VERMONT'S CLOSE JAIL EXECUTION: PHYSICAL INCARCERATION OF THE WILFUL AND MALICIOUS TORTFEASOR

INTRODUCTION

The concept of imprisonment for a debt, technically described as *capius ad satisfaciendum,*[1] can be traced to early Roman and English laws, where imprisonment was permitted for nearly any type of debt.[2] In the United States, however, physical incarceration for indebtedness is not favored at law.[3] As a result, the concept today receives a somewhat restricted application.[4]

Vermont's close jail execution statute,[5] enacted in 1823 and remaining virtually unchanged to the present date,[6] represents one

1. A body execution authorizes physical incarceration as a means to satisfy a debt for damages rendered in certain actions. *See generally* Note, *Body Attachment and Body Execution: Forgotten But Not Gone,* 17 WM. & MARY L. REV. 543 (1976) [hereinafter cited as *Body Executions*].

2. *See generally* P. COLEMAN, DEBTORS AND CREDITORS IN AMERICA (1974); Ford, *Imprisonment For Debt,* 25 MICH. L. REV. 24 (1926).

3. Many states limit or completely disallow imprisonment for indebtedness in their constitutions. Basic provisions are: ARIZ. CONST. art. II, § 18; ARK. CONST. art. II, § 16; CAL. CONST. art. I, § 10; COLO. CONST. art. II, § 12; FLA. CONST. art. I, § 11; IDAHO CONST. art. I, § 15; ILL. CONST. art. I, § 14; IND. CONST. art. I, § 22; IOWA CONST. art. I, § 19; KAN. CONST., BILL OF RIGHTS, § 16; KY. CONST., BILL OF RIGHTS, § 18; MICH. CONST. art. I, § 21; MINN. CONST. art. I, § 12; MO. CONST. art. I, § 11; MONT. CONST. art. III, § 12; NEB. CONST. art. I, § 20; NEV. CONST. art. I, § 14; N.J. CONST. art. I, § 13; N.C. CONST. art. I, § 28; N.D. CONST. art. I, § 15; OHIO CONST. art. I, § 15; OKLA. CONST. art. II, § 13; ORE. CONST. art. I, § 19; PA. CONST. art. I, § 16; R.I. CONST. art. I, § 11; S.C. CONST. art I, § 19; S.D. CONST. art. VI, § 15; UTAH CONST. art. I, § 16; VT. CONST. ch. II, § 40; WASH. CONST. art. I, § 17; WIS. CONST. art. I, § 16; WYO. CONST. art. I, § 5.

4. *E.g.*, some states, including Vermont, permit incarceration for certain malicious torts. *See* COLO. REV. STAT. § 13-59-103 (1973); ILL. ANN. STAT. ch. 77, § 5 (Smith Hurd 1966); KY. REV. STAT. ANN. § 426.390 (Baldwin 1977); N.J STAT. ANN. § 2A:17-79 (West 1952); N.C. GEN. STAT. § 1-410 (1969).

5. VT. STAT. ANN. tit. 12, § 3624 (1973) provides:

> A person shall not be admitted to the liberties of the jail yard, who is committed on execution upon a judgment rendered in an action founded on a tort, when the court, at the time of the issuance of such execution, adjudges that the cause of action arose from the wilful and malicious act or neglect of the defendant, and that the defendant ought to be confined in close jail, and a certificate thereof is stated in or upon such execution.

6. Vt. Pub. L. ch. 15, § 2 (1823) provides:

> And it is hereby further enacted, that every person, who is now, or may hereafter be, imprisoned, by virtue of any execution issued, or hereafter to be issued, from any court in this state, on a judgment heretofore recovered in any

instance where imprisonment for a debt is still permitted. Through its application, a person failing to satisfy a judgment resulting from the commission of a wilful and malicious tort may be subject to confinement in close jail.[7] The object of close jail confinement is to provide a judgment creditor[8] with an effective remedy in securing payment of the judgment and to punish the debtor for the maliciousness of his conduct.[9]

Although the frequency with which the close jail execution is utilized has diminished in recent years,[10] the statute and its procedures are readily available for use by judgment creditors seeking to enforce their monetary tort judgments.[11] Recently, the constitution-

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> of the actions mentioned in the preceding section shall be entitled to all the benefits and privileges of the said acts, [termed "liberties of the jail yard" in section 1] unless it shall be made to appear to the commissioners of jail delivery, that the cause of action, on which such judgment was rendered, accrued from the *wilful and malicious act or neglect* of such person. (Emphasis added).

Compare note 5 *supra.*

7. Close jail differs from an ordinary body execution in its degree of severity. Although both modes of confinement are similar, a person confined on a body execution is entitled to a conditional release as a matter of right upon posting bond, VT. STAT. ANN. tit. 12, § 3621 (1973), whereas a close jail prisoner is not entitled to these liberties. *Id.* § 3624. *See also In re* Thompson, 111 Vt. 7, 9 A.2d 107 (1939).

8. Judgment creditor is the term given to a plaintiff who has obtained a judgment against his debtor under which he can enforce execution. BLACK'S LAW DICTIONARY 980-81 (rev. 4th ed. 1968).

9. *See* Gould v. Towslee, 117 Vt. 452, 460, 94 A.2d 416, 421 (1953) where the court stated:

> The object of the statute authorizing the close jail execution is two-fold, partly remedial, partly punitory; to furnish a more effectual remedy to a party who has suffered injury from the wanton and malicious act or conduct of another and to punish such offender for such wanton and malicious violation of another's rights.

See also Peoples Trust Co. of St. Albans v. Trahan, 134 Vt. 136, 353 A.2d 136 (1976) (relying on *Gould* as an accurate statement of the law concerning close jail execution); and Dempsey v. Hollis, 116 Vt. 316, 75 A.2d 662 (1950).

10. Telephone interviews with: Mr. Justice William C. Hill, Vermont Supreme Court; Chief Judge Stephen B. Martin, Vermont Superior Court; Judge Ernest W. Gibson, Vermont Superior Court; and Judge Silvio T. Valente, Vermont Superior Court (Jan. 18, 1978).

11. That close jail executions remain in current use is evidenced by the fact that a case dealing with the applicability of the statute is pending before the Vermont Supreme Court. Steinberg v. Dacres, No. 332-77 (Vt. Sup. Ct., filed Nov. 21, 1977). In *Stein,* the plaintiff, after prevailing in an action for conversion, sought and was denied a close jail execution against the defendant. The plaintiff is appealing this denial. The issue before the court involves the application of the statute when the execution is sought against only one of two joint tort-feasors. Telephone interview with Hanford Davis, Attorney for the Plaintiff, (Jan. 18, 1978).

ality of Vermont's close jail execution statute was challenged before the state supreme court in *Dunbar v. Gabaree.*[12] In that case a constitutional attack upon the statute was premised on the due process and equal protection clauses of the United States Constitution.[13] The *Dunbar* court declined to reach these constitutional issues, however, and instead remanded the case because of procedural infirmities.[14]

This note will address the constitutional issues left undecided in *Dunbar.*The procedural safeguards which are presently afforded the judgment debtor prior to the issuance of a close jail execution will first be examined in an effort to determine whether they adequately meet the minimum requirements of the due process clause of the fourteenth amendment. In addition, this note will consider whether the imposition of an undue hardship on indigent debtors[15] resulting from the close jail execution statute violates the equal protection clause. An initial discussion of the procedural mechanics of the statute will aid in a proper understanding of these constitutional issues.

I. Procedural Operation[16]

Upon motion by the judgment creditor, a close jail execution

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12. 133 Vt. 59, 330 A.2d 89 (1974).

13. In the 1974 *Dunbar* case the defendant challenged the close jail execution statute on due process grounds. 133 Vt. 59, 330 A.2d 89. In 1977, on appeal after remand the defendant questioned the close jail execution statute on equal protection grounds. ___ Vt. ___, 376 A.2d 51 (1977).

14. In 1974 the Vermont Supreme Court remanded *Dunbar* because the statutory time period during which the defendant could appeal had not expired prior to issuance of the close jail execution. Another infirmity found by the court was that the presiding judge had improperly issued and signed the close jail certificate. 133 Vt. at 60-61, 330 A.2d at 90-91. In 1977, on appeal from the disposition on remand, the Supreme Court found that the execution was issued prior to the filing of a deposition which the parties had stipulated would be considered at the close jail execution hearing. ___ Vt. at ___, 376 A.2d at 51. The court in this later case recognized, that a possible equal protection issue remained unanswered. The court stated: "In as much as the equal protection issue remains unresolved, we note that should the constitutionality of 12 V.S.A. § 3624 be drawn into question in further proceedings, the parties are cautioned to comply with V.R.C.P. 24(d) and V.R.A.P. 44 regarding notification to the Attorney General." *Id.*

15. Indigent is defined as "one who is needy and poor; or one who has not sufficient property to furnish him a living nor anyone able to support him to whom he is entitled to look to for support." Black's Law Dictionary 913 (rev. 4th ed. 1968).

