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RESENTENCE WITHOUT CREDIT FOR TIME SERVED: UNEQUAL PROTECTION OF THE LAWS

FRANK J. WHALEN, JR.*

I. INTRODUCTION

One of the proudest boasts of Americans is stated in various forms, but no more succinctly than that appearing above the entrance of the Supreme Court of the United States: "Equal Justice Under Law." In recent years, there has appeared, in a number of jurisdictions, a doctrine which blatantly violates that notion. And it is most critical indeed that the breach has appeared in the administration of the criminal law, an area of government in which we have prided ourselves that progress was making its way.

What has been done is this. Prisoners, by habeas corpus, writs of error coram nobis, or other review procedures, have procured the reversal of judgments under which they were sentenced long ago. Retrial or resentencing followed, and at the time of imposing the second sentence, the courts refused to give the defendants credit for time served under the earlier sentence.¹

The effects upon the defendants have varied. For some, the total time served exceeded the statutory maximum for the offense involved in the ultimate conviction and judgment.² For others, the

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¹Member of District of Columbia on Massachusetts Bars.
¹The doctrine is most prevalent in the mid-continent in contiguous states: Illinois, Indiana, Michigan and Wisconsin. Typical are People v. Starks, 395 Ill. 567, 71 N. E. 2d 23 (1947), cert. denied, 334 U. S. 821 (1948) (credit for 3 years denied); People v. Judd, 396 Ill. 211, 71 N. E. 2d 29 (1947) (4 years); McDowell v. State, 225 Ind. 495, 500, 76 N. E. 2d 249, 251 (1947) (2½ years); In re Doelle, 323 Mich. 241, 35 N. W. 2d 251 (1948), leave to file original petition for habeas corpus denied, 336 U. S. 942 (1949); In re De Meerleer, 323 Mich. 287, 35 N. W. 2d 255 (1948), cert. denied, 335 U. S. 946 (1949) (15 years); State ex rel. Drankovich v. Murphy, 248 Wis. 433, 439, 22 N. W. 2d 540, 543 (1946) (11 years). See also Ex parte Wilkerson, 76 Okla. Crim. 204, 135 P. 2d 507 (1943).
²In re Doelle, and In re De Meerleer, supra note 1.
total time served exceeded that imposed under either sentence. And for nearly all, the time required for eligibility for parole and for realizing the benefit of credit for good prison conduct was postponed. Pyrrhic victories resulted—men accomplishing nothing by obtaining a fair trial and judgment at long last, except to lose their chances for prompt release. Thus periods of men’s lives amounting to three, four, eight, eleven, and fifteen years spent in prison, were ignored in fixing how much longer they should serve for the very same offense.

The reasons courts have given for this treatment have varied considerably. There is the theory that the first sentence is now void and the state has no responsibility for the punishment the defendant has undergone. And furthermore, the legislature has left no discretion for the court to reduce the second sentence. And, of course, the defendant has himself procured the reversal of his conviction or sentence, so he has “waived” the rights under it.

II. THE VOID SENTENCE DOCTRINE
(A) Origin and Development

Perhaps the most important reason is the idea of the “void
sentence." This has its root, it would seem, in the development of habeas corpus as a method for reviewing criminal cases. It has a long history, evolving from procedural limitations in the federal courts. Consequently a brief review of the historical background is in order.

After the passage of the Judiciary Act of 1789, an anomalous situation existed in our federal court system. Criminal cases from state courts could be reviewed by the United States Supreme Court. However, no review could be had anywhere of a federal criminal case.

In 1802, review was provided to resolve a deadlock resulting from division of opinion among two judges in a circuit court. Thereafter, until 1879, such certificate of division constituted the only possible direct review of a federal criminal case. Finally in 1879, review was allowed of right in the circuit court from decisions of district courts in criminal cases. Not until 1889 was a writ of error from the Supreme Court allowed in a federal criminal case and then only in capital cases. In 1891, this review was extended to "all infamous crimes," a provision which was very broadly construed. The burden upon the Supreme Court became considerable; and consequently in 1897, review there was limited to capital crimes. The appeal as of right in the Circuit Court of Appeal sufficed by 1911 to allow abolition of direct review in the Supreme Court, save under very exceptional circumstances.

This situation caused resort to habeas corpus in federal courts, even in the Supreme Court on original petition, as a panacea for correction of errors in federal criminal cases. For a time, even habeas corpus in state courts was employed. The Supreme Court

8. 1 Stat. 73, c. 20 (1789).
9. 1 Stat. 85, § 25 (1789).
10. Ibid. See Orfield, Criminal Appeals in America 243 et seq. (1939) for a broad review.
11. 2 Stat. 159, c. 31, § 6 (1802).
12. 20 Stat. 354, c. 176 (1879). Review was possible in all criminal cases in which the permissible sentence included imprisonment, or if fine only, over $300. There was still no right of review in the Supreme Court.
13. 25 Stat. 656, c. 113 (1889).
14. 26 Stat. 826, c. 517 (1891). In Ex parte Wilson, 114 U. S. 417 (1885), it had been held that the maximum allowable punishment controlled the determination whether a crime was infamous, within the Sixth Amendment.
17. 2 Warren, Supreme Court in United States History 332 (1926); see Kurtz v. Moffitt, 115 U. S. 487, 490 (1885) (argument for respondents).
resisted the temptation for a long while;\textsuperscript{18} but finally, in \textit{Ex parte Lange},\textsuperscript{19} it allowed habeas corpus to perform the office of review. At the same time analogous developments were taking place in state courts—led on by the federal courts to use habeas corpus as a remedy for unconstitutional and illegal convictions and sentences.

Habeas corpus would lie, as the cliché put it, only if the court ordering the imprisonment was without jurisdiction—i.e., if the order was "void."	extsuperscript{20} Consequently the courts came to refer to the first sentence as "void" (if it could be set aside on habeas corpus), "voidable" or "merely erroneous" (if habeas corpus would be denied).\textsuperscript{21} That the first sentence was not "void" for all purposes was clear, at least where the ground for reversal was constitutional, for such a reversal necessitated a holding that the first sentence was the result of governmental action.\textsuperscript{22} Nevertheless, the tyranny of labels\textsuperscript{23} persisted, with the result that courts even went so far

\textsuperscript{18} Under the Judiciary Act of 1789, 1 Stat. 82, habeas corpus would lie in federal courts only when the petitioner was held under the authority of the United States; in 1867, the provision was extended to allow habeas corpus whenever the detention violated the Constitution, laws, or treaties of the United States, 14 Stat. 385, as amended, 28 U. S. C. § 2241 (Supp. 1949).

\textsuperscript{19} The earlier attitude of the Court is revealed in \textit{United States v. Gooding}, 2 Wheat. 460, 467-68 (U.S. 1827). In \textit{Ex parte Gordon}, 1 Black 503 (U.S. 1867), in an opinion by Chief Justice Taney, it was held that circuit court decisions could not be reviewed in criminal cases on writs of error, prohibition or certiorari. See Orfield, \textit{A Resume of Decisions of the United States Supreme Court on Federal Criminal Procedure}, 20 Neb. L. Rev. 251, 262-65 (1941).

