 483 (1954).

4. Kurland, The Supreme Court 1963 Term, 78 Harv. L. Rev. 143, 144 (1964).

5. Efforts to extend civil rights and eliminate poverty are perhaps the most striking examples of our preoccupation with equality.

5a. The federal cases included are decisions of federal courts sitting in New York, decisions by the Supreme Court on review of those courts, and decisions by other lower federal courts and the Supreme Court on the constitutional validity of New York laws.

CIVIL RIGHTS

A conflict between the New York Constitution and congressional legislation provided the vehicle for some startlingly broad declarations by the Supreme Court[6] about the power of Congress under the fourteenth amendment. The New York State constitution and statutes require new voters to be literate in English.[7] With the swelling Puerto Rican community the number of United States citizens domiciled in New York but ineligible to vote has grown,[8] and the English literacy test has become correspondingly more controversial. During the Senate debate on the Voting Rights Act of 1965, Senator Robert Kennedy, supported by Senator Javits, introduced an amendment[9] that prohibited states from requiring literacy in English, as a condition for voting in state and federal elections, of anyone who had completed sixth grade in any American-flag school.[10] The Senate passed the amendment, and, though it was removed from the House version of the bill, it was reinserted by the Conference Committee and passed as Section 4(e) of the final enactment.[11]

In *Morgan* two New York City voters claimed that their votes would be diluted by the new law and sued to enjoin its enforcement. Their position was sustained by a three-judge district court[12] in the District of Columbia[13] which declared Section 4(e) unauthorized by the federal constitution.[14] Relying heavily on *Lassiter v. Northampton County Bd. of Elections*,[15] in which the Supreme Court had unanimously upheld a state literacy requirement, the court found the New York law to be within constitutionally permissible limits, including the test of reasonableness imposed by the equal protection clause. Assuming that Section 5 of the four-

6. Katzenbach v. Morgan, 384 U.S. 641 (1966).

7. N.Y. Const. art II, § 1; N.Y. Elect. Law §§ 150,168. The constitutional provision was adopted in 1921. It exempted persons already eligible to vote from having to read and write English.

8. With limited exceptions, an alien who is not literate in English may not be naturalized, 66 Stat. 239 (1952), 8 U.S.C. § 1423 (1964).

9. 111 Cong. Rec. 11027 (1965).

10. That the amendment was directed at New York is clear. Among states with a requirement of literacy in English, New York is the only one with a substantial Puerto Rican population, and Puerto Rico is the only major United States territory in which the primary language of instruction is not English. Those discussing the amendment in Congress acknowledged that its purpose was to alter the situation in New York. 111 Cong. Rec. 11060 (1965). The sixth-grade level of education was picked to correspond with New York's rule that proof of completion of the sixth grade in an English speaking school is sufficient to show English literacy. 71 Cong. Rec. 11060 (1965); N.Y. Elect. Law § 168.

11. Voting Rights Act of 1965, § 4(e), 79 Stat. 439, 42 U.S.C. § 1973b(e) Supp. I (1965).

12. Three-judge district courts are required in all cases in which an interlocutory or permanent injunction against the enforcement of an Act of Congress is sought on the grounds of the act's unconstitutionality. 28 U.S.C. §§ 2282, 2284 (1964).

13. In order to preclude recalcitrant federal courts in the South from issuing hobbling injunctions, Congress provided, in Section 14(b), that only the District Court in the District of Columbia could enjoin provisions of the Voting Rights Act, 79 Stat. 445 (1965), 42 U.S.C. § 1973L(b) (Supp. I, 1965).

14. Morgan v. Katzenbach, 247 F. Supp. 196 (D.D.C. 1965), rev'd, 384 U.S. 641.

15. 360 U.S. 45 (1959).

teenth amendment[16] conferred power upon Congress only in the event of infringement of rights protected by the amendment, the court concluded that Congress had no power to enact section 4(e).[17]

Within a month of the *Morgan* decision a three-judge district court in New York reached the contrary result in *United States v. Monroe County Bd. of Elections.*[18] In that case, the government successfully sued Rochester election officials who refused to register persons qualified to vote by section 4(e). According to the opinion of Judge Kaufman, Congress has "some latitude to determine for itself what patterns of activity contravene Fourteenth Amendment rights,"[19] and the exercise of the power is particularly apt when state action would otherwise impede legitimate congressional policies. The court emphasized that Spanish had been used as the language of instruction in Puerto Rico pursuant to a deliberate policy of Congress to encourage the island's cultural autonomy. Thus, "because of the sui generis circumstances present in the instant case,"[20] it was determined that Congress had power to enact Section 4(e) under the fourteenth amendment.

Noting jurisdiction in the *Morgan* case, the Supreme Court heard argument at the same time it considered a challenge to the New York English literacy requirement based solely on the fourteenth and fifteenth amendments. That challenge had been rejected in *Cardona v. Power*[21] by a divided New York Court of Appeals, which had refused to allow plaintiff to take a literacy test in Spanish. On the last day of term, the Court reversed *Morgan*[22] without deciding the issue raised by *Cardona.*[23] In doing so, it went considerably beyond Judge Kaufman's formulation of congressional power under the fourteenth amendment. Writing for the Court, Mr. Justice Brennan indicated that the draftsmen had intended Section 5 of the fourteenth amendment to confer upon Congress the same broad powers it had under the necessary and proper clause. Congress explicitly intended to rest section 4(e) on the fourteenth amendment, and the section was "appropriate legislation, 'plainly adopted' to furthering aims of the equal protection clause."[24] Congress might have concluded that

16. "The Congress shall have power to enforce, by appropriate legislation, the provisions of the Article."

17. The Court rejected the view of Circuit Judge McGowan, dissenting, Morgan v. Katzenbach, supra note 14, at 204, that the territorial power allowed Congress to protect the voting privileges of Spanish speaking citizens from Puerto Rico who had moved to the mainland.

18. 248 F. Supp. 316 (W.D.N.Y. 1965), appeal dismissed, 383 U.S. 575 (1966).

19. 248 F. Supp. at 322.

20. Id. at 323.

21. 16 N.Y.2d 639, 209 N.E.2d 119, 261 N.Y.S.2d 78 (1965). The three dissenters had had a change of heart, or mind, since Comacho v. Doe, 7 N.Y.2d 762, 163 N.E.2d 140, 194 N.Y.S.2d 33 (1959).

22. Katzenbach v. Morgan, 384 U.S. 641 (1966).

23. The Court vacated the judgment in Cardona and remanded the case to the Court of Appeals to determine whether appellant could qualify to vote under section 4(e), a point not clear from the record, and to decide what scope should be given to those aspects of the New York English literacy requirements not vitiated by the federal legislation. Cardona v. Power, 384 U.S. 672 (1966).

24. 384 U.S. at 652.

the broadened franchise would be helpful to Puerto Ricans in gaining nondiscriminatory treatment in the provision of government services. Congress, said Mr. Justice Brennan, could weigh this need against the state interests served by the English literacy requirement; "it is enough that we be able to perceive a basis upon which Congress might resolve the conflict as it did."[25] Since such a basis existed, the legislation was valid.

The Court reached the same conclusion with regard to the more confined inquiry whether section 4(e) could be sustained if merely aimed at the elimination of an invidious discrimination in voting. Congress might have determined that the New York constitutional provision resulted largely from prejudice or that the state interests asserted to support its existence did not justify denial of a right as precious as the right to vote. The Court's role, again, was merely to "perceive a basis upon which Congress might predicate a judgment" that the New York requirement was "an invidious discrimination in violation of the equal protection clause."[26]

Mr. Justice Harlan, joined by Mr. Justice Stewart, dissented.[27] He did not consider the New York English literacy rule to be arbitrary or unreasonable on its face. No facts had been established by any legislative record to support the congressional judgment of invidious discrimination. The power of Congress under section 5, according to Mr. Justice Harlan, had to be premised on an infringement of constitutional rights, and whether such an infringement had taken place was a judicial inquiry. Not finding such a violation, the dissent concluded that section 4(e) was not constitutionally authorized.

