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Settling Prosecution Costs on the Offender: How the Rights Are Priced in Illinois

Teree E. Foster

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Settling Prosecution Costs on the Offender: How the Rights Are Priced in Illinois

Governmental authority to assess against a convicted defendant the costs accrued incident to his prosecution originated by legislative fiat; the imposition of costs upon the convicted party in a criminal action did not exist at common law.¹ In Anglo-American jurisprudence, the practice evolved in 18th century England in derogation of prior custom which obliged the private complainant² to bear all costs arising in a criminal proceeding.⁴ Current prevalence of the practice of costs taxation against convicted offenders in this country, at least as a matter of record, is indicated by the fact that the federal government⁴ and the governments of most states⁵ have enacted statutory schemes requiring imposition of such costs as a part of the judgment in criminal proceedings.

Examination of these diverse statutory provisions reveals that an extensive range of expenses incident to criminal proceedings, includ-
ing items such as docket fees, jurors' per diem or attendance fees and mileage, and per diem fees of government witnesses for each day of attendance at trial whether or not the witness actually testified on the day of attendance, have been found properly taxable against convicted defendants. The underlying rationale for obligating one convicted in a court of law to recompense the government for the time, resources and energy expended in securing his conviction is obvious: the offender, whose transgressions of society's laws served as the impetus for mobilizing the state's criminal justice machinery against him, is the proper party to bear the financial burden incurred.

Regardless of the validity of this rationale or the social efficacy of its operation, implementation of the statutorily derived authority for inclusion of prosecution costs as a part of a criminal judgment requires that such statutes be particularly drafted by the legislature and periodically scrutinized by the judiciary to ascertain that current statutory provisions effectively further the goals of criminal justice administration. However, legislatures and courts have remained recalcitrant in this matter, with the consequence that:

Despite the great increase in crime in recent years, antiquated statutory provisions of pre-Civil war vintage, compounded by piecemeal enactments and amendments without repeal, are still in effect in many of the states.

The basic Illinois provision mandating assessment of costs of prosecution against convicted offenders is found in chapter 38, section 180-3 of the Illinois Revised Statutes:

When any person is convicted of an offense under any statute, or at common law, the court shall give judgment that the offender

7. See, e.g., Souther v. Commonwealth, 48 Va. (7 Gratt.) 673 (1851).
11. See Charging Costs of Prosecution, supra note 10. The author posits and evaluates various not-unrelated rationales expressed both explicitly and implicitly in judicial opinions construing costs assessment provisions. These include: compensation to the state and its officers, penalization to the offender as a part of his sentence and judicial discouragement of unnecessary trials and the use of frivolous or otherwise wasteful trial tactics. In early Illinois cases, courts frequently refer to the compensation basis for the existence of costs assessment statutes. The grounds set forth by Illinois courts for enforcement of these statutes is further discussed in the text accompanying notes 21 through 26 infra.
12. Note, Without Rhyme or Reason, supra note 3, at 79.
pay the costs of the prosecution.\textsuperscript{13}

This law, with the accompanying statutory scheme enacted for its implementation,\textsuperscript{14} has been in effect with little change for a period of more than 140 years. Repeal and piecemeal enactment of further provisions which crucially relate to the functioning of costs assessment, in the absence of concomitant legislative review of the costs assessment provisions, have rendered the scheme contradictory, unwieldy and legally unintelligible.

So long as the circuit courts in Cook County ignored the mandates of chapter 38, section 180-3 in rendering judgments in criminal cases, the effect of this anachronistic statutory scheme remained moot. However, a motion\textsuperscript{15} filed in the Circuit Court of Cook County, Criminal Division, on August 20, 1974 by the State's Attorney prayed that the court enter judgment against the defendant convicted of robbery for costs incurred in the prosecution of the case. This motion is indicative of recent policy pursued by the State's Attorney's Office of Cook County that the state demand judgment for the costs of prosecution in all criminal cases thereafter prosecuted.\textsuperscript{16} Revitalization of this long-dormant statutory scheme necessitates analysis of provisions extant to determine whether implementation of this statutory scheme inflicts upon convicted defendants any burdens forbidden by the federal and state constitutions. This article seeks to perform this requisite analysis, as well as to reconcile, as far as possible, outmoded and contradictory provisions, to promulgate specific proposals for revision, and to posit a proposed statutory scheme for costs assessment which eliminates any constitutionally objectionable practices possibly ordained by the current statutory system.\textsuperscript{17}

\begin{itemize}
\item \textsuperscript{13} ILL. REV. STAT. ch. 38, § 180-3 (1973).
\item \textsuperscript{14} See text accompanying notes 63 through 64 infra.
\item \textsuperscript{15} MOTION FOR JUDGMENT FOR COSTS, People v. James L. Hickman, Indictment No. 74-2887, filed August 20, 1974 [hereinafter cited as People v. Hickman].
\item \textsuperscript{16} Current practice in the Office of the State's Attorney of Cook County limits demand for judgment for costs to cases where the defendant is deemed not indigent and has been released on bond. For further discussion of the determination of indigency for purposes of costs assessment, see pp. 368-73 infra.
\item \textsuperscript{17} This article presents no analysis of the social utility of the practice of assessing against convicted persons the costs incurred in their prosecutions. For inquiry into similar statutory provisions authorizing criminal litigation expenses to be taxed to the offender and analysis of the desirability of the procedure in terms of social effect in other jurisdictions, see Sachs, Indigent Court Costs and Bail: Charge Them to Equal Protection, 27 MD. L. REV. 154 (1967) [hereinafter cited as Indigent Court Costs and Bail]; Comment, Reimbursement of Defense Costs as a Condition of Probation for Indigents, 67 Mich. L. REV. 1404 (1969) [hereinafter cited as Reimbursement of Defense Costs]; Note, Jail Fees and Court Costs for the Indigent Criminal Defendant: An Examination of the Tennessee Procedure, 35 Tenn. L. REV. 74 (1967); Note, Kansas Court Costs: The Quality of Mercy is Strained, 9 Wash. L.J. 87 (1969); Note, Without Rhyme or Reason, supra note 3; Note, Taxation of Court Costs, supra note 5.
\end{itemize}
THE ILLINOIS PROVISIONS

Illinois requires taxation of prosecution costs of all convicted offenders. Further provisions set forth procedures for enforcement of this law: attachment of a lien upon the property of the accused at the time of indictment and execution and levy 30 days after conviction and judgment; acknowledgement of the judgment for costs by the offender, with adequate sureties; and, after all legal means have been exhausted, release of indigents incarcerated for nonpayment from pecuniary obligations arising from the judgment, upon a satisfactory demonstration of inability to liquidate the judgment liability.

18. For further discussion, see note 13 supra and accompanying text.
19. ILL. REV. STAT. ch. 38, § 180-4 (1973) provides:
   The property, real and personal, of every person who shall be convicted of any offense, shall be bound, and a lien is hereby created on the property, both real and personal, of every such offender, not exempt from execution or attachment, from the time of finding the indictment at least so far as will be sufficient to pay the fine and costs of prosecution. The clerk of court in which the conviction is had shall upon the expiration of thirty (30) days after judgment is rendered issue an execution for any fine that remains unpaid, and all costs of conviction remaining unpaid; in which execution shall be stated the day on which the arrest was made, or indictment found, as the case may be. The execution may be directed to the proper officer of any county in this State. The officer to whom such execution is delivered shall levy the same upon all the estate, real and personal, of the defendant (not exempt from execution) possessed by him on the day of the arrest or finding the indictment, as stated in the execution and any such property subsequently acquired; and the property so levied upon shall be advertised and sold in the same manner as in civil cases, with the like rights to all parties that may be interested therein. It shall be no objection to the selling of any property under such execution, that the body of the defendant is in custody for the fine or costs, or both.
20. ILL. REV. STAT. ch. 38, § 180-5 (1973) provides:
   If the person convicted, together with one or more sufficient sureties, will acknowledge a judgment in favor of the People of the State of Illinois, for the amount of the fine and costs, or the costs only, when no fine is imposed, the court shall cause the same to be entered in full satisfaction of the fine and costs, or costs, only, with a direction that if the judgment is not paid within five months from the time of entering the same, execution shall be issued thereon; and the defendant shall, upon the entering of such judgment, be discharged from imprisonment on account of the fine or costs, but he shall not thereby be discharged from any imprisonment which is made a part of his punishment not dependent upon the payment of the fine or costs. Such judgment shall be a lien upon all the real estate of the persons acknowledging the same from the date of its entry. If the judgment so entered is not paid within five months from the entry it may be enforced by execution, in the same manner as other judgments at law. Such judgments may be acknowledged in vacation before the clerk of the court, and he may, in such case, approve the surety; and a judgment so acknowledged shall have the same force and effect from the date of entry as if entered in open court.
21. ILL. REV. STAT. ch. 38, § 180-6 (1973) provides:
   Whenever it shall be made satisfactorily to appear to the court, after all legal means have been exhausted, that any person who is confined in jail for any fine or costs of prosecution, for any criminal offense, hath no estate wherewith to pay such fine and costs, or costs only, it shall be the duty of the said court to discharge such person from further imprisonment for such fine and costs, which discharge shall operate as a complete release of such fine and costs: Provided, that nothing herein shall authorize any person to be discharged from imprisonment before the expiration of the time for which he may be sentenced to be imprisoned, as part of his punishment.
Judicial interpretation of the effect of operation of these provisions upon an offender is restricted to a handful of cases, most of pre-World War I vintage. These early cases, in articulating the function of costs assessment, advance the rationale that imposition of prosecution costs upon the convicted person is compensatory, serving as reimbursement to the state for certain trial expenditures. Liability of the convicted offender for costs arises from the judgment as a matter of course and is incidental to a judgment of conviction. The defendant is obliged, subject to his right to controvert the amount of costs assessed, to recompense the state for energies and services expended in securing his conviction; the liability is not deemed a penalty inflicted in addition to the sentence. Simply, statutes requiring costs assessment upon convicted persons serve as a burden-shifting device: the state imposes upon the convicted defendant, rather than upon the government, the duty and liability of satisfying all costs legally taxable in his case. The Illinois courts early separated liability of the offender for costs arising from the judgment of conviction from the sentence subsequently inflicted by ruling that executive pardon, although clearly intended to remit the entire punishment, did not release the defendant from his obligation to recompense the government in the form of costs payment.

Illinois courts have generally required strict construction of statutes which impose costs; therefore, a more precise delineation of the statutory term “costs of the prosecution” is a necessary preliminary to any inquiry into the operation of the statute. “Costs,” as used in criminal cases, is distinguishable from “fees” in that costs are an allowance for expenses specially and necessarily incurred in the prosecution of the case, while fees serve as compensation allowed by statute to of-

22. Moody v. People, 20 Ill. 315 (1858). See also Carpenter v. People, 8 Ill. (3 Gilm.) 147, 149 (1846), where the court stated:
The general principle on the subject of costs is, that the party who requires an officer to perform services, for which compensation is allowed, is, in the first instance, liable therefor.
24. In contrast to these early Illinois opinions discussing the liability of the convicted offender for costs incurred in his prosecution as solely incidental to the judgment of conviction is Kennedy v. People, 122 Ill. 649, 13 N.E. 213 (1887). The court, asserting the notion that costs serve compensatory purposes by describing costs as incidental to the prosecution of the proceedings, approvingly quoted in dicta a passage indicating that costs form a proper part of the penalty inflicted upon conviction. No other reference to the imposition of costs as a part of the offender’s punishment is found in either prior or subsequent reported Illinois cases.
Officers of the court and to jurors or witnesses compelled to render services during the progress of the cause. However, criminal costs assessment statutes have rarely observed this distinction.

The more critical distinction lies between “costs” and “fines.” Fines are thoroughly punitive and constitute as much a part of the sentence imposed as punishment for the particular offense upon a convicted defendant as does a term of imprisonment. Costs, by contrast, are imposed as a statutory reimbursement allowance to the government.

