UIC Law Review

Volume 6 | Issue 1 Article 10

Fall 1972

Schilb v. Kuebel: Reform Helps Cost Retention Provision Meet the Constitutional Requirements of Equal Protection and Due Process, 6 J. Marshall J. of Prac. & Proc. 204 (1972)

Fred Schneider

SCHILB v. KUEBEL: REFORM HELPS COST RETENTION PROVISION MEET THE CONSTITUTIONAL REQUIREMENTS OF EQUAL PROTECTION AND DUE PROCESS

THE BAIL ACT

The 1963 Illinois Bail Reform Act[1] has been widely acclaimed for its meritorious destruction of the evils associated with professional bail bondsmen.[2] The Act contains three sections which offer an accused in a criminal or quasi-criminal case[3] the opportunity to obtain pre-trial release.[4] Section 110-2[5] of the Act provides for release on the accused's own recognizance; section 110-7(a)[6] conditions release on the depositing of 10% of the bail with the clerk of the court; and

---

[1] ILL. REV. STAT. ch. 38, §§110-1 - 15 (1971).

[2] In relation to the evils associated with the professional bail bondsman, *see* A. BEELEY, THE BAIL SYSTEM IN CHICAGO 39 (1927); FREED and WALD, BAIL IN THE UNITED STATES 34 (1964); R. GOLDFARB, RANSOM, 92-126 (1965); Arcs and Stuz, *Bail and the Indigent Accused*, 8 CRIME AND DELINQUENCY 12 (1962); Roberts and Palermo, *A Study of the Administration of Bail in N.Y. City*, 106 U. PA. L. REV. 693 (1958); Foote, *Compelling Appearance in Court: Administration of Bail in Philadelphia*, 102 U. PA. L. REV. 1031 (1954); Foote, *The Coming Constitutional Crises in Bail*, (pts. 1-2) 13 U. PA. L. REV. 959, 1125.

In relation to the meritorious achievements of the Bail Reform Act, *see* Bowman, *The Illinois Ten Per Cent Bail Deposit Provision*, 1965 U. ILL. L.F. 35; Boyle, *Bail Under the Judicial Article*, 17 DEPAUL L. REV. 267, 272 (1968); Kamin, *Bail Administration in Illinois*, 53 ILL. B.J. 674, 680 (1965); Oaks and Lehman, *The Criminal Process of Cook County and the Indigent Defendant*, 1966 U. ILL. L.F. 584, 670-74. *See also* Bowman, *Committee Comments*, ILL. STAT. ANN. ch. 38, §110 (Smith-Hurd 1969).

[3] This 1963 Bail Reform Act covers only criminal and quasi-criminal procedure. ILL. STAT. ANN. ch 38, §110 (Smith-Hurd 1969). In relation to bail for traffic offenses, *see* Illinois Supreme Court Rules, ILL. REV. STAT. ch. 110A §501 *et seq.*

[4] Although the term "pre-trial" is used in the text of this case note, these three sections govern release on recognizance or bail at anytime during the criminal procedure.

Also, an accused must not fall within ILL. REV. STAT. ch. 38, §110-4(a) (1971) which states:

> All persons shall be bailable before conviction, except when death is a possible punishment for the offenses charged and the proof is evident or the presumption great that the person is guilty of the offense. [Note the effect of Furman v. Georgia, 403 U.S. 952 (1972), abolishing the death penalty.]

Nor may the accused fall within art. 1, §9 of the ILLINOIS CONSTITUTION which states: "All persons shall be bailable by sufficient sureties, except for capital offenses where the proof is evident or the presumption great."

[5] ILL. REV. STAT. ch. 38, §110-2 (1971)

[6] *Id.* §110-7(a):

> The person for whom bail has been set shall execute the bail bond and deposit with the clerk of the court before which the proceeding is pending a sum of money equal to 10% of the bail, but in no event shall deposit be less than $25.

