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Imprisonment of Indigent Defendants for Nonpayment of Fines

IMPRISONMENT OF INDIGENT DEFENDANTS FOR NONPAYMENT OF FINES

> *When society acts to deprive one of its members of his life, liberty or property, it takes its most awesome steps. No general respect for, nor adherence to, the law as a whole can well be expected without judicial recognition of the paramount need for prompt, eminently fair and sober criminal law procedures. The methods we employ in the enforcement of our criminal law have aptly been called the measures by which the equality of our civilization may be judged.*[1]

The use of fines as a criminal sanction has been a part of Anglo-American law for over six hundred years.[2] From the inception of this penalty, however, law making bodies have had to deal with the convicted criminal who fails or refuses to pay the fine imposed upon him. The early non-paying offender faced being sold into slavery[3] unless the necessary funds could be produced by family or friends. From such early remedies for default our present more civilized alternative of imprisonment arose.

Today almost every state,[4] including Virginia,[5] has statutory provisions for the imprisonment of defendants who fail to pay their fines.[6] The inherent constitutionality of these sanctions has never been questioned as a valid method of enforcing the payment of fines. Such statutes have almost universally been upheld as constitutional on their face, but considerable controversy has arisen as to the validity of their application to indigent[7] defendants as a class.[8]

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[1] Coppedge v. United States, 369 U.S. 438, 449 (1962).

[2] 2 F. POLLOCK & F. MAITLAND, THE HISTORY OF ENGLISH LAW 451-462, 517-518 (2d ed. 1968).

[3] *See* Strattman v. Studt, 20 Ohio St. 2d 95, 253 N.E.2d 749 (1969); 2 F. POLLOCK & F. MAITLAND, THE HISTORY OF ENGLISH LAW 517 (2d ed. 1968).

[4] For a catalogue of current state statutes providing for incarceration for the failure to pay a fine, *see* Williams v. Illinois, 399 U.S. 235 (1970).

[5] *See* VA. CODE ANN §§ 19.1-338, -339 (Cum. Supp. 1970).

[6] The Supreme Court has consistently implied its approval of the use of imprisonment as a legitimate method for the collection of fines. *See* Tate v. Short, 39 U.S.L.W. 4301 (U.S. March 2, 1971); Williams v. Illinois, 399 U.S. 235 (1970); Hill v. United States *ex rel.* Wampler, 298 U.S. 460 (1936); *Ex parte* Jackson, 96 U.S. 727 (1877). *See generally* Kelly v. Schoonfield, 285 F. Supp. 732 (D. Md. 1968); Sawyer v. District of Columbia, 238 A.2d 314 (D.C. Ct. App. 1968); 18 U.S.C. § 3565 (1964).

[7] There seems to be no uniform method which courts may use to determine which defendants are indigent. This determination is generally left to the judge's discretion upon hearing a general report on the defendant's financial condition, although some statutes provide specific guidelines for this decision. *See* 18 U.S.C. § 3569 (Supp. V, 1969).

[8] *Compare* Kelly v. Schoonfield, 285 F. Supp. 732 (D. Md. 1968); United States *ex*

Default statutes have been attacked by indigent offenders on several constitutional grounds, including the excessive fines[9] and cruel and unusual punishment[10] provisions of the eighth amendment and the involuntary servitude provision of the thirteenth amendment.[11] The most successful attacks, however, have been made under the due process and equal protection clauses

rel. Privitera v. Kross, 239 F. Supp. 118 (S.D.N.Y.), *aff'd*, 345 F.2d 533 (2d Cir.), *cert. denied*, 382 U.S. 911 (1965); State v. Brown, 5 Conn. Cir. 228, 249 A.2d 672 (1967); Adjmi v. State, 139 So.2d 179 (Fla. Dist. Ct. App. 1962); People *ex rel.* Jackson v. Ruddell, 42 Ill.2d 40, 245 N.E.2d 761 (1969); Wade v. Carsley, 221 So. 2d 725 (Miss. 1969); State v. Allen, 104 N.J. Super. 187, 249 A.2d 70 (1969); People *ex rel.* Loos v. Redman, 48 Misc. 2d 592, 265 N.Y.S.2d 453 (Sup. Ct. 1965); People v. Watson, 204 Misc. 467, 126 N.Y.S.2d 832 (Ct. Gen. Sess. 1953); *with* Williams v. Illinois, 399 U.S. 235 (1970), *vacating sub nom.* People v. Williams, 41 Ill. 2d 511, 244 N.E.2d 197 (1969); Morris v. Schoonfield, 301 F. Supp. 158 (D. Md. 1969), *vacated per curiam*, 399 U.S. 508 (1970); *In re* Antazo, 3 Cal. 3d 100, 473 P.2d 999, 89 Cal. Rptr. 255 (1970); Sawyer v. District of Columbia, 238 A.2d 314 (D.C. Ct. App. 1968); State v. Hampton, 209 So. 2d 899 (Miss. 1968); Spinler v. State, 152 Mont. 69, 446 P.2d 429 (1968); State v. Allen, 104 N.J. Super. 187, 249 A.2d 70 (1969) (dissenting opinion); People v. McMillan, 53 Misc. 2d 685, 279 N.Y.S.2d 941 (Orange County Ct. 1967); People v. Tennyson, 19 N.Y.2d 273, 281 N.Y.S.2d 76, 277 N.E.2d 876 (1967); People v. Saffore, 18 N.Y.2d 101, 271 N.Y.S.2d 972, 218 N.E.2d 686 (1966); People v. Collins, 47 Misc. 2d 210, 261 N.Y.S.2d 970 (Orange County Ct. 1965); Strattman v. Studt, 20 Ohio St. 2d 95, 253 N.E.2d 749 (1969); Petition of Cole, 17 Ohio App. 2d 207, 245 N.E.2d 384 (1968). *See also* PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: THE COURTS 18 (1967) [hereinafter cited as TASK FORCE REPORT]; Goldberg, *Equality and Governmental Action*, 39 N.Y.U.L. REV. 205 (1964).

[9] *See, e.g.*, Morris v. Schoonfield, 301 F. Supp. 158 (D. Md. 1969), *vacated per curiam*, 399 U.S. 508 (1970); Kelly v. Schoonfield, 285 F. Supp. 732 (D. Md. 1968); United States *ex rel.* Privitera v. Kross, 230 F. Supp. 118 (S.D.N.Y.), *aff'd*, 345 F.2d 533 (2d Cir.), *cert. denied*, 382 U.S. 911 (1965); Sawyer v. District of Columbia, 238 A.2d 314 (D.C. Ct. App. 1968); State v. Allen, 104 N.J. Super. 187, 249 A.2d 70 (1969); People v. Saffore, 18 N.Y.2d 101, 271 N.Y.S.2d 972, 218 N.E.2d 686 (1966).

