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The Constitutionality of Mandatory Sentence Statutes

THE CONSTITUTIONALITY OF MANDATORY SENTENCE STATUTES

Courts in the United States have long had conflicting opinions concerning their authority to suspend criminal sentences. Some have held that the authority comes from statutory enactments by the legislature[1] while others have decided that legislative action is unnecessary because the power is inherent within the judiciary.[2]

Much of the conflicting opinion about the power to suspend sentence stems from failure to distinguish between two meanings of the term. One use of the phrase denotes a suspension of *imposition* of sentence where the judge, after verdict, fails to hand down any sentence or waits until a later time to sentence. The second use of the phrase means a suspension of *execution* of sentence where the sentence is pronounced but then suspended. It is generally held that the court does have the inherent power to suspend, at least temporarily, the imposition of sentence, but the conflict of opinion occurs when courts try to suspend execution indefinitely[3] without statutory permission.

The source of authority to suspend execution indefinitely becomes crucial when a state legislature enacts a mandatory sentence statute, and the constitutionality of this limitation on judicial discretion is then tested on the ground that it is an encroachment upon the inherent power of the judiciary. The problem is one concerning the separation of powers, as the judiciary claims an inherent power to suspend while the legislature contends that only it has the power to allow suspension. Where the legislature attempts to set a mandatory sentence, these contentions are brought into sharp conflict.

The constitutionality of such a statute was questioned in the recent Idaho case of *State v. McCoy*.[4] The defendant was convicted in the pro-

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[1]Madjorous v. State, 24 Ohio App. 146, 156 N.E. 916 (1924), *aff'd*, 113 Ohio St. 427, 149 N.E. 393 (1925), *cert. denied*, 270 U.S. 662 (1926).

[2]People v. Goodrich, 149 N.Y.S. 406 (Sup. Ct. 1914).

[3]One author has said:

> Probably one reason for the mass of conflicting opinion in other jurisdictions was the failure of the courts . . . to recognize the logical point in procedure at which this discretionary power of the courts could be properly exercised without statutory authority. Instead of following the Massachusetts practice of acting before sentence these courts exhausted their power by imposing sentence, and then tried to suspend its execution, which was beyond the judicial function *until extended by statute.*

Grinnell, *The Common Law History of Probation*, 45 MASS. L.Q., Oct., 1960, at 87.

[4]94 Idaho 236, 486 P.2d 247 (1971).

bate court of driving under the influence of intoxicating liquor, and his sentence was suspended notwithstanding a statute specifically providing that anyone convicted of driving under the influence must serve at least ten days in jail.[5] The prosecuting attorney sought a writ of mandate from the district judge ordering the probate court to sentence the defendant, but the writ was denied as the court found the statute to conflict with the state's general probation statute[6] and three provisions of the state constitution.[7] The state appealed, arguing that the legislature is given authority to determine sentences for crimes, which authority includes the power to prescribe mandatory sentences. The state further asserted that, while the judiciary may have had the power to suspend sentences at common law, that power is not inherent and may be abrogated by statute.

A majority of the Idaho Supreme Court held that the judicial branch had inherent power to suspend sentences and that the power could not be withdrawn by the legislature. Relying on passages from Blackstone's

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[5]*Idaho Code Ann.* § 49-1102(d) (Supp. 1970) provides that:

> Every person who is convicted of a violation of this section shall be punished by imprisonment in the county or municipal jail for not more than six (6) months or by fine of not more than three hundred dollars ($300) or by both such fine and imprisonment. Every person convicted under this section shall serve at least ten (10) days in the county or municipal jail *and this sentence shall be mandatory on every court of the state of Idaho without any right to exercise judicial discretion in said matter*. . . . (Emphasis added).

