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Imprisonment Of Indigents For Non-Payment Of Fines: Equal Protection Or Substitute Punishment?

Morris v. Schoonfield

INTRODUCTION

In still another chapter in the continuing drama of the wayward indigent, a three judge panel of the United States District Court for the District of Maryland ruled in Morris v. Schoonfield that indigents cannot automatically be incarcerated for their inability to pay fines and costs. The court's ruling requires that indigents be given a hearing at which they are afforded the opportunity of informing the sentencing judge of their indigency. If, after learning of the defendant's indigency, the judge desires to allow the sentence of a fine to stand, the impecunious wrong-doer may be incarcerated in the local gaol in accordance with the statutory scheme. While the court's solution to this perplexing problem is novel, it falls short of assuring equality in sentencing between the rich and the poor, and seemingly fails to comport with the dictates of the equal protection clause of the Constitution.

The use of imprisonment for the non-payment of fines has long been practiced. Originating in twelfth century England, the practice has become an integral part of the administration of criminal justice in the United States. Today, a large portion of the people incarcerated throughout the United States are in jail for default in the payment of fines. Courts have generally adhered to the notion that the imprisonment resulting from the non-payment of a fine is not punishment, but merely a device to coerce payment, although these courts have not been able to satisfactorily explain away the time-worn cliche about squeezing blood from turnips when applying such statutes to indigents. While the explanation of imprisonment as a means to coerce payment of fines appears rational in the abstract, it makes little or no sense when the failure to pay a fine results from an inability rather than a refusal to pay.

The Maryland provisions for imprisonment for non-payment of fines contained in article thirty-eight of the Maryland Annotated Code are similar to those found in other states. Section one of that article is the basic authority for imprisonment in default of payment of fines and costs. Section four sets forth the rate of confinement of two

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2. Id.
7. Md. ANN. CODE art. 38, § 1 (1965): "... If any person shall be adjudged guilty of any ... offense by any court having jurisdiction in the premises, he shall
dollars per day and prescribes various maximum periods of confinement for certain fines.  

**EQUAL PROTECTION**

The most persuasive argument against the use of such statutes in the case of the indigent defendant is found in the equal protection clause of the Constitution. The use of this clause in eliminating economic differences in the criminal process was spearheaded by the Supreme Court's decision in *Griffin v. Illinois*. In *Griffin*, the Court held that an indigent must be provided a free trial transcript for use in preparing an appeal where his indigency prevents him from obtaining one otherwise. *Griffin* represented a new approach under the equal protection clause of the fourteenth amendment, requiring state governments to promote economic equality in the criminal process.

Writing for the majority, Mr. Justice Black succinctly concluded: "There can be no equal justice where the kind of trial a man gets depends on the amount of money he has. Destitute defendants must be afforded as adequate appellate review as defendants who have money enough to buy transcripts."

The intended result of *Griffin* is to ban economic discrimination at all stages of the criminal process. The principle of economic
equality behind *Griffin* has been used successfully to secure expert
witnesses necessary for the adequate defense of an indigent, to provide counsel for indigents charged with serious crimes, and to reimburse an indigent’s counsel for expenses incurred in investigating crimes. Thus, economic disabilities have been theoretically eliminated in all but two important areas — bail and sentencing — the *alpha* and *omega* of the criminal process.

The first attempt to apply the *Griffin* doctrine of equal protection to the case of an indigent confined solely because of his inability to pay a fine is found in *United States ex rel. Privitera v. Kross*. There petitioner had been sentenced to thirty days in jail and a $500 fine, with an additional sixty days in default of payment of the fine. After his unsuccessful attempts in state courts to have the fine set aside, he brought habeas corpus proceedings, alleging *inter alia*, that the additional imprisonment resulting from his inability to pay the fine was a violation of the equal protection clause. Pointing out that he had received less than the maximum authorized imprisonment of one year, and noting the judge’s discretion in tailoring a sentence to the individual defendant, the court rejected his claim. No different result was required by *Griffin*. Even if it were, petitioner would have to be remanded for resentencing at which time the judge would be free to impose a straight term of ninety days or more. Despite this denial of relief, the court noted that a different question would be presented where the resulting imprisonment for the non-payment of a fine exceeded the maximum imprisonment authorized for the offense.

