STUDENT SYMPOSIUM: EQUAL PROTECTION

FOREWORD

As everyone is aware both within and without the legal profession, the United States Supreme Court has in recent years been deeply concerned with the fairness and quality of the criminal justice system in this country. Through the vehicle of the 14th amendment, the Court has rewritten the rules of criminal procedure in the courts of fifty states.

For many years, constitutional analysis of criminal problems concentrated on the concept of procedural due process—the necessity of "fair trial," judged either by the standards of the Bill of Rights or by the "immutable principles" of fundamental fairness. Recently, however, in criminal matters as well as in other areas, the Supreme Court has turned more and more of its attention to the second clause of the 14th amendment, and has held an ever widening variety of practices to be denials of "the equal protection of the laws." This Symposium examines and analyzes the "equal protection" approach as it has been or might be applied in several areas of our criminal justice system. The consistent thread running through the notes which follow is that equal protection may mean different things in different areas of the law; in the criminal area it appears to be tempered with the traditional notion of due process.

The first note, *Full Protection of Fundamental Rights,* takes an historical approach to the matter, showing the growth and development of the principle of equal protection in parallel with the due process concept. The author notes with approval the abandonment of the "state action" doctrine, but concludes that the Court has given too short shrift to the nature of the right being protected, and thus must refine its definition of equal protection in order to avoid placing too heavy a burden on the administration of criminal justice.

The second note, *Right to Counsel,* examines the development in the past half-decade of the concept of equal protection in what is perhaps the most fundamental due process right in the criminal justice system. Due process alone cannot account for the decision in *Douglas v. California*; and from that decision has sprung a multitude of perplexing questions as to when and how counsel must be provided for the indigent. The author considers, in particular, the time when counsel must be appointed and the misdemeanant's right to appointed counsel. He concludes that much remains to be decided

in the area, and that the rationale of equal protection may extend far beyond that of due process.

If equal protection is required in the availability of counsel, why is it not also required as to the great variety of resources which may conceivably aid an accused in his defense, but which cost money to obtain? *Griffin v. Illinois* indicated that the requirement did exist in other areas besides the provision of counsel; and the rationale of that case has been considerably extended in the intervening thirteen years. However, there remains vast unexplored territory. The third note, *Scope of the Right to Aid Other Than Counsel,* examines the distance that *Griffin* has come and explores the possibilities for the future. The author concludes that although progress has been made in providing transcripts and avoiding filing fees, there is still substantial inequality for the indigent, in particular in the availability of expert witnesses and investigation. The burden of providing these resources to the indigent need not, he suggests, be heavy; since the resources provided need not be unlimited, but need only be what the prudent man of reasonable means would furnish for himself; and since provision of these resources will produce more efficiency and fairness at the trial level of the system.

In October of this year, an Ohio municipal court judge was reported by the local press to have sharply criticized police department practices in recommending pre-trial release. In particular, the judge was reported to be upset with the release on their own recognizance of persons accused of narcotics violations. The tenor of his remarks as reported clearly indicated his concern over the seriousness of the offenses and the necessity for strict treatment; but nowhere in the report was there any indication of the judge's awareness of the two questions which are the only ones relevant to consideration of pre-trial release: (1) whether the accused can be relied upon to appear at trial; and (2) whether there is a serious likelihood the accused will commit crimes during the interval. Although an extreme case, the reported attitude of the judge points up the general misunderstanding of, or lack of attention to, considerations underlying the bail system by courts, prosecutors, and perhaps defense attorneys as well. The final note in this Symposium, *The Bail System: Is It Acceptable?*, examines the application of equal protection principles to the bail system, and finds it an area where distinctions based upon the financial resources of an accused are rampant and have received little judicial scrutiny. The author, after examining the results of several bail projects, concludes that the money bail system as pres-

ently constituted in most jurisdictions is discriminatory and frequently unnecessarily harsh; and that serious legislative and judicial consideration should be given to its complete overhaul.

Problems of equal protection for all who appear before the bar of criminal justice will continue to vex judge, prosecutor, defense attorney, and scholar. Improvement in the protection of the indigent accused must move forward apace; but at the same time the administration of criminal justice must continue with as little disruption as possible. It is hoped that the papers in this Symposium, by analyzing the rationale of equal protection and suggesting directions in which the law may move and should move, will be of some small help in assuring that the judicial gloss on the phrase "equal protection of laws" will provide continually improving protection for the individual accused and his society.

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