[10] *See, e.g.*, Morris v. Schoonfield, 301 F. Supp. 158 (D. Md. 1969), *vacated per curiam*, 399 U.S. 508 (1970); Nemeth v. Thomas, 35 U.S.L.W. 2320 (N.Y. Sup. Ct. Dec. 5, 1966); People *ex rel.* Loos v. Redman, 48 Misc. 2d 592, 265 N.Y.S.2d 453 (1965); Foertsch v. Jameson, 48 S.D. 328, 204 N.W. 175 (1925). *See generally* Note, *The Equal Protection Clause and Imprisonment of the Indigent for Nonpayment of Fines*, 64 MICH. L. REV. 938 (1966); Note, *Imprisonment of an Indigent for the Nonpayment of a Fine Violates the Eighth Amendment Prohibition Against Cruel and Unusual Punishments and the Fourteenth Amendment Equal Protection Clause*, 4 HOUSTON L. REV. 695 (1967).

[11] *See, e.g.*, Morris v. Schoonfield, 301 F. Supp. 158 (D. Md. 1969), *vacated per curiam*, 399 U.S. 508 (1970). Imprisonment for nonpayment of court costs has also been attacked under the involuntary servitude provision. *See* Wright v. Matthews, 209 Va. 246, 163 S.E.2d 158 (1968). In *Wright*, the petitioner, being indigent, also attacked the constitutionality of his imprisonment under the due process and equal protection clauses of the fourteenth amendment, but the Virginia Supreme Court of Appeals declined to rule on these issues.

of the fourteenth amendment.[12] Arguments under the latter provisions are generally based on the failure of these statutes to fulfill their legislative purposes when applied to indigent defendants.[13]

Default statutes are generally said to have a dual purpose, depending on the situation: (1) they serve as a means of coercion, and (2) they act as an alternative punishment.[14] The theory behind such statutes is that the defendant is given a choice when sentenced to pay a fine: he may either pay the fine and go free, or he may refuse to pay the fine and "work it off" by serving a corresponding number of days in jail.[15] His decision will be based on his personal sense of values. If he feels that his liberty is more valuable to him than the dollar value of the fine, he will choose to pay it. If, on the other hand, he feels that his liberty is not worth that amount of money, he may go to jail.[16] Either way, the legislative purposes of the statute are fulfilled. The spectre of imminent imprisonment will have the effect of encouraging the convicted defendant to pay his fine; but if he refuses, he will then be faced with the alternative term of imprisonment.

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12 *See* cases cited note 6 *supra*. Although many courts have used the due process clause of the fourteenth amendment as a basis for ruling on imprisonment of indigent defendants who default in the payment of fines, the majority of courts have relied on the equal protection provision. Equal protection reasoning is more easily applied to the situation in which a class of individuals are discriminated against on the basis of wealth. *See* Tate v. Short, 39 U.S.L.W. 4301 (U.S. March 2, 1971); Williams v. Illinois, 399 U.S. 235 (1970); Note, *Discriminations Against the Poor and the Fourteenth Amendment*, 81 HARV. L. REV. 435 (1967); 84 HARV. L. REV. 46 (1970). The most far-reaching case yet to be decided in this area is *In re* Antazo, 3 Cal. 3d 100, 473 P.2d 999, 89 Cal. Rptr. 255 (1970). In that case the California Supreme Court held that the imprisonment of an indigent defendant for his inability to pay a fine which was an alternative of a jail sentence was a denial of equal protection. The court felt that the imprisonment of indigent defendants in this manner was unreasonably discriminatory since incarceration was not constitutionally "necessary" for the collection of fines.

13 *See, e.g.*, Morris v. Schoonfield, 301 F. Supp. 158 (D. Md. 1969), *vacated per curiam*, 399 U.S. 508 (1970); Strattman v. Studt, 20 Ohio St. 2d 95, 253 N.E. 2d 749 (1969).

14 *Id.*

15 The rate of credit at which the offender may work off his fine varies from state to state. Some states allow no more than $1 or less credit per day of imprisonment. *See, e.g.*, ARIZ. REV. STAT. ANN. § 13-1648 (1956); ARK. STAT. ANN. § 43-2315 (1964); MASS. ANN. LAWS ch. 127, § 144 (1969); VA. CODE ANN. § 53-221 (Cum. Supp. 1970). Other states credit defendants with as much as $10 per day. *See* MD. ANN. CODE art. 38, § 4 (Cum. Supp. 1970); MONT. REV. CODES ANN. § 95-3202(b) (1969).

16 The defendant is faced with the same choice whether he is sentenced to a jail term plus a fine ("$30 and 30 days"), a jail term or a fine ("$30 or 30 days"), or merely a flat fine without a jail term. In the first and third situations, an alternate jail sentence will be prescribed by statute if the defendant defaults in payment. In the "$30 or 30 days" situation, the trial judge imposes the term of imprisonment in the case of default. The result as far as the defendant is concerned is the same.

The failure of this legislative theory occurs, however, when the defendant is indigent and therefore unable to pay his fine.[17] In this situation neither statutory purpose is fulfilled. If a fine is imposed upon an indigent defendant, the threat of imprisonment, no matter how severe, could never succeed in forcing him to pay. Since the statute fails as a means of coercion, its role must then be to serve as an alternative punishment. When this situation is applied to indigent offenders, it is obvious that this alternative is an involuntary one and, in most cases, an unreasonable one.[18] The defendant of means has an actual choice of paying the fine or serving the jail term, but the choice of the indigent defendant is really an illusory one. Being unable to pay the fine, he is forced to go to jail.[19] The result of this situation is a discriminatory treatment of a certain class of offenders on the basis of wealth.[20] Such statutory classifications have generally been defended as a necessary result of the enforcement of legitimate state interests,[21] i.e., retribution, rehabilitation, deterrence, and collection of fines.

It has been held by the Supreme Court that the type of judicial treatment received by an accused should not depend upon his financial condition.[22] When statutory classifications are made which result in the denial of basic rights, such as liberty, the guarantee of equal protection under the

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[17] *See* TASK FORCE REPORT 18; Goldberg, *supra* n.8, at 221.

[18] If an indigent defendant is to be forced to accept imprisonment as an alternative to the payment of his fine, such imprisonment must be a reasonable alternative to be constitutionally acceptable. It could easily be argued that $1 per day credit is not reasonable, but it would be difficult to determine what a reasonable rate of credit would be. People v. McMillan, 53 Misc. 2d 685, 279 N.Y.S.2d 941 (Orange County Ct. 1967) (held $1 per day credit unreasonable); Strattman v. Studt, 20 Ohio St. 2d 95, 253 N.E.2d 749 (1969) (held $3 per day credit unreasonable). Indeed, many would argue that no dollar value can be equated to an individual's loss of liberty.

