WILLFUL BLINDNESS: CHALLENGING INADEQUATE ABILITY TO PAY HEARINGS THROUGH STRATEGIC LITIGATION AND LEGISLATIVE REFORMS

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INTRODUCTION

In 2008, Harriet Cleveland, a mother of three living in Montgomery, Alabama, received a ticket for driving without insurance and without a license.[1] When she was unable to pay her court-imposed fines, a judge sentenced her to two years of probation with Judicial Correction Services (JCS), a for-profit company.[2] Under the terms of her probation, Cleveland was required to pay JCS two hundred dollars each month, with forty of those dollars going toward a "supervision" fee.[3] Over the next year, Cleveland did her best to keep up with the payments, regularly reporting to the JCS office to pay whatever money she had been able to put together that month.[4] Before long, however, she fell behind.[5] Often, she was barely able to gather enough money to cover the supervision fee.[6] She had lost her full-time job, and what began as several hundreds of dollars in tickets soon skyrocketed to $4,713 in debt, of which more than one thousand dollars was for private probation fees.[7] After more than two years of struggling to pay her legal fees, Cleveland owed more than she had initially, due in part to the District Attorney nearly doubling her fines because of her failure to pay, adding a 30% collection fee, a "warrant" fee, and other charges.[8]

On a Tuesday morning, while Cleveland was at home babysitting her two-year-old grandson, a police officer arrived and placed her under arrest.[9] She was sentenced to one month in prison for violating the terms of her probation.[10] At no point during her sentencing hearing did the judge inquire into Cleveland's ability to

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1. Sarah Stillman, *Get Out of Jail, Inc.*, NEW YORKER (June 16, 2014), https://www.newyorker.com/magazine/2014/06/23/get-out-of-jail-inc (on file with the *Columbia Human Rights Law Review*).
2. *Id.*
3. *Id.*
4. *Id.*
5. *Id.*
6. *Id.*
7. *Id.*
8. *Id.*
9. *Id.*
10. *Id.*; *see, e.g.*, HUM. RTS. WATCH, PROFITING FROM PROBATION: AMERICA'S "OFFENDER-FUNDED" PROBATION INDUSTRY 1 (2014) (explaining how adherence to a payment plan is a common condition of probation and how failure to make court-ordered payments means that an individual is no longer complying with the terms of their probation).

pay, nor did he determine whether her nonpayment had been a choice or if she was truly unable to pay her fines and fees.[11]

Harriet Cleveland's story is not unique. In America an estimated ten million people owe court-ordered economic sanctions, known as Legal Financial Obligations (LFOs), totaling more than fifty billion.[12] Many jurisdictions utilize "poverty penalties," piling on additional late fees, fees for payment plans, and interest for individuals who are unable to keep up with their payments.[13] As in Harriet Cleveland's case, these surcharges are often exorbitant.[14] For example, Alabama charges a 30% collection fee.[15] By contrast, under the state's general usury laws, interest rates on private loans are capped at 8%.[16] Similarly in Florida, private collections agencies are permitted to add up to a 40% surcharge to the amount they collect from delinquent payments,[17] while in Illinois, for delinquent payments, an additional collection fee of 30% goes to the States' Attorney to compensate for the costs of collection.[18] For those struggling to make their baseline payments, these surcharges are crushing.

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11. Amended Complaint, ¶¶ 6, 18, 20–24, Cleveland v. City of Montgomery, No. 2:13-cv-00732-MEF-TFM, 2014 WL 6461900 (M.D. Ala. Nov. 17, 2014). Fines are monetary punishments for an infraction, misdemeanor, or felony, whereas fees are the administrative costs associated with court-related activities, such as court costs or expenses related to incarceration. COUNCIL ECON. ADVISORS, FINES, FEES, AND BAIL: PAYMENTS IN THE CRIMINAL JUSTICE SYSTEM THAT DISPROPORTIONATELY IMPACT THE POOR 1 (2015), https://obamawhitehouse.archives.gov/sites/default/files/page/files/1215_cea_fine_fee_bail_issue_brief.pdf [https://perma.cc/ZJ4W-9BKQ].

12. *See* DOUGLAS N. EVANS, JOHN JAY COLL. CRIM. JUST., THE DEBT PENALTY; EXPOSING THE FINANCIAL BARRIERS TO OFFENDER REINTEGRATION 3–4, 7 (2014) (explaining that the term "LFO" incorporates both fines and fees).

13. ALICIA BANNON ET AL., BRENNAN CTR. FOR JUST., CRIMINAL JUSTICE DEBT: A BARRIER TO REENTRY 1 (2010).

14. *See, e.g.*, MACK FINKEL, PRISON POL'Y INITIATIVE, NEW DATA: LOW INCOMES–BUT HIGH FEES–FOR PEOPLE ON PROBATION (2019), https://www.prisonpolicy.org/blog/2019/04/09/probation_income/ [https://perma.cc/5ZJQ-ZXA5] (describing the high costs of probation and the toll that these costs have on low-income individuals); *see also* RACHEL L. MCLEAN & MICHAEL D. THOMPSON, COUNCIL STATE GOV'T JUST. CTR., REPAYING DEBTS 7–8 (2007) ("Nationally, two-third of people detained in jails report annual incomes under $12,000 prior to arrest.").

15. ALA. CODE § 12-17-225.4 (1975).

16. *Id.* at § 8-8-1.

17. FLA. STAT. § 28.246(6) (2020).

18. 730 ILL. COMP. STAT. 5/5-9-3(e).

Although Congress has never formally abolished imprisonment for debt at the federal level, in 1832 the practice was outlawed in the District of Columbia and the territories.[19] Many states soon followed suit,[20] but the practice of incarcerating individuals for failure to pay their debts has persisted in one form or another to present day, and has even seen a resurgence in recent years.[21] With the landmark case of *Bearden v. Georgia*, the Supreme Court held that a state may only revoke probation for failure to pay a fine upon a showing that the nonpayment was "willful."[22] This is the standard used by courts today.[23] And yet in many instances—as exemplified by the case of Harriet Cleveland—courts fail to consider ability to pay when incarcerating individuals for willful nonpayment of LFOs.[24] Thus, while the ruling handed down by the Supreme Court in *Bearden v. Georgia* was clear on its face, the legal standard it spawned has been poorly enforced and, in many cases, completely ignored.[25]

Contributing to this problem is the fact that there often is little oversight of the judges who make—or fail to make—these ability

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19. H.R. REP. NO. 732, at 14 (1832). The bill instructed the courts that they would not be permitted to "issue a *capias ad satisfaciendum*, or any other process . . . upon any judgment at law or final decree in chancery, for payment of money . . . and upon all such contracts and causes of action after judgment, imprisonment shall be totally and absolutely abolished." *Id.* (emphasis added).

20. Matthew J. Baker et al., *Debtor's Prison in America: An Economic Analysis*, 84 J. ECON. BEHAVIOR & ORG. 216, 219 (2012); *see also* Devon King, Comment, *Toward an Institutional Challenge of Imprisonment for Legal Financial Obligation Nonpayment in Washington State*, 90 WASH. L. REV. 1349, 1356–57 (explaining that imprisonment for debt is currently prohibited by forty-one state constitutions).

21. *See, e.g.*, ACLU, IN FOR A PENNY: THE RISE OF AMERICA'S NEW DEBTOR'S PRISONS 5–8 (2010) (describing how states and counties have sought to rectify budget shortcomings through increased court-related financial penalties) [hereinafter IN FOR A PENNY]; *see also* MYESHA BRADEN ET AL., LAWS. COMM. FOR C.R. UNDER L., TOO POOR TO PAY: HOW ARKANSAS' OFFENDER-FUNDED JUSTICE SYSTEM DRIVES POVERTY & MASS INCARCERATION (2019) (discussing Arkansas's growing incarceration rate from 2004–2014, despite an overall drop in crime rates during the same period).

22. Bearden v. Georgia, 461 U.S. 660, 672–73 (1983); *see also infra* Section II.A (discussing the meaning of "willful" as used in *Bearden v. Georgia*).

23. *See* Jaclyn Kurin, *Indebted to Injustice: The Meaning of "Willfulness" in a* Georgia v. Bearden *Ability to Pay Hearing*, 27 GEO. MASON U. C. R. L.J. 265, 276–77 (2017) (discussing the legacy of *Bearden v. Georgia*).

24. BANNON ET AL., *supra* note 13, at 21.

25. *See infra* Section II.B.

to pay inquiries,[26] resulting in determinations that range from crude to macabre:

> [A] public defender in Illinois observed that rather than evaluating a person's assets and obligations, one judge simply asked everyone if they smoked. If they smoked and had paid nothing since the last court date, he found willful nonpayment and put them in jail without doing any further inquiry. Similarly, in Michigan, a public defender said that while incarceration for failure to pay is not common, she has observed judges make only cursory ability to pay inquiries, such as finding a person's failure to pay willful because he had cable television.[27]

The lack of a clear procedure for the judges who must make willfulness determinations is problematic for many reasons, not the least of which are the ways in which this standard, when improperly applied, leads to a deprivation of liberty and disparately impacts poor, and often minority individuals.[28] This Note argues that the lack of a clear definition for the term "willful," compounded by poor oversight of failure to pay determinations, has exacerbated the problems created by crippling LFO debt, increasing rates of

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26. *See, e.g.*, SHARON BRETT & MITALI NAGRECHA, CRIM. JUST. POL'Y PROGRAM, HARV. L. SCH., PROPORTIONATE FINANCIAL SANCTIONS: POLICY PRESCRIPTIONS FOR JUDICIAL REFORM 9, 13–14 (2019), available at http://cjpp.law.harvard.edu/assets/Proportionate-Financial-Sanctions_layout_FINAL.pdf [https://perma.cc/H2M9-MCGC] (explaining how most current state laws defer to judges' discretion in determining ability to pay); *see also* THERESA ZHEN & BRANDON GREENE, E. BAY CMTY. L. CTR., PAY OR PREY: HOW THE ALAMEDA COUNTY CRIMINAL JUSTICE SYSTEM EXTRACTS WEALTH FROM MARGINALIZED COMMUNITIES 2 (2018), available at https://ebclc.org/wp-content/uploads/2018/10/EBCLC_CrimeJustice_WP_Fnl.pdf [https://perma.cc/AG7Q-K3KY] (noting how, despite state law allowing for ability to pay hearings, the procedure is routinely ignored resulting in an average LFO burden of $6,000 for county probationers).

27. BANNON ET AL., *supra* note 13, at 21–22.

28. U.S. COMM'N ON C. R., TARGETED FINES AND FEES AGAINST LOW-INCOME COMMUNITIES OF COLOR: CIVIL RIGHTS AND CONSTITUTIONAL IMPLICATIONS 19–22 (2017) (describing how the excessive collection of fines and fees can disproportionately harm communities of color); *see also* Tamar R. Birckhead, *The New Peonage*, 72 WASH. & LEE L. REV. 1595, 1668–69 (2015) (concluding that Bearden's willfulness standard leaves trial court judges with "unfettered discretion to determine which defendants qualify for relief and which do not.").

recidivism and leading to more and larger criminal justice debts.[29] Even when courts do engage in meaningful willfulness determinations, they consume scarce judicial resources and may discriminate against indigent individuals and Black Americans—two groups that are historically overrepresented in and disadvantaged by the criminal justice system.[30] But as shown by recent cases at both the state and federal levels,[31] there is the possibility of a challenge for litigants hoping to bring civil rights claims against trial court judges who routinely circumvent *Bearden*.

Part I of this Note offers a history of LFOs and the willfulness standard in the United States, examining the major case law and concluding by discussing the dramatic increase in LFOs in recent years. Part II discusses why the lack of a clear standard is problematic and why the current system is inadequate to deal with the problem created by LFO burdens. Part III discusses two recent cases that offer a way forward for litigants. Finally, this Note concludes with a discussion of evidentiary shortcomings as both a problem and a potential solution, and argues for a more coherent and unified national standard in making willfulness determinations.

I. INCARCERATION FOR NONPAYMENT OF LFOS

In the mid-twentieth century, the Supreme Court decided a series of cases applying the Due Process and Equal Protection Clauses to indigent defendants who were facing jail time for inability to pay their court fines.[32] In many jurisdictions, the practice of

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29. *See infra* Section II.C (discussing the challenges inherent in making willfulness determinations).

30. *Id.*

31. Complaint at 6–7, Fuentes v. Benton Cnty., No. 15-2-02976-1 (Wa. Super. Ct. Oct. 7, 2015), available at https://www.aclu.org/sites/default/files/field_document/fuentes_v._benton_county_-_complaint.pdf [https://perma.cc/SW4B-HUWG] [hereinafter Fuentes Complaint]; Cain v. City of New Orleans, 281 F. Supp. 3d 624, 628 (E.D. La. 2017), *aff'd sub nom.* Cain v. White, 937 F.3d 446 (5th Cir. 2019); *see also infra* Sections III.A–B (discussing recent litigation challenging inadequate ability to pay determinations in violation of *Bearden*).

32. Sundeep Kothari, *And Justice for All: The Role Equal Protection and Due Process Principles Have Played in Providing Indigents with Meaningful Access to the Courts*, 72 TUL. L. REV. 2159, 2180 (1998). It is important to note that although the author argues that the Court effectively used a hybrid due process and equal protection approach in these cases, the Court itself only purported to use due process in its analyses. *Id.* at 1276–80.

automatically converting economic sanctions to incarceration had become commonplace.[33] In 1960, for example, there were over twenty-six thousand individuals in New York City jails incarcerated for defaulting on their LFOs,[34] and by 1970, 60% of inmates in Philadelphia County, Pennsylvania were incarcerated as a result of their inability to pay their LFOs.[35] Although most constitutional scholars agree that the Supreme Court has effectively closed the door on indigency as a suspect class,[36] these cases nevertheless instituted certain protections for those who are unable to pay their legal fines and fees owing to indigency.[37]

This Part will first offer a brief introductory note on LFOs in America before discussing the trilogy of cases that led to the Supreme Court's ruling in *Bearden v. Georgia*. It will then discuss the facts of *Bearden* itself before examining some of the reasons for the recent expansion in the number and amount of LFOs that courts are permitted to levy.

A. Legal Financial Obligations in America

Nearly anytime an individual is hauled into court, they will incur some sort of cost. These costs may appear as fines, restitution charges, or other fees that attach to a court appearance, which may

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33. Beth A. Colgan, *Wealth-Based Penal Disenfranchisement*, 72 VAND. L. REV. 55, 96 (2019).

