INTRODUCTION

Thirty years ago, the United States Supreme Court held in *Bearden v. Georgia*¹ that the Equal Protection Clause of the Fourteenth Amendment² prevents a state from “impos[ing] a fine as a sentence and then automatically convert[ing] it into a jail term solely because the defendant is indigent and cannot forthwith pay the fine in full.”³ As a result, a court may not incarcerate an individual for failure to pay unless it first inquires into their reasons for failing to do so and determines that the defendant willfully failed to make a bona fide effort to pay;⁴ to hold otherwise, the Court stated, would be “fundamentally unfair.”⁵ The American Civil Liberties Union (“ACLU”) reports, however, that “courts across the United States routinely disregard the protections and principles the Supreme Court established in *Bearden*.”⁶ The ACLU studied the practices of a number of states, including Georgia,⁷ and determined that “day after

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² U.S. CONST., amend. XIV (“[N]o state shall…deny to any person within its jurisdiction the equal protection of the laws.”).
³ Bearden, 461 U.S. at 667 (internal citations omitted).
⁴ Id. at 672.
⁵ Id. at 668.
⁶ IN FOR A PENNY: THE RISE OF AMERICA’S NEW DEBTORS’ PRISONS, Am. Civil Liberties Union 5 (2010), available at http://www.aclu.org/files/assets/InForAPenny_web.pdf [hereinafter IN FOR A PENNY]. See also ALICIA BANNON, ET AL., CRIMINAL JUSTICE DEBT: A BARRIER TO REENTRY, BRENnan CTR. FOR JUSTICE 20 (2010), available at http://www.brennancenter.org/publication/criminal-justice-debt-barrier-reentry (“Brennan Center interviews with defenders and court personnel revealed that some jurisdictions ignore the requirement that courts inquire into ability to pay before utilizing debtors’ prison, while many others skirt the edges of the law by failing to evaluate a defendant’s ability to pay until after he or she has been arrested, or even jailed, for criminal justice debt.”).
⁷ See IN FOR A PENNY, supra note 6, at 55 (“Georgia courts have consistently held that debtors cannot be criminally prosecuted and have barred the imprisonment of persons who are willing but unable to repay a debt. Despite this clear law, indigent Georgians are often jailed solely for the nonpayment of fines and fees.”) (internal citations omitted).
day, indigent defendants are imprisoned for failing to pay legal debts they can never hope to manage.”

The specific facts of Bearden required the Court to review the constitutionality of incarcerating defendants for their failure to pay traditional legal debts: fines and restitution. Recently, a new kind of legal debt has emerged. As states’ budgets tighten, so-called “user fees” are becoming an increasingly common way for legislatures to fund the expansion of the criminal justice system without tapping traditional funding sources. “Across the country, individuals face an increasing number of ‘user fees’ as part of their criminal cases.” As a result of this trend, legislatures have been able to enact statutes that impose politically popular, mandatory sentences without consideration of their costs. By requiring the “user,” or criminal defendant, to bear the entire cost of the sentence, legislatures can be tough on crime for free.

Unfortunately, the overwhelming majority of these “users” cannot afford to bear these costs. “[User] fees are often imposed on top of other forms of criminal justice debt, such as fines and restitution, and can add up to staggering totals.” For instance, Georgia requires all defendants to pay for the cost of their probation and imposes fees on defendants who receive state-appointed counsel, who by definition have already been deemed indigent by the court.

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8 Id. at 5.
9 Bearden, 461 U.S. at 660.
10 See Penalizing Poverty: Making Criminal Defendants Pay for Their Court-Appointed Counsel Through Recoupment and Contribution, 42 U. Mich. J.L. Reform 323, 374 (2009) (“Increasingly, states impose ‘user fees’ on defendants. Prisoners pay the cost of incarceration, probationers pay the cost of probation, sex offenders often pay the cost of mandated therapy. Recoupment and contribution can be seen as part of the general trend toward privatization.”).
11 See Bannon ET AL., supra note 6, at 4 (“Cash-strapped states have increasingly turned to user fees to fund their criminal justice systems”). See also Shadow Citizens: Felony Disenfranchisement and the Criminalization of Debt, 117 Penn St. L. Rev. 349, 349, 379 (2012) (user fees are “assessed to recoup the operating costs of the justice system”).
12 Bannon ET AL., supra note 6, at 7.
13 Id. at 4 (“[T]he decision to raise or create new user fees is rarely made with much deliberation or thought about the consequences.”).
14 Id. (“Fees and other criminal justice debt are typically levied on a population uniquely unable to make payments. Criminal defendants are overwhelmingly poor. It is estimated that 80-90 percent of those charged with criminal offenses qualify for indigent defense.”).
15 Id. at 7.
16 See O.C.G.A. § 42-8-34(d)(1) (“[I]n addition to any fine or order of restitution imposed by the court, there shall be imposed a probation fee as a condition of probation, release, or diversion in the amount equivalent to $23.00 per each month under supervision, and in addition, a one-time fee of $50.00 where such defendant was convicted of any felony.”).
This is in addition to any fine, fee, restitution, or other amount ordered by the sentencing judge. For example, “in many states, individuals convicted of drug crimes, driving under the influence (‘DUI’), or sex offenses face mandatory fees that dramatically increase their overall debt.”

In addition to these probation conditions involving explicit repayment of certain user fees, particular types of offenders face less obvious debt-related probation conditions. For example, many states require sex offenders to pay for the cost of electronic monitoring, drug offenders for the cost of their testing and treatment, and DUI offenders for the cost of DUI classes and ignition interlock devices. As a result, an individual who fails to complete one of these cost-prohibitive probation conditions is at risk of having his probation revoked, despite the fact that it may have been due entirely to his indigence.

It’s also worth noting that the impact of user fees is magnified within demographics that are overrepresented in the poor population. For instance, the U.S. Census Bureau reports that the poverty rate is 9.9% among white, non-Hispanic Americans. In comparison, the poverty rate among Americans of Hispanic origin is 23.2% and nearly 26% among those identifying themselves as black or African American. Thus, because racial and ethnic minorities are disproportionately represented in the indigent population, the laws at issue undoubtedly have a disparate impact on them.

This modern use of user fees has created what the ACLU has called a “two-tiered system of justice in which the poorest defendants are punished more harshly than those with means.”

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18 BANNON ET AL., supra note 6, at 10 (“In addition to user fees that apply to all offenses, individuals convicted of certain types of crimes frequently face substantial additional debt.”).

19 Id.

20 Id. at 21 (“Failure to pay can lead to revocation if an individual cannot pay for mandatory treatments, classes, or polygraph tests that are often conditions of supervision.”).

21 See, e.g., REBEKAH DILLER, THE HIDDEN COSTS OF FLORIDA’S CRIMINAL JUSTICE FEES, BRENNA CTR. FOR JUSTICE 13 (2010), available at http://www.brennancenter.org/sites/default/files/legacy/Justice/FloridaF&F.pdf?nocdn=1 (“When an offender is unable to pay the treatment provider, the treatment provider may eventually terminate the treatment as unsuccessful or the offender may cease showing up because he is unable to pay for sessions. Termination of treatment can then be a basis for a violation of probation.”).


23 Id.

24 IN FOR A PENNY, supra note 6, at 10.
Such a result is entirely inconsistent with *Bearden* and operates as a de facto debtors’ prison for an entire class of impoverished people.  

This article will explore one such user fee in Georgia, which requires that all individuals convicted of a domestic violence offense be required to fund and complete a Family Violence Intervention Program (“FVIP”) as a condition of their probation. The paper will begin by exploring the statutes and agency rules that govern the imposition of FVIP classes in Georgia. The next section provides a descriptive analysis of how the existing legal framework for these classes operates in practice. Then, the following section will survey existing equal protection jurisprudence as it relates to indigent defendants who cannot afford the costs imposed upon them by the criminal justice system. As part of this discussion, this section will examine both Supreme Court jurisprudence leading up to *Bearden*, as well as state responses in the wake of *Bearden*, including with regard to certain user fees. Finally, this paper concludes Georgia’s provisions related to the mandatory imposition of FVIP classes violate the Equal Protection Clause of the Fourteenth Amendment.

## II. GOVERNING LAW

First and foremost, this paper begins by examining the law governing the mandatory imposition of family violence classes in Georgia.

### A. Relevant Statutes

In Georgia, the legislature has enacted a mandatory scheme that requires offenders to complete domestic violence classes in nearly all criminal cases involving family violence. The statutory framework identifies qualifying family violence cases by (1) the *crime* committed, and (2) the *relationship* between the offender and the victim.

O.C.G.A. § 19-13-10 defines qualifying *crimes* as “the commission of the offenses of battery, simple battery, simple assault, assault, stalking, criminal damage to property, or criminal trespass between family or household members.” However, not all individuals who have

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25 See BANNON ET AL., supra note 6, at 5 ("Debt-related…probation and parole conditions leave debtors vulnerable for violations that result in a new form of debtors’ prison.").

26 The current Georgia statutes were enacted on May 16, 2002 as part of Georgia’s Family Violence Intervention Program Certification Act (“The Act”). The Act, among other things, added O.C.G.A. §§ 19-13-10 to 17 (related to sentencing on domestic violence offenses) and amended § 42-8-35 (related to conditions of probation for domestic violence offenses), discussed infra.

27 O.C.G.A. § 19-13-10(5).
committed one of these qualifying offenses are subject to a mandatory family violence class. The law applies only where a certain relationship exists between the offender and the victim. O.C.G.A. § 19-13-10 defines a qualifying relationship to be one between “past or present spouses, persons who are parents of the same child, or other persons living or formerly living in the same household.”

