NOTES

SAFE HAVEN NO LONGER: THE ROLE OF GEORGIA COURTS AND PRIVATE PROBATION COMPANIES IN SUSTAINING A DE FACTO DEBTORS' PRISON SYSTEM

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I. INTRODUCTION

Late one evening, a man found himself wandering the dark streets of the unforgiving town of his youth. He had left it only once to serve his country overseas—to defend his country in battles that still haunt his dreams. Yet upon his return, he found himself destitute, living off the pittance provided to him for his service—an amount barely sufficient to pay his board at a rooming house and purchase the bare essentials for his life. Despite repeated attempts, he was unable to find a job to supplement this income and was left with little hope for a change in his life.

On this evening in particular, the man let himself cave to despair and temptation, spending the remainder of his monthly allowance on a few drinks. Soon he was wandering the streets in a haze of intoxication, unsure of where he was going or what he was doing. A police officer spotted the man. The officer approached but found the man unwilling to cooperate and raging about the unfairness of his treatment by the country he had given his best years to protect. The officer arrested the man and locked him up to sleep off his anger.

The next day, the man was woken roughly and taken to court to stand before a judge who, in a matter of seconds, issued him a fine exceeding his monthly allowance to punish him for his night of intoxication. He was handed over to a creditor hired by the court for the sole purpose of ensuring the man's payment.

The months that followed brimmed with uncertainty. The man tried to find the money to pay. He even offered to do community service to pay off the fine. The creditor allowed this, and the fine owed to the court was soon discharged. But the fees he was required to pay directly to the creditor were not. The creditor would not allow the man to work off these fees—these were the creditor's profit.

The man sought ways to pay off the fees, even going without food. But inevitably, the creditor called for him. Acting as an arm of the court, the creditor filed an order that sent the police to the man's door. He was again taken before the judge. This time, when the judge made his pronouncement aided by the creditor's testimony, the man found himself in a cell with no release date on the horizon. The man found himself in debtors' prison.

While some artistic liberties have been taken, the bare facts of the above story belong to Georgia resident and veteran, Hills McGee. Charged with public drunkenness and obstruction of a police officer in connection with his actions in October of 2008, McGee was fined $270 and put on probation under the supervision of Sentinel Offender Services, LLC (Sentinel).[1] In addition to his fine, McGee had to pay a monthly supervision fee to Sentinel.[2] McGee, only receiving a monthly income of $243 in veterans' benefits, was allowed to convert his fine to forty-one hours of community service, which he quickly completed.[3]

Rather than converting the monthly supervision fees owed to Sentinel into community service, or waiving them entirely, Sentinel required McGee to continue to make payments.[4] It soon became apparent that McGee was unable to pay.[5] As a result, Sentinel issued a warrant for revocation of McGee's probation, requiring McGee to attend a probation revocation hearing and conditioning his release upon his payment of $186, the amount he owed in past fees.[6] At the hearing the court revoked McGee's probation "for two . . . months or [until] the payment of past due [Sentinel] fees of $186" was made, whichever occurred first.[7] In a habeas corpus petition for McGee's release, his attorney stated

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[1] Petition for Writ of Habeas Corpus and Order Declaring the Provisions of O.C.G.A. § 42-8-100(f) as an Illegal Delegation of Judicial Power and Declaring the Provisions of O.C.G.A. § 15-21A-6(c) Unconstitutional and in Violation of the Right to Counsel Guaranteed by the Sixth Amendment to the United States Constitution and the Constitution of the State of Georgia at 2–5, McGee v. Sentinel Offender Servs., LLC, No. CV 110–054 (S.D. Ga. Jan. 22, 2010), 2010 WL 4929951 [hereinafter McGee Petition for Writ of Habeas].

[2] *Id.* at 4.

[3] *Id.*

[4] *Id.* ("[B]ecause of Petitioner's indigency, [Sentinel] could have waived its fee or converted it to community service, but chose not to do so.").

[5] *Id.* Requiring McGee to pay his fees despite his indigency appears contradictory to a provision of Sentinel's contract with the State Court of Richmond County, which states: "If a determination is made by Sentinel that the probationer lacks the resources to be able to make weekly or monthly payments, *every effort* will be made to convert the remaining fines or costs to community service hours." *Id.* at 6 (emphasis added).

[6] *Id.* at 5, 23.

[7] *Id.* Probation revocation is a practice in which, following a probation violation such as failure to pay a fine or committing another crime, a judge at a probation revocation hearing can decide to terminate in part or whole a probationer's remaining probation sentence, a process which puts the probationer in prison for the period of time revoked. *See* JACK GOGER, GEORGIA CRIMINAL TRIAL PRACTICE § 30-8 (2012–2013 ed.) (discussing the result of a probation violation).

that having McGee "incarcerated for failing to pay a fee to a private probation company is similar to debtors' prison."[8]

There have been many other cases similar to that of Hills McGee. One woman, Ora Lee Hurley, failed to pay a $705 fine as a condition of her probation and was imprisoned in the Gateway Diversion Center in Atlanta.[9] Her release was conditioned on her payment of the fine.[10] While she was allowed to leave the Diversion Center to go to work, the only job she could find paid $6.50 an hour.[11] Almost all of this income was taken by the Diversion Center to pay for her room and board, and the rest went towards paying the fine.[12] After almost a year in the Diversion Center, her counselor reported that her fine had actually gone up to $1,103.90 because of the added cost of room and board.[13] Upon the filing of a habeas corpus petition on her behalf, some of the rent Ms. Hurley had paid to the Diversion Center was applied to pay off her fine, and she was immediately released from the Diversion Center.[14]

Blake Johnson suffered a similar fate. Following a series of charges for possession of marijuana, which resulted in a fine and probation time, Johnson's probation was revoked for failing to pay the court-ordered fines and fees.[15] The court held an evidentiary hearing "at which Johnson testified that he did not have a job; that he had applied for employment at several places, which he named; [and] that his family did not have the resources to help him pay his probation costs."[16] Though Johnson demonstrated that his failure to pay the fine was not willful, he was sentenced to serve

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[8] McGee Petition for Writ of Habeas, *supra* note 1, at 8.

[9] Petition for a Writ of Habeas Corpus at 3, Hurley v. Hinton, No. HC00532 (Sup. Ct. Fulton Cnty., Ga. Sept. 2006) [hereinafter Hurley Petition], *available at* http://www.schr.org/files/hurley_habeas.pdf. Diversion centers generally house nonviolent offenders who can leave to go to work but must return to the locked-down facility at night. Inmates must pay for their room and board. Joe Johnson, *Athens-Clarke Opens First-Ever County Diversion Center*, ATHENS BANNER-HERALD, May 12, 2012, http://onlineathens.com/local-news/2012-05-11/athens-clarke-opens-first-ever-county-diversion-center.

[10] Hurley Petition, *supra* note 9, at 3.

[11] *Id.* at 3, 5.

[12] *Id.*

[13] *Id.* at 7.

[14] *In for a Penny: The Rise of America's New Debtors' Prisons*, ACLU 56 (Oct. 2010), http://www.aclu.org/files/assets/InForAPenny_web.pdf.

[15] Johnson v. State, 707 S.E.2d 373, 374 (Ga. Ct. App. 2011).

[16] *Id.* at 373–74.

one year in a detention center.[17] On Johnson's appeal the Georgia Court of Appeals reversed the revocation decision on the grounds that the trial court had failed to "make a finding as to Johnson's willfulness" in not paying the fine.[18]

These are just a few documented examples of the de facto debtors' prison system that has arisen in Georgia. However, there are likely multiple others whose experiences are undocumented, who have not been able to contact an attorney for assistance, or whose families have pulled together their meager resources to pay for their family member's release. This de facto debtors' prison system is sustained by the fine collection methods used by private misdemeanor probation companies hired by many Georgia counties. These methods and the results they induce are unconstitutional under federal and Georgia law.[19]

This Note begins by briefly introducing the history of the systemized use of debtors' prisons in England, America, and Georgia, and the laws that signaled the end of this system in the period after the Civil War. Despite state constitutional bans on imprisonment for debt, many courts continued to imprison those who could not pay court-imposed fines and fees.

These practices gave rise to the landmark Supreme Court case *Bearden v. Georgia*, which established that before imprisoning a defendant for failure to pay a fine, a court must first conduct a hearing on the willfulness of the defendant's failure to pay and consider alternative methods of sentencing.[20] Despite this holding, some courts, including those in Georgia, still use various methods to distinguish the cases before them from *Bearden* in order to allow imprisonment for failure to pay a fine without a showing of willfulness.[21]

This Note then focuses on the use of private probation companies for misdemeanor supervision in many Georgia counties and their common practices, which generally encourage probation revocation for indigents who fail to pay a fine even though the

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[17] *Id.* at 374.

[18] *Id.* at 375.

[19] The unconstitutionality of these practices is the main focus of this Note.

[20] Bearden v. Georgia, 461 U.S. 660, 672 (1983) (noting that community service or a reduced fine may "adequately serve[ ] the State's goals of punishment and deterrence").

[21] *See infra* notes 46–55 and accompanying text.

court has made no finding of willfulness.[22] There have been multiple challenges to O.C.G.A. § 42-8-100, the statute which authorizes counties to use private misdemeanor probation.[23] The most recent challenges have focused on the unequal impact of the practices of private probation companies on indigent probationers, challenging these practices as violating the Equal Protection Clause, Due Process Clause, and Protection against Excessive Fines Clause.[24]

Following the summary of background material, Part III focuses on ways to combat the problem of imprisoning indigents, without a finding of willfulness, for failing to pay a fine. A key means of combat is to raise awareness among Georgia legal practitioners that these practices are unconstitutional. Further, this Note argues that several Georgia statutes dealing with the issues addressed in this Note are unconstitutional, specifically O.C.G.A. § 17-10-20 (detailing the imposition of fines as part or all of a sentence), O.C.G.A. § 42-8-100(g)–(h) (enabling counties to contract with private probation companies), and O.C.G.A. § 42-8-100(d) (allowing fees to be imposed as part of probation). The Georgia Supreme Court should grant certiorari to cases challenging these statutes and raising the issues addressed in this Note in order to find these statutes unconstitutional.

Finally, this Note recommends action on the part of the Georgia Legislature, providing a survey of other states' laws that offer greater protection to indigent defendants against unconstitutional sentencing procedures. Like these states, the Georgia Legislature should adopt a similar statutory scheme protective of indigent defendants as well as take a more active role in curtailing the

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[22] *See* Ethan Bronner, *Poor Land in Jail as Companies Add Huge Fees for Probation*, N.Y. TIMES, July 2, 2012, http://www.nytimes.com/2012/07/03/us/probation-fees-multiply-as-companies-profit.html?pagewanted=all&_moc.semityn.www&_r=1& (discussing the numerous for-profit probation companies in Georgia given authority to issue warrants for probationers who fail to pay fines or fees); *see also* discussion *infra* Part II.B.