Under §110-7 the accused must execute the bail bond and post his 10%

section 110-8(a)[7] provides for the deposit of either the entire amount of the bail in cash or securities, or double the amount in unencumbered real estate. Section 110-7, known as the 10% deposit provision,[8] is the only one of the three sections which has provided for cost-retention. It states:

> When the conditions of the bail bond have been performed and the accused has been discharged from all obligations in the cause, the clerk of the court shall return to the accused, unless the court orders otherwise, 90% of the sum . . . deposited and shall retain as bail bond costs 10% of the amount deposited.[9]

The constitutionality of the cost retention provision was recently challenged in *Schilb v. Kuebel.*[10] John Schilb was arrested and charged with leaving the scene of an accident and obstructing traffic. Bail was fixed at an aggregate sum of $750 for two charges; however, Schilb merely deposited 10% of the total bond to obtain his pre-trial release. At his trial, Schilb was found guilty of obstructing traffic; he thereupon paid his fine and was returned his bail deposit less $7.50 as bail bond costs pursuant to section 110-7(f). Schilb brought a class action in the circuit court challenging the constitutionality of the cost-retention provision. The circuit court dismissed Schilb's complaint, and on direct appeal the Illinois Supreme Court affirmed.[11]

The appellant, Schilb, contended that the imposition of the bail cost upon those depositing 10% of the bail under section 110-7(f) was unconstitutional, since it violated the due process and equal protection clauses of the fourteenth amendment to the United States Constitution.[12] More specifically, Schilb ar-

deposit. Under §110-8 the bail bond may be executed with or without sureties. The sureties contested the legality of their exclusion from §110-7 to their displeasure in People *ex rel.* Gendron v. Ingram, 34 Ill. 2d 623, 217 N.E.2d 803 (1966).

[7] ILL. REV. STAT. ch. 38, §110-8(a) (1971):

> In lieu of the bail deposit . . . in Section 110-7 of this code any person for whom bail has been set may execute the bail bond with or without sureties which bond may be secured: (1) By a deposit, with the clerk of the court, of an amount equal to the required bail, of cash, or stocks and bonds in which trustees are authorized to invest trust funds under the laws of this state; or (2) By real estate situated in this state with unencumbered equity not exempt owned by the accused or sureties worth double the amount of bail set in the bond.

If the accused is found guilty his deposit under §§110-8 and 110-7 may be applied toward the judgment; however, the deposit under §110-7 is applied toward the judgment only after the bail bond costs of §110-7(f) have been deducted and in accordance with §110-7(h).

[8] *See* Bowman, *The Illinois Ten Per Cent Bail Deposit Provision,* (1965) U. ILL. L.F. 35.

[9] ILL. REV. STAT. ch. 38, §110-7(f) (1971). The amount that is kept is 10% of the amount deposited which is 1% of the amount of the total bond.

[10] Schilb v. Kuebel, 404 U.S. 357, (1971).

[11] Schilb v. Kuebel, 46 Ill. 2d 538, 264 N.E.2d 377 (1970).

[12] Brief for Appellant at 10.

gued that it imposed bail costs only on one segment of the class gaining pre-trial release;[13] that it imposed bail costs on the non-affluent while no like costs were imposed on the affluent;[14] and finally, that it imposed bail costs on the innocent.[15]

Prior to a determination of the specific constitutional issues, the Court was faced with the question of determining whether to apply the traditional[16] or redefined test[17] of classification. In adopting the former, necessitating the presence of a rational basis of classification, the Court stated that the cost retention provision "smacks of administrative detail and procedure."[18] Thus, it avoided applying the redefined test by find-

[13] *Id.* U.S. CONST. amend. XIV; Appellant based his argument upon Rinaldi v. Yeager, 384 U.S. 305 (1966).

[14] Brief for Appellant at 10. U.S. CONST. amend. XIV; appellant based this argument upon Griffin v. Illinois, 351 U.S. 12 (1956). *Accord,* Williams v. Illinois, 399 U.S. 235 (1970).

[15] Brief for Appellant at 10, Schilb v. Kuebel, 404 U.S. 357, U.S. CONST. amend. XIV; appellant based this argument upon Giaccio v. Pennsylvania, 382 U.S. 399 (1966). The case of *Giaccio,* which is relied upon by the appellant for his due process argument, does not hold that a court cost imposed against an acquitted defendant is unconstitutional. However, the separate concurring opinions of Mr. Justice Stewart and Mr. Justice Fortas are support for appellant's argument.

