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there are still manifestations of juror prejudice to be dealt with which need study and "experimentation." It has been suggested that training for jury service would help meet the problem of juror prejudice but even this suggestion would only be meaningful as part of a comprehensive effort by the courts.⁷⁷ The element of communication also needs the consideration of the courts; for example an "experiment" with written instructions might prove fruitful.⁷⁸ It would seem that there are possibilities for more productive experiments in the field of criminal responsibility than that found in the instant case.

JAMES M. VAN DE WATER

CRIMINAL LAW—PUNISHMENT—IMPRISONMENT OF INDIGENT FOR NON-PAYMENT OF A FINE UNCONSTITUTIONAL IF EXTENDED BEYOND MAXIMUM STATUTORY SENTENCE

Subsequent to a plea of guilty to the misdemeanor of assault in the third degree, defendant Saffore was given the maximum sentence allowed by law:¹ a five hundred dollar fine in addition to imprisonment for one year. Non-payment of the fine was to result in one day imprisonment for each dollar remaining unpaid upon completion of the one year of incarceration.² It is undisputed that the sentencing court was cognizant of the defendant's inability to pay the fine: because of his indigency the trial court, the Appellate Division, and the Court of Appeals granted the defendant's motion to have counsel assigned to him. The effect of the complete sentence was to incarcerate Saffore for at least eight months (assuming time off for good behavior)³ plus an additional five hundred days, for a crime for which the legislature had imposed a maximum one year term of imprisonment. The Appellate Division of the Supreme Court affirmed the trial court's decision⁴ and an appeal was taken by permission. The Court of Appeals *held*, 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 total imprisonment of more than one year for a misdemeanor, is unauthorized by the Code of Criminal Procedure and violates the defendant's right to equal protection of the law and the constitutional ban

77. Arens 27.

78. *Ibid.*

1. N.Y. Pen. Law § 245 provides, "Assault in the third degree is punishable by imprisonment for not more than one year, or by a fine of not more than five hundred dollars, or both."

2. N.Y. Code Crim. Proc. §§ 484, 718 provide "A judgment that the defendant pay a fine may also direct that he be imprisoned until the fine be satisfied, specifying the extent of the imprisonment, which cannot exceed one day for every one dollar of the fine."

3. See N.Y. Correc. Law § 230.

4. *People v. Saffore*, 25 A.D.2d 496, 267 N.Y.S.2d 314 (4th Dep't 1966).

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

Providing substantial justice for all men regardless of financial standing is an age-old problem.⁵ At common law all misdemeanors were punishable by fine and imprisonment as well as by corporal punishment and all felonies except petit larceny, mayhem, and rape were punishable by death.⁶ Although fines were often very large, sentences of imprisonment rarely exceeded the term of two years.⁷ Common law rules prevailed in this country until the ratification of the federal constitution.⁸ Today, in addition to state constitutional provisions regarding excessive fines⁹ and equal protection,¹⁰ the fourteenth amendment expressly mandates equal protection in the application of both federal¹¹ and state¹² laws. The eighth amendment prohibits the imposition of excessive fines by federal¹³ and state¹⁴ tribunals in criminal proceedings. The Court in the instant case recognized the persuasiveness of the defendant's arguments concerning the ever-increasing protections afforded the indigent by the Supreme Court of the United States.¹⁵ Particularly since the case of *Griffin v. Illinois*,¹⁶ the Supreme Court has made measured advances toward affording an indigent defendant equal protection of the laws before, during, and after criminal proceedings.¹⁷ In the *Griffin* case, Justice Black, speaking for a majority of the Court, enunciated an enlarged standard of equal protection: "In criminal trials, a state can no more discriminate on account of poverty

5. "Ye shall do no unrighteousness in judgment: thou shalt not respect the person of the poor, nor honour the person of the mighty: *but* in righteousness thou shalt judge thy neighbor." *Leviticus* 19:15.

6. See *People ex rel. Gately v. Sage*, 13 App. Div. 135, 43 N.Y. Supp. 372 (2d Dep't 1897).

7. *Id.* at 138, 43 N.Y. Supp. at 374.

8. For a general history of early fines and imprisonment, see 2 Holdsworth, *A History of English Law* 43-44, 46 (3d ed. 1923).

9. See, e.g., N.Y. Const. art. I, § 5 which provides, "Excessive bail shall not be required nor excessive fines imposed, nor shall cruel and unusual punishments be inflicted. . . ."

