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Case Law and Constitutional Problems in Defaults on Fines and Costs and in the Disposition of Fine Revenues

by

Alice Dawson

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Vera Institute of Justice
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Engendered by Defaults on Fines and Costs

IMPRISONMENT UPON DEFAULT

A. Imprisonment of Fine Defaulters

Fines are one piece in a government's punitive arsenal. In order for a fine to have its intended punitive effect, however, there must be some way to enforce it. When the defendant is either unwilling or unable to discharge the fine, the obvious and usual sanction is imprisonment. This commitment is imposed to coerce the defendant to pay up, to punish the defendant for not obeying the court's order to pay, or to impose punishment on the defendant in lieu of the fine. The primary problem with this approach is that it results in the imprisonment of indigent defendants, who would go free upon payment, if they only had the wherewithal to satisfy the fine. This is contrary to the concept expressed by the United States Supreme Court in Griffin v. Illinois that "[t]here can be no equal justice where the kind of trial a man [or woman] gets depends on the amount of money he [or she] has."[1] A concurring opinion in that case presents Anatole France's oft-quoted but nonetheless applicable line: "The 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."[2] The imprisonment of impoverished defaulters solely because they cannot pay is another example of this "majestic equality."

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[1] Griffin v. Illinois, 351 U.S. 12, 19 (1956).

[2] Id. at 23 (Frankfurter, J., concurring) (quoting John Cournos, A Modern Plutarch, p. 27).

Numerous courts have grappled with the many issues raised by the incarceration of indigents who default on fines, particularly since the issuance by the Supreme Court of a trilogy of opinions on the subject.[3]

1. Indigency

Non-indigent defaulters are considered to be willful actors and therefore subject to incarceration for failure to immediately pay a fine in full.[4] No constitutional guarantees prohibit these defaulters from being imprisoned for even longer

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[3] Tate v. Short, 401 U.S. 395 (1971); Morris v. Schoonfield, 399 U.S. 508 (1970) (per curiam); Williams v. Illinois, 399 U.S. 235 (1970).

[4] See Tate v. Short, 401 U.S. at 400; Williams v. Illinois, 399 U.S. at 242 n. 19; Ex parte Jackson, 96 U.S. 727 (1877); United States v. Miller, 588 F. 2d 1256, 1264 (9th Cir. 1978); United States v. Levenson, 81-Cr-56 (S.D. N.Y. Oct. 27, 1981) (exerpted in N.Y.L.J., Oct. 29, 1981, at 1, col. 2); People v. McArdle, No. 522 (N.Y. Nov. 17, 1981); Rutledge v. Turner, 495 P.2d 119, 123 (Okla.Crim.App. 1972).

In United States v. Levenson, supra, defendants' claims of indigency were found to be "patently unbelievable" due, inter alia, to the "nature and scope of the defendant's massive tax evasion, as well as their offer to pay $1000 each per month towards their fines. Judge Edmund L. Palmieri observed that "the government should not be put to the inconvenience and expense of attempting to ferret out the assets of non-indigent persons in seeking to collect committed fines...." In ordering the defendants to pay, put up surety bonds, or go to jail by noon of the next day, the judge noted that once the nonpayment is determined to be willful, "[t]he public interest requires a draconian remedy...." As reported in the New York Law Journal, Nov. 2, 1981, at 17, col. 6, the defendants paid the fines to avoid being jailed.

terms than allowed for their substantive offense.[5] As discussed below, however, in some cases indigents may not be jailed for failure to pay a fine. Obviously, the determination of who is an "indigent," "at least in a legal sense,"[6] is crucial.

Some courts stress the discretion of the judge as to the method of determination.[7] The U.S. District Court in Alabama recognized "the practical problems inevitably inherent" in the determination, but cautioned that when a locality "devises means to test indigency claims... they must be fair and bear some reasonable relationship to attainment of

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[5] See, e.g., State v. Lukefahr, 363 So. 2d 661,666 (La. 1978), cert. denied, 440 U.S. 981 (1979) (defendant was not shown to be indigent; therefore, the imposition of a statutorily authorized one year sentence for nonpayment of a fine in addition to the statutory maximum sentence of ten years at hard labor was permissible). See also Peeples v. District of Columbia, 75 A.2d 845(D.C.Mun.Ct. App.1950) (defendant was required to serve more on default sentence than was authorized for the substantive offense; this alone does not invalidate the alternative prison sentence, if it is imposed to compel payment and not to indirectly imprison poor persons for longer periods).

Some states do, however, statutorily prohibit the imposition upon anyone, regardless of economic situation, of a term of imprisonment plus an incarceration period for default which, when aggregated, exceed the maximum authorized sentence for the offense. Cal. Penal Code §1205 (West Supp. 1981); Colo. Rev. Stat. §16-11-502(3)(d)(1978); Md. Ann. Code art. 38, §4(b)(4)(1978); Miss. Code Ann. §99-19-20(2)(b) (Supp. 1980); Neb. Rev. Stat. §29-2412(1979); Nev. Rev. Stat. §176.065(1979); N.Y. Crim. Proc. Law §420.10(3)(d) (McKinney Supp. 1980); 18 Pa. Cons. Stat. Ann. §1372 (Purdon Supp. 1980); S.D. Codified Laws Ann. §23A-27-22 (1979);Tenn Code Ann.§40-3204(E)(1975); and Texas Code Crim. Proc. Ann. art. 43.03(b) (Vernon 1979). Colorado explicitly provides through statute that if no imprisonment is possible for the substantive offense, not even a non-indigent offender may be committed for defaulting on the payment of an imposed fine. Colo. Rev. Stat. §16-11-502(3)(c.5) (Supp. 1980) (effective date 7/1/79).

[6] Burton v. Goodlett, 480 F. 2d 983,984 (5th Cir. 1973).

[7] See, e.g., Karr v. Blay, 413 F. Supp. 579, 586 (N.D. Ohio 1976).

the desired ends."[8] At a hearing to determine indigency, the burden of proving indigence has been placed on the defendant.[9]

Some courts have accepted the appointment of a public defender to represent the defendant as establishing indigency,[10] while others have held that the granting of permission to a defendant to proceed in forma pauperis (waiving court fees)

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[8] Tucker v. City of Montgomery Board of Commissioners, 410 F. Supp. 494, 510-511 (D.C. Ala. 1976).

[9] See City of Orlando v. Cameron, 264 So. 2d 421, 423 (Fla.1972); Commonwealth ex rel.Benedict v. Cliff, 451 Pa. 427, 434,304 A.2d 158,16 (1973); Commonwealth v. Holm, 233 Pa. Super.Ct. 281,287,335A.2d 713, 717 (1975); State ex rel. Pedersen v. Blessinger, 56 Wis. 2d 286,201 N.W. 2d 778, 784 (1972).

[10] People v. Kay, 36 Cal. App. 3d 759,763, 111 Cal. Rptr. 894,896 (1973); State v. Williams, 288 So. 2d 319,321 (La. 1974). Contra, Meeker v. State, 395 N.E. 2d 301,307 n.5 (Ind. App. 1979). The court in Meeker stated:

> To find an individual "indigent" in regard to a particular statute, is to find that individual in need of the benefit, consideration, or dispensation thereby conferred. That is, the status of indigency is closely related to the purpose of the statute. We are unable to say that a finding of indigency in regard to the appointment of trial counsel- a constitutional right - is the same as a finding that the individual is indigent in regard to his ability to pay court costs and fines - a legitimate state interest. The determinations are related, but independent ones and are left to the discretion of the trial court. Id. (emphasis in original).

See also People v. Mitchell, 52 Ill, App. 3d 745, 367 N.E. 2d 1351, 10 Ill. Dec. 585.(1977) (the assignment of a public defender to the defendant did not indicate that the defendant would be unable to pay the $250 traffic fine).

is only a nondispositive factor in the determination.[11]

In In re Collins,[12] the Arizona Supreme Court applied a most cogent definition of indigency--the individual need not necessarily be wholly devoid of any means, just through force of circumstances be incapable of paying the fine forthwith. This definition focuses on the distinction between willfullness in not paying (which can lead to imprisonment) and inability to pay (which alone should not result in confinement). In State ex rel. Pedersen v. Blessinger,[13] the Wisconsin Supreme Court followed suit and stated its belief that the Constitution forbids imprisonment as a fine-collection method when the court knows it cannot work, i.e., when the offender is unable to pay the fine.[14] Dealing with a defendant who had the means to pay a fine, but chose to disburse his funds in other ways, the Nevada Supreme Court held that a state could

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[11] Simms v. United States, 276 A.2d 434, 437 (D.C. Ct.App. 1971). Cf. Batres v. District of Columbia, 347 A.2d 585,587 (D.C. Ct. App. 1975 (permission granted to proceed in forma pauperis plus counsel's request for a 30-day period to raise money to pay fine "was tantamount to notice of indigency ").

[12] 108 Ariz. 310, 312, 479 P. 2d 523, 525 (1972).

[13] 56 Wis. 2d 286, 201 N.W. 2d 778 (1972).

[14] The court in Blessinger cautioned trial courts to

> take a long and hard look upon the argument of inability to pay in our affluent society.... Too many claim an inability to pay when they consider the payment of a fine to be in the . . lowest order of priority. In traffic cases it is difficult to find inability to pay when a defendant owns an automobile and seemingly has money to buy gasoline or has the ability to borrow. 56 Wis. 2d at 295, 201 N.W. 2d at 783.

constitutionally choose to treat such a person as a willful defaulter, rather than as an indigent.[15] It has also been held that those whose default is attributable to a failure to make a good faith effort to obtain the necessary funds for payment may be imprisoned for their default, as a criminal contempt sanction.[16]

The question of the relevant "moment of indigency" of a defendant has been raised in several cases.[17] In the Washington Supreme Court, the imposition of a fine as part of a sentence that provided for three annual installments, starting one year after sentencing, was judged not to be an abuse of discretion, notwithstanding the fact that at the time of the sentencing the defendant was indigent.[18] Other courts have also indicated that the relevant "moment of indigency" is not at sentencing, but at the time the payment

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[15] Burke v. State, 96 Nev.449,452,611 P.2d 203,204-05(1980) (per curiam). See also Frazier v. Jordan, 457 F.2d 726, 731 (5th Cir. 1972) (Coleman, Circuit Judge, dissenting) (question raised of including in the definition of "indigent" one who acquires the money to pay a fine but spends it otherwise).

[16] State ex rel. Stracener v. Jackson, 610 S.W.2d 420 (Mo. App. 1980); State v. Meyer, 31 Or. App. 775, 571 P.2d 550 (1977).

[17] This issue is intertwined with, but not identical to, the issue of when a defendant is entitled to a hearing to determine indigency. See §I A (4) infra.

[18] State v. Young, 83 Wash. 2d 937, 523 P.2d 934 (1974).

is due.[19] This is consonant with the reasoning in some Ninth Circuit federal cases holding that a defendant must wait to attack the constitutionality of 18 U.S.C. §3569,[20] extending the imprisonment of an indigent prisoner solely for nonpayment of a fine, until the prisoner is held on that extension. Otherwise, the extra confinement may never take place because by the time the defendant has to pay, s/he may no longer be

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[19] See, e.g., United States v. Merritt, 639 F. 2d 254,257(5thCir. Unit A 1981) (the proper time for consideration of the financial condition of the defendant who was sentenced to a committed fine as well as to a period of imprisonment, followed by a period of probation, will arise when he becomes eligible for release from prison); Dunn v. State, 247 So. 2d 26,27 (Fla.Dist.C App. 1971) (portion of sentence vacated which required one year imprisonment over maximum if defendant defaulted on fine, however, "if appellant is not indigent at the expiration of his prison sentence, this opinion does not prevent his incarceration for failure to pay his fine."); People v. Davis, 2 Ill. App. 3d 106,108,276 N.E.2d 134,136 (1971) (case remanded for hearing at the expiration of defendant's one year sentence to determine if there is an involuntary nonpayment of fine and costs; judgment remained collectible "in the event defendant fortuitously loses his indigent status."); and State v. Walding, 477 S.W. 2d 251, 252-53 (Tenn. Crim. App. 1971) (defendant released and allowed to pay off his fine in installments; the fact that he plea bargained for his sentence of six months in jail plus $150 fine does not permit "the state to keep him in jail when he despite his earlier hopes, was unable to pay his fine in toto instanter [in full and at once] because of his indigency."); State ex rel. Pedersen v. Blessinger, 56 Wis. 2d 286, 298-99,201 N.W. 2d 778, 785 (1972) (case remanded on appeal for a hearing to determine defendant's ability to pay fine "now" - approximately one year and four months after imposition of comparatively small fine, time which defendant had to save or raise these funds).

In some cases, the time for determining non-indigency has been stretched to any date in the future when the defendant will be able to pay the fine. This approach prohibits imprisoning an indigent defaulter, yet theoretically allows for the collection of the amount if and when the person is no longer "indigent." See, e.g., In re Jackson, 26 Ohio St. 2d 51,53,268 N.E. 2d 812,813 (1971) (indigent offender held for fine nonpayment was entitled to be discharged; however, if "his financial status changes, a different situation may prevail"); cf. State v. Woods, 62 Ohio. Op. 2d 48,293 N.E. 2d 583,584 (Akron. Mun. Ct. 1972) ("since the court would have to be unrealistically optimistic to expect defendant's financial status to change (for the better) in the foreseeable future, it would be futile to release her with orders that she pay such fine and costs when things do go well with her.")

[20] See Appendix A for the text of 18 U.S.C. §3569. Generally, it provides that an indigent committed for nonpayment of a fine may be released only after serving 30 days solely for such nonpayment. This statute is treated futher in Section IA (2) (e) infra.

indigent.[21]

In an isolated case, the Alabama Court of Criminal Appeals held, three to two, that although an indigent defendant cannot be sentenced to serve time for nonpayment of fines and costs, if the defendant was not found to be an indigent until after sentencing, such a judgment of default incarceration is without error and does not "injuriously [affect] the substantial rights of appellant."[22] As the issue of whether the imposition of a fine is proper is very different from the issue of whether a defaulter can be incarcerated, insisting that the finding of indigency be made before sentencing, if an indigent defaulter

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[21] United States v. Dixon, 538 F. 2d 812,814 (9th Cir. 1976), cert. denied, 429 U.S. 959 (1976); United States v. Miller, 588 F. 2d 1256,1264 (9th Cir. 1978). But see People v. Sherman, 43 App. Div. 2d 575, 349 N.Y.S. 2d 124 (1973) (Shapiro, J., dissenting), rev'd on Shapiro's dissent, 35 N.Y. 2d 931, 365 N.Y.S. 2d 164 (1974), remitted for hearing, 49 App. Div. 2d 929, 374 N.Y.S. 2d 142 (1975). Justice Shapiro points out that the sentencing judge in Williams v. Illinois, 399 U.S. 235 (1970) dismissed the indigent prisoner's petition to vacate the committed fine portion of his sentence as premature on the ground that Williams might be able to pay the fine by the time his one-year sentence of imprisonment was served. The Illinois Supreme Court then rejected the proposition that the petition was premature and reached the merits. When the United States Supreme Court decided the case, it reversed the Illinois Court on the merits, apparantly also concluding, sub silentio, that the petition was not premature. See United States v. Glazer, 532 F. 2d 224, 230 (2nd Cir. 1976).

[22] Gatlin v. City of Andalusia, 342 So. 2d 37, 40 (Ala. Crim. App. 1976).

is to avoid incarceration, makes very little sense.[23] Recognizing this, a federal district court in Ohio took the opposite view and concluded that it "would be improper... for a court to inquire into indigency before it has sentenced an offender, since one's fiscal resources have no bearing on whether conduct should be punished by a fine or by confinement. Courts must avoid discrimination in sentencing on basis of indigency."[24]

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[23] A possible explanation for the Gatlin approach is provided by the Georgia Supreme Court in Hunter v. Dean, 240 Ga. 214,219-20,239 S.E. 2d 791,795(1977), cert. dismissed as improvidently granted, 439 U.S. 281 (1978). In that case, upholding the constitutionality of the revocation of probation for failure to pay a lump sum fine immediately, the petitioner never claimed to be indigent, and unequivocally informed the court that she was able to pay a fine. It was on this basis that the court framed its sentence. Had the court been informed of the petitioner's claimed indigency and inability to pay a fine at the time of sentencing, the sentence might have been entirely different, i.e., a short sentence of incarceration, a longer sentence of probation, or the payment of the fine in periodic installments.

> We do not think that a defendant should be able to mislead the court as to ability to pay a fine, thus inducing an alternate sentence, and later seek to rely upon constitutional safeguards to avoid punishment.

[24] Karr v. Blay, 413 F. Supp. 579,586 (N.D. Ohio 1976) (citation omitted) Cf. Will v. State, 84 Wis. 2d 397, 405 ,267 N.W. 2d 357,360 (1978) ("trial courts should exercise caution in the manner in which the inquiry [into defendant's ability to pay at the time of sentencing] is conducted. The trial courts should avoid the implication that incarceration is the selected sentencing alternative solely because the defendant could not pay a fine if one were imposed."). But see Commonwealth v. Schwartz, 275 Pa. Super. Ct. 112 ,418 A.2d 637 (1980) (Pennsylvania law requires a sentencing judge to determine that defendant is or will be able to pay a fine before imposing one).

When confronted with a defendant who has claimed indigency after being sentenced to default incarceration, appellate courts commonly have ordered the case remanded for determination of ability to pay and/or for resentencing.[25] Some courts have ordered an affirmance of the conviction without prejudice to the filing of a post-sentence motion for modification or vacation of the judgment based on indigency.[26]

2. Equal Protection Analysis

Although individuals determined to be "non-indigent" under the guidelines discussed above are subject to commitment for defaulting on payment of a fine, the United States Supreme Court has decided that, under certain circumstances, "indigents" are not.

