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Imprisonment of Indigents for Non-Payment of Fines or Court Costs; The Need for Legislation That Will Provide Protection to the Poor

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IMPRISONMENT OF INDIGENTS FOR NON-PAYMENT OF FINES OR COURT COSTS; THE NEED FOR LEGISLATION THAT WILL PROVIDE PROTECTION TO THE POOR

INTRODUCTION

"The custom of imprisoning a convicted defendant for nonpayment of fines dates back to medieval England."[1] In this country the practice has become so pervasive that at the present time almost all states, as well as the Federal Government, have statutes authorizing incarceration under such circumstances.[2] For example, the North Dakota Century Code provides:

> A judgment that the defendant pay a fine and costs also may direct that he be imprisoned until both the fine and costs are satisfied, specifying the extent of the imprisonment, which must not exceed one day for every two dollars of the fine and costs, but such imprisonment does not discharge the judgment for the fine and costs.[3]

The North Dakota statute differs from the majority of state statutes in that the imprisonment does not discharge the duty to pay the fine.[4] However, the amount of the fine is used to determine the length of confinement: "[T]he imprisonment. . . must not exceed one day for every two dollars of the fine and costs."[5] The difference between the statutes that discharge the fine and those that do not is important when it is necessary to determine the purpose of the particular statute.[6] Those statutes that provide for dis-

1. Williams v. Ill., 399 U.S. 235, 239 (1970). *See generally* 2 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 43-44 (3d ed. 1927); 1 J. BISHOP, CRIMINAL LAW § 940, at 693 (9th ed. 1923); 1 J. STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 57 (1883). *See also* Comment, *Fines, Imprisonment, and the Poor: "Thirty Dollars or Thirty Days"*, 57 CALIF. L. REV. 778, 780-87 (1969).

2. Williams v. Ill., 399 U.S. 235, 247-58 (1970) (Appendix acccompanying the majority opinion compiles state statutes authorizing imprisonment for nonpayment of fines). *See also* Note, *The Equal Protection Clause and Imprisonment of the Indigent for Nonpayment of Fines*, 64 MICH. L. REV. 938 (1966); Comment, 57 CALIF. L. REV. 778, (1969) *supra* note 1, for compilations of these statutes. The corresponding federal statutes are 18 U.S.C. §§ 3565, 3569 (1964).

3. N.D. CENT. CODE § 29-26-21 (1960).

4. *See e.g.*, S.D. COMP. LAWS ANN. § 23-48-23 (1969).

5. N.D. CENT. CODE § 29-26-21 (1960).

6. The distinction has been important primarily with regard to an analysis of whether the statute has a rational purpose that will withstand the test of the Equal Protection Clause of the Fourteenth Amendment. *See* notes 53-57 and accompanying text *infra*.

charge of the fine by imprisonment appear to be a substitute punishment. On the other hand, the statutes which do not discharge the fine by incarceration seem more likely to have been intended as a means of compelling the offender to pay his fine.[7]

In order to appreciate the broad potential application of statutes calling for imprisonment for nonpayment of fines, it should be kept in mind that the fine is the most frequently imposed criminal sanction.[8] Conceivably, every offender subject to a fine might be imprisoned for nonpayment under these statutes. When the nonpayment is a wilful refusal to comply with the order of a court, it is analogous to any ordinary contempt of court violation, and imprisonment for such defiance is not necessarily undesirable. However, when the person imprisoned is financially unable to pay the fine, which is often the case, it seems that the visceral reaction should be that incarceration is unduly harsh and unfair treatment. This imprisonment seems especially unfair when the court is able to confine an offender beyond the period the legislature has established as the maximum punishment for the crime, merely because the offender is too poor to pay a fine. For example, assume that a North Dakota defendant is convicted of driving an automobile while under the influence of alcohol. North Dakota law provides that the offense be punished by a maximum fine of two-hundred dollars, or a maximum jail sentence of thirty days, or both.[9] If the defendant were sentenced to the maximum fine of two-hundred dollars, but was unable to pay, the court would then be able to imprison him for 100 days (at the North Dakota statutory rate of $2 credit per day), even though the legislature has manifested its intention that thirty days be the maximum period of confinement for those convicted of that offense.[10] The unfairness inherent in such imprisonment, and the frequency of its occurrence,[11] have compelled the courts to re-examine their former

7. North Dakota does have provision for dimunition of fines by the labor to be performed by an imprisoned offender. "For each day of labor performed by a convict under the provisions of this chapter, there shall be credited on any judgment for fine and costs against him the sum of five dollars." N.D. CENT. CODE § 12-44-33 (Supp. 1971).

8. It has been estimated that fines constitute 75% of all sentences. E. SUTHERLAND & D. CRESSEY, PRINCIPALS OF CRIMINOLOGY 572 (6th ed. 1960). Although not documented, such estimates are not implausible given the large number of traffic and other minor offenses that come within the scope of the criminal law, and are almost exclusively dealt with by the imposition of a fine. The fine is not limited to minor offenses. It can be imposed as the sole penalty for infractions ranging in gravity from holding a dance on Sunday, N.D. CENT. CODE § 12-21-19 (Supp. 1971), to voluntary manslaughter, 18 U.S.C. § 1112 (1964).

9. N.D. CENT. CODE § 39-08-01(2) (Supp. 1971).

10. *See* People v. Saffore, 18 N.Y.2d 101, 218 N.E.2d 686, 271 N.Y.S.2d 972 (1966) which involved similar circumstances. The case is discussed in the text accompanying notes 18-22 *infra*. Under recent decisions of the United States Supreme Court confinement of an indigent beyond the statutory maximum for nonpayment of his fine or court costs is no longer constitutionally possible. Williams v. Ill., 399 U.S. 235, 239 (1970).

11. The 1910 Census reported that 58.6% of all inmates of the United States prisons were committed for nonpayment of fines. More recent figures from large city jails appear to show that the percentage of inmates doing time for nonpayment of fines has remained extremely high. *See* 57 CALIF. L. REV. 778, 787 (1969); Note, *Fines and Fining—An Evaluation*, 101 U. PA. L. REV. 1013, 1014 (1953).

policy of upholding such confinement and to consider the present legality of the long accepted practice of imprisoning convicted defendants who fail to pay their fines or court costs.

IMPRISONMENT OF INDIGENTS — DEVELOPMENTS IN THE CASE LAW

Defendants imprisoned for failure to pay their fines have long argued that such imprisonment was unconstitutional.[12] However, these arguments were generally unsuccessful.[13] Most recent cases that have held the incarceration of the defendant unconstitutional have involved defendants who were indigent, i.e., unable to pay the fine imposed.[14]

Even before the right of an indigent to avoid imprisonment for nonpayment of a fine had been elevated to a constitutional right by the United States Supreme Court,[15] several courts had found ways to abrogate the practice. The reasons given for finding such incarceration illegal ranged from finding the sentence unauthorized by statute,[16] to holding the statute authorizing such confinement violative of one or more of the defendant's constitutional rights.[17]

In *People v. Saffore*,[18] the leading case before the United States

12. N.D. COMP. LAWS OF 1913, § 10941, the predecessor of N.D. CENT. CODE § 29-26-21 (1960), was challenged in State v. Kilmer, 31 N.D. 442, 153 N.W. 1089 (1915) where it was held not to violate either the State or Federal Constitutions.

13. *Id.* at 1090.

14. The question of who qualifies as an indigent for any particular purpose is always a difficult one.

> The determination of indigency in Cook County [Illinois] generally consists of two questions in open court, asked by the judge: "Do you have a lawyer?" And if not, "Do you have funds with which to hire a lawyer?" The prevailing attitude of the Illinois judges toward the determination of indigency reflects the practice most often followed: if the defendant has not made bail by the time of arrangement, and if he says he is unable to hire a lawyer and wants one, then the court assumes that the defendant is indigent and freely appoints counsel for him. If the defendant were financially able, it is assumed, he would most probably have secured his release on bail and have retained his own attorney. The trial judges generally are not concerned with whether relatives of a defendant are able to employ counsel for the defendant because there is no legal obligation upon relatives to hire an attorney for him, regardless of the degree of kinship. However, rather common factors considered by many judges in determining indigency are employment of the accused and whether he owns an automobile or other valuable property."

Dowling & Yantis, *Defense of the Poor in Criminal Cases in Illinois*, 47 CHI. B REC. 216, 219 (1966).