[19] As stated by former Justice Goldberg, "The resulting imprisonment is no more or no less than imprisonment for being poor, a doctrine which I trust this Nation has long since outgrown." Goldberg, *supra* n.8, at 221.

[20] *See In re* Antazo, 3 Cal. 3d 100, 473 P.2d 999, 89 Cal. Rptr. 255 (1970); State v. Allen, 104 N.J. Super. 187, 249 A.2d 70 (1969) (dissenting opinion); TASK FORCE REPORT 18.

[21] *See* Williams v. Illinois, 399 U.S. 235 (1970); Kelly v. Schoonfield, 285 F. Supp. 732 (D. Md. 1968); Wade v. Carsley, 221 So. 2d 725 (Miss. 1969). In *Kelly*, the court stated the following at 737:

> The commitment of convicted defendants who default in the payment of their fines, whether from inability or unwillingness to pay, imposes a burden upon a defined class to achieve a permissable end in which the State has a vital interest; i.e., that persons who are found guilty of breaking the law shall receive some appropriate punishment, to impress on the offender the importance of observing the law, in the hope of reforming him, and to deter the offender and other potential offenders from committing such offenses in the future.

[22] *See* Griffin v. Illinois, 351 U.S. 12 (1956).

law requires that such classification be justified by some compelling state interest.[23] Otherwise, any such discriminatory treatment may be considered invidious and therefore contrary to the fourteenth amendment equal protection provision.[24] The most far-reaching Supreme Court ruling in this area is *Williams v. Illinois*.[25] In *Williams* an indigent defendant was convicted of petty theft, a misdemeanor, and sentenced to the maximum punishment for that offense of one year in jail, plus a $500 fine and $5 court costs. The defendant, being unable to pay his fine at the completion of his one year term, was to be retained in custody to work off his fine and costs at the rate of $5 of the fine for each day in jail, pursuant to an Illinois default statute.[26] The majority of the Court held that such treatment of an indigent defendant amounted to an invidious discrimination and therefore was a denial of equal protection of the law[27] as guaranteed by the fourteenth amendment. The Court's decision, however, was limited to the situation in which an indigent defendant is imprisoned for a period longer than the maximum statutory term for the substantive offense solely due to his inability to pay a fine.[28] The court hastened to point out that its decision in no way affected the typical alternative "$30 or 30 days" situation.

The majority of the Court reasoned that once a state determines through its legislative branch what the maximum penalty for a substantive offense should be, the mandates of the equal protection clause prohibit increasing

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[23] *See* Rinaldi v. Yeager, 384 U.S. 305 (1966); Douglas v. California, 372 U.S. 353 (1963).

[24] *Id.*

[25] 399 U.S. 235 (1970).

[26] ILL. ANN. STAT. ch. 38, § 1-7 (k) (Smith-Hurd 1970). Since the defendant was unable to pay the assessments against him, he faced an additional term of 101 days for the $505 in fines and costs.

[27] Although the other Justices joined Chief Justice Burger in his equal protection approach to *Williams*, Justice Harlan wrote a special concurring opinion in which he reached the same holding as did the majority, but by way of the due process clause of the fourteenth amendment. Justice Harlan's use of the due process clause rather than the equal protection clause is consistent with his opinions in other discrimination cases similar to *Williams*. *See* Shapiro v. Thompson, 394 U.S. 618 (1969) (Harlan, J., dissenting); Williams v. Rhodes, 393 U.S. 23 (1968) (Harlan, J., concurring); Harper v. Board of Elections, 383 U.S. 663 (1966) (Harlan, J., dissenting); Douglas v. California, 372 U.S. 353 (1963) (Harlan, J., dissenting); Griffin v. Illinois, 351 U.S. 12 (1956) (Harlan, J., dissenting).

[28] Since the maximum jail term for the crime of petty theft in Illinois was one year, the imprisonment of Williams for an additional 101 days for his inability to pay the fine would be unconstitutional. Presumably, if Williams had only been sentenced to six months in jail for his offense, the additional 101 days would have been constitutionally permissable.

this penalty against a certain class of offenders solely because of their indigence. Since the Illinois legislature had determined that the state's retributive interests for a misdemeanor could be fully satisfied by a maximum jail term of one year, the court felt that the incarceration of Williams beyond that term merely because he was unable to pay his fine amounted to invidious discrimination.[29]

Shortly after the *Williams* decision, the Supreme Court applied the same equal protection reasoning to a slightly different factual situation. In *Tate v. Short*[30] the defendant had been convicted of nine traffic violations in the corporation court of Houston, Texas, and was fined a total of $425. The offenses for which Tate was convicted were punishable by fine only. Being unable to pay the fines, the defendant was ordered to work off his sentence at a municipal prison farm at the rate of $5 per day.

The Supreme Court held, upon the defendant's petition for writ of habeas corpus, that the imprisonment of Tate for his inability to pay his fines was "precisely the same unconstitutional discrimination" as existed in *Williams,* and was therefore a violation of the equal protection clause of the fourteenth amendment. Since the maximum punishment for traffic violations in Texas is the assessment of a fine, the Court held that punishment could not constitutionally be converted into a jail sentence solely because the defendant is indigent and unable to pay his fine. The Court recognized other feasible methods for the collection of fines (such as the installment method) which could be utilized by the states before resorting to imprisonment. However, the Court reserved judgment upon the situation where an indigent defendant has made all reasonable attempts to pay his fines by such alternative means but has been unable to effect payment.

The *Tate* decision should have a profound effect upon the sentencing procedure of the lower courts of most states, including Virginia. *Tate* will prohibit the automatic imprisonment of indigent defendants convicted of offenses for which the only statutory punishment is a fine. This decision will force all states to adopt some alternative method of collection to replace the convenient system of automatic imprisonment for default. However, the states may continue to use imprisonment in the case of the contumacious

[29] *Accord,* Sawyer v. District of Columbia, 238 A.2d 314 (D.C. Ct. App. 1968); People v. Tennyson, 19 N.Y.2d 273, 281 N.Y.S.2d 76, 227 N.E.2d 876 (1967); People v. Saffore, 18 N.Y.2d 101, 271 N.Y.S.2d 972, 218 N.E.2d 686 (1966); Petition of Cole, 17 Ohio App. 2d 207, 245 N.E.2d 384 (1968); *cf.*, State v. Allen, 104 N.J. Super. 187, 249 A.2d 70 (1969) (dissenting opinion). *Contra,* State v. Hampton, 209 So. 2d 899 (Miss. 1968).

