Buffalo Law Review

Volume 21 | Number 1 Article 14

10-1-1971

Constitutional Law—Conversion of Fine Into Term of Imprisonment for Offenders Financially Unable to Pay Fine Held Violative of Equal Protection Clause

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in the use of class actions which would parallel California's progressive model. Restrictive approaches in states such as New York fail to recognize the substantial public benefit which can accrue by a more liberal application of the class action to consumer fraud situations. Where joinder of parties is impracticable a court's refusal to allow prosecution of claims by class suit may, practically speaking, leave the injured consumer without legal recourse. But as one observer has recently noted, when "[f]aced with the choice of letting wrongdoers retain the fruits of illegal conduct or venturing into problem areas of class litigation, the [Field Code] courts all too often have chosen the former alternative."[81] The state of commercial affairs demands that the courts of New York and similar jurisdictions abandon the strict adherence to decisional precedent which denies class actions when "separate wrongs to separate persons" are involved. If common interest among class members must be found, the *Vasquez* opinion offers a more reasonable and equitable standard in recognition of the obvious similarity in questions of law and fact among injured consumers. Only through acknowledgment of consumers' rights will the norm of responsibility in the giant retailing and advertising industries be significantly improved.

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CONSTITUTIONAL LAW—CONVERSION OF FINE INTO TERM OF IMPRISONMENT FOR OFFENDERS FINANCIALLY UNABLE TO PAY FINE HELD VIOLATIVE OF EQUAL PROTECTION CLAUSE

Preston Tate, an indigent, was convicted of various traffic offenses which were punishable by fine only. Accordingly, he was fined a total of $425. Since he was unable to pay the fine, Texas law required that he be imprisoned for a period of time sufficient to "serve-out" his fine at the rate of $5 per day. Thus Tate was sent to prison and after serving 21 days he applied for a writ of habeas corpus, alleging that he was unable to pay the fine due to his indigency. The County Criminal Court of Harris County denied the writ and the Court of Criminal Appeals of Texas affirmed, rejecting the appellant-petitioner's contention that his impri-

81. Homburger, *supra* note 11, at 617.

sonment was unconstitutional because he was too poor to pay the fine.[1] Tate appealed to the United States Supreme Court, and in a unanimous decision the Court *held* that where a state has declared that for a given offense its penological interest is served by a fine alone, it is a denial of equal protection to convert such a fine into a prison sentence for those who are financially unable to pay. *Tate v. Short,* 401 U.S. 395 (1971).

The concept of imprisonment for persons unable or unwilling to pay a court-imposed fine or penalty has long been established in the Anglo-American judicial system.[2] Practically, the concept has been embodied in two different sentencing procedures: fine collection and alternative punishment, that is, "thirty days or thirty dollars."[3]

While these practices flourished unchallenged with regard to the sentencing of indigents, decisions in other, analogous areas of criminal procedure began to recognize the special problems of providing justice for the poor. In *Griffin v. Illinois,*[4] the Supreme Court declared that financial disparity among criminal defendants should not affect the kind of justice they receive; while *Douglas v. California*[5] stood for the proposition that the state has an affirmative duty to assure that the poor man receives, at least, an approximation of equal justice. These cases, however, were thought not to apply to equality in punishment between rich and poor, but only to equality in access to justice prior to conviction. Punishment was to remain a highly individualized matter, where the sentencing judge retained a great deal of discretion. Since no offender had the right to demand that he be punished in exactly the same manner as another who had committed an identical offense, the poor offender could not maintain that his imprisonment, as opposed to the rich man's money-loss for the same offense, was unfair.[6] However, while a handful of rela-

1. *Ex parte* Tate, 445 S.W.2d 210 (Tex. Crim. App. 1969).

2. Comment, *Fines, Imprisonment, and the Poor: "Thirty Dollars or Thirty Days,"* 57 CALIF. L. REV. 778, 783-87 (1969).

3. *Id.* at 791-95.

4. 351 U.S. 12 (1956).

5. 372 U.S. 353 (1963).

