CONSTITUTIONAL LAW—EQUAL PROTECTION CLAUSE—IMPRISONMENT OF INDIGENT FOR NONPAYMENT OF FINE DECLARED UNCONSTITUTIONAL—*In re Antazo*, 3 Cal. 3d 100, 473 P.2d 999, 89 Cal. Rptr. 255 (1970).

> The law in its majestic equality, forbids the rich as well as the poor to sleep under bridges, to beg in the streets, and to steal bread.
>
> Anatole France[1]

In the early morning of November 30, 1968, Simeon Munzel Antazo entered the San Jose Speed Shop, took $320 and some speed equipment, and then set the shop afire. Antazo, after being notified by the police that he was wanted in connection with the crime, voluntarily surrendered and, upon being questioned, admitted to conspiring with the owner of the store, Stephen Clausman, to burglarize and set fire to the store so that Clausman might collect on his fire insurance policy. Clausman was arrested and both men were charged with arson,[2] arson of insured personal property,[3] and conspiracy to commit these substantive offenses.[4] Antazo pleaded guilty to the arson count and the other charges were dropped. Clausman was found guilty on all three counts after Antazo testified against him. At the joint sentencing the judge stated that he considered both defendants "as standing in the same and identical shoes before the Court with respect to responsibility for these matters."[5] Hence, each was given a three year suspended sentence, each to be released on probation on the condition he pay a fine totaling

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1 LE LYS ROUGE, ch. 7, *as quoted in* State v. Lavelle, 54 N.J. 315, 330, 255 A.2d 223, 231 (1969) (Proctor, J., dissenting).

2 CAL. PENAL CODE § 448a (West 1970):

> Any person who willfully and maliciously sets fire to or burns or causes to be burned or who aids, counsels or procures the burning of any barn, stable, garage or other building, whether the property of himself or of another, not a parcel of a dwelling house; or any shop, storehouse, warehouse, factory, mill or other building, whether the property of himself or of another; or any church, meeting-house, courthouse, workhouse, school, jail or other public building or any public bridge; shall, upon conviction thereof, be sentenced to the penitentiary for not less than 2 nor more than 20 years.

3 CAL. PENAL CODE § 450a (West 1970):

> Any person who willfully and with intent to injure or defraud the insurer sets fire to or burns or causes to be burned or who aids, counsels or procures the burning of any goods, wares, merchandise or other chattels or personal property of any kind, whether the property of himself or of another, which shall at the time be insured by any person or corporation against loss or damage by fire, shall upon conviction thereof, be sentenced to the penitentiary for not less than one nor more than five years.

4 CAL. PENAL CODE § 182 (West 1970).

5 *In re* Antazo, 3 Cal. 3d 100, 106, 473 P.2d 999, 1001, 89 Cal. Rptr. 255, 257 (1970).

$3,125 or, in lieu of the fine, spend one day in jail for each $10 of fine. Clausman paid his fine and was immediately released on probation. Antazo, unable to pay his fine because of his indigency,[6] was remanded to prison until he worked it off at the prescribed rate.

After serving approximately four months Antazo sought a writ of habeas corpus,[7] alleging that his imprisonment for nonpayment of a fine was unconstitutional because it violated the due process and equal protection clauses of the fourteenth amendment to the United States Constitution. The Supreme Court of California, in a landmark decision, granted petitioner's writ of habeas corpus and ruled that the imprisonment of an indigent for failure to pay a fine was a violation of the equal protection clause.[8]

Although the *Antazo* court subscribed to the petitioner's basic contention that the imposed conditions of probation necessarily resulted in different treatment for the monied defendant and the indigent defendant, the court stated that this in itself was not sufficient to establish a denial of equal protection since the law allows for differences in treat-

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6 *See* Hardy v. United States, 375 U.S. 277, 289 n.7 (1964) (Goldberg, J., concurring), *quoting from* REPORT OF ATTORNEY GENERAL'S COMMITTEE ON POVERTY IN THE ADMINISTRATION OF FEDERAL CRIMINAL JUSTICE, at 8-9:

> Indigence "must be conceived as a relative concept. An impoverished accused is not necessarily one totally devoid of means." An accused must be deemed indigent when "at any state of the proceedings [his] lack of means . . . substantially inhibits or prevents the proper assertion of a [particular] right or a claim of right." . . . Thus, the fact that a defendant may be able to muster enough resources, of his own or of a friend or relative, to obtain bail does not in itself establish his nonindigence for the purpose of purchasing a complete trial transcript or retaining a lawyer.

7 Petitioner was able to make use of habeas corpus rather than relying on appeal because California law provides that habeas corpus is available when special circumstances arise. The existence of a constitutional question is a special circumstance which relieves a defendant from the rule that habeas corpus cannot serve as a substitute for appeal. 3 Cal. 3d at 107-08, 473 P.2d at 1002-03, 89 Cal. Rptr. at 258-59. *Accord, In re* Newbern, 53 Cal. 2d 786, 350 P.2d 116, 3 Cal. Rptr. 364 (1960) (petitioner attacked constitutionality of vagrancy statute); *Ex parte* Bell, 19 Cal. 2d 488, 122 P.2d 22 (1942) (constitutionality of ordinance challenged). In both cases there was no need to exhaust all available remedies by appeal.

8 *In re* Antazo, 3 Cal. 3d 100, 473 P.2d 999, 89 Cal. Rptr. 255 (1970). Recently, the United States Supreme Court, in Tate v. Short, 39 U.S.L.W. 4301 (Mar. 2, 1971), also ruled on the imprisonment of indigents. Tate was imprisoned for failure to pay $425 in traffic fines and the Court ruled that this was unconstitutional, extending the decision in Williams v. Illinois, 399 U.S. 235 (1970) (*see* notes 57-62 and accompanying text, *infra*), by adopting Justice White's concurring opinion in Morris v. Schoonfield, 399 U.S. 508 (1970) (*see* note 63 and accompanying text, *infra*). The Court, discussing the facts before it, stated:

> Since Texas has legislated a "fines only" policy for traffic offenses, that statutory ceiling cannot, consistently with the Equal Protection Clause, limit the punishment to payment of the fine if one is able to pay it, yet convert the fine into a prison term for an indigent defendant without the means to pay his fine.

39 U.S.L.W. at 4302.

ment,[9] provided that the result of such treatment is not "invidious discrimination."

The traditional equal protection test,[10] *i.e.*, whether the statutory classification is devoid of any rational connection to a declared state purpose,[11] was not applied to the statutes in question[12] because the court held that the circumstances warranted the application of the relatively modern "compelling interest" test.[13] This test consists of two separate and distinct standards for determining whether the classification is unconstitutionally discriminatory: (1) when the classification is based upon certain "suspect" criteria it must be supported by a "compelling" interest;[14] (2) when any classification affects the exercise of a "fundamental right," regardless of the classification's criteria or basis, the state must establish a compelling interest to justify the resulting difference in treatment.[15] Under both of these standards, once the interest has

9 *Id.* at 110, 473 P.2d at 1005, 89 Cal. Rptr. at 261. *See* Tigner v. Texas, 310 U.S. 141, 147 (1940):

> The Constitution does not require things which are different in fact or opinion to be treated in law as though they were the same.

