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Imprisonment for Nonpayment of Fines and Costs: A New Look at the Law and the Constitution

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NOTES

Imprisonment for Nonpayment of Fines and Costs: A New Look at the Law and the Constitution

"We ought always to deal justly, not only with those who are just to us, but likewise to those who endeavor to injure us; and this for fear lest by rendering them evil for evil, we should fall into the same vice."

Hierocles

I. INTRODUCTION

The purpose of this note is to evaluate the long-accepted use of imprisonment in default of payment of fines and costs assessed upon a guilty defendant during the post-conviction sentencing process.[1] Despite the resurgence of concern in America today to preserve procedural fairness and equality in all criminal proceedings, the sentencing process remains practically unsupervised by legislative, judicial or constitutional controls. Indeed, society's interest in the accused virtually disappears after conviction, and the safeguards designed to insure fairness and equality are replaced by the almost complete discretion of the sentencing judge and the correctional authorities. This arbitrary power to determine the complex questions of sentencing implements the current desire for individualized punishment—adapting the sentence to the offender rather than solely to the offense—and sentencing discretion exercised to reflect this policy is certainly justifiable and desirable. However, this society was established upon principles of human value, and upon each individual's inherent right to certain basic freedoms such as equal justice under law, and sentencing discretion exercised in disregard of sound sentencing policy is not otherwise immune from challenge.

This note is based on the premise that a new understanding of the principles of sentencing has evolved during the past half-century. After articulating this thesis, one which has been more fully developed elsewhere,[2] an assessment is made of the extent to which the more

1. Since the vast majority of defendants plead guilty, the sentencing process is the only significant confrontation with the judicial process for most offenders. *See* THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: THE COURTS 9 (1967).

2. For discussions of sentencing discretion and suggested reform, see Chandler, *Latter-Day*

modern concepts of sentencing have been embodied in public policy as enunciated in statutes and court decisions, particularly decisions interpreting constitutional requirements. This examination reveals that the existing rules and practices concerning imprisonment for fines and costs reflect uneasy compromises between competing policies and that these rules and practices are largely holdovers from an earlier time when both courts and legislatures proceeded on principles of sentencing quite different from those advocated by most contemporary penologists. A scattering of statutes and decisions, however, indicate that significant changes are beginning to take place, changes consistent with contemporary sentencing theory. Perhaps more important, it is submitted that developments in other areas of criminal procedure indicate that modern sentencing theory has an arguably important role in the extension of constitutional protections. The note concludes that the operative rules concerning imprisonment for fines and costs should be changed to reflect present day understanding of sentencing theory, that certain of these changes can be premised on constitutional mandates, and that others should be embodied in emendations of statutes and of the common law.

II. LEGISLATIVE STANDARDS AND SENTENCING POLICY

A. Goals of Criminal Correction

The ultimate objective of all criminal laws is the protection of society, and this is as true of the sentencing of offenders as it is of the definition of specific offenses.[3] Traditionally, punishment was meant to secure retribution for the evil done by the offender,[4] and the objective of sentencing was to make the punishment fit the crime, that is, to provide equivalent sentences for similar offenses. Severe penalties were widely known, and death was imposed routinely for even the most trivial of crimes. An offender was sentenced according to the sanction prescribed by law; any reduction of his sentence was from mercy rather than by right. The theory of retribution has long

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Procedures in the Sentencing and Treatment of Offenders in the Federal Courts, 37 VA. L. REV. 825 (1951); Kadish, *Legal Norm and Discretion in the Police and Sentencing Processes*, 75 HARV. L. REV. 904 (1962); Note, *Procedural Due Process at Judicial Sentencing for Felony*, 81 HARV. L. REV. 821 (1968); Note, *Due Process and Legislative Standards in Sentencing*, 101 U. PA. L. REV. 257 (1952).

3. "Penal administration shall be based on the principles of reformation and upon the need for protecting the public." ALASKA CONST. art. 1, § 12. *See* Weher v. Commonwealth, 303 Ky. 56, 196 S.W.2d 465 (1946); State v. Meyer, 163 Ohio St. 279, 126 N.E.2d 585 (1955).

4. *See* notes 13-15 *infra* and accompanying text.

been repudiated, however, and reformation and rehabilitation are today the important goals of criminal correction.[5] In modern penal theory, mitigating circumstances of individual personality or capacity make the signficance of one criminal act different from another of the same class. The appropriate sentence can be determined only after a broad range of information about the offender is evaluated.[6]

Two basic policies underlie the goals of modern sentencing procedure: (1) a preference for treatment in the community, as opposed to institutional treatment, where it is feasible without detriment to the community or the prisoner;[7] and (2) an emphasis on individualization of treatment based on consideration of individual characteristics, circumstances, needs and potentialities as revealed by a case study of the offender.

> [E]ach individual case requires on the one hand consideration of all factors bearing upon the security and welfare of the public and, on the other, a fair analysis and appraisal of the individual defendant. An imbalance between compassion for the individual and concern for the public, or an unrealistic appraisal of either, may result in a sentence unjust and harmful to the individual, to the public, or both.[8]

Thus, the decision to impose a financial penalty represents a conclusion that this sanction is the appropriate method of treating the offender; any different treatment would be less useful as a penal sanction and more harmful to the person on whom it is imposed.[9] A corollary to the goal of individualization of punishment is that a defendant should not be assessed a financial penalty beyond his ability to pay.[10] Rather, the financial resources of the defendant and the nature of the burden that its payment will impose, are important factors in determining the amount and method of payment for each particular offender.[11] These principles form the fundamental

5. Williams v. New York, 337 U.S. 241 (1949); S. RUBIN, THE LAW OF CRIMINAL CORRECTION 645-72 (1963); Boldt, *Recent Trends in Criminal Sentencing*, 27 FED. PROB. 3 (March, 1963).

6. *See* NAT'L PROBATION AND PAROLE ASS'n, Standard Probation and Parole Act § 1 (1955). *See generally* S. RUBIN, *supra* note 5, at 645-94; E. SUTHERLAND & D. CRESSEY, PRINCIPLES OF CRIMINOLOGY 335-85 (7th ed. 1966); Note, 81 HARV. L. REV., *supra* note 2, at 823.

7. For example, consider the recent development of probation, parole, suspended sentences, and work release. For the criteria under which a term of imprisonment would be an appropriate sanction, see MODEL PENAL CODE § 7.01 (1962).

8. Boldt, *supra* note 5, at 3.

9. *See* MODEL PENAL CODE § 7.02(1)(2)(b) (1962), § 7:02, Comment (Tent. Draft No. 2, 1954).

10. MODEL PENAL CODE § 7.02(3) (1962), § 7.02, Comment (Tent. Draft No. 2, 1954).

11. MODEL PENAL CODE § 7.02(4) (1962). In United States v. Doe, 101 F. Supp. 609 (D.

perspective for the recommended changes of legislative, judicial, and constitutional policies presented in the following analysis.

B. *The Statutory Framework*

1. *Fines.*—(a) *Background.*—Although statistics are not readily available, it is estimated that fines constitute more than 75 per cent of all sentences imposed in the United States.[12] The origin of the fine may be traced to the ancient practice of the payment of compensation by a person causing the death or injury of another.[13] It is based on a strict concept of punishment originating in situations where vengence and material reimbursement were of prime importance. When an individual was injured by another, he was entitled to personal retribution, and the early law required the payment of a stipulated sum by the aggressor to the victim, the amount depending on the injury done and the social position of the injured party.[14] The criminal law of fines evolved from this process of publicly-sanctioned private retribution when the state assumed responsibility for the punishment of wrongdoers. The state began to demand a part of the retribution payments, or an additional sum, as its share for participation in the trial and as compensation for the disturbance of the peace. Gradually, the victim's share decreased until the state received the entire payment. These payments became a substantial source of revenue, and imprisonment began to be used as a means of compelling the defendant to pay the fine.[15]

Under present statutes, the fine is used as a criminal sanction in three ways: (1) imposition of a fine only—the case in most misdemeanors where the criminal sanction is expressed in terms of a

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Conn. 1951), Chief Judge Hincks noted: "In my view, a fine known to be beyond the defendant's capacity to pay is not in accordance with sound sentencing policy. Like any judicial order which is not enforced, it breeds disrespect for the judicial process. It tends to encourage lack of executive diligence in the collection of fines which with due diligence are collectible. If accompanied by a sentence of confinement it constitutes an arbitrary obstruction of parole and creates undesirable custodial problems. By obstructing economic rehabilitation in the long run it operates to foment rather than to deter crime." *Id.* at 613 n.6.

12. S. RUBIN, *supra* note 5, at 240; E. SUTHERLAND & D. CRESSY, *supra* note 6, at 329.

13. The history of fines is traced in S. RUBIN, *supra* note 5, at 222; E. SUTHERLAND & D. CRESSEY, *supra* note 6, at 328-29. *See also* 2 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 43-44, 46 (3d ed. 1923); 1 J. STEPHEN, A HISTORY OF CRIMINAL LAW OF ENGLAND 57 (1883); Miller, *The Fine—Price Tag or Rehabilitative Force,* 2 NAT'L PROBATION & PAROLE ASS'N J. 337 (1956).

14. For an example of early English law, see F. MAITLAND & F. MONTAGUE, A SKETCH OF ENGLISH LEGAL HISTORY 193-99 (1915), in S. RUBIN, *supra* note 5, at 43-48.

15. E. SUTHERLAND & D. CRESSEY, *supra* note 6, at 329.

monetary penalty; (2) imposition of a fine or imprisonment—the alternative sentence where the criminal sanction is either confinement or an equivilant sanction expressed in monetary terms; and, (3) imposition of imprisonment and fine—sanction of confinement plus forfeiture of money. The retributive aspect of the financial penalty remains a principal reason for its use; its value as a deterrent is probably limited to situations where greed was a primary motive for committing the offense, or where the offender is known consciously to consider the penalty as an obvious consequence of his decision to violate the law, fines for breach of a no-strike clause or violations of the Federal Communications Act, for example; a fine has insignificant penological value when added to a term of imprisonment, or when used as punishment for the so-called crimes of violence.[16]

(b) *Enforcement of payment.*— When a fine is assessed against a convicted defendant, it becomes payable immediately.[17] One of the accepted methods available for obtaining collection is civil action. At common law, fines were enforced by execution against property of the defendant,[18] and most jurisdictions continue to provide this remedy.[19] The usual method of enforcing payment of a fine, however, has been imprisonment.[20] At common law, whenever a party was convicted of

16. *See* Barrett, *The Role of Fines in the Administration of Criminal Justice in Massachusetts*, 48 MASS. L.Q. 435 (1963); Davidson, *The Promiscuious Fine*, 8 CRIM. L.Q. 74, 80-87 (1965); Note, *Fines and Fining—An Evaluation*, 101 U. PA. L. REV. 1013, 1020, 1023 (1952).

17. *E.g.*, HAWAII REV. LAWS § 259-3 (1955); LA. CODE CRIM. L. & PROC. ANN. art. 888 (1968); NEV. REV. STAT. § 176.400 (1963); N.C. GEN. STAT. § 6-65 (1953).

