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COMMENTS

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THE RAMIFICATIONS OF UNITED STATES v. FALK ON EQUAL PROTECTION FROM PROSECUTORIAL DISCRIMINATION

The great discretion of the prosecutor to decide who shall be charged with a crime has been long recognized but little controlled. Speaking then as Attorney General, Justice Robert Jackson warned that:

> The prosecutor has more control over life, liberty, and reputation than any other person in America.... While the prosecutor at his best is one of the most beneficient forces in our society, when he acts from malice or other base motives, he is one of the worst.[1]

Until recently, the courts have greatly restricted the use of the equal protection clause as a defense against prosecutorial discrimination. In *United States v. Falk*,[2] the Court of Appeals for the Seventh Circuit made this remedy more accessible by lowering the burden of proof required to raise the defense. Under this new standard, if a defendant can raise a reasonable doubt about whether his prosecution was the result of purposeful discrimination, then the burden of going forward with proof of non-discrimination would shift to the prosecutor.

The purpose of this comment is to discuss the impact of *Falk* on the development of safeguards for defendants against wrongful discrimination in the decision to prosecute. This discussion will include a review of the historical development of the law on prosecutorial discrimination and an analysis of the possible effects of *Falk* on criminal law and the criminal justice system.

Historical Development

The foundation of the law on prosecutorial discrimination was the establishment in 1880 of the concept that the equal protection clause[3] applies to executive as well as legislative state action.[4] Seven years later, the Supreme Court applied the equal protection clause to the executive branch in the seminal case in the field of prosecutorial discrimination, *Yick Wo v. Hopkins*.[5] In that case, a San Francisco ordinance required that laundries not made of brick or stone had to obtain approval to operate from the Board of Supervisors. Because permits were only granted to whites, Chinese laundrys were prevented from operating legally. The petitioner, a Chinese, demonstrated that the ordinance was only applied to people of his nationality. In frequently-quoted language, the Court held that a conviction based on a law which is constitutional on its face may still be invalid if the application of the law violates the equal protection clause.[6] Discriminatory application of a statute against a class (such as Chinese) was stated to be a valid reason for overturning a conviction.

Despite the apparent holding of *Yick Wo* that discriminatory prosecutions cannot be tolerated, state courts have been reluctant to free defendants on the sole ground that other people who committed the same acts were not also prosecuted.[7] Because *Yick Wo* could not be ignored, state courts attempted to distinguish the case in a series of tortuous decisions.

The most popular interpretation of *Yick Wo* was that it only applied to harmless statutory crimes (*malum prohibitum*) but not to dangerous common law crimes (*malum in se*). Therefore, courts rea-

[1] Jackson, *The Federal Prosecutor*, 31 J. CRIM. L.C. & P.S. 3 (1940).

[2] 479 F.2d 616 (7th Cir. 1973).

[3] U.S. CONST. amend. XIV § 1:
> No State shall ... deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

[4] *Ex Parte* Virginia, 100 U.S. 339, 347 (1879):
> A state acts by its legislative, its executive, or its judicial authorities. It can act in no other way. The constitutional provision, therefore, must mean that no agency of the State ... shall deny to any person within its jurisdiction the equal protection of the laws.

[5] 118 U.S. 356 (1886).

[6] Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution.
Id. at 373–74.

[7] *See* Comment, *The Right to Nondiscriminatory Enforcement of State Penal Laws*, 61 COLUM. L. REV. 1103 (1961), for an exhaustive analysis of the reception of *Yick Wo*.

soned that discriminatory prosecution was available as a valid defense for illegally operating a laundry, but not for "vicious" crimes such as pandering,[8] perjury[9] and gambling.[10] The invalidity of the distinction was finally settled by the Supreme Court's reassertion of *Yick Wo* in *Oyler v. Boles*.[11] The Court clearly implied that the application of a habitual criminal statute would be overturned if the petitioner had shown deliberate discrimination.[12] Because habitual criminal statutes deal only with felonies (which are *malum in se*), the Supreme Court tacitly acknowledged that *Yick Wo* can be used to prevent the prosecution of any type of crime.[13]

Another method of distinguishing *Yick Wo* was to limit the holding to cases which involved both an agency and its use of excessive discretion.[14] The invalidity of this distinction was also made clear by the dicta in *Oyler v. Boles*,[15] which implied that although the prosecutor in *Oyler* was not part of an agency exercising excessive discretion, *Yick Wo* still would have been applicable.

Underlying this reluctance to accept *Yick Wo* has been a feeling on the part of the courts that a guilty man should not go free just because others who committed the same crime were not prosecuted. This sentiment is similar to the apprehension expressed by Justice Cardozo about the exclusionary rule: the "criminal is to go free because the constable has blundered." [16] In recent cases such as *Mapp v. Ohio*,[17] however, the Supreme Court has often made the difficult decision that

> The criminal goes free, if he must, but it is the law which sets him free. Nothing can destroy a government more quickly than its failure to observe its own laws, or worse, its disregard of the charter of its own existence.[18]

The philosophy of *Mapp* has been adopted by state courts who, following *Yick Wo* and *Oyler v. Boles*, have chosen to free defendants who have been discriminatorily selected for prosecution.[19]

Although the right to the equal application of the law is now fully accepted, the elements necessary to prove improper prosecutorial discrimination are still unclear. One factor that has been required by the great preponderance of authority is that the discrimination must be intentional. The Supreme Court clarified this requirement in the case of *Snowden v. Hughes*.[20] The petitioner claimed that because of racial discrimination, his name had been left off an election ballot. Because the petitioner could not prove that the omission was intentional, the Court refused to grant an injunction. Building upon *Yick Wo* and *Snowden*, the Supreme Court in *Oyler v. Boles* conclusively held that a prosecution is valid where no evidence of purposeful discrimination is offered.[21] Therefore, a defendant cannot rely

[8] People v. Montgomery, 47 Cal. App. 2d 1, 117 P.2d 437 (1941).

[9] People v. Darcy, 59 Cal. App. 2d 342, 139 P.2d 118 (1943) (alternate holding).

[10] People v. Winters, 171 Cal. App. 2d 876, 342 P.2d 538 (1959); People v. Van Randall, 140 Cal. App. 2d 771, 296 P.2d 68 (1956). There is no wording in *Yick Wo* which even implies that the holding should be limited to the facts of the case.

[11] 368 U.S. 448 (1962)(dictum). Two defendants claimed that the West Virginia habitual criminal statute was discriminatorily applied to them because the statute was very rarely used, even though it could have been applied to almost a thousand men then in West Virginia prisons.

[12] *Id.* at 456.

[13] Despite *Oyler*, vestiges remain of the *malum in se—malum prohibitum* distinction. State v. Baldonado, 79 N.M. 175, 441 P.2d 215 (Ct. App. 1968); Sims v. Cunningham, 203 Va. 347, 124 S.E.2d 221 (1962). *Baldonado* specifically follows People v. Montgomery, 47 Cal. App. 2d 1, 117 P.2d 437 (1941).

[14] Jackie Cab Co. v. Chicago Park District, 366 Ill. 474, 9 N.E.2d 213 (1937)(alternate holding); Society of Good Neighbors v. Van Antwerp, 324 Mich. 22, 36 N.W.2d 308 (1949). In *Jackie Cab Co.*, the Park District authorities were charged with only enforcing an ordinance against black taxi drivers. The court refused to grant an injunction because the Park District was not a discretionary agency as was the Board of Examiners in *Yick Wo*, yet certainly the Park District could exercise as much discretion in enforcing a city ordinance as could the Board of Examiners in granting licences to laundrys.

[15] 368 U.S. 448, 456 (1962).

[16] People v. Defore, 242 N.Y. 13, 21, 150 N.E. 585, 587 (1926).

[17] 367 U.S. 643 (1961).

[18] *Id.* at 659. Consider also Miranda v. Arizona, 384 U.S. 436, 480 (1966).

[19] City of Ashland v. Heck's Inc., 407 S.W.2d 421, 424 (Ky. Ct. App. 1966):

> We find the constitutional right to be of greater importance than our reluctance to give succor to a passing law violator as an unavoidable incident to the preservation of that right.

[20] 321 U.S. 1 (1944)(alternate holding). Although *Snowden* does not involve discrimination by a prosecutor, the requirement of showing intentional discrimination to raise the defense of equal protection has been applied to cases involving prosecutors. Oyler v. Boles, 368 U.S. 448, 456 (1962). Before *Snowden*, some lower courts had already assumed that the demonstration of deliberateness was a necessary element in proving improper prosecutorial discrimination. Boynton v. Fox West Coast Theatres Corp., 60 F.2d 851 (10th Cir. 1932); People v. Darcy, 59 Cal. App. 2d 342, 139 P.2d 118 (1943).

[21] 368 U.S. 448 (1962)(dictum). Since *Snowden*, many claims of equal protection have failed because of an inability to prove intentional prosecutorial discrimination. Edelman v. California, 344 U.S. 357

only on evidence that he was chosen for prosecution when others similarly situated were allowed to go free.[22] Instead, the defendant must establish that the prosecutor was improperly motivated in making his decision to charge. The heavy burden of proving intentional discrimination[23] is justified by the public policy that the prosecutor requires great discretion to fulfill his quasi-judicial duties.[24] Therefore, "the conscious exercise of some selectivity in enforcement is not in itself a federal constitutional violation." [25]

A second element in establishing the defense of prosecutorial discrimination has been the requirement that the defendant demonstrate that he is part of a class which has been discriminated against. This requirement was originally specified in *Yick Wo* and then used as an alternative holding in *Snowden*.[26] *Oyler v. Boles* clarified this requirement by holding that prosecutorial discretion is only unconstitutional if "deliberately based on an unjustifiable standard such as race, religion, or another arbitrary classification." [27]

Although the courts have never explained their reasons, the requirement of class discrimination probably stems from doctrines which guarantee equal protection from discriminatory legislation. The rule in this field has been that there is no violation of equal protection if the legislative classifications have a reasonable relationship to the goals of the legislators.[28] Similarly, a prosecutor cannot select defendants for reasons which are unrelated to his job of enforcing the law.[29]

The requirement of showing discrimination toward a class provides indirect evidence of intentional discrimination by showing a disparity of treatment between classes. If an *individual* can show a difference in treatment between himself and those not prosecuted, then courts may allow him to raise the defense of prosecutorial discrimination. Although such a defendant cannot claim he is part of a persecuted class, certainly his right to equal protection of the laws has been just as seriously violated.[30] In fact, courts have recently allowed an individual to argue that he is the victim of personal hostility.[31]

In summary, the defense of prosecutorial discrimination has developed two requirements that the defendants must meet: they must show that the discrimination was deliberate and that it was based on a characteristic of a class which separates it from those who were not prosecuted. Few defendants have fulfilled both these requirements.[32]

(1953)(dictum)(vagrancy charges); Rhinehart v. Rhay, 440 F.2d 718 (9th Cir. 1971)(sodomy charge); Moss v. Hornig, 314 F.2d 89 (2d Cir. 1963)(Sunday closing law); United States v. Rickenbacker, 309 F.2d 462 (2d Cir. 1962)(refusal to fill out census form); Oregon v. Hicks, 213 Ore. 619, 325 P.2d 794 (1958)(habitual criminal statute). Two isolated, although recent decisions have held that intentional discrimination need not be shown. City of Ashland v. Heck's, Inc., 407 S.W.2d 421, 424 (Ky. Ct. App. 1966); People v. Millstein, 54 Misc. 2d 493, 283 N.Y.S.2d 353 (Long Beach City Ct. 1967)(dictum). The latter decision was repudiated by another New York judge one year later. People v. Derison, 57 Misc. 2d 1003, 294 N.Y.S.2d 339 (Long Beach City Ct. 1968).

[22] Similarly, the mere fact that a law has not been used for a long time does not prove intentional discrimination. Washington v. United States, 401 F.2d 915 (D.C. Cir. 1968); Sanders v. Waters, 199 F.2d 317 (10th Cir. 1952); Grell v. United States, 112 F.2d 861 (8th Cir. 1940).

[23] *See* text accompanying note 33 *infra* for discussion of proof problems.

[24] *See* Newman v. United States, 382 F.2d 479 (D.C. Cir. 1967) (opinion by then Circuit Judge Burger). The necessity of prosecutorial discretion is discussed in the text accompanying note 125 *infra*.

[25] 368 U.S. at 456.

[26] 321 U.S. 1, 7 (1944). The fact that some blacks were allowed on the ballot defeated the petitioner's claim that he, a black, had been denied equal protection of the laws by being excluded from the ballot.

[27] 368 U.S. at 456.

[28] *See, e.g.*, Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 78 (1911).

[29] For example, a prosecutor may not enforce Sunday closing laws only against cut-rate drug stores while regular stores are allowed to remain open. The discrimination against a class of stores is unrelated to the prosecutor's duty of enforcing the law. People v. Utica Daw's Drug Co., 16 App. Div. 2d 12, 225 N.Y.S.2d 128 (1962).