The issue of the constitutionality of imprisonment of indigent defendants for their failure, solely due to indigency, to pay a fine imposed upon conviction for a criminal offense, is defined by a trilogy of Supreme Court cases decided in 1970 and 1971; Williams v. Illinois,[27] Morris v. Schoonfield,[28] and Tate v. Short.[29]

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[25] See, e.g., City of West Allis v. State ex rel. Tochalauski, 67 Wis. 2d 26, 226 N.W. 2d 424 (1975); Commonwealth v. Schwartz, 275 Pa. Super. Ct. 112 . 418 A. 2d 637 (1980).

[26] See, e.g., Will v. State, 84 Wis. 2d 397, 267 N.W. 2d 357 (1978); Harris v. United States, 440 F. 2d (D.C. Cir. 1971) (per curiam). In non-legalese, this means that the appellate court is telling the defendant that she or he can go back to the sentencing court and ask that the sentence of imprisonment for default be changed on the grounds that the defendant is unable to pay the fine.

[27] 399 U.S. 235 (1970).

[28] 399 U.S. 508 (1970) (per curiam).

[29] 401 U.S. 395 (1971).

One interpretation of the collective holding of these cases is that such imprisonment, if automatically substituted for a fine without reference to penal objectives, impermissibly discriminates against indigent defendants in violation of the Equal Protection Clause of the Fourteenth Amendment.[30]

a. Williams v. Illinois

In Williams v. Illinois,[30a] the appellant had been sentenced to one year imprisonment plus a $500 fine and $5 in court costs. The period of imprisonment was the maximum provided for the offense by Illinois law. Pursuant to state statute, the judgment provided that if the appellant defaulted on the payment of the fine and costs, his incarceration would continue until he had "worked off" the amount at the rate of $5 per day.[31] The appellant was indigent and unable to pay the fine and costs at all stages of the proceedings. The effect of the "working off" provision was thus to require the appellant to be incarcerated for 101 days beyond the statutory maximum, solely as a result of his lack of financial resources.

Faced with a constitutional challenge to this sentencing scheme, the Supreme Court held that "once the state has defined the outer limits of incarceration necessary to satisfy its penological interest and policies, it may not then subject a certain class of convicted defendants to a period of imprisonment beyond the

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[30] See Wood v. Georgia, 450 U.S. 261, 284-87, 101 S. Ct. 1097 (1981) (White, J., dissenting).

[30a] 399 U.S. 235 (1970).

[31] Section 1-7(k) of the Illinois Criminal Code of 1961 provided for the "working off" of fines during a maximum period of six months imprisonment for such a purpose.

statutory maximum solely by reason of their indigency."[32] The Illinois statute, as applied to those unable to satisfy judgments of fines due to poverty, worked an invidious discrimination based on inability to pay and was violative of the equal protection guarantees of the Fourteenth Amendment.

The Court explicitly noted that the mere fact of imprisonment of an indigent for a longer time than a non-indigent on the same offense was not unconstitutional, if the period of confinement did not exceed the statutory maximum for the substantive offense.[33] Also noted as not precluded by the Williams decision was the imprisonment of an offender for willful refusal to pay a fine or court costs.[34] The question of the constitutionality of imprisoning an indigent offender under an alternative sentence, such as "$30 or 30 days," was expressly reserved by the Court.[35] The Court wrote: "We hold only that the Equal Protection Clause of the Fourteenth Amendment requires that the statutory ceiling placed on imprisonment for any substantive offense be the same for all defendants irrespective of their economic status."[36]

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[32] Williams, 399 U.S. at 241-42.

[33] Id. at 243.

[34] Id. at 242, n. 19.

[35] Id. at 243.

[36] Id. at 244.

b. Morris v. Schoonfield

Morris v. Schoonfield,[37] was argued to and decided by the Supreme Court with Williams. The appellants in Morris were confined in jail solely for nonpayment of fines and costs, pursuant to Article 38, §§1 and 4 of the Maryland Code, without regard to their ability to pay the amounts. The Court vacated (set aside) the judgment of the District Court and remanded the case to be reconsidered in light of its decision in Williams and relevant intervening legislation enacted by Maryland.

Justice White concurred in the judgment and was joined by Justices Brennan, Douglas and Marshall,[38] He opined that the jailing of an indigent for failure to make immediate payment of a fine in full is unconstitutional, whether or not the fine has been imposed in addition to a jail term and whether or not the length of the indigent's period of incarceration exceeds the statutory maximum imposable on a non-indigent. "[I]n imposing fines as punishment for criminal conduct more care must be taken to provide for those whose lack of funds would otherwise automatically convert a fine into a jail sentence."[39] The infirmity, the concurrence stated, lies in the automatic and immediate conversion of a sentence of a fine into a jail term, solely because of the

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[37] 399 U.S. 508 (1970) (per curiam).

[38] A concurrence is not the binding opinion of the majority of the court.

[39] Id. at 509.

indigency of the defendant.[40]

c. Tate v. Short

In Tate v. Short,[41] the Supreme Court held that the incarceration of an individual convicted of an offense statutorily punishable by fine only, due solely to that defendant's inability to pay, violates the Equal Protection Clause of the Fourteenth Amendment.

The petitioner in Tate was committed to a municipal prison farm when he was unable, due to indigency, to pay $425 in accumulated traffic offense fines. The traffic court which sentenced Tate had no authority to imprison an offender for any substantive offense. Pursuant to Texas Code of Criminal Procedure, Article 45.53 (1966) and Houston Code §35-8, Tate was required to remain incarcerated until he had satisfied the fine sentence at a rate of $5 credit per day.

The Supreme Court pointed out that such default imprisonment of indigents was not imposed in order to further any penal objective of the State; the legislature had already determined that, for the punishment of these offenses, payment of a fine and not incarceration would serve the public interest. Imprisonment in

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[40] When Morris was remanded, the plaintiff prisoners in that case elected to institute a new case, rather than file supplementary pleadings in that case. Arthur v. Schoonfield, 315 F. Supp. 548, 552 n. 3 (D. Md. 1970). In the new proceeding, the District Court held that the practice of conditionally suspending a jail sentence upon payment of a fine and court costs and then immediately jailing defendants for nonpayment, without taking their indigency into account, violates the due process and equal protection rights of the defendants, as well as the recently amended Maryland Code.

[41] 401 U.S. 395 (1971).

a case such as Tate is a collection device, imposed to augment the State's revenues, a goal that imprisonment of an indigent for failure to pay actually undermines. "[T]he defendant cannot pay because he is indigent and his imprisonment, rather than aiding collection of the revenues, saddles the state with the cost of feeding and housing him for the period of his imprisonment."[42]

On the facts of Tate, that case could have been decided on the same narrow basis as Williams, i.e., an indigent convicted of an offense for which imprisonment is not an allowable penalty may not be imprisoned for default on fines imposed for that offense, as this would be imprisonment for longer than the statutory maximum. However, the Court in Tate went further, by quoting from and adopting the views of the concurrence in Morris. "[W]hether or not the jail term of the indigent extends beyond the maximum term that may be imposed on a person willing and able to pay the fine..." it is unconstitutional to jail an indigent for failing to immediately pay a fine in full.[43]

The Court in Tate, following the lead of Williams,[44] went on to suggest the utilization of alternative means "to serve its concededly valid interest in enforcing payment of fines."[45] Explicitly left open in Tate was the legality under the Constitution of imprisonment "as an enforcement method when alternative means are unsuccessful despite the defendant's reasonable efforts to satisfy the fine by

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[42] Id. at 399.

[43] 404 U.S. at 398, quoting Morris v. Schoonfield, 399 U.S. at 509, (White, J., concurring).

[44] 399 U.S. at 244-45

[45] Id. at 399.

those means...[46] That determination, the Court stated, "must await the presentation of a concrete case."[47] As of this writing, the Court has not addressed this issue, although lower courts have.[48]

d. Williams, Morris, and Tate: Which Equal Protection Test?

The Fourteenth Amendment to the Constitution of the United States provides, inter alia, a guarantee that no "State...[shall] deny to any person within its jurisdiction the equal protection of the laws." This guarantee has been interpreted to mean that when a state, either by enacting or applying a statute, takes action which treats classes of individuals differently, the classification must be at least rationally related to a legitimate government objective.[49] Under this traditional test, if the connection between the distinction drawn and the objective is not reasonable, or if the goal is not a permissible one for the state, then the action will offend the equal protection clause.

There is another facet of the equal protection guarantee which provides for more rigorous judicial scrutiny when the challenged statute deals with "suspect classes" or interferes with the

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[46] Id. at 401.

[47] Id. See §III infra for discussion of "concrete cases" presented to the Supreme Court in which the Court declined to determine this issue, and how lower courts have handled the question.

[48] See §III infra.

[49] See, e.g., McDonald v. Board of Election Commissioners of Chicago, 394 U.S. 802, 809-10 (1969) (the equal protection clause is not violated by the failure of state absentee balloting statute to provide for voting by jail inmates being held before trial because such differential treatment may be based on a legislative determination that local officials might be tempted to try to influence the absentee voting of inmates).

exercise of "fundamental rights." These are factors of such importance as to override the normal deference of the judiciary to legislative and administrative choices.[50] This strict test requires the state to show that the classification is justified by a compelling state interest (an interest more important than a merely "legitimate" one) and "necessary" to further the state's purpose, i.e., there is no alternative less intrusive of individual rights.[51]

A "suspect class" has been defined as a class "saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such position of political powerlessness as to command extraordinary protection from the majoritarian political process."[52] "Fundamental rights" are those "rights and liberties protected by the Constitution."[53]

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[50] See L. Tribe, American Constitutional Law at 1000 (1978).

[51] Loving v. Virginia, 388 U.S. 1,11 (1967) (state statutes making interracial marriages illegal violate the equal protection clause).

[52] San Antonio School District v. Rodriguez, 411 U.S. 1,28 (1973). Race, ancestry, and alienage have been treated as suspect classifications. See Massachusetts Board of Retirement v. Murgia, 427 U.S. 307, 312 n. 4 (1976) (per curiam).

[53] San Antonio School District v. Rodriguez, 411 U.S. at 29. The right to vote, the right to interstate travel, First Amendment rights, the right to procreate and the right to privacy, which includes the abortion decision, are among those which have been held to be fundamental rights. See Massachusetts Board of Retirement v. Murgia, 427 U.S. at 307 n. 3.

Moderating between the "strict scrutiny" and the "mere rationality" modes of analysis for equal protection problems, a newer "middle tier" approach has arisen. This scheme involves a balancing of three factors to determine which of a spectrum of middle range equal protection standards to apply. The three factors to be weighed are the character of the classification, the asserted state interest being promoted, and the importance of the individual interest involved.[54] To withstand an equal protection challenge, the discrimination must be found to serve "important government objectives and [the] discriminatory means employed must be substantially related to the achievement of those objectives."[55] The Supreme Court seems to have made sub silentio use of this mode of analysis when dealing with "semi-suspect" classifications such as gender,[56] legitimacy,[57] and alienage[58]

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[54] San Antonio School District v. Rodriguez, 411 U.S. at 98-110 (Marshall, J., dissenting).

[55] Wengler v. Druggists Mutual Insurance Co., 100 S. Ct. 1540,1545 (1980) (emphasis added) (worker's compensation laws which deny benefits to a widower without special proof, while a widow gets benefits without such proof, violate the Equal Protection Clause).

[56] Reed v. Reed, 404 U.S. 71 (1971) (state statute giving preference to men over women in appointments as estate administrators violates the Equal Protection Clause); Craig v. Boren, 429 U.S. 190 (1976) (state statute prohibiting sale of 3.2% beer to males under 21 and females under 18 denies equal protection of the laws).

[57] Trimble v. Gordon, 430 U.S. 762 (1977) (state statute allowing illegitimate children to inherit by intestate succession only from their mothers violates Equal Protection Clause).

[58] Foley v. Connelie, 435 U.S. 291 (1978) (upholding a state law excluding aliens from public employment as state troopers).

or with important, if not fundamental, liberties or benefits.[59]

In neither Williams nor Tate did the Supreme Court make clear what equal protection analysis was appropriate to measure the constitutionality of the application of a state statute allowing imprisonment of an individual who, due solely to indigency, defaulted on a fine.[60] The Court did not state whether either a fundamental right or suspect classification is involved in this issue.

The Court's choice of which equal protection test to apply has significance to the issues involved in the commitment of indigent defaulters. This significance lies in the degree of scrutiny to which the state's objectives and its means for obtaining those objectives will be subjected. Closer scrutiny should increase the likelihood that state action in imprisoning defaulting indigents in situation beyond the scope of those in Williams and Tate will be considered unconstitutional.[61] These state actions not yet ruled on by the Supreme Court include default commitment for less

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[59] Tribe, supra note 41 at 1089-92. Tribe lists these important liberties or benefits as "ineligibility for employment in a major sector of the economy," Hampton v. Mow Sun Wong, 426 U.S. 88, 102-03 (1976); the interest in retaining drivers' licenses, Bell v. Burson, 402 U.S. 535, 539 (1971); the interest in a higher education at an affordable tuition, see Vlandis v. Kline, 412 U.S. 441, 459 (1973) (White, J., concurring); and the interest in receiving such subsistence benefits as food stamps, see United States Department of Agriculture v. Murry, 413 U.S. 508, 519 (1973) (Marshall, J., concurring).

[60] 16 Vill. L. Rev. 754,758 (1971) and Note, "Imprisonment of Indigents for Nonpayment of Fines or Court Costs; The Need for Legislation that Will Provide Protection to the Poor," 48 N.D. L. Rev. 109, 117 n. 53 (1971-72).

[61] The real predictive value of this analysis is undermined by many factors, e.g., the changing composition and views of the Supreme Court (see nn. 75 and 82 infra), the difference in treatment by the courts of different legislative classes (see n. 86 infra), and the existence of other analyses with which to measure these actions (see §I A(3) infra).

than the statutory maximum;[62] incarceration on an alternative sentence, such as "30 days or $30"[63] (situations covered only by dicta in Tate); imprisonment upon default on an alternative payment plan, such as installments (the open question in Tate and Williams, awaiting the presentation of a "concrete case");[64] and revocation of probation or parole for failure to fulfill a condition of payment.[65]

In applying the equal protection analysis in Tate and Williams, the Supreme Court identified the collection of fines as the objective of statutes allowing incarceration of indigent fine defaulters.[66] This interest was termed "concededly valid," as well as "substantial and legitimate."[67] The Court also observed that alternatives to imprisonment exist that will accomplish this objective, and that imprisonment of indigents does not particularly aid in its fulfillment.[68] Thus, possible rationales

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[62] See §I A (2) (e) infra.

[63] Id.

[64] See §III infra.

[65] See §I A (2) (e), text at nn. 107 to 113.

[66] Tate, 401 U.S. at 399.

[67] Williams, 399 U.S. at 238.

[68] See §I A (1) supra for discussion of default imprisonment of non-indigents.

for its holdings are that the incarceration of indigents is not rationally related to the legitimate purpose (thereby falling before the traditional test), that the state interest being promoted is not sufficiently compelling (failing the stricter test), and/or that the classification is not "necessary" to accomplish the objective (likewise running afoul of the stricter test).[69]

At least one commentator has noted that the Court in Williams "appeared to be applying the compelling and necessary test although it did not use those terms nor did it specifically discuss either standard."[70] The California Supreme Court has noted that the United States Supreme Court "appeared" to be using the stricter test, finding the type of sentence invoked in Williams to be "not necessary" to promote the state interest.[71]

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[69] It seems likely that the state's actions would have survived the "rational relation" test, if that had been applied. Most, although not all, actions do survive it, as the "fit" of the classification and the objective does not have to be "made with mathematical nicety." Dandridge v. Williams, 397 U.S. 471, 485 (1970) (quoting Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61,78), and as recently stated by the Supreme Court, the "rational basis" does not necessarily have to have been the purpose that the legislature actually had in mind, United States Railroad Retirement Board v. Fritz, 499 U.S. 166,179, 101 S.Ct. 453,461(1980). See Schwartz,"Equal Protection of the Laws," N.Y.L.J., April 21, 1981, at 1, col. 1.

[70] "Installment Payments: A Solution to the Problem of Fining Indigents," 244 Fla. L. Rev. 166, 171 (1971).

[71] In re Antazo, 3 Cal. 3d 100, 112 n. 8, 473 P. 2d 999, 1006 n.8, 89 Cal. Rptr. 255 (1970).

A case decided by the Supreme Court in 1973 comments specifically on Tate and Williams and sheds some light, albeit backlight, on this mystery. In San Antonio School District v. Rodriguez,[72] a state scheme of financing local public school districts partly through local ad valorem property taxes, resulting in substantial disparities in per-pupil expenditures, was held nonviolative of equal protection guarantees. Rodriguez is generally understood to hold that poverty (or wealth) is not a suspect classification,[73] and that equal protection guarantees are therefore violated only when the state law or action based on poverty fails the traditional rational basis test.[74] However, in Rodriguez, the Court distinguished the holdings in Williams

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[72] 411 U.S. 1 (1973).

[73] See also United States v. Kras, 409 U.S. 434, 446 (1973) (requiring a filing fee from a bankrupt does not violate equal protection guarantees); Ortwein v. Schwab, 410 U.S. 656, 660 (1973) (requiring a filing fee to obtain judicial review of an adverse agency determination of welfare eligibility was constitutional). In both these cases involving indigents, the Court noted that no suspect classification, such as race, nationality, or alienage, was present, and no fundamental right was infringed upon. The composition of the Court in these cases was the same as in Rodriguez. See note 64 infra. See also Maher v. Roe, 432 U.S. 464, 471 (1977) (State need not pay for non-therapeutic abortions for indigent women eligible for Medicaid; financial need alone does not identify a suspect class for purposes of equal protection analysis). Cf. Boddie v. Connecticut, 401 U.S. 371 (1971) (requiring from indigents payment of court fees and expenses to commence action for divorce, which is a fundamental interest and a procedure that can be accomplished only through the state, violates the Due Process Clause). But see Justice Douglas' concurrence in Boddie, in which he opined that rather than the substantive due process analysis used by the Court the case really turned on equal protection grounds with wealth viewed as a suspect classification, as it had been in the line of cases following Griffin v. Illinois, 351 U.S. 12 (1956). See note 83 infra.

