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Discriminatory Enforcement Of Blue Laws As Denial Of Equal Protection

testify as to one of the most important elements of her proof. It did this in order to sustain a rule which is without logic and poorly suited to modern conditions. To adopt the policy announced by Lord Mansfield is to protect an unfaithful wife, to protect her paramour, both of whom have grossly violated the marital relation, to close the mouth of the injured husband, and to force him to support a child which, in fact, is not his.[38] The dissent is more persuasive in its recognition that for many years the trend has been to remove disqualifications of witnesses, either by modifying the common law rules, or by liberally construing statutes, in the interest of the unhampered ascertainment of truth.

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DISCRIMINATORY ENFORCEMENT OF BLUE LAWS AS DENIAL OF EQUAL PROTECTION

Although the United States Supreme Court has held that Sunday Closing Laws do not infringe upon religious freedom,[1] the discriminatory enforcement of these laws may be unconstitutional as a denial of equal protection of the laws under the fourteenth amendment.[2] When blue laws do not reflect a strong public opinion, or when confusion exists as to the classification of the various stores to which the ordinances are to be applied,[3] enforcement policies may be sporadic, based on prejudice rather than a rational pattern.

The recent New York case of *People v. Paine Drug Co.*,[4] a decision by the Monroe County Court was the first to find a pattern of discrimination in the enforcement of a blue law and recognize this circumstance as a defense to a criminal prosecution. At the hearing on the indictment, voluminous testimony was given before a single judge, who granted the motion to quash.

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[38]Moore v. Smith, 178 Miss. 383, 172 So. 317, 320 (1937).

[1]McGowan v. Maryland, 366 U.S. 420 (1961); Two Guys from Harrison-Allentown, Inc. v. McGinley, 366 U.S. 582 (1961); Braunfeld v. Brown, 366 U.S. 599 (1961); Gallagher v. Crown Kosher Super Market of Massachusetts, Inc., 366 U.S. 617 (1961).

[2]Two Guys from Harrison-Allentown, Inc. v. McGinley, 366 U.S. 582 (1961).

[3]According to defendant's brief, page 4, the District Attorney admitted the truth of a newspaper article published prior to the defendant's arrest in which he was quoting as stating: "I feel the law in its present form is unreasonable, it is valid to sell fruit, but not vegetables, hot dogs but not hamburgs [sic], milk but not butter. I do not propose to lend the services of my offices to any enforcement of a law which makes such distinctions."

[4]241 N.Y.S.2d 946 (Monroe County Ct. 1963).

The Rochester Executive Committee of the Retail Merchant's Council instituted proceedings to prevent eleven large cut-rate type stores from operating on Sunday. At the hearing on the indictment the Executive Committee readily admitted that its motive was economic preservation and that the specific class chosen for prosecution consisted of large-size discount or cut-rate stores that were competing with the more prominent retail merchants.[5] Both before and after these prosecutions many other stores were violating the statute, but they had not been prosecuted within the memory of incumbent officials. These violations were known to the public authorities, who had no intention to follow up the immediate prosecutions with a policy of general enforcement.[6] Consequently, the court found that the public authorities were acting as the agents of the merchant group.

The Monroe County Court in deciding *People v. Paine* relied heavily on a New York Appellate Division decision, *People v. Utica Daw's Drug Co.*,[7] which enunciated the few established rules in the area of discriminatory enforcement of a nondiscriminatory law. The lower court in *Utica* was reversed on an evidence point, but the court by way of dicta laid down rules as to the facts that would establish a constitutional violation and the procedural route to be followed in setting up such a defense. In *Utica* the Appellate Division recognized three procedural routes as being available to the defendant.[8] These remedies are: (1) a hearing on the indictment, (2) an affirmative defense at the trial, and, (3) an action in equity to enjoin the criminal prosecution.