[30] No court has attempted to answer the question of whether the class requirement of *Oyler* means that an individual cannot raise the defense of prosecutorial discretion.

[31] Two New York courts have found that deprivations of property involving personal hostility warranted the defense of equal protection. Burt v. City of New York, 156 F.2d 791 (2d Cir. 1946)(Hand, J.) (architect lost building contract because of personal hostility of city officials); People v. Walker, 14 N.Y.2d 901, 252 N.Y.S.2d 96, 200 N.E.2d 779 (1964)(mem.) (charged with building violations after involvement in payoffs to inspectors). Both cases are susceptible to being distinguished on the ground that they do not actually involve a prosecutor's decision.

[32] Since *Yick Wo*, only a few defendants have successfully stated a cause of action through the defense of prosecutorial discrimination. The trend, however, seems to be toward more often allowing this defense. United States v. Steele, 461 F.2d 1148 (9th Cir. 1972) (refusal to answer census questions); United States v. Crowthers, 456 F.2d 1074 (4th Cir. 1972)(disorderly conduct at a demonstration); People v. Gray, 254 Cal. App. 2d 256, 63 Cal. Rptr. 211 (1967)(vandalism by hanging campaign posters): People v. Harris, 182 Cal. App. 25d 837, Cal. Rptr. 852 (1960)(gambling); City of Ashland v. Heck's, Inc., 407 S.W.2d 421, 424 (Ky. Ct. App. 1966)(Sunday closing law); City of Covington v. Gausepohl, 250 Ky. 323, 62 S.W.2d 1040 (Ct.

How does a defendant prove that the prosecutor has deliberately discriminated against him? The Supreme Court has never specified what burden of proof a defendant must meet to invalidate his prosecution on these grounds. The consensus of the few state courts which have come to grips with the problem is that the defendant must establish improper discrimination by a preponderance of the evidence.[33]

The task of proving intentional discrimination is the greatest problem confronting the defendant. Because the prosecutor need not testify as to his own motives in choosing a case for prosecution,[34] the defendant must establish by inference that there was an improper motive.

The most common attempt to prove intentional discrimination has been to create an inference with statistical comparisons. For example, in *Yick Wo*, the defendant demonstrated that all 150 people who were arrested for violating the ordinance were Chinese.[35] Although this method occasionally has been successful,[36] it requires an inference by the court. In *Yick Wo* this inference was made when the Supreme Court reasoned that such a figure must be the result of deliberate discrimination against Chinese. Most courts, however, have found statistical comparisons inadequate for two reasons. First, a showing that many people in the same situation as the defendant are not charged may prove only that the enforcement of a statute has been lax, rather than intentionally discriminatory.[37] Second, because the prosecutor may not have known of the existence of other violators, his discrimination may have been unintentional.[38] It has even been suggested that statistical comparison is never appropriate to prove prosecutorial discrimination.[39]

Another method of proof is simply to point to similarly situated groups which have not been prosecuted. This method was successful in *United States v. Crowthers*,[40] where the defendants, members of an anti-war group, demonstrated that military bands had been much more disruptive than the defendants but had not been prosecuted for disorderly conduct. Usually, however, this method is found inadequate because the comparison group was not similar enough to the defendant to raise an inference of intentional discrimination against a class.[41] No matter which method of proof is used, the defendant faces an uphill struggle in attempting to establish the defense of prosecutorial discrimination.

Alternative Methods of Curtailing Discretion

In order to assess the impact of *United States v. Falk* on criminal law, it is important to consider if there are any alternative methods of curtailing the improper use of prosecutorial discretion. State

App. 1933)(Sunday closing law); People v. Walker, 14 N.Y.2d 901, 252 N.Y.S.2d 96, 200 N.E.2d 779 (1964); People v. Utica Daw's Drug Co., 16 App. Div. 2d 12, 225 N.Y.S.2d 128 (1962).

[33] People v. Gray, 254 Cal. App. 2d 256, 63 Cal. Rptr. 211 (1967) (clear preponderance); People v. Utica Daw's Drug Co., 16 App. Div. 2d 12, 225 N.Y.S.2d 128 (1962) (preponderance).

[34] No court has ever forced a prosecutor to testify as to his motives. United States v. Falk, 479 F.2d 616, 631 (7th Cir. 1973) (Cummings, J., dissenting). The only possible exception before *Falk* is the recent case of United States v. Steele, 461 F.2d 1148 (9th Cir. 1972). The court acquitted the defendant because the prosecution failed to rebut the incriminating evidence introduced by the defendant. Although the court did not specify that the prosecutor must have personally testified, this would seem to be the obvious way for the prosecutor to demonstrate that his motives were proper.

[35] 118 U.S. 356 (1886).

[36] Statistics also were successful in proving discrimination in the following cases. In United States v. Steele, 461 F.2d 1148 (9th Cir. 1972), the defendant showed that all four people who had been charged with not filling out census forms were members of an anti-census organization, while six nonmembers who also had not filled out forms were not charged. In People v. Harris, 182 Cal. App. 2d 837, 5 Cal. Rptr. 852 (1960), the court agreed to hear evidence that far more blacks than whites were being charged with gambling.

[37] Oregon v. Hicks, 213 Ore. 619, 325 P.2d 794 (1958)(no injunction was granted even though it was shown that only twenty-four were convicted under a habitual criminal statute when 984 people were eligible).

[38] Oyler v. Boles, 368 U.S. 448, 456 (1962) See note 22 *supra*.

[39] People v. Gray, 254 Cal. App. 2d 256, 63 Cal. Rptr. 211 (1967)(dictum). In other aspects of criminal law statistics are sometimes conclusive proof of unconstitutional discrimination. For example, statistical comparisons are regularly used to determine if juries have been discriminatorily selected. Eubanks v. Louisiana, 356 U.S. 584, 587 (1958); Finkelstein, *The Application of Statistical Decision Theory to the Jury Discrimination Cases*, 80 HARV. L. REV. 338 (1966). In Furman v. Georgia, 408 U.S. 238, 291, 309 (1972), Justices Brennan and Stewart found the death penalty to be used so rarely that there is a presumption of arbitrariness.

[40] 456 F.2d 1074 (4th Cir. 1972).

[41] Ah Sin v. Wittman, 198 U.S. 500 (1905) (dictum) (evidence failed to show that non-Chinese were not arrested for gambling); People v. Pam, 38 Misc. 2d 296, 238 N.Y.S.2d 363 (Crim. Ct. 1963)(no allegation that similar stores were allowed to operate on Sundays); State v. Gamble Skogmo, Inc., 144 N.W.2d 749 (N.D. 1966) (no allegation that any other stores allowed to operate on Sundays).

laws which authorize the power of the prosecutor usually are too vague to offer guidelines against which a prosecutor's conduct can be compared.[42] Furthermore, statutory checks on the prosecutor are aimed at stopping a *failure* to bring cases, not arbitrary decisions to prosecute.[43]

One statutory provision with significant possibilities for checking discretion is a law that allows judges to dismiss any indictment on their own motion in the interests of justice.[44] However, few states have such statutes,[45] and the states without them will not allow a judge to second-guess the prosecutor.[46] If this authority were widespread, conscientious judges could insure that at least in their courtrooms, prosecutors did not discriminate improperly against classes of defendants.

Other possible controls from within the criminal justice system have not been effective in checking discretion. Although intended to be a check on the prosecutor,[47] the grand jury has been ineffective in detecting discrimination. First, the grand jury has no way of knowing the prosecutor's motives in bringing a case. Secondly, without an overview of all the cases brought by the prosecutor, the grand jury cannot tell whether class discrimination is occurring. The police check discretion by acting as gatekeepers, sorting out those cases they wish to present to the prosecutor.[48] However, the prosecutor still has complete discretion over all cases reaching his office and over those cases in which he has initiated the investigation.

Collateral attacks by the defendant against the prosecutor have been almost completely closed off by the courts. The most obvious remedy is a civil suit for malicious prosecution. However, the great majority of courts have decided that *because* of the prosecutor's great discretion, he must be clothed with the same immunity from liability to which judges are entitled.[49] Therefore, the prosecutor, while acting within the scope of his duty, cannot be sued for malicious prosecution even if he acts in bad faith.[50]

The Civil Rights Act of 1871 has recently been used successfully to obtain damages from police officers in cases of misconduct.[51] However, the courts have held that in passing the Civil Rights Act, Congress did not intend to overrule the common law theory of judicial immunity, which applies also to prosecutors.[52] Therefore, in most circumstances the prosecutor can exercise his discretion justly or maliciously, without fear of civil retaliation.[53]

Commentators have recently advocated the resurrection of the common law defense of desuetude.[54] This defense invalidates a conviction based

[42] *See generally*, Note, *Prosecutor's Discretion*, 103 U. PA. L. REV. 1057 (1955). A typical example is the law setting up the office of United States Attorney: "[E]ach United States Attorney, within his district, shall (1) prosecute for all offenses against the United States . . . ." 28 U.S.C. § 547 (1966). Ethical considerations of the American Bar Association are only slightly less vague: "A government lawyer who has discretionary power relative to litigation should refrain from instituting or continuing litigation that is obviously unfair." ABA, CODE OF PROFESSIONAL RESPONSIBILITY E.C. 7-14. See also ABA STANDARDS, THE PROSECUTION FUNCTION AND THE DEFENSE FUNCTION § 3.9 (Approved Draft 1971).

Elections are probably a poor check because of the low visibility of most prosecutorial decisions. *See* K. DAVIS, DISCRETIONARY JUSTICE 209 (1969).

[43] For example, several states have provisions for the state Attorney General to take over a local prosecutor's duties if that prosecutor fails to enforce the law. F. MILLER, PROSECUTION, THE DECISION TO CHARGE A SUSPECT WITH A CRIME 298 (1969).

[44] In People v. Quill, 11 Misc. 2d 512, 177 N.Y.S.2d 380 (Kings County Ct. 1958), a state statute allowed the trial judge to dismiss a criminal libel case in the interests of justice.

[45] F. MILLER, *supra* note 43 at 335 n. 166.

[46] In State *ex rel.* Ronan v. Stevens, 93 Ariz. 375, 381 P.2d 100 (1963), a trial judge dismissed an indictment because he felt that others committing the same crime were not being charged. The appellate court held that the judge had no such power in the absence of statutory authority. In People v. Winters, 171 Cal. App. 2d 876, 342 P.2d 538 (1959), a similar result was reached when a judge dismissed a case because he detected that only blacks were being charged with gambling.

[47] Lumbard, *The Criminal Justice Revolution and the Grand Jury*, 39 N.Y.S. BAR J. 397, 399-400 (1967).

[48] For a survey on how police use their discretion in deciding which cases to take to the prosecutor, see PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: THE COURTS 6 (1967).

[49] The public policy behind the prosecutor's immunity is that he must not be deterred from aggressively enforcing the law nor must his time be wasted defending himself. Zulkey, *Prosecutorial Immunity: Its Past and Its Future*, 60 ILL. BAR J. 946-47 (1972).

[50] Yaselli v. Goff, 12 F.2d 396 (2d Cir. 1926), *aff'd mem.*, 275 U.S. 503 (1927).

[51] *See* Monroe v. Pape, 365 U.S. 167 (1961) The most often used provision is 42 U.S.C. § 1983 (1970).

[52] Bauers v. Heisel, 361 F.2d 581 (3d Cir. 1966). A prosecutor may incur liability if he acts outside his traditional role. Littleton v. Berbling, 468 F.2d 389, 410 (7th Cir. 1972), *cert. granted*, 411 U.S. 915 (1973).

[53] A writ of mandamus is designed only to force a public official to carry out his duty; mandamus cannot prevent the commission of an act. Goldberg v. Hoffman, 225 F.2d 463, 466 (7th Cir. 1955).

[54] Bonfield, *The Abrogation of Penal Statutes by Nonenforcement*, 49 IOWA L. REV. 389 (1964); Russo, *Equal Protection From the Law: The Substantive Requirements for a Showing of Discriminatory Law Enforcement*, 3 LOY. U. L. REV. 65 (1970). Both commentators argue that if desuetude were revived, a defendant would no longer have to prove the motive of the prosecutor, but

on a law which has long been unused. In theory, the failure to use the law makes it void, just as if it were repealed by the legislature. In America, however, desuetude has rarely been recognized as a valid defense.[55]

On balance, the arsenal of possible safeguards against prosecutorial discretion provides almost no check whatsoever on the prosecutor's decision of whom to charge with a crime.[56] In considering *United States v. Falk*, it should be kept in mind that *Falk* may be the precursor of a doctrine which will serve as the only deterrent to prosecutorial discrimination. As *Mapp v. Ohio*[57] acts to deter improper police conduct in illegally seizing evidence, so may *Falk* serve to deter prosecutors from using improper discrimination in bringing indictments.[58]

The Falk Decision

Jeffrey Falk was convicted by a jury of three counts of not possessing Selective Service registration and classification cards.[59] Falk argued at his trial and on appeal that he was chosen for prosecution because he had publicly opposed the war in Vietnam and had engaged in draft counseling. Therefore, his conviction allegedly both chilled his right to free speech and violated his right to equal protection. The trial court refused to hear evidence on prosecutorial discrimination in both a pre-trial hearing and during the trial itself.