34. Brief of Nat'l Legal Aid & Def. Ass'n as Amicus Curiae Supporting Petitioner at 16, Williams v. Illinois, 399 U.S. 235 (1970) (No. 1089) (noting the large and growing number of people incarcerated for failure to pay legal fines and fees).

35. *Id.*

36. *See* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 28 (1973) ("The system of alleged discrimination and the class it defines have none of the traditional indicia of suspectness . . . ."); Bertrall L. Ross II & Su Li, *Measuring Political Power: Suspect Class Determinations and the Poor*, 104 CAL. L. REV. 323, 342–43 (2016) ("[I]n subsequent cases, the Court used *Rodriguez* as a jumping-off point for denying suspect class status to the poor."). *But see* Henry Rose, *The Poor as a Suspect Class Under the Equal Protection Clause: an Open Constitutional Question*, 34 NOVA L. REV. 407, 421 (2015) (arguing that *San Antonio* left open the question of whether the indigent constitute a quasi-suspect or suspect class under the Equal Protection Clause).

37. *See* Kothari, *supra* note 32, at 2201–02 (discussing how the Court used equal protection and due process analyses to combat wealth discrimination).

include attorneys' fees, filings costs, and administrative expenses.[38] With the explosive growth of incarceration rates coupled with mounting budgetary concerns, LFOs have grown dramatically—both in number and severity—over the past forty years.[39] The shifting of costs, including administrative costs, to defendants has caused some to label this an "offender-funded" system.[40] While it is nearly impossible to catalogue the extent and variety of LFOs due to jurisdictional differences, they often at a minimum include court-appointed attorney fees, DNA collection fees, drug funds, emergency response expenses, and courts costs, in addition to other fines and penalties authorized by statute.[41]

B. The *Griffin* Trilogy

In the 1956 case of *Griffin v. Illinois*, the Supreme Court struck down financial barriers to accessing criminal appeals as violative of the Equal Protection Clause of the Fourteenth Amendment.[42] The plurality opinion, authored by Justice Black, held that wealth was a suspect class on the same footing as race.[43] It also noted that, while a state is not necessarily required to create a system for criminal appeals, once it chooses to do so, it cannot discriminate between individuals on account of their ability to pay.[44] Although the court later shifted away from *Griffin*'s treatment of wealth as a

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38. Because the variety and amount of LFOs vary wildly from one jurisdiction to the next, it is difficult to accurately summarize the costs of going to court, which is why many analyses of these practices are jurisdiction specific. For a good discussion of the various types of legal fees that can accompany a court appearance, see Neil L. Sobol, *Charging the Poor: Criminal Justice Debt & Modern-Day Debtors' Prisons*, 75 MD. L. REV. 486, 501–04 (2016).

39. Katherine Beckett & Alexes Harris, *On Cash and Conviction: Monetary Sanctions as Misguided Policy*, 10 CRIMINOLOGY & PUB. POL'Y, 509, 512–13 (2011).

40. HUM. RTS. WATCH, *supra* note 10, at 1.

41. *See, e.g.*, Travis Stearns, *Legal Financial Obligations: Fulfilling the Promise of Gideon by Reducing the Burden*, 11 SEATTLE J. FOR SOC. JUST. 963, 966–67 (2013) (describing some of the common LFOs in use in Washington state).

42. Griffin v. Illinois, 351 U.S. 12, 18 (1956) (plurality opinion).

43. *Id.* at 17–18 ("In criminal trials a State can no more discriminate on account of poverty than on account of religion, race, or color.").

44. *Id.* at 18 ("[A]t all stages of the proceedings the Due Process and Equal Protection Clauses protect persons like petitioners from invidious discriminations.").

suspect class,[45] the case's second holding—the right to fair treatment in the criminal justice system for all defendants regardless of their economic status[46]—proved more enduring.[47]

In 1970, the Supreme Court decided *Williams v. Illinois*.[48] In that case, the appellant, Willie Williams, had been convicted of petty theft, a crime that carried a maximum sentence of one years imprisonment.[49] The trial judge kept Williams imprisoned for 101 days longer than the maximum term because Williams, who was indigent, could not pay his $505 fine.[50] Writing for a unanimous court, Chief Justice Burger concluded that the Fourteenth Amendment's Equal Protection Clause prohibits a state from "subject[ing] a certain class of convicted defendants to a period of imprisonment beyond the statutory maximum solely by reason of their indigency."[51] The court stopped short of carving out a suspect class around indigent defendants, but noted that by creating a different maximum sentence only for indigent defendants, "the State has visited different consequences on two categories of persons since the result is to make incarceration in excess of the statutory maximum applicable only to those without the requisite resources to satisfy the money portion of the judgment."[52]

One year later, in 1971, the Supreme Court decided *Tate v. Short*.[53] Preston Tate, an indigent defendant, was convicted of traffic offenses and fined $425.[54] Under Texas law, Tate was incarcerated until he was able to pay his fines.[55] The law provided that an indigent defendant could earn a $5 credit each day he was incarcerated, requiring Tate to serve eighty-five days in prison to pay off his fine.[56] Citing *Williams*, the Supreme Court reversed the Court of Criminal

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45. *See* Michael Klarman, *An Interpretive History of Modern Equal Protection*, 90 MICH. L. REV. 213, 217 (1991) (referring to the "rejection of suspect classification for wealth" as one of the "principal equal protection developments of [the 1970s and 1980s]").

46. *Id*.

47. *See infra* Section II.A.

48. Williams v. Illinois, 399 U.S. 235 (1970).

49. *Id.* at 236.

50. *Id.* at 236–37.

51. *Id.* at 242.

52. *Id.*

53. Tate v. Short, 401 U.S. 395 (1971).

54. *Id.* at 396.

55. *Id.* at 396–97.

56. *Id*. at 397.

Appeals of Texas, finding that the Fourteenth Amendment prohibits courts from automatically converting a fine to prison time for indigent defendants who lack the ability to pay.[57]

Together, this trilogy of cases created important protections for indigent defendants faced with the task of paying off LFOs. Although the Court has declined to treat wealth as a suspect class, it has simultaneously recognized the "great governmental power" to hale people into court where "they may be convicted, and condemned to lose their lives, their liberty, or their property, as a penalty for their crimes."[58] Justice Powell recognized this important power in *San Antonio Independent School District v. Rodriguez*, even while declining to treat indigency as a suspect class.[59] Thus, although the exact delineation of the government's authority to deprive indigent defendants of their life or liberty is not clear from *Griffin* and its progeny, these cases served to crystallize the Court's recognition that constitutional protections should preclude the government from engaging in wealth-based discrimination when wielding its great power to punish.

C. The Unconstitutionality of Incarcerating Indigent Defendants for Nonpayment of LFOs

Following *Williams* and *Tate*, the Court was primed to extend even greater constitutional protections over indigent defendants. In 1983, the Supreme Court decided *Bearden v. Georgia*.[60] The defendant, Danny Bearden, pled guilty in a Georgia trial court to burglary and theft.[61] Under Georgia's First Offender's Act, the trial court sentenced Bearden to pay a fine and restitution, making

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57. *Id.* at 398–99.

58. Boddie v. Connecticut, 401 U.S. 371, 390–91 (Black, J., dissenting).

59. *See* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 28 (1973) ("The system of alleged discrimination and the class it defines have none of the traditional indicia of suspectness."); *see also* Memorandum from Lewis F. Powell, Jr. Assoc. J., U.S. Sup. Ct., to Larry Hammond, Law Clerk, at 11 (Oct. 12, 1972) (noting that while "[w]ealth alone [is] not suspect," when connected with another fundamental interest it may receive heightened scrutiny, and describing "fair criminal process" as one such fundamental interest); Ross & Li, *supra* note 36 at 342–43 (explaining how subsequent cases relied on *Rodriguez* for the proposition that indigency alone is not a suspect class).

60. Bearden v. Georgia, 461 U.S. 660 (1983).

61. *Id.* at 662.

payment a condition of his probation.[62] The court ordered Bearden to pay $100 upfront, $100 the next day, and the remaining $550 within four months.[63]

Bearden was able to make an initial payment of $200 by borrowing the sum from his parents.[64] A month later, however, he was laid off from his job and began having difficulty making his payments.[65] Bearden was unsuccessful in finding new employment, informing his probation officer that he "was going to be late with his payment because he could not find a job."[66] Three months after his deadline to pay lapsed, the Georgia State's Attorney filed a petition revoking Bearden's probation due to his failure to pay.[67] After an evidentiary hearing, the trial court granted the State's petition and sentenced Bearden to serve the remaining portion of his probationary period—two and a half years—in prison.[68]

Bearden appealed his case to the Georgia Court of Appeals which found that imprisoning a defendant for inability to pay his fine was not a violation of the Equal Protection Clause of the Fourteenth Amendment.[69] The Court of Appeals gave only a cursory explanation of its findings, reasoning that the trial court was within its discretion to revoke Bearden's probation simply by virtue of the fact that he had

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62. *Id.*

63. *Id.*

64. Transcript of Proceedings at 21, Bearden v. Georgia, 461 U.S. 660 (1983) (Nos. 8917 & 8923) [hereinafter Bearden Transcript]; Bench Memo from Rives Kistler, Justice Powell's Clerk, to Lewis F. Powell, Jr., Associate Justice, United States Supreme Court, Bearden v. Georgia (No. 81–6333) (Jan. 10, 1983), at 2 (on file as part of the Powell Papers in Lewis F. Powell, Jr. Archives, Washington & Lee University School of Law Library).

65. *Bearden*, 461 U.S. at 662–63.

66. *Id*. at 662–63; Bearden Transcript, *supra* note 64, at 23–24, 28–29, 31 (stating that Bearden sought work at the Georgia Unemployment Office, in addition to multiple businesses and a local school). Mr. Bearden's wife also testified. *Id*. at 18 ("I have took [sic] him to look for jobs myself. I took him to Dalton Unemployment Office, and they didn't have nothing, and he went to look for different jobs. He has been everywhere in Ringgold . . . and nobody's hiring."). Bearden's efforts to find a job were likely hampered because he had only a ninth-grade education and was unable to read. *Bearden*, 461 U.S. at 662–63.

67. *Bearden*, 461 U.S. at 663.

68. *Id.*

69. *Id.*

violated its terms regardless of his economic status.[70] The Georgia Supreme Court denied review.[71]

Bearden successfully appealed his case to the Supreme Court.[72] A unanimous Court held that automatic revocation of probation based on failure to pay court ordered fines violated the Fourteenth Amendment.[73] Justice O'Connor explained the test applied by the Court, stating that "[i]f the probationer has made all reasonable efforts to pay . . . and yet cannot do so through no fault of his own, it is fundamentally unfair to revoke probation automatically without considering whether adequate alternative methods of punishing the defendant are available."[74] Thus, *Bearden* began with the Court's sentencing limitations from *Williams* and *Tate* and extended constitutional protections over the ways in which states are permitted to punish individuals for failure to pay when they do not have the means to do so.[75]

Bearden followed in the footsteps of the *Griffin* line of cases in expressing the Court's desire to preclude the government from engaging in wealth-based discrimination in the criminal realm.[76] Prior to *Bearden*, the Court had noted that using incarceration as punishment is unjustifiable when imposed on a person who did not willfully commit any wrongful act.[77] In *Bearden*, the Court similarly

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70. Bearden v. State, 161 Ga. App. 640, 640–41 (1982), *rev'd*, 461 U.S. 660 (1983).

71. *Bearden*, 461 U.S. at 663.

72. Bearden v. Georgia, 161 Ga. App. 640, *cert. granted*, 102 S. Ct. 3482 (1982).

73. *Bearden*, 461 U.S. at 660.

74. *Id.* at 668–69.

75. *Id*. at 667 ("In analyzing this issue, of course, we do not write on a clean slate, for both *Williams* and *Tate* analyzed similar situations."). *But see* Robert M. Cover, Comment, *The Supreme Court, 1982 Term—Criminal Sentencing of Indigents*, 97 HARV. L. REV. 86, 89 (1983) [hereinafter *Criminal Sentencing of Indigents*] (explaining how the constitutional focus differs between *Bearden* and the earlier line of cases). In *Williams* and *Tate*, the Court relied on the Equal Protection Clause of the Fourteenth Amendment to stress the importance of equal treatment for indigent as well as affluent defendants. *Id*. In *Bearden*, however, the Court took a more moderate course, finding simply that the state's purported rationale for the defendant's incarceration had been inadequate, without carving out a difference between indigent and wealthy defendants. *Id.* at 90.

76. *Bearden*, 461 U.S. at 667.

77. *See, e.g.*, Williams v. Illinois, 399 U.S. 235, 242 (1970) (explaining that payment is "an illusory choice for . . . any indigent who, by definition is without funds"); Enmund v. Florida, 458 U.S. 782, 800 (1982) ("American criminal law has

reasoned that punishing a person for failure to pay their LFOs when that person "through no fault of his own" does not have the means to do so is an untenable position for the government to take.[78] Thus, in many ways *Bearden* represented a victory for the rights of indigent defendants by requiring the State to provide adequate justification for its decision to incarcerate an individual whom it has already elected to punish through parole.[79] On the other hand, the Court's decision to back away from the indigent-affluent dichotomy signaled the outer limits of its willingness to create special protections on the basis of economic status.[80]

D. Understanding the Dramatic Rise in LFOs

In recent years, there has been a dramatic expansion in both the type of LFOs that a court is able to levy, as well as the amount that courts are permitted to charge.[81] Today, approximately two-thirds of all prison inmates have LFOs[82] and the number of non-

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long considered a defendant's intention—and therefore his moral guilt—to be critical to 'the degree of [his] criminal culpability.'" (internal citation omitted)).

78. Transcript of Oral Argument at 26–27, Bearden v. Georgia, 461 U.S. 660 (1983) (No. 81-6633).

79. *Bearden*, 461 U.S. at 667.

80. *See Criminal Sentencing of Indigents*, *supra* note 75, at 94 ("Although the *Bearden* Court extended *Williams*' protection of indigents, its focus on 'fundamental fairness' rather than equal treatment allows the Court to limit that protection in the future.").

81. *See, e.g.*, Alexes Harris et al., *Drawing Blood from Stones: Legal Debt and Social Inequality in the Contemporary United States*, 115 AM. J. SOCIO. 1753, 1758–59 (2010) (discussing the growing role of monetary sanctions in the American criminal legal system); *see also* ALEXES HARRIS, A POUND OF FLESH: MONETARY SANCTIONS AS PUNISHMENT FOR THE POOR 23–25 (2016) [hereinafter A POUND OF FLESH] ("Inmate surveys reveal a swift rise in the number of people who have been sentenced to monetary sanctions: 25 percent of inmates reported receiving LFOs in 1991, but that number had risen to 66 percent by 2004."); BANNON ET AL., *supra* note 13, at 7 (explaining how a survey of 15 states showed that most have increased both the number and dollar value of criminal justice fees over the past few years); U.S. COMM'N ON C.R., TARGETED FINES AND FEES AGAINST COMMUNITIES OF COLOR: CIVIL RIGHTS & CONSTITUTIONAL IMPLICATIONS 71 (2017) (describing a recent increase in the imposition of fines and fees resulting from ordinance and traffic violations).