This latter fact situation arose shortly in *People v. Collins*, in which defendant had been sentenced to both the maximum jail sentence and a fine. On appeal, defendant contended that his imprisonment violated his rights under the eighth and fourteenth amendments. The court rejected defendant’s eighth amendment claim with little discussion but found that his fourteenth amendment claim had merit.

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17. While an extensive discussion of bail is beyond the scope of this note, it is appropriate to point out the possible use of the equal protection clause in holding bail to be unconstitutional in certain cases of indigents. See Bandy v. United States, 81 S. Ct. 197 (Douglas, Circuit Justice, 1960): To continue to demand a substantial bond which the defendant is unable to secure raises considerable problems for the equal administration of the law. We have held that an indigent defendant is denied equal protection of the law if he is denied an appeal on equal terms with other defendants, solely because of his indigence. . . Can an indigent be denied freedom, where a wealthy man would not, because he does not happen to have enough property to pledge for his freedom? It would be unconstitutional to fix excessive bail to assure that a defendant will not gain his freedom. . . Yet in the case of an indigent defendant, the fixing of bail in even a modest amount may have the practical effect of denying him release. 

*Id.* at 197-98 (citations omitted).


19. 239 F. Supp. at 121.

20. *Id.*

The court had little difficulty in reaching the conclusion that the additional imprisonment caused by defendant's inability to pay the fine violated the equal protection clause since it discriminated between indigents and non-indigents. The court's rationale in *Collins* was two-pronged. First, the man of means has the wherewithal to limit the amount of time he must spend in jail to the one year maximum. An indigent, though willing to pay, cannot so limit his term of imprisonment to the maximum confinement authorized by the statute. Secondly, because the purpose of the additional imprisonment is to coerce payment of the fine, an exception must be made for those who are unable and thus uncoercable.  

Although *Griffin* was not discussed, the court's decision in *Collins* is an obvious extension of the *Griffin* rationale of equal justice for those in unequal circumstances. "To hold otherwise would add one more disadvantage which the law will place upon the defendant without the money in his pocket to pay his fine, although the quality of their conduct has been the same and although their intention to pay the fine has been the same." It is interesting to note, for purposes which will be discussed later, that the court stated that the fine itself was not invalid and that the state could enforce it like an ordinary civil judgment.  

The problem of the indigent defendant who faced additional imprisonment beyond the statutory maximum by virtue of his inability to pay a fine was not laid to rest in New York by *Collins*. Lower court decisions subsequently divided on the issue. In *People v. Johnson*, the court reached a result similar to *Collins* by merely noting that the additional punishment caused by non-payment of the fine was excessive. A concurring opinion would have rested the decision on the equal protection clause. In *People v. Redman*, the court refused to distinguish this situation from that in which the imprisonment for non-payment of a fine did not exceed the maximum authorized confinement. The court ignored the decisions in *Collins* and *Johnson* and looked to the federal court's decision in *Privitera* in denying relief.  

This division of authorities set the stage for the New York Court of Appeals' decision in *People v. Saffore*. Faced with a situation identical to *Collins*, *Johnson*, and *Redman*, the court held 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 . . . violates the
defendant's right to equal protection of the law. . . ."²⁹ Not only did
the court find that imprisonment of those who were unable to pay
ran contra to the statute, but it also found that it is "an illegal method
of requiring imprisonment far beyond the maximum term."³⁰ With
the exception of two recent cases in the United States District Court
for the District of Maryland, equal protection as a device to prohibit
the incarceration of those unable to pay fines had reached its high-
water mark.³¹

Following the riots in Baltimore in April 1968, renewed attacks
were made on the Maryland procedures for confining indigents who
defaulted in payment of fines and costs.³² Kelly v. Schoonfield³³ was
a class action filed by various persons who had been convicted of
curfew violations during the riots. Two petitioners were sentenced
to fines of one hundred dollars and four dollars costs and four were
sentenced to fines of fifty dollars and costs of four dollars. Inasmuch
as petitioners were indigent and unable to pay their fines and costs,
they were incarcerated in accordance with the statutory scheme for
non-payment.³⁴ Petitioners sought a declaratory judgment that article
38, sections one and four, were unconstitutional when applied to peti-
tioners and others similarly situated solely as a result of their inability
to pay fines and costs.