Morgan is a notable decision. Although the case could conveniently have been decided the same way on much narrower grounds,[28] the Court chose to make a striking change in constitutional doctrine concerning the power of Congress under the fourteenth amendment.[28a] The doctrine on which the Court first relies—that Congress may prohibit state laws that do not themselves violate the fourteenth amendment but arguably contribute to conditions in which other infringements of fourteenth amend-

25. Id. at 653.
26. Id. at 656.
27. Id. at 659.
28. The Court could have followed Judge McGowan's reliance on the territorial power. See note 17 supra. It could have found the New York requirement violative of the fourteenth amendment, by emphasizing the fundamental nature of voting rights and by giving some deference to the congressional judgment. No doubt, Lassiter v. Northampton County Bd. of Elections, supra note 15, posed something of a roadblock, though not an insuperable one, to this course. Finally, the Court could have mixed all the special facts in the case together and come up with something like the serviceable, if not intellectually satisfying, rationale of Judge Kaufman in United States v. Monroe County Bd. of Elections, supra note 18.
28a. For Professor Cox, South Carolina v. Katzenbach, 383 U.S. 301, 329 (1966) is the germinal case, and Morgan is a clarification and application of its principles. Cox, note 2a supra, at 102. The language in the earlier case may or may not be read to cover the kinds of problems raised in Morgan. That Mr. Justice Harlan and Mr. Justice Stewart were able to join the majority opinion is strong evidence that they, at least, did not believe it contained the same implications found by Professor Cox.

ment rights take place—has no support in previous law.[29] None of the cases dealing with congressional legislation under the fourteenth amendment have suggested that Congress has the power to prohibit state practice "A," which is constitutionally pure, because it may create circumstances in which unrelated state practice "B," which is constitutionally impure, is likely to occur. The Court achieves its result by taking the phrase "enforce, by appropriate legislation" and focussing on the last three words. It does not consider whether "enforce" has, as an ordinary reading might indicate, any limiting content.[29a] This interpretation allows Congress the same kind of discretion to implement fourteenth amendment rights that it has to regulate interstate commerce.

The Court's alternative holding—that so long as the judgment of Congress is rational[30] it may decide what state activities are prohibited by the fourteenth amendment—is also inconsistent with the Court's earlier approach to legislation based on the fourteenth amendment. Whether sustaining[31] or invalidating[32] such legislation, the Court has always made an independent determination whether the practice prohibited by Congress violates the amendment, and has assumed that only if it does can the

29. Professor Cox notes that Marshall's formula for congressional power, McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 421 (1819), was never limited to the necessary and proper clause. Cox, supra note 2a, at 102. It is true, as he points out, that its substance was applied to sustain a federal fugitive slave law, Prigg v. Pennsylvania, 41 U.S. (16 Pet.) 539 (1842), and prohibition legislation, James Everard's Breweries v. Day, 265 U.S. 545 (1924), but in each of these instances the exercise of congressional power resembled that passed on in South Carolina v. Katzenbach, and these cases do not provide a very solid foundation for the breadth of the *Morgan* rationale. In South Carolina v. Katzenbach, supra note 28a, at 329, the Court indicates that when Congress tries to correct what are plainly violations of the fifteenth amendment it can create classifications for the application of its remedial legislation that may reach some situations in which no constitutional violation is present. A contrary rule would seriously inhibit the power of Congress to develop workable schemes of classification, and might result in harmful delays of administration, since each time legislation was applied a claim could be made that there had been no underlying infringement of constitutional rights. (The Voting Rights Act of 1965 does in fact allow for such claims under a special procedure.) The theory of *Morgan* goes much further, however. It would sustain legislation that in direct effect covers no instances of constitutional violation.

29a. What historical evidence there is seems to suggest that the wording chosen for section 5 was intended to grant Congress narrower powers than those it has under the necessary and proper clause. See, e.g., Bickel, The Original Understanding and the Segregation Decision, 69 Harv. L. Rev. 1, 32-40, 60 (1955); Harris, The Quest for Equality 33-37 (1960). Necessary and proper language had been a key part of one of the proposals of Congressman John Bingham which was rejected by the House of Representatives.

30. This inquiry is, however, subject to an important qualification. Mr. Justice Brennan is at pains to point out that Congress cannot dilute equal protection and due process decisions of the Court. Katzenbach v. Morgan, 384 U.S. at 651 n.10. Apparently this is so even when rational men might think the clauses provide less protection than the Court has declared. Presumably the "no dilution" rule does not turn on whether the Court has had a chance to pass on a certain state practice before Congress acts. In other words, in cases of possible dilution in which the congressional act does not conflict with previous decisions, the Court, at least in theory, must independently ascertain the scope of fourteenth amendment protections, though perhaps with some deference to the legislative judgment.

31. See, e.g., Screws v. United States, 325 U.S. 91 (1945); Strauder v. West Virginia, 100 U.S. 303 (1880).

32. See, e.g., Civil Rights Cases, 109 U.S. 3 (1883); United States v. Cruikshank, 92 U.S. 542 (1875).

amendment serve as a source of power for the challenged federal act.[33] While the authors cited by the Court[34] do argue that the equal protection clause is much more sweeping than the Court has acknowledged and that it gives Congress broad powers to protect guaranteed rights, many of which will go unprotected unless it acts, they do not assert that Congress has discretion to define the scope of those rights.[35]

The breadth of the Court's rationale may be suggested by two examples. Since Congress might reasonably conclude that Civilian Review Boards diminish police disregard of rights guaranteed by the equal protection clause, ordering cities to have such boards would be an appropriate means of enforcing the fourteenth amendment. If we assume that the equal protection clause, by itself, neither prohibits nor mandates positive steps to eliminate de facto segregation in schools, and we further assume that reasonable men may believe such steps to be either constitutionally required or constitutionally forbidden,[36] Congress, under its powers of definition, may force the states to act or prevent them from acting.

Presumably the Court's rationale may also serve to sustain legislation in areas other than civil rights where the equal protection clause or other provisions of the fourteenth amendment are relevant, and these include all state laws and practices impinging on the liberties of the Bill of Rights. Of course, the Court could limit what it has apparently held in *Morgan*. It did

33. The Court could, consistently with this approach, give some deference to the congressional judgment on constitutionality. It could also rely on congressional fact finding. Perhaps a finding by Congress that the New York amendment was motivated by prejudice could be considered a relevant constitutional fact. If courts do not inquire into legislative motive because motive is constitutionally irrelevant, then this would not be so; but if noninquiry merely reflects a view that legislative motive is not appropriately ascertainable by judicial process, a determination by Congress concerning motive would have some import. At any rate, of the various reasons suggested by the Court why Congress might have considered the New York requirement a violation of equal protection, the existence of prejudice at the constitutional convention and the availability of Spanish-language newspapers and radios were the only ones involving any sort of fact finding. Mr. Justice Brennan does not distinguish these sorts of judgments from the weighing of values in the constitutional context. Thus, he says, Congress might have believed that the state's denial of the right to vote is not an appropriate means of encouraging persons to learn English. It is just this type of judgment that has traditionally been the province of the Court when dealing with the fourteenth amendment.

34. Harris, op. cit. supra note 29a, at 33-56. ten Broek, The Antislavery Origins of the Fourteenth Amendment 187-217 (1951); Frantz, Congressional Power to Enforce the Fourteenth Amendment Against Private Acts, 73 Yale L.J. 1353, 1356-57 (1964).