82. U.S. DEP'T OF JUST., FACT SHEET ON WHITE HOUSE AND JUSTICE DEPARTMENT CONVENING—A CYCLE OF INCARCERATION: PRISON, DEBT AND BAIL PRACTICES (2015), available at https://www.justice.gov/opa/pr/fact-sheet-white-house-and-justice-department-convening-cycle-incarceration-prison-debt-and [https://perma.cc/9GWQ-DCS6].

convicted inmates in jails increased by 60% between 1996 and 2014.[83] In Pennsylvania, for example, a study of economic sanctions from 2006 to 2007 found a total of 2,629 different types of economic sanctions in use across the state at different levels of government.[84] Additionally, fees were imposed for even the most routine court functions.[85] In Florida, courts impose a $50 fee to apply for indigent status to qualify for a public defender,[86] a minimum fee of $50 for the assistance of a public defender in a traffic or misdemeanor case,[87] and an additional $50 "cost of prosecution fee."[88] Although judges may, in their discretion, raise some of these fees, they do not have the authority to waive or reduce them below the mandatory floor,[89] and the fines are levied "notwithstanding the defendant's present ability to pay,"[90] apparently in direct contradiction to the Supreme Court's holding in *Gideon v. Wainwright*.[91]

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83. *Id.* The growing number of non-convicted inmates is typically attributed to an increase in LFOs, chiefly the rising use of bail payments. *See infra* note 110 and accompanying text.

84. R. Barry Ruback & Valerie Clark, *Economic Sanctions in Pennsylvania: Complex and Inconsistent*, 49 DUQ. L. REV. 751, 761 (2011).

85. MATTHEW MENENDEZ ET AL., BRENNAN CTR. FOR JUST., THE STEEP COSTS OF CRIMINAL JUSTICE FEES AND FINES: A FISCAL ANALYSIS OF THREE STATES AND TEN COUNTIES 6 (2019).

86. FLA. STAT. § 27.52(1)(b).

87. *Id*. § 938.29(1)(a).

88. *Id*. § 938.27(8).

89. *Id*. § 938.29.

90. *Id*. § 938.29(1)(b).

91. Gideon v. Wainwright, 372 U.S. 335, 343 (1963) (describing how the Sixth Amendment requires states to provide an attorney to defendants in criminal cases who cannot afford to pay for their own counsel). Forty-three states and the District of Columbia charge indigent defendants for the cost of their public defender. *See State-by-State Court Fees*, NPR (May 19, 2014), https://www.npr.org/2014/05/19/312455680/state-by-state-court-fees [https://perma.cc/G5D8-WQTB]. Although the Constitution does not compel the government to sponsor a defense attorney in all prosecutions, they are required to do so for criminal proceedings where a conviction may "end up in the actual deprivation of a person's liberty." *See* Alabama v. Shelton, 535 U.S. 654, 658 (2002). *But see* Scott v. Illinois, 440 U.S. 367, 373–74 (1979) (no right to appointed counsel in instances where only a criminal fine is imposed); Ross v. Moffitt, 417 U.S. 600, 610(1974) (no right to appointed counsel in cases involving discretionary appeal). Although application fee provisions permit or even require public defenders to charge for their services in a majority of states, none of these provisions permit counsel to be denied if a defendant fails to pay the required fee, and all states with the exception of Florida allow trial judges to waive fees when a defendant is unable to pay. *See* FLA. STAT. § 27.52.

LFOs can attach to an individual before they ever reach a courthouse.[92] As of 2017, forty-three states utilized some method of cost-recovery for public defenders,[93] and twenty-seven of those states charged registration fees upfront.[94] Fees for the use of a public defender can range from $10 to $480.[95] Defendants often are not informed of the fact that they can seek a fee waiver or that they have a right to a public defender regardless of their ability to pay.[96] A conviction also typically comes with a financial penalty, and appearing in a courthouse usually involves a range of administrative fees.[97] Currently, forty-nine out of fifty states allow "pay-to-stay" charges for incarcerated individuals,[98] and on average, ex-offenders owe between 69% and 222% of their income to criminal debts upon reentry.[99]

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92. BANNON ET AL., *supra* note 13, at 7.

93. DEVON PORTER, ACLU, PAYING FOR JUSTICE: THE HUMAN COST OF PUBLIC DEFENDER FEES 2 (2017) [hereinafter PAYING FOR JUSTICE].

94. Ronald F. Wright & Wayne A. Logan, *The Political Economy of Application Fees for Indigent Criminal Defense*, 47 WM. & MARY L. REV. 2045, 2052 (2006).

95. *Id.* at 2052–53.

96. PAYING FOR JUSTICE, *supra* note 93, at 2.

97. *See, e.g.*, Helen A. Anderson, *Penalizing Poverty: Making Criminal Defendants Pay for Their Court-Appointed Counsel Through Recoupment and Contribution*, 42 U. MICH. J.L. REFORM 323, 329–34 (2009) (explaining the process of recoupment, by which a judicial order requires a defendant to reimburse the government for certain costs).

98. *Is Charging Inmates to Stay in Prison Smart Policy?*, BRENNAN CTR. FOR JUST. (Sept. 9, 2019), https://www.brennancenter.org/our-work/research-reports/charging-inmates-stay-prison-smart-policy [https://perma.cc/N2PS-3K22]. In addition to charges for room and board, these fees can also include, *inter alia*, charges related to parole and probation, work release, physicals, dental visits, medication including prescriptions, calls to nurses and hospital treatment. *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, 319 (2014).

99. Harris et al., *supra* note 81, at 1776. Comparing mean legal debt to average income post-incarceration in Washington State, Harris et al. found that formerly incarcerated white men had been assessed LFOs roughly equal to their expected annual earnings. *Id.* Formerly incarcerated Hispanic men held legal debt equal to 69% of their expected earnings. *Id.* And formerly incarcerated black men held legal debt equal to 222% of their expected earnings. *Id.* Taking into account the accumulation of interest, the authors found that even those who are able to make consistent payments of $100 a month toward their (average) legal fees would still be in arrears 10 years later. *Id.*

The expansion of LFOs, in both size and number, has been dramatic, up from $260 million in 1985[100] to $145 billion in 2014.[101] Two-thirds of prison inmates surveyed in 2004 reported having been assigned monetary sanctions,[102] up from a quarter of survey respondents in 1991.[103] Budgetary pressures are frequently cited as a primary reason for the expansion in LFOs in recent decades.[104] Many states pay some or all of the operating costs of their criminal justice system through collection of LFOs.[105] In some cases, the amount generated by courts through the imposition and recoupment of LFOs is used to fund expenditures not related to the judicial system.[106] In Florida, for example, courts "typically generate about $1 billion a year, which is more than what is needed to support court operations."[107] Many jurisdictions view court "user fees" as a legitimate way to generate revenue, and have instituted mandatory minimum fines and fees for increasingly minor offenses and traffic

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100. U.S. GEN. ACCOUNTABILITY OFF., GAO-01-664, CRIMINAL DEBT: OVERSIGHT AND ACTIONS NEEDED TO ADDRESS DEFICIENCIES IN COLLECTION PROCESSES 9 (2001), available at https://www.gao.gov/assets/160/157104.pdf [https://perma.cc/S8GW-37ST].

101. U.S. DEP'T OF JUST., UNITED STATES ATTORNEYS' ANNUAL STATISTICAL REPORT: FISCAL YEAR 2018, at 41 tbl.8E (2018), available at https://www.justice.gov/usao/page/file/1199336/download [https://perma.cc/Y7JT-9TRC].

102. Harris et al., *supra* note 81, at 1769.

103. *Id.*

104. *See, e.g.*, DOUGLAS N. EVANS, THE DEBT PENALTY: EXPOSING THE FINANCIAL BARRIERS TO OFFENDER REINTEGRATION 8 (2014), available at https://jjrec.files.wordpress.com/2014/08/debtpenalty.pdf [https://perma.cc/C7SK-6BMK] (explaining that many jurisdictions pursue aggressive collections practices because court operations budgets depend on the revenue); HUM. RTS. WATCH, SET UP TO FAIL: THE IMPACT OF OFFENDER-FUNDED PRIVATE PROBATION ON THE POOR 18 (2018), available at https://www.hrw.org/report/2018/02/21/set-fail/impact-offender-funded-private-probation-poor# [https://perma.cc/7HBN-FWTD] [hereinafter SET UP TO FAIL] (describing the budgetary shortfalls that compel states to privatize criminal justice services).

105. Matthew Shear, *How Cities Make Money by Fining the Poor*, N.Y. TIMES MAG. (Jan. 8, 2019), https://www.nytimes.com/2019/01/08/magazine/cities-fine-poor-jail.html) [https://perma.cc/53VB-NPUR]; MENENDEZ ET AL., *supra* note 85, at 5 (examining how many counties rely on revenue raised from LFOs to fund their court systems and basic government operations).

106. SET UP TO FAIL, *supra* note 104, at 16.

107. *Court Funding & Budget,* FLA. CTS., https://flcourts.org/Administration-Funding/Court-Funding-Budget [https://perma.cc/9MUP-4FT3]. Excess funds are funneled into the state's general revenue fund. *Id*.

violations as a way of rectifying budget shortcomings.[108] In other jurisdictions, judges are permitted to tack on surcharges to fund, among other things, law enforcement training and sheriffs' retirement funds.[109]

The toll that legal fees take on indigent people has been extensively studied.[110] Legal debt can have a crippling effect on emotional and psychological well-being,[111] mandatory driver's license suspensions cause people to lose their jobs, miss court dates, and fall further behind on court payments,[112] and burdensome LFOs generally

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108. This practice was highlighted by the Department of Justice's investigation into policing practices in Ferguson, Missouri in the wake of the slaying of Michael Brown in 2014. The investigation report noted that "the City's Finance Director stated publicly that Ferguson intends to make up a 2014 revenue shortfall in 2015 through municipal code enforcement, stating to Bloomberg News that '[t]here's about a million-dollar increase in public-safety fines to make up the difference.'"; U. S. DEP'T OF JUST. C. RTS. DIV., INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT 13 (Mar. 4, 2015), available at https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf [https://perma.cc/3MHX-KCWA]; *id.* at 2 (noting that despite the City anticipating sizeable increases in revenue collected from municipal fines and fees each year, "City officials routinely urge [Police] Chief Jackson to generate more revenue"); Rebekah Diller, *Court Fees as Revenue?*, BRENNAN CTR. FOR JUST. (July 30, 2008), https://www.brennancenter.org/our-work/analysis-opinion/court-fees-revenue [https://perma.cc/7J5J-NPW8] (noting that many state judiciaries are expected to be self-sustaining and are increasingly expected to raise revenue for additional government functions); *see also Developments in the Law—Policing and Profit,* 128 HARV. L. REV. 1723, 1726–33 (2015) (discussing three recent examples that highlight the trend of allocating police resources in a way that criminalizes poverty and maximizes profit).

109. To view the full range of LFOs statutorily authorized on a state-by-state basis, see *50-State Criminal Justice Debt Reform Builder*, HARV. L. SCH. CRIM. JUST. POL'Y PROGRAM, https://cjdebtreform.org/ [https://perma.cc/U9NQ-NWX7].

110. *See, e.g.*, Sobol, *supra* note 38, at 516–21 (describing the impact of criminal justice debt on the poor and racial minorities as well as their families and dependents).

111. *See generally* Alexandra Shookhoff et al., *The Unintended Sentence of Criminal Justice Debt*, 24 FED. SENT'G REP. 62 (2011) (describing how the pressure to pay the debt can have an emotional and psychological toll on offenders); Monica Lewandoski, *Barred from Bankruptcy: Recently Incarcerated Debtors in and Outside Bankruptcy*, 34 N.Y.U. REV. L. & SOC. CHANGE 191 (examining the relationship between debt and mental health in the immediate reentry period following incarceration).

112. *See, e.g.*, Philip Alston, Rep. of the Special Rapporteur on Extreme Poverty and Human Rights on His Mission to the United States of America, U.N.

contribute to increased rates of recidivism and an unworkable cycle of debt.[113] What prior research has failed to fully consider, however, is that litigants have the potential to be the most successful agents of change in a world that systematically disadvantages the poor. As recent cases highlight, litigants who contest inadequate ability to pay hearings challenge judges to be more mindful of the constitutional protections in place for indigent defendants. Doing so can also lead to structural changes. When states realize the high costs of inadequate ability to pay determinations, they are incentivized to ensure that these hearings are conducted in a manner that is consistent with Supreme Court precedent. When judges fail to consider ability to pay in making willfulness determinations, they contribute to interminable cycles of poverty, debt, and recidivism, problems which are disproportionately shouldered by the indigent and people of color.[114] With the right resources, however, and the appropriate focus, these defendants-turned-plaintiffs can bring about change where other efforts at reform have stagnated.

II. LACK OF A CLEAR STANDARD AND ITS CONSEQUENCES

Although Justice O'Connor's guidance in *Bearden* was simple on its face,[115] courts have often failed to implement adequate safeguards to ensure that defendants receive the protections they need. This is largely because the term "willful," as used by the court

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DOC. A/HRC/38/33/ADD.1 (May 4, 2018) ("Two paths are open [to those whose driving licenses are suspended]: penury, or driving illegally, thus risking even more serious and counterproductive criminalization."); Jessica Brand, *How Fines and Fees Criminalize Poverty: Explained*, THE APPEAL (July 16, 2018), https://theappeal.org/fines-and-fees-explained-bf4e05d188bf/ [https://perma.cc/78DK-6PSS].

113. Harris et al., *supra* note 81, at 1753.

114. *See, e.g.*, Michael Pinard, *Criminal Records, Race and Redemption*, 16 N.Y.U. J. LEGIS. & PUB. POL'Y 963, 964–67 (2013) (explaining how people of color, especially indigent people of color, disproportionately interface with the criminal justice and thus disproportionately shoulder the burdens that come with being a part of the criminal justice system); Olivia C. Jerjian, *The Debtors' Prison Scheme: Yet Another Bar in the Birdcage of Mass Incarceration of Communities of Color*, 41 N.Y.U. REV. L. & SOC. CHANGE 235, 257–62 (2017) (arguing that the debtors' prison scheme is another "branch" of race-based mass incarceration, akin to Michelle Alexander's *The New Jim Crow*).