The court first found petitioners' claim of a violation of the eighth
amendment prohibitions against "excessive fines" and "cruel and un-
usual punishment" to be without merit. Citing United States ex rel.
Privitera v. Kross,³⁵ the court pointed out that petitioners were not
being incarcerated for a longer period than the maximum permissible
straight jail sentence.³⁶

²⁹. 218 N.E.2d at 688, 271 N.Y.S.2d at 975.
³⁰. Id. at 687, 271 N.Y.S.2d at 974.
³¹. While no cases go beyond Saffore to prohibit any imprisonment of an indigent
for non-payment of a fine, there have been other cases which reached the same result
where the maximum jail term would be exceeded. E.g., Sawyer v. District of
³². Previous attacks on the validity of the Maryland procedures for imprisonment
for non-payment of fines had been unsuccessful. See, e.g., Warden v. Drabic, 213 Md.
438, 132 A.2d 111 (1957) (where more than one fine is imposed, the fines shall not be
totaled for the purpose of determining the resulting imprisonment for non-payment,
but each fine shall be served separately); Cohen v. State, 173 Md. 216, 195 A. 532
(1937) (fine of $5000 and the resultant imprisonment for non-payment were not
cruel and unusual punishment notwithstanding the hopelessness of defendant ever
paying); Callahan v. State, 163 Md. 298, 162 A. 856 (1932) (provisions of art.
38 are read into sentence of fine so as to make the term of imprisonment for non-
payment definite and certain); Dean v. State, 98 Md. 80, 56 A. 481 (1903) (commit-
ment for non-payment of fine is valid even though statute violated provides only for
money fine). It should be noted that the grounds for decision in these cases were
statutory and not constitutional.
³⁴. At this time, prior to the July 1, 1968 amendment to art. 38, § 3, the rate of
imprisonment was one day for each dollar of fines and costs. Md. Ann. Code art. 38,
§ 4 (1965).
³⁵. 239 F. Supp. 118 (S.D.N.Y.), aff'd per curiam, 345 F.2d 533 (2d Cir.), cert.
denied, 382 U.S. 911 (1965).
³⁶. 285 F. Supp. at 735. The court also distinguished cases relied upon by peti-
tioners, wherein offenses which in fact were "diseases" were set aside as "cruel and
The court also rejected petitioners' contention that imprisonment of indigents for non-payment of fines violated the equal protection clause. The court recognized that "... it cannot be doubted that most persons who have defaulted in the payment of fines have done so because they were unable rather than unwilling to pay." However, the court noted, not all discriminatory legislation is invalid. "... legislation may impose special burdens upon defined classes in order to achieve permissible ends" so long as "the distinctions that are drawn have 'some relevance to the purpose for which the classification is made.'" The court then found that article thirty-eight possessed such relevance to its purpose:

The commitment of convicted defendants who default in the payment of their fines, whether from inability or unwillingness to pay, imposes a burden on a defined class to achieve a permissible end in which the State has a vital interest; i.e., 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 from committing such offenses in the future.

The court's holding in Kelly represents a complete departure from the firmly established notion that the purpose of these statutes is not punishment but a means of coercing payment. The court's decision also seems to be directly opposite to the intent of the drafters of the original Maryland statute upon which article thirty-eight was based. The title of this act appears to be a clear expression of the legislature's intent that the statute was designed as a collection device.

While the court found that confining an indigent for the non-payment of a fine was not unconstitutional, the court did however make a distinction between fines and costs. The court first pointed out that costs were not made a part of the penalty of the statute violated by petitioners in Kelly. Indeed, costs were seldom made a part of the penalty in criminal statutes in Maryland. The court then noted the divergent practices of the trial courts in the treatment of costs. Where a straight jail sentence was imposed, costs were not included in the sentence. However, when a fine was imposed, the courts generally included costs which increased the amount of time to be served in default of payment. The requirement that time be served for costs when the sentence was a fine, rather than a straight jail term was, reasoned the court, a violation of the Supreme Court's mandate in unusual punishment. See, e.g., Robinson v. California, 370 U.S. 660 (1962) (conviction for being a drug addict); Driver v. Hinnant, 356 F.2d 761 (4th Cir. 1966) (alcoholic convicted of public drunkenness).


