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Criminal Procedure—Equal Protection—The Dual Impact of Tate v. Short on Default Imprisonment and Monetary Bail

The inequality and blatant discriminations which face many indigents in the criminal process would shock many Americans who naively believe that the phrase "with liberty and justice for all" accurately describes the criminal process. Would the average American believe that an estimated seventy-five percent of the persons in jail are there because of inability to pay fines?[1] Would not most Americans be shocked and embarrassed to know that approximately forty-nine percent of all arrested persons are detained in jail before trial or any determination of guilt for inability to post monetary bail?[2] The first of these inequalities was mitigated when default imprisonment, the practice of imprisoning indigents because of their inability to pay fines, was recently declared unconstitutional by the United States Supreme Court in *Tate v. Short*.[3] An extrapolation of the *Tate* Court's equal protection analysis presages further mitigation of inequalities in the area of monetary bail.

The petitioner in *Tate* was fined upon conviction of nine traffic offenses. Because he could not afford to pay the fine, the court converted the fine into a prison sentence pursuant to a statutory formula. The petitioner subsequently applied for a writ of habeas corpus arguing that he was in jail solely due to discrimination based on wealth. The Supreme Court reversed the lower court's denial of the writ and held that the equal protection clause of the fourteenth amendment prohibits the states from imposing a fine as the sentence and then converting it into a prison term when the defendant is unable to pay the fine.[4]

Since the landmark case of *Griffin v. Illinois*,[5] invidious discriminations based on wealth have been prohibited. Moreover, although the states obviously are not required to equalize completely all effects of unequal economic status,[6] classifications based on wealth have come by

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[1]Note, *Fines and Fining—An Evaluation*, 101 U. PA. L. REV. 1013, 1014 (1953) [hereinafter cited as *Fines and Fining*].

[2]Note, *A Study of the Administration of Bail in New York City*, 106 U. PA. L. REV. 693, 707 (1958). Bail is generally set at a pretrial hearing held only to establish whether a prima facie case exists.

[3]401 U.S. 395 (1971).

[4]401 U.S. at 399.

[5]351 U.S. 12 (1956). In *Griffin*, the Court held that the state may not structure appellate review in a way that discriminates on the basis of wealth.

[6]Douglas v. California, 372 U.S. 353, 357 (1963).

decisional evolution to be "constitutionally suspect" and subject to the "most rigid scrutiny" regardless of the underlying legislative purpose.[7] In addition, classifications which substantially infringe upon fundamental constitutional rights must be *necessary* to promote a *compelling* state interest.[8] Thus the default-imprisonment and monetary-bail practices should both be subject to strict scrutiny, since both involve classifications based on wealth and both may result in the deprivation of personal liberty.[9] With respect to default imprisonment, at least, the Supreme Court has evidenced agreement with this proposition.

The Court's initial examination of default imprisonment came in *Williams v. Illinois*.[10] There the defendant had been sentenced to one year in jail and a five-hundred-dollar fine for petty theft. When the defendant was unable to pay the fine, he was imprisoned beyond the statutory maximum of one year in order to serve a sufficient number of days to satisfy his fine.[11] The Court held that the equal protection clause requires that the maximum imprisonment for any offense be the same for all defendants regardless of their wealth. The Court acknowledged the state's interest in collecting fines but discounted the necessity of imprisonment because alternatives existed which would also serve that interest.[12] Although *Williams* involved a situation in which default im-

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[7]The quoted phrases are taken from McLaughlin v. Florida, 379 U.S. 184, 192 (1964). *McLaughlin* involved a classification based on race, which was the first declared by the Court to be suspect. In Harper v. Virginia Bd. of Elections, 383 U.S. 663, 668 (1966), the Court included wealth as a "suspect criterion." In contrast, the equal protection standard applied when the classification is not "suspect" and does not affect fundamental rights is whether the classification bears a rational relationship to a permissible legislative purpose. McGowan v. Maryland, 366 U.S. 420, 425 (1960). In *McLaughlin* the Court compared these two standards, stating with respect to a "suspect classification" that "[s]uch a law, even though enacted pursuant to a valid state interest, bears a heavy burden of justification . . . and will be upheld only if it is *necessary*, and not merely rationally related, to the accomplishment of a permissible state policy." 379 U.S. at 196 (emphasis by the Court).