35. While their respective analyses are by no means identical, it is fair to generalize that Frantz, Harris and ten Broek contend that the equal protection clause imposes a positive obligation on the states to protect certain basic rights, which, if the states default, may be directly protected by Congress against private as well as state action. For example, states are supposed to protect persons equally from bodily injury. If they fail to provide this protection for a class of persons, particularly members of a racial minority, Congress may act. There is no effective way for the federal judiciary, in the absence of congressional legislation, to guard Negroes against racially motivated assaults and murders supported by state inaction. Since this is true, Congress does have, according to the theory of these authors, broad discretion to determine the actual effectiveness of fourteenth amendment protections. But this does not mean that Congress can define what rights the amendment protects. See Bickel, The Voting Rights Cases, The Supreme Court Review 79, 97 (1966). But cf. Bickel, The Original Understanding and the Segregation Decision, 69 Harv. L. Rev. 1, 60-64 (1955).

36. See text accompanying notes 41-47 infra.

note that voting is the right "preservative of all rights,"[37] and perhaps measures different from the extension of voting would not so easily be found appropriate means of protecting other constitutionally guaranteed rights. Similarly, the Court might be more hesitant to accept congressional determinations of the scope of the equal protection clause if they concern rights the Court considers less basic than voting.

That the Court departs from prior law in this area is in itself neither surprising nor unfortunate. That law was derived from relatively few, mostly old, and somewhat discredited cases. Civil rights is now a problem that is national in scope. Perhaps it has always been, but for a long period between the Civil War and World War II recognition of that fact was dormant. Much can be said for giving Congress the legal power to protect rights its deems to be fundamental; indeed, the greater the extent to which the elected representatives rather than the judiciary are the guardians of these rights, the better. But in *Morgan* the Court turns its back on previous interpretations of the fourteenth amendment without any reasoned explanation of why it is doing so. It does cite a few cases and authors "creatively," but it declines to come to grips, in any real way, with the issues of historical intent, accumulated case law, and the role of Congress in our federal system in regard to civil rights. Nor does it consider the implications of its rationale. This all seems rather regrettable, even if one takes cognizance of the pressures under which the Court operates at the end of term. One might, of course, defend the opinion's content on the theory that summary conclusions are preferable to clear analysis when the Court redefines major constitutional principles, but exploration of the merits of that theory is beyond the scope of this article.

Even if *Morgan* is taken to stand for all it seems to say, it is difficult to predict whether the working of the federal system will be substantially altered. Congress has not legislated to the extent of its power with regard to commerce, and congressional representation of state interests[38] is particularly vigorous in the area of civil rights. Moreover, the present Court has shown a disposition to sustain major civil rights legislation under the commerce clause,[39] and the spending power gives Congress another potent weapon to further equal rights. For much of the civil rights legislation that seems politically feasible in *Morgan* promises a change in rationale rather than result. Since first amendment liberties and the rights of criminal suspects do not enjoy great popular favor, the possibilities for massive federal preemption of state laws and procedures in these areas are not likely to be soon realized.

It would, however, be a mistake to write *Morgan* off as an interesting but not terribly relevant case. In regard to civil rights legislation reaching

37. 384 U.S. at 652.
38. See Wechsler, Principles, Politics and Fundamental Law, 49-82 (1961).
39. Katzenbach v. McClung, 379 U.S. (1964); Heart of Atlanta Motel v. United States, 379 U.S. 241 (1964).

private action, it may bear immediate fruit. In *United States v. Guest*,[39a] decided last term, six justices declared their readiness to hold that Congress under section 5 may make criminal acts of private individuals that interfere with the exercise of fourteenth amendment rights.[40]

Although it is not yet clear what acts will be held to constitute such interference,[40a] one may suppose, given *Morgan*, that Congress will be allowed latitude to punish what private behavior it chooses. *Morgan* and *Guest* together, then, give Congress wide discretion to frame laws under the fourteenth amendment to protect Negroes and civil rights workers. With doubts about congressional power in this area virtually eliminated, passage of legislation like that proposed last session[40b] is likely unless it is tied to more controversial measures.

Morgan may also have more subtle effects on federal legislation. By contributing to a climate in which congressional power to act with regard to problems like housing discrimination is clear,[40c] it will blunt the edge of the constitutional arguments of opponents and perhaps help sway a few borderline legislators who have honest doubts about federal power to act or about the appropriateness of relying on the commerce clause for noncommercial purposes. When the time is politically propitious for such legislation, last term's cases may make a small, but meaningful, difference.

Despite congressional action in recent years to protect civil rights, the courts must still face a number of questions raised by *Brown v. Board of Educ.* without the benefit of national legislative guidance. One of the thorniest of these is what the state may, or must, do to eliminate so called de facto school segregation caused by housing patterns. In the past year, two federal district courts and a state supreme court considered the equal protection issues raised by the policy of the Board of Regents to promote integration in the public schools. Having determined that Negro children suffer from going to schools wholly or predominantly attended by other Negroes, the Board decided to eliminate racially imbalanced schools.[41] Unlike state imposed school segregation, which can be eliminated or reduced if the state becomes "color-blind,"[42] de facto segregation can be di-

39a. 383 U.S. 745 (1966).

40. Concurring opinion of Mr. Justice Clark (joined by Justices Black and Fortas) and concurring and dissenting opinion of Mr. Justice Brennan (joined by Chief Justice Warren and Justice Douglas), in United States v. Guest, supra note 39a, at 761, 774. This departure from earlier cases is considerably easier to defend in terms of the historical intent of the framers than that in *Morgan*.

40a. See Cox, note 2a supra, at 112-17, for a discussion of some of the problems raised.

40b. See Title V of the proposed Civil Rights Act of 1966 (S. No. 3296, 89th Cong., 2d Sess. (1966); H.R. No. 14765, 89th Cong., 2d Sess. (1966)).

40c. See Cox, supra note 2a, at 117-21.

41. See State Education Dep't, Summary of State Education Dep't's Position with respect to The Elimination of De Facto Segregation in the Schools (1964). Racially imbalanced schools have been defined as "predominantly Negro schools in which the proportion of Negroes substantially exceeds the proportion of Negroes in the public schools of the same grade level in the community." Fiss, Racial Imbalance in the Public Schools: The Constitutional Concepts, 78 Harv. L. Rev. 564 (1965).

42. See Brown v. Board of Educ., 347 U.S. 483 (1954); Plessy v. Ferguson, 163 U.S. 537, 559 (1896) (dissenting opinion of Harlan, J.).

rectly attacked[43] only if the state consciously recognizes racial differences in building new schools, merging attendance zones, and transferring pupils. Herein lies the constitutional problem.

Must the state use racial classifications to achieve integration, must it decline to do so, or has it a choice? Proponents of mandatory integration contend that segregated public education, even though not consciously created by state officials, denies Negroes equal educational opportunities and thus contravenes the equal protection of the laws.[44] Those who assert that a state is forbidden to use racial classification to achieve integration rely on the premise that under our Constitution racial differentiations are inherently arbitrary[45] and justified, if at all, only in the most extreme circumstances.[46] Permitting but not requiring the use of racial classifications leaves the decision of whether and how to alter de facto segregation up to nonjudicial officials. This position is responsive both to inherent limitations in the judicial role and to existing social realities. Absent state discriminatory action, courts will have trouble developing principles to determine when racial imbalance must be corrected[47] and what sorts of corrective action suffice to meet constitutional requirements. On the other hand, to interpret the Constitution as prohibiting racial classification in this context may be to deny, on the basis of a principle, the only effective means for promoting the most important end served by the principle, a society in which human opportunities are not controlled by racial differences.

Thus far the Supreme Court has avoided dealing with this constitutional issue.[48] The lower federal and state courts, of course, do not have that option. The three courts considering the problem in the year under review sustained New York's efforts to promote racial balance in its public schools. In *Etter v. Littwitz*,[49] parents of pupils in the West Irondequoit

43. Of course, laws prohibiting racial discrimination in housing and employment, as well as a variety of welfare programs for the disadvantaged, will help to break down Negro ghettos and thus indirectly contribute to school integration, but the alteration of housing patterns is a long range process.