In New York the defendant obtains a hearing on the indictment by filing a motion for an order dismissing the indictment. Although New York has no specific statutory provision for such a motion, there is precedent for entertaining any motion to quash an indictment, which is based on constitutional grounds, at a hearing on the indictment.[9]

Since the discrimination issue has no bearing on the guilt or innocence of the accused, the evidence can best be heard at a separate proceeding. A hearing presided over by a single judge can examine the facts and law of the discriminatory enforcement charge and decide whether the alleged violation should be presented to a jury. A second advantage is that a dismissal of the indictment does not render the

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[5]Id. at 950.

[6]Supra note 3.

[7]16 App. Div. 2d 12, 225 N.Y.2d 128 (1962).

[8]225 N.Y.S.2d at 134.

[9]People v. Glenn, 173 N.Y. 395, 66 N.E. 112 (1903) (insufficient evidence to support the indictment); People v. Utica Daw's Drug Co., 16 App. Div. 2d 12, 225 N.Y.S.2d 128 (1962); (discriminatory enforcement of statute); People v. Gonzales, 31 Misc. 2d 486, 221 N.Y.S.2d 846 (Ct. Gen Sess. 1961) (illegally seized evidence).

entire proceedings res judicata, since the authorities can institute a new action under an impartial enforcement policy.

In regard to an affirmative defense raised at the trial, *Mapp v. Ohio*[10] has recently re-emphasized that where a constitutional right has been withheld the defendant must have the right to assert that violation as a bar to conviction at the trial. "To hold otherwise is to grant the right but in reality to withhold its privilege and enjoyment."[11] There are reasons which make it unfair to limit defendant to this one method of asserting his constitutional right. First, it forces the jury to decide a complex issue wholly disconnected from the general issues. Second, if the defendant has been denied equal protection of the laws, then the expense and public embarrassment of a trial are just a continuation of that discrimination. If the prejudicial treatment actually exists, it should be discovered at the earliest possible time. A disadvantage from the standpoint of the prosecution is that if the laws have been applied in an unequal manner the episode is res judicata, and there will be no opportunity to reprosecute under a fairer policy.

In regard to an equitable action to enjoin a criminal prosecution, there are some factors which make this an uncertain remedy. Because the businesses have been operating under illegal conditions, it is doubtful whether the offending storeowners may claim that the ordinance interfered with a lawful property right.[12] The defendant is usually unable to claim that he has no adequate remedy at law.[13] Also an equity court can resort to the "clean hands" doctrine in order to refuse the injunction.[14] Due to the crowded dockets and delays involved in exhausting rights of appeal, the officials against whom the injunctions are directed are frequently no longer in office when the case comes to a final determination, and the court avoids issuing the

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[10]367 U.S. 643 (1961).

[11]Id. at 656.

[12]Ah Sin v. Wittman, 198 U.S. 500, 507 (1905) (dictum); Crowley v. Christensen, 137 U.S. 86 (1890); People v. Darcy, 59 Cal. App. 2d 342, 139 P.2d 118 (Dist. Ct. App. 1943); People v. Montgomery, 47 Cal. App. 2d 1, 117 P.2d 437 (Dist. Ct. App. 1941).

[13]But see Bargain City U.C.A., Inc. v. Dilworth, 407 Pa. 129, 179 A.2d 439 (1962). Defendant was owner of store and police threatened his concessionaires and their employees with prosecution for blue law violations. Defendant had no adequate remedy at law and an injunction was his only means available to prevent irreparable injury.

[14]Society of Good Neighbors v. Van Antwerp, 324 Mich. 22, 36 N.W.2d 308 (1949).

injunction upon the assumption that the new officials will not act in a discriminatory manner.[15]

Assuming that the Sabbath law is valid, the two elements which must be established are: (1) conscious discriminatory enforcement of the statute against a class or individual and (2) absence of an intention to follow up the initial prosecution with a general enforcement.

