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Constitutional Law: May a State Compel Unbailed Defendants to Appear in Lineups?

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About one-half the states have held that privity is not required for some products that are neither foodstuff nor a dangerous instrumentality.[19]

Most of the decisions in the various jurisdictions that have abolished privity have been hopelessly bogged down in theoretical justification.[20] Few courts have faced the question so directly and stated in such clear and concise language that privity is not necessary regardless of the product. Without theoretical discussion, the Florida Supreme Court appears to have held that any damages resulting from a defect in any product should fall upon the manufacturer of that product. This liability of the manufacturer for his product places the burden of loss on the party ultimately responsible for the defect and the one most able to suffer the loss. It appears, therefore, that the Florida Supreme Court has provided a very satisfactory solution to the problem of damages occurring to the helpless consumer as a result of defects in the products he must use.

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CONSTITUTIONAL LAW: MAY A STATE COMPEL UNBAILED DEFENDANTS TO APPEAR IN LINEUPS?

Rigney v. Hendrick, 355 F.2d 710 (3d Cir. 1966)

Appellants, charged with various offenses and held in jail pending trial for want of bail, sought to enjoin police officials from placing them in a lineup, as either a fill-in or for purposes of possible identification by victims of similar crimes, unrelated to the crime with which they were charged. Appellants contended that compelling their appearance in the lineup, when bailed defendants could not be so compelled, violated the equal protection clause of the fourteenth amendment of the United States Constitution. The district court denied the injunction;[1] on appeal to the Third Circuit, HELD,

Pelletier v. DuPont, 124 Me. 269, 128 Atl. 186 (1925).

19. *E.g.*, Thomas v. Leary, 15 App. Div. 2d 438, 225 N.Y.S.2d 137 (4th Dep't 1962); Beck v. Spindler, 256 Minn. 543, 99 N.W.2d 670 (1959); Morrow v. Caloric Appliance Corp., 372 S.W.2d 41 (Mo. 1963).

20. For a discussion of the numerous theories and also for citations to other articles see PROSSER, TORTS §97 (3d ed. 1964).

1. Morris v. Crumlish, 239 F. Supp. 498 (E.D. Pa. 1965).

affirmed. The court of appeals reasoned that compelling unbailed defendants to appear in a lineup was neither a denial of due process nor a violation of the prohibition against self-incrimination nor a violation of the equal protection clause.[2]

The court's decision and its discussion of the equal protection clause are open to question. The evolution of the equal protection doctrine, and its current application in the area of rights of the criminally accused as evidenced in the "poverty cases,"[3] would seem to indicate a result different from the one reached in the instant case.

The equal protection doctrine in the past has been held to prevent discrimination, which is the result of statutes whose purpose is discriminatory[4] or whose application creates classifications that have no reasonable relationship to an otherwise valid state policy.[5] The Supreme Court has established basic guidelines to determine whether a classification is reasonable. First, if a class is defined by the state for purpose of unique treatment, all persons within that class must be treated substantially alike.[6] Moreover, the classification itself must be reasonably related to the accomplishment of the valid state purpose, which, ideally, means that all persons within the class set out must possess the characteristics to be regulated, prohibited, or eliminated and that only those persons possessing these characteristics should be found within the class affected by the law.[7] Thus, the classification should not be substantially over-inclusive (too many persons within the class lack the characteristics)[8] nor substantially under-inclusive (too many persons without the class share the same characteristics as those persons within the class).[9]

A valid state purpose requires that the statute's classification must not be of a discriminatory nature, reflecting prejudice, hostility, an-

2. This decision disagreed with the decision in Butler v. Crumlish, 239 F. Supp. 565 (E.D. Pa. 1965).

3. Draper v. Washington, 372 U.S. 487 (1963); Lane v. Brown, 372 U.S. 477 (1963); Douglas v. California, 372 U.S. 353 (1963); Smith v. Bennet, 365 U.S. 708 (1961); Burns v. Ohio, 360 U.S. 252 (1959); Eskridge v. Washington State Bd. of Prison Terms & Paroles, 357 U.S. 214 (1958); Griffin v. Illinois, 351 U.S. 12 (1956).

