

Supreme Court of the United States

OCTOBER TERM, 1969

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In the Matter of:

Docket No. 782

PHILLIP MORRIS, et al.,

Petitioners,

vs,

HIRAM SCHOONFIELD, WARDEN, et al.

Respondents.

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Place Washington, D. C.

Date April 22, 1970

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ARGUMENTS OF:

P A G E

Robert G. Fisher, on behalf of Petitioners

2

George L. Russell, Jr., on behalf of Respondents

16

REBUTTAL ARGUMENT OF:

P A G E

Robert G. Fisher, on behalf of Petitioners

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* * * *

1 IN THE SUPREME COURT OF THE UNITED STATES

2 October Term 1969

3 - - - - -X
 4 PHILLIP MORRIS et al., :
 5 Petitioners; :
 6 vs. : No. 782
 7 HIRAM SCHOONFIELD, WARDEN, et al., :
 8 Respondents. :
 9 - - - - -X

10 Washington, D. C.
11 April 22, 1970

12 The above-entitled matter came on for argument
13 at 11:54 a.m.

14 BEFORE:

15 WARREN E. BURGER, Chief Justice
 16 HUGO L. BLACK, Associate Justice
 17 WILLIAM O. DOUGLAS, Associate Justice
 JOHN M. HARLAN, Associate Justice
 WILLIAM J. BRENNAN, JR., Associate Justice
 POTTER STEWART, Associate Justice
 BYRON R. WHITE, Associate Justice
 THURGOOD MARSHALL, Associate Justice

18 APPEARANCES:

19 Robert G. Fisher, Esq.
 20 500 West Baltimore Street
 21 Baltimore, Maryland 21201
 Attorney for Petitioners

22 George L. Russell, Jr.,
 23 City Solicitor of Baltimore
 24 508 Tower Building
 Baltimore, Md. 21202
 Attorney for Respondents

1 Q Two dollars per day?

2 A Two dollars per day.

3 Q Your statute has been substantially amended;

4 I expect you are going to tell us about that in due course.

5 A That is right, Your Honor. The new statute
6 should be in force, but it is not. I called the Chief Judge
7 of the Municipal Court of Baltimore yesterday, and he said he
8 had never heard of the new statute. He asked me to send him
9 a copy, which I did. I called the jail, and they said that
10 they had not heard of the new statute; that nobody was getting
11 out under it.

12 The new statute, by the way, just gives a judicial
13 remedy. It does not say that everybody who was committed under
14 the old statute should get out. It only gives them a right
15 to apply to the justice that committed them for redetermination
16 under the new statute, and it does not guarantee that they will
17 get out.

18 Q It gives judicial --- Excuse me.

19 Q I was just going to ask does it have a daily rate?

20 The new statute?

21 A It has a minimum rate of \$10 per day.

22 Q So it gives potential judicial remedy to those
23 now in jail, and it also, for the future, sets up ---

24 A You are right, Your Honor, it gives a potential
25 remedy, but it doesn't require that they be notified of the

1 existence of the remedy. And if the Chief Judge of the
2 Municipal Court doesn't know about it a week after it was
3 passed ---

4 Q Well, he knows now; you told him.

5 A --- how are people that are locked up in jail,
6 where they don't have television or newspapers or radios,
7 supposed to find out about it?

8 Q Is the new statute part of your papers?

9 A No, it is not, Your Honor, but it is substan-
10 tially the same as a copy that was printed in the brief of
11 the state conceding jurisdiction, and, in addition, City
12 Solicitor Russell has sent, I understand, copies of the new
13 statute to the Court.

14 Q Does this case involve offenses for which a fine
15 only is provided?

16 A Yes, it does, Your Honor, traffic offenses.

17 Q This does involve the traffic offense that we
18 were talking about previously?

19 A That is right. I am aware of the colloquy before
20 me, and I notice that the Attorney General of Illinois said
21 that it would be disastrous, because there would be no way to
22 compel people to pay traffic fines. There is a very good way
23 to compel people to pay traffic fines, and that is to take
24 away their license if they don't pay the fine. And there are
25 other traffic remedies.

1 Let me explain how we got here -- I have very little
2 time -- and then maybe I could start off with my argument on
3 the equal protection, due process, cruel and unusual punishment,
4 excessive fines, and involuntary servitude when we come back
5 after lunch.

6 We commenced this action under 42 United States Code
7 983 for an injunction of the Warden of the Baltimore City Jail
8 to restrain him from holding people unconstitutionally
9 detained and for a declaratory judgment that the statute is
10 unconstitutional on its face.

11 The district court held that the statute was constitu-
12 tional on its face, but that it was unconstitutional as applied
13 in two respects. In the first place, it said ---

14 MR. CHIEF JUSTICE BURGER: I think we will suspend
15 for lunch now, Mr. Fisher, and pick up after lunch.

16 (Whereupon, the argument in the above-entitled matter
17 was recessed at 12:00 noon, to resume at 1:00 p.m. the same
18 day.)

1 (The argument in the above-entitled matter was
2 resumed, pursuant to recess, at 1:00 p.m.)

3 MR. CHIEF JUSTICE BURGER: Mr. Fisher, you may pick
4 up where you left off.

5 FURTHER ARGUMENT OF ROBERT G. FISHER

6 ON BEHALF OF PETITIONERS

7 MR. FISHER: Where I left off, Your Honor, was the
8 decision of the three-judge district court. It upheld the
9 Maryland \$2 a day statute as constitutional on its face. But
10 it held that in each case the sentencing judge had to hold a
11 hearing to allow persons being committed to tell the judge
12 about their indigency and give him an opportunity to decide
13 whether or not to reduce the fine, or to put them on probation,
14 or to allow them to pay in installments, or to commit them.

