THE FOREVER SCARLET LETTER: THE NEED TO REFORM THE COLLATERAL CONSEQUENCES OF CRIMINAL CONVICTIONS

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BATTERING THE POOR: HOW GEORGIA’S MANDATORY FAMILY VIOLENCE CLASSES DENY INDIGENT DEFENDANTS EQUAL PROTECTION OF THE LAW

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*Whitney Scherck*
# The Forever Scarlet Letter: The Need to Reform the Collateral Consequences of Criminal Convictions

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I. INTRODUCTION

In a national study, the American Bar Association ("ABA") found there are 38,000 federal and state statutory and regulatory restrictions and barriers for people that have a criminal record. 1 These "civil punishments" are called collateral consequences because they are imposed by operation of law and not part of the sentencing jurisprudence. 2 As a result, these punishments, which are mostly "riders" to other pieces of legislation, often go unnoticed by the general public and are not considered by the judiciary committees. 3 Such "invisible punishments" chip away from the core foundations necessary to provide support for the poor in our country. 4 They emphasize that one’s debt to society is never paid, and have been viewed as a tool for "internal exile." 5 In fact, studies show that collateral consequences have a negative effect on reintegration and increase recidivism. 6 Moreover, such growing collateral consequences are now affecting roughly 30 percent of Americans who have a criminal record, as well as 6.5 percent of citizens who are serving or have served a prison sentence. 7

With about 700,000 adults, 1,600 per day, leaving the state and federal prisons each year, the biggest challenge is determining how to reintegrate these individuals into our society. 8 A large, disproportionate number of those individuals return to urban “core counties” or low-income communities, which now deal with tremendous waves of returning ex-prisoners. 9 Furthermore, most of these individuals have serious social and medical issues, with about one in

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1 ABA, ABA Criminal Justice Section Collateral Consequences Project, NAT’L INST. OF JUSTICE (Jan. 5, 2012), http://www.abacollateralconsequences.org/CollateralConsequences/map.jsp.


3 Id.

4 Id. at 18.


8 Id. at 3. Also, note that 93 percent of the 1.6 million prisoners are at some point released. Id.

three suffering from mental illness and two in three having a history of substance abuse.\textsuperscript{10} Unfortunately, less than one-third of these individuals received any type of treatment while incarcerated.\textsuperscript{11} They are further excluded from society by voting disenfranchisement laws, which exist in all states except two.\textsuperscript{12} Even more, lack of education and skill hinder the reintegration process, as well as both the formal and informal stigma associated with having a prison record,\textsuperscript{13} which creates problems in acquiring employment and social benefits.\textsuperscript{14} These “invisible punishments” become a tool for social exclusion.\textsuperscript{15} When compared to other “institutionally similar nations,” the propensity to incarcerate for violent crimes is not different in the United States; however, for property and drug related crimes, the United States has the highest incarceration rate, as well as harsher, more permanent collateral consequences.\textsuperscript{16}

Even if one takes the view that these individuals deserve those collateral consequences, the denial of certain rights has a harsh effect on the ex-offender’s community.\textsuperscript{17} In fact, the communities that ex-offenders are returning to suffer disproportionately from lack of cohesion, unemployment, homelessness and family instability.\textsuperscript{18} When the number of barriers expands, an ex-offender’s “chances of succeeding in this environment are further reduced, with detrimental consequences for these communities.”\textsuperscript{19} Collateral consequences do not merely affect the prisoner or the prison system, but have vicious and brutal social, political, and economic consequences for a prisoner’s family and community.\textsuperscript{20} Such consequences either limit or completely bar lower-income individuals from the support system in our country.\textsuperscript{21} Furthermore, formal consequences hinder the ex-prisoner’s ability to gain employment or housing, which


\textsuperscript{11} Id. at 4, 50.


\textsuperscript{13} PETERSILIA, supra note 7, at 105-07.

\textsuperscript{14} Travis, supra note 2, at 16-18.


\textsuperscript{16} PETERSILIA, supra note 7, at 22.

\textsuperscript{17} Nora V. Demleitner, Collateral Damage: No Re-entry for Drug Offenders, 47 VILL. L. REV. 1027, 1048 (2002).

\textsuperscript{18} Id.

\textsuperscript{19} Id.; See D. A. Andrews & James Bonta, Rehabilitating Criminal Justice Policy and Practice, 16 PSYCHOL. PUB. POL’Y & L. 1, 39-55 (2010).

\textsuperscript{20} Demleitner, supra note 17, at 1048; see Andrews & Bonta, supra note 19, at 39-55.

\textsuperscript{21} Travis, supra note 2, at 18.
increases the chance of recidivism. Consequently, the community’s workforce becomes diminished, thereby resulting in the departure of businesses and the creation of less sustainable communities.

This article asserts that harsh and broad collateral consequences socially exclude ex-prisoners; are not effective in reducing future crime; are more longstanding than formal criminal sentences; impact poor and urban communities severely; and stand as a contrast to the modes of collateral consequences employed by other countries. This article also requests rehabilitation reform during imprisonment in an attempt to diminish the need for such collateral consequences, and finally encourages a reversal from the broad, status-generated punishments to recognizing redemption and setting reintegration as the goal. Part I details the history of the collateral consequence policies since the 1950s, noting the evolution from rehabilitation to continuous and permanent punishment, followed by an identification of demographics concerning soon to be released inmates. Part II briefly summarizes the growth of such collateral consequences, focusing on employment, housing, student loans, public benefits, and voting rights. This Part of the article also details the harsh reality created by some collateral consequences along with the lack of direct relation these collateral consequences have to the underlying offense. Part II notes how collateral consequences are not only ineffective, but also serve as a hindrance to the reintegration process by showing that current collateral consequences actually impede and counteract an ex-prisoner’s ability to be a productive member of the society, even though they have already served their time. Part III sets forth a comparative approach by describing the collateral consequences and conditions in Canada, Germany, Sweden, and England, to demonstrate how a similarly situated individual in the United States is in fact more stigmatized by the operation of law than an ex-prisoner in any of those four countries. Part IV provides a detailed summary of plausible explanations and arguments for the imposition of such harsh collateral consequences. First, Part IV discredits the argument that collateral consequences promote safety and minimize criminal activity. Second, this section analyzes the argument that, although facially neutral, such collateral consequences have a disproportionate effect, resulting in the criminalization of both the poor and minorities. Finally, Part V discusses recommendations for reform within the sentencing period and the process for pardons, and further advocates for a change in the drug-offense policies reflected through imprisonment and harsh, unrelated collateral consequences. Part V further argues that collateral consequences must be alleviated, and some even abolished, specifically felon disenfranchisement. If these harsh collateral consequences are not to be abolished, they must at least be proportional and directly related to the underlying offense. Finally, this section asks for a re-analysis and transformation in our philosophical and moral understanding of an ex-offender, appreciating their dignity rather than silencing and ostracizing them long after they have done their time.

23 Id.
II. HISTORY & IDENTITY OF THE PRISONER & EX-PRISONER

A. Ebb and Flow of Incarceration & Collateral Consequences

Today, the United States has the highest incarceration rate in the world. In 2011, our country incarcerated 1.6 million people, followed by 2.3 million in 2012. Consequently, for every 100,000 residents, there are 492 inmates. Considering that there are now approximately 700,000 individuals released from state and federal prisons each year, the impact of such high incarceration rates continues long after the end of an inmate’s sentence and regularly impacts minorities and low-income communities.

