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Constitutional Law--Imprisonment of the Indigent for Non-Payment of Fines

Richard A. Arnold

CONSTITUTIONAL LAW—IMPRISONMENT OF THE INDIGENT FOR NON-PAYMENT OF FINES

*Few would care to say there can be equal justice where the kind of punishment a man gets depends on the amount of money he has.**

I. INTRODUCTION

The concept of equal protection became a viable constitutional remedy for the economically deprived after the 1956 United States Supreme Court decision of *Griffin v. Illinois*.[1] This case was an effort to alleviate discrimination in the judicial process against those unable to pay the cost of litigation by removing indigency as a factor in the administration of justice. Despite some criticism of this egalitarianism, later cases[2] have reinforced this attempt to mitigate the disparate treatment of indigents in the criminal process. Unfortunately, the Supreme Court has been particularly tardy in applying equal protection to indigents who are imprisoned for the nonpayment of fines. Although the Supreme Court's recognition of equal protection for indigents is a relatively recent development, the lateness of its application to imprisonment for nonpayment of fines seems strange when one considers the wide acceptance and broad use of this form of punishment. This type of punishment originated in twelfth-century England[3]

* Edgerton, C. J. dissenting in Wildeblood v. U. S., 284 F.2d 592, 593 (D.C. Cir. 1960).

1. 351 U.S. 12 (1956). This case held that the failure to provide an indigent with a trial transcript which was necessary for appeal is unconstitutional.

2. *E.g.* Douglas v. California, 372 U.S. 353 (1962), which held that when the merits of the only appeal an indigent has as of right are decided without benefit of counsel in a State criminal case, there has been a discrimination between the rich and the poor which violates equal protection guarantees of the Constitution; *see also* Rinaldi v. Yeager, 384 U.S. 305 (1966). A state statute requiring an unsuccessful indigent appellant to repay the cost of a transcript used in preparing his appeal which applies only to one incarcerated, but not to others constitutes invidious discrimination in violation of the Equal Protection Clause of the fourteenth amendment.

3. SUTHERLAND and CRESSY, CRIMINOLOGY 275 (6th ed. 1960).

and its wide acceptance in this country has been accentuated by the ever increasing use of fines[4] in this century.

This Case Comment is an attempt to show how the law has progressed under the standard of equal protection when faced with opposition from one of the longest standing widely used practices in this country's legal system.

II. EQUAL PROTECTION AND THE INDIGENT

Anytime a court is faced with an equal protection problem, there is a basic analytical procedure it must apply in order to properly decide the merits of the case. The equal protection remedy, unlike other constitutional rights is limited by the use of comparison to other "similarly situated" individuals. In other words, if the government were violating everyone's constitutional rights then equal protection would not be a viable remedy. In deciding a case under equal protection analysis, the court must consider the rationality of the unequal treatment received by the individual or group alleging discrimination. The nature of the classification has a direct bearing on the standard of rationality that is required to justify the difference in treatment.

There are certain "suspect classifications" that give rise to a presumption of "invidious discrimination." *Griffin v. Illinois*[5] placed classifications based on poverty into this suspect group along with other classifications based on "religion, race or color." The Court, in considering the rationality of this classification, concluded,

> "Plainly the ability to pay costs in advance bears no rational relationship to a defendant's guilt or innocence."[6]

It is interesting to note that in situations involving "suspect classifications" the presumption against rationality can only be overcome by a compelling state interest. Even if there is a compelling state interest to be served by the classification under attack, the State must show that there is not an alternative that would serve the same purpose. The real impact of classification as a "suspect classification" is that it shifts

4. This has been attributed to the increased number of "minor offenses" with some estimates figuring that fines constitute 75% of all sentences imposed in the United States. RUBIN, CRIMINAL CORRECTION 230 (1963).

5. 351 U.S. 12 (1956). The court in articulating this concept, said "In criminal trials a state can no more discriminate on account of poverty than on account of religion, race or color." *Id.* at 18.

6. *Id.* at 18.

the burden of proof from those alleging discrimination to the State.