4. *E.g.*, Takahashi v. Fish & Game Comm'n, 334 U.S. 410 (1948); Ketch v. Board of River Pilot Comm'rs, 330 U.S. 552 (1947); Korematsu v. United States, 323 U.S. 214 (1944); Hirabayashi v. United States, 320 U.S. 81 (1943); Truax v. Raich, 239 U.S. 33 (1915); Yick Wo v. Hopkins, 118 U.S. 356 (1888).

5. *E.g.*, Skinner v. Oklahoma *ex rel.* Williamson, 316 U.S. 535 (1942); Tigner v. Texas, 310 U.S. 141 (1940); Crane v. Johnson, 242 U.S. 339 (1916).

6. *E.g.*, Buck v. Bell, 274 U.S. 200 (1927); Powell v. Pennsylvania, 127 U.S. 678 (1888); Yick Wo v. Hopkins, 118 U.S. 356 (1888).

7. See Tussman & ten Broeck, *The Equal Protection of the Laws*, 37 CALIF. L. REV. 341 (1949) for an extensive study of the general doctrine.

8. See Korematsu v. United States, 323 U.S. 214 (1944); Hirabayashi v. United States, 320 U.S. 81 (1943).

9. See Salsburg v. Maryland, 346 U.S. 545 (1954).

tagonism, or class consciousness[10] and, regardless of its purpose, must not operate so as to accomplish substantive results absolutely prohibited.[11] But, if the law in question does not manifest an arbitrary classification or prohibited state motive then it is valid, even though actual inequalities may flow from its operation.[12] In order to render an otherwise valid law violative of the equal protection clause, it must be administered in a willfully discriminatory manner.[13]

This was the state of equal protection before *Griffin v. Illinois* and its progeny,[14] which can be termed the "poverty cases," inasmuch as they asked whether it is a deprivation of an individual's constitutional rights to so administer the laws as to condition the assertion of some basic legal right on the ability to pay.

Historical attitudes toward the poor help explain early court reluctance to consider the most ubiquitous of all discriminations, loss of legal rights due to lack of property ownership.[15] Early cases manifested an attitude of moral indignation at the impoverished condition of some of humanity. Thus, in *New York v. Miln*, the Supreme Court said: "We think it [is] competent and necessary for a state to provide precautionary measures against the moral pestilence of paupers, vagabonds and . . . convicts."[16] It was not until *Edwards v. California*,[17] decided in 1941, that the *Miln* rationale was specifically repudiated. In concurring opinions, Mr. Justice Douglas and Mr. Justice Jackson stated the law cannot: "permit those who were stigmatized by a state as indigents, paupers, or vagabonds to be relegated to an inferior class of citizenship"[18] and that indigence does not constitute a basis for restricting the freedom of a citizen.[19]

The change in attitude was reflected in *Griffin v. Illinois*, which held that a statute, which in practical effect if not in intent barred an indigent's appeal from a criminal conviction because of his indigency, denied him the equal protection of the law.[20] The change in the

10. Cases cited note 4, *supra*.

11. See, *e.g.*, Shelley v. Kraemer, 334 U.S. 1 (1948) (right of minority groups to property wherever they wish is to be protected).

12. See Tigner v. Texas, 310 U.S. 141 (1940); Mallett v. North Carolina, 181 U.S. 589 (1901); Barbier v. Connoly, 113 U.S. 27 (1885).

13. Snowden v. Hughes, 321 U.S. 1 (1944).

14. Cases cited note 3, *supra*.

15. See *Report of U.S. Attorney General's Committee on Poverty and the Administration of Criminal Justice* (1963); Smith, R. H., *Justice and the Peer* (1919) for some studies of the ever-present problem.

16. 36 U.S. (11 Pet.) 102, 142 (1837).

17. 314 U.S. 160 (1941).

18. *Id.* at 181 (concurring opinion).