The court of appeals, sitting en banc, reversed the trial court, remanding the case to a new district court judge with orders to hold a hearing on whether there was improper prosecutorial discrimination.[60] The majority in the four-three decision established a new test for raising the claim of prosecutorial discrimination: if the defendant can establish a reasonable doubt as to whether there was improper discrimination in his prosecution, then the burden of going forward with proof shifts to the government to demonstrate that its motives were proper.[61] The majority held that the facts alleged by Falk fulfilled this requirement. The court specifically noted that it expected the prosecutor who originally brought the case to answer the allegations of the defendant by testifying in court.[62]

The majority opinion and the dissenting opinion of Judge Cummings clashed over two issues. First, what is the proper standard of proof for raising the question of prosecutorial discretion? Second, did the facts in this case establish a prima facie case of discrimination by any standards?

In answering the first question, the majority decision relied on *Yick Wo* and *Oyler v. Boles*. The court followed the now-established doctrine that an injunction against prosecution is possible when a defendant proves he has been the victim of intentional, improper discrimination.[63] The court unhesitatingly interpreted *Oyler v. Boles* to mean that this discrimination can be directed against an individual as well as against a class.[64]

United States v. Steele[65] provides strong support for the court's reliance on *Yick Wo*. In *Steele*, the Court of Appeals for the Ninth Circuit overturned a conviction on the grounds that the prosecution discriminated against the defendant because he asserted his right of free speech. The defendant,

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only that the statute under which he was convicted was long unused.

[55] Bonfield, *supra* note 54 at 429, 439.

[56] In short, unless lawlessness is rampant, enforcement at a low level and public indignation at a high one, the prosecutor is relatively immune from sanctions that might influence routine decision-making.
F. Miller, *supra* note 42 at 305.

[57] 367 U.S. 643 (1961).

[58] *See* notes 18 & 19 *supra*. It has been recognized that the exclusionary rule must be maintained, at least temporarily, because no adequate civil remedy has yet been developeded to deter police from illegally seizing evidence. Bivens v. Six Unknown Federal Narcotics Agents, 403 U.S. 388, 420–24 (1971) (Burger, C. J., dissenting). Until such a remedy is found, the only possible sanction is to exclude illegally-obtained evidence from the trial. Similarly, unless other remedies are available to curtail improper prosecutorial discrimination, the only sanction possible may be to block the prosecution itself.

[59] 50 U.S.C. § 462 (App. 1970). The jury found Falk also guilty of failing to submit to the draft, but the trial judge dismissed this count in a post-trial motion on the grounds that there was no basis in fact for the Selective Service Board to deny Falk conscientious objector status. Falk was sentenced by the trial judge to three years imprisonment, a sentence later described as unnecessarily harsh. United States v. Falk, 479 F.2d 616, 624 (7th Cir. 1973) (Fairchild, J., concurring).

[60] A three-man court of appeals panel originally upheld the trial court. United States v. Falk, 472 F.2d 1101 (7th Cir. 1972) (Cummings, J.) (2–1 decision). The reasoning of Judge Cummings in the majority opinion is the same as his dissent in the rehearing. United States v. Falk, 479 F.2d at 625.

[61] 479 F.2d at 624.

[62] *Id.* at 623.

[63] *Id.* at 618–21.

[64] *Id.* at 619. No court had previously tried to determine whether the Supreme Court in *Oyler* had intended to allow individuals, as opposed to classes, to claim the defense of prosecutorial discrimination. However, there is no reason why an individual would not be just as entitled to protection from a prosecution based on arbitrary standards of selection. *See* People v. Walker, 14 N.Y.2d 901, 252 N.Y.S.2d 96, 200 N.E.2d 779 (1964) and accompanying text.

[65] 461 F.2d 1148 (9th Cir. 1972).

an activist against the census, refused to answer census questions on the grounds that they violated his privacy. The defendant demonstrated that non-activists in Hawaii who did not answer the questions were not prosecuted, while all four prosecutions were of census opponents. *Steele* shows the viability of *Yick Wo* and the fact that engaging in free speech is an improper basis for discrimination.[66]

In the dissenting opinion in *Falk*, Judge Cummings vigorously objected to the majority's justification for looking into the prosecutor's motive in charging a suspect.[67] The dissent argued that as a matter of general policy the judiciary should not pry into the motives of the executive branch in effectuating policy decisions. To maintain the separation of powers, the judiciary should not second-guess decisions by executive officers made in the scope of their duties.

The dissent relied on *United States v. O'Brien*[68] and *McCray v. United States*,[69] both of which are distinguishable from the instant case. Both cases dealt with judicial consideration of legislative, not prosecutorial intent. This distinction is important because the legislature's ability to discriminate is checked by judicial review of a statute's constitutionality, but discrimination by a prosecutor is accomplished in secret. The only way for the judiciary to check the prosecutor is to inquire into his motives.

O'Brien also can be distinguished on its facts. The defendant burned his draft card, committing an offense which is strictly enforced. Because almost all those who commit this crime are charged, the prosecutor has little opportunity for discrimination in selecting defendants. In *Falk*, however, the offense of not possessing a draft card rarely has been enforced, thus allowing the prosecutor great discretion.

The specific authorities relied on by the majority tend to overwhelm the general policy statements cited by the dissent. Unable to deny the concrete precedent of the line of cases developed from *Yick Wo*,[70] the dissent could only argue on policy grounds that the use of the equal protection clause against prosecutorial discrimination should not allow one branch of government to pry into the motives of another. The majority stood on firmer ground in building on the established principles of *Yick Wo*.

The second area of disagreement between the majority and dissenting opinions concerned whether the allegations of the defendant established a prima facie case of discrimination.[71] The dissent argued persuasively that the facts alleged by the defendant did not even meet the reasonable doubt test offered by the majority.

The majority relied heavily on the offer of proof made by Falk that 25,000 men who had turned in their draft cards had not been prosecuted.[72] The dissent replied that simply showing that other people were not prosecuted for the same crime has never been sufficient to raise the defense of prosecutorial discrimination.[73] According to the dissent, the defendant must prove that he has the same important characteristics as those who were not prosecuted, except for one factor which caused the defendant to be selected for prosecution.[74] In *Falk*, the exercise of free speech was the distinguishing factor, but Falk failed to allege that the 25,000 who were not prosecuted did not also engage in free speech. If all those who turned in their draft cards were also engaging in free speech, then Falk cannot claim that he was discriminated against on that basis.

The majority also gave weight to a Selective Service policy statement that called for not prosecuting cases where draft cards were turned

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[66] The court also cited United States v. Crowthers, 456 F.2d 1074 (4th Cir. 1972). For a discussion of *Crowthers*, see text accompanying note 90 *infra*.

[67] 479 F.2d at 625–31.

[68] 391 U.S. 367 (1968). In this case, the Supreme Court refused to inquire into Congress' purpose in making draft card burning a crime.

[69] 195 U.S. 27 (1904). In this case the Court declined to look for a wrongful motive behind special treatment of oleomargarine.

[70] Oyler v. Boles, 368 U.S. 448 (1962); United States v. Steele, 461 F.2d 1148 (9th Cir. 1972); United States v. Crowthers, 456 F.2d 1074 (4th Cir. 1972). For the dissent's response to *Steele* and *Crowthers*, see note 74 *infra*.

[71] Because of the changes in criminal procedure made in *Falk*, it may be particularly important to determine what facts the majority found were sufficient to shift the burden of proof to the government. Future courts may be anxious to distinguish *Falk* on its facts.

[72] 479 F.2d at 621.

[73] *Id.* at 626–28. Laxness of enforcement is never a defense. *See* note 22 *supra*. Furthermore, to prove discrimination it must be shown that the prosecutor knew of these other offenses. Oyler v. Boles, 368 U.S. at 456.

[74] *See* note 41 *supra* for examples of cases where the defendants failed to distinguish themselves from those not charged with the crime. The dissent in *Falk* uses this basis to distinguish the majority's three major cases: *Yick Wo;* United States v. Steele 461 F.2d 1148 (9th Cir. 1972); and United States v. Crowthers, 456 F.2d 1074 (4th Cir. 1972). 479 F.2d at 627–28. In each of those cases, the defendant demonstrated that the alleged reason for discrimination was the only factor separating him from those who were not prosecuted.

in.[75] Instead, draft officials were instructed to handle these cases administratively. The majority wanted to know why the Government violated this policy three years after Falk turned in his draft cards.[76] The dissent provided a possible answer.[77] After the Supreme Court decided *Gutknecht v. United States* in 1970,[78] the Government was precluded from punishing draft opponents by moving up their induction dates. In response to this decision, the Government had to start prosecuting those who turned in draft cards if they were to be punished at all. This provided a possible explanation why 25,000 men were not prosecuted and Falk was. The Government began prosecuting those who were passed up, making the "discrimination" in Falk's case a factor of chance, not evil intent. The majority acknowledged this possibility but placed the burden on the Government to prove its validity.[79]

The evidence most incriminating to the government was a statement to Falk's attorney by the Assistant United States Attorney who tried the case. The prosecutor allegedly refused to compromise with the defense attorney because the government wanted to stop Falk's lawful draft counseling activities. Furthermore, the trial prosecutor revealed during the trial that the decision to prosecute Falk had been reviewed by the Department of Justice in Washington. The majority felt that this procedure was highly unusual and created an inference that the government was singling out Falk for prosecution.[80]

The dissent had little response to the highly incriminating admission that Falk's draft counseling was the reason for his prosecution.[81] But the fact that the decision to prosecute was approved by several people was seen by the dissent to lessen the importance of one man's opinion as to why Falk was charged.[82] The dissent also suggested an alternative reason why the Department of Justice would become involved: a high administrative decision was necessary to direct lower officials on what to do with cases that could no longer be handled administratively because of *Gutknecht*.[83]

The dissent raised an additional argument which sought to undercut the basis for the majority's reasoning. The dissent suggested that it was not improper discrimination to prosecute someone who is highly visible to the public and whose conviction would therefore have a strong deterrent effect.[84] Although this may chill an individual's free speech, it was felt that the purpose of the prosecution is reasonably related to the goal of stopping crime by enforcing the law. The majority apparently disagreed with this analysis,[85] but neither side was able to marshall authorities in its favor.[86] However, the majority avoided this argument by relying on the trial prosecutor's statement that the Government was attempting to curtail Falk's legal draft counseling activity. There is no doubt that the Government cannot intentionally hamper lawful activities (especially free speech) by prosecuting on highly discretionary charges.[87]

In retrospect, the alleged admission to the defense attorney is probably the only allegation which, if proven in a hearing, would establish improper discrimination.[88] None of the other offers

[75] 479 F.2d at 621.
[76] *Id.* at 622
[77] *Id.* at 632–33.
[78] 396 U.S. 295 (1970).
[79] 479 F.2d at 621.
[80] *Id.* at 622.
[81] *Id.* at 633–34. The dissent did point out that the prosecutor who made the statement was not yet working for the Government when the indictment was handed down. However, his statement implied that he heard about the prevailing policy of the office in regard to this case.
[82] *Id.* at 633.
[83] *Id.* at 634–35.
[84] *Id.* at 634.
[85] *Id.* at 619–20.
[86] One court commenting on the subject agreed with the dissenting view that deterrence is a proper standard for discretion. People v. Utica Daw's Drug Co., 16 App. Div. 2d 12, 225 N.Y.S.2d 128 (1962).
[87] Cox v. Louisiana 379 U.S. 536, 557–58 (1965):
> It is clearly unconstitutional to enable a public official to determine which expressions of view will be permitted and which will not or to engage in invidious discrimination among persons or groups either by use of a statute providing a system of broad licensing power or, as in this case, the equivalent of such a system by selective enforcement of an extremely broad prohibitory statute.

[88] Although not argued by defense counsel, the majority raised one more argument to prove discrimination. 479 F.2d at 622–23. The trial prosecutor also allegedly admitted to the defense attorney that the Government's case was weak on the count involving refusal to submit for induction. *See* note 59 *supra*. The majority concluded from this that by bringing draft card charges against the defendant, the prosecution was discriminating against an individual who was exercising his first amendment right to ask for the status of conscientious objector. Theoretically, if Falk had not asked to be classified as a conscientious objector, the draft card counts would have been dropped. The dissent correctly pointed out in rebuttal that Falk had no constitutional right to refuse an order to report for induction. Furthermore, even if the Government's case was thought to be weak, it was strong enough to convince a jury beyond reasonable doubt. 479 F.2d at 635–36. Therefore, the Government should be assumed to have used good faith in prosecuting Falk for illegally refusing induction.

of proof actually possess the potential for demonstrating that Falk was prosecuted because he exercised his first amendment rights.