18. E. SUTHERLAND & D. CRESSEY, *supra* note 6, at 329.

19. ALA. CODE tit. 15, § 340 (1958); ALASKA STAT. § 12.55.020 (1962); ARIZ. REV. STAT. ANN. § 13-1648 (1956); ARK. STAT. ANN. § 43-2404 (1964); CAL. PEN. CODE § 1206; COLO. REV. STAT. ANN. § 39-10-6 (1963); DEL. CODE ANN. tit. 11, § 4101 (1953); GA. CODE ANN. § 27-2801 (1953); HAWAII REV. LAWS § 259-5 (1955); IDAHO CODE ANN. § 19-2518 (1948); ILL. ANN. STAT. ch. 38, § 180-4 (Smith-Hurd 1964); IOWA CODE ANN. § 790.1 (1950); KAN. GEN. STAT. ANN. § 62-1901 (1964); KY. REV. STAT. ANN. § 453.020 (1963); LA. CODE CRIM. L. & PROC. ANN. art. 886 (1968); MINN. STAT. ANN. § 631.48 (1947); MONT. REV. CODES ANN. § 95-2302 (Special Supp. 1968); NEB. REV. STAT. § 29-2404 (1964); NEV. REV. STAT. § 169.070 (1967); N.J. STAT. ANN. § 2A:166-11 (1953); N.Y. CODE CRIM. PROC. § 470-d; N.D. CENT. CODE § 29-26-22 (1960); OHIO REV. CODE ANN. § 2949.09 (Baldwin 1964); ORE. REV. STAT. § 137.180 (1967); S.C. CODE ANN. § 17-573 (1962); TEX. CODE CRIM. PROC. art. 43.07 (1966); UTAH CODE ANN. § 77-35-16 (1953); VA. CODE ANN. § 19.1-339 (1967); WASH. REV. CODE ANN. § 10.82.010 (1961); W. VA. CODE ANN. § 62-4-11 (1961); WIS. STAT. ANN. § 959.055 (1961).

20. The use of default imprisonment is especially significant in the criminal law. The Census Bureau has estimated that 58% of all prison commitments in 1910 were for nonpayment of fines and in 1923 the figure was 47.5%. S. RUBIN, *supra* note 5, at 252. A study at the Philadelphia Reed Street Prison indicated that about 60% of the commitments were for

an offense and sentenced to pay a fine, the court could order his imprisonment until the fine was paid.[21] Unless commitment on default of payment had been expressed as a part of the sentence, however, the payment could be enforced only by execution against the defendant's property.[22] The practice of commitment has been continued by federal[23] and state statutes, either as a mandatory part of the sentence,[24] or as permissive in the discretion of the court.[25]

In most states, the offender is compelled to discharge the fine by serving a term of imprisonment, the duration of which is computed according to a statutory conversion ratio equating a certain number or fraction of dollars with a day's imprisonment.[26] Most of these

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nonpayment of fines. Note, 101 U. PA. L. REV., *supra* note 16, at 1022. In New York City in 1960 alone, a record $15 million in fines was imposed, with 26,176 committed for nonpayment. S. RUBIN, *supra* note 5, at 253.

21. The practice originated in twelfth century England. E. SUTHERLAND & D. CRESSEY, *supra* note 6, at 329. *See Ex parte* Johnson, 96 U.S. 727 (1877); *Ex parte* Watkins, 32 U.S. (7 Pet.) 586 (1833); United States v. Ridgewood Garment Co., 44 F. Supp. 435 (E.D.N.Y. 1942). The authority to commit did not usually extend to a magistrate. Mullen v. State *ex rel.* Williams, 38 Del. 533, 194 A. 578 (1937); People v. Stock, 26 App. Div. 564, 50 N.Y.S. 483 (1898). *But see Ex parte* Garrison, 193 Cal. 37, 223 P. 64 (1924).

22. Hill v. United States *ex rel.* Wampler, 298 U.S. 460 (1936); United States v. Buchanan, 195 F. Supp. 713 (E.D. Ky. 1961); United States v. Ridgewood Garment Co., 44 F. Supp. 435 (E.D.N.Y. 1942). *Contra,* Baucum v. New Jersey Parole Bd., 68 N.J. Super. 271, 172 A.2d 231 (1961).

23. 18 U.S.C. § 3565 (1964).

24. ALA. CODE tit. 15, §§ 341-42 (1958); ALASKA STAT. § 12.55.010 (1962); ARK. STAT. ANN. § 43-2315 (1964); DEL. CODE ANN. tit. 11, § 4103 (1953); FLA. STAT. ANN. § 921.14 (Supp. 1969); IND. ANN. STAT. § 9-2222 (1956); KAN. GEN. STAT. ANN. § 62-1513 (1949); LA. CODE CRIM. L. & PROC. ANN. art. 884 (1968); MISS. CODE ANN. § 2540 (1942); MONT. REV. CODES ANN. § 95-2302 (Special Supp. 1968); NEB. REV. STAT. § 29-2405 (1964); N.M. STAT. ANN. § 41-13-4 (1964); N.C. GEN. STAT. § 6-65 (1953); ORE. REV. STAT. § 137.150 (1967); TENN. CODE ANN. § 40-3203 (1955); VT. STAT. ANN. tit. 13, § 7172 (1959); WASH. REV. CODE ANN. § 10.70.010 (1961); WIS. STAT. ANN. § 959.055 (Supp. 1968).

25. ARIZ. REV. STAT. ANN. § 13-1648 (1956); CAL. PEN. CODE § 1205; COLO. REV. STAT. ANN. § 39-10-10 (1963); CONN. GEN. STAT. REV. § 18-63 (1968); GA. CODE ANN. § 27-2901 (1953); HAWAII REV. LAWS § 259-3 (1955); IDAHO CODE ANN. § 19-3922 (1948); ILL. ANN. STAT. ch. 38, § 1-7 (Smith-Hurd 1964); IOWA CODE ANN. § 762.32 (1950); ME. REV. STAT. ANN. tit. 15, § 1703 (1964); MD. ANN. CODE art. 24, § 7 (1966); MICH. STAT. ANN. § 28.1077 (1954); NEV. REV. STAT. § 176.160 (1967); N.H. REV. STAT. ANN. § 607:15 (1955); N.J. STAT. ANN. § 2A:166-14 (1953); N.D. CENT. CODE § 29-26-21 (1960); UTAH CODE ANN. § 77-35-15 (1953); W. VA. CODE ANN. § 62-4-9 (1966); WYO. STAT. ANN. § 6-8 (1957).

26. ALA. CODE tit. 15, § 341 (1958) ($2 to $4 per day); ALASKA STAT. § 12.55.010 (1962) ($5 to $10 per day); ARIZ. REV. STAT. ANN. §§ 13-1648, 31-145 (1956) ($1 per day); ARK. STAT. ANN. §§ 46-510, 43-2315 (1964) ($1 per day); CAL. PEN. CODE § 1205 ($5 per day); CONN. GEN. STAT. REV. § 18-13 (1968) ($3 per day); FLA. STAT. ANN. §§ 951.15-.16 (Supp. 1969) ($0.30 per day); HAWAII REV. LAWS § 259-4 (Supp. 1965) ($5 per day); IDAHO CODE ANN. § 19-2517 (Supp. 1967) ($5 per day); ILL. ANN. STAT. ch. 38, § 1-7 (Smith-Hurd Supp. 1967) ($5 per day); IND. ANN. STAT. § 9-2227a (Supp. 1968) ($5 per

statutory rates are arbitrary and generally have escaped modernization or review.[27] In some jurisdictions, imprisonment is credited to reduce the amount of the unpaid fine only if the sentence provides for manual labor and the prisoner actually works.[28] In other states, mere imprisonment without labor is satisfactory under the statute to discharge the amount of the fine.[29] In a few states, "default" imprisonment does not substitute for liability for the amount of the fine at all, and a civil remedy still may be pursued.[30]

2. *Costs.*—Studies of the assessment of costs in criminal proceedings are conspicuously absent from legal literature. The only extended work on the subject is a treatise published in 1768 and confined to British usage.[31] Unlike imprisonment for nonpayment of fines, default imprisonment for nonpayment of court costs was unknown at common law, and in the absence of statute, a court

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day); IOWA CODE ANN. § 789.17 (1962) ($3.33 per day); KAN. GEN. STAT. ANN. § 62-2109 (1964) ($2 per day); KY. REV. STAT. ANN. §§ 431.140-.150 (1963) ($2 per day); ME. REV. STAT. ANN. tit. 15, § 1904 (1964) ($5 per day); MD. ANN. CODE art. 38, § 4 (1966) ($1 per day); MASS. GEN. LAWS ANN. ch. 127, § 144 (1965) ($1 per day); MINN. STAT. § 641.10 (1961) ($3 per day); MO. ANN. STAT. § 543.270 (1953) ($2 to $10 per day); MONT. REV. CODES ANN. § 95-2302 (Special Supp. 1968) ($10 per day); NEB. REV. STAT. § 29-2412 (1964) ($6 per day); NEV. REV. STAT. § 176.160 (1967) ($4 per day); N.H. REV. STAT. ANN. § 607:16 (Supp. 1967) ($5 per day); N.J. STAT. ANN. § 2A:166-16 (Supp. 1967) ($5 per day); N.M. STAT. ANN. § 42-2-9 (Supp. 1967) ($5 per day); N.D. CENT. CODE § 29-26-21 (1960) ($2 per day); OHIO REV. CODE ANN. § 2947.14 (Baldwin 1964) ($3 per day); OKLA. STAT. ANN. tit. 57, § 20 (1950) ($1 per day); ORE. REV. STAT. § 137.150 (1967) ($5 per day); UTAH CODE ANN. § 77-35-15 (1953) ($2 per day); VT. STAT. ANN. tit. 13, §§ 7221-23 (Supp. 1968) ($1 per day); VA. CODE ANN. § 53-221 (1967) ($0.75 per day); WASH. REV. CODE ANN. § 10.82.030 (Supp. 1967) ($10 per day); W. VA. CODE ANN. § 62-4-10 (1966) ($1.50 per day); WYO. STAT. ANN. § 6-8 (1957) ($1 per day).

27. Pennsylvania law provides an amusing illustrative example, originally enacted in 1751: "If any person or persons whatsoever shall give or sell any rum, wine, or other strong liquors, at the time of any vendue, to any person or persons attending the same, he, she, or they so selling or giving any liquors, shall forfeit and pay for the first offense, *the sum of four pounds*, and for the second and every other offense, *the sum of five pounds.*" PENN. STAT. ANN. tit. 47, § 665 (1952) (emphasis added).

28. People v. Hedenberg, 21 Ill. App. 2d 504, 158 N.E.2d 417 (1959); State *ex rel* Mathews v. Stephenson, 112 W. Va. 218, 164 S.E. 38 (1932).

29. *E.g.*, ALA. CODE tit. 15, § 341 (1958); ALASKA STAT. § 12.55.010 (1962); CONN. GEN. STAT. REV. § 18-63 (1968); FLA. STAT. ANN. § 951.16 (Supp. 1968); IDAHO CODE ANN. § 20-624 (Supp. 1967); KY. REV. STAT. ANN. § 441.190 (1963); OKLA. STAT. ANN. tit. 57, § 20 (1950); ORE. REV. STAT. § 137.150 (1967); WASH. REV. CODE ANN. § 10.82.030 (Supp. 1967); W. VA. CODE ANN. § 62-4-10 (1966).

30. ARK. STAT. ANN. § 43-2602 (1964); N.D. CENT. CODE § 29-26-21 (1960).

31. S. SAYER, THE LAW OF COSTS (1768). This work was generally restricted to civil costs. Articles have been published dealing with costs in criminal practice in the states of Missouri, Tennessee, and Wyoming. *See* Note, *Criminal Costs Assessment in Missouri—Without Rhyme or Reason*, 1962 WASH. U.L.Q. 77; Note, *Jail Fees and Court Costs*

cannot assess a defendant with the costs of his prosecution.[32] An obvious corollary is that only those costs specifically enumerated by statute are assessable.[33] Many courts have interpreted costs to exclude general expenses of maintaining a system of courts and administration of justice.[34] Further, if several defendants are tried together, or if one defendant is tried on several counts, the costs are apportioned according to the amount attributable to each defendant, or to each count (in the event the defendant is acquitted on some counts), to avoid multiple assessment of costs.[35]

Collection of the costs of prosecution is also governed strictly by the statute. Most states provide a civil remedy—the costs become a lien on the property of the defendant, against which execution may lie.[36] Some states prohibit imprisonment for nonpayment of costs if the defendant is sentenced to the state penitentiary.[37] Others prohibit imprisonment if the defendant is unable to pay.[38] Most statutes however require the defendant to work at hard labor,[39] or discharge

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for Indigent Criminal Defendants: An Examination of the Tennessee Procedure, 35 TENN. L. REV. 74 (1967); Note, *The Assessment and Collection of the Costs of a Criminal Prosecution in Wyoming*, 13 WYO. L.J. 178 (1959).

