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CRIMINAL JUSTICE USER FEES AND THE PROCEDURAL ASPECT OF EQUAL JUSTICE

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INTRODUCTION: BARRIERS TO LITIGATION ACCESS

In *Griffin v. Illinois*,[1] a plurality of the Supreme Court proclaimed: "There can be no equal justice where the kind of trial a man gets depends on the amount of money he has."[2] In announcing this principle of equal justice, *Griffin* — which held that indigent defendants must be exempt from payment for trial transcripts where the state has conditioned the right to criminal appeals upon production of such transcripts[3] — inaugurated "the fundamental rights strand of equal protection," which protects "against governmental action producing disparate wealth effects with regard to certain 'fundamental' interests."[4] Beginning with this prototypical case,[5] the Court has continued to construct this doctrine of "equal justice" upon the mutually reinforcing textual pillars of the Constitution's Equal Protection and Due Process Clauses.[6]

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[1] 351 U.S. 12 (1956).

[2] *Id.* at 19 (plurality opinion).

[3] *Id.* at 13–15, 19–20.

[4] Michael Klarman, *An Interpretive History of Modern Equal Protection*, 90 MICH. L. REV. 213, 264 (1991).

[5] *See* M.L.B. v. S.L.J., 519 U.S. 102, 110 (1996).

[6] *See* Bearden v. Georgia, 461 U.S. 660, 665 (1983); 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, 361 (2009) ("The Supreme Court has developed a blended due process and equal protection approach to cases involving poverty and access to the courts."); *see also* Beth A. Colgan, *Wealth-Based Penal Disenfranchisement*, 72 VAND. L. REV. 55, 64 & n.34 (2019) (collecting scholarship that "argue[s] that the dual use of constitutional provisions, including the due process and equal protection clauses, can render the provisions mutually reinforcing," *id.* at 64 n.34, thereby "providing greater protection than either [provision] would have on its own," *id.* at 64); Brandon L. Garrett, *Wealth, Equal Protection, and Due Process*, 61 WM. & MARY L. REV. 397, 403 (2019) ("Section 1 of the Fourteenth Amendment should be understood

A. The Modern Standard

If *Griffin* represents the "foundation case,"[7] then *Bearden v. Georgia*[8] is the modern touchstone for evaluating claims that wealth-based barriers to litigation access (especially in the criminal justice realm) violate the principle of equal justice.[9] *Bearden* held that the Constitution prohibits a sentencing court from revoking probation for failure to pay a fine and restitution, absent the findings that the defendant "willfully refused to pay or failed to make sufficient bona fide efforts legally to acquire the resources to pay," and that "alternative measures of punishment other than imprisonment" are inadequate to meet the State's legitimate interests.[10] In reaching this conclusion, the Court articulated a four-part test for assessing "equal justice" claims — that is, challenges to policies that deny indigents equal access to a fundamental right: courts should make "a careful inquiry"[11] into (1) the nature of the individual interest concerned; (2) the extent to which that interest is impacted by the government policy; (3) whether the nexus between the policy's purpose and means is rational; and (4) whether any alternative means exist to accomplish that purpose.[12] Applying this test, the Court concluded that the state's "penological interests"[13] in punishing a failure to pay cannot justify impinging on an individual's fundamental right to freedom from bodily restraint, *unless* the state first considers the individual's ability to pay and whether the state's interests can be "served fully by alternative means."[14]

B. The Modern Standard's Shortcomings

Perhaps because of *Bearden*'s idiosyncratic blending of equal protection and due process principles, courts and scholars alike have struggled to ascertain the contours of its equal-justice test. Recent scholarship, however, has redoubled attempts to bring clarity to *Bearden*'s nearly

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holistically as part of a structure designed to ensure citizenship (and the rights thereof) and government's duties to persons."); Laurence H. Tribe, *Equal Dignity: Speaking Its Name*, 129 HARV. L. REV. F. 16, 17 (2015) ("*Obergefell*'s chief jurisprudential achievement is to have tightly wound the double helix of Due Process and Equal Protection into a doctrine of *equal dignity*.").

[7] *M.L.B.*, 519 U.S. at 110.

[8] 461 U.S. 660.

[9] *See* Colgan, *supra* note 6, at 59 n.12, 62 (identifying *Bearden* as the "key case," *id.* at 59 n.12, and referring to *Griffin* and its progeny as the "*Bearden* line," *id.* at 62).

[10] *Bearden*, 461 U.S. at 672.

[11] *Id.* at 666.

[12] *Id.* at 666–67 (quoting Williams v. Illinois, 399 U.S. 235, 260 (1970) (Harlan, J., concurring in the result)).

[13] *Id.* at 670.

[14] *Id.* at 672.

forty-year-old test.[15] The renewed interest in deciphering the *Bearden* line is partly attributable to the recent proliferation of "legal financial obligations" (LFOs) — the monetary sanctions, including fines, fees, restitution, and surcharges, imposed upon criminal defendants[16] — and the surging community activism[17] and civil rights litigation[18] challenging LFO practices, from Ferguson, Missouri,[19] to Washington State.[20]

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[15] *See* Colgan, *supra* note 6, at 91–115 (providing detailed doctrinal analysis of *Bearden*); *see also* Darryl K. Brown, *The Case for a Trial Fee: What Money Can Buy in Criminal Process*, 107 CALIF. L. REV. 1415, 1432–34 (2019) (describing *Bearden*'s legacy vis-à-vis regulation of incarceration for inability to pay fines and fees); Jaclyn Kurin, *Indebted to Injustice: The Meaning of "Willfulness" in a* Georgia v. Bearden *Ability to Pay Hearing*, 27 GEO. MASON U. C.R. L.J. 265, 297–305 (2017) (discussing courts' differing interpretations of "willful refusal," *id.* at 297, and arguing that courts should interpret willfulness to include "intentional and volitional elements," *id.* at 305); Wayne A. Logan & Ronald F. Wright, *Mercenary Criminal Justice*, 2014 U. ILL. L. REV. 1175, 1225 n.369 (noting that courts often construe *Bearden* narrowly); Andrea Marsh & Emily Gerrick, *Why Motive Matters: Designing Effective Policy Responses to Modern Debtors' Prisons*, 34 YALE L. & POL'Y REV. 93, 96–97, 118–19 (2015) (arguing that the *Bearden* line of cases has built "personal responsibility . . . into the foundations of constitutional limitations on incarceration for debt," *id.* at 118); Colin Reingold, Essay, *Pretextual Sanctions, Contempt, and the Practical Limits of* Bearden*-Based Debtors' Prison Litigation*, 21 MICH. J. RACE & L. 361, 362–63 (2016) (attempting to reconcile *Bearden*'s widespread invocation in courtrooms and criminal codes with the fact that "every day in courtrooms across America[,] criminal defendants are sent to jail for being poor," *id.* at 362); Note, *State Bans on Debtors' Prisons and Criminal Justice Debt*, 129 HARV. L. REV 1024, 1026 (2016) ("Most commentators have thus far focused on the 1983 Supreme Court case *Bearden v. Georgia*."); Ann K. Wagner, Comment, *The Conflict over* Bearden v Georgia *in State Courts: Plea-Bargained Probation Terms and the Specter of Debtors' Prison*, 2010 U. CHI. LEGAL F. 383, 388 (2010) (contending *Bearden* requires courts to treat plea-bargained probation terms no differently than judge-imposed probation terms).

[16] ALEXES HARRIS, A POUND OF FLESH: MONETARY SANCTIONS AS PUNISHMENT FOR THE POOR 18 (2016) ("[S]tates have recently formalized the imposition and enforcement of monetary sanctions in state laws and expanded the types of fines, fees, and surcharges imposed on felony defendants at the time of conviction."); John D. King, *Privatizing Criminal Procedure*, 107 GEO. L.J. 561, 594 (2019) ("[T]he use and popularity of court costs and fees has greatly increased in recent years."); Karin D. Martin et al., *Monetary Sanctions: Legal Financial Obligations in US Systems of Justice*, 2018 ANN. REV. CRIMINOLOGY 471, 472 (noting "ubiquity" of LFOs).

[17] *See, e.g.*, John Hickey, *Berkeley Helps to Push Back Against Excessive California Court Fees and Fines*, BERKELEY NEWS (June 21, 2019), https://news.berkeley.edu/2019/06/21/berkeley-helps-to-push-back-against-excessive-california-court-fees-and-fines [https://perma.cc/5A7J-4JTP] (describing protests in Ferguson and lobbying efforts in California).

[18] *See, e.g.*, Garrett, *supra* note 6, at 402 (describing a "wave of national litigation concerning the constitutionality of fines, fees, cash bail, and other ways in which the indigent lose important rights").

[19] *See* Consent Decree at 10, 79–80, United States v. City of Ferguson, 4:16-cv-000180 (E.D. Mo. Mar. 17, 2016) [hereinafter Ferguson Consent Decree].

[20] ACLU, IN FOR A PENNY: THE RISE OF AMERICA'S NEW DEBTORS' PRISONS 65–67 (2010), https://www.aclu.org/sites/default/files/field_document/InForAPenny_web.pdf [https://perma.cc/5S6J-JQUP] (describing activism around LFOs in Washington); Press Release, ACLU of Wash., Legislature Passes Bill to Bring Fairness to Washington's System of Legal Financial Obligations (Mar. 6, 2018), https://www.aclu-wa.org/news/legislature-passes-bill-bring-fairness-washington%E2%80%99s-system-legal-financial-obligations [https://perma.cc/F7GU-6PD9].

The Obama DOJ, ACLU, NAACP Legal Defense and Educational Fund, Inc. (LDF), and public defender offices, including ArchCity Defenders, Ohio Office of the Public Defender, and San Francisco Public Defender, have all litigated the constitutionality of LFO practices. *See In re*

The situation in Ferguson — which garnered national attention in the wake of the police killing of unarmed Black teenager Michael Brown — has become emblematic of a particularly disturbing pattern[21]: as LFOs have increased in popularity, they have also "come to serve as a fiscal crutch for cash-strapped governments," who wield them against poor constituents as a "regressive tax."[22] In 2015, the Justice Department released a report exposing Ferguson's reliance on LFOs and overpolicing to generate municipal revenue that brought national attention not only to the injustice of such revenue-raising police practices,[23] but also to the overt racial bias with which such practices are implemented.[24] While Ferguson has become a symbol of these problems, it is unfortunately not unique in punishing its residents, especially those of color, for their poverty.[25] Across all locales, the reliance on LFOs consistently results in overpunishment of society's poorest populations, a negative

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Humphrey, 228 Cal. Rptr. 3d 513, 516 (Ct. App. 2018); Ferguson Consent Decree, *supra* note 19; S.F. PUB. DEF., ANNUAL REPORT AND 2019 CALENDAR (2019), http://sfpublicdefender.org/wp-content/uploads/sites/2/2019/01/2018-Report-2019-Calendar.pdf [https://perma.cc/JF8N-YV2W]; Press Release, ACLU, Settlement Reached in Lawsuit Ending Benton County's Modern-Day Debtors' Prison (June 1, 2016), https://www.aclu.org/press-releases/settlement-reached-lawsuit-ending-benton-countys-modern-day-debtors-prison [https://perma.cc/2M67-D28A]; Press Release, ArchCity Defs., ArchCity Defenders Files Subsequent Debtors' Prison Lawsuit Against Edmundson (Dec. 12, 2018), https://www.archcitydefenders.org/archcity-defenders-files-subsequent-debtors-prison-lawsuit-against-edmundson-2 [https://perma.cc/XGN7-JUWR]; Press Release, NAACP Legal Def. & Educ. Fund, Inc., LDF Files Amicus Brief in Support of Requiring Courts to Assess Defendants' Ability to Pay Court Costs (May 7, 2019), https://www.naacpldf.org/press-release/ldf-files-amicus-brief-support-requiring-courts-assess-defendants-ability-pay-court-costs [https://perma.cc/U69Z-HNA6]; Dan Trevas, *Must Trial Court Consider Ability to Pay When Asked to Waive Court Costs?*, CT. NEWS OHIO (Jan. 7, 2020), http://www.courtnewsohio.gov/cases/previews/20/0107/0107.asp [https://perma.cc/7564-U5FX].

The Civil Rights Corps has been especially prolific in litigating issues related to criminal justice debts. *See Challenging the Money Bail System*, C.R. CORPS, https://www.civilrightscorps.org/work/wealth-based-detention [https://perma.cc/HG3C-EMX4].

[21] *See, e.g.*, Joseph Shapiro, *In Ferguson, Court Fines and Fees Fuel Anger*, NPR (Aug. 25, 2014, 5:56 PM), https://www.npr.org/2014/08/25/343143937/in-ferguson-court-fines-and-fees-fuel-anger [https://perma.cc/MW93-87PC] (tying protests against police in Ferguson to its LFO practices).

[22] King, *supra* note 16, at 594. *See generally* Lisa Foster, *Injustice Under Law: Perpetuating and Criminalizing Poverty Through the Courts*, 33 GA. ST. U. L. REV. 695 (2017).

[23] *See* CIVIL RIGHTS DIV., U.S. DEP'T OF JUSTICE, INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT 9–15 (2015), https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf [https://perma.cc/D5CT-MZY5].