The Impact of Falk

If *Falk* were widely followed, the largest change in the law of equal protection from prosecutorial discrimination would be in the new burden of proof. Instead of having to prove discrimination by a preponderance of the evidence,[89] under *Falk* a defendant need only raise a reasonable doubt to shift the burden of going forward with proof to the prosecution. The court did not discuss the derivation of this standard other than to acknowledge that it was borrowed from *United States v. Crowthers*.[90] Following *Yick Wo*, the court in *Crowthers* set aside a conviction for disorderly conduct because the anti-war defendants were less disorderly than non-political groups (such as military bands) who performed at the same place and were not prosecuted. Although the court did not use this standard in reaching its decision,[91] it suggested that if a defendant could establish a prima facie case of discrimination, then the burden of going forward with proof shifts to the party having knowledge of the true facts. Because in *Crowthers* the Government had knowledge that other noisy demonstrations had occurred, it would have had the obligation to come forward with evidence to rebut the inference of discrimination raised by the defendants.[92]

The Court in *Crowthers* borrowed this standard of proof from cases dealing with racial discrimination. When a prima facie case of racial discrimination is proven in such areas as housing,[93] employment,[94] and grand jury selection,[95] it is well-established that the defendant possessing the facts must shoulder the burden of proof. The rationale for this standard of proof is that the only way to prove racial discrimination is to force the party with knowledge of the facts to go forward with evidence to refute the created presumption of discrimination. Without this standard, the plaintiff would have great difficulty in establishing that the actions of the defendant were motivated by racial bias.[96] The applicability of this standard of proof to prosecutorial discrimination is obvious. A victim of prosecutorial discrimination is faced with the difficult task of proving that the prosecutor intentionally discriminated against the defendant.[97] Because the prosecutor holds the knowledge of what other cases he chose not to prosecute, he should be required to go forward with proof of a legitimate purpose in order to rebut the inference of improper motive raised by the defendant. In effect, the court in *Falk* has engrafted the standard of proof in racial discrimination cases on the line of prosecutorial discrimination cases developed from *Yick Wo*.

Falk does not specify what is required to raise a reasonable doubt of prosecutorial discrimination. In general, when questions of shifting burdens of proof arise, the only guideline is that the party must present evidence to "entitle himself to a ruling that the opponent should fail if he does nothing more in the way of producing evidence." [98] Applying this guideline to *Falk*, the defendant presented enough evidence of prosecutorial discrimination to reverse his conviction, unless the Government was able to rebut the inference of discrimination with evidence of a proper exercise

[89] *See* People v. Gray, 254 Cal. App. 2d 256, 63 Cal. Rptr. 211 (1967); People v. Utica Daw's Drug Co., 16 App. Div. 2d 12, 225 N.Y.S.2d 182 (1962).

[90] 456 F.2d 1074 (4th Cir. 1972). This standard is similar to one implied in dicta by the Ninth Circuit. United States v. Steele, 461 F.2d 1148 (9th Cir. 1972). For an argument in favor of such a standard, see Givelber, *The Application of Equal Protection Principles to Selective Enforcement of the Criminal Law*, 1973 U. ILL. L. F. 88 (1973).

[91] The court found the evidence of discrimination so complete that the Government could not possibly give a satisfactory explanation of its motives. 456 F.2d at 1078. Therefore, the question of shifting burdens of proof was not involved in the court's holding.

[92] It is neither novel nor unfair to require the party in possession of the facts to disclose them. (citation omitted). We think defendants made a sufficient prima facie showing that application of the noise and obstruction regulation to them was pretensive and that the government, being in possession of the facts as to noise and obstruction of approved activity, should have come forward with evidence, if it could, to rebut the inference of a double standard.

Id. at 1078.

[93] 42 U.S.C. § 1982 (1970) is used to stop racial discrimination in housing. Once the plaintiff has proven certain prescribed elements indicating discrimination, the defendant must come foreward with evidence to rebut the inference of discrimination. Bush v. Kaim, 297 F.Supp. 151, 162 (N.D. Ohio 1969).

[94] Chambers v. Hendersonville City Board of Education, 364 F.2d 189, 192 (4th Cir. 1961).

[95] Reece v. Georgia, 350 U.S. 85, 88 (1955).

[96] For example, in *Chambers*, 364 F.2d 189, 192 (4th Cir. 1961), a group of black school teachers presented statistical evidence that created an inference of racial discrimination in the firing of several teachers. However, conclusive proof would not be possible unless the members of the Board of Education were required to state the reasons why each teacher had been fired. 364 F.2d at 192.

[97] *See* the discussion at note 20 *supra*.

[98] WIGMORE, EVIDENCE § 2494, at 293 (3d ed. 1940).

of prosecutorial selectivity. The amount of proof required in each case must be decided by the judge in relation to the nature of the discrimination sought to be proved. No one label describes the standard of proof necessary to shift the burden. The court in *Falk* uses the terms "prima facie" and "reasonable doubt" interchangeably.[99] Other courts dealing with shifting burdens have used terms such as "inference," [100] "strong inference," [101] and "strong tendency." [102]

Despite the reduction in the burden of proof from preponderance of the evidence to reasonable doubt, defendants will still encounter great difficulty in successfully raising the defense of prosecutorial discrimination. First, the burden of persuasion never shifts from the defendant.[103] Even if the defendant does raise a reasonable doubt, the prosecution is then allowed to rebut the inference of discrimination. If the prosecution succeeds, then the defendant must still prove by a preponderance of the evidence[104] that there has been improper discrimination. The effect of *Falk*, therefore, is to adopt a low threshold of proof which will force the prosecutor to reveal and defend his motives. The ultimate burden of persuasion, however, remains the same.

Another obstacle to such a defense is that courts have always been hostile to the doctrine that convicted criminals must be freed when others who committed the same acts were not prosecuted.[105] If courts are forced to adopt *Falk*, their hostility is likely to manifest itself in skepticism over attempts to prove that the motives of the prosecutor were improper. Furthermore, the unusual fact of the prosecutor's admission of motive in *Falk* may allow courts to distinguish *Falk* from cases that follow. If *Falk* is widely adopted, prosecutors are certain to become taciturn in the presence of the defendant's counsel. Because a defendant still must prove intentional discrimination, he will still face an arduous task in raising even the lesser standard of reasonable doubt.

In the absence of a talkative prosecutor, how will a defendant prove intentional discrimination? The use of statistical comparisons will only be successful if the defendant can prove that the basis of the alleged discrimination is not common to any of the people who were not prosecuted. Future courts are unlikely to be as lenient as the majority in *Falk* in drawing an inference of discrimination from the naked fact that others were not prosecuted.

Even if a defendant can prove he was picked out for prosecution, he must also establish that the basis for the discrimination was impermissible.[106] One probably legitimate basis for discrimination which has already been discussed is to prosecute a highly visible offender with the intent of creating an effective deterrent to others. The court in *Falk* did not consider the possibility that the purpose of prosecuting Falk may have been to deter others from discarding their draft cards. Future courts, however, may not question prosecutions when the prosecutor can prove that deterrence was the motive for charging a figure in the public eye.

Certain routine grounds for selectivity have always been approved. For example, the prosecutor may conserve law enforcement resources by selecting individuals at random.[107] The prosecutor may also indict an individual for the purpose of developing a test case.[108] Another common ground for discriminating is to grant immunity to several offenders in return for testimony which would hopefully convict another offender who is otherwise difficult to reach. It might be argued that the Government has improperly discriminated by allowing equally guilty offenders to go free in the process of convicting the defendant.[109] However, courts have consistently held that it is within the prosecutor's discretion to conduct a case however he sees fit, including giving immunity to known offenders.[110] In order to raise the defense of prosecutorial discrimination, the defendant would have to demonstrate that the granting of immunity was itself based on improper motives, such as a personal or racial dislike for the defendant.

[99] 479 F.2d at 620, 623–24.

[100] 364 F.2d 189, 192 (4th Cir. 1961).

[101] United States v. Steele, 461 F.2d 1148 (9th Cir. 1972).

[102] Reece v. Georgia, 350 U.S. 85, 88 (1955).

[103] *See* McCORMICK, EVIDENCE § 336 (2d ed. 1972).

[104] Because the court in *Falk* did not substitute a new burden of persuasion, it should be assumed that the defendant must still prove discrimination by a preponderance of the evidence. *See* note 33 *supra*.

[105] See the discussion on the development of *Yick Wo* accompanying note 8 *supra*.

[106] Oyler v. Boles, 368 U.S. 448, 456 (1962).

[107] People v. Utica Daw's Drug Co., 16 App. Div. 2d 12, 225 N.Y.S.2d 128 (1962).

[108] MacKay Telegraph Co. v. Little Rock, 250 U.S. 94 (1919) (dictum).

[109] This argument would be most likely to be raised by powerful figures who are ordinarily difficult to prosecute, such as leaders of organized crime and public officials charged with official misconduct.

[110] Saunders v. Lowry, 58 F.2d 158 (5th Cir. 1932) (dictum); State v. Jourdain, 225 La. 1030, 74 So. 2d 203 (1954).

Another proper means of selectivity is to convict a suspected dangerous criminal of a petty crime.[111] A typical example is the prosecution of a suspected hard drug dealer for possession of a small amount of marijuana. The prosecutor can charge a suspected criminal with any petty crime he has actually committed, even if most people are not prosecuted for the same crime.[112]

Even under *Falk* the range of permissible prosecutorial discretion is great. An individual hoping to raise the defense of prosecutorial discretion must allege that he has been discriminated against on grounds which are clearly unrelated to the goals of effective law enforcement, such as free speech, race, religion, nationality, personal hostility, or some other completely arbitrary distinction.

Because *Falk* does not change the ultimate burden of persuasion, perhaps the greatest practical change mandated by *Falk* is that once the defendant raises a reasonable doubt, the prosecutor must personally testify at the hearing. Because many prosecutors may become involved in preparing and reviewing a single case,[113] it is yet to be decided exactly who would be required to testify. The unhappy possibility that everyone connected with the case would testify must be dealt with by future courts. Because of the clearly intolerable burden of tying up several prosecutors whenever a hearing on equal protection is held, courts would probably attempt to limit the number who testify to only those most likely to have made the decision to prosecute. The defense also gains a significant advantage by being able to cross-examine the prosecutor as to his motives. The dissent in *Falk* pointed out that in order to convince the judge that the prosecutor's motives were proper, the prosecutor would have to reveal his true motives to counter the inferences raised by the defendant's allegations.[114] In some cases, the prosecutor would have to rely entirely on his own word in rebutting the defendant's evidence. Under skillful cross-examination, this self-serving statement of purpose may be unpersuasive to the judge. It should be kept in mind, however, that the prosecutor only need testify after the defense has raised a reasonable doubt—a burden which will continue to frustrate most defendants.

An interesting aspect to the legal impact of *Falk* is that even if an injunction is granted, its effect may only be temporary. Courts have agreed that if the prosecutor starts applying a law impartially, then the defendant who was freed can be successfully prosecuted if he commits the same crime again.[115] If the injunction is granted upon a pretrial motion, then double jeopardy would not attach,[116] thus probably allowing the government to re-indict the defendant for the same crime.[117] In either case, an injunction against prosecution may not permanently protect a defendant.

In summary, not many defendants will be able to raise even a reasonable doubt that they have been the victims of intentional discrimination. Few defendants will be in a position to argue that the basis of their selection was improper, and of those that can so argue, fewer still will be able to prove that the motives of the prosecutor were evil.

The *Falk* decision may also have a significant impact on the operation of the criminal justice system. Whenever a court changes criminal procedure to broaden defendants' rights or remedies, the dissenting opinion will usually warn of the impending flood of new cases which will inundate the courthouses.[118] Were *Falk* adopted broadly, this apocalyptic prediction might not be far off target. Because of the significantly lower threshold of proof required to get the prosecutor on the stand, defendants who are already on trial will be encouraged to throw up another defense by arguing that they were the victims of improper discrimination.[119]

[111] United States v. Sacco, 428 F.2d 264 (9th Cir. 1970). The defendant, a suspected organized crime figure, was convicted of violating alien registration laws.

[112] However, the defendant must be suspected of committing other *crimes*, not of engaging in unpopular legal activities. Cox v. Louisiana, 379 U.S. 536, 557–58 (1965).

[113] Abrams, *Internal Policy: Guiding the Exercise of Prosecutorial Discretion*, 19 U.C.L.A.L. REV. 1, 6 (1971).

[114] 479 F.2d at 631.

[115] Wade v. City and County of San Francisco, 82 Cal. App. 2d 337, 186 P.2d 181 (1947); City of Covington v. Gausepohl, 250 Ky. 323, 62 S.W.2d 1040 (Ct. App. 1933); people v. Utica Daw's Drug Co., 16 App. Div. 2d 12, 225 N.Y.S. 2d 128 (1962).

[116] Double jeopardy usually does not attach until the jury has been impaneled. *See* Illinois v. Somerville, 410 U.S. 458 (1973).

[117] Of course the government cannot prosecute if the statute of limitations has run on the original offense.

[118] The dissent in *Falk* is no exception:

> [T]here are few criminal defendants who will be unable to make assertions as bald and unspecific as defendant's, and naturally there is now incentive to make them.

