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PUNISHING THE POOR: CHALLENGING CARCERAL DEBT PRACTICES  
UNDER *BEARDEN* AND *M.L.B.*

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INTRODUCTION

In 2007, an African American woman received two citations for illegally parking her car in Ferguson, Missouri.<sup>1</sup> She was given a \$151 fine, plus fees. She soon began struggling to make ends meet and went in and out of homelessness.<sup>2</sup> Unsurprisingly, she could not make payments on her parking fine. Over the next three years, a local municipal court charged her seven times with a Failure to Appear—a charge entailing arrest and new fines and fees—due to missed payments and court dates.<sup>3</sup> On two occasions, she tried to make partial payments of \$25 and \$50, but the judge rejected these payments because they did not completely cover the balance.<sup>4</sup> By the time that seven years had elapsed since the initial fine was imposed at \$151, she had paid \$550 and still owed \$541.<sup>5</sup> She had been arrested twice and spent

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1 U.S. DEP'T OF JUST. C.R. DIV., INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT 4 (Mar. 4, 2015), [https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson\\_police\\_department\\_report.pdf](https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf) [<https://perma.cc/SL76-59EX>].

2 *Id.*

3 *Id.*

4 *Id.*

5 *Id.*

six days in jail for failures to appear in court and pay a fine that she could not afford.<sup>6</sup>

The Department of Justice uncovered these facts while investigating the police and courts of Ferguson, Missouri following the shooting of Michael Brown.<sup>7</sup> The findings are not news to anyone passing through the criminal justice system.<sup>8</sup> Today, the courts impose heavier-than-ever financial burdens in the form of “carceral debt.”<sup>9</sup> Carceral debt is comprised of user fees,<sup>10</sup> court costs, fines, and restitution.<sup>11</sup> Though small in isolation, these fees regularly result in thousands of dollars of debt to the individual.<sup>12</sup> As in Missouri, failure to pay these debts results in incarceration in many states,<sup>13</sup> even though the Supreme Court has rejected “punishing a person for his poverty.”<sup>14</sup> And even when the Ferguson courts did not follow through with incarceration, the threat alone forces the poor to scramble for a way to cough up the cash.<sup>15</sup> The result is a pay-or-stay system where the wealthy can buy their freedom and the poor cannot.

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<sup>6</sup> *Id.*

<sup>7</sup> Press Release, U.S. DEP’T OF JUST., Justice Department Announces Findings of Two Civil Rights Investigations in Ferguson, Missouri (Mar. 4, 2015), <https://www.justice.gov/opa/pr/justice-department-announces-findings-two-civil-rights-investigations-ferguson-missouri> [<https://perma.cc/ZXP7-J4MN>].

<sup>8</sup> U.S. DEP’T OF JUST. C.R. DIV., *supra* note 1, at 42 (“We have heard similar stories from dozens of other individuals.”).

<sup>9</sup> Ann Cammett, *Shadow Citizens: Felony Disenfranchisement and the Criminalization of Debt*, 117 PENN. ST. L. REV. 349, 353 (2012) (defining “carceral debt” as “civil debt associated with criminal justice penalties or debt incurred during incarceration, or both”); *see also* Michelle Alexander, *THE NEW JIM CROW* (2012), at 153–53 (describing “preconviction service fees” such as jail book-in and public defender fees, and post-conviction fees, including parole or probation service fees).

<sup>10</sup> Cammett, *supra* note 9, at 353 (defining “user fees” as the government’s “attempt to recoup from prisoners the operating costs of the criminal justice system”).

<sup>11</sup> Alicia Bannon, Mitali Nagrecha & Rebekah Diller, BRENNAN CTR. FOR JUST. AT N.Y.U. SCHOOL OF L., *CRIMINAL JUSTICE DEBT: A BARRIER TO REENTRY* 1–2 (2010) (surveying fifteen states with the highest prison population in the country and finding that “[a]lthough ‘debtors’ prison’ is illegal in all states, reincarcerating individuals for failure to pay debt is, in fact, common in some—and in all states new paths back to prison are emerging for those who owe criminal justice debt”).

<sup>12</sup> Cammett, *supra* note 9, at 354; *see also* Bannon, et al., *supra* note 11, at 1.

<sup>13</sup> *See* ACLU, *In For a Penny: The Rise of America’s New Debtors’ Prisons* (2010), [https://www.aclu.org/files/assets/InForAPenny\\_web.pdf#page=6](https://www.aclu.org/files/assets/InForAPenny_web.pdf#page=6) [<https://perma.cc/TEM6-3VTM>] (profiling five states where persons were jailed for inability to pay carceral debts); Bannon, *supra* note 11 (profiling fifteen states where criminal justice debt can lead to incarceration).

<sup>14</sup> *Bearden v. Georgia*, 461 U.S. 660, 671 (1983) (employing heightened scrutiny by relying on both Equal Protection and Due Process).

<sup>15</sup> U.S. DEP’T OF JUST. C.R. DIV., *supra* note 1, at 55 (“Ferguson uses its police department in large part as a collection agency for its municipal court.”).

This paper argues that many carceral debt practices today are subject to heightened scrutiny under the Equal Protection and Due Process clauses.<sup>16</sup> Traditionally, laws trigger heightened equal protection scrutiny when they either inhibit a fundamental right or make a suspect classification.<sup>17</sup> It is settled that wealth classifications standing alone are not suspect.<sup>18</sup> Over sixty years ago, however, the Supreme Court announced a criminal protection for the poor in *Griffin v. Illinois*: “In criminal trials[,] a State can no more discriminate on account of poverty than on account of religion, race, or color.”<sup>19</sup> The Court later extended *Griffin* in *Bearden v. Georgia*,<sup>20</sup> by striking down a law revoking probation solely for a person’s inability to pay probation costs. There, the Court announced a new form of heightened scrutiny for these laws, that resembles a balancing test: “a careful inquiry into such factors as [1] the nature of the individual interest affected, [2] the extent to which it is affected, [3] the rationality of the connection between legislative means and purpose, and [4] the existence of alternative means for effectuating the purpose.”<sup>21</sup>

This paper offers a roadmap for relying on *Bearden*’s four-factor test to challenge laws that discriminate against the poor. In Part I, the paper explores the rules that *Griffin* and *Bearden* established. *Griffin* announced broadly that “bolt[ing] the door to equal justice” based on ability to pay violates the fundamental fairness of the Fourteenth Amendment.<sup>22</sup> *Bearden* shaped this principle into a new form of heightened scrutiny that balances four factors.<sup>23</sup> Thus, the paper argues, whenever a law infringes a right solely because of inability to pay, the law must face *Bearden*’s four-factor inquiry. Part I draws these principles out from the cases.

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<sup>16</sup> U.S. CONST. amend. XIV, § 1.

<sup>17</sup> See *M.L.B. v. S.L.J.*, 519 U.S. 102, 115–16 (1996) (“Absent a fundamental interest or classification attracting heightened scrutiny . . . the applicable equal protection standard is that of rational justification.”).

<sup>18</sup> See *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1, 22 (1973) (“The Court has not held that fines must be structured to reflect each person’s ability to pay in order to avoid disproportionate burdens.”); *James v. Valtierra*, 402 U.S. 137 (1971) (refusing to consider wealth classifications to be like racial classifications).

<sup>19</sup> *Griffin v. Illinois*, 351 U.S. 12, 17 (1956).

<sup>20</sup> *Bearden v. Georgia*, 461 U.S. 660, 666–67 (1983) (citations omitted).

<sup>21</sup> *Id.*

<sup>22</sup> *Griffin*, 351 U.S. at 24 (Frankfurter, J., concurring).

<sup>23</sup> *Bearden*, 461 U.S. at 666–67 (“[This issue] requires a careful inquiry into such factors as ‘the nature of the individual interest affected, the extent to which it is affected, the rationality of the connection between legislative means and purpose, and the existence of alternative means for effectuating the purpose.’”) (quoting *Williams v. Illinois*, 399 U.S. 235, 260 (1970)). See also *M.L.B. v. S.L.J.*, 519 U.S. 102 at 120–121 (1996) (“we inspect the character and intensity of the individual interest at stake, on the one hand, and the State’s justification for its exaction, on the other.”).

Part II of the paper rebuts two “shields” that advocates and jurists wield to limit *Bearden*’s application in new contexts. Some, for example, find that *Bearden*-style claims should be limited to criminal cases where a defendant is incarcerated for inability to pay.<sup>24</sup> Others argue that *Bearden* applies only when challengers suffer an “absolute deprivation” of some right.<sup>25</sup> Part II rebuts those views and argues that their underlying concern—that properly applying *Bearden*’s factors might open the floodgates of poverty litigation—is largely unwarranted. This is so because *Bearden* balances the individual interest affected with alternative means for achieving the stated goal. Under this balancing test, a *Bearden* violation will not exist in the “mine run” of civil cases.<sup>26</sup> Part II concludes with a third case, *M.L.B. v. S.L.J.*,<sup>27</sup> that supports this rebuttal and illustrates the *Bearden* roadmap offered in Part I.

Despite *Bearden* and its related cases, the Ferguson investigation reveals that many modern practices still incarcerate or punish the poor for their poverty. Part III of the paper examines three such practices, arguing how and why *Bearden* should apply. These three practices are (1) requiring indigent persons to pay court appointed attorney fees, (2) assigning bail on a fixed-sum basis, and (3) conditioning felon re-enfranchisement on payment of carceral debt. The paper argues that the laws undergirding each of these practices should be subjected to *Bearden*’s heightened scrutiny because they inhibit a significant right based on inability to pay. The paper concludes that the laws cannot stand under *Bearden*’s four-factor test.

## I. DEVELOPING *BEARDEN*’S HEIGHTENED SCRUTINY

In Ferguson, the courts filled the state’s coffers by imposing exorbitant carceral debts on those convicted of petty offenses.<sup>28</sup> The constitutional

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<sup>24</sup> See, e.g., *Johnson v. Bredesen*, 624 F.3d 742, 749–750 (6th Cir. 2010) (stating that *Bearden* only requires courts to consider ability to pay when revoking probation and faulting the entire *Griffin* case line for “fail[ing] to articulate a precise standard of review.”); see also J.T. Price, *An Improper Extension of Civil Litigation by Indigents: M.L.B. v. S.L.J.*, 117 *S. Ct.* 555 (1996), 20 HARV. J.L. & PUB. POL’Y 905 (1997) (arguing that *Bearden* and *Griffin*’s principles should be constrained to claims by criminal defendants); Michael J. Klarman, *An Interpretive History of Modern Equal Protection*, 90 MICH. L. REV. 213 (1991) (arguing the same).

<sup>25</sup> See, e.g., *San Antonio v. Rodriguez*, 411 U.S. 1, 20 (1973); *Walker v. City of Calhoun, Georgia*, 901 F.3d 1245, 1261 (11th Cir. 2018) (citing *Rodriguez*’s language as a reason not to apply *Bearden*).

<sup>26</sup> *M.L.B.*, 519 U.S. at 123.

<sup>27</sup> *Id.*

<sup>28</sup> U.S. DEP’T OF JUST. C.R. DIV., *supra* note 1, at 43 (“[W]hile the municipal court does not have any authority to impose a *fine* of over \$1,000 for any offense, it is not uncommon for individuals to pay more than this amount to the City of Ferguson—in forfeited bond payments, additional Failure to Appear charges, and added court fees—for what may have begun as a simple code violation.”).

problem with this scheme arises when the court issues arrest warrants and threatens jail time to collect on carceral debts. In *Ferguson*, the courts were converting code violations that were not “jail-worthy” on their own into jail-worthy offenses solely due to inability to pay.<sup>29</sup> In other words, the courts punished the status of being poor. Under *Griffin* and *Bearden*, legal schemes of this sort must face heightened scrutiny that resembles a balancing test under the Due Process and Equal Protection Clauses. This section of the paper outlines *Griffin*, *Bearden*, and their framework for challenging laws that violate the rights of the poor solely because of inability to pay.

