CASE COMMENTS

CONSTITUTIONAL LAW—COUNSEL ASSIGNED TO REPRESENT INDIGENT CRIMINAL DEFENDANT IN FEDERAL COURT AWARDED COMPENSATION

After representing an indigent criminal defendant pursuant to appointment by a federal district court, petitioner, at the suggestion of the court, moved to recover reasonable compensation from the Government.[1] The court ordered payment of thirty-five dollars an hour, basing the award on the fifth amendment's prohibition against taking property without just compensation. *Dillon v. United States*, 230 F. Supp. 487 (D. Ore. 1964).

In the past attorneys appointed to represent indigent defendants in federal criminal prosecutions have not been awarded compensation for services,[2] and neither the Federal Rules of Criminal Procedure, providing for appointment of counsel,[3] nor the statute providing for assignment of counsel in capital cases[4] provide for compensation.[5] However, Congress recently has passed the Criminal Justice Act of 1964,[6] which provides in part:

> PAYMENT FOR REPRESENTATION.—An attorney appointed pursuant to this section, or a bar association or legal aid agency which made an attorney available for appointment, shall . . . be compensated at a rate not exceeding $15 per hour for time

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[1] Dillon, the indigent criminal defendant, was resentenced in proceedings under 28 U.S.C. § 2255 (1958).

[2] Both Congress and the courts have denied compensation. FELLMAN, THE DEFENDANT'S RIGHTS 125 (1958); see Nabb v. United States, 1 Ct. Cl. 173 (1864); *cf.* United States v. Fore, 38 F. Supp. 142 (S.D. Cal. 1941).

[3] FED. R. CRIM. P. 44:

> If the defendant appears in court without counsel, the court shall advise him of his right to counsel and assign counsel to represent him at every stage of the proceeding unless he elects to proceed without counsel or is able to obtain counsel.

See also 28 U.S.C. § 1915(d) (1958) (proceedings in forma pauperis).

[4] 18 U.S.C. § 3005 (1958).

[5] An attorney's out-of-pocket expenses present a different problem, since Congress has expressly provided for their allowance in certain situations. Bell, *Criminal Indigent Defense in the Federal Courts*, 37 LOS ANGELES B. BULL. 297-98 (1962). This expense provision was directed toward protecting the indigent defendant and not toward reimbursing his attorney. See 28 U.S.C. § 753(f) (1958) (expenses of transcripts); 28 U.S.C. § 1915 (1958) (printing the record on appeal); FED. R. CRIM. P. 15(c) (travel and subsistence when taking depositions); FED. R. CRIM. P. 17(b) (serving subpoenas). In United States v. Germany, 32 F.R.D. 343 (M.D. Ala. 1963), the court went beyond these bounds and held that it was part of defendant's right to effective representation to have the attorney reimbursed for reasonable and necessary expenses incurred in interviewing a witness. *Id.* at 345. In a later opinion in the same case, the court specifically disclaimed any intention of allowing reasonable attorney's fees by the payments authorized. United States v. Germany, 32 F.R.D. 421, 423-24 (M.D. Ala. 1963).

[6] For a discussion of similar bills in prior Congresses, see Celler, *Federal Legislative Proposals To Supply Paid Counsel to Indigent Persons Accused of Crime*, 45 MINN. L. REV. 697 (1961).

> expended in court or before a United States commissioner, and $10 per hour for time reasonably expended out of court, and shall be reimbursed for expenses reasonably incurred. . . . [T]he compensation . . . shall not exceed $500 in a case in which one or more felonies are charged, and $300 in a case in which only misdemeanors are charged. In extraordinary circumstances, payment in excess of the limits stated herein may be made if the district court certifies that such payment is necessary to provide fair compensation for protracted representation . . . .[7]

Although the present case was decided before this compensation statute was enacted, the court's rationale could nullify its effect. The standard of compensation provided for a taking of property under the fifth amendment is one of market value.[8] This value would vary, depending on the individual attributes of each attorney,[9] and for most would probably exceed the amount provided under the act.[10] Therefore, it is necessary to examine carefully the legal basis for the present decision with a view towards its potential effect on the administration of the Criminal Justice Act.

The present court held that attorneys' services were "property," entitling the owner to just compensation, since the fifth amendment bars the "Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." [11] Under the sixth amendment the Government has an obligation to provide defense counsel in criminal cases.[12] Since criminal prosecu-

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[7] Criminal Justice Act of 1964, § 2(d), 78 Stat. 552, 553 (1964). This section also provides: "For representation . . . in an appellate court, the compensation to be paid . . . shall in no event exceed $500 in a felony case and $300 in a case involving only misdemeanors." *Ibid.* Furthermore, reasonable compensation as determined by a court is provided for "investigative, expert, or other services necessary to an adequate defense . . . ." *Ibid.*

[8] United States v. Miller, 317 U.S. 369, 373-74 (1943); United States v. 658.59 Acres of Land, 224 F. Supp. 645, 646 (W.D. Pa. 1963); 1 ORGEL, VALUATION UNDER THE LAW OF EMINENT DOMAIN § 17 (2d ed. 1953).

Market value is the price at which a willing seller would sell to a willing buyer, when neither is under compulsion to enter the transaction. Olsen v. United States, 292 U.S. 246, 257 (1934); Cade v. United States, 213 F.2d 138 (4th Cir. 1954).

[9] The sentence in § 2(d) of the Criminal Justice Act providing for extra payments in extraordinary circumstances probably does not mean that the hourly rates may be increased, but rather that for protracted litigation the total compensation may be increased above the $500 statutory maximum.