15 I also held that, as the statute was being applied
16 with respects to costs at that particular time, the statute
17 was unconstitutional, because the people were not being jailed
18 for costs in all cases, but they were in some cases. And under
19 the Rinaldi vs. Yeager Case this was a discrimination, a denial
20 of equal protection. At that particular time, the statute
21 could not constitutionally be applied in the State of Maryland
22 to jail people for nonpayment of costs.

23 We have appealed from this decision under the
24 authority of article 28, section 1253. Our basic contention
25 in this Court boils down really to one premise, and that is

1 that one 24 hour day in jail with all that that entails in
2 terms of the stigma in the community and the fact that
3 the man may lose his job, the fact that the man may be sub-
4 jected to the unpleasant experiences of the jail -- one 24
5 hour day in jail does not equal \$2.

6 The poor man is being punished more severely than
7 the rich man if the rich man pays \$2 and the poor man goes to
8 jail for a 24 hour day. We submit that this goes to an issue
9 that is so fundamental that it is written in stone on the
10 front of this Courthouse, "Equal Justice Under Law."

11 Q How far would that argument go? Let's assume
12 a \$10 fine on a person and that all that person possessed in
13 the world was \$10, as compared to a \$10 fine on a person who
14 had a million dollars. That would be unequal protection,
15 wouldn't it, under your standard?

16 A The way our society looks at a man who has paid
17 a fine is different than the way our society looks at a man
18 who has gone to jail. The man who has gone to jail is a criminal.
19 The man who has paid a fine is somebody who might have got a
20 traffic ticket.

21 Q Well, that is not what the Maryland Legislature
22 has said. The Maryland Legislature said they were equivalent.

23 A They are not ---

24 Q That is the way society, as represented in the
25 Maryland Legislature, has disagreed with you, isn't it?

1 A No. The Maryland Legislature has another
2 purpose in passing this statute, and that is to compel people
3 with money to pay. The Maryland Legislature has deliberately
4 made the alternative to nonpayment a harsher penalty so that
5 people with money will choose the alternative of paying. That
6 is the dominant -- we submit that is the only purpose behind
7 this statute. The other side disagrees, but that is certainly
8 the dominant purpose of this statute. The legislative history
9 makes that clear: to collect money from those who can pay
10 by threatening them with jail.

11 Q And by jailing those who don't pay, isn't that
12 correct?

13 A If you jail those who don't pay, you are punishing
14 a man unfairly, in a greater amount than the judge adjudicated,
15 in order to make somebody else pay. He is a sacrificial goat,
16 so to speak, for the man who doesn't want to pay and is being
17 made to pay. We submit ---

18 Q What is to happen to the scofflaw who collects
19 dozens and dozens of parking tickets in his friend's auto-
20 mobile and who hasn't got a nickel to his name?

21 A We had an intervener in this case who is in
22 that very position. He had something like \$1200 worth of
23 fines. He was a scofflaw. He was a schoolteacher . He went
24 to jail for -- he would have gone to jail, but for this case,
25 for over a year. Whereas, another scofflaw who had \$1200

1 would not have gone to jail at all.

2 The schoolteacher lost his right to teach school. He
3 could never teach school in the State of Maryland again, because
4 they found out that he had been sent to jail. The man who pays
5 the \$1200 because he has got it -- they never find that out.

6 Q Do you think their appraisal would have been
7 higher if they found out that he had just scoffed at the law
8 for \$1200 worth of traffic tickets?

9 A They never would have found out if he had had
10 the money to pay.

11 Q Now you are talking just about a practical
12 aspect.

13 A I don't think I am. I think when you are talking
14 about the way justice treats two people, you are talking about
15 a fundamental aspect.

16 Q How do you think they should have treated him?

17 A The scofflaw?

18 Q Do you suggest that he could not have paid that
19 fine?

20 A I think that as a matter of wisdom that the
21 State of Maryland should provide a statute that sends scofflaws
22 of all kinds to jail. If scofflaws should be sent to jail, all
23 scofflaws should be sent to jail. And the State of Maryland
24 can make that decision, and I think it should have made that
25 decision.

1 What the State of Maryland cannot do is ruin the
2 career of one scofflaw in order to make another scofflaw pay.

3 Q I realize we are not arguing the schoolteacher's
4 case today, but you used it as an analogy, and I am lost. If
5 he was a schoolteacher, I presume he got paid for teaching
6 school. What would be unjust about sending him to jail when
7 he could have paid and didn't?

8 A He didn't have \$1200 on the day that he was
9 supposed to pay. He could have paid if had been allowed to
10 pay in installments.

11 Q Of course, the law afforded him an opportunity
12 to pay it in installments in the first instance.

13 A No, it did not.

14 Q In the first instance.

15 A No, it did not.

16 Q He didn't get all these traffic tickets in one
17 day or one week, did he?

18 A Oh, no he did not. That is true. The law
19 afforded him the opportunity not to commit a crime. It also
20 afforded that opportunity to the scofflaw ---

21 Q Wait a minute. It afforded him the opportunity
22 to pay \$2, \$4 or \$6 each time he got the ticket. That is
23 what I am talking about. And now you suggest that there is
24 something inherently unfair about the fact that the boom was
25 lowered on him finally after the \$1200 mark.

1 A I think there was something inherently unfair
2 that the boom was lowered on him when it was not lowered on
3 somebody else who let his traffic tickets accumulate. Two
4 people -- Justice has taken her blindfold off and looked at
5 this man, and the only thing that she has seen that is different
6 from the other man is the fact that he doesn't have \$1200 today.
7 She is supposed to keep that blindfold on.

