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Constitutional Law--The Indigent Defendant Moves One Step Closer to Equality

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In essence, injunctive relief should be given when a plaintiff's constitutional rights are threatened by "bad faith" criminal prosecution. If an injunction were not granted, the only remedy left would be to subject the plaintiff to the uncertainties and dangers of multiple criminal prosecution. It is these imponderables and contingencies that inhibit the full exercise of first amendment rights. In such a case the remedy at law would be at war with itself. Therefore, the rule established in *Harris* seems to be in conflict with the public policy of assuring that legitimate conduct is not inhibited by unnecessary legal uncertainty.[57]

The final result of the *Harris* decision is that an individual's constitutional rights vary depending upon whether or not he is able to file his papers in the federal court *before* the prosecution can present its case to a grand jury. This "race to the court house" was predicted by Mr. Justice Harlan in his dissenting opinion in *Dombrowski* in which he said: "to make standing and criminality turn on which party wins the race to the forum of its own choice is to repudiate the considerations of federalism to which the Court pays lip service."[58]

Despite the ambiguities and the questions left unanswered in *Younger v. Harris,* the decision appears to signal a retreat in the judicial attitude toward substantive due process by restricting the availability of injunctive relief.

Stephen Driesler

CONSTITUTIONAL LAW—THE INDIGENT DEFENDANT MOVES ONE STEP CLOSER TO EQUALITY.

> We should say now, and in no uncertain terms, that a man's mere property status, without more, cannot be used by a state to test, qualify, or limit his rights as a citizen of the United States. 'Indigence' in itself is neither a source of rights nor a basis for denying them. The mere state of being without funds is a neutral fact—constitutionally an irrelevance, like race, creed, or color. . . .
>
> Any measure which would divide our citizenry on the basis of property into one class free to move from state to state and another class that is poverty bound to the place where it has suffered misfortune is not only at war with the habit and custom by which our country has expanded, but is also a short-sighted blow at the security of property itself. Property can have no more dangerous, even if unwitting, enemy than one who would make its possession

[57] See Bunis v. Conway, 17 App. Div. 2d 207, 234 N.Y.S.2d 435 (1962), *appeal dismissed,* 12 N.Y.2d 882, 188 N.E.2d 260 (1963).

[58] 380 U.S. at 502 (Harlan, J., dissenting).

> a pretext for unequal or exclusive civil rights. Where those rights are derived from national citizenship no state may impose such a test. . . .[1]

Where 30 years previously,[2] the Supreme Court of the United States had so adamently deplored a state law which attempted to restrict a person's freedom of motion from one state to another because of his indigent status,[3] in the recent case of *Tate v. Short*[4] it was confronted with an equally dangerous and even more pervasive type of restriction. In *Tate*, this boundary was intensified to the confinement of a four wall prison cell. In this case, the defendant was convicted in the Corporation Court of Houston, Texas of nine traffic offenses and was fined $425.00. Tate claimed himself to be an indigent and unable to pay his fine. Although Texas only provides a monetary penalty for traffic convictions, a state statute[5] required the Corporation Court to incarcerate the defendant for a sufficient time (85 days in this case) to satisfy the fine. His application for writ of habeas corpus, although based on a state statute,[6] was denied by the County Criminal Court. This decision was affirmed by the Court of Criminal Appeals of Texas.[7] The Supreme Court of the United States granted certiorari.[8] The Court

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[1] Edwards v. California, 314 U.S. 160, 184-85 (1941) (Jackson, J., concurring).

[2] *Id.*

[3] In the past, the Court has decided many cases based on a defendant's status as an indigent. *See* the list of cases at note 24 *infra*. As applied in these cases the term "indigent" is best defined as a person ". . . who is financially unable to employ to his advantage the institution or service under consideration." *See also*, Note, *Equal Protection and the Indigent Defendant: Griffin and Its Progeny*, 16 STAN. L. REV. 394, 395 n.10 (1964).

[4] 39 U.S.L.W. 4301 (U.S. March 2, 1971).

[5] TEX. CODE CRIM. PROC. ANN. art. 43.09 (1966) provides:

> When a defendant is convicted of a misdemeanor and his punishment is assessed at a pecuniary fine, if he is unable to pay the fine and costs adjudged against him, he may for such time as will satisfy the judgment be put to work in the workhouse . . . or if there be no such workhouse, farm or improvements, he shall be imprisoned in jail for a sufficient length of time to discharge the full amount of fine and costs adjudged against him; rating such labor or imprisonment at five dollars for each day thereof; provided, however, that the defendant may pay the pecuniary fine assessed against him at any time while he is serving . . . his jail sentence, and in such instances he shall be entitled to a credit of five dollars for each day or fraction of a day that he has served and he shall only be required to pay his balance of the pecuniary fine against him.

[6] TEX. CODE CRIM. PROC. ANN. art. 45.53 (1966) provides in pertinent part:

> A defendant placed in jail on account of failure to pay the fine and costs can be discharged on habeas corpus by showing:
>
> 1. That he is too poor to pay the fine and costs; . . .