10 The traditional equal protection test is sometimes referred to as the "wholly irrelevant" test; *see, e.g.*, McGowan v. Maryland, 366 U.S. 420, 425-26 (1961):

> The [fourteenth amendment] safeguard is offended only if the classification rests on grounds *wholly irrelevant* to the achievement of the State's objective. State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality. (emphasis added).

See also Drueding v. Devlin, 234 F. Supp. 721 (D. Md. 1964), *aff'd mem.*, 380 U.S. 125 (1965).

11 *See* Walters v. City of St. Louis, 347 U.S. 231, 237 (1954) (for a denial of equal protection the statutory classification must cause "different treatments . . . so disparate, relative to the difference in classification, as to be wholly arbitrary"); Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 78 (1911) (for a denial of equal protection the statute must be "without any reasonable basis and therefore is purely arbitrary").

12 CAL. PENAL CODE § 1205 (West 1970) provides that a judgment imposing a fine may also direct imprisonment until the fine is paid at a rate of not more than one day for each five dollars of the fine. CAL. PENAL CODE § 13521 (West 1970) provides for the imposition of a penalty assessment equal to five dollars for every twenty dollars or fraction thereof, of every fine imposed by the courts. This penalty assessment may be waived if the offender has been imprisoned for nonpayment of the fine.

13 *See* Shapiro v. Thompson, 394 U.S. 618, 658-62 (1969) (Harlan, J., dissenting), for a general discussion of the "compelling interest" test.

14 The operational meaning of "suspect" is, roughly, that a court will invalidate the classification unless it is shown to be "necessary" in the service of some "compelling" state interest (rather than merely "rationally related" to some "permissible" governmental objective).

Michelman, *Forward: On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7, 20 (1969). Michelman defines compelling as "a requirement that the infringement of fundamental interests resulting from the classification's use be outweighed by the claimed state purpose." *Id.* at 20 n.34. For a general discussion, *see* Shapiro v. Thompson, 394 U.S. 618, 658 (1969) (Harlan, J., dissenting).

15 Shapiro v. Thompson, 394 U.S. at 660.

been established, there is a further requirement that this particular classification be "necessary"[16] to achieve that interest.[17]

The first compelling interest standard evolved from the cases involving racial classifications now regarded as inherently suspect.[18] The list of suspect criteria was subsequently expanded by the courts so as to include religion,[19] political beliefs,[20] and wealth.[21] In each of these cases the very basis of the classification provoked the court to request that the state have a necessary compelling interest to justify the resulting difference in treatment.

The second branch of the compelling interest test involves the complex and nebulous concept of "fundamental rights." Through case law the courts have included under this concept the right to vote,[22] right of procreation,[23] rights with respect to criminal procedure,[24] right

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16 Michelman defines "necessity" as follows:

> [A] requirement that the challenged classification be strictly relevant to whatever purpose is claimed by the state to justify its use, and also that it be the fairest and least restrictive alternative evidently available for the pursuit of that purpose . . . .

Michelman, *supra* note 14, at 20 n.34.

17 Shapiro v. Thompson, 394 U.S. at 637.

18 *See* Loving v. Virginia, 388 U.S. 1, 11 (1967) (Virginia's statutory scheme to prevent marriages between persons solely on the basis of racial classifications held to be a denial of equal protection); Korematsu v. United States, 323 U.S. 214, 216 (1944) (classification based on Japanese ancestry found "suspect," although held acceptable under wartime conditions).

Some justices have advanced the minority view, commonly designated the doctrine of the "color-blind" constitution, that the equal protection clause prohibits classifications based on race under any circumstances; *see, e.g.*, Loving v. Virginia, 388 U.S. at 13 (Stewart, J., concurring); McLaughlin v. Florida, 379 U.S. 184, 198 (1964) (Stewart, J., joined by Douglas, J., concurring); Kotch v. Board of River Port Pilot Comm'rs, 330 U.S. 552, 566 (1947) (Rutledge, J., dissenting).

19 Sherbert v. Verner, 374 U.S. 398, 406 (1963) (disqualification from unemployment benefits due to appellant's refusal to work on Saturday contrary to her religious beliefs held to impose unconstitutional burden on free exercise of religion); Braunfeld v. Brown, 366 U.S. 599, 603 (1961) (statute requiring closing of business on Sunday not unconstitutional as applied to appellant who due to his religious beliefs cannot work on Saturday).

20 Williams v. Rhodes, 393 U.S. 23, 31 (1968) (election laws preventing minor parties from having their names placed on the ballot held unconstitutional).

21 Harper v. Virginia Bd. of Elections, 383 U.S. 663, 668 (1966) (Virginia's poll tax struck down); Griffin v. Illinois, 351 U.S. 12 (1956) (right of indigent to free trial transcript on appeal).

22 Reynolds v. Sims, 377 U.S. 533, 561-62 (1964):

> Undoubtedly, the right of suffrage is a fundamental matter in a free and democratic society. Especially since the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized.

23 Skinner v. Oklahoma, 316 U.S. 535, 541 (1942) (compulsory sterilization of habitual criminals):

> We are dealing here with legislation which involves one of the basic civil rights

to equal education,[25] right to equal opportunity for employment,[26] right to marital privacy,[27] right to associate freely and privately,[28] and the right to travel.[29] All of these cases involved significant encroachments

of man. Marriage and procreation are fundamental to the very existence and survival of the race. . . . He is forever deprived of a basic liberty. . . . [S]trict scrutiny of the classification which a State makes in a sterilization law is essential, lest unwittingly, or otherwise, invidious discriminations are made against groups or types of individuals in violation of the constitutional guaranty of just and equal laws.

24 Williams v. Illinois, 399 U.S. 235 (1970) (right of indigent not to be imprisoned beyond the statutory maximum); Douglas v. California, 372 U.S. 353 (1963) (right of indigent to counsel on appeal); Griffin v. Illinois, 351 U.S. 12 (1956) (right of indigent to free trial transcript on appeal).

25 Brown v. Board of Educ., 347 U.S. 483 (1954) (state segregation of public schools held a denial of equal protection):

> Today, education is perhaps the most important function of state and local governments. . . . It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is the principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.

Id. at 493; Barksdale v. Springfield School Comm., 237 F. Supp. 543 (D. Mass.), *vacated on other grounds*, 348 F.2d 261 (1st Cir. 1965) (racial segregation resulting from "neighborhood school" policy held a denial of equal protection despite a finding of no conscious attempt on the part of school authorities to segregate the races, *i.e.*, de facto segregation held a denial of equal protection).

26 Purdy v. State, 71 Cal. 2d 566, 579, 456 P.2d 645, 654, 79 Cal. Rptr. 77, 86 (1969):

> Any limitation on the opportunity for employment impedes the achievement of economic security, which is essential for the pursuit of life, liberty and happiness; courts sustain such limitations only after careful scrutiny.

27 Griswold v. Connecticut, 381 U.S. 479 (1965) (statute forbidding use of contraceptives held violative of right to marital privacy).

