

MEMORANDUM

TO: Free University of Tbilisi
Constitutional Law Clinic
Professor Giorgi Chitidze

FROM: Washburn University School of Law
Law Students, Audrey Koehler and Dean Kirk
Faculty Adviser, Professor William Rich

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RE: Georgia Constitutional Law Project, Detention for Failure to Pay a Fine

QUESTIONS PRESENTED

- I. Does a state enjoy a wide margin of discretion while establishing sanctions for crimes, misdemeanors, and administrative offenses?
- II. For sanctions that are within the realm of judicial control, what are the legal tests, standards, or criteria used to evaluate the constitutionality of existing sanctions with respect to the right to equality?
- III. Can indigent defendants be imprisoned for failure to pay fines in the United States?

BRIEF ANSWER

- I. Yes. States have discretion in establishing punishment for crimes, but are limited by the Eighth and Fourteenth Amendments.
- II. The judicial standard for reviewing neutral laws which negatively impact the indigent is rational basis review. Rational basis review requires a legitimate state or governmental interest, and that the law be reasonably related to serving that interest. If the negative impact of the legislation impinges upon a fundamental interest, such as marriage or access to the courts to protect basic rights, higher levels of judicial scrutiny will apply.

Loss of liberty because of inability to pay a fine may trigger this higher level of protection.

- III. In general, imprisonment for failure to pay a fine is allowed. However, nonpayment by indigent defendants may not result in imprisonment longer than the maximum sentence available under a statute, nor can a fine-only statute be transformed into imprisonment as a result of the indigent defendant's failure to pay. Although there are no United States Supreme Court decisions directly on point, precedent from other courts suggests that automatic imprisonment for non-payment of a fine without an opportunity to present evidence of inability to pay would be invalid.

FACTS

Article 197, Paragraph 2, of the Code of Administrative Offences of Georgia provides that "Failure to appear before the military conscription commission with the intention of evading military service – shall carry a fine of GEL 1000," and that "failure to pay the fine within the fixed period – shall carry an administrative detention for up to 15 days." Furthermore, the person shall be deprived of the right to carry arms for up to three years. This provision has been challenged pursuant to Article 14 of the Constitution of Georgia, which states that "everyone is born free and is equal before the law regardless of race, colour of skin, language, sex, religion, political or other opinions, national, ethnic and social affiliation, origin, property or social status, [or] place of residence."

ANALYSIS

I. STATES POSSESS DISCRETION IN ESTABLISHING CRIMINAL SANCTIONS WITHIN THE CONSTITUTION.

A. States have wide discretion in establishing criminal sanctions, limited by the Constitution and subject to judicial review.

The government has wide discretion in establishing criminal and civil sanctions, and punishment for violation of those state laws, subject to the constitutional limitations of the of the Fifth, Eighth and Fourteenth Amendments,. The Eighth Amendment provides that “excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted,” while the Fourteenth Amendment provides that states shall not deny any person “equal protection of the laws.” U.S. Const. amend. VII; U.S. Const. amend. XIV, § 1. The Fifth and Fourteenth Amendments contain procedural protection from deprivation of life, liberty or property by the national and state governments respectively. If statutes within the states are challenged by citizens on constitutional grounds, the U.S. Supreme Court may review the statute and overrule it if it is deemed unconstitutional. *Marbury v. Madison*, 5 U.S. 137, 177 (1803).

The “excessive fines” provision of the Eighth Amendment has not been interpreted to impose significant constraints on government discretion. The remainder of this memorandum focuses on limitations derived from a combination of equal protection and due process principles. Section II introduces background principles that apply when government impairment of fundamental rights falls more heavily on persons who are unable to make payments. An extension of that section briefly describes additional issues that may apply when government sanctions include deprivation of a right to possess firearms. Section III addresses the more specific constitutional problems associated with imprisonment of indigent defendants for their nonpayment of fines.

II. THE ADMINISTRATIVE DETENTION PROVISION PROBABLY ACTIVATES DUE PROCESS AND EQUAL PROTECTION.

A. The Fifth and Fourteenth Amendments mandate due process for restriction or deprivation of an individual's liberty interest.

The Fifth Amendment's Due Process Clause protects individuals against actions by the federal government, providing that "no person shall . . . be deprived of life, liberty, or property, without due process of law." U.S. Const. amend. V. These protections are incorporated against the states by the Fourteenth Amendment, which similarly provides that "[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1.