[7] *Ex Parte* Tate, 445 S.W.2d 210 (Tex. 1969). In affirming the decision of the Harris County Criminal Court denying Tate's application for a writ of habeas corpus, the court said:

> We overrule appellant's contention that because he is too poor to pay the fine his imprisonment is unconstitutional. His status as an indigent does not render this petitioner immune from criminal prosecution. *Id.* at 211.

[8] Tate v. Short, 399 U.S. 925 (1970).

reversed, holding that it is an invidious discrimination and thus, a denial of the Equal Protection Clause of the Fourteenth Amendment to automatically convert a fine into imprisonment solely because a defendant is unable to pay due to his status of indigency.

At common law, the fine originated as the principle punishment for misdemeanors.[9] Subsequently, a term of imprisonment on default of payment was constituted,[10] and as early as the thirteenth century the duration of such term of imprisonment was indefinite.[11] In the United States, most states have enacted legislation whereby the offender is required to discharge the fine by serving a term of imprisonment. The duration of this imprisonment is not indefinite but rather the respective statutes equate a certain number or fraction of dollars with a day's imprisonment.[12]

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[9] *See* I J. BISHOP, A TREATISE ON CRIMINAL LAW 693 (9th ed. 1923); S. RUBIN, H. WEIHOFEN, G. EDWARDS & S. ROSENZWEIG, THE LAW OF CRIMINAL CORRECTION 226 (1963) [hereinafter cited as RUBIN], which states:

> The origin of the fine has . . . been traced to the practice, early in the postfeudal era, of grading penance for wrongs to the monetary status of the wrongdoer, so that upperclass persons, with the means to pay, were punished with money fines in accordance with their economic status while lower class persons without means were subject to other types of punishments. *Id. citing* G. RUSCHE & O. KIRCHEIMER, PUNISHMENT AND SOCIAL STRUCTURE 166 (1939).

See also 2 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 43-50 (3d ed. 1923); L. STURGE, STEPHEN'S DIGEST OF THE CRIMINAL LAW 42, 487 (8th ed. 1947).

[10] In 2 F. POLLOCK & F. MAITLAND, THE HISTORY OF ENGLISH LAW 517-18 (1911), the authors stated:

> In theory the fine is a bilateral transaction, a bargain; it is not 'imposed,' it is 'made' . . . The wrongdoer but rarely goes to prison even for a moment. . . . The justices do not wish to keep him in gaol, they wish to make him pay money. . . . The causes for fines were now very numerous, and the king preferred a power of inflicting many small penalties to that of demanding heavy sums in a few grave cases.

See RUBIN, *supra* note 9, at 227; E. SUTHERLAND & D. CRESSEY, CRIMINOLOGY 275 (6th ed. 1960); Comment, 64 MICH. L. REV. 938 (1966). *See also* Note, *Fines, Imprisonment, and the Poor: "Thirty Dollars or Thirty Days,"* 57 CALIF. L. REV. 778, 779-80 (1969).

[11] RUBIN, *supra* note 9, at 227.

[12] ALA. CODE tit. 15, § 341 (1959) ($2 to $4 per day); ALAS. STAT. § 12.55.010 (1962) ($5 to $10 per day); ARIZ. REV. STAT. ANN. § 13-1648 (1956) ($1 per day); ARK. STAT. ANN. § 46-510 (1964) ($1 per day); CAL. PEN. CODE § 1205 (1970) ($5 per day); CONN. GEN. STAT. REV. § 18-13 (1968) ($3 per day); FLA. STAT. ANN. §§ 951.15-.16 (Supp. 1971) ($0.30 per day); HAWAII REV. STAT. § 712-5 (1968) ($5 per day); IDAHO CODE ANN. § 19-2517 (Supp. 1969) ($5 per day); ILL. ANN. STAT. ch. 38, § 1-7 (Smithhurd Supp. 1971) ($5 per day); IND. ANN. STAT. § 9-2227a (Burns Supp. 1970) ($5 per day); IOWA CODE ANN. § 789.17 (1950) ($3.33 per day); KY. REV. STAT. §§ 431.140-.150 (1971) ($2 per day); ME. REV. STAT. ANN. tit. 15, § 1904 (Supp. 1970) ($5 per day); MD. ANN. CODE art. 38, § 4 (Supp. 1970) ($10 per day); MASS. ANN. LAWS. ch. 127, § 144 (Supp. 1970) ($3 per day); MINN. STAT. ANN. § 641.10 (Supp. 1971) ($3 per day); MO. REV. STAT. § 543.270 (1969) ($2 to $10 per day); MONT. REV. CODES ANN. § 95-2303 (1969) ($10 per day); NEB. REV. STAT. § 29-2412 (1965) ($6 per day); NEV. REV. STAT. § 176.065 (1967) ($4 per day); N.H. REV. STAT. ANN. § 607:16 (Supp. 1970) ($5 per day); N.J. STAT. ANN. § 2A:166-16 (Supp. 1970) ($5 per day); N.M. STAT. ANN. § 42-2-92A (Supp. 1969) ($5 per day); N.D. CENT. CODE