\textsuperscript{20} See \textit{Ex parte Watkins}, 3 Pet. 193, 202-03 (U.S. 1830): "An imprisonment under a judgment cannot be unlawful, unless that judgment be an absolute nullity, and it is not a nullity if the Court has general jurisdiction of the subject, although it should be erroneous."

\textsuperscript{21} E.g., \textit{Ex parte Parks}, 93 U. S. 18, 23 (1876); \textit{Ex parte Wilson}, 114 U. S. 417, 421 (1885); \textit{Ex parte Royall}, 117 U. S. 241, 253 (1886); \textit{Ex parte Nielsen}, 131 U. S. 176, 184 (1899); \textit{In re Mills}, 135 U. S. 263, 270 (1890).

\textsuperscript{22} United States v. Cruikshank, 92 U. S. 542 (1875); \textit{Civil Rights Cases}, 109 U. S. 3, 11, 17 (1883); see \textit{King v. United States}, 69 App. D. C. 10, 12-13, 98 F. 2d 291, 293 (1938): "The Government's brief suggests, in the vein of the Mikado, that because the first sentence was void appellant 'has served no sentence but has merely spent time in the penitentiary'; that since he should not have been imprisoned as he was, he was not imprisoned at all. The brief deduces the corollary that his non-existent punishment cannot possibly be 'increased.' As other corollaries it might be suggested that he is liable in quasi-contract for the value of his board and lodging, and criminally liable for obtaining them under false pretenses. We cannot take this optimistic view."

as to say that the defendant, having been imprisoned under a subsequently reversed judgment, was in the same position as though he had never been sentenced at all, or had escaped between verdict and sentence.

(B) The Spectre of Double Jeopardy

Ex parte Lange, led the courts to a great fear also that a defendant might interpose the bar of double jeopardy, should the first conviction or sentence be accorded any validity at all. Although less had been decided, there were those words:

"The common law not only prohibited a second punishment for the same offence, but it went further and forbid a second trial for the same offence, whether the accused had suffered punishment or not, and whether in the former trial he had been acquitted or convicted."

Under such a broad concept, if it were to be admitted that the defendant had once been punished, by even a single day in jail, for the same offense, then the only course would be to release him absolutely. Reversal of the conviction could not then be followed by a new trial; and reversal of the sentence only (e.g., for non-compliance with the statutory requirement as to allocution), could not be followed by resentencing under a proper procedure.

That the desideratum was a balance between fairness to the defendant and fairness to society was not seen. The danger from hyper-technical doctrines developed to mitigate a retributive criminal law justly caused Mr. Justice Holmes to complain:

"At the present time in this country there is more danger that

24. E.g., United States v. Harmon, 68 Fed. 472, 474 (D. Kan. 1895): "The sentence of the court under which the defendant went to prison was void. It was the same in legal effect as if it had been rendered by a justice of the peace or a United States Commissioner, or the same as if the circuit court had ordered the defendant to be transported or hanged."

26. 18 Wall. 163 (U.S. 1874).
27. Id. at 169.
28. This very reasoning was accepted in In re Johnson, 46 Fed. 477, 481 (C.C.D. Mass. 1891), and rejected in McCormick v. State, 71 Neb. 505, 508, 99 N. W. 237 (1904).
29. The decisions in McElvaine v. Brush, 142 U. S. 155 (1891); Trezza v. Brush, 142 U. S. 160 (1891) (affirming imposition of solitary confinement twice after two trials resulting in death sentences); and Murphy v. Massachusetts, 177 U. S. 155 (1900) (rejecting defendant's argument that the Constitution was violated when state courts allowed credit for prison time served under a reversed sentence, but declined to remit requirement of again serving one day in solitary confinement unless defendant would waive non-compliance with the statute) were in very broad terms, not limited to the bar of double jeopardy, but encompassing repeated punishment generally within the declaration that the defendant "waived" any objection founded on the first conviction.
criminals will escape justice than that they will be subjected to tyranny.\textsuperscript{30}

Indeed, there grew up in the federal courts, with the Lange case as root-stock, the doctrine that the double jeopardy protection would be violated if a defendant once validly sentenced were resentenced, even at the same term, so as to increase his sentence.\textsuperscript{31}

Possibly common law precedents and orthodox interpretation of punishment statutes would have led to the same result, but certainly such a doctrine should not have been placed upon constitutional grounds.\textsuperscript{32}

Unfortunately also there was a common law doctrine, developed in English decisions long since overruled, that even an erroneous and illegal sentence could not be corrected.\textsuperscript{33} It took a considerable time for courts to court such an unsound doctrine, and the remnants contributed to the impetus to hold the first sentence void in every way.\textsuperscript{34}

(C) Other Factors

There are other elements besides this overemphasis upon the nullity of the first proceeding which have brought courts to deny credit for time served. There has been a conviction widely held that the criminal law is one of the most exact and certain branches of our law. Nicety of definition of substantive crimes and considerable formalism in procedural matters have contributed to its

\textsuperscript{30} Kepner v. United States, 195 U. S. 100, 134 (1904).
\textsuperscript{31} United States v. Benz, 282 U. S. 304 (1931); Roberts v. United States, 320 U. S. 264 (1943).
\textsuperscript{32} The Lange case had decided no more than that (1) the statute permitted confinement or fine, but not both; (2) after the defendant had paid the maximum fine, under sentence to confinement and fine, the court could not again sentence him, requiring confinement only. Common law procedure then required one lawful sentence only.
\textsuperscript{33} King v. Ellis, 5 B. & C. 395, 400 (K.B. 1826); King v. Bourne, 7 A. & E. 58 (K.B. 1837); Whitehead v. Queen, 7 Q. B. 582 (1845). Reversal was by statute, 9 & 10 Vict., c. 24, § 1 (1846).
\textsuperscript{34} The first fully considered rejection of the doctrine was in Beale v. Commonwealth, 25 Pa. 11, 22 (1855); but the leading case is In re Bonner, 151 U. S. 242 (1894). However, the old learning was only slowly overturned. Shepherd v. Commonwealth, 2 Metc. 419 (Mass. 1841) (later reversed by statute); Elliott v. People, 13 Mich. 365 (1865), but compare People v. Farrell, 146 Mich. 264, 109 N. W. 440 (1906); McDonald v. State, 45 Md. 90 (1876) (later reversed by statute); In re Johnson 46 Fed. 477 (C.C.D. Mass. 1891), but compare In re Bonner, supra; Ex parte Cox, 3 Idaho 530, 32 Pac. 197 (1893); Adams v. State, 9 Ala. App. 89, 93-94, 64 So. 371, 372 (1913); Hickman v. Fenton, 120 Neb. 66, 68, 231 N. W. 510 (1930). Much of the history is reviewed in McCormick v. State, 71 Neb. 505, 510, 99 N. W. 237, 239 (1904).

The doctrine long persisted in Illinois, colored with strong constitutional overtones. See cases reviewed in United States ex rel. Freislinger on behalf of Kappel v. Smith, 41 F. 2d 707 (7th Cir. 1930).
Every court must feel assured that it can determine what the punishment for a given offense must, under the statute, be. In most of the statutory formulae for indeterminate sentences, there is an apparent simplicity—in fact deceptive—which is lost when the problem of what sentence to impose is complicated by what has been done before, perhaps by another judge or another court or agency.