[6]IDAHO CODE ANN. § 19-2601 (Supp. 1970) reads:

> Whenever any person shall have been convicted, or enter a plea of guilty, in any district court of the state of Idaho, of or to any crime against the laws of the state, except those of treason or murder, the court in its discretion may:
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> . . . .
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> 2. Suspend the execution of the judgment at the time of judgment or at any time during the term of a sentence in the county jail and place the defendant on probation under such terms and conditions as it deems necessary and expedient . . . .

[7]IDAHO CONST. art. II, § 1 divides the powers of the government into three branches and provides that one branch may not exercise powers properly belonging to another unless expressly permitted by the constitution. IDAHO CONST. art. II, § 19 provides that no local or special laws may be passed. (This provision seems to be irrelevant to the problem.) IDAHO CONST. Art. V, § 13 provides that the legislature may not deprive the judiciary of any power rightly belonging to it but shall regulate by law proceedings in courts below the Supreme Court of Idaho.

Commentaries[8] and Hale's *Pleas of the Crown*,[9] the majority first held that the judiciary did have power to suspend at common law. The court conceded that if the power were substantive law, it could be abrogated by statute,[10] but it held that the power to suspend was of a higher order: "Rather, it is in the nature of an inherent right of the judicial department and one which the separation of powers concept in our system of government places above and beyond the rule of mandatory action imposed by legislative fiat."[11] The court also relied upon the New York case of *People ex rel. Forsyth v. Court of Sessions*,[12] where it was held that the judiciary

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[8]4 W. BLACKSTONE, COMMENTARIES *394. The pertinent passage is as follows:

> The only other remaining ways of avoiding the execution of the judgment are by a reprieve or a pardon; whereof the former is temporary only, the latter permanent.
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> I. A reprieve (from *reprendre*, to take back) is the withdrawing of a sentence for an interval of time whereby the execution is suspended. This may be, first, *ex arbitrio judicis*, either before or after judgment; as where the judge is not satisfied with the verdict, or the evidence is suspicious, or the indictment is insufficient, or he is doubtful whether the offence be within clergy; or sometimes, if it be a small felony, or any favorable circumstances appear in the criminal's character, in order to give room to apply to the crown for either an absolute or conditional pardon. These arbitrary reprieves may be granted or taken off by the justices of gaol-delivery, although their session be finished and their commission expired; but this rather by common usage than of strict right.

[9]2 M. HALE, PLEAS OF THE CROWN *412. The pertinent passage is as follows:

> REPRIEVES, or stays of judgment or execution are of three kinds, viz.
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> . . . .
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> II. *Ex arbitrio judicis.* Sometimes the judge reprieves before judgment, as where he is not satisfied with the verdict, or the evidence is uncertain, or the indictment insufficient, or doubtful whether within clergy; and sometimes after judgment, if it be a small felony, tho out of clergy, or in order to a pardon or transportation . . . . [T]hese arbitrary reprieves may be granted or taken off by the justices of gaol-delivery, altho their sessions be adjourned or finished, and this by reason of common usage.

[10]IDAHO CODE ANN. § 73-116 (1947):

> Common law in force.—The common law of England, so far as it is not repugnant to, or inconsistent with, the constitution or laws of the United States, in all cases not provided for in these compiled laws, is the rule of decision in all courts of this state.

[11]486 P.2d at 251.

[12]141 N.Y. 288, 36 N.E. 386 (1894). Although *Forsyth* held that courts had inherent power to suspend *imposition*, the rule was expanded to cover suspension of *execution* in People v. Goodrich, 149 N.Y.S. 406 (Sup. Ct. 1914). *Goodrich* was disapproved only three years later in People *ex rel.* Hirschberg v. Seeger, 179 App. Div. 792, 166 N.Y.S. 913 (1917) which upheld *Forsyth* but said that once sentence had been pronounced, the power of the trial court over the sentence was gone. *Goodrich* was specifically restored as authority through questionable reasoning in *Ex parte* Kuney, 168 Misc. 285, 5 N.Y.S.2d 644 (Sup. Ct. 1938). The inherent power in the courts to suspend was further upheld in Hogan v.