[23] O.C.G.A. § 42-8-100 (g)(1)–(2)(1997 & Supp. 2013) ("The chief judge of any court within the county . . . is authorized to enter into written contracts with corporations [and] . . . to provide probation supervision, counseling, [and] collection services . . . .").

[24] *See, e.g.*, McGee v. Sentinel Offender Servs., LLC, No. CV 110–054, 2010 WL 4929951 (S.D. Ga. Nov. 30, 2010) (holding that the court lacked subject-matter jurisdiction to consider the constitutionality of O.C.G.A. § 42-8-100(f)); Sentinel Offender Servs., LLC v. Harrelson, 690 S.E.2d 831 (Ga. 2010) (declining to rule on defendant's constitutional challenges to O.C.G.A. § 42-8-100 because the superior court below had not done so).

power of private probation companies. However, until such recommendations are heeded in Georgia, little change is likely to come: "[W]ith the private [probation] companies seeking a profit, with courts in need of income and with the most vulnerable caught up in the system, 'we [end up] balancing the budget on the backs of the poorest people in society.' "[25]

II. BACKGROUND

A. THE HISTORY OF DEBTORS' PRISONS

For many, the phrase "debtors' prison" conjures images of seventeenth- and eighteenth-century England where fathers were thrown into prison for their inability to pay a debt, leaving their families to struggle to earn the money necessary for their release.[26] What many Americans may not realize is that this scenario was not uncommon in the American colonies. People were sometimes jailed for as little as $1—the equivalent of $25 today.[27] Georgia was specifically established as a colony for debtors—a haven where they could be safe from imprisonment if they remained in the state.[28] In the mid-1800s, the practice of imprisoning debtors fell into disfavor in both England and America, and in the years surrounding the Civil War, many states banned the practice.[29] Having strayed from its initial status as a debtors' haven, Georgia followed suit in 1877 and banned imprisonment for debt.[30]

1. The Rise of Modern-Day Debtors' Prisons. Despite constitutional bans on imprisonment for debt, many states have devised creative methods for continuing to imprison debtors.[31]

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[25] Bronner, *supra* note 22 (quoting Stephen Bright, President and Head Attorney at Southern Center for Human Rights, Atlanta, GA) (providing examples of the abuses of for-profit probation companies).

[26] *See* Jason Zweig, *Are Debtors' Prisons Coming Back?*, WALL ST. J. (Aug. 28, 2012, 5:59 PM), http://blogs.wsj.com/totalreturn/2012/08/28/are-debtors-prisons-coming-back/ (describing the history of debtors' prisons in the United States and England).

[27] *Id.*

[28] *Id.*

[29] *Id.* For example, Kentucky has made imprisonment for debt unconstitutional where no evidence of fraud exists. KY. CONST. § 18.

[30] GA. CONST. art. I, § 1, para. XXIII ("There shall be no imprisonment for debt.").

[31] *See generally* Richard E. James, Note, *Putting Fear Back into the Law and Debtors Back into Prison: Reforming the Debtors' Prison System*, 42 WASHBURN L.J. 143 (2002) (arguing that, although currently unconstitutional, de facto debtors' prisons still exist in

Two of the most common methods are (1) imposing a sanction of imprisonment on someone who is held in civil contempt for failure to pay judicially imposed fines such as child support[32] and (2) revoking probation for failure to pay a fine or fee imposed as a condition of probation.[33]

The seminal case regarding imprisonment for debt in the criminal context is *Bearden v. Georgia*, in which the Supreme Court addressed the issue of probation revocation for failure to pay a fine.[34] In this case, the petitioner, Danny Bearden, pled guilty to the felony charges of burglary and theft by receiving stolen goods.[35] Bearden was put on probation for four years with the added condition that he pay a $500 fine and $250 in restitution—$200 to be paid within the first two days and the other $550 over the course of four months.[36] Bearden made the initial $200 payment with help from his parents but was unable to pay the other $550 after being laid off from his job.[37] Despite repeated attempts, Bearden was unable to find another job, and the State filed a petition to revoke his probation.[38] After an evidentiary hearing, Bearden's probation was revoked for failing to pay the balance of his fine, and he was sentenced to serve the remaining period of probation in prison.[39]

The Supreme Court granted certiorari, noting that the initial sentencing decision to put Bearden on probation rather than in prison was indicative of the level of punishment the State felt was necessary.[40] Though Bearden's efforts to find a job were unsuccessful and he could not pay the fine, imprisoning Bearden would not further the State's interest in receiving payment.[41] The

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America and that they should be formalized so as to create a standardized system for instilling fear in debtors).

[32] *Id.* at 149.

[33] *See supra* notes 1–18 and accompanying text. This Note will focus on the criminal justice system specifically.

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

[35] *Id.* at 662.

[36] *Id.*

[37] *Id.* at 662–63.

[38] *Id.*

[39] *Id.* at 663.

[40] *See id.* at 670 ("The decision to place the defendant on probation . . . reflects a determination by the sentencing court that the State's penological interests do not require imprisonment.").

[41] *Id.*

Court further noted that such a policy could even have the negative effect of causing probationers threatened with impending imprisonment to acquire money illegally.[42]

For these reasons, the Supreme Court found that a petitioner's lack of fault in failing to pay provides a "substantial reaso[n] which justifie[s] or mitigate[s] the violation and make[s] revocation inappropriate"[43] and that depriving a defendant of his "freedom simply because, through no fault of his own, he cannot pay a fine . . . would be contrary to the fundamental fairness required by the [Due Process Clause of the] Fourteenth Amendment."[44] Consequently, the Court held that before probation can be revoked for failing to pay a fine, a court must perform an assessment of the probationer's willfulness in not paying the fine and consider reasonable alternatives to imprisonment.[45]

2. An Exception to the Bearden *Rule.* Since the 1990s, many courts have attempted to create an exception to the *Bearden* rule by distinguishing a judge-imposed sentence as used in *Bearden* from one agreed to in a plea bargain, finding that the latter category does not require a finding of willfulness since the defendant affirmatively agreed to pay the fine by accepting the plea bargain.[46] These courts reason, by analogy, that a defendant's agreement to a plea bargain is similar to the establishment of a private contract between the probationer and the State, thus granting the courts leeway in enforcing this "contract."[47]

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[42] *Id.* at 670–71.

[43] *Id.* at 669 (alterations in original) (quoting Gagnon v. Scarpelli, 411 U.S. 778, 790 (1973)).

[44] *Id.* at 672–73.

[45] *See id.* at 672 (noting that community service or a reduced fine may "adequately serve[ ] the State's goals of punishment and deterrence").

[46] Ann K. Wagner, Comment, *The Conflict over* Bearden v. Georgia *in State Courts: Plea-Bargained Probation Terms and the Specter of Debtors' Prison*, 2010 U. CHI. LEGAL F. 383, 386–87 (2010); *see, e.g.*, United States v. Johnson, 767 F. Supp. 243, 248 (N.D. Ala. 1991) (holding that *Bearden* does not govern plea bargains because restitution obligations are bargained for).

[47] Wagner, *supra* note 46, at 396 n.74 (citing State v. Thorstad, 261 N.W.2d 899, 902 (N.D. 1978) ("Plea bargaining has been officially accepted in North Dakota, and . . . contract criteria have been superimposed upon it. This gives courts justification to treat court-approved plea bargain agreements similarly to contracts.")).

In 2002, Georgia joined the states that have carved out this exception in the case *Dickey v. State*.[48] In *Dickey*, the defendant, Victor Dickey, was indicted for theft, having stolen over $160,000 from his employer.[49] Dickey agreed to a plea bargain sentencing him to ten years on probation subject to several conditions, including that he pay restitution by August 15, 2001 and that he spend 90 to 120 days in a detention center.[50] Dickey failed to pay, claiming that he was unable to earn the money because he was confined to the detention center.[51] Dickey's probation was revoked, and he was imprisoned for two years in a detention center.[52] Dickey appealed this decision, claiming that the court had imprisoned him despite his inability to pay and lack of willfulness, a determination which *Bearden* required prior to probation revocation.[53] The court of appeals reasoned that this case was distinguishable from *Bearden* in that, by entering into a plea agreement, Dickey had essentially entered into a contract to pay restitution, which he had breached by not paying.[54] Further, the court noted that Dickey's failure to express any concern about his possible inability to pay at the time he entered into the plea agreement signified his culpability.[55]

More recently, in *Johnson v. State*, the Georgia Court of Appeals attempted to realign with *Bearden* by limiting the *Dickey* holding to cases in which the plea agreement was negotiated with regards to paying restitution as opposed to punitive fines.[56] Any other probation revocation for failure to pay fines, the court noted, should still be determined according to the *Bearden* rule.[57] The Georgia Supreme Court has not yet addressed this issue.

Despite precedent clearly prohibiting imprisonment for a non-willful failure to pay a fine other than restitution, criminal defendants in Georgia are regularly imprisoned following a

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[48] Dickey v. State, 570 S.E.2d 634, 634 (Ga. Ct. App. 2002).
[49] *Id.* at 635.
[50] *Id.*
[51] *Id.*
[52] *Id.*
[53] *Id.*
[54] *Id.* at 636.
[55] *Id.*
[56] Johnson v. State, 707 S.E.2d 373, 375 (Ga. Ct. App. 2011).
[57] *Id.*

probation revocation.[58] This is due in part to the practices of private, for-profit probation companies, which have been given charge over misdemeanor probation in many Georgia counties.[59]

B. THE PRIVATE PROBATION SYSTEM IN GEORGIA

1. The Development of a Private Probation System in Georgia. In 2000, with the passage of amendments to O.C.G.A. § 17-10-3, the state of Georgia officially divested the Department of Corrections of jurisdiction to supervise misdemeanor offenders.[60] Supervision of approximately 25,000 misdemeanants was transferred from the State Department of Corrections to the individual counties.[61] As a result, many counties began entering into contracts with private probation companies to provide misdemeanor probation services,[62] contracts which were previously authorized by O.C.G.A. § 42-8-100 but rarely entered into as many counties preferred state supervision over private supervision.[63] These companies generally charge the government nothing for their services, instead charging probationers monthly supervision and enrollment fees to turn a profit.[64]

Currently, there are around three dozen private probation companies operating in courts around Georgia.[65] One company, Sentinel, supervises more than 40,000 active probationers in Georgia.[66] Its website boasts of having "collected and remitted more than $25 million to 90 Georgia courts."[67] What Sentinel's

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[58] *See* ACLU, *supra* note 14, at 55 ("[I]ndigent Georgians are often jailed solely for the nonpayment of fines and fees.").