8 Q As far as I am concerned, your schoolteacher
9 analogy doesn't help you or your case very much. I am
10 puzzled yet ---

11 A I was asked about the scofflaw; these are the
12 actual facts. Let's take another person who has committed
13 a disorderly conduct case. He's done it only once and he is
14 fined \$50.

15 Q A single instance case?

16 A A single instance case.

17 Q Do you think that is the same as the school-
18 teacher who let \$1200 worth of traffic tickets accumulate?

19 A The statute makes no distinction between any of
20 a great variety of cases. The usual case is, obviously, not
21 the scofflaw case. The usual case is a person who gets a \$25
22 fine or a \$50 fine.

23 Q Well, Mr. Fisher, you are in further trouble,
24 because I have never heard of a schoolteacher being able to
25 plead that he was a pauper.

1 A This schoolteacher was not a pauper; he just
2 didn't have \$1200 at one time.

3 Q He could have gotten it, unless the banks were
4 all closed up.

5 A Actually, he was a part time schoolteacher, and
6 he probably ---

7 Q But he wasn't a pauper.

8 A He did not have \$1200, but he was not a pauper.

9 Q Is there any reason why he couldn't get \$1200?

10 A He signed an affidavit that he could not raise
11 the money.

12 Q I agree with the Chief Justice; I would hate to
13 see this case turn on that case.

14 A Well, it doesn't turn on this case. It does
15 not turn on that case. It turns on a statute which covers all
16 sorts of cases. It covers the man who doesn't have \$10, who
17 gets a \$10 fine and goes to jail for 5 days. It covers the
18 scofflaw; it covers the man who gets 5 \$50 fines in a row for
19 5 counts, because he ---

20 Q Does your case -- your case, not the statute --
21 cover a man who lies, who is not a pauper, who can get the
22 money?

23 A No, it certainly does not. That is the case of
24 the person who contumaciously refuses to pay.

25 Q Well, unless conditions have changed in Baltimore,

1 if you had that many convictions of any kind, you would lose
2 your job as a teacher, whether you paid a fine or anything else.

3 A Well, there are people who go and pay fines and
4 nobody ever hears about it. Many people.

5 Q I said where they do hear about it.

6 A They may ---

7 Q I would assume that with \$1200 it was in the
8 newspaper.

9 A Well, it might be; it might be, but there
10 certainly are other people who do not make the newspapers,
11 because hundreds of people ---

12 Q You said there was one other man that had \$1200
13 and paid the fine. Where did you find that out, except the
14 newspapers?

15 A I was hypothetically creating that other man,
16 but I am sure there are such people.

17 Q Mr. Fisher, while we have you stopped for a
18 moment; I can sympathize with your arguments about \$2 a day
19 for a 24 hour day. What if the Maryland Legislature had said
20 that it should be tied to the minimum wage established by the
21 Department of Labor, which I think is a \$1.60 now, isn't it?
22 If that is so, that would be \$38.40. Suppose they fixed it
23 to that, and he got \$38.40 credit on a fine for every 24 hours
24 he served in jail. Would you have problems?

25 A I would still have problems, but I would have

1 less problems. What Your Honor is suggesting is a sort of
2 separate but equal doctrine, where the man without money is
3 punished separately in a way that is supposed to be equivalent.
4 Because of the other problems that attend the jail punishment,
5 I don't think that it is possible to equate jail punishment and
6 the fine punishment. But, certainly, that would be a much
7 better situation than we have here, where we have a \$2 statute
8 which is designed to be unequal. Because it is really designed
9 to compel the person with money to pay.

10 This statute cannot simultaneously have the 2 purposes
11 that have been advanced for it: 1) to equate jail and fine
12 money and 2) to compel people who do have money to pay.

13 Q Because the premise of the latter proposition
14 is that it is much more unpleasant to go to jail than it is
15 to pay?

16 A Sure.

17 Q But they are not equal?

18 A That is right. What Your Honor is suggesting
19 is that the state might design a new statute. Actually they
20 have attempted to do it. I think the State of Maryland has
21 recognized the unconstitutionality of this statute in passing
22 the new statute. They have attempted to improve upon it, and
23 they have raised the figure to \$10 a day. What Your Honor
24 is suggesting is that is certainly more equal and better.

25 Q I wasn't really suggesting it, Mr. Fisher. I

1 wanted to know what you had to say about it.

2 A What I say is it is more equal, but it is still
3 not equal. It is a type of separate but equal doctrine. It
4 just cannot be equated.

5 Now there are other things that the state can do in
6 order to punish the man or deter the man that are more equal
7 to a fine that he cannot pay. One of the arguments that has
8 been raised is that there is no way that the state can punish
9 these people, no way that they can deter them. That just is
10 not true. There are other things that can be done.

11 One that we have suggested is that a man can be
12 allowed to pay in installments. This is actually fulfilling
13 the sentence of the judge who sentenced him. He wanted him
14 to pay a fine. He thought that was the deterrent. The state
15 legislature provided that the judge could fine him. They
16 expected him to use his best judgment in deciding what was
17 appropriate. He decided a fine was appropriate.

18 The way that he can carry out the state legislature's
19 intent in this situation is to allow the man to pay on terms
20 that he can pay. This is certainly a more equal alternative.

21 Now suppose the man cannot pay. He can still put
22 him in jail, as the model penal code suggests, if the man
23 fails to make a showing that he has made reasonable efforts to
24 get the money. In that case they would be putting him in
25 jail for contempt, for some additional act or omission.

1 They could take away his driver's license. As the
2 Rinaldi vs. Yeager Case suggested, they can garnish his salary,
3 if he has any, or collect the judgment by attachment -- probably
4 not a very feasible way of doing it.