As to the conscious discrimination, a heavy burden of proof must be sustained by the defendant.[16] Apparently courts feel that wrongdoers will take advantage of the rule to avoid responsibility for their acts, unless strong proof of bias is required.[17] The compiling of statistics that show which groups have been prosecuted is the only objective way to prove a discriminatory motive.[18] Prejudical enforcement against a political, racial or religious group is more blatant than when directed at a group of stores. This is the main reason discriminatory enforcement involving blue law violations has been found in only the principal case.[19]

The most obvious evidence that the authorities have no intention to proceed with a general enforcement policy is the police department's past record of arrests. In *Paine,* the District Attorney was so exasperated by the confused state of the Sabbath laws that at one time he announced that he would not enforce them.[20]

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[15]Two Guys from Harrison-Allentown, Inc. v. McGinley, 366 U.S. 582 (1961); Bargain City U.S.A., Inc. v. Dilworth, 407 Pa. 129, 179 A.2d 439 (1962).

[16]Taylor v. City of Pine Bluff, 266 Ark. 309, 289 S.W.2d 679 (1956); State v. Karmil Merchandising Corp., 158 Me. 450, 186 A.2d 352 (1962); People v. Friedman, 302 N.Y. 75, 96 N.E.2d 184 (1950); People v. Utica Daw's Drug Co., 16 App. Div. 2d 12, 225 N.Y.S.2d 128 (1962); City of South Euclid v. Bondy, 192 N.E.2d 139 (Euclid Munic. Ct. Ohio 1963).

[17]People v. Darcy, 59 Cal. App. 2d 342, 139 P.2d 118 (Dist. Ct. App. 1943); Sherman v. State, 324 Miss. 775, 108 So. 2d 205 (1959). This argument loses its force when it is realized that one of the defendant's main contentions is that the law is being openly flouted by the rest of the business community. In only two cases involving malum in se crimes has discriminatory enforcement been raised as a defense: People v. Zammora, 66 Cal. App. 2d 166, 152 P.2d 180 (Dist. Ct. App. 1944) (attempted murder); People v. Montgomery, 47 Cal. App. 2d 1, 117 P.2d 437 (Dist. Ct. App. 1941) (pandering).

[18]People v. Harris, 173 Cal. App. 2d 597, 343 P.2d 765 (Dist. Ct. App. 1959) (gambling arrest figures in City of Pasadena showed that 276 Negroes and 16 Whites were apprehended in 1957, while in the year 1959 only Negroes were arrested); Society of Good Neighbors v. Van Antwerp, 324 Mich. 22, 36 N.W.2d 308 (1949) (43 bingo games operating at time of arrest); note, Discriminatory Law Enforcement and Equal Protection From the Law, 59 Yale L.J. 354 (1950).

[19]241 N.Y.S.2d 946.

[20]The New York Sabbath Law makes the following exceptions to its general prohibitory law: food sales, services and delivery before 10 a.m.; sale of prepared food by grocers, delicatessens, bakeries, 4-7:30 p.m.; off limits sale of beer before 3 a.m. and after 1 p.m. in certain cities; farmers' markets, farm produce, road-

When the essential elements of discrimination have been established, the state may still justify its apparently arbitrary action by showing a reasonable basis for its selection of defendants.[21] Selective enforcement of a blue law may be justified if: (1) insufficient funds and inadequate manpower prevent general enforcement,[22] (2) a primary objective is the deterrent effect on other violators,[23] (3) a test case is necessary,[24] and, (4) a laxity of enforcement policy is evident without a prejudicial intent.[25]

The justification that inadequate resources precludes adequate investigations and enforcement will be established by showing that a rational pattern of enforcement has been followed. The Rochester Police Chief in the *Paine* case testified that he could have handled as many as a thousand violations in a month or two if necessary,[26] and so there was no justification for the indictment of Paine on this basis.

The second justification occurs when the executive branch wishes to initiate a new policy of enforcement; then, a few selected prosecutions may be legally acceptable for their deterrent value on other violators. The reasonable basis being that the value of the deterrent effect on the community outweighs the injustice of prosecuting a few individuals. At the *Paine* hearing there was no evidence that any other store, being illegally operated, had closed as a result of the Paine prosecutions, and the District Attorney did not indicate that deterrent value was a consideration.

