NOTE

Paying to Pay: Poverty Penalties for the Collection of Criminal Justice Debt

*Jordan Morris**

ABSTRACT

The 1983 Supreme Court case Bearden v. Georgia *held unconstitutional the practice of jailing defendants for nonpayment of court-mandated legal debt without first determining that the nonpayment was willful. For those buried under criminal justice debt and unable to pay, the holding in* Bearden *functions as a barrier to imprisonment for nonpayment of legal debt. Under the current interpretation of the law, however,* Bearden*'s protections fail to prevent jurisdictions from imposing fines, user fees, and interest upon indigent defendants solely because the defendant is unable to pay. Unexplored is the ability of the* Bearden *precedent to limit the imposition of post-conviction monetary punishments, such as poverty penalties imposed in the context of repayment plans for legal financial obligations.*

This Note argues that the Bearden *ruling requires courts to make a finding of willful nonpayment before imposing monetary sanctions upon defendants for the use of a payment plan or for late payments. This Note then argues that Congress should both prohibit such practices through federal legislation and create a federal spending scheme providing federal funding for court administration and court systems technology, the receipt of which is conditioned on a state's compliance with higher standards for ability-to-pay determinations and debt collection practices.*

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INTRODUCTION

In 2009, Cleveland County arrested Kendallia Killman and charged her with two misdemeanors.[1] At the time of her sentencing, Killman lived with two of her children, her father, and her boyfriend in a two-bedroom apartment under the Department of Housing and Urban Development's Housing Choice Voucher Program ("Section 8 Housing").[2] The family

1 TONY MESSENGER, PROFIT AND PUNISHMENT 22 (2021).
2 *Id.* at 24.

received $306 per month in food stamps.[3] Ms. Killman's only income at the time was a monthly disability benefit of $543 that she received as the primary caretaker of her intellectually disabled adult son.[4] Less than a week prior to her arrest, Ms. Killman had purchased a car for less than $400 to drive to Arkansas for a family emergency.[5] On the way home, Ms. Killman was pulled over. The police searched her car and found a marijuana pipe with residue in the trunk.[6]

On the advice of her court-appointed attorney, Ms. Killman pled "no contest."[7] The judge sentenced her to two years in jail—one year for each count—but deferred her sentence on the condition that Ms. Killman complete forty hours of community service and pay "court costs."[8] Upon pleading no contest, neither the court nor Ms. Killman's attorney informed her of the exact amount of "court costs" that she would be sentenced to pay.[9] Those "court costs" included a laundry list of fees. Notably, Ms. Killman was charged $150 for her court-appointed attorney.[10] The judge charged Ms. Killman with numerous additional fees: $100 for a "court assessment," $100 for a victims' compensation fund, $100 for a "mental health fee," $100 for a trauma care assistance fund, $25 for the Oklahoma county court information system, $15 to the District Attorney Council, $10 for courthouse security, a $6 law library fee, a $5 "Sheriff's Service" fee, a $27.50 fee for the county clerk, and a $17 collections fee.[11] Ms. Killman was charged for each fee twice—one for each count—despite the fact that both charges were processed together.[12] In total, Ms. Killman owed the county $1,150.[13] The judge placed Ms. Killman on a payment plan that required her to pay $100 per month, not including the additional $40 per month Ms. Killman was required to pay for the cost of being on probation.[14]

Unable to afford even the monthly $40 probation fee, Ms. Killman failed to make payments on her outstanding debt to the county.[15] Every time Ms. Killman missed a payment, the county charged her an additional fee for that

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3 *Id.*

4 *Id.*

5 *Id.* at 3; Marco Poggio, *Campaigns to Eliminate Justice Fees Pick Up Steam*, LAW360 (Oct. 7, 2022, 4:40 PM), https://www.law360.com/articles/1538355/campaigns-to-eliminate-justice-fees-pick-up-steam [https://perma.cc/M876-66J3].

6 MESSENGER, *supra* note 1, at 4.

7 *Id.* at 22.

8 *Id.* at 23; Poggio, *supra* note 5.

9 MESSENGER, *supra* note 1, at 23.

10 Poggio, *supra* note 5.

11 MESSENGER, *supra* note 1, at 23.

12 *Id.*

13 *Id.*; Poggio, *supra* note 5.

14 Poggio, *supra* note 5.

15 MESSENGER, *supra* note 1, at 48.

missed payment.[16] One year after her sentencing, a warrant was issued for her arrest for nonpayment.[17] The county charged Ms. Killman with another $50 fee for the cost of the warrant, in addition to a bond filing fee and a court filing fee.[18] By 2012, three years after her original sentence, Ms. Killman owed the county $1,115—only $35 less than the original amount imposed upon her, despite having paid much more.[19] Another warrant was issued for her arrest in 2012 and again in 2015, accompanied by additional fees that further increased the amount she owed.[20] In 2015, Cleveland County sold Ms. Killman's court debt to Aberdeen Enterprises II, Inc., a debt collection company that charges a thirty-percent surcharge to the court debt it collects, compounding upon her outstanding debt.[21] By 2017, Killman owed $1,600 despite having paid over $800 to the county over the previous eight years.[22] Although Ms. Killman's debt was eventually suspended by the court in 2018, nine years after her sentence,[23] situations like those of Ms. Killman are not uncommon; there is over $27.6 billion in unpaid court debt in the United States.[24]

Over forty years ago, in the seminal case *Bearden v. Georgia*,[25] the Supreme Court held that the practice of jailing criminal defendants who are unable, rather than simply unwilling, to pay their court debt is unconstitutional.[26] However, *Bearden* did not protect Ms. Killman from the county's limitless debt collection efforts against her and the fees imposed for that collection despite her inability to pay; *Bearden*'s holding as currently applied only protects against incarceration for nonpayment. This Note argues that *Bearden* put forward a new test for laws that create distinctions in punishment based on a criminal defendant's ability to pay, under which the

16 *See id.* at 126.

17 *Id.* at 48–49.

18 *See id.* at 49.

19 *See id.* at 126.

20 *See id.*

21 *Id.* at 126.

22 Poggio, *supra* note 5; MESSENGER, *supra* note 1, at 128.

23 MESSENGER, *supra* note 1, at 132.

24 *See* BRIANA HAMMONS, FINES & FEES JUST. CTR., TIP OF THE ICEBERG: HOW MUCH CRIMINAL JUSTICE DEBT DOES THE U.S. REALLY HAVE? 5 (2021), https://finesandfeesjusticecenter.org/content/uploads/2021/04/Tip-of-the-Iceberg_Criminal_Justice_Debt_BH1.pdf [https://perma.cc/J4RH-GTUV] (noting that the full extent of nationwide court debt is unknown because ten states and the District of Columbia do not have the capacity to track or gather information regarding court debt, and another ten states do not track court debt totals).

25 461 U.S. 660 (1983).

26 *Id.* at 660, 672–73.

imposition of fees and interest for an indigent defendant's nonpayment of outstanding court debt is unconstitutional.[27]

Yet prohibiting the imposition of interest and fees on outstanding criminal debt would only chip away at a small aspect of a much larger system of court fines and fees, leaving unresolved the crushing weight of outstanding court debt that so often buries indigent defendants like Ms. Killman. To better address this issue, Congress should prohibit the imposition of financial penalties for the use of payment plans—including enrollment fees, installment fees, collection fees, late fees, and interest—upon an individual who is utilizing a payment plan because they are unable to pay the entire sum in full upon the imposition of the court-related debt. Congress should condition funding for state court systems technology and administration upon compliance with heightened requirements for ability-to-pay determinations, payment plans, and debt collection practices. To obtain funding under this system, the state must (1) require the court to offer the individual the use of a payment plan if a court finds that a defendant is unable to pay the amount owed in full; (2) prohibit the imposition of interest and collection fees upon individuals whom the court finds are unable to pay the amount owed in full; (3) promulgate standards that establish circumstances constituting prima facie evidence of an inability to pay that mandate a conversion of a payment of fine into an alternative sanction or punishment for low-level offenses; (4) provide judges with the discretion to waive or reduce fees and impose alternative, nonmonetary sanctions; and (5) require courts at all levels to track and report court practices related to holding ability-to-pay hearings and debt collection.

Part I outlines the widespread use of administrative fees in the American justice system and explains the limit of *Bearden*'s current holding and the negative impacts of poverty penalties related to criminal justice debt. Part II distills *Bearden*'s rule and evaluates its application to poverty penalties imposed in relation to payment plans for outstanding court debt. Part II then demonstrates that, under *Bearden*, the imposition of user fees for repayment of criminal justice debt and the collection of interest on such debt is unconstitutional without a positive determination of the defendant's ability to pay. Part III discusses the need for federal legislation codifying such a constitutional requirement and the shortcomings of such legislation. Part III then proposes that Congress create a spending scheme that conditions federal

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[27] Many scholars have argued that *Bearden* applies to non-carceral punishments and may prohibit any distinction in punishment based on wealth. *See, e.g.*, Beth A. Colgan, *Wealth-Based Penal Disenfranchisement*, 72 VAND. L. REV. 55 (2019); Brandon L. Garrett, *Wealth, Equal Protection, and Due Process*, 61 WM. & MARY L. REV. 397 (2019); Tyler Smoot, *Punishing the Poor: Challenging Carceral Debt Practices Under* Bearden *and* M.L.B., 23 U. PA. J. CONST. L. 1086 (2021).

funding for court administration and court technology upon a state's compliance with higher standards for ability-to-pay determinations and debt collection practices.

I. LEGAL FINANCIAL OBLIGATIONS AND INDIGENT DEFENDANTS

The 1983 Supreme Court case *Bearden v. Georgia* held unconstitutional the practice of jailing defendants for nonpayment of court-mandated legal debt "without determining that [the defendant] had not made sufficient bona fide efforts to pay or that adequate alternative forms of punishment did not exist."[28] As it stands, this precedent provides little protection for indigent defendants from the negative impacts of the rampant, modern-day practices of imposing administrative fees within the criminal justice system.