[30] 39 U.S.L.W. 4301 (U.S. March 2, 1971).

offender as well as the offender who has attempted to satisfy his fine by alternative methods but could not.

The *Tate* decision, even though it imposes an important limitation upon lower state courts, factually does not apply to those defendants fined for offenses punishable by fine *and* imprisonment. *Tate,* just as *Williams,* prevents only the increasing of the statutory ceiling on imprisonment for the substantive crime in the case of indigent offenders. It does not prevent the default imprisonment of defendants when such imprisonment would not exceed the maximum statutory jail term allowed for that offense.

Although the *Williams* decision was restricted to that situation in which the defendant faced imprisonment beyond the maximum statutory term, the equal protection reasoning of the Court could logically be extended much further.[31] Even though the state legislature may decide that its penalogical interests regarding a certain offense may be satisfied by a given term of imprisonment, it is a well-accepted doctrine that the punishment for a specific offense should be made to fit the specific defendant on trial and the particular circumstances surrounding his act.[32] So when a trial court sets the term of incarceration for a misdemeanant at six months while the maximum punishment is one year in jail, the judge is saying that the state's penalogical interests in regard to this *specific* offense can be satisfied by a jail term of only six months. A state can speak through its judicial branch just as effectively as it can through its legislature. The judicial body may even be more effective since the trial judge has the facts and circumstances of each case there before him.

Following the reasoning in *Williams,* once a state has determined through its judiciary what it requires in retribution for a specific offense, then it would seem that imprisonment of an indigent defendant for any longer period for his innocent failure to pay a fine would be just as invidious a discrimination as if he were imprisoned beyond the maximum statutory term.[33] When the state determines what would satisfy its penalogical in-

31 *See* Williams v. Illinois, 399 U.S. 235, 261 (1970) (Harlan, J., concurring); 84 HARV. L. REV. 46 (1970). *See generally* Morris v. Schoonfield, 399 U.S. 508 (1970) (Brennan, Douglas, Marshal & White, JJ., concurring); *In re* Antazo, 3 Cal. 3d 100, 473 P.2d 999, 89 Cal. Rptr. 255 (1970).

32 *See* Williams v. New York, 337 U.S. 241 (1949); Nemeth v. Thomas, 35 U.S.L.W. 2320 (N.Y. Sup. Ct. Dec. 5, 1966); Note, *Imprisonment of an Indigent for the Nonpayment of a Fine Violates the Eighth Amendment Prohibition Against Cruel and Unusual Punishments and the Fourteenth Amendment Equal Protection Clause,* 4 HOUSTON L. REV. 695 (1967).

33 Justice Harlan felt, in his dissent in *Williams,* that the due process requirement would likewise prevent the imprisonment of defaulting indigents whether the original

terests for an offense, whether through its judiciary or its legislature, any further imprisonment of an indigent defendant due to his financial condition should be a violation of the equal protection provision of the fourteenth amendment.[34] Even though *Williams* and *Tate* were limited to the factual situations involved therein, it seems inevitable that the Court will logically extend this doctrine when an appropriate factual situation is presented to it.[35] The equal protection clause should protect any indigent defendant from additional imprisonment beyond that to which he was originally sentenced if such additional time is attributed merely to his inability to pay a fine.[36]

A future extension of the *Williams* ruling may be indicated by a companion case which was handed down on the same day. In *Morris v. Schoonfield*,[37] Justices White, Douglas, Brennan and Marshall joined in a concurring opinion to a per curiam decision in which they stated that the Constitution prohibits the imposition of a fine on an indigent defendant with the subsequent automatic conversion of the fine to a jail sentence solely because of the defendant's inability to pay the fine.[38] The concurring

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term imposed upon them was equal to or less than the maximum permissable period. He stated that "[i]n this regard, unlike the Court, I see no distinction between the circumstances where the State through its judicial agent determines that effective punishment requires less than the maximum prison term plus a fine, or a fine alone, and the circumstances of this case." Williams v. Illinois, 399 U.S. 235, 265 n.

[34] Whether an indigent defendant is sentenced to pay a fine alone, or to pay a fine *plus* serve a term in jail, or to pay a fine *or* serve a term in jail, his incarceration for his inability to pay such fine is a discriminatory practice. Upon default in the first two situations, the legislature determines what additional incarceration will serve the state's penalogical interests. In the third situation, the court makes that determination. However, in each case, the defendant is given no choice. If a fine will be sufficient retribution for the offender's misconduct, whether in conjunction with a jail term or not, then such fine should not automatically be converted into a jail sentence. *See* Morris v. Schoonfield, 399 U.S. 508 (1970).

> Legislative action should impose limitations on the common practice of imposing sentences which offer the offender a choice of paying the fine or serving a stated period of imprisonment, such as "$10 or 10 days." This type of sentence is inherently discriminatory because it determines the severity of punishment solely on the basis of a defendant's wealth. Statutes which authorize the imposition of fines should provide that if the court concludes that the public would be adequately protected by the payment of the fine, the fine itself is the appropriate sentence. TASK FORCE REPORT at 18.

[35] *See generally* Williams v. Illinois, 399 U.S. 235 (1970) (concurring opinion); Morris v. Schoonfield, 399 U.S. 508 (1970) (concurring opinion).

[36] *See In re* Antazo, 3 Cal. 3d 100, 473 P.2d 999, 89 Cal. Rptr. 255 (1970); TASK FORCE REPORT 18.

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

[38] The inequitable results which often follow such practices can be illustrated by

Justices indicated that any such summary treatment of indigent offenders will be strictly viewed by the Court. The *Williams* decision, they felt, at least "means that in imposing fines as punishment for criminal conduct more care must be taken to provide for those whose lack of funds would otherwise convert a fine into a jail sentence."[39]

Neither *Williams* nor *Tate* should be interpreted as prohibiting the imprisonment of any defendant, indigent or otherwise, for his contumacious refusal to pay a fine.[40] Such action is still considered by the Supreme Court to be a legitimate method of enforcing fines. However, despite the legitimate aims of default statutes, the results become unreasonable and discriminatory when applied to indigent defendants. Even though there is a presumption of constitutionality of state statutes, when their application results in discrimination against a certain class of persons and affects a fundamental constitutional guarantee, the presumption of constitutionality will not prevail.[41] The states have an interest in the punishment and rehabilitation of offenders and in the collection of fines, but the automatic imprisonment of indigent defendants is not constitutionally permissible since there are alternate and equally effective remedies available to the states.[42] Since such a basic freedom is at stake, the Court suggests that the states pursue such alternative remedies rather than resort to automatic incarceration.

