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The "$30 or 30 Days" Fine as Applied to Indigents

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could lead to some undesirable results.[71] Therefore, the special character of the industry should be considered before resorting to any unduly strict interpretation of them.

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THE "$30 OR 30 DAYS" FINE AS APPLIED TO INDIGENTS

The practice of imprisoning convicted defendants for failure to pay fines was firmly imbedded in the common law[1] and is established by statute in most states.[2] Imprisonment for non-payment of a fine was seldom questioned in federal courts, and, until the 1960's, none of the challenges to this procedure appears to have been founded upon a defendant's indigency.[3] Even as late as 1968, a federal district court upheld on constitutional grounds the practice of imprisonment of indigents under the alternative sentence of fine or imprisonment.[4] Consequently, the Fifth Circuit's recent pronouncement that the alternative sen-

71. For example, if article 779 were strictly applied, it would mean the landowner could select the location upon which the mineral servitude should be exercised, because the manner of exercising the servitude would be uncertain. The mineral servitude owner or those who derive their rights therefrom will always be in a better position to know the best place to locate a well, not the landowner.

1. E. SUTHERLAND & D. CRESSEY, CRIMINOLOGY 311 (8th ed. 1970): "But it was in the reign of Edward I in the latter half of the thirteenth century that incarceration came into extensive use in England, though even in this period it was used primarily as a 'squeezer,' or means of securing fines." *See also* 2 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 43-50 (3d ed. 1927); 1 J. STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 57 (1883); STURGE, STEPHEN'S DIGEST OF THE CRIMINAL LAW 32-33 (9th ed. 1950).

2. *See, e.g.*, ALASKA STAT. §§ 12.55.010, .030 (1962); COLO. REV. STAT. ANN. §§ 39-10-10 (1963); HAWAII REV. STAT. §§ 712-14 (1968); IND. ANN. STAT. § 9-2227a (Supp. 1972); NEV. REV. STAT. § 176.065 (1967); VT. STAT. ANN. tit. 13, §§ 7221-23 (Supp. 1972).

3. *In re* Antazo, 3 Cal. 3d 100, 113 n.10, 473 P.2d 999, 1007 n.10, 89 Cal. Rptr. 255, 263 n.10 (1970): "Prior to 1960 none of the cases appear to have involved challenges based upon a defendant's indigency. [Citations omitted.] The question whether the imprisonment of indigent convicted defendants for non-payment of fines offended the equal protection clause under the principle declared in *Griffin* was raised in Wildeblood v. United States, *supra*, 109 U.S. App. D.C. 163, 284 F.2d 592 (dissent by Edgerton, J.). During the last ten years numerous cases dealt with the question." [Citations omitted.]

See generally Annot., 31 A.L.R.3d 926 (1970), and 16 Am. Jur. 2d *Constitutional Law* § 388 at 727-28 (1964).

4. Kelly v. Schoonfield, 285 F. Supp. 732, 736 (D. Mich. 1968): "It has been generally held that commitment under such circumstances is not an unconstitutional imprisonment for debt, and that it does not violate any other constitutional provision, *although doubt has been expressed where it results in a total imprisonment longer than the maximum imprisonment which could have been imposed for the offense.*" (Emphasis added.)

tence is unconstitutional as applied to indigents[5] marks a significant reversal of the law. This Comment will analyze the reasoning and policy considerations which induced this rapid development, and evaluate the consequences of the invalidation of the alternative sentence as applied to indigents in the Fifth Circuit. The particular effect upon Louisiana's system of fines will also be considered.