The statutory requirement of assessment of “costs of the prosecution” has been generally construed by courts to exclude the ordinary.

29. Id.; see, e.g., Carpenter v. People, 8 Ill. (3 Gilm.) 147 (1846); People v. Williams, 232 Ill. 519, 83 N.E. 1047 (1908). See also People v. Kawoleśki, 310 Ill. 498, 142 N.E. 169 (1924), where the court did not question taxing state's attorney's fees to the convicted defendant as costs. Long ago, prior to legislative institution of salaries for court and county officers, collection of fees from the convicted offender as costs was a vital source of income for services rendered. See, e.g., Fosselman v. City of Springfield, 38 Ill. App. 296 (1890), aff'd, 139 Ill. 185, 28 N.E. 916 (1891), where a justice of the peace brought suit to recover from the city his fees arising in cases where the convicted defendants were impoverished. Today, however, even though judicial and county employees are no longer dependent upon costs collected from convicted defendants for their compensation, the taxing of certain fees as costs may perhaps be justified as a means of protecting the state's coffers. Note, Litigation Costs: Hidden Barrier to the Indigent, 56 Geo. L.J. 516 (1968) [hereinafter cited as Hidden Barrier to the Indigent].

This article includes both “fees” and “costs” in the term “costs.”

30. In Holliday v. People, 10 Ill. (5 Gilm.) 214 (1848), the court held that gubernatorial pardon of an offender sentenced to imprisonment and to pay a fine excused such payment, despite the contention of the state that the pardon was intended only to mitigate corporeal punishment. The pardon was found ineffective to relieve the offender from payment of costs, however, because such costs are compensatory and do not share a punitive cast.

31. Id. See text accompanying notes 22 through 29 supra.

32. Early Illinois opinions refer to “fines and costs” as related species of the same concept, both being enforceable pecuniary obligations owed to the state; see, e.g., People ex rel. Hoyne v. Windes, 283 Ill. 251, 119 N.E. 297 (1918).

33. These opinions do not articulate the notion that the difference between compelling the offender to pay the costs incurred in the prosecution of his case and inflicting a fine upon him not only arises from wholly different considerations, but also is pertinent to proper disposition of the case. See pp. 354-68 infra.

34. As “prosecution” has been judicially defined, the defendant is liable for all allowable costs accruing from the time of institution of criminal proceedings against him, i.e., the time of indictment, rather than costs related only to the trial of his case. The court in Corbin v. People, 52 Ill. App. 355, 356 (1893) stated:

A prosecution is defined to be the institution or commencement and continuance of a criminal suit; the process of exhibiting formal charges against an offender before a legal tribunal, and pursuing them to final judgment.

The United States Supreme Court concurred in this demarcation of “prosecution” in Kirby v. Illinois, 406 U.S. 682, 689-90 (1972):

The institution of judicial criminal proceedings is far from a mere formalism.

It is the starting point of our whole system of adversary criminal justice. For
In Illinois, chapter 53, entitled "Fees And Salaries," sets the fees of various court officers which may be assessed as costs in both civil and criminal proceedings, and includes fees taxable to recompense the state's attorney, the circuit court clerk, and the sheriff.  

Illinois cases describe the operation of costs assessment in particular circumstances. The imposition of costs by the court is mandatory upon a judgment of conviction and may not be waived as an exercise of judicial discretion. However, the court may tax as costs only those items specifically set forth in the applicable statute; further

... it is only then that the government has committed itself to prosecute, and only then that the adverse positions of government and defendant have solidified. It is then that a defendant finds himself faced with the prosecutorial forces of organized society, and immersed in the intricacies of substantive and procedural criminal law. It is this point, therefore, that marks the commencement of the "criminal prosecutions."...

39. ILL. REV. STAT. ch. 53, § 51.1 (1973). In relation to fees of the circuit court clerk, ILL. REV. STAT. ch. 53, § 32 (1973) further provides for alternative payment from the county treasury:

For swearing jurors and witnesses, or for any services in criminal cases not hereinbefore enumerated, the clerk shall be allowed the same fees as in civil cases; and in all criminal cases, when the costs cannot be collected from the defendants on their conviction, or when the defendants shall be acquitted, such costs shall be paid to the clerk from the county treasury.

40. ILL. REV. STAT. ch. 53, § 71 (1973). ILL. REV. STAT. ch. 53 (1973) further authorizes compensation for per diem and mileage expenses to jurors in section 62 and to witnesses in section 65. The county is statutorily responsible for compensating jurors for per diem and mileage expenses, under section 62. The State's Attorney's Office of Cook County does not currently assess per diem and mileage expenses of either jurors or witnesses. See Appendix. But see note 194 infra. Section 65 requires the county to bear the expense of per diem and travelling expenses in criminal cases where the witness is subpoenaed from a foreign county or state. It is not clear that the per diem and mileage expenses of witnesses who are residents of the county in which the criminal trial is held are not taxable to the convicted defendant. The only Illinois case on point, Corbin v. People, 52 Ill. App. 355 (1893), holding the convicted offender liable for the fees of witnesses who were residents of foreign counties, has clearly been overruled by section 65.

41. People v. Harris, 97 Ill. App. 2d 288, 240 N.E.2d 123, cert. denied, 395 U.S. 985 (1968); People v. Barringer, 22 Ill. App. 3d 168, 317 N.E.2d 331 (1974). The statute, ILL. REV. STAT. ch. 38, § 180-3 (1973) (emphasis added), provides that "the court shall give judgment." In construing statutes, courts have generally held that the word "shall" is mandatory, particularly when the word is addressed to a public official. People v. Liddell, 19 Ill. App. 3d 794, 313 N.E.2d 248 (1974).

42. Acquitted defendants sustain no liability for costs. Wells v. McCulloch, 13 Ill. 606 (1852); Heist v. People, 56 Ill. App. 391 (1894). Although the court in Carpenter v. People, 8 Ill. (3 Gilm.) 147 (1846) found the defendant obligated to pay costs accrued during his trial and appeal to the supreme court even though his conviction was reversed, this result would not obtain today: an accused is not required to advance any payment of costs. McArthur v. Artz, 129 Ill. 352, 21 N.E. 802 (1889). Judgment on appeal in favor of the accused precludes assessment of state's attorney's and clerk's fees. ILL. REV. STAT. ch. 53, §§ 8, 32 (1973).
assessment by the court is an abuse of judicial discretion warranting reversal on the costs issue. When several defendants are jointly tried, each defendant is liable only for the costs particularly attributed to the prosecution of his case; the costs must be apportioned among offenders, and the costs of prosecuting defendants acquitted in the cause are taxable to no convicted defendant. But where an offender is tried and convicted upon a multi-count indictment, the state’s attorney’s fees are taxed on each count in the indictment resulting in conviction, up to the statutory maximum of ten. No reciprocal right of compensation vests in the defendant in the form of costs allowances against the state in the event of his acquittal of the charges against him.

Procedurally, the assessment of costs is implemented by issue of an order and execution by the clerk against the property of the defendant upon judgment. The defendant may then controvert the accuracy of the assessment by motion to quash the order for costs.

In the event of nonpayment, the execution is levied by the proper

43. In People v. Parks, 216 Ill. App. 529 (1920), an information charged defendant with negligence and refusal to pay support and maintenance amounts to his wife, necessitating a criminal proceeding because proof of guilt was required beyond a reasonable doubt. Upon a finding of guilt by the jury, the court taxed $40 to the defendant as costs, that sum representing the $15 statutory amount allowed under Ill. Rev. Stat. ch. 53, § 8 to the state’s attorney as well as a $25 fee for the wife’s attorney. The appellate court reversed, holding inter alia that the assessment of fees of the wife’s attorney was error:

The taxing of the fee of $25 for attorney Denton as part of the costs of this proceeding was clearly without warrant of law. The statute under which this information was filed does not provide for the assessment of attorney’s fees as costs.


Consideration of the propriety of assessing attorneys’ fees is permissible only where the statute specifically allows their assessment ....

44. Moody v. People, 20 Ill. 315 (1858); Kennedy v. People, 122 Ill. 649, 13 N.E. 213 (1887).

45. Borschenious v. People, 41 Ill. 236 (1866); People v. Kawoleski, 310 Ill. 498, 142 N.E. 169 (1924).


47. People v. Pierce, 6 Ill. (1 Gilm.) 553 (1844); Galpin v. City of Chicago, 249 Ill. 554, 94 N.E. 961 (1911); People v. Summy, 377 Ill. 255, 36 N.E.2d 331 (1941); People v. Rocco, 4 Ill. App. 2d 238, 124 N.E.2d 25 (1955); People v. Fox, 7 Ill. App. 3d 707, 288 N.E.2d 500 (1972). For further discussion, see text accompanying notes 126 through 134 infra.

48. Carpenter v. People, 8 Ill. (3 Gilm.) 147 (1846); Corbin v. People, 52 Ill. App. 355 (1893). The early Illinois opinions refer to the order as a “fee bill.” See Appendix.

49. A lien is created upon all real and personal property of the offender, not otherwise exempt from attachment or garnishment, from the time of indictment. Ill. Rev. Stat. ch. 38, § 180-4 (1973). The text of this statute is set forth at note 19 supra.

50. People v. Borschenious, 41 Ill. 226 (1866). However, entry of a confession of judgment, under Ill. Rev. Stat. ch. 38, § 180-5 (1973), note 20 supra, by the offender and his sureties estops the offender from disputing the accuracy of the assessment at a later time. Lambert v. People, 43 Ill. App. 223 (1892).
county officer 30 days after judgment upon property of the offender sufficient to satisfy the judgment for costs.\footnote{51}

Of crucial concern, however, is the fact that it remains wholly unclear whether any remedies are available under this statutory scheme for costs assessment and enforcement where the offender lacks the financial capability to satisfy the judgment for costs, through either direct payment or criminal execution upon his property. Each enforcement provision in the statutory system for costs assessment presumes that the offender has already suffered incarceration,\footnote{52} yet no statute extant enables the state to imprison a person upon involuntary default in payment of costs. Thus, the system of laws relating to judgment for costs and subsequent enforcement of the judgment, as it currently exists, is not only incomplete, but utterly confusing and unintelligible as well. Proper construction of these provisions as they affect an impecunious defendant obliged to bear the costs of his prosecution is possible only through a thorough examination of the history of related statutes which, in times past, permitted incarceration in cases of involuntary default in payment. Only through an analysis of all statutes relating to costs assessments and incarceration can it be determined whether Illinois law, in fact, sanctions penal confinement of a convicted person to compel enforcement of a judgment for costs.

Two distinct theories support the conclusion that a judgment requiring the convicted offender to reimburse the state for costs incurred in his prosecution cannot be executed by imprisonment of the offender who involuntarily\footnote{53} defaults in payment of the assessed costs. First,

\footnote{51. \textit{ILL. REV. STAT.} ch. 38, § 180-4 (1973), supra note 19; see Wells v. McCullock, 13 Ill. 606 (1852).}
\footnote{52. \textit{ILL. REV. STAT.} ch. 38, § 180-4 (1973) states in pertinent part:}
\footnote{\textit{ILL. REV. STAT.} ch. 38, § 180-5 (1973) states in pertinent part:}
\footnote{\textit{ILL. REV. STAT.} ch. 38, § 180-6 (1973) states in pertinent part:}
\footnote{Whenever it shall ... appear to the court ... that any person who is confined in jail for any fine or costs of prosecutions ... hath no estate wherein to pay such fines and costs, or costs only, it shall be the duty of the said court to discharge such person from further imprisonment for such fines and costs, which discharge shall operate as a complete release of such fine and costs ... [emphasis added].}
\footnote{The complete text of these laws is set forth at notes 19 through 21 supra.}
\footnote{53. Voluntary default subjects the offender to civil contempt, and commitment is authorized until the offender complies with the order of the court as an exercise of the}
study of the history of prior statutes authorizing imprisonment in cases of nonpayment of money obligations to the state, and of cases interpreting these laws, reveals that Illinois law, despite contrary language surviving in chapter 38, sections 180-4, 180-5, and 180-6, has never permitted incarceration of a defendant unable to liquidate his liability solely for costs. Alternatively, enactment of the Illinois Criminal Code of 1961 and subsequent repeal of all statutes authorizing imprisonment as a mode of enforcement of money obligations owed the state conclusively determines that no feasible construction of the costs assessment and enforcement provisions allows incarceration of persons financially incapable of satisfying a judgment for costs.