32. Saunders v. People, 63 Colo. 241, 165 P. 78 (1922); State v. Reed, 65 Mont. 51, 210 P. 756 (1922); State v. McO'Blenis, 21 Mo. 272 (1855); *Ex parte* Autry, 58 Okla. Cr. 88, 50 P.2d 239 (1935); State *ex rel.* Titus v. Hayes, 150 W. Va. 151, 144 S.E.2d 502 (1965); State v. Faulkner, 75 Wyo. 104, 292 P.2d 1045 (1956). Arizona, California, and New York make no provision for taxation of costs.

33. State v. White, 217 Tenn. 524, 398 S.W.2d 737 (1965) (litigation tax); Knox County v. Fox, 107 Tenn. 724, 65 S.W. 404 (1901) (costs incurred after conviction); Anglea v. State, 51 Va. (10 Gratt.) 696 (1853) (costs incurred in felony case).

34. Gleckman v. United States, 80 F.2d 394 (8th Cir.), *cert. denied*, 297 U.S. 709 (1935); United States v. Murphy, 59 F.2d 734 (5th Cir. 1932); United States v. Wilson, 193 F. 1007 (S.D.N.Y. 1911); State v. Gillman, 202 Iowa 428, 210 N.W. 318 (1885); Arnold v. State, 76 Wyo. 445, 306 P.2d 368 (1957).

35. *See, e.g.*, State v. Faulkner, 75 Wyo. 104, 292 P.2d 1045 (1956). Several state statutes provide for apportionment of court costs. *E.g.*, OHIO REV. CODE ANN. § 2949.19 (1964); TENN. CODE ANN. § 40-3326 (1955).

36. *See* statutes cited note 19 *supra*.

37. N.J. STAT. ANN. § 2A:166-4 (1953); R.I. GEN. LAWS ANN. § 12-20-8 (1956); TEX. CODE CRIM. PROC. ANN. art. 1018 (1966); VT. STAT. ANN. tit. 13, § 7177 (1958). Connecticut and Massachusetts prohibit the assessment of the costs of prosecution against all convicted persons. CONN. GEN. STAT. REV. § 54-143 (1949); MASS. ANN. LAWS ch. 280, § 6 (1968).

38. ARK. STAT. ANN. §§ 43-2404, -2405 (1964); COLO. REV. STAT. ANN. §§ 33-2-1, 39-10-9 (1963); DEL. CODE ANN. tit. 11, § 4103 (1966 Supp.); FLA. STAT. ANN. § 939.05 (1944); GA. CODE ANN. § 27-2804 (1953); ILL. ANN. STAT. ch. 38, § 180-6 (Smith-Hurd 1964); IOWA CODE ANN. § 337.12 (Supp. 1968); KAN. GEN. STAT. ANN. §§ 62-1515, 62-1901 (1964); N.J. STAT. ANN. § 2A:106-7 (1953); OHIO REV. CODE ANN. § 2949.19 (Baldwin 1964); WIS. STAT. ANN. § 959.055 (Supp. 1968).

39. ALA. CODE tit. 15, § 341 (1958); ARIZ. REV. STAT. ANN. § 31-145 (1956); ARK. STAT. ANN. § 46-502 (1964); HAWAII REV. LAWS § 259-3 (1955); KAN. GEN. STAT. ANN. § 62-

the costs by imprisonment according to a statutory rate of conversion.[40]

3. *Discharge from imprisonment.*—Obviously, if the prisoner pays the amount of the fine or costs due, he becomes entitled to discharge from imprisonment, although this occasion is difficult to imagine, since anyone with enough money initially to pay the assessment would rarely be confined in jail. In addition to this method of discharge, many statutes recognize the hardship which the default imprisonment statutes work on an indigent defendant, and permit an indigent prisoner to secure his release without having paid the fine or costs.[41]

A few states limit the period of confinement to be maximum imprisonment to which the defendant could have been sentenced as punishment for the crime he committed.[42] Other jurisdictions excuse a defendant from the payment of costs whenever he is sentenced to a term of imprisonment, assessing costs to the county of the place of the trial.[43] Discharge on proof of insolvency is allowed by the federal government[44] and by many states.[45] The typical requirements for an insolvency discharge include a sworn statement that the prisoner does not own a certain minimum amount of property. If he qualifies, the prisoner may be released from imprisonment after a fixed period of confinement.[46] The use of an insolvency oath has several disadvantages. First, it does not entitle the prisoner to be discharged until a fixed period of confinement has expired. Where the prisoner was convicted on several counts, this initial period can be of significant

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2239 (1964); KY. REV. STAT. ANN. § 431.140 (1963); MINN. STAT. § 641.10 (1961); MO. ANN. STAT. § 221.180 (1962); NEB. REV. STAT. § 29-2404 (1964); TENN. CODE ANN. § 41-2119 (1955); TEX. CODE CRIM. PROC. art. 43.10 (1966); VA. CODE ANN. § 53-221 (1967); WASH. REV. CODE ANN. § 10.82.040 (Supp. 1967); WYO. STAT. ANN. § 7-282 (1957).

40. *See* statutes cited note 26 *supra.*

41. *See* statutes cited note 38 *supra.*

42. ARIZ. REV. STAT. ANN. § 13-1648 (1956); CAL. PEN. CODE § 1205; N.Y. CODE CRIM. PROC. § 470-d.

43. *See* statutes cited note 37 *supra.*

44. 18 U.S.C. § 3569 (1964).

45. *E.g.*, ALASKA STAT. § 12.55.030 (1962); HAWAII REV. LAWS § 259-3 (1955); KAN. GEN. STAT. ANN. § 62-1515 (1949); MASS. GEN. LAWS ANN. ch. 127, § 146 (1965); MO. ANN. STAT. § 546.850 (1953); N.M. STAT. ANN. § 42-2-9 (Supp. 1967); N.C. GEN. STAT. § 23-24 (1965); OKLA. STAT. ANN. tit. 57, § 15 (1950); ORE. REV. STAT. § 169.160 (1967); PA. STAT. ANN. tit. 61, § 377 (1964); S.D. CODE § 13.4614 (1960); VA. CODE ANN. § 19.1-334 (1967).

46. Some statutes require waiting periods of up to six months. *See* OKLA. STAT. ANN. tit. 57, § 15 (1950); S.D. CODE § 13.4614 (1960). *But see* MO. ANN. STAT. § 221.180 (1962).

length.[47] Second, the statutory property amount is totally unrelated to the amount of the fine or costs and is an unreliable estimate of a person's economic status and, specifically, his ability to pay the assessments. Finally, the taking of an insolvency oath usually entitles the prisoner only to a hearing of his cause, at which time the determination of his release may be made; actual discharge may be delayed even further.

C. *The Purpose of Imprisonment*

From a defendant's point of view, imprisonment for default is indistinguishable from an ordinary sentence of imprisonment. Both are equally stigmatizing and incapacitating to the prisoner, and both subject him to all the evils of short-term imprisonment.[48] Penologically, however, the purpose for which each is imposed differs significantly.

Most authorities agree that commitment for nonpayment of a fine does not represent punishment for the substantive criminal offense, but is essentially a means of enforcing the judgment of the court; it is a supplement to the state's civil remedy of levy and execution.[49] Implicit in this concept is the idea that imprisonment is less desirable from the defendant's point of view than is a fine; otherwise the threat of default imprisonment would have no coercive effect. On the other hand, the position which regards imprisonment on default of a fine to be punishment equates the severity of the fine and the applicable period of imprisonment, and assumes that on default of

47. Sentences for default imprisonment may run consecutively and the minimum term has been interpreted to apply to each individual count. *See, e.g.*, Wright v. Matthews, 209 Va. 246, 163 S.E.2d 158 (1968) (conviction on nine counts required 2 1/2 years imprisonment before insolvency oath could be invoked).

48. The disadvantages of short-term imprisonment are numerous: (1) the time limit makes rehabilitative measures almost impossible; (2) the institutions are frequently crowded and unsanitary; (3) ill-equipped defendants are exposed to contamination by other, more experienced criminals; (4) the absence of the defendant may affect the economic status and morale of his family and incur the permanent social stigma of the community; and (5) the danger of recidivism may be increased by the difficulties the defendant will undergo when seeking to readjust to the community after discharge. *See* Note, 101 U. PA. L. REV. *supra* note 16, at 1022.

49. United States v. Ridgewood Garment Co., 44 F. Supp. 435 (E.D.N.Y. 1942); Shoop v. State, 209 Ark. 642, 192 S.W.2d 122 (1946); *Ex parte* Garrison, 193 Cal. 37, 223 P. 64 (1924); *In re* Sullivan, 3 Cal. App. 193, 84 P. 781 (1906); Mullin v. State *ex rel.* Williams, 38 Del. 533, 194 A. 578 (1937); Henderson v. United States, 189 A.2d 132 (D.C. App. 1963); Lee v. State, 103 Ga. App. 161, 118 S.E.2d 599 (1961); *Ex parte* Converse, 45 Nev. 93, 198 P. 229 (1921); State *ex rel.* Lynch v. Johnson, 30 N.J. Super. 235, 104 A.2d 87 (1954); People *ex rel.*

one the other should be imposed.[50] This latter view, however, is not consistent with the current theories of criminal correction, because the factors which determine that a fine should be imposed are independent, indeed mutually exclusive, of those which determine that imprisonment would be an appropriate sanction. Imprisonment to enforce payment of a fine vitiates the initial decision to punish by fine. Avoidance of imprisonment is an important part of modern sentencing policy, and failure to pay a fine should not lead routinely to jailing.[51] According to sound sentencing policy, the sanction to be imposed should depend strictly upon the optimum corrective course as determined diagnostically, rather than mechanically by statute. This impropriety of imprisonment for nonpayment is particularly acute when the court has no authority to impose a sentence of imprisonment for the substantive offense, when the fine imposed is beyond the defendant's ability to pay, or when the imprisonment occurs for nonpayment of court costs.

The absence of authority to punish the substantive offense by imprisonment is a clear statement of legislative policy that the offender should not be removed from the community under any circumstances. Default imprisonment represents another, more general legislative policy, which if applied to the previous particular situation creates irreconcilable conflict. Because of the underlying policy that default imprisonment is an enforcement device, the general policy of default imprisonment should be subordinate to the more specific statutes.

When a court imposes a fine known to be beyond the ability of the defendant to pay, it has, effectively, imposed a sentence of imprisonment after determining that the policy considerations called for a financial sanction. The fine may thus become a guise for imprisoning the poor whenever the sentencing judge believes that the maximum term provided by statute is not sufficiently severe.[52] A defendant should not be sentenced to imprisonment simply because he cannot pay a fine at the time of the judgment. The severity of the

Loos v. Redamn, 265 N.Y.S.2d 453 (Sup. Ct. 1965); McKinney v. Hamilton, 282 N.Y. 393, 26 N.E.2d 949 (1940); City of Buffalo v. Murphy, 228 App. Div. 279, 239 N.Y.S. 206 (1930); *Ex parte* Arnett, 225 P.2d 381 (Okla. Crim. App. 1950); *Ex parte* Autry, 58 Okla. Cr. 88, 50 P.2d 239 (1935). *But see* Chapman v. Selover, 225 N.Y. 417, 122 N.E. 206 (1919); Dixon v. State, 2 Tex. 481 (1849).

50. *See, e.g.*, Dixon v. State, 2 Tex. 481, 483 (1849).

51. *See* notes 7-11 *supra* and accompanying text.

52. *See, e.g.*, People v. Kelly, 32 Misc. 319, 66 N.Y.S. 733 (Sup. Ct. 1900).

punishment should be measured by its corrective value rather than by reason of the defendant's wealth.