44. See, e.g., Fiss, supra note 41, at 582-98.

45. See, e.g., Kaplan, Segregation Litigation and the Schools—Part II: The General Northern Problem, 58 Nw. U.L. Rev. 157, 171-74 (1963).

46. Perhaps a threat to national security as great as that imagined by the military authorities in Korematsu v. United States, 323 U.S. 214 (1944), would be sufficiently extreme.

47. The problem is one of developing a definition of racial imbalance that has constitutional significance. Given a community whose school children are 20% Negro, should a school that is 45% Negro be treated differently from one that is 55% Negro? Given, in different communities, two schools that are 80% Negro, should it matter that in one community 50% of the school children are Negro, and in the other 80% are Negro? How is the relevant community to be ascertained? Courts might, of course, develop standards, whether flexible or rigid, to deal with these questions, but the issues are, at the least, quite complex.

48. See, e.g., Balaban v. Rubin, 379 U.S. 881, denying cert. in 14 N.Y.2d 193, 199 N.E.2d 375, 250 N.Y.S.2d 281 (1964); Bell v. School City of Gary, 377 U.S. 924 (1964), denying cert. in 324 F.2d 209 (7th Cir. 1963). Professor Alexander Bickel has suggested that in the related area of benevolent housing quotas, the Court *should* refrain from decision. Bickel, The Least Dangerous Branch, 60-72 (1962).

49. 49 Misc. 2d 934, 268 N.Y.S.2d 885 (Sup. Ct., Monroe Co. 1966).

School District sued in the Monroe County Supreme Court to enjoin the voluntary transfer of students from a racially imbalanced school in the contiguous Rochester City School District. The court's task was relatively simple. The Court of Appeals, in a rather cryptic opinion, had earlier sustained the drawing of a new school zone to achieve racial balance among the student body.[50] It had also upheld plans to "pair" schools,[51] that is, to combine school attendance zones.[52] Although the court indicated that the school board actions challenged in those cases would have been defensible apart from the policy of encouraging racial balance, it is doubtful that this element was central. Almost certainly the Court of Appeals will approve the voluntary busing of pupils even if the sole purpose is to further school integration. Since voluntary busing had already been upheld by the Appellate Division of the Fourth Department,[53] the court's dismissal of the complaint in *Etter* was plainly dictated by the decisions of superior courts.

The two federal courts were not so bound. In *Olson v. Board Of Educ.*[54] a federal district court dismissed the complaint of a white child, by his parent, who protested the decision of the Commissioner of Education to merge elementary school attendance zones in the Malverne School District. Before the merger 91 per cent of one school's students and approximately 20 per cent of the students of the other two schools were Negro. The Commission made it clear that it ordered a change in attendance zones, two zones being set for grades 1 through 3 and one zone for grades 4 and 5, to eliminate the racial imbalance in the predominantly Negro school. According to Judge Bartels, the Constitution does not require, but permits, mixing the races to remedy racial imbalance in schools.[55] Not finding the Commissioner's action arbitrary and believing that a racial classification "is not proscribed if it is *necessary* to the accomplishment of a permissible state policy," he sustained the merger of zones.[56]

In *Offermann v. Nitkowski*,[57] the district court upheld a plan for the city of Buffalo to relocate school boundary lines and provide for pupil transfer. Quoting with approval another federal court's view that the *Brown* decision did not convert the first Mr. Justice Harlan's metaphor (our Constitution is "color-blind") "into a constitutional dogma barring

50. Balaban v. Rubin, 14 N.Y.2d 193, 199 N.E.2d 375, 250 N.Y.S.2d 281, cert. denied, 379 U.S. 881 (1964).

51. Addabbo v. Donovan, 16 N.Y.2d 619, 209 N.S.2d 112, 261 N.Y.S.2d 68, cert. denied, 382 U.S. 905 (1965); Vetere v. Allan, 15 N.Y.2d 259, 206 N.E.2d 174, 258 N.Y.S.2d 77, cert. denied, 382 U.S. 825 (1965) (apparently, but not explicitly, deciding the constitutional issue).

52. In a simple pairing of two elementary schools all the children in both attendance zones would go to one school for grades 1 through 3 and to the other for grades 4 through 6.

53. Di Sano v. Storandt, 22 App. Div. 2d 6, 253 N.Y.S.2d 411 (4th Dep't 1964).

54. 250 F. Supp. 1000 (E.D.N.Y. 1966).

55. Id. at 1006.

56. Id. at 1010 (emphasis added).

57. 248 F. Supp. 129 (W.D.N.Y. 1965).

affirmative action to accomplish the purposes of the Fourteenth Amendment,"[58] Judge Henderson held that the amendment "does not bar cognizance of race in a proper effort to eliminate racial imbalance in a school system."[59]

The *Offermann* opinion's explicit recognition of the relevance of the purpose underlying a racial classification is more satisfactory than the test formulated in *Olson*, which is apparently meant to be applicable to all racial classifications.[60] Unless "necessary" is given a highly restrictive meaning, the *Olson* test is much too permissive for judging classifications that operate against minority groups. If "necessary" does receive a narrow reading, the test is too strict for classifications used to promote equal opportunity.

Reapportionment

Apart from *Brown v. Board of Educ.*,[61] no constitutional ruling of recent years has affected the country's political and social structure as significantly as the state reapportionment cases.[62] Although the past year's cases develop no important new principles in this area, they do reflect the continuing problem in federal relations created by the reapportionment decisions and the impact of those decisions on malapportionment of local, as well as state, government bodies. New York has yet to achieve a permanent formula for the election of state legislators that meets the *Reynolds v. Sims* standard of "substantially equal state legislative representation for all citizens."[63] A recounting of the history of developments up to the present is, though tedious, necessary if one is to understand the delicacy and difficulty of the state-federal issues involved, the significance of the most recent court opinions, and the task facing the 1966 Constitutional Convention.[63a] In June of 1964, New York's legislative apportionment system, under which less populated areas were somewhat over-represented in both houses, was declared invalid by the Supreme Court.[64] On remand, a three-judge district court permitted the 1964 election to take place under the rejected framework, but ordered the legislature to produce an acceptable apportionment for a special election in 1965.[65] His party having been badly decimated by the Goldwater debacle in November 1964, Governor Rockefeller hastened to convene a special session of the Republican controlled lame-duck legislature. It enacted four alternative ap-

58. Id. at 131, citing opinion of District Judge Bohanon in Dowell v. School Bd., 244 F. Supp. 971, 981 (W.D. Okla. 1965).

59. 248 F. Supp. at 131.

60. Perhaps the court in Olson is addressing itself only to classifications used to encourage integration, but this is not clear from the opinion.

61. 347 U.S. 483 (1959).

62. See, e.g., WMCA, Inc. v. Lomenzo, 377 U.S. 633 (1964); Reynolds v. Sims, 377 U.S. 533 (1964); Baker v. Carr, 369 U.S. 186 (1962).

63. Reynolds v. Sims, supra note 62, at 568.

63a. See McKay, Reapportionment, 380-90 (1965) for a helpful summary of the history of apportionment in New York.

64. WMCA, Inc. v. Lomenzo, supra note 62.

65. Hughes v. WMCA, Inc., unreported decision, S.D.N.Y., July 27, 1964, aff'd, 379 U.S. 694 (1965).

portionment plans in late December. The district court decided that only Plan A, the last of these in order of declining legislative preference, met federal constitutional standards.[66] However, plan A had the misfortune to include a 174 member assembly, flatly contradicting the state constitutional requirement of a 150 member assembly.[67] In April the plan was declared invalid under the state constitution by the New York Court of Appeals.[68] In May, the federal court, nonetheless, directed that the 1965 election be held under Plan A as a stop gap measure.[69] Despite Mr. Justice Harlan's sharp admonition that the sensitive issues of state-federal relations presented were deserving of plenary consideration, the Supreme Court refused to accelerate the appeal from the district court or stay its order.[70] Given the limited time before election, the denial of these motions represented effective acceptance of the course charted by the district court. A divided New York Court of Appeals in July, obviously exasperated with the federal court's disregard of state law, enjoined the holding of the 1965 "unconstitutional election."[71] Within a few days, the district court responded by reaffirming its order and enjoining interference with the election.[72] Dealing summarily with four pending appeals in October[73] and one more in December,[74] the Supreme Court sustained the district court's action, and thus wrote finis to this particular exercise in creative federalism.