(Continued on next page)

It is estimated that fines constitute 75% of all sentences[13] and a very high percentage of those fined are imprisoned for nonpayment.[14] These high percentages are illustrative of the fact that courts have lost sight of the common law purpose for establishing a punishment on default of payment.[15] Imprisonment for nonpayment of a fine is not punishment for a substantive offense but rather a means to coerce payment.[16] The purpose of alternative fine statutes or statutes providing imprisonment on default of payment will never be fulfilled by imprisoning indigents. To imprison an indigent for nonpayment of

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(Footnote continued from preceding page)
ANN. § 29-26-21 (1960) ($2 per day); OHIO REV. CODE ANN. § 2947.14 (1954) ($3 per day); OKLA. STAT. ANN. tit. 57, § 20 (1969) ($1 per day); ORE. REV. STAT. § 137.150 (1969) ($5 per day); GEN. LAWS OF R.I. tit. 13, ch. 2-36 (1969) ($5 per day); S.D. COMP. LAWS ANN. tit. 23, ch. 48-23 (1967) ($2 per day); TEX. CODE CRIM. PROC. ANN. art. 43.09 (1966) ($5 per day); UTAH CODE ANN. § 77-35-15 (1953) ($2 per day); VT. STAT. ANN. tit. 13, §§ 7221-23 (Supp. 1970) ($1 per day); VA. CODE ANN. § 53-221 (Supp. 1970) ($0.75 per day worked. $0.25 per other day); WASH. REV. CODE ANN. § 10.82.030 (Supp. 1970) ($10 per day worked, $8 per other day); W. VA. CODE ANN. § 62-4-10 (1966) ($1.50 per day); WYO. STAT. ANN. § 6-8 (1957) ($1 per day). *See also* 18 U.S.C. § 3565 (1964).

[13] *See* Note, *Fines and Fining—An Evaluation*, 101 U. PA. L. REV. 1013, 1014 (1953), *citing*, J. MICHAEL & M. ALDER, INSTITUTE OF CRIMINOLOGY AND OF CRIMINAL JUSTICE 479 (1932) and E. SUTHERLAND, PRINCIPLES OF CRIMINOLOGY 572 (4th ed. 1947).

[14] *See* AMERICAN BAR ASSOCIATION SENTENCING ALTERNATIVES AND PROCEDURES 120 (Approved Draft, 1968) [hereinafter cited as ABA]; 3 NATIONAL COMMISSION ON LAW OBSERVANCE AND ENFORCEMENT, REPORT ON PENAL INSTITUTIONS, PROBATION AND PAROLE 140-41 (1931); RUBIN, *supra* note 9, at 252-53; 101 U. PA. L. REV., *supra* note 13, at 1022.

[15] *See* ABA, *supra* note 14, at 292 where it is stated that:

> [I]mprisonment should not be a substitute for payment but instead an enforcement device used in the case of those who have inexcusably refused to pay . . .

See also Wildeblood v. United States, 284 F.2d 592, 593-94 (D.C. Cir. 1960) (Edgerton, J., dissenting). This dissenting opinion suggests that through the holding of this case, imprisonment for nonpayment has become as much a part of the punishment as the fine itself.

[16] *See* Wildeblood v. United States, 284 F.2d 592, 593-94 (D.C. Cir. 1960) (Edgerton, J., dissenting); McKinney v. Hamilton, 282 N.Y. 393, ——, 26 N.E.2d 949, 951 (Ct. App. 1940); City of Buffalo v. Murphy, 228 App. Div. 279, 287, 239 N.Y.S. 206, 216 (Sup. Ct. App. Div. 1930); People *ex rel.* Loos v. Redman, 48 Misc. 2d 592, ——, 265 N.Y.S.2d 453, 455 (Sup. Ct. 1965); People v. Collins, 47 Misc. 2d 210, ——, 261 N.Y.S.2d 970, 973 (Orange County Ct. 1965); Foertsch v. Jameson, 204 N.W. 175, 176 (S.D. 1925). *See generally* People v. Gittelson, 25 A.D.2d 265, ——, 268 N.Y.S.2d 779, 785-86 (Sup. Ct. App. Div. 1966); People *ex rel.* Gately v. Sage, 13 App. Div. 135, ——, 43 N.Y.S. 372, 373 (1897); People v. Watson, 204 Misc. 467, ——, 126 N.Y.S.2d 832, 834 (Ct. Gen. Sess., N.Y. County 1953) where the court stated:

> [I]t is settled that this remedy for the collection of a fine is not part of the sentence. It is simply a means of enforcing the sentence. . . .
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> A direction in a sentence imposing a fine that defendant stand committed until the fine is paid is no part of the penalty for the offense, but is merely a means of compelling obedience to the judgment of the court. City of Buffalo v. Murphy, *supra* at ——, 239 N.Y.S. at 216.

fines is to work an invidious discrimination based on economic status and punish him for his indigency.[17]