**Incarceration to Enforce Payment of Obligations Owed the State: Development of the Statutes in Illinois**

The practice of imprisoning offenders to enforce payment of fines was an integral part of the common law. Illinois law, prior to 1973, authorized commitment of offenders sentenced to pay a fine under chapter 38, section 1-7 (k) in the event of default. The offender was thereby permitted to "work off" his monetary obligation to the state at the statutory rate of $5.00 per day. Analysis of the development of this law in terms of legislative intent indicates that

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54. See note 52 supra.
55. Id.
56. Id.
58. See text accompanying note 1 supra.
60. For discussion of the legislative repeal of this authority, see text accompanying notes 97 through 105 infra.
62. Id.
the authority to incarcerate an offender for nonpayment of monetary obligations to the state arises only in cases in which a sentence of a fine is inflicted; judgment for costs, absent a sentence of a fine, resulted in no further imprisonment of the defendant beyond the term imposed as punishment for his crime.

The Illinois costs assessment provisions\(^68\) have remained virtually unchanged since 1833.\(^64\) The early statutes included, however, a further provision, no longer part of Illinois law,\(^65\) which codified the established common law principle\(^66\) of compelling payment of fines through commitment upon default. This statute provided:

> The court shall have power in all cases of conviction under this act, when any fine is implicated, to order, as part of the judgment of the court, that the offender shall be committed to jail, there to remain until the fines and costs are fully paid, or otherwise legally discharged.\(^67\)

This law may not be construed as a means of alternative sentencing, for the assessment of the fine defined the extent of punishment inflicted.\(^68\) Commitment was authorized only as incident to and for purposes of enforcement of the sentence that the offender pay a fine, so that subsequent imprisonment occurred only in cases of default of payment of the fine.\(^69\)

Judgment that the defendant pay a fine is clearly distinct from taxation of costs in that the latter arises incidentally, as a matter of course from the judgment of conviction. The fine is the sentence; judgment that the offender pay the cost of his prosecution is a part of the judgment of conviction, and not a part of the sentence.\(^70\) A fair construction of this enabling provision is that it empowered the court only to enforce sentences of fines by incarceration; upon the accomplishment of such commitment the offender was detained in prison un-

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65. For discussion of the limitation and subsequent repeal of this law see text accompanying notes 83 through 91 infra.


67. Ill. Stat. 1833 p. 209, § 163. For purposes of clarity, this law, in the various forms in which it existed until its repeal, is hereinafter referred to as the enabling provision.

68. Ex parte Bollig, 31 Ill. 88 (1863); Kanter v. Clerk of the Circuit Court, 108 Ill. App. 287 (1903).

69. In Kanter v. Clerk of the Circuit Court, 108 Ill. App. 287, 304 (1903), the court stated:

> That where a fine is imposed, it is the punishment ordered, and the commitment is but an incident, is an established doctrine of the common law.

70. For further discussion of the basis of this distinction, see text accompanying notes 3 through 33 supra.
til his entire monetary obligation to the state, \textsuperscript{71} fines and costs, was expunged. By its terms, \textsuperscript{72} this law did not extend to initial commitment of the defendant upon default in the payment of costs alone and did not authorize continued imprisonment past the term meted out to him upon his conviction for recovery of costs alone. \textsuperscript{73}

The court's power to incarcerate convicted persons who failed to satisfy fines until all moneys due the state were paid under the Illinois enabling provisions was subsequently modified by the introduction of two laws relating to recovery of funds owed to the state. In 1879, the legislature enacted, \textsuperscript{74} as part of the larceny statute, \textsuperscript{75} a provision enabling courts to require offenders convicted of petit larceny or of any misdemeanor in which a fine could be levied as part of the penalty, to work \textsuperscript{76} out the fine and attendant costs for the public benefit at a statutory rate of credit of $1.50 per day. \textsuperscript{77} This provision amplified prior law which had authorized imprisonment in the penitentiary upon conviction of grand larceny for a term of 1 to 10 years, and imprisonment in the county jail for a maximum period of 1 year plus a maximum fine of $100 upon conviction of petit larceny, \textsuperscript{78} by providing an effective means of compelling payment of the fine

\textsuperscript{71} The constitutional prohibitions against incarceration of debtors was circumvented by the Illinois courts' construction of the prohibition as applicable only to debts arising \textit{ex contractu}. \textit{Kennedy v. People}, 122 Ill. 649, 13 N.E. 213 (1887).

\textsuperscript{72} Compare the terms of \textit{La. Code Crim. P. art. 884} (1973):

\begin{quote}
\textit{If a sentence imposed includes a fine or costs, the sentence shall provide that in default of payment thereof the defendant shall be imprisoned for a specified period not to exceed one year; provided that where the maximum prison sentence which may be imposed as a penalty for a misdemeanor is six months or less, the total period of imprisonment upon conviction of the offense, including imprisonment for default in payment of a fine or costs, shall not exceed six months for that offense} \textit{(emphasis added)}.
\end{quote}

Clearly, the terms of this law contemplate that costs may be imposed as part of the penalty inflicted upon the offender; default in payment of costs under this language, compels incarceration. The terms of the Illinois enabling provision, which authorized incarceration only in cases of default in the payment of a \textit{fine}, are in marked contrast.

\textsuperscript{73} Relief to the indigent defendant, who defaulted in payment of his fine was afforded upon a satisfactory demonstration by the defendant to the court that he was without funds, under \textit{Ill. Stat. 1845 p. 187, § 195}, a provision virtually identical to \textit{Ill. Rev. Stat. ch. 38, § 180-6} (1973), \textit{supra} note 21. \textit{Ex parte Bollg}, 31 Ill. 88 (1863).

\textsuperscript{74} \textit{Ill. Laws 1879 p. 117} (repealed 1962).

\textsuperscript{75} \textit{Ill. Laws 1879 p. 118} (repealed 1962).

\textsuperscript{76} For purposes of clarity, this statute is hereinafter referred to as the \textit{working out} provision.

\textsuperscript{77} \textit{Ill. Laws 1879 p. 118} (repealed 1962). The statute provided:

\begin{quote}
That any person convicted of petit larceny, or any misdemeanor punishable under the laws of this State, in whole, or in part, by fine may be required by the order of the Courts of Record, in which the conviction is had, to work out such fine and all costs, in the work-house of the city, town or county, or in the streets and alleys; of any city or town, or on the public roads in the county, under the proper person in charge of such work-house, streets, alleys, or public roads, at the rate of one dollar and fifty one hundredth dollars ($1.50) per day for each day's work.
\end{quote}

\textsuperscript{78} \textit{Ill. Laws 1877 p. 85} (repealed 1879).
imposed upon conviction of petit larceny or other misdemeanor.

The effect of this working out provision upon the already established enabling provision, as clearly explained in *Berkenfield v. People* 79 was to vest an option in the court upon conviction of the defendant of an offense for which both a fine and imprisonment could be imposed. Under the enabling provision, the court was empowered to order incarceration of the offender for a specified term; if the fine was not satisfied upon completion of that term, the offender was simply further detained until such fine, along with costs, were paid. 80 Extension of the sentence of imprisonment in this case directly corresponded with default in the sentence to pay the fine, not with failure to pay costs. Under the working out provisions, the court was empowered to commit the defendant to labor, at the statutory rate of credit, upon expiration of his period of incarceration until his fines and costs were satisfied. 81 This sanction also was primarily intended to compel satisfaction of *fines* which were not collectible by execution. 82 Extension of the term of incarceration under both laws due to default in payment of costs was wholly incidental to the initial authorization to detain the defendant past his completion of his sentence of imprisonment, and such authorization was clearly limited to cases of failure to satisfactorily defray the fine imposed.

The second legislative enactment affecting the imposition of penal sanctions to compel recovery of moneys due the state was section 2 of the Parole and Pardon Act, effective in 1917, providing that:

79. 191 Ill. 272, 61 N.E. 96 (1901).
80. *Id.* at 277, 61 N.E. at 98:
   Under an indictment charging a single offense upon a conviction for which both fine and imprisonment may be imposed, the court may properly order the defendant, for a failure to pay such fine and costs, to be imprisoned, such imprisonment to commence after the expiration of the term fixed as a punishment for the crime, otherwise the sentence of imprisonment and fine would be satisfied by imprisonment only.
81. *Id.* at 278, 61 N.E. at 99:
   [T]he court had power to commit the defendant to the county jail after expiration of the time for which he was specifically sentenced, there to remain until such fine and the costs of this proceeding were paid, and that in default thereof he be required to work out such fine and costs in a workhouse, or upon the streets, alleys and public roads of the city, town or county where such conviction was had, at the rate of $1.50 per day, unless he be otherwise discharged pursuant to law.
82. *Berkenfield v. People*, 191 Ill. 272, 61 N.E. 96 (1901); *People v. Shattuck*, 274 Ill. 491, 113 N.E. 921 (1916); *People ex rel. Hoyne v. Windes*, 283 Ill. 251, 119 N.E. 279 (1918); *People v. Jaraslowski*, 254 Ill. 299, 98 N.E. 574 (1912). These latter two cases mark one further effect of the working out provision: the indigent sentenced to work out his fine was precluded from seeking relief under *Ill. Rev. Stat.* ch. 38, § 455 (1911), a provision virtually identical to *Ill. Rev. Stat.* ch. 38, § 180-6 (1973), *supra* note 21. See note 73 *supra*. An indigent was entitled to discharge from full satisfaction of his fine and costs under the working out provisions only if he were physically incapable of labor. *People v. Hedenberg*, 21 Ill. App. 2d 504, 158 N.E.2d 417 (1959).
No person shall by any court be committed to the penitentiary, reformatory or other State institution for recovery of a fine or costs.\textsuperscript{83}

This statute effectively prevented a defendant's sentence of imprisonment to state penal institutions being extended by compelling him to submit to further imprisonment for an indefinite period upon failure to satisfy his financial obligations to the state,\textsuperscript{84} removing the option present under the enabling provision.\textsuperscript{85}

Thus, judicial power to incarcerate an offender upon failure to satisfy a monetary obligation to the state functioned only in cases where the defendant's default was in paying a fine inflicted as either whole or partial punishment for his offense, warranting an order that he work off amounts owed the state. No Illinois statute ever sanctioned either initial imprisonment or extension of a term of imprisonment due to the offender's failure to pay costs alone. Therefore, the language of the costs assessment provisions which make reference to incarceration of the defendant upon his default in payment\textsuperscript{88} must be read as referring to the only cases where such incarceration was statutorily permitted, \textit{i.e.}, where failure to pay a \textit{fine} subjected the defaulter to commitment to satisfy his obligations to the state.

This construction of the interrelationships of the Illinois costs assessments provisions and the incarceration provisions\textsuperscript{87} is buttressed by the fact that Illinois cases discuss the issue of costs in one of only two contexts: issuance of the order assessing costs\textsuperscript{88} and resolution of the

\begin{footnotes}
\textsuperscript{83} Ill. Laws 1917 p. 353. This provision has survived, in various forms, since its enactment, and exists today as part of the New Code of Corrections, Ill. Rev. Stat. ch. 38, § 1005-8-6(d) (1973).

\textsuperscript{84} People v. Stavrakas, 335 Ill. 570, 167 N.E. 852 (1929); People v. Tidrick, 269 Ill. App. 191, 180 N.E. 796 (1933).