There are several alternatives to imprisonment for default which have been used or proposed in various states and foreign countries:

(1) *Abolition of all fines as a criminal sanction.* This solution may eliminate the evil of discriminatory imprisonment of indigent offenders for their failure to pay a fine, but it would be unsatisfactory for other practical

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the situation in Sawyer v. District of Columbia, 238 A.2d 314 (D.C. Ct. App. 1968), as related by the court at 318:

> The maximum penalty for jaywalking is a fine of $300 or imprisonment of ten days, or both. Appellant received a fine of $150, one half of the allowable maximum. In default of that fine, however, he was sentenced to imprisonment for 60 days, 50 days in excess of the maximum which could have been imposed upon him as an original sentence. In practical effect then, because he is an indigent and known to be so, appellant has been sentenced to a straight term of 60 days. We hold this sentence invalid, and are of the opinion that in every case in which the defendant is indigent, a sentence of imprisonment in default of payment of a fine which exceeds the maximum term of imprisonment which could be imposed under the substantive statute as an original sentence is an invalid exercise of the court's discretion for the reason that its only conceivable purpose is to impose a longer term of punishment than is permitted by law.

[39] Morris v. Schoonfield, 399 U.S. 508, 509 (1970) (concurring opinion).

[40] *See* Williams v. Illinois, 399 U.S. 235, 242 n.19 (1970).

[41] *See* Skinner v. Oklahoma *ex rel.* Williamson, 316 U.S. 535 (1942).

[42] *See* Williams v. Illinois, 399 U.S. 235, 244 (1970).

reasons.[43] First, fines are an important source of revenue for the states and localities; their loss would have adverse financial results. Secondly, many crimes are not severe enough to warrant imprisonment, but are serious enough to warrant some form of punishment.[44] Fines are well suited as an appropriate sanction for such minor offenses. Thirdly, if a day of imprisonment may be considered equal to a monetary sum, calculated by the loss of a day's wages by the defendant, such imprisonment would operate as a harsher penalty on wealthy employed offenders than on indigent unemployed defendants.[45] Therefore, the imprisonment of all offenders would operate as a form of inverse discrimination which would defeat the purpose for which the fines were abolished.[46]

(2) *Individualized fines.* To carry the equal protection argument to its most logical extreme, trial judges would have to impose individualized fines tailored to each defendant's financial position.[47] The court would be forced to measure the marginal utility of each dollar fined the defendant to insure that the fine would be equally severe on a wealthy defendant as on a poor one. The obvious difficulty with a system such as this is the complexity and impracticality of its administration. This would be a constitutionally attractive system but would seem almost impossible to implement.

(3) *Day fines.* This plan is somewhat similar to the use of individualized fines. In effect, it would involve the imposition of fines on the basis of a certain number of days' wages for each offense.[48] This approach would tend to treat persons in different financial situations more equally. Day fines have been used extensively in some European countries but have not been

[43] *See* Note, *Discriminations Against the Poor and the Fourteenth Amendment*, 81 HARV. L. REV. 435 (1967).

[44] This consideration applies mainly to the imposition of only a fine, rather than a fine plus a term of imprisonment.

[45] *See* Note, *The Equal Protection Clause and Imprisonment of the Indigent for Nonpayment of Fines*, 64 MICH. L. REV. 938 (1966).

[46] It is obvious that the imprisonment of all defendants would remove the choice of sanctions which the non-indigent defendant now has when sentenced to pay a fine. The result would be to force non-indigents to accept a harsher punishment than they would receive upon the imposition of a fine, just as the present fine-or-imprisonment system forces indigents to accept the harsher punishment.

[47] This was one of the main criticisms raised by Justice Harlan concerning the majority's equal protection analysis in the *Williams* case. *See* 399 U.S. 235, 261. It is doubtful, however, that any court would extend the equal protection guarantee to such an extreme. Equal protection of the laws does not guarantee absolute equality, but merely a freedom from "invidious discrimination." Douglas v. California, 372 U.S. 353, 357 (1963). Undoubtedly "compelling state interests" would preclude the adoption of a complicated system of individualized fines.

[48] *See* Note, *Fines and Fining—An Evaluation*, 101 U. PA. L. REV. 1013 (1953).

adopted in the United States.[49] The same administrative problems would exist with day fines as with individualized fines.

(4) *Weekend jail sentences.* Many lower court judges voluntarily adopt a system by which the defendant is allowed to serve out his jail sentence by spending only weekends in jail, thereby permitting him to keep his job and support his family. Weekend jail sentences are usually imposed in cases where the offense is not serious and the loss of the defendant's job would cause his family to become a burden on the state. Weekend jail terms solve some of the practical problems related to imprisonment of indigent defendants, but the constitutional issues involved still remain unsolved.[50]

(5) *Installment payments.* The most popular, and probably the most practical, method of enforcing the payment of fines without imprisonment is the use of installment payments.[51] If an offender is unable to pay his fine in a lump sum, the installment method allows him to attempt to pay the fine in periodic installments which he can afford.[52] Installment payments provide the indigent offender with an actual choice as to the payment of the fine;[53] he would no longer be faced with imminent imprisonment. Upon

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[49] *Id.*

[50] Even if indigent or low income defendants are allowed to serve their jail terms on weekends, their treatment may still involve invidious discrimination if the term which they must serve has been imposed because of the defendant's inability to pay a fine. The fact that he may be allowed to keep his job does not alter the fact that the indigent offender was forced to accept a jail term in lieu of a fine. *But see* VA. CODE ANN. § 19.1-300 (Cum. Supp. 1970).

[51] A deferred payment plan for the collection of fines from indigents has received support both from the bench and the bar. *See* Tate v. Short, 39 U.S.L.W. 4301 (U.S. March 2, 1971); Williams v. Illinois, 399 U.S. 235 (1970); Arthur v. Schoonfield, 315 F. Supp. 548 (D. Md. 1970); Morris v. Schoonfield, 301 F. Supp. 158 (D. Md. 1969), *vacated per curiam*, 399 U.S. 508 (1970); *In re* Antazo, 3 Cal. 3d 100, 473 P.2d 999, 89 Cal. Rptr. 255 (1970); TASK FORCE REPORT 18.

[52] In most states which use the installment system the size of the payments is generally set by the court pursuant to a report on the financial condition of the defendant and the status of his employment. *See, e.g.*, MD. ANN. CODE art. 38, § 4 (Cum. Supp. 1970); MASS. ANN. LAWS ch. 279, § 1A (1968).