19. *Id.* at 184. This change of attitude is apparent in Warren, *Chief Justice John Marshall: A Heritage of Freedom and Stability*, 41 A.B.A.J. 1008 (1955).

20. 351 U.S. 12 (1956).

Court's treatment of the equal protection clause was marked, for neither in *Griffin* nor in any of the later "poverty cases" did the statutes involved[21] evince a discriminatory purpose or classify groups arbitrarily[22] nor were any of the statutes administered in a willfully discriminatory manner.[23] The only constitutionally repugnant characteristic the cases shared was that, markedly, the opportunity of indigent persons to insist on the exercise of basic legal rights was effectively foreclosed. Thus, making the means available to indigents is not sufficient; the state must affirmatively insure that the factor of indigency, alone, will not place them in an unequal position before the court.

This change in doctrine affects the validity of the conclusion of the court in *Rigney v. Hendrick.* The reason for compelling the appellants to participate in a lineup was their presence in jail pending trial. However, their presence in jail was due solely to the operation of the bail bond system, which, in this case, requires the posting of a money bond before an accused is released from custody. It is appropriate, therefore, to consider the bail system and its effects on appellants' legal rights. Such a consideration reveals a close analogy to the problems posed for the courts by the poverty cases. There is no doubt that there is a valid state purpose behind the bail bond system. This purpose is to give practical effect to the presumption of innocence before conviction by allowing a man to remain free before trial while assuring the accused's presence at trial by requiring that he post a bond, which will be forfeited should he fail to appear.[24] The classification of the accused into bailed and unbailed categories is not unrelated to this purpose, for it is reasonable to presume that those who have some collateral at stake will be more prone to return for trial than those who do not; indeed, the classification seems to be

21. In *Griffin* the statute involved required that a convicted defendant pay for a transcript of record; without the transcript an appeal from the conviction would not be taken. The apparent purpose of charging for the transcript was to defray court costs and discourage frivolous appeals.

22. In *Griffin* there was no affirmative classification involved at all. As the four dissenters pointed out: "[T]he terms of the appeal are open to all, although some may not be able to avail themselves of the full appeal because of their poverty." Griffin v. Illinois, 351 U.S. 12, 28 (1956).

23. The court recognized the lack of willful discrimination in all these cases. Thus, for example, in Lane v. Brown, 372 U.S. 477, 478 (1963) the court said: "Indiana seems to have long pursued a conspicuously enlightened policy in the quest for equal justice to the destitute, and it is not without irony that the constitutional problem in this case stems from legislation evidently enacted to enlarge that state's existing system of aid to the indigent."

24. Stack v. Boyle, 342 U.S. 1 (1951); United States v. Foster, 278 F.2d 567 (2d Cir. 1960); Reynolds v. United States, 80 Sup. Ct. 30 (Douglas, Circuit Justice, 1959); United States *ex rel.* Rubenstein v. Mulcahy, 155 F.2d 1002 (2d Cir. 1946).

constitutionally authorized, since the constitutional prohibition of excessive bail[25] indicates an acquiescence in the practice of requiring some bond in certain cases.

Since the only purpose of requiring a bond before release from custody is to assure the return of the accused, only those differences in treatment between bailed and unbailed defendants that are a necessary and incidental element in the custodial care of the unbailed defendant can be tolerated.[26] Other differences, bearing no relationship to the purpose of the bail system, are arbitrary and, in the granting and protection of legal rights, a state cannot arbitrarily discriminate in favor of the bailed defendant and against the unbailed defendant.[27]

Compulsory appearance at a lineup is not a factor common to both classes. A bailed defendant need not appear at a lineup, which is being conducted to investigate a crime that is unrelated to the specific crime with which he is charged, unless he is rearrested, on a showing of probable cause, in connection with the crime being investigated.[28] Moreover, it cannot be said that compulsory lineups are a necessary or incidental part of confinement to assure reappearance at trial.[29]

Bearing in mind that the only reason one defendant is bailed and the other is not is the ability to post a property collateral, it is apparent that the inability of the unbailed defendant to exercise the legal right accorded bailed defendants to insist on rearrest on probable cause before being exposed and humiliated in a lineup stems from this inability, as an indigent, to post bond. An indigent is, therefore, being effectively denied a basic legal right by the administration of a law that is otherwise reasonable and permissible and

25. "Excessive bail shall not be required." U.S. CONST. amend. VIII.

