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Installment Payments: A Solution to the Problem of Fining Indigents

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INSTALLMENT PAYMENTS: A SOLUTION TO THE PROBLEM OF FINING INDIGENTS

The practice of sentencing persons to thirty dollars or thirty days has recently been pushed into judicial antiquity. In *Tate v. Short*[1] the United States Supreme Court ruled that indigents could not constitutionally be imprisoned for failure to pay a fine.[2] However, the discovery of a proper functional tool of enforcement to replace imprisonment for nonpayment now faces most courts.

With regard to fines of indigents, fears have long been expressed: "[I]f no means were provided for enforcing their collection, the sentence to pay a fine would be, in their ears, but as the tinkling cymbal and the sounding brass."[3] In light of *Tate v. Short,* some observers have expressed the opinion that many legislatures and courts may now abrogate fines in traffic and misdemeanor convictions and routinely impose imprisonment in all cases.[4] It is the purpose of this commentary to suggest that such a step is neither necessary nor preferable[5] — that alternative means of collecting a fine are available to protect the state's interest in punishment of the offender.

The state of Delaware statutorily abolished imprisonment for nonpayment of fines in 1969 and has arrived at other satisfactory means of collecting them.[6] Indeed, unlike several other Supreme Court decisions, which have forced states to spend money to achieve equal protection of indigent criminal defendants,[7] the holding of *Tate v. Short* may enable states to save millions of dollars a year.[8]

Purpose and Cost of Imprisonment for Nonpayment

Of the three principal types of noncapital punishment — imprisonment, fine, and probation — imprisonment is considered to have the greatest deter-

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1. 401 U.S. 395 (1971).

2. The Court limited its holding to exclude instances in which a person has the means to pay a fine but refuses or neglects to do so or in which an indigent is unsuccessful despite reasonable efforts to satisfy a fine. *Id.* at 401.

3. State v. Abraham, 139 La. 466, 467, 71 So. 769 (1916).

4. *See* Justice Blackmun's concurring opinion in Tate v. Short, 401 U.S. at 401; St. Petersburg Times (Fla.), March 4, 1971, §A at 24, cols. 4-6 (Associated Press national survey of local judges).

5. In *Tate,* Justice Blackmun implied that prison sentences might not be an "undesirable" method of "resolving the problems of traffic irresponsibility and the frightful carnage it spews upon our highways . . . ." 401 U.S. at 401. This commentary does not discuss the philosophic merits of imprisonment as a possible proper punishment for an offense, but deals solely with the situations in which legislatures have allowed and courts have imposed fines.

6. *See* text accompanying notes 62-81 *infra.*

7. *See* Douglas v. California, 372 U.S. 353 (1963) (counsel on criminal appeal); Gideon v. Wainwright, 372 U.S. 335 (1963) (counsel for criminal defendants); Griffin v. Illinois, 351 U.S. 12 (1956) (transcript for criminal appeal).

8. *See* text accompanying notes 19-27 *infra.*

rent effect because of its severity.[9] Courts impose imprisonment in cases where isolation is required to protect the community and where discipline and training in an institutional setting may be conducive to a program of rehabilitation.[10] However, in actual expense to governments and in loss of productive capacity to the prisoner and support for his dependents, imprisonment is also the most costly alternative.[11] Further, the President's Commission on Law Enforcement and the Administration of Justice found that the "atmosphere, associations, and stigma of imprisonment may reinforce . . . criminality . . . ."[12] and therefore impede successful reintegration into the community. Thus, where there is no need for isolation or institutionalized rehabilitation, a fine is frequently the deterrent applied.[13]

A fine has obvious advantages over imprisonment in cases in which it is determined that less severe punishment is required. A fine may be refunded if error is discovered; paying a fine does not carry the public stigma of imprisonment or cause separation of families; and a fine is economical to impose and provide income for the state.[14] The advantage of the penal fine disappears, however, when a person is without funds to pay a fine and is imprisoned as a result of that inability.

The person who is imprisoned for nonpayment of fine is separated from his family,[15] and both he and his family suffer the stigma of imprisonment. The government does not collect the revenue; indeed, it must pay for the

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9. THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND THE ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: THE COURTS 15 (1967) [hereinafter cited as TASK FORCE]. But authorities acknowledge very little is known about how various kinds of individuals are likely to react to correctional programs or about the deterrent effects of the criminal process. THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND THE ADMINISTRATION OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY 141 (1967) [hereinafter cited as PRESIDENT'S COMMISSION].

10. TASK FORCE, *supra* note 9, at 15. Rehabilitation of offenders and deterrence of potential offenders are, in theory, the goals behind criminal sanctions. Williams v. New York, 337 U.S. 241, 248 n.13 (1948); S. RUBIN, THE LAW OF CRIMINAL CORRECTION 646, 652-53 (1963) [hereinafter cited as RUBIN]; TASK FORCE, *supra* note 9, at 14. The United States Supreme Court has said "punishment should fit the offender and not merely the crime . . . . The belief no longer prevails that every offense in a like legal category calls for an identical punishment without regard to the past life and habits of a particular offender." Williams v. New York, 337 U.S. 241, 247 (1948). But correctional institutions have been criticized for not reaching the goal of rehabilitation. PRESIDENT'S COMMISSION, *supra* note 9, at 159; TIME, Jan. 18, 1971, at 49.

11. TASK FORCE, *supra* note 9, at 15.

12. *Id.*

13. RUBIN, *supra* note 10, at 265.

14. *See* E. SUTHERLAND & D. CRESSEY, CRIMINOLOGY 319-20 (8th ed. 1970).