A. Legal Financial Obligations and Modern-Day Debtor's Prisons

1. The Use of Fees in the Criminal Justice System

Understanding the breadth and scope of fees in the criminal justice context is essential to evaluating the mechanisms for repaying court debt and the consequences for failing to pay. A "fee" in the context of the criminal justice system encompasses any surcharge or cost imposed upon a criminal defendant.[29] These fees, imposed throughout all stages of the judicial process, are added to any fine a defendant may be required to pay. Fines, fees, and other court-ordered charges imposed upon the criminal defendant are collectively referred to as "Legal Financial Obligations" ("LFOs").[30] All fifty states and the District of Columbia permit county and municipal courts to impose some form of fees upon those involved in a judicial proceeding, including criminal defendants.[31]

States authorize or require numerous types of fees at all stages of the criminal justice process. Referred to as "hidden taxes,"[32] fees imposed upon

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28 *Bearden*, 461 U.S. at 661–62.

29 *See* AM. BAR ASS'N, TEN GUIDELINES ON COURT FINES AND FEES 1 (2018), https://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_ind_10_guidelines_court_fines.pdf [https://perma.cc/J2Z3-BHQD].

30 *See* NAT'L CTR. FOR STATE COURTS, PRINCIPLES ON FINES, FEES AND PRETRIAL PRACTICES 1 (2024), https://www.ncsc.org/__data/assets/pdf_file/0016/100384/Updated-Fines-Fees-and-Pretrial-Principles-24.4.302.pdf [https://perma.cc/7EKG-E4VE].

31 *See Fines and Fees Justice Index Overall Findings*, NAT'L CTR. FOR ACCESS TO JUST. (2023), https://ncaj.org/state-rankings/justice-index/fines-and-fees [https://perma.cc/DF9H-C3DX].

32 *See* James Van Bramer, *The 'Hidden Taxes' of the Justice System*, THE CRIME REP. (July 7, 2022), https://thecrimereport.org/2022/07/07/the-hidden-taxes-of-the-justice-system [https://perma.cc/5A9U-T8A8] (quoting former California judge and then-co-director of the

criminal, traffic, and local ordinance cases function as a source of revenue for states and local municipalities, funneling money to state and local general funds and law enforcement funds.[33] In 2019, state and local governments generated over $16 billion in financial penalties collected from civil and criminal defendants.[34] One such fee is an administrative fee or a general charge for "court costs," which governments charge to any individual processed through the state justice system. Texas, for example, imposes a $123 "court cost" fee upon a "person convicted of a Class A or Class B misdemeanor" and a $105 "court cost" fee upon a "person convicted of a felony."[35] The court places the revenue generated from these fees into accounts that fund the court's operations.[36] Comparatively, Illinois charges $439 in various administrative fees for a "generic" misdemeanor offense[37] and $549 for a "generic" felony offense.[38] Of the various types of administrative fees, thirty-two states have statutes that automatically impose at least one administrative fee that collects money for a victims' compensation fund, even for charges that lack a specified victim, such as minor traffic and drug charges.[39]

Although the Supreme Court held in *Gideon v. Wainwright*[40] that the Sixth Amendment requires that states provide counsel to criminal defendants who cannot afford an attorney themselves,[41] most states force indigent criminal defendants to pay for court-appointed counsel.[42] Forty-two states and the District of Columbia permit courts to charge criminal defendants for their court-appointed counsel through a statutory cost of counsel fee.[43]

Fines and Fees Justice Center, Lisa Foster, who refers to the revenue generated from arrests and judicial proceedings as "hidden taxes").

33 *See* ARAVIND BODDUPALLI & LIVIA MUCCIOLO, URB. INST., FOLLOWING THE MONEY ON FINES AND FEES: THE MISALIGNED FISCAL INCENTIVES IN SPEEDING TICKETS 4–8 (2022), https://www.urban.org/sites/default/files/publication/105331/following-the-money-on-fines-and-fees_final-pdf.pdf [https://perma.cc/9FSH-HYWV].

34 *See id.* at 1.

35 TEX. LOC. GOV'T CODE ANN. §§ 134.101–02 (West 2024).

36 *See id.*

37 705 ILL. COMP. STAT. § 135/15-25 (2024).

38 *Id.* § 135/15-5.

39 *See* FINES & FEES JUST. CTR., ASSESSMENTS & SURCHARGES: A 50-STATE SURVEY OF SUPPLEMENTAL FEES 2 (2022), https://finesandfeesjusticecenter.org/content/uploads/2022/12/Assessments-Surcharges-2.pdf [https://perma.cc/H78P-MZXP].

40 372 U.S. 335 (1963).

41 *Id.* at 344.

42 *See* MAREA BEEMAN, KELLIANNE ELLIOTT, ROSALIE JOY, ELIZABETH ALLEN & MICHAEL MROZINSKI, NAT'L LEGAL AID & DEF. ASS'N, AT WHAT COST? FINDINGS FROM AN EXAMINATION INTO THE IMPOSITION OF PUBLIC DEFENSE SYSTEM FEES 4–6 (2022), https://www.nlada.org/sites/default/files/NLADA_At_What_Cost.pdf [https://perma.cc/MEQ7-Y4VU].

43 *See id.*

Eighteen states mandate that criminal defendants pay an application fee or an appointment fee for court-appointed counsel, ranging anywhere from $10 to $400.[44] States may also employ "recoupment" or "reimbursement fees": fees for the cost of counsel imposed upon criminal defendants convicted of the charges brought against them, including those who plead guilty.[45] Seventeen states impose a fee for the appointment or application of counsel as well as reimbursement or recoupment fees.[46]

For those who are forced to spend time in jail, either because they cannot afford bail or because they are serving a sentence, defendants may be charged per day of their incarceration under aptly named "pay-to-stay" laws.[47] For example, Leann Banderman was arrested for shoplifting nail polish in Salem, Missouri.[48] With cash bail set at $3,000, she remained in jail until pleading guilty and accepting a plea bargain sentencing her to time served.[49] A sentence of time served allowed the city to charge her per day for her stay in jail, pursuant to the "pay-to-stay" law.[50] In total, the court charged Ms. Banderman $1,400 for her theft of a bottle of nail polish worth less than $25.[51]

In addition to pay-to-stay charges, jails and prisons often impose fees for necessary items, including meals and toilet paper.[52] These "board bills" may also accrue from jurisdictions charging for essential services, such as charging to transfer money into an inmate's correctional account, charging per minute of a phone call, and medical co-pay fees for health services.[53] For an inmate incarcerated in Minnesota, the average fifteen-minute, in-state phone call costs more than $5.00.[54]

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44 *See id.* at 4.

45 *See* ALICIA BANNON, MITALI NAGRECHA & REBEKAH DILLER, BRENNAN CTR. FOR JUST., CRIMINAL JUSTICE DEBT: A BARRIER TO REENTRY 7, 12 (2010).

46 BEEMAN ET AL., *supra* note 42, at 5.

47 *See* Lauren-Brooke Eisen, *Paying for Your Time: How Charging Inmates Fees Behind Bars May Violate the Excessive Fines Clause*, 15 LOY. J. PUB. INT. L. 319, 321 (2014).

48 MESSENGER, *supra* note 1, at 73.

49 *Id.*

50 MO. REV. STAT. § 221.105 (2024) (permitting counties and cities to impose up to $37.50 per day per prisoner).

51 MESSENGER, *supra* note 1, at 73.

52 *See* Eisen, *supra* note 47, at 321.

53 *See id.*

54 PETER WAGNER & WANDA BERTRAM, PRISON POL'Y INITIATIVE, STATE OF PHONE JUSTICE 2022: THE PROBLEM, THE PROGRESS, AND WHAT'S NEXT, at app. 5 (2022), https://www.prisonpolicy.org/phones/state_of_phone_justice_2022.html [https://perma.cc/BK6H-AXQB]; *see also* Wanda Bertram, *Since You Asked: What's Next for Prison and Jail Phone Justice Now that the Martha Wright-Reed Just and Reasonable Communications Act is Law?*, PRISON POL'Y INITIATIVE (Jan. 19, 2023) (describing the implications of the Martha Wright-Reed Just and Reasonable Communications Act on in-state rates for phone calls made from within state-level correctional facilities).

Not only may payment of fees be made a condition of an individual's probation or parole, but some jurisdictions impose fees for the cost of in-community supervision.[55] In thirty-eight states, individuals who find themselves on probation or parole are charged a monthly supervision fee, ranging anywhere from $10 to over $200 per month.[56] Many states also charge additional programming fees for any mandatory program that is a condition of an individual's parole or probation, such as counseling, drug testing, drug or mental health treatment, electronic monitoring, and even participation in community service.[57] Texas, for example, uses a "reimbursement" scheme for expenses "related to a defendant's participation in a pretrial intervention program."[58] The law permits a district or county attorney to collect a fee of up to $500 after a defendant's participation in such a program.[59] Nothing in the law requires the district or county attorney to inform the defendant of the cost of participation any time prior to enrollment in the program.[60] The law does not contain any provision mandating that a fee be waived if the defendant is unable to pay nor a provision requiring the district attorney to consider a defendant's ability to pay before imposing the fee.[61] Texas also charges a $100 fee for filing a petition for expunction of a criminal record, in addition to postage.[62]

2. The Impact of Fee Schemes on Criminal Defendants

The frequency with which courts impose fines and fees has dramatically increased in the past forty years, coinciding with the rise of mass incarceration in the United States.[63] This rampant increase in the use of fines and fees is due in part to local governments relying upon fines and fees as a source of revenue to fund their court systems or even supplement government pension accounts, particularly in rural areas.[64] Enacting these fines and fees allows politicians to claim they are keeping taxes low while

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55 *See* FINES & FEES JUST. CTR. & REFORM ALL., 50 STATE SURVEY: PROBATION & PAROLE FEES 5 (2022), https://finesandfeesjusticecenter.org/content/uploads/2022/05/Probation-and-Parole-Fees-Survey-Final-2022-.pdf [https://perma.cc/7M9M-WPWP].