In *Griffin* the State was unable to show a compelling State interest that could give rationality to this classification.[7] With this shifting of the burden of proof to the State, *Griffin* has served as a spring board from which indigents have been able to attack other discriminatory practices. Although later decisions[8] extended this concept beyond the *Griffin* factual situation, it was *Douglas v. California*[9] that brought this analysis to its now imposing stature. The Court noted that the evil being attacked in *Douglas* was the same as in *Griffin*, discrimination against the indigent. Since this case involved a "suspect classification," the State was required to justify a system that denied the right to counsel on appeal to most indigents. This denial was based on a summary determination by a state court that the appeal was without merit.[10] The Court concluded that there was no compelling state interest being served by this discrimination; therefore, it was an unconstitutional denial of equal protection of the laws. Armed with the analysis in these decisions indigents have slowly been reaching true equal status in the situations where there is no rational reason for unequal treatment.

7. The State argued that it was under no duty to provide appellate review and that if it did provide appellate review, it had a right to make decisions based on the expense of providing this service. Mr. Justice Frankfurter answered this very cogently in his concurring opinion:

> "Neither the fact that a State may deny the right of appeal altogether nor the right of a State to make an appropriate classification based on differences in crimes and their punishment nor the right of a State to lay down conditions it deems appropriate for criminal appeals, sanctions differentiations by a State that have no relation to a rational policy of criminal appeal or authorizes the imposition of conditions that offered the deepest presupporitions of our society."

Id. at 22.

8. *See* Draper v. Washington, 372 U.S. 487 (1963); Smith v. Bernett, 365 U.S. 708 (1961); Burns v. Ohio, 360 U.S. 252 (1959).

9. 372 U.S. 353 (1963).

10. The Court, in defining the nature of the discrimination involved, said,

> "[T]he rich man, who appeals, as of right, enjoys the benefit of counsel's examination into the record, research of the law and marshalling of arguments on his behalf, while the indigent, already burdened by a preliminary determination that his case is without merit is forced to shift for himself."

Id. at 398.

Obviously imprisonment for non-payment of a fine has an inherent detrimental effect on indigents; however, the problem has been to decide whether this detrimental effect is justified by a compelling state interest. Before examining how the United States Supreme Court applied the *Griffin-Douglas* rule in this situation, we should consider earlier cases challenging imprisonment of indigents for the non-payment of fines.

III. THE "PRE-WILLIAMS" APPROACH

Although it now seems apparent that the state interests in imprisonment of indigents for non-payment of fines are more illusory than real, the courts of this country took a long time before recognizing the basic lack of merit in this method of punishment.[11] There are actually four possible situations where imprisonment for non-payment discriminates against the indigent. These may be categorized as first, where the fine is the only statutorily approved punishment;[12] second, the "thirty day or thirty dollar" alternative sentence situation;[13] third, where imprisonment for non-payment, combined with the original jail sentence, results in a term of imprisonment beyond the statutory maximum sentence;[14] and fourth, where imprisonment for non-payment combined with the original jail sentence, results in a term of imprisonment less than the maximum statutory limitation.[15] While there is some confusion as to which situations are unconstitutionally discriminatory there is no doubt about the unconstitutionality of the first and third situations. Unfortunately, the discriminatory nature of any of these situations has not always been recognized by our courts.

11. Caveat, many courts still see merit in this form of punishment under limited situations. *E.g.* Kelly v. Schoonfield, 285 F. Supp. 732 (D. Md. 1968); United States *ex rel.* Privetera v. Kross, 239 F. Supp. 118 (S.D.N.Y.), *aff'd* 345 F.2d 533 (2d cir.), *cert. denied,* 382 U.S. 911 (1956).

12. Tate v. Short, 401 U.S. 395 (1971); Kelly v. Schoonfield, 285 F. Supp. 732, 735 (D. Md. 1968).

13. *See* Comment, *Fines, Imprisonment and the Poor: "Thirty Dollars or Thirty Days,"* 57 CALIF. L. REV. 778 (1969). This plan offers no real choice to a man too poor to pay the fine.

14. This is the principal situation which has been held unconstitutional. *E.g.* Williams v. Illinois, 399 U.S. 235 (1970); People v. Saffore, 18 N.Y. 2d 101, 218 N.E. 2d 686, 271 N.Y.S. 2d 972 (1966).