If court costs are considered a financial penalty, they are assessed as an arbitrary addition to the punishment, without regard for those penological principles of sentencing by which a fine, or other sanction, should be imposed. Consequently, their amount is usually unrelated to the ability of the defendant to pay or to the severity of the criminal offense. Further, when accompanying a sentence of imprisonment, the punitive effect of a financial assessment is extremely limited.[53] When accompanying a fine, imprisonment for nonpayment of costs conflicts with the policy implicit in the imposition of the fine. On the other hand, if costs are not considered as punishment, that conclusion operates to invoke the constitutional limitations of the thirteenth amendment prohibiting involuntary servitude.[54]

Since modern penology favors individualized punishment, the rules should allow a certain amount of discretion to distinguish particular individuals. The policy of cquality of treatment must be carefully distinguished from an alleged right to identity of treatment.[55] No person should complain that he has not received a sentence identical to one given another convicted of the same class of crime. Nor should a person unable to pay any fine whatever be immune from imprisonment if such a sanction is authorized by statute and no other penalty is available. It is unlikely, however, that all unfavorable discriminatory consequences of current sentencing procedure can be eliminated when the only alternatives before the sentencing judge are fine or imprisonment. Putting all offenders in jail would be as unacceptable as would relieving those unable to pay a fine of all penalties. There are methods, however, by which the legislatures and the courts can apply principles of modern sentencing to insure a more efficient use and enforcement of financial penalties. These alternatives are discussed in the following section.

D. Alternatives to Imprisonment

Certainly, practical difficulties should be expected in determining the offender's ability to pay a fine or costs. However, the use of presentence reports containing information pertinent to an individual

53. *See* notes 7 & 16 *supra*.

54. For a discussion of the constitutional questions raised by this hypothesis, see notes 122-39 *infra* and accompanying text.

55. *See* REP. ATT'Y GEN. COMM. ON POVERTY AND THE ADMIN. OF FED. CRIM. JUSTICE 9-10 (1963). *See also* Note, 81 HARV. L. REV., *supra* note 2, at 821-23.

offender is already recognized as indispensible to a fair sentence.[56] In some states the court is required to make a presentence report,[57] but the usual practice leaves the use of such a report to the discretion of the court.[58] The Supreme Court has endorsed the liberal use of presentence reports, and has suggested the broad potential for their use.[59]

The presentence report may include information concerning the economic status of the offender. Earnings can be checked reliably through an employer, or by permitting disclosure to the court of the defendant's tax returns. Alternatively, the burden can be placed on the defendant to show cause why a financial penalty should not exceed a certain amount, requiring him to file an affidavit listing his assets, income, and obligations. Obviously, the filing of a false statement under oath would subject the offender to penalties for contempt or perjury.

1. *Day-fines.*—Assessment of fines according to the ability to pay is not a new idea. Imposition of fines according to the defendant's wealth was practiced in 13th century England, and advocated throughout the 18th and 19th centuries.[60] When a laborer had been fined the equivalent of three days wages, equity and efficiency of sentencing procedure would require that a wealthy man be fined three days income for the same offense.

In Finland and Sweden, a system for assessing fines according to this theory has been established.[61] It sets up a system of "day-fines" according to which a fine is expressed in abstract units, varying between a minimum and maximum prescribed for the offense. This preserves a distinction in punishment with respect to the nature of the offense. The actual monetary value of the abstract unit is determined by considering the wealth of the defendant, his daily income,

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56. Boldt, *supra* note 5, at 4; Chandler, *supra* note 2, at 830-31. For a critical appraisal of the use of presentence reports, see S. RUBIN, *supra* note 5, at 73-108; Keve, *The Professional Character of the Presentence Report*, 26 FED. PROBATION 51 (June, 1962). *See also* Bach, *The Defendant's Right to Access to Presentence Reports*, 4 CRIM. L. BULL. 160 (1968); Note, 81 HARV. L. REV., *supra* note 2, at 835-41.

57. *E.g.*, MONT. REV. CODE ANN. § 95-2203 (1968); R.I. GEN. LAWS ANN. § 12-19-6 (1950).

58. *E.g.*, LA. CODE CRIM. L. & PROC. ANN. art. 875 (1967); N.M. STAT. ANN. § 41-17-23 (1964); VA. CODE ANN. § 53-278.1 (1967); *cf.* MODEL PENAL CODE § 7.07(5) (1962).

59. Williams v. New York, 337 U.S. 241 (1949).

60. Note, 101 U. PA. L. REV., *supra* note 16, at 1024.

61. Eriksson, *Postwar Prison Reform in Sweden*, 293 THE ANNALS 152, 153 (May 1954); Note, 101 U. PA. L. REV., *supra* note 16, at 1024-25.

productive capacity, and the number of his dependents. The fine is computed by multiplying this unit by a factor of the defendant's wealth. This system of fining at a rate of the defendant's daily income, rather than by the arbitrary amounts customarily fixed in criminal statutes, makes a much wider range of fines available. For example, in Sweden fines may range from $0.97 to $6,984.00 for identical offenses.[62]

There are several advantages to a day-fine system. First, fines are imposed more equitably. A court need not resort to a sentence of imprisonment in lieu of a fine unless the former sanction is required for correctional purposes. If a fine is determined to be the appropriate penalty, the court will almost always be able to assess an equitable penalty. Second, there is a greater probability of payment. This means that the financial penalty will be more effective as a criminal sanction, without incurring the dangers of default imprisonment. In Sweden, the day-fine system is credited with reducing imprisonment for defaults from 12,000 or 13,000 a year to a few hundred a year.[63]

2. *Installment payment.*—The day-fine system is not completely satisfactory in the abstract, because it considers the economic status of the defendant only at a single point in time—the date of sentencing. Often, the defendant is unable to pay a sufficient amount to meet even the minimum fine which the court considers an appropriate sanction, or is unable to pay at all, but could, over an extended period of time, make payments totalling a much larger sum. In many cases, especially when a trial has been demanded, the defendant who is unable to pay the costs of prosecution at the time of sentencing could do so if he were given a period of time to collect the money. In these situations, the law should allow a deferred system of payment. Several states make express provisions for payment of fines by installments, usually in connection with a period of probation.[64] Other jurisdictions have general provisions permitting the delay of payment.[65] One commentator would frame the solution in terms of a criminal credit

62. Note, 101 U. PA. L. REV., *supra* note 16, at 1025.

63. Eriksson, *supra* note 61, at 152-53.

64. CAL. PEN. CODE § 1205; KAN. GEN. STAT. ANN. § 62-2239 (1967 Supp.); MD. ANN. CODE art. 52, § 18 (1957); MASS. GEN. LAWS ANN. ch. 279, §§ 1, 1A (1968); N.Y. CODE CRIM. PROC. § 470-d; OHIO REV. CODE ANN. § 2947.11 (Baldwin 1964); PA. STAT. ANN. tit. 61, §§ 953, 955, 1052, 1082 (1964); WASH. REV. CODE ANN. § 9.92.070 (1961). The federal government also permits delayed installment payment in connection with probation. *See* 18 U.S.C. § 3651 (1964).

65. CAL. PEN. CODE § 1203.1; CONN. GEN. STAT. REV. § 54-119 (1968); GA. CODE ANN. § 27-2901 (1953); N.Y. CODE CRIM. PROC. § 470-d; OHIO REV. CODE ANN. § 2947.12

administration which would "lend" the defendant the money for the fines and costs and arrange for subsequent repayment.[66]

The advantages of the installment system are persuasive. First, it avoids the evils of short-term imprisonment. Assuming that a correctional institution is able to run an efficient correctional program, the rehabilitative effects on a short-term prisoner are negligible and may be outweighed by the unfavorable influences with which the prisoner is confronted. Further, such rehabilitative programs are rarely established in county jails or similar facilities where most default prisoners are likely to be incarcerated. Second, installment payment plans implement the sentencing policy that the defendant should be permitted to continue social contact with his family and his community, while enforcement of the penal sanction is secured. The evidence indicates that the rate of collection under an installment payment system is significantly greater than in a system without installment plans. In England, as a result of 1914 reforms permitting delayed payments, imprisonment for default declined from 83,000 a year in 1909 to 2,600 in 1946.[67] In West Virginia, at the peak of the Depression, one court reported that only five per cent of installment fines led to default.[68] Third, installment payment seems to have some reformative effect on the offender. Recidivism is notably lower among cases where a fine is imposed as a condition of probation.[69] Fourth, the costs of criminal administration could be reduced. A decrease in the number of default imprisonments would decrease the costs of prison maintenance. The state more likely would be reimbursed for the costs of prosecution. Because the defendant is permitted to remain in the community, welfare payments to the offender's family may be avoided.[70]

(Baldwin 1964); S.C. CODE ANN. § 55-591 (1962); UTAH CODE ANN. § 77-35-17 (1953); WIS. STAT. ANN. § 57.04 (Supp. 1968).

66. Note, *Equal Protection and the Indigent Defendant: Griffin and Its Progeny*, 16 STAN. L. REV. 394, 412-13 (1964).

67. *See* E. SUTHERLAND & D. CRESSEY, *supra* note 6, at 330; Craven, *Criminal Justice in England*, 27 CAN. BAR REV. 1111, 1113-14 (1949); Miller, *The Fine—Price Tag or Rehabilitative Force*, 2 NAT'L PROBATION & PAROLE ASS'N J. 377, 383 (1956). Installment fines were authorized in Britain in 1873 but little use was made of them until they became mandatory in 1914. Craven, *supra*, at 1113.

68. Note, 101 U. PA. L. REV., *supra* note 16, at 1023.

69. Barrett, *The Role of Fines in the Administration of Criminal Justice in Massachusetts*, 48 MASS. L.Q. 435 (1963); Davidson, *The Promiscuous Fine*, 8 CRIM. L.Q. 74 (1965); Note, 101 U. PA. L. REV., *supra* note 16, at 1020.

70. By imprisoning for nonpayment of fines and costs, the state not only loses the money which might otherwise be collected, but it must also bear the cost of committing the defaulter.

When a defendant defaults in the payment of an installment, he should not be committed to prison automatically, but should be permitted to appear to show cause why he should not be confined. If a defendant shows that default was not attributable to willful refusal to obey the order of the court or to failure to make a good faith effort to obtain funds, the court should be empowered to allow additional time for payment, to reduce the fine, or to revoke the unpaid portion of the fine.[71]

3. *The realm of imprisonment.*—As already indicated complete abolition of the power of commitment is not desirable, because a change of circumstances after the date of sentencing may require reevaluation of the original sentence. This power should be used sparingly, remembering that a civil remedy always would be available. Subsequent imprisonment would be justified if a defendant becomes totally unable to pay a fine, and the court believes that some punishment beyond probation must be exacted. The term of incarceration should be determined with regard for the same penal policies appropriate to original sentencing. The length of commitment of a wage-earning defendant should be related to the amount of the original fine so as to reflect the current economic value of forfeiture of a day's work for the particular offender. In no event should the imprisonment exceed the maximum amount provided as punishment for violation of the substantive criminal offense. Since court costs are assessed without consideration of penal or punitive effect, if the defendant becomes unable to pay them, the civil remedy should be exclusive. The state has no interest in imposing imprisonment for correctional purposes in that situation, and it is unlikely that it would recover the costs assessed when the expenses of imprisonment or hard labor generally are greater than the value of the labor received.[72]

In 1960, the average cost per capita for daily maintenance of prisoners in local jails and prisons was $2.83. REPORT OF THE WORK OF THE FED. BUREAU OF PRISONS 17 (1960). In Tennessee, one study showed the per capita costs of imprisonment and the revenue credit obtained by prison labor resulted in a net loss to the county of more than half a million dollars. Comment, *Jail Fees and Court Costs for the Indigent Defendant: An Examination of the Tennessee Procedure*, 35 TENN. L. REV. 74, 89 (1967). In Maryland, per capita costs for prisoners are $1,681 each year, ANN. REP. MD. DEP'T CORREC. 7 (1966), and in Massachusetts the annual per capita cost is $2,686.54. ANN. REP. MASS. STATE COMM'N OF CORREC., Pub. Doc. No. 115 (1964). The national average is around $2,000. THE PRESIDENT'S COMM'N ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: THE COURTS 15 (1967). *See generally* Alexander, *Do Our Prisons Cost Too Much*, 293 THE ANNALS 35 (May 1954).