115. Bearden v. Georgia, 461 U.S. 660, 672 (1983) ("We hold, therefore, that in revocation proceedings for failure to pay a fine or restitution, a sentencing court must inquire into the reasons for the failure to pay.").

in *Bearden*,[116] has never been given a clear meaning. The result is that lower courts have differed in their interpretation of what constitutes willful nonpayment of LFOs. Even worse, many courts fail to undertake any meaningful evaluation of a defendant's wealth, and some courts eschew ability to pay hearings altogether.[117] This Part will first discuss the *Bearden* holding in depth and explore its use of the term "willful." Next, it will examine the divergent manner in which lower courts conduct ability to pay hearings, explaining the three different ways that courts have applied this standard.

A. Willfulness Under *Bearden v. Georgia*

The *Bearden* Court created a threshold that lower courts must reach before they can revoke probation based solely on a debtors' failure to pay their LFOs.[118] Although the exact contours of that threshold are not explicit within the four corners of the *Bearden* decision itself, a close reading of Justice O'Connor's majority opinion can help elucidate the proper posture that a court should strike in conducting such a finding. As lower courts have often struggled to employ this standard in a meaningful way,[119] clarifying the procedure that is required in conducting ability to pay hearings may help to ease judicial uncertainty about the appropriate posture to take in these hearings and reinforce the important rights recognized by the *Bearden* Court.

1. Ability to Pay Hearings

The key takeaway from *Bearden*—that courts must conduct ability to pay determinations before revoking probation for failure to pay LFOs[120]—has often been treated as more of a suggestion than a hard rule.[121] A recent report by the American Civil Liberties Union (ACLU) describes the process that offenders go through in a typical county in Washington State.[122] LFOs typically are initially

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116. *Id.*
117. *See infra* Sections II.B.1–2.
118. *Bearden*, 461 U.S. at 668.
119. *See infra* Sections II.B.1–2.
120. *Bearden*, 461 U.S. at 672.
121. *See infra* Sections II.B.1–2 (discussing courts that fail to make or make inadequate willfulness determinations).
122. ACLU, MODERN-DAY DEBTORS' PRISONS: THE WAY COURT-IMPOSED DEBTS PUNISH PEOPLE FOR BEING POOR 8 (2014) [hereinafter DEBTORS' PRISONS].

administered without taking into account an individual's ability to pay.[123] Any payment plans offered by the court are determined based on the amount owed, rather than the offender's financial circumstances.[124] Those who become delinquent on their payments are ordered to appear in court for a failure to pay hearing,[125] although at times, warrants may be issued even if a person hasn't missed a failure to pay hearing.[126] Failure to pay hearings are held weekly, and as many as one hundred individuals may have their cases adjudicated in a matter of hours.[127] Those who fail to show up for their hearings have warrants issued for their arrest, and also incur a $100 fee per warrant issued, which is added to any outstanding LFOs.[128]

For those who do appear at their hearings, a number of outcomes are possible. Those who have not previously missed payments are often allowed to "restart" their payment plans.[129] Sometimes the court will permit these individuals to make a lower monthly payment, although court policy requires a minimum payment of $25 a month.[130] When the court refuses to restart a payment plan, the individual is ordered either to pay the entire amount owed or to report to a work crew.[131] Those who cannot satisfy

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Aggregating data on LFOs is a challenge, due in part to the fact that states are under no obligation to preserve or disseminate these records. *See infra* Section III.C (discussing evidentiary shortcomings in evaluating the impact of LFOs on the poor). Washington is an example of a state where the work of researchers like Alexes Harris and institutional support from the ACLU and other organizations has converged to create a better picture of the burden created by excessive LFOs. *See, e.g.*, A POUND OF FLESH, *supra* note 81 at 23–25 (discussing the devastating impact of monetary sanctions in Washington State).

123. DEBTORS' PRISONS, *supra* note 122, at 7–8.

124. *Id.* at 8.

125. *Id.*

126. *Id.* at 23 n.36.

127. *Id.* at 9.

128. *Id.*

129. *Id.*

130. *Id.*

131. *Id.* Those assigned to a work crew spend between nine and ten hours a day, four days a week performing manual labor, earning $80 per day as credit against their LFOs. However, participating in a work crew requires a fee of $5 per day, paid up front. Thus, an individual with $800 in LFOs would need to work for 10 days, but would also be required to pay, over the course of those ten work days, $50 to the State, an amount that is likely prohibitive for those who are already struggling to meet their basic needs while contributing to mandated minimum payments on their court-ordered fines and fees. Furthermore, work crew is not open to all offenders or those who have previously failed to report. *Id.*

their payments on a work crew or who are ineligible to participate are ordered to jail, where they "sit out" their fines, accruing a $50 credit for each day they are incarcerated.[132]

2. The Meaning of "Willful"

Forty years prior to *Bearden*, in a case involving tax evasion, the Supreme Court noted that "willful . . . is a word of many meanings," and that its construction often would be "influenced by its context."[133] The Court did not further define the term, but remarked on its "traditional aversion to imprisonment for debt," and noted that willfulness would likely incorporate "some element of evil motive and want of justification in view of all the financial circumstances."[134] Subsequent cases walked back the requirement that there be some bad faith or evil intent,[135] and the Supreme Court later concluded that willful simply means "voluntary, intentional violation of a known legal duty."[136] Without clearer guidance, courts have differed drastically in their interpretation of what constitutes willful nonpayment,[137] leading to inconsistent and often draconian punishments that further cripple indigent defendants who are already struggling to make ends meet.

Bearden instructs that "[i]f the probationer has willfully refused to pay the fine or restitution when he has the means to pay, the State is perfectly justified in using imprisonment as a sanction to enforce collection."[138] The state bears the burden of proof in establishing beyond a preponderance of the evidence that an offender

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132. *Id.*

133. Spies v. United States, 317 U.S. 492, 497 (1943).

134. *Id.* at 498.

135. *See* United States v. Murdock, 290 U.S. 389, 398 (1933) (describing "willfully" as requiring a showing of "bad faith or evil intent"), *rev'd on other grounds*, 378 U.S. 52 (1964); *see also* United States v. Pomponio, 429 U.S. 10, 11–12 (1976) (per curiam) (reversing Court of Appeals' denial of jury instructions that "good motive alone is never a defense" where the statute required a showing of bad purpose or evil motive, on the grounds that "evil motive" required only an "intentional violation of a known legal duty").

136. Cheek v. United States, 498 U.S. 192, 201 (1991) (internal citation omitted).

137. Joseph Shapiro, *As Court Fees Rise, the Poor Are Paying the Price*, NPR (May 19, 2014), https://www.npr.org/2014/05/19/312158516/increasing-court-fees-punish-the-poor [https://perma.cc/47L8-4SR5].

138. Bearden v. Georgia, 461 U.S. 660, 668 (1983).

has failed to comply with the terms of their probation.[139] Thus, the critical finding by the Court in the case of Danny Bearden was that the sentencing court had made "no finding that the petitioner had not made sufficient bona fide efforts to find work."[140] Absent such a finding, the Court concluded, it would be "contrary to the fundamental fairness required by the Fourteenth Amendment" to revoke probation based merely on an inability to pay.[141] Thus, a court must make a finding as to the offender's willfulness or their "sufficient bona fide efforts legally to acquire the resources to pay."[142] The Court stopped there, without giving further substance to the term "willful" or explaining what constitutes "bona fide efforts" to pay.[143]

Although the *Bearden* Court did not give a definition of the term "willful," its reference to other legal authorities sheds some light on how it interpreted the word.[144] After noting that the state is justified in imprisoning an offender who has willfully neglected to pay their LFOs, the Court cited to the American Legal Institute Model Penal Code § 302.2(1).[145] That section instructs that "[w]hen a defendant sentenced to pay a fine defaults in the payment thereof or any installment, the court . . . may require him to show cause why his default should not be treated as contumacious and may issue a

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139. FRANCES H. PRATT, OFF. OF DEF. SERVS. TRAINING BRANCH, REVOCATION OF PROBATION & SUPERVISED RELEASE 5 (2004), https://www.ussc.gov/sites/default/files/pdf/training/online-learning-center/supporting-materials/Revocation-of-Probation-and-Supervised-Released.pdf [https://perma.cc/8VGY-U3DX].

140. *Bearden*, 461 U.S. at 672–73.

141. *Id*. at 673.

142. *Id*. at 672; *see also* Vanita Gupta & Lisa Foster, U.S. Dep't of Just., C.R. Div., Dear Colleague Letter Regarding Law Enforcement Fines and Fees, at 3 (Mar. 14, 2016), https://www.courts.wa.gov/subsite/mjc/docs/DOJDearColleague.pdf [https://perma.cc/55UP-8J5T] (explaining that under *Bearden*, courts must not incarcerate a person for nonpayment of LFOs without conducting an indigency determination and evaluating whether the nonpayment was willful).

143. *Bearden*, 461 U.S. at 668 ("[A] probationer's failure to make sufficient bona fide efforts to seek employment or borrow money in order to pay the fine or restitution may reflect an insufficient concern for paying the debt he owes to society.").

144. *Id.*

145. *Id.*; MODEL PENAL CODE § 302.2(1) (AM. L. INST., Proposed Official Draft 1962).

summons or warrant of arrest for his appearance."[146] Contumacious conduct is "willful disobedience of a court order,"[147] and is very nearly analogous to civil contempt, which requires that "[t]he act . . . complained of must be within the defendant's power to perform."[148]

Later in the *Bearden* opinion, in a footnote, the Court again made reference to contumacious behavior, citing the Model Penal Code as well as legal commentators such as the National Advisory Commission on Criminal Justice Standards and Goals and the National Conference of Commissioners on Uniform State Laws.[149] The Model Penal Code defines contumacious failure to pay a fine by contrasting it with "good faith efforts" to obtain the funds to pay.[150] Together these definitions suggest that an individual who is deemed to have willfully neglected to pay their LFOs has done so with some degree of intent, or that they have done so by design.

Furthermore, the Court in *Bearden* carefully stressed the importance of a finding of fault by the trial court judge.[151] Justice O'Connor several times made reference to Bearden's "reasonable efforts" to find work,[152] and also noted that his inability to acquire the funds necessary to meet his court-ordered payments was through "no fault of his own."[153] The cases that laid the foundations for the *Bearden* decision, *Williams* and *Tate*, use similar language in discussing a person's efforts or ability to pay.[154] In *Williams*, for example, the Court made reference to the state's decision to imprison the defendant for "involuntary nonpayment."[155] In *Tate*, the Court

146. MODEL PENAL CODE § 302.2(1) (AM. L. INST., Proposed Official Draft 1962).

147. *Conduct—Contumacious Conduct*, BLACK'S LAW DICTIONARY (11th ed. 2019).

148. *Civil Contempt*, BLACK'S LAW DICTIONARY (11th ed. 2019).

149. Bearden v. Georgia, 461 U.S. 660, 669 n.10 (1983).

150. *Id.*

151. *Id.* at 669 ("This lack of fault provides a 'substantial reason[n] which justifie[s] or mitigate[s] the violation and make[s] revocation inappropriate.'" (quoting Gagnon v. Scarpelli, 411 U.S. 778, 790 (1973))).

152. *Id.* at 668.

153. *Id*. at 672–73.

154. *Id.* at 667 ("The rule of *Williams* and *Tate*, then, is that the State cannot 'impos[e] a fine as a sentence and then automatically conver[t] it into a jail term solely because the defendant is indigent and cannot . . . pay the fine in full.'" (quoting Tate v. Short, 401 U.S. 395, 398 (1971))).

155. Williams v. Illinois*,* 399 U.S. 235, 241 (1970).

similarly made a reference to "involuntary non-payment" of court-ordered LFOs.[156]

These discussions help to contextualize the meaning of willful. Willful nonpayment, in *Bearden* terms, requires a volitional action or inaction.[157] That is, a person must have the ability to pay *and* deliberately choose not to do so. It seems unlikely that such a finding can be made in a cursory manner. In fact, the *Bearden* decision rested on the Court's finding that the trial court had not established a sufficient record to support their ultimate conclusion that Bearden had not made sufficient efforts to find work.[158]

3. The Ability to Pay Threshold Under *Bearden*

Two important caveats contained within the *Bearden* ruling are important to note. First, an offender must not only make an effort to pay with his or her current resources, but also make good faith efforts to secure new assets which can be used to pay down LFOs.[159] Second, a trial court is permitted to imprison even indigent defendants for nonpayment of LFOs if it determines that no alternative form of punishment will satisfy the state's legitimate, punitive interests.[160] If anything, however, these caveats further illustrate why an ability to pay determination cannot be made through cursory efforts. In order to fully appreciate whether or not an individual's failure to pay their LFOs was willful, an ability to pay

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156. *Short*, 401 U.S. at 399.

157. *Bearden*, 461 U.S. at 670 ("[A] probationer who has made sufficient bona fide efforts to pay. . . and who has complied with the other conditions of probation, has demonstrated a willingness to pay his debt to society and an ability to conform his conduct. . . .").

158. *See supra* Section II.A.

159. *Bearden*, 461 U.S. at 672 (describing how the defendant must make bona fide efforts legally to acquire the resources to pay); *see also id.* at 660–61 (explaining that good faith efforts may include credit applications and job hunts). Beyond this, the Court made no further reference to efforts to secure financial resources, suggesting that judges who instruct indigent defendants to liquidate their assets or cease paying for services like cable television may not be following *Bearden* faithfully. *Id.*

160. *See id.* at 672 ("Only if alternative measures are not adequate to meet the State's interests in punishment and deterrence may the court imprison a probationer who has made sufficient bona fide efforts to pay."); *see also Williams,* 399 U.S. at 260 (Harlan, J., concurring) (explaining that the trial court should make a careful inquiry into, inter alia, "the existence of alternative means for effectuating the [State's] purpose").

hearing must evaluate that person's specific financial situation, as well as their prospects for completing alternative forms of remediation. The *Bearden* Court set up incarceration as a last ditch effort.[161]

This holding therefore delineates an ability to pay threshold that demands several, key efforts that guide and inform a trial court's determination of whether a failure to pay has been made willfully. First, an inquiry is required not only into the offender's current financial situation, but also into the prospect of acquiring future assets.[162] The nature of the Court's discussion in *Bearden* suggests some limits for this finding.[163] In discussing the reasons that may compel a probationer to fail to make payments, the Court limited its understanding of what constitutes "bona fide efforts" to seeking employment or borrowing money.[164] Second, if the defendant is, after the court's evaluation, determined to be unable to pay, the court must then consider all other alternatives prior to incarceration.[165] Under the *Bearden* standard, these are the only circumstances in which an indigent defendant may be incarcerated for nonpayment of LFOs.