15. *E.g.* United States *ex rel.* Privitera v. Kross, 239 F. Supp. 118 (S.D.N.Y.), *aff'd,* 345 F.2d 533 (2d Cir.), *cert. denied,* 382 U.S. 911 (1965).

In *U.S.* ex rel. *Privitera v. Kross*,[16] a federal district court rejected what seemed a logical extension of the *Griffin-Douglas* approach. This court took cognizance of the decisions making review of criminal convictions available to indigents, but reasoned that these cases should not be construed to compel the eradication of every disadvantage caused by indigency. The determinative point in this decision was that the aggregate sentence did not exceed the maximum allowable jail sentence. The court in *Kross* considered the equal protection problems presented by imprisonment for the non-payment of fines.

Indigents have made several unsuccessful attacks on this form of discrimination under other theories of law. In *State v. Hampton*,[17] the Mississippi Supreme Court refused to recognize an indigent's claim that continued confinement to "work off" a fine after his initial jail term constituted "cruel and unusual punishment," without making any apparent distinction between an indigent offender and one who is able to pay his fine. Before equal protection became in vogue as a constitutional remedy, the eighth amendment's protection against "cruel and unusual punishment" loomed as the most promising form of relief available to indigents. The United States Supreme Court's definition of this amendment guaranteed its reflection of current civilized standards:

> The amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.[18]

The promise of this concept was reflected in some very early cases, which determined that when a sentence included a term of imprisonment in addition to a fine, imprisonment for non-payment of the fine was an invalid abuse of the court's power:

> When the legislature enacted these provisions of the statute providing for the punishment of an offense by fine or imprisonment or both, it was not contemplated that, when a punishment by imprisonment was imposed, thereafter another should be added because the fine was not paid. The degradation and punishment by imprisonment are greater than that by fine. Such a judgment would be excessive, in that it would

16. *Id.* Where an indigent was sentenced to 30 days and a fine of $500 or 60 additional days for non-payment, this court held there was no denial of equal protection because the aggregate sentence of 90 days did not exceed the statutory maximum of 1 year.

17. 209 So. 2d 899 (Miss. 1968).

18. Trop v. Dulles, 356 U.S. 86, 101 (1962).

impose imprisonment for the non-payment of a debt or fine due the state after the right to punish by imprisonment had been exhausted.[19]

Despite this early promise and the Supreme Court's assurances of the contemporariness of the standard, most courts have rejected assertions that imprisonment for non-payment of a fine constitutes cruel and unusual punishment even if the statutory maximum for the substantive offense has been exceeded.[20] One case, *People v. McMillan*,[21] did, however, hold that if a fine was found to be the appropriate punishment, then five months imprisonment for non-payment was excessive. With the maturation of equal protection as a viable remedy for indigents, the concept of "cruel and unusual punishment" will receive very little judicial attention in this context in the future.

IV. MODERN APPROACH

Although there were a few earlier decisions holding default imprisonment to be a denial of equal protection,[22] this concept matured through puberty when the United States Supreme Court handed down *Williams v. Illinois*[23] and followed it up with a logical extension in *Tate v. Short*.[24]

19. Roberts v. Howells, 22 Utah 289, 62 P. 892, 893 (1900); *accord*, People v. Brown, 113 Cal. 35, 45 P. 181 (1896); People v. Kerr, 75 Cal. App. 273, 144 P. 584 (1911); People v. Verlarde, 45 Cal. App. 520, 188 P. 59 (1920).

20. People *ex rel.* Crockett v. Redman, 41 Misc. 2d 962, 246 N.Y.S. 2d 861 (Supp. Ct. 1964); Henderson v. U.S., 189 A.2d 132 (D.C. App. 1963); Adjni v. State, 139 So. 2d 179 (D.C. App. Fla. 1962); Lee v. State, 103 Ga. App. 161, 118 S.E.2d 599 (1961); People v. Magoni, 73 Cal. App. 78, 238 P. 112 (1925); Foertsch v. Jameson, 48 S.D. 328, 204 N.W. 175 (1925).