The term "indigent" defies precise definition. Certainly it cannot be based on a stated minimum dollar amount of assets. This is especially true when determining defendant's status for purposes of assessing a fine. In this situation the status should be determined on the basis of the adequacy of the defendant's resources in relation to the fine. In regard to the determination of indigency with respect to right to counsel, *See generally* Note, *Right to Aid in Addition to Counsel for Indigent Criminal Defendants*, 47 MINN. L. REV. 1054, 1073-74 (1963); Note, *The Representation of Indigent Criminal Defendants in the Federal District Courts*, 76 HARV. L. REV. 579-80 (1963); Note, *Representation of Indigents in California—A Field Study of the Public Defender and Assigned Counsel Systems*, 13 STAN. L. REV. 522, 545 (1961).

15. Williams v. Ill., 399 U.S. 235 (1970); Tate v. Short, 401 U.S. 395 (1971), discussed in the text accompanying notes 29-52 *infra*.

16. People v. Saffore, 18 N.Y.2d 101, 218 N.E.2d 686, 271 N.Y.S.2d 972 (1966).

17. Note 26 *infra*.

18. People v. Saffore, 18 N.Y.2d 101, 218 N.E.2d 686, 271 N.Y.S.2d 972 (1966).

Supreme Court spoke out on the issue, the New York Court of Appeals avoided determining the constitutional issues by holding that the imprisonment of the indigent defendant for nonpayment of his fine was unauthorized under New York law. The defendant had pleaded guilty to charges of third degree assault and was given the maximum sentence of one year and a fine of $500, which, if not paid, was to be served at the rate of one day for each dollar. The defendant was an indigent, which was known to the sentencing court. It had taken this fact into account in assigning counsel for him, but disregarded it in assessing the fine. The Court of Appeals asserted that under New York law, imprisonment for nonpayment of a fine is not part of the punishment for the offense, but a means of enforcing payment.[19] Therefore, the court concluded: "[I]t runs directly contra to the meaning and intent of section 484 of the Code of Criminal Procedure[20] to order a defendant to stay in prison until he pays a fine, when the court knows that he cannot possibly pay it."[21] The court construed the statute as calling for the imprisonment of those who refuse to pay their fines, but as not having been intended to apply to those who are unable to pay. Thus, the decision did not place the right of an indigent to avoid imprisonment for nonpayment on a constitutional footing. However, the court did say in dictum that "[i]t is a denial of due process and of equal protection of the law to let a defendant's lack of money determine how long he must be imprisoned."[22]

In *Sawyer v. District of Columbia*,[23] the defendant appealed his sentence for jaywalking on the grounds that it constituted a violation of his right to equal protection as well as a proscription of excessive fines. The maximum imprisonment for the offense was 10 days in jail. The trial court knew of the defendant's indigency but nevertheless imposed a fine of $150 or, in default thereof, a penalty of 60 days in jail. The District of Columbia Municipal Court of Appeals, in accord with *People v. Saffore*,[24] found that the purpose of the statute

19. New York had established that imprisonment for nonpayment of a fine was merely a means of collection in Matter of McKinney v. Hamilton, 282 N.Y. 393, 26 N.E.2d 949 (1940).

20. N.Y. CODE CRIM. PROC. §§ 484, 718 (McKinney 1958) provided that if a sentence of imprisonment and a fine was imposed and the fine was unpaid at the expiration of the prison sentence, it was to be served out at the rate of one day in prison for each dollar remaining unpaid. These statutes were repealed by N.Y. LAWS ch. 681, §§ 66, 82 (1967). New York has altered the statute since that time. *See* N.Y. CODE OF CRIM. PROC. § 470-e (McKinney Supp. 1970).

21. People v. Saffore, 18 N.Y.2d 101, 218 N.E.2d 686, 687, 271 N.Y.S.2d 972 (1966). *But see* People v. Windes, 283 Ill. 251, 119 N.E. 297, 298 (1918), where the Illinois Supreme Court said of a similar statute, "The statute was intended to enable the state to collect in labor fines that could not be collected by execution, and applies as well to a case where a person is able to pay in labor but not in money as to a case where he is able to pay in money but is unwilling to do so."

22. People v. Saffore, 18 N.Y.2d 101, 218 N.E.2d 686, 688, 271 N.Y.S.2d 972 (1966). The court also raised the possibility that the fine was excessive, in violation of the eighth amendment prohibition against excessive fines.

23. Sawyer v. Dist. of Col., 238 A.2d 314 (D.C. App. 1968).

24. People v. Saffore, 18 N.Y.2d 101, 218 N.E.2d 686, 271 N.Y.S.2d 972 (1966).

authorizing such imprisonment was to enforce collection. It therefore held that imprisoning one unable to pay a fine, since it cannot possibly serve to enforce collection, is an abuse of a court's discretion. The court limited its holding to those instances in which the resulting period of confinement exceeds the maximum term of imprisonment which could be levied under the substantive statute as an original sentence.[25]

Other cases have held imprisonment for nonpayment violative of one or several of the indigent's constitutional rights.[26] One early case held that the portion of a sentence for embezzlement ordering confinement in default of payment of the fine was cruel and unusual punishment.[27] Although the defendant in that case was apparently not an indigent, his sentence to a fine of $576,853.74 is analogous to fining a person without funds. Ordered to confinement in the county jail until payment, the order provided that the additional confinement was not to exceed 288,426 days. On the basis of the eighth amendment prohibition against cruel and unusual punishment, the court modified the sentence by reversing that portion imposing the fine, as well as the provision for confinement until payment thereof.[28]

THE SUPREME COURT CASES

In *Williams v. Illinois*,[29] the Supreme Court of the United States resolved the existing conflict in the decisions throughout the country

25. Sawyer v. Dist. of Col., 238 A.2d 314, 317 (D.C. App. 1968). *In re* Petition of Cole, 17 Ohio App. 2d 207, 245 N.E.2d 384 (1968) cited Sawyer as authority for the proposition that sentencing an indigent to pay a fine or in the alternative, to serve a jail term longer than that provided in the statute under which the indigent was charged, is an abuse of discretion by the trial court.

26. Spinler v. State, 446 P.2d 429 (Mont. 1968) (equal protection); State v. Allen, 104 N.J. Super. 187, 249 A.2d 70 (1969), *aff'd* without reaching this point, 54 N.J. 311, 255 A.2d 221 (1969) (equal protection and due process). *See* Tussman & tenBroek, *The Equal Protection of the Laws*, 37 CALIF. L. REV. 341, 362-65 (1949) where it is argued that due process and equal protection are blurred into one so that a violation of equal protection is also a violation of due process. *Cf.* Note, *Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065 (1969).

Other constitutional arguments included that imprisonment of indigents in default on fines or court costs violated the eighth amendment prohibition against excessive fines. People v. Saffore, 18 N.Y.2d 101, 218 N.E.2d 686, 271 N.Y.S.2d 972 (1966) (dictum); *cf.* State v. Staub, 182 La. 1040, 162 So. 766, 768 (1935). Another eighth amendment argument was that the proscription on "cruel and unusual punishment" applied to imprisoning an offender for his inability to pay a fine. *See* Comment, 57 CALIF. L. REV. 778, 803, 806 (1969). As the author points out, if imprisonment is considered a means of compelling payment the question of cruel and unusual punishment should arise under recent decisions holding punishment for a status or conduct beyond the defendant's control unconstitutional. *E.g.*, Robinson v. Cal., 370 U.S. 660 (1962) (it is cruel and unusual punishment to punish a defendant for his status as a drug addict). Poverty, like drug addiction, is a status beyond the control of the individual. The argument that imprisonment for nonpayment violated the various state constitutional restrictions against imprisonment for debt has been dismissed as tenuous on the basis of the long recognized distinction between the two phrases as terms of art. However, the practice of confining indigent offenders for nonpayment of fines has been termed an archaic system akin to imprisonment for debt. People v. McMillan, 53 Misc. 2d 685, 279 N.Y.S.2d 941 (1967).

27. State v. Ross, 55 Or. 450, 104 P. 596 (1909), *modified on rehearing*, 55 Or. 474, 106 P. 1022 (1910), *writ of error dismissed* 227 U.S. 150 (1913).

