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Constitutional Law--Racial Discrimination--Denial of Due Process

Beauchamp E. Brogan
University of Kentucky

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hearing. If one may be deprived of his liberty in a so-called “non-criminal” proceeding, then the rights consistent with due process must also extend to such hearings if the spirit and intent of the due process requirement is to be met.

Juvenile court legislation has done much to improve upon our judicial system. Its goals, standards, and ideals are commendable. The fact remains, however, that the practice does not yet measure up to the theory—the reality has not yet equated the ambition. Until the juvenile courts can more closely approach the ideals set for them, it is believed that children brought before them should never be deprived of their liberty without benefit of procedural due process safeguards. It is strongly urged that the example set by the District of Columbia36 and California37 should be followed.38 The purpose of juvenile legislation is to enhance the position of the juvenile offender before our courts. It is difficult, therefore, to justify a denial of procedural safeguards when such denial will certainly make his position less secure. Why should an infant be denied those privileges and rights accruing to the adult offender? To say, “Because the infant doesn’t need such protection in view of the fact that the proceeding is non-criminal”, is to allow legal fictions and semantic manipulation to overcome reason and common sense.39

Charles L. Calk

CONSTITUTIONAL LAW—RACIAL DISCRIMINATION—DENIAL OF DUE PROCE-SS—Relators, three Chinese-born minors, claimed admission to the United States as citizens by derivation from one Lee Ha, concededly an American citizen and alleged to be their father. The Board of Special Inquiry, Immigration and Naturalization Service, solely on the basis of blood grouping tests held to preclude paternity, rejected their claim and they were taken into custody pursuant to that determination. Habeas Corpus was then brought against the District Director of

36 In addition to the instant case, see In re Poff, 135 F. Supp. 224 (1955).
38 Id. at 633. “While the juvenile court law provides that adjudication of a minor to be a ward of the court shall not be deemed to be a conviction of crime, this is a legal fiction, presenting a challenge to credulity and doing violence to reason. . . .”
39 For further evidence of what may be a trend in the right direction, see Ex Parte State ex rel. Echols, 245 Ala. 353, 17 So. 2d 449 (1944) (which indicated that having an attorney representing the infant in juvenile court was not only entirely proper, but may have been a matter of right, where a pending prosecution for murder entered into the issue of delinquency); Dendy v. Wilson, 142 Tex. 460, 179 S.W. 2d 269 (1944) (which held that the privilege against self-incrimination extends to juvenile court proceedings).
Immigration and Naturalization Service, New York, to secure their release from custody. The Federal District Court for the Southern District of New York held that a rule of the immigration authority requiring that one seeking admission to the United States on the ground that he is the child of a citizen of the United States submit to a blood test was a denial of due process since it applies only to persons of Chinese descent, regardless of sufficiency of other proof of paternity. On appeal to the United States Court of Appeals, Second Circuit, Held: Reversed, Justice Frank dissenting. The record failed to show that there was such racial discrimination in requiring blood tests of foreign-born persons claiming derivative citizenship as would deny due process to Chinese-born persons claiming such citizenship. The court further held, Justice Frank concurring, that if blood tests are conducted without discrimination on racial grounds, there is no denial of due process in requiring blood tests to determine paternity of foreign-born persons claiming derivative citizenship, even though there are no statutes or official, authorized regulations permitting the Immigration Service to make use of blood tests as a method of non-discriminatory investigative procedure. *United States v. Shaughnessy*, 237 F. 2d 307 (2d Cir. 1956).

Relators claimed that no blood tests were required of white persons but that all Chinese-born persons seeking admission to the United States as citizens by derivation were required to submit to such tests. After being told that they had to submit to the tests or be excluded, two blood grouping tests were made of the entire family. These tests established conclusively that Lee Ha could not be the father of two of the relators. On this basis alone, relators were excluded. Other evidence was sufficient to the extent that if no blood grouping tests had been conducted relators would have been admitted to the United States. Was the holding that such evidence was conclusive on the issue of paternity correct? In order to correctly answer this question, it is desirable to examine the background and history of the blood grouping tests to determine the extent of their reliability and the weight courts should give them—assuming they are properly conducted and that the person who conducted them is available for examination.

Blood grouping tests were predicated on the discovery that the red corpuscles in human blood contain two affirmative agglutinating substances called agglutinogens. There are four types of blood: one containing both substances, AB; one containing A; another B; and the fourth containing neither, O. Scientists determined that every individual's blood falls into one of these classes and remains the same.

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This blood individuality is an hereditary characteristic handed down from parent to offspring according to the Mendelian Law of inheritance. According to scientific findings, no agglutinating substance can appear in a child which was not present in one of its parents. The blood tests cannot prove that a certain man is the father of a child, but they can prove that he is not the father of the child in certain combinations.