21. 53 Misc. 685, 279 N.Y.S. 2d 941 (Sup. Ct. 1967), this decision did not reject imprisonment for non-payment since the ration decidendi was the archaic conversion ratio at which the indigent would be required to "work off" his fine, one dollar per day.

22. Sawyer v. District of Columbia, 238 A.2d 314 (D.C. App. 1968). "We hold this sentence invalid and are of the opinion that in every case in which the defendant is indigent, a sentence of imprisonment in default of payment of a fine which exceeds the maximum term of imprisonment which could be imposed under the substantive statute as an original sentence is an invalid exercise of the court's discretion . . ." *Id.* at 318. People v. Saffore, 18 N.Y. 2d 101, 218 N.E. 2d 686, 271 N.Y.S. 2d 972 (1966) (the court invalidated the default imprisonment holding it a denial of equal protection).

23. 399 U.S. 235 (1970). For those who have long criticized the egalitarianism of the "Warren Court" in earlier indigency cases, it should be noted that this decision was rendered unanimously by the "Burger Court" with the Chief Justice writing the opinion.

24. 401 U.S. 395 (1971).

Williams represented the much belated extension of the *Griffin-Douglas* rule into this area. This case involved reversal of historic practices of long standing among the several states and the Federal Government since the use of imprisonment to "work off" fines for those unable or unwilling to pay has been universally used in the past as an effective and convenient means of collection. The Court took judicial notice of the breadth of this practice in its opinion,[25] while also noting that even the U.S Supreme Court had given its tacit approval in the past.[26] Past history was not considered sufficient to justify this practice when compared to the constitutional deprivations involved. This case, like *Tate,* involved imprisonment for failure to pay a fine, but, unlike *Tate,* it involved an extension of a prison sentence beyond its maximum statutory limits for that purpose. In *Williams,* the court, although stressing the wide latitude allowed states in fixing sentences, stated that

> [O]nce the State has defined the outer limits of incarceration necessary to satisfy its penological interests and policies, it may not then subject a certain class of convicted defendants to a period of imprisonment beyond the statutory maximum solely by reason of their indigency.[27]

The Court was quick to stress that this statute which required "work off" incarceration was not unconstitutional per se, but it was in application because, in fact, it presents an illusory choice for indigents who do not have the resources to choose to pay the fine. The analysis involved in this case was familiar. The indigents represented a suspect classification; therefore, the burden of justifying the discrimination shifted to the State. The alleged compelling state interest was that the use of imprisonment for the non-payment of fines furthered the State's penological aims. This interest does not require imprisonment because the court has already determined that a fine will satisfy the state's interest. The later imposition of imprisonment vitiates that determination. An-

25. 399 U.S. at 256. South Carolina's default payment statute was included in this survey, S.C. CODE ANN. §17-574 (1962) which provides that offenders may be committed to jail if they are unable to pay forfeitures, until amount is satisfied. There is no analytical reason to assume that this statute is constitutional in light of *Tate.*

26. *See* Hill v. U.S. *ex rel.* Wampler, 298 U.S. 460 (1938) (mem.); *Ex parte* Jackson, 96 U.S. 727 (1878).

27. 399 U.S. at 241.

other interest alleged by the State was that to do otherwise would place an undue financial burden on the state.[28] This position was held untenable as applied to this situation,[29] in fact there are indications that the State actually suffers a financial loss in opting for this form of enforcement.[30]

Tate v. Short,[31] decided mainly on the authority of *Williams*, derives its judicial significance as an extension of the novel decision in *Williams*. *Tate* involved an indigent traffic offender who was imprisoned in lieu of fine payment rather than the extension of a maximum sentence of imprisonment because of a fine. In fact, the Corporation Court of Houston, the sentencing court in this case, did not have the power to sentence one to jail,[32] except for failure to pay a fine.[33] This defendant was subjected to imprisonment solely because of his impecunious condition. Although an extension of *Williams*, the problem presented in this case was anticipated earlier by

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28. *See* SILVIG, *Inconsistencies in Present Criminal Procedure*, in ESSAYS ON CRIMINAL PROCEDURES 354-56 (1964).