28. State v. Ross, 55 Or. 474, 106 P. 1022 (1910).

29. Williams v. Ill., 399 U.S. 235 (1970).

by holding that under the Equal Protection Clause of the Fourteenth Amendment an indigent offender who fails to pay his fine cannot be imprisoned beyond the maximum statutory period set for the substantive offense.[30] The defendant had been convicted of petty theft and given the maximum sentence of one year in prison plus a $500 fine and $5 in court costs. The judgment provided that if he had not paid the monetary obligations by the expiration of the one year sentence, he would have to remain in jail and work them off at the rate of $5 per day.[31] The Supreme Court of Illinois rejected the defendant's argument that an indigent is denied equal protection of the laws when he is imprisoned for failure to fulfill the monetary obligations of his sentence.[32] In reversing, the United States Supreme Court noted that the appellant would be imprisoned 101 days beyond the maximum period of confinement set by statute[33] and stated:

> A state has wide latitude in fixing the punishment for state crimes. Thus, appellant does not assert that Illinois could not have appropriately fixed the penalty, in the first instance, at one year and 101 days. Nor has the claim been advanced that the sentence imposed was excessive in light of the circumstances of the commission of this particular offense. However, once the State has defined the outer limits of incarceration necessary to satisfy its penological interests and policies, *it may not then subject a certain class of convicted defendants to a period of imprisonment beyond the statutory maximum solely by reason of their indigency.*[34] (Emphasis added)

The sentence was not imposed upon the defendant because of his indigency, but because he had committed a crime. However, the court, quoting *Griffin v. Illinois*,[35] opined that "a law nondiscriminatory on its face may be grossly discriminatory in its operation."[36] Thus the Court recognized that the sentence must be tailored to fit the offender and not merely the crime.[37] Accordingly, it held that

30. *Id.* at 240-241. This holding recognized the distinction between default confinement that serves to extend imprisonment beyond the statutory maximum term of imprisonment, and those situations in which the term of incarceration remains within the statutory limits. For an earlier argument that such a distinction is unwarranted, see the dissenting opinion of Conford, S.J.A.D., in State v. Allen, 104 N.J. Super. 187, 249 A.2d 70 (1969).

31. This provision in the judgment was authorized by ILL. REV. STAT. ch. 38, § 1-7(k) (1967).

32. People v. Williams, 41 Ill. 2d 511, 244 N.E.2d 197 (1969).

33. Williams v. Ill., 399 U.S. 235, 237 (1970).

34. *Id.* at 241-42.

35. Griffin v. Ill., 351 U.S. 12 (1956).

36. Williams v. Ill., 399 U.S. 235, 242 (1970). "On its face the statute extends to all defendants an apparently equal opportunity for limiting confinement to the statutory maximum simply by satisfying a money judgment. In fact, this is an illusory choice for Williams or any indigent who, by definition, is without funds."

37. *Id.* at 243. "The Constitution permits qualitative differences in meting out punishment and there is no requirement that persons convicted of the same offense receive identical sentences."

under the Equal Protection Clause, the statutory ceiling placed on imprisonment for any substantive offense must be the same for all defendants irrespective of their economic status.[38]

Despite the Court's failure to explicitly declare what equal protection test it employed in arriving at its conclusion,[39] it did, for the first time, place the right of an indigent to avoid imprisonment for nonpayment of a fine or court costs on a constitutional basis. However, the Court expressly limited its equal protection holding to situations in which the effect of the imprisonment would be to keep the indigent incarcerated beyond the statutory maximum.[40]

In spite of the limitation of the *Williams* decision to incarcerations beyond the statutory maximum, a concurring opinion in a companion case,[41] in which four justices joined, made it clear that the same principles applied in *Williams* might compel a holding that the imprisonment of indigents was unconstitutional in other situations where he was essentially being punished for his status, something over which he has no control:

> [T]he same constitutional defect condemned in *Williams* also inheres in jailing an indigent for failing to make immediate payment of any fine, whether or not the fine is accompanied by a jail term and whether or not the jail term of the indigent extends beyond the maximum term that may be imposed on a person willing and able to pay a fine. In each case, the Constitution prohibits the State from imposing a fine as a sentence and then automatically converting it into a jail term solely because the defendant is indigent and cannot forthwith pay the fine in full.[42]

Less than a year later the Court was presented with the case of *Tate v. Short*,[43] which expanded the precedent set in *Williams* by

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38. *Id.* at 238 n.7, 259. Several constitutional arguments had been raised by Williams in his appeal. Besides contending that every instance of default imprisonment violates either the Equal Protection and/or Due Process Clause(s), he asserted that the $5 per diem figure for "working off" the fine was unreasonable and irrational. Mr. Justice Harlan, in concurring in the result, preferred to judge the legislation on the basis of due process, i.e., whether it arbitrarily infringed upon a constitutionally protected right of the defendant. In his view, the equal protection argument espoused by the majority was a " 'wolf in sheep's clothing,' for that rationale is no more than a masquerade of a supposedly objective standard for *subjective* judicial judgment as to what state legislation offends notions of 'fundamental fairness'." *See also* Tussman & tenBroek, 37 CALIF. L. REV. 341, 362-65 (1949) (due process and equal protection tend to merge); Note, *Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065 (1969).

39. *See* notes 53-57 and accompanying text *infra*.

40. Williams v. Ill., 399 U.S. 235, 243 (1970).
> [N]othing we now hold precludes a judge from imposing on an indigent, as on any defendant, the maximum penalty prescribed by law.
> It bears emphasis that our holding does not deal with a judgment of confinement for nonpayment of a fine in the familiar pattern of alternative sentence of '$30 or 30 days'. We hold only that a State may not constitutionally imprison beyond the maximum duration fixed by statute a defendant who is financially unable to pay a fine.

41. Morris v. Schoonfield, 399 U.S. 508 (1970) (concurring opinion).

42. *Id.* at 509.

43. Tate v. Short, 401 U.S. 395 (1971).

adopting the reasoning in the concurring opinion quoted above.[44] In that case the defendant had accumulated fines of $425 on nine convictions in the Corporation Court of Houston, Texas, for traffic offenses. He was unable to pay the fines because of indigency and the Corporation Court, which otherwise had no jurisdiction to impose prison sentences, committed him to the municipal prison farm according to the provisions of a state statute and municipal ordinance which required that he remain there a sufficient time to satisfy the fines at the rate of five dollars for each day.[45] This meant that he would have to serve 85 days at the prison farm. He applied to the County Criminal Court of Harris County for a writ of habeas corpus after 21 days in custody, and he was released on bond. The County Court denied the application and the Court of Criminal Appeals of Texas affirmed the denial.[46] The Supreme Court reversed, thereby expanding the precedent set in *Williams v. Illinois*:[47]

> The Illinois statute involved in *Williams* authorized both a fine and imprisonment. . . . We held that the Illinois statute as applied to Williams worked an invidious discrimination solely because he was too poor to pay the fine, and therefore violated the Equal Protection Clause.
>
> Although the instant case involves offenses punishable by fines only, petitioner's imprisonment for nonpayment constitutes precisely the same unconstitutional discrimination since, like Williams, petitioner was subjected to imprisonment solely because of his indigency.[48]

A wealthier defendant could have avoided incarceration in *Tate*, as in *Williams*, merely by paying the fine. The person who is unable to pay does not have the same choice of purchasing his freedom.[49] He

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44. *Id.* at 398.

45. TEX. CODE OF CRIM. PROC. ANN. art. 45.43 (Vernon's 1966).

46. *Ex parte* Tate, 445 S.W.2d 210 (Tex. Cr. App. 1969).

47. Williams v. Ill., 399 U.S. 235, 241-43 (1970).

48. Tate v. Short, 401 U.S. 395, 397-98 (1971).

49. In Griffin v. Ill., 351 U.S. 12, 19 (1956) Mr. Justice Black, speaking for the court, said: "There can be no equal justice where the kind of trial a man gets depends on the amount of money he has." As has been pointed out, it is also true that equal justice is denied when the kind of sentence a man gets is determind by his wealth. 45 TUL. L. REV. 627, 631 (1971). In *Griffin* the Court held that it was a violation of the Equal Protection Clause to fail to provide an indigent criminal defendant with a trial transcript at public expense in order to prosecute a first appeal from a criminal conviction. Since that time there has been an almost continuous flow of decisions from the Supreme Court in the area of cconstitutional rights of indigent defendants. *See* Eskridge v. Washington Prison Bd., 357 U.S. 214 (1958) (full appellate review available to all defendants); Burns v. Ohio, 360 U.S. 252 (1959) (indigents can be exempt from paying filing fees to begin appeal); Smith v. Bennett, 365 U.S. 708 (1961) (filing fee for writ of habeas corpus unconstitutional when applied to indigents); Draper v. Wash., 372 U.S. 487 (1963) (appellate review cannot be deemed frivolous because of defendant's indigency); Gideon v. Wainwright, 372 U.S. 335 (1963) (State must provide counsel for indigents at trial court); Douglas v. Cal., 372 U.S. 353 (1963) (indigent is entitled to counsel at first appeal at state's expense); Lane v. Brown, 372 U.S. 477 (1963) (writs of coram nobis); Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966) (declared a

is forced to give up his freedom because of a status over which he has no control.