[74] See, e.g., Park, "Thinking about Equal Protection," 57 U.Det. J. Urb. L. 961, 998 (1980).

and Tate,[75] stating that in those cases the "disadvantaged class was composed only of persons who were totally unable to pay the demanded sum"[76] and consequently "sustained an absolute deprivation,"[77] i.e., incarceration. In Rodriguez, the class of schoolchildren was characterized as not "definably 'poor' persons" and not having been absolutely deprived of the desired benefit due to their poverty.[78]

The Court in Rodriguez thereby implied that the strict scrutiny test was applied in Williams and Tate, although it also stated that it "has never heretofore held that wealth discrimination alone provides an adequate basis for invoking strict scrutiny...."[79]

The opinion in Rodriguez leaves us with the impression either that poverty can be considered a suspect classification, but only when the class being discriminated against is "completely unable

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[75] As has been suggested by Tribe, the Supreme Court in Rodriguez may have been disingenuous in distinguishing Rodriguez from earlier wealth classification cases on the basis of "precisely defined classes suffering absolute deprivations." Tribe, supra note 41 at 1124. It should be remembered that the membership of the Court changed through the addition of Justices Rehnquist and Powell in the places of Justices Black and Harlan, during the time between the decision in Tate and that of Rodriguez. The Court's orientation has been known to change with its membership. (To date, a further change in the make-up of the Court has been the addition of Justices Stevens and O'Connor and the departure of Justices Douglas and Stewart.)

[76] Rodriguez, 411 U.S. at 22.

[77] Id. at 20.

[78] Id. at 22-23.

[79] Rodriguez, 411 U.S. at 29 (emphasis added).

to pay for a desired benefit and as a consequence...[sustains] an absolute deprivation of a meaningful opportunity to enjoy that benefit"[80] or that a sub silentio use is being made of a middle tier, balancing of factors tests, such as was advocated by Justice Marshall in his dissent in Rodriguez.[81]

Another possibility which would allow the use of a strict scrutiny test is the treatment of the indigent offender's loss of liberty as a fundamental interest.[82] This would be consistent with the Supreme Court's application of strict scrutiny to cases where the access of indigents to certain aspects of the criminal

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80 Id. at 20.

81 411 U.S. at 98-110.

82 See Brown v. State, 262 Ind. 629, 633, 322 N.E. 2d 708, 710-11 (1975) (classification affects "fundamental right to be at liberty," therefore it must be shown to further a compelling state interest).

See J. Nowak, R. Rotunda, J. Young, Constitutional Law at 619-23, 674-80 (1978) for the view that wealth has never been treated as a suspect classification by the Supreme Court and strict scrutiny is not triggered by a wealth-based classification unless a fundamental right is burdened. In these author's analysis, the right to fair treatment in the criminal justice system (including the right to fair treatment in sentencing) is a fundamental right, and so cannot be given only to those who can pay for it. The state, however, is not required to level all economic distinctions; e.g., an indigent defendant may have the right to have counsel appointed for his or her first appeal from conviction, but not the right to the most effective counsel possible. Williams v. Illinois, 399 U.S. at 261 (Harlan, J., concurring).

The advantage of this analysis is that it is consistent, logical, and makes sense out of the Supreme Court's decisions concerning wealth classifications. However, it may be too simplistic a version, ignoring the changes in the Court's orientation and attitude towards the rights of poor people and the rights of states from the "Warren Court" to the "Burger Court." See Tribe at 1098-99, 1099-1136 for a recognition of this more temporal analysis.

process was limited, thereby increasing their risk of incarceration.[83]

The constitutional scholar, Laurence Tribe, finds the principle of Williams and Tate similar to that implied in Stack v. Boyle.[84] In Stack v. Boyle, setting bail higher than reasonably calculated to assure the presence of an accused at trial was held to violate the Eighth Amendment guarantee against excessive bail. Tribe sees in all these cases the attempt to ensure a relative equality among individuals with differing degrees of wealth as to the "price" charged for their liberty.[85]

While it once seemed that wealth was a suspect classification, it seems clear now that, at least under federal constitutional law as interpreted by the United States Supreme Court, classifications based on wealth will only receive strict scrutiny under equal protection analysis if the distinction impacts on a fundamental

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[83] See Griffin v. Illinois, 351 U.S. 12 (1956) (free transcripts to be provided to indigents for appeals purposes); Douglas v. California, 372 U.S. 353 (1963) (indigent entitled to appointed attorney as representative on criminal appeal); Roberts v. LaVallee, 389 U.S. 40 (1967) (indigent entitled to free transcript of preliminary hearing to aid in appeal). Park, supra at 1006 n. 128; Sanford, "The Burger Court and Social Welfare Cases," 57 U. Det. J. Urb. L. 813, 816 (1980).

[84] 343 U.S. 1 (1951).

[85] Tribe, at 1106.

interest.[86] Hence, whatever the equal protection analysis actually applied by the Court in Williams, Morris, and Tate, the Court now is likely to explain those cases in terms of defendants being denied the equal protection of the laws due to the infringement upon their fundamental interests in fair treatment in the criminal justice system by a statutory distinction which was not necessary to the achievement of a compelling state objective.

e. Post-Tate Response in the Lower Courts: Imprisonment of Indigents for Failure to Immediately Pay Fines in Full

Although the expansion of the holding of Williams by the opinion in Tate, (referred to in §I A (2)(c), supra), is dicta, the message that was received by the majority of states and by several federal jurisdictions (either judicially or legislatively),

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[86] See Tribe, supra note 41, 1979 Supp., p. 101-102. Professor Tribe cites Zablocki v. Redhail, 434 U.S. 374 (1978), for the disheartening proposition that, not only do equal protection guarantees protect the poor today only when a fundamental right is involved (in that case, marriage), but perhaps only when no new state expenditures would be required to provide equal treatment. In Zablocki, it was held that a statute violated the Equal Protection Clause when it required Wisconsin residents to obtain a court order to enable them to marry if they had support obligations toward minor children not in their custody, and provided that a court should not issue such an order unless the support obligations had been met and the children were not then, and not likely to become, public charges.

See Maher v. Roe, 432 U.S. 464, 471 n. 6 (1977). In a footnote in the Maher decision, the Court characterizes the line of cases holding that equal protection requires states to provide equal opportunities to indigents in the criminal justice system as being grounded in a system which is a governmental monopoly and in which participation is compelled. The Court notes that its "subsequent decisions have made it clear that the principles underlying [these cases] do not extend to legislative classification generally."

was that imprisonment of an indigent defendant who cannot forthwith pay a fine in full violates equal protection guarantees.[87] This prohibition has also been held to cover imprisonment of indigents[88] under alternative sentences, e.g., "30 days or $30," if the imprisonment follows immediately upon sentence and default.[89] Some alternative to immediate payment or incarceration must be offerred to the indigent defendant upon whom a fine is imposed.[90]

In ruling on this question, some courts have based their decisions on the grounds that wealth is a suspect classification.[91]

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87 See Appendix B, attached, for the cases so holding. See material summarizing state statutes for the legislation, passed chiefly in response to the Supreme Court's decisions dealing with this issue.

88 This prohibition does not cover sentences imposed on non-indigents. See Williams v. United States, 427 A. 2d 901, 904 n. 3 (D.C.Ct. App. 1980), cert. den.,101 S.Ct. 1763 (sentencing a non-indigent defendant to a fine and to 180 days in jail if the defendant defaults on payment is legal, especially "where...it is clear that the alternative sentence was imposed solely to compel payment of the fine.").

89 See Smith v. State, 301 Minn. 455, 459 n.4, 223 N.W. 2d 775,778 n.4 (1974) (cases cited) (affirming default imprisonment of indigent convicted of traffic offense after defendant given reasonable opportunity to satisfy fine).

90 See §II infra.

91 Frazier v. Jordan, 457 F. 2d 726, 728 (5th Cir. 1972); In re Antazo, 3 Cal, 3d 100, 112,473 P.2d 999,1006,89 Cal.Rptr. 255 (1970); State v. Snyder, 203 N.W. 2d 280, 287 (Iowa 1972).

Some courts, without stating the basis therefor, applied strict scrutiny as the appropriate test, found that the state had not demonstrated that its action served a compelling interest and concluded that the statute, when applied to indigents, did not pass constitutional muster.[92] Most courts, however, merely cited Williams and Tate and stated that the confinement of indigent defendants for failure to immediately make total payment of a fine would violate the defendants' rights to equal protection. These courts, following the Supreme Court's lead, failed to indicate which test[93] was applied to determine this.[94]

In a few jurisdictions, it has been noted by courts or by judges dissenting from the majority opinion that the language in Tate regarding the unconstitutionality of imprisonment of indigents for failure to immediately pay a fine in full is broader than the facts warrant, and that it is not necessary to "gallop ahead of

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92 See, e.g., Allen v. Warden, Community Correctional Center, 31 Conn. Supp. 459, 468, 334 A.2d 488, 493 (1975).

93 See §I A (2) (d) supra, for equal protection tests.

94 See, e.g., Karr v. Blay, 413 F. Supp. 579, 585-86 (N.D. Ohio 1976); Tucker v. City of Montgomery Board of Commissioners, 410 F. Supp. 494 (D.C. Ala. 1976); Hood v. Smedley, 498 P. 2d 120, 121 (Alas:1972); State v. Tackett, 52 Haw.601,602,483 P.2d 191,192 (1971); Nelson v. Tullos, 323 So. 2d 539, 542 (Miss. 1975); In re Jackson, 26 Ohio St. 2d 51,53 268 N.E. 2d 812,813 (1971).

But cf. People v. Terminelli, 68 Mich. App. 635, 637, 243 N.W. 2d 703, 704 (1976) (denial of equal protection because no "significant" state interest is served by the discrimination against indigents whose probation is revoked for inability to pay costs or fines). This appears to be an application of the "middle-tier" equal protection test.

the Supreme Court of the United States in this administratively difficult area."[95]

In several states, neither the courts nor legislatures have dealt explicitly with the issue of default imprisonment of indigents for failure to pay a fine in toto instanter. This may be due to the presence of statutes in most of those states which, while not specifically prohibiting such default imprisonment, do call for consideration of a defendant's economic status when determining the amount and/or method of payment of a fine,[96] and/or mandate a hearing upon a defendant's failure to make payment to determine whether the failure was the result of good faith efforts to pay and if so, allow for modification of sentence.[97]

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[95] In re Jackson, 26 Ohio St. 2d 51,54, 268 N.E.2d 812,814 (1971) (Schneider, J., dissenting). See also Frazier v. Jordan, 457 F. 2d 726, 730 (5th Cir. 1972) (Coleman, Circuit Judge, dissenting on grounds that as "a practical matter, collecting fines on the installment plan is a delusion," and that equal protection will be denied to those who can afford to pay, while the poor would be "given a license to violate the law on the installment plan."); McKinney v. State, 260 So.2d 444 (Miss. 1972) (distinguishing Tate on grounds that appellant here could never be imprisoned for default on $100 fine for longer than the 90 days statutorily authorized for the substantive offense, therefore the immediate default imprisonment was permissible; however the financial status of appellant was not specified). But cf. Nelson v. Tullos, 323 So. 2d 539 (Miss. 1975) (an indigent defendant must first have a reasonable opportunity to pay a fine before being imprisoned for default, under the directive laid down in Tate).

[96] N.C. Gen. Stat. §15A-1362; N.D. Cent. Code §12.1-32-05 (1); Or. Rev. Stat. §161.645; S.C. Code §17-25-350.

[97] N.C. Gen. Stat. §15A-1364; N.D.Cent Code §12.1-32-05(3) (a)(b); Or. Rev. Stat. §161.685; Utah Code Ann. §§76-3-201.1, 77-18-8; Va. Code §19.2-358; Wash. Rev. Code Ann. §10.01.180. Cf. Idaho Code §18-303 (when a party has the ability to pay an imposed fine, s/he shall be committed until the fine is paid). Cf. Karr v. Blay, 413 F. Supp. 579, 583 (N.D. Ohio 1976) ("The new Ohio statutes amply make clear that a criminal defendant has the right...not to be imprisoned for nonpayment of a fine if he were indigent, for they forbid the imposition of any fine at all upon an indigent defendant. No one can be imprisoned for failure to pay a fine which is not imposed.")

In several jurisdictions, statutes provide (or have, in the past, provided) for an indigent's release from default commitment upon the taking of an "pauper's oath," or upon a judicial finding of indigency, but only after a set amount of time (30 or 60 days or 3 months) has been spent in jail for the default.[98] Statutes like these, to the extent that they impose incarceration on an indigent when it would not be imposed on a non-indigent, or impose a longer period of commitment on an indigent than on a non-indigent, have been held to violate the Equal Protection Clause.[99] Jurisdictions, in so ruling, have taken the Tate dicta to heart. Before incarceration a determination of immediate ability to pay must be made and an indigent defendant must be given a reasonable opportunity to satisfy the fine.[100]

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[98] E.g., Fla. Stat. Ann.§992.04 (West); 1979 Mass. Acts Chap. 485 (c. 127§146); N.M. Stat. Ann §33-3-11; Okla. Stat. Ann. tit. 57, §15 (West); Pa. Stat. Ann. tit. 39,§13 (Purdon).

[99] Hood v. Smedley, 498 P. 2d 120 (Alas. 1972) (found unconstitutional A.S. 12.55.030, which limited sentence in lieu of fine payment to 30 days, upon proof of indigency); State v. Tackett, 52 Haw. 601,602 n.2, 483 P.2d 191,192 n.2 (1971) (stated that the ruling, although not squarely in issue, necessarily applied to make unconstitutional H.R.S. §712-4, which provided for release of a pauper after 30 days of being held solely for nonpayment of a fine and after swearing to indigency). Cf. Walker v. Stokes, 54 Ohio App. 2d 119,124,375 N.E. 2d 1258, 1262-63(1977) (held the provisions of R.C. 3111.18, which provided that putative fathers jailed for nonpayment of support may be released because of indigency, but only after 3 months in jail, violative of equal protection).

[100] Commonwealth ex rel Benedict v. Cliff, 451 Pa. 427,433,304 A.2d 158,161 (1973)(vacating and remanding for further proceedings the portion of sentences requiring commitment for failure to immediately pay fines and costs for a minimum of three months prior to allowing defendant to sign Pauper's Oath and gain release, the procedure under 39 P.S.§323 (now obsolete, but substantially the same as Pa. Stat. Ann. tit.39, §13 (Purdon), see note 98 supra); see also Rutledge v. Turner, 495 P.2d 119 (Okla. Crim. App. 1972) (Oklahoma statutes must be construed in conjunction with Tate and Williams; no imprisonment for default, immediate or otherwise, by indigent, unless indigent fails to appear in court at any time fixed by court; guidelines set forth by court as to hearings to determine ability to pay when sentencing to fine and/or costs and reasonable payment schedules).

The Ninth Circuit Court of Appeals has held that the federal "pauper's oath" statute, 18 U.S.C. §3569,[101] is unconstitutional, "to the extent that it would confine a defendant for thirty days beyond the normal release date for nonpayment of the fine."[102] The statute, however, is still on the books. Other courts, when confronted with this law, have conceded that it is likely to be unconstitutional,[103] but have ruled that since the Bureau of Prisons and the Board of Parole have formally recognized its unconstitutionality by issuing policy statements[104] and regulations[105] assuring that an indigent will not be held past the normal release date for failure to pay a fine or costs, there is no need to deal more directly with the statute.[106]

The state courts of Georgia have found what might be termed a way around the constitutional requirements of Tate and Williams. In a line of cases dating from 1974, Georgia courts have been

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[101] See Appendix A for text of statute.

[102] United States v. Estrada de Castillo, 549 F. 2d 583,584 (9th Cir. 1976).

[103] See United States v. Welborn, 495 F. Supp. 833, 834 n.3 (M.D.N.C. 1980).

[104] Bureau of Prisons Policy Statements 2101.2A (June 25, 1971) and 7500.44/40100.20 (March 19, 1973).

[105] 28 C.F.R. §2.32.

[106] United States v. Glazer, 532 F. 2d 224,230-31 (2nd Cir. 1976). The statutes of Florida, Massachusetts, and New Mexico authorizing the release of indigent fine defaulters only after a set period of incarceration on the default are the only such statutes that have been left standing by both legislative and judicial branches.

upholding sentences which impose terms of imprisonment, probated on the condition that the defendants pay fines before the probationary sentences become operative.[107] The effect of such a sentence is to imprison an indigent defendant who is unable to immediately pay a fine in a lump sum. In Calhoun v. Couch and Hunter v. Dean, the Georgia Supreme Court held that the equal protection dictates of Tate, Morris, and Williams were not applicable to this situation. The court pointed to the technical difference that the Georgia sentence "does not involve a fine which has been converted into a prison sentence. Rather, it involves a sentence which provides it can be served on probation upon payment of the fine."[108] In Hunter v. Dean, the court listed many justifications for imposing a lump sum fine without regard to the defendant's ability to pay immediately. Generally, these reasons concern the wide discretion of the sentencing judge in molding a sentence to fit the situation and the determination by the judge that only if defendant first pays a fine will s/he be considered a good candidate for probation.

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[107] Nixon v. State, 155 Ga. App. 395, 271 S.E.2d 44 (1980); Hunter v. Dean, 240 Ga. 214, 239 S.E.2d 791 (1977), cert. granted, 435 U.S. 967, cert. dismissed as improvidently granted, 439 U.S. 281 (1978); Barnett v. Hopper, 234 Ga. 694, 217 S.E.2d 280 (1975); Calhoun v. Couch, 232 Ga. 467, 207 S.E.2d 455 (1974). Accord, Simpson v. State, 154 Ga. App. 775, 270 S.E.2d 51 (1980) vacated, 450 U.S. 972, 101 S. Ct. 1504 (1981); Young v. State, 152 Ga. App. 108, 262 S.E.2d 258 (1979); Wood v. State, 150 Ga. App. 582, 258 S.E.2d 171 (1979), vacated, 450 U.S. 261, 101 S. Ct. 1097 (1981). These last three cases deal with similar issues, but probation was revoked for failure by an indigent to pay a fine in installments.