15. The imprisonment of the head of a household may indirectly have the deleterious social and economic effect of requiring public welfare payments to support the family of the imprisoned person. TASK FORCE, *supra* note 9, at 15. In California an average of $16,621,200 is spent each year to support the indigent families of persons in jail. CALIFORNIA ASSEMBLY COMM. ON CRIMINAL PROCEDURE, PROGRESS REPORT: DETERRENT EFFECT OF CRIMINAL SANCTIONS 39 (1968), *cited in* Note, *Fines, Imprisonment and the Poor*, 57 CALIF. L. REV. 778, 789 n.93 (1969).

prisoner's upkeep and possibly the family's subsistence.[16] Imprisonment may harden or create antisocial attitudes, and the associations formed while in jail may increase the possibility of future criminal activity.[17] Rehabilitation might be possible under ideal conditions of imprisonment. But sentences for nonpayment of a fine usually are served in a city or county jail where rehabilitative facilities and personnel are lacking.[18]

No comprehensive statistics are kept in the United States on the cases in which fines are imposed.[19] However, some estimates may be made using the results of a special one-day national jail census of city and county jails[20] and statistics obtained from two states in a survey undertaken by the *University of Florida Law Review*.[21]

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16. TASK FORCE, *supra* note 9, at 38. "Unnecessary detention costs the community more than jail expenses. Many persons who fail to raise bail have jobs and dependents. The consequences of their detention are plain: loss of employment and support for the family, repossession of household goods, and accumulations of debt. If the family is put on relief, community funds must be devoted to its support. Loss of employment also means a drop in the tax revenues; for the employer it may mean the additional expense of training a replacement." *Id.* Although this statement referred to indigents held in lieu of bail, it is equally applicable to those held in lieu of fine.

17. TASK FORCE, *supra* note 9, at 29. The sentencing of indigents in lieu of fines is primarily done by the lower courts, which handle misdemeanors and traffic offenses. This practice received severe criticism from the staff of the President's Commission on Law Enforcement and the Administration of Justice. "Two unfortunate characteristics of sentencing practice in many lower courts are the routine imposition of fines on the great majority of misdemeanants . . . and the routine imprisonment of offenders who default in paying fines. These practices result in unequal punishment of offenders and in needless imprisonment of many persons because of their financial condition." *Id.* at 18.

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"No program of crime prevention will be effective without a massive overhaul of the lower criminal courts. The many persons who encounter these courts each year can hardly fail to interpret that experience as an expression of indifference to their situations and to the ideals of fairness, equality, and rehabilitation professed in theory, yet frequently denied in practice. The result may be a hardening of antisocial attitudes in many defendants, and the creation of obstacles to the successful adjustment of others." *Id.* at 29.

18. PRESIDENT'S COMMISSION, *supra* note 9, at 178. "No part of corrections is weaker than the local facilities that handle persons awaiting trial and serving short sentences. Because their inmates do not seem to present a clear danger to society, the response to their needs has usually been one of indifference." *Id.*; TIME, Jan. 18, 1971, at 48-49.

19. 3 NATIONAL COMM'N ON LAW OBSERVANCE AND ENFORCEMENT: REPORT ON CRIMINAL STATISTICS 3 (1931) [hereinafter cited as WICKERSHAM REPORT]; RUBIN, *supra* note 10, at 239-40; L. SILVERSTEIN, 1 DEFENSE OF THE POOR IN CRIMINAL CASES IN AMERICAN STATE COURTS, NATIONAL REPORT 123 (1965).

20. U.S. DEPARTMENT OF JUSTICE, LAW ENFORCEMENT ASSISTANCE ADMINISTRATION, [LEAA], NATIONAL JAIL CENSUS (1970). The special one-day census of 4,037 city and county jails was made March 15, 1970, by the Census Bureau on a $140,000 grant from the LEAA. It showed 160,863 persons being held in those jails. Another 175,317 persons were held in state prisons at the end of 1967. BUREAU OF PRISONS, NATIONAL PRISONER STATISTICS 8 (1967). Federal prisons held 19,579 inmates. *Id.* Thus, not counting institutions for juveniles, about 355,000 persons are incarcerated each day.

21. The 36 states that have court administrative offices were sent a two-page ques-

In 1969, 43 per cent of the persons serving post-conviction jail terms in Arkansas were imprisoned in lieu of payment of fines.[22] In New Jersey 46 per cent of the committed defendants were sentenced for nonpayment.[23] Miami, Florida also has had a 46 per cent ratio of nonpayment sentences to total commitments.[24] These percentages are similar to others gathered in prior years.[25] Based on these reports it is apparent that a significant number of prisoners have been held in jail for nonpayment of fines.

Since there were 69,096 prisoners serving sentences in local jails on the day the national jail census was taken,[26] applying a 40 per cent figure as a conservative estimate would mean almost 28,000 persons were held that day for nonpayment of fines. The cost of keeping 28,000 persons in jail for one day would be as high as 260,000 dollars if the federal prison system's operation cost of $9.31 a day per prisoner is used.[27] That would mean an annual cost of about $95 million dollars.

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tionnaire. Twenty agencies replied, but only two had statistical information available. Arkansas officials estimated 281,000 persons were fined during 1969 in its municipal courts and 15,000 of them were committed to jail when unable to pay the fines. Another 20,000 were sent to jail outright. The officials also estimated $525,000 in fines — about 7% of the total assessed — were not collected because the defendants were indigent. Letter from C. R. Huie, Executive Secretary, Judicial Department, Little Rock, Ark., to *University of Florida Law Review*, Dec. 2, 1970 [hereinafter referred to as Arkansas letter]. New Jersey reported 11,423 persons were committed to jail in lieu of fines assessed in municipal courts for traffic, parking and criminal offenses. Another 13,551 persons were sentenced directly to jail. The amount of fines assessed totaled $20,138,040. PROCEEDINGS IN THE MUNICIPAL COURTS, Sept. 1, 1968 to Aug. 31, 1969 (published by Administrative Office of the Courts, Trenton, N.J.) [hereinafter referred to as NEW JERSEY REPORT].

22. Compiled from statistics in Arkansas letter, *supra* note 21.

23. Compiled from statistics in NEW JERSEY REPORT, *supra* note 21.

24. The Metropolitan Court of Dade County reported 5,163 persons were committed to jail in lieu of fines during 1969. Another 6,160 were sentenced to jail terms (some of these also were fined in addition to the jail term). METROPOLITAN COURT, DADE COUNTY FLA., ANNUAL REPORT (1969).