The state cannot achieve its purpose of compelling payment by imprisoning those unable to pay.[50] On the contrary, imprisonment of indigents for nonpayment may be counterproductive. The President's Commission on Riots and Civil Disorders[51] has reported that the general distrust of the judicial system which is prevalent in ghetto areas, where income is lowest, has helped to increase the level of crime.

> Some of our courts. . . have lost the confidence of the poor. . . . The belief is pervasive among ghetto residents that lower courts. . . dispense "assembly-line" justice; that from arrest to sentencing, the poor and uneducated are denied equal justice with the affluent, that procedures such as. . . fines have been perverted to perpetuate class inequities. . . . [T]he apparatus of justice in some areas has itself become a focus for distrust and hostility. Too often the courts have operated to aggravate rather than relieve the tensions that ignite and fire disorders.[52]

THE CURRENT STATE OF THE LAW

The Supreme Court did not make clear in *Williams* what equal protection test it employed in reaching its decision.[53] The Court may have judged the legislation by the "traditional test," which requires that classifications made by state law bear some rational nexus to a legitimate state objective.[54] A decision of unconstitutionality could have been supported on the basis of the traditional equal protection test on the ground that the legitimate objective of the state was compelling payment of a fine, and that the objective could not be achieved by imprisoning one who is unable to pay. The Court may have also used the so-called stricter test in arriving at its conclusion. In applying the stricter test the Court has more closely scrutinized state statutes when a "suspect classification" or "fundamental interest" is involved and has required the state to show a compelling

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state poll tax unconstitutional because it excluded indigents from voting on the basis of their inability to pay a fee); Anders v. Cal., 386 U.S. 738 (1967) (indigent must have counsel who will advocate his cause); Coleman v. Ala., 399 U.S. 1 (1970) (defendant must have counsel at preliminary hearing).

50. "Imprisonment in such a case is not imposed to further any penal objective of the State. It is imposed to augment the State's revenues but obviously does not serve that purpose; the defendant cannot pay because he is indigent and his imprisonment, rather than aiding collection of the revenue, saddles the State with the cost of feeding and housing him for the period of his imprisonment." Tate v. Short, 401 U.S. 395, 399 (1971).

51. REPORT OF THE NAT'L ADVISORY COMM'N ON CIVIL DISORDERS (1968).

52. *Id.* at 337.

53. 16 VILL. L. REV. 754, 758 (1971).

54. Note, *Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065, 1077-87 (1969).

interest that justifies the law as such, and the distinctions created by the law must be necessary to further the state's purpose.[55] Indigency might have been considered a "suspect classification" as has been race and alienage,[56] or the right to avoid imprisonment a "fundamental interest," to justify the use of the stricter test.[57] The Court's finding that the state statutes in *Williams* and *Tate* were unconstitutional as applied to the particular defendants could have rested on the stricter test since it seems unlikely that a state could sustain the burden of showing that imprisonment of those unable to pay can further its asserted purpose of compelling payment of unpaid fines.

Thus it seems that a holding of unconstitutionality in *Williams* and *Tate* could have been fairly derived from the application of either the traditional equal protection test, or the stricter test. However, the fact that the Court did not indicate which equal protection test it relied upon makes it a difficult task for the lower courts to apply the *Williams* and *Tate* decisions.[58]

A further difficulty in ascertaining the current state of the law is the question of whether the lower courts will follow that portion of the Court's opinion in *Tate* which declares imprisonment of indigents for nonpayment of fines unconstitutional "whether or not the jail term of the indigent extends beyond the maximum term that may be imposed on a person willing and able to pay." This statement is quoted from the opinion of Justice White in *Morris v.*

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55. *Id.* at 1087-1121. The Supreme Court of California had already applied the stricter test in a case involving imprisonment of an indigent for nonpayment of a fine. *In re* Antazo, 3 Cal. 3d 100, 473 P.2d 999, 89 Cal. Rptr. 255 (1970). The court reasoned that the United States Supreme Court had tended to apply the "traditional test" only in areas such as economic regulation where judicial restraint is considered essential. It felt that the stricter test was appropriate where a "suspect classification" or "fundamental interest" was involved.

56. *See e.g.,* Shapiro v. Thompson, 394 U.S. 618 (1969); Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966); Williams v. Rhodes, 393 U.S. 23 (1968).

57. Although the California court indicated in *In re* Antazo, 3 Cal. 3d 100, 473 P.2d 999, 89 Cal. Rptr. 255 (1970), that the presence of either a "suspect classification" or a "fundamental interest" would call for the use of the stricter test, decisions of the United States Supreme Court may require more. Note, *Developments in the Law—Equal Protection,* 82 HARV. L. REV. 1065, 1120-21 (1969):

> The interaction of these two factors ["suspect classifications" and "fundamental interests"] can be visualized by imagining two gradients. Along the first . . . is a hierarchy of classifications, with those which are most invidious—suspect classifications based on traits such as race—at the top. Along the second, arranged in ascending order of importance, are interests such as employment, education, and voting. When the classification drawn lies at the top of the first gradient, it will be subject to strict review even when the interest it affects ranks low on the second gradient—for example, the denial of a driver's license on the basis of race. As the nature of the classification becomes less invidious . . . the measure will continue to elicit strict review only as it affects interests progressively more important. . . . Thus, restrained review ["traditional test"] might be applied when a state disqualifies by requiring a fee from all persons desiring a driver's license or a university education, whereas strict review is applied when indigents are disqualified from voting through a fee imposed for the exercise of that right.

58. *See e.g.,* State v. DeBonis, 58 N.J. 182, 276 A.2d 137 (1971), discussed in the text accompanying notes 68-72 *infra.*

Schoonfield,[59] whose reasoning was expressly adopted by the majority in *Tate v. Short*.[60] However, the principle expressed in *Williams v. Illinois*,[61] that, "[o]nce the State has defined the outer limits of incarceration necessary to satisfy its penological interests and policies, it may not then subject a certain class of convicted defendants to a period of imprisonment beyond the statutory maximum . . ."[62] would have been a sufficient basis in itself for holding Tate's incarceration violative of the Equal Protection Clause.[63] In *Tate* the "outer limit" of incarceration set by the State was a fine. Therefore, the broader language adopted in the opinion qualifies as dictum and is not necessarily binding on the lower courts. The Supreme Court of Ohio has applied *Tate* to find imprisonment of an indigent for nonpayment of his fine unconstitutional, even though the resulting period of confinement was within the maximum statutory period set for the substantive offense.[64] However, the dissenting judge would have distinguished *Tate* in that it involved confinement beyond the statutory maximum.[65]

One further problem in gauging the scope of *Williams* and *Tate* remains. Both cases dealt with statutes which were construed by the Court as a "means of enabling the Court to enforce collection of money that a convicted defendant was obligated by the sentence to pay."[67] In *State v. DeBonis*,[68] the Supreme Court of New Jersey pointed out that it had construed its statute calling for imprisonment for nonpayment as having been intended by the legislature "to further a penal objective by subjecting a defendant to one sting instead of another that failed."[69] The question thus arose whether that court would be compelled to follow the *Williams* and *Tate* equal protection holdings which were based on statutes having as their purpose compelling payment, not a substitute punishment. The New Jersey Court read *Williams* as finding an invidious discrimination "in the denial to the defendant of the opportunity to raise the moneys and thereby to experience the same punishment which would be his if he had sufficient funds on hand."[70] It therefore reversed the municipal court

59. Morris v. Schoonfield, 399 U.S. 508 (1970) (concurring opinion).
60. Tate v. Short, 401 U.S. 395 (1971).
61. Williams v. Ill., 399 U.S. 235 (1970).
62. *Id.* at 241-42.
63. *See* text accompanying note 66 *infra*.
64. *In re* Jackson, 26 Ohio St. 2d 51, 268 N.E.2d 812 (1971). The California Supreme Court had already held imprisonment of an indigent because of his inability to pay a fine violative of the Equal Protection Clause even though the resulting confinement is less than the statutory maximum set for the substantive offense. The decision was based on the stricter equal protection test and held that the imprisonment was not necessary to promote the state's asserted interest. *In re* Antazo, 3 Cal. 3d 100, 473 P.2d 999, 89 Cal. Rptr. 255 (1970).
65. *In re* Jackson, 26 Ohio St. 2d 51, 268 N.E.2d 812, 814 (1971).
66. *Id.*
67. Williams v. Ill., 399 U.S. 235, 240 (1970).
68. State v. DeBonis, 58 N.J. 182, 276 A.2d 137 (1971).
69. *Id.* at 145.
70. *Id.* at 143-44.

