FINES, IMPRISONMENT, AND THE POOR: "THIRTY DOLLARS OR THIRTY DAYS"

The Laws are like cobwebs; the small flies are caught but the great break through.

Sir Francis Bacon

On October 10, 1966, Clarence Sawyer was arrested for crossing an intersection in Washington, D.C. in disobedience of a "Don't Walk" signal. Since he was indigent and unable to post five dollars collateral security Sawyer spent the night in jail. The court of general sessions found him guilty of jaywalking. Although the court knew that Sawyer was indigent it sentenced him to a fine of 150 dollars or, in default thereof, 60 days in jail.[1]

Clarence Sawyer's experience is not unique. The courts of most states have the power to imprison indigent defendants unable to pay their fines.[2] Often they are imprisoned one day for each dollar of fine

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1. Sawyer v. District of Columbia, 238 A.2d 314 (D.C. Ct. App. 1968). Sawyer remained in jail at least ten days before the District of Columbia municipal court of appeals vacated his sentence. 238 A.2d at 319.

2. ALA. CODE tit. 15, § 341 (1958); ALAS. STAT. §§ 12.55.010, 12.55.020 (1962); ARIZ. REV. STAT. ANN. § 13-1648 (1956); ARK. STAT. ANN. § 43-2606 (1964); CAL. PEN. CODE § 1205 (West Supp. 1968); COLO. REV. STAT. ANN. §§ 39-10-9, 39-10-10 (1963); CONN. GEN. STAT. REV. §§ 18-50, 18-63 (1968); DEL. CODE. ANN. tit. 11, § 4103 (Supp. 1966); FLA. STAT. ANN. § 921-14 (Supp. 1968); GA. CODE ANN. § 27-2804 (1953), § 27-2901 (Supp. 1968); HAWAII REV. LAWS § 259-3 (1955); IDAHO CODE ANN. §§ 18-303 (1948), 20-624 (Supp. 1967); ILL. ANN. STAT. ch. 38, § 1-7(k) (Smith-Hurd Supp. 1967); IND. ANN. STAT. § 9-2228 (1956), § 9-2227(a) (Supp. 1968); IOWA CODE ANN. §§ 762.32, 789.17 (1950); KAN. GEN. STAT. ANN. §§ 62-1513, 62-1515 (1964); KY. REV. STAT. § 431.150 (1963); LA. CRIM. PRO. CODE ANN. art. 884 (West 1966); ME. REV. STAT. ANN. tit. 15, § 1904 (Supp. 1968); MD. ANN. CODE art. 38, § 4 (Supp. 1968), *amended in* Acts of 1968, ch. 367; MASS. ANN. LAWS ch. 127, §§ 144-46 (1965), ch. 279, §§ 1-1A (1956); MICH. STAT. ANN. § 7A.4815 (1962); MINN. STAT. ANN. § 629.53 (1947); MISS. CODE ANN. §§ 7899, 7906 (1956); MO. ANN. STAT. §§ 546.830-50, 551.010 (1953); MONT. REV. CODES ANN. § 95-2302 (1968); NEB. REV. STAT. §§ 29-2206, 29-2412 (1960); NEV. REV. STAT. § 176.065 (1967); N.H. REV. STAT. ANN. §§ 618:9, 619:21 (1955); N.J. STAT. ANN. § 2A:166-16 (1953); N.M. STAT. ANN. § 42-2-9 (Supp. 1967); N.C. GEN. STAT. §§ 23-24 (1965), 6-65 (1953); N.D. CENT. CODE § 29-26-21 (1960); OHIO REV. CODE ANN. § 715.57 (Page 1953); OKLA. STAT. ANN. tit. 57, § 15 (1950); ORE. REV. STAT. § 86-782 (1940); PA. STAT. tit. 39, § 323 (1954); R.I. GEN. LAWS ANN. § 13-2-36 (1956); S.C. CODE ANN. § 17-574 (1962); S.D. CODE § 34.3706 (Supp. 1960); TENN. CODE ANN. § 41.1223 (1956); TEX. CODE CRIM. PROC. art. 43.09 (1966); UTAH CODE ANN. § 77-35-15 (1953); VT. STAT. ANN. tit. 13, § 7223 (Supp. 1968); VA. CODE ANN. § 19.1-334 (1964); WASH. REV. CODE ANN. §§ 10.82.030-040 (Supp. 1967); W. VA. CODE ANN. §§ 62-4-9, 62-4-10 (1966); WIS. STAT. ANN. § 959.055 (Supp. 1968); WYO. STAT. ANN. § 6-8 (1959). The exception is New York, which amended its statutes in response to recent court of appeals decisions holding some forms of imprisonment for nonpayment of fines unconstitutional. See note 227 *infra*.

unpaid,[3] thus subjecting an indigent convicted of a crime punishable by a five hundred dollar fine, to imprisonment for five hundred days.[4] In some states an indigent may obtain discharge from prison if he establishes his poverty; however, he must usually wait at least one month before exercising the privilege.[5] In some states imprisonment does not discharge liability for payment of the fine.[6]

Available statistics reveal that over the past 50 years the courts have incarcerated vast numbers of indigents in the United States for failure to pay fines. In 1910 the United States Bureau of the Census reported that such commitments accounted for 58 percent of all persons in prison.[7] In 1956 the percentage was 67.5.[8]

Imprisonment for nonpayment of fines is as old as the common law itself, and has roots antedating the Twelve Tables of Rome and the Law of Moses. In the middle ages in England an individual unable to pay a fine could remain in prison for life.[9] In Rome such an individual could be banished or sold into slavery.[10] Under the Law of Moses he could be stoned to death.[11]

The social inequities inherent in the fine system are one facet of the broader problem of providing equal justice for the poor and the affluent alike. Although it is tempting simply to call for the abolition of imprisonment for nonpayment of fines, history must give us pause. The inequalities of the fine system have persisted from the oldest times to the present. They are to some extent inevitable in a society which uses money as a medium of exchange. Suggestions for reform of such fundamental and longstanding inequities should only be

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3. This is a common minimum rate of discharge. *E.g.*, ARIZ. REV. STAT. ANN. § 13-1648 (1956); MINN. STAT. ANN. § 629.53 (1947); TENN. CODE ANN. § 41-1223 (1956) ($1 of fine for 10 hours of labor). Other states, for one day's imprisonment, discharge a minimum of two dollars of fine, *e.g.*, ARK. STAT. ANN. § 43-2606 (1964), CONN. GEN. STAT. REV. § 18-50 (1968); three dollars of fine, *e.g.*, N.J. STAT. ANN. § 2A:166-16 (1953); five dollars of fine, *e.g.*, CAL. PEN. CODE § 1205 (West Supp. 1968); or ten dollars, *e.g.*, MONT. REV. CODES ANN. § 95-2302 (1968). Some states have a maximum confinement, such as six months, MICH. STAT. ANN. § 27A.4815 (1962), or two years, MISS. CODE ANN. § 7899 (1956).

4. *E.g.*, People v. Saffore, 18 N.Y.2d 101, 218 N.E.2d 686, 271 N.Y.S.2d 972 (1966); People *ex rel.* Loos v. Redman, 48 Misc. 2d 592, 265 N.Y.S.2d 453 (Sup. Ct. 1965).

5. *E.g.*, ALAS. STAT. § 12.55.030 (1962) (one month); HAWAII REV. LAWS § 259-3 (1955) (one month); MASS. ANN. LAWS ch. 127, § 146 (1965) (three months); MO. ANN. STAT. § 546.850 (1953) (20 days); OKLA. STAT. ANN. tit. 57, § 15 (1950) (six months); PA. STAT. tit. 39, § 323 (1956) (three months).

6. *E.g.*, ARK. STAT. ANN. § 43-2606 (1964); N.D. CENT. CODE § 29-26-21 (1960).

7. See authority cited in note 81 *infra*.

8. See authority cited in note 85 *infra*.

9. See authority cited in note 44 *infra*.

10. See authority cited in notes 36, 37 *infra*.

11. See authority cited in note 15 *infra*.

offered after a careful exploration of the history, penology, and legality of the fine.

This Comment therefore examines the entire problem of imprisonment for nonpayment of fines. Part I traces the development of the fine system from its antecedents in the private settlement and its beginnings under William the Conqueror to its final form under modern statutes. Part II examines the penology of imprisonment both as a means of collection and as an alternative punishment to the fine. Part III explores the numerous constitutional and statutory challenges to imprisonment for nonpayment of fines. Part IV analyzes the basic techniques through which the courts can fine the poor while at the same time avoiding imprisonment for inability to pay.

I

HISTORY

A. The Settlement

The earliest societies had no public criminal law.[12] Individuals avenged private injuries by retaliation or by family blood feuds.[13] The wrongdoer, however, could prevent violence by voluntarily paying compensation to the injured party or to his family.[14] More than a millenium before Christ, for example, the Mosaic law provided that an individual who negligently allowed his ox to injure another person could escape death by compensating the injured individual or the individual's master.[15]

Even during this early period, however, there was some public regulation of private settlements. Mosaic law provided that judges would determine the damages for some personal injuries.[16] Early Roman law employed a similar system of private settlements subject

12. 2 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 21, 43-50 (1924) [hereinfater cited as HOLDSWORTH]; 2 F. POLLOCK & F. MAITLAND, THE HISTORY OF ENGLISH LAW 448 (1895) [hereinafter cited as POLLOCK & MAITLAND].

13. *Id.*

14. *Id.*

15. "But if an ox were wont to push with his horn in time past, and it hath been testified to his owner, and he hath not kept him in, but that he hath killed a man or a woman; the ox shall he stoned, and his owner shall be put to death. If there be laid on him a sum of money, then he shall give for the ransom of his life whatsoever is laid upon him." *Exodus* 21:29-31.

16. "If men strive, and hurt a woman with child . . . be shall surely be punished, according as the woman's husband will lay upon him; and he shall pay as the judges determine." *Exodus* 22:22. Homer also refers to the role of arbitrators in settling disputes. 1 POLLOCK & MAITLAND, *supra* note 12, at 25-26.

to public regulation. The Twelve Tables[17] provided that for battery an injured party could retaliate in kind, or if he wished, accept compensation.[18] For accidental injuries, the "wrongdoer" could offer a ram to prevent blood revenge.[19] The laws specified the amount of compensation to be offered for various injuries and required an injured party to accept an offer of compensation.[20]

The earliest evidence of Anglo-Saxon law reveals a highly developed system of private settlements.[21] The laws of the Kentish kings, from the seventh century,[22] and the Dooms of Ine, from the seventh and eighth centuries, regulated in great detail[23] the amount of private settlements in accordance with the degree of injury and social status of the injured party.[24] These early Anglo-Saxon laws provided that compensation be paid either to the injured party[25] or, if he were killed, to his family,[26] and made acceptance of a legal offer of compensation mandatory.[27] An offender and his family could always avoid the blood feud if they were able and willing to pay compensation.[28]

With the development of increased public regulation of private settlements, the idea gradually developed that a private wrong was a wrong to the public and to the state as well,[29] and the state began to require compensation for its own injury.[30] Thus, in Anglo-Saxon

17. After 449 B.C. the Twelve Tables established the rights and obligations of all Roman citizens. ANCIENT ROMAN STATUTES 8 (C. Pharr ed. 1961).

18. 2 POLLOCK & MAITLAND, *supra* note 12, at 447.

19. *The Twelve Tables* 8:24a, ANCIENT ROMAN STATUTES (C. Pharr ed. 1961).

20. *See* 2 HOLDSWORTH, *supra* note 12, at 44.

21. 2 HOLDSWORTH, *supra* note 12, at 45, 50; 1 POLLOCK & MAITLAND, *supra* note 12, at 25; 1 J. STEPHEN, HISTORY OF THE CRIMINAL LAW OF ENGLAND 54, 56, 58 (1883) [hereinafter cited as STEPHEN].

22. F. SEEBOHM, TRIBAL CUSTOM IN ANGLO-SAXON LAW 440 (1911).

23. The Laws of Alfred, for example, provide, "If a great toe shall be struck off let twenty shillings be paid him as *bot*. If it be the second toe, fifteen shillings. If it be the middlemost toe, nine shillings. If the fourth toe, six shillings. If the little toe be struck off let five shillings be paid him." 1 STEPHEN, *supra* note 21, at 56. The code dates from approximately 890 A.D. THE LEGAL CODE OF ALFRED THE GREAT 48-55 (M. Turk ed. 1893).

24. 2 HOLDSWORTH, *supra* note 12, at 45, 50; 1 POLLOCK & MAITLAND, *supra* note 12, at 25; 1 STEPHEN, *supra* note 21, at 54, 56, 58.

25. Known as "*bot*." 2 HOLDSWORTH, *supra* note 12, at 44. Pollock and Maitland state that "*bot*" means compensation. 1 POLLOCK & MAITLAND, *supra* note 12, at 26.

26. Known as "*wergeld*" or "*wer*." 2 HOLDSWORTH, *supra* note 12, at 44-45; 1 POLLOCK & MAITLAND, *supra* note 12, at 25.

27. 2 HOLDSWORTH, *supra* note 12, at 44.

28. *See* 2 POLLOCK & MAITLAND, *supra* note 12, at 449. The injured party could not begin the blood feud until he had made an attempt to collect compensation.

29. *See* 2 HOLDSWORTH, *supra* note 12, at 47, 50.

30. *Cf.* 2 POLLOCK & MAITLAND, *supra* note 12, at 452.

England, an assault within close range of the king or a feudal lord was a breach of the lord's peace and the offender had to compensate the lord for the injury.[31] In later times, as the feudal lords expanded their control over the settlement process, it became necessary to pay compensation not only to the lord of the slain man[32] but also to the lord controlling the land where the injury occurred.[33]

The Roman and Anglo-Saxon systems of private settlement, like modern fine or imprisonment, operated harshly upon the poor. The law did not distinguish between the individual who refused to pay compensation and the individual unable to pay compensation.[34] In Rome the wrongdoer who failed to compensate the injured party risked either a blood feud,[35] or slavery.[36] In some instances the state could declare him an outlaw, whom any person could kill with impunity.[37] An offender in Anglo-Saxon England, in addition to being subject to the dangers of the blood feud,[38] might be mutilated,[39] outlawed,[40] or sold into slavery.[41]

With the Norman Conquest the use of these traditional Anglo-Saxon procedures suddenly ceased. The fine, which developed out of

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31. The payment was known as "*wite.*" 2 HOLDWSORTH, *supra* note 12, at 47-48. The Dooms of Ine provided, "If any one fight in an *ealdorman's* house . . . let him make bot with 60 scillings and pay a second 60 scillings as wite." F. SEEBOHM, TRIBAL CUSTOM IN ANGLO-SAXON LAW 393-94 (1911).

32. The payment was called "*man bote.*" 2 HOLDSWORTH, *supra* note 12, at 45.

33. The payment was called "*fight-wite*" or "*wite.*" *See id.*

34. R. VON IHERING, SCHERTZ UND ERNST IN DER JURISPRUDENZ 412 (Leipzig 1899) [hereinafter cited as R. VON IHERING]. There were some exceptions to this generalization. Under the *Twelve Tables* an indigent person who could not make compensation was punished corporally for the negligent burning of a building or stack of grain, whereas, presumably, the man capable of making compensation but refusing to do so would be put to death. *The Twelve Tables* 8:10, ANCIENT ROMAN STATUTES (C. Pharr ed. 1961); *cf.* J. FOX, THE HISTORY OF CONTEMPT OF COURT 138 (1927).

35. 2 HOLDSWORTH, *supra* note 12, at 44-45; *The Twelve Tables* 8:2, ANCIENT ROMAN STATUTES (C. Pharr ed. 1961) (retaliation in kind).

36. R. VON IHERING, *supra* note 34, at 408-09; *The Twelve Tables*, 2:5, 2:9, ANCIENT ROMAN STATUTES (C. Pharr ed. 1961).

37. *The Twelve Tables* 3:5, ANCIENT ROMAN STATUTES (C. Pharr ed. 1961).

38. 2 POLLOCK & MAITLAND, *supra* note 12, at 448-49. Presumably because the feud was so rigorous, individuals were allowed to withdraw from the family unit responsible for avenging the wrong. 2 HOLDWSORTH, *supra* note 12, at 44. *Cf.* F. SEEBOHM, TRIBAL CUSTOM IN ANGLO-SAXON LAW 134 (1911).

39. 1 POLLOCK & MAITLAND, *supra* note 12, at 26.

