MAGNA CARTA ESSAYS
Edited by A. E. Dick Howard

YALE KAMISAR
FRED E. INBAU
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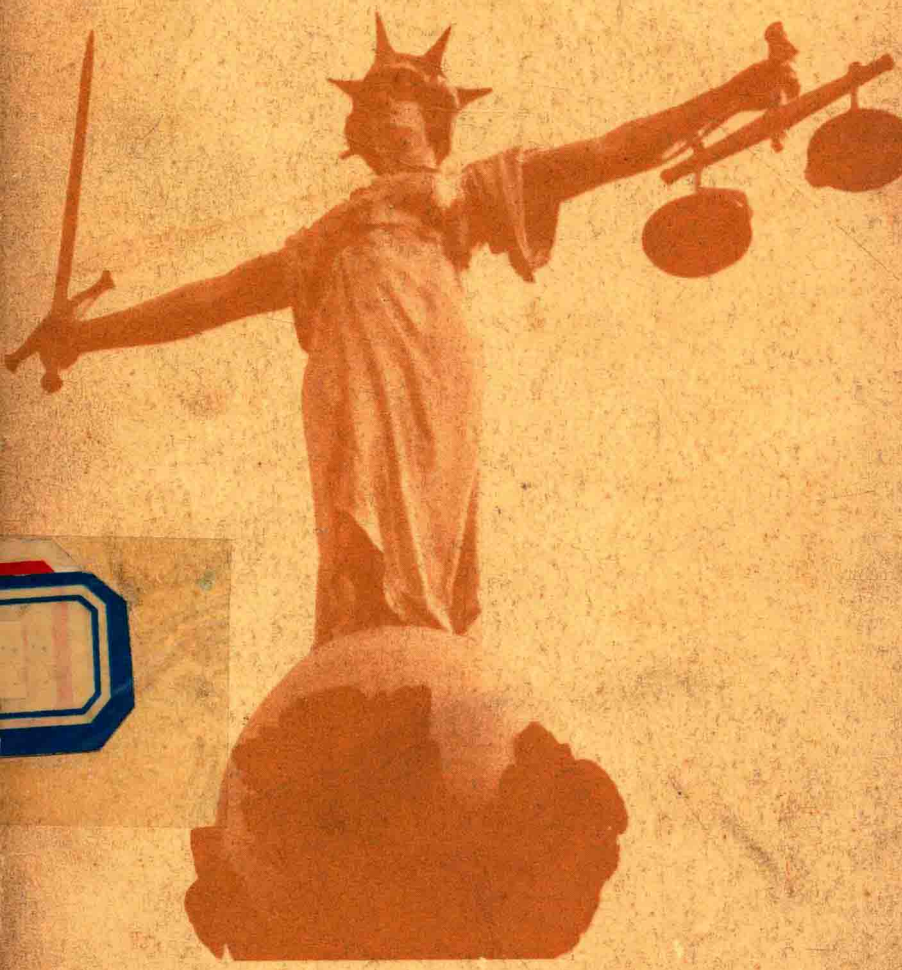
CRIMINAL JUSTICE IN OUR TIME



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The illustration on the cover is the figure of Justice atop London's Central Criminal Court, better known as Old Bailey. Unlike most statues of Justice, this figure is not blindfolded.

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PREFATORY NOTE

Many people would imagine the study of criminal law to be the study of what elements comprise given crimes, such as murder or burglary. That, indeed, is a reasonable place to start. But Anglo-American jurisprudence has always had a special concern for the way in which these substantive criminal laws are given effect in courts of law. Englishmen of the thirteenth century and Americans of the twentieth share at least this: a great interest in the administration of their criminal laws, the operation of the courts, and the fairness of the procedures whereby a man may be adjudged guilty of crime and his life or liberty or property forfeited.

In the Great Charter of King John, this concern is reflected in such guaranties as those of chapter 39, "No free man shall be taken, imprisoned, disseised, outlawed, banished, or in any way destroyed, nor will We proceed against or prosecute him, except by the lawful judgment of his peers and by the law of the land," and of chapter 40, "To no one will We sell, to none will We deny or delay, right or justice." In modern times the concern takes the form of debates–in courts, in legislative halls, in the press, and elsewhere–over the right to counsel, unlawful searches and seizures, legality of arrest, wiretapping, and other burning issues.

The three essays here published mark the 750th anniversary of Magna Carta by focusing on these problems of the twentieth century, especially the unending task of adjusting the rights of the criminal accused and the

rights of society. In the pages that follow, three noted legal thinkers put forceful views on problems ranging from the right-to-counsel requirements of the hotly debated *Escobedo* case[1] to the continuing search for a standard of insanity to be applied in criminal trials—problems to try the best minds of any age.

A. E. DICK HOWARD

[1] Escobedo v. Illinois, 378 U.S. 478 (1964).

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EQUAL JUSTICE IN THE GATEHOUSES AND MANSIONS OF AMERICAN CRIMINAL PROCEDURE: FROM *POWELL* TO *GIDEON*, FROM *ESCOBEDO* TO . . .