71. MODEL PENAL CODE §§ 302.2, 302.3 (1962).

72. *See* note 26 *supra*.

Since the ultimate function of default imprisonment remains the enforcement of payment of the original fine, the state has an interest in allowing a defaulting offender to continue to work at his employment and secure the money to pay. Thus, if the offender is imprisoned, he might still be afforded an opportunity to continue working under a "work-release" program, now in operation in a growing number of states.[73] Prison inmates could, upon proper qualification for the program, be released to the community to pursue a trade or other activity. The wages earned could be held by the states, or directly applied to discharge the financial penalty. Such a program might provide a useful alternative when a defendant willfully refuses to pay his fine or when a defendant is unable to manage his financial affairs.

III. CONSTITUTIONAL LIMITATIONS

The previous discussion contrasted the use of imprisonment on default of payment of fines and court costs with the goals of sound sentencing policies and criminal correction. The remainder of this inquiry is confined to an examination of the constitutional limitations on the administration of criminal justice and the practice of default imprisonment. This section also considers the extent to which policies of sentencing and criminal correction are incorporated into principles of constitutional protection, such as equal protection, involuntary servitude, and due process of law. Appellate review of sentencing is required to implement fully the conclusions inferred in this part, since those procedural safeguards provided at trial do not meet the needs of a guilty defendant who is treated unfairly after he is convicted. The extension of constitutional limitations to the post-conviction process is needed not only because the sentencing process plays such an important part in determining the futures of individuals convicted of

73. Work release programs are in effect in more than one-third of the states. *See* ALASKA STAT. § 33.30.250 (1962); CAL. PEN. CODE § 1208; DEL. CODE ANN. tit. 11, §§ 6532-34 (Supp. 1966); FLA. STAT. ANN. § 945.091 (Supp. 1968); IDAHO CODE ANN. § 20-614 (Supp. 1967); IND. ANN. STAT. §§ 13-140 *et seq.* (Supp. 1968); IOWA CODE ANN. § 356.26 (Supp. 1969); ME. REV. STAT. ANN. tit. 34, § 527 (Supp. 1968-69); MD. ANN. CODE art. 27, § 700A (Supp. 1967); MICH. STAT. ANN. § 28.1741 (Supp. 1968); MINN. STAT. § 241.26 (Supp. 1967); MO. ANN. STAT. § 221.170 (1962); MONT. REV. CODES ANN. § 95-2216 (Special Supp. 1968); N.H. REV. STAT. ANN. § 607:14-a (Supp. 1967); N.Y. CORREC. LAW §§ 150-60; N.C. GEN. STAT. § 148-33.1 (Supp. 1967); S.C. CODE ANN. § 55-321.1 (Supp. 1967); TENN. CODE ANN. § 41-1237 (Supp. 1968); VT. STAT. ANN. tit. 28, § 207 (Supp. 1968). *Cf.* MODEL PENAL CODE § 303.9 (1962). *See generally* Zalba, *Work Release—A Two-Pronged Effort*, 13 CRIME & DELIN. 506-20 (1967).

crime, but also because it determines the general effectiveness of the criminal law to protect all of society from unlawful abuse.[74]

A. Equal Protection

Few principles are more basic than that equal justice be accorded to rich and poor alike, and significant efforts have been made to eliminate the discriminatory treatment of indigent defendants[75] in criminal proceedings. In *Griffin v. Illinois*,[76] the Supreme Court made its first broad pronouncement on equality in the criminal process. The Court held that an Illinois statute which conditioned appeal of a criminal conviction on the purchase of a trial transcript violated the equal protection clause of the Constitution. Although the statute was not, on its face, unconstitutional, its practical effect was to deny the right of appeal to those too poor to purchase a transcript. The holding emphasized that when economic inequalities among the criminally accused tend to influence the administration of criminal law, the government is required to take affirmative action to minimize the influence; it is as much a denial of equal protection to treat unequals equally as to treat equals unequally under the law.[77]

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74. For a discussion of appellate review of criminal sentences, see Mueller & Le Poole, *Appellate Review of Legal But Excessive Sentences: A Comparative Study*, 21 VAND. L. REV. 411 (1968); Thomas, *Appellate Review of Sentences and the Development of Sentencing Policy: The English Experience*, 20 ALA. L. REV. 193 (1968); Weigel, *Appellate Revision of Sentences: To Make the Punishment Fit the Crime*, 20 STAN. L. REV. 405 (1968).

75. Although cases involving the right of the indigent at trial and on appeal often concern those who are absolutely destitute, it should be remembered that problems of equal criminal justice, especially in this delicate area of financial penalties, extend to the near poor and the average wage earner as well. For purposes of this note, the term "indigent" refers to anyone who is financially unable to employ to his advantage the institution or service under consideration, and in lieu of a better word, those who are not indigent are described as wealthy or affluent. Clearly, "poverty must be conceived as a relative concept. An impoverished accused is not necessarily one totally devoid of means. A problem of poverty arises for the system of criminal justice when at any stage of the proceedings lack of means in the accused substantially inhibits or prevents the proper assertion of a right or a claim of right." REP. ATT'Y GEN. COMM'N ON POVERTY IN THE ADMIN. OF FED. CRIM. JUSTICE 8-9 (1963); *cf. In re* Patterson, 136 Colo. 401, 317 P.2d 1041 (1957); Loy v. State, 74 So. 2d 650 (Fla. 1954); Lloyd v. Warden of Md. Pen., 217 Md. 667, 143 A.2d 483 (1958). *See generally* Kasimer & Choper, *The Right to Counsel in Minnesota: Some Field Findings and Legal Policy Observations*, 48 MINN. L. REV. 1, 17-33 (1963); Note, *Right to Aid in Addition to Counsel for Indigent Criminal Defendants*, 47 MINN. L. REV. 1054, 1073 n.110 (1962).

76. 351 U.S. 12 (1956).

77. One recalls the admonition of Anatole France that "[t]he law, in its majestic equality, forbids the rich as well as the poor to sleep under bridges, to beg in the streets, and to steal bread." A. FRANCE, JOHN COURNOS, A MODERN PLUTARCH 27, *quoted in* Griffin v. Illinois, 351 U.S. 12, 23 (1956) (Frankfurter, J., concurring).

The *Griffin* rationale has been liberally applied to other aspects of appeal,[78] and has been logically extended to impose constitutional limitations within the trial process itself.[79] What once was dictum is now controlling in our judicial system: "There can be no equal justice where the kind of trial a man gets depends on the amount of money he has."[80] Although the United States Supreme Court has not yet examined the possible extension of the *Griffin* trend to the post-conviction stage of criminal proceedings,[81] the high courts of New York and the District of Columbia have recently ruled that default imprisonment of indigent prisoners which exceeds the maximum term which could be imposed as an original sentence violates the prisoner's right to equal protection of the laws.

In *People v. Saffore*,[82] the New York Court of Appeals faced the case of an indigent prisoner convicted of assault and sentenced to a term of one year imprisonment plus a 500 dollar fine—the maximum penalty allowed by the state's statute. Unable to pay the fine, the defendant was ordered committed to additional imprisonment of 500 days, one day for each dollar of the fine. The prevailing view in previous cases involving similar sentences was to uphold the validity of the imprisonment against either statutory or constitutional attack,[83] although several lower courts in New York rejected that majority position.[84] In *Saffore*, the New York Court of Appeals invalidated the default imprisonment, holding that "when payment of a fine is impossible, imprisonment to work out the fine, if it results in a total imprisonment of more than a year for a misdemeanor [the statutory maximum] . . . violates the defendant's right to equal protection of the law . . . ."[85] The court's decision rested on two grounds. First, since imprisonment for nonpayment of a fine was construed as a

78. *E.g.*, Lane v. Brown, 372 U.S. 477 (1963); Douglas v. California, 372 U.S. 353 (1963); Smith v. Bennet, 365 U.S. 708 (1961); Burns v. Ohio, 360 U.S. 252 (1959).

79. *E.g.*, Gideon v. Wainwright, 372 U.S. 335 (1963).

80. 351 U.S. 12, 19 (1956).

81. In Winters v. Beck, 385 U.S. 907 (1966), the Court denied certiorari in a case involving the right of counsel in misdemeanor offenses. Dissenting from the decision, Mr. Justice Stewart said in part: "[N]ot surprisingly, the petitioner did not question the vagueness of the charge against him or the validity of converting a sentence of 30 days into one of 9½ months solely because of his poverty." *Id.* at 907.

82. 18 N.Y.2d 101, 218 N.E.2d 686, 271 N.Y.S.2d 972 (1966).

83. United States *ex rel.* Privitera v. Kross, 239 F. Supp. 118 (S.D.N.Y. 1965); People *ex rel.* Loos v. Redman, 48 Misc. 2d 592, 265 N.Y.S.2d 453 (Sup. Ct. 1965); People *ex rel.* Price v. Hayes, 151 App. Div. 561, 136 N.Y.S. 854 (1912).

84. People v. Johnson, 24 App. Div. 577, 262 N.Y.S.2d 431 (1965); People v. Collins, 47 Misc. 2d 210, 26 N.Y.S.2d 970 (Sup. Ct. 1965).

85. 18 N.Y.2d at 104, 218 N.E.2d at 688, 271 N.Y.S.2d at 975.

method of collection after a refusal to pay, the court held that the statute did not permit imprisonment of a defendant who is financially unable to pay. Secondly, applying *Griffin*, the court reasoned that a defendant's lack of money should not extend the length of his imprisonment beyond the statutory maximum term. If the statute were interpreted to permit default imprisonment to extend this maximum period, the man who could not pay his fine would be treated unequally from a more affluent offender, since only the latter would possess the power to shorten his imprisonment. The analogy to *Griffin* should be apparent; although the "protection" against incarceration afforded by the statutory fine is superficially non-discriminatory, the indigent who is unable to buy his freedom actually receives no protection at all.

A similar result was reached by the Court of Appeals of the District of Columbia in *Sawyer v. District of Columbia*.[86] The defendant was fined 150 dollars for jaywalking under a statute providing for a penalty of 300 dollars, or ten days imprisonment, or both; being unable to pay the fine, he was committed for 60 days. Noting its prior warnings that alternative sentences and default imprisonment could not be used as a guise for meting out longer prison terms,[87] the court invalidated the sentence:

> We hold this sentence invalid and are of the opinion that in every case in which the defendant is indigent, a sentence of imprisonment in default of payment of a fine which exceeds the maximum term of imprisonment which could be imposed under the substantive statute as an original sentence is an invalid exercise of the court's discretion . . . .[88]

The decision rested on grounds of statutory interpretation and constitutionality: "The application of the statute to a person known by the court to be indigent . . . subverts the legitimate purpose of a valid statute and it is clear that the statute, so applied, would then present the grave constitutional questions argued here."[89] The court noted that the only reason that the defendant was imprisoned beyond the maximum period of ten days was because of his indigence and found that such use of default imprisonment was inconsistent with its purpose to coerce payment. The sentencing court's action was

86. 238 A.2d 314 (D.C. App. 1968).

87. Henderson v. United States, 189 A.2d 132 (D.C. App. 1963); Peeples v. District of Columbia, 75 A.2d 845 (Mun. Ct. App. 1950).