28 But note that O.C.G.A. § 19-13-1, last updated in 1993, also purports to define qualifying crimes. That Section (“the 1993 definition”) has never been repealed or explicitly preempted. However, this 1993 definition differs from O.C.G.A. § 19-13-10 (“the 2002 definition”), discussed supra. The 1993 definition includes felonies and the misdemeanor of unlawful restraint, which the 2002 definition omits. See O.C.G.A. § 19-13-1. Compare § 19-13-10 (“As used in this article, the term ‘family violence’ means”). On the other hand, the 2002 definition falls in Article 1A and purports to apply to the entirety of Article 1A. See § 19-13-10 (“As used in this article, the term… ‘[f]amily violence’ means”). This is problematic because the statute imposing mandatory FVIP classes on qualifying offenders does not specify to which definition of family violence crimes it applies, i.e. whether FVIP classes are mandatory only for those misdemeanors listed in the 2002 definition or whether it’s also mandatory for felony offenders and those convicted of unlawful restraint. See O.C.G.A. § 19-13-16. To further complicate the issue, the mandatory FVIP statute falls in Article 1A, to which the definitions in both Article 1 and Article 1A presumably apply. See id. Although no court has considered the conflict, it’s likely that the legislature intended the 2002 definition to govern the mandatory FVIP statute for the following reasons: First, most obviously, the 2002 definition is the more recent definition, it being enacted almost ten years after the 1993 definition was last updated. Second, the 2002 definition and the mandatory FVIP statute were enacted at the same time, as part of the same act. Finally, O.C.G.A. § 42-8-35.6, related to conditions of probation for domestic violence offenses, was also enacted as part of the same legislative scheme, and it explicitly states that the 2002 definition is to govern its provisions. See O.C.G.A. § 42-8-35.6(a) (“[A] court sentencing a defendant to probation for an offense involving family violence as such term is defined in [the 2002 definition] shall require as a condition of probation that the defendant participate in a family violence intervention program.”). However, to the extent a court might look to an agency’s interpretation of a statute for guidance, note that the Georgia Department of Corrections, the agency charged with setting the specifics of FVIP, applies a third and distinct definition. See Rule 125-4-9-.03(i)(1) (“Commission of the offense of battery, simply battery, simple assault, assault, stalking, criminal damage to property, unlawful restraint, or criminal trespass.”) (includes unlawful restraint but not any felony).

29 O.C.G.A. § 19-13-10(4).

30 But note that O.C.G.A. § 19-13-1 also purposes to define a qualifying relationship. As indicated supra note 26, that Section (“the 1993 definition”) was last updated in 1993 and has never been repealed or explicitly preempted. However, this 1993 definition differs from O.C.G.A. § 19-13-10 (“the 2002 definition”), discussed in the body of this paper. The 1993 definition states that an act qualifies as family violence if it takes place “between past or present spouses, persons who are parents of the same child, parents and children, stepparents and stepchildren, foster parents and foster children, or other persons living or formerly living in the same household.” See O.C.G.A. § 19-13-1. Compare O.C.G.A. § 19-13-10(4) (excludes parents and children, stepparents and stepchildren, and foster parents and foster children from the definition of qualifying relationships between the offender and the victim). See supra note 26 for a discussion of the applicability of each definition and for an argument that the 2002 definition most likely applies. However, note that the Georgia Department of Corrections, rather than applying a third and unique definition of qualifying relationship, applies a definition consistent with the 1993 definition. See Rule 125-4-9-.03(i) (“‘Family violence’ means the occurrence of one or more of the following acts between past or present spouses, persons who are parents of the same child, parents and children, stepparents and stepchildren, foster parents and foster children, or other persons living or formerly living in the same household”).
Georgia state law requires a judge to sentence every qualifying defendant to a state-certified FVIP “unless the court determines and states on the record why participation in such a program is not appropriate.” Additionally, the provisions of Title 42 relating to probation require a court, whenever imposing or revoking a probationary sentence for a qualifying offender, to sentence them to complete FVIP “unless the court determines and states on the record why participation in such a program is not appropriate.” Thus, the legal infrastructure for family violence classes in Georgia can be described as a mandatory sentence with a safety valve. However, the statutes say nothing further about what circumstances would make an order to complete FVIP “inappropriate,” nor has any court to date considered whether a certain situation was “appropriate” for the suspension of FVIP. Though it appears from practice in Georgia that poverty is not such a justifying circumstance.

The statutes governing the imposition of FVIP specify that the defendant is responsible for paying for this class that the state has mandated him to complete. Notably, it appears that the statutes give no authority to judges to waive program fees for any defendants. Rather, the statutes do provide that in the case of “indigent defendants…the cost of the program shall be

31 O.C.G.A. § 19-13-16(a) (“A court, in addition to imposing any penalty provided by law, when sentencing a defendant or revoking a defendant’s probation for an offense involving family violence...shall order the defendant to participate in a family violence intervention program...unless the court determines and states on the record why participation in such a program is not appropriate.”).

32 O.C.G.A. § 42-8-35.6 provides:

(a) [A] court sentencing a defendant to probation for an offense involving family violence... shall require as a condition of probation that the defendant participate in a family violence intervention program...unless the court determines and states on the record why participation in such a program is not appropriate.

(b) A court...when revoking a defendant’s probation for an offense involving family violence...shall order the defendant to participate in a family violence intervention program...unless the court determines and states on the record why participation in such program is not appropriate.

33 An Assistant Solicitor in Athens-Clarke County stated that he will place on the record a request that FVIP not be included as part of a defendant’s sentence in the following situations: (1) most frequently, when he thinks the defendant has a mental health problem (in which case he will request the defendant be ordered to complete a mental health evaluation in lieu of FVIP); (2) when he thinks that the relationship between the offender and the victim, while technically within the letter of the law, is not what the legislature intended (e.g. college roommates, though qualifying as “other persons living or formerly living in the same household,” don’t seem to him to be family violence as targeted by the statutes); (3) when sentencing an offender who has already completed FVIP in the past and has reoffended. Interview with Will Fleenor, Assistant Solicitor, Athens-Clarke County (Jan. 23, 2013).

34 The same Assistant Solicitor also stated that his understanding is that “FVIP is more punishment than counseling.” Thus, “judges see payment for class as punishment for the offense” and are not inclined to waive it. See supra note 31.

35 See O.C.G.A. § 19-13-16(c) (“Unless the defendant is indigent, the cost of the family violence intervention program as provided by this Code section shall be borne by the defendant.”). See also O.C.G.A. § 42-8-35.6(d).
determined by a sliding scale based upon the defendant’s ability to pay.”36 However, the statute says nothing about how a defendant is to be designated as “indigent,” who is responsible for making that determination, or what factors are relevant to that decision-making.37 Neither do the statutes provide any guidance as to the range of the “sliding scale” nor how to identify where an individual deemed indigent should fall on such a scale. Rather, O.C.G.A. § 19-13-14, related to the certification of FVIPs, simply states that the Georgia Commission on Family Violence (the “Commission”) and the Georgia Department of Corrections (the “Department of Corrections”) “shall establish standards and requirements concerning the content of courses, including, but not limited to…program and certification fees.”38

B. Relevant Rules of the Board of Corrections39

36 O.C.G.A. § 19-13-16(c). See also O.C.G.A. § 42-8-35.6(d).

37 See People v. Walters, 913 N.Y.S.2d 893, 903 (City Ct. 2010), for the suggestion that a statute’s failure to set standards for determining indigency could violate equal protection (“The State’s failure to afford judges any guidance for determining indigency invites chaos. Similarly-situated defendants statewide have no assurance their financial circumstances will receive similar treatment because every court enjoys essentially standardless discretion in determining ability to pay…Such is a textbook equal protection violation, because the State provides no principled way for apportioning criminal fines among similarly situated defendants…[Thus,] the Court holds that [the provisions of a statute mandating DWI offenders to install ignition interlock devices for at least 6 months] are unconstitutional to the extent that they require the Court to make indigency determinations without a statutory metric for ascertaining indigency.”). See also In For A Penny, supra note 6, at 64 (recommending that Georgia “[e]stablish objective measures to guide judges in determining a defendant’s indigence, and audit judges to ensure that these measures are consistently applied to all defendants.”).


39 This Section only addresses the Rules of the Board of Corrections relevant to program cost. However, much of the Rules pertain to program content. For example, Rule 125-4-9.06(c)(3)-(4) prevents FVIPs from providing “any couples, marriage, or family therapy or treatment” or “individual therapy or treatment.” Furthermore, Rule 125-4-9.06(a)(1) states that “[p]rogram topics must follow a model that identifies and challenges family violence as an overall system of physical and emotional abuse where the participant chooses to use tactics of power and control over a victim.” However, Project Safe, a non-profit working to end domestic violence, acknowledges that there is more than one kind of domestic violence. See Domestic Violence, Project Safe, available at http://www.project-safe.org/index.php?id=9. They identify two kinds of domestic violence: intimate terrorism and situation couple violence. But existing Georgia law has no sorting mechanism and provides a one-sized-fits-all approach based on the power and control model. See FVIP Fact Sheet, Georgia Commission on Family Violence, available at http://www.gcfv.org/index.php?option=com_content&view=article&id=6&Itemid=11. Not surprisingly, there is a current trend moving away from this traditional model of struggle for power towards more individualized treatment plans. So an additional question that should be asked, given this paper’s discussion of the immense financial burden placed on individuals, is do these classes even work. Shockingly, the author found that few people in Georgia are asking this question. The Act itself doesn’t require anyone to track recidivism. However, the Commission’s website, at first glance, appears hopeful:

Is Research Available to Show That FVIPs Work? Most research tells us that participants who complete FVIPs are less likely to commit new acts of violence or to violate restraining orders. Several studies show that FVIPs reduce recidivism by 36-85% (Dutton, 1986; Edleson & Grusznski, 1988; Tolman & Bennett, 1990; Gondolf, 1997; Gondolf, 1999). Still, despite some promising signs, recidivism rates are high and FVIPs cannot guarantee safety for victims. The Commission can e-mail you copies of recent research about FVIPs.
Subsequently, the Department of Corrections issued Chapter 125-4-9 of its Rules of Board of Corrections, known as the Rules for Family Violence Intervention Programs ("Rules"), to fulfill the obligations delegated to it by the state legislature.\(^{40}\) The Rules establish general application and certification requirements for those individuals wishing to provide FVIP classes ("service providers"). Among those is the requirement that every service provider pay a $20 fee to the Department of Corrections for each program participant that enrolls in one of its FVIP classes.\(^{41}\) However, Rule 125-4-9-.04(a)(3) provides that service providers may "pass this cost on to the participant."\(^{42}\) Thus, each offender that enrolls in an FVIP class costs that service provider $20, a cost each service provider will surely seek to recover from each offender at some point during his or her enrollment.