[24] *See* U.S. COMM'N ON CIVIL RIGHTS, TARGETED FINES AND FEES AGAINST COMMUNITIES OF COLOR: CIVIL RIGHTS & CONSTITUTIONAL IMPLICATIONS 1 (2017), https://www.usccr.gov/pubs/2017/Statutory_Enforcement_Report2017.pdf [https://perma.cc/4E9Q-7KQB] ("The Department's investigation revealed that the financial relationship between Ferguson's municipal courts and its police department resulted in the disproportionate ticketing, fining, and jailing of its African American residents. The Department also found evidence of intentional racism in these practices.").

[25] *Id.* (noting DOJ has issued two "Dear Colleague" letters and has sponsored grants relating to fines and fees in five state jurisdictions). *See generally id.* ch. 3.

impact that falls disparately on people of color.[26] This surge in LFOs directly implicates *Bearden*'s central teaching — that imprisonment for failure to pay is presumptively unconstitutional — because the increase in LFOs has been accompanied by a concomitant increase in "incarceration of individuals for failure to pay LFOs."[27]

Furthermore, because the *Bearden* line applies beyond cases in which imprisonment is at stake,[28] the "equal justice" doctrine should be relevant to the collateral consequences of failure to pay LFOs,[29] including driver's licenses suspensions and disenfranchisement,[30] as well as to the constitutionality of criminal justice "user fees."[31] These "user fees" are the increasingly common practice of charging criminal defendants for the costs of their prosecutions, including those incurred for the exercise of Sixth Amendment trial rights, like the right to counsel.[32] Paradoxically, this "'offender-funded' system"[33] attempts to recoup the expenses of our distended criminal justice system from a population that is already disproportionately poor, vulnerable, and marginalized.[34] Research shows that LFOs interact with the preexisting economic vulnerability faced by many with criminal convictions to further exacerbate

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[26] *See, e.g.*, Joseph Shapiro, *As Court Fees Rise, the Poor Are Paying the Price*, NPR (May 19, 2014, 4:02 PM), https://www.npr.org/2014/05/19/312158516/increasing-court-fees-punish-the-poor [https://perma.cc/P9YZ-9GVM].

[27] Neil L. Sobol, *Charging the Poor: Criminal Justice Debt & Modern-Day Debtors' Prisons*, 75 MD. L. REV. 486, 492 (2016); *see also* U.S. COMM'N ON CIVIL RIGHTS, *supra* note 24, at 15–16.

[28] M.L.B. v. S.L.J., 519 U.S. 102, 111 (1996); *see* Pamela S. Karlan, *Equal Protection, Due Process, and the Stereoscopic Fourteenth Amendment*, 33 MCGEORGE L. REV. 473, 481 & n.55 (2002).

[29] *See* Thomas v. Haslam, 303 F. Supp. 3d 585, 607–12 (M.D. Tenn. 2018). *But see* Fowler v. Benson, 924 F.3d 247, 260–63 (6th Cir. 2019).

[30] *See* Martin et al., *supra* note 16, at 475.

[31] *See, e.g.*, Alexander v. Johnson, 742 F.2d 117, 124–25 (4th Cir. 1984) (evaluating the constitutionality of a "user fee" for court-appointed counsel); People v. Jackson, 769 N.W.2d 630, 639 (Mich. 2009) (same).

Fuller v. Oregon, 417 U.S. 40 (1974), is the leading Supreme Court case on the constitutional limits on criminal justice user fees. *See id.* at 47–54. Although that case predated *Bearden* (and did not rely on pre-*Bearden* equal justice cases, like *Griffin*), subsequent decisions interpreting *Fuller*, such as the Fourth Circuit's *Alexander v. Johnson*, 742 F.2d 117, decision, have recognized *Bearden*'s relevance to the constitutionality of criminal justice user fees. *See id.* at 124.

[32] *See* King, *supra* note 16, at 566–68; *see also* Sobol, *supra* note 27, at 492 ("Fees have expanded to include a wide variety of charges purportedly to reimburse the costs of state and local entities. The fees even cover constitutionally required services such as public defenders." (footnotes omitted)); Shapiro, *supra* note 26 ("A state-by-state survey conducted by NPR found that defendants are charged for many government services that were once free, including those that are constitutionally required.").

[33] Sobol, *supra* note 27, at 492.

[34] *See* Shapiro, *supra* note 26 ("The people most likely to face arrest and go through the courts are poor, says sociologist Alexes Harris . . . . 'They tend to be people of color, African-Americans and Latinos . . . . They tend to be high school dropouts, they tend to be people with mental illness, with substance abuse. So these are already very poor and marginalized people in our society, and then we impose these fiscal penalties to them and expect that they make regular payments, when in fact the vast majority are unable to do so.'").

their financial circumstances, "resulting in a lack of economic stability and mobility."[35] And of course, LFOs and offender funding implicate issues of not only constitutional criminal procedure, but also racial justice: "Taken together, the vast racial disparities in wealth[,] combined with the significant racial disparities throughout the criminal justice system and the monetary sanctions that accrue at each step of case processing[,] create enormous potential for these sanctions to worsen racial disparities."[36]

Accurate application of the *Bearden* line is thus essential to ensuring that these pervasive offender-funding and LFO practices do not run afoul of the Constitution's guarantee of "equal justice," regardless of wealth. Professor Laurence Tribe has developed a helpful "double helix" metaphor for conceptualizing the relationship between the Equal Protection and Due Process Clauses of the Fourteenth Amendment, which he has used to elucidate the doctrine of equal dignity that animates landmark fundamental rights cases like *Lawrence v. Texas*[37] and *Obergefell v. Hodges*.[38] To that end, this Essay aims to clarify the application of the sometimes-enigmatic doctrine by isolating — without permanently unzipping — the due process strand from its mutually reinforcing equal protection counterpart in the "double helix" of equal dignity. Although prior scholarship has not paid much attention to the individual contributions of each clause to the "blended" doctrine,[39] the Supreme Court has given some sparse indication as to the discrete role of each strand: "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."[40] This Essay will draw upon "equal justice" and procedural due process precedents to develop a unified, descriptive theory of the procedural aspect of equal justice.

But the goal is more than simplifying an often-inscrutable doctrine: a focus on the procedural aspect of equal justice may be strategically

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[35] ELLA BAKER CTR. FOR HUMAN RIGHTS ET AL., WHO PAYS?: THE TRUE COST OF INCARCERATION ON FAMILIES 7 (2015), https://ellabakercenter.org/sites/default/files/downloads/who-pays.pdf [https://perma.cc/23X6-J87V] (discussing how the economic opportunities, stability, and mobility for people with convictions are diminished because of "copious fees, fines, and debt").

[36] Martin et al., *supra* note 16, at 474; *see* Sobol, *supra* note 27, at 492 ("As may be expected, the impact on the poor and minorities is especially severe.").

[37] 539 U.S. 558 (2003).

[38] 135 S. Ct. 2584 (2015); *see* Tribe, *supra* note 6, at 17; Laurence H. Tribe, Essay, Lawrence v. Texas*: The "Fundamental Right" that Dare Not Speak Its Name*, 117 HARV. L. REV. 1893, 1898 (2004) (outlining a "narrative in which due process and equal protection, far from having separate missions and entailing different inquiries, are profoundly interlocked in a legal double helix").

[39] *But see, e.g.*, Anderson, *supra* note 6, at 361–67; *see also* Colgan, *supra* note 6, at 100–04.

[40] M.L.B. v. S.L.J., 519 U.S. 102, 120 (1996) (citation omitted) (first citing Griffin v. Illinois, 351 U.S. 12, 23 (1956) (Frankfurter, J., concurring in the judgment); and then citing Ross v. Moffitt, 417 U.S. 600, 609 (1974)).

useful in ensuring adequate protections for indigents in the justice system through constitutional litigation. As an entry point and an illustrative example, the Essay focuses upon constitutional challenges to a little-studied, but profoundly important, species of "user fees": those imposed by many states on criminal defendants who exercise their Sixth Amendment jury trial right.[41] In addition to further clarifying the constitutional mechanics of the *Bearden* doctrine, this Essay seeks to supplement the literature on jury fees, specifically, and to cast new light on how the Constitution constrains offender funding of the criminal justice system generally.

The Essay's central thesis is that the Constitution imposes certain procedural constraints on states' authority to charge criminal justice LFOs that burden fundamental rights — be they jury fees, counsel costs, or simple fines — and that *Bearden* best articulates the doctrinal test for determining what is constitutionally required. Given the paramount importance of the jury trial right and the minimal governmental interest in attempting to recover user fees from indigent defendants, the Constitution requires, at the very least, consideration of ability to pay and the opportunity for judicial waiver of user-fee debt before governments can impose such fees on defendants.

Part I addresses the failure of the courts to develop a unified doctrinal approach to the constitutionality of user fees that burden fundamental rights, and explains why such a unified approach is normatively desirable. Part II analyzes lower court cases that rely on the due process strand of *Bearden*'s equal justice principle. These cases suggest a unified doctrinal approach to policies that burden indigents' access to fundamental rights: the Constitution requires certain procedures before governments impose such burdens on indigents — namely, an ability-to-pay determination and a potential indigency waiver. Such procedures are necessary, if not sufficient, to render constitutional user fees that burden fundamental rights. Part III explores how this doctrine of procedural equal justice might be used strategically to challenge the constitutionality of criminal justice user-fee recoupment and franchise restoration conditioned on LFO repayment.

I. THE NEED FOR A UNIFIED DOCTRINAL APPROACH TO USER FEES

The constitutional status of user fees lies at the intersection of two constitutional doctrines: (1) *United States v. Jackson*'s[42] proscription

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[41] *See* King, *supra* note 16, at 578; T. Ward Frampton, Comment, *The Uneven Bulwark: How (and Why) Criminal Jury Trial Rates Vary by State*, 100 CALIF. L. REV. 183, 208 (2012) ("In many states . . . criminal defendants who seek to exercise their fundamental right to a jury trial have been forced to shoulder part of that burden.").

[42] 390 U.S. 570 (1968).

against penalizing the exercise of constitutional rights,[43] and (2) *Bearden*'s equal justice principle, which prohibits wealth discrimination with respect to the provision of fundamental rights.[44]

The entire corpus of Supreme Court doctrine on the constitutionality of user fees consists of two cases from the 1970s. In *Jackson*, the Supreme Court struck down a provision of the Federal Kidnapping Act that made the death penalty applicable to only those defendants who asserted their jury trial rights.[45] Yet "*Jackson* did not hold, as subsequent decisions have made clear, that the Constitution forbids every government-imposed choice in the criminal process that has the effect of discouraging the exercise of constitutional rights"[46]: the relevant distinction between unconstitutional penalties and mere "discouraging effect[s]"[47] is whether the state has "'*unnecessarily*' and 'needlessly chill[ed] the exercise of basic constitutional rights.'"[48] At first blush, imposition of jury fees might appear to categorically violate *Jackson*'s prohibition on policies that have an unnecessary "chilling effect" on the exercise of constitutional rights.[49]

When the Supreme Court directly addressed the constitutionality of user fees, however, it applied the *Jackson* test in a perfunctory manner, ignoring the ways that user fees do, in fact, chill the exercise of constitutional rights.[50] Rather than imposing a total substantive prohibition on user fees, the doctrine authorizes criminal justice user fees, as long as certain procedures are in place to protect indigent defendants — a principle that prefigures the core holding of *Bearden*.[51]

This Part will describe the Supreme Court's existing user-fees precedents — which are limited to fees for court-appointed counsel (the "most familiar user fee"), despite the fact that criminal justice fees have proliferated in variety.[52] Then, it will explain why the preexisting doctrine must be updated to address this proliferation and to provide uniform protection for all fundamental criminal procedure rights, including the jury trial right.

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43 *See id.* at 582–83.
44 *See* Bearden v. Georgia, 461 U.S. 660, 672–73 (1983).
45 *Jackson*, 390 U.S. at 581–83.
46 Chaffin v. Stynchcombe, 412 U.S. 17, 30 (1973).
47 *Id.* at 31.
48 *Id.* at 30 (alteration in original) (emphasis added) (quoting *Jackson*, 390 U.S. at 582).
49 *Jackson*, 390 U.S. at 582–83.
50 *See* Fuller v. Oregon, 417 U.S. 40, 54 (1974).
51 *See* Anderson, *supra* note 6, at 357 ("The essence of the problem [with user fees] is procedural . . . .").
52 King, *supra* note 16, at 562.