29. It is interesting to note that in Goldberg v. Kelly, 397 U.S. 254 (1970), the Supreme Court held that fiscal considerations would not justify the abridgment of important individual freedoms.

30. The national average for the per capita cost for prisoners is approximately $2,000. *The President's Comm'n on Law Enforcement and Administration of Justice, Task Force Report:* THE COURTS 15 (1967).

31. 401 U.S. 395 (1971); the petitioner in this case had accumulated fines of $425 on nine convictions for traffic offenses. He was unable to pay this amount because of his "impoverished condition," a fact which was stipulated by the prosecution. This inability to pay caused him to be imprisoned under a Texas Statute which required indigent traffic offenders to "work off" their fines while committed to a municipal prison farm.

32. TEX. CODE CRIM. PROC. ANN. art. 4.14 (1966) provides:

> "The corporation court in each incorporated city, town, or village of this State shall have jurisdiction within the corporate limits in all criminal cases arising under the ordinances of such city, town or village, and shall have concurrent jurisdiction with any justice of the peace in any precinct in which said city, town or village is situated in all criminal cases arising under the criminal laws of this State, in which punishment by fine only, and where the maximum of such fine may not exceed two hundred dollars, and arising with such corporate limits."

33. HOUSTON, TEX., CODE OF ORDINANCES §35-8 (1968) provides: "Each prisoner committed to the city jail or to the municipal prison farm for nonpayment of the fine arising out of his conviction of a misdemeanor in the corporation court shall receive credit against such fine of five dollars ($5.00) for each day or fraction of a day that he has served."

the Supreme Court in *Morris v. Schoonfield.*[34] In *Morris,* the Court articulated a prohibition against automatic conversion to a jail sentence when an indigent cannot pay his fine immediately. The Court in *Tate,* was bothered mainly by the fact that the imprisonment of the defendant was not in keeping with the penological aims of the State as defined by the statute which made a fine the sole penalty for these particular traffic violations. Once these penological aims have been defined, the State should be loathe to so readily impose an inconsistent form of punishment on an offender merely because of his indigency. The Court was careful to note that this decision was not intended to make the states powerless in enforcing fines against indigents, but was intended to encourage them to work out methods of payment of fines which fall in between imprisonment and the inverse discrimination of not enforcing payment. One plan suggested by the Court is the installment plan which is used in several states[35] with apparent success, but, as the court stressed, the states are free to work out their own alternative plans which would be consistent with the Court's opinion.

Mr. Justice Harlan concurred in the result in *Tate* based on his concurring opinion in *Williams.* He would have reached the same result but for different reasons. He was concerned with analysis of the issue from a "due process" point of reasoning rather than the more vulnerable "equal protection" argument. In answering the arguments usually put forth for the state not using the installment plan for repayment of fines, namely the convenience of imprisonment as a form of collection and the deterrent value of immediate payment of fines, Mr. Justice Harlan dismissed the latter as untrue and concerning the former, said,

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34. 399 U.S. 508, 509 (1970). "[T]he same constitutional defeat condemned in *Williams* also adheres in jailing an indigent for failing to make immediate payment of any fine, whether or not the fine is accompanied by a jail term and whether or not the jail term of an indigent extends beyond the maximum term that may be imposed on a person willing and able to pay the fine. In each case, the Constitution prohibits the State from imposing a fine as a sentence and then automatically converting it into a jail term solely because the defendant is indigent and cannot forthwith pay the fine in full."

35. *E.g.* CAL. PENAL CODE §1205 (West 1970); DEL. CODE ANN. TIT. 11, §4332 (c) (Supp. 1968); MD. ANN. CODE art. 38, §4(a) (2) (Supp. 1970); MASS. GEN. LAWS ANN. ch. 279, §/A (1959); N.Y. CODE CRIM. PROC. §470d (1) (b) McKinny (Supp. 1970); PA. STAT. ANN. §9.92.070 (1961).

> Given the interest of the individual affected, I do not think a State may, after declaring itself indifferent between a fine and jail, rely on the convenience of the latter as a constitutionally acceptable means for enforcing its interest given the existence of less restrictive alternatives.[36]

Mr. Justice Harlan would not have limited *Williams* to its factual situation but would have made it applicable in cases where the extended sentence for non-payment of a fine did not exceed the maximum imprisonment. This would make any imprisonment, beyond the court designated sentence, for non-payment of a fine unconstitutional.