4. When Ability to Pay Hearings are Insufficient

A recent case from Ohio illustrates just how cursory a judge's evaluation of willful nonpayment may be. In 2006, Howard Webb was arrested and charged with contempt of court for nonpayment of fines and fees resulting from previous criminal and traffic convictions.[166] At the time of his incarceration, Mr. Webb was employed as a dishwasher earning $7 per hour and was making child support

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161. *Bearden*, 461 U.S. at 672.

162. *Id.* at 673–74 ("While the sentencing court commented on the availability of odd jobs such as lawn-mowing, it made no finding that the petitioner had not made sufficient bona fide efforts to find work, and the record as it presently stands would not justify such a finding.").

163. *Id.* at 668.

164. *Id.* Limiting "bona fide efforts" to efforts to find work or borrow money is an important caveat created by the court that has often gone unnoticed by lower courts who have opted for a much more draconian path. *See, e.g.*, ACLU, A POUND OF FLESH: THE CRIMINALIZATION OF PRIVATE DEBT 35 (2018) (describing debtors taking out high interest loans, surrendering public benefits, and going without food and medication in order to make their court-ordered payments).

165. What alternatives are available may vary from one jurisdiction to the next, but typically include options such as extending deadlines, offering payment plans, and community service. A POUND OF FLESH *supra* note 81, at 34–35.

166. IN FOR A PENNY, *supra* note 21, at 44.

payments of $118.23 every two weeks.[167] His LFOs had grown over the previous decade to $2,882.36, during which time Judge Susan L. Goldie had issued several warrants for his arrest.[168] In total, Mr. Webb had spent 204 days in jail for nonpayment of his LFOs through 2005.[169] Under Ohio law, individuals incarcerated for nonpayment of their LFOs are required to receive credit against their fines in the amount of $50 per day,[170] meaning that Mr. Webb served enough time in jail to pay for his LFOs more than three times over.

On August 1, 2006, however, Judge Goldie once again ordered Mr. Webb incarcerated, sentencing him to thirty days in jail for each of his "contempt" violations—270 days of jail time, or enough to cover $13,500 in fines.[171] After serving 126 days in prison, Mr. Webb was finally released by order of the Greene County Court of Appeals.[172] Judge Goldie was later publicly reprimanded by the Ohio Supreme Court Disciplinary Counsel,[173] but a State Public Defender remarked that it is commonplace for judges to fail to give defendants the credit they are owed under state law,[174] creating a debt spiral where individuals are jailed for contempt, saddled with costs and fees, and prevented from working to pay off their fines.[175] Courts that perpetuate these cycles of poverty and recidivism are not only contributing to the expansion of America's carceral state,[176] but they

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167. *Id.*
168. *Id.*
169. *Id.*
170. OHIO REV. CODE § 2947.14.
171. IN FOR A PENNY, *supra* note 21, at 45.
172. *Id.*
173. Ohio State Bar Ass'n v. Goldie, 119 Ohio St. 3d 428, 2008-Ohio-4606, at ¶ 2 (per curiam). The Ohio State Bar Association formally reprimanded Judge Goldie for violating Canon 3(b)(2) of the Code of Judicial Conduct, which requires a judge to "be faithful to the law and maintain professional competence in it." *Id.* Because Judge Goldie had left the bench by the time of the Bar Association's findings, they pursued no sanctions against her. *Id.* ¶ 26.
174. IN FOR A PENNY, *supra* note 21, at 45.
175. *Id.*
176. *See, e.g.*, Jonathan Simon, *Racing Abnormality, Normalizing Race: The Origins of America's Peculiar Carceral State and its Prospects for Democratic Transformation Today*, 111 NW. UNIV. L. REV. 1625, 1643 (2017) (examining the relationship between the "War on Crime" and America's history of marginalizing black citizens); Ian F. Haney López, *Post-Racial Racism: Racial Stratification and Mass Incarceration in the Age of Obama*, 98 CAL. L. REV. 1023, 1029–31 (2010) (discussing the dramatic expansion in incarceration during the last few decades of the 20th century).

are also acting in blatant violation of *Bearden*'s instruction that "in revocation proceedings for failure to pay a fine or restitution, a sentencing court must inquire into the reasons for the failure to pay."[177] In order to understand how to overcome the challenges posed by insufficient ability to pay determinations, it is useful to examine the different ways that lower courts have applied the *Bearden* holding. The next Section will briefly discuss broad themes in the willfulness standard post-*Bearden*, before cataloguing some of the ways in which courts diverge in their application of the standard.

B. Divergent Interpretations of Willfulness After *Bearden*

While it is impossible to catalogue all of the ways in which lower courts have interpreted—or misinterpreted—the Court's holding in *Bearden*, it is possible to distill several themes from these decisions. Organizations such as the ACLU regularly report on instances where judges fail to follow the process for determining willfulness as the Court understood it in *Bearden*,[178] helping to bring clarity to a problem that is otherwise plagued by insufficient data. On one end of the spectrum are courts that simply fail to make any sort of determination whatsoever.[179] In the middle are courts that consider the defendant's financial status, but for one reason or another, their determinations are insufficient to meet the threshold set by *Bearden*.[180] Finally, some courts do make determinations on adequate ability to pay and reach a legitimate finding that an offender has willfully failed to make the requisite payments.[181]

1. Courts that Fail to Make a Willfulness Assessment

The most egregious violation of *Bearden* occurs when trial court judges fail to make any consideration of a defendant's ability to

177. Bearden v. Georgia, 461 U.S. 660, 672 (1983).

178. *See, e.g.*, IN FOR A PENNY, *supra* note 21, at 5–10 (describing some of the various ways in which courts fail to engage in meaningful considerations of defendants' ability to pay before revoking probation).

179. *See infra* Section II.B.1.

180. *See infra* Section II.B.2.

181. *See infra* Section II.B.3. Without a greater effort by states to keep track of the ways in which judges impose LFOs and revoke probation for nonpayment, it is impossible to know the relative frequency with which courts fail to engage in meaningful ability to pay determinations. *See infra* Section III.C (discussing the evidentiary challenges of investigating the impact of LFOs).

pay. As the court noted in *Bearden*, absent such a finding, it is not possible to conclude whether a nonpayment was willful.[182] Unfortunately, this practice appears to be widespread, with public defenders routinely observing judges failing to make any assessment into an individual's financial situation prior to revoking their probation.[183] A complaint recently filed in the Circuit Court of Pulaski County, Arkansas by the Fines and Fees Justice Center highlights just such a case.[184]

Judge Mark Derrick is a judge of the White County District Court in Arkansas, seated in a county where nearly 16% of residents live below the federal poverty line.[185] Judge Derrick is known for having a "Zero Tolerance" policy in regards to non-payment of court-ordered fines and fees, even going so far as to post a sign stating as much in county offices.[186] At the beginning of his hearings, Judge Derrick frequently announces, "[i]f you fail to make a payment, a warrant will issue for your arrest."[187] Under Judge Derrick's supervision, more than four thousand arrest warrants for failure to pay fines were issued in the town of Beebe, Arkansas between April 2016 and April 2018.[188] Beebe, Arkansas is a town of just eight thousand people.[189]

According to a complaint filed by the Fines & Fees Justice Center in 2018, "Judge Derrick routinely issues warrants charging individuals who have missed a payment" even if that person contacts the court seeking an extension, attempting to make a partial payment, or hoping to plead inability to pay.[190] All of the plaintiffs in the suit against Judge Derrick were indigent at the time of their incarceration for nonpayment of LFOs.[191] One of the plaintiffs, a twenty-three-year-old father of two who works six days a week at a tire shop, was jailed twice by Judge Derrick for nonpayment of traffic

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182. *See supra* Section II.A (discussing the willfulness standard).

183. BANNON ET AL., *supra* note 13, at 21–22.

184. Complaint at 1–2, Mahoney v. Derrick, No. 60CV-18-5616 (Pulaski Cnty. Cir. Ct., Ark. Aug. 9, 2018).

185. *Id.* at 12.

186. Braden, *supra* note 21, at 15.

187. Mahoney Complaint, *supra* note 184, at 19.

188. *Id.* at 20.

189. *Quick Facts: Beebe City, Arkansas*, U.S. CENSUS BUREAU (July 1, 2019), *https://www.census.gov/quickfacts/*beebecityarkansas [https://perma.cc/4DAP-G8SY].

190. Mahoney Complaint, *supra* note 184, at 19.

191. *Id.* at 11.

fines, despite being "the sole breadwinner for his family."[192] Another, a certified nursing assistant and mother of four, became homeless, lost custody of her children, and spent forty-two days in jail stemming from her inability to pay LFOs, which accrued as a result of nothing more than traffic charges.[193]

These cases highlight how a single instance of a court failing to properly determine whether nonpayment of LFOs was willful can bring financial ruin on a person. Although these cases seem extreme, they are far from unusual.[194] The Lawyers' Committee for Civil Rights Under Law, for example, describes hearings lasting less than two minutes and defendants regularly facing judges without the support of counsel.[195] Similarly, a report by the ACLU of New Hampshire found that judges who were incarcerating individuals for nonpayment of LFOs failed to conduct a meaningful ability to pay hearing in over half of cases observed.[196] Elsewhere, it is not uncommon for offenders to be incarcerated without any hearing, and only after spending up to several months in jail are they given the opportunity to explain the reasons for their delinquency, a blatant violation of the Supreme Court jurisprudence and state law.[197]

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192. *Id.* at 10.

193. *Id.* at 5–6.

194. BRADEN ET AL., *supra* note 21, at 4.

195. *Id.*; *see also* Brian Highsmith, *Criminal Justice Debt*, *in* SURVIVING DEBT: EXPERT ADVICE FOR GETTING OUT OF FINANCIAL TROUBLE 1, 2 (Nat'l Consumer L. Ctr. 11th ed., 2019), available at https://library.nclc.org/criminal-justice-debt-consumer-debt-advice-nclc [https://perma.cc/Z25B-DHNX] (advising that judges often do not conduct ability to pay determinations or make only cursory findings); *Man Jailed for Inability to Immediately Pay $200 Littering Ticket Deserves Justice, ACLU-NJ Says*, ACLU (Oct. 27, 2016), https://www.aclu.org/press-releases/man-jailed-inability-immediately-pay-200-littering-ticket-deserves-justice-aclu-nj [https://perma.cc/HFZ4-L6VX].

196. ACLU OF N.H., DEBTORS' PRISONS IN NEW HAMPSHIRE 1–6 (2015), https://www.aclu-nh.org/sites/default/files/field_documents/report_aclu-nh_debtors-prisons_09-23-15.pdf [https://perma.cc/36MW-2KY9].

197. IN FOR A PENNY, *supra* note 21, at 20. States have and use various criteria for determining ability to pay for court-appointed counsel, whether to waive filing fees, or the LFOs that attach to probation. In California, for example, California Rule of Court 4.335 requires an ability to pay determination only for infractions. Cal. R. Ct. 4.335. Court fees for misdemeanors and felonies, by contrast, are subject to ability to pay determinations by statute only. Although some statutes make it explicit that an ability to pay determination is required—see, e.g., CAL. PENAL CODE § 1203.1b(a) (West 2015) (requiring a determination into defendant's ability to pay their court-ordered fines and fees)—other statutes say nothing about the requirement to conduct an ability to pay determination.

2. Courts that Make Inadequate Willfulness Assessments

While the most egregious violations of the willfulness standard occur when courts incarcerate debtors without any ability to pay determination whatsoever, courts that conduct inadequate hearings are also guilty of failing to meet the standard set by *Bearden*. As Justice O'Connor made clear in her opinion, willfulness cannot be determined by cursory efforts, but instead requires a detailed consideration of the offender's financial position, as well as his or her efforts to acquire sufficient assets to pay LFOs.[198] Some state statutes, however, establish a baseline for ability to pay that goes far beyond the meaning of willful envisioned by the Court in *Bearden*, creating a more stringent set of circumstances for determining ability to pay. In Alabama, for example, in making an ability to pay determination, courts consider whether a person owns "anything of value—land, house, boat, TV, stereo, jewelry."[199] *Bearden* did not explicitly address whether probationers could be required to resort to selling their personal belongings in order to satisfy the conditions of their parole, so the precise extent to which trial courts may ask a probationer to do so remains an open question.[200] The Court's analysis, however, suggests that the approach should be holistic and thorough.[201] As the *Bearden* case itself demonstrates, an ability to pay hearing must result in a finding, on the record, that a person's nonpayment of their LFOs was truly willful before probation can be revoked for nonpayment.[202] Cursory hearings that do not

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See, e.g., CAL. GOV'T CODE § 70373 (West 2009) (failing to mention ability to pay determination in statute regarding court operations fee).

198. *See supra* Section II.A.

199. Alabama explicitly lists the following categories of equity in personal property that a court is empowered to consider in making ability to pay determinations: "the value of motor vehicles, stereo, VCR, furnishing, jewelry, tools [and] guns." *See* ALA. UNIFIED JUD. SYS., C-10A, AFFIDAVIT OF SUBSTANTIAL HARDSHIP at 2 (2019), available at https://dhr.alabama.gov/wp-content/uploads/2019/07/379031ALAUJS-C-10-Affidavit-of-Substantial-Hardship-0295.pdf [https://perma.cc/CC3A-R8ZR].

200. The Court's opinion and discussion at oral argument, however, which centered around the petitioner having and looking for a job in order to acquire the resources to make their payments, may suggest that such a determination by a trial court judge may be out of bounds. *See* Bearden Transcript, *supra* note 64, at 26–28.

201. *Id.*

202. *Bearden*, 461 U.S. at 673–74 (1983) ("In the absence of a determination that the petitioner did not make sufficient bona fide efforts to pay

interrogate the reasons for nonpayment are unlikely to meet this threshold.

A Superior Court judge in Benton County, Washington, for example, described his method for determining ability to pay by the appearance of the defendants who present themselves in court.[203] Those who appear in court wearing expensive looking clothes are asked if the clothes were a gift.[204] If the clothes were a gift, the defendant is instructed that they should have instead asked for cash to pay their court fees.[205] This judge also goes through a similar process for those defendants who have tattoos.[206] Although the Court's discussion of Danny Bearden's economic position did not reach his clothing or his physical appearance, it is hard to imagine findings such as these rising to a level sufficient to satiate Justice O'Connor's command that nonpayment must be willful. In *Bearden*, the Court gave "bona fide efforts" a narrow interpretation, discussing only attempts to find work or borrow money.[207] Importantly, the trial court commenting on "the availability of odd jobs such as lawn-mowing"[208] was dismissed by the Court as an inadequate finding.[209] This suggests that, without more, willfulness determinations such as those discussed above cannot meet the threshold set out by the Supreme Court.