The Fifth Circuit recently confronted these issues in the decision of *Frazier v. Jordan.*[6] In that case, the petitioner pleaded not guilty to a violation of two local ordinances.[7] Subsequently, he was found guilty on both counts and received an alternative sentence of a $17 fine or thirteen days in jail for each violation. Petitioner, an indigent, was unable to pay the fine and was consequently compelled to commence serving his two consecutive thirteen day terms. While serving his second term, he was granted a writ of habeas corpus in federal district court. The court of appeals affirmed the judgment of the lower court, holding that imprisonment of an indigent under the traditional alternative sentence of fine or imprisonment is a denial of equal protion under the fourteenth amendment.[8]

Due to the Fifth Circuit's reliance on the equal protection clause, it is necessary to understand the recent adoption of more stringent standards in this area by the Supreme Court.[9] Until the latter half of the 1960's the Supreme Court used a solitary standard of equal protection,[10] under which it was necessary only that the statutory distinction at issue bear some rational relationship to a legitimate state end:

"State legislatures are presumed to have acted within their

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

6. *Id.*

7. ATLANTA, GA., MUNICIPAL CODE §§ 12-2, 20-30 (Atlanta Noise & Fire Ordinances).

8. The United States Supreme Court has not yet deliberated on the precise issue which squarely confronted the Fifth Circuit in the Frazier decision. It does not appear that Jordan, the superintendent of the City of Atlanta Prison Farm, applied for writs of certiorari to the Supreme Court.

9. For an exhaustive treatment of the growing application of the equal protection clause, see *The Evolution of Equal Protection—Education, Municipal Services & Wealth*, 7 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 105 (1972), and *Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065 (1969).

10. Williamson v. Lee Optical Co., 348 U.S. 483 (1955); Daniel v. Family Sec. Life Ins. Co., 336 U.S. 220 (1949); Kotch v. Board of River Port Pilot Comm'rs, 330 U.S. 552 (1947); Metropolitan Cas. Ins. Co. v. Brownell, 294 U.S. 580 (1935); Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61 (1911); Atchison, T. & S.F.R. Co. v. Matthews, 174 U.S. 96 (1899).

> constitutional power despite the fact that, in practice, their laws result in some inequality. A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it."[11]

However, in *Harper v. Virginia Board of Elections*,[12] indication of another standard of equal protection appeared.[13] There, the Court laid the foundation for the more rigorous standards of the compelling state interest test.[14] This new standard has been applied by the Supreme Court in two general areas: 1) when there is a fundamental right in question,[15] and 2) when the state's discrimination is based on a "suspect" criterion.[16] In the absence of either, the Supreme Court will continue to apply the traditional equal protection test.[17]

While the court in *Frazier* primarily supported its ruling with a vigorous application of the compelling state interest test, it first had to deal with three United States Supreme Court cases. A consideration of these cases will reveal a gradual expan-

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11. McGowan v. Maryland, 366 U.S. 420, 427-28 (1961). *See also* McDonald v. Board of Election Comm'rs, 394 U.S. 802, 809 (1969), for a similar illustration of this standard.

12. 383 U.S. 663 (1966).

13. *Id.* at 666: "We conclude that a State violates the Equal Protection Clause of the Fourteenth Amendment whenever it makes the affluence of the voter or payment of any fee an electoral standard. . . . Our cases demonstrate that the Equal Protection Clause of the Fourteenth Amendment restrains the States from fixing voter qualifications which invidiously discriminate."

14. *Williams v. Rhodes*, 393 U.S. 23, 30 (1968), states some of the underlying considerations which are evaluated by the Court in its application of the compelling state interest test: "In determining whether or not a state law violates the Equal Protection Clause, we must consider the facts and circumstances behind the law, the interests which the State claims to be protecting, and the interests of those who are disadvantaged by the classification." The Court therefore held that "the totality of the Ohio restrictive laws taken as a whole . . . [are] an invidious discrimination, in violation of the Equal Protection Clause." *Id.* at 34.

15. Shapiro v. Thompson, 394 U.S. 618, 638 (1969): "But, of course, the traditional criteria do not apply in these cases. Since the classification here touches on the fundamental right of interstate movement, its constitutionality must be judged by the stricter standard of whether it promotes a *compelling* state interest."

16. McDonald v. Board of Election Comm'rs, 394 U.S. 802, 807 (1969): "And a careful examination on our part is especially warranted where lines are drawn on the basis of wealth or race, *Harper v. Virginia Board of Elections, supra*, two factors which would independently render a classification highly suspect and thereby demand a more exacting judicial scrutiny. *Douglas v. California*, 372 U.S. 353 (1963); *McLaughlin v. Florida*, 379 U.S. 184, 192 (1964)."

