(ATTENUATING) THE TAINT OF POVERTY: HOW FOURTEENTH AMENDMENT JURISPRUDENCE AND THE ATTENUATION DOCTRINE LEAD TO LESSER FOURTH AMENDMENT RIGHTS FOR THE POOR

Then consequently, those must be bad Laws, which authorize the Imprisoning [of] any Man for Debt, who does honestly give up to his Creditors all that he hath in the World. . . . [T]o what good End, a Debtor is shut up in a Prison, after he is stripped of all his Goods. Can his Creditors, with all their Wisdom, have more than All? Will his Imprisonment increase his Estate? Will his Confinement pay or diminish his Debts? [O]r the Punishment of his Body be any Kind of Advantage to them, or to Society?[1]

INTRODUCTION

The United States is a nation that loathes its poor.[2] The ethos of this country is that any person can be successful if he works hard enough[3] — that the United States is a land of opportunity. Not succeeding, then, is seen as an individual shortcoming. People are poor because of their own bad decisions,[4] because the government

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[1] AN IMPARTIAL HAND, THE ILL POLICY AND INHUMANITY OF IMPRISONING INSOLVENT DEBTORS, FAIRLY STATED AND DISCUSSED 6 (Newport, James Franklin 1754).

[2] Of course, the poor are not a monolith, so attitudes — and sympathies — vary based on an indigent individual's other identities. *Compare, e.g.*, Yaël Bizouati-Kennedy, *Child Tax Credit: Polling Shows Bipartisan Support for Extension Beyond 2025 — What Are the Pros and Cons?*, GOBANKINGRATES (Oct. 30, 2023), https://www.gobankingrates.com/money/economy/child-tax-credit-polling-shows-bipartisan-support-extension-beyond-2025 [https://perma.cc/4U5H-KB7U] (describing the potential bipartisan support for extending a program addressing childhood poverty), *with* Meredith Lee Hill & Garrett Downs, *Republicans Launch Opening Salvo Against Food Aid*, POLITICO (Mar. 13, 2023, 12:16 PM), https://www.politico.com/news/2023/03/13/republicans-snap-benefits-cuts-00086638 [https://perma.cc/Y48C-NDPC] (describing a legislative effort to make it more difficult "for able-bodied adults without dependents" to receive government food assistance). When this Note refers to the poor, it refers to adults. Moreover, for the avoidance of doubt, this Note does not use the term "poor" disparagingly.

[3] *See, e.g.*, PEW RSCH. CTR., IN A POLITICALLY POLARIZED ERA, SHARP DIVIDES IN BOTH PARTISAN COALITIONS 42 (2019), https://www.pewresearch.org/politics/wp-content/uploads/sites/4/2019/12/PP_2019.12.17_Political-Values_FINAL.pdf [https://perma.cc/FD9G-P7W9] (finding that sixty percent of Americans surveyed believe "most people can get ahead if they're willing to work hard").

[4] *See, e.g.*, Susan E. Wright, Drake Univ., Blaming the Victim, Blaming Society or Blaming the Discipline: Fixing Responsibility for Poverty and Homelessness, Presidential Address Before the Midwest Sociological Society (Apr. 2, 1992), *in* 34 SOCIO. Q. 1, 2 (1993) ("When presented with the option of blaming the individual or blaming the broader social structure for economic failure, Americans consistently have chosen to blame the victim."); EMILY EKINS, CATO INST., WHAT AMERICANS THINK ABOUT POVERTY, WEALTH, AND WORK 20 (2019), https://www.cato.org/sites/cato.org/files/2019-09/Cato2019WelfareWorkWealthSurveyReport%20%281%29.pdf [https://perma.cc/AC2M-D5G5] ("When asked the top three causes of poverty in this country, Americans

incentivizes poverty via the welfare state,[5] or because they are being punished by God.[6] Or, they're lying; poor people are not actually poor but are instead misrepresenting their circumstances to take advantage of others' generosity or government services.[7] These narratives are embedded to the point of being nearly unassailable.[8] As a result, the country's public figures openly flaunt their disdain for the poor,[9] and legislatures across the country pass laws that penalize homelessness,[10]

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agree that poor life choices (42%) and abuse of drugs and alcohol (40%) are key."). *But see generally* PEW RSCH. CTR., MOST AMERICANS POINT TO CIRCUMSTANCES, NOT WORK ETHIC, FOR WHY PEOPLE ARE RICH OR POOR (2020), https://www.pewresearch.org/politics/wp-content/uploads/sites/4/2020/03/3-2-20-Wealth-in-America-FOR-RELEASE_FINAL-1.pdf [https://perma.cc/PQ2L-YKP9].

[5] *See, e.g.*, Carroll Doherty et al., *What Trump Supporters Believe and Expect*, PEW RSCH. CTR. (Nov. 13, 2024), https://pewrsr.ch/3YO2WDb [https://perma.cc/TW87-3SQN] ("72% of Trump supporters said aid to the poor does more harm than good."); Robert Rector, *Encouraging Work Lifts People Out of Poverty. The Green New Deal Won't Do That.*, THE HERITAGE FOUND. (Apr. 2, 2019), https://www.heritage.org/welfare/commentary/encouraging-work-lifts-people-out-poverty-the-green-new-deal-wont-do [https://perma.cc/PNH5-T4EJ]; Message to the Congress on America's Agenda for the Future, 1 PUB. PAPERS 149, 154 (Feb. 6, 1986) (describing welfare as creating a "spider's web of dependency"); Remarks on Welfare Reform Legislation and an Exchange With Reporters, 2 PUB. PAPERS 1233, 1233 (July 31, 1996) (describing welfare as "a broken system that traps too many people in a cycle of dependence").

[6] *See, e.g.*, Russell H. Conwell, Acres of Diamonds, *in* RUSSELL H. CONWELL & ROBERT SHACKLETON, ACRES OF DIAMONDS 21 (1915). In a speech that he purportedly delivered 6,152 times, Russell Conwell, the founder of Temple University, *Russell H. Conwell*, TEMPLE UNIV., https://www.temple.edu/about/history-traditions/russell-conwell [https://perma.cc/R5GM-B7N4], linked poverty with divine punishment, stating:

> I sympathize with the poor, but the number of poor who are to be sympathized with is very small. To sympathize with a man whom God has punished for his sins, thus to help him when God would still continue a just punishment, is to do wrong, no doubt about it . . . . [T]here is not a poor person in the United States who was not made poor by his own shortcomings, or by the shortcomings of some one else. It is all wrong to be poor, anyhow.

Conwell, *supra*.

[7] *See, e.g.*, Robert D. McFadden, *Comments by Meese on Hunger Produce a Storm of Controversy*, N.Y. TIMES, Dec. 10, 1983 (§ 1), at 12 ("Well, I think some people are going to soup kitchens voluntarily . . . . [W]e've had considerable information that people go to soup kitchens because the food is free and that that's easier than paying for it." (quoting *Here Is a Partial Transcript of the Interview Thursday* . . . , UPI (Dec. 9, 1983), https://www.upi.com/Archives/1983/12/09/Here-is-a-partial-transcript-of-the-interview-Thursday/3738439794000 [https://perma.cc/R784-BPDT])); Message to the Congress on America's Agenda for the Future, *supra* note 5, at 154 ("[M]any who are not poor receive benefits intended for the poor."); Catherine Lucey, *Donald Trump Wants Welfare Reform, Says "People Are Taking Advantage of the System*," PBS (Nov. 24, 2017, 11:52 AM), https://www.pbs.org/newshour/politics/donald-trump-wants-welfare-reform-says-people-are-taking-advantage-of-the-system [https://perma.cc/Z45E-JWGQ].

[8] *Cf.* THERESA L. MILLER ET AL., FRAMEWORKS INST., TALKING ABOUT POVERTY: NARRATIVES, COUNTER-NARRATIVES, AND TELLING EFFECTIVE STORIES 3 (2021) (describing research to try to reshape these "*[b]ootstraps* narrative[s]").

[9] *See, e.g.*, Maureen Dowd, Opinion, *Liberties; Trump Shrugged*, N.Y. TIMES, Nov. 28, 1999 (§ 4), at 11 (describing Donald Trump as calling politicians from low-income backgrounds "morons"); *id.* ("I don't like poverty. Usually, there's a reason for poverty. Do you want someone who gets to be president and that's literally the highest paying job he's ever had?" (quoting Donald Trump)).

[10] *See, e.g.*, HAW. REV. STAT § 291C-112 (2024) (criminalizing sleeping in one's car "between 6:00 p.m. and 6:00 a.m."); *cf.* City of Grants Pass v. Johnson, 144 S. Ct. 2202, 2208, 2226 (2024)

"criminalize[] poverty,"[11] and make it more difficult for altruists to help the less fortunate and for the poor to access social services.[12]

Bias against the poor manifests in disparate outcomes in the criminal legal system based on wealth.[13] The Constitution ostensibly protects the poor from being incarcerated merely because they are, well, poor. Indeed, in a triad of decisions, the U.S. Supreme Court announced that when a person's indigency prevents him from paying a legal financial obligation (LFO), he cannot be incarcerated for the crime of nonpayment.[14] But there are workarounds to this rule; state courts have created and are exploiting loopholes in the Court's protect-the-poor jurisprudence. In some jurisdictions, rather than sending indigent people to jail for failing to satisfy their LFOs, courts issue contempt of court warrants when debtors fail to pay court-ordered fines.[15] Nonpayment becomes a crime in these circumstances because the debtors have disobeyed the court's order to pay the fine, rendering the resultant warrants — and the concomitant arrests and incarceration — constitutional, *even if the defendants did not pay because they had no money*.

