Wealth-Based Penal Disenfranchisement

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This Article offers the first comprehensive examination of the way in which the inability to pay economic sanctions—fines, fees, surcharges, and restitution—may prevent people of limited means from voting. The Supreme Court has upheld the constitutionality of penal disenfranchisement upon conviction, and all but two states revoke the right to vote for at least some offenses. The remaining jurisdictions allow for reenfranchisement for most or all offenses under certain conditions. One often overlooked condition is payment of economic sanctions regardless of whether the would-be voter has the ability to pay before an election registration deadline. The scope of wealth-based penal disenfranchisement is grossly underestimated, with commentators typically stating that nine states sanction such practices. Through an in-depth examination of a tangle of statutes, administrative rules, and policies related to elections, clemency, parole, and probation, as well as responses from public disclosure requests and discussions with elections and corrections officials and other relevant actors, this Article reveals that wealth-based penal disenfranchisement is authorized in forty-eight states and the District of Columbia.

After describing the mechanisms for wealth-based penal disenfranchisement, this Article offers a doctrinal intervention for dismantling them. There has been limited, and to date unsuccessful, litigation challenging these practices as violative of the Fourteenth Amendment's equal protection and due process clauses. Because voting

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eligibility is stripped of its fundamental nature for those convicted of a crime, wealth-based penal disenfranchisement has been subject to the lowest level of scrutiny, rational basis review, leading lower courts to uphold the practice. This Article posits that these courts have approached the validity of wealth-based penal disenfranchisement through the wrong frame—the right to vote—when the proper frame is through the lens of punishment. This Article examines a line of cases in which the Court restricted governmental action that would result in disparate treatment between rich and poor in criminal justice practices, juxtaposing the cases against the Court's treatment of wealth-based discrimination in the Fourteenth Amendment doctrine and the constitutional relevance of indigency in the criminal justice system broadly. Doing so supports the conclusion that the Court has departed from the traditional tiers of scrutiny. The resulting test operates as a flat prohibition against the use of the government's prosecutorial power in ways that effectively punish one's financial circumstances unless no other alternative response could satisfy the government's interest in punishing the disenfranchising offense. Because such alternatives are available, wealth-based penal disenfranchisement would violate the Fourteenth Amendment under this approach.

INTRODUCTION

In May 2017, Alabama Governor Kay Ivey signed into law a statute that resolved a long-standing question regarding the right to vote in the state: What constitutes a crime of "moral turpitude" that results in voter disenfranchisement upon conviction?[1] The term appeared in Alabama's Constitution as early as its adoption in 1901,[2] but in the intervening years, beyond a smattering of opinions by Alabama's Attorney General,[3] discerning the breadth of crimes that could result in disenfranchisement was left to the discretion of election officials in each of Alabama's sixty-seven counties.[4] The new law

1. ALA. CODE § 17-3-30.1 (2018); *see also* Connor Sheets, *Gov. Ivey Signs Bill Restoring 'Thousands' of Alabama Felons' Right to Vote*, AL.COM (May 25, 2017), https://www.al.com/news/index.ssf/2017/05/gov_ivey_signs_bill_restoring.html [https://perma.cc/GX6M-5MC4].

2. ALA. CONST. art. VIII, § 177(b).

3. *See* Marc Meredith & Michael Morse, *Discretionary Disenfranchisement: The Case of Legal Financial Obligations,* 46 J. LEGAL STUD. 309, 318 (2017).

4. *See* Connor Sheets, *Alabama Election Officials Remain Confused Over Which Felons Should Be Able to Vote*, AL.COM (Oct. 13, 2017), https://www.al.com/news/index.ssf/2017/10/alabama_election_officials_rem.html [https://perma.cc/9GJP-NJC9].

resolved inconsistencies between the counties by designating forty-two felonies as crimes of moral turpitude.[5]

A question soon arose regarding the status of people who had been disenfranchised prior to the law's amendment for crimes not on the list of felonies set forth in the new statute and who had not yet regained the right to vote under Alabama's reenfranchisement laws because those laws required the complete payment of all economic sanctions[6] imposed upon conviction, including "all fines, court costs, fees, and victim restitution."[7] Alabama Secretary of State John H. Merrill initially advised that people would have to pay in full before regaining the right to vote, regardless of the fact that the felonies for which they were convicted now clearly did not qualify as crimes of moral turpitude and thus could not be disenfranchising in the first instance.[8] After a quick backlash in the media, Secretary Merrill issued a correction, stating that people convicted of nondisenfranchising felonies could register to vote, regardless of whether they had outstanding criminal debt.[9]

While the clarification of Alabama's disenfranchisement laws resulted in the reenfranchisement of thousands of the state's citizens,[10] for those convicted of offenses now designated crimes of moral turpitude, the inability to pay economic sanctions still leaves voting out

5. ALA. CODE § 17-3-30.1. These felonies include an array of violent offenses, sex offenses, drug offenses, and offenses involving real and intellectual property. *Id.*

6. This Article uses the term "economic sanctions" to refer to any form of financial penalty, including statutory fines, surcharges, administrative fees, and restitution because the Supreme Court has explicitly declined to distinguish between these forms of punishments in the cases offering the relevant constitutional analysis. *See* Bearden v. Georgia, 461 U.S. 660, 662, 667 (1983) (applying the prohibition on automatic revocation of probation for failure to pay to both statutory fines and restitution); Williams v. Illinois, 399 U.S. 235, 239, 244 n.20 (1970) (explaining that the prohibition on automatic conversion of statutory fines to incarceration applies equally to court costs).

7. ALA. CODE § 15-22-36.1(a)(3) (2018).

8. Connor Sheets, *Too Poor to Vote: How Alabama's 'New Poll Tax' Bars Thousands of People from Voting*, AL.COM, https://www.al.com/news/index.ssf/2017/10/too_poor_to_vote_how_alabamas.html (last updated July 24, 2018) [https://perma.cc/D5GX-EGB8] ("In order for you to have your voting rights restored, you have to make sure all of your fines and restitution have been paid." (quoting Alabama Secretary of State John Merrill)).

9. Connor Sheets, *In Wake of Reports, Alabama Clarifies that Some Felons Can Vote Despite Debts*, AL.COM, https://www.al.com/news/index.ssf/2017/10/in_wake_of_reports_alabama_cla.html (last updated Aug. 26, 2018) [https://perma.cc/E57V-QWFK].

10. Connor Sheets, *Thousands of Alabama Felons Register to Vote in Last-Minute Push*, AL.COM (Nov. 27, 2017), https://www.al.com/news/index.ssf/2017/11/advocates_make_last-minute_pus.html [https://perma.cc/933X-JNGA].

of reach.[11] These outstanding sanctions effectively operate as what this Article refers to as "wealth-based penal disenfranchisement."[12]

In Part I, this Article provides the first comprehensive examination of the structures through which the inability to pay economic sanctions may prevent people from voting.[13] The number of

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11. *See* ALA. CODE §17-3-30.1 (2018) (listing crimes of moral turpitude).

12. I do not refer to this form of penal disenfranchisement as "poverty-based" because the loss of access to voting through the mechanisms detailed herein is not limited to people who live below any particular poverty threshold, but rather applies to any person who does not have the financial capacity to meet a jurisdiction's payment requirements in advance of the registration deadline for an election. This is in keeping with the key case upon which the doctrinal intervention provided in this Article arises, in which the Court understood poverty as operating not as a class, but as a barrier to fair treatment in criminal justice systems for any person unable to make a required payment. Bearden v. Georgia, 461 U.S. 660, 666 n.8 (1983) ("[I]ndigency in this context is a relative term rather than a classification . . . ."); *id.* ("[A] defendant's level of financial resources is a point on a spectrum rather than a classification."). The term "wealth-based" is also in keeping with the phrase "wealth-based discrimination," commonly used to discuss cases arising under the Fourteenth Amendment that implicate a person's financial condition.

Additionally, I use the term "penal disenfranchisement" rather than "felon disenfranchisement" intentionally. Most jurisdictions disenfranchise for all or a subset of felony convictions. *See, e.g.*, NEB. CONST. art. VI, § 2; *supra* notes 1–5 and accompanying text. In some jurisdictions misdemeanor convictions also may be disenfranchising. *See* D.C. CODE § 1-1001.02(7) (2018); KY. CONST. § 145(1) (2018); MO. REV. STAT. § 115.133.2(2)–(3) (2018); S.C. CODE ANN. § 7-5-120(B)(2) (2018); UTAH CODE ANN. § 20A-2-101(2) (LexisNexis 2018); Letter from Steven L. Beshear, Ky. Att'y Gen., to Tipton Baker, Harlan Cty. Judge (Apr. 24, 1980), Ky. OAG80-234, 1980 WL 103047 (stating that the legislature has never defined "high misdemeanors" and therefore the disenfranchisement provision is inoperable as to such offenses). *But see* Erika Wood & Rachel Bloom, *De Facto Disenfranchisement*, AM. CIVIL LIB. UNION & BRENNAN CTR. FOR J. 2–3 (2008), http://www.brennancenter.org/sites/default/files/legacy/publications/09.08.DeFacto.Disenfranchisement.pdf [https://perma.cc/X3ZV-QQCU] (reporting that forty percent of county clerks interviewed in Kentucky believed that people with misdemeanor convictions were disenfranchised). Florida and Louisiana even require payment of economic sanctions imposed as punishment for nondisenfranchising convictions and traffic offenses to be eligible for reenfranchisement, extending the effects of wealth-based penal disenfranchisement to even petty offenses. *See* Fla. Office of Exec. Clemency, Rules of Executive Clemency § 6, (Mar. 9, 2011) [hereinafter Fla. Clemency Rules], https://www.flgov.com/wpcontent/uploads/2011/03/2011-Amended-Rules-for-Executive-Clemency.final_.3-9.pdf [https://perma.cc/R8L8-WETP]; LA. ADMIN CODE tit. 22, § 203(A)(1) (2018); *infra* notes 88–89 and accompanying text (regarding the continuation of those requirements in Florida for people convicted of murder and sex offenses). The constitutionality of disenfranchisement for misdemeanors or petty offenses is an open question. *See* Richardson v. Ramirez, 418 U.S. 24, 55 (1974) (upholding disenfranchisement for felony convictions as constitutional, but not discussing other offenses); Richard M. Re & Christopher M. Re, *Voting and Vice: Criminal Disenfranchisement and the Reconstruction Amendments*, 121 YALE L.J. 1584, 1648–51 (2012) (reviewing the historical record and arguing that it does not support the constitutionality of disenfranchisement for lower-level felonies and misdemeanors).

13. The Restoration of Rights Project, produced by the Collateral Consequences Resource Center, the National Association of Criminal Defense Lawyers, the National Legal Aid and Defender Association, and the National HIRE Network, is an excellent resource regarding penal disenfranchisement generally, but does not distinguish wealth-based penal disenfranchisement. *See* RESTORATION OF RIGHTS PROJECT, http://restoration.ccresourcecenter.org/ (last visited Sept. 1, 2018) [https://perma.cc/E5AK-DJ7T]. In 2016, the Alliance for a Just Society published an overview of laws that result in continued disenfranchisement due to the failure to pay economic sanctions. *See generally* Allyson Fredericksen & Linnea Lassiter, *Disenfranchised by Debt:*

jurisdictions in which wealth-based penal disenfranchisement is authorized is grossly underestimated. Commentators typically state that nine jurisdictions—including Alabama—require full payment to be eligible for reenfranchisement.[14] To understand the reach of wealth-based penal disenfranchisement, this Article provides an in-depth examination of a tangle of election, clemency, parole, and probation statutes, rules, and policies, along with an analysis of responses to formal and informal public disclosure requests and discussions with elections and corrections officials and other relevant actors.[15] This Article reveals that wealth-based penal disenfranchisement is sanctioned under the laws of forty-eight states and the District of Columbia,[16] potentially preventing up to a million people or more from voting,[17] particularly in low-income communities and communities of

Millions Impoverished by Prison, Blocked from Voting, ALLIANCE FOR JUST SOC'Y (Mar. 2016), http://allianceforajustsociety.org/wp-content/uploads/2016/03/Disenfranchised-by-Debt-FINAL-3.8.pdf [https://perma.cc/YY6U-SQZZ]. The report marks the first significant attempt to marshal legal authorities on this topic. This Article significantly expands on that effort by examining additional jurisdictions not included in the report, considering wealth-based restrictions on obtaining clemency, correcting portions of the analysis that conflate parole and probation, and assessing disenfranchisement stemming from federal and out-of-state convictions. Finally, a 2017 investigation into the use of economic sanctions in nine states provides useful information about the relationship between voting restrictions and criminal debt in those jurisdictions. *See* ALEXES HARRIS ET AL., MONETARY SANCTIONS IN THE CRIMINAL JUSTICE SYSTEM: A REVIEW OF LAW AND POLICY IN CALIFORNIA, GEORGIA, ILLINOIS, MINNESOTA, MISSOURI, NEW YORK, NORTH CAROLINA, TEXAS, AND WASHINGTON (Apr. 2017), http://www.monetarysanctions.org/wp-content/uploads/2017/04/Monetary-Sanctions-Legal-Review-Final.pdf [https://perma.cc/76QN-C67M].

14. *See, e.g.*, Robert Reich, *The Poor Are Being Barred from Voting*, NEWSWEEK (Nov. 21, 2017, 10:03 AM), https://www.newsweek.com/robert-reich-poor-are-being-barred-voting-and-thats-unconstitutional-718117 [https://perma.cc/CQ7S-EDTS] (stating that people cannot vote due to outstanding fees and fines "[i]n nine states"); Sheets, *supra* note 8 ("[I]n Alabama and eight other states from Nevada to Tennessee, anyone who has lost the franchise cannot regain it until they pay off any outstanding court fines, legal fees and victim restitution.").

15. *See infra* Appendices A–F.

16. *See infra* Part I.

17. Additional research is needed to discern the number of people subject to wealth-based penal disenfranchisement, but what data is available suggests the figure could be over one million people. Christopher Uggen and his colleagues have estimated that, as of 2016, over 1.8 million people subject to penal disenfranchisement are on parole or probation. CHRISTOPHER UGGEN ET AL., 6 MILLION LOST VOTERS: STATE-LEVEL ESTIMATES OF FELONY DISENFRANCHISEMENT, 2016, at 15 tbl.3 (2016), https://www.sentencingproject.org/publications/6-million-lost-voters-state-level-estimates-felony-disenfranchisement-2016/ [https://perma.cc/T2EL-NGL7]; *see also infra* Appendices C–D. That figure is certainly overrepresentative of wealth-based penal disenfranchisement: not all people on parole or probation will have outstanding criminal debt; in at least some cases people will have a meaningful ability to pay what debt does exist, and people may be retained on or revoked from parole or probation for multiple reasons in addition to a failure to pay economic sanctions. Given, however, both the overreliance on supervision fees that often compound criminal debt in the parole and probation context, as well as the financial vulnerability of people with felony convictions, it is reasonable to believe that a significant portion of people on community supervision will be subjected to wealth-based penal disenfranchisement. *See, e.g.*, ABA WORKING GROUP ON BLDG. PUB. TR. IN THE AM. JUST. SYS., TEN GUIDELINES ON COURT FINES AND FEES 2 (Aug. 2018) [hereinafter ABA, TEN GUIDELINES], https://www.americanbar.org/

color.[18]

While well-informed legislative advocacy responsive to the intricacies of the various laws and policies identified herein could secure meaningful reform, litigation may be necessary to bring about change in many jurisdictions,[19] and so Part II offers a doctrinal intervention. There has been limited, and to-date unsuccessful, litigation challenging wealth-based penal disenfranchisement on the grounds that it violates the Fourteenth Amendment's due process and equal protection clauses.[20] The lower courts have approached the

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content/dam/aba/images/abanews/2018-AM-Resolutions/114.pdf [https://perma.cc/H5RC-SQT3]; *Statement on the Future of Community Corrections*, COLUM. JUST. LAB (May 17, 2018), http://justicelab.iserp.columbia.edu/statement.html [https://perma.cc/8MEN-HCLH]. Those figures also do not include people who may have been discharged from parole or probation but live in a jurisdiction in which payment of economic sanctions is independently required to regain the vote even if the person has completed all other terms of his or her sentence. *See infra* Appendix B. For example, a recent estimate of the effect of reforms in 2018 to Florida's reenfranchisement law suggested that 560,000 people in that state alone may remain disenfranchised upon completion of parole and probation due to outstanding criminal debt should the new law be interpreted to require payment. *See* Memorandum from Howard Simon, Exec. Dir., ACLU of Florida and Marc Mauer, Exec. Dir., Sentencing Project, to Executive Board, Second Chances Team (Feb. 11, 2018), https://docs.google.com/document/d/1om20yURi8GKBdtYUuur-R-RyAagoY1SvmWDWRYghVss/edit# [https://perma.cc/RZV8-D5Y5]. Further study should also include the ripple effects of wealth-based penal disenfranchisement policies on eligible voters. Voting rights information provided by elections and corrections officials often lacks clarity regarding when the right to vote is restored. *See, e.g.*, *infra* notes 64, 149; *see also* Eli Hager, *More Ex-Prisoners Can Vote—They Just Don't Know It*, MARSHALL PROJECT (Aug. 1, 2018), https://www.themarshallproject.org/2018/08/01/more-ex-prisoners-can-vote-they-just-don-t-know-it [https://perma.cc/TV64-92NZ]. Particularly when combined with the risk of prosecution for voting post-conviction if those rules are misunderstood, unclear information may dissuade eligible voters with criminal records from registering. *See, e.g.*, Jack Healy, *Arrested & Charged with a Felony. For Voting.*, N.Y. TIMES (Aug. 2, 2018), https://www.nytimes.com/2018/08/02/us/arrested-voting-north-carolina.html [https://perma.cc/94MQ-H8PE] (describing efforts in several states to prosecute people for illegal voting even if they misunderstood the state's disenfranchisement laws); Vanessa Romo, *Texas Woman Sentenced to 5 Years for Illegal Voting*, NAT'L PUB. RADIO (Mar. 31, 2018), https://www.npr.org/sections/thetwo-way/2018/03/31/598458914/texas-woman-sentenced-to-5-years-for-illegal-voting [https://perma.cc/X8C4-D6KG] (regarding the sentence imposed on Virginia Mason for voting while still disenfranchised for a felony despite her lack of understanding that she was prohibited from voting).

18. *See infra* notes 157–162 and accompanying text.

19. *See, e.g.*, Rebecca Beitsch, *Felony Voting Laws Are Confusing; Activists Would Ditch Them Altogether*, HUFFPOST (Apr. 5, 2018), https://www.huffingtonpost.com/entry/felony-voting-laws-are-confusing-activists-would-ditch_us_5ac6371ce4b01190c1ed6e41 [https://perma.cc/R4D3-UVKV] ("Nebraska Gov. Pete Ricketts, a Republican, vetoed a bill last year that would have allowed felons to vote once they left prison.").

20. *See* Johnson v. Bredesen, 624 F.3d 742 (6th Cir. 2010) (holding Tennessee had a rational basis for the state's disenfranchisment statute); Madison v. Washington, 163 P.3d 757 (Wash. 2007) (holding that Washington's disenfranchisement statute was rationally related to a legitimate state interest). There is a growing literature on penal disenfranchisement generally. *See, e.g.*, JEFF MANZA & CHRISTOPHER UGGEN, LOCKED OUT: FELON DISENFRANCHISEMENT AND AMERICAN DEMOCRACY 84 (2006); KATHERINE IRENE PETTUS, FELONY DISENFRANCHISEMENT IN AMERICA: HISTORICAL ORIGINS, INSTITUTIONAL RACISM, AND MODERN CONSEQUENCES (2005); Pamela S. Karlan, *Convictions and Doubts: Retribution, Representation, and the Debate Over Felon Disenfranchisement*, 56 STAN. L. REV. 1147, 1148 n.8 (2004) (providing examples of recent

question through a voting rights frame, employing the traditional tiers of scrutiny approach; upon finding that the right to vote is no longer fundamental for those who are disenfranchised as the result of a conviction, the courts have subjected the practice to only rational basis review.[21]

To examine the possibility of an alternative doctrinal challenge to wealth-based penal disenfranchisement, this Article recasts the constitutional question through the frame of punishment. This intervention is based on a set of cases dating back to 1956[22] and upon which the Supreme Court continues to rely.[23] These cases are referred to here as the "*Bearden* line," after *Bearden v. Georgia,*[24] a case that is most closely associated with the use of "poverty penalties" imposed on people of limited means for the failure to pay economic sanctions. [25] In

scholarship); Mary Sigler, *Defensible Disenfranchisement*, 99 IOWA L. REV. 1725 (2014); *see also infra* notes 162, 167 (citing sources). Wealth-based penal disenfranchisement, however, has received only limited attention in the literature. *See* Ann Cammett, *Shadow Citizens: Felony Disenfranchisement and the Criminalization of Debt*, 117 PENN. ST. L. REV. 349, 357 (2012); Jill E. Simmons, *Beggars Can't Be Voters: Why Washington's Felon Re-enfranchisement Law Violates the Equal Protection Clause*, 78 WASH. L. REV. 297, 318–20 (2003); Cherish M. Keller, Note, *Re-Enfranchisement Laws Provide Unequal Treatment: Ex-Felon Re-enfranchisement and the Fourteenth Amendment*, 81 CHI-KENT L. REV. 199, 212–16 (2006); *see also* MANZA & UGGEN, *supra*, at 84 (noting briefly that full payment of criminal debt is required for reenfranchisement in some states).

21. *See Johnson*, 624 F.3d 742; *Madison*, 163 P.3d 757.

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

23. The Court has turned to this line of cases to confirm its understanding 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. *See, e.g.*, Obergefell v. Hodges, 135 S. Ct. 2584, 2602–03 (2015) (regarding the proposition that the two clauses "are connected in a profound way, though they set forth independent principles"); M.L.B. v. S.L.J., 519 U.S. 102, 104, 106, 119–20 (1996) (relying on the dual use of the equal protection and due process clauses to conclude that court fees preventing a parent from warding off state efforts to terminate parental rights in light of the fundamental interest at stake for the parent); Ake v. Oklahoma, 470 U.S. 68, 76, 76 n.3 (1985) (relying on the line for the proposition that indigent defendants must be protected "when a State brings its judicial power to bear on an indigent defendant in a criminal proceeding"). In cases where the Court has afforded special protection in relation to wealth outside of the criminal context, it has bolstered its decisions by characterizing the potentially adverse consequences at issue as rendering the proceedings "quasi-criminal." *See M.L.B.*, 519 U.S. at 124–25 (regarding termination of parental rights); *see also id.* at 139–40 (Thomas, J., dissenting) (arguing that the majority failed to preserve the distinction between civil and criminal proceedings, the latter of which involved numerous constitutional protections, including not only liberty interests but the interest in avoiding excessive fines). In contrast, the Court has declined to extend such protections to areas it deemed wholly distinct from the criminal justice system and not otherwise implicating a fundamental right. *See, e.g.*, Kadrmas v. Dickinson Pub. Sch., 487 U.S. 450, 457–48, 462 n.* (1988) (regarding school bus user fees).

24. 461 U.S. 660 (1983).

25. *See* Beth A. Colgan, *The Excessive Fines Clause: Challenging the Modern Debtors' Prison*, 65 UCLA L. REV. 2, 2–12 (2018) (describing various poverty penalties imposed for the failure to

Bearden, the Court held that when payment of a fine or restitution is made a condition of probation, the state may not automatically revoke probation for a failure to pay without first considering whether the violation was willful or due instead to the person's financial circumstances.[26] An examination of the *Bearden* line, juxtaposed against both its treatment of wealth-based discrimination elsewhere in the Fourteenth Amendment and indigency in the criminal justice system broadly, suggests that the Court has departed from the traditional tiers of scrutiny approach. In *Bearden*, that resulted in a test that 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. Because alternatives to the use of wealth-based penal disenfranchisement that protect the government's interest in punishing the disenfranchising offense while also protecting against the punishment of one's financial condition exist—including severing the link between payment and reenfranchisement, reducing economic sanctions to a payable amount, and creating provisional restoration opportunities during a payment period—wealth-based penal disenfranchisement would violate the Fourteenth Amendment under this approach.[27]

Though this Article is focused on exploring what the parameters of the test announced in *Bearden* are and, more specifically, the ways in which that test may be used to challenge wealth-based penal disenfranchisement, it additionally contributes to a broader theoretical inquiry regarding what justifies[28] and constitutes[29] punishment, as well

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pay, including costs of collection and interest, loss of driver's and occupational licenses, and loss of public benefits).

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

27. *See infra* Section II.D.2.

28. *Cf.* Sharon Dolovich, *State Punishment and Private Prisons*, 55 DUKE L.J. 437, 462–63 (2005) ("The principles reflect familiar liberal ideals: that . . . any violation of the liberty and dignity of citizens by the state demands compelling justification."); Mary Sigler, *Private Prisons, Public Functions, and the Meaning of Punishment*, 38 FLA. ST. L. REV. 149, 163 (2010) (arguing that to impose "the sort of treatment that we call punishment—taking life, liberty, or property" requires justification in order to avoid "a grave injustice").

29. As detailed in Part II, this inquiry raises the question of whether penal disenfranchisement constitutes punishment regardless of whether it also has regulatory qualities. The question of how to draw appropriate lines between criminal and civil matters has been the subject of a rich literature. *See, e.g.*, Mary M. Cheh, *Constitutional Limits on Using Civil Remedies to Achieve Criminal Law Objectives: Understanding and Transcending the Criminal-Civil Law Distinction*, 42 HASTINGS L.J. 1325 (1991); Gabriel J. Chin, *The New Civil Death: Rethinking Punishment in the Era of Mass Conviction*, 160 U. PA. L. REV. 1789, 1827–28 (2012); Donald Dripps, *The Exclusivity of the Criminal Law: Toward a "Regulatory Model" of, or "Pathological Perspective" on, the Civil-Criminal Distinction*, 7 J. CONTEMP. LEGAL ISSUES 199 (1996); Kenneth Mann, *Punitive Civil Sanctions: The Middleground Between Criminal and Civil Law*, 101 YALE L.J. 1795 (1992); Carol S. Steiker, *Punishment and Procedure: Punishment Theory and the Criminal-Civil Procedural Divide*, 85 GEO. L.J. 775, 799 (1997); Franklin E. Zimring, *The Multiple*

as the relevance of one's financial condition to interpretation of the Fourteenth Amendment more broadly. Regarding the former, these cases affirm that when the government wields its prosecutorial power, it "takes its most awesome step,"[30] and that the Constitution is "designed to wrap [its] protection . . . around all defendants upon whom the mighty powers of government are hurled to punish for crime."[31] These cases, therefore, are animated by the overarching norm that when the government employs that mighty power, it must be justified in doing so, and that nonwillful behavior stemming from a person's financial circumstances cannot serve as justification.[32] These normative commitments, along with the Court's related understanding that fundamental rights may not be constrained due solely to one's financial condition,[33] find a home in the due process and equal protection clauses because both the fairness of systems concerning criminal and fundamental rights and the demand that all people be treated equally within them regardless of financial condition are implicated. Together those clauses bolster and reinforce each other, providing greater protection than either would have on its own.[34] In short, these

Middlegrounds Between Civil and Criminal Law, 101 YALE L.J. 1901 (1992); *see also* Sessions v. Dimaya, 138 S. Ct. 1204, 1229 (2018) (Gorsuch, J., concurring in part and concurring in judgment) (calling into question the distinction between criminal and civil law in light of the significant penalties—including fines and forfeitures—that can be imposed in nominally civil settings).

30. Coppedge v. United States, 369 U.S. 438, 448–49 (1962).

31. Boddie v. Connecticut, 401 U.S. 371, 390–91 (1971) (Black, J., dissenting); *see also infra* notes 210–219 and accompanying text.

32. *See infra* Part II.

33. The Court's reliance on both the due process and equal protection clauses also has relevance for other rights that the Court understands to be explicitly or implicitly subjected to constitutional protection. *See, e.g.*, *supra* note 23 and accompanying text; *see also* Cary Franklin, *Marrying Liberty and Equality: The New Jurisprudence of Gay Rights*, 100 VA. L. REV. 817, 818–19, 873–74, 881, 888 (2014) (examining the ways in which courts' increased understanding of the historical discrimination of LGBTQ people, which implicates equal protection concerns, has resulted in a broader conception of liberty interests under the due process clause).

34. *See infra* Section II.A.2. A handful of scholars have argued that the dual use of constitutional provisions, including the due process and equal protection clauses, can render the provisions mutually reinforcing, providing greater protection together than either provision might provide independently. *See* Kerry Abrams & Brandon L. Garrett, *Cumulative Constitutional Rights*, 97 B.U. L. REV. 1309, 1313–14 (2017) (describing "intersectional rights" as existing "where the action in question violates more than one constitutional provision and when the constitutional provisions are read to inform and bolster one another"); Michael Coenen, *Combining Constitutional Clauses*, 154 U. PA. L. REV. 1067, 1070 (2016) ("The Court . . . has combined constitutional clauses, deriving an overall conclusion of constitutional validity (or invalidity) from the joint decisional force of two or more constitutional provisions."); Franklin, *supra* note 33, at 818 ("Due process and equal protection often work in tandem to illuminate important aspects of constitutional questions that can be seen less clearly through the lens of a single clause."); Pamela S. Karlan, *Equal Protection, Due Process, and the Stereoscopic Fourteenth Amendment*, 33 MCGEORGE L. REV. 473, 474 (2002) ("[L]ooking at an issue stereoscopically—through the lenses of both the due process clause and the equal protection clause—can have synergistic effects, producing results that neither clause might reach by itself."); Laurence H. Tribe, Lawrence v.

underlying normative commitments not only explicate the test that emerges from *Bearden* itself but offer meaningful guidance for analyzing the constitutionality of governmental practices that price people out of fair treatment in criminal justice systems and beyond.[35]

I. STATE MECHANISMS FOR WEALTH-BASED PENAL DISENFRANCHISEMENT

Though authorization for wealth-based penal disenfranchisement is widespread, it is typically understood to exist in only nine states.[36] This Part shows that it is actually authorized under the laws and policies of forty-eight states and the District of Columbia.[37] This disparity is attributable to the fact that penal disenfranchisement and reenfranchisement practices are not neatly laid out in a discrete set of statutes. In each jurisdiction, conviction of certain offenses triggers disenfranchisement.[38] Some crimes are permanently disenfranchising,[39] but otherwise the satisfaction of certain conditions makes a person automatically eligible to register to vote or eligible to apply for reenfranchisement through a restoration process. Ascertaining what those conditions are involves an analysis of multiple

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Texas*: The 'Fundamental Right' That Dare Not Speak Its Name*, 117 HARV. L. REV. 1893, 1898 (2004) ("[D]ue process and equal protection, far from having separate missions and entailing different inquiries, are profoundly interlocked in a legal double helix."); Katherine Watson, *When Substantive Due Process Meets Equal Protection: Reconciling* Obergefell *and* Glucksburg, 21 LEWIS & CLARK L. REV. 245, 247, 253 (2017) (describing the Court as "undertak[ing] a hybrid approach that ultimately gives each clause more teeth" and explaining that the overlap "can trigger a synergy in which each clause broadens the scope of the other"); *cf.* Akhil Reed Amar, *Intertextualism*, 112 HARV. L. REV. 747, 772–73 (1999) (positing that the Fourteenth Amendment's framers would have understood the Fifth Amendment's due process clause as incorporating equal protection principles, but added the explicit requirement of equal protection to the Fourteenth Amendment as a "clarifying gloss," and thus the clauses may readily be interpreted as addressing interrelated concerns). *But see* Cass R. Sunstein, *Sexual Orientation and the Constitution: A Note on the Relationship Between Due Process and Equal Protection*, 55 U. CHI. L. REV. 1161, 1173–75 (1988) (arguing that due process protects traditional practices and equal protection aims to disrupt historical practices, so that these clauses are doing distinct work).

35. Mayer v. City of Chicago, 404 U.S. 189, 196–97 (1971). *See also supra* note 33 and accompanying text (regarding application of cases that, like *Bearden*, rely on due process and equal protection in combination to afford protections related to fundamental rights); *infra* note 176 and accompanying text (regarding application of the *Bearden* line to pretrial detention and detention in advance of ability-to-pay hearings).

36. *See supra* note 14 and accompanying text.

37. The constitutional provisions, statutes, rules, and policies set out in this Article are current as of the 2018 midterm elections unless a given state had already passed a law scheduled to go into effect in 2019, in which case those changes are reflected herein. *See, e.g.*, 2018 La. Acts 636.

38. *See supra* note 12 and accompanying text.

39. *See, e.g.*, ALA. CODE § 15-22-36.1(g) (2018) (listing convictions that permanently prohibit reinstatement of voting rights, including impeachment, treason, murder, and certain violent and sex offenses).

layers of constitutional and statutory text, administrative rules, and departmental policies, and necessitates an understanding of not just voter registration procedures but also the intricacies of each jurisdiction's clemency, parole, and probation systems. While much of the often-complex array of documents needed to ascertain this information is publicly available to those willing to excavate it, in many instances practices could only be discerned through information obtained via formal and informal public disclosure requests and discussions with public officials who execute a jurisdiction's reenfranchisement practices.[40]

There are three key, and overlapping, difficulties in understanding the full range of mechanisms by which jurisdictions authorize wealth-based penal disenfranchisement. First, by focusing on the sanctioning of wealth-based penal disenfranchisement through what this Article refers to as "independent payment requirements"—so named because they involve a requirement to pay economic sanctions to become reenfranchised independent of any other aspect of a person's sentence—obscures the role that one's parole or probation status plays in eligibility for reenfranchisement. As detailed below, because supervision status may be dependent on compliance with the conditions of supervision, including the payment of economic sanctions, the link to parole and probation significantly expands the authorization of wealth-based penal disenfranchisement across the country.[41] Second, commentators fail to account for jurisdictions that impose penal disenfranchisement not only for violations of their own laws but for federal or out-of-state convictions as well.[42] Third, the relevant laws and policies in many jurisdictions use vague language in which penal disenfranchisement and restoration requirements are hidden. For example, Georgia, Kansas, Nebraska, and West Virginia each preclude reenfranchisement until the sentence imposed on the would-be voter is completed.[43] Election officials in Georgia and Kansas have interpreted

40. In compiling the data for this project, I did not consider the effect of ability-to-pay determinations that may be in play at sentencing. Some jurisdictions, for example, inquire into a person's ability to pay in determining whether to impose, or the amount of, an economic sanction in the first instance. *See, e.g.*, W. VA. CODE § 61-11A-4(g) (2018). Such practices may limit the number of people subjected to wealth-based penal disenfranchisement because they may render payment of economic sanctions manageable, so long as a person has the ability to pay the amount imposed before the next election registration deadline or has an opportunity to provisionally register to vote during the payment period. *See infra* Section II.D.

41. *See infra* Section I.B, Appendices C–D.

42. *See infra* Section I.C, Appendix E.

43. GA. CODE ANN. § 21-2-216(b) (2018) (allowing registration upon "completion of the sentence"); KAN. STAT. ANN. § 21-6613(a)–(b) (2018) (disenfranchising until the person has "completed the terms of the authorized sentence"); NEB. REV. STAT. §§ 29-122, 32-313 (2018) (disenfranchising "until two years after he or she has completed the sentence"); W. VA. CONST. art.

that requirement to include full payment of economic sanctions to regain eligibility to vote[44]—thus authorizing wealth-based penal disenfranchisement through an independent payment requirement—whereas Nebraska and West Virginia election officials have not.[45] Similarly, ascertaining whether a jurisdiction disenfranchises for federal or out-of-state convictions is often dependent on interpretive decisions of administrative officials that are not readily available to the public. For example, a request to Alaska election officials for additional information was necessary to discern that its officials have interpreted its statutory reference to crimes of moral turpitude to include federal but not out-of-state convictions.[46] In contrast, officials in Delaware[47] and Wisconsin[48] have interpreted laws requiring disenfranchisement upon conviction of a "felony" to include both federal and out-of-state offenses. In a small handful of jurisdictions in which relevant statutes, rules, and policies do not explicitly state whether disenfranchisement occurs upon conviction of federal or out-of-state offenses, no official interpretation could be obtained,[49] leaving the scope of penal disenfranchisement—let alone wealth-based penal disenfranchisement—unclear.[50]

The difficulty of discerning the full array of mechanisms sanctioning wealth-based penal disenfranchisement raises interesting questions beyond the scope of this Article regarding institutional design and public choice.[51] The labyrinth of laws, policies, and practices that

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IV, § 1 (stating that people are disenfranchised upon conviction "while such disability continues"); W. VA. CODE § 3-1-3 (2018) (same); W. VA. CODE § 3-2-2(b) (2018) (stating that disenfranchisement continues "while serving his or her sentence, *including* any period of incarceration, probation, or parole related thereto" (emphasis added)).

44. GA. JUST. PROJECT, 2014 FELON DISENFRANCHISEMENT STUDY REPORT 1 (2014), https://www.gjp.org/wp-content/uploads/Final-Report-Final.pdf [https://perma.cc/648T-3UVV]; Telephone Interview with Jameson Beckner, Asst. Dir. of Elections, Kan. Sec'y of State (June 6, 2018).

45. Telephone Interview with Wayne Bena, Neb. Deputy Sec'y of State for Elections (June 7, 2018); E-mail from Stephen R. Connolly, Deputy Sec'y & Chief Legal Counsel, W. Va. Sec'y of State, to Beth A. Colgan, Asst. Prof. of Law, UCLA Sch. of Law (June 8, 2018) (on file with author).

46. E-mail from Jeremy Johnson, Region III Election Supervisor, Alaska Div. of Elections, to Beth A. Colgan, Asst. Prof. of Law, UCLA Sch. of Law (Dec. 1, 2017) (on file with author).

47. Email from Elaine Manlove, State Election Comm'r, to Beth A. Colgan, Asst. Prof. of Law, UCLA Sch. of Law (Dec. 4, 2017) (on file with author).

48. Email from Michael R. Haas, Staff Counsel, Wis. Elections Comm'n, to Beth A. Colgan, Asst. Prof. of Law, UCLA Sch. of Law (Mar. 19, 2018) (on file with author).

49. *See infra* Appendix E.

50. Woods & Bloom, *supra* note 12, at 6–7 (documenting confusion among election officials regarding the applicability of disenfranchisement laws to federal and out-of-state convictions).

51. For examples of the use of institutional design and public choice theory to assess the development and effects of criminal practices and procedures, see Rachel E. Barkow, *Institutional Design and the Policing of Prosecutors*, 61 STAN. L. REV. 869 (2010); Keith N. Hylton & Vikramaditya S. Khanna, *A Public Choice Theory of Criminal Procedure*, 15 SUP. CT. ECON. REV.

sanction wealth-based penal disenfranchisement could reflect many things, including an intentional effort to punish[52] or to prevent people from voting,[53] a desire to promote collections of economic sanctions aimed at a jurisdiction's revenue-generation goals,[54] or a mere accident stemming from the unfamiliarity of lawmakers with the effect of an array of criminal and election laws layered over time.[55] In addition, because blocking people from voting eligibility may make elected officials less responsive to disenfranchised communities and therefore less likely to reform laws precluding reenfranchisement, the practices may be self-perpetuating.[56]

Further, even with the robust examination offered here, it is important to note that this Article is focused on identifying when wealth-based penal disenfranchisement is authorized by the law on the books, rather than an assessment of the law in action.[57] In some jurisdictions, wealth-based penal disenfranchisement practices are undoubtedly preventing people from voting due to the ubiquity of economic sanctions,[58] the likelihood that people required to pay economic sanctions and subject to disenfranchisement have limited

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61 (2007); Paul J. Larkin, Jr., *Public Choice Theory and Overcriminalization*, 36 HARV. J.L. & PUB. POL'Y 715 (2013); and Erik Luna, *Race, Crime, and Institutional Design*, 66 L. & CONTEMP. PROBS. 183 (2003).

52. For a discussion of how the use of penal disenfranchisement evinces punitive intent, see *infra* Part II.C.2.

53. *See infra* notes 461–462 and accompanying text.

54. *Cf. generally* Colgan, *supra* note 25.

55. *See, e.g.*, Sigler, *supra* note 20, at 1741 (noting that the scope of what constitutes a felony, and thus a disenfranchising crime, has expanded well beyond what was recognized at the common law).

56. *See* Murat C. Mungan, *Over-Incarceration and Disenfranchisement*, 172 PUB. CHOICE 377 (2017) (positing that disenfranchisement laws reduce political pressure on politicians to respond to people with convictions, thereby pushing politicians away from optimal sentencing); *see also* George Fletcher, *Disenfranchisement as Punishment: Reflections on the Racial Uses of Infamia*, 46 UCLA L. REV. 1895, 1906 (1999) ("[V]oting is precisely about expressing biases, loyalties, commitments, and personal values" and so "[e]xcluding from the electorate those who have felt the sting of criminal law obviously skews the politics of criminal justice toward one side of the debate"); *infra* notes 460–462 and accompanying text; *cf.* Samuel Issacharoff & Richard H. Pildes, *Politics as Markets: Partisan Lockups of the Democratic Process*, 50 STAN. L. REV. 643, 646–48 (1998) (comparing the political process with competitive markets in which "anticompetitive entities alter the rules of engagement to protect established powers from the risk of successful challenge," and thus remain vital only with a robust competition arising through a diversity of ideas).

57. *See, e.g.*, Roscoe Pound, *Law in Books and Law in Action*, 44 AM. L. REV. 12, 34 (1910) ("[T]he law upon the statute books will be far from representing what takes place actually."). *See generally* Roger A. Shiner, *Theorizing Criminal Law Reform*, 3 CRIM. L. & PHIL. 167 (2009) (regarding the value of understanding doctrine (law on the books) and the sociologist's and criminologist's account of the law (law in action) despite critiques that even together they do not adequately account for societal and political forces).

58. *See, e.g.*, Colgan, *supra* note 25, at 6–7.

means or otherwise cannot complete payment prior to an election,[59] and the fact that exclusion from the vote is expressly mandated until payment is made.[60] In others, whether a person will be subject to wealth-based penal disenfranchisement is less certain, because its application will depend on discretionary decisions regarding a would-be voter's financial capacity that are made by individual governors, courts, or corrections personnel in a given case. For example, a judge or corrections officer may have sufficient authority to respond to a failure to pay economic sanctions by expanding the term of parole or probation, and thus the period of disenfranchisement, depending on whether or not she believes that the person made reasonable efforts to pay.[61] While systems can be carefully designed to appropriately capture a person's financial capacity,[62] absent such care, the likelihood that wealth-based penal disenfranchisement will occur increases.[63] Further, implementation decisions regarding disenfranchisement and reenfranchisement may rest in the hands of a disparate array of local election officials across counties or municipalities, and so the potential ways that each jurisdiction's laws allow for wealth-based penal disenfranchisement may be exacerbated by local decisionmaking.[64]

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59. *See, e.g.*, Nathan W. Link, *Criminal Justice Debt During the Prisoner Reintegration Process: Who Has It & How Much?*, 46 CRIM. JUST. & BEHAV. 154 (2018).

60. *See, e.g.*, *infra* notes 74–81 and accompanying text.

61. *See infra* notes 114–126 and accompanying text.

62. *See generally* Beth A. Colgan, *Graduating Economic Sanctions According to Ability to Pay*, 103 IOWA L. REV. 53 (2017).

63. *See infra* Section II.D.

64. A joint study conducted by the ACLU and the Brennan Center for Justice involving interviews of election officials in twenty-three states showed a widespread misunderstanding of voter eligibility rules, including confusion about which offenses were disenfranchising, whether disenfranchisement applied to people on parole or probation, the scope of other eligibility requirements such as waiting periods, and whether documentation of eligibility was required to register. *See* Wood & Bloom, *supra* note 12. As another example, even after Alabama clarified the definition of moral turpitude in its disenfranchisement statute and provided guidance to local election officials regarding the change, several officials reported that they were unsure of how to implement the new law. *See* Sheets, *supra* note 4. Similarly, Maryland's Parole Commission's website still says that a person must complete parole or probation to be eligible to vote despite a change in the law in 2016 allowing restoration upon release from incarceration. *Compare Frequently Asked Questions*, MD. DEP'T PUB. SAFETY & CORR. SERV., https://www.dpscs.state.md.us/about/FAQmpc.shtml#pardon (last visited Sept. 2, 2018) [https://perma.cc/XV8E-QYCQ], *with* MD. CODE ANN., ELEC. LAW, § 3-102(b)(1) (LexiNexis 2018). *See also* Cammett, *supra* note 20, at 376–77 (noting that in many cases neither election officials nor potential voters understand disenfranchisement laws); Marc Mauer, *Felon Voting Disenfranchisement: A Growing Collateral Consequence of Mass Incarceration*, 12 FED. SENT'G REP. 248, 249 (2000) (describing confusion among local election officials); *infra* note 149; *cf.* Justin Weinstein-Tull, *Election Law Federalism*, 114 MICH. L. REV. 747 (2016) (documenting implementation and enforcement difficulties when election laws are administered at the local level).

Understanding how wealth-based penal disenfranchisement is authorized is essential for reform efforts directed at legislative and executive officials as well as through the courts. For example, in 2013, in an attempt to eliminate wealth-based penal disenfranchisement, Delaware amended its constitution to remove an independent payment requirement mandating full payment of "fees, fines, costs, and restitution" to be eligible for reenfranchisement.[65] The amended constitutional provision, however, continues to require "expiration of the sentence,"[66] which includes completion of parole or probation.[67] Because the length of such supervision may be dependent on full payment of economic sanctions,[68] wealth-based penal disenfranchisement remains authorized in Delaware.[69] The same is true for the rejection of independent payment requirements by the two most recent governors of Virginia, detailed below.[70] While that reform provided relief for people no longer on supervision but struggling with criminal debt, for the potentially tens of thousands of people on parole or probation in Virginia who are required to pay economic sanctions as a condition of supervision,[71] wealth-based penal disenfranchisement remains possible. In addition to ensuring meaningful policy reform, for any litigator seeking to challenge wealth-based penal disenfranchisement as unconstitutional, understanding each authorization mechanism is necessary to ensure that the relief sought addresses the full scope of the problem.[72]

Therefore, this Part details three types of conditions necessary to regain the right to vote that can result in wealth-based penal disenfranchisement: independent payment requirements, payment requirements tied to one's parole or probation status, and payment requirements related to federal and out-of-state convictions.