Foreign courts were the first to accept these tests as evidence of non-paternity. The value of these tests and their reliability were subsequently recognized by the courts of the United States, and some states have enacted legislation directing that in cases raising the issue of paternity the persons involved submit to the tests and such tests be admitted as evidence of non-paternity. However, even among states where the evidence is admissible, there is a conflict as to the weight to which the tests should be entitled. Some say it is conclusive on the issue of paternity where it establishes non-paternity and where the accuracy of the testing methods is established. Others hold that it is to be considered together with other pertinent evidence. California is perhaps the leading authority which holds that it is not conclusive while New York leads in holding that it is conclusive. The California Supreme Court in Arais v. Kalensnikoff refused to accept the negative

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2 Ibid.
3 Ibid. and see 12 A.B.A.J. 441 (1926).
4 Supra note 1.
5 Ibid.
6 104 A.L.R. 430 at 449 (1936).
7 Ibid.
8 The Civil Practice Act of N.Y., sec. 306a (1948) states that:

Wherever it shall be relevant to the prosecution or defense of an action . . . the court, by order, shall direct any party to the action . . . and the child of any such party and the person involved in the controversy to submit to one or more blood-grouping tests. . . . Whenever such test is ordered and made, the results thereof shall be receivable in evidence only where definite exclusion is established. In cases involving blood grouping tests, constitutional questions have arisen regarding the issue whether the admissibility violated the privilege against self-incrimination. The courts in most states hold such contentions untenable. 46 A.L.R. 2d 1014 (1956). This view is applied in both criminal and civil cases. The Uniform Act on Blood Tests to Determine Paternity provides for the issuance of blood grouping test orders in civil and criminal proceedings in which paternity is a relevant fact. This act has been adopted in California, Michigan, New Hampshire, and Oregon. There is no statutory authorization for such blood test in Kentucky. The Kentucky Court has held that taking a blood specimen from a defendant in a criminal case violates the constitutional provision that no defendant in a criminal case shall be a witness against himself. McManus v. Commonwealth, 264 Ky. 240, 94 S.W. 2d 609 (1936). Also see 164 A.L.R. 969 (1946) and 104 A.L.R. 449 (1936).

10 Id. at 1028, 1038.
results of the tests as conclusive evidence of non-paternity where there was a conflict between the scientific testimony and testimony as to collateral facts. Rather, the court stated that it was for the jury to determine the relative weight of the evidence. In that case, the results of blood tests showed conclusively that the father could not be the parent of the child. However, there was testimony to the effect that the alleged father had been seen at the mother’s home on many occasions, that he paid the nurse who attended the mother, that he had bought groceries and clothing for the child, and had told various persons that the child was his. Due to this conflict between the scientific testimony and the collateral fact testimony, the court refused to accept the tests as conclusive evidence of non-paternity. The court adopted this view in the Chaplin case\textsuperscript{12} and courts in other states have adopted a similar position.\textsuperscript{13}

The better view is that adopted by New York holding the tests to be reliable and infallible. In Anonymous v. Anonymous,\textsuperscript{14} the husband was allowed to disprove the paternity of a child even though he had lived with the mother during the entire period of gestation and for five years thereafter. The court accepted the tests as definitely excluding the defendant as a possible father of the child. Members of the medical profession believe that the tests should be conclusive evidence of non-paternity and have encouraged the legal profession to adopt measures directing persons to submit to the tests in all litigation involving the issue of paternity.\textsuperscript{15} That the medical profession considers the tests conclusive evidence of non-paternity is indicated in the approval of the results in the Anonymous case.\textsuperscript{16} The profession re-established its faith and reliability in the tests when approval was given to the results in the Anonymous case and to the court’s declaration that: "The tests, of course, will be relevant only if they show non-compatibility as between the blood of defendant, the plaintiff, and the twins. If so, such evidence should be deemed conclusive as to non-paternity."\textsuperscript{17} As the American Medical Association remarks: "Science has thus prevented the continuation of an injustice to a husband by the activities of an unfaithful wife."\textsuperscript{18}

The federal court has held that blood grouping tests are competent evidence to establish non-paternity in nationality cases and are not

\textsuperscript{14} 150 N.Y.S. 2d 344 (1956).
\textsuperscript{15} Supra note 1.
\textsuperscript{17} Ibid.
\textsuperscript{18} Ibid. at 1487.
limited to the male in a matrimonial or bastardy case. And giving conclusive weight to such tests by a board of special inquiry does not constitute a denial of due process. Accordingly, the court was correct in ruling that the tests in the instant case conclusively established that relators were not the offspring of Lee Ha, and that such was not a denial of due process.

However, where facts establish a deliberate use of the blood test technique to exclude Chinese-born persons and admit others similarly qualified, except for race, the discrimination is clearly unconstitutional. The Constitution of the United States is violated if arbitrary and unjust discrimination founded on differences of race between persons otherwise in similar circumstances are made. Racial discrimination is abhorrent to our institutions. The issue directly before the court in the principal case was whether relators had been racially discriminated against by requiring them to submit to blood grouping tests while excluding others. Was the court correct in holding that the finding below, that the testing of these relators was actuated by racial discrimination, was not warranted?