16. This section will deal only with those mechanical procedures leading to the judgment

will be issued to enforce a tort judgment when the court finds that: (1) the tort arose from the wilful and malicious act or neglect of the defendant; and (2) the defendant ought to be confined in close jail.[17] Pursuant to the Vermont Rules of Civil Procedure, an execution hearing will be held to determine whether the judgment creditor's motion meets these two prerequisites.[18] Although neither the Vermont Statutes nor the Vermont Rules of Civil Procedure describe the actual format for the close jail hearing, the Vermont courts have generally permitted the debtor to present and cross-examine witnesses, and have allowed the debtor to have counsel present.[19] There is no certainty, however, that even these safeguards will be provided in every case. Because of the lack of direction in Vermont law, the question that arises is what procedural safeguards, if any, must be

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debtor's incarceration. Although it is beyond the scope of this note, the mechanics for release of the debtor are also important. These mechanics are outlined in several statutes. *See, e.g.*, VT. STAT. ANN. tit. 12, § 3628 (1973) (permits conditional release if the debtor and creditor reach an agreement that is approved by the court. The debtor is, however, required to post a bond); VT. STAT. ANN. tit. 12, § 3672 (1973) (permits the judgment creditor to take an alias execution against the goods, chattels, or estate of the debtor; see Dennison v. Siason, 39 Vt. 606 (1867); Martin v. Kilbourne, 11 Vt. 93 (1839)); VT. STAT. ANN. tit. 12 § 3691 (1947) (permits the judgment debtor to petition for the right to take the Poor Debtor's Oath). The text of the Poor Debtor's Oath is set out at VT. STAT. ANN. tit. 12, § 3689 (1973). This procedure, available as a matter of right in ordinary body executions, *id.* § 3673, requires that notice must be given to the creditor and that a hearing be held to determine the merits of the debtor's petition. *Id.* § 3692. If the debtor is released under this procedure, the judgment remains in force as against the property of the debtor. *Id.* § 3690. If the debtor is not released his final recourse is a habeas corpus proceeding. *Id.* § 3693.

17. For the complete text of the statute see note 5 *supra*. Motion for execution can be made immediately upon issuance of the judgment, VT. R. CIV. P. 62 (c) (1971) (issued only when conditions which the court deems proper are shown to exist) or can be made after the statutory period for appeal has expired, VT. R. CIV. P. 62 (a) (1971) (thirty-day period is an automatic stay of execution).

18. VT. R. CIV. P. 69 (1971) provides:

> Process to enforce a judgment for the payment of money shall be a writ of execution, unless the court directs otherwise. No execution running against the body shall be issued unless after motion and hearing it is so ordered by the court, which shall not order such execution to issue on a judgment based on a contract, express or implied, or in an action on such a judgment, except as permitted by statute against absconding debtors. In addition to the procedure on execution, in proceedings supplementary to and in aid of a judgment, and in proceedings on and in aid of execution, as provided by law, the judgment creditor . . . may obtain discovery from any person, including the judgment debtor, in the manner provided in these rules.

19. *See* note 10 *supra*.

afforded the judgment debtor[20] to comply with the constitutional requirements of due process.

II. Due Process[21]

The due process clause of fourteenth amendment of the United States Constitution provides that "[n]o State shall make or enforce any law which shall . . . deprive any person of life, liberty, or property without due process of law. . . ."[22] Interpreting this amendment the United States Supreme Court has stated that "[c]onsideration of what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as . . . the private interest that has been affected by governmental action."[23]

20. Judgment debtor is the term given a person against whom judgment has been recovered, and which remains unsatisifed. Black's Law Dictionary 981 (rev. 4th ed. 1968).

21. Some courts, in examining body execution statutes have analogized to United States Supreme Court decisions prescribing due process standards for cases involving creditors' remedies where a property deprivation is at stake. *See, e.g.*, Yoder v. County of Cumberland, 278 A.2d 379 (Me. 1971). In *Yoder*, Maine's Supreme Judicial Court held that a state body execution statute that did not provide for a hearing prior to incarceration was void, based on the authority of the United States Supreme Court's decision in Sniadach v. Family Finance Corp., 395 U.S. 337 (1969). The reasoning of the *Yoder* court was that if due process required a hearing prior to the deprivation of one's property then "it would seem an *a fortiori* conclusion that procedural due process forbids the summary taking of a person's liberty, his body—his most precious possession . . . ." *Id.* at 386. Whereas the narrow issue in *Yoder* dealt only with the necessity for a pre-incarceration hearing, the court did not describe the procedural format which would be required for that hearing. Arguably, because body executions deprive an individual of his liberty as opposed to merely an interest in property, courts should not be bound solely by the due process standards involving property deprivations. *See generally Body Executions, supra* note 1, at 558. This note will address the due process issue as a liberty deprivation, basing its analysis on the position that body executions should be distinguished from ordinary creditors' remedies involving property interests.

22. U.S. Const. amend. XIV, § 1. To determine the necessity for and scope of due process, a two-step test is employed. The first step of this test asks whether it is necessary for due process to apply. The United States Supreme Court has held that if the interest of the complaining party is within the scope of the liberty and property language of the fourteenth amendment, then due process must apply. Following the initial determination that due process is applicable, the second step of the test seeks to define "what process is due." *See* Mechum v. Fano, 427 U.S. 215 (1976); Morrisey v. Brewer, 408 U.S. 471 (1972); French v. Blackburn, 428 F. Supp. 1351 (M.D.N.C. 1977); Bartley v. Kremens, 402 F. Supp. 1039 (E.D. Pa. 1975), *vacated and remanded on other grounds,* 431 U.S. 119 (1977).

23. Goldberg v. Kelly, 397 U.S. 254, 262-63 (1970) (quoting Cafeteria & Restaurant Workers Union v. McElroy, 367 U.S. 886, 895 (1961)).

Vermont's close jail execution statute, by imposing physical incarceration upon the debtor, constitutes a deprivation of liberty cognizable under the due process clause.[24] At a minimum, therefore, due process requires that notice and an opportunity to be heard must be afforded the judgment debtor.[25] The issue that remains to be considered is which safeguards, beyond these minimum protections, are constitutionally required.

In an effort to identify what additional safeguards are appropriate, courts facing similar questions in other contexts have considered a threshold question of whether the sanction imposed was criminal in nature.[26] The full panoply of procedural safeguards mandated by the fifth and sixth amendments must be afforded if the sanction is determined to be "criminal."[27] If, on the other hand, the sanction to be imposed is "civil," then the procedural safeguards

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24. *See* Wolff v. McDonnell, 418 U.S. 539 (1974); Morrissey v. Brewer, 408 U.S. 471 (1972); Friendly, *Some Kind of Hearing*, 123 U. PA. L. REV. 1267, 1296 (1975). ("Deprivation of liberty, even conditional liberty, is the harshest action the state can take against the individual . . . . The Supreme Court thus was right in demanding a very high level of procedural protection. . . .")

25. *See* Mullane v. Central Hanover Trust Co., 339 U.S. 306, 313 (1950) where the Court stated: "There can be no doubt that at a minimum [due process requires] that a deprivation of life, liberty, or property by adjudication be preceded by notice and an opportunity for a hearing appropriate to the nature of the case." *See also* Grannis v. Ordeau, 234 U.S. 385 (1914). The *Mullane* decision is still considered a "bench mark" for guidance in the area of due process. Goss v. Lopez, 419 U.S. 565 (1975).

26. *See, e.g.*, Tug Ocean Prince, Inc. v. United States, 436 F. Supp. 907 (S.D.N.Y. 1977); Ward v. Coleman, 423 F. Supp. 1352 (W.D. Okla. 1976); United States v. General Motors Corp., 403 F. Supp. 1151 (D. Conn. 1975); United States v. Eureka Pipeline Co., 401 F. Supp. 934 (N.D. W. Va. 1975); United States v. LeBeouf Bros. Towing, Inc., 377 F. Supp. 558 (E.D. La. 1974), *rev'd*, 537 F.2d 149 (5th Cir. 1976), *cert. denied*, 430 U.S. 987 (1977). The above cases all held that the imposition of a civil fine under the Water Pollution Control Act was not criminal in nature. At least one court, however, has found that a statutory monetary fine can be criminal in nature. *See* United States v. Futura, Inc., 339 F. Supp. 162 (N.D. Fla. 1972). The United States Supreme Court has also examined "civil" statutes to determine whether they were actually criminal in nature. *See, e.g.*, One Lot Emerald Cut Stones and One Ring v. United States, 409 U.S. 232 (1972) (customs forfeiture does not require application of criminal safeguards); Kennedy v. Mendoza-Martinez, 372 U.S. 144 (1963) (deprivation of citizenship cannot be imposed without criminal protections).