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65. 311 Del. Laws 242 (2016).

66. DEL. CONST. amend. art. V, § 2.

67. DEL. CODE ANN. tit. 15, §§ 6102(a)(4); 6104(a), (c) (2000).

68. *See* DEL. CODE ANN. tit. 11, §§ 4104, 4321, 4347(j) (2018); State of Del. Dep't of Corr., Procedure Number 7.5: The Collection of Monies (Feb. 12, 2016) (on file with author).

69. Delaware also has a possibility of wealth-based penal disenfranchisement in its restoration application because it requires the applicant to provide payment-history information for the purposes of merits consideration. *See Delaware Board of Pardons Instructions*, STATE DEL. BD. PARDONS 2, https://pardons.delaware.gov/wpcontent/uploads/sites/42/2017/11/pardon_checklist_11142017.pdf (last visited Sept. 17, 2018) [https://perma.cc/N9X4-XLBS]; *see also infra* notes 107–110 and accompanying text.

70. *See infra* notes 90–94 and accompanying text.

71. *See* UGGEN ET AL., *supra* note 17 (estimating that 1,604 Virginia residents are disenfranchised while on parole supervision and 56,908 are disenfranchised while on probation supervision); *see also supra* note 17 and accompanying text.

72. *See infra* Section II.D.

A. Independent Payment Requirements

As detailed below, twenty-eight jurisdictions require either full or partial payment of economic sanctions to regain eligibility to vote, independent of any other sentencing requirements.

1. Full Payment Required

That reenfranchisement is out of reach for those with no meaningful ability to pay is most evident in the eight states that explicitly mandate full payment of economic sanctions to regain eligibility in their primary reenfranchisement laws, whether as a restriction on eligibility for automatic reenfranchisement, reenfranchisement through a discretionary application processes, or both.[73] In addition to Alabama's requirement,[74] Arizona,[75] Arkansas,[76] Connecticut,[77] Florida,[78] Kentucky,[79] Tennessee,[80] and Texas[81] each

73. For a breakdown of the mechanisms by which disenfranchisement occurs, see *infra* Appendix A.

74. *See supra* note 7 and accompanying text.

75. ARIZ. REV. STAT. ANN. § 13-912 (2018). Arizona also requires full payment of economic sanctions to be eligible for relief through its general clemency process. *See* Ariz. Bd. of Exec. Clemency, Pardon Application at 1 (last updated Jan. 9, 2015) (on file with author); *infra* note 82 and accompanying text.

76. ARK. CONST. amend. LI, § 11(d)(2)(A), (C)–(D).

77. CONN. GEN. STAT. § 9-46a(a) (2018).

78. Fla. Clemency Rules, *supra* note 12, at 7, 10–11, 14–15; Fla. Office of Exec. Clemency, Application for Clemency (Aug. 18, 2017), https://www.fcor.state.fl.us/docs/clemency/ClemencyApplication.pdf [https://perma.cc/K7BV-FUUA]. Though Florida voters amended the state's constitution to allow automatic reenfranchisement for most felonies in 2018, people convicted of murder or sex offenses must still apply for reenfranchisement through its clemency process. *See infra* notes 88–89 and accompanying text.

79. Kentucky's statute refers only to completion of restitution, but its pardon application, through which restoration must be sought, extends the statutory requirement to payment of fines. KY. REV. STAT. ANN. § 196.045(2)(c) (West 2018); Ky. Div. of Probation & Parole, Application for Restoration of Civil Rights 2, https://corrections.ky.gov/Probation-and-Parole/Documents/Civil%20Rights%20Application%20Rev%2011-25-2015.pdf (last updated July 2012) [https://perma.cc/K2MT-VRCH].

80. TENN. CODE. ANN. § 40-29-202(b)(1) (2018). In addition to full payment of restitution, Tennessee also requires payment of court costs, "except where the court has made a finding at an evidentiary hearing that the applicant is indigent at the time of the [restoration] application." *Id.* § 40-29-202(b)(2).

81. The relevant provisions in Texas require payment unless fines and costs are "separately remitted or discharged." TEX. ELEC. CODE ANN. § 11.002(A)(4)(A) (West 2018); TEX. CODE CRIM. PROC. ANN. § 43.01(a) (West 2018). Under Texas law, as is true in many states, the clemency power includes authority to remit fines. 37 TEX. ADMIN. CODE § 143.71 (2017). Therefore, it is possible in these states that a person could seek a remission of her fines in order to obtain eligibility for reenfranchisement. The actual operation of remission awards is outside of the scope of this Article, however, for several reasons. First, even where remission authority exists, it may rarely, if ever, be used. *Compare, e.g.*, DEL. CONST. art. 7, § 1 (providing authority for remitting fines), *with* DEL. BD. PARDONS, https://pardons.delaware.gov/ (last visited Sept. 2, 2018) [https://perma.cc/L7WL-

prohibit reenfranchisement until payment of restitution, fines, fees, costs, or a combination thereof is complete.

Four additional states include explicit independent payment requirements outside of their primary reenfranchisement codes. A review of restoration application and general clemency[82] procedures reveals that Idaho,[83] Nebraska,[84] South Carolina,[85] and South Dakota[86] also each require full payment of economic sanctions to be eligible to apply for relief.

A handful of additional states also have interpreted their reenfranchisement codes as including an independent payment requirement. In Georgia and Kansas, the relevant laws require completion of the sentence, which state officials have interpreted to include full payment of economic sanctions.[87] Florida may soon join this list. In 2018, Florida voters passed an amendment to the state's constitution allowing for automatic reenfranchisement for most disenfranchising felonies "upon completion of all terms of sentence

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LWN2] (providing application materials for other forms of clemency but not remissions). Second, though the term "fines" for the purpose of remission has not been interpreted in many states, where it has, it has been strictly construed and therefore would not provide relief where wealth-based penal disenfranchisement stems from an inability to pay restitution, fees, or other economic sanctions. *See, e.g.*, MO. REV. STAT. § 217.805 (2018) (requiring payment of costs in order to seek remission of fines). Finally, eligibility for remission may be effectively impossible if it is only available upon completion of parole or probation, the conditions of which may include full payment of fines. *See, e.g.*, Florida Clemency Rules, *supra* note 12 at 4.

82. General clemency would provide an alternative avenue for restoration of the vote, even where it is not expressly tied to the jurisdiction's reenfranchisement processes. This Article excludes such practices, however, if a person would have already been automatically reenfranchised before becoming eligible for clemency, even if the clemency system could turn on ability to pay. *See, e.g.*, GA. CODE ANN. § 21-2-216(b) (2018) (allowing for automatic discharge upon completion of sentence); *id.* § 42-9-54(a) (stating that pardon also restores the right to vote); GA. COMP. R. & REGS. 475-3-.10 (2018) (requiring the completion of a sentence to be eligible to apply for a pardon). Barriers to clemency due to an inability to pay may be separately unconstitutional. *See infra* note 337.

83. IDAHO CODE § 50.01.01.550.02(b)(v) (2018); *Pardon Application Information*, IDAHO COMM'N PARDONS & PAROLE, https://parole.idaho.gov/pardonsinfoandapppage.html (last visited Oct. 22, 2018) [https://perma.cc/UY3K-GWHK].

84. NEB. REV. STAT. § 29-2264(2), (4) (2018); Neb. Bd. of Pardons, Pardon Application (2013), http://www.pardons.nebraska.gov/content/2013-new-application [https://perma.cc/5ZCU-FTLZ]; *Pardon Application Instructions*, NEB. BD. PARDONS, http://www.pardons.nebraska.gov/instructions.html (last visited Oct. 22, 2018) [https://perma.cc/5ZN2-JQQM].

85. S.C. CODE ANN. §§ 17-25-322(E), 24-21-970 (2018); *How to Apply for a Pardon*, S.C. DEP'T PROB., PAROLE & PARDON SERVS., https://www.dppps.sc.gov/content/download/138528/3154712/file/1118+Pardon+Application+Rvsd+12-19-17+Fillable.pdf (last updated Dec. 19, 2017) [https://perma.cc/Z5UM-CM7A]; *Frequently Asked Questions About Expungements and Pardons in South Carolina Courts*, S.C. JUD. DEP'T, https://www.sccourts.org/selfhelp/FAQExpungementPardon.pdf [https://perma.cc/6598-8JK8].

86. S.D. Bd. of Pardons & Paroles, Executive Clemency Application, http://doc.sd.gov/documents/executiveclemencypardonapplication_3_.pdf (last updated June 2009) [https://perma.cc/2NMZ-V33Q].

87. *See supra* notes 43–44 and accompanying text.

including parole or probation."[88] While Florida's explicit requirement of repayment continues to apply to people convicted of murder and sex offenses, for those convicted of any other felony, it was an open question at the time of publication as to whether "completion" includes payment of all economic sanctions.[89] Whether Virginia law includes an independent payment requirement is also in flux. Virginia's eligibility for restoration requires a five-year waiting period that begins when a person "has completed . . . service of any sentence."[90] Under previous administrations, this language had been treated as including an independent payment requirement to be eligible for restoration.[91] In 2015, however, then-Governor Terry McAuliffe announced a policy change that ongoing criminal debt would not preclude reenfranchisement[92]—effectively interpreting the "completed . . . service" language to refer only to terms of incarceration, parole, or probation.[93] It appears that current-Governor Ralph Northam will continue in that vein.[94] In other words, the actual imposition of wealth-based penal disenfranchisement depends upon the political will of the executive, which can be altered upon a change in attitude or the loss of

88. Constitutional Amendment Petition Form, Amendment to Florida Constitution Article VI, § 4, https://dos.elections.myflorida.com/initiatives/fulltext/pdf/64388-1.pdf [https://perma.cc/8TDW-RCDC].

89. *See supra* note 78 and accompanying text; *see also* Glenn Fleishman, *Florida Felons Regain Voting Rights, But How Many Can Actually Pass the Hurdles, Then Register, and Finally Vote?*, FORTUNE (Nov. 9, 2018), http://fortune.com/2018/11/08/florida-felons-vote-rights-restored-initiative/ [https://perma.cc/G8TH-5ST3]. At the time of publication, Florida's Division of Elections declined to provide direction to county election officials, claiming that deciphering the meaning of the amendment would require legislative action. *See* Steve Bousquet et al., *Confusion Clouds Restoration of Florida Felons' Voting Rights*, TAMPA BAY TIMES (Dec. 4, 2018), https://www.tampabay.com/florida-politics/buzz/2018/12/04/confusion-and-uncertainty-cloud-restoration-of-felons-voting-rights/ [https://perma.cc/Q87M-4WT9].

90. VA. CODE ANN. § 53.1-231.2 (2018).

91. *See* 148 CONG. REC. 797 (2002) (statement of Sen. George Allen) (regarding his practices related to reenfranchisement while serving as Virginia's governor: "I always looked at restitution and court costs in my assessment" of whether to allow restoration; and explaining that while full payment of restitution and costs was not a complete bar, "I cared a great deal about restitution and court costs" and noting that payment was often a condition of probation).

92. Press Release, Office of the Governor of Va., Governor McAuliffe Announces New Reforms to Restoration of Rights Process (June 23, 2015), https://governor.virginia.gov/newsroom/newsarticle?articleId=11651 [https://perma.cc/89R9-HUAC].

93. *Id.*

94. *See* Vann R. Newkirk II, *How Letting Felons Vote is Changing Virginia*, ATLANTIC (Jan. 8, 2018), https://www.theatlantic.com/politics/archive/2018/01/virginia-clemency-restoration-of-rights-campaigns/549830/ [https://perma.cc/N538-FEJ8] (noting that Governor Northam "has said every time he's had the opportunity to say it that he's proud of the work we've done [regarding voting restoration] and wants to continue it"); *Restoration of Rights*, SEC'Y COMMONWEALTH VA., https://commonwealth.virginia.gov/judicial-system/restoration-of-rights/ (last visited Sept. 14, 2018) [https://perma.cc/L8DL-RPTZ] ("To be eligible for restoration of civil rights, an individual must have a felony conviction and be free from any term of incarceration and/or supervision resulting from felony conviction(s).").

an election. In fact, we have seen this exact reversal happen before in the context of penal disenfranchisement more broadly. Between 2005 and 2015, governors in Florida, Iowa, and Kentucky each issued executive orders to allow automatic restoration of voting rights only to have those actions undone by their successors, returning would-be voters to seek reenfranchisement through onerous, and even arbitrary, discretionary procedures.[95] Therefore, because this policy is so readily reversed and the laws allowing for wealth-based penal disenfranchisement remain on the books, I categorize Virginia as among the jurisdictions with laws and policies that establish independent payment requirements.

2. Ongoing Payment Required

In addition to jurisdictions that have independent requirements that make full payment of all economic sanctions necessary for reenfranchisement, several jurisdictions also mandate ongoing payments toward one's criminal debt to regain eligibility to vote. Wealth-based penal disenfranchisement remains possible in these jurisdictions because each requires or allows for a determination that a person is not making sufficient efforts to pay. Whether these practices result in wealth-based penal disenfranchisement therefore turns entirely on whether the procedure for making that determination adequately captures a person's financial circumstances.[96]

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95. *See* Griffin v. Pate, 884 N.W.2d 182, 194 (Iowa 2016); Jean Chung, *Felony Disenfranchisement: A Primer*, SENTENCING PROJECT 2 (May 10, 2016), https://www.sentencingproject.org/wp-content/uploads/2015/08/Felony-Disenfranchisement-Primer.pdf [https://perma.cc/HM9K-T9XW]; David Weigel, *Kentucky's New Governor Reverses Executive Order that Restored Voting Rights for Felons*, WASH. POST (Dec. 23, 2015), https://www.washingtonpost.com/news/post-politics/wp/2015/12/23/kentuckys-new-governor-reverses-executive-order-that-restored-voting-rights-for-felons/?utm_term=.9ffa785da510 [https://perma.cc/KTJ6-VDCB]; *see also* Hand v. Scott, 285 F. Supp. 3d 1289, 1308–09 (N.D. Fla. 2018) (finding that Florida's clemency process is unconstitutionally arbitrary), *motion for stay granted*, 888 F.3d 1206, 1207 (11th Cir. 2018) (staying the district court's ruling during appeal given the executive's broad clemency authority "even when the applicable regime lacks any standards").

96. In a prior work, I examined how a system for graduating economic sanctions according to ability to pay may be designed and operated so as to provide accurate information upon which a person's financial condition can be efficiently and effectively calculated. In addition to ensuring that a system does not result in artificial inflation of a person's means, I also raised questions of institutional design regarding whether and how to include family resources or income derived from criminal activity or off-the-books labor, as well as the role of statutory maximum caps. *See* Colgan, *supra* note 62; *see also* ABA, TEN GUIDELINES, *supra* note 17, at 11; *Lawful Collection of Legal Financial Obligations: A Bench Card for Judges*, NAT'L TASK FORCE ON FINES, FEES AND BAIL PRACS. (Feb. 2, 2017), https://www.ncsc.org/~/media/Images/Topics/Fines%20Fees/BenchCard_FINAL_Feb2_2017.ashx [https://perma.cc/MXU7-PUUR] (providing factors to be considered in determining whether a defendant can pay a court-ordered legal financial obligation).

For example, Washington State has adopted a provisional restoration process through which a person may vote so long as the trial court does not find that she willfully failed to make payments toward the completion of her economic sanctions.[97] If a person misses three payments in a twelve-month period, the county clerk may require the prosecutor to file a motion seeking revocation,[98] at which time the court must determine whether the failure to pay was willful or due to the person's financial circumstances.[99] Absent a meaningful determination, a person could lose eligibility to vote despite an inability to pay. Further, if provisional reenfranchisement is revoked due to a finding of willful nonpayment, the only way in which a person could obtain reenfranchisement again is upon a showing of a good faith effort to pay,[100] a standard that is undefined in the relevant statutes.[101] Even presuming the initial determination of a willful nonpayment was proper, a person who experienced a change in financial circumstances and thus became unable to pay before the registration deadline for the next election remains at risk.[102] Therefore, whether the good faith determination is made at the point at which provisional restoration is lost or is restored, people may be excluded from the franchise based only on ability to pay if the mechanisms for making that determination are not sufficiently robust.

Iowa's system for provisional reenfranchisement, which sets substantial hurdles to initially qualify for provisional reenfranchisement as well as to obtain permanent restoration, is even more problematic. People in Iowa may apply to have voting rights restored when they have ongoing criminal debt,[103] but Iowa's governor is precluded from awarding provisional restoration unless the person is

97. WASH. REV. CODE § 29A.08.520(2)(a) (2018).

98. *Id.* § 29A.08.520(2)(b).

99. *Id.* § 29A.08.520(2)(a).

100. *Id.* § 29A.08.520(3).

101. Originally, Washington's provisional reenfranchisement statute pointed to a separate statute that suggested a showing of good faith would be limited to circumstances in which the person had paid the principal debt in full or made fifteen payments within an eighteen month period. *Id.*; *see also* WASH. REV. CODE § 10.82.090(2)(c) (2017) ("For the purposes of this section, 'good faith effort' means that the offender has either (i) paid the principle amount in full; or (ii) made at least fifteen monthly payments within an eighteen-month period . . . ."). The statute was subsequently amended to eliminate that language, 2018 Wash. Sess. Laws 269, and so now the primary disenfranchisement statute points to a definition of good faith effort to pay in a statute in which there is none. *See* WASH. REV. CODE § 29A.08.520(3) (2018) ("If the court revokes the provisional restoration of voting rights, the revocation shall remain in effect until . . . the person shows that he or she has made a good faith effort to pay as defined in [Wash. Rev. Code Section] 10.82.090.").

102. *Cf.* Bearden v. Georgia, 461 U.S. 660, 662–63, 673–74 (1983) (describing the change in financial circumstances that led to the revocation of Mr. Bearden's probation).

103. IOWA ADMIN. CODE r. 205-14.3(914)(3) (2018).

current on all payments.[104] Therefore, if a person is unable to stay current because a mandated payment is beyond her financial capacity, this requirement would preclude access to the vote based only on an inability to pay. Further, applicants must demonstrate that they are paying in "good faith" through a payment plan,[105] and if economic sanctions remain unpaid upon discharge of probation, the court may recommend that Iowa's governor deny permanent restoration of the vote.[106] Again, were the governor to deny restoration on those grounds in cases where an applicant had been unable to pay, the denial would amount to wealth-based penal disenfranchisement.

In addition to the type of good faith inquiries required for provisional restoration in Washington and Iowa, several jurisdictions leave open the possibility of employing similar considerations in their restoration application or general clemency processes by requiring applicants to supply information and explanations regarding their efforts to pay off criminal debt.[107] The requirement that an applicant provide such information does not mean it will be grounds for a denial. Nevada's application, for example, explicitly indicates that consideration will be given to one's ability to pay, and so wealth-based penal disenfranchisement may be avoided if that review is meaningful.[108] Similarly, while Washington requires an applicant to provide information on unpaid economic sanctions, current-Governor Jay Inslee does not treat criminal debt as a bar to obtaining clemency.[109] As with the executive order amending Virginia's requirement detailed above, Governor Inslee, or his successor, has the power to change that policy at any time.[110] If a restoration or general clemency application were to be denied there or in any jurisdiction on the basis that the applicant—who has no meaningful ability to pay—has outstanding criminal debt, it would constitute wealth-based penal disenfranchisement.

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104. *Streamlined Application for Restoration of Citizenship Rights*, OFF. GOVERNOR, https://governor.iowa.gov/sites/default/files/documents/Voting%20Application_0.pdf (last visited Sept. 17, 2018) [https://perma.cc/5NXM-XDTX].

105. *Frequently Asked Questions (FAQs) — Restoration of Citizenship Rights — Right to Vote and Hold Public Office*, GOVERNOR IOWA, https://governor.iowa.gov/sites/default/files/documents/FAQ%20-%20Voting.pdf (last updated Sept. 1, 2016) [https://perma.cc/2A9V-32FM].

106. IOWA CODE § 907.9(4)(a) (2018).

107. *See infra* Appendix B.

108. *See Criteria and Application Instructions—Community Cases*, STATE NEV. BD. PARDONS 1 (Apr. 25, 2017), http://pardons.nv.gov/uploadedFiles/pardonsnvgov/content/About/CriteriaAndApplicationInstructions.pdf [https://perma.cc/Z6PW-F7ED].

109. E-mail from Taylor Wonhoff, Deputy Gen. Counsel, Office of Governor Jay Inslee, to Beth A. Colgan, Asst. Prof. of Law, UCLA Sch. of Law (Dec. 11, 2017) (on file with author).

110. *See supra* notes 90–95 and accompanying text.

B. Parole- and Probation-Based Requirements

Understanding the full scope of wealth-based penal disenfranchisement requires a comprehensive inquiry into how reenfranchisement is dependent on parole or probation status, and how the failure to pay economic sanctions can alter those forms of supervision.[111]

The role of parole and probation in authorizing wealth-based penal disenfranchisement is widespread, with thirty-two states requiring completion of parole,[112] probation,[113] or both in order to regain the vote in a way that is dependent on a person's ability to pay economic sanctions. Early discharge from parole or probation for completing payment means that a would-be voter becomes eligible for reenfranchisement sooner, but not a person who cannot pay in full. If reenfranchisement is delayed due to an extension of parole or probation terms in response to ongoing debt, that delayed access to the franchise also would constitute wealth-based penal disenfranchisement. In some jurisdictions, the relevant statutes and rules explicitly require payment of economic sanctions to qualify for early termination or state that a failure to pay constitutes grounds for an extension of supervision.[114] In others, the link to payment is through a mandate to complete all supervision conditions, of which payment would be one.[115] In still

111. Appendices C and D include citations to economic sanctions that are indicative of the type that may be made conditions of parole and probation, but do not include all forms of economic sanctions that may be implicated. Further, there are numerous ways that parole and probation conditions may be more difficult to meet due to a person's financial condition beyond requirements to pay economic sanctions. For example, compliance with a requirement to maintain housing may be cost-prohibitive and may also negatively impact parole or probation status. While the use of such conditions may violate the due process and equal protection clauses, it would involve extending the doctrine relied upon in Part II a step further than is necessary to address wealth-based penal disenfranchisement stemming from the failure to pay economic sanctions, and therefore is beyond the scope of this Article.

112. *See infra* Appendix C.

113. *See infra* Appendix D. In Florida, the effect of failure to pay economic sanctions varies from circuit to circuit because state law allows the circuits to adopt alternative sanctions programs for that and other technical probation violations. FLA. STAT. § 948.06(1)(h) (2018). Several circuits have adopted alternative sanctions programs that allow for responses that do not alter the term of probation. *See, e.g.*, Fla. Fourth Jud. Cir., Admin. Order 2017-19, at 3 (on file with author). Additionally, the First Judicial Circuit adopted a system in which probation may be terminated prior to completion of payment of economic sanctions, with debt converted to a civil judgment. Fla. First Jud. Cir., Admin. Order 2009-13, at 3, https://www.firstjudicialcircuit.org/sites/default/files/document_library/AO2009-13.pdf [https://perma.cc/F6SH-N28G]. In five other circuits, however, failure to pay can result in an extension of the term of probation. *See infra* Appendix D (Florida). For the remaining six circuits that have not adopted an alternative sanctions program that addresses economic sanctions, the standard rules apply, including a loss of good time for failure to pay. *Id.*

114. *See, e.g.*, ARIZ. REV. STAT. ANN. § 13-902(C)(1) (2018).

115. *See, e.g.*, MO. REV. STAT. § 559.100(2) (2018).

others, the relevant laws grant sufficiently expansive authority to parole or probation officials to award early termination or extend supervision—for example, by requiring that the "ends of parole have been attained"—so that grounding that decision on early completion of payment or on the failure to pay could fall within the official's discretion.[116]

Mississippi provides an example of how requiring completion of parole or probation—and the link between completion and payment—can result in continued disenfranchisement. Mississippi provides three mechanisms for reenfranchisement, all of which are tied explicitly or implicitly to parole and probation.[117] First, reenfranchisement can occur through a gubernatorial pardon,[118] for which the applicant is required to provide information about whether she ever violated a condition of parole or probation.[119] Second, Mississippi offers a separate process for restoration of citizenship rights by the governor, which requires completion of probation.[120] Third, restoration is possible via a favorable vote of two-thirds of both houses of the legislature.[121] Of the thirty-nine people who regained the right to vote through the legislative process between 2008 and 2018, each one had completed all terms of their sentences, including parole and probation.[122] Payment of economic

116. *See, e.g.*, W. VA. CODE § 62-12-18 (2018) (allowing early discharge upon a determination that "the ends of parole have been attained and the best interests of the state and the parolee will be served thereby").

117. 29-201 MISS. CODE R. § 2.6(A) (LexisNexis 2018).

118. *Id.*

119. Technically, Mississippi also automatically reenfranchises people who committed a disenfranchising offense and subsequently served honorably in World War I or World War II, but given the likelihood that no person could still take advantage of this mechanism, I exclude it here. *See* MISS. CODE. ANN. § 99-19-37(1) (2018).

120. *Id.* § 47-7-41; 29-201 MISS. CODE R. § 2.6(B) (LexisNexis 2018).

121. MISS. CONST. art. 12, § 253.

122. H.B. 1700, 2018 Leg., Reg. Sess. (Miss. 2018); H.B. 1691, 2018 Leg., Reg. Sess. (Miss. 2018); H.B. 1690, 2018 Leg., Reg. Sess. (Miss. 2018); H.B. 1688, 2018 Leg., Reg. Sess. (Miss. 2018); S.B. 2951, 2018 Leg., Reg. Sess. (Miss. 2018); H.B. 1750, 2017 Leg., Reg. Sess. (Miss. 2017); H.B. 1475, 2017 Leg., Reg. Sess. (Miss. 2017); H.B. 742, 2017 Leg., Reg. Sess. (Miss. 2017); H.B. 612, 2017 Leg., Reg. Sess. (Miss. 2017); S.B. 107, 2017 Leg., Reg. Sess. (Miss. 2017); H.B. 1689, 2015 Leg., Reg. Sess. (Miss. 2015); H.B. 1686, 2015 Leg., Reg. Sess. (Miss. 2015); H.B. 1685, 2015 Leg., Reg. Sess. (Miss. 2015); H.B. 1684, 2015 Leg., Reg. Sess. (Miss. 2015); H.B. 1649, 2014 Leg., Reg. Sess. (Miss. 2014); H.B. 652, 2014 Leg., Reg. Sess. (Miss. 2014); S.B. 2035, 2014 Leg., Reg. Sess. (Miss. 2014); H.B. 1703, 2013 Leg., Reg. Sess. (Miss. 2013); H.B. 1574, 2011 Leg., Reg. Sess. (Miss. 2011); H.B. 1555, 2011 Leg., Reg. Sess. (Miss. 2011); H.B. 1554, 2011 Leg., Reg. Sess. (Miss. 2011); H.B. 1551, 2011 Leg., Reg. Sess. (Miss. 2011); H.B. 1550, 2011 Leg., Reg. Sess. (Miss. 2011); H.B. 1521, 2011 Leg., Reg. Sess. (Miss. 2011); S.B. 3129, 2011 Leg., Reg. Sess. (Miss. 2011); H.B. 1740, 2010 Leg., Reg. Sess. (Miss. 2010); H.B. 1711, 2010 Leg., Reg. Sess. (Miss. 2010); H.B. 1710, 2010 Leg., Reg. Sess. (Miss. 2010); H.B. 1709, 2010 Leg., Reg. Sess. (Miss. 2010); H.B. 1707, 2010 Leg., Reg. Sess. (Miss. 2010); H.B. 1706, 2010 Leg., Reg. Sess. (Miss. 2010); H.B. 1699, 2010 Leg., Reg. Sess. (Miss. 2010); H.B. 1683, 2008 Leg., Reg. Sess. (Miss. 2008); H.B. 1681, 2008 Leg., Reg. Sess. (Miss. 2008); H.B. 1675, 2008 Leg., Reg. Sess. (Miss. 2008); H.B. 1674, 2008 Leg., Reg. Sess. (Miss.

sanctions may be made a condition of parole or probation in Mississippi.[123] Failure to pay in a given month can result in a loss of earned time credits against the parole or probation terms,[124] and Mississippi trial courts have broad authority to terminate probation early[125] or to extend the term of probation up to five years.[126] Therefore, Mississippi's restoration processes are inherently bound to a person's ability to pay.

In addition to the thirty-two jurisdictions that require completion of parole, probation, or both, arguably the most hidden mechanism for authorizing wealth-based penal disenfranchisement exists in fifteen states and the District of Columbia. In each of these jurisdictions, the right to vote is restored upon, or after a designated period following, release from incarceration, regardless of whether a person remains subject to a sentence of parole or probation.[127] At first glance, these jurisdictions seemingly cannot be engaged in wealth-based penal disenfranchisement because the only relevant bar to voting is whether one is or is not incarcerated, regardless of the existence of outstanding criminal debt.[128] Because, however, failure to pay economic

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2008); H.B. 61, 2008 Leg., Reg. Sess. (Miss. 2008); H.B. 59, 2008 Leg., Reg. Sess. (Miss. 2008); S.B. 3099, 2008 Leg., Reg. Sess. (Miss. 2008). All bills are available at *Mississippi Legislative Bill Status System*, MISS. LEGISLATURE, http://billstatus.ls.state.ms.us/sessions.htm (last visited Sept. 17, 2018) [https://perma.cc/32G3-JUX9].

123. MISS. CODE ANN. §§ 47-7-5(7)(a)–(b), -35(1)(h), -47(5), -49(1) (2018); 29-201 MISS. CODE R. § 2.5(L) (LexisNexis 2018).

124. MISS. CODE ANN. §§ 47-7-2(q); -38(5)(e); -40(1), (3), (5); -402(2), (5) (2018).

125. *Id.* § 47-7-37(1).

126. *Id.*

127. D.C. CODE § 1-1001.02(7) (2018); D.C. MUN. REGS. tit. 3, § 500.2(c) (2018); HAW. REV. STAT. § 831-2(a)(1) (2018); ILL. CONST. art. III, § 2; 10 ILL. COMP. STAT. 5/3-5 (2018); IND. CODE § 3-7-13-4 (2018); 18 LA. STAT. ANN. §§ 102(A)(1), 104(C)(1)(b), 177(A)(1) (2018); MD. CODE ANN., ELEC. LAW § 3-102(b)(1) (LexisNexis 2018); MASS. CONST. amend. art. III; MICH. COMP. LAWS § 168.758b (2018); MONT. CONST. art. IV, § 2; N.H. REV. STAT. ANN. § 607-A:2(I) (2018); N.D. CENT. CODE § 12.1-33-01, -03(1) (2018); OHIO REV. CODE ANN. § 2961.01(A) (LexisNexis 2018); OR. REV. STAT. § 137.281(1), (3) (2018); 25 PA. CONS. STAT. § 1301(a) (2018); R.I. CONST. art. II, § 1; UTAH CODE ANN. §§ 20A-2-101.3(2); -101.5(2)(a), (c) (LexisNexis 2018). In addition, North Dakota, Ohio, and Pennsylvania each have restoration application or general clemency procedures that take into account whether parole or probation has been violated or revoked as part of a merits evaluation. *See infra* Appendices C–D (North Dakota, Ohio, Pennsylvania).

128. While other states may also have laws that result in parole or probation revocation for failure to pay economic sanctions, I do not include them in this category because disenfranchisement is not singularly dependent on incarceration. Were a state to amend its laws to eliminate all other forms of wealth-based penal disenfranchisement but retain restrictions based upon incarceration, it would raise the same concerns noted here. Similarly, the fifteen states and the District of Columbia that only authorize wealth-based penal disenfranchisement through a return to incarceration also may allow for early termination or extension of parole and probation terms due to a failure to pay economic sanctions, but I do not include those processes in this analysis because the length of the parole or probation term does not implicate eligibility to vote. *See, e.g.*, MONT. DEP'T OF CORR., PROB. & PAROLE DIV., OPERATIONAL PROCEDURE ¶ III.A.2.a (2017) (precluding conditional discharge from supervision until all economic sanctions are paid in full).

sanctions could result in revocation or other intermediate sanctions that involve short-term incarceration, voting eligibility may in fact turn on one's ability to pay.[129] To be clear, this particular mechanism is less likely to result in wealth-based penal disenfranchisement than the other methods described above. Some jurisdictions favor intermediate sanctions short of revocation—such as electronic monitoring or increased reporting requirements—for technical violations of parole or probation, including failure to pay.[130] Those responses to nonpayment would not result in renewed disenfranchisement. But intermediate sanctions may also include the option to impose short periods of incarceration,[131] which would trigger a loss of the vote for that period. Further, even though some jurisdictions preclude revocation for failure to pay if a person is financially incapable of doing so,[132] if processes for determining ability to pay fail to adequately capture a person's financial circumstances, wealth-based penal disenfranchisement may occur.[133]

C. Requirements Related to Federal and Out-of-State Convictions

Another mechanism by which jurisdictions authorize wealth-based penal disenfranchisement is through the disenfranchisement of

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Such processes, however, may be separately unconstitutional. *See infra* note 337 and accompanying text. Only one state fits into both camps. Louisiana allows for reenfranchisement automatically upon termination of supervision (its courts may terminate probation early in recognition of compliance with conditions or extend probation for violating a condition) and also allows for provisional reenfranchisement while a person remains on parole or probation so long as the person has not been incarcerated in the prior five years. *See infra* Appendices C–D (Louisiana).

129. *See infra* Appendices C–D. Although Ohio's Parole Board has the authority to revoke probation for the failure to pay economic sanctions, I have excluded it because they may only do so if there is another independent reason for revoking parole, and thus inability to pay alone could not be the basis for revocation. Email from Ashley Parriman, Staff Counsel, Ohio Dep't of Rehab. & Corr., to Beth A. Colgan, Asst. Prof. of Law, UCLA Sch. of Law (Aug. 29, 2018) (on file with author).

130. *See, e.g.*, Email from Steven D. Hall, Dir. of Transitional Planning Servs., N.D. Dep't of Corr. & Rehab., to Beth A. Colgan, Asst. Prof. of Law, UCLA Sch. of Law (July 19, 2018) (on file with author) (noting that it would be "very rare" for parole to be revoked due to nonpayment of economic sanctions); Or. Dep't of Corr., *Administrative Structured Sanctions*, DOC COMMUNITY CORRECTIONS, https://www.oregon.gov/doc/CC/pages/structured_sanctions.aspx (last visited Sept. 17, 2018) [https://perma.cc/RHD7-7FQU]; *Administrative Sanctions Sanctioning Grid,* CRIM. JUST. COMM'N (Apr. 15, 2008), https://www.oregon.gov/doc/CC/docs/pdf/sanction_gridline.pdf [https://perma.cc/29SY-S4PH]. These additional requirements may independently violate *Bearden*. *See infra* notes 336–342 and accompanying text.

131. *See, e.g.*, UTAH CODE ANN. §§ 64-13-21(2)(a)–(b), 77-27-10(6) (LexisNexis 2018).

132. *See, e.g.*, *Graduated Intervention and Sanctions Matrix,* MD. DEP'T PUB. SAFETY & CORR. SERVS., https://www.dpscs.state.md.us/parole_and_probation/Graduated_Interventions_and%20_Sanctions_Matrix.pdf (last visited Sept. 17, 2018) [https://perma.cc/9LY3-5AWU].

133. *See, e.g.*, IND. CODE § 35-38-2-3(g) (2018) (allowing revocation for failure to pay if a person "recklessly, knowingly, or intentionally fails to pay," which appears to allow revocation even where the failure to pay was not willful).

people upon conviction for a federal or out-of-state offense that continues as the result of outstanding criminal debt.[134] Reenfranchisement policies mirror the requirements for in-jurisdiction convictions, thereby tying reenfranchisement for federal or out-of-state convictions to independent payment requirements, parole or probation status, or both.[135] Under federal law, fines, fees, surcharges, and restitution are available and at times mandatory punishments for many offenses.[136] In Fiscal Year 2016, for example, the federal courts sentenced over fifteen thousand people to pay economic sanctions totaling over $9 billion,[137] adding to the $110 billion in outstanding restitution alone, $100 billion of which the federal government deems

134. *See infra* Appendix E. Disenfranchisement for federal and out-of-state convictions for the jurisdictions in which disenfranchisement only occurs during a period of incarceration requires additional explanation. *See supra* notes 127–133 and accompanying text. Each jurisdiction is a member of the Interstate Commission for Adult Offender Supervision ("ICAOS"), and therefore a person may be convicted in one jurisdiction but allowed to serve a term of parole or probation under the supervision of corrections personnel in another member jurisdiction. *See Regions/States*, ICAOS, https://www.interstatecompact.org/regions-states (last visited Sept. 17, 2018) [https://perma.cc/7NQ7-G3GG]. Under the terms of the ICAOS, a person would be subject to the same forms of discipline for violating conditions as people convicted in the supervising jurisdiction, *ICAOS Rules*, ICAOS R. 4.101 (Mar. 1, 2018), https://www.interstatecompact.org/sites/interstatecompact.org/files/pdf/legal/ICAOS-2018-Rules-ENG.pdf [https://perma.cc/MV25-7VDL], and therefore could become disenfranchised by imposition of a period of short-term incarceration where that intermediate sanction is available for nonpayment. Further, if parole or probation is revoked, the person would be returned to the jurisdiction of conviction to serve the term of incarceration. *Id.* R. 5.103. This would still result in wealth-based penal disenfranchisement if the revocation was due to a failure to pay economic sanctions due to inability because the person would not otherwise lose eligibility to vote under each of the jurisdictions' residency requirements due to absence from the jurisdiction on the date of election. *Cf.* 52 U.S.C. § 10502(c) (2012) (prohibiting the use of durational residency requirements for presidential elections); O'Brien v. Skinner, 414 U.S. 524, 530 (1974) (holding that because confinement constituted a physical disability preventing a person from reaching the polls on election day, it was arbitrary to allow out-of-county defendants to vote by absentee but not defendants confined in the county of conviction).

135. *See, e.g.*, ARIZ. REV. STAT. ANN. §§ 13-909, -910, -912 (2018). Though federal parole is limited to people sentenced to less than thirty years for crimes committed before November 1, 1987, *see* Sentencing Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1987, and therefore the number of people that fall within this category as a result of a federal parole sentence may be limited, I have included jurisdictions with parole-related payment requirements. Additionally, when a question arose in Colorado as to whether the form of federal supervision known as "supervised release" constitutes parole or probation, federal probation and court officials opined that it constituted probation. *See* Email from Fred Bach, Chief U.S. Prob. Officer, Dist. of Colo., to Denise Dohanic (Nov. 3, 2008) (forwarding opinion letter from Joe Gergits, Asst. Gen. Counsel, Admin. Office for the U.S. Courts) (on file with author).

136. *See, e.g.*, 18 U.S.C. §§ 3013, 3553(a), 3571(b), 3663A (2012); U.S. SENTENCING COMM'N, U.S. SENTENCING GUIDELINES MANUAL §§ 5E1.1–.3, 5E1.5 (2016) [hereinafter GUIDELINES MANUAL].

137. *Offenders Receiving Fines and Restitution in Each Primary Offense Category: Fiscal Year 2016*, FED. SENT. GUIDELINES COMM'N 1 (2016), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2016/Table15.pdf [https://perma.cc/NSY2-GQB9].

uncollectable because debtors lack the financial resources to pay.[138] Payment also may be a condition of federal probation or supervised release,[139] and the sentencing court may set a longer term of supervision in order to allow time for full payment.[140] Further, the failure to pay can result in revocation of federal probation, though the federal court must consider whether the failure was willful or as a result of a person's financial condition.[141] With respect to out-of-state convictions, the use of economic sanctions, including as conditions of parole or probation, are ubiquitous across the country,[142] and therefore the application of payment requirements would extend the term of disenfranchisement for out-of-state convictions as well.

In each jurisdiction, for those who are disenfranchised due to a federal or out-of-state conviction, opportunities for reenfranchisement may be even more limited than for people whose convictions arose under the laws of the disenfranchising jurisdiction. Nearly all of those jurisdictions explicitly preclude restoration of the vote for people with federal or out-of-state convictions through one or more of its restoration procedures.[143] For example, in April 2018, after years of unsuccessful attempts by Democrats in New York's legislature to pass reforms that

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138. U.S. GOV'T ACCOUNTABILITY OFF., GAO-18-203, FEDERAL CRIMINAL RESTITUTION: MOST DEBT IS OUTSTANDING AND OVERSIGHT OF COLLECTIONS COULD BE IMPROVED 25 (2018).

139. 18 U.S.C. § 3603(7) (2012); GUIDELINES MANUAL, *supra* note 136, §§ 5B1.3(a)(2), (6), (8); 5D1.3(a)(5)–(6); 5E1.1(a)(2); U.S. DEP'T JUST., USPC RULES & PROCEDURES MANUAL § 2.33(d) (2010), https://www.justice.gov/sites/default/files/uspc/legacy/2010/08/27/uspc-manual111507.pdf [https://perma.cc/4CLS-AQZC] [hereinafter U.S. PAROLE MANUAL].

140. GUIDELINES MANUAL, *supra* note 136, § 5B1.3, Commentary:

> [A] term of probation may also be used to enforce conditions such as a fine or restitution payments . . . . Often, it may not be possible to determine the amount of time required for satisfaction of such payments . . . in advance. This issue has been resolved by setting forth two broad ranges for the duration of a term of probation depending upon offense level.

141. 18 U.S.C. §§ 3613A(a)(1)–(2), 3614 (2012); U.S. PAROLE MANUAL, *supra* note 139, § 2.52(e).

142. *See infra* Appendices B–D.

143. *See, e.g.*, *Executive Clemency Packet,* STATE ALASKA BD. PAROLE 6 (Jan. 20, 2018), http://www.correct.state.ak.us/Parole/documents/Final%20Clemency%20Application.pdf [https://perma.cc/9VHG-G69L] (precluding people disenfranchised for federal convictions from seeking clemency). Exceptions include Alabama, Iowa, Kentucky, Texas, and Wyoming. *See* TEX. CODE CRIM. PROC. ANN. art. 48.05(a) (West 2018); WYO. STAT. ANN. § 7-13-105 (2018); Ala. Bd. of Pardons & Paroles, Rules, Regulations, and Procedures art. 8, http://www.pardons.state.al.us/Rules.aspx#Article_Eight (last visited Sept. 15, 2018) [https://perma.cc/GSH2-XE7V]; Ky. Div. of Prob. & Parole, Application for Restoration of Civil Rights, https://corrections.ky.gov/depts/Probation%20and%20Parole/Documents/Restoration%20of%20Civil%20Rights.pdf (last updated July 2012) [https://perma.cc/K2MT-VRCH]; *Application for Special Restoration of Citizenship Rights (Firearms) and Pardon*, IOWA OFF. GOVERNOR 1, https://governor.iowa.gov/sites/default/files/documents/Firearm%20and%20Pardon%20Application_5.pdf (last visited Sept. 17, 2018) [https://perma.cc/WBL6-X8EB].

would expand voting eligibility to people on parole,[144] Governor Andrew Cuomo eased penal disenfranchisement via executive order.[145] Because economic sanctions can be made a condition of parole in New York,[146] and because early discharge is available only upon a determination by New York's Parole Board that a person has made a good faith effort to pay economic sanctions and is "financially able to comply" with such payments going forward,[147] people on parole in New York were at risk of being subject to wealth-based penal disenfranchisement. Governor Cuomo's executive order affords him the authority to grant a conditional pardon for people on parole to provisionally restore the right to vote,[148] and he quickly did so for over twenty-four thousand of the approximately thirty-five thousand New Yorkers serving parole terms, with a promise to review additional cases.[149] The executive order, however, does not apply to people with federal or out-of-state convictions who are also disenfranchised under New York law.[150] Such people in New York, or in other jurisdictions that preclude relief for those convicted under federal or out-of-state laws and who cannot afford to complete payment of their economic sanctions, may be left with only the slim chance of a presidential pardon or clemency from the jurisdiction of conviction. And just as clemency is restricted in relation to payment of economic sanctions in many states,[151] the federal pardon

144. *See* Sasha Abramsky, *At Long Last, Andrew Cuomo Restores the Vote for New York Parolees*, NATION (Apr. 26, 2018), https://www.thenation.com/article/at-long-last-andrew-cuomo-restores-the-vote-for-new-york-parolees/ [https://perma.cc/3AL3-SWB7].

145. N.Y. Exec. Order No. 181 (Apr. 18, 2018), https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/EO_181.pdf [https://perma.cc/SVA9-W9VJ].

146. N.Y. EXEC. LAW § 259-i(2)(a) (LexisNexis 2018); N.Y. COMP. CODES R. & REGS. tit. 9, § 8003.4(a) (2018).

147. N.Y. EXEC. LAW § 259-j(1), (3) (LexisNexis 2018).

148. *See* N.Y. Exec. Order No. 181, *supra* note 145.

149. *More than 24,000 Individuals Included in First Group of Conditional Pardons*, N.Y. STATE (May 22, 2018), https://www.governor.ny.gov/news/governor-cuomo-issues-first-group-conditional-pardons-restoring-right-vote-new-yorkers-parole [https://perma.cc/7WND-9ACW]. The executive order is sufficiently vague that it leaves open the possibility for wealth-based penal disenfranchisement for those serving parole for convictions under New York's laws. The review process provided involves consideration of a "variety of factors, including if the person is living successfully in the community." *Id.* Governor Cuomo could, for example, determine that the person is not "living successfully" if she has not established an income sufficient to pay off her outstanding criminal debt. *See id.* Further, in the 2018 midterm elections, the New York City Campaign Finance Board, which publishes a voter guide booklet, failed to update the guide, and so it stated that people on state parole could not vote, potentially causing confusion to even those who had been awarded a conditional pardon. *See* Beth Vertig, *City Voter Guide Mistakenly Tells Paroled Felons They Can't Vote*, WNYC (Oct. 31, 2018), https://www.wnyc.org/story/city-voter-guide-mistakenly-tells-paroled-felons-they-cant-vote/ [https://perma.cc/NP8Y-QS3J].