25. In Baltimore, a ten-month study in 1965 showed 80% of the 20,000 inmates were there for failure to pay fines. Of 27,000 persons fined in that period, 16,000 were unable to pay. TASK FORCE, *supra* note 9, at 124. A 1910 census showed 58% of all commitments to prison were for failure to pay fines; by 1923 the percentage had dropped to 47.5%. RUBIN, *supra* note 10, at 252. Philadelphia's Reed Street Prison reported that in one year (1949-1950) 59.9% of the 4,140 commitments were for nonpayment of fines. Note, *Fines and Fining — An Evaluation*, 101 U. PA. L. REV. 1013, 1022 (1953).

26. DEPARTMENT OF JUSTICE, *supra* note 20, at 1. Another 83,079 persons held in jail had not been tried and 8,688 prisoners had been convicted but were awaiting further legal action. *Id.* Thus, the total local jail population on March 15, 1970, was 160,863. *Id.*

27. Letter from Bernard Peters, Public Information Officer, Federal Bureau of Prisons, to the *University of Florida Law Review*, Dec. 11, 1970. It is likely the per day cost of keeping an inmate in a local prison is less than the comparable cost for a federal prison. In 1968 the per day cost in Florida state prisons was $4.75. FLORIDA PROBATION AND PAROLE COMM'N, ANNUAL REPORT 1969. Individual Florida cities that responded to a survey estimated per day costs ranging from $3.75 to $8 a day per prisoner.

CONSTITUTIONAL ASPECTS

Pre-Tate v. Short

Regardless of the economic and social hardships involved in imprisonment for inability to pay a fine, American courts have traditionally upheld the practice.[28] In *Griffin v. Illinois,* however, the rationale behind nonpayment sentencing began to be eroded.[29] The Supreme Court admonished: "There can be no equal justice where the kind of trial a man gets depends on the amount of money he has."[30] It was not until *Williams v. Illinois,*[31] however, that the Supreme Court had occasion to directly consider the proper application of the equal protection clause to sentencing for nonpayment of fine. Williams had been convicted of petty theft and given the maximum sentence of one year in jail and a 500 dollar fine, which if not paid was to be satisfied by an additional day in jail for each five dollars still owing. The state conceded that the only purpose for the nonpayment sentence was to coerce payment of the fine.[32] The Supreme Court held that an indigent criminal defendant could not be imprisoned in default of payment of a fine for a period extending beyond the maximum imprisonment authorized by the statute regulating the substantive offense.[33] The Court, relying on *Griffin,* ruled such a sentence to be an "impermissible discrimination which rests on ability to pay . . . ."[34]

The equal protection clause has been traditionally construed to require that distinctions drawn between two classes must bear a rational relationship to a legitimate state purpose.[35] But in cases involving classification based on race or wealth[36] or matters involving fundamental rights[37] the Supreme Court has applied a more stringent test for governmental action:

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28. *See, e.g., Ex parte* Jackson, 96 U.S. 727 (1877); United States *ex rel.* Privitera v. Kross, 239 F. Supp. 118 (S.D.N.Y.), *aff'd,* 345 F.2d 533 (2d Cir.), *cert. denied,* 382 U.S. 911 (1965); Wildeblood v. United States, 284 F.2d 592 (D.C. Cir. 1960); United States v. Ridgewood Garment Co., 44 F. Supp. 435 (E.D.N.Y. 1942); Peeples v. District of Columbia, 75 A.2d 845 (D.C. Mun. Ct. App. 1950); *Ex parte* Bryant, 24 Fla. 278, 4 So. 854 (1888); *Ex parte* Smith, 92 P.2d 1098 (Utah 1939).

29. 351 U.S. 12 (1956). *See also* People v. Saffore, 18 N.Y.2d 101, 271 N.Y.S.2d 972, 218 N.E.2d 686 (1966).

30. Griffin v. Illinois, 351 U.S. 12, 19 (1956).

31. 399 U.S. 235 (1970).

32. *Id.* at 238. Other states assert the imprisonment serves either as a coercive device or as substitute punishment for the crime itself. *See, e.g., In re* Antazo, 3 Cal. 3d 100, 473 P.2d 999, 89 Cal. Rptr. 255 (1970). The dual purpose view appears to be a legal fiction. Although the imprisonment is considered punishment rather than merely coercion to pay, the court in assessing the fine has declared that money rather than imprisonment would satisfy society's penological interests. *See* Strattman v. Studt, 20 Ohio St. 2d 95, 253 N.E.2d 749 (1969).

33. Williams v. Illinois, 399 U.S. 235, 243 (1970).

34. *Id.* at 240-41.

35. *E.g.,* McDonald v. Board of Election Comm'rs, 394 U.S. 802 (1969).

36. *E.g.,* Loving v. Virginia, 388 U.S. 1 (1967); Griffin v. Illinois, 351 U.S. 12 (1956).

37. *E.g.,* Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966); Griffin v. Illinois, 351 U.S. 12 (1956).

Is the state's purpose "compelling" and is the classification "necessary" to the purpose?[38] In *Williams* the Court appeared to be applying the compelling and necessary test although it did not use those terms nor did it specifically discuss either standard.

Regardless of which criteria were applied in *Williams*, the Court limited its consideration solely to the portion of the sentence served in lieu of fine. Two classes of defendants were thus contemplated: those who could pay the fine and those who, like Williams, could not pay and remained in jail to satisfy the fine.[39] The state's purpose in the "pay or jail" part of the sentence was to coerce payment of fines, an interest the Court called "substantial."[40] The remaining question under the traditional equal protection test would have been whether imprisonment was a rational method of coercing payment.[41] Without considering that question, however, the Court discussed the availability of other means of collecting the fine.[42] Thus, the Court implied that imprisonment was not necessary[43] and indicated that the proper criteria in this area is the more stringent "compelling and necessary" test.