3. When Courts Conduct a Thorough Willfulness Inquiry

An assessment of court practices regarding ability to pay hearings would be incomplete without acknowledging the fact that many judges refuse to issue arrest warrants for nonpayment of LFOs, finding them costly and unproductive.[210] Similarly, courts often do

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or to obtain employment in order to pay, we cannot read the opinion of the sentencing court as reflecting such a finding.").

203. Joseph Shapiro, *Supreme Court Ruling Not Enough to Prevent Debtors Prisons*, NPR (May 21, 2014), https://www.npr.org/2014/05/21/313118629/supreme-court-ruling-not-enough-to-prevent-debtors-prisons [https://perma.cc/7K9K-X9YP].

204. *Id.*

205. *Id.*

206. *Id.*

207. *Bearden*, 461 U.S. at 673–75.

208. *Id.* at 673.

209. *Id.*

210. *See, e.g.*, THE FUND FOR MODERN COURT, FINES AND FEES AND JAIL TIME IN NEW YORK TOWN AND JUSTICE COURTS: THE UNSEEN VIOLATION OF

make adequate findings as to the willfulness of a defendant in missing their court ordered payments.[211] Although it is difficult to know the relative frequency with which procedurally proper ability to pay hearings are conducted (as opposed to those that fail to meet the threshold established in *Bearden*), recognizing that many judges *do* adhere to the constitutional demands delineated by the *Bearden* Court is an important way to frame and contextualize those ability to pay hearings that fall short of the mark. An example of such a case is *People v. Lawson*, as it involved an offender who had the means to pay, but chose not to.[212]

Linda Lawson pled guilty in 1992 to one count of felony welfare fraud because she had improperly received $21,000 in social security[213] and food stamp benefits.[214] The trial court placed Lawson on probation and referred her to the probation department to determine the appropriate amount of restitution, in addition to probation and attorneys' fees of $400.[215] The probation department set the amount of restitution at $21,226 and scheduled regular hearings to monitor her progress.[216] A year after her sentencing, however, Lawson had made only $380 in payments, all of which came

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CONSTITUTIONAL AND STATE LAW 12–14 (2019), available at http://moderncourts.org/wp-content/uploads/2019/04/Fines-and-Fees-and-Jail-Time-in-New-York-Town-and-Village-Justice-Courts-The-Unseen-Violation-of-Constitutional-and-State-Law.pdf [https://perma.cc/F956-LJT6] (describing an interview with a panel of judges who stated that "bench warrants are a waste of time and resources, and that they do not increase the likelihood of payment").

211. People v. Lawson, 81 Cal. Rptr. 2d 283, 283 (Cal. Ct. App. 1999).

212. *Id.*

213. Aid to Families with Dependent Children (AFDC) was a federal social security program that existed from 1935 to 1996, when it was replaced with the Temporary Assistance for Needy Families (TANF) program. *See generally* U.S. DEP'T OF HEALTH & HUM. SERVS., AID TO FAMILIES WITH DEPENDENT CHILDREN (AFDC) AND TEMPORARY ASSISTANCE FOR NEEDY FAMILIES (TANF) – OVERVIEW (2009), available at https://aspe.hhs.gov/aid-families-dependent-children-afdc-and-temporary-assistance-needy-families-tanf-overview-0 [https://perma.cc/BL7X-4VCV] (discussing the history of AFDC and its replacement in 1996 with the TANF program).

214. *Lawson*, 81 Cal. Rptr. 2d at 284.

215. *Id.*

216. *Id.*; *see also* U.S. GOV'T ACCOUNTABILITY OFF., REP. TO CONG. COMM., FEDERAL CRIMINAL RESTITUTION: MOST DEBT IS OUTSTANDING AND OVERSIGHT OF COLLECTIONS COULD BE IMPROVED 22–26 (2018), available at https://www.gao.gov/assets/690/689830.pdf [https://perma.cc/C73F-A7EG] (describing how the vast majority of restitution in federal criminal cases remained outstanding).

in the form of checks which were returned due to insufficient funds.[217] The court then created a payment plan, ordering Lawson to pay restitution to the Welfare Department at the rate of $50 per month.[218] However, a year and a half later, although Lawson had finally paid her probation and attorneys' fees, she had made only $200 in restitution payments.[219] Nearly three years after her sentencing hearing, the court revoked Lawson's probation and ordered her to serve 180 days in county jail.[220]

Over the next two years, Lawson continued to miss her payments.[221] In the course of conducting ability to pay hearings, the court discovered that during that time, however, she was employed, and along with her spouse had a net monthly income of $4,900.[222] Lawson reported having a disposable income of approximately $2,480 each month, but after fifty-seven months of probation she had made only $1,866 in restitution payments.[223] After continued failure to meet her payments and several more court hearings, Lawson was sentenced to two years' imprisonment, with 179 days credit for time served.[224]

On appeal, Lawson raised *Bearden*-style equal protection and due process claims. Discussing these claims, the court noted that Bearden had tried and failed to find a job, and had no assets or income.[225] By contrast, in Lawson's case, the trial court found that Lawson had the means to pay the minimum amount required of her each month and nevertheless failed to do so, a finding that Lawson did not contest.[226] The court concluded that Lawson "willfully refused to pay restitution as ordered," and that her probation was revoked "not because she was financially unable to [make her payments], but because she *chose* not to make them."[227]

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217. *Lawson*, 81 Cal. Rptr. 2d at 284.
218. *Id.*
219. *Id.*
220. *Id.* at 285.
221. *Id.*
222. *Id.*
223. *Id.*
224. *Id.* at 286.
225. *Id.* at 289.
226. *Id.* at 286.
227. *Id.* at 288 (emphasis in original).

C. The Problem with *Bearden*–Style Ability to Pay Determinations

The practices described above are problematic for a number of reasons. Considering the constitutional concerns set forth in *Bearden*, it is "fundamentally unfair" to revoke probation for an indigent defendant who is unable to pay their LFOs.[228] When an indigent defendant receives different treatment than an individual who has the resources to pay their court-ordered fines and fees, "[d]ue process and equal protection principles converge" to require the State to exhaust all other possible remedies before resorting to incarceration.[229] The *Bearden* decision therefore rested on the bedrock principal that the State's interest in punishment and deterrence is not served by incarcerating a person whose inability to pay was through no fault of their own.[230] Thus, when courts fail to undertake adequate ability to pay determinations, they abrogate these constitutional protections while failing to meaningfully advance the State's penological interests.

1. The Willfulness Standard Creates Administrative Challenges

On an administrative level, the willfulness standard is equally problematic as it creates an exacting procedure for trial court judges to follow.[231] *Lawson* highlights the extensive factfinding required of judges making an ability to pay determination.[232] In practice, this onerous standard is likely to be a difficult one for overworked judges to meet. The lack of clear guidance on how to conduct ability to pay determinations may also result in significant differences in the way that the willfulness standard is applied.[233] Constitutional concerns again come into play when one indigent

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228. Bearden v. Georgia, 461 U.S. 660, 668 (1983).

229. *Id.* at 665.

230. *Id.* at 672–73.

231. *See supra* Section II.B.3.

232. *Lawson*, 81 Cal. Rptr. 2d at 284–86 (describing multiple ability to pay hearings spanning a period of 57 months).

233. Jessica M. Eaglin, *Improving Economic Sanctions in the States*, 99 MINN. L. REV. 1837, 1853–56 (2015) (explaining how the size of economic sanctions imposed on similar offenders may vary drastically within and between jurisdictions).

person is able to satisfy their debt through community service—or receives debt forgiveness—while another is incarcerated.[234]

2. Ability to Pay Determinations May Be Counterproductive

Additionally, efforts to secure payment from individuals who lack the resources to pay may be fruitless at times.[235] For example, a report by the ACLU in New Hampshire found that in 2013, taxpayers spent approximately $167,000 to house inmates jailed for nonpayment of LFOs.[236] The total cost of LFOs that courts were seeking to recover, however, was less than $76,000.[237] Similar studies have shown that the costs of jailing indigent defendants are often in excess of the amount that courts hope to collect.[238] Although incarceration helps to achieve other goals that the State may have, such as incapacitation and deterrence, these goals are less likely to be met when a probationer is imprisoned because they lack the resources to pay their LFOs.[239] Thus, whether from an economic or a penological perspective, incarcerating individuals for nonpayment of the LFOs is unlikely to accomplish the State's goals.

Other commentators have noted how ability to pay determinations disproportionately disadvantage Black Americans and perpetuate racialized economic divides.[240] Hearings like those

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234. Ryan W. Scott, *The Effects of Booker on Inter-Judge Sentencing Disparity*, 22 FED. SENT'G REP. 104, 104 (2009) ("Not all forms of disparity in sentencing are a cause for concern, but *inter-judge* disparity is widely recognized as unwarranted." (internal citation omitted)).

235. *See, e.g.*, IN FOR A PENNY, *supra* note 21, at 9 (explaining that incarcerating indigent defendants for nonpayment of LFOs often ends up costing more than States are hoping to recover).

236. DEBTORS' PRISONS, *supra* note 122, at 7.

237. *Id.*

238. *See, e.g.*, MENENDEZ ET AL., *supra* note 85, at 5 ("Jailing those unable to pay fees and fines is especially costly—sometimes as much as 115 percent of the amount collected—and generates no revenue.").

239. This particular scenario was explicitly contemplated by the *Bearden* Court. Bearden v. Georgia, 461 U.S. 660, 670 (1983) (explaining that while the threat of imprisonment *may* encourage probationers to keep up with their payments, "[r]evoking the probation of someone who . . . is unable to make restitution will not make restitution suddenly forthcoming.").

240. *See, e.g.*, Theresa Zhen, *Color(Blind) Reform: How Ability to Pay Determinations are Inadequate to Transform a Racialized System of Penal Debt*,

described in *Lawson* are invasive,[241] present an underinclusive understanding of indigency,[242] and perpetuate stereotypes that are harmful to Black families.[243] Therefore, when ability to pay hearings are insufficiently conducted, they trigger constitutional concerns. On the other hand, adequate determinations may bring into play similar concerns while being labor intensive and consuming scarce judicial resources. Moreover, even when these hearings are properly carried out under the standard set forth in *Bearden*, they run the risk of perpetuating discrimination and harmful stereotypes.

III. EVIDENTIARY SHORTCOMINGS AND THE POTENTIAL FOR LEGISLATIVE REFORM

Any attempt to understand and reconcile the problems caused by the imposition of LFOs and failure to pay determinations must confront two distinct but related hurdles. First, the statutes and rules that govern legal financial obligations are multi-layered and complex, and can vary a great deal between jurisdictions.[244] Second, it is often difficult for litigants to access the empirical resources needed to uncover widespread abuses of the *Bearden* standard.

A. Challenging Inadequate Ability to Pay Hearings Through Class Action

In 2016, the ACLU filed a class action lawsuit in Benton County, Washington on behalf of individuals who had been incarcerated or placed on work crews for failure to make LFO payments.[245] The complaint in *Fuentes v. Benton County* proposed two

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43 N.Y.U. REV. L. & SOC. CHANGE 175, 201–12 (2019) (examining how ability to pay determinations may actually contribute to the criminalization of poverty).

241. Mary Fainsod Katzenstein & Mitali Nagrecha, *A New Punishment Regime*, 10 CRIMINOLOGY & PUB. POL'Y 555, 564 (2011) (describing the difficulties that judges face in conducting thorough ability to pay determinations).

242. Zhen, *supra* note 240, at 203–04.

243. *Id.* at 205–09 (discussing how the willfulness standard can be used as a pretext for perpetuating racial discrimination and reallocating resources from Black Americans to the State).

244. *See, e.g.*, R. Barry Ruback & Valerie Clark, *Economic Sanctions in Pennsylvania: Complex and Inconsistent*, 49 DUQ. L. REV. 751, 752–53 (2011) (describing the growing number of laws that govern LFOs in Pennsylvania).

245. Fuentes Complaint, *supra* note 31, at 6–7.

classes of individuals, the "Indigent Class"[246] and the "Incarcerated Class,"[247] alleging that both classes had been deprived of their constitutional rights as a result of court practices.[248] The ACLU found that over a period of six and a half months, 320 individuals had been incarcerated or placed on work crews for failure to pay their district court LFOs, a figure corresponding to more than 28% of all those incarcerated in the county.[249] Collectively, the debtors surveyed by the ACLU owed close to one million dollars in fines and fees, at an average of about $2,670 per person.[250] The complaint further alleged that Benton County routinely incarcerated probationers for nonpayment of LFOs, many of whom were homeless or unemployed, without conducting any ability to pay hearing.[251]

Benton County ultimately settled the case.[252] Under the terms of the agreement, the county agreed to stop issuing arrest warrants for nonpayment of LFOs and comply with *Bearden*'s ability to pay standard.[253] The county also instituted new notice requirements, mandating that anyone facing penalties for noncompliance with LFO payments receive written notification at least twenty-one days prior to their hearing.[254] Perhaps most importantly, under the terms of the settlement, Benton County public defenders and prosecutors are required to participate in trainings on laws and procedures regarding

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246. *Id.* at 7 ("All indigent persons who owe legal financial obligations in relation to criminal cases prosecuted in Benton County District Court.").

247. *Id.* at 8 ("All indigent persons who, at any time since October 6, 2012, were jailed or placed in partial confinement on work crew (or both) for nonpayment of legal financial obligations owed in relation to criminal cases prosecuted in Benton County District Court.").

248. *Id.* at 7–11. The complaint did not specify the number of individuals in each class, but rather alleged that "[b]oth of the Classes are so numerous that individual joinder of all members is impracticable. Hundreds if not thousands of indigent persons have been jailed or placed in partial confinement on work crew for nonpayment of LFOs owed . . . in Benton County District Court since October 6, 2012." *Id*. at 8.

249. *Id.* at 25.

250. *Id.*

251. *Id*. at 21–24.

252. *Settlement Reached in Lawsuit Ending Benton County's Modern-Day Debtors' Prison*, ACLU (June 1, 2016), https://www.aclu.org/press-releases/settlement-reached-lawsuit-ending-benton-countys-modern-day-debtors-prison [https://perma.cc/8NP7-NQ5D].