27. In a criminal prosecution, the defendant is guaranteed the following procedural safeguards: the privilege against self-incrimination, *see* Malloy v. Hogan, 378 U.S. 1 (1964); the right to counsel, *see* Gideon v. Wainwright, 372 U.S. 334 (1963); the right to a speedy and public trial, *see* Klopfer v. North Carolina, 386 U.S. 213 (1967); *In re* Oliver, 333 U.S. 257 (1948); the right to confront opposing witnesses, *see* Pointer v. Texas 388 U.S. 400 (1965); the right to an impartial jury, *see* Duncan v. Louisiana, 391 U.S. 145 (1968); and the guarantee against double jeopardy, *see* Benton v. Maryland, 395 U.S. 784 (1969).

that are constitutionally mandated are determined by a comparison of the competing governmental and individual interests.[28]

Vermont's close jail execution is classified by the legislature as a "civil" remedy.[29] Such a legislative classification, however, does not preclude a finding that the statute actually imposes a sanction which is criminal.[30] The United States Supreme Court has recognized that "civil labels . . . do not themselves obviate the need for criminal due process safeguards."[31] Therefore, an examination of the nature of the sanction imposed by Vermont's close jail execution statute is appropriate.

In *Kennedy v. Mendoza-Martinez*,[32] the United States Supreme Court enumerated seven criteria traditionally considered by courts in determining whether a sanction should be considered civil or criminal.[33] Four of the *Kennedy* factors strongly suggest that Vermont's close jail execution imposes a criminal sanction. First, a close jail execution involves a complete and severe loss of personal liberty. Moreover, because the close jail procedures do not provide for a maximum period of confinement, the possibility exists that this loss could extend for a significant period of time. This deprivation of liberty imposes an affirmative restraint recognized in *Kennedy* as characteristic of a criminal sanction.[34] Second, the Ver-

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28. *See* Cafeteria Workers Union v. McElroy, 367 U.S. 886, 895 (1961).

29. Procedures for utilizing the close jail execution are set forth in Vermont's Rules of Civil Procedure. *See* VT. R. CIV. P. 69 (1971).

30. *See In re* Winship, 397 U.S. 358 (1970).

31. *Id.* at 365-66.

32. 372 U.S. 144 (1963).

33. *Id.* at 168-69. In identifying the traditional tests, the Court stated:

> Whether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment, whether it comes into play only on a finding of *scienter*, whether its operation will promote the traditional aims of punishment—retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned are all relevant to the inquiry. . . . (Citations omitted).

34. Criminal sanctions seek to restrain whereas civil sanctions merely control or regulate certain conduct. The Supreme Court in *Kennedy*, 372 U.S. at 168 n.22 compared several cases to demonstrate what would be considered an affirmative restraint: Fleming v. Nestor, 363 U.S. 603 (1960) (denial of noncontractual benefits was not a restraint or punishment); United States v. Lovett, 328 U.S. 303 (1946) (denial of compensation for federal employment held to be punishment); *Ex parte* Garland, 71 U.S. (4 Wall.) 333 (1886) (denial of right to practice

mont Supreme Court has historically viewed the imposition of a close jail execution as punishment to the judgment debtor for the commission of a wilful and malicious tort.[35] This historical recognition of a punitive function is also characteristic of a criminal penalty.[36] Third, this punitive function of Vermont's close jail execution serves to promote the twin aims of punishment: retribution and deterrence, aims identified in *Kennedy* as elements of a criminal sanction.[37] The final factor supporting a criminal classification is that the close jail execution is utilized only in cases involving wilful and malicious torts.[38] The standards of willfulness and maliciousness encompass the concept of *scienter*, an element found in many criminal sanctions.[39]

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law in the courts of the United States held to be a punitive restraint). A case illustrating the concept of a civil regulation is Telephone News Sys., Inc. v. Illinois Bell Tel. Co., 220 F. Supp. 621 (N.D. Ill. 1963), *aff'd per curiam*, 376 U.S. 782 (1964). In that case, termination of a customer's telephone service pursuant to a statute relating to using telecommunications to carry illegal gambling information was not considered to be a deprivation requiring criminal due process rights. The statute was intended not as punishment but rather was designed to regulate conduct in the area of telecommunications. A comparison of Vermont's close jail execution sanction to the above cases and their concepts demonstrates that close jail incarceration is a sanction that is criminal in nature.

35. *See* Gould v. Towslee, 117 Vt. 452, 461, 94 A.2d 416, 421 (1953).

36. How the sanction has been historically regarded is one factor in determining its civil-criminal nature. *See* note 34 *supra*. The Supreme Court in *Kennedy*, 372 U.S. at 168 n.23 illustrated this criterion by citing several cases: Wong Wing v. United States, 163 U.S. 228 (1896) (imprisonment at hard labor held to be punishment); Mackin v. United States, 117 U.S. 348 (1886) (imprisonment at hard labor is punishment); *Ex parte* Wilson, 114 U.S. 417 (1885); Cummings v. Missouri, 71 U.S. (4 Wall.) 227 (1866) (denial of clergyman's right of lawful advocation held to be punishment). The punitive purpose historically recognized in Vermont's close jail execution statute is analogous to the punitive purposes recognized in these cases.

37. The Supreme Court in Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168 n.25 (1963), cited two cases as examples of sanctions which served to promote retribution and deterrence. Trop v. Dulles, 356 U.S. 86 (1958); and United States v. Constantine, 296 U.S. 287 (1935). In *Trop* it was found that expatriation of deserters served the purposes of punishment and in *Constantine* a "tax" on unlawful liquor was designed to deter unlawful sales.

38. *See* note 5 *supra*.

39. "Scienter" is defined as follows:

> Knowingly. The term is used in pleading to signify an allegation (or that part of the declaration or indictment which contains it) setting out the defendant's previous knowledge of the cause which led to the injury complained of, or rather his previous knowledge of a state of facts which it was his duty to guard against. . . .

BLACK'S LAW DICTIONARY 1512 (rev. 4th ed. 1968). The concept of scienter is recognized as an element common to many sanctions which are criminal in nature. The United States Supreme Court in Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168 n.24 (1963), cited the

While the above factors could justify the imposition of criminal procedural safeguards, it may be argued that other factors enumerated by the Supreme Court in *Kennedy* indicate that the statute should maintain its current "civil status." The statute serves, in addition to its punitive purpose, the nonpunitive function of providing an effective collection remedy for judgment creditors.[40] This nonpunitive function is one element supporting the finding of a "civil" sanction.[41] Secondly, in its application, the close jail execution does no more than is necessary to achieve this remedial function. Because the judgment debtor holds the keys to his freedom in that he can be released from confinement upon "satisfaction" of the judgment debt,[42] the close jail sanction arguably is not excessive in relation to its nonpunitive purpose.[43] By focusing on these factors, it would be plausible to conclude that the full scope of procedural safeguards provided a defendant in a criminal action would be un-

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following two cases as examples of sanctions that were criminal in nature requiring scienter: Child Labor Tax Case, 259 U.S. 20 (1922) ("tax" levied on manufacturers employing underage children required knowledge on the part of the manufacturer); Helwig v. United States, 188 U.S. 605 (1903) (customs statute created presumption of knowledge for imports claimed at less than 60% of their actual value). The Vermont Supreme Court has interpreted the wilful and malicious element of a close jail execution. The wilful standard has been held to signify an act done intentionally without just cause or excuse and the malice standard has been interpreted as the intentional doing of a wrongful act in disregard of what one knows to be his duty to the injury of another. *See* Mangan v. Smith, 115 Vt. 250, 56 A.2d 476 (1948); Judd v. Challoux, 114 Vt. 1, 39 A.2d 357 (1944). These interpretations are consistent with the definition of scienter and the United States Supreme Court decisions cited above and clearly demonstrate that the concept of scienter is present in the close jail sanction.

40. *See* Gould v. Towslee, 117 Vt. 452, 461, 94 A.2d 416, 421 (1953).