Two months earlier the state supreme court, although refusing to appoint referees to devise an apportionment plan for the 1966 election, had directed the legislature to approve such a plan by February 1, 1966.[75] It retained jurisdiction to formulate an appropriate plan if the legislature failed to proceed. Despite the traditional New York view that apportionment is a political task completely within the legislative province, the court reasoned that the reapportionment decision had injected the courts into the area and that state courts were more able than federal courts to assure compliance with state constitutional requirements.[76] In light of the experience of the preceding few months, the latter conclusion was hard to

66. WMCA, Inc. v. Lomenzo, 238 F. Supp. 916 (S.D.N.Y. 1965).

67. It was argued in defense of Plan A that it was nevertheless constitutional on the theory that the 150-member requirement was an inseparable part of the state constitutional scheme of apportionment, and thus fell with the rest of the scheme as a result of the Supreme Court's decision in WMCA, Inc. v. Lomenzo, supra note 62; see Matter of Orans, 15 N.Y.2d 339, 356-59, 206 N.E.2d 854, 862-64, 258 N.Y.S.2d 825, 836-39 (dissenting opinion of Van Voorhis, J.).

68. Matter of Orans, supra note 67.

69. Travia v. Lomenzo, unreported decision, S.D.N.Y., May 18, 1965.

70. Travia v. Lomenzo, 381 U.S. 431 (1965).

71. Glinski v. Lomenzo, 16 N.Y.2d 27, 209 N.E.2d 277, 261 N.Y.S.2d 281 (1965).

72. WMCA, Inc. v. Lomenzo, 246 F. Supp. 953 (S.D.N.Y. 1965).

73. Screvane v. Lomenzo, 382 U.S. 11 (1965); Rockefeller v. Orans, 382 U.S. 10 (1965); Travia v. Lomenzo, 382 U.S. 9 (1965); WMCA, Inc. v. Lomenzo, 382 U.S. 4 (1965).

74. Travia v. Lomenzo, 382 U.S. 287 (1965).

75. Matter of Orans, 47 Misc. 2d 493, 262 N.Y.S.2d 893 (Sup. Ct. 1965).

76. In addition to the limitation on the number of assemblymen, the state constitution requires that both senate and assembly districts be "in as compact a form as practicable." N.Y. Const. art III, §§ 4, 5. Thus, political gerrymandering violates the state constitution. Matter of Orans, supra note 75, at 501, 262 N.Y.S.2d at 901, though it has not yet been held inconsistent with the federal equal protection clause.

dispute. The appellate division, over Judge Breitel's strong dissent, affirmed the order of the lower court.[77] Although the Court of Appeals stayed the effect of the order until February 23, 1966,[78] the Republican senate and Democratic assembly of the newly elected legislature could not reach agreement on a plan of apportionment, and the Court of Appeals appointed a judicial commission to submit a plan to the court.[79] The commission's plan, which reapportioned the state into 57 senate districts, and 150 assembly districts, was approved by the Court of Appeals in March[80] to govern the 1966 elections to the state legislature and the Constitutional Convention.[81] The Convention will be responsible for developing a permanent apportionment plan and bringing to an end litigation over representation in the state legislature.

In July, 1965, the Court of Appeals decided that the principles of the reapportionment decisions were applicable to elective legislative bodies exercising general governmental powers at the municipal level. In *Seaman v. Fedourich,*[82] the Court affirmed the invalidation of a new districting plan for the Common Council of the City of Binghamton.[83] It indicated that population variances of up to 50 per cent (12,000 for one ward as opposed to 8,600 for another) were not permissible and noted that the city could, without difficulty, provide greater equality of representation in its districting.[84] Binghamton's revised plan was approved by the Supreme Court, Broome County, in April, 1966.[85] Under the new plan the most and least populous districts differ by less than 10 per cent; deviation from the representational norm is less than 5 per cent; and votes from districts having at least 54 per cent of the population are necessary to elect a majority of the councilmen.

Following *Seaman,* lower state courts have in the last year invalidated apportionments for County Boards of Supervisors when representation on the boards failed to reflect the population differences of the constituent municipalities.[86] The discrepancies are often shocking. In Westchester

77. Matter of Orans, 24 App. Div. 2d 217, 265 N.Y.S.2d 49 (1st Dep't 1965).
78. Matter of Orans, 17 N.Y.2d 550, 215 N.E.2d 503, 268 N.Y.S.2d 319 (1966).
79. Matter of Orans, 17 N.Y.2d 601, 215 N.E.2d 682, 268 N.Y.S.2d 561 (1966).
80. Matter of Orans, 17 N.Y.2d 107, 216 N.E.2d 311, 269 N.Y.S.2d 97 (1966).
81. Three delegates will be elected from each senate district, and fifteen will be elected at large.
82. 16 N.Y.2d 94, 209 N.E.2d 778, 262 N.Y.S.2d 444 (1965).
83. Id. at 99, 209 N.E.2d at 780, 262 N.Y.S.2d at 447. The Council had adopted this plan to ameliorate existing egregious differences in ward populations.
84. Id. at 100, 209 N.E.2d at 781, 262 N.Y.S.2d at 448. The plan was also wanting in two other respects. The Council had departed from the state policy of using the federal census to calculate population figures, and it had excluded from its figures patients at a state hospital although no investigation had been made to see if they had a right to vote.
85. Seaman v. Fedourich, 49 Misc. 2d 873, 268 N.Y.S.2d 647 (Sup. Ct., Broome Co. 1966).
86. Shilbury v. Board of Supervisors, 25 App. Div. 2d 688, 267 N.Y.S.2d 1022 (3rd Dep't 1966), affirming 46 Misc. 2d 837, 260 N.Y.S.2d 931 (Sup. Ct., Sullivan Co. 1965); Grove v. Chemung County Bd., 50 Misc. 2d 418, 270 N.Y.S.2d 465 (Sup. Ct., Chemung Co. 1966); Town of Greenburgh v. Board of Supervisors, 49 Misc. 2d 116, 266 N.Y.S.2d 998 (Sup. Ct., Westch. Co. 1966); Dona v. Board of Supervisors, 48 Misc. 2d 876, 266 N.Y.S.2d 229

County, for example, the towns of Greenburgh and North Salem, with respective populations of 76,000 and 2,300, each have one supervisor on the Board; the City of Yonkers, with 202,000 people, has 12 supervisors representing it.[87] The courts have uniformly declined to reapportion until the Boards have had an opportunity to act, but they have retained jurisdiction and set dates for compliance with constitutional requirements.[88] The Appellate Division, Fourth Department has sanctioned weighted or fractional voting as an interim way to provide relief to underrepresented voters.[89]

Even if the convention should simplify the task of reapportionment of local government bodies, the issues raised will certainly be with us for some years to come. One problem yet to be dealt with is the applicability of equal representation principles to government entities such as public authorities, special districts, and metropolitan coordination agencies.[90] What does seem certain is that the rule of substantial equality will revolutionize the composition of virtually all governmental bodies exercising general powers.

Indigency and the Criminal Process

In *Griffin v. Illinois*[91] and succeeding cases,[92] the Supreme Court has held a variety of state rules governing the appellate criminal process to be inconsistent with the guarantees of due process and equal protection as they apply to indigents. Under these decisions a more severe test than the traditional standard of reasonableness is used to judge rules of criminal procedure which, though neutrally phrased, result in a disparity of treatment between the poor and the financially able. During the past year a number of New York courts have been asked to extend the rationale of *Griffin*.