[10] See, *e.g.*, PHILADELPHIA BAR ASS'N, MINIMUM FEE SCHEDULE (1959).

[11] Instant case at 493 (quoting Armstrong v. United States, 364 U.S. 40, 49 (1960)); *accord*, United States v. Sponenbarger, 308 U.S. 256, 266 (1939). Jurisdiction of the court to hear the present action is based on 28 U.S.C. § 1346(a)(2) (1958).

[12] Johnson v. Zerbst, 304 U.S. 458 (1938). There is no sixth amendment right to counsel in proceedings under 28 U.S.C. § 2255 (1958), since such motions are considered in the nature of civil suits. *E.g.*, Baker v. United States, 334 F.2d 444, 447 (8th Cir. 1964). Request for counsel in these proceedings is addressed to the sound discretion of the court. *E.g., ibid.*; Ellis v. United States, 313 F.2d 848, 850 (7th Cir. 1963). Such request will generally be granted if a hearing on the motion is required as in the instant case. See, *e.g.*, United States v. Paglia, 190 F.2d 445 (2d Cir. 1951); Green v. United States, 158 F. Supp. 804, 808 (D. Mass.), *aff'd*, 256 F.2d 483 (1st Cir.), *cert. denied*, 358 U.S. 854 (1958).

tions are conducted for benefit of the public, the counsel requirement can be said to result in employing an attorney's services for a public advantage or public use.[13]

The question whether anything is "taken" from an attorney appointed to defend an indigent turns on whether he is in any way compelled to serve. One direct source of compulsion is the courts. The Supreme Court in *Powell v. Alabama*[14] imposed a duty on the court to appoint counsel if requested,[15] and another court has stated that "the lawyer *must* . . . give of his time and use his skill and knowledge . . ."[16] when directed to defend an indigent.

While formal contempt sanctions apparently have never been used, there is a psychological compulsion upon an attorney to serve. Because of an attorney's close dependence upon the courts, both on a formal and an informal basis, he is not likely to refuse the request of a judge before whom he regularly appears.[17] He may often feel that refusing might result in the judge being less willing to do normal favors which are within a judge's discretion, such as moving a trial date a few days or granting a continuance. Thus, even though the attorney formally "consents" to serve, this should not be taken to manifest a subjective willingness to serve.[18]

However, the lawyer has an ethical obligation to society through the legal system,[19] which negates the assertion that appointment amounts to a

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[13] Property taken for a "public use" includes property needed by a government official in the performance of his public duties. *E.g.*, United States v. Certain Lands, 78 F.2d 684, 687 (6th Cir. 1935); United States v. 209.25 Acres of Land, 108 F. Supp. 454, 460 (W.D. Ark. 1952) (dictum), *rev'd on other grounds sub nom.* United States v. Willis, 211 F.2d 1 (8th Cir.), *cert. denied*, 347 U.S. 1015 (1954).

[14] 287 U.S. 45, 73 (1932): "The duty of the trial court to appoint counsel . . . is clear . . . and its power to do so, even in the absence of a statute, can not be questioned." The Court went on to imply that this power stemmed from the status of attorneys as officers of the court which binds them to render service to the indigent criminal. *Ibid.*

[15] See, *e.g.*, United States v. Haug, 21 F.R.D. 22, 27 (N.D. Ohio 1957). See also 28 U.S.C. § 1915 (1958).

[16] Bibb County v. Hancock, 211 Ga. 429, 438, 86 S.E.2d 511, 518 (1955). (Emphasis added.) The courts have placed emphasis upon the compelling nature of the attorney's duty to serve. In a civil case where defendant asked for appointed counsel pursuant to 28 U.S.C. § 1915(d) (1958), the court stated that, while they could only "request" counsel to serve in a civil matter, in a criminal action they would "assign" counsel who would have to serve. Reid v. Charney, 235 F.2d 47 (6th Cir. 1956) (per curiam) (dictum); see Moss v. Thomas, 299 F.2d 729, 730 (6th Cir. 1962).

[17] There is some question as to whether the services of the attorney in the instant case were rendered voluntarily. *Compare* instant case at 495 ("I have called you . . . to *appoint* you counsel . . . and *direct* you to represent Dillon . . ."), *with id.* at 496 ("if I have the power to enlist your services, *voluntarily*, albeit . . ."). (Emphasis added.)

[18] Compare the problem of "consent" in the context of search and seizure. See Note, 113 U. PA. L. REV. 260-61 (1964).

[19] Weatherby v. Pittman, 24 Ga. App. 452, 101 S.E. 131 (1919); see Rowe v. Yuba County, 17 Cal. 61, 63 (1860) (counsel not at liberty to reject appointments which form part of general duty); David, *Institutional or Private Counsel: A Judge's View of the Public Defender System*, 45 MINN. L. REV. 753, 757 (1961).

"governmental taking." This obligation arises not only from the state's licensing power, but also from the special privileges granted to attorneys.[20] As an officer of the court,[21] an attorney has the unique privilege of setting the judicial processes in motion on behalf of a client.[22] Historically, this privilege has involved the corresponding duty to serve those financially unable to obtain counsel.[23] As expressed by the *Canons of Professional Ethics*: "A lawyer assigned as counsel for an indigent prisoner ought not ask to be excused for any trivial reason, and should always exert his best efforts in his behalf." [24] By his admission to the bar, the attorney accepts an implied moral and ethical qualification on his right to practice—that he defend the indigent.[25] Thus the theory behind the just compensation clause of the fifth amendment—not compelling one group to bear the burdens of the public at large without compensation—has no application to the present situation.