[59] *See generally id.* at 60–63 (describing private probation companies' practices leading to imprisonment of probationers).

[60] O.C.G.A. § 17-10-3(f) (1997 & Supp. 2013).

[61] *See* Whitworth v. State, 622 S.E.2d 21, 23 (Ga. Ct. App. 2005) (summarizing the events surrounding the passage of amendments to O.C.G.A. § 17-10-3).

[62] David M. Reutter, *Georgia's Privatized Probation System Traps the Poor*, PRISON LEGAL NEWS, June 2010, at 22, *available at* http://webcache.googleusercontent.com/search?q=cache:BhIjQNDoMssJ:https://www.prisonlegalnews.org/(S(ohht0jqikll2xxr3npvohff0))/includes/_public/_issues/pln_2010/06pln10.pdf+&cd=1&hl=en&ct=clnk&gl=us.

[63] *See* O.C.G.A. § 42-8-100 (1997) (authorizing counties to contract with private probation companies).

[64] Bronner, *supra* note 22.

[65] *Id*.

[66] ACLU, *supra* note 14, at 59.

[67] *Houston County Georgia Beats Jail Overcrowding with Sentinel Offender Services Electronic Monitoring Service Partnership*, SENTINEL OFFENDER SERVS., http://www.sentrak.

website does not mention, however, is the profit it has earned from their probationers.[68]

2. The Practices of Private Probation Companies in Georgia. A study on the practices of private probation companies in Georgia is revealing. In some courts, if defendants are financially unable to pay a fine on the day they are sentenced, they are placed on supervised probation until they pay off the fine.[69] While this may seem beneficial to a defendant with little or no income, many of the private probation companies charge between $35 and $44 in monthly supervision fees, totaling between $420 and $528 over the course of a year.[70] This means that a person who is unable to pay a $200 fine on the day of sentencing and is placed on probation may ultimately pay a tripled or even quadrupled amount over the course of one year as compared to a person of means who would not face probation fees.[71]

Many of the people who are caught in the private probation payment system would not be considered a threat to society so as to warrant supervision. Rather, they are often people like Carla, a twenty-five-year-old single mother on probation in Americus, Georgia, who was too poor to pay a $200 ticket for rolling through two stop signs.[72] Indicative of the innocuous nature of many

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com/files/CaseHistory_HoustonGA.pdf (last modified Dec. 5, 2008).

[68] *See* ACLU, *supra* note 14, at 60 (internal quotation marks omitted) ("[T]he problem with outsourcing probation services is that it involves the wrong incentives. Private businesses want to make a profit . . . .").

[69] Sarah Geraghty & Melanie Velez, *Bringing Transparency and Accountability to Criminal Justice Institutions in the South*, 22 STAN. L. & POL'Y REV. 455, 475 (2011); *see, e.g.*, Petition to Modify Probation Sentence at 1, Georgia v. Conner, No. 07-RCST-15889 (St. Ct. Richmond Cnty., Ga. Dec. 1, 2007) [hereinafter Conner Petition] ("Because Ms. Conner is poor and was unable to pay [the fine of] $140 on the day of court, she was placed on probation with a private company . . . .").

[70] S. CTR. FOR HUMAN RIGHTS, PROFITING FROM THE POOR: A REPORT ON PREDATORY PROBATION COMPANIES IN GEORGIA 5 (2008), *available at* http://www.schr.org/files/profit_from_poor.pdf; *see, e.g.*, Conner Petition, *supra* note 69, at 1 (noting that Ms. Conner was charged $39 per month in supervision fees). Compare this with the $23 monthly supervision fee used in the government-run felony probation system. S. CTR. FOR HUMAN RIGHTS, *supra* note 70, at 10.

[71] S. CTR. FOR HUMAN RIGHTS, *supra* note 70, at 2. For example, in the case of Conner, over the course of four months the probation company's monthly supervision fees in addition to her initial fine of $140 nearly doubled the total amount she had to pay. This amounted to a 100% interest rate—a rate far in excess of that allowed by Georgia's usury laws in O.C.G.A. § 7-4-18 (2000), which limit any person or company from charging more than 5% interest per month. Conner Petition, *supra* note 69, at 5.

[72] Celia Perry, *Probation Profiteers*, MOTHER JONES (July 21, 2008, 12:00 AM), http://

probationers is the fact that the required monthly "supervision" meetings often consist exclusively of money collection.[73] According to the experiences of various probationers, after paying at the front desk, they must wait to see their probation officer who asks them if and how much they paid and whether they have any new criminal charges.[74] Probationers are generally not counseled on issues such as lack of housing, family instability, unemployment, or substance abuse—services that might be expected to be provided for someone the court has impliedly deemed unstable by imposing regular supervision.[75]

One probationer under the supervision of Middle Georgia Community Probation Company (MGPC) reported asking his probation officer for assistance in battling alcoholism only to be told, "We don't do that."[76] This lack of assistance seems contradictory to the purpose of probation, a sentence which has "traditionally been used by trial judges in Georgia as [an] effective tool[ ] of rehabilitation."[77] In contrast, the felony probation system, which is still under the control of the Georgia Department of Corrections, operates several units providing intense programming to assist probationers with battling addictions and developing marketable skills.[78]

Some of these private probation companies take the first cut from a probationer's payment to satisfy their supervision fees; this policy makes it difficult for a probationer to make progress in paying off his initial fine if his monthly income is minimal, as is often the case.[79] Further, probationers are often either not told

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www.motherjones.com/politics/2008/07/probation-profiteers (" 'These [probationers] are not cold, hardened criminals,' [said Americus, Georgia] NAACP chapter president Matt Wright . . . . 'These are just people struggling, trying to make it.' ").

[73] S. CTR. FOR HUMAN RIGHTS, *supra* note 70, at 6.

[74] *Id.*

[75] *Id.*; *see also* Brief of Amicus Curiae the Southern Center for Human Rights on Behalf of Cross-Appellant Lisa Harrelson at 19, Sentinel Offender Servs. v. Harrelson, 286 Ga. 665 (2010) [hereinafter Harrelson Brief] ("[T]he fees . . . do not go toward the provision of services for probationers.").

[76] Perry, *supra* note 72.

[77] Quintrell v. State, 499 S.E.2d 117, 120 (Ga. Ct. App. 1998).

[78] *Field Operations*, GA. DEP'T OF CORRS., http://www.dcor.state.ga.us/Divisions/Corrections/ProbationSupervision/FieldOperations.html (last visited Oct. 14, 2013).

[79] S. CTR. FOR HUMAN RIGHTS, *supra* note 70, at 6. One Georgia probationer, Lisa Harrelson, made a payment of $500 to Sentinel towards paying off her initial $651 fine.

that they can convert their fine into community service or are required to pay a certain amount before being allowed to do so.[80]

At least one private probation company links probation officers' job security to the amount of money they collect each month.[81] Crystal Paige, the area manager for the Sentinel branch in Richmond County, testified that officers are given bonuses based on profitability.[82] If an officer does not collect enough from the people on his caseload, he may be fired.[83] In 2009, a former Sentinel probation officer, Rudolph Falana, testified that he had been fired for not issuing the required weekly quota of warrants for probation revocation.[84] Falana stated that it was part of his job description to issue around twenty-five warrants a week for probation revocation, make phone calls, and send out letters in order to improve collections.[85] Other practices used to improve collections are to increase the frequency of supervision meetings or verbally threaten probationers with incarceration.[86]

Some companies encourage the incarceration of probationers by allowing defaulting probationers to be removed from a probation officer's caseload if the officer issues a warrant for probation revocation.[87] This enables the officer to avoid the negative consequences of having a defaulting probationer under his supervision.[88] So as to avoid the appearance of revoking probation solely for failing to pay a fine or fee, probation officers will commonly increase the frequency of required meetings for

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Almost 40% of this payment went towards paying Sentinel's fees rather than Harrelson's fine. Harrelson Brief, *supra* note 75, at 12, 16 n.3.

[80] S. CTR. FOR HUMAN RIGHTS, *supra* note 70, at 7.

[81] *Id.* at 8.

[82] McGee Petition for Writ of Habeas, *supra* note 1, at 43 (quoting Transcript of Oral Argument at 75, Sentinel Offender Servs., LLC v. Harrelson, 286 Ga. 665 (2010) ("Q. And, ma'am, your company is a profit motivated company; is that right? A. That would be correct. Q. And you are – are you ever paid a bonus based on the profits of this company? A. Uh, we – there is a bonus plan; however, uh, it varies. Me, personally, uh, I've probably in ten years, maybe five times. Q. And so, is that based on the profitability, ma'am? A. Yes, sir.")).

[83] S. CTR. FOR HUMAN RIGHTS, *supra* note 70, at 8.

[84] McGee Petition for Writ of Habeas, *supra* note 1, at 56 (citing Hearing excerpt at 3–4, Falana v. Sanford, No. 2009-RCD-498 (Super. Ct., Richmond Cnty., Ga. May 20, 2009)).

[85] *Id.* at 57.

[86] *See* ACLU, *supra* note 14, at 59 ("Jail for nonpayment is a constant threat and a frequent reality among those trapped by private probation companies.").

[87] S. CTR. FOR HUMAN RIGHTS, *supra* note 70, at 8.

[88] *See id*. (noting link between job security and earnings of probation officers and money collected from probationers).

defaulting probationers until they miss a meeting.[89] The probation officer is then able to list as violations both failure to pay fines or fees and failure to report. However, release for this revocation is often conditioned on the payment of the balance of the fine or fee, thus indicating that the imprisonment is for the fine or fee, not for the failure to report.[90] Moreover, private, for-profit probation companies have an incentive to incarcerate probationers who do not pay since this then shifts the cost of collection to the state and taxpayers, who pay for the probationer to remain incarcerated until he pays off his fines and fees.[91]

While the above practices of private probation companies in Georgia have been compiled based on first-hand accounts of probationers, testimony of probation officers, and observation of court sentencing practices, the totality of private probation companies' practices remain unknown.[92] With the passage of O.C.G.A. § 42-8-106 in 2006, private probation companies' files were officially shielded from public scrutiny. This statute states that

> All reports, files, records, and papers of whatever kind relative to the supervision of probationers by a private corporation . . . are declared to be confidential and shall be available only to the affected county, municipality, or consolidated government, the judge handling a particular case, the Department of Audits and Accounts, or the council or its designee.[93]

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[89] *See, e.g.*, *id.* at 6 (describing a situation in which a probationer saw his probation meetings multiply when he could not make full payments).