6. In United States *ex rel.* Privitera v. Kross, 239 F. Supp. 118, 120 (S.D.N.Y.), *aff'd mem.,* 345 F.2d 533 (2d Cir.), *cert. denied,* 382 U.S. 911 (1965), it was said that an indigent defendant:

> has no constitutional right that another defendant, no matter what his economic status, rich or poor, receive the same sentence for the same offense . . . . No

tively recent cases began to point out the unfairness of punishment being dependent upon economic status,[7] there was a great reluctance to conclusively abolish the practice, despite practical as well as legal reasons for doing so.[8]

A major step was taken when the United States Supreme Court was recently confronted with the constitutional problem of imprisonment of indigents for nonpayment of fines in *Williams v. Illinois*.[9] Willie E. Williams was convicted of petty theft and received the maximum statutory sentence, one year in prison as well as a five-hundred dollar fine and five dollars court costs.[10] The judgment provided that, if the prisoner was in default of the fine after his one-year incarceration, he should remain in jail to "work off" this obligation at a rate of five dollars per day, all in accordance with section 1-7 (k) of the Illinois Criminal Code.[11] The prisoner petitioned the trial court to vacate that portion of judgment which called for further incarceration in lieu of the payment of his fine.[12] The trial court granted the state's motion to dismiss the petition on the grounds that claim was premature as Williams was still serving the authorized one year imprisonment, not the additional time.[13] On appeal, the Supreme Court of Illinois bypassed the ripeness issue and chose to hear the case on the merits, but found no denial of equal protection.[14] The Supreme Court of the United States reversed and held that *"when the aggregate imprisonment exceeds the maximum period fixed by statute* and results directly from an involuntary nonpayment of a fine or court costs . . . [there] is an impermissible discrimination that rests on ability to pay"[15] and therefore a violation of the equal protection

different conclusion is required by the line of cases beginning with *Griffin v. People of the State of Illinois* [351 U.S. 12 (1956)]. Those decisions making review of criminal convictions available to the indigent have not yet been construed to compel government, state or federal, to eradicate from the administration of criminal justice every disadvantage caused by indigence.

7. *See, e.g.*, Sawyer v. District of Columbia, 238 A.2d 314 (D.C. Ct. App. 1968); People v. Saffore, 18 N.Y.2d 101, 218 N.E.2d 686, 271 N.Y.S.2d 972 (1966); People v. Collins, 47 Misc. 2d 210, 261 N.Y.S.2d 970 (Orange County Ct. 1965).

8. *See* Comment, *supra* note 2, at 785-810.

9. 399 U.S. 235 (1970).

10. *Id.* at 236.

11. *Id.*

12. *Id.* at 237.

13. *Id.*

14. People v. Williams, 41 Ill. 2d 511, 517, 244 N.E.2d 197, 200 (1969).

15. Williams v. Illinois, 399 U.S. 235, 240-41 (1970) (emphasis added).

clause. The essential consideration in *Williams* seemed to be that when the state has fixed the "outer limits of incarceration necessary to satisfy its penological interest,"[16] it may not subject indigent defendants to a period of imprisonment beyond those limits. What powers the state may have *within* those limits must have been deemed a separate question, one not within the reach of the Court in the *Williams* fact situation. The majority opinion also specifically asserted that the judgment did not deal with the "familiar pattern of alternative sentence of '$30 or 30 days.' "[17]

The companion case to *Williams, Morris v. Schoonfield,*[18] was remanded to the District Court of Maryland due to intervening corrective legislation by that state. Here, there was no question of exceeding the outer limits of incarceration as was presented in *Williams.* Four Justices although concurring in the remand, felt that it was then appropriate to state their views on the practice of imprisoning indigents for nonpayment of fines. The concurring opinion by Mr. Justice White speaking for those four Justices asserted that:

> [T]he same constitutional defect condemned in *Williams* also inheres 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 the indigent extends beyond the maximum term imposed on a person willing and able to pay a 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.[19]

The opinion, however, acknowledged that the decision in *Williams* would not prevent states from establishing an "equivalent" jail sentence, which the indigent may serve after the state has attempted some sort of accommodation.[20] These four Justices, then, were most concerned over summary, immediate and/or

16. *Id.* at 242.

17. *Id.* at 243.

18. 399 U.S. 508 (1970) (per curiam).

19. *Id.* at 509 (White, J., concurring) (emphasis added). Mr. Justice Harlan in an unnumbered footnote to his *Williams* concurrence, also expressed the view that the breach of maximum statutory limits had no bearing on this issue. 399 U.S. at 265.