Tate is important in its immediate holding since its impact will be felt in almost every state. It's significance and importance, aside from such direct impact, derives from the equality which the Court has in fact created—indigent defendants are to receive equal treatment. Although the Court's decisions in *Hill v. United States ex. rel. Wampler*[18] and *Ex Parte Jackson*[19] upheld the constitutionality of state statutes which provided for the conversion of a fine into imprisonment upon default of payment, it did not reach the issue of inequality presently raised in *Tate*. In the latter, it followed and further expanded the holding in two of its recent decisions, *Williams v. Illinois*,[20] and *Morris v. Schoonfield*.[21] In *Williams*, the Court held that a state could not constitutionally imprison an indigent defendant beyond the maximum duration fixed by statute solely because he was financially unable to pay a fine. *Morris* was remanded for reconsideration in light of the *Williams* decision.

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[17] *See* Comment, 4 HOUST. L. REV. 695, 700 (1967).

[18] 298 U.S. 460 (1936).

[19] 96 U.S. 727 (1877).

[20] 399 U.S. 235 (1970). This case was preceded by a number of appellate cases which found that the imprisonment of an indigent defendant for default of payment, in addition to the maximum confinement permitted by the substantive statute was a violation of defendant's constitutional rights protected by the Fourteenth Amendment. *See* Wildeblood v. United States, 284 F.2d 592, 593-94 (D.C. Cir. 1960) (Edgerton, J., dissenting); Sawyer v. District of Columbia, 238 A.2d 314, 316 (Dist. Col. Ct. App. 1968); State v. Allen, 249 A.2d 70, 76-77 (N.J. Super. Ct. App. Div. 1969) (Conford, J., dissenting); People v. Tennyson, 19 N.Y.2d 753, ——, 281 N.Y.S.2d 76, 78 (Ct. App. 1967); People v. Mackey, 18 N.Y.2d 755, 221 N.E.2d 462 (Ct. App. (1966); People v. Saffore, 18 N.Y.2d 101, ——, 271 N.Y.S.2d 972, 975 (Ct. App. 1966); People v. Johnson, 24 App. Div. 2d 577, ——, 262 N.Y.S.2d 431, 432 (Sup. Ct. App. Div. 1965) (Hopkins, J., concurring); People v. McMillan, 53 Misc. 2d 685, ——, 279 N.Y.S.2d 941, 942-43 (Orange County Ct. 1967); People v. Collins, 47 Misc. 2d 210, ——, 261 N.Y.S.2d 970, 973 (Orange County Ct. 1965); Strattman v. Studt, 253 N.E.2d 749, 752 (Ohio 1969). The court in People v. McMillan, *supra*, profoundly noted:

> It is to be hoped that the Legislature will modify the law with respect to the payment of fines in cases involving indigent defendants. . . .
>
> In these times in which all of the engines of the criminal law are driving toward preserving and defending the rights of the indigent, our local courts should avoid resort to an archaic system akin to imprisonment for debt. *Id.* at 943.

See also United States *ex rel.* Privitera v. Kross, 239 F. Supp. 118 (S.D. N.Y. 1965). Although the court rejected the defendant's argument that the additional term of imprisonment imposed, as a result of his nonpayment of a fine, was unfair because a defendant with funds could be released, dictum suggested that an additional imprisonment beyond the maximum permissible by a substantive statute would be invalid. *Id.* at 121.

[21] 399 U.S. 508 (1970). The Court seemed to anticipate Tate v. Short as demonstrated by the following statement:

> [T]he Constitution prohibits the State from imposing a fine as a sentence and then automatically converting it into a jail term solely because the defendant is indigent and cannot forthwith pay the fine in full. *Id.* at 509.

Even though *Williams* and *Morris* provide important precedent which the Court relies upon in deciding *Tate*, *Griffin v. Illinois*[22] is the more important case. The Court, in *Griffin*, held that an indigent defendant could not be denied adequate appellate review because he had no money for a certified copy of the trial record, while all others who had the ability to pay could receive such review. In relation to setting trends, *Griffin* was the first case which pronounced an effort to alleviate economic discrimination in criminal proceedings.[23] Following the *Griffin* rationale, a growing body of case law[24] ". . . has come to treat the unequal impact of certain state activities as 'invidious discrimination' forbidden by the fourteenth amendment."[25] With the many protections now extended to indigent defendants to guarantee their equal protection of the laws, it would seem proper to extend this constitutional protection to the sentencing process.[26]

The Court had previously held that the central purpose of the Fourteenth Amendment was to eliminate invidious "racial" discrimina-

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[22] 351 U.S. 12 (1956). In this case the Court stated that even though a law may be nondiscriminatory on its face, it could be grossly discriminatory in its operation. The Court further said:

> There can be no equal justice where the kind of trial a man gets depends on the amount of money he has. Destitute defendants must be afforded as adequate appellate review as defendants who have money enough to buy transcripts. *Id.* at 19.