17. Dandridge v. Williams, 397 U.S. 471 (1970).

sion of the rights of indigents in the criminal fining process, and will also illustrate that the holding in *Frazier* represents a definite extension of these cases.

The inequalities in the area of fining and indigency were initially questioned in *Williams v. Illinois*,[18] where the appellant was convicted for petty theft and received the maximum sentence of one year imprisonment and a $500 fine plus $5 in court costs. Under Illinois law, if the appellant had not paid his fine at the end of his term, he was forced to remain in jail to "work off" his monetary obligation at the rate of $5 per day.[19] The Supreme Court held this was impermissible discrimination in violation of the equal protection clause when the aggregate imprisonment of an indigent prisoner exceeded the statutory maximum as a result of his financial inability to pay.[20] The Court did not indicate whether it was applying the traditional equal protection formula or the compelling state interest test.[21]

Williams was specifically limited to the prohibition of incarcerating an indigent beyond the statutory maximum.[22] As long as imprisonment does not exceed the statutory maximum, the fact that an indigent may be imprisoned for a longer time than a non-indigent is not a violation of the equal protection clause.[23] The Court specifically stated that its decision did not deal with the traditional alternative sentence of "30 dollars or 30 days."[24]

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18. 399 U.S. 235 (1970).

19. Hence, the appellant was incarcerated for 101 days over the statutory maximum.

20. Williams v. Illinois, 399 U.S. 235, 240-41 (1970): "We conclude that when the aggregate imprisonment *exceeds the maximum period fixed by the statute* and results directly from an involuntary nonpayment of a fine or court costs we are confronted with an impermissible discrimination that rests on ability to pay, and accordingly, we vacate the judgment below." (Emphasis added.)

21. *See* Note, 48 N. DAK. L. REV. 109 (1971), and Note, 16 VILL. L. REV. 754 (1971).

22. 399 U.S. at 243: "We hold only that a State may not constitutionally imprison beyond the maximum duration fixed by statute a defendant who is financially unable to pay a fine." *See also* 399 U.S. at 240-42. For further discussion, see text accompanying note 31 *infra*.

23. 399 U.S. at 243: "The mere fact that an indigent in a particular case may be imprisoned for a longer time than a non-indigent convicted of the same offense does not, of course, give rise to a violation of the Equal Protection Clause." *See also* Note, 22 SYRACUSE L. REV. 807 (1971).

24. 399 U.S. at 243: "It bears emphasis that our holding does not deal with a judgment of confinement for nonpayment of a fine in the familiar pattern of alternative sentence of '$30 or 30 days.'" Justice Harlan, concurring on due process grounds rather than accepting the equal protection rationale of the majority, likewise stated that there was no intention to

On the same day it decided *Williams*, the Court remanded the similar case of *Morris v. Schoonfield*[25] for reconsideration in light of *Williams*. In addition to the per curiam order, there was a short concurring opinion by four justices[26] which issued a warning as to future sentencing in this area. Referring to the factual situation in *Williams* and *Morris*, Justice White wrote:

> "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."[27]

This language at least indicated that the Supreme Court would not hesitate to consider similar questions involving the imprisonment of indigents.[28]

This caution was applied the following year by the final case in the trilogy, *Tate v. Short*.[29] Tate, an indigent, was convicted on nine traffic offense charges and fined a total of $425. Unable to pay, he was sent to a municipal prison farm to work off his fine at the rate of $5 per day.[30] The Court found the same unconstitutional discrimination here as in *Williams*, and adopted the view expressed by the four concurring justices in *Morris*.

Tate v. Short is a logical application of *Williams*. The statutory ceiling placed on imprisonment for these violations was zero days because the statutes imposed no imprisonment at all for these offenses. Since petitioner was required to serve 85 days in jail, this was imprisonment beyond the statutory maximum. Like *Williams*, this is an unconstitutional discrimination because the petitioner was imprisoned beyond the statutory maximum solely because of his indigency.[31]

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cast any doubt on the validity of the conventional "$30 or 30 days" sentence. *Id.* at 265. *See also* Note, 22 SYRACUSE L. REV. 807 (1971) and Note, 16 VILL. L. REV. 754 (1971).