5 They can put him on probation with conditions that
6 he work in the courthouse. You don't have to lock him up in
7 maximum security in order to get some work out of him. They can
8 send him to driver's school.

9 I anticipate that Mr. Russell is going to talk about
10 mootness, and I would like to reserve some time so that I can
11 answer whatever he has to say about mootness. So I am going
12 to sit down at this time.

13 MR. CHIEF JUSTICE BURGER: Very well.

14 Mr. Russell.

15 ARGUMENT OF GEORGE L. RUSSELL, JR.

16 ON BEHALF OF RESPONDENTS

17 MR. RUSSELL: Mr. Chief Justice; may it please the
18 Court:

19 My brother is correct. The first argument I intend
20 to make is that this case is moot in light of the statute
21 recently passed by the Maryland Legislature as an emergency
22 bill entitled, Chapter 147, and it was signed by Governor
23 Mandel on the 15th of April.

24 This statute under section 6 is retroactive in its
25 application, and, therefore, the appellants, or the plaintiffs,

1 in this case may take advantage of it. It provides that any
2 person incarcerated for default of payment of a fine may apply
3 for a hearing or, by general order of the court, may have a
4 hearing on his indigency status.

5 The court, after conducting an inquiry, if it finds
6 that this individual is unable to pay the fine, immediately,
7 the court may provide installment payments. If the court finds
8 that installment payments are not feasible under the circum-
9 stances, it then may offer to the defendant substitute punish-
10 ment.

11 And this is the theory under which Maryland has enact-
12 ed its legislation: the theory that there must be an alterna-
13 tive punishment appropriately imposed upon a defendant upon
14 whom financial criminal sanctions would have no relevancy.

15 In this case -- in the Maryland statute the court
16 cannot impose a confinement that exceeds \$10 a day. That is
17 to state that if the fine is \$500 and the court finds that the
18 defendant is indigent, it may state that, I believe, that
19 one day in jail is sufficient. But the court cannot impose a
20 sentence that would exceed \$10 a day. That is the minimum that
21 it can allow.

22 Q When did that legislation become effective?

23 A April 15, immediately upon the signing by the
24 Governor, and that is the reason that my brother anticipated
25 the mootness statute, because we propose that this is the law

1 of the case under prior Supreme Court rulings.

2 Now as to the philosophy under which this substitute ---

3 Q It would hardly be moot, technically, because
4 they are still in jail.

5 A Well, that is true.

6 Q It would be more accurate to say that there
7 is a new state remedy.

8 A They have this remedy available to them upon
9 application or by general order of the court. That is to say
10 the statute anticipates that perhaps the Chief Judge of
11 Municipal Court or the Chief Judge of the Supreme Bench of
12 Baltimore City can, by general order, make this available.

13 Q Has there been any such general order?

14 A Not to my knowledge, no, sir.

15 Q True mootness, perhaps, could have been ripened
16 by action yesterday by an appropriate general order, could it
17 not?

18 A Except to the extent that substitute punishment,
19 as a philosophy, is not a denial of equal protection of the
20 law. I think that my brother is arguing that the whole theory
21 of substitute punishment, or alternative punishment, is a
22 violation of the Fourteenth Amendment.

23 Q Mr. Russell, if you did have the alternative --
24 the State of Maryland -- to have a judicial order which would
25 have released this man yesterday -- is that right?

1 A That is correct.

2 Q What reason are you here other than seeking to
3 get this Court to approve a law that doesn't apply any more?

4 A I understood that my brother was raising the
5 issue that the theory of substitute punishment is a denial
6 of equal protection of the law. That is, under any circumstances,
7 if a man is indigent, where the statute only provides as a
8 penalty a fine, that it would be unconstitutional to give as
9 an alternative punishment for an indigent confinement in the
10 jail.

11 Q Well, it makes no difference as to whether we
12 agree with the petitioner or the Chief Judge of the Supreme
13 Bench issues an order, either way this petitioner gets out.

14 A These petitioners are already out, except for
15 the one petitioner who is serving 21 years in a normal peniten-
16 tiary. He alleges that he will have difficulty getting
17 paroled because a fine has been imposed upon him. Well, this
18 statute provides him with a remedy if he can get a job and
19 could come in an earning capacity, or have the capacity to
20 make money, he could be afforded the installment program.

21 Q But your point is that the new law, with all its
22 ameliorations, nonetheless, still does preserve the theory
23 of substitute punishment.

24 A Yes, sir.

25 Q And that is what you understand your brother on

1 the other side attacks, continues to attack, and it is that
2 that you are here to defend.

3 A To address myself to, yes, sir.

4 Now to get involved with the theory of substitute
5 punishment I think one must view, first of all, the function
6 in the State of Maryland; that is to provide sanctions so that
7 people will obey its criminal laws.

8 We have created a class in Maryland: those who
9 cannot pay fines and those who are too poor to pay fines. And
10 so the state has been left with the obligation to the over-
11 whelming class in the state, the law-abiding citizens, to
12 impose criminal sanctions to protect the law-abiding citizens
13 of Maryland from those who violate the laws of Maryland and
14 do not have funds or intend to plead poverty as a defense to
15 punishment.

16 Maryland in its judgment has stated that there shall
17 be a substitute punishment or alternative punishment, and this
18 was the theory of Judge Thompson's majority opinion. And the
19 statute, of course, codified it.

20 Now, to the extent that my brother feels that
21 Maryland has not been wise in its judgment, that there are other
22 alternatives that the State of Maryland could have made that
23 may have been better, that may have reached the problem
24 better -- This Court has said time and time again that equal
25 protection under the law does not require this Court to

1 substitute its judgment for that of the Maryland Legislature,
2 indeed any state legislature, as long as it meets the require-
3 ments of the Constitution. And as I understand it and I propose
4 that the equal protection clause requires only that the remedy
5 be reasonable and that it be related to a legitimate state
6 interest.