[23] *See*, Goldberg, *Equality and Governmental Action*, 39 N.Y.U.L. REV. 205, 218 (1964); 4 HOUST. L. REV., *supra* note 17, at 698; 64 MICH. L. REV., *supra* note 10, at 941. *See generally* Comment, 10 VAND. L. REV. 141, 144 (1956).

[24] The Griffin logic was extended in the cases to follow in which the Court has concentrated its efforts into providing rights and privileges denied to indigent defendants solely on the basis of their economic status. *See* Williams v. Oklahoma City, 395 U.S. 458 (1969) (can't be denied right of appeal for lack of money to pay for a trial transcript); Gardner v. California, 393 U.S. 367 (1968) (free transcript furnished on appeal); Roberts v. LaVallee, 389 U.S. 40 (1967) (can't be denied access to instruments needed to assert legal rights); Long v. District Court of Iowa, 385 U.S. 192 (1966) (free transcript on appeal); Miranda v. Arizona, 384 U.S. 436 (1966) (right to have an attorney at interrogation); Rinaldi v. Yeager, 384 U.S. 305 (1966) (state can't deny right to appeal); Draper v. Washington, 372 U.S. 487 (1963) (adequate and effective appellate review); Lane v. Brown, 372 U.S. 477 (1963) (appellate review); Douglas v. California, 372 U.S. 353 (1963) (free appellate counsel); Gideon v. Wainwright, 372 U.S. 335 (right to counsel); Coppedge v. United States, 369 U.S. 438 (1962) (procedural safeguards on appeal); Smith v. Bennett, 365 U.S. 708 (1961) (state must docket petition for a writ of habeas corpus); Douglas v. Green, 363 U.S. 192 (1960) (must be afforded an adequate remedy for appeal); Burns v. Ohio, 360 U.S. 252 (1959) (no financial restrictions on appellate review); Eskridge v. Washington State Bd. of Prison Terms and Paroles, 357 U.S. 214 (1958) (full appellate review).

> [T]he Fourteenth Amendment weighs the interests of rich and poor criminals in equal scale, and its hand extends as far to each. Smith v. Bennett, *supra* at 714.

[25] Note, *Discrimination Against the Poor and the Fourteenth Amendment*, 81 HARV. L. REV. 435 (1968).

[26] *See* Note, *Imprisonment for Nonpayment of Fines and Costs: A New Look at the Law and the Constitution*, 22 VAND. L. REV. 611, 627-28 (1969).

tion in the states,[27] however, recent decisions have expanded the original purpose of the fourteenth amendment to apply to any invidious discrimination[28] and especially those "suspect" classifications based on one's economic status.[29] However, discrimination alone is not sufficient to render a statute unconstitutional.[30] Legislative classification is provided for in the Equal Protection Clause of the Fourteenth Amendment.[31] Such a classification, however, must be drawn without creating an invidious discrimination against a particular class.[32] It must also present a real, reasonable, and substantial difference founded upon a legitimate legislative objective.[33] What the Equal Protection Clause prohibits is the arbitrary selection of a class of individuals[34] or an irrational classification[35] which ". . . was aimed at undue favor and

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[27] *See, e.g.*, Shelley v. Kraemer, 334 U.S. 1, 23 (1948); Strauder v. West Virginia, 100 U.S. 303, 307-308 (1880); Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 71, 81 (1873).

[28] *See* Ferguson v. Skrupa, 372 U.S. 726, 732 (1963); Williamson v. Lee Optical of Oklahoma, Inc., 348 U.S. 483, 489 (1954). In Hernandez v. Texas, 347 U.S. 475, 478 (1953) the court held that the Fourteenth Amendment was not directed solely against differences between "white" and "black", but could apply as well to any particular class treated differently without any reasonable legislative basis. *See generally* Morey v. Doud, 354 U.S. 457, 463-64 (1957); Dowd v. United States *ex. rel.* Cook, 340 U.S. 206, 208 (1950); Cockran v. Kansas, 316 U.S. 255, 257 (1941).

[29] *See* note 24 *supra*, and accompanying text. In interpreting this Amendment's purpose, the Court in Brown v. Bd. of Education of Topeka, 347 U.S. 483, 492 (1953) (dictum) emphasized that its protection was not limited to its original purpose as adopted in 1868. Further supporting *Brown* the Court in Harper v. Virginia State Board of Elections, 383 U.S. 663, 669 (1966) said:

> Likewise, the Equal Protection Clause is not shackled to the political theory of a particular era. In determining what lines are unconstitutionally discriminatory, we have never been confined to historic notions of equality. . . . Notions of what constitutes equal treatment for purposes of the Equal Protection Clause *do* change.

[30] *See, e.g.*, Norvell v. Illinois, 373 U.S. 420 (1963) in which the Court said:

> Exact equality is no prerequisite of equal protection of the laws within the meaning of the Fourteenth Amendment. . . . *Id.* at 423.

See generally, Douglas v. California, 372 U.S. 353, 355 (1963); Snowden v. Hughes, 321 U.S. 1, 8 (1943).

[31] U.S. CONST. amend. XIV, § 1.

[32] *See* Levy v. Louisiana, 391 U.S. 68, 71 (1968).