40. 2 HOLDSWORTH, *supra* note 12, at 46; 1 POLLOCK & MAITLAND, *supra* note 12, at 19, 27; 2 POLLOCK & MAITLAND, *supra* note 12, at 458. *See generally*, G. IVES, A HISTORY OF PENAL METHODS, ch. IV (1914).

41. Since the kin of the wrong-doer were generally liable for his debt of compensation this could even mean slavery for the whole family. 1 POLLOCK & MAITLAND, *supra* note 12, at 33.

the private settlement and the principle of compensation to the king, took their place.[42]

B. The Fine

During the reign of William the Conqueror, persons guilty of certain criminal offenses would be "in the king's mercy"—*in misericordia regis*—and would therefore forfeit their personal liberty.[43] In theory this loss of liberty was permanent. However, just as private parties could always reach a settlement to prevent private violence, under the early common law an individual imprisoned in the king's mercy could always reach a private monetary settlement with the king to obtain release from prison.[44] From the Latin word for this final settlement, *finalis concordia*, the agreement to end imprisonment was called a "fine."[45]

Conceptually, the courts did not impose fines upon an offender. Instead the fine was a "voluntary" private settlement between the king and the offender.[46] The court did not "fine" the offender. Rather, the offender "made fine" with the king.[47] The king originally

42. 2 POLLOCK & MAITLAND, *supra* note 12, at 457-60.

43. J. FOX, THE HISTORY OF CONTEMPT OF COURT 119-23 (1927) [hereinafter cited as FOX]; C. HASKINS, NORMAN INSTITUTIONS 278-80 (1918); 2 POLLOCK & MAITLAND, *supra* note 12, at 510-11. The phrase "*in misericordia regis*" first appears in the Doomsday Book in 1086. FOX, *supra*, at 121.

44. FOX, *supra* note 43, at 119, 121-201. Quite early, however, statutes began to provide for an independent form of imprisonment with no opportunity to "make fine," and the courts later developed the power to impose this punishment without statutory authority. *Id.* at 137-40, 164-97.

45. 1 W. CRUISE, AN ESSAY ON THE NATURE AND OPERATION OF FINES AND RECOVERIES 5 (3d ed. 1794); R. GLANVILL, THE TREATISE ON THE LAWS AND CUSTOMS OF THE REALM OF ENGLAND viii, 3 (G. Hall ed. 1965); 2 HOLDSWORTH, *supra* note 12, at 266; 3 HOLDSWORTH, *supra* note 12, at 236; *see* FOX, *supra* note 43, at 142.

46. FOX, *supra* note 43, at 138, 150-56; 11 HOLDSWORTH, *supra* note 12, at 567.

47. *Id.* The fictitious law suit—also called a "fine"—by which it was possible to transfer land at common law is closely related to the making of fine with the king. It frequently happened that after an injured party initiated prosecution against a trespasser by filing an appeal of felony, the parties would terminate all prosecution by the king by reaching a final agreement or "final concord" based on payment of compensation to the injured party. This final concord was also called a fine. When it was decided in 1195 that these final concords would be recorded in triplicate with one copy kept permanently in the treasury the proceeding became one of the most important of the common law. To transfer land, for example, the original owner needed only sue the prospective owner and then make an agreement to settle the case. The triplicate record ("feet of fines") permanently established the new ownership. 1 W. CRUISE, AN ESSAY ON THE NATURE AND OPERATION OF FINES AND RECOVERIES 2, 6-7, 9, 23 (3d ed. 1794); R. GLANVILL, THE TREATISE ON THE LAWS AND CUSTOMS OF THE REALM OF ENGLAND viii, 1, 3, 5 (G. Hall ed. 1965); 2 HOLDSWORTH, *supra* note 12, at 184; 2 POLLOCK & MAITLAND, *supra* note 12, at 94-95, 100-02; D.M. STENTON, ENGLISH JUSTICE BETWEEN THE NORMAN CONQUEST AND THE GREAT CHARTER: 1066-1215 at 10, 52 (1964).

administered such sentences largely for revenue rather than for penological goals. "So intimate is the connexion of judicature with finance under the Norman Kings," wrote one commentator, "that we scarcely need the comment of historians to guide us to the conclusion that it was mainly for the sake of profits that justice was administered at all."[48] The desire for revenue was reflected in the harsh punishments imposed for any interference with fines or revenue[49] and in the use of fines during the reigns of Richard I, John, Henry II, and Edward I as punishments for numerous technical violations of court procedure.[50]

It appears that the revenue minded kings chose imprisonment as the means of forcing offenders to "make fine" primarily for two reasons. First, in an age in which force was often necessary to compel obedience to the courts,[51] imprisonment, which involved not only the loss of liberty, but also the risk of disease in prison,[52] was undoubtedly a sufficiently harsh sanction to effectively force an offender to "make fine." Second, imprisonment in the middle ages was the least expensive of punishments because prisons were self supporting. Jailkeepers earned their living by extorting money from inmates and their relatives and friends.[53]

At common law imprisonment for failure to "make fine" was not a punishment, but a means of compelling the "making of fine"

48. W. STUBBS, CONSTITUTIONAL HISTORY § 127 (1891), as quoted in FOX, *supra* note 43, at 137.

49. *See* FOX, *supra* note 43, at 137; BRITTON ii, 22, 5, cited in FOX, *supra* note 43, at 152; BRITTON ii, 12, 17 (F. Nichols ed. 1865), cited in FOX, *supra* note 43, at 148, 152.

50. "Fines were paid on every imaginable occasion . . . and for every description of official default, or irregularity or impropriety. In short, the practice of fining was so prevalent that if punishment is taken as the test of a criminal offence, and fines are regarded as a form of punishment, it is almost impossible to say where the criminal law in early times began or ended. It seems as if money had to be paid to the king for nearly every matter of public business, and it is impossible practically to draw the line between what was paid by way of fees and what was paid by way of penal fines." 2 STEPHEN, *supra* note 21, at 198.

51. *See* 1 POLLOCK & MAITLAND, *supra* note 12, at 27. The laws of Edgar and the laws of Canute both provided harsh sanctions for individuals who evaded the court's jurisdiction. A person who three times evaded the courts could be pursued as an outlaw, killed at will, and buried in unconsecrated ground. *Id.*

52. In 1577 at Oxford a rash of jail fever spread from the prison and within two days killed the chief baron, the sheriff, and three hundred other inhabitants of the town. 11 HOLDSWORTH, *supra* note 12, at 567; G. IVES, A HISTORY OF PENAL METHODS 17-18 (1914). Howard, the great prison reformer, stated that in the years 1773-74 more people died of jail fever than were executed. *Id.* at 18. It was not until the 19th century that the prison conditions were largely corrected. 11 HOLDSWORTH, *supra* note 12, at 567.

53. 11 HOLDSWORTH, *supra* note 12, at 567; 1 STEPHEN, *supra* note 21, at 484; G. IVES, A HISTORY OF PENAL METHODS 12 (1914).

with the king.[54] The imprisoned offender was encouraged and in fact had a right to terminate his imprisonment at any time by paying the king.[55] Gradually, however, the fine lost the character of a settlement to prevent imprisonment and became more like a punishment. This change was reflected in the verbal change from the form "make fine" to the form "be fined." An act of 1383 appears to be the first statute to use the phraseology "pay a fine."[56] The act provided that an "officer of the forest" could only imprison an individual after obtaining an indictment, and provided that any person who violated the ordinance should "pay double damages to the parties, and fine and ransom to the king."[57] The first statutory use of "fine" as a verb occurred in 1601.[58] The statute authorized the Justices of the Peace in quarter sessions or Justices of Assize "to fine" any treasurer who omitted his statutory duties.[59]

The linguistic change occurred in the law commentaries at approximately the same time. The *Abridgement*[60] of Chief Justice Brooke,[61] published in 1568, still used the form "make fine."[62] The reports of Dyer, published shortly thereafter, in 1585, appear to first use the form "were fined" in reference to a common law case.[63] The writings of Sir Edward Coke reveal that by the beginning of the 17th century, the linguistic transformation was virtually complete.[64] Thus, for example, in *Beecher's Case* (1609)[65] Coke wrote that, "if judgment be given against the defendant he shall be fined and be imprisoned, for to every fine imprisonment is incident."[66] In the *Institutes* Coke went

54. FOX, *supra* note 43, at 137; 1 POLLOCK & MAITLAND, *supra* note 12, at 27; E. SUTHERLAND & D. CRESSY, PRINCIPLES OF CRIMINOLOGY 340 (6th ed. 1960).

55. FOX, *supra* note 43, at 138.

56. FOX, *supra* note 43, at 151.

57. "*[P]aie as parties endamagez lours doubles damages et fyn et raunceon au roy.*" *Id.*

58. 43 Eliz. c. 2, § 16 (1601); FOX, *supra* note 43, at 150.

59. *Id.*

60. The work is an abridgement of the Year Books of Henry VII and Henry VIII. 2 HOLDSWORTH, *supra* note 12, at 545; FOX, *supra* note 43, at 166 n.2. However, the author has added many entries and has sometimes gone beyond the authorities cited. *Id.*

61. Brooke died ten years before publication. FOX, *supra* note 43, at 166.

62. "It seems that in all cases where the defendant shall be imprisoned he shall make fine to the king." BROOKE, ABRIDGEMENT, "Imprisonment," para., cited in FOX, *supra* note 43, at 166.

63. The reporter stated that certain jurors had been drinking before delivery of their verdict, "and for this they were fined." FOX, *supra* note 43, at 178. Fox quotes the statute as follows: "*et pur ceo il fueront* [sic] *fyne.*" This appears to be a typographical error. *Cf.* FOX, *supra* note 43, at 153.

64. *See* FOX, *supra* note 43, at 181.

65. 8 Coke 58a (1609).

66. FOX, *supra* note 43, at 178. The original edition of Coke's Reports, which appeared in law-french, used the form "*serra fine.*" FOX, *supra* note 43, at 178 & n.6.

so far, in his adoption of the new phraseology, as to use the form "to fine" where the traditional authorities he discusses had used "make fine."[67]

Although fine or imprisonment had already assumed its fundamental form by the beginning of the 16th and 17th centuries, it subsequently underwent several significant changes. First, beginning in the middle of the 16th century, statutes increased the number of misdemeanors.[68] Since most of these crimes were punishable by fines,[69] the use of the punishment also increased. Today fines are the most frequent criminal sanction.[70] Second, the period of alternative confinement became definite. During the 14th century the towns of Lubeck and Hamburg provided for limited confinement for nonpayment of fines.[71] Early laws from the Netherlands were among the first to provide that one day's imprisonment would cancel a portion of the fine.[72] The change is quite important because it makes the imprisonment more like a substitute punishment than a means of collecting the fine. Third, beginning at the end of the 18th century, the statutory provisions for fines began to employ monetary minimum and maximum punishments.[73] The Prussian code of 1794 was among the first of modern statutes to provide such limits.[74]

Except for these changes the fine today is administered almost exactly as it was in the 12th and 13th centuries. Today, as then, the individual who is able to pay the fine may escape imprisonment. Today, as then, the individual who is unable to pay the fine must go to prison. Imprisonment for nonpayment of fines originated during a time when the state's need for revenue was very great and when imprisonment was an inexpensive penal sanction. Today, when it is generally believed that the desire for revenue should not be an influencial factor in the administration of criminal justice,[75] and when imprisonment is the most expensive of punishments,[76] a careful

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67. *Id.* at 181.

68. 11 HOLDSWORTH, *supra* note 12, at 513.

69. S. RUBIN, H. WEIHOFEN, GA. EDWARDS, S. ROSENZWEIG, THE LAW OF CRIMINAL CORRECTION 226 (1963) [hereinafter cited as RUBIN]. Chapter Seven of this book, on fines, is entirely by S. Rosenzweig.

70. RUBIN, *supra* note 69, at 240.

71. Seagle, *Fines*, ENCYCLOPEDIA OF THE SOCIAL SCIENCES 250 (E. Seligman ed. 1931).

72. *Id.*

73. *Id.*

74. *Id.*

75. *See, e.g.*, ABA SENTENCING ALTERNATIVES AND PROCEDURES 118 (Approved Draft 1968).

76. See authority cited in note 90 *infra*.

reexamination of the penology and legality of fines is badly needed. On the basis of that reexamination it may be possible to find ways to limit or totally abolish imprisonment for nonpayment of fines.

II

PENOLOGY

A. Frequency

The American Bar Association,[77] the American Law Institute,[78] and numerous authors,[79] have drawn attention to the large number of criminal offenders in the United States imprisoned for nonpayment of fines. Although it is difficult to determine the exact number of offenders involved[80] it is clear that it is substantial.

In 1910 the United States Bureau of the Census reported that 58 percent of all inmates of United States prisons were committed for nonpayment of fines.[81] The percentage of such prisoners in 1923 was 47.5.[82] More recent figures from large city jails appear to show that the figure has remained extremely high since these early studies.[83] Charles H. Miller[84] stated in 1956 that "Recent figures indicate that 67.5 percent of all offenders in jail for short terms were confined for failure to pay a fine."[85] The trend apparently continues today.[86]

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77. ABA SENTENCING ALTERNATIVES AND PROCEDURES 119 (Approved Draft 1968).

78. MODEL PENAL CODE, § 7.02, Comment (Tent. Draft No. 2, 1954).

79. *See, e.g.*, Goldberg, *Equality and Governmental Action*, 39 N.Y.U.L. REV. 205, 221 (1964); 3 NAT'L COMM'N ON LAW OBSERVANCE AND ENFORCEMENT, REPORT ON PENAL INSTITUTIONS, PROBATION AND PAROLE 140-41 (1931); RUBIN, *supra* note 69, at 249-55. See authorities cited in note 95 *infra*.

80. Although fines are the most frequently imposed criminal sanction today, RUBIN, *supra* note 69, at 239-40, there are no complete state or local statistics which show the number of crimes punished by fines or the number of individuals imprisoned for inability to pay. *See id.* at 239-44; Note, *Fines and Fining—An Evaluation*, 101 U. PA. L. REV. 1013, 1014 (1953). To document the incidence of imprisonment for nonpayment of fines it is unfortunately necessary to rely on a number of individual studies of very limited scope and studies which are now very old.

81. RUBIN, *supra* note 69, at 252.

82. *Id.*

83. A study by the National Commission on Law Observance and Enforcement in 1931 determined that 77.7% of the inmates of the Chicago House of Correction were confined for nonpayment of fines. RUBIN, *supra* note 69, at 253. (46.1% of the total confinements involved sentences of fine only; 24.1% involved sentences of fine only where the offender failed to pay an installment; 7.5% involved fines imposed in addition to a prison or jail sentence. *Id.*) In 1940 such prisoners constituted 60% of the Baltimore City Jail population. E. SUTHERLAND, PRINCIPLES OF CRIMINOLOGY 572 (4th ed. 1947). From 1949 to 1950 they constituted 59.9% of the prisoners in the Philadelphia Reed Street Prison. RUBIN, *supra* note 69, at 253.

84. In 1956, Director of Legal Aid Clinic, College of Law, University of Tennessee.

85. Miller, *The Fine—Price Tag or Rehabilitative Force?*, 2 NAT'L PROBATION AND PAROLE ASS'N [now CRIME AND DELINQUENCY] 377, 381 (1956). Miller cites no sources.

86. During the years 1960-64 the courts of New York city imprisoned an average of

It is safe to assume that the vast majority of those who fail to pay fines do so solely because of their poverty.[87] Thus, although available statistics are incomplete, they suggest that in the United States today possibly as many as 40 to 60 percent of all individuals confined in county jails are imprisoned for inability to pay their fines.

Clearly, imprisonment for nonpayment of fines has a substantial impact on the administration of the criminal law. It is therefore critical to examine closely the penological justification of this practice.