[108] Calhoun v. Couch, 232 Ga. 467, 469, 207 S.E.2d 455, 456 (1974).

The Hunter v. Dean court stated that "if[a] poor defendant is not a good candidate for probation because of a lack of funds, his imprisonment is simply not the result of invidious discrimination; his imprisonment is the result of his being a poor risk for probation."[109]

The superficiality of this analysis is pointed up by an observation of the California Supreme Court. It stated that "there is no significant difference in the fact that petitioner's fine...[was] imposed as a condition of probation in the court's probation order rather than in a judgment of conviction after denial of probation. We are of the view that the same constitutional principles govern both situations."[110]

In a case subsequently vacated as moot by the United States Supreme Court (and therefore not binding on any court),[111] the Fifth Circuit rejected the Georgia scheme of imprisoning indigents who nonwillfully fail to pay a fine imposed as a condition precedent to probation. That court had held that "[t]o imprison an indigent when in the same circumstances an individual of financial

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[109] 240 Ga. at 219, 239 S.E. 2d at 795.

[110] In re Antazo 3 Cal 3d 100, 116 473 P. 2d 999, 1009, 89 Cal. Rptr. 225, 265 (1970). Accord, People v. Terminelli, 68 Mich. App. 635, 637, 243 N.W. 2d 703, 704 (1976); Burke v. State, 96 Nev. 449, 451, 611 P. 2d 203, 204 (1980); State v. Crawford, 54 Ohio App. 2d 86, 88, 375 N.E. 2d 69, 70 (1977).

[111] Barnett v. Hopper, 548 F. 2d 550 (5th Cir. 1977), vacated as moot, 439 U.S. 1041 (1978).

means would remain free constitutes a denial of equal protection of the laws."[112] The next year, a federal district court in Georgia again found this type of imprisonment to be unconstitutional.[113] This court rejected the rationale of the Georgia Supreme Court that the prepayment of a fine would give a probationer a greater interest in carrying out the terms of probation than would the payment of a fine through installments. The federal court noted that there was no explanation or evidence of this theory in the state case, nor in the case before it, and that there are many other factors which a sentencing court may analyze to determine if a particular defendant is a good probation risk.

3. Other Approaches

Although the courts have in the main, dealt with the issue of default commitment of indigents in an equal protection framework,[114] they have occassionally applied other analyses. Even before the Supreme Court decided Williams, two state courts had invalidated imprisonment for longer than the statutory maximum for default on a fine,[115] on the basis of state law.

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[112] Id. at 554.

[113] Hutchinson v. Jones, 477 F. Supp. 51 (N.D. Ga. 1979). N.b., Hutchinson involved the immediate payment of restitution, not fines.

[114] See §I B (3) infra, for discussion of Thirteenth Amendment and prohibitions on imprisonment for debt.

[115] See People v. Saffore, 18 N.Y. 2d 101,103,218 N.E.2d 686,687, 271 N.Y.S. 2d 972 (1966) (since the purpose of the statute authorizing commitment for default is collection, committing on indigent defendant who cannot possibly pay runs against the meaning and intent of the statute); Sawyer v. District of Columbia, 238 A.2d 314 (D.C. Ct. App. 1968).

Other state courts have held that default imprisonment of indigents violates their state, as well as the federal, constitution.[116]

a. Eighth Amendment-Excessive Fines

The Eighth Amendment of the United States Constitution guarantees that "[e]xcessive fines [shall not be] imposed, nor cruel and unusual punishments inflicted."[117] Very few fines have ever been determined to be "excessive" or "cruel and unusual" under the Eighth Amendment if they are within statutory maximums.[118] However, a state version of this clause has been applied to render a fine excessive when levied on an indigent, if "it means in reality that he must be jailed for a period far longer than the normal period of the crime."[119] This analysis has generally not

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[116] E.g., State v. Tackett, 52 Haw. 601, 602, 483 P.2d 191, 192 (1971) (the disparity in punishment contravenes Article 1, Section 4 of the Hawaii State Constitution, a due process and equal protection guarantee).

[117] The guarantees of the Eighth Amendment have been held to apply to the states through the Fourteenth Amendment. Robinson v. California, 370 U.S. 660 (1962).

[118] Or even if they exceed statutory maximums. See Note, "Imprisonment for Nonpayment of Fine and Costs," 22 Van. L. Rev. 611, 634-37 (1969) for discussion of this and of Eighth Amendment topics generally.

See also State v. LeCompte, La. Sup. Ct., 5/18/81 29 Cr. L. 2259 (6/24/81) (the unlimited fines permitted by a state statute which provides mandatory minimum fines of $200,000 for possession of large quantities of marijuana and $250,000 for large amounts of cocaine, with no maximums, violate the state's constitutional prohibition of excessive punishment).

[119] People v. Saffore, 18 N.Y. 2d 101, 104, 218 N.E. 2d 686, 688, 271 N.Y.S. 2d 972 (1966).

been taken up by other courts.[120]

b. Due Process: Justice Harlan's Approach

Justice Harlan, in his concurrences in Williams and Tate, promoted the proposition that the Due Process Clause of the Fourteenth Amendment to the United States Constitution[121] provides the proper basis for holding the offending default commitment statutes unconstitutional. It was his opinion that the equal protection analysis used by the majority of the Court in Tate and Williams blurred the analysis:

> by shifting the focus away from the nature of the individual interest affected, the extent to which it is affected, the rationality of the connection between legislative means and purpose, the existence of alternative means for effectuating the purpose, and the degree of confidence we may have that the statute reflects the legislative concern for the purpose that would legitimately support the means chosen.[122]

A due process analysis was, in Harlan's view, "more conducive to judicial restraint."[123] This analysis involves a determination of whether the legislation at issue "arbitrarily infringes a constitutionally protected interest of this appellant."[124]

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120 See United States v. Miller, 588 F. 2d 1256, 1264 (9th Cir. 1978) (defendant's argument that a committed fine constitutes cruel and unusual punishment was noted by the court, but since defendant did not allege indigency, the court did not deal with the argument).

121 The Due Process Clause provides that no state shall "deprive any person of life, liberty, or property, without due process of law...."

122 Williams, 399 U.S. at 260 (Harlan, J., concurring).

123 Id.

124 Id. at 259.

Harlan determined that the Illinois statute challenged in Williams violated the appellant's due process rights because once the state has declared that its penological interest will be satisfied by a monetary payment, there exists no valid justification for the state to jail an indigent individual rather than offering an alternative.[125] In general, this due process approach has not been pursued by other courts, although it has been mentioned by several as additional grounds to support their holdings.[126]

c. Sixth Amendment-Right to Counsel

A different due process issue is raised by imprisonment of an indigent misdemeanant,[127] due to nonpayment of a fine, where the defendant was not represented by counsel during the prosecution that resulted in the fine.[128] In Argersinger v. Hamlin,[129] the United

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125 Id. at 264-65.

126 See, e.g., Arthur v. Schoonfield, 315 F. Supp. 548,553-54 (D. Md. 1970); Allen v. Warden, Community Correctional Center, 31 Conn. Supp. 459,464, 334 A. 2d 488,491 (1975). See also Strattman v. Studt, 20 Ohio St. 2d 95, 253 N.E. 2d 749 (1969) (Taft, C.J., concurring).

127 Gideon v. Wainwright, 372 U.S. 335 (1963), established the right to counsel in all felony cases.

128 On a related issue, the Supreme Court has held that, pursuant to the Sixth Amendment and Article III, §2 of the United States Constitution, a defendant is entitled to a jury trial upon request, but only when the crime charged or the penalty imposed is "serious." Baldwin v. New York, 399 U.S. 66 (1970); Duncan v. Louisiana, 391 U.S. 145(1968). The line drawn to separate a petty from a serious offense for this purpose is at an authorized 6 months of imprisonment or $500 fine on an individual. Muniz v. Hoffman, 422 U.S. 475 (1975). As pointed out by Justice Brennan in a dissent to Scott v. Illinois, 440 U.S. 367,375-90(1979), the decision in that case "restricts the right to counsel, perhaps the most fundamental Sixth Amendment right, more narrowly then the admittedly less fundamental right to jury trial." Id. at 389 (footnotes omitted).

129 407 U.S. 25, 37 (1972).

States Supreme Court declared that the Sixth Amendment[130] guarantees that "absent a knowing and intelligent waiver, no person may be imprisoned for any offense, whether classified as petty, misdemeanor, or felony, unless he was represented by counsel at his trial."[131] The Court in Argersinger reserved consideration of whether the federal constitutional right to counsel should be extended to those cases in which a loss of liberty is not involved.[132]

In a five to four decision in Scott v. Illinois,[133] the Supreme Court held that under the Sixth and Fourteenth Amendments to the Federal Constitution an indigent defendant charged with a misdemeanor was entitled to the appointment of counsel only if that defendant was actually sentenced to a term of imprisonment, not if a sentence of imprisonment was merely authorized by statute.

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[130] The Sixth Amendment to the United States Constitution provides, inter alia, that "[i]n all criminal prosecutions, the accused shall enjoy the right...to have the Assistance of Counsel for his defense." The Sixth Amendment right to counsel has been held to apply to the states by reason of its incorporation into the Due Process Clause of the Fourteenth Amendment. Gideon v. Wainwright, 372 U.S. 335 (1963).

[131] Id. at 37 (footnote ommited).

[132] Id. at 37. For a case which decided that question on the basis of state constitutional law, see Alexander v. City of Anchorage, 490 P. 2d 910,915 (Alas. 1971) (under the Alaska Constitution, the right to assistance of counsel applies when conviction may result in incarceration, loss of valuable license, or fine so heavy as to indicate criminality). See also Brunson v. State, 394 N.E. 2d 229 (Ind. App. 1979) (Art. I, §13 of the Indiana Constitution establishes a right to counsel for all persons charged with a criminal misdemeanor, regardless of whether the charge ultimately results in the misdemeanant's imprisonment). See Scott v. Illinois, 440 U.S. 367,386- 88 nn. 18-22 (1979) (Brennan, J., dissenting) for state statutes and case law concerning provision of counsel for indigent defendants.

[133] 440 U.S. 367 (1979) (Rehnquist, J.).

In that case, the petitioner was fined $50 after a conviction for shoplifting, an offense that carried a maximum penalty of a $500 fine and/or one year in jail. The Court stated that the central premise of Argersinger was "that actual imprisonment is a penalty different in kind from fines or the mere threat of imprisonment,"[134] and that this sound permise "warrants adoption of actual imprisonment as the line defining the constitutional right to appointment of counsel."[135]

A year later, in Baldasar v. Illinois,[136] the Court again split five to four on the question of the right to counsel,[137] with

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134 Id. at 373

135 Id.

136 446 U.S. 222, 100 S. Ct. 1585 (1980).

137 In Lassiter v. Department of Social Services of Durham County, North Carolina, ____, U.S. ____, 101 S. Ct. 2153 (1981), the Supreme Court also discussed the issue of right to appointed counsel. The Court held there that an indigent parent's right to due process was not violated when counsel was not provided to represent her at a hearing to determine whether to terminate her parental rights. The Court stated that the "fundamental fairness" requirement of the due process guarantee means that the bottom line consideration for determining when an individual is constitutionally entitled to counsel is whether, "if he loses, he may be deprived of his physical liberty." Id. at 2159.

Lassiter was decided by the same five to four majority as Scott. Justices Stewart, Burger, White, Powell, and Rehnquist joined in affirming state court decisions that counsel need not be provided to indigents under the pertinent circumstances. Justices Blackmun, Brennan, Marshall, and Stevens dissented in both cases. In the five to four decision in Baldasar, Justice Stewart was the swing vote, joining Justices Blackmun, Brennan, Marshall, and Stevens in reversing a state court judgment that an enhanced prison term can be imposed on the basis of a prior uncounseled misdemeanor conviction. The departure of Justice Stewart from the Court raises a question about the result in any future case on this issue.

the majority producing three concurring opinions and a per curiam opinion. The result of the decision was the reversal of a state court judgment allowing an uncounseled misdemeanor conviction to be used as a prior conviction under an enhanced penalty statute, thereby converting a subsequent misdemeanor into a felony with a prison term as punishment. The prior conviction resulted in a fine and a year of probation and so, even though uncounseled, was constitutional under Scott. Like the question of whether the default on a fine resulting from an uncounseled conviction may lead to commitment, the issue in Baldasar was whether imprisonment which is collateral to the uncounseled conviction may constitutionally be imposed.

The Supreme Court decisions clearly allow an unrepresented defendant to be sentenced to a fine,[138] but the Court has not directly addressed the question of whether under the Sixth Amendment an uncounseled indigent defendant may be "actually" imprisoned

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[138] Tate-Williams considerations might in some cases lead a judge to decide (albeit, unconstitutionally and improperly) to impose imprisonment in the first instance, even though a "mere" fine would be appropriate, in order to ensure the punishment of an indigent defendant. Contrariwise, because of Argersinger, a judge might decide (again, improperly) to impose a fine, rather than an appropriate prison term, in order to save the effort and expense of appointing counsel.

upon defaulting on the payment of a fine.[139] The Baldasar opinion suggests that the answer is "no."[140]

Lower courts, however, have dealt with this issue.[141] There is no consensus among them as to the correct answer.[142]

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139 The right to counsel attaches to any critical stage of the proceedings against an individual accused of a crime. Arsenault v. Massachusetts, 393 U.S. 5 (1968) A critical state has been defined as any stage at which denial of the right to counsel would deny a fair trial. Stovall v. Denno, 388 U.S. 293, 297, 298 (1967). Sentencing has been held to be such a critical stage under some circumstances. See, e.g., Townsend v. Burke, 334 U.S. 736 (1948); Annot., 20 ALR 2d 1240 (1951). Arguably therefore, this right may apply to hearings to determine indigency (see §I A(4) infra), subject to the considerations discussed herein concerning sentencing of misdemeanants.

140 See People v. Guice, 83 Ill. App. 3d 914, 917 ,404 N.E. 2d 261,263-64,38 Ill. Dec. 837(1980), cert. den.,450 U.S.968("we do not believe that violation of the probation imposed would be grounds for imprisonment, for this would make possible a prison term based on the uncounseled conviction, a result forbidden by both Scott and Baldasar v. Illinois.").

141 In State v. Borst, 278 Minn. 388,397, 154 N.W.2d 888,894 (1967) the Minnesota Supreme Court avoided holding on state or federal constitutional grounds, and based its rule that the courts may not impose imprisonment on indigent defendants convicted after being denied counsel "whether or not it is suspended or contingent on failure to pay the fine," upon the court's supervisory power to insure the fair administration of justice."

142 A similar question, concerning the jailing of indigent persons who have not paid civil fines for municipal ordinance violations and who have had no counsel appointed for them, has arisen in Wisconsin. McKeehan v. City of Wausau (Wis. Cir. Ct., Marathon County, Jan. 15, 1981) (court issued temporary order approving class certification for class action by plaintiffs). Reported at 14 Clearinghouse Review 1288, ¶30,854.

A Florida federal district court, in Gilliard v. Carson,[143] enjoined the prosecuting attorney for the Municipal Court of Jacksonville from prosecuting any indigent citizens for offenses punishable by imprisonment or by fine, if "the fine may be automatically or administratively transformed into a jail term for nonpayment, unless (A) the defendant is represented by counsel; or unless (B) the defendant has made a waiver [of the right to appointed counsel] which is intelligent and voluntary...."[144] The district court based its order on the petitioners' Sixth Amendment right to counsel and an interpretation of Argersinger.[145]

An Ohio federal district court followed Gilliard v. Carson and "noted that if...judges place the onus of raising the issue of indigency on the offender, and if his failure to raise the claim, absent a knowing and intelligent waiver of the claim of indigency, would result in confinement, this Court is of the opinion that counsel would have to be appointed for indigent persons facing any charge punishable by a fine."[146]

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143 348 F. Supp. 757, 762-63 (M.D. Fla. 1972).

144 Id.

145 Since Scott v. Illinois has made actual imprisonment the line at which the right to counsel attaches, there is arguably no longer any basis for the district court's injunction against prosecution of uncounseled indigents who are "merely" subject to a fine or imprisonment.

146 Karr v. Blay, 413 F. Supp. 579, 586 (N.D. Ohio 1976). See also Allen v. Warden, Community Correctional Center, 31 Conn. Sup. 459, 469, 334 A.2d 488, 493-94 (1975) (indigent misdemeanants' lack of counsel was unconstitutional when they were sentenced to committed fines).

On the other side of the issue, the Florida Supreme Court, in a case involving indigents imprisoned for default after uncounseled guilty pleas,[147] was "not convinced that the United States Supreme Court intended to extend the right to counsel beyond a criminal trial to a proceeding which amounts to no more than a civil contempt."[148] That court held that only Tate considerations applied to post-conviction proceedings to enforce payment of fines;[149] Argersinger was not relevant.

The following year, the Mississippi Supreme Court faced the same problem in Nelson v. Tullos[150] and determined that the trial court's failure to appoint counsel for an indigent sentenced to a fine and then committed immediately for its non-payment invalidated the defendant's imprisonment (although not his conviction).

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147 299 So. 2d 586,589 (Fla. 1974), cert. denied, 419 U.S. 1009 (1974). This case arose after the federal district court decision in Gilliard v. Carson, 348 F. Supp. 757 (M.D. Fla. 1972) and was evidently a state answer to it. Subsequent to Rollins v. State, a change in Florida Rule of Criminal Procedure 3.111 altered the state law with regard to provision of counsel for indigents.

148 Rollins, 299 So.2d at 589. However, some courts have held that indigent defendants are entitled to court-appointed counsel in civil contempt cases. See Mastin v. Fellerhoff, S.D. Ohio, 11/13/81, 30 Cr. L. 2214 (12/16/81); Brotzman v. Brotzman, 91 Wis.2d 335,283 N.W. 2d 600 (1979); and Chase v. Chase, 287 Md. 472,488 413 A.2d 208,216 (Eldridge, J., dissenting) (1980) and cases cited.