The third justification occurs when a test case is being brought to determine the constitutionality or the meaning of a blue law. At the *Paine* hearing no evidence was offered to show that the Sabbath Laws were unclear. Doubt concerning the application of the laws may justify a test case, as if the prosecution wants to know (1) whether

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stands, tackle and bait stores. N.Y. Pen. Law, § 2147 (Supp. 1962). See also note 3, supra.

[21]Kotch v. Board of River Port Pilot Comm'rs, 330 U.S. 552 (1947); Barbier v. Connolly, 113 U.S. 27 (1885); Taylor v. City of Pine Bluff, 226 Ark. 309, 289 S.W.2d 679 (1956).

[22]Kotch v. Board of River Port Pilot Comm'rs, 330 U.S. 552 (1947); Bargain City U.S.A., Inc. v. Dilworth, 407 Pa. 129, 179 A.2d 439 (1926).

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

[24]Broad-Grace Arcade Corp. v. Bright, 48 F.2d 348 (E.D. Va. 1931).

[25]Boynton v. Fox W. Coast Theatres Corp., 60 F.2d 851 (10th Cir. 1932); Taylor v. City of Pine Bluff, 266 Ark. 309, 289 S.W.2d 679 (1956); Wade v. City of San Francisco, 82 Cal. App. 2d 337, 186 P.2d 181 (Dist. Ct. App. 1947); People v. Friedman, 302 N.Y. 75, 96 N.E.2d 184 (1950); People v. Utica Daw's Drug Co., 16 App. Div. 2d 12, 225 N.Y.S.2d 128 (1962); City of South Euclid v. Bondy, 192 N.E.2d 139 (Euclid Munic. Ct. Ohio 1963).

[26]Brief for Defendant, p. 21.

the courts intend to uphold the blue laws,[27] or (2) whether a drug store which also sells hardware, toiletries and cosmetics can remain open on Sunday, under the exception provided for in the New York Penal Laws.[28] For drug stores, these facts would justify bringing a test case and the selection of particular defendants for such a test case. The *Paine* court did not discuss this possibility and apparently it was not raised.[29]

The fourth justification is laxness of enforcement. Although the selection of a few random violators for prosecution has no rational basis, it is not condemned by the courts as a violation of the equal protection clause because it involves no purposeful discrimination. An example of laxity of enforcement not being sufficient to void the indictment is found in the Ohio case of *People v. Bondy*.[30] In that case the police had a policy of nonenforcement of blue laws, but they would prosecute if a private citizen presented them with evidence of a violation.

Within the past three years the discriminatory enforcement issue has been the subject of litigation in the United States Supreme Court and in three other jurisdictions.[31] It is submitted that the following statements are valid conclusions concerning the use of discriminatory enforcement as a constitutional defense: (1) Conscious, discriminatory enforcement of a law by an arm of the state is a greater wrong than the violation of a blue law. (2) A hearing on the indictment is the most equitable manner to present to the court a charge of prejudicial enforcement. (3) The heavy burden of proof will prevent the violator of a blue law from using the rule as a loophole for evading a deserved punishment. (4) The easily satisfied standard of reasonableness by which the public authorities can justify their decision to select those whom they wish to prosecute does not place an unreasonable burden on law enforcement officials.

The decision in *People v. Paine* will encourage public authorities to either follow a rational pattern of enforcement or completely defy the legislatures by refusing all prosecutions. If the latter alternative

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[27]Supra, note 3.

[28]N.Y. Pen. Law, § 2147 (Supp. 1962).

[29]Supra, note 28.

[30]192 N.E.2d 139 (Eculid Munic Ct. Ohio 1963).

[31]Two Guys from Harrison-Allentown, Inc. v. McGinley, 366 U.S. 420 (1961); People v. Paine Drug Co., 241 N.Y.S.2d 946 (Monroe County Ct. 1963); City of South Euclid v. Bondy, 192 N.E.2d 139 (Euclid Munic. Ct. Ohio 1963); Bargain City U.S.A., Inc. v. Dilworth, 407 Pa. 129, 179 A.2d 439 (1962).