Although this decision represents a logical extension of the *Williams* case, it does not represent its logical conclusion. The Court left open the answer to the problem of the use of imprisonment for enforcement where despite the employment of an alternative means, the defendant's reasonable effort to pay the fine is unsuccessful. The decision, as was carefully stressed by the Court, was not intended to make indigents a privileged group, immune from enforcement if an indigent chose not to pay. Imprisonment will continue to be a viable alternative for the enforcement of fines, but the states will not be allowed to use it for a mere tool of convenience. Based on the reasoning and the tone of this decision, one should not be surprised to see imprisonment as an alternative to the payment of a fine upheld in future cases where a concrete situation involving either the refusal of an indigent to pay a fine under any plan or where a hopeless indigent is unable to pay back on any basis. In the former situation the state would probably not be required to search too far for an alternative method of enforcement, but in the latter situation the state, in order to justify the use of imprisonment, should and probably would be required to exhaust every alternative means possible, short of non-payment.

"Thirty Dollars or Thirty Days"

The Supreme Court in *Williams* and *Tate* expressed no opinion on the "thirty dollars or thirty days" type punishment. Analytically there is no reason to differentiate this situation from the "automatic conversion from a fine to a jail sentence" approach that was held unconstitutional in *Tate*.

36. 399 U.S. at 264.

The choice between paying the fine or choosing to go to jail is just as illusory for an indigent as is the choice in *Tate*. The Fifth Circuit[37] has held the "thirty dollar or thirty days" type sentence to be a violation of equal protection. This case contained the typical equal protection analysis with the creation of a suspect classification shifting the burden of proof to the State to justify the unequal treatment by showing a compelling state interest. The State alleged that the public's interest in the collection of revenues, the rehabilitation of offenders, and the deterrent effect on offenders were important enough to justify this unequal treatment. All of these interests seem to have been just as applicable in *Williams* and *Tate*. The Fifth Circuit agreed that the State had a real interest in all three, but noted that this method of punishment was not the only way to satisfy those interests. Since this method is discriminatory, the burden is on the State to find other methods of satisfying these interests.

Conclusion

Tate represents no more than one more step in the direction of the removal of pecuniary elements from our judicial process, hopefully taking the one step closer to the removal of indigency as a factor in the administration of justice. Under the concepts articulated in *Tate,* the United States Supreme Court has placed the burden of finding constitutionally acceptable methods of enforcing fines on indigents other than an automatic resort to imprisonment. There are several possible solutions with the most obvious being the abolition of all fines and punishing by imprisonment only. Although this might seem like an easy theoretical solution since there has been doubt expressed as to the efficacy of fines as a form of punishment,[38] realistically there are many crimes in our society which simply do not warrant imprisonment of the violators. Also, the fines collected have evolved into an important method of governmental taxation.[39] Another possible solution would be to make the amount of a fine depend on an individual's pecuniary status since a fifty dollar fine would mean nothing to a man of means where it would be an insufferable

37. Frazier v. Jordan, 457 F.2d 726 (5th Cir. 1972).

38. *See generally* Barrett, *The Role of Fines in the Administration of Criminal Justice in Massachusetts,* 48 MASS. L. Q. 435 (1963).

39. RUBIN, *supra* note 4, at 230.

burden on certain particular destitute indigents. This type of punishment seems appropriate to all except the extremely poor person who could not pay any fine at all. It would not be in anyone's best interest to allow him to escape any type of punishment. Another alternative, possibly the most viable, is the installment payment plan which was suggested by the Supreme Court in *Tate*.[40] This plan would allow the state to save the expense of maintaining the indigents in prison and it would give the indigent a real choice of whether to pay back the fine under some reasonable plan or go to jail. This is the alternative that our system now offers non-indigents. As the Supreme Court has stressed, states are free to devise their own alternatives;[41] however, whatever the plan devised, it must provide for non-discriminatory treatment for indigents or it cannot stand.

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40. 401 U.S. at 400.
41. *Id.*