38. Id. at 736-37 (citations omitted).
39. Id. at 737.
40. See note 6 supra and accompanying text.
41. The original act was entitled "An ACT to direct in what manner all fines, forfeitures, and penalties, shall be recovered, and in what manner fines, forfeitures, penalties, and amercaments shall be applied." Act of February 8, 1777, ch. VI, [1777] Maryland Laws.
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Thus, the practice was an invidious discrimination which violated the equal protection clause.

Although the court's reasoning concerning the imprisonment for non-payment of fines is objectionable, its result concerning imprisonment for the non-payment of costs is laudable as a preliminary step in Maryland toward equal protection in sentencing. The decision was hopefully to have a significant impact on the average number of persons confined for non-payment and on the length of time that an individual would be incarcerated. Since the period of time that one is required to serve is computed by lumping fines and costs together, the imposition of a few dollars costs could significantly increase the sentence of one who defaulted in payment. Because the statute provides a maximum period of confinement of thirty days for a hundred dollars of unpaid fines and costs and a maximum of sixty days for fines and costs between a hundred dollars and $500, the addition of four dollars in costs to a hundred dollar fine would increase the period of confinement from thirty to fifty-two days.

Following the court's decision in Kelly, a second suit was filed in the district court challenging the constitutionality of sections one and four of article thirty-eight. In this action, Morris v. Schoonfield, petitioners had been convicted of various minor offenses and fines were imposed as punishment. Petitioners were also ordered to pay costs. Being indigent and unable to pay, petitioners were incarcerated in the Baltimore City Jail in accordance with the statutory scheme. Petitioners brought suit alleging that the automatic application of the sections in question to indigents violated the "excessive fines" and "cruel and unusual punishment" provisions of the eighth amendment and the "due process" and "equal protection" clauses of the fourteenth amendment as well as the "involuntary servitude" prohibition of the thirteenth amendment.

The court first turned to the question of costs which had previously been ruled upon in Kelly. The court noted that upon the stipulated facts, notwithstanding its earlier decision in Kelly, widely divergent practices continued to exist throughout the state concerning imprisonment for non-payment of costs. The court held that, upon such stipulated facts, the state could not constitutionally include such costs for purposes of computing time to be served under article thirty-eight, section four. The court did not declare the imprisonment for non-payment of costs to be unconstitutional per se but merely stated that the non-uniform application throughout the state prohibited their being used in computing time to be served. Thus, the court neatly dodged the issue of whether one could ever be confined for costs where such

42. 384 U.S. 305 (1966).
44. Since Kelly was decided when the dollar per day rate was in effect, imposition of four dollar costs to a hundred dollar fine meant that the person was confined for sixty days instead of thirty days, or exactly double.
46. In an earlier case, Dillehay v. White, 264 F. Supp. 164 (M.D. Tenn. 1966), it was held that imprisoning indigents to work out jail fees which accrued during pre-trial detention was a violation of equal protection.
47. 301 F. Supp. at 161 n.2.
costs were not a statutory part of the punishment. Recent cases that have faced this question have concluded that such imprisonment is a violation of the involuntary servitude provision of the thirteenth amendment since the costs were not a part of the punishment for a crime.48

The court next addressed itself to the constitutionality of jailing indigents for the non-payment of fines. It quoted with approval its earlier language in *Kelly* in which the court found a relationship between the class defined and the purpose of the statute. Although the court admitted that the two dollars per day rate was low, and that a better ratio might be devised, it did not find the statute unconstitutional on its face. In fact, it found that the low dollar-to-jail ratio suggested a two-fold purpose to the statute: to provide a substitute punishment for those who cannot pay and to *coerce* those who could pay to do so. The court clearly indicated that if the statute's *only* purpose were to coerce payment it might run into constitutional problems when applied to indigents: "The use of compulsion to pay a fine in the case of a non-indigent is constitutionally permissible, but the *imposition of such compulsion on an indigent defendant might well violate the equal protection clause of the Fourteenth Amendment."49