The numbers were not always this troubling. Since 1970, the federal and state prison population has increased by more than 700 percent. The overwhelming growth of incarcerations throughout the country is primarily due to a shift in sentencing and correction policy. Before the 1980s, the predominant policy consideration was one of indeterminate, treatment-orientated sentencing. As a result, many Supreme Court rulings granted rights and protections to inmates, and in 1955, the National Council on Crime and Delinquency proposed that the “civil rights” of an offender should be returned after his sentence. In 1973, the National Advisory Commission on Corrections contended that disenfranchisement was unnecessary and prohibited the reintegration process. Additionally, the ABA recommended that

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30 Michael Pinard, Reflections and Perspectives on Reentry and Collateral Consequences, 100 J. CRIM. L. & CRIMINOLOGY 1213, 1217 (2010).

31 Id.

32 Travis, supra note 2, at 20; See NATIONAL COUNCIL ON CRIME AND DELINQUENCY, STANDARD PROBATION AND PAROLE ACT § 27 (1955).

33 Travis, supra note 2, at 21.
civil disabilities not be automatically imposed, other than those directly connected to the offense and necessary for governmental or public interest, but rather, only impose civil disabilities for a limited time with a possibility of early termination upon review. However, contrary to past recommendations, the policy has been transformed from one of rehabilitation and reintegration to one of maintenance within prison and social exclusion outside of prison. In fact, the decrease in collateral consequences during the 1960s and early 1970s was not only reversed, but also expanded in the 1980s and 1990s. Such restrictions now relate to public benefits, and many target drug offenders as opposed to violent crime offenders. Beginning in the 1980s, both federal and state legislatures passed several laws and regulations that now restrict employment, parental rights, public housing, welfare benefits, child support, educational loans, and the right to vote. This phenomenon, although not necessarily new, is unique because the restrictions continue growing in number and are applied to a larger percentage of the American population: 59 million Americans, almost 30 percent of the country, have a criminal record and about 13 million are now serving or already have served a felony sentence.

B. Identity of Prisoners & Soon to be Ex-Prisoners

To better understand the implications of such harsh collateral consequences and to improve the current system, one must understand the identity of the soon to be ex-prisoner. This section will provide a brief overview of the demographics and characteristics.

1. Age

Approximately 61 percent of state and federal prisoners are aged 39 years old or younger, with 34 years of age being the average. This means that more than half of our prisoners, and possible ex-prisoners are very young. Given the large percentage of young ex-prisoners and the denial of access to basic citizenship rights and social programs, this not only has significant implications on their re-entry and reintegration process, but also their family and community.

34 Id.; Pinard, supra note 30, at 1218.
35 Pinard, supra note 30, at 1217.
36 Id.
37 Id. at 1218. Considering that the number of individuals imprisoned for drug possession has increased more than 1,000 percent an alarming percentage of our population is targeted and punished by post-sentencing restrictions. Don Stemen, Reconsidering Incarceration: New Directions for Reducing Crime, VERA INSTITUTE OF JUSTICE 8 (2007), http://www.vera.org/download?file=407/veraincarc_vFW2.pdf.
38 Travis, supra note 2, at 67-69.
39 PETERSILIA, supra note 7, at 136.
40 Id. at 24 (noting the average age in 1999).
41 Margaret C. Love, Paying Their Debt to Society: Forgiveness, Redemption, and the Uniform Collateral Consequences of Conviction Act, 54 HOWARD L. J. 753, 771 (2010-11) (stating that young ex-prisoners can be precluded from receiving public benefits, employment, educational loans, and housing).
2. Race

Based on a study by the Bureau of Justice Statistics, about 841,000 Black males, compared to 693,000 White males and 442,000 Hispanic males were held in state and federal prisons.\textsuperscript{42} Black males are incarcerated at rates six times higher than White non-Hispanic males and about three times higher than Hispanic males.\textsuperscript{43} In fact, we have more young Black men in the criminal justice system than in college, and 25 percent of Black males are estimated to experience a prison term before the age of 35, compared to fewer than 5 percent of White males.\textsuperscript{44}

3. Gender

Women are also rapidly growing among the prison population.\textsuperscript{45} Two-thirds of imprisoned women are minorities and about half are drug offenders.\textsuperscript{46} From 1986 to 1996, the number of women incarcerated for drug related crimes increased 888 percent.\textsuperscript{47} It is important to note the difference between the needs of male and female offenders, since about 57 percent of female prisoners have had prior physical or sexual abuse and have higher drug addiction rates than male prisoners.\textsuperscript{48} Female prisoners also have higher infectious disease rates than their male counterparts.\textsuperscript{49} The collateral consequences are gender-neutral and eschew consideration of the prominent role of women in child rearing, the subordinate role of women in crimes, and the lower rates of recidivism of women as compared to men.\textsuperscript{50} When a mother is imprisoned, the likelihood of a family being broken is greater than if a father is arrested; women are simply ostracized more than male offenders.\textsuperscript{51} Furthermore, about 1.5 million children have a parent in


\textsuperscript{43} Becky Pettit & Bruce Western, \textit{Incarceration & Social Inequality}, \textit{J. AMERICAN. ACAD. OF ARTS & SCIENCES} 8, at 11 (Summer 2010).

\textsuperscript{44} \textit{Id.}

\textsuperscript{45} \textit{PETERSILLA, supra note 7, at 26-27.}

\textsuperscript{46} \textit{Id.}


\textsuperscript{50} Harlow, \textit{supra note 48.}

prison, thus increasing the number of people that are affected by the collateral consequences placed on their parents.\textsuperscript{52}

4. Mental Conditions

Mental illness is an important consideration as it affects the success of reintegration, especially job placement.\textsuperscript{53} Such illnesses are often ignored, unless they become an explicit part of the offense or are very obvious at discharge. About 50 percent of prisoners have mental health problems.\textsuperscript{54} Furthermore, mental illnesses such as schizophrenia, anxiety, and bipolar disorders are disproportionately higher among inmates than the overall U.S. population.\textsuperscript{55}

5. Education

While education is not the direct cause of criminal convictions, those who are poorly educated are disproportionately found in prison.\textsuperscript{56} Seventy percent of inmates do not possess a high school degree, about 19 percent are completely illiterate, and a staggering 40 percent are functionally illiterate.\textsuperscript{57} Since the elimination of Pell grants for inmates in 1994, inmate college programs drastically declined, even though less than 1 percent of recipients were prisoners.\textsuperscript{58} These numbers are highly relevant because the lower one’s education level, the more likely they will be re-arrested.\textsuperscript{59} In fact, one study shows that every dollar spent on prison education yielded two more dollars in savings from re-incarceration costs.\textsuperscript{60}

\begin{flushright}
\textsuperscript{52}Pinard et al., supra note 15, at 600.
\textsuperscript{57}Id.
\textsuperscript{59}See generally, Denis Gottfredson et al., CRIME: PUBLIC POLICIES FOR CRIME CONTROL 149 (2002).
\textsuperscript{60}Peter Schmidt, College Programs for Prisoners, Long Neglected, Win New Support, Chronicle of Higher Education, CHRONICLE OF HIGHER EDUCATION, (Feb. 8, 2002), http://chronicle.com/article/College-Programs-for/30902. The study focused on prison education programs in Maryland, Minnesota, and Ohio.
\end{flushright}
III. BRIEF SUMMARY OF COLLATERAL CONSEQUENCES & EFFECTIVENESS

A. Current Conditions

Even though state spending on corrections has quadrupled over the past two decades,\(^{61}\) one commenter noted that educational and rehabilitative programs are among the first to be cut in times of fiscal belt-tightening.\(^{62}\) We spend $50 billion annually on corrections for in-prison rehabilitation programs, with some of the money being put into hiring more correction officers and constructing more prisons.\(^{63}\) Only one-third of all prisoners released received some sort of vocational or education training, and one-fourth received drug or alcohol substance abuse treatment (even though three-quarters of all inmates have some sort of alcohol or drug abuse problem).\(^{64}\) Moreover, while we have decreased in-prison rehabilitation services, we have increased barriers and statutory restrictions on ex-prisoners.\(^{65}\)

B. Employment

Employment is a vital factor for successful reintegration, but the likelihood of gaining employment as an ex-prisoner is often bleak.\(^{66}\) Aside from the stigma of being an ex-offender, other common obstacles to gainful employment include: (i) “low levels of education and previous work experience,” (ii) “substance abuse or other mental health issues,” (iii) “residing in poor inner-city neighborhoods,” and (iv) “a lack of motivation” and “alienation from of traditional work.”\(^{67}\) In addition, manufacturers are more willing to hire ex-offenders; however, those kinds of job are becoming almost non-existent as we move away from blue-collar jobs to a more service based economy. Further, since 1992, some states revoke or suspend the driver’s license of those with a drug-related felony for at least six months, causing a huge hinder on one’s


\(^{63}\) PEW, supra note 61.