A due process challenge may be substantive, procedural, or both. A substantive challenge seeks protection of a liberty interest, derived from the "liberty" language of the due process clause. The scope of fundamental rights or liberties protected by substantive due process are subject to debate, and generally must be both "deeply rooted in [the] Nation's history and tradition," and "implicit in the concept of ordered liberty." *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997). Once a liberty interest is identified, the procedural protections of the due process clause activates. *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 541 (1985). The freedom from physical or bodily restraint is a fundamental right and liberty interest so well-recognized that liberty interest case law often begins by stating that physical freedom is not the only freedom encompassed by "liberty" in due process. *See Glucksberg*, 521 U.S. at 720.

When the government deprives an individual of liberty, "the question remains what process is due." *Loudermill*, 470 U.S. at 541 (quoting *Morrisey v. Brewer*, 408 U.S. 471, 481 (1972)). The basic elements of procedural due process are notice and an opportunity to respond. *Id.* at 546. This means that the adjudicatory deprivation of a life, liberty, or property interest

requires a level of judicial process consistent with the importance of the interest which the government seeks to infringe. *See Boddie v. Connecticut*, 401 U.S. 371, 378 (1971). Determining the process due requires balancing three factors: (1) the interest of the person affected; (2) the risk of erroneous deprivation of that interest through the procedure used, weighed against the value of additional or different corrective safeguards; and (3) the strength of the government's interest, including the cost and administrative burdens of safeguards. *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976). The first two factors are balanced together against the government's interest. *See id.* Strong individual interests come with great risk when restricted, and the first two factors weigh heavily against the government's interest. *See id.; Goldberg v. Kelly*, 397 U.S. 254, 264 (1970). When the balancing test weighs heavily against the government, significant procedural safeguards are necessary. *See Goldberg*, 397 U.S. at 264 (requiring a full evidentiary hearing where loss of government entitlements implicated a property interest related to government assistance needed for basic survival).

The freedom from physical restraint is a long-recognized fundamental right and liberty interest, but it is not absolute. *See e.g. United States v. Salerno*, 481 U.S. 739, 750-51 (1987). Restriction of an individual's liberty interest "is not itself unconstitutional; what is unconstitutional is the deprivation of such an interest *without due process of law.*" *Zinermon v. Burch*, 494 U.S. 113, 126 (1990) (citation omitted, emphasis in original). In a criminal context, the fundamental liberty interest may be overcome by "a valid criminal conviction and prison sentence," which will "extinguish a defendant's right to freedom from confinement." *Vitek v. Jones*, 445 U.S. 480, 493 (1980). In a civil proceeding for parole revocation, the required process is significantly reduced, and an informal hearing is sufficient so long as it is "structured to assure that the finding of a parole violation will be based on verified facts and that the exercise of

discretion will be informed by an accurate knowledge of the parolee's behavior.” *Morrissey v. Brewer*, 408 U.S. 471, 484 (1972).

Due process concerns will be triggered by laws that automatically presume guilt without providing the accused with an opportunity to present evidence relevant to a legitimate defense. With respect to detention of a person for failure to pay a fine, the question is whether inability to pay the fine because of poverty should be treated as a valid defense. If so, then the government must provide an opportunity to present such evidence.

B. The Fourteenth Amendment’s Equal Protection Clause may be activated by the law’s discriminatory impact on indigent persons.

The Fourteenth Amendment’s Equal Protection Clause provides that “[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws.” U.S. Const. amend. XIV, § 1. The effect of this language is to shield classes of people against laws which may be discriminatory, guaranteeing equal treatment for similarly situated persons. *See City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985). Although the Fourteenth Amendment’s Equal Protection Clause prohibits discrimination by a “State,” the Supreme Court has held that the Due Process Clause of the Fifth Amendment includes a similar equal protection component against the federal government. *Bolling v. Sharpe*, 347 U.S. 497, 498-99 (1954) (“discrimination may be so unjustifiable as to be violative of due process”).