\textsuperscript{85} Although thus severely circumscribed in operation, all vestiges of the enabling provision were not expunged from Illinois law until 1973. For further discussion, see text accompanying notes 97 through 105 infra.

\textsuperscript{86} See note 52 supra.

\textsuperscript{87} See notes 67 and 76 supra.

\textsuperscript{88} See, \textit{e.g.}, Carpenter v. People, 8 Ill. (3 Gilm.) 147 (1846) (defendant whose conviction was reversed by the state supreme court was still liable for the costs of his appeal); Wells v. McCullock, 13 Ill. 606 (1852) (acquittal or other legal discharge of a party indicted under the criminal code absolved him from the payment of all costs); Moody v. People, 20 Ill. 315 (1858) (defendant tried jointly with others is liable only for his own costs upon conviction); Borscheinous v. People, 41 Ill. 236 (1866) (defendant is liable for costs of each count in the indictment under which he is convicted); Corbin v. People, 52 Ill. App. 355 (1893) (defendant is liable for fees of witnesses who are residents of foreign counties); People v. Harris, 97 Ill. App. 2d 288, 240 N.E.2d 123, \textit{cert. denied}, 395 U.S. 985 (1968) (trial court properly assessed costs against defendant even though counsel was appointed to represent him on appeal under Ill. Rev. Stat. ch. 110A, § 607 (1973); People v. Taylor, 401 Ill. 11, 81 N.E.2d 463 (1948) (order of the trial court committing defendant to the penitentiary until his costs were paid was void under Ill. Rev. Stat. ch. 38, § 802 (1947), a provision virtually identical to Ill. Rev. Stat. ch. 38, § 1005-8-6(d) (1973); see text accompanying note 83 supra.

\end{footnotes}
validity of the practice of holding the offender obliged to satisfy attendant costs once he had already been incarcerated for failure to pay a fine.\textsuperscript{88} No Illinois case reports either initial commitment or detention of the defendant past the term of imprisonment meted out to him upon his conviction for failure to discharge his liability for costs.

\textit{The Effect of the New Illinois Criminal Code and the 1970 Constitution}

Although the offender did not suffer imprisonment for default in payment of costs alone, this proved slight comfort to the defendant already sentenced to labor for failure to pay his fine whose term was extended while he worked off \textit{all} sums of money due the state, fines and costs, at the statutory rate.\textsuperscript{90} This practice of recovery of costs in labor from a defendant already incarcerated for nonpayment of his fine was legislatively abrogated by the advent of the new Criminal Code in 1961.\textsuperscript{91} The Code repealed prior enabling\textsuperscript{92} and working off\textsuperscript{93} provisions;\textsuperscript{94} all surviving portions of these laws were incorporated into chapter 38, section 1-7(k) of the Code, which provided:

A judgment of a fine imposed upon an offender may be enforced in the same manner as a judgment entered in a civil action; provided, however, that in such judgment imposing the fine the court may order that upon nonpayment of such fine,
the offender may be imprisoned until the *fine* is paid, or satisfied at the rate of $5.00 per day of imprisonment; provided, further, however, that no person shall be imprisoned under the first proviso hereof for a longer period than 6 months.\(^9\)

Legislative extraction of all reference to costs from this law conclusively demonstrates that incarceration occurred thereafter only in cases of default in the payment. Legislative rationale for the exclusion of costs from this penal provision becomes clear upon examination of the distinct underlying considerations served by fines and costs. Fines are punitive, and constitute part of the sentence inflicted; their enforcement is directly within the state's penal interest. Costs are compensatory. Converting an assessment for costs into a prison term to recover moneys expended by the state in trying the offender is illogical, for prisoners compound, rather than defray, state expense.\(^9\)

Ratification of the new Illinois Constitution\(^9\) tolled the death knell for the practice of incarcerating persons who defaulted in payment of fines by supplementing prior prohibitions against imprisonment for debt with an express ban on commitment of any person, except in cases of willful default, for failure to satisfy a criminal fine, unless sufficient time is afforded for payment, by installment, if necessary.\(^9\)

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95. *ILL. REV. STAT.* ch. 38, § 1-7(k) (1963) (repealed 1973) (emphasis added). This statute was adjudged unconstitutional on equal protection grounds in its effect on indigent defendants unable to pay fines levied as part of their penalty in *Williams v. Illinois*, 399 U.S. 235 (1970). The defendant in that case received the statutory maximum sentence of one year's imprisonment and a fine of $500 plus $5 court costs upon conviction of theft, and the trial judge directed that if the defendant was in default at the expiration of his imprisonment term he would remain committed to work off his monetary obligations to the state, as provided in *ILL. REV. STAT.* ch. 38, § 1-7(k) (1969) (repealed 1973). The Illinois Supreme Court affirmed the order. *People v. Williams*, 41 Ill. 2d 511, 244 N.E.2d 197 (1969).

The United States Supreme Court reversed, holding that although incarceration to enforce payment of fines was not in itself constitutionally invalid, imprisonment beyond the maximum term fixed by the statute governing the offense involved, due to involuntary nonpayment of fines or costs, constituted an impermissible discrimination which violated the equal protection clause.

Although the issue of inclusion of costs in the order was not specifically raised, probably due to the relatively slight sum involved, it is submitted that the trial court's order requiring extended commitment in the event of default to satisfy both fines and costs was patently violative of the clear terms of § 1-7(k). In affirming the order, the Illinois Supreme Court reiterated the permissibility of extending imprisonment only in terms of satisfaction of the fine. 41 Ill. 2d at 514, 515, 516, 517, 244 N.E.2d at 198, 199, 200. 96. *Tate v. Short*, 401 U.S. 395, (1971); *Charging Costs of Prosecution, supra note 10.*


98. Art. 1, § 14 of the Illinois Constitution of 1970 provides:

> No person shall be imprisoned for debt unless he refuses to deliver up his estate for the benefit of his creditors as provided by law or unless there is a strong presumption of fraud. No person shall be imprisoned for failure to pay a fine in a criminal case unless he has been afforded adequate time to make payment, in installments if necessary, and has willfully failed to make payment.

The first sentence of art. 1, § 14 is virtually identical to art. 2, § 12 of the Illinois Con-
The fatal blow was struck by the repeal of chapter 38, section 1-7(k) and the concomitant enactment of chapter 38, section 1005-9-1 et seq., governing fines, as part of the new Code of Corrections. These provisions enable the court to revoke the fine, or any unpaid portion thereof, or to modify the method of payment, which may be either on an installment basis or within a period of time specified by the court. Default is now a matter of civil contempt, subjecting the offender to imprisonment, unless he demonstrates that his failure to pay the fine was not due to a lack of good faith effort. If the default is not intentional, the court may allow additional time for payment, reduce the amount of the fine or of each installment, or revoke the fine or the unpaid portion. Thus, imprisonment for nonpayment of fines occurs only in narrow cases of willful default.

No similar provisions qualifying the language referring to incarceration in the costs assessment provisions have been enacted. Although this may be explained as legislative oversight, an equally plausible view is that since Illinois law has traditionally sanctioned initial imprisonment only for failure to satisfy a fine, a default in costs payment being only incidental, abrogation of laws authorizing commitment upon default in fines payment precluded a fortiori commitment for failure to pay costs. A system of laws analogous to chapter 38, section 1005-9-1 et seq. relating to costs is wholly unnecessary.

Further, examination of Illinois law has demonstrated that chapter 38, section 1-7(k) was the sole remaining statute authorizing incarceration for default in payment of money obligations. Even if chapter 38, section 1-7(k) and its predecessors could be construed as allowing either initial imprisonment or extension of a fixed term of imprisonment, clearly, repeal of the sole enabling statute terminates that authority. Again, the differences in rationale underlying fines and costs supports this contention: since fines, in con-
Contrast to costs, are clearly punitive, a dilution of the authority to imprison for nonpayment of fines must extend to costs as well. 108

The current effect of the incarceration language in the costs assessment provisions may be gauged by an examination of the operation of these provisions. A lien attaches to the accused's property at the time of the finding of indictment. 109 Costs are assessed upon a judgment of conviction. 110 If the defendant is financially unable to pay the costs, no statute exists which enables the court to incarcerate him, so a demonstration by the defendant that his nonpayment is involuntary 111 must gain him respite from costs payment. 112 The judgment for costs remains in full force and effect, collectible by execution 113 in the event that the defendant fortuitously sheds his indigent status. 114

Clearly, the language referring to imprisonment of a defendant who defaults in payment of costs in the costs assessment provisions 115 is mere surplusage. This language presumes that incarceration for default in the payment of money obligations has already been accomplished. Since no provision sanctions such incarceration, this language can have no effect.

Equal Protection

The Illinois costs assessment provisions are mandatory 116 in operation and applicable, theoretically, in every criminal case where conviction is rendered. However, even a law nondiscriminatory on its face may function to arbitrarily or capriciously burden certain groups; 117 where no rational basis 118 for isolating these classes is demonstrated,

108. Charging Costs of Prosecution, supra note 10, at 996.
110. ILL. REV. STAT. ch. 38, § 180-3 (1973). This statute is set forth in the text accompanying note 13 supra.
111. The court retains inherent contempt power to discipline a wilful defaulter. Kennedy v. People, 122 Ill. 649, 13 N.E. 213 (1887). For further discussion, see note 53 supra.
113. ILL. REV. STAT. ch. 38, § 180-4 (1973). The text of this statute is set forth at note 19 supra.
115. For discussion of consequences of voluntary default, see the reference to the contempt power of the court, note 53 supra.
116. See discussion at note 41 supra.
118. Traditionally, the equal protection clause supports only minimal judicial intervention in most contexts; legislative groupings on the basis of imperfect and imprecise generalizations is tolerated, so long as the classification bears a reasonable relationship to the purpose for which it is structured, and affords equal treatment to all members
the law is violative of equal protection.\textsuperscript{119} Although superficially neutral in operation, these costs assessment laws in fact demark distinct classifications and afford dissimilar treatment to the groups differentiated. Inquiry into the operation of these statutes is two-fold: whether de facto classifications resulting from operation of the statutes are arbitrarily drawn; and whether members of the groups so classified are obliged to bear an undue encumbrance by application of the statutory provisions to them.

\textit{Convicted v. Acquitted Defendants}

The costs assessment provisions, by their terms, concern only convicted defendants. Thus, the statute selectively segregates two groups from the large class of accuseds: those convicted and those acquitted of the charges against them. Analysis of these classifications in equal protection terms necessitates further inquiry on two grounds.

\textit{(a) Should All Accuseds Be Obligated to Pay the Costs of Their Prosecution?}

Given the compensatory rationale of the costs assessment provisions, it might be argued that a defendant acquitted of all charges should likewise be compelled to recompense the state for the amounts of money, time and services expended in trying him. The fact of whether or not a conviction is actually obtained is irrelevant for reimbursement purposes. The costs assessment statutes would then operate equally and consistently on all members of the large class of accuseds, levying the same fees whenever services were performed by government officers.\textsuperscript{120}

\textsuperscript{119} Yick Wo v. Hopkins, 118 U.S. 356 (1886).

\textsuperscript{120} Pennsylvania law, under the Act of 1860, 19 PA. STAT. § 1222 (1963), had long sanctioned the practice of rendering a judgment for costs incurred in criminal proceedings against acquitted defendants as reimbursement to the county for its expenditures whenever the jury determined that the accused, rather than the county or the prosecutor, was the proper party to bear such expenses. Pennsylvania courts upheld the practice for over 100 years, reasoning that:

However anomalous the course may appear to jurisdictions unfamiliar with our procedure, it is the law of this commonwealth, and it works substantial justice. Commonwealth v. Giaccio, 415 Pa. 139, 141 n.2, 202 A.2d 55, 57 (1964). The \textit{Giaccio}
This argument, however, flagrantly ignores the basic theory supporting the compensatory rationale for the assessment of costs in criminal proceedings: that the offender, the person whose conduct provided the impetus for mobilization of the criminal justice system, is the proper party to bear the attendant costs. The burden of proving such conduct beyond a reasonable doubt remains on the state. The accused is haled into court, much against his own volition; certainly he cannot be found to have occasioned the prosecutorial proceedings by his conduct when his accusers fail to sustain their burden of demonstrating that such conduct in fact occurred. Failure to successfully discharge this burden requires the conclusion that the acquitted accused is not the proper party to bear the costs of the criminal proceedings; a contrary result is wholly repugnant to basic notions of procedural due process, since the obligation to reimburse arises only upon a judgment of conviction.