\(^{64}\) PETERSILIA, supra note 7, at 105.

\(^{65}\) Id. A number of these statutory restrictions are the byproduct of the 1980s and 1990s “Get Tough” movement. Id. States vary from one another on restrictions, and some allow the restoration of such rights through passage of time, affirmative executive or judicial act, or occurrence of a specific event.

\(^{66}\) Id. at 113.

\(^{67}\) Id. (citations omitted).
mobility to find a job or even be hired without identification. Finally, almost all states restrict former offenders from being licensed in certain professions or trades.68

C. Housing

Although having a stable residence is essential to successful reintegration and continuance in substance abuse and mental health treatment, for an ex-prisoner, finding such a residence is nearly an impossible task. First, the private housing market is cost prohibitive, especially considering the ex-prisoner’s low income or lack of income. And even if the ex-prisoner can afford it, they are usually denied due to background checks. Second, under public housing, certain felons, such as drug offenders, are denied housing based on statutory restrictions.69 In fact, all members of the ex-prisoner’s household can be evicted for criminal activity committed by just one member of the household.70 Thus, such statutory restrictions do not merely impact the ex-offender, but have consequential effects on the community at large, as their relapse may create a vicious cycle of repeat offenses, imprisonment, fear within the community, and detrimental consequences to the family unit.

D. Student Loans and Public Assistance

An ex-prisoner’s eligibility for public assistance can be a very important component of a successful reintegration plan. Specifically, ex-drug offenders are denied access to student loans and other educational grants under the Higher Education Act of 1992.71 Considering that the majority of ex-offenders are young, education is an integral part of the reintegration process and the denial of access to higher education can create detrimental effects. Further, as stated above, finding secure employment is very difficult for ex-prisoners, who often need to participate in mental health, substance abuse, job training, or education programs.72 Without public assistance, many are left without a way to pay for necessities and treatment programs. In fact, some states permanently bar those with drug-related felonies from receiving federally funded public

68 Legal Action Ctr., After Prison: Roadblocks to Reentry—A Report on State Legal Barriers Facing People with Criminal Records, at 21-24 (2009), http://www.lac.org/roadblocks-to-reentry/upload/lacreport/Roadblocks-to-Reentry--2009.pdf. For example, even though many in-prison training programs are geared toward the barbering trade, many states bar former offenders from gaining their license in this profession.

69 Id.

70 Regina Austin, “Step on a Crack, Break Your Mothers Back”: Poor Moms, Myths of Authority, and Drug-Related Evictions from Public Housing, 14 YALE J. L. & FEMINISM 273, 274-75 (2002) (citations omitted). For example, even if one of the children of the family is convicted, his entire family will be denied public housing and may have to be placed in shelters.

71 Travis, supra note 2, at 24.

72 PETERSILIA, supra note 7, at 126 (citations omitted).
assistance and food stamps. Thus, even ex-prisoners convicted of a violent crime such as murder may at some point be eligible for welfare benefits and food stamps, while an individual, even if a first time offender, convicted of a drug related offense is completely barred. About 22 states permanently ban welfare benefits for those with drug felonies and 10 deny the benefits for a term.

Although many would view such treatment as “necessary” to punish the drug ex-offender, we have to look at who needs such government benefits. It is not the manufacturer or the large drug distributors of illegal drugs, but rather the poor, minor offender or addict ex-prisoner who is trying to “make it.” Even more, 65 percent of female prisoners, the fastest growing demographic within the prison population, have children. Therefore, it is not merely the ex-offender that is affected by such laws, but also their immediate family and children, who are often left with no safety net, because of the hardship ex-prisoner parents face in finding employment, thus leaving them without any access to welfare benefits.

E. Voting Rights

Over 5.3 million Americans are currently ineligible to vote because of their felon or ex-felon status; noteworthy is the fact that many of these people have already paid their debt to society by completing their sentences. With the exception of Maine and Vermont, all states have some form of law barring felons and/or ex-felons from voting; however, these laws vary from state to state as to when, if ever, voting rights may be restored. As discussed above, the indigent and racial minority populations are convicted at a disproportionate rate when compared to other socioeconomic groups; thus members of these populations, many of whom live, work, and raise families, are denied one of the most valued rights of American citizenship. Because both of these groups tend to vote for Democratic candidates, “disfranchisement laws have provided a small but clear advantage to Republican candidates in every presidential and

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75 See Petersilia, supra note 7, at 126.

76 Id.


78 Rottinghaus, supra note 77, at 29-31. Thirteen states permanently ban the right to vote for ex-felons.
A study by Uggen and Manza found that if about 15 percent of the nearly 900,000 disfranchised felons in Florida had been able to participate in the 2000 presidential election, Al Gore, rather than George W. Bush, would have prevailed in Florida. Regardless of one’s political views and party affiliation, there is no denying that a substantial population goes unheard because disenfranchisement laws serve as barriers to the ballot box, thereby alienating some American citizens from the political process. Thus, it is necessary that we re-examine felony disfranchisement laws and whether they serve a legitimate public purpose.

**F. Influence of Collateral Consequences on Reoffending**

It is imperative to examine whether such wide-reaching collateral consequences are effective in reducing recidivism rates. About two-thirds of former inmates are re-arrested and return to the prison system within three years of their release for a new act of crime; about 30 percent of such arrests occur within just the first six months. Recidivism rates are the highest among inmates originally incarcerated for property crimes (“crimes for money”) such as burglary, robbery, larceny, and theft of a motor vehicle, while drug offenders have the next highest rate of return. The lowest recidivism rates are from inmates who were originally imprisoned for crimes not motivated by the desire for material gain, such as homicide, sexual assault, rape, or driving under the influence of drugs or alcohol. This begs the question of whether collateral consequences, such as the inability to find employment, housing, or receive government assistance, promote or at least catalyze economic crimes. As some post-imprisonment restrictions apply for a limited time, many others are permanent and directly affect an inmate for more than just the first few years after release. There is a strong argument that such restrictions hamper the rehabilitation and reintegration process, resulting in new arrests of former inmates for economically related crimes that may have been avoided but for the extreme restrictions placed on former inmates.

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80 *Id.* at 797; see also Florida Department of State, Division of Elections, November 7, 2000, *General Election Official Results*, http://election.dos.state.fl.us/Elections/ResultsArchive/Index.asp?ElectionDate=11/7/2000&DATAMODE=.


83 *Id.*; PETERSILIA, supra note 7, at 141.