[90] *See, e.g.*, McGee Petition for Writ of Habeas, *supra* note 1, at 9 (stating that the amount owed probation company is $186 and the payment necessary for release is $186).

[91] *See id.* (stating that by incarcerating probationers, probation companies eliminate the minimal costs to them of supervising the probationer and shift to taxpayers the costs of incarcerating probationers at approximately $45 to $50 per day); *see also* ACLU, *supra* note 14, at 61 ("Since private probation companies do not bear the costs of incarceration or overburdened courts . . . there is nothing discouraging them from referring large numbers of defaulting probationers to the courts and, potentially, jail.").

[92] Interview with Stephen Bright, President and Senior Attorney, S. Ctr. for Human Rights, in Athens, Ga. (Sept. 19, 2012).

[93] O.C.G.A. § 42-8-106 (1997 & Supp. 2013).

O.C.G.A. § 42-8-106 imposes an additional shield by stating that the above-listed documents "shall not be subject to process of subpoena."[94] The provisions of this statute make it incredibly difficult for a private citizen to challenge the practices of private probation companies, since neither a probationer nor his attorney are able to access the probation company's files even with a subpoena. Thus, unless a judge or county decides to investigate these companies' practices, the full extent of the abuses of the private probation system will remain unknown.

C. CHALLENGES TO THE PRIVATE PROBATION SYSTEM IN GEORGIA

Since the passage of O.C.G.A. § 42-8-100, which encouraged the use of private probation companies in Georgia, there have been multiple challenges to the system and its practices. In recent years, lawsuits have focused on the unequal impact the private probation system often has on indigent defendants.

In 2007, Lisa Harrelson was charged with driving under the influence of alcohol.[95] She pled guilty and was sentenced to pay $651 in fines and serve twelve months on probation with Sentinel.[96] In 2008, Harrelson filed a petition for habeas corpus relief, challenging O.C.G.A. § 42-8-100 as violating the Equal Protection Clauses of both the state and federal constitutions,[97] as well as the federal and state constitutional protection against imposition of excessive fines.[98] Harrelson reasoned that because the imposition of supervised probation for minor offenses such as traffic violations is often made solely because of a defendant's inability to pay a fine at the time of sentencing, a longer and more expensive punishment is often imposed on those who are poor,

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[94] *Id.*

[95] Sentinel Offender Servs., LLC v. Harrelson, 690 S.E.2d 831, 832 (Ga. 2010).

[96] *Id.*

[97] Harrelson Brief, *supra* note 75, at 16–18 (detailing Harrelson's Equal Protection claim); U.S. CONST. amend. XIV, § 1; GA. CONST. art. I, § 1, para. II ("Protection to person and property is the paramount duty of government and shall be impartial and complete. No person shall be denied the equal protection of the laws.").

[98] Harrelson Brief, *supra* note 75, at 19. While U.S. Const. amend. VIII has never been incorporated to the states, Georgia adopted a nearly identical provision in Ga. Const. art. I, § 1, para. XVII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted . . . .").

thus unconstitutionally affecting defendants who are indigent.[99] The Georgia Supreme Court, however, dispensed of this case on procedural grounds without considering the merits of Harrelson's constitutional challenges to O.C.G.A. § 42-8-100.[100]

That same year, similar challenges were made in *McGee v. Sentinel Offender Services, LLC*.[101] This case arose following the revocation of McGee's probation and his incarceration for failing to pay his fees to Sentinel, the circumstances surrounding which are described in Part I.[102]

Despite the Supreme Court's holding in *Bearden*, the court did not determine McGee's willfulness in not paying the fine at his probation revocation hearing, and he was imprisoned for two months or until he paid the fine.[103] Soon after his imprisonment, a petition for habeas corpus was filed on McGee's behalf claiming that he was not competent to participate in the probation revocation hearing without an attorney.[104] The Superior Court of Richmond County found that continued imprisonment of McGee was unlawful, ordered his release, and terminated his probation.[105]

Despite the court's order terminating his probation, McGee continued to receive letters from Sentinel, threatening to revoke his probation if he did not pay the $186 he owed them.[106] In response, McGee filed suit against Sentinel in part arguing that O.C.G.A. § 42-8-100(f) is "unconstitutional as an illegal delegation of judicial power to a private company, who are vested as officers of the Court [yet] primarily owe their duties to their 'for profit' company."[107] This suit was brought as a class action "on behalf of

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[99] *See id.* at 16 ("Charging a poor person more, and in some cases, double the fine that a person with means would pay for the same offense, violates principles of fundamental fairness and the Equal Protection Clauses of the state and federal constitutions.").

[100] *See Harrelson*, 690 S.E.2d at 834 (finding that the superior court properly overturned Harrelson's conviction after finding that the state failed to meet its burden of proving that Harrelson's plea was knowingly entered into and that the entry of default against the defendant was valid).

[101] McGee v. Sentinel Offender Servs., LLC, No. CV 110–054, 2010 WL 4929951, at *4 (S.D. Ga. Nov. 30, 2010) (denying the plaintiff's motion to remand to state court).

[102] *See supra* notes 1–8 and accompanying text.

[103] McGee Petition for Writ of Habeas, *supra* note 1, at 5 (citing Bearden v. Georgia, 461 U.S. 660, 668 (1983)).

[104] McGee v. Sentinel Offender Servs., LLC, 719 F.3d 1236, 1238–39 (11th Cir. 2013).

[105] *Id.* at 1239.

[106] *Id.*

[107] McGee Petition for Writ of Habeas, *supra* note 1, at 10.

all individuals previously convicted of a misdemeanor or ordinance violation in the State of Georgia, who are under probation supervised by Sentinel, and who have paid a fee to Sentinel."[108]

Sentinel removed the case to the United States District Court for the Southern District of Georgia. The district court granted summary judgment in favor of Sentinel because McGee had failed to give the Georgia Attorney General notice of the constitutional challenge to O.C.G.A. § 42-8-100(g), thereby depriving the court of subject-matter jurisdiction to resolve the issue.[109] Earlier this year, the United States Court of Appeals for the Eleventh Circuit affirmed the district court's decision, noting that "McGee lack[ed] standing to seek a declaration of [the statute's] invalidity because he ha[d] suffered no harm under the statute since the Superior Court granted him habeas relief."[110] In so deciding, the courts again avoided deliberating on the constitutionality of O.C.G.A. § 42-8-100.

The practices condoned in O.C.G.A. § 42-8-100 are not isolated to Georgia but have been the subject of recent complaints in multiple other states, including Missouri, Alabama, and Illinois.[111] In a 2012 Harpersville, Alabama case similar to *McGee*, Judge Hub Harrington issued a scathing rebuke of the city's court system and use of the services of Judicial Corrections Services, a private probation company based in Georgia.[112] Judge Harrington stated that

> [w]hen viewed in a light most favorable to Defendants, their testimony concerning the City's court system could reasonably be characterized as the operation of a debtors prison . . . . [A] more apt description of the Harpersville Municipal Court practices is that of a judicially sanctioned extortion racket. Most distressing is that these abuses have been perpetrated

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[108] McGee v. Sentinel Offender Servs., LLC, No. CV 110–054, 2010 WL 4929951, at *1.

[109] *McGee*, 719 F.3d at 1240.

[110] *Id.* at 1241 n.6.

[111] Zweig, *supra* note 26.

[112] Adam Peck, *Alabama Judge Rebukes Private Correctional Company for Running 'Debtors Prison,'* THINK PROGRESS (July 13, 2012, 5:00 PM), http://thinkprogress.org/justice/2012/07/13/516403/alabama-private-prison-debtors-prison/.

> by what is supposed to be a court of law. Disgraceful.[113]

The Georgia courts and legislature should follow suit and recognize the unconstitutionality and disgracefulness of these practices.

III. ANALYSIS

The United States Supreme Court precedent in *Bearden* is ignored in Georgia, leading to the incarceration of probationers for failing to pay fines and fees[114] and the creation of a modern-day debtors' prison. In order to combat this problem, awareness should be raised among legal practitioners in Georgia, the Georgia Supreme Court should grant certiorari to cases raising these and related issues, and the state legislature should adopt legislation offering greater protection to indigent defendants.

A. AWARENESS AMONG LEGAL PRACTITIONERS

In order to end the repeated violations of the Supreme Court's ruling in *Bearden*, attorneys and judges across Georgia should be informed of the *Bearden* requirements and reminded of Georgia's constitutional ban on imprisonment for debt.

One key problem is that defense attorneys are not constitutionally required to be present at probation revocation hearings, and even when they are present, they are often uninformed on the law surrounding imprisonment for failure to pay a fine.[115] Generally, indigent probationers do not have a right to appointment of counsel at a probation revocation hearing, as it is not considered a critical "stage of criminal prosecution."[116] The Supreme Court has recognized that there are some limited circumstances in which a probationer may request counsel, such as

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[113] Burdette v. Harpersville, CV 2010-900183 (Cir. Ct. Shelby Cnty., Ala., July 11, 2012).

[114] *See supra* notes 1–18 and accompanying text.

[115] *See, e.g.*, Memorandum from Judith Pond on Court Observations of Judge Watkins Jail Clearing to S. Ctr. for Human Rights Richmond-Augusta Cnty. File 7 (July 9, 2012) (on file with S. Ctr. for Human Rights and author) (evidencing two public defenders' lack of knowledge on imprisonment for debt).

[116] Gagnon v. Scarpelli, 411 U.S. 778, 782 (1973); *see also* Vaughn v. Rutledge, 462 S.E.2d 132, 133 (Ga. 1995) ("[A] probationer has no Sixth Amendment right to counsel at a revocation hearing.").

when the probationer is disputing the probation violation and needs to present witness testimony to verify his story.[117]

At a probation revocation hearing for a probationer who has minor, undisputed violations such as failing to pay fines or fees, the court may not appoint an attorney for indigent defendants.[118] Consequently, there may be no one speaking directly on the probationer's behalf to ensure that the court undertakes an analysis of the probationer's willfulness in failing to pay the fine, as *Bearden* requires.[119] This can lead to the court disregarding evidence of non-willfulness as demonstrated in *Johnson*. There the court heard evidence that Johnson, who did not have an attorney present, had been unable to find a job despite multiple attempts, yet still sentenced him to one year in a detention center.[120] Even worse are the probation revocation hearings where, as in *McGee*, the court makes no determination of the probationer's willfulness prior to revoking probation.[121]

There are times when attorneys may be present. For example, at jail call proceedings, two or more public defenders may be assigned to represent upwards of fifty inmates who are all brought to court on one morning for various hearings including probation revocation hearings.[122] Even in this situation, attorneys often do

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[117] *Gagnon*, 411 U.S. at 790 ("Although the presence and participation of counsel will probably be both undesirable and constitutionally unnecessary in most revocation hearings, there will remain certain cases in which fundamental fairness—the touchstone of due process—will require that the State provide at its expense counsel for indigent probationers or parolees.").