28 Gibson v. Florida Legis. Invest. Comm., 372 U.S. 539, 546 (1963) (Court held that petitioner's contempt conviction for refusing to divulge information contained in membership lists violated rights of association); Bates v. Little Rock, 361 U.S. 516 (1960) (compulsory disclosure of NAACP's membership lists held an unconstitutional interference with the members' freedom of association):

> Where there is a significant encroachment upon personal liberty, the State may prevail only upon showing a subordinating interest which is compelling.

Id. at 524; NAACP v. Alabama, 357 U.S. 449 (1958) (member of association cannot be forced to disclose the lists of its membership):

> [I]t is immaterial whether the beliefs sought to be advanced by association pertain to political, economic, religious or cultural matters, and state action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny.

Id. at 460-61; *see* Williams v. Rhodes, 393 U.S. 23, 31 (1968):

> The State has here failed to show any "compelling interest" which justifies imposing such heavy burdens on the right to vote and to associate.

29 Shapiro v. Thompson, 394 U.S. 618 (1969) (residency requirement for reception of welfare benefits was a denial of equal protection):

> Since the classification here touches on the fundamental right of interstate

upon individual rights and liberties either expressly or impliedly guaranteed by the Constitution and inherent in the form of government created thereby. When the exercise of any of these fundamental rights is inhibited by a statutory classification, the resulting personal detriment is always severe; and this severity is perhaps the main reason for preferential treatment afforded these rights under the compelling interest test.[30]

When a statutory classification does impinge upon the exercise of a fundamental right, it is often difficult to determine exactly under which compelling interest standard the court is making its decision, *i.e.*, whether the court is adding to the list of suspect criteria or instead finding that the classification has a detrimental effect upon a fundamental right. It is for this reason that there is some disagreement as to whether wealth is in fact a suspect classification.[31]

The *Antazo* court, relying heavily on *Williams v. Illinois*,[32] found both a suspect classification and the involvement of a fundamental right and therefore subjected the statutes in question to the compelling interest test on both grounds. The court concluded that the imprisonment of a convicted indigent for nonpayment of a fine was ineffectual in coercing payment since neither "the threat [nor] the actuality of imprisonment can force a man who is without funds, to

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movement, its constitutionality must be judged by the stricter standard of whether it promotes a *compelling* state interest.

Id. at 638; Keenan v. Board of Law Examiners, 317 F. Supp. 1350 (E.D.N.C. 1970) (residency requirement to qualify to take state bar exam held a denial of equal protection):

We conclude that Rule VI(6) imposes a burden upon the right to interstate travel without being necessary to promote a compelling interest and is therefore unconstitutional.

Id. at 1362. *See* Note, *Residency Requirements and State Bar Examinations*, 2 SETON HALL L. REV. 540 (1971).

30 This view was expressed in Comment, *Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065, 1130 (1969).

31 *See* Shapiro v. Thompson, 394 U.S. at 660 n.9 (Harlan, J., dissenting); Comment, 82 HARV. L. REV. 1065, *supra* note 30, at 1124:

These cases [*Harper* and *Griffin*, *supra* note 21 and accompanying text] also involved rights of fundamental importance, such as voting [*Harper*] and criminal procedure [*Griffin*]. Thus, a concern over distinctions based on wealth was strongly reinforced by a desire to protect these important personal interests and it does not appear that distinctions based on payment are always suspect.

See also Michelman, *supra* note 14, at 24. Michelman contends that *Harper* did not hold classifications based on wealth "suspect," but held that one cannot be denied the "fundamental right" to vote as a sanction for nonpayment of a tax.

32 399 U.S. 235 (1970) (indigent, guilty of petty theft, was given maximum imprisonment plus a fine which upon default could be worked off at rate of five dollars per day; held a denial of equal protection to imprison an indigent beyond the statutory maximum). In *Antazo*, the defendant did not receive the maximum sentence under CAL. PENAL CODE § 448a (*see* note 2 *supra*).

pay a fine."[33] Assuming, *arguendo*, that imprisonment for default did serve the state's interest in the collection of fines, the court reasoned that it was not necessary in the constitutional sense, since there existed alternative and less intrusive methods of obtaining payment of fines from convicted indigents.[34]

The court also concluded that immediate imprisonment for default was not a necessary practice to further the state's interest in punishing, rehabilitating and reforming indigent offenders, since the very nature of a sentence or condition of probation providing alternatively for fine or imprisonment illustrates the trial judge's prior determination that payment of a fine is sufficient to achieve the state's interest in this regard.[35]

The *Antazo* court, for these reasons, concluded that automatic incarceration of a convicted indigent for his involuntary refusal to pay a fine, whether embodied in a probation order or a sentence, violated the indigent's right to equal protection of the law since there is no necessity for such a practice to achieve any compelling state interest, *i.e.*, there is no justification for denying an indigent the same opportunity as that of a monied offender to pay his fine and go free.[36]

The first case to apply the equal protection rationale to the condition of indigency was *Griffin v. Illinois*, in which the United States Supreme Court held that the failure to provide an indigent with a free trial transcript on appeal constituted a denial of equal protection.[37] Justice Black there pronounced that "[t]here can be no equal justice where the kind of trial a man gets depends on the amount of money he has."[38] This equal protection rationale departed from the

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33 3 Cal. 3d at 114, 473 P.2d at 1007, 89 Cal. Rptr. at 263.

34 *Id.* For a discussion of alternate means of obtaining payment *see* notes 65-86 *infra* and accompanying text. *See also* Comment, *Fines, Imprisonment, and the Poor: "Thirty Dollars or Thirty Days,"* 57 CALIF. L. REV. 778, 810-19 (1969); Comment, *Equal Protection and the Use of Fines as Penalties for Criminal Offenses*, 1966 ILL. L.F. 460, 463-66; Note, *The Equal Protection Clause and Imprisonment of the Indigent for Nonpayment of Fines*, 64 MICH. L. REV. 938, 945-47 (1966).

35 3 Cal. 3d at 115, 473 P.2d at 1009, 89 Cal. Rptr. at 265.

36 *Id.* at 115-16, 473 P.2d at 1009, 89 Cal. Rptr. at 265. The court, in holding that § 1205 of the CAL. PENAL CODE denied the indigent petitioner equal protection, apparently ignored the distinction between a judgment and a probation order; *see Ex parte* McVeity, 98 Cal. App. 723, 727, 277 P. 745, 746 (Dist. Ct. App. 1929) (a fine as a condition of probation is not a judgment imposing a fine within the meaning of § 1205).

37 351 U.S. 12, 18-19 (1956).

38 *Id.* at 19; *see* Wildeblood v. United States, 284 F.2d 592 (D.C. Cir. 1960), where Judge Edgerton, dissenting, paraphrases Justice Black, applying his reasoning to default imprisonment of the indigent:

> Few would care to say there can be equal justice where the kind of punishment a man gets depends on the amount of money he has.