150. *See infra* Appendix E (New York); *see also Apply for Clemency*, N.Y. STATE, https://www.ny.gov/services/apply-clemency (last visited Sept. 8, 2018) [https://perma.cc/S7SS-7DEJ] (noting that eligibility requires "[c]onvict[ion] of a New York State felony").

151. *See supra* notes 82–95, 107–110 and accompanying text.

application mandates proof of payment or a written explanation as to why fines and restitution remain unpaid.[152]

* * *

The following table identifies the manner in which each jurisdiction's laws and policies authorize wealth-based penal disenfranchisement through independent payment requirements, parole- and probation-based payment requirements, and requirements related to federal or out-of-state convictions. The symbol "✓" indicates where such practices are possible, the symbol "Δ" indicates a temporary suspension of such practices by the current executive, and the symbol "†" indicates a jurisdiction where the disenfranchisement or reenfranchisement laws are indeterminate. A more detailed breakdown of each jurisdiction's laws and policies is set out in Appendices A through E. Maine and Vermont are not included in the table, as neither state engages in penal disenfranchisement.[153]

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152. *Petition for Pardon after Completion of Sentence*, U.S. DEP'T JUST. 2 (July 2016), https://www.justice.gov/pardon/file/960581/download [https://perma.cc/BLF8-EKLD]. Disenfranchisement for felony convictions and the link to federal clemency brings Oklahoma into the group of jurisdictions that authorize wealth-based penal disenfranchisement. Oklahoma's laws do not risk wealth-based penal disenfranchisement for people convicted of felonies under its own statutes because reenfranchisement is automatic upon expiration of the original sentence, which is not altered regardless of payment or nonpayment of economic sanctions. OKLA. STAT. tit. 26, § 4-101(1) (2018); OKLA. ADMIN. CODE § 230:15-5-3(b) (2018). Though clemency restores the vote in Oklahoma, it is irrelevant for in-state convictions because a person convicted of a crime in Oklahoma is ineligible for clemency until discharge of the sentence, at which point the person would automatically be restored to the right to vote. *See Pardon Information and Instructions*, OKLA. PARDON & PAROLE BD. 3 (2017), https://ok.gov/ppb/documents/Pardon%20Application%202016.pdf [https://perma.cc/MN55-VT8D]. Oklahoma does, however, disenfranchise people for federal convictions. *See* OKLA. STAT. tit. 26, § 4-120.4(A) (2018) (describing the process by which the State Election Board cancels the voter registration of people convicted of federal felonies); Hughes v. Okla. State Election Bd., 413 P.2d 543, 548 (Okla. 1966) (holding that Oklahoma's disenfranchisement law applies to a person convicted of a federal crime that would constitute a felony in Oklahoma). Oklahoma's reenfranchisement law also allows restoration upon a presidential pardon. *See Voter Registration in Oklahoma*, OKLA. STATE ELECTION BD. (2018), https://www.ok.gov/elections/Voter_Info/Register_to_Vote/ [https://perma.cc/ZWY2-GSRJ] ("A convicted felon may not register for a period equal to the time of the original sentence. A convicted felon who has been pardoned may register."); *Okla. Voter Registration Application*, OKLA. STATE ELECTION BD. 2, https://www.ok.gov/elections/documents/Oklahoma%20Voter%20Registration%20Application%20form%20v4-20%20SEB%20web.pdf (last visited Sept. 17, 2018) [https://perma.cc/2QZJ-246U] (same). Presidential pardons are, of course, rare. *See* John Gramlich & Kristen Bialik, *Obama Used Clemency Power More Often Than Any President Since Truman*, PEW RES. CTR. (Jan. 20, 2017), http://www.pewresearch.org/fact-tank/2017/01/20/obama-used-more-clemency-power/# [https://perma.cc/AW8Z-JYBM]. Even so, wealth-based penal disenfranchisement is effectively imported into Oklahoma because the federal clemency application allows for consideration of one's payment history and requires an explanation of unpaid criminal debt for the purposes of merits review.

153. *See infra* note 474 and accompanying text.

Jurisdiction	Independent Requirement of Payment	Payment Required as Parole Condition	Payment Required as Probation Condition	Payment Required via Federal and/or Out-of-State Convictions
Alabama	✓	✓	✓	✓
Alaska	✓	✓	✓	✓
Arizona	✓	✓	✓	✓
Arkansas	✓		✓	✓
California		✓		✓
Colorado		✓		✓
Connecticut	✓	✓		✓
Delaware	✓	✓	✓	✓
District of Columbia	✓	✓	✓	†
Florida	✓, †	✓	✓	✓
Georgia	✓	✓	✓	✓
Hawaii		✓	✓	✓, †
Idaho	✓	✓	✓	✓
Illinois			✓	✓
Indiana		✓	✓	✓
Iowa	✓	✓	✓	✓
Kansas	✓	✓	✓	✓
Kentucky	✓	✓	✓	✓
Louisiana		✓	✓	✓
Maryland		✓	✓	✓
Massachusetts		✓	✓	✓
Michigan		✓	✓	✓
Minnesota	✓	✓	✓	✓
Mississippi		✓	✓	
Missouri		✓	✓	✓
Montana		✓	✓	✓, †
Nebraska	✓	✓	✓	✓

Jurisdiction	Independent Requirement of Payment	Payment Required as Parole Condition	Payment Required as Probation Condition	Payment Required via Federal and/or Out-of-State Convictions
Nevada	✓	✓	✓	✓
New Hampshire		✓	✓	✓
New Jersey		✓	✓	✓
New Mexico		✓	✓	✓
New York	✓	✓, Δ		✓
North Carolina		✓	✓	✓
North Dakota		✓	✓	†
Ohio	✓	✓	✓	✓
Oklahoma				✓
Oregon	✓	✓	✓	✓
Pennsylvania	✓	✓	✓	†
Rhode Island		✓	✓	✓
South Carolina	✓	✓	✓	✓
South Dakota	✓	✓	✓	✓
Tennessee	✓	✓	✓	✓
Texas	✓	✓	✓	✓
Utah		✓	✓	✓
Virginia	Δ	✓	✓	✓
Washington	✓, Δ			✓
West Virginia		✓	✓	✓
Wisconsin	✓	✓	✓	✓
Wyoming	✓	✓	✓	✓

II. THE FOURTEENTH AMENDMENT AS A SAFEGUARD AGAINST WEALTH-BASED PENAL DISENFRANCHISEMENT

Having shown that wealth-based penal disenfranchisement is authorized in all but two jurisdictions in the United States, this Part

turns to the question of whether there is a viable challenge to these practices under the Fourteenth Amendment.

The black letter of Fourteenth Amendment doctrine provides a hierarchy of review, commonly known as the tiers of scrutiny, in which the level of protection afforded depends on the characteristics of the person affected or the nature of the right implicated by the challenged governmental action. While the Supreme Court has never had unanimity on the validity of the tiers of scrutiny approach,[154] it remains firmly entrenched in the doctrine. The most protective tier, strict scrutiny, requires the government to have a compelling interest in the challenged practice, and the practice must be narrowly tailored to achieving that interest.[155] The least protective tier, rational basis review, requires courts to uphold actions that are rationally related to any legitimate governmental interest.[156]

One possible, though difficult, inroad to challenging wealth-based penal disenfranchisement might be through a claim that such practices invidiously discriminate on the basis of race, and therefore must be subject to strict scrutiny.[157] What limited data exists on wealth-based penal disenfranchisement does suggest significant racial disparities. In studying disenfranchisement rates in Alabama before its laws were clarified, Marc Meredith and Michael Morse found that African Americans with felony convictions were 9.4 percentage points more likely than people with felony convictions overall to be ineligible to vote due to outstanding criminal debt.[158] These results reflect racial disparities in penal disenfranchisement as a whole. While overall penal

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154. *See, e.g.*, City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 439–41 (1985) (describing the tiers of scrutiny approach); *id.* at 458 (Marshall, J., concurring in part and dissenting in part) (agreeing with the tiers of scrutiny approach but critiquing the majority as stating it is using rational basis review when actually employing heightened scrutiny); *id.* at 451–54 (Stevens, J., concurring) (opining that the tiers of scrutiny do not "adequately explain the decisional process" and favoring a single rational basis approach under which classifications based on race and other protected classes are unlikely to be deemed rational); Craig v. Boren, 429 U.S. 190, 212–13 (1976) (Stevens, J., concurring) ("I am inclined to believe that what has become known as the two-tiered analysis of equal protection claims does not describe a completely logical method of deciding cases, but rather is a method the Court has employed to explain decisions that actually apply a single standard in a reasonably consistent fashion."); *id.* at 210 n.* (noting that "the Court has had difficulty in agreeing" on the tiers of scrutiny approach but it has "substantial precedential support"); *id.* at 217–18 (Rehnquist, J., dissenting) (disagreeing with the tiers of scrutiny approach); *see also infra* note 213 and accompanying text.

155. Clark v. Jeter, 486 U.S. 456, 461 (1988).

156. Kadrmas v. Dickinson Pub. Sch., 487 U.S. 450, 457–58 (1988).

157. *See* Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 228–29 (1995) (regarding the use of strict scrutiny in challenges to congressional racial classifications).

158. *See* Meredith & Morse, *supra* note 3, at 311, 327–28. For an explanation of racial disparities in penal disenfranchisement practices as reflective of the continuum of disproportionate minority contact at each stage of criminal processes, arrest through sentencing, see PETTUS, *supra* note 20, at 129, 148–51.

disenfranchisement rates range from 0.21 to 10.43 percent of the general voting population, the rate for African Americans ranges from 0.83 to 26.15 percent.[159] In Kansas, for example, the overall rate of disenfranchisement affects 0.80 percent of the general voting population but 4.29 percent of the African American voting population, a disparity of over 88 percent.[160] Sustaining a race-based challenge to penal disenfranchisement practices under the Fourteenth Amendment is possible, particularly where penal disenfranchisement may be a component of a larger project to restrict the ability of people of color to vote.[161] But it is significantly limited by the requirement that challengers prove the laws were adopted with a racially discriminatory purpose.[162]

Courts must also apply strict scrutiny in cases in which a practice infringes upon a fundamental right, such as voting.[163] This would seem a good fit for a challenge to wealth-based penal disenfranchisement in which people are ineligible to vote due to an inability to pay fines, fees, restitution, and the like because—in striking down poll taxes—the Supreme Court stated that "wealth or fee paying has, in our view, no relation to voting qualifications; the right to vote is too precious, too fundamental to be so burdened or conditioned."[164]

Yet if wealth-based penal disenfranchisement is assessed through the lens of voting rights under the tiers of scrutiny approach,

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159. *See State-by-State Data*, SENT'G PROJECT (2016), https://www.sentencingproject.org/the-facts/#map?dataset-option=SIR [https://perma.cc/74Q3-LP2T] (providing an interactive map of sentencing data). Data is not available for the District of Columbia. *Id.*

160. *See id.*

161. *See* Thompson v. Alabama, No. 2:16-CV-783-WKW, 2017 WL 6597511, at *1333 (M.D. Ala. Dec. 26, 2017) (holding that plaintiffs' complaint stated an actionable claim that Alabama's disenfranchisement laws involved intentional discrimination based on race).

162. *See* Hunter v. Underwood, 471 U.S. 222, 225 (1985) (stating that plaintiffs must show that race was a substantial or motivating factor); *see also infra* note 217. In addition to challenging penal disenfranchisement on racial discrimination grounds, the literature contains a handful of interesting arguments that it is otherwise unconstitutional as a general matter. *See, e.g.*, George P. Fletcher, *Disenfranchisement as Punishment: Reflections on the Racial Uses of* Infamia, 46 UCLA L. REV. 1895, 1904–06 (1999) (arguing that penal disenfranchisement constitutes a bill of attainder); Katherine Shaw, *Invoking the Penalty: How Florida's Felon Disenfranchisement Law Violates the Constitutional Requirement of Population Equality in Congressional Representation, and What to Do About It*, 100 NW. U. L. REV. 1439, 1440 (2006) (arguing that penal disenfranchisement undermines the one-person, one-vote principle by distorting population counts for the purposes of establishing congressional representation). This Article also does not address the Twenty-fourth Amendment, which may provide separate grounds for challenging wealth-based penal disenfranchisement. U.S. CONST. amend. XXIV ("The right of citizens of the United States to vote in any primary or other election for President or Vice President, or for electors of President or Vice President, or for Senator or Representative in Congress, shall not be denied or abridged by the United States or any State by reason of failure to pay any poll tax or other tax.").

163. Harper v. Va. State Bd. of Elections, 383 U.S. 663, 670 (1966).

164. *Id.* at 670.

it will be subject only to rational basis review. In *Richardson v. Ramirez*,[165] the Court expressly held that the reference in Section Two of the Fourteenth Amendment to "participation in rebellion, or other crime,"[166] exhibited congressional intent to leave to the states the power to engage in penal disenfranchisement.[167] Thus, once lost upon conviction, access to the franchise no longer constitutes a fundamental right that triggers strict scrutiny.[168] Rational basis review, of course, is not a death knell for all poverty penalties;[169] there has been recent success, for example, in challenging driver's license restrictions imposed for the failure to pay on the grounds that it is irrational, given

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165. Richardson v. Ramirez, 418 U.S. 24 (1974).

166. U.S. CONST. amend. XIV, § 2.

167. *Ramirez*, 418 U.S. at 54–55. *Ramirez* has been much maligned in the literature. *See, e.g.*, MANZA & UGGEN, *supra* note 20, at 32 ("The irony of the interpretation in *Ramirez* is remarkable. The Fourteenth Amendment was intended to *expand* voting rights to previously excluded groups, *not* to allow the states to add new restrictions."); Richard W. Bourne, Richardson v. Ramirez*: A Motion to Reconsider*, 42 VAL. U. L. REV. 1, 1, 29–30 (2007) (arguing that the references to "crime" in Section Two were intended to allow only the disenfranchisement of whites who had participated in treasonous acts on behalf of the Confederacy during the Civil War); Gabriel J. Chin, *Reconstruction, Felon Disenfranchisement, and the Right to Vote: Did the Fifteenth Amendment Repeal Section 2 of the Fourteenth Amendment?*, 92 GEO. L.J. 259, 260, 262–63, 272 (2004) (asserting that the 1870 ratification of the Fifteenth Amendment's prohibition on restrictions of the franchise based on "race, color, or previous conditions of servitude" should be understood to have overridden the prior ratification of Section Two of the Fourteenth Amendment); Fletcher, *supra* note 162, at 1904 (same); Re & Re, *supra* note 12, at 1584, 1648–51 (arguing that a broader historical analysis would support the state's ability to disenfranchise for serious crimes beyond treason, but not lower-level felonies as allowed under *Ramirez*); David L. Shapiro, *Mr. Justice Rehnquist: A Preliminary View*, 90 HARV. L. REV. 293, 303 (1976) ("[T]here is not a word in the fourteenth amendment suggesting that the exemptions in section two's formula are in any way a barrier to the judicial application of section one in voting rights cases, whether or not they involve the rights of ex-convicts."). An exception to the near universal criticism of *Ramirez*'s interpretation and breadth can be found in Roger Clegg et al., *The Bullet* and *the Ballot? The Case for Felon Disenfranchisement Statutes*, 14 AM. U. J. GENDER SOC. POL'Y & L. 1, 5–8 (2006). In this Article, I do not relitigate *Ramirez*'s shortcomings, however, taking as a starting point the premise that lawmakers can restrict the right to vote in response to a felony conviction and that, once such a restriction occurs, the right to vote is no longer fundamental for people so convicted.

168. *See* Harvey v. Brewer, 605 F.3d 1067, 1079 (9th Cir. 2010) (explaining, in an opinion authored by Justice O'Connor (retir.), that the right to vote is no longer fundamental postpenal disenfranchisement, though perhaps not wealth-based penal disenfranchisement, and is thus subject to rational basis review). For arguments that the strict scrutiny test should be employed because voting remains a fundamental right despite conviction, see Griffin v. Pate, 884 N.W.2d 182, 207–09 (Iowa 2016) (Hecht, J., dissenting); Madison v. State, 163 P.3d 757, 778–80 (Wash. 2007) (Alexander, J., dissenting); Angela Behrens, Note, *Voting—Not Quite a Fundamental Right? A Look at Legal and Legislative Challenges to Felon Disenfranchisement Laws*, 89 MINN. L. REV. 231, 259 (2004); Keller, *supra* note 20, at 212–16; and Simmons, *supra* note 20, at 318–20. *Cf.* Sonia B. Starr, *Evidence-Based Sentencing and the Scientific Rationalization of Discrimination*, 66 STAN. L. REV. 803, 833–41 (2014) (arguing, based in part on *Bearden*, that risk-assessment tools that predict recidivism based on demographics and socioeconomic status should be subject to heightened scrutiny because they effectively turn poverty into an aggravating factor).

169. *See generally* Katie R. Eyer, *The Canon of Rational Basis Review*, 93 NOTRE DAME L. REV. 1317, 1321 (2018) (discussing the underappreciated level of success social justice movements have had under rational basis review).

that one's ability to pay is actually hampered by an inability to drive to one's place of employment.[170] But lower courts have also upheld wealth-based penal disenfranchisement as rationally related to nonpenal interests such as setting voter eligibility standards.[171]

What this Article offers, therefore, is a distinct avenue of constitutional attack, focusing not on the nature of the right at stake but on restrictions the Fourteenth Amendment places on the government's power to punish. This Article posits that the Court has set aside the traditional tiers of scrutiny in a line of cases aimed at protecting against the government's use of the prosecutorial power in ways that price people out of fair treatment in criminal justice systems.[172]

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170. *See* Thomas v. Haslam, No. 3:17-cv-00005, 2018 WL 3301648, at *10–12 (M.D. Tenn. July 2, 2018) (holding that plaintiffs met the burden of showing that the use of driver's license revocation for failure to pay economic sanctions failed rational basis review in light of census data showing that at least ninety-two percent of workers in Tennessee's major metropolitan areas drive to work); Robinson v. Purkey, No. 3:17-cv-01263, 2018 WL 2862772, at *37–43 (M.D. Tenn. June 11, 2018) (denying motion to dismiss claim that driver's license suspension scheme violated due process and equal protection as articulated in the *Bearden* line); *Robinson*, 2018 WL 2862772, at *43 (determining that plaintiffs had stated a valid claim that suspension of driver's licenses for a nonwillful failure to pay was irrational). *But see* Fowler v. Johnson, No. 17-11441, 2017 WL 6379676, at *8–9 (E.D. Mich. Dec. 14, 2017) (determining that plaintiffs were unlikely to succeed on the merits of a challenge to a driver's license revocation policy under a rational basis review standard).

171. *See* Johnson v. Bredesen, 624 F.3d 742, 747 (6th Cir. 2010) (upholding a voter-eligibility requirement that people with felony convictions must pay all restitution to be reenfranchised as rational, pointing to justifications, including protection of "the ballot box from convicted felons who continue to break the law by failing to comply with court orders"); Madison v. State, 163 P.3d 757, 769 (Wash. 2007) ("Additionally, even though low-income felons may not be accountable for their wealth status, they have been adjudicated responsible for their status as felons, which is the classification at issue. Therefore, we do not apply intermediate scrutiny, and we examine Washington's disenfranchisement scheme using rational basis review."). For an argument that wealth-based penal disenfranchisement fails under rational basis review, see Cammett, *supra* note 20.

172. The analysis in Part II relies primarily on the text of the relevant cases themselves. At times, I also point to the oral arguments in the cases, the parties' briefings, and available files from the Justices who participated in developing the doctrine. Despite the value of these additional materials, I am sensitive to their potential for misuse or overstatement, so I offer this brief note to establish the parameters of my reliance upon them in this Article. First, these sources underscore the Court's statements within the cases regarding the risk of prosecutorial abuse in criminal processes, particularly as it pertains to indigent defendants. *See, e.g.*, *infra* notes 203–217 and accompanying text. Second, the sources bolster the intentionality of the Court's decisions by revealing awareness of the practical implications of the protections it afforded to indigent defendants and by showing the contrast between the Court's analyses and holdings and those championed by the litigants. *See, e.g.*, *infra* notes 252–273 and accompanying text. It is also important to note that the Justices' papers in particular are incomplete, as some are not yet publicly available and others contain only a handful of documents related to a given case. *See* Stephen Wermiel, *SCOTUS for Law Students: Supreme Court Mysteries and the Justices' Papers*, SCOTUSBLOG (July 2, 2018, 1:19 PM), http://www.scotusblog.com/2018/07/scotus-for-law-students-supreme-court-mysteries-and-the-justices-papers/ [https://perma.cc/JA6E-MH39]. Fortunately, numerous files relevant to this analysis were available at the following sources: Department of Rare Books & Special Collections, Princeton University (John Marshall Harlan

To that end, this Section begins by uncovering the constitutional norms that animate the line of cases leading to the Court's decision in *Bearden v. Georgia*,[173] a case in which it limited the government's ability to respond to nonpayment of economic sanctions due to an inability to pay. These underlying principles are grounded in a concern that the government could abuse its prosecutorial power by treating people disparately because of their financial circumstances,[174] as well as a recognition that, taken together, the due process and equal protection clauses provide amplified protection in the criminal arena.[175]

This Section then turns to the question of whether the *Bearden* test, as contemplated by the Court in that case, would prohibit wealth-based penal disenfranchisement. The constitutional norms that inform the *Bearden* line might be extended to other arenas in which the government subjects people to disparate treatment in the criminal justice system, including, perhaps, the creation of a new test to respond to wealth-based penal disenfranchisement.[176] The goal of this Article,

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Papers); Harvard Law School Library (Felix Frankfurter Papers); Hoover Institute, Stanford University (William H. Rehnquist Papers); Library of Congress (Hugo Black Papers, Harry Blackmun Papers, William Brennan Papers, Harold H. Burton Papers, William O. Douglas Papers, Thurgood Marshall Papers, Earl Warren Papers, Byron White Papers); Manuscripts and Archives, Yale Law Library (Abe Fortas Papers, Potter Stewart Papers); Tarlton Law Library, University of Texas (Thomas C. Clark Papers); Washington & Lee Law Library (Lewis F. Powell Papers). All documents referenced throughout this Article are also on file with the author. I am grateful to Michael Klarman, who has encouraged legal scholars to engage with the Justices' papers. *See* Michael Klarman, *An Interpretive History of Modern Equal Protection*, 90 MICH. L. REV. 213, 218–19 (1991).

173. 461 U.S. 660 (1983).

174. *See infra* Section II.A.1.

175. *See infra* Section II.A.2.

176. To date the *Bearden* line has struck down practices in which a person's inability to pay limited opportunities for criminal appeal, *see, e.g.*, Griffin v. Illinois, 351 U.S. 12 (1956) (plurality), prohibited the direct imposition of incarceration as a substitute for unpayable economic sanctions at sentencing, *see, e.g.*, Williams v. Illinois, 399 U.S. 235 (1970), and rejected the automatic revocation of probation in response to nonpayment, *see Bearden*, 461 U.S. 660. The scope and operation of criminal justice systems is vast, however, and there are many other circumstances in which a person's financial condition may be implicated. It is unsurprising, for example, that some lower courts have relied on the constitutional norms in the *Bearden* line to assess practices that involve imposition of monetary requirements beyond a person's ability to pay in order to obtain pretrial release. *See, e.g.*, Walker v. City of Calhoun, 901 F.3d 1245, 1265–66 (11th Cir. 2018); ODonnell v. Harris Cty., 892 F.3d 147, 161–62 (5th Cir. 2018); Pugh v. Rainwater, 572 F.2d 102, 105–06 (5th Cir. 1978) (en banc); Buffin v. City of San Francisco, Civ. No. 15-4959, 2018 WL 424362, at *8–10 (N.D. Cal. Jan. 16, 2018). Were the Court to adopt a new test to attend to circumstances not yet addressed in the *Bearden* line, it might consider factors such as "the nature of the individual interest affected, the extent to which it is affected, the rationality of the connection between legislative means and purpose, [and] the existence of alternative means for effectuating the purpose." *Bearden*, 461 U.S. at 666–67 (quoting Williams v. Illinois, 399 U.S. 235, 260 (1970) (Harlan, J., concurring)). As explained in Section II.B, unlike a tiers of scrutiny approach in which individual and governmental interests are weighed against each other in the test's application, those considerations would instead be relevant to crafting the test to be employed. This Article is not engaging in that exercise, however, assessing instead whether the

however, is to determine whether that restriction on voting is prohibited by *Bearden* itself.

The doctrinal intervention contemplated here is viable if three things prove true. First, the *Bearden* line of cases must actually operate outside of the traditional tiers of scrutiny. As described below, the *Bearden* Court crafted a unique test under which, if the government imposes economic sanctions as punishment for an offense and a person does not pay due to inability, the government is flatly prohibited from imposing additional punishment unless no alternative response could ensure that the debtor does not escape punishment for the original offense altogether.[177] Second, because the *Bearden* test is triggered when the government imposes additional punishment in response to a failure to pay, penal disenfranchisement must constitute punishment. Though some lower courts have suggested that the *Bearden* test only applies if the additional punishment involves a deprivation of liberty, the Court's repeated rejection of penalty-based distinctions appears to belie that restriction.[178] Third, even if it constitutes punishment, continued penal disenfranchisement due to an inability to pay would only be unconstitutional under the test if alternative responses that meet the government's interest in punishing the disenfranchising offense are feasible. Because several such alternatives are feasible, this approach would render wealth-based penal disenfranchisement unconstitutional under the Fourteenth Amendment.[179]

A. The Underlying Constitutional Norms

Challenges to wealth-based penal disenfranchisement and other poverty penalties have relied heavily on the 1983 case of *Bearden v. Georgia*.[180] To date, the lower courts have presumed that *Bearden* fits within the traditional tiers of scrutiny approach. As noted above, the first step for challenging wealth-based penal disenfranchisement outside of that approach is discerning whether the lower courts'

Bearden test as articulated by the Court in that case would render wealth-based penal disenfranchisement unconstitutional. There may be other practices that also fail the *Bearden* test on its own terms. For example, in several jurisdictions courts issue warrants when people do not pay economic sanctions and then hold the people subjected to those warrants in detention to await a hearing to determine whether the nonpayment was willful or due to an inability to pay. Though not directly addressed by the Court, incarcerating someone in order to determine whether incarcerating them is constitutional violates the spirit, if not the letter, of *Bearden*.

177. *See infra* Section II.B.

178. *See infra* Section II.C.1.

179. *See infra* Section II.D.

180. *Bearden*, 461 U.S. at 661–62, 672–73.

understanding is correct, or instead whether the Supreme Court has adopted a distinct test that affords greater protection.

At its simplest reading, *Bearden* struck down the automatic revocation of probation for failure to pay when a person had no meaningful ability to do so.[181] Upon conviction as a first-time offender for entering a mobile home without permission and theft of a VCR,[182] a Georgia trial court sentenced Danny Bearden to pay a fine and restitution, making payment a condition of his probation.[183] Mr. Bearden paid $200 he borrowed from his mother and father, who were also of limited means.[184] Shortly thereafter, he was laid off from his job, and when his efforts to find new employment proved unsuccessful,[185] he had no capacity to pay the remaining $550 in criminal debt.[186] The trial court revoked his probation, resulting in a sentence of two and a half years in prison.[187] Mr. Bearden successfully appealed his case to the Supreme Court. In holding that automatic revocation violated the Fourteenth Amendment, the Court expressed the test it applied as follows: "If the probationer has made all reasonable efforts to pay . . . and yet cannot do so through no fault of his own, it is fundamentally unfair to revoke probation automatically without considering whether adequate alternative methods of punishing the defendant are available."[188]

Read independently, *Bearden* or any other case in its line easily could be misunderstood as existing wholly within the tiers of scrutiny frame. The Court could be stating that the failure to attend to

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181. *Id.* at 672–73.

182. Appendix to Petition for Writ of Certiorari at 3, 8 (May 3, 1982), *Bearden*, 461 U.S. 660 (No. 81-6633); Order of Court Under First Offender's Act, State v. Bearden (Catoosa Cty. Sup. Ct. Oct. 8, 1980) (No. 8923).

183. *Bearden*, 461 U.S. at 662–63.

184. Transcript of Proceedings at 21, *Bearden*, 461 U.S. 660 (Nos. 8917 & 8923); Appendix to Petition for Writ of Certiorari, *supra* note 182.

185. At Mr. Bearden's probation revocation hearing, he testified regarding his attempts to find employment. Transcript of Proceedings, *supra* note 184, at 23–24, 28–29, 31 (stating he sought work at the Georgia Unemployment Office, multiple businesses, and a local high school, and that he attempted to apply at "Salem Carpet" but that "[t]hey wouldn't even let me in the gate over there, just said they wasn't doing no hiring"). Mr. Bearden's wife also testified. *Id.* at 18 ("I have took him to look for jobs myself. I took him to Dalton Unemployment Office, and they didn't have nothing, and he went to look for different jobs. He has been everywhere in Ringgold to find a job, and nobody's hiring."); *id.* at 20 ("He's looked in Dalton, all over Dalton carpet mills down there. He went to Babb Lumber Company, Salem Carpet, Dixie Yarn, every place in Ringgold he could think of to go to, but he still hasn't found one."). Mr. Bearden's attempts to find employment were likely hampered by the fact that he had only a ninth-grade education and was unable to read. *Id.* at 26, 31; Brief for Petitioner at 8, *Bearden*, 461 U.S. 660 (No. 81-6633) (on file with author).

186. *Bearden*, 461 U.S. at 662–63.

187. *See id.*

188. *Id.* at 668–69.

alternative punishments falls short of the strict scrutiny test's requirement that the government's action be narrowly tailored.[189] Or the Court could have held that revoking probation for an inability to pay is simply irrational, thus failing under rational basis review.[190] Further, other cases in the *Bearden* line often confusingly employed language associated with both tiers of scrutiny.[191] It is unsurprising then that the lower courts and litigants—including the parties in *Bearden*[192]—have attempted to shoehorn *Bearden* into the traditional tiers.[193]

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189. *See supra* note 155 and accompanying text.

190. *See supra* note 156 and accompanying text.

191. The Court has described the line as using a form of heightened scrutiny or used language suggesting the use of strict scrutiny in the following cases: *M.L.B. v. S.L.J.*, 519 U.S. 102, 123–24 (1996); *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 102 (1973); *Rinaldi v. Yeager*, 384 U.S. 305, 309 (1966); and *Griffin v. Illinois*, 351 U.S. 12, 16–18 (1956). The Court has described the challenged practice as "irrational" or otherwise suggested the use of rational basis review in the following cases: *Shapiro v. Thompson*, 394 U.S. 618, 633 n.11 (1969); *Smith v. Bennett*, 365 U.S. 708, 710 (1961); and *Burns v. Ohio*, 360 U.S. 252, 257–58 (1959). *See also* Murray v. Giarratano, 492 U.S. 1, 17 (1989) (Stephen, J., dissenting); Black v. Romano, 471 U.S. 606, 620–21 (1985) (Marshall, J., concurring); Klarman, *supra* note 172, at 234 ("[T]he last two decades of equal protection development are replete with instances in which the Court mouthed rationality language while surreptitiously substituting a heightened review standard.").

192. *See, e.g.*, Transcript of Oral Argument at 7, 16, 25, *Bearden*, 461 U.S. 660 (No. 81-6633) [hereinafter *Bearden*, Transcript of Oral Argument] (discussing different outcomes that would result if strict scrutiny or rational basis review were applied), *audio recording with speaker designation available at Bearden v. Georgia*, OYEZ, https://www.oyez.org/cases/1982/81-6633 (last visited Oct. 10, 2018) [https://perma.cc/36QZ-5R4T]; *id.* at 34 (noting laughter from the audience after Justice O'Connor stated, "It is not altogether clear what the basis of some of these prior decisions . . . ."); *see also* Petitioner's Reply Brief, *Bearden*, 461 U.S. 660 (No. 81-6633) (on file with author) (focusing argument on appropriate tier of scrutiny and application thereof); Brief for Respondent, *Bearden*, 461 U.S. 660 (No. 81-6633) (on file with author) (same); Brief for Petitioner, *Bearden*, *supra* note 185 (same); Brief in Opposition to Petition for Writ of Certiorari, *Bearden*, 461 U.S. 660 (No. 81-6633) (same); Petition for Writ of Certiorari, (May 3, 1982), *Bearden*, 461 U.S. 660 (No. 81-6633) (same).

According to the Supreme Court's website, cases were not routinely transcribed until 1968. Even once transcriptions became common practice, speakers—Justices and in some cases counsel—were not clearly identified. Instead, the words "Question" and "Answer" (or "Q" and "A") were used to designate a shift in speaker. All speakers were identified by name beginning in the October 2004 Term. *See Argument Transcripts*, SUPREME COURT OF THE UNITED STATES, http://www.supremecourt.gov/oral_arguments/argument_transcript (last visited Oct. 18, 2018) [https://perma.cc/K7S2-UQNM]. To properly designate speakers for cases decided prior to 2004, this Article relies on the Oyez.org database, which provides transcripts with speaker designations beginning in the 1950s. *See* Cases, OYEZ, https://www.oyez.org/cases (last visited Oct. 18, 2018) [https://perma.cc/T72G-RXJE].

193. *Compare, e.g.*, Johnson v. Bredesen, 624 F.3d 742, 748–49 (6th Cir. 2010) (describing *Bearden* as employing strict scrutiny), *with id.* at 758, 756–57 (Nelson Moore, J., dissenting) (arguing that *Bearden* employed rational basis review). *Compare also* Madison v. State, 163 P.3d 757, 768–69 (Wash. 2007) (applying rational basis review), *with id.* at 779–80 (Alexander, J., dissenting) (arguing that strict scrutiny applied). One lower court recently noted the distinction between the *Bearden* line and the tiers of scrutiny approach, but stated that it was constrained by a prior Sixth Circuit ruling which interpreted *Bearden* as applying strict scrutiny. *See* Robinson v. Purkey, No. 3:17–cv–01263, slip op. at 37–38 (M.D. Tenn. June 11, 2018) (noting that "the simple

Read collectively and in the context of the Court's treatment of wealth-based distinctions under the Fourteenth Amendment writ large, however, what emerges is a distinct form of protection driven by constitutional norms against the government's use of its prosecutorial power in ways that subject people to disparate treatment due to their financial circumstances. Those norms are evident in both the Court's efforts to carve out the prosecutorial power from other governmental functions, as well as its use of both due process and equal protection to protect against abuse. The excavation of these norms supports the conclusion that in the *Bearden* line the Court is operating outside of the tiers of scrutiny.

1. Recognition of the Unique Threat of the Prosecutorial Power

The origins of the distinct test for assessing the constitutionality of poverty penalties such as wealth-based penal disenfranchisement may be found in constitutional norms first espoused in the 1956 case of *Griffin v. Illinois*, which struck down financial barriers to accessing criminal appeals as of right.[194] The *Griffin* plurality engaged in two key moves, only one of which would survive: it treated wealth as a suspect class on the same footing as race,[195] and it stated that while the government need not devise a system for criminal appeals as of right, once it chose to create that system, it could not deny access to it due to an inability to pay.[196] *Griffin* continued to thrive during the Burger and Rehnquist eras, in which the Court engaged in a marked shift away from the idea of wealth as a suspect class,[197] because the Court recast *Griffin* to be focused around its latter concern regarding the manner in which the government treats people with limited means while employing its prosecutorial power.[198]

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tiers-of-scrutiny analysis that the Sixth Circuit considered adequate . . . cannot simply be substituted for a consideration of the full line of *Griffin* cases without losing quite a bit in the translation" and that "[i]gnoring those holdings in favor of a two-sizes-fit-all approach does not afford the Supreme Court's cases the precedential weight to which they are entitled").

194. *Griffin*, 351 U.S. 12.

195. *See, e.g.*, *id.* at 17–18 (plurality opinion) ("In criminal trials a State can no more discriminate on account of poverty than on account of religion, race, or color.").

196. *Id.* at 18; *id.* at 23 (Frankfurter, J., concurring).

197. *See* Klarman, *supra* note 172, at 217 (calling "the rejection of suspect classification status for wealth" one of the "principal equal protection developments of the [1970s and 1980s]").

198. *Id.* (describing distinctions drawn between entitlements and deliberate disadvantaging in the context of wealth discrimination); *cf.* Pamela S. Karlan, *Unduly Partial: The Supreme Court and the Fourteenth Amendment in* Bush v. Gore, 29 FLA. ST. U. L. REV. 587, 595–96 (2001) (describing how, in striking down the poll tax in *Harper*, the Court originally pointed to both wealth as a suspect class and voting as fundamental, but over time *Harper* came to stand for only the latter proposition).

As the early *Griffin* cases developed to protect indigent defendants at the appellate stage,[199] the question of whether, at sentencing, a trial court could convert economic sanctions to incarceration began percolating up from the lower courts,[200] finally reaching the Supreme Court in 1970 with *Williams v. Illinois*[201] and in 1971 with *Tate v. Short*.[202] When people were too poor to pay in a lump sum at sentencing,[203] jurisdictions across the country were converting economic sanctions to days of incarceration—at a rate of $5 per day in *Williams* and *Tate*.[204] In many jurisdictions the automatic conversion of economic sanctions to incarceration was so commonplace that it contributed significantly to incarceration rates; for example, by 1970, sixty percent of jail inmates in Philadelphia County, Pennsylvania were incarcerated due to an inability to pay economic sanctions.[205] Relying heavily on *Griffin*,[206] the Court struck down the automatic conversion of economic sanctions to incarceration in both cases.[207]

At the same time that the Court expanded protections to indigent defendants in *Williams* and *Tate*, concerns began to rise to the fore that if taken to its logical extreme, the notion of wealth as a suspect

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199. *See infra* notes 311–314 and accompanying text.

200. The Court learned of this practice as early as *Griffin*, as counsel for Illinois used its own statutes allowing for incarceration as a substitute for economic sanctions to argue that people of limited means were routinely treated unfairly in criminal processes and therefore its financial barriers to criminal appeals should stand. Transcript of Oral Argument at 31, Griffin v. Illinois, 351 U.S. 12 (1956) (No. 95) [hereinafter *Griffin*, Transcript of Oral Argument], *reprinted in* 50 LANDMARKS BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW 851 (Philip B. Kurland & Gerhard Casper eds., 1975); Brief for Respondent at 7, *Griffin*, 351 U.S. 12 (No. 95) (on file with author). In 1966, the Court was presented with a case in which trial courts converted economic sanctions to incarceration, but it was styled as a Sixth Amendment challenge to the denial of counsel who may have, among other things, challenged the constitutionality of the conversion of debt rather than as a direct challenge to the conversion itself. *See* Winters v. Beck, 385 U.S. 907, 907–09 (1966) (Stewart, J., dissenting from denial of certiorari).

201. Williams v. Illinois, 399 U.S. 235 (1970). The Court also accepted review of a similar statute in Maryland, but because the Maryland legislature amended the statute after oral argument, it remanded it for further consideration in light of *Williams*. *See* Morris v. Schoonfield, 399 U.S. 508, 508 (1970) (per curiam).

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

203. *See Williams*, 399 U.S. at 240 ("[C]ommitment for failure to pay . . . has been viewed as a means of enabling the court to enforce collection of money that a convicted defendant was obligated by the sentence to pay."); Brief for the Appellee at *3–5, *7, *Williams*, 399 U.S. 235 (No. 1089), 1970 WL 136557 (discussing historic and contemporary "work-off" laws and the frequency of issuing fines during sentencing); Brief of National Legal Aid & Defender Ass'n as Amicus Curiae Supporting Petitioner at *13–17, *Williams*, 399 U.S. 235 (No. 1089), 1970 WL 136555 [hereinafter NLADA Amicus] (surveying different "work-off" statutes and their effects on indigent defendants).

204. *Id.* at 396–97; *Williams*, 399 U.S. at 236–37; *see also Williams*, 399 U.S. at 246–59 (surveying state statutes in which rates of credit for time served ranged from $1 to $10).

205. NLADA Amicus, *supra* note 203, at *16.

206. *Williams*, 399 U.S. at 241.

207. *Id.*; *Tate*, 401 U.S. at 397–99.

class could lead to a determination that the government had an affirmative obligation to eliminate wealth disparities.[208] These concerns were no doubt heightened in 1971, when, in *Boddie v. Connecticut*, the Court struck down mandatory filing fees in divorce actions on the grounds that the marital relationship is fundamental, relying heavily on the importance of court access recognized in *Griffin*.[209]

The question of how far the special treatment of wealth would extend came to a head in 1973, when the Court decided *San Antonio Independent School District v. Rodriguez*.[210] The case involved a challenge to a public school financing scheme in which district funding depended on local tax assessments, meaning that schools in tax-poor neighborhoods received less funding than their wealthier counterparts.[211] The notes of Justice Powell, who authored the *Rodriguez* majority, indicate that he found the idea that wealth was a suspect class anathema, considering it mere "communist doctrine . . . not even accepted (except in a limited sense) in socialist countries."[212] Yet in drafting the *Rodriguez* opinion, Justice Powell labored to preserve the special treatment of wealth in prior cases, including *Griffin* and its progeny,[213] distinguishing those cases in two

208. *See* Klarman, *supra* note 172, at 266–67, 285–91 (describing the pressure to reign in the potential expansive effects of earlier wealth-based discrimination cases and the fear the doctrine would lead to wealth redistribution).

209. Boddie v. Connecticut, 401 U.S. 371, 375, 382–83 (1971); *see also* Memorandum from Harry A. Blackmun, Assoc. Justice, U.S. Supreme Court, to File 2 (Nov. 17, 1970), Harry Blackmun Papers, *supra* note 172, Boddie v. Connecticut file (noting concern that the application of equal protection to questions of indigency might go beyond access to the courts and also "apply to the denial of a fishing license, or any one of many other things"); *Court Bids States Help the Poor Pay Costs of Divorce*, N.Y. TIMES, Mar. 3, 1971, at 1, 28 (linking *Boddie* and *Tate*); Jack C. Landau, *High Court Cool to Idea, But Will Get Cases of Injustice Caused by Poverty*, JERSEY J., Dec. 5, 1970, at 7 (questioning whether the Court's cases would ultimately apply to driver's license fees, fishing license fees, and electric bills).

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

211. *Id.* at 5–8.

212. Handwritten Notes, Lewis F. Powell Papers, *supra* note 172, San Antonio Indep. Sch. Dist. v. Rodriguez file.

213. After Justice Powell circulated a draft of his opinion in *Rodriguez*, Justice Stewart sent him a memo stating, "I have decided I cannot subscribe to an opinion that accepts the 'doctrine' that there are two separate alternative tests under the Equal Protection Clause." Memorandum from Potter Stewart, Assoc. Justice, U.S. Supreme Court, to Lewis F. Powell, Jr., Assoc. Justice, U.S. Supreme Court 1 (Feb. 8, 1973). He explained that he did not believe that the "so-called 'compelling state interest' test" was grounded in precedent and felt it risked "return[ing] this Court, and all federal courts, to the heyday of the Nine Old Men, who felt that the Constitution enabled them to invalidate almost any state laws they thought unwise." *Id.* at 2–3. Justices Rehnquist (then-Associate) and Blackmun expressed agreement with Justice Stewart's concerns. *See* Memorandum from William Rehnquist, Assoc. Justice, U.S. Supreme Court, to Lewis F. Powell, Jr., Assoc. Justice, U.S. Supreme Court (Feb. 8, 1973); Memorandum from Harry Blackmun, Assoc. Justice, U.S. Supreme Court, to Lewis F. Powell, Jr., Assoc. Justice, U.S. Supreme Court (Feb. 12, 1973). Justice Powell then requested his law clerk to draft a memorandum listing each case in which the Court had previously employed strict scrutiny, *see*

ways. First, the majority opinion described the *Griffin* cases as involving a total deprivation of access to appellate processes and *Williams* and *Tate* as total deprivations of liberty solely due to an inability to pay, as opposed to the relative deprivation caused by comparatively lesser funding of public schools to which access was not barred.[214] Second, the Court distinguished the prosecutorial power and other cases involving fundamental rights explicitly or implicitly protected by the Constitution from access to education.[215]

The *Rodriguez* Court placed the early cases in the *Bearden* line on special footing because it saw the unique nature of, and threat of abuse inherent in, the government's prosecutorial power as subject to broad constitutional protection. In doing so, the Court picked up on Justice Black's dissent in *Boddie*, in which he argued that because the "great governmental power" to hale people into court where "they may be convicted, and condemned to lose their lives, their liberty, or their property, as a penalty for their crimes" was so awesome, failing to guard against wealth discrimination in that context "would have been unfaithful to the explicit commands of the Bill of Rights, designed to wrap the protections of the Constitution around all defendants upon whom the mighty powers of government are hurled to punish for crime."[216] Justice Powell's *Rodriguez* opinion took up this notion, distinguishing its previous special treatment of wealth as limited to cases in which the wealth-based deprivation related to a right explicitly or implicitly protected by the Constitution—in the *Griffin* cases, *Williams*, and *Tate*, the right to fair treatment in the criminal justice system.[217]

Memorandum from Larry Hammond, Law Clerk, to Lewis F. Powell, Jr., Assoc. Justice, U.S. Supreme Court (Feb. 13, 1973), which Justice Powell shared with his colleagues. *See* Memorandum from Lewis F. Powell, Jr., Assoc. Justice, U.S. Supreme Court, to Potter Stewart, Assoc. Justice, U.S. Supreme Court 2 (Feb. 14, 1973) ("I agree that the historic origins of the two-level approach to equal protection problems are at least dubious. But . . . I concluded that the considerable volume of precedent in this area leaves little room for a *de novo* review unless the Court is willing to start fresh."); *see also* Memorandum from Lewis F. Powell, Jr., Assoc. Justice, U.S. Supreme Court, to Harry Blackmun, Assoc. Justice, U.S. Supreme Court (Feb. 13, 1973) ("Whatever I may have thought of this [two-tier] approach as a de novo proposition, I thought it was too firmly rooted in our past decisions for me to attempt a new basis of analysis."). Ultimately, Justices Stewart, Rehnquist, and Blackmun joined the *Rodriguez* majority, though Justice Rehnquist explained that he regarded its discussion of strict scrutiny as dicta. *See* Memorandum from William Rehnquist to Lewis F. Powell, Jr., *supra*. All sources referenced in this note are available in the Lewis F. Powell Papers, *supra* note 172, San Antonio Indep. Sch. Dist. v. Rodriguez file.

