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A Unified Constitutional View of Financial Punishment: Synthesizing the Excessive Fines Clause and *Bearden*-Based Protections

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This Note coordinates the Eighth Amendment Excessive Fines Clause with the Fourteenth Amendment wealth-discrimination protection set forth in Bearden v. Georgia*. It is generally assumed that the two protections operate independently: while the Excessive Fines Clause protects individuals against exorbitant financial obligations,* Bearden *limits the state from converting criminal debt into a severe liberty deprivation. But in recognizing how the two doctrines are normatively and functionally reinforcing, this Note proposes a single framework for considering financial punishment's constitutionality.*

If the Eighth Amendment protection applies at the imposition of a financial punishment, Bearden *provides a "second look" at the constitutionality of that punishment. Or, put another way, the Eighth Amendment is a preemptive look at the downstream poverty-based liberty deprivations that* Bearden *secures individuals against. Appreciating this relationship affords additional authority to both protections, and suggests a number of improvements to existing safeguards.*

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Unfair and persistent fines and fees practices, and the "criminal debt" that results, have given rise to a two-tiered system of criminal justice. Financial punishment encumbers poor individuals in court appearances, police contacts and arrests, and periods of imprisonment—feeding a cycle of mass incarceration and poverty, and subverting the promise of equal citizenship.[2] Though this phenomenon has received increased attention from legislatures and courts in the wake of Ferguson, the costs of financial obligations continue to expand.[3]

The mixed equal protection-due process framework associated with *Bearden v. Georgia* has provided the main constitutional intervention into this cycle.[4] In *Bearden* itself, the Supreme Court considered the

2. *See* Alexes Harris et al., *Drawing Blood from Stones: Legal Debt and Social Inequality in the Contemporary United State*s, 155 AM. J. OF SOC. 1753, 1777 (2010).

3. *See* Lisa Foster, *Judicial Responsibility for Justice in Criminal Courts*, 46 HOFSTRA L. REV. 21, 27 (2017) (noting that nearly every state has increased the rates of their civil and criminal fines and fees since 2010). I use "financial obligation" to include fines, forfeitures, fees, court costs, and restitution. For a description of each, see Karin D. Martin et al., *Shackled to Debt: Criminal Justice Financial Obligations and the Barriers to Re-Entry They Create*, NEW THINKING IN COMMUNITY CORRECTIONS 2 (2017), https://www.ncjrs.gov/pdffiles1/nij/249976.pdf [https://perma.cc/95SU-RHL8].

4. 461 U.S. 660 (1983). *See infra* Section II.B describing the *Bearden* case line and the hybridized due process-equal protection constitutional architecture

relationship between indigency and the constitutionality of imprisonment. The Court embraced a hybridized due process and equal protection rationale, since described by commentators as "equal process"[5] or "the 'alchemy' of equal protection and due process,"[6] to determine that Danny Bearden's probation could not be revoked solely because he was unable to afford a financial obligation.

But in 2019, the Court incorporated the Eighth Amendment's Excessive Fines Clause against the states in *Timbs v. Indiana.*[7] It is likely path dependency, rather than some essential limitation at the heart of the Clause, that explains why *Bearden* has served as the dominant constitutional frame through which courts, litigants, and scholars have addressed the constitutionality of financial punishment.[8] That said, *Timbs* provides an opportunity to assess both doctrines in light of one another. This work attempts to coordinate the Clause with *Bearden*-based protections, bringing their rationales into alignment and asking how the relationship might be characterized within constitutional theory and procedure.

The Excessive Fines Clause is assumed to apply at sentencing or when an obligation is otherwise "imposed."[9] Only after imposition does the

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developed around it. *See also* Colin Reingold, *Pretextual Sanctions, Contempt, and the Practical Limits of* Bearden*-Based Debtors' Prison Litigation*, 21 MICH. J. RACE & L. 361, 362 (2016) ("Today, *Bearden* is invoked in courtrooms throughout America to protest when judges attempt to jail a defendant for reasons that directly or indirectly stem from poverty.").

5. Brandon L. Garrett, *Wealth, Equal Protection, and Due Process*, 61 WM. & MARY L. REV. 397, 402 (2019).

6. Judith Resnik, *(Un)Constitutional Punishment: Eighth Amendment Silos, Penological Purposes, and People's "Ruin,"* 129 YALE L.J.F. 365, 389 (2020) [hereinafter Resnik, *(Un)Constitutional Punishment*].

7. 139 S. Ct. 682 (2019).

8. *See* Resnik, *(Un)Constitutional Punishment*, *supra* note 6, at 386 ("Indeed, had *Timbs* been decided in the 1960s, *Williams* [a case closely related to *Bearden*, *see infra* Section II.B.1] might also have explored the import of the Excessive Fines Clause."). Given the longstanding dormancy of the Clause, courts have not analyzed the two in tandem. A Westlaw search of *Bearden* and *Timbs*/*Bajakajian* (the prominent Excessive Fines Clause case before *Timbs*) yields only five instances in which both claims are raised and discussed in the same federal court decision.

9. U.S. CONST. amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.").

Bearden-based protection curb the *conversion* of an unaffordable financial obligation into a constitutionally registered liberty deprivation—including, but not limited to, incarceration.[10] As of now, few substantive constitutional protections are in place at imposition and before the moment of conversion. But when kept in view of their shared purpose and overlapping applications, the two protections reinforce one another and suggest additional safeguards throughout the interim period.[11] Understanding the interplay between the two protections would thus be of immense value to litigants and courts seeking to develop an excessive fines jurisprudence that can address the myriad forms of financial punishment and adapt as new forms emerge.

This Essay's analysis unfolds in four Parts. Part I considers the current state of the Excessive Fines Clause. Section I.A surveys the Court's limited excessive fines case law. Though the Court has yet to formally recognize the constitutional necessity of an individualized inquiry into affordability (an "ability-to-pay" inquiry) at the moment a fine is imposed, neither has it foreclosed the possibility. Section I.B describes the interpretative approaches to the Clause that have been elsewhere proposed, and suggests that *Bearden* provides an unexplored though promising vantage from which to justify an upfront ability-to-pay inquiry and bolster the Clause's authority.

Part II examines the *Bearden* and excessive fines doctrines on their own terms, before considering their many conceptual and practical points of convergence. Section II.A traces the history of the Clause through the lens of the *Timbs* opinions, and argues that the Clause's recent

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

11. Given the "post hoc" character of the *Bearden* protection, Beth Colgan has argued that the Eighth Amendment would provide a more robust and upfront means for curbing wealth discrimination in the criminal justice system, for the *Bearden* protection only kicks in after the individual is imperiled in court-imposed debt. *See* Beth A. Colgan, *The Excessive Fines Clause: Challenging the Modern Debtors' Prison*, 65 UCLA L. REV. 2 (2018). Colgan observes that the Excessive Fines Clause is preferable to the *Bearden* protection and should be the focus for reform. In my view, the two protections are normatively reinforcing corollaries, both of which should have import across the debt-imposition continuum. Even if the Excessive Fines Clause is a more promising focal point notwithstanding its dormancy, *Bearden* and its related line of cases can amplify the substantive protections afforded by the Clause and help orient its development. *See infra* Section III.B.

incorporation infused it with anti-subordination principles that further suggest the necessity of an individualized inquiry. Section II.B examines the *Bearden* line of cases and works to make sense of the hybridized equal protection-due process framework.

Part III then shows the two doctrines to be normatively reinforcing. For instance, both are fundamentally concerned with predatory uses of the state's punishment authority to extract payment. In light of that shared purpose, a number of updates to the protections are required—including an ability-to-pay inquiry at the moment a fine is imposed—to adjust the law to new institutional forms of financial punishment and collection. From the standpoint of the Excessive Fines Clause at-imposition protection, *Bearden* might be conceptualized as a "second-look" protection along the logic of *Miller*[12] and *Montgomery*.[13] From the standpoint of the *Bearden* at-conversion protection, the Excessive Fines Clause might be conceptualized as a preemptive look at downstream liberty deprivations. On either view, the pains of financial punishment are so drastic, and predatory revenue generation and wealth-based liberty deprivations so widespread, that multiple points of constitutional protection across the criminal-debt continuum are required.

I. THE EXCESSIVE FINES CLAUSE AND ABILITY-TO-PAY PROTECTIONS

A. The Doctrine After Timbs

In *Timbs v. Indiana*,[14] the Court traced the Excessive Fines Clause back to the Magna Carta's requirement that monetary sanctions "not be so large as to deprive [an offender] of his livelihood."[15] While protecting an individual's "livelihood" would seem to require courts to consider whether the individual can afford the sanction, the Court clarified that it "tak[es] no position on the question whether a person's income and wealth are relevant considerations in judging the excessiveness of a fine."[16] The

12. Miller v. Alabama, 567 U.S. 460 (2012).

13. Montgomery v. Louisiana, 136 S. Ct. 718 (2016).

14. 139 S. Ct. 682 (2019).

15. *Id.* at 688 (alteration in original) (quoting Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc., 492 U.S. 257, 271 (1989)).