In *People v. Robinson*,[93] the state supreme court rejected an indigent

(Sup. Ct., St. Lawrence Co. 1966); Treiber v. Lanigan, 48 Misc. 2d 434, 264 N.Y.S.2d 797 (Sup. Ct., Oneida Co. 1965), aff'd as modified, 25 App. Div. 2d 202, 269 N.Y.S.2d 595 (4th Dep't), modified, 25 App. Div. 2d 937, 270 N.Y.S.2d 496 (4th Dep't 1966); Augostini v. Lasky, 46 Misc. 2d 1058, 262 N.Y.S.2d 594 (Sup. Ct., Broome Co. 1965).

87. See Town of Greenburgh v. Board of Supervisors, supra note 86.

88. Grove v. Chemung County Bd., supra note 86; Town of Greenburgh v. Board of Supervisors, supra note 86; Dona v. Board of Supervisors, supra note 86; Augustini v. Lasky, supra note 86. In some instances these Boards would have been powerless to act—even in the unlikely event they had wished to do so—in the absence of a court order, since state law compels malapportionment in many counties. Town of Greenburgh v. Board of Supervisors, supra; Dona v. Board of Supervisors, supra; Augostini v. Lasky, supra. For example, in regard to counties that are not chartered, Town Law § 20 provides that each town will have one supervisor, and County Law § 150 provides that the supervisors of the towns and cities will constitute the county board.

89. Treiber v. Lanigan, supra note 86; Graham v. Board of Supervisors, 25 App. Div. 2d 250, 269 N.Y.S.2d 477 (4th Dep't 1966).

As Professor Jack Weinstein has pointed out, weighted voting does not seem an acceptable permanent solution to malapportionment, both because it conflicts with the usual equality of members in a democratically elected legislative body and because representatives exercise power in ways other than voting. Weinstein, The Effect of the Federal Reapportionment Decisions on Counties and Other Forms of Municipal Government, 65 Colum. L. Rev. 21 (1965).

90. See Weinstein, supra note 89, at 31-40.

91. 351 U.S. 12 (1956).

92. Draper v. Washington, 372 U.S. 487 (1963); Lane v. Brown, 372 U.S. 477 (1963); Burns v. Ohio, 360 U.S. 252 (1959).

93. 48 Misc. 2d 799, 265 N.Y.S.2d 722 (Sup. Ct. Queens Co. 1965).

defendant's pretrial motion for a free transcript of the testimony at his preliminary hearing. In the court's view such transcripts are less essential than trial transcripts for defendants prosecuting appeals, since the latter are usually a precondition for appeal. Although the transcript of the preliminary examination might be useful for cross-examination of witnesses, its denial, said the court, is not unlike other disadvantages, such as less expensive legal talent, borne by poor defendants.

That the state need not, indeed cannot, equalize every advantage possessed by rich defendants hardly compels the result in *Robinson*. What was involved was a record of a formal state proceeding against the accused, which would be available to a defendant with money. If not having the transcript would in all probability seriously disadvantage a defendant at trial, the state should be obligated to supply it to him if he cannot purchase it.[94] At the least, the court should have made a more particularized inquiry into the probable use of the transcript in this case.

On the last day of term, the New York Court of Appeals in *People v. Saffore*[95] struck down a sentence that in effect confined the indigent defendant to jail for inability to pay a fine, thus vitiating one form of a sentencing practice used in virtually every state. In doing so, it became, albeit tentatively, the first of the highest state courts[96] to apply *Griffin* to sentencing practices. Saffore had been given the maximum sentence for assault as a misdemeanor, a year's imprisonment and a 500 dollar fine. Though the trial judge knew the defendant to be indigent, the sentence provided that if he failed to pay the fine, he would have to remain in jail one day for each unpaid dollar.[97] By the time his case had reached the Court of Appeals, the defendant had already served more than 21 months in prison.

In overturning the aspect of the sentence imposing imprisonment for nonpayment of the fine, Chief Judge Desmond, for a unanimous court, placed primary emphasis on the argument that the legislature had not authorized the alternative of jail for unpaid fines when indigents are in the dock. Since, in the court's view, the statutory provisions[98] allowing such imprisonment were intended to provide a means for assuring collection of fines, it "runs directly contra to . . . [their] meaning and intent"[99] to

94. In People v. Brabson, 9 N.Y.2d 173, 181, 173 N.E.2d 227, 231, 212 N.Y.S.2d 401, 407 (1961), upon which the opinion in Robinson relies, the Court of Appeals refused to supply a defendant with a document expert at public expense. However, while the line is not easy to draw, there is a difference between paying for the services of someone who might develop helpful evidence for a defendant and paying enough to provide him with what is already formally on the record. The state's obligation in the latter instance is more direct.

95. 18 N.Y.2d 101, 218 N.E.2d 686, 271 N.Y.S.2d 972 (1966). The author was of counsel in this case.

96. For an earlier lower court case to the same effect, see People v. Collins, 47 Misc. 2d 210, 261 N.Y.S.2d 970 (Orange County Ct. 1965). But see People ex rel. Loos v. Redman, 48 Misc. 2d 592, 265 N.Y.S.2d 453 (Sup. Ct., Erie Co. 1965).

97. New York Code of Crim. Proc. §§ 484 & 718 give a court imposing sentence discretion to direct imprisonment at that rate or any other more favorable to the convicted defendant.

98. Ibid.

99. People v. Saffore, supra note 95, at 103, 218 N.E.2d at 687, 271 N.Y.S.2d at 974

order imprisonment for a fine the court knows cannot be paid. Chief Judge Desmond, having effectively disposed of the case on statutory grounds, nevertheless turned to the constitutional issues. He said, "[defendant] argues persuasively that . . . it is a denial of due process and of equal protection of the law to let a defendant's lack of money determine how long he must be imprisoned. The man who can pay and the man who cannot are not treated equally."[100] The opinion then considered the question of whether a fine of 500 dollars for a common misdemeanor is constitutionally excessive[101] when, in effect, it results in 500 days in jail. It concluded:

> We do not hold illegal every judgment which condemns a defendant to confinement if he does not pay his fine. We do hold that, when payment of a fine is impossible and known by the court to be impossible, imprisonment to work out the fine, if it results in a total imprisonment of more than a year for a misdemeanor, is unauthorized by the Code of Criminal Procedure and violates the defendant's right to equal protection of the law, and the constitutional ban against excessive fines.[102]

The *Saffore* case involved an issue not yet faced by the U.S. Supreme Court. Its decisions invalidating aspects of state criminal processes prejudicial to the rights of the poor have all dealt with the procedure for guilt determination. One might argue that their extension is unwarranted when the wrongful attribution of guilt is not a danger. From the point of view of the accused, however, procedural discrimination may be less important than inequality in sentencing. The former creates only the possibility of difference in the ultimate disposition of his case—the accused may succeed despite a procedural disadvantage and, more likely, may fail even if the obstacle is eliminated—but disparity in sentencing, almost by definition, means actual difference in the final treatment received. When no substantial state interest justifies a significant differentiation in the effect of sentences on rich and poor, the poor man's claim to equal treatment should surely be given constitutional recognition. That *Saffore* was such a case is plain. As the court pointed out, the extra time in jail was patently futile as a means of collection. Nor could it have been upheld as a way of equating Saffore's punishment with that of a nonindigent who might pay the 500 dollars since it would offend our basic notions of justice for a day of liberty to be valued at one dollar.

The opinion's characterization of the fine as "excessive"[103] appears to

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The court's conclusion was bolstered by reference to earlier cases in which language, though directed to different issues, indicated the purpose of the statutory provisions was coercive rather than punitive.