Yale Kamisar
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Too often we conceive of an idea as being like the baton that is handed from runner to runner in a relay race. But an idea as a transmissible thing is rather like the sentence that in the parlor game is whispered about in a circle; the point of the game is the amusement that comes when the last version is compared with the original.

–Lionel Trilling,
The Liberal Imagination (1953), p. 186

Much that has been said of Magna Carta may be said of our Constitution:

> The Charter was found valuable as a weapon in the hands of later champions of freedom because of its *flexibility*. The original meaning of many of its clauses was in later centuries forgotten, and, after the decay of feudalism, new interpretations . . . superseded older ones. The process which substituted the redress of the abuses most bitterly felt in later centuries for those actually redressed in 1215 was usually a perfectly honest one; and, thus, even mistaken interpretations of Magna

THIS PAPER was written while I was Professor of Law, University of Minnesota, and Visiting Professor of Law, Harvard University. My thanks go to the many members of the Harvard Law Faculty for their sometimes favorable, sometimes adverse, but always helpful, criticism. A condensed version of the paper was delivered at the College of William and Mary on February 12, 1965.

Carta have contributed to the advance of sound principles of government. . . . [T]he interpretation of some of its most famous clauses commonly entertained under Edward III would have astonished alike John and his opponents.

. . . . .

The *elasticity* of the Great Charter has thus enabled it to adapt itself to the ever-changing needs of succeeding centuries; and each century that enjoyed its powerful aid has heaped upon it, in return, tributes of grateful veneration, and has read into it new principles of which its framers never dreamed.[1]

When we declare that an indigent defendant must be furnished counsel[2] and a transcript of the trial proceedings[3] at state expense, we readily discover precedents for these reforms not only in the due process and equal protection clauses of the Fourteenth Amendment, but in chapter 40 of the Great Charter: "To no one will We sell, to none will We deny or delay, right or justice."[4] But, more often than not, when we look to history to represent a much-needed innovation as a return to the time-honored past, we have difficulty "differentiating history from the historians."[5]

It appears that "the original intent" of chapter 40 was only "to check certain abuses of John's reign, not to stop the legitimate sale of writs, or the customary fees for expediting justice or securing some special procedure";[6]

[1] W. S. McKechnie, "Magna Carta, 1215-1915," in *Magna Carta Commemoration Essays* (London, 1917), pp. 18-20.

[2] Gideon v. Wainwright, 372 U.S. 335 (1963); Douglas v. California, 372 U.S. 353 (1963).

[3] Griffin v. Illinois, 351 U.S. 12 (1956).

[4] Chapter 40 is cited by the Court. *Ibid.*, pp. 16–17.

[5] Paul A. Freund, "Rationality in Judicial Decisions," in *Nomos VII: Rational Decision,* ed. Carl J. Friedrich (New York, 1964), p. 109, at p. 114.

[6] Faith Thompson, *Magna Carta: Its Role in the Making of the English Constitution, 1300-1629* (Minneapolis, 1948), p. 98.

at least that is all that can be said for the pratical effect of the clause.[7] For example, a century and a half after the clause had been framed, Richard II stoutly defended the practice of charging a fine in addition to the customary set fee for writs on grounds of profit and prescription.[8] Indeed, discussing chapter 40 some seven hundred years later, a renowned commentator pointed out that "in the twentieth century, as in the thirteenth, justice cannot be had for nothing"; the notion that it can is "an ideal never yet attained in any civilized community."[9]

If, centuries after it had been framed, chapter 40 still did yeoman service only as "an effective rhetorical flourish in arguments in courts or parliament,"[10] for much of its shorter life the equal protection clause fared no better. "As recently as Mr. Justice Holmes's heyday on the Court, he could accurately report that the [equal protection] clause was 'the usual last resort of the constitutional arguments.' "[11] And still more recently, in his 1956 Holmes Lecture, "Federalism and State Criminal Procedure," Judge Schaefer of the Illinois Supreme

[7] *Ibid.*, pp. 98-99; W. S. McKechnie, *Magna Carta: A Commentary on the Great Charter of King John* (Glasgow, 1914), pp. 396-97.

[8] McKechnie, *op. cit. supra* note 7, p. 397; Thompson, *op. cit. supra* note 6, p. 99.

[9] McKechnie, *op. cit. supra* note 7, p. 396. Cf. Henry Cecil, *Daughters in Law* (New York, 1961), p. 117: "You want a full-scale action, with counsel and solicitors on both sides and all the rest of it, do you? That's what Magna Carta gives you. . . . But it's expensive. Magna Carta says nothing about not being expensive. To no one will we sell–well, there are no bribes in this country–to no one will we deny–to no one will we delay, justice. Nothing about not charging, is there?"

[10] Thompson, *op. cit. supra* note 6, p. 97.