Related to this is the fear possessed by many courts that emotion might affect them when imposing criminal punishment. The sentencing court may even find consolation in applying some logical rule, supported by considerable precedent, although it is clearly harsh on the defendant and violates the sense of justice. The temptation to impose punishment in a vacuum thus leads courts to avoid the basic issue: Is there any rational justification for punishing this defendant substantially more than others who committed the same offense, simply because this defendant was not given a fair trial or was not properly sentenced the first time?

Now, there are some periods of confinement which are required of criminal defendants without credit against their sentences. In some jurisdictions no credit is given for time in custody awaiting and attending trial. And others deny credit for time in custody

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36. See the difficulty of solution in Lindsey v. Superior Court of King County, 33 Wash. 2d 94, 204 P. 2d 482 (1949) (defendant sentenced to minimum term to be fixed by sentence board, with statutory maximum of 20 years; sentence board fixed minimum at 7½ years, with an ambiguous notation that 1½ years in jail while appeal was pending had been considered; the state supreme court required the sentencing court and the sentence board to indicate the calculations clearly).


38. E.g., In re Doelle, 323 Mich. 241, 249, 35 N. W. 2d 251, 254-55 (1948): "In the last analysis, the law is not vindictive, and possibly the criminal code should be amended as was done in Iowa, so as to credit a prisoner on a new sentence with the time he has served under a void sentence. This also would bring uniformity in the practice." See State v. Lee Lim, 79 Utah 68, 108-113, 7 P. 2d 825, 840 (1932) (Hansen, J., dissenting) stating the void sentence doctrine with great clarity: "Courts refuse to recognize a hybrid sentence which for one purpose is voidable or erroneous and for another purpose is void."

39. Ryan v. State, 100 Ala. 105, 110, 14 So. 766, 767 (1893) (representing the common law practice). But compare Ky. Rev. Stat. § 431.150 (1948) (credit for jail time awaiting trial, against fine or jail sentence); N. Y. Pen. Law § 2193 (credit for all pre-sentenced time against any sentence of confinement); Pa. Stat. Ann., tit. 19, § 894 (Supp. 1949) (credit for all pre-sentence time, against any sentence of confinement), and
while an appeal is pending.\textsuperscript{40} Those states which deny credit for these periods regard such incarceration as mere custodial detention, intended to assure the presence of the defendant on those occasions when bail is not allowed or the defendant cannot produce it.\textsuperscript{41} Normally, however, only short periods of time are involved and a relatively small percentage of defendants are affected. Furthermore, several jurisdictions permit the defendant to elect to commence his sentence during the pendency of his appeal.\textsuperscript{42} This also minimizes the inequality. But, of course, such short periods of time in a jail are quite different from several years in a prison—usually at hard labor.

Another circumstance bringing courts to this unfortunate doctrine is the presence in nearly all jurisdictions of a parole system, often coupled with an indeterminate sentence scheme of some kind.\textsuperscript{43} Under this, the function of the court in fixing the sentence see Comm. \textit{ex rel.} Lerner v. Smith, 151 Pa. Super. 265, 270, 30 A. 2d 347, 351 (1943); Tex. Stat., Code Crim. Proc. art. 768 (Cum. Supp. 1949) (discretionary credit for all pre-sentence time); Va. Code Ann. § 53-208 (1950) (credit for all pre-sentence jail time against any sentence of confinement); W. Va. Code Ann. § 6136 (1949) (discretionary credit for all pre-sentence jail time against any sentence of confinement); Puerto Rico Laws 1946, p. 752 § 293 (credit for all time deprived of liberty, against any sentence of confinement); Byers v. United States, 175 F. 2d 654, 656 (10th Cir. 1949) (\textit{held} credit for pre-sentence time—discretionary—with sentencing court, because 62 Stat. 838 (1948), 18 U. S. C. § 3568 (Supp. 1949) fixes commencement of running of sentence from time defendant is received at place designated for service [or place to await transportation thereto]).


41. People \textit{ex rel.} Stokes v. Warden, 66 N. Y. 342, 345 (1876); \textit{Ex parte} Ducket, 15 S. C. 210 (1881); Hall v. Patterson, 45 Fed. 352, 357 (1891); Ryan v. State, 100 Ala. 105, 110, 14 So. 766, 767 (1893). Of course, one difficulty is that jail life is not usually so arduous as prison life so that punishment is not wholly equivalent. Dimmick v. Tompkins, 194 U. S. 540 (1904); see Fairley v. State, 114 Miss. 510, 513, 75 So. 374 (1917) (Ethridge, J., dissenting).

42. Fed. R. Crim. P. 38 (a) (2) (1948): "A sentence of imprisonment shall be stayed if an appeal is taken and the defendant elects not to commence service of the sentence or is admitted to bail." See Tilghman v. Hunter, 168 F. 2d 946 (10th Cir. 1948); Mitchell v. Sanford, 161 F. 2d 374 (5th Cir. 1947). See also, Ala. Code, tit. 15, § 373 (1940); Fla. Stat. Ann. § 924.22 (1944).

43. In 1939, only three states lacked parole laws, but twelve jurisdic-
is reduced to determining a maximum and minimum term, or even fixing a minimum term and advising the defendant that there is a certain mandatory maximum term; or in a few jurisdictions, fixing the sentence amounts to no more than telling the defendant that the statute requires a specified minimum and maximum term. The actual time to be served is decided by an administrative board—variously known as a sentence, parole, or prison board. That agency considers the defendant's chances for reform if released, predicated its judgment on his past record, his prison conduct, natural capacity and character, family background and the like. Where sentencing has become such a mechanical thing, with the typical sentence for a serious felony being one to twenty years at hard labor, the court can scarcely be blamed for considering its function as routine. And, of course, with credits for good prison conduct available, and the defendant whose conduct is good becoming eligible for parole after serving about two-thirds of the minimum term, there is little chance that the board will permit the aggregate time served under both sentences to exceed the statutory maximum.

Of course, courts would be justified in regarding many a defendant as a poor risk to have in society. But the legislature has not said, or even implied, that the defendant should be subjected to preventive detention beyond the fair and lawful punishment for his offense. And at any event, the effect of denying credit for the first sentence is to extend the time the defendant must serve (as compared with others properly sentenced the first time for the same crime) in order to become eligible for parole or absolute release. Furthermore, it must be remembered that under most systems the administrative boards have wide discretion in granting parole, so that it is not an adequate answer to tell the defendant that the parole board will probably take into consideration the time served on the first sentence.