41. A nonpunitive purpose may be indicative of a civil-type sanction. The United States Supreme Court in Kennedy v. Mendoza-Martinez, 372 U.S. 144, 169 n.27 (1963), cited several cases to illustrate that while some statutes have alternative nonpunitive purposes, others serve only as punishment. Flemming v. Nestor, 363 U.S. 603 (1960); Trop v. Dulles, 356 U.S. 86 (1958); United States v. LaFranca, 282 U.S. 568 (1931); Lipke v. Lederer, 259 U.S. 557 (1922); Cummings v. Missouri, 71 U.S. (4 Wall.) 277 (1886).

42. "Satisfaction" as used in this context does not necessarily mean that the creditor has received payment for the judgment. Satisfaction in this instance may mean that the incarcerated debtor has taken advantage of a poor debtor's oath or some other statutory release procedure entitling him to be released from confinement. *See* note 16 *supra*.

43. If a sanction is excessive when compared with its nonpunitive purpose, then the sanction is primarily designed as punishment and is not considered "civil." The Supreme Court in Kennedy v. Mendoza-Martinez, 372 U.S. 144, 169 n.28 (1963), illustrated this excessiveness factor by citing several cases: Flemming v. Nestor, 363 U.S. 603 (1960); Rex Trailer Co. v. United States, 350 U.S. 148 (1956); United States v. Constantine, 296 U.S. 287 (1935); Child Labor Tax Case, 259 U.S. 20 (1922); Helwig v. United States, 188 U.S. 605 (1903); Cummings v. Missouri, 71 U.S. (4 Wall.) 277 (1866).

necessary for the close jail execution hearing. If these "civil" factors were determined to be controlling, then the procedural safeguards to be afforded the judgment debtor would be defined by considering the need and usefulness of specific procedural safeguards in relation to the competing governmental and private interests involved.[44]

Since the nature of the close jail sanction is uncertain, this note will consider several safeguards in light of due process requirements under, alternatively, criminal and civil standards.

A. *The Right to Present and Cross-Examine Witnesses*

Although the statutes and rules of procedure are silent, Vermont courts have generally permitted the judgment debtor to present and cross-examine witnesses.[45] Because there is no formal requirement for providing this safeguard, there is no guarantee that it will continue to be provided.

If Vermont's close jail execution were found to be criminal in nature, the right to present and cross-examine witnesses would be mandatory in every case.[46] Even if not deemed criminal, this protection still may be necessary. The United States Supreme Court has held that a right to present and cross-examine witnesses is essential to a fair trial and, under our adversary system, the most effective means of presenting both sides of an argument and exposing falsehoods in the testimony of witnesses.[47]

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44. See Cafeteria Workers Union v. McElroy, 367 U.S. 886, 895 (1961); Bartley v. Kremens, 402 F. Supp. 1039 (E.D. Pa. 1975), *vacated and remanded on other grounds,* 431 U.S. 119 (1977); Friendly, *Some Kind of Hearing,* 123 U. PA. L. REV. 1267, 1278 (1975).

45. *See* note 10 *supra.*

46. *See* Washington v. Texas, 388 U.S. 14 (1967); Pointer v. Texas, 380 U.S. 400 (1965).

47. *See* Pointer v. Texas, 380 U.S. 400, 404 (1965); *In re* Oliver, 333 U.S. 257, 273 (1948) (right of cross-examination of witnesses is basic to our system of jurisprudence). *See also* Greene v. McElroy, 360 U.S. 474, 496 (1959) where the Court stated:

> Certain principles have remained relatively immutable in our jurisprudence. One of these is that where governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the . . . case must be disclosed to the individual so that he has an opportunity to show that it is untrue. While this is important in the case of documentary evidence, it is even more important where the evidence consists of testimony of individuals whose memory might be faulty or who, in fact, might be perjurers or persons motivated by malice, vindictiveness, intolerance, prejudice, or jealousy. We have formalized these protections in the requirements of confrontation and cross-examination.

In a close jail execution hearing, issues not decided at the previous civil trial, such as the wilful and malicious nature of the debtor's conduct and whether or not he "ought to be confined in close jail," are raised for the first time.[48] Because decision on these issues will ultimately determine whether the debtor retains his personal liberty, the need to present and cross-examine witnesses is crucial. In addition, providing the debtor with this safeguard would serve the state's interest in maintaining the integrity of the judicial system through the attainment of reliable decisions.

Even where less severe deprivations were at stake, the United States Supreme Court has required that the individual be afforded a right to present and cross-examine witnesses. In a parole revocation hearing,[49] for example, the Supreme Court recognized that depriving a parolee of his personal liberty did not involve a deprivation of "the absolute liberty to which every citizen is entitled," but rather was a mere taking of a "conditional liberty properly dependent on observance of special parole restrictions."[50] Despite this conditional liberty, and what the Court characterized as an "overwhelming interest [on the part of the state] in being able to return the individual to imprisonment without the burden of a new adversary criminal trial,"[51] the right to present and cross-examine witnesses was required.[52]

In Vermont's close jail execution, the interests of the state in depriving the judgment debtor of his personal liberty cannot be as great as the state's interests in the parole revocation hearing. Unlike

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48. The wilful and malicious nature of the debtor's tortious conduct may also be an issue at the civil trial which establishes the debtor's liability. This wilful and malicious element, however, is not always determined at the civil trial. The second element of a close jail execution, whether or not the debtor "ought to be confined in close jail," is always determined at a close jail execution hearing. *See* Peoples Trust Co. of St. Albans, 134 Vt. 136, 353 A.2d 357 (1976).

49. *See* Morrissey v. Brewer, 408 U.S. 471 (1972).

50. *Id.* at 480.

51. *Id.* at 481.

52. *Id.* at 489. In addition to mandating the procedural safeguards of presentation and cross-examination of witnesses, the court in *Morrissey* also required that the parolee be given written notice of his alleged parole violations, a full disclosure of the evidence against him, the right to a neutral and detached hearing body (not necessarily composed of judicial officers or lawyers), and the right to a written statement by the factfinder as to the evidence relied upon and the reasons for revoking parole. *Id.*

the parolee who has previously been found guilty of a crime against the people, the judgment debtor has had no prior restrictions placed upon his liberty, as he has simply been found civilly liable. The state has no "overwhelming" interest, therefore, in being able to deprive the judgment debtor of his right to absolute liberty without first affording him procedural safeguards at least as substantial as those afforded the parolee.

Similarly, in the context of welfare terminations,[53] the United States Supreme Court has required that a welfare recipient be afforded a right to cross-examine witnesses at a pretermination hearing.[54] Here again the interests of an individual in receiving welfare, a statutorily created entitlement,[55] cannot be regarded to be as fundamental as the judgment debtor's interest in protecting his constitutionally recognized right of personal liberty. Thus, an overall assessment of the need and usefulness of the right to present and cross-examine witnesses, supported by the United States Supreme Court's decisions which have extended this safeguard to situations where a less severe deprivation was at stake, would suggest that due process requires that the judgment debtor be permitted to present and cross-examine witnesses in a close jail execution hearing.[56]

53. *See* Goldberg v. Kelly, 397 U.S. 254 (1970).

54. *Id.* at 268.

55. *Id.* at 263.

56. In addition to the favorable support that may be obtained from the *Morrissey* and *Goldberg* decisions, two other decisions would support the constitutional requirement that the judgment debtor be afforded the right to present and cross-examine witnesses. In Wolff v. McDonnell, 418 U.S. 539 (1974), the Supreme Court found that, in the context of a prison inmate hearing concerning the loss of good time credit, due process required a right to present and cross-examine witnesses if presentation of witnesses would not unduly burden institutional and correctional goals. *Id.* at 566. In that case, the liberty interest of the inmate was in protecting his "good time credit," an interest clearly subordinate to the absolute liberty interest of a judgment debtor faced with Vermont's close jail execution. In another case, Goss v. Lopez, 419 U.S. 565 (1975), the Supreme Court stated that in student suspension or expulsion cases where the suspension may be for a period of time longer than ten days, that students should be given the rights of presentation and cross-examination of witnesses. In some difficult cases, the Court pointed out that there may even be a right to counsel to protect the interests of the student. *Id.* at 566. Arguably, in light of an earlier Supreme Court decision, San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1 (1973), holding that a right to education did not involve a "fundamental interest," it can be asserted that the interests of a judgment debtor in protecting his personal liberty should demand as much, if not more, procedural protection than the interests of a student faced with suspension or expulsion.