Additionally, the Rules establish requirements for the structure of FVIPs with which all FVIP classes (or "programs") must comply. A couple of these requirements are relevant here. First, the Rules specify that "[p]rograms must require each participant to attend a minimum of at least twenty-four (24) once a week group classes within 27 weeks."\(^{43}\) Upon the individual's fourth absence, they will be automatically terminated from the program.\(^{44}\) The Rules further specify that each individual, once-a-week class must be no less than ninety minutes long.\(^{45}\) Second, the Rules require that each program "conduct an initial orientation and an intake/screening interview" on each new offender.\(^{46}\) With regard to these mandatory initial appointments, Rule 125-9-.07(a) states that "[p]rograms may charge separate fees for the orientation and the intake/screening interview" and that "[n]either the orientation nor the

\(^{40}\) Adopted Apr. 23, 2003.

\(^{41}\) Rule 125-4-9-.04(a)(3) ("Each FVIP will be assessed a $20.00 fee for each participant who participates in an FVIP. FVIPs may pass this cost on to the participant. Program participant fees must be submitted to the Department [of Corrections] by the tenth day of each month. If a participant reenrolls in an FVIP after either completing the program or being terminated from the program, the FVIP shall be assessed another $20.00 program participation fee for that participant.").

\(^{42}\) Rule 125-4-9-.04(a)(3).

\(^{43}\) Rule 125-4-9-.07(c)(1).

\(^{44}\) Rule 125-4-9-.07(c)(3) ("Four absences must result in automatic termination from the program unless a leave of absence has been approved by the referral source and program in consultation with the victim liaison in advance of the fourth absence. Lateness is considered an absence.").

\(^{45}\) Rule 125-4-9-.07(c)(2) ("Classes must be at least ninety (90) minutes in length.").

\(^{46}\) Rule 125-4-9-.07(a).
intake/screening interview count toward the 24 class requirement." The Rules provide no further regulation of these appointments. So, it would seem that individual service providers are not limited in the amount they can charge for these preliminary appointments, which are legally required before an offender can enroll in a program. Thus, each individual offender is actually required to attend 26 total sessions before he has successfully completed the program, and the cost of the first two mandatory sessions is unregulated by law, irrespective of indigency.

With regard to the cost of the 24 weekly classes, the Rules address the “sliding scale” mentioned in the governing state statutes. Recall that O.C.G.A. § 19-13-16 stated that “the cost of the program shall be determined by a sliding scale based upon the defendant’s ability to pay.” However, the statute itself did not define “sliding scale,” but rather left it to the Commission and the Department of Corrections to determine program fees. Rule 125-4-9-.07(d) responds to this open question by stating that “FVIPs will charge a fee of between $5 to $50 per class.” The Rules do set an upper limit on the amount each service provider may charge an offender per class—fifty dollars. Rule 125-4-9-.07(d) further states that each individual service provider “must have a written indigent fee reduction plan for participants declared indigent by the court.” So the Rules also answer the question of who makes the determination of indigence—the court, however, the Rules, like the authorizing statutes, provide no guidance as to how a court should make that determination.

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47 Id.
48 But note that it could possibly be argued that the sliding scale discussed infra also applies to these first two appointments, although the language and structure of the Rules indicate otherwise. See Rule 125-4-9-.07(a), (c)-(d).
49 Id.
50 O.C.G.A. § 19-13-16(c).
51 O.C.G.A. § 19-13-14(a).
52 Rule 125-4-9-.07(d).
53 Id.
54 Id.
55 Although outside the scope of this paper, it might reasonably be asked whether the Department of Corrections violated the non-delegation doctrine by leaving to each individual service provider the authority to determine how to treat indigent participants.
56 Rule 125-4-9-.07(d).
57 However, an Assistant Solicitor in Athens-Clarke County expressed the view that, while the court is supposed to determine who is indigent, many judges are reluctant to declare a defendant indigent for FVIP purposes. Interview with Will Fleenor, Assistant Solicitor, Athens-Clarke County (Jan. 23, 2013). Furthermore, a certified FVIP provider in the Athens-Clarke County area stated that, because courts are reluctant to do so, the burden falls on individual providers to determine indigency. Interview with John Lee, Family Counseling of Athens (Jan. 22, 2013).
58 See supra note 31 (same arguments might apply with regard to an agency definition).
More troubling, though, the Rules do not specify any restrictions on the service provider in the event the court deems an individual indigent. Rather, they are simply required to have an “indigent fee reduction plan” in place for those individuals. But, as discussed in Section IIIA infra, few service providers admit to having such a plan in place, and compliance with this requirement is all but ignored by the State. Thus, outside of prohibiting a service provider from charging more than $50 per class, the Rules place no restrictions on the fee a service provider may charge any given offender. There is no guidance as to how a service provider should determine where—between $5 and $50—a particular offender’s fee should lie. Nor is there any indication as to what factors may be relevant to that determination. Left entirely to the service provider’s discretion, it can only be assumed that these decisions are being made based on the service provider’s own profit margin, local competition, and market for services.

However, the Rules do make sure to provide that a participant may be terminated for failure to make whatever fee payments are determined to be appropriate by the service provider. Rule 125-4-9-.09(b) specifies the circumstances under which a participant must be terminated and prohibited from completing an FVIP class. Among those circumstances listed, in addition to termination for absences, discussed supra, is the failure to make fee payments. Thus, an individual participant unable to come up with the fee that has been determined unilaterally by the service provider must be terminated from an FVIP class and risk revocation of his probation.

The Rules go on to address many other requirements, including a victim notification requirement and standards for training facilitators, which are outside the scope of this paper. However, one additional point deserves mention. Noticeably absent from the Rules is any provision for a defendant to appeal or to ask for review of any of these discretionary decisions that have been left to the service provider. So other than trying to find another FVIP service

59 See infra Section IIIA.
60 See supra note 31 (same arguments might apply with regard to individual service providers). See also O.C.G.A. § 19-13-13(a) (“A program certified pursuant to this article shall be administered by the [D]epartment [of Corrections].”).
61 Id.
62 Note the limited bargaining power of an offender, who is ordered by law to attend a private program and who, as discussed infra Section III B, may not have more than one choice of service provider.
63 See Rule 125-4-9-.09(b)(2).
64 Rule 125-4-9-.09(b) (“Criteria for terminating participant from an FVIP.”).
65 Rule 125-4-9-.09(b)(2) (“Failure to abide by the rules and regulations of the FVIP, including participation, attendance, fee payment…”).
66 To be sure, an individual has the right to a hearing before his probation can be revoked for failing to complete FVIP. See O.C.G.A. § 42-8-34.1. However, see infra Sections VI & V for a discussion of existing equal protection jurisprudence governing probation revocation based on indigency and for what actually happens in
provider at which to complete this required condition of probation, an individual defendant has no recourse against a service provider who has charged him a fee he cannot afford and/or who has terminated him because he could not pay.

III. FVIPs in Practice

Given the gaping holes left open by the governing statutes and agency rules, and the sizable discretion left to individual service providers as a result, the author endeavored to undertake a small empirical study of FVIPs in Georgia to better understand what is happening with family violence offenders within the State. In particular, the author was concerned with the actual cost of FVIPs to individuals sentenced to complete it. She first asks how much service providers are charging offenders to complete FVIP. Then, she asks where these classes are located, noting one substantial, additional cost of compliance. Lastly, she looks at data being collected in Athens-Clarke County to see how family violence offenders are coping with these costs.

A. Cost Per Class

First, because of the wide discretion left to individual service providers in setting fees, the author wanted to know how much offenders were actually being charged in practice. According to a fact sheet provided to the author by the Commission, the average cost of an FVIP class in Georgia is $28 per class. That same fact sheet states that the most common cost of an FVIP class in Georgia is $30 per class. It also reiterates that “FVIPs are required to have a sliding fee scale for offenders declared indigent by the court.” The author contacted the Department of Corrections’ Office of Legal Services in hopes of getting access to these fee reduction plans that

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67 But see supra note 60.

68 Id.

69 But note that the author does not purport to approximate the total economic impact of an FVIP class on an individual. Many additional costs of compliance exist other than those examined in this Section, including opportunity costs that are not readily identifiable or measurable.

70 See infra Appendix A. Emailed by La Donna Varner, FVIP Compliance Coordinator, Georgia Commission on Family Violence (Jan. 16, 2013).

71 Id.

72 Id.
each service provider is required to develop. In response to an open records request, the legal department replied that neither the Department of Corrections nor the Commission has copies of FVIP provider indigent fee scales. In fact, she said, service providers are not required to send in their fee reduction plans, but rather simply certify that they have read the general policies and rules regarding FVIPs and agree to abide by them. Thus, the State of Georgia never sees any “indigent fee reduction plans,” simply a signature from a service provider admitting to having one.

The author then contacted service providers directly. She sampled a number of service providers around the State and asked for their policy on indigent participants. Table 1, infra, contains their responses. Specifically, she asked each service provider (1) what fees were required even before an individual could enroll in the 24-week course, (2) how much enrolled participants were charged each week for the single, 90-minute class, (3) whether any concessions were made for individuals who state that they cannot pay that amount, and (4) what their policy is when a registered individual shows up for a class without that week’s payment. The answers to these questions were quite revealing.

First, as predicted in Section IIB supra, every service provider contacted stated that they require an offender to pay some amount of money up front before they can even enroll in the 27-week course. Whether it’s called registration, orientation, assessment, or evaluation, the average initial fee of the service providers sampled was $75.50. Thus, every offender sentenced to complete FVIP in these areas must come up with an average of $75 before they can comply with a condition of probation that requires them to register for a program within a certain amount of time.