B. Expense

Whatever may be said of imprisonment for nonpayment of fines as an effective deterrent, it is clear that it is extremely expensive. A state which imprisons a criminal offender for a 20 dollar fine at the rate of one day in prison for each dollar of fine[88] not only loses the 20 dollars that probably could have been collected by other means[89] but incurs the added expense of imprisoning the offender for 20 days. Imprisonment is the most expensive of modern punishments.[90] It has been estimated that the city of Chicago between 1907 and 1921, when

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approximately 25,000 persons each year for inability to pay fines. *See* NEW YORK CITY MAGISTRATES' COURTS, ANNUAL REPORT 24-25 Table 7 (1960); NEW YORK CITY MAGISTRATES' COURTS, ANNUAL REPORT 24-25, Table 7 (1961); NEW YORK CITY MAGISTRATES' COURTS, ANNUAL REPORT 22-23, Table 7 (Jan. 1- Aug. 31, 1962); NEW YORK CITY CRIMINAL COURTS, ANNUAL REPORT 24-25, Table 7 (Sept. 1-Dec. 31, 1962); NEW YORK CITY CRIMINAL COURTS, ANNUAL REPORT 30-31, Table 9 (1963); NEW YORK CITY CRIMINAL COURTS, ANNUAL REPORT 30-31, Table 10 (1964). Effective Sept. 1, 1962, New York City renamed the "Magistrates' Courts" and the "Courts of Special Sessions," "Criminal Courts," and combined their statistics. The statistics include traffic violations. New York City also reported the number of individuals who received sentences of both imprisonment and fine and who were further imprisoned for failure to pay the fine portion of their sentence. The statistics show that only a small number paid their fines and that the courts committed approximately an equal number under the jail portion of the sentence as under the fine portion. For example, in 1961, 4,430 defendants were imprisoned on the jail portion of their sentence and 3,687 were imprisoned for failure to pay the fine portion of their sentence. *See* NEW YORK CITY MAGISTRATES' COURTS, ANNUAL REPORT 26, Table 8 (1961). It is impossible to determine from these statistics what percentage of the prison population in New York were in prison for failure to pay fines.

87. *See, e.g.*, Kelly v. Schoonfield, 285 F. Supp. 732, 736 (D. Md. 1968); S. BRECKINRIDGE, SOCIAL WORK AND THE COURTS 410 (1934); Stern, *Treatment of Petty Offenders In Chicago*, 25 J. OF THE AMER. INST. OF CRIMINAL LAW AND CRIMINOLOGY [now J. CRIM. L.C. & P. S.] 935, 946 (1934).

88. This is a common rate of discharge. Authorities cited in note 3 *supra*.

89. See text accompanying notes 222-68 *infra*.

90. "[I]mprisonment is infinitely the most expensive form of punishment ever devised. Millbank, the first of the English penitentiaries . . . completed in 1821, took nine years to erect for an outlay of near three-quarters of a million pounds. . . . Moreover, though rigid economy bas usually characterized the administration of prison systems, their running cost has steadily mounted over the years. In England and Wales the total expenditure on the Prison

prison costs were relatively low,[91] lost five million dollars in uncollected fines and incurred an additional expense in prison maintenance of five million dollars—a total cost of ten million dollars.[92] In addition, a state which imprisons an indigent offender may incur a substantial cost in maintaining the offender's family on welfare.[93] If, as this Comment maintains,[94] there are ways of fining the poor, then all of these expenses are unnecessary.

C. *Value*

Virtually every writer who has analyzed the penology of fines has condemned the imprisonment of the poor for nonpayment.[95] To be sure, some authors have argued that if imprisonment is not employed the poor will commit crimes without fear of any sanction.[96] However,

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Service, which was £ 1,165,188 in 1921, had risen by 1962 to over £ 20,000,000 . . . ." G. PLAYFAIR & D. SINGTON, CRIME, PUNISHMENT AND CURE 31-32 (1965). In 1960 the cost of maintaining a prisoner in jail in New York City for one day was between $3.60 and $7.93. RUBIN, *supra* note 69, at 253 n.154. The average cost in the United States of imprisoning an adult felon for one year is $2000. PRESIDENT'S COMM'N ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: THE COURTS 15 (1967).

91. The approximate cost of imprisoning an offender for one day was 40 cents. E. SUTHERLAND, PRINCIPLES OF CRIMINOLOGY 572 (4th ed. 1947).

92. *Id.*

93. ASSEMBLY COMMITTEE ON CRIMINAL PROCEDURE, PROGRESS REPORT: DETERRENT EFFECTS OF CRIMINAL SANCTIONS 39 (Calif. 1968); PRESIDENT'S COMM'N ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: THE COURTS 15 (1967); Binford, *Installment Collection of Fines by a County Court*, 67 AMER. PRISON ASS'N 361, 366; *see* ABA SENTENCING ALTERNATIVES AND PROCEDURES 120 (Approved Draft 1968). In California an average of 16,621,200 dollars is spent each year to support such families. CAL. ASSEMBLY COMMITTEE ON CRIMINAL PROCEDURE, PROGRESS REPORT: DETERRENT EFFECT OF CRIMINAL SANCTIONS 39 (1968).

94. See text accompanying notes 222-68 *infra*.

95. *See* ABA SENTENCING ALTERNATIVES AND PROCEDURES 119-20 (Approved Draft 1968); MODEL PENAL CODE, § 7.02, Comment (Tent. Draft No. 2, 1954); S. BRECKINRIDGE, SOCIAL WORK AND THE COURTS 405-10 (1934); M. COHEN, REASON AND LAW 68 (Collier ed. 1961); M. HASSAN, L'AMEND PENALE DANS LES DROITS MODERNES ET SPECIALEMENT DANS LE CODE PENAL SUISSE (Geneva 1958); RUDOLF V. IHERING, *supra* note 34, at 424-25; G. PLAYFAIR & D. SINGTON, CRIME, PUNISHMENT AND CURE 24-25, 27-28, 42, 105-06 (1965); PRESIDENT'S COMM'N ON LAW OBSERVANCE AND THE ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: THE COURTS 18 (1967); RUBIN, *supra* note 69, 249-55; E. SUTHERLAND, PRINCIPLES OF CRIMINOLOGY 575 (4th ed. 1947); Binford, *Installment Collection of Fines by a County Court*, 67 AMER. PRISON ASS'N 361 (1937); Goldberg, *Equality and Governmental Action*, 39 N.Y.U.L. REV. 205, 221 (1964); Greenwalt, *Survey of Constitutional Law*, 18 SYRACUSE L. REV. 180, 194-98 (1966); Miller, *The Fine—Price Tag or Rehabilitative Force?*, 2 NAT'L PROBATION AND PAROLE ASS'N J. [now CRIME & DELINQUENCY] 372 (1956); PILOT INSTITUTE ON SENTENCING, 26 F.R.D. 231, 380 (1959); Stern, *Treatment of Petty Offenders In Chicago*, 25 J. OF THE AMER. INST. OF CRIMINAL LAW AND CRIMINOLOGY [now J. CRIM. L.C. & P.S.] 935 (1934); Note, 81 HARV. L. REV. 435, 447-48 (1967); Note, 4 HOUSTON L. REV. 695, 701 (1967); Comment, 1966 ILL. L. FORUM 460; *Fines and Fining*, 101 U. PA. L. REV. 1013, 1021-24 (1953).

96. F. Mead, Esq., an English Police Chief Magistrate, stated in 1934 that if the courts

most other authors, in addition to pointing out that there are other viable alternatives to imprisonment, have argued that it is an expensive sanction and one which has only a limited deterrent effect.[97]

Much of the confusion in the debate over the penology of imprisonment for nonpayment of fines is due to the failure to identify the theoretical purposes of the imprisonment. Since the justifications for such imprisonment depend upon whether it is charactertized as a means of collecting fines or as an alternative punishment to the fine, intelligent discussion requires that one indicate at each stage of analysis what characterization is being assumed.

We have seen that at common law the imprisonment was of indefinite duration and was considered a means of collection.[98] Although the term of imprisonment is now proportional to the amount of the fine, so that the confinement is more like an alternative punishment, American jurisdictions continue to characterize it as a means of collection.[99] In those states where the jail term does not discharge liability for the fine[100] this characterization may be accurate. However, in the many states where a portion of the fine is discharged by each day's imprisonment,[101] the confinement clearly appears to be an alternative punishment.[102]

In light of the conflicting state attitudes toward the purpose of the imprisonment and the strong state precedents holding that the imprisonment is only a means of collection, this Comment refrains from adopting one characterization to the exclusion of the other.

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did not imprison those who were unable to pay fines, "it would mean that the impecunious would be able to commit all offenses with impunity, where the punishment was only pecuniary in the first instance." Mead, *Imprisonment on Non-Payment of Fines*, 98 JUSTICE OF THE PEACE AND LOCAL GOVT. REV. 616, 617 (1934). *Cf.* Kelly v. Schoonfield, 285 F. Supp. 732, 737 (D. Md. 1968); United States *ex rel.* Privitera v. Kross, 239 F. Supp. 118 (S.D.N.Y.), *aff'd mem.*, 345 F.2d 533 (2d Cir.), *cert. denied*, 382 U.S. 911 (1965).

97. *See, e.g.*, RUBIN, *supra* note 69, at 249-55; E. SUTHERLAND, PRINCIPLES OF CRIMINOLOGY 575 (4th ed. 1947).

98. *See* text accompanying notes 43-55 *supra*.

99. *E.g.*, Kelly v. Schoonfield, 285 F. Supp. 732, 736 (D. Md. 1968); *Ex parte* Brady, 70 Ark. 376, 380, 68 S.W. 34, 35 (1902); *Ex parte* Garrison, 193 Cal. 37, 38, 223 P. 64 (1924); State v. Sorenson, 65 Mont. 65, 72, 210 P. 752, 755 (1922); *Ex parte* Converse, 45 Nev. 93, 98, 198 P. 229, 230 (1921); McKinney v. Hamilton, 282 N.Y. 393, 396, 26 N.E.2d 949, 950 (1940). *But see* Shoop v. State, 209 Ark. 642, 645, 192 S.W.2d 122, 123 (1946) (holding that a crime which is otherwise a misdemeanor becomes a felony if the total confinement resulting from the jail and fine portion of the sentences is such as to require confinement in a penitentiary).

100. *See* statutes cited in note 6 *supra*.

101. *See, e.g.*, ALAS. STAT. § 12.55.010 (1962); MASS. ANN. LAWS ch. 127, § 144 (1965).

102. At least one court which has considered the validity of imprisonment for nonpayment of fines has tacitly assumed this to be true. *See* United States *ex rel.* Privitera v. Kross, 239 F. Supp. 118, 120 (S.D.N.Y. 1965), *aff'd mem.*, 345 F.2d 533 (2d Cir. 1965), *cert. denied* 382 U.S.

Rather it attempts to show that whichever view is taken, imprisonment of the poor for nonpayment of fines is an unjustifiable penological practice.

Criminal sanctions are imposed to achieve rehabilitation, security, revenge, general and special deterrence, and sometimes, in the case of fines, for restitution.[103] Since rehabilitation and security contemplate the offender's long term confinement in a correctional institution fines alone cannot be expected to rehabilitate criminals or secure society against dangerous offenders.[104] Whatever the significance of revenge in the punishment of crimes of violence it appears to have little importance in the punishment of lesser crimes—traffic offenses and misdemeanors—for which fines are typically imposed.[105] Fines alone are therefore justifiable primarily as a means of deterrence and of making restitution.

1. Imprisonment For Collection

Viewed solely as a means of collection, imprisonment of the poor is subject to several obvious criticisms. It is of course futile as applied to individuals completely unable to pay.[106] It is also undesirable for

911 (1965). It was also the assumption of Judge Edgerton in a 1960 federal case. *See* Wildeblood v. United States, 284 F.2d 592, 593 (D.C. Cir. 1960) (dissenting opinion).

There are powerful reasons why courts have continued to hold that imprisonment for nonpayment of fines is not an alternative punishment. If the imprisonment is construed as a punishment, then the defendant may be entitled to an appeal of right. *See* Wildeblood v. United States, 284 F.2d 592, 593 (D.C. Cir. 1960) (dissenting opinion), in which it was argued that a sentence of 25 dollars or 10 days in jail was a penalty greater than 50 dollars. If the imprisonment is an alternative punishment then the offense may become a felony rather than a misdemeanor, Shoop v. State, 209 Ark. 642, 645, 192 S.W.2d 122, 123 (1946), which may in turn determine whether the trial court had jurisdiction to try the case, *see* McKinney v. Hamilton, 282 N.Y. 393, 396, 26 N.E.2d 949, 950 (1940). Theoretically, in a state which allows imprisonment at the rate of one day in jail for each dollar of fine unpaid, and which defines a misdemeanor as a crime punishable by no more than $500 and/or one year in jail, such a holding would eliminate all misdemeanors, since all such crimes would be potentially punishable by up to 865 days in jail. Rather than advocate a holding which the state would so strongly resist, this Comment attempts to show that imprisonment for nonpayment of fines is unwise and unconstitutional even if the imprisonment is only a means of collecting fines.

103. RUBIN, *supra* note 69, at 654-72. *See* PRESIDENT'S COMM'N ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: THE COURTS 15 (1967).

104. Morrison, *The Treatment of the Juvenile Delinquent*, in PENAL REFORM IN ENGLAND 107 (L. Radzinowicz & J. Turner eds. 1940); *cf.* G. PLAYFAIR & D. SINGTON, CRIME, PUNISHMENT AND CURE 100 (1965).

105. *See* Ehrenzweig, *A Psychoanalysis of the Insanity Plea—Clues to the Problem of Criminal Responsibility and Insanity In The Death Cell*, 1 CRIM. LAW BULL., Nov. 1965, at 3, 16-18 (1965). Even if this proposition is incorrect, it is proper to exclude revenge as a rational objective of the criminal law. *E.g.*, Williams v. New York, 337 U.S. 241, 248 (1949).

106. *See* Sawyer v. District of Columbia, 238 A.2d 314, 318 (D.C. Ct. App. 1968); People v. Saffore, 18 N.Y.2d 101, 103, 104, 218 N.E.2d 686, 687, 271 N.Y.S.2d 972, 974 (1966); People v. Collins, 47 Misc. 2d 210, 213, 261 N.Y.S.2d 970, 973 (1965).

individuals who are barely able to pay. The harshness of the sanction for nonpayment in all probability causes the offender to shift the burden of the fine to his friends or his family who had no part in the crime.[107] This shift of punishment may have some deterrent effect because the affected friends may pressure the offender to avoid further crime. However, it offends our sense of fairness to punish the innocent as a means of deterring the guilty.[108]

Perhaps the most cogent criticism of imprisonment as a means of collecting fines from nonwilful defaulters, however, is that there are more appropriate, efficacious, and inexpensive methods of obtaining payment. As will be argued in detail in the final part of this Comment, the judicious use of delayed and installment payments of fines allows even the very poor to pay fines with a miminum shifting of the burden to innocent persons and with no loss in deterrent effect.[109]

It is very likely that many judges impose sentences of fine or imprisonment simply out of habit.[110] However, if the imprisonment is a means of collection, then this habit is unjustifiable. If a fine is the appropriate punishment for the offender, then the court should take steps to see that the punishment is actually enforced. It should neither allow wealthy offenders to choose an alternative and less appropriate punishment nor deny poor offenders a chance of paying, by sending them to jail.[111] Rather, it should punish the wealthy offenders if they wilfully refuse to obey the order to pay, and it should employ flexible collection techniques for the poor to make payment possible.

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107. G. PLAYFAIR & D. SINGTON CRIME, PUNISHMENT AND CURE 21 (1965); *see* ABA SENTENCING ALTERNATIVES AND PROCEDURES 120-21 (Approved Draft 1968); Seagle, *Fines*, ENCYCLOPEDIA OF THE SOCIAL SCIENCES 249 (E. Seligman ed. 1931); *cf.* E. SUTHERLAND, PRINCIPLES OF CRIMINOLOGY 574-75 (4th ed. 1947).

108. It is an inadequate response to this argument to maintain that in many cases the family does have some responsibility for the offender's crime. Although the imprisonment tends to compel the poor but not the wealthy to shift the burden, there is no argument that the family and friends of poor defendants are more responsible for the defendant's crime than the family and friends of affluent defendants.

109. See text accompanying notes 248-62 *infra*.

110. 98 JUSTICE OF THE PEACE AND LOCAL GOV'T REV. 520 (1934). Some judges have had standing orders to their clerks to incorporate in every judgment an alternative term of imprisonment for nonpayment of a fine, even in cases in which the judge at the time of sentencing imposed a fine alone. Hill v. United States *ex rel.* Wampler, 298 U.S. 460, 461-62 (1936). Moreover, some of the sentences to imprisonment have been so unreasonably long as to compel the conclusion that they were imposed mechanically. In State v. Ross, 55 Ore. 450, 106 P. 1022, *appeal dismissed* 227 U.S. 150 (1910), an embezzler was fined 576,853.74 dollars or, in default thereof, imprisoned at the rate of one day in jail for each dollar of fine—a total imprisonment of nearly 800 years for nonpayment of the fine.

111. *See* ABA SENTENCING ALTERNATIVES AND PROCEDURES 122 (Approved Draft 1968).