[33] *See, e.g.*, Turner v. Fouche, 396 U.S. 346, 362 (1970); McGowan v. Maryland, 366 U.S. 420, 425 (1961); Barbier v. Connolly, 113 U.S. 27, 31-2 (1884); Dowd v. Stuckey, 51 N.E.2d 947, 948 (Ind. 1943).

> Class legislation, discriminating against some and favoring others, is prohibited, but legislation which, in carrying out a public purpose, is limited in its application, if within the sphere of its operation it affects alike all persons similarly situated, is not within the amendment. Barbier v. Connolly, *supra* at 32.

See also Ferguson v. Skrupa, 372 U.S. 726, 732 (1963).

[34] *See* Loving v. Virginia, 388 U.S. 1, 10 (1967); McLaughlin v. Florida, 379 U.S. 184, 188 (1964); Duncan v. Missouri, 152 U.S. 377, 382 (1893); McPherson v. Blacker, 146 U.S. 1, 39-40 (1892); Hayes v. Missouri, 120 U.S. 68, 71-72 (1886).

[35] *See* McGowan v. Maryland, 366 U.S. 420, 425 (1961). *See generally* Skinner v. Oklahoma *ex rel.* Williamson, 316 U.S. 535, 540 (1941).

individual or class privilege, on the one hand, and at hostile discrimination or the oppression of inequality, on the other."[36]

In earlier decisions the Court suggested that the Equal Protection Clause was designed to secure an individual against intentional and purposeful discrimination.[37] Since such discrimination was not presumed, the burden of proof was placed on the defendant to show an irrational and arbitrary legislative classification.[38] However in applying this theory to recent cases finding in favor of indigent defendants, it appears that this burden of proof has been placed upon the State to justify discriminations which operate harshly on the poor.[39] Classifications should be inspected with care and if they seem contrary to our traditions they are constitutionally "suspect."[40]

Although many of the decisions striking down invidious discrimination based on one's economic status have relied upon both the Due Process and Equal Protection Clauses of the Fourteenth Amendment,[41] it seems that the Equal Protection Clause, as applied in *Tate* and *Williams*, is a more extensive and specific safeguard for prohibiting unfairness than that demanded by the Due Process Clause.

> [T]he framers and adopters of this Amendment were not content to depend on a mere minimum secured by the due process clause, or upon the spirit of equality which might not be insisted on by local public opinion. They therefore embodied that spirit in a specific guaranty.[42]

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[36] Truax v. Corrigan, 257 U.S. 312, 332-33 (1921).

[37] *See, e.g.*, Snowden v. Hughes, 321 U.S. 1, 8 (1944); Sunday Lake Iron Co. v. Township of Wakefield, 247 U.S. 350, 352 (1917); Gundling v. Chicago, 177 U.S. 183, 186 (1899).

[38] *See* Fay v. New York, 332 U.S. 261, 285 (1947); Snowden v. Hughes, 321 U.S. 1, 8 (1944); Draper v. Rhay, 315 F.2d 193, 198 (9th Cir. 1963); Hughes v. Heinze, 268 F.2d 864, 870 (9th Cir. 1959); Coffelt v. Bryant, 381 S.W.2d 731, 736 (Ark. 1964).

[39] *See* note 24 *supra*, and accompanying text. In Burruss v. Wilkerson, 301 F. Supp. 1237, 1239-40 (W.D. Va. 1968), the Court said:

> It is clear beyond question that discrimination based on poverty is no more permissible than racial discrimination, and that the discrimination on the part of the state officials need not be intentional to be condemned under the equal protection clause. . . . [S]tate policies imposing conditions on the exercise of basic rights, which conditions operate harshly on the poor, must be clearly justified in order to be constitutionally permissible. . . .

[40] *See generally* Korematsu v. United States, 323 U.S. 214, 216 (1944); Hirabayashi v. United States, 320 U.S. 81, 100 (1942); Hill v. Texas, 316 U.S. 400, 406 (1941); Yick Wo v. Hopkins, 118 U.S. 356, 373 (1885).

[41] *E.g.*, Douglas v. California, 372 U.S. 353 (1963); Eskridge v. Washington State Bd. of Prison Terms and Paroles, 357 U.S. 214 (1958); Griffin v. Illinois, 351 U.S. 12 (1956).

[42] Traux v. Corrigan, 257 U.S. 312, 332 (1921). *See* Bolling v. Sharpe, 347 U.S. 497, 499 (1953). In Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886) the Court stated that ". . . the equal protection of the laws is a pledge of the protection of equal laws."

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In *Williams* the Court held that the Equal Protection Clause required the maximum statutory penalty for any substantive offense to be the same for all defendants regardless of their economic status.[43] This opinion is not read to require that mere inequality of sentences[44] are indicative of violations of the Equal Protection Clause. However, when a fine is imposed and the defendant is found to be indigent the "subsequent use of imprisonment to enforce payment of the fine . . . vitiates the previous fundamental decision to deal with the offender by fine."[45] When an indigent defendant is fined, the fundamental purpose of the fine is converted into the very jail sentence which it was designed to avoid.[46] In setting sentences, the court must look to the pertinent statutes and if an offense is punishable by the imposition of a fine solely, then the courts should not be permitted to imprison an indigent defendant on his default of payment.[47] Such imprisonment is unfair and unjustifiable as a penal or correctional objective. If a jail sentence would have better served the needs of public safety or the welfare of the offender, the legislature would have provided such a sentence, rather than merely providing a fine as the only sentence.