Second, when each service provider was asked how much they charge an individual to attend their program, all but one responded initially by stating a flat fee per class, making no reference to indigency or a sliding scale based on income. Among these costs first given, the average cost reported was $29.44 per class. That means that, in order to comply with a court order to complete FVIP in these areas, an offender must spend, on average, nearly $30 a week for 24 weeks. In total, the average cost of successfully completing 24 classes in one of these

73 Request made pursuant to the Georgia Open Records Act. See O.C.G.A. § 50-18-70 to 72.
74 Email from Bethany Whetzel, Assistant Counsel, Office of Legal Services, Georgia Department of Corrections (Feb. 4, 2013).
75 Id.
76 See infra Table 1 for each service provider’s explicit response.
77 Id.
78 See infra Section IIIC, for the usual condition of probation that registration for an FVIP occur within 30 days of sentencing.
areas is $720. When the fee(s) each participant must pay up front in order to register for the course are included, the average cost to an offender of the entire 24-week program in one of these areas is $795.

The author followed up with each service provider after they gave these initial quotes to see what concessions, if any, they make when an individual states that he is financially unable to pay that amount. Given that she identified herself simply as a law student writing a paper for school, she suspected that service providers would answer in the most favorable light possible, as they wouldn’t actually have to accept any business at the quote they make. Surprisingly, however, some service providers still stated that they do nothing, that they are unwilling to charge any rate lower than the flat fee they advertise, regardless of an individual’s situation. The majority of providers replied instead that they do make some concessions in certain cases, but the majority did so reluctantly.

Of those service providers who indicated that they were willing to negotiate class fees with an offender, most appeared to have no clear procedures in place for doing so. All but two service providers indicated that they have no real policy on how an offender can prove his indigency. In fact, one service provider stated that they require no documentation of indigency because “it’s easy to tell by looking at [someone] and talking with them whether someone can pay or not.”

However, every service provider contacted did indicate that they had a policy in place for terminating an offender for failing to pay. Two service providers expressly indicated that if an individual enrolled in one of their FVIP courses shows up to any class without the entire fee in his possession, he will be turned away and deemed absent for that week. Most providers, however, indicated that they allow the defendant some leniency, such as by permitting him to get no more than two weeks or a certain dollar amount behind before they will start to consider him absent. Only one of the service providers contacted indicated that, once enrolled, participants will never be turned away from a class if they don’t have the money to pay. However, even at that program, the “participant will not get a certificate of course completion until all debts are paid off.” Thus, in reality, all service providers said that they terminate individuals for failing to come up with the fees once they’ve been determined, thus placing that individual at risk for probation revocation.

B. Location of FVIPs

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79 Interview with Sam Evans, Director, Person Centered Court Services (Jan. 30, 2013).


81 Id.
In addition to the explicit cost imposed on an individual who is ordered to complete an
FVIP, additional burdens affect whether or not an individual is able to comply with that
condition of probation. One such burden is the proximity (or lack thereof) of an FVIP provider
to an individual’s home. The Department of Corrections is required to maintain a list of all
available FVIP providers in the State. The Department does so by listing all available certified
programs providers by county. While the State of Georgia consists of 159 counties,
according to the Department’s list last updated on September 6, 2012, 86 counties in Georgia did
not have a certified provider within its limits. And this number actually understates the number
of Georgia counties that do not contain a service provider. This means that, at most, FVIP
classes are only available in 73 of Georgia’s counties, just under 46% of them.

What happens if there is not an FVIP class located near a defendant? Recently, a federal
court considered the unfairness of similar geographical burdens in the context of a voter
identification law. The Texas law at issue would have required its citizens to show
government-issued IDs in order to vote in elections. Those without qualifying identification
would be able to obtain a free voter registration card from any of Texas’s voter registration
offices. However, the court noted, obtaining the free document “[would] not be costless.”
“[T]here are some towns where the nearest [voter registration] office is about a 100 to 125 mile
one way trip away” and such offices “are not easily accessible by public transportation.”
Thus, although the Texas law by its terms applied equally to all of its residents, the court found
that its burden fell disproportionately on the poor, who generally lack driver’s licenses and

82 O.C.G.A. § 19-13-14(f) (“The department shall maintain a list of programs certified pursuant to this
article and make the list available to the public and all courts.”).
83 Certified Family Violence Intervention Programs (By County), Georgia Commission on Family Violence
84 2010 CENSUS: GEORGIA PROFILE, U.S. CENSUS BUREAU, available at
85 Certified Family Violence Intervention Programs (By County), Georgia Commission on Family Violence
86 The Commission lists some identical providers under more than one county, e.g., see id. at 1, 2, 8 (The
Susenbach Group, located in Brunswick, Georgia, is listed as being within both Brantley, Camden, and Glynn
Counties.).
88 Id. at 115-16.
89 Id.
90 Id. at 116.
91 Id. at 139 (internal citations omitted).
92 Id. at 140 (internal citations omitted).
access to motor vehicles.\textsuperscript{93} Although the case was not decided on constitutional grounds, the court does a good job demonstrating how seemingly indiscriminate legislation, such as the FVIP statutes at issue here, can have a disparate impact on groups of people who lack access to transportation.

Similarly, the Georgia statutes mandating FVIP do so without regard to the availability of a certified provider nearby.\textsuperscript{94} The Department of Corrections’ online fact sheet purports to answer the question “[w]hat happens if there is no certified FVIP in my area?”\textsuperscript{95} The Department responds:

Please use your judicial or prosecutorial leadership to encourage your local providers or other agencies to apply for certification. Pursuant to OCGA 19-13-14(b) FVIPs that meet certification standards may be operated by any individual, partnership, corporation, association, civic group, club, county, municipality, board of education, school, or college or any public, private, or governmental entity.\textsuperscript{96}

Thus, it appears that domestic violence offenders living in a county without a certified service provider are not released from the mandatory requirement of completing FVIP. Rather, like in Texas, those citizens unfortunate enough to live in areas without providers must travel a greater distance in order to comply with the law. As a result, the Georgia law impacts citizens differently based on whether they have a driver’s license or access to a vehicle, or whether the closest FVIP is reachable by public transportation. As discussed in \textit{Holder}, such individuals who meet these criteria are overwhelming poor. Thus, Georgia’s FVIP statute imposes significant additional burdens on indigent defendants, who compose more than 80\% of the population to whom it applies.\textsuperscript{97}

\begin{footnotes}
\item[93] \textit{Id.} at 144 (“[U]ncontested record evidence conclusively shows that the implicit costs of obtaining SB 14–qualifying ID will fall most heavily on the poor”).
\item[94] See O.C.G.A. § 19-13-16. \textit{Compare} 18 U.S.C. § 3563(b) (requiring a domestic violence rehabilitation program to be imposed as a condition of federal probation, but \textit{only if} “an approved program is readily available within a 50-mile radius of the legal residence of the defendant.”).
\item[96] \textit{Id.}
\item[97] \textit{See supra} note 14.
\end{footnotes}
C. FVIP Completion Rates

Given the sizable burden of FVIPs on individuals, it is not surprising that few offenders are able to successfully complete it. One service provider in Athens-Clarke County, who has been providing family violence counseling since 1994, shared some of his experience regarding FVIP completion.\(^98\) He stated that, while domestic violence is not unique to one’s socioeconomic condition, arrest and punishment for it is. Moreover, when asked why, in his experience, people fail to complete FVIP, he gave the author two interrelated responses: (1) misdemeanor probation is usually only 12 months, while completion of FVIP takes 6 months; thus, not much time remains for sorting through financial issues; and (2) socioeconomic factors impact whether or not someone is successful in his program – not just due to a lack of money, but also due to the lack of education and training needed to register and complete a 24-week course.

Additionally, two organizations in the Athens-Clarke County area track whether or not offenders are successful in completing FVIP as a condition of their probation. Both were willing to share their data.

The first, Project Safe, is a non-profit working to end domestic violence. The organization tracks every person who has been charged with a family violence offense in Athens-Clarke County from arrest up until the point at which their case is resolved. Of all such individuals arrested between July 1, 2007 and December 31, 2010, 898 individuals were ordered to complete FVIP. Of those cases, Project Safe reviewed 694 for FVIP compliance.\(^99\) Upon doing so, they found that only 36%\(^100\) of those offenders ordered to complete FVIP were actually successful in completing it. The remaining 64%\(^101\) of offenders were not. So before anyone can assess whether or not FVIP works, they have to deal with the fact that a large majority of probationers do not complete it.

The second individual, Jason Kelley, is a VAWA-funded probation officer handling misdemeanor domestic violence cases in Athens. He conducted a study of all 2011 cases coming through his office in order to track FVIP compliance. In that year, there were 215 misdemeanor cases in which the defendant was ordered to enroll in FVIP within 30 days of sentencing and whose probation compliance was supervised by Jason Kelley’s office. Of those, 199 were reviewed.\(^102\) His data showed that only 30% of these offenders actually enrolled in an FVIP


\(^{99}\) The remaining cases were not reviewed because, at the time of this paper, they were still open cases. Some cases may not yet have been closed if, for example, the individual was still serving his probationary term.

\(^{100}\) 252 of 694 offenders.

\(^{101}\) 442 of 694 offenders.

\(^{102}\) See supra note 93.
within the mandated 30 days of sentencing. Mr. Kelley stated that individuals who failed to enroll in a program within 30 days are regularly given a 30-day extension in which to do so. However, even after 60 days, 37%\textsuperscript{103} of his probationers never enrolled in FVIP in the first place. In all those cases, a warrant issued for their arrest. That means that, in more than 1/3 of the cases they supervised in 2011, offenders were accused of violating their probation for failure to complete FVIP within just 60 days of being sentenced.

The remaining 63\% of their probationers\textsuperscript{104} actually enrolled in an FVIP class within 60 days. Of those that did enroll, 36\%\textsuperscript{105} successfully attended FVIP to its completion, while 64\%\textsuperscript{106} did not.\textsuperscript{107} Thus, out of the 199 probationers they supervised in 2011, only 22\%\textsuperscript{108} successfully completed an FVIP course. These results show an even lower rate of compliance than that found by Project Safe. One begins to wonder whether the law sets up unrealistic expectations and significant barriers to completion for offenders ordered to complete FVIP.