56 *See id.*

57 *See id.* at 6.

58 TEX. CODE OF CRIM. PROC. ANN. § 102.0121(a) (2024).

59 *Id.*

60 *See id.*

61 *See id.*

62 *See id.* § 102.006.

63 *See* Lisa Foster, *The Price of Justice: Fines, Fees and the Criminalization of Poverty in the United States*, 11 U. MIA. RACE & SOC. JUST. L. REV. 1, 5 (2020); Jack Furness, Note, *Willful Blindness: Challenging Inadequate Ability to Pay Hearings Through Strategic Litigation and Legislative Reforms*, 52 COLUM. HUM. RTS. L. REV. 957, 965 (2021).

64 *See* BODDUPALLI & MUCCIOLO, *supra* note 33, *passim*.

siphoning money from individuals who are roped into the criminal justice system.[65]

Eighty percent of all criminal defendants are indigent.[66] Those who fail to pay their LFOs face further sanctions, including suspension of driver's licenses and occupational licenses, suspension of access to public benefits and programs including supplemental income, food stamps, and public housing, and the termination of public utilities including electricity and water.[67] Continued nonpayment may lead to the issuance of an arrest warrant for the violation of a parole or probation provision requiring the payment of LFOs.[68] Warrants often come with additional fees for the administrative process of their issuance, further adding to the existing outstanding debt.[69] Individuals may be jailed for nonpayment, restarting the cycle of fees associated with incarceration and further compounding their debt. Over time, outstanding LFOs can negatively impact an individual's credit or even lead to bankruptcy,[70] which in turn has been shown to affect employment prospects.[71] Employment is further impeded in jurisdictions that require regular in-person debt review hearings; individuals with LFOs often report spending entire days waiting to be heard before the judge.[72] Because failure to appear at these compliance hearings could result in a bench warrant, individuals must regularly spend long hours in court waiting for their appearance. This is time spent away from work, negatively impacting an individual's earnings and, thus, further limiting their ability to pay off their LFOs.[73]

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65 *See* FINES & FEES JUST. CTR., *supra* note 39, at 4.

66 *See* CAROLINE WOLF HARLOW, BUREAU OF JUST. STATS., U.S. DEP'T OF JUST., NCJ 179023, DEFENSE COUNSEL IN CRIMINAL CASES 1 (2000), https://bjs.ojp.gov/content/pub/pdf/dccc.pdf [https://perma.cc/27KT-ZDHN].

67 *See* U.S. COMM'N ON CIV. RTS., TARGETED FINES AND FEES AGAINST COMMUNITIES OF COLOR: CIVIL RIGHTS AND CONSTITUTIONAL IMPLICATIONS 35–38 (2017); BANNON ET AL., *supra* note 45, at 27–29; TZEDEK DC, LOCKED OUT: HOW DC BANS WORKERS WITH UNPAID FINES FROM MORE THAN 125 JOBS OR STARTING A BUSINESS, AND WHAT WE CAN DO ABOUT IT (2023).

68 U.S. COMM'N ON CIV. RTS., *supra* note 67, at 38–40.

69 *See* FINES & FEES JUST. CTR., BENCH WARRANT FEES: A 50-STATE SURVEY OF ANOTHER HIDDEN TAX IN AMERICA'S COURTS *passim* (2022), https://endjusticefees.org/wp-content/uploads/2022/10/Bench-Warrant-Fees-Oct-2022.pdf [https://perma.cc/2NRU-DC3N].

70 *See* Steven Mello, *Speed Trap or Poverty Trap? Fines, Fees, and Financial Wellbeing*, FINES & FEES JUST. CTR. (2018), https://finesandfeesjusticecenter.org/articles/speed-trap-or-poverty-trap-fines-fees-and-financial-wellbeing [https://perma.cc/EP6H-PBPH].

71 *See* Michele Cadigan & Gabriela Kirk, *On Thin Ice: Bureaucratic Processes of Monetary Sanctions and Job Insecurity*, 6 RUSSELL SAGE FOUND. J. SOC. SCIS. 113, 116 (2020).

72 *See id.* at 121.

73 *See id.* at 122.

The widespread use of fines and fees in connection with criminal justice proceedings also exacerbates existing societal inequalities.[74] Criminal justice fee schemes disproportionately impact poor and minority communities,[75] as fees are more likely to be levied against individuals in these communities, which has been shown to increase poverty rates in these areas.[76] Excessive criminal justice fees also impact the broader community: A survey of participants in the community corrections program for Jefferson County, Alabama found that forty percent of participants had children in the home who were affected by their parents' inability to pay for necessities due to LFOs.[77] Court debt is so burdensome that almost twenty percent of defendants in New Mexico elected to convert their LFOs into a period of incarceration to "pay off" their debt by serving time in jail.[78]

B. Bearden *and Incarceration for Nonpayment of Legal Financial Obligations*

The decades-old Supreme Court precedent *Bearden v. Georgia*[79] currently provides minimal constitutional protections for indigent defendants who owe criminal justice debt but are unable to pay.[80] In September 1980, Bearden was indicted on two felonies, burglary and theft, for his receipt of stolen property.[81] Although the trial court did not enter a guilty judgment, it deferred proceedings and sentenced Bearden to three years of probation.[82] The court ordered Bearden to pay a $500 fine and $250 in restitution as a condition of his probation, $200 of which was to be paid by the following day with the remaining $550 to be paid within the following four months.[83]

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74 *See* U.S. COMM'N ON CIV. RTS., *supra* note 67, at 19.

75 *See id.* at 4; *Under Pressure: How Fines and Fees Hurt People, Undermine Public Safety, and Drive Alabama's Racial Wealth Divide*, ALA. APPLESEED CTR. L. & JUST. 5 (2018), http://alabamaappleseed.org/wp-content/uploads/2018/10/AA1240-FinesandFees-10-10-FINAL.pdf [https://perma.cc/8R34-JLF2].

76 *See* MARIA RAFAEL & STEPHAN LURIE, VERA INST. OF JUST., A MATTER OF TIME: THE CASE FOR SHORTENING CRIMINAL DEBT COLLECTION STATUES OF LIMITATIONS, A 50-STATE SURVEY 6 (2024), https://www.vera.org/downloads/publications/A-Matter-of-Time-The-Case-for-Shortening-Criminal-Debt-Collection-Statutes-of-Limitations-a-50-State-Survey.pdf [https://perma.cc/N3MK-RJJL].

77 *See* Carol Gundlach & Dev Wakeley, *Criminal Justice Debt: A Modern-Day Debtors' Prison*, ALA. ARISE (Jan. 10, 2020), https://www.alarise.org/resources/criminal-justice-debt-a-modern-day-debtors-prison [https://perma.cc/7SW9-956M].

78 *See* RAFAEL & LURIE, *supra* note 76, at 6.

79 461 U.S. 660 (1983).

80 *See* discussion *infra* Sections II.A.2, II.B.

81 *See Bearden*, 461 U.S. at 662.

82 *Id.*

83 *See id.*

One month following Bearden's sentence, Bearden lost his job.[84] Having only a ninth-grade education and being unable to read, Bearden was unable to find other means of employment despite repeated efforts to do so and had no other source of income nor remaining assets upon which he could rely.[85] Four months after his sentencing, still unable to find a job, Bearden notified his probation officer of his circumstances, explaining that he would be unable to pay the remainder of the fine by the court-imposed deadline.[86] After an additional three months, during which Bearden's circumstances did not change, the State petitioned the trial court to revoke Bearden's probation for failure to pay.[87] Following an evidentiary hearing on those grounds, the trial court revoked Bearden's probation for failure to pay the outstanding balance in May 1981 and sentenced Bearden to serve the remaining time of his probation in prison.[88]

Bearden appealed, arguing that the State's act of imprisoning him for failing to pay when he was unable to do so violated the Equal Protection Clause of the Fourteenth Amendment.[89] The Court found for Bearden, holding that the trial court erred in revoking Bearden's probation without determining that Bearden "had not made sufficient bona fide efforts to pay or that adequate alternative forms of punishment did not exist."[90] Thus, *Bearden* created additional procedural due process protection for indigent defendants at risk of incarceration for nonpayment of LFOs, requiring a determination of their ability to pay.[91]

C. Poverty Penalties for Payment Plans

For those buried under criminal justice debt and unable to pay, the holding in *Bearden* functions as a barrier to imprisonment for nonpayment of debt. Under current law, however, *Bearden*'s protections extend only to certain instances of incarceration and provide no protection for indigent defendants against the modern practice of imposing fines and fees solely because a defendant cannot pay.

Under *Bearden*, a court must find that the defendant failed to make "sufficient bona fide efforts to pay" and find that alternatives to incarceration

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84 *See id.*

85 *See id.* at 662–63.

86 *See id.* at 663.

87 *See id.*

88 *See id.*

89 *See id.*

90 *See id.* at 661–62.

91 *See* Vanita Gupta, Kristen Clarke, Amy L. Solomon & Rachel Rossi, *Dear Colleague Letter*, U.S. DEP'T OF JUST., CIV. RTS. DIV. 6 (Apr. 20, 2023), https://www.justice.gov/d9/press-releases/attachments/2023/04/20/doj_fines_and_fees_dear_colleague_letter_final_with_signatures_0.pdf [https://perma.cc/5VF4-8CTU].

inadequately punish and deter before a court may incarcerate a defendant for nonpayment.[92] Courts interpret *Bearden*'s holding to require an "ability-to-pay" hearing before a judge may incarcerate a defendant for nonpayment of LFOs.[93] Some states, however, fail to provide straightforward standards or definitions for what circumstances indicate inability to pay or what qualifies as indigency,[94] which was similarly left undefined by the *Bearden* Court.