"Property" under the just compensation clause has traditionally referred to a corporeal object capable of being subject to ownership,[26] or the rights in such object,[27] and has also been expanded to include certain contract rights.[28] But this term has never been interpreted to include the services of an individual;[29] indeed, the present court's analogy[30] from

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[20] Ruckenbrod v. Mullins, 102 Utah 548, 553, 133 P.2d 325, 327 (1943); see, *e.g.*, *In re* Day, 181 Ill. 73, 96, 54 N.E. 646, 653 (1899); Johnston v. Lewis & Clarke County, 2 Mont. 159 (1874). *But see* Johnson v. Whiteside County, 110 Ill. 22 (1884).

[21] *E.g.*, Arkansas County v. Freeman, 31 Ark. 266 (1876); Wayne County v. Waller, 90 Pa. 99, 104 (1879).

[22] Ruckenbrod v. Mullins, 102 Utah 548, 558, 133 P.2d 325, 330 (1943).

[23] Chief Justice Hale expressed this duty: "'Although serjeants have a *monopoly of practice* in the Common Pleas, they have a right to practice, and do practice, at this bar; and if we were to assign one of them as counsel, and he was to refuse to act, we should make bold to commit him to prison.'" 1 COOLEY, CONSTITUTIONAL LIMITATIONS 700 n.4 (8th ed. 1927). (Emphasis added.)

"'Membership in the bar is a privilege burdened with conditions.' . . . [An attorney is] received into that ancient fellowship for something more than private gain." People *ex rel.* Karlin v. Culkin, 248 N.Y. 465, 470-71, 162 N.E. 487, 489 (1928) (Cardozo, C.J.).

[24] ABA CANON OF PROFESSIONAL ETHICS 4.

"It is part of the lawyer's oath that he 'will never reject, from any consideration personal to himself, the cause of the defenseless or oppressed, or delay any man's cause for lucre or malice.'" BLAUSTEIN & PORTER, THE AMERICAN LAWYER 247 (1954).

[25] See Wayne County v. Waller, 90 Pa. 99 (1879); *cf.* People *ex rel.* Karlin v. Culkin, 248 N.Y. 465, 162 N.E. 487 (1928).

[26] 2 NICHOLS, EMINENT DOMAIN § 5.1[1] (3d ed. 1963); see Blake v. United States, 181 F. Supp. 584, 587 (E.D. Va. 1960), *aff'd*, 295 F.2d 91 (4th Cir. 1961); Central Eureka Mining Co. v. United States, 138 F. Supp. 281, 289 (Ct. Cl. 1956), *rev'd on other grounds*, 357 U.S. 155 (1958).

[27] See United States v. Causby, 328 U.S. 256 (1946) (right in peaceful enjoyment of land); United States v. General Motors Corp., 323 U.S. 373 (1945) (leasehold); United States v. Finn, 127 F. Supp. 158 (S.D. Cal. 1954), *modified and aff'd*, 239 F.2d 679 (9th Cir. 1956).

[28] Johnson v. United States, 79 F. Supp. 208 (Ct. Cl. 1948); see Brooks-Scanlon Corp. v. United States, 265 U.S. 106, 119-24 (1924). Compare Omnia Commercial Co. v. United States, 261 U.S. 502 (1923).

[29] See 1 NICHOLS, *op. cit. supra* note 26, at § 1.4[3]. Services have often been compensated, not because of any constitutional mandate, but as a matter of public policy. *Ibid.*

[30] Instant case at 491.

two patent cases [31] seems inapposite, since those cases did not involve fifth amendment rights.

While an attorney's franchise to practice in a state,[32] as well as the rights of others to perform services,[33] are protected by the due process clause from governmental abuse and arbitrary discrimination, the standard for awarding damages under the due process clause is the same as that under the just compensation clause.[34] Thus, when a sovereign takes property, even if arbitrarily, the only right to a money recovery rests on the just compensation clause.

The present court also argued that the attorney has a right to recover because of an implied contract. Since there is no historical basis for a reasonable expectation of compensation,[35] such belief by the attorney in the present case could only come from the judge's statement when he appointed the attorney that he had "inherent power to establish a just obligation on the part of the government for compensation . . . ." [36] To buttress its statement that there is an implied contract, the present court [37] used the two patent cases which were decided on the ground that the Government, by asking the inventor to exhibit his work, had implied that it would pay for the use of the patents.[38] However, in these cases the war department board, which eventually took the patented ideas for its own use, had express authority to investigate the matter and purchase certain patents for its use. Here the judge had no express authority to establish a governmental obligation, and "no officer of the Government has the power to bind the United States in the absence of congressional authority".[39] In addition there is no inherent judicial power to contract for the Government,[40] and the statute providing for appointment of counsel cannot be said to furnish an implied contract that the Government will

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[31] United States v. Berdan Fire-Arms Mfg. Co., 156 U.S. 552 (1895); United States v. Palmer, 128 U.S. 262 (1888).

[32] See Konigsberg v. State Bar, 353 U.S. 252 (1957); Schware v. Board of Bar Examiners, 353 U.S. 232 (1957).

[33] Smith v. Texas, 233 U.S. 630 (1914).

[34] See Hessel v. A. Smith & Co., 15 F. Supp. 953 (E.D. Ill. 1936); 1 NICHOLS, *op. cit. supra* note 26, at § 4.8: "[E]ven though the constitutional prohibition against the taking of property without due process of law does not specify or regulate compensation, just compensation . . . is an essential element of due process . . . ."

[35] See text accompanying note 2 *supra*.

[36] Instant case at 496.

[37] *Id.* at 491.