84 PETERSILIA, supra note 7, at 141.

85 Travis, supra note 2, at 24.
Moreover, there is correlation between age and the likelihood that one will reoffend. Recidivism is inversely related to age with about 80 percent of juvenile offenders who are released from correctional facilities being re-arrested, compared to 43 percent of those older than 45 years of age and older. This drastic difference may be attributed to the fact that many young offenders are incarcerated for drug-related offenses rendering them ineligible for student loans, at least for a specific period of time after release, under the Higher Education Act of 1998. Lacking the resources to get an education results in few legal means for former inmates to make money, which explains why “crimes for money” occur at such an alarming rate within the young offender population, thereby resulting in a higher recidivism rate.

IV. COMPARISON COUNTRIES

To provide possible suggestions, this article looks at the treatment of inmates as well as ex-prisoners in Canada, Germany, Sweden, and England. These countries were chosen because they are Western democratic societies and have similar prison reentry and reintegration issues. There are also specific similarities that will be detailed in each country’s section.

A. Canada

Both Canada and the United States’ laws originated from the British Common Law and have federalist political structures. Furthermore, as the United States’ incarceration rates have increased, so have Canada’s and, analogous to the disproportionate imprisonment of minorities in the United States, Canada disproportionately incarcerates Aborigines. However, in contrast to the United States, Canada has a more “liberal, penal welfare” policy, with higher rehabilitative treatments and programs available for inmates while in prison, and less harsh post-imprisonment restrictions. First, Canada only prohibits those on probation or parole from obtaining welfare assistance. Second, unlike the United States, it does not disenfranchise nor deny public

86 Petersilia, supra note 7, at 142.
87 Travis, supra note 2, at 24 (eligibility may be restored after meeting certain criteria).
91 Id. at 498.
housing to those with a felony conviction. In fact, the Canadian Supreme Court has stated that disenfranchisement excludes inmates from society and “undermines correctional law and policy directed towards rehabilitation and integration,” and has further stated that the right to vote allows prisoners to learn “democratic values and social responsibility.”

Although there are practical difficulties in obtaining housing caused by the informal stigma of a criminal record or lack of financial resources, there are no institutionalized statutory laws that exclude ex-prisoners. In the United States, pardons are rare and limited usually to misdemeanors or first-time offenders. Moreover, expunging or sealing may have no actual effect on certain federal collateral restrictions in America. On the other hand, Canadian ex-prisoners can have their criminal records pardoned, expunged, or sealed by the National Parole Board. It is available for not only those convicted of a misdemeanor, but also felonies. Unlike their American counterparts, the Canadian government approves 98.5 percent of all pardon applications.

B. Germany

Similar to the United States, beginning in the early 1990s, imprisonment population in Germany increased with drug offenders comprising one-fourth of the prison population. Dissimilar to the United States, in 1976, the Prison Act, a result of decisions by the Federal Constitutional Court of Germany, explicitly identified reintegration as the goal of corrections. Thus, the Prison Act provides: “[w]hile serving the sentence, the prisoner shall be enabled to lead, in social responsibility, a life without criminal offences (goal of corrections). The execution of the prison sentence also serves to safeguard the public of further [offenses].”

Further, Section 3 of the Prison Act notes the following three principles that are to guide prison practice and the interpretation of the Act: (1) the principle of normalization, as in life in prison...
must resemble, as much as possible, general living conditions outside prisons; (2) the principle of damage reduction, where the “damaging consequences” of imprisonment must be counteracted; and (3) the principle of integration, where prison life is organized to help prisoners integrate themselves into society after imprisonment. Thus, German principles stand in sharp contrast to the punitive ideologies perpetuated through the United States current and post-incarceration systems.

One of the fundamental programs present in Germany’s correctional system is the “individual reintegration plan.” A thorough assessment is carried out at the very beginning of the inmate’s prison term, focusing on factors that are essential for methodical treatment and reintegration after release. The assessment involves prison administrators investigating the inmate’s background to create tools and plans for re-entry. The plan is created for specific workplace or training placement with individualized goals and tools for measurement. The plan is revised throughout the inmate’s sentence and fully discussed with him. The first step to rehabilitation and reintegration is to provide individualized assessments for reintegration when inmates are admitted initially, which continue through the end of their sentence, instead of at the end. Considering the decrease in rehabilitation and reintegration programs, one cannot find such an attentive, individualized plan in the United States. In Germany, once convicted and after sentencing, the inmate is transferred to a prison located in his home region. The benefits that it creates are stability in the assessment planning and sustainability of the essential connections with family and community. In addition, through a practice called “work-day releases,” a prisoner is released to “sample” a particular work with external employers or to attend education and training courses, viewed as an integral part of the “normalization” principle stated above.

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103 Id. However, beginning in 1998, some politicians have demanded a more punitive system.

104 Id. at 371.

105 Id.

106 Id. at 372.

107 Id. at 371-72.

108 Id at 371. Although it should be noted that these individualized plans are far from perfect, since they depend on the implementation by the specific state. Some have designated diagnostic facilities that analyze and classify inmates before serving imprisonment, while other states the inmate is assessed while serving his sentence. Further, some prisons have brought the individual reintegration planning to mere bureaucratic exercise, where forms are merely completed lacking content and attention.

109 Id.

110 Id at 372.

111 Id.

More than 70 percent of ex-prisoners continue to work with that particular employer after release and others are able to secure positions through experience gained while in prison.\textsuperscript{113}

\section*{C. Sweden}

Sweden is somewhat similar to Germany in its treatment of its prisoners and ex-prisoners.\textsuperscript{114} In Sweden, the philosophy is that prison is the last possible resort, with alternative sanctions being more prevalent.\textsuperscript{115} Such alternatives include fines, conditional sentences, probation, and commitment to special care.\textsuperscript{116} In fact, the legislature and judiciary have continued to aim at decreasing prison sentences and finding alternatives that do not take an individual’s liberty.\textsuperscript{117} Unlike the United States, the Swedish prison population has actually decreased, due to imprisonment alternatives such as electronic monitoring.\textsuperscript{118} Even more, once imprisoned, the policy is to promote prisoner reintegration and re-socialization while counteracting the adverse consequences of imprisonment\textsuperscript{119} In contrast to the United States, the Prison Administration in Sweden is under a statutory duty to give prisoners work, but prisoners are also under obligation to work or participate in vocational training or education, some of which takes place outside of prison.\textsuperscript{120} The philosophy is one that “every person deprived of freedom must spend the time in a useful way” and thus, education or work must be available.\textsuperscript{121} Swedish law also has day or short-term releases, with prison administration discretion, so inmates can remain outside the prison to work, participate in drug or mental health treatment, or take part in vocational education, which may be continued once the individual is on parole.\textsuperscript{122}

\begin{itemize}
\item \textsuperscript{113} Id. at 57. Moreover, if an ex-prisoner is unable to find work after a period of time from being released, they are able to receive unemployment benefits. HERTA TÓTH, Women, Integration and Prison: An Analysis of the Processes of Socio-Labor Integration of Women After Prison in Europe, COMPARATIVE REPORT BASED ON NATIONAL REPORTS’ FIELDWORK FINDINGS, at 45 (March 2005), available at http://cps.ceu.hu/sites/default/files/publications/cps-working-paper-mip-comparative-report-short-verison-2005.pdf.
\item \textsuperscript{114} Id. at 154.
\item \textsuperscript{115} Id.
\item \textsuperscript{116} Id.
\item \textsuperscript{117} Id. at 154.
\item \textsuperscript{118} Id. at 155. Compare to the United States’ 1.6 million prisoners or 492 inmates for 100,000 residents.
\item \textsuperscript{119} Id.
\item \textsuperscript{120} 322 ch. 10-12 § (SFS 1974: 203) (Swed.).
\item \textsuperscript{121} Id.
\item \textsuperscript{122} Rehabilitation of Prisoners, supra note 112, at 156-57.
\end{itemize}
D. England

Similar to the United States, ex-prisoners in England deal with several barriers and restrictions after incarceration. However, the amount and type of crimes that can make an ex-prisoner ineligible are much narrower in scope and many are only temporary.