There is also a substantial possibility that many judges who impose sentences of fine or imprisonment do not conclude that a fine is the appropriate punishment at all, but rather wish to impose a sentence of imprisonment indirectly. It is probable, for example, that when the court in Washington, D.C. sentenced Clarence Sawyer to a fine of 150 dollars or 60 days in jail for jaywalking it really intended to imprison him for 60 days. Sawyer had a long record of convictions for public drunkenness and claimed he was a chronic alcoholic;[112] the court evidently believed that sixty days in jail would be a good "cure." Such a sentence, however, is unjustifiable. If the court does not have the statutory authority to sentence the offender to imprisonment directly, then it should not subvert the legislative intent by imposing an unauthorized punishment indirectly. If the court does have the statutory authority to sentence the offender to prison, then it should do so explicitly, both to make sure that the sentencing judge realizes he is imposing a prison sentence,[113] and to avoid the impression that it is administering a harsher punishment to the poor than to the affluent.[114]

2. As Alternative Punishment

Since the 18th century, commentators have criticized short term imprisonment as a penal sanction.[115] Such imprisonment is particularly undesirable as applied to the typical offender unable to pay a fine—one who has committed a slight offense[116] and who is poor. In today's jails there is frequently no separation of first offenders from confirmed criminals.[117] At the same time that

112. Sawyer v. District of Columbia, 238 A.2d 314, 315 (D.C. Ct. App. 1968).

113. 98 JUSTICE OF THE PEACE AND LOCAL GOVT. REV. 519, 520 (1934). *See* ABA SENTENCING ALTERNATIVES AND PROCEDURES 123 (Approved Draft 1968).

114. *See* REPORT OF THE NAT'L ADVISORY COMM'N ON CIVIL DISORDERS 337 (Bantam 1968), quoted in text accompanying note 125 *infra*.

115. ABA SENTENCING ALTERNATIVES AND PROCEDURES 120 (Approved Draft 1968); M. HASSAN, L'AMENDE PENALE DANS LES DROITS MODERNES ET SPECIALEMENT DANS LE CODE PENAL SUISSE 27-30 (Geneva 1958); "We may affirm without fear of error that all commentators without exception condemn this punishment [short term imprisonment] because of its deplorable conditions, and underline its inutility in a society which not only searches for absolute justice in the prevention of crimes, but which also seeks other ends such as general deterrence, special deterrence, reformation and rehabilitation." *Id.* 27-28 (trans. by author); PRESIDENT'S COMM'N ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: THE COURTS 15 (1967); Seagle, *Fines*, ENCYCLOPEDIA OF THE SOCIAL SCIENCES 251 (E. Seligman ed. 1931); *see* G. PLAYFAIR & D. SINGTON, CRIME, PUNISHMENT AND CURE 20-21 (1965). *See generally* G. PLAYFAIR & D. SINGTON, CRIME, PUNISHMENT AND CURE (1965).

116. *See* E. SUTHERLAND, PRINCIPLES OF CRIMINOLOGY 572 (4th ed. 1947).

117. ABA SENTENCING ALTERNATIVES AND PROCEDURES 120 (Approved Draft 1968); *see* G. PLAYFAIR & D. SINGTON, CRIME, PUNISHMENT AND CURE 200-05 (1965).

imprisonment exposes the indigent to the undesirable influence of more hardened criminals,[118] it subjects him to severe economic hardship. Already impoverished, the offender will lose his salary or wages for the entire period of confinement.[119] Even if the confinement is only for a few days, he may lose his job,[120] and he probably will have increased difficulty in regaining employment due to his prison record.[121] In all likelihood, therefore, the close association with other criminals and the economic hardship imposed by the imprisonment will substantially diminish any deterrent effect of short term confinement upon the individual offender.[122]

Although it is difficult to speak with confidence about the general deterrent effect on the public of any particular penal sanction,[123] two conclusions are clear. First, the state incurs the great expense of imprisonment precisely in those situations in which a fine alone has been found most appropriate to achieve the desired general deterrence.[124]

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118. ABA SENTENCING ALTERNATIVES AND PROCEDURES 120 (Approved Draft 1968); M. HASSAN, L'AMENDE PENALE DANS LES DROITS MODERNES ET SPECIALEMENT DANS LE CODE PENAL SUISSE 28 (Geneva 1958); "All [commentators] criticize short term imprisonment because it corrupts rather than reforms; in effect, first offenders, who have not yet undergone imprisonment and who are not yet confirmed criminals, as soon as they are imprisoned and find themselves in contact with confirmed recidivists . . . who teach them from the moment of their arrival all the methods of committing crime; in prison they form dangerous friendships and make friends who will follow them after release from prison." *Id.* (trans. by author); *see* G. PLAYFAIR & D. SINGTON, CRIME, PUNISHMENT AND CURE 21, 105 (1965) (citing the United Nations Congress of 1960).

119. "A fine of $500 for a common misdemeanor, levied on a man who has no money at all . . . deprives the defendant of all ability to earn a livelihood for 500 days . . . ." People v. Saffore, 18 N.Y.2d 101, 104, 218 N.E.2d 686, 688 (1966); *see* ABA SENTENCING ALTERNATIVES AND PROCEDURES 120 (Approved Draft 1968); Seagle, *Fines*, ENCYCLOPEDIA OF THE SOCIAL SCIENCES 251 (E. Seligman ed. 1931).

120. *See* Ford, *Imprisonment For Debt*, 25 MICH. L. REV. 24, 45-46 (1927); Seagle, *Fines*, ENCYCLOPEDIA OF THE SOCIAL SCIENCES 251 (E. Seligman ed. 1931).

121. G. PLAYFAIR & D. SINGTON, CRIME, PUNISHMENT AND CURE 36-37 (1965).

122. ABA SENTENCING ALTERNATIVES AND PROCEDURES 120 (Approved Draft 1968). "[T]here can be little constructive effect of such a short term commitment . . . ." *Id.* "[T]he Advisory Committee can think of no sound correctional objective which is served by such a sentence [fine or imprisonment]." *Id.* at 127; Seagle, *Fines*, ENCYCLOPEDIA OF THE SOCIAL SCIENCES 251 (E. Seligman ed. 1931): "[S]hort term imprisonment . . . often results in converting casual offenders into confirmed criminals;" *see* G. PLAYFAIR & D. SINGTON, CRIME, PUNISHMENT AND CURE 24-25, 27-28, 42, 105-06 (1965); E. SUTHERLAND, PRINCIPLES OF CRIMINOLOGY 573 (4th ed. 1947); *cf.* Goldberg, *Equality and Governmental Action*, 39 N.Y.U.L. REV. 205, 219 (1964); Miller, *The Fine—Price Tag or Rehabilitative Force?*, 2 NAT'L PROBATION AND PAROLE ASS'N J. [CRIME & DELINQUENCY] 377, 383 (1956).

123. *See* CAL. ASSEMBLY COMMITTEE ON CRIMINAL PROCEDURE, PROGRESS REPORT: DETERRENT EFFECTS OF CRIMINAL SANCTIONS 25 (1968); G. PLAYFAIR & D. SINGTON, CRIME, PUNISHMENT AND CURE 27-28 (1965).

124. This is true provided that the court does not impose the sentence out of habit or as an indirect means of imposing imprisonment, both of which are improper sentencing procedures. See text accompanying notes 110-14 *supra*. ABA SENTENCING ALTERNATIVES AND PROCEDURES

Second, the unequal treatment accorded to indigent offenders may lead to disrespect of or even antagonism to the law on the part of the general public, which in turn leads to an increase rather than a reduction in the level of crime. The President's Commission on Riots and Civil Disorders concluded that the belief is "pervasive" in ghetto areas that the courts in imposing fines discriminate against the poor, that the judicial system has become an object of distrust, and that this distrust has increased the level of crime:

> Some of our courts . . . have lost the confidence of the poor . . . . The belief is pervasive among ghetto residents that lower courts . . . dispense "assembly line" justice; that from arrest to sentencing, the poor and uneducated are denied equal justice with the affluent, that procedures such as . . . fines have been perverted to perpetuate class inequities . . . . [T]he apparatus of justice in some areas has itself becomes a focus for distrust and hostility. Too often the courts have operated to aggravate rather than relieve the tensions that ignite and fire civil disorders.[125]

Imprisonment of the poor for nonpayment of fines is an unjustifiable penal practice. Either as a means of collection or as an alternative punishment, the imprisonment is expensive, inefficient, and unfair. Before considering preferable ways of administering fines, however, this Comment presents an analysis of the numerous legal objections to the present procedures.

III

LEGAL CHALLENGES

The case law on the legality of imprisonment of the poor for nonpayment of fines is in a state of confusion. Both the courts which have upheld such imprisonment[126] and the courts which have declared

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120-21 (Approved Draft 1968); RUBIN, *supra* note 69, at 254; E. SUTHERLAND & D. CRESSEY, PRINCIPLES OF CRIMINOLOGY 276 (6th ed. 1960); Note, *Fines and Fining—An Evaluation*, 101 U. PA. L. REV. 1013, 1021-22 (1953).

125. REPORT OF THE NAT'L ADVISORY COMM'N ON CIVIL DISORDERS 337 (Bantam 1968). This conclusion is substantiated by W. Francis Binford, judge of the Trial Justice Court of Prince George County, Virginia during the 1930's. "The defendant feels that due to his incarceration he has been discriminated against, that society has stamped him as a jailbird. This is a demoralizing influence and, to a certain order of our people, the fact that he has once been in prison embitters him. He has a general moral let-down and once a man goes to jail the stigma of returning is not so great because among his fellowmen he has not been able to live down his first sentence of imprisonment." Binford, *Installment Collection of Fines by a County Court*, 67 AMER. PRISON ASS'N 361, 366 (1937).

126. Kelly v. Schoonfield, 285 F. Supp. 732 (D. Md. 1968); United States *ex rel.* Privitera

it illegal[127] have failed to place their arguments upon a sound and consistent foundation. As in the penological debate, the confusion of conflicting views is due to a failure to identify for analytical purposes the objective of the imprisonment. The principal legal challenges to such imprisonment are, first, that it is unconstitutional and, second, that state statutes authorizing imprisonment for nonpayment of fines were not intended to apply to indigents unable to make payment.

A. Constitutional Validity

1. Equal Protection and Due Process

a. Imprisonment For Collection

Both due process[128] and equal protection[129] prohibit the arbitrary selection of a class of individuals for the imposition of special burdens. They require that governmental action and classification be at least rationally related to a legitimate governmental objective.[130]

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v. Kross, 239 F. Supp. 118 (S.D.N.Y.), *aff'd mem.*, 345 F.2d 533 (2d Cir.), *cert. denied*, 382 U.S. 911 (1965); People v. Williams, ___ Ill. ___, 244 N.E.2d 197 (1969); State v. Hampton, ___ Miss. ___, 209 So. 2d 899 (1968); State v. Allen, 104 N.J. Super. 187, 249 A.2d 70 (Super. Ct. App. Div. 1969); People *ex rel.* Loos v. Redman, 48 Misc. 2d 592, 265 N.Y.S.2d 453 (Sup. Ct. 1966); People *ex rel.* Crockett v. Redman, 41 Misc. 2d 962, 246 N.Y.S.2d 861 (Sup. Ct. 1964); Foertsch v. Jameson, 48 S.D. 328, 204 N.W. 175 (1925). *See also* Morris v. Schoonfield, 4 CRIM. L. REP. 2398, 2400 (D. Md. Jan. 1969).

In addition to these cases there are a number of decisions upholding the imprisonment but in which the issue of the poverty of the defendant was not raised. Hill v. United States *ex rel.* Wampler, 298 U.S. 460 (1936); *Ex parte* Jaekson, 96 U.S. 727 (1877); Wildeblood v. United States, 284 F.2d 592 (D.C. Cir. 1960); Dorsey v. Peak, 24 F.2d 892 (D.C. Cir. 1928); Bowles v. District of Columbia, 22 App. D.C. 321 (1903); Davis v. District of Columbia, 91 A.2d 14 (D.C. Ct. App. 1952); Anderson v. District of Columbia, 48 A.2d 710 (D.C. Ct. App. 1946); Yeager v. District of Columbia, 33 A.2d 629 (D.C. Ct. App. 1943); *Ex parte* Converse, 45 Nev. 93, 198 P. 229 (1921); *Ex parte* Smith, 97 Utah 280, 92 P.2d 1098 (1939).

Since there is little doubt that it is constitutional to imprison an offender for wilful refusal to pay a fine, these decisions are not authority for the constitutionality of imprisonment of the poor for nonpayment of fines. The Supreme Court of Utah has specifically held that it is constitutional to imprison wilful defaulters. *Id.*

127. Sawyer v. District of Columbia, 238 A.2d 314 (D.C. Ct. App. 1968); People v. Saffore, 18 N.Y.2d 101, 218 N.E.2d 686, 271 N.Y.S.2d 972 (1966); People v. McMillan, 53 Misc. 2d 685, 279 N.Y.S.2d 941 (1967); People v. Collins, 47 Misc. 2d 210, 261 N.Y.S.2d 970 (1965); *In re* Figueroa, Crim. No. 4502-C (Super. Ct. Cal., Mendicino County, filed Nov. 1, 1968) (on file with the *California Law Review*). *See also* Wildeblood v. United States, 284 F.2d 593 (D.C. Cir. 1960) (dissenting opinion of Edgerton, J.); Morris v. Schoonfield, 4 CRIM. L. REP. 2398, 2400 (D. Md. Jan. 1969) (Winter, J., partially dissenting); State v. Allen, 104 N.J. Super. 187, ___, 249 A.2d 70, 75 (Super. Ct. App. Div. 1969) (Conford J., dissenting); People v. Johnson, 262 N.Y.S.2d 431 (Sup. Ct. 1965) (Hopkins, J., partially dissenting).

128. *See, e.g.*, Loving v. Virginia, 388 U.S. 1, 12 (1967); Schneider v. Rusk, 377 U.S. 163, 168-69 (1964); Bolling v. Sharpe, 347 U.S. 497, 498-99 (1954).

129. *See, e.g.*, Loving v. Virginia, 388 U.S. 1, 11 (1967); McLaughlin v. Florida, 379 U.S. 184, 196 (1964).

130. *See, e.g.*, Loving v. Virginia, 388 U.S. 1, 8-9, 12 (1967).

Since the collection of criminal fines is clearly such an objective, the courts need only consider whether imprisonment of offenders who fail to pay fines is a rational means of collection. The result seems clear. To the extent that those who fail to pay fines are indigent and unable to pay, imprisonment is not rationally related to the objective of collecting fines. The imprisonment arbitrarily deprives indigents of their liberty and draws an "invidious discrimination" between poor and nonpoor criminal offenders.[131] Because the imprisonment cannot compel indigents to pay[132] it is arbitrary and deprives indigents of due process and equal protection of the law.

Since the rationality of governmental action depends upon its purpose,[133] it is essential to proper analysis of the equal protection and due process requirements that courts explicitly state the assumed purpose of the imprisonment. Because the courts have either failed to do so, or have failed to assume the same purpose throughout the course of their argument, no court to date has faced squarely the due process and equal protection objections to imprisonment of indigents as a means of collecting unpaid fines.[134] The recent case of *Kelly v. Schoonfield*[135] provides a striking example. One of the indigent offenders in this case fined 100 dollars and four dollars court costs, and upon default ordered imprisoned for 60 days, applied for release on the ground that the imprisonment denied him equal protection.[136] The United States District Court for the District of Maryland reiterated the state rule that such imprisonment is only a means of collecting fines.[137] The court then correctly observed that equal protection requires that separate classification of the poor and nonpoor offenders have "some relevance to the purpose for which the classification is made."[138] It then concluded, however, that the

131. In a sense, any violation of due process is also a violation of equal protection. *See* Tussman & tenBroek, *The Equal Protection of the Laws*, 37 CALIF. L. REV. 341, 362-65 (1949).

132. See authorities cited in note 106 *supra*.

133. Tussman & tenBroek, *The Equal Protection of the Laws*, 37 CALIF. L. REV. 341, 344-46 (1949); *cf.* McLaughlin v. Florida, 379 U.S. 184, 190 (1964).

134. The sole exception is an extremely well-reasoned dissent by Judge Conford of the appellate division of the New Jersey superior court in State v. Allen, 104 N.J. Super. 187, ____, 249 A.2d 70, 75 (Super. Ct. App. Div. 1969). Judge Conford recognized that the imprisonment is construed as a means of collection. 249 A.2d at 79. He stated, "In terms of substantive due process, I regard it as fundamentally unjust to deprive a person of his liberty for no better reason that he has not at the moment wherewithal to pay a fine in full . . . ." 249 A.2d at 77.