Id. at 594.

traditional "state action"[39] approach and, in effect, imposed upon the state the obligation to take affirmative action to obviate societal handicaps, *e.g.*, "class structures, distribution of wealth, and group prejudices,"[40] for which the state is not directly responsible, "whenever they operate to prevent equal access to basic, minimal advantages enjoyed by other citizens."[41] Under this approach, the *Griffin* Court found "wealth" to be a suspect classification which prevented equality of opportunity within the system of criminal procedure, and even using the traditional equal protection test found no rational basis for such a classification.[42] The *Griffin* rationale has been utilized by later courts to ensure equality within other areas of criminal procedure.[43]

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39 For cases holding that there is no denial of equal protection unless the discrimination is the result of state action, *see* Bell v. School City, 213 F. Supp. 819 (N.D. Ind.), *aff'd*, 324 F.2d 209 (7th Cir. 1963), *cert. denied*, 377 U.S. 924 (1964); Vick v. County Bd. of Educ., 205 F. Supp. 436 (W.D. Tenn. 1962); Brown v. Board of Educ., 139 F. Supp. 468 (D. Kan. 1955).

40 Comment, 82 HARV. L. REV. 1065, *supra* note 30, at 1189.

41 *Id. See also* Barksdale v. Springfield School Comm., 237 F. Supp. 543 (D. Mass.), *vacated on other grounds*, 348 F.2d 261 (1st Cir. 1965), where the court stated:

> It is neither just nor sensible to proscribe segregation having its basis in affirmative state action while at the same time failing to provide a remedy for segregation which grows out of discrimination in housing, or other economic or social factors. Education is tax supported and compulsory, and public school educators, therefore, must deal with inadequacies within the educational system as they arise, and it matters not that the inadequacies are not of their making.

Id. at 546; Hobson v. Hansen, 269 F. Supp. 401, 508 (D.D.C. 1967), *aff'd sub nom.* Smuck v. Hobson, 408 F.2d 175 (D.C. Cir. 1969) (court ordered the school board to take affirmative steps to correct the racial imbalance in the schools despite the fact that the segregation was not directly attributable to the school's policies).

42 The *Griffin* Court stated:

> In criminal trials a State can no more discriminate on account of poverty than on account of religion, race, or color. Plainly the ability to pay costs in advance bears no rational relationship to a defendant's guilt or innocence . . . .

351 U.S. at 17-18. Justice Harlan, dissenting, argued that the requirement of payment of a fee could not be considered a suspect classification because it would require the states to equalize the economic positions of rich and poor. *Id.* at 35-36. Justice White echoed Justice Harlan's opinion in Draper v. Washington, 372 U.S. 487, 509 (1963) (White, J., dissenting).

43 Mempa v. Rhay, 389 U.S. 128, 137 (1967) ("a lawyer must be afforded at this proceeding whether it be labeled a revocation of probation or a deferred sentencing"); Roberts v. LaVallee, 389 U.S. 40, 42 (1967) (fee for preliminary hearing transcript held a denial of equal protection); Entsminger v. Iowa, 386 U.S. 748 (1967) (supplying of indigent with mere "clerk's transcript" held a denial of equal protection); Anders v. California, 386 U.S. 738, 745 (1967) (provision of counsel upon initial review "would merely afford . . . that advocacy which a nonindigent defendant is able to obtain."); Long v. District Court, 385 U.S. 192 (1966) (right to free transcript on habeas corpus proceedings); Miranda v. Arizona, 384 U.S. 436, 472 (1966) (indigent has right to counsel prior to police interrogation); Draper v. Washington, 372 U.S. 487 (1963) (trial judge cannot determine merits of indigent's appeal); Lane v. Brown, 372 U.S. 477 (1963) (public defender may not decide merits of indigent's appeal); Douglas v. California, 372 U.S. 353, 357-58 (1963) (merits of

The court in *United States ex rel. Privitera v. Kross*[44] refused to extend the *Griffin* rationale to the prohibition of the automatic incarceration of convicted indigents for nonpayment of a fine when the resulting imprisonment is less than the maximum statutory period of confinement for the commission of the substantive offense.[45] *Privitera,* contrary to the traditional view,[46] construed default imprisonment to be part of the punishment for the crime committed,[47] and evaded the equal protection issue by attributing the discriminatory results of such a practice to the trial judge's sentencing discretion.[48]

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indigent's appeal cannot be determined without counsel); Gideon v. Wainwright, 372 U.S. 335, 339 (1963) (statute appointing counsel for indigents in capital cases only held unconstitutional); Smith v. Bennett, 365 U.S. 708, 714 (1961) (filing fee cannot be employed to deny an indigent writ of habeas corpus); Burns v. Ohio, 360 U.S. 252 (1959) (filing fee unconstitutional if it prohibits indigent from exercising right of appeal); Ellis v. United States, 356 U.S. 674 (1958) (indigent is entitled to have his counsel functioning actively on his behalf and not merely as amicus curiae); Greenwell v. United States, 317 F.2d 108, 110 (D.C. Cir. 1963) (indigent's request for subpoenas need not be substantiated by production of testimonial or documentary evidence). *But see* Norvell v. Illinois, 373 U.S. 420, 423 (1963) (if no transcript is available and indigent's trial lawyer is continuing on his case there is no absolute right to a trial transcript); United States *ex rel.* Marshall v. Wilkins, 338 F.2d 404, 406 (2d Cir. 1964) (since habeas corpus is civil in nature there is no absolute right to appointment of counsel); Pilkington v. Circuit Court, 324 F.2d 45, 46 (8th Cir. 1963) ("mere fact that an accused is unable to furnish [bail] in any sum . . . does not present a federal question").

44 239 F. Supp. 118 (S.D.N.Y.), *aff'd,* 345 F.2d 533 (2d Cir.), *cert. denied,* 382 U.S. 911 (1965) (indigent was convicted of illegal possession of lottery slips under statute allowing maximum sentence of one year plus $500 fine; sentence imposed was 30 days and $500 fine, upon default of which an additional sixty days was added).

45 239 F. Supp. at 120.

46 The traditional view is that default imprisonment is used solely as a device to coerce payment of a fine. *See generally* 21 AM. JUR. 2d *Criminal Law* § 603 (1965); 36A C.J.S. *Fines* § 11 (1961).

47 *See* Note, 64 MICH. L. REV. 938, *supra* note 34, at 943:

> [T]he *Privitera* court erred in placing imprisonment for nonpayment of a fine on a parity with incarceration for the substantive offense.

48 239 F. Supp. at 120. The court stated:

> [S]entences are individualized, [and] it serves no useful purpose to compare the sentence of this [indigent] defendant with that of another, hypothetical [wealthy] defendant.

Privitera's argument has been the object of some criticism. *See* Note, 64 MICH. L. REV. 938, *supra* note 34:

> This analysis would seem to skirt the issue by failing to recognize that imprisonment for nonpayment of fines has always been justified *only* as a coercive device, never as a punishment. The judge's discretion as to the use of defendant's past criminal record is relevant only when the sanction for the substantive crime is being imposed. At that time the record may influence the decision whether to impose a fine, imprisonment, or both. However, these considerations have no applicability as a justification for imprisonment for nonpayment once the appropriate sanction is determined. (footnote omitted).

Id. at 942-43; Comment, 57 CALIF. L. REV. 778, *supra* note 34, at 801; Greenawalt, *Constitutional Law,* 18 SYRACUSE L. REV. 180, 196-97 (1966); Note, 4 HOUSTON L. REV. 695, 700 (1967).