Williams required only that the statutory ceiling placed on imprisonment for any substantive offense be the same for all defendants irrespective of their economic status.[44] Consequently, a determination of the equal protection standard applied in that case would be dispositive in concluding whether the same reasoning would be applicable to a case in which the total time served did not exceed the statutory maximum. Since imprisonment is arguably a rational method of coercing payment of a fine, imprisonment for a period not exceeding the maximum time for the substantive offense might not be objectionable under the traditional equal protection test. But since alternative means of payment would be available regardless of whether a defendant had served the statutory maximum, imprisonment would not be "compelling and necessary" to coerce payment.[45] Thus, any imprisonment for involuntary nonpayment of a fine would fail to meet the more exacting equal protection standard.[46]

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38. *See* Note, *Developments in the Law: Equal Protection*, 82 HARV. L. REV. 1065 (1969).

39. Williams v. Illinois, 399 U.S. 235, 236-37 (1970).

40. *Id.* at 238.

41. The state urged this approach. *Id.*

42. *Id.* at 244-45 n.21. The Court listed statutes and articles concerning installment payment of fines.

43. The Court stated that if there were no other ways to enforce collection of a fine, allowing an indigent his freedom would amount to inverse discrimination since the person who had money would have to pay or go to jail while the pauper would escape both. In other areas of criminal justice, however, the Court has held that states must provide counsel for indigent defendants, Gideon v. Wainwright, 372 U.S. 335 (1963), and free transcripts for appeals by indigents, Draper v. Washington, 372 U.S. 487 (1963).

44. 399 U.S. 235, 244 (1970).

45. Justice Harlan in his concurring opinion reached the conclusion that there was no distinction between imprisonment for a fine alone and imprisonment for nonpayment when the maximum term also is imposed. 399 U.S. 235, 265 n.* (1970).

46. In another case decided the same day as *Williams*, four justices adopted the view that any imprisonment of an indigent for failure to make immediate payment of a fine

Tate v. Short

Any doubt of the unconstitutionality of sentencing an indigent to jail for involuntary failure to immediately pay a fine was eliminated in *Tate v. Short*.[47] The state law in that case only provided for fines in traffic offenses, and consequently sentencing the defendant to jail in lieu of the fine exceeded the statutory maximum for the substantive offense.[48] The Court held, however, that the defendant was imprisoned solely because of his indigency.[49] Although the case could have been decided strictly on the basis of *Williams*, the Supreme Court adopted the position that all imprisonment for involuntary nonpayment was violative of equal protection.[50]

In addition, the Court repeated its statement from *Williams* that alternative methods of collecting fines may be adopted by the states.[51] The holding does not prevent states from imprisoning a defendant who has the means to pay a fine but refuses or neglects to do so, or a defendant who despite reasonable efforts is unsuccessful in raising money to pay the fine.[52]

In a concurring opinion, Justice Blackmun warned that the decision "may well encourage state and municipal legislatures to do away with the fine, and to have the jail term as the only punishment for a broad range of traffic offenses."[53] Whether or not the concern expressed by Justice Blackmun as a result of *Tate v. Short* proves valid, it is apparent that some sort of legislative action is necessary in most states.

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would be constitutionally defective. Morris v. Schoonfield, 399 U.S. 508, 509 (1970). The four issued a concurring opinion to a per curiam vacation of a lower court judgment on the grounds of subsequent legislation in the sentencing state. *Id.* The California supreme court applied the "compelling and necessary" test a few weeks after *Williams*, holding imprisonment of a defendant for involuntary nonpayment of a fine was a denial of equal protection. *In re* Antazo, 3 Cal. 3d 100, 473 P.2d 999, 89 Cal. Rptr. 255 (1970). That case involved imprisonment for less than the statutory maximum term. The court said alternative methods of collecting the fine would serve both purposes of the state: (1) coercing payment and (2) rehabilitating the offender by conditions that serve to make him aware of his responsibility for his criminal conduct. *Id.* at 115, 473 P.2d at 1008, 89 Cal. Rptr. at 264.

47. 401 U.S. 395 (1971).

48. *Id.* at 396-97.

49. "Imprisonment in such a case is not imposed to further any penal objective of the State. It is imposed to augment the State's revenues but obviously does not serve that purpose; the defendant can't pay because he is indigent and his imprisonment, rather than aid collection of the revenue, saddles the State with the cost of feeding and housing him for the period of his imprisonment." *Id.* at 398.

50. *Id.* at 399.

51. *Id.* at 399-400.

52. *Id.* at 400-01. The *Tate* decision would have appeared to cover persons in the latter category had the court not specifically separated them. However, the court did not approve of jail in lieu of fine for persons who are unable to satisfy the fine despite reasonable efforts, it merely withheld a decision until such a case comes before it. *Id.*

53. *Id.* at 401.

LEGISLATIVE ACTION

The federal government[54] and all of the states except Delaware have statutes allowing imprisonment for nonpayment.[55] The statutes vary considerably in their attempts to coerce payment of the fine.[56] As noted by the Su-

54. 18 U.S.C. §3565 (1964).