16. *Id.* at 688 (noting that it previously took no position on the question in United States v. Bajakajian, 524 U.S. 321, 340 n.15 (1998)).

constitutional relevance of a defendant's ability to pay therefore remains formally undecided by the Court, though the majority and concurring opinions' argumentative logic highly suggests that the inquiry is required.[17]

Because the Supreme Court had only interpreted the Clause on five occasions before *Timbs* and without much practical effect, the potential for the Clause to provide an additional source of constitutional protection still remains uncertain.[18] In *Bajakajian*, the Court's most recent Excessive Fines Clause decision before *Timbs*, the Court held that a gross disproportionality standard—which it adopted wholesale from the Cruel and Unusual Punishment domain—is the touchstone of excessiveness.[19] Lower courts have varied in their applications of this standard and its attending factors.[20] When Tyson Timbs's challenge to the forfeiture of his

17. *See infra* Section II.A. The paradigmatic harms of excessive fines, as depicted in *Timbs*, turn on particular assumptions about economic circumstance. For instance, Black Code vagrancy fines compelled former slaves back into servitude, recreating slavery in fact, precisely because former slaves were unable to pay these fines.

18. *See Bajakajian*, 524 U.S. at 328–33; Austin v. United States, 509 U.S. 602, 618 (1993); Alexander v. United States, 509 U.S. 544, 558–59 (1993); *Browning-Ferris Indus.*, 492 U.S. at 275–76. While the Court has clarified that both criminal and civil forfeitures are subject to the Clause, as are monetary and in-kind forfeitures, it has also held that an obligation must be *punitive* in nature. *See Austin*, 509 U.S. at 610. *But see* Colgan, *The Excessive Fines Clause: Challenging the Modern Debtors' Prison*, *supra* note 11, at 32-41 (2018) (arguing that fines, fees, and restitution all constitute economic sanctions and thus should qualify under the Clause). *Bearden* protections more straightforwardly apply to punitive and remedial obligations alike, including reparations and restitution. *See* Bearden v. Georgia, 461 U.S. 660, 667 (1983) (reasoning that incarceration stemming from an unpaid fine is as constitutionally problematic as that stemming from unpaid restitution).

19. *Bajakajian,* 524 U.S. at 322. The Court described a number of factors that bear on an offense's gravity and that should be weighed within the gross disproportionality test, including whether the violated statute was principally designed to bar the defendant's offense, *id.* at 338; the maximum sentence for the offense per the Sentencing Guidelines, *id.*; the harm caused by the offense, *id.*; and whether monetary sanctions would have been levelled against the offender during the Founding Era, *id.* at 340.

20. *Compare* United States v. Seher, 562 F.3d 1344, 1370 (11th Cir. 2009) (determining that the Court has prescribed a complete three-factor test), *with* United States v. Beecroft, 825 F.3d 991, 1000 (9th Cir. 2016)

vehicle was remanded to the Indiana Supreme Court later in 2019, the court observed that *Bajakajian* "took no position on whether a person's income and wealth are relevant considerations in judging the excessiveness of a fine" but still construed *Timbs* to mandate that "the forfeiture's effect on the owner is an appropriate consideration in determining the harshness of the forfeiture's punishment."[21] Most circuits remain tepid in their approach to such an individualized determination of economic circumstances, having either rejected the prospect outright[22] or not yet passed judgment on the inquiry's constitutional status.[23] Meanwhile, the First and Second Circuits have both held that a defendant's

(determining that the Court has prescribed a complete four-factor test), *and* United States v. Viloski, 814 F.3d 104, 111 (2d Cir. 2016) (determining that the Court has prescribed a four-factor test that permits the evaluation of additional factors). *See generally* United States v. Wagoner Cnty. Real Estate, 278 F.3d 1091, 1101 (10th Cir. 2002) ("To adapt the *Bajakajian* standard to [new] circumstances, we must supplement the factors discussed by the Supreme Court."). Because the Court noted in *Timbs* that it has yet to determine whether an individual's ability to pay should bear on assessments of gross disproportionality, the Court itself does not seem to view the *Bajakajian* decision as having provided a complete account of all relevant factors.

21. State v. Timbs, 134 N.E.3d 12, 36 (Ind. 2019).

22. The Ninth and Eleventh Circuits have expressly held that an individual's ability to pay does not bear on the gross disproportionality test. *See, e.g.*, United States v. Beecroft, 825 F.3d 991, 997 n.5 (9th Cir. 2016); United States v. Carlyle, 712 Fed. Appx. 862, 864 (11th Cir. 2017).

23. The D.C., Third, Fourth, Fifth, Sixth, Seventh, and Tenth Circuits have not expressly decided whether ability to pay is a relevant constitutional inquiry. The D.C. Circuit recently observed that "[t]he Excessive Fines Clause does not make obvious whether a forfeiture is excessive because a defendant is unable to pay." United States v. Bikundi, 926 F.3d 761, 796 (D.C. Cir. 2019). However, it also noted that the ability-to-pay inquiry "draws support from the First Circuit [gross disproportionality test] . . . and from scholarship" on the original meaning of the Excessive Fines Clause. *Id.* at 796 n.5. *See also, e.g.*, United States v. Young, 618 Fed. Appx. 96 (3d Cir. 2015); United States v. Blackman, 746 F.3d 137 (4th Cir. 2014); United States v. Wallace, 389 F.3d 483 (5th Cir. 2004); United States v. Ely, 468 F.3d 399 (6th Cir. 2006); United States v. Malewicka, 664 F.3d 1099 (7th Cir. 2011); *Wagoner Cnty. Real Estate*, 278 F.3d at 1101.

financial circumstances should inform determinations of constitutionality.[24]

B. Interpretative Paths to Heightened Excessive Fines Protections

In recent years, and especially in the wake of *Timbs*, a variety of constitutional arguments favoring more robust protections have been developed. Most use historical-originalist reasoning to assign the Clause additional authority. Though the historical origins of the Clause long failed to attract much attention, these newer works canvass the Clause's intellectual history and provide insight into the nature of financial obligations during late medieval, colonial, and early American periods.[25]

24. While the First Circuit has framed inability to pay as a threshold consideration outside, and thus separate from, the gross disproportionality calculus, *e.g.*, United States v. Levesque, 546 F.3d 78, 85 (1st Cir. 2008), the Second and Eighth Circuits have characterized inability to pay as another *Bajakajian* factor to be weighed within the calculus, *e.g.*, United States v. Viloski, 814 F.3d 104, 111 (2d Cir. 2016); United States v. Smith, 656 F.3d 821, 828 (8th Cir. 2011). In other words, the First Circuit's test takes indigency as an absolute or per se constraint on financial punishment, while the Second Circuit test would continue to allow severe fines to the extent the livelihood deprivation concern is eclipsed by other *Bajakajian* factors—including the gravity of the offense and the harm caused by the particular criminalized act. It need not be the case that the threshold formulation provides greater protection in practice than the Second Circuit's nested formulation. For instance, if ability to pay is framed as a factor rather than an "all or nothing" consideration, courts might weigh financial hardship within the proportionality analysis even in cases where such hardship does not rise to a level of abject livelihood deprivation. A threshold formulation of the inquiry would seem to foreclose this graduated approach.

25. Nicholas McLean's *Livelihood, Ability to Pay, and the Original Meaning of the Excessive Fines Clause*, 40 HASTINGS CONST. L. Q. 833 (2013), provides perhaps the most comprehensive account of the Clause's original meaning. Beth Colgan's *Reviving the Excessive Fines Clause*, 102 CALIF. L. REV. 277 (2014), also demonstrates that a principle against permanent impoverishment is exhibited in the Magna Carta and throughout early American law, and—like McLean—concludes that an historically accurate understanding of "excessive" would account for the individual-specific effects of fines. Other relevant historical accounts include WILLIAM S. MCKECHNIE, MAGNA CARTA: A COMMENTARY ON THE GREAT CHARTER OF KING JOHN 285-86 (2d ed. 1914); Kevin Bennardo, *Restitution and the Excessive Fines Clause*, 77 LA. L. REV. 21 (2016); C. Massey, *The Excessive Fines Clause and Punitive Damages: Some Lessons*

The evidence generally supports the view that individual economic circumstances were considered in some instances of state-imposed financial penalties, though the character of these assessments remains somewhat murky. Of course, analogizing between these early practices and modern financial punishment involves a predictable array of interpretative difficulties.

In a more purposivist mode, others argue that measuring excessiveness with respect to a person's financial situation would further the core principles of criminal law. An individualized inquiry comports with the values animating the Court's Cruel and Unusual Punishments proportionality doctrine—including sentencing equality, commensurability between offense and punishment, and the preservation of human dignity.[26] In a similar vein, the "anti-ruination" constraint running through Eighth Amendment cases constitutionally bars the state from destroying people financially, just as it bars bodily destruction.[27] It too would necessitate such an inquiry.

An intersectional reading of *Bearden* and the Clause can bolster these conclusions while providing its own unique advantages. For one, moving the analysis beyond the Eighth Amendment helps to overcome various impasses posed by punishment-proportionality doctrine. The gross disproportionality standard is broadly permissive,[28] and may be in minor

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from History, 40 VAND. L. REV. 1233 (1987); and James S. McDonald, Note, *Excessive Fine and the Indigent—An Historical Argument*, 42 MISS. L.J. 265 (1971).

26. Colgan has compellingly developed these arguments across a number of works. *E.g.*, Colgan, *supra* note 11; Beth A. Colgan, *Graduating Economic Sanctions According to Ability to Pay*, 103 IOWA L. REV. 53 (2017); BETH A. COLGAN, ADDRESSING MODERN DAY DEBTORS' PRISONS WITH GRADUATED ECONOMIC SANCTIONS THAT DEPEND ON ABILITY TO PAY, HAMILTON PROJECT (March 2019), https://www.hamiltonproject.org/assets/files/Colgan_PP_201903014.pdf [https://perma.cc/SL4C-9DNA].