The *Privitera* court indicated, however, that if the imprisonment exceeded the statutory maximum there might be a denial of equal protection.[49] The *Privitera* holding was upheld by subsequent federal decisions in *Kelly v. Schoonfield*[50] and *Morris v. Schoonfield*.[51] These three decisions turn on the fact that the courts construed default imprisonment to be validly applied to indigents if its purpose is substituted punishment.

A year after *Privitera,* the New York Court of Appeals in *People v. Saffore* held exactly what *Privitera* had hinted at, namely, that imprisonment of an indigent for nonpayment of a fine was a denial of equal protection if it forced the indigent offender to be imprisoned beyond the statutory maximum.[52] However, *Saffore* rejected *Privitera's* interpretation of default imprisonment as substituted punishment,[53] concluding:

> Since imprisonment for nonpayment of a fine can validly be used only as a method of collection for refusal to pay a fine we should now hold that it is illegal so to imprison a defendant who is financially unable to pay.[54]

This reasoning would appear to support the position that automatic default imprisonment is a denial of equal protection regardless of the length of the indigent's confinement, but the court declined to so hold.

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49 239 F. Supp. at 121:

> [T]he issues raised [equal protection and excessive fines] by petitioner would be more starkly presented in Federal constitutional terms had he been sentenced . . . to the maximum permissible jail term and fined $500, default to result in additional imprisonment . . . .

50 285 F. Supp. 732 (D. Md. 1968) (class action testing constitutionality of default imprisonment resulting in confinement for less than the statutory maximum). The court held that the classification was valid to promote the state's interest in seeing

> that persons who are found guilty of breaking the laws 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.

Id. at 737.

51 301 F. Supp. 158 (D. Md. 1969), *vacated as moot,* 399 U.S. 508 (1970) (practice of imprisoning indigents for default of fines when the result is less than the statutory maximum). The court held that the indigent could be imprisoned for default if such imprisonment is substituted punishment, but qualified its holding by stating:

> The use of compulsion to pay a fine in the case of a non-indigent defendant is constitutionally permissible, but the imposition of such compulsion on an indigent defendant might well violate the equal protection clause of the Fourteenth Amendment.

Id. at 163.

52 18 N.Y.2d 101, 218 N.E.2d 686, 271 N.Y.S.2d 972 (1966) (indigent found guilty of assault and given maximum sentence of one year plus $500 fine; default imprisonment held a denial of equal protection).

53 *Id.* at 104, 218 N.E.2d at 687, 271 N.Y.S.2d at 974.

54 *Id.*

Subsequent state court decisions have found a denial of equal protection only when, as in *Saffore*, the resulting confinement exceeds the statutory maximum,[55] although a few decisions have upheld the constitutionality of imprisonment of indigents beyond the statutory maximum.[56]

The *Privitera-Saffore* reasoning was embraced by the United States Supreme Court in the recent case of *Williams v. Illinois*.[57] In this case, which involved an indigent who had received the maximum prison term plus a fine, the Court limited itself to the *Saffore* holding:

> [T]he Equal Protection Clause of the Fourteenth Amendment requires that the statutory ceiling placed on imprisonment for any substantive offense be the same for all defendants irrespective of their economic status.[58]

The Hobson's choice condemned by the *Williams* Court was not the indigent's choice of paying his fine and avoiding default imprisonment but rather his choice of limiting his confinement to the statutory maximum by paying his fine.[59] Justice Harlan, concurring in this result, criticized the Court for deciding the case on the equal protection basis[60] and stated:

> [W]hen a State declares its penal interest may be satisfied by a fine or a forfeiture in combination with a jail term the administrative inconvenience in a judgment collection procedure does not, as a matter of due process, justify sending to jail or extending the jail term of individuals who possess no accumulated assets.[61]

Although Harlan chose to view the resulting injustice as a denial of due process, he expressed an understanding of the fundamental issue involved in such a practice and chided the majority for limiting its

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55 *See, e.g.*, State v. Allen, 104 N.J. Super. 187, 249 A.2d 70 (App. Div.), *aff'd on other grounds*, 54 N.J. 311, 255 A.2d 221 (1969) (less than maximum sentence; court remarked that *Saffore* and other decisions have held such imprisonment invalid only when it exceeded the statutory maximum); People v. Tennyson, 19 N.Y.2d 573, 227 N.E.2d 876, 281 N.Y.S.2d 76 (1967); People v. Mackey, 18 N.Y.2d 755, 221 N.E.2d 462, 274 N.Y.S.2d 682 (1966).

56 *See* People v. Williams, 41 Ill. 2d 511, 244 N.E.2d 197 (1969), *rev'd*, 399 U.S. 235 (1970) (indigent forced through default imprisonment to be imprisoned beyond the statutory maximum; held not a denial of equal protection); Wade v. Carsley, 221 So. 2d 725 (Miss. 1969) (indigent forced by default to be imprisoned beyond the maximum; held valid). The *Wade* court stated that the "fine was imposed not because appellant was indigent, but because she violated the law." *Id.* at 726.

57 399 U.S. 235 (1970).

58 *Id.* at 244.

59 *Id.* at 242.

60 *Id.* at 260.

61 *Id.* at 265.

holding to situations in which the indigent offender received the statutory maximum period of confinement:

> [U]nlike the Court, I see no distinction between 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.[62]

Soon after the *Williams* decision, Supreme Court Justices White, Douglas, Brennan and Marshall, in a concurring opinion, addressed themselves to the fundamental equal protection issue involved in the perfunctory imprisonment of an indigent offender for his inability to make an immediate lump sum payment of his fine:

> [T]he same constitutional defect condemned in *Williams* also inheres in jailing an indigent for failing to make immediate payment of any fine, whether or not the fine is accompanied by a jail term and whether or not the jail term of the indigent extends beyond the maximum term that may be imposed on a person willing and able to pay a fine. In each case, the Constitution prohibits the State from imposing a fine as a sentence and then automatically converting it into a jail term solely because the defendant is indigent and cannot forthwith pay the fine in full.[63]

It is unfortunate that this articulate analysis of the equal protection issue took the form of dicta.

The California Supreme Court did not wait for the United States Supreme Court to reach this determination. *Antazo* is the first case, state or federal, to hold that it is a denial of equal protection to automatically imprison an indigent offender for his inability to make immediate payment of a fine, whether imposed as part of a probation order or a sentence, regardless of the length of the resulting confinement. Distinguishing between a refusal to pay a fine and the inability to do so, the court concluded that the fundamental equal protection argument was not the indigent's inability to limit his confinement to the statutory maximum, but his inability to make a choice when faced with an *alternative* sentence of fine or imprisonment.[64] Under this rationale the length of the indigent's imprisonment is ir-

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62 *Id.* at 265 n.

63 Morris v. Schoonfield, 399 U.S. 508, 509 (1970).

64 Justice Goldberg concurs in this analysis. *See* Goldberg, *Equality and Governmental Action*, 39 N.Y.U.L. REV. 205, 221 (1964):

> The "choice" of paying $100 fine or spending 30 days in jail is really no choice at all to the person who cannot raise $100. 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.

relevant, since it is the legality of the imprisonment itself which is constitutionally defective.