for denying the defendant an opportunity to pay his fine in reasonable installments.[71]

It has been pointed out that a sentencing court might be able to deny an indigent defendant his constitutional rights as announced in the *Williams* and *Tate* decisions by simply imposing an original sentence of imprisonment on those unable to pay a fine.[72] This would create a difficult problem of proof for the indigent who would then have to prove that his imprisonment was due to his indigence and not imposed because of a judicial determination that imprisonment is the appropriate punishment.[73] However, under the New Jersey court's application of *Williams* and *Tate*, failure of the sentencing court to allow the fine to be paid in installments is itself a violation of the Equal Protection Clause.[74] Appelate courts should be able to review the merits of the sentence imposed as easily as they can decide whether it was unconstitutional or not to allow the fine to be paid in installments.

It must also be remembered that in order for a defendant to assert a denial of equal protection under *Williams* and *Tate* he will have to demonstrate to the *sentencing court* that he is an indigent.[75] In *Harris v. United States*,[76] the United States Court of Appeals for the District of Columbia said that a motion to vacate or modify the judgment, alleging indigency, was necessary if the defendant wished the trial judge to take into account his inadequate financial condition.[77] Failure to do so may amount to a waiver.

THE FUTURE OF THE FINE AS A PENAL SANCTION

If fining is a legitimate penal objective, the courts must be able to impose a fine on all offenders, indigent as well as affluent. Traditionally, there have been several bases for imposing criminal sanctions, viz., retribution, rehabilitation, incapacitation and deterrence. Retribution is now largely discouraged as a penal objective.[78] But even assuming its legitimacy, there are few situations in which its purpose could be achieved by a fine standing alone. Perhaps a fine

71. *Id.* at 147. The New Jersey Court distinguished imprisonment for nonpayment of court costs. "[I]n the absence of a statute making 'costs' a part of punishment, costs cannot be deemed to seek a punitive end."

72. 16 VILL. L. REV. 754, 763 (1971).

73. *Id.*

74. State v. DeBonis, 58 N.J. 182, 276 A.2d 137 (1971). This again emphasizes the importance of determining which equal protection test the United States Supreme Court used to reach its decisions in *Williams* and *Tate*. Both equal protection tests are based to some degree on the "purpose" of the statute. However, there might be a different conclusion as to the constitutionality of a statute having as its purpose substituted punishment, if a particular equal protection test was invoked by the Court.

75. Harris v. United States, 440 F.2d 240, 241 (D.C. Cir. 1971) (Case affirmed because no showing of indigency had been made in the trial court).

76. Harris v. United States, 440 F.2d 240, 241 (D.C. Cir. 1971).

77. *Id.* at 241. The Court pointed out that this was the procedure employed in *Williams*.

78. *See* MICHAEL & WEHSLER, CRIMINAL LAW AND ADMINISTRATION 4-17 (1940).

would avenge an embezzlement or other crimes where greed is a motive,[79] but in the typical case it would have little impact in terms of retribution. Likewise a fine is not well suited to the purposes of rehabilitation or incapacitation, since the offender is neither treated nor confined. Fines are therefore justifiable from a penological standpoint primarily as a deterrent.[80] It has been said that the imposition of a fine probably does have some deterrent effect when imposed as the sole penalty for an offense.[81]

In determining what reform is needed in the present sentencing practices of the courts there are other considerations besides the efficacy of the fine as a penal practice. It seems that often the fine is imposed as a negative alternative to the other punishments available. Since the 18th century, virtually all commentators have criticized the use of short-term imprisonment as a penal sanction.[82] Since fines are most often used as a penalty for minor infractions, their abolition might well result in a substantial increase in the number of offenders sentenced to short-term confinement. This is a highly undesirable prospect, and one that in itself supports the continued use of the fine as a criminal sanction, without regard to its penological effectiveness.[83]

> The abolition of fines would deprive the sentencing process of much flexibility, for this form of punishment can be easily tailored to the individual defendant so as to avoid injustice.[84]

There are also financial considerations in determining when to

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79. Note, 101 U. PA. L. REV. 1013, 1018 (1953).

80. They are also sometimes used as a means of making restitution to the victim. However, this is more properly an aim of the civil, than the criminal law.

81. Note, 101 U. PA. L. REV. 1013, 1018 (1953). The same commentator has pointed out that where the sentence is imprisonment plus a fine it is difficult to assign any great deterrent power to the fine, if the imprisonment itself is insufficient to restrain the potential offender.

82. ABA, SENTENCING ALTERNATIVES AND PROCEDURES 120 (1968); PRESIDENT'S COMM'N ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: THE COURTS (1967); G. PLAYFAIR & D. SINGTON, CRIME PUNISHMENT AND CURE 20-21 (1965); Comment, 57 CALIF. L. REV. 778, 793 (1969).

83. Not all writers have acknowledged the "crime school" effect of short-term imprisonment. Justice Blackmun, in concurring in *Tate*, observed that the Court's holding that it was unconstitutional to imprison an indigent for non-payment of a fine "[m]ay well encourage state and municipal legislatures to do away with the fine and to have the jail term as the only punishment for a broad range of traffic offenses. Eliminating the fine whenever it is prescribed as alternative punishment avoids the equal protection issue that indigency occasions and leaves only possible eighth amendment considerations. If, as a nation, we ever reach that happy point where we are willing to set our personal convenience to one side and we are really serious about resolving the problem of traffic irresponsibility and the frightful carnage it spews upon our highways, a development of that kind may not be at all undesirable." Tate v. Short, 401 U.S. 395, 401 (1971) (concurring opinion). This argument is unsound because it begs the question. It assumes that the higher the penalty, the lower will be the rate of occurrence of the crime, and on that basis proposes stricter penalties. But the lower occurrence of crime is the very thing that must be shown to support a policy of stricter penalties. Nowhere is the reader given cause to believe that stricter penalties will ensure safety on the highways, or serve any other purpose.

84. State v. Tackett, 483 P.2d 191, 192 (Hawaii 1971).

use a fine as opposed to imprisonment as a penalty for criminal conduct. Although raising revenue for the state is not a direct purpose of fining, it is a welcomed by-product. When the offender is imprisoned, not only does the state lose revenue it would have added if a fine had been imposed, but it also incurs the expense of housing and feeding him, as well as possibly supporting his family through state welfare programs while he is incarcerated. The average cost in the United States of imprisoning an adult offender for one year is $2,000.[85] The overall costs of an efficient administration of criminal justice is so high that it is already beyond the amount that many states are willing to appropriate for the purpose.[86] Existing budgets should not be further strained by a deluge of new prisoners, unless it can be clearly shown that such a policy will further some other more compelling interests of the state.[87]

There are also instances in which the fine is the only realistic punishment available, e.g., violations of the criminal law by corporations whose officers are not individually liable. Since there is no one available to imprison, the fine must be employed to deter the corporation from committing further infractions.

The fine will in all probability continue to be employed extensively as a criminal sanction. Assuming this to be true, and recognizing that it has now been declared unconstitutional to imprison an indigent for nonpayment of a fine or court costs,[88] it is timely to consider possible alternatives to the existing fining system.

THE NEED FOR LEGISLATION

It is incumbent upon the states to find alternatives to imprisoning indigents for nonpayment of fines or court costs. In *Tate v. Short*,[89] the Supreme Court re-emphasized its admonition in *Williams* to the effect that this can and must be done:

> The State is not powerless to enforce judgments against those financially unable to pay a fine; indeed, a different result would amount to inverse discrimination since it would enable an indigent to avoid both the fine and imprisonment for nonpayment whereas other defendants must always suffer one or the other conviction.[90]

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85. PRESIDENT'S COMM'N ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: THE COURTS 15 (1967). The average daily cost per capita for each inmate at Oahu State Prison, Hawaii, for the year 1969-70 was $19.86. State v. Tackett, 483 P.2d 191 (Hawaii 1971).