135. 285 F. Supp. 732 (D. Md. 1968).

136. *Id.* at 734-35.

137. *See id.* at 736.

138. *Id.* at 736-37. "[T]he Equal Protection Clause does require that, in defining a class subject to legislation, the distinctions that are drawn have 'some relevance to the purpose for which the classification is made.' " *Id.*

classification was rational because the imprisonment would tend to *punish* indigent offenders and therefore deter them from further crime.[139] The court only avoided the logical implications of its analysis by changing its assumptions in mid-course.

b. Imprisonment As Punishment

If the imprisonment is an alternative punishment substituted for the fine itself, then equal protection[140] and due process[141] require that it be at least rational to sentence indigents to a different punishment than those who are not indigent. In cases involving fundamental rights and liberties, particularly those involving the rights of criminal defendants, equal protection and due process require something more than mere rationality in the selection of a class subjected to special burdens.[142]

Griffin v. Illinois[143] held that it is a denial of equal protection and due process to refuse a defendant a transcript upon which to base a first appeal from a criminal conviction because of the defendant's inability to pay for the transcript.[144] *Griffin* and the other recent Supreme Court decisions have established that classifications based on relative wealth,[145] like those based on race,[146] are "suspect," and that if the inequality resulting from the classification is very great, and the justification is small, the classification constitutes an "invidious discrimination" and hence denies the defendant equal protection and due process of law.[147]

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139. *Id.* at 737. "The commitment of convicted defendants who default in payment of their fines, whether from inability or unwillingness to pay, imposes a burden upon a defined class to achieve a permissible end . . . 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.* (emphasis added).

140. See authorities cited note 129 *supra.*

141. See authorities cited note 128 *supra.*

142. *Compare* Day-Brite Lighting, Inc. v. Missouri, 342 U.S. 421, 425 (1952) *with* Schneider v. Rusk, 377 U.S. 163, 166 (1964) *and* Bolling v. Sharpe, 347 U.S. 497, 500 (1954).

143. 351 U.S. 12 (1956).

144. 351 U.S. at 17-19.

145. Harper v. Virginia State Bd. of Elections, 383 U.S. 663, 668 (1966); Douglas v. California, 372 U.S. 353, 357 (1963); Lane v. Brown, 372 U.S. 477 (1963); Burns v. Ohio, 360 U.S. 252, 257-58 (1959); Griffin v. Illinois, 351 U.S. 12, 17 (1956); Edwards v. California, 314 U.S. 160, 184-85 (1941) (" 'Indigence' in itself is neither a source of rights nor a basis for denying them. The mere state of being without funds is . . . constitutionally an irrelevance, like race, creed, or color." Jackson, J., concurring). *But see* Shapiro v. Thompson, 37 U.S.L.W. 4333, 4345 (U.S. April 21, 1969) (Harlan, J., dissenting). Even under Harlan's view, however, there would presumably be adequate justification for the result here reached because liberty is a fundamental right.

146. *See, e.g.*, Loving v. Virginia, 388 U.S. 1, 8-9 (1967).

147. *See, e.g.*, McLaughlin v. Florida, 379 U.S. 184, 192-93 (1964); Skinner v. Oklahoma, 316 U.S. 535, 541-42 (1942).

Although one cannot read *Griffin* to require the abolition of all inequalities resulting from poverty,[148] the Supreme Court should apply the rationale of the *Griffin* cases to imprisonment of the poor for nonpayment of fines.[149] First, since the legal questions raised by the imprisonment involve the rights of criminal defendants, the questions fall squarely within the competence of the Court.[150] Second, since the discrimination inherent in the imprisonment is based primarily on the wealth of the defendant and results in the loss of the defendant's personal liberty, it is at least as "invidious" a discrimination as that involved in some of the *Griffin* cases.[151] Third, the burden to the state which would follow from a holding that imprisonment of the poor for nonpayment of fines is unconstitutional would, if anything, be less than that which *Griffin* and similar cases have imposed upon the states.[152]

If the *Griffin* rationale is applied to imprisonment of the poor for nonpayment of fines, the constitutional result seems clear. Sentences of fine or imprisonment, in practical effect,[153] discriminate between criminal offenders on the basis of their wealth. The "choice" of

148. Griffin v. Illinois, 351 U.S. 12, 23 (1956) (Frankfurter, J., concurring).

149. It should be noted that a holding that the *Griffin* rationale prohibits imprisonment of the poor for nonpayment of fines would not logically require the same holding for the imprisonment of indigents for inability to post bail. One of the principal alternatives to imprisonment for nonpayment of fines is to allow indigents to pay their fines in installments; this alternative is not onerous to the states because it is if anything less expensive than imprisonment, and may even have a greater deterrent effect. See text accompanying notes 88-126 *supra*. The principal alternative to imprisonment for failure to post bail—release on recognizance—however, may involve release of an offender without adequate assurance that he will be present for trial.

150. *See* Harper v. Virginia State Board of Elections, 383 U.S. 663, 670 (1966): "[W]here fundamental rights and liberties are asserted under the Equal Protection Clause, classifications which might invade or restrain them must be closely scrutinized and carefully confined;" Tussman & tenBroek, *The Equal Protection of the Laws*, 37 CALIF. L. REV. 341, 372-73 (1949).

151. Smith v. Bennett, 365 U.S. 708 (1961), held that the *Griffin* rationale prohibits refusal to allow an indigent to file a writ of habeas corpus to test the validity of his confinement (not his conviction) even though he is unable to pay the filing fees. Imprisonment of indigents for nonpayment of fines is, if anything, a greater discrimination than that involved in *Smith* because the discrimination causes the original imprisonment rather than simply making it impossible for a prisoner to test his confinement once the courts have made a preliminary determination that the confinement is proper.

152. Douglas v. California, 372 U.S. 353 (1963), for example, held that a California procedure according to which appellate judges examined the trial record of an indigent requesting a first appeal to determine whether it was necessary to appoint counsel denied equal protection. The case, in effect, required the state to appoint counsel for all indigents requesting an appeal. *See id.* at 355-58.

153. It is safe to assume that the vast majority of those who refuse to pay their fines are unable to pay. ABA SENTENCING ALTERNATIVES AND PROCEDURES 288-89 (Approved Draft 1968); Kelly v. Schoonfield, 285 F. Supp. 732, 736 (D. Md. 1968) ("[I]t cannot be doubted that

paying a fine or going to jail is no choice to the indigent.[154] As a consequence, the indigent defendant loses his liberty and his income, and is subjected to the personal indignities and public obloquy of imprisonment,[155] whereas the nonindigent offender who has committed the same crime has the alternative of paying the fine and avoiding imprisonment. The only justification advanced for this discrimination is that it is difficult or even impossible to fine the poor.[156] However, this is hardly an adequate justification for a classification based on wealth which results in depriving indigents of their personal liberty. In the final part of this Comment it is argued that a state can employ a number of fining techniques which preserve the desired deterrent objectives without subjecting indigent defendants to imprisonment.[157] Although the competing considerations will appear more sharply after a full evaluation of these options open to the state, we may at least tentatively conclude here that in light of the small burden to the state and the great inequality in punishment between the poor and the nonpoor offenders, imprisonment of the indigent for nonpayment of fines denies them equal protection and due process of the law.[158]

A number of recent cases have discussed the equal protection objection to imprisonment as an alternative punishment.[159] *United*

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most persons who have defaulted in the payment of fines have done so because they were unable rather than unwilling to pay."); State v. Allen, 104 N.J. Super. 187, ____, 249 A.2d 70, 76 (Super. Ct. App. Div. 1969) (Conford, J., dissenting).

154. Former Justice Goldberg stated, "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." Goldberg, *Equality and Governmental Action*, 39 N.Y.U.L. REV. 205, 221 (1964), *quoted with approval* in State v. Allen, 104 N.J. Super. 187, ____, 249 A.2d 70, 77 (Super. Ct. App. Div. 1969) (Conford, J., dissenting).

155. *See* PRESIDENT'S COMM'N ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: THE COURTS 15 (1967); RUBIN, *supra* note 69, at 237.

156. *Cf.* authorities cited in note 96 *supra*.

157. See text accompanying notes 228-68 *infra*.

158. The cases reaching this conclusion are cited in note 127 *supra*. The following commentators also support this conclusion: Greenawalt, *Survey of Constitutional Law*, 18 SYRACUSE L. REV. 180, 193-98 (1966); Note, 4 HOUSTON L. REV. 695, 700 (1967); Note, 64 MICH. L. REV. 938, 944-45 (1966); *cf.* Goldberg, *Equality and Governmental Action*, 39 N.Y.U.L. REV. 205, 221 (1964); Note, 13 S.D.L. REV. 159, 165 (1968).

159. *See* United States *ex rel.* Privitera v. Kross, 239 F. Supp. 118 (S.D.N.Y.) *aff'd mem.*, 345 F.2d 533 (2d Cir.), *cert. denied*, 382 U.S. 911 (1965); Kelly v. Schoonfield, 285 F. Supp. 732, 737 (D. Md. 1968) (although the court states that the imprisonment is only a means of collection, its reasoning is only intelligible on the assumption that the imprisonment is a punishment; see notes 135-39 *supra*); Wildeblood v. United States, 284 F.2d 592, 593 (D.C. Cir. 1960) (Edgerton, J., dissenting); Sawyer v. District of Columbia, 238 A.2d 314, 318 (D.C. Ct. App. 1968); People v. Saffore, 18 N.Y.2d 101, 103-04, 218 N.E.2d 686, 687, 271 N.Y.S.2d 972, 974 (1966). The latter two cases, although recognizing that the imprisonment is considered a means of collection, state that as applied to indigents it is only rational as a punishment, and that as a punishment it is unconstitutional.

States ex rel. Privitera v. Kross[160] is the leading case upholding the constitutionality of the imprisonment.[161] The defendant was convicted of illegal possession of policy slips, an offense punishable in New York by a maximum of one year in jail and/or a 500 dollar fine,[162] and received a sentence of 30 days imprisonment and a fine of 500 dollars, or in the event of nonpayment, an additional 60 days in jail.[163] On habeas corpus, the District Court for the Southern District of New York rejected the equal protection argument based on the comparison between indigent and the nonindigent defendants on the ground that under modern sentencing theory sentences should be individualized and that an offender once convicted "has no constitutional right that another defendant, no matter what his economic status, receive the same sentence for the same offense."[164] Although this proposition is correct as applied to a comparison between any two actual defendants, it is incorrect if applied to a comparison between an actual defendant before the court and another hypothetical defendant. Where it can be shown by a hypothetical comparison that two defendants who differ only in wealth will always receive markedly different punishments, the equal protection and due process question arises.[165]

Several courts have recognized the denial of equal protection in imprisoning indigents for nonpayment of fines. The leading case, *People v. Saffore*,[166] involved a defendant who had received the maximum sentence for a misdemeanor of one year in jail and a 500 dollar fine. Since he was unable to pay the fine the court ordered him imprisoned at the rate of one day in prison for each dollar of fine—a

160. 239 F. Supp. 118 (S.D.N.Y.), *aff'd mem.*, 345 F.2d 533 (2d Cir.), *cert. denied*, 382 U.S. 911 (1965).

161. Several later courts have followed this decision. Kelly v. Schoonfield, 285 F. Supp. 732, 736 (D. Md. 1968); People v. Williams, ___ Ill. ___, 244 N.E.2d 197, 198-99 (1969); State v. Allen, 104 N.J. Super. 187, ___, 249 A.2d 70, 73-74 (Super. Ct. App. Div. 1969); People *ex rel.* Loos v. Redman, 48 Misc. 2d 592, 594-95, 265 N.Y.S.2d 453, 455-56 (Sup. Ct. 1965). One commentator has called it a "well-reasoned" opinion. 2 B. SCHWARTZ, A COMMENTARY ON THE CONSTITUTION OF THE UNITED STATES, PART III: RIGHTS OF THE PERSON 544-45 (1968). Judge Conford has noted, however, that most commentators have found the reasoning unsound. State v. Allen, 104 N.J. Super. 187, ___, 249 A.2d 70, 78-79 (Super. Ct. App. Div. 1969) (dissent).

162. United States *ex rel.* Privitera v. Kross, 239 F. Supp. 118, 119 (S.D.N.Y.), *aff'd mem.*, 345 F.2d 533 (2d Cir.), *cert. denied*, 382 U.S. 911 (1965).

163. *Id.* at 119.

164. *Id.* at 120.

165. A number of writers have rejected the reasoning of *Privitera*. State v. Allen, 104 N.J. Super. 187, ___, 249 A.2d 70, 78-79; Greenawalt, *Survey of Constitutional Law*, 18 SYRACUSE L. REV. 180, 196 (1966); Note, 64 MICH. L. REV. 938, 942-43 (1966); Note, 4 HOUSTON L. REV. 695, 700 (1967).

166. 18 N.Y.2d 101, 218 N.E.2d 686, 271 N.Y.S.2d 972 (1966).

total additional imprisonment of 500 days.[167] In a unanimous opinion the New York court of appeals held the sentence unconstitutional because "it is a denial of due process and equal protection of the law to let a defendant's lack of money determine how long he must be imprisoned."[168] Impliedly rejecting the reasoning of the *Privitera* opinion, the court stated, "[t]he man who can pay and the man who cannot are not treated equally."[169]

Unfortunately, in ultimately stating its holding, the court drew a distinction between sentences of imprisonment which do and those which do not exceed the maximum authorized imprisonment for the offender's crime. "We do not hold illegal every judgment which condemns a defendant to confinement if he does not pay his fine. We do hold that, when payment of a fine is impossible . . . imprisonment to work out the fine, if it results in a total imprisonment of more than a year for a misdemeanor . . . violates the defendant's right to equal protection of the law . . . ."[170] This statement has given support to the reasoning suggested in the final part of the *Privitera* opinion that the constitutionality of imprisonment for nonpayment of fines may turn on the length of the resulting confinement.[171] This distinction in the *Privitera* opinion, however, is unsupported by the logic of the equal protection analysis. The indigent is denied equal protection not because his sentence exceeds the maximum authorized imprisonment for his offense[172] but because the wealthy offender who has committed the same offense is not sent to prison at all.

It appears that the court in *Saffore* did not intend to imply the relevance of any distinction based on the length of the indigent's confinement. Nothing in its equal protection argument in any way supports or alludes to the distinction. In fact, at the conclusion of its analysis of the intent of New York's fine or imprisonment statute,[173] the court concluded, "we should now hold that it is illegal to . . . imprison a defendant who is financially unable to pay."[174] It appears,

167. *Id.* at 102, 218 N.E.2d at 686-87, 271 N.Y.S.2d at 973.

168. *Id.* at 104, 218 N.E.2d at 688, 271 N.Y.S.2d at 975.

169. *Id.* at 102, 218 N.E.2d at 686-87, 271 N.Y.S.2d at 975.

170. *Id.* at 104, 218 N.E.2d at 688, 271 N.Y.S.2d at 975.

171. See text accompanying note 176 *infra*.

172. The confusion in this area is probably due to the fact that such a sentence is illegal because it is unauthorized by statute. See text accompanying notes 214-66 *infra* for an analysis of this aspect of the legality of the imprisonment. The question, however, is entirely independent of the equal protection question in which the length of the imprisonment is immaterial.

173. See text accompanying notes 203-14 *infra* for an analysis of this part of the *Saffore* opinion.

174. 18 N.Y.2d at 104, 218 N.E.2d at 687, 271 N.Y.S.2d at 974.

therefore, that the court limited its holding only out of a desire to avoid unnecessary dictum.[175] Nevertheless, later courts have read *Saffore* as agreeing with *Privitera* and as standing for the proposition that imprisonment of indigents for nonpayment of fines is constitutional if its duration does not exceed the maximum permissible punishment for the class of offense.[176]

2. Cruel and Unusual Punishment

Imprisonment as an alternative punishment to the fine itself does not raise the constitutional question of cruel and unusual punishment. Even a punishment of one year plus 500 days in jail for a misdemeanor is not sufficiently harsh to violate the constitutional standard.[177] However, if the imprisonment is interpreted as a means of compelling payment of the fine then the question of cruel and unusual punishment arises under recent United States Supreme Court decisions which hold it unconstitutional to punish a defendant for a status or for conduct which is beyond his power to prevent.