[38] United States v. Berdan Fire-Arms Mfg. Co., 156 U.S. 552 (1895); United States v. Palmer, 128 U.S. 262 (1888).

[39] Byrne Organization, Inc. v. United States, 287 F.2d 582, 586 (Ct. Cl. 1961). Even though the judge and the attorney may have thought some inherent power existed, "anyone entering into an arrangement with the Government takes the risk of having accurately ascertained that he who purports to act for the Government stays within the bounds of his authority." Federal Crop Ins. Corp. v. Merrill, 332 U.S. 380, 384 (1947).

[40] Wayne County v. Waller, 90 Pa. 99 (1879) (attorney claimed implied jurisdiction of court to compensate him in order to promote justice); County of Dane v. Smith, 13 Wis. 585, 587-88 (1861) (dictum) (clarifying Carpenter v. Dane County, 9 Wis. 274 (1859)).

pay.[41] Thus judicial power to award compensation must be based on the court's right to award damages under the just compensation clause.

The present case most probably arose only because the judge wanted to "remedy" the "intolerable burden upon the legal profession" [42] of providing free counsel for those unable to pay. Compensation lessens the financial strain on attorneys trying to build a practice,[43] as well as on those whose practice has already been established.[44] Compensation also results in more effective counsel, because it provides the attorney with monetary incentive, as well as some of the necessary investigative resources. Finally, compensation justifies taking more experienced attorneys from other work and thus enhances the possibility that such attorneys will be appointed in the more difficult criminal cases.[45] The Criminal Justice Act appears to have met these problems, at least to the extent of providing a reasonable rate of compensation. While this rate may not equal the market-value standard of the fifth amendment, compensation under the latter standard can be attained only by distorting the just compensation rationale.

CRIMINAL PROCEDURE—Use of Indigent Defendants in Police Lineups Held Denial of Equal Protection With an Assist From Due Process

Plaintiffs were awaiting trial on state criminal charges in the Philadelphia Detention Center for want of bail. They were ordered by the police to participate in a lineup for possible identification as perpetrators of unsolved crimes similar to those they were accused of committing. The plaintiffs sought and obtained a preliminary injunction against enforcement of the order from the United States District Court for the Eastern District of Pennsylvania. The court found that a defendant released on bail could not be subjected to an investigatory lineup unless he voluntarily cooperated or the police were able to obtain "sufficient

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[41] See Nabb v. United States, 1 Ct. Cl. 173 (1864); *cf.* People *ex rel.* Wheldon v. Board of Supervisors, 192 App. Div. 705, 183 N.Y. Supp. 438 (1920) (attorney claimed rule requiring appointment of counsel entitled him to compensation). *But cf.* Hall v. Washington County, 2 Greene 473 (Iowa 1850). See also Webb v. Baird, 6 Ind. 13 (1854) (court provided compensation under a state constitution which required just compensation for the taking of services).

[42] Instant case at 495.

[43] *Hearings on S. 63 and S. 1057 Before the Senate Committee on the Judiciary*, 88th Cong., 1st Sess. 77-78 (1963). Whitney North Seymour, Director of the New York Legal Aid Society, read this letter from a young lawyer: "'I had spent approximately $100, which was advanced to me by my wife from her bank account (saved from schoolteaching days) . . . 150 hours would be a conservative estimate (of time spent) . . . .'" *Id.* at 78. See also Ervin, *Uncompensated Counsel: They Do Not Meet the Constitutional Mandate*, 49 A.B.A.J. 435, 436 (1963).

[44] See *Hearings on S. 63 and S. 1057, supra* note 43, at 98-99; Ervin, *supra* note 43, at 436.

[45] See *Hearings on S. 63 and S. 1057, supra* note 43, at 101-02.

evidence to constitute probable cause for his arrest on the new charge." [1] The court, therefore, held that the forced participation of the jailed defendants would constitute an invidious discrimination depriving them of the equal protection of the laws guaranteed by the fourteenth amendment. *Butler v. Crumlish*, 229 F. Supp. 565 (E.D. Pa. 1964).[2]

The position of the jailed defendant awaiting trial is generally no better than that of a convicted prisoner.[3] His very incarceration places him at a distinct disadvantage compared with the bailed defendant, for he is subject "to all those restraints which are an essential part of the management of a prison." [4] He does not have free access to the mails, the phone, his friends, or even his attorney.[5] His compelled absence from work necessarily imperils his job and consequently renders him less able to establish a favorable presentencing record. If convicted the jailed defendant is more apt to be imprisoned rather than given a suspended sentence. Indeed he is more frequently convicted than his bailed counterpart.[6]

While the Supreme Court, in recent years, has expressed increasing concern with the plight of the indigent defendant during trial [7] and the appellate process,[8] the full Court has not yet considered the relationship of indigency to the bail system. Instead it has merely reaffirmed bail's prominent position among basic constitutional rights and indicated that bail may not be denied arbitrarily.[9] The present decision does not explicitly question the constitutionality of a bail system based upon a man's

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[1] Instant case at 567.

[2] At the time of the hearing on the permanent injunction, the plaintiffs were no longer in custody. Therefore, the court terminated the preliminary injunction and denied a final injunction, but retained jurisdiction with leave for the plaintiffs to file an amended complaint in the event they were returned to custody and threatened with a compulsory police lineup. Butler v. Crumlish, 237 F. Supp. 58 (E.D. Pa. 1964).

[3] At times jailed defendants "are confined pending trial under conditions which are more oppressive and restrictive than those applied to convicted and sentenced felons." Foote, *Foreword: Comment on the New York Bail Study*, 106 U. PA. L. REV. 685, 689 (1958).