#### A. *Griffin*, *Leading Up to Bearden*

This story begins<sup>30</sup> with *Griffin v. Illinois*.<sup>31</sup> Griffin—an indigent person convicted of a crime—wanted to appeal his conviction, but was unable to afford the fee to procure a transcript of his trial.<sup>32</sup> Without the transcript, he could not make an appeal.<sup>33</sup> Griffin filed a motion asking for the transcript at no cost, alleging that he was a “poor person with no means of paying the necessary fees.”<sup>34</sup> The motion was denied, effectively denying his right to an appeal.<sup>35</sup> The Supreme Court overturned the Illinois law, explicitly relying on both the Equal Protection and Due Process clauses.<sup>36</sup> The law violated the Equal Protection Clause because it made a wrongful classification on the basis of wealth: “Destitute defendants must be afforded as adequate appellate review as defendants who have money enough to buy transcripts.”<sup>37</sup> Likewise, Justice Frankfurter’s concurrence found the law to be a “money hurdle,” no more defensible than requiring defendants to pay a flat fee to

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<sup>29</sup> *Id.* at 43 (“[W]hile the municipal court does not generally deem the code violations that come before it as jail-worthy, it routinely views the failure to appear in court to remit payment to the City as jail-worthy, and commonly issues warrants to arrest individuals who have failed to make timely payment.”).

<sup>30</sup> See Bertram F. Wilcox & Edward J. Bloustein, *The Griffin Case—Poverty and the Fourteenth Amendment*, 43 CORNELL L. Q. 1, 4 (1957) (writing, on the heels of *Griffin*, that “one might expect the law books to be filled with decisions concerning the constitutional effects of poverty. In fact, the opposite is true.”).

<sup>31</sup> 351 U.S. 12 (1956).

<sup>32</sup> *Id.* at 13.

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> *Id.* at 15.

<sup>36</sup> See *id.* at 18 ([A]t all stages of the proceedings the Due Process and Equal Protection Clauses protect persons like petitioners from invidious discriminations.”).

<sup>37</sup> *Id.* at 19.

appeal.<sup>38</sup> The Court concluded, “[t]here can be no equal justice where the kind of trial a man gets depends on the amount of money he has.”<sup>39</sup>

*Griffin* and the cases that follow do not reflect the traditional Equal Protection framework. The Court did not apply any of the traditional forms of Equal Protection scrutiny—rational basis, strict scrutiny, and so forth. Instead, the holding was constrained to the Illinois law at issue, finding that it violated both the Equal Protection and Due Process clauses of the Fourteenth Amendment.<sup>40</sup> This confused some of the case’s early commentators,<sup>41</sup> leading them to accuse the Court of acting only on its “value preferences.”<sup>42</sup> But the *Griffin* Court rightly saw that wealth discrimination is discrimination, equivalent to discrimination for “religion, race, or color.”<sup>43</sup> In fact, the Court suggested that the Illinois law would fall even under rational basis review: “[T]he ability to pay costs in advance bears no *rational*

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38 *Id.* at 22–23 (Frankfurter, J., concurring) (“Surely it would not need argument to conclude that a State could not, within its wide scope of discretion in these matters, allow an appeal for persons convicted of crimes punishable by imprisonment of a year or more, only on payment of a fee of \$500.”). Frankfurter concurred largely to limit the potential scope of *Griffin*’s impact: “Of course a State need not equalize economic conditions. A man of means may be able to afford the retention of an expensive, able counsel not within reach of a poor man’s purse.” *Id.* at 23 (Frankfurter, J., concurring). Insofar as Frankfurter feared that an indiscernible standard would open the floodgates to poverty litigation, *Bearden* and *M.L.B.* responded by clarifying the standard of review that these challenges will face.

39 *Id.* at 19.

40 *Griffin*, 351 U.S. at 17 (“[O]ur own constitutional guaranties of due process and equal protection both call for procedures in criminal trials which allow no invidious discriminations between persons and different groups of persons.”).

41 Justice Harlan’s dissent, for example, assumed that the majority was engaging in a Substantive Due Process analysis alone, despite its touting the Equal Protection violation. *Id.* at 36 (Harlan, J., dissenting) (“I submit that the basis for [the plurality’s] holding is simply an unarticulated conclusion that it violates ‘fundamental fairness’ . . . That of course is the traditional language of due process.”). Others surmised that the *Griffin* Court was primarily concerned about a fundamental right at stake. Ralph K. Winter, Jr., *Poverty, Economic Equality, and the Equal Protection Clause*, 1972 SUP. CT. REV. 41, 53–54 (1972) (“In equal protection terms, the cases can be rationalized as involving a legal distinction between rich and poor touching on a fundamental matter, the interest in a fair trial and appeal.”). This view was ultimately undercut by *Bearden* and *M.L.B.*, neither of which relied on a fundamental interest at stake.

42 Winter, *supra* note 41, at 58 (“So long as the Court continues to engage in the ad hoc process of recognizing ‘fundamental interests,’ the number of interests can be endlessly expanded through argument by analogy, which in turn depends almost entirely on the value preference of individual Justices.”).

43 *Griffin*, 351 U.S. at 17. This paper does not argue that *Griffin* or *Bearden* advance the strict scrutiny standard for wealth classifications, even though racial classifications usually receive this treatment. See, e.g., *Korematsu v. United States*, 323 U.S. 214, 216 (1944), *abrogated by* *Trump v. Hawaii*, 138 S. Ct. 2392 (2018) (“It should be noted, to begin with, that all legal restrictions which curtail the civil rights of a single racial group are immediately suspect. That is not to say that all such restrictions are unconstitutional. It is to say that courts must subject them to the most rigid scrutiny.”).

*relationship* to a defendant's guilt or innocence and could not be used as an excuse to deprive a defendant of a fair trial."<sup>44</sup> But the Court did not employ a standardized form of scrutiny, so *Griffin* did little to help later courts measure the constitutionality of similar legal schemes.

While some scholars criticized *Griffin* as an expression of the Warren Court's judicial activism,<sup>45</sup> the Court itself affirmed and expanded *Griffin* through the 1970s and 80s.<sup>46</sup> In *Williams v. Illinois*,<sup>47</sup> a criminal defendant could not pay a \$505 fine for petty theft.<sup>48</sup> After serving the one-year maximum prison sentence for the crime, Williams was confined to prison labor for 101 additional days to "work out" the debt at a rate of \$5 per day.<sup>49</sup> The Court found the law to work an "invidious discrimination" and struck it down.<sup>50</sup> The Court said that states "may not . . . subject a certain class of convicted defendants to a period of imprisonment beyond the statutory maximum solely by reason of their indigency."<sup>51</sup> Sadly, the legal scheme in *Williams* is too familiar. The Ferguson municipal code provided that when carceral debts were unpaid, the nonpaying party must be imprisoned one day for every \$10.00 owed, not to exceed a total of four months.<sup>52</sup> This provision is almost identical to the "work out" provision struck down in *Williams*. Even so, such practices persist today.

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<sup>44</sup> *Griffin*, 351 U.S. at 17–18 (emphasis added). *See also id.* at 22 (Frankfurter, J., concurring in judgement) (dismissing Illinois's rationale that only defendants who can pay the fee for the stenographic minutes can have their trial errors reviewed by the state Supreme Court).

<sup>45</sup> *See Klarman, supra* note 24, at 289–290 ("The unpalatable aspect of fundamental rights equal protection, in other words, was not its recognition of unenumerated rights, but its reconceptualization of equal protection as an entitlement to affirmative governmental assistance."); *see also Winter, supra* note 41, at 100 ("Having no basis in the history or language of the Amendment and lying well outside what seems the core area of judicial competence, it [the use of the Equal Protection Clause to reduce economic inequality] finds sustenance solely in its alleged wisdom as public policy.").

<sup>46</sup> *See Williams v. Ill.*, 399 U.S. 235 (1970) (holding that when a criminal defendant has been held in prison longer than the maximum sentence due to the failure to pay fines or court costs violates the Equal Protection Clause); *Tate v. Short*, 401 U.S. 395 (1971) (holding that a town that holds a traffic offender who could not pay his fines in prison at a rate of \$5 per day until the \$425 fine had been paid violated the Equal Protection Clause); *Bearden*, 461 U.S. 660 (holding that a court cannot revoke a defendant's probation for failure to pay a fine unless the defendant was responsible for not paying the fine and other forms of punishment are inadequate).

<sup>47</sup> 399 U.S. 235 (1970).

<sup>48</sup> *Id.* at 236.

<sup>49</sup> *Id.* at 236–37.

<sup>50</sup> *Id.* at 242 ("On its face the statute extends to all defendants an apparently equal opportunity for limiting confinement to the statutory maximum simply by satisfying a money judgment. In fact, this is an illusory choice for Williams or any indigent who, by definition, is without funds.").

<sup>51</sup> *Id.* at 241–42.

<sup>52</sup> U.S. DEP'T OF JUST. C.R. DIV., *supra* note 1, at 58 n.33.

*Williams*'s framing of the Equal Protection violation mirrors that in *Griffin*.<sup>53</sup> Both laws impermissibly classified on ability to pay and locked up those unable to pay.<sup>54</sup> But also like *Griffin*, *Williams* offered little clarity as to the standard of review applied when such a classification exists. *Bearden* filled that gap.

#### B. *Bearden's Four-Factor Scrutiny*

*Bearden v. Georgia*<sup>55</sup> announced the enduring test for laws that punish the poor for their poverty. *Bearden* pleaded guilty to burglary charges, but because it was his first criminal offense, the trial court sentenced him to probation, with a \$500 fine and \$250 total in restitution.<sup>56</sup> *Bearden* was later laid off his job. With a ninth grade education and being unable to read, he could not find other work; paying the \$550 remainder of his balance was out of reach.<sup>57</sup> When he failed to pay, the trial court revoked his probation, entered a conviction, and sentenced him to serve his remaining probation period in prison.<sup>58</sup> The Supreme Court found that revoking probation for failure to pay “is no more than imprisoning a person solely because he lacks funds to pay the fine . . . .”<sup>59</sup> In a unanimous decision, the Court overturned the law under both the Due Process and Equal Protection clauses.<sup>60</sup>

*Bearden* clarified a new level of heightened scrutiny for laws that target indigent criminal defendants. As in *Griffin*, the law's pay-or-stay provision produced an impermissible classification; probationers either remained free from jail or were locked up based only on inability to pay. In other words,

<sup>53</sup> *Griffin*, 351 U.S. at 19 (“Destitute defendants must be afforded as adequate appellate review as defendants who have money enough to buy transcripts.”).

<sup>54</sup> The year after *Williams*, the Court decided *Tate v. Short* on similar grounds. 401 U.S. 395 (1971). In that case, an indigent defendant was incarcerated to “work off” an unpaid fine of \$425. *Id.* at 397. Although *Williams*'s underlying crime—thief—called for a prison sentence, *Tate*'s minor infraction—a traffic violation—did not. Because *Tate*'s underlying infraction called for a less-severe punishment than that in *Williams*, the Court adopted the *Williams* rationale; the State cannot “[impose] a fine as a sentence and then automatically convert[] it into a jail term solely because the defendant is indigent and cannot forthwith pay the fine in full.” *Id.* at 398.

<sup>55</sup> 461 U.S. 660 (1983).

<sup>56</sup> *Id.* at 662 n.1.

<sup>57</sup> *Id.* at 662–63.

<sup>58</sup> *Id.* at 663.

<sup>59</sup> *Id.* at 674.

<sup>60</sup> *Id.* at 665, 674. Justice White wrote the concurrence for four justices, rejecting the “superstructure of procedural steps” imposed by the majority's Equal Protection standard. *Id.* at 676 (White, J., concurring in judgement). Instead, he favored a looser test of whether, in revoking probation, the judge made a “good faith effort” to impose a “roughly equivalent” jail sentence to the underlying fine. *Id.* at 675 (White, J., concurring in judgement). The majority rejected both the presumption of judicial good faith and the ambiguity of the “roughly equivalent” sentence. *Id.* at 673 n.12.

the state “treated the petitioner differently from a person who did not fail to pay the imposed fine and therefore did not violate probation.”<sup>61</sup> Citing *Griffin*, the Court stated that “[d]ue process and equal protection principles converge in the Court’s analysis in these cases.”<sup>62</sup> The Court refused the “pigeonhole analysis” of applying the traditional levels of scrutiny under Equal Protection.<sup>63</sup> Instead, the Court imposed a factor-driven balancing test: “This issue . . . requires a careful inquiry into such factors as [1] ‘the nature of the individual interest affected, [2] the extent to which it is affected, [3] the rationality of the connection between legislative means and purpose, and [4] the existence of alternative means for effectuating the purpose.’”<sup>64</sup>

This factor-driven inquiry is a tougher standard for laws to pass than that traditional rational basis review, which asks only whether the law “bear[s] some rational relationship to legitimate state purposes.”<sup>65</sup> Thus, it is a new form<sup>66</sup> of heightened scrutiny for those laws that deprive rights to similarly situated criminal defendants based only on ability to pay.