B. *The Right to Appointed Counsel for Indigent Debtors*

Under present close jail execution hearing procedures, both the judgment creditor and judgment debtor have the right to retain an attorney.[57] There is, however, no statutory right to appointed counsel for indigent debtors. If the close jail statute were determined to be criminal in nature, due process would require that indigent debtors be provided with counsel.[58] Moreover, even if the statute were determined to be civil in nature, a consideration of competing interests leads to the conclusion that the close jail execution hearing requires application of this safeguard.

The rationale underlying the right-to-counsel decisions of the United States Supreme Court is that the assistance of counsel is essential to providing the individual with a meaningful opportunity to be heard.[59] Even in the case of a juvenile delinquency proceeding,[60] an action not considered by the state to be a criminal prosecution,[61] the Supreme Court stated that since the potential depriva-

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57. There is no dispute concerning the debtor's right to retain counsel in light of the adversarial nature of the close jail procedures and in light of United States Supreme Court decisions which hold that there is no bar to an individual's right to retain an attorney. *See* Powell v. Alabama, 287 U.S. 45, 69 (1932). *See also* Goldberg v. Kelly, 397 U.S. 254, 270-71 (1970), explaining the rationale underlying an individual's right to retain an attorney in the context of a welfare pre-termination proceeding. The court stated:

> We do not say that counsel must be provided at the pre-termination hearing, but only that the recipient must be allowed to retain an attorney if he so desires. Counsel can help delineate the issues, present the factual contentions in an orderly manner, conduct cross-examination and generally safeguard the interests of the recipient. We do not anticipate that this assistance will unduly prolong or otherwise encumber the hearing.

58. The right to counsel must be afforded to all indigents in a criminal prosecution where a deprivation of liberty is at stake. *See* Argersinger v. Hamlin, 407 U.S. 25 (1972); *In re* Gault, 387 U.S. 1 (1967); Specht v. Patterson, 386 U.S. 605 (1967); Gideon v. Wainwright, 372 U.S. 335 (1963); Powell v. Alabama, 287 U.S. 45 (1932).

59. *See, e.g.,* Argersinger v. Hamlin, 407 U.S. 25 (1972); *In re* Gault, 387 U.S. 1 (1967); Specht v. Patterson, 386 U.S. 605 (1967); Gideon v. Wainwright, 372 U.S. 335 (1963); Powell v. Alabama, 287 U.S. 45 (1932); *In re* Harris, 69 Cal. 2d 486, 446 P.2d 148, 72 Cal. Rptr. 340 (1968). *See generally* Charney, *The Need For Constitutional Protections For Defendants In Civil Penalty Cases,* 59 CORNELL L. REV. 478 (1974); Note, *The Right To Counsel In Civil Litigation,* 66 COLUM. L. REV. 1322 (1966); Note, *The Indigent's "Right" To Counsel In Civil Cases,* 43 FORDHAM L. REV. 989 (1975) [hereinafter cited as *Indigent's Right To Counsel*]; Note, *Payne v. Superior Court: The Indigent Prisoner's Right To Counsel In A Civil Suit,* 13 IDAHO L. REV. 415 (1977); Note, *The Emerging Right Of Legal Assistance For The Indigent In Civil Proceedings,* 9 U. MICH. J.L. REF. 554 (1976).

60. *See In re* Gault, 387 U.S. 1 (1967).

61. *Id.* at 22-23, 36.

tion of liberty was comparable to that in an adult criminal proceeding, assistance of appointed counsel was necessary "to cope with problems of law, to make skilled inquiry into the facts, to insist upon regularity of the proceedings and to ascertain whether [the juvenile had] a defense and to prepare and submit it."[62] Subsequent lower court decisions relying upon this rationale have extended the right to appointed counsel to other proceedings involving potential deprivations of liberty not traditionally regarded as criminal, such as civil commitment[63] and civil mesne process.[64] Because Vermont's close jail execution involves a deprivation of liberty comparable to that in civil commitment and civil mesne process, ap-

62. *Id.* at 36.

63. *See, e.g.*, Bartley v. Kremens, 402 F. Supp. 1039 (E.D. Pa. 1975), *vacated and remanded on other grounds*, 431 U.S. 119 (1977); Lynch v. Baxley, 386 F. Supp. 378 (M.D. Ala. 1974).

64. *See, e.g.*, *In re* Harris, 60 Cal. 2d 486, 446 P.2d 148, 72 Cal. Rptr. 340 (1968). Mesne process, technically described as *capius ad respondenum*, is a procedure where the defendant is notified to defend in a suit, and arrest of the defendant is procured "until security for the plaintiff's claim is furnished." *See* BLACK'S LAW DICTIONARY 262 (rev. 4th ed. 1968). Vermont has abolished civil mesne process. *See* VT. R. CIV. P. 4.3 (1971).

A further extension of the right to counsel may be emerging in light of the Supreme Court's decision in Maness v. Meyers, 419 U.S. 449 (1975). In that case, the issue concerned whether a lawyer could be held in contempt during the trial of a civil case for advising his client "to refuse to produce material demanded by a subpoena *duces tecum* when the lawyer believe[d] in good faith [that] the material may tend to incriminate his client." *Id.* at 458. In dicta, the Court discussed the value of counsel:

> The assertion of a testimonial privilege, as of many other rights often depends upon legal advice from someone who is trained and skilled in the subject matter, and who may offer a more objective opinion. A layman may not be aware of the precise scope, nuances, and the boundaries of his Fifth Amendment privilege.

Id. Justice Stewart, concurring in *Maness*, 419 U.S. at 470, stated that by his interpretation of the majority decision, the right to appointed counsel, in the context of a civil proceeding, had been expanded. He stated:

> The Court's rationale thus inexorably implies that counsel must be appointed for any indigent witness, whether or not he is a party, in any proceeding in which his testimony can be compelled . . . . Unless counsel is appointed, these indigents will be deprived . . . of the opportunity to decide whether to assert their constitutional privilege. "To hold otherwise would deny the constitutional privilege against self-incrimination the means of its own implementation."

Id. at 471. (Citation omitted).

The majority in *Maness* rebutted Justice Stewart's contentions, *id.* at 466 n.15, but did not address the question of whether an indigent civil defendant, facing a possible waiver of his fifth amendment privilege, could demand assistance of appointed counsel. The *Maness* decision is discussed in *Indigent's Right to Counsel, supra* note 59, at 996-98.

pointed counsel for indigent debtors in the close jail hearing procedures should similarly be required. In addition to the support that may be obtained through decisional law, the peculiarities of the close jail execution further justify the requirement of appointed counsel for indigent debtors. The indigent debtor cannot be expected to understand the legal elements of wilful and malicious conduct; nor can he be expected to comprehend the legal considerations involved in determining whether he "ought to be confined in close jail." Counsel would be instrumental in making a skilled inquiry into relevant facts, preparing an adequate defense, and insuring that all appropriate safeguards are provided at the execution hearing. Furthermore, appointed counsel could assist the debtor in protecting himself against future criminal liability which could result from a finding that the tort was wilful and malicious.[65] The potential of subsequent criminal liability, creates a particular need for appointed counsel. In matters involving compliance with discovery motions,[66] for example, the assistance of an attorney would be invaluable in formulating the delicate responses necessary to protect the debtor from making self-incriminating statements.

Although appointed counsel would significantly protect an indigent debtor's liberty interests, substantial financial costs and delays would result from providing this protection.[67] Notwithstanding

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65. In many cases a wilful and malicious tort could result in criminal as well as civil liability. For example if a tortfeasor purposely, knowingly, or recklessly causes bodily injury to another, he may be subject to prosecution under VT. STAT. ANN. tit. 13, §§ 1023-1024 (1974). Certain wilful and malicious trespass injuries may also result in criminal liability. *See, e.g.*, VT. STAT. ANN. tit. 13, § 3733 (1974). Under that statute a person who wilfully and maliciously damages a dam, mill, or bridge may be imprisoned for up to five years or fined up to $500. Other statutes provide that, persons who wilfully and maliciously cause certain injuries to burial grounds, VT. STAT. ANN. tit. 13, § 3765 (1974), wilfully cause certain damage to cemetaries and monuments, *id.* § 3674, or wilfully cause certain damage to grave markers and ornaments, *id.* § 3766, may be criminally punished. Persons violating these statutes are expressly subject to tort liability for their actions as well. *Id.* § 3769.