In an equal protection challenge, two factors are used in order to determine the appropriate level of judicial review: (1) the type of discrimination which results from the challenged law; and (2) the class against whom the challenged law discriminates. A law may be discriminatory in its purpose, on its face, in application, or in outcome. *See Miller v. Johnson*, 515 U.S. 900, 917 (1995) (purpose and outcome); *Loving v. Virginia*, 388 U.S. 1, 11-12 (1967) (facial); *Yick Wo v. Hopkins*, 118 U.S. 356, 373-74 (1886) (application). For neutral laws which

are discriminatory in their outcome alone, the Supreme Court applies rational basis review regardless of the affected class. *Washington v. Davis*, 426 U.S. 229, 242-43 (1976). Classes which receive elevated scrutiny are termed “suspect” and “quasi-suspect” classes, comprised of “discrete and insular minorities,” and the type of class alters the level of judicial scrutiny applied to the discriminatory law. *See United States v. Carolene Products Co.*, 304 U.S. 144, 152 & n. 4 (1938) (considering the standard). Classes which do not receive elevated scrutiny are still entitled to equal protection, and laws affecting these classes are scrutinized under rational basis review.

Indigence or wealth is not a class which receives elevated protection absent other concerns. *See United States v. Kras*, 409 U.S. 434, 447-49 (1973) (applying rational basis test where fee payment was required for bankruptcy filing); *Little v. Streater*, 452 U.S. 1, 16-17 (1981) (holding fee requirement for blood grouping tests violated indigent right to due process). The degree of judicial protection changes, however, when the government imposes financial burdens on the exercise of fundamental rights. As a result, legislation which negatively impacts a fundamental right is subject to more stringent judicial scrutiny regardless of discriminatory intent or existence of a “protected” class. *See Boddie v. Connecticut*, 401 U.S. 371, 376 (1971) (holding fee requirement for divorce denies indigent due process right of access to the courts needed to protect a fundamental interest). The contrast in treatment involving bankruptcy proceedings (which were not considered “fundamental”) and divorce or paternity proceedings (which implicated fundamental rights) illustrates this distinction.

In the context of indigence, *Kras* applied rational basis review to uphold the prepayment of filing fees before obtaining discharge in bankruptcy. 409 U.S. at 447-48. In analyzing the bankruptcy statute, the Court stated that there was no fundamental right to due process in bankruptcy, so the facially-neutral statute did not implicate heightened scrutiny. *See id.* at 446-

47. The Court deferred to Congress on the question of whether it had a legitimate governmental interest in requiring payment of a filing fee to initial bankruptcy proceedings. *See id.* at 447. The Court held that Congress had taken reasonable steps to mitigate the indigent burden of fee prepayment, including a fee payment plan which would reduce the \$50 filing fee to very low weekly payments. *See id.* at 448-49.

In contrast, *Little* and *Boddie* held indigent fee payment requirements to be an unconstitutional violation of due process, where nonpayment resulted in a denial of access to the courts needed to establish fundamental rights. *See* 452 U.S. at 16-17; 401 U.S. at 788. In *Little*, the appellant was defending against a child support judgment identifying him as the father of an illegitimate child. *See* 452 U.S. at 1. The challenged statute required the requesting party to pay a fee in order to receive a blood grouping test for paternity. *Id.* The Supreme Court stated that while paternity proceedings were termed a “civil” matter, special concerns were raised by state law which made a defendant’s testimony alone insufficient to overcome the plaintiff’s *prima facie* case. *See id.* at 10-12. This increased evidentiary burden, and the risk of an adverse child support judgment, were sufficient to raise significant due process concerns. *See id.* at 12-13. Performing a balancing test, the Court found that the indigent appellant’s strong property and liberty interests combined with the substantial risk of error that would result if blood testing evidence was not available meant that the government must pay for the cost of such evidence to determine paternity and support obligations of an indigent father. *Id.* at 13-14.

In *Boddie*, the Supreme Court reversed a state requirement that a fee be paid in order to obtain a divorce. 401 U.S. at 372. The Court held that in the context of an indigent person, where the state held a monopoly over divorce proceedings, due process required that the person be allowed to go to court and obtain a divorce. *Id.* at 381-83. The Court declined to find a

categorical entitlement of access to the courts under due process, but held that the case presented “the exclusive precondition to the adjustment of a fundamental human relationship,” and that the denial of this right could not satisfy due process. *Id.* at 383. As in *Little*, the combination of a possible deprivation of fundamental interests linked to financial barriers imposed on individuals unable to make payments triggered constitutional protection.