7 In this case deterrence of criminal activity or
8 deterrence of the violation of criminal laws is a legitimate
9 function of the state. And we believe that the alternative
10 punishment is rationally related to it, and under the cases, that
11 this law should be upheld.

12 Q How is it that a man who is a millionaire commits
13 the exact, same crime as the pauper, and the millionaire pays
14 the fine and the pauper goes to jail?

15 A The problem is ---

16 Q Is it that simple? Is the problem that simple?

17 A The problem, as I view it, sir, is what sanctions
18 does the State of Maryland have to prevent people from violating
19 the law?

20 Q By its saying that everybody who violates this
21 law goes to jail; that is one way of doing it. And that
22 wouldn't violate the Constitution.

23 A That well may be the result if the Court finds --
24 as many cases have held, particularly the New York case, and it
25 has been suggested in a Washinton case -- that any conclusion

1 that the alternative punishment theory is not constitutional
2 would cause the kind of irreparable harm that would result
3 from imprisonment for everyone.

4 Q You mean it would be irreparable harm to
5 imprison a millionaire?

6 A Prison results in irreparable harm to anyone in
7 my judgment, Your Honor.

8 Q The only thing I see here, in my case and yours,
9 is I say that when you put a poor man in jail and let a man
10 who can pay his fine pay his fine, or you can say everybody
11 that commits this crime shall go to jail. Now I don't see why
12 the last one hurts anybody?

13 A Well, I think that ---

14 Q Under the equal protection clause, it doesn't
15 hurt anybody.

16 A The answer I would propose to that is that the
17 equal protection clause does not require the same punishment
18 for all people.

19 Q Absolutely not.

20 A It does not require -- It simply requires that
21 when you make a classification of a group of people that this
22 classification be a reasonable one and that it be related to
23 a legitimate state interest.

24 Q I would be interested in the case you will cite
25 to me which says that you can make poor people a class, that

1 the state can.

2 A Well, this is why we are here, Your Honor. There
3 has been no Supreme Court case that has stated as such, that
4 poor people can be made a class.

5 Q Do you have anything close?

6 We have the authority that Chief Judge Thompson
7 relied on, the Privitera Case. You see, the approach, as we
8 view it, Your Honor, is whether the state has a legitimate
9 interest in imposing sanctions on people who are unable to pay
10 fines. We simply cannot have a system of justice which would
11 call for charge account justice, whereby a man would violate
12 the law and then plead poverty and simply tell the court to
13 put it on the account. And this is exactly what would result
14 with the application under the theory that has been offered to
15 the Court here.

16 The equal protection clause does not go so far-- that
17 is our position -- that it is impossible to equate imprisonment
18 with fine.

19 Q Do you think that the State of Maryland, in its
20 criminal process, can say that a pauper is in a class by
21 himself and shall have sentences placed on him solely because
22 he is a pauper?

23 A The sentence, may it please the Court, is not
24 being imposed upon him solely because he is poor.

25 Q Why?

1 A It is being imposed upon him because he has
2 violated the law. The sanctions available to him under the law
3 are useless because he is poor, and, therefore, the State of
4 Maryland has provided an alternative punishment.

5 Q The alternative for punishment is also given
6 to the rich man. He can either pay his fine or got to jail.
7 Right?

8 A That is correct, sir.

9 Q So, the poor man doesn't have that alternative.

10 A This is true, but I do not view this as being
11 such a disparity as to violate the Constitution.

12 Q Is it solely because he is poor that he goes to
13 jail? The only reason he goes to jail is because in the same
14 category of everybody convicted of this one crime, the only
15 man who must go to jail is the pauper. Is that true, under
16 this statute?

17 A Under this statute he would ---

18 Q How can you justify it?

19 A I justify it because the State of Maryland,
20 otherwise, would be powerless to impose sanctions upon people
21 who are unable to pay fines. What is the alternative?

22 Q So you take away the right of a man to be
23 considered the equal of every other man. I understood that
24 this poor man in a court has the exact, same rights as the
25 wealthiest man in the state.

1 A This is true, he has ---

2 Q How could he? He ends up in jail.

3 A He ends up in jail because he violated the law.

4 Q No, I am talking about those who have been
5 convicted. The class I am talking about are those who have
6 committed a crime, been tried and convicted. And you single
7 out of that class the pauper and give him special treatment.

8 A We give special treatment to other people also.

9 Q Who?

10 A We give special treatment to recidivists; we
11 give special treatment to many people. As this Court has
12 stated, there are many factors that come into play. Poverty
13 is one factor that we are here on today.

14 Q I would assume that a recidivist is a recidivist
15 because he wants to be and did it deliberately. I can't
16 assume that for a pauper.

17 A I would concur that this should not be assumed
18 for a pauper. A man is poor through no fault of his own, but
19 I must assume that he willfully violated the law ---

20 Q I assume the wealthy man did.

21 A --- and assuming that he willfully violated the
22 law, he then should not be able to escape or be able to
23 dictate the kind of punishment he is to incur. And under
24 the present Maryland statute the court is given wide latitude
25 as to the amount of confinement. For instance, in the case

1 where the statute provides only a fine, the confinement shall
2 not be more than 15 days, however, it can be as short a time
3 as the judge feels, in his wise discretion, that the case
4 before him dictates.