27. *See* Resnik, *supra* note 6, at 369.

28. *Cf.* Harmelin v. Michigan, 501 U.S. 957, 1001 (1991) (Kennedy, J., concurring in part and concurring in the judgment) (describing how the highly deferential Cruel and Unusual Punishment standard only forbids "*extreme* sentences that are 'grossly disproportionate' to the crime") (emphasis added); Transcript of Oral Argument at 24, Timbs v. Indiana, 139 S. Ct. 682 (2019) (Kagan, J.) ("We've made it awfully, awfully hard to assert a disproportionality claim with respect even to imprisonment."). Brandon Buskey of the ACLU has argued that the gross disproportionality standard is

tension with an individualized, effects-specific approach to measuring a fine's severity.[29] More fundamentally, from inside the Eighth Amendment, it can be difficult to reconcile the constitutional bar on livelihood-depriving fines with the (as of now) permissibility of execution, solitary confinement, and extensive prison terms.[30] This is not to say these tensions are irreconcilable, or that the Eighth Amendment cannot provide answers on its own.[31] But widening the interpretative lens can promote new ways of thinking about the Clause and the constitutionality of financial punishment more generally. We should ask why, for instance, the *Bearden* view of the problem necessitates individualized consideration and heightened-scrutiny review, while the Eighth Amendment view is, at least putatively, highly deferential to the state.[32]

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so misaligned with the crisis of financial punishment that the Court should overturn *Bajakajian* entirely, replacing it with the more stringent Excessive Bail test. *See* Brandon Buskey, *A Proposal to Stop Tinkering with the Machinery of Debt*, 129 YALE L.J.F. 415 (2020).

29. The gross disproportionality standard applied in the noncapital Cruel and Unusual Punishments Clause context measures the fit between the act committed and the associated punishment without regard for the individual's experience of the severity of that punishment. *E.g.*, *Harmelin*, 501 U.S. at 1000-01. But the Court undertakes effects-based, individualized determinations in other Eighth Amendment domains—namely, capital punishment and life without parole. *See* William W. Berry, *Individualized Sentencing*, 76 WASH. & LEE. L. REV. 13, 53 (2019). The tension here may thus not be significant if viewed from these other domains.

30. *Cf.* United States v. Viloski, 814 F.3d at 112 n.13 ("If the Eighth Amendment permits the Government to end some offenders' lives . . . it surely permits the Government to destroy other offenders' livelihoods.").

31. *See, e.g.*, Resnik, *supra* note 6, at 393 ("Eighteenth century commentaries proffered a utilitarian rationale for the incongruity that permitted governments to end a person's life yet not 'ruin' a person economically. One explanation was about perverse incentives, if a minor offense left a person in a 'worse Condition' than committing a capital crime."). The revenue-generation incentives built into financial punishment provides another angle from which to resolve the incongruity. While imprisonment and execution prove financially costly, fines are in the state's fiscal interest and thus require additional constitutional restraint. *Cf. Harmelin*, 501 U.S. at 978 n.9 (opinion of Scalia, J.) ("[I]t makes sense to scrutinize governmental action more closely when the State stands to benefit.").

32. *See infra* Section III.B.1 for further discussion.

II. POINTS OF CONVERGENCE BETWEEN *TIMBS* AND *BEARDEN*

This Part evaluates each protection in turn and begins to bridge them at the related levels of values and doctrines. Courts have read similar constitutional rationales into each protection, recognizing the significant liberty harms of economic deprivation[33] and questioning the penological goals served by rendering someone financially destitute.[34] At the doctrinal level, the two protections are related in their logical structures and overlap in their applications.

Section II.A considers the Clause's meaning in light of its incorporation and suggests that the livelihood deprivation principle at the center of the *Timbs* analysis has nested within it a range of individual liberty interests. This includes physical liberty (freedom from imprisonment), as well as other liberty interests implicated within the *Bearden* line. Section II.B then provides an account of the *Bearden* line's development, its jurisprudential basis, and the viability of extending *Bearden* into domains beyond wealth-based incarceration.

A. The Paradigmatic Harms of Excessive Fines

The *Timbs* decision was not mere "constitutional housekeeping."[35] Instead, the process of incorporation—properly understood—recasts the Clause in light of Reconstruction Era anti-subordination principles and should inform our understanding of the liberty interests at stake in

33. *E.g.*, Timbs v. Indiana, 139 S. Ct. 682, 689 (2019) ("Exorbitant tolls undermine other constitutional liberties."). The state's practice of "punishing a person for his poverty," Bearden v. Georgia, 461 U.S. 660, 671 (1983), is itself a negative consequence of economic deprivation.

34. *E.g.*, *Timbs*, 139 S. Ct. at 689 ("[F]ines may be employed in a measure out of accord with the penal goals of retribution and deterrence, for fines are a source of revenue, while other forms of punishment cost a State money." (citations and internal quotations omitted)); *Bearden*, 461 U.S. at 670-71 ("Revoking the probation of someone who through no fault of his own is unable to make restitution will not make restitution suddenly forthcoming. Indeed, such a policy may have the perverse effect of inducing the probationer to use illegal means to acquire funds . . . .").

35. *See* Brianne J. Gorod & Brian R. Frazelle, Timbs v. Indiana: *Mere Constitutional Housekeeping or the Timely Revival of a Critical Safeguard?*, 2019 CATO SUP. CT. REV. 215.

financial punishment. If the prototypical instance of extreme fining during the late medieval and early colonial periods concerned fines levied against political adversaries of the English Crown, the imagined rights bearer shifts to the newly freed slave come Reconstruction, and then come incorporation to Tyson Timbs—who, like many others today, lost his car through forfeiture and struggled to survive economically[36] as a result.[37] Appreciating the core constitutional harms across these three phases makes the necessity of an ability-to-pay inquiry obvious.

Timbs gives pride of place to the longstanding principle, originating with the Magna Carta, that financial punishment cannot ruin a person's livelihood.[38] The opinions draw a through-line from the early Magna Carta era to the seventeenth century, when Stuart kings and the High Court of Star Chamber violated this protection to raise revenue for the Crown in the absence of parliamentary grants.[39] Beyond the perversities of using financial punishment to fill the Treasury, the Court emphasizes the Crown's use of fines to debilitate political adversaries.[40] Exorbitant fines forced prominent Crown opponents, including outspoken clerics and sheriffs, into silence or debtors' prisons. With respect to these early, high-profile instances, financial punishments not only violated the livelihood-protecting principles sustained since the Magna Carta; they also served illegitimate forms of political compulsion and domination (namely, "retaliat[ing] against or chill[ing] the speech of political enemies"[41]). Of course, the nexus between economic punishment and political freedom—and the nature of political freedoms themselves—has changed over the last three centuries, and grafting these earlier concerns regarding state

36. I adopt the phrase and concept of "economic survival" from McLean, *supra* note 25, at 893 n.219.

37. *See* Adam Liptak, *He Sold Drugs for $225. Indiana Took His $42,000 Land Rover*, N.Y. TIMES (June 25, 2018), http://www.nytimes.com/2018/06/25/us/politics/supreme-court-civil-asset-forfeiture.html [https://perma.cc/34US-WFKK].

38. *Timbs*, 139 S. Ct. at 688 ("Magna Carta required that economic sanctions 'be proportioned to the wrong' and 'not be so large as to deprive [an offender] of his livelihood.'").

39. *See Timbs*, 139 S. Ct. at 688; *id.* at 693 (Thomas, J., concurring).

40. *See id*. at 689; *id.* at 694 (Thomas, J., concurring in the judgment) (noting how in 1682 the Sheriff of London was fined over $10 million for "speaking against the Duke of York").

41. *See id.* at 689.

domination onto the present is a complicated interpretative task. Still, the *Timbs* opinions recognize that financial punishment can prove destructive of one's economic livelihood and political standing alike, and that both forms of destruction should offend our modern constitutional commitments.

The opinions then shift to the decades following the Civil War, when southern states used abusive fines to "subjugate newly freed slaves and maintain the prewar racial hierarchy."[42] The Court recognizes that this use of fines was of urgent concern to the Reconstruction Congress.[43] To the extent that the process of incorporation should update the meaning and purpose of a constitutional provision in accordance with Reconstruction Era principles,[44] the Court's own understanding of the relationship between fines and the institutional preservation of slavery is of heightened interpretative importance.

By criminalizing "vagrancy" after the abolition of slavery, states levied fines against newly freed African Americans that, if unpaid, would convert into "forced labor" requirements.[45] Through the use of Black Codes, fines

42. *Id.* at 688; *see also id.* at 697-98 (Thomas, J., concurring). Justice Thomas's concurrence also includes an extended discussion of the Clause's role in the eighteenth and early nineteenth centuries before Reconstruction. *See id.* at 695-97.

43. *See id*. at 698.