20. *Id.* at 509.

automatic conversion of a fine into a jail term. They interpreted the minimal meaning of *Williams* thusly:

> [I]n imposing fines as punishment for criminal conduct *more care* must be taken to provide for those whose lack of funds would otherwise *automatically* convert a fine into jail sentence.[21]

This, then, indicated a reluctance to summarily ban the fine-imprisonment alternative for indigents. Mr. Justice White's opinion did indicate, though, that alternative punishment provisions should be subjected to close judicial scrutiny when applied to indigents, and should provide for an attempt at accomodation *prior* to imprisonment. Most state statutes providing for imprisonment of indigents in default of payment could not be construed as providing for any attempt at accommodation and thus would not survive this test. Certainly, the many states which provide for release from jail upon a showing of indigency by the prisoner would not meet Justice White's requirement of an attempt at accommodation prior to the imprisonment.[22]

A recent California case, *In re Antazo*,[23] squarely confronted the issue of incarceration of indigents in lieu of payment. Simeon Antazo entered a plea of guilty to a charge of arson. At arraignment for sentencing the California trial court placed Antazo on probation on condition that he pay a fine of $2,500 and a penalty assessment of $625 or "in lieu of payment . . . one (1) day in the County Jail for each $10.00 unpaid."[24] He was unable to pay and immediately began to "serve out" his fine in jail. The Supreme Court of California, after establishing that a habeas corpus proceeding was proper in this case, held that the confinement of an indigent to serve out a fine and penalty at a specified rate per day is an invidious discrimination in violation of the equal protection clause of the fourteenth amendment.[25] In this case, like *Morris*, there was no question of imprisonment beyond a statutory maximum as in *Williams*. The California Supreme Court, nevertheless, freely cited *Williams* in

21. *Id.* (emphasis added).

22. Two states that provide for accommodation prior to incarceration are New Jersey and Wisconsin. However, both states make the prior accommodation discretionary for the sentencing judge. N.J. STAT. ANN. § 2A:166-15 (1971); WIS. STAT. ANN. § 973.05 (1971).

23. 3 Cal. 3d 100, 473 P.2d 999, 89 Cal. Rptr. 255 (1970).

24. *Id.* at 106, 473 P.2d at 1002, 89 Cal. Rptr. at 258.

25. *Id.* at 115, 473 P.2d at 1009, 89 Cal. Rptr. at 265.

its opinion, evidently feeling that the breach of the outer limits of incarceration was not a vital component in the *Williams* rationale. The court's use of the equal protection rationale in the same manner as in *Williams* indicated that this rationale does not require the imprisonment to be in excess of statutory limits to be declared impermissible.

The relatively short majority opinion in the *Tate* case adopts, without extensive explanation, the equal protection rationale used in *Williams* and *Morris*. The Court has become comfortable enough with that rationale to merely mention that a violation of equal protection has occurred.[26] The instant case fits squarely into that rationale as it has been developed. Broadly speaking the "new" equal protection rationale prohibits a state from unduly burdening any classification or group of persons when the classification is based on "suspect criteria," and it further prohibits the abrogation of an individual's fundamental rights, unless, in either case, the state can show a compelling interest for so acting.[27] In the case under discussion, we have both a classi-

26. Mr. Justice Harlan views this development with dismay. He has consistently admonished his brethren concerning the use of the new equal protection rationale in cases other than those involving racial discrimination. *See, e.g.,* his dissents in Griffin v. Illinois, 351 U.S. 12, 29 (1956) and Shapiro v. Thompson, 394 U.S. 618, 655 (1969). He advocates a return to the standard of due process of law and the elimination of the classifications and comparative approaches of the equal protection rationale. The logical extension of the equal protection approach, in Justice Harlan's view, would result in a requirement that government take affirmative action to redress differences in the condition of persons subject to its laws, wherever those laws apply with varying effect or harshness due to such differences in condition. Thus graduated tuition at state universities might be required. The answer to Justice Harlan's objection and a weakness of the equal protection rationale probably stem from the identical problem—equal protection in this area is a misnomer. What is really being offered is a minimum protection of "just wants" as is suggested by Professor Michelman. Michelman, *Foreword: On Protecting the Poor Through the Fourteenth Amendment,* 83 HARV. L. REV. 7 (1969). The comparisons used in the various equal protection cases, merely point out how "just" the particular "want" is.