(holding that federal courts cannot, under the Eighth Amendment, invalidate state statutes criminalizing homelessness by prohibiting camping in public places). *See generally* RAJAN BAL, NAT'L HOMELESSNESS L. CTR., HOUSING NOT HANDCUFFS 2021: STATE LAW SUPPLEMENT (2021), https://homelesslaw.org/wp-content/uploads/2022/02/2021-HNH-State-Crim-Supplement.pdf [https://perma.cc/6QXM-Q8HU] (describing state laws criminalizing homelessness across the country); SASHA FELDSTEIN ET AL., BERKELEY L. POL'Y ADVOC. CLINIC, CALIFORNIA'S NEW VAGRANCY LAWS: THE GROWING ENACTMENT AND ENFORCEMENT OF ANTI-HOMELESS LAWS IN THE GOLDEN STATE (2016), https://www.law.berkeley.edu/wp-content/uploads/2015/12/Californias-New-Vagrancy-Laws.pdf [https://perma.cc/5VMU-Z695]; Jerod MacDonald-Evoy, *Pair of Proposed Bills Would Criminalize Homelessness in Arizona*, AZ MIRROR (Jan. 18, 2023, 5:36 PM), https://www.azmirror.com/2023/01/18/pair-of-proposed-bills-would-criminalize-homelessness-in-arizona [https://perma.cc/7MHG-CABY].

[11] Jared Bennett, *New Report Examines How Kentucky Fills Jails and Prisons by Criminalizing Poverty*, WKMS (Sept. 12, 2023, 10:22 AM), https://www.wkms.org/criminal-justice/2023-09-12/new-report-examines-how-kentucky-fills-jails-and-prisons-by-criminalizing-poverty [https://perma.cc/W4PG-DRY6]. *But see, e.g.*, Edwards v. California, 314 U.S. 160, 171, 173, 177 (1941) (discussing and invalidating a California statute that prohibited anybody from relocating, or helping relocate, indigent persons into the state).

[12] *See, e.g.*, Michael Sainato, *Houston Volunteers Face Thousands in Fines for Feeding Homeless*, THE GUARDIAN (Aug. 4, 2023, 7:00 AM), https://www.theguardian.com/us-news/2023/aug/04/texas-volunteers-fined-feeding-homeless-heat [https://perma.cc/NVZ3-4X7U] (discussing an ordinance that imposes fines for the "distribut[ion of] food to more than five people" on public or private property without consent of property owner); Dalia Faheid, *California City Criminalizes "Aiding" and "Abetting" Homeless Camps*, CNN (Feb. 13, 2025, 8:43 AM), https://www.cnn.com/2025/02/12/us/fremont-california-homeless-encampment-ban/index.html [https://perma.cc/L2XC-75HA] (discussing a recently passed ordinance criminalizing, inter alia, "aiding" or "abetting" a homeless camp with a fine of "up to $1,000 and up to six months in jail"). The contours of these debates, however, are outside the scope of this Note.

[13] *See, e.g.*, JEFFREY REIMAN, . . . AND THE POOR GET PRISON: ECONOMIC BIAS IN AMERICAN CRIMINAL JUSTICE 92 (1996) ("*For the same criminal behavior*, the poor are more likely to be . . . charged, . . . convicted, . . . and if sentenced, more likely to be given longer prison terms than members of the middle and upper classes.").

[14] *See* Williams v. Illinois, 399 U.S. 235, 240–41 (1970); Tate v. Short, 401 U.S. 395, 397 (1971); Bearden v. Georgia, 461 U.S. 660, 661–62, 672–73 (1983).

[15] *See, e.g.*, *infra* section III.B, pp. 1882–84 (discussing the example of Idaho prior to 2021).

In certain other jurisdictions, courts refuse to consider indigency when imposing LFOs; instead, they consider a debtor's ability to pay his fines only *after he has already been arrested for nonpayment*.[16] Constitution notwithstanding, then, poor people are still being arrested and incarcerated for being poor. And at base, in its current incarnation, the criminal legal system reflects the nation's disdain for the poor and treats indigent defendants with contempt.

For those concerned with how indigent defendants fare in the criminal legal system, several state court decisions offer glimpses of an alternate reality where the aims of the Supreme Court's protect-the-poor jurisprudence are realized. *Beck v. Elmore County Magistrate Court*,[17] for example, held that Idaho courts cannot issue contempt warrants for failure to pay LFOs without first determining on the record that the defendant *willfully* did not pay his fine.[18] Put differently, the court eschewed failure to pay a fine as being sufficient evidence in itself to substantiate a contempt of court charge and instead stated that willful nonpayment requires one to have been able to pay in the first place.[19] As previously operated, the Idaho process violated the Fourteenth Amendment because "it effectively turned a fine into jail time without due process."[20] Moving forward, Idaho courts must conduct an ability-to-pay inquiry "before issuing a [contempt] warrant" based on an individual's failure to pay his fine.[21] Only after finding he has chosen not to pay, despite having the means to do so, can the court imprison him.[22]

Decisions like *Beck*, which stop indigent defendants from being incarcerated for failure to pay before courts determine if their nonpayment was willful, are significant for two key reasons. First, they vindicate poor people's Fourteenth Amendment rights by closing a seemingly unintended loophole in the Court's jurisprudence that allows such incarceration. Given the number of indigent people at risk of incarceration due to their inability to pay fines,[23] precluding a court from issuing arrest warrants right after nonpayment is significant in that it gives the indigent defendant a chance to avoid incarceration by proving his

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16 *See, e.g.*, 7 PA. STAT. AND CONS. STAT. ANN. § 706(D) (West 2024) (citing 1 PA. STAT. AND CONS. STAT. ANN. § 150 (West 2024)).

17 489 P.3d 820 (Idaho 2021).

18 *Id.* at 833–34.

19 *Id.* at 834 ("[T]he mere allegation that an individual failed to pay court-ordered fines and fees . . . is not sufficient to provide a substantial basis for a probable cause determination with respect to willfulness.").

20 *Id.* at 836.

21 *Id.*

22 *See id.*

23 *See* Kiren Jahangeer, *Fees and Fines: The Criminalization of Poverty*, ABA (Dec. 16, 2019), https://www.americanbar.org/groups/government_public/publications/public_lawyer_articles/fees-fines [https://perma.cc/CVV5-P6MS] ("All 15 states [with the largest prison populations] make payment of criminal justice debt a condition of probation, parole, or other correctional supervision. In some states, when individuals fail to pay, they may face rearrest . . . ."); *see also id.* ("[A]pproximately two-thirds of people in prison have been assessed court fines and fees.").

nonpayment was unintentional.[24] Much ink has been spilled about the ill effects and witlessness of incarcerating people for being poor, and this Note need not synthesize that literature.[25]

Second, and more to this Note's contribution, *Beck*-type decisions have implications that extend beyond the Fourteenth Amendment, affecting poor people's Fourth Amendment rights as well. Indeed, the Supreme Court in *Utah v. Strieff*[26] held that a breach of one's constitutional right to be free from unreasonable search and seizure is cured if the officer discovers that the person he has unconstitutionally stopped has an outstanding arrest warrant.[27] The warrant saves the fruits of that unconstitutional stop from the exclusionary rule.[28] On first blush, *Strieff* may seem only tangentially related to the issue of incarcerating the indigent for failing to pay their LFOs. But the link between *Strieff* and cases like *Beck* comes into sharp relief when one learns that Edward Strieff's arrest warrant was based on a financial obligation he was unable to pay: a parking ticket.[29] Because poor people are less likely to be able to pay their LFOs, they are more likely to have failure-to-pay warrants out for their arrest.[30] After *Strieff*, this probability means that their Fourth Amendment rights have been enfeebled; if a court issues an arrest warrant for an indigent person based on his unpaid fine, and that person is later unconstitutionally stopped by the police, he will not be able to move to suppress evidence gathered in violation of his Fourth Amendment rights. In effect, then, the Fourth Amendment's protections vary based on wealth: Those with means enjoy a more fulsome Fourth Amendment, but the poor get only an insipid version of it.

Given the number of active arrest warrants across the country for failure to pay one's fine,[31] if more state courts were required to engage in an ability-to-pay analysis *before* issuing warrants against indigent people for failure to pay — under the guise of contempt or otherwise — the Fourth Amendment violations sanctioned by the Court in *Strieff* would pose less of a problem. Indigent debtors could avoid arrest and incarceration for being unable to pay their LFOs. This Note is the first to fully parse out the Fourteenth *and* Fourth Amendment implications

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[24] See *infra* notes 100–03 and accompanying text for a brief discussion of the negative consequences of being incarcerated, even if only briefly.