66. The judgment creditor is given a statutory right to require the judgment debtor to comply with motions for discovery. *See* VT. R. CIV. P. 69 (1971) which provides in part:

> In addition to the procedure on execution, in proceedings supplementary to and in aid of a judgment, and in proceedings on and in aid of execution, as provided by law, the judgment creditor . . . may obtain discovery from any person, *including the judgment debtor*, in the manner provided in these rules. (Emphasis added).

67. *See* Gagnon v. Scarpelli, 411 U.S. 778 (1973). In that case the United States Supreme Court considered which due process safeguards were constitutionally required for a revocation of probation. The court extended the procedural safeguards required in Morrissey v. Brewer,

such costs, however, the severity of the deprivation at stake in a close jail execution, and the importance attached to the right to counsel by the United States Supreme Court, justify affording this safeguard to the judgment debtor.

C. *Standard of Proof*

At the close jail execution hearing, the judgment creditor must establish the elements required for a close jail execution by a preponderance of the evidence.[68] "Expressions in many opinions of [the Supreme] Court indicate that it has long been assumed that proof of a criminal charge beyond a reasonable doubt is constitutionally required."[69] Therefore, if the close jail execution sanction were determined to be criminal, the present preponderance standard would violate the requirements of due process. Even under civil standards, however, a standard of proof higher than a preponderance of the evidence may be required.

In his often cited concurring opinion in *In re Winship*,[70] Mr. Justice Harlan stated that the standard of proof set for a particular type of litigation should reflect an assessment of the comparative social costs resulting from erroneous fact determinations.[71] Justice Harlan labeled these costs as "social disutility," illustrating the concept by comparing a civil suit for money damages to an action where a deprivation of liberty might result.[72] In a civil action for money damages, a minimum standard of proof by a preponderance of the evidence is justified, according to Harlan, because "we view it as no more serious in general for there to be an erroneous verdict in the defendant's favor than for there to be an erroneous verdict in

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408 U.S. 471 (1972), a parole revocation proceeding, to probation revocation. In addition, the Court added a requirement of appointed counsel for indigents in some cases. The decision whether counsel is required would be determined on a case by case basis. The nature of the issues, the usefulness of counsel, the financial costs to the state, and the prolongation of the revocation proceeding would all be considered. 411 U.S. at 487-88.

68. *See* note 10 *supra.*

69. *In re* Winship, 397 U.S. 358, 362 (1970). *See also* Speiser v. Randall, 357 U.S. 513, 525-26 (1958); Holland v. United States, 348 U.S. 121, 138 (1954); Brinegar v. United States, 338 U.S. 160, 174 (1949).

70. 397 U.S. 358, 370 (1970) (Harlan, J., concurring).

71. *Id.* at 371.

72. *Id.* at 371-72.

the plaintiff's favor."[73] On the other hand, in actions where a deprivation of liberty is at stake, Harlan observed that a greater social disutility would result from erroneous findings that led to the unjust deprivation of personal liberty.[74] Harlan concluded that the requirement of proof beyond a reasonable doubt was founded on "a fundamental value determination of our society that it is far worse to convict an innocent man than to let a guilty man go free."[75]

Vermont's close jail execution involves a deprivation of liberty as opposed to mere money damages. Thus, according to Justice Harlan's analysis in *In re Winship,* greater social disutility would result from an unjust deprivation of the judgment debtor's liberty than an error adversely affecting the judgment creditor. Acceptance of this analysis would support the institution of the standard of proof beyond a reasonable doubt in the close jail execution hearing. Additional support for instituting a higher standard of proof may be found through a comparison between the close jail execution and civil commitment, an action which, like close jail, results in a deprivation of an individual's personal liberty. Several courts have invalidated civil commitment procedures which have utilized a minimum standard of proof by a preponderance of the evidence.[76] Although some courts have required proof beyond a reasonable doubt,[77] other courts have adopted somewhat lesser standards.[78] The reluctance of these latter courts to demand the highest standard of proof is directly attributable to the nature of the evidence presented

73. *Id.* at 371.

74. *Id.* at 372.

75. *Id.*

76. *See, e.g.,* Bartley v. Kremens, 402 F. Supp. 1039 (E.D. Pa. 1975), *vacated and remanded on other grounds,* 431 U.S. 119 (1977); Lynch v. Baxley, 386 F. Supp. 378 (M.D. Ala. 1974); *In re* Ballay, 482 F.2d 648 (D.C. Cir. 1973); Lessard v. Schmidt, 349 F. Supp. 1078 (E.D. Wis. 1972), *remanded on other grounds,* 414 U.S. 473 (1974). *Contra,* Dower v. Boslow, 539 F.2d 969 (4th Cir. 1976) (commitment of prisoners for treatment); Tippett v. Maryland, 436 F.2d 1153 (4th Cir. 1971) (commitment of prisoners for treatment). *See also* French v. Blackburn, 428 F. Supp. 1351 (M.D.N.C. 1977) (court upheld clear and convincing standard in North Carolina's commitment procedure).

77. *See, e.g., In re* Ballay, 482 F.2d 648 (D.C. Cir. 1973); Lessard v. Schmidt, 349 F. Supp. 1078 (E.D. Wis. 1972), *remanded on other grounds,* 414 U.S. 473 (1974).

78. For example, in *Bartley v. Kremens,* the standard adopted was proof by clear and convincing evidence. 402 F. Supp. 1039, 1052 (E.D. Pa. 1975), *vacated and remanded on other grounds,* 431 U.S. 119 (1977). In *Lynch v. Baxley,* the standard of proof held to apply was proof by "clear, unequivocal, and convincing evidence." 386 F. Supp. 378, 393 (M.D. Ala. 1974).

at a civil commitment hearing. As the federal district court in *Bartley v. Kremens*[79] stated in explaining the adoption of a clear and convincing standard:

> Applying a preponderance standard creates too great a risk of erroneous commitment, wrongfully depriving [a person] of his interest in liberty, an interest of "transcending value," and, *given the subjectivity and "relatively undeveloped state of psychiatry as a predictive science,"* requiring proof beyond a reasonable doubt creates too great a risk of erroneously releasing [persons] in need of institutionalization.[80]

The nature of the evidence presented at Vermont's close jail execution hearings justifies requiring proof beyond a reasonable doubt. The issues presented at such a hearing relate to the degree of culpability of the judgment debtor's prior tortious conduct. Proof of that conduct is not dependent upon an "undeveloped predictive science," as is proof in civil commitment proceedings. Therefore, to require proof beyond a reasonable doubt for the close jail execution hearing would be consistent with the rationale underlying the establishment of a standard of proof which achieves "the highest degree of certitude reasonably attainable in view of the nature of the matter at issue."[81]

D. *The Right to a Trial by Jury*

The judgment debtor is not afforded a trial by jury under present close jail execution hearing procedures.[82] The constitutional necessity for providing this safeguard would depend upon whether the statute was considered criminal or civil in nature.[83]

The sixth amendment of the United States Constitution mandates that in all criminal prosecutions the accused must be permitted a trial by jury.[84] This guarantee has been narrowed somewhat

79. 402 F. Supp. 1039 (E.D. Pa. 1975), *vacated and remanded on other grounds*, 431 U.S. 119 (1977).

80. *Id.* at 1052-53.

81. Lynch v. Baxley, 386 F. Supp. 378, 393 (M.D. Ala. 1974).

82. Neither the Vermont Statutes nor the Rules of Civil Procedure provide a right to a jury trial for the judgment debtor. For the text of the relevent statute and rule see notes 15 & 18 *supra*.

83. *See* text accompanying notes 26-43 *supra*.

84. U.S. CONST. amend. VI.

by recent United States Supreme Court interpretations of the sixth amendment which permit the state to dispense with the jury safeguard when the period of incarceration imposed upon an individual found guilty of a criminal offense does not exceed six months.[85] Classification of the close jail execution as criminal would limit the period of incarceration that could constitutionally be imposed without the safeguard of a jury to six months.

On the other hand, if the close jail execution is determined to be civil in nature, a comparison of the close jail execution with civil contempt proceedings[86] indicates that a jury trial need not be provided. In civil contempt proceedings, the Supreme Court has not required the jury safeguard because the individual is incarcerated only for so long as he refuses to obey a court order.[87] The justification for this rule is two-fold: First, a court retains an inherent power to compel individuals to comply with its lawful orders;[88] and second, because the deprivation of liberty is conditioned upon the individual's compliance with the court's order, certain procedural protections are unnecessary.[89]

As in the case of the civil contemptor, the judgment debtor in Vermont's close jail execution has the ability to determine the length of his incarceration in that he can effect his release through "satisfaction"[90] of the judgment debt. Based upon this similarity, the denial of a jury trial in the close jail execution hearing might

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85. *See e.g.,* Muniz v. Hoffman, 422 U.S. 454 (1975) (jury not required for "petty" contempts where imprisonment is for less than six months); Codispoti v. Pennsylvania, 418 U.S. 506 (1974) (serious crimes requiring right to jury are those carrying more than six months as a sentence).