27. This test evolved over a period of time in a number of cases involving various rights and groups of persons. The following is a list of some of these cases indicating the burdened group or suspect classification and the right infringed upon in each case. *See, e.g.,* Shapiro v. Thompson, 394 U.S. 618 (1969) (the poor; right to travel among the states); Levy v. Louisiana, 391 U.S. 68 (1968) (illegitimate children; right to recover for wrongful death of mother); Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966) (the poor; right to vote); Douglas v. California, 372 U.S. 353 (1963) and Griffin v. Illinois, 351 U.S. 12 (1956) (the poor; right to appeal criminal convictions or ultimately the right to personal liberty); Skinner v. Oklahoma, 316 U.S. 535 (1942) (certain habitual criminals; right to procreate). The test was described by Chief Justice Earl Warren in a case where it was not found applicable, McDonald v. Board of Election Comm'rs, 394 U.S. 802 (1969). The test is ultimately a balancing test. Some of the rights abrogated are so "fundamental" that even the most compelling

fication based on suspect criteria—the poor; and a denial of an individual's fundamental right to liberty—the incarceration which occurs only because he is poor. The state does have a legitimate interest in collecting fines, but the alternatives available, such as installment payments, are arguably more effective and less burdensome upon the offender. In fact, it has been often correctly stated that imprisonment to "work-off" a fine at a per diem rate does not further the state's interest in collecting that fine at all; for the state then not only loses the revenue it may have received from the fine, but it also incurs the cost of supporting the indigent in jail.[28]

Many different alternative procedures have been proposed, and many are presently available to sentencing judges. Among these procedures are installment payments, delayed payments and reduced payments. Also suggested is proportional payment, modeled perhaps on the successful day-fine systems used in Sweden and Finland, where the amount of the fine is determined in proportion to the offender's ability to pay as well as the gravity of his offense.[29]

Mr. Justice Blackmun, concurring in both the opinion and the result in the instant case, adds that the decision might result in the substitution of jail terms for fines for many traffic offenses, which certainly would be a far greater deterrent to unsafe driving and its resultant carnage.[30] The writer agrees that diminishing the horrifying losses that occur on our highways would be a truly gratifying result, but the imprisonment sanction presents certain dangers. It would serve to introduce persons who would never, in all probability, otherwise be incarcerated to our "spawning grounds" of crime. Prison terms tend to embitter rather than rehabilitate and short terms, as are contemplated here, are said to be of the very least penological utility.[31]

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government interests are not enough to dislodge them. Other rights are not so vital, but if they are being systematically denied to a given group of persons, the practice may still violate the "classification [of persons] based on suspect criteria" branch of the equal protection doctrine.

28. *See* sources cited in Tate v. Short, 401 U.S. 395, 400 n.5 (1971). *See also* Comment, *supra* note 2.

29. *See* Comment, *supra* note 2, at 817.

30. Tate v. Short, 401 U.S. 395, 401 (1971) (Blackmun, J., concurring) [hereinafter cited as instant case].

31. *See, e.g.*, Comment, *supra* note 2, at 791-95; Note, 101 U. PA. L. REV. 1013, 1021-24 (1953).

The possibility of mixing traffic offenders with hardened criminals is not an encouraging prospect. Most likely the proper approach to curtailing driving offenses rests in harsher license revocation and suspension procedures. It must be remembered that the detrimental effects of imprisonment are a prime reason for abolition of imprisonment in lieu of fine payment.

The primary question raised by the instant case is, how does the statutorily-proscribed thirty days or thirty dollars alternative fare under the rationale of this decision. In *Williams*, as previously mentioned, a limitation was enunciated whereby the imprisonment levied because of nonpayment must have been in excess of the maximum statutory limit for that offense in order to be found unconstitutional. The Court, in the instant case, by pointing out that the legislature had instituted a "fines only" policy and had thus established a statutory limit that could not be breached, seems to be reluctant to conclusively repudiate this part of the *Williams* rationale.[32] Under the thirty days or thirty dollars alternative, the statutory limit of thirty days is not breached when the indigent defendant must take thirty days because he does not have the thirty dollars. (This indicates that the thirty-thirty alternative might be retained under this rationale or, at least, that it raises a separate question.) On the other hand, however, the portion of the *Morris* opinion quoted in the instant case might well indicate that the breach of statutory limits factor is no longer controlling.[33]

Mr. Justice Harlan, in his *Williams* concurrence, carefully distinguished the thirty-thirty alternative from the *Williams-Tate* imprisonment for nonpayment situation.[34] According to Harlan, the factor that distinguishes the latter situation and makes it unconstitutional when applied to indigents is that the legislature has declared that a fine alone will satisfy its penological interests.[35] But, if the legislature authorizes a penalty of the thirty-thirty type, can it not be said that here also they have declared their penal interest may be satisfied by a fine alone? Certainly the legislature would not be concerned if every time the

32. Instant case at 399.

33. The portion of the *Morris* opinion quoted in *Tate* is reproduced in this paper in the text accompanying *supra* note 20.