Thus, *automatic* application of sections one and four to an indigent would seem to be unconstitutional,50 since one of the purposes would be coercion of indigents. However, the court later opined, the constitutionality of the statute would be saved if the indigent were given the opportunity to inform the sentencing judge of his inability to pay the fine. Such a hearing would enable the judge to take defendant's indigency into account by tailoring the fine to the particular defendant, permitting installment payments, or reducing the period of confinement in the event of default. The judge might, if he were so inclined after such a hearing, permit the original fine to stand: "If this is done, it will be clear that the commitment reflects only the substitute punishment for the crime, the imposition of which would not deprive an indigent defendant of the equal protection of the laws."51

The court's approach to the problem is unique. It appears to be striking a blow for equal protection by recognizing that the *automatic* application of the statutes to indigents might violate the equal protection clause. It then turns around, however, and seizes upon the substitute punishment theory which it first advanced in *Kelly* a year earlier to find a way out of this dilemma. By calling the resulting imprisonment a substitute punishment, all could be solved by providing the indigent with a hearing in which the coercive force of the statute is magically transformed into a substitute punishment. The court's

49. 301 F. Supp. at 163 (emphasis added).
50. A technical reading of the court's language would be that the court assumes without deciding that such imprisonment would be unconstitutional. It is submitted that the court actually decided that such automatic application of the statutes in question to indigents was *in fact* unconstitutional. Any other reading would make the court's later discussion of hearings superfluous *dictum*.
51. 301 F. Supp. at 163.
attempt at a solution to the problem is as unsatisfactory as it is novel. Neither the coercion theory nor the substitute punishment theory comports with the equal protection clause as viewed in Griffin.

Statutes providing for the imprisonment of persons who default in the payment of fines pre-date our Constitution. It has long been held that the purpose of such statutes is to coerce payment from the recalcitrant offender. While such statutes have withstood numerous attacks, many of which were on constitutional grounds, most such attacks pre-date the more refined view of equal protection found in Griffin. It is submitted that, in light of the obvious result required by the broad scope which has been given Griffin, to now ascribe to the legislature a second purpose in order to save the statute is to engage in constitutional dishonesty. The original Maryland statute was passed nearly a hundred years before the equal protection clause became a part of the Constitution. The statute, in its original form, could not have been passed with equal protection in mind and it is unlikely that the legislature also had the noble second purpose that the court ascribes to it, which happens to coincide with notions of equal protection 190 years later.

The substitute punishment theory requires a re-examination of Mr. Justice Black's words in Griffin recognizing that "[t]here can be no equal justice where the kind of trial a man gets depends on the amount of money he has." The spirit of Griffin and its progeny indicate that the word "trial" should be read broadly to encompass the entire criminal process. Indeed, the spirit of Griffin may be at the threshold of securing new rights for indigents in non-criminal areas. It should not then be too great a perversion of Mr. Justice Black's words to say "there can be no equal justice where the kind of punishment a man gets depends upon the money he has." When two men commit the same offense and one man who can pay a fine goes free while the other who cannot goes to jail, surely the kind of punishment has been determined by the amount of money they have.

While, as the court indicated, the judge may change the sentence after learning of defendant's indigency in a Morris hearing, he is not required to do so. He may allow the original fine intact, thus making the determination that the statutory scheme provides an appropriate substitute punishment. Thus, the constitutionality of the statute in each case is dependent upon proper administration by the trial judge. Such reliance, however, runs afoul of Supreme Court decisions which have held that when an unconstitutional statute must rely on

52. 351 U.S. 12, 19 (1956).
53. See notes 11-17 supra and accompanying text.
"benevolent administration" by government bodies to make it constitutional, such reliance is a violation of equal protection.55

SUBSTITUTE PUNISHMENT

If the equal protection clause permits different albeit substitute punishments, based on one's financial status, then the very nature of the clause should demand that the substitute punishments be equal. Equal protection simply should not tolerate inequality. In order to evaluate the substitute punishment theory in terms of the equal protection clause, an examination of the two sentences, jail or fine, is appropriate.