479 F.2d at 625.

[119] Despite the fact that few defendants would be likely to succeed on such issues, the claims would be raised anyway since the criminal defendant is already in court and his motivation is strong to make any argument that either delays the process or provides even the remotest chance of success. Abrams, *supra* note 113, at 53.

The effect of *Falk* may be analogous to the broadening of federal habeas corpus rights: many more prisoners have petitioned for writs of habeas corpus, but few have been successful.[120] Similarly, many more defendants may raise the defense of prosecutorial discrimination, but few will be successful in fulfilling the threshold standard of reasonable doubt, and far fewer still will eventually gain an injunction against prosecution.[121] Even under *Falk* defendants must overcome skeptical courts and the heavy obstacles of proving intentional discrimination based on improper grounds. Nevertheless, more crowded court dockets may become a legacy of the *Falk* decision which probably will be considered by future courts in deciding whether to adopt *Falk* in other jurisdictions.[122]

Another possible effect of *Falk* is to hamper prosecutors in their duties. As the prosecutor's role has evolved, he has assumed tremendous discretion in deciding what laws should be enforced and who should be prosecuted.[123] Consequently, the prosecutor often takes on the role theoretically reserved to the judge: to decide in the interests of justice whom society should punish for breaking its laws, and even what form that punishment should take.[124] Because the courts do not have the resources to hear every case which comes to the attention of the prosecutor, this exercise of discretion is essential.[125] If the prosecutor had no discretion, the court system would immediately break down under the burden of hearing a plethora of petty cases.

If *Falk* results in prosecutors having to testify often as to their motives,[126] the prosecutor's discretion might be significantly impaired. Revealing the internal policies of the prosecutor's office might embarrass the prosecutor and create distrust in the general public.[127] For example, a prosecutor may not wish to disclose a policy of not enforcing marijuana laws when the offenders are not selling large quantities or harder drugs. Similarly, a prosecutor may be forced to reveal secret plans, such as a plan of using immunity and informers to eventually convict an organized crime figure. Rather than make public the policies of the office, prosecutors may be forced to drop important cases that would otherwise be won.

Falk may also restrict discretion by hampering plea bargaining. The fear of revealing discriminatory motives may inhibit a prosecutor in discussions with the defendant's attorney. The prosecutor cannot strengthen his bargaining position by telling the defense attorney that the prosecutor's office is extremely anxious to convict the defendant and therefore will not compromise. The *Falk* case is a specific lesson that such bravado

[120] Rights of state prisoners under federal habeas corpus were significantly expanded in three Warren Court decisions: Sanders v. United States, 373 U.S. 1 (1963); Fay v. Noia, 372 U.S. 391 (1963); Townsend v. Sain, 372 U.S. 293 (1963). These decisions encouraged more state prisoners to petition for habeas corpus. Although the number of petitions jumped from 1,903 in 1963 to 6,331 in 1968, very few of these petitions have resulted in the prisoner's freedom. C. WRIGHT, LAW OF FEDERAL COURTS 217-18 (2d ed. 1970).

Falk may contribute to the increase in habeas petitions. A prisoner may argue in his petition that his conviction should be thrown out because of prosecutorial discrimination. Such a remedy was implicitly sanctioned in Oyler v. Boles, 368 U.S. 448 (1962).

[121] Not only will few defendants be released, but most of those that are released will not have committed serious crimes. Prosecutors have a much greater opportunity to discriminate when lesser crimes are involved which are generally not prosecuted because they are unimportant. *See* Comment, *The Right to Nondiscriminatory Enforcement of State Penal Laws*, 61 COLUM. L. REV. 1103, 1140 (1961).

[122] If the experience with habeas corpus petitions is applicable, the increase in cases that *Falk* might generate is not unmanageable. Despite the enormous increase in habeas corpus petitions, a recent study concluded that consideration of petitions for writs of habeas corpus comprise only a small part of the total work load of Federal district courts. Note, *The Burden of Federal Habeas Corpus Petitions from State Prisoners*, 52 VA. L. REV. 486, 506 (1966).

[123] Viewed in broad prospective, the American legal system seems to be shot through with many excessive and uncontrolled discretionary powers but the one that stands out above all others is the power to prosecute.

K. DAVIS, DISCRETIONARY JUSTICE 188 (1969). For general discussions of the discretion exercised by the prosecutor, see F. MILLER, PROSECUTION: THE DECISION TO CHARGE A SUSPECT WITH A CRIME (1969); Abrams, *Internal Policy: Guiding the Exercise of Prosecutorial Discretion*, 19 U.C.L.A.L. REV. 1 (1971); Baker, *The Prosecutor—Initiation of Prosecution*, J. CRIM. L.C. & P.S. 770 (1933); Breitel, *Controls in Criminal Law Enforcement*, 27 U. CHI. L. REV. 427 (1960); Kaplan, *Prosecutorial Discretion—A Comment*, 60 NW. U. L. REV. 174 (1965); LaFave, *The Prosecutor's Discretion in the United States*, 18 AM. J. COMP. L. 932 (1970).

[124] A prosecutor trying to develop a policy for selectively enforcing a penal statute will rely upon his own intuition, training, and values, including his notions about the purposes of the criminal law, the role and efficacy of incarceration and other forms of punishment, general ideas about standards for initiating prosecutions and the specific traditions of the particular prosecution office.

Abrams, *supra* note 123, at 21.

[125] *Id.* at 5.

[126] This assumption is probably false because the great bulk of defendants will be unable to fulfill the requirement of raising a reasonable doubt. See discussion in text accompanying note 103 *supra*.

[127] On the other hand, some commentators argue that prosecutors need to limit discretion by creating and publicizing internal policy guidelines. Davis, *supra* note 123; Abrams, *supra* note 123.

may provide evidence of discrimination and result in no conviction at all.

Conclusion

As the Court in *Mapp v. Ohio*[123] the court in *Falk* has made the difficult decision to burden the criminal justice system in order to protect constitutional rights that otherwise would be jeopardized. While great discretion must be allowed the prosecutor, this quasi-judicial power must be watched by the courts. If the courts abdicate this responsibility, a defendant who has been unconstitutionally discriminated against will have no effective remedy.

The adoption of the shifting burden of proof from racial discrimination cases is necessary to overcome the nearly impossible task of proving intentional discrimination by inference. If the courts insist on requiring that a defendant prove what a prosecutor is thinking, the courts should allow the defendant to ask him. Although this new test would probably encourage many defendants to introduce the defense of prosecutorial discrimination, few will be successful. Skeptical courts applying the traditional burdens of proving both intentional and improper discrimination will defeat the claims of the overwhelming majority of defendants. The alleged facts in *Falk* do not portend differently. The distinguishing feature of *Falk* is the admission by the prosecutor that the defendant was being prosecuted because of his lawful draft counseling activities. If *Falk* is adopted widely, such an admission will be extremely rare. A better check on the enormous power of the prosecutor is worth the price of more crowded court dockets.

[123] 367 U.S. 643 (1961).

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AN ANALYSIS OF THE CITATION SYSTEM IN EVANSTON, ILLINOIS: ITS VALUE, CONSTITUTIONALITY AND VIABILITY

INTRODUCTION

The bail system as administered in the United States is beset with many problems. Its inadequacies have been identified by many critics.[1] In response to such criticisms, alternatives to bail have been adopted in a number of jurisdictions.[2] This comment will discuss various alternatives to bail with particular attention focused on the first year's operation of the citation violation system which was instituted on September 22, 1971 in Evanston, Illinois.[3] This one year period was chosen to insure that all cases examined had reached a final disposition by December, 1973.[4]

Evanston's system permits a patrolman to issue a citation to offenders who commit certain misdemeanors.[5] The citation orders an offender to appear in court on a specified date. Before issuing a citation, the officer must be convinced that the cited misdemeanant possesses enough ties to Evanston to render his appearance in court likely. The citing officer must also be convinced that no violence will ensue as a result of releasing the cited offender at the scene of his misdemeanor. If a patrolman determines that an offender might not appear as summoned or might continue to perpetrate the offense which first prompted the patrolman's intervention, the officer should make an arrest and take the offender into custody, thereby subjecting him to the bail system.[6]

[1] *See, e.g.*, A. BEELEY, THE BAIL SYSTEM IN CHICAGO (1927) [hereinafter cited as BEELEY]; Foote, *The Coming Constitutional Crisis in Bail* (pts. 1-2), 113 U. PA. L. REV. 959, 1125 (1965); Rankin, *The Effect of Pretrial Detention*, 39 N.Y.U.L. REV. 641 (1964); Note, *Bail: An Ancient Practice Reexamined*, 70 YALE L.J. 966 (1961).

[2] *See, e.g.*, Ares, Rankin & Struz, *The Manhattan Bail Project: An Interim Report on the Use of Pre-Trial Parole*, 38 N.Y.U.L. REV. 67 (1963); Berger, *Police Field Citations in New Haven*, 1972 WIS. L. REV. 382 (1972); Comment, *Pretrial Release Under California Penal Code Section 853.6: An Examination of Citation Release*, 60 CALIF. L. REV. 1339 (1972).

[3] Evanston Police Department, Departmental General Order 71-13.

[4] The court records on these cases revealed that it was not uncommon for one year to eighteen months to elapse before a case was finally adjudicated. This lag was primarily a result of continuances. Limiting the time period to one year, insured that all cases examined in this study had reached their final disposition.

[5] *See* note 50 *infra*.

[6] Evanston Police Department, Departmental General Order 71-13.

BACKGROUND

Before examining Evanston's experience with citation release, it is necessary to discuss the purpose of the bail system, identify some problems besetting its administration and examine some systems designed to replace it. In the United States, bail is not a matter of specific constitutional right. Rather, the eighth amendment provides that, "Excessive bail shall not be required...."[7] The Judiciary Act of 1789, however, established the absolute right to bail in non-capital cases.[8] Congress provided that "upon all arrests in criminal cases, bail shall be admitted, except where the punishment may be death...."[9] With regard to capital cases, bail was discretionary depending upon the "nature and circumstances of the offense, and of the evidence, and usages of law."[10] The amount of bail required depends upon a number of factors. In rule 46(c) of the Federal Rules of Criminal Procedure, the traditional standards for admission to bail are provided as follows:

> If the defendant is admitted to bail, the amount thereof shall be such as in the judgment of the commissioner or court or judge or justice will insure the presence of the defendant, having regard to the nature and circumstances of the offense charged, the weight of the evidence against him, the financial ability of the defendant to give bail, and the character of the defendant.

The purpose of bail was discussed by the United States Supreme Court in *Stack v. Boyle*.[11] Chief Justice Vinson, writing for the majority of the Court, observed that "the fixing of bail for any individual defendant must be based upon standards relevant to the purpose of assuring the presence of that defendant [in court]."[12] In *Stack*, twelve petitioners were accused of violating the Smith Act. Bail was set at $50,000 per defendant.[13] The Supreme Court concluded that such amount was excessive and suggested that the petitioners move for a reduction of bail on the remand of their

[7] U.S. CONST. amend. VIII.

[8] 1 STAT. 73, 91 (1789).

[9] *Id.*

[10] *Id.*

[11] 342 U.S. 1 (1951).

[12] *Id.* at 5.

[13] *Id.* at 1.

cases.[14] The defendants offered evidence of their "financial resources, family relationships, health, prior criminal records, and other information" to establish their reliability, while the Government introduced no evidence demonstrating the unreliability of these particular defendants. The Government had only shown that four Smith Act violators, other than the petitioners, who were convicted in the Southern District of New York had forfeited bail.[15] In view of the purpose of bail as applicable to this particular situation, the court reasoned that $50,000 was not necessary to insure the defendants' presence and was thus excessive.

In his concurring opinion in *Stack*, Justice Jackson stated the reasons for the absolute right to bail in noncapital cases. He argued that bail affords an offender an opportunity to prepare his defense unhampered, preserves the presumption of his innocence and prevents the infliction of punishment before judgment.[16] Justice Jackson also noted that "[a]dmission to bail always involves a risk that the accused will take flight. That is a calculated risk which the law takes as the price of our system of justice."[17] It follows from this statement that the likelihood of flight does not in and of itself preclude the admission to bail. Furthermore, Justice Jackson observed that "[i]n allowance of bail, the duty of the judge is to reduce the risk by fixing an amount reasonably calculated to hold the accused available for trial and its consequence. But the judge is not free to make the sky the limit."[18] Thus not only must bail be admitted in all noncapital cases, but it also must be set at a reasonable amount which is designed only to insure the timely appearance of the accused.