The Georgia law ultimately failed this new factor-driven heightened scrutiny. Under the first and second factors, the individual interest was obvious—“depriv[ing] the probationer of his conditional freedom.”<sup>67</sup> Under the third factor, the Court granted that “[t]he State, of course, has a fundamental interest in appropriately punishing persons—rich and poor.”<sup>68</sup> But absent a finding of whether Bearden could afford to pay probation costs, there was no rational connection between the legislative means and purpose: “Revoking the probation of someone who through no fault of his own is

61 *Id.* at 665.

62 *Id.*; *see also id.* at 666 n.8 (“fitting ‘the problem of this case into an equal protection framework is a task too Procrustean to be rationally accomplished’”).

63 *Id.* at 665–67 (rejecting the parties’ attempt to “argu[e] the question primarily in terms of equal protection, and debate vigorously whether strict scrutiny or rational basis is the appropriate standard of review.”).

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

65 *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 40 (1973).

66 The Court purported not to “write on a clean slate” by examining *Williams* and *Tate* and even drew the factors in its new heightened scrutiny from *Williams*. *See Williams v. Ill.*, 399 U.S. 235, 259–60 (Harlan, J., concurring in the result) (articulating that *William’s* majority opinion holds that all statutory classifications that are “suspect” or affect “fundamental rights” violate the Equal Protection Clause unless there is a “compelling” government interest). Unlike *Bearden*, however, *Williams* did not shape them into a form of heightened scrutiny.

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

68 *Id.* at 669. The state also advanced two other interests; first, in ensuring payment of restitution to crime victims; second, in rehabbing the probationer and protecting society from criminals. *Id.* at 670–71.

unable to make restitution will not make restitution suddenly forthcoming.”<sup>69</sup> And under the fourth factor, the Court found that Georgia’s interest in punishment and deterrence could be effected fully by other means.<sup>70</sup> The Court found that the state could incarcerate Bearden for failure to pay, but “[o]nly if the sentencing court determines that alternatives to imprisonment are not adequate in a particular situation to meet the State’s interest in punishment and deterrence.”<sup>71</sup> In sum, the Court stated:

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. . . . If the probationer could not pay despite sufficient bona fide efforts to acquire the resources to do so, the court must consider alternate measures of punishment other than imprisonment.<sup>72</sup>

Imposing these constraints on probation revocations, the Court concluded, would curb the Equal Protection and Due Process violation identified under *Bearden*’s heightened scrutiny.

Sadly, the wrong that *Bearden* aimed to prevent—punishing the poor for their poverty—was not stamped out by its holding. In *Ferguson*, Missouri that wrong was occurring just a few years ago. Recall that the woman in the *Ferguson* investigation received only a citation for illegal parking, yet she accrued over half a dozen arrest warrants, two arrests, and spent over six days in jail.<sup>73</sup> She was locked up only because she was unable to pay.<sup>74</sup> *Ferguson* courts’ efforts to disguise the punishment for poverty as a punishment for “fail[ing] to abide by the court’s rules” was unavailing.<sup>75</sup> As the Department of Justice stated, “*Ferguson*’s practice of automatically treating a missed payment as a failure to appear—thus triggering an arrest warrant and possible incarceration—is directly at odds with well-established law that prohibits ‘punishing a person for his poverty.’”<sup>76</sup> Freedom from incarceration cannot be conditioned on ability to pay. *Bearden*’s protection is needed now more than ever.

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69 *Id.* at 670 (continuing, 670–71, “Indeed, such a policy may have the perverse effect of inducing the probationer to use illegal means to acquire funds to pay in order to avoid revocation.”).

70 *Id.* at 671–72 (“For example, the sentencing court could extend the time for making payments, or reduce the fine, or direct that the probationer perform some form of labor or public service in lieu of the fine.”).

71 *Id.* at 672.

72 *Id.*

73 U.S. DEP’T OF JUST. C.R. DIV., *supra* note 1, at 4 (noting that *Ferguson* punishes defendants based on their income level by not making an ability-to-pay determination, and enforcing severe penalties for late payments, such as immediately issuing an arrest warrant).

74 *Id.* at 53.

75 *Id.* at 58 n.32.

76 *Id.* at 57 (citing *Bearden v. Ga.*, 461 U.S. 660, 671 (1983)).

## II. TWO SHIELDS AGAINST *BEARDEN*

Courts and advocates have long fended off *Bearden* and *Griffin* claims for fear that the cases would lead to unconstrained poverty litigation.<sup>77</sup> This fear is not new. Justice Burton's dissent in *Griffin*, for example, expressed fear that the Court's rationale could require states to equalize the quality of counsel available to rich and poor litigants.<sup>78</sup> When courts today want to avoid *Bearden*'s heightened scrutiny, they typically employ two legal arguments—shields to deflect *Bearden*'s use.<sup>79</sup> This section explores those two shields, outlines their weaknesses, and concludes with *M.L.B. v. S.L.J.*, a Supreme Court case that lays them to rest.

### A. *Shield One: Rodriguez and "Absolute Deprivations"*

The first shield courts wield against *Bearden* is limiting language from *San Antonio v. Rodriguez*, an inapposite case that predated *Bearden*.<sup>80</sup> In *Rodriguez*, the Court dismissed a challenge to public school funding based on the property tax base.<sup>81</sup> The case is often cited for the implication that there is no substantive due process right to education.<sup>82</sup> But plaintiffs made an alternative claim, based on wealth classification. They claimed that the law made a suspect classification against the poor by confining their children to underfunded schools solely because of their lower neighborhood tax base.<sup>83</sup>

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<sup>77</sup> See, e.g., Wilcox & Blaustein, *supra* note 30, at 1–2 (“Although on its facts it [*Griffin*] involves solely a poor man's need of a transcript for appeal, its reasoning is broad enough to apply to many other of the injustices arising from the poverty of litigants in our courts.”).

<sup>78</sup> See *id.* at 30; *Griffin v. Ill.*, 351 U.S. 12, 28 (1956) (Burton & Minton, JJ., dissenting) (arguing that the Constitution does not require states to treat defendants as economic equals). The dissenting Justices also noted that *Griffin* could be read to end the use of fixed bail rates for all accused—a practice that, as this paper argues in Part III, should not stand under *Bearden*.

<sup>79</sup> See *Walker v. Calhoun, Ga.*, 901 F.3d 1245, 1261–62 (11th Cir. 2018) (applying the absolute deprivation shield against *Bearden* to distinguish the case and uphold fixed-sum bail practices).

<sup>80</sup> 411 U.S. 1 (1973). See *Walker* 901 F.3d at 1261 (citing *Rodriguez*'s language as a reason not to apply *Bearden*).

<sup>81</sup> *Rodriguez*, 411 U.S. at 28.

<sup>82</sup> *Id.* at 38, 40.

<sup>83</sup> *Id.* at 19 (restating—and ultimately rejecting—the District Court's finding that, “since, under the traditional systems of financing public schools, some poorer people receive less expensive educations than other more affluent people, these systems discriminate on the basis of wealth.”).

The trial court accepted this claim,<sup>84</sup> but the Supreme Court did not, recasting the *Griffin* cases significantly:

The individuals, or groups of individuals, who constituted the class discriminated against in our prior cases [such as *Griffin*] shared two distinguishing characteristics: because of their impecunity they were completely unable to pay for some desired benefit, and as a consequence, they sustained an absolute deprivation of a meaningful opportunity to enjoy that benefit.<sup>85</sup>

This language both limits and expands *Griffin*. It expands *Griffin* (and its progeny, *Bearden*) by what it omits: that the petitioners in *Griffin*, *Williams*, and, later, *Bearden* were criminal defendants. In other words, under *Rodriguez*, *Griffin*-style claims are not limited to situations where the petitioner is a criminal defendant. Such claims may lie even when incarceration is not at stake. As explained in Subsection B. below, this view is not uniformly accepted, but it is correct. *Rodriguez*, however, also limited *Griffin* to those claims where the plaintiff suffers an “absolute deprivation.”<sup>86</sup> The Court found that, since the *Rodriguez* plaintiffs still had access to *some* schooling—albeit unequal to that of their richer neighbors—they did not suffer an “absolute deprivation” of their right to education.<sup>87</sup> As such, the Court surmised that *Griffin* never meant to protect this class of persons.

*Bearden*, however, later laid to rest the *Rodriguez* Court’s requirement that there be an “absolute deprivation” of a right. *Bearden*’s first factor examines “the extent to which [a private interest] is affected,”<sup>88</sup> rather than simply whether that private interest was “absolutely deprived.” *Bearden* states that *any* deprivation—even one that is not “absolute”—should be weighed against the means-end rationality of the law and alternative means for achieving the law’s purpose.<sup>89</sup> In *Rodriguez*, after the Court found that *Rodriguez* was not absolutely deprived of the right to education, the Court’s ended its analysis

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<sup>84</sup> *Id.* at 16 (“Finding that wealth is a ‘suspect’ classification and that education is a ‘fundamental’ interest, the District Court held that the Texas system could be sustained only if the State could show that it was premised upon some compelling state interest.”).

<sup>85</sup> *Id.* at 20.

<sup>86</sup> *Id.* at 20–21, 23.

<sup>87</sup> *Id.* at 23 (“The argument here is not that the children in districts having relatively low assessable property values are receiving no public education; rather, it is that they are receiving a poorer quality education than that available to children in districts having more assessable wealth.”).

<sup>88</sup> *Bearden v. Ga.*, 461 U.S. 660, 660–67 (1983) (emphasis added).

<sup>89</sup> *See id.* at 666–67 (“[This issue] requires a careful inquiry into such factors as ‘the nature of the individual interest affected, the extent to which it is affected, the rationality of the connection between legislative means and purpose, and the existence of alternative means for effectuating the purpose . . . .’”) (citing *Williams v. Illinois*, 399 U.S. 235, 260 (1970)).

under *Griffin* and its progeny.<sup>90</sup> After *Bearden*, the inquiry cannot end there; the law must be subjected to all of *Bearden*'s factors to determine if an Equal Protection violation exists.

*B. Shield Two: Bearden Is for Incarceration Cases Only*

The second shield that *Bearden*'s detractors employ is the view that *Griffin* and *Bearden* should apply only when an indigent person faces incarceration for their failure to pay.<sup>91</sup> Many lower courts,<sup>92</sup> policy groups,<sup>93</sup> and state laws<sup>94</sup> interpret *Bearden* as only applying to laws that lead to incarceration. These readers ignore the first factor of *Bearden*'s heightened scrutiny,<sup>95</sup> which asks whether the law burdens *any* "individual interest" because of inability to pay, not just the individual's liberty interest in freedom from incarceration.<sup>96</sup>

On the one hand, there are easy cases when *Bearden* can be applied in a straightforward fashion. For example, indigent defendants recently challenged an Arizona drug court program that would not release them from

<sup>90</sup> See *Rodriguez*, 411 U.S. at 23 ("[N]either appellees nor the District Court addressed the fact that, unlike each of the foregoing cases, lack of personal resources has not occasioned an *absolute deprivation* of the desired benefit. The argument here is not that the children in districts having relatively low assessable property values are receiving no public education; rather, it is that they are receiving a poorer quality education than that available to children in districts having more assessable wealth.") (emphasis added).

<sup>91</sup> See, e.g., *Mendoza v. Garrett*, 358 F. Supp. 3d 1145, 1171 (D. Or. 2018) ("What [*Griffin*, *Bearden*, and *M.L.B.*] teach is that the 'fundamental fairness' principles of due process and equal protection originating in *Griffin* have been applied when either incarceration or access to the courts, or both, is at stake."); *Latonik v. Florida Dep't of Highway Safety & Motor Vehicles*, No. 6:14-CV-1793-ORL, 2014 WL 7010737, \*4 (M.D. Fla., Dec. 11, 2014) ("A determination of the defendant's ability to pay is only necessary when the state seeks to enforce the collection of costs through the threat of imprisonment.").