5 Q Can the judge allow him to pay the fine on
6 installments?

7 A Yes, sir, that is provided in the statute also.
8 The commitment of a man is the last alternative that the court
9 has before it. Installment payments as a conditional probation,
10 payment at once, or the judge in his discretion -- and I am
11 speaking now where the statute calls only for a fine. Because
12 I do not view it a problem where the statute provides for
13 imprisonment, and the court as an alternative to a fine commits
14 him. Our statute states that in that case he shall not serve
15 more that one-third of the term provided for imprisonment or
16 90 days, whichever is less. But the problem arises, of course,
17 in the case where only a fine is provided as a penalty.

18 I submit that it is not a denial of equal protection
19 of the law to offer to this man, or to impose upon him, an
20 alternative punishment, since he is unable, because of his
21 poverty -- which came about through no fault of this own and,
22 presumably, for the purpose of this case through no fault of
23 anyone.

24 Now to do otherwise would be asking this Court -- or
25 I believe the appellants would be asking this Court to correct

1 every inequity that exists in our society because of the poverty
2 that is there. And while this is a praiseworthy objective, I
3 do not feel that it is the function of the Court to interject
4 and to substitute its judgment for the Maryland Legislature how
5 the poor -- the Court may believe may have been expressed --
6 although I submit that this is perhaps the most enlightened
7 statute in the nation, insofar as punishment is concerned.
8 I believe that cases have held and this Court has held many
9 times before that the Court simply will not substitute its
10 judgment.

11 The sole question, therefore, as I view it, is
12 whether the alternative punishment theory is constitutional,
13 not whether it is the best alternative that could be offered,
14 but whether it meets the requirements of the equal protection
15 clause. And I say that it does, because it is a reasonable
16 classification and, secondly, because it is related directly
17 to a legitimate state interest.

18 The Court asked in the prior case about some statistics,
19 and I thought that I would offer to the Court: In Maryland
20 there are 99,000 traffic cases tried in one year -- that is in
21 Baltimore City. And of the 99,000, one hundred and fifty seven
22 were committed as the default of payment of fine. We offer
23 that it is less than .3% of those cases tried that people are
24 incarcerated because they cannot pay their fine.

25 In some cases in the criminal courts, of course,

1 people are committed in default of payment of fines and then,
2 suddenly, the money arrives. They, of course, are given credit
3 for the time that they have served and the balance is paid
4 and the release is effected.

5 Q Would the statistics on traffic violators really
6 be a fair showing of the pattern of statistics in all kinds of
7 crimes?

8 A I think that the statistics of traffic violators
9 would be lower. I think more people are committed in default
10 of fines in the criminal court than would be in the traffic
11 court.

12 Q If it is true, then you would assume -- if you
13 had a law, for instance, that made every wholesale company
14 in the nation pay a license of \$15, you wouldn't have much
15 trouble collecting that \$15. And you wouldn't have much
16 trouble collecting a fine that could be imposed as a rule on
17 a traffic violator, would you?

18 A This is true. I think that is ---

19 Q It is about the same thing.

20 A Yes, sir, I think that is a fair assumption.
21 Normally, if a man is able to own an automobile or driving one,
22 usually, in 99.9% of the cases, at least in Baltimore City,
23 they have come up with the money, with the fine.

24 Q The figures you gave us first, that 3%, was ---

25 A .3%, Your Honor.

1 Q --- .3%, was that traffic or non-traffic?

2 A That was traffic. Non-traffic, the statistics
3 are a bit different. Our figures here indicate that in a six-
4 month period 2,048 individuals were committed in the criminal
5 courts for default of payment of fines.

6 Q Out of a total of how many? Just approximate,
7 we don't need it precisely. I lost that figure. Well, go
8 on with your argument, and if it shows up ---

9 A Well, my brother has indicated in his brief that
10 he felt that the Eighth Amendment of the Constitution was
11 violated as well as the Thirteenth Amendment of the Constitution.
12 And just because I only have one appearance here, I would like
13 to state that in neither of these cases that we feel that the
14 Maryland statute, that we believe is the law of the case now, in
15 any way violates either of those amendments of the Constitution:
16 involuntary servitude, or slavery, or cruel and inhuman punish-
17 ment, nor do we have the problem of excessive fines here. All
18 of the fines imposed are within statutory limits.

19 I simply want to acknowledge that we have reacted to
20 this argument in our briefs and would be prepared to answer
21 any questions on those particular issues.

22 But as for the equal protection clause, I feel viewed
23 in its totality and viewing the function and the duty that the
24 states have to its individual inhabitants to impose sanctions
25 upon individuals and to determine the need to have sanctions,

1 that this statute meets the constitutional burden to the
2 extent that it provides an alternative punishment to individuals
3 who are unable to pay fines; and that this alternative
4 punishment theory meets all the requirements of the Constituion.

5 Thank you.

6 MR. CHIEF JUSTICE BURGER: Thank you, Mr. Russell.

7 Mr. Fisher.

8 REBUTTAL ARGUMENT OF ROBERT G. FISHER

9 ON BEHALF OF PETITIONERS

10 MR. FISHER: Your Honor, Mr. Russell and I are
11 talking about different statutes. He is defending the new
12 statute, and we are attacking the old statute. There is nobody,
13 as far as I know, and has been committed to jail in Maryland
14 so far that the new statute -- the Chief Judge in the Municipal
15 Court just found out about the new statute 2:30 yesterday
16 afternoon from me.

17 There are 150 people in jail today under the old
18 statute.

19 Q But it does furnish an administrative means of
20 softening that, does it not?

21 A It does not furnish -- by any interpretation
22 that I can see -- the power to release these people by general
23 order. Because one of the provisions of the new statute is
24 that each case has to be decided on its own merits, and the
25 \$10 figure is only a minimum figure. So if the judge were to

1 deal with all of these people by general order, he would be
2 violating that part of the statutory scheme.