26. On this point both majority and dissent agree. Rigney v. Hendrick, 355 F.2d 710 (3d Cir. 1965).

27. In the Matter of Bommarito, 270 Mich. 455, 259 N.W. 310 (1935); Morton v. State, 105 Ohio St. 366, 138 N.E. 45 (1922); *cf.* Coffin v. Reichard, 143 F.2d 443 (6th Cir. 1944), *cert. denied,* 325 U.S. 887 (1945).

28. United States *ex rel.* Heikkinen v. Gordon, 190 F.2d 16 (8th Cir. 1951), *vacated on other grounds.*

29. The *Rigney* majority treated the "lineup" as analogous to permissible "surveillance" for purposes of identification to which the police may subject an unbailed defendant, the lineup being necessitated by the practical impossibility of viewing the defendant within the jail. Thus, the majority reasoned, confinement necessitated the "lineup" as the only method of doing what could be done with the bailed defendant, *i.e.* viewing him for purposes of identification, 355 F.2d 710, 715 (3d Cir. 1965). This seems to fail to distinguish between the practical possibility of doing so and the absolute right to do so and it overlooks the main distinction in the two situations: the element of state compulsion. Moreover, it ignores the factor of prejudice and humiliation and intrusion of the right of privacy inherent in placing a person in a lineup, which is not present in mere viewing in public. The two situations are not in fact analogous.

that does not flow from arbitrary or discriminatory motives or enforcement. The case falls squarely within the doctrine of the "poverty cases."[30]

Of greater importance than the specific problem presented in *Rigney* is the demonstration of the questionable operation of the entire state bail bond system. There are undoubted basic legal rights that are granted to one class of persons (bailed defendants) and denied the other class of persons (unbailed defendants); for example, freedom itself, the right to gainful employment, and, related to the constitutional guarantee of counsel in all criminal cases, the ability to effectively prepare a defense, investigate issues, corroborate vital testimony, or to discover witnesses.[31]

Since denials of this nature, unlike the denial in *Rigney*, are unquestionably necessary and incidental to custody of the unbailed defendant, and hence necessary for the purpose of assuring reappearance, it would seem at first that no constitutional issue arises. Certainly, there is no gainsaying that the state's purpose in administering a bail program is valid. There is, however, the further question whether such a classification, based as it is solely on the ability to post a bond, is a reasonable classification within the meaning of the poverty cases. If not, it cannot be a constitutionally permissible classification. It is no answer to this question to assert that the Constitution expressly permits requiring payment of a bond. True, the Constitution does recognize that money bail bonds may be required in certain cases, else its prohibition of excessive bail is surplusage. The Constitution, does not, however, authorize bail in all cases,[32] nor does it require, in those cases where bail is available, that a bond must be posted; it merely prohibits setting the bond level, in those cases in which it is to be used, at an excessive scale. It would seem that if the ability to be released on bail rests entirely on the question of property ownership, any differences that flow therefrom by the rationale of the "poverty cases," are the result of invidious and unreasonable classifications and hence constitutionally invalid.[33]

The present state bail system, based as it is largely on the ability of the defendant to pay a professional bondsman's fee, also presents

30. See text accompanying note 20 *supra*.

31. See Foote, *Foreword to Comment on the New York Bail Study*, 106 U. PA. L. REV. 685 (1958); Rankin, *The Effect of Pretrial Detention*, 39 N.Y.U.L. REV. 641 (1964) for discussion of the differences in treatment and their practical results.