A. Current Doctrine on User Fees

Although the Supreme Court has never addressed the constitutionality of user fees for jury costs specifically, it has twice addressed a related issue, namely: constitutional limits on recoupment of fees for court-appointed counsel. First, in *James v. Strange*,[53] the Court considered a constitutional challenge to a Kansas statute authorizing recovery of counsel fees from criminal defendants.[54] Although the lower court "invalidated this statute on the grounds that it 'needlessly encourage[d] indigents'" to waive their "right to counsel" under *Gideon v. Wainwright*,[55] the Supreme Court declined to reach that issue and affirmed on other grounds.[56] The statute in *James* violated equal protection because it deprived indigent defendants of "the array of protective exemptions Kansas [had] erected for other civil judgment debtors,"[57] such as "restrictions on the amount of disposable earnings subject to garnishment" and "protection of the debtor from wage garnishment at times of severe personal or family sickness."[58] The Court concluded this distinction between indigent defendants and other civil judgment debtors was irrational, in violation of the Equal Protection Clause.[59]

Two years later, the Court considered a challenge to Oregon's method of recouping counsel costs from indigent defendants. In *Fuller v. Oregon*,[60] the Supreme Court rejected the proposition that user fees for court-appointed defense categorically violate the Sixth Amendment right to counsel.[61] The Court emphasized that *Jackson* and its progeny proscribe only *needless* burdens on constitutional rights, and Oregon's legislation was tailored to avoid such unnecessary chilling effects[62]:

> Oregon's recoupment statute merely provides that a convicted person who later becomes able to pay for his counsel may be required to do so. Oregon's legislation is tailored to impose an obligation only upon those with a foreseeable ability to meet it, and to enforce that obligation only against those who actually become able to meet it without hardship.[63]

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[53] 407 U.S. 128 (1972).

[54] *Id.* at 128.

[55] 372 U.S. 335 (1963).

[56] *James*, 407 U.S. at 134 (quoting Strange v. James, 323 F. Supp. 1230, 1233 (1971), *aff'd*, 407 U.S. 128).

[57] *Id.* at 135. Although this is not the case for every user fee, *see, e.g.*, ABBY SHAFROTH ET AL., NAT'L CONSUMER LAW CTR., CONFRONTING CRIMINAL JUSTICE DEBT: A GUIDE FOR LITIGATION 4 (2016), the debts in *James* were treated as civil judgments. *James*, 407 U.S. at 128.

[58] *James*, 407 U.S. at 135.

[59] *Id.* at 140–42.

[60] 417 U.S. 40 (1974).

[61] *Id.* at 52–53.

[62] *Id.* at 53–54.

[63] *Id.* at 54.

Fuller thus makes clear that certain procedural protections are essential to the constitutionality of fee-recoupment statutes, even if there is no absolute substantive prohibition on their implementation.[64] Oregon's user fee was "never mandatory,"[65] and the following procedural constraints were sufficient to satisfy the Court that the statute was constitutional: (1) "a requirement of repayment [was permitted to] be imposed only upon a *convicted* defendant";[66] (2) "a court [was not permitted to] order a convicted person to pay these expenses," unless it found "he [was or would] be able to pay them" after "tak[ing] account of the financial resources of the defendant and the nature of the burden that payment of costs [would] impose";[67] (3) a convicted person "[was permitted to] at any time petition the court which sentenced him for remission of the payment of costs or of any unpaid portion thereof,"[68] which the state court was permitted to grant if payment "[would] impose manifest hardship on the defendant or his immediate family";[69] and (4) "no convicted person [could] be held in contempt for failure to repay if he show[ed] that 'his default was not attributable to an intentional refusal to obey the order of the court or to a failure on his part to make a good faith effort to make the payment.'"[70] *Fuller* thus "provide[s] a roadmap to the states" on how to charge user fees for court-appointed counsel "*without* violating constitutional principles of due process, equal protection, or the Sixth Amendment right to counsel."[71]

Although it is clear that Oregon's procedural protections are *sufficient* to pass constitutional muster, it is not clear from the Court's opinion that they are all *necessary*.[72] Professor Helen Anderson has argued that *Fuller* "implied[ly]" held that Oregon's protections were necessary features of a user-fee scheme and that, without them, such schemes violate *Jackson*'s anti-chilling principle and *Bearden*'s equal justice principle.[73] Because challenges to user-fee-recoupment schemes often arise in the context of direct appeals from state criminal convictions or sentences,

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64 *See* Anderson, *supra* note 6, at 357 ("The essence of the problem is procedural . . . .").

65 *Fuller*, 417 U.S. at 44.

66 *Id.* at 45.

67 *Id.* (quoting OR. REV. STAT. § 161.665(1) (1973)).

68 *Id.* (quoting OR. REV. STAT. § 161.665(4)).

69 *Id.* at 45–46 (quoting OR. REV. STAT. § 161.665(4)).

70 *Id.* at 46 (quoting OR. REV. STAT. § 161.685(2)).

71 King, *supra* note 16, at 585 (emphasis added).

72 *But see* Brief of Amicus Curiae NAACP Legal Defense & Educational Fund, Inc. in Support of Appellee Darren Taylor at 9, State v. Taylor, No. 2018-0797 (Ohio May 7, 2019) [hereinafter LDF *Taylor* Amicus].

73 Anderson, *supra* note 6, at 357.

state courts have been the primary engines of the doctrine's development. Some state courts agree with Anderson,[74] while others have concluded that a "statute need not provide all the safeguards of the Oregon statute [in *Fuller*]."[75] The federal courts are similarly divided as to whether the procedures in *Fuller* are constitutionally necessary or sufficient.[76] For courts that treat *Fuller*'s procedural protections as a constitutional mandate, the general consensus is that consideration of ability to pay and the opportunity for judicial waiver of user-fee debt are the paramount criteria of constitutionality.[77]

Courts applying *Fuller* have diverged not only on the constitutional necessity of the procedural protections in that case, but also on its application beyond the narrow context of user fees for court-appointed counsel. Counsel fees are the most prevalent,[78] and "[c]hallenges to the imposition of fees for the exercise of other constitutional rights are less frequent";[79] scholars have similarly concentrated their attention on counsel fees.[80] But as criminal procedure has increasingly "privatiz[ed],"[81] user fees for other Sixth Amendment rights — such as the right to confront adverse witnesses,[82] the right to compulsory process,[83]

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[74] State v. Blank, 930 P.2d 1213, 1218–19 (Wash. 1997) (noting that "[a] number of courts have, as this court has, treated the characteristics identified in *Fuller* as constitutionally mandatory guidelines," even though "the Court in *Fuller* did not expressly say all of these requirements are constitutionally necessary"); *see also* LDF *Taylor* Amicus, *supra* note 72, at 9 ("Most state . . . courts have interpreted *Fuller* to stand for the proposition that Oregon's protections for indigent defendants . . . were *necessary* to the constitutionality of the cost-recoupment statute.").

[75] State v. Kottenbroch, 319 N.W.2d 465, 473 (N.D. 1982); *see also* State v. Albert, 899 P.2d 103, 110–12 (Alaska 1995) (concluding that consideration of ability to pay before imposing liability was unnecessary where certain procedural safeguards were in place, including that "recoupment debtors have the additional right to petition the court for reduction or remission of a judgment based on a showing of manifest hardship," *id.* at 112).

[76] *Compare* Alexander v. Johnson, 742 F.2d 117, 124 (4th Cir. 1984) (deriving five "required features of a constitutionally acceptable approach" from *James*, *Fuller*, and *Bearden*), *and* Olson v. James, 603 F.2d 150, 155 (10th Cir. 1979) ("[*Fuller*] points up the *necessity* for inquiring into present and future financial resources of the criminal defendant." (emphasis added)), *with* United States v. Palmer, 809 F.2d 1504, 1506–08 (11th Cir. 1987) (upholding mandatory assessment of costs of prosecution), United States v. Wyman, 724 F.2d 684, 688–89 (8th Cir. 1984) (same), *and* United States v. Chavez, 627 F.2d 953, 957–58 (9th Cir. 1980) (same).

[77] *See Olson*, 603 F.2d at 155; State v. Miller, 535 P.2d 15, 16 (Ariz. 1975) ("Like the Oregon statute before the United States Supreme Court, our rule insures that only those whom the court finds to have the requisite financial resources to offset the costs of legal services become obligated."); *see also* King, *supra* note 16, at 585 & n.177 (collecting cases on ability to pay).

[78] King, *supra* note 16, at 562.

[79] *Id.* at 585.

[80] *See, e.g.*, Anderson, *supra* note 6; Beth A. Colgan, Essay, *Paying for* Gideon, 99 IOWA L. REV. 1929 (2014); Kate Levine, Note, *If You Cannot Afford a Lawyer: Assessing the Constitutionality of Massachusetts's Reimbursement Statute*, 42 HARV. C.R.-C.L. L. REV. 191 (2007).

[81] King, *supra* note 16, at 562; *see id.* at 562–65.

[82] *Id.* at 572.

[83] *See, e.g.*, LDF *Taylor* Amicus, *supra* note 72, at 11 (discussing constitutionality of an Ohio cost-recoupment statute that imposed obligations for subpoena fees); Ralph Friederich, Comment,

and (most importantly for present purposes) the jury trial right[84] — have grown in popularity among states.

Where defendants have challenged user fees that specifically burden their right to a jury trial, states have reached disparate conclusions as to the legality of the practice and to *Fuller*'s applicability. First, although "[m]ost state court litigation has focused on whether the imposition of such jury costs was properly authorized by statute, and has avoided the constitutional issues,"[85] state courts have generally "looked unfavorably upon the practice of charging [jury fees]."[86] Many of the strongest pronouncements against the practice of charging jury fees to criminal defendants have relied upon state law, however, rather than the federal constitutional principles of *Fuller* or *Bearden*.[87] The New Hampshire Supreme Court, for example, "conclude[d] that" — as a matter of state law — "a criminal defendant cannot be required to purchase a jury trial — even for so nominal a sum as eight dollars,"[88] analogizing jury fees to the poll taxes outlawed in *Harper v. Virginia Board of Elections*.[89] The Michigan Supreme Court has similarly held that "assessing costs against a defendant for a jury in a criminal case is not permissible under the laws of [the] State."[90]

But where state courts have applied *federal* constitutional principles, they have reached inconsistent conclusions in applying *Fuller* to the context of user fees generally. In particular, states have reached divergent conclusions as to whether sentencing courts must consider a defendant's ability to pay *prior* to imposing any user fee, as in *Fuller*, or whether a post-imposition ability-to-pay procedure alone is also sufficient.[91]

Constitutionality of the Illinois "Cost" Statute, 1976 S. ILL. U. L.J. 203, 206–07 (describing how Illinois cost statute burdens compulsory process right). *See generally* Sanjay Chhablani, *Disentangling the Sixth Amendment*, 11 U. PA. J. CONST. L. 487, 523–28 (2009) (surveying doctrine on defendant's Sixth Amendment right to "to have compulsory process for obtaining witnesses in his favor," *id.* at 523 (quoting U.S. CONST. amend. VI)).

84 King, *supra* note 16, at 578; Frampton, *supra* note 41, at 208.

85 Frampton, *supra* note 41, at 210–11.

86 King, *supra* note 16, at 586.

87 *See id.* at 586 & n.190.

88 State v. Cushing, 399 A.2d 297, 298 (N.H. 1979).

89 383 U.S. 663 (1966); *see Cushing*, 399 A.2d at 298 (quoting *Harper*, 383 U.S. at 668); *see also* King, *supra* note 16, at 586; Frampton, *supra* note 41, at 211–12.

90 People v. Hope, 297 N.W. 206, 208 (Mich. 1941); *see also* Frampton, *supra* note 41, at 211 & n.161.

91 *See* Anderson, *supra* note 6, at 340 ("One key way in which jurisdictions differ [in the context of counsel fees] is in whether the trial court must make a finding of the defendant's ability to pay *before* imposing the obligation to repay either recoupment or contribution fees, or whether the court need only consider the defendant's financial circumstances when enforcement of the judgment is sought."). *Compare* State v. Dudley, 766 N.W.2d 606, 613–15 (Iowa 2009) ("A cost judgment may not be constitutionally imposed on a defendant unless a determination is *first* made that the defendant is or will be reasonably able to pay the judgment." *Id.* at 615 (emphasis added).), *and* State v. Moore, 277 P.3d 1212, 1215 (Mont. 2012) ("The District Court needed to investigate further Moore's financial circumstances, including his ability to pay, before imposing jury costs."), *with* State v. Albert, 899 P.2d 103, 109 (Alaska 1995) ("[W]e conclude that *James* and *Fuller* do not require a prior

(Notably, as explained above, *Fuller* left open the question of whether preimposition procedures are constitutionally *sufficient* or constitutionally *necessary*.[92])

A second divergence is whether *Fuller* applies to jury fees (and other user fees) or is instead limited to the context of counsel fees. The Ohio Supreme Court, for example, suggested (in dicta[93]) that *Fuller* and *James* "can be distinguished" from recoupment of jury fees.[94] Without much reasoning, that court explicitly drew a distinction between cases "examin[ing] the effect of recoupment statutes on the right to counsel" and cases examining the effect of similar statutes "on the right to a jury trial."[95] In contrast, the Virginia Court of Appeals has definitively rejected the suggestion that counsel fees should be treated differently from jury fees and other costs of prosecution, instead applying the "same principles" to "recoupment of attorney fees" and "other costs of prosecution."[96] Despite this interjurisdictional disagreement, the position of the Virginia court is well represented;[97] the next section explains why it is also normatively superior.

B. Against a Hierarchy of Fundamental Rights

The Ohio Supreme Court's implication that user fees for jury trials should be subjected to different (and perhaps lesser) protections than those accorded the right to counsel is normatively unjustifiable for two reasons. First, the Ohio approach implicitly endorses a hierarchy of fundamental rights, but such a hierarchy is conceptually incoherent;

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determination of ability to pay in a recoupment system which treats recoupment judgment debtors like other civil judgment debtors . . . ."), *and* State v. Lopez-Solis, 589 N.W.2d 290, 293 & n.2 (Minn. 1999) ("[T]he trial court need not find an ability to pay before imposing prosecution costs in a criminal proceeding." *Id.* at 293.).