[8]Shapiro v. Thompson, 394 U.S. 618, 634 (1969).

[9]The determination of whether or not to subject a classification based on wealth to strict scrutiny has been conceptualized as the assessment of two interlocking gradients. The first scale ranks classifications with the most invidious at the top and the second ranks individual rights affected by the classification in ascending order of importance. When the classification in question is at the top of the first gradient, it is subject to strict review even if the individual interest it affects is low on the second. However, as the classifications become less invidious, they get strict review only if they affect interests progressively more important. Note, *Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065, 1120 (1969).

[10]399 U.S. 235 (1970). The Court had earlier tacitly approved default imprisonment in Hill v. Wampler, 298 U.S. 460 (1936) and *Ex parte* Jackson, 96 U.S. 727 (1878).

[11]399 U.S. at 236.

[12]*Id.* at 244.

prisonment resulted in confinement beyond the maximum sentence, it recognized the inequalities inherent in that practice.

In *Tate* the Court relied heavily upon *Williams*.[13] Texas had legislated a "fines only" sentence for traffic offenses, which the Court treated in effect as imposing a statutory maximum imprisonment of zero days in jail. Thus *any* conversion of a traffic-offense fine would have resulted in a prison term in excess of the statutory maximum which had already been condemned by *Williams*. However, the language of the *Tate* opinion goes far beyond the facts of the case and suggests the elimination of default imprisonment even if the maximum sentence is not exceeded. The only apparent motivation for the *Tate* opinion was a desire to expand *Williams*, which four members of the Court had already demonstrated strongly in another case[14] decided after *Williams* and before *Tate*. Thus the Court's statement in *Tate* that "the Constitution prohibits the State from imposing a fine as a sentence and then automatically converting it into a jail term solely because the defendant is indigent and cannot forthwith pay the fine in full"[15] indicates that automatic default imprisonment denies equal protection whether or not the maximum imprisonment for the offense is exceeded. This interpretation has in fact been followed in Florida, Hawaii, Kentucky, New Jersey, and Ohio.[16]

The Court held that default imprisonment violates the equal protection clause not only because it discriminates on the basis of wealth but also because constitutional alternatives are available to accomplish the state's purpose of securing payment of fines.[17] After *Tate* a state is forced either to eliminate fines in their entirety[18] or to adopt one or a combination of those alternatives. The most equitable and useful alternative is

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[13]"We reverse on the authority of our decision in *Williams v. Illinois*." 401 U.S. at 397.

[14]Morris v. Schoonfield, 399 U.S. 508 (1970). The district court judgment was vacated and remanded per curiam because a change in the Maryland default imprisonment statute mooted the equal protection question.

[15]401 U.S. at 398, *quoting* Morris v. Schoonfield, 399 U.S. 508, 509 (1970).

[16]Johnson v. State, 250 So. 2d 347 (Fla. Dist. Ct. App. 1971); State v. Tackett, ___ Hawaii ___, 483 P.2d 191 (1971); Spurlock v. Noe, 467 S.W.2d 320 (Ky. 1971); State v. DeBonis, 58 N.J. 182, 276 A.2d 137 (1971); *In re* Jackson, 26 Ohio St. 2d 51, 268 N.E.2d 812 (1971).

[17]401 U.S. at 399. For general discussions of proposed alternatives, see, *e.g.*, S. RUBIN, THE LAW OF CRIMINAL CORRECTION (1963); Comment, *Fines, Imprisonment and the Poor: "Thirty Dollars or Thirty Days*, 57 CALIF. L. REV. 778 (1969) [hereinafter cited as *Thirty Dollars or Thirty Days*]; Note, *Discriminations Against the Poor and the Fourteenth Amendment*, 81 HARV. L. REV. 435 (1967).