214. *Rodriguez*, 411 U.S. at 20–22.

215. *Id.* at 30–35; *see also supra* notes 23, 33 and accompanying text (regarding the interrelationship between the *Bearden* line and other cases involving fundamental rights).

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

217. *See Rodriguez*, 411 U.S. at 20–21. This distinction is emphasized in memos throughout Justice Powell's *Rodriguez* file. *See, e.g.*, Memorandum from Lewis F. Powell, Jr., Assoc. Justice, U.S. Supreme Court, to Larry Hammond, Law Clerk 8, 11 (Oct. 12, 1972) (agreeing with the notion

While the *Rodriguez* Court's recasting of *Griffin* and the other early cases in the *Bearden* line as limiting the government's behavior within criminal justice systems has an air of post-hoc rationalization,[218] it was plausible because the notion that the government's use of its prosecutorial power was particularly fraught was already imbedded in those cases. For example, in one early case the Court explained that "[w]hen society acts to deprive one of its members of his life, liberty or property, it takes its most awesome steps," and therefore "[t]he methods we employ in the enforcement of our criminal law have aptly been called the measures by which the quality of our civilization may be judged."[219]

In light of the Court's ongoing concern that the government be precluded from engaging in wealth-based discrimination in the criminal realm, and prior limitations in *Williams* and *Tate* regarding sentencing, it is unsurprising that the *Bearden* Court would extend constitutional protections to restrict the manner in which the government enforced financial punishment. Prior to *Bearden*, the Court had recognized that punishment is unjustifiable if imposed on a person who did not willfully

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that "[w]ealth alone [is] not suspect," so to receive heightened scrutiny it must be connected to another fundamental interest and describing "fair criminal process" as a fundamental interest); Bench Memorandum from Larry Hammond, Law Clerk 18–21 (Oct. 2, 1972) (discussing the *Griffin* cases and *Harper* and noting that each involved wealth plus some other fundamental right); *see also* Memorandum from Lewis F. Powell, Jr., Assoc. Justice, U.S. Supreme Court, to Potter Stewart, Assoc. Justice, U.S. Supreme Court 2 (Feb. 4, 1973) (explaining the approach of requiring a connection to an explicitly or implicitly guaranteed right); Memorandum from Lewis F. Powell, Jr., Assoc. Justice, U.S. Supreme Court, to Larry A. Hammond, Law Clerk 1–2 (Nov. 13, 1972) (discussing the need to distinguish interests rooted in the Constitution); Memorandum from Larry A. Hammond, Law Clerk, to Lewis F. Powell, Jr., Assoc. Justice, U.S. Supreme Court 2 (Oct. 28, 1972) (discussing fundamental interests). All sources referenced in this note are available in Lewis F. Powell Papers, *supra* note 172, San Antonio Indep. Sch. Dist. v. Rodriguez file.

Justice Thomas has argued that the *Griffin* cases are no longer valid because the Court subsequently held in *Washington v. Davis*, 426 U.S. 229 (1976), that a facially neutral statute with a discriminatory impact was insufficient to establish an equal protection violation. *See* Lewis v. Casey, 518 U.S. 343, 373–75 (1996) (Thomas, J., concurring); *see also* Williams v. Illinois, 399 U.S. 235, 242 (explaining that the statute allowing for automatic conversion of fines to incarceration was neutral on its face but "in operative effect exposes only indigents to the risk of imprisonment beyond the statutory maximum"). In making this argument, Justice Thomas pointed to *Rodriguez* as evidence that the Court was rejecting *Griffin*'s approach to wealth-based discrimination as part of the trajectory toward upholding facially neutral statutes, *see Lewis*, 518 U.S. at 374–75 & n.5, and stated that "[t]he *Davis* Court was motivated in no small part by the potentially radical implications of the *Griffin*/*Douglas* rationale," *id.* at 376. *Rodriguez*, however, distinguished the *Griffin* cases from those that were not rooted in an explicit or implicit constitutional right. *See supra* notes 210–217 and accompanying text. In addition, *Davis* does not mention *Griffin*, *Douglas*, or any other related case. *See Davis*, 426 U.S. 229; *see also* M.L.B. v. S.L.J., 519 U.S. 102, 125–27 (1996) (rejecting Justice Thomas's argument and explaining that sanctions based on ability to pay "are not merely disproportionate in impact. Rather they are wholly contingent on one's ability to pay" and thus necessarily discriminatory).

218. *See* Klarman, *supra* note 172, at 285–86 (explaining that the Burger Court's reticence to the risk that equal protection may be used for "judicial wealth redistribution" led to an effort to "reexplain Warren-era fundamental rights strand cases as something other than what they were").

219. Coppedge v. United States, 369 U.S. 438, 449 (1962).

engage in wrongdoing.[220] That theme emerged in *Bearden* as well. Punishing a person for failure to pay when he, "through no fault of his own," did not have the means to do so[221]—something Justice O'Connor equated at oral argument in *Bearden* to revoking probation for the offense of leaving the state when one had been kidnapped[222]—does not provide justification for the government to use its awesome power to punish.

2. Amplification of Protections Through the Dual Use of Equal Protection and Due Process

In addition to the distinction between the use of the prosecutorial power and other governmental functions drawn by the Court, the constitutional norm against punishing a person's financial condition is also evident through its dual reliance on the due process and equal protection clauses. The *Griffin* plurality's use of both clauses[223] broke from a long line of cases in the criminal justice arena in which the Court had exclusively employed due process.[224] While some members of the Court have criticized the *Griffin* cases for their limited

220. *See, e.g.*, *Williams*, 399 U.S. at 242 (describing payment as "an illusory choice for . . . any indigent who, by definition is without funds"); Robinson v. California, 370 U.S. 660, 667 (1962) (striking down a statute that criminalized the status of being an addict); Erik Luna, *The Story of* Robinson*: From Revolutionary Constitutional Doctrine to Modest Ban on Status Crimes*, *in* CRIMINAL LAW STORIES 47, 65–67 (Donna Coker & Robert Weisberg eds., 2013) (describing *Robinson* as susceptible to numerous interpretations, including a restriction of the criminal law to willful acts); *see also* H.L.A. HART, PUNISHMENT AND RESPONSIBILITY: ESSAYS IN THE PHILOSOPHY OF LAW 181 (1968) ("[A] primary vindication of the principle of responsibility could rest on the simple idea that unless a man has the capacity and fair opportunity or chance to adjust his behavior to the law its penalties ought not be applied to him."); *cf.* Enmund v. Florida, 458 U.S. 782, 800 (1982) ("American criminal law has long considered a defendant's intention—and therefore his moral guilt—to be critical to 'the degree of [his] criminal culpability' and the Court has found criminal penalties to be unconstitutionally excessive in the absence of intentional wrongdoing." (citation omitted)); William O. Douglas, *Vagrancy and Arrest on Suspicion*, 70 YALE L.J. 1, 11 (1960) ("Criminal intent of some character, not mere idleness and destitution, must be present."). For a discussion of how a focus on willfulness could lead to harsher punishments because it allows for a narrative in which people who have engaged in criminal activity may be cast as "incorrigible evildoers," see Sharon Dolovich, *Exclusion and Control in the Carceral State*, 16 BERKELEY J. CRIM. L. 259, 264–65, 287–88 (2011).

221. Bearden v. Georgia, 461 U.S. 660, 672–73 (1982); *see also* Black v. Romano, 471 U.S. 606, 610–11, 614–15 (1985) (describing *Bearden* as "acknowledg[ing] this Court's sensitivity to the treatment of indigents in our criminal justice system" and as emphasizing the distinction between willful violations of probation and the unwillful violation that occurred given the inability to pay).

222. *Bearden*, Transcript of Oral Argument, *supra* note 192, at 26–27.

223. Griffin v. Illinois, 351 U.S. 12, 16–17 (1956).

224. The early due process cases focused on access to counsel. *See, e.g.*, Powell v. Alabama, 287 U.S. 45 (1932). The combination of the equal protection and due process clauses was foreshadowed in a 1947 dissent in which Justice Rutledge suggested that equal protection might be relevant when the ability to defend oneself depended on one's financial circumstances. Foster v. Illinois, 332 U.S. 134, 141–42 (1947) (Rutledge, J., dissenting).

explanation of the relationship between the two clauses,[225] the *Griffin* plurality does provide some explanation. The plurality noted that the American constitutional tradition required that the procedures used in criminal matters—the province of due process—may not invidiously discriminate based on wealth—the province of equal protection—so that "all people charged with crime must, so far as the law is concerned, 'stand on an equality before the bar of justice in every American court.' "[226]

Though *Griffin* and the early cases in the line linked the two clauses together, a position the Court would return to later in the Burger Court era, the Court's decisions in *Williams* and *Tate* provide a blip in which it relied only on the equal protection clause to prohibit the automatic conversion of economic sanctions to incarceration.[227] There are at least two plausible explanations for this shift, both of which may be in play. First, it is possible that the dual use of the two clauses was a rhetorical device employed in the early *Griffin* cases to bring Justices into the tent in an area of disagreement and uncertainty.[228] The Warren

225. *See, e.g.*, Ross v. Moffitt, 417 U.S. 600, 608–09 (1974) ("The precise rationale for the *Griffin* and *Douglas* line of cases has never been explicitly stated, some support being derived from the Equal Protection Clause of the Fourteenth Amendment, and some from the Due Process Clause of that Amendment."); *see also* Smith v. Robbins, 528 U.S. 259, 276 (2000) (quoting same language from *Ross*); Lewis v. Casey, 518 U.S. 343, 367 (1996) (Thomas, J., concurring) (describing the Court's "inability . . . to agree upon the constitutional source of the supposed right"); M.L.B. v. S.L.J., 519 U.S. 102, 120–21 (1996) (noting the complaint in *Ross*, but quoting *Bearden* for the proposition that "cases of this order 'cannot be resolved by resort to easy slogans or pigeonhole analysis' "). The lack of clarity has led to confusion among both members of the Court, its clerks, and litigants. *See* Douglas v. California, 372 U.S. 353, 360–61 (1963) (Harlan, J., dissenting) ("[T]he Court *appears* to rely on both the Equal Protection Clause and on the guarantees of fair procedure inherent in the Due Process Clause." (emphasis added)); "QUESTIONS," Harry Blackmun Papers, *supra* note 172, Bearden v. Georgia file (listing prepared questions for both petitioner and respondent asking them to identify the "standard of . . . scrutiny . . . employed"); Bench Memorandum from "Rives" to Lewis F. Powell, Jr., Assoc. Justice, U.S. Supreme Court 8 (Jan. 10, 1983), Lewis F. Powell Papers, *supra* note 172, Bearden v. Georgia file ("A problem with these opinions is that they do not make the proper level of scrutiny clear."); Bench Memorandum from "Rives" to Lewis F. Powell, Jr.*, supra* at 8–9 (describing the *Griffin* opinion as referencing rationality but "disguis[ing] the application of a heightened level of scrutiny" and *Williams* as doing the same); Memorandum from "ASM" to Harry Blackmun I, Assoc. Justice, U.S. Supreme Court 11–12, 17 (Jan. 3, 1983), Harry Blackmun Papers, *supra* note 172, Bearden v. Georgia file (explaining that the prior cases appear to be using "intermediate-level scrutiny" and noting different outcomes if rational basis review was employed rather than any form of heightened scrutiny); Memorandum from "SNS" (May 14, 1959), John Marshall Harlan Papers, *supra* note 172, Burns v. Ohio file (noting different outcomes in a case depending on the "extent to which" prior cases relied on due process versus equal protection); Brief of Petitioner at 8, 11, Williams v. Oklahoma City, 395 U.S. 458 (1969) (No. 841), 1969 WL 120009 (1969) (describing *Griffin* as decided under equal protection and "probably" due process).

226. *Griffin*, 351 U.S. at 16–17.

227. Tate v. Short, 401 U.S. 395, 397–99 (1971); Williams v. Illinois, 399 U.S. 235, 244 (1970).

228. *See* Nelson Tebbe & Robert L. Tsai, *Constitutional Borrowing*, 108 MICH. L. REV. 459, 461–63 (2010) (positing that people may borrow concepts from one doctrine when arguing for the development of another in order to bolster and persuade).

Court arguably used the equal protection clause as a cloak for substantive due process in order to make it more palatable to Justices wary of a return to the abuses of the *Lochner* era, including Justice Frankfurter, who served as the crucial fifth vote in concurrence in support of the *Griffin* plurality.[229] Second, it is also possible that the dual use is mere surplusage, with equal protection alone serving as sufficient grounding for restricting wealth-based discrimination in the criminal arena. This was, in fact, the position taken by Chief Justice Burger in authoring the *Williams* opinion, in which he retroactively recast *Griffin* as relying only on that clause.[230]

Regardless, the Court quickly returned, begrudgingly at first, to an understanding of the due process and equal protection clauses as linked where a risk exists that a person would be excluded from fair treatment in criminal proceedings due to her financial circumstances. Three years after announcing *Tate*, the Court took up the question of whether to expand access to counsel for criminal appeals in *Ross v. Moffitt*.[231] The Court had previously relied on both clauses to afford counsel in a first appeal as of right in *Douglas v. California*.[232] In doing so, the *Douglas* Court emphasized that during that first appeal, "only the barren record speaks for the indigent," leaving the appellant to ascertain meritorious arguments "without a champion," thus rendering the direct appeal effectively meaningless, as if the appellant had no access to an appeal at all.[233] In contrast, in *Ross*, the Court opined that at the time of a later discretionary review the appellant would have the benefit of the records compiled and arguments made by counsel during the direct appeal process.[234] Therefore, no right to counsel need be afforded because an appellant without the financial ability to retain a lawyer would still have an adequate opportunity to obtain meaningful

229. *See Griffin*, 351 U.S. at 20–21 (Frankfurter, J., concurring in judgment); *see also* Klarman, *supra* note 172, at 219–24 ("While *Lochner* was laid to rest doctrinally . . . its ghost has lived on, haunting the Court's constitutional conscience for the next fifty years."). In correspondence located in his files, Justice Frankfurter indicated that his concurring opinion in *Griffin*, though emphasizing due process, relied on both clauses. *See* Letter from Justice Frankfurter, Assoc. Justice, U.S. Supreme Court, to Bertram F. Wilcox, Prof. of Law, Cornell Law Sch. (Dec. 11, 1957), Felix Frankfurter Papers, *supra* note 172, Griffin v. Illinois file ("[H]owever serious the difficulties you may have found with what I wrote in Griffin, I did not find much to quarrel with in what you wrote about it."); *see also* Bertram F. Wilcox & Edward J. Bloustein, *The* Griffin *Case—Poverty and the Fourteenth Amendment*, 43 CORNELL L.Q. 1, 10–13 (1957) (arguing that Justice Frankfurter's concurrence is properly read as employing both clauses).

230. *Williams*, 399 U.S. at 241; *see also* Lewis v. Casey, 518 U.S. 343, 369–73 (1996) (Thomas, J., concurring) (arguing that *Griffin* relies only on equal protection); Evitts v. Lucey, 469 U.S. 387, 407 (1985) (Rehnquist J., dissenting) (same).

231. Ross v. Moffitt, 417 U.S. 600 (1974).

232. Douglas v. California, 372 U.S. 353 (1963).

233. *Id.* at 356.

234. *Ross*, 417 U.S. at 614–15.

discretionary review.[235] In doing so, the *Ross* Court stated that it was relying on an equal protection analysis.[236] Yet, it also affirmed that *Douglas*—which it left untouched—was grounded in both due process and equal protection.[237] In other words, the *Ross* opinion is fairly read as standing for the proposition that while equal protection alone does not require intervention where a person of limited means has meaningful, albeit imperfect, access to criminal processes, if instead a person is priced out of fair treatment—either through total exclusion or through a process that is effectively meaningless—the enhanced protections afforded by both clauses are triggered.

The *Bearden* Court again embraced this understanding of the combined force of the two clauses to protect against abuses of the prosecutorial power by treating the clauses as providing greater protection together than either may have done on its own.[238] The case had been presented and argued solely under the equal protection clause.[239] The Court described that clause as affording protection where "the State has invidiously denied one class of defendants a substantial benefit available to another class of defendants" due to their wealth.[240] It then declined to proceed by using the traditional classification-based approach to equal protection, explaining that "fitting the problem of this case [revocation of probation for a failure to pay economic sanctions] into an equal protection framework [was] a task too Procrustean to be rationally accomplished"[241] because a person's financial condition is a "point on a spectrum rather than a classification."[242] In other words, the need to protect against the abuses of the prosecutorial power did not exist only for those below some specified economic threshold, but for anyone priced out of fair treatment.[243] Therefore, the Court also brought due process principles to bear. As it explained, the due process clause is concerned with "fairness of relations between the criminal defendant and the State," in which punishment for something beyond a

235. *Id*. This move by the *Ross* Court mirrored the distinction drawn in *Rodriguez* between an absolute deprivation of access to appellate processes and a relative deprivation caused by comparatively lower funding of public schools. *See supra* note 214 and accompanying text.

236. *Ross*, 417 U.S. at 609, 614–15.

237. *Id*. at 609, 611–12.

238. Bearden v. Georgia, 461 U.S. 660, 665 (1982); *see also supra* note 34 and accompanying text.

239. *See, e.g.*, Brief for Petitioner, *Bearden*, *supra* note 185.

240. *Bearden*, 461 U.S. at 665.

241. *Id.* at 666 n.8 (quoting North Carolina v. Pearce, 395 U.S. 711 (1969)).

242. *Id.*

243. *See id.* ("[I]ndigency in this context is a relative term rather than a classification . . . .").

defendant's control is arbitrary and thus prohibited.[244] The state, then, would not act arbitrarily or undermine equality principles if it denied people who are unable to pay—as well as those who can—an opportunity for appellate review[245] or revoked probation on grounds unrelated to payment.[246] So too, the state is not precluded from imposing a penalty for nonpayment where a person had the means to pay but chose not to do so.[247] Where the government's use of its prosecutorial power crosses over and becomes arbitrary in violation of due process because it creates a wealth-based inequality in contradiction to the principles of equal protection, is where the manner in which the prosecutorial power is employed depends on a person's financial condition.[248]

B. Application of the Constitutional Norms in Bearden

The norms embraced by the Court that the Constitution protects people from unfair treatment in criminal justice systems due to their

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244. *Bearden*, 461 U.S. at 665; *see also* M.L.B. v. S.L.J., 519 U.S. 102, 120 (1996) ("The due process concern homes in on the essential fairness of the state-ordered proceedings anterior to adverse state action."); Evitts v. Lucey, 469 U.S. 387, 392, 404 (1985) ("[The disposition required by the statute in *Griffin*] violated due process principles because it decided the appeal in a way that was arbitrary with respect to the issues involved.").

245. *See, e.g.*, *supra* note 196 and accompanying text.

246. *Bearden*, 461 U.S. at 668 n.9.

247. Williams v. Illinois, 399 U.S. 235, 240–41 (1970); *see also Bearden*, 461 U.S. at 668, 672–73 (distinguishing between willful and nonwillful failure to pay); Tate v. Short, 401 U.S. 395, 397–98 (1971) (explaining that the automatic conversion of fines to incarceration was not justified where it was applied to "an indigent defendant without the means to pay his fine"); Morris v. Schoonfield, 399 U.S. 508, 509 (1970) (White, J., concurring) (describing *Williams* as standing for the proposition that a state maintains the power to punish willful nonpayment but cannot add additional punishment in response to a failure to pay where a defendant is unable to secure the necessary funds). The Court had held a case for consideration in which the petitioner's probation had been revoked for failure to pay while *Bearden* was pending, but ultimately concluded that *Bearden* would not be relevant because the lower court had found that the petitioner had the means to pay. *See* Memorandum from Sandra Day O'Connor, Assoc. Justice, U.S. Supreme Court, to the Conference 2, (June 1, 1983), Harry Blackmun Papers, *supra* note 172, Bearden v. Georgia file.

248. *Bearden*, 461 U.S. at 671; *see also* Black v. Romano, 471 U.S. 606, 614–15 (1985) (distinguishing *Bearden* from voluntary violations of probation by explaining that it involved a nonwillful failure to pay due to poverty); Transcript of Oral Argument at 32, *Black*, 471 U.S. 606 (No. 84-465) [hereinafter *Black*, Transcript of Oral Argument] (Justice O'Connor correcting counsel's assertion that *Bearden* required consideration of alternative punishments prior to revocation of probation for willful noncompliance by stating, "[I]n *Bearden*, we had a situation of a person who was unable to live up to the terms of probation through no fault of his own"), *audio recording with speaker designation available at Black v. Romano*, OYEZ, https://www.oyez.org/cases/1984/84-465 (last visited Oct. 11, 2018) [https://perma.cc/47Z5-9Z4Y]; Oral Argument at 42:29 to 42:43, Giaccio v. Pennsylvania, 381 U.S. 923 (1965) (No. 47), https://www.oyez.org/cases/1965/47 (last visited Oct. 11, 2018) [https://perma.cc/W6CA-AHUX] (Justice Brennan distinguishing between people who have the ability to pay economic sanctions but do not from those who cannot do so).

financial condition is commensurate with the *Bearden* Court's crafting of a distinct test that significantly cabins the prosecutorial power to respond to nonpayment of economic sanctions. Under the tiers of scrutiny approach, constitutionality is determined by weighing individual and governmental interests.[249] In contrast, the Court baked into the *Bearden* test both strong protection of the individual interest in avoiding unjustified punishment and the governmental interest in punishing wrongful conduct. The resulting test does not engage in further balancing but instead flatly prohibits the government from imposing punishment for the failure to pay economic sanctions when a person is unable to do so unless no alternative response could ensure the debtor does not escape punishment from the original offense altogether.

1. Protection of Individual Interests

The *Bearden* Court embraced the constitutional norms detailed above, saw punishing a person's financial circumstances as "fundamentally unfair,"[250] and thus devised a test that provides significant protection of the individual interest in avoiding unjustified punishment. Had the Court followed the tiers of scrutiny, that individual interest would be weighed against any related governmental interests when assessing a practice's constitutionality.[251] Instead, when crafting the *Bearden* test, the Court continued the approach of the earlier cases in its line in which it rejected as irrelevant multiple governmental interests—including interests that might be considered in the application of either of the tiers of scrutiny—in order to protect against fundamentally unfair treatment due to one's financial condition.

The Court, for example, protected the individual interest in fair treatment in the criminal justice system by disclaiming both the government's economic and administrative interests. Regarding the former, by the time that *Williams* reached the Court in 1970, parties' briefs and oral arguments had made clear that many jurisdictions were highly dependent on fines and fees, particularly for the financing of court systems.[252] The Court even expressly stated that it understood the

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249. *See supra* notes 154–156 and accompanying text.

250. *Bearden*, 461 U.S. at 668–69; *see also id.* at 666–67 (noting the importance of considering "the nature of the individual interest affected" and "the extent to which it is affected" in devising the *Bearden* test (quoting Williams v. Illinois, 399 U.S. 235, 260 (1970) (Harlan, J., concurring))).

251. *See supra* notes 155–156 and accompanying text.

252. *See* Transcript of Oral Argument at 31–32, Williams v. Illinois 399 U.S. 235 (1970) (No. 1089) [hereinafter *Williams*, Transcript of Oral Argument] (responding to a question by Justice

state's interest in revenue collection to be "substantial and legitimate."[253] But even so, the Court declared that such fiscal interests were "irrelevant,"[254] and that they could not justify the application of additional punishment triggered by an inability to pay the economic sanctions originally imposed as punishment for the crime of conviction.[255] Likewise, the Court deemed the administrative burden on the government inapposite. For example, despite knowing that *Griffin* led to voluminous requests for transcripts,[256] and despite arguments that its extension would be administratively infeasible,[257] the Court continued to expand *Griffin* in striking down other financial barriers to appeal in opinions that neither discussed nor otherwise treated such interests as relevant.[258] Similarly, in the lead-up to both *Williams* and *Tate*, the states vehemently protested that they must be allowed to insist that economic sanctions be paid as a lump sum, because the use

White as to the amount of fines collected, counsel for Illinois stated: "I am sure it's in the high millions and as a practical matter, offers the source of support for those Courts which enforce misdemeanor and petty offenses and traffic offenses. Without the revenues derived from the imposition of fines, especially in traffic cases, it would be extremely difficult for the State of Illinois, on their present budget, to support those courts."), *audio recording with speaker designations available at Williams v. Illinois,* OYEZ, https://www.oyez.org/cases/1969/1089 (last visited Oct. 11, 2018) [https://perma.cc/58UG-8MEN]; Brief for the Appellee, *Williams*, 399 U.S. 235, *supra* note 203, at *8 ("It's fair to say that many of the local courts across the country are supported almost entirely by revenue derived from the imposition of fines and costs in misdemeanor cases, especially traffic offenses.").

253. *Williams*, 399 U.S. at 238.

254. Mayer v. City of Chicago, 404 U.S. 189, 196–97 (1974).

255. *Id.*; *see also* Tate v. Short, 401 U.S. 395, 399 (1971) (discounting the interest in using imprisonment to enforce fines and noting that "[i]t is imposed to augment the State's revenues but obviously does not serve that purpose").

256. *See* Letter from Walter V. Schaffer, Justice, Supreme Court of Ill., to Felix Frankfurter, Assoc. Justice, U.S. Supreme Court (Apr. 15, 1958), Felix Frankfurter Papers, *supra* note 172, Griffin v. Illinois file (reporting that since *Griffin* they have had "1138 requests for records and transcripts in the criminal court of Cook County alone" and that "[r]equests in new cases are averaging something over 300 per month in that court"); Memorandum from Felix Frankfurter, Assoc. Justice, U.S. Supreme Court, to Justices of the United States Supreme Court (Apr. 17, 1958), Felix Frankfurter Papers, *supra* note 172, Griffin v. Illinois file (circulating same to all Justices).

257. *See* Oral Argument at 16:47 to 17:16, Burns v. Ohio, 360 U.S. 252 (1959) (No. 581), https://www.oyez.org/cases/1958/581 (last visited Oct. 12, 2018) [https://perma.cc/3Z2A-E77J] (arguing that the costs of transcripts and filing fees for "thousands" of appeals would be burdensome); Brief of Respondents at 9–10, Williams v. Oklahoma City, 395 U.S. 458 (1969) (No. 841), 1969 WL 120010, at *10 (noting that the court system was "already taxed" and that "the application of the Griffin Rule will add additional burden to the Municipal Court System").

258. *Infra* notes 311–314 and accompanying text; *see* Memorandum from William Brennan, Assoc. Justice, U.S. Supreme Court, to Potter Stewart, Assoc. Justice, U.S. Supreme Court (May 19, 1966), William Brennan Papers, *supra* note 172, Rinaldi v. Yeager file (stating that "state laws burdening the critical right to appeal from a criminal conviction" are so important that they must be struck down "when the burden has no better justification than administrative convenience").

of installment plans[259] or any system requiring a determination of a person's ability to pay[260] would be unmanageable. Though the Court did not mandate the use of those practices, in *Williams* and *Tate*—and later in *Bearden*—it described them as viable remedies for the Fourteenth Amendment violations at issue in each case.[261]

The Court not only rejected from consideration nonpenal interests but also penal interests that effectively equate poverty with a proclivity to commit crime. The State of Georgia had argued that it had a legitimate public safety interest served by revoking probation where a person had no ability to pay previously imposed economic sanctions because, while it was "not a pleasant conclusion for one to draw,"[262] people living in poverty in general[263]—and Mr. Bearden post-job loss in particular[264]—would be "in the position of being easily led to commit another crime."[265] Early review of this argument raised alarms. For example, notes made by Justice Powell include his agreement with his clerk's conclusion that "the indigent's failure to pay sheds no light on

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259. *See, e.g.*, Transcript of Oral Argument at 32–35, *Tate*, 401 U.S. 395 (No. 324) (arguing, on behalf of the State of Texas, that installment plans would be impossible to implement), *audio recording with speaker designations available at Tate v. Short*, OYEZ, https://www.oyez.org/cases/1970/324 (last visited Oct. 12, 2018) [https://perma.cc/3GA8-F369]; *id.* at 33:

> [I]t's going to take the wisdom of Solomon and the sophistication of a computer that hasn't even been invented to correlate the mans [sic] family size, his personal sensitivity, his, the value of his car which he has committed the crimes with and all of that into a jumble and come out and say that all right, now, for you it's going to be $4.75 a week.

See also Brief for Respondent at 27–28, *Tate*, 401 U.S. 395 (No. 324), 1970 WL 122461, at *27–28 (arguing that payment in installments raises questions that are "insurmountable"); Brief of the City of Chicago as Amici Curiae Urging Affirmance at 6, Williams v. Illinois, 399 U.S. 235 (1970) (No. 1089), 1970 WL 136558, at *6 (arguing that installment plans were "largely unrealistic").

260. *See, e.g.*, *Williams*, Transcript of Oral Argument, *supra* note 252, at 36–37 (arguing that it would be too difficult to determine whether people did or did not have the capacity to pay); Brief for Respondent at 22–23, *Tate*, 401 U.S. 395 (No. 324), 1970 WL 122461, at *22–23 (stating that separating people who are and are not indigent "would be insurmountable"). For a discussion of how the Court treated these concerns as relevant for purposes of ensuring only people who were actually unable to pay economic sanctions receive the benefit of *Bearden*'s protections see *infra* notes 442–448 and accompanying text.

261. Bearden v. Georgia, 461 U.S. 660, 671–72 (1983); *Tate*, 401 U.S. at 400 n.5; *Williams*, 399 U.S. at 244–45, 245 n.21. For a discussion of limitations on the use of installment plans to ensure that the total amount of economic sanctions imposed do not become constitutionally excessive in violation of the Eighth Amendment's excessive fines clause, see Colgan, *supra* note 25, at 58–61.

262. Brief for Respondent, *Bearden*, *supra* note 192, at 19–20.

263. *Id.* at 20–22 (providing studies showing a correlation between poverty and crime).

264. *Id.* at 8 ("[P]etitioner's inability to pay the fine and restitution amounts made him a poorer probation risk . . . the revocation promotes petitioner's rehabilitation by removing him from circumstances in which the likelihood of his committing a crime had increased."); *id.* at 19–20 (repeating arguments that inability to pay made Mr. Bearden more likely to commit a crime); *id.* at 22, 25–26 (same, linking the increased probation risk directly to his loss of employment).

265. *Id.* at 26; *see also Bearden*, 461 U.S. at 671 ("[T]he State asserts that its interest in rehabilitating the probationer and protecting society requires it to remove him from the temptation of committing other crimes.").

the probationer's chances for rehabilitation."[266] At oral argument, Justice Marshall pressed counsel for Georgia, and after confirming that the state's position was that "a trial court could reasonably use a person's financial resources" to determine the "[l]ikelihood that they would commit a crime,"[267] pointedly asked: "So a poor person is more likely to commit a crime than a person with money? And you are speaking as a state Attorney General?"[268] The Court saw instead that it was the threat of the revocation of probation, and not poverty itself, that might "have the perverse effect of inducing the probationer to use illegal means to acquire funds to pay."[269] In the end, in rejecting Georgia's contention, the Court did not mince words:

> This is no more than a naked assertion that a probationer's poverty by itself indicates he may commit crimes in the future and thus that society needs for him to be incapacitated. . . . [T]he State cannot justify incarcerating a probationer who has demonstrated sufficient bona fide efforts to repay his debt to society, solely by lumping him together with other poor persons and thereby classifying him as dangerous. This would be little more than punishing a person for his poverty.[270]

Finally, in the *Bearden* line, the Court also declined to consider governmental interests with both penal and remedial qualities, the latter of which could only be satisfied through payment of economic sanctions. The *Bearden* Court agreed that the government had a legitimate interest in promoting payment of victim restitution,[271] which the Court understands as serving both punitive and remedial aims.[272]

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266. *See* Bench Memorandum from "Rives" to Lewis F. Powell, Jr., *supra* note 225 (writing "yes" and "I agree" in the margin); *see also* Memorandum from "NED" to William J. Brennan, Jr., Assoc. Justice, U.S. Supreme Court 1 (Jan. 1983), William Brennan Papers, *supra* note 172, Bearden v. Georgia file (arguing that Georgia's practices had "all the earmarks of a return to debtor's prisons"); Memorandum from "Stuart" to Byron White, Assoc. Justice, U.S. Supreme Court (Jan. 4, 1983), Byron White Papers, *supra* note 172, Bearden v. Georgia file (describing Georgia's practices as "an openly-admitted additional punishment for the misfortune of being poor").

267. *Bearden*, Transcript of Oral Argument, *supra* note 192, at 27–28.

268. *Id.* at 28; *see also* Transcript of Oral Argument at 22–25, Morris v. Schoonfield, 399 U.S. 508 (1970) (No. 782) [hereinafter *Morris*, Transcript of Oral Argument] (questioning by Justice Marshall) ("I would assume that the recidivist is a recidivist because he wants to be and did it deliberately. I can't assume that for a pauper."), *audio recording with speaker designations available at Morris v. Schoonfield*, OYEZ, https://www.oyez.org/cases/1969/782 (last visited Oct. 12, 2018) [https://perma.cc/JMV5-3XKN].

269. *Bearden*, 461 U.S. at 670–71.

270. *Id.* at 671; *see also id.* at 665 (emphasizing the need to determine whether a defendant is "somehow responsible" for the failure to pay); *id.* at 668 ("This distinction, based on the reasons for non-payment, is of critical importance here.").

271. *Bearden*, 461 U.S. at 670–71.

272. *See* Paroline v. United States, 572 U.S. 434, 456–58 (2014) (noting that restitution "serves punitive purposes"); Pasquantino v. United States, 544 U.S. 349, 365 (2005) (explaining that the "purpose of awarding restitution" under the Mandatory Victim Restitution Act "is not to collect a foreign tax, but to mete out appropriate criminal punishment"); Kelly v. Robinson, 479 U.S. 36, 53 (1986) (upholding a statute barring restitution from being subject to discharge in Chapter 7 bankruptcy proceedings due to its penal nature); *see also* Colgan, *supra* note 25, at 42–43 ("The

The Court made clear, however, that when assessing the constitutionality of imposing additional punishment for failure to pay, it would not recognize that interest in collecting restitution because inflicting a punishment for nonpayment on "someone who through no fault of his own is unable to make restitution will not make restitution suddenly forthcoming."[273]

In other words, the Court's desire to protect against the abuses of the prosecutorial power led it to exclude from consideration all nonpenal interests, as well as penal interests that equate being poor with being criminally inclined or that are intertwined with remedial interests that could be satisfied only through a payment a person has no meaningful ability to make, even though such considerations would be relevant under the tiers of scrutiny.

2. Protection of the State's Interest in Punishing Criminal Conduct

In devising the *Bearden* test, the Court did not just alter the tiers of scrutiny approach to avoid the fundamental unfairness of punishing financial condition but also to protect the government's "fundamental"[274] interest in ensuring that people found to have engaged in illegal conduct are not "immunized" from being punished at all.[275] The Court addressed this interest in two ways: by limiting who qualified as unable to pay, thus falling within *Bearden*'s ambit, and by leaving a narrow window open to incarceration for failure to pay even for those without the means to do so.

Though concerns regarding inverse discrimination date back to Justice Harlan's dissent in *Griffin*,[276] they took on a new tone when the Court precluded the government from automatically converting economic sanctions to jail time in *Williams* and *Tate*,[277] with states arguing that people would make "spurious claims of indigency" to avoid

understanding of restitution as at least partially punitive is in keeping with the Supreme Court's repeated statements that restitution serves a punitive function in response to prohibited conduct.").

273. *Bearden*, 461 U.S. at 670.

274. *Id.* at 669.

275. *See id.* ("A defendant's poverty in no way immunizes him from punishment.").

276. Griffin v. Illinois, 351 U.S. 12, 34–35 (1956) (critiquing the decision to strike down financial barriers to appeal as imposing "an affirmative duty to lift the handicaps flowing from differences in economic circumstances" and that "[i]t may as accurately be said that the real issue in this case is not whether Illinois *has* discriminated but whether it has a duty to discriminate").

277. Tate v. Short, 401 U.S. 395, 398–99 (1971); Williams v. Illinois, 399 U.S. 235, 243–44 (1970); *see also* Handwritten Notes on Bench Memorandum from "Rives" to Lewis F. Powell, Jr., *supra* note 225 (writing and underlining "yes" next to statement mentioning "inverse discrimination").

punishment.[278] These arguments took up the rhetoric of personal responsibility that was informing debates around poverty in other contexts, such as in the public benefits arena.[279] During the litigation of *Williams*, for example, the City of Chicago filed an amicus brief pitting "the great working majority who must pay their fines with their own hard-earned money" against those who would claim an inability to do so.[280] To address these concerns, the Court repeatedly invoked the idea that the debtor must make "bona fide efforts" to pay economic sanctions; a person who had not done so would not qualify for *Bearden*'s protections.[281]

In addition to limiting *Bearden*'s application to those who have made bona fide efforts to pay, the Court also addressed the concern that people who met that qualification would be able to violate the law with impunity by creating a narrow space allowing for the use of incarceration for even an unwilling failure to pay. Lawmakers urged the Court to allow them to continue incarcerating people with no means to pay, positing that any other result would lead to people of limited means becoming scofflaws. For example, in *Tate*, the city of Houston, Texas, claimed that if it were not allowed to incarcerate the poor for failure to pay, "[a]n indigent would be licensed to tie up a parking space in downtown Houston, free of charge, all day long; he could spit at will on the sidewalks and in all public buildings; he could run all traffic lights; drive his automobile without a license, ad infinitum."[282] In response, the *Bearden* Court permitted the imposition of incarceration for the nonpayment of economic sanctions due to inability, though only

278. *Williams*, Transcript of Oral Argument, *supra* note 252, at 36–37; *see also* Brief of the City of Chicago as Amici Curiae Urging Affirmance, *supra* note 259, at 3 ("[T]he plea of poverty and inability to pay is the knee-jerk reaction to the overwhelming majority of debtors when asked to pay. . . . How then, is the Court to separate the wheat from the chaff and determine who is the real indigent?"); *Tate*, Transcript of Oral Argument, *supra* note 259, at 33 (on behalf of Houston, Texas) ("[T]hen are we going to have a separate hearing on my guilt velle non, and then another on whether I was telling the truth when I said I was too poor?").

279. *See, e.g.*, King v. Smith, 392 U.S. 309, 320–25 (1968) (discussing the incorporation of concepts of "worthiness" into the development of public welfare programs). *See generally* JOEL F. HANDLER & ELLEN JANE HOLLINGSWORTH, THE "DESERVING POOR": A STUDY OF WELFARE ADMINISTRATION (1971) (documenting how public welfare legislation has sought to differentiate between those deserving of aid and those who are not through the use of eligibility requirements, including efforts to find employment).

280. Brief of the City of Chicago as Amici Curiae Urging Affirmance, *supra* note 259, at 3.

281. Bearden v. Georgia, 461 U.S. 660, 668, 670–73 (1983). For a brief discussion of the application of the concept of bona fide efforts to pay, see *infra* notes 442–448 and accompanying text.

282. Brief for Respondent, *Tate*, *supra* note 260, at 22–23; *see also Morris*, Transcript of Oral Argument, *supra* note 268, at 25 (on behalf of the State of Maryland) ("A man is poor through no fault of his own, but I must assume that he willfully violated the law . . . and assuming that he willfully violated the law, he then should not be able to escape or be able to dictate the kind of punishment he is to incur.").

if the government meets the burden of showing that no alternative response could satisfy its interest in punishing the underlying offense of conviction.[283]

3. The Resulting Test

Rather than a simple recasting of the tiers of scrutiny tests, in which individual and governmental interests are weighed to assess a practice's constitutionality,[284] the fundamental individual interest in avoiding unfair treatment in criminal matters due to one's financial

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283. *Bearden*, 461 U.S. at 672–73; *see also id.* at 666–67 (noting the relevance to its assessment in crafting the *Bearden* test "the rationality of the connection between legislative means and purpose, [and] the existence of alternative means for effectuating the purpose" (quoting Williams v. Illinois, 399 U.S. 235, 260 (1970) (Harlan, J., concurring))). In his concurrence, Justice White expressed concern that this caveat effectively allowed additional punishment of a person's financial condition because the Court suggested no upper limit on the substituted term of imprisonment at stake if Mr. Bearden's probation were revoked should no alternatives suffice. *Id.* at 676 (White, J., concurring). As he noted, however, the length of any substituted incarceration would still be restricted by the Eighth Amendment. *Id.* In his concurrence, Justice White would have allowed the state to impose incarceration as a substitute for economic sanctions, though only where the length of the substituted term was "roughly equivalent" to the economic sanctions in severity. *Id.* at 675 (White, J., concurring); *see also* Memorandum from Lewis F. Powell, Jr., Assoc. Justice, U.S. Supreme Court, to Byron White, Assoc. Justice, U.S. Supreme Court (May 12, 1983), Lewis F. Powell Papers, *supra* note 172, Bearden v. Georgia file (noting his joinder in Justice White's concurring opinion and stating that he "would be willing to add . . . that the prison term imposed in this case appears on its face to be disproportionate as a sentence when compared with the fine"); Memorandum from Lewis F. Powell, Jr., Assoc. Justice, U.S. Supreme Court, to Sandra Day O'Connor, Assoc. Justice, U.S. Supreme Court (May 2, 1983), Lewis F. Powell Papers, *supra* note 172, Bearden v. Georgia file ("In my view [the substitution of a jail term of two-and-a-half years for a $550 fine] was a denial of equal protection. There is not even a rough equivalence between the fine and jail sentence."). Justice White saw rough equivalency as more protective of people of limited means than the majority's solution, because it was expressly cabined to reach equality in treatment. *See Bearden*, 461 U.S. at 675–76 (White, J., concurring); *see also id.* at 675 (White, J., concurring) (agreeing that a jail term roughly equivalent to the value of the economic sanctions would be permissible); Wood v. Georgia, 450 U.S. 261, 285–87 (1981) (White, J., dissenting) (arguing that the Court should have resolved the question of whether probation revocation for failure to pay violated the Fourteenth Amendment, and that it would be appropriate to substitute a term of incarceration for economic sanctions so long as it was properly calibrated so as not to be more punitive). There is some evidence that then-Associate Justice Rehnquist, who signed onto the concurrence, did not believe that there was a need for even rough equivalence between the economic sanctions and the substituted term of incarceration. He was the lone Justice to vote to affirm the lower court opinion upholding probation revocation at conference. Memorandum from William H. Rehnquist, Assoc. Justice, U.S. Supreme Court, to Sandra Day O'Connor, Assoc. Justice, U.S. Supreme Court (May 12, 1983), Lewis F. Powell Papers, *supra* note 172, Bearden v. Georgia file. He also stated at oral argument that he believed "it would be quite difficult" to value a day of incarceration in order to do an equivalents calculation. *Bearden*, Transcript of Oral Argument, *supra* note 192, at 14. Similarly, Chief Justice Burger had previously stated that he had "some difficulty seeing how you put a rate on [a person's] liberty by the hour." *Williams*, Transcript of Oral Argument, *supra* note 252, at 18–19 ("How do you measure the value of a man's freedom?"). Both Justices did, however, join Justice White's concurrence. *See* Memorandum from William H. Rehnquist to Sandra Day O'Connor, *supra* (noting that Justice Rehnquist preferred Justice White's approach to the majority's).

284. *See supra* notes 155–156 and accompanying text.

condition, and the government's fundamental interest in punishing wrongdoing for which a person is culpable, are incorporated into the structure of the test that emerges in *Bearden*. As the Court explained in describing the early *Bearden* cases, the line "does not represent a balance between the needs of the accused and the interests of society; its principle is a flat prohibition against pricing indigent defendants out of"[285] fair treatment in the criminal justice system. Therefore, rather than weighing a litany of governmental interests against the individual interest at stake, the *Bearden* test calls for answers to two questions of fact: Has the person made a bona fide effort to pay, and if so, are alternative responses that would satisfy the government's interest in punishing only the underlying offense feasible?[286]

The importance of the *Bearden* test's structure is evident through its application to wealth-based penal disenfranchisement. Two of the primary justifications for penal disenfranchisement generally focus solely on the regulation of elections, and thus are entirely nonpenal in nature. Supporters of penal disenfranchisement have argued that it is necessary to preserve the "purity of the ballot box" against tarnishing of the integrity of elected officials or of other voters due to the tainted votes of those who have not abided by social norms.[287] In addition, supporters have attempted to justify penal disenfranchisement on the grounds that if people convicted of crimes were allowed to vote, they might form a voting block that disrupts

285. Mayer v. City of Chicago, 404 U.S. 189, 196–97 (1974).

286. *See infra* Section II.D.