149 Cf. Brooks v. State, 336 So. 2d 647 (Fla.Dist.Ct.App.1976)(the conviction of a non-indigent misdemeanant who waived counsel without being adequately warned of the dangers of proceeding without counsel was constitutional, in view of the fact that the sentence was limited to a fine. The fact that imprisonment might result if defendant failed to pay does not change the essential character of the non-imprisonment sentence).

150 323 So. 2d 539, 545-46 (Miss. 1975).

The court went on to comment that the precepts of Argersinger would not be violated if an indigent defendant who was not represented by counsel when a fine was imposed was later subjected to the conversion of the fine into a jail sentence because of the defendant's failure to pay the fine "after reasonable measures designed to aid payment prove unsuccessful."[151] The court combined Tate and Argersinger considerations.

The question of entitlement to appointed counsel at hearings for revocation of probation, for reasons of default on fine payments or otherwise, has been settled more conclusively by the United States Supreme Court. The answer is "sometimes." In Gagnon v. Scarpelli,[152] the Court stated that since probation revocation does result in a loss of liberty, a probationer is entitled to due process. However, as probation revocation is not a stage of a criminal prosecution, a probationer is not entitled to the full due process rights of a defendant, which includes the right to counsel. Scarpelli established a case-by-case rule, entitling indigent probationers to appointed counsel at probation revocation hearings, but only when fundamental fairness requires it, i.e., when the probationer makes a request for appointed counsel:

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151 Id. at 546.

152 411 U.S. 778 (1973).

> based on a timely and colorable claim (i) that he has not committed the alleged violation of the condition upon which he is at liberty; or (ii) that, even if the violation is a matter of public record or is uncontested, there are substantial reasons which justified or mitigated the violation and make revocation inappropriate, and that the reasons are complex or otherwise difficult to develop or present. [153]

The Court in Wood v. Georgia[154] notes that the petitioner in that case, whose probation was revoked for nonpayment of a fine that was a condition of probation, would have been entitled to appointed counsel at his probation revocation hearing (if he had made the showing of indigence which he later made) because his case would have come under the second subdivision of the case-by-case rule enunciated in Scarpelli.[155]

Applying this reasoning, an indigent probationer would be entitled to counsel at a revocation hearing at which the issue was the probationer's indigence as the cause of nonpayment of a fine, only if the case was complex or hard to present. Denial of counsel in such a situation would be a violation of due process rights and the resulting imprisonment would be unconstitutional.

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[153] Id. at 790.

[154] 450 U.S. 261, 101 S. Ct. 1097 (1981).

[155] Petitioner in Wood was represented by his own counsel at the hearing, paid for by his employer.

4. Hearings to Determine Ability to Pay a Fine[156]

The obligation to determine indigency and the appropriate time for a hearing on the matter varies among the jurisdictions. Generally, no constitutional burden has been placed on a sentencing court to determine, before sentencing a defendant to a fine, whether that defendant has the ability to pay. It has been held that the constitutional problem arises solely from imprisoning the indigent defendant for defaulting, not from the imposition of the fine.[157]

In Oklahoma, however, the Court of Criminal Appeals adopted a rule, which it based on constitutional grounds, requiring a court to hold a hearing on defendant's ability to immediately satisfy a fine or pay costs before it imposes them.[158] In Pennsylvania, a statute places an affirmative duty on the sentencing court to inquire into and determine a defendant's ability to pay a fine before its imposition.[159]

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156 See §I A(1) for related topic.

157 See City of Orlando v. Cameron, 264 So. 2d 421,423 (Fla.1972); People v. Collins, 47 Misc. 2d 210,213,261N.Y.S. 2d 970,974(Orange County Ct. 1965); State v. Young, 83 Wash. 2d 937,941,523 P.2d 934,937 (1974).

158 Rutledge v. Turner, 495 P. 2d 119 (Okla. Crim. App. 1972).

159 Commonwealth v. Schwartz,275 Pa. Super.Ct.112,418 A.2d 637(1980); But cf.Karr v. Blay, 413 F. Supp. 579,586 (N.D. Ohio 1976) (prior to sentencing, an inquiry by a court into an offender's fiscal resources would be improper as having no bearing on whether punishment should be by confinement or fine).

An Indiana Court of Appeals took an intermediate course when it held that as long as a defendant's procedural and substantive rights were properly afforded at a meaningful time, a trial court had discretion to hold an indigency hearing prior to imposition of fines or after sentencing, when imprisonment for default is being considered.[160]

Several courts have held that only if a court is made aware of defendant's claim of indigence is the defendant entitled to a hearing to avoid or end default commitment and to determine ability to comply with an alternative sentence.[161] Otherwise, there is no constitutional requirement that the court make the determination.[162]

In Rhode Island, however, the state's highest court held that a hearing is needed before a defendant can be committed for defaulting on a fine, even if the defendant does not raise the issue. The defendant may be committed only after a determination that the refusal to pay is unjustified.[163] Based on a state statute, an

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160 Meeker v. State, 395 N.E. 2d 301,307 (Ind. App. 1979).

161 See, e.g., Simms v. United States, 276 A.2d 434,437 (D.C. Ct. App. 1971); State v. Lukefahr, 363 So. 2d 661,666 (La. 1978); People v. McArdle, 70 App. Div. 2d 600, 416 N.Y.S. 2d 758 (1979); People v. Sherman, 43 A.D. 2d 575, 349 N.Y.S. 2d 124 (1973), reversed on dissenting opinion, 35 N.Y. 2d 931, 324 N.E. 2d 546, 365 N.Y.S. 2d 164 (1974).

162 Harris v. United States, 440 F. 2d 240 (D.C. Cir. 1971); City of West Allis v. State ex rel. Tochalauski, 67 Wis. 2d 26,226 N.W. 2d 424 (1975); People v. Mitchell, 52 Ill. App. 3d 745, 367 N.E. 2d 1351, 10 Ill. Dec. 585 (1977).

163 Town of Westerly v. Parker, 387 A. 2d 1070 (R.I. 1978).

Indiana court held that the issue of indigency cannot be waived. Accordingly, the court has a duty to inquire about and determine the defendant's indigence even if the defendant fails to raise the issue.[164]

In New York, a statute provides a middle ground between requiring a hearing before any defendant is committed for default and requiring a hearing only when the court is made aware of the defendant's claim of indigence. A New York court must advise a defendant about to be sentenced to imprisonment for failure to pay a fine that if he or she is unable to pay, there is an absolute right to be resentenced under a special sentencing scheme for indigents.[165]

B. Imprisonment For Default on Costs

Various states' statutes allow or require the imposition of costs upon convicted defendants. The purpose is to repay the jurisdiction for the costs of prosecuting, trying, and/or defending

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[164] Meeker v. State, 395 N.E. 2d 301, 307 (Ind. App. 1979).

[165] N.Y. Crim. Proc. Law §420.10(2) (McKinney Supp. 1980). The special sentencing scheme for indigents involves either vacating the fine sentence, reducing it, changing the method of payment or complete resentencing. This duty to inform defendants of their rights before default commitment was imposed as a safeguard for indigent defendants who have no awareness of the available sentencing alternatives, often because they do not have counsel. This legislation was adopted in 1980, following the suicide of a youngster who was jailed far from home for failure to pay a fine imposed for "venial conduct." Bellacosa, Supplementary Practice Commentary, McKinney's Cons. Laws of N.Y., Book 11A, C.P.L. 420.10, Supp. 1980, p. 86.

the defendant.[166] The consequences of a default on the payment of costs are, in some states, dealt with by statute.[167] Imprisonment may result from nonpayment of costs,[168] fees,[169] litigation taxes,[170] or costs in peace bond proceedings[171] only when there is statutory authority for such default commitment.

1. Equal Protection Analysis

When the defendant against whom costs have been assessed is indigent and therefore unable to pay, the same equal protection analysis applies as when the default is on a fine. In Williams v. Illinois,[172] the Supreme Court stated that "inability to pay court costs cannot justify imprisoning an indigent beyond the maximum statutory term for the offense since the Equal Protection Clause prohibits expanding the maximum term specified by the

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166 See Fuller v. Oregon, 417 U.S. 40 (1974) (upheld the constitutionality of an Oregon statute requring a convicted defendant to repay state costs of defense counsel, appointed when defendant was indigent, when defendant subsequently acquires the means to bear such cost).

167 Eg., Del. Code tit. 11, §4106 (no imprisonment for default on fines or costs); Kan. Stat. §22-3425 (convicted defendant to be imprisoned till fine and/or costs are paid off); Nev. Rev. Stat. §29-2206,2207,2405 (costs of prosecution shall be assessed against every person convicted; court may order imprisonment with or without hard labor until costs are paid, secured, or otherwise discharged).

168 State v. Allred, 254 N.W. 2d 701 (N.D. 1977); State ex rel. Titus v. Hayes, 150 W. Va. 151,155, 144 S.E. 2d 502,506(1965)(citing 20 C.J.S., Costs, §464).

169 State ex rel. Titus v. Hayes, 150 W.Va.151,144 S.E.2d 502(1965)

170 Dillehay v. White, 264 F. Supp. 164,165 n.1 (M.D. Tenn. 1966).

171 Ex parte Chambers, 221 Mo. App. 64, 290 S.W.103 (1927).

172 399 U.S. 235 (1970).

statute simply because of inability to pay."[173] The Court explicitly treated court costs in the same manner as a fine because, although the "amounts prescribed...reflect quite different considerations...the purpose of incarceration appears to be the same in both instances: ensuring compliance with a judgment."[174]

While neither the concurrence in Morris, nor the majority opinion in Tate dealt explicitly with the constitutionality of imprisonment for default on costs,[175] the expanded interpretation of these cases[176] has been applied to that situation. Imprisonment solely for non-willful failure to forthwith pay costs in full has been held to be unconstitutional.[177]

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[173] Id. at 244 n. 20.

[174] Id.

[175] Commitment for default on costs was an issue in Morris. See Morris v. Schoonfield, 310 F. Supp. 554 (D.C. Md. 1969), vacated and remanded 399 U.S. 508 (1970).

[176] See §I A (2) (e) supra.

[177] See, e.g., Tucker v. City of Montgomery Board of Com'rs, 410 F. Supp. 494 (D.C. Ala. 1976); People v. Nicholls, 45 Ill. App. 3d 312,359 N.E.2d 1095, 4 Ill. Dec. 143 (1977); People v. Terminelli, 68 Mich. App. 635,243 N.W. 2d 703 (1976); Spencer v. Basdinger,562 S.W. 2d 350 (Mo. 1978); Pruitt v. State, 508 S.W. 2d 832(Tex. Crim.App. 1974). See also Strattman v. Studt, 20 Ohio St. 2d 95, 253 N.E. 2d 749 (1969) (decided prior to Tate).

Cf. Commonwealth v. Holm, 233 Pa. Super Ct. 281,335 A.2d 713 (1975) (although the facts of the case indicate willful nonpayment of costs by probationer, the court held that failure to pay costs after being given a reasonable opportunity to do so may, under Tate, result in commitment, even if nonpayment was not willful).

Cf. People v. Gallagher, 55 Mich. App. 613,620,223 N.W. 2d 92, 96 (1974) (defendant who was not able to pay ordered restitution should not have probation revoked or be imprisoned); Burke v. State, 96 Nev. 449 ,611 P.2d 203(1980) (per curiam)(applying Tate rule to revocation of probation for violation of condition of restitution); State v. Devatt, 173 N.J. Super. 188,413 A.2d 973 (1980) (applying the same reasoning to a case involving termination of participation of individuals in pretrial intervention program due to their failure to pay restitution, whose financial ability to pay was not determined); People v. Cunningham, 106Misc. 2d 326, 431 N.Y.S. 2d 785 (Crim. Ct. N.Y. 1980) (renewal of criminal prosecution by the restoration of an "adjournment in contemplation of dismissal," solely based on indigent's inability to pay restitution, is impermissible).

In New Jersey, a state in which commitment until costs are paid was allowed by statute,[178] the highest state court held that such commitment is impermissible when applied to an indigent non-willful defaulter.[179] This holding was based on the determination that the legislature did not provide for the imposition of costs as a punitive device, so "there is no basis for the substitution of a form of punishment for their nonpayment."[180] The purpose of incarceration in such circumstances would be only to coerce payment, not to punish for the original offense; therefore, commitment of one unable to pay would be precluded, presumably because it is not aimed at a proper purpose.

In 1974, the Supreme Court upheld an Oregon statute which allowed its courts to require a convicted defendant, as a condition of probation or otherwise, to repay the state some or all of the expense incurred for appointed counsel.[181] There were several considerations upon which the constitutionality of the law rested. Of particular note are the specifications that a court could not order a convicted person to pay these expenses unless s/he is or will be able to pay them, that the court could remit

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178 N.J. Stat. Ann. §2A: 166-16(West) (1971) (repealed 1978) and N.J. Stat. Ann. §39: 5-36 (West)(1973) (pertaining to motor vehicle offenses).

179 State v. DeBonis, 58 N.J. 182, 276 A. 2d 137 (1971).

180 Id. at 200, 276 A. 2d at 147.

181 Fuller v. Oregon, 417 U.S. 40 (1974).

if payment will impose manifest hardship on the defendant or his or her immediate family, and that non-willful failure to repay would not result in the convicted person being held in contempt. This case, and cases following it, have held that it is not permissible to imprison a defendant, whether as a result of revocation of probation, or otherwise, when that defendant has failed to make reimbursement as a result of a good faith inability to pay such costs.[182]

2. Marshall's Equal Protection Approach

In his dissent in Fuller v. Oregon, Justice Marshall propounded an alternative equal protection approach.[183] He noted that when the repayment of defense costs to the state can be made a condition of probation, as it was in that case, then the probationer's failure to pay can result in imprisonment. Marshall contrasted this to the situation of any other civil judgment debtor or a non-indigent defendant who has retained private counsel and then failed to pay the bill. Under the Oregon Constitution, imprisonment for debt is not an option even for the non-paying civil

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[182] See, e.g., Olson v. James, 603 F. 2d 150,155 (10th Cir. 1979); United States v. Santarpio, 560 F. 2d 448, 455 (1st Cir. 1977); Robbin v. State, 318 So. 2d 472 (Fla.Dist. Ct.App. 1975); State v. Rogers, 251 N.W. 2d 239(Iowa 1977); People v. Williams, 66Mich.App. 67, 238 N.W. 2d 407 (1975); Opinion of the Justices, N.H. Sup. Ct. 6/12/81, 29 Cr. L. 2336 (7/22/81); Basaldua v. State, 558 S.W. 2d 2, 5-7 (Tex. Crim. App. 1977); State v. Barklind, 87 Wash. 2d 814, 557 P. 2d 314 (1976). See Annot. "Validity of Requirement that, as Condition of Probation, Indigent Defendant Reimburse Defense Costs," 79 ALR 3d 1025 (1977).

The added problem of the right to counsel guaranteed by the Sixth Amendment is raised when an indigent is imprisoned for failure to pay defense costs. See State v. Barklind, 87 Wash. 2d 814, 557 P. 2d 314 (1976).

[183] 417 U.S. at 59-61.

debtor with the ability to pay (unless there is fraud or the debtor has absconded). Therefore, the debtor with a private creditor may not be put in jail for defaulting on a debt owing for legal representation, while an indigent probationer may be so imprisoned.

Although not properly raised by the parties, this argument was addressed by the majority of the Court which stated, in dicta, that there was no constitutional invalidity in the Oregon statute on this basis.[184] The Court pointed out that revocation of probation for nonpayment of costs can only occur when the probationer intentionally refuses to reimburse the state, even though s/he is financially able to pay. Therefore, the Court stated, the revocation is a sanction imposed for willful disobedience to a court order and not a collection device. If therefore does not constitute invidious discrimination against the poor.

3. Thirteenth Amendment

The Thirteenth Amendment to the United States Constitution provides, inter alia, that "involuntary servitude, exept as a punishment for crime whereof the party shall have been duly convicted, shall [not] exist within the United States or any place subject to their jurisdiction." (emphasis added). This has been interpreted to mean that in states in which costs assessed against a convicted person are extraneous to the punishment for a crime, imprisonment for default on such costs, not being punishment for

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Id. at 48 n. 9.

crime, is involuntary servitude and violates the Thirteenth Amendment.[185] Other states have held that costs "are imposed as a part of a fine and as a penalty for the transgression" and therefore imprisoning a defendant who has defaulted on costs violates no constitutional provision.[186]

There is yet another line of cases which holds that imprisonment resulting from revocation of probation for violation of a condition requiring repayment of costs does not violate the Thirteenth Amendment.[187] These cases stress that probation may be revoked, only after a willful and contemptuous nonpayment by a probationer with the means to pay. The revocation is not for failure to pay a debt, but for failure to comply with the terms of probation. The defendant would "simply [be] serving out a

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185 Wright v. Matthews, 209 Va. 246, 163 S.E. 2d 158 (1968); Anderson v. Ellington, 300 F. Supp. 789, 792-93 (M.D. Tenn. 1969); cf. Opinion of the Justices, N.H. Sup. Ct., 6/12/81, 29 Cr. L. 2336 (7/22/81) (repayment of costs of legal counsel is not part of the punishment for the underlying crime; therefore, requiring an indigent defendant who is unable to reimburse the state to satisfy the debt by performing uncompensated labor for the state would violate the Thirteenth Amendment).

186 State v. Kilmer, 31 N.D. 442, 446,153 N.W. 1089, 1090 (1915); Whaley v. District Court of Mayes County, 422 P.2d 227 (Okla.Crim.App. 1966) (costs of prosecution are part of the penalty for the offense). Cf. State v. Bender, 283 A. 2d 847 (Del. Super.Ct.1971). In Delaware, costs are imposed in the judge's discretion as part of the sentence, but the state court held that under Tate and Williams, imprisonment of an indigent for default on costs was unconstitutional. The court modified the defendant's sentence of 10 days consecutive imprisonment upon default of prosecution costs to a requirement that he report for work for the state to discharge any costs on which he has defaulted.