25. 399 U.S. 508 (1970).

26. *Id.* at 509. Joining in the concurring opinion were Justices Douglas, Brennan, and Marshall.

27. *Id.*

28. *Id.* "But *Williams* means, at minimum, that in 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 a jail sentence."

29. 401 U.S. 395 (1971).

30. TEX. CODE CRIM. PROC. art. 45.53 (1966).

31. Tate v. Short, 401 U.S. 395, 397-98 (1971): "Although the instant case involves offenses punishable by fines only, petitioner's imprisonment for

One of the primary economic benefits of traffic offense statutes is augmentation of the state's revenues through the collection of fines. The state's penal objectives are served by the deterrent effect of forcing payment of these fines and not through imprisonment.[32] This is not the case with the alternative sentence of fine or imprisonment.[33] In such a situation, the legislature has made it clear that its penal objectives will be satisfied either by the payment of the fine or by imprisonment. Hence, an indigent sentenced to a seventeen dollar fine or thirteen days in jail would not be subjected to imprisonment beyond the statutory maximum, since the statutory maximum is thirteen days.

This narrow interpretation of *Williams* and *Tate* indicates that *Frazier* has extended the reasoning of these cases beyond their specific factual situations. It is on this point that the Fifth Circuit's reasoning diverged from the other courts of appeals.[34] In two other instances a federal circuit court had been confronted with the constitutional problem of the alternative sentence as applied to indigents, but in each case the court avoided the constitutional issue.[35] Hence, the invalidation of the alter-

nonpayment constitutes precisely the same unconstitutional discrimination since, like Williams, petitioner was subjected to imprisonment solely because of his indigency." (Footnote omitted.)

32. *Id.* at 399: "Imprisonment *in such a case* is not imposed to further any penal objective of the State." (Emphasis added.) It should be noted that the italicized words refer to imprisonment beyond the statutory maximum and not to incarceration under the alternative sentence.

33. For contradicting interpretations of *Tate* and its impact on the "$30 or 30 days" fine see Note, 40 FORDHAM L. REV. 159 (1971), and Note, 24 U. FLA. L. REV. 166 (1971).

34. The federal circuits have followed *Williams*, *Morris* and *Tate*, but have refrained from giving these cases the expansive interpretation utilized in *Frazier*. *See, e.g.*, U.S. v. Thompson, 452 F.2d 1333 (D.C. Cir. 1971); Johnson v. New York State Educ. Dep't, 449 F.2d 871 (2d Cir. 1971); U.S. v. Gaines, 449 F.2d 143 (2d Cir. 1971); Baldwin v. Smith, 446 F.2d 1043 (2d Cir. 1971); U.S. v. Shaheen, 445 F.2d 5 (7th Cir. 1971).

Earlier cases before the Fifth Circuit have not gone as far as *Frazier*. Hart v. Henderson, 449 F.2d 183 (5th Cir. 1971) (the inability of an indigent defendant to make bond should not extend the duration of his imprisonment beyond the statutory maximum); Wade v. Carsley, 433 F.2d 68 (5th Cir. 1970) (the additional incarceration of 166 and ⅔ days for inability to pay the fine was held to be patently unconstitutional under *Williams*).

35. In *Cavanaugh v. District of Columbia*, 441 F.2d 1039 (D.C. Cir. 1971), the appellant was sentenced to $25 or 5 days in jail for disorderly conduct. The court held the appellant was not indigent at the time the fine was imposed nor did he raise any issue in court as to his inability to pay the fine. In *Harris v. U.S.*, 440 F.2d 240 (D.C. Cir. 1971), the appellant was sentenced to 30 days in jail and a fine of $500 or 90 days in jail. However, the appellant had not made the trial judge aware that he was an indigent. The court stated the appellant should have filed a motion to vacate or modify the judgment of fine or imprisonment in lieu of paying the fine.

native sentence in *Frazier* is the most far reaching extension of the *Williams* and *Tate* decisions by a federal court.

