NOTES

CONSTITUTIONAL LAW—IMPRISONMENT OF INDIGENT FOR NON-PAYMENT OF TRAFFIC FINES VIOLATIVE OF EQUAL PROTECTION—GRIFFIN-DOUGLAS IN TRAFFIC COURT

In *Tate v. Short*,[1] petitioner Tate, an indigent,[2] accumulated $425 in traffic fines from nine convictions in Houston, Texas. Unable to pay, he was jailed pursuant to a municipal ordinance[3] and a state statute[4] to work out the fine at the rate of five dollars a day, over a period of 85 days. After 21 days in custody, petitioner applied for a writ of habeas corpus in the Criminal Court of Harris County. In his application, he alleged, "Because I am too poor, I am, therefore, unable to pay the accumulated fine of $425."[5] The county court denied the application. The Texas Court of Criminal Appeals affirmed, holding: "We overrule appellant's contention that because he was too poor to pay the fines his imprisonment was unconstitutional."[6]

On certiorari, the United States Supreme Court reversed and remanded in an opinion by Mr. Justice Brennan, relying on the authority of *Williams v. Illinois*.[7] The Court held that an indigent could not be confined for a period longer than his original jail sentence merely because he did not have the money to pay the $425 fine. In *Williams*, the Court held that the Illinois statute worked an invidious discrimination solely because the indigent was too poor to pay the fine, and it therefore violated equal protection.[8] Although the Texas enactments examined in

1. 401 U.S. 395 (1971).

2. At the habeas hearing, the assistant district attorney appearing for the state stipulated: "We would stipulate he is poverty stricken, and that his whole family has been for all periods of time therein, and probably always will be." Petitioner's uncontradicted testimony at the hearing was that, prior to his imprisonment, he earned between $25 and $60 a week in casual employment. He also received a monthly Veteran's Administration check of $104.00. He had a wife and two children dependent on him for support.

3. HOUSTON CODE § 35-8 (1966) provided: "Each person committed to the county jail or to the municipal prison farm for non-payment of their fine arising out of a misdemeanor in the corporation court shall receive a credit of five dollars ($5.00) for each day or fraction of a day that he has served."

4. TEX. CODE CRIM. PROC. art. 43.09 (1966).

5. 401 U.S. at 396.

6. *Id.* at 397.

7. 399 U.S. 235 (1970).

8. *Id.* at 292-93.

the instant case[9] involved offenses punishable by fines only, the Court concluded that petitioner's imprisonment for nonpayment constituted precisely the same discrimination as that found in *Williams*.

The practice of imprisoning a convicted defendant for nonpayment of fines dates back to medieval England[10] and has long been practiced in this country. Forty-nine states[11] and the federal government presently have statutes authorizing incarceration under such circumstances. The great majority of these states permit imprisonment beyond the maximum term allowed by law. In some states, there is no limit on the length of time one may serve for nonpayment.[12]

Before *Williams* and *Tate*, the Court seems to have given tacit approval to this type of statute.[13] Heretofore, commitment for failure to pay has not been regarded as a part of the punishment but as a means of enabling the court to enforce collection of money that a convicted defendant was obligated by the sentence to pay.[14] The impracticability of the application of this rhetoric in the context of our modern system of criminal justice was exposed in *Edwards v. California*.[15] There, Justice Byrnes, writing for the Court concluded

> that a defendant may be able to work but is without savings or employment can no longer validly be made the basis for sentencing him to the workhouse. This theory of the Elizabethan poor laws no longer fits the facts.[16]

Nevertheless, the greatly increased use of fines as a criminal sanction has made nonpayment a major cause of incarceration in America.[17]

Parallelling these unfortunate evolvements in our criminal law has been the striking emergence of the *Griffin-Douglas*[18] indigency decisions, which at bottom, compel the holdings in *Williams* and *Tate*. This line of cases stands for the principle that there can be no equal justice where

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9. TEX. CODE CRIM. PROC. ANN. art. 4.14 (1966).

10. *See generally* 1 J. BISHOP ON CRIMINAL LAW § 940, at 693 (9th ed. 1923) and 57 CAL. L. REV. 778 (1969).

11. *See, for instance*, WEST'S CAL. PEN. CODE § 1205 (1968); FLA. STAT. ANN. § 921.14 (Supp. 1969); GA. CODE ANN. § 27-2901 (Supp. 1969); N.Y. CODE CRIM. PROC. § 470-d (McKinney Supp. 1969); N.C. GEN. STAT. § 6-65 (Supp. 1970); S.C. CODE ANN. § 17-574 (1962); and TENN. CODE ANN. § 40-3203 (1955).

12. *See* 64 MICH. L. REV. 938 (1966).

13. *See* Hill v. United States, 298 U.S. 460 (1936); *Ex parte* Jackson, 96 U.S. 727 (1878).

14. 399 U.S. at 240.

15. 314 U.S. 160 (1941).

16. *Id.* at 174.