86. Civil contempt is a state action authorizing a deprivation of liberty for the purpose of coercing an individual into compliance with lawful court orders. *See* Shillintani v. United States, 384 U.S. 364 (1966); Maggio v. Zeitz, 333 U.S. 56 (1948) (criminal contempt is to punish for past disobedience, civil contempt is coercive); United States v. UMW, 330 U.S. 258 (1947); Gompers v. Bucks Stove & Range Co., 221 U.S. 418 (1911) (character of confinement distinguishes criminal and civil contempt).

87. *See* Shillintani v. United States, 384 U.S. 364, 370-71 (1966).

88. *Id.* at 370. *See also* United States v. UMW, 330 U.S. 258, 330-32 (1947) (Black and Douglas, JJ., concurring in part and dissenting in part).

89. *See* Shillitani v. United States, 384 U.S. 364, 370-71 (1966), where the Court stated: "The conditional nature of the imprisonment—based entirely upon the contemptor's continued defense—justifies holding civil contempt proceedings absent the safeguards of indictment and jury. . . ." (Citation omitted).

90. *See* note 42 *supra.*

be warranted if the close jail sanction were determined to be civil in nature.

In summary, Vermont's close jail execution hearing procedures are constitutionally inadequate. The extent to which the statute violates the requirements of the due process clause of the fourteenth amendment is dependent upon whether the statute is classified as "criminal" or "civil." It is clear, however, that regardless of its classification, the close jail hearing procedures are deficient.

Although it may be possible to cure existing procedural defects by providing for the appropriate safeguards, the close jail execution statute suffers from another constitutional infirmity. The statute, as it applies to indigent debtors, discriminates against indigent debtors and thus is subject to a challenge under the equal protection clause of the fourteenth amendment.[91]

III. Equal Protection

Vermont's close jail execution statute, in its application, may affect an indigent debtor more severely than a nonindigent debtor. The person without sufficient funds or other assets to satisfy the judgment has no means of avoiding incarceration once a close jail execution is issued,[92] whereas the solvent debtor can avoid this sanction completely by paying the judgment. Thus, the issue that arises is whether this difference in treatment between the indigent and solvent debtor violates the principles of equal protection.

The United States Supreme Court has consistently held that the principles of equality underlying the equal protection clause of the fourteenth amendment are offended when a deprivation of liberty is dependent upon an individual's status as an indigent.[93] Thus,

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91. U.S. Const. amend. XIV, § 1. This equal protection issue was left undecided by the Vermont Supreme Court in Dunbar v. Gabaree, ____ Vt. ____, 376 A.2d 51 (1977). *See* note 14 *supra*.

92. Recall that in order to make use of the Poor Debtor's Oath, a judgment debtor must initially be incarcerated and then must petition the court for a hearing to vacate the close jail certificate. Only after the certificate is vacated may the close jail debtor take the Oath. *See* note 16 *supra*.

93. *See* Tate v. Short, 401 U.S. 395 (1971); Williams v. Illinois, 399 U.S. 235 (1970); Douglas v. California, 372 U.S. 353 (1963); Griffin v. Illinois, 351 U.S. 12 (1956). *See generally* Clune, *The Supreme Court's Treatment of Wealth Discriminations Under The Fourteenth*

the Court has held state statutes which have made the availability of a transcript,[94] or the right to representation by counsel on appeal[95] turn upon one's ability to pay, to involve "invidious discrimination," in violation of the fourteenth amendment.[96] Indeed, even where interests less critical than liberty have been at stake, the Court has struck down statutes discriminating against indigents. For example, the Court has invalidated statutes which in practical effect have denied indigents the rights to vote in state and local elections,[97] to obtain a divorce,[98] and to marry.[99]

The two Supreme Court cases whose principles are most applicable to an analysis of Vermont's close jail execution statute are *Williams v. Illinois*,[100] and *Tate v. Short*.[101] In *Williams*, the statute under review required that an imprisoned indigent work off his fine at the rate of $5 per day for each day of his confinement.[102] The Court determined that the sanction of imprisonment under these circumstances discriminated on the basis of the defendant's ability to pay and therefore violated the principles of equal protection.[103] In *Tate*, a statute similar to the one in *Williams* authorized the imprisonment of an indigent who was unable to pay an accumulated $425 in parking violation fines.[104] The Supreme Court, relying substantially on its opinion in *Williams*, found that this statute "worked an

Amendment, 1975 Sup. Ct. Rev. 289 (1975). Compare McGinnis v. Royster, 410 U.S. 263 (1973). In that case the Supreme Court held that a New York statute denying good time credit for time served during presentence incarceration did not violate an indigent's right to equal protection. A careful reading of the Court's opinion, however, makes it clear that *McGinnis* did not involve a liberty deprivation. The issue before the Court concerned merely the state's methods of computing good time credit and whether these methods were discriminatory. After analyzing the statutory scheme, the Court concluded that the methods of computation were rationally related to the rehabilitative goals of the state. *Id.* at 373-77. Because there is no mention of a liberty deprivation, it seems clear that the *McGinnis* opinion does not alter the basic principles underlying the *Tate, Williams, Douglas* and *Griffin* decisions.

94. Griffin v. Illinois, 351 U.S. 12 (1956).

95. Douglas v. California, 372 U.S. 353 (1963).

96. *Id.* at 355-56; Griffin v. Illinois, 351 U.S. at 18.

97. *See* Harper v. Virginia Board of Elections, 383 U.S. 663 (1966).

98. *See* Boddie v. Connecticut, 401 U.S. 371 (1971).

99. *See* Zablocki v. Redhail, 98 S.Ct. 673 (1978); Loving v. Virginia, 388 U.S. 1 (1967).

100. 399 U.S. 235 (1970).

101. 401 U.S. 395 (1971).

102. 399 U.S. at 236-37.

103. *Id.* at 240-41.

104. 401 U.S. at 396-97.

invidious discrimination . . . and therefore violated the Equal Protection Clause."[105]

In *Abbit v. Bernier,*[106] a recent case decided by the Federal District Court in Connecticut, a statute virtually identical to Vermont's close jail execution statute was challenged on constitutional grounds.[107] The *Abbit* court, relying on the Supreme Court decisions in *Williams* and *Tate,* invalidated the Connecticut statute on the grounds that the incarceration it imposed was based upon the ability of an individual to pay.[108]

The *Abbit* decision is the most recent case to face squarely the constitutional issues of equal protection in relation to a body execution statute. Although it is possible to argue that the statute considered in the *Abbit* case can be distinguished from Vermont's close jail execution because the Connecticut statute covered all unpaid tort judgments whereas Vermont's statute applies only to wilful and malicious torts,[109] this distinction would seem to be one without constitutional significance. Whether a tort is wilful and malicious does not alter the fact that the close jail statute makes a deprivation of liberty dependent upon the debtor's ability to pay, as can be illustrated by the following comparative examples.

In Case A, a tort is committed for which the injured person brings an action and obtains a judgment for a sum of money. To enforce this judgment, the plaintiff-creditor makes a timely motion for a close jail execution. This motion is granted upon a finding that the tort was wilful and malicious and that the defendant-debtor "ought to be confined in close jail." In this case the debtor is solvent and chooses to pay the judgment before being incarcerated, thus totally avoiding imprisonment.

In Case B, the facts are the same except that the defendant-

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105. *Id.* at 397.

106. 387 F. Supp. 57 (D. Conn. 1974).

107. CONN. GEN. STAT. ANN. § 52-369 (West 1960). This statute authorized incarceration of judgment debtors for nonpayment of tort judgments. The only significant distinction between the Connecticut statute and Vermont's close jail execution is that the Vermont statute is limited in its application to only those torts which are willful and malicious. *See* note 5 *supra.*

108. 387 F. Supp. at 59.