[4] Instant case at 566.

[5] For a discussion of the disadvantages facing the jailed defendant, see generally U.S. ATTORNEY GENERAL'S COMMITTEE ON POVERTY AND THE ADMINISTRATION OF FEDERAL CRIMINAL JUSTICE, REPORT 68-72 (1963); Wald, *Pretrial Detention and Ultimate Freedom: A Statistical Study, Foreword*, 39 N.Y.U.L. REV. 631 (1964); Rankin, *The Effect of Pretrial Detention*, 39 N.Y.U.L. REV. 641-46, 649-50 (1964); Foote, *Foreword: Comment on the New York Bail Study*, 106 U. PA. L. REV. 685 (1958); Note, *A Study of the Administration of Bail in New York City*, 106 U. PA. L. REV. 693, 722-29 (1958); Note, *Compelling Appearance in Court: Administration of Bail in Philadelphia*, 102 U. PA. L. REV. 1031, 1049-59 (1954).

[6] Rankin, *supra* note 5, at 642-43, 649-50; Note, 106 U. PA. L. REV. 693, 726-27 (1958); Note, 102 U. PA. L. REV. 1031, 1049-54 (1954).

[7] See Gideon v. Wainwright, 372 U.S. 335 (1963).

[8] See, *e.g.*, Douglas v. California, 372 U.S. 353 (1963); Coppedge v. United States, 369 U.S. 438 (1962); Griffin v. Illinois, 351 U.S. 12 (1956).

[9] See Stack v. Boyle, 342 U.S. 1 (1951); *cf.* Pannell v. United States, 320 F.2d 698 (D.C. Cir. 1963). Compare Bandy v. United States, 82 Sup. Ct. 11 (Douglas, Circuit Justice, 1961); Bandy v. United States, 81 Sup. Ct. 197 (Douglas, Circuit Justice, 1960). See generally Note, *Bail: An Ancient Practice Reexamined*, 70 YALE L.J. 966 (1961); Comment, 51 MICH. L. REV. 389 (1953).

financial standing.[10] Nor does it discredit the lineup itself, which has repeatedly been held to be a legitimate police practice;[11] it merely eliminates one of the numerous inequalities to which the jailed defendant is exposed.

The court rested its decision on the following reasoning: bailed defendants cannot constitutionally be forced to participate in lineups unless the police have probable cause to arrest them for the crimes for which the lineups are held; thus defendants who cannot raise bail would be denied equal protection of the laws if police could force them into an investigatory lineup without probable cause. The basis of the premise was that forcing the bailed defendant to participate in a lineup would constitute an arrest, which would violate the due process clause if probable cause was lacking. This rationale seems to be a compromise between two more conventional approaches to the same result: (1) forcing the jailed defendant into a lineup is itself a violation of due process; (2) any significant disparity in treatment between jailed and bailed persons beyond that absolutely necessary for the maintenance of the prison violates equal protection. The court did not consider the first approach; it apparently rejected the latter.[12]

The absence of an explicit conclusion on the first point is conspicuous because the analogy of the present case to an arrest without probable cause is almost self-evident, and the courts are generally reluctant to utilize the equal protection clause when there is an available alternative.[13] The Supreme Court decisions holding the fourth amendment binding upon the

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[10] The court, however, was not insensitive to the problem of bail and the indigent: "The theoretical equality of the right to bail when all are not financially equal thus has become in reality a deep and wounding social inequality, increasingly oppressive to the poor and the vagrant." Instant case at 568. See also Pannell v. United States, 320 F.2d 698, 699 (D.C. Cir. 1963) (separate opinion of Bazelon, C.J.).

[11] See, *e.g.*, Caldwell v. United States, 338 F.2d 385 (8th Cir. 1964); United States v. Vita, 294 F.2d 524 (2d Cir. 1961); State v. King, 84 N.J. Super. 297, 201 A.2d 758 (App. Div. 1964).

[12] See text accompanying notes 28-30 *infra*.

[13] It was not until Griffin v. Illinois, 351 U.S. 12 (1956), that the Supreme Court first gave extended consideration to the relationship of the equal protection clause to the indigent in criminal procedure. Packer, *Two Models of the Criminal Process*, 113 U. PA. L. REV. 1, 19 n.20 (1964). *Griffin* has been the vehicle for an extensive re-examination of the indigent's plight under our system. See *id.* at 18-19; Note, *Equal Protection and the Indigent Defendant: Griffin and Its Progeny*, 16 STAN. L. REV. 394 (1964). The relationship between the constitutional requirements of due process and equal protection is extremely close. See Bolling v. Sharpe, 347 U.S. 497 (1954). Indeed, the Court's judgment in *Griffin* rested upon both the due process and equal protection clauses, but Mr. Justice Frankfurter's concurring opinion seems to reject the due process argument, and later cases dealing with appellate review have stressed equal protection. *E.g.*, Lane v. Brown, 372 U.S. 477 (1963); Douglas v. California, 372 U.S. 353 (1963).