did have the inherent power to suspend *imposition* of sentence. Further, the Idaho majority held that "common sense"[13] dictated the result that the judiciary have discretion in sentencing.[14] A dissenting justice pointed out that this decision reversed the previous Idaho decision of *Ex parte Peterson*,[15] where it had been said, without elaboration, that the trial courts had no power to suspend execution of sentence absent an authorizing statute.[16]

The ramifications of the result reached in the Idaho decision could be of extreme importance if other state courts should accept its reasoning. Statutes denying judicial discretion are common[17] and will of course, be

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Bohan, 279 App. Div. 1044, 113 N.Y.S.2d 280 (1952), *aff'd* 305 N.Y. 110, 111 N.E.2d 233 (1953) and People *ex rel.* Galea v. McCoy, 27 Misc. 2d 850, 209 N.Y.S.2d 205 (Sup. Ct. 1960), *rev'd on other grounds*, 14 App. Div. 2d 979, 221 N.Y.S.2d 417 (1961).

[13]486 P.2d at 251.

[14]Although, as pointed out in note 16 *infra*, there had been Idaho cases concerning sentence suspension which were relied on by the dissenting justice, the majority chose not to discuss these. Instead the court concentrated on other situations where it had been held that the judiciary had inherent powers, such as Application of Kaufman, 69 Idaho 297, 206 P.2d 528 (1949), where a statute regulating admission to the Idaho bar was stricken as an invalid encroachment upon the judiciary, and R.E.W. Constr. Co. v. District Court, 88 Idaho 426, 400 P.2d 390 (1965), where the court upheld its own inherent power to promulgate rules of procedure.

[15]19 Idaho 433, 113 P. 729 (1911). The case was cited with approval in *Ex parte* United States, 242 U.S. 27 (1916), which is discussed in text accompanying notes 18-27 *infra*.

[16]*See also Ex parte* Grove, 43 Idaho 775, 254 P. 519 (1927), a case dealing with suspension of imposition, where the court said:

> Since the decisions in the Peterson and Ensign Cases relate to the suspension of a sentence already entered, they are not strictly in point on the precise question here presented, to wit, the power to indefinitely withhold the pronouncement of judgment on a plea of guilty. However, those decisions indirectly sustain the proposition that the courts possess no such power, for like the power to indefinitely suspend the execution of judgment, the power to indefinitely withhold the pronouncement of judgment is nothing more or less than the power to perpetually prevent punishment, which the courts do not possess.

Id. at 520. This argument is similar to the fear expressed in *Ex parte* United States, 242 U.S. 27 (1916), that if the courts had discretion to suspend sentence, they might use this discretion, if not regulated, to thwart the law permanently.

State *ex rel.* Conner v. Ensign, 38 Idaho 539, 223 P. 230 (1924), cited in *Grove*, held that an annulment of sentence by the trial judge after part of it had been served was void. The *Grove* case thus reinforces the *Peterson* holding that there was no inherent power to suspend sentence. Later, in *Ex parte* Jennings, 46 Idaho 142, 267 P. 227 (1928), where the principal issue was whether defendant could be made to serve a sentence the execution of which had been suspended, both parties agreed that the suspension itself was invalid.

[17]Idaho may have to declare others of her statutes unconstitutional, for example IDAHO

stricken if it is found that the power of the courts to suspend is superior to any action by the legislature decreeing otherwise.