In the case pending before the Constitutional Court of Georgia, the difference in outcomes between the indigent and those able to pay could present equal protection and due process challenges. Applying equal protection principles, indigence is not a suspect class which receives elevated scrutiny. Under rational basis review, the courts would likely recognize a state’s latitude in establishing sanctions, reading the sanctions as motivated by a legitimate governmental purpose. However, when nonpayment of fees under Paragraph 2 of Article 197 results in imprisonment, the loss of freedom may be seen as a fundamental right that would result in a need for procedural safeguards. In particular, it will be necessary to determine whether nonpayment resulted from willful failure to pay or from inability to pay due to poverty, and some form of procedural protection may be necessary to make that distinction. The courts could be expected to employ a balancing test in order to determine the minimum level of necessary procedural protection.

C. An automatic loss of the right to bear arms may increase the level of judicial scrutiny.

The Second Amendment of the U.S. Constitution provides that “A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.” U.S. Const. amend. II. This language has recently been held to protect the individual right to keep and bear arms, and to protect the lawful possession of handguns for self-defense in the home. *See District of Columbia v. Heller*, 128 S. Ct. 2783, 2799 & 2822 (2008)

(recognizing the right in federal jurisdictions); *McDonald v. Chicago*, 561 U.S. 742, 746-47 (2010) (recognizing the right incorporated against states by the Fourteenth Amendment).

In *Heller*, a special police officer challenged the enforcement of a gun control statute which required that lawfully-owned firearms be kept inoperable in the home. 128 S. Ct. at 2787-88. The Supreme Court ruled the statute to be an unconstitutional violation of the Second Amendment, holding that the amendment conferred an individual right, and that the statute's manner of impairing that right created an unacceptable violation of the right to self-defense. *See id.* at 2786. However, despite recognizing an individual right, the Court did not explicitly establish a level of judicial scrutiny, instead relying on heightened protections of self-defense in the home, and stating that “[u]nder any of the standards of scrutiny . . . this prohibition . . . would fail constitutional muster.” *Id.* at 2786-87. The court also declined to strike down other existing restrictions, stating that “the Second Amendment right is not unlimited,” and that there are valid restrictions of the right to bear arms. *Id.*

Here, it is unclear whether the *Heller* self-defense standard and individual right recognition would trigger increased judicial scrutiny when the penalty imposed by the government includes lengthy deprivation of a right to bear arms. This issue would, of course, only arise if a right to bear arms would be seen as a fundamental individual right under Georgian law. Analysis of such a right, if it exists, would presumably be independent of questions involving poverty and the inability to pay a fine. As a recognized individual right, however, questions could be raised regarding the link between failure to appear for military conscription and the penalty of losing a right to possess arms. While *Heller* recognized that the right to bear arms may not apply to those convicted of a crime, case law has not established a level of judicial scrutiny that applies to government decisions about how or when such restrictions may apply.

III. IMPRISONMENT OF INDIGENT DEFENDANTS FOR NONPAYMENT OF A FINE MAY BE UNCONSTITUTIONAL.

A. The imprisonment of indigent defendants, either for nonpayment of a fine-only statute, or when it exceeds the maximum punishment available against paying defendants, is unconstitutional.

Indigent defendants may not be imprisoned longer than the maximum sentence allowed by law for mere inability to pay, nor may a statute imposing fines alone be converted to a punishment of imprisonment because a defendant cannot afford to pay. *Williams v. Illinois*, 399 U.S. 235, 242 (1970); *Tate v. Short*, 401 U.S. 395, 398 (1971).

The long-standing history in the United States of imprisonment for nonpayment of fines was challenged by an indigent defendant who had been imprisoned for failure to pay a fine in *Williams v. Illinois*. In this case, a defendant was convicted of theft and received the maximum sentence allowed by state law and a \$500 fine. *Williams*, 399 U.S. at 236. After completing his prison sentence, the defendant remained unable to pay his fine and per Illinois statute, the defendant was required to remain in jail to “work off” his remaining fine at the rate of \$5 per day, effectively adding 101 days to his sentence and surpassing the maximum sentence under the statute by that time. *Id.* at 236-37.

The Court found that imprisoning indigent defendants beyond the maximum period fixed by statute solely for inability to pay treats indigent defendants differently than those who can pay and thus violates their right to equal protection under the law. *Id.* at 242. The Court stated that the states are free to choose alternative punishments for indigent defendants, including installment payments or other methods the state may devise. *Id.* at 244. The Court noted, however, that the holding applied narrowly to defendants being imprisoned beyond the maximum sentence and did not apply to alternate sentences of confinement for nonpayment. *Id.* at 243.