In addition to studying overall rates of compliance, Mr. Kelley’s data went further and asked why 64\%\textsuperscript{109} of people who enrolled in FVIP were unsuccessful in completing it. He found that 70\%\textsuperscript{110} were terminated from FVIP for absences, 15\%\textsuperscript{111} enrolled but never started, and 15\%\textsuperscript{112} received new criminal charges before they could complete the 24-week course. Furthermore, Mr. Kelley’s data shows that, of those 64\%\textsuperscript{113} of offenders terminated from their FVIP program for whatever reason, the probation office issued a warrant for their arrest in 72\%\textsuperscript{114} of the cases. The foregoing data shows that not only can offenders be revoked in theory for failing to complete FVIP, they are in fact being revoked. In the remaining 28\%\textsuperscript{115} of cases, the probation officers gave the offenders the opportunity to re-enroll in FVIP within 15 days.

\textsuperscript{103} 73 of 199 offenders.
\textsuperscript{104} 126 of 199 offenders.
\textsuperscript{105} 45 of 126 offenders.
\textsuperscript{106} 81 of 126 offenders.
\textsuperscript{107} But note that these percentages double count offenders who enrolled more than once, i.e. offenders who were terminated but were allowed to re-enroll. For example, an offender who was terminated, re-enrolled, and then terminated again would be included as two offenders in the termination values. However, the incidence of double counting is probably very small and shouldn’t skew the results of the study.
\textsuperscript{108} 45 of 199 offenders.
\textsuperscript{109} 81 of 126 offenders.
\textsuperscript{110} 57 of 81 offenders.
\textsuperscript{111} 12 of 81 offenders.
\textsuperscript{112} 12 of 81 offenders.
\textsuperscript{113} 81 of 126 offenders.
\textsuperscript{114} 58 of 81 offenders.
\textsuperscript{115} 23 of 81 offenders.
But, as discussed in Section IIIA *supra*, when offenders who have already been terminated from FVIP wish to re-enroll, they must begin the registration process from the beginning. In addition to losing the money they’ve already spent on the FVIP classes they did complete, they could be required to pay the upfront orientation and screening costs a second time.

Finally, Mr. Kelley’s data follows the revocation process to its completion. Two groups of people previously discussed were issued warrants for their arrest: those who never enrolled in FVIP in the first place and the 72% of those who enrolled but were terminated before they completed it. This means that, in 66% of all the cases he reviewed, the offender was arrested for failing to complete FVIP. As discussed in Section V *infra*, these probationers have a right to a hearing to determine whether they in fact violated the conditions of their probation. At that hearing, 34% of offenders were continued on probation and directed to continue with FVIP, 20% were continued on probation without FVIP, and 46% were discontinued from probation and given a confinement sentence. In all, in 2011, 30% of the offenders originally sentenced to complete FVIP and supervised by Mr. Kelley’s probation office subsequently had their probation revoked and converted into a jail term.

While none of this data tells us specifically how many probations are being revoked because of an inability to pay, certain assumptions can be made. For instance, 73 of Mr. Kelley’s probationers never enrolled in FVIP in the first place. It can be assumed that many of these people simply exhibit anti-social behavior and were not going to comply with any probation conditions, regardless of their cost. Given the costs of enrollment discussed in Section IIIA *supra* and the fact that probationers were only given 60 days to enroll, however, it can be inferred that some percentage of this group would have enrolled if could come up with the money in time. By the same token, 69 of Mr. Kelley’s probationers enrolled in FVIP but were subsequently terminated for some reason other than for receiving a new criminal charge. Given the sizable weekly costs of FVIP programs, the burden on many individuals of getting there, and the discussion in Section IIIA *supra* of service providers’ practice of deeming indebted offenders

116 73 offenders.
117 58 offenders.
118 131 of 199 offenders.
119 See *infra* Section VA regarding the constitutionality of pre-hearing arrest.
120 45 of 131 offenders.
121 26 of 131 offenders.
122 60 of 131 offenders.
123 60 of 199 offenders.
124 37% of 199 offenders.
125 Sum of 57 offenders (terminated for absences) and 12 offenders (enrolled but never started).
absent, it can be inferred that some percentage of this group would have been successful if they had had the money. In sum, 142\textsuperscript{126} of Mr. Kelley’s probationers were unsuccessful in completing FVIP for some reason other than for receiving a new criminal charge. It defies all probability that some percentage of this very large group was not terminated solely because of their indigence.

IV. RELEVANT EQUAL PROTECTION JURISPRUDENCE

The data, including direct statements from service providers, confirms that some, if not many, individuals who have been sentenced to a mandatory probation term are facing incarceration because of their inability to afford FVIP, while those who can afford it remain free. Given this disparate treatment of individuals under the law,\textsuperscript{127} this paper will next examine the decisions that could be used to shape a constitutional challenge to FVIP on equal protection grounds.

A. The Supreme Court: Equal Protection and Wealth

In 1956, the U.S. Supreme Court first attempted to define the constitutional relationship between poverty and the criminal justice system.\textsuperscript{128} There, the Court held, “consistent with the Due Process and Equal Protection Clauses of the Fourteenth Amendment,” that Illinois could not have differing appellate review procedures based on whether or not an individual could afford a trial transcript.\textsuperscript{129} Although the Court recognized that a defendant does not have a right to an appeal, it found that Illinois, having granted appellate review, could not then treat indigent defendants differently than others.\textsuperscript{130} Thus, the Court held, “at all stages of the proceedings

\textsuperscript{126} Sum of 73 offenders (never enrolled in FVIP), 12 offenders (enrolled but never started), and 57 offenders (terminated for absences).

\textsuperscript{127} The data also shows a disparate impact among racial minorities. For instance, Mr. Kelley’s data indicates that 99 out of the 124 domestic violence probationers for whom he had demographic information were black or African-American. Although a small data set, roughly 80% of the individuals convicted in Athens Clarke-County of domestic violence-related offenses in 2011 and given a probationary sentence were composed of a single racial minority. This number is staggering when compared to the County’s overall African American population of only 26.6%. See 2010 Census, available at http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?src=bkmk. Thus, one can easily infer that a disproportionate number of minority offenders are facing longer prison terms than their white counterparts.

\textsuperscript{128} Griffin v. Illinois, 351 U.S. 12 (1956).

\textsuperscript{129} Id. at 13.

\textsuperscript{130} Id. at 18.
[whether you have a right to it or not] the Due Process and Equal Protection Clauses protect persons…from invidious discriminations” on account of their poverty.  

In so holding, the Supreme Court was not clear whether its ruling was based primarily on the Equal Protection Clause or on the Due Process Clause.  Rather, it appeared that its holding was based on a confluence of principles found in both clauses.  Subsequently, the Court has used varying formulations of this Equal Protection-Due Process analysis to strike down filing fees for habeas petitions, the requirement that indigent defendants make a preliminary showing of merit in order to be appointed counsel on direct appeal, and the denial of preliminary hearing transcripts to those who cannot afford to pay for them.  These early cases, however, dealt with state procedures that denied or curtailed indigents’ access to the court system.

It wasn’t until 1970 that the Supreme Court first used Fourteenth Amendment jurisprudence to invalidate variations in sentencing that were based solely on wealth.  In Williams, an individual was sentenced to a $500 fine and a year imprisonment, the maximum sentenced authorized by state law for that offense.  After completion of his one-year sentence, the defendant was kept incarcerated an additional 101 days in order to “work off” the fine, which

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131 Id. (emphasis added).
132 See id. at 17.
133 See, e.g., Bearden v. Georgia, 461 U.S. 660, 665 (1983) (“Due process and equal protection principles converge in the Court’s analysis in these cases. Most decisions in this area have rested on an equal protection framework, although Justice Harlan in particular has insisted that a due process approach more accurately captures the competing concerns.”) (internal citations omitted).
134 Thus, this paper will not dwell on the difference between the two clauses nor the principles that define each. It will assume (not without reason) that the Supreme Court’s jurisprudence in this area relies on principles taken from both constitutional provisions, notwithstanding the use of just one of the clauses in any given case.
135 Smith v. Bennett, 365 U.S. 708, 709 (1961) (“We hold that to interpose any financial consideration between an indigent prisoner of the State and his exercise of a state right to sue for his liberty is to deny that prisoner the equal protection of the laws.”).
136 Douglas v. California, 372 U.S. 353, 357 (1963) (“[A] state can, consistently with the Fourteenth Amendment, provide for differences so long as the result does not amount to a denial of due process or an ‘invidious discrimination.’… But where the merits of the one and only appeal an indigent has as of right are decided without benefit of counsel, we think an unconstitutional line has been drawn between rich and poor.”).
137 Roberts v. LaVallee, 389 U.S. 40 (1967) (“We have no doubt that the New York statute…. as applied to deny a free [preliminary hearing] transcript to an indigent [when his case was called for trial], could not meet the test of our prior decisions.”).
138 See, e.g., id, at 42 (“Our decisions for more than a decade now have made clear that differences in access to the instruments needed to vindicate legal rights, when based upon the financial situation of the defendant, are repugnant to the Constitution.”) (emphasis added).
140 Id. at 236.
he was unable to pay. Applying Griffin to the present context, the Court held that “an indigent criminal defendant may not be imprisoned in default of payment of a fine beyond the maximum authorized by the statute regulating the substantive offense.” While noting that the Illinois penal law was not discriminatory on its face, as it imposed the same maximum sentence on all offenders, the Court held that “a law nondiscriminatory on its face may be grossly discriminatory in its operation. Here the Illinois statutes as applied to Williams work an invidious discrimination solely because he is unable to pay the fine.”

A year later, in Tate v. Short, the Court extended its holding in Williams to invalidate a Texas law that required an indigent who was unable to pay traffic tickets to immediately “work off” his fine with a prison sentence at the rate of $5 a day. Notably, the Court stated:

Although the instant case involves offenses punishable by fines only, petitioner’s imprisonment for nonpayment constitutes precisely the same unconstitutional discrimination since, like Williams, petitioner was subjected to imprisonment solely because of his indigency... In each case, the Constitution prohibits the State from imposing a fine as a sentence and then automatically converting it into a jail term solely because the defendant is indigent and cannot forthwith pay the fine in full.

Thus, where the statutory maximum is a fine, a State cannot convert the fine into a prison term simply because an individual cannot immediately pay it.