10. See, e.g., N.Y. Const. art. I, § 11 which provides, "No person shall be denied equal protection of the laws. . . ."

11. U.S. Const. amend. XIV, § 1: "No state shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws."

12. *Ibid.*

13. U.S. Const. amend. VIII: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

14. The eighth amendment has been held to be applicable to the states through the fourteenth amendment. See *Robinson v. California*, 370 U.S. 660 (1962); *United States ex rel. Bryant v. Fay*, 211 F. Supp. 812 (S.D.N.Y. 1962), *cert. denied*, 375 U.S. 852 (1963) (cruel and unusual punishment clause); *Mastrian v. Hedman*, 326 F.2d 708 (8th Cir.), *cert. denied*, 376 U.S. 965 (1964), and *Pilkinton v. Circuit Ct.*, 324 F.2d 45 (8th Cir. 1963) (excessive bail clause); *United States ex rel. Privitera v. Kross*, 239 F. Supp. 118 (S.D.N.Y. 1965) (excessive fines clause assumed to be applicable).

15. Instant case at 104, 218 N.E.2d at 687-88, 271 N.Y.S.2d at 975 (1966).

16. *Griffin v. Illinois*, 351 U.S. 12 (1955).

17. See, e.g., *Escobedo v. Illinois*, 378 U.S. 478 (1964) (All persons must be notified of right to counsel before police interrogations.); *Lane v. Brown*, 372 U.S. 477 (1963) (An indigent may secure a free transcript of trial if such is necessary for appeal.); *Gideon v. Wainwright*, 372 U.S. 335 (1963) (The absolute right to counsel at trial for major crimes is afforded indigents.); *Smith v. Bennett*, 365 U.S. 708 (1961) (Financial hurdles must not impair the availability of a writ of habeas corpus.); *Burns v. Ohio*, 360 U.S. 252 (1959) (Nonpayment of a docket fee does not preclude appeal.).

than on account of religion, race, or color."¹⁸ Although the statute involved¹⁹ was both fair on its face and indiscriminately administered, it was held to be both unreasonably discriminatory and in violation of equal protection because it led to one result for the wealthy and another for the poor.²⁰ Thus *Griffin* was the genesis of explicit Supreme Court recognition of the fundamental rights of the indigent accused under the equal protection standard. In a recent district court case,²¹ however, the court recognized that the wide discretion vested in the sentencing judge (considering, for example, the defendant's past criminal records at the time of sentencing) precluded the invocation of the eighth or fourteenth amendments in the case where neither a maximum fine nor maximum imprisonment had been imposed upon an indigent.²² The imprisonment of a defendant for nonpayment of a fine when he is unable to pay brings into play many of the basic protections implicitly guaranteed by the Constitution but only recently recognized by the judiciary. The basic problem can be more easily analyzed by looking to the development of this area of the law in New York State.

Early New York statutes provided that fines and imprisonment could be levied against one who was convicted of a misdemeanor as well as upon a convicted felon.²³ New York courts in the last century imposed imprisonment for nonpayment upon defendants convicted of a misdemeanor for the purpose of bringing about collection of a fine.²⁴ Upon the adverse judgment a *capias ad satisfaciendum pro fine* was issued to the sheriff to seize the convicted defendant and detain him in jail for a period not to exceed one day for each unpaid dollar of the fine.²⁵ Yet as early as 1898 imprisonment for nonpayment of a fine was deemed not to be criminal punishment but rather only a means compelling payment of the fine.²⁶ Even at this early date, however, there was considerable confusion as to whether the trial judge in his discretion could levy a fine upon an impecunious defendant for the purpose of increasing his jail term when

18. *Griffin v. Illinois*, 351 U.S. 12, 17 (1955).

19. See Ill. Rev. Stat. ch. 110, § 101.65 (1955) (Sup. Ct. Rule 65).

20. *Griffin v. Illinois*, 351 U.S. 12, 17-18 (1955) explains that, "Plainly the ability to pay costs in advance bears no rational relationship to a defendant's guilt or innocence and could not be used as an excuse to deprive a defendant of a fair trial." Also, "There can be no equal justice where the kind of trial a man gets depends upon the amount of money he has." *Id.* at 19.

21. *United States ex rel. Privitera v. Kross*, 239 F. Supp. 118 (S.D.N.Y. 1965).

22. *Id.* at 121. Instances in which the indigent defendant is sentenced and fined the maximum allowed by law are expressly distinguished.

23. N.Y. Revised Laws of 1813, ch. 29, § 13 (now various sections of N.Y. Pen. Law).

24. See *Kane v. People*, 8 Wend. 203, 216 (1831): "It seems now to be well settled, that for the collection of the fine imposed upon the defendant upon such conviction [of a misdemeanor], the people have the right to proceed against the property of the defendant by a *levari facias*, as well as against the body; and perhaps they may proceed against both at the same time."