[16] The traditional test questions whether the distinction drawn by the statute is invidious and without rational basis.

Dandridge v. Williams, 397 U.S. 471 (1970); *accord,* Richardson v. Belcher, 404 U.S. 78 (1971); South Carolina v. Katzenbach, 383 U.S. 301, 331 (1966); Williamson v. Lee Optical of Oklahoma, 348 U.S. 483, 489 (1955); McGowan v. Maryland, 336 U.S. 420, 426 (1961); United States v. Maryland Savings-Share Ins. Corp., 400 U.S. 4, 6 (1970); Reed v. Reed, 404 U.S. 71 (1971); McDonald v. Bd. of Election Comm'rs, 394 U.S. 802, 809 (1969); Standard Oil Co. v. City of Marysville, 279 U.S. 582, 586-87 (1929); Royster Guanco v. Virginia, 253 U.S. 412, 415 (1920); Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 78-79 (1911); Baxtrom v. Herold, 383 U.S. 107- 111 (1966); Walters v. City of St. Louis, 347 U.S. 231, 237 (1954); Louisville Gas and Electric Co. v. Coleman, 277 U.S. 32, 37-39 (1928); Air-way Electric Appliance Corp. v. Day, 266 U.S. 71, 75 (1924); Schlesinger v. Wisconsin, 270 U.S. 230. 240 (1926); Gulf, Colorado & Santa Fe Ry. v. Ellis, 165 U.S. 150, 155 (1897); McLaughlin v. Florida, 379 U.S. 184, 189-90 (1964); Atchinson, Topeka & Santa Fe R.R. Co. v. Matthews, 174 U.S. 96, 104-07 (1899); American Sugar Ref. Co. v. Louisiana, 179 U.S. 89, 92 (1900); Southern Ry. Co. v. Greene, 216 U.S. 400, 417 (1910); Hartford Steam Boiler Inspection and Ins. Co. v. Harrison, 301 U.S. 459, 461-63 (1937); Kotch v. Pilot Comm'rs, 330 U.S. 552, 556-57 (1947). *Cf.* Hernandez v. Texas, 347 U.S. 475, 478 (1954); Carrington v. Rash, 380 U.S. 89, 93 (1965); Dominion Hotel, Inc. v. Arizona, 249 U.S. 265, 266 (1919); Atlantic Coast Line R.R. v. Daughton, 262 U.S. 413 (1923); Great Atlantic and Pacific Tea Co. v. Grosjean, 301 U.S. 412 (1937); N.Y. Rapid Transit Corp. v. City of N.Y., 303 U.S. 573 (1938); Barbier v. Connolly, 113 U.S. 27 (1885).

[17] The redefined test states "that a statutory classification based upon suspected criteria or affecting 'fundamental rights' will encounter equal protection difficulties unless justified by a compelling governmental interest." Schilb v. Kuebel, 404 U.S. 357 at 365 (1971). *See* Oregon v. Mitchell, 400 U.S. 112, 247 n.30 (1970) (opinion of Justices Brennan, White, and Marshall); Shapiro v. Thompson, 394 U.S. 618, 634, 638 (1969); Kramer v. Union School District, 395 U.S. 621, 626 (1969); Cipriano v. City of Houma, 395 U.S. 701, 706 (1969); Williams v. Rhodes, 393 U.S. 23, 30 (1968); Kotch v. Pilot Comm'rs, 330 U.S. 552, 556 (1947).

[18] Schilb v. Kuebel, 404 U.S. 357 *supra* at 365 (1971).

ing that there was neither an involvement of a fundamental right nor of a suspected criteria.[19]

Armed wih the less formidable test of "traditional" classification, the Court proceeded to distinguish the 10% cost-retention provision from the sections providing for release on recognizance and release on full bail deposit. Under the old bail system, an accused released on recognizance was never charged, and, therefore, there was no security to be held by the state on his behalf. Thus, the burden under the new system is said to be no more than under the old.[20] With regard to the full bail deposit, said deposit operates as a productive asset whose interim benefit presumably accrues to the state.[21] Further, the full deposit is viewed as a greater protection against expenses inevitably incurred if the accused fails to appear.[22] As a result, the Court concluded that:

> The Joint Committee's and State Legislature's decision in balancing these opposing considerations in the way that they did cannot be described as lacking in rationality to the point where equal protection considerations require that they be struck down.[23]

Thus, the Court found these sections of the Bail Act to constitute three rationally classified groups for the purposes of equal protection.[24]

Justice Stewart, dissenting, illustrated that the traditional test for equal protection used by the Court states rationality as a standard, and that standard must be relevant to the purpose for which the classification is made. Significantly, the majority relied on Stewart's expression in *Rinaldi v. Yeager*: "the Equal Protection Clause does require that in defining a class subject to legislation, the distinctions that are drawn have some relevance to the purpose for which the classification is made."[25]

---

[19] See note 17 *supra*.

[20] *See* Justice Stewart's dissenting opinion. Schilb v. Kuebel, 404 U.S. 357 at 386 (1971).

[21] This conclusion depends on whether the state used the money in such a way so that the asset is actually productive during this interim period.

[22] It would be logical for one to assume that if more people were released on bail due to the 10% bail deposit provision, there would be a corresponding reduction in jail costs which might offset the costs incurred under the 10% deposit-cost retention provision. *See* Oaks and Lehman, *The Criminal Process of Cook County and the Indigent Defendant*, U. ILL. L. F. 584, 670-74 (1966).

[23] Schilb v. Kuebel, 404 U.S. 357 at 367 (1971).

[24] Schilb had contended that the 10% cost retention provision was, in effect, a charging of costs for the whole bail system against one class of accused persons, and that there was no rational basis in designating only one of the three sections of the Bail Act for cost retention.

[25] Rinaldi v. Yeager, 384 U.S. 305, 308-09 (1966). Defendant appealed his five to ten years imprisonment, and was granted a free transcript of his trial procedings to aid his appeal. The appeal was unsuccessful, and his prison earnings were withheld under a New Jersey statute for reimburse-

The different result necessarily arose from the conceptual disagreement concerning the fundamental purpose of the bail section. According to Justice Stewart, the purpose of the cost retention section (110-7(f)) was not the destruction of the evils associated with professional bail bondsmen as implied by the majority but, rather, the covering of administrative costs of the bail bond system.[26] With this latter purpose in mind, the dissent reasoned that there was no rational basis for distinguishing by classification among these three sections of the Bail Act.[27]

The majority, although recognizing the "purpose" element, evaded the question by failing to expressly state that the classifications were relevant to any purpose. Seemingly the majority excused any purported capricious classification by stating: "The Court more than once said that state legisla-

---

ment of the cost of his transcript. Defendant brought suit, claiming a violation of the equal protection clause of the fourteenth amendment of the U.S. Constitution. The U.S. Supreme Court held that statute was violative of the equal protection clause because repayment for the transcript is imposed on unsuccessful appellants who are imprisoned, but is not imposed on men who receive suspended sentences or have been placed on probation. Nor does it require repayment from an unsuccessful appellant who has been sentenced to pay only a fine.

Accord, Baxtrom v. Herald, 383 U.S. 107, 111 (1966); Walters v. City of St. Louis, 347 U.S. 231, 237 (1954). This test has also been worded as "must rest upon some ground of difference having a fair and substantial relation to the object of legislation." Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920). *Accord,* Hartford Steam Boiler Inspection & Ins. Co. v. Harrison, 301 U.S. 459, 461-63 (1937); Air-Way Electric Appliance Corp. v. Day, 266 U.S. 71, 75 (1924); Atlantic Coast Line R.R. v. Daughton, 262 U.S. 413 (1923); Southern Ry. v. Greene, 216 U.S. 400, 417 (1910). For a third wording of this test, the Supreme Court has said:

> That is to say mere difference is not enough; the attempted classification must always rest upon some difference that bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without any such basis.