English ex-prisoners have significant difficulty in securing employment and housing. Several English laws make those with a criminal record ineligible for professional trades, and the stigma of a criminal record carries the same consequences prevalent in the United States. Yet, since England has recognized the parallel between increased recidivism and unemployment, it has established services that attempt to find employment for such individuals, while asking and urging its citizens to hire those with criminal records to decrease such recidivism. Ex-prisoners in England are given benefits such as Job Seekers Allowance and Crisis Loans. Further, only those with welfare fraud convictions are restricted from receiving welfare benefits, and such ineligibility is restricted to a period of four weeks following release. This is in contrast to an ex-felon in the United States, who is permanently banned from welfare benefits not just for fraud offenses but also for minor drug offenses, even if the individual is a first time offender. In addition, convicted inmates in England cannot vote during their sentencing period; however, their right to vote is immediately restored upon release. Recently, the European Court of Human Rights, which is overseen by the Council of Europe, ruled that a blanket ban on sentencing inmates is also illegal. Therefore, it is possible that with enough public and international pressure, England will restore prisoners’ right to vote.

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123 Pinard, supra note 90, at 495.
124 Id.
125 Id.
126 Id.
127 Id. at 496-97. However it should be noted that application for such programs is often complicated and contains large logistical hurdles.
128 Id.
129 Travis, supra note 2, at 23.
130 Pinard, supra note 90, at 497.
131 Council of Europe warns over UK’s prisoner vote option, BBC News (Dec. 10, 2012), http://www.bbc.co.uk/news/uk-politics-20667357. Though it seems that the Parliament is opposed to drafting such a bill, and its opposition could lead to strain relations and England leaving the European Convention on Human Rights.
132 Id.
V. POSSIBLE EXPLANATIONS FOR COLLATERAL CONSEQUENCES

This Article examines the two most common arguments or plausible explanations for the broad and harsh post-imprisonment restrictions prevalent throughout the United States. These arguments also demonstrate the differences in foreign policy between the United States and the nations stated above. Current post-imprisonment restrictions for traditional purposes of punishment are categorized as deterrence, prevention, retribution, and incapacitation, which are neither rehabilitative nor consistent with rehabilitation or reintegration purposes.\(^{133}\) Considering that the United States incarcerates more of its citizens than any other country,\(^{134}\) it is necessary to examine the plausibility of such explanations while also considering political, cultural, and social factors prevailing in the United States.

A. Collateral Consequences to Promote Safety and Minimize Criminal Activity

Purported by those who call for a change from rehabilitation to more “get tough” policies\(^ {135}\); an argument exists that harsher collateral consequences promote decreased criminal activity and improved public safety. However, this argument is problematic for several reasons. First, most of the current collateral consequences, such as inability to receive public housing or educational loans, do not directly coincide with the underlying offense, and thus, do very little to actually prevent future harm.\(^ {136}\) Second, the recidivism rate for ex-inmates is significant, as approximately two-thirds of ex-inmates are repeat offenders,\(^ {137}\) with such rates most significant for economic crimes.\(^ {138}\) Therefore, instead of decreasing crime, the harsh and mostly unrelated collateral consequences actually catalyze re-offending individuals.

There is also an argument that the general public demands such harsh consequences to ensure public safety.\(^ {139}\) Since 1980, between 70 and 90 percent of the American public believes that criminals receive lenient treatment in courts.\(^ {140}\) Although this assertion supports a more

\(^{133}\) Travis, supra note 2, at 26.


\(^{136}\) Id.; On the other hand, certain collateral consequences, when they are directly related to the underlying crime, may hold to be more effective in preventing future crime. For example, child sex offenders are barred from employment in context with children. As opposed to a low-level drug offender who is unable to get an educational loan.

\(^{137}\) Cole, *supra* note 18, at 20; Petersilia, *supra* note 7, at 143.


\(^{140}\) Travis, *supra* note 2, at 27-28 (study done by the General Social Survey).
punitive treatment of prisoners, a survey conducted by the Gallup organization found that between one-half to two-thirds of Americans favor “educations and jobs to address ‘the social and economic problems that lead to crime’ as opposed to ‘more prisons, police, and judges.’”

This survey demonstrates that the American public favors policies that prevent individuals from ever becoming offenders, supporting the argument that the United States should focus on creating policies that advocate social programs that prevent crimes from even occurring.

Conversely, others argue that harsher collateral consequences act as a deterrent, no matter the public opinion or relation to the underlying offense; however, a basic requirement for deterrence is that those whom the collateral consequence are intended for are actually aware of such consequences. The current collateral consequences are “invisible punishments” because: (i) they take outside of the traditional sentencing process (i.e. are statutory imposed rather than by judicial decisions); (ii) are usually “riders to other, major pieces of legislation”; and (iii) are part of a complex and dispersed set of laws across states. Therefore, not only are such collateral consequences “invisible” to those within the criminal justice system, but also those outside the intended reach. Ultimately, the invisibility of collateral consequences essentially fails its deterrence purpose.

B. Race-based Policy of “War on Drugs” & its Collateral Consequences

Many scholars argue that “War on Drugs” policies had, and continue to have, a tremendous impact on minorities and impoverished communities, especially Black Americans. Similarly, some argue that such movements not only disproportionately affect minorities, but were created with race as a silent motivating factor. Today, the United States stands out from other countries of similar standing as being far more punitive in its treatment of drug offenders. Admission increased most dramatically for Black drug offenders, followed closely

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141 Id.

142 Further, even if the punitive view is the current political and general public view, the collateral consequences held by various courts do not constitute criminal punishment (as would be required by a punitive approach) but rather “civil disabilities.” See Smith v. Doe, 538 U.S. 84, 105 (2003); see also United States v. Ward, 448 U.S. 242, 249 (1980).


144 Travis, supra note 2, at 16-17.


146 Id. at 4; TODD R. CLEAR, IMPRISONING COMMUNITIES: HOW MASS INCARCERATION MAKES DISADVANTAGED NEIGHBORHOODS WORSE 54-55 (Oxford University Press 2007).

by Hispanic offenders.\textsuperscript{148} The increase in admission for White drug offenders, however, is considerably less dramatic.\textsuperscript{149} Although this article does not attempt to prove the effectiveness of the “War on Drugs” policies or the considerable racial disparities present in said policies, race can provide critical insights as we attempt to reconfigure current policies, particularly when considering that many of the collateral consequences of criminal convictions explicitly impact ex-drug offenders.\textsuperscript{150}

Some scholars analogize the current expansion of collateral consequences with Jim Crow laws.\textsuperscript{151} This analogy is strongly evidenced by felon disenfranchisement.\textsuperscript{152} Incarceration was a tool employed to control former slaves following emancipation, with sentences carried out not in reformatories but rather labor camps.\textsuperscript{153} The theory of imprisonment being utilized as an alternative to enslavement was especially demonstrated by the disproportionate number of Black Americans who are sentenced.\textsuperscript{154} Between 1890 and 1910, disenfranchisement grew markedly in the south and in Texas, where poll taxes, literacy tests, grandfather clauses, and, most importantly, criminal disenfranchisement laws were designed to specifically single out Blacks.\textsuperscript{155} Today, roughly 13 percent of Black men—seven times the national average—do not have the right to vote.\textsuperscript{156} About 4 million Americans, or 1 out of 50 adults, do not have the right to vote; 1.4 million of those individuals being Black men.\textsuperscript{157} In fact, one in every four Black men in Iowa, Mississippi, New Mexico, Virginia, Washington, and Wyoming, and one in every three Black men in Alabama and Florida are permanently disenfranchised.\textsuperscript{158} With a disproportionate number of Black American men returning to more urban, minority-dominated areas, decrease in

\textsuperscript{148} Petersilia, supra note 7, at 29.