17. S. RUBIN, THE LAW OF CRIMINAL CORRECTION 253 (1963).

18. Douglas v. California, 372 U.S. 353 (1963); Griffin v. Illinois, 351 U.S. 12 (1956).

the kind of trial a man gets depends upon the amount of money he has.[19] Significantly, the Court's analysis in *Griffin* and *Douglas* was cast primarily in terms of due process.

Griffin drove the opening wedge. There, two indigent defendants convicted of armed robbery in an Illinois state court filed a motion in the trial court asking that a certified copy of the record, necessary for a complete bill of exceptions, be furnished them without cost. The trial court denied the motion without a hearing. The defendants then filed a petition alleging that the refusal to afford full appellate review solely because of poverty was a denial of due process and equal protection. Their petitions were dismissed by the state courts. In vacating the judgments, the Supreme Court emphasized the state's arbitrary denial of adequate appellate review under color of state law.[20] This analysis is apparently founded upon procedural due process concepts. That is, the Illinois statutes as applied deprived the defendants of an opportunity to be heard on appeal, to which they were absolutely entitled.

In *Douglas*, two indigent defendants were tried and convicted of felonies in a California state court. A single public defender was appointed to represent them. At the commencement of the trial, the defendant moved for a continuance, but this motion was denied. The defendants dismissed the defender and renewed motions for separate counsel and for a continuance, both of which were denied. On appeal, the state courts affirmed their convictions after denying their request for counsel under a California rule of criminal procedure authorizing such a denial where after an independent investigation of the record the appellate court determines that appointment of counsel would be helpful to neither the defendant nor the court. The Supreme Court vacated the state court judgments. Although the Court spoke vaguely about a violation of the fourteenth amendment, the holding again seems to be based primarily on due process. The Court held that the statute constituted an arbitrary classification and worked an invidious discrimination against indigents. In so holding, the *Douglas* Court relied heavily on its due process rationalizations in *Griffin*. Therefore, the conclusion that *Douglas* is founded upon due process is not uncalled for; nor does it represent a turn in a new direction. Due process has long been the Court's principal bulwark against arbitrary legislation.[21]

In *Williams*, though, the Supreme Court based its decision on equal protection. There, an indigent was convicted of petty theft and given a

19. 351 U.S. at 19.

20. ILL. REV. STAT. ch. 38, § 769.1 (1955); and ILL. REV. STAT. ch. 110, § 259.70A (1953).

21. *See* Flemming v. Nestor, 363 U.S. 603 (1960).

one year sentence and a $500 fine. The defendant filed a post-conviction petition with the sentencing judge to vacate that portion of the judgment which under state law directed that if the defendant was in default of the monetary payment, he should remain in jail to work off the balance at the statutory rate of five dollars a day. The Illinois courts denied the petition. On appeal, the Supreme Court vacated and remanded, holding that there was an invidious discrimination violative of equal protection when the aggregate imprisonment of an indigent state prisoner exceeded the maximum period fixed by the statute and resulted directly from an involuntary nonpayment of a fine or court costs. The Court reasoned that although the sentence was not imposed because of Petitioner's indigency, but because he had committed an offense, it still constituted an invidious discrimination in that only a convicted person with access to funds could avoid the increased imprisonment provided by the statute. In its holding, the Court was careful to explicitly delineate the question decided:

> We hold only that the Equal Protection Clause of the Fourteenth Amendment requires that the statutory ceiling placed on imprisonment for any substantive offense be the same for all defendants irrespective of their economic status.[22]

The Court expressly did not reach the question of whether a state is precluded in any other circumstances from holding an indigent accountable for a fine by use of a penal sanction; nor did this decision deal with a judgment of confinement for nonpayment of a fine in the familiar pattern of the alternative sentence of "$30 or 30 days." At bottom, *Williams* means that in imposing fines as punishment for criminal conduct more care must be taken to provide for those whose lack of funds would automatically convert a fine into a jail sentence.[23] That is, where such cases arise, reasonable alternatives, like installment plans[24] must be considered.

The result in *Tate*, then, was compelled by the holdings in *Griffin* and *Douglas*. The *Tate* opinion, however, disavowed the due process framework laid by *Griffin* and *Douglas* and chose to use an equal protection rationale based on *Williams*. This movement toward equal protection in

22. 399 U.S. at 244.

23. *See* Morris v. Schoonfield, 399 U.S. 508 (1970); Rinaldi v. Yeager, 384 U.S. 305 (1966); Lane v. Brown, 372 U.S. 477 (1963); Smith v. Bennett, 365 U.S. 708 (1961).