Gulf, Colorado, Sante Fe Ry. v. Ellis, 165 U.S. 150, 155 (1897) as cited in Hartford Steam Boiler Inspection & Ins. Co. v. Harrison, 301 U.S. 459, 462 (1937); McLaughlin v. Florida, 379 U.S. 184, 189-90 (1964). A fourth wording is " . . . the power of classification upheld whenever such classification proceeds upon any difference which has a reasonable relation to the object sought to be accomplished." Atchison, Topeka & Santa Fe R.R. v. Matthews, 174 U.S. 96, 104-07 (1899). A fifth wording by the Court is "the courts must reach and determine the question whether the classification drawn in a statute is reasonable in light of its purpose." McLaughlin v. Florida, 379 U.S. 184, 191 (1964); Carrington v. Rash, 380 U.S. 89, 93 (1965). For an unusual wording of this test, the Court in Southern Ry. v. Greene, 216 U.S. 400, 417 (1910) stated "bearing a reasonable and just relation to the things in respect to which such classification is imposed."

Is the distinction in classification to be related to the purpose of 110-7(f) (cost retention), or to the purpose of the whole act (doing away with the evils of the professional bail bandsmen)? As the above worded tests show, what is to be chosen as a relevant purpose is not clear.

[26] Schilb v. Kuebel, 404 U.S. 357 (1971).

[27] Thus, Justice Stewart's argument in the dissent is that for the purpose of cost there is no rational difference between section 110-7 and section 110-8. In his dissent he also refutes rationalizations for a distinction between section 110-7 and section 110-2 as related to cost as the purpose of section 110-7(f). *See* Schilb v. Kuebel, 404 U.S. 357 (1971) (Justice Stewart dissenting).

tive reform by way of classification is not to be invalidated because the legislature moves one step at a time."[28]

POOR-RICH DICHOTOMY

The appellant then argued that the choices of release available under the statutory scheme inherently discriminated against the poor. The Court rejected this contention, stating: "the situation . . . is not one where we may assume that the Illinois plan works to deny relief to the poor man merely because of his poverty."[29] The Court reasoned that a rich man is usually conscious of financial conditions in the investment field and is aware that the full deposit provision means a deposit of 90% more funds than the 10% deposit provision. The rich man is also aware that the funds not deposited by use of the 10% deposit provision may be invested so that the returns on such investment might readily offset or surpass the amount retained as cost.[30]

The Court's arresting discussion of the dichotomy seems

---

[28] Legislatures are presumed to have acted constitutionally . . . and their statutory classifications will be set aside only if no grounds can be conceived to justify them. . . . With this much discretion, a legislature traditionally has been allowed to take reform 'one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind.'

McDonald v. Bd. of Election Comm'rs of Chicago, 394 U.S. 802, 809 (1969). *Accord,* Williamson v. Lee Optical of Oklahoma, Inc., 348 U.S. 483, 489 (1955); Ozan Lumber Co. v. Union County Nat'l Bank of Liberty, 207 U.S. 251 (1907); McGowan v. Maryland, 366 U.S. 420, 425-26 (1961); Two Guys from Harrison-Allentown, Inc. v. McGinley, 366 U.S. 582, 591-92 (1961); Allied Stores of Ohio, Inc. v. Bowers, 358 U.S. 522, 528 (1959); Railway Express Agency, Inc. v. New York, 336 U.S. 106, 110 (1949); Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 78-79 (1911). *See* McLaughlin v. Florida, 379 U.S. 184, 189-90 (1964) (wherein the "one step at a time" philosophy does not apply to statutes involving racial discrimination).

[29] Schilb v. Kuebel, 404 U.S. 357 (1971).

[30] *See* Brief for Appellee at 16-17, App. xvii, which states:

Example 1. If 'A' chose to deposit 10 per cent, he need only post $100.00. The remaining $900.00 could then realistically be invested to draw 5 per cent interest. After 'A' was discharged from his obligations under the bond he would be required to pay a 1 per cent fee or $10.00. Thus 'A' would have benefited by depositing the 10 per cent under Pa. 110-7; *i.e.* $900.00

.05 (5% interest per 1 year)
45.00
— 10.00 (1% fee)
$ 35.00 net gain

'A' would thus stand to make a gain unless the matter was disposed of within a three month period: *i.e.*

$900.00
.0125 (5% interest for 3 mo.)
11.25
— 10.00 (1% fee)
$ 1.25 net gain

Only a very small fraction of those cases requiring bonds in excess of $25.00 are disposed of (and without a subsequent appeal) within a three-month period.