55. ALA. CODE tit. 15, §341 (1958); ALASKA STAT. §§12.55.010, .030 (1962) ($5 a day, release after 30 days on certain conditions); ARIZ. REV. STAT. ANN. §13-1648 (1956) ($1 a day up to statutory maximum); ARK. STAT. ANN. §§43-2315, 46-510 (1964) ($1); CAL. PENAL CODE §1205 (1968) ($2 a day up to statutory maximum); COLO. REV. STAT. ANN. §§39-10-10, -10-9 (1963) (pauper's discharge); CONN. GEN. STAT. ANN. §§18-63, -50, 54-119 (1968) ($3); FLA. STAT. §§775.07, 921.14, 951.15 (1969) (30 cents, 60 days); GA. CODE ANN. §27-2901 (Supp. 1969); HAWAII REV. LAWS §712-4 (1968) (pauper's discharge); IDAHO CODE ANN. §19-2517 (Supp. 1969) ($5); ILL. REV. STAT. ch. 38, §1-7(k) (Supp. 1971), §180-6 (1964) ($5, 6 months, pauper's discharge); IND. ANN. STAT. §§9-2228, -2227a (Supp. 1969) ($5); IOWA CODE ANN. §§762.32, 789.17 (1950) ($3.33); KAN. GEN. STAT. ANN. §§62-1513, -1515, -2109 (1964) ($2, pauper's discharge); KY. REV. STAT. §431.140 (1969) ($2); LA. CODE CRIM. PRO. ANN. art. 884 (West Supp. 1970) (1 year maximum); ME. REV. STAT. ANN. tit. 15, §1904 (Supp. 1970) ($5, 11 months); MD. ANN. CODE art. 38, §4 (Supp. 1970) ($10); MASS. ANN. LAWS ch. 279, §1.145, ch. 127, §§144-45 (1969) ($1, pauper's discharge); MICH. COMP. LAWS ANN. §769.3 (1968) (30 days); MINN. STAT. ANN. §§629.53, 641.10 (Supp. 1969) ($3); MISS. CODE ANN. §§7899, 7906 (1957) ($3, 2 years); MO. ANN. STAT. §§546.830, .840, 551.010, 543.260, .270 (1953) ($2); MONT. REV. CODES ANN. §95-3202(b) (1969) ($10); NEB. REV. STAT. §§29-2206, -2412, -2404 (1965) ($6); NEV. REV. STAT. §176.065 (1967) ($4); N.H. REV. STAT. ANN. §§618.6, .9 (Supp. 1969) ($5); N.J. STAT. ANN. §§2A:166-14, -15, -16, 2A:169-1 (Supp. 1969) ($5); N.M. STAT. ANN. §42-1-60 (1964), §42-2-9 (Supp. 1971) ($5, pauper's discharge); N.Y. CODE CRIM. PROC. §470-3 (Supp. 1970); N.C. GEN. STAT. §§6-65, 23-23, 23-24 (Supp. 1970) (pauper's discharge); N.D. CENT. CODE §29-26-21 (1960) ($2); OHIO REV. CODE ANN. §§2947.14, .20 (Baldwin 1964) ($3); OKLA. STAT. tit. II, §794, tit. 57, §15 (1969) ($2, pauper's discharge); ORE. REV. STAT. §§137.150, 169.160 (1967) ($5, pauper's discharge); PA. STAT. ANN. tit. 12, §257, tit. 39, §323, tit. 19, §§953, 956 (1964) (pauper's discharge); R.I. GEN. LAWS ANN. §13-2-36 (1957) ($5); S.C. CODE ANN. §§17-574 to 55-593 (1962); S.D. COMPILED LAWS ANN. §23-48-23 (1960) ($2); TENN. CODE ANN. §40-3202 (1955), §41-1223 (Supp. 1970) ($5); TEX. CODE CRIM. PROC. art. 43.09 (1966); UTAH CODE ANN. §77-35-15 (1953) ($2); VT. STAT. ANN. tit. 13, §§7221-23 (Supp. 1971) ($1); WASH. REV. CODE ANN. §10.82.030 (Supp. 1969); W. VA. CODE ANN. §§62-4-9, -10 (1966) ($1.50, 6 months); WIS. STAT. ANN. §§959.055, 957.04 (Supp. 1969) (6 months); WYO. STAT. ANN. §§6-8, 7-230 (1969) ($1).

56. Many state statutes have provided a specified minimum per day rate at which credit is to be given toward satisfying the fine. This rate varies from 30 cents to $10, but generally is between $1 and $5. Ironically, most of the rates are below the per day cost to the state of keeping a person in jail. *See* note 27 *supra* and accompanying text. The equal protection clause has been invoked in two cases to throw out low per day credits against assessed fines. In *Strattman v. Studt* the Ohio supreme court found a $3 per day credit was "so unreasonable that it unfairly discriminates against the indigent." 20 Ohio St. 2d 95, 102, 253 N.E.2d 749, 753 (1969). A New York court similarly voided a 150-day sentence in lieu of a $150 fine. People v. McMillan, 53 Misc. 2d 685, 279 N.Y.S.2d 941 (Orange County Ct. 1967). Some states allow short delays of sentence to enable the defendant to raise the fine. *See, e.g.*, WASH. REV. CODE ANN. §10.82.030 (Supp. 1969) (5 days); WIS. STAT. ANN. §959.055 (Supp. 1969) (30 days). Other states have a maximum amount of time that can be imposed for nonpayment. *See, e.g.*, LA. CODE CRIM. PRO. ANN. art. 884 (West Supp. 1970) (1 year). Still others allow an indigent to obtain his release after a specified time by signing a "pauper's oath," a statement that he has no money or property over a minimal value. *See, e.g.*, COLO. REV. STAT. ANN. §39-19-10 (1964).

preme Court in both *Williams v. Illinois*[57] and *Tate v. Short*,[58] a few states have allowed judges to accept installment payments. The state statutes mentioned by the Court[59] do not require a judge to accept installment payments, however, nor do they forbid him from jailing a person who is unable to pay.[60] Two states, New York and Maryland, recently enacted laws limiting the use of nonpayment imprisonment, but neither prohibited sentences for nonpayment.[61] Thus, all of these laws would appear to allow the sentences that the Supreme Court has forbidden. Only Delaware appears to have a law completely in accord with the constitutional demands of *Tate v. Short*.

The Delaware Experience

In 1969 Delaware, at the request of its Governor, abolished the practice of imprisoning persons unable to pay fines.[62] The legislature enacted a law[63] that provided: "No person sentenced to pay fine or costs upon conviction of a crime shall be ordered imprisoned in default of the payment of such fine or costs."[64] Various sections of the bill allowed a person who was fined to pay at designated intervals, to execute a judgment bond for payment within ten days, or to agree to report to the commissioner of the Delaware Department of Correction to be assigned employment in public works projects at the normal salary until the fine was paid.[65]

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57. 399 U.S. 235, 244 (1970).

58. 401 U.S. 395, 400 n.5 (1971).

59. *E.g.*, CAL. PENAL CODE §1205 (West 1970). This is the statute under which the petitioner in *In re Antazo* received the imprisonment for nonpayment that the California supreme court held unconstitutional. *See* note 46 *supra*.