Robinson v. California[178] held that it is cruel and unusual punishment to punish for the status of drug addiction.[179] In *Powell v. Texas*,[180] a closely divided Court upheld the conviction of a chronic alcoholic for public drunkenness. Four members voting to affirm the conviction reasoned that since public drunkenness, unlike drug addiction, was an act, the states could make it a crime.[181] The four dissenters, however, felt that the state was punishing the defendant for the condition of chronic alcoholism which he could not avoid.[182] Justice White voted with the majority on the ground that the defendant could have

175. One New York court has evidently so read *Saffore*: "Our appellate courts will ultimately determine the extent to which the rule and the spirit of People v. Saffore . . . shall be extended to other cases involving the nonpayment of fines by indigent defendants." People v. McMillan, 53 Misc. 2d 685, 686-87, 279 N.Y.S.2d 941, 943 (Sup. Ct. 1967).

176. Kelly v. Schoonfield, 285 F. Supp. 732, 736 (D. Md. 1968); People v. Williams, ___ Ill. ___, 244 N.E.2d 197, 199 (1969); State v. Allen, 104 N.J. Super. 187, ___, 249 A.2d 70, 72-74 (Super. Ct. App. Div. 1969). Sawyer v. District of Columbia, 238 A.2d 314, 317-18 (D.C. Ct. App. 1968), a case involving a sentence which exceeded the maximum permissible punishment under District of Columbia law, cited *Saffore* approvingly and held the sentence unconstitutional; however, it also limited its holding to cases of sentences exceeding the maximum authorized punishment. *Id.* at 317-18.

177. *See* People *ex rel.* Loos v. Redman, 48 Misc. 2d 592, 595, 265 N.Y.S.2d 453, 454 (Sup. Ct. 1965); People v. Collins, 47 Misc. 2d 210, 212, 261 N.Y.S.2d 970, 972 (Sup. Ct. 1965).

178. 370 U.S. 660 (1962).

179. *Id.* at 666-67.

180. 392 U.S. 514 (1968).

181. *Id.* at 532-33.

182. *Id.* at 566-70 (Fortas, J., Douglas, J., Brennen, J., and Stewart, J., dissenting).

avoided public drunkenness, despite his chronic condition. However, he suggested that if it where shown that a defendant could not avoid drunkenness and could not avoid being drunk in public, then the punishment would be cruel and unusual and therefore unconstitutional.[183]

An indigent's failure to pay a fine is analogous to the chronic alcoholic's act of taking a drink. Poverty, like alcoholism, is a status beyond the control of the individual. The indigent is no more capable of paying his fine than the chronic alcoholic is of refraining from drink. If the analogy is accepted, then it follows from the reasoning of Justice White and the four dissenters in *Powell v. Texas* that imprisonment of the poor to compel payment of fines constitutes cruel and unusual punishment.[184]

3. Excessive Fines

The eighth amendment provides, "Excessive bail shall not be required, nor excessive fines imposed . . . ."[185] It is relatively safe to assume that the Supreme Court will ultimately hold that this prohibition of excessive fines applies to the states through the fourteenth amendment.[186] It is the traditional interpretation that this section bans fines which are "so great or numerous as to shock the conscience of reasonable men, or are patently and unreasonably harsh or oppressive as penalties for the wrong sought to be . . . redressed . . . ."[187]

Some courts have held that the excessiveness of a fine is determined without reference to the circumstances of the individual's crime and without reference to his wealth. They argue that if the

183. *Id.* at 551 (White, J., concurring).

184. *See id.* at 548-50 (White, J., concurring). It might be argued that under Douglas' view in Robinson v. California, 370 U.S. 660, 676 (1962) (Douglas, J. concurring), it is not the punishment but the conviction itself which constitutes cruel and unusual punishment and that the indigent is never formally convicted of the "crime" of not paying a fine. However, since the Court has never adopted this view and since Justice Douglas himself did not restate it in *Powell v. Texas*, it is unlikely that the Court would apply this distinction to a fine or imprisonment case.

185. U.S. CONST. amend. VIII.

186. *Cf.* Malloy v. Hogan, 378 U.S. 1, 6 n.6 (1964); Robinson v. California, 370 U.S. 660, 666 (1962). Ten United States Supreme Court Justices have believed that the fourteenth amendment incorporates all of the first eight amendments. Malloy v. Hogan, 378 U.S. 1, 4 n.2 (1964).

187. Amos v. Gunn, 84 Fla. 285, 363-64, 94 So. 615, 641 (1922); *see* People v. Magoni, 73 Cal. App. 78, 80, 238 P. 112, 113 (1925) ("so excessive and unusual, and so disproportionate to the offense committed, as to shock public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances."); State v. Seraphine, 266 Wis. 118, 121-22, 62 N.W.2d 403, 405 (1954).

statutory limits for the fine are not in themselves excessive, then any fine within the limits is constitutional.[188]

Several recent cases, however, have questioned this narrow interpretation. In *People v. Saffore*,[189] the New York court of appeals held that a sentence of fine or imprisonment imposed upon an individual without sufficient funds to pay is excessive in violation of the eighth amendment if it results in a total period of confinement longer than the maximum authorized statutory imprisonment for the offense involved:

> The phrase "excessive fine," if it is to mean anything, must apply to any fine which notably exceeds in amount that which is reasonable, usual, proper or just. A fine of $500 for a common misdemeanor, levied on a man who has no money at all, is necessarily excessive when it means in reality that he must be jailed for a period far longer than the normal period for the crime, since it deprives the defendant of all ability to earn a livelihood for 500 days and since it has the necessary effect of keeping him in the penitentiary for longer than would ordinarily be the case.[190]

In reaching its decision the court accepted the traditional New York holding that the imprisonment is not a part of the punishment itself, but rather a means of collection.[191] Hence it did not base its holding on the theory that the 500 days imprisonment for nonpayment of the fine exceeded the statutorily authorized punishment of one year. Rather it held that although the statutory maximum fine of 500 dollars imposed in addition to a prison term of one year was not in itself "excessive," it became "excessive" when applied to an individual without funds to pay.[192]

Although the court intimated that it might later hold all fines

188. People *ex rel.* Loos v. Redman, 48 Misc. 2d 592, 594, 265 N.Y.S.2d 453, 454 (Sup. Ct. 1965); People v. Watson, 204 Misc. 467, 468, 126 N.Y.S.2d 832, 834 (1953) (The court here held that a fine of $500 or 500 days in jail, imposed in addition to a one year jail sentence, did not become excessive in cases in which the offender was unable to pay. People v. Saffore, 18 N.Y.2d 101, 104, 218 N.E.2d 686, 688, 271 N.Y.S.2d 972, 975 (1966), has implicitly overruled these decisions); State v. Naczas, 8 Wis. 2d 187, 190, 98 N.W.2d 444, 445 (1949); *see* People v. Wolfe, 338 Mich. 525, 61 N.W.2d 767 (1953); *cf.* Kelly v. Schoonfield, 285 F. Supp. 732, 735 (D. Md. 1968); United States *ex rel.* Privitera v. Kross, 239 F. Supp. 118, 120 (S.D.N.Y.), *aff'd mem.*, 345 F.2d 533 (2d Cir.), *cert. denied* 382 U.S. 911 (1965). *But see* State v. Staub, 182 La. 1040, 1046, 162 So. 766, 768 (1935) ("What constitutes an excessive fine . . . depends in part upon . . . the ability of the defendant to pay."); *cf.* State v. Ross, 55 Ore. 450, 480, 106 P. 1022, 1024 (1910).

189. 18 N.Y.2d 101, 218 N.E.2d 686, 271 N.Y.S.2d 972 (1966).

190. *Id.* at 104, 218 N.E.2d at 688, 271 N.Y.S.2d at 975.

191. *Id.* at 103, 218 N.E.2d at 687, 271 N.Y.S.2d at 974.

192. *See id.* at 104, 218 N.E.2d at 688, 271 N.Y.S.2d at 975.

"excessive" which result in the imprisonment of indigents,[193] it restricted its holding to cases where the imprisonment exceeds the maximum authorized statutory imprisonment.[194] In response to the decision New York changed its statute in an attempt to prohibit imprisonment of indigents for nonpayment.[195] Consequently, it is unlikely that the New York court will have further occasion to consider the application of the eighth amendment prohibition of excessive fines to sentences of fine or imprisonment.

Other courts which consider the question should construe the eighth amendment to prohibit imprisonment for nonwilful failure to pay fines. This construction would give "excessive fines" a plain and ordinary meaning and would infuse this rarely used[196] constitutional provision with revived meaning.

4. Imprisonment For Debt

Indigent defendants frequently contend that imprisonment of the poor for nonpayment of fines violates state constitutional prohibitions against imprisonment for debt.[197] The argument is appealing because most, if not all, of the objections to imprisonment for debt apply with equal force to imprisonment for nonpayment of fines. Nevertheless, it is clear that "imprisonment for debt," a term of art, does not include imprisonment for fines. Most state constitutional provisions expressly exclude fines from the term "debts,"[198] or have judicial decisions excluding them as a matter of interpretation.[199]

In such states indigents could only benefit from the constitutional

193. At the conclusion of the analysis of the New York statute authorizing fine or imprisonment sentences, the court stated, "we should now hold that it is illegal . . . to imprison a defendant who is financially unable to pay." *Id.* at 104, 218 N.E.2d at 687, 271 N.Y.S.2d at 974.

194. *Id.* at 104, 218 N.E.2d at 688, 271 N.Y.S.2d at 975.

195. Ch. 61, [1876] N.Y. Laws 49, *as amended* ch. 692, § 16, [1962] N.Y. Laws 3184 (*formerly* §§ 484, 718 of the New York Code of Criminal Procedure), *repealed by* ch. 681, §§ 66, 82, [1967] N.Y. Laws 1612, 1621. The subject matter is now covered by N.Y. CODE CRIM. PROC. § 470-d (McKinney Supp. 1967).

196. *See* RUBIN, *supra* note 69, at 249.

197. *E.g.*, People v. Kovach, 197 Cal. App. 2d 80, 84, 16 Cal. Rptr. 876, 878 (1961); State v. Dowling, 92 Fla. 848, 857, 110 So. 522, 525 (1926); State v. Intl. Harvester Co., 241 Minn. 367, 378-79, 63 N.W.2d 547, 555, *appeal dismissed*, 348 U.S. 853, *rehearing denied*, 348 U.S. 903 (1954); *Ex parte* McInnis, 98 Miss. 773, 781, 54 So. 260, 261 (1910).

198. *E.g.*, MO. CONST. art. I, § 11; OKLA. CONST. art. II, § 13. Many states limit the prohibition to debts arising out of contract. *E.g.*, S.D. CONST. art. VI, § 15; WIS. CONST. art. I, § 16. Some states limit the prohibition to civil actions for debt. *E.g.*, CAL. CONST. art. I, § 15; TEX. CONST. art. I, § 18.

199. *E.g.*, ALA. CONST. art. I, § 20, *construed in* Nelson v. State, 46 Ala. 186, 189-90 (1871); MISS. CONST. art. III, § 30; *Ex parte* Diggs, 86 Miss. 597, 38 So. 730 (1905).

prohibition by arguing that the two types of imprisonment are so similar that it is a denial of equal protection to distinguish between them.[200] Although this argument has some appeal, it seems likely that the courts would reject it. There is at least one basis upon which the legislatures can rationally distinguish between fines and debts. Whereas indebtedness is frequently beyond the debtor's control, the criminal offender presumably can avoid crime.[201] It is arguable that this distinction is immaterial because the fundamental reason for abolishing imprisonment for debt is not to avoid punishing the debtor but to avoid the imprisonment which makes it impossible for him, as for the indigent criminal defendant, to earn the money for the lack of which he is being imprisoned. Nevertheless, it is likely that most courts would defer to the legislative judgment that a state may reasonably distinguish between bankrupt debtors and indigent criminal defendants and that these courts would therefore conclude that a state may treat the two classes of individuals differently.[202]

B. Statutory Intent

1. Unauthorized Collection

In *People v. Saffore*[203] the New York court of appeals, in a unanimous opinion, held as a matter of state law that New York statutes did not authorize imprisonment for nonpayment of a fine when the total resulting confinement exceeded the maximum authorized punishment for the offense involved.[204] The primary ground for its decision was not that the imprisonment was unconstitutional, but that the New York statute authorizing imprisonment for nonpayment of fines did not apply to indigent defendants.[205]

The New York Code of Criminal Procedure gave courts power to imprison a criminal offender until he paid his fine provided that the imprisonment did not exceed one day for each one dollar of fine.[206] Referring to the many New York cases holding that imprisonment was not a part of the punishment but only a means of collecting the fine and noting that imprisonment could not force an indigent to pay,

200. The author knows of no case dealing with this possible argument.

201. *But see* J. HALL, GENERAL PRINCIPLES OF CRIMINAL LAW 456 (2d ed. 1960).

202. It is possible that the Supreme Court would hold that imprisonment for debt itself violates the due process and equal protection clauses. The question is beyond the scope of this Comment.

203. People v. Saffore, 18 N.Y.2d 101, 218 N.E.2d 686, 271 N.Y.S.2d 972 (1966).

204. *Id.* at 104, 218 N.E.2d at 688, 271 N.Y.S.2d at 975.

205. *See id.* at 103, 218 N.E.2d at 687, 271 N.Y.S.2d at 974.

206. Note 195 *supra.*

the court concluded that the legislature did not intend the statute to authorize imprisonment of indigents.[207]

The court in *People v. Saffore* ultimately chose to limit its holding to cases where the total resulting confinement exceeds the maximum statutory imprisonment for the offense involved.[208] It seems clear, however, that the court's reasoning would apply with equal force to cases where the total confinement did not exceed the maximum. A prison term less than the maximum would be as ineffective in compelling an indigent to pay as would be a term over the maximum.[209] The court did not deny this conclusion. On the contrary, at the end of its analysis of the intent of New York's statute, it indicated that *all* imprisonment of indigents for nonpayment of fines might be unauthorized:

> [I]t runs directly contra to the meaning and intent of section 484 of the Code of Criminal Procedure to order a defendant to stay in prison until he pays a fine, when the court knows that he cannot possibly pay it. . . . 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.[210]

It seems that many states could employ the reasoning of the New York court of appeals to declare imprisonment for nonpayment of fines unauthorized by state statute.[211] The District of Columbia, which like New York considered imprisonment only as a means of collection, has held such imprisonment to be unauthorized under its statutes. In *Sawyer v. District of Columbia*[212] the District of Columbia municipal court of appeals cited *People v. Saffore* and stated:

> [B]ecause a court should not be powerless to compel a contumacious defendant to pay a fine imposed as punishment . . . Congress has provided statutory authority to use imprisonment as a method of

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207. 18 N.Y.2d at 103-04, 218 N.E.2d at 687, 271 N.Y.S.2d at 974.

208. "We do not hold illegal every judgment which condemns a defendant to confinement if he does not pay his fine. We do hold that, when payment of a fine is impossible and known by the court to be impossible, imprisonment to work out the fine, if it results in a total imprisonment of more than a year for a misdemeanor, is unauthorized by the Code of Criminal Procedure and violates the defendant's right to equal protection of the law, and the constitutional ban against excessive fines." *Id.* at 104, 218 N.E.2d at 688, 271 N.Y.S.2d at 975.

209. *Cf.* People *ex rel.* Loos v. Redman, 48 Misc. 2d 592, 594-95, 265 N.Y.S.2d 453, 455-56 (Sup. Ct. 1965).

210. 18 N.Y.S.2d at 103-04, 218 N.E.2d at 687, 271 N.Y.S.2d at 974 (emphasis added).

211. *E.g.*, jurisdictions cited in note 99 *supra*.

212. 238 A.2d 314 (D.C. Ct. App. 1968). The facts are stated in the first paragraph of this Comment.

> compelling payment of the fine. But . . . no such purpose can possibly be served in the case of an indigent who, although willing to do so, is without funds to pay a fine and avoid the term of imprisonment. . . . [T]he application of the statute to a person known by the court to be indigent . . . subverts the legitimate purpose of a valid statute . . . .[213]

In states where it is possible, it is preferable to prohibit imprisonment for nonpayment of fines by means of statutory construction, since this avoids holding unconstitutional an act of the legislature. The familiar rule of statutory construction that statutes be construed, where possible, to avoid unconstitutionality may even compel such a holding.