This issue had been previously considered by a state court. In *In re Antazo*,[36] a decision of the California supreme court, the defendant was faced with "a fine in the amount of $2,500 plus a penalty assessment in the amount of $625, or, in lieu of payment thereof to be imprisoned in the county jail one day for each $10 of the unpaid amount."[37] The court determined that the practice of imprisoning indigents under the alternative sentence is not necessary to promote a compelling state interest.[38] *Antazo* stated that an indigent who would pay his fine if he could must be given an option similar to the offender who is not indigent.[39] The court in *Frazier* followed this reasoning of *Antazo*, likewise basing its decision on the compelling state interest test.

Wealth as a "Suspect" Classification

In *Frazier*, the court stated that the alternative sentence is a legislative pronouncement that the state's penal interests will be served only by the immediate payment of a fine or by imprisonment.[40] Hence, this is distinguishable from a conviction where the state's only penal interest is a fine, as in *Tate*. The imposition of this alternative sentence creates two separately treated classes of offenders: first, those who can pay the fine immediately and thereby avoid imprisonment; and second, those who are indigent, with no alternative to incarceration.[41] The court then concluded that, "[s]ince the difference in treatment

36. 3 Cal. 3d 100, 473 P.2d 999, 89 Cal. Rptr. 255 (1970).

37. *Id.* at 104, 473 P.2d at 1000, 89 Cal. Rptr. at 256.

38. *Id.* at 115, 473 P.2d at 1009, 89 Cal. Rptr. at 265: "We therefore conclude that petitioner's imprisonment because of his inability, due solely to his indigency, to pay the fine and penalty assessment imposed upon him as a condition of probation was not necessary to promote the state interests claimed by respondent and constituted an invidious discrimination based on his poverty in violation of the equal protection clause of the Fourteenth Amendment."

39. *Id.* at 116, 473 P.2d at 1009, 89 Cal. Rptr. at 265. For a thorough examination of *Antazo*, see Note, 16 VILL. L. REV. 754 (1971).

40. 457 F.2d at 728.

41. *Id. See also In re* Antazo, 3 Cal. 3d 100, 108, 473 P.2d 999, 1003, 89 Cal. Rptr. 255, 259 (1970): "To put it in another way and in the context of the present case, when a fine in the same amount is imposed upon co-defendants deemed equally culpable with the added provision for their imprisonment in the event of its nonpayment, an option is given to the rich defendant but denied to the poor one."

is one defined by wealth, the alternative fine creates a 'suspect' classification which must be tested by the compelling state interest test."[42]

The Fifth Circuit understood that the default imprisonment of indigents under this conventional alternative sentence allegedly advances two broad interests of the state: the state's monetary interest in the collection of fines, and its interest in rehabilitation of the offender who refuses or is unable to pay the fine.[43] The first interest is not valid because the indigent is not coerced or encouraged to pay the fine for fear of the alternative imprisonment since he has no money in the first place. Consequently, he has no real "alternative" under the alternative sentence. It is apparent that the state's financial interests in this particular area are diminished rather than enhanced by the economic burden of supporting these imprisoned indigents.[44] Thus, the state's first interest does not satisfy the more rigid and exacting requirement of the Supreme Court's compelling state interest test.[45]

The state is not actually interested in rehabilitation, the second broad interest in this area. This is so because the state has decreed that its punitive and deterrent interests can be adequately served through the payment of the fine.[46] Those who can pay the fine are not subjected to any rehabilitation program. The indigent is actually being imprisoned for his failure to pay the fine rather than as punishment for his violation of the statute. Thus, rehabilitation plays no viable role in incarceration of an indigent under the alternative sentence.[47] The Fifth Circuit felt that there are other means of collection which are more equitable:

> "We hold that the penal and deterrent effect of the immediate fine may be achieved through the alternative device

42. Frazier v. Jordan, 457 F.2d 726, 728 (5th Cir. 1972). *See also In re* Antazo, 3 Cal. 3d 100, 111, 473 P.2d 999, 1005, 89 Cal. Rptr. 255, 261 (1970): "Under the strict standard applied in such cases, the state bears the burden of establishing not only that it has a *compelling* interest which justifies the law but that the distinctions drawn by the law are *necessary* to further its purpose." (Citations omitted.)