109. *See* note 5 *supra.*

debtor is indigent. As a result of his inability to pay, the debtor is sentenced to close jail until the judgment is "satisfied."[110] In each case, the tort and the culpability were the same. Only the indigent debtor, however, was incarcerated. This fact illustrates that the incarceration imposed by a close jail execution does not turn upon the degree of culpability of the debtor, but rather upon the fact of his indigency. Moreover, the indigent has absolutely no way to avoid this imprisonment.[111]

It is important to appreciate that not all statutes which incidentally have a disproportionate adverse impact on indigents are unconstitutional per se. The United States Supreme Court has stated that "a State can, consistent with the Fourteenth Amendment, provide for differences so long as the result does not amount to an 'invidious discrimination.' "[112] The test a court would apply to determine whether there is "an invidious discrimination" in Vermont's close jail execution statute would be a "strict scrutiny" test, because a fundamental interest of the judgment debtor—his liberty[113]—is at stake.[114] Under this test, the state would be required

110. *See* note 42 *supra*.

111. *See* note 92 *supra*.

112. Douglas v. California, 372 U.S. 353, 356 (1963).

113. It is difficult to conceive of an interest more fundamental than an individual's interest in his personal liberty—his right to remain free. Being specifically enumerated in the fourteenth amendment, this interest of personal liberty has always been closely guarded by the decisions of the United States Supreme Court. *See, e.g.*, Wolff v. McDonnell, 418 U.S. 539 (1974); Morrissey v. Brewer, 408 U.S. 471 (1972); Tate v. Short, 401 U.S. 395 (1971); Williams v. Illinois, 399 U.S. 235 (1970). Justice Harlan, concurring in *Williams*, stated, "this court will squint hard at any legislation that deprives an individual of his liberty—his right to remain free." *Id.* at 263.

114. In other situations where a court is faced with an equal protection challenge to legislation, a strict scrutiny review will be employed when the alleged discrimination is aimed at a "suspect class" or affects a "fundamental interest." Classifications based upon race have consistently been regarded as suspect. *See, e.g.*, Washington v. Davis, 426 U.S. 229 (1976); Milliken v. Bradley, 418 U.S. 717 (1974); Keyes v. School Dist. No. 1, 413 U.S. 189 (1973); Brown v. Board of Education, 347 U.S. 483 (1954). Classifications based on alienage or ethnic origin have also been considered "suspect," and thus subject to strict judicial review. *See* Graham v. Richardson, 403 U.S. 365 (1971); Hernandez v. Texas, 347 U.S. 475 (1954); Korematso v. United States, 323 U.S. 214 (1944). *But see* Fiallo v. Bell, 430 U.S. 787 (1977) (less than strict scrutiny employed for alienage where an action of Congress was at issue); United States v. Martinez-Fuerte, 428 U.S. 543 (1976) (less than strict scrutiny for ethnic origin); Mathews v. Diaz, 426 U.S. 67 (1976).

"Fundamental interests" have also been subjected to a strict scrutiny review. *See, e.g.*, Boddie v. Connecticut, 401 U.S. 371 (1971) (marriage is a fundamental interest, a right of access to the courts is also fundamental where the state has a monopoly over the subject to

to demonstrate first, that the statute's discriminatory effect on indigent debtors is justified because of a "compelling state interest,"[115] and second, that the statute is "necessary" to the accomplishment of legitimate state goals.[116]

It seems clear that Vermont's close jail execution statute could not survive a constitutional challenge under the strict scrutiny standard of review.[117] Essentially, two legitimate interests of the state are served by the close jail execution statute:[118] to provide a judgment creditor with an effective collection remedy thus ensuring compliance with lawful court decrees; and to punish a debtor for the commission of a wilful and malicious tort, thereby protecting society from unnecessary harm.[119] In light of the *Williams*, *Tate*, and *Abbit* decisions, where the statutes in question were invalidated despite the presence of somewhat similar state interests,[120] it would be difficult to argue that Vermont's interests are sufficiently compelling to justify the adverse impact upon indigent debtors created by the close jail execution statute.

Even assuming for purposes of analysis that the state could demonstrate its interests as "compelling," under the strict scrutiny

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be litigated); Shapiro v. Thompson, 394 U.S. 618 (1969) (right to travel is fundamental); Harper v. Virginia Board of Elections, 383 U.S. 663 (1966) (right to vote is fundamental); Griswold v. Connecticut, 381 U.S. 479 (1965) (right of marital privacy is fundamental).

115. *See* Zablocki v. Redhail, 98 S. Ct. 673 (1978).

116. *See* Loving v. Virginia, 388 U.S. 1 (1967).

117. Even under a less strict standard of review, the rational relationship test, Vermont's close jail execution statute would fail to comply with the principles of equal protection because of its treatment of indigent debtors. Supporting this contention is a statement by Justice Stewart, concurring in Zablocki v. Redhail, 98 S.Ct. 673, 683 (1978) (Stewart, J., concurring). In discussing a Wisconsin statute denying a marriage license to persons having minor children on welfare roles, to whom they owed a duty of support, Justice Stewart stated that even assuming that the statute serves the state's interests in reducing its welfare load, "[t]he fact remains that some people simply cannot afford to meet the statute's financial requirements. To deny these people permission to marry penalizes them for failing to do that which they cannot do. Insofar as it applies to indigents, the state law is an irrational means of achieving [the] objectives of the state." *Id.* at 685. Likewise, granting that the close jail execution statute may serve the legitimate remedial and punitive purposes of the state, the fact remains that some persons are subjected to incarceration simply because they cannot afford to pay their tort judgments. Thus, like the Wisconsin statute, Vermont's close jail execution statute is, in its application to indigents, "an irrational means of achieving [the] objectives of the state." *Id.*

118. *See* Gould v. Towslee, 117 Vt. 452, 94 A.2d 416 (1953).

119. *Id.*

120. *See* text accompanying notes 102-10 *supra*.

standard, it would also have the burden to persuade a court that the close jail execution statute was "necessary" to achieve the state's legitimate remedial and punitive objectives.[121] Satisfying this burden would be difficult because reasonable alternatives are available to achieve the state's goals. The state's interest in providing an effective collection remedy for judgment creditors can be realized through the utilization of attachment procedures[122] and other measures which do not involve a substantial deprivation of liberty.[123] Moreover, the punishment objective of the statute could be more appropriately served by the enactment of statutes making criminal conduct that constitutes a wilful and malicious tort.[124]

In summary, Vermont's close jail execution statute is vulnerable to an equal protection challenge on two grounds. First, it discriminates against indigent debtors and thus involves an unconstitutional "invidious discrimination." Second, the state interests furthered by the statute, although legitimate and important, are not "compelling"; and, in any case, the state has available reasonable alternatives for achieving its objectives.

CONCLUSION

Vermont's close jail execution statute violates both the due process and equal protection clauses of the United States Constitution. Because the close jail execution involves a substantial deprivation of liberty, it is clear that, whether the statute is classified as "civil" or "criminal," due process requires significantly greater procedural protections for the judgment debtor than are currently provided.[125] Moreover, the close jail statute discriminates against indi-

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121. *See* Loving v. Virginia, 388 U.S. 1 (1967).

122. *See* VT. STAT. ANN. tit. 12, §§ 3251-3410 (1973 & Cum. Supp. 1977).

123. The Supreme Court in Williams v. Illinois, 399 U.S. 235, 244-45 (1970), noted that a state was not without authority to enforce its judgments upon indigents. The Court in *Williams* recognized that alternatives such as installment plans for payment could be utilized thereby avoiding the harsh results of physical incarceration.

124. The suggestion that Vermont's close jail execution statute contemplates conduct more appropriately characterized as criminal has been previously asserted. *See* Note, *Present Status of Execution Against the Body of the Judgment Debtor*, 42 IOWA L. REV. 306, 317 n.75 (1957). *See also* note 65 *supra*.

125. A similar view was expressed by the Federal District Court of Connecticut in Abbit v. Bernier, 387 F. Supp. 57 (D. Conn. 1974). In a footnote, the court discussed its suggestion

gent debtors. Not only does the state lack a compelling interest sufficient to justify this "invidious discrimination," it also can achieve whatever legitimate interests are furthered by the statute through less constitutionally offensive alternatives.

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that a hearing, for the express purpose of determining a debtor's ability to pay, would rectify constitutional flaws in the Connecticut statute. The *Abbit* court stated that "[s]ince the loss suffered in this instance involves one's cherished physical freedom, the process due one exposed to this possible loss will necessarily be considerable." *Id.* at 62 n.12. The court then went on to briefly mention that minimum procedural protections should probably include: the right to appointed counsel; the right to present witnesses; the right to confront and cross-examine witnesses; and the requirement that the creditor's claims relating to the debtor's abilities to pay be proven "perhaps by 'beyond a reasonable doubt,' but at least by clear and convincing evidence." *Id.* The discussion in this note of due process safeguards appropriate for Vermont's close jail execution is consistent with the suggestions of the *Abbit* court. *See* text accompanying notes 45-91 *supra.*