86. For an illustration of the consequences of over burdened facilities see the description of the Arkansas penal situation in Holt v. Sarver, 309 F. Supp. 362 (E.D. Ark. 1970).

87. Imprisonment of those convicted of minor traffic violations would call for such great increases in jail space that it would not be feasible to accommodate all offenders without construction of addtional facilities.

88. *See* text accompanying notes 29-52 *supra*.

89. Tate v. Short, 401 U.S. 395 (1971).

90. *Id.* at 399.

Although the Court did not intimate the precise legislation that would enable the state to enforce judgments against those financially unable to pay a fine, it did imply that there were schemes available that would be effective and still not violate the indigent's rights to equal protection of the law:

> It is unnecessary for us to canvass the numerous alternatives to which the State by legislative enactment—or judges within the scope of their authority—may resort in order to avoid imprisoning an indigent. . . for involuntary nonpayment of a fine or court costs. Appellant has suggested several plans, some of which are already utilized in some States, while others resemble those proposed by various studies. The State is free to choose from among the variety of solutions already proposed and, of course, it may devise new ones.[91]

1. INSTALLMENT PLANS FOR THE PAYMENT OF FINES

Among the plans impliedly endorsed by the Court was a procedure for payment of fines in installments. Some such plans were already then being used in various states.[92] Under the installment-plan the fine is paid in the same manner that a purchase is made on a conditional sales contract. Payments are spread out over a period of time, taking into consideration the amount of income the indigent is expected to have[93] and such other things as the size of the family he must support. There is no reason why the family of the offender should suffer deprivation when they themselves have not violated the law.

In setting up the amount of installments the court would be in a similar position to the businessman who deals with the poor. The huge volume of sales of consumer products that is transacted on the basis of installment payments is a realization that certain segments of the population do not find themselves able to accumulate large sums of money at any one time. By being able to spread payments

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91. *Id.* at 399-400, citing Williams v. Ill., 399 U.S. 235, 244-245 (1970).

92. In a footnote the *Tate* Court cited the following statutes as examples of then existing installment-plans for the payment of fines: CAL. PENAL CODE § 1205 (1970) (misdemeanors); DEL. CODE ANN. tit. 11, § 4332(c) (Supp. 1970); MD. ANN. CODE art. 38, § 4(a)(2) (Supp. 1970); MASS. GEN. LAWS ANN. ch. 279, § 1A (1959); N.Y. CODE CRIM. PROC. § 470-d(1)(b) (McKinney Supp. 1970); PA. STAT. ANN. tit. 19, § 953 (1964); and WASH. REV. CODE ANN. § 9.92.070 (1961). Other examples of existing installment-plans are: N.J. REV. STAT. § 2A: 166-15 (1953) (misdemeanors); OHIO REV. CODE ANN. § 2947.11 (Baldwin 1964) (misdemeanors); S.C. CODE ANN. § 55-593(6) (1962) (fines as a condition of probation); UTAH CODE ANN. § 77-35-17 (1953) (fines as a condition of probation). Proposed legislation for fines to be payable in installments includes: MODEL PENAL CODE § 302.1(1) (1962); ABA, SENTENCING ALTERNATIVES AND PROCEDURE § 2.7(b) (1968). All of these laws and proposals make the allowance of installment payments discretionary with the judge. It is the opinion of this writer that allowing payment to be made in installments should be mandatory.

93. It seems that all income, including payments under the various welfare programs, that inure to the benefit of the offender, should be included as income for these purposes. Welfare payments that are essentially for the benefit of other members of the offender's family should be excluded in considering the amount of the fine to assess. *See also* State v. DeBonis, 58 N.J. 182, 276 A.2d 137 (1971).

over an extended period, many consumers are encouraged to purchase products that they might otherwise feel themselves unable to afford. Similar reasoning supports the use of installment-plans for the payment of fines. If the offender feels that the fine has been assessed in installments that are within his ability to pay, he may be encouraged to make a greater effort to pay the fine. Indeed, it has been said that the states which currently have provision for installment payment of fines achieve a higher rate of collection.[94] The installment-plan method has also been supported on other grounds:

> This procedure [collection of fines in installments] has been widely endorsed as effective not only to collect the fine but also to save the expense of maintaining a prisoner and avoiding the necessity of supporting his family under the state welfare program while he is confined.[95]

Of course the use of installment payments requires a greater inquiry on the part of the court into the background of the offender to determine the amount of the installments, and the intervals at which payments should fall due. However, these administrative costs seem small compared to the costs of confinement of the offender, and also seem inevitable in light of the Supreme Court's position:

> We are not unaware that today's holding may place a further burden on States in administering criminal justice . . . But the constitutional imperatives of the Equal Protection Clause must have priority over the comfortable convenience of the status quo.[96]

Allowing payments to be made in installments would greatly increase the amount of a fine that a court could constitutionally impose upon an indigent. By making payment possible within the limited means of the indigent, the equal protection deficiency in imprisoning an indigent for failure to pay is removed.[97] The deterrent effect of the fine would not be diminished since the court can impose a greater fine through installments, and the consequences of the fine upon the offender would seem to be just as great since he will be forced to

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94. Note, 101 U. PA. L. REV. 1013, 1023 (1953). *See also* Note, *Imprisonment for Nonpayment of Fines and Costs: A New Look at the Law and the Constitution,* 22 VAND. L. REV. 611, 625 (1969). *But see* 16 VILL. L. REV. 754 (1971).

95. Tate v. Short, 401 U.S. 395, 400-05 (1971), discussed in text accompanying notes 43-52 *supra. Cf.* State v. DeBonis, 58 N.J. 182, 276 A.2d 137 (1971) where it is said that failure of the sentencing court to allow payment of a fine to be made in reasonable installments is a violation of the indigent's right to equal protection.

96. Williams v. Ill., 399 U.S. 235, 245 (1970).

97. This is because there is no constitutional difficulty in imprisoning one who willfully refuses to pay a fine. In *Tate* the court made this clear.

> We emphasize that our holding today does not suggest any constitutional infirmity in imprisonment of a defendant with the means to pay a fine who refuses or neglects to do so.

Tate v. Short, 401 U.S. 395, 400 (1971).

think about the crime he has committed over a longer period of time than if he had paid the fine immediately in one lump sum.

The advantages of installment-payment of fines over requiring immediate payment has been summarized as: "(1) avoidance of the evils of short-term imprisonment; (2) actual collection of more fines, thus increasing the retributive and deterrent effects of the penalty and adding to revenues; (3) decrease of mounting prison maintenance expenses; (4) probable decrease in costs of aid given prisoners' families by welfare departments." To this list can now be added, (5) avoiding having the indigent escape punishment completely by a judicial determination that his imprisonment is unconstitutional.[98]

If legislation is not forthcoming, appellate courts, within the scope of their authority, may ensure that defendants have an opportunity to pay their fines in installments. The New Jersey Supreme Court has said: "[W]e find the following course to be appropriate. If a defendant is unable to pay a fine at once, he shall, upon showing of that inability, be afforded the opportunity to pay the fine in reasonable installments consistent with the objective of achieving the punishment the fine is intended to inflict."[99]

2. ALLOWING PAYMENT TO BE DEFERRED UNTIL A LATER TIME

The offender should always be allowed a sufficient amount of time in which to make payment. Allowing short delays is often necessary given the economic situation of our time. If the defendant tells the court that he is now unable to pay the fine, but upon receiving his regular pay check, will be willing and able to do so, the court should allow the delay. Deferring the due date of the fine will not only help ease the constitutional difficulty that arises in fining an offender who is currently without funds, it will also benefit the more affluent offender.