[18]"Eliminating the fine whenever it is prescribed as alternative punishment avoids the equal protection issue that indigency occasions . . . ." 401 U.S. at 401 (Blackmun, J., concurring).

to permit indigents to pay their fines in installments over a reasonable period of time.[19] The success of this procedure has been demonstrated in Sweden and Britain where dramatic decreases in the number of default imprisonments occurred after its adoption.[20]

The disadvantages of an installment plan in requiring an increased number of administrative personnel should be outweighed by the increased collection of fines and decreased cost of maintaining prisoners.[21] Additionally, permitting the defendant to remain out of jail allows him to keep or to get a job that may prevent his family from going on welfare. As with all of the available proposed alternatives, the installment plan strives to assure that when the state declares that the penal sanction for a particular offense is to be a fine and that a jail sentence is not deemed necessary to accomplish the state's objective of retribution, rehabilitation, and deterrence, then an indigent defendant will not be imprisoned for failure to pay that fine. One other advantage of the installment plan is that it avoids the detrimental effects of short-term imprisonment. The state can use alone, or in conjunction with an installment plan, day fines[22] or some type of supervised release or probation[23]

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[19]This proposal has been extensively discussed. *E.g., Thirty Dollars or Thirty Days*; Note, *The Equal Protection Clause and Imprisonment of the Indigent for Nonpayment of Fines*, 64 MICH. L. REV. 938 (1966); *Fines and Fining* 1022.

[20]The recorded drop in Sweden was from 13,358 in 1932 to 286 in 1946 and in Britain was from an average of 83,187 during the period 1909-1913 to 2,667 in 1946. *Fines and Fining* 1023. Although these statistics may be influenced by other variables, they do show the effect of an installment plan.

[21]The estimated cost of maintaining defendants in jail is at least $6.00 per day per man. Comment, *Constitutional Limitations on the Conditions of Pretrial Detention*, 79 YALE L.J. 941, 943 (1970).

[22]The severity of the offense is established by the court as a particular number of days and each day is then assigned a monetary value based on the defendant's wealth, income, capacity to work, dependents, debts and so forth. Because the day fine is tailored to each individual's ability to pay, there is an increased chance that each defendant will pay his fine and the deterrent effect is increased because collection should be assured. *Thirty Dollars or Thirty Days* 813; *Fines and Fining* 1024.

[23]For a description of conditional probation and work release, *see, e.g.*, Zalba, *Work Release—A Two-Pronged Effect*, 13 CRIME & DELINQ. 506 (1967); Note, *Imprisonment for Non-payment of Fines and Costs: A New Look at the Law and the Constitution*, 22 VAND. L. REV. 611, 627 (1969). It is also possible to use a partial confinement which has the same equal protection defects but is, at least, not as harsh as total imprisonment. AMERICAN BAR ASSOCIATION, STANDARDS RELATING TO SENTENCING ALTERNATIVES AND PROCEDURES § 2.4 (Approved Draft 1968) [hereinafter cited as SENTENCING ALTERNATIVES]. In conjunction with probation, indigents may be given jobs on state projects or with the local government.

The Court left it to the states to adopt an already existing alternative or to develop new ones. 401 U.S. at 400.

which are especially useful for the indigent with so little money that allowing him to pay installments will not help.

The inherent problem with all proposed alternatives is their enforcement. In *Tate*, the Court emphasized that it was not ruling on whether imprisonment could be used to enforce the alternatives adopted by the state when the alternatives are unsuccessful despite the defendant's reasonable attempt at compliance.[24] Imprisonment to penalize contumacious failure to pay fines is unaffected by the *Tate* decision.[25] Beyond that, the American Law Institute and the American Bar Association both suggest imprisonment as a means to enforce the adopted alternatives.[26] However, imposing a jail sentence for a default on an installment is again a discrimination based on wealth if the reason for the default is financial inability. Because *Tate* relied heavily on the existence of alternatives in declaring default imprisonment unconstitutional, the equal protection argument against imprisonment for failure to meet installments which were tailored to the individual defendant would be less persuasive because of the decreased number of available alternatives. However, to prevent violation of the equal protection clause, the state should establish a system of probation, jobs on state projects, or supervised release which, although still restrictive of the defendant's freedom, are less onerous alternatives than imprisonment. It has also been suggested that if the defendant cannot pay an installment and has made a good-faith effort to do so, the fine should be changed or even revoked,[27] on the theory that enough deterrent and rehabilitative effect has been administered in the process of attempting the alternative even though it was unsuccessful. In ruling on whether a state's use of imprisonment to enforce the alternative adopted violates the equal protection clause, the Court would have to consider the alternatives chosen, their administration, the opportunities available to an indigent defendant who cannot pay the installment, and other methods that could be used by a state in

[24]401 U.S. at 400.