\textsuperscript{149} Id.

\textsuperscript{150} See supra Part II.

\textsuperscript{151} Alexander, supra note 145, at 186-87.

\textsuperscript{152} Id. at 187-88.


\textsuperscript{154} Petersilia, supra note 7, at 29.


\textsuperscript{156} Erika Wood, Restoring the Right To Vote, BRENNAI CTR. FOR JUSTICE, 1, 6-7 (2009), http://brennan.3cdn.net/5e8532ee8134b233182_z5m6ibv1n.pdf.

\textsuperscript{157} Rottinghaus, supra note 77, at 28. Further, it is important to note that this number does not include the women, even though minority women are the fastest growing group in prisons. AMERICAN CIVIL LIBERTIES UNION, Facts About the Over-Incarceration of Women in the United States, (Dec. 12, 2007), https://www.aclu.org/womens-rights/facts-about-over-incarceration-women-united-states.

\textsuperscript{158} Rottinghaus, supra note 77, at 29.
political power of such communities is perpetuated, which results in less attention and support from politicians.\textsuperscript{159} In addition to the decrease in power politically, “War on Drugs” policies create numerous other post-imprisonment consequences, such as disqualification from student loans.\textsuperscript{160} At the same time, the majority of offenders convicted of drug offenses are Blacks and Hispanics, even though studies indicate that Whites have higher drug use rates.\textsuperscript{161} Even if one assumes such policies do not consider race as a factor, there is still strong evidence that a disproportionate percentage of our population, especially Blacks and Hispanics, are the ones who continue to bear the excessively harsh consequences.

Although it would be foolish to blindly implement policies from other countries without taking into consideration the differences in historical and cultural backgrounds, it may help to compare the remedial steps taken by some other countries mentioned above. As discussed in Part III, Canada disproportionately incarcerates Aborigines; however, in 1996 Canada codified a statute that requires judges to pay “particular attention to the circumstances of aboriginal offenders,” and the Canadian Supreme Court noted that Aborigines have “circumstances . . . [that are] unique, and different from those of non-aboriginal offenders.”\textsuperscript{162} Even more, in \textit{Suave v. Canada}, the Canadian Supreme Court overruled a statute disenfranchising inmates with two or more years of incarceration, noting that with “disproportionate number of Aboriginal people in penitentiaries” such disenfranchisement would result in a “disproportionate impact on Canada’s already disadvantaged Aboriginal population.”\textsuperscript{163} This is a strong indication that, even if we do not incorporate policies directly from other countries, we need to rethink our current collateral consequences resulting from criminal convictions as it continues to create harsher and more institutionalized “us” versus “them” ideologies in the United States.

\textbf{VI. Recommendations}

As shown by the above data and country comparisons, harsh, broad, and invisible collateral consequences hinder the reintegration of United States ex-offenders. This practice continues to punish and stigmatize an ex-offender far after his release. In light of the fact that

\begin{itemize}
  \item Pinard et al., \textit{supra} note 11, at 603.
  \item See \textit{supra} Part II.
  \item Gabriel J. Chin, \textit{Race, The War on Drugs, and the Collateral Consequences of Criminal Conviction}, 6 J. GENDER RACE \& JUST. 253, 265-66 (2002) (stating that whites “seem less likely to be arrested; if arrested, less likely to be convicted; and if convicted, less likely to be imprisoned” even though they “represent the vast majority of drug [users]”).
  \item \textit{Suave}, 3 S.C.R. at 523 (Can.).
\end{itemize}
this affects both the offender and the community they return to, this article proposes several recommendations considering the lessons learned from the comparison countries. Although there are numerous changes to policy that should be made, the most integral is how to better reintegrate the ex-offender back into his community so that they may become a productive member of society. The suggested reforms include the following: (1) make collateral consequences visible; (2) implement targeted rehabilitative programs and community involvement; (3) apply easier process for pardons and certifications; (4) reexamine the collateral consequences for ex-drug offenders; (5) alleviate invisible punishments and link proportional consequences with the underlying offense and rehabilitation progress; and (6) change our philosophical and cultural perspectives on ex-offenders returning to society.

A. Make Collateral Consequences Visible

Before we can implement change, we must first recognize that legislation authorizes an increasing number of collateral consequences, which in essence are permanent punishments. Although this article refers to them as “invisible punishments,” to better deal with the issues as stated above, we need to make them visible.\textsuperscript{164} This includes uniformly codifying both federal and state collateral consequences, requiring more thorough analysis by the legislature, and demanding that the offender acknowledge the potential collateral consequences.\textsuperscript{165} As they become more visible, not only will deterrence increase, but it will also help the general public question the disproportionate effect on the poor and minority groups as well as its ineffectiveness, thus eventually leading to reform.

B. Implement Targeted Rehabilitative Programs & Community Involvement

Rehabilitative reform during imprisonment will help smooth the reintegration process and eliminate the need for collateral consequences. First and foremost, during imprisonment and the transition period, mental health or substance abuse programs and work and education trainings must improve. Additionally, the prison culture must change to better reflect the outside world and incorporate prison officials in implementing each prisoner’s reintegration as one of their core responsibilities. Similar to Germany and Sweden, our goal for imprisonment should be beyond punishment; as such, we must identify reintegration as the main goal. Such reintegration begins during imprisonment and continues throughout the collateral consequences. Although this article

\textsuperscript{164} TRAVIS, supra note 5, at 75-76.

\textsuperscript{165} For example, the Public Defender Service's Civil Legal Services, in D.C., specifically informs its clients on related collateral consequences. Avis E. Buchanan, Fiscal Year 2013 Cong. Budget Justification, PUB. DEFENDERS SERVICE FOR D.C. 11-12 (Feb 13, 2012.), http://www.pdsc.org/Resources/Publication/PDS%20FY%202013%20Budget%20Justification%20-%20FINAL%20Feb%202013%202012%209%23am.pdf.
does not attempt to give a thorough recommendation for in-prison treatment, it is important to note that incorporation of the improvements noted below, there will be no need for such harsh and broad collateral consequences to control the ex-offender. Even more so, the current collateral consequences actually hinder the success of reintegration, thereby counteracting the rehabilitative benefits.

1. Treatment, Training, and Pre-Release Programs

While numerous studies show that rehabilitation programs actually reduce recidivism with highly successful rates, states are cutting many of these programs because of budget constraints. There are several forms of rehabilitation regimes, the most common include: (i) education; (ii) needs assessments; (iii) vocational training; (iv) employment; (v) behavioral, mental health, and substance abuse treatment; and (vi) resettlement in community through assistance in finding employment and housing. However, all prisoners are not the same, and it would be unwise to apply every rehabilitative program to every inmate. Much like the individualized plans created for inmates in Germany, each American inmate program should be customized, identifying measurable goals and tools from the beginning and implementing them post-release. It should focus on the inmate’s background, knowledge, and capabilities to build training and workplace programs. For younger offenders, educational programs are more beneficial, whereas for older offenders, job placement services are more effective and useful. Many argue that this would be a costly decision; however, a study by the Washington State Institute for Public Policy showed that the ratio of benefits per dollar of costs is actually positive for every correctional treatment, with work release programs receiving the highest ratio. In Germany, work release programs have been very successful, resulting in 70 percent of inmates maintaining a job with that employer after release. The goals of such work release programs are to prepare inmates for work after prison and connect them to work opportunities in their own communities. This article places more importance on employment and education programs, because recidivism rates are highest in economic crimes. Although one can argue several other factors for recidivism, several studies show there is an inverse relationship between employment and involvement in crime. Not only is it a “basic human” right to give an ex-offender a fair