In 1962, the *New York Herald Tribune* reported incidents in which affluent defendants were imprisoned because they were not carrying with them sufficient cash to pay the small fines imposed upon them,[100] and although some had checks, New York City Courts

98. Note, 101 U. PA. L. REV. 1013, 1023 (1953).
99. State v. DeBonis, 58 N.J. 182, 276 A.2d 137, 147 (1971) also providing for installment payment of fines assessed as an incident of probation.
100. New York Herald Tribune, July 5, 1962, at 1, col. 4:

> April 11, 1962 — Robert E. Golden . . . a public relations man and a law-school graduate, appeared at Chief Magistrate's Term Court at 100 Centre St. in the morning to answer to a citation for a traffic offense a year before. His offense is termed "crosswalk", meaning he had stopped his car beyond the building line when discharging a passenger at the subway.
> At 2:15 p.m. the verdict was $25 or two days in jail. He had $18 and a checkbook with him but his check was refused. Instead he was fingerprinted and put in a cell with about 40 other prisoners. His offer to

often refused to accept them.[101] Due to the public outcry that resulted when these articles were printed, New York City adopted a rule allowing offenders 48 hours to pay any fine. The result was a huge reduction in the number of offenders imprisoned for nonpayment of fines.[102]

A few states already have statutory provision for delayed payment.[103] For those that do not, such statutes should be enacted. Their effectiveness would be greatly enhanced if they were enacted in conjunction with provisions allowing payment to be made in installments. Allowing a delay may be sufficient protection against imprisonment for those with moderate income. But in many cases deferring payment would mean requiring the offender to accumulate several pay checks to pay his fine on the prescribed date. In such instances installments would be a much better solution. By paying each installment the offender would lessen the risk of spending the periodic income that he received before the date for payment arrived. Likewise, where the offender is really in need of a short amount of time to make payment, setting up an installment program for him would involve the court in unnecessary administrative expenses which could be avoided if both delayed payment and installment payment programs were available to the court that imposed sentence.

Even in those states that do not have statutes providing for delayed and installment payment of fines, judges frequently allow a delay or set up an installment plan as a matter of judicial authority.[104] However, in order to provide the objectivity in the law that equal justice requires, provisions for deferment of payment, and payment in installments should be guaranteed by statute to the offender.

3. FINING THE DEFENDANT IN PROPORTION TO HIS WEALTH

It is common knowledge that a fine affects the person fined

> the other prisoners to sell his $100 watch for the $7 he needed to get out was greeted with laughter: "If I had $7, I wouldn't be in here", was the rejoinder.
>
> Soon afterward he was manacled to another prisoner and taken to the Tombs because court had closed for the day. There he was held until 6:15 p.m. when he was released.

See Comment, 57 CALIF. L. REV. 778, 816 (1969).

101. Comment, 57 CALIF. L. REV. 778, 816 (1969).

102. *Id.* at 816-17.

103. CAL. PEN. CODE § 1203.1 (1970); GA. CODE ANN. § 27-2901 (1953); N.Y. CODE CRIM. PROC. § 470-d (McKinney Supp. 1970); OHIO REV. CODE ANN. § 2947.12 (Baldwin 1964); S.C. CODE ANN. § 55-591 (1962); UTAH CODE ANN. § 77-35-17 (1953). The federal government also permits delayed payment and installment plans in connection with probation. *See* 18 U.S.C. § 3651 (1964). *See also* MODEL PENAL CODE § 302.1(1) (1962).

104. State v. DeBonis, 58 N.J. 182, 276 A.2d 137 (1971) where the New Jersey Supreme Court exercised judicial authority to require all sentencing courts in that jurisdiction to allow payment in installments.

in proportion to the amount of money he actually has.[105] For this reason many writers have advocated assessing fines which would be computed on the basis of the offender's wealth.[106] The American Law Institute has adopted such a proposal:

> The court shall not sentence a defendant to pay a fine unless: (a) the defendant will be able to pay the fine; and (b) the fine will not prevent the defendant from making restitution or reparation to the victim of the crime. . . . In determining the amount and method of payment of a fine, the Court shall take into account the financial resources of the defendant and the nature of the burden that its payment will impose.[107]

This proposal suffers from the same problem that exists where the trial court has the total discretion of determining whether the offender should be able to defer payment of his fine, or pay it in installments. Such broad discretion does not ensure that the offender will be fairly treated. An abuse of discretion can occur by oversight, when the judge's discretion is not clearly defined. Allowing the judge to determine what rights the defendant has gives no assurance that the defendant has any rights at all. Greater fairness can be achieved through statutory guidelines providing standards that can be uniformly administered.[108]

Opposition to proportional fining can be anticipated on the grounds that the policy of the law should be to make the fine equal to the gravity of the offense. But the policy of imposing a fine in accordance with the gravity of the offense is not necessarily abandoned by the added consideration of how much money the offender has. One way to accomplish both objectives is to impose "day-fines."[109] Under this system of fining, the court first sentences the offender to a number of day-fines *to be determined by the gravity of the offense*. The number of day-fines for a particular offense could be established by a statutory range just as monetary amounts are now often established by the legislature. After the court has determined the severity of the offense, and on that basis the number of day-fines, it can then compute the monetary amount of each day-fine by calculating the offender's per diem income

105. "What is ruin to one man's fortune may be a matter of indifference to another's." 4 BLACKSTONE, COMMENTARIES 430 (Wendell's Am. ed. 1847).
106. Note, 101 U. PA. L. REV. 1013, 1024-26 (1953).
107. MODEL PENAL CODE § 7.02(3), (4) (1962). *See also* ABA SENTENCING ALTERNATIVES AND PROCEDURES 122 (1968) ("the most important suggestion designed to alleviate the problem is that fines be imposed on those who are likely to be able to pay them").
108. The American Bar Association in its proposals for reforming the fine system, has urged that legislatures in the United States study the possiblity of using automatic fining systems for certain offenses. ABA SENTENCING ALTERNATIVES AND PROCEDURES 128-29 (1968).
109. Note, 101 U. PA. L. REV. 1013, 1024 (1953).

in accordance with uniform standards set by statute. Such legislation is not now in effect in any American jurisdiction.[110] However, highly successful versions of the day-fine system have already been introduced in Sweden,[111] Finland,[112] Switzerland,[113] and Cuba.[114] These statutes compute the daily income of the offender with reference to his financial obligations, the number of his dependents, his productive capacity, and any other factors affecting his wealth.[115] In adapting the day-fine system to American circumstances, the very poor would not have to be excluded from the reach of the fine. Those who are unable to work usually receive some welfare benefits from the state which should be included as income for purposes of computing the amount of the fine, except to the extent that such benefits are intended to aid the family of the offender. The income for those who chose not to work could be determined with reference to what they could earn with reasonably diligent effort. This is currently being done in the European countries utililzing this system.[116] The Swedish statute also provides a minimum fine of five crowns, or approximately one dollar, and excludes most minor traffic violations.[117] It is questionable whether traffic violations should be exempt from such a system, since the same unfairness exists in arbitrary fining whether the offense is a traffic violation or some other offense.

The most difficult obstacle to the successful implementation of a day-fine system in the United States would be the added administrative burden on the courts. One writer has advocated the use of prior federal income tax returns to simplify the process of determining the offender's per diem income.[118] If tax returns are used for this purpose the offender should be able to refute their applicability by showing a substantial change in his financial condition, in which case the court would be required to make a more extensive inquiry into his current financial state. An administrative system could also be established especially for the

110. Comment, 57 CALIF. L. REV. 778, 818 (1969).

111. SVERIGES RIKES LAG, STRAFF-LAG Rap. 2, § 8 (1949), cited in Note, 101 U. PA. L. REV. 1013, 1025 (1953). In 1932, before this statute was enacted, there were 13,358 people in Swedish prison for nonpaymnt of fines. By 1946 only 286 offenders were imprisoned yearly for nonpayment of fines. T. SELLIN, RECENT PENAL LEGISLATION IN SWEDEN 14-15 (1947), cited in 101 U. PA. L. REV. 1013, 1024 (1953).

112. SUPPLEMENT TILL FINLANDS RIKES LAG No. 36, § 4 (1942), cited in 101 U. PA. L. REV. 1013, 1024 (1953).

113. STGB (C.Pen.), § 4, art. 48 (1950), cited in Comment, 57 CALIF. L. REV. 778, 813 (1969).

114. CODIGO DE DEFENSA SOCIAL art. 59, §§ A-E. (1938), cited in Comment, 57 CALIF. L. REV. 778, 814 (1969).

115. Note, 101 U. PA. L. REV. 1013, 1025 (1953).

116. *Id.* at 1025, n.92.

117. *Id.* at 1025, n.93.

118. Comment V, *Equal Protection and the Use of Fines as Penalties for Criminal Offenses*, 1966 U. ILL. L. FORUM 460, 465. It should be noted that current restrictions on the use of income tax returns would prohibit their use for this purpose. INT. REV. CODE § 6013 (1954).

purpose of determining the offender's financial status. Questionnaires could be filled out by a defendant prior to imposition of sentence and his answers quickly checked by phone for confirmation.[119] The offender would be able to challenge the court's assessment of his wealth in a plenary proceeding if the court's determination was incorrect. But he would also be liable to additional punishment if he misrepresented his financial condition.[120] In the case of indigent defendants receiving welfare from the state, the court could call the assigned case worker of the indigent and receive whatever information that administrative body already had acquired as to the defendant's financial status.[121]

4. IMPRISONMENT FOR NONPAYMENT OF INSTALLMENTS OR PROPORTIONAL FINES

It must be recognized that even with the added protection of deferments, payment in installments, and a proportional system of fining, cases will arise where it would be unfair to imprison the offender for being in default. The only offender who should be committed for nonpayment is the one who has *willfully* refused to pay.[122] Since the circumstances may well have changed since the sentence was imposed, the offender should be given a hearing before commitment and the "willfulness" of his default determined in light of the circumstances existing at the time the payment was due.