While the bail system performs an important function by providing a means whereby an accused can remain free pending a final determination of guilt or innocence, the system has been subject to substantial criticism. Sitting as a circuit justice in *Bandy v. United States*,[19] Justice Douglas considered an application for the reduction of bail. In the course of his opinion, he observed that

> this bail theory is based on the assumption that a defendant has property. To continue to demand a substantial bond which the defendant is unable to secure raises considerable problems for the equal administration of the law.[20]

Justice Douglas focused his concern on the issue which has most troubled critics of the bail system by asking, "Can an indigent be denied freedom, where a wealthy man would not, because he does not happen to have enough property to pledge for his freedom?"[21]

In his classic study, *The Bail System in Chicago*, Arthur Lawton Beeley examined the administration of bail in the Municipal Court and Criminal Court of Cook County.[22] The Report of the Wickersham Commission in 1931 commended Beeley on his work's thoroughness.[23] It also observed that his conclusions were applicable to many other American communities. In general, Beeley found that the bail system was badly administered in Chicago. He observed that "notwithstanding the fact that all accused persons are presumed to be innocent and that most of them are later discharged, large numbers of citizens of limited means and influence are detained."[24] He also discovered that the setting of bail amount was more a result of arbitrary standards than it was a function of assessing the accused's personality, social history, financial ability and integrity.[25] Individualized determinations of bailability were rare.

As a result of his research, Beeley was able to determine what types of people failed to make bail. He also was able to assess which people in this group could have been released without subjecting them to the bail system.[26] Beeley found that approximately 50 per cent of the pretrial detainees he studied were too poor to post the requisite bail.[27] Ninety per cent of these offenders were residents of Chicago at the time of their arrest, and 33 per cent had lived in Chicago all their lives.[28] Furthermore, 60 per cent were living with either their immediate families or close relatives at the time of their arrest.[29] Fifty per cent of these unsentenced prisoners were first offenders.[30] Beeley also discovered that 50 per cent of the unsentenced jail de-

[14] *Id.* at 7.
[15] *Id.* at 1.
[16] 342 U.S. at 8 (Jackson, J., concurring).
[17] *Id.*
[18] *Id.*
[19] 81 S. Ct. 197 (1960).
[20] *Id.* at 198.
[21] *Id.*
[22] BEELEY, *supra* note 1.
[23] NATIONAL COMMISSION ON LAW OBSERVANCE & ENFORCEMENT, SURVEYS ANALYSIS 89 (1931).
[24] BEELEY, *supra* note 1, at 155.
[25] *Id.* at 33.
[26] *Id.* at 156.
[27] *Id.* at 157.
[28] *Id.* at 158.
[29] *Id.*
[30] *Id.*

fendants were regularly employed.[31] On the basis of this information, he concluded that 28 per cent of these detainees should have been released because their various ties to Chicago made them good release risks.[32] As a result of identifying these instances of needless incarceration, Beeley made a number of recommendations which he hoped would improve the administration of bail. For example, he suggested that a summonsing procedure take the place of arrest and bail in cases of petty offenses. Summonsing would involve issuing a notice to appear; there would be no need to take the suspect into custody.[33] With regard to the more serious offenses, Beeley advocated a more individualized treatment of each offender's application for bail. He suggested examining "(1) the nature of the offense, (2) the weight of the evidence, (3) the character of the accused, (4) the seriousness of punishment following conviction, and (5) the quality of the bail security." [34]

After Beeley's pioneering research in 1927, twenty-seven years elapsed before the administration of bail again was systematically studied in a metropolitan context. In 1954, Caleb Foote conducted the first of two informative investigations of bail practices. He first scrutinized the administration of bail in Philadelphia.[35] He discovered that many offenders were imprisoned while awaiting trial because they were unable to make bail. For example, three out of every four serious offenders did not make bail.[36] With regard to other noncapital offenses, 27 per cent of those accused were unable to obtain pretrial release.[37] Bail amounts were set on the basis of predetermined standards, however, deviation from these arbitrary standards did occur. For example, Chief Magistrate Clothier said that high bail was employed "to break crime waves." [38] Of those offenders detained, 53 per cent did not spend any time in jail after the disposition of their case. Of this 53 per cent, 20 per cent were found not guilty.[39] But for their inability to provide bail, these offenders would never have "tasted" jail. As Foote demonstrated, however, these 20 per cent were fortunate to have obtained their ultimate release. In his study of effects of pretrial detention, Foote discovered that "the handicap of being in jail pretrial may result in a number of convictions which would not occur were the defendant given his liberty during the pretrial period." [40] In other words, pretrial detention correlated with a finding of guilt. The strength of this correlation was given more concrete expression in the second of Foote's bail studies.

At the initiative of Professor Foote, a study of the administration of bail in New York City was undertaken in 1957. Many of these findings paralleled the results of the Philadelphia study. For example, 58 per cent of the pretrial detainees who were interviewed said that they did not possess the resources to make bail.[41] The effect of detention was graphically demonstrated in the difference that existed among defendants receiving suspended sentences. Fifty-four per cent of the bailed defendants received suspended sentences, while only 13 per cent of the pretrial detainees received suspended sentences.[42] In another study of bail administration in New York, Anne Rankin discovered that the inability to make bail may have a significant effect on disposition and sentence.[43] She found that only 17 per cent of the bailed defendants were imprisoned, while 64 per cent of those detained were imprisoned. With respect to suspended sentences, she determined that 36 per cent of the bailed offenders were suspended while only 9 per cent of the detained offenders received such treatment.[44]

As a result of his findings, Foote made a number of recommendations concerning bail reform. Many of his proposals paralleled the suggestions that Beeley had advanced in his early study. On the basis of his 1954 findings, Foote advocated the wider use of a summonsing procedure.[45] In his 1957 study, Foote and his colleagues recommended the more extensive use of release on recognizance programs.[46] The use of either a summons system or a

[31] *Id.*
[32] *Id.*
[33] *Id.* at 166.
[34] *Id.* at 167.
[35] Note, *Compelling Appearance in Court: Administration of Bail in Philadelphia*, 102 U. PA. L. REV. 1031 (1954).
[36] *Id.* at 1048.
[37] *Id.*
[38] *Id.* at 1038. Chief Magistrate Clothier was referring to the practice of setting high bail to keep offenders in pretrial confinement, thereby restricting the number of potential troublemakers free on bail.
[39] *Id.* at 1049–50.
[40] *Id.* at 1058.
[41] Note, *A Study of the Administration of Bail in New York City*, 106 U. PA. L. REV. 693, 711 (1958).
[42] *Id.* at 727.
[43] Rankin, *The Effect of Pretrial Detention*, 39 N.Y.U.L. REV. 641–42 (1964).
[44] *Id.*
[45] Note, *Compelling Appearance in Court: Administration of Bail in Philadelphia*, 102 U. PA. L. REV. 1031, 1072 (1954).
[46] Note, *A Study of the Administration of Bail in New York City*, 106 U. PA. L. REV. 693, 730 (1958).

release-on-recognizance program would eliminate the most pernicious aspect of the bail system, pretrial confinement as a result of indigency. The recommendations of such pioneering researchers as Beeley and Foote were adopted in a number of jurisdictions during the 1960's.

The first major response to the critics of the bail system came in New York. The Vera Foundation supervised the so-called Manhattan Bail Project. Staff members and law students from New York University conducted interviews with offenders who were awaiting arraignment. They attempted to determine whether any of these defendants would represent good parole risks. These decisions were made on the basis of a series of questions which the staff asked. In particular, these questions focused on the offender's previous employment record, current charges, family relationships, residence patterns, character references and existing criminal record. The defendant's responses were rated and an overall reliability quotient was obtained. If this figure fell within permissible limits, the defendant's references were investigated. When his references were verified, the committee assigned to his case then made a recommendation as to his pretrial release.[47]

This procedure worked well for a number of reasons. Most importantly, it individualized the bail system. This individualization made it possible for magistrates making decisions about bail applications to know the personal history of the applicants before them. This improved fact-finding enabled court officials to feel more confident about the reliability of an offender they released pretrial. Because the released offenders demonstrated ties to the community in which they were freed, the law enforcement personnel were satisfied that the alledged offenders would appear at trial on schedule. Furthermore, the inability to make cash bail was not a factor of crucial consequence in the Manhattan system. Thus, an indigent offender was now able to obtain pretrial release by establishing adequate community roots.

The appearance rate of the released defendants was excellent. From October 16, 1961, through September 20, 1962, only three out of 215 paroled defendants failed to appear as instructed. In 1960, 101 of the 1,395 bailed defendants randomly sampled did not show for their first court appearance.[48] Thus, in a comparison of bail versus parole release for a period of almost a year in both cases, 7 per cent of the bailed defendants failed to appear as directed, while only 1 per cent of the paroled defendants did not show. The difference between the dispositions of the paroled defendants and a random sample of jailed defendants was marked. Sixty-four per cent of the detainees were convicted and imprisoned. While 53 per cent of the parolees were convicted, only 17 per cent were ultimately imprisoned pursuant to their conviction.[49] This comparison indicates that pretrial detention may have a significant impact on the disposition of any given case.

Another form of pretrial release which does not involve economic discrimination is the citation or summons release. With this procedure, the arresting officer has the option of giving an offender a citation at the scene of an offender's infraction. The decision to cite as opposed to the decision to arrest and take into custody depends upon a number of factors. Different communities have adopted citation systems, and some variation has occurred. Some communities stressed the existence of employment and familial responsibilities, while others required evidence of residence. In most jurisdictions, some evidence of ties to the community where the offense occurred is required.

On August 23, 1971, the City Council of Evanston, Illinois, enacted a violation citation system.[50] Evanston's citation release program incorporated attributes of similar systems which had been developed in Oakland and New Haven. Although comparisons will be made to the Oakland and New Haven systems, the focus of this study will be on the first year of Evanston's operation of the citation system. In a comparison of the citation systems of these three cities, it is necessary to examine each program's scope and standards for citability.

In Evanston, a citation may be issued for seven Illinois misdemeanors.[51] All Evanston Municipal Code violations are citable except those involving

[47] Ares, Rankin & Struz, *The Manhattan Bail Project: An Interim Report on the Use of Pre-Trial Parole*, 38 N.Y.U.L. REV. 67, 70–74 (1963).

[48] *Id.* at 86.

[49] *Id.* at 82.

[50] Evanston, Illinois, Resolution 43-R-71, August 23, 1971.

[51] The seven state misdemeanors are: Curfew violation, ILL. REV. STAT. ch. 23, § 2371 (1971); simple assault, ILL. REV. STAT. ch. 38, § 12-1 (1971); disorderly conduct, ILL. REV. STAT. ch. 38, § 26-1(a)(1) (1971); solicitation of alcoholic or non-alcoholic beverages, ILL. REV. STAT. ch. 38, § 26.1 (1971); Dram Shop Acts, ILL. REV. STAT. ch. 43 (1971); ticket scalping, ILL. REV. STAT. ch. 121½, § 157.32 (1971); sale, use or explosion of fireworks, ILL. REV. STAT. ch. 127½, § 128 (1971).

deadly weapons, juveniles, prostitution, lewdness, sex offenses or traffic offenses. In New Haven, all misdemeanors except those involving juvenile offenders or sex offenses are citable. In Oakland, all misdemeanors are citable.

In all three cities, certain circumstantial standards must be met before a citation can be issued. In Evanston, the officer issuing the citation must be satisfied that the offender has given him authentic identification. Second, the offender must not be wanted as a result of any outstanding warrants. Third, the offender must be a temporary or permanent Illinois resident. Fourth, the defendant must demonstrate enough reliability so that he can be trusted to appear in court as summoned. Fifth, and most importantly, the officer issuing the citation must be convinced that the accused will desist from whatever conduct prompted his citation in the first place.[52]

In Oakland, the limitations on the use of citation release were expressed in terms of six factors, any of which would disqualify an offender. Persons ineligible for citation release were those unable to care for themselves, those likely to continue or resume the offense in point, those unable or unwilling to produce adequate identification, those unlikely to appear in court, those with warrants outstanding and those who would not sign the citation form or who demanded immediate arraignment. With respect to the likelihood of court appearance, the arresting officer must determine whether the offender has enough community roots to warrant pretrial release.[53] In New Haven, four standards relating to the circumstantial nature of the incident were required before a citation was issued. A citation was not to be issued if the incident represented potential for further violence, the offender required medical attention, the offender was uncooperative or the offender was unlikely to appear in court.[54]

Generally, all three systems possessed the same procedural frameworks. In Evanston and New Haven, however, the emphasis was on field citations, while in Oakland stationhouse citation was preferred. Because the offenders were extricated from the situation as a matter of course in Oakland, Oakland patrolmen did not have to concentrate on the situational variables to the same degree that Evanston and New Haven police did. All three programs were basically confined to misdemeanors. The context in which these misdemeanors occurred had to be devoid of the potential for further violence. Finally, all defendants had to demonstrate a likelihood of appearing in court.

The benefits of the citation system are several. It is preferable to the bail system because it does not involve the invidious consequences of economic discrimination. At the same time, it assures the presence of the defendant at his trial—thereby complying with the purpose of bail.[55] This presence is assured by only releasing offenders who demonstrate ties to the community where the offenses occur. The citation system is also superior to the release-on-recognizance programs because it does not involve judicial intervention during the pretrial period. Police officers can release eligible offenders soon after their apprehension. With the release-on-recognizance procedure, a release recommendation must be approved by a court. The absence of court involvement makes the use of the citation release more expeditious.