[25]The Court emphasized that imprisonment was not unconstitutional when the defendant had the means to pay his fine but refused to do so. *Id.* at 400.

[26]Unless the defendant shows that his default on an installment payment was in good-faith, the default is contumacious and a jail sentence is imposed. MODEL PENAL CODE § 302.2(1) (Proposed Official Draft 1962); SENTENCING ALTERNATIVES § 6.5(b). The most perplexing problem concerns enforcement if the default is not contumacious. The American Law Institute suggests that the court allow the defendant more time, reduce the amount of the installment, or revoke the fine. MODEL PENAL CODE § 302.2(4) (Proposed Official Draft 1962).

[27]*Thirty Dollars or Thirty Days* 820.

lieu of imprisonment. In order to afford indigents the equal protection guaranteed by the fourteenth amendment, a state should eliminate default imprisonment, replacing it with an individualized installment plan augmented by supervised release and work projects.

An extrapolation of the Court's analysis of the constitutional question in *Tate* logically requires the invalidation of the highly criticized administration of monetary bail.[28] The purpose of bail is to insure that the defendant will be present for his trial. The theory is that if a defendant is required to leave a financial deposit with the court or a bondsman, this deposit will deter his fleeing and assure his appearance. A separate opinion of Justice Jackson in *Stack v. Boyle*[29] said that the "spirit" of the bail system is to allow persons to stay out of jail until their guilt has been established at trial.[30] Although the Court has used eloquent phrases to emphasize the importance of pretrial freedom to the preparation of a defense and the injustice of punishment before conviction,[31] it has been reported that as many as seventy percent of all arrested persons are subjected to pretrial punishment for inability to post bail.[32]

The present method of bail created the professional bail bondsmen whose authority has become so widespread as to evoke the comment that they "hold the keys to the jail in their pockets."[33] The deplorable effects of pretrial detention have been voluminously catalogued.[34] The most egregious inequality that requires reform of the bail system is its effect

[28]"The American bail system is a scandal." R. GOLDFARB, RANSOM: A CRITIQUE OF THE AMERICAN BAIL SYSTEM 4 (1965) [hereinafter cited as GOLDFARB]. "It is not only unfair; it is illogical, it does not even work well." *Id.* at 4-5. "At best, it is a system of checkbook justice; at worst, a highly commercialized racket." Goldberg, *Foreward* to *id.* at ix.

[29]342 U.S. 1 (1951).

[30]*Id.* at 8.

[31]*E.g., id.* at 4.

[32]Wald, *Pretrial Detention and Ultimate Freedom: A Statistical Study*, 39 N.Y.U.L. Rev. 631, 634 (1964). Other results showed over seventy percent in Baltimore and St. Louis; thirty to forty percent in Washington, D.C.; and sixty-two percent in Chicago. *Id.* It has been estimated that fifty-two percent of all bondable arrested persons stayed in jail. Note, *Bail or Jail: Toward an Alternative*, 21 U. FLA. L. REV. 59, 62 (1968). Another study reported an estimate of forty-nine percent. Note, *A Study of the Administration of Bail in New York City*, 106 U. PA. L. REV. 693, 707 (1958). Although the figures are divergent, they do at least show that substantial numbers of arrested persons are incarcerated prior to trial for inability to post bail.

[33]Pannel v. U.S. 320 F.2d 698, 699 (D.C. Cir. 1963) (Wright, J., concurring). The corruption and discretionary power of bondsmen are discussed in GOLDFARB 909; Comment. *Bail: An Ancient Practice Reexamined*, 70 YALE L.J. 966, 971 (1961).