187 State v. Barklind, 87 Wash. 2d 814,557 P.2d 314(1976); State v. Gerard, 57 Wis. 2d 611, 205 N.W. 2d 374 (1973); cf. Opinion of the Justices, N.H. Sup. Ct. 6/12/81, 29 Cr.L. 2336 (7/22/81)(requiring a physically fit indigent defendant who is financially unable to reimburse the state or local government for appointed counsel to satisfy the debt by performing uncompensated work for the government as a condition of probation would be constitutional, as would be a revocation for willful refusal by a capable defendant to do such work).

sentence that was previously imposed and stayed upon conditions which he violated."[188]

4. Imprisonment for Debt

As Justice Marshall pointed out in his dissent in Fuller, imprisonment for debt is specifically prohibited by many state constitutions.[189] There is conflict over whether this prohibition applies to imprisonment of a convicted defendant for failure to pay costs in criminal cases.[190]

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188 State v. Barklind, 87 Wash. 2d 814,821 ,557 P.2d 314,319-320 (1976) (quoting State v. Gerard, 57 Wis . 2d 611, 624,205 N.W. 2d 374,381 (1973).

189 See, e.g., Ark. Const. art. 2, §16; Ohio Const. art. 1, §15; Or. Const. art. 1,§19; Wash. Const. art. 1, §17.

190 Compare State v. Barklind, 87 Wash. 2d 814,820,557 P.2d 314, 318-19 (1976) (state constitutional prohibition against imprisonment for debt relates to basically contractual matters, not to an order of the court to pay defense expenses as a condition of probation, especially since the failure to make such payments will only result in confinement if the failure is willful, i.e., the defendant has financial ability but willfully fails to pay or willfully fails to make a good faith reasonable effort to acquire means to make the payment) and State v. Montroy, 37 Idaho 684,689, 217 P. 611,613(1923) ("the great weight of authority is to the effect that costs of prosecution are not a debt within the constitutional inhibition against imprisonment for debt.") and Lavender v. City of Tuscaloosa, 29 Ala. App. 502,504, 198 So. 459 (1940) (state constitutional immunity from imprisonment for debt is limited to debts arising out of contract and does not include "a fine and costs imposed by the municipality for the willful neglect or refusal to comply with the public duty imposed on the defendant by the terms of the ordinance upon which the prosecution was rested") with Strattman v. Studt, 20 Ohio St. 2d 95,102,253N.E.2d 749, 754 (1969) (court costs in criminal cases, just as in civil cases, are not imposed for punitive, rehabilitative or retributive purposes, but to lighten taxpayers' burden of financing court system; both are civil contractual-type obligations and neither may be collected by imprisonment or threat thereof). Cf. LaRue v. Burns, 268 N.W. 2d 639, 641-42 (Iowa 1978) (in absence of a statute making court costs part of the fine to be imposed as the penalty for an offense, a judgment for costs against a criminal defendant creates a civil, not a criminal, liability and therefore may be enforced by execution against income or property, but not by imprisonment). See 16 C.J.S. Constitutional Law §204(4) text at nn. 12 and 13 and cases cited.

II. ALTERNATIVES TO IMPRISONMENT OF INDIGENTS ON DEFAULT

In Williams and Tate, the Supreme Court, while reversing the default imprisonment of indigents as violative of the Equal Protection Clause, emphasized that numerous constitutional alternatives to imprisonment are available to state legislatures and judges to serve the state's "concededly valid interest in enforcing payment of fines."[191] An installment payment plan and a parole requirement of specified work were mentioned by the court as possibilities.[192]

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[191] Tate v. Short, 401 U.S. at 399. See also Williams v. Illinois, 399 U.S. at 244-45.

The Court in Williams commented that while implementing these alternatives might "place a further burden on states in administering criminal justice...the constitutional imperatives of the Equal Protection Clause must have priority over the comfortable convenience of the status quo." 399 U.S. at 245. Similarly, courts have sympathetically noted the crowded dockets of the overtaxed state trial courts but held that in this matter "[c]onstitutional rights are...not to be subordinated to administrative convenience." Allen v. Warden Community Correctional Center, 31 Conn. Supp. 459, 469-70, 334A. 2d 488, 494 (1975). Also Arthur v. Schoonfield, 315 F. Supp. 548, 554 (D.Md. 1970); Hood v. Smedley, 498 P. 2d 120, 123 (Alas. 1972) Rutledge v. Turner, 495 P. 2d 119, 124 (Okla.Crim.App. 1972). It should be added that while alternative methods of fine collection may utilize additional judicial and administrative resources, they certainly save state expense in prison maintenance costs. State v. Tackett, 52 Haw. 601, 603, 483P. 2d 191, 193 (1971). See also Tate v. Short, 401 U.S. 395, 399 (1971).

[192] Williams v. Illinois, 399 U.S. at 244-45 n. 21.

A. Continuing liability of an Indigent for a Fine

Most courts, in interpreting Tate and Williams, have made clear that an indigent defendant is not relieved of liability for a fine simply because s/he may not be incarcerated upon default.[193] Even in the absence of specific statutory authority, some state courts have insisted on some alternative to outright and unconditional release. For example, authority to impose payment by installments has been found within the general statutory authority to impose conditions on probation or suspension of sentence, has been read into the statutory authority to accept a note or bond with adequate security or sureties,[194] and has been held to be "implicit in the power to impose the penalty."[195]

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193 See, e.g., Frazier v. Jordan, 457 F. 2d 726, 730 (5th Cir.1972); In re Antazo, 3 Cal. 3d 100, 117 473 P.2d 999, 1010 89 Cal. Rptr. 255 (1970) Spurlock v. Noe, 467 S.W. 2d 320, 322 (Ky. App. 1971). Contra, e.g., Simms v. United States, 276 A.2d 434 (D.C. App. 1971); Booth v. State 246 So.2d 791 (Fla. Dist.Ct. App.1971); Gary v. State, 239 So. 2d 523 (Fla. Dist. Ct. App. 1970): (N.b. that all three cases involved fines imposed in addition to sentences to the maximum period of imprisonment).

The United States Court of Appeals for the Second Circuit in Vitagliano v. United States, 601 F. 2d 73 (2d Cir. 1979), cert. denied, 444 U.S. 1085, rejected the argument that a defendant's rights against double jeopardy were violated when the obligation to pay a fine survived default commitment. The court reasoned that, in the absence of a statutory rate of credit per day of imprisonment, there was no double punishment for the offense since the commitment was not intended to be substitute punishment, but was meant to compel obedience to the court's order to pay. Accord, State ex rel. Pedersen v. Blessinger, 56 Wis. 2d 286, 295 n.6, 201 N.W. 2d 778, 783 n. 5 (1972).

194 Cherry v. Hall, 251 Ark. 305, 472 S.W. 2d 225 (1971).

195 State v. DeBonis, 58 N.J. 182, 189, 276 A. 2d 137, 141 (1970); accord, Hood v. Smedley, 498 P. 2d 120, 122 (Alas. 1972).

Other courts have held that the judgment remains in force and collectible should the defendant ever gain the ability to satisfy the fine.[196]

Occasionally, a court will acknowledge that the situation of the defendant is such that it would be futile to try to impose an alternative method for securing payment of the fine[197] or to release the defendant under an order that the fine be paid when the defendant becomes able to do so.[198] In such cases, the fine is simply vacated. Significantly, the fines in these cases were imposed in addition to sentences which had already been served by the defendants.

In New York, the legislature has provided that only where a sentence consists of probation or imprisonment, in addition to the fine, may the fine portion of the sentence be completely revoked after a determination that the defendant is indigent.[199] The alternatives available on resentencing an indigent who was originally sentenced to a fine alone or fine plus punishment other than imprisonment or probation are adjustment of the payment terms, a lowering of the amount of the fine, or a revocation of the entire sentence and a resentencing of the defendant to any sentence which

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196 Colocado v. State, 251 So. 2d 721,724 (Fla.Dist.Ct.App. 1971); People v. Davis, 2 Ill. App. 3d 106, 276 N.E. 2d 134,136 (1971); In re Jackson, 26 Ohio St. 2d 51, 268 N.E. 2d 812,813 (1971).

197 People v. Hernandez, 53 Mich. App. 91, 93, 218 N.W. 2d 394,395 (1974).

198 State v. Woods, 62 Ohio Op. 2d 48, 293 N.E. 2d 583,584 Akron Mun. Ct. (1972).

199 N.Y. Crim. Proc. Law §420.10(4)(c)(McKinney Supp. 1980). See People v. Goddard, 108 Misc. 2d 742,746, 439 N.Y.S.2d 71 (Crim.Ct. N.Y. 1981).

could have been imposed originally.[200]

B. Are Installments Constitutionally Required?

Some courts have held that the constitutional mandate to afford each defendant an opportunity to satisfy a fine before commitment for default requires a sentencing court to permit the payment of a fine in reasonable installments when the defendant is unable to pay in a lump sum.[201]

In Oklahoma, the Court of Criminal Appeals has set forth guidelines to be followed by all of the state district and municipal courts.[202] Based upon its interpretation of Tate, Morris, and Williams, this court requires that a defendant who is unable to immediately satisfy a fine be given the opportunity to make installment payments. However, a court is not thereby prohibited from fixing a future date for payment, in lieu of installment payments.[203]

The more logical constitutional approach is that an indigent defendant need not be given the opportunity to pay a fine by installments, if another viable possibility is offered.[204] To pass

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[200] N.Y. Crim. Proc. Law §420.10(4)(a,b,d) (McKinney Supp. 1980).

[201] State v. DeBonis, 58 N.J. 182, 276 A. 2d 137 (1971); Commonwealth ex rel. Benedict v. Cliff, 451 Pa. 427, 434 ,304 A. 2d 158,161 (1973).

[202] Rutledge v. Turner, 495 P.2d 119 (Okla. Crim. App. 1972).

[203] Id. at 124.

[204] See State ex rel. Pedersen v. Blessinger, 56 Wis. 2d 286, 201 N.W. 2d 778(1972)(statute providing for fine payment within 60 days was constitutional, when considered together with the court's inherent power to stay a sentence upon such terms as it finds just).

constitutional muster, however, the alternative must be truly fitted to the indigence and circumstances of the defendant.[205]

C. Work-parole option

While most states focus their attention on installment plans or delayed payments, the other possibility mentioned by the Supreme Court in Williams,[206] a "work-parole" option, has been adopted by legislation in at least three states.[207] Under such a statute, a Delaware court sentenced an indigent defendant to prison and to pay a fine and the costs of prosecution, with the proviso that if the amounts were not paid by the time the prison sentence was completed, the defendant was to report to the Director of the Division of Corrections for work, during regular work days, to discharge the fine and costs imposed.[208]

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205 See Allen v. Warden, Community Correctional Center, 31 Conn. Sup 459, 334 A. 2d 488 (1975) (merely postponing for a few weeks the date on which payment was due from indigent defendants was not constitutionally adequate when no effort was made by the sentencing court to determine what defendant's ability to pay would be on that date).

206 When work-parole is used to pay off fines which are imposed as "punishment for crime," this involuntary servitude arguably causes no Thirteenth Amendment problems. See §I (B)(3). Cf. Opinion of the Justices, N.H. Sup. Ct., 6/12/81, 29 Cr. L. 2336 (7/22/81).

207 Del. Code Ann. tit. 11, §4105 (1974); Ky. Rev. Stat. §534.060 (3)(1975); Miss. Code Ann. §99-19-20(1)(d) (Supp. 1980).

208 State v. Bender, 283 A. 2d 847, 851-52 (Del. Super. Ct. 1971).

The New Jersey Supreme Court, on the other hand, has opined that it would not

> be wise to say the Constitution requires the State to find some job the offender can pursue at large, for that...would not be feasible. To insist upon a solution which lacks realism must redound to the injury of defendants who might be able to pay a fine, for impractical impediments to the realization of the State's penological objective might drive the sentencing judge to impose jail terms in cases in which he would otherwise have sought that objective through a fine. 209

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209 State v. DeBonis, 58 N.J. 182, 198, 276 A. 2d 137, 146 (1971).

III. DEFAULT BY AN INDIGENT ON AN ALTERNATIVE TO IMPRISONMENT

A. The Supreme Court's "Concrete Cases"

In Tate v. Short, the Supreme Court left undecided the question of whether imprisonment may be constitutionally imposed "as an enforcement method when alternative means are unsuccessful despite the defendant's reasonable efforts to satisfy the fines by those means...."[210] The Court commented that that determination "must await the presentation of a concrete case."[211]

The "concrete case" was presented to the Supreme Court in Wood v. Georgia,[212] and they granted certiorari to resolve this issue. However, the majority of the Justices held that "rather than decide a novel constitutional question that may be avoided,"[213] the judgment below should be vacated and the case remanded to determine an issue not explicitly presented to the Court: whether there was an actual conflict of interest on the part of the petitioners' attorney which violated petitioners' due process rights.

The petitioners in Wood, upon conviction for violation of the obscenity laws, had been fined and sentenced to jail, but granted immediate probation conditioned upon payment of the fine in installments. The judge evidently assumed that the petitioners' employer,

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

211 Id.

212 450 U.S. 261, 101 S. Ct. 1097 (1981).

213 Id. at 265, 101 S. Ct. at 1100.

an "adult entertainment" firm, would pay the fines for petitioners, and consequently imposed large fines in monthly installments of $500 apiece. Without such assistance, petitioners were financially unable to pay the fines. When the employer declined to pay, the petitioners' probation was revoked for nonpayment and they were ordered imprisoned to serve the remainder of their jail sentences.

The Court's concern with the due process issue arose because the attorney who represented petitioners also represented and was paid by their employer. The court noted that the interests of the employer may not have been compatible with those of the petitioners at the time of sentencing or at the probation revocation hearing. There was a possibility that the petitioners' attorney, on behalf of the employer, was seeking to create a test case and for that reason did not protest the size of the fines imposed.

The identical situation with the same attorney for different petitioners was presented in Simpson v. Georgia.[214] The Supreme Court again avoided the "concrete case," vacated the state court judgment, and remanded for further consideration in light of Wood.

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[214] 154 Ga. App. 775, 270 S.E. 2d 50, vacated, 450 U.S. 972, 101 S. Ct. 1504 (1981).

B. State Courts' Interpretations

Although the Supreme Court has failed to reach this equal protection issue,[215] other jurisdictions have come to grips with it. The courts of some states have interpreted the equal protection analysis of Tate, Morris, and Williams to prohibit the imprisonment of an indigent defaulter, even if the default is on an alternative method of payment such as installments or deferred payments, if such a failure was solely as the result of indigency and despite a good faith effort to pay.[216]

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[215] An alternate approach to the revocation of an indigent's probation for nonpayment of a fine which was a condition of probation is found in United States v. Wilson, 469 F. 2d 368 (2d Cir. 1972); United States v. Taylor, 321 F. 2d 339 (4th Cir. 1963); State v. Huggett, 55 Haw. 632,525 P.2d 1119 (1974); and Burke v. State 96 Nev.449,452, 611 P.2d 203,205 n.3 (1980). Revocation of probation based solely on a probationer's good faith inability to pay is deemed an abuse of the judge's usually broad discretion involving probation revocation decisions.

[216] In re Antazo, 3 Cal. 3d 100, 473 P. 2d 999, 89 Cal. Rptr 255. (1970); Dixon v. State, 365 So. 2d 1067 (Fla.Dist. Ct. App. 1979); State v. Huggett,55 Haw. 632,525 P.2d 1119(1974); People v. Terminelli, 68 Mich. App. 635, 243 N.W. 2d 703 (1976); Hendrix v. Lark, 482 S.W. 2d 427 (Mo. 1972); People v. Sherman, 43 App. Div. 2d 575, 349 N.Y.S. 2d 124 (Shapiro, J. dissenting)(1973), rev'd on Shapiro's dissent, 35 N.Y. 2d 931 324 N.E. 2d 546, 365 N.Y.S. 2d 164 (1974), remitted for hearing, 49 App. Div. 2d 929,374 N.Y.S. 2d 142 (1975); State v. Jeffers, 57 Ohio App. 2d 107, 385 N.E. 2d 641 (1978); Rutledge v. Turner, 495 P. 2d 119 (Okla.Crim. App. 1972); State ex rel. Pedersen v. Blessinger, 56 Wis. 2d 286,294-95,201 N.W. 2d 778, 783 (1972). Cf. Burke v. State, 96 Nev. 449, 451, 611 P. 2d 203,204 (1980) (the same rule should apply where restitution, rather than a fine, is involved; default imprisonment of an indigent resulting solely from such indigence violates the equal protection guarantee whether it occurs at the time of sentencing or at any time thereafter).

Of course, as the California Supreme Court stated, in dicta,

> [w]hen the indigent offender refuses to avail himself of...alternatives..., or defaults or otherwise fails to meet the conditions of the particular alternative which is offered him without a showing of reasonable excuse, the indigent offender becomes in the eyes of the court exactly the same as the contumacious offender who is not indigent. When either of these conditions obtain the offender's indigency ceases to be dispositive and he may, consistently with the mandate of the equal protection clause, be relegated to "working out" his fine by imprisonment.[217]

The Supreme Court of Wisconsin, in holding that a reasonable payment schedule must be afforded an indigent defendant and that such a defendant may not be imprisoned for inability to pay the fine, noted that "[o]nce a fine and a payment schedule are reasonably suited to the offender's means, the offender carries the heavy burden of showing that such an individualized payment schedule is in fact beyond his means."[218]

In Oklahoma,[219] a defendant may be imprisoned if he or she can give no satisfactory explanation for failing to make installment payments which were imposed after a hearing at which the court

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217 In re Antazo, 3 Cal. 3d 100, 116, 473 P.2d 999, 1009, 89 Cal.Rptr. 225, 265 (1970) (first emphasis supplied, second emphasis in original). See Smith v. State, 301 Minn. 455, 223 N.W. 2d 775 (1974) (the default commitment of an indigent defendant does not violate equal protection when the defendant was allowed extensions for payment and when his failure to find employment that would have enabled him to pay was due to a lack of diligence).