[118] *See, e.g.*, Banks v. State, 620 S.E.2d 581, 584 (Ga. Ct. App. 2005) (holding that the trial court was correct to deny probationer's request for counsel because she admitted to probation violation). The court must provide attorneys for probationers in superior court probation revocation hearings according to O.C.G.A § 17-12-23(a)(2) (2013). However, this Note focuses primarily on misdemeanor probation, which would be found in state court, because the counties are responsible for providing misdemeanor probation while the State still has control over felony probation. *See supra* notes 60–63 and accompanying text. Thus this statute does not govern the majority of the cases discussed in this Note.

[119] *See* Bearden v. Georgia, 461 U.S. 660, 668–69 (1983) (requiring courts to conduct a hearing to determine a probationer's willfulness in failing to pay a fine prior to revoking his probation).

[120] Johnson v. State, 707 S.E.2d 373, 373–74 (Ga. Ct. App. 2011) (sentence reversed on appeal).

[121] McGee Petition for Writ of Habeas, *supra* note 1, at 5 (stating that, despite the *Bearden* requirement, no determination on the willfulness of McGee's failure to pay $186 in fees to Sentinel was made).

[122] *See, e.g.*, Memorandum from Sarah Bellacicco on Judge Simpson Jail Call Court Observations to Professor Russell Gabriel 4 (Oct. 15, 2012) (on file with author) (describing

not know the law on the issue. Two students observing jail call proceedings in Richmond-Augusta State Court on July 2, 2012, witnessed a man sentenced to a $500 fine *or* five months in jail for probation violations in a process dubbed "pay or stay."[123] When speaking with the public defenders assigned to the court following the proceedings, the students mentioned the unconstitutionality of the "pay or stay" procedure and were met with surprise.[124] The public defenders were unaware that it was unconstitutional to incarcerate someone for their inability to pay a fine.[125] This is not uncommon. A young public defender in Athens-Clarke County also responded with surprise to the information that *Bearden* prohibits incarcerating a probationer for failing to pay a fine without a determination of willfulness.[126]

In a system where public defenders are often grossly overworked and very little formal continuing education is required,[127] the public defenders' lack of awareness is not surprising. To ensure that public defenders can better advocate on behalf of indigent clients and stay abreast of the law on issues such as this, greater funding of the Georgia Public Defender Standards Council is necessary.[128] More funding would allow more public defenders to be hired and workloads to decrease. Well-

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the extremely brief first meetings between the public defenders and their clients and the rushed proceedings seeking to provide hearings for around fifty inmates in the course of a few hours).

[123] Memorandum from Judith Pond, *supra* note 115, at 3, 7.

[124] *Id.* at 3.

[125] *Id.*

[126] Interview with a Public Defender, W. Circuit Pub. Defender Office, in Athens, Ga. (Oct. 26, 2012).

[127] *See, e.g.*, Marie-Pierre Py, Letter, *Without Funds, PD System Will Deteriorate Further*, FULTON CNTY. DAILY REPORT, Mar. 19, 2009, http://www.nlada.org/DMS/Documents/1237466797.97/ (stating that in the thirteen months the author worked as a Walton County Public Defender, she closed approximately 900 cases, had approximately 270 open cases at one time, and received inadequate training and supervision).

[128] Recently, progress has been made in rectifying the deficient funding of the Georgia Public Defender System. Soon after the statewide public defender system was created in 2003, the Indigent Defense Fund was created to provide funding by collecting civil filing fees and surcharges on criminal fines and bonds. Yet over the past nine years, around $4 to $8 million of the money generated by these filing fees and surcharges each year has not been directed toward the public defender system. In the 2012 legislative session, the legislature passed HR 977 and HB 648, which required that all funding generated by the filing fees and surcharges be used only for indigent defense. Sara Totonchi, *If You Cannot Afford a Lawyer*, PEACH PUNDIT (Mar. 5, 2012, 9:24 AM), http://www.peachpundit.com/2012/03/05/if-you-cannot-afford-a-lawyer/.

developed training programs and mentors are also needed, so as to create support networks and foster an environment in which issues like the disregard for *Bearden* can be raised.[129] In a system where courts are clearly overstepping their bounds, whether intentionally or not, public defenders need to be better prepared to represent indigent defendants to ensure that they are given constitutional hearings.

Further, judges should be reminded of the constitutional restraints on their contempt power to punish debtors who have been unable to pay fines or fees.[130] They should also be reminded that according to *Bearden*, judges must conduct findings on and take into account a probationer's willfulness in failing to pay a fine or fee prior to probation revocation.[131] In 2011, the Georgia General Assembly created and charged a Criminal Justice Reform Council with reviewing the current practices of the criminal justice system and making suggestions of improvements to the legislature and Judicial Council of Georgia,[132] a representative council of twenty-six judges that acts as an administrative arm of the Georgia court system.[133] The Georgia General Assembly should charge the Criminal Justice Reform Council with the specific task of observing and reporting on the constitutional abuses occurring in Georgia courts every day. The General Assembly should require the Judicial Council of Georgia to ensure that judges are informed of these abuses and are working to put an end to their occurrence. Moreover, the Council should publicize findings on specific judges found to sustain unconstitutional practices so that this information may be taken into account when the judges are up for re-election.

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[129] For an example of a well-developed training program, see *Core 101*, GIDEON'S PROMISE, http://gideonspromise.org/training/core-101/ (last visited Sept. 7, 2013).

[130] GA. CONST. art. I, § 1, para. XXIII ("There shall be no imprisonment for debt.").

[131] Bearden v. Georgia, 461 U.S. 660, 668–69 (1983).

[132] *See generally* CRIMINAL JUSTICE REFORM COUNCIL, REPORT OF THE SPECIAL COUNCIL ON CRIMINAL JUSTICE REFORM FOR GEORGIANS 2 (Dec. 2012), *available at* http://gov.georgia.gov/sites/gov.georgia.gov/files/related_files/press_release/Report%20of%20the%20Special%20Council%20on%20Criminal%20Justice%20Reform%20for%20Georgians%202012%20-%20FINAL.pdf (detailing the Council's findings and suggestions for improvement in 2012).

[133] *See generally Judicial Council of Georgia*, ADMINISTRATIVE OFFICE OF THE COURTS, http://www.georgiacourts.org/index.php/judicial-council (last visited Dec. 12, 2012) (detailing the function of the Judicial Council in the Georgia court system).

Probation officers need to be trained on constitutional and non-harassing methods of supervision as well as means of properly assessing the viability of probation revocation as compared to converting the fine into community service. The first option requires a full probation revocation hearing and findings on willfulness before a judge,[134] whereas the latter option only requires court approval of a request to modify the terms of probation.[135] Not only would this improve the efficiency of the court system, it would also reduce the stress of the many probationers who are faced with warrants for probation revocation based on their inability to pay a fine. This training should be made a condition of contract renewal and could be conducted by the County and Municipal Probation Advisory Council (CMPAC), an institution already in existence.[136] The funding for this training could be provided by requiring private probation companies to pay yearly registration fees to CMPAC.[137]

By applying the methods suggested above, awareness can be raised among the many actors in the probation process. This awareness is essential to decreasing the regularity with which these unconstitutional practices occur.

B. GEORGIA SUPREME COURT INVOLVEMENT

To further address the de facto debtors' prison system in Georgia, the Georgia Supreme Court should grant certiorari to cases challenging the validity of the Georgia probation practices that are leading to unconstitutional abuses of probationers' rights. While it would be most beneficial for the court to decide a case challenging a lower court's failure to consider probationers' willfulness when revoking probation for nonpayment of fines, it is

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[134] O.C.G.A. § 42-8-34.1(a)(1) (2010).

[135] *Id.* § 42-8-34.1(c); *see, e.g.*, McGee Petition for Writ of Habeas, *supra* note 1, at 22 (recording the court's approval of an order to modify the terms of probation by converting McGee's fines to community service).

[136] *See* S. CTR. FOR HUMAN RIGHTS, ROADBLOCKS TO REFORM: PERILS FOR GEORGIA'S CRIMINAL JUSTICE SYSTEM 10 (Nov. 2012), http://www.schr.org/files/post/Privatization%20Report%20FINAL.pdf (noting the problems with the use of private companies in the criminal justice system and making suggestions for reform to the Special Council on Criminal Justice Reform).

[137] *See id.* at 12 (noting CMPAC's annual request for more probation officer training and suggesting a source of funding).

unlikely that the court will hear such a case. Often, when indigent probationers are incarcerated for failing to pay a fine and a habeas corpus petition is filed on their behalf, the court quickly recognizes the unconstitutionality of the incarceration and reverses the revocation, ending the case.[138] If further appeal is made challenging the constitutionality of the probation revocation hearing or the statutes authorizing private probation, the case may be decided in favor of the defendant by the Georgia Court of Appeals as occurred in *Johnson*,[139] or it may be removed to district court as occurred in *McGee*.[140] For these reasons, the chances of Georgia's high court reviewing the problems examined in this Note are remote. However, there are other state court practices and statutes that should be challenged in attempt to chip away at the practices causing the revival of modern-day debtors' prisons.

1. There Should Be No Distinction between Plea-Bargained-for Sentences and Judge-Imposed Sentences When Applying the Bearden *Rule.* Although the Georgia Court of Appeals ruled on this issue in *Johnson*, asserting that there should be no distinction between a plea bargain and judge-imposed sentence when determining whether to apply the *Bearden* test,[141] the Georgia Supreme Court has not ruled on the issue. Neither has the Georgia Supreme Court invalidated the holding of *Dickey*, which distinguished plea-bargained-for probation from the *Bearden* ruling, holding that no determination of willfulness needs be conducted in cases where the sentence is the result of a plea bargain.[142] While a plea-bargained-for sentence is factually distinct from the judge-imposed sentence in Bearden, the Supreme Court's holding in *Bearden* included "no explicit exception for plea bargains."[143] Further, a plea bargain has to be approved by a

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[138] *See, e.g.*, ACLU, *supra* note 14, at 56 (noting Ora Lee Hurley's release following habeas corpus petition).

[139] Johnson v. State, 707 S.E.2d 373, 375 (Ga. Ct. App. 2011).

[140] McGee v. Sentinel Offender Servs., LLC, No. CV 110–054, 2010 WL 4929951, at *1 (S.D. Ga. Nov. 30, 2010).

[141] *See Johnson*, 707 S.E.2d at 375 (finding reversible error where the trial court failed to consider the reasons for Johnson's failure to pay or alternative punishments as required by *Bearden*).