60. Dramatic evidence that merely allowing courts to use installments does not greatly reduce nonpayment sentencing comes from Great Britain. Courts were allowed to accept installment payments in 1879. Craven, *Criminal Justice in England*, 27 CAN. B. REV. 1111, 1113-14 (1949). But annual imprisonments for nonpayment totaled 79,583 in 1913. A 1914 act required giving a defendant time to pay in most circumstances, and cases of nonpayment imprisonment declined to 15,261 in 1923. *Id.* A 1935 act proscribed immediate imprisonment for nonpayment and required the judge to take a defendant's financial condition into consideration. Imprisonment for nonpayment continued to fall from 12,496 in 1930 to 7,936 in 1938. *Id.* at 1114.

61. *See* note 81 *infra*.

62. Wilmington (Del.) Evening Journal, June 16, 1969, at 1, col. 3, at 2, cols. 4-6. The Governor of Delaware, Russell W. Peterson, had a background in correction law reform as chairman of a citizens' group that obtained revision of the state's correctional system in 1964. A HISTORY OF THE THREE-S-CITIZENS' CAMPAIGN (1964).

63. DEL. CODE ANN. tit. 11, §§4103, 4106 (1969).

64. *Id.* §4106(a). Economic reasons appeared to provide the main motivation. The state correction commissioner, Warren J. Gehrt, said about one-third of the state prison inmates at the time were held for nonpayment, and it was costing $6.28 a day to hold each prisoner. Wilmington (Del.) Evening Journal, June 16, 1969, at 1, col. 3. A former magistrate, S. Bernard Ableman, said at the time: "What we have now is a situation where the judge says, 'Since you can't pay your fine, I now sentence the taxpayer to $6.28 a day for X number of days in default of your fine.'" *Id.* at 4, cols. 5-6.

65. DEL. CODE ANN. tit. 11, §4106(b) (1969). Another section permitted the magistrate court to order a defendant to pay the victim for physical or property damage. *Id.* §4103.

The first year of operation under the new law was not without problems. The amount of unpaid fines nearly doubled[66] and some law enforcement officials complained that minor offenders were making a mockery of the police and courts.[67] These problems, however, were blamed primarily on the failure to provide the courts with adequate power to enforce deferred payments.[68] Even with the problems of enforcement, state officials claimed a net savings to the state over the previous year because of a large decrease of prison expenses.[69]

One year after the original law was adopted, a series of five amendments were enacted to alleviate deficiencies in the original statute.[70] The amendments make it easier for courts to enforce payments by granting magistrate courts the power of civil contempt,[71] the authority to request suspension of driver's licenses,[72] and the authority to garnish wages.[73] In addition to these statutory powers, uniform procedures have been established in the magistrate courts to insure prompt efforts to collect the fine when a defendant defaults on the installments.[74]

Fines assessed but not collected rose from seven per cent of total fines in the year before the enactment of the law to eleven per cent in the year afterward.[75] State officials have begun to reduce defaults sharply. Unpaid money is still being collected[76] and since the institution of uniform pro-

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This reparation section has been repealed by 57 Laws of Del., ch. 513 (1970). Commentators generally have urged a reparation program, however. *See generally* Note, *But What About the Victim? The Forsaken Man in American Criminal Law,* 22 U. FLA. L. REV. 1 (1969).

66. Report submitted by Joseph B. Leavy to Governor Peterson, July 9, 1970 [hereinafter cited as Leavy Report].

67. Wilmington (Del.) Evening Journal, Aug. 19, 1969, at 1, cols. 1-3.

68. Letter from Harold T. Perkins, Justice of the Peace and Chief Judge for New Castle County, Delaware, to the *University of Florida Law Review,* Dec. 6, 1970.

69. Leavy Report, *supra* note 66. The net savings to the state at that point was $5,161. However, amounts later collected on fines owed by persons released under the law would increase the net savings.

70. Wilmington (Del.) Evening Journal, April 8, 1970, at 11, cols. 4-7.

71. DEL. CODE ANN. tit. 10, §9506 (Supp. 1971).

72. *Id.* tit. 21, §§2731, 2732 (Supp. 1971).

73. *Id.* tit. 10, §4913 (Supp. 1971).

74. Directive 72 from the Deputy Administrator to the Chief Justice of the State of Delaware, Oct. 28, 1970, and Directive 72A, Nov. 27, 1970. The administrator of the justice of the peace system hopes to further stiffen the law by obtaining passage of a bill requiring persons signing for installment payments to surrender their driver's licenses at that time. Temporary permits would be issued for the period until full payment was due. Letter from Morton Richard Kimmel, Deputy Administrator to the Chief Justice of the State of Delaware, to the *University of Florida Law Review,* Jan. 13, 1971 [hereinafter cited as Kimmel Letter]. Issuance of the temporary license would remove some of the inconvenience required by the system currently used.

75. Compiled from figures in the Leavy Report, *supra* note 66.

76. Since the defendants have not been held in jail the fine has not been extinguished. There is no time limit on collection of such judgments. Smith v. United States, 143 F.2d 228 (9th Cir.), *cert denied,* 323 U.S. 729 (1944). Mr. Kimmel believes less than 7% of the money still owed will prove to be uncollectable. Kimmel Letter, *supra* note 74. That would mean the state would end up collecting about 98% of all fines assessed, based on figures in the Leavy Report, *supra* note 66.

cedures the collection rate has increased thirty-five per cent.[77] Over-all, the state expects to save several hundred thousand dollars a year over the old system of collection by imprisonment.[78]

Delaware officials believe the *Tate v. Short* decision will help in their efforts to collect from out-of-state residents.[79] Although the state can cancel an out-of-state resident's driving privilege in Delaware and request the home state to supend the person's license, other states have not cooperated.[80] The Supreme Court decision could lead to reciprocity agreements if other states adopt similar installment payments systems.[81]

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77. Statement of Governor Russell W. Peterson, March 8, 1971 [hereinafter cited as the Governor's Statement].