92 *See* Fuller v. Oregon, 417 U.S. 40, 52–54 (1974); *see also* Washington v. McQuiggin, No. 11-cv-212, 2011 WL 2516292, at *4 (W.D. Mich. June 23, 2011) ("Although the *Fuller* Court held the Oregon scheme constitutional and that scheme required a presentence determination of future ability to pay, nothing in the *Fuller* decision suggests that a presentence determination is constitutionally mandatory."), *aff'd in part and dismissed in part*, 529 F. App'x 766 (6th Cir. 2013).

93 LDF *Taylor* Amicus, *supra* note 72, at 13.

94 State v. White, 817 N.E.2d 393, 396 (Ohio 2004); *see also* State v. Threatt, 843 N.E.2d 164, 167 (Ohio 2006) (concluding that the indigency determination does not protect against imposing court costs).

95 *White*, 817 N.E.2d at 396.

96 Ohree v. Commonwealth, 494 S.E.2d 484, 490 (Va. Ct. App. 1998).

97 *See* State v. Lopez, 853 P.2d 1126, 1129 (Ariz. Ct. App. 1993) (applying *Fuller*'s ability-to-pay requirement to "costs of prosecution"); State v. Haines, 360 N.W.2d 791, 794 (Iowa 1985) (same); State v. Moore, 277 P.3d 1212, 1215 (Mont. 2012) ("The District Court needed to investigate further . . . ability to pay, before imposing jury costs."); Commonwealth v. Coder, 415 A.2d 406, 408 (Pa. 1980) (applying *Fuller* to recoupment of "costs and expenses of prosecution," including those accrued from a change of venue (quoting Commonwealth v. Coder, 382 A.2d 131, 137 (Pa. Super. Ct. 1977) (Cercone, J., dissenting))); Johnson v. State, 562 S.W.3d 168, 181 (Tex. Ct. App. 2018) ("[T]he United States Supreme Court has concluded that a convicted defendant may be held liable for the reasonable court costs of his or her prosecution.").

courts should presumptively disfavor the ranking of fundamental rights. Second, even if such a hierarchy were justifiable, protections against user fees for jury rights should be *at least as strong* as those applicable to counsel fees.

Although "some ordering of social values is essential" in constitutional adjudication,[98] when it comes to rights deemed *fundamental*, such ranking is doctrinally incongruous and should be presumptively avoided.[99] There is a well-established test for distinguishing between fundamental *enumerated* rights, which are "incorporated" against the states through the Fourteenth Amendment, and nonfundamental enumerated rights,[100] and the Supreme Court recently reaffirmed the relevant test in *Timbs v. Indiana*[101]: "A Bill of Rights protection is incorporated, we have explained, if it is 'fundamental to our scheme of ordered liberty,' or 'deeply rooted in this Nation's history and tradition.'"[102] This test does not contemplate degrees of fundamentality. The Supreme Court has long recognized the right to a jury trial, like the right to counsel (and all other Sixth Amendment rights[103]), as fundamental.[104] And once a right is declared fundamental and incorporated, "there is no daylight between the federal and state conduct it prohibits or requires."[105]

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98 Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 25 (1959).

99 *See id.* ("Certainly the concept [of preferred constitutional rights] is pernicious if it implies that there is any simple, almost mechanistic basis for determining priorities of values having constitutional dimension, as when there is an inescapable conflict between claims to free press and a fair trial.").

100 Although the doctrinal test for "unenumerated" rights under the Due Process Clauses of the Fifth and Fourteenth Amendments differs from the test for enumerated rights, *see* Kenji Yoshino, *The Supreme Court, 2014 Term — Comment: A New Birth of Freedom?:* Obergefell v. Hodges, 129 HARV. L. REV. 147, 148–49 (2015) (discussing the difficulties in, and two possible approaches to, determining which unenumerated rights the Court should protect), the Ninth Amendment precludes courts from subjugating unenumerated fundamental rights, *see* Laurence H. Tribe & Michael C. Dorf, *Levels of Generality in the Definition of Rights*, 57 U. CHI. L. REV. 1057, 1061 (1990) ("Some have argued that the specification of various liberties in the Bill of Rights requires the Court to play a greater role in determining the substantive content of enumerated rights than of unenumerated rights, although this contention seems impossible to square with the command of the Ninth Amendment." (footnote omitted)); Yoshino, *supra*, at 148 ("The Ninth Amendment provides textual assurance of the existence of unenumerated rights.").

101 139 S. Ct. 682 (2019).

102 *Id.* at 687 (quoting McDonald v. City of Chicago, 561 U.S. 742, 767 (2010)).

103 *See McDonald*, 561 U.S. at 764 n.12 (collecting cases incorporating various clauses of the Sixth Amendment). After the Court's decision in *Timbs*, which incorporated the Eighth Amendment's Excessive Fines Clause, 139 S. Ct. at 687, "the only rights not fully incorporated are (1) the Third Amendment's protection against quartering of soldiers; (2) the Fifth Amendment's grand jury indictment requirement; [and] (3) the Seventh Amendment right to a jury trial in civil cases." *McDonald*, 561 U.S. at 765 n.13. The Court has never addressed the question of Third Amendment incorporation.

104 Duncan v. Louisiana, 391 U.S. 145, 149 (1968) (incorporating jury trial right because it "is fundamental to the American scheme of justice"); Gideon v. Wainwright, 372 U.S. 335, 342–44 (1963) (stating that assistance of counsel is a fundamental right).

105 *Timbs*, 139 S. Ct. at 687.

It would be inconsistent with this doctrine to distinguish between these two rights when evaluating the constitutionality of a user-fee scheme.[106]

In addition to this absence of doctrinal justification, the creation of a hierarchy of fundamental rights for purposes of user fees is normatively undesirable for several reasons.

First, hierarchically classing fundamental rights would be unadministrable. Several scholars have articulated, in other contexts, similar concerns about developing a hierarchy of fundamental rights, reasoning that there is "no principled basis" for conducting such ranking.[107] Of course, such ad hoc value judgments are to some extent inevitable in constitutional adjudication,[108] but as Professors Mayer Freed and Daniel Polsby aptly explain:

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[106] The Supreme Court made a similar point in the somewhat related context of the unconstitutional conditions doctrine. *See generally* Louis W. Fisher, *Contracting Around the Constitution: An Anticommodificationist Perspective on Unconstitutional Conditions*, 21 U. PA. J. CONST. L. 1167, 1175–79 (2019). In *Dolan v. City of Tigard*, 512 U.S. 374 (1994), the Court addressed "the required degree of connection between the exactions imposed by [a] city" as a condition of a building permit, and "the projected impacts of the proposed development." *Id.* at 377. In articulating its "rough proportionality" test — a somewhat heightened level of scrutiny — for evaluating such claims, *id.* at 391, the Court alluded to an anti-rights-hierarchy rationale: "We see no reason why the Takings Clause of the Fifth Amendment, as much a part of the Bill of Rights as the First Amendment or Fourth Amendment, should be relegated to the status of a poor relation in these comparable circumstances," *id.* at 392; *see also* Thomas W. Merrill, Dolan v. City of Tigard*: Constitutional Rights as Public Goods*, 72 DENV. U. L. REV. 859, 865–66, 866 n.40 (1995).

[107] Richard Albert, *Constitutional Handcuffs*, 42 ARIZ. ST. L.J. 663, 683 n.81 (2010) ("It has been suggested that there may be no principled basis upon which to construct a hierarchy of constitutional values." (citing Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc., 454 U.S. 464, 484 (1982))); *see also* Mayer G. Freed & Daniel D. Polsby, *Race, Religion, and Public Policy:* Bob Jones University v. United States, 1983 SUP. CT. REV. 1, 13–14 (noting that judicial attempts at rights-hierarchy "fall somewhere between the ad hoc and the downright hokey," *id.* at 14, despite the fact that "[v]arious analytical models of [ranking]" — such as the "'tiers' of the Equal Protection Clause" and "'fundamental rights' theory" — are "already in existence," *id.* at 13); Arnold H. Loewy, *Police-Obtained Evidence and the Constitution: Distinguishing Unconstitutionally Obtained Evidence from Unconstitutionally Used Evidence*, 87 MICH. L. REV. 907, 910 (1989) ("[F]ourth amendment rights should be deemed different from, but not less important than, the procedural rights protected by the fifth, sixth, and fourteenth amendments."); William P. Marshall, *Diluting Constitutional Rights: Rethinking "Rethinking State Action,"* 80 NW. U. L. REV. 558, 563 & n.30 (1985) ("Given the extreme difficulty of choosing between competing rights in the first place, perhaps the decision to insulate private activity from constitutional scrutiny is justified as a way to avoid forcing judges to make impossible decisions." *Id.* at 563.).

[108] *See, e.g.*, RONALD DWORKIN, LAW'S EMPIRE 225 (1986) ("[P]ropositions of law are true if they figure in or follow from the principles of justice, fairness, and procedural due process that provide the best constructive interpretation of the community's legal practice."); H.L.A. HART, THE CONCEPT OF LAW 138 (3d ed. 2012) ("No doubt [legal rules] are rules with an open texture and at the points where the texture is open, individuals can only predict how courts will decide and adjust their behaviour accordingly."); Leslie Green, *Introduction* to HART, *supra*, at xv ("[L]aw sometimes pretends to an objectivity it does not have for, whatever judges may say, they in fact wield serious power to create law."); Douglas Lind, *Constitutional Adjudication as a Craft-Bound Excellence*, 6 YALE J.L. & HUMAN. 353, 385 (1994) ("Certain constitutional provisions, such as the Equal Protection Clause and the Due Process Clause, are exceedingly 'open-textured.'"). *But see* ADRIAN VERMEULE, JUDGING UNDER UNCERTAINTY: AN INSTITUTIONAL THEORY OF

> It is one thing to concede the inevitability of some extemporaneity in constitutional adjudication. This is no more than a concession that there is no very well elaborated or widely accepted general theory of constitutional right. But theoretical poverty is no proud boast in a constitutional system, and there is no good reason gratuitously to call attention to it.[109]

Second, and relatedly, once we are in the realm of "fundamental" rights,[110] any attempt to hierarchically prioritize those rights would be wholly atextual, as the Constitution itself makes no hierarchical distinctions between rights.[111] This is not to suggest that a slavish and rigid textualism is the only normatively appropriate method of constitutional adjudication; taken to its logical extreme, such rigid textualism is not only descriptively inaccurate,[112] but also leads to incongruous results.[113]

LEGAL INTERPRETATION 233, 284–89 (2006) ("Courts should enforce the Constitution only where, as the nineteenth-century legal scholar James Bradley Thayer suggested, no reasonable basis for interpretive dispute exists . . . ." *Id.* at 233.); Frederick Schauer, *On the Open Texture of Law*, 87 GRAZER PHILOSOPHISCHE STUDIEN 197, 213 (2013) ("It is logically and conceptually possible for rules to be interpreted, understood, applied, and enforced according to the literal meaning of the component language of their formulations. Whether in this or that legal system they are in fact so treated is a descriptive question, and it turns out . . . that as a descriptive matter defeasibility is less universal in actual legal systems than we might have thought, even in the legal systems in which we might have most expected it to exist."). *See generally* Scott J. Shapiro, *The "Hart-Dworkin" Debate: A Short Guide for the Perplexed* (Univ. Mich. Law Sch. Pub. Law & Legal Theory Working Paper Series, Working Paper No. 77, 2007), https://law.yale.edu/sites/default/files/documents/pdf/Faculty/Shapiro_Hart_Dworkin_Debate.pdf [https://perma.cc/43GK-SD4M].

109 Freed & Polsby, *supra* note 107, at 14.

110 As explained above, "the Supreme Court considers some rights more fundamental than others." Mike Bothwell, Note, *Facing God or the Government* — United States v. Aguilar*: A Big Step for Big Brother*, 1990 BYU L. REV. 1003, 1013.

111 *See* Albert, *supra* note 107, at 683 ("There also exists a larger and more problematic consequence of the hierarchy of constitutional provisions resulting from the departure between text and entrenchment: the reasons or principles according to which some constitutional provisions are elevated above others may be neither apparent nor even logically sound to those bound by its terms."); Carl H. Esbeck, Idea, *"Play in the Joints Between the Religion Clauses" and Other Supreme Court Catachreses*, 34 HOFSTRA L. REV. 1331, 1336 (2006) ("Where are we to find this hierarchy of constitutional rights, or is that too to be trusted to the balancing of nine unelected Justices?").

112 Eric J. Segall, *Lost in Space: Laurence Tribe's* Invisible Constitution, 103 NW. U. L. REV. COLLOQUY 434, 435 (2009) (book review) (acknowledging that the fact that the Constitution "cannot be understood by simply reading its text . . . is accepted by virtually everyone who reads and studies constitutional law (as a descriptive, not normative, account)"). *See generally* ERWIN CHEMERINSKY, WE THE PEOPLE: A PROGRESSIVE READING OF THE CONSTITUTION FOR THE TWENTY-FIRST CENTURY, ch. 2 (2018).