218 Will v. State, 84 Wis. 2d 397, 406-07, 267 N.W. 2d 357, 361 (1978).

219 Rutledge v. Turner, 495 P. 2d 119, 123 (Okla. Crim. App. 1972).

determined that the defendant may have the ability to make such payments. If, however, a defendant is unable to make payment of a particular installment because of misfortune or exigent circumstances, the court should, in its discretion, give the defendant a further opportunity. If a defendant, due to physical disability or poverty, cannot pay the fine in installments at all, s/he must be relieved of the obligation or required to report back to the court at intervals for a determination of whether s/he has gained the ability to commence payments. A defendant who fails to appear on a date fixed by the court may be imprisoned to satisfy the fine.

In a case holding that the equal protection guarantee requires that a defendant be given a reasonable opportunity to pay before being committed, the Mississippi Supreme Court expressed its reluctance to imprison an indigent who fails to pay installments on a fine. The defendant in that case had been arrested twice before for failure to satisfy fines and had one outstanding unpaid fine in addition to the one involved in the case. The court commented:

> "Certainly, we do not take lightly the imprisonment of an indigent for inability to pay his fine. Admittedly, it smacks somewhat of the discarded practice of imprisoning one who is unable to pay his debts. However, when faced with a habitual offender or recalcitrant defendant who is without resources to pay yet evinces a callous disregard for law enforcement, imprisonment may often be the only enforcement method left." [220]

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[220] Nelson v. Tullos, 323 So. 2d 539,544 (Miss. 1975). The court held that the defendant in this case be given a reasonable opportunity to pay his fines. The quoted language is dicta.

In a few jurisdictions, the focus has been on the language in Tate noting that that decision did not preclude imprisonment of a defaulting indigent "as an enforcement method when alternative means are unsuccessful despite the defendant's reasonable efforts to satisfy the fines by those means"[221] and that only an "automatic" conversion of a fine sentence into a jail term, upon an indigent's failure to "immediately" pay a fine is prohibited.[222] Under this approach, even a non-willful default on a payment plan brought about by financial inability to pay may result in the incarceration of the defendant.[223]

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221 Tate, 404 U.S. at 401.

222 Id. at 398, quoting Morris v. Schoonfield, 399 U.S. 508,509(1970).

223 See, e.g., In re Collins, 108 Ariz. 310, 497 P. 2d 523 (1972) (an indigent defendant sentenced to a $100 fine or 40 days in jail should be given an "appropriate" time period within which to pay the fine imposed, after which time, if the court's order to pay has not been complied with, the defendant is to be forthwith committed to jail to serve the alternative sentence); Commonwealth v. Holm,233 Pa. Super. Ct.281,335 A.2d 713(1975) (probation of an indigent defendant may be revoked even if the failure to comply with the probation condition of paying the costs of prosecution was not willful); but see Commonwealth v. Del Conte,277 Pa. Super.Ct.296, 419 A.2d 780 (1980) (the question of whether non-willful conduct may justify a probation revocation is still open in Pennsylvania; Commonwealth v. Holm did not settle that question as, in that case, the probationer willfully defaulted by not diligently seeking the wherewithal to meet his obligations).

c. The DeBonis Approach and Hendrix v. Lark

The Supreme Court of New Jersey, in holding that the United States Constitution requires that an indigent defendant be permitted to pay the fine and costs in installments, addressed the issue of what may be done with a defendant who, without contumacy, does not pay in accordance with such an installment plan.[224] The court declared that it would not violate the Constitution to imprison an indigent upon failure to pay in installments when the jail term imposed upon such default was a "substitute" for the fine.

In State v. DeBonis, this court resolved first that under state law, when an offender could not be reached by a fine because of inability to pay, there was no plainly adequate way short of imprisonment to achieve the state's penological aim. If there was such a way, the court opined, it would deny equal protection or due process to instead use imprisonment for an unpaid fine.[225] It is emphasized in the opinion that default imprisonment in New Jersey serves as an alternative punishment for the offense, a substitute

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224 State v. DeBonis, 58 N.J. 182, 276 A. 2d 137 (1971).

225 The DeBonis court used a strict scrutiny equal protection analysis; the classification was found to be justified by a compelling state interest and "necessary" to further that interest. See §I A (2)(d) supra for discussion of equal protection tests.

"therapeutic sting" for the one that failed, i.e., the fine.[226] This definition of the purpose of default commitment is in contrast to that assigned by the United States Supreme Court to the same practice in Texas[227] and Illinois.[228] There, the Supreme Court found that incarceration for nonpayment of a fine was imposed to enforce collection,[229] a "valid", "substantial and legitimate"[230] purpose. Imprisonment of indigents cannot be said to be "necessary" to the collection of fines, particularly as

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226 In a case following DeBonis, a lower appeals court in New Jersey held that a defendant resentenced to a custodial term after a willful failure to pay a fine may not escape the imprisonment simply by paying the fine; once the sentencing court "concluded that the fines failed to achieve the intended punitive end, the alternative of paying the fines simply did not exist." State v. O'Toole, 162 N.J. Super. 339, 345, 392 A. 2d 1225, 1229 (1978). Compare with State ex rel. Stracener v. Jackson, 610 S.W. 2d 420 (Mo. App. 1980) (after not paying a fine when given a reasonable time to do so, defendant did finally pay it just prior to a hearing being held to determine if default was willful; the court determined that the failure had been willful and that defendant should be imprisoned, not as an alternative to the fine, but as a punishment for contempt of court in failing to obey the court's sentence). Note that a committed New Jersey defendant would no longer be liable for the fine, while such a Missouri defendant would still be liable. See n. 193, supra, for discussion of double jeopardy.

227 Tate v. Short, 401 U.S. at 399.

228 Williams v. Illinois, 399 U.S. at 240.

229 Tate, 401 U.S. at 399.

230 Williams, 399 U.S. at 238.

an indigent cannot pay, even if imprisoned.[231] However, following the analysis by the New Jersey Supreme Court, when the purpose of default commitment is defined as the imposition of an alternative punishment, and no alternative punishment less intrusive of individual rights is available, the state's interest can be termed "compelling" and the means become rationally related and "necessary" to the achievement of that end."[T]o exonerate a defendant because he cannot pay the fine would defeat the penological objective of the State and be tantamount to a grant of immunity from penal responsibility. The result would be the antithesis of the equality guaranteed by the equal protection clause"[232] The court in DeBonis determined that the appropriate course was to afford an indigent defendant a reasonable opportunity to pay the fine in installments and to reconsider the sentence if the payments are not met. The court may then reduce or suspend the fine or modify the payment plan, "or, if none of these alternatives is warranted, the court may impose a jail term to achieve the needed penological objective."[233] The duration of such a jail term

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231 It has been noted that imprisonment of all defaulters, indigent and otherwise, may be useful in fine collection, in the effect that it has as a threat on defaulters who could come up with the money if properly motivated.

232 DeBonis, 58 N.J. at 199, , 276 A.2d at 146.

233 Id. 58 N.J. at 200,276 A. 2d at 147.
Cf. State v. Devatt, 173 N.J. Super. 188, 413 A.2d 973 (1980) (the termination of participation of indigents in a pretrial intervention program and the start of criminal proceedings against them without a determination that their failure to make restitution within a three-month period was willful denied them equal protection of the laws by exposing them to a potential deprivation of liberty because of indigency, although others facing similar charges are permitted to enjoy the advantages of the diversionary system). Note that restitution by compensating victims serves a social purpose larger than merely punishment and this purpose will not be served by prosecuting the defendants.

would be determined after consideration of the total circumstances of the individual case.

Justice White, in his dissent in Wood v. Georgia, used the same reasoning as the New Jersey court in DeBonis. He concluded that the Supreme Court should have reached the equal protection question and, because the constitutional rationale of Tate and Williams prohibits incarceration as it was imposed on those defendants, reversed the judgment of the Georgia court. Justice White's view on this issue is that

> if an indigent cannot pay a fine, even in installments, the Equal Protection Clause does not bar the State from specifying other punishment, even a jail term, in lieu of the fine. To comply with the Equal Protection Clause, however, the State must make clear that the specified jail term in such circumstances is essentially a substitute for the fine and serves the same purpose of enforcing the particular statute that the defendant violated. 234

Justice White found that in Wood, by imposing the sentence it did, Georgia declared that its penal interests would be satisfied by the payment of a fine, with no loss of liberty except that incident to probation. When it revoked the defendants' probation, the court made no attempt to calculate what terms of imprisonment would be a proper substitute for the fines to satisfy the state's

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234 450 U.S.at 285-86, 101 S. Ct. at 1110-11 (footnote omitted) (White, J., dissenting).

interest in enforcing the criminal law involved.[235] Justice White also noted that even after serving their prison terms, the defendants will still be liable for their unpaid fines.[235] The commitment therefore was "for failure to pay a fine, without regard to the goals of the criminal justice system. As in Williams, and Tate, the State is speaking inconsistently concerning the necessity of imprisonment to meet its penal objectives; imprisonment of an indigent under these circumstances is constitutionally impermissible."[237]

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[235] A Georgia court, in defending that state's sentencing scheme, averred that "[t]he financial inability of the defendant to pay the monthly installment when due did not convert the monetary portion of the sentence to imprisonment, but merely invoked the previously imposed confinement portion of the sentence." Simpson v. State, 154 Ga. App. 775, 776, 270 S.E. 2d 50 (1980), vacated, 450 U.S. 972, 101 S. Ct. 1504 (1981). In effect, the court asserted that the reimposed incarceration sentence was initially determined to be an appropriate sentence. Contra, People v. Goddard, 108 Misc. 2d 742, 747, 439 N.Y.S. 2d 71 (Crim. Ct. N.Y. 1981) ("applying the original sentence to a truly impoverished defendant because he is without means to satisfy the fine clearly results in a poorly disguised, back-door method of circumventing the indigent's right to equal protection.").

[236] The defendants in Wood were sentenced to fines and prison terms and granted immediate probation on the condition that installment payments be made towards the fines. The point raised by Justice White's comment is that, since the Georgia commitment would not discharge the fine, the theoretical purpose of the incarceration could only be to function as a collection device or as a contempt sanction for nonpayment, but not as a substitute punishment. As the foregoing has discussed, commitment of indigent defaulters merely to collect fine revenues has already been found unconstitutional by several courts. As for the contempt sanction, it can only be called into play in a situation like this when a person willfully disobeys a court order; the inability of an indigent to pay is not willful. 17 C.J.S. Contempt §§19, 103, 104. See People v. Harris, 41 Ill. App. 3d 690, 354 N.E. 2d 648 (1976).

[237] 450 U.S. at 287, 101 S. Ct. at 1111.

The Supreme Court of Missouri has examined the theory espoused in DeBonis.[238] In Hendrix v. Lark, it found that

> [t]he difficulty with [the New Jersey] approach is...that it ignores the fact that the only ones who receive the "therapeutic sting" in the form of a jail sentence are those who are indigent and cannot pay the fine, and ignores the vast difference in the amount of sting inflicted on the indigent who must work out the fine by serving time in the St. Louis city jail, as compared to the defendant who has funds, pays the fine, and walks away free.[239]

The Missouri court also noted that while the New Jersey default imprisonment may operate as an alternative form of punishment, the ordinance involved in the Missouri case utilized default commitment as a collection device. The court stated that under a scheme such as the latter,"[a]s applied to indigents we fail to see how either the threat or the actuality of imprisonment can force a man who is without funds, to pay a fine...."[240] It went on to conclude that if the defendant was jailed after involuntarily failing to meet installment payments, she would be jailed solely because of her indigency.

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238 State v. DeBonis, 58 N.J. 182, 276 A. 2d 137 (1971).

239 Hendrix v. Lark, 482 S.W. 2d 427, 429 (Mo. 1972).

240 Hendrix v. Lark, 482 S.W. 2d at 429, quoting In re Antazo, 3 Cal. 3d 100, 114, 473 P. 2d 999, 1008, 89 Cal. Rptr. 255, 263 (1970).

> It was for this very reason that the initial incarceration was a denial of equal protection of the law. We perceive no substantial difference between imprisonment of an indigent because of an inability to make an immediate payment of fines and costs, and imprisonment of an indigent because of the involuntary failure to make installment payments when permitted the opportunity to do so. Both deny the indigent equal protection of the law. In both the end result is that she is incarcerated because she is poor. The intervening grace period does not change this.[241]

In response to the view that inverse discrimination would result from not allowing default commitment of indigents the Hendrix court noted that

> [u]ltimately, it may turn out that an indigent cannot pay, but this need not mean that the indigent can commit the offense with impunity or that he goes scot-free as a matter of course if the city is willing to pursue the various alternatives available. On the contrary, this method of handling the indigent should convince him of just the opposite.[242]

A New York judge recently made a plea to that state's legislature to provide the judiciary with such alternatives for defendants who are so impoverished that they truly cannot pay any amount in installments towards the satisfaction of a fine.[243] In the case of an indigent defendant who had been sentenced to a

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241 Hendrix v. Lark, 482 S.W. 2d at 430.

242 482 S.W. 2d at 432 n.6.

243 People v. Goddard, 108 Misc. 2d 742, 439 N.Y.S. 2d 71 (Crim. Ct. N.Y. 1981).

conditional discharge and a fine of $250, the court held that to resentence a defaulting indigent to jail would violate the equal protection clause. The opinion also highlighted the additional concerns involved in "add[ing] to the already staggering over-population of the prisons and the costs of warehousing persons who initially were not to be sanctioned by prison."[244] The court commented that "[t]he historic practice of imprisoning defendants for non-payment of fines would appear to be anachronistic, unconstitutional, costly, and an area suitable for realistic alternatives."[245]

Under this analysis, perhaps the most sensible and the only constitutional[246] alternative that would serve a state's penological interest when an indigent has been unable to satisfy a fine in installments is a work-parole or civic service option available for a sentencing court to impose.

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[244] Id. at 748.

[245] Id. at 750.

[246] See n. 206 supra.

§ 3569. Discharge of indigent prisoner

(a) When a poor convict, sentenced for violation of any law of the United States by any court established by enactment of Congress, to be imprisoned and pay a fine, or fine and costs, or to pay a fine, or fine and costs, has been confined in prison thirty days, solely for the nonpayment of such fine, or fine and costs, such convict may make application in writing to the nearest United States magistrate in the district where he is imprisoned setting forth his inability to pay such fine, or fine and costs, and after notice to the district attorney of the United States, who may appear, offer evidence, and be heard, the magistrate shall proceed to hear and determine the matter.

If on examination it shall appear to him that such convict is unable to pay such fine, or fine and costs, and that he has not any property exceeding $20 in value, except such as is by law exempt from being taken on execution for debt, the magistrate shall administer to him the following oath: "I do solemnly swear that I have not any property, real or personal, exceeding $20, except such as is by law exempt from being taken on civil process for debt; and that I have no property in any way conveyed or concealed, or in any way disposed of, for my future use or benefit. So help me God." Upon taking such oath such convict shall be discharged; and the magistrate shall file with the institution in which the convict is confined, a certificate setting forth the facts. In case the convict is found by the magistrate to possess property valued at an amount in excess of said exemption, nevertheless, if the Attorney General finds that the retention by such convict of all of such property is reasonably necessary for his support or that of his family, such convict shall be released without further imprisonment solely for the nonpayment of such fine, or fine and costs; or if he finds that the retention by such convict of any part of such property is reasonably necessary for his support or that of his family, such convict shall be released without further imprisonment solely for nonpayment of such fine or fine and costs upon payment on account of his fine and costs, of that portion of his property in excess of the amount found to be reasonably necessary for his support or that of his family.

(b) Any such indigent prisoner in a Federal institution may, in the first instance, make his application to the warden of such institution, who shall have all the powers of a United States magistrate in such matters, and upon proper showing in support of the application shall administer the oath required by subsection (a) of this section, discharge the prisoner, and file his certificate to that effect in the records of the institution.

Any such indigent prisoner, to whom the warden shall fail or refuse to administer the oath may apply to the nearest magistrate

for the relief authorized by this section and the magistrate shall proceed de novo to hear and determine the matter.

June 25, 1948, c. 645, 62 Stat. 838; Oct. 17, 1968, Pub.L. 90-578, Title III, § 301(a) (1), (3), 82 Stat. 1115.

APPENDIX "B"

Cases holding that imprisonment of an indigent defendant for failure to forthwith pay a fine in full is unconstitutional.

State court cases

Alabama	Gatlin v. City of Andalusia, (dicta) 342 So. 2d 37 (Ala. Crim. App. 1976)
	Lingle v. State, 51 Ala. App. 210, 283 So. 2d 660 (1973)
	Smith v. State, 51 Ala. App. 212, 283 So. 2d 662 (1973) (dicta).
	Dorch v. Opelika, 50 Ala. App. 612, 281 So. 2d 666 (1973).
Alaska	Hood v. Smedley, 498 P. 2d 120 (Alas. 1972)
Arizona	In re Collins, 108 Ariz. 310, 497 P. 2d 523 (1972)
Arkansas	Cherry v. Hall, 251 Ark. 305, 472 S.W. 2d 225 (1971).
California	In re Antazo, 3 Cal. 3d 100, 473 P. 2d 999, 89 Cal. Rptr. 255 (1970) People v. Kay, 36 Cal. App. 3d 759, 111 Cal. Rptr. 894 (1973) (dicta).
	Kaylor v. Department of Human Resources, 32 Cal. App. 3d 732, 108 Cal. Rptr. 267 (1973) (dicta).
	In re Fry, 19 Cal. App. 3d 177, 96 Cal. Rptr. 418 (1971).
Connecticut	Allen v. Warden, Community Correctional Center, 31 Conn. Supp. 459, 334 A. 2d 488 (1975).
Delaware	State v. Bender, 283 A. 2d 847 (Del.Super. Ct. 1971).
Florida	Rollins v. State, 299 So. 2d 586 (Fla. 1974) cert. den. 419 U.S. 1009.
	Martin v. State, 248 So. 2d 643 (Fla. 1971) (per curiam).
	Brooks v. State, 336 So. 2d 647 (Fla. Dist. Ct. App. 1976).