[142] Dickey v. State, 570 S.E.2d 634, 636 (Ga. Ct. App. 2002) (holding that the defendant should not be excused for non-willful failure to pay a fine as required by *Bearden* where he breached the plea agreement).

[143] Wagner, *supra* note 46, at 387.

judge, thus the technical distinction between plea-bargained-for and judge-imposed sentences is weak.[144]

However, many states have made this distinction by analogizing plea bargains to contracts, saying that when a defendant agrees to a plea bargain, he is in effect consenting to a contract with the state. This analogy allows the state more leeway in enforcing that contract, and thereby overrides the protection offered by the required *Bearden* willfulness test.[145] This analogy fails, however, when one tries to analogize a violation of this bargained-for probation with a breach of a contract, since, when a person breaches a contract, imprisonment has long since ceased to be the punishment.[146] Rather, a contractual breach leads only to damages because of state constitutional prohibitions against imprisonment for debt as well as "our [country's] traditional aversion to imprisonment for debt."[147] If these arguments have sufficed to prevent imprisonment for debt in private contracts, they should suffice to prohibit imprisonment for debt in "contracts" with the state, especially when the Supreme Court has placed restrictions on such imprisonment for debt in *Bearden*.

Some courts have also dismissed the *Bearden* willfulness hearing requirement by stating that a probationer's willfulness or bad faith can be implied by the fact that he entered into a plea agreement with the knowledge of the set due date for payment of the fine.[148] Yet this ignores the fact that a defendant's financial circumstances will often radically change over the course of the months or years that the defendant is supposed to satisfy the debt, often as a result of factors outside of a probationer's control,[149]

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[144] *Id.* at 395–96.

[145] *Id.* at 396–97 ("Plea bargains resemble private contracts in that each party makes concessions . . . in order to achieve a more highly desired outcome . . . .").

[146] *Id.* at 397 ("[W]hile breach of private contract leads only to damages, breach of a probation condition strips the defendant of his or her personal liberty.").

[147] *Id.* (quoting United States v. Bishop, 412 U.S. 346, 352 (1973)) (internal quotation marks omitted).

[148] *Id.* at 398–400 (citing State v. Nordahl, 680 N.W.2d 247, 253 (N.D. 2004) (determining that the defendant had breached the revocation agreement and that, although there may be circumstances justifying his breach, his breach was enough to revoke his probation); United States v. Mitchell, 51 M.J. 490, 490–91, 494 (C.A.A.F. 1999) (allowing a plea bargain to be used as evidence of probationer's willfulness or bad faith in defaulting on the agreed due date of payment)).

[149] Wagner, *supra* note 46, at 400.

such as the financial recession that has struck America in the past decade.[150] In many cases, including *Bearden*, a defendant may lose his job soon after the plea bargain is entered into, making his ability to pay a practical impossibility.[151] In that case, the Court said that "fundamental fairness" required the lower court to conduct a hearing of the defendant's willfulness.[152] A defendant who entered into a plea bargain with the same ignorance of his future financial circumstances and lack of willfulness in not fulfilling his obligations should face no more severe consequences than a defendant upon whom a fine is imposed solely by a judge.

Perhaps the greatest argument against distinguishing the situation in *Bearden* from plea-bargained-for probation terms is that in doing so the court system narrows the application of *Bearden* into potential irrelevancy.[153] Currently, around 95% of convictions are attained pursuant to a plea bargain,[154] a practical necessity in the often over-burdened court system.[155] This statistic is likely even higher among indigent defendants—whom *Bearden* was intended to protect—because they are often represented by public defenders who must utilize plea bargains in light of overwhelming caseloads.[156] Thus if courts are permitted to continue this distinction, the *Bearden* requirements will apply to less than 5% of cases, thereby undermining this important Supreme Court precedent.[157] For all of these reasons, the Georgia Supreme Court should abolish the distinction applied by the Georgia Court of Appeals in *Dickey* and instead uphold *Bearden*'s protections for indigent defendants who enter into plea bargains.

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[150] *See generally* Sam Roberts, *New Census Numbers Show Recession's Effect on Families*, N.Y. TIMES, Aug. 27, 2013, http://www.nytimes.com/2013/08/28/us/new-census-numbers-show-recessions-effect-on-families.html?_r=0 (describing the effects the American recession has had on employment and families' financial situations).

[151] Wagner, *supra* note 46, at 400 n.91 (citing Bearden v. Georgia, 461 U.S. 660, 662–63 (1983)).

[152] *See Bearden*, 461 U.S. at 672–73 ("To . . . deprive the probationer of his conditional freedom simply because, through no fault of his own, he cannot pay the fine . . . . would be contrary to the fundamental fairness required by the Fourteenth Amendment.").

[153] Wagner, *supra* note 46, at 402.

[154] *Id.*

[155] *See id.* at 405 (noting the heightened cost-efficiency of a system that utilizes plea-bargaining).

[156] *Id.* at 402.

[157] *See supra* note 148 and accompanying text.

2. O.C.G.A. § 17-10-20 Should Be Struck as an Unconstitutional Violation of the Equal Protection Clause. O.C.G.A. § 17-10-20 governs the imposition of fines as part or all of a sentence.[158] This statute violates the Equal Protection Clause of both the United States and Georgia constitutions.[159] A claim made on equal protection grounds is essentially a claim that "other persons similarly situated as is the claimant unfairly enjoy benefits that he does not or escape burdens to which he is subjected."[160] In the Georgia probation system, people in similar situations are not being treated alike.

Generally, imposing the same fine on indigent and non-indigent defendants who have committed the same crime is not an equal sentence because the fine will impose much less of a financial burden on the non-indigent defendant. For example, the $270 fine imposed in *McGee* would only be 27% of someone's income if that person earns $1,000 per month, whereas for McGee, the $270 fine was 111% of his $243 monthly income.[161] Accordingly the sentence will subject an indigent defendant to a greater financial burden than a non-indigent defendant.

Further, in Georgia an indigent defendant is often placed on supervised probation for the purpose of allowing payment of a fine over time, yet this adds monthly supervision fees to his overall costs.[162] When on probation, the indigent defendant also faces the risk of imprisonment for failure to pay fines and fees.[163] Thus the effects of judgments issued under O.C.G.A. § 17-10-20, namely that these judgments cause indigent defendants to be placed on probation and face greater financial burdens and legal penalties, unequally burden indigent defendants.

The fact that O.C.G.A. § 17-10-20 does not draw a distinction between indigent and non-indigent defendants within the wording

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[158] O.C.G.A. § 17-10-20 (2013) ("In any case in which a fine or restitution is imposed as part of the sentence, such fine and restitution shall constitute a judgment against the defendant.").

[159] U.S. CONST. amend. XIV, § 1; GA. CONST. art. I, § 1, para. II ("Protection to person and property is the paramount duty of government and shall be impartial and complete. No person shall be denied the equal protection of the laws.").

[160] United States v. Cronn, 717 F.2d 164, 169 (5th Cir. 1983).

[161] McGee Petition for Writ of Habeas, *supra* note 1, at 4.

[162] S. CTR. FOR HUMAN RIGHTS, *supra* note 70, at 6–7.

[163] *Id.* at 5, 8.

of the statute does not insulate it from a viable equal protection claim. It is well-settled that a law that is nondiscriminatory on its face may still be grossly discriminatory in its application and can be struck down as violating equal protection.[164] When evaluating an equal protection claim, the Supreme Court first considers which level of scrutiny to apply: strict scrutiny in cases involving laws that discriminate against a suspect class, such as classes defined by race;[165] intermediate scrutiny in cases involving laws discriminating against quasi-suspect classes, such as classes defined by gender;[166] and rational basis review for cases involving all other classifications.[167] The Supreme Court has held that "poverty, standing alone, is not a suspect classification."[168] Therefore, the discriminatory effects of laws premised on indigency, such as O.C.G.A. § 17-10-20, are not subject to intermediate or strict scrutiny, but rather rational review. Under this level of review, "[t]he general rule is that legislation is presumed to be valid and will be sustained if the classification drawn by the statute is *rationally related* to a legitimate state interest."[169] Likely, the State interest in O.C.G.A. § 17-10-20 is to provide punishment and secure deterrence of criminals by imposing a fine. However, as described above, the methods used to deter and punish criminals are applied inequitably because indigent defendants are generally punished more vigorously.

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[164] Griffin v. Illinois, 351 U.S. 12, 17 n.11 (1956) ("Dissenting opinions here argue that the Illinois law should be upheld since by its terms it applies to rich and poor alike. But a law nondiscriminatory on its face may be grossly discriminatory in its operation.").

[165] *See, e.g.*, Bolling v. Sharpe, 347 U.S. 497, 499 (1954) ("Classifications based solely upon race must be scrutinized with particular care, since they are contrary to our traditions and hence constitutionally suspect.").

[166] *See, e.g.*, Craig v. Boren, 429 U.S. 190, 197 (1976) ("To withstand constitutional challenge, previous cases establish that classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives.").

[167] *See* Richard B. Saphire, *Equal Protection, Rational Basis Review, and the Impact of Cleburne Living Center, Inc.*, 88 KY. L.J. 591, 602–03 (2000) (noting that the majority of statutes do not make classifications on the basis of race, gender, or some other trait that would trigger strict or intermediate scrutiny, but are instead what would be considered social or economic legislation, which warrants the application of the rational basis standard).

[168] Harris v. McRae, 448 U.S. 297, 323 (1980).

[169] City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 440 (1985) (emphasis added).

While the rational relationship test applies a fairly deferential standard in favor of upholding the law,[170] punishing indigent defendants more harshly than non-indigent defendants is in no way rationally related to the state interest in deterrence and punishment. Therefore, O.C.G.A. § 17-10-20 should be struck down as a violation of the Equal Protection Clauses of the state and federal constitutions.

3. O.C.G.A. § 42-8-100(g) and (h) Should Be Struck as Unconstitutional Violations of the Due Process Clause. O.C.G.A. § 42-8-100(g) and (h), which enable counties to contract with private probation companies to provide misdemeanor probation services,[171] violate the Due Process Clauses of the United States and Georgia constitutions.[172] When analyzing a procedural due process violation, the Court applies a flexible balancing test of three factors: (1) the private interest that will be affected by the official action; (2) the risk of an erroneous deprivation of such interest through the procedures used; and (3) the government's interest in using the procedures involved.[173]

In the Georgia probation system, probationers are erroneously deprived of their constitutional rights to liberty and property as a result of the control private probation companies have been given over misdemeanor probation services in many counties. Often, these private companies neither conduct any investigation into, nor consider the willfulness of, a probationer's failure to his their fines or fees prior to issuing a probation revocation.[174] As a result, the failure to raise a probationer's willfulness at the hearing becomes an issue on appeal because the probationer generally does

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[170] Emma Freeman, Note, *Giving* Casey *Its Bite Back: The Role of Rational Basis Review in Undue Burden Analysis*, 48 HARV. C.R.-C.L. L. REV. 279, 282 (2013) ("Because it is the most deferential standard of constitutional scrutiny, rational basis has traditionally functioned as a rubber stamp for legislation.").