The *Bearden* Court also suggested that once a court determines that a defendant is unable to pay, a court may provide additional time to make payments, decrease the amount owed, or provide an alternative sentence to the payment of debt, such as labor or public service.[95] Some jurisdictions permit judges to offer payment plans for defendants. Payment plans are installment programs requiring individuals to pay set portions of their LFOs at an established interval, typically every month.[96] Most states do not require courts to offer payment plans to individuals who are unable to pay.[97] States that permit judges to offer payment plans often do so with little guidance to the judge, and others even limit the use of payment plans to certain circumstances based on the type of LFO or the kind of conviction from which the LFO stems.[98] Wisconsin, for example, limits a court's ability to extend the time for payment to a maximum of sixty days,[99] and Vermont permits the use of payment plans only for payment of LFOs arising from traffic violations.[100]

Although both extending the time to make payments and formally placing a defendant on a payment plan prevents indigent defendants from being incarcerated on the basis of inability to pay, many jurisdictions then impose "poverty penalties"—"additional late fees, payment plan fees, and interest" imposed upon individuals who are unable to pay their debts in

92 *See Bearden*, 461 U.S. at 674.

93 *See* Gupta et al., *supra* note 91, at 6 ("State and local courts have an affirmative duty to determine an individual's ability to pay and whether any nonpayment was willful before imposing incarceration as a consequence.").

94 *See* Theresa Zhen, *Color(Blind) Reform: How Ability to Pay Determinations are Inadequate to Transform a Racialized System of Penal Debt*, N.Y.U. REV. L. & SOC. CHANGE 175, 203 (2019).

95 *See Bearden*, 461 U.S. at 672.

96 *See, e.g.*, ALASKA STAT. § 12.55.035(d) (2022) ("If a defendant is sentenced to pay a fine, the court may grant permission for the payment to be made within a specified period of time or in specified installments.").

97 *See generally Fines and Fees Justice Index Overall Findings*, *supra* note 31.

98 *See id.*

99 *See* WIS. STAT. § 973.05(1) ("When a defendant is sentenced to pay a fine, the court may grant permission for the payment of the fine, plus costs, fees, and surcharges imposed under ch. 814, to be made within a period not to exceed 60 days. If no such permission is embodied in the sentence, the fine, plus costs, fees, and surcharges imposed under ch. 814, shall be payable immediately.").

100 *See* VT. STAT. ANN. tit. 4, § 1109(b)(2) (2023).

full.[101] At least nine states charge a fee for enrollment in a payment plan.[102] Arizona, for example, imposes an additional $20 on an individual "who pays a court ordered penalty, fine or sanction on a time payment basis."[103] The law explicitly prohibits the judge from waiving or suspending the time payment fee. Other states, such as Florida and Idaho, impose a "processing" or "handling" fee upon each payment made.[104] At least nine states require the imposition of a "collection fee," which some states charge as a percentage of the amount owed,[105] and at least thirteen states authorize courts to impose interest or late fees upon individuals who miss payments.[106] Florida, for example, permits the clerk to charge an additional "40 percent of the amount owed at the time the account is referred to the attorney or agent for collection."[107] Georgia goes so far as to permit courts to institute "any procedure for execution upon the writ of *fieri facias*[108] through levy, foreclosure, [and] garnishment" "if the fine or restitution is not paid in full."[109] Some states that employ private debt collectors allow the private debt collection companies to impose additional fees or a percentage of the amount owed. Alabama, for example, requires that courts "assess a collection fee of 30 percent of the funds due which shall be added to the amount of funds due" upon a missed payment.[110] In comparison, the state of Montana, rather than providing a specific amount a court may pay a private collector, instead permits the court to pay the private collector "a reasonable fee for collecting the judgment."[111]

Criminal justice fee schemes are used consistently across the country but vary drastically between jurisdictions. Given the sheer quantity of fines and fees levied against individuals in the criminal justice system, the absence of formal payment plans in many jurisdictions, and the imposition of poverty

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101 *See* BANNON ET AL., *supra* note 45, at 1.

102 *See id.* at 18.

103 *See* ARIZ. REV. STAT. § 12-116(A) (2022).

104 *See* FLA. STAT. § 28.24(27)(a)–(c) (2023) (describing the "processing charges" imposed upon each partial payment); IDAHO CODE ANN. § 31-3201(4) (2025) (describing the "handling fee" imposed on each monthly installment); *see also* OHIO REV. CODE ANN. § 2929.28(G)(2) (2023) (permitting the clerk of the court to "charge the fee to the offender" any fee "associated with processing an electronic transfer").

105 *See* BANNON ET AL., *supra* note 45, at 17.

106 *See id.*

107 *See* FLA. STAT. § 28.246(6) (2023).

108 A writ of *fieri facias* is a court order that directs law enforcement to seize and sell property and then use the money generated from the sale of that property to satisfy the owner's outstanding debt. *See Fieri Facias*, LEGAL INFO. INST. (2021), https://www.law.cornell.edu/wex/fieri_facias [https://perma.cc/JY9Z-NXBU].

109 *See* GA. CODE § 17-10-20 (2022) (footnote added).

110 *See* ALA. CODE § 12-17-225.4 (2022); *see also* ALA. CODE § 12-17-225.2 (2022).

111 *See* MONT. CODE ANN. § 3-10-601(4) (2023).

penalties for the use of such plans in others, fee schemes work together to bury criminal justice defendants under court debt from which they cannot escape, affecting a defendant's livelihood, their family, and the wider community.[112] The next Part explores the viability of applying *Bearden* case law to poverty penalties levied upon defendants who are unable to pay their LFOs in full at the time they are imposed.

II. POVERTY PENALTIES AND THE LIMITS OF THE *BEARDEN* STANDARD

There is a renewed interest in *Bearden* among scholars in an attempt to better distill its rule and expand its application to enhance protections for Sixth Amendment rights,[113] restore voting rights,[114] reform bail practices,[115] eliminate driver's license suspensions,[116] and abolish user-funded pretrial monitoring.[117] Unexplored is the ability of *Bearden* precedent to limit the imposition of post-conviction monetary fees and sanctions, such as poverty penalties imposed in the context of LFO repayment plans. This Part analyzes the *Bearden* holding and the precedent upon which it is based and demonstrates that the *Bearden* ruling requires that courts make a finding of willful nonpayment before imposing monetary sanctions upon defendants for the use of a payment plan and for late payments.

*A. The Development of "*Bearden *Scrutiny"*

1. Due Process and Equal Protection Under the Fourteenth Amendment

The Due Process Clause of the Fourteenth Amendment provides that "[n]o state shall . . . deprive any person of life, liberty, or property, without due process of law."[118] In application, the Due Process Clause requires that

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112 *See supra* Section I.A.2.

113 *See generally* Louis Fisher, *Criminal Justice User Fees and the Procedural Aspect of Equal Justice*, 133 HARV. L. REV. F. 112 (2020) (distilling an "Equal Justice" theory from *Bearden* and applying that theory to laws that burden Sixth Amendment rights, such as jury fees, counsel costs, and other trial-related fines); Helen A. Anderson, *Penalizing Poverty: Making Criminal Defendants Pay for Their Court-Appointed Counsel Through Recoupment and Contribution*, 42 U. MICH. L.J. REFORM 323 (2009).

114 *See generally* Colgan, *supra* note 27, at 91–92.

115 *See* Smoot, *supra* note 27, at 1086–87 (applying *Bearden*'s rule to laws that require criminal defendants to pay for their public defenders, assign bail on a fixed-sum basis, and condition re-enfranchisement on payment of LFOs).

116 *See* Garrett, *supra* note 27, at 428–34 (distilling an "Equal Process" conception of the *Bearden* holding and comparing its application to driver's license suspensions with a due process challenge to driver's license suspension).

117 *See* Jaden Warren, Note, *What's Free: A Proposal to Abolish User Fees For Pretrial Electronic Monitoring*, 47 AM. J. CRIM. L. 139, 150 (2020) (arguing that *Bearden* prohibits the imposition of user fees for pretrial electronic monitoring).

118 U.S. CONST. amend. XIV, § 1.

a person have a meaningful opportunity to be heard before the state may deprive a person of life, liberty, or property.[119] To find a violation of the Due Process Clause, a court must determine whether the administrative procedures in question comport with the Constitution, which requires a consideration of three factors set forth in *Mathews v. Eldridge*[120]:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.[121]

Typically, to comport with the Due Process Clause, a hearing is required before the State may deprive an individual of a property interest.[122]

The Fourteenth Amendment also provides that "[n]o state shall . . . deny to any person within its jurisdiction the equal protection of the law."[123] When a law imposes differing treatment upon individuals based on membership in a certain class or group, a court must decide "whether the classifications drawn in a statute are reasonable in light of its purpose," or, in other words, "whether there is an arbitrary or invidious discrimination between those classes covered by [the law in question] and those excluded."[124] Constitutionally suspect classifications recognized by the Supreme Court include distinctions on the basis of race and national origin.[125] When a law discriminates against classifications that are constitutionally suspect, the law "will be upheld only if it is necessary, and not merely rationally related, to the accomplishment of a permissible state policy."[126] Such requirement that the law be considered necessary is considered "strict" or "rigid" scrutiny: The law must be "narrowly tailored" and must support a "compelling" state interest.[127] Quasi-suspect classifications, such as distinctions based on gender and sex, receive a lower level of scrutiny—intermediate scrutiny—

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119 *See* Mathews v. Eldridge, 424 U.S. 319, 333–35 (1976).

120 424 U.S. 319 (1976).

121 *Id.* at 335.

122 *See* Wolff v. McDonnell, 418 U.S. 539, 557–58 (1974).

123 U.S. CONST. amend. XIV, § 1.

124 *See* McLaughlin v. Florida, 379 U.S. 184, 191 (1964).