78. In the fiscal year prior to enactment of the no-imprisonment law, Delaware jailed 2,123 persons for failure to pay fines. They served an average of 15.8 days in prison and cost the state about $230,000 for upkeep. *Id.* In addition, about $100,000 in fines went uncollected. Leavy Report, *supra* note 66. Some of the savings will be offset by the hiring of additional court clerks to handle the administrative matters. Statement of Mr. Morton Richard Kimmel, Deputy Administrator to the Chief Justice of the State of Delaware, March 8, 1971 [hereinafter cited as the Kimmel Statement].

79. Kimmel Statement, *supra* note 78; Governor's Statement, *supra* note 77.

80. *Id.* Magistrates had found the majority of out-of-state residents willingly pay installments, perhaps in appreciation of the state's treatment of them. Letters from Justice of the Peace Noble S. Warren, Nov. 1970, and Justice of the Peace Norman D. Baker, Nov. 19, 1970 to the *University of Florida Law Review.*

81. Two other states, Maryland and New York, have in recent years updated their laws on sentencing in lieu of fine. In Maryland the law was passed after a federal district court required courts to grant a hearing to indigents before imprisoning them for nonpayment. Morris v. Schoonfield, 301 F. Supp. 158 (D. Md.), *vacated and remanded,* 399 U.S. 508 (1969). The Maryland law does not bar imprisonment for nonpayment, but merely requires that a defendant be given an opportunity to inform the court of his inability to pay the fine. The judge then may allow installment payment, reduce the fine to an amount the defendant is able to pay, or order the defendant committed for nonpayment. MD. ANN. CODE art. 38, §§1, 4 (Supp. 1970). The latter alternative thus allows what *Tate v. Short* forbids.

In New York the statute also followed a court opinion that held a sentence under the prior law to be unconstitutional. People v. Saffore, 18 N.Y.2d 101, 218 N.E.2d 686, 271 N.Y.S.2d 972 (1966). The opinion in *Saffore* was restricted to the portion of the sentence in the lieu of fine, which resulted in imprisonment in excess of the maximum penalty provided by statute for the substantive offense. The new law greatly discourages nonpayment sentencing, but does not expressly forbid it. N.Y. Code Crim. Proc. §470-d (Supp. 1970), *repealing* N.Y. Code Crim. Proc. §718 (1958). However, §470-d has been replaced itself by the new Criminal Procedure Law §420.10, which took effect Sept. 1, 1971, and is substantially the same in content. The statute allows installment payments. If the court is satisfied the defendant is unable to pay, a new sentence must be imposed based on the amount defendant can pay. A defendant unable to pay may apply for resentencing at any time.

The American Bar Association, SENTENCING ALTERNATIVES AND PROCEDURES §§2.7, 6.5 (Approved Draft 1968), and the American Law Institute, MODEL PENAL CODE §§7.02, 302.1-3 (Proposed Official Draft 1962), have each proposed model codes that would greatly change prevailing practice in assessment of fines and imprisonment for nonpayment. The ALI MODEL PENAL CODE would appear to meet the requirements of *Tate v. Short.* However, the standards proposed by the ABA would still leave the alternative of imprisonment in lieu of payment of fine within the trial judge's discretion and would, therefore, appear to be

THE PRACTICE IN FLORIDA

Under Florida law, whenever a court assesses a fine it must also set an alternate period of imprisonment.[82] No statutory provision is made for installment payment of fines. Indeed, installment payment may be prohibited because it is provided by law that if the fine is not paid within twenty-four hours (during which the person remains in custody), the defendant "shall" be committed to the county jail "until such fines and costs shall be paid or until duly discharged by law."[83] The mandatory wording of the statute would not seem to allow for release without payment.

In some instances, however, Florida courts have avoided imprisonment for nonpayment of fines.[84] In Dade County Metropolitan Court, for example,

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unacceptable in that respect. ABA SENTENCING ALTERNATIVES AND PROCEDURES §2.7(b) (Approved Draft 1968).

82. FLA. STAT. §921.14 (1969).

83. *Id.* §937.11(2). The prisoner is entitled to a credit of at least 30 cents a day toward his fine and costs. *Id.* §951.15. The prison indigent who has been sentenced in lieu of fine has three potential avenues for relief:

(1) He may be released on a 90-day bond for the amount of the fine and costs if he can find "one or more good and responsible persons" willing to sign such bond. *Id.* §921.15(1). This practice apparently is infrequently followed. Letter from Monroe W. Treiman, County Judge, Hernando County, Florida, and Executive Secretary, Florida County Judges Association, to the *University of Florida Law Review*, Oct. 26, 1970.

(2) For misdemeanors where the substantive statute does not specify the punishment, a general statute provides a maximum sentence of $200 or 90 days in jail; if a fine alone is authorized by the substantive statute, a court may order the defendant imprisoned for 60 days in default of payment. FLA. STAT. §775.07 (1969).

(3) A person who has been sentenced to a fine not over $300, confined in prison for 60 days, and who does not have property valued at over $20 may apply to the court for discharge from custody. *Id.* §922.04. One other possible benefit provided by Florida law to the indigent defendant is the opportunity to be heard on mitigating circumstances before imposition of the sentence. However, the judge is not required to ask if there are any such circumstances. *Id.* §921.13. Indigent defendants may also be discharged from payment of costs. *Id.* §939.05.

84. Statistics showing the dimensions of the practice of imprisonment in Florida for nonpayment of a fine are not generally available. A questionnaire seeking statistical information on the number of prisoners jailed through alternate sentences was mailed to the sheriffs and police chiefs in 11 of the 12 largest cities and counties in Florida. In addition, officials in the Alachua County sheriff's office and Gainesville police department were interviewed. Of the 22 questionnaires mailed, 10 were returned, but accurate information was unavailable. Estimates of the number of prisoners held on alternate sentence ran from 1% to 84%. One reason statistics are not compiled appears to be that if a person cannot pay a fine immediately in a municipal or county judge's court, he is turned over to the city police department or sheriff's office. If relatives then pay the fine, he is released, but the court is not notified. There is no cross-checking of information between the judicial and police agencies. Nor, apparently, in most cases do either the courts or police compile any annual breakdown of information showing number of alternate sentences, the amount of fines assessed but not collected, or numbers of prisoners serving alternate sentences. The Dade County Metropolitan Court, which uses a computer in its recordkeeping, published an annual report for 1969 that shows that 137,202 persons paid fines; that 5,163 individuals were fined and jailed when unable to pay; that 3,292 persons were sentenced

the presiding judge may authorize a stay of execution of a fine; nonetheless, 5,163 persons went to jail for nonpayment in 1969.[85] In Tampa, Florida, a probation officer is available in court to arrange for delayed payments by persons who cannot immediately pay a fine.[86]