Notes:

4. All the cases cited note 1 supra, involved sentences of this type.
5. The federal statutory standard is one of the oldest and typical: "If it appears . . . that there is a reasonable probability that such prisoner will live and remain at liberty without violating the laws, and if . . . such release is not incompatible with the welfare of society. . . ." 36 Stat. 819 (1910), as amended, 18 U. S. C. § 4203 (Supp. 1949).
44. Credits for good prison conduct are virtually universal. See statutes collected in 1 Att'y Gen. Survey of Release Procedures (1939).
45. Even a prisoner under a life sentence may become eligible for parole. E.g., State ex rel. Drankovich v. Murphy, 248 Wis. 433, 22 N. W. 2d 540 (1946).
46. See Lindsey v. Superior Court of King County, 33 Wash. 2d 94, 204 P. 2d 483 (1949).
Related to this is the effect of the separation of powers doctrine. Nearly all courts which deny credit state that they must find some express constitutional or statutory authority for allowing credit against the second sentence. They argue that because the legislature has fixed the punishment for a given crime, for example, at between one and twenty years at hard labor there is no room to exact such imprisonment under anything but the lawful (i.e., second) sentence. Of course, when the defendant has served the prescribed time, as punishment for the same offense, the consequence the legislature has attached to the crime has followed, and whether it has been incurred under the first or second sentence is an inconsequential fortuity to both the defendant and society.

Another phase of the separation of powers doctrine is the idea that the granting of credit interferes with the pardon power. This reasoning is possible only when the courts treat the first sentence as void, for the function of the pardon power is to relieve an offender from the punishment prescribed for his offense. It can hardly be said that courts, in giving credit for time served under a subsequently vacated sentence, forgive all or part of the punishment; rather they do no more than recognize that the punishment which the defendant has undergone was for this very same offense, and that a portion of the price for the crime has been exacted under the earlier sentence.

Possibly one of the strongest reasons for this denial of credit is the desire of courts to discourage appeals. Belated review of a host of cases has followed the decision of Betts v. Brady, requiring state courts to furnish counsel in order that the Fourteenth Amendment's due process requirements might be met, at least in cases where youth, inexperience, local hostility, or the nature of the charge, make trial without counsel unfair. Reversals in such

50. People v. Lueckfield, 396 Ill. 520, 72 N. E. 2d 198 (1947); Ex parte Wilkerson, 76 Okla. Crim. 204, 208, 135 P. 2d 507, 509 (1943); Ogle v. State, 43 Tex. Crim. 219, 63 S. W. 1009 (1901).
51. Illinois' labyrinthian appellate procedure has, of course, been notorious. See speech Chief Justice Vinson, Sept. 7, 1949, 69 Sup. Ct. 855, 862-64 (1949).
53. Arising from deprivation-of-counsel cases were State ex rel. Drankovich v. Murphy, 248 Wis. 433, 22 N. W. 2d 540 (1946); McDowell v. State, 225 Ind. 495, 76 N. E. 2d 249 (1947); and In re De Meerleer, 323 Mich. 287, 35 N. W. 2d 255 (1948) (all denying credit); State v. Stroemple, 355 Mo. 1147, 199 S. W. 2d 913, cert. denied, 331 U. S. 857 (1947) (apparently
cases, at this late date, make necessary new trials in which the prosecution may be handicapped by the absence of witnesses, the shortness of memory, and the leniency of the jury toward a defendant who has already suffered long imprisonment.54

In Illinois, one of the most severe problems arose when the 1941 indeterminate sentence law was declared unconstitutional in 1942.55 In the interim many defendants were sentenced under the unconstitutional enactment. Upon resentencing—even though no retrial was involved—the Illinois courts refused credit.56 Likewise they have refused credit when the original sentences have been excessive or otherwise illegal.57 The only credit the Illinois courts have regularly allowed is where the defendant has already served a period in excess of the statutory maximum.58

Consequently it is clear that a number of factors have induced courts to adopt this doctrine. There are strong reasons impelling them to do so, but unfortunately they do not lead to either sound interpretation of punishment statutes or substantial fairness in administering the criminal law.

(D) The Effects of the Inequity

The results are undesirable for many reasons. First, there is an inevitable sense of discontent among both the prisoners affected and


54. In re Doelle, 323 Mich. 241, 249, 35 N. W. 2d 251, 255 (1948): “Defendant made no claim of improper sentence until over seven years had elapsed and as the trial judge stated it had become difficult to obtain the testimony offered at the first trial in behalf of the plaintiff.” In Ogle v. State, 43 Tex. Crim. 219, 221, 233, 63 S. W. 1009, 1012 (1901), the original conviction of murder in the second degree with a sentence of 99 years was set aside 17 years later, the defendant retried, and again convicted of murder in the second degree. Despite an instruction not to consider the fact defendant had been imprisoned some 17 years, the jury fixed the punishment at 5 years.

55. People v. Montana, 380 Ill. 596, 608-09, 44 N. E. 2d 569 (1942) (violate of separation of powers to subject judicially imposed maximum and minimum sentences to administrative revision).

56. Typical are People v. Wilson, 391 Ill. 463, 63 N. E. 2d 488, 575 (1945), cert. denied, 327 U. S. 801 (1946) (no credit for three years served); People v. Starks, 395 Ill. 567, 71 N. E. 2d 23 (1947) (no credit for three years as of right but dictum that credit could be given by sentencing court shortening the maximum). Worse than this is the loss of good time credits and postponement of eligibility for parole. See note 4 supra.

57. People v. Atkinson, 376 Ill. 623, 35 N. E. 2d 58 (1941); People v. Lueckfield, 396 Ill. 520, 72 N. E. 2d 198 (1947); People v. Williams, 404 Ill. 624, 89 N. E. 2d 822 (1950).

the public at large, because the law is operating irrationally. To require $A$ to serve substantially more time than $B$, for the same offense, simply because $A$ was improperly tried and sentenced in the first place, is to discriminate without reason. It is hard enough to explain to a lay person why the few weeks or months spent in jail before trial, or while an appeal is pending, are not credited. But it makes little sense to anyone when courts require defendants to throw years in prison into the bottomless pit of legal anachronism.

Indicative of the reaction are the repeated assaults made by defendants (and, necessarily, the profession which represents them). Furthermore, judges at the trial level have often tried to ameliorate the harshness of the doctrine by evasive devices. This brings with it a waste of judicial and executive time, for multiple appeals, and applications for parole or pardon in one form or another are predicated upon the very inequity of the treatment.

Another difficulty which the layman also resents is the effect that such denial of credit has upon the function of the jury in determination of guilt. Thus, where the court believes that at the second trial the jury sought to make allowance for the time the defendant had already served by finding him guilty of a lesser offense only, and consequently denies credit against the sentence ultimately imposed, the effect is to deprive the jury of its proper function. The court's surmise may be correct, but it cannot be denied that where, for example, the charge is murder in the first degree, and instructions are given allowing the jury to consider manslaughter, the twelve finders of fact well might find, independently of any notion of balancing the accounts, that the defendant was guilty of nothing more than manslaughter.

59. The large number of jurisdictions which, during the past two decades, have adopted statutes allowing credit, indicates the modern judgment as to the fairness of the proposition. See notes 39, 40 supra, and text at notes 69-88 infra.

60. Consider People v. Green, 394 Ill. 173, 175, 68 N. E. 2d 263, 264 (1946) (trial court said: "It is further ordered by the Court that the minimum of three years be considered served."). In People ex rel. Barrett v. Bardens, 394 Ill. 511, 68 N. E. 2d 710 (1946) the trial court, on remand for resentencing, placed the defendant on probation, although the defendant had already served nearly three years; the State Supreme Court reversed.