Besides ending economic discrimination and bypassing court involvement, the citation system also has some other beneficial attributes. The system affords a considerable saving of police man-hours. In Evanston, it was estimated that a citation involved approximately fifteen minutes while an arrest required a minimum of two hours.[56] In Oakland, the citation also required only fifteen minutes while an arrest consumed an hour.[57] In New Haven, it was estimated that a savings of two hours resulted with the use of the citation system.[58] The benefits to offenders are also noteworthy. Besides no cash deposit, the cited offender does not incur an arrest record nor does he lose time as a result of pretrial incarceration. Thus, the cited offender has an opportunity to prepare his case for trial as well as to continue work so that he will have the resources to pursue an appeal if that becomes necessary.

Constitutional Questions

Despite the benefits of a citation system, there are potential constitutional defects inherent to its

[52] Evanston Police Department, Departmental General Order 71-13.

[53] Comment, *Pretrial Release Under California Penal Code Section 853.6: An Examination of Citation Release*, 60 Calif. L. Rev. 1339, 1350 (1972).

[54] Berger, *Police Field Citations in New Haven*, 1972 Wis. L. Rev. 382, 400 (1972).

[55] *See* text accompanying note 12 *supra*.

[56] This information was gathered from a series of interviews conducted with the Patrol Division of Evanston's Police Department. For a discussion of interviewing technique and the confidentiality of this information, see note 89 *infra*.

[57] Comment, *supra* note 53, at 1361.

[58] Berger, *supra* note 54, at 409.

operation. Three equal protection questions arise with respect to the use of a citation program. First, does the delegation of extensive discretion to individual officers create the probability that the system will be applied discriminatorily? Second, can eligibility for citation be limited to those individuals who possess adequate community roots? Third, can felons be excluded from the operation of the system?

Under the fourteenth amendment, all persons are entitled to the equal protection of the law.[59] The amendment condemns the unequal regulation of private conduct by state criminal laws. However, unequal regulation of private conduct may result from discriminatory enforcement practices.[60] In *Yick Wo v. Hopkins*, the Supreme Court held that:

> Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution.[61]

This landmark case involved extreme discrimination. In the enforcement of a statute that prohibited the operation of laundries in wood frame buildings, the state agency involved denied permits to all Chinese applicants, yet it gave permits to all but one non-Chinese. These permits enabled the non-Chinese to operate laundries in wood frame buildings without the possibility of official intervention.

More recently, the concept of discretionary enforcement was discussed in *People v. Harris*.[62] In this case, gambling statutes were enforced against blacks only, despite the acknowledged violation of such statute by whites. The court found instances of deliberate discrimination since enforcement officers admitted not raiding gambling parties which occurred in so-called white "gentlemen's clubs."[63] In *Bargain City U.S.A., Inc. v. Dilworth*,[64] Sunday sale bans involving certain products were enforced against large department while smaller stores selling the prohibited items went unprosecuted. The court in *Bargain City* held that where intentional discriminatory enforcement practices occurred injunctive relief was available to prohibit such activity.[65]

A number of criticisms have been raised against the use of the equal protection argument in cases where the defendant contends that his conviction should be reversed because a law was enforced against him while others went unprosecuted. The chief argument advanced against such a defense is that equal protection does not guarantee equal protection of law violators.[66] Put another way, the right to commit a crime does not exist; therefore, the equal protection clause does not reach such conduct even though it may be selectively sanctioned. Another argument which is used to defeat the extension of the equal protection guarantee to cases of discriminatory enforcement focuses on the concern that law violators should not go unpunished merely because law enforcers were unable to prosecute all law violators.[67] Both of the foregoing arguments reflect a concern that intrinsically harmful acts should be prosecuted despite the fact that some perpetrators escape prosecution.

These countervailing arguments have not completely vitiated the viability of the discriminatory enforcement defense. However, this defense is hedged with two requirements which make its invocation difficult. First, it must be demonstrated that the discrimination which occurred concomitant with the enforcement was intentional.[68] Second, if intentional discrimination is proved, it must be shown that such classification was unreasonable. Classifications focusing on racial or religious grounds carry a presumption of suspicion; others may be reasonably related to the general welfare and thus escape invalidity.[69]

In cases of discriminatory enforcement as a result of vesting too much discretion in individual officers, three problems of proof arise. First, because of the low visibility of discretionary practices in police enforcement activity, it is difficult to

[59] The fourteenth amendment provides that "No state shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV.

[60] Comment, *The Right to Nondiscriminatory Enforcement of State Penal Laws*, 61 COLUM. L. REV. 1103 (1961).

[61] 118 U.S. 356, 373–74 (1886).

[62] 182 Cal. App. 2d Supp. 837, 5 Cal. Rptr. 852 (1960).

[63] *Id.* at 838, 5 Cal. Rptr. at 854.

[64] The Philadelphia Legal Intelligencer, June 22, 1960, p. 1, col. 1 (Phila. County Ct. of Common Pleas 1960).

[65] *Id.*

[66] Comment, *supra* note 60, at 1107.

[67] *Id.*

[68] Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 78 (1911).

[69] *Id.*

secure proof that such activity was intentional. Police rarely admit to the advertent or inadvertent practice of discriminatory enforcement. Second, the defendant must also overcome the presumption that police act in a regular and proper manner.[70] Third, it is difficult to demonstrate that the classification at issue really exists. A proper showing often requires that the selective enforcement be extremely blatant. Anything less than a focus on one class to the almost total exclusion of other classes may be explained as a function of chance or laxity.[71]

Despite these difficulties of proof, however, the potential for discrimination in citation systems as a result of unchecked discretion should not be ignored. The potential of equal protection violations as a result of discretionary enforcement is attributable to the lack of standardized guidelines which regulate the use of the citation procedure. This problem is compounded by the fact that individual officers are vested with the sole responsibility for decisions as to citability. Unresolved questions exist in most citation systems as to the relative weight to be given the standards used in the decision to cite or arrest.[72] Questions as to the relative weight among these factors need to be resolved. Furthermore, the delegation of broad decision-making power to individual officers gives them the opportunity to make citation decisions without adequate supervision. Hypothetically, an officer may assess the potential for further violence in similar situations differently as a result of his predisposition to the personal characteristics of the parties. Thus, a decision to use the citation in one situation while not in another could conceivably be a function of something other than the situational variables and an objective determination of the reliability of the accused. Concededly, this practice may occur with arrest as well, but the citation procedure invites such a result by not having definite guidelines as to the weight to be given the circumstantial variables and by permitting an officer to cite unsupervised.[73]

[70] LaFave, *The Police and Nonenforcement of the Law*, 1962 WIS. L. REV. 104, 136 (1962).

[71] *Id.*

[72] Comment, *supra* note 53, at 1346.

[73] Our interview data suggest that there was considerable supervisor involvement in Evanston's citation experience. In approximately two-thirds of the citation incidents, supervisors became involved in one way or another. However, their involvement was more a matter of chance than it was a function of duty. The need exists for supervisor involvement to be made mandatory and guidelines for citation to be formalized.

The second constitutional issue involves the question of whether the community roots' test violates the equal protection clause. The answer to this question, in turn, depends upon a consideration of residence requirements and their relation to an individual's right to travel vis-à-vis the states' right to exercise their police power. In *Shapiro v. Thompson*,[74] the right to travel was characterized as a fundamental right. A residency requirement conditioning eligibility for welfare payments was invalidated in the *Shapiro* case. Residency requirements affecting voting rights have been invalidated consistently. In *Dunn v. Blumstein*,[75] the Supreme Court held that a one year state and a three month county residency prerequisite for enfranchisement violated the equal protection clause of the fourteenth amendment. In the analysis of the validity of a residence requirement, two questions must be answered. First, can the "exercise of state created rights . . . be constitutionally limited only to residents of the state." [76] Second, if so, is a "durational residence requirement . . . a constitutionally permissible means for distinguishing residents from non-residents so as to limit the exercise of the right to residents only." [77] The answers to these questions depend upon the quality of the right infringed and the reasonableness of the state interest justifying such infringement.

Arguably, the requirement that an offender establish ties to a given community before he is eligible for citation interferes with that offender's right to travel. In this case, the state created right which is denied travelers is the privilege of being cited instead of being arrested in the event that they commit a misdemeanor. To retain a discriminatory classification, the state or subdivision thereof must demonstrate that the classification either has a rational basis or that it is based on a compelling state interest.[78] The latter test is required if the right infringed is considered fundamental.[79] The interest served by requiring a showing of community roots before citation is one of assuring the appearance of defendants in court to answer charges. The fulfillment of this interest promotes the more orderly and expeditious administration of justice. A state's interest in promoting orderly administration of

[74] 394 U.S. 618, 634 (1969).

[75] 405 U.S. 330, 360 (1972).

[76] Comment, *The Demise of the Durational Residence Requirement*, 26 SW. L.J. 538, 539 (1972).

[77] *Id.* at 542.

[78] *Id.* at 543.

[79] *Id.*

justice is legitimate. Furthermore, a state's interest in avoiding no-shows and assuring that offenders are brought to trial compels the classification of offenders into residents and nonresidents because residence in the state where the offense occurs corresponds with a low no-show rate.

Besides the state's compelling interest in securing the appearance of misdemeanants, the citation system's residence requirement is justified for another reason. This argument focuses on a consideration of the alternatives to citation and their consequences. But for citation release, indigent offenders face the rigors of pretrial detention. As a result of the citation option, defendants too poor to make bail may obtain release during the hiatus between their citation and first court date. In the interest of making the citation system an effective substitute for bail, the community roots test was devised. By balancing the benefits gained and the detriments incurred, it could be concluded that the citation system with its residency requirement is a reasonable means by which the appearance of cited offenders can be assured. The discrimination between resident and non-resident should be tolerated because the citation system eliminates the economic discrimination associated with bail. Of the two discriminations, the economic one is arguably more pernicious than the one limiting mobility.[80]

The third constitutional issue involving the question of equal protection arises as a result of the narrow scope of the citation system. Offenses other than misdemeanors should be citable. In an analysis of this third constitutional issue, one must here again determine whether a right needs to be protected, an infringement of that right has occurred, and a reason exists which justifies such infringement. The right which is denied as a result of the narrow scope of the citation system's applicability is the one which lies at the heart of the citation system's *raison d'être*. The potential for economic discrimination in the bail system is as great with respect to felons as it is with misdemeanants. Furthermore, the distinction between certain felonies and misdemeanors are inconsequential at least as far as the concerns underlying the citation system are involved. Assuming that the concerns reflected in the citation system focus on the cessation of the offense in point and the likelihood that the offender will honor his summons to appear in court, felonies that differ from misdemeanors only with regard to the value of the merchandise stolen should be citable. All other things being equal, under the present citation systems in Evanston, Oakland and New Haven stealing property valued one dollar more than the upper limit for qualification as a misdemeanor could conceivably subject such a felon to the inequities of the bail system. Furthermore, the distinction between felonies and misdemeanors is rendered less meaningful due to the practice of plea bargaining. Felonies are commonly reduced to misdemeanors as a result of the exercise of prosecutorial discretion.[81]

The reason offered for the exclusion of felonies from the citation program is that these offenses are more serious and should be subject to the safeguards of bail. This argument fails to take into account the nature of bail. In non-capital cases, bail is a matter of absolute right.[82] Thus, given the offender's financial ability, bail is no impediment to release despite the likelihood that the offender might perpetrate other offenses.[83] The express terms of the citation system's guidelines provide that a citation would not issue in the case of a violent felony or in a felony where the potential for violence still exists. The distinction between violent and non-violent misdemeanors and felonies is compelled by the state's interest in preventing further harm to its citizens or their property. Thus, it is not unreasonable to deny citations in incidents where the potential for further violence exists. However, officers should have the opportunity to use the citation system in felony cases where no potential for further violence exists. If insuring the presence of the offender in court is the sole purpose for the requirement of bail, then citation should serve as a valid replacement of bail provided that it is as successful in compelling court appearance.

Evanston's Experience

While this discussion of problems in administration of the citation system is drawn exclusively from data generated in a study of the first year of Evanston's program, Evanston's system is representative of other programs, and, therefore, the following analysis is relevant to other citation release procedures. Furthermore, the urban characteristics of suburban Evanston increase the value of this data. Evanston does not conform to the so-called "bedroom" suburb pattern. For example,

[80] Comment, *supra* note 53, at 1346.

[81] *Id.* at 1347.

[82] *See* text accompanying note 1 *supra*.

[83] *See* Williamson v. United States, 184 F. 2d 280, 282–83 (2d Cir. 1950).

Evanston has a population in excess of 80,000.[84] Approximately, 16 per cent of this total is black. Blacks represent 17 per cent of the population of the six county metropolitan area including and surrounding Chicago.[85] In this respect, therefore, Evanston is almost a microcosm of the metropolis which surrounds it.