spurious. The only statement made by the Court on behalf of the poor man's position was that his hope is section 110-2, release on personal recognizance. However, the Court notably failed to mention that the rich man may also seek release upon personal recognizance and may, in fact, have a better opportunity of obtaining release due to the factors upon which such release is predicated.[31] The Court also failed to recognize that a rich man may deposit unencumbered real estate, rather than cash; thus, his liquid assets remain available for investment, and at the same time he avoids the cost retention provision.[32] Most importantly, the Court omitted from its reasoning the basic proposition that the rich man has an option to use section 110-8 in lieu of section 110-7, while the poor man, in effect, does not. Instead, the Court stated that there is a substantial basis for finding that the rich man will not tend to use section 110-8, but will be inclined to use section 110-7, and, thus, there is no discrimination because it could not be assumed that the Illinois plan worked to deny relief to the poor man merely because of his poverty.

BAIL AS AN ADMINISTRATIVE COST

The Court rejected Schilb's argument that section 110-7(f) imposes court costs on innocent defendants, distinguishing *Giaccio v. Pennsylvania*,[33] relied upon by the appellant. In *Giaccio*, the Court decided that the statute was vague and lacked general standards to prevent the arbitrary imposition of prosecution costs.[34] To the *Schilb* Court it was not only

---

Example 2. Note that if a 'C' bond were posted, although a 1 per cent fee was not charged, the $900.00 would not be available for investment since the full amount of $1,000.00 would have had to have been posted. These examples adequately show why 90.2 per cent choose a 'D' bond when the amount of the bail is in excess of $25.00.

[31] *See Bail: The Need for Reconsideration, Right To Release of Accused on Personal Recognizance*, 59 NW. U.L. REV. 678 at 683 (1964); ILL. REV. STAT. ch. 38, §110-5 (1967).

[32] For example, if "A" chose to deposit real estate under section 110-8, he would avoid the cost-retention charge under section 110-7. However, if "A" is as "affluently" aware of financial conditions as the Court supposes, this deposited real estate may be actually a profitable financial investment.

[33] 382 U.S. 399 (1966). In this case the defendant was acquitted of a misdemeanor, but was sentenced to pay costs of prosecution. The United States Supreme Court found:

> This 1860 Pennsylvania Act contains no standards at all, nor does it place any conditions of any kind upon the jury's power to impose costs upon a defendant who has been found by the jury to be not guilty of a crime charged against him. The Act, without imposing a single condition, limitation or contingency on a jury which has acquitted a defendant simply says . . . the trial judge 'shall forthwith pass sentence to that effect, and order him [defendant] to be committed to the jail of the county, there to remain until he either pays or gives security for the costs.'

[34] See note 15 *supra*. *See also* the concurring opinion of Mr. Justice Stewart in Giaccio v. Pennsylvania, 382 U.S. 399, 405, wherein he stated, "In the present case it is enough for me that Pennsylvania allows a

obvious that section 110-7(f) was neither vague nor lacking in standards, but also that the cost-retention provision imposed an administrative fee rather than a court cost:

> This is what the description implies, namely, an administrative cost imposed upon all those guilty and innocent alike, who seek the benefit of 110-7. This conclusion is supported by the presence of the long established Illinois Rule against the imposition of costs of prosecution upon an acquitted or discharged defendant . . . and by the Illinois Courts' own determination . . . that the charge under 110-7(f) is an administrative fee and not a cost of prosecution imposed under Illinois Revised Statutes 1969 . . . only upon the convicted defendant.[35]

The express reasoning for the holding of the United States Supreme Court appears to be illusory. The Court had based its finding that section 110-7(f) is an administrative cost upon the *Wells*[36] case and upon the holding of the Illinois Supreme Court in *Schilb v. Kuebel.*[37] *Wells,* which involved a similar statute[38] clearly established the rule against the imposition of prosecution costs against an acquitted defendant. However, *Wells* did not incorporate any standards to differentiate a prosecution cost from an administrative cost. On this precise issue the Illinois Supreme Court in *Schilb* had determined, without supporting reasoning, that section 110-7(f) was an administrative cost. Justice Douglas, dissenting, concluded that section 110-7(f) was part and parcel of a criminal proceeding, since it only arises as a result of a criminal prosecution. He further reasoned that any cost imposed upon an acquitted defendant, no matter when, was a violation of due process. Accordingly, it appears that section 110-7(f) would violate due process whenever the cost retention is imposed against an acquitted defendant.[39]

CONCLUSION

In closing, the Supreme Court stated:

> Neither are we inclined to read constitutional implications into

---

jury to punish a defendant after finding him not guilty. That, I think, violates the most rudimentary concept of due process of law."