61. The case of De Meerleer is typical: (1) denial of motion for leave to file a delayed motion for new trial, affirmed, 313 Mich. 548, 21 N. W. 2d 849 (1946); (2) reversed and remanded, 329 U. S. 663 (1947); (3) new trial resulting in conviction of manslaughter; (4) hearing in trial court on issue whether any sentence could be imposed; (5) denial of habeas corpus to relieve from sentence which denied credit for time served, 323 Mich. 287, 35 N. W. 2d 255 (1948); (6) certiorari denied, 336 U. S. 946 (1949); (7) defendant released on parole (1949).

The result of all these considerations is that there is no sound rationale for this treatment of an unfortunate class of criminal defendants. The injustice and illegality of the treatment the defendant has received before his first sentence began is no justification for discriminating against him at a second proceeding. In the field of punishment for crime, the range of governmental operation is admittedly broad, as the indeterminate sentence, recidivist, and juvenile delinquency statutes witness. Still, as Mr. Justice Brandeis once wrote:

"... the classification must rest upon a difference which is real, as distinguished from one which is seeming, specious, or fanciful, so that all actually situated similarly will be treated alike; ... the object of the classification must be the accomplishment of a purpose or the promotion of a policy ...; ... the difference must bear a relation to the object of the legislation which is substantial as distinguished from one which is speculative, remote, or negligible." \(^{663}\)

It scarcely needs argument to show that the circumstance that the defendant has received treatment in the first instance which was violative of the Constitution is not a valid reason for making the distinction. Nor is it a policy congruent with our Constitution to permit courts to deny credit for time already served, and thus discourage the use of review procedures. Nor for that matter, are state constitutional objections sufficient grounds for denying the federal guarantee of equal protection of the laws. \(^{664}\)

Although several petitions have been made, not yet has the United States Supreme Court undertaken to review such a case. \(^{665}\) Perhaps it may be too narrow an issue to warrant the expenditure of the Court's carefully rationed time, or possibly the cases presented have not drawn the federal question with exactitude. Nevertheless, the least that can be said is that there is considerable doubt

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63. See Quaker City Cab Co. v. Pennsylvania, 277 U. S. 389, 406 (1928) (dissenting opinion).
64. U. S. Const. Amend. XIV, § 1; Art. VI, cl. 2.
65. See cases cited notes 1, 49 supra.
about the constitutionality of the practice. And considering the
great number of jurisdictions which have, by statute or decision,
taken a positive stand requiring that credit be given, it would
seem to be the sense of the country as a whole that denial of credit
is an intolerable abuse of criminal process.66

III. THE NEED FOR LEGISLATION

One unfortunate feature of the situation is that most of the
states, in adopting the doctrine, have coupled the decision with a
pronouncement that it is the legislature which is to blame. In nearly
all cases, the legislature has been silent as the Sphinx in the
matter and the implications of the several judicial conceptions we
have discussed are the source of the trouble.67 Consequently it
appears that statutory correction of the situation is essential.68 The
courts are unable to reverse their position without incurring the
wrath of those who have already been denied credit. And perhaps
jurisdictions under pressure from many belated criminal appeals
are unwilling to do so. Consequently only a broad legislative enact-
ment can hope to correct the difficulty definitively. Furthermore,
continued legislative acquiescence may well be taken as approval
of the doctrine and perhaps greater extension will occur.

66. See statutes discussed in text at notes 69-88 infra. Consider also that
without direct statutory authority federal courts generally allow substantial
credit, although with varying exactitude: King v. United States, 69 App.
D. C. 10, 98 F. 2d 291 (1942); Mitchell v. Youell, 130 F. 2d 880, 882
(4th Cir. 1942); McDonald v. Moinet, 139 F. 2d 939, 941 (6th Cir.), cert.
denied, 322 U. S. 730 (1944); Tinkoff v. United States, 86 F. 2d 888, 880
(7th Cir. 1936), cert. denied, 301 U. S. 689 (1937); and Bryant v. United
States, 214 Fed. 41 (8th Cir. 1914). Also granting credit, without direct
statutory authority: State v. Nelson, 160 Fla. 744, 36 So. 2d 427 (1948);
Helton v. Mayo, 153 Fla. 616, 618, 15 So. 2d 416 (1943) ("Otherwise peti-
tioner would be done a grave injustice."); Owen v. Comm., 214 Ky. 394,
283 S. W. 400 (1926); Jackson v. Comm., 187 Ky. 760, 220 S. W. 1045 (1920)
(a leading case); State ex rel. Petcoff v. Reed, 138 Minn. 465, 468, 163 N. W.
984, 985 (1917); Laury v. State, 187 Tenn. 391, 215 S. W. 2d 797 (1948);
State v. Lee Lim, 79 Utah 68, 7 P. 2d 825 (1932) (assuming credit was
properly allowed).

67. Aside from the constitutional objection, the position taken in State
ex rel. Drankovich v. Murphy, 248 Wis. 433, 22 N. W. 2d 540 (1946)
might possibly be said to be supported by the implication of Wis. Stat.
§ 359.07 (1947): "... All sentences shall commence at twelve o'clock, noon,
on the day of such sentence, but any time which may elapse after such
sentence, while such convict is confined in the county jail, or is at large on
bail, or while his case is pending in the supreme court upon writ of error or
otherwise, shall not be computed as part of the term of such sentence. ..."
(Enacted 1943, Italics added.) But it is scarcely conceivable that the legis-
lateve purpose included cases in which appeal was "pending" for eleven
years.

The italicized portion was deleted by Wis. Laws 1946-47, c. 631, § 166.
See Wis. Stat. § 359.07 (1949).

68. See text to note 49 supra.
Now the few statutes dealing with this problem fall generally into three classes:

1. Granting discretion to the courts to allow or deny credit;
2. Requiring credit at resentence after reversal;
3. Requiring credit for all time in custody awaiting and attending trial, and prosecuting appeal.

(1) Discretionary Credit

The discretionary power has all the evils and dangers of discretion uncontrolled by a statutory standard or expressed legislative purpose. Furthermore it invites contests over what is an abuse of discretion. The only benefit from allowing judicial freedom to grant or withhold credit is that it enables courts to combat abuses

69. Texas, West Virginia, and Kansas. See note 72 infra.
70. Arkansas, North Dakota, Iowa, Washington, Maryland, Massachusetts, California, and Puerto Rico. See notes 74, 79, 81, 83, and 84 infra.
72. (a) Credit against any sentence of confinement:
   (1) Tex. Stat. Code Crim. Proc. art. 768 (Cum. Supp. 1949): "If a new trial is not granted, nor judgment arrested in felony cases, the sentence shall be pronounced in the presence of the defendant at any time after the expiration of the time allowed for making the motion for a new trial or the motion in arrest of judgment; provided that in all criminal cases the judge of the court in which defendant was convicted, may within his discretion, give the defendant credit on his sentence for the time, or any part thereof, which said defendant has spent in jail in said cause, from the time of his arrest and confinement until his sentence by the trial court; and provided further that in all cases where the defendant has been tried for any violation of the laws of the State of Texas, and has been convicted and has appealed from said judgment and/or sentence of conviction, and where said cause has been affirmed by the Court of Criminal Appeals, and after receipt of the mandate by the Clerk of the trial court, the judge is authorized to again call said defendant before him, and, if, pending appeal, the defendant has not made bond or entered into recognizance and has remained in jail pending the time of such appeal, said trial judge may then in his discretion resentence the defendant, and may subtract from the original sentence pronounced upon the defendant, the length of time the defendant has lain in jail pending such appeal; provided, however, that the provisions of this Act shall not apply after conviction and sentence in felony cases in which bond or recognizance is not permitted by law."