Mr. Justice Holmes once called the equal protection clause "the usual last resort of constitutional arguments . . . ." Buck v. Bell, 274 U.S. 200, 208 (1927). Although the present Supreme Court has not been nearly so reluctant to invoke the equal protection clause as its predecessors, see Kurland, *Foreword: "Equal in Origin and Equal in Title to the Legislative and Executive Branches of the Government," The Supreme Court, 1963 Term*, 78 HARV. L. REV. 143-62 (1964), it still seems to prefer to rely on other constitutional commands whenever possible. See Wesberry v. Sanders, 376 U.S. 1 (1964); Gideon v. Wainwright, 372 U.S. 335 (1963). Compare Douglas v. California, *supra*.

states have been primarily in the area of search and seizure.[14] While the Court has not established a uniform standard of arrest,[15] recent opinions indicate that the Constitution does place limits upon a state's power to arrest.[16] The fourth amendment's strict insistence upon probable cause stems from the belief that the state should not deprive an individual of his freedom or invade his privacy unless "the facts and circumstances known to the officer warrant a prudent man in believing that the offense has been committed [by the person suspected] . . . ." [17]

To give the police greater leeway in the investigation of a jailed defendant seems inconsistent with an accusatorial system which places the entire burden in the criminal process upon the state.[18] It can be argued forcefully that one of the reasons for the requirement of probable cause to arrest is a belief that the state should muster a certain quantum of evidence before obligating a citizen to assist in his own prosecution even by the relatively passive "actions" of submitting to a lineup or fingerprinting.[19] In this respect the practice condemned in the present case is very similar to the use of dragnet arrests for investigatory purposes, which is not a sanctioned method of police investigation:[20]

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[14] See Aguilar v. Texas, 378 U.S. 108 (1964); Ker v. California, 374 U.S. 23 (1963); Mapp v. Ohio, 367 U.S. 643 (1961); Wolf v. Colorado, 338 U.S. 25, 27-28 (1949) (dictum).

[15] "*Mapp* . . . established no assumption by this Court of supervisory authority over state courts . . . and, consequently, it implied no total obliteration of state laws relating to arrests and searches in favor of federal law." Ker v. California, *supra* note 14, at 31.

[16] Aguilar v. Texas, 378 U.S. 108, 112 n.3 (1964); see Ker v. California, 374 U.S. 23 (1963); Wong Sun v. United States, 371 U.S. 471 (1963); Broeder, *Wong Sun v. United States: A Study in Faith and Hope*, 42 NEB. L. REV. 483, 557-64 (1963).

While evidence sufficient to establish guilt is not necessary in order to make an arrest, the fourth amendment does require probable cause. Henry v. United States, 361 U.S. 98 (1959). Since most arrests are made without a warrant, the initial decision is generally made by the police alone. Even where a warrant is sought, there is substantial evidence that the judicial officer merely rubber stamps the police decision. See Barrett, *Police Practices and the Law—From Arrest to Release or Charge*, 50 CALIF. L. REV. 11, 21 (1962). See generally Foote, *Law and Police Practice Safeguards in the Law of Arrest*, 52 NW. U.L. REV. 16 (1957); Lafave, *Detention for Investigation by the Police: An Analysis of Current Practices*, 1962 WASH. U.L.Q. 331. However, in Aguilar v. Texas, 378 U.S. 108 (1964), the Court expressed a willingness to go beyond the face of an otherwise valid search warrant and determine for itself if the magistrate was correctly performing his function. The Court intimated that it would still be far more reluctant to overturn a prior judicial determination of probable cause, as evidenced by the issuance of a search warrant, than a search where no warrant had been issued. *Id.* at 111.

[17] Henry v. United States, *supra* note 16, at 102; *accord*, Brinegar v. United States, 338 U.S. 160, 175-76 (1949); Commonwealth v. Bosurgi, 411 Pa. 56, 190 A.2d 304, *cert. denied*, 375 U.S. 910 (1963).

[18] See Massiah v. United States, 377 U.S. 201 (1964); Culombe v. Connecticut, 367 U.S. 568 (1961); Rogers v. Richmond, 365 U.S. 534 (1961); Mallory v. United States, 354 U.S. 449 (1957); Goldstein, *The State and the Accused: Balance of Advantage in Criminal Procedure*, 69 YALE L.J. 1149 (1960).

[19] See Mallory v. United States, 354 U.S. 449, 454 (1957); Gatlin v. United States, 326 U.S. 666 (D.C. Cir. 1963); Bynum v. United States, 262 F.2d 465 (D.C. Cir. 1958).

[20] Wong Sun v. United States, 371 U.S. 471, 481 n.9 (1963); *cf.* Marron v. United States, 275 U.S. 192, 196 (1927).

> The round-up or dragnet arrest, the arrest on suspicion, for questioning, for investigation or on an open charge all are prohibited by the law. . . . The finger of suspicion is a long one. In an individual case it may point to all of a certain race, age group or locale. Commonly it extends to any who have committed similar crimes in the past. Arrest on mere suspicion collides violently with the basic human right of liberty. It can be tolerated only in a society which is willing to concede to its government powers which history and experience teach are the inevitable accoutrements of tyranny.[21]

While the jailed defendant may have been constitutionally deprived of his liberty, he has not lost all his rights. Thus a search of his car or home without a valid warrant or his consent is clearly illegal.[22] The right to refrain from making self-incriminating statements, of course, remains inviolable.[23] The prison authorities may not unduly harass the defendant nor attempt to destroy his remaining self-dignity. In the words of the present court, the jailed defendant cannot be forced to become "an active participant in police investigation, a role which a free man is not required to assume," [24] inasmuch as his "rights are not different because he is accused of a crime." [25]

Had the court placed its decision entirely on a due process-type "active participant" rationale, however, it might have hampered police administration unduly, for that rationale might be interpreted to forbid forcing the arrested person to submit to "mug" photographs, fingerprints, or any lineup,[26] since all of these investigatory procedures require some degree of active participation by the accused. The court's failure to consider the direct relationship of the law of arrest to the present case probably resulted from this consideration and the conclusion that, since the plaintiffs' freedom had already been lawfully curtailed, their removal from the custody of the prison authorities without probable cause need not be viewed as a restriction of their liberty and hence was not an arrest.[27]

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[21] Hogan & Snee, *The McNabb-Mallory Rule: Its Rise, Rationale, and Rescue*, 47 GEO. L.J. 1, 22 (1958).