ALTERNATIVES TO DEFAULT IMPRISONMENT

The use of fines as a criminal sanction has been the subject of some criticism. The sanction in fact frequently "has little to do with his culpability or with the affirmative accomplishment of any penological objectives."[65] Moreover, despite its frequent use as an alternative to punishment, "it frequently happens that the result is the very jail sentence which is sought to be avoided."[66] However, regardless of its deficiencies, the complete elimination of the fine from the administration of criminal justice is not the solution because: (1) there are instances when the offense and the offender's past record do not justify the harshness of imprisonment although requiring some penal sanction; (2) total reliance on imprisonment as a penal sanction would impose an unequal burden on the employed monied offender, as opposed to the burden such confinement would impose on an unemployed indigent; and (3) fines have become an important source of revenue for local government.[67]

There are two possible approaches to the problem of default imprisonment: the development of other more flexible methods of obtaining payment, and the requirement that fines be imposed only on those able to pay.

The most ideal method of obtaining payment of a fine from a defendant unable to make an immediate lump sum payment is an installment fine system. Many states already provide by statute for such a system,[68] as does the *Model Penal Code*.[69] Under this system the

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65 ABA PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, SENTENCING ALTERNATIVES AND PROCEDURES, Commentary § 2.7(a), at 119 (Tentative Draft 1967).

66 *Id.*, Commentary § 2.7(b), at 119.

67 Note, 64 MICH. L. REV. 938, *supra* note 34, at 946; Note, 101 U. PA. L. REV. 1013, 1026 (1953) (these authorities defend the utilization of fines in the administration of criminal justice). *But see* ABA, SENTENCING ALTERNATIVES AND PROCEDURES, *supra* note 65, at § 2.7(c)(IV), (in pertinent part): "Revenue production is not a legitimate basis for imposing a fine."

68 *E.g.*, CAL. PENAL CODE § 1205 (West 1970); MD. ANN. CODE art. 38, § 4 (1970 Cum. Supp.); MASS. ANN. LAWS ch. 279, § 1 (1968); MICH. COMP. LAWS ANN. § 769.3 (1948); N.J. STAT. ANN. § 2A:166-15 (1953); PA. STAT. ANN. tit. 19, §§ 953-56 (1964); S.C. CODE ANN. § 55-593 (1952); N.Y. CODE CRIM. PROC. § 470-d(1)(b) (McKinney Supp. 1970).

69 MODEL PENAL CODE § 302.1(1) (P.O.D. 1962):

> When a defendant is sentenced to pay a fine, the Court may grant permission for the payment to be made within a specified period of time or in specified installments. If no such permission is embodied in the sentence, the fine shall be payable forthwith.

courts would be required to offer this method of payment immediately upon a showing of indigency. The installment system has many advantages over the present usage of default imprisonment:

(1) It avoids the following evils of short-term imprisonment:[70]
   (a) The confinement is so brief as to prohibit any effectual rehabilitative measures.
   (b) The institutions are often crowded and unsanitary.
   (c) Since "there is little or no attempt to segregate types of offenders, . . . [there results] associations which may promote future crime rather than deter it."[71]
   (d) The offender's absence may have an adverse effect upon his family's economic status, morale and community reputation.
   (e) The rate of recidivism may be increased by the offender's inability to readjust to the community after his release.[72]
(2) It leads to a collection of more fines.
(3) It decreases the mounting cost of prison maintenance.[73]
(4) It reduces recidivism by keeping the offender cognizant of his guilt for a longer period of time.[74]

If the indigent offender should achieve the ability to pay and then refuses, he may at that time be validly imprisoned for his default.[75]

Similar to the installment system are the "criminal credit administration" and the "delayed payment system." The criminal credit administration would be established by the state for the purpose of

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70 For a general discussion of the evils of short-term imprisonment, *see* Note, *Imprisonment for Nonpayment of Fines and Costs: A New Look at the Law and the Constitution*, 22 VAND. L. REV. 611 (1969); Note, 101 U. PA. L. REV. 1013, *supra* note 67, at 1022.

71 ABA, SENTENCING ALTERNATIVES AND PROCEDURES, *supra* note 65, Commentary § 2.7(b), at 120.

72 Note, 22 VAND. L. REV. 611, *supra* note 70, at 620 n.48.

73 A Tennessee study has shown that the per capita cost of prison maintenance and the revenue extracted from prison labor resulted in a net loss of more than half a million dollars. Comment, *Jail Fees and Court Costs for the Indigent Criminal Defendant: An Examination of the Tennessee Procedure*, 35 TENN. L. REV. 74, 89 (1967).

74 On advantages of the installment system generally, *see* Note, 22 VAND. L. REV. 611, *supra* note 70, at 625; Note, 64 MICH L. REV. 938, *supra* note 34, at 946.

75 PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: THE COURTS 18 (1967):

> [A] defendant may not be imprisoned unless his default is due to a willful refusal to pay or to make a good faith effort to obtain the money.

ABA, SENTENCING ALTERNATIVES AND PROCEDURES, *supra* note 65, states:

> The effect of nonpayment of a fine should be determined after the fine has not been paid and after examination of the reasons for nonpayment.

Id. at § 2.7(e).

lending the indigent offender the funds to pay his fine.[76] Many states already provide for a delayed payment system;[77] under this system the court would be empowered to set some future date by which the fine must be paid rather than demand immediate payment. Some states also provide a civil remedy of execution against defendant's property.[78] It is also possible to transfer the harshness of a fine into a conditional probation devoid of any financial obligations by extending the length of the probationary period, imposing a curfew, and requiring weekly reports to his probation officer; analogous is the system of "custodial release" which would authorize the court to assign an unemployable indigent offender to the custody of welfare and social authorities.

> This custodial release would not only offer the possibility of enabling the indigent ultimately to satisfy his pecuniary obligation to the state, but would also offer significant opportunities for rehabilitation.[79]

If confinement is necessary, some of the disadvantages of the present default imprisonment system could be avoided by a weekend imprisonment which would hopefully induce the offender to obtain a job rather than suffer this periodic incarceration. Similar to the previous system is the "work release" program, effective in more than one-third of the states,[80] under which certain prisoners, with proper qualifications, could be released to the community to pursue some employment.

The courts could easily determine the impact of a particular penal sanction through the utilization of a presentence report. In some states the court is required to make such a report,[81] but usually its use

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

77 *E.g.*, CAL. PENAL CODE § 1203.1 (West 1970); DEL. CODE ANN. tit. 11, § 4332(c) (Supp. 1968); MD. ANN. CODE art. 38, § 4 (Supp. 1970); MASS. LAWS ANN. ch. 279, §§ 1-1A (1968); N.Y. CODE CRIM. PROC. § 470-d (McKinney Supp. 1970); PA. STAT. ANN. tit. 19, § 1082 (1964); WASH. REV. CODE § 10.82.020 (1959).

78 *E.g.*, CAL. PENAL CODE § 1206 (West 1970); ILL. ANN. STAT. ch. 38, § 180-4 (Smith-Hurd 1964); N.J. STAT. ANN. § 2A:166-11 (1953); N.Y. CODE CRIM. PROC. § 470-d (McKinney Supp. 1970); OHIO REV. CODE ANN. § 2949.09 (Baldwin 1964).