   (2) W. Va. Code Ann. § 6136 (1949): "Whenever any person is convicted of an offense in a court of this State having jurisdiction thereof, and sentenced to confinement in jail or the penitentiary of this State, or by a justice of the peace having jurisdiction of the offence, such person may, in the discretion of the court or justice, be given credit on any sentence imposed by such court or justice for the term of confinement spent in jail awaiting such trial or conviction."

   (b) Credit against any jail sentence:
   (1) Kan. Gen. Stat. Ann. § 62-1533 (Cum. Supp. 1947): "In any criminal action in which the defendant pleads guilty to a misdemeanor or is found guilty of a misdemeanor by a jury, or by the court if the trial is by the court, the judge, if he sentences the defendant to jail, may deduct from the sentence the time, if any, the defendant has spent in jail pending the disposition of the defendant's case." (Italics added.)
like prolonged frivolous appeals and other dilatory tactics. But the light is scarcely worth the candle. Stiffened bail requirements and affirmative expedition of the calendar by strict enforcement of court rules are better correctives than ad hoc refusal of equal treatment.\textsuperscript{73}

At any rate, dilatory practices are not usually employed by men in jail or prison. Even those held in jail pending appeal hardly find the difference between jail life and prison life worth prolongation of the review.

\begin{enumerate}
\item \textbf{Mandatory Credit}
\end{enumerate}

The mandatory credit for time served on a sentence subsequently reversed has the advantage of eliminating the doubt, confusion, and contestability of the discretionary credit. Yet the statutes which have adopted it usually have suffered from a lack of broad generality. Thus four states\textsuperscript{74} have pre-1900 provisions which require the credit only when there has been a retrial—no express provision being made for credit on resentence after reversal of the judgment only. It well may be that the legislatures in those states desired that courts, \textit{a fortiori}, grant credit on resentence \textit{without retrial}. But that interpretation has not been consistently followed.\textsuperscript{75} And furthermore some of these statutes are narrow in other respects: allowing credit only for time "in the penitentiary,"\textsuperscript{76} or for time "imprisoned in the execution of the judgment appealed

\textsuperscript{73} See Holtzoff, \textit{Defects in the Administration of Criminal Justice}, 9 F. R. D. 303, 305 (1949).

\textsuperscript{74} (a) Ark. Stat. Ann. § 43-2728 (1947): "If the defendant upon the new trial is again convicted, the period of his former confinement in the penitentiary shall be deducted by the court from the period of confinement fixed in the last verdict of conviction."

(b) N. D. Rev. Code § 29-2834 (1943): "If a defendant, during the pendency of an appeal, has been imprisoned in the execution of the judgment appealed from, and upon a new trial ordered by the supreme court shall be again convicted, the period of his former imprisonment shall be deducted by the district court from the period of his imprisonment to be fixed on the last verdict of conviction."

(c) Iowa Code § 793.26 (1946): "If a defendant, imprisoned during the pendency of an appeal, upon a new trial ordered by the supreme court is again convicted, the period of his former imprisonment shall be deducted from the period of imprisonment to be fixed on the last verdict of conviction." (Originally Iowa Revised Stat. § 4933 (1860).)

(d) Wash. Rev. Stat. Ann. § 1750 (Remington, 1932): "If a defendant who has been in prison during the pendency of an appeal, upon a new trial ordered by the supreme court, shall be again convicted, the period of his former imprisonment shall be deducted by the superior court from the period of imprisonment to be fixed on the last verdict of conviction." (Italics added.)


\textsuperscript{76} Ark., see note 74 (a) \textit{supra}. 
from"77 or for time imprisoned "during the pendency of an appeal."78

On the other hand, the Maryland statute,79 adopted with the avowed purpose of reversing a contrary decision,80 allows credit only when the new sentence follows reversal of the previous judgment or sentence alone, and makes no provision for resentence after a new trial.81 Of course, there may have been a fear that a double jeopardy defense might be possible at retrial if the first sentence were treated as valid punishment.82

Recently California adopted a provision prescribing mandatory credit for all confinement under invalidated or modified judgments.83 Couched in general terms, it avoids the error of correcting one injustice only to create another. This general approach was also employed in a Puerto Rican statute enacted in 1946.84 However, the Puerto Rican provision, in its entirety, has the broadest scope of all—allowing credit for all confinement prior to sentence, during the pendency of appeal, and under a subsequently annulled, vacated, or suspended sentence.85

77. N. D., see note 74 (b) supra.
78. N. D., Iowa, Wash., see note 74 (b), (c), (d) supra.
79. Md. Ann. Code Gen. Laws art. 5, § 87 (1939): "Whenever any writ of error or appeal shall be brought upon any judgment, or any indictment, information, presentment, inquisition or conviction in any criminal case, and the court of appeals shall reverse the judgment for error in the judgment, or sentence itself, it shall be the duty of the court of appeals to remit the record to the court below, in order that such court may pronounce the proper judgment upon such indictment, information, presentment, inquisition, or conviction; provided, however, that it shall be the duty of the court in passing any sentence under the provisions of this section to deduct from the term of sentence the time already served by the prisoner under the previous sentence from the date of his conviction." (Italics added.)
80. McDonald v. State, 45 Md. 90 (1876) had followed the early English cases cited note 33 supra. See Lynn v. State, 84 Md. 67, 83 (1896).
81. Similarly, in Massachusetts, where credit has usually been allowed (see Murphy v. Commonwealth, 174 Mass. 369, 372-73, 54 N. E. 860, 862 (1899)), a limited statutory provision was made in Mass. Ann. Laws, c. 278, § 28C (Supp. 1949): "[Special sentence revision court may impose corrected sentence.] . . . Time served on a sentence appealed from shall be deemed to have been served on a substituted sentence."
82. See text at note 26 supra.
83. Cal. Pen. Code § 2900.1 (1949): "Where a defendant has served any portion of his sentence under commitment based upon a judgment which judgment is subsequently declared invalid or which is modified during the term of imprisonment, such time shall be credited upon any subsequent sentence he may receive upon a new commitment for the same criminal act or acts."
84. Puerto Rico Laws 1946, p. 752, # 293, § 3: "The time that a person may have been deprived of his liberty under a sentence that is subsequently annulled or reversed, shall be fully deducted from the prison term that said person must serve in case he is imprisoned again for the same offenses for which he was imposed the sentence so annulled or reversed." (This official translation has suffered.)
85. Puerto Rico Laws 1946, p. 752, # 293, § 1: "The time that a person
This broadest corrective has the advantage of simplicity and uniformity, although there is needless repetition in the Puerto Rican formula. It is desirable, if feasible, to fell the whole shambles of error at one blow; and to allow credit for time awaiting trial, prosecuting appeal, and the like, in order to prevent as much as possible unnecessary and irrational inequalities in the treatment of criminals. On the other hand, the specific correctives have some practical advantage in their very limitation. By restricting the modification to the resentence problem—a definite evil of considerable proportions—the chance of passage by legislatures conservative as to change in the criminal law, is improved.