Jail is generally thought of as a harsher penalty than the payment of a fine.56 It is doubtful that many people with the ability to pay a fine would choose the alternative of jail as the lesser of two evils. In addition to the obvious loss of liberty, several reasons exist why people would not make this choice. A jail term, without doubt, carries a much greater social stigma than does the payment of a fine. It is even submitted that in the eyes of many laymen, one who is sentenced to the payment of a fine is not considered a criminal, whereas one who must "do time" is. Thus, one who in fact has the choice to pay or not to pay will normally select the former. To choose otherwise would cause his family unnecessary embarrassment and perhaps jeopardize the person's present or future standing in the labor force.

One cannot seriously contend that two dollars is the equivalent of a day in jail. Courts themselves have been critical of the low rates at which fines are served. The court noted in Morris that "... a ratio of one day to each $2.00 of fine seems to set a very low number of dollars for each day to be served"57 and indicated that a different statute would be preferred. Unfortunately, the court's plea to the legislature has so far fallen on deaf ears.58 Even if the legislature should provide a more realistic conversion factor, the two punishments can in no way be made equal. The intangible factors attached to the stigma of a jail term cannot be measured with sufficient accuracy to say that the punishments are equal. It would seem that both economically and socially, jail cannot be considered the equivalent of a fine.

Assuming that the theory of substitute punishment may in some instances protect the constitutionality of the statute, the statute rears its ugly head in the most objectionable manner when the statute pro-


57. 301 F. Supp. at 162–63. In discussing the basic unfairness of the low rates, Chief Judge Desmond put his judicial finger precisely on the point: "To make it worse, this fine is to be served out at the absurdly low rate of $1 per day in a State where the Legislature has recently imposed a minimum wage of $1.50 per hour." People v. Saffore, 18 N.Y.2d 101, 104, 218 N.E.2d 686, 688, 271 N.Y.S.2d 972, 975 (1966).

58. A bill that would have raised the rate to ten dollars per day passed the Maryland Senate, S. 730, but failed to pass in the House of Delegates.
vides only for a fine as punishment. For certain minor offenses the legislature has declared that violation of the statute is not such a serious occurrence to warrant sending the offender to jail. In such instances, the judge could not send the wealthy offender to jail even if he wanted to do so for he could satisfy the statute by payment of the fine. This is the clearest example of an instance where the amount of money a man has determines the kind of punishment he receives. Nonetheless, the Morris court considered the problem and concluded that sections one and four of article thirty-eight are not unconstitutional in such instances as long as the hearing is provided. 59

A Need For Change — Alternatives

If it should later be held that statutes such as article thirty-eight cannot constitutionally be applied to indigents even though they are given a Morris-type hearing, the legislature will be faced with devising new ways of punishing those who cannot pay a fine. Even if the statutes are not declared unconstitutional, the legislature may nevertheless desire to change the present procedure, for as Mr. Justice Goldberg wrote: “What the equal protection clause of the Constitution does not command, it may still inspire.” 60 Even if the legislature is not persuaded by the statute’s basic unfairness, it may well be motivated by the statute’s economic unfeasibility.

A pertinent inquiry at this point is whether the present system of fining is adequate to do the job intended. In many instances, fines are not an effective deterrent to crime today. Two reasons may be advanced in support of this proposition. In many instances, the fine prescribed for a certain offense was set by the legislature many years ago. The natural erosion of the dollar has devalued many fines to the point of meaninglessness. 61 For example, a ten dollar fine a hundred years ago may have been the equivalent of several days’ or even a week’s work. Today, however, many people can earn that amount in less than half a day. Thus, inflation has lessened the actual sting of the fine.

Similarly, economic differences between offenders causes our present system of fining to have little impact on wealthier offenders. 62 A $500 fine imposed on one earning $5,000 per year is depriving him of ten per cent of his income. The same $500 fine imposed upon one earning $10,000 is only five per cent of his income, and only two and one-half per cent of the income of one earning $20,000. Thus, if the amount of the fine remains constant, the impact that it has on a particular defendant decreases as his wealth increases. A possible solution to this problem could be to fix the amount of the fine in terms of a percentage of income. Thus, a ten percent fine would be $500 for a man earning $5,000 and $1,000 for a man earning $10,000.