[22] Preston v. United States, 376 U.S. 364 (1964); United States v. Arrington, 215 F.2d 630 (7th Cir. 1954).

[23] Haynes v. Washington, 373 U.S. 503 (1963); see Malloy v. Hogan, 378 U.S. 1 (1964).

[24] Instant case at 567.

[25] Commonwealth v. Brines, 29 Pa. Dist. 1091 (C.P. Philadelphia County 1920), quoted in instant case at 567.

[26] See Editorial, The Philadelphia Inquirer, Nov. 29, 1964, § 7, p. 4, col. 1. The validity of these practices has not been seriously questioned. See Caldwell v. United States, 338 F.2d 385 (8th Cir. 1964); United States v. Kelly, 55 F.2d 67 (2d Cir. 1932); 8 WIGMORE, EVIDENCE § 2265 (McNaughton rev. 1961). PA. STAT. ANN. tit. 19, § 1403 (1964) expressly authorizes the police to fingerprint and photograph arrested individuals.

[27] An arrest is generally held to be consummated when the individual's liberty is restricted. *E.g.*, Henry v. United States, 361 U.S. 98, 103 (1959).

On the other hand, the court's utilization of the equal protection clause could also have vast implications, even though it expressly limited its holding to the investigatory lineup [28] by stating that the police could bring victims of crimes to the prison and permit them to view the suspects in their cells or in the prison yard.[29] The police admitted that they do not use viewings of bailed defendants.[30] Therefore, the court's dictum suggests that police use of a certain investigatory practice exclusively against jailed defendants does not render the practice unconstitutional, so long as the police might constitutionally use it against persons free on bail, even if police do not in fact do so.

However, equal protection of the laws may be denied a class where a law or administrative procedure valid on its face is so administered as to create an invidious discrimination against that class.[31] Once it is determined that there is an invidious classification, it is immaterial whether the state action which results in the inequality is due to the state's lack of legal power to take similar action against members of the favored class or simply to a decision by the state to refrain from taking such action.[32] In criminal procedure the classification of defendants according to their ability to pay is generally as invidious a discrimination as one based on religion, race, or creed.[33] Nevertheless, administrative discrimination must be intentional or purposeful to be constitutionally forbidden,[34] and even this showing will not render the classification unconstitutional when it can be justified as a legitimate exercise of discretion.[35] As a rule the police and prosecutor have broad discretionary power in their conduct of investigations.[36]

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[28] "[A] preliminary injunction will still leave available to the police opportunities for observation of [jailed] suspects by complainants which are broader than in the case of those who are free on bail." Instant case at 568.

[29] *Id.* at 566. Although plaintiff's counsel conceded this point, the court's reliance upon the active participant rationale indicates that it would arrive at the same result without the concession.

[30] *Id.* at 567 n.7.

[31] See, *e.g.*, Hernandez v. Texas, 347 U.S. 475 (1954); Yick Wo v. Hopkins, 118 U.S. 356 (1886). See generally Comment, *The Right to Nondiscriminatory Enforcement of State Penal Laws*, 61 COLUM. L. REV. 1103 (1961).

[32] See, *e.g.*, Strauder v. West Virginia, 100 U.S. 303 (1880); People v. Harris, 182 Cal. App. 2d 837, 5 Cal. Rptr. 852 (Dist. Ct. App. 1960).

[33] See, *e.g.*, Douglas v. California, 372 U.S. 353 (1963); Griffin v. Illinois, 351 U.S. 12 (1956).

[34] Snowden v. Hughes, 321 U.S. 1, 8 (1944); Comment, 61 COLUM. L. REV. 1103, 1113 (1961).

A major difficulty that plaintiffs in the instant case, or in like situations, have to overcome is proving that the police were deliberately utilizing an administrative procedure which discriminated against them. The problems of proof are substantial and may in some situations prove to be impossible of solution. However, the courts should not disregard "and ignore the common knowledge that the system of bail, based as it is on financial ability, is weighted heavily against the poor." Instant case at 567-68. For a discussion on the problem of proof and possible approaches which can be utilized, see Comment, 61 COLUM. L. REV. 1103, 1122-31 (1961).

[35] *Cf.* Oyler v. Boles, 368 U.S. 448 (1962); McGowan v. Maryland, 366 U.S. 420, 425-26 (1961); Salsburg v. Maryland, 346 U.S. 545 (1954).

[36] See Comment, 61 COLUM. L. REV. 1103, 1119-22 (1961). See generally Note, *Prosecutor's Discretion*, 103 U. PA. L. REV. 1057 (1955).

The bail system generally operates so that nonindigents will be bailed rather than jailed, so a classification of suspects according to whether they are bailed or jailed will tend to approximate a classification of them according to whether they are indigent or not.[37] Once it is shown that law enforcement officials investigating unsolved crimes consciously place jailed defendants at a distinct disadvantage as compared to bailed, the burden should be on the state to show that this is a justifiable method of law enforcement.[38]

In determining whether or not a classification is justifiable, the Supreme Court seems to have balanced the harm imposed upon the individual so classified with the interest of the state in maintaining the classification.[39] "Absolute equality is not required; lines can be and are drawn and we often sustain them."[40] However, once the Court has determined that a particular classification violates the equal protection clause, it has been very reluctant to approve other inequalities between these same classes.[41] Thus in *Griffin v. Illinois*,[42] the Court held that Illinois, having established a system of appellate review, could not deprive an indigent of his right to appeal because he was unable to afford a needed trial transcript.[43] Since *Griffin* the Court has extended the scope of equal protection in order to afford the indigent an adequate appellate review.[44]

The only uniqueness in the present case is the extension of equal protection to the area of police investigation.[45] The unequal treatment with which the indigents in the present case were threatened is as significant as

[37] See authorities cited note 5 *supra*.