2. Unauthorized Punishment

If imprisonment is construed as an alternative punishment rather than as a means of collection, then the term of imprisonment must be limited to the maximum authorized term of imprisonment for the class of offense involved.[214] Thus, for example, if a court sentences an indigent to the maximum authorized punishment of one year in prison and a 500 dollar fine, it may not legally imprison the indigent at all for nonpayment of the fine.[215] On the other hand, if he had received a 500 hundred dollar fine and no jail term, he could be imprisoned for 365 days.[216]

A number of courts have accepted this reasoning.[217] In *Peeples v. District of Columbia*,[218] a defendant who had been sentenced to a fine of 75 dollars or in default thereof 150 days in jail claimed that he had been illegally imprisoned for longer than the 30 days authorized by statute.[219] Although the municipal court of appeals upheld imprisonment on the ground that it was only a means of collection, it warned that a judge could not legally use the fine or imprisonment statute to punish the defendant for a period longer than that authorized by statute:

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213. *Id.* at 318 (footnotes omitted).

214. *Id.* at 316-17 (D.C. Ct. App. 1968); Peeples v. District of Columbia, 75 A.2d 845, 847-48 (D.C. Ct. App. 1950); *see* People v. Saffore, 18 N.Y.2d 101, 103, 218 N.E.2d 686, 687, 271 N.Y.S.2d 972, 974 (1966); People *ex rel.* Loos v. Redman, 48 Misc. 2d 592, 594, 265 N.Y.S.2d 453, 454 (Sup. Ct. 1966).

215. *Cf.* People v. Saffore, 18 N.Y.2d 101, 103, 218 N.E.2d 686, 687, 271 N.Y.S.2d 972, 974 (1966).

216. *Id.*

217. See cases cited note 214 *supra*.

218. 75 A.2d 845 (D.C. Ct. App. 1950).

219. *Id.* at 846.

> [It] looks suspiciously as if the trial court decided, either for appellant's good or for the good of the community, that appellant because of his record of approximately seventy convictions for drunkenness, should be confined for more than the thirty days permitted by the statute, and used the alternative sentence to accomplish this. If we were convinced that this was true, we would reverse, because Congress has fixed thirty days as the maximum term of imprisonment for the first offense of drunkenness and the court ought not to evade the legislative enactment under the guise of enforcing payment of a fine.[220]

In this case, as in *Sawyer v. District of Columbia*,[221] in which the trial court sentenced an alleged indigent alcoholic to a fine of 150 dollars or in lieu thereof 60 days in jail,[222] it seems clear that the court simply intended to "dry out" the defendant and that the fine was really an indirect means of imposing a prison sentence. When any such jail term exceeds the maximum authorized punishment for the offense, the appellate courts should hold it illegal.

IV

REFORM

In preceding sections this Comment has attempted to show that imprisonment of the poor for nonpayment of fines arose under historical circumstances which no longer obtain, that it now serves only a limited penological function, that it violates due process, equal protection, and the eighth amendment prohibitions against cruel and unusual punishments and excessive fines, and that it is inconsistent with the reasonable construction of many state statutes. Not surprisingly, virtually every commentator and many courts which have considered imprisoment for nonpayment of fines have called for reform of the law.[223]

The suggestions for reform offered in this final part proceed on the assumption that fines should be retained as a criminal sanction both for poor and nonpoor defendants. There is evidence that the fine, if properly imposed, is an effective detterrent.[224] It is true that there

220. *Id.* at 847.

221. 238 A.2d 314 (D.C. Ct. App. 1968).

222. *Id.* at 315.

223. See authorities cited in notes 77-79 *supra*.

224. G. PLAYFAIR & D. SINGTON, CRIME, PUNISHMENT AND CURE 101-04 (1965). It is, of course, difficult to evaluate the deterrent effect of any particular criminal sanction. See authority cited in note 123 *supra*.

are inequalities inherent in the fine system.[225] However, the disadvantages of short term imprisonment are even more serious.[226] The solution to the inequities of the system is thus not to abolish fines but to eliminate, to the greatest extent possible, their unjust elements.[227]

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225. Even if there were no imprisonment of the poor for nonpayment of fines, it would be impossible to administer fines in absolute fairness so that they struck all similar offenders equally. This, however, is also true of other punishments. Imprisonment affects differently prisoners who have different attitudes, life styles, and states of health.

226. See text accompanying notes 106-25 *supra.*

227. New York, in its response to the decision in *People v. Saffore*, 18 N.Y.2d 101, 218 N.E.2d 686, 271 N.Y.S.2d 972 (1966), has revealed some of the difficulties of achieving this objective. Although it stipulated that no person be imprisoned for inability to pay a fine, it gave sentencing courts power to impose greater prison terms upon those unable to pay than on those able to pay:

> 1. When the court imposes a fine upon an individual the court may direct as follows:
>
> (a) That the defendant pay the entire amount at the time sentence is imposed;
>
> (b) That the defendant pay a specified portion of the fine at designated periodic intervals, and in such case may direct that the fine be remitted to a probation officer who shall report to the court on any failure to comply with the order;
>
> (c) Where the defendant is sentenced to a period of probation as well as a fine, that payment of the fine be a condition of the sentence.
>
> 2. If the defendant fails to pay the fine as directed, the court may direct that he be imprisoned until the fine be satisfied and the court must specify the period of any such imprisonment subject to the following limits:
>
> (a) Where the fine was imposed for a felony, the period shall not exceed one year;
>
> (b) Where the fine was imposed for a misdemeanor, the period shall not exceed one-third of the maximum authorized term of imprisonment;
>
> (c) Where the fine was imposed for a violation or a traffic infraction the period shall not exceed fifteen days; and
>
> (d) Where a sentence of imprisonment as well as a fine was imposed the aggregate of the period and the term of the sentence shall not exceed the maximum authorized term of imprisonment.
>
> 3. In any case where the defendant is unable to pay a fine imposed by the court, the defendant may at any time apply to the court for resentence. In such a case, if the court is satisfied that the defendant is unable to pay the fine, the court must, notwithstanding any other provision of law, revoke the entire sentence imposed and must resentence the defendant. Upon such resentence, the court may impose any sentence it originally could have imposed except that the amount of any fine imposed shall not be in excess of the amount the defendant is able to pay.
>
> 4. Notwithstanding that the defendant was imprisoned for failure to pay a fine or that he has satisfied the period of imprisonment imposed, a fine may be collected in the same manner as a judgment in a civil action. It shall be the duty of the district attorney to institute proceedings to collect such fine.

NEW YORK CODE CRIM. PROC. § 470-d (McKinney Supp. 1967).

The statute is subject to two major criticisms. First, it gives authority to the courts to sentence indigents to imprisonment as a primary punishment if they are unable to pay fines. Such sentences violate the principles of equal protection and due process. See text accompanying notes 140-76, *supra.* Second, since the imprisonment is limited to the maximum authorized imprisonment for the offense, there is no way to imprison wilful defaulters if they have received the maximum authorized imprisonment in addition to the fine. *People v. Saffore* does not compel this result.

This Comment proposes three steps to reform. First, in setting fines the sentencing court should take account of the defendant's financial resources. Second, the court should always permit indigent defendants to make delayed and installment payments. Third, if an offender fails to pay a fine, the court should tailor its response to the reason for nonpayment. If the default was wilful the court should punish it as contempt of court. If it was due to the offender's inability to pay the court should reduce or remit the fine or alter the terms of payment so that payment is possible.[228]

A. "Proportional" Fines

Almost all legal commentators have explicitly affirmed the principle of making fines proportional to the wealth of an offender.[229] The purpose of making fines "proportional" is not to give the poor a special advantage, but to give them equal punishment. As many

228. It is also very important for the courts to use probation in sentencing. In most instances, however, the decision to grant probation should be made regardless of the offender's ability to pay. From a theoretical point of view, probation is unrelated to the objective of fining the poor fairly. If the court correctly applies the principles of making fines progressive and using deferred payments of fines, then the poor should have no greater burden of fines than those who are not poor. If the burden of fines is equal then there is no reason to give special probation advantages to the poor. From a practical point of view, however, there are cases in which the dollar limits on fines may make a fine particularly unfair, and in which probation may be necessary. For example, it could be used with offenders who are temporarily out of a job. Probation could be granted on the condition that the offender obtain employment.

229. *E.g.*, ABA SENTENCING ALTERNATIVES AND PROCEDURES 122 (Approved Draft 1968) ("the most important suggestion designed to alleviate the problem [of imprisonment of the poor for nonpayment of fines] is that fines be imposed only on those who are likely to be able to pay them." The Association then quotes with approval from the REPORT OF THE PRESIDENT'S COMM'N ON CRIME IN THE DISTRICT OF COLUMBIA, *infra*); MODEL PENAL CODE § 7.02 (Proposed Official Draft 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; and (b) the fine will not prevent the defendant from making restitution or reparation to the victim of the crime. . . . In determining the amount and method of payment of a fine, the Court shall take into account the financial resources of the defendant and the nature of the burden that its payment will impose." In its comments the Code notes, "the section seeks to outlaw fines that the defendant can not pay." Commentary, Tent. Draft No. 2, p. 36.); M. HASSAN, L'AMENDE PENALE DANS LES DROITS MODERNES ET SPECIALEMENT DANS LE CODE PENAL SUISSE 109-35 (Geneva 1958) (the author cites numerous international authorities and congresses affirming the principle); REPORT OF THE PRESIDENT'S COMM'N ON CRIME IN THE DISTRICT OF COLUMBIA 394 (1966): "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." *Id.* RUBIN, *supra* note 69, at 238-39 ("In general one of the overriding principles repeatedly urged is that financial capabilities of the offender should be taken into consideration, because unless fines are proportioned to the defendant's ability to pay, they will be treated lightly by persons of means and will be an unbearable burden to the poor."); Note, *Fines and Fining—An Evaluation*, 101 U. PA. L. REV. 1013, 1024-26 (1953). Montesqieu, Bentham and Lombroso all advocated setting fines in light of an offender's wealth. *Id.* The United States Supreme Court, in a case involving a fine of

authors have observed,[230] it is not equal treatment if the poor and the affluent offender are both fined 100 dollars for the same offense. "[T]he *quantum* . . . of pecuniary fines," wrote Blackstone, "neither can, nor ought to be ascertained by invariable law. . . . [W]hat is ruin to one man's fortune may be a matter of indifference to another's."[231] If the courts are to impose fines fairly and if fines are to deter the poor and the rich equally then fines must be set in light of the offender's wealth.[232]

The primary difficulty is not in deciding that fines should be proportional, but in achieving this objective. Granting the courts discretion to determine the amount of fines has never been a successful way of guaranteeing that fines will be set in light of an offender's wealth. The most effective procedure now in use is the "day-fine" system of Sweden,[233] Finland,[234] Switzerland,[235] and Cuba,[236] which determines the amount of the fine according to the offender's income once the relative severity of punishment has been determined. The court first sentences the offender to a number of day-fines, in accordance with the gravity of his offense. Then the court determines the monetary value of each day-fine as an approximation of the offender's personal daily income, with reference to his financial obligations, the number of dependents, his productive capacity, and

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$3,500,000 against the United Mine Workers of America, stated that it is a "corollary" of sound sentencing principles that in fixing the amount of a fine to be imposed as punishment for contempt the court "must . . . consider the amount of defendant's financial resources and the consequent seriousness of the burden to that particular defendant." United States v. United Mine Workers of America, 330 U.S. 258, 304 (1947). At a conference of the Pilot Institute On Sentencing, under the auspices of the Judicial Conference of the United States, at which 68 judges participated it was concluded that "no fine should be imposed unless it reasonably appears that the defendant is financially able to pay it either at once or in installments under probation." 26 F.R.D. 231, 380 (1959).

230. *E.g.*, RUBIN, *supra* note 69, at 229; E. SUTHERLAND & D. CRESSEY, PRINCIPLES OF CRIMINOLOGY 574 (4th ed. 1947).

231. BLACKSTONE, 4 COMMENTARIES 430 (Wendell's Am. ed. 1847), *cited* in RUBIN, *supra* note 69, at 229.

232. M. HASSAN, L'AMENDE PENALE DANS LES DROITS MODERNES ET SPECIALEMENT DANS LE CODE PENAL SUISSE 115 (Geneva 1958).

233. Law of June 30, 1948, [Sweden 1949] SVERIGES RIKES LAG, STRAFF-LAG Rap. 2, § 8, reported in Note, *Fines and Fining—An Evaluation*, 101 U. PA. L. REV. 1013, 1025 n.93 (1953).

234. Law of May 21, 1921, [Finland 1923] SUPPLEMENT TILL FINLANDS RIKES LAG N:o 36, § 4, reported in Note, *Fines and Fining—An Evaluation*, 101 U. PA. L. REV. 1013, 1024 n.91 (1953).

235. StGB (C. PEN.) Sec. 4, art. 48, cited and translated in Miller, *The Fine—Price Tag or Rehabilitative Force?*, NAT'L PROBATION AND PAROLE ASS'N JOURNAL 377, 381 (1956) [now CRIME AND DELINQUENCY].

236. CODIGO DE DEFENSA SOCIAL art. 59, §§ A-E (Cuba 1938), reported in Note, *Fines and Fining—An Evaluation*, 101 U. PA. L. REV. 1013, 1025 n.92 (1953).

any other factors affecting his wealth. The income for an individual who chooses not to work is determined with reference to the income he could earn.[237] In accordance with this system, the courts of Sweden could fine a poor person as little as one dollar, while fining a wealthier offender 60 dollars for the same offense.[238] The Swedish statute also provides a minimum fine of five crowns or approximately one dollar.[239]

The day-fine system has proven to be a great success. In 1932, in Sweden, 13,358 persons were in prison for nonpayment of fines. In 1938, after the introduction of the day-fine system, the number had dropped to 4,728. In 1939, after additional reform, the number dropped to 815. By 1946 only 286 persons were imprisoned yearly for nonpayment of fines.[240]

Despite this apparent success, American jurisdictions have not adopted and may not have even considered the day-fine system. The Model Penal Code, for example, in its thorough provision for eliminating imprisonment for nonpayment of fines does not discuss the possibility of any automatic fining systems although it explicitly affirms the principle that fines be proportional to the offender's financial resources.[241] The American Bar Association in its proposals for reforming the fine system, however, has urged that legislatures study the possibility of using automatic fining systems in the United States for certain offenses.[242] A critical study of automatic systems for proportioning fines to the offenders' wealth is beyond the scope of this Comment. In light of the importance of fining to the criminal law, the need for true equality of fines, and the apparent success of the system in other countries, state legislatures should undertake such a study and should give serious consideration to the adoption of the system. If the day-fine or a similar system is not adopted, or if it is not adopted for all classes of offenses,[243] and the court is given

237. *See* authorities cited in notes 238-41 *supra*.

238. T. SELLIN, THE PROTECTIVE CODE, A SWEDISH PROPOSAL 27 (1957).

239. Note, *Fines and Fining—An Evaluation*, 101 U. PA. L. REV. 1013, 1025 n.93 (1953).

240. T. SELLIN, RECENT PENAL LEGISLATION IN SWEDEN 14-15 (1947).

241. MODEL PENAL CODE § 7.02, Art. 302 (Proposed Official Draft 1962).

242. ABA SENTENCING ALTERNATIVES AND PROCEDURES 128-29 (Approved Draft 1968).

243. In Sweden the day-fine system is not used for certain petty offenses, such as drunkenness, nor for motor vehicle violations. T. SELLIN, THE PROTECTIVE CODE, A SWEDISH PROPOSAL 27 (1957). Evidently this is because the system is too cumbersome for use with such frequent offenses. It should be noted, however, that it is particularly important to preserve fairness in the area of minor offenses because the criminal law in this area reaches and thus influences so many people's attitude toward the law. *Cf.* ABA SENTENCING ALTERATIVES AND PROCEDURES 205-06 (Approved Draft 1968).

discretion to determine the amount of the fine, sentencing statutes should explicitly state that once the relative severity of the punishment has been determined, fines should be set in light of the offender's means and the probable impact that the fine will have on his financial condition. In no case should an offender be fined beyond his ability to pay.[244]

To make fines proportional, the courts must make an inquiry into the defendant's financial status.[245] Although this might at first seem to impose an excessive burden on the courts, the bail experiments of New York's Vera foundation have demonstrated that the relevant information could probably be assembled in a matter of minutes. Under the Vera procedures, employees of the criminal court's probation department question each defendant as he awaits his appearance before the judge and prepare a short form pre-sentence report. The officers may quickly check by phone to determine the truth of the offender's answers.[246] If the court overestimates a defendant's wealth, it should be possible for the offender to challenge the court's conclusion by presenting more convincing evidence.[247] If, on the other hand, the defendant is found to have misrepresented his financial condition he should be liable for additional punishment.[248] In all cases the offender should have the right to petition the court for reduction or remission of the fine on the grounds that there has been

244. ABA SENTENCING ALTERNATIVES AND PROCEDURES 122-23 (Approved Draft 1968); MODEL PENAL CODE § 7.02(3)(a) (Proposed Official Draft 1962); JOINT STATE GOVERNMENT COMM'N, PROPOSED CRIMES CODE FOR PENN. § 608(c)(1) at 88-89 (1967); N.Y. CODE CRIM. PROC. § 470-d(3) (McKinney 1958), *as amended*, N.Y. Laws 1967, ch. 681, § 61; PILOT INSTITUTE ON SENTENCING, 26 F.R.D. 231 (1959).