(b) Should Acquitted Defendants Be Granted a Right of Costs Recovery Against the State?

Although an accused acquitted of all charges against him is spared criminal penalization and the concomitant stigma of conviction, he sustains manifest loss through his involuntary participation in the criminal justice system. It is the universal rule in the United States that the accused bears the cost of his defense, regardless of the subsequent determination of his guilt or innocence. In addition, the opinion is extensively analyzed in Comment, Man Acquitted of Misdemeanor Obligated to Pay Costs or Be Incarcerated, 60 NW. U.L. REV. 251 (1965).

The Act of 1860 was declared void for vagueness in Giaccio v. Pennsylvania, 382 U.S. 399 (1966), by the United States Supreme Court, seven members holding that it lacked adequate legal, enforceable standards by which to determine when an accused would be saddled with the costs of an unsuccessful prosecution. The Pennsylvania Supreme Court's act of terming the assessment compensatory, rather than punitive, could not cure this facial defect, for:

Whatever label be given the 1860 Act, there is no doubt that it provides the State with a procedure for depriving an acquitted defendant of his liberty and his property. Both liberty and property are specifically protected by the Fourteenth Amendment against any state deprivation which does not meet the standards of due process, and this protection is not to be avoided by the simple label a State chooses to fasten upon its conduct or its statute. So here this State Act whether labeled "penal" or not must meet the challenge that it is unconstitutionally vague.

382 U.S. at 402. Justices Stewart and Fortas concurred on fourteenth amendment grounds, but relied on the due process clause to support their view that constitutional offensiveness was inherent in the imposition of any penalty upon a defendant found not guilty of the offense with which he was charged.

121. For further discussion, see text accompanying notes 22 through 26 supra.
Prosecution Costs

accused may be subjected to the costs of making bond and loss of wages during trial, as well as the humiliation of arrest and detention and the frustration, apprehension and stigma innate in defending against a criminal prosecution, irrespective of its ultimate outcome.\footnote{124} The acquitted person is left in the midst of this plight with only the wholly inadequate remedy of a possibility of an action in tort for malicious prosecution.\footnote{125} Certainly these factors denote the need for providing at least a partial remedy to the accused person upon his acquittal in the form of recoupment of his costs in successfully defending against the state.\footnote{126}

Cases discussing this question posit two rationalizations for disallowances of costs to the acquitted person. First, since statutes governing costs must be strictly construed, only those costs specifically detailed in the statutes are allowed.\footnote{127} The laws of no jurisdiction provide for recovery of costs from the state, so all claims are ignored. Clearly, this reasoning is less than intellectually satisfying, for the legislature could implement any societal demand for costs allowance by simply statutorily so providing. Second, sovereign immunity\footnote{128}
protects the state, absent its consent, from suit by one of its citizens. However, in view of the modern trend towards abrogation of absolute immunities, blanket governmental consent to reimburse acquitted persons for expenditures incurred in defending in criminal proceedings could be legislatively decreed.

Notwithstanding these two grounds for disallowance of costs to persons discharged upon a verdict of not guilty, a third, unexpressed rationale is apparent: awarding costs to all persons acquitted is simply undesirable social policy. A legislative determination that obliging convicted persons to recompense the state, while withholding from acquitted persons the commensurate right to compensation from the state, has been found rational by the United States Supreme Court in recognition that such inequities are an inherent and unavoidable part of our legal system.

Criminal v. Civil Execution of the Judgment Lien

Under the execution statute of the Illinois costs assessment

XI provides:
The Judicial power of the United States shall not be construed to extend to any Suit, in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State [emphasis added].

129. See generally PROSSER, supra note 125, §§ 131, 133. See also Molitor v. Kane-land Community Unit Dist., 18 Ill. 2d 11, 163 N.E.2d 89, cert. denied, 362 U.S. 968 (1959) (abrogation of municipal immunity); Darling v. Charleston Community Memorial Hosp., 33 Ill. 2d 326, 211 N.E.2d 253, cert. denied, 383 U.S. 946 (1965) (abrogation of charitable immunity).

130. See generally Charging Costs of Prosecution, supra note 10. This determination is a corollary of the demanding burden remaining in the prosecution to sustain its proof of the guilt of the accused beyond a reasonable doubt. Double jeopardy generally precludes prosecutorial right to appeal from acquittal at the trial level. See PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: THE COURTS 47-48 (1967). Also, the exclusion of highly probative evidence is often required in order to vindicate the accused's constitutional rights. See, e.g., Mapp v. Ohio, 367 U.S. 643 (1961); Beck v. Ohio, 379 U.S. 89 (1964); Miranda v. Arizona, 384 U.S. 436 (1966).

Consequently, some commentators have concluded that a verdict of not guilty is unavailing for purposes of distinguishing between "legally" and "factually" guilty defendants. Since no unequivocal distinction is possible between "innocent" and "factually guilty" defendants on the basis of acquittal, the argument runs, awarding costs to all acquitted persons is wholly inadvisable. See generally Brief for the People of the State of Illinois as Amicus Curiae, People v. Schwanz, Indictment No. 74-2625, filed January, 1975, in the Circuit Court of Cook County, Illinois.

131. In Fuller v. Oregon, 417 U.S. 40, 49-50 (1974), the United States Supreme Court stated:

We conclude that this classification is wholly noninvidious . . . . The imposition of such dislocations and hardships without an ultimate conviction is, of course, unavoidable in a legal system that requires proof of guilt beyond a reasonable doubt and guarantees important procedural protections to every defendant in a criminal trial . . . . This legislative decision reflects no more than an effort to achieve elemental fairness and is a far cry from the kind of invidious discrimination that the Equal Protection Clause condemns.

provisions, a lien attaches to property of the accused which is not otherwise exempt at the time of indictment. The statute fixes no expiration period for the lien. Since criminal execution, when required, is effected by statute in the same manner as in civil cases, the focus of inquiry narrows to two questions.

(a) Is the Relation Back of the Lien to the Time of Indictment an Arbitrary Discrimination?

A judgment did not create a lien upon the real or personal property of the debtor at common law; rather, the judgment lien is purely a statutory creature. Since a lien arises only upon judgment in civil cases, the relation back of the lien to the time of indictment under chapter 38, section 180-4 creates a marked variance in treatment of civil debtors and convicted offenders. This distinction is not irrational, however, in view of the pronouncement of the United States Supreme Court that the state’s claim to reimbursement may take precedence over the claims of private creditors, so that procedures implementing the respective interests need not be identical. The offender becomes liable for payment of costs only upon a judgment of conviction, and execution is stayed until 30 days after default. Therefore, the relation back of the lien to the time of indictment works no manifest hardship and is not arbitrary in that this procedure serves legitimate state concerns by precluding fraudulent concealment of assets in the interim between indictment and judgment.

(b) Does the Creation of a Lien Which Does Not Expire By Its Terms Cause Undue Hardship?

Judgment liens arising in civil cases expire after a 7-year term. By contrast, chapter 38, section 180-4 fixes no termination period for the judgment lien created upon indictment. However, this variation cannot be analyzed in equal protection terms because Illinois courts have not yet determined whether the provision in chapter 38,

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133. Smith v. Toman, 368 Ill. 414, 14 N.E.2d 478 (1938).
135. James v. Strange, 407 U.S. 128 (1972). Although recognizing the validity of state interests served by recoupment provisions, the Supreme Court found the particular statute at issue violative of equal protection in that it failed to allow criminal defendants all the exemptions provided for other judgment debtors. The Illinois statute, by contrast, which allows identical exemptions to those provided civil judgment debtors and operates in precisely the same manner as in civil cases, suffers from no such constitutional infirmities.
section 180-4 for enforcement of judgments "in the same manner as in civil cases" includes the element of time within which the state must act in order to preserve its privilege of execution.\textsuperscript{137} It is submitted that interminably extending a judgment lien imposes an unduly harsh burden upon the convicted person and his family, whose assets are thereby unceasingly subject to execution and levy. Construction of chapter 38, section 180-4, which limits the duration of the judgment lien to the 7-year period recognized in civil cases and commences the 7-year term from the time of the creation of the lien, would not defeat the legitimate interests of the state in recouping expenditures and would eliminate discriminatory effects of the statute by guaranteeing a respite to the convicted person financially incapable of satisfying a judgment for costs within the statutory period.

\textit{Affluent v. Indigent Defendants}

\textit{Written laws are like spiders' webs, and will like them only entangle and hold the poor and weak, while the rich and powerful will easily break through them.}\textsuperscript{138}

Judicial recognition that neutral laws may function to arbitrarily deny the indigent the ability to assert rights which are not ordinarily jeopardized where money is available to purchase vindication of those rights is especially patent in the area of costs assessment. The thrust of every pertinent decision of the United States Supreme Court since \textit{Griffin v. Illinois}\textsuperscript{139} is that inability to advance costs cannot op-

\textsuperscript{137} A discussion of this question published 24 years ago noted that, although the Illinois Supreme Court, in the case of Smith v. Toman, 368 Ill. 414, 14 N.E.2d 478 (1938), declared that statutory provisions defining the time within which the right must be exercised constitute not a statute of limitations, which would not bind the sovereign, but are instead an integral part of the grant of such right, it was unclear whether the criminal execution provisions at issue here were governed by that case. The determination was dependent upon whether the term "manner" as used in ILL. REV. STAT. ch. 38, § 180-4 was intended to include the element of time. Kratovil & Harrison, \textit{Enforcement of Judgments Against Real Property}, 1951 U. ILL. L.F. 1, 14-16. The passage of time has injected no further clarity into the interpretation of this term in the context of criminal executions.

\textsuperscript{138} \textit{ANACHARSIS: To Solon}, noted in \textit{THE GREAT QUOTATIONS} 561 (compiled by G. Seldes) (1972).

\textsuperscript{139} 351 U.S. 12 (1956). The Supreme Court held that, upon establishing an appellate process for review of criminal convictions, a state could not preclude access to that process solely on the basis of the defendant's financial inability to purchase a transcript. The aggregate effect of subsequent application of this principle is that the indigent defendant may not be foreclosed from utilization of any direct or collateral remedy to which the affluent defendant has ready access. \textit{See, e.g.}, Burns v. Ohio, 360 U.S. 252 (1959) (state may not require an indigent criminal defendant to pay a filing fee as a prerequisite to filing a motion for leave to appeal); Smith v. Bennett, 365 U.S. 708 (1961) (state may not require payment of a statutory filing fee before permitting an indigent defendant to file a petition for a writ of habeas corpus); Draper v. Washington, 372 U.S. 487 (1963) (state practice which authorized the trial court to determine the frivolity of the defendant's assignments of error and deny preparation of a free transcript...
erate to preclude a defendant from access to any stage of the criminal process. The effect of the Illinois costs assessment provisions must therefore be thoroughly scrutinized to ascertain that, in compliance with the constitutional mandate, enforcement of these provisions does not function to impede the indigent's access to the criminal process.

(a) Who Is an Indigent?