In Hernando County, Florida, the county court has developed a system of installment payments.[87] After a defendant has either pled or been found guilty, the court will withhold sentence and release the defendant on his own recognizance. The defendant then makes periodic payments to a trust fund; when the fund equals the fine and costs the defendant is sentenced and the money transferred to the court's fine account.[88]

In addition to these individual and random indications of dissatisfaction with the alternate sentencing system in Florida, a committee established by the Florida Bar has made recommendations to end the practice of alternate sentencing.[89] The committee's recommendations, based on a comparison of Florida law with the ABA minimum standards, include sug-

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directly to jail; and that 2,868 defendants received both a jail sentence and fine. The report does not show the total amount of the fines assessed against those who could not pay. METROPOLITAN COURT, DADE COUNTY, FLA., ANNUAL REPORT (1969).

A possible indication that Florida has a large number of persons sentenced in lieu of payment of fines comes from these statistics: Florida ranks *ninth* in population. U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES 12 (91st ed. 1970). It is *fifth* in serious crimes. U.S. DEPARTMENT OF JUSTICE, UNIFORM CRIME REPORTS 64-73 (1969). It is *fifth* in state prison population. BUREAU OF PRISONS, NATIONAL PRISONER STATISTICS 8 (1967). It is *third* in the number of prisoners serving sentences in city and county jails. U.S. DEPARTMENT OF JUSTICE, LAW ENFORCEMENT ASSISTANCE ADMINISTRATION, NATIONAL JAIL CENSUS 9 (1970). If 40% of the 4,011 prisoners in city, and county jails on one day (*id.*) were there for nonpayment, the cost per year in jail expenses for those held for nonpayment would be about $2,800,000. This computation is arrived at by using the Florida Probation and Parole Commission's estimate of the cost of providing for care of a prisoner in a state prison at $4.75 a day. *See* authorities cited note 27 *supra.*

85. METROPOLITAN COURT, DADE COUNTY, FLA., ANNUAL REPORT (1969). The Miami court system has one of the most liberal "work off" rates in the nation, reducing the fine by $15 for each day served. *Id.*

86. Letter from Norman Conaty, Assistant Superintendent, City of Tampa Sanitation Department, to the *University of Florida Law Review*, Dec. 29, 1970.

87. Letter from Monroe W. Treiman, County Judge, Hernando County, Florida, and Executive Secretary, Florida County Judges Association, to the *University of Florida Law Review*, Nov. 3, 1970.

88. *Id.* The system is not available to defendants from out of the area or those with whom there has been "bad experience" in the past. *Id.* A defendant can have the payment schedule extended for good cause. But if the defendant does not cooperate, the judge may issue a capias for his arrest. *Id.* Another effort at freeing indigent defendants pending payment of fines has been made in Pensacola. A police inspector assumed the responsibility over an 18-month period of releasing about 100 prisoners who owed fines from $10 to $311, allowing them to find work and then pay the fine. Letter from Inspector James C. Davis, Commanding Officer of the Service Division, Pensacola Police Department, to the *University of Florida Law Review*, Dec. 3, 1970.

89. COMPARATIVE ANALYSIS OF NINE APPROVED ABA STANDARDS FOR THE ADMINISTRATION OF CRIMINAL JUSTICE WITH FLORIDA STATUTORY LAW, COURT RULES AND LEGAL PRACTICE 86 (1970). The committee merely compared Florida's statutes to the ABA standards and did not conduct an independent examination into the matter.

gested statutory provision for allowing installment sentences, legislative criteria as to whether a fine is the proper punishment for an offense, and abolition of the alternate sentence system.[90]

CONCLUSION

The Supreme Court has ruled that states may no longer impose imprisonment for inability to immediately pay a fine.[91] The decision leaves state legislatures and courts the choice of alternative means of enforcing their penological interests. Some observers believe the result will be increased use of jail terms and less use of fines.[92] Unless the authorities decide, however, that imprisonment is a necessary or preferable deterrent in traffic and minor misdemeanor cases such a step would appear to be unjustified. Although increased use of specified jail terms might withstand equal protection challenges,[93] that alternative poses obvious unacceptable social consequences.[94] In addition, any saved administrative costs through imprisonment rather than installment payment would probably be illusory.[95]

Imprisonment often results in loss of employment and the resulting social and economic problems inherent in separation of families. Unless adequate rehabilitative facilities are provided, imprisonment may well harden the individual's anti-social attitude rather than ameliorate his criminal predilections. Especially in the cases of misdemeanors and minor first offenses does the social and economic cost of imprisonment appear anomalous.

Although an initial reaction to *Tate v. Short* is that it presents another step toward favoring the lawbreaker at the expense of the state, in reality it may provide states the impetus to enforce their laws at less cost to government and society. Given the present plight of our national prison systems and the social problems created by the disparity in imprisoning the poor while the more affluent guilty go free, the decision in *Tate v. Short* may prompt changes in our penal system that have been long needed. The Delaware experience has shown that the practices proscribed by *Tate v. Short* were, indeed, antiquated. Florida must make an immediate reassessment of its methods of enforcing fines if it is to conform to constitutional mandates and provide a more just and economical penal system.

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90. *Id.* at 86-87. It is obvious that present Florida statutory provisions are unsatisfactory and fall clearly within the proscriptions of *Tate v. Short.*

91. Tate v. Short, 401 U.S. 395 (1971).

92. See note 4 *supra* and accompanying text.

93. Equal protection might still be argued if it could be shown that courts were fining persons from higher economic classes and imprisoning those from lower economic classes.

94. *See* text accompanying notes 9-18 *supra.*

95. *See* text accompanying notes 62-78 *supra.*