253. *Id.*

254. *Id.*

the proper constitutional standards for assessment and collection of LFOs.[255]

Although the *Fuentes* settlement did not open the door to any new developments regarding the willfulness standard or improper ability to pay hearings, it did set an important precedent for litigants hoping to challenge courts that are unconstitutionally imprisoning indigent defendants for noncompliance with LFO payments. The class action lawsuit quickly resulted in a settlement that granted the class members' requested relief, and was later cited as an instrumental reason for further reform in Washington State.[256] *Fuentes* is an important example to consider because it demonstrates how a single class group,[257] bolstered by robust data,[258] can expediently highlight egregious abuses of the *Bearden* standard and compel far-reaching reform. This is especially important where the class members are necessarily indigent and therefore unlikely to be able to pursue litigation individually or without the assistance of legal aid. Ultimately, states and municipalities may reconsider their practices and determine that it is preferable to reform their policies to align with Supreme Court precedent rather than engage in costly, time-consuming litigation that, even if successful, will serve neither penological nor economic interests. In other words, enough litigation targeted against inadequate ability to pay hearings may eventually eliminate the need for further lawsuits in this area.

B. Applying Due Process and Equal Protection to Inadequate Ability to Pay Determinations

A more recent case highlights the possibility for success for litigants who do bring a case to trial. In *Cain v. City of New Orleans*,[259] a group of former criminal defendants in the Orleans Parish Criminal District Court (OPCDC) brought a putative class action against one dozen judges, challenging the way in which the OPCDC collects LFOs from indigent defendants.[260] In addition to

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255. *Id.*
256. *See supra* note 122 and accompanying text.
257. *See* Fuentes Complaint, *supra* note 31, at 8.
258. *Id.* at 13.
259. Cain v. City of New Orleans, 281 F. Supp. 3d 624, 628 (E.D. La. 2017), *aff'd sub nom.* Cain v. White, 937 F.3d 446 (5th Cir. 2019).
260. *Id.* at 628.

fines[261] and restitution,[262] the judges imposed various fees that went to support OPCDC operations, including a mandatory $5 fee,[263] additional fees of up to $500 for a misdemeanor and $2,500 for a felony,[264] court costs up to $100,[265] and a $14 fee for the "Indigent Transcript Fund."[266] The court also imposed further "court costs" on defendants that went to supporting, *inter alia*, the Orleans Public Defender, the District Attorney, and the Louisiana Supreme Court.[267] OPCDC also regularly added the costs of drug treatment and drug testing to the LFOs that criminal defendants were required to pay.[268] As a result of their convictions, class members were assessed fines and fees ranging from $148 to $901.50, in addition to restitution.[269]

Agents for the Collections Department were trained to send two form letters to defendants who were delinquent on payments.[270] The first letter informed defendants of their delinquency, and stated that if they did not report to the Collections Department to make arrangements for the payment of their LFOs, they would be placed under arrest.[271] The second letter merely warned defendants that unless payment was received or arrangements made within seventy-two hours, the defendant would be arrested.[272] Following this procedure, the Collections Department would check court dockets to determine whether the defendants had made a payment or been granted an extension.[273] If their investigation revealed that no new payments had been made, they issued an alias capias warrant for the

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261. LA. STAT. ANN. § 15:571.11(D).
262. LA. CODE CRIM. PROC. ANN. art. 883.2.
263. *Id.* § 13:1381.4(A)(1).
264. *Id*. § 13:1381.4(A)(2).
265. *Id*. § 13:1377(A).
266. *Id*. § 13:1381.1(A). The Indigent Transcript Fund, which is used to compensate court reporters for the costs of preparing transcripts for indigent defendants, may also come with additional costs under the Louisiana Code of Criminal Procedure Article 887(A). For example, two of the class members in *Cain* were assessed an additional $100 fee under this provision as a condition of their probation. Cain v. City of New Orleans, 281 F. Supp. 3d 624, 628 (E.D. La. 2017), *aff'd sub nom*. Cain v. White, 937 F.3d 446 (5th Cir. 2019).
267. *Cain,* 281 F. Supp. 3d at 629.
268. LA. REV. STAT. § 13:5304.
269. *Cain*, 281 F. Supp. 3d at 629.
270. *Id.* at 630.
271. *Id.*
272. *Id.* at 630–31.
273. *Id.* at 631.

defendant's arrest.[274] Individuals arrested pursuant to these warrants typically remained in jail until released by a judge, or until their family or friends could make a payment on their court debt.[275] The class members in *Cain* were imprisoned for anywhere between six days and two weeks.[276]

The action filed by the class members alleged, among other grievances, that the court's policy of jailing indigent defendants for nonpayment of LFOs without conducting an ability to pay inquiry violated due process, equal protection, and the Supreme Court's ruling in *Bearden*.[277] The court noted that while each named plaintiff in the class had been imprisoned for failure to pay court debts, at no point had a judge conducted an ability to pay determination.[278]

Citing *Williams* and *Tate* and finding *Bearden* controlling,[279] the court applied the *Mathews* framework[280] to the case, reasoning

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274. *Id.* An *alias capias* warrant, also known as a *capias ad faciendum,* is a warrant that instructs an officer to take a named defendant into custody following a failure to appear in court. *Capias—Capias ad Faciendum*, BLACK'S LAW DICTIONARY (11th ed. 2019).

275. *Cain*, 281 F. Supp. 3d at 631.

276. *Id.*

277. *Id.* at 633. Noting the actions taken by the defendants in response to the litigation, the court held that while a number of the plaintiff's claims had become moot, "the Judges' practice of failing to inquire into ability to pay before plaintiffs are imprisoned for nonpayment" was predicated on underlying constitutional injuries that could not be rendered moot without a showing that "the challenged conduct could not reasonably be expected to recur." *Id.* at 639–40 (citing Friends of the Earth, Inc. v. Laidlaw Envt'l Servs. (TOC), Inc., 528 U.S. 167, 189 (2000)).

278. *Id.* at 647.

279. *Id.* at 647. The court also relied on a more recent Supreme Court case, *Turner v. Rogers*, which held that incarcerating a person for their failure to make child support payments following a civil contempt finding, where the defendant neither received counsel nor the benefit of alternative procedural safeguards such as clear notice that ability to pay would constitute a critical question in a civil contempt proceeding, violated the Due Process Clause. 564 U.S. 431, 449 (2011).

280. The *Mathews* test evaluates whether a government action has violated procedural due process rights. Under *Mathews*, if an individual is found to have been deprived of their liberty interest, courts use a three-factor balancing test to determine whether the procedural safeguards comport with due process. The factors considered are: (1) the individual interest that is implicated; (2) the risk of "erroneous deprivation" through the procedures that are currently in place and the probable value of any additional procedures; and (3) the government interest, including fiscal and administrative burdens imposed by additional procedures. Mathews v. Eldridge, 424 U.S. 319, 335 (1976).

that the class members' interest in "freedom from bodily restraint" weighed "heavily in favor of procedural safeguards provided before imprisonment."[281] Additionally, the court found the "risk of erroneous deprivation without an inquiry into ability to pay" to be high,[282] and the judges failed to identify any countervailing interest in not conducting an ability to pay inquiry.[283] The court concluded that the onus was on the State, and not the criminal defendant, to ensure these procedural safeguards, and found that "requiring the criminal defendant to raise the issue on her own, would undermine *Bearden*'s command that a criminal defendant not be imprisoned solely because of her indigence."[284] Following this inquiry, the court deemed it appropriate to award summary judgment to the plaintiffs.[285] On appeal, the Court of Appeals for the Fifth Circuit affirmed the holding of the district court.[286]

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281. *Cain,* 281 F. Supp. 3d at 651 (quoting Turner v. Rogers, 564 U.S. 431, 445 (2011)). The Fifth Circuit's application of *Mathews* to an ability to pay case is important because it applies a different test than that which the Court undertook in *Bearden*. While Justice O'Connor wrote in *Bearden* that both due process and equal protection concerns are triggered by an inadequate ability to pay determination, her decision not to give greater emphasis to these constitutional concerns limited the *Bearden* holding. Bearden v. Georgia, 461 U.S. 660, 665 (1983). The *Mathews* test, on the other hand, has been widely applied and therefore gives judges a more concrete standard on which to determine whether an ability to pay determination has been conducted lawfully. *See, e.g.* Andrew Blair-Stanek, Twombly *Is the Logical Extension of the* Mathews v. Eldridge *Test to Discovery*, 62 FLA. L. REV. 1, 11–12 (2010) (explaining that the *Mathews* test has been widely used by the Supreme Court).

282. *Cain,* 281 F. Supp. 3d at 651.

283. *Id.*

284. *Id.* at 652 (citing *Bearden*, 461 U.S. at 672–73).

285. *Id.* at 659–60.

286. Cain v. White, 937 F.3d 446, 454 (5th Cir. 2019), *cert. denied*, 140 S. Ct. 1120 (2020). One of the principal issues before the district court, and the only question on appeal was the judge's apparent conflict of interests due to the fact that a significant portion of the revenue collected by OPCDC judges through LFOs was funneled into a general fund, known as the "Judicial Expense Fund" (JEF). *Id*. Approximately one-quarter of the funding received by the JEF came from the court's collection of fines and fees. *Id.* at 448. OPCDC judges maintained exclusive control over how the JEF was spent and used it for, among other thing, salaries and benefits, attending conferences, office supplies, advertising, maintenance and repairs, coffee, professional liability insurance, supplemental health insurance and reimbursement for out-of-pocket medical expenses, and many other random expenses. *Id*. at 448–49. Although the JEF could not be used to supplement the judge's own salaries, the funds could be used to pay the salaries of court

The *Cain* litigation was a success for a number of reasons, and its remedial impact could be felt before the final judgment was even issued.[287] As a result of the lawsuit being filed, for example, OPCDC rescinded the Collections Department's authority to issue warrants,[288] identified and recalled Collections Department's warrants predicated solely on failure to pay LFOs,[289] "wrote off" approximately one million dollars in fines and fees,[290] and worked "to implement new procedures to correct complaints about delays in getting arrestees timely to court."[291]

Both *Fuentes* and *Cain* highlight the success that litigants may have in challenging inadequate ability to pay determinations through class litigation. Both cases resulted in payouts prior to a final judgment being issued, while *Cain* demonstrated that courts that fail to consider a defendant's ability to pay are guilty not only of violating Supreme Court jurisprudence, but also of due process violations under a *Mathews* balancing test.[292] These cases demonstrate that litigation against lower courts has the potential to result in positive change,[293] and offer a successful model for future litigants hoping to bring similar claims.

C. The Positive Impact of Increased Empirical Resources

As the cases above demonstrate, litigants armed with the right empirical tools can be successful in bringing constitutional claims against the judges that fail to undertake adequate ability to pay determinations. The discussion below suggests why requiring states to do a better job in collecting this information could prove to be a cost-effective way to bring about change, and discusses a recent example of legislative reform.

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personnel. *Id*. at 449. Both courts found that the judges' pecuniary interest in the JEF posed an unconstitutional conflict of interests. *Id.* at 454.

287. *Cain,* 281 F. Supp. 3d at 637.

288. *Id.*

289. *Id.*

290. *Id.*

291. *Id.*

292. *Id.* at 650. On appeal, however, the Fifth Circuit affirmed the district court without any mention of *Mathews*. *Id.* For a discussion of the *Mathews* balancing test, see *supra* note 280 and accompanying text.

293. *Cain*, 281 F. Supp. 3d at 652 (awarding declaratory relief in favor of the plaintiffs on their count relating to the court's practice of incarcerating indigent defendants without making an ability to pay determination).

1. Greater Empirical Resources as a Solution

The collection of empirical information regarding LFOs and court practices in determining willfulness is a slow and challenging process.[294] Because the majority of sentencing occurs at the state and local level,[295] any effort to reach broad conclusions must be sensitive to the fact that LFO regimes and court practices vary drastically between jurisdictions.[296] One of the greatest hurdles that reformers and policymakers face when seeking to challenge harmful LFO regimes is a lack of the kind of evidence needed to draw meaningful conclusions about LFOs and identify jurisdictions where courts regularly run afoul of the Supreme Court's guidance in *Bearden*.[297] Therefore, one way to encourage reform is making it easier for policymakers and litigators to access the data needed to draw meaningful conclusions about the impact of LFOs and ability to pay determinations on indigent individuals.

To that end, states should invest in methods of collecting and publishing data regarding the assessment and collection of LFOs, in addition to the costs of collection and how funds are distributed, including relevant demographic statistics. These statistics could be analyzed by courts or judges to determine problem areas and help guide reform. The Bureau of Statistics within the Department of Justice already maintains some of these statistics at the federal level through the Federal Justice Statistics Program (FJSP) by compiling data from six different federal agencies.[298] Implementing a similar

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294. *See, e.g.*, Harris et al., *supra* note 81, at 1764 (describing the absence of national data regarding the LFOs imposed on criminal defendants).

295. *See* MATTHEW DUROSE, BUREAU OF JUST. STATS., U.S. DEP'T OF JUST., STATE COURT SENTENCING OF CONVICTED FELONS, 2004: STATISTICAL TABLES tbl.1.2 (2007), available at https://www.bjs.gov/content/pub/html/scscf04/tables/scs04110tab.cfm [https://perma.cc/82CB-RGAJ] (demonstrating that over 94% of convicted felons are sentenced in state courts, and that only 5.8% are sentenced in federal courts, while those accused of misdemeanors are sentenced in local courts).

296. *See supra* note 244 and accompanying text.

297. *See* CRIM. JUST. POL'Y PROGRAM, CONFRONTING CRIMINAL JUSTICE DEBT: A GUIDE FOR POLICY REFORM 27–29 (2016), available at https://www.nclc.org/images/pdf/criminal-justice/confronting-criminal-justice-debt-1.pdf [https://perma.cc/82CB-RGAJ].

298. MARK MOTIYANS, BUREAU OF JUST. STATS., U.S. DEP'T OF JUSTICE, FEDERAL JUSTICE STATISTICS 2015–2016, at 1 (2019), available at https://www.bjs.gov/index.cfm?ty=pbdetail&iid=6506 [https://perma.cc/9J43-FTRT] (explaining that the six federal agencies from which FJSP aggregates its

regime at the state level would allow researchers and lawmakers to have access to the data needed to make decisions about reforming LFO regimes.

Any measure that imposes a financial burden on states is likely to incur criticism. From a cost perspective, however, this reform appears feasible. From 2015 to 2017, the Criminal Justice Statistics program within the Bureau of Justice Statistics maintained an annual operating budget of $41 million,[299] only a small fraction of the Department's overall budget.[300] At the state level, the costs would be even lower. Creating vast new repositories of criminal justice-related data may seem like an expansive change, but would largely consist of consolidating and promulgating existing information and identifying municipalities where current resources are inadequate to contribute to this effort. The application of such databases would be widespread, and could help local actors to better understand the effect that new policies or practices may have on indigent defendants. As discussed below, capturing the economic realities of incarcerating indigent individuals for nonpayment of LFOs may also catch the attention of state lawmakers, offering further incentives for reform.