79 Note, 64 MICH. L. REV. 938, *supra* note 34, at 946.

80 *E.g.*, CAL. PENAL CODE § 1208 (West 1970); DEL. CODE ANN. tit. 11, §§ 6532-34 (Supp. 1968); FLA. STAT. ANN. § 945.091(1)(b) (Supp. 1971); ME. REV. STAT. ANN. tit. 34, § 527 (Supp. 1970); MICH. STAT. ANN. § 28.1747(1) (Supp. 1970); MINN. STAT. ANN. § 241.26 (Supp. 1971); MO. REV. STAT. § 221.170 (1959); MONT. REV. CODES ANN. § 95-2216 (Special Supp. 1968); N.H. REV. STAT. ANN. § 607:14-a (Supp. 1970); N.Y. CORREC. LAW §§ 150-60 (McKinney 1968); N.C. GEN. STAT. § 148-33.1 (Supp. 1969); TENN. CODE ANN. § 41-1237 (Supp. 1970); VT. STAT. ANN. tit. 28, § 207 (repl. 1970); *cf.* MODEL PENAL CODE § 303.9 (P.O.D. 1962).

81 *E.g.*, MONT. REV. CODES ANN. § 95-2203 (Special Supp. 1968); N.J.R. 3:21-2 (1969); R.I. GEN. LAWS ANN. § 12-19-6 (1969).

is left to the court's discretion.[82] If the court determines that a particular defendant is unable to pay a fine, then the court can directly impose a short-term confinement. This practice of fining only those who can pay was accepted by the *American Bar Association Project on Minimum Standards for Criminal Justice*[83] and incorporated into the *Model Penal Code*.[84] This position was also endorsed by the *President's Commission on Crime in the District of Columbia*:

> The Commission believes that making imprisonment dependent on an offender's financial status is wrong. If a fine is to be imposed, it should be set in light of the offender's ability to pay and this information should specifically appear in the presentence report. If the offender cannot pay a fine all at once, periodic installment payments should be established. If it appears that he will not be able to pay a fine under any circumstances, the court should impose a sentence of either imprisonment or probation, whichever is appropriate in the case, and not offer an offender a false option unrelated to his character or his offense.[85]

Of the two alternatives to the problem of default imprisonment, the collection approach is the more preferable, since the other would frequently result in the indigent's direct imprisonment. Although such imprisonment would no doubt be shorter than that imposed under the existing default procedures, it nonetheless remains imprisonment when a fine would have been sufficient. If for some reason an indigent is unable to pay under any of the alternative collection methods and probational or custodial release is unavailable, imprisonment based upon the indigent's own peculiar circumstances must necessarily be imposed. This imprisonment will at least be more equitable than imprisonment under some arbitrary rate.[86]

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82 *E.g.*, N.M. STAT. ANN. § 41-17-23 (1964); VA. CODE ANN. § 53-278.1 (1967 repl.)

83 ABA, SENTENCING ALTERNATIVES AND PROCEDURES, *supra* note 65, at § 2.7(c) (in part):

> In determining whether to impose a fine and its amount, the court should consider:
>
> (i) the financial resources of the defendant and the burden that payment of a fine will impose, with due regard to his other obligations;
>
> (ii) the ability of the defendant to pay a fine on an installment basis or on other conditions to be fixed by the court . . . .

See also ABA, PROBATION § 3.2(d) (Tentative Draft 1967):

> Conditions requiring payment of fines, restitution, reparation, or family support should not go beyond the probationer's ability to pay.

84 MODEL PENAL CODE § 7.02(3)(a) (P.O.D. 1962):

> The Court shall not sentence a defendant to pay a fine unless: (a) the defendant is or will be able to pay the fine . . . .

85 REPORT OF THE PRESIDENT'S COMMISSION ON CRIME IN THE DISTRICT OF COLUMBIA 394 (1966).

86 The per diem rates vary from state to state; *see, e.g.*, CAL. PENAL CODE § 1205

THE NEW JERSEY APPROACH

Imprisonment for nonpayment of a fine has long been an accepted practice in New Jersey. In 1822 a juror was held in contempt of court and fined; the supreme court ruled that it was proper that the juror "be committed till the fine is paid."[87] Such imprisonment has been justified by applying the common law reasoning that it is not part of the punishment but rather only a method to coerce payment of the fine. In *Dodge v. State*,[88] in 1854, the defendant was sent to jail for nonpayment of costs, and the supreme court, after ruling that costs were on the same footing as a fine, stated:

> [D]irecting that the prisoner shall stand committed till the fine, or till the fine and costs are paid, is not adding to the legal punishment, but simply a mode of enforcing obedience to the sentence of the law. The usual form of common law judgment is, that the prisoner stand committed till the fine is paid. . . .
>
> . . . .
>
> The order that the defendant stand committed till the fine and costs are paid, does not . . . add anything to the punishment inflicted by law, or in any wise affect the rights of the defendant . . . .[89]

Under the early common law, the length of time a defendant who failed to pay his fine had to spend in jail was indefinite, but later statutes limited it or set up a correlation between the length of the jail term and the amount of the fine.[90] In 1851, New Jersey passed a law that a defendant unable to pay his fine should be confined to prison to do labor until the fine was paid by "such labor, or otherwise."[91] This statute followed the common law approach that the defendant should be sent to jail until his fine was paid, the only modification being that the defendant could pay off his fine while in jail. Once again the imprisonment itself was not part of the punishment, but only a method of compelling the defendant to pay his fine. A similar act was passed

(West 1970) (five dollars); MONT. REV. CODES ANN. § 95-2302(b) (1969) (ten dollars); NEB. REV. STAT. § 29-2412 (1965) (six dollars); N.J. STAT. ANN. § 2A:166-16 (Supp. 1970) (five dollars); OHIO REV. CODE ANN. § 2947.14 (1954) (three dollars); UTAH CODE ANN. § 77-35-15 (1953) (two dollars); W. VA. CODE ANN. § 62-4-10 (1966) (one dollar and fifty cents).

87 Crane v. Sayre, 6 N.J.L. 110, 111 (Sup. Ct. 1822).

88 24 N.J.L. 455 (Sup. Ct. 1854).

89 *Id.* at 466-67.

90 *See generally* 2 F. POLLOCK & F. MAITLAND, THE HISTORY OF THE ENGLISH LAW 516-18 (2d ed. 1968); Seagle, *Fines*, in ENCYCLOPEDIA OF THE SOCIAL SCIENCES 250 (1931); Comment, 57 CALIF. L. REV. 778, *supra* note 34.

91 Law of March 18, 1851, ch. 237, § 90, N.J. Laws 348.

in 1898, which provided that a defendant be placed at labor until his fine is paid by the proceeds of his labor.[92]

This statute refers to a fine meted out in any court in the state, and applies whether the defendant is placed in a county jail or a penitentiary. The legislature, however, by laws in 1895[93] and 1898[94] limited to ninety days the amount of time a defendant could spend in jail for nonpayment of a fine imposed by a city court and a county court, respectively. But the legislature was not deviating from the common law concept of imprisonment for nonpayment of a fine. The ninety day limitation did not make the jail term an alternate punishment for the substantive offense; rather, it simply added a practical limitation.