[25] *See, e.g.*, *supra* note 1 and accompanying text. That said, this Note is not principally about why it is nonsensical to send poor people to jail for being poor, either from a theories-of-punishment perspective or in terms of economics. This Note is also not primarily about the consequences, criminogenic or otherwise, of a penal regime where poor people are incarcerated for their poverty.

[26] 579 U.S. 232 (2016).

[27] *Id.* at 243.

[28] *See id.*; *see also infra* notes 131–32 and accompanying text.

[29] *See Strieff*, 579 U.S. at 243; *cf.* Brief for Respondent at 4, *Strieff*, 579 U.S. 232 (No. 14-1373) ("Edward Strieff's outstanding warrant was a 'small traffic warrant.'").

[30] *See, e.g.*, Nirej Sekhon, *Dangerous Warrants*, 93 WASH. L. REV. 967, 972 (2018).

[31] *See infra* notes 133–35 and accompanying text.

of failure-to-pay warrants.[32] It proceeds as follows: Part I discusses the criminalization of poverty and what is at stake for poor people. Part II then describes the jurisprudence that enables courts to circumvent Fourteenth Amendment equal protection requirements. Finally, Part III recounts the facts and reasoning behind *Strieff* and *Beck*, highlights the cases' interrelatedness, advocates for *Beck*'s reasoning to be adopted nationwide, and addresses counterarguments.

I. THE CRIMINALIZATION OF POVERTY, AND IMPOTENT CONSTITUTIONAL PROTECTIONS FOR THE POOR

A. The Criminalization of Poverty in the United States

To appreciate why cases like *Beck* and *Strieff* are significant, it is helpful to discuss some ways America's poor are marginalized. Almost any contact a poor person has with the criminal legal system runs the risk of pushing him into financial ruin.[33] States tack miscellaneous fees onto fines for nonjailable offenses, rendering seemingly minor financial penalties all but impossible to pay for the nation's poor.[34] For example, in California, penalty fees added to a traffic ticket with a base fine of thirty-five dollars could ultimately cost the driver up to $234.[35] A report by the state auditor noted that "the total cost for a traffic infraction almost doubled from 2002 to 2010" and "that failure to pay all or any portion of a fine [could] result in an additional civil assessment of up to $300" levied against drivers.[36] According to one estimate, that $300 late fee was imposed on over 300,000 Californians in fiscal year 2019–2020.[37] In other jurisdictions, for crimes slightly more serious than mere traffic violations,[38] the accused can simply pay to have the entire prosecution against him cease.[39] And in other American cities, most notably in

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[32] Justice Sotomayor alluded to these implications in her *Strieff* dissent but did not make clear that case's connection to the Fourteenth Amendment and implications for the indigent. *See Strieff*, 579 U.S. at 249–50 (Sotomayor, J., dissenting).

[33] *See* Jahangeer, *supra* note 23 ("With nearly half of American adults reporting that they could not cover a $400 emergency expense, even minimal fees can contribute to an endless cycle of debt.").

[34] *See, e.g.*, LEGIS. ANALYST'S OFF., OVERVIEW OF CRIMINAL FINE AND FEE SYSTEM AND NOTABLE RELATED ACTIONS 2 (2023) (describing various penalties and surcharges added to traffic tickets, including a penalty to help fund the county and state DNA identification program).

[35] *Id.*; *see also* ELAINE M. HOWLE, CAL. STATE AUDITOR, REPORT NO. 2017-126, PENALTY ASSESSMENT FUNDS 6 (2018).

[36] HOWLE, *supra* note 35, at 6.

[37] DEBT FREE JUST. CAL., CIVIL ASSESSMENTS: THE HIDDEN COURT FEE THAT PENALIZES POVERTY 6, 19 n.1 (2022).

[38] This Note does not take issue with ticketing drivers for moving violations, particularly those that threaten road safety. It instead argues that ballooning fines for less dangerous violations should not lead to poor people being incarcerated. Ordinances should be enforced, but people should not be jailed for, say, unpaid parking tickets, especially if they are too poor to pay those tickets.

[39] *See* Wayne A. Logan & Ronald F. Wright, *Mercenary Criminal Justice*, 2014 U. ILL. L. REV. 1175, 1188 ("[L]ocal law or practice [in two pre-trial abatement regimes] allows defendants in minor cases to pay . . . the police or the courts t[o] stop[] the prosecution from going forward.").

Ferguson, Missouri, police have been known to target poor, Black communities intentionally for enforcement of revenue-generating crimes, using the resultant extorted money to fund city budgets.[40] When residents do not pay those fines, warrants are issued for their arrest.[41]

If they cannot gather the requisite funds to avoid jail, indigent debtors are incarcerated. In Massachusetts, they serve what is colloquially known as "fine time," a period in jail where each day served reduces the debtor's balance owed by ninety dollars.[42] In Mississippi, judges sentence defendants to be incarcerated in "restitution centers" for indefinite periods of time.[43] Essentially jails, these facilities restrict residents' activities, sometimes allowing defendants to leave only if they are going to work.[44] The state then takes most of the money the residents earn and applies it to their outstanding debts, which grow daily because they are charged "room and board" for their stay.[45] Especially for defendants who earn minimum wage and have other financial obligations, stays in restitution centers can stretch for months.[46]

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[40] *See* C.R. DIV., U.S. DOJ, INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT 10, 64–67 (2015) ("[W]ith a high fine schedule, . . . [c]ity and police leadership pressure officers to write citations, independent of any public safety need, and rely on citation productivity to fund the [c]ity budget." *Id.* at 10.). But Ferguson is not unique in this regard. In cities across the country, fines make up a significant percentage of municipal revenue, sometimes over twenty-five percent. U.S. COMM'N ON C.R., TARGETED FINES AND FEES AGAINST COMMUNITIES OF COLOR 21 (2017).

[41] C.R. DIV., U.S. DOJ, *supra* note 40, at 3. According to the report:

> In 2013 alone, the court issued over 9,000 warrants . . . [for] minor violations such as parking infractions, traffic tickets, or housing code violations. *Jail time would be considered far too harsh a penalty for the great majority of these code violations, yet Ferguson's municipal court routinely issues warrants for people to be arrested and incarcerated for failing to timely pay related fines and fees*.

Id. (emphasis added).

[42] COMMONWEALTH OF MA. S. COMM. ON POST AUDIT AND OVERSIGHT, FINE TIME MASSACHUSETTS: JUDGES, POOR PEOPLE, AND DEBTORS' PRISON IN THE 21ST CENTURY, S. 189-2504, at 5 (2016); *see also* MASS. GEN. LAWS ch. 127, § 144 (2018).

[43] *See* Anna Wolfe & Michelle Liu, *Debtors Prisons: In Mississippi, Judges Can Lock You Up for Owing Money*, PEOPLE'S WORLD (Jan. 13, 2022, 9:58 AM), https://www.peoplesworld.org/article/debtors-prisons-in-mississippi-judges-can-throw-you-in-prison-for-owing-money [https://perma.cc/6QWT-R3JC].

[44] *See id.*

[45] *Id.*; *see also* Leah A. Plunkett, *Captive Markets*, 65 HASTINGS L.J. 57, 58–59 (2013); Laura I. Appleman, *Nickel and Dimed into Incarceration: Cash-Register Justice in the Criminal System*, 57 B.C. L. REV. 1483, 1501 (2016) ("In forty-one states, . . . [t]hrough 'pay-to-stay' programs, offenders incarcerated in state and county jails are financially responsible for their room and board along with every other possible cost related to their stay." (footnote omitted)); Sarah Lehr, *The Vast Majority of States Allow People to Be Charged for Time Behind Bars*, NPR (Mar. 4, 2022, 5:13 AM), https://www.npr.org/2022/03/04/1084452251/the-vast-majority-of-states-allow-people-to-be-charged-for-time-behind-bars [https://perma.cc/96SG-6VLV]; ALEXANDRA NATAPOFF, PUNISHMENT WITHOUT CRIME 129–30 (2018) ("In some places, going to jail worsens defendants' debt: [T]hey are charged daily jail fees, meal fees, booking fees, and medical fees if they require health care during their incarceration. In other words, they must 'pay to stay.'").

[46] *See* Wolfe & Liu, *supra* note 43 (describing stays in restitution centers lasting on average "nearly four months . . . and up to five years," with individuals at those centers making only "an average of $6.76 per hour in take home pay" per data from 2016 to 2018).