Tate has attempted to lessen some of the social inequities inherent in our fine system by providing equal justice for the indigent defendant. Prior to *Tate*, the defendant with means received a proportionately smaller sanction than an indigent defendant. A mere lack of money caused the indigent to be imprisoned, while the defendant with means was given a choice to either pay the fine or go to jail. Realistically, the indigent had no choice and was comparably placed at a disadvantage.[48]

> In general, one of the overriding principles repeatedly urged is that the financial capabilities of the offender should be taken into consideration, because unless fines are proportioned to the defendant's

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(Footnote continued from preceding page)

In Hill v. Texas, 316 U.S. 400, 406 (1941) the Court held:
Equal protection of the laws is something more than an abstract right. It is a command which the State must respect, the benefits of which every person may demand. Not the least merit of our constitutional system is that its safeguards extend to all. . . .

[43] 399 U.S. at 244.

[44] In 4 HOUST. L. REV., *supra* note 17, at 699-700 (1967), it was stated:
To require absolute equality of sentences would go against the trend of modern penology which emphasizes individualization in the sentencing process.

[45] RUBIN, *supra* note 9, at 254. *See also* People v. Gittelson, 25 A.D.2d 265, ——, 268 N.Y.S.2d 779, 785 (Sup. Ct. App. Div. 1966).

[46] *See* 101 U. PA. L. REV., *supra* note 13, at 1021.

[47] 57 CALIF. L. REV., *supra* note 10, at 793.

[48] *See* 22 VAND. L. REV., *supra* note 26, at 632; Comment, 1966 U. ILL. L.F 460.

> ability to pay, they will be treated lightly by persons of means and will be an unbearable burden on the poor.[49]

The *Tate* holding should cause many states to abolish their present practice of providing a statutory formula based on a specific monetary credit for each day the defendant is incarcerated. Such a formula can provide long sentences and is an arbitrary figure which bears no relation to modern penological goals, nor to economic efficiency.[50] Although legislative reform would seem to be preferred over judicial reform[51] in the area of fines, the state legislatures have been slow to respond to the problems of the poor. Therefore the Court has taken the lead, forcing legislative reforms (as in other areas where indigents' rights were withheld)[52] through the constitutional invalidation of statutes which fall within the purview of *Tate*.

Even though *Tate* has, in effect, overruled a practice as old as the common law, the Court did not attempt to establish any specific alternative plans for the legislatures to follow. The Court observed, citing *Williams*:

> It is unnecessary for us to canvass the numerous alternatives to which the State by legislative enactment—or judges within the scope of their authority—may resort in order to avoid imprisoning an indigent beyond the statutory maximum for involuntary nonpayment of a fine or court costs. . . .[53]

One alternative is mentioned in Mr. Justice Blackmun's concurring opinion in *Tate* which suggests that this decision might encourage the states to abolish the present system of fines and substitute terms of imprisonment for all offenses.[54] However, the abolition of fines would be an unrealistic alternative.[55] The indigent defendant would not be benefited in any manner and the defendant capable of paying the fine would be imprisoned for an offense previously designed to be deterred through an economic sanction. The burden would be displaced from the indigent defendant to his counterpart and also to the State. If fines were abolished the State would not only lose a direct source of revenue but would also have to provide funds to maintain the offender and, while he is in jail, his family may require state economic aid.

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[49] RUBIN, *supra* note 9, at 238-39. *See ABA, supra* note 14, at 288; NATIONAL PROBATION AND PAROLE ASSOCIATION GUIDES FOR SENTENCING, 22 (1957).

[50] *See* ABA, *supra* note 14, at 292.

[51] *See generally* 81 HARV. L. REV., *supra* note 25, at 448; 1966 U. ILL. L.F., *supra* note 48, at 466.

[52] *See* note 24 *supra*, and accompanying text.

[53] 399 U.S. at 244.

[54] 39 U.S.L.W. at 4303 (Blackmun, J., concurring).

[55] *See* 81 HARV. L. REV., *supra* note 25, at 448; 64 MICH. L. REV., *supra* note 10, at 945-46.

Thus, while the abolition of fines appears to be the easiest method by which to provide a substitution for current statutes, it would be both unfair and very expensive.

Another alternative is the approach presently taken in a few states whose statutes provide for a "pauper's oath" to be heard after a fixed period of imprisonment.[56] *Tate* would invalidate these statutes in their present form, however, their basic approach could be changed into an acceptable alternative. A hearing to establish the ability of a defendant to pay a fine could be held at the time of sentence rather than after a required term of imprisonment. However, if the same result as provided in these "pauper's oath" statutes is desired, the indigent defendant would go free and suffer neither incarceration nor economic penalty. The defendant with the least means to pay, but who has not been classified an indigent, is punished harshly. Because the indigent defendant is not deterred, the sentencing motives of correction are subverted.