59. 301 F. Supp. at 164.
A similar notion has been employed in several countries in the form of "day fines." These fines, which look to the effect rather than the amount of the fine, are expressed in terms of units rather than dollars. The value of each unit is then computed for the particular individual based on such factors as wealth, income, productive capacity, and number of dependents. In this manner, fines are imposed more equitably and, though disproportionate in amount, they tend to produce the same effect on all.

In addition to equalizing the effect of a fine between people of different economic circumstances, day fines have several other advantages. Since such fines are assessed according to a person's theoretical ability to pay based on various factors, there is more likelihood that the fine will actually be paid. Not only might this lead to more revenue to the state but it would also decrease the state's costs of incarcerating those who do not pay. Proportioning fines according to one's ability to pay would also serve as more of a deterrent to the rich who may under the present system look upon the relatively low fine as merely the cost of engaging in an illegal enterprise. Theoretically, punishment should be tailored to have the best effect on the particular individual. Such day fining statutes would literally force tailoring of the sentences to individuals.

One of the most sensible alternatives to automatic imprisonment for non-payment of fines is to permit payment in installments. Many convicted defendants are unable to pay their fines in a lump sum. However, if permitted to pay in installments, they may well be able to eventually pay the entire fine. The use of installment payment of fines has been widely advocated and is permitted in several states. Limited authority exists in Maryland for installment payments.


64. In Sweden, a fine may vary from $0.97 to $6984.00. Note, Fines and Fining—An Evaluation, 101 U. PA. L. REV. 1013, 1025 (1953).


66. See note 71 infra and accompanying text.


69. MD. ANN. CODE art. 52, § 18 (Supp. 1969): Any provision of law to the contrary notwithstanding, in any case where a justice of the peace in and for Queen Anne's, Prince George's, Carroll, Kent and Charles Counties has sentenced a person to pay a fine or costs or both fine and costs, said justice of the peace shall have power, in his discretion, to order that said person pay said fine and/or costs in installments of such amounts and at such times and upon such conditions as said justice of the peace may fix.
ever, to be effective the statute needs a major revision to extend its applicability to the entire state. 70

The advantages of installment payments are manifold. First, and probably most important, it would avoid the evils of short term imprisonment and permit the offender to remain a productive member of society. If the offender has no job, he could be given a reasonable amount of time to find one. The installment system then would not only keep people with jobs out of jail, but would also provide an incentive for those without jobs to secure one.

Installment payments would also directly benefit the public treasury. 71 Not only does the cost of imprisonment exceed the two dollar per day rate at which fines are served, but the state frequently incurs additional expenses in the form of public assistance to the prisoner's family. 72 Beyond the immediate financial benefits to the state are the longer-term social benefits of permitting the man to retain his job and keep his family together.

The mechanism necessary to collect installment payments could be located in one of the state agencies, such as the Probation Department. This department would be required to keep the accounting records and report delinquent payments to the courts. If an offender failed to make his payments, a hearing would be held so that the delinquent offender could explain his non-payment. If his non-payment was caused by his refusal to pay or by his failure to seek employment, the judge would then have the power to incarcerate him at a rate set by the legislature. If his non-payment were a result of circumstances beyond his control the judge could then alter the time or amount of the payments. 73

The traffic offender presents a somewhat easier problem in finding an alternative to imprisonment for non-payment of fines. If a person were unable to pay a traffic fine, his name and other pertinent data could be fed into a computer bank. It would then be a relatively simple task to match applications for automobile registration and driver license renewals with this list of names to determine if the applicant has unpaid fines outstanding. If there is an outstanding fine, his license or registration would not be renewed until the fine is paid. 74

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70. Senate Bill S. 730 would have provided: "Installment payments of fine. — The courts shall have power, in its discretion, in accordance with Article 38, Section 4, to order that any person sentenced to pay a fine shall pay said fine in installments of such amounts, at such times, and upon such conditions as the court may fix. Any of said terms may at any time be revised."

71. The costs to the State of incarceration are not small. The average daily per capita cost of maintaining a prisoner in the Maryland Penitentiary was $4.83 in 1966. Report, Fiscal Year 1966, Maryland Department of Correction 19 (1966). Assuming that this figure, which has surely been increased by inflation, can be applied to the Baltimore City Jail, the cost of maintaining the 167 prisoners confined for non-payment of fines on May 31, 1969, would exceed $800 per day, or more than one quarter of a million dollars per year!