(3) Credit for Pre-sentence Confinement

The third type of statute simply requires that credit be allowed for all pre-sentence confinement attributable to the same

charged with the commission of any public offense may have been deprived of his liberty, shall be fully deducted from the prison term,...

§ 2: "The time that a person may have been deprived of his liberty awaiting the result of an appeal taken from the sentence imposed upon him, shall be fully deducted."

§ 4: "The time that a person may have been deprived of his liberty under a sentence which is subsequently suspended shall be fully deducted..."

86. Compare the English Criminal Justice Act of 1948, 11 & 12 Geo. 6, c. 58: § 38 requires credit for time in custody during pendency of appeals (under special conditions as an appellant) only for a period in excess of six weeks, unless leave to appeal, or a certificate of probable cause is granted, with discretion in the Court of Criminal Appeal to allow further credit. The English have treated this problem of equality of sentences with great care because of its effect upon the attitude of the convict. See the opinion of Lord Goddard, C. J. in Rex v. Payne, [1950] 1 All Eng. Rep. 102, 103: "This man received a heavier sentence than the other two because he was tried in a different court on a different day. This is a most inconvenient practice and it ought to cease. It can only lead to different sentences being passed, and will, naturally, leave a sense of grievance in the minds of prisoners."

87. In California, on the whole credit had been allowed, but there were decisions and dicta denying credit where the vacated sentence and the resentence were to confinement in different types of institutions. E.g., Ex parte Ralph, 27 Cal. 2d 866, 872, 168 P. 2d 1, 5 (1946); Ex parte Wilson, 202 Cal. 341, 345, 260 Pac. 542, 543 (1927).

88. (1) N. Y. Pen. Law § 2193: "Any time spent by a person convicted of a crime in a prison or jail prior to his conviction and before sentence has been pronounced upon him, shall become and be calculated as a part of the term of the sentence imposed upon him, whether such sentence is an indeterminate one or for a definite period of time; and such time shall, in addition, to the discretionary reduction allowed under the provisions of the correction law, be deducted from the term of the sentence so imposed, under the provisions of article nine of the correction law."

(2) Pa. Stat. Ann. tit. 19, § 894 (Supp. 1949): "From and after the passage of this act, all sentences for criminal offenses of persons who at the time sentence is imposed are held in custody in default of bail, or otherwise, shall begin to run and be computed from the date of commitment for the offense for which said sentence shall be imposed, unless the person sentenced shall then be undergoing imprisonment under a sentence imposed for any other offense or offenses, in which case the court shall direct whether the
criminal offense. While these statutes were drawn with the primary object of changing the prior rule which denied credit for jail time awaiting or attending trial, their ultimate effect is to move the date of commencement of service of sentence back to the time the defendant was last arrested for one and the same offense. Of course, credit is not, and should not be allowed for time not actually in custody. There must be no windfall for the defendant who is released on personal recognizance or bail.

One thing this third type of statute accomplishes most effectively is the elimination of the distinction between time served in jail, reformatory, house of correction, and prison, for the purpose of giving credit. One of the chief reasons courts did not undertake, without statutory authority, to allow credit for pre-sentence jail time was the absence of the strict regimen and hard labor of the other institutions. But, of course, from the prisoner's point of view, the basic punishment is not the regimen or the labor, but the loss of his liberty. Consequently jail and prison confinement are basically equivalent, so that a convict who receives credit for proportionately greater jail time is not being favored substantially.

new sentence will run concurrently or consecutively].” (Italics added.) Comm. ex rel. Accobacco v. Burke, 162 Pa. Super. 592, 596, 60 A. 2d 426, 429 (1948) indicates that “commitment” here means the act of placing in custody after arraignment to await trial.

(3) Va. Code Ann. § 53-208 (1950): “Any person who may be sentenced by any court to a term of confinement in the penitentiary, or by any court or trial justice to a term of confinement in jail, for the commission of a crime, or in jail for default in the payment of a fine, shall have deducted from any such term all time actually spent by such person in jail or the penitentiary awaiting trial, or pending an appeal, and it shall be the duty of the court or trial justice, when entering the final order in any such case, to provide that such person so convicted be given credit for the time so spent. [No deduction shall be allowed for time not actually confined, nor to escapees; but the superintendent of the penitentiary shall allow deduction to those now confined.]” (Italics added.)

89. The effect of the discretionary credits allowed in Texas, West Virginia, and Kansas (see note 74 supra) is, within the limits of those statutes, the same. And Puerto Rico has prescribed a credit for pre-sentence time by means of a separate section of its statute. See § 1, note 85 supra.

90. See note 88 supra: (1) N. Y.: “Any time spent ... in a prison or jail....” (2) Pa.: “... held in custody in default of bail, or otherwise, shall begin to run and be computed from the date of commitment....” (3) Va.: “... all time actually spent ... in jail or the penitentiary....” See also, note 83 supra: Cal.: “... any portion of his sentence under commitment....” And also, note 84 supra: Puerto Rico: “The time that a person may have been deprived of his liberty....”

91. See cases cited note 41 supra. Of course, the cost of confinement in jail is usually greater than in prison because prisoners in jail are not required to work. See Fairley v. State, 114 Miss. 510, 513, 75 So. 374, 375 (1917) (Ethridge, J., dissenting).
From the administrative point of view, there is a definite advantage in the simplicity of treating confinement of all types as fungible.92

(B) Who and How?

A few of the jurisdictions which have adopted these corrective statutes have also prescribed what agency is to allow credit, and in what manner. If the statutes are to be really effective, they must, as we have seen, be mandatory, and they must make clear which governmental body is to allow the credit. Only by thus clarifying the procedure can there be assurance that each defendant will receive his credit, and receive it only once.93

The alternatives available are several, and the choice depends to some extent on larger questions of penal policy than concern this paper. On the whole, where the jury fixes the punishment, it is probably better to instruct them not to allow credit, because the court will.94 Then the jury can direct itself to the instant case only, and the defendant can see for himself that the allowance has in fact been made, without proximate danger of double credit.

A closer question is whether the court, the prison authority, or the sentence board should make the deduction in jurisdictions where the court fixes the punishment. This depends partly on the mechanics of handling the commitment papers. Some jurisdictions have left it to the prison authority on the ground that the clerical data can be more easily transferred when the prisoner is re-committed under sentence or moved to a new place of confinement.95 In those states where sentence boards fix the minimum

92. When defendant has been erroneously confined in the penitentiary for an offense requiring only confinement in county jail, Pennsylvania courts allow commensurately greater credit than the actual time served. Comm. ex rel. Stuecky v. Burke, 165 Pa. Super. 636, 70 A. 2d 466 (1950). On the other hand, California denied credit when the subsequently vacated sentence was of lesser severity, but noted that the state board of prison directors would probably consider the time served. Ex parte Wilson, 202 Cal. 341, 260 P. 542 (1927).

93. Leaving it indefinite are: Cal. Pen. Code § 2900.1 (1949) ("... such time shall be credited...”); Mass. Ann. Laws c. 278, § 28C (Supp. 1949) ("... Time served... shall be deemed...”).