A more realistic and appropriate alternative is for the court to assess a fine based on an amount which a particular defendant is able to pay, complemented by a method of installment or deferred system of payments.[57] Such a plan would enable the courts to impose a realistic fine on an indigent defendant and the offender would have a fair chance to satisfy this sanction. A defendant with greater wealth would pay a proportionately greater fine which would satisfy the deterrent motivations of sentences.

Some states have already enacted legislation which allows an indigent defendant to pay his fine in installments.[58] Although an argument can be made that an indigent will not be able to pay his fine because he is unemployed, that problem can be solved by furnishing him with state employment at the minimum wage. The

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[56] *E.G.*, ALAS. STAT. § 12.55.030 (1962) (available after thirty days, if no non-exempt property exceeding $50); COLO. REV. STAT. ANN. § 39-10-9 (1963) (available after all legal means have been exhausted if defendant has no estate and is without means); HAWAII REV. STAT. § 712-4 (1968) (available after thirty days, if no non-exempt property exceeding $20); N.M. STAT. ANN. § 42-2-9(B) (1964) (available after three months, if no property with which to pay); Gen. Stat. of N.C. § 23-23-25 (1965) (available after twenty days if no property with which to pay); ORE. REV. STAT. § 169.160 (1969) (available after thirty days, if no non-exempt property exceeding $20). See also 18 U.S.C. § 3569 (1964) (available after thirty days if non-exempt property exceeding $20).

[57] *See* MODEL PENAL CODE § 302.1(1)(Proposed Official Draft, 1962); *Pilot Institute on Sentencing*, 26 F.R.D. 231, 380 (1959).

[58] CAL. PEN. CODE § 1205 (West 1970); DEL. CODE ANN. tit. 11, § 4106(b) (Supp. 1970); KAN. STAT. ANN. ch. 22-3425 (Supp. 1970); MD. ANN. CODE art. 52, § 18 (Supp. 1970); N.J. STAT. ANN. § 2A:166-15 (1953); N.Y. CODE CRIM. PROC. § 470-d(1)(b) (McKinney Supp. 1970); OHIO REV. CODE ANN. § 2947.11 (1970); PA. STAT. ANN. tit. 19, §§ 953-56 (1964); WASH. REV. CODE ANN. § 9.92.070 (1957); WYO. STAT. ANN. § 7-322 (1959).

reader is probably wondering how difficult it would be to bring such a plan into effect and more likely than not, may view this plan in a pessimistic manner. However one's attitude may be changed upon examination of the realistic steps that have already been taken by some states, even before the decision in Tate was rendered. A recent statute enacted by Delaware,[59] whereby a person is placed in a specific means of employment which enables him to adequately satisfy his fine, could well serve as a model for future state legislatures to follow.

The installment or deferred method of payment satisfies all the relevant factors which need to be taken into consideration. The state is economically benefited. Penological interests and sentencing motivations are advanced. More important, however, the indigent defendant's constitutional rights are protected. Under such an alternative plan, the indigent receives equal treatment—he has a choice!

John W. Oakley

FAMILY LAW—ALIMONY AND PROPERTY RESTORATION—A RESTATEMENT. —The problems of divorce, alimony,[1] and property settlement are drawing increasing attention as legalists and theologians alike begin

[59] DEL. CODE ANN. tit. 11, § 4106(b) (Supp. 1970). This statute reads in pertinent part as follows:

> Where a person sentenced to pay a fine, cost or both, on conviction of a crime is unable or fails to pay such fine, costs or both, at the time of imposition of sentence or in accordance with the terms of payment set by the court, the court may order the person to report during regular work days to the Director of Division of Corrections of the Department of Health & Social Service, or a person designated by him, for work for a number and schedule of days necessary to discharge the fine imposed. The Division may approve public work projects for assignment of convicted persons. . . . The Director of the Division, or a person designated by him, may also assign a convicted person to a private employer provided the private employer shall compensate the convicted person at a rate of pay no less than that normally paid to employees performing the same or similar services for such an employer. The Division of Corrections shall compensate any convicted person assigned to work under the supervision of any State, County or municipal agencies at a rate of pay equal to that normally paid to employees performing the same or similar services . . . The Division shall withhold from or require payment from the periodic earnings of the convicted person all amounts not deemed by the Division to be required to sustain the convicted person. . . . The amount withheld shall be paid over to the State to be applied to the fine and costs imposed until fully paid.

[1] "Alimony" is derived from the Latin *alimonia,* literally "sustenance." It is used to denote that amount of money paid by one spouse (usually the husband) to the other for support during and/or after a divorce proceeding. W. WINTER, THE NEW CALIFORNIA DIVORCE LAW 81 (1969). *See also* 24 AM. JUR. 2d *Divorce and Separation* § 600 (1966).