100. Id. at 104, 218 N.E.2d at 688, 271 N.Y.S.2d at 975.

101. U.S. Const. amend. VIII; N.Y. Const. art. I, § 5.

102. People v. Saffore, supra note 95, at 104, 218 N.E.2d at 688, 271 N.Y.S.2d at 975.

103. No case has been found prior to Saffore in which either the federal courts or the New York courts struck down a fine as constitutionally excessive. New York decisions dismissing challenges to fines claimed to be excessive refer to reasonableness as the constitutional test, but give little indication what factors would render a fine not reasonable. See, e.g., People v. Watson, 204 Misc. 467, 126 N.Y.S.2d 832 (Ct. of Gen. Sess. N.Y. 1953). The courts of other states have generally referred to the relationship between the penalty and the offense, and have not considered the size of the offender's pocketbook. See, e.g., People v. Magoni, 73 Cal. App. 78, 238 Pac. 112 (1925); State v. Main, 69 Conn. 123, 37

be an independent constitutional basis for its holding, but analysis suggests that this ground rests heavily on either the statutory intent or the equal protection argument. A state legislature would certainly be within constitutional bounds if it set three years of imprisonment as the maximum sentence for the crime of simple assault. The "fine" of 500 days of extra imprisonment after the one year term becomes excessive only because the legislature contemplated nothing more severe than a 500 dollar fine in addition to the year term,[104] or because some other group of persons committing the same offense could not be given the same punishment.

By carefully limiting its holding, the court refrained from passing on the propriety of imprisonment for nonpayment of a fine when the total amount of time spent in jail does not exceed the statutory maximum. A district court case the previous year, had presented just this problem. In *United States ex rel. Privitera v. Kross*,[105] the indigent petitioner, convicted in New York of possessing policy slips, had been sentenced to 30 days in jail and a fine of 500 dollars, with 60 additional days in jail in the event of nonpayment. Judge Weinfeld rejected the equal protection claim, raised by petition for habeas corpus, on the ground that the trial judge could, within his discretion, have given petitioner a prison sentence of up to a year.[106] The flaw in Judge Weinfeld's reasoning is that the trial judge had not exercised his discretion to give the defendant a 90-day sentence or any larger part of a year than 30 days. For whatever reasons, he had thought 30 days appropriate. Yet Privitera was forced to spend 60 days more in jail than other persons with money who, having committed the same offense had also been sentenced to 30 days in jail and a 500 dollar fine. The futility of imprisonment as a device to coerce payment of the fine is just as great as in *Saffore* and it is also true that "the man who can pay and the man who cannot are not treated equally."[107] Thus the arguments based on statutory construction and the equal protection clause, which proved determinative in *Saffore,* are both applicable when the statutory term of imprisonment is not exceeded.

There is, however, another component in the Saffore sentence which was not present in *Privitera*—the outrageously harsh rate of conversion of dollars into days in jail, to wit, one dollar for each day. If the sole justification for confinement as an alternative to payment of a fine is to compel

Atl. 80 (1897). Only rarely have fines been held unconstitutional. See State v. Starlight Club, 17 Utah 2d 174, 406 P.2d 912 (1965).

104. It might be argued that a legislature even if it chose to impose a term of imprisonment beyond the apparent statutory maximum of one year could not achieve this result indirectly by allowing imposition of a fine that cannot be paid. This argument would make excessiveness turn on the impropriety of the legislature's method of notifying the public of the maximum penalties for crimes.

105. 239 F. Supp. 118 (S.D.N.Y.), aff'd, 345 F.2d 533 (2d Cir.) (mem.), cert. denied, 382 U.S. 911 (1965).

106. The court also noted that petitioner, if victorious on habeas corpus, could on remand be sentenced to 90 days in jail. This dilemma presumably could have been avoided, however, if the district court had invalidated only the part of the sentence requiring imprisonment for nonpayment of the fine.

107. People v. Saffore, supra note 95, at 104, 218 N.E.2d at 688, 271 N.Y.S.2d at 975.

payment of the fine, then the rate of conversion is not of constitutional significance. Only those able to pay their fines can be imprisoned under this rationale, and since they have the keys to their cells, they cannot complain that they are given insufficient credit against their fines for the days they spend in jail. Perhaps, however, confinement as an alternative to payment can be justified as a method of equalizing the punishment of indigents and those who pay their fines. Such a justification would be weakest in the context of someone, like Saffore, who has already received a maximum prison sentence, but it would be relatively strong if the original sentence of the accused included a short term of imprisonment as in *Privitera*, or no imprisonment at all. One might decide that the indigent's lack of choice renders even the briefest confinement for nonpayment of a fine a violation of the equal protection clause,[108] but a more sensible position would be to allow the state some flexibility in differentiating the penalties imposed on rich and poor so long as there is rough equivalence in severity. That equivalence would be present only if the rate of conversion of dollars into days in jail were civilized.[109]

The *Saffore* case, because of its reliance both on the *Griffin* line of cases and on the explicit prohibition of excessive fines, may prove useful to those who seek to apply equal protection concepts of constitutionality to the setting of bail for indigents.[110] Clearly, the indigent unable to raise bail is disadvantaged when compared with the accused who can afford to pay. Not only is he compelled to bear the hardship and unpleasantness of prison before a finding of guilt has occurred, his chances of proving his innocence may be seriously diminished by his lack of freedom. Thus far, despite a dictum of Mr. Justice Douglas to the contrary,[111] the courts have refused to hold that the inability of an accused to make bail constitutes a denial of equal protection or makes the bail excessive.[112] The salient differ-

108. This argument would be strengthened by the availability of devices, such as installment payments or special state employment, that make it possible for at least some indigents to pay their fines over a period of time. See, e.g., 64 Mich. L. Rev. 938, 946 (1966).

109. This suggestion does raise at least two difficult questions: How does one compare days in jail with monetary fines? How far should the courts defer to a legislative decision in this regard? At the outer limits, one day per $1 or one day per $100, judgment should not be difficult. In the doubtful ranges, say $10 a day to $25 a day, a court could refuse to sustain a sentence unless there were evidence that the relevant legislative body or trial judge had adverted to the problem of fairness.

The federal government has, by statute, 18 U.S.C. § 3569 (1964), developed a compromise between keeping indigents in prison an inordinate length of time for nonpayment of their fines and simply releasing them. After being confined 30 days for nonpayment, an indigent may then obtain release. One defect in this solution is that the permitted period of confinement is unrelated either to the size of the fine or to the amount of time already served for the same sentence.

110. For a thorough and well-reasoned argument for such application see Foote, The Coming Constitutional Crisis in Bail, 113 U. Pa. L. Rev. 959, 1125 (1965).

111. Bandy v. United States, 82 Sup. Ct. 11, 13 (Douglas, Circuit Justice 1961) (not officially reported). Professor Caleb Foote suggests that the Court's denial of certiorari at a later stage in this case over the dissent of Mr. Justice Douglas, Bandy v. United States, 369 U.S. 815 (1962), is some indication that most of the justices did not subscribe to his views. Foote, supra note 110, at 1156.