287. *See* Kronlund v. Honstein, 327 F. Supp. 71, 73 (N.D. Ga. 1971) ("A state has an interest in preserving the integrity of her electoral process by removing from the process those persons with proven anti-social behavior whose behavior can be said to be destructive of society's aims."); Stephens v. Yeomans, 327 F. Supp. 1182, 1188 (D.N.J. 1970) (recognizing that "the intended state purpose for the disenfranchisement has something to do with the purity of the electoral process"); Otsuka v. Hite, 414 P.2d 412, 417 (Cal. 1966) ("The manifest purpose is to preserve the purity of the ballot box, which is the only sure foundation of republican liberty, and which needs protection against the invasion of corruption."); State *ex rel.* Barrett v. Sartorious, 175 S.W.2d 787, 788, 790 (Mo. 1943) (en banc) (recognizing the state interest in protecting the "purity of the ballot box"); State *ex rel.* Olson v. Langer, 256 N.W. 377, 386 (N.D. 1934) (describing preservation of the "purity of the ballot box" as the "manifest purpose" of penal disenfranchisement); *In re* Application of Palmer, 61 A.2d 922, 925 (Essex Cty. Ct. N.J. 1948) (stating that the framers of New Jersey's constitution sought to maintain the purity of elections); *In re* Application of Marino, 42 A.2d 469, 470 (N.J. Ct. of Common Pleas 1945) ("Clearly, the purpose . . . was . . . to maintain the purity of our elections by excluding those would-be voters whose status was deemed to be inimical thereto."); *see also* MANZA & UGGEN, *supra* note 20, at 12–13 (describing the concern that felons might "corrupt the ballot box or use their votes illegitimately"); Alec C. Ewald, *"Civil Death": The Ideological Paradox of Criminal Disenfranchisement Law in the United States*, 2002 WIS. L. REV. 1045, 1083–84 (citing *Washington v. State*, 75 Ala. 582, 585 (1884), for the idea of preserving "the purity of the ballot box").

preexisting law enforcement priorities.[288] As discussed further below, these justifications have been subject to significant criticism.[289] Several lower courts, however, have treated these considerations as legitimate,[290] and thus they serve as a basis for upholding wealth-based penal disenfranchisement under a tiers of scrutiny approach.[291] In contrast, these nonpenal interests would never come into consideration in a challenge to wealth-based penal disenfranchisement under the *Bearden* test.[292]

As with nonpenal interests, the importance of the *Bearden* Court's rejection of penal interests that equate poverty and criminality is also evident through application to wealth-based penal disenfranchisement. A standard rationale for penal disenfranchisement as a whole is that people convicted of crimes are more likely to commit voter fraud in the future.[293] Once lawmakers choose to reenfranchise people, they disclaim the notion that those who qualify for reenfranchisement are inherently likely to engage in voter fraud. Continuing to exclude people who cannot pay from the franchise suggests that they remain more likely to commit voter fraud, thereby equating poverty and criminality.[294]

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288. *See* Green v. Bd. of Elections, 380 F.2d 445, 451–52 (2d Cir. 1967) ("A contention that the equal protection clause requires New York to allow convicted mafiosi to vote for district attorneys or judges would not only be without merit but as obviously so as anything can be."); *see also* Woodruff v. Wyoming, 49 Fed. App'x 199, 203 (10th Cir. 2002) (citing *Green*, 380 F.2d 445, for the proposition that it is "unreasonable" for felons to vote in elections for legislators, prosecutors, or judges); Wesley v. Collins, 605 F. Supp. 802, 813 (M.D. Tenn. 1985) (citing same); Madison v. State, 163 P.3d 757, 771 (Wash. 2007) (en banc) (citing same); Roger Clegg, *Who Should Vote?*, 6 TEX. REV. L. & POL. 159, 177 (2001) ("If these laws did not exist there would be a real danger of creating an anti-law enforcement voting bloc in municipal elections . . . ."); Alec C. Ewald, *An "Agenda for Demolition": The Fallacy and the Danger of the "Subversive Voting" Argument for Felony Disenfranchisement*, 36 COLUM. HUM. RTS. L. REV. 109, 115–16 (2004) (describing conservative commentators arguing that eliminating penal disenfranchisement would result in "politicians pandering for the vote of felons"); Ashley Killough & Karl de Vries, *Trump Slams Voting Rights for Felons, Wants GOP To Court Black Voters*, CNN, https://www.cnn.com/2016/08/20/politics/donald-trump-african-american-voters-virginia-voting-rights/index.html (last updated Aug. 22, 2016) [https://perma.cc/KK3F-QU8A] (quoting then-candidate Donald Trump as describing penal disenfranchisement reform as an "effort to cancel out the votes of both law enforcement and crime victims").

289. *See infra* notes 411–418 and accompanying text.

290. *See supra* note 287 and accompanying text.

291. *See* Johnson v. Bredesen, 624 F.3d 742 (6th Cir. 2010); *Madison*, 163 P.3d 757.

292. *See supra* notes 252–261 and accompanying text.

293. *See* Otsuka v. Hite, 414 P.2d 412, 417 (Cal. 1966) (describing the risk that people with criminal convictions may engage in voter fraud as "not fanciful fears"); Washington v. State, 75 Ala. 582, 585 (1884) (stating that a person who committed a crime may be "morally corrupt" and therefore may engage in "selling or bartering his vote or otherwise engaging in election fraud"). For a discussion of the lack of evidence linking disenfranchising offenses and voter fraud, see *infra* notes 407–408 and accompanying text.

294. *Cf.* Christopher P. Manfredi, *Judicial Review and Criminal Disenfranchisement in the United States and Canada*, 60 REV. POL. 277, 303 (1998) (providing justifications for penal

Likewise, the social contract theory of disenfranchisement, when applied to wealth-based penal disenfranchisement, effectively casts people who are unable to pay as criminals and is thus irrelevant to assessing the government's interest in punishing the disenfranchising offense as well. Proponents of the theory posit that by breaking the law and violating the social contract, "the criminal forfeits the right to participate" in the development of the law.[295] In other words, social contract theory permanently casts a person who has committed a crime as a rule violator regardless of evidence of reform.[296] Again, once lawmakers choose to reenfranchise citizens convicted of an offense, they repudiate the idea that people who have committed that crime have irreparably violated the social contract. While it is true that a person who completes payment has satisfied the terms of his sentence, and the person who is unable to pay has not—and thus literally has not

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reenfranchisement but stating that those practices are only valid so long as they depend solely upon prohibited conduct and not upon a person's characteristics).

295. Ewald, *supra* note 287, at 1072–73, 1079–81; *see* Green v. Bd. of Elections, 380 F.2d 445, 451 (2d Cir. 1967) ("A man who breaks the laws he has authorized his agent to make for his own governance could fairly have been thought to have abandoned the right to participate in further administering the compact."); State *ex rel.* Olson v. Langer, 256 N.W. 377, 388–39 (N.D. 1934) ("[H]e who sets himself above the law and does an act . . . of so serious a nature as to be . . . penalized as a felony, may well be held in this state to be unfit to participate in governmental affairs."); *see also* Baker v. Pataki, 85 F.3d 919, 929–30 (2d Cir. 1996) (per curiam) (citing the proposition in *Green*, 380 F.2d at 451); Wesley v. Collins, 605 F. Supp. 802, 813 (M.D. Tenn. 1985) (citing same); Griffin v. Pate, 884 N.W.2d 182, 195–96 (Iowa 2016) ("Under [the social contract] theory, those who harm others or society through criminal action would exercise the right to vote in a way to harm society."); State *ex rel.* Barrett v. Sartorious, 175 S.W.2d 787, 790 (Mo. 1943) (citing the proposition from *Langer*, 256 N.W. at 388–39); Fisher v. Governor, 749 A.2d 321, 329–30 (N.H. 2000) ("We cannot say that it is unreasonable for the legislature to conclude that a citizen who commits a felony and is incarcerated also abandons the right to participate in voting for those who create and enforce the laws."); Mixon v. Commonwealth, 759 A.2d 442, 449 (Pa. Commw. Ct. 2000) ("The Court has also acknowledged that a state has a valid interest in ensuring that the rules of its society are made by those who have not shown an unwillingness to abide by those rules."); Ewald, *supra* note 288, at 112 ("[C]riminals violate the most basic agreement making rights possible. How can they claim the right to make the polity's laws?"); Manfredi, *supra* note 294, at 299 ("[C]riminal disenfranchisement reinforces the general moral signals . . . by further indicating the degree to which these offenders have broken their obligation to obey the rules of the political community of which they claim to be members.").

296. *See, e.g.*, PETTUS, *supra* note 20, at 127 ("[B]oth judicial and political justifications for felon disenfranchisement hinge on the presumption of unworthiness, conferring brands of status that constitute a caste distance . . . ."); Atiba R. Ellis, *Tiered Personhood and the Excluded Voter*, 90 CHI.-KENT L. REV. 463, 478 (2015) ("[O]ne's view about felon disenfranchisement ultimately depends on . . . whether one sees a felon through the lens of full equality or assumes that by virtue of committing a crime, the felon belongs, permanently, in a different class of citizens."). This conception of a person as forever tainted by a criminal act is not unique to penal disenfranchisement but may instead inform punishment in the United States writ large. *See* Dolovich, *supra* note 220, at 295–310 (positing that the government incarcerates people for nonviolent offenses, as well as those who have been rehabilitated, because of a conception that "everything there is to know about a given offender can be found in the mere fact of his criminal history").

paid his debt to society[297]—the *Bearden* Court addressed and dismissed the idea that those unable to pay remained in violation of the social contract. As the Court explained, when a person can pay but chooses not to do so, it "may reflect an insufficient concern for paying the debt he owes to society for his crime."[298] But a person who has made bona fide efforts to pay but fallen short, and who has otherwise completed the terms of his sentence, "has demonstrated a willingness to pay his debt to society and an ability to conform his conduct to social norms."[299]

Finally, the use of poverty penalties such as wealth-based penal disenfranchisement as a cudgel for promoting payment of economic sanctions also falls out of consideration under *Bearden*. Lawmakers at times justify these practices as necessary to ensure restitution is paid to victims and other economic sanctions paid to the state.[300] But the *Bearden* Court explicitly rejected the relevance of that exact argument because that interest could only be satisfied by payment the debtor has no meaningful ability to make.[301]

Instead, rather than assessing the validity and weighing the importance of the various justifications for penal disenfranchisement, once triggered by a failure to pay economic sanctions due to inability, the government is flatly prohibited from imposing any additional punishment, unless there could be no workable alternative that meets the government's interest in punishing the disenfranchising offense. In other words, as articulated in *Bearden*, when a person, through no fault of her own, has no meaningful ability to pay economic sanctions, the government "must consider alternate measures of punishment" for the underlying offense, and may only impose an additional punishment in response to the failure to pay "if alternate measures are not adequate to meet the state's interest in punishment and deterrence" of that offense alone.[302]

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297. *See* Johnson v. Bush, 214 F. Supp. 2d 1333, 1343 (S.D. Fla. 2002), *rev'd*, 353 F.3d 1287 (11th Cir. 2003) (arguing that completion of one's sentence, including full payment of restitution, "is directly related to the question of the applicant's rehabilitation and readiness to return to the electorate"); Madison v. State, 163 P.3d 757, 772 (Wash. 2007) (en banc) ("The State clearly has an interest in ensuring that felons complete all terms of their sentence . . . ."); *see also* Harvey v. Brewer, 605 F.3d 1067, 1079 (9th Cir. 2010) (stating that lawmakers "might . . . rationally conclude that only those who have satisfied their debts to society through fulfilling the terms of a criminal sentence are entitled to restoration of their voting rights," but specifically excluding from its consideration wealth-based penal disenfranchisement).

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

299. *Id.* at 670.

300. *See, e.g.*, Johnson v. Bredesen, 624 F.3d 742, 747 (6th Cir. 2010) (finding that the state's interests in ensuring restitution payments are made satisfies the rational basis requirement).

301. *See supra* notes 271–273 and accompanying text.

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

C. Applying the Test Upon Imposition of Any Form of Punishment for Nonpayment

As detailed above, there is significant evidence that the first step in raising a challenge to wealth-based penal disenfranchisement outside of the traditional tiers of scrutiny approach—the creation of a distinct test—is satisfied by *Bearden*. Though the constitutional norms that provide a foundation for the *Bearden* test likely would allow for its extension,[303] the test as is would only be triggered if the government imposes additional punishment for a nonwillful failure to pay. Therefore, the question arises as to whether continued penal disenfranchisement constitutes punishment as that term is understood in *Bearden*. Using the tiers of scrutiny, lower courts have focused on the nature of the deprivation at stake, reasoning that because Mr. Bearden would have been incarcerated had his probation been revoked, the *Bearden* line's heightened protections are only available if the risk to the individual is a deprivation of liberty or an equally fundamental harm, and therefore once access to the franchise is stripped of its fundamental nature due to a conviction, limitations on it would only be eligible for rational basis review.[304] Reading the *Bearden* line in conjunction with the contemporaneous development of the Sixth Amendment right to counsel, however, makes clear that from the line's inception the Court unflaggingly rejected penalty-based distinctions, suggesting that the *Bearden* test applies any time the government imposes punishment for failing to pay economic sanctions upon a person who cannot do so.[305] Though the Court has not assessed whether penal disenfranchisement constitutes punishment as contemplated in *Bearden*, as detailed below, treatment of penal disenfranchisement as punishment would be commensurate with the Court's inquiries into the meaning of punishment broadly.[306]

303. *See supra* notes 176 and accompanying text.

304. *See Johnson*, 624 F.3d at 746–49 ("The revocation of probation at issue in *Bearden* implicated physical liberty . . . Tennessee's re-enfranchisement conditions, by contrast, merely relate to the restoration of a civil right to which Plaintiffs have no legal claim, and invoke only rational basis review."); *see also* Madison v. State, 163 P.3d 757, 768–69 (Wash. 2007) (en banc) (distinguishing the right to vote from the right to be free from incarceration based on limiting language in Section Two of the Fourteenth Amendment suggesting that the right to vote is not fundamental for people convicted of felonies).

305. *See infra* Section II.C.1.

306. *See infra* Section II.C.2.

1. Rejection of Penalty-Based Line Drawing

From the inception of the *Bearden* line, the Court rejected arguments that its protections should be limited by the nature of the punishment at stake. In the 1950s, Illinois provided criminal defendants a statutory right to appeal their convictions, but appellants were required to furnish a bill of exceptions or report of proceedings, which would be impossible to create without a trial transcript.[307] While the state provided free transcripts to people sentenced to death, all other defendants were required to purchase transcripts.[308] Counsel for Illinois pointed to the Fourteenth Amendment's right to counsel doctrine—which at the time mandated counsel in death penalty cases but required representation under only limited circumstances in noncapital cases—to argue that the penalty-based distinction in Illinois's law should be affirmed.[309] By striking down the law, the *Griffin* plurality rejected that distinction, emphasizing that though the Constitution did not mandate the provision of appellate review in the first instance, once lawmakers provided a system for review, they were strictly prohibited from erecting financial barriers to accessing the system even in a noncapital case.[310]

The Court's rejection of penalty-based distinctions would continue as the *Bearden* line developed, despite the further entrenchment of such distinctions in the right to counsel context. Over the next decade and a half, the Court would extend *Griffin*, striking down the use of transcript fees[311] as well as docket and filing fees,[312] assessing the constitutionality of *in pauperis* application procedures,[313] and requiring appointment of counsel in first appeals as of right.[314] And though the Court did at times emphasize the loss of liberty as a

307. Griffin v. Illinois, 351 U.S. 12, 13–14 (1956) (plurality).

308. *Id.* at 14–15.

309. *Griffin*, Transcript of Oral Argument, *supra* note 200, at 24–25; Brief for Respondent, *Griffin*, *supra* note 200, at 4–5.

310. *Griffin*, 351 U.S. at 18.

311. Williams v. Oklahoma City, 395 U.S. 458, 459–60 (1969) (per curiam); Gardner v. California, 393 U.S. 367, 368–69 (1969); Roberts v. LaVallee, 389 U.S. 40, 41–42 (1967) (per curiam); Long v. District Court of Iowa, 385 U.S. 192, 194 (1966) (per curiam); Lane v. Brown, 372 U.S. 477, 483–85 (1963); Eskridge v. Wash. State Bd. of Prison Terms & Parolees, 357 U.S. 214, 216 (1958) (per curiam); *see also* Wade v. Wilson, 396 U.S. 282 (1970); Norvell v. Illinois, 373 U.S. 420, 423–24 (1963); McCrary v. Indiana, 364 U.S. 277, 277 (1960) (per curiam); Ross v. Schneckloth, 357 U.S. 575, 575 (1958) (per curiam).

312. Smith v. Bennett, 365 U.S. 708, 709 (1961); Douglas v. Green, 363 U.S. 192, 192–93 (1960) (per curiam); Burns v. Ohio, 360 U.S. 252, 257–58 (1959).

313. Coppedge v. United States, 369 U.S. 438, 448 (1962).

314. Swenson v. Bosler, 386 U.S. 258, 259–60 (1967) (per curiam); Douglas v. California, 372 U.S. 353, 355 (1963).

rationale for the protection granted,[315] it explicitly referenced deprivations of life, liberty, *or* property in *Griffin* itself.[316]

It was unsurprising that advocates relied on these cases in seeking to extend the guaranteed right to counsel beyond the capital context when *Gideon v. Wainwright*[317] reached the Court.[318] In arguing in favor of retaining the capital–noncapital distinction, the states posited that distinguishing between imprisonment and nonincarcerative punishments was untenable. For example, J. Lee Rankin, arguing on behalf of the State of Alabama, remarked:

> [I]t's been mentioned about the police courts now in Alabama, I know we have people who get a certain number of traffic violations or certain type of traffic violations have their driver's license taken away from them. Well, that's a very—if a man's a salesman, loss of his driving license is a very vital thing to him . . . .[319]

Ultimately, the *Gideon* Court avoided the arguably open-ended application of a right based on the Fourteenth Amendment in favor of adopting a blanket rule requiring the provision of counsel under the Sixth Amendment, drawing the line for its rule at felony cases.[320] As the *Gideon* line developed alongside the *Griffin* cases, the Court continued its line-drawing exercise, first extending *Gideon* to any case—serious or petty—in which incarceration was imposed as punishment,[321] and ultimately denying a blanket rule that would have required counsel in fine-only cases.[322]

That the Court would not bend the *Bearden* line toward *Gideon*'s penalty-based disposition of rights was immediately evident. On the same day the Court announced its decision in *Gideon*, it also struck

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315. *See Smith*, 365 U.S. at 712–13 (emphasizing the loss of liberty at stake in habeas proceedings).

316. Griffin v. Illinois, 351 U.S. 12, 19 (1956) (plurality opinion) ("[T]o deny adequate review to the poor means that many of them may lose their life, liberty or property because of unjust convictions which appellate courts would set aside.").

317. 372 U.S. 335 (1963).

318. Brief for the Petitioner at 21–26, *Gideon*, 372 U.S. 335 (No. 155), 1962 WL 115120, at *21–26; Oral Argument Part II at 7:18 to 8:24, *Gideon*, 372 U.S. 335 (No. 155) [hereinafter *Gideon*, Oral Argument Part II], https://www.oyez.org/cases/1962/155 (last visited Oct. 12, 2018) [https://perma.cc/NP7F-9R6J].

319. *Gideon*, Oral Argument Part II, *supra* note 318, at 1:51:15 to 1:51:42; *see also* Brief for Respondent at 44–45, *Gideon*, 372 U.S. 335 (No. 155), 1963 WL 105476, at *44–45 (arguing that the precedent articulates a "clear, consistent and operable" standard for evaluation).

320. *Gideon*, 372 U.S. at 344–45. For a critique of the Court's decision to move to the Sixth Amendment and away from the focus on fundamental fairness in the due processes doctrine, see Tracey L. Meares, *What's Wrong with* Gideon, 70 U. CHI. L. REV. 215 (2003).

321. Argersinger v. Hamlin, 407 U.S. 25, 37 (1972).

322. Scott v. Illinois, 440 U.S. 367, 373–74 (1979); *see also* Alabama v. Shelton, 535 U.S. 654, 674 (2002) (leaving open the question of whether a right to counsel would apply if a state imposes economic sanctions at sentencing, the nonpayment of which would result in incarceration).

down financial barriers related to transcripts on appeal[323] and issued its opinion in *Douglas v. California*, in which it extended *Griffin* to afford a blanket right to counsel on first appeal as of right.[324] Unlike *Gideon*, those cases made no reference to the nature of the penalty involved.[325]

Of course, the Fourteenth Amendment cases may be explained away because in each the penalty at stake was life or liberty, rather than property,[326] but the Court would come to explicitly reject offense and penalty-based distinctions in that realm. After the *Gideon* opinion was announced, some lower courts began to allow financial barriers to appellate processes using offense- or penalty-based line drawing that mimicked *Gideon*. The first such case to reach the Supreme Court—the 1969 case of *Williams v. Oklahoma City*—involved a statute that required transcripts in order to perfect appeals stemming from misdemeanor convictions, without providing free transcripts for the indigent.[327] Counsel for Mr. Williams even suggested that the Court could engage in *Gideon*-like line drawing between petty and serious offenses—with his client's offense of driving while intoxicated falling on the serious and thus protected side of the line[328]—but the Court did not bite. It instead adhered to *Griffin*, holding again that once lawmakers choose to provide a process for appeal, they cannot limit the ability of indigent appellants to access that system by devising financial barriers.[329] Two years later, the Court again declined to set penalty-

323. *See* Draper v. Washington, 372 U.S. 487, 499 (1963) (holding that the state could not deny free transcripts to indigent defendants for the purpose of appeal through a process in which a trial judge had authority to deem the appeal frivolous, but also through which people who could pay for transcripts were given full appellate review); Lane v. Brown, 372 U.S. 477, 484–85 (1963) (holding that indigents cannot be foreclosed from appellate review as a result of their inability to afford a transcript).

324. 372 U.S. 353, 354–56 (1963).

325. *See id.*; *Draper*, 372 U.S. 487; *Lane*, 372 U.S. 477. The same is true of other post-*Gideon* cases. *See* Gardner v. California, 393 U.S. 367, 370 (1969) (holding that a transcript must be provided for indigent defendants for preparation in habeas proceedings without reference to the nature of the punishment at stake); Roberts v. LaVallee, 389 U.S. 40, 42 (1967) (per curiam) (striking down a fee requirement pursuant to *Griffin*, also without comment regarding the degree of the punishment).

326. *See Draper*, 372 U.S. at 510 (addressing a penalty of twenty years of incarceration); *Lane*, 372 U.S. at 478 (involving a capital sentence); *Douglas*, 372 U.S. at 354 (involving a penalty of imprisonment).

327. 395 U.S. 458, 458–59 (1969) (per curiam).

328. Transcript of Oral Argument at 12, *Williams*, 395 U.S. 458 (No. 841) ("[A]ll we are asking this Court to get to is that that goes for all serious criminal convictions . . . ."), *audio recording with speaker designation available at Williams v. Oklahoma City*, OYEZ, https://www.oyez.org/cases/1968/841 (last visited Oct. 12, 2018) [https://perma.cc/BR5W-34KN]; *id.* at 17 ("[W]e concede the fact that there is at some place a petty offense. But this Court need not re-examine the roots of the peety-serious [sic] offense distinction because in this case, it is a serious crime.").

329. *Williams*, 395 U.S. at 459–60.

based restrictions in *Mayer v. Chicago*.[330] The City of Chicago argued that a felony–nonfelony line for providing free transcripts was justifiable because nonfelony offenses were only subject to fines, and therefore the potential harm for the defendant was outweighed by the "State's fiscal and other interests in not burdening the appellate process."[331] This reflected the same argument that pushed the Court to the actual-imprisonment limitation in the *Gideon* line.[332] The *Mayer* Court, however, explained in no uncertain terms that it would not import penalty-based distinctions into the *Griffin* cases, stating: "The invidiousness of the discrimination that exists when criminal procedures are made available only to those who can pay is not erased by any differences in the sentences that may be imposed."[333]

In other words, though *Bearden* involved a deprivation of liberty, it is part of a line of cases in which the Court rejected penalty-based distinctions at its inception, never rested its analysis on the degree of punishment involved, and repeatedly rejected the incorporation of such distinctions while simultaneously engaging in that type of line drawing in a related area. To remain in keeping with this unflagging approach, therefore, the protections afforded in the *Bearden* line have applied regardless of whether the punishment triggered by an inability to pay involves liberty or some other deprivation.

2. Evidence that Penal Disenfranchisement Constitutes Punishment

The Fourteenth Amendment protections afforded through the *Bearden* test are implicated when the government imposes an economic sanction as punishment for an offense and then, when a person fails to pay due to inability, inflicts an additional punishment.[334] Though penal

330. 404 U.S. 189, 196–97 (1971).

331. *Id.* at 196.

332. *See* Scott v. Illinois, 440 U.S. 367, 373–74 (adopting "actual imprisonment as the line defining the constitutional right to appointment of counsel"); *see also* Transcript of Oral Argument at 22–23, *Mayer*, 404 U.S. 189 (No. 70-5040) (regarding Justice Blackmun's line of inquiry into whether the *Griffin* cases apply to traffic offenses or nominal fines and stating, "[T]his is what we have to struggle with"), *audio recording with speaker designation available at Mayer v. City of Chicago*, OYEZ, https://www.oyez.org/cases/1971/70-5040 (last visited Oct. 12, 2018) [https://perma.cc/L2JV-8ZPE].

333. *Mayer*, 404 U.S. 189, 196–97 (1971); *see also* M.L.B. v. S.L.J., 519 U.S. 102, 111–12, 121 (1996) (describing *Mayer* as "declin[ing] to limit *Griffin* to cases in which the defendant faced incarceration" in part due to recognition of the potential "collateral consequences" of fine-only punishments). In later years, the Court also refused to distinguish between capital and noncapital punishment when declining to require counsel for indigent death row inmates seeking postconviction relief under due process, relying in part on the *Griffin* cases. *See* Murray v. Giarratano, 492 U.S. 1, 7–10 (1989) (holding that the "rule . . . should apply no differently in capital cases than in noncapital cases").

334. *See supra* Section II.B.

disenfranchisement is imposed at conviction,[335] because the person would otherwise have regained the right to vote, its continuation or reimposition due to an inability to pay would serve as an additional punishment subject to *Bearden* so long as penal disenfranchisement constitutes punishment in the first instance.

Before addressing whether penal disenfranchisement constitutes punishment, however, it is important to note that mechanisms that relate to revocation or extension of parole or probation easily fit within the *Bearden* test on their own right. *Bearden* itself involved the revocation of probation for the failure to pay economic sanctions.[336] Jurisdictions that revoke parole or probation for the nonwillful failure to pay would, even without a link to wealth-based penal disenfranchisement, trigger the *Bearden* test's examination of the availability of alternative sanctions.[337] Similarly, jurisdictions that

335. *See supra* note 12 and accompanying text. Though no lower court has stated outright that the automatic nature of a penalty renders it nonpunitive, the Washington Supreme Court hinted at that notion. *See* Madison v. State, 163 P.3d 757, 768–70 (Wash. 2007) (stating that *Bearden* and *Williams* involved additional punishment whereas disenfranchisement merely required a person to complete her original sentence); *see also* State *ex rel.* Olson v. Langer, 256 N.W. 377, 387 (N.D. 1934) ("This disqualification is not a penalty. It is merely a consequence attendant on, and incidental to, the doing of the felonious act.").

336. *See* Bearden v. Georgia, 461 U.S. 660 (1983).

337. *See supra* Section I.B; *infra* Appendices C–D. In addition to parole and probation status constituting a constitutional violation distinct from violations related to wealth-based penal disenfranchisement, financial impediments to executive clemency or other restoration processes due to ongoing criminal debt may separately violate the due process clause. *See* Ohio Adult Parole Auth. v. Woodard, 523 U.S. 272, 284–85 (1998) (plurality opinion) (holding that due process did not require a more generous process in capital cases); *id.* at 288–90 (O'Connor, J., concurring) (adding a fifth vote and explaining that an executive clemency system must provide due process and cannot grant or deny relief on arbitrary grounds); Conn. Bd. of Pardons & Paroles, Absolute Pardon Application 1 (Nov. 2017), https://www.ct.gov/bopp/lib/bopp/2018_CT_Pardon_application.pdf [https://perma.cc/VEW2-NPYA] (listing resolution of outstanding court fees and fines as eligibility requirement for a pardon application); Haw. Paroling Auth., *Pardon Information & Instructions*, HAW. DEP'T OF PUB. SAFETY 1 (Jan. 2, 2018), https://dps.hawaii.gov/wp-content/uploads/2012/09/Pardon-application2.pdf [https://perma.cc/EG99-HANL] (requiring "[f]ines, fees, restitution, etc. [to be] paid off"); Telephone Interview with Katie McLoughlin, Deputy Legal Counsel, Office of the Governor John W. Hickenlooper (Dec. 18, 2017) ("When we receive an application, we are always looking to see if they're completely paid up and we would expect that to be completed."). Likewise, procedures in a handful of states that require payment of a fee, filing of documents that are only obtainable upon paying a fee, or placement of an advertisement in the newspaper at the applicant's expense to apply for clemency—and therefore may preclude indigent applicants from obtaining relief—are also constitutionally deficient. *See* KY. REV. STAT. ANN. § 431.073(2) (West 2018) (mandating payment of application fee); S.C. CODE ANN. § 24-21-960 (imposing a $100 fee on clemency application); Ariz. Bd. of Exec. Clemency, Pardon Application, *supra* note 75, at 11 (requiring newspaper advertisement); Conn. Bd. of Pardons & Paroles, *Pardon Application Process and Instructions*, STATE CONN., http://www.ct.gov/bopp/cwp/view.asp?a=4331&q=508204 (last modified Aug. 31, 2018 2:42 PM) [https://perma.cc/5HJY-QDQ3] (requiring submission of a criminal history report at a cost of $75); Ga. State Bd. of Pardons and Paroles, Application for Pardon/Restoration of Rights 13, https://pap.georgia.gov/sites/pap.georgia.gov/files/ParoleConsideration/Pardon%20Application%20Revised%20July%202018.pdf (last updated July 20, 2018) [https://perma.cc/HW69-PTFZ]

extend the length of a parole or probation term impose an additional punishment. There is no doubt in *Bearden* regarding, nor could there be any reasonable debate about, the fact that parole and probation constitute punishment. In addition to continued disenfranchisement, being on parole or probation often means that a person is subject to an array of supervision conditions that infringe on one's privacy, time, and financial well-being. People on parole or probation have reduced Fourth Amendment rights, opening them up to searches of their home and person under conditions that would be unconstitutional if applied to other people.[338] In addition, supervision conditions may affect private relations, often precluding people from spending time with family members or neighbors.[339] Conditions of supervision typically require people to report to a government office for meetings, drug testing, and the like, depriving them of both privacy and the time it takes to complete such activities.[340] As Fiona Doherty has documented in the context of probation, conditions of supervision are often so vague that they give enormous power to probation officials to control nearly every aspect of a person's life.[341] To add insult to injury, the government routinely requires people to pay periodic supervision fees.[342] Therefore, though a fraction of a step removed from the probation revocation at issue in *Bearden*, the extension of a parole or probation term certainly constitutes additional punishment.

(requiring submission of criminal history check, which requires a fee to procure); Ky. Court of Justice, Application to Vacate and Expunge Felony Conviction 2, https://courts.ky.gov/resources/legalforms/LegalForms/4963.pdf (last updated July 2016) [https://perma.cc/MBZ4-QX8U] (setting fee at $500); La. Bd. of Pardons and Parole, Application for Pardon Consideration 1 (July 6, 2017), http://www.doc.la.gov/media/1/PardonParole%20Policies/7.6.17.application.for.pardon.consideration_.out.2017.pdf [https://perma.cc/P3W5-LSF6] (requiring payment of a $150 fee for any applicant who passes initial eligibility review); Pa. Bd. of Pardons, *Process*, COMMONWEALTH PA. http://www.bop.pa.gov/application-process/Pages/Process.aspx (last visited Nov. 20, 2018) [https://perma.cc/X8BA-9Q9J] (requiring a $25 filing fee); S.C. Dep't of Probation, Parole & Pardon Servs., Pardon Application, https://www.dppps.sc.gov/content/download/138528/3154712/file/1118+Pardon+Application+Rsvd+12-19-17+Fillable.pdf (last updated Dec. 19, 2017) [https://perma.cc/Q7RR-6JYH] (requiring filing fee).

338. *See* Sampson v. California, 547 U.S. 843, 847 (2006) (allowing suspicionless searches of a parolee where law enforcement would otherwise need reasonable suspicion that a crime was occurring or about to occur or probable cause); United States v. Knights, 534 U.S. 112, 122 (2001) (allowing warrantless searches of probationers' homes based only on reasonable suspicion where the police would otherwise need a warrant based on probable cause); *see also* Fiona Doherty, *Obey All Laws and Be Good: Probation and the Meaning of Recidivism*, 104 GEO. L.J. 291, 317–22 (2016) (exploring the spectrum of ways different courts have expanded the "investigative and surveillance powers of probation officers").

339. Doherty, *supra* note 338, at 307–09.

340. *Id.* at 316–17.

341. *Id.* at 300–12, 316–17.

342. *Statement on the Future of Community Corrections*, *supra* note 17.

Wealth-based penal disenfranchisement is not always linked to parole and probation conditions, however,[343] and the Court has yet to assess whether poverty penalties, standing on their own, constitute punishment as contemplated in *Bearden*.[344] The Court has, however, considered whether to treat penalties with remedial or regulatory qualities as punishment in numerous other settings. A preliminary question involves what degree of punitive intent is required to trigger the constitutional protection at issue. Take, for example, civil forfeiture. When challenged under the Eighth Amendment's excessive fines clause, the Court held that a forfeiture need only be partially punitive to constitute a fine for two reasons.[345] First, it understood the clause as serving as a bulwark at the moment of sentencing against the risk that the government would abuse its prosecutorial power as a mechanism for revenue generation targeted at people who are politically vulnerable.[346] Second, treating a forfeiture as a fine merely allowed an opportunity to consider whether the civil forfeiture was, or was not, constitutionally excessive.[347] In contrast, when challenged under the Fifth Amendment's double jeopardy clause, the Court held that the appropriate test was whether the forfeiture was so punitive as to outweigh other evidence of nonpunitive intent. It did so because, unlike the two-part inquiry in the excessive fines context, the determination of the forfeiture's punitiveness resolved the ultimate question of whether the property owner had been twice subjected to punishment for the same offense.[348] Challenges to poverty penalties fit best under the

343. *See supra* Section I.B; *infra* Appendix B.

344. The *Bearden* Court had an opportunity to resolve this question, but did not reach it. Counsel for *Bearden* included in its opening brief the fact that one consequence of revoking Mr. Bearden's probation for the failure to pay was that the revocation would trigger Georgia's penal disenfranchisement laws. *See* Brief for Petitioner, *Bearden*, *supra* note 185, at 7, 19–20. Counsel for Mr. Bearden included the discussion of disenfranchisement to bolster the position that the Court should employ strict scrutiny. *Id*. Counsel for Georgia gave a rather tepid response to this position, arguing it was the underlying crime that resulted in the loss of voting rights, rather than the revocation, *see* Brief for Respondent, *Bearden*, *supra* note 192, at 13, and the issue was barely mentioned in Mr. Bearden's reply brief. *See* Petitioner's Reply Brief, *Bearden*, *supra* note 192, at 7. While Justice Powell's clerk noted the issue in an internal memo, prompting Justice Powell to underline the notation and write "!!" in the margin, *see* Bench Memorandum from "Rives" to Lewis F. Powell, Jr., *supra* note 225, at 3–4, it did not come up at oral argument or in the *Bearden* opinion. *See Bearden*, Transcript of Oral Argument, *supra* note 192; Bearden v. Georgia, 461 U.S. 660 (1983). Of course, the outcome of the case, which reinstated Mr. Bearden's probation, meant that he did not, in fact, become disenfranchised, therefore making the point moot.

345. Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc., 492 U.S. 257, 271–76 (1989).

346. *Id.*; *see also* Harmelin v. Michigan, 501 U.S. 957, 978 n.9 (1991) (Scalia, J.) ("There is good reason to be concerned that fines, uniquely of all punishments, will be imposed in a measure out of accord with the penal goals of retribution and deterrence . . . [because] fines are a source of revenue."); Colgan, *supra* note 25, at 21–22.

347. *See* Austin v. United States, 509 U.S. 602, 622 & n.14 (1993).

348. United States v. Ursery, 518 U.S. 267, 287 (1996).

former treatment. Treating penal disenfranchisement as punishment ensures broad protection against the risk that the government will use its prosecutorial power in a way that subjects a person to unfair treatment due to her financial circumstances in violation of the constitutional norms detailed above,[349] merely providing an opportunity to assess the secondary question of whether additional punishment is, or is not, constitutional under the *Bearden* test.[350] But regardless of whether the Court adopts a partially punitive test or the more exacting test requiring that punitive intent outweigh other interests, as detailed below, the evidence of punitive intent in relation to penal disenfranchisement is sufficiently expansive that it should satisfy either examination.

In assessing whether a practice evinces punitive intent, the Court has looked at a variety of factors. It often begins by considering the government's own categorization of or explanation for the practice.[351] Though some aspects of penal disenfranchisement laws are found in election provisions or other parts of a jurisdiction's code, they are frequently incorporated into the criminal code or policies related to clemency, parole, or probation.[352] This is unsurprising, as even staunch proponents of penal disenfranchisement describe the practice as a form of punishment.[353] Though in most jurisdictions the categorization of penal disenfranchisement would lean toward a finding of punitive intent, the mixed signals sent in some jurisdictions means that categorization alone is unlikely to resolve the question. In such circumstances, the Court has also looked to other evidence,[354] including

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349. *See supra* Section II.A.

350. *See supra* Section II.B.3; *infra* Section II.D.2.

351. *See* Trop v. Dulles, 356 U.S. 86, 94 (1958) (plurality).

352. *See infra* Appendices A–E; *see also* Ewald, *supra* note 287, at 1057–59 (describing *Trop* but noting that some jurisdictions describe disenfranchisement in penal terms); Harold Itzkowitz & Lauren Oldak, *Restoring the Ex-Offender's Right to Vote: Background and Developments*, 11 AM. CRIM. L. REV. 721, 730 (1973) (providing examples of state constitutions and penal codes that categorize penal disenfranchise as a component of criminal punishment).

353. *See, e.g.*, Clegg et al., *supra* note 167, at 23 (arguing in favor of penal disenfranchisement on the grounds that it has traditionally been understood to constitute punishment and thus is in the purview of the state's power to enforce its criminal laws); *Civic Participation and Rehabilitation Act of 1999: Hearing on H.R. 906 Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 106th Cong. 41 (Oct. 21, 1999) [hereinafter *Civic Participation and Rehabilitation Act Hearing*] (statement of Todd F. Gaziano, Senior Fellow, Heritage Foundation) (arguing that Congress could not pass a law guaranteeing a right to vote in federal elections because it would "lessen the sanction for State crime"); *Should Felons Have to Pay All Fines, Fees, and Restitutions Related to Their Conviction Before Regaining Their Vote?*, PROCON.ORG, https://felonvoting.procon.org/view.answers.php?questionID=000670 (last updated Jan. 19, 2010) [https://perma.cc/F83E-8B3Q].

354. This list of factors is generally derived from a list provided in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 168 (1963), and in subsequent cases. What is offered here is not a checklist but rather explicates the continuity between treating penal disenfranchisement as punishment

the historical use of the practice as punishment,[355] the link between the practice and the necessity of a conviction,[356] the relationship between the penalty and a finding of scienter,[357] whether the severity of the deprivation signals a desire to meet the utilitarian or retributive aims of punishment,[358] the nexus—or lack thereof—between the stated regulatory goals and the underlying criminal conduct,[359] whether those stated goals are irrational or otherwise improper,[360] whether the practice operates as an affirmative disability or restraint,[361] and whether it conveys blame for wrongdoing.[362]

A jurisdiction seeking to preserve its use of wealth-based penal disenfranchisement has in its corner *Trop v. Dulles*, in which a plurality of the Court stated that penal disenfranchisement was historically understood to be nonpunitive.[363] *Trop* addressed the question of whether the loss of citizenship constituted cruel and unusual

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and existing doctrine. Further, the Court has not presented these considerations as a well-articulated theoretical account of what constitutes punishment. *See, e.g.*, Wayne A. Logan, *The Ex Post Facto Clause and the Jurisprudence of Punishment*, 35 AM. CRIM. L. REV. 1261, 1268 (1998) (critiquing the doctrine as lacking coherence). These concepts do, however, bear the hallmarks of certain aspects of punishment theory. For example, H.L.A. Hart posited that to be considered punishment, a sanction must be in response to a violation of the laws of the state. *See* HART, *supra* note 220, at 4–5. This is similar to the Court's understanding that punitive intent may be visible through a practice's close connection to convictions for criminal offenses. *See infra* notes 384–389 and accompanying text. Hart also proposed that punishment must "involve pain or other consequences normally considered unpleasant," HART, *supra* note 220, at 4–5, similar to the Court's considerations of the severity of the deprivation as evidence of utilitarian or retributive aims and the extent to which the practice conveys blameworthiness that stigmatizes the person to whom it is applied, *see infra* notes 394–399, 427–440 and accompanying text. Carol Steiker also has suggested a positive and normative frame for defining punishment for the purposes of assessing when constitutional protections should attach in which she advances an understanding of punishment as an act of blaming by the state, in which evidence of the state's desire to blame and the effect on the individual in receiving that blame are relevant to understanding a practice as punishment. *See* Steicker, *supra* note 29, at 810–11. Finally, it should also be noted that these factors bear some similarities with the factors that the *Bearden* Court noted as relevant to its considerations as it crafted the *Bearden* test. *See* Bearden v. Georgia, 461 U.S. 660, 666–67 (1983) ("[T]he nature of the individual interest affected, the extent to which it is affected, the rationality of the connection between legislative means and purpose, [and] the existence of alternative means for effectuating the purpose . . . ." (quoting Williams v. Illinois, 399 U.S. 235, 260 (1970) (Harlan, J., concurring)); *see also supra* note 176. This overlap provides additional continuity between the Court's goals in devising the *Bearden* test and its application to responses to nonpayment that constitute punishment.

355. *See infra* notes 363-382 and accompanying text.
356. *See infra* notes 384–389 and accompanying text.
357. *See infra* notes 390–393 and accompanying text.
358. *See infra* notes 394–399 and accompanying text.
359. *See infra* notes 400–404 and accompanying text.
360. *See infra* notes 405–421 and accompanying text.
361. *See infra* notes 422–426 and accompanying text.
362. *See infra* notes 427–440 and accompanying text.
363. Trop v. Dulles, 356 U.S. 86, 96–97 (1958) (plurality opinion).

punishment for the offense of wartime desertion.[364] Because the penalty could be construed as a regulation of nationality, rather than a punishment, the *Trop* plurality undertook an examination of whether the law was, in substance, penal.[365] The plurality described the relevant inquiry for ascertaining whether a government act constituted punishment as whether the legislature appears to have intended the statute to "reprimand the wrongdoer" or to "deter," as opposed to some other legitimate purpose."[366] It then provided as an example penal disenfranchisement for the crime of bank robbery, which it deemed to "designate a reasonable ground of eligibility for voting" and thus was a "nonpenal exercise of the power to regulate the franchise."[367] Though a few lower courts have noted this conclusion in support of penal disenfranchisement generally,[368] there are significant reasons to disregard it.

First, the *Trop* plurality's statement may be rejected as ahistorical. Prior to *Trop*, the Court itself treated penal disenfranchisement as punitive[369] and the State of Illinois had described it as a form of punishment when litigating *Griffin*.[370] Further, as the Court later recognized in *Ramirez*, states seeking admission for representation in Congress were restricted from limiting the franchise, unless the limitation was employed "as a punishment."[371] Therefore, when the *Ramirez* Court interpreted Section Two of the Fourteenth Amendment—which prohibits abridging the right to vote "except for participation in rebellion, or other crime"[372]—as allowing a state to strip the vote from its mooring as a fundamental right due to a felony conviction,[373] it did so with the understanding that states used penal

364. *Id.* at 86.

365. *Id.* at 95.

366. *Id.* at 96.

367. *Id.* at 96–97.

368. Green v. Bd. of Elections, 380 F.2d 445, 449–51 (2d Cir. 1967); Kronlund v. Honstein, 327 F. Supp. 71, 74 (N.D. Ga. 1971); *In re* Marino, 42 A.2d 469, 470–71 (N.J. Essex County Ct. 1945); Mixon v. Commonwealth, 759 A.2d 442, 448–49 (Pa. Commw. Ct. 2000); Fernandez v. Kiner, 673 P.2d 191, 193 (Wash. Ct. App. 1983). *But see* Fincher v. Scott, 352 F. Supp. 117, 120 (M.D.N.C. 1972), *aff'd*, 411 U.S. 961 (1973) (citing *Trop* for the proposition that the Eighth Amendment analysis requires assessment of evolving standards of decency but treating penal disenfranchisement as punishment in assessing whether it could be considered cruel and unusual).

369. *See* Weems v. United States, 217 U.S. 349, 364–65, 381 (1910) (describing the loss of the franchise as one aspect of the punishment *cadena temporal* in finding that it constituted cruel and unusual punishment in violation of the Eighth Amendment).

370. *See* Brief for Respondent, *Griffin*, *supra* note 200, at 9.

371. *E.g.*, Richardson v. Ramirez, 418 U.S. 24, 51 (1974) (quoting the enabling acts for Arkansas's admission to representation in Congress).

372. U.S. CONST. amend. XIV, § 2.

373. *See supra* notes 165–171 and accompanying text.

disenfranchisement to punish.[374] That conception was consistent with evidence that civil disabilities, including the loss of the right to vote, were historically understood to serve both deterrent and retributive purposes of punishment.[375]

Second, the cases upon which the *Trop* plurality relied do not support the conclusion that penal disenfranchisement is nonpunitive. The two cases, both from the 1800s, involved statutes that precluded people who engaged in bigamy or polygamy from registering to vote.[376] In one case, the Court did not address whether penal disenfranchisement was or was not a form of punishment but instead described the state of Idaho's voter qualifications—which included penal disenfranchisement, a prohibition on plural marriage, and other limitations—and stated that these qualifications were "not open to any valid legal objection to which [our] attention has been called."[377] The legal objection that had been raised involved a challenge to the criminalization of plural marriage in light of the religious liberty protections of the First Amendment.[378] The other case actually did address the question of whether denying the vote to people in plural marriages involved punishment and thus operated as an ex post facto

374. *See Ramirez*, 418 U.S. at 52 (discussing how Congress considered equally applicable laws to be paramount when readmitting southern states to the Union, in order to keep southern states from "misus[ing] the exception for felons to disenfranchise Negros").