In *Tate*, the Court further addressed the issue of equal protection when an indigent defendant who was unable to pay fines of \$425 was sentenced to 85 days in a prison farm to pay off his fines. 401 U.S. at 396-97. The Court noted that the municipal court in which the defendant was convicted had authority only to impose fines, not imprison. *Id.* at 396. The Court found that the municipal court effectively converted the punishment of a fine to imprisonment, solely because the defendant was indigent, and thus violated the defendant's right to equal protection. *Id.* at 398. The Court noted its decision in *Williams*, again holding that "the statutory ceiling placed on imprisonment for any substantive offense be the same for all defendants irrespective of their economic status." *Id.* at 398-99.

In both *Williams* and *Tate*, the Court noted that its holdings applied only to defendants who were truly unable to pay and not those who simply failed to pay. *Williams*, 399 U.S. 235, 242 n.19; *Tate*, 401 U.S. 395, 400. In *Bearden*, the Court addressed the issue of determining indigency in holding that a trial court erred in revoking probation of a defendant who failed to pay his fines without first determining if the defendant made good faith efforts to pay. *Bearden v. Georgia*, 461 U.S. 660, 662 (1983). The Court again noted that courts should identify alternative methods of punishment and deterrence when a defendant cannot pay, such as community service or a reduced fine. *Id.* at 669-72. The United States Supreme Court has not revisited this issue, leaving subsequent development of relevant case law in the hands of lower level state and federal courts.

Since *Bearden*, states have largely set their own standards for indigency hearings by statute and the U.S. Courts of Appeals have mostly upheld imprisonment after hearings, provided states have a legitimate interest in the imprisonment or that a defendant did not make good faith efforts to pay. *United States v. Johnson*, 347 F.3d 412, 419 (2d Cir. 2003) (finding imprisonment

of indigent defendant was rationally related to the state's purpose in enforcement and thus constitutional); *United States v. Caddell*, 830 F.2d 36, 40 (5th Cir. 1987) (finding trial court properly revoked defendant's probation based on defendant's unwillingness to answer questions at hearing regarding indigency); *United States v. Warner*, 830 F.2d 651, 658 (7th Cir. 1987) (finding trial court did not err in revoking probation of client that did not put forth "good faith effort" to pay fines). However, the Fifth Circuit Court of Appeals has repeatedly granted writs of habeas corpus to indigent defendants that were imprisoned immediately upon nonpayment, rather than being given an offer of installment payments for fines. *Frazier v. Jordan*, 457 F.2d 726 (5th Cir. 1972) (holding state did not have a compelling interest in imprisoning the defendant immediately for failure to pay a fine); *Burton v. Goodlett*, 480 F.2d 983 (5th Cir. 1973) (holding defendant must be given option of installment payments rather than immediate imprisonment upon failure to pay fine).

CONCLUSION

Under U.S. law, the imprisonment, could be unconstitutional as applied to an indigent defendant. The United States Supreme Court has established that punishment for non-payment of a fine which results in imprisonment longer than normally available under the law, or which automatically converts a fine-only statute into imprisonment, would be unconstitutional. Neither of those rulings, however, directly apply to provisions of Article 197, Paragraph 2, of the Code of Administrative Offences of Georgia. A combination of equal protection and due process considerations, however, suggest that there may be need for some consideration of the reasons for nonpayment before punishment can be imposed under that provision of Georgian law.

In equal protection challenges, the U.S. Supreme Court has declined to apply heightened scrutiny to neutral laws which may have a discriminatory impact against indigent persons unless

the effect of those laws infringes upon a fundamental right. For neutral laws which do not implicate a fundamental right, the Court applies rational basis review, requiring only a legitimate government interest and that the challenged law be reasonably related to advancing that interest. When a fundamental right is implicated, the Court applies greater scrutiny, and laws which infringe on fundamental rights require significant procedural safeguards. As one result, laws that interfere with ownership of firearms in the United States may trigger the need for a higher level of government justification for the restriction.

Poverty will generally not be treated as a “suspect category” that automatically triggers higher levels of judicial scrutiny, and the fact that payment may be more difficult for a poor person than a person with greater wealth will not in and of itself trigger higher levels of judicial scrutiny. Automatic deprivation of liberty through imprisonment of a person who is unable to pay a fine because of poverty, however, should trigger procedural protection. As a result, Paragraph 2’s automatic application without examination of ability to pay a fine would result in a combination of due process and equal protection concerns, triggering the need for significant judicial safeguards.