88. Sawyer v. District of Columbia, 238 A.2d 314, 318 (D.C. App. 1968).

89. *Id.*

interpreted as an attempt "to impose a longer term of punishment than permitted by law."[90]

Whether costs of prosecution are considered a penalty or not, the rules limiting imprisonment for nonpayment of fines are equally applicable to assessment of costs, since the subsequent default imprisonment remains a coercive device. Arguments can also be raised against imprisonment for certain specific items of costs. For example, a state which assigns as costs of the prosecution attorney fees of the lawyer furnished to an indigent defendant cannot imprison on default of payment.[91] If the defendant had retained counsel, commitment for nonpayment of fees would have been prohibited as imprisonment for debt. Yet if the defendant declines the assistance of counsel in fear of additional imprisonment, his right to counsel becomes illusory, and this promotes invidious discrimination between rich and poor, especially when counsel was assigned because the defendant could not afford his own attorney. This problem applies also to assessment of jury fees, jury mileage, bailiff fees, meals, lodging, professional services rendered by physicians and other expert witnesses, and similar expenses.[92]

Costs which the indigent incurs before and during trial as a consequence of his incarceration and inability to post bail are also obviously the result of his economic status. Although the state may distinguish between criminal defendants by freeing those who supply bail pending trial and confining those who do not,[93] it may not use this period of confinement to impose any additional inequality of treatment beyond that which is inherent in the confinement itself. For example, a defendant unable to furnish bail is not required to stand in a police line-up.[94] Similarly, imprisonment for nonpayment of costs which accrue because a defendant can not make bail discriminates against the indigent, and has been held constitutionally impermissible:

90. *Id.*

91. *Ex parte* Wilson, 89 Ohio L. Abs. 575, 183 N.E.2d 625 (1962).

92. Gleckman v. United States, 80 F.2d 394 (8th Cir.), *cert. denied*, 297 U.S. 709 (1935); United States v. Wilson, 193 F. 1007 (S.D.N.Y. 1911).

93. *But see* Bandy v. United States, 82 S. Ct. 11 (Douglas, Cir. J. 1961) (dictum), Bandy v. United States, 81 S.Ct. 197 (Douglas, Cir. J. 1960) (dictum). The right to bail is discussed exhaustively in Foote, *The Coming Constitutional Crisis in Bail: I & II*, 113 U. PA. L. REV. 959, 1125 (1965).

94. Butler v. Crumlish, 229 F. Supp. 565 (E.D. Pa. 1964). "The theoretical equality . . . when all are not financially equal thus has become in reality a deep and wounding social inequality, increasingly oppressive to the poor and the vagrant. It brings to mind Anatole France's ironic epigram that the law in its majestic impartiality forbids the rich and poor alike to sleep under bridges." *Id.* at 568.

> [S]tatutes requiring an indigent defendant to remain in jail beyond his term to work out costs incurred as jail fees awaiting trial do operate to discriminate against the defendant due to his poverty, and are in conflict with the . . . [equal protection clause] of the Fourteenth Amendment to the Constitution of the United States. It would not be incurred by a defendant able to make bond, and, in fact, would not be costs incurred by rich and poor alike.[95]

The *Saffore-Sawyer* decisions were limited to cases in which default imprisonment exceeded the statutory maximum sentence, and subsequent decisions have refused to extend the holding to default imprisonment less than that maximum.[96] The argument is that a defendant's rights regarding default imprisonment are no greater than those rights applicable to the original sentence; a defendant sentenced to a non-maximum term of imprisonment for default is in no worse position than if he were originally imprisoned for the same period of time. If, however, the functional distinction between original imprisonment and default imprisonment is maintained,[97] the *Saffore-Sawyer* reasoning would not be limited to default imprisonment which exceeds statutory maximums. Imposition of a fine, which reflects a statutory or penological policy determination that the offender should not be isolated from his community, enables the offender to buy his freedom by tender of payment. But a fine assessed above the defendant's ability to pay denies this opportunity to obtain freedom; it is, in effect, imprisonment for being poor.[98] Thus, to provide truly equal protection of the laws, reasonable alternatives to imprisonment, such as delayed payment, installment payment or conditional probation, must be available to the less affluent offender to serve the same "opting out" function that fines afford the offender who can pay his fine.

When default imprisonment is used to coerce payment from those who can afford to pay, or when no other alternative would satisfy the penal or correctional goal desired, every attempt should be made to impose only that degree of imprisonment which most closely approximates the punitive effect of the financial penalty.[99] The

95. State *ex rel.* Hawkins v. Luttrel, 221 Tenn. 32, 35-36, 424 S.W.2d 189, 191 (1968); *accord,* Dillehay v. White, 264 F. Supp. 164 (M.D. Tenn. 1966).

96. People v. Gittelson, 25 App. Div. 265, 268 N.Y.S.2d 779 (1966); People *ex rel.* Eisenstadt v. Thomas, 51 Misc. 2d 627, 273 N.Y.S.2d 638 (Sup. Ct. 1966).

97. *Cf.* Wildeblood v. United States, 284 F.2d 592, 597-98 (D.C. Cir. 1960); Hart v. Norman, 92 Misc. 185, 155 N.Y.S. 238 (Sup. Ct. 1915).

98. *See* Goldberg, *Equality and Governmental Action,* 39 N.Y.U. L. REV. 205 (1964); Greenawalt, *1966 Survey of New York Law: Constitutional Law,* 18 SYRACUSE L. REV. 180 (1967); Note, *Equal Protection and the Indigent Defendant: Griffin and Its Progeny,* 16 STAN. L. REV. 394 (1964).

99. *See* Greenawalt, *supra* note 98, at 197.

conversion ratio for default imprisonment would have to be revised to reflect the minimum economic value of a day's labor. Although no precise equation of fines and imprisonment is possible, an offender could be imprisoned no longer than would be necessary to persuade an affluent person to pay the minimum fine which the court deems an adequate penal sanction and to avoid the imprisonment. When the marginal value of the imprisonment exceeds this "point of persuasion," the affluent pays the fine and avoids imprisonment, but the indigent has no choice but to remain incarcerated. Even if a longer term of imprisonment might otherwise have been imposed as punishment for the substantive offense, an indigent's freedom would not be valued equal to that of the wealthy, unless he receives the fair worth, by modern economic standards, of the loss of his freedom.[100]

Opponents of the extension of the *Griffin* rationale deny that a prisoner is entitled to constitutional protection at the sentencing stage. The argument proposes that all offenders must be punished, and an indigent who is not imprisoned for default will be invited to violate the law with impunity.[101] This position seems to confuse identity of sanction with equality of treatment, ignoring that the primary purpose of the default imprisonment is to coerce payment. Further, it is unrealistic to assume a defendant has not been punished, especially when he has served the statutory maximum imprisonment for the offense. Opponents also argue that if indigents are excused from imprisonment, then those wealthy enough to pay fines and costs will be denied equal protection of the law.[102] This overlooks the fact that groups can be treated differently if there is a basis for reasonable classifications. For example, the state must provide only the indigent with free counsel to assist him, and only the indigent must be given a free transcript on appeal. Similarly, the indigent sentenced to pay a fine or costs beyond his ability to pay is forced by the action of the state, whether he desires to pay or not, to serve a term of imprisonment which the wealthy person has the option to avoid. The

100. *Compare* the language of Mr. Justice Black in Griffin v. Illinois, 351 U.S. 12, 19 (1956) (cited in text accompanying note 80 *supra*), *with* Wildeblood v. United States, 284 F.2d 592, 593 (D.C. Cir. 1960) (Edgerton, C.J. dissenting): "Few would care to say there can be equal justice where the kind of punishment a man gets depends on the amount of money he has." *Id.* at 594.

101. *Cf.* State *ex rel.* Dillehay v. White, 217 Tenn. 524, 398 S.W.2d 737 (1966); United States *ex rel.* Privitera v. Kross, 239 F. Supp. 118 (S.D.N.Y. 1965). *See also* Note, *The Equal Protection Clause and Imprisonment of Indigents for Non-payment of Fines*, 64 MICH. L. REV. 938, 943 n.35 (1966); Note, 16 STAN. L. REV., *supra* note 66, at 412-13.

102. State *ex rel.* Dillehay v. White, 217 Tenn. 524, 531-32, 398 S.W.2d 737, 740 (1966).

difference in economic status makes the default imprisonment of a wealthy person a reasonable exercise of the power to coerce payment,[103] while applied to the indigent, it only serves to increase the term of commitment above the legal amount—the coersive aspect is meaningless. Finally, opponents argue that extension of rights to the indigent creates a severe financial burden to the states.[104] However, in cases involving imprisonment for nonpayment of fines and costs, these objections do not apply. The state would actually reduce expenditures by decreasing the instances of default imprisonment.[105]

In summary, the equal protection clause suggests several restrictions on imprisonment for nonpayment. First, the total imprisonment may never exceed the maximum provided for the statutory offense. Second, imprisonment for less than the maximum amount must be computed as a reasonable equivalent to payment of the fine. Third, the defendant may never be imprisoned for nonpayment of any costs accrued as a result of his indigence.

B. The Eighth Amendment: Excessive Fines and Cruel and Unusual Punishment

The eighth amendment to the Constitution of the United States, prohibiting the imposition of excessive fines and cruel and unusual punishment,[106] has been made applicable to the states through the fourteenth amendment.[107] In addition, each state constitution includes equivalent guarantees.[108] The meaning of these protections has been difficult to determine, although it certainly includes "unnecessary cruelty" and anything "unhuman or barbarous."[109] It has been

103. Since those imprisoned who can pay their fines and costs have the "keys to their cells," they cannot complain that they are given insufficient credit against their fines and costs for the days spent in jail. Greenawalt, *supra* note 98, at 196-97.

104. *E.g.*, Draper v. Washington, 372 U.S. 487, 509 (1963) (White, J. dissenting); Griffin v. Illinois, 351 U.S. 12, 34 (1956) (Harlan, J. dissenting).

105. *See* note 70 *supra*.

106. "Excessive bail shall not be required, nor excessive fines imposed nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII.

107. Robinson v. California, 370 U.S. 660 (1962); *cf.* Powell v. Texas, 392 U.S. 514 (1968) (chronic alcoholic). The source of the eighth amendment is found in the English Bill of Rights of 1688: "[E]xcessive fines have been imposed; and illegal and cruel punishments inflicted. . . . [E]xeessive bail ought not to be required, nor excessive fines imposed; nor cruel and unusual punishments inflicted." 1 Will. & Mary, Sess. 2, eh. 2 (1688).

108. *See* LEGISLATIVE DRAFTING RESEARCH FUND, INDEX DIGEST OF STATE CONSTITUTIONS 342-43 (2d ed. 1959, Supp. 1965).

109. *See In re* Kemmler, 136 U.S. 436, 447 (1890); Wilkerson v. Utah, 99 U.S. 130, 135-36 (1879).

interpreted to refer to the type or character of the punishment rather than to its severity; if a sentence imposed a penalty within the maximum fixed by the legislature, it has been held that no cruel and unusual punishment can result.[110] The eighth amendment does not merely prohibit cruel and unusual punishment as it was known in 1789, however, but acquires a wider meaning as public opinion changes; a punishment may become cruel as public sentiment begins to condemn it.[111] The basic concept is measured by the limits of current civilized standards: "The amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."[112]

When a sentence has included a fine, or a fine and imprisonment, most authority has rejected assertions that imprisonment for nonpayment was cruel and unusual punishment, even if the statutory maximum for the substantive offense had been exceeded.[113] The decisions have also refused to consider the defendant's ability to pay a fine in determining whether the sentence was excessive or cruel and unusual punishment.[114] For example, when a defendant was convicted of the unlawful practice of medicine, a lower New York court held:

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110. United States v. Rosenberg, 195 F.2d 583, 603-09 (2d Cir.), *cert. denied*, 344 U.S. 838 (1952); People v. Calcaterra, 33 Ill. 2d 541, 213 N.E.2d 270 (1965); Duff v. State, 229 Md. 126, 182 A.2d 349 (1962); Barber v. Gladden, 210 Ore. 46, 309 P.2d 192 (1957), *cert. denied*, 359 U.S. 948 (1959). *Contra*, O'Neil v. Vermont, 144 U.S. 323, 366 (1892) (Harlan & Brewer, JJ. dissenting). *But cf.* State v. Starlight Club, 17 Utah 2d 174, 406 P.2d 912 (1965), where fines above $2500 were set aside as excessive in case when maximum fine of $2500 and liquor charter revocation could have been imposed on single liquor violation, but plainclothes police procurred multiple violations by continuing to order rounds of drinks. *See also* Townsend v. Burke, 334 U.S. 736, 741 (1948). *See generally* Francis v. Resweber, 329 U.S. 459 (1947); State v. Staub, 182 La. 1040, 162 So. 766 (1935); Mitchell v. State, 82 Md. 527, 34 A. 246 (1896).