How has the United States gotten to this point? The problem is with the relationship between financial sanctions and the criminal legal system broadly. People are fined because those fines (theoretically) generate revenue, not because the fines are part of a rational theory of punishment or rehabilitation.[47] It is difficult to quantify the exact scale of the criminal justice debt issue because many states do not track their court debt.[48] That said, a recent estimate puts the total outstanding amount of fines and fees debt nationwide at over $27.6 billion.[49] A disproportionate amount of this debt is borne by communities of color.[50] States issue "tens of thousands of . . . warrants" each year for unpaid fines, but it is difficult to know the scope of the problem on this end, too, "because states and local courts do not typically track these orders as a category of arrest warrants."[51] Available data indicate that four small claims courts in Massachusetts "issued 1,325 [debt-based] warrants" in 2016;[52] New York City had "1.2 million outstanding warrants, many for" court debt, in 2014;[53] and in Texas, "[b]etween 2012 and the end of 2018, . . . municipal and justice of the peace courts issued" nearly 5 *million* warrants for unpaid court debt.[54] But ultimately, because indigent people often cannot pay their fines expeditiously (if at all), a state may spend more to collect the debt than what it would gain in revenue. This imbalance would render the entire scheme financially imprudent.[55]

B. The Supreme Court's (Failed) Attempt to Protect the Poor

In the latter half of the twentieth century, the Supreme Court released a trio of decisions seeking to provide constitutional protections to

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[47] *Cf.* Devah Pager et al., *Criminalizing Poverty: The Consequences of Court Fees in a Randomized Experiment*, 87 AM. SOCIO. REV. 529, 529 (2022) ("The evidence indicates that court debt charged to indigent defendants neither caused nor deterred new crime, and the government obtained little financial benefit."); NATAPOFF, *supra* note 45, at 9 ("Some judges' salaries depend on collecting fines and fees from the people they convict. Small cities and local courts raise millions of dollars from misdemeanor and traffic offenses.").

[48] *See* BRIANA HAMMONS, FINES & FEES JUST. CTR., TIP OF THE ICEBERG: HOW MUCH CRIMINAL JUSTICE DEBT DOES THE U.S. REALLY HAVE? 5 (2021).

[49] *Id.* at 10.

[50] *See* U.S. COMM'N ON C.R., *supra* note 40, at 19; *cf.* Kate K. O'Neill et al., *Debtors' Blocks: How Monetary Sanctions Make Between-Neighborhood Racial and Economic Inequalities Worse*, 8 SOCIO. RACE & ETHNICITY 43, 44 (2022) ("As [they are] with police contact, . . . communities with higher rates of poverty and BIPOC residents are disproportionately affected by LFOs." (citation omitted)).

[51] ACLU, A POUND OF FLESH: THE CRIMINALIZATION OF PRIVATE DEBT 12 (2018).

[52] *Id.* at 12–13.

[53] *See* 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/UJ8R-7T2U].

[54] *See* Johann D. Gaebler et al., *Forgotten but Not Gone: A Multi-State Analysis of Modern-Day Debt Imprisonment*, PLOS ONE, Sept. 13, 2023, at 9.

[55] *See, e.g.*, MATTHEW MENENDEZ ET AL., BRENNAN CTR. FOR JUST., THE STEEP COSTS OF CRIMINAL JUSTICE FINES AND FEES 5 (2019) ("One New Mexico county spends at least $1.17 to collect every dollar . . . it raises through fees and fines, . . . los[ing] money through this system.").

indigent defendants facing incarceration for failing to pay LFOs. Together, these decisions — *Williams v. Illinois*,[56] *Tate v. Short*,[57] and *Bearden v. Georgia*[58] — announced that, absent exigent circumstances, indigent defendants cannot go to jail simply for being too poor to pay LFOs.[59] Nonetheless, states continue to jail indigent defendants who default on their LFOs due to inability to pay. Before getting into how *Williams*, *Tate*, and *Bearden* have failed the poor, it is helpful to understand their facts and rationales.

In *Williams*, the Court considered a challenge from a petitioner sentenced to the maximum penalty for a petty theft conviction: "[O]ne year imprisonment and a $500 fine."[60] Claiming indigency, Williams did not pay the fine while incarcerated.[61] Illinois law at the time provided that defendants who did not pay the fines associated with their convictions could be incarcerated until those fines were "paid, or satisfied at the rate of $5.00 per day of imprisonment."[62] While incarcerated, Williams petitioned to be released at the end of his year-long prison stint so he could get a job and pay his debt because he was "indigent at all stages of the proceedings."[63] The court rejected Williams's request, thus opening the door for him to serve an additional 101 days in prison, the amount of time it would take for his fine to be paid.[64] On appeal, the Supreme Court deemed unconstitutional Williams's sentence to more than three additional months in prison.[65] The Court held "that the Equal Protection Clause of the Fourteenth Amendment requires that the statutory ceiling placed on imprisonment for any substantive offense be the same for all defendants irrespective of their economic status."[66]

Then, in *Tate*, the Court again found in favor of the indigent defendant challenging his incarceration for failing to pay his LFO. Here, the debt — for unpaid traffic offenses — totaled $425.[67] Tate, who earned between twenty-five and sixty dollars per week and was the sole provider for his wife and two children, could not pay that debt.[68] Consequently, he was sentenced to eighty-five days of labor at the municipal

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[56] 399 U.S. 235 (1970).
[57] 401 U.S. 395 (1971).
[58] 461 U.S. 660 (1983).
[59] *See Williams*, 399 U.S. at 240–41; *Tate*, 401 U.S. at 397; *Bearden*, 461 U.S. at 661–62.
[60] *Williams*, 399 U.S. at 236 (citing ILL. REV. STAT. ch. 38, § 16-1 (1967) (current version at 720 ILL. COMP. STAT. 5/16-1 (2020)).
[61] *Id.* at 236–37.
[62] *Id.* at 236 n.3 (quoting ILL. REV. STAT. § 16-1 (1961)).
[63] *Id.* at 237.
[64] *Id.* at 236–37. Williams was also liable for a five-dollar court fee, bringing his total debt to $505. *Id.* at 236.
[65] *See id.* at 244.
[66] *Id.*
[67] Tate v. Short, 401 U.S. 395, 396 (1971).
[68] *Id.* at 396 n.1.

prison farm.[69] The Texas Court of Criminal Appeals affirmed a lower court's denial of Tate's habeas corpus application.[70] But the Supreme Court reversed.[71] Extending the logic of *Williams*, the Court stated that "[a]lthough the instant case involves offenses punishable by fines only, petitioner's imprisonment for nonpayment constitutes precisely the same unconstitutional discrimination [seen in *Williams*] since, like Williams, petitioner was . . . imprison[ed] solely because of his indigency."[72]

Finally, and most importantly, *Bearden* reaffirmed that an indigent person's nonpayment of his court-imposed debt was not sufficient, by itself, to justify his incarceration. Bearden was placed on probation after pleading guilty to burglary and theft charges.[73] One term of his probation was that he "pay a $500 fine and $250 in restitution," with $100 due on the day the condition was imposed, $100 due the next day, "and the $550 balance [due] within four months."[74] Bearden borrowed money to pay the first $200 on schedule.[75] After that, "however, [he] was laid off."[76] Illiterate and lacking a complete secondary education,[77] Bearden struggled to find gainful employment thereafter and could not pay the balance of his debt.[78] So before his four-month window expired, Bearden told his probation office that he would be late in paying his fine due to his being unemployed.[79] Rather than granting Bearden more time, "the State filed a petition . . . to revoke [Bearden's] probation" and send him to jail for the rest of his probationary period to punish his nonpayment.[80] The trial court acquiesced, the appeals court affirmed, and the state supreme court "denied review."[81] But the Supreme Court reversed, condemning the State's actions.[82] It stated that a "court must inquire into the reasons for the failure to pay" and "consider alternative[s]" to imprisonment for probationers who cannot "pay despite sufficient bona fide efforts."[83] "To do otherwise would . . . be contrary to the fundamental fairness required by the Fourteenth Amendment."[84]

Critically, *Bearden* introduced a crucial protection for the poor: the willfulness, or ability-to-pay, analysis. The Court's decisions in *Williams*

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[69] *Id.* at 396–97. It would have taken Tate eighty-five days to pay off his debt at a rate of five dollars per day. *See id.*

[70] *Id.* at 397.

[71] *Id.*

[72] *Id.* at 397–98.

[73] Bearden v. Georgia, 461 U.S. 660, 662 (1983).

[74] *Id.*

[75] *Id.*

[76] *Id.*

[77] *Id.*

[78] *Id.* at 662–63.

[79] *Id.* at 663.

[80] *Id.*

[81] *Id.*

[82] *Id.* at 661–62.

[83] *Id.* at 672.

[84] *Id.* at 672–73.

and *Tate* concerned disparate punishments for the poor and nonpoor based on statutes — one that gave the option between incarceration and fine payment (*Williams*) and another that did not include such an option but nonetheless resulted in the poor being jailed and the nonpoor going free (*Tate*). But *Bearden* introduced the mens rea requirement for nonpayment-based incarceration: that the defendant must have the means to pay and choose to eschew his financial obligations.

Together, this trio of decisions seems to clearly prohibit courts from putting indigent people in jail for being too poor to pay their LFOs except as a last resort. They recognized that there are better ways to ensure compliance with the law than punishing indigency with incarceration.[85] But in reality, *Williams*, *Tate*, and *Bearden* have not stopped states from incarcerating the indigent for their unpaid LFOs.[86]

II. FISSURES IN THE FOURTEENTH AMENDMENT

The issue with *William*, *Tate*, and *Bearden* is twofold. First, judges routinely ignore *Bearden* and send people to jail for not paying fines without any recourse or consequences.[87] The indigent people sent to jail are hardly ever represented by counsel[88] and may lack the resources to

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[85] That is to say, the Court did not — and this Note does not — argue that the indigent should face no consequences for breaking the law. Rather, the point is that punishment is not a suitable deterrent — it just punishes someone for being poor. *See infra* section III.D, pp. 1885–86.