113 *See* LAURENCE H. TRIBE, THE INVISIBLE CONSTITUTION 80 (2008) (suggesting that the Ninth and Tenth Amendments are "textual proof of an extratextual Constitution"). *Compare* John F. Manning, *Federalism and the Generality Problem in Constitutional Interpretation*, 122 HARV. L. REV. 2003, 2040 (2009) (rejecting "freestanding federalism" that is abstracted from the text of the Constitution), *with* Gillian E. Metzger, Response, *The Constitutional Legitimacy of Freestanding Federalism*, 122 HARV. L. REV. F. 98, 103–05 (2009) (defending structural constitutional reasoning from implications of Professor John Manning's exclusive textualism), *and* Michael Halley, Response, *Constitutional Interpretation and Judicial Review: A Case of the Tail Wagging the Dog*, 108 MICH. L. REV. FIRST IMPRESSIONS 58, 60 (2010) ("If, as the weight of authority suggests, judicial

But the contemporary Supreme Court's "textualist turn" cannot be denied,[114] nor can the prevalence and normative force of the textual mode of constitutional interpretation.[115] And even scholars who advocate extratextualist constitutional construction recognize the normative force of textual anchors for constitutional principles.[116]

Finally, some scholars have argued that to create a rights hierarchy would be to degrade the intrinsic value of fundamental constitutional rights: "To regard a constitution as a mere compilation of individual provisions, each subject to a sliding scale of worth, is to devalue the constitutional text as a document whose constituent parts must be read together to give the larger whole its full meaning."[117] In a similar vein, I have previously argued that the unconstitutional conditions doctrine serves to protect fundamental rights as "civic goods," which would be "diminished or corrupted if bought and sold for money."[118] The "corruption objection"[119] outlined here, however, is far more granular: rights are value-incommensurate not only with *money*, but also with other

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review cannot be tied to the letter of the Constitution, the logical conclusion of Manning's argument [against 'freestanding federalism'] is that judicial review should not exist.").

114 *See* Jonathan R. Siegel, *The Legacy of Justice Scalia and His Textualist Ideal*, 85 GEO. WASH. L. REV. 857, 873–74 (2017) (arguing that "statutory text is far more prominent on the Court's interpretive agenda" today than it was before Justice Scalia joined the Court, *id.* at 873); *see also* Elena Kagan, *The Scalia Lecture: A Dialogue with Justice Kagan on the Reading of Statutes* at 8:28 (Nov. 17, 2015), https://www.youtube.com/watch?v=dpEtszFToTg [https://perma.cc/3V7B-CY9B] (noting that "we're all textualists now").

115 *See* PHILIP BOBBITT, CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION, ch. 3 (1982) (explaining the power of textual constitutional argument in the array of typology of constitutional arguments).

116 *See* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW 12 (5th ed. 2017) (noting that "'nonoriginalists[]' . . . argue that it is important that the Constitution evolve by interpretation and not only by amendment"); TRIBE, *supra* note 113, at 189–90, 195–97 (arguing that many unenumerated rights can be justified by looking "beneath the surface of textually identified rights . . . to unearth . . . their underlying presuppositions and premises," *id.* at 189); KEITH E. WHITTINGTON, CONSTITUTIONAL CONSTRUCTION: DIVIDED POWERS AND CONSTITUTIONAL MEANING 1, 5–9 (1999).

117 Albert, *supra* note 107, at 683. Recognizing a hierarchy of rights would also undermine the argument that rights cannot simply be balanced against other, nonrights values. It is because rights resist measurement that they are not readily sacrificed to achieve otherwise desirable ends. *See* KATHARINE G. YOUNG, CONSTITUTING ECONOMIC AND SOCIAL RIGHTS 119 (2012) ("On one view, the balancing of rights is an oxymoron. . . . An incommensurability of values provides protection against efficiency or welfarist arguments, which are not accorded the same moral importance . . . [, and] also provides protection against the interests of the majority."); Cass R. Sunstein, *Incommensurability and Valuation in Law*, 92 MICH. L. REV. 779, 834 (1994) ("[T]he lexical priority of equal liberty is structurally akin to the refusal to allow a child to be traded for cash, or a promise to be breached as a result of mildly changed circumstances. It reflects a judgment that the prevalent kind of valuation forbids compromising the good for certain reasons, even though those reasons are legitimate bases for action in other contexts.").

118 Fisher, *supra* note 106, at 1198 (quoting Michael J. Sandel, *What Money Can't Buy: The Moral Limits of Markets*, *in* 21 THE TANNER LECTURES ON HUMAN VALUES 87, 94 (Grethe B. Peterson ed., 2000)).

119 MICHAEL J. SANDEL, WHAT MONEY CAN'T BUY: THE MORAL LIMITS OF MARKETS 111 (2012).

rights. In other words, each fundamental right exists in a separate sphere of value — incommensurate, but nonhierarchical.[120]

Even if one were to accept the premise that fundamental rights may be hierarchically prioritized, it would be difficult to justify placing the jury trial right *below* the right to counsel. To the contrary, the normative justifications underlying *Fuller* and *Bearden* suggest that the jury trial right should be subject to *greater* protection than the right to counsel, notwithstanding certain judicial implications to the contrary.[121]

As Professor John King helpfully points out, there are two main "principled" objections to the privatization of fundamental rights through the imposition of user fees: "The commodification of trial rights not only risks creating a secondary class of criminal justice for poor people, but also risks changing our conception of fundamental rights."[122] In another context, and drawing upon the work of other scholars,[123] I have described these objections as the "distributive inequality objection[]"[124] and the "corruption objection"[125] respectively, and applied them to constitutional jurisprudence.[126] To elaborate upon King's description, a distributive inequality objection to user fees concerns disparate impacts upon indigent defendants: if fundamental rights of criminal procedure are conditioned on pre- or post-trial payment, then poor people will be disproportionately incentivized to waive these protections.[127]

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120 *See* Fisher, *supra* note 106, at 1188–89 (discussing "spheres . . . of valuation," *id.* at 1188 (footnote omitted)).

121 *See* State v. Threatt, 843 N.E.2d 164, 167 (Ohio 2006) (finding that an indigency determination is meant to protect, among other rights, the accused's right to counsel, and thus "does not shelter a convicted defendant from other burdens, such as court costs"); State v. White, 817 N.E.2d 393, 395–96 (Ohio 2004) (distinguishing *Fuller* and *James* on the grounds that "they deal with recoupment statutes for appointed counsel costs" and "do not speak to the imposition of court costs," *id.* at 396).

122 King, *supra* note 16, at 587 (footnotes omitted).

123 *See generally, e.g.*, SANDEL, *supra* note 119, at 9; I. Glenn Cohen, *Regulating the Organ Market: Normative Foundations for Market Regulation*, 77 LAW & CONTEMP. PROBS., no. 3, 2014, at 71, 75–79 (explaining the differences between coercion, exploitation, undue inducement, and justified paternalism as arguments against organ sales); Sandel, *supra* note 118, at 94–95 (distinguishing coercion-based "objections to extending the reach of market valuation and exchange," *id.* at 94, from corruption-based arguments); Note, *The Price of Everything, the Value of Nothing: Reframing the Commodification Debate*, 117 HARV. L. REV. 689, 690–93 (2003) (acknowledging Professor Michael Sandel's description of "coercion" and "corruption" as "two broad classes" of "anticommodification arguments," *id.* at 690, and outlining several subcategories of each class).

124 Fisher, *supra* note 106, at 1187.

125 *Id.* at 1188 (quoting SANDEL, *supra* note 119, at 111).

126 *Id.* at 1192–209.

127 *Cf. id.* at 1172 (arguing that one justification of the unconstitutional conditions doctrine is that "the offer of rights-for-benefits will be harder to resist for poorer rightsholders, threatening a constitutional system that offers differential protection of fundamental rights depending on one's socioeconomic status").

Bearden and *Fuller* both speak directly to these concerns about distributive inequality.[128]

But *Fuller* also alluded to the second — and perhaps less obvious — objection to user fees: corruption. In the course of rejecting the defendant's contention that user fees for court-appointed counsel were categorically impermissible, the Court noted that access to counsel is traditionally conceptualized as a "market good"[129]: "We live in a society where the distribution of legal assistance, like the distribution of all goods and services, is generally regulated by the dynamics of private enterprise."[130] Contrast this consensus treatment of legal services as a market good with the general reluctance to marketize the right to vote: as "perhaps the quintessential civic good," the franchise "cannot be purchased because to allow such an exchange would fundamentally denigrate the nature of the vote."[131]

The jury trial right is a civic good, more akin to voting than to court-appointed counsel; and for this reason, courts should be *more likely* to find jury fees unconstitutional than the counsel fees analyzed in *Fuller*. Trial rights "should simply flow from citizenship," and they "have previously been thought to be incident to citizenship."[132] This is particularly true of the jury right, which affects each individual citizen in a way that other criminal procedure rights might not.[133]

Consistent with this conception of the jury trial right, courts have often treated it as a civic, rather than market, good; indeed, as noted in

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[128] *See* Bearden v. Georgia, 461 U.S. 660, 672–73 (1983) ("To . . . deprive the probationer of his conditional freedom simply because, through no fault of his own, he cannot pay the fine . . . would be contrary to the fundamental fairness required by the Fourteenth Amendment."); Fuller v. Oregon, 417 U.S. 40, 53 n.12 (1974) ("The limitation of the obligation to repay to those who are found able to do so also disposes of the argument, presented by an *amicus curiae*, that revocation of probation for failure to pay constitutes an impermissible discrimination based on wealth."); *see also id.* at 61 (Marshall, J., dissenting) ("I would therefore hold the Oregon recoupment statute unconstitutional under the Equal Protection Clause insofar as it permits payment of the indigent defendant's debt to be made a condition of his probation.").

[129] *See* Fisher, *supra* note 106, at 1190 (noting Sandel's distinction "between market goods on the one hand, which are properly valued according to profit and use, and civic goods and sacred goods on the other, which are corrupted by commodification" (citing SANDEL, *supra* note 119, at 9–10)).

[130] *Fuller*, 417 U.S. at 53; *see also* United States v. Chavez, 627 F.2d 953, 958 (9th Cir. 1980) (rejecting challenge to user-fee statute in part based on market-based argument that the Court is "incapable of leveling the economic ability of some defendants to pay for superior legal or investigative services that may be of some assistance to them" (quoting JOHN E. NOWAK ET AL., HANDBOOK ON CONSTITUTIONAL LAW 678 (1978))).

[131] Fisher, *supra* note 106, at 1198 (citing Sandel, *supra* note 118, at 118).

[132] King, *supra* note 16, at 588.

[133] *See* Blakely v. Washington, 542 U.S. 296, 305–06 (2004) ("[The jury trial] right is no mere procedural formality, but a fundamental reservation of power in our constitutional structure. Just as suffrage ensures the people's ultimate control in the legislative and executive branches, jury trial is meant to ensure their control in the judiciary."); *see also* Parsons v. Bedford, 28 U.S. (3 Pet.) 433, 446 (1830) ("The trial by jury is justly dear to the American people . . . and every encroachment upon it has been watched with great jealousy.").

one of the few studies to specifically address the legality and effects of jury fees, some courts have "emphasized that jury costs are more appropriately borne by the government as an inherent expense of running a criminal justice system."[134] For example, the Eighth Circuit held it is presumptively impermissible to charge defendants for jury fees as "costs of prosecution" — without a clear statement that the legislature or "established local practice" mandates a contrary result.[135] The court grounded its reasoning in a civic-goods conception of the jury trial right, reasoning that as a "general expense of maintaining the system of courts and the administration of justice," costs associated with juries are "an ordinary burden of government" and cannot "be taxed as costs."[136] Other state and federal courts have relied on similar arguments based on civic valuation and governmental duty to similarly conclude that "the broad statutory authority to assess the 'costs of prosecution' against a convicted defendant is generally held not to include the authority to tax a defendant with jury expenses."[137]

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134 Frampton, *supra* note 41, at 212.