Examination of the cases involving Chinese-born persons seeking admission to the United States as citizens demonstrated that the court was correct in holding that no arbitrary racial discrimination had been practiced on relators. Blood grouping tests in the case of such persons are necessary by reason of the pattern and type of case, not because the persons involved happen to be of the Chinese race. Inadequate records of marriages and birth and the many Chinese who illegally attempt to enter this country make necessary the use of blood tests to determine paternity. A typical pattern is followed in these cases. (1) The alleged father claims to have returned to China for the purpose of marriage or a visit. Within a year or so a child is born; then, following a second or third conception, the father returns to the United States. Later application is filed for admittance of the child or children. A similarity of facts follows. Offspring always followed cohabitation with the wife in China, the children are preponderantly male in startling proportions, and despite the fact that the children are born in rural villages without any known means of modern conveniences,
all children born survive and none are deformed or ailing. (2) The practice developed of preparing coaching books or “Halgoons” comprising an extensive background of family conditions which the alleged family members memorize in an effort to avoid inconsistencies and to cover up fraud. (3) The witnesses are always interested in the proceeding, and it is extremely difficult for the Service to disprove paternity on fact testimony alone. The federal court in the case of Gong v. Brownell\(^{26}\) held that in proceedings where a Chinese-born person attempts to establish his United States citizenship, testimony on behalf of the Chinese given by interested witnesses is not required to be believed, notwithstanding the fact that such testimony is uncontradicted. Because of these factors and the suspicion of substitution of children solely for the purpose of entry into the United States, the use of the blood test was seized upon as a genuinely tangible method of reaching the truth. It was not used extensively until after the interior of China was closed, making it impossible to determine paternity on the basis of fact alone. And the court found that the instructions directing the use of blood tests in Chinese visa petition cases at no time precluded the use of blood tests in non-Chinese cases nor directed the use of blood tests exclusively in Chinese cases. There was thus no arbitrary racial discrimination. Rather it was a proper administrative motive for the aid of investigators in solving difficult cases.

Two recent cases handed down by the Federal Court of Appeals have recognized the problem involved here.\(^{27}\) The question of racial discrimination was not as compelling in those cases as here and do not, therefore, control this case. However, the court recognized the problem and stated in Kon v. Brownell\(^{28}\) that in view of obstacles to investigation by ordinary means into family history and evidence of parentage of Chinese persons, the giving of blood tests to test paternity claims only to Chinese applicants for declaration of nationality would not effect unconstitutional discrimination based on race or color. Relators offered no evidence in that case that the tests were given only to Chinese, but the court stated that even if that fact were established, it would not in itself show the discrimination was based on race or color. And in United States v. Shaughnessy\(^{29}\) the court held that the requirement that foreign-born Chinese seeking admission to the United States as sons of American citizens submit to a blood test

\(^{26}\) Mar Gong v. Brownell, 209 F. 2d 448 (9th Civ. 1954); see Flynn v. Ward, 104 F. 2d 300, 302 (1st Civ. 1939).

\(^{27}\) Supra note 19, 20.

\(^{28}\) Ibid.

\(^{29}\) Ibid.
is justified by lack of reliable written governmental records of birth and parentage.

An analogous situation is presented in Hirabayashi v. United States. Pursuant to an Executive Order by the President while the United States was at war with Japan, the military commander of the Western Defense Command promulgated an order requiring, inter alia, that all persons of Japanese ancestry within a designated military area be within their place of residence between the hours of 8 p.m. and 6 a.m. A United States citizen of Japanese ancestry was convicted for violation of the curfew order. The court held that the order did not unconstitutionally discriminate against citizens of Japanese ancestry, but that it was a war measure designed to protect against sabotage and espionage. Likewise, the requirements of a blood test in the case of Chinese-born persons is a protective device. It protects the public from an influx of illegal immigrants. Assuming the tests are infallible, the honest Chinese have nothing to fear from such a requirement. It is the Chinese with a guilty disposition who fear such tests. To refuse the Immigration Service permission to require such tests would impede its operation and again open the gate to a flood of illegal immigrants. A decision of the Service holding an applicant not of a status entitling him to admission should not be rejected in habeas corpus unless resulting from manifest abuse of power and discretion. It is clear that the evidence in this case was sufficient to exclude relators and that there was no abuse of power. Accordingly, the court was correct in excluding relators and holding that there was no denial of due process.

Beauchamp E. Brogan

30 Hirabayashi v. United States, 320 U.S. 81 (1943). See Takahashi v. Commission, 334 U.S. 410 (1948) where the Court held that a California statute barring issuance of commercial fishing licenses to persons ineligible to citizenship, which classification included resident alien Japanese and precluded such a one from earning his living as a commercial fisherman in the ocean waters off the coast of the State was unconstitutional.

And see the vigorous dissents in Korematsu v. United States, 323 U.S. 214 (1944) where the majority of the Court held that an order directing the exclusion from a West Coast military area of all persons of Japanese ancestry was constitutional as of the time it was made.


32 Since the principal case was first decided in 1952, the Immigration Service has applied the tests to all immigrants applying for entry to the United States on a claim of paternity, so that the problem has been eliminated. However, it is believed that this change was not necessary in view of the conclusion that there was no arbitrary discrimination in requiring blood tests in cases involving Chinese-born persons. Note dissent by Justice Frank in principal case at page 315.