[34]*See, e.g.*, Comment, *Constitutional Limitations on the Conditions of Pretrial Detention*, 79 YALE L.J. 941, 943 (1970).

on verdicts and sentences. One study found that the percentage of defendants who are jailed before trial who were convicted was eighty-two, while only fifty-two percent of the bailed defendants were convicted.[35] The same study concludes that bail also affects the sentence: twenty-two percent of the bailed defendants received a prison sentence compared to fifty-nine percent of the jailed defendants.[36] The courts and legislatures should correct these inequities.

The initial Supreme Court mention of this inequality was rendered in a dissent in *Griffin v. Illinois*:[37] "Why fix bail at any reasonable sum if a poor man can't make it?" Later Justice Douglas in *Bandy v. United States*[38] succinctly stated the issue as being whether "an indigent [can] be denied freedom where a wealthy man would not, because he does not happen to have enough property to pledge for his freedom[.]"[39] This issue should be resolved by applying strict constitutional scrutiny[40] and the *Tate* constitutional-atlernatives analysis to the monetary-bail practice, which involves a classification based on wealth and which seriously affects the fundamental right to freedom.

Monetary bail in itself is inefficient in achieving the purpose of assuring the defendant's appearance at trial. The deterrent effect of the threat of monetary forfeiture is minimal compared to that deriving from the fear of being a hunted fugitive and from the threat of a more severe sentence if the bail-jumper is caught.[41] In addition, in *Bandy* Justice Douglas pointed out that other strong assurances of appearance at

[35]Note, *Compelling Appearance in Court: Administration of Bail in Philadelphia*, 102 U. PA. L. REV. 1031, 1052 (1954).

[36]*Id.* at 1053. Another study reported similar results: fifty-three percent of the bailed defendants were convicted compared to seventy-three percent of the jailed defendants; seventeen percent of the bailed defendants were sentenced to prison as compared to sixty-four percent of the jailed defendants. Rankin, *The Effect of Pretrial Detention*, 39 N.Y.U.L. REV. 641, 642 (1964). To establish a causal relationship between detention and unfavorable verdicts and sentences, this study isolated other factors which could have influenced the above figures. The results showed that prior record, bail amount, type of counsel, family integration and employment stability did not substantially affect the unfavorable dispositions, thus strengthening the correlation and causal relation between pretrial detention and the disposition of the case. *Id.* at 655.

[37]Griffin v. Illinois, 351 U.S. 12, 29 (1956).

[38]81 S. Ct. 197 (1960) (Douglas, Cir. J.).

[39]*Id.* at 198, Justice Douglas later considered Bandy's application for release on recognizance and said that "[f]urther reflection has led me to conclude that no man should be denied release because of indigence." Bandy v. United States, 82 S. Ct. 11, 13 (1961) (Douglas, Cir. J.).

[40]See note 9 & accompanying text *supra.*

[41]Note, *Compelling Appearance in Court: Administration of Bail in Philadelphia*, 102 U. PA. L. REV. 1031, 1060 (1954).

trial—such as long residence in the locality, ties with family and friends, and the increased efficiency of the police—may exist.[42] In *Tate* the Court noted that default imprisonment does not meaningfully serve the state's purpose of collecting fines.[43] Thus the default-imprisonment and monetary-bail practices are similar in that their efficiency is highly questionable. Moreover, as is true with respect to default imprisonment,[44] the monetary-bail system saddles the state with the expense of maintaining the defendant in jail,[45] and its elimination would save the state money.

The final link in *Tate* was the availability of alternatives which allowed the Court to strike down default imprisonment without leaving a void in the sentencing and enforcement process. Tested alternatives also exist which should be required in replacement of the bail system.[46] The Manhattan Bail Project has been used to assist the court in determining the defendant's reliability to return for trial without imposing monetary bail.[47] The most attractive alternative available to a state is release on recognizance,[48] which should be used in conjunction with increased penalties for failure to appear at trial.[49] Another alternative is supervised release, which is similar to probation in that the travel of the defendant may be restricted or the defendant may be required to report periodically to an officer of the court or a third-party individual or

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[42]81 S. Ct. at 198.

[43]401 U.S. at 399.