In 1950, the New Jersey Legislature passed a statute which provided that any person incarcerated for nonpayment of a fine would be given a credit of $3 toward his fine for each day in prison. This was amended in 1963 to raise the credit to $5 per day.[95] The legislature was apparently substituting the alternate punishment rationale by providing an equivalent time in jail for a specific amount of fine. The potential prisoner is now faced with a choice of paying *X* amount of dollars or going to jail for *Y* amount of time, with the imprisonment a substitute punishment for the mulct. Of course, by retaining the threat of imprisonment for nonpayment, the statute also provides a coercive pressure upon the defendant.

In spite of the legislative change, the courts have chosen to retain the common law rationale. In 1954, the appellate division of the

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92 Law of June 14, 1898, ch. 237, § 90, N.J. Laws 899:

> When on any indictment, judgment shall be given in any of the courts of this state for fine or imprisonment and costs, or fine without costs, or costs without fine or imprisonment, it shall be lawful to place the defendant against whom such judgment shall be rendered at labor in any county jail or county penitentiary, until such fine and costs, or fine or costs, are paid by the proceeds of such labor or otherwise.

This law is now codified as N.J. STAT. ANN. § 2A:166-14 (1953).

93 Law of February 26, 1895, ch. 52, § 1, N.J. Laws 118-19.

94 Law of June 13, 1898, ch. 208, § 1, N.J. Laws 481-82.

95 N.J. STAT. ANN. § 2A:166-16 (Supp. 1970) states:

> Whenever it shall appear that a person is confined in a State penal or correctional institution by reason of default in the payment of fines and costs of prosecution and wherein the committing court, as part of the sentence of imprisonment, ordered that the prisoner stand committed until such fine and costs are paid, such prisoner shall be given credit against the amount of such fines and costs at the rate of $5.00 for each day of confinement. When the prisoner shall have been confined for a sufficient number of days to establish credits equal to the total aggregate amount of such fines and costs, and is not held by reason of any other sentence or commitment, he shall be discharged from imprisonment by the chief executive officer of the State penal or correctional institution wherein he is so confined.

superior court was presented with the question of whether Ronald Johnson would be able to credit thirty days pretrial detention toward his sentence of thirty days in jail for failure to pay a $200 fine.[96] If the thirty day imprisonment for nonpayment was an alternate punishment, then Johnson could get credit for the thirty days he had already spent in jail; on the other hand, if the thirty day sentence for nonpayment was coercive and not part of the punishment, then Johnson would not be entitled to the credit. The court, in accordance with the common law, ruled against Johnson, holding that the thirty day jail term must be considered as a penalty for not paying the fine; the custody of the defendant is only a method of enforcing the fine.[97]

State v. Johnson was quoted with approval in *State v. Allen*,[98] where the propriety of imprisoning an indigent for nonpayment of a fine was questioned. Here the court ruled that such imprisonment was constitutional as long as the amount of time the defendant spent in jail did not exceed the maximum sentence the statute prescribed.[99] The majority did not ascribe any importance to the reasoning behind the fine but instead based their decision on the fact that imprisonment for nonpayment had a long history in the law. Judge Conford, however, in his dissent attacking the custom, stated:

> [S]ubjection of an indigent to incarceration as a *purported sanction for failure to pay a fine* is unconstitutional both as a denial of equal protection of the laws and a deprivation of liberty without substantive due process.[100]

The question of imprisonment of an indigent for failure to pay a fine was brought before the New Jersey Supreme Court in *State v. Lavelle*.[101] Lavelle had been convicted for possession of marihuana

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96 State v. Johnson, 30 N.J. Super. 235, 237, 104 A.2d 87, 88 (App. Div. 1954).

97 *Id.*

98 104 N.J. Super. 187, 249 A.2d 70 (App. Div.), *aff'd on other grounds*, 54 N.J. 311, 255 A.2d 221 (1969).

99 The court relied on the reasoning of People v. Saffore, 18 N.Y.2d 101, 218 N.E.2d 686, 271 N.Y.S.2d 972 (1966), and United States *ex 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). *See* notes 44-56 *supra*, and accompanying text.

100 104 N.J. Super. at 197, 249 A.2d at 75 (emphasis added). Apparently what Judge Conford meant when he said that the imprisonment would be a loss of liberty without substantive due process is that, since the imprisonment for failure to pay a fine is not, according to New Jersey law, an alternate punishment, the imprisonment is a punishment for failure to pay the fine. Therefore the incarceration is a separate punishment not issuing out of the conviction for the substantive offense and therefore one which the defendant never had a chance to defend himself against; hence he loses his liberty without an opportunity to be heard on the matter.

101 54 N.J. 315, 255 A.2d 223 (1969). Also decided on the same day was State v. Allen,

and given a suspended sentence and a $250 fine which was to be satisfied at $5 per week. During the ensuing year Lavelle paid only $25 of his fine and was again arrested. As a result, the trial judge vacated his original sentence and ordered Lavelle to jail for three to five years and imposed a $1,000 fine, with the provision that Lavelle remain in jail until the fine was paid. After spending some time in jail Lavelle was granted parole. However, he was not to be granted street parole until he worked off his fine at $5 a day in jail. He appealed his cell parole on the ground that he was being imprisoned as a result of his poverty.

Justice Francis, speaking for the majority, stated:

> Under all the circumstances revealed by the record it cannot be said that Lavelle was denied street parole *solely* because of his indigency. Courts must give great weight to the expertise of the Board in dealing with parole decisions. They should not intervene unless it clearly and convincingly appears that the Board abused its discretion. No such showing has been made here. Accordingly, we see no problem of constitutional dimension in the case . . . .[102]

Justice Proctor, in a dissent in which he was joined by Justices Jacobs and Schettino, felt that the defendant's constitutional rights had been violated because he was given a cell parole while another more affluent defendant would have been given street parole. He stated:

> It was solely Lavelle's lack of funds that was keeping him in prison . . . . A prisoner, rich or poor, who has been found fit to return to society under conditions of parole should be given an opportunity to pay his fine in installments while he is at liberty.[103]

Through this dissent, the three New Jersey Supreme Court Justices put themselves in line with the *Antazo* decision, and it is hoped that perhaps soon the rest of the court will adopt this reasoning.

CONCLUSION

In light of the abundant and varied alternatives to immediate incarceration for nonpayment of a fine, and in view of the strong constitutional challenges which have been marshalled against the practice, the *Antazo* decision presents a solution which is both just and

54 N.J. 311, 255 A.2d 221 (1969), which was affirmed on grounds other than which the appellate division had decided it.

102 54 N.J. at 325, 255 A.2d at 228.

103 *Id.* at 329-30, 255 A.2d at 231.

practical. The state must present alternative methods of payment for indigent defendants, but should those persons afforded such an opportunity not carry out the conditions imposed on them, then they may be jailed to work off their fine. Such a solution does not trample on the fundamental rights of the poor for administrative convenience, nor, on the other hand, does it allow indigent defendants to avoid punishment altogether; rather, the *Antazo* rationale provides a good balance, and it is a decision that should be followed by other courts.

Richard P. Cushing
John F. Neary