125 *See id.* at 192; Graham v. Richardson, 403 U.S. 365, 372 (1971) ("[C]lassifications based on alienage, like those based on nationality or race, are inherently suspect and subject to close judicial scrutiny."); *see also* Henry Rose, *The Poor as a Suspect Class Under the Equal Protection Clause: An Open Constitutional Question*, 34 NOVA L. REV. 407, 408–11 (2010) (describing the evolution of suspect class categories in equal protection cases).

126 *McLaughlin*, 379 U.S. at 195 (1964).

127 MATTHEW BENDER, STATE CONSTITUTIONAL LAW: RIGHTS & PROTECTIONS § 10.01 (LexisNexis 2023 ed.).

such that the classification "must serve important governmental objectives and must be substantially related to . . . those objectives."[128] Statutes that neither discriminate on the basis of a suspect or quasi-suspect class nor implicate a fundamental right are subject to rational basis review, which requires that the statutory classification "bears a rational relation to some legitimate [legislative] end."[129] A law is considered to be rationally related to a legitimate legislative end when there exists a rational justification that supports the classification.[130]

San Antonio Independent School District v. Rodriguez[131] is generally regarded as the Supreme Court precedent that holds that financial status or poverty level is not considered a suspect class and, thus, does not warrant a strict or intermediate scrutiny analysis under the Equal Protection Clause.[132] However, as many scholars have observed, the Court has repeatedly found in the criminal justice context that laws that disparately impact an impoverished person's access to justice are unconstitutional.[133] Based on the rule distilled from *Bearden* and the cases upon which it relied, many scholars argue that the Equal Protection Clause and Due Process Clause converge in the criminal justice context to create a level of scrutiny higher than rational basis.[134] The next Section assesses *Bearden*, the cases upon which *Bearden*

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128 *See* Craig v. Boren, 429 U.S. 190, 197 (1976); *see also* United States v. Virginia, 518 U.S. 515, 524 (1996).

129 *See* Romer v. Evans, 517 U.S. 620, 631 (1996). *But see* Raphael Holoszyc-Pimentel, *Reconciling Rational-Basis Review: When Does Rational Basis Bite*, 90 N.Y.U. L. REV. 2070, 2074–76 (2015) (arguing that the Court, purporting to employ rational basis scrutiny, sometimes employs a higher level of scrutiny—"rational-basis-with-bite"—when the case at hand involves immutability and burdens a significant right).

130 BENDER, *supra* note 127.

131 411 U.S. 1 (1973).

132 *See* Fowler v. Benson, 924 F.3d 247, 261 (6th Cir. 2019) ("We review equal protection challenges to laws on grounds of 'wealth-classification' only to see if they have a rational basis." (quoting *San Antonio Indep. Sch. Dist.*, 411 U.S. at 29)); *San Antonio Indep. Sch. Dist.*, 411 U.S. at 29 ("[W]ealth discrimination alone does not provide an adequate basis for invoking strict scrutiny . . . ."); *see also* Harris v. McRae, 448 U.S. 297, 323 (1980) ("[T]his Court has held repeatedly that poverty, standing alone, is not a suspect classification."). *But see* Garrett, *supra* note 27, at 412 (arguing that *Rodriguez* does not establish that wealth-based criteria receive rational basis review under the Equal Protection Clause but rather that *Rodriguez* denied relief on the basis that the law in question did not "clearly target an identifiable group of indigent people").

133 *See, e.g.*, Williams v. Illinois, 399 U.S. 235, 240–41 (1970); Tate v. Short, 401 U.S. 395, 398–99 (1971).

134 *See* Kerry Abrams & Brandon L. Garrett, *Cumulative Constitutional Rights*, 97 B.U. L. REV. 1309, 1313 (2017) (describing the Court's use of an "intersectional analysis" that "occurs when the action in question violates more than one constitutional provision [but only results in a holding for relief] when the constitutional provisions are read to inform and bolster one another . . . ."); Garrett, *supra* note 27, at 417 (arguing that "a case such as *Bearden* should not be seen as a case involving two separate constitutional claims" and instead the "two constitutional claims are related and bolster each other"); Fisher, *supra* note 113, at 113

relied, and the recent scholarship arguing that *Bearden* sets forth a rule requiring a heightened level of scrutiny in cases involving impoverished individuals in the criminal justice system. The following Section then applies this standard to poverty penalties imposed upon defendants for the use of payment plans and concludes that such practices are unconstitutional when imposed without a determination that a defendant is able to pay.

2. *Bearden* Scrutiny: The Intersection of Equal Protection and Due Process

The holding in *Bearden* was not unprecedented, but rather was the culmination of previous decisions that expanded protections for indigent criminal defendants. In fact, the majority in *Bearden* noted that in setting out its standard, the Court built upon the precedent established in *Williams v. Illinois*[135] and *Tate v. Short*.[136]

The Court in *Williams* assessed an Illinois law that required indigent defendants to be incarcerated for failure to pay the monetary sanctions of their sentences, resulting in a period of incarceration beyond the maximum provided in the statute.[137] Pointedly, the *Williams* Court addressed "a claim of *discriminatory* treatment based upon financial inability to pay."[138] The Court reasoned that the statute made the maximum length of incarceration contingent upon a defendant's ability to pay, effectively vesting "different consequences on two categories of persons," resulting in "invidious discrimination solely because he is unable to pay the fine."[139] Relying upon *Griffin v. Illinois*,[140] the *Williams* Court "reaffirm[ed] allegiance to the basic command that justice be applied equally to all persons," holding that it is discriminatory to vest an indigent defendant with a term of incarceration exceeding the statutory maximum solely because of his inability to pay.[141]

The Court "extended"[142] *Williams* less than one year later in *Tate v. Short*.[143] *Tate* assessed the constitutionality of a Texas statute that required defendants unable to pay their fines to be sentenced to municipal prison farms to satisfy their outstanding debt at a rate of $5 per day.[144] The Court

(describing "equal justice" claims as those that bring "challenges to policies that deny indigents equal access to a fundamental right").

135 399 U.S. 235 (1970).

136 401 U.S. 395 (1971).

137 *Williams*, 399 U.S. at 236.

138 *See id.*

139 *See id.* at 242.

140 351 U.S. 12 (1956).

141 *See Williams*, 399 U.S. at 241.

142 *Bearden v. Georgia*, 461 U.S. 660, 665 (1983).

143 401 U.S. 395 (1971).

144 *Id.* at 397.

held that the "statutory ceiling cannot, *consistently with the Equal Protection Clause*, limit the punishment to payment of the fine if one is able to pay it, yet convert the fine into a prison term for an indigent defendant without the means to pay his fine."[145] Both *Williams* and *Tate* relied upon the principle that the Equal Protection Clause prohibits discriminatory treatment on the basis of a criminal defendant's ability to pay.

Although *Williams* and *Tate* explicitly relied only upon the Equal Protection Clause in coming to their rulings, the *Bearden* Court framed the question before it as one also involving due process. Justice O'Connor, writing for the majority in *Bearden*, noted that the parties argued the issue primarily in terms of Equal Protection and found that there was "no doubt that the State has treated [Bearden] differently from a person who did not fail to pay the imposed fine and therefore did not violate probation," paralleling the findings of discrimination in *Williams* and *Tate* and prompting an Equal Protection analysis.[146] Under an Equal Protection framework, "one must determine whether, and under what circumstances, a defendant's indigent status may be considered in the decision whether to revoke probation."[147] Justice O'Connor explained that this inquiry was "substantially similar" to determining "when it is fundamentally unfair or arbitrary for the State to revoke probation when an indigent is unable to pay the fine" under a due process analysis.[148] Because of these similarities, "due process and equal protection principles converge in the Court's analysis in these cases."[149]

With this convergence of equal protection and due process principles in mind, the *Bearden* Court summarized *Williams* and *Tate* as establishing the rule that "if the State determines a fine or restitution to be the appropriate and adequate penalty for the crime, it may not thereafter imprison a person solely because he lacked the resources to pay it."[150] *Bearden* then adds to and clarifies *Williams* and *Tate*: When an individual's indigent status is the basis for differential treatment in the criminal justice process, regardless of

> [w]hether analyzed in terms of equal protection or due process . . . [*Bearden*] requires a careful inquiry into such factors as "the nature of the individual interest affected, the extent to which it is affected, the rationality of the connection between legislative

145 *See id.* at 399 (emphasis added).

146 *See Bearden*, 461 U.S. at 665.

147 *See id.* at 665–66.

148 *See id.* at 666.

149 *See id.* at 665; *see also* Garrett, *supra* note 27, at 404, 417 (discussing how Due Process and Equal Protection principles converge under *Bearden* to create a singular, heightened claim of "Equal Process" which should be entitled to higher scrutiny than rational basis).

150 *Bearden*, 461 U.S. at 667–68.

> means and purpose, [and] the existence of alternative means for effectuating the purpose . . . .[151]

Failure to justify such differential treatment on the basis of indigency status, as was the case in *Bearden*, then triggers the requirement of certain due process protections—an inquiry into ability to pay before the imposition of another punishment—to prevent such discriminatory treatment. The next Section applies this rule to poverty penalties imposed in relation to the use of a payment plan for LFOs and concludes that doing so without a positive finding of a defendant's affirmative ability to pay is unconstitutional under *Bearden*, because the court may not "punish[] a person for his poverty."[152]

B. Applying Bearden *Scrutiny to the Poverty Penalties of Payment Plans*

Many scholars have argued that *Bearden* applies to non-carceral punishments and may prohibit any distinction in punishment based on wealth.[153] With the understanding that the *Bearden* ruling prohibits punishment for nonpayment without a determination of an ability to pay, this Section specifically analyzes *Bearden*'s application to poverty penalties imposed upon individuals in the context of a payment plan.