34. Williams v. Illinois, 399 U.S. 235, 266 (1970) (Harlan, J., concurring).

35. *Id.*

offense were committed a fine were paid no imprisonment given. And in nearly all cases, where a choice is given, except where the defendant is financially unable, the fine will be paid. Where the defendant has the financial wherewithal to pay his fine, the prison alternative is so unlikely as to be functionally nonexistent.

The most relevant question to be asked about the thirty days or thirty dollars situation is simply, does the identical evil inhere in that situation as existed in *Williams* and in the instant case. The evil in both of those cases as the Court stated in the instant case was that the offender "was subjected to imprisonment solely because of his indigency."[36] This certainly occurs when a man cannot pay a fine of thirty dollars and thus must take the "alternative" of thirty days in jail, and it occurs regardless of the absence of a breach of any statutory ceiling.

Another question raised by the instant decision is whether a law such as section 420.10 of the New York Criminal Procedure Law[37] will be subject to consititutional attack. This section provides that, if a judge decides upon a fine for a given offense and the offender is unable to pay the fine, the offender may apply for resentencing, at which time the judge's options include any sentence he could have given the prisoner at the original sentencing, which will for many offenses include imprisonment. This statute will be defended on the ground that the judge must retain a broad range of options in punishment to fit the circumstances of various cases and defendants, but the basic evil

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36. Instant case at 398.

37. N.Y. CRIMINAL PROCEDURE LAW § 420.10 subd. 4 (McKinney 1971) reads as follows:

> Application for resentence. In any case where the defendant is unable to pay a fine imposed by the court, he *may* at any time apply to the court for resentence. In such case, if the court is satisfied that the defendant is unable to pay the fine it must:
>
> (a) Adjust the terms of payment; or
> (b) Lower the amount of the fine; or
> (c) Where the sentence consists of probation or imprisonment and a fine, revoke the portion of the sentence imposing the fine; or
> (d) Revoke the entire sentence imposed and resentence the defendant. Upon such resentence the court may *impose any sentence it originally could have imposed,* except that the amount of any fine imposed may not be in excess of the amount the defendant is able to pay. (emphasis added)

Taken out of context as it is here, the word "may" referring to the offender's right to apply for resentencing is somewhat misleading. He "may" apply, if he does not want to go to jail under subdivision 2 of the same section, which sanctions imprisonment for nonpayment of fines, subject only to the limitations set out in subdivision 4, above.

remains: the indigent will go to jail, while the rich man may buy his freedom. This seems especially unfair here, where the judge has already declared that in a particular case the state's interest could have been satisfied by a fine alone. Another related and basic issue is whether the sentencing judge, with his wide range of remedies for a given offense—including fines and terms of imprisonment—should be allowed to imprison a defendant solely because he knows or suspects the defendant will not be able to pay a fine. If the defendant's record and the circumstances of the commission of the crime indicate that only a fine is required, then a sentence of imprisonment, due to the defendant's indigency, contains the same vice of discriminatory treatment that has been condemned in the instant case, *Morris* and *Williams*.

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TAXATION—TREASURY REGULATION VALUING MUTUAL FUND SHARES FOR ESTATE TAX PURPOSES AT THE REPLACEMENT COST HELD INVALID

As the executor of decedent's estate, plaintiff commenced an action in the United States District Court for the Western District of New York to recover $3,092.59 in estate taxes and interest paid on shares held by the decedent at the time of her death in an open-end investment company (mutual fund).[1] The decedent had acquired the shares over a period of years through gift, inheritance, and reinvestment of capital gains and ordinary income distributions. The Commissioner had valued the shares for estate tax purposes at their *asked price*, that is, the price at which these shares could be purchased from the mutual fund at the time of decedent's death.[2] Plaintiff contended that the true value of the shares was reflected in the *bid price* for such shares,

1. An estate tax is imposed by the INT. REV. CODE of 1954, § 2001 as follows:
A tax . . . is hereby imposed on the *transfer* of the taxable estate . . . of every decedent, citizen or resident of the United States . . . . (emphasis added).

2. Treas. Reg. § 20.2031-8 (b) (1958), T.D. 6680, 1963-2 CUM. BULL. 417, 419 which provides as follows:
Valuation of shares in an open-end investment company. (1) The fair market value of a share in an open-end investment company (commonly known as a "mutual fund") is the public offering price of a share . . . .