<sup>92</sup> See, e.g., *Johnson v. Bredesen*, 624 F.3d 742, 750 (6th Cir. 2010) (stating that *Bearden* only requires courts to consider ability to pay when revoking probation and faulting the entire *Griffin* case line for "fail[ing] to articulate a precise standard of review.").

<sup>93</sup> E.g., NAT'L TASK FORCE ON FINES, FEES AND BAIL PRACTICES, *Principles on Fines, Fees, and Bail Practices*, Principle 6.3 (2017), (recommending that, since *Bearden*, state courts must consider ability to pay only when revoking probation).

<sup>94</sup> E.g., ALA. R. CRIM. PRO. § 26.11(h)(1) (requiring courts to consider ability to pay only when imposing fines, costs, and restitution that could lead to *incarceration*); ARIZ. REV. STAT. ANN. § 13-810(E)(1) (making such considerations discretionary, rather than mandatory); MICH. COMP. LAWS § 771.3(6)(b) (allowing judges to impose carceral debts without considering ability to pay, while burdening defendants to petition for remission); see also *Bannon*, *supra* note 11, at 13 (finding that 14 of 15 states surveyed have at least one statutorily mandatory carceral debt that cannot be modified for inability to pay).

<sup>95</sup> See, e.g., *Klarman*, *supra* note 24, at 264 (focusing on how *Bearden* "created affirmative governmental obligations to redress poverty not directly attributable to the state.").

<sup>96</sup> *Bearden*, 461 U.S. at 666–67.

restrictive drug court supervision until they fully paid the program fees.<sup>97</sup> The case was analogous to *Bearden* in many ways: participants' conditional liberty was at stake; they could be immediately incarcerated for failure to comply; and their release from the program was conditioned on ability to pay.<sup>98</sup> The court correctly applied *Bearden* and struck down the law under heightened scrutiny.<sup>99</sup>

Other cases are not so easy, however. Consider whether *Bearden* should apply to laws that revoke a driver's license for the driver's failure to pay court fines and fees. Unlike *Bearden*, the "interest" at stake is the loss of a driver's license (not conditional liberty), and the persons are not criminal defendants. Recent *Bearden*-style challenges to these laws produced mixed results. In *Thomas v. Haslam*,<sup>100</sup> a district court—despite stating that *Bearden* and *Griffin* were on point—subjected the law to rational basis review, rather than *Bearden*'s four factors.<sup>101</sup> The *Thomas* court struck down the law, however, finding that there was no rational relationship between license revocation and the state's interest in debt collection.<sup>102</sup> By contrast, the Sixth Circuit addressed an identical law in a separate suit and refused to apply *Bearden* because there was no "fundamental liberty interest" at stake.<sup>103</sup> The Sixth Circuit employed the second shield against *Bearden* in classic fashion: "*Bearden*, then, concerns what kind of process is due before a probationer is *subject to confinement*, not what kind of process is due before a driver's license is subject

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<sup>97</sup> *Briggs v. Montgomery*, No. CV-18-02684-PHX-EJM, 2019 WL 2515950, \*1 (D. Ariz., June 18, 2019).

<sup>98</sup> *Id.* at \*5.

<sup>99</sup> *Id.* at \*10 (employing *Bearden*'s four-factor heightened scrutiny as outlined above because "[c]laims alleging 'categorically worse treatment for the indigent' require a 'hybrid analysis of equal protection and due process principles.'" (citing *Walker v. City of Calhoun, Ga.*, 901 F.3d 1245, 1261 (11th Cir. 2018), *cert. denied sub nom.*)).

<sup>100</sup> *Thomas v. Haslam*, 329 F. Supp. 3d 475, 475 (M.D. Tenn. 2018) (striking down the license revocation scheme).

<sup>101</sup> *Id.* at 518 ("[O]ne could imagine the rational relationship that might exist between the threat of license revocation and the legitimate interest of collecting court debt. That connection, though, falls apart where indigent debtors are concerned.").

<sup>102</sup> *Id.* Revoking a driver's license typically makes a person less able to pay their debts, after all. *See id.* at 490-91 (concluding that "in Memphis, Nashville, and Knoxville, 72% to 75% of jobs are not accessible by public transportation within 90 minutes" and that "in Nashville, Knoxville, and Chattanooga, more than two thirds of working-age residents lack access to public transportation.").

<sup>103</sup> *Fowler v. Benson*, 924 F.3d 247, 260 (6th Cir. 2019) ("[T]he district court correctly distinguished the *Griffin* cases from Plaintiffs' claims because none of the *Griffin* cases concerned a property interest. Those cases dealt with basic features of the criminal justice system—imprisonment, probations, and appeals.").

to suspension.”<sup>104</sup> The Sixth Circuit applied rational basis review—as in *Thomas*—but upheld the law.<sup>105</sup> The *Thomas* court resides in the Sixth Circuit, so that case is now likely abrogated by *Fowler*. This is a shame since the *Thomas* court came closer to getting *Bearden* right.<sup>106</sup>

The two driver’s license cases show how unpredictably courts wield the incarceration-only shield against *Bearden* in non-criminal cases. The *Thomas* court rightly recognized that *Bearden* should apply when any individual right is infringed, but the court failed to follow through and apply *Bearden*’s factor-driven heightened scrutiny. Oddly, the court struck down the law under rational basis review. On the other hand, the Sixth Circuit was openly hostile to even applying *Bearden* to a case where no liberty interest was at stake.<sup>107</sup> And under rational basis review, the law stood.<sup>108</sup>

Ultimately, the uncertainty around how to apply *Bearden* stems from the simultaneously broad and narrow scope of the *Bearden* cases themselves; they addressed the sweeping problem of “punishing a person for his poverty,”<sup>109</sup> while tailoring the opinion to the “treatment of indigents *in our criminal justice*

<sup>104</sup> *Id.* at 261 (emphasis added). This view misses the mark on two fronts: *Bearden* should not be limited to the criminal context because it addressed any “individual interest affected,” not just criminal interests. *Bearden*, 461 U.S. at 666–67. And *Bearden* relied on both the Due Process and Equal Protection clauses, rather than due process alone. *Id.* at 666.

<sup>105</sup> *Fowler*, 924 F.3d at 262–63 (“Plaintiffs maintain that suspending the driver’s license of an indigent license holder for nonpayment is patently irrational because doing so makes it harder for him to obtain and hold a job, which in turn makes him less likely to pay his court debt. Perhaps Plaintiffs are right that the policy is unwise, even counterproductive. But under rational basis review we ask only whether Michigan’s statutes are ‘rationally related to legitimate government interests.’”) (citing *Johnson v. Bredesen*, 624 F.3d 742, 746 (6th Cir. 2010)).

<sup>106</sup> Both cases purported to rely on *Johnson v. Bredesen*, which addressed a law conditioning felon voting re-enfranchisement on complete payment of fines and fees. 624 F.3d at 746. But the *Thomas* court openly disagreed with the logic of *Johnson*: “The Sixth Circuit, in *Johnson* . . . applies its own gloss on *Bearden*, assuring the reader that, whatever the Supreme Court said, what it meant was that the Court was applying heightened scrutiny because the fundamental right to physical liberty was at issue. It is difficult for this court to see how *Bearden* supports such a reading.” *Thomas*, 329 F. Supp. 3d at 515 (citations omitted). Part III of this paper addresses *Johnson* and rebuts its rationale for the same reason.

<sup>107</sup> The Sixth Circuit view may be gaining traction. See *Mendoza v. Garrett*, 358 F.Supp.3d 1145, 1169 (D. Or. 2018) (agreeing with *Fowler* because “[*Bearden*] cases have all arisen in the context of the criminal justice system where fundamental rights of liberty are implicated.”). Other litigation by groups such as the Southern Poverty Law Center are dismissed on procedural or jurisprudential grounds, especially when plaintiffs’ licenses have been revoked for multiple reasons. See *Cook v. Taylor*, No. 2:18-CV-977-WKW, 2019 WL 1938794, \*1 (M.D. Ala., May 1, 2019) (dismissing case for lack of standing when plaintiffs’ licenses were revoked for failure to appear in court, as well as failure to pay fines).

<sup>108</sup> *Id.* at 263.

<sup>109</sup> *Bearden*, 461 U.S. at 671. See also *Griffin*, 351 U.S. at 16 (addressing the sweeping problem of “providing equal justice for poor and rich, weak and powerful alike . . .”).

system.”<sup>110</sup> This perhaps left open the question of whether *Bearden* applies beyond those cases where indigent persons face incarceration. *Rodriguez* moved in the direction of recognizing that *Griffin* and *Bearden* should apply to any deprivation of rights. But it was not until *M.L.B.* that the Court clarified that *Bearden*’s heightened scrutiny applies to criminal, “quasi-criminal,” and even some civil cases when a law withholds an individual’s rights “solely by reason of their indigency.”<sup>111</sup>

### C. *M.L.B. Clears the Air*

In *M.L.B. v. S.L.J.*,<sup>112</sup> a mother’s parental rights were permanently terminated following a Mississippi Chancery Court proceeding. The mother, M. L. B., filed an appeal but was unable to pay the mandatory record preparation fee, estimated at over \$2,300.<sup>113</sup> Even though it was a civil, rather than criminal case, the Court struck down the fee<sup>114</sup> by applying *Bearden*’s test.<sup>115</sup> First, the Court reiterated the basics of Equal Protection: absent either a fundamental interest or a suspect classification, the law must face rational basis review.<sup>116</sup> But the Court noted two exceptions to this general rule: “The basic right to participate in political processes as voters and candidates cannot be limited to those who can pay for a license. Nor may access to judicial processes in cases criminal or ‘quasi criminal in nature’ turn on ability to pay.”<sup>117</sup> But it was not until *M.L.B.* that the Court clarified that *Bearden*’s heightened scrutiny applies to criminal, “quasi criminal,” and

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<sup>110</sup> *Bearden*, 461 U.S. at 664 (emphasis added); see also *Griffin*, 351 U.S. at 17–18 (“In criminal trials a State can no more discriminate on account of poverty than on account of religion, race, or color. Plainly the ability to pay costs in advance bears no rational relationship to a defendant’s guilt or innocence and could not be used as an excuse to deprive a defendant of a fair trial.”). *Bearden* pleaded guilty to burglary and theft by receiving stolen property. *Bearden*, 461 U.S. at 660. *Griffin* was convicted of armed robbery. *Griffin*, 351 U.S. at 13.

<sup>111</sup> *Bearden*, 461 U.S. at 667 (citing *Williams v. Illinois*, 399 U.S. 235, 241–42 (1970)).

<sup>112</sup> 519 U.S. 102 (1996).

<sup>113</sup> *Id.* at 109.

<sup>114</sup> *Id.* at 124.

<sup>115</sup> The Court was also clearer in *M.L.B.* than in *Bearden* as to how the Equal Protection and Due Process Clauses function together: “The equal protection concern relates to the legitimacy of fencing out would-be appellants based solely on their inability to pay core costs . . . . The due process concern homes in on the essential fairness of the state-ordered proceedings anterior to adverse state action.” *Id.* at 120 (citations omitted).

<sup>116</sup> *Id.* at 115–16 (“Absent a fundamental interest or classification attracting heightened scrutiny . . . the applicable equal protection standard ‘is that of rational justification’ . . . .”) (citing *Ortwein v. Schwab*, 410 U.S. 656, 660 (1973)) (per curiam).