72. For example, under Maryland's Aid to Families with Dependent Children Program which provides assistance to families that have been denied parental support, the average monthly expenditure per family in 1967 was $149.10. Of this amount, thirty-five percent was supplied by state funds. I Public Welfare in Maryland 15 (1968).

73. See note 70 supra.

74. There is presently authority for a similar procedure in Maryland. Md. Ann. Code art. 66½, § 86C (Supp. 1969), provides that when the appropriate enforcement
Another alternative available to the legislature seeking to reform the existing system would be a program whereby those who cannot pay their fines are put to work for the state. Such persons would be "employed" by the state at the then existing minimum wage law. The amount they earn would then be applied as a credit toward their fine. Such persons could be employed in jobs requiring little skill or experience, such as street cleaning or maintenance, or any area in which the state might have difficulty in securing an adequate number of men. If an individual were possessed of a particular skill he could be assigned to work in such an area where the state had a need for the skill.

While such a state work program would seem to raise again the equal protection problems present in the existing article thirty-eight, a careful analysis will reveal that such is not the case. First, such punishment would result in the payment of the fine in services in lieu of money. It would only be the manner of payment instead of the type of punishment that would be the result of one's not being able to pay a money fine. Secondly, the rate would reflect a realistic ratio and so the offender would not have to work longer to pay the fine than would his "monied" counterpart earning the state's minimum wage. Thus, the two manners of paying the fine would be more nearly equal. Similarly, objections based on involuntary servitude would be without merit; since the work would be assigned as punishment for a crime, the provisions of the thirteenth amendment would not be violated, for that amendment does not prohibit involuntary servitude as punishment for a crime of which a person has been convicted.

**CONCLUSION**

Throughout the United States, large numbers of people are confined in jails for no reason other than their inability to pay fines. While on their face statutes providing for such confinement apply equally to all, it is only indigents who are affected. When the effect of statutes regulating the criminal process is to cause discrimination based on the amount of money that one has, such statutes violate the equal protection clause as viewed by the Supreme Court in *Griffin v.*

75. In *People v. Williams*, 41 Ill. 2d 511, 244 N.E.2d 197 (1969), the court considered whether imprisonment of indigents for non-payment of fines constituted a denial of equal protection under *Griffin*. In holding that it did not, the court wrote: "The statute was intended to enable the state to collect in labor fines that could not be collected by execution, and applies as well to a case where a person is able to pay in labor but not in money as to a case where he is able to pay in money but unwilling to do so." Id. at 199 (citations omitted).

76. The thirteenth amendment provides: "Neither slavery nor involuntary servitude, except as punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction."
Notwithstanding _Griffin_, courts have tended to adhere to the traditional notion that such statutes are simply a means of coercing payment. So viewed, such statutes do not violate the equal protection clause so long as the amount of time to be served does not exceed the maximum authorized term of imprisonment for the particular offense.

In _Morris v. Schoonfield_, the court finally recognized that _automatic_ application of such statutes to indigents is a violation of equal protection. However, the court managed to save the statute by declaring that the resulting imprisonment was a substitute punishment which was constitutionally permissible if the defendant were given a hearing at which he could inform the sentencing judge of his indigency. The court's holding does little to improve the plight of the indigent and fails to satisfy the requirements of equal protection. The court's decision seems to ignore both the extreme inequality between fines and imprisonment and the need for impermissible reliance on benevolent administration of the statute.

Although the court in _Morris_ finds its procedures to be compatible with the requirements of the equal protection clause, the legislature should be inspired by the clause to change the present system in the name of fundamental fairness. Constitutional arguments aside, the practice makes little sense in view of modern penological theories of individualized punishment when the sentencing judge has already determined that there is no need to send the offender to jail. There are more efficient and economical means available to the legislature which would avoid the evils of short term imprisonment and which would be an important advance in social engineering. Whether it is the legislature or the courts that ultimately effect the change, the present system of confining indigents for non-payment of fines should be discarded as a relic from another era.