43. 457 F.2d at 728-29.

44. *See* text at note 56 *infra.*

45. Frazier v. Jordan, 457 F.2d 726, 728-29 (5th Cir. 1972).

46. *Id.* at 729.

47. *See* text at note 60 *infra.*

of installment payments appropriately calculated, and perhaps through other measures which the states, in their wisdom, may devise."[48]

As neither of the state's interests satisfied the compelling state interest test,[49] "the detention imposed according to the alternative sentence was unlawful."[50]

The Future of the Alternative Sentence

The presentation by the Fifth Circuit and the California supreme court of the equal protection argument on the basis of wealth as a suspect criterion will be difficult to refute.[51] Further, two Justices of the Supreme Court have recently indicated, by way of a concurring opinion, that the alternative sentence as applied to indigents is subject to critical analysis.[52]

In addition to this equal protection argument, the *Frazier* decision is supported by persuasive policy considerations. First, the courts have lost sight of the original purpose of the alternative sentence. These statutes were primarily designed to punish the unyielding defendant who refused to pay.[53] Second, the increased use of fines as a criminal sanction has made non-payment one of the fundamental causes of imprisonment in the United States.[54] One authority estimates that forty to sixty per cent of all prisoners incarcerated in county jails are there be-

48. Frazier v. Jordan, 457 F.2d 726, 730 (5th Cir. 1972).

49. *Id.* at 728-29 (5th Cir. 1972). Under the traditional test of the equal protection clause, the state could probably uphold its interest in this area. Such an alternative sentence induces an offender to pay immediately or somehow secure the required money rather than go to jail. *See* text at notes 10 & 11 *supra.*

50. 457 F.2d at 730.

51. *See generally* Comment, 57 CALIF. L. REV. 778 (1969).

52. Argersinger v. Hamlin, 407 U.S. 25 (1972).

53. Kelly v. Schoonfield, 285 F. Supp. 732, 736 (D. Md. 1968): "Committing the defendant to jail is no part of the punishment; the penalty or the punishment adjudged is the fine, and the custody adjudged is the mode of executing the sentence." *See also* Note, 60 KY. L.J. 225, 233 (1971); Note, 45 TUL. L. REV. 627, 628 (1971); Comment, 101 U. PA. L. REV. 1013, 1021 (1953).

54. S. RUBIN, H. WEIHOFEN, G. EDWARDS, & S. ROSENZWEIG, THE LAW OF CRIMINAL CORRECTION § 16, at 252-53 (1963): "A generation ago, the National Commission on Law Enforcement and Observance called attention to the inordinate number of offenders imprisoned for failure to pay fines. In five institutions studied, 65 per cent of the prisoners were serving terms of thirty days or less, and 95 per cent terms of one year or less; a great many of these were confined for nonpayment of fines." "It is estimated that fines constitute 75% of all sentences in the United States." *Id.* § 11, at 240.

cause of inability to pay fines.[55] Applying this, the *Frazier* rationale would alleviate many problems associated with generally overcrowded jails. Third, imprisonment of indigents for failure to pay a fine is an economic burden on the state. The estimated cost of maintaining a prisoner in jail is $6 per day[56] or approximately $2,000 a year for an adult offender.[57] In California alone, an average of $16,621,000 is spent each year to support the indigent families of persons in jail.[58] It has been noted that the disadvantages of an installment plan are outweighed by the decreased costs of prison maintenance and welfare payments.[59] Finally, no adequate plans for rehabilitation are implemented in the city and county jails because the indigent is there for a relatively short time.[60] Even if the defendant will be in jail for a considerable period, rehabilitative facilities and personnel are generally lacking in these jails.

In addition to the above policy considerations, *Frazier* is further supported by the decision of the United States Supreme Court in *Argersinger v. Hamlin*.[61] This case held that an indigent has a right to counsel if there is any possibility that he will be subjected to a jail term of any length. Under this holding, an indigent charged with an offense which imposes an alternative sentence of fine or imprisonment would have a constitutional right to demand that he be represented by court appointed counsel. This would place an impractical and time-consuming burden on the legal profession. Under *Frazier*, the indigent would

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55. *Id.* § 16, at 253.