1. Discrimination Based on Indigency Status

Poverty penalties imposed in connection with payment plans tend to fall into two categories: administrative user fees and monetary sanctions for late payments.[154] The imposition of both types of poverty penalties parallel the statutes and practices identified as discriminatory in *Williams*, *Tate*, and *Bearden*.

An individual is placed on a payment plan when they are unable to pay the entirety of their LFOs at the time the court imposes them, whether as a provision of probation or as a sentence. Numerous jurisdictions then charge various fees or interest for the use of a payment plan.[155] Although such a statute is not *per se* discriminatory, as "its terms apply to rich and poor alike . . . a law nondiscriminatory on its face may be grossly discriminatory in its operation."[156] Such is the case with payment plan user fees and the accumulation of interest while using such a plan. An individual is *only* placed on a payment plan and is, therefore, only charged a user fee and interest when

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151 *See id.* at 666–67 (quoting Williams v. Illinois, 399 U.S. 235, 260 (1970) (Harlan, J., concurring) (alteration in original)).

152 *See id.* at 671.

153 *See, e.g.*, Colgan, *supra* note 27; Garrett, *supra* note 27; Smoot, *supra* note 27.

154 *See supra* Section I.C.

155 *See supra* Section I.C.

156 *See* Griffin v. Illinois, 351 U.S. 12, 17 n.11 (1956).

their financial circumstances—i.e., their poverty level or indigency status—are such that they are unable to pay their LFOs in full at the time of their imposition. Without an ability-to-pay determination, these schemes deprive individuals of essential funds "solely because [they are] indigent and cannot immediately pay the fine in full."[157] Doing so "traps indigent individual in a cycle of . . . mounting debt, based solely on their inability to pay."[158] An individual may only escape these additional sanctions by payment of their LFOs, just as Bearden could escape additional incarceration only by payment of his court debt.[159] Fundamentally, user fees for payment plans charge individuals for their inability to pay; they force indigent defendants to pay more simply because they cannot pay, in violation of the principles established in *Williams*, *Tate*, and *Bearden*.

Monetary sanctions for missed or late payments parallel the discriminatory treatment in *Bearden* even more closely than user fees and interest. By charging an individual for missing payment without determining whether the missed payment was due to an inability to pay, the court risks imposing an additional sanction upon an individual solely because of his indigency status—a punishment which an individual may escape only by payment. Taken together, the imposition of both user fees for payment plans and monetary sanctions for late payments trigger an application of the *Bearden* factors, which weigh "[1] the nature of the individual interest affected, [2] the extent to which it is affected, [3] the rationality of the connection between legislative means and purpose, [and 4] the existence of alternative means for effectuating the purpose."[160]

2. Poverty Penalties Extensively Affect Indigent Defendants' Individual Interest

In part, *Bearden* requires a consideration of "the nature of the individual interest affected [and] the extent to which it is affected" before a procedural practice that punishes a defendant solely because of his indigency status may be barred or before a procedural protection may be required to prevent such a practice.[161] Although *Bearden*'s holding was based on a deprivation of individual liberty interests, poverty penalties implicate individual property interests. The Fourteenth Amendment guarantees due process protections for the deprivation of liberty and property.[162] Property interests within the scope

157 *Bearden*, 461 U.S. at 664.

158 *See* Mendoza v. Strickler, 51 F.4th 346, 361 (9th Cir. 2022) (Berzon, J., dissenting).

159 *See Bearden*, 461 U.S. at 668.

160 *See id.* at 666–67 (quoting Williams v. Illinois, 399 U.S. 235, 260 (1970) (Harlan, J., concurring)).

161 *See id.*

162 *See* Bd. of Regents of State Colls. v. Roth, 408 U.S. 564, 572 (1972).

of the Fourteenth Amendment include not only "actual ownership of real estate, chattels, [and] money," but also "extend[s] well beyond" these traditional categories to include "the security of interests that a person has already acquired in specific benefits."[163]

Although poverty penalties are imposed in small increments, any amount of additional charges can be exceptionally burdensome for indigent individuals—especially for those who are not on a fixed payment plan.[164] According to a 2022 Federal Reserve study, thirty percent of Americans would be unable to afford three months of expenses upon the loss of their primary source of income, and thirteen percent of Americans would be unable to afford their monthly bills if faced with a $400 emergency expense.[165] The harms of imposing fees are even higher in states that charge interest or charge a percentage of the amount owed upon a missed payment.[166] Such schemes set up a slippery slope; the more an individual is charged, the greater the risk of a substantial deprivation of their finances.[167] In addition to the financial property interest, user fees and monetary sanctions implicate an individual's liberty interests as well.[168] By increasing the amount an individual must pay, poverty penalties prolong the court's

163 *See id.* at 571–72, 576 (1972); *see also* Bell v. Burson, 402 U.S. 535, 539 (1971) (finding a property interest in a motorist's license and thus requiring due process protections before its suspension); Goldberg v. Kelly, 397 U.S. 254, 262–63 (1970) (finding that a person who is entitled by statute to specific welfare benefits has a property interest in those benefits such that procedural due process protections apply).

164 *See* Mendoza v. Strickler, 51 F.4th 346, 370 (9th Cir. 2022) (Berzon, J., dissenting) ("[A] person who is in debt to the state suffers consequences. 'When a minor offense produces a debt, that debt, along with the attendant court appearances, can lead to loss of employment or shelter, compounding interest, yet more legal action, and an ever-expanding financial burden—a cycle as predictable and counterproductive as it is intractable.'" (quoting Rivera v. Orange Cnty. Prob. Dep't, 832 F.3d 1103, 1112 n.7 (9th Cir. 2016))).

165 BD. OF GOVERNORS OF THE FED. RESERVE SYS., ECONOMIC WELL-BEING OF U.S. HOUSEHOLDS IN 2022, at 33–34 (2023), https://www.federalreserve.gov/publications/files/2022-report-economic-well-being-us-households-202305.pdf [https://perma.cc/J2W5-TFCZ].

166 *See* AM. C.L. UNION, IN FOR A PENNY: THE RISE OF AMERICA'S NEW DEBTOR'S PRISONS 65–67 (2010) (describing the substantial negative impact of interest accrual upon LFOs for low-income individuals); *see also, e.g.*, WASH. REV. CODE § 10.82.090 (2023) (permitting the court to impose interest on restitution); FLA. STAT. § 28.246(6) (permitting the clerk to charge an additional "40 percent of the amount owed at the time the account is referred to the attorney or agent for collection."); ALA. STAT. § 12-17-225.4 (requiring that courts "assess a collection fee of 30 percent of the funds due which shall be added to the amount of funds due" upon a missed payment).

167 *See* AM. C.L. UNION, *supra* note 166, at 65–67 (describing the substantial negative impact of interest accrual upon LFOs for low-income individuals).

168 *Id.*

surveillance over the individual, increasing the likelihood that an indigent individual misses a future payment and is sanctioned with incarceration.[169]

3. The Irrationality of Poverty Penalties and Available Alternatives

Bearden requires an analysis of "the rationality of the connection between legislative means and purpose, [and] the existence of alternative means for effectuating the purpose."[170] The Supreme Court has recognized state interest in user fees and recoupment statutes as valid methods of recovering some of the cost of criminal justice proceedings and lowering the burden placed upon public funds by such proceedings.[171] Similarly, circuit courts have recognized state interest in using punishment for the sake of punishment, in addition to using punishment as a tool to motivate compliance with court orders and to deter future noncompliance of the law.[172] However, such state interests do not function as blanket authorization to discriminate against indigent defendants on the basis of their indigency; the means chosen must be rationally related to accomplishing the state's goals.[173]

Studies have found that criminal justice fee schemes are ineffective and inefficient at raising revenue for state and municipal governments for a number of reasons.[174] Much of the outstanding court debt across the country

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169 *See* Fuller v. Oregon, 417 U.S. 40, 60 (1974) (Marshall, J., dissenting) ("The important fact which the majority *ignores* is that under [the law in question], the repayment of the indigent defendant's debt to the State can be made a condition of his probation . . . . Petitioner's failure to pay his debt can result in his being sent to prison. In this respect the indigent defendant . . . is treated quite differently from other civil judgment debtors.") (emphasis added); Mendoza v. Strickler, 51 F.4th 346, 365 (9th. Cir. 2022) (Berzon, J., dissenting) (stating that *Bearden* requires judges conduct a "careful inquiry into the constitutionality of a punishment scheme that imposes an additional, significant punishment on a person solely based on that person's nonpayment of a fine").

170 Bearden v. Georgia, 461 U.S. 660, 666–67 (1983) (brackets in original).

171 *See Bearden*, 461 U.S. at 669 ("The State, of course, has a fundamental interest in appropriately punishing persons—rich and poor—who violate its criminal laws."); James v. Strange, 407 U.S. 128, 141 (1972) ("We note here also that the state interests represented by recoupment laws may prove important ones. Recoupment proceedings may protect the State from fraudulent concealment of assets and false assertions of indigency . . . [and] trends have heightened the burden on public revenues, and recoupment laws reflect legislative efforts to recover some of the added costs."); Ortwein v. Schwab, 410 U.S. 656, 660 (1973) ("The purpose of the filing fee . . . is apparent. The . . . court system incurs operating costs, and the fee produces some small revenue to assist in offsetting those expenses.").

172 *See* Fowler v. Benson, 924 F.3d 247, 262 (6th Cir. 2019); *Mendoza*, 51 F.4th at 357.

173 *See Ortwein*, 410 U.S. at 660 (noting that the appellants did "not contend that the fee is disproportionate or that it is not an effective means to accomplish the State's goal" before holding a $25 filing fee constitutional because procedural protections, not contingent on a fee, were in place).