25. *People ex rel. Gately v. Sage*, 13 App. Div. at 138, 43 N.Y. Supp. at 374 (2d Dep't 1897). This case contains a good review of early New York law on fine and imprisonment.

26. *People v. Stock*, 26 App. Div. 564, 50 N.Y. Supp. 483 (2d Dep't), *aff'd*, 157 N.Y. 681, 51 N.E. 1092 (1898).

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he thought the statutory punishment to be too lenient.²⁷ Today, although some states impose not only jail sentences for nonpayment but hard labor as well,²⁸ the sole rationale in New York State for imprisonment resulting from nonpayment of fines is that imprisonment is a means of collecting the fine and not an increase in criminal penalty.²⁹ Both Congress and the New York State Legislature have recognized to a limited degree the inequities arising from the incarceration of an insolvent defendant.³⁰ Present statutory provisions, however, do not solve the problem of determining the scope of the indigent's rights under the eighth and fourteenth amendments: since constitutional rights, once recognized, are absolute, the determination of whether a defendant's rights have been violated should not depend upon whether he serves one day or one year or whether the fine imposed is one dollar or five hundred dollars.³¹ Moreover, the constitutional implications of imprisonment for nonpayment of a fine have not been recognized by New York State courts until recently,³² when two decisions held that imprisonment of an indigent for nonpayment of a fine was unconstitutional.³³ In *People v. Johnson*,³⁴ Justice Hopkins explicitly stated that confinement arising from default of payment of a fine by a known indigent violated the defendant's rights under the equal protection clause of the fourteenth amendment. The decision in *People v. Collins*³⁵ is much more explicit in analyzing the constitutional implications of prior decisions. Although the court in *Collins* rejected the defendant's contention that his imprisonment was a violation of the prohibition against cruel and unusual punishment, it did recognize the imprisonment as a violation of the equal protection clause of the Constitution.³⁶ The court stated that since the indigent does not have within his control the power to free himself from incarceration he is placed in an un-

27. See *People v. Kelly*, 32 Misc. 319, 66 N.Y. Supp. 733 (Ct. Gen. Sess., N.Y. County 1900).

28. See, e.g., Ala. Code tit. 15, § 341 (1958); Utah Code Ann. § 77-36-7 (1953).

29. *Matter of McKinney v. Hamilton*, 282 N.Y. 393, 26 N.E.2d 949 (1940); *City of Buffalo v. Murphy*, 228 App. Div. 279, 239 N.Y. Supp. 206 (4th Dep't 1930); *People ex rel. Wright v. Redman*, 27 Misc. 2d 984, 209 N.Y.S.2d 1001 (Sup. Ct. 1960), *appeal dismissed*, 13 A.D.2d 620, 218 N.Y.S.2d 500 (4th Dep't 1961). *But see Chapman v. Selover*, 225 N.Y. 417, 421, 122 N.E. 206, 207 (1919), in which Justice Cardozo says, "The state, when it punishes misdemeanors by a fine, is not confined to the dubious remedy of a civil action for a penalty. . . . The offender who refuses to pay may be imprisoned until the fine is satisfied. . . ."

30. See 18 U.S.C. § 3569 (1964) permitting one incarcerated for nonpayment of a fine to obtain his release after thirty days upon sufficient showing of poverty; ALI Model Penal Code § 302.2 (proposed final draft No. 1, 1961) providing for imprisonment in the event of default only when a defendant has failed "to make a good faith effort to obtain the funds required for the payment" or is otherwise contumacious; see also N.Y. Code of Crim. Proc. § 484 (power to remit fines).

31. See Brief for Respondent, p. 7, instant case.

32. See *People v. Watson*, 204 Misc. 467, 126 N.Y.S.2d 832 (Ct. of Gen. Sess., N.Y. County 1953).

33. See *People v. Johnson*, 24 A.D.2d 577, 262 N.Y.S.2d 431 (2d Dep't 1965); *People v. Collins*, 47 Misc. 2d 210, 261 N.Y.S.2d 970 (County Ct., Orange County 1965).

34. *People v. Johnson*, *supra* note 33.

35. *People v. Collins*, 47 Misc. 2d 210, 261 N.Y.S.2d 970 (County Ct., 1965).