2. Massachusetts: A Case Study in Positive LFO Reform

Massachusetts has the lowest prison incarceration rate in the country,[301] and in 2018 enacted sweeping reform aimed at transforming its criminal justice system even further.[302] The state offers a good model for the use of empirical information to inform criminal justice practices. In 2010, for example, the state legislature

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data are the U.S. Marshals Service, Drug Enforcement Administration, Executive Office for U.S. Attorneys, Administrative Office of the U.S. Courts, and Federal Bureau of Prisons).

299. U.S. DEP'T OF JUST., FY 2017 PERFORMANCE BUDGET 16 (2016), available at https://www.justice.gov/jmd/file/822366/download [https://perma.cc/5N9P-MB7V].

300. *Id.* at 19.

301. Jacob Kang-Brown et al., *People in Prison in 2018*, VERA INST. OF JUST., 1–4 (2019), https://www.vera.org/downloads/publications/people-in-prison-in-2018-updated.pdf [https://perma.cc/5YA9-FT2S].

302. Michael Crowley, *Massachusetts Sets an Example for Bipartisan Criminal Justice Reform*, BRENNAN CTR. FOR JUST. (May 1, 2018), https://www.brennancenter.org/our-work/analysis-opinion/massachusetts-sets-example-bipartisan-criminal-justice-reform [https://perma.cc/5YA9-FT2S].

considered imposing a local jail fee.[303] The legislature created a special commission to investigate the feasibility of implementing a fee, the revenue that could be generated, the costs of administering and collecting the fee, and the impact on affected populations.[304] The commission consulted with neighboring states, issued surveys to Sheriffs and the State Department of Corrections, and reviewed literature on the subject.[305] Their findings suggested that any revenue generated from the project would be minimal and that indigency would likely increase among inmates as a result,[306] concluding that fees would lead to a "host of negative and unintended consequences."[307]

The state continued its reforms in 2018, with a bill aimed at introducing comprehensive changes to the criminal justice system.[308] In addition to the many changes the bill introduced to the criminal justice system generally, the legislation made significant adjustments to the state's LFOs regime.[309] Under the new law, courts are permitted to waive any ordinarily-imposed fees if it finds that imposing such fees would cause substantial financial hardship "to the offender or the person's immediate family or the person's dependent."[310] Additionally, in order to incarcerate a person for nonpayment of LFOs, Massachusetts courts must undertake an ability to pay hearing, taking into consideration the person's "employment status, income, financial resources, living expenses, number of dependents, and any special circumstances,"[311] and establish by a preponderance of the evidence that the person can pay the fine "without causing substantial financial hardship to the person

303. MASS. EXEC. OFF. OF PUB. SAFETY AND SEC., INMATE FEES AS A SOURCE OF REVENUE: REVIEW OF CHALLENGES 3 (2011) [hereinafter SPECIAL COMMISSION REPORT].

304. *Id.*

305. *Id.* at 5.

306. *Id.* at 15–16.

307. *Id.* at 4.

308. *See* S.B. 2371, 189th Leg., Reg. Sess. (Mass. 2018); Dartunorro Clark, *Massachusetts Has a Blueprint for What's Next in Criminal Justice Reform*, NBC NEWS (Dec. 24, 2019), https://www.nbcnews.com/politics/politics-news/massachusetts-has-blueprint-what-s-next-criminal-justice-reform-n1105911 [https://perma.cc/GGA9-KUB6].

309. *See Crowley*, *supra* note 302.

310. Mass. S.B. 2371 § 129.

311. *Id.* § 145(a).

or their immediate family or dependents."[312] Further, courts will no longer be permitted to incarcerate a defendant for nonpayment of LFOs if the person is not represented by counsel in their ability to pay hearing, nor can the courts charge indigent defendants for the costs of court-appointed counsel in ability to pay hearings.[313]

Reforms like those in Massachusetts highlight the importance of data-driven decisionmaking. As evidenced by the special commission's report, however, there is still a dearth of solid empirical information regarding LFOs and criminal justice statistics more broadly.[314] Therefore, states should maintain a centralized database which would allow lawmakers to have easy access to the manner and degree of LFOs that are assessed in a given jurisdiction. Having access to this data would make it easier to implement policy reforms and also to track and understand disparities in LFO assessments, particularly relating to their effect on racial minorities and the indigent. Better oversight is also necessary in local court systems to ensure that changes like those implemented in Massachusetts regarding willfulness determinations in ability to pay hearings are carried out in accordance with state law and Supreme Court precedent. Providing states with uniform access to empirical resources of this caliber would assist legislators in making decisions about criminal justice reform generally. These resources would also make it easier for practitioners to identify and target courts and judges that are failing to adhere to state laws and Court guidance regarding willfulness determinations.

D. Why *Bearden* Needs Legislative Help

The above reforms demonstrate that legislative efforts to reform the willfulness standard can have a profound effect, and suggest that the needs of indigent defendants are no longer adequately being met under the *Bearden* standard. The underlying

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312. *Id.*

313. *Id.* § 145(b).

314. *See* SPECIAL COMMISSION REPORT, *supra* note 303, at 5–7 (discussing a series of surveys and follow-up interviews with sheriffs conducted by the commission). The report notes that follow-ups were often necessary to clarify sheriff responses. Also, "the commission felt it could draw no significant conclusions from the departments' estimates of indigency" because, among other things, the department lacks a system-wide definition of indigency required for more rigorous analysis. *Id*.

premise of *Bearden*—that courts that revoke probation solely on the basis of an individual's economic status are not acting in the best interests of the state or the offender—is conceptually sound. In practice, however, this standard has proved unworkable, whether as a result of insufficient judicial resources, entrenched racial prejudice, or sheer ignorance of the law.[315] The wide latitude that judges have used in applying the Court's holding suggests that the standard needs to be refined considerably. However, because *Bearden* and the cases that preceded it rested solidly on principles of due process and equal protection,[316] and these avenues have effectively been closed insofar as they are able to offer protections for indigent defendants on the basis of their economic status,[317] reformers may need to look beyond the judiciary.

1. Revisiting the Indigency Standard

As a starting point, it is time for state and national lawmakers to revisit the indigency standard, giving the term a uniform definition that is more inclusive and equitable.[318] Even detailed ability to pay determinations seldom take account of factors such as geographic variations in cost of living,[319] earning potential, or the possible constraints on one's earning potential owing to factors such as a criminal record or health concerns. A definition of indigency that takes into account a broader range of factors that may impact an individual's ability to pay their LFOs is the first step toward lessening the burden that these fees have on the indigent.

One possibility of a better method for determining ability to pay in the probation revocation setting may be a variation of the

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315. *See supra* Section II.C.

316. *See supra* Sections I.A–B.

317. *See* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 28 (1973).

318. In a 50-state survey of indigency standards, there was a wide array of definitions used to determine indigency. *50-State Criminal Justice Debt Reform Builder*, *supra* note 109. The most common definition of indigency requires that an individual receive public assistance. *See, e.g.*, CAL. GOV'T CODE § 68632; WIS. STAT. ANN. § 814.29(1); COLO. REV. STAT. ANN. § 18-1.3-702; Mass. Sup. Jud. Ct., R. 3:10 (2018); R.I. GEN. LS. § 12-20-10 (all defining indigency according to whether an individual receives public assistance).

319. Alaska is the only state so far that accounts for "adjusted federal poverty guidelines amount," which is a way of adjusting the federal poverty line based on "the geographic cost-of-living adjustment . . . for the court location nearest the defendant's residence." ALASKA R. CRIM. P. 39.1(i).

"undue hardship" test used in determining whether student loan debts are dischargeable in a bankruptcy proceeding, as used in *Brunner v. New York State Higher Education Services Corp*.[320] Under this analysis, courts consider three factors to determine whether the debt may be discharged: (1) ability to maintain a minimal standard of living, (2) the prospects of finding future employment, and (3) good-faith efforts to repay the loans.[321] Courts could require a *Brunner*-style finding before opening the door to imprisonment for nonpayment of LFOs. As the state bears the burden to show that a person on probation has failed to comply with the terms of their probation, under this analysis the government would be required to consider the probationer's employment prospects as well as their other financial obligations before the court may consider revocation.[322] Such a test would preserve a crucial aspect of the *Bearden* standard—probationers' good faith efforts to pay their fines[323]—while importing additional safeguards for indigent defendants. Although these considerations may be read to be already within the ambit of the *Bearden* holding, explicitly requiring a more detailed process would encourage states to work to create better, more workable alternatives to incarceration for indigent defendants who are unable to pay their LFOs.

Congress could also give teeth to the *Bearden* holding by legislating more objective financial standards for indigent status, borrowing from bankruptcy law. In a Chapter 7 or Chapter 11 bankruptcy proceeding, for example, debtors whose income is less than 150% of the federal poverty level are eligible to have their filing fees waived.[324] A similar practice should be widely applied to indigent probationers. Additionally, because income is just one indicia that can be used to determine indigency, courts conducting ability to pay

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320. 831 F.2d 395, 396 (1987).

321. *See id.* at 396. Although the *Brunner* test is stringent and difficult to meet, courts should take seriously the decision to revoke probation for nonpayment of LFOs. For that reason, a similarly lofty standard may be appropriate when determining whether to revoke probation for nonpayment of LFOs under these circumstances.

322. *See supra* Section II.A.2.

323. *See* Bearden v. Georgia, 461 U.S. 660, 670 (1983) ("[A] probationer who has made sufficient bona fide efforts to pay his fine and restitution, and who has complied with the other conditions of probation, has demonstrated a willingness to pay his debt to society and an ability to conform his conduct to social norms.").

324. 28 U.S.C. § 1930(f)(1)–(3).

determinations should be required to look further into an individual's financial situation. As with a bankruptcy proceeding, such a determination should at least require the court to consider (1) a list of the defendant's assets and liabilities, (2) a schedule of current income and expenditures, and (3) a statement of financial affairs.[325] Other protections could include financial counseling and exempt status for important assets like vehicles.

2. How More Thorough Ability to Pay Hearings Can Improve Access to Justice

While a more invasive ability to pay hearing may not always be desirable, more stringent standards would force courts to think harder before revoking probation for nonpayment of LFOs, and also provide more uniform guidelines for such evaluations.[326] Doing so would mitigate concerns about bias and subjective judgements regarding an indigent individual's personal responsibility, in line with the concerns expressed by the Court in *Bearden*.[327] As a result, the number of individuals who require access to the pool of alternative relief from incarceration for debt would grow, forcing municipalities to expand their offerings and provide alternatives for those whose schedules or ability preclude them from participating in work crews or community service. States should also invest in work programs that allow probationers to fulfill their legal obligations while earning a livable wage. Expanding access to health-based solutions will also reduce recidivism and may make it more likely that offenders will be able to pay their LFOs.[328]

Furthermore, any legislative reform should take account of the relational aspect of LFOs. Criminal justice debt has a much more deleterious effect on those who are unable to pay it, and whether or

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325. FED. R. BANKR. P. 1007(b)(1).

326. *But see* Zhen, *supra* note 240, at 201–03 (examining how invasive ability to pay determinations create difficult burdens for those with nontraditional sources of income or family structures).

327. *Bearden*, 461 U.S. at 660 ("[I]f the probationer has made all reasonable bona fide efforts to pay the fine and yet cannot do so through no fault of his own, it is fundamentally unfair to revoke probation . . . without considering whether adequate alternative methods . . . are available.").

328. *See* JOSIAH D. RICH ET AL., HOW HEALTH CARE REFORM CAN TRANSFORM THE HEALTH OF CRIMINAL JUSTICE-INVOLVED INDIVIDUALS 464–65 (2014) (explaining that increased access to community-based health care is correlated with a reduction in recidivism rates).

not a person is able to pay a debt depends not only on their financial resources, but also on the size of the debt. Therefore, the amount of LFOs that can be levied against an individual should be proportionate to their ability to pay. Doing so not only allays fundamental concerns about fairness, but it also makes it more likely that individuals will actually pay off their debts. Following the example of Massachusetts, this proportionality requirement should take into consideration, at a bare minimum, an individual's income, living expenses, and their dependents.[329] This reform should go even further to include other mandatory costs such as alimony and child support. Only in light of all of these considerations can a court truly determine whether or not nonpayment of LFOs was willful.

3. The Potential Downsides of More Searching Ability to Pay Hearings

It is important to be mindful of the fact that any changes to the current system may lead to unintended consequences. A heightened standard for determining ability to pay, for example, may result in more defendants being denied probation and incarcerated if courts are concerned that conducting ability to pay hearings will be too costly. Such an effect would likely be felt most strongly by indigent defendants who pose a greater risk of being found unable to pay their LFOs.[330] Courts may also respond by eliminating LFOs across the board but increasing prison terms to compensate for this. These concerns could be mitigated by shifting away from a system in which courts rely on collecting legal fees as a revenue stream. An additional way of responding to these concerns would be by expanding the pool of alternatives to incarceration, which would grant trial courts greater flexibility.

CONCLUSION

In *Bearden*, the Supreme Court affirmed an important constitutional protection for indigent defendants while offering little guidance for lower courts to interpret what constitutes willfulness in an ability to pay determination. Since then, some courts have struggled to make use of this guidance and instead have failed to

329. S.B. 2371, 189th Cong., Reg. Sess., § 145(a) (Mass. 2018).

330. Zhen, *supra* note 240, at 188–91 (examining entrenched racial bias in the context of ability to pay hearings).

implement the constitutional guarantees that formed the basis of the Court's decision. However, recent court cases suggest that plaintiffs have the potential to play a role in bringing about change to state practices of incarcerating indigent defendants for failure to pay their LFOs. Even without a clear understanding of what constitutes willful nonpayment, litigants have the potential to root out the most egregious violations of *Bearden*: cases where courts fail to undertake any ability to pay determination.

Courts also have a role to play. Although the *Bearden* Court did not offer a clear definition of the term willful, it did give an example of what an ability to pay determination should look like. Courts that choose to forego these determinations are failing in their constitutional duties and contributing to unworkable cycles of debt and poverty. Reforms to this system must begin with courts conducting meaningful and thorough ability to pay determinations. An evaluation of willful nonpayment cannot be done without such a determination. Probation should be revoked only after considering a defendant's present ability to pay, prospects for future income, and all alternatives to incarceration. In courts across the country, clear violations of Supreme Court jurisprudence are occurring with alarming regularity. Conducting meaningful ability to pay inquiries is the first step in rectifying this miscarriage of justice.