PROCEDURAL DUE PROCESS—CRIMINAL

Generally: The Principle of Fundamental Fairness

The Court has held that practically all the criminal procedural guarantees of the Bill of Rights—the Fourth, Fifth, Sixth, and Eighth Amendments—are fundamental to state criminal justice systems and that the absence of one or the other particular guarantees denies a suspect or a defendant due process of law under the Fourteenth Amendment.[1022] In addition, the Court has held that the Due Process Clause protects against practices and policies that violate precepts of fundamental fairness,[1023] even if they do not violate specific guarantees of the Bill of Rights.[1024] The standard query in such cases is whether the challenged practice or policy violates "a fundamental principle of liberty and justice which inheres in the very idea of a free government and is the inalienable right of a citizen of such government." [1025]

This inquiry contains a historical component, as "recent cases . . . have proceeded upon the valid assumption that state criminal

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party who unsuccessfully appeals from money judgment meets rational basis test under equal protection challenge, since it applies to plaintiffs and defendants alike and does not single out one class of appellants).

[1022] *See* analysis under the Bill of Rights, "Fourteenth Amendment," *supra*.

[1023] For instance, *In re* Winship, 397 U.S. 358 (1970), held that, despite the absence of a specific constitutional provision requiring proof beyond a reasonable doubt in criminal cases, such proof is required by due process. For other recurrences to general due process reasoning, as distinct from reliance on more specific Bill of Rights provisions, *see*, *e.g.*, Chambers v. Mississippi, 410 U.S. 284 (1973) (defendant may not be denied opportunity to explore confession of third party to crime for which defendant is charged); Wardius v. Oregon, 412 U.S. 470 (1973) (defendant may not be held to rule requiring disclosure to prosecution of an alibi defense unless defendant is given reciprocal discovery rights against the state); Mullaney v. Wilbur, 421 U.S. 684 (1975) (defendant may not be required to carry the burden of disproving an element of a crime for which he is charged); Estelle v. Williams, 425 U.S. 501 (1976) (a state cannot compel an accused to stand trial before a jury while dressed in identifiable prison clothes); Henderson v. Kibbe, 431 U.S. 145 (1977) (sufficiency of jury instructions); Patterson v. New York, 432 U.S. 197 (1977) (defendant may be required to bear burden of affirmative defense); Taylor v. Kentucky, 436 U.S. 478 (1978) (requiring, upon defense request, jury instruction on presumption of innocence); Kentucky v. Whorton, 441 U.S. 786 (1979) (fairness of failure to give jury instruction on presumption of innocence evaluated under totality of circumstances); Sandstrom v. Montana, 442 U.S. 510 (1979) (conclusive presumptions in jury instruction may not be used to shift burden of proof of an element of crime to defendant); Hicks v. Oklahoma, 447 U.S. 343 (1980) (where sentencing enhancement scheme for habitual offenders found unconstitutional, defendant's sentence cannot be sustained, even if sentence falls within range of unenhanced sentences).

[1024] Justice Black thought the Fourteenth Amendment should be limited to the specific guarantees found in the Bill of Rights. *See*, *e.g.*, *In re* Winship, 397 U.S. 358, 377 (1970) (dissenting). For Justice Harlan's response, *see* id. at 372 n.5 (concurring).

[1025] Twining v. New Jersey, 211 U.S. 78, 106 (1908). The question is phrased as whether a claimed right is "implicit in the concept of ordered liberty," whether it partakes "of the very essence of a scheme of ordered liberty," Palko v. Connecticut,