111. Weems v. United States, 217 U.S. 349 (1910); State v. Staub, 182 La. 1040, 162 So. 766 (1935).

112. Trop v. Dulles, 356 U.S. 86, 101 (1962) (divestiture of citizenship violates eighth amendment); *see* Robinson v. California, 370 U.S. 660 (1962); *cf.* Powell v. Texas, 392 U.S. 514 (1968).

113. People v. Magoni, 73 Cal. App. 78, 238 P. 112 (1925); Henderson v. United States, 189 A.2d 132 (D.C. App. 1963); Adjni v. State, 139 So. 2d 179 (D. Ct. App. Fla. 1962); Lee v. State, 103 Ga. App. 161, 118 S.E.2d 599 (1961); Berkenfield v. People, 191 Ill. 272, 61 N.E. 96 (1901); State v. Peterson, 38 Minn. 143, 36 N.W. 443 (1888); People *ex rel.* Crockett v. Redman, 41 Misc. 2d 962, 246 N.Y.S.2d 861 (Sup. Ct. 1964); *Ex parte* Converse, 45 Nev. 93, 198 P. 229 (1921); Foertsch v. Jameson, 48 S.D. 328, 204 N.W. 175 (1925); State v. Tullock, 118 Wash. 496, 203 P. 932 (1922).

114. *Ex parte* Watkins, 32 U.S. (7 Pet.) 568 (1833); Burlington C.R. & N. Ry. v. Dey, 82 Iowa 312, 48 N.W. 98 (1891); Foertsch v. Jameson, 48 S.D. 328, 204 N.W. 175 (1925). *But see Ex parte* Tuicher, 69 Iowa 393, 396, 28 N.W. 655, 656 (1886): "It is true that the imprisonment is but a mode of enforcing the payment of the fine and costs; but if the convicted person is unable to pay, then the imprisonment becomes punishment, and possibly within the prohibition of section

> The fine imposed on the defendant was reasonable penalty authorized by statute. Inability to pay such a reasonable fine does not render the fine unreasonable or excessive . . . nor is the method of enforcing the fine in default of payment improper, as this method is expressly provided for by statute. . . . In providing that a judgment that defendant pay a fine may also direct that he be imprisoned in default of payment for an additional period of confinement, this statute discloses the legislative intent that inability to pay a fine should not constitute a legal objection to a fine, and that the State should not be relegated to the dubious remedy of a civil action for a penalty to enforce a fine.[115]

The majority conclusion has not passed unchallenged. A few early cases determined that when a sentence included a term of imprisonment plus a fine, imprisonment for nonpayment of the fine was invalid abuse of the court's power:

> When the legislature enacted these provisions of the statute providing for the punishment of an offense by fine or imprisonment or both, it was not contemplated that, when a punishment by imprisonment was imposed, thereafter another should be added because the fine was not paid. The degradation and punishment by imprisonment are greater than that by fine. Such a judgment would be excessive, in that it would impose imprisonment for the nonpayment of a debt or fine due the state after the right to punish by imprisonment had been exhausted. In such a case the state must resort to its execution for the collection of its fine, as in a case at law.[116]

The trend of authority is returning to this position, and the ability to pay a fine is being considered as grounds for invalidating a fine or the resulting default imprisonment as "excessive" or "cruel and unusual punishment."[117] When imprisonment exceeds the statutory maximum, it produces an additional term of incarceration where the legislature intended nothing more severe than a pecuniary fine. In this sense, the severity of the sentence exceeds the statutory maximum. The excessive nature of any term of imprisonment for default of payment of fines and costs is keynoted by the present low conversion ratios by which financial liability must be converted into imprisonment.[118] It has been suggested that constitutional limitations extend to any imprisonment for nonpayment when the conversion ratio does not measure up to acceptable economic standards, whether or not the sentence exceeds

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17 of article 1 of the Constitution, which provides that cruel and unusual punishment shall not be inflicted."

115. People v. Watson, 204 Misc. 467, 126 N.Y.S.2d 832 (Sup. Ct. 1953).

116. Roberts v. Howells, 22 Utah 289, 62 P. 892 (1900); *accord*, People v. Brown, 113 Cal. 35, 45 P. 181 (1896); People v. Kerr, 75 Cal. App. 273, 114 P. 584 (1911); People v. Velarde, 45 Cal. App. 520, 188 P. 59 (1920).

117. *But see* State v. Hampton, 209 So. 2d 889 (Miss. 1968).

118. *See* People v. Saffore, 18 N.Y.2d 101, 218 N.E.2d 686, 271 N.Y.S.2d 972 (1966); *cf.* United States v. Doe, 101 F. Supp. 609, 613 n.6 (D. Conn. 1951).

the statutory maximum, if payment is required immediately upon sentencing.[119]

In *People v. McMillian*,[120] the defendant was convicted of petty larceny and fined 150 dollars. Because he was indigent and could not pay, the fine was converted at the rate of one day per dollar to 150 days imprisonment. The court invalidated the sentence and ordered the prisoner released, having found that if a fine was the appropriate punishment for the offense, then a sentence of five months in jail for inability to pay was excessive and illegal. The court noted that the statutory conversion ratio of one day per dollar dated back to 1876 and remitted the fine to an amount equal to the time already served. This disposition seems to suggest that the court did not reject default imprisonment absolutely, but only as far as the equation of fine and imprisonment was excessive according to modern economic standards. This decision represents a return to the penological conclusion that "what constitutes an excessive fine depends in part upon the nature and character of the offense committed and in part upon the ability of the defendant to pay. A fine which in one case would be only small punishment, because easily paid, might in another case be excessive, because its payment would be ruinous to the convict."[121] The decision brings the constitutional standards into closer harmony with modern criminal correctional theory.

C. *Involuntary Servitude*

The thirteenth amendment to the Constitution of the United States reads:

> §1. Neither slavery nor involuntary servitude *except as a punishment for crime* whereof the party shall have been duly convicted shall exist within the United States, or any place subject to their jurisdiction.
>
> §2. Congress shall have power to enforce this article by appropriate legislation.[122]

Although the amendment was obviously directed at the abolition of slavery following the Civil War, this was not its sole purpose; it was declared to encompass all the badges and incidents of slavery, and to embrace all classes of persons.[123] Pursuant to section two, Congress

119. *See generally* Greenawalt, *supra* note 98.

120. 53 Misc. 685, 279 N.Y.S.2d 941 (Sup. Ct. 1967).

121. State v. Staub, 182 La. 1040, 162 So. 766 (1935); *accord*, Cohen v. State, 173 Md. 216, 195 A. 532 (1936); *cf. Ex parte* Tuicher, 69 Iowa 393, 28 N.W. 655 (1886).

122. U.S. CONST. amend. XIII (emphasis added).

123. Jones v. Alfred Mayer Co., 392 U.S. 409 (1968); Pollack v. Williams, 322 U.S. 4 (1944); Bailey v. Alabama, 219 U.S. 219 (1911); Slaughterhouse Cases, 83 U.S. 36 (1873).

enacted the Anti-Peonage Act of 1867,[124] later revised in 1948.[125] This legislation was designed to secure freedom and mobility in the labor market and to prevent forced labor in the United States, except as a means to punish crime.[126] Thus, the question is posed: whether imprisonment for nonpayment of fines and costs can be included within the meaning of punishment for crime.

A fine is certainly punishment for crime within the meaning of the thirteenth amendment, but default imprisonment may be regarded as a coercive device used to enforce payment of the fine. In the early case of *City of Topeka v. Boutwell*,[127] the Supreme Court of Kansas held that hard labor imposed on the defendant to work off a fine levied for violation of a municipal ordinance was only a means of collecting the fine, and was therefore in violation of the prohibition against involuntary servitude. The weight of authority, however, has been to the contrary,[128] and the Supreme Court of the United States has said in dictum that the state may impose fines and penalties which must be worked out for the benefit of the state.[129] Certainly, imprisonment resulting from the refusal of a defendant to pay a fine within his capacity to pay is closely related to the original punishment. It is the consequence which the law attached to refusal to pay. In the case of the indigent defendant who cannot pay, this consequence is automatic. The nexus between a fine and default imprisonment is sufficient to describe its use as punishment for the crime, even though technically an enforcement device.

A few authorities also consider the assessment of court costs as

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124. 14 Stat. 546 (1867).

125. 62 Stat. 772-73 (1948), 18 U.S.C. §§ 1581-88 (1964). Peonage is defined as the holding of one person against his will for the purpose of discharging a real or alleged indebtedness. *See* Bailey v. Alabama, 219 U.S. 219 (1911); Peonage Cases, 123 F. 671 (M.D. Ala. 1903); United States v. McClellan, 127 F. 971 (S.D. Ga. 1904); *cf.* United States v. Shackney, 333 F.2d 475 (2d Cir. 1964). *See generally* Shapiro, *Involuntary Servitude: The Need for a More Flexible Approach*, 19 RUTGERS L. REV. 65 (1964).

126. "The undoubted aim of the thirteenth Amendment as implemented by the Anti-Peonage Act was not merely to end slavery but to maintain a system of completly free and voluntary labor throughout the United States. . . . [W]hatever of social value there may be, and of course, it is great, in enforcing contracts and collection of debts, Congress has put it beyond debate that no indebtedness warrants a suspension of the right to be free from compulsory service." Pollack v. Williams, 322 U.S. 4, 17-18 (1944).

127. 53 Kan. 20, 35 P. 819 (1894).

128. Goode v. Nelson, 73 Fla. 29, 74 So. 17 (1917); City of Chicago v. Kunowski, 308 Ill. 206, 139 N.E. 28 (1923); State v. McGuire, 152 La. 953, 94 So. 896 (1922); *Ex parte* Hollman, 79 S.C. 9, 60 S.E. 19 (1908); City of Milwaukee v. Horvath, 31 Wis. 2d 490, 143 N.W.2d 446 (1966).

129. United States v. Reynolds, 235 U.S. 133, 149 (1914).

part of the punishment for the substantive criminal offense, in the nature of a fine.[130] Most authorities, however, treat costs as a debt imposed upon the defendant, rather than upon the state, for policy reasons that an offender should be required to reimburse the public treasury for the expense of prosecuting him for his own wrongdoing.[131] According to statutory interpretation and penological policy, costs are not punishment for crime, and as such, it is constitutionally impermissible to impose involuntary servitude by way of default imprisonment to secure their collection.

The language of many statutes implies that legislative policy does not regard criminal costs as part of the punishment. For example, the statutes often distinguish the period of imprisonment for "punishment" from the period of default imprisonment. Also, default imprisonment statutes are normally not found in the section of state codes dealing with criminal offenses, but rather are usually topically located with statutes concerning prisons, or criminal procedure. Judicial interpretation of the nature of criminal costs suggests a similar conclusion. For example, a general pardon of a person convicted of crime would not discharge him from liability for the costs of prosecution.[132] Where the defendant is executed for the crime of murder, his estate would still be liable for the costs of prosecution.[133] Unlike a fine, the state cannot remit the costs, and where the jury fixed the sentence they may not be instructed or permitted to modify the amount of the costs.[134] Penological policy would also distinguish the extra-punitive nature of court costs, since costs are assessed automatically without regard for those principles of sentencing by which penology requires a fine, or other sanction, to be determined.