375. Mixon v. Commonwealth, 759 A.2d 442, 448 (Pa. Commw. Ct. 2000) ("Most ancient, medieval, and early modern societies conceived of disenfranchisement as a form of punishment."); Nora V. Demleitner, *Continuing Payment on One's Debt to Society: The German Model of Felon Disenfranchisement as an Alternative*, 84 MINN. L. REV. 753, 765–66 (2000) (discussing retributive and deterrence rationales for felon disenfranchisement under English common law); Itkowitz & Oldak, *supra* note 352, at 725–27 (discussing historical use of civil disabilities as punishment); Sigler, *supra* note 20, at 1726 (analyzing historical felon disenfranchisement among different nations and stating the "explicitly punitive nature" of the disenfranchisement was one of the consistent "salient features"); Christopher Uggen et al., *Criminal Disenfranchisement*, 1 ANN. REV. L. & SOC. SCI. 307, 310 (2005) ("Disenfranchisement appears to have been initially premised upon both retributive and deterrence theories."). *But see* Griffin v. Pate, 884 N.W.2d 182, 193 (Iowa 2016) (stating that a 2014 Iowa Supreme Court decision determined that Iowa's founders rejected the notion of infamy as a criminal punishment and viewed the concept more as a regulatory measure); State *ex rel.* Barrett v. Sartorious, 175 S.W.2d 787, 788 (Mo. 1943) (acknowledging that penal disenfranchisement laws were seen as "a part of the punishment" for particular crimes, but dismissing that evidence in favor of the notion that disenfranchisement was intended to keep the ballot box "pur[e]").

376. Davis v. Beason, 133 U.S. 333, 346–47 (1890); Murphy v. Ramsey, 114 U.S. 15, 38 (1885). More than a decade after these two cases were decided, the Court favorably referenced an Alabama Supreme Court case that had upheld penal disenfranchisement against claims that it constituted a bill of attainder and ex post facto law. Hawker v. New York, 170 U.S. 189, 197 (1898) (citing Washington v. State, 75 Ala. 582 (1884)). It did so, however, for the proposition that the government may impose a rule of general application in which a conviction is evidence of a disqualifying condition, rather than positing that penal disenfranchisement is nonpunitive. *Id.*

377. *Davis*, 133 U.S. at 347.

378. *Id.* at 341–43.

law.[379] The Court pointed to the fact that the relevant criminal statute limited the offenses of bigamy and polygamy to the moment at which the plural marriage occurred.[380] In contrast, the voter eligibility statute applied to the continuing status of plural marriage, which was not a criminal offense.[381] The Court reasoned, therefore, that the intent behind the statute was not punitive, given that it did not relate to any criminal act, and therefore the sole purpose was to ascertain who should be qualified to vote.[382]

Even if historical evidence did not point to the conclusion that penal disenfranchisement was seen as punitive,[383] evidence of such intent can also be discerned from the government's decision to require a link between the practice and a conviction for a crime. In ascertaining whether a purportedly "collateral" consequence constitutes punishment in other contexts, the Court has considered whether its imposition is dependent on a conviction—suggesting it is punitive—or simply on a particular type of conduct that can be proved up by a conviction as well as other forms of evidence—suggesting the consequence is merely regulatory.[384] A broad reading of the voter eligibility statutes in some jurisdictions could suggest that conviction is but one form of evidence—along with youth or mental incapacity, for example—showing that a would-be voter is not fit to vote.[385] The relevant question, however, is not whether other characteristics may disqualify a person from voting but whether specific conduct can be proven in more than one way. For example, Alabama's law does not allow other forms of evidence that a person committed a burglary to result in a loss of voter eligibility, but a

379. *Murphy*, 114 U.S. at 42–44.

380. *Id.* at 43.

381. *Id.*

382. *Id.*

383. *Cf.* JON D. MICHAELS, CONSTITUTIONAL COUP: PRIVATIZATION'S THREAT TO THE AMERICAN REPUBLIC 23–38 (2017) (arguing that historical arguments may be inapposite due to intervening cultural changes).

384. Hawker v. New York, 170 U.S. 189, 196 (1898) ("The vital matter is not the conviction, but the violation of the law."); *see also* Kansas v. Hendricks, 521 U.S. 346, 362 (1997) (holding that indefinite civil commitment for sex offenders was not sufficiently punitive to trigger the double jeopardy or ex post facto clauses because the fact of a conviction was unnecessary to make the requisite showing of mental abnormality); Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168 (1963) (considering whether "the behavior to which it applies is already a crime"); Gabriel J. Chin, *Are Collateral Sanctions Premised on Conduct or Conviction?: The Case of Abortion Doctors*, 30 FORDHAM URB. L.J. 1685, 1686 (2003) ("[T]he single most important piece of evidence in the determination of whether a sanction is criminal or civil is whether the sanction is imposed based on conviction or conduct.").

385. *See* Washington v. State, 75 Ala. 582, 584–85 (1884) (casting a conviction as one of several potential qualifiers along with mental conditions and gender); *see, e.g.*, KY. CONST. § 145 (disqualifying people upon conviction of certain crimes as well as denying eligibility to vote to "idiots and insane persons").

conviction for burglary necessarily and automatically triggers penal disenfranchisement.[386] Thus it is so "enmeshed" with the government's punitive response as to signify its use as punishment.[387] That the government in each jurisdiction subjects people to disenfranchisement only upon conviction of a disenfranchising offense—and not while awaiting trial—further cements its status as punitive. Even while subject to pretrial detention, people charged with but not yet convicted of a disenfranchising crime cannot be subject to disenfranchisement[388] consistent with the fact that they are not yet eligible for punishment. To be sure, wealth-based penal disenfranchisement makes for an uneasy fit into this consideration, because it is imposed in response to nonpayment. Yet, it can only occur if penal disenfranchisement was imposed in the first instance, which necessitates a conviction.[389]

Relatedly, the Court has considered the relationship between the penalty and a finding of scienter.[390] At first glance, a nonwillful failure to pay would not fit the bill. The Court, however, appears to consider this factor as weighing in support of punitive intent where the same type of penalty is imposed for both willful and nonwillful behavior.

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386. ALA. CODE § 17.3-30.1(c)(41) (2018).

387. *See* Padilla v. Kentucky, 559 U.S. 356, 365–66 (2010) (declining to answer the question of whether, to be effective, counsel must advise clients of collateral consequences by determining that deportation—the consequence at issue—constituted a direct punishment because immigration was "enmeshed" with the criminal justice system and deportation was "nearly . . . automatic" upon conviction); *see also* Carafas v. LaValle, 391 U.S. 234, 237–38 (1968) (noting that penal disenfranchisement "flow[s] from" a conviction in determining that the case was not moot despite satisfaction of the term of imprisonment); Chin, *supra* note 29, at 1828 (regarding the automatic nature of deportation).

388. *See, e.g.*, O'Brien v. Skinner, 414 U.S. 524 (1974) (holding that denying absentee ballots for voting to pretrial detainees in jails within their counties of residence, but not those in jails located outside of their residences, violated equal protection); Mays v. Husted, No. 2:18-cv-01376-MHW-CMV, slip op. at 2 (S.D. Ohio Nov. 6, 2018) (granting temporary restraining order requiring Ohio Secretary of State Jon Husted to provide absentee ballots to the named plaintiffs at the jail in which they were detained, but denying the motion as it applied to all others similarly situated only because it would be "impractical, if not logistically impossible" to grant class-wide relief on election day); Murphree v. Winter, 589 F. Supp. 374 (1984) (S.D. Miss. 1984) (certifying a class of pretrial detainees and postconviction detainees convicted of nondisenfranchising crimes but denied an opportunity to vote during incarceration); Arlee v. Lucas, 222 N.W.2d 233 (Mich. Ct. App. 1974) (holding that statute restricting people incarcerated pretrial from voting violated equal protection); Emery v. State, 580 P.2d 445, 448 (Mont. 1978) (distinguishing between the state's restriction on voting for those convicted of disenfranchising offenses and those in pretrial detention). Though people in pretrial detention, as well as those incarcerated for nondisenfranchising crimes, retain the right to vote, the ability to register and vote during a period of incarceration may be stymied by jailers who refuse to allow access to organizations assisting with registration or at jails that do not have mechanisms in place to allow for registration or voting. *See Mays*, slip op. at 1–2; Margaret Barthel, *Getting Out the Vote From the County Jail*, ATLANTIC (Nov. 4, 2018), https://www.theatlantic.com/politics/archive/2018/11/organizers-fight-turn-out-vote-county-jails/574783/ [https://perma.cc/PXU4-68WR].

389. *See supra* note 12 and accompanying text.

390. Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168 (1963).

In one of the two cases the Court has pointed to for the relevance of this consideration, the behavior at issue was misstating the value of imported goods.[391] Even though it had been determined that the importer's misstatement was not willful, the significant financial penalty imposed upon him was akin to the financial penalties imposed for a fraudulent misstatement, and so constituted punishment.[392] Here, the penalties are identical; whether a person has the means to pay but chooses not to, or does not pay due to inability, he remains disenfranchised regardless. Further, expanding the scope of this consideration beyond wealth-based penal disenfranchisement to penal disenfranchisement generally, one finds a direct scienter requirement, as the imposition of penal disenfranchisement is limited to felonies and, in some jurisdictions, a subset of misdemeanors, many of which require a finding of scienter.[393] For those disenfranchising offenses that do not require scienter, the penalty imposed is identical to those that do: a loss of the vote.

The severity of the deprivation at issue is also indicative of punitive intent as it suggests a desire to meet either the utilitarian or retributive aims of punishment, another of the Court's considerations.[394] As noted above, penal disenfranchisement has historically been understood to satisfy both utilitarian and retributive goals.[395] This is not to say that penal disenfranchisement actually serves the goals of punishment well. Pamela Karlan has convincingly argued that penal disenfranchisement fails to meet the utilitarian aims of deterrence because it is not clear that voters are aware that they will lose the right to vote prior to committing a crime, of incapacitation because at best it only incapacitates the very rare offense of voting fraud, or of rehabilitation because penal disenfranchisement can undermine the goal of restoring a person with a conviction to the community.[396] Similarly, several scholars have noted that penal disenfranchisement is—in at least the vast majority of cases involving low-level felonies, misdemeanors, and crimes unrelated to voting—

391. Helwig v. United States, 188 U.S. 605, 606–08 (1903); *see also Mendoza-Martinez*, 372 U.S. at 168 n.24 (relying on *Helwig* as establishing the scienter factor).

392. *Helwig*, 188 U.S. at 611–13.

393. *See supra* note 12.

394. *Mendoza-Martinez*, 372 U.S. at 168; *see also* United States v. Constantine, 296 U.S. 287, 295 (1935) (considering whether a liquor assessment constituted a tax or punishment and holding that the fact that the assessment was significantly greater than other taxes and that it was conditioned on the commission of a crime was evidence of a desire to deter).

395. *See supra* note 375 and accompanying text.

396. Karlan, *supra* note 20, at 1166–67; *see also infra* note 480 and accompanying text (regarding evidence that restoring the right to vote is rehabilitative).

unduly retributive[397] because it constitutes a significant loss in which the person is "severed from the body politic and condemned to the lowest form of citizenship."[398] It is not, however, the effectiveness of the sanction, but instead the severity of the loss of the right to vote that suggests a desire to punish.[399]

Further, the fact that penal disenfranchisement is applied without requiring a nexus between the underlying offense and the risk of a specific, future public harm also evinces punitive intent.[400] For

397. For arguments that penal disenfranchisement undermines retributive aims of punishment because states lump all felonies together regardless of seriousness, see, for example, Ewald, *supra* note 287, at 1103–04 (positing that the application of disenfranchisement for a drug offense and for a homicide suggests that its use as to the former would be disproportionate); Fletcher, *supra* note 56, at 1896 ("These measures could hardly be retributive, for they stand in clear disproportion to the gravity of the offenses that trigger their application . . . ."); Amy Heath, *Cruel and Unusual Punishment: Denying Ex-Felons the Right to Vote After Serving Their Sentences*, 25 AM. U. J. GENDER SOC. POL'Y & L. 327, 350–51 (2017) ("While crimes like murder or rape seem to justify a complete denial of voting rights, crimes like possession of controlled substances or other drug related felonies are small in comparison and disproportionate to the punishment of disenfranchisement."); Karlan, *supra* note 20, at 1167 ("When retribution is the sole function of a criminal punishment, proportionality analysis necessarily focuses on the gravity of Defendant's conduct . . . . A categorical disenfranchisement of all ex-offenders convicted of a felony lumps together crimes of vastly different gravity."); Susan E. Marquardt, *Deprivation of a Felon's Right to Vote: Constitutional Concerns, Policy Issues, and Suggested Reform for Felony Disenfranchisement Law*, 82 U. DET. MERCY L. REV. 279, 296–301 (2005) ("That there may be a lack of proportionality in punishment when felony disenfranchisement has been treated as a collateral consequence of incarceration is a concern echoed by adversaries of felony disenfranchisement."); and Uggen et al., *supra* note 375, at 310 ("Felon disenfranchisement is retributive because the denial of voting rights exacts some degree of vengeance from felons. The blanket disenfranchisement of all people convicted of felonies, however, calls into question the proportionality of the punishment."). *See also* Clegg, *supra* note 288, at 174–75 (arguing in favor of penal disenfranchisement but conceding that policies should reflect offense seriousness).

398. McLaughlin v. City of Canton, 947 F. Supp. 954, 971 (S.D. Miss. 1995).

399. *See supra* note 394 and accompanying text.

400. *See* Ball v. United States, 470 U.S. 856, 864–65 (1985) (treating generally applied collateral consequences without a nexus to the offense of conviction as "impermissible punishment" stemming from a conviction obtained in violation of double jeopardy even if the underlying term of imprisonment was completely overlapped by a concurrent sentence on a separate, valid conviction); Lewis v. United States, 445 U.S. 55, 66 (1980) (upholding the constitutionality of a firearm restriction for people convicted of violent felonies); De Veau v. Braisted, 363 U.S. 144, 159 (1960) (plurality opinion) (upholding occupational licensing restrictions where the underlying offense was related to the relevant profession); *see also* Baldwin v. New York, 399 U.S. 66, 69–70 & n.8 (1970) (plurality opinion) (relying solely on length of term of incarceration to establish jury trial rights but describing generally applied collateral consequences, including penal disenfranchisement, as a component of sentence severity that makes felony convictions more punitive than misdemeanor convictions). In *Lewis*, the Court noted that penal disenfranchisement was a constitutional punishment per *Ramirez*. 445 U.S. at 66. In doing so, however, it did not suggest that penal disenfranchisement was nonpunitive but rather that it was a comparatively more fundamental interest than firearm ownership. *Id.* For an argument that the Court has responded to the collective nature of a wide array of collateral sanctions in concluding that they are punitive, see Chin, *supra* note 29. *See also* Andrew von Hirsch & Martin Wasik, *Civil Disqualifications Attending Conviction: A Suggested Conceptual Framework*, 56 CAMBRIDGE L.J. 599, 601, 605–11 (1997) (arguing that collateral consequences of conviction do not constitute punishment if they amount to targeted risk prevention, but that voter disenfranchisement should

example, the Court has considered whether completion of a term of incarceration renders a habeas petition moot, repeatedly finding that generally applicable collateral consequences,[401] including penal disenfranchisement,[402] are sufficiently punitive to constitute a case and controversy. The crimes that trigger disenfranchisement in the jurisdictions at issue are vast, covering all felonies (and in some cases misdemeanors) or a specific subset of offenses that may include, but are in no way limited to, election law violations.[403] Likewise, wealth-based penal disenfranchisement is in response to nonpayment, which has no connection to a future risk of voting fraud. In either case, the failure to target penal disenfranchisement to a future risk with a close nexus to the triggering offense[404] suggests that it operates as a general condemnation of and punishment for the underlying crime.

Another consideration weighing in favor of understanding penal disenfranchisement as a form of punishment is that the alternative explanations offered for the practice lack rationality or are otherwise improper,[405] leaving punishment as the only viable justification.[406] The typical arguments in support of penal disenfranchisement have been widely discredited as irrational or improper. The argument that people convicted of crimes are also likely to commit voter fraud may have more purchase if a nexus existed with the crime of conviction. But beyond evidence suggesting that people may accidentally vote when disenfranchised due to confusion about a jurisdiction's laws,[407] there is otherwise a dearth of evidence suggesting that a person convicted of a crime unrelated to elections is more likely than anyone else to engage in fraudulent voting.[408] Similarly, the social contract theory, which

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be eliminated because it is "not apparent how or why permitting prisoners to vote would undermine the democratic process").

401. Daniels v. United States, 532 U.S. 374, 379–80 (2001); Pennsylvania v. Mimms, 434 U.S. 106, 108 n.3 (1977); Street v. New York, 394 U.S. 576, 579 n.3 (1969); Sibron v. New York, 392 U.S. 40, 54–58 (1968).

402. Spencer v. Kemna, 523 U.S. 1, 8–9 (1998); North Carolina v. Rice, 404 U.S. 244, 247 & n.1 (1971); *Carafas*, 391 U.S. at 237–38; Fiswick v. United States, 329 U.S. 211, 222 & n.10 (1946).

403. *See supra* note 12.

404. For critiques of the lack of nexus between disenfranchising crimes and the likelihood of future election offenses, see *supra* notes 407–410 and accompanying text.

405. *See* Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168–69 (1963) (considering "whether an alternative that may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose").

406. *See generally* Karlan, *supra* note 20.

407. *See supra* notes 17, 64, 89 and accompanying text.

408. *See* Dillenburg v. Kramer, 469 F.2d 1222, 1224–25 (9th Cir. 1972) ("Few decisions have penetrated the disenfranchisement classification to ascertain whether the offenses that restrict or destroy voting rights have anything to do with the integrity of the electoral process . . . ."); Itzkowitz & Oldak, *supra* note 352, at 739 (stating that even if there was a correlation between nonelection offenses and voter fraud, the criminal justice system is premised on proving new guilt

posits that a person who breaks the law forfeits the right to vote, may be on firmer footing if penal disenfranchisement applied to a narrow set of particularly serious crimes for a limited time,[409] but becomes harder to justify when people are excluded from democratic participation for a wide range of felonies or even, in some states, misdemeanors.[410] Another justification for penal disenfranchisement—that it preserves the purity of the ballot box by preventing the votes of people with felony convictions from tainting the votes of others or the integrity of those elected—has been subject to heavy criticism and described as at best "mystical."[411] Likewise, the idea that penal disenfranchisement aids in the regulation of elections by preventing people convicted of crimes from creating a voting block to eliminate the criminal law is also irrational.[412] It is factually problematic given evidence that many people with past convictions may actually support tough criminal laws.[413] Further, voters in such a block would have difficulty differentiating between Republican and Democratic candidates, given that both parties have a history of touting "tough on crime" rhetoric[414] and that members of both have begun pushing for criminal justice reforms in recent years.[415] A felon voting block is also implausible given how unlikely it is that any group of people could convince a majority of the electorate to vote for

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beyond a reasonable doubt rather than imposing a punishment "in advance on a basis of probability").

409. Sigler, *supra* note 20, at 1740–44; *see also* Demleitner, *supra* note 375, at 759, 797–804 (arguing that the United States should adopt the German model of penal disenfranchisement, which applies only to a limited number of offenses, is time limited and must be imposed at sentencing at the discretion of the court, which rarely occurs).

410. *See supra* note 12 and accompanying text.

411. Fletcher, *supra* note 56, at 1899; *see* Dillenburg v. Kramer, 469 F.2d 1222, 1224–25 (9th Cir. 1972) (describing the purity argument as "quasi-metaphysical"); Griffin v. Pate, 884 N.W.2d 182, 208 (Iowa 2016) (Hecht, J., dissenting) (describing the purity argument as "fanciful at best"); Arlee v. Lucas, 222 N.W.2d 233, 237 (Mich. App. 1974) (remarking that the purity argument is "a bit disturbing" because "[i]t is hard to conceive how the State can possibly justify denying any person his right to vote on the ground that his vote might afford a state official the opportunity to abuse his position of authority"); Itzkowitz & Oldak, *supra* note 352, at 737 (remarking that it is "absurd to suggest that, like the proverbial bad apple, contamination flowing from [the vote of a person who committed a crime] can literally seep throughout the ballot box").

412. *See supra* note 288 and accompanying text.

413. *See* MANZA & UGGEN, *supra* note 20, at 143–44 (documenting political beliefs of people with criminal convictions, including support for tougher drug and child pornography laws and the need for prisons); *cf.* James M. Binnall, *Convicts in Court: Felonious Lawyers Make a Case for Including Convicted Felons in the Jury Pool*, 73 ALB. L. REV. 1379, 1403 (2010) (documenting cases in which people with felony convictions returned guilty verdicts during jury service).

414. Ewald, *supra* note 288, at 140.

415. *See, e.g.*, Alex Swoyer, *Bipartisan Support for Criminal Justice Reform Builds in Senate*, WASH. TIMES (June 26, 2018), https://www.washingtontimes.com/news/2018/jun/26/bipartisan-support-criminal-justice-reform-builds/ [https://perma.cc/CLD4-ANXS].

candidates willing to fundamentally disrupt the criminal law.[416] And finally, limiting the vote based on a possible policy choice constitutes impermissible viewpoint discrimination,[417] which is antithetical to the notion that democracy is best served when policy choices are subject to a plurality of ideas.[418]

Though not typically presented as a justification for penal disenfranchisement, perhaps the strongest potential argument that the practice is rational is that lawmakers may favor it because of the administrative complications and expense of allowing people to vote while incarcerated. In particular, administrative difficulties may arise in facilities in which the population includes both people who have and who have not been disenfranchised. There are three reasons, however, why penal disenfranchisement may actually be more administratively and fiscally burdensome than its elimination. First, jail and prison facilities across the country already provide opportunities to vote for people awaiting trial or convicted of nondisenfranchising crimes, suggesting that doing so is administratively feasible.[419] Second, many people subject to penal disenfranchisement are not incarcerated and so such concerns are irrelevant as to that population.[420] Third, the use of penal disenfranchisement carries with it significant administrative burdens and expenses caused by confusion among elections and corrections officials regarding reenfranchisement rules and by the sheer number of governmental actors needed to maintain systems for determining whether any would-be voter does or does not remain disenfranchised.[421]

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416. *See* Ewald, *supra* note 288, at 115–16, 124–26 (explaining the argument that felons will vote together to weaken criminal law, then countering with an explanation of why that would be "wholly unimaginable"); Mauer, *supra* note 64, at 249–50 (demonstrating the unlikelihood that a group of ex-felons could not only elect a pro-felon candidate but also get the candidate to convince the legislature to pass less punitive criminal laws).

417. *See* Karlan, *supra* note 20, at 1152–53 (linking penal disenfranchisement to the Court's rejection of restrictions based on the potential content of one's vote); *see also* Adam Winkler, *Expressive Voting*, 68 N.Y.U. L. REV. 330, 355–58 (1993) (describing *Ramirez* as breaking from the Court's professed preclusion against content-based restrictions on voting).

418. *See* Ewald, *supra* note 288, at 131 ("It would be a sick and stagnant democracy in which the majority simply disenfranchised those who preferred different policies."); *see also* Richard A. Bierschbach, *Fragmentation and Democracy in the Constitutional Law of Punishment*, 111 NW. U. L. REV. 1437, 1438–39, 1442, 1444 (2017) (regarding the particular need to ensure that a wide range of stakeholders with varying opinions about criminal justice are necessary for a vibrant democratic process); Dorothy E. Roberts, *Democratizing Criminal Law as an Abolitionist Project*, 111 NW. U. L. REV. 1597, 1601–02 (2017) (regarding the diluting effect that penal disenfranchisement has on the power of African American communities to participate in elections). *See also supra* notes 287–299 and accompanying text (regarding the ways in which these considerations fail when applied to wealth-based penal disenfranchisement).

419. *See infra* note 476 and accompanying text.

420. *See, e.g., infra* Appendices B–E.

421. *See supra* notes 17, 64, 89 and accompanying text

A separate question the Court has considered is whether penal disenfranchisement constitutes an "affirmative disability or restraint."[422] The Court has, for example, treated exclusion from a profession triggered by past wrongful conduct to constitute an affirmative disability, and thus punishment,[423] as contrasted with a denial of a noncontractual government benefit for which a person does not qualify for reasons unrelated to past wrongdoing.[424] Penal disenfranchisement can occur only upon conviction for an offense, the quintessential example of wrongdoing.[425] Further, wealth-based penal disenfranchisement is tied to nonpayment, which the government treats as wrongdoing. The Court has made clear that for purposes of this consideration, wrongdoing need not involve a conviction, but is satisfied if the government is responding to a perceived wrongful act.[426] Therefore, both penal disenfranchisement generally and wealth-based penal disenfranchisement specifically are tied to perceived wrongdoing and, in either case, the practice precludes a person from the vote; it thus constitutes an affirmative disability or restraint.

A final factor the Court has looked to in assessing punitive intent is whether there is evidence that the practice involves an expression of

422. Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168 (1963).

423. United States v. Lovett, 328 U.S. 303, 316 (1946) (holding that precluding a person from government employment due to a congressional committee finding that the person was "guilty" of subversive activity and thus "unfit" for employment constituted punishment); *Ex Parte* Garland, 71 U.S. 333, 377 (1866) ("And exclusion from any of the professions or any of the ordinary avocations of life for past conduct can be regarded in no other light than as punishment for such conduct.").

424. Flemming v. Nestor, 363 U.S. 603, 617 (1960) (stating that a denial of old-age benefits to people who were no longer eligible as the result of deportation, where the deportation law was not adopted in response to a concern regarding wrongdoing, did not constitute an affirmative disability or restraint).

425. *See supra* note 12 and accompanying text.

426. *Garland*, 71 U.S. at 334–37 (holding that an oath stating that a person had not engaged in hostilities against the United States during the Civil War constituted punishment because it was a response to behavior Congress treated as wrongful, even though the person in question had not been convicted of any offense); *see also Mendoza-Martinez*, 372 U.S. at 168, n.22 (citing *Garland* as an example of a case employing the affirmative disability or restraint consideration).

blame for wrongdoing[427] that stigmatizes the would-be voter.[428] This factor is perhaps the most ambiguous of the Court's considerations, as it has not clarified how to reconcile the inquiry with the fact that legislative bodies are made up of multiple actors who may have competing aims for supporting a particular practice and involve a membership that changes over time. For example, as a theoretical matter, blame suggests a self-consciousness on the part of a lawmaker,[429] and though the intent to blame is evident for some lawmakers,[430] for at least some others, support for penal disenfranchisement may stem not from a desire to blame but from an unfamiliarity with the interplay between the various laws identified in Part I.[431] The Court does appear, however, to be concerned with the stigmatizing effect of the punishment,[432] which could exist even if a

427. The Court has focused on the link to wrongdoing, for example, in distinguishing between punishment and taxes. *See, e.g.*, Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 564–68 (2012) (holding that the Affordable Care Act penalties constituted taxes rather than punishments because they were not linked to unlawful acts); United States v. Sanchez, 340 U.S. 42, 45 (1950) (holding that a tax was not a penalty because it was not conditioned on the commission of a crime); United States v. Constantine, 296 U.S. 287, 295 (1935) (holding that a tax constituted a punishment in part because it was triggered by criminal conduct); United States v. La Franca, 282 U.S. 568, 572 (1931) ("[A] 'penalty,' as the word is here used, is an exaction imposed by statute as punishment for an unlawful act."); Lipke v. Lederer, 259 U.S. 557, 561–62 (1922) (noting that the mere use of the word "tax" in a criminal statute is not conclusive); Child Labor Tax Case, 259 U.S. 20, 38 (1922) ("[T]here comes a time . . . [when a] so-called tax . . . loses its character as such and becomes a mere penalty, with the characteristics of regulation and punishment."); *see also* Joel Feinberg, *The Expressive Function of Punishment*, *in* 4 PHILOSOPHY OF LAW: CRIMES AND PUNISHMENTS 190 (Jules Coleman ed. 1994) (positing that to constitute punishment the penalty must indicate "disapproval and reprobation"); Steiker, *supra* note 29, at 807 (defining punishment for the purposes of assessing constitutional protection as involving blaming by the state and noting that such moral condemnation can cause harm to a person's self-conception).

428. *See, e.g.*, Ball v. United States, 470 U.S. 856, 865 (1985) (noting that a second conviction "certainly carries the societal stigma accompanying any criminal conviction"); Weems v. United States, 217 U.S. 349, 366 (1910) (describing a set of postincarceration punishments, including loss of the vote, as "circumstance[s] of degradation"); *see also* Dan Markel et al., *Beyond Experience: Getting Retributive Justice Right*, 99 CALIF. L. REV. 605, 619–21 (2011) (arguing that collateral consequences like penal disenfranchisement, which are "the product of lawful and intended authorized state action," constitute state-authorized punishment because they convey a "continuing . . . message of condemnation" and are distinguished from regulations that are directly linked to public safety such as firearm restrictions for violent felons or occupational licensing stemming from convictions relating directly to the nature of the employment).

429. *See, e.g.*, Steiker, *supra* note 29, at 802 (explaining that "[t]he idea of 'punishment for an offense' implies that" an authority has not only established what constitutes a crime but also how a person who violates that law should be treated).

430. *See, e.g.*, Jerry Mitchell, *Lawsuit: Mississippi Constitution Still Disenfranchising Thousands*, CLARION LEDGER (Mar. 27, 2018), https://www.clarionledger.com/story/news/2018/03/27/mississippi-still-disenfranchising-thousands/458068002/ [https://perma.cc/EAU5-7J5J] ("There is a price to pay for violating the laws of the state of Mississippi, particularly a felony . . . . And one of them is that you lose your right to vote unless it is restored by the Mississippi Legislature. . . . I wouldn't want to change it." (quoting Mississippi Governor Phil Bryant)).

431. *See supra* note 55 and accompanying text.

432. *See supra* note 428 and accompanying text.

given lawmaker did not intend penal disenfranchisement generally or wealth-based penal disenfranchisement specifically to operate as an expression of blame.

That stigmatization is reflected in the experiences of people who continue to be disenfranchised as contrasted against those who have been restored to the vote. Once seen as a privilege that the government could restrict to a limited few, voting is now understood as a fundamental right central to democratic participation.[433] Unsurprisingly then, for those disenfranchised due to criminal debt, the sense of social exclusion and stigmatization[434] is pronounced. They report feeling detached from the broader community,[435] like "less of an American,"[436] and that penal disenfranchisement "is one piece of a much larger feeling of not being permitted to participate in society that [one is] supposed to be adjusting to again."[437] In sharp contrast, people who have been reenfranchised report that the opportunity to vote made them feel linked to and invested in the community[438] and hopeful about

433. *See* John Ghaelian, *Restoring the Vote: Former Felons, International Law, and the Eighth Amendment*, 40 HASTINGS CONST. L.Q. 757, 776–77 (2013) (critiquing the *Trop* plurality for relying on *Davis* and *Murphy* because they were decided when suffrage was seen as subject to unlimited government regulation rather than a practically universal right of adults, and thus were anachronistic); Karlan, *supra* note 20, at 1150–55 (documenting the shift to understanding voting as a fundamental right); Pamela A. Wilkins, *The Mark of Cain: Disenfranchised Felons and the Constitutional No Man's Land*, 56 SYRACUSE L. REV. 85, 103–06 (2005) (same).

434. *See* Ewald, *supra* note 287, at 1113–14 (regarding the stigmatizing effect of penal disenfranchisement); Itzkowitz & Oldak, *supra* note 352, at 732 (same); *see also* Griffin v. Pate, 884 N.W.2d 182, 209 (Iowa 2016) (Hecht, J., dissenting) ("Disqualification . . . stigmatizes . . . .").

435. *See, e.g.*, ACLU, IN FOR A PENNY: THE RISE OF AMERICA'S NEW DEBTORS' PRISONS 78 (Oct. 2010), http://www.aclu.org/files/assets/InForAPenny_web.pdf [https://perma.cc/YU7J-2J4M].

436. KATHERINE A. BECKETT ET AL., WASH. STATE MINORITY & JUSTICE COMM'N, THE ASSESSMENT AND CONSEQUENCES OF LEGAL FINANCIAL OBLIGATIONS IN WASHINGTON STATE 61 (Aug. 2008), http://www.courts.wa.gov/committee/pdf/2008LFO_report.pdf [https://perma.cc/DU8R-EZXP].

437. *Id.*; *see also, e.g.*, *Civic Participation and Rehabilitation Act Hearing, supra* note 353, at 41 (statement of Hilary O. Shelton, Dir. to the Wash. Bureau of the NAACP) (quoting Joe Loya, a person disenfranchised as a result of a conviction: "[W]ithout a vote, a voice, I am a ghost inhabiting a citizen's space."); Daniel A. Gross, *What It Felt Like for a Florida Man with a Felony to Regain His Voting Rights*, NEW YORKER (Nov. 7, 2018), https://www.newyorker.com/news/as-told-to/what-it-felt-like-for-a-florida-man-with-a-felony-to-regain-his-voting-rights [https://perma.cc/2ZL2-YNZW] (quoting Steve Phalen, whose right to vote was restored due to the passage of an amendment altering Florida's reenfranchisement laws: "Not being able to cast a vote is something that feels like my civic identity, my identity as a citizen, is just completely erased. Made irrelevant. It's like, you're never going to fully be a part of this country anymore.").

438. BRENNAN CTR. FOR JUST., MY FIRST VOTE 6 (2009) [hereinafter BRENNAN CTR., MY FIRST VOTE], http://www.brennancenter.org/sites/default/files/legacy/Democracy/MyFirst%20Vote.pdf [https://perma.cc/MJ5P-PAAF] (quoting Deirdre Wilson, Santa Cruz, CA:

> As I ran my pen back and forth over the small square space for the candidates I chose to vote for, I felt responsible and powerful; responsible as a member of our society and powerful to have a say in the process. . . . My vote is equal to everyone else's and it connected me to the rest of the United States . . . .);

their ability to be productive and law-abiding members of society.[439] As one woman explained:

> I've been battling substance abuse for thirty years and have been in and out of prison all my life. But I've been out, and clean, for more than four years. My life has completely changed. And on [Election Day], with millions of Americans, I had a say about what happens in our country. There were tears in my eyes as I waited to vote. I felt like I was finally a productive member of society. I've never before felt like I could make a difference in terms of what happens around me. But I walked out of the polling place on Election Day feeling like I mattered, that I made a difference. I realized how far I've come.[440]

In short, evidence of the government's punitive intent in employing penal disenfranchisement can be found in the manner in which it is categorized, its historical link to punishment, its necessary connection to a conviction, its identical application to those who willfully fail to pay and those who are unable to do so, the severity of the deprivation, the lack of nexus between it and a specific risk of public harm, the absence of a rational and proper justification for the practice, its operation as an affirmative disability or restraint, and its stigmatizing effect. A finding of punitive intent on these grounds would mean that wealth-based penal disenfranchisement falls within the *Bearden* line's ambit.

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id. at 19 (quoting Leroy Clark, Fort Lauderdale, Florida: "When you can't [vote], you create a person who doesn't have a character anymore. But once you vote, you change that. I have a voice again."); *id.* at 20 (quoting Maurice Pinkston, Brooklyn, New York: "I was overjoyed when I got my voter registration card. I was a real citizen! [Election Day] felt like my birthday.").

439. *Id.* at 5 (quoting Terry Sallis, Newton, Iowa:

> The sense of hopelessness and questioning of your self-worth, which goes hand in hand with the loss of citizenship, seemed to vanish once I had voted. . . . It instills a sense of hope and belief that if you do the right thing, society is forgiving and there will be opportunities to succeed.);

id. at 10 (quoting Koren Carbuccia, Pawtucket, Rhode Island: "Voting is a way of being a responsible, law abiding citizen.").

440. *Id.* at 2 (quoting Linda Steele, New York, New York); *see also* ERIKA WOOD, BRENNAN CTR. FOR JUSTICE, RESTORING THE RIGHT TO VOTE 8–9 (2009), https://www.brennancenter.org/sites/default/files/legacy/Democracy/Restoring%20the%20Right%20to%20Vote.pdf [https://perma.cc/JVB6-JXD6] (quoting David Waller, Maryland:

> According to the state of Maryland I was not a full citizen. In my eyes, I was not a full citizen. . . . Today all that changes. When I walk into the Board of Elections and hand in my signed voter registration, I will no longer be fragmented from society. I'll be a father, grandfather, uncle, and friend who is able to give more of a hand in creating a better place to live, work, and go to school.);

id. at 11–12 (quoting law enforcement officials arguing that restoration of voting rights promotes successful reentry and rehabilitation).

D. Imposing a Flat Ban on Punishment of Financial Condition Where Alternatives Exist

With the creation of a distinctive test that applies if penal disenfranchisement constitutes punishment, the constitutionality of continued reenfranchisement or the reapplication of disenfranchisement for a person in relation to the nonpayment of economic sanctions would depend on the two questions of fact called for by the *Bearden* test: whether the person who would be subject to penal disenfranchisement has made bona fide efforts to pay, and if so, whether alternative responses to the nonpayment could satisfy the government's penal interest in punishing the underlying offense.[441] Though both questions are rightly the subject of a deeper inquiry, the following provides a first cut at understanding how the *Bearden* test, as explicated above, would apply to a challenge arguing that a person has been subject to wealth-based penal disenfranchisement.

1. Assessment of Financial Condition

The first question—whether the would-be voter has made bona fide efforts to pay but remains unable to do so—is critical because the constitutional norms against unfair treatment in criminal justice systems due to a person's financial condition, which underly the *Bearden* line, cannot be realized if the determination of one's ability to pay is too narrowly circumscribed. Despite its importance, the *Bearden* Court gave little insight into what should constitute evidence of bona fide efforts to pay, other than to reference the two ways in which Mr. Bearden had sought the means to pay—seeking employment and borrowing money from his parents.[442] The Court also suggested that unsupported conclusions about job availability would be an insufficient basis to sidestep the *Bearden* test, rejecting the trial court's vague statement at the probation revocation hearing regarding "the availability of odd-jobs such as lawn-mowing."[443] In light of Mr. Bearden's testimony and that of his wife regarding his unsuccessful attempts to find employment, the Court explained that the record

441. *See supra* notes 172–179 and accompanying text.

442. Bearden v. Georgia, 461 U.S. 660, 662–63 (1983) (describing Mr. Bearden's inability to find work and that he had borrowed money from his parents); *id.* at 668 (noting Mr. Bearden's "bona fide efforts to seek employment or borrow money"); *id.* at 671 (noting Mr. Bearden's "bona fide efforts to find a job").

443. *Id.* at 673.

"would not justify" a determination that he had not made bona fide efforts to pay.[444]

To ensure that the constitutional norms espoused by the Court are meaningful, any system that requires an ability-to-pay determination must be carefully designed. In addition to disallowing determinations that a person failed to take advantage of employment opportunities without evidence in the record that such opportunities were, in fact, available,[445] a system for assessing financial capacity must preclude wide-ranging, subjective determinations that would allow decisionmakers to rely on personal preferences about such things as attire or even racial bias when making the determination, because it presents a significant risk that a person with no meaningful ability to pay will be deemed to have willfully refused to do so.[446] As I have examined in previous work, however, it is possible to design systems focused on objective criteria such as income from employment or public benefits or the lack thereof, living expenses relating to housing and other needs for the individual and her dependents, and other identifiable expenses such as medical costs or student debt.[447] In short, systems can be designed to fairly and accurately determine a person's financial condition.[448]

2. Identification of Alternatives to Wealth-Based Penal Disenfranchisement

Once a determination is made that a person's failure to pay was due to inability, the question of the constitutionality of wealth-based penal disenfranchisement will depend on whether an alternative response could address the government's interest in imposing punishment for the disenfranchising offense. In *Williams*, *Tate*, and *Bearden*, the Court provided a nonexhaustive list of possible alternative sanctions—the use of reasonable installment plans, reduction of the economic sanctions in recognition of their regressive qualities, and substitution of community service—which suggest that the government would be hard pressed to show that no suitable alternative was feasible

444. *Id.* at 673–74; *see also supra* notes 184–185 and accompanying text.

445. *See supra* note 444 and accompanying text.

446. Andrea Marsh & Emily Gerrick, *Why Motive Matters: Designing Effective Policy Responses to Modern Debtors' Prisons*, 34 YALE L. & POL'Y REV. 93, 102, 117–19 (2015).

447. *See* Colgan, *supra* note 62, at 103.

448. *See id.* For an argument that states may be required to adopt ability-to-pay mechanisms to assess the constitutionality of an economic sanction under the excessive fines clause, see Colgan, *supra* note 25, at Part II.

for most, if not all, offenses.[449] The following considers those suggestions as they relate to the feasibility of alternatives in the context of both independent payment requirements and requirements related to parole or probation conditions.

As detailed in Part I, one form of wealth-based penal disenfranchisement arises from an independent payment requirement.[450] Whether that requirement be for full or partial payment, the most straightforward way of ensuring wealth-based penal disenfranchisement does not occur is by disentangling payment of economic sanctions from reenfranchisement entirely by eliminating the requirement. Doing so still allows courts to impose punishments deemed suitable by the legislature. Not only may lawmakers continue to impose economic sanctions in the first instance, they may also impose penal disenfranchisement. In doing so they may require the completion of conditions other than payment of economic sanctions, such as fulfilment of a term of incarceration or a delay of a set period of time thereafter. In either case, the government can satisfy its interest in imposing punishment for the underlying offense while eliminating the risk that an independent payment requirement will result in the additional punishment of continued disenfranchisement due only to an inability to pay.

In addition to removing independent payment requirements entirely, lawmakers can employ the alternatives suggested by the Court,[451] which would allow for independent payment requirements combined with a robust system for determining a person's financial capacity. First, the government could reduce outstanding criminal debt to a payable amount so that the person may complete payment and become eligible to vote.[452] The debtor would still feel the "pinch on the purse" that the *Bearden* Court saw as responsive to the person's culpability as well as serving as a deterrent for further criminal activity and thus meeting the government's penal interests while also addressing the regressive qualities of economic sanctions[453] and avoiding the risk of wealth-based penal disenfranchisement. Second, if a reduction of criminal debt to an immediately payable amount could not satisfy the government's penal interests given the seriousness of the

449. *See Bearden*, 461 U.S. at 671–72; Tate v. Short, 401 U.S. 395, 399 (1971); Williams v. Illinois, 399 U.S. 235, 244 (1970).

450. *See supra* Section I.A.

451. *See supra* note 449 and accompanying text.

452. Bearden v. Georgia, 461 U.S. 660, 672 (1983); ABA, TEN GUIDELINES, *supra* note 17, at 1, 3, 7, 10 (Guidelines 1, 2, 4, & 6).

453. *Bearden*, 461 U.S. at 672 (quoting Williams v. Illinois, 399 U.S. 235, 265 (1983) (Harlan, J., concurring)).

underlying offense, the jurisdiction could allow for the use of reasonable payment plans combined with a system for provisional reenfranchisement.[454] These systems would need to be designed to avoid the types of problems seen in Iowa's, and potentially Washington's, provisional reenfranchisement systems.[455] For example, in designing the system, lawmakers should avoid requirements that mandate that a person be current on all payments to be eligible for provisional reenfranchisement because it may preclude people from voting eligibility due to an improperly high periodic-payment requirement or an unexpected change in circumstances resulting in an unavoidable missed payment.[456] It is important to note, however, that these approaches are unavailable to address wealth-based penal disenfranchisement stemming from federal or out-of-state convictions because the disenfranchising jurisdiction would have no ability to alter the sentence imposed.

Along with independent payment requirements, wealth-based penal disenfranchisement may occur as a result of parole and probation conditions requiring payment of economic sanctions.[457] As noted above, even if reenfranchisement did not require completion of parole or probation, and thus wealth-based penal disenfranchisement were not at stake, revocation or extension of such supervision for a nonwillful failure to pay economic sanctions would independently violate the *Bearden* test.[458] As a result, unlike independent payment requirements, disentangling reenfranchisement entirely from parole and probation would only solve a portion of the problem. As with independent payment requirements, however, parole- and probation-related payment requirements could be cured through the options of reducing economic sanctions to a payable amount or creating a system by which no additional punishment—including penal disenfranchisement—can be imposed for the nonwillful violation of a condition mandating payment. Of course, for such reforms to eliminate wealth-based penal disenfranchisement, a properly designed method of determining a person's financial condition is of central importance.

454. *Id.*; ABA, TEN GUIDELINES, *supra* note 17, at 1, 3, 7, 10 (Guidelines 1, 2, 4, & 6).

455. *See supra* notes 97–106 and accompanying text.

456. *Id.*

457. *See supra* Section I.B.

458. *See supra* notes 336–342 and accompanying text (discussing the direct application of the *Bearden* test to extensions or revocations of parole or probation).

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In short, the three steps required to effectively challenge wealth-based penal disenfranchisement under the test as articulated in *Bearden* appear to be met. In light of constitutional norms against the use of the government's prosecutorial power to price people out of fair treatment in criminal justice systems due to their financial condition, the *Bearden* line may be properly read as separate and distinct from the tiers of scrutiny. The *Bearden* test flatly prohibits the imposition of additional punishment unless no alternative could satisfy the government's interest in punishing the original offense. The history of the *Bearden* line's development further supports the conclusion that those norms, and thus that test, apply not only to deprivations of liberty but to any form of punishment, including a continuation or reimposition of penal disefranchisement. Because alternatives to these practices that would satisfy the government's penal aims exist, wealth-based penal disenfranchisement would violate the Fourteenth Amendment.

CONCLUSION

This Article demonstrates that the authorization of wealth-based penal disenfranchisement is far more widespread than commentators have assumed. A review of statutes, rules, procedures, and policies across the country make clear that people convicted of disenfranchising crimes in forty-eight states and the District of Columbia may be prohibited from regaining their right to vote until they can afford to pay the economic sanctions imposed against them. This Article also argues that *Bearden* provides a doctrinal intervention for eliminating systems that block people from reenfranchisement due solely to an inability to pay economic sanctions. In short, what this Article provides is a tool for promoting change through either legislative advocacy directed at dismantling the tangle of laws that result in wealth-based penal disenfranchisement or, where such advocacy is stymied, an argument for constitutionally mandated change.