36. *Id.* at 212, 261 N.Y.S.2d at 972.

equal position with the wealthy defendant whose conduct, trial, and punishment have been the same.³⁷

In the instant case, the Court explicitly recognized that the only justification for imposing a jail sentence following nonpayment of a fine is that incarceration enforces payment of the fine and is not an increment to the maximum statutory penalty.³⁸ The imprisonment is, in other words, merely a means of compelling obedience to the judgment of the court.³⁹ Thus, when the court knows that the defendant cannot possibly pay the fine immediately, incarceration runs contrary to the spirit and intent of the New York Code of Criminal Procedure section 484, violates the defendant's right to equal protection of the law, and is contrary to the constitutional ban against excessive fines.⁴⁰ In enunciating this decision, Chief Judge Desmond, speaking for a unanimous Court, defined an excessive fine as one "which notably exceeds in amount that which is reasonable, usual, proper or just."⁴¹ He explained that a fine of five hundred dollars leived upon a man who has no money at all is necessarily excessive when it means that he will be jailed for a period longer than he otherwise would for the crime, and will be deprived of the ability to earn a livelihood for a period of five hundred days.⁴² The Court also maintained that it is a denial of equal protection of the laws to let a defendant's financial position determine how long he must be imprisoned. The general rule of the case, then, requires two exigencies: first, that the court recognize the actual indigency of the defendant; second, that imprisonment under the sentence result in more than one year for a misdemeanor. Such determinations by any New York court must necessarily prohibit the immediate imprisonment of an indigent for nonpayment of a fine.

It has been said that "equal criminal justice for the rich and poor alike is one of the few areas where our country follows rather than leads."⁴³ Since the case of *Griffin v. Illinois*,⁴⁴ attainment of substantial criminal justice regardless of economic disparities has been a major goal of the courts. The decision in the instant case may be said to be one step in this direction. Yet it is arguable that the Court of Appeals decision fails to give clear guidelines for the determination of future cases. For example: Is the very imposition of a fine upon a known

37. It should be noted that the facts in the *Collins* case are strikingly similar to those in the instant case and the court in *Collins* did not relieve an indigent from paying the fine. In effect, the court realized that this would put the wealthy person in a worse position than the indigent and would be a further violation of equal protection and due process. *Ibid.*

38. Instant case at 103, 218 N.E.2d at 687, 271 N.Y.S.2d at 974.

39. See also *McKinney v. Hamilton*, 282 N.Y. at 397-98, 26 N.E.2d at 951 (1940); *City of Buffalo v. Murphy*, 228 App. Div. 279, 239 N.Y. Supp. 206 (4th Dep't 1930).

40. Instant case at 104, 218 N.E.2d at 687, 271 N.Y.S.2d at 974: "Since imprisonment for nonpayment of a fine can validly be used only as a method of collection for refusal to pay a fine we should now hold that it is illegal so to imprison a defendant who is financially unable to pay."

41. Instant case at 104, 218 N.E.2d at 688, 271 N.Y.S.2d at 975.

42. Chief Judge Desmond also stresses the absurdity of serving out a fine at the rate of one dollar per 24 hours in a state where the minimum wage is \$1.50 per hour.

43. Goldberg, *Equality and Governmental Action*, 39 N.Y.U.L. Rev. 205, 224 (1964).

44. 351 U.S. 12 (1955).

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indigent a violation of his constitutional rights *per se*? Perhaps the imposition of a fine upon an indigent by itself is not unconstitutional, but only becomes such in the absence of giving the indigent a reasonable opportunity to bring about its payment. In accordance with the notions of due process and the protection against excessive fines, the instant Court recognized the constitutional demands for "reasonable, usual, proper, or just" punishment.⁴⁵ It would seem that if an indigent defendant is afforded no opportunity to bring about payment of the fine, imprisonment for nonpayment is unreasonable, unfair, and unjust. A fine may be termed "excessive" only in terms of the indigent's ability to pay. Moreover, if an indigent is not given the opportunity to comply with the judgment of the court and is subsequently imprisoned for a period longer than the maximum allowed by statute, a fine imposed upon him denies equal protection because blatant discrimination exists between the wealthy man and the poor man. Accordingly, the "impossibility" of payment recognized by the Court can exist only when *immediate* payment is demanded from the indigent or when the indigent will under no circumstances ever be able to bring about payment.

If the reasonableness of a fine is based upon a "choice"⁴⁶ of freedom or imprisonment because of economic means, consider the comparison between the wealthy man and the indigent. The indigent has no choice with regard to immediate payment. It may be argued, therefore, that imprisonment of an indigent defendant is justified to prevent his eluding without pain the penalty a non-indigent suffers in paying a fine: the penalties, although different in form, are equal in burden. However, no one would contend that imprisonment at the rate of one day of imprisonment for each unpaid dollar falls with equal severity upon the indigent as the fine of five hundred dollars upon the man of means.⁴⁷ The decision in the instant case does not preclude terms of reasonable payment imposed by the judge in accordance with probation proceedings.⁴⁸ It is suggested, then, that the rule in the instant case is based upon the indigent's ability to pay the fine under reasonable circumstances and does not prohibit all impositions of fines upon indigents nor all imprisonment resulting from nonpayment.