112. See Alston v. United States, 343 F.2d 345 (D.C. Cir. 1964) (per curiam); People v. Gigante, 9 Misc. 2d 881, 173 N.Y.S.2d 971 (Ct. of Gen. Sess., N.Y. 1957). But see

ence between Saffore's confinement and that inflicted on an indigent accused of a crime who cannot raise bail is that the latter may serve a legitimate state interest, the assurance of the accused's presence at trial. The contention that confinement is necessary to protect against the flight of one for whom bail is set but not posted,[113] however, rests on the doubtful factual premise that the posting of monetary bond is the primary reason, in a significant number of cases, that those accused return to trial.[114] Even if this premise is granted, there is room for a more careful review of the setting of bail in particular cases. If, for example, the accused has a steady job, deep roots in the community, no previous criminal record, and the capacity to raise some money for bail, though less bail than is usually set for the offense with which he is charged, it would certainly be reasonable to require, as a matter of constitutional law, that bail be set within his means.[115]

A discussion of cases dealing with equal protection in the criminal process during the past year would be incomplete without mention of *New York v. Westover*, a companion case to *Miranda v. Arizona*.[116] In its most controversial decision of the term, the Court held that when a suspect is taken into custody he must be warned of the privileges against self-incrimination and his right to have counsel. If the suspect is indigent and wishes counsel the state must assign him a lawyer. The suspect has a right to have counsel present during any interrogation by the police. *Miranda* does not involve the equal protection clause, but its breadth does reflect the Court's concern for the poor and ignorant. Given the holding of *Escobedo v. Illinois*[117] that the police cannot deny a suspect's request to talk with his attorney, any decision short of *Miranda* would have penalized those not astute enough to ask for counsel or those not rich enough to afford counsel, or both.

Commitment of the Mentally Ill

Two decisions during the past year, one by the United States Supreme Court and one by the New York State Court of Appeals, involved applications of the equal protection clause to procedures for committing the mentally ill and keeping them in custody. The first of these, *People ex rel. Baxstrom v. Herold*,[118] turned on the traditional equal protection principle that a state classification must have some rational justification. Persons

People v. Rezek, 25 Misc. 2d 705, 707, 207 N.Y.S.2d 640, 643 (Kings County Ct. 1960) (dictum).

113. The New York Constitution, like that of the United States but unlike those of most states, does not contain a right to be admitted to bail. But cf. Foote, supra note 110, at 959-89, where the author develops an elaborate historical argument to show that the language of the eighth amendment was intended to include that right.

114. See Foote, supra note 110, at 1159-64.

115. Certain statutory and judicial reforms have promoted greater liberality in the setting of bail and release on recognizance for those who are "good risks." See, e.g., Foote, supra note 110, at 961, on the operation of the Manhattan Bail Project which has been sponsored by the Vera Foundation.

116. 384 U.S. 436 (1966).

117. 378 U.S. 478 (1964).

118. 383 U.S. 107 (1966).

who are civilly committed under the New York Mental Hygiene Law[119] have a right to de novo review by jury trial on the issue of their sanity, and they may not be committed to a hospital maintained by the Department of Correction unless it is judicially determined that they are so dangerously ill that their presence in a civil hospital is dangerous to the safety of other patients, or employees, or the community.[120] Convicted criminals who have become insane during their term of imprisonment and been confined to Dannemora State Hospital are treated quite differently. When their term of imprisonment expires, they may be civilly committed without any jury review of their sanity, and the decision is left to administrative officials whether to keep those needing institutional care in Dannemora or transfer them to a civil hospital.[121] A unanimous Supreme Court reversed the appellate division[122] and declared that the fact that petitioner was nearing the end of a prison sentence was not relevant to the manner of determining either his insanity or the appropriate institution for commitment. He was entitled under the equal protection clause to the same procedural safeguards as other persons civilly committed.

Three months later, the Court of Appeals in *People ex rel. Rogers v. Stanley*[123] cited *Baxstrom* in a memorandum opinion holding that indigent mental patients have a constitutional right to assigned counsel in habeas corpus proceedings to establish their sanity. The Court also relied on *Gideon v. Wainwright*,[124] *Griffin v. Illinois*,[125] and two post-*Griffin* cases. One of the latter, *Douglas v. California*,[126] had granted indigents the right to assigned counsel for appeal; the other, *Lane v. Brown*,[127] had invalidated a procedure that gave the Public Defender unreviewable discretion to decide if an indigent would be given a free trial transcript for coram nobis proceedings. The use of *Gideon* leaves it unclear whether the four members of the court joining the memorandum opinion thought the basic issue was one of right to counsel or equal protection. Perhaps there was disagreement and the judges sought to preserve a majority opinion. The sixth amendment relates only to criminal prosecutions, and, it can hardly cover civil proceedings[128] to test civil commitments, although one might argue

119. N.Y. Ment. Hy. Law § 74.
120. N.Y. Ment. Hy. Law §§ 85, 135.
121. N.Y. Corr. Law § 384.
122. People ex rel. Baxstrom v. Herold, 21 App. Div. 2d 754, 251 N.Y.S.2d 938 (3rd Dep't) (mem.), appeal denied, 14 N.Y.2d 490, 202 N.E.2d 159, 253 N.Y.S.2d 1028 (1964), rev'd, 383 U.S. 107 (1966).
123. 17 N.Y.2d 256, 217 N.E.2d 636, 270 N.Y.S.2d 573 (1966).
124. 372 U.S. 335 (1963).
125. 351 U.S. 12 (1956).
126. 372 U.S. 353 (1963).
127. 372 U.S. 477 (1963).
128. Traditionally, habeas corpus has been considered a civil remedy, and even when it is invoked to test criminal confinements, the courts have not held that indigent petitioners are constitutionally entitled to have counsel provided for them. See, e.g., Schlelle v. California, 284 F.2d 827 (9th Cir.), cert. denied, 366 U.S. 940 (1960); Madison v. Tahash, 249 F. Supp. 600 (D. Minn. 1966) (distinguishing Douglas v. California, supra note 126). A recent ruling of the Supreme Court, however, equates habeas corpus proceedings to other post conviction remedies for purposes of deciding whether a differentiation in treatment violates the equal protection clause. Long v. District Court of Iowa, 87 Sup. Ct.

that such proceedings so resemble those in criminal cases that the right to the aid of counsel is guaranteed as a matter of due process or through some "emanation" of the sixth amendment.[129] If the decision is thought to depend primarily on the inequality of an indigent petitioner when compared with one who can afford counsel, it represents a significant extension of the principles of *Griffin* to the noncriminal area. No doubt the demand for liberty from compulsory commitment is a peculiar kind of civil case, but *Rogers* could provide the basis for a contention that indigents have a right to assigned counsel in other civil cases that affect them in some vital way.[130]

At any rate, it is unfortunate that the court did not elaborate its holding, particularly in light of Judge Bergan's strong dissent approving the present system, under which judges have discretion whether or not to assign counsel. He argued that the announced change will waste the time of lawyers and psychiatrists in unproductive adversary hearings over the basis of medical judgments. Since the cases cited did not compel its conclusion, the majority must have believed that the presence of counsel in habeas corpus proceedings testing sanity does serve a valuable social function, but it did not choose to say why.

TAXATION

One successful challenge was made to a state classification for taxing purposes in the last year. In *Roosevelt Raceway, Inc. v. County*[131] the appellate division invalidated an enabling law requiring a tax of 30 per cent on the admission price for harness races in Nassau County. In every county but Nassau and Westchester the tax is 15 per cent for harness tracks, and in all counties the tax is 15 per cent for running tracks. Since there was, in the Court's view, no rational basis for the steeper tax on harness tracks in Nassau County, the raceway's claim of denial of equal protection was sustained.

The *Raceway* case, as well as *Baxstrom*, indicate that the traditional equal protection requirement that schemes of classification must be rational still has some life. Nonetheless, its significance is minimal when compared with the importance of more recently developed equal protection principles compelling state recognition of the demand for equality of fundamental rights. In the areas of civil rights, reapportionment, and the rights of indigents, a state must do more than avoid arbitrary rules or activities, it must act in accord with basic constitutional values as interpreted by the Supreme Court or, subsequent to *Morgan*, by the Congress.

362 (1966). Though this case concerned a transcript, one of its obvious implications is that states must furnish counsel for habeas corpus petitioners attacking a criminal conviction.

129. Cf. Griswold v. Connecticut, 381 U.S. 479, 484 (1965).

130. See generally Note, The Right to Counsel in Civil Litigation, 66 Colum. L. Rev. 1322 (1966).

131. 25 App. Div. 2d 595, 267 N.Y.S.2d 591 (2d Dep't 1966).