[44]*Id.*

[45]The total cost of maintaining the 22,343 persons detained awaiting federal trials in 1963 was estimated at over $4,000,000. GOLDFARB 43-44. The cost to New York City of pretrial detention was estimated at over $10,000.000 in 1962. *Id.* at 45. Washington, D.C., estimated that it could save $105,768 per year in prison expenses and welfare payments if all persons eligible for bail were released. Paulsen, *Pre-Trial Release in the United States*, 66 COLUM. L. REV. 109, 114 (1966).

[46]For an interesting and highly informative treatment of the bail dilemma and constitutional alternatives, *see* Foote, *The Coming Constitutional Crisis in Bail* (pts. I-II), 113 U. PA. L. REV. 959, 1125 (1965) [hereinafter cited as Foote]. *See also, e.g., Thirty Dollars or Thirty Days*; Comment, *Indigent Court Costs and Bail: Charge Them to Equal Protection*, 27 MD. L. REV. 154 (1967).

[47]Basically, the system involves interviewing and collecting information concerning the arrestee's prior record, residence, employment, and family in order to predict the probability that he will return for trial without monetary bail. Foote 961. It is a useful tool but does not eliminate the inequality of pretrial detention for those persons recommended and not released.

[48]The method of release on recognizance requires the defendant to sign a statement promising to return at a specified time for his trial. *See, e.g.*, GOLDFARB 186; D. FREED & P. WALD, BAIL IN THE UNITED STATES 76 (1964).

[49]18 U.S.C. § 3150 (1970) provides for penalties up to five years and $5,000 for failure to appear after release from a felony charge and one year and $1,000 if the charge was a misdemeanor. For results of statistical studies on the use of release on recognizance, see D. FREED & P. WALD, BAIL IN THE UNITED STATES 62 (1964).

group.[50] For minor offenses, a procedure similar to that used for parking violations has been suggested—a summons in lieu of arrest.[51] This procedure simply involves notifying the person of a date to appear for trial and thereby eliminating the arrest and bail process. These alternatives are available to the state[52] and, as with those of default imprisonment, should be used as the situation merits in conjunction with one another.[53]

In *Tate* the Supreme Court eliminated inequalities in the criminal procedure which affect the post-trial liberty of indigent defendants. The constitutional analysis in *Tate*—focusing on available alternatives—can be applied to alleviate the even harsher inequalities brought about by wealth discriminations in the bail system so that a man is entitled to *pretrial* liberty regardless of his wealth. An indigent who cannot post bail is deprived of his freedom prior to any judicial determination of guilt or innocence. The Court has declared default imprisonment unconstitutional because it works an invidious discrimination on indigents.[54] The same analytical approach should be applied to the bail system in order to eliminate its inequalities. Both discrimnations are based on suspect classifications affecting the fundamental right of liberty. While failing to serve a penal objective of the state, they both saddle the state with maintenance expenses and most importantly they are not necessary because either can be replaced with constitutional alternatives which accomplish the state's objectives. The Court has taken the first step in eliminating inequalities in post-trial detention; it should apply the same reasoning process to the unconstitutional pretrial detention of indigents.

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[50]One method tried in Tulsa, Oklahoma was to release the defendant to his attorney. If a defendant did not appear at trial, his attorney's name was removed from the list of attorneys to whom prisoners could be released. During a ten-month period, approximately 2,000 defendants were released and only thirteen of the three hundred and ten participating attorneys were removed from the list. D. FREED & P. WALD, BAIL IN THE UNITED STATES 76 (1964). Presently, supervised release is discretionary in federal courts. 18 U.S.C. § 3146(a)(1) (1970).

[51]*E.g.*, GOLDFARB 167.

[52]It is beyond the scope of this note to discuss the issues raised by preventive detention, which involves denying pretrial freedom on the basis of dangerousness to society rather than any educated estimate of likelihood to appear for trial. For a discussion of this area, see, *e.g.*, Foote 1164; Mitchell, *Bail Reform and the Constitutionality of Pretrial Detention*, 55 U. VA. L. REV. 1223 (1969); Note, *The Costs of Preventive Detention*, 79 YALE L.J. 926 (1970).

[53]For example, one writer proposes summons in lieu of arrest for petty offenses, a judicial choice between release on recognizance and supervised release for more serious offenses, and preventive detention of dangerous defendants. GOLDFARB 244.

[54]401 U.S. at 397.