In *Wright v. Matthews*,[135] the Virginia Supreme Court of

130. *E.g.*, State *ex rel.* Hopkins v. Justices of Buchanan County Ct., 41 Mo. 254 (1867); State v. Kilmer, 31 N.D. 442, 153 N.W. 1089 (1915); Galcatcher v. Page, 437 P.2d 284 (Okla. Crim. 1968). *See* W. VA. CODE ANN. § 62-5-7 (1966).

131. *In re* Boyd, 34 Kan. 57, 9 P. 240 (1886); Kincaid v. Commonwealth, 200 Va. 341, 105 S.E.2d 846 (1958); *cf.* MASS. GEN. LAWS ch. 280, § 6 (1968); "Costs shall not be imposed by the court or justice as a penalty or part penalty for a crime."

132. Edwards v. State, 12 Ark. 122 (1851); *In re* Boyd, 34 Kan. 57, 9 P. 240 (1886); State v. McO'Blenis, 21 Mo. 272 (1855); Playford v. Commonwealth, 4 Pa. 144 (1846); Anglea v. Commonwealth, 51 Va. (10 Gratt.) 696 (1853).

133. Commonwealth v. McCue's Ex'rs, 109 Va. 302, 63 S.E. 1066 (1909).

134. Wilson v. Sloan, 438 S.W.2d 75 (Tenn. Crim. App. 1968); Brief for Petitioner, at 11. *But see* IND. ANN. STAT. § 9-1825 (1956).

135. 209 Va. 246, 163 S.E.2d 158 (1968).

Appeals was presented with this very constitutional question. The petitioner was sentenced to a nine month term of imprisonment for burglary and "to serve such [further] time as may be required to pay the costs herein [$1,064.75] unless said costs are sooner paid."[136] "[S]uch costs" amounted to two and a half years at hard labor in the state labor farm, the costs being discharged at a rate of seventy-five cents per day. Reversing the decision below, the court granted the petition for writ of habeas corpus, holding that assessment of the costs of prosecution were not part of the petitioner's punishment, and that, therefore, his imprisonment for nonpayment of those costs contravened the thirteenth amendment.[137]

Although the petitioner in *Wright* was indigent, the court's reasoning applies to all persons, regardless of economic status. Default imprisonment is strictly a remedial action which serves the purpose of collecting a debt owed to the state which a defendant refuses to pay. It is not intended as a deterrent to offenses against the public, but is in the nature of a civil contempt proceeding.[138] When the state has other adequate means available to collect the amount due, such as the civil remedy of levy and execution,[139] it is not entitled to resort to imprisonment to collect its debt.

D. Imprisonment for Debt

Although the Federal Constitution has not been interpreted as prohibiting imprisonment for debt, the thirteenth amendment and the Anti-Peonage legislation may be construed to indicate this conclusion, at least to the extent of contractual debts, such as labor contracts. Certainly, the broad powers granted by the implementation clause of the amendment would enable Congress to enact such a prohibition. Nevertheless, imprisonment for debt is currently a state constitutional

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136. Wright v. Matthews, 209 Va. 246, 163 S.E.2d 158, 159 (1968).

137. The court's theory is now being tested in the federal courts. *See* Morris v. Schoonfield, 4 CRIM. L. REP. 2398 (D. Md. Jan. 29, 1969); Anderson v. Ellington, Civil Action No. 5344 (M.D. Tenn., March 7, 1969). The *Wright* decision did not discuss whether mere imprisonment without labor would contravene the thirteenth amendment, but the amendment is probably broad enough to include that possibility. *See* Jones v. Alfred Mayer Co., 392 U.S. 409 (1968). *But see* City of Milwaukee v. Horvath, 31 Wis. 2d 490, 143 N.W.2d 466 (1966).

138. For a discussion of civil and criminal contempt, see Fenton v. Walling, 139 F.2d 608 (9th Cir. 1943); Staley v. South Jersey Realty Co., 83 N.J. Eq. 300, 90 A. 1042 (1914). Of course, when the defendant is indigent, the contempt concept is meaningless; in that case, he does not refuse to pay, but simply is unable to do so.

139. *See* note 19 *supra*.

question.[140] Most authority does not regard imprisonment for nonpayment of fines and costs to be imprisonment for debt, drawing a distinction between the public and the private creditor.[141] Two state constitutions make specific exception from the prohibition of imprisonment for debt for "fines and penalties imposed by law," recognizing sub silentio that fines are really debts.[142] The state limitations are usually concerned with imprisonment for a contractual debt, and often except from limitation the imprisonment for debts arising from tort claims.[143] In the context of fines and costs, except when imprisonment is required as a punishment for crime, a state has no special right to obtain forced labor or imprisonment for debt. Reasonable existing alternatives to imprisonment which promise to produce the desired penal treatment and also make possible payment of the defendant's debt have already been discussed, and no legitimate public interest can be served by imprisoning the defendant instead. Since state statutes provide that judgments for fines and costs are liens on the defendant's property, since default imprisonment should be interpreted as an enforcement device rather than as punishment, and since these assessments resemble a "quasi-contractual" debt owed by the defendant to the state, the state may not escape the proscription of imprisonment for debt which limits the rights of all other private creditors.

E. Due Process

The relationship between society and the individual is probably never so crucial as in the sentencing of criminal offenders, which determines both the futures of convicted individuals and the effectiveness of criminal law administration to deal with society's

140. For an index to state constitutional provisions dealing with imprisonment for debt, see LEGISLATIVE DRAFTING RESEARCH COUNCIL, INDEX DIGEST OF STATE CONSTITUTIONS 351 (2d ed. 1959, Supp. 1964). *See generally* Ford, *Imprisonment for Debt*, 25 MICH. L. REV. 24 (1926); Freedman, *Imprisonment for Debt*, 2 TEMP. L.Q. 330 (1927); Note, *Present Status of Execution Against the Body of the Judgment Debtor*, 42 IOWA L. REV. 306 (1957).

141. *See, e.g.*, Freeman v. United States, 217 U.S. 539 (1910); Lee v. State, 75 Ala. 29 (1883); *Ex parte* Small, 92 Okla. Crim. 101, 122 P.2d 669 (1950); Harlow v. Clow, 110 Ore. 257, 223 P. 541 (1924); Williams v. State, 155 Tenn. 364, 293 S.W. 757 (1927); Dixon v. State, 2 Tex. 481 (1847); Colby v. Backus, 19 Wash. 347, 53 P. 367 (1898). *But see Ex parte* Russellville, 95 Ala. 19, 11 So. 18 (1891); Hubbell v. Higgins, 148 Iowa 36, 126 N.W. 914 (1910); Risser v. Hoyt, 53 Mich. 185, 18 N.W. 611 (1884); *Ex parte* Crenshaw, 80 Mo. 447 (1883).

142. MO. CONST. art. 1, § 11; OKLA. CONST. art. 2, § 13.

143. *Compare* CAL. CONST. art 1, § 15, *with* N.J. CONST. art. 1, § 13.

offenders. Despite its importance, trial courts have exercised unreviewable discretion over the sentencing process which is without comparison in our judicial system, and courts have refused to examine the sentencing function of the lower courts against the procedural and substantive restrictions on the deprivation of liberty and property without due process of law.[144] It is not surprising that the discretionary powers in the lower courts give rise to great disparity of sentencing practices; the intended purpose of individualization of treatment is to permit a wide range of dispositions for similar offenses. But when the disparity becomes prejudicial to the rehabilitation of offenders and to the reduction of recidivism, it begins to restrict the vitality of the correctional system itself. The protections against judicial abuse afforded defendants before they are found guilty should apply after they are convicted as safeguards in the assessment of penalty. Legislative supervision and judicial review of the sentencing procedure is needed to balance the powers of discretion and the requirements of both substantive and procedural due process. The present discussion, however, is limited to questions of substantive due process and default imprisonment.

Imprisonment for a term computed on the basis of a day for each dollar of an unpaid fine offends basic notions of justice. By this sum, or one similar, a day of liberty is valued for default imprisonment purposes. Since the penological purpose of such imprisonment is to allow the state to collect in labor that which it cannot collect in money, it would seem that the statutory conversion ratios must approximate modern labor market conditions. When the use of delayed payment, installment plans or other alternatives promise to satisfy the correctional functions of a financial penalty, it becomes fundamentally unfair for the state to force menial labor at low wages upon an offender in the guise of proper administration of the criminal law. For example, costs are assessed without regard for the character of the offense or the offender; they lack any rational relationship to the severity of the crime or to the defendant's ability to pay.[145] When nonpayment of costs results in imprisonment that serves no correctional function, it actually impairs rehabilitation and

144. For discussion of the procedural due process question, see articles cited *supra* note 2.

145. *E.g.*, Wilson v. Sloan, 438 S.W.2d 75 (Tenn. Crim. App. 1968) (original six months imprisonment plus cost of $71.80 resulting in additional imprisonment in workhouse of two months); Wright v. Matthews, 209 Va. 246, 163 S.E.2d 158 (1968) (original sentence of nine months plus additional imprisonment of two and one half years for nonpayment of $1,064.75 costs, including attorney fees); State v. Alexander, 78 Wyo. 324, 324 P.2d 831 (1958) (original sentence

promotes recidivism. The constitutional protection of due process of law clearly pre-empts a state's interest in obtaining "reimbursement" for the costs of prosecuting a criminal offender at the expense of the proper administration of criminal justice.

Imprisonment for nonpayment of costs may also deny due process by interfering with the exercise of other constitutional rights. For example, imprisonment is improper when a defendant fails to pay a fine assessed following conviction for a misdemeanor.[146] Since the defendant in a misdemeanor prosecution may be denied counsel, it is unfair to imprison a convicted defendant who might not have been able to defend himself without counsel. If counsel is denied on the distinction between felony and misdemeanor, only the latter being punishable by imprisonment, then default imprisonment cannot be used to obliterate the distinction once a misdemeanant is convicted. Similarly, an imprisonment for nonpayment of costs may interfere with the right to trial,[147] since a defendant who chooses to exercise his right to trial is threatened with large costs which could be avoided if, instead, the accused settled the case with the prosecutor.

IV. CONCLUSION

The use of imprisonment to enforce the collection of fines and costs is an unfortunate remnant of a time when penal theory and constitutional interpretation lacked their present sophistication. Its mechanical and indiscriminate use today interferes with the proper administration of criminal correction—a highly complicated process of individualized treatment of offenders—and denies protections afforded by the Constitution of the United States. This note has examined the restrictions which might be applied to the post-conviction sentencing procedure of default imprisonment, as derived from the relevant concepts of legislative, judicial, constitutional, and penological policy. To the extent that the Constitution affords protection, the judicial branch has power to define the applicable rules. Beyond that which the Constitution requires, both the courts and the legislatures must be inspired to establish sentencing guidelines which implement the policies of modern sentencing. Except to the

of 45 to 65 years plus $6,435 costs resulting in additional 18 years imprisonment); Arnold v. State, 76 Wyo. 408, 306 P.2d 368 (1957) (original sentence of six months imprisonment and $100 fine with $900 costs resulting in two and a half years additional imprisonment figured at the rate of a dollar a day).

146. State v. Borst, 278 Minn. 388, 154 N.W.2d 888 (1968).

147. Wilson v. Sloan, 438 S.W.2d 75 (Tenn. Crim. App. 1968), Brief for Petitioner, at 9.

extent necessary for its use as a penal sanction, imprisonment for nonpayment of fines and costs should be abolished from the criminal system. Whenever imprisonment is imposed, it must be justified as appropriate punishment for the offender and for the offense. Default imprisonment should not be used at the convenience of the state simply to avoid pursuing civil remedies, to excuse the correctional system from administering alternative payment plans, or to excuse the judicial system from fully considering all factors relevant to the determination of criminal sentences.

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