Jurisdictions found to be engaging in wealth-based penal disenfranchisement could, however, simply eliminate opportunities for reenfranchisement altogether given that the constitutional claims investigated in this Article are available only because lawmakers have chosen to create a system for reenfranchisement that discriminates between people of means and those without.[459] There is some risk that lawmakers might take this option. While many states have seen a

459. *See supra* notes 238–248 and accompanying text.

relaxing of penal disenfranchisement laws in recent years,[460] lawmakers in other states have made reenfranchisement processes more onerous[461] and have even engaged in efforts to restrict access to voting overall.[462] Further, while some Republican candidates and pundits are finding it increasingly difficult to justify penal disenfranchisement,[463] others continue to support the practice upon the presumption, valid or not,[464] that reenfranchisement will favor

460. *See, e.g.*, MANZA & UGGEN, *supra* note 20, at 85 (listing Virginia as a state that "now routinely restores voting rights for increasing numbers of former felons" as well as Alabama as one that "recently streamlined its restoration process"); U.S. Comm'n on Civil Rights, *U.S. Commission on Civil Rights Public Briefing: Collateral Consequences: The Crossroads of Punishment, Redemption and the Effects on Communities*, YOUTUBE 1:51:57 (May 19, 2017), https://www.youtube.com/watch?v=MHveFxX9qek [https://perma.cc/GHQ9-GBSV] (testimony of Marc Mauer, Exec. Dir., The Sentencing Project) (noting that, over the last twenty years, a number of states have enacted reforms to penal disenfranchisement laws).

461. Cammett, *supra* note 20, at 376 (explaining that, in 2011, Governor Rick Scott repealed Florida's voting restoration procedure to require that even nonviolent offenders wait five years after serving their sentences to apply for the opportunity to restore their civil rights); Ghaelian, *supra* note 433, at 760 n.21 (identifying Iowa as a state whose governor rescinded an executive order easing requirements for reenfranchisement); Behrens, *supra* note 168, at 254–55 (observing that "a handful of states have adopted, or attempted to adopt, more restrictive felon disfranchisement laws in recent years"); Chung, *supra* note 95, at 2 (identifying Florida and Iowa as states involved in repealing decisions and orders restoring voting rights); *see also* Clegg et al., *supra* note 167, at 3–4 (regarding a voter initiative that amended the Massachusetts constitution to disenfranchise people who are currently incarcerated). For a discussion of the ebb and flow of disenfranchisement laws, see Uggen et al., *supra* note 375, at 309. *See also supra* note 95 and accompanying text.

462. *See New Voting Restrictions in America*, BRENNAN CTR. FOR JUST., https://www.brennancenter.org/new-voting-restrictions-america (last visited Sept. 10, 2018) [https://perma.cc/5V9G-4NJG] (describing how "state lawmakers nationwide started introducing hundreds of harsh measures making it harder to vote" after the 2010 election).

463. *Compare, e.g.*, MANZA & UGGEN, *supra* note 20, at 14–15 (quoting conservative commentator George Will in 2005 as expressing concern that people convicted of crimes would vote for Democratic candidates), *with* George F. Will, *There's No Good Reason to Stop Felons From Voting*, WASH. POST (Apr. 6, 2018), https://www.washingtonpost.com/opinions/theres-no-good-reason-to-stop-felons-from-voting/2018/04/06/88484076-3905-11e8-8fd2-49fe3c675a89_story.html?utm_term=.262567050191 [https://perma.cc/T3E9-MT62] (expressing support for eliminating penal disenfranchisement); *see also* Matt Ford, *The Strangest Political Attack Ad of 2017*, ATLANTIC (Oct. 24, 2017), https://www.theatlantic.com/politics/archive/2017/10/gillespie-criminal-justice-ad/543762/ [https://perma.cc/9AL8-FAFK] (describing an ad by Republican gubernatorial candidate Ed Gillespie that simultaneously attacked and supported penal reenfranchisement).

464. Studies have shown that penal disenfranchisement made a difference in a very small, albeit consequential, number of close races that favored Republican candidates, such as the Bush-Gore presidential election in 2000 and Mitch McConnell's senatorial win in 1984, but also that absent penal disenfranchisement, Richard Nixon may have prevailed over John F. Kennedy in 1960. MANZA & UGGEN, *supra* note 20, at 182–83, 192–93. Further, investigations of the political views of people who are currently or were formerly incarcerated also suggest that these potential voters have nuanced political opinions that do not necessarily sway left. *Id.* at 114–21, 137–80; Marc Meredith & Michael Morse, *Why Letting Ex-Felons Vote Probably Won't Swing Florida*, VOX (Nov. 2, 2018), https://www.vox.com/the-big-idea/2018/11/2/18049510/felon-voting-rights-amendment-4-florida [https://perma.cc/QM7R-QK3X]. The presumption that people who are reenfranchised will favor Democratic candidates is based largely on the fact that the criminal

Democratic candidates.[465]

Elimination of reenfranchisement opportunities, however, may have the unintended effect of reducing lawmakers' power in this arena as a constitutional matter. This Article began with the premise that the Court's decision to uphold penal disenfranchisement in *Richardson v. Ramirez* remains good law.[466] A decision by lawmakers seeking to entrench their own political power by entirely eliminating reenfranchisement in order to sidestep the Court's interest in cabining its use of the prosecutorial power may provide fodder for reexamining *Ramirez*. Such partisanship runs afoul of the Court's general prohibitions against viewpoint discrimination in voting,[467] cuts against the democratic principle that voting "is the most important legal right in a society philosophically devoted to liberty and self-governance,"[468] and implicates concerns the Court has expressed in the context of the excessive fines clause that the Constitution must guard against the use of economic sanctions in a manner that particularly targets politically vulnerable citizens.[469] The violation of so many constitutional norms may simply be a bridge too far.

There are reasons to believe that lawmakers will not head down this path, and may instead embrace the expansion of voting rights for people with criminal convictions. Even in historically conservative states, voters have signaled an interest in alleviating the harshness of

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justice system disproportionately ensnares people of color. MANZA & UGGEN, *supra* note 20, at 183; *see also* Ewald, *supra* note 287, at 1135 & n.363; Karlan, *supra* note 20, at 1708. Even if it were true that all or most people of color restored to the vote would vote Democratic, the demographics of those who are disenfranchised may be changing, particularly with the rise of opioid abuse among white adults of voting age in Republican strongholds. *See* Paul Chisholm, *Analysis Finds Geographic Overlap in Opioid Use and Trump Support in 2016*, NAT'L PUB. RADIO (June 23, 2018, 8:02 AM), https://www.npr.org/sections/health-shots/2018/06/23/622692550/analysis-finds-geographic-overlap-in-opioid-use-and-trump-support-in-2016 [https://perma.cc/NG6K-2DE8]; Scott Simon, *Study: Communities Most Affected by Opioid Epidemic Also Voted for Trump*, NAT'L PUB. RADIO (Dec. 17, 2016, 9:14 AM), https://www.npr.org/2016/12/17/505965420/study-communities-most-affected-by-opioid-epidemic-also-voted-for-trump [https://perma.cc/9VBV-43MH].

465. *See, e.g.*, Laura Vozzella, *McAuliffe Restores Voting Rights to 13,000 Felons*, WASH. POST (Aug. 22, 2016), https://www.washingtonpost.com/local/virginia-politics/mcauliffe-restores-voting-rights-to-13000-felons/2016/08/22/2372bb72-6878-11e6-99bf-f0cf3a6449a6_story.html?utm_term=.457ff30b23b6 [https://perma.cc/UP8K-NLTV] (describing complaints by Republican legislators in Virginia that Democratic Governor Terry McAullife restored voting rights to ensure more Democratic Party voters would be eligible to vote); Tucker Carlson (@TuckerCarlson), TWITTER (Dec. 19, 2017, 4:54 PM), https://twitter.com/TuckerCarlson/status/943283425657675776 [https://perma.cc/EBH7-6N84] ("Giving the vote to felons almost certainly flipped Virginia's House of Delegates. To paraphrase a Florida senator, the Democrats knew exactly what they were doing.").

466. *See supra* note 167 and accompanying text.

467. *See, e.g.*, Karlan, *supra* note 20, at 1152.

468. *See, e.g.*, Winkler, *supra* note 417, at 330.

469. *See supra* notes 345–346 and accompanying text.

economic sanctions as a general matter[470] and in easing penal disenfranchisement specifically, with public opinion polls showing that two-thirds of respondents support reenfranchisement even for people who are still serving terms of parole or probation.[471] Legal and law enforcement groups such as the American Bar Association, the American Law Institute, the American Probation and Parole Association, and the National Black Police Association, as well as organizations within the religious community, also support increased opportunities for reenfranchisement.[472] At the time of publication, Iowa's Public Safety Advisory Board unanimously recommended the legislature pass reforms that would automatically restore voting rights, and Iowa Governor Kim Reynolds indicated she would support such reforms.[473] Further, a bill was pending in New Jersey's legislature that would make it the third state—along with Maine and Vermont[474]—to reject penal disenfranchisement entirely.[475] While that reform would increase the administrative costs associated with providing access to the ballot to people who are incarcerated, doing so for people incarcerated in Maine, Vermont, and pretrial detention facilities around the country has proven manageable.[476] Further, it would eliminate the confusion among both administrative staff and would-be voters about voter eligibility,[477] as well as the expense created by maintaining a system in which governmental employees in elections

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470. *See* Colgan, *supra* note 62, at 103 (identifying Arizona, Louisiana, Nebraska, and Texas as states among those engaged in reform).

471. Chung, *supra* note 95, at 4; *see also* MANZA & UGGEN, *supra* note 20, at 218 (suggesting that "[t]he public endorses disenfranchisement for current prisoners, but 'draws the line' at the prison gates" and concluding that "there is little public support for stripping the right to vote from all people convicted of felonies").

472. WOOD, *supra* note 440, at 11, 17; ABA, TEN GUIDELINES, *supra* note 17, at 8 (Guideline 5) ("Failure to pay court fines and fees should never result in the deprivation of fundamental rights, including the right to vote.").

473. Barbara Rodriguez, *Gov. Kim Reynolds Says She's Open to Automatically Restoring Voting Rights in Iowa*, DES MOINES REGISTER (Nov. 20, 2018), https://www.desmoinesregister.com/story/news/politics/2018/11/20/iowa-governor-kim-reynolds-automatically-restoring-voting-rights-felons-ia-legislature/2065872002/ [https://perma.cc/N62L-X244]; Jason Clayworth, *Should Iowa Restore Voting Rights to 52,000 Felons? Advisory Board Says Yes*, DES MOINES REGISTER (Nov. 14, 2018), https://www.desmoinesregister.com/story/news/politics/2018/11/14/iowa-felon-voters-rights-restored-advisory-group-says/2003546002/ [https://perma.cc/2PKT-2KY6].

474. ME. STAT. tit. 21-A, § 111 (2017); VT. STAT. ANN. tit. 17, § 2121 (2018).

475. Kate King, *New Jersey Bill Proposes to Give State's Prisoners Right to Vote*, WALL ST. J. (Feb. 26, 2018, 7:09 PM), https://www.wsj.com/articles/new-jersey-bill-proposes-to-give-states-prisoners-right-to-vote-1519690171 [https://perma.cc/AUS3-A3WZ].

476. *See, e.g.*, Patsy R. Brunsfield, *Jails Plan for Inmates Locked Up But Not Locked Out of Voting*, MISS. TODAY, Sept. 28, 2016; Jessica Sarhan, *2016 Election: America's Prison Voters*, AL JAZEERA (Oct. 1, 2016), https://www.aljazeera.com/indepth/features/2016/09/2016-election-america-prison-voters-160906085936094.html [https://perma.cc/RND9-8H37].

477. *See supra* notes 17, 64, 89 and accompanying text (providing examples of confusion to election officials and would-be voters regarding penal reenfranchisement laws).

offices, corrections departments, and courts are involved in case-by-case determinations of who is eligible to vote.[478]

Perhaps most importantly, at a time when the criminal justice system has become one of the few arenas in which there is bipartisan support for reform based on the increasingly accepted premise that helping people rehabilitate and successfully return to their communities is good policy,[479] voter restoration provides particular promise. Empirical analyses have shown both a negative correlation between restoration and a likelihood of future arrest, incarceration, and self-reported criminal activity,[480] as well as an increase in prodemocratic attitudes predictive of reduced recidivism among people restored to the vote.[481] These results are, perhaps, unsurprising. Allowing people to vote provides them with agency,[482] a meaningful

478. *See supra* Part I.

479. *See, e.g.*, *supra* note 415 and accompanying text.

480. MANZA & UGGEN, *supra* note 20, at 33; *see* Christopher Uggen & Jeff Manza, *Voting and Subsequent Crime and Arrest: Evidence from a Community Sample*, 36 COLUM. HUM. RTS. L. REV. 193, 214 (2004) (concluding that "[v]oting appears to be part of a package of pro-social behavior that is linked to desistence from crime"); *see also* Hayden v. Pataki, No. 00 Civ. 8586(LMM), 2004 WL 1335921, at *4 (S.D.N.Y. June 14, 2004) (explaining that New York's state legislature justified relaxing its disenfranchisement laws on the grounds that it would have rehabilitative effects); Ky. Exec. Order 2015–871 (Nov. 24, 2015), https://felonvoting.procon.org/sourcefiles/kentucky-executive-order-felon-voting.pdf [https://perma.cc/FBG4-FD2J] (noting the rehabilitative aspects of reenfranchisement); JOAN PETERSILIA, WHEN PRISONERS COME HOME: PAROLE AND PRISONER REENTRY 130–33 (2003) (discussing potential rehabilitative effects of voting); Guy Padraic Hamilton-Smith & Matt Vogel, *The Violence of Voicelessness: The Impact of Felony Disenfranchisement on Recidivism*, 22 BERKELEY LA RAZA L.J. 407, 414–16 (2012) (positing that the theories of reintegrative shaming and classical labeling could explain a link between recidivism and disenfranchisement); Sarhan, *supra* note 476 ("Michael Tausek, deputy warden at Maine State Prison, says that whereas prisons have traditionally been about punishment, his facility is trying to 'embed' what he calls 'a culture of transformation and change,' and having the ability to vote is part of that transformation."); Will, *supra* note 463 (noting that in Florida, from 2011 to 2015, the overall recidivism rate among people with felony convictions post-incarceration was thirty percent as compared to 0.4 percent of those whose rights had been restored and, though the latter group would have an "overrepresentation of those who had the financial resources and tenacity to navigate the complex restoration process . . . the recidivism numbers are suggestive").

481. Victoria Shineman, Restoring Rights, Restoring Trust: Evidence that Reversing Felon Disenfranchisement Penalties Increases Both Trust and Cooperation with Government (Oct. 25, 2018) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3272694 [https://perma.cc/2T8D-Z723].

482. *See* Frank I. Michelman, *Dunwody Distinguished Lecture in Law, Conceptions of Democracy in American Constitutional Argument: Voting Rights*, 41 FLA. L. REV. 443, 451 (1989) ("Through political engagement, persons or communities (or both, reciprocally) forge identities, and persons assume freedom in the 'positive' sense of social and moral agency.").

connection to their community[483] and its laws,[484] and confirmation that society values their membership and participation in the democratic enterprise.[485]

483. *See* Pamela S. Karlan, *The Rights To Vote: Some Pessimism About Formalism*, 71 TEX. L. REV. 1705, 1710 (1993) (describing voting as providing "civic inclusion: 'a sense of connectedness to the community and of equal political dignity' ").

484. *See* Winkler, *supra* note 417, at 368–70, 387–88 ("Allowing ex-felons to vote under an expressive voting approach may be the quintessential example of using law as a positive force in the lives of members of the community.").

485. *Id.* at 367–68 (positing that through voting, "the voter's identity may be shaped as the voter is given a sense of belonging, transcendence, and dignity that comes from being a valued member of society").

APPENDIX A: RESTORATION MECHANISMS

This Appendix documents jurisdictions in which mechanisms for allowing restoration of the vote may result in wealth-based penal disenfranchisement. There are four options. First, a person may become automatically eligible to register to vote upon, or after the expiration of a time period triggered by, completion of one or more terms of her sentence beyond any period of incarceration (the "Automatic–Final" category). Second, a person may automatically obtain provisional eligibility to register to vote dependent on ongoing payment of economic sanctions or on release from incarceration where a return to incarceration for a failure to pay economic sanctions would result in renewed disenfranchisement (the "Automatic–Provisional" category). Third, a person may be required to apply for restoration of eligibility for either full or provisional restoration of the vote, the outcome of which is discretionary. This review process may be akin to, or even conducted via, the jurisdiction's general clemency process (the "Discretionary–Restoration Application" category). Fourth, a person may regain eligibility to vote through a jurisdiction's general clemency process even though that process is not explicitly identified as a mechanism for restoration in its primary restoration laws, rules, or policies. Though all jurisdictions have a general clemency process, information is only included as a unique avenue for restoration here if that process allows for wealth-based penal disenfranchisement and would not be duplicative of a standard restoration application process (the "Discretionary–General Clemency" category). As indicated below, a jurisdiction may have more than one restoration mechanism available. Finally, as with each of the following appendices, Maine and Vermont are not included because they do not engage in penal disenfranchisement at all.

Jurisdiction	**Automatic**		**Discretionary**		**Authority**
	Final	**Provisional**	**Restoration Application**	**General Clemency**	
Alabama	✓		✓		ALA. CONST. art. V, § 124 ALA. CODE § 15-22-36.1 (2018)
Alaska	✓			✓	ALASKA CONST. art. III, § 2 ALASKA STAT. §§ 15.05.030(a), 33.20.070, 33.30.241(a) (2018) *Executive Clemency Packet,* STATE ALASKA BD. PAROLE 1 (Jan. 20, 2018)
Arizona	✓		✓	✓	ARIZ. CONST. art. V, § 5

Jurisdiction	Automatic		Discretionary		Authority
	Final	Provisional	Restoration Application	General Clemency	
					ARIZ. REV. STAT. ANN. §§ 13-905(A)–(B), 13-906(A)–(B), 13-908, 13-912(A)(2), 31-443 (2018) ARIZ. ADMIN. CODE §§ R5-4-101(6), R5-4-201(F) (2018) Ariz. Bd. of Exec. Clemency, Pardon Application (last updated Jan 9, 2015) Judicial Restoration Application Materials (*see* Appendix F) Superior Court of Ariz. Greenlee Cty., Restoration of Civil Rights Application (Aug. 2017) (on file with author)
Arkansas	✓		✓		ARK. CONST. art. VI, § 18 ARK. CONST. amend. LI, § 11(a)(4), (d)(2)(A)–(D) 004.00.2 ARK. CODE R. § 1305 (Lexis Nexis 2018)
California	✓				CAL. CONST. art. II, § 4 CAL. ELEC. CODE § 2101(a) (West 2018)
Colorado	✓		✓		COLO. CONST. art. VII, § 10 COLO. REV. STAT. § 1-2-103(4) (2018)
Connecticut	✓				CONN. GEN. STAT. § 9-46(a) (2018)
Delaware	✓		✓		DEL. CONST. art. V, § 2 DEL. CODE ANN. tit. 11, § 4364 (2018)
District of Columbia		✓		✓	D.C. CODE § 1-1001.02(2)(D) (2018) D.C. MUN. REGS. tit. 3, § 500.2(c) (2018) Letter from Margret Nedelkoff Kellems, Deputy Mayor for Pub. Safety & Justice, Gov't of D.C. Exec. Office of the Mayor, to David. A. Guard, Project Manager (Sept. 7, 2001)
Florida	✓		✓		FLA. CONST. art. VI, § 4 FLA. STAT. § 940.05 (2018)
Georgia	✓		✓		GA. CONST. art. II, § 1, ¶ III(a) GA. CODE ANN. §§ 21-2-216(b), 42-9-54(a) (2018) Effect of New Georgia Constitution of 1983 on the Loss and Restoration of Civil Rights, Op. Att'y Gen. Ga. 69 (1983) (on file with author)
Hawaii		✓			HAW. REV. STAT. § 831-2(a)(1) (2018)
Idaho	✓		✓		IDAHO CONST. art. IV, § 7 IDAHO ADMIN. CODE r. 50.01.01.010(35) (2018)
Illinois		✓			ILL. CONST. art. III, § 2 10 ILL. COMP. STAT. ANN. 5/3-5 (West 2018)

Jurisdiction	Automatic		Discretionary		Authority
	Final	Provisional	Restoration Application	General Clemency	
Indiana		✓			IND. CODE. §§ 3-7-13-4(a)–(b), 3-7-13-5 (2018)
Iowa			✓		IOWA CODE §§ 48A.6, 907.9(4)(a) (2018) IOWA ADMIN. CODE r. 205-14.3(3)(914) (2018)
Kansas	✓				KAN. STAT. ANN. §§ 21-6613(a)–(b) (2018)
Kentucky			✓		KY. CONST. §§ 77, 145 KY. REV. STAT. ANN. §§ 116.025; 196.045(1)(c), (2)(c); 431.073(6) (West 2018)
Louisiana	✓	✓			LA. CONST. art. I, § 20 LA. STAT. ANN. §§ 18:102(A)(1), 18:104(C)(1)(b), 18:177(A)(1) (2018) *Frequently Asked Questions*, LA. DEP'T CORR.
Maryland		✓			MD. CODE ANN., ELEC. LAW § 3-102(b)(1) (West 2018)
Massachusetts		✓			MASS. CONST. amend. art. III MASS. GEN. LAWS ch. 51, § 1 (2018)
Michigan		✓			MICH. COMP. LAWS § 168.758b (2018)
Minnesota	✓			✓	MINN. STAT. §§ 609.165(1)–(2), 638.02 (2018)
Mississippi			✓		MISS. CONST. art. 12, § 253 MISS. CODE ANN. § 47-7-41 (2018) 201-2 MISS. CODE R. § 6(A)–(B) (LexisNexis 2018)
Missouri	✓				MO. REV. STAT. § 115.133.2 (2018)
Montana		✓			MONT. CONST. art. II, § 28; *id.* art. IV, § 2
Nebraska	✓		✓	✓	NEB. CONST. art. IV, § 13; *id.* art. VI, § 2 NEB. REV. STAT. §§ 29-112 to -113; 29-2264(2), (4), (4)(b); 32-313 (2018) *Frequently Asked Questions*, NEB. BD. PARDONS
Nevada	✓		✓		NEV. CONST. art. II, § 1 NEV. REV. STAT. § 213.090(1) (2018) NEV. REV. STAT. §§ 213.155(1)(a)(1), (2); 213.157(1)(a)(1), (2) (effective Jan. 1, 2019) *Restoration of Voting Rights in Nevada,* NEV. SEC'Y STATE
New Hampshire		✓			N.H. REV. STAT. ANN. § 607-A:2(I)(a) (2018)
New Jersey	✓		✓		N.J. STAT. ANN. § 19:4-1(6)–(8) (West 2018)
New Mexico	✓				N.M. CONST. art. VII, § 1(A) N.M. STAT. ANN. §§ 1-4-27.1(B), 31-13-1 (2018)

Jurisdiction	Automatic		Discretionary		Authority
	Final	Provisional	Restoration Application	General Clemency	
New York	✓		✓		N.Y. CONST. art. IV, § 4 N.Y. CORRECT. LAW §§ 700–701, 703, 706 (McKinney 2018) N.Y. ELEC. LAW § 5-106(2) (McKinney 2018) N.Y. EXEC. LAW § 15 (McKinney 2018) N.Y. Exec. Order No. 181 (Apr. 18, 2018) N.Y. Dep't of Corr. & Cmty. Supervision, Parole Handbook § 8.8 (Nov. 2010)
North Carolina	✓				N.C. CONST. art. VI, § 2(3) N.C. GEN. STAT. § 13-1 (2018)
North Dakota		✓		✓	N.D. CENT. CODE. §§ 12.1-33-01(1)(a), 12.1-33-03(1), 12-55.1-01(4), 12-55.1-04 (2018)
Ohio		✓	✓		OHIO REV. CODE ANN. §§ 2961.01(A)(1)–(2), 2967.04(A) (LexisNexis 2018)
Oklahoma				✓	*Voter Registration in Oklahoma*, OKLA. STATE ELECTION BD. (2018) *Okla. Voter Registration Application*, OKLA. STATE ELECTION BOARD 2
Oregon		✓		✓	OR. CONST. art. V, § 14 OR. REV. STAT. §§ 137.281(1)–(2), (3)(d), (7); 144.649 (2018)
Pennsylvania		✓		✓	PA. CONST. art. IV, § 9 25 PA. CONS. STAT. ANN. § 1301(a) (2018) 71 PA. CODE § 299 (2018)
Rhode Island		✓			R.I. CONST. art. II, § 1 100-20 R.I. CODE R. § 2 (LexisNexis 2018)
South Carolina	✓		✓		S.C. CODE ANN. §§ 7-5-120(B)(3), 24-21-930, 24-21-990(1)–(2) (2018)
South Dakota	✓			✓	S.D. CODIFIED LAWS § 24-14-11 (2018) S.D. ADMIN. R. 5:02:05:02, 5:02:05:02.01 (2018)
Tennessee	✓		✓		TENN. CODE ANN. §§ 40-29-202(a)(1), (3); 40-29-203 (2018)
Texas	✓		✓		TEX. ELEC. CODE ANN. § 11.002(A)(4)(A)–(B) (West 2018) 37 TEX. ADMIN. CODE §§ 143.3, 143.9 (2018) TEX. CODE CRIM. PROC. ANN. art. 48.01(a) (West 2018)
Utah		✓			UTAH CODE ANN. §§ 20A-2-101(2), 20A-2-101.3(2), 20A-2-101.5(2) (West 2018)
Virginia			✓		VA. CONST. art. II, § 1 VA. CODE ANN. § 53.1-231.2 (2018)
Washington		✓		✓	WASH. CONST. art. III, §§ 9, 11 WASH. REV. CODE § 29A.08.520(1) (2018)
West Virginia	✓				W. VA. CONST. art. IV, § 1

Jurisdiction	Automatic		Discretionary		Authority
	Final	Provisional	Restoration Application	General Clemency	
					W. VA. CODE §§ 3-1-3, 3-2-2(b) (2018) Osborne v. Kanawha Cty. Court, 69 S.E. 470, 470–471 (W. Va. 1910)
Wisconsin	✓		✓		WIS. CONST. art. V, § 6 WIS. STAT. §§ 6.03(1)(b), 304.078 (2018)
Wyoming	✓		✓	✓	WYO. CONST. art. IV, § 5 WYO. STAT. ANN. §§ 6-10-106(a)(ii); 7-13-105(a), (b)(ii), (c)(i) (2018)

APPENDIX B: INDEPENDENT PAYMENT REQUIREMENT

This Appendix documents jurisdictions that require payment of economic sanctions to be eligible for reenfranchisement independent of parole and probation systems. Wealth-based penal disenfranchisement can occur because payment relates to eligibility for reenfranchisement ("E") or merits consideration for discretionary forms of reenfranchisement ("M"). Further detail of these mechanisms are designated as follows:

- π Explicit mandate of payment of economic sanctions
- ζ Requirement that all terms of sentence be "completed" or "discharged" and those terms have been interpreted to include payment of economic sanctions
- Ψ Authority is sufficiently expansive (e.g., requiring provision of information about outstanding economic sanctions for merits review) so as to allow for the existence of ongoing criminal debt to be the determining factor for reenfranchisement
- Φ Reenfranchisement eligibility decision includes a determination of whether a person makes a good faith or reasonable effort to pay
- Δ Law or policy would normally require payment, but is currently suspended by executive order or policy
- † Law or policy indeterminate

Jurisdiction	Automatic		Discretionary		Authority
	Final	Provisional	Restoration Application	General Clemency	
Alabama	E π				ALA. CODE § 15-22-36.1(a)(3) (2018)
Alaska				M Ψ	*Executive Clemency Packet*, STATE ALASKA BD. PAROLE 2, 6, 16, 22 (Jan. 20, 2018)
Arizona	E π			M Ψ	ARIZ. REV. STAT. ANN. § 13-912(A)(2) (2018) Ariz. Bd. of Exec. Clemency, Pardon Application 1, 10 (last revised Jan. 9, 2015) (on file with author) Judicial Restoration Application Materials (*see* Appendix F) Superior Court of Ariz. Greenlee Cty., Restoration of Civil Rights Application (Aug. 2017) (on file with author)

Jurisdiction	Automatic		Discretionary		Authority
	Final	Provisional	Restoration Application	General Clemency	
Arkansas	E π		M Ψ		ARK. CONST. amend. LI, § 11(d)(2)(A), (C)–(D) Ark. Parole Bd., Executive Clemency Application 2 (May 4, 2015) *See, e.g.*, Press Release, Ark. Governor's Office, Governor Asa Hutchinson Announces Intent to Grant Executive Clemency (Sept. 5, 2018) ("The applicants intended for pardons have . . . paid all fines related to their sentences.")
Connecticut	E π				CONN. GEN. STAT. § 9-46a(a) (2018)
Delaware			M Ψ		Del. Bd. of Pardons, Board of Pardons Application Packet 2
District of Columbia				M Ψ	U.S. Dep't of Just., Petition for Commutation of Sentence 2 (May 2, 2014)
Florida	E †		E π		FLA. CONST. art. VI, § 4 Fla. Office of Exec. Clemency, Application for Clemency (Aug. 18, 2017) Fla. Office of Exec. Clemency, Rules of Executive Clemency 4–5, 8–10, 12–13 (Mar. 9, 2011)
Georgia	E π				GA. JUST. PROJECT, 2014 FELON DISENFRANCHISEMENT STUDY REPORT (2014)
Idaho			E π		IDAHO ADMIN. CODE r. 50.01.01.550.02(b)(v) (2018) *Pardon Application Information*, IDAHO COMM'N PARDONS & PAROLE
Iowa			E π M Φ		IOWA CODE § 907.9(4)(a) (2018) *Frequently Asked Questions (FAQs)—Restoration of Citizenship Rights–Right to Vote and Hold Public Office*, OFFICE GOVERNOR IOWA (Sept. 1, 2016) *Streamlined Application for Restoration of Citizenship Rights*, OFFICE GOVERNOR IOWA (last updated Apr. 20, 2018)
Kansas	E ζ				Telephone Interview with Jameson Beckner, Asst. Dir. of Elections, Kan. Sec'y of State (June 6, 2018) (on file with author)
Kentucky			E π		KY. REV. STAT. ANN. § 196.045(1)(c), (2)(c) (West 2018) Ky. Div. of Prob. & Parole, Application for Restoration of Civil Rights (last updated July 2012)
Minnesota				M Ψ	Minn. Bd. of Pardons, Application for Pardon or Commutation (2016)

Jurisdiction	Automatic		Discretionary		Authority
	Final	Provisional	Restoration Application	General Clemency	
Nebraska			E π	E π	NEB. REV. STAT. § 29-2264(2), (4), (4)(b) (2018) *Instructions for Filing an Application*, NEB. BD. PARDONS (2013) Neb. Bd. of Pardons, Pardon Board Application (2013)
Nevada			M Ψ, Φ		NEV. REV. STAT. § 213.155(2) (effective Jan. 1, 2019) *Criteria and Application Instructions—Community Cases*, NEV. BD. PARDONS 1 (Apr. 25, 2017)
New York			E π M Ψ		N.Y. Exec. Order No. 181 (Apr. 18, 2018) N.Y. State Dep't of Corrs. & Cmty Supervision, Certificate of Relief from Disabilities—Certificate of Good Conduct Application and Instructions 3 *More than 24,000 Individuals Included in First Group of Conditional Pardons*, N.Y. STATE (May 22, 2018)
Ohio			M π		Ohio Dep't of Rehab. & Corr., Policy 105-PBD-05, Clemency Procedures: Non-Death Penalty Cases § VI.C(4)(c) (July 17, 2017) Email from Ashley Parriman, Staff Counsel, Ohio Dep't of Rehab. & Corr., to Beth A. Colgan, Asst. Prof. of Law, UCLA Sch. of Law (Aug. 29, 2018) (on file with author)
Oregon				M Ψ	Or. Governor's Office, Information on Applications for Executive Clemency (Pardons, Commutations, Etc.) 10, 14 (on file with author)
Pennsylvania				M π	*Factors Considered by the Board*, PA. BD. PARDONS (Aug. 15, 2012)
South Carolina			E π		S.C. CODE ANN. §§ 17-25-322(E), 24-21-950(A), 24-21-970 (2018) *How to Apply for a Pardon*, S.C. DEP'T PROB., PAROLE & PARDON SERV. (last updated Dec. 19, 2017) *Frequently Asked Questions (FAQs) About Expungements and Pardons in South Carolina Courts*, S.C. JUD. DEP'T 8 (2011)
South Dakota				E π	S.D. Bd. of Pardons & Paroles, Executive Clemency Application (last updated June 2009)
Tennessee	E π, Φ				TENN. CODE ANN. § 40-29-202(b)(1)–(2) (2018)
Texas	E π		M Ψ		TEX. CRIM. PROC. ANN. CODE art. 43.01(a) (West 2018)

Jurisdiction	Automatic		Discretionary		Authority
	Final	Provisional	Restoration Application	General Clemency	
					Full Pardon Application—Instructions, TEX. BD. PARDONS & PAROLES 1, 3 (last updated Feb. 17, 2012) Tex. Bd. of Pardons & Paroles, FP-10 Criminal History Information (Feb. 17, 2012)
Virginia			E Δ		VA. CODE ANN. § 53.1-231.2 (2018) *Restoration of Rights*, SEC'Y COMMONWEALTH VA. Press Release, Office of the Governor of Va., Governor McAuliffe Announces New Reforms to Restoration of Rights Process (June 23, 2015)
Washington		M Φ		M Δ	WASH. REV. CODE §§ 10.82.090; 29A.08.520(2)(a)–(b), (3) (2018) Governor of the State of Wash., Petition for Reprieve, Commutation, or Pardon 3 (last updated Jan. 2, 2013) Email from Taylor Wonhoff, Deputy Gen. Counsel, Office of Governor Jay Inslee, to Beth A. Colgan, Asst. Prof. of Law, UCLA Sch. of Law (Dec. 11, 2017) (on file with author)
Wisconsin			M π		Office of the Governor of State of Wisc., Application for Executive Clemency (last updated Mar. 11, 2009)
Wyoming				M ζ, Ψ	Office of the Governor of State of Wyo., Application for a Pardon or Restoration of Rights (last updated July 2016) (on file with author)

APPENDIX C: PAROLE

This Appendix documents jurisdictions in which reenfranchisement is dependent on completion of parole in ways that allow for wealth-based penal disenfranchisement. Wealth-based penal disenfranchisement can occur because payment relates to eligibility for reenfranchisement ("E") or consideration of the merits for discretionary forms of reenfranchisement ("M"), or may serve as a basis for revocation of parole or other return to incarceration for nonpayment ("R"). A would-be voter may be subject to wealth-based penal disenfranchisement through the loss of early discharge from parole ("Early") or an extension of the parole term ("Extend") due to an inability to pay economic sanctions. Further detail of these mechanisms are designated as follows:

- π Explicit mandate of payment of economic sanctions
- ζ Requirement of adherence to all parole conditions
- Ψ Authority is sufficiently expansive (e.g., satisfactory completion or violation of parole conditions, or no limitations on discretion) so as to allow for the existence of ongoing criminal debt to be the determining factor for reenfranchisement
- Φ Parole decision includes a determination of whether a person makes a good faith or reasonable effort to pay
- ± Parole requirement is waivable
- Δ Law or policy would normally require payment, but is currently suspended by executive order or policy

Jurisdiction	Automatic		Discretionary		Authority
	Final	Provisional	Restoration Application	General Clemency	
Alabama	E Early Ψ		E ζ		ALA. CODE §§ 15-22-29, 15-22-33, 15-22-36.1(a)(4)(a)–(c) (2018) Ala. Bd. of Pardons & Paroles, Rules, Regulations, and Procedures art. 8, ¶ 7 Telephone Interview with Sarah Stillman, Asst. Exec. Dir., Ala. Bd. of Pardons & Paroles (June 14, 2018)
Alaska	E Early π, ζ			M Early ζ, Ψ	ALASKA STAT. §§ 12.55.185(18), 33.16.150(b)(6), 33.16.210(a)–(c)(3) (2018) ALASKA ADMIN. CODE tit. 22, § 20.200(a)(4) (2018)

Jurisdiction	Automatic		Discretionary		Authority
	Final	Provisional	Restoration Application	General Clemency	
					Executive Clemency Packet, STATE ALASKA BD. PAROLE 6, 8, 13 (Jan. 20, 2018) St. of Alaska Dep't of Corr., Policy 910.04: Fines, Court Costs And Restitution (Dec. 29, 2016)
Arizona	E Extend π		E Extend π	M Ψ	ARIZ. REV. STAT. ANN. §§ 13-906; 13-908; 13-912(A); 31-411(A), (D), (E), (J); 31-412(A)–(B); 31-418(A), (D) (2018) Ariz. Bd. of Exec. Clemency, Application for Absolute Discharge from Parole (June 30, 2017) Ariz. Bd. of Exec. Clemency, Pardon Application 10 (last revised Jan. 9, 2015) (on file with author) Judicial Restoration Application Materials (*see* Appendix F) Superior Court of Ariz. Greenlee Cty., Restoration of Civil Rights Application (Aug. 2017) (on file with author)
California	E Early Ψ				CAL. CONST. art. II, § 4 CAL. ELEC. CODE § 2101(a) (West 2018) CAL. PENAL CODE § 3000(a)(3), (b)(6)–(7) (West 2018) *Frequently Asked Questions: Offender Restitution Information*, CAL. DEP'T CORR. & REHAB.
Colorado	E Early ζ, Ψ				COLO. REV. STAT. §§ 1-2-103(4), 17-2-103(9)(a), 17-22.5-403(6)–(8)(a), 17-22.5-405(1)(e) (2018) 8 COLO. CODE REGS. § 1511-1 (2018) Colo. Dep't of Corr., Community Return to Custody Standards ¶¶ 6-010(g), 6-180, 6-190 (2014) Div. of Adult Parole, *Adult Parole: Adult Parole Offender Resources, Restitution*, COLO. DEP'T CORR.
Connecticut	E Early Ψ				CONN. GEN. STAT. §§ 9-46a(b), 53a-30, 54-125e(b), 54-129 (2018) State of Conn. Bd. of Pardons & Paroles, Statement of Understanding and Agreement Conditions of Parole (on file with author)
Delaware	E Early Ψ				DEL. CODE ANN. tit. 11, §§ 4104, 4321, 4347(i)–(j) (2018) DEL. CODE ANN. tit. 15, §§ 6102(a)(4); 6104(a), (c) (West 2018) State of Del. Dep't of Corr., Procedure Number 7.5: The Collection of Monies (Feb. 12, 2016) (on file with author)

Jurisdiction	Automatic		Discretionary		Authority
	Final	Provisional	Restoration Application	General Clemency	
District of Columbia		R Φ E Φ			U.S. DEP'T JUST., USPC RULES & PROCEDURES MANUAL §§ 2.105(a)(2), (f); 2.7(a)–(b) (2010) *Frequently Asked Questions*, U.S. PAROLE COMM'N (last updated Sept. 29, 2015) Fed. Bureau of Prisons, Change Notice to Program Statement 5882.03 (Feb. 4, 1998)
Florida	E Early π, Ψ, Φ		E Early π, Ψ, Φ		FLA. CONST. art. VI, § 4 FLA. STAT. §§ 947.18; 947.24(2); 947.141(6); 947.147; 947.181(1)–(4); 948.06(5), (7) (2018) FLA. ADMIN. CODE ANN. r. 23-21.020(1); 23-21.022(23)–(24) (2018) Fla. Office of Exec. Clemency, Application for Clemency (Aug. 18, 2017) Fla. Office of Exec. Clemency, Rules of Executive Clemency 4–5, 8–10, 12–13 (Mar. 9, 2011)
Georgia	E Early ζ, Ψ				GA. CONST. art. II, § 1, ¶ III(a) GA. CODE ANN. §§ 21-2-216(b), 42-9-42(d)(2), 42-9-44(a) (2018) GA. COMP. R. & REGS. §§ 125-2-4-.04(2)(a), 475-3-.08(8), 475-3-.10(7) (2018) Effect of New Georgia Constitution of 1983 on the Loss and Restoration of Civil Rights, Op. Att'y Gen. Ga. 69 (1983) (on file with author) *Frequently Asked Questions*, GA. SEC'Y STATE
Hawaii		R Φ			HAW. REV. STAT. §§ 353-66(b), (d)–(e); 706-624(1)(g), (2)(d) (2018) HAW. CODE R. § 23-700-44 (2018) HAW. DEP'T OF PUB. SAFETY, HAW. PAROLING AUTH., PAROLE HANDBOOK 4, 11 (1991)
Idaho	E Early Ψ Extend Ψ			E Early Ψ Extend Ψ	IDAHO CODE §§ 18-310(2), 20-225, 20-233(1) (2018) IDAHO ADMIN. CODE r. 50.01.01.400(04), (11) (2018) Collections Bureau, Inc. v. Dorsey, 249 P.3d 1150, 1155 (Idaho 2011) Idaho Comm'n of Pardons & Parole, Notice of Action on Public Records Request (Dec. 8, 2017) (on file with author) *Pardon Application Information*, IDAHO COMM'N PARDONS & PAROLE
Indiana		R Φ			IND. CODE §§ 11-13-3-4(b), (f), (n); 35-50-6-1(c) (2018)

Jurisdiction	Automatic		Discretionary		Authority
	Final	Provisional	Restoration Application	General Clemency	
Iowa			E Early Ψ Extend Ψ		IOWA CODE § 905.14 (2018) IOWA ADMIN CODE r. 201-45.2(906), 201-45.3(910), 201-45.6(1)-(3)(906), 205-11.4(908), 205-11.7(10)(d)(908), 205-13.1(2)(906), 205-14.3(3)(914) (2018) *Frequently Asked Questions (FAQs)—Restoration of Citizenship Rights–Right to Vote and Hold Public Office*, OFFICE GOVERNOR IOWA (Sept. 1, 2016)
Kansas	E Early π, ζ, Φ				KAN. STAT. ANN. §§ 22-3717(d)(1)(E), (d)(2), (m)–(n); 22-3722 (2018) KAN. ADMIN. REGS. §§ 44-6-101(a)(1); 44-6-108; 44-6-115b(c), (d)(4), (h)(1), (l); 44-6-125(a), (g); 44-9-503(a)(2)–(3); 44-9-503(b); 45-800-1(a)(2); 45-1000-1; 45-1000-3 (2018) State v. Anthony, 45 P.3d 852 (2002) *Voter Registration Instructions*, KAN. SEC'Y STATE Prisoner Review Bd., *Conditions*, KAN. DEP'T CORR. Kan. Dep't of Corr., IMPP 14-107A: Offender Fees Payment Procedures (May 27, 2015) Kan. Dep't of Corr., IMPP 14-120A: Good Time During Post-Release Supervision 7 (May 27, 2015) Kan. Dep't of Corr., IMPP 14-133A, Parole Services: Discharge from Supervision 2 (July 25, 2017) Kan. Dep't of Corr., Policy Memorandum #17-12-003 to IMPP 14-120A (Nov. 27, 2017) Email from Todd Fertig, Pub. Info. Officer, Kan. Dep't of Corr., to Beth A. Colgan, Asst. Prof. of Law, UCLA Sch. of Law (Jan. 9, 2018) (on file with author) Email from Samir Arif, Kan. Dep't of Corr., to Beth A. Colgan, Asst. Prof. of Law, UCLA Sch. of Law (June 7, 2018) (on file with author)
Kentucky			E Extend π, Ψ		KY. REV. STAT. ANN. §§ 196.045(2)(a); 431.073(2); 439.563(1), (3)(d), (5) (West 2018) 501 Ky. Admin. Regs. 1:050 (2018) Ky. Parole Bd., KYPB 11-00: Conditions of Parole (Dec. 4, 2015) Ky. Parole Bd., KYPB 12-00: Final Discharge of Parole and Payment of Restitution (Dec. 4, 2015)

Jurisdiction	Automatic		Discretionary		Authority
	Final	Provisional	Restoration Application	General Clemency	
					Ky. Parole Bd., KYPB 21-00: Conditions of Mandatory Reentry Supervision (Dec. 4, 2015) Ky. Parole Bd., KYPB 22-00: Final Discharge From Mandatory Reentry Supervision (Dec. 4, 2015)
Louisiana		R ζ			LA. STAT. ANN. §§ 15:574.7(C)(2)(a)(ix)(dd), 15:574.9(H) (2018) LA. STAT. ANN. §§ 18:2(8), 18:102(A)(1), 18:104(C)(1)(b), 18:177(A)(1) (effective Mar. 1, 2019) LA. ADMIN CODE tit. 22, § 409 (2018) *Supervision Conditions*, LA. DEP'T CORR. *Frequently Asked Questions*, LA. DEP'T CORR.
Maryland		R ζ, Φ			MD. CODE ANN., CORR. SERVS. §§ 6-101(m); 7-401(c), (d)(1)–(2); 7-503; 7-504(a), (b)(iii)–(iv); 7-701(a)–(b), (d), (g); 7-702(e), (g)(1) (West 2018)
Massachusetts		R Φ			MASS. GEN. LAWS ch. 27, § 5; ch. 127, §§ 130, 131, 133A, 133B, 145, 148, 149 (2018) 120 MASS. CODE. REGS. 303.01 (2018)
Michigan		R Φ			MICH. COMP. LAWS §§ 791.236(5)–(8), (12)–(13); 791.236a; 791.240a(10)–(11) (West 2018)
Minnesota	E Early Ψ			E Extend ζ	MINN. STAT. §§ 201.145(3)(b), 243.05(3), 609.12(1), 609.165(1)–(2), 638.02(1) (2018) MINN. R. § 6600.1000 (2018) *Voting with a Criminal Record*, MINN. SEC'Y STATE *Register to Vote*, MINN. SEC'Y STATE Minn. Dep't of Corr., Division Directive 201.013: Supervision Fees—Field Services (Dec. 20, 2016)
Mississippi			M Ψ		MISS. CODE. ANN. §§ 47-7-5(7)(a)–(b); 47-7-38(5)(e); 47-7-40(1), (5); 47-7-49(1) (2018) 29-201 MISS. CODE R. § 2.5(L) (LexisNexis 2018) Office of the Governor, Application for Clemency 5 *See supra* note 122 and accompanying text
Missouri	E Early ζ Extend π, ζ				MO. REV. STAT. §§ 115.133.2(2); 217.703(1), (3)–(4), (7); 559.100(2)–(3); 559.105(3) (2018) *Go Vote Missouri: Frequently Asked Questions*, MO. SEC'Y STATE