56. *Id.* n.154. *See also* State v. Tackett, 52 Haw. 601, 603 n.4, 483 P.2d 191, 193 n.4 (1971): "The daily per capita cost for each inmate at Oahu State Prison for the year 1969-70 was $19.86 (a figure reported by the Hawaii State Government, Department of Social Services, Corrections Division and computed from the Budget for Corrections Division, Fiscal Year 1969-70)."

57. PRESIDENT'S COMM'N ON LAW ENFORCEMENT & ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: THE COURTS 15 (1967): "The Commission's nationwide survey of correctional operations revealed that the average cost of probation supervision for an adult felony offender is $200 per year, while the average yearly cost of imprisoning such an offender is almost $2,000."

58. Note, 24 U. FLA. L. REV. 166, 167 n.15 (1971), *citing* the CALIFORNIA ASSEMBLY COMM. ON CRIMINAL PROCEDURE, PROGRESS REPORT: DETERRENT EFFECT OF CRIMINAL SANCTIONS 39 (1968).

59. Note, 50 N. CAR. L. REV. 136 (1971), and Comment, 101 U. PA. L. REV. 1013, 1022 (1953).

60. The defendant with adequate financial means escapes incarceration, even though he has committed the identical offense as the indigent, who is waiting out his fine in a jail room.

61. 407 U.S. 25 (1972).

not be entitled to a lawyer as there is no possibility of imprisonment for non-payment of the fine.

Of even greater relevance to the *Frazier* case is the concurring opinion in *Argersinger* of Justice Powell, joined by Justice Rehnquist. Justice Powell discussed the "serious problems of fairness" under the discretionary alternative sentence as applied to indigents:

> "The type of penalty discussed above (involving the discretionary alternative of 'jail or fine') presents serious problems of fairness—both to indigents and nonindigents and to the administration of justice. Cf. Tate v. Short. [Citations omitted.] No adequate resolution of these inherently difficult problems has yet been found. The rule adopted by the Court today, depriving the lower courts of all discretion in such cases unless counsel is available and is appointed, could aggravate the problem."[62]

Continuing, Powell discussed the equal protection ramifications of *Argersinger* under the alternative sentence of fine or imprisonment. He stated that a judge who has determined in advance that there will be no imprisonment in order to avoid the constitutional requirement of appointing a lawyer, has precluded the imposition of any meaningful sentence on the indigent. The convicted indigent may not be sent to jail because he was not represented by counsel and fine will not serve as adequate punishment since the indigent is without funds to pay. Consequently, there would be little to deter an indigent from subsequent similar offenses. *Frazier* not only alleviates *Argersinger's* requirement of appointing a lawyer in this situation, but likewise suggests that installment methods be introduced to insure that an indigent will be adequately punished through gradual payments on his fine.

Frazier's Impact in Louisiana

Assuming that the Supreme Court does accept the reasoning in *Frazier*, new legislation will be necessary because, at present, the federal government[63] and most states have statutes which

62. *Id.* at 2021 n.17.

63. 18 U.S.C. § 3565 (1970): "In all criminal cases in which judgment or sentence is rendered, imposing the payment of a fine or penalty, whether

require imprisonment for non-payment of fines.[64] Louisiana's provision reads:

> "If a sentence imposed includes a fine or costs, the sentence shall provide that in default of payment thereof the defendant shall be imprisoned for a specified period not to exceed one year; provided that where the maximum prison sentence which may be imposed as a penalty for a misdemeanor is six months or less, the total period of imprisonment upon conviction of the offense, *including imprisonment for default in payment of a fine or costs*, shall not exceed six months for that offense."[65]

This procedure, which was introduced into the law over 100 years ago,[66] is now patently unconstitutional under *Frazier*.

A growing number of states have initiated procedures allowing indigents to pay fines in installments.[67] A comparable system would be beneficial to Louisiana since it has no installment plan for the payment of fines by indigents.[68] Until such legislation is passed, the judges in the Fifth Circuit must improvise some sort of temporary plan that does not destroy the spirit of the *Frazier* decision.