[53] Even though the installment method provides some low income offenders the opportunity to pay their fines rather than go to jail, the problem still exists as to the unemployed defendant. Such a person could not even pay a fine over a period of time. In such situations, most statutes require the defendant to make a good faith attempt to obtain employment. In case of his inability to find a job, the trial judge is usually given the discretion to reduce the fine or revoke it altogether. However, allowing a criminal offender to go unpunished is not an acceptable result either. In the situation of such an unemployed offender, the best approach seems to be to allow him to work for the state at a reasonable compensation until his fine has been paid. *See generally* Note, *The Equal Protection Clause and Imprisonment of the Indigent for Nonpayment of Fines*, 64 MICH. L. REV. 938 (1966).

default in the payment of the installments, the state could retain the remedy of attaching any property the defendant may have,[54] or the state could reduce the amount of each installment by allowing a longer period of payment.[55] Of course, if default were intentional or due to the negligence or lack of good faith of the defendant, the alternative of imprisonment would still be available.[56]

Opponents of such a system for the collection of fines generally base their arguments on what they feel would be the prohibitive costs of administration.[57] However, when the direct and indirect costs to society of an imprisonment system are weighed against the relative costs of an installment system, the former seems to be the more expensive.[58] When an indigent defendant is automatically imprisoned for default on his fine, the state then has the burden of caring for and feeding the prisoner while he is in custody. Moreover, assuming the defendant is willing and able to work, his imprisonment precludes any possibility of employment. As a direct result of his unemployment, the defendant's family, possibly already living only slightly above the subsistence level, will very likey become an additional burden on the state. Finally, when the defendant is released from custody, his fine will remain unpaid. The result of all this is that the state has expended a relatively large amount of money in trying the defendant, imprisoning him and possibly supporting his family, and in the end must write off the fine as a loss.[59]

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54 *See, e.g.*, VA. CODE ANN. § 19.1-339 (Cum. Supp. 1970). *See also* State v. Allen, 104 N.J. Super. 187, 249 A.2d 70 (1969) (dissenting opinion). Some states allow the defendant to be hired out to a private business in return for the payment of the fine by the new "employer." *See* VA. CODE ANN. § 19.1-329 (1960).

55 *See, e.g.*, MASS. ANN. LAWS ch. 279, § 1A (1968); MODEL PENAL CODE § 302.2 (Proposed Official Draft 1962).

56 *Id.*

57 There is no doubt that the investigation into the financial situation of those defendants claiming indigency and the man-hours needed to collect and supervise the payment of each installment would involve greater expenditures of revenue than a system whereby all fines are collected in a lump sum or not collected at all. *See* Note, *The Equal Protection Clause and Imprisonment of the Indigent for Nonpayment of Fines*, 64 MICH. L. REV. 938 (1966).

58 *See* Note, *Discriminations Against the Poor and the Fourteenth Amendment*, 81 HARV. L. REV. 435 (1967).

59 From a purely economic standpoint, it would be difficult to defend the lump sum payment-imprisonment system as a means to save money. It is obvious that such a system cannot deal efficiently with indigent offenders. However, the possibility that the alternative of a lump sum payment of fines or automatic imprisonment will have a greater deterrent effect on future offenders must be considered. *See* Justice Harlan's concurring opinion in *Williams*.

On the other hand, the adoption of installment payments would seem to save money in the long run. The institution of such a system would no doubt involve relatively high costs of administration, but the savings on subsequent expenses in other areas[60] should prove more than compensatory. An indigent or low income offender who is allowed to pay his fine in installments could retain any employment which he may have had and thereby remain a productive member of society. He could continue supporting his family while making reasonable weekly or monthly payments towards his fine.[61] Thus, neither he nor his family would become a burden on society and the chances would be much greater that the fine would eventually be paid.

Another and possibly more important by-product of an installment system is that poor defendants would be able to retain a greater measure of personal dignity. Being able to retain his job, support his family, and still pay his debt to society would have a much more favorable effect on the defendant than the shame and ignominy of an automatic jail sentence. Since most persons' only contact with the law is on the lower misdemeanor or petty offense level, a fair system of installment payments would instill a greater respect for the law. Enforcement of all unpaid fines by means of imprisonment causes the lower class segments of society to view our legal system as a harsh and discriminatory tool of oppression, whereas an installment plan would go much further as a means of rehabilitation.

Another consideration when weighing the administrative convenience of jail with the difficulties of a more complex installment system is the importance of the defendant's interests which lie in the balance.[62] When a fundamental right such as the liberty of a defendant is weighed against the administrative convenience of a jail term, the individual's rights must

[60] In many jurisdictions which have initiated a system of installment payments, the number of offenders imprisoned for failure to pay fines has been drastically reduced. *See* Note, *Fines and Fining—An Evaluation*, 101 U. PA. L. REV. 1013 (1953). This result would indicate that when given the chance to pay their fines at a rate commensurate with their means, most defendants are willing and able to pay their fines rather than work them off in jail.

[61] The ease with which the defendant would be able to pay his fine by way of installments again raises the question of whether this method would critically reduce the deterrent effect of fines. It may be argued that an offender will no more fear conviction for a minor offense than he would fear the purchase of a television set, since he could pay for both on time. However, it seems that to an indigent defendant, the thought of periodic garnishments from his pay check would be equally as distasteful as the lump sum payment would seem to a more wealthy defendant.

[62] *See* Williams v. Illinois, 300 U.S. 235 (1970) (Harlan, J., concurring).

prevail, especially when there is a reasonable alternative open to the states such as an installment plan.[63]

The practice of arbitrarily imprisoning a defendant for failing to pay his fine may be attacked on due process grounds as well as on the basis of equal protection.[64] Mr. Justice Harlan chose the due process approach in his concurring opinion in the *Williams* case.[65] He felt that the equal protection analysis of the majority could logically be extended much further than would be constitutionally necessary, pointing out that it was not the purpose of the Constitution to cure every inequity in our society.[66] The due process clause, however, was much more restrictive in that it prevented the arbitrary denial of a defendant's fundamental rights and was not based on vague distinctions which would allow the court merely to substitute its own concepts of fairness for basic constitutional guarantees.[67] Justice Harlan felt that the Illinois default statute would only be permissible under the requirements of due process if the state legislature had made a "reasoned judgment" that the state's penalogical interests could only be satisfied by

[63] As stated by Justice Harlan, previous decisions of the Supreme Court in the area of statutory classifications "unquestionably show that this Court will squint hard at any legislation that deprives an individual of his liberty—his right to remain free . . . . While the interest of the State, that of punishing one convicted of crime is no less substantial, . . . the 'balance which our Nation, built upon postulates of respect for the liberty of the individual, has struck between that liberty and the demands of organized society . . . having regard to what history teaches' is such that the State's interest here does not outweigh that of the individual . . . ." *Id.* at 263 (Harlan, J., concurring) (citations omitted).