Jurisdiction	Automatic		Discretionary		Authority
	Final	Provisional	Restoration Application	General Clemency	
Montana		R Φ			MONT. CODE ANN. §§ 46-18-203(6)(b), (7)(a)(iii)–(v); 46-23-215(2)(a) (2018) MONT. ADMIN. R. 20.7.1101(11); 20.25.306; 20.25.702(1)(k), (2); 20.25.801(16)(c)–(e) (2018) *Conditions of Probation and Parole*, MONT. DEP'T CORR. (2012) *Paying Restitution and Supervision Fees*, MONT. DEP'T CORR.
Nebraska	E Early π, Ψ			E ±	NEB. REV. STAT. §§ 29-122, 29-2284, 32-313, 83-116(1)(h) (2018) NEB. BD. OF PAROLE R. §§ 2-101(U)(7), 3-208(D), 4-103(D), 7-102(B)(3), 7-104 (2018) *Instructions for Filing an Application*, NEB. BD. OF PARDONS (2013) Neb. Bd. of Pardons, Pardon Board Application (2013)
Nevada	E Early π, Φ		E ± M Ψ		NEV. REV. STAT. §§ 209.4475(1)–(2); 213.126(1), (6) (2018) NEV. REV. STAT. § 213.155(1)(b)–(c), (2) (effective Jan. 1, 2019) NEV. ADMIN. CODE §§ 213.065(1)(b)–(f), (3); 213.230; 213.260 (2018) Nev. Bd. of Parole Comm'rs, Procedures for the Collection of Restitution (May 4, 2001) *Frequently Asked Questions*, NEV. BD. PAROLE COMM'RS
New Hampshire		R Ψ			N.H. REV. STAT. ANN. § 651-A:17 (2018) *Victim Services: Community-Based Punishment*, N.H. DEP'T CORR. *Victim Services: Conditions of Probation-Parole*, N.H. DEP'T CORR.
New Jersey	E Early π, ζ, Φ		E ζ		N.J. STAT. ANN. §§ 19:4-1(8), 30:4-123.59(g), 30:4-123.60(b) (2018) N.J. ADMIN. CODE §§ 10A:71-6.4(a)(13), (k); 10A-71-6.5(a), (b)(3); 10A:71-6:7(d); 10A:71-6:8(a); 10A:71-6.9(a)(3) (2018) State of N.J., Petition for Executive Clemency (last updated June 2011)
New Mexico	E Early π				N.M. STAT. ANN. §§ 1-4-27.1(B)(2), 31-13-1(A)(1), 31-21-10(g)(2) (2018) N.M. CODE R. § 22.510.15.8(O) (2018) State v. Montano, 95 P.3d 1059, 1061 (N.M. Ct. App. 2004) State v. Dean, 727 P.2d 944, 947–48 (1986) *Voter Registration Information*, N.M. SEC'Y STATE

Jurisdiction	Automatic		Discretionary		Authority
	Final	Provisional	Restoration Application	General Clemency	
					Voter Registration Eligibility Requirements and FAQs, N.M. SEC'Y STATE N.M. Corr. Dep't, Policy CD-050200 (Mar. 9, 2017) N.M. Corr. Dep't, Policy CD-051500 1, 3-4 (July 31, 2015) N.M. Corr. Dep't, Policy CD-055000 1, 3-4 (Oct. 27, 2017) *Probation & Parole*, N.M. CORR. DEP'T ("Supervision Conditions & Special Programs")
New York	E Early Φ		M ζ, Ψ		N.Y. CORRECT. LAW §§ 75; 703(3), (4) (McKinney 2018) N.Y. ELEC. LAW § 5-106(2) (McKinney 2018) N.Y. EXEC. LAW §§ 259-i(2)(a); 259-j(1), (3) (McKinney 2018) N.Y. COMP. CODES R. & REGS. tit. 9, § 8003.4(a) (2018) N.Y. Exec. Order No. 181 (Apr. 18, 2018) N.Y. State Dep't of Corrs. & Cmty Supervision, Certificate of Relief from Disabilities—Certificate of Good Conduct Application and Instructions 3 *Apply for Clemency*, N.Y. STATE
North Carolina	E Early π Extend ζ				N.C. GEN. STAT. §§ 13-1(1); 15A-1373(a); 15A-1374(b)(11a)–(11b), 12(c); 148-57.1(b) (2017) State v. Lambert, 252 S.E.2d 855 (N.C. Ct. App. 1979) *Policy & Procedures*, N.C. DEP'T PUB. SAFETY 140, 158, 210, 241, 349–50 (Aug. 1, 2016) *Completing Parole/Post Release Successfully*, N.C. DEP'T PUB. SAFETY *N.C. Voting Rights Guide: People in the Criminal Justice System*, N.C. STATE BD. ELECTIONS & ETHICS ENF'T
North Dakota		R ζ		M ζ	N.D. CENT. CODE §§ 12-59-07, 12-59-15(6) (2018) N.D. Pardon Advisory Bd. Application, SFN 14859 (Dec. 2010) N.D. Parole Bd., Conditions of Parole, SFN 7880 (June 2018) (on file with author) E-mail from Steven D. Hall, Dir. of Transitional Plan. Serv., N.D. Dep't of Corr. & Rehab., to Beth A. Colgan, Asst. Prof. of Law, UCLA Sch. of Law (July 19, 2018) (on file with author)

Jurisdiction	Automatic		Discretionary		Authority
	Final	Provisional	Restoration Application	General Clemency	
Ohio			M Ψ		OHIO REV. CODE ANN. §§ 2967.28(D)(1), (E)(3) (LexisNexis 2018) OHIO ADMIN. R. §§ 5120:1-1-02(2), 5120:1-1-41(D) (2018) Ohio Dep't of Rehab. & Corr., Policy 105-PBD-05, Clemency Procedures: Non-Death Penalty Cases § VI.C(4)(e) (July 17, 2017) Ohio Dep't of Rehab & Corr., Conditions of Supervision at 2
Oregon		R ζ			OR. REV. STAT. §§ 144.102(5)(a)–(b), 144.343(2)(b)–(c), 144.106 (2018)
Pennsylvania		R ζ		M ζ	37 PA. CODE §§ 63.4(6), 65.4(6) (2018) 61 PA. CONS. STAT. § 6138(c)(5), (d) (2018) *Parole Conditions*, PA. BD. PROB. & PAROLE *Understanding the Technical Parole Violation Process in Pennsylvania*, PA. BD. PROB. & PAROLE (Dec. 2014) *Violations*, PA. BD. PROB. & PAROLE *Factors Considered by the Board*, PA. BD. PARDONS (Aug. 15, 2012)
Rhode Island		R Φ			13 R.I. GEN. LAWS § 13-8-16(a), 13-8-18, 13-8-19(a), 13-8-32(c) (2018) E-mail from Lisa Blanchette, Asst. Prob. & Parole Adm'r, to Beth A. Colgan, Asst. Prof. of Law, UCLA Sch. of Law (July 23, 2018) (on file with author)
South Carolina			E ζ		S.C. CODE ANN. §§ 17-25-322(c), 24-21-950(A)(3) (2018) *Frequently Asked Questions (FAQs) About Expungements and Pardons in South Carolina Courts*, S.C. JUD. DEP'T (2011) *How to Apply for a Pardon*, S.C. DEP'T PROB., PAROLE & PARDON SERV. (last updated Dec. 19, 2017)
South Dakota	E Early ζ, Ψ, Φ				S.D. CODIFIED LAWS §§ 16-22-29, 24-15-11, 24-15A-6, 24-15A-7, 24-15A-8.1, 24-15A-24, 24-15A-50 (2018) S.D. Bd. of Pardons & Paroles, Policy 8.1.A.7 Early Discharges § VI.7 (last updated Aug. 2017) S.D. Parole Services, Operational Memo. 7.3.E.5 § 7.A.1 (on file with author) S.D. Parole Services, Operational Memo. 7.4.G.3 § V.B.3.e (on file with author) S.D. Parole Services, Parole/Suspended Sentence Standard Supervision Agreement, at SA13C (on file with author)

Jurisdiction	Automatic		Discretionary		Authority
	Final	Provisional	Restoration Application	General Clemency	
					Frequent Questions: Parole, Continued, S.D. DEP'T CORR. (2018) E-mail from Michael Winder, Commc'ns & Info. Manager, S.D. Dep't of Corr., to Beth A. Colgan, Asst. Prof. of Law, UCLA Sch. of Law (Mar. 20, 2018) (on file with author) Letter from Dennis Kaemingk, Cabinet Sec'y, S.D. Dep't of Corr., to Beth A. Colgan, Asst. Prof. of Law, UCLA Sch. of Law (Jan. 29, 2018) (on file with author)
Tennessee	E Extend Ψ				TENN. CODE ANN. §§ 40-28-117(a)(1), (a)(2)(A); 40-28-609(a); 40-29-202(a)(3) (2018) Tenn. Div. of Elections, Certificate of Restoration of Voting Rights (Apr. 2017)
Texas	E Early ζ, Ψ, Φ				TEX. ELEC. CODE ANN. § 11.002(A)(4)(A) (2017) TEX. CODE CRIM. PROC. ANN. art. 42.037(h) (West 2018) TEX. GOV'T CODE ANN. §§ 508.182; 508.189; 508.221; 508.222; 508.1555(a)(2), (4) (2017)
Utah		R ζ			UTAH CODE ANN. §§ 63M-7-404(6)(a), (c); 64-13-21(2)(a)–(b), (6)(a); 77-27-6; 77-27-10(1)(a), (6); 77-27-11(1), (6) (LexisNexis 2018) *Parole Special Conditions*, UTAH DEP'T CORR. (2015)
Virginia			E Early Ψ Extend Ψ		VA. CODE ANN. §§ 53.1-136, 53.1-150(B), 53.1-157, 53.1-231.2 (2018) VA. PAROLE BD., POLICY MANUAL 23–25 (Oct. 1, 2006) *Community Corrections—Frequently Asked Questions*, VA. DEP'T CORR.
West Virginia	E Early Ψ				W. VA. CODE §§ 3-2-2(b), ; 61-11A-4(g); 62-12-17(a)(5), (c); 62-12-18 (2018)
Wisconsin	E Early π		M Ψ		WIS. STAT. § 304.074(4); 304.078(1), (3); 973.20(14) (2018) *Standard Rules of Community Supervision*, WIS. DEP'T CORR. Office of the Governor of State of Wisc., Application for Executive Clemency (last updated Mar. 11, 2009) Wisc. Dep't of Corr., Div. of Cmty. Corr., Electronic Case Reference Manual, Discharge Section 5 (2012) (on file with author) Wisc. Dep't of Corr., Div. of Cmty. Corr., Electronic Case Reference Manual,

Jurisdiction	Automatic		Discretionary		Authority
	Final	Provisional	Restoration Application	General Clemency	
					Supervision Process 1 (2012) (on file with author)
Wyoming				M ζ, Ψ	Office of the Governor of State of Wyo., Application for a Pardon or Restoration of Rights (last updated July 2016) (on file with author)

APPENDIX D: PROBATION

This Appendix documents jurisdictions in which reenfranchisement is dependent on completion of probation in ways that allow for wealth-based penal disenfranchisement. Wealth-based penal disenfranchisement can occur because payment relates to eligibility for reenfranchisement ("E") or consideration of the merits for discretionary forms of reenfranchisement ("M"), or may serve as a basis for revocation of probation or other return to incarceration for nonpayment ("R"). A would-be voter may be subject to wealth-based penal disenfranchisement through the loss of early discharge from probation ("Early") or an extension of the probation term ("Extend") due to an inability to pay economic sanctions. Further detail of these mechanisms are designated as follows:

- π Explicit mandate of payment of economic sanctions
- ζ Requirement of adherence to all probation conditions
- Ψ Authority is sufficiently expansive (e.g., satisfactory completion or violation of probation conditions, or no limitations on discretion) so as to allow for the existence of ongoing criminal debt to be the determining factor for reenfranchisement
- Φ Probation decision includes a determination of whether a person makes a good faith or reasonable effort to pay
- ± Probation requirement is waivable

Jurisdiction	Automatic		Discretionary		Authority
	Final	Provisional	Restoration Application	General Clemency	
Alabama	E Early π		E Early π		ALA. CODE §§ 15-18-70, 15-22-36(c), 15-22-36.1(a)(4)(a)–(c), 15-22-54(b) (2018) Ala. Bd. of Pardons & Paroles, Rules, Regulations, and Procedures, art. 8, ¶ 7 Telephone Interview with Sarah Stillman, Asst. Exec. Dir., Ala. Bd. of Pardons & Paroles (June 14, 2018)
Alaska	E Early π, Φ			M Early Ψ	ALASKA STAT. §§ 12.55.051(c), 12.55.100(a)(2)(A)–(B), 12.55.185(18), 33.05.020 (2018) *Executive Clemency Packet,* STATE ALASKA BD. PAROLE 6, 8, 13 (Jan. 20, 2018) State of Alaska Dep't of Corr., Policy 910.04: Fines, Court Costs And Restitution (Dec. 29, 2016)

Jurisdiction	Automatic		Discretionary		Authority
	Final	Provisional	Restoration Application	General Clemency	
Arizona	E Extend π		E Extend π	M Ψ	ARIZ. REV. STAT. ANN. §§ 13-808(B), 13-902(C)(1), 13-905, 13-912(A)(1) (2018) Ariz. Bd. of Exec. Clemency, Pardon Application 3, 10 (last updated Jan. 9, 2015) (on file with author) Judicial Restoration Application Materials (*see* Appendix F) Superior Court of Ariz. Greenlee Cty., Restoration of Civil Rights Application (Aug. 2017) (on file with author)
Arkansas	E Extend π		M Ψ		ARK. CONST. amend. LI, § 11(d)(2)(A), (C)–(D) ARK. CODE ANN. §§ 5-4-205(f)(1), 5-4-306, 16-10-305, 16-93-311, 16-93-312(a)(3) (2018) Ark. Parole Bd., Executive Clemency Application 2 (May 4, 2015) *See, e.g.*, Press Release, Ark. Governor's Office, Governor Asa Hutchinson Announces Intent to Grant Executive Clemency (Sept. 5, 2018) ("The applicants intended for pardons have . . . fulfilled all . . . probationary requirements . . . .")
Delaware	E Early Ψ Extend ζ				DEL. CODE ANN. tit. 11, §§ 4104, 4321, 4333(a), 4333(f), 4333(h), 4347(j) (2018) DEL. CODE ANN. tit. 15, §§ 6102(a)(4), 6104(a), 6104(c) (2018) DEL. SUPER. CT. R. CRIM. PROC. 32.1(b), 35(b) State of Del. Dep't of Corr., Procedure Number 7.5: The Collection of Monies (Feb. 12, 2016) (on file with author)
District of Columbia		R Ψ			D.C. CODE §§ 16-711, 24-304(a) (2018) Court Services & Offender Supervision Agency for D.C., Strategic Plan, Fiscal Years 2014–2018, at 11
Florida	E Early π Extend π, Φ		E Early π Extend π, Φ		FLA. CONST. art VI, § 4 FLA. STAT. §§ 940.05; 948.06(1)(h), (2)–(3), (5), (7) (2018) FLA. ADMIN. CODE ANN. r. 33-302.111(1) (2018) Fla. Third Jud. Cir. Admin. Order 2017-002, at 3–4 (on file with author) Fla. Thirteenth Jud. Cir. Admin. Order S-2016-019, at 4 (on file with author) Fla. Fourteenth Jud. Cir. Admin. Order 2017-00-02, at 3 (on file with author) Fla. Fifteenth Jud. Cir. Admin. Order 4.411-11/17, at 3 (on file with author) Fla. Eighteenth Jud. Cir. Admin. Order 17-29-B, at 4 (on file with author)

Jurisdiction	Automatic		Discretionary		Authority
	Final	Provisional	Restoration Application	General Clemency	
					Telephonic Message from Paula Watkins, Office of Court Admin., Second Jud. Cir., to Beth A. Colgan, Asst. Prof. of Law, UCLA Sch. of Law (Dec. 5, 2017) (on file with author) Fla. Office of Exec. Clemency, Application for Clemency (Aug. 18, 2017) Fla. Office of Exec. Clemency, Rules of Executive Clemency 4–5, 8–9, 12–13 (Mar. 9, 2011)
Georgia	E Early π Extend π, Ψ				GA. CONST. art. II, § 1, ¶ III GA. CODE ANN. §§ 17-10-1(a)(1)(B), 17-10-1(a)(2)(A), 21-2-216(b), 42-8-34(d)–(e) (2018) Effect of New Georgia Constitution of 1983 on the Loss and Restoration of Civil Rights, Op. Att'y Gen. Ga. 69 (1983) (on file with author) *Frequently Asked Questions*, GA. SEC'Y STATE
Hawaii		R Φ			HAW. REV. STAT. §§ 706-624(1)(g), (2)(d); 706-625(3), (5) (2018)
Idaho	E Early Ψ Extend Ψ		E Early Ψ Extend Ψ		IDAHO CODE §§ 18-310(2), 19-2601, 19-2608, 20-222(1), 20-225 (2018) State v. Wagenius, 581 P.2d 319, 324–26 (Idaho 1978) *Pardon Application Information*, IDAHO COMMISSION PARDONS & PAROLE
Illinois		R Φ			730 ILL. COMP. STAT. ANN. 5/5-6-3(b)(8), (b)(10)(iv)–(v), (g), (i)–(i)(5), (j); 5/5-6-4(d), (h) (West 2018)
Indiana		R Φ			IND. CODE §§ 35-38-2-1(b), (d); 35-38-2-2.1; 35-38-2-2.3(6), (8), (21); 35-38-2-3(a)(1), (g), (h)(3), (n) (2018)
Iowa			E Early π Extend π M π		IOWA CODE §§ 905.14; 907.6; 907.7; 907.9(1), (4)(a) (2018) IOWA ADMIN. CODE r. 201-45.6(2)–(3), 205-14.3(3)(914) (2018) *Frequently Asked Questions (FAQs)—Restoration of Citizenship Rights–Right to Vote and Hold Public Office*, OFFICE GOVERNOR IOWA (Sept. 1, 2016)
Kansas	E Early π Extend π				KAN. STAT. ANN. §§ 21-6607(b)(7), (13); 21-6607(c)(2), (3)(A); 21-6608(c)(7)–(8), (d) (2018) Crimes and Punishments, Op. Att'y Gen. Kan. 2000-59 (Nov. 20, 2000) *Am I Eligible to Vote?*, VOTE KANSAS
Kentucky			E Extend π		KY. CONST. § 145(1) KY. REV. STAT. ANN. §§ 431.073(2); 533.020(4); 533.030(2)(g), (3) (West 2018)

Jurisdiction	Automatic		Discretionary		Authority
	Final	Provisional	Restoration Application	General Clemency	
					Commonwealth v. Wright, 415 S.W.3d 606 (Ky. 2013) Ky. Div. of Prob. & Parole, Application for Restoration of Civil Rights 2 (last updated July 2012)
Louisiana	E Early ζ Extend ζ	R ζ			LA. CONST. art. I, § 20 LA. STAT. ANN. §§ 15:574.7(C)(2)(a)(ix)(dd); 18:2(8); 30:875.2(A); 30:895(A), (C), (K), (M); 30:897(A); 30:985.1 (2018) LA. STAT. ANN. §§ 18:102(A)(1), 18:104(C)(1)(b), 18:177(A)(1) (effective Mar. 1, 2019) LA. CODE CRIM. PRO. ANN. § 900(A)(5)–(7), 901.1 (West 2018) LA. ADMIN. CODE tit. 22, § 409(H) (2018) Rosamond v. Alexander, 846 So. 2d 829 (La. Ct. App. 2003) *Frequently Asked Questions*, LA. DEP'T CORR.
Maryland		R ζ, Φ			MD. CODE ANN., CRIM. PROC. §§ 6-223(d); 6-224(d); 6-226(b), (d), (f), (g)(1)–(3); 11-607(a)(1)(iii) (West 2018) MD. R. CRIM. PRO. 4-346 (West 2018)
Massachusetts		R π			MASS. GEN. LAWS. ch. 276, §§ 87A, 92; ch. 279, § 1 (2018) *Find Out What Happens If You Violate Your Probation*, OFF. COMM'R PROBATION *Guidelines for Probation Violation Proceedings in the Superior Court*, MASS. SUP. CT. DEP'T (Feb. 1, 2016)
Michigan		R ζ, Φ			MICH. COMP. LAWS §§ 771.1(3); 771.3(8); 771.4; 771.4b(1)–(2), (4), (7) (2018) *Probation Supervision*, MICH. DEP'T CORR.
Minnesota	E Early Ψ Extend π, ζ			E Extend ζ	MINN. STAT. §§ 201.145(3)(b); 609.135(1)(a)–(b), (2)(f)–(g), (4); 609.165(1)–(2); 638.02(1) (2018) MINN. R. § 6600.1000 (2018) MINN. R. CRIM. P. 27.03(4)(E) (2018) *Register to Vote*, MINN. SEC'Y STATE *Voting with a Criminal Record*, MINN. SEC'Y STATE Minn. Dep't of Corr., Probation Agreement (on file with author)
Mississippi			E Early ζ, Ψ Extend Ψ M		MISS. CODE ANN. §§ 47-7-2(q); 47-7-35(1)(h); 47-7-37(1); 47-7-38(5)(e); 47-7-40(3); 47-7-41; 47-7-47(5); 47-7-49(1); 47-7-402(2), (5) (2018)

Jurisdiction	Automatic		Discretionary		Authority
	Final	Provisional	Restoration Application	General Clemency	
			ζ		201-2 MISS. CODE R. § 6(B) (LexisNexis 2018) Office of the Governor, Application for Clemency 5 *See supra* notes 122 and accompanying text
Missouri	E Early ζ, Ψ Extend π, Ψ				MO. REV. STAT. §§ 115.133.2(2), 217.703, 559.021, 559.036(2), 559.100(2)–(3), 559.105(2) (2018) 28 Mo. Prac., Mo. Crim. Prac. Handbook § 37:3 (2018) *Go Vote Missouri: Frequently Asked Questions,* MO. SEC'Y STATE
Montana		R Φ			MONT. CODE ANN. §§ 46-18-203(6)(b), 46-18-203(7)(a)(iii)–(iv), 46-18-241 (2018) MONT. ADMIN. R. 20-7-1101(11) (2018) *Paying Restitution and Supervision Fees*, MONT. DEP'T CORR.
Nebraska	E Early π		E Early π	E ±	NEB. REV. STAT. §§ 29-2262(2)(l), (m), (s)–(t); 29-2263(1)–(2), (4); 29-2264(1)–(2), (4), (4)(b) (2018) NEB. CT. R. § 6-1903(A)(3), (B) (2018) *Instructions for Filing an Application*, NEB. BD. PARDONS (2013) Neb. Bd. of Pardons, Pardon Board Application (2013)
Nevada	E Early π, Ψ, Φ Extend Φ		E ± M Ψ		NEV. REV. STAT. §§ 176A.430(1), (5)–(6); 176A.500(1)–(2), (5)(a); 213.1076 (2018) NEV. REV. STAT. §§ 176A.850(4), 213.155(2) (effective Jan. 1, 2019) NEV. ADMIN. CODE §§ 213.065(1)(b)–(f), (3); 213.230 (2018) *Criteria and Application Instructions Community Cases*, NEV. BD. PARDONS 1, 3 (Apr. 25, 2017)
New Hampshire		R ζ			N.H. REV. STAT. ANN. §§ 504-A:4(III); 651:2(V)–(VII)(a)(4), (b) (2018) *Victim Services: Community-Based Punishment*, N.H. DEP'T CORR. *Victim Services: Conditions of Probation-Parole*, N.H. DEP'T CORR.
New Jersey	E Early Φ Extend π		E Φ		N.J. STAT. ANN. §§ 2C:45-1(a), (b)(11), (c), (d)(1); 2C:45-2(a)–(b), (c)(1)–(2); 2C:45-3(a)(4); 2C:46-1(b)(1); 19:4-1(8) (West 2018) State v. DeChristino, 562 A.2d 236, 238–39 (N.J. Super. Ct. App. Div. 1989) State of N.J., Petition for Executive Clemency (last updated June 2011)

Jurisdiction	Automatic		Discretionary		Authority
	Final	Provisional	Restoration Application	General Clemency	
New Mexico	E Early π Extend π				N.M. STAT. ANN. §§ 1-4-27.1(B)(2); 31-13-1(A)(1); 31-17-1(B)–(C), (H); 31-20-6 (2018) State v. Lack, 650 P.2d 22, 28 (N.M. 1982) *Voter Registration Eligibility Requirements and FAQs*, N.M. SEC'Y STATE *Voter Registration Information*, N.M. SEC'Y STATE N.M. Corr. Dep't, Policy CD-050200 (Mar. 9, 2017) N.M. Corr. Dep't, Policy CD-051500 3 (July 31, 2015) N.M. Corr. Dep't, Policy CD-053100 2(F) (Mar. 9, 2017) N.M. Corr. Dep't, Policy CD-055000 1, 3–4 (Oct. 27, 2017) *Offender Orientation Handbook*, N.M. CORR. DEP'T 1 *Probation & Parole*, N.M. CORR. DEP'T ("Supervision Conditions & Special Programs")
North Carolina	E Early π Extend Φ				N.C. GEN. STAT. §§ 13-1(1); 15A-1334(a), (d); 15A-1342(b); 15A-1343 (2018) *Policy & Procedures*, N.C. DEP'T PUB. SAFETY 140, 158, 169, 210, 222, 235–36, 266, 268–69 (Aug. 1, 2016) *Completing Probation Successfully*, N.C. DEP'T PUB. SAFETY *NC Voting Rights Guide: People in the Criminal Justice System*, N.C. STATE BD. ELECTIONS & ETHICS ENF'T
North Dakota		R ζ, Φ		M ζ, Φ	N.D. CENT. CODE §§ 12.1-32-07(2), (3)(k), (4)(e)–(f), (4)(p), (7) (2018) N.D. Pardon Advisory Bd. Application, SFN 14859 (Dec. 2010) E-mail from Steven D. Hall, Dir. of Transitional Planning Serv., N.D. Dep't of Corr. & Rehab., to Beth A. Colgan, Asst. Prof. of Law, UCLA Sch. of Law (July 19, 2018) (on file with author)
Ohio		R ζ	M Ψ		OHIO REV. CODE ANN. §§ 2951.021(A)(1)–(2), (4); 2929.15(B)(1)(c)(i)–(ii); 2929.18 (LexisNexis 2018) Ohio Dep't of Rehab. & Corr., Policy 105-PBD-05, Clemency Procedures: Non-Death Penalty Cases, § VI.C(4)(e) (July 17, 2017)

Jurisdiction	Automatic		Discretionary		Authority
	Final	Provisional	Restoration Application	General Clemency	
Oregon		R ζ			OR. REV. STAT. §§ 137.540(1)(a), 137.545(5)(a)–(b), 137.593(2)(a), 137.593(c)–(d), 137.599 (2018) OR. ADMIN. R. 213-010-0002(1)–(3) (2018)
Pennsylvania		R ζ		M ζ	37 PA. CONS. STAT. § 65.4(6) (2018) 42 PA. CONS. STAT. § 9771(b) (2018) *Factors Considered by the Board*, PA. BD. PARDONS (Aug. 15, 2012)
Rhode Island		R Φ			12 R.I. GEN. LAWS §§ 12-19-8.1(a)(8), 12-19-9(b)(5) (2018) R.I. SUPER. CT. R. CRIM. P. 32(f) E-mail from Lisa Blanchette, Asst. Prob. & Parole Adm'r, to Beth A. Colgan, Asst. Prof. of Law, UCLA Sch. of Law (July 23, 2018) (on file with author)
South Carolina	E Early Ψ Extend Ψ		E Early Ψ Extend Ψ		S.C. CODE ANN. §§ 7-5-120(B)(3), 17-3-30(B), 17-25-323, 24-21-430(6), 24-21-440, 24-21-950(A)(1) (2018) *Frequently Asked Questions (FAQs) About Expungements and Pardons in South Carolina Courts*, S.C. JUD. DEP'T (2011) *How to Apply for a Pardon*, S.C. DEP'T PROB., PAROLE & PARDON SERV. (last updated Dec. 19, 2017) Opinion regarding the interpretation of Section 7-5-120(B)(3) of the South Carolina Code, Op. Att'y Gen. S.C., 2014 WL 4382450 (Aug. 19, 2014)
South Dakota	E Early π, ζ, Ψ				S.D. CODIFIED LAWS §§ 16-22-29, 23A-27-18, 23A-27-25.1(2), 24-15A-6, 24-15A-8.1 (2018) *Elections & Voting: Felony Convictions*, S.D. SEC'Y STATE
Tennessee	E Extend ζ, Φ				TENN. CODE ANN. §§ 40-35-303(d)(1), (d)(11), (d)(12)(A), (i)(2)–(3), (p)(6)(A)–(B); 40-35-308(c); 40-35-311(e)(1) (2018) Tenn. Div. of Elections, Certificate of Restoration of Voting Rights (Apr. 2017)
Texas	E Early ζ, Φ Extend ζ, Φ				TEX. ELEC. CODE ANN. § 11.002(A)(4)(A) (2017) TEX. CODE CRIM. PROC. ANN. art. 42.037(h); 42A.651(a); 42A.652(a)–(b); 42A.701(b)(1), (e)–(f); 42A.751(i); 42A.752(a); 42A.753(a), (c) (West 2018)
Utah		R ζ			UTAH CODE ANN. §§ 63M-7-404(6)(a), (c); 64-13-21(2)(a)–(b), (6)(a); 77-18-1(8)(f)–(h), (12)(e)(ii), (iv) (West 2018) *Probation Special Conditions*, UTAH DEP'T CORR.

Jurisdiction	Automatic		Discretionary		Authority
	Final	Provisional	Restoration Application	General Clemency	
Virginia			E Early Ψ Extend π, Ψ		VA. CODE ANN. §§ 19.2-303; 19.2-303.3(B), (D); 19.2-304; 19.2-305(A)–(C); 19.2-305.1(A), (C); 53.1-231.2 (2018)
West Virginia	E Early Ψ Extend Ψ				W. VA. CODE §§ 3-2-2(b); 61-11A-4(g); 62-12-9(a)(5)–(6), (b)(1)–(2); 62-12-11 (2018)
Wisconsin	E Early π Extend Φ		M Ψ		WIS. STAT. §§ 304.078(3); 973.09(1)(b), (3)(c)(1), (d)(2), (5), (l)(g), (l)(r) (2018) *Standard Rules of Community Supervision*, WIS. DEP'T CORR. Office of the Governor of State of Wisc., Application for Executive Clemency (last updated Mar. 11, 2009) Wisc. Dep't of Corr., Div. of Cmty. Corr., Electronic Case Reference Manual, Discharge Section 1 (2012) (on file with author) Wisc. Dep't of Corr., Div. of Cmty. Corr., Electronic Case Reference Manual, Supervision Process 3–4 (2012) (on file with author) E-mail from Michael R. Haas, Staff Counsel, Wis. Elections Comm'n, to Beth A. Colgan, Asst. Prof. of Law, UCLA Sch. of Law (Mar. 20, 2018) (on file with author) E-mail from Michael R. Haas, Staff Counsel, Wis. Elections Comm'n, to Beth A. Colgan, Asst. Prof. of Law, UCLA Sch. of Law (Mar. 19, 2018) (on file with author)
Wyoming	E Early ζ Extend Ψ		E Early ζ Extend Ψ	M ζ, Ψ	WYO. STAT. ANN. §§ 7-9-108(a); 7-9-109; 7-13-105(a)(ii), (b)(ii), (c)(i)–(ii); 7-13-302(a)(ii), 7-13-304(a); 7-13-305(a)–(b) (2018) Office of the Governor of State of Wyo., Application for a Pardon or Restoration of Rights (last updated July 2016) (on file with author) Wyo. Dep't of Corr., Policy & Procedure #3.403 Inmate Rights 8 (July 1, 2018) Wyo. Dep't of Corr., Application for Restoration of Wyoming Voting Rights (June 30, 2017) (on file with author) Wyo. Dep't of Corr., Field Servs. Operational Standards & Proc. #7.10 Restoration of Voting Rights (Jan. 2, 2018) (on file with author)

APPENDIX E: FEDERAL AND OUT-OF-STATE CONVICTIONS

This Appendix documents jurisdictions that disenfranchise people for federal or out-of-state convictions ("✓") or in which the primary disenfranchising language is sufficiently broad to allow for federal and out-of-state convictions but where no official interpretation exists ("†").

Jurisdiction	Federal	Out-of-State	Authority
Alabama	✓	✓	ALA. CODE § 17-3-30.1(c)(47) (2017)
Alaska	✓		E-mail from Jeremy Johnson, Alaska Div. of Elections, to Beth A. Colgan, Asst. Prof. of Law, UCLA Sch. of Law (Dec. 1, 2017) (on file with author)
Arizona	✓		ARIZ. REV. STAT. ANN. §§ 13-909, 13-910, 13-912 (2018)
Arkansas	✓	✓	Merritt v. Jones, 533 S.W.2d 497, 387 (Ark. 1976)
California	✓		CAL. ELEC. CODE § 2101(a), (c) (Deering 2018)
Colorado	✓		COLO. REV. STAT. § 1-2-606 (2018) *Voters with Convictions FAQ*, COLO. SEC'Y STATE
Connecticut	✓	✓	CONN. GEN. STAT. §§ 9-46, 9-46a (2017) Letter from Lewis A. Button, III, Office of the Sec'y of State, to Beth A. Colgan, Asst. Prof. of Law, UCLA Sch. of Law (Jan. 3, 2018) (on file with author)
Delaware	✓	✓	Email from Elaine Manlove, State Election Comm'r of Del., to Beth A. Colgan, Asst. Prof. of Law, UCLA Sch. of Law (Dec. 4, 2017) (on file with author)
District of Columbia	†	†	D.C. CODE § 1-1001.02(2)(C), (7) (2018) D.C. Mun. Regs. tit. 3, § 500.2(c) (2018) Email from Matthew James, Asst. Att'y Gen. Legal Counsel Div., Office of Att'y Gen. of D.C., to Beth A. Colgan, Asst. Prof. of Law, UCLA Sch. of Law (Aug. 24, 2018) (on file with author)
Florida	✓	✓	Fla. Office of Exec. Clemency, Rules of Executive Clemency 14 (Mar. 9, 2011)
Georgia	✓	✓	GA. CODE ANN. § 21-2-231 (2018)

Hawaii	†	✓	HAW. REV. STAT. §§ 11-13(1), (5); 831-2(a)(1) (2018) Telephone Interview with Tommy Johnson, Parole & Pardons Adm'r, Haw. Paroling Auth. (July 19, 2018)
Idaho	✓	✓	IDAHO CODE § 18-310(4) (2018)
Illinois	✓	✓	10 ILL. COMP. STAT. 5/3-1, 5/3-2, 5/3-5 (2018) *Illinois Voter Registration Application*, ILL. STATE BD. ELECTIONS (Sept. 2017)
Indiana	✓	✓	IND. CODE §§ 3-5-5-2; 3-5-5-4; 3-5-5-8, 3-5-5-9; 3-7-13-1; 3-7-13-4(a)–(b); 3-7-13-5; 3-7-46-1 to -9 (2018) E-mail from Matthew R. Kochevar, Co-Gen. Counsel, Ind. Election Div., to Beth A. Colgan, Asst. Prof. of Law, UCLA Sch. of Law (Aug. 15, 2018) (on file with author)
Iowa	✓		IOWA CODE §§ 48A.6, 48A.30(1)(d) (2018)
Kansas	✓	✓	KAN. STAT. ANN. § 21-6613(a)–(b) (2018)
Kentucky	✓	✓	Ky. Div. of Prob. & Parole, Application for Restoration of Civil Rights 2 (last updated July 2012)
Louisiana	✓		Cardon v. Dauterive, 264 So. 2d 806 (La. Ct. App. 1972) Crothers v. Jones, 120 So. 2d 248 (La. 1960)
Maryland	✓	✓	MD. CODE ANN., ELEC. LAW § 3-102 (2018) Wagner v. Scurlock, 170 A. 539, 542 (Md. 1934) *Voter Registration*, MD. STATE BD. ELECTIONS
Massachusetts	✓	✓	MASS. GEN. LAWS ch. 51, § 1 (2018) *Absentee Voting*, SEC'Y COMMONWEALTH MASS. E-mail from Mass. Elections Div., to Beth A. Colgan, Asst. Prof. of Law, UCLA Sch. of Law (Aug. 8, 2018) (on file with author)
Michigan	✓	✓	MICH. CONST. art. II, § 1 MICH. COMP. LAWS §§ 168.10(1), 168.11(1)–(2), 168.758b (2018)
Minnesota	✓	✓	E-mail from Aaron Swanum, Info. Officer, Minn. Dep't of Corr., to Beth A. Colgan, Asst. Prof. of Law, UCLA Sch. of Law (July 20, 2018) (on file with author)
Missouri	✓		State *ex rel.* Barrett v. Sartorius, 175 S.W.2d 787, 788–89 (Mo. 1943) Bruno v. Murdock, 406 S.W.2d 294, 297 (Mo. Ct. App. 1966)

Montana	✓	†	MONT. CONST. art. IV, § 2 MONT. CODE ANN. §§ 13-1-111; 13-1-112(1)–(2), (4) (2018) Melton v. Oleson, 530 P.2d 466, 470 (Mont. 1974) *How to Register to Vote*, MONT. SEC'Y STATE
Nebraska	✓	✓	NEB. REV. STAT. §§ 29-113; 32-313(1), (3) (2018)
Nevada	✓	✓	NEV. CONST. art. II, § 1
New Hampshire	✓	✓	N.H. REV. STAT. ANN. §§ 607-A:1, 607-A:2(I)(a), 607-A:5(II)–(III), 654:2(I), 654:2-a(I) (2018) Paey v. Rodrigue, 400 A.2d 51, 53 (N.H. 1979)
New Jersey	✓	✓	N.J. STAT. ANN. § 19:4-1(8) (West 2018)
New Mexico	✓	✓	N.M. STAT. ANN. § 31-13-1(A)(3) (2018) *Voter Registration Eligibility Requirements and FAQs*, N.M. SEC'Y STATE
New York	✓	✓	N.Y. ELEC. LAW § 5-106(3)–(4) (McKinney 2018)
North Carolina	✓	✓	N.C. CONST. art. VI, § 2(3) N.C. GEN. STAT. §§ 13-1(4)–(5), 163A-841(a)(2) (2018)
North Dakota	†	†	N.D. CENT. CODE §§ 12.1-33-01(1)(a), 16.1-01-04, 16-1-01-04.2 (2018)
Ohio	✓	✓	OHIO REV. CODE ANN. §§ 2961.01(A)(1)–(2); 3503.1(A); 3503.02(A)–(B) (West 2018)
Oklahoma	✓		OKLA. STAT. tit. 26 § 4-120.4 (2018) Hughes v. Okla. State Election Bd., 413 P.2d 543, 548 (1966) *See supra* note 152
Oregon	✓		OR. REV. STAT. §§ 137.281(5); 247.035(1)(a), (c)–(d), (f), (2) (2018)
Pennsylvania	†	†	25 PA. CONS. STAT. §§ 1301(a); 1302(a)(1)(iii), (a)(3) (2018)
Rhode Island	✓	✓	17 R.I. GEN. LAWS §§ 17-1-3, 17-1-3.1(a)(2) (2018) E-mail from Emmanuel Hernandez, R.I. Bd. of Elections, to Beth A. Colgan, Asst. Prof. of Law, UCLA Sch. of Law (July 20, 2018) (on file with author)
South Carolina	✓	✓	E-mail from Harrison Brant, Legal Counsel, S.C. State Election Comm'n, to Beth A. Colgan, Asst. Prof. of Law, UCLA Sch. of Law (Mar. 1, 2018) (on file with author) E-mail from Harrison Brant, Legal Counsel, S.C. State Election Comm'n, to Beth A.

			Colgan, Asst. Prof. of Law, UCLA Sch. of Law (Dec. 15, 2017) (on file with author) Opinion as to Whether an Individual Convicted of a Violent Crime Would Be Eligible to Purchase a Pistol, Op. Att'y Gen. S.C. (Jan. 21, 1966), 1966 WL 11763 Opinion on Statute Defining Violent Crimes, Op. Att'y Gen. S.C., (May 24, 1995), 1995 WL 803666 Opinion on Whether Certain Convictions Disqualify One from Voting, Op. Att'y Gen. S.C., (Aug. 3, 1984), 1984 WL 159901.
South Dakota	✓		S.D. CODIFIED LAWS § 12-4-18 (2018) *Elections & Voting: Felony Convictions*, S.D. SEC'Y STATE
Tennessee	✓	✓	TENN. CODE ANN. § 40-29-202(a) (2018)
Texas	✓	✓	31B TEX. JUR., ELECTIONS § 113 (3d ed. Oct. 2018)
Utah	✓	✓	UTAH CODE ANN. §§ 20A-2-101(1)(b), (2)(a)(ii); 20A-2-101.5 (West 2018)
Virginia	✓	✓	VA. CONST. art. II, § 1 Opinion on Restoration of Felon Voting Rights, Op. Att'y Gen. Va. (Aug. 3, 1999), 1999 WL 1211285
Washington	✓	✓	WASH. REV. CODE § 29A.04.079 (2018) *Elections and Voting*, WASH. SEC'Y STATE
West Virginia	✓	✓	W. VA. CODE § 3-2-23(2) (2018)
Wisconsin	✓	✓	E-mail from Michael R. Haas, Staff Counsel, Wis. Elections Comm'n, to Beth A. Colgan, Asst. Prof. of Law, UCLA Sch. of Law (Mar. 19, 2018) (on file with author)
Wyoming	✓	✓	WYO. STAT. ANN. § 7-13-105(a), (c)(ii) (2018) Wyo. Dep't of Corr., Policy & Procedure #3.403 Inmate Rights (July 1, 2018) Wyo. Dep't of Corr., WDOC Form #344: Application for Restoration of Wyoming Voting Rights (last updated June 30, 2017)

APPENDIX F: PUBLICLY AVAILABLE SOURCES

This Appendix provides links to sources cited in Appendices A–E that are publicly available. All other sources cited in appendices, other than statutes and administrative rules, are on file with the author.

Jurisdiction	**Authority**
Alabama	Ala. Bd. of Pardons & Paroles, Rules, Regulations, and Procedures art. 8, http://www.pardons.state.al.us/Rules.aspx#Article_Eight (last visited Sept. 15, 2018) [https://perma.cc/GSH2-XE7V]
Alaska	*Executive Clemency Packet,* STATE ALASKA BD. PAROLE (Jan. 20, 2018), http://www.correct.state.ak.us/Parole/documents/Final%20Clemency%20Application.pdf [https://perma.cc/9VHG-G69L] State of Alaska Dep't of Corr., Policy 910.04: Fines, Court Costs And Restitution (Dec. 29, 2016), http://www.correct.state.ak.us/pnp/pdf/910.04.pdf [https://perma.cc/7KR3-CRMH]
Arizona	Ariz. Bd. of Exec. Clemency, Application for Absolute Discharge from Parole (June 30, 2017), https://boec.az.gov/sites/default/files/documents/files/Absolute-Discharge-Application-Form_REV063017.pdf [https://perma.cc/ZNE7-P69P] *Judicial Restoration Application Materials:* Cochise County (July 20, 2017), https://www.cochise.az.gov/sites/default/files/court_administration/RestorationofRights.pdf [https://perma.cc/VW37-8AX5] Coconino County (Aug. 2017), http://www.coconino.az.gov/DocumentCenter/View/1880/49?bidId [https://perma.cc/2F37-LEVF] Graham County (Oct. 1, 2015), https://www.graham.az.gov/DocumentCenter/View/869/G10-Restoration-of-Civil-Rights-PDF?bidId [https://perma.cc/Q4XV-YNS2] Maricopa County (Apr. 30, 2014), http://www.clerkofcourt.maricopa.gov/eformsondemand/300.pdf [https://perma.cc/4Q8N-AQXM] Mohave County (Nov. 18, 2010), https://www.mohavecourts.com/court%20forms/Clerks%20Office/Criminal/CRInstRestoreCivilRights-sc.pdf [https://perma.cc/ZN6C-8H5F] Pima County (Aug. 2012), http://www.sc.pima.gov/portals/0/library/revisedrestorationforms%208-12.pdf [https://perma.cc/BG7J-3698] Pinal County (July 6, 2017), http://www.coscpinalcountyaz.gov/assets/restoration-of-civil-rights-application.pdf [https://perma.cc/W8PK-Z7AT]

Jurisdiction	Authority
	Santa Cruz County, https://www.santacruzcountyaz.gov/DocumentCenter/View/6815/RESTORATION-OF-RIGHT-TO-VOTE (last visited Oct. 30, 2018) [https://perma.cc/L6TT-3E7W]
	Yavapai County (May 1, 2011), http://courts.yavapai.us/Portals/1/Documents/App-to-Vacate-Judgment.pdf [https://perma.cc/72AP-BZXZ]
	Yuma County, http://www.yumacountyaz.gov/home/showdocument?id=27028 (last visited Oct. 30, 2018) [https://perma.cc/AH4T-GVSE]
Arkansas	Ark. Parole Bd., Executive Clemency Application (May 4, 2015), https://www.paroleboard.arkansas.gov/Websites/parole/images/PardonApplication050415.pdf [https://perma.cc/L5J6-JUMN]
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Wyoming	Wyo. Dep't of Corr., Policy & Procedure #3.403 Inmate Rights (July 1, 2018), https://docs.google.com/a/wyo.gov/viewer?a=v&pid=sites&srcid=d3lvLmdvdnxkb2N8Z3g6YTE3M2Y2YWUyNGEzMDUy [https://perma.cc/7UJK-MMU9]
	Wyo. Dep't of Corr., WDOC Form #344: Application for Restoration of Wyoming Voting Rights, https://docs.google.com/a/wyo.gov/viewer?a=v&pid=sites&srcid=d3lvLmdvdnxkb2N8Z3g6N2JkZDlhOTU0NTU0OTg5ZA (last updated June 30, 2017) [https://perma.cc/PMH8-TQYH]