167 Rehabilitation of Prisoners, supra note 112, at 11-12.

168 Petersilia, supra note 7, at 120.

169 Id. at 178-79.

170 Rehabilitation of Prisoners, supra note 112, at 56.

chance to seek employment, it is also “one of the surest ways to reduce crime.” Employment encourages desistance by the following: (i) reduction in “association[s] with criminal peers by expanding social networks to include more law-abiding citizens”; (ii) disassociation with criminal identity and adoption of a pro-social role; and (iii) reduction in crime due to an alternate source of financial support. Furthermore, pre-release programs have become a “shallow institutional ‘after thought’ of little importance.” If pre-release programs are given more thought and attention, the need for such broad and harsh collateral consequences becomes obsolete. In addition, because there are obvious and well-founded concerns with the costs associated with such programs, both in and out of prison, the most cost-effective suggestion is to eliminate the formal, statutory-based collateral consequences restricting employment opportunities, job training, and educational funding, especially for those whose underlying offense does not related to the collateral consequence.

2. Promote Responsible Behaviors

Even if the system promotes and implements various rehabilitative programs, the reality is that the inmate, once released, is essentially on their own and with little support. The current prison system is one that prison officials decide “when, where, and with whom prisoners will work, live, eat, and play.” Such control may be necessary for management; however, it harms the prisoner’s ability to survive in the outside world, where he, not the official, will be responsible for his decisions. Thus, his daily life in prison should somewhat resemble the one he will have outside. This idea, entitled “Parallel Universe,” was developed by Dr. Schriro and consists of four components, where each inmate: (i) works or attends school, and receives mental and substance abuse treatment (as applicable) during working hours; and participates in community service, reparative activities, and recreation during non-working hours; (ii) must retain relapse prevention strategies while abstaining from unauthorized activities; (iii) must earn opportunities to make choices and is held accountable for those choices; and (iv) is recognized for good conduct. In fact, there is an interview process for the in-prison job, and as the inmate’s education increases, his pay increases. This program was applied in Missouri, where

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172 Radice, supra note 133, at 722.
173 See Christopher Uggest et al., Work and Family Perspectives on Reentry, in PRISONER REENTRY AND CRIME IN AMERICA 209, 234 (Jeremy Travis & Christy Visher eds., 2005).
174 Petersilia, supra note 7, at 184 (noting that only 12 percent of state prisoners participate in prerelease programs).
175 Uggest et al., supra note 173 at 235, 237.
176 Petersilia, supra note 7, at 182.
177 Id. at 183.
178 Id. at 184.
recidivism rates decreased 13 percent after implementation.\textsuperscript{179} Since there is an almost colonized culture within prisons, an inmate’s personal accountability is diminished, which negatively affects reintegration. With an increased sense of personal accountability, the need for invisible punishments to control or decrease recidivism weakens and may even work against the reintegration of the now accountable ex-offender.

\textit{C. Apply an Easier Process for Pardons and Certificates of Good Conduct}

Although we have a system for pardons or certificates of good conduct and/or rehabilitation, both are given infrequently and are very difficult to obtain.\textsuperscript{180} On the other hand, in Canada about 98.5 percent of such pardons are approved if the ex-offender is crime-free for a period of time.\textsuperscript{181} Similarly, under England’s Rehabilitation of Offenders Act, if no felony occurs after a period of time, the criminal conviction is “spent,” or ignored.\textsuperscript{182} Furthermore, minor offenses such as misdemeanors do not influence that time period; instead, the rehabilitation time period is based on the sentence period.\textsuperscript{183} If such a rule is applied in the United States, the invisibility of such collateral consequences can be alleviated since the judge may consider such rehabilitation period as it correlates with the sentence. Yet, even though we have the second highest incarceration rate, we also have an excruciatingly difficult process when it comes to removing the stigmatizing effects of a criminal record.\textsuperscript{184} Beyond the practical effects (e.g. employment), “wiping the slate clean” allows the ex-offender, legally, to “rewrite his or her history to make it more in line with his or her present, reformed identity.”\textsuperscript{185} Rewriting can help alleviate the self-fulfilling prophecy and the antisocial behaviors.\textsuperscript{186} Humans reframe their experiences, expectations, and explanations from their self-concept, which is derived from labels others place on them.\textsuperscript{187} Thus, criminal labels actually diminish the ex-offender’s ability to change, increase recidivism, and promote community ostracism.\textsuperscript{188} A more effective process in

\textsuperscript{179} See \textit{id.} at 184.
\textsuperscript{180} \textit{Id.} at 216.
\textsuperscript{182} See Rehabilitation of Offenders Act, 1974, c. 53 (Eng.). However, compared to other European countries, this Act is actually tougher with longer rehabilitation periods. It, however, is still less harsh than pardon rules found in the United States.
\textsuperscript{183} See \textit{id.}
\textsuperscript{184} Pinard, \textit{supra} note 90, at 504.
\textsuperscript{185} \textbf{SHADD MARUNA}, \textbf{MAKING GOOD: HOW EX-CONVICTS REFORM AND REBUILD THEIR LIVES} 164 (Russ Immarigeon 2000).
\textsuperscript{186} See Bruce J. Winick, \textit{Sex Offender Law in the 1990s: A Therapeutic Jurisprudence Analysis}, 4 PSYCHOL. PUB. POL’Y & L. 505, 539 (1998); \textit{see also} PETERSILIA, \textit{supra} note 7, at 219. This “rebiographing” is already applied to juvenile records upon adulthood and credit histories after a set time period.
\textsuperscript{187} PETERSILIA, \textit{supra} note 7, at 227.
\textsuperscript{188} \textit{Id.}
removing criminal history must be implemented by displacing relevant collateral consequences in order to break the “us” and “them” dichotomy, and allow ex-offenders to become productive, free citizens.

D. Re-analyze Drug Offense Policies

The United States must change its policies as applied to drug offenders, especially those with minor offenses. For these populations, imprisonment provides little benefit, but a vast amount of harm is done, especially with broad, unrelated collateral consequences. Furthermore, as discussed above, “War on Drugs” policies have disproportionately affected the poor, women, and minorities.\textsuperscript{189} Therefore, it is vital to re-think our goals and the actual effectiveness of such harsh and expanded collateral consequences. Today, an unbalanced number of restrictive collateral consequences, as well as a vast portion of our limited criminal justice spending, results from drug offense-related incarcerations, as opposed to violent crimes.\textsuperscript{190} The annual operating cost for drug offenders in federal and state prisons is $6 billion.\textsuperscript{191} Furthermore, the majority of those imprisoned are low-level offenders, though numerous studies show little benefit in criminal behavior or crime reduction of low-level drug offenders.\textsuperscript{192} This is especially true since most drug crimes function as “businesses,” where each individual fills a necessary role, easily replaced by another.\textsuperscript{193} Even though criminologists continue to discourage reliance on imprisonment and harsher post-imprisonment policies, legislatures continue to pass and advocate for tough-on-crime laws that target drug offenders.\textsuperscript{194} On the other hand, about three-quarters or 76 percent of Americans favor supervised drug treatment and community service as opposed to prison time for drug offenders.\textsuperscript{195} It is clear that a change is necessary. Non-violent and low-level drug offenders should be treated with community-based programs and given access to education, training, and job programs. Prisons should be the last possible resort because, as

\textsuperscript{189} See Barbara Bloom et al., \textit{Women Offenders and the Gendered Effects of Public Policy}, 21 REV. OF POL\'Y RES. 31, 38 (2004); Jamie Fellner, \textit{Race, Drugs, and Law Enforcement in the United States}, 20 STAN. L. & POL\'Y REV. 257, 257 (2009). The Human Rights Watch reported that, in seven states, Blacks constituted 80 to 90 percent of all drug offenders sent to prison, and in fifteen states, Blacks are admitted to prison on drug charges 20 to 57 times greater than Whites. ALEXANDER, supra note 145, at 96. On the other hand, Blacks were no more likely to be guilty of drug crimes than Whites, while White youth are more likely (about three times) to have illegal drugs than Black youth and White youth actually comprise the vast majority of drug users and dealers. \textit{Id.} at 97; See Fellner at 266-68. Thus, the notion that Blacks have higher rates of drug abuse is unfounded.