This threshold inquiry is troublesome because, although commentary on the topic abounds, judicial definitions of the term have been neither consistent nor frequent, and discuss the state of indigency solely in the context of ability to secure adequate representation. The problem seems to defy resolution: even if standards for criteria to be considered in the determination of indigency may be satisfactorily articulated, the prospect of judicial administration of on that basis, thereby precluding appellate review, was unconstitutional); Lane v. Brown, 372 U.S. 477 (1963) (state procedure under which an indigent was foreclosed from appealing the denial of coram nobis because of the public defender's belief that such appeal would be unsuccessful was unconstitutional).


141. One commentator suggests four basic problems in formulating an operative definition of indigency: (1) reviewing courts have posited only hazy and inconsistent definitions of indigency; (2) standards for determining indigency are not spelled out in the statutes, but rather relegated to the exercise of judicial discretion; (3) practices for determining indigency vary widely even within counties in a single state; (4) critics are in disagreement as to whether primary responsibility for defining indigency rests with the courts, prosecutors or the organized bar. Financial Status of an Accused, supra note 140, at 870.


143. Judge Prettyman expresses the problem of determining the finite bounds of indigent status as follows:

Of course a person with nothing in any way, shape or form is indigent. But suppose that, although he has no ready cash, he has a good job. Or suppose that he has assets such as a car, a television set or a refrigerator. Suppose he has a good job and some cash but has a wife and children. Suppose he has no ready convertible asset but has an equity in a home. Suppose he has
such standards in a criminal justice system characterized by insufficient numbers of courtrooms, judges and attorneys to combat increasingly overcrowded dockets is overwhelming.  

Certainly the determination of indigent status must remain fluid in order to conform with the mandate of *Griffin*. The determination must be subject to alteration throughout the various phases of criminal proceedings, and must be relative, measured by the particular service or requirement under consideration and the comparative ability of the defendant to pay for it. For purposes of this analysis, the term "indigent" refers to a person who is financially incapable of employing to his advantage the service under consideration, or of meeting pecuniary obligations imposed upon him.

(b) *Is Equal Protection Violated When Assessed Costs Are Deducted From the Indigent's Bail Bond?*

The Illinois bail statute requires that pecuniary obligations arise...
 Prosecution Costs

ing from a judgment for a fine or costs be satisfied from the amount of money on deposit in the court in the form of a bail bond.\textsuperscript{149} The mandatory language of the statute precludes a separate determination of present ability to pay or of subsequent hardship on the defendant and his family. Consequently, the rationale must be that the defendant capable of posting bond, whether or not counsel was provided for him, is not indigent for purposes of satisfying assessed costs.

This rationale is consistent with the definition of indigent status as inability to bear the obligation under consideration or to purchase the necessary service. Commentators universally agree that ability to post bond is not dispositive of the question of indigency for purposes of appointment of counsel,\textsuperscript{150} and the Illinois Supreme Court has adopted this position.\textsuperscript{151} If the defendant capable of posting bond may be found indigent for purposes of appointment of counsel, conversely then the defendant financially incapable of engaging his own attorney may be found not indigent if his money is on deposit in the court and readily available to be applied in satisfaction of a judgment for costs.\textsuperscript{152} Adoption of this reasoning process precludes the assertion of equal protection violations in this practice: the defendant deemed not indigent is simply obliged to discharge the same liability for costs arising upon every judgment of conviction.

The flaw in this reasoning is its implicit presumption that funds deposited in the court in order to secure release on bond are the property solely of the defendant. It is an uncontesterable fact, however, that a large proportion of accuseds are financially unable to meet pecuniary requirements for bail,\textsuperscript{153} so that their pre-trial release through bail procedures is effected solely through the generosity of friends and relatives. Can a defendant be deemed not indigent if his

\textsuperscript{149}\textsuperscript{149} ILL. REV. STAT. ch. 38, § 110-7(h) provides:
After a judgment for a fine and court costs or either is entered in the prosecution of a cause in which a deposit had been made in accordance with subsection (a) the balance of such deposit, after deduction of bail bond costs, shall be applied to the payment of the judgment.

\textsuperscript{150}\textsuperscript{150} Providing Defense Services, supra note 142, at 55; Financial Status of an Accused, supra note 140, at 874-75. One commentator has suggested that use of ability to post bond as a test to determine eligibility for court appointed counsel may infringe equal protection by denying counsel to the indigent person whose friend or relative acts as surety, while granting counsel to the indigent who remains in jail. Bail in the State Courts, supra note 147, at 645.


\textsuperscript{152} This conclusion is premised upon the fact that costs involve relatively minimal amounts in comparison with the sums required to hire an attorney. As currently assessed, costs of prosecution in Cook County will rarely exceed $150. See Appendix.

\textsuperscript{153} Report of the Attorney General's Committee, supra note 140, at 67; The Administration of Illinois Bail Provisions, supra note 147, at 382.
visible sources of wealth consist of money supplied by others?

Although Illinois courts have not yet resolved this precise issue, opinions of other jurisdictions generally indicate that the legality of the application of cash bail to the satisfaction of fines or costs is a matter governed by statute.\textsuperscript{154} Scrutiny of the particular statute involved must therefore precede a determination of whether a generous friend or relative of the accused may be deprived of funds advanced for bail by application of those funds to a judgment for costs. By its terms, the Illinois bail statute indulges in a conclusive presumption that funds deposited in the court in lieu of bail are the property of the defendant by requiring that the accused himself deposit the funds,\textsuperscript{155} and by directing in express terms that such moneys in excess of amounts applied to satisfy a fine or costs\textsuperscript{156} be returned to the accused himself.\textsuperscript{157} The statute does not contemplate inquiry into the source of the funds received under its terms. So long as a deposit is made in compliance with the statute,\textsuperscript{158} the depositor is presumed to be cognizant of the statutory provisions.\textsuperscript{159} This construction of the Illinois bail statute effectively dissolves the possibility of assertion of equal protection violations: if the defendant posts bond with "his" money, he is deemed not indigent.\textsuperscript{160}

\textsuperscript{154} See cases collected at Annot., 92 A.L.R.2d 1084 (1963).
\textsuperscript{155} ILL. REV. STAT. ch. 38, § 110-7(a) (1973). The statute provides:
The person for whom bail has been set shall execute the bail bond and deposit with the clerk of the court before which the proceeding is pending a sum of money equal to 10\% of the bail, but in no event shall such deposit be less than $25.
\textsuperscript{156} ILL. REV. STAT. ch. 38, § 110-7(h). The text of this statute is set forth at note 149 supra.
\textsuperscript{157} ILL. REV. STAT. ch. 38, § 110-7(f) (1973). The statute provides:
When the conditions of the bail bond have been performed and the accused has been discharged from all obligations in the cause the clerk of the court shall return to the accused, unless the court orders otherwise, 90\% of the sum which had been deposited and shall retain as bail bond costs 10\% of the amount deposited. However, in no event shall the amount retained by the clerk as bail bond costs be less than $5.
At the request of the defendant the court may order such 90\% of defendant's bail deposit, or whatever amount repayable to defendant from such deposit, to be paid to defendant's attorney of record.
\textsuperscript{158} When any party other than the defendant makes the deposit for him, it is a deposit in compliance with the statute, and the money is thus devoted to the purposes of the statute, and to the use of the defendant.
People ex rel. Gilbert v. Laidlaw, 102 N.Y. 588, 592, 7 N.E. 910, 913 (1886). See also State v. Ross, 100 Tenn. 303, 45 S.W. 673 (1898); Kaspar v. State, 206 Tenn. 445, 333 S.W.2d 934 (1967).
\textsuperscript{159} People ex rel. Gilbert v. Laidlaw, 102 N.Y. 588, 7 N.E. 910 (1886).
\textsuperscript{160} Opinions holding that the defendant need not affirmatively establish the financial incapability of his family and friends to bear costs, as well as his own indigency, are not in conflict with the operation of this presumption. See, e.g., State v. Vallejos, 87 Ariz. 119, 348 P.2d 554 (1960) (defendant need not prove the indigency of his family and friends in order to be found unable to purchase a transcript for appellate purposes); Knapp v. Hardy, 111 Ariz. 107, 523 P.2d 1308 (1974) (defendant need not establish his mother's indigency in order to qualify for appointed counsel). See also Pro-
Prosecution Costs

Disturbingly narrow and artificial as this construction of the statute may be, it is difficult to make out a claim that the accused's equal protection rights have been infringed when funds donated by friends or relatives are applied in satisfaction of costs. The accused has secured pre-trial release and upon conviction his debt to the state in the form of a judgment for costs is merely transformed into a debt to his benefactor. Certainly the accused may not vindicate the depositor's claim to the funds applied to the judgment for costs by asserting that his own rights have been violated.

Nor can statutory preclusion of inquiry into the source of cash deposited in lieu of bail be attacked as irrational or arbitrary. Although the identity of the owner of the funds deposited could conceivably be ascertained by requiring that such information be stated by affidavit at the time bail bond is executed, the twin prospect of fraudulent attempts to transfer ownership of the funds and subsequent recurring disputes as to whose money was actually deposited may become a disturbing reality. A legislative decision to forestall such administrative difficulties by stifling potential sources of chaos cannot be termed wholly capricious.¹⁶¹

Due Process

"Due process" is, perhaps the least frozen concept of our law—the least confined to history and the most absorptive of powerful social standards of a progressive society.¹⁶²

A social scheme which included no consistent, systemized procedural context within which the exercise of rights and the fulfillment of duties was safeguarded would be intolerable. The centrality of the constitutional guarantee of procedural due process is paramount, for:

Without this guarantee that one may not be deprived of his rights, neither liberty nor property, without due process of law, the

¹⁶¹ VIDING DEFENSE SERVICES, supra note 142, at 53-54. This denial of access to a phase of the criminal process solely on the basis of the accused's inability to demonstrate the impecuniousness of his friends and relatives is distinguished from the application of funds freely advanced to a judgment for costs rendered only at the conclusion of the proceeding. If the defendant is unable to pay the costs which accrue upon a judgment of conviction, clearly his friends and relatives are not legally obligated to act as sureties. The defendant who benefits from the generosity of others is not, however, discriminatorily refused a necessary service which the state is constitutionally obligated to provide.

State's monopoly over techniques for binding conflict resolution could hardly be said to be acceptable.163

Procedural due process guarantees preclude not only curtailment of access164 to the judicial process, i.e., notice and opportunity to be heard,165 but also the imposition of burdens which needlessly chill the exercise of constitutional rights. A determination of whether obliging an offender, upon conviction, to reimburse the state for expenses specially incurred in his prosecution offends due process requirements necessitates resolution of two questions.166

Does Knowledge That Prosecution Costs Will Be Imposed in the Event of Conviction Unduly Burden the Accused's Exercise of Fifth and Sixth Amendment Rights?

The seminal United States Supreme Court opinion, United States v. Jackson,167 held that governmental practices whose sole objective is discouragement of assertion of a constitutional right are patently unconstitutional. In that case, an indictment charging the defendant with violation of the Federal Kidnapping Act168 was dismissed by the district court169 on the ground that the Act was wholly unconstitutional in that, by vesting sole authority in the jury to inflict the death penalty upon a finding of guilt, it required that the accused risk loss of life as the price for assertion of the right to trial by jury. The Supreme Court agreed, finding that, while the legislative objective of removing the decision to inflict the death penalty from the discretion of the trial court was legitimate, that objective could not permissibly be implemented by means which needlessly chilled the exercise of fundamental rights:

The question is not whether the chilling effect is "incidental"

166. The due process question involved here is not denial of access to the judicial process. Cf. Boddie v. Connecticut, 401 U.S. 371 (1971). Nor is it a denial of the means with which to vindicate one's rights. Cf. Griffin v. Illinois, 351 U.S. 12 (1956); Harper v. Virginia State Bd. of Elections, 383 U.S. 663 (1966). Imposing prosecution costs at the point of conviction neither negates one's right to trial in the first instance nor influences the basic fairness of the trial which precedes the judgment. The focus is rather in determining whether an accused's foreknowledge that prosecution costs will accrue in the event of his conviction is a needless and undue inducement to waive his fifth amendment right to plead not guilty and his sixth amendment right to trial and to consideration of the evidence by a jury of his peers.
rather than intentional; the question is whether that effect is un-
necessary and therefore excessive.\textsuperscript{170}

The Supreme Court, however, has receded from application of this
broad mandate in subsequent cases\textsuperscript{171} where the defendant contended
that his right to assert constitutional guarantees had been chilled.
The scope of the principle which formed the basis of the \textit{Jackson}
holding was thus restricted:

Jackson did not hold, as subsequent decisions have made clear, that
the Constitution forbids every government-imposed choice in the
criminal process that has the effect of discouraging the exercise
of constitutional rights.\textsuperscript{172}

The question becomes then, one addressed to the voluntariness of the
choice ultimately made by the defendant, rather than to the impact
of governmental practices in inducing that choice.