If the indigent were given a reasonable period to pay the fine, subsequent failure to pay could result in further proceedings against the defendant⁴⁹ and

45. Instant case at 104, 218 N.E.2d at 688, 271 N.Y.S.2d at 975.

46. Goldberg, *supra* note 43, at 221 states, "The 'choice' of paying \$100 fine or spending 30 days in jail is really no choice at all to the person who cannot raise \$100. The resulting imprisonment is no more or no less than imprisonment for being poor, a doctrine which I trust this Nation has long since outgrown."

47. See Brief for Appellant, p. 11, instant case, arguing that in terms of due process this sentence "has a kind of vice that is unlawful for a rich man as well as for a poor man. It condemns a person to imprisonment for a period outlasting the maximum time authorized by law unless the prisoner fulfills an impossible condition."

48. See, e.g., N.Y. Code of Crim. Proc. § 932 (A court may impose as a condition of probation that a defendant convicted of a misdemeanor "shall work faithfully at suitable employment" and "shall pay a fine in one or several sums.") and § 935 (power to jail defendant for violation of probation).

49. Perhaps contempt proceedings. Compare N.Y. Court Acts, Part I, Support Proceedings § 454 (commitment for nonpayment).

would not be in violation of either the eighth or the fourteenth amendments.⁵⁰ By comparing what it costs the state to imprison a defendant with the dollar amount of the fine collected through this remedy, some states, recognizing the best interests of the state and the defendant, have provided for installment payments in lieu of incarceration.⁵¹ Provisions in the new New York Revised Penal Law, however, do not adopt the "reasonable terms of payment" rationale, but provide for the imposition of fines for a misdemeanor as a deterrent and as a sanction.⁵²

Serious problems may arise in extension of the rationale of the present Court to other fact situations, *e.g.*, violation of an ordinance.⁵³ The Court's rationale could logically be extended to prohibit the imprisonment of a person who violated an ordinance and subsequently was unable to pay the fine. In a recent Wisconsin case,⁵⁴ however, imprisonment for failure to pay a fine imposed for violation of ordinance was held constitutional. Although the court expressly recognized such indigency arguments as were presented in the instant case,⁵⁵ it did not refute the efficacy of these arguments. The court held that to adopt such line of reasoning would be to vitiate all fines of ordinance violators who could be considered "indigent," and would allow such offenders to violate city ordinances with impunity.⁵⁶ This reasoning overlooks the installment payment possibilities and the attendant contempt proceedings for violation thereof. It is persuasive to suggest, then, that the way to assure that an indigent will pay a fine is not to incarcerate him but rather to permit him the opportunity to earn money to pay it.⁵⁷ Finally, although it is said that the government cannot be expected to equalize all economic disparities, this does not mean that it should not try to equalize such disparities in certain critical areas like criminal justice: "The real question is . . . 'has the government done all that can be reasonably required of it . . . to render the poverty of the litigant an irrelevancy?'" In all candor we must confess that government in this country—both state and federal—has not done all that can reasonably be required.⁵⁸ The instant case is a step in the right direction.

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50. A further analogy may be made to support proceedings. Courts maintain records of reasonable and steady payments. See, *e.g.*, N.Y. Court Acts, Part I, Support Proceedings, §§ 412-14 (duty of payment) and 224 (collection of money).

51. See Cal. Pen. Code § 1205; Pa. Stat. Ann. tit. 19, § 953 (1964).

52. See N.Y. Revised Pen. Law, Commission Staff Comments on Changes in the New Pen. Law Since the 1964 Study Bill, art. 80. The same comments, however, recognize that fines levied upon felons must bear a reasonable relation to the perpetrated crime.

53. See, *e.g.*, Buffalo, N.Y., Ordinances ch. IX, § 30 (1952) (disorderly conduct), which provides "and in case the person so convicted does not *immediately* pay such fine, he or she may be committed to the Erie County penitentiary for the term of one day for each and every dollar of such fine not paid." (Emphasis added.)

54. *City of Milwaukee v. Horvath*, 143 N.W.2d 446 (Sup. Ct. Wis. 1966).

55. *Id.* at 448.

56. *Ibid.*

57. See Brief for Appellant, *supra* note 47.

58. Goldberg, *supra* note 43, at 224.