32. Carlson v. Landon, 342 U.S. 524 (1952), which held that the right to bail is a purely statutory right.

33. See Griffin v. Illinois, 351 U.S. 12, 19 (1956): "Such a denial is a misfit in a country dedicated to affording equal justice to all and special privileges to none in the administration of its criminal law."

problems of under-and-over-inclusive classification; that is, some defendants on bail will probably not show up for trial, while others barred from bail because of indigency would probably show up by reason of community ties, familial relationships, jobs, or belief in innocence — all factors not normally considered in granting bail.

Recent cases demonstrate a growing awareness of the constitutional objections to a bail bond system oriented solely toward a requirement of money bond. Thus, in *Bandy v. United States*,[34] Mr. Justice Douglas posed the question whether a state may constitutionally deny freedom to an indigent in a situation in which a wealthy man would get his freedom merely because of lack of sufficient money to post bond[35] and answers: "[N]o man should be denied release because of indigence. Instead . . . a man is entitled to be released on 'personal recognizance' where other relevant factors make it reasonable to believe that he will comply with the orders of the Court."[36]

Rigney v. Hendrick, although reaching a result that upholds present bail practices, is sure to be merely the first of a number of cases challenging our bail system. Appellant's main contention, violation of equal protection, was denied but it would seem the denial was incorrect. It is sure to be reconsidered, if not in the context of compulsory lineup, then in some other area where present bail practice allows flagrant and abusive discrimination between the wealthy and the indigent. It is particularly appropriate that the case was decided, primarily, on equal protection grounds, for this is sure to be the battleground on which future clashes over the bail program will be fought. The current judicial awareness of the questionable aspects of our bail system indicates that changes in the current bail system are necessary, and indeed, the Congress has recognized this need and both Houses have recently passed much needed reform legislation.[37]

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34. 82 Sup. Ct. 11 (1961).

35. *Id.* at 12.

36. *Id.* at 13. For a similar viewpoint see the dissent of Bazelon, C. J., in Pannell v. United States, 320 F.2d 698, 699 (D.C. Cir. 1963).

37. On June 9, 1966, The Bail Reform Act of 1966 was sent to the President who signed the bill on June 22, 1966. It requires, in part, that all prisoners charged with noncapital federal crimes be released on personal recognizance or on unsecured bond unless the judicial officer finds that release would not reasonably assure reappearance at trial. In lieu of or in addition to such release, judicial officers are empowered to require any condition deemed necessary to assure appearance, including return to custody after specified hours, posting of appearance bond, release in custody of designated persons, restrictions on travel, association, or place of abode. In setting the conditions of release the judicial officer is required to take into account the offense charged, the weight of evidence, family ties, employment, financial resources, character and mental condition, length of

It is to be expected that resistance will be great to attempts at reform. Perhaps those who would prefer the present state bail system, because of its familiarity or because of inability to imagine better possibilities, and who will be sure to resist any recommendations of change, whether judicial or legislative, can best be answered by Judge Frank's statement: "Danger to democratic freedom lurks in the sentiment, 'Come weal or come woe, my status is quo'."[38] Resistance or not, the conclusion is inescapable that under present constitutional principles, the bail programs of most of the states fall far short of assuring that all persons accused of crime are given the "equal protection of the laws." The recently enacted federal bail bond program should add to the impetus requiring reform, since the example of a more equitable and practical alternative is sure to make a bail bond program based exclusively on the posting of bond even more unattractive to the courts. Whether legislatively enacted or court ordered, some reform more in keeping with the requirements of the United States Constitution is to be expected.

RICHARD V. FALCON

residence in the community, prior convictions, and record of prior flights to avoid prosecution. These conditions are reviewable by the court of original jurisdiction and the findings must be in writing. These, in turn, are reviewable by the proper appellate court. Penalties, both by fine and imprisonment, are provided for failure to appear as required. Credit toward prison sentence is to be given for time spent in custody awaiting trial. 6 U.S. CODE CONG. & AD. NEWS 1531 (1966). The complete text of the President's remarks on signing the bill appears in 26 CONG. Q. 1416 (1966).

38. United States v. Johnson, 238 F.2d 565, 574 (2d Cir. 1956). The case presents an excellent discussion of some of the disadvantages faced by the indigent in our courts and recommendations for their amelioration.