135 Gleckman v. United States, 80 F.2d 394, 403 (8th Cir. 1935).

136 *Id.*

137 Gooch v. State, 685 N.E.2d 152, 155 (Ind. Ct. App. 1997) (citing Mickler v. State, 682 So. 2d 607, 609 (Fla. Dist. Ct. App. 1996)); *see* United States v. Ross, 535 F.2d 346, 350–51 (6th Cir. 1976) ("We find no authority for taxing as costs the expenses of calling a jury in federal court." *Id.* at 350.); United States v. Wilson, 193 F. 1007, 1007 (C.C.S.D.N.Y. 1911) ("[T]he word 'costs,' in section 974, Rev. Stat. U.S. (U.S. Comp. St. 1901, p. 703), ... [does not include] the fees of trial jurors, nor the fees and mileage of persons not examined as witnesses at the trial, nor fees for service of subpoenas upon persons who did not testify at the trial, unless in the latter cases the adverse party default."); United States v. Murphy, 59 F.2d 734, 735 (S.D. Ala. 1932) (noting cost of jury "is one the government assumes in giving to the various litigants a tribunal in which the trials may be had, and therefore is not properly chargeable against a defendant who is being tried on a criminal prosecution"); Walden v. State, 371 S.E.2d 852, 852 (Ga. 1988) (holding the costs of bailiffs and jurors are not taxable against the defendant in a criminal case); State v. Hanson, 448 P.2d 758, 761 (Idaho 1968) ("Several courts have determined that jury costs are a general expense of maintaining the system of courts and the administration of justice, and that such costs are more properly an ordinary burden of government."); State v. Rideau, 943 So. 2d 559, 573 (La. Ct. App. 2006) ("[F]ederal and state courts have held expenses associated with juries are costs inherent in the judicial process and are not ordinarily taxed as costs against defendants, indigent or non-indigent."), *writ denied*, 963 So. 2d 395 (La. 2007); Gantt v. State, 675 A.2d 581, 585 (Md. Ct. Spec. App. 1996) ("Jury costs are generally not understood to be 'court costs,' and are usually not included within the costs imposed by courts in civil and criminal cases."); People v. Kennedy, 25 N.W. 318, 320 (Mich. 1885) ("We know of no authority in the circuit courts to add the *per diem* of jurymen to the fine and costs in a case like this. . . . [C]ertainly it would be monstrous to establish a practice of punishing persons convicted of misdemeanors for demanding what the constitution of the state gives them, — a trial by jury."); Stanton Cty. v. Madison Cty., 4 N.W. 1055, 1057–58 (Neb. 1880) (finding no statutory authority to tax jury costs); State v. Ayala, 623 P.2d 584, 586 (N.M. Ct. App. 1981) (holding that statute did not authorize imposition of jury costs, which "are part of the general expense of maintaining a system of courts and the administration of justice"); Arnold v. State, 306 P.2d 368, 375–76, 378 (Wyo. 1957) (noting "right to trial by jury in criminal prosecutions is inviolate," *id.* at 376, and holding as a statutory matter that "taxing, as costs of prosecution, the mileage and per diem paid to all jurors on the jury panel and the amounts paid for the services of the court bailiffs, was erroneous," *id.* at 378).

Although these cases do not go so far as to categorically bar taxation of defendants for their jury costs, and generally avoid the constitutional question,[138] the presumption against permitting taxation of jury fees illustrates the possible distinction between the civic nature of the jury right and the market nature of the right to counsel. Therefore, in a hypothetical hierarchy of rights, it would be normatively problematic and precedentially anomalous to subordinate the jury trial right to the right to counsel.

The following Part addresses the proper framework for evaluating the constitutional limitations on states' ability to impose user fees generally, assuming they speak with sufficient clarity to overcome the aforementioned presumption against taxing jury costs. Although the Supreme Court's *Fuller* decision offers some guidance, it is analytically insufficient to fully address the constitutional concerns inherent in taxing criminal defendants with user fees. First, the *Fuller* analysis is too granular: it approves Oregon's relatively complex fee-recoupment procedures, but without developing a generalizable principle to explain why those procedures make counsel-fee recoupment constitutionally tolerable. Consequently, as explained above, courts applying *Fuller* have struggled to ascertain whether Oregon's procedures are constitutionally *necessary* or merely sufficient.[139] Similarly, because of this granularity, it remains ambiguous whether *Fuller* applies beyond *counsel* fees to other criminal justice user fees and LFOs. While there is no principled reason to restrict *Fuller*, some courts have seized upon this distinction to cabin its constitutional protections.[140]

For these reasons, it is necessary to develop a generalizable constitutional principle on which courts can rely to ensure that indigent defendants have equal access to fundamental rights of criminal procedure, including not only the right to counsel but also the right to a jury trial.

II. *BEARDEN* CLAIMS AND THE PROCEDURAL ASPECT OF EQUAL JUSTICE

Doctrinal confusion abounds when it comes to the constitutional limitations on the imposition of criminal justice user fees and on other governmental practices that similarly "disproportionately burden the poor."[141] To ameliorate some of this confusion, this Part builds upon

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[138] *See, e.g.*, *Arnold*, 306 P.2d at 377. *See generally* Frampton, *supra* note 41, at 210–11 ("Most state court litigation has focused on whether the imposition of such jury costs was properly authorized by statute, and has avoided the constitutional issues such fees pose.").

[139] *See supra* pp. 121–22.

[140] *See supra* p. 124.

[141] Garrett, *supra* note 6, at 404 ("Lower and appellate courts are split over whether to treat practices that disproportionately burden the poor as due process or equal protection claims."); *see*

Anderson's insight that, although these issues implicate due process *and* equal protection rights, the "essence of the problem is procedural: [fee] recoupment is unconstitutional where there is no finding of ability to pay, fee awards are not supported, or there is no notice and opportunity to be heard on these issues."[142] Therefore, the *procedural strand* of the *Bearden* doctrine is the best candidate for a generalizable and administrable test of the constitutionality of a fee-recoupment regime, even though the *Bearden* decision postdates *Fuller* (the Supreme Court's last pronouncement on user fees) by nine years.

The *Bearden* doctrine is composed of two mutually reinforcing constitutional principles, equal protection and due process, leading scholars to characterize it as a "blended due process and equal protection test."[143] But this characterization, while accurately identifying the two *textual* bases for the doctrine, obscures how each independent constitutional principle operates in context, depending on how a challenged policy burdens the fundamental rights of indigents. In fact, in a footnote to the *Bearden* decision, the Court itself explained how, in certain circumstances, a focus on the doctrine's procedural aspect is analytically preferable:

> A due process approach has the advantage in this context of directly confronting the intertwined question of the role that a defendant's financial background can play in determining an appropriate sentence. When the court is initially considering what sentence to impose, a defendant's level of financial resources is a point on a spectrum rather than a classification. Since indigency in this context is a relative term rather than a classification, fitting "the problem of this case into an equal protection framework is a task too Procrustean to be rationally accomplished." The more appropriate question is whether consideration of a defendant's financial background in setting or resetting a sentence is so arbitrary or unfair as to be a denial of due process.[144]

Similarly, in *Halbert v. Michigan*,[145] the Supreme Court again clarified the individual role of each strand: "'The equal protection concern relates to the legitimacy of fencing out would-be appellants based solely on their inability to pay core costs,' while '[t]he due process concern homes in on the essential fairness of the state-ordered proceedings [anterior to adverse state action].'"[146] And as Anderson has explained, the applicability of *Bearden*'s procedural aspect is not limited to issues of sentencing and punishment: "*Bearden*'s due process requirement that

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also, e.g., Colgan, *supra* note 6, at 93–95 (noting confusion over relationship between *Bearden* line and tiers of scrutiny).

142 Anderson, *supra* note 6, at 357.

143 *Id.* at 361.

144 Bearden v. Georgia, 461 U.S. 660, 666 n.8 (1983) (citation omitted) (quoting North Carolina v. Pearce, 395 U.S. 711, 723 (1969), *overruled by* Alabama v. Smith, 490 U.S. 794 (1989)).

145 545 U.S. 605 (2005).

146 *Id.* at 610–11 (first alteration in original) (quoting M.L.B. v. S.L.J., 519 U.S. 102, 120 (1996)).

the court make particular findings about the defendant's ability to pay before revoking probation are [sic] [also] applicable to revocation for failure to pay recoupment costs . . . ."[147]

This Part will demonstrate how certain lower court opinions have drawn upon *Bearden*'s procedural justice aspect to strike down unnecessary burdens on the fundamental rights of indigent defendants. Prior scholarship has not addressed how the procedural aspect of *Bearden* may predominate in certain cases and also provide a more effective means of securing indigent defendants' rights. Most recently, Professor Beth Colgan has characterized *Bearden* as a sui generis doctrine in constitutional law, standing apart from the "traditional tiers" of equal protection scrutiny.[148] She contends that the *Bearden* doctrine "operates as a flat ban on the government's use of its prosecutorial power in ways that effectively punish a person for her financial condition rather than her culpability,"[149] thereby constituting "a distinct avenue of constitutional attack" based on restricting the "government's power to punish" under the Fourteenth Amendment rather than "focusing . . . on the nature of the right at stake."[150]

But this understanding, which focuses on substantive prohibitions on the scope of the government's punitive authority, obscures the independent potency of the procedural aspect of *Bearden*. As the Supreme Court suggested in footnote eight of *Bearden*, a procedural focus is sometimes more analytically useful than a substantive one when dealing with questions of indigents' right to equal justice.[151] *Bearden* makes clear not *only* that equal justice is about avoiding unnecessary and disparate punishment of the poor,[152] but also that it presumptively requires adherence to certain procedures to avoid unnecessary burdens on indigents' fundamental rights: an evaluation of an individual's financial circumstances and ability to pay a legal financial obligation is necessary to ensure that indigents are not disproportionately deterred from exercising or enjoying their fundamental rights, be it to liberty (as in *Bearden*) or to Sixth Amendment counsel (as in *Fuller*) or to a jury trial (as discussed above).[153]

Colgan's flat-ban theory subsumes the procedural aspect of *Bearden* within the substantive prohibition against punishing individuals based

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147 Anderson, *supra* note 6, at 339.

148 Colgan, *supra* note 6, at 63.

149 *Id.*

150 *Id.* at 90.

151 Bearden v. Georgia, 461 U.S. 660, 666 n.8 (1983).

152 *Id.* at 667–68.

153 *See id.* at 672–73. Courts must also evaluate whether there are alternative punishments besides imprisonment. *Id.* at 672.

solely on poverty when alternative measures could satisfy the government's punitive interest. She describes the constitutionally required ability-to-pay determination as just the initial step needed to determine whether *Bearden* has been violated, formulating the two-part test as: (1) Did the failure to pay occur despite bona fide efforts, and (2) could an alternative response have addressed the government's interest?[154] *Bearden* has been violated if the answer to both questions is "yes." But where the government fails to implement adequate procedural protections against disproportionately burdening indigents' access to a fundamental right — even absent an act of punishment like imprisonment or disenfranchisement — the Constitution is independently violated. For that reason, lower courts have turned to *Bearden*'s test to impose purely procedural ability-to-pay requirements.

For example, in *Hernandez v. Sessions*,[155] the Ninth Circuit applied the procedural strand of *Bearden*'s equal justice principle to conclude that the Due Process Clause of the Fifth Amendment requires the government to consider immigrant-detainees' financial circumstances (as well as potential alternative release conditions) *before* it sets a bond amount under federal immigration regulations.[156] Importantly, the court's opinion was concerned wholly with the government's bond-determination *process* and made no comment on the substantive reasonableness of the plaintiffs' bond *amounts*.[157] In concluding that the government's bond procedures violated due process, the court made a "careful inquiry"[158] into the three factors required by *Bearden*: "[1] the nature of the individual interest affected[and] the extent to which it is affected, [2] the rationality of the connection between legislative means and purpose, and [3] the existence of alternative means for effectuating the purpose . . . ."[159] The court held that the paramount individual interest in

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154 Colgan, *supra* note 6, at 139.

155 872 F.3d 976 (9th Cir. 2017).

156 *Id.* at 990–91; *see also* 8 C.F.R. §§ 236.1(d), 1003.19(c) (2019).

157 *See Hernandez*, 872 F.3d at 993–94 ("Even though consideration of these matters does not *guarantee* that a non-citizen will actually be released on a bond that he is financially able to obtain once all flight risk factors are considered, IJs and ICE will certainly be less likely to impose an excessive bond if they are mandated to at least *consider* financial circumstances and alternative conditions before setting the amount.").

In fact, due to jurisdictional restrictions peculiar to immigration law, the court would have lacked jurisdiction over any such substantive challenge to the amount of plaintiffs' bonds: "Plaintiffs in the present case claim that the 'discretionary process itself was constitutionally flawed' at their initial bond determinations. Thus their claims are 'cognizable in federal court on habeas,' despite the jurisdictional restrictions in [federal immigration statutes]." *Id.* at 988 (citations omitted) (quoting Singh v. Holder, 638 F.3d 1196, 1202 (9th Cir. 2011)).

158 *Bearden*, 461 U.S. at 666.

159 *Id.* at 666–67 (alteration omitted) (quoting Williams v. Illinois, 399 U.S. 235, 260 (1970) (Harlan, J., concurring in the result)).

freedom from bodily restraint[160] establishes the "common-sense proposition" that the government's legitimate interests in setting bond cannot be rationally served without procedural protections, including consideration of ability to pay:

> Setting a bond amount without considering financial circumstances or alternative conditions of release undermines the connection between the bond and the legitimate purpose of ensuring the non-citizen's presence at future hearings. There is simply no way for the government to know whether a lower bond or an alternative condition would adequately serve those purposes when it fails to consider those matters. Therefore, the government's current policies fail to provide "adequate procedural protections" to ensure that detention of the class members is reasonably related to a legitimate governmental interest.[161]

The court further emphasized its focus on the procedural element of the equal justice principle by superimposing a pure procedural due process analysis on top of its *Bearden* analysis. Turning to the familiar balancing test set forth in *Mathews v. Eldridge*,[162] the court held that the government was required to employ procedures to consider ability to pay because, in short, the costs of doing so were drastically outweighed by the benefit of ensuring no immigrant-detainees were unnecessarily incarcerated before their hearings.[163] It is "beyond dispute" that the individual interest in bodily freedom is fundamental, and without ability-to-pay procedures, "there is a significant risk that the individual will be needlessly deprived" of that fundamental right.[164] In comparison, the government's interest was minimal, given that the individuals in question had "been determined not to be a danger to the community" and their "appearance at future immigration proceedings [could] be reasonably ensured by a lesser bond or alternative conditions."[165] The cost of ability-to-pay procedures was also minimal, as the government conceded that consideration of ability to pay was "already 'implicitly' required";[166] in fact, it is hard to imagine how "a bond . . . [could] be reasonably calculated to assure an alien's appearance at a future removal

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160 *Hernandez*, 872 F.3d at 990.