[64] *See* State v. Allen, 104 N.J. Super. 187, 249 A.2d 70 (1969) (dissenting opinion); Petition of Cole, 17 Ohio App. 2d 207, 245 N.E.2d 384 (1968).

[65] Jusice Harlan attempted to distinguish his due process approach from the majority's traditional equal protection analysis of statutory classification cases by alluding to his dissenting opinions in previous cases. *See* cases cited note 27 *supra.*

[66] Justice Harlan believes that the equal protection approach to discrimination cases results in an attempt to require equal treatment of all persons similarly situated. This, he feels, is not constitutionally necessary. The better analysis of unequal treatment of persons by the State is to determine whether there is a rational relation between the legislative distinction and the governmental purpose. Williams v. Illinois, 399 U.S. 235, 260.

[67] An analysis under due process standards, correctly understood, is, in my view, more conducive to judicial restraint than an approach couched in slogans and ringing phrases, such as "suspect" classification or "invidious" distinctions, or "compelling" state interest, that blur 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.

Id.

a lump sum payment of a fine. Since the legislature had never considered whether a fine paid by installments would have the same rehabilitative and deterrent effects as a lump sum payment, then the use of the lump sum–imprisonment alternatives was an arbitrary denial of a basic liberty in violation of the due process clause.

Justice Harlan reserved judgment on the situation in which the state legislature has made a reasoned judgment that only a lump sum payment—rather than payment over a term—would satisfy the state's retributive, rehabilitative and deterrent interests. There is some doubt as to the validity of imprisonment-default statutes in reference to indigents even if the legislature considered and rejected the effectiveness of installment payments. Justice Harlan believed that it would be very difficult to justify a decision that a fine paid in installments would be penalogically less effective than one paid in a lump sum.[68]

At least nine states now provide for the installment payment of fines,[69] and such a system has long been endorsed by the American Law Institute[70] and the American Bar Association.[71] In Virginia, there is no statutory provision for installment fines,[72] as such. Any defendant drawing a fine which is levied or affirmed in a circuit or corporation court may be jailed until the fine and/or costs are paid.[73] The same may be done in a court not of record

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[68] *Id.*

[69] *See* CAL. PEN. CODE § 1205 (1968); MD. ANN. CODE art. 38, § 4 (Cum. Supp. 1970); MASS. ANN. LAWS ch. 279, § 1A (1956); MICH. COMP. LAWS ANN. § 769.3 (1968); PA. STAT. ANN. tit. 19, § 953 (1964); S.C. CODE ANN. § 55-593 (1962); UTAH CODE ANN. § 77-35-17 (1953); WASH. REV. CODE ANN. 10.82.030 (Cum. Supp. 1969); WIS. STAT. ANN. § 57.04 (Cum. Supp. 1969).

[70] *See* MODEL PENAL CODE §§ 302.1 & 302.2 (Proposed Official Draft 1962). These sections allow the trial judge to impose a fine payable in a lump sum or by installments, at his discretion. In case of default, the court may conduct a hearing to determine whether nonpayment was willful. If so, the defendant may be imprisoned at a rate of one day in jail per $5 of fine, or for 30 days in case of misdemeanor, or 1 year for a felony, whichever term would be shorter. If nonpayment was involuntary, the court may allow the defendant more time to pay, reduce the installments, or revoke the fine altogether.

[71] *See* AMERICAN BAR ASS'N PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, STANDARDS FOR SENTENCING ALTERNATIVES AND PROCEDURES § 2.7 (b), at 117 (Approved Draft 1968).

[72] *But see* VA. CODE ANN. § 19.1-300 (Cum. Supp. 1970). Virginia does have a work release program which allows trial judges to permit certain low-income, employed defendants to retain their jobs while being held in custody during their off-hours. Their wages are subject to a form of garnishment for the payment of work release expenses, support of defendant's family, or any fines or costs imposed on defendant. This provision provides limited relief for low-income defendants convicted of minor offenses.

[73] VA. CODE ANN. § 19.1-339 (Cum. Supp. 1970).

if no security is given by the defendant.[74] If a defendant is jailed for a specific term together with the court's direction that he remain there until his fine and/or costs[75] are paid, he may be kept in custody until he pays the fine or until the statutory limitation for such confinement expires.[76]

The rate of credit at which the defendant may work off the fine depends on the nature of his sentence. If he is jailed until his fine and costs are paid, his rate of credit may be as little as $1 per day, with a limit of two months per offense.[77] In this situation the fine and costs are not considered satisfied by the jail term, and additional collective measures may subsequently be taken.[78]

If the defendant instead is sentenced to work off his fine at the state farm or with a field unit, he will be credited with $0.75 for each day that he works, and $0.25 for each that he does not work. The maximum term in this situation is six months,[79] after which time the fine will be considered paid in full.[80]

Virginia's default statutes appear to be much less comprehensive[81] than the more progressive statutes of several other states.[82] Virginia does have one statutory provision which allows the trial judge, upon petition by the defendant, to reduce or revoke the fine and imprisonment at the court's discretion.[83] However, this statute makes no mention that its purpose is to relieve indigent defendants,[84] nor does it set out any guidelines by which

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74 VA. CODE ANN. § 19.1-338 (Cum. Supp. 1970).

75 This provision has remained intact despite the holding by the Virginia Supreme Court of Appeals that imprisonment for nonpayment of costs was a violation of the involuntary servitude provision of the thirteenth amendment. *See* Wright v. Matthews, 209 Va. 246, 163 S.E.2d 158 (1968).

76 VA. CODE ANN. § 19.1-328 (1960).

77 VA. CODE ANN. § 19.1-334 (1960) provides that a defendant who is jailed until his fine is paid may be held up to five days if the fine and costs are less than $5; up to ten days if less than $10; up to fifteen days if less than $25; up to thirty days if less than $50; and in no case more than two months. This section does not apply to the defendant sentenced to work off his fine with a state labor unit. *See* May v. Dillard, 134 Va. 707, 114 S.E. 593 (1922).

78 May v. Dillard, 134 Va. 707, 114 S.E. 593 (1922); Quillin v. Commonwealth, 105 Va. 874, 54 S.E. 333 (1906).

79 The two-month and six-month maximum terms apply to each offense of which the defendant is convicted.

80 VA. CODE ANN. § 55-221 (Cum. Supp. 1970).

81 *See* statutes cited note 68 *supra*.

82 *Compare* statutes cited in Appendix of Williams v. Illinois, 399 U.S. 235, 246 (1970).