[11] Philip B. Kurland, "Foreword: Equal in Origin and Equal in Title to the Legislative and Executive Branches of the Government," 78 *Harvard Law Review* 143, 144 (1964).

Court noted that until that year "the equal protection clause . . . has been pretty largely confined to cases of jury exclusion."[12]

That year was the year of *Griffin v. Illinois*.[13] Looking back, it is easy to say that *Griffin* presaged the indigent's right to assigned counsel at trial and at least on the first appeal, for in holding that "destitute defendants must be afforded as adequate [direct] appellate review as defendants who have money enough to buy transcripts,"[14] the Court, per Black, J., "painted with a broad brush":[15]

> Both equal protection and due process emphasize the central aim of our entire judicial system–all people charged with crime must, so far as the law is concerned, "stand on an equality before the bar of justice in every American court."
>
> . . . . .
>
> [T]o deny adequate review to the poor . . . is a misfit in a country dedicated to affording equal justice to all and special privileges to none in the administration of its criminal law. There can be no equal justice where the kind of trial a man gets depends on the amount of money he has.[16]

Since the availability of a transcript was, however, a *sine qua non* to access to the appellate courts in Illinois–allegations with respect to certain kinds of trial errors could not be considered at all by a reviewing court if the petitioner was too poor to afford a transcript–commentators could (and did) view *Griffin* as not affect-

[12] 70 *Harvard Law Review* 1, 5 (1956).
[13] 351 U.S. 12 (1956). [14] *Ibid.*, p. 19.
[15] Mr. Justice Harlan, dissenting, so characterized Mr. Justice Black's opinion. *Ibid.*, p. 34.
[16] *Ibid.*, pp. 17-19.

ing the "right to counsel" at all.[17] The argument ran along these lines: The *Griffin* principle is not concerned with the quality of appellate review, merely its availability. So long as a defendant is allowed *access* to the courts (whether or not he has a lawyer), "fourteenth admendment equality" does not require that he be provided counsel as well, simply because such aid would be "helpful." The presence of counsel is not a *sine qua non* to access to the courts, as was the availability of the transcript in *Griffin* or the payment of filing fees in *Burns v. Ohio*[18] and *Smith v. Bennett*.[19] So long as it provides a road, the state need not guarantee that every man have an equally good car to drive down it.

This is all that the *Griffin* case might have signified. For it was a decision "fraught with creative ambiguity," a decision "which moved in a certain direction but left open the turns that might be taken."[20] That is, until 1963, when the court closed some turns in *Douglas v. California*.[21]

Whether it is denial of a transcript or the assistance of counsel, wrote Mr. Justice Douglas for a 6-3 majority in the *Douglas* case,

> the evil is the same: discrimination against the indigent. For there can be no equal justice where the kind of an appeal a man enjoys "depends on the amount of money he has." Griffin v. Illinois. . . . There is lacking that equality demanded by the Fourteenth Amendment where the rich man, who appeals as of right, enjoys the benefit

[17] See the discussion and authorities collected in Yale Kamisar, "Betts v. Brady Twenty Years Later: The Right to Counsel and Due Process Values," 61 *Michigan Law Review* 219, 247-54 (1962).

[18] 360 U.S. 252 (1959). [19] 365 U.S. 708 (1961).

[20] *Cf.* Freund, *op. cit. supra* note 5, p. 118.

[21] 372 U.S. 353 (1963).

of counsel's [work] . . . while the indigent, already burdened by a preliminary determination that his case is without merit, is forced to shift for himself.[22]

After *Douglas,* the narrow "access" interpretation of *Griffin* must be greatly revised, if not completely abandoned. *Griffin* and *Douglas* may well demand at every post trial stage "more than that the state simply place the defendant upon the 'road'; it must see that he has some vehicle–counsel–to use in traveling the 'road.' "[23] Nor is this all. The "equality demanded by the Fourteenth Amendment" which requires assigned counsel at least on the first appeal promises (or threatens, depending upon your point of view) to clean up much of the unfinished business of right to counsel. This "equality" may well signify that indigent persons are entitled to counsel in magistrate courts, police stations, juvenile proceedings, probation revocation hearings–everywhere a rich man or the son of a rich man may enjoy counsel. Nor is this all. It may signify further that indigent defendants are entitled to be furnished various forms of aid other than counsel. Indeed, on reflection the need for an investigator or psychiatrist or handwriting expert is likely to be more compelling than the need for counsel on a first appeal, let alone a second one, or on collateral attack.

If *Douglas* closed some of the turns that *Griffin* might have taken, it left many open. The precise route can only be plotted by many cases to come. Nevertheless, I

[22] *Ibid.,* pp. 355-58.

[23] Note, 47 *Minnesota Law Review* 1054, 1068 (1963). My colleague Jesse Choper and I have explored the potential impact and the possible limitations of the *Griffin-Douglas* principle in "The Right to Counsel in Minnesota: Some Field Findings and Legal-Policy Observations," 48 *Minnesota Law Review* 1, 4-14 (1963).