[38] *Cf.* McLaughlin v. Florida, 379 U.S. 184 (1964); Norvell v. Illinois, 373 U.S. 420 (1963) (by implication); Hernandez v. Texas, 347 U.S. 475 (1954).

[39] Note, 16 STAN. L. REV. 394, 399 (1964); see McGowan v. Maryland, 366 U.S. 420 (1961); Griffin v. Illinois, 351 U.S. 12 (1956). *Compare* Norvell v. Illinois, 373 U.S. 420 (1963), *with* Douglas v. California, 372 U.S. 353 (1963), *and* Eskridge v. Washington, 357 U.S. 214 (1958).

It has been suggested that the balancing done by the Court in the equal protection area involves the same determination of "fundamental fairness" as that in due process. See Douglas v. California, *supra* at 360-63 (Harlan, J., dissenting); Griffin v. Illinois, *supra* at 35-36 (Harlan, J., dissenting); Note, 16 STAN. L. REV. 394, 399 (1964). *Compare* Griffin v. Illinois, *supra, and* Douglas v. California, *supra, with* Gideon v. Wainwright, 372 U.S. 335 (1963).

[40] Douglas v. California, 372 U.S. 353, 357 (1963); see McGowan v. Maryland, 366 U.S. 420 (1961); Goesaert v. Cleary, 335 U.S. 464 (1948).

[41] See Kurland, *supra* note 13, at 145-62 (1964). *Compare* Baker v. Carr, 369 U.S. 186 (1962), *with* Reynolds v. Sims, 377 U.S. 533 (1964), *and* Lucas v. Forty-Fourth Gen. Assembly, 377 U.S. 713 (1964).

[42] 351 U.S. 12 (1956).

[43] The extent to which *Griffin* itself is the result of a balancing process is demonstrated by the concurring and dissenting opinions of Justices Frankfurter and Harlan. *Id.* at 20, 29. Mr. Justice Frankfurter recognized that the holding in *Griffin* created a new constitutional right and suggested that it be applied only prospectively. *Id.* at 25. Mr. Justice Black's opinion, announcing the judgment of the Court, does not explicitly weigh the harm to the individual against the reasonable objective of the state. However, such an analysis seems implicit. See *id.* at 13.

[44] See Draper v. Washington, 372 U.S. 487 (1963); Lane v. Brown, 372 U.S. 477 (1963); Douglas v. California, 372 U.S. 353 (1963); Eskridge v. Washington, 357 U.S. 214 (1958).

[45] In People v. Harris, 182 Cal. App. 2d 837, 5 Cal. Rptr. 852 (Dist. Ct. App. 1960), however, it was held that proof that the police were discriminating against Negroes in the investigation and enforcement of state gambling laws would constitute a defense to prosecution of Negroes under those laws.

the inequality under which those in *Griffin* suffered. Illinois supplied indigents with free transcripts only in capital cases and cases involving a constitutional issue. The state attempted to justify its appeals law on the grounds that it would be a financial hardship on the state to supply all indigents with trial transcripts, and that it might make matters unduly difficult for appellate courts to allow appeals without transcripts. But the state's failure to supply transcripts in *Griffin* made an appeal impossible for the convicted indigent. Thus an indigent, unlike a nonindigent, would probably have to accept the trial court's determination of his case as final.

In the present case the state's justification for the jailed-bailed classification is based upon its lack of responsibility for the individual's confinement. The police are using these lineups for the purpose of law enforcement, certainly an important social end. A restriction on the investigatory lineup will undoubtedly allow some jailed defendants, who under current practices would be identified and convicted, to escape ever being brought to trial.

On the other hand, the rights of indigents, as individuals and as a class, must also be considered. The Supreme Court's increasing sensitivity to the dangers posed to individual rights by police investigatory practices has been adequately demonstrated during recent terms.[46] In the present case the state's law enforcement policy would result in identifications of indigents without corresponding identifications of nonindigents. On the basis of these identifications, indigents would be more likely to be brought to trial than corresponding nonindigents. The present injunction will protect the innocent jailed defendant from an improper identification as well as the guilty one from a proper identification.

The court was probably aware of the implications its holding would have if placed solely on grounds of either equal protection or due process by bringing into question the entire relationship of the arrested individual to the police. Thus it did its utmost to restrict its holding to these lineups by stressing the constitutionality of the bail system and the viewings. It seems to have reasoned that if it would be a violation of due process to force a bailed defendant to submit to a particular hazard or hardship, then, and only then, it is a denial of equal protection to subject an indigent defendant to that hazard or hardship.

However, the justification for unequal treatment in the viewings is no greater than for the investigatory lineup, and the inequality imposed is equally significant. Indeed a lineup is simply a viewing of several individuals at one time with the intention of minimizing the chances of a mistaken identification. One could hardly think of a more prejudicial place to view a suspect than in a prison cell. The evil of the police practice litigated in *Butler* is not the lineup, but the relegation of the poor to a place of distinct disadvantage in the criminal process.

[46] See, *e.g.*, Escobedo v. Illinois, 378 U.S. 478 (1964); Massiah v. United States, 377 U.S. 201 (1964); Mapp v. Ohio, 367 U.S. 643 (1961).