<sup>117</sup> *Id.* at 124 (emphasis added) (citing *Mayer v. Chicago*, 404 U.S. 189, 196 (1971)).

even some civil cases when a law withholds an individual's rights solely because of inability to pay.<sup>118</sup>

In defining the “quasi criminal” category, the Court relied on *Mayer v. Chicago*.<sup>119</sup> There, the Court struck down a law requiring an indigent criminal defendant to pay an appeal fee.<sup>120</sup> Mayer was convicted of a petty offense, not subject to the threat of incarceration.<sup>121</sup> Even so, the *M.L.B.* Court found that *Bearden*'s core concern was implicated when the defendant's inability to pay could bar his access to “appellate processes from even [the State's] most inferior courts.”<sup>122</sup> The Court granted that Mayer's inability to pay for an appeal only affected “his professional prospects,” including whether he could practice medicine.<sup>123</sup> If *Mayer*—with so little an individual interest at stake—justified *Bearden*-style scrutiny, the Court reasoned that *Bearden* should apply to *M.L.B.*, where parental rights were at stake. Likewise, the Court characterized *Bearden* as quasi criminal because the law “fenc[ed] out would-be appellants based solely on their inability to pay core costs.”<sup>124</sup> These cases all fell within a “narrow category of civil cases in which the State must provide access to its judicial processes without regard to a party's ability to pay court fees.”<sup>125</sup>

The Court then applied *Bearden*'s heightened scrutiny.<sup>126</sup> In so doing, the *M.L.B.* Court rejected the second shield against *Bearden* described above—that *Griffin* and *Bearden* should apply only when an indigent person faces incarceration.<sup>127</sup> The Court explicitly concluded that “*Griffin*'s principle has not been confined to cases in which imprisonment is at stake.”<sup>128</sup> Rather, the key fact is that the laws in *Mayer*, the poll tax cases, and *Bearden* were

<sup>118</sup> *M.L.B. v. S.L.J.*, 519 U.S. 102, 124 (1996).

<sup>119</sup> 404 U.S. 189 (1971).

<sup>120</sup> *M.L.B.*, 519 U.S. at 124. See *Mayer*, 404 U.S. at 196 (“The size of the defendant's pocketbook bears no more relationship to his guilt or innocence in a nonfelony than in a felony case.”).

<sup>121</sup> *M.L.B.*, 519 U.S. at 121 (citing *Mayer*, 404 U.S. at 197).

<sup>122</sup> *Id.* at 112 (citing *Mayer*, 404 U.S. at 197).

<sup>123</sup> *Id.* at 121.

<sup>124</sup> *Id.* at 120. See also *id.* at 119 (finding *Bearden* applied because *M. L. B.* faced the termination of her parental rights, an issue typically appealable, “but for her inability to advance required costs”).

<sup>125</sup> *Id.* at 113.

<sup>126</sup> *Id.* at 120–21 (“In line with those decisions, we inspect the character and intensity of the individual interest at stake, on the one hand, and the State's justification for its exaction, on the other.”) (citing *Bearden v. Georgia*, 461 U.S. 660, 666–67 (1983)).

<sup>127</sup> Some commentators were outraged that *M.L.B.* destroyed what they considered to be a bright line distinction restricting *Griffin* and *Bearden* to the criminal context. See Price, *supra* note 24, at 914 (arguing that *Bearden* and *Griffin*'s principles should be constrained to claims by criminal defendants). But these scholars failed to see that *Bearden* applies whenever any “individual interest” is infringed solely based on inability to pay. *Bearden*, 461 U.S. at 666–67.

<sup>128</sup> *M.L.B.*, 519 U.S. at 111.

“wholly contingent on one’s ability to pay, and thus ‘visit[ed] different consequences on two categories of persons,’ they apply to all indigents and do not reach anyone outside that class.”<sup>129</sup> *M.L.B.* fit the bill as well, so *Bearden*’s scrutiny applied.

The *M.L.B.* Court also laid to rest the first shield against *Bearden*. Contrary to *Rodriguez*, the Court did not limit its consideration to whether the indigent mother suffered an “absolute deprivation” of some right.<sup>130</sup> Rather, it was enough that the State sought to sever M. L. B.’s parental rights. This individual interest was significant, and it was infringed “solely because of inability to pay,” so the Court employed *Bearden*’s heightened scrutiny.<sup>131</sup> Under the first prong, the Court examined the gravity of the parental relationship and the extent to which that relationship was affected by her inability to pay.<sup>132</sup> Because of “the primacy of the parent-child relationship,”<sup>133</sup> the Court found that “the stakes for petitioner . . . are large, ‘more substantial than mere loss of money.’”<sup>134</sup> The Court then weighed the loss of parental rights against the state’s interest in recouping court costs.<sup>135</sup> The state’s interest was found wanting.<sup>136</sup>

Even though *Bearden* applies when non-incarceration rights are infringed, there is no cause for alarm that *M.L.B.* opens the floodgates to poverty litigation. *M.L.B.*’s dissenters, for example, argued that expanding *Bearden* to civil claims would expose every government-provided service to challenge.<sup>137</sup> This view loses sight of the fact that, even after *M.L.B.*, the burden on *Bearden*

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<sup>129</sup> *Id.* at 127 (citations omitted). The Court also rejected the argument that the law at issue should be challenged under the disparate-impact theory. *See* *Washington v. Davis*, 426 U.S. 229, 248 (1976) (establishing the disparate impact framework).

<sup>130</sup> *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 20 (1972).

<sup>131</sup> *M.L.B.*, 519 U.S. at 113.

<sup>132</sup> *Id.* at 121. While the Court identified the parental interest at stake as “fundamental,” the holding was not based on that conclusion.

<sup>133</sup> *Id.* at 120.

<sup>134</sup> *Id.* at 121 (quoting *Santosky v. Kramer*, 455 U.S. 745, 756 (1982)).

<sup>135</sup> *Id.* at 120–21 (“In line with [*Bearden* and] those decisions, we inspect the character and intensity of the individual interest at stake, on the one hand, and the State’s justification for its exaction, on the other.”).

<sup>136</sup> *Id.* at 124.

<sup>137</sup> *Id.* at 138 (Thomas, J., dissenting) (“The *Griffin* line of cases ascribed to—one might say announced—an equalizing notion of the Equal Protection Clause that would, I think, have startled the Fourteenth Amendment’s Framers. . . . In [*Washington v. Davis*, among other cases, we began to recognize the potential mischief of a disparate impact theory writ large, and endeavored to contain it. In this case, I would continue that enterprise.”). *See generally* Price, *supra* note 23, at 914 (arguing that *Bearden* and *Griffin*’s principles should be constrained to claims by criminal defendants). *But see* *M.L.B.*, 519 U.S. at 127 (rejecting the view that *Washington* and disparate impact cases controlled this case).

challengers is high. Indigent persons challenging laws that punish the poor must still face *Bearden*'s scrutiny, which requires the interest infringed to overcome the state's interest.<sup>138</sup> *M.L.B.* met this test because the private interest at stake "involve[d] the awesome authority of the State 'to destroy permanently all legal recognition of the parental relationship.'"<sup>139</sup> But most "mine run civil actions" will not rise to this level.<sup>140</sup> And the individual interest is one factor among four, including the state's interest in the fee structure, the means-end rationality of the law, and the viability of any alternative fee collection means.<sup>141</sup> It is unlikely, as one court feared, that an indigent person's "right" to reduced postage stamps will outweigh the other factors in favor of reduced postage prices for persons who are poor.<sup>142</sup>

The woman discussed in the Ferguson investigation was jailed twice for her failure to pay carceral debts.<sup>143</sup> Apparently this practice was routine.<sup>144</sup> As the Department of Justice noted, *Bearden* directly prohibits jailing the poor solely for their inability to pay.<sup>145</sup> But *M.L.B.* clarified that *Bearden* should not be cabined to those cases where the defendant faces incarceration. Instead, *Bearden* applies whenever an individual interest is burdened due to inability to pay. If so, the law at issue must face *Bearden*'s four-factor inquiry.<sup>146</sup>

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<sup>138</sup> See *M.L.B.*, 519 U.S. at 123 (finding that only where the interest potentially infringed overcomes a "rational" state interest in covering state's costs will courts grant access to transcripts or state-appointed counsel).

<sup>139</sup> *Id.* at 128 (citing *Rivera v. Minnich*, 483 U.S. 574, 580 (1987)). While the Court noted that the parental right, generally, is a fundamental interest, the Court did not rely on that fact to conclude that *Bearden* should apply. See *id.* (citing *Lassiter v. Dep't of Soc. Services of Durham Cnty.*, 452 U.S. 18 (1981); *Santosky v. Kramer*, 455 U.S. 745 (1982)).

<sup>140</sup> *Id.* at 127.

<sup>141</sup> *Bearden v. Georgia*, 461 U.S. 600, 666–67 (1983) ("[T]he issue . . . requires a careful inquiry into such factors as 'the nature of the individual interest affected, the extent to which it is affected, the rationality of the connection between legislative means and purpose, and the existence of alternative means for effectuating the purpose.'" (citing *Williams v. Illinois*, 399 U.S. 235, 260 (1970)) (Harlan, J., concurring).

<sup>142</sup> *Walker v. City of Calhoun*, 901 F.3d 1245, 1262 (11th Cir. 2018) (offering this hypothetical as a reason to refuse to apply *Bearden*).

<sup>143</sup> U.S. DEP'T OF JUST. C.R. DIV., *supra* note 1, at 4.

<sup>144</sup> *Id.* at 55 ("With extremely limited exceptions, every warrant issued by the Ferguson municipal court was issued because: 1) a person missed consecutive court appearances, or 2) a person missed a single required fine payment as part of a payment plan.").

<sup>145</sup> *Id.* at 57 (finding that the practices at issue were "directly at odds with well-established law that prohibits 'punishing a person for his poverty.'" (citing *Bearden*, 461 U.S. at 671).

<sup>146</sup> See *Bearden*, 461 U.S. at 666–67 (listing the four factors: nature of the individual interest affected, the extent to which the nature of the interest is affected, the rationality between the legislative means and purpose, and existence of alternate means to affect the purpose).

III. THREE CARCERAL DEBT CHALLENGES AFTER *BEARDEN*

This paper now turns to several common state practices hurting the poor that are ripe for challenge under *Bearden*. To be sure, plaintiffs fight an uphill battle against “the general rule . . . that fee requirements ordinarily are examined only for rationality.”<sup>147</sup> But Ferguson illustrates that many courts enforce carceral debts with the threat of incarceration—even when the underlying offense could not have led to imprisonment.<sup>148</sup> This practice clearly violates Equal Protection and Due Process under *Bearden*. Likewise, this paper argues that the following examples fall within *Bearden*’s scope because challengers allege the violation of a significant interest solely due to inability to pay.<sup>149</sup> These examples also fall within the categories where *M.L.B.* stated that *Bearden* should apply—access to the political process and access to judicial process in cases criminal or quasi-criminal.<sup>150</sup> These claims should succeed under *Bearden*’s four-factor test.<sup>151</sup>

A. *Court-Appointed Defender Fees*

Today, about 80% of state criminal defendants and 66% of federal criminal defendants require appointed counsel.<sup>152</sup> It has been settled since *Gideon v. Wainwright* that indigent defendants deserve access to adequate legal representation.<sup>153</sup> But barely a decade after *Gideon*, the Court curtailed this right. In *Fuller v. Oregon*, the Supreme Court found that indigent defendants could be required to repay the costs of their court appointed attorneys.<sup>154</sup> *Fuller* should not be read overbroadly. The Court’s upholding the Oregon

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<sup>147</sup> *M.L.B. v. S.L.J.*, 519 U.S. 102, 123 (1996).

<sup>148</sup> U.S. DEP’T OF JUST. C.R. DIV., *supra* note 1, at 43 (“[W]hile the municipal court does not generally deem the code violations that come before it as jail-worthy, it routinely views the failure to appear in court to remit payment to the City as jail-worthy, and commonly issues warrants to arrest individuals who have failed to make timely payment.”).

<sup>149</sup> *See Bearden*, 461 U.S. at 666–67 (setting forth the four factor test for when an individual faces a burden due to an inability to pay).

<sup>150</sup> *M.L.B.*, 519 U.S. at 124.

<sup>151</sup> *See Bearden*, 461 U.S. at 666–67 (“[This] issue requires a careful inquiry into such factors as [1] ‘the nature of the individual interest affected, [2] the extent to which it is affected, [3] the rationality of the connection between legislative means and purpose, and [4] the existence of alternative means for effectuating the purpose . . . .’” (citing *Williams v. Illinois*, 399 U.S. 235, 260 (1970)) (Harlan, J., concurring)).

<sup>152</sup> 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 (2009).

<sup>153</sup> *See* 372 U.S. 335, 344–45 (1963) (establishing an indigent criminal defendant’s right to state-funded defense at trial).