The United States Supreme Court has yet to decide whether imprisonment for nonpayment of an installment would violate the indigent's right to equal protection.[123] But if the defendant has done everything within his power to satisfy the fine, and is unable to do so, it is difficult to see how imprisonment would serve the state's purpose of compelling collection. The situation cannot fairly

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119. Comment, 57 CALIF. L. REV. 778, 815 (1969). The writer points out that the Vera Foundation in New York is employing similar procedures in connection with setting bail. Employees of the criminal court's probation department question each defendant as he awaits his appearance before the judge. They prepare a report and verify the answers by phone. *See also* PRESIDENT'S COMM'N ON LAW ENFORCEMENT AND THE ADMINISTRATION OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY 131-32 (1967).

120. The defendant would be precautioned of the additional penalty in order to encourage truthfullness in answering questions relating to his wealth. Comment, 57 CALIF L. REV. 778, 815 (1969).

121. There would be no issue as to an invasion of the defendant's privacy. The determination as to wealth would not be undertaken until the defendant has pleaded or been found guilty, the commission of the offense being a waiver of his right to be left alone.

122. *In re* Antazo, 3 Cal. 3d 100, 115, 473 P.2d 999, 1008-1009, 89 Cal. Rptr. 255 (1970). *But see* State v. DeBonis, 58 N.J. 182, 276 A.2d 137, 146 (1971). "To exonerate a defendant because he cannot pay the fine would defeat the penological objective of the State and be tantamount to a grant of immunity from penal responsibility."

123. "Nor is our decision to be understood as precluding imprisonment as an enforcement method when alternative means have been unsuccessful despite the defendant's reasonable efforts to satisfy the fines by those means; the determination of the constitutionality of imprisonment in that circumstance must await the presentation of a concrete case." Tate v. Short, 401 U.S. 395, 400-01 (1971).

be distinguished from the sentences for nonpayment which the Court has already found violative of the Equal Protection Clause.[124] In both situations the more wealthy offender could avoid the imprisonment. Moreover, in neither instance could the indigent be coerced into paying, since by definition, he is unable to do so.

The only rational purpose the state can assert for imprisoning one who fails to pay a fine is that it is attempting to compel payment.[125] Commitment for nonpayment can therefore only serve the state's purpose if the offender is able to pay but refuses or neglects to do so. The American Law Institute has recognized that a state only has justification in imprisoning offenders who willfully default and has proposed that the defendant in default be allowed to show cause as to why he has not paid. If the default was found not to be contumacious, the court would be able to allow additional time for payment, reduce the amount of each installment, or revoke all or any portion of the fine remaining unpaid.[126] This would allow the court to reassess the defendant's ability to pay in light of subsequent events and avoid the injustice of imposing too great a burden on the defendant.[127] The defendant should be able to have his reasons for nonpayment presented to the court by counsel, and if he cannot afford to pay, counsel should be appointed for him.[128]

If the offender's failure to pay is found to have been willful, the court should treat the refusal as it would any other instance

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124. *See* Williams v. Ill., 399 U.S. 235 (1970); Tate v. Short, 401 U.S. 395 (1971) discussed in the text accompanying notes 29-52 *supra.*

125. State v. DeBonis, 58 N.J. 182, 276 A.2d 137, 147 (1971) interpreted the New Jersey statute calling for imprisonment for nonpayment of fines as a substitute punishment. The New Jersey Supreme Court formulated the following policy:

> If a defendant fails to meet the installments, he shall be recalled for reconsideration of his sentence. The court may reduce the fine or suspend it, or modify the installment plan, or, if none of those alternatives is warranted, the court may impose a jail term to achieve the needed penological objective. If a jail sentence is thus substituted for the fine, the sentencing judge shall not be obliged to equate a day in jail with a statutorily stated dollar amount. On the contrary, such statutes must be deemed to prescribe only a minimum equivalency. The sentencing judge must impose a lesser jail term if it is adequate in the light of the total circumstances of the individual case.

This approach is not justifiable. If the sentencing court felt that a fine was a sufficient criminal sanction when it imposed sentence it is difficult to see how the defendant's *inability* to pay the fine converts the state's need into incarceration. The inability to pay is more probably indicative of an excessively high fine in light of the offender's wealth, than it is of futility of the fine as a penal sanction. If the offender has any money at all, and a fine was considered a sufficient original sentence, it should still be sufficient at the rehearing on nonpayment, if the defendant's default is noncontumacious. Therefore, the provision in the New Jersey court's opinion for re-evaluation of the amount would only be effective to protect a defendant's right to equal protection if the provision for imprisonment were omitted.

126. *Id. See also* MODEL PENAL CODE § 302.2(1), (2) (1962).

127. Under the Model Penal Code proposal the defendant would also be able, on his own initiative, to petition the court for revocation of all or any unpaid portion of the fine if there was a change of circumstances since the imposition of the fine that would make it unjust to require further payment in accordance with the original sentence. MODEL PENAL CODE § 302.3 (1962).

128. Comment, 57 CALIF. L. REV. 778, 820 (1969).

of disobeying a court order, and impose sentence accordingly. Imprisonment based on the amount of the fine originally imposed would be undesirable because it would not in every case be suited to the gravity of the offender's refusal to pay.[129] The court should not be compelled to impose a prison sentence in all cases. If merely imposing an additional fine is a sufficient penalty under the circumstances for the willful failure to pay the original fine, the court should be able to do so.[130]

When the default is found to be contumacious, the state should be allowed to employ any means that would be available to collect an unpaid civil judgment.[131] If the offender is imprisoned for his willful refusal, the fine should still be collected through civil processes such as garnishment and execution. To allow the fine to be discharged by the commitment for nonpayment would be to allow the refusal to pay to go unpunished.[132] The punishment for the refusal to pay should be based on the seriousness of that refusal. The sentence is in the nature of a sentence for contempt and should bear no relationship to the punishment for the actual substantive crime.

CONCLUSION

The United States Supreme Court has indicated that it will closely scrutinize the constitutionality of statutes which result in imprisonment of indigents for nonpayment of fines which other defendants could have avoided by payment. The state's purpose in compelling payment cannot be achieved by imprisonment, and thus fails to meet the test of the Equal Protection Clause of the Fourteenth Amendment. Most states must therefore turn to new means of collecting fines from indigents. The delayed payment, and installment-plan methods, already in use in several states, have been impliedly endorsed by the Supreme Court as constitutional alternatives to current practices.[133] Legislatures may also find it desirable to experiment with legislation in the area of fines, such as establishing a system of proportional fines. The "day-fine" system, already successfully employed in several European countries, might be copied and adapted to local conditions.

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129. *See* State v. DeBonis, 58 N.J. 182, 276 A.2d 137, 147 (1971). *See also* ABA SENTENCING ALTERNATIVES AND PROCEDURES 284-85 (1968).

130. Comment, 57 CALIF. L. REV. 778, 820 (1969).

131. MODEL PENAL CODE § 302.2(1) (1962); ABA SENTENCING ALTERNATIVES AND PROCEDURES 285 (1968).

132. Comment, 57 CALIF. L. REV. 778, 820 (1969), cites both the American Law Institute and American Bar Association proposals as allowing the imprisonment to discharge the duty to pay the fine. The author of the Comment points out that this allows either the original crime, or the contempt to go unpunished since it, in effect, provides an alternative to the original sentence.

133. Text accompanying note 92 *supra*.

Should the legislatures fail to act to reform those practices which have now been declared unconstitutional, it will be up to judges, within the scope of their discretion, to provide equal protection when assessing fines. In undertaking this effort it should be borne in mind that for a fine to have an equal impact upon the poor and the affluent it must be collected in such a way that all will be able to pay without undue hardship. Moreover, any fine should be imposed in proportion to the offender's wealth in order to provide an equal punitive and deterrent effect.

EDWARD J. WARD