3 Q Let's lay aside the general order mechanism.
4 Individually, each incarcerated person, or a person now on
5 bail as your client, has some form of administrative remedy
6 available, does he not?

7 A They do, if they find out about it. The statute
8 doesn't provide that they are to be notified. They are indigents.
9 They don't have lawyers. They are in jail where they don't have
10 access to news media.

11 Q Well, obviously, the people that you are talking
12 about, the people that you are representing here today, now
13 before us, do know about it through you.

14 A We are representing a whole class of people
15 who are defined as those people who are in the Baltimore City
16 Jail and those people that have detainers against them. And
17 we also submit that our request for declaratory judgment covers
18 all of those people who have been in jail since the beginning
19 of the lawsuit because they have an interest in this case.

20 The burden is always on the party asserting mootness
21 to prove it, and they are in no position to assert mootness
22 at this point. In addition, the new statute would require these
23 people to be resentenced, in effect, with a possibility that
24 they could get a penalty that is more severe than the penalty
25 they originally got, the fine. I submit there are double

1 jeopardy problems there and ex post facto law problems there.

2 This new statute simply is not a way out when you
3 have people that are actually in jail under the old statute at
4 this time and no evidence that the new statute has actually
5 come into force, other than up in the sky somewhere.

6 Q Is it retroactive? Does it apply to these
7 people?

8 A No. Yes and no, I should say, Your Honor. The
9 new statute merely gives them a remedy to ask to have their
10 sentences redetermined under the provisions of the new statute.

11 Q Do you question the new statute? Do you attack
12 it? I know you say you don't have to here, but what is your
13 view about that?

14 A I submit that in the broad argument that I have
15 made that jail could never be equated with money. So I would
16 have to question it, but I am not questioning it today because
17 I have got a \$2 statute, and under no circumstances could \$2
18 be equated with 24 hours. So I don't have to attack \$10, and
19 I am in a much better position to attack \$2.

20 There is no overriding state interest in punishing
21 poor people at a greater rate than rich people, in order to
22 make the rich people pay. There is no overriding state interest
23 that justifies having Justice take her blindfold off and
24 give poor people a harsher penalty than the judge, who as
25 charged by state law with determining the appropriate penalty,

1 determined.

2 The state has other things that it can do to solve
3 this problem. I am not asking this Court to tell the state
4 what to do. There are many different alternatives. I am
5 not asking this Court to spell out to the state what they are.

6 I suggest an analogy that the Constitution is the
7 foundation of our justice system, and the state penal system
8 is the structure that the state builds upon that foundation.
9 In this case the system the state has built is off of the
10 foundation of equal justice under law. And it is properly the
11 rule of this Court to establish that foundation.

12 Q Can you take a fine and reduce it to a judgment?
13 Is there any provision for that?

14 A In the new statute there is, and I believe it
15 could also be ---

16 Q Under the old statute.

17 A --- under the old statute. The old statute itself
18 may not have provided that, but there were other provisions.

19 Q Other provisions of law that entitled the
20 state as creditor to reduce the fine to a judgment and then
21 have all the benefits of a judgment creditor?

22 A I believe so, Your Honor. Now that, of course,
23 is the state's interest in collecting the fine. If that is
24 the purpose of the statute, then there is no rational way that
25 you can justify putting people who don't have the money in jail.

1 That costs the state money, and it prevents them from paying
2 the fine.

3 Q There is not the same kind of work program here
4 as there was in the previous case, am I mistaken about that?

5 A No. The state does not have a theory that it
6 collects the fine in work.

7 Q To test out your equal protection thing here
8 with, perhaps, a rather exaggerated hypothetical case: First,
9 I assume that when you talk about rich people you mean any
10 person that is able to pay; that is a plumber or an electrician
11 who is making \$600 or \$1000 a month is what you call a rich
12 person for these purposes?

13 A Certainly.

14 Q Now suppose those group of plumbers and
15 electricians and newspaper reporters would all band together
16 and say that there is a denial of equal protection because they
17 must pay their fines in cash, whereas, 13,412 people, under
18 your theory of what the law ought to be, didn't have any money
19 to pay the fine and, therefore, they were excused from paying
20 the fine, but the man who is making a salary has been required
21 to do so. Is that a denial of equal protection the other way?

22 A It certainly would not be equal. I think that
23 poor people should be punished in some way. I am saying the
24 state must find an equal way of punishing. It certainly cannot
25 find a grossly unequal way of punishing them, when it is not

1 necessary to do so. It has no compelling interest in punishing
2 these people more severely than other people that are equally
3 guilty of the same offense.

4 Q But you just seemed to concede that this other
5 category that I spoke of, the electricians, etc., that they
6 would be discriminated against by having to pay a fine in the
7 same circumstances where this indigent person did not pay a
8 fine.

9 A As a matter of fact, the Court in *Strattman*
10 *v. Studt* stated that it would be a denial of equal protection
11 to let the poor man go. And I am not suggesting that he be
12 let go. I am suggesting -- the best thing to do is to do what
13 the judge decided should be done, to find a way to make him
14 pay his fine. And that can be done.

15 Your Honor asked a question in the previous argument
16 about whether the new statute would be counter-productive,
17 whether a judge would start sending people to jail. I think
18 we have to assume that judges will act the way judges are supposed
19 to act and keep the blindfold on as far as a person's
20 poverty is concerned, and that they will sentence people fairly
21 and judicially, even though they may, under some new scheme,
22 not be able to send them to jail for nonpayment of a fine.
23 So I don't think -- I see my time is up -- I don't think that
24 it will be counter-productive.

25 Q Are you saying that all punishments of money

1 are necessarily void because there is denial of equal protection
2 of the law?