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Hawaii	State v. Huggett, 55 Haw. 632, 525 P. 2d 1119 (1974).
	State v. Tackett, 52 Haw. 601, 483 P. 2d 191 (1971).
Illinois	People v. Nicholls, 45 Ill. App. 3d 312, 359 N.E. 2d 1095, 4 Ill. Dec. 143 (1977) (dicta).
Indiana	State v. Irvin, 259 Ind. 610, 291 N.E. 2d 70 (1973).
Iowa	State v. Snyder, 203 N.W. 2d 280 (Iowa 1972).
Kentucky	Spurlock v. Noe, 467 S.W. 2d 320 (Ky. App. 1971).
Maine	Blackwell v. State, 311 A. 2d 536 (Me. 1973).
Massachusetts	Ariel v. Commonwealth, 356 Mass. 194, 248 N.E. 2d 496 (1969), cert.den. 396 U.S. 276 (dicta).
Michigan	People v. Hamilton, 84 Mich. App. 601, 269 N.W. 2d 693 (1978).
	People v. Terminelli, 68 Mich. App. 635, 243 N.W.2d 703 (1976).
	People v. Hernandez, 53 Mich. App. 91, 218 N.W. 2d 394 (1974).
Minnesota	Smith v. State, 301 Minn. 455, 223 N.W. 2d 775 (1974).
Mississippi	Nelson v. Tullos, 323 So. 2d 539 (Miss. 1975).
Missouri	Spencer v. Basinger, 562 S.W. 2d 350 (Mo. 1978)
	Hendrix v. Lark, 482 S.W. 427 (Mo. 1972).
Nevada	Burke v. State 96 Nev. 449, 611 P. 2d 203 (1980).
New Jersey	State v. DeBonis, 58 N.J. 182, 276 A. 2d 137 (1971).
New York	People v. Sherman, 43 App. Div. 2d 575, 349 N.Y.S. 2d 124 (1973) (Shapiro, J., dissenting), rev'd on dissenting opinion, 35 N.Y. 2d 931, 324 N.E. 2d 546, 365 N.Y.S. 2d 164 (1974)
Ohio	In re Jackson, 26 Ohio St. 2d 51, 268 N.E. 2d 812 (1971).
Oklahoma	Rutledge v. Turner, 495 P. 2d 119 (Okla. Crim. App. 1972).
Pennsylvania	Commonwealth ex rel Benedict v. Cliff, 451 Pa. 427, 304 A. 2d 158 (1973).

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Rhode Island — Town of Westerly v. Parker, 387 A. 2d 1070 (R.I.1978).

Carver v. Howard, 112 R.I. 918, 310 A. 2d 145 (1973).

Tennessee — State v. Walding, 477 S.W. 2d 253 (Tenn Crim. App. 1971).

Texas — Ex parte Minjares, 582 S.W. 2d 105 (Tex. Crim. App. 1978).

Ex parte Tate, 471 S.W. 2d 404 (Tex. Crim. App. 1971).

Vermont — State v. Diamondstone, 132 Vt. 303, 318 A. 2d 654 (1974) (dicta).

Wisconsin — State ex rel. Pedersen v. Blessinger, 56 Wis. 2d 286, 201 N.W. 2d 778 (1972).

Federal court cases

United States v. Glazer, 532 F. 2d 224 (2d Cir. 1976) (dicta).

Barnett v. Hopper, 548 F. 2d 550 (5th Cir. 1977), vacated as moot, 439 U.S. 1041 (1978).

Burton v. Goodlett, 480 F. 2d 983 (5th Cir. 1973).

Frazier v. Jordan, 457 F. 2d 726 (5th Cir. 1972).

United States ex rel. Meyer v. Weil, 458 F. 2d 1068 (7th Cir. 1972), cert. den., 409 U.S. 1060, reh. den. 412 U.S. 914 (dicta).

Campbell v. Cauthron, 623 F. 2d 503 (8th Cir. 1980) (dicta).

United States v. Estrada de Castillo, 549 F. 2d 583 (9th Cir. 1976) (dicta).

Tucker v. City of Montgomery Board of Com'rs., 410 F. Supp. 494 (D.C. Ala. 1976).

Arthur v. Schoonfield, 315 F. Supp. 548 (D. Md. 1970).

Karr v. Blay, 413 F. Supp. 579 (N.D. Ohio 1976).

DISPOSITION OF FINE REVENUES AND THE INTEREST OF JUDGES[1]

The United States Supreme Court has pointed out "that it is completely within the power of the Legislature to dispose of fines collected in criminal cases as it will..."[2] This power is, of course, subject to constitutional restraints. Among and within the various states, there are numerous schemes for disposing of the money collected in the forms of fines from convicted criminal defendants. The recipients and beneficiaries of fine revenues include the general funds of state, county, and municipal treasuries, state, county and municipal education funds, victim compensation funds law enforcement agencies, prosecutors, court clerks, court law libraries, retirement funds for judges and court clerks, justices of the peace, and court systems in general.[3] In some jurisdictions, fines for violation of specific laws are earmarked for uses relating to those laws. For example, fines collected for motor vehicle violation often go, wholly or in part, to a highway fund and fines collected for violations of fish and game laws sometimes are used to cover the expenses involved in enforcing those laws.[4]

1. See Annot., 72 ALR 3d 375 (1976) for an excellent review of the cases on disqualification of judges for pecuniary interest in fines, forfeitures, or fees payable by litigants.

2. Tumey v. Ohio, 273 U.S. 510, 534-35 (1927).

3. For the specific statutes setting forth these recipients, see the separate report on state statutory law on criminal fines.

4. See n. 3 supra.

In Tumey v. Ohio,[5] the United States Supreme Court held that certain state statutes, in providing for the trial by a village mayor of one accused of violating the state's Prohibition Act, deprived the accused of due process of law in violation of the Fourteenth Amendment to the Federal Constitution because of the pecuniary and other interest in the result of the trial which those statutes gave the mayor. The statutes in the Tumey case allowed the mayor of the village of North College Hill, Ohio to act as judge in cases charging violations of state law prohibiting manufacture and sale of alcoholic beverages, and provided that any money from fines and forfeited bonds in such cases were to be divided equally between the general revenue fund of the state treasury and the treasury of the municipality. Under village ordinances passed pursuant to the state statutes, one-half of the municipality's share of the fine revenue was earmarked to the "secret service fund" to be used to enforce the prohibition laws by compensating in fixed percentages, deputy marshals, detectives, secret service officers and prosecuting attorneys involved in cases arising under these laws. Also provided for by ordinance was the receipt by the village mayor of the amount of his costs in each case, in addition to his regular salary, as compensation for hearing such cases. If a defendant was acquitted by the mayor, neither the mayor, the other officers involved, nor the village treasury would receive any of this money.

5. 273 U.S. 510 (1927).

The Supreme Court found this to constitute a direct, personal, substantial pecuniary interest on the part of the judge/mayor to reach a conclusion against the defendant. The Court followed an old legal principal that officers acting in a judicial or quasi-judicial capacity are disqualified by their interest in the controversy to be decided ("nemo debit esse judex in propria causa"),[6] unless the interest is so small as to be properly ignored as within the maxim "de minimus non curat les" (the law does not deal with trifles). The Court specified that the fact that some people would not allow their judgment to be affected by a possible recovery of costs in a case does not satisfy the requirement of due process of law in judicial procedure.

> "Every procedure which would offer a possible temptation to the average [person] as a judge to forget the burden of proof required to convict the defendant, or which might lead him [or her] not to hold the balance nice, clear, and true between the state and the accused denies the latter due process of law."[7]

It has become the prevailing view that the dependence by a judge on the conviction of a defendant for all or any portion of his or her compensation violates the due process rights of the defendant.[8] Any pecuniary interest, it has been held, no matter how remote, on the part of a judge in a case to be

6. See Bonham's Case, 8 Coke, 118a, 77 Eng. Reprint 646 (1610).

7. Tumey, 273 U.S. at 532.

8. Brown v. Vance, 637 F. 2d 272 (5th Cir. 1981) and cases cited; State ex rel. Moats v. Janco, 154 W. Va. 887, 180 S.E. 2d 74 (1971); Annot., 72 A.L.R. 3d 375, 402 (1976).

tried before him or her will disqualify the judge.[9]

However, some states still have statutes which seem to violate the principles of Tumey. Under Georgia law,[10] set sums are taken out of fines collected for violations of state statutes on traffic laws in cases which come before probate court judges and these sums are deposited into the "Judges of the Probate Courts Retirement Fund." Other contributions to this fund come from donations, from dues paid by the judges, and from a mandated 20% of all fees collected by the probate court judges for services such as issuing marriage licenses. It would seem that even the presence of contributions from other sources does not save this provision from violating the due process rights of the criminal defendants who come before probate court judges. Certainly the "possibility of temptation" could exist on the part of probate court judges to beef up their retirement at the expense of such defendants.

The Court in Tumey further held that due process was denied not only because of the personal pecuniary interest of the mayor, but also because of his interest, as chief executive of the village in charge of looking after the village's finances, in the amounts recoverable by the municipality and the enforcement officers from defendants convicted.[11]

9. State ex rel. Osborne v. Chinn, 146 W. Va. 610, 121 S.E. 2nd 610 (1961).

10. Ga. Code Ann. §24-1716 (a).

11. In Tumey, the Supreme Court made a distinction between prosecutors or informers as recipients of fine revenue and judges in that position. (continued next page)

Non-mayoral judges, unlike the judge considered in Tumey, are not generally considered to have a direct interest in the finances of their locality. Even mayors, it has been held, might be considered to have no such interest. A mayor with judicial functions whose executive authority was limited was held to have had too remote an interest in his city's financial policy for a due process violation to exist.[12] In the converse situation, the convictions resulting in fines of a judge who was also the chief financial officer of his county were held not to be void, as any pecuniary interest on his part was too remote, speculative, and trivial.[13]

A Maryland statute provides an interesting situation for analysis under this aspect of Tumey. Under the Maryland

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11. (continued)

> It is...said with truth that the Legislature of a state may and often ought to stimulate prosecutions for crime by offering to those who shall initiate and carry on such prosecutions rewards for thus acting in the interest of the state and the people. The Legislature may offer rewards or a percentage of the recovery to informers... It may authorize the employment of detectives.
>
> Tumey at 535 (cite omitted).

Other courts have utilized this distinction in limiting the effect of Tumey solely to those in a judicial or quasi-judicial position and allowing a pecuniary interest in a conviction on the part of law enforcement officials. Bennet v. Cottingham, 393 U.S. 317, affirming 290 F. Supp. 759, 763 (N.D. Ala. 1968) (sheriffs and their deputies who are arresting officials for alleged violations of the highway laws); State v. Briggs, 388 A. 2d 507, 510 (Me. 1978) (Department of Inland Fisheries and Game, the agency entrusted with enforcement of the Fisheries and Game laws which defendant was convicted of violating.) See State v. Holland, 399 A. 2d 976 (N.H. 1979) (ten percent statutory penalty charge on a fine for a traffic offense was the equivalent of an increase in the fine and its allocation to (continued)

12. (See next page)
13. (See next page)

Annotated Code Article 38, §5, one-half of the circuit court fines and forfeitures collected are "to be expended under the directions of the judge or judges of said courts, for the augmentation of the libraries of said courts." Certain specified counties are excluded from the application of this law. In certain specified counties, the county commissioners are to add to the fund enough money to bring the total to a specified amount. In other counties, the commissioners are to add a certain flat sum, and in some of these counties an additional sum, if such is determined necessary by the commissioners, for the support and maintenance of the court library. In all the counties, all these sums, whether from fine revenue or from the county commissioners, are to be expended under the direction of the judges.

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11. (continued) the Police Standards and Training Council was valid). See Marshall v. Jerrico, Inc., 446 U.S. 238 (1980) (receipt by Employment Standards Administration [ESA] of civil penalties imposed for unlawful employment of child labor, to be used to cover costs of determining violations and assessing penalties, does not violate due process requirements since, inter alia, the functions of the ESA assistant regional administrator resemble those of a prosecutor rather than those of a judge).

12. Dugan v. Ohio, 277 U.S. 61 (1928); State ex rel. Brockman v. Proctor, 35 Ohio St. 2d 79, 298 N.E. 2d 532, 64 Ohio Ops. 2d 50 (1973). Cf. Ward v. Village of Monroeville, 409 U.S. 57 (1972) (defendant was deprived of his due process rights by being tried before a mayor who did have executive responsibilities for village finances and the fines of whose court contributed substantially to the village revenues).

13. Joseph v. Travis County, 8 S.W. 2d 741 (Tex. Civ. App. 1928), aff'd, 16 S.W. 2d 283 (Tex. Com. App. 1929). N.b., the continued validity of the holding of this case is questionable, particularly since the United States Supreme Court's decision in Ward v. Village of Monroeville. See n. 12 supra.

A question is raised as to whether due process is denied to a defendant, half of whose fine money goes to "augment" the court library of the judge who has imposed the sentence and who also has direct statutory control over how that revenue should be spent. Arguably, the control of a court library is too trivial a matter to tempt most judges, consciously or otherwise, from their sworn path. However the standard set up by the Supreme Court in Tumey was that of "possible temptation to the average [person] as a judge."[14] This standard, the Court has held, applies not only to a situation where the judge shares directly in the fine revenue, but also when the judge has executive responsibilities for finances.[15] A showing of actual bias is not necessary.

Additionally, as it has been stated by the Supreme Court, the due process requirement of neutrality in adjudicative proceedings not only

> helps to guarantee that life, liberty, or property will not be taken on the basis of an erroneous or distorted conception of the facts or the law...[but] [a]t the same time, it preserves both the appearance and reality of fairness, "generating the feeling, so important to a popular government, that justice has been done,"...by ensuring that no person will be deprived of his interests in the absence of a proceeding in which he may present his case with assurance that the arbiter is not predisposed to find against him.[16]

14. Tumey, 273 U.S. at 532.

15. Ward v. Village of Monroeville, 409 U.S. 57, 60 (1972).

16. Marshall v. Jerrico, Inc., 446 U.S. 238, 242 (1980) (cite omitted).

In other words, "justice must satisfy the appearance of justice..."[17]

The availability of other moneys for the purpose under consideration is an additional factor affecting the analysis. If the amount of money needed annually for the library would never exceed the amount the commissioners must contribute, then the interest of a judge in imposing fines for the same purpose would indeed seem trivial. This component of the Tumey analysis can be seen in analogous situations where judges are paid out of a fund derived at least partially from fine revenues, but their salaries are fixed, thereby relieving the pressures relied on in Tumey,[18] or where the fund available from non-fine sources for the questioned purpose is more than adequate for the purpose, removing any realistic possibility for bias.[19]

However, the opposite situation may be seen in a case in which the justice of peace was salaried and turned over all fines, fees, and costs to an account in the general county fund known as "the justices' fund." The judge's salary came wholly from this fund. West Virginia's highest court held that this arrangement violated federal and state due process guarantees since

> it might create a tendency for the justices to find an accused guilty in order to obtain a fine to be

17. Id. at 243, quoting Offutt v. United States, 348 U.S. 11, 14 (1954).
18. See In re Guerrero, 69 Cal. 88, 101, 10 P. 261 (1886); State v. Davis, 16 Ohio Misc. 282, 241 N.E. 2d 750, 45 Ohio Ops. 2d 347 (1968).
19. See Marshall v. Jerrico, Inc., 446 U.S. 238, 250 (1980).

> placed in the fund, without giving the proper weight to the burden of proof in finding individuals who may be tried before said justices guilty beyond all reasonable doubt. Then too, ...it may create a tendency to assess higher fines in order to have sufficient funds in the special justices' account with which to pay the full salaries of all justices of the peace in Kanawha County.[20]

Statutes in other states provide for the distribution of fine revenues to various types of court funds. Whether these dispositions are constitutionally valid depend on the factors discussed in the analysis above.[21]

For example, under Idaho law, percentages of imposed fines go to a district court fund of the county in which the violation occurred, to pay for almost all types of court expenditures. However, in addition to the contribution made by fine revenues to these courts funds, a special county property tax also subsidizes court expenditures. This additional revenue arguably relieves the pressure on judges to finance their own courts from their impositions of fines.

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20. State ex rel. Osborne v. Chinn, 146 W. Va. 610, 613 121 S.E. 2d 610 (1961). Accord Williams v. Brannen, 116 W. Va. 1, 178, S.E. 67 (1935).

21. Cases in the past have held that receipt by judges of fine monies was purged of any constitutional taint by the presence of a statute providing for the disqualification of interested, biased, or prejudiced judges; or by the opportunity available to the defendant to appeal or to get a trial de novo. See Annot. 72 ALR 3d 375 (1976); Application of Borchert, 57 Wash. 2d 719, 359 P. 2d 789 (1961). The Supreme Court, in Ward v. Village of Monroeville, 409 U.S. 57, 61-62 (1972), ruled conversely and stated that a defendant "is entitled to a neutral and detached judge in the first instance." (Footnote omitted.) See Brown v. Vance, 637 F. 2d 272 (5th Cir. 1981) for the same analysis applied to the availability of trial by jury as negating the due process violation.

22. Idaho Code §19-4705 and 31-867.

Recently, a federal court of appeals quoted a 1974 American Bar Association standard on the subject of revenue from fines which bears repeating.

> The purpose of fines and other exactions imposed through judicial proceedings is to enforce the law and not to provide financial support for the courts or other agencies of government. All revenue from fines, penalties, and forfeitures levied by a court should be transferred to the state general fund, and should not be appropriated to the court receiving them or by a local unit of government that supports such a court. The use of courts as revenue-producing agencies is a continuing abuse of the judicial process. It has long been recognized as unconstitutional for a judge to have his [or her] income dependent on the outcome of cases before him [or her], but a similar result often occurs indirectly when the budget of the court in which he [or she] sits is established with reference in whole or in part to the fine revenues produced by the court. This is at present a common practice in local courts of limited jurisdiction. It should be eliminated.[23]

23. Brown v. Vance, 637 F. 2d at 272 and n. 6 (cites omitted) quoting American Bar Association Commission Standards of Judicial Administration 107 (1974).