<sup>154</sup> 417 U.S. 40, 54 (1974).

law was contingent upon the law's built-in safeguards.<sup>155</sup> The law only imposed defender fees on those who, despite being indigent at trial, later *gained means to pay*.<sup>156</sup> The law also required the court to offer a hearing on the defendant's ability to pay his defender fees.<sup>157</sup> A defendant could avoid the obligation to pay if the court found him unable to do so.<sup>158</sup> And most importantly, plaintiffs did not make a *Griffin*-style Equal Protection claim, and the case predated *Bearden*.<sup>159</sup> Thus, the Court refused to address whether the law would fall under such a challenge.<sup>160</sup> In light of *Bearden*, *Fuller*'s holding is in serious doubt.<sup>161</sup>

Even so, many states overread *Fuller*, broadly imposing defender fees as a condition of release from parole or supervision.<sup>162</sup> A recent study by the Brennan Center indicates that, among thirteen of the fifteen states surveyed impose defender fees<sup>163</sup>: "This practice can push defendants to waive counsel, raising constitutional questions and leading to wrongful convictions."<sup>164</sup> Many states tailor their laws to thread the needle of Due Process and Equal Protection requirements laid out in *Bearden* and other relevant cases.<sup>165</sup> In other states, however, defendants can be incarcerated

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<sup>155</sup> See Anderson, *supra* note 152, at 337–38 (noting that the *Fuller* court upheld the Oregon statute because it only imposed the obligation to pay upon defendants who could meet the burden without hardship).

<sup>156</sup> Fuller, 417 U.S. at 46.

<sup>157</sup> *Id.* at 45.

<sup>158</sup> *Id.*

<sup>159</sup> *Id.* at 48 n.9.

<sup>160</sup> *Id.*

<sup>161</sup> See Alexander v. Johnson, 742 F.2d 117, 124 (4th Cir. 1984) (reinterpreting *Fuller*'s significance in light of *Bearden* to produce "five basic features of a constitutionally acceptable attorney's fees reimbursement program . . .").

<sup>162</sup> See *id.* at 125. (restating the North Carolina statute's requirement that court appoint counsel fees as a condition for parole).

<sup>163</sup> BANNON ET AL., *supra* note 11, at 12 ("In North Carolina, the court must order convicted defendants to pay a \$50 fee and must direct a judgment to be entered for the full value of the defense services provided, currently valued at \$75/hour for non-capital cases, plus additional fees and expenses. In Virginia, poor defendants may be charged as much as \$1,235 per count for certain felonies.").

<sup>164</sup> *Id.* at 1.

<sup>165</sup> Shortly after *Bearden*, for instance, the Fourth Circuit upheld a North Carolina scheme that conditioned parole on payment of defender fees. *Johnson*, 742 F.2d at 126. There, "[t]he interlocking statutes and court decisions that regulate" the recoupment scheme provided judges discretion to lower defender fee amounts based on inability to pay, and the parolees could appeal the determination of whether they were indigent for purposes of repayment. *Id.* at 125–26.

simply for inability to pay for their court-appointed attorney, perpetuating modern “debtors’ prisons.”<sup>166</sup>

Those courts upholding the practice of imposing defender fees have allowed *Fuller* to swallow the rule established in the *Bearden* cases.<sup>167</sup> Today, defender fee laws in most states lack the protections for indigent defendants present in *Fuller*. In three out of fifteen states surveyed, the Brennan Center exposed that defender fees are *mandatory* by statute, with no possibility of waiver.<sup>168</sup> These states cannot hide behind *Fuller*, which permits only non-mandatory defender fees that consider ability to pay.<sup>169</sup> And even in those jurisdictions that do consider ability to pay before imposing defender fees, there is still little “rationality of . . . connection between legislative means and purpose.”<sup>170</sup> Studies reveal that recoupment schemes do not achieve their goal; counties expend great resources to try to recover these debts and the collection rate is—unsurprisingly—very low.<sup>171</sup> A state’s overspending on the unlikely chance that they may recover defender fees is not rational.<sup>172</sup>

Laws making the failure to pay defender fees punishable by incarceration fare even worse under *Bearden*. Jailing poor defendants for their inability to pay defender fees directly parallels the harm in *Bearden*; the state has “impos[ed] a fine as a sentence and then automatically conver[t]ed it into a jail term.”<sup>173</sup> These laws must face *Bearden*’s heightened scrutiny.<sup>174</sup> Under

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<sup>166</sup> See NAT’L TASK FORCE ON FINES, FEES AND BAIL PRACTICES, *supra* note 93, at 7 (finding that courts should not sentence defendants to prison for their inability to pay court fees in absence of a hearing and a justified situation); Lauren Sudeall Lucas, *Reclaiming Equality to Reframe Indigent Defense Reform*, 97 MINN. L. REV. 1197, 1198 (2013) (arguing that there exists a two-tiered justice system based upon income level and inadequate access to legal counsel perpetuates this phenomena).

<sup>167</sup> *E.g.*, State v. Albert, 899 P.2d 103, 109 (Alaska 1995) (upholding law authorizing judgment to collect attorney fees without determination of ability to pay because “we conclude that *James* and *Fuller* do not require a prior determination of ability to pay in a recoupment system which treats recoupment judgment debtors like other civil judgment debtors . . .”).

<sup>168</sup> See Bannon, *supra* note 11, at 12 (pointing to Florida, North Carolina, and Virginia).

<sup>169</sup> *Fuller v. Oregon*, 417 U.S. 40, 54 (1974).

<sup>170</sup> *Bearden v. Georgia*, 461 U.S. 600, 667 (1983).

<sup>171</sup> See Anderson, *supra* note 152, at 332 (“A 1984 Justice Department study revealed that less than 10 percent of recoupment orders were collected. Furthermore, a 1986 study showed that while it is possible for revenues to exceed costs in a tightly run and carefully administered recoupment program, in most instances recoupment programs were not cost-effective.”).

<sup>172</sup> See *id.* (“The recoupment program reviewed by the Supreme Court in a 1972 case spent \$400,000 collecting \$17,000 over two years.”).

<sup>173</sup> *Bearden*, 461 U.S. at 667 (citations omitted).

<sup>174</sup> Challengers could also argue for strict scrutiny, since a fundamental right is at stake, but this type of claim is beyond the scope of this paper. See *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 16 (1973) (“[The law at issue] could not withstand the strict judicial scrutiny that this Court has found appropriate in reviewing legislative judgments that interfere with fundamental constitutional rights or that involve suspect classifications.”) (citations omitted).

this scrutiny, the state's interest in recouping defender fees is insubstantial compared to a defendant's freedom from incarceration.<sup>175</sup> This is to say nothing of the alternative punishment and collection methods available to the state. And other states try an end-run on *Fuller* by assessing ability to pay only after defendants challenge their defender fee debts—a post-deprivation hearing.<sup>176</sup> But the law in *Fuller* was upheld only because it required a pre-deprivation hearing that assessed ability pay before imposing the fee. Absent such a finding, states cannot claim that their interest in imposing defender fees outweighs the penalties that criminal defendants face. Thus, they fail *Bearden's* heightened scrutiny.

### B. Bail and Pretrial Detention

The second practice that should end under *Bearden* is the imposition of fixed-sum bail. Nearly two thirds of all inmates in county jails are defendants awaiting trial.<sup>177</sup> The majority of these inmates are indigent, non-felony offenders.<sup>178</sup> One solution to the unmanageable growth of pretrial detention population numbers is to directly reduce the number of pretrial detainees. New Jersey<sup>179</sup> and New York,<sup>180</sup> for example, both recently passed laws

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<sup>175</sup> In *Bearden*, the Court addressed criminal fines whose purpose was punishment. As such, the Court felt that there may be circumstances where revoking probation is justified because “alternative measures are not adequate to meet the State’s interests in punishment and deterrence . . . .” *Bearden*, 461 U.S. at 672. This is not the case for defender fees, where the fee’s only purpose is recouping state funds. See also *James v. Strange*, 407 U.S. 128, 139 (1972) (“If acquitted, the indigent finds himself obligated to repay the State for a service the need for which resulted from the State’s prosecution.”).

<sup>176</sup> Anderson, *supra* note 152, at 345 (“In Washington, fees for appointed counsel on appeal automatically become part of the judgment and sentence against the defendant if the defendant does not object to the state’s cost bill. Even if the defendant objects, no pre-imposition determination of ability to pay is required . . . .”) (citation omitted).

<sup>177</sup> Eric Holder, Attorney General of the United States, U.S. Dep’t of Just., Speech at the National Symposium on Pretrial Justice (June 1, 2011), <https://www.justice.gov/opa/speech/attorney-general-eric-holder-speaks-national-symposium-pretrial-justice> [https://perma.cc/TB5N-Q4DV].

<sup>178</sup> *Id.*

<sup>179</sup> See Nicholas Pugliese, *Did Nj Bail Reform Cause a Surge in Crime? Court Analysis Says No*, NORTHJERSEY.COM (Apr. 2, 2019, 5:20 PM), <https://www.northjersey.com/story/news/new-jersey/2019/04/02/nj-bail-reform-no-crime-surge-pretrial-release/3336423002/> [https://perma.cc/N853-Z85J] (outlining the New Jersey law that allows judges to make individual risk assessments of defendants before deciding to release them on bail and noting that the law has not caused a spike in crime and has decreased the racial disparity in New Jersey jails).

<sup>180</sup> New York’s law went into effect in January 2020, producing a 30% decrease in New York City’s jail population. MICHAEL REMPEL & KRISTAL RODRIGUEZ, CTR. FOR CT. INNOVATION, BAIL REFORM REVISITED: THE IMPACT OF NEW YORK’S AMENDED BAIL LAW ON PRETRIAL

preventing pretrial detention for almost anyone charged with a misdemeanor or nonviolent felony. These measures have reduced the state costs of pretrial detention, with no measured increase in crime rates.<sup>181</sup> The United States Attorney General’s office proposed a more modest reform: eliminate “fixed-sum” bail.<sup>182</sup> Fixed sum bail is the practice of automatically assigning bail rates based on the charged offense.<sup>183</sup> The Attorney General’s proposed system would consider the charged offense alongside two other factors: the danger that the accused poses to society and the risk that they may flee before trial. In this regard, bail rates would not be “fixed.” Recent litigation has taken up the battle against fixed-sum bail.<sup>184</sup>

Fixed-sum bail challenges rely on *Griffin* and its progeny as well as *Pugh v. Rainwater*,<sup>185</sup> a critical Fifth Circuit opinion. In *Pugh*, Florida plaintiffs challenged their pretrial detention based on their inability to pay money bail.<sup>186</sup> Drawing on *Griffin*, *Williams*, and *Tate*,<sup>187</sup> the panel subjected the bail scheme to strict scrutiny and found “a presumption against money bail and

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DETENTION 1 (May 2020), [https://www.courtinnovation.org/sites/default/files/media/document/2020/bail\\_reform\\_revisit\\_ed\\_05272020.pdf](https://www.courtinnovation.org/sites/default/files/media/document/2020/bail_reform_revisit_ed_05272020.pdf) [<https://perma.cc/NN36-PM4T>].

181 GLENN A. GRANT, ACTING ADMINISTRATIVE DIRECTOR OF THE COURTS, 2018 REPORT TO THE GOVERNOR AND THE LEGISLATURE 5 (Apr. 2019), <https://njcourts.gov/courts/assets/criminal/2018cjrannual.pdf?c=taP> [<https://perma.cc/8V3N-DK52>] (“Notably, in 2014, 12.7 percent of defendants were charged with a new indictable crime while on pretrial release, a number that remained consistently low, 13.7 percent, in 2017.”); PRETRIAL JUST. INST., PRETRIAL JUSTICE: HOW MUCH DOES IT COST? 1 (Jan. 2017) <https://university.pretrial.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=c2f50513-2f9d-2719-c990-a1e991a57303&forceDialog=0> [<https://perma.cc/6VRB-UZBM>] (“Each day someone is in jail, the price of his or her food, medical care, and security (excluding fixed building expenses) may be conservatively estimated at \$85 a day.”). Data regarding criminal acts committed by those not under pretrial detention under the new law in New York is still being gathered. REMPEL & RODRIGUEZ, *supra* note 180, at 1 (noting that the bill had been passed one month before the report was published and in the middle of the COVID-19 pandemic).