This problem, however, will not arise by adopting the approach taken in *Ex parte United States,*[18] where the United States Supreme Court held that federal courts do not have any inherent power to suspend execution of sentence for an indefinite length of time. The Court based its decision on an interpretation of Hale[19] and Blackstone[20] under which it was admitted that courts at common law did have power to suspend execution temporarily but not indefinitely. The Court further noted that both suspension of imposition and suspension of execution had been used to alleviate the harshness of the common law, which harshness had been made more lenient in modern times by judicial review or new trial. But it did not follow, the Court said, that because courts have discretion to suspend execution temporarily, they have an inherent right permanently to refuse to enforce the law. Further, it was pointed out that suspensions were recognized in some states only as the result of prior habit,[21] and this was certainly little reason to let the practice continue. The conclusion drawn was that if federal courts were to have authority to suspend execution, Congress would have to give it.[22]

In those cases adopting the contrary rule, it has been argued that "common sense" dictates the conclusion that courts have the inherent power to suspend execution of sentence.[23] Rehabilitation, it is contended, should be the primary consideration when imposing a criminal sentence; that goal can best be fostered by the judge, the person most familiar with the case.[24] The purpose of rehabilitation, it is urged, cannot be furthered by allowing the legislature to do away with judicial discretion and thus preventing the judge from weighing the special circumstances of each case.

The Supreme Court, in *Ex parte United States,* seems to have antici-

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CODE ANN. § 19-2601 (Supp. 1970), which is quoted in note 6 *supra.* A court, under this statute, cannot suspend sentence in murder or treason convictions. This prohibition is the same denial of judicial discretion as was stricken in the principal case.

[18]242 U.S. 27 (1916).

[19]*See* note 9 *supra.*

[20]*See* note 8 *supra.*

[21]*See, e.g.,* People v. Goodrich, 149 N.Y.S. 406 (Sup. Ct. 1914). New York was one such state.

[22]Even before the Supreme Court decision, the Eighth Circuit had reached the same conclusion in Morgan v. Adams, 226 F. 719 (8th Cir. 1915).

Federal courts are given power to suspend sentence by 18 U.S.C. § 3651 (1964). This power was first given by the Federal Probation Act, ch. 521, 43 Stat. 1259 (1925). In Affronti v. United States, 350 U.S. 79 (1955), the Supreme Court held that the power of the courts to grant probation comes purely from the legislature. For other federal cases involving the validity of mandatory sentences, *see* Munich v. United States, 337 F.2d 356 (9th Cir. 1964); Lathem v. United States, 259 F.2d 393 (5th Cir. 1958); United States v. Lewis, 300 F. Supp. 1171 (E.D. Pa. 1969).

[23]State v. McCoy, 94 Idaho 236, 486 P.2d 247, 251 (1971).

[24]*Id.*

pated this reasoning. It realized that to function properly, a trial court must be given some discretion, such as allowing sentence to be suspended temporarily in order that the defendant might pursue a post-conviction remedy. However, an overriding consideration led to the conclusion that such discretion did not vest the court with the inherent right to refuse to enforce the law.[25] The Court said that if the judiciary were able to set aside punishment prescribed by law upon considerations completely extraneous to the conviction, they might also assume authority to permanently refuse to try a person on the grounds that the act made criminal by law was not of such a nature that sanctions should be imposed. Carried to the extreme, this view could leave no laws to be enforced.[26]

The reasoning of the Supreme Court and other policy considerations

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[25]The Court stated:

> But these concessions afford no ground for the contention as to the power here made, since it must rest upon the proposition that the power to enforce begets inherently a discretion to permanently refuse to do so. And the effect of the proposition urged upon the distribution of powers made by the Constitution will become apparent when it is observed that indisputable also is it that the authority to define and fix the punishment for crime is legislative . . . .

[26]Ohio courts have followed federal precedent, for instance, upholding a mandatory sentence statute in Madjorous v. State, 24 Ohio App. 146, 156 N.E. 916 (1924), *aff'd*, 113 Ohio St. 427, 149 N.E. 292 (1925), *cert. denied*, 270 U.S. 662 (1926), where the court stated:

> The General Assembly of Ohio, in the exercise of its prerogatives, has passed laws permitting certain classes of offenders convicted of certain crimes to be released upon parole by the trial court under certain conditions. These laws . . . have been the subject of great abuse by the trial courts, with the result that many offenders have been paroled that the General Assembly never intended to have paroled . . . .
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> We believe that this was a mere declaration of what the law always was before the passage of the parole acts . . . and when this law was passed it was not an encroachment upon the powers of the judiciary.
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> We are aware that this question has been before the United States Supreme Court and the courts of the several states of this country a great many times, and we believe that a great deal of seeming confusion in the decisions has been brought about because of the failure to make the proper distinction between the suspending or postponing of the imposition of a sentence upon a prisoner, and the indefinite stay of execution of a sentence theretofore pronounced by the court. As we understand the law, it has always been conceded in this country that the trial court, in exercise of its judicial discretion, had a right to postpone for a reasonable time the imposition of a sentence; and they also have been given the right to temporarily suspend the execution of a sentence already imposed, in order to give the accused an opportunity to have his case reviewed as provided by law. But we do not understand that a trial court has ever had the right to postpone indefinitely the execution of a sentence already imposed.

156 N.E. at 917. The state supreme court affirmed, citing *Ex parte United States* and saying

call for a result opposite to that reached by the Idaho court in *McCoy*. The practice of suspending sentence seems to have come about when it was badly needed from both a social and legal point of view. Punishment for all but the most minor crimes was capital, and benefit of clergy, which originated as the ecclesiastics' claim of exemption from secular court criminal process, had been extended unevenly and was not available to all classes.[27] Many forms of post-conviction relief or review which are available today were not known at common law. Today, states allow sentence to be suspended in many circumstances,[28] and it thus seems unreasonable to deny the legislature the right to direct that sentences shall be mandatory in certain situations where they think the need exists.

It would seem from several of the cases on which the Idaho majority relied[29] that it failed to distinguish between suspension of imposition and suspension of execution. However, the question may be raised if there is any logical distinction between the two. The answer is that such a difference exists, because there must be some point in time where the trial court loses its jurisdiction over the case unless given a continuing jurisdiction by statute.[30] The question becomes whether this point is after verdict, after imposition of sentence or after sentence has begun to be served.

Logically, a court should be able to suspend imposition for a definite period and not lose jurisdiction of the case because its task would not yet be finished. However, after sentence has been imposed in a criminal case, the work of the court is at its logical conclusion, and jurisdiction of the matter should pass to others. The Idaho court might have been objecting to the fact that the mandatory sentence statute seemed not to allow suspension of imposition,[31] but the decision is not clear on this matter. The facts of the case, however, presented a situation where execution and not imposition had been suspended, as the defendant had been sentenced to thirty days in jail before suspension.

The majority spoke of "common sense" dictating that courts have the

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that the inherent powers of a state court are no more than those of federal courts. Madjorous v. State, 113 Ohio St. 427, 149 N.E. 393 (1925), *aff'g* 24 Ohio App. 146, 156 N.E. 916 (1924).

For similar results in other states, *see* Kelly v. Dewey, 111 Conn. 281, 149 A. 840 (1930); State v. Johnson, 42 N.J. 146, 199 A.2d 809 (1964).

[27]*See* Grinnell, *The Common Law History of Probation*, 45 MASS. L.Q., Oct., 1960, at 87.

[28]*E.g.*, IND. STAT. ANN. § 9-2209 (Repl. Vol. 1956).

[29]Gehrmann v. Osborne, 79 N.J. Eq. 430, 82 A. 424 (1912); People *ex rel.* Forsyth v. Court of Sessions, 141 N.Y. 288, 36 N.E. 386 (1894). In both of these cases, imposition and not execution was suspended.

[30]*See, e.g.*, VA. CODE ANN. § 53-272 (1950), which provides that a judge may suspend any unserved portion of a sentence.