161 *Id.* at 991.

162 424 U.S. 319 (1976). The Supreme Court's *Mathews* test is the touchstone for evaluating procedural due process claims:

> [I]dentification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Id. at 335 (citing Goldberg v. Kelly, 397 U.S. 254, 263–71 (1970)).

163 *See Hernandez*, 872 F.3d at 993–94.

164 *Id.* at 993.

165 *Id.* at 994 (citing Pugh v. Rainwater, 572 F.2d 1053, 1057 (5th Cir. 1978) (en banc)).

166 *Id.*

hearing" *without* considering the immigrant's financial circumstances.[167] The *Hernandez* case thereby demonstrates how equal justice mandates that courts balance individual liberty against any legitimate government interests in determining when extra procedures are necessary to ensure indigents' equal access to fundamental rights.

The Sixth Circuit employed a similar procedurally focused analysis in *Fowler v. Benson*,[168] albeit while ruling in favor of the government. In that case, plaintiffs brought challenges under the Due Process and Equal Protection Clauses[169] to Michigan's practice of suspending even an indigent individual's driver's license for failure to pay certain fines, court costs, fees, or assessments under state law.[170] The district court had enjoined the state's driver's-license-suspension scheme, which lacked a mandatory predeprivation ability-to-pay hearing, as likely violative of procedural due process.[171] The Sixth Circuit reversed and remanded,[172] holding that plaintiffs' procedural due process claim failed because they lacked a cognizable property interest: under state law, there was no protectable "right of the indigent, who cannot pay court debt, to be exempt from driver's-license suspension on the basis of unpaid court debt."[173]

For present purposes, it is most important that both the district court and the court of appeals rejected plaintiffs' *Bearden* claim that the state's "refusal to exempt those who are willing but unable to pay violates . . . 'fundamental fairness.'"[174] Notably, the Sixth Circuit focused on the procedural aspect of *Bearden*, concluding that the case "concern[ed] what kind of *process* is due before a probationer is subject to confinement."[175] In *Fowler*, the court's conclusion that Michigan had not violated the equal justice doctrine at step one of the *Bearden* test obviated the need for a hearing or other procedural protections — a driver's license was not an individual interest "due the same degree of legal protection as the fundamental liberty interests implicated" in cases like *Bearden*.[176] Unlike *Bearden* and related cases such as *Griffin v. Illinois*, *Williams v. Illinois*,[177] *Tate v. Short*,[178] and *Mayer v. City of Chicago*,[179]

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[167] *Id.* at 991 n.19 (omission in original).
[168] 924 F.3d 247 (6th Cir. 2019).
[169] *Id.* at 253.
[170] *Id.* at 252 & n.1.
[171] *Id.* at 253.
[172] *Id.* at 264.
[173] *Id.* at 258.
[174] *Id.* at 261 (emphasis omitted); *see also* Fowler v. Johnson, No. 17-11441, 2017 WL 6379676, at *7 (E.D. Mich. Dec. 14, 2017), *rev'd and remanded sub nom.* Fowler v. Benson, 924 F.3d 247.
[175] *Fowler*, 924 F.3d at 261 (emphasis added).
[176] *See id.*
[177] 399 U.S. 235 (1970).
[178] 401 U.S. 395 (1971).
[179] 404 U.S. 189 (1971).

all of which dealt with "basic features of the criminal justice system" like "imprisonment, probation, and appeals"[180] (and all of which implicated *liberty* interests), *Fowler* concerned indigent people's "*property* interest[s] in . . . driver's license[s]."[181] *Bearden* and its progeny make clear that the protection of fundamental criminal procedure rights mandates extra predeprivation procedures, such as consideration of ability to pay, whereas the protection of mere property interests may not.[182]

This critical distinction — between property interests and fundamental rights of criminal procedures that protect defendants' liberty interest in freedom from bodily restraint — similarly distinguishes *Fowler* from *Hernandez*.

The next Part demonstrates how this procedural conception of *Bearden* applies to fundamental rights besides bodily freedom, including the Sixth Amendment rights implicated by criminal justice user fees.

III. Litigating the Procedural Aspect of Equal Justice

Although the *Bearden* doctrine remains something of an enigma, the previous Part illustrated how some courts have applied it to decide whether and when extra procedural protections are required before the government takes adverse action against indigents based on their failure to pay. This Part will examine how advocates have strategically employed a procedurally focused understanding of *Bearden* to minimize the probability that indigents will be deprived of (fundamental) rights due to poverty. The Part begins by returning to the constitutionality of "user fees" that burden the Sixth Amendment jury trial right.

A. Jury Costs

In a recent amicus brief before the Ohio Supreme Court, the NAACP Legal Defense and Educational Fund (LDF) relied on a procedural justice conception of *Bearden*'s equal justice to argue that imposition of jury fees on convicted criminal defendants is unconstitutional unless ability-to-pay procedures are in place.[183] Under Ohio law, "[i]n all criminal cases . . . the judge or magistrate shall include in the sentence the costs of prosecution . . . and render a judgment against the defendant

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[180] *Fowler*, 924 F.3d at 260.

[181] *Id.* at 261 (emphasis added).

[182] A similar issue is pending before the Fourth Circuit in a suit filed by the American Civil Liberties Union (ACLU), Southern Poverty Law Center, and Southern Coalition for Social Justice. *See* Opening Brief for Appellants/Plaintiffs at 1–2, Johnson v. Jessup, No. 19-1421 (4th Cir. Aug. 19, 2019), https://www.aclu.org/legal-document/opening-brief-appellantsplaintiffs [https://perma.cc/LC4L-RAFN].

[183] LDF *Taylor* Amicus, *supra* note 72, at 13–17.

for such costs."[184] Notably, these court costs include those associated with the right to a trial by jury, as well as the Sixth Amendment right to compulsory process.[185] The state's trial courts, however, "retain[] jurisdiction to waive, suspend, or modify the payment of the costs of prosecution . . . at any time."[186]

In *State v. Taylor*,[187] a case pending before the Ohio Supreme Court, after the trial court assessed costs against the defendant, the defendant moved to vacate or suspend, explaining that his indigence precluded him from satisfying this financial obligation.[188] Although the trial court rejected his request, the intermediate appellate court reversed in regard to court costs because the trial court failed to consider Mr. Taylor's ability to pay.[189] The question before the Ohio Supreme Court is whether the relevant state statute (or the U.S. Constitution) mandates that trial courts employ procedures to consider ability to pay when a defendant moves for waiver, suspension, or modification of court costs imposed on them for exercising Sixth Amendment rights.[190]

LDF argues that absent consideration of ability to pay, Ohio's cost-recoupment scheme would violate, among other things, the procedural aspect of *Bearden*'s equal justice principle.[191] First, although *Bearden* and related Supreme Court cases have specifically dealt with *imprisonment* of indigents without ability-to-pay consideration (as the *Fowler* court observed[192]), the *Bearden* analysis applies whenever access to a fundamental right is conditioned on wealth status; consequently, state and federal courts have applied *Bearden* to determine the constitutionality of states' efforts to recoup criminal justice user fees.[193] This application of *Bearden* outside the imprisonment context is also consistent

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184 OHIO REV. CODE ANN. § 2947.23(A)(1)(a) (West 2014); *see also* State v. White, 817 N.E.2d 393, 394 (Ohio 2004) (quoting the Ohio law).

185 *See* State v. Johnson, No. 1-16-41, slip op. at 14–15 (Ohio Ct. App. July 24, 2017) (subpoena costs); State v. Weathers, 988 N.E.2d 16, 20 (Ohio Ct. App. 2013) (jury costs).

The Sixth Amendment guarantees defendants not only the right to a trial by jury, but also the right to have "compulsory process for obtaining witnesses in [their] favor." Washington v. Texas, 388 U.S. 14, 18 (1967). The compulsory process right, like the jury trial right, is "a fundamental element of due process of law." *Id.* at 19; *see also* Harris v. Thompson, 698 F.3d 609, 626 (7th Cir. 2012) (detailing how various Justices of the Supreme Court have described the right to compulsory process as "sacred" and an "essential attribute of the adversary system itself" (first quoting United States v. Burr, 25 F. Cas. 30, 33 (C.C.D. Va. 1807); and then quoting Taylor v. Illinois, 484 U.S. 400, 408 (1988))).

186 § 2947.23(C).

187 No. 27539, 2018 WL 1989584 (Ohio Ct. App. Apr. 27, 2018), *cert. granted* (Ohio Aug. 29, 2018) (No. 2018-0797).

188 *See id.* at *1.

189 *Id.* at *5.

190 *See* LDF *Taylor* Amicus, *supra* note 72, at 5–24.

191 *Id.* at 7–12, 15–17.

192 *See* Fowler v. Benson, 924 F.3d 247, 260 (6th Cir. 2019).

193 LDF *Taylor* Amicus, *supra* note 72, at 14–15 (collecting cases).

with Colgan's observation that *Bearden* has influenced the Supreme Court's conception of "due process and equal protection as providing amplified protection where the individual interest in avoiding unfair treatment due to one's financial condition involves the criminal justice system or other fundamental rights, as well as its concerns regarding the unique risk posed by the use of the prosecutorial power."[194]

Next, as LDF argues, "*Bearden* requires 'a careful inquiry' into (1) the individual interest affected, (2) the nexus between the legislative means and purpose, and (3) whether alternative means for effectuating that purpose exist."[195] In this case, the balance of factors mirrors the Ninth Circuit's analysis in *Hernandez*: (1) the individual interest involved is fundamental, as the threat of unaffordable financial obligations may deter defendants from exercising their Sixth Amendment rights; (2) the nexus between the government's refusal to consider ability to pay and its goal of recouping costs is virtually nonexistent, given the unlikelihood of receiving payment for court costs from those whom the ability-to-pay procedures would screen out; and (3) an alternative means of recouping costs is readily available, as trial courts could simply inquire into defendants' financial circumstances when they move for modification of their financial obligations.[196]

Also, like the plaintiffs in *Hernandez*, LDF's *Bearden* claim draws on the doctrine's procedural strand.[197] In fact, the Supreme Court's *Fuller* precedent would have foreclosed an argument — like Colgan's theoretical challenge to wealth-based penal disenfranchisement — that sought a flat prohibition against imposition of criminal justice user fees on indigent defendants.[198] Instead, by focusing on the procedural aspect of equal justice, LDF's brief demonstrates that *Bearden*'s three-factor "careful inquiry" test is consistent, and perhaps synchronous, with the Supreme Court's analysis of recoupment of counsel costs in *Fuller*.[199] The Supreme Court upheld Oregon's counsel-cost recoupment scheme in *Fuller* because that "legislation [was] tailored to impose an obligation only upon those with a foreseeable ability to meet it, and to enforce that obligation only against those who actually become able to meet it without hardship."[200] But critically, Oregon accomplished this tailoring through mandatory ability-to-pay procedures: "The sentencing court must 'take account of the financial resources of the defendant and the

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[194] Colgan, *supra* note 6, at 62 n.23 (citing, inter alia, Obergefell v. Hodges, 135 S. Ct. 2584, 2602–03 (2015)).

[195] LDF *Taylor* Amicus, *supra* note 72, at 15–16 (quoting Bearden v. Georgia, 461 U.S. 660, 666–67 (1983)).

[196] *See id.* at 16–17.

[197] *See id.* at 14–17.

[198] *See* Fuller v. Oregon, 417 U.S. 40, 46–50 (1974); *cf.* Colgan, *supra* note 6, at 112–15.

[199] LDF *Taylor* Amicus, *supra* note 72, at 16–17.

[200] *Fuller*, 417 U.S. at 54.

nature of the burden that payment of costs will impose.'"[201] *Bearden*'s inquiry into the nexus between the government's interest and the means it employs, balanced against the weight of the individual interest affected, accomplishes precisely the same tailoring goal: indigents' access to a fundamental right cannot be unnecessarily burdened, and the government must employ the least restrictive available set of procedures to guard against such unnecessary chilling.

B. Voting Rights Restoration

As Colgan has demonstrated, *Bearden*'s equal justice principle represents a powerful tool for challenging laws that punish those convicted of crimes with disenfranchisement.[202] In addition, the procedural aspect of equal justice may provide a strategically useful means of blunting the disenfranchising impact of laws that condition voting rights on repayment of legal financial obligations. Another of LDF's recent cases, *Jones v. DeSantis*,[203] presents a useful entry point.

The American Civil Liberties Union (ACLU), the Brennan Center for Justice at NYU Law, and LDF filed a lawsuit[204] in June 2019 challenging Florida's Senate Bill 7066 (SB 7066) as an "unconstitutional[] den[ial of] the right to vote to returning citizens with a past felony conviction based solely on their inability to pay outstanding fines, fees, or restitution."[205] The Florida Legislature passed SB 7066, and the Governor signed it, following the passage of the Voting Restoration Amendment (also known as "Amendment 4") to the state constitution by popular referendum.[206]

Amendment 4 provides that "any disqualification from voting arising from a felony conviction shall terminate and voting rights shall be restored upon completion of all terms of sentence including parole or probation";[207] it thereby "restored voting rights to over a million previously disenfranchised Floridians who had completed the terms of their sentences."[208] SB 7066, however, conditions restoration of voting rights not

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[201] *Id.* at 45 (quoting OR. REV. STAT. § 161.665(3) (1973)).