83 VA. CODE ANN. § 19.1-332 (1960).

84 The only Virginia case concerning § 19.1-332 has held that a defendant may be

the judge may determine which defendants should be excused and under what circumstances.

The only statutory provision in Virginia for the relief of convicted indigent offenders is the seldom-used work release program.[85] Under this system, a defendant convicted of a misdemeanor or of nonsupport and desertion may be allowed to retain his job while spending his nonworking hours in custody. Whether a defendant will qualify for this program is in the discretion of the trial judge. The only suggested guideline is whether the loss of the defendant's salary during imprisonment would cause his family to become charges of the state. If the trial judge decides a defendant does qualify, he may provide in the offender's sentence for his release during working hours and for the withdrawal from his wages of expenses for the defendant's keep, travel, support for his dependents, or for any fines or costs.

This provision permits equitable treatment of some indigent defendants, but it seems to fall short of providing adequate overall relief in the area of imprisonment of indigents for failure to pay a fine. The trial judge is not compelled to conduct any sort of investigation into a defendant's indigency, nor is he compelled to make use of the work release program if the defendant's indigent condition is brought to his attention. In addition, there are no definite standards set to determine which defendants should qualify. The statute seems to be directed toward those defendants who have a job and support dependents. Thus, those offenders who are unemployed or support no one possibly may not qualify for work release privileges. There still remains the likely probability that many indigent offenders sentenced to a fine will be automatically jailed for their inability to pay.

These provisions compare somewhat unfavorably with those of several other states which provide for prompt hearings as to the defendant's financial condition and specify situations in which the court may allow a fine to be paid by installments, or revoked altogether. The 1970 Maryland legislature, for example, adopted elaborate provisions whereby an indigent defendant could obtain a hearing in order to have the payment of his fine altered to meet his financial situation.[86] Under the new Maryland Act, extensive use is made of the state's probation officers in the collection of installment payments. Trial judges, when imposing fines, have the discre-

released if it is shown that further imprisonment would be injurious to his health. *See* Wilkerson v. Allan, 64 Va. (23 Gratt.) 10 (1873). *Compare* 18 U.S.C. § 3569 (1964).

85 VA. CODE ANN. § 19.1-300 (Cum. Supp. 1970).

86 MD. ANN. CODE art. 38, § 4 (Cum. Supp. 1970).

tionary power to order payment in a lump sum or to permit payment by installments to probation officers. If the defendant is sentenced to a term of probation plus fine, the payment of his fine is a condition of his probation. If the defendant defaults in his payments or asserts his inability to pay the fine, the court investigates his claim of indigency and his family situation to verify the cause. According to the results of this investigation, the court may reduce the fine if default is involuntary or order the defendant's imprisonment in the case of intentional or negligent default. In the case of imprisonment, the defendant must be credited with at least $10 of his fine for each day of imprisonment.[87]

Several other states[88] have adopted statutes similar to the Maryland Act. Such procedures substantially eliminate the discriminatory aspects of enforcement of the payment of fines. The steps which are necessary to reduce such discrimination have been proven successful[89] and are neither prohibitively expensive nor difficult to administer.

In light of recent Supreme Court decisions[90] and progressive state legislation,[91] Virginia's statutes on the collection of fines do not seem sufficiently comprehensive to adequately guarantee equal protection of the laws to indigent defendants. It seems inevitable that the equal protection and due process reasoning of the Supreme Court in *Williams v. Illinois* will eventually be extended to declare unconstitutional the imprisonment of indigent defendants beyond their original terms for their inability to pay a fine.[92] There are too many practical methods of collection and enforcement for imprisonment to remain an acceptable alternative.[93]

The lower court judges in Virginia, subsequent to *Williams* and *Tate,* are now forced to resort to some alternative method for the collection of fines from indigents before they may imprison such defendants for default

[87] If the defendant is imprisoned for his default, the Maryland statute provides that his imprisonment may not exceed one third of the maximum statutory term for the substantive offense or 90 days, whichever is less. If the defendant had been fined for a crime which carried no jail term, his incarceration for default may not exceed 15 days. If the defendant had been sentenced to a jail term plus a fine, his jail term for default may in no case exceed the maximum term for that offense. *Id.*

[88] *See, e.g.,* CAL. PEN. CODE § 1205 (1968); MASS. ANN. LAWS ch. 279, § 1A (1956).

[89] *See* Note, *Fines and Fining—An Evaluation,* 101 U. PA. L. REV. 1013 (1953).

[90] *See* Tate v. Short, 39 U.S.L.W. 4301 (U.S. March 2, 1971); Williams v. Illinois, 399 U.S. 235 (1970); Morris v. Schoonfield, 399 U.S. 508 (1970). *See also* Douglas v. California, 372 U.S. 353 (1963); Griffin v. Illinois, 351 U.S. 12 (1956).

[91] *See* statutes cited note 68 *supra.*

[92] One state court has already chosen to extend *Williams. See In re* Antazo, 3 Cal. 3d 100, 473 P.2d 999, 89 Cal. Rptr. 255 (1970).

[93] *See* Williams v. Illinois, 399 U.S. 235, 244 n.21 (1970).

beyond the permissible statutory term.[94] The only statutory means available to Virginia trial judges to avoid such imprisonment is the work release program.[95] As previously discussed, this provision does not adequately establish a satisfactory alternative means for the collection of fines from indigent offenders. Due to the *Williams* and *Tate* rulings, it will no longer be permissible for lower court judges to provide work release advantages for *some* indigent defendants, but they must provide an alternative means for payment to all indigents who come within the purview of *Williams* and *Tate*. Therefore, additional legislation in this area is needed in order to provide Virginia's judges with a more workable means to collect fines from indigent offenders. Hopefully, a more extensive provision may be adopted providing for installment payment of fines as well as a reliable method for determining the ability of defendants to pay their fines.

P.DEB.R.

[94] Three days subsequent to the *Tate* decision, an opinion rendered by Andrew P. Miller, Attorney General of Virginia, was sent to all judges in the state. The Attorney General stated that *Tate* was applicable to all prisoners presently serving a sentence solely for failure to pay fines or who are or will be incarcerated as a result of an unpaid fine after serving a definite term. A determination of which prisoners should be released, however, was left to the discretion of the judges who had imposed the sentences.

Although it was not mentioned in this opinion, the standard for ascertaining which prisoners should be released is that recited in the *Williams* and *Tate* decisions. These decisions affect all those defendants whose confinement, because of their inability to pay a fine, extends beyond the maximum statutory term for the substantive offense for which they were convicted.

[95] VA. CODE ANN. § 19.1-300 (Cum. Supp. 1970).