As an example, in Baton Rouge district courts, the judge will usually delay the imposition of sentence, *i.e.*, instruct the indigent to return in two weeks, and require the convicted indigent to be present on that day with the amount of the fine.[69]

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alone or with any other kind of punishment, such judgment, so far as the fine or penalty is concerned, may be enforced by execution against the property of the defendant in like manner as judgments in civil cases. Where the judgment directs imprisonment until the fine or penalty imposed is paid, the issue of execution on the judgment shall not discharge the defendant from imprisonment until the amount of the judgment is paid."

64. *See* note 2 *supra*. For a list of these statutes which were still in effect in 47 states in 1971, see 24 U. FLA. L. REV. 166, 173 nn.54 & 55 (1971).

65. LA. CODE CRIM. P. art. 884. (Emphasis added.)

66. LA. CODE CRIM. P. art. 884, comment (a).

67. *See, e.g.*, CAL. PENAL CODE § 1205 (Supp. 1971); GA. CODE ANN. § 27-2901 (1972); MD. ANN. CODE art. 52, § 18 (1957); MASS. GEN. LAWS ANN. ch. 279, § 1A (1968); N.J. STAT. ANN. § 2A:166-15 (1953); PA. STAT. tit. 19, §§ 953, 956 (1964); WASH. REV. CODE ANN. § 10.82.030 (Supp. 1972); WIS. STAT. ANN. § 57.04 (Supp. 1972).

68. *See* MD. ANN. CODE art. 38, § 4(a)(2) (1971), for an example of new legislation in this area.

69. Interview with Mr. Cheney C. Joseph, Jr., who at the time of the interview was an assistant District Attorney in East Baton Rouge Parish and is presently serving as a faculty member at L.S.U. Law School.

This gives the indigent a short amount of time to secure the required money and likewise postpones immediately sending him to jail.

Conclusion

It is submitted that the validity of *Frazier* rests in its application of the compelling state interest test to the question of the incarceration of indigents under the alternative sentence. Since *Griffin v. Illinois*,[70] there has been a growing concern to protect the rights of the poor in the administration of criminal justice. Also, the Supreme Court's recent questioning of the imprisonment of indigents, as indicated by *Williams*, *Morris*, and *Tate*, reveals that the Court will not hesitate to consider similar problems. It appears that the traditional "30 dollars or 30 days" fine, as applied to indigents, will be struck down by the Supreme Court when it is confronted with a factual situation paralleling *Frazier*.

Gerald E. Songy

BROADENED COVERAGE UNDER THE LHWCA

In 1972, Congress amended the Longshoremen's and Harbor Workers' Compensation Act.[1] In addition to raising benefits[2] and making administrative changes,[3] this recent legislation wrought considerable changes in the substantive maritime law of the United States. The provision dealing with third party liability was amended to restrict an injured employee's action against the shipowner to one based upon negligence, effectively denying the "warranty of seaworthiness" to longshoremen.[4] Also eliminated was the "warranty of workmanlike service," which had been read into maritime contracts to allow the shipowner to

70. 351 U.S. 12 (1956).

1. 33 U.S.C. §§ 901-50 (1970), *as amended by* Longshoremen's & Harbor Workers' Compensation Act Amendments of 1972, Pub. L. No. 92-576 (Oct. 27, 1972), 86 Stat. 1251 [hereinafter cited as LHWCA 1972; reference to the former Act will be made to the 1970 edition of the United States Code].

2. LHWCA 1972 §§ 5, 10.

3. *E.g.*, the new legislation establishes a Benefits Review Board. LHWCA 1972 § 15.

4. LHWCA 1972 § 18. In *Seas Shipping Co. v. Sieracki*, 328 U.S. 85 (1946), the Supreme Court had extended this no-fault tort remedy to those who did work supposedly done by the members of the crew. For an analysis of the harbor worker's unseaworthiness remedy, *see* George, *Ship's Liability to Longshoremen Based on Unseaworthiness—Sieracki through Usner*, 3 J. MAR. & COMM. 45 (1971).