182 See Brief for the United States as Amicus Curiae at 9, *Varden v. City of Clanton*, No. 2:15-cv34-MHT-WC, 2015 WL 5387219 (M.D. Ala. Sept. 14, 2015) (No. 26), at 1 (arguing that any bail scheme that madness pre-fixed amount payments for different offenses to gain pre-trial release is unconstitutional and bad public policy).

183 *Id.*

184 See EQUAL JUST. UNDER L., *Ending American Money Bail*, <https://equaljusticeunderlaw.org/money-bail-1> [<https://perma.cc/QY9M-CFC2>] (last visited Feb. 8, 2020) (finding that bail amounts are significant of wealth status, not necessarily depending on flight risk or danger to society); Anna Claire Vollers, *Too Poor to Make Bail: Alabama Forced to Reform “Two-Tiered” Jail System*, AL.COM (Oct. 11, 2017), [https://www.al.com/news/2017/10/too\\_poor\\_to\\_make\\_bail\\_alabama.html](https://www.al.com/news/2017/10/too_poor_to_make_bail_alabama.html) [<https://perma.cc/6NYZ-C2LQ>] (detailing a lawsuit dismantling Alabama’s practice of assigning bail by fixed schedule in seventy-five counties).

185 557 F.2d 1189 (5th Cir. 1977), *vacated en banc on other grounds*, 572 F.2d 1053 (5th Cir. 1978).

186 *Pugh*, 557 F.2d at 1190.

187 *Id.* at 1196–97.

in favor of those forms of release which do not condition pretrial freedom on an ability to pay.”<sup>188</sup> During the pendency of appeal, Florida changed its law to include an indigency determination in the first 48 hours of detention, so the case was vacated as moot.<sup>189</sup> But in the decision to moot the prior holding, the en banc court approved of the prior panel’s rationale.<sup>190</sup> Challengers today can draw on *Pugh* for the principle that, at the very least, a court must consider the accused’s ability to pay within the first 48 hours of detention.

There is now a circuit split in resolving these challenges. The Eleventh Circuit, for example, recently refused to apply *Bearden*’s heightened scrutiny to fixed bail schemes. In *Walker v. City of Calhoun, Georgia*,<sup>191</sup> the court upheld a law imposing fixed bail rates because the law provided a hearing on ability to pay within the first 48 hours of pretrial confinement, if defendants requested it.<sup>192</sup> The court admitted that *Pugh* and *Bearden* were the guiding cases<sup>193</sup> but made three crucial mistakes in applying them. First, the court assumed that *Bearden* merely “synthesized” the case law for indigent defendants,<sup>194</sup> rather than announcing a new test that laws must face when they criminalize poverty.<sup>195</sup> Second, relying on *Rodriguez*’s limiting language, the court incorrectly split hairs over the deprivation at issue: “Under the Standing Bail Order, Walker and other indigents suffer no ‘absolute deprivation’ of the benefit they seek, namely pretrial release. Rather, they must merely wait some appropriate amount of time to receive the same

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<sup>188</sup> *Id.* at 1202.

<sup>189</sup> *Pugh v. Rainwater*, 572 F.2d 1053 (5th Cir. 1978). This is a common practice; when litigants challenge a local bail policy, the city will amend the policy immediately after the case’s filing. This limits the amount of published case law on the issue. *E.g.*, *Jones v. City of Clanton*, No. 2:15cv34–MHT (WO), 2015 WL 5387219 at \*4, \*12 (M.D. Ala. Sept. 14, 2015) (dismissing the case following the city’s amended policy, but reiterating that “the use of a secured bail schedule to detain a person after arrest, without an individualized hearing regarding the person’s indigence and the need for bail or alternatives to bail, violates the Due Process Clause of the Fourteenth Amendment.”).

<sup>190</sup> *Pugh*, 572 F.2d at 1056 (announcing “[a]t the outset” that the court “accept[ed] the principle that imprisonment solely because of indigent status is invidious discrimination and not constitutionally permissible.”).

<sup>191</sup> 901 F.3d 1245 (11th Cir. 2018).

<sup>192</sup> *Id.* at 1266.

<sup>193</sup> *Id.* at 1265 (“Thus the district court was correct to apply the *Bearden/Rainwater* style of analysis for cases in which ‘[d]ue process and equal protection principles converge.’”).

<sup>194</sup> *Id.* at 1259.

<sup>195</sup> The court also addressed *M.L.B.*, but only in passing, and quoting a passage from the opinion that countered an unrelated point: whether the claim was one of disparate impact and should fall subject to the rule announced in *Washington v. Davis*. A deeper treatment of *M.L.B.* would reveal the breadth of cases to which *Bearden* applies, countering the court’s overuse of the *Rodriguez* limiting principle, as discussed in the next paragraph.

benefit as the more affluent.”<sup>196</sup> By this logic, the Supreme Court similarly could have found that Bearden was not “absolutely deprived” of his personal liberty while he was incarcerated for inability to pay probation costs; he was merely locked up for an additional “appropriate amount of time.” The Supreme Court did not adopt this view, so *Rodriguez* should not be read to advance it.

Finally, the *Walker* court misunderstood the convergence of Due Process and Equal Protection in the *Bearden* cases.<sup>197</sup> In the same breath, the court cited *Bearden*’s four-factor scrutiny, then said, “We take *Bearden*’s quotation of Justice Harlan’s *Williams* concurrence as a sign that the *Bearden* court shared his assessment that these kinds of questions should be evaluated along something akin to a traditional due process rubric.”<sup>198</sup> The Court then applied *Mathews v. Eldridge*’s procedural due process analysis.<sup>199</sup> It is interpretive gymnastics to read a later case (here, *Bearden*), citing an earlier case (*Williams*), as silently advancing a theory espoused by a single Justice in the earlier case over and against what the later case plainly states.<sup>200</sup> Further, *Bearden* never cited to nor relied on *Mathews*. That *Bearden*’s test may resemble due process analysis does not mean it should be replaced by *Mathew*’s more general due process test. *Bearden*, not *Mathews*, provides the appropriate framework for review for laws that target the poor. Even so, the Eleventh Circuit addressed the law under “something akin to procedural due process” alone.<sup>201</sup> The court admitted its motivation for doing so; “the courts would be flooded with litigation” under *Bearden*, including indigent postal customers asserting a right to free express postage.<sup>202</sup> Equating one’s right to pretrial liberty with another’s desire to get discounted postage both is callous and overstates the floodgates argument. *Bearden*’s four-factor scrutiny will insulate “the mine run of cases” plaintiffs may bring.<sup>203</sup> Only when a significant right

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<sup>196</sup> *Id.* at 1261.

<sup>197</sup> *Id.* at 1264. The dissent correctly pointed out the intersection of harms when the right to freedom is deprived based on inability to pay. *Id.* at 1278, n.8 (Martin, C.J., concurring in part and dissenting in part).

<sup>198</sup> *Id.* at 1265. This view is unprecedented and unsupported by the scholarly literature.

<sup>199</sup> *Id.*; *Mathews v. Eldridge*, 424 U.S. 319 (1976).

<sup>200</sup> *See Bearden*, 461 U.S. at 665 (“Most decisions in this area have rested on an equal protection framework, although Justice Harlan in particular has insisted that a due process approach more accurately captures the competing concerns. . . . [W]e generally analyze the fairness of relations between the criminal defendant and the State under the Due Process Clause, while we approach the question whether the State has invidiously denied one class of defendants a substantial benefit available to another class of defendants under the Equal Protection Clause.”).

<sup>201</sup> *Walker*, 901 F.3d at 1265.

<sup>202</sup> *Id.* at 1262.

<sup>203</sup> *M.L.B.*, 519 U.S. at 123.

is at stake (here, conditional liberty) and the means-end rationality is particularly weak are laws at risk of being struck down under *Bearden*.

The same year that *Walker* came down, the Fifth Circuit correctly applied *Bearden* to affirm a preliminary injunction against a fixed-sum bail program in Texas.<sup>204</sup> Relying on the same precedent as *Walker*, the court found in *O'Donnell*:

Both aspects of the *Rodriguez* analysis apply here: indigent misdemeanor arrestees are unable to pay secured bail, and, as a result, sustain an absolute deprivation of their most basic liberty interests—freedom from incarceration. Moreover, this case presents the same basic injustice: poor arrestees in Harris County are incarcerated where similarly situated wealthy arrestees are not, solely because the indigent cannot afford to pay a secured bond. Heightened scrutiny of the County's policy is appropriate.<sup>205</sup>

The Fifth Circuit subjected the law to *Bearden*'s factors and it was found wanting. The court found the first two factors to weigh solidly for the plaintiff, considering the “most basic liberty interest” at stake.<sup>206</sup> The court also found no means-end rationality of the law, based on “empirical data and studies [finding] that the County had failed to establish any ‘link between financial conditions of release and appearance at trial or law-abiding behavior before trial.’”<sup>207</sup> Further, the court found persuasive other studies showing that “the imposition of secured bail might *increase* the likelihood of unlawful behavior.”<sup>208</sup> Thus, the preliminary injunction against the law stood. Later courts should follow the model of *O'Donnell*, rather than *Walker* because it rightly applies *Bearden*, the commanding authority over these laws.

### C. Felon Disenfranchisement

The third practice that should fall under *Bearden* is payment-contingent felon re-enfranchisement. The Supreme Court has long held that the right

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<sup>204</sup> *O'Donnell v. Harris County*, 892 F.3d 147 (5th Cir. 2018).

<sup>205</sup> *Id.* at 162.

<sup>206</sup> *Id.*; see *Bearden*, 461 U.S. at 666–67 (“[This issue] requires a careful inquiry into such factors as [1] the nature of the individual interest affected, [2] the extent to which it is affected, [3] the rationality of the connection between legislative means and purpose, and [4] the existence of alternative means for effectuating the purpose.”).

<sup>207</sup> *O'Donnell*, 892 F.3d at 162.

<sup>208</sup> *Id.* (citing Paul Heaton et al., *The Downstream Consequences of Misdemeanor Pretrial Detention*, 69 STAN. L. REV. 711, 786–87 (2017)). See also ACLU, *supra* note 13 (noting that setting bail without regard to one's ability to pay may incentivize criminal behavior to pay bail costs); Cammett, *supra* note 9, at 383.

to vote is “the essence of a democratic society.”<sup>209</sup> Still, the Fourteenth Amendment specifically permits denial of the right to vote due to “participation in rebellion, or other crime.”<sup>210</sup> Today, those convicted of felonies in all states except two lose their right to vote.<sup>211</sup> The Supreme Court affirmed this practice in *Richardson v. Ramirez*, by upholding a California law that completely barred all felons from re-gaining the right to vote.<sup>212</sup> Even so, some states have tried to re-enfranchise former felons through legislation. In 2018, Florida voters approved a constitutional amendment that automatically restored the right to vote to the state’s 1.4 million felons who had served their time.<sup>213</sup> But four months later, the Florida Legislature passed a contrary bill requiring complete payment of carceral debts before restoring voting rights.<sup>214</sup> This is a common practice today; rather than deny re-enfranchisement altogether, many states condition voting restoration on the complete payment of carceral debts.<sup>215</sup>

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<sup>209</sup> Reynolds v. Sims, 377 U.S. 533, 555 (1964) (“The right to vote freely for the candidate of one’s choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government.”); see also *Harper*, 383 U.S. at 670 (“[W]ealth or fee paying has, in our view, no relation to voting qualifications; the right to vote is too precious, too fundamental to be so burdened or conditioned.”).

<sup>210</sup> U.S. CONST. amend XIV, § 2.

<sup>211</sup> Cammett, *supra* note 9, at 350–51.

<sup>212</sup> 418 U.S. 24 (1974). *Richardson’s* Fourteenth Amendment holding is beyond the scope of this paper, but it rested on the tension between the fundamental nature of the right to vote and the provision in clause two of the Fourteenth Amendment that the right could be curtailed for criminals. *Id.* at 55 (“Section 1 [of the Fourteenth Amendment], in dealing with voting rights as it does, could not have been meant to bar outright a form of disenfranchisement which was expressly exempted from the less drastic sanction of reduced representation which Section 2 imposed for other forms of disenfranchisement.”).