[86] It is worth noting, briefly, that the Fourteenth Amendment is not the only constitutional provision that could shield indigent defendants from being jailed for being too poor to pay their LFOs. In a different reality, the Eighth Amendment could also shield these debtors because it prohibits "excessive fines." U.S. CONST. amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed . . . ."). For more on how the Eighth Amendment would shield debtors by requiring these penalties to be proportional to an individual's financial means, rather than simply to the offense, see generally Professor Beth Colgan's works, such as Beth A. Colgan, *The Excessive Fines Clause: Challenging the Modern Debtors' Prison*, 65 UCLA L. REV. 2 (2018).

[87] *See, e.g.*, COMMONWEALTH OF MA. S. COMM. ON POST AUDIT AND OVERSIGHT, *supra* note 42, at 16 (finding, in a study of people serving jail time for unpaid fines in Massachusetts, that even though "60% [of defendants in the sample] had been found indigent for the purposes of receiving court-appointed counsel in the earlier criminal proceeding that gave rise to the fines, fees and court costs," "[o]nly six judges undertook an inquiry into whether failure to pay was a function not of willful contempt but of inability to pay"); *cf.* West v. City of Santa Fe, 16-CV-0309, 2018 WL 4047115, at *2 (S.D. Tex. Aug. 16, 2018) (describing a municipality where an indigent debtor could not prove his indigency before being incarcerated because "the judges had gone out of town and had not left any way to get in touch with them. . . . [I]t [wa]s not their ordinary practice to hold [such] hearings before committing someone to jail on a capias pro fine warrant" (quoting First Amended Complaint ¶ 33, *West*, No. 16-cv-0309, 2017 WL 6016092)); Michael Goldberg, *Mississippi Police Unconstitutionally Jailed People for Unpaid Fines, Justice Department Says*, AP NEWS (Feb. 29, 2024, 6:03 PM), https://apnews.com/article/justice-department-civil-rights-lexington-mississippi-26757dd41d88b7d0155ce9789e4c7038 [https://perma.cc/S5FX-HN4J]; *In re* Hayes III, No. 49, 2017 WL 132929, at *1, *4 (Ala. Ct. Judiciary Jan. 5, 2017) (entering final judgment against a municipal judge for, "[o]n many occasions," *id.* at *1, jailing residents for failing to pay LFOs without inquiring into their ability to pay the fines).

[88] Note, *State Bans on Debtors' Prisons and Criminal Justice Debt*, 129 HARV. L. REV. 1024, 1028 (2016) ("Debtors are almost never provided legal counsel.").

challenge their incarceration either before or after the fact.[89] Their exploitation goes unchecked, particularly because the judicial system often perceives benefits from the revenue generated by defendants' LFOs.[90]

The second reason is somewhat more complicated. In *Williams*, *Tate*, and *Bearden*, the Court held only that the Fourteenth Amendment (1) prohibits disparate punishments based on wealth[91] and (2) requires courts to assess a defendant's ability to pay before sentencing him to incarceration for failing to pay his LFO.[92] But the cases did not explicitly require courts to engage in an ability-to-pay analysis before *arresting* someone for not paying his LFO. This distinction is significant. It means that if an indigent person defaults on his LFO, a court does not have to determine if that nonpayment was willful before issuing a contempt of court arrest warrant based on nonpayment or an arrest warrant for someone to appear at a hearing to determine his ability to pay. The Court's intent in deciding *Williams*, *Tate*, and *Bearden* seems to have been to stop indigent people from being incarcerated for failing to pay except as a last resort. But state courts have figured out how to seemingly comply with the letter — but not the spirit — of those decisions, even though the result is the same for the indigent: jail time.

Consider the situation in Pennsylvania. Pennsylvania Rule of Criminal Procedure 706(A) states that "[a] court shall not commit the defendant to prison for failure to pay a fine or costs unless it appears after hearing that the defendant is financially able to pay the fine or costs."[93] Then, if a defendant is found unable to pay, subsection C of that same rule requires a court to consider "the defendant's financial means," "insofar as is just and practicable," before imposing mandatory costs.[94] The issue is that the ability-to-pay analysis happens only at the stage of the proceeding when a criminal defendant faces incarceration for nonpayment and not at any point prior to that.[95] This timing means that when a person becomes delinquent on his LFO in Pennsylvania, a court can issue a warrant for his arrest, the police can arrest him, and he can wait in jail *for more than three days* before the court determines whether

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89 *Cf., e.g.*, ACLU, *supra* note 51, at 22 (finding that about ninety percent of debt collection cases end "in default judgment . . . because the defendant did not contest the case").

90 *See, e.g.*, MATTHEW MENENDEZ ET AL., *supra* note 55, at 6 ("North Carolina collects 52 separate fees . . . [and] uses fees to fund half of [its] judicial budget . . . ."); *see also* Cain v. White, 937 F.3d 446, 448–50, 453–54 (5th Cir. 2019) (citing Cain v. City of New Orleans, 281 F. Supp. 3d 642, 654 (E.D. La. 2017); Ward v. Village of Monroeville, 409 U.S. 57, 58 (1972)) (describing the pecuniary interest the Orleans Parish Criminal District Courts have in imposing LFOs on defendants because the resultant funds, if collected, go to a Judicial Expense Fund controlled by the judges).

91 *See* Williams v. Illinois, 399 U.S. 235, 244 (1970); Tate v. Short, 401 U.S. 395, 397 (1971).

92 *See* Bearden v. Georgia, 461 U.S. 660, 672–73 (1983).

93 7 PA. STAT. AND CONS. STAT. ANN. § 706(A) (West 2024).

94 *Id.* § 706(C).

95 *See* Commonwealth v. Lopez, 280 A.3d 887, 910–11 (Pa. 2022) (holding that the ability-to-pay analysis need not happen even at sentencing).

he willfully did not pay or simply lacked the means to do so.[96] Advocates challenged this scheme on *Bearden* grounds,[97] but the Pennsylvania Supreme Court held that it is constitutional even though it results in indigent defendants being incarcerated, if only temporarily, before their ability-to-pay hearings take place.[98]

These regimes, and others across the country that circumvent the Fourteenth Amendment, are insidious. They turn nonpayment into a strict liability crime — essentially standing for the proposition that the only reason a person does not pay his court debt is because he does not want to, not because he cannot.[99] State courts are casting too wide of a net, sweeping in those they should not punish — people unable to pay their LFOs due to their being indigent — with those they wish to punish — people who choose not to pay.

And it matters that poor people are being jailed, even for a few days, for nonwillful nonpayment of their LFOs. It does not matter that they are not formally sentenced to a term in jail or prison for failing to pay their LFOs; the arrest is sufficient to wreak havoc on their lives. Being arrested can result in a person losing his job or his home, and the concomitant record makes securing future employment and housing more difficult.[100] Arrests come with indignities and invasions of privacy.[101] Conditions in U.S. jails and prisons are bleak, to say the least.[102] And the fear of being arrested for an unpaid LFO causes debtors to forego paying for food, medicine, and other necessities, sending ripple effects

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[96] *See* Brief of Amici Curiae The Fines and Fees Justice Center and the Cato Institute in Support of Appellant Alexis Lopez at 4, *Lopez*, 280 A.3d 887 (No. 27 EAP 2021) ("The defendant can be jailed for over three days while waiting for an ability-to-pay hearing.").

[97] *See id.* at 8–9.

[98] *See Lopez*, 280 A.3d at 910–11. And, of course, there is the pre-*Beck* regime in Idaho, where the Elmore County Magistrate Court circumvented *Bearden* by jailing a defendant for contempt rather than for failing to pay her LFO. *See infra* section III.B, pp. 1882–84.

[99] Nonpayment functioning as sufficient proof of willful contempt is especially troubling given criminal law's general move away from strict liability for minor crimes. *See, e.g.*, MODEL PENAL CODE § 2.05 cmt. (AM. L. INST. 1985).

[100] *See* Utah v. Strieff, 579 U.S. 232, 253 (2016) (Sotomayor, J., dissenting) (quoting Gabriel J. Chin, *The New Civil Death*, 160 U. PA. L. REV. 1789, 1805 (2012)) (citing JAMES B. JACOBS, THE ETERNAL CRIMINAL RECORD 33–51 (2015); Kathryne M. Young & Joan Petersilia, *Keeping Track*, 129 HARV. L. REV. 1318, 1341–57 (2016)).

[101] *See id.* (quoting Florence v. Bd. of Chosen Freeholders, 566 U.S. 318, 323 (2012)) (citing Maryland v. King, 569 U.S. 435, 465–66 (2013)).