245. ABA SENTENCING ALTERNATIVES AND PROCEDURES 125-26 (Approved Draft 1968): "Since fines should be imposed only on those with the ability to pay, the prelude to imposition of a fine must be an investigation into the resources of the defendant, his other obligations and the impact which a fine will have on his financial situation. Part of this same inquiry should involve a consideration of whether a fine could be paid on an installment basis. Compliance with both subsection (c)(i) and (c)(ii) [requiring consideration of financial situation and possibility of installments] should also put the court in a position to assure itself that, even though the defendant could barely pay, a fine would not have a disproportionate impact."

246. PRESIDENT'S COMM'N ON LAW ENFORCEMENT AND THE ADMINISTRATION OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY 131-32 (1967).

247. It may be necessary for the legislature to limit this right somewhat. For example, it could provide that in all cases of a fine over $30 there is a right to a full hearing, but that in cases involving smaller fines the hearing would be discretionary with the judge or would be restricted to a brief oral presentation without benefit of counsel. However, the legislature should only adopt such a plan if it seems absolutely necessary.

248. This seems advisable because it will help the judge to obtain honest answers into his inquiries into the financial situation of the offender. He could warn each offender that there is a punishment for false answers.

a significant change in his economic circumstances which renders the fine excessive.

B. Delayed and Installment Payment of Fines

The use of delayed payments or installment payments is a fundamental requirement of any fair and effective fine system. Delayed payments allow offenders a fixed period within which to pay a fine. Installments allow them to pay over a long period of time.

Since the indigent often have only small savings, their ability to pay fines may fluctuate greatly from day to day. If the court fines an indigent the day before he receives a periodic pay check or shortly after he incurs a large expense he may be able to pay a fine of only a few dollars. Consequently, if the court does not use installment payments and only fines the poor what they can pay at the time of sentencing, it will frequently fine too lightly for the necessary deterrent effect. If the court fines more heavily, but still does not allow delayed or installment payments, the result will be imprisonment for nonpayment.

Delayed payments may be very important even for the affluent offender. In 1962 the *New York Herald Tribune* reported a number of case histories of affluent defendants fined in small amounts who were imprisoned simply because they did not have sufficient cash to pay their fines all at once.[249] Had the court allowed them twenty-four hours to pay, so that they could have gone home to get their wallets, many could have paid and could have avoided imprisonment. In response to this article and the ensuing public outcry, the courts of New York City adopted a rule allowing offenders 48 hours to pay a fine.[250] It appears that as a result of this single provision, the number

249. New York Herald Tribune, July 5, 1962, at 1, col. 4:

> April 11, 1962—Robert E. Golden . . . a public relations man and a law-school graduate, appeared at Chief Magistrate's Term Court at 100 Centre St. in the morning in answer to a citation for a traffic offense a year before. His offense is termed "crosswalk," meaning he had stopped his car beyond the building line when discharging a passenger at the subway.
>
> At 2:15 p.m. the verdict was $25 or two days in jail. He had $18 and a checkbook with him but his check was refused. Instead he was fingerprinted and put in a cell with about 40 prisoners. His offer to the other prisoners to sell his $100 watch for the $7 he needed to get out was greeted with laughter: "If I had $7, I wouldn't be in here," was the rejoinder.
>
> Soon afterward he was manacled to another prisoner and taken to the Tombs because court had closed for the day. There he was held until 6:15 p.m. when he was released.

250. RUBIN, *supra* note 69, at 256 n.174.

of imprisonments in the city for nonpayment of fines dropped by approximately 10,000 individuals per year.[251]

Delayed and installment payments have their respective advantages. A short term delay in payment would enable a great many offenders to obtain the cash to pay their fines without involving the courts in the administrative difficulties of installment payments. The simplicity of the short term delay, however, is counterbalanced by its inflexibility. If the courts adopt a very short delay period it will be of little help to the poorest defendants. If they adopt a long delay, for example one month, offenders will be without any punishment at all for a long period. Installment payments, on the other hand, while involving more work on the part of the court, enable indigent offenders to pay even substantial fines without postponing the entire punishment of relying on the offender's ability to save the entire amount of the fine.

Clearly the use of installment payments of fines requires more work for the court clerks. However, it appears likely that the increased collection of fines and the saved cost of imprisonment would easily offset this additional work and expense. In New York City, for example, it would cost between 25 and 55 dollars to imprison an offender for one week.[252] It is probable that the administrative costs of collecting one weekly installment from such an offender would be small compared to the total cost of the imprisonment.[253]

It may be objected that the use of installment payments would lessen the deterrent effect of fines because the fine would be less burdensome. This conclusion is doubtful. Assuming that a court should only fine an indigent offender an amount he can pay, it may fine him a larger amount if it allows installment payment than if it requires payment all at once. Moreover, it seems likely that the periodic installment payment would serve as a frequent reminder of the offense and thereby increase the fine's overall deterrent effect.[254]

The merits of installment or delayed payments are widely

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251. These figures represent the number of commitments to prison in New York City for the years 1960-64 for nonpayment of a fine (imposed as the sole sanction) for a summary offense: 1960, 23,307; 1961, 25,879; 1962, 26,412; 1963, 16,742; 1964, 16,820. See authorities cited in note 86 *supra*.

252. See RUBIN, *supra* note 69 at 253 n.154.

253. *Cf.* Binford, *Installment Collection of Fines by a County Court*, 67 AMER. PRISON ASS'N 361, 364-66 (1937). This judge, who did not have a probation officer, was able to administer fines on the installment system to all his offenders. He concluded not only that the system could keep 99 percent of all fined offenders out of prison, but pay many times over the costs of the officers to administer it. *See id.* at 365, 366.

254. It is also argued that the fine is most effective if it reduces the offender's standard of

recognized. At least 14 states[255] and many foreign jurisdictions[256] allow installment payment of fines. England requires courts to allow at least seven days for the payment of any fine.[257] The recent proposals of the American Law Institute[258] and the American Bar Association[259] as well as the writings of numerous authors[260] all support the expanded use of installment payment of fines.

The proposals of most commentators, however, appear deficient in two respects. First, they ignore the distinct advantages of the delayed payment. Second, they give the courts unlimited discretion to refuse an offender permission to pay a fine in installments. This appears to be unwise. Statistics from England have shown that if installment payments are to be effectively used statutes must sharply restrict the discretion of the sentencing courts to refuse permission to pay in installments.[261] In all probability, the same is true in American jurisdictions today. This Comment proposes a two-fold approach which combines the advantages of the short term delayed payments with those of installment payments, while restricting somewhat the

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living over a period of time. This is only possible with installments. TUBINGER FESTSCHRIFT FUR EDUARD KERN 41 (Rechts- und Wirtschaftswissenshaftlichen Fakultat der Universitat Tubingen 1968).

255. ABA SENTENCING ALTERNATIVES AND PROCEDURES 121-22 (Approved Draft 1968) cites the following jurisdictions: CAL. PEN. CODE § 1205 (West. Supp. 1966); DEL. CODE ANN. tit. 11, 4332(c) (Supp. 1966); N.Y. CODE CRIM. PROC. § 470-d(1)(b) (McKinney Supp. 1967); MD. ANN. CODE art. 52, § 18 (Supp. 1966); MASS. GEN. LAWS ANN. ch. 279, § 1A (1959); MICH. STAT. ANN. § 28.1075 (1954); N.J. REV. STAT. § 2A:166-15 (1953) (misdemeanors); OHIO REV. CODE ANN. § 2947.11 (1954) (misdemeanors); PA. STAT. ANN. tit. 19, § 953-56 (1964); S.C. CODE ANN. § 55-593(6) (1962) (fine as condition of probation); UTAH CODE ANN. § 77-35-17 (1953) (fine as condition of probation); WASH. REV. CODE ANN. § 9.92.070 (1961); WIS. STAT. ANN. § 57.04 (Supp. 1967) (fine as condition of probation); WYO. STAT. ANN. § 7-322 (1959).

256. M. HASSAN, L'AMENDE PENALE DANS LES DROITS MODERNES ET SPECIALEMENT DANS LE CODE PENAL SUISSE 170-71 (Geneva 1958).

257. Money Payments (Justices Procedure) Act of 1935, 25 & 26 Geo. 5, ch. 46. *See* Craven, *Criminal Justice In England*, 27 CAN. BAR. REV. 1111, 1113-14 (1949).

258. MODEL PENAL CODE § 302.1(1) (Proposed Official Draft 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.").

259. ABA SENTENCING ALTERNATIVES AND PROCEDURES § 2.7(b) (Approved Draft 1968) ("The court should be explicitly authorized to permit installment payments of any imposed fine, on conditions tailored to the means of the particular offender.").

260. *See, e.g., Miller, The Fine—Price Tag or Rehabilitative Force?*, 2 NAT'L PROBATION AND PAROLE ASS'N J. [now CRIME AND DELINQUENCY] 377, 382 (1956); PRESIDENT'S COMM'N ON LAW OBSERVANCE AND THE ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: THE COURTS 18 (1967); RUBIN, *supra* note 69, at 255; E. SUTHERLAND, PRINCIPLES OF CRIMINOLOGY 572 (4th ed 1947), and other authorities cited in note 95 *supra*.

261. The Summary Jurisdiction Act of 1879, 42 & 43 Vict., ch. 49, § 7, first permitted English courts, when imposing fines, to allow time for payment, to authorize payment by installment, to take security for payment, or to suspend collection of the fine subject to

discretion of the court to refuse deferred payment. First, for all offenders the court must allow 48 hours to pay a fine. Second, in any case where the defendant reasonably establishes his inability to pay within 48 hours of sentencing, the court must either permit the defendant to pay in installments appropriate to his means or reduce the amount of the fine, or both. This combination of mandatory provisions for delayed and installment payments would make it possible for virtually all offenders to pay their fines while imposing only a small additional burden on the courts.

C. The Response To Nonpayment

State law should prohibit sentences of "fine or imprisonment."[262] They should require sentencing courts to determine the response to nonpayment only after the reason for the nonpayment is known. No one response is appropriate for all those who fail to pay fines.[263] If the failure to pay is due to the excessiveness of the installment payments, then the court should reduce the amount of the installments. If it is due to a sudden economic reversal or unexpected expense of the defendant, then the amount of the fine itself should be reduced. If on the other hand, the failure to pay is due to wilfulness on the part of the defendant, the court should punish the offender for contempt.[264]

The American Law Institute has proposed that upon nonpayment of the fine or any installment thereof the court may issue an order to show cause why the defendant's default should not be treated as contumacious.[265] Through this order the court can most easily obtain

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conditions. However, the courts did not take advantage of these provisions. Although the Home Office issued a lengthy circular in 1905 reminding courts of the serious hardships which would result from failure to use these provisions, the number of imprisonments for nonpayment of fines remained approximately constant. Then, in 1914, the Criminal Justice Administration Act made it mandatory for judges to allow at least seven days for payment of any fine. Following the enactment of this provision the number of commitments for nonpayment dropped from an average of 83,187 for the years 1909 to 1913 to an average of 13,433 for the years 1925 to 1930. *See* Cordes, *Fines and Their Enforcement*, 2 JOURNAL OF CRIMINAL SCIENCE 46, 47-49 (1950).

262. ABA SENTENCING ALTERNATIVES AND PROCEDURES 127 (Approved Draft 1968).

263. *Id.*; RUBIN, *supra* note 69, at 254.

264. *See* MODEL PENAL CODE § 302.2(1) (Proposed Official Draft 1962).

265. MODEL PENAL CODE § 302.2(1) (Proposed Official Draft 1962). The American Bar Association, while agreeing with the substantive provisions of the Model Penal Code, feels that there should be no such analogy to contempt because it might bring with it other aspects of the contempt sanction which would be "undesirable" in this context. ABA SENTENCING ALTERNATIVES AND PROCEDURES 289 (Approved Draft 1968). The ABA purposes instead that the court simply have the power to modify the amount of the fine and the payment conditions if the default is "excusable." *Id.* at 284. This approach suffers from the defect that the offender's liberty turns on the vague standard of "excusability." In an area where discrimination on the basis of poverty and possibly other bases is prevalent it seems wise to have definite standards which restrict the court's power and put offenders on clear notice of their rights.

the information necessary to determine the appropriate response to nonpayment. Since the offender's liberty may be at stake, he should have an opportunity to present testimony in his behalf and, if he is unable to afford counsel, the court should appoint counsel for him.

If the offender fails to establish that his default was nonwilful or that he made a good faith effort to pay, then the court may consider his nonpayment as contumacious. Since short term imprisonment has such doubtful value, the courts should carefully consider possible alternative punishments such as an additional fine before imposing a jail term for wilful nonpayment. If it decides, however, that imprisonment is necessary, then it should impose a definite term of imprisonment proportioned to the gravity of the wilful nonpayment, and not keyed to the amount of the fine which the offender refused to pay.[266] Since the imprisonment is for contumacious nonpayment, it should not discharge liability for the fine. Rather the court should employ civil means to collect the fine.[267]

If in response to the order to show cause the offender establishes that he was unable to pay the fine or the installment, or if he establishes that he made a good faith effort to pay, the court should have no authority to imprison him. Rather the court should carefully tailor its response to remedy the cause of default. It should remit all or a portion of the fine, alter the terms of the installment payments, or both.[268] Through these means the court should and can effectively enforce the criminal law while avoiding imprisonment of the poor for nonpayment of fines.

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266. See ABA SENTENCING ALTERNATIVES AND PROCEDURES 284-85 (Approved Draft 1968).

267. Both the American Law Institute and the American Bar Association disagree in part. Although authorizing collection by civil means, they provide that service of the term of imprisonment discharges liability for the fine. MODEL PENAL CODE § 302.2(1) (Proposed Official Draft 1962); ABA SENTENCING ALTERNATIVES AND PROCEDURES 285 (Approved Draft 1968). This approach appears both anachronistic and inconsistent. If the term of imprisonment is not a punishment for the original offense, but a punishment for wilful default, then there is no logical reason to discharge liability for the fine. To do so would be to leave either the original offense or the contempt of court unpunished. The attitude of these proposals seems to hark back to the notion that the poor should be punished by a different type of punishment than the affluent, which the proposals themselves purport to reject.

268. ABA SENTENCING ALTERNATIVES AND PROCEDURES 284-85 (Approved Draft 1968); MODEL PENAL CODE § 302.2(2) (Proposed Official Draft 1962); NEW YORK CODE OF CRIMINAL PROCEDURE § 470-d(3) (McKinney Supp. 1967). The New York Code makes alteration of the sentence mandatory if the offender establishes his inability to pay. *Id.* Unfortunately, however, it gives the court power to impose any sentence it could have imposed at the original sentencing. This appears to invite the substitution of the prison term, which, since it was imposed at a second sentencing, would be relatively difficult to attack on equal protection grounds.

CONCLUSION

Sentences of fine or imprisonment are as old as the common law itself. However, when an ancient legal practice ceases to effect the objectives it is designed to achieve, and when its unconstitutionality becomes clear, no long history of its application can justify its retention.[269] Today, when we have the means and knowledge to achieve reform, and when all the machinery of the law is moving toward a more effective and more equal justice, the legislatures and the judicial system should end imprisonment of the poor for nonpayment of fines.

Derek A. Westen

269. *See* Malloy v. Hogan, 378 U.S. 1, 5, 84 (1964); Brown v. Board of Education, 347 U.S. 483, 492-95 (1954); Erie R.R. v. Tompkins, 304 U.S. 64, 77-78 (1938); *In Re* Anderson, 69 Adv. Cal. 638, 667, 447 P.2d 117, 136, 73 Cal. Rptr. 21, 40 (1968) (Tobriner, J., dissenting).