<sup>213</sup> BRENNAN CTR. FOR JUST., *Voting Rights Restoration Efforts in Florida* (May 31, 2019), <https://www.brennancenter.org/our-work/research-reports/voting-rights-restoration-efforts-florida> [<https://perma.cc/XL6B-9BNJ>]. Before this change, the Florida constitution permanently disenfranchised citizens, granting only the governor the authority to restore voting rights. In his first five years in office, Governor Rick Scott restored rights to fewer than 2,000 Floridians.

<sup>214</sup> *Id.*

<sup>215</sup> *E.g.*, ALA. CODE § 15-22-36.1(a), (g) (2012) (stating that a person convicted of a crime who applies for certificate of eligibility to register to vote must pay all fines, court costs, fees, and victim restitution; persons convicted of certain crimes are not eligible to apply for certificate of eligibility to register to vote); ARK. CONST. amend. 51, § 11(d)(2)(A) (requiring payment of probation fees, court costs, fines, and restitution); KY. REV. STAT. ANN. § 196.045(2)(c) (2012) (requiring full payment of restitution). Scholars also argue that these laws produce racially disproportionate effects. See Pamela S. Karlan, *Convictions and Doubts: Retribution, Representation, and the Debate Over Felon Disenfranchisement*, 56 STAN. L. REV. 1147, 1156 (2004) (“Virtually every contemporary discussion of criminal disenfranchisement in the United States begins by noting the sheer magnitude of the exclusion, and its racial salience.”).

These pay-to-vote laws run headlong into *Harper v. Virginia State Board of Elections*.<sup>216</sup> In that case, the Supreme Court struck down a poll tax, requiring voters to pay to register to vote.<sup>217</sup> The Court stated, “[w]ealth, like race, creed, or color, is not germane to one’s ability to participate intelligently in the electoral process. Lines drawn on the basis of wealth or property, like those of race, are traditionally disfavored.”<sup>218</sup> Supporting this finding was the Court’s conclusion that the right to vote is a “fundamental matter in a free and democratic society.”<sup>219</sup>

There are two alternative methods for challenging these laws. The first is a traditional Equal Protection challenge based on the fundamental right at stake. *Harper* made clear that the right to vote is fundamental, and infringing fundamental rights typically triggers strict scrutiny under the Equal Protection Clause alone.<sup>220</sup> This claim does not require relying on *Bearden* at all.<sup>221</sup>

More relevant here, pay-to-vote laws are also subject to challenge under *Bearden*, for those ex-felons who cannot afford to pay off their carceral debts. *M.L.B.* stated outright that laws placing a price tag on the right to vote trigger *Bearden*’s heightened scrutiny.<sup>222</sup> Even *Rodriguez*—which limited wealth-based Equal Protection claims—stated, “The Court has long afforded zealous protection against unjustifiable governmental interference with the individual’s rights to speak and to vote.”<sup>223</sup> Some states have tried to legislate around *Bearden*. Florida’s new law, for example, defines the payment of carceral debts as part of a felon’s “term of sentence.”<sup>224</sup> In so doing, the law

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<sup>216</sup> *Harper*, 383 U.S. at 667.

<sup>217</sup> *Id.*

<sup>218</sup> *Id.* at 668 (citing *Griffin*, 351 U.S. at 17 and *Korematsu v. United States*, 323 U.S. 214, 216 (1944)).

<sup>219</sup> *Id.* at 667 (quoting *Reynolds*, 377 U.S. at 561–562).

<sup>220</sup> *M.L.B.*, 519 U.S. at 115–16; see also *Rodriguez*, 411 U.S. at 16 (“[The law at issue] could not withstand the strict judicial scrutiny that this Court has found appropriate in reviewing legislative judgments that interfere with fundamental constitutional rights or that involve suspect classifications.”).

<sup>221</sup> Some scholars have also advanced the view that these laws are subject to a disparate impact challenge, since over-policing produces disproportionate conviction and felony rates among minority communities. See, Karlan, *supra* note 215, at 1164 (“The felon disenfranchisement cases offer an attractive vehicle for courts to express their concern with the staggering burdens the war on drugs and significantly disparate incarceration rates have imposed on the minority community.”)

<sup>222</sup> *M.L.B.*, 519 U.S. at 105 (“The basic right to participate in political processes as voters and candidates cannot be limited to those who can pay for a license.”).

<sup>223</sup> *Rodriguez*, 411 U.S. at 36.

<sup>224</sup> BRENNAN CTR. FOR JUST., *supra* note 213. This is a common tactic for states to try to bypass *Bearden*. See also *Harvey v. Brewer*, 605 F.3d 1067, 1079 (9th Cir. 2010) (“We have little trouble concluding that Arizona has a rational basis for restoring voting rights only to those felons who have completed the terms of their sentences, which includes the payment of any fines or restitution orders.”); *Madison v. State*, 163 P.3d 757, 771 (Wash. 2007) (upholding a similar law).

purports not to impose a voter restriction based on ability to pay, but rather to condition voting on the completion of a sentence that itself includes a payment requirement. This is a legal shell game. In *Bearden*, the Court struck down efforts to “automatically convert” a fine into a prison sentence for those unable to pay.<sup>225</sup> Here, felon disenfranchisement laws convert a fine into a permanent denial of the right to vote by calling the fine a part of the sentence. These laws should not escape *Bearden*’s four-factor scrutiny.

Even so, not a single appellate court addressing felon voter disenfranchisement laws has applied *Bearden*. In an unpublished opinion, the Fourth Circuit upheld a \$10 fee required to begin the process of restoring felon voting rights.<sup>226</sup> Rejecting the plaintiff’s claim under *Harper*, the court stated, “it is not his right to vote upon which payment of a fee is being conditioned; rather, it is the restoration of his civil rights upon which the payment of a fee is being conditioned.”<sup>227</sup> In other words, there is no problem with denying the right to vote based on inability to pay, so long as all other civil rights are denied in kind. This view finds no support in *Bearden* and *M.L.B.*, where the heightened scrutiny can be applied to the denial of any right, including the right to “participate in political processes as voters and candidates.”<sup>228</sup>

Other circuits have flatly denied that the right to vote is fundamental for felons.<sup>229</sup> These circuits deal with *Harper* in short shrift, probably because the Court found just the opposite: the right to vote is fundamental and cannot be conditioned on payment.<sup>230</sup> These cases also find little support in *Richardson*. In that case, the only question was whether California could deny a felon’s right to vote, *across the board*.<sup>231</sup> *Richardson*, however, is not controlling when a state takes away the right to vote, but later provides a selective avenue for restoration, based on ability to pay. Rather, *Griffin* and *Bearden* are better

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<sup>225</sup> *Bearden*, 461 U.S. at 667 (“The rule of *Williams* and *Tate*, then, is that the State cannot impose a fine as a sentence and then automatically convert it into a jail term solely because the defendant is indigent and cannot forthwith pay the fine in full.”) (citations omitted).

<sup>226</sup> *Howard v. Gilmore*, 205 F.3d 1333 (4th Cir. 2000).

<sup>227</sup> *Id.* at \*2. The court also misinterpreted *Harper* as a case relying solely on the Twenty-fourth Amendment, rather than an intersectional claim relying on Equal Protection as well.

<sup>228</sup> *M.L.B.*, 519 U.S. at 124.

<sup>229</sup> See *Johnson v. Bredesen*, 624 F.3d 742, 746 (6th Cir. 2010) (“Having lost their voting rights, Plaintiffs lack any fundamental interest to assert.”); *Madison*, 163 P.3d at 770 (“Convicted felons . . . no longer possess that fundamental right as a direct result of their decision to commit a felony.”); *Harvey*, 605 F.3d at 1079 (“[T]he denial of the statutory benefit of re-enfranchisement . . . is not a fundamental right.”).

<sup>230</sup> *Harper*, 383 U.S. at 666.

<sup>231</sup> See *Cammett*, *supra* note 9, at 391 (“Because *Richardson v. Ramirez* allows courts to render felons’ voting rights less than fundamental, courts have engaged in the use of this legal formality.”).

analogs.<sup>232</sup> In *Griffin*, the Court noted that states were not required to offer an appeal in the first place, but if they did offer an appeal, they must do so in a way that did not selectively discriminate against the poor.<sup>233</sup> So it may be true that, under *Richardson*, states can deny felons the right to vote.<sup>234</sup> But when states offer re-enfranchisement in a way that closes the voting booth only to those who cannot pay, the discrimination is no different than in *Griffin*. Finally, even if these courts are correct that a felon's right to vote is not fundamentals, *Bearden* still may apply. And indeed, *M.L.B.* stated that when the voting right is conditioned on the ability to pay, the law must be subjected to *Bearden's* four-factor scrutiny.<sup>235</sup>

If the courts subjected these laws to *Bearden's* heightened scrutiny,<sup>236</sup> they would find the laws cannot stand. The Washington Supreme Court recently summarized, then (wrongly) refused to apply *Bearden's* heightened scrutiny against pay-to-vote laws.<sup>237</sup> Under *Bearden*, (1) voting is a significant right—indeed, fundamental; (2) there is little means-end rationality because “wealth . . . is not germane to one's ability participate intelligently in the electoral process”<sup>238</sup>; (3) even though the state is entitled to recoup carceral debts, “the basic right to participate in political processes as voters and candidates cannot be limited to those who can pay for a license”<sup>239</sup>; and (4) there are alternatives to a pay-to-vote law (states could offer a community service repayment option, rather than denying the right to vote). Felon disenfranchisement laws that require carceral debt repayment, when stripped bare, are nothing more than modern day poll taxes for ex-felons. Under *Bearden*, these laws cannot stand because they unjustifiably burden the right to vote solely on the inability to pay.

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<sup>232</sup> Plaintiffs in *Griffin*, *Williams*, and *Bearden* were all criminally convicted persons.

<sup>233</sup> *Griffin*, 351 U.S. at 18 (“It is true that a State is not required by the Federal Constitution to provide appellate courts or a right to appellate review at all. . . . But that is not to say that a State that does grant appellate review can do so in a way that discriminates against some convicted defendants on account of their poverty.”).

<sup>234</sup> *Richardson*, 418 U.S. at 54.

<sup>235</sup> *M.L.B.*, 519 U.S. at 124.

<sup>236</sup> See *Bearden*, 461 U.S. at 666–67 (“[This issue] requires a careful inquiry into such factors as ‘[1] the nature of the individual interest affected, [2] the extent to which it is affected, [3] the rationality of the connection between legislative means and purpose, and [4] the existence of alternative means for effectuating the purpose.’”).

<sup>237</sup> *Madison*, 163 P.3d at 771 (summarizing and summarily rejecting the dissent's theory of the case).

<sup>238</sup> *Harper*, 383 U.S. at 668.

<sup>239</sup> *M.L.B.*, 519 U.S. at 105.

## CONCLUSION

While preventing injustice to the poor may pose “an age-old problem,” it remains alive and well today.<sup>240</sup> Injustice reared its head in Ferguson when a woman cited for a parking violation ended up owing over \$1000 in fines and was incarcerated twice for her inability to pay. Likewise, when indigent persons are locked up for being unable to repay their public defenders, there is an injustice. When the poor are detained in pretrial detention because they cannot pay fixed-sum bail, there is an injustice. And when an ex-felon’s right to vote is conditioned on ability to pay, there is an injustice. The Court has provided a framework for identifying these injustices in *Bearden*’s heightened, four-factor scrutiny. This scrutiny should apply to laws denying rights to the poor “solely by reason of their indigency.”<sup>241</sup> Further, *M.L.B.* stated that *Bearden* applies, at the very least, for criminal and quasi criminal cases and when the right to vote or parental rights are at stake.<sup>242</sup> But this should not limit *Bearden*’s scrutiny to that context. Instead, “[p]eople [should] never ceas[e] to hope and strive to move closer to that goal” of equal justice for rich and poor alike.<sup>243</sup>

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<sup>240</sup> *Griffin*, 351 U.S. at 16.

<sup>241</sup> *Bearden*, 461 U.S. at 667.

<sup>242</sup> *M.L.B.*, 519 U.S. at 124.

<sup>243</sup> *Griffin*, 351 U.S. at 16.