44. *See* McLean, *supra* note 25, at 879-84 (providing an account, albeit pre-*Timbs*, of the various ways in which incorporation should inform interpretations of the Clause); *see also* AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 133 (1998); Jamal Greene, *Fourteenth Amendment Originalism*, 71 MD. L. REV. 978, 1011 (2000) (describing how, in Amar's view, the "meaning and scope of an incorporated right [should] be understood with reference to the concerns that animated the Reconstruction generation"); Kurt T. Lash, *The Fourteenth Amendment and the Bill of Rights: Beyond Incorporation*, 18 J. CONTEMP. LEGAL ISSUES 447, 449 (2009) ("[W]hat we are after is not the incorporation of 1787 texts, but the public understanding of 1868 texts—in particular the . . . scope of congressional power to enforce these newly constitutionalized rights.").

45. *See Timbs*, 139 S. Ct. at 688-90; *id.* at 697-99 (Thomas, J., concurring); W.E.B. DU BOIS, BLACK RECONSTRUCTION IN AMERICA 153-58 (Transaction 2013) (chronicling the vagrancy ordinances across all southern states). For a sampling of such laws, see PAUL FINKELMAN & DONALD R. KENNON, ENDING THE CIVIL WAR AND CONSEQUENCES FOR CONGRESS 95 (2019) ("The [Mississippi Vagrant Law also created] a one-dollar poll tax for all free blacks. Anyone not

and forfeitures provided the pretext under which the conditions of slavery were reconstituted, for newly freed African Americans deemed guilty of vagrancy were subsequently auctioned off as "contract laborers."[46] The Fourteenth Amendment was a response to southern states' attempts to recreate "slavery in fact" by targeting poor, newly freed slaves with fines that, when unpaid, reimposed arrangements of servitude.[47]

Within the frame of pre-*Timbs* Excessive Fines Clause jurisprudence—namely, the version of the gross disproportionality test presented in *Bajakajian*—the "excessiveness" of Black Code fines would be explained as follows: the southern states' vagrancy fines were improperly calibrated to the severity of the vagrancy offense. This formulation of the Excessive Fines Clause violation should strike us as strange, for it implies that a vagrancy penalty *might* have passed Eighth Amendment muster if brought below a certain monetary amount. But the *Timbs* opinions, and certainly the aforementioned aims of the Fourteenth Amendment, do not suggest that the injustice of such laws is solely conditioned on the fine amount.[48] Fines of *any* amount imperiled newly freed slaves, who—dispossessed of property and economic opportunity, and thus unable to pay—were forced back into servitude. But without an account of these poverty conditions, the instrumental connection between vagrancy laws and the reconstitution of slavery is largely lost. An historically informed Clause after incorporation—one that apprehends the basics of how slavery was institutionally maintained—would measure unconstitutional excessiveness with some respect to the background economic circumstances of the targeted individual or group.

Across these two historical phases, the Court understands financial punishment to feed into other forms of liberty deprivation. The seventeenth-century fine was a means of political castigation or exclusion that, operating against the backdrop of debt-based incarceration, often

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paying the tax could also be declared a vagrant and thus assigned to some white planter to work at hard labor.").

46. Garrett Epps, *The Antebellum Political Background of the Fourteenth Amendment*, 67 LAW & CONTEMP. PROBS. 175, 204 (2004).

47. *See, e.g.*, CONG. GLOBE, 39th Cong., 1st Sess. 3210 (1866) (Rep. Julian) ("Cunning legislative devices are being invented in most of the States to restore slavery in fact."); *id.* at 1123 (Rep. Cook) (describing how the laws "sell[] men into slavery in punishment of crimes of the slightest magnitude").

48. *See Timbs*, 139 S. Ct. at 688-89 (observing that "newly freed slaves were *unable to pay* imposed fines") (emphasis added).

amounted to imprisonment. The vagrancy fine converted financial destitution into re-enslavement. In both contexts, the fine is directly tied to these fundamental deprivations of body and personhood. It is significant that the constitutional rationale—that an unpayable financial obligation sets off other distinct liberty deprivations (here of a determinately grave variety)—approximates *Bearden*'s doctrinal structure.[49]

The Court's discussion in *Timbs* is largely historical, with little expressly said about contemporary financial punishment or its consequences. But the case arose after Ferguson, and the stakes of today's "royal revenue" generation are all too plain. Tyson Timbs's brief described for the Court how criminal debt "can effectively control a person's life" and "amount to perpetual punishment."[50] With references to Ferguson, Timbs observes that "defaulters may see their driver's licenses suspended or their voting rights withheld," and "[o]thers are jailed."[51]

Importantly, debt-based license suspension, voter disenfranchisement, and incarceration are core targets of contemporary *Bearden* challenges.[52] By tying the right to be free from excessive fines to these downstream liberty deprivations, Timbs's brief draws attention to the normative and functional overlap between the two protections. Unpayable criminal debt makes economic survival difficult, all the while perpetuating additional civil and political liberty deprivations. Thus, at its imposition and throughout its aftermath, excessive financial punishment undermines our shared commitments to individual dignity and equal citizenship and must be limited accordingly. If the Eighth Amendment protects against the initial imposition of an unpayable obligation, the *Bearden* protection provides the constitutional backstop.

B. The Equal Protection-Due Process Bearden *Framework*

In *Bearden v. Georgia*, the Court constitutionally barred the state from revoking Danny Bearden's probation—and thus re-incarcerating him—on

49. As described in Section II.B, a *Bearden* violation takes the following conditional form: If failure to meet a financial obligation is the state's basis for compromising a right or significant interest, then that obligation must be made affordable to the individual. Or, put succinctly, a significant liberty deprivation cannot be solely conditioned on indigency.

50. Brief of Petitioner at 26, *Timbs*, 139 S. Ct. at 682 (No. 17-1091).

51. *Id.* at 27.

52. *See infra* Section II.B.

the basis of his indigency.[53] Due process and equal protection considerations "converge[d] in the Court's analysis,"[54] together generating a constitutional violation even though neither strand when taken independently would seem to register one.[55]

This interweaving of wealth-based equal protection with a due process rationale presents a number of puzzles, many of which have come to the fore as lower courts extend *Bearden* protections into new legal areas. Some lower courts have recognized *Bearden*'s applicability within the incarceration-related contexts of pretrial bail[56] and immigration detention,[57] as well as the more distant contexts of license forfeiture[58] and ex-prisoner re-enfranchisement.[59] Other courts have been less willing to extend *Bearden* beyond a narrow set of incarceration-related circumstances, typically construing *Bearden* as a prudential, site-specific carveout within the *Rodriguez* rational-basis rule given incarceration's severity.[60] Courts have reasoned through these applications in different

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

54. *Id.* at 665; *see also* Obergefell v. Hodges, 135 S. Ct. 2584, 2603 (2015) (drawing on the *Bearden* convergence theory to set forth the right to gay marriage: "This interrelation of the two principles furthers our understanding of what freedom is and must become.").

55. Because there is no per se right to probation, the state could in theory have eliminated the option of probation for all prisoners without generating a due process violation. Under equal protection precedents, the state is also generally permitted to treat individuals differently on the basis of relative wealth. *See* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 29 (1973) ("[T]his Court has never heretofore held that wealth discrimination alone provides an adequate basis for invoking strict scrutiny . . . ."); *see also* Harris v. McRae, 448 U.S. 297, 323 (1980) (noting that the Court "has held repeatedly that poverty, standing alone, is not a suspect classification").

56. *E.g.*, ODonnell v. Harris County, 251 F. Supp. 3d 1052, 1134 (S.D. Tex. 2017); *In re* Humphrey, 228 Cal. Rptr. 3d 513 (Ct. App. 2018).

57. *E.g.*, Hernandez v. Sessions, 872 F.3d 976, 991-93 (9th Cir. 2017).

58. *E.g.*, Robinson v. Purkey, No. 3:17-cv-01263, 2018 WL 5023330, at *2 (M.D. Tenn. Oct. 16, 2018), *rev'd*, Robinson v. Long, No. 18-6121, 2020 WL 2551889 (6th Cir. May 20, 2020).

59. *E.g.*, Jones v. Governor of Florida, 950 F.3d 795, 808-810, 811 n.9 (11th Cir. 2020).

60. *E.g.*, Johnson v. Bredesen, 624 F.3d 742, 749 (6th Cir. 2010) (declining to evaluate a wealth-based felon re-enfranchisement scheme under *Bearden*);

ways, with the viability of the *Bearden* framework turning largely on how the court characterizes the underlying liberty interest and the degree of liberty deprivation involved.

Without developing a complete account of *Bearden*'s development or doctrinal architecture, I aim to describe the basic structure of a *Bearden*-styled claim and isolate the various liberty interests upon which successful *Bearden* challenges have been predicated. This should make clear that the *Bearden* constitutional backstop should be afforded beyond the incarceration context, laying the groundwork for the integrative *Bearden*-Eighth Amendment analysis presented in Part III.

1. The *Bearden*-*Williams*-*Tate* Line

In 1970, the Court held in *Williams v. Illinois* that extending a term of prison beyond the statutory maximum for inability to pay restitution violates the Equal Protection Clause.[61] The year after, in *Tate v. Short*, the Court extended *Williams* to the sentencing phase by holding that a state is constitutionally barred from imprisoning a person under a fine-only statute because that person cannot pay the fine.[62] In 1983, *Bearden* weaved *Tate* and *Williams* into a broader rule: "only if alternative measures are not adequate to meet the state's interests . . . may the court imprison a[n indigent] probationer who has made sufficient bona fide efforts to pay."[63]

The mixed theory running through the three decisions should be read as a carry-over from the Warren Court's wealth-equality jurisprudence, which stretches back to the seminal 1956 *Griffin v. Illinois* decision.[64] In

Madison v. State, 161 Wash. 2d 85 (2007) (same). *Rodriguez* itself explicitly excepted the wealth-based detention at issue in *Tate* and *William*, deeming such detention to be an "absolute deprivation." San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 20 (1973).