[171] O.C.G.A. § 42-8-100 (g), (h) (1997 & Supp. 2013) ("The chief judge of any court within the county . . . is authorized to enter into written contracts with corporations [and] . . . to provide probation supervision, counseling, collection services . . . . In no case shall a private probation corporation . . . be charged with . . . supervising a felony sentence.").

[172] U.S. CONST. amend. XIV, § 1; GA. CONST. art. I, § 1, para. I ("No person shall be deprived of life, liberty, or property except by due process of law.").

[173] Mathews v. Eldridge, 424 U.S. 319, 335 (1976).

[174] *See generally* McGee Petition for Writ of Habeas, *supra* note 1, at 5.

not have an attorney present to represent him at the revocation hearing.[175]

However, under the traditional model of probation, it is the probation officer who is supposed to represent the probationer's best interests at a probation revocation hearing.[176] Yet probation officers employed by private companies are also meant to represent the interests of their company. These interests are in direct conflict with one another—earning a profit versus receiving rehabilitative services requiring an output of money. As a result, Georgia misdemeanor probationers are often charged at probation revocation hearings where there is no representation of the probationer's interests. Such a deficiency may result in the probationer's loss of liberty through probation revocation at a hearing where no *Bearden* willfulness finding is conducted.[177]

A further result of the breakdown in the traditional representative function of probation officers over their probationers' interests is that probationers are often not informed of the possibility of converting their fines or fees into community service.[178] Without this information, probationers are unnecessarily deprived of their property, and potentially their liberty, if they cannot pay the fine or fees and are imprisoned.

The state interest in enacting O.C.G.A. § 42-8-100(g) and (h) was likely to increase cost-efficiency in collecting fines from, and providing rehabilitative services to, misdemeanor probationers.[179] However, it is not clear that this statute actually accomplishes these interests.[180] Of a $500 payment that Lisa Harrelson[181] paid to Sentinel towards her $651 fine for driving under the influence, for instance, $265 went towards payment of her fine, $190 went directly to Sentinel for past due probation fees, and $45 went to

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[175] *See supra* notes 115–19 and accompanying text.

[176] Gagnon v. Scarpelli, 411 U.S. 778, 783–84 (1973) (discussing the unique function of probation officers as representatives of clients' best interests in a probation revocation hearing).

[177] Bearden v. Georgia, 461 U.S. 600, 668–69 (1983).

[178] *See, e.g.*, McGee Petition for Writ of Habeas, *supra* note 1, at 6 (noting a provision of Sentinel's contract with the State Court of Richmond County which states that Sentinel should make every effort to convert fines or fees into community service if a probationer lacks resources to pay, though it failed to do so in that case).

[179] Harrelson Brief, *supra* note 75, at 16.

[180] *Id.* at 16–17.

[181] *See supra* notes 95–100 and accompanying text.

the Georgia Victims' Crime fund.[182] Thus the county only received 53% of the probation payment. Felony probation, which is still under the supervision of the Georgia Department of Corrections, charges $23 to $29 per month in supervision fees, depending on the level of supervision necessary.[183] Harrelson was required to pay $35 per month to Sentinel, despite the low level of supervision necessary in her case since the probation officer did nothing other than collect money from her.[184] If Harrelson had been on felony probation, she would have likely only been charged $23 per month, a fee that more accurately reflects the services rendered by the probation officer in her case. Such a difference in fee amounts is likely due to the profit sought by private companies through the fees, their only source of income.

This reduction in monthly fees would have meant that Harrelson would have owed much less in past-due supervision fees, meaning that a greater percentage of her payment would have gone towards payment of her fine to the county. In turn, she would have been able to pay off her fine in a much more timely manner. This indicates that it is likely not more cost-efficient for the county to receive payment of fines through a private probation company that withholds a large percent of each payment for its own profit.

Perhaps more illuminating is the example of McGee, who was imprisoned for past-due supervision fees that Sentinel refused to convert into community service despite converting his court-imposed fine into community service.[185] Since Sentinel allowed McGee to convert his entire court-imposed fine to community service, the county received no income at all from McGee's probation, but was instead induced to pay for McGee's imprisonment in order to ensure that Sentinel received a profit from McGee for past-due probation fees.[186]

Thus, the savings that counties anticipated to receive by contracting with private probation companies are being exhausted

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[182] Harrelson Brief, *supra* note 75, at 12.

[183] *Field Operations*, GA. DEP'T OF CORRS., http://www.dcor.state.ga.us/Divisions/Corrections/ProbationSupervision/FieldOperations.html (last visited Oct. 14, 2013).

[184] *See generally* Harrelson Brief, *supra* note 75.

[185] *See supra* notes 1–8 and accompanying text.

[186] McGee Petition for Writ of Habeas, *supra* note 1, at 4–6.

as a result of these companies' perverse practices. Instead, the counties must pay the costs of conducting probation revocation hearings and imprisoning probationers for failing to pay a fine or fee, even where no willfulness is found. Further, it takes longer for counties to receive full payment of fines from probationers because private companies withhold such a large portion in supervision fees.

These facts indicate that Georgia probationers are often being deprived of their property and liberty by the actions of profit-seeking probation companies in order to uphold the government's somewhat illusory interest in saving money. Private probation companies survive off of the fees paid by probationers, and thus have very little motivation to provide costly rehabilitative services to their probationers, convert fees into community service, or investigate the reasons for a probationer's failure to pay his fines or fees. Private probation officers do not represent the best interests of probationers; rather, they seek the interests of the company for whom they work. This often leads to the deprivation of probationers' liberty and property at hearings where they are not given adequate due process of law since the alleged representation of probationers' interests by the probation officer is sacrificed for the interests of the probation company. For all of these reasons, O.C.G.A. § 42-8-100(g) and (h) should be struck as unconstitutional violations of procedural due process.

4. O.C.G.A. § 42-8-100(d) Should Be Struck as an Unconstitutional Violation of the Constitutional Protection Against Excessive Fines. The fees imposed on indigent defendants through private probation, as allowed by O.C.G.A. § 42-8-100(d), are excessive,[187] violating the Excessive Fines Clause of the Georgia Constitution.[188] In Georgia, the standard traditionally applied in evaluating the excessiveness of fines is whether "a punitive forfeiture" "is grossly disproportional to the gravity of a defendant's offense."[189]

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[187] O.C.G.A. § 42-8-100(d) (1997 & Supp. 2013) ("The court may, in its discretion, require the payment of a fine or costs, or both, as a condition precedent to probation.").

[188] GA. CONST. art. I, § 1, para. XVII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted . . . .").

[189] Harrelson Brief, *supra* note 75, at 20 (quoting Howell v. State, 656 S.E.2d 511, 512 (Ga. 2008)) (internal quotation marks omitted).

While administrative fees and fees imposed for rehabilitative purposes have often been found lawful under the Excessive Fines Clause, the fees imposed by Sentinel extend beyond what should properly be imposed for either of these purposes.[190] The fees collected by private probation companies often total more than what should be applied for nominal administrative fees because the fees collected often amount to the sum of the initial fine itself.[191] Further, these companies provide little, if any, rehabilitative services. Thus the fees collected should not be classified as fees imposed for a rehabilitative purpose.[192]

Because defendants who receive a fine as a sentence often must pay private probation fees if they cannot pay their fine on the day of sentencing, the imposition of the extra supervisory fees cannot be said to be proportional to the crime charged. Rather, in assessing the original amount of the fine, the court was setting *that* amount as an appropriate punishment for the crime charged. Further, because these fees can double or even triple the total amount paid by an indigent defendant in comparison with a defendant who is able to pay on the day of sentencing,[193] it is evident that the imposition of these fees and fines on top of the initial punitive fine is *grossly* disproportionate to the crime charged.[194] Therefore, unless a court imposes probation as a reasonable addition to a fine irrespective of the defendant's ability to pay on the day of sentencing, the practice of forcing an indigent defendant to pay extra fees through probation should be struck down as a violation of the constitutional protection against excessive fines.

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[190] *See id.* at 19 (citing Tillman v. Lebanon Cnty. Corr. Facility, 221 F.3d 410, 420 (3d Cir. 2000) (finding that charging inmates $10 per day was not an excessive fine because it was imposed for rehabilitative, not punitive, purposes)).

[191] *See id.* at 12 (noting that $265 of Harrelson's payment went towards payment of her fine and $190 towards payment of Sentinel's supervision fees).

[192] *See supra* notes 72–78 and accompanying text.

[193] *See supra* note 71 and accompanying text.

[194] Harrelson Brief, *supra* note 75, at 20 ("In many cases involving private probation . . . the probationer may end up paying double the fine originally intended, and double the fine anyone else subject to the same offense but able to pay the fine on the day of court would pay. . . . [I]t seems that doubling the fine ultimately paid by the indigent defendant would certainly be disproportionate to the gravity of the offense.").

C. LEGISLATIVE ACTION

For a greater and more immediate solution to the unconstitutionality of the actions of courts and private probation companies described in this Note, action on the part of the Georgia Legislature is necessary.

1. The Legislature Should Adopt a Statutory Scheme Protecting Indigent Defendants. An analysis of other state statutes is instructive of the deficiencies in Georgia's comparable statutes. In Texas, for example, "[a] court may waive payment of a fine or cost imposed on a defendant who defaults in payment if the court determines that: (1) the defendant is indigent; and (2) each alternative method of discharging the fine . . . would impose an undue hardship on the defendant."[195] South Carolina provides that upon imposition of a fine, if the judge determines that the defendant is indigent, he must set up a payment schedule that takes into account the "income, dependents and necessities of life of the individual."[196] Each of these statutes forces the court to consider the ability of a defendant to pay as well as the fact that imposing immediate payment of a fine on an indigent defendant may lead to a greater punishment than intended.

The best example of a statutory scheme that fairly addresses the situations of indigent defendants is found in Kentucky. There, when a person claims indigency, the pretrial release officer must consider an enumerated list of factors to determine whether the person is considered "needy" under the statute.[197] This evaluation must occur no later than the defendant's first appearance in court and is reassessed at each step in the proceedings.[198] If the defendant is found to be "needy," the pretrial release officer must certify by an affidavit of indigency the factors relating to the defendant's inability to pay.[199] The affidavit of indigency, included

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[195] TEX. CODE CRIM. PRO. art. 43.091 (West 2012), *available at* http://www.statutes.legis.state.tx.us/Docs/CR/htm/CR.43.htm#43.01.