[31]Note 5 *supra*.

inherent power to suspend,[32] because the purpose of punishment is rehabilitation. Basically, there are two philosophies of punishment:[33] the punitive philosophy, which contains within it the objectives of protection to society and revenge; and the therapeutic philosophy, which emphasizes that government sanction should try to rehabilitate the offender or deter possible future crimes. But is it within the province of the judiciary to say which purpose should be pursued? This decision would seem to be a matter of policy for the legislature, which would also be the proper authority to decide how that purpose might be best implemented. The mandatory ten-day sentence stricken in this case may be looked at as a retributive measure; but whatever the purpose, it is an objective which should be decided upon and implemented by the legislature unless some constitutional limitation would be otherwise violated. Assuming, but not conceding, that the purpose of a mandatory sentence statute is retribution, the question may be asked if this is a prohibited purpose under the constitution. Tested against the eighth amendment prohibition of cruel and unusual punishment,[34] a mandatory sentence statute has been upheld as constitutional.[35]

Cases which hold that the power to suspend either imposition or execution of sentence is inherent either rely on faulty reasoning or cite little authority,[36] or they hold that the power was exercised at common law and is therefore inherent.[37] Such analyses seem tenuous. If a power were inherent because it was exercised at common law, many practices which would seem barbaric to modern society would exist today. However, many states have alleviated this problem by statutes specifically providing that constitutions and laws passed by the legislature abrogate the common law.[38] The problem, as was realized in *State v. McCoy,* goes deeper than mere substantive law, the fundamental question being whether the act by the legislature deals with substantive law which can be controlled by the legislature, or is "higher" than bare substantive law, in which case the legislature cannot act.

It is extremely difficult to characterize powers as either substantive

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[32]86 P.2d at 251.

[33]E. JOHNSON, CRIME, CORRECTION AND SOCIETY 281-86 (rev. ed. 1968).

[34]U.S. CONST. amend. VIII. provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

[35]*See, e.g.,* Sperling v. Willingham, 353 F.2d 6 (7th Cir. 1965) which upheld a mandatory sentence statute as not being cruel and unusual punishment nor violative of equal protection.

[36]Chatman v. Page, 484 P.2d 537 (Okla. Crim. App. 1971).

[37]People *ex rel.* Forsyth v. Court of Sessions, 141 N.Y. 288, 36 N.E. 386 (1894).

[38]*E.g.,* IDAHO CODE ANN. § 73-116 (1947).

law or "something more."[39] The best approach seems to be that of arguing from implication. The legislature decides what acts of human behavior shall be unacceptable to society, and therefore punishable as a crime, and further sets the penalty for the act. It would then be only reasonable to conclude that the legislature may require that the punishment it has set be carried into effect. This reasoning is especially true for a crime such as driving under the influence, which is a creation of statute, that crime being unknown at common law for obvious reasons. Furthermore, it can very logically be argued that the power to suspend execution of sentence is not inherent in the judiciary because the courts could function quite well without it.[40]

The foregoing is not to say that there is not a place for the suspended sentence in the American legal system. Since each case presents a somewhat different factual situation to the court, the flexibility afforded the judge by the power to suspend sentence is of great value. In some situations, there are valid extenuating circumstances which the court rightly should take into consideration before fixing punishment. Legislatures have recognized these problems and have given broad power to suspend, with capital offenses and recidivist felony convictions being the major exceptions.[41] If the powers given by statute were niggardly, then at least on practical grounds, the argument for inherent power would be stronger. However, in light of the widespread adoption of statutes granting that power, there seems little reason for courts to claim or to hold that they have an inherent power to suspend execution of sentences for an indefinite period.

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[39]The power would have to be express, implied or inherent in the constitution, or be superior to it. However, those claiming the unconstitutionality of mandatory sentence statutes usually rely on the inherency of the power without stating whether the power is inherent in the constitution or is superior to it.

[40]If an inherent power is defined to be a power flowing implicitly from the constitution because the court needs this authority to function properly, and if a court could function properly without being able to suspend execution, obviously that power is not inherent.

[41]*E.g.*, OKLA. STAT. ANN. tit. 22, § 991a (Supp. 1971).