In an attempt to evaluate Evanston's citation system, six members of the Northwestern University Law and Society Program's 1972 summer research team examined the effects and implementation of this system one year after its enactment.[86] In the "effect" branch of the study, court docket sheets and police arrest records were examined to determine the dispositions of the citation cases. The dispositions of the cases which were bailed but could have been cited were also examined. These bailed cases were a result of an officer's failure to invoke the citation procedure. In most cases, such failure was probably either a function of an officer's decision that the situation merited arrest or of an officer's failure to recall that the system was available as an option.[87] The no-show rate for both cited and bailed defendants was also determined.

In the "implementation" branch of the study, a series of interviews with the Patrol Devision of the Evanston Police Department were conducted. In these interviews, it was hoped that the officers would identify the problems they had encountered with the use of the citation system. During the last week of July, 1972 and the first week of August, 1972, sixty-one out of a total of seventy-three patrolmen were interviewed.[88] Interviews were limited to the patrolmen because they were the only officers who were issued the citation form booklets.

The following discussion deals with the reactions of the Evanston patrolmen to the innovation of the citation procedure.[89] It is followed by a number of suggestions designed to rectify the potential constitutional defects considered earlier. It is believed that these constitutional issues can be resolved by implementing a series of proposals which will also alleviate many of the difficulties identified by the patrolmen in their criticisms of the citation system.

The data generated by the "effect" branch of the study may best be considered in conjunction with the information gathered in the interviews. These interviews revealed that the police held a basically negative view of the citation procedure. Although there were exceptions to this general attitude, a majority of the officers objected to the use of the citation system for at least three reasons. A majority of officers were convinced that the cited offenders would not appear in court as scheduled. This concern was reflected in several comments. One officer felt that "the offenders will take it [the citation] as a joke." Another patrolman remarked that "no one will honor a mere piece of paper [the citation ticket] which is issued at the scene of the incident." [90] A number of the officers felt that all criminal law violators should be arrested as a matter of course. These men seemed convinced that anything less than full arrest and taking into custody would give the offender the impression that his crime was not seriously regarded. Some officers also maintained that such an impression would not deter the offender from resuming the conduct which had first prompted police intervention. These officers exhibited much concern about the potential for further violence. The concern these officers expressed was generated by an inability to assess

[84] Planning Department, Evanston, Illinois, *Basic Population Data of the 1970 Census*, Report #1, July, 1971, at 1 (1971).

[85] *Id.* at 2-3.

[86] This research was directed by Professors John Heinz and Victor Rosenblum of the Northwestern University School of Law and Professor Wesley Skogan of Northwestern University: Department of Political Science.

[87] Twelve percent of the officers interviewed in the Evanston study indicated that they had failed to use a citation on an appropriate occasion merely because they had forgotten that it was available.

[88] The other twelve patrolmen were either on vacation or on sick leave when we were conducting our interviews and thus were unavailable for comment.

[89] Because we extended a pledge of confidentiality to our interviewees, the Evanston patrolmen, we will be unable to identify any of our information by specific source. However, the interview information is available for perusal at the offices of the Journal of Criminal Law & Criminology, 357 East Chicago Avenue, Chicago, Illinois 60611.

With respect to interviewing technique, one student asked the officers questions while another student recorded their responses. At the end of each interview, the interviewer and recorder alternated roles. The officers were uniformly cordial and cooperative. Although designed for one-half hour intervals, the interviews were rarely completed within one hour and some required an hour and one-half. The interview schedule employed open-ended questions which were to be followed by specific probes. For example, we asked officers if they had encountered any problems with the administration of the citation system. Following their response or lack thereof, we questioned them about the specific problems which we had anticipated as a result of our study of other citation programs. In preparation for the analysis of the interview data, we classified the responses of the officers. This classification enabled us to discover the relative frequency of any given response.

[90] These comments represented the most open evidence of dissatisfaction.

accurately this potential. This problem was aggravated because the decision to cite was initially the responsibility of an individual officer.

A majority of the patrolmen also concluded that the citation would not result in any convictions. This attitude was manifested in a particularly unfortunate way. Some officers assumed that the citation would not result in a conviction and therefore used it as a mere warning device. In this respect, they were promoting the occurrence of their expectation that citations would not result in convictions since they were using them in cases that should have only involved a warning and not a formal citation. This practice had the result of bringing more individuals into the criminal justice process than had been the case before the institution of the citation system. When asked whether they would have arrested in cases where they had issued a citation, seven officers said that they would not have arrested but for the citation alternative.

The validity of these conclusions is not borne out by the study's findings. There were 97 citations issued between September 22, 1971 and September 22, 1972. There were 21 no-shows in the 97 citation case adjudications. This figure represents a no-show rate of 22 per cent. During the same year, 248 offenses that were eligible for citation were processed as arrests. Of this number, 37 defendants failed to appear. This figure represents a 15 per cent "skip" rate for bailed defendants. On first glance, there appears to be a significant difference between the two no-show rates, 22 per cent for the cited and 15 per cent for the bailed. However, this discrepancy loses significance if one examines the circumstances underlying the citation no-shows.

Seven of the 21 no-shows may be explained as a result of extenuating circumstances. In three of the 21 no-shows, a family fight was involved. According to our interviews, in these three cases the complainant-wives did not show up to prosecute. It is a reasonable inference from this fact that the husband-defendants' absence was a mere result of their awareness that their wives were not going forward with the complaint. In three other cases, the cited offenders were incarcerated in the Cook County Jail when their court date arrived. These individuals were cited at the Howard Street Rapid Transit Station at the Chicago-Evanston boundary. Apparently, in the interval between this incident and their citation appearance date, they were arrested and incarcerated in Chicago. In another no-show case, the citing officer described the offender as "deaf, dumb, and mentally unbalanced." He was only cited at the insistence of the complainant, an Evanston theater owner. Furthermore, one of the apprehending officers supposedly knew the misdemeanant. In any event, his citation represented a dubious exercise of the citation prerogative; therefore, it is not surprising that his failure to appear occurred. Thus, in seven of the 21 citation no-shows, mitigating circumstances existed to explain the reason for non-appearance. If the citation no-show rate is figured minus these seven cases, it corresponds exactly to the fifteen per cent skip rate found with the bailed offenders.

With regard to the fear that the citation would never result in convictions, the frequency of guilty verdicts with this procedure was 44 per cent. Guilty verdicts in citation cases included assignments to supervision or probation and payment of fines. In arrest cases, the frequency of guilty verdicts was 45 per cent. The verdicts of guilt in arrest cases consisted of ex parte dispositions, assignment to supervision or probation, payment of fines, jail time to serve, time considered served, and commitment to a mental hospital. Thus, dispositions of guilt seem to be relatively constant regardless of the form of arrest used.

The frequency of not-guilty verdicts with citation cases was 56 per cent. With arrest cases, the not guilty frequency was 55 per cent. In both citation and arrest cases, not-guilty type verdicts included dismissals, discharges, leave to file charges, denials, nolle prosequi, motions to suppress evidence sustained, and non-suits. As with the guilty verdicts, not-guilty dispositions seem to be relatively constant regardless of the form of arrest used. With regard to both arrest and citation, the explanation of a high degree of not-guilty verdicts rests with the type of offenses citable. That is, the citable offenses result in not-guilty dispositions more than 50 per cent of the time no matter which form of formal action, citation or arrest, brings the offender into the judicial process. Evidently, the patrolmen assumed that the form of arrest and not the quality of the offenses themselves would cause the high degree of not-guilty verdicts.

In addition to holding these unfounded presuppositions, the patrolmen also complained about specific procedural difficulties that arose in their use of the citation system. The most frequently mentioned administrative problem concerned the gathering of crowds at the scene of the incident. Fifty-two per cent of the patrol division said that

crowds interfered with the citation procedure. These officers maintained that it was necessary to remove the offender from the scene of his misdemeanor. According to some officers, the practice of completing the citation in the field kept them in the vicinity of the incident longer than usual. Twenty-five per cent of the officers observed that the citation procedure could be followed by merely taking the alleged offender into the squad car and driving out of the neighborhood. These officers maintained that a citation could be issued with greater ease at a less volatile location.

Approximately 30 per cent of the officers interviewed indicated that it was difficult to complete a citation in the field because they needed information which was only available at headquarters. These officers wanted information about the offender and his charge. In Evanston, officers are required to make a warrant check on an offender before they can issue a citation. Patrolmen also needed information about the nature and extent of an offender's previous record. A number of officers commented that it was impossible to obtain such information over their radios. One officer noted that air-time was routinely limited to three minute conversations because the police radio network encompassed a number of communities besides Evanston. Thus, it was difficult to obtain warrant checks over the radio. Another limitation on the use of the radio as an informational source was caused by the inability of the desk officer to respond to requests from the field without also neglecting his stationhouse responsibilities.

PROPOSALS

The incipient constitutional controversies and the administrative difficulties besetting citation release can be remedied to a large extent. The potential for discriminatory enforcement could be lessened through the adoption of a more refined citation formula in which the relative weight and priority of the situational variables would be defined. With a clear-cut set of criteria, an officer would be able to make more consistent citation decisions. A definition of the relative importance of the elements in the community roots' test should be devised also. For example, the following formula might be used:

Is there any potential for further violence?

(1) To what extent was violence present in the first place?
(2) Is the offender uncooperative and quarrelsome?
(3) Is the offender inebriated?
(4) Is the offender under the influence of drugs?
(5) Will the offender and the complaining witness be in proximity of each other after the officer departs?

Will the offender appear in court as scheduled?

(1) Does he have adequate identification?
  (a) Driver's License.
  (b) Social Security Card.
  (c) Voter's Registration Card.
(2) Does he live in Evanston or the Chicago area?
(3) Does he work in Evanston or the Chicago area?
(4) Does he have relatives in the area?

An unsatisfactory answer to any one of the five questions under the potential violence question would result in denial of citation release. As a result of this clear-cut set of criteria, an officer would be able to make more consistent citation decisions. As to the question raising the likelihood of court appearance, unsatisfactory identification would disqualify the offender from further consideration for citation release. If an offender has reliable identification, he would only be disqualified from further consideration if he gave unsatisfactory answers to questions two, three, and four under the likelihood of appearance question. This formula is merely suggested as a starting point. It can and should be altered to meet the needs of individual departments. In any event, this formula or a variation on it would not only restrict an individual officer's discretion and thus help to prevent discriminatory enforcement, but it would also promote a more cautious use of the citation system.

During the interviews, the officers expressed concern about the propriety of using the citation in certain situations. For example, they questioned the appropriateness of invoking its use in family fight situations or with inebriated offenders. The explicit set of guidelines formulated above would offer officers confronted with such difficult field decisions a means by which they could make choices between arrest and citation. More explicit guidelines would also result in more consistent enforcement which thereby would promote equal protection.

Uniformity of practice could also be insured by only permitting citation at the stationhouse where

it would be subject to supervision and review. The decision to cite should be a function of agreement between the apprehending officer, his sergeant and the lieutenant in charge of that shift detail. Furthermore, this decision should be subject to review by a desk sergeant who is regularly entrusted with the responsibility of interviewing offenders in citation incidents to determine whether their references corroborate what they have told the apprehending officer about their residence, job and relatives. This scheme would divide responsibility of the citation process. Individual officers would no longer be able to invoke the citation as a mere warning. The desk officer review would infuse a measure of procedural consistency, and this consistency would help to insure the uniform treatment of misdemeanants eligible for citation.

Stationhouse summons would also eliminate the administrative difficulties many of the officers noted. No crowd problem would exist with stationhouse citation. The unavailability of information would no longer frustrate officers willing to cite a given offender but hesitant to follow through for fear of not discovering an outstanding warrant. There would be no need to tie up air-time with stationhouse citation. Furthermore, the potential for violence in a citation incident would be mitigated by a short trip to headquarters because the cited offender would have the opportunity to cool down in an environment removed from his recent misbehavior. As a result of extricating an offender from the scene of his offense, more emphasis could be placed on the community roots test. This emphasis would enable officers to by-pass the more ill-defined and anxiety-producing situational variables test.

The problem with residence requirements and the community roots test was discussed above. Basically, the community roots test is valid because it comes under the rubric of a state's compelling interest in maintaining an orderly and efficient system of criminal law administration. The elimination of the third constitutional issue would involve the expansion of the citation system's scope. Felonies of a non-capital nature should be citable. The success of the community roots test in assuring court presence with misdemeanants should be extended to felons. This test is flexible so that the existence of dangerous situational variables may be used as a justification for denying citation in any given case. Since all pecunious defendants may obtain pretrial release by resort to bail even though they have committed felonies, impecunious felons should also have the opportunity to obtain pretrial release through citation. The problem of equal protection as between arrest and citation does not exist with regard to capital felonies because bail is not a matter of absolute right with them.

The potential viability of the citation system as an alternative to bail should increase as more jurisdictions like Evanston experiment with similar programs and learn from their experience. Presumably as more cities implement citation programs, the courts will have an opportunity to pass on whatever constitutional problems are posed and hopefully these issues will be resolved in favor of a system which makes the opportunity for pre-trial release available without regard to the financial status of the offender.