After Williams and Tate, it became clear that a State could not impose varying statutory ceilings based on whether or not a defendant could afford a fine. But a question remained as to the constitutionality of imposing differing sentences, within the statutory maximum, based on a defendant’s ability to pay. Thus, if a state statute permits the imposition of a $1,000 fine and a year imprisonment for a given offense, does it violate the Constitution for a judge to sentence someone to $1,000 because they can afford it, while sentencing an indigent to a year in prison because they cannot?

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141 Id. at 236-37.
142 Id. at 241.
143 Id. at 242.
145 Id. at 397-98.
146 Id. at 399.
147 See, e.g., Williams at 244 (“[T]he Equal Protection Clause of the Fourteenth Amendment requires that the statutory ceiling placed on imprisonment for any substantive offense be the same for all defendants irrespective of their economic status.”).
The Court answered this question in 1983.\textsuperscript{148} In \textit{Bearden}, the Court clarified the Williams-Tate line of cases to stand for the proposition that “if the State determines a fine or restitution to be the appropriate and adequate penalty for the crime, it may not thereafter imprison a person solely because he lacked the resources to pay it.”\textsuperscript{149} The \textit{Bearden} Court noted that a judge may consider wealth among the countless other factors when sentencing a defendant and making the initial determination between incarceration and other forms of punishment authorized by statute.\textsuperscript{150} However, once a judge imposes a sentence other than incarceration, that decision “reflects a determination by the sentencing court that the State’s penological interests do not require imprisonment.”\textsuperscript{151} Thus, a judge can consider indigency in initially deciding whether or not to place a defendant on probation. Once that determination has been made and the defendant is given a probationary sentence, the judge cannot revoke that probation and incarcerate the individual simply because he has failed to make payments as required by his probationary sentence.

Earlier Supreme Court cases also expressly left open the question of the constitutionality of incarcerating a defendant who has the financial resources to satisfy a criminal debt, but who willfully chooses not to.\textsuperscript{152} In \textit{Bearden}, the defendant was sentenced to three years probation, a $500 fine, and $250 in restitution.\textsuperscript{153} As a condition of his probation, the defendant was to pay $200 immediately, which he did, and then was to pay off the remaining $550 balance within four months.\textsuperscript{154} The Court noted that:

About a month later, however, [defendant] was laid off from his job. [Defendant], who has only a ninth grade education and cannot read, tried repeatedly to find other work but was unable to do so. The record indicates that [defendant] had no income or assets during this period. Shortly before the balance of the fine and restitution came due [..., defendant] notified the probation office he was going to be late with his payment because he could not find a job.\textsuperscript{155}

\textsuperscript{149} \textit{Id.} at 667.
\textsuperscript{150} \textit{Id.} at 669-70 (“A defendant’s poverty in no way immunizes him from punishment. Thus, when determining initially whether the State’s penological interests require imposition of a term of imprisonment, the sentencing court can consider the entire background of the defendant, including his employment history and financial resources [and may impose the maximum penalty prescribed by law].”).
\textsuperscript{151} \textit{Id.} at 670.
\textsuperscript{152} See, e.g., Tate at 400 (“We emphasize that our holding today does not suggest any constitutional infirmity in imprisonment of a defendant with the means to pay a fine who refuses or neglects to do so.”).
\textsuperscript{153} Bearden, 461 U.S. at 662.
\textsuperscript{154} \textit{Id.}
\textsuperscript{155} \textit{Id.} at 662-63.
Nonetheless, the defendant’s probation was revoked, and he was resentenced to serve the remaining portion of his probationary sentence in prison. The Supreme Court reversed for the reasons stated in the preceding paragraph. In so doing, however, it distinguished the case at bar from one in which a “probationer has willfully refused to pay the fine or restitution when he has the means to pay.” In such a case, the Court stated that incarceration, regardless of the statutory maximum, would be constitutional. But if the probationer made “bona fide” efforts to satisfy his debt to the court “and yet cannot do so through no fault of his own, it is fundamentally unfair to revoke probation automatically without considering whether adequate alternative methods of punishing the defendant are available.” Thus, after Bearden, a court may not revoke a defendant’s probation and impose a term of imprisonment absent (1) an explicit finding of willfulness, or (2) a determination that circumstances have changed such that the State’s interests in punishment and deterrence are not adequately met with the existing probationary sentence.

B. Georgia: Equal Protection and Wealth After Bearden

Subsequent to the Supreme Court’s decision in Bearden, two areas of state court jurisprudence in Georgia are particularly noteworthy. The first area deals with the temporal requirements of Bearden, for example, at what point(s) a determination of willfulness must be made. Second, Georgia courts consider the applicability of Bearden to cases in which a defendant voluntarily enters into a plea agreement with the State that includes the payment of a fine.

156 Id. at 663.
157 Id. at 668.
158 Id. at 668-69.
159 See id. at 672 for a discussion of points a court should consider when determining whether existing measures are adequate to secure the state’s interests (“For example, the sentencing court could extend the time for making payments, or reduce the fine, or direct that the probationer perform some form of labor or public service in lieu of the fine. Justice Harlan appropriately observed in his concurring opinion in Williams that the deterrent effect of a fine is apt to derive more from its pinch on the purse than the time of payment. Indeed, given the general flexibility of tailoring fines to the resources of a defendant, or even permitting the defendant to do specified work to satisfy the fine, a sentencing court can often establish a reduced fine or alternate public service in lieu of a fine that adequately serves the State’s goals of punishment and deterrence, given the defendant’s diminished financial resources.”) (internal citations omitted).

160 But note that the requirement that a court consider alternative punishments may not be relevant in the case of user fees where the state’s interest is not punishment. See PENALIZING POVERTY: MAKING CRIMINAL DEFENDANTS PAY FOR THEIR COURT-APPOINTED COUNSEL THROUGH RECOURT AND CONTRIBUTION, 42 U. MICH. J.L. REFORM 323, 338-39 (2009) (“Bearden concerned the non-payment of a fine, not defense fees. The purpose of a fine is punishment, and so the Court went on to hold: … Only if alternate measures are not adequate to meet the State’s interests in punishment and deterrence may the court imprison a probationer who has made sufficient bona fide efforts to pay. This reasoning underscores the punitive purpose of a fine, but it is inapplicable to recoupment.”) (internal citations omitted).
1. When a Bearden Determination Must be Made

Not long after the Supreme Court’s decision in *Bearden*, the Supreme Court of Georgia considered the question of when a determination of willfulness, as required by *Bearden*, must be made.\(^{161}\) In *Massey*, the defendant was sentenced to twelve months confinement and a $600 fine “as a condition precedent to the granting of any probation.”\(^{162}\) The defendant, not being able to pay the fine at the time he was sentenced, was taken to jail to serve his entire sentence in prison.\(^{163}\) The Court reversed, holding that “where payment of a fine is made a condition precedent to probation, a defendant's probation may not be revoked or withheld because of his failure to pay the fine without a showing of willfulness on his part or inadequacy of alternative punishments.”\(^{164}\) Thus, the structures of *Bearden* apply equally in Georgia where a sentence authorizing probation is conditioned upon the defendant making an immediate payment of a fine.\(^{165}\)

In *Hunt v. State*,\(^{166}\) the Georgia Court of Appeals also considered the question of when a Bearden determination must be made. In *Hunt*, the defendant had been sentenced to eight years in prison followed by seven years on probation, along with a $7,500 fine to be paid through probation “beginning 30 days after release from custody.”\(^{167}\) The defendant appealed the imposition of the fine on the basis that the trial court had failed to determine whether he was financially able to pay before it imposed the pecuniary portion of the sentence.\(^{168}\) The court responded by saying that the sentencing judge does not have to make a determination as to whether or not the defendant can afford the fine before a fine is imposed.\(^{169}\) Rather, *Bearden* only applies where a defendant faces imprisonment because of his failure to pay a fine.\(^{170}\) Here,

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\(^{162}\) *Id.* at 389.

\(^{163}\) *Id.*

\(^{164}\) *Id.*

\(^{165}\) *Id.* (“It is true that *Bearden* dealt with revocation of probation because of failure to pay an installment of the fine upon which the probation was conditioned whereas here payment of the entire amount was a condition precedent to the probation. This, however, is a distinction without a difference. In both cases the court initially found confinement unnecessary and then confined defendant for failure to pay a fine which was a condition of his probation.”).


\(^{167}\) *Id.* at 70.

\(^{168}\) *Id.*

\(^{169}\) *Id.* (“A *Bearden* hearing as to defendant's ability to pay is required only when a fine is made a condition precedent of probation or probation is about to be revoked for failure to pay a fine. Since neither is the case here, with respect to the complained-of [fine], *Bearden* does not apply.”)

\(^{170}\) *Id.*
the defendant’s probationary sentence was not conditioned on his financial ability to pay the fine at the time of sentencing, as was the case in *Massey*. Thus, the Court holds, no determination of financial ability is required unless and until the court seeks to revoke his probation for failure to satisfy the fine in accordance with his probation.

2. Application of Bearden to Voluntary Pleas

Additionally, in the period following *Bearden*, there has been a split of authority on whether plea-bargained probation conditions should be treated the same as judge-imposed probation conditions. Some states have “carved out an exception to *Bearden* in situations in which the probationer has affirmatively agreed to pay as part of a plea bargain.” Georgia courts appeared to be headed that direction after the Court of Appeals’ decision in *Dickey v. State*. There, the defendant entered into a plea agreement with the State that sentenced him to ten years imprisonment, probated upon the payment of $160,000 in restitution in accordance with an agreed-upon payment schedule, among other things. After he failed to make payments in accordance with that schedule, the trial court revoked his probation. The Court upheld the revocation as consistent with *Bearden* and found that, because the defendant had “negotiated payment of restitution to avoid what likely would have been significant time in prison,” the trial court was not required to find that he willfully refused to pay restitution before it revoked his probation.

Thus, it appeared that Georgia was destined to be one of the jurisdictions that treated bargained plea agreements as outside the scope of *Bearden*. However, the Court of Appeals in 2011 rejected the State’s argument that would have extended *Dickey* to a negotiated plea agreement. In *Johnson*, the defendant was sentenced to eight years probation and a significant fine. The trial court subsequently revoked his probation for failing to pay court-ordered fines.