61. 399 U.S. 235 (1970).

62. 401 U.S. 395 (1971).

63. *Bearden*, 461 U.S. at 672; *see also id.* at 671 ("In each case, the Constitution prohibits the State from imposing a fine as a sentence and then automatically converting it into a jail term solely because the defendant is indigent . . . .").

64. An engaged historical analysis with the mixed theory's rise goes beyond this project's scope, though I sketch a few pivotal moments here by drawing on Michael Klarman's history of modern equal protection. *See* Michael Klarman, *An Interpretative History of Equal Protection*, 90 MICH. L. REV. 213 (1991).

Griffin, a divided Court held that indigent defendants must be provided with free trial transcripts if a state-created criminal appeal process requires that one be produced. The Court made clear that a state "is not required by the Federal Constitution to provide appellate courts or a right to an appellate review," but that once a state decides to provide review, it "cannot make lack of means an effective bar to the exercise of this opportunity."[65] In other words, the appeal is not a *right* per se, though limiting access on the basis of poverty nonetheless abridged basic equality principles. *Griffin* thus suggested a "virtually unprecedented" constitutional consideration for poverty.[66] Its applications over the Burger Court era were subsequently limited, with Justice Harlan's procedural due process conception of the case often used to cabin *Griffin* equality

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Klarman does not reference *Bearden*, *Williams*, or *Tate*, but provides a description of the doctrine's backdrop that is instructive. In *Griffin v. Illinois*, 351 U.S. 12 (1956), the Warren Court held that the state must provide free copies of trial records for indigent defendants if these records are otherwise available for purchase, thus invalidating a form of wealth discrimination premised on its disparate effects rather than on animus or some special designation of the poor. *Id.* at 255; *see also* Owen Fiss, *Racial Imbalance in the Public Schools: The Constitutional Concepts*, 78 HARV. L. REV. 564, 593 n.50 (observing that *Griffin*'s rationale turns on disparate impact). Klarman observes that the Court further refined its wealth-equality precedents through the fundamental rights line of equal protection, in part because it sought *some* limiting principle for controlling the "virtually limitless reach of a constitutional rule condemning disparate wealth effects." Klarman, *supra*, at 266. The Warren Court soon characterized *Griffin* as an originating point in this new fundamental rights line of equal protection, which runs through cases like *Gideon v. Wainwright*, 372 U.S. 335 (1963), and *Douglas v. California*, 372 U.S. 353 (1963). Come the Burger Court and its concern with the possibility of "judicial wealth redistribution," the class-discrimination fundamental rights line is truncated and *Griffin*'s equality principles are reconceptualized in procedural due process terms. *Id.* at 285. Justice Harlan's *Griffin v. Illinois* dissent, 351 U.S. 12, 36 (1956), originally suggested such a procedural due process framing, which is cited alongside the *Griffin* majority opinion in *Bearden*. *See Bearden*, 461 U.S. at 665. The mixed due process-equal protection framework that emerges in *Bearden* is thus a function of these multiple and discrepant attempts to preserve certain wealth-equality commitments in the criminal justice context while undoing them elsewhere.

65. *Griffin v. Illinois*, 351 U.S. 18 (1956); *id.* at 24 (Frankfurter, J., concurring).

66. Klarman, *An Interpretative History of Equal Protection*, *supra* note 64, at 265.

principles to the managerial domains of courts and prisons.[67] That said, the *Williams-Tate-Bearden* line is a clear extension of the *Griffin* tradition. *Williams* offers that it is "applying the teaching" of *Griffin*, and *Bearden* sources the convergence theory of "due process and equal protection principles" back to it.[68]

Significantly, many of the Court's pre-*Bearden* decisions invoking *Griffin* (and at times *Williams* and *Tate*) concerned wealth-based deprivations of *non-physical* liberty—including, for instance, interests in marriage, divorce, and running for office.[69] Drawing on Justice Harlan's *Williams* concurrence, *Bearden* itself sets forth factors to determine when a wealth-based liberty deprivation is sufficiently severe to warrant heightened scrutiny—including the "nature" and "extent of the individual interest affected"—and never indicates that the interest must involve freedom from incarceration.[70] The Court suggested as much decades later in *M. L. B.*, where Justice Ginsburg's majority opinion invokes *Bearden* and the other "*Griffin*-line cases" to hold that indigent parents unable to pay court fees cannot be deprived of appellate review of the termination of parental rights.[71] Citing to *Bearden*, the *M. L. B.* Court "inspect[ed] the character and intensity of the individual interest at stake"—here characterized as the destruction of family bonds—and deemed the deprivation too grave to be conditioned on wealth status.[72] *M. L. B.* thus

67. *See supra* note 64 and accompanying text.

68. *Bearden*, 461 U.S. at 665; *Williams*, 399 U.S. at 241.

69. *See, e.g.*, Zablocki v. Redhail, 434 U.S. 374, 402 (1978) (Powell, J., concurring) (citing *Griffin* to strike down a statute that conditioned marriage on the payment of child support); Lubin v. Panish, 415 U.S. 709, 720 (1974) (Douglas, J., concurring) (citing *Griffin*, *Williams*, and *Tate* to hold that states cannot require indigent candidates to pay campaign filing fees); Boddie v. Connecticut, 401 U.S. 371, 382-84 (1971) (citing *Griffin* to render unconstitutional on due process grounds the filing fees that prevented an indigent couple from obtaining a divorce); *id.* at 383-86 (Douglas, J., concurring) (reaching the same outcome but on equal protection grounds).

70. *Bearden* sets forth four factors: "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*, 399 U.S. at 260 (Harlan, J., concurring)).

71. M.L.B. v. S.L.J., 519 U.S. 102, 120 (1996); *see also id.* at 111 ("*Griffin*'s principle has not been confined to cases in which imprisonment is at stake.").

makes clear that *Bearden*-styled protections can be predicated on non-incarceration-related liberty interests, though *Bearden*'s outer bounds are left largely undefined.[73]

More recent challenges to wealth-based deprivation schemes have spurred further consideration of the kinds of liberty interests that qualify for *Williams-Tate-Bearden* heightened scrutiny. In what follows, I survey a handful of recent decisions that take differing approaches to the *Bearden* doctrine.

2. *Bearden* in Incarceration and Non-Incarceration Contexts

Lower courts typically evaluate the liberty interest underwriting a *Bearden* claim along the two axes previously named: the character of the interest and the degree of deprivation involved. The *degree* tends to be at issue in physical liberty-related contexts like pretrial or immigration detention. In recent *Bearden* challenges to wealth-based ex-prisoner re-enfranchisement and license suspension, whether the *character* of the interest is sufficiently fundamental typically drives the analysis.

a. Incarceration-Related Contexts

In *ODonnell v. Harris County*, a Texas district court determined that the liberty interest in being free from pretrial detention is sufficiently analogous to the interest in remaining on probation, and therefore found that the detention of indigent defendants violated *Bearden*.[74] The court

72. *Id.* at 120-25.

73. The Court does distinguish *M. L. B.* from cases where complainants "sought state aid to subsidize their privately initiated action." *Id.* at 125. In *McRae*, for instance, the Court determined that Medicaid funding need not be provided to subsidize medically necessary abortions. *See* Harris v. McRae, 448 U.S. 297, 321-26 (1980). But in *M. L. B.*, as well as in the *Bearden* applications evaluated here, claims of affirmative right to government aid are hardly at issue.

74. The County unsuccessfully argued that the *Williams-Tate-Bearden* line is limited to the payment of *post*-conviction fines, and does not cover the pretrial phase. 251 F. Supp. 3d 1052, 1137 (S.D. Tex. 2017), aff'd in part, rev'd in part, 892 F.3d 147 (5th Cir. 2018). The parties reached a settlement in November 2019, which requires an individualized ability-to-pay hearing if secured money bail is imposed as a condition of release. *See* ODonnell v.

sought to reconcile *Bearden* and *ODonnell* with *Rodriguez*'s rational-basis rule by emphasizing the differing *degrees* of deprivation at issue. It noted that the Supreme Court in *Rodriguez* had expressly excepted *Williams* and *Tate* from rational basis review by recognizing that the disadvantaged classes in those cases were "completely unable to pay for some desired benefit" and "sustained an absolute deprivation" as a result.[75] The *ODonnell* court then contrasted the *Rodriguez* petitioners' "relative" liberty interest in "*better* schooling" with the *ODonnell* plaintiffs' "absolute" liberty interest in being free from detention.[76] Given the absolute deprivation at stake, *Bearden* rather than *Rodriguez* applied.[77]

But in a similar pretrial bail challenge, the Eleventh Circuit rejected the premise that detention necessarily amounts to an absolute deprivation.[78] The court observed that the bail regime imposed "merely" forty-eight hours of jail for indigent defendants, which it determined to be a non-absolute deprivation when considered relative to the much longer period of pretrial release that the indigent person still ultimately accesses under the scheme.[79]

The Arizona district court sided with *ODonnell*'s reasoning when it recently considered the constitutionality of a for-profit state diversionary program. The program compelled payment of user fees by automatically extending a person's required participation until payment is made. According to the court, "[p]laintiffs have indeed been absolutely deprived of the ability to complete the program in 90 days like other, wealthier participants."[80] In accordance with *ODonnell*'s logic, excess time of *any*

Harris County, No. 4:16-cv-01414, 2019 WL 6219933, at *6 (Nov. 21, 2019 S.D. Tex.).