[102] *See, e.g.*, EMILY D. BUEHLER & SHELBY KOTTKE-WEAVER, U.S. DOJ, NCJ 308553, SEXUAL VICTIMIZATION REPORTED BY ADULT CORRECTIONAL AUTHORITIES, 2019–2020 — STATISTICAL TABLES 1 (2024) ("In 2020, correctional administrators reported 36,264 allegations of sexual victimization in . . . correctional facilities."), https://bjs.ojp.gov/document/svraca1920st.pdf [https://perma.cc/3G2B-MSAK]; West v. City of Santa Fe, No. 16-CV-0309, 2018 WL 4047115, at *13 (S.D. Tex. 2018) (describing the City of Santa Fe's alleged "Hungry Man Policy," whereby the city feeds inmates "a daily ration of one Pop Tart for breakfast, one Pop Tart for lunch, and a frozen meal — such as a Hungry Man frozen dinner — at night.").

through their families.[103] In short, it does not matter that indigent people who default on their fines are only temporarily incarcerated. What matters is that the consequences of such incarceration can be disastrous.

III. THE POVERTY GAP IN THE COURT'S FOURTEENTH AMENDMENT JURISPRUDENCE AND HOW TO PLUG IT

A. Loopholes to Handcuffs: How State Courts' Circumvention of the Fourteenth Amendment Enfeebles the Fourth Amendment for the Poor

Arrest warrants for unpaid LFOs diminish indigent debtors' Fourth Amendment protections against unconstitutional searches and seizures. Under the Fourth Amendment, "[t]he right of the people to be secure . . . against unreasonable searches and seizures[] shall not be violated."[104] To prevent the "reduc[tion of] the Fourth Amendment to a form of words,"[105] the Supreme Court has interpreted the amendment as, inter alia, prohibiting states from introducing evidence gathered via illegal means against criminal defendants at trial.[106] This prohibition has two closely related manifestations — the exclusionary rule and the fruit of the poisonous tree doctrine — which together disallow both *direct and derivative* evidence gathered in violation of the Fourth Amendment from being used against a defendant in a criminal trial.[107] The purpose of these doctrines is deterrence, disincentivizing police from violating criminal defendants' constitutional rights by forbidding officers from benefiting from their own bad behavior (that is, by rendering unconstitutionally derived evidence inadmissible).[108] Absent these mechanisms, the Fourth Amendment would be toothless.

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[103] *See, e.g.*, WILSON CTR. FOR SCI. & JUST. & FINES & FEES JUST. CTR., DEBT SENTENCE: HOW FINES AND FEES HURT WORKING FAMILIES 3 (2023), https://finesandfeesjusticecenter.org/content/uploads/2023/05/Debt_Sentence_FFJC-Wilson-Center-May-2023.pdf [https://perma.cc/4M4W-65VK].

[104] U.S. CONST. amend. IV.

[105] Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392 (1920) (citing Weeks v. United States, 232 U.S. 383, 393 (1914)).

[106] *See, e.g.*, United States v. Calandra, 414 U.S. 338, 347–48 (1974) (describing "a judicially created remedy designed to safeguard Fourth Amendment rights," *id.* at 348, by prohibiting "evidence obtained in violation of the Fourth Amendment [from being] used in a criminal proceeding against the victim of the illegal search and seizure," *id.* at 347 (citing *Weeks*, 232 U.S. at 383; Mapp v. Ohio, 367 U.S. 643 (1961))).

[107] *See, e.g.*, Olmstead v. United States, 277 U.S. 438, 462 (1928) ("The striking outcome of the *Weeks* case and those which followed it was the sweeping declaration that the Fourth Amendment, although not referring to or limiting the use of evidence in courts, really forbade its introduction if obtained by government officers through a violation of the Amendment."); *Silverthorne*, 251 U.S. at 391–92. The Court later held that the exclusionary rule was incorporated against the states via the Fourteenth Amendment. *See Mapp*, 367 U.S. at 655.

[108] *E.g.*, Elkins v. United States, 364 U.S. 206, 217 (1960) ("The [exclusionary] rule is calculated . . . to compel respect for the constitutional guaranty in the only effectively available way — by removing the incentive to disregard it." (citing Eleuteri v. Richman, 141 A.2d 46, 50 (N.J. 1958))));

But over time, the Court has carved out exceptions to the exclusionary rule and fruit of the poisonous tree doctrine. Describing the exclusionary rule as imposing "substantial social costs,"[109] the Court has created exceptions out of a desire to not "set[] the guilty free and the dangerous at large."[110] One such exception is the attenuation doctrine. Under that doctrine, courts "need not hold that all evidence is 'fruit of the poisonous tree' simply because it would not have come to light but for the illegal actions of the police,"[111] because "[i]n some cases, . . . the link between the unconstitutional conduct and the discovery of the evidence is too attenuated to justify suppression."[112] And in such cases, it is irrelevant that the State has violated a person's Fourth Amendment rights and that his only remedy in his criminal proceeding — suppression — is unavailable to him. Because some event purportedly breaks the link between the unconstitutional police activity and the discovery of the evidence, the Court says suppression is inapposite.

Utah v. Strieff illustrates the issue. In *Strieff*, the respondent was stopped by a police officer without probable cause or reasonable suspicion.[113] Everyone in the case — the police officer, the State, and the Solicitor General — conceded that this stop was unconstitutional.[114] Nonetheless, the officer stopped Strieff,[115] ran Strieff's name through a police database, and discovered an arrest warrant for an outstanding

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Terry v. Ohio, 392 U.S. 1, 12 (1968) ("[T]he rule excluding evidence seized in violation of the Fourth Amendment . . . [is] a principal mode of discouraging lawless police conduct." (citing *Weeks*, 232 U.S at 391–93)); *Calandra*, 414 U.S. at 347 ("[T]he rule's prime purpose is to deter . . . unlawful police conduct and thereby effectuate the guarantee . . . against unreasonable searches and seizures . . . ." (citation omitted) (quoting *Elkins*, 364 U.S. at 217) (citing *Mapp*, 367 U.S. at 656; Tehan v. United States *ex rel.* Shott, 382 U.S. 406, 416 (1966); *Terry*, 392 U.S. at 29)).

109 United States v. Leon, 468 U.S. 897, 907 (1984).

110 Hudson v. Michigan, 547 U.S. 586, 591 (2006).

111 Wong Sun v. United States, 371 U.S. 471, 487–88 (1963).

112 Utah v. Strieff, 579 U.S. 232, 235 (2016).

113 *See id.* at 235–36.

114 *See id.* at 239 ("[W]e assume without deciding (because the State conceded the point) that Officer Fackrell lacked reasonable suspicion to initially stop Strieff."); *see also* Terry v. Ohio, 392 U.S. 1, 27 (1968) (declaring it unconstitutional for police to stop an individual based on an "inchoate and unparticularized suspicion or [a] 'hunch'" that he has done something illegal); Illinois v. Wardlow, 528 U.S. 119, 123 (2000) ("In *Terry,* we held that an officer may, consistent with the Fourth Amendment, conduct a brief, investigatory stop when the officer has a reasonable, articulable suspicion that criminal activity is afoot." (citing *Terry*, 392 U.S. at 30)); *cf.* UTAH CODE ANN. § 77-7-15 (West 2019) ("A peace officer may stop any individual . . . when the officer has a reasonable suspicion to believe the individual has committed or is . . . committing . . . a public offense . . . .").

115 *Strieff*, 579 U.S. at 235. The stop was related to an investigation into a nearby house, where the police suspected drugs were being distributed. *See id.* As Justice Kagan put it in her dissent:

> Fackrell's seizure of Strieff was a calculated decision, taken with so little justification that the State has never tried to defend its legality. At the suppression hearing, Fackrell acknowledged that the stop was designed for investigatory purposes — *i.e.*, to "find out what was going on [in] the house" he had been watching, and to figure out "what [Strieff] was doing there." And Fackrell frankly admitted that he had no basis for his action except that Strieff "was coming out of the house."

Id. at 257 (Kagan, J., dissenting) (alterations in original) (citation omitted).

traffic violation — a parking ticket.[116] The officer "arrested Strieff [on] that warrant."[117] In a search of Strieff "incident to the arrest," police found drug-related contraband.[118]

Unsurprisingly, Strieff argued that the contraband should be subject to the exclusionary rule under the fruit of the poisonous tree doctrine.[119] Since that evidence was found only after the police illegally stopped Strieff, he argued that it could not be used against him at trial.[120] Although the lower courts both decided not to suppress the evidence,[121] the Utah Supreme Court ruled that the exclusionary rule *should* apply, and it reversed the lower courts' denial of Strieff's suppression motion.[122]

But the Supreme Court reversed.[123] In a 5–3 decision,[124] it held that the officer's discovery of Strieff's arrest warrant for the unpaid parking ticket sufficiently attenuated the connection between the unconstitutional stop and the seized contraband.[125] First, the Court disagreed with the Utah Supreme Court's contention that the attenuation doctrine applies only in situations where a defendant's voluntary act attenuates the taint of the illegal police activity.[126] Then, it held that because Strieff's arrest warrant was valid and because the officer merely "made two good-faith mistakes" in stopping Strieff,[127] the attenuation doctrine applied.[128] Notably, the Court was unmoved by Strieff's argument that "because of the prevalence of outstanding arrest warrants in many jurisdictions, police will engage in dragnet searches if the exclusionary rule is not applied."[129] It instead stated that the solution to such misconduct is civil suits, and perhaps the outcome would have been different had Strieff presented evidence of deliberate, flagrant police misconduct.[130]

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116 *Id.* at 235 (majority opinion).

117 *Id.*

118 *Id.* at 235–36.