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171 *Id.*
172 *Id.*
174 *Id.* at 386.
176 *Id.* at 190.
177 *Id.* at 191.
178 *Id.* at 194.
180 *Id.* at 570.
costs, and fees. The Court of Appeals reversed on the ground that the trial court had made no express findings as to the reason for the defendant’s failure to pay before it revoked his probation. The Johnson Court read Dickey narrowly as applying only to negotiated restitution agreements. Instead, the Court held that the necessity of a Bearden determination still applies in cases in which an indigent defendant has pled guilty and “was sentenced to general fines, costs, and fees.”

C. Equal Protection and User Fees After Bearden

As discussed in Section I, supra, user fees are becoming an increasingly common way for legislatures to impose mandatory classes on offenders without having to fund them. Surprisingly, although Bearden was decided nearly three decades ago, relatively few courts have considered constitutional challenges to a court’s decision to revoke a defendant’s probation for failing to pay one of these user fees. Some states that have considered the question have expressly extended the holding in Bearden to require a finding of willfulness before a court may revoke any condition of probation that requires the defendant to make a payment. For example:

Florida courts have held that the State may only revoke a term of probation upon finding that the violation is both “substantial” and “willful” and “supported by the greater weight of the evidence,” regardless of whether the violation is one based on a failure to pay or of another kind. Florida courts have held that the State may only revoke a term of probation upon finding that the violation is both “substantial” and “willful” and “supported by the greater weight of the evidence,” regardless of whether the violation is one based on a failure to pay or of another kind.

A few other states have done the same. However, the vast majority of jurisdictions, including Georgia, have not. Despite the lack of wholesale extensions of Bearden in most jurisdictions, some courts have indicated a willingness to find a constitutional violation in the revocation of probation for failure to comply with certain cost-prohibitive conditions. For example, certain

181 Id.
182 Id. at 572.
183 Id. at 572-73 (“[In Dickey], we concluded that there was evidence of willfulness because the defendant breached the contract he had made with the state to pay significant restitution in an effort to avoid imprisonment… Therefore, because Dickey involves the failure to pay monies in accordance with a negotiated restitution provision, we find it inapposite here.”).
184 Id. at 573.
185 Brown v. McNeil, 591 F.Supp.2d 1245, 1258 (2008) (emphasis added). See also Coxon v. State, 365 So.2d 1067, 1068 (1979) (“[W]e hold that probation cannot be revoked solely for violation of conditions requiring payment without evidence that the probationer is able to make the payment.”).
186 See, e.g., State v. Leach, 20 P.3d 709, 713 (Idaho Ct. App. 2001) (“[I]f a probationer's violation of a probation condition was not willful, or was beyond the probationer's control, a court may not revoke probation and order imprisonment without first considering alternative methods to address the violation.”). See also State v. Alves, 851 P.2d 129, 131 (Ariz. Ct. App. 1992) (“A violation of probation must be willful.”).
courts have done so in the context of repayment of attorney’s fees, mandatory installation of ignition interlock devices, and anger management courses.

D. Equal Protection and Family Violence Classes After Bearden

Most notably, in addition to various courts’ treatment of Bearden in other user fee contexts, one California court has explicitly considered the question in the context of mandatory domestic violence classes. Although the court found that this particular defendant had willfully failed to enroll in the class, the court held that a Bearden determination is required in this context:

We do not disagree with defendant that if a probationer establishes to the satisfaction of the trial court his inability to pay for a domestic violence program, his probation cannot be revoked for failing to enroll in the program. Application of the principles set forth by the Supreme Court in Bearden would render revocation improper in most such cases.

Additionally, South Carolina, in an apparent attempt to avoid implicating Bearden, provides by statute that no person ordered to attend a family violence class may be turned away for failure to pay. Like Georgia, South Carolina requires domestic violence offenders to complete a “batterer treatment program” as a condition to receiving a suspended sentence.

187 Alexander v. Johnson, 742 F.2d 117, 124 (4th Cir. 1984) (“The indigent defendant ordered to repay his attorney’s fees as a condition of release, parole, or probation cannot be imprisoned for failing to extinguish his debt as long as his default is attributable to his poverty, not his contumacy.”).

188 People v. Pedrick, 32 Misc. 3d 703, 706-07 (N.Y. City Ct. 2011) (“Any due process concerns involving an individual’s ability to bear the cost is addressed at the time of sentencing not unlike when a court determines a restitution amount due and a defendant's ability to pay... Moreover, once classified as a fine...[a]ny modification determination, including alternative sentencing options, is constrained by both due process and equal protection considerations. [citing Bearden] [court cannot impose a jail sentence for failure to pay fine where defendant has made bona fide efforts to pay and there is some adequate alternative sanction which can be imposed]. Thus existing statutory, regulatory, and case law provides a defendant with both equal protection of the law and due process.”).

189 Garcia v. State, 701 So.2d 607, 609-10 (Fla. Ct. App. 1997) (overturning the revocation of defendant’s probation for failing to attend an anger management class where “the State did not dispute [the defendant’s] inability to pay the required fee.”). But see People v. White, 2004 WL 2075399 at FN7 (Cal. Ct. App. Sept. 16, 2004) (“Defendant, relying on cases wherein the courts have held that probation cannot be revoked for failure to pay a restitution fine unless the trial court first determines and indicates on the record the defendant had the ability to pay the fine and willfully failed to pay, argues that since he was unable to pay the enrollment fee for an anger management program, the trial court could not rely on this term as a ground for revoking probation without first determining whether defendant had the ability to pay the treatment fee. We believe that these cases do not apply to treatment fees.”) (internal citations omitted).


191 Id.


193 Id. at (B)(1)-(2) (for first and second-time offenders).
However, the same statute mandating these classes specifies that “[a]n offender who participates in a batterer treatment program pursuant to this section…must pay a reasonable fee for participation in the treatment program but no person may be denied treatment due to inability to pay.”

V. **EQUAL PROTECTION CHALLENGE TO GEORGIA’S MANDATORY FVIP STATUTES**

Considering the foregoing, this paper now turns to Georgia’s probation laws and mandatory FVIP statutes in order to demonstrate that the scheme it creates is unconstitutional in violation of the Equal Protection Clause. At every step of the way, *Bearden* is implicated.

**A. Pre-Hearing Incarceration**

In Georgia, once an individual is placed on probation, the sentencing court retains jurisdiction over him throughout the probationary term. Whenever a defendant has failed to meet the obligations of a condition of his probation, a judge has wide latitude to re-incarcerate him upon determining that he violated his probation by a preponderance of the evidence. However, in Georgia, no actual violation need be proven before the probationer is arrested. Rather, anytime a probation officer “believes” that an individual is in violation of his probation, he can either arrest the probationer without a warrant or issue a warrant for the defendant’s arrest. Although a probationer is entitled to a hearing to determine whether or not he has violated that condition in fact, Georgia courts have stated that 30 days is a reasonable waiting period before a probationer whom an officer believes is in violation may be able to contest that at a hearing. And, “[t]he court, upon the probationer being brought before it, may commit him or release him with or without bail.” Thus, Georgia authorizes pre-hearing detention of an individual for up to a month or longer, even where the violation may be based on the defendant’s inability to pay in accordance with a condition of probation. Pre-hearing incarceration of these

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194 Id. at (H) (emphasis added).
195 See O.C.G.A. § 42-8-34(g).
196 See O.C.G.A. § 42-8-34.1.
197 See O.C.G.A. § 42-8-38.
198 Id.
199 See O.C.G.A. § 42-8-34.1.
201 O.C.G.A. § 42-8-38(b).
types of individuals is especially likely since, those who have been unable to pay for a condition of their probation are surely unable to make bond while awaiting their probation hearing. This first issue, not unique to revocations for failure to attend FVIP, implicates the constitutionality of incarcerating someone before a Bearden determination has been made.

As discussed in Section IVB1, supra, “[u]nder the Constitution, while a court can make debt payment a condition of probation…regardless of ability to pay, probation…can only be revoked after a court makes an ability to pay inquiry.” Consequently, Georgia’s arrest and pre-hearing incarceration policy “take[s] place before a court has ever assessed whether an individual has the resources to make payments.” While the Supreme Court has never specifically considered the constitutionality of these types of practices, Georgia’s policy of allowing a court to deny a probation bond and incarcerate an individual for as long as a month before their hearing looks very much like punishing an individual for failure to pay without first determining willfulness.

This is especially concerning given the fact that, in more than 80% of cases, an individual facing revocation has already been deemed indigent by the court for purposes of securing legal counsel. Thus, in the vast majority of cases, there has already been a determination on the record that the individual being revoked is indigent. In such cases, in order to secure an arrest warrant, probation officers should be required to show more than just probable cause that the person has violated a probation condition. Rather, to stay truthful to Bearden, they should also be required to show probable cause that the violation is not based on a condition of probation requiring payments, or if it is, that the person has the ability to pay and has willfully failed to do so. This better reflects the principles that led the court in Bearden to invalidate punishment of an individual for failure to pay without a determination of willfulness.

Thus, Georgia’s statutes that allow for pre-hearing incarceration of an individual facing revocation, without a showing of probable cause of willfulness, is an unconstitutional violation of Bearden.

B. Revocation for Failing to Enroll Within a Short Period of Time

202 BANNON ET AL., supra note 6, at 21.
203 Id. at 23.
204 Id. (“While the Supreme Court has never specifically addressed the constitutionality of using arrests for failure to pay debt or appear at debt-related hearings, at core these practices punish debtors without first determining whether they have the ability to pay. This is inconsistent with basic fairness and runs directly against the equal protection and due process principles reflected in the cases prohibiting debtors’ prison.”).
205 See supra note 14.
Moreover, to the extent that Georgia’s FVIP statutes permit a court to require an individual to enroll in FVIP within a short period of time, the Constitution is violated whenever a person is thereafter revoked for failing to do so.

Jason Kelley’s data, discussed in Section IIIC, showed that in all of the cases he reviewed, a judge had required the individual to enroll in an FVIP within 30 days. Thus, the first obligation of a defendant who is sentenced to complete FVIP is to register for a program. Mr. Kelley’s data indicated that in 37% of his cases, offenders were revoked for failing to do so within just 60 days of sentencing.