75. San Antonio Indep. School District v. Rodriguez, 411 U.S. 1, 20 (1973).

76. *ODonnell*, 251 F. Supp. 3d at 1135.

77. *See also* Pugh v. Rainwater, 572 F.2d 1053, 1056 (5th Cir. 1978) ("[I]ncarceration of those who cannot [pay for pretrial release] . . . infringes on both due process and equal protection requirements.").

78. Walker v. City of Calhoun, GA, 901 F.3d 1245 (11th Cir. 2018).

79. *Id.* at 1261 ("[T]hey must merely wait some appropriate amount of time to receive the same benefit as the more affluent."). *But see id.* at 1275-76 (Martin, J., concurring in part and dissenting in part) (chronicling the "very real consequences" of forty-eight hours in jail).

80. Briggs v. Montgomery, No. CV-18-02684-PHX-EJM, 2019 WL 2515950, at *10 (D. Ariz. June 18, 2019).

length that subjected an indigent person to prosecutorial risk and potential imprisonment was viewed as a unique or standalone deprivation, and thus violated *Bearden*.

Note that the "comparator" assumed by the court shifts across these cases: for the Eleventh Circuit, the forty-eight hours faced by an indigent person is compared to the much longer period of freedom that comes after *their own* pretrial release, so the detention is treated as marginal; but for the Texas and Arizona district courts, the excess time in detention (or in a diversionary program that threatens possible future detention) is compared against the lack of detention (or risk) faced by a *wealthier* person.[81] The distinction between "absolute" deprivation and "mere" diminishment in these cases is thus largely rhetorical, an outgrowth of *Rodriguez* that turns on how the court frames the liberty interest at stake.[82] Characterizing pretrial liberty as "access to pretrial release" rather than "freedom from incarceration," for instance, alters the status of the deprivation and the eventual outcome of the analysis.[83] These are antecedent framing choices made by courts before and beyond an application of doctrine.

b. Bearden Beyond Incarceration

Outside the incarceration context, recent *Bearden*-styled challenges to wealth-based ex-prisoner re-enfranchisement and license suspension schemes have typically hinged on the "fundamental" status of the implicated liberty interest. In its recent and high-profile *Jones v. DeSantis* decision, the Eleventh Circuit considered the constitutionality of a Florida law requiring that ex-felons satisfy their financial obligations to be

81. The Eleventh Circuit's approach lacks a fixed baseline against which the degree of deprivation can be judged, and therefore provides no rule to determine the point at which an ongoing deprivation turns absolute.

82. In some *Bearden* challenges, the additional incarceration time is so substantial that the "absolute" status of the deprivation is not at issue. *E.g.*, United States v. Parks, 89 F.3d 570, 5720-73 (9th Cir. 1996) (determining that the addition of a criminal history point on the basis of an unpaid fine, which contributed eight months to the defendant's sentence, ran afoul of *Bearden*).

83. *See Walker*, 901 F.3d at 1274 (11th Cir. 2018) (Martin, J., concurring in part and dissenting in part) (associating the first framing with the *Walker* majority and the second with Judge Rosenthal's opinion in *ODonnell*).

included within an automatic re-enfranchisement scheme.[84] Prior courts had upheld similar schemes under rational basis review, distinguishing the "statutory benefit" of re-enfranchisement from the "fundamental right[s]" and "implicated *physical* liberty" at issue across the *Griffin-Bearden* case line.[85] But in a landmark ruling that offers to dramatically expand access to the vote, the Eleventh Circuit deemed the Florida scheme unconstitutional under heightened scrutiny.[86]

The *Jones* per curiam opinion suggests a subtle, though significant, distinction between two variations of the *Bearden* protection, each of which is presented as independently sufficient to compel strict scrutiny. The first involves the recognizable tiers of scrutiny approach.[87] State action abridges the interest in voting—"squarely among the interests that fall within *Griffin*'s grasp"—on the basis of wealth, and triggers heightened scrutiny.[88] The second variation, however, does not turn on the presence of a fundamental interest or the showing of liberty deprivation.[89] Instead, the *Bearden* protection functions as a flat ban on *all* wealth-based punishments.[90] Under this second framing of *Bearden*, the court need only

84. Jones v. Governor of Florida, 950 F.3d 795 (11th Cir. 2020).

85. Johnson v. Bredesen, 624 F.3d 742, 748-49 (6th Cir. 2010) (emphasis added) (arguing that the fundamental *right* of access to the courts was at issue in *Griffin*); *see also* Madison v. State, 161 Wash. 2d. 85, 105 (2007) (same). *But see supra* note 64 (noting that the *Griffin* opinions do not characterize access to an appeal as a per se right).

86. *Jones*, 950 F.3d at 800; *see also* Jones v. DeSantis, No. 4:19cv300-RH/MJF, 2020 WL 2618062, at *1 (N.D. Fla. May 24, 2020) (determining that the state's "pay-to-vote" system as applied to all individuals was unconstitutional).

87. *See Jones*, 950 F.3d at 820-25.

88. *Id.* at 821; *see also id.* at 823 ("*Williams*, *Tate*, and *Bearden* establish . . . that the state's ability to deprive someone of a profoundly important interest does not change the nature of the right, nor whether it is deserving of heightened scrutiny when access to it is made to depend on wealth.").

89. *See id.* at 817-20.

90. *See id.* at 818. As traced by Colgan, the flat ban reading accurately reflects *Bearden*'s historical development. *See* Beth A. Colgan, *Wealth-Based Penal Disenfranchisement*, 72 VAND. L. REV. 55, 116-20 (2019) ("Reading the *Bearden* line in conjunction with the contemporaneous development of the Sixth Amendment right to counsel . . . makes clear that from the line's inception the Court unflaggingly rejected penalty-based distinctions . . . .").

ask whether the state action qualifies as punishment. If it does, then the ban applies—unaffected by the severity level of the deprivation or the character of the punishment itself.[91]

The flat ban view of *Bearden* would be a particularly significant development in contexts like driver's license suspension, where the severity of the individual liberty deprivation has often been deemed inadequate. For instance, in reviewing the constitutionality of Michigan's policy to suspend a person's driver's license on the basis of unpaid court debt, the Sixth Circuit determined that the "property interest" in the license does not approximate the physical liberty interest in *Bearden*, nor does it constitute a fundamental right.[92] In a corollary case, the court further distinguished this interest from the "unique" parental rights at issue in *M. L. B.*[93] Dissenting opinions and opinions below appropriately recognized that license deprivation implicates "a basic and fundamental necessity"[94] and "the debtor's interest in self-sufficiency;"[95] indeed, an inability to drive closes off employment prospects and can lead to firing, makes obtaining food or medical care difficult, and limits participation in communal life.[96] The interest is therefore bound up in a wide range of livelihood and economic survival-related interests, the constitutional gravity of which *Timbs* has helped elucidate.[97] But to the extent these

91. *See Jones*, 950 F.3d at 819 ("Disenfranchisement is punishment. We have said so clearly.").

92. Fowler v. Benson, 924 F.3d 247, 261, 261 n.8 (6th Cir. 2019) (upholding the policy under rational basis review).

93. *See* Robinson v. Long, No. 18-6121, 2020 WL 2551889, at *3 (6th Cir. May 20, 2020).

94. *Fowler*, 924 F.3d 247 at 272 (Donald, J., dissenting).

95. Robinson v. Purkey, 326 F.R.D. 105, 154 (M.D. Tenn. 2018), *rev'd*, Robinson v. Long, No. 18-6121, 2020 WL 2551889, at *1 (6th Cir. May 20, 2020).

96. *See id.* at 156.

97. *Timbs* marks a new understanding of the constitutional severity of state-imposed livelihood deprivation and financial destruction. *See supra* Section II.A. Its livelihood deprivation principle finds particular resonance here, given the Court's established stance that driver's licenses are "essential in the pursuit of a livelihood." Bell v. Burson, 402 U.S. 535, 539 (1971). In turn, *Timbs* lends additional credence to the liberty interests at stake in license suspension schemes, which immobilize people physically and financially solely because of their poverty. I note that this analysis falls cleanly outside *M. L. B.*'s affirmative subsidization exception. *See supra* note 73 and

interests remain thought of as non-fundamental, the ban variation suggested in *Jones* may provide one plausible path forward for litigants.

III. SYNTHESIZING THE PROTECTIONS: TWO "LOOKS" AT INDIGENCY

This Part identifies additional conceptual overlaps between the two doctrines and demonstrates that many forms of financial punishment qualify as constitutional violations under either. For instance, *Bearden* violations can often be redescribed as Excessive Fines Clause violations because failure to pay at conversion typically implies an inability to pay at imposition. Given these considerations, I offer two ways to frame the procedural relationship between the protections.

Section III.A frames the *Bearden* backstop as a "second look" at excessive fines, while Section III.B frames the Clause as a "preemptive look" at *Bearden*-styled liberty deprivations. Together, they place criminal debt in a continuum stretching between two constitutional poles, and across which additional constitutionally informed protections should be developed.