94. Reed v. State, 147 Tex. Crim. 41, 44, 177 S. W. 2d 784, 785 (1944) (since court had discretion to award credit for pre-sentence jail time, defendant's counsel properly prevented from arguing to jury that it should consider the time defendant had spent in jail). But compare Hale v. Comm., 137 Va. 774, 119 S. E. 49 (1923) (error to instruct jury to disregard the time served, because court would later make the deduction; jury should be allowed, but not required, to consider time already served, along with other factors relevant to fixing punishment).

95. N. Y. Pen. Law § 2193: "... Prior to imposition of sentence, a certificate shall be furnished to the judge who is to impose sentence, by the officer having custody of the defendant, showing the length of time spent by the defendant in a prison or jail prior to his conviction and before sentence.
sentence after an observation period, necessarily the credit must be considered in fixing the tentative date of earliest discharge.\(^9^6\)

Where the court has an effective discretion in fixing the sentence, it is very desirable that the court itself make the deduction.\(^9^7\) This is for two reasons: (1) it brings home to the court the circumstance of the previous sentence and so dramatizes the fact that the second sentence is in a sense *nunc pro tunc*; (2) it makes certain to the defendant that the credit has been allowed by the final adjudicating body.

Whichever procedure is adopted, it is essential that the credit appear accurately and definitely *on the record* for all to see. By converting the credit into an automatic, mandatory deduction, at some stage, the possibility of litigation is almost eliminated, and in cases of error or marginal dispute, mandamus is a reasonably clear-cut remedy.\(^9^8\) A further advantage is that the spectre of double credit is obliterated, so that there is no temptation to lay down a general rule denying all credit in order to prevent a defendant from asserting a claim to credit which probably has already been allowed.\(^9^9\)

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At the time of commitment . . . it shall be *the duty of the officer . . . to indorse upon the commitment papers the length of time spent by the person convicted in a prison or jail prior to his conviction and before sentence which is to be calculated as part of the term of sentence imposed upon such person.* Puerto Rico Laws 1946, p. 752, § 293, § 6: "The deductions mentioned in this Act shall be made by the proper penal authorities with preference over any other reductions or deductions authorized by other laws, except where it is otherwise provided in said law." (Italics added.)

\(^9^6\) Lindsey v. Superior Court of King County, 33 Wash. 2d 94, 104, 204 P. 2d 482, 487 (1949): "We are of the opinion, and declare, that in a case where a convicted person is entitled to a time credit for prior imprisonment, the judgment and sentence entered by the superior court should so state on its face, and that such credit should then apply on the maximum sentence imposed by the court and also upon the 'duration of confinement' when fixed by the board of prison terms and paroles; this can easily be accomplished by having the judgment state the time from which the sentence and imprisonment thereunder shall run."

\(^9^7\) Prescribing that the court make the deduction: Kansas, Texas, West Virginia, note 72 *supra*; Arkansas, Iowa, North Dakota, Washington, note 74 *supra*; Pennsylvania, Virginia, note 88 *supra*.

\(^9^8\) Employed in substance in Lindsey v. Superior Court of King County, 33 Wash. 2d 94, 204 P. 2d 482 (1949).

\(^9^9\) The ambiguity of the record caused extreme difficulty of this kind in *Ex parte Fritz*, 179 Cal. 415, 177 Pac. 157 (1918) (limiting earlier cases allowing credit); *People ex rel. Boyle v. Ragen*, 460 Ill. 571, 81 N. E. 2d 444, *cert. denied. 335 U. S. 868* (1948) (denying credit); *Travis v. Hunter*, 109 Iowa 602, 80 N. W. 680 (1899) (relying on presumption of regularity); *State v. Stroemple*, 355 Mo. 1147, 199 S. W. 2d 913 (1947) (rejecting claim of double jeopardy); *McCormick v. State*, 71 Neb. 505, 99 N. W. 237 (1904) (rejecting claim of double jeopardy); *Ex parte Wilkerson*, 76 Okla. Crim. 204, 135 P. 2d 507 (1943) (at retrial, jury had apparently allowed credit; on appeal [apparently to prevent double credit] overruled *Ex parte Williams*, 63 Okla. Crim. 395, 75 P. 2d 904 (1938), which had held credit
Furthermore, some clarification may be needed to indicate the effect of the deduction upon parole eligibility, good conduct credits, work credits, and other deductions. This is especially so when the deduction is made by the prison authority or sentence board. It has been accomplished in three ways:

1. by stating that the credit for time served on subsequently vacated sentences is in addition to other credits and deductions;\textsuperscript{100}
2. by giving the credit for time served priority over other credits and deductions;\textsuperscript{101}
3. by making the resentence \textit{nunc pro tunc}, as of the date of the vacated sentence, for all purposes.\textsuperscript{102}

The desirable approach depends upon the local penal system entirely. The third method—the \textit{nunc pro tunc} sentence—has admirable simplicity, involving least disruption of existing ideas and habits in most jurisdictions.\textsuperscript{103}

\textbf{IV. CONCLUSION}

Consequently it appears that the practice of denying credit for time served under a sentence subsequently vacated is unjust and inequitable. It trenches upon the equal protection guarantee of the Fourteenth Amendment. It is a departure from even-handed justice. It is an unnecessary irrational feature of the criminal system of the jurisdictions which have espoused it.

Legislative correction is necessary and desirable. But unless

\textsuperscript{100} N. Y. Pen. Law § 2193 ("... in addition to the discretionary reduction allowed under the provisions of the correction law... "); Va. Code Ann. § 53-208 (1950) ("... in addition to the good conduct allowance...").

\textsuperscript{101} Puerto Rico Laws 1946, § 293, § 6: "The deductions mentioned in this Act shall be made by the proper penal authorities with preference over any other reductions or deductions authorized by other laws, except where it is otherwise provided in said laws."

\textsuperscript{102} Pa. Stat. Ann. tit. 19, § 894 (Supp. 1949): "... shall begin to run and be computed from the date of commitment... " And see also Lindsey v. Superior Court of King County, 33 Wash. 2d 94, 104, 204 P. 2d 482, 487 (1947): "... by having the judgment state the time from which the sentence and imprisonment thereunder shall run."

\textsuperscript{103} Of course a provision like 36 Stat. 1157 (1911), as amended, 18 U. S. C. § 3568 (Supp. 1949), construed literally, may interfere with the \textit{nunc pro tunc} resentence:

"The sentence of imprisonment of any person... shall commence to run... " And see also Byers v. United States, 175 F. 2d 654, 656 (10th Cir. 1949).
such correction accomplishes certain things, it will defeat its purpose. The amendatory statute must, consistently with the rest of the jurisdiction's criminal procedure and penal system, provide for the following:

1. Mandatory credit for time served under a subsequently vacated sentence;
2. Designation of the agency to allow the credit;
3. Prescription of the manner in which the allowance of the credit is to be placed upon the record, and the prisoner informed of it;
4. Clarification of the relationship of the credit for such time served to other deductions permitted for different purposes.

The selection of the specific approach to be used in a given jurisdiction must depend, as has been indicated, upon the peculiarities of the local system. Adequate materials are available among the statutes which have been employed. The need for action is urgent, lest an anachronistic dogma continue the perversion of justice.