119 *See* State v. Strieff, 357 P.3d 532, 536 (Utah 2015) ("He moved to suppress the evidence seized in the search incident to his arrest, arguing that it was fruit of an unlawful investigatory stop.").

120 *See id.*; *cf.* Wong Sun v. United States, 371 U.S. 471, 484 (1963) ("It is conceded that [the evidence is] to be excluded if [it is] held to be [a] 'fruit[]' of the agents' unlawful action.").

121 *See* State v. Strieff, 286 P.3d 317, 320 (Utah Ct. App. 2012).

122 *See Strieff*, 357 P.3d at 546.

123 *See Strieff*, 579 U.S. at 237.

124 *See id.* at 233. Justice Thomas announced the Court's decision and was joined by Chief Justice Roberts and Justices Kennedy, Breyer, and Alito. *Id.*

125 *Id.* at 243 ("We hold that the evidence Officer Fackrell seized as part of his search incident to arrest is admissible because his discovery of the arrest warrant attenuated the connection between the unlawful stop and the evidence seized from Strieff incident to arrest.").

126 *See id.* at 238–39.

127 *See id.* at 241. That is, Officer Fackrell erred by stopping Strieff in the first place without the requisite reasonable articulable suspicion and erred in "demanding that" Strieff speak with him rather than asking him to do so. *Id.*

128 *See id.* at 239–42.

129 *Id.* at 243.

130 *Id.* The Court stated that "there is no evidence that the concerns that Strieff raises with the criminal justice system are present in South Salt Lake City, Utah." *Id.* This conclusion may or

Justice Sotomayor, in dissent,[131] framed the outcome differently:

> The Court today holds that the discovery of a warrant for an unpaid parking ticket will forgive a police officer's violation of your Fourth Amendment rights. . . . This case allows the police to stop you on the street, demand your identification, and check it for outstanding traffic warrants — even if you are doing nothing wrong. If the officer discovers a warrant for a fine you forgot to pay, courts will now excuse his illegal stop and will admit into evidence anything he happens to find by searching you after arresting you on the warrant.[132]

She went on to note that the officer's discovery of the warrant was not simply a serendipitous accident, as the majority implied, because "at the time of the arrest, Salt Lake County had a 'backlog of outstanding warrants' so large that it faced the 'potential for civil liability.'"[133] Citing nationwide reports explaining how a seemingly minor violation can subject an individual to arrest, Justice Sotomayor described outstanding warrants as "surprisingly common"[134] and noted that there are "astounding numbers of warrants" — "'drawers and drawers' full" — "that many cities issue for traffic violations and ordinance infractions."[135] Given that context, she noted that "[t]he majority does not suggest what makes this case 'isolated' from these and countless other examples. Nor does it offer guidance for how a defendant can prove that his arrest was the result of 'widespread' misconduct."[136]

One fact worth mentioning explicitly, which is perhaps tacit in Justice Sotomayor's dissent, is that the "'drawers and drawers' full" of arrest warrants to which she referred are disproportionately for indigent people.[137] The issue in *Strieff*, then, is not confined to the Fourth

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may not be true; unlike some other cities that offer publicly accessible databases for tracking *Terry* stops, *see, e.g.*, *Stop, Question and Frisk Data*, N.Y.C. POLICE DEP'T, https://www.nyc.gov/site/nypd/stats/reports-analysis/stopfrisk.page [https://perma.cc/4VL8-44EZ], the Salt Lake City Police Department appears to offer no data on the rate at which its police officers conduct investigatory stops, constitutional or not, *see Open Data*, SALT LAKE CITY POLICE DEP'T, https://police.slc.gov/open-data [https://perma.cc/A6R6-KGM9] (offering no such data).

131 Justice Sotomayor was joined in part by Justice Ginsburg. *Strieff*, 579 U.S. at 243 (Sotomayor, J., dissenting).

132 *Id.* at 243–44.

133 *Id.* at 247 (quoting INST. FOR L. & POL'Y PLAN., SALT LAKE COUNTY CRIMINAL JUSTICE SYSTEM ASSESSMENT 6.7 (2004), https://www.supremecourt.gov/opinions/URLs_Cited/OT2015/14-1373/14-1373-2.pdf [https://perma.cc/6DBM-EMCZ]) (citing BUREAU OF JUST. STAT., U.S. DOJ, SURVEY OF STATE CRIMINAL HISTORY INFORMATION SYSTEMS, 2014, at tbl. 5a (2015), https://www.ojp.gov/pdffiles1/bjs/grants/249799.pdf [https://perma.cc/9ZRE-47VN]).

134 *Id.* at 249.

135 *Id.* at 250 (quoting C.R. DIV., U.S. DOJ, *supra* note 40, at 47) (citing ALICIA BANNON ET AL., BRENNAN CTR. FOR JUST., CRIMINAL JUSTICE DEBT 23 (2010), https://www.brennancenter.org/sites/default/files/2019-08/Report_Criminal-Justice-Debt-%20A-Barrier-Reentry.pdf [https://perma.cc/VVW4-3NXW]; HUM. RTS. WATCH, PROFITING FROM PROBATION 1, 51 (2014), https://www.hrw.org/sites/default/files/reports/us0214_ForUpload_0.pdf [https://perma.cc/8PEM-KC32]; BUREAU OF JUST. STAT., U.S. DOJ, *supra* note 133; C.R. DIV., U.S. DOJ, *supra* note 40, at 6, 55).

136 *Id.* at 251–52.

137 *See supra* notes 49–54 and accompanying text.

Amendment. Instead, *Strieff* stands for the proposition that poor people will less often be able to vindicate their Fourth *and Fourteenth* Amendment rights, because if their Fourth Amendment rights are violated, but a police officer later discovers that they have a warrant for an unpaid LFO (a "common" situation), they cannot have the fruits of the illegal stop suppressed.

B. Plugging the Gap: How Requiring Earlier Ability-to-Pay Analyses Would Vindicate Bearden *and Neuter* Strieff

As previously discussed, one way states circumvent the Fourteenth Amendment is by arresting poor people for failing to pay LFOs before determining if their nonpayment was willful.[138] And they argue this process is constitutional because those people are not being sentenced to incarceration for being too poor to pay their fines — they are just being jailed for contempt or temporarily jailed pending their ability-to-pay hearings. But if this appears to be a distinction without a difference, that's because it is. That there is, facially, an alternate reason for the arrest does not change the fact that the debtor is ultimately in jail for being too poor to pay his fine. So functionally, in most jurisdictions across the country, today's indigent debtors are as susceptible as ever to being jailed for being poor, Fourteenth Amendment notwithstanding. And even those who aren't ultimately arrested nonetheless have their Fourth Amendment rights diluted to nearly nothing.

Roxana Beck's case presents a paradigmatic example of a court using contempt to justify the otherwise unconstitutional jailing of an indigent debtor. Beck pleaded guilty to a nonviolent misdemeanor punishable "by a fine of not more than . . . $300 . . . [or] not more than ninety . . . days in the county jail, or both."[139] Beck worked at Burger King; she requested her fines be either waived or set "as low [as] possible" since her "hours of work . . . had recently been reduced."[140] But the court refused.[141] Beck was not sentenced to serve any time in county jail, but the terms of her sentence required her "to pay $150 in fines, $197.50 in court costs, and $291 in restitution to the Idaho State Lab."[142] This decision ultimately rendered her liable for $638.50.[143]

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138 *See, e.g.*, *supra* notes 93–98 and accompanying text.

139 IDAHO CODE ANN. § 37-2732(d) (West 2021); Beck v. Elmore Cnty. Magistrate Ct., 489 P.3d 820, 827 (Idaho 2021).

140 *Beck*, 489 P.3d at 827 (alteration in original).

141 *Id.*

142 *Id.*

143 *Id.* This result is curious given that the statute under which Beck was charged sets the upper limit for a fine at $300, § 37-2732(d), yet individuals may become liable for over double that amount when accounting for auxiliary fees, *see Beck*, 489 P.3d at 827.

As is typical when mammoth fines are imposed on low-income debtors, Beck eventually found herself in arrears.[144] This delay prompted Elmore County to issue a contempt warrant for Beck's arrest.[145] Months later, she was arrested in a different Idaho county, arraigned the next day in that county, and held until she could be transported back to Elmore County.[146] It took four days for that transfer to happen.[147] That day, she "was sentenced to five days in jail," but was given "five days' credit for [the] time [she] served" between being arrested and being seen by the Elmore magistrate judge.[148] Nonetheless, her debt remained.[149] Beck was "reordered to pay the outstanding fines, court costs, and restitution from her misdemeanor conviction," minus a seventy-dollar credit for having been "held in jail for two days longer than the statutory maximum."[150] Per her agreement with the court, "if Beck missed a payment" toward her debt, "the entire sum would become due and [another] warrant may be issued for her arrest for failure to pay."[151]

Beck filed a petition for a writ of prohibition seeking to prevent the State from issuing another warrant for her arrest should she miss a payment toward her court debt.[152] The Idaho Supreme Court sided with her.[153] It held that the trial court's practice of issuing bench warrants after a debtor failed to pay her court debt was prohibited by *Bearden*, and that under the Equal Protection Clause, a person could be in contempt of court for failure to pay her fine only if she *willfully* did not pay that fine.[154] Echoing *Bearden*, the *Beck* court explained that "determin[ing] that an individual has willfully disobeyed a court order by failing to pay fines and fees [requires] . . . at least some inquiry into why the person failed to pay," and that "the mere allegation that an individual failed to pay court-ordered fines and fees, as was before the magistrate court in this case, is not sufficient to provide a substantial basis for a probable cause determination with respect to willfulness."[155] It went on to "hold that the magistrate court's issuance of the warrant of attachment against Beck, without considering the reasons that she failed to

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144 *Id.* The proceedings in Beck's case took place at the onset of the global COVID-19 pandemic. It may therefore be unsurprising that a person who was already low-income would fall behind on her LFO payments at a time when the national economy stalled, ushering in a period that had devastating effects for the poor. *See, e.g.*, *United States: Pandemic Impact on People in Poverty*, HUM. RTS. WATCH (Mar. 2, 2021, 6:00 AM), https://www.hrw.org/news/2021/03/02/united-states-pandemic-impact-people-poverty [https://perma.cc/CP47-L8YC].