[202] Colgan, *supra* note 6, at 112–15. Relying on *Bearden*, Colgan advances "a distinct avenue of constitutional attack," *id.* at 90, against "wealth-based penal disenfranchisement," *id.* at 91.

[203] 410 F. Supp. 3d 1284 (N.D. Fla. 2019), *aff'd sub nom.* Jones v. Governor of Florida, No. 19-14551, 2020 WL 829347 (11th Cir. Feb. 19, 2020).

[204] Complaint for Injunctive and Declaratory Relief at 69–71, Gruver v. Barton, No. 19-cv-00302 (N.D. Fla. June 28, 2019) [hereinafter *Gruver* Compl.].

[205] *Id.* at 2. This case was consolidated with four other cases. *See* Plaintiffs' Memorandum of Law in Support of Motion for Preliminary Injunction or, in the Alternative, for Further Relief at 15, *Jones*, 410 F. Supp. 3d 1284 (No. 19-cv-300) [hereinafter *Jones* PI Brief].

[206] *Gruver* Compl., *supra* note 204, at 2–3.

[207] FLA. CONST. art. VI, § 4. "[P]erson[s] convicted of murder or a felony sexual offense" are exempted from Amendment 4's restoration of voting rights. *Id.*

[208] *Gruver* Compl., *supra* note 204, at 2.

only on "completion of all terms of sentence including parole or probation,"[209] but also on payment of any and all outstanding LFOs, regardless of whether indigency would make such payment impossible.[210] Consequently, SB 7066 raises significant constitutional questions under *Bearden* (among other things).

The *Jones* plaintiffs mount a powerful attack against SB 7066 under *Bearden*, but this attack relies exclusively on the substantive aspect of equal justice, echoing Colgan's interpretation of *Bearden* as a categorical prohibition on punishment for poverty.[211] Turning to *Bearden*'s multifactor inquiry, the plaintiffs contend that "[t]he first two factors — the nature of the interest and the extent to which it is affected — tip unquestionably in Plaintiffs' favor": voting rights are "paramount," and "Plaintiffs' interest in voting has been affected to the fullest possible extent; it has been completely denied."[212] As to the nexus between the policy and any legitimate governmental interest, "there is no rational connection between SB7066's LFO requirement and a legitimate legislative purpose," given that "there are a multitude of alternative and more appropriate means for effectuating any state purpose behind the requirement."[213] The legislation is not necessary to effective implementation of Amendment 4,[214] nor does it "promote Florida's interest in collecting unpaid debts," as "imposing prolonged disenfranchisement on people unable to pay does not 'aid[] collection of the revenue.'"[215] Consequently, the plaintiffs conclude that SB 7066 amounts to an unconstitutional effort to "'bolt the door to equal justice' based on ability to pay."[216]

Plaintiffs' substantive attack on the constitutionality of SB 7066 under *Bearden* is wholly legitimate and should prevail. Yet it overlooks an argument grounded in the procedural strand of equal justice: the thrust of such a challenge would be that Florida must employ ability-to-pay procedures before depriving returning citizens of their voting-restoration rights under the state constitution, at least if it wants to use the franchise as leverage to enforce LFOs.

Under Florida law, "courts need not determine a defendant's ability to pay before imposing LFOs"; therefore, "many returning citizens cannot afford to pay their LFOs, nor does Florida anticipate that they will."[217] This reality makes SB 7066 a prime candidate for a challenge under the procedural strand of *Bearden*. As the *Jones* plaintiffs argue,

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[209] *Id.* at 3 (quoting FLA. CONST. art. VI, § 4).
[210] *Id.* at 3–4.
[211] *See* Colgan, *supra* note 6, at 112–13.
[212] *Jones* PI Brief, *supra* note 205, at 56.
[213] *Id.*
[214] *Id.* at 66–68.
[215] *Id.* at 68 (alteration in original) (quoting Tate v. Short, 401 U.S. 395, 399 (1971)).
[216] *Id.* at 57 (quoting M.L.B. v. S.L.J., 519 U.S. 102, 110 (1996)).
[217] *Id.* at 30.

the right to vote is paramount.[218] And even if precedent renders the right of returning citizens to vote nonfundamental,[219] the substantial importance of the franchise unquestionably transcends the relatively minor constitutional import of property rights, such as the driver's licenses at issue in *Fowler*.[220] In any event, nothing in *Bearden* requires that plaintiffs establish a "fundamental" individual interest in order to prevail. Assuming the legitimacy of Florida's interest in collecting on outstanding LFOs, the nexus between Florida's current policy — which lacks ability-to-pay procedures and indigency exemptions — and this legitimate interest is severely attenuated:

> The Florida Circuit Criminal Courts in 2018 reported that the collections rate for fines and fees was just 20.55%. Over 85% of all felony-related fines and fees in Florida are categorized as at risk — meaning the courts have "minimal collections expectations" due to the defendant's lack of financial resources. Of all felony-related LFOs, 22.9% are labeled at risk (i.e., "minimal collections expectations") specifically because the defendant was indigent.[221]

As in *Hernandez*, the government's interest here in collecting debts cannot be rationally served without considering whether returning citizens will in fact be able to repay their LFOs, especially before the government attempts to leverage an interest as important as franchise restoration to collect these debts.

Ultimately, the court in *Jones* issued a preliminary injunction in the plaintiffs' favor based on this very procedural-justice-oriented rationale.[222] Relying on *Johnson v. Governor of Florida*,[223] in which the Eleventh Circuit upheld Florida's disenfranchisement of all felons, subject to restoration by an executive clemency board,[224] the court held that SB 7066 likely failed to procedurally protect indigent felons from an unconstitutional denial of the franchise for inability to pay.[225] The Eleventh Circuit in *Johnson* explained that "[a]ccess to the franchise cannot be made to depend on an individual's financial resources";[226] from this

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[218] *Id.* at 56.

[219] Harvey v. Brewer, 605 F.3d 1067, 1079 (9th Cir. 2010) ("[Plaintiffs] cannot complain about their loss of a fundamental right to vote because felon disenfranchisement is explicitly permitted under the terms of [*Richardson v. Ramirez*, 418 U.S. 24, 55 (1974)]."); Colgan, *supra* note 6, at 89 & n.168 ("[O]nce lost upon conviction, access to the franchise no longer constitutes a fundamental right that triggers strict scrutiny." *Id.* at 89.).

[220] *See* 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.").

[221] *Jones* PI Brief, *supra* note 212, at 30 (footnotes omitted).

[222] Jones v. DeSantis, 410 F. Supp. 3d 1284, 1310 (N.D. Fla. 2019), *aff'd sub nom.* Jones v. Governor of Florida, No. 19-14551, 2020 WL 829347 (11th Cir. Feb. 19, 2020).

[223] 405 F.3d 1214 (11th Cir. 2005) (en banc).

[224] *Id.* at 1216 n.1, 1234–35.

[225] *Jones*, 410 F. Supp. 3d at 1309.

[226] *Id.* at 1300 (emphasis omitted) (quoting *Johnson*, 405 F.3d at 1216 n.1).

pronouncement, the *Jones* court derived two principles: (1) "Florida cannot deny restoration of a felon's right to vote solely because the felon does not have the financial resources necessary to pay" LFOs; and (2) the state can meet this constitutional mandate by providing a procedure to address returning citizens' financial circumstances.[227] Although the court did not rely on *Bearden*'s formulation of the procedural aspect of equal justice, it reached precisely the conclusion that such an analysis would produce: the state must provide some sort of process for determining returning citizens' financial circumstances before it denies them restoration of their voting rights for failure to pay.[228]

The conclusion that the procedural aspect of equal justice should require such ability-to-pay procedures is also reinforced by the (sparse) precedent on the question. In *Harvey v. Brewer*,[229] for example, Justice O'Connor — sitting by designation on the Ninth Circuit[230] — upheld Arizona's franchise-restoration law because "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."[231] Nonetheless, Justice O'Connor left open the possibility that this regime may fail constitutional muster as applied to indigents, absent ability-to-pay procedures: "Perhaps withholding voting rights from those who are truly unable to pay their criminal fines due to indigency would not pass this rational basis test, but we do not address that possibility because no plaintiff in this case has alleged that he is indigent."[232]

At least one district court has relied on *Harvey* to deny a motion to dismiss plaintiffs' claim that "requiring convicted felons to pay LFOs as a condition of re-enfranchisement"[233] violates the Equal Protection Clause.[234] Without deciding the level of scrutiny appropriate to the plaintiffs' challenge, the court concluded that they adequately alleged an equal protection violation under even minimum rationality review.[235]

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[227] *Id.* at 1301.

[228] *Id.* The Eleventh Circuit affirmed the injunction, *Jones v. Governor of Florida*, No. 19-14551, 2020 WL 829347, at *29 (11th Cir. Feb. 19, 2020), relying in part on "the *Griffin-Bearden* principle" that states may not punish individuals solely on the basis of their wealth status, *see id.* at *18. Applying heightened scrutiny in the form of *Bearden*'s four-part test, *id.* at *23–25, the Eleventh Circuit ultimately concluded "that the LFO requirement is unconstitutional as applied to felons who genuinely cannot pay," *id.* at *23.

[229] 605 F.3d 1067 (9th Cir. 2010).

[230] *Id.* at 1070 n.*.

[231] *Id.* at 1079; *see also* Johnson v. Bredesen, 624 F.3d 742, 747 (6th Cir. 2010) (upholding similar law under rational basis review).

[232] *Harvey*, 605 F.3d at 1080.

[233] Thompson v. Alabama, 293 F. Supp. 3d 1313, 1331 (M.D. Ala. 2017).

[234] *See id.* at 1332.

[235] *Id.* at 1331–32 ("Even if this court were to align with the weight of non-binding authority and apply rational basis review, dismissal under Rule 12(b)(6) is premature on Defendants' thin arguments.").

And indigence was the critical factor distinguishing that case from *Harvey*: "But, in *Harvey*, unlike in this case, no plaintiff had 'alleged that he [was] indigent' . . . . Defendants omit any reference to this factual distinction in their cursory citation to *Harvey*."[236] The district court's decision in *Thompson* implies that the absence of ability-to-pay procedures and a concomitant indigency exception to the repayment requirement may be irrational as applied to the poor. Although the court neither cited *Bearden* nor relied on its equal justice doctrine, its conclusion is wholly consistent with the analysis in this Essay: ability-to-pay procedures are required to ensure sufficient "rationality of the connection between legislative means and purpose"[237] when the government burdens indigents' rights to significant constitutional interests, from constitutional criminal procedure rights to the franchise.

CONCLUSION

The degree of constitutional protection due to indigents qua indigents has long been a fraught topic: the Supreme Court's precedents on wealth inequality generally draw criticism,[238] and for over fifty years, scholars have argued that the Due Process and Equal Protection Clauses mandate constitutional protections for indigents.[239] Although its application has proven enigmatic at times, *Bearden*'s blend of idiosyncratic equal protection and due process represents the constitutional touchstone for ensuring indigents equal access to fundamental constitutional rights.

Civil rights advocates have recently used this doctrine to achieve significant constitutional victories, challenging wealth-based detention policies across the nation. This Essay not only focuses on an additional means by which indigents are treated unfairly in our criminal justice system — user fees that burden their Sixth Amendment rights — but also suggests a supplementary theory of constitutional attack on such policies.

Constitutional challenges to criminal justice user fees generally cite some combination of *Jackson*'s anti-chilling doctrine, equal protection, and *Bearden*'s equal justice principle. But this Essay has demonstrated the utility of a unified doctrinal approach grounded solely in the latter doctrine. Consistent with the constitutionally sufficient procedures endorsed in *Fuller*, the procedural aspect of equal justice, as articulated under *Bearden*'s multifactor test, requires states to conduct ability-to-pay

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[236] *Id.* at 1332 (alteration in original) (quoting *Harvey*, 605 F.3d at 1079).

[237] Bearden v. Georgia, 461 U.S. 660, 667 (1983) (quoting Williams v. Illinois, 399 U.S. 235, 260 (1970) (Harlan, J., concurring in the result)).

[238] Professors Erwin Chemerinsky and Steven Shiffrin both identified *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973) — in which the Supreme Court held that wealth status is not a protected class under the Equal Protection Clause, *id.* at 27–28 — as the worst Supreme Court decision since 1960. *See* Andrea Sachs, *The Worst Supreme Court Decisions Since 1960*, TIME (Oct. 6, 2015), https://time.com/4056051/worst-supreme-court-decisions [https://perma.cc/VB7N-LA5L].

[239] *See* Garrett, *supra* note 6, at 401 & n.11.

hearings before taking action that disparately burdens indigents' access to fundamental rights. As certain recent civil rights successes, like the *Hernandez* case, have demonstrated, courts may be more receptive to this process-based theory of equal justice. And advocates should take heed of its strategic value: as a practical matter, judges may be more willing to impose such procedural protections than to categorically ban states from practices such as user-fee cost recoupment.