In every case subsequent to \textit{Jackson}, the Court has refused to ad-
dress the merits of claimed constitutional deprivations raised under the
\textit{Jackson} principle which occurred prior to the entry of a guilty plea.\textsuperscript{173}

Instead, the Court has concluded in each case that the issue was not
the respective merits of the constitutional claims as such, but rather
whether the guilty plea had been made intelligently and voluntarily
with the advice of competent counsel.\textsuperscript{174}

The aggregate effect of these cases expatiating the \textit{Jackson} prin-
ciple is as follows: imposition of a burden tantamount to a chilling
effect upon the defendant's assertion of a constitutional right is insuf-
ficient to invalidate, on constitutional grounds, a guilty plea which
is voluntary, in view of the relevant surrounding circumstances and
supported by adequate factual basis.\textsuperscript{175} In such circumstances, the

\textsuperscript{170} 390 U.S. at 582 (1968).
\textsuperscript{171} See cases cited in note 173 \textit{infra}.
\textsuperscript{172} Chaffin v. Stynchcombe, 412 U.S. 17, 30 (1973).
\textsuperscript{173} Parker v. North Carolina, 397 U.S. 790 (1970) (an otherwise valid guilty plea
was not involuntary because induced by the defendant's desire to limit the possible max-
imum penalty to less than that authorized if defendant had chosen a jury trial); North
Carolina v. Alford, 400 U.S. 25 (1970) (the fact that a defendant would not have
pleaded guilty except for the opportunity to limit the possible penalty did not necessarily
demonstrate that the plea was not the product of a free and rational choice); Brady v.
United States, 397 U.S. 742 (1970) (defendant's plea of guilty found supported by sub-
stantial evidence of voluntariness, even though defendant was indicted under the same
Federal Kidnapping Act discussed in \textit{Jackson}, and premised his appeal on the \textit{Jackson}
rationale). \textit{See also} Tollett v. Henderson, 411 U.S. 258 (1973), and Chaffin v. Stynch-
combe, 412 U.S. 17 (1973), discussing the scope of the \textit{Jackson} holding.

\textsuperscript{174} The topic of the voluntariness of guilty pleas is beyond the scope of this article.
For a discussion of factors that may justify a reduction in penalty upon a plea of guilty,
see \textit{ABA PROJECT ON STANDARDS FOR CRIMINAL JUSTICE: PLEAS OF GUILTY} (Approved
Draft 1968) 37-52; A \textit{CRIMINAL JUSTICE SYSTEM AND THE ACCUSED, supra} note 140, at
53-57.

\textsuperscript{175} Boykin v. Alabama, 395 U.S. 238 (1969); Machibroda v. United States, 368
proper issue for judicial consideration is not the degree to which the
defendant's rights were chilled, but rather, in the totality of circum-
cstances, whether his waiver of those rights represents a voluntary and
intelligent choice among the alternative courses of action available.\textsuperscript{176} That state practice may be a factor in motivating a plea of guilty
does not detract from its voluntariness.\textsuperscript{177}

Thus, despite the constitutional soundness of the \textit{Jackson} principle
that the state may not impair the exercise of constitutional rights by
extracting such a price for that exercise that the will to assert the
rights is chilled, as expatiated in subsequent cases, it is difficult to
postulate a context in relation to the issue under discussion where
the principle is applicable. Assume hypothetically that defendant, in-
dicted for an offense, chooses to enter a plea of guilty. If the de-
fendant does not inform the court at the time he pleads that his plea
is induced by the prospect of more substantial costs accruing during
the course of the trial,\textsuperscript{178} he is precluded from raising whatever chill-
ing effect the costs assessment provisions exerted on his fifth and
sixth amendment rights as an issue on appeal. Under the \textit{Parker-
Alford-Brady}\textsuperscript{179} reasoning, the appellate court may properly consider
solely the voluntariness of the defendant's plea, and such voluntari-
ness is unaffected by the fact that the prospect of liability for costs in-
duced the defendant to plead guilty, so long as the defendant, desir-
ous of avoiding further costs liability, freely chose that alternative
over others available. The voluntariness of the plea is not influenced
by identification of one factor as a \textit{sine qua non} cause of the plea,
absent coercion.\textsuperscript{180} On the other hand, should the defendant attempt
to demonstrate coercion by announcing to the court at the time of his
plea that his decision to waive his fifth and sixth amendment rights

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\textsuperscript{177} In Brady v. United States, 397 U.S. 742, 750 (1970), the Court declared:
The State to some degree encourages pleas of guilty at every important step
in the criminal process. For some people, their breach of a State's law is alone
sufficient reason for surrendering themselves and accepting punishment. For
others, apprehension and charge, both threatening acts by the Government, jar
them into admitting their guilt. In still other cases, the post-indictment accu-
mulation of evidence may convince the defendant and his counsel that a trial
is not worth the agony and expense to the defendant and his family. All these
pleas of guilty are valid in spite of the State's responsibility for some of the
factors motivating the pleas; the pleas are no more improperly compelled than
is the decision by a defendant at the close of the State's evidence at trial that
he must take the stand or face certain conviction.
\textsuperscript{178} If the defendant chose to be tried by the court, the only additional costs are
a $10 fee for each day of trial for the state's attorney, and a service mileage fee of 8\$
per mile for the sheriff. A jury trial would cause the following additional items to ac-
crue: jury demand, $50; summoning jurors, $2 per juror.
\textsuperscript{179} See note 173 \textit{supra}.
\end{flushleft}
is grounded in his desire to avoid liability for further costs, the court would be bound, in compliance with Illinois Supreme Court Rule 402,181 to reject the plea and put the defendant to trial.182

Thus, the principle of Jackson, although presumably still constitutionally sound, has been rendered virtually ineffectual through subsequent refinement and cannot, therefore, form the basis for an argument that the mere prospect of liability for prosecution costs in the event of conviction is an undue burden which substantially chills the exercise of fifth and sixth amendment rights.

Significantly, the Supreme Court in Fuller v. Oregon183 recently rejected the contention that a defendant's knowledge that he may remain under an obligation to repay the expenses incurred in providing him legal representation might impel him to decline the services of an appointed counsel and thus chill his constitutional right to counsel. The Court distinguished recoupment statutes, which permissibly serve a valid state interest in conservation of public moneys, from statutes which function solely to chill the exercise of constitutional rights by inflicting penalties upon the assertion of these rights, and held that recoupment statutes impose no undue burden upon the exercise of constitutional rights, so long as the obligation to recompense the state is enforced only against defendants capable of meeting it.184

Further discussion, however, in terms of the question at issue, is precluded by the operative inadequacy and unintelligibility of the existing Illinois statutory provisions for costs assessment. Although it is conclusive that incarceration for involuntary default in costs payment is impossible under Illinois law,185 there is no statutory requirement of a determination regarding the present ability of the offender to

182. This hypothetical situation must be contrasted to the procedural context of Jackson, where the defendant moved to quash the indictment under which he was charged on the constitutional grounds discussed. 390 U.S. 570 (1968). Clearly, since a defendant could not be indicted for violation of the costs assessment provisions, this context could not arise in Illinois.
184. But see In re Allen, 71 Cal. 2d 388, 455 P.2d 143, 78 Cal. Rptr. 207 (1969), holding that any reimbursement requirement constitutes an impediment to the free exercise of constitutional rights. See also State v. Young, 21 N.C. App. 316, 204 S.E.2d 183 (1974); State ex rel. Brundage v. Eide, 83 Wash. 2d 676, 521 P.2d 706 (1974); Opinion of the Justices, 109 N.H. 508, 256 A.2d 500 (1969). The United States Supreme Court discussed and specifically dismissed the holdings of these cases, concluding that such reasoning was "wide of the constitutional mark." Fuller v. Oregon, 417 U.S. 40, 51-52 (1974). See also People v. Amor, 12 Cal. 3d 20, 523 P.2d 1173, 114 Cal. Rptr. 765 (1974), holding that a recoupment statute which conditioned reimbursement upon a judicial determination of present ability to pay imposed no burden on the defendant's constitutional rights.
185. For discussion of the reasoning impelling this conclusion, see pp. 354-62 supra.
satisfy a judgment for costs. Arguably, such a determination is implicit in the operation of the enforcement procedures, whereby the offender is obligated to pay, but no penalties inure in the event of involuntary default. However, the predicament of an offender who possesses few visible assets and is financially incapable of wholly satisfying the costs assessment immediately upon judgment remains uncertain in two respects: procedures by which the defendant may satisfactorily demonstrate his current impecuniousness are nowhere apparent in the statutory scheme of enforcement provisions, and the duration of the lien which attaches at the time of his indictment and continues upon default cannot be determined.

It is strongly suggested that potential due process contentions that undue burden and chilling of rights proceeding from the operation of the costs assessment provisions be alleviated by re-enacting the statute to clearly exclude those offenders who demonstrate present inability to bear a judgment for costs, while safeguarding the state’s interest in conserving the resources of its coffers by retaining the lien protection, but limiting its operative duration. Only a clear statutory mandate that only those offenders financially capable of liquidating a judgment for costs are required to recompense the state authoritatively precludes any due process claims of undue impediments of the exercise of constitutional rights.

Is a Jury Tax Properly Assessable?

A corollary to the issue of state-induced chill upon the exercise of constitutional rights is the question of the propriety of the inclusion of certain expenses as costs of the prosecution which proceeds from a criminal defendant’s right to be tried by a jury of his peers. In Illinois, these expenses, a jury-demand fee and a fee for swearing jurors, are in the nature of a tax, assessed as part of the fee for services performed by the sheriff and circuit clerk.  


187. The State’s Attorney’s Office of Cook County currently taxes a jury-demand fee of $50 as compensation to the circuit clerk and a fee for swearing jurors in the amount of $2 per juror as compensation to the sheriff. See Appendix.


Whether these expenses are constitutionally taxable to the offender as costs of the prosecution is a question of first impression in Illinois; however, the Illinois Supreme Court has affirmed the constitutionality of levying a jury-demand fee as a tax in a civil context, dismissing contentions that compelling payment of the jury-demand fee impaired due process rights in terms applicable here:

The constitution does not guarantee to the citizen the right to litigate without expense, but simply protects him from the imposition of such terms as unreasonably and injuriously interfere with his right to a remedy in the law or impede the due administration of justice; and that a party who demands a trial by jury should be required to advance a small jury fee . . . seems no more liable to a constitutional objection than is the requirement that the fees of the clerk, sheriff and other officers shall be paid . . . .192

From this perspective the jury tax is not in essence distinct from similar government expenditures taxable to the offender as costs specially incurred in his prosecution193 and is clearly distinguished from other classes of jury-related expenditures, such as jurors’ per diem and mileage expenses and personal fees, which are inherent in the maintenance and operation of government and not properly assessable against the defendant.194 By predicating enforce-

192. Id. at 479, 263 N.E.2d at 822 (1970) (citations omitted).
193. Characterization of a jury-demand fee in criminal cases as indistinct from other costs and fees levied upon the convicted defendant on the basis of procedures deemed applicable in civil cases does not negate cognizance of the essentially different functions served by juries in civil and criminal cases. In addition to the fact-finding role performed by civil juries, criminal juries function as "an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge." Duncan v. Louisiana, 391 U.S. 145, 156 (1968). The question, however, focuses upon the exercise without undue burden of sixth amendment rights to trial and fifth amendment due process rights, rather than upon the inviolability accorded the exercise of the right to trial by jury. If assessment of other classes of trial-related expenses does not unduly burden the exercise of the right to trial in the first instance, imposition of a jury tax upon a defendant adjudged financially able to satisfy the obligation does not further contravene fundamental rights.
194. ILL. REV. STAT. ch. 53, § 62 (1973) clearly obligates the county to bear per diem, mileage and personal expenses of jurors in Illinois. The State’s Attorney's Office of Cook County initially attempted to include these jury-related expenses in a demand for judgment for costs of the prosecution in People v. Hickman, supra note 15. This attempt was judicially rebuffed, and such expenses are currently not assessed in Cook County. See APPENDIX.