174 MATTHEW MENENDEZ, MICHAEL F. CROWLEY, LAUREN-BROOKE EISEN & NOAH ATCHISON, BRENNAN CTR. FOR JUST., THE STEEP COSTS OF CRIMINAL JUSTICE FEES AND FINES

is likely unrecoverable, yet states and local governments spend exceptional amounts of money attempting to recover fines and fees.[175] Counties studied in Texas and New Mexico were found to spend 121 times more on recovery and administrative costs than the IRS spends to collect taxes.[176] In fact, a county in New Mexico was found to spend more on collection efforts than it actually recovered.[177] Such data demonstrates that states do not recover a large percentage of administrative costs through criminal justice fee schemes.[178]

Not only are fee schemes a generally inefficient method of recouping administrative costs, but they also do little to serve the state's interests when imposed upon indigent defendants who are unable to pay. It is important to correctly identify the state practice at issue; the challenge is not to the state's *general ability* to impose user fees and monetary sanctions to recoup administrative costs or to motivate compliance with court orders. Rather, the challenged state practice is the state's imposition of user fees and monetary sanctions *upon indigent defendants without an ability-to-pay determination*.[179]

Having properly identified the challenged state action, it is clear that the imposition of user fees and monetary sanctions upon indigent defendants is not rationally connected to any state interest. An indigent individual's

> failure to pay provides no information about her responsiveness to other deterrents or punishment [because,] [u]nlike the willful non-payment of a fine by a person who is able to pay, an indigent [person's] assumed flouting of the fine is, in fact, a demonstration of a financial limitation rather than of a desire to escape punishment or to break the law.[180]

(2019), https://www.brennancenter.org/our-work/research-reports/steep-costs-criminal-justice-fees-and-fines [https://perma.cc/5PGX-3MMG].

175 *See id.* at 10.

176 *See id.* at 5, 9.

177 *See id.* at 5.

178 *See supra* notes 163–166 and accompanying text.

179 Notably, the *Bearden* Court did not identify the question before it as whether a court can revoke any defendant's probation for failure to pay in order to coerce payment and deter future nonpayment. Rather, the Court identified the question as "[w]hether a sentencing court can revoke a defendant's probation for failure to pay the imposed fine and restitution, absent evidence and findings that the defendant was somehow responsible for the failure or that alternative forms of punishment were inadequate." Bearden v. Georgia, 461 U.S. 660, 665 (1983). *See also* Fowler v. Benson, 924 F.3d 247, 269 (6th Cir. 2019) (Donald, J., dissenting) (framing the government's interest as an interest in "suspending driver's licenses without a pre-deprivation hearing" and finding such interests minimal when assessing a statute that suspends an individual's driver's license upon failure to pay criminal justice debt without notice).

180 Mendoza v. Strickler, 51 F.4th 346, 367 (9th Cir. 2022) (Berzon, J., dissenting).

This distinction eliminates the rational connection between the state interest and its means of discriminating against indigent individuals. As the *Bearden* Court firmly established, if an indigent person "has made all reasonable efforts to pay the fine . . . yet cannot do so through no fault of his own, it is fundamentally unfair to [punish them] automatically."[181]

In this context, although the state's general interests in recovering administrative costs and deterring nonpayment appear valid on its face, the means of imposing poverty penalties upon indigent defendants without a determination of ability to pay is not rationally related to those interests. The imposition of poverty penalties upon indigent defendants neither recoups administrative costs, nor compels payment, nor deters nonpayment. Comparatively, the state has a strong interest in ensuring that once a defendant has served their punishment and has returned to public life, they are able to participate as productive members of society—a goal that is hindered by perpetually accruing interest and fees upon outstanding court debt.[182] Instead, the state could easily extend time for payments if an individual has not paid or reduce the amount owed, as the *Bearden* court suggested, which in turn reduces the administrative cost of lengthy payment plans.[183] Thus, the state may not use such interests to justify the discriminatory treatment of criminal defendants on the sole basis of their indigency.[184] *Bearden* therefore bars a court from imposing a fee for the use of a payment plan solely because the defendant cannot pay. Instead, a court must determine that the defendant is willing but unable to pay in order to impose a fee for use of a payment plan or to impose interest on outstanding LFOs.[185] Similarly, *Bearden* therefore also bars a court from imposing a monetary sanction upon a defendant for a missed or late payment due to his inability to pay unless the court finds that the nonpayment was willful.[186]

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181 *Bearden*, 461 U.S. at 668 (1983).

182 *See* James v. Strange, 407 U.S. 128, 139 (1972) ("It is in the interest of society and the State that such a defendant, upon satisfaction of the criminal penalties imposed, be afforded a reasonable opportunity of employment, rehabilitation and return to useful citizenship. There is limited incentive to seek legitimate employment when, after serving a sentence during which interest has accumulated on the indebtedness for legal services, the indigent knows that his wages will be garnished without the benefit of any of the customary exemptions.").

183 *Bearden*, 461 U.S. at 672 (1983) ("[T]he sentencing court could extend the time for making payments, or reduce the fine, or direct that the probationer perform some form of labor or public service in lieu of the fine.").

184 *Id.* at 667–68.

185 *Id.* at 672.

186 *Id.*

III. SOLUTION

Although *Bearden* can and should be expanded through federal legislation to prohibit the imposition of user fees and poverty penalties upon indigent defendants,[187] such expansion inadequately addresses this widespread practice.[188] Instead, Congress should implement a state funding scheme for municipal and state court administration conditioned upon compliance with requirements that mitigate a larger scope of harms.

A. The Shortcomings of a Constitutional Prohibition Under Bearden *and Federal Legislation*

Bearden should be expanded to hold the practice of imposing user fees and interest upon criminal defendants who are unable to pay LFOs in full as unconstitutional, creating a constitutional requirement for an ability-to-pay determination before a court imposes such fees. However, a constitutional expansion by itself is insufficient to provide protections for indigent defendants.[189] Over forty years ago, *Bearden* held that the incarceration of an individual for nonpayment of court debt without an ability-to-pay hearing was unconstitutional, yet courts across the country continue this practice.[190] A 2015 investigation by the Department of Justice's Civil Rights Division into the City of Ferguson, prompted by the 2014 police killing of the eighteen-year-old black teenager, Michael Brown,[191] found that the City's "focus on revenue rather than . . . public safety . . . shaped its municipal court, leading to procedures that raise due process concerns and inflict unnecessary harm on members of the Ferguson community."[192] In a 100-page report, the Department of Justice described how "the court primarily use[d] its judicial authority as the means to compel the payment of fines and

187 *See supra* Section II.B.

188 *See supra* Section I.A.

189 For an example of a more protective solution that does not rely on a constitutional expansion of *Bearden*, see Furness, Note, *supra* note 63, at 1004–06.

190 *See, e.g.*, Consent Decree, United States v. City of Ferguson, 16-cv-000180 (E.D. Mo. Mar. 17, 2016), https://www.justice.gov/crt/file/833701/download [https://perma.cc/HCY2-PEG2].

191 *See Timeline of Events in Shooting of Michael Brown in Ferguson*, ASSOCIATED PRESS (Aug. 8, 2019, 1:28 PM), https://apnews.com/article/shootings-police-us-news-st-louis-michael-brown-9aa32033692547699a3b61da8fd1fc62 [https://perma.cc/95K9-XXDK].

192 U.S. DEP'T OF JUST., CIV. RTS. DIV., INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT 1, 2 (2015), https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf [https://perma.cc/RLQ4-RQXB].

fees" while regularly incarcerating individuals for failing to pay without considering alternatives to incarceration.[193]

The Ferguson investigation, while receiving widespread national attention,[194] does not stand alone; judges across the country appear to misunderstand the *Bearden* standards and regularly fail to hold ability-to-pay hearings.[195] In a 2021 investigation into the practices of the Magistrate Court of Lexington County, South Carolina, the Chief Magistrate testified that "the normal practice in Lexington County and . . . outside of Lexington County [was] to issue bench warrants for failure to pay without requiring a hearing before a magistrate."[196]

To bolster the strength of *Bearden*'s rule as applied to poverty penalties for payment plans, Congress should codify this constitutional expansion with federal legislation. Policy institutes and legal scholars alike advocate for the passage of state and federal legislation limiting the use of fee schemes in the criminal justice system.[197] Congress should prohibit the imposition of financial penalties for the use of payment plans—including enrollment fees, installment fees, collection fees, late fees, and interest—upon an individual who is utilizing a payment plan because of their inability to pay the entire sum in full upon the imposition of the LFOs.[198] Congress should also mandate that a court must find that nonpayment was willful before imposing monetary sanctions against an individual for nonpayment.[199]

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193 *Id.* at 3.

194 *See* Eric Tucker & Alanna Durkin Richer, *How Ferguson Elevated the Profile of the Justice Department's Civil Rights Enforcers*, ASSOCIATED PRESS (Aug. 16, 2024, 11:51 AM), https://apnews.com/article/justice-department-civil-rights-ferguson-michael-brown-b2d5ff17cc430e230c57b186cbdd0c9b [https://perma.cc/KQ4X-73YP].

195 *See, e.g.*, Cain v. City of New Orleans, 281 F. Supp. 3d 624, 648–49 (E.D. La. 2016) ("[T]he Judges [of Orleans Parish Criminal District Court] have a practice of not inquiring into plaintiffs' ability to pay court debts when plaintiffs are essentially held in civil contempt and imprisoned for nonpayment."); Ohio State Bar Ass'n v. Goldie, 894 N.E.2d 1226, 1229, 1230 (Ohio 2008) (finding that Judge Goldie repeatedly violated defendants' due process rights by failing to hold ability-to-pay hearings as required under *Bearden* prior to incarceration).

196 Brown v. Lexington County, No. 17-1426, 2021 WL 2949813, at *7 (D.S.C. July 14, 2021) (quoting ECF No. 248-1 at 15) (alteration and ellipsis in original).

197 *See, e.g.*, Furness, Note, *supra* note 63, at 1004–06 (proposing federal legislation that creates a uniform indigency standard, borrowing from the "undue hardship" test used in bankruptcy proceedings).