24. Several states have a procedure for paying fines in installments, *e.g.*, WEST'S CAL. PENAL CODE § 1205 (1970) (misdemeanors); DEL. CODE ANN. tit. 11, § 4322(c) (Supp. 1968). MD. ANN. CODE art. 38, § 4(a)(2) (Supp. 1970); MASS. GEN. LAWS ANN. ch. 279, § 1A (1959); N.Y. CODE CRIM. PROC. § 470-d(i)(b) (McKinney Supp. 1970); PA. STAT. ANN. § 9.92.070 (1961).

this area is not new. In a formidable line of cases, the Court has hailed the equal protection clause as an objective standard to which state criminal procedure and statutes must measure.[25] But many observers, including Justice Harlan, have long averred that the Court "protesteth too much" about equal protection. In his concurring opinion in *Williams*, Justice Harlan observed:

> The "equal protection" analysis of the Court is . . . a "wolf in sheep's clothing," for that rationale is no more than a masquerade of a supposedly objective standard for *subjective* judicial judgment as to what state legislation offends notions of "fundamental fairness." Under the rubric of "equal protection" this court has in recent times effectively substituted its own "enlightened" social policy for that of the legislature no less than did in the older days the judicial adherents of the now discredited doctrine of "substantive" due process.[26]

The Court's concept of equal protection has taken an alarming turn in recent days. The equal protection clause prevents states from arbitrarily treating people differently under their laws. Whether any such differing treatment is to be deemed arbitrary depends on whether or not it reflects an appropriate differentiating classification among those affected. The test evolved by the Supreme Court for determining whether such a classification exists is whether such a classification can be justified in light of some rational and otherwise constitutionally permissible state policy.[27] This standard reduces to a minimum the likelihood that the federal judiciary will judge state policies in terms of the individual notions and predilictions of its own members. Recently,[28] however, the Court has applied a new doctrine: the rule that statutory classifications which are based on certain suspect criteria or which affect fundamental rights will be held to deny equal protection unless justified by a compelling governmental interest. The part of this doctrine which requires that classifications which are based on suspect criteria be supported by a compelling interest apparently has its genesis in cases involving racial classifications, which have, at least since *Korematsu v. United States*,[29] been regarded as inherently suspect. The criterion of wealth or indigency

25. *See* McLaughlin v. Florida, 379 U.S. 184 (1964); Loving v. Virginia, 388 U.S. 1 (1967); and McDonald v. Board of Election Comms., 394 U.S. 802 (1969).

26. 399 U.S. at 259. (Emphasis added).

27. *See, e.g.*, Powell v. Pennsylvania, 127 U.S. 678 (1888); Barrett v. Indiana, 229 U.S. 26 (1913); and Walters v. City of St. Louis, 347 U.S. 231 (1954).

28. *See, e.g.*, Williams v. Rhodes, 393 U.S. 23 (1968) and Loving v. Virginia, 388 U.S. 1 (1967).

29. 323 U.S. 214 (1944).

apparently was added as an alternative justification in *Harper v. Board of Elections*.[30] This characterization of indigency as suspect for purposes of legislative classification has never been accepted by the Supreme Court.[31] The *Griffin* and *Douglas* cases, as noted above, were built upon due process, not upon the new equal protection analysis.

In *Tate*, the Court clearly utilized the "compelling interest" test to reach its laudable but ill-supported conclusion. The Court concluded that the Texas statute under which Petitioner Tate was imprisoned was premised upon the suspect criteria of indigency. Deciding that the state had no compelling interest to justify this classification, the Court struck down the statute. According to the *Tate* Court, imprisonment in such a case is not imposed to further any penal objective of the state, but to augment its revenue. The Court reasoned that the imprisonment did not serve that purpose as the state was saddled with the cost of feeding and housing petitioner during his imprisonment.

Such a result based on the new equal protection standard is admirable in its treatment of indigents but unsupportable and unjustifiable in its development of constitutional theory. The new equal protection standard, when so used, leaves open avenues of abuse which were thoroughly explored by the Court some 40 years ago under the misguided banner of substantive due process. Justice Harlan has pointed out the tools which the Court should have seized in *Tate*:

> An analysis under due process standards, correctly understood, is . . . more conducive to judicial restraint than an approach couched in slogans and ringing phrases, such as "suspect" classification or "compelling" state interest that blur analysis by shifting the focus away from the nature of the individual interest affected, the extent to which it is affected, the rationality of the connection between legislative means and purpose, the existence of alternative means for effectuating the purpose . . . .[32]

Under such a due process analysis, the same result is obtainable in *Tate* within existing dogma which allows much less room for judicial abuse. The due process clause can be thought to interpose a bar only if the statute manifests a patently arbitrary classification, utterly lacking justification. In *Tate*, one can fairly conclude that Texas had no rational justification for the subject statute. The state's penological purpose and administrative inconvenience are the only possible justifications for such

30. 383 U.S. 663 (1966).
31. 314 U.S. at 184-85.
32. 399 U.S. at 260.

a statute. It is clear that when the State of Texas declared such penological purpose satisfied by a fine, the administrative inconvenience in a judgment collection procedure would not have as a matter of due process, justified sending petitioner to jail, or extending his jail term because he possessed no assets.

It is then respectfully suggested that the Court would do well and do justice to amend its equal protection heading so as to bring us back to more familiar waters, less fraught with potentialities for federal abuse.

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