[196] S.C. CODE ANN. § 17-25-350 (1976), *available at* http://www.scstatehouse.gov/code/title17.php.

[197] KY. REV. STAT. ANN. § 31.120 (West 2006), *available at* http://www.lrc.ky.gov/statutes/statute.aspx?id=21231 (noting relevant factors including sources of income, property owned, number and ages of dependents, complexity of the case, amount a private attorney charges for similar services, etc.).

[198] *Id.* § 31.120(1).

[199] *Id.* § 31.120(2).

in the statute, sets out such material factors as the defendant's employment status, any government assistance he receives, and all dependents under his care.[200]

Once this affidavit is on file with the court, the court must then act accordingly, such as by appointing counsel and abiding by statutory exceptions applicable to indigent defendants.[201] Perhaps most pertinent to the situations described in this Note is the exception provided in both KY. REV. STAT. ANN. § 534.040 and KY. REV. STAT. ANN. § 534.030, which set out a statutory scheme of fines that may be imposed for misdemeanor violations and felony violations, respectively. Subsection four of each of these statutes states that "[f]ines required by this section shall not be imposed upon any person determined by the court to be indigent . . . ."[202] In determining fines for felonies, KY. REV. STAT. ANN. § 534.030 also protects low-income defendants by requiring the court to consider factors such as the "defendant's ability to pay the fine" and the "hardship likely to be imposed on the defendant's dependents" by the fine.[203] While the above Kentucky statutes do not explicitly state what alternative sentences may be imposed rather than fines, other Kentucky statutes do set out alternative sentences—including community service and participation in a counseling program—that may be considered in every case.[204]

Statutory schemes like Kentucky's are appropriate because they force courts to consider the financial position of the defendant. The Georgia Legislature should adopt a similar statutory scheme, requiring an officer of the court to submit an affidavit of indigency prior to a defendant's first appearance in court. The court should

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[200] *Id.* § 31.120(3).

[201] *See, e.g.*, *id.* § 31.110(1)(a) ("A needy person who is . . . under formal charge . . . is entitled to be represented by an attorney."); § 534.040(4) ("Fines required by this section shall not be imposed upon any person determined by the court to be indigent pursuant to KRS Chapter 31.").

[202] KY. REV. STAT. ANN. § 534.030(4) (West 1994), *available at* http://www.lrc.ky.gov/statutes/statute.aspx?id=20097. *Id.* § 534.040(4) (West 1992), *available at* http://www.lrc.ky.gov/statutes/statute.aspx?id=20098.

[203] *Id.* § 534.030(2) (West 1994), *available at* http://www.lrc.ky.gov/statutes/statute.aspx?id=20097.

[204] *Id.* § 533.010(9) (West 2011), *available at* http://www.lrc.ky.gov/statutes/statute.aspx?id=39598 ("When the court deems it in the best interest of the defendant and the public, the court may order the person to work at community service related projects . . . ."); *id.* § 533.015 (West 2011), *available at* http://www.lrc.ky.gov/statutes/statute.aspx?id=39599 (noting alternatives to incarceration).

then take the circumstances enumerated in the affidavit into consideration when imposing any sentence, including a fine. If a fine is deemed the appropriate sentence, it should be adjusted accordingly so as to only impose hardship on an indigent defendant that is proportional to that imposed on a non-indigent defendant. Imposing a flat rate percentage, such as 25% of a defendant's monthly income, would facilitate proportional fines among defendants and thereby cure the current constitutional flaws in the criminal process.

As another alternative, a type of graduated system could be created in which the typical fine for a violation is reduced based on multiple defendant-specific factors, including income, number of dependents, and extraordinary expenses like medical bills. While a graduated fine scheme may appear complicated, a simple chart could be constructed based on the recommendations of economists, which would include various categories of deductions. The guidelines for fines set out in this chart would remain subject to the discretion of the court depending on the particular circumstances of the case, yet would still provide some guidance in understanding the difficulties a fine could impose on an indigent defendant.

Further, rather than putting a defendant convicted of a minor offense on probation merely to allow payment of a fine over time, as is often done in Georgia, the legislature should adopt legislation similar to that of South Carolina that requires an indigent defendant to make payments directly to the magistrate or clerk of court.[205] If the defendant repeatedly defaults on scheduled payments, he could be called before a judge for a hearing to assess the willfulness of default as described in *Bearden*, at which time the court would consider alternative sentences as encouraged by the Texas statute.[206]

Further, the legislature could adopt a system similar to that recently suggested by the Vera Institute of Justice following a study of the negative impact that the imposition of fines and fees

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[205] See *supra* note 196 and accompanying text.

[206] See *supra* note 195 and accompanying text.

has on the reentry and rehabilitation of indigent defendants.[207] The Institute's proposed system offers individuals credit towards their monetary legal debt in exchange for their participation in programs such as substance abuse treatment programs, workforce development programs, and counseling programs.[208] Participation in rehabilitative programs such as these more directly addresses and attempts to eliminate the causes of a specific individual's criminality—such as unemployment, addiction, or mental illness—than does simply placing an additional financial burden and stressor on a defendant that is already struggling financially.[209] While still holding defendants accountable, this system would likely reduce recidivism and increase the successful participation of past offenders in society.[210] Further, this type of system would increase the efficiency of the courts by focusing collection resources on defendants who are financially able to pay.[211] This sort of program has been implemented on a small scale in the Roxbury Division of the Boston Municipal Court in Suffolk County, Massachusetts, where it has enjoyed success.[212]

By adopting a statutory scheme that embraces all or portions of these suggestions, the legislature would require Georgia courts to recognize the unique circumstances of indigent defendants and the greater hardship that fines and fees impose on them as compared to other defendants.

2. The Legislature Should Impose Tighter Restraints on the Practices of Private Probation Companies. Currently, Georgia has a statute in place outlining the required provisions of contracts with private probation companies entered into under O.C.G.A. § 42-8-100.[213] For purposes of the circumstances described in this Note, the three most pertinent provisions required for a contract with a private probation company are the (1) "[p]rocedures for

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[207] *See* Alexandra Shookhoff et al., Vera Inst. of Justice, *The Unintended Sentence of Criminal Justice Debt*, 24 FED. SENT'G REP. 62, 62–64 (2011) (detailing the negative effects of fines on individuals, their families, the community, and the criminal justice system).

[208] *Id.* at 63.

[209] *Id.* (noting that 80%–90% of criminal defendants qualify for public defenders).

[210] *Id.* at 64.

[211] *Id.*

[212] *See id.* at 63 (discussing the Clapham Set, twenty-six men with felony convictions who were offered the opportunity to earn credit by participating in counseling, substance abuse treatment, and workforce development programs).

[213] O.C.G.A. § 42-8-102 (1997 & Supp. 2013).

handling the collection of all court ordered fines, fees, and restitution," (2) "[p]rocedures for handling indigent offenders to ensure placement of such indigent offenders irrespective of the ability to pay," and (3) "[c]ircumstances under which revocation of an offender's probation may be recommended."[214]

Overly vague, this statute allows courts to neglect both setting limits on fine collection practices and the regularity of issuing warrants for probation revocation when contracting with probation companies. The Georgia Legislature should place greater restraints on private probation companies through this statute by enumerating acceptable methods of supervision, requiring that rehabilitative services be provided, and emphasizing that probation revocation is intended as a method of last resort. In addition, the legislature should adopt a statutory cap on the amount of supervision fees that may be collected and set conditions under which these fees should be reduced or converted to community service based on indigent status. These statutory provisions would ensure that private probation companies act in the best interest of probationers as well as the government, rather than seeking to turn a profit for personal gain.

Further, the legislature should overturn O.C.G.A. § 42-8-106, which shields private probation companies from public scrutiny.[215] Transparency would allow legal practitioners concerned with the unconstitutional methods employed by these companies to fully scrutinize those practices and bring the companies to court when necessary.

The practices of these companies must be closely scrutinized and controlled. If the changes suggested above fail to curtail the unjust practices of private probation companies, the Georgia Legislature should completely repeal the sections of O.C.G.A. § 42-8-100 that authorize counties to contract with private probation companies. Only then will the probationers of Georgia be fully protected from the practices of probation officers who have a personal financial incentive in the probationers' criminal status.

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[214] *Id.* § 42-8-102(b)(7)–(9).

[215] *Id.* § 42-8-106 ("All reports, files, records, and papers of whatever kind relative to the supervision of probationers by a private corporation . . . are declared to be confidential.").

IV. CONCLUSION

This Note is not intended to excuse nonpayment of fines or ask for lesser punishment for indigent defendants; rather it is intended to call attention to the unconstitutional practices of Georgia courts and private probation companies that have overstepped their constitutional bounds, using punitive methods that unfairly impact indigent defendants.

Many actors in the judicial system have played a role in sustaining these unconstitutional practices. Judges repeatedly place people on probation merely because they cannot pay a fine on the day of sentencing. They also repeatedly revoke probation when the fine is not paid without conducting a full *Bearden* analysis. Defense attorneys do not speak up when violations of *Bearden* occur, often because few are aware of its requirements. The Georgia Legislature has chosen to favor private probation companies over the citizens of Georgia by enacting a statute shielding these companies from public scrutiny of their practices. Private probation companies repeatedly prioritize their desire to make a profit over the traditional purpose of probation—to rehabilitate probationers. All of these actors must be better informed of the law and held accountable when they disregard it. Their current practices should be declared unconstitutional, and indigent defendants should be given greater statutory protection.

The State of Georgia has come a long way since it was founded as a safe haven for debtors, meant to protect its citizens from the ill-practices of creditors and the horrors of debtors' prisons. It is a haven no longer. The poorest of the state are bullied by judicially-sanctioned probation companies. The poorest of the state are robbed of their already-limited resources by fines and fees that can place families on the verge of homelessness. The poorest of the state are imprisoned because of practices that the United States Supreme Court has already declared unconstitutional.

The people of this state must ask themselves what purpose probation revocation of those who cannot pay off fines or fees truly serves. Is it to uphold justice, punish criminals, and deter criminal behavior? Or is it to "balanc[e] the [state's] budget on the

backs of the poorest people in society"[216] and pad the pockets of for-profit companies? This is "[d]isgraceful."[217]

Sarah Dolisca Bellacicco

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[216] Bronner, *supra* note 22.
[217] Burdette v. Harpersville, CV 2010-900183 (Cir. Ct. Shelby Cnty., Ala. July 11, 2012).