But as seen in Section IIB, service providers in Georgia are permitted, pursuant to the Rules, to charge individuals wishing to register an unregulated amount before they permit them to enroll in their course. And the empirical data discussed in Section IIIA, suggested that providers are in fact doing so. The average cost charged by those surveyed was more than $75. Thus, a judge-imposed condition that a probationer enroll in FVIP within 30 days is akin to requiring a defendant to pay $75 within 30 days or face incarceration. Given the case law discussed, such a condition precedent to probation would be entirely improper absent a Bearden determination. Recall that the Supreme Court in Tate told us that imprisonment for failure to pay a fine immediately is improper. Furthermore, recall the Georgia Supreme Court’s holding in Massey “that where payment of a fine is made a condition precedent to probation, a defendant's probation may not be revoked or withheld because of his failure to pay the fine without a showing of willfulness on his part or inadequacy of alternative punishments.”

Thus, Bearden requires that before a defendant can be ordered to enroll in an FVIP course within 30 days, so long as individual programs are permitted to place significant financial barriers to doing so, the court must make a determination that the offender is financially able to come up with the money within that time period. To hold otherwise would create a de facto condition precedent to probation in violation of the Fourteenth Amendment.

C. Revocation After Enrollment

Finally, Georgia’s mandatory FVIP statutes violate the Constitution by allowing service providers to terminate offenders for failing to pay, thus triggering a revocation without a determination of willfulness. Recall the discussion in Section IIIA, that surveyed service

206 But note that no such statute or Rule specifically authorizes a judge to do so.
207 Tate, 401 U.S. at 399.
208 Massey, 253 Ga. at 389.
providers charged, on average, slightly less than $30 a class. Thus, an individual sentenced to complete FVIP is required to pay an average of $30 a week for 24 out of 27 consecutive weeks.

Recall also that the Rules permit an individual to be terminated from an FVIP program for failure to pay.\(^{209}\) As discussed in Section IIIA, \textit{supra}, all FVIP providers surveyed stated that they do, in fact, have a policy in place for prohibiting delinquent offenders from continuing in their program. Most indicated that they enforced such policy by treating individual offenders who show up for class without their weekly fee as absent. Surely, program participants who know this policy won’t waste their time coming to class just to be turned away. More likely, if an offender does not have the money, he will not show up for class. And recall that, once an offender misses more than 3 classes, he must be terminated from the program and forfeit all investment he has made so far in the program. If he wishes to try again, he must start anew at the enrollment process. The constitutional infirmities with the foregoing scheme are two-fold.

First, recall from Section IIIC, \textit{supra}, that 70\% of the probationers that enrolled in an FVIP program but failed to complete it were unsuccessful because they were terminated for absences. In total, 55\%\(^ {210}\) of the probationers who were able to enroll in an FVIP course were subsequently terminated for absences. Given this sizeable number, it was suggested that at least some percentage of these offenders were violated for absences solely because they were unable to pay.\(^ {211}\) Absent a determination of willfulness, this would be a patent violation of \textit{Bearden}. That holding indicated that an ability to pay determination should be deemed by all states to be a constitutional element of any revocation. Thus, as some states have already done, the necessity of a showing of willfulness should be read into every condition of probation that involves payment. Georgia, however, permits revocation for failure to complete FVIP without requiring a court to first inquire into the defendant’s financial ability.

Second, Georgia’s scheme not only fails to require such a determination to be made by the court once a probation officer seeks revocation, it also permits service providers to act in violation of \textit{Bearden}. It allows service providers to blur the line between termination for absences and termination for failure to pay. Individuals who cannot afford the cost of FVIP either do not show up or are deemed absent when they do, which creates a false appearance of willfulness. Thus, a court wishing to comply with \textit{Bearden} and to make a determination of willfulness before revoking probation may often be misled. Even where a court wishes to inquire into a defendant’s reasons for failing to complete FVIP, many defendants may still be at risk of being revoked, despite the fact that it may be due solely to their indigency.

\(^{209}\) See Rule 125-4-9-.09(b)(2).

\(^{210}\) 126 offenders enrolled in FVIP; 69 were subsequently terminated for absences or for not beginning class in the first place.

\(^{211}\) This is especially so given that 80-90\% of criminal offenders are indigent. \textit{See supra} note 14.
VI. CONCLUSION

Thirty years after the U.S. Supreme Court decided *Bearden*, Georgia courts continue to revoke indigent offenders’ probation for failure to comply with conditions that require them to make payments. Empirical evidence shows that, even in Athens-Clarke County, one of the State’s most liberal counties, probations are being revoked for failure to complete statutorily mandated family violence classes without regard to a defendant’s ability to afford such classes. What began as a popular response to domestic violence has deprived Georgia’s most vulnerable citizens of their liberty and has created a system that is unjust, unequal, and, most importantly, unconstitutional. The implications for Georgia are two-fold.

Narrowly, this paper highlights the constitutional and practical infirmities of the FVIP regime. At all stages, the regime fails the indigent defendant. It creates an administrative structure in which the Department of Corrections provides virtually no oversight and leaves private service providers to make all the rules, governed exclusively by their profit margins. Georgia does all this without asking whether the classes actually work and without taking note of the fact that the majority of offenders never complete them. Thus, Georgians should ask whether FVIPs should be eliminated altogether, entirely restructured, or at least seriously studied with an eye toward major revision. Anything less would permit Georgia to continue violating the constitutional rights of its citizens.

More broadly, the foregoing suggests that Georgia needs to rethink its imposition of user fees on defendants as a means of funding its criminal justice system. If legislators wish to toughen penalties for certain types of crimes or to mandate rehabilitative sentences, they must internalize the costs of doing so. Policymakers cannot continue to push the costs of legislation off on Georgia’s poorest citizens who have become trapped in the criminal justice system. By doing so, we perpetuate a cycle of incarceration, poverty, and social opprobrium and render the constitutional promise of equal protection meaningless.

<p>| Table 1 |
|-----------------|-----------------|------------------|-----------------|-----------------|
| <strong>Service Provider</strong> | <strong>Location</strong> | <strong>Required Prior to Enrollment</strong> | <strong>Cost Per Class (Once Enrolled)</strong> | <strong>Termination Policy</strong> |
| | | | | |</p>
<table>
<thead>
<tr>
<th>Service Provider</th>
<th>Location</th>
<th>Assessment Fee</th>
<th>State Fee</th>
<th>Class Fee</th>
<th>Notes</th>
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<tbody>
<tr>
<td>Person Centered Court Services</td>
<td>Athens, Clarke Co.</td>
<td>$10 assessment</td>
<td>$40 state fee</td>
<td>$35/class</td>
<td>Will place participants on sliding scale from $5 to $35 “if they ask for help.” If someone is on Medicaid or disability, “they qualify” for a sliding scale. However, unemployment is not a “good enough reason” for reduced class fee. If participants show up for class and can’t pay, they won’t be deemed absent. Provider will extend credit for up to 30 days. If participant fails to pay after 30 days, will be terminated.</td>
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<td>Family Counseling of Athens</td>
<td>Athens, Clarke Co.</td>
<td>$100 assessment</td>
<td>$30 x 2 individual assessments</td>
<td>$30/class</td>
<td>Once registered, if participants can’t pay, provider will negotiate fee down to $10/class. *Note: provider has contract with court. Judge can order someone into an indigent slot, and they can attend for free. However, provider says court is reluctant to do so. Participants are supposed to pay every week, but they are never turned away from a class if they don’t have the money. However, participants will not get a certificate of course completion until all debts are paid off.</td>
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<tr>
<td>Redirect Counseling</td>
<td>Valdosta, Lowndes Co.</td>
<td>$50 intake</td>
<td>$35 orientation</td>
<td>$30/class</td>
<td>Offers classes on sliding scale between $30 and $65. But, in reality, all qualify for $30; have never charged someone $65. Their advertising says $30/week. Don’t require any documentation of indigency. Participants will be deemed absent if they don’t have $30. Limit is 2 payments behind. If they have to miss 3rd payment, not allowed to come into class.</td>
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<tr>
<td>Defying the Odds, Inc.</td>
<td>Atlanta, College Park, Fulton Co.</td>
<td>$50 evaluation/registration</td>
<td>$30/class</td>
<td>If trouble paying, it is participant’s responsibility to come in and let them know what’s going on (1 in every 25-30 people participants do this). At that point, they will talk about sliding scale. May cut Participants can have a balance of up to $100 after they’re registered. Beyond that, participants are deemed absent. With 3 absences, have to restart.</td>
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<td>Alternative Strategies</td>
<td>Decatur, Lithonia, DeKalb Co.</td>
<td>$60 evaluation appointment, $45 state fee</td>
<td>Participants can get behind 2 payments, and then they're deemed absent.</td>
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<td>Counseling Group</td>
<td>Augusta, Richmond Co.</td>
<td>$45 intake, $25/class</td>
<td>If participants can’t make payment, they will more than likely be deemed absent. They can speak with the facilitator about their financial situation. She'll have the ultimate call.</td>
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<td>Parent &amp; Child</td>
<td>Savannah, Chatham Co.</td>
<td>$45 evaluation, $20 orientation</td>
<td>Participants can’t be more than 2 payments behind or they will be deemed absent.</td>
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<td>Family Violence</td>
<td>Columbus, Muscogee Co.</td>
<td>$75 intake/orientation, Sliding scale $10-$75 based on yearly net income. Must bring in proof of income (e.g. pay stub, social security/benefit information, or something from unemployment office) and picture ID.</td>
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<td>Intervention Program of</td>
<td>Macon, Bibb Co.</td>
<td>$75 assessment, No pro bono slots. Might be able to reduce the cost down to $25/class. Decision made by Executive Director.</td>
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<td>Domestic Violence</td>
<td>Gray</td>
<td>$45 fee due at, $30/class</td>
<td>If participants can’t make payment, they will be deemed</td>
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<td>Alternatives</td>
<td>Jones Co.</td>
<td>first class</td>
<td>absent (have to wait until they can make payment). Must restart program after 3rd absence.</td>
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<td>After starting class, may offer discount (2-page financial sheet they must fill out). If no income, want to know who’s paying their rent, how they’re living. Cheapest someone could pay would be $20.</td>
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