[35] Schilb v. Kuebel, 404 U.S. 357, 370 (1971).

[36] Wells v. McCullock, 13 Ill. 606 (1852).

[37] 46 Ill. 2d 538, 264 N.E.2d 377 (1970); 404 U.S. 357 (1971). In determining whether a cost is one of prosecution or administration, see the following cases: City of Carterville v. Cardwell, 152 Mo. App. 32, 132 S.W. 745 (1910); *Ex parte* Coffelt, 93 Okla. Crim. 343, 228 P.2d 199 (1951); *Ex parte* Carson, 143 Tex. Crim. 498, 159 S.W.2d 126, 127 (1942); Rosebud County v. Flinn, 109 Mont. 537, 98 P.2d 330, 334 (1940).

[38] ILL. REV. STAT. ch. 38, §108(3) (1969).

[39] Justice Douglas goes farther by stating:

> . . . Nor does the rubric 'administrative' require a contrary result. If this were the talisman through which a state could impose its costs upon acquitted defendants, I could see no stopping point and we might be left with a system in which an acquittal might be nearly as ruinous to the defendant as a conviction.

Schilb v. Kuebel, 404 U.S. 357, 378 (1971).

either the presence[40] or absence[41] of a retention provision in corresponding statutes of states other than Illinois.[42]

What, if any, implications can be drawn from the *Schilb* decision? Certainly the Court needs to expressly state what distinctions and classifications are to be drawn when applying the traditional equal protection test. As it stands now, a provision may or may not meet equal protection requirements, depending upon whether the rational distinctions are to be drawn from the purpose of the entire Act or from the purpose of the specific section or subsection under attack.

In rejecting the affluent man-poor man argument, the Court did not rely upon the pecuniary position of either one. Rather, the decision rested upon the relation between the percentage of cost retained as opposed to the percentage of interest expected in returns on investments available when the bond is posted.[43] It seems that the Court's measuring test should be dependent upon the pecuniary standing or lack of standing of the rich or poor. Further, despite the lack of supportive reasoning, either expressed or implied, the Court held that the cost retention provision of the Bail Reform Act is an administrative cost.

It may be that in the future, given a case with more conducive facts, the Supreme Court will appropriately adopt Schilb's argument, based on the concurring opinion in *Giaccio*.

Fred Schneider

---

[40] *See* WIS. STAT. §§969.02(5) and 96.03(1)(c) (1969), where a 10% cost-retention charge is kept, but not against an acquitted or dismissed defendant; MICH. STAT. ANN. §28.872(56); C.L. 1948, §780.66, added by PUB. ACTS 257 (1966), (STAT. ANN. CUM. SUPP. §28.872(51 *et seq.*) (1970). In regard to the Michigan statute, *see* Pressley v. Lucas, 30 Mich. App. 300, 186 N.W.2d 412 (1971).

[41] *See* N.Y. LAWS ch. 518 (1936) and MCKINNEY'S CONS. L. of N.Y. §586.3 (1958 and 1970-71 Supp.), having a 2% fee provision, now replaced by §§520.10-520.30 of N.Y.'s new criminal procedure law effective Sept. 1, 1971 without the provision. *See also* ALASKA STAT. §§12.30.010-12.30.080; D.C. CODE §§23-1321 - 23-1331; IOWA CODE ANN. §763.16 (1971 Supp.). Each of these allow for 10% bail deposit by the accused without a cost retention provision. *See also* 18 U.S.C. §3146(a)(3) (1971).

[42] Schilb v. Kuebel, 404 U.S. 357, 371-72 (1971).

[43] One may speculate that if the cost retention had been 2½% and the investment return rate the same; the court might have found the cost provision to be in violation of equal protection.