145 *Beck*, 489 P.3d at 827.

146 *Id.*

147 *Id.*

148 *Id.*

149 *See id.*

150 *Id.*

151 *Id.*

152 *Id.*

153 *See id.* at 836, 841.

154 *See id.* at 835 (quoting Bearden v. Georgia, 461 U.S. 660, 668–69 (1983)).

155 *Id.* at 834.

pay, violate[d] the Fourteenth Amendment . . . [because] it effectively turned a fine into jail time without due process."[156]

Beck is significant, then, because it breathes life back into *Williams*, *Tate*, and *Bearden*, vindicating indigent debtors' constitutional rights under the Equal Protection Clause.

C. Beck *and Beyond: Protecting Poor Americans from Going to Jail for Being Poor*

The virtue of decisions like *Beck*, which require courts to conduct ability-to-pay hearings not only before a court sentences a debtor to incarceration for failing to pay his fines but also before a court seeks to have someone arrested for nonpayment,[157] is that they stop state courts from exploiting a loophole in *Williams*, *Tate*, and *Bearden*. In states where this willfulness analysis is not a perfunctory final step before sentencing poor people to incarceration and is instead a meaningful protection to prevent them from being jailed for being too poor to pay their LFOs, there will be fewer warrants like the one that led to Edward Strieff's arrest. Given that "fundamental fairness" under the Fourteenth Amendment prohibits the state from incarcerating an indigent debtor when, "through no fault of his own, he cannot pay [his] fine,"[158] *Beck* and similar interpretations of *Bearden* embody what is actually required under the Equal Protection Clause.

It is not enough to require courts, before sentencing a defendant for failing to pay his fines, to inquire as to whether his nonpayment is or is not willful. Instead, courts must conduct this type of ability-to-pay analysis any time a defendant faces *incarceration* for an infraction based on his nonpayment, including contempt. Requiring an ability-to-pay analysis in all such situations, be it at the time the fine is levied by the court, before the court issues a contempt warrant, or at some other moment before incarceration for failure to pay is imminent, would close the loophole states have created in the Court's Fourteenth Amendment precedent, which sought to protect the poor from being jailed for failure to pay for any amount of time. In practice, courts would then need to issue orders to show cause as to why a warrant should not be issued for failing to pay before actually issuing that warrant, a potentially modest procedural step that could make all the difference for indigent defendants.

Indeed, if Utah courts were bound by this interpretation of the Fourteenth Amendment, Edward Strieff likely would not have had a warrant issued for his arrest. Rather than the arrest warrant, he would have been issued a summons to appear in court, requiring him to appear before a judge and explain why he had not paid his parking tickets. If, during that hearing, the court credited Strieff's account that he had not

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156 *Id.* at 836.

157 *See id.*

158 *Bearden*, 461 U.S. at 672–73.

paid his tickets because he could not afford to do so, it could have determined an alternative punishment (for example, community service), set up a payment plan that was reasonable for an indigent person to comply with, or otherwise come up with a plan that did not lead to an indigent person being incarcerated for his indigency.

Had that happened, there would have been no warrant to attenuate the taint between the officer's unconstitutional stop and his finding contraband on Strieff, meaning that the evidence would have been excluded, and the parties would have reached an outcome more aligned with a robust reading of the Fourth Amendment.[159] In sum, requiring state courts to conduct ability-to-pay analyses before subjecting defaulting debtors to arrest, not just sentencing, for failure to pay gives necessary meaning to both the Fourth and Fourteenth Amendments.

D. Counterarguments

Detractors may argue that *Beck*'s innovation is inconsequential and that it will not actually do much to stem the tide of indigent people being jailed for nonpayment of fines. This argument is not totally without merit. Adding the additional step of courts having to conduct an ability-to-pay hearing before imposing nonpayment sanctions is only meaningful if the debtor (1) is made aware of the hearing and (2) actually attends the hearing. The first issue is one of institutional competence on a court's part, and it may be addressed by instituting procedures prohibiting collection and incarceration proceedings from moving forward if the debtor is not sufficiently provided notice of said proceedings. The second issue is more complicated. It is difficult for indigent defendants to get to court no matter the stakes. They must take time off work, find childcare, figure out how to travel to sometimes faraway courthouses without reliable transportation, and otherwise disrupt their lives.[160] As is the case with paying a facially insignificant fine to most people, the burden on the poor to get to court can be much greater than it is on the average person. Add to this dignity interests; an ability-to-pay hearing

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[159] Scholars are not aligned on whether such a reading comports with the Framers' intent in drafting the Fourth Amendment. *Compare, e.g.*, Roger Roots, *The Originalist Case for the Fourth Amendment Exclusionary Rule*, 45 GONZ. L. REV. 1, 14–20 (2009/10) (arguing that a historical exclusionary rule existed under some circumstances), *with* Sanford E. Pitler, Comment, *The Origin and Development of Washington's Independent Exclusionary Rule: Constitutional Right and Constitutionally Compelled Remedy*, 61 WASH. L. REV. 459, 466 (1986) (arguing that there was a categorical nonexclusionary rule at common law). Originalism notwithstanding, a fulsome reading of the Fourth Amendment has appeal at a time when police have been described as, inter alia, "untouchable." *See generally* JOANNA SCHWARTZ, SHIELDED: HOW THE POLICE BECAME UNTOUCHABLE (2023).

[160] *See, e.g.*, SHANNON MAGNUSON ET AL., JUST. SYS. PARTNERS, UNDERSTANDING COURT ABSENCE AND REFRAMING "FAILURE TO APPEAR" 46 (2023), https://justicesystempartners.org/wp-content/uploads/2023/05/SJC-Lake-County-Getting-to-Court-as-Scheduled-Reframing-Failure-to-Appear.pdf [https://perma.cc/S4TU-PFW2] (describing reasons people in one Illinois county were unable to make it to court).

is, at base, a request for a person to stand up in open court and say, in front of everyone, that he is too poor to pay his court debt. One might, empathetically, imagine that to be a humiliating experience. Consequently, there is merit to the idea that a poor person, issued a summons to appear in court for an ability-to-pay hearing, will not show up.

Here, too, there is a response. Experiences drawn from other parts of the criminal legal system have shown that it is possible to implement "[b]ehavioral nudges" and otherwise make it easier for people to attend court hearings.[161] In New York, researchers "made court information more salient by redesigning the court summons form and sending text messages to defendants."[162] They found those "interventions significantly reduced the rate at which defendants missed their court dates for low-level offenses, and fewer arrest warrants were issued as a result."[163] Other jurisdictions have implemented similar interventions, including providing transportation assistance,[164] creating virtual hearing options,[165] and creating flexible scheduling options for criminal defendants.[166] The bottom line is that advocates should think critically about how to increase court attendance rates. The lessons from increasing attendance for other court proceedings can be transposed to the ability-to-pay hearing context. It is much easier to figure out how to get an indigent person to court to explain why they cannot pay an LFO than it is to get that insolvent person to pay a debt they have no funds to pay.

CONCLUSION

With no indication that poverty in the United States is abating, it is more important than ever to think about how the consequences of being indigent manifest in unexpected ways and in unexpected areas of the law. One such manifestation is in lesser Fourth Amendment protections for people issued arrest warrants after not paying their LFOs, even when they did not do so because they were insolvent. Decisions like *Beck*, which prohibit such warrants from being issued absent an ability-to-pay hearing, should be adopted nationwide because their reasoning plugs these constitutional gaps: It helps prevent poor people from being jailed simply for being poor.

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161 Alissa Fishbane et al., *Behavioral Nudges Reduce Failure to Appear for Court*, 370 SCIENCE 682, 682 (2020).

162 *Id.*

163 *Id.*

164 *See* SHANNON MCAULIFFE ET AL., IDEAS42, NATIONAL GUIDE TO IMPROVING COURT APPEARANCES 53 (2023), https://www.ideas42.org/wp-content/uploads/2023/05/national-guide-improving-court-appearance.pdf [https://perma.cc/K62S-QVB7].

165 *See id.* at 51.

166 *See id.* at 34.