Precedent from other jurisdictions regarding the propriety of taxing jury-demand fees as a cost of the prosecution is of little value; courts concern themselves only with the propriety of taxing to the offender personal jurors’ fees, per diem and mileage and assume that the jury-demand fee is a properly taxable item. See, e.g., Saunders v. People, 63 Colo. 241, 165 P. 781 (1917). Interestingly, in discussing the issue of the propriety of saddling the offender with jurors’ personal fees, even courts whose opinions express doubt as to the constitutionality of this practice consistently recede from approaching the issue on constitutional grounds. No court, to date, has actually declared the practice of obliging defendants to bear the costs of various jury expenses, such as meals and lodging, per diem and fees, unconstitutional. The approach utilized is rather to construe the phrase "costs of the prosecution" to exclude such personal jurors’ expenses. See, e.g.,
ment of liability for jury-related taxes, as well as all other expenditures properly deemed costs of the prosecution upon a judicial determination of the present ability of the offender to satisfy the judgment for costs, inhibitory effects upon the exercise of constitutional rights is minimized.

CONCLUSION

We do not inquire whether this statute is wise or desirable, or "whether it is based on assumptions scientifically substantiated." Misguided laws may nonetheless be constitutional . . . . Our task, however, is not to weigh this statute's effectiveness but its constitutionality. Whether the returns under the statute justify the expense, time, and efforts of state officials is for the ongoing supervision of the legislative branch.195

Notwithstanding probable minimal adequacy on constitutional grounds, the existing statutory procedures for costs assessment and enforcement remain anachronistic, unintelligible, riddled with surface contradiction regarding possible incarceration of defaulting offenders and precariously close to unconstitutionality on due process grounds. The social utility and effectiveness of inflicting prosecution costs upon convicted defendants is a purely legislative determination. If it be legislatively ordained that amounts actually realized are not negligible when balanced against administrative time and resources expended in their collection, then the following suggestions for reenactment of the costs assessment provisions are submitted:

(1) Notice of potential liability for costs, in the event of conviction, must be afforded the accused. Such notice must include a statement of the items, and their amounts, which are properly taxable, as well as an explanation that, in the event of conviction, immediate enforcement of costs obligations will occur only if it is judicially determined that the accused possesses the financial capability to satisfy the judgment. Although the obligation to so inform the accused may be delegated to defense counsel, it is suggested that this duty be incorporated as a function of the court at the preliminary examination.

(2) Statutory language must be clarified, repealing anachronistic

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sections and specifically detailing the precise items taxable as costs of the prosecution.

(3) Enforcement procedures must be specifically set forth, and their implementation must be predicated upon judicial determination of present ability to satisfy a judgment without inducing manifest hardship. This procedure may be accomplished, with a minimum of administrative difficulty, by affidavit at the sentencing hearing, or at the time sentence is imposed. The court must be granted discretion to implement and modify methods of payment.

(4) The judgment lien must be statutorily limited in duration to a term of 7 years from its inception at indictment. Although it is eminently feasible that an offender adjudged indigent at the time of judgment may later fortuitously realize means of repayment, an interminable lien is excessive and unnecessary to advancement of the state's interest in shielding its coffers. Administrative costs of incessant investigation of the offender to ascertain whether he had subsequently acquired property subject to the judgment lien would substantially outbalance the amounts realizable under the costs assessment provisions.

A proposed statute incorporating these suggestions is submitted:

§ 1 Judgment for Costs
When any person is convicted of an offense, the court shall give judgment that the offender pay the costs of the prosecution. The court shall inform the defendant at the preliminary examination that, in the event of conviction, judgment for the costs of the prosecution will issue. The court shall further inform the defendant as to the nature of such costs, as hereinafter provided.

§ 2 Allowable Costs
Costs shall be limited to expenses specially incurred by the state in prosecuting the offender. Such costs will not include expenses inherent in providing a constitutionally guaranteed jury trial or expenditures related to the maintenance and operation of government agencies that will be made by the public irrespective of specific violations of law.\(^{196}\) Costs of the prosecution shall include only those costs and fees as hereinafter provided.

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§ 3  *State's Attorney—Fees*\(^{197}\)

State's attorneys shall be entitled to the following fees:
For each conviction in a prosecution on an indictment for a felony, $30.
For each conviction in other cases tried in the circuit court, $5.
For preliminary examination of each defendant held to bail or recognizance, $5.
For each case of appeal to the Supreme or Appellate Court when prosecuted or defended by him, $50.
For each day actually employed in the trial of a case, $10.
For each case of forfeited recognizance where the forfeiture is set aside at the instance of the defense, in addition to the ordinary costs, $10 for each defendant.
For each proceeding in a circuit court to inquire into the alleged mental incompetence of any person, $5 for each defendant.
For each proceeding in a circuit court to inquire into the alleged dependency or delinquency of any child, $10.
For each proceeding involving a case of habeas corpus, $20.
In cases of inquiry into the mental incompetence of any person alleged to be mentally ill and in cases of appeal in the Supreme or Appellate Court, where judgment is in favor of the accused, no costs shall be assessed against the accused.

§ 4  *Sheriff—Fees*\(^{198}\)

For serving any writ of summons on each defendant, $4.
For serving a subpoena on each witness, $3.
For swearing jurors, $2 per juror.
Mileage for service of all process, 8¢ per mile each way necessarily traveled in making such service computed from the place of holding court.
For attending before a judge with a prisoner on writ of habeas corpus, $3.50 per day.
For discharging each prisoner from jail, $2.

§ 5  *Circuit Clerk—Fees*\(^{199}\)

For each jury demand, $50.
For filing a complaint, $30.

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For filing an appearance, $12.
For filing a motion to vacate judgment, $10.

§ 6 Proceeding To Determine Financial Capability

In all cases where the court gives judgment that the offender pay the costs of prosecution and the offender claims he is without funds to satisfy all or a portion of such costs, the court shall conduct a proceeding to determine the present ability of the defendant to pay all or a portion of the costs. The court shall require an affidavit signed by the offender containing sufficient information to determine the assets and liabilities of the offender. If the court determines that the offender has the present ability to pay all or a portion of the costs, the court shall order the costs to be paid forthwith or within a specified period of time or in installments. The court may, upon a showing of good cause, including manifest hardship to the offender or his immediate family, modify the method or time of payment.

§ 7 Judgment Lien on Property, Real and Personal—Execution

(a) The property, real and personal, not otherwise exempt from execution or attachment, of every person convicted of any offense, shall be bound, and a lien shall be created on the property of every such offender from the time of indictment, but only so far as will be sufficient to pay the costs of prosecution.

(b) Acquittal of the person charged with the commission of an offense shall operate to discharge the lien.

(c) Payment in full of the costs of prosecution by any person convicted of an offense or by any person in his favor shall operate to discharge the lien.

(d) In any case where the court determines that a person convicted of an offense is without present financial ability to pay all or a portion of the costs of prosecution, the lien created shall continue upon all property, real and personal, not otherwise exempt from execution or attachment, possessed by the offender at the time of indictment, for a period of seven (7) years. If, at any time during the seven (7) year period, it is determined that the offender possesses sufficient property to satisfy the judgment for costs of the prosecution, the clerk of the court in which the conviction was had shall issue an execution for all costs of prosecution remaining unpaid.

(e) In the event of default in the payment of costs of the prosecution or in any installment, the clerk of the court in which the conviction was had shall upon expiration of thirty (30) days after default in the payment of costs or in any installment, unless the offender shows that his default was not due to a failure on his part to make a good faith effort to pay, issue an execution for all costs of the prosecution remaining unpaid.

(f) The execution may be directed to the proper officer of any county in this State. The officer to whom such execution is delivered shall levy the same upon all the estate, real and personal, of the defendant, not otherwise exempt from execution, as stated in the execution. The property so levied upon shall be advertised and sold in the same manner as in civil cases, with like rights reserved to all parties that may be interested therein.

Author's note:

In a memorandum order dated May 16, 1975, Cook County Circuit Court trial Judge Marvin E. Aspen ruled this cost statute void on its face as inducing an unconstitutionally chilling effect upon a criminal defendant's exercise of 14th amendment rights, and in its application, noting that, contrary to the mandatory language of the statute, costs assessment currently proceeds on an ad hoc basis which varies according to the court and the particular assistant state's attorney trying the offender. Judge Aspen recommended that a more particularly drafted costs assessment statute be enacted by the Legislature. The Office of the State's Attorney of Cook County has indicated that these issues will be raised before Illinois reviewing courts.
### APPENDIX

**IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS**

**THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff,**

v.

**CASE NUMBER:**

**ORDER ASSESSING FINES FEES AND COSTS**

This cause having been concluded by a final order of Judgment, the following are hereby allowed and taxed as costs herein:

<table>
<thead>
<tr>
<th>FINES</th>
<th>CIRCUIT CLERK</th>
</tr>
</thead>
<tbody>
<tr>
<td>FILING COMPLAINT @ $30.00</td>
<td>$</td>
</tr>
<tr>
<td>APPEARANCE @ $12.00</td>
<td>$</td>
</tr>
<tr>
<td>MOTION TO VACATE JUDGMENT @ $10.00</td>
<td>$</td>
</tr>
<tr>
<td>JURY DEMAND @ $50.00</td>
<td>$</td>
</tr>
</tbody>
</table>

| SHERIFF                         |                                         |
| SUMMONS ON DEFENDANT @ $4.00   | $                                     |
| SUBPOENA @ $3.00                | $                                     |
| SUMMONING JUROR @ $2.00/JUROR  | $                                     |
| SERVICE MILEAGE @ $0.08/MILE    | $                                     |
| ATTENDING H. C. PRISONER @ $3.50/DAY | $                        |
| DISCHARGING PRISONER FROM JAIL @ $2.00 | $                              |

| STATE'S ATTORNEY                |                                         |
| FELONY CONVICTION @ $30.00     | $                                     |
| MISDEMEANOR CONVICTION @ $5.00 | $                                     |
| PRELIMINARY HEARING @ $5.00    | $                                     |
| APPEAL @ $50.00                | $                                     |
| EACH DAY OF TRIAL @ $10.00     | $                                     |
| REINSTATEMENT OF BFW @ $10.00  | $                                     |
| COMPETENCY HEARING @ $5.00     | $                                     |
| DEPENDENCY/DELINQUENCY HEARING @ $10.00 | $                         |
| HABEAS CORPUS HEARING @ $20.00 | $ | $ | TOTAL |

**GRAND TOTAL FINE, FEES AND COSTS**

$ | $ | TOTAL

Judgment is hereby entered against Defendant for above. Execution may issue. Execution may issue. The Clerk is hereby directed to deduct payment of foregoing from any cash bail posted herein, to extent possible.

Other Orders:

| AMOUNT OF BOND | ENTER: ___________________________ | 197 |
| DEFICIENCY, IF ANY | JUDGE: ____________________________ |

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