198 *See, e.g.*, BANNON ET AL., *supra* note 45, at 32 ("States should eliminate 'poverty penalties' that impose additional costs on individuals who are unable to pay criminal justice debt all at once.").

199 *See, e.g.*, CRIM. JUST. POL'Y PROGRAM, HARVARD L. SCH., CONFRONTING CRIMINAL JUSTICE DEBT: A GUIDE FOR POLICY REFORM 16 (2016) (recommending that state legislatures should require "courts to conduct an ability to pay assessment before levying penalties for non-payment" and "[p]rohibit[] the imposition of additional interest or other costs for payment plans for those with the inability to pay the full amount").

Although there is a pressing need for federal legislation, it would not address the plethora of issues rising from the widespread use of fee schemes within the criminal justice system. First, the scope of the federal legislation on this matter is limited to the enforcement powers delegated to Congress by the Fourteenth Amendment or other provisions of the Constitution.[200] As such, Congress's ability to address the negative impacts of fee schemes and poverty penalties is limited by *Bearden*'s rule. In other words, Congress would be unable to require the provision of a payment plan to indigent defendants, limit the negative impacts of judicial discretion in determining a defendant's inability to pay,[201] nor provide judges with the discretion to waive fines and fees without Congress first demonstrating that the ability to pass such legislation is within the scope of its constitutionally granted power.

Second, Congress would also likely be unable to address current failures of judicial oversight. Although some state supreme courts track data regarding ability-to-pay hearings and debt collection efforts, many jurisdictions do not collect this data.[202] Failures in reporting such data make detecting constitutional rights violations more difficult, which in turn creates barriers to the enforcement of any procedural protections required by federal legislation.

B. Conditional Spending Scheme for Court Funding

To address the shortcomings of federal legislation, Congress should also condition funding for state court administrative costs and state court systems technology upon compliance with heightened process and reporting requirements for the imposition of fines and fees.

Congress has the constitutional authority to enact conditional funding schemes.[203] The General Welfare Clause of the Constitution vests Congress with the power to "provide for the common Defence and general Welfare of the United States."[204] The Supreme Court held in *South Dakota v. Dole*[205] that Congress may condition the states' receipt of federal money if (1) the spending furthers the general welfare, (2) the conditions are expressed

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200 The Fourteenth Amendment of the Constitution provides that "[t]he Congress shall have power to enforce, by appropriate legislation, the provisions of this article." U.S. CONST. amend. XIV, § 5.

201 *See, e.g.*, Zhen, *supra* note 94, at 205–09 (describing how structural bias and racial discrimination may impact judges' ability-to-pay determinations).

202 *See* HAMMONS, *supra* note 24, at 5 (noting that ten states and the District of Columbia do not have the technological capacity to track or gather information regarding court debt collection practices and twenty-five states only collect limited general statistics regarding collected amounts).

203 *See, e.g.*, South Dakota v. Dole, 483 U.S. 203, 207–09 (1987).

204 U.S. CONST. art. I, § 8, cl. 1.

205 483 U.S. 203 (1987).

unambiguously, (3) the conditions further a particular federal interest, (4) no independent constitutional bar exists for fulfilling the condition, and (5) the financial inducement is not coercive or compulsive.[206] In order for a financial inducement to be coercive or compulsive, it must be more than a "relatively mild encouragement," such that it functions as a "gun to the head."[207] For example, a financial inducement is coercive or compulsive if (1) Congress threatens to discontinue all existing funding if the condition of expanding coverage is not met, (2) Congress changes the terms of existing program without notice, or (3) Congress merges two existing programs.[208]

Conditional funding for state court administration and court systems technology meets these constitutional requirements. Such a conditional funding scheme would increase the efficiency of courts and would reduce local municipalities' reliance upon fines and user fee recoupment schemes as a source of revenue, furthering the general welfare.[209] Doing so promotes the government's interest in reducing the financial burden on individuals from lower socioeconomic classes. The conditions of the spending provision, outlined below, would put a state on notice of the requirements to be considered in compliance with the provision. Lastly, these conditions are neither barred by the Constitution nor exert such control over an existing state program that they would be considered coercive or compulsive.[210]

The conditional funding scheme would provide funding to states for administrative costs of court proceedings and divergence programs.[211] The funding would first require that state courts offer the use of a payment plan if a court finds that a defendant is unable to pay the amount owed in full.[212] States should also prohibit the imposition of user fees and interest upon individuals who the court finds are unable to pay the full amount owed.[213]

However, some scholars note that "ability-to-pay" determinations are excessively subjective and critique the invasiveness of the inquiry into a defendant's finances that often accompanies the construction of a payment

206 *Id.* at 207–08, 211.

207 *See* Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 581 (2012).

208 *Id.* at 576–80.

209 *See supra* note 64 and accompanying text.

210 *See supra* notes 206–209 and accompanying text.

211 Similar conditional spending legislation has been proposed: The "Ending Debtor's Prison for Kids Act," introduced in July 2023 as a part of the Second Chance for Justice Package, would establish a grant program that provides funds for rehabilitation services for juveniles within the criminal justice system to states that prohibit the collection of fines and fines from juveniles. Ending Debtor's Prison for Kids Act, H.R. 4975, 118th Cong. (1st Sess. 2023). *See also* JESSICA FEIERMAN, NAOMI GOLDSTEIN, EMILY HANEY-CARON & JAYMES FAIRFAX COLUMBO, JUV. L. CTR., DEBTORS' PRISON FOR KIDS? THE HIGH COST OF FINES AND FEES IN THE JUVENILE JUSTICE SYSTEM 25 (2016).

212 *See* CRIM. JUST. POL'Y PROGRAM, *supra* note 199, at 18, 24–25.

213 *See id.* at 16.

plan.[214] To address these concerns, the funding would also be conditioned upon the state's promulgation of standards that establish circumstances constituting prima facie evidence of an inability to pay that mandate a conversion of a payment of a fine into an alternative sanction or punishment for low-level offenses.[215] Currently, across the fifty states and Washington, D.C., the local standards for when a defendant is considered unable to pay vary dramatically, and indigency standards tend only to encompass the extremely impoverished.[216] Requiring a court to determine that nonpayment was willful further opens the door to bias in the judicial process.[217] Thus, states should adopt cost of living indexes, which provide thresholds for when judges should waive or reduce fees.[218] This approach mitigates some weaknesses of existing systems for ability-to-pay determinations by decreasing opportunities for judicial bias and streamlining the determination of a defendant's inability to pay.[219] Doing so, as opposed to adopting nationwide indigency standards, allows for flexibility so as to better tailor indigency standards to state-specific characteristics, such as cost of living.

To obtain funding, states must provide judges with the discretion to waive or reduce fees.[220] Waiving fees prevents poverty penalties and opens the door to alternatives such as community service.[221] However, some advocates of criminal justice reform note that community service as an alternative is not always feasible for impoverished or houseless individuals.[222] To mitigate these concerns, states must also grant judges the discretion to impose alternative punishments upon individuals for nonviolent offenses.[223]

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214 *See* Zhen, *supra* note 94, at 201–11.

215 *See* ROOPAL PATEL & MEGHNA PHILIP, BRENNAN CTR. FOR JUST., CRIMINAL JUSTICE DEBT: A TOOLKIT FOR ACTION 3 (2012) (recommending the creation and enforcement of exemptions for indigence when assessing criminal justice debt).

216 *See* Zhen, *supra* note 94, at 204–05.

217 *See id. at* 205–09.

218 *See* 12 R.I. GEN. LAWS § 12-20-10(b) (2022) (providing conditions that constitute "prima facie evidence of the defendant's indigency"); GA. CODE ANN. § 42-8-102(e) (2022) (requiring that the court "waive, modify, or convert" any "moneys assessed by the court" against a defendant that has "significant financial hardship or inability to pay," which "shall be presumed" if the defendant meets certain qualifications).

219 *See supra* notes 216–218 and accompanying text.

220 *See* AM. BAR ASS'N, *supra* note 29, at 3 ("No law or rule should limit or prohibit a judge's ability to waive or reduce any fine . . . .").

221 *Id.*; U.S. COMM'N ON CIV. RTS., *supra* note 67, at 40.

222 *See* U.S. COMM'N ON CIV. RTS., *supra* note 67, at 40; Zhen, *supra* note 94, at 213–14.

223 *See* BANNON ET AL., *supra* note 45, at 33 (recommending that courts "offer community service programs that build job skills for individuals unable to afford criminal justice debt").

Finally, to obtain funding for their court systems, states must require courts at all levels to track and report court practices related to holding ability-to-pay hearings and debt collection.[224] Most states and jurisdictions do not track data regarding outstanding LFOs or court practices regarding LFO collection.[225] Many of these jurisdictions claim that they do "not possess the technological capacity or bandwidth" to collect such information.[226] The failure of states to track and make publicly available data regarding LFOs and collections practices substantially impacts policymakers' understanding of the fee scheme, the public's ability to hold policymakers accountable, and third party actors' ability to identify jurisdictions who employ unconstitutional practices.[227] Requiring states to track and publish such data and providing them with the funding to do so will address these deficiencies.

CONCLUSION

"Poverty penalties" imposed upon defendants who are unable to pay LFOs in full upon their imposition violate the constitutional standard set forth in *Bearden v. Georgia*. Yet, this constitutional prohibition only reforms a small aspect of a much larger system of court fines and fees. Because of the remaining deficiencies in the system, Congress should both prohibit such practices through federal legislation and create a conditional spending scheme that conditions the receipt of federal funds for court administrative costs and court systems technology on a state's compliance with higher standards for ability-to-pay determinations and debt collection.

224 *See* AM. BAR ASS'N, *supra* note 29, at 13 ("Information concerning fines and fees, including financial and demographic data, should be publicly available.").

225 *See* HAMMONS, *supra* note 24, at 5 (describing the failures of multiple state and local governments to track data related to court debt collection practices).

226 *See id.*

227 *See id.* at 2.