3 A Oh, no, Your Honor.

4 Q What is the extent to what you say happens to
5 the law?

6 A I am merely saying that the State of Maryland
7 cannot select a class of people and treat them differently
8 only because of their poverty. The State of Maryland has a
9 number of different alternative ways: probation, ordering
10 them to work, ordering them to go to driver's school, taking
11 away their driver's license, ordering them to pay in install-
12 ments, punishing them then if they do not make a showing
13 themselves that they have made reasonable efforts to get the
14 money. There are a number of different ways that the State of
15 Maryland can, in its wisdom, decide what to do about the
16 situation.

17 Q Well, it requires a pretty good amount of wisdom,
18 doesn't it, to determine what you will do in these cases?

19 A These are tremendous problems, and they do
20 require a great deal of wisdom, but the foundation that that
21 wisdom ought to be built on is the principle that is even
22 older than the jail-or-fine statute; that the law looks at
23 the man without regard to his status in the community.

24 Q Would the law be invalid only as applied to an
25 indigent?

1 A It would only be invalid as applied to indigents,
2 but the discrimination is apparent on the face of the law.

3 Q Therefore, it can't be done? You can't have a
4 law that fixes a punishment for payment of money?

5 A Well, I am sorry, Your Honor ----

6 Q You have a situation where you claim that the
7 law is invalid, either as applied or on its face.

8 A That is correct.

9 Q Now if it is invalid on its face, invalid as
10 applied to everybody, what substitute can Maryland or any
11 state provide for punishment by money fines?

12 A They can provide that if a man fails to pay
13 his money fine -- I am assuming they will continue to fine
14 most people by the law that says the judge can either send
15 him to jail or fine him, in the first instance. Then, in the
16 case that it comes to the attention of the court that he
17 cannot pay, they then must provide some other means for
18 punishing him, deterring him, collecting money from him than
19 the one they have provided here, which is to send him to jail
20 at an unfair rate.

21 Q I thought your basic contention was that it
22 would be unconstitutional to jail a person in lieu of a money
23 fine at any rate; that there is a difference not only in
24 degree but in kind between those two punishments -- a
25 constitutional difference in kind between the fine and

1 imprisonment -- and it violates equal protection to have any
2 imprisonment in lieu of a money fine.

3 A When the Chief Justice asked his question, I
4 said that is my contention, although I do not have to argue
5 that here, because the \$2 rate is unequal in any event. And
6 this is true of the rates in most of the states' statutes --
7 they have some that are \$1 rates.

8 Q But how would we decide that question if you
9 say, in any case, \$2 is not enough? How would we decide what
10 is enough?

11 A I don't know, Your honor. If you had to decide
12 that question -- I think you can decide what is not enough,
13 especially, when the purpose of the state statute is to make
14 an unequal punishment in order to collect the money from
15 people that can pay. You could decide that easily. And I have
16 never heard anybody suggest to me that \$2 is equal to 24 hours;
17 nobody has actually asserted that to me.

18 Q Suppose they made it \$10?

19 A Well, my position is that \$10 is still not
20 equal to one day in jail.

21 Q Do we make it go up until we could find some
22 way to say that, well, the amount of work that they require is
23 worth as much as the man paying money? That is a pretty
24 difficult thing.

25 A I would hope that you would never decide it on

1 that basis. I would hope that you would decide that in
2 accordance with my philosophy, that one day in jail can never
3 equal any amount of money because ---

4 Q That would just settle this case, wouldn't it?
5 It wouldn't settle them all, would it, if we just decided a
6 certain amount of money is too low to compensate?

7 A If you just decided that, that would only settle
8 this case, it would not settle the \$10 case or the \$15 case.

9 Q It wouldn't settle the deep problem that was
10 raised between you gentlemen?

11 A No; but it would settle the other case if you
12 went further than I have asked you to go and reached the basic
13 value judgment that jail and money cannot be equated. It
14 would settle all of that.

15 Q It seems to me that your argument -- and it may
16 be right; I am not saying it is right or wrong -- it seems to
17 me that your argument and the other argument that was made today
18 on that side assume that no law can be fair which makes it
19 fair and a non-violation of the equal protection law to fix
20 punishment by fines.

21 A I do not understand that.

22 Q Well, how could you pass a law that would
23 equalize it?

24 A Could equal two people ---

25 Q Here is a man that is worth a \$100,000; here is

1 another one that makes \$30 a week. How could you equalize
2 the fine of money for those two?

3 A It could be done, and it has been done in
4 countries like Sweden where they have the day-fine principle,
5 where the judge attempts to sting the man's pocketbook by an
6 amount that will take into account how much he can pay.

7 Q Maybe he couldn't afford to pay anything.

8 A Then it seems to me ---

9 Q I assume that it is true that some of them
10 couldn't afford to pay anything; they are too poor.

11 A That is probably true.

12 Q What would you do with them?

13 A You would have to collect the money from them
14 at a later time or in a different way.

15 Q They might not make enough, or they might be
16 sick.

17 A Well, then you have to find some other way ---

18 Q You have to get down, don't you, finally, to
19 the bedrock argument that punishment by fines is so inherently
20 unfair and unjust and discriminating between people, that it
21 shouldn't be allowed?

22 A I don't get down that far, Your Honor, but I
23 can understand how a person could see that.

24 Q We might have to.

25 A You might decide to do it, but I am not urging

1 you to.

2 Q I just want to know how to avoid it.

3 MR. CHIEF JUSTICE BURGER: Thank you, Mr. Fisher.

4 The case is submitted.

5 (Whereupon, at 1:55 p.m. the argument in the above-
6 entitled matter was concluded.)

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