A. Reading Timbs *into* Bearden

Financial obligations are imposed, accrue, and amount to liberty deprivations over time. In some situations, the obligation is ultimately paid off but still strains a person's ability to survive economically; in others, the obligation remains unpaid and gives rise to additional liberty consequences. It should be plain enough that an Excessive Fines Clause violation is often temporally and analytically antecedent to a *Bearden* violation.[98] A financial obligation that is unaffordable at the moment of

accompanying discussion. Even if the initial issuance of a license qualifies as an affirmative grant, complainants here only seek to keep their licenses. This would not seem to involve state subsidization or support.

98. Under the tiers of scrutiny theory, a *Bearden* violation requires that (1) a failure to pay occurred despite the individual's bona fide effort to pay; (2) the government interest could have been satisfied by a means other than through the deprivation of a liberty interest; and (3) the predicate liberty interest is of a relevant character (as evaluated in Section II.B.2). *See* Louis Fisher, *Criminal Justice User Fees and the Procedural Aspect of Equal Justice*, 133 HARV. L. REV. 112, 135 (2020) (breaking the *Bearden* violation down into the first two steps). I have added step three. My argument here concerns the overlap between the Clause and step one.

conversion was possibly, if not probably, unaffordable when it was initially imposed. *Bearden*, *Tate*, and *Williams*, for instance, all involved exorbitant fines that could have been additionally challenged under the Clause, had such a theory been available.[99] As suggested at the end of Section II.A, a *Bearden* violation might thus be understood as a downstream consequence of an excessive fine left unaddressed.

It is often the case that an individual fine or fee may not appear unaffordable in isolation but impairs one's livelihood when aggregated with other obligations. Court and diversion program fees, for instance, may be individually small yet constantly imposed, quickly becoming unaffordable.[100] When considered ex post from the vantage of a *Bearden* conversion, a set of financial obligations might be treated as a *cumulative* Excessive Fines Clause violation.[101] In the Cruel and Unusual Punishments domain, for instance, the Court has recognized that conditions of confinement can amount to an Eighth Amendment violation "in combination; when each would not do so alone, but only when they have a mutually enforcing effect that produces the deprivation of a single, identifiable human need."[102] So too, the accumulation of financial obligations can spill over into a livelihood deprivation even when each obligation appears affordable in isolation. Whether a *Bearden* claim is predicated on one unpaid obligation or the unaffordable sum of many smaller ones, an Eighth Amendment violation is to be implied.[103]

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99. The petitioner in *Tate* faced $425 in traffic fines. *See* Tate v. Short, 401 U.S. 395, 396 (1971). Danny Bearden faced a $500 fine and $250 in restitution, which he was unable to satisfy in the four-month period prescribed by the court. *See* Bearden v. Georgia, 461 U.S. 660, 662 (1983). Arguably, the $250 in restitution could be deemed non-punitive and thus beyond the coverage of the Clause. *But see supra* note 18 and accompanying discussion.

100. *E.g.*, Briggs v. Montgomery, No. CV_18-02684-PHX-EJM, 2019 WL 2515950 (D. Ariz. June 18, 2019) (considering a marijuana diversion scheme that charged $15 to $17 per drug test up to three times a week).

101. *See* Kerry Abrams & Brandon L. Garrett, *Cumulative Constitutional Rights*, 97 B.U. L. REV. 1309 (2017).

102. Wilson v. Seiter, 501 U.S. 294, 304 (1991); *see* Abrams & Garrett, *supra* note 101, at 1322.

103. Fines lend themselves to aggregation much better than the qualitative aspects of confinement and thus make a compelling candidate for the cumulative violation theory. But my argument is not wholly dependent on the viability of this theory. Consider a situation where $5 fees are systematically assessed against a person whose maximum ability to pay is

1. *Bearden* as a "Second Look"

The *Bearden* protection thus affords a "second look" at an earlier obligation's constitutionality, all the while providing a backstop against an additional liberty deprivation flowing from that unmet obligation. The idea of a constitutionally required "second look" is not altogether foreign to the Court, but bears similarity to the Court's reasoning in other Eighth Amendment contexts. Consider, for instance, *Miller* and *Montgomery*'s constitutional logic of requiring parole hearings in situations of juvenile life imprisonment.[104] The state must afford juvenile offenders the possibility of a "second look" at some point in the future in light of a child's rehabilitative potential and the constitutional gravity of life imprisonment. Similarly, the state must afford individuals a "second look" at criminal debt, in light of newly accrued financial obligations and the gravity of an imminent liberty deprivation.

In sum, an indigent defendant's failure to pay should often be sufficient to ground an Eighth Amendment violation even where the other necessary elements of a *Bearden* claim—that the state has no other alternative means and that the liberty deprivation is sufficiently fundamental and absolute—are not demonstrated.[105] Litigants should recognize this overlap and consider bringing *Bearden* and Eighth Amendment challenges in tandem.

B. Reading Bearden *into* Timbs

Understanding the changes to criminal punishment in the decades since the 1983 *Bearden* decision—specifically, the financialization of

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$100. If fees were assessed twenty-one times, we could either say that the twenty-one fees are *cumulatively* excessive, *or* that the twenty-first fee *in particular* is excessive given the prior fees. This second description does not require aggregation. It only requires that courts calculate ability to pay in light of the prior financial obligations already owed at the time of imposition.

104. *Miller v. Alabama* bars mandatory life imprisonment without parole for juveniles because children have "diminished culpability and greater prospects for reform." 567 U.S. 460, 471 (2012); *see also* Montgomery v. Louisiana, 136 S. Ct. 718 (2016) (applying *Miller* retroactively).

105. For an account of the *Bearden* elements, see *supra* note 70. My argument assumes that an inability to pay is a per se violation of the Excessive Fines Clause.

punishment and new uses of financial sanctions—further clarifies the need for both protections. As *Bearden* was decided, the early 1980s marked the proliferation of financial sanctions and related shifts in the institutional forms of criminal justice and crime prevention.[106] The causes behind the increased uses of fines are difficult to isolate, though they likely involved the mass scaling of incarceration over the course of the 1970s and 1980s.[107] From that period to today, obligations have provided a way for legislatures to displace the costs of this industrialized expansion onto justice-involved people themselves, rather than pass those costs onto the broader tax base.[108] In principle, the *Williams-Tate-Bearden* line aims to intervene between fines and imprisonment by proscribing the state's use of incarceration as a leveraging tool to collect on criminal debt.

But the reach of the criminal justice system has changed in recent decades, as has the relationship between poverty and incarceration. State punishment power has spread across a wider range of legal, bureaucratic, and nongovernmental actors, many of which possess significant legal

106. *See* Martin et al., *supra* note 3, at 2 (observing that the frequency of fines and forfeitures has increased since the 1980s at every level of government).

107. Fines and probation were the common forms of punishment during the postwar decades, comporting with then-dominant "welfarist" or rehabilitative criminological perspectives. *See* DAVID GARLAND, THE CULTURE OF CONTROL: CRIME AND SOCIAL ORDER IN CONTEMPORARY SOCIETY 167 (2001). But, breaking with these perspectives, penological currents in the 1970s and 1980s emphasized expressive and security-minded punishment administered through the prison. *Id.* at 175. While the use of the fine continued to expand throughout this period, *see* Martin et al., *supra* note 3, its rationale now depended on the prison. The fine had become a revenue-generating tool to meet mass incarceration's costs, in service to incarceration rather than the principal mode of punishment in its own right.

108. *See* Brief for Professors in Support of Petition for Writ of Certiorari as Amici Curiae at 5, Timbs v. Indiana, 139 S. Ct. 682 (2019) (No. 17-1091) ("[B]ecause this is a financially profitable enterprise, it is often also politically profitable: many who bear the brunt of fines and forfeitures lack the power to resist them. The government knows this, and also knows that raising broadly applicable taxes instead of raising revenue from fines and forfeitures would likely spur a political backlash."). For an estimation of the costs of mass incarceration, see LOÏC WACQUANT, PUNISHING THE POOR: THE NEOLIBERAL GOVERNMENT OF SOCIAL INSECURITY 64 (George Steinmetz & Julia Adams eds., 2009), which calculates that federal funding for criminal justice multiplied by 5.4 times between 1972 and 1990—from under $2 billion to over $10 billion.

authority to impose financial obligations and participate in collection.[109] For instance, civil asset forfeiture as highlighted in *Timbs* has increased substantially since the 1990s.[110] Such property forfeitures can affect one's ability to satisfy other legal obligations and may in turn trigger imprisonment or a host of additional deprivations much like fines do.[111] But forfeitures do not typically take the form of a conditional *Bearden*-styled claim, as they do not impose an *unpaid* obligation (in a sense, the forfeiture is itself the payment).

Even wealth-based incarceration—the paradigm case—is thought to have increased in recent years, evolving in ways that can make identifying and proving up violations difficult. For instance, the increasingly privatized nature of criminal justice administration—including diversion, probation, and other supervisory schemes—can make it difficult for courts to distinguish debt-based incarceration from incarceration that is the result of other forms of noncompliance.[112] Similarly, incarceration is often imposed under the guise of "court order" violations, which can obscure that the incarceration stems from an unpaid obligation.[113]

109. Assessments of this dispersion of punishment authority have varied. *See, e.g.*, GARLAND, *supra* note 107, at 170; Heather Schoenfeld, *A Research Agenda on Reform: Penal Policy and Politics Across the States*, 664 ANNALS AM. ASSOC. POL. SCI. 155, 157 (2016); Vesla M. Weaver & Amy E. Lerman, *Political Consequences of the Carceral State*, 104 AM. POL. SCI. REV. 817, 818 (2010).

110. *See* Dick M. Carpenter et al., *Policing for Profit: The Abuse of Civil Asset Forfeiture*, INST. FOR JUST. 2 (Nov. 2015), https://ij.org/wp-content/uploads/2015/11/policing-for-profit-2nd-edition.pdf.

111. "For example, the loss of an automobile may interfere with conditions requiring attendance at work or school, [or] meetings with probation and parole staff . . . ." Beth A. Colgan & Nicholas M. McLean, *Financial Hardship and the Excessive Fines Clause: Assessing the Severity of Property Forfeitures After* Timbs, 129 YALE L.J.F. 430, 446 (2020).

112. *See* Alexandra Natapoff, *Misdemeanor Decriminalization*, 68 VAND. L. REV. 1055, 1085 (2015); *Confined and Costly: How Supervision Violations Are Filling Prisons and Burdening Budgets*, CSG JUST. CTR. (June 2019), https://csgjusticecenter.org/publications/confined-costly; *In for a Penny: The Rise of America's New Debtors' Prisons*, ACLU 58-59 (Oct. 2010), https://www.aclu.org/files/assets/InForAPenny_web.pdf.

113. *See* Matthew Menendez et al., *The Steep Costs of Criminal Justice Fees and Fines*, BRENNAN CTR. FOR JUST. 6 (2019), https://www.brennancenter.org/sites/default/files/2020-07/2019_10_Fees%26Fines_Final.pdf ("[W]hen failure to pay is not an

This is only a limited survey of recent developments, though it is meant to suggest that financial punishment—including the extent of fines and fees, as well as the methods by which financial obligations are collected upon—has outgrown narrow formulations of the *Bearden-Tate-Williams* protection. These formulations assume that the conversion between an unpaid obligation and the resulting liberty deprivation is direct, programmatic, and identifiable to a court. But individuals are accumulating criminal-justice debt continuously and often unknowingly, the lived consequences of which can be catastrophic (and often include incarceration) but can be difficult to capture in a discrete, backward-looking *Bearden* violation.

1. The Excessive Fines Clause as a "Preemptive Look"

Expanding the constitutional focus beyond the conversion question (whether a financial obligation, by nature of being unaffordable, did in fact result in a liberty deprivation) and toward the initial financial obligation itself is one way of adapting judicial oversight to these developments. Of course, an Excessive Fines Clause-styled claim does just this by challenging the financial obligation at its imposition, and need not wait for the fine to spiral into a cognizable liberty deprivation. But framing the upfront protection provided by the Clause as a preemptive or prophylactic variant on *Bearden*,[114] made necessary by these shifting forms of punishment and revenue generation, leads into a few additional considerations.

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explicit charge, jail sentences are handed down for failure to appear or failure to comply—infractions that often stem from failure to pay . . . . Under the guise of different charges, such a policy perpetuates the function of a debtors' prison.").

114. The "prophylactic" framing is admittedly polarizing, though such rules are ubiquitous and often legitimate. *See* Evan H. Caminker, Miranda *and Some Puzzles of 'Prophylactic' Rules*, 70 U. CIN. L. REV. 1, 2 (2001) ("[S]uch rules respond to the inevitability of imperfect judicial detection of constitutional wrongdoing."); David A. Strauss, *The Ubiquity of Prophylactic Rules*, 55 U. CHI. L. REV. 190, 195-98 (1988) (distinguishing legitimate from illegitimate prophylactic rules). "Prophylaxis" is particularly legitimate in this context, where the Clause already applies at the front end of the debt-imposition process (this is not an instance of stretching a constitutional protection to where there would otherwise be *none*). The Clause remains underdeveloped and to an extent open-ended, and its meaning and function should be interpreted in light of *Bearden*'s principles.

First, when the effects of a financial imposition are in fact identifiable, courts should take them into account in the course of the excessive fines ability-to-pay evaluation.[115] If the constitutional rationale for the upfront protection is as much about proportional punishment as it is about staving off the downstream, liberty-denying effects of financial obligations (that may well cumulate in *Bearden* violations), it follows that prospective hardship should be factored into assessments of affordability. For instance, when the forfeiture of a vehicle would predictably make it difficult for a person to meet conditions of probation, that risk should be incorporated into the initial ability-to-pay consideration. Fees imposed in contexts like pre-prosecution diversion programs—where the conditional liberty interests are both apparent and substantial—should be subjected to a more stringent ability-to-pay standard.[116] The same may be said about initial assessments of financial obligations in jurisdictions where license suspension is widespread and predictable. *Bearden* provides a doctrinal justification for building this kind of consequence-oriented, contextual flexibility into the excessiveness determination.

Second, bringing *Bearden*'s reasoning to bear may also help answer a popular lower-court rationale for refusing to engage in ability-to-pay determinations: that the person might be *presently* unable to afford an

115. *See* Colgan & McLean, *supra* note 111, at 447-49 (describing how consequence-based assessments at imposition could reduce the financial hardship posed by forfeitures).

116. Termination from a pre-prosecution diversion program can expose indigent participants to prosecution and the possibility of a criminal record and imprisonment. *See, e.g.*, State v. Jiminez, 810 P.2d 801 (N.M. 1991) (recognizing these potential liberty deprivations and determining that an indigent defendant cannot be terminated from a diversion program); Moody v. State, 717 So. 2d 562 (Miss. 1998) (same). In *Briggs v. Montgomery*, No. CV_18-02684-PHX-EJM, 2019 WL 2515950 (D. Ariz. June 18, 2019), a class of plaintiffs brought a *Bearden* challenge against a marijuana diversion program that subjects participants to a host of user fees. Notably, the plaintiffs challenged the extended risk of prosecution they faced within the scheme, rather than the absence of individualization at the front-end imposition of program costs. *See id.* at *11. But if an Excessive Fines Clause claim were also raised against such a scheme (though the putatively remedial character of the fees may prove one constraint), a participant's ability to pay should be reduced in light of the error costs of a potential wealth-based prosecution.

obligation, but "might legitimately come into money . . . in the *future*."[117] But in the *Bearden* context, the Court has made clear that pressuring a person without means to "come into money" can have "perverse," criminogenic effects and is fundamentally incompatible with legitimate penological goals.[118] Even if there are constitutionally relevant differences between punitive and remedial obligations,[119] the defectiveness of this reasoning remains the same. If anything, a forward-looking understanding of the Clause would suggest that the individualized excessiveness determination should be made both at imposition *and* open to reassessment in the event a person's financial situation turns worse.[120]

IV. CONCLUSION

Whether it is the loss of livelihood and economic ruination, or the loss of physical liberty or the right to vote, the constitutional gravity of financial punishment cannot be overstated. Constitutional scrutiny must therefore be meaningfully extended across the criminal debt continuum.

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117. United States v. Smith, 656 F.3d 821, 828 (8th Cir. 2011) (emphasis added); *see also* cases cited *supra* note 22 (invoking similar reasoning).

118. *See* Bearden v. Georgia, 461 U.S. 660, 670-71 (1983) ("Revoking the probation of someone who through no fault of his own is unable to make restitution will not make restitution suddenly forthcoming. Indeed, such a policy may have the perverse effect of inducing the probationer to use illegal means to acquire funds to pay . . . ."); *see also* Jones v. Governor of Florida, 950 F.3d 795, 811 (11th Cir. 2020) ("The simple truth is that a collection-based rationale for those who genuinely cannot pay, and who offer no immediate prospects of being able to do so, erects a barrier 'without delivering any money at all.'" (quoting Zablocki v. Redhail, 434 U.S. 374, 389 (1978))); United States v. Fuentes, 107 F.3d 1515, 1529 n.26 (11th Cir. 1997) ("[A] defendant subject to an impossible restitution order has less incentive to seek remunerative, rehabilitative, and non-criminal employment and to maximize his or her income than a defendant subject to a difficult but doable order."); Robinson v. Purkey, 326 F.R.D. 105, 154 (M.D. Tenn. 2018) ("No person can be threatened or coerced into paying money that she does not have and cannot get.").

119. *See supra* note 18 and accompanying text.

120. For instance, Danny Bearden was unable to afford subsequent installments of the criminal debt he owed because he lost his job *after* the initial imposition. *See Bearden*, 461 U.S. at 661.

Depending on which protection is chosen to anchor the analysis, the relationship between the two can be expressed in different constitutional terms. From the vantage of the *Bearden* protection, an Excessive Fines Clause-based ability-to-pay inquiry at the moment a fine is imposed might be conceptualized as a "preemptive" protection. Alternatively, from the vantage of the Excessive Fines Clause at-imposition protection, *Bearden* might be conceptualized as a "second-look" protection along the logic of other Eighth Amendment protections—including, for instance, the right to a "second look" provided to juveniles in life sentences.[121] From either vantage, *Bearden* and the Excessive Fines Clause protections are fundamentally complementary.

121. *See* Montgomery v. Louisiana, 136 S. Ct. 718 (2016); Miller v. Alabama, 567 U.S. 460 (2012).