\textsuperscript{190} See Pinard, supra note 90, at 459.

\textsuperscript{191} PETERSILIA, supra note 7, at 226.

\textsuperscript{192} Marc Mauer & Michael Coyle, \textit{The Social Cost of America's Race to Incarcerate}, 23 J. RELIGION & SPIRITUALITY IN SOC. WORK: SOC. THOUGHT, 7, 14 (2004) (stating that expanding prison population through low-level drug offenders has very little influence on the crime or drug abuse.).

\textsuperscript{193} Id.

\textsuperscript{194} Id. at 11-15.

shown above, imprisonment of drug offenders does not reduce recidivism or allow for successful reintegration.\textsuperscript{196} Prisons are “warehouses for outcasts; they put problem people at a distance from those who may shame . . . and . . . help reintegrate them.”\textsuperscript{197} In fact, drug treatment and therapeutic community programs outside of prison, such as work release, yield a benefit of $8.87 for every dollar spent.\textsuperscript{198} In contrast, in-prison treatments only yield a benefit of $1.91 to $2.69 for every dollar spent.\textsuperscript{199} Moreover, states can save money by mandating treatment instead of incarceration.\textsuperscript{200} On the other hand, “[b]y linking treatment to punishment, these programs risk having a counter therapeutic effect because they stigmatize the user” and “would-be employers may refuse to hire users with a record of incarcerations” which “may ultimately slow recovery.”\textsuperscript{201} After all, such imprisonment results in both the formal and informal collateral consequences listed above. Similar to Sweden, there must be reform in our treatment of drug offenders, with re-commitment to special care or probation as alternatives and promotion of reintegration and readjustment with drug treatment programs, family, and community support services. Overall, imprisoning drug offenders is more costly and less beneficial. It disproportionally singles out minorities in our country without fixing community problems and fails to successfully reintegrate ex-offenders in our community, placing harsh and broad post-imprisonment consequences on them. The collateral consequences for drug offenders, such as denial of student loans or housing, should be removed as they are not only ineffective but also harmful to the ex-offender’s reintegration process and participation in his community.\textsuperscript{202} Reconnecting an ex-offender with legitimate employment is also crucial to sustaining recovery and reducing recidivism.\textsuperscript{203} “Chronic joblessness or underemployment limits their ability to leave the drug-crime lifestyle, to support a family and to successfully transition from the treatment program to the community.”\textsuperscript{204} Additionally, many former drug-offenders are ineligible for federal education grants or loans, membership in certain jobs, and public assistance programs, thereby compounding the fact that most lack social, educational, or vocational training or skills to find

\begin{footnotesize}
\textsuperscript{196} See Petersillia, supra note 7, at 245.
\textsuperscript{197} Id.
\textsuperscript{199} Id.
\textsuperscript{200} Id. at 6, 15. In fact, the yearly cost of incarcerating a drug offender versus treatment in California is $27,000 as opposed to $4,500. That is a saving of $22,500 per person, per year. In Maryland, the cost of incarceration per year is $20,000 as opposed to $4,000 for cost of treatment. \textit{Id.}
\textsuperscript{202} See McVay et al., supra note 198, at 17.
\textsuperscript{203} Id. at 18.
\textsuperscript{204} Id.
\end{footnotesize}
and sustain employment.\textsuperscript{205} Therefore, many of these collateral consequences must be removed because they are ineffective and unrelated to the underlying offense.

\textbf{E. Alleviate Invisible Punishments and Link and Proportionalize Consequences with Underlying Offense and Rehabilitation Progress}

Current collateral consequences are too broad, lack proportion, promote perpetual punishment and are a revolving door into imprisonment, while socially excluding individuals who already “paid for the crime.”\textsuperscript{206} This article suggests that there should be more measures to assist ex-offenders obtain housing, financial, healthcare, employment, education, and training needs. Similar to Canada, ex-offenders should not be denied public welfare, should be able to receive an opportunity to gain public housing and be allowed to vote.\textsuperscript{207} Currently, post-imprisonment policies are “one size fits all” or, in the event of modification, the modifications do not follow the offense of the individual.\textsuperscript{208} Rather, consequences imposed upon ex-offenders should relate to the underlying offense and be proportionate to the criminal conduct.\textsuperscript{209} Public safety or reduction of criminal activity may be true when the collateral consequence is directly related to the underlying offense.\textsuperscript{210} However, this argument gains little traction when the consequence has almost no relation to the underlying act.\textsuperscript{211} While there may be a good argument as to why a sex offender is barred from working in child-care facilities or any child-related employment, the reasoning for increased public safety or reduction in recidivism is weak when a minor drug offender is barred from educational loans and grants.\textsuperscript{212} This same argument can be made for ex-prisoners who cannot obtain public housing, because this only negatively influences their ability to support themselves, sustain their mental or substance abuse health

\textsuperscript{205} Id.

\textsuperscript{206} Perpetual punishment is highlighted in the case of Mr. La Cloche. La Cloche v. Daniels, 755 N.Y.S.2d 827 (N.Y. Sup. Ct. 2003). Mr. La Cloche learned the trade of barbering while serving eleven years in prison for first-degree robbery. Although he worked in a barbershop for a few years after his release, his license was taken away, because Mr. La Cloche’s criminal background indicated a lack of “good moral character.” Mr. La Cloche was so passionate about his future with the trade he obtained a tattoo of barber’s clippers and comb on his arm. Because this was the only trade he knew, following revocation of his license, Mr. La Cloche was no longer employed and dependent on public assistance. Ironically, the same state that financed La Cloche learning the barbering trade denied his ability to practice that trade. This example shows not only the retroactive effect of such licensing laws on the particular individual’s ability to reintegrate and reduce recidivism but also the eventual need for welfare dependency. Clyde Haberman, \textit{He Did Time, So He’s Unfit to do Hair}, N.Y. TIMES, March 4, 2005, http://www.nytimes.com/2005/03/04/nyregion/04nyc.html?pagewanted=print&position=&_r=0.

\textsuperscript{207} Rottinghaus, \textit{supra} note 77, at 22, 38.

\textsuperscript{208} See Demleitner, \textit{supra} note 17, at 1027-28, 1033; Pinard, \textit{supra} note 90, at 507-08.

\textsuperscript{209} Demleitner, \textit{supra} note 17, at 1033.

\textsuperscript{210} Pinard, \textit{supra} note 90, at 508.

\textsuperscript{211} Id.

\textsuperscript{212} See Pinard, \textit{supra} note 90, at 507-08; see also Demleitner, \textit{supra} note 17, at 1039; Uggest et al., \textit{supra} note 173, at 237.
treatment, and may even increase crime in their community through homelessness. Conversely, in England, only those convicted of welfare fraud are denied from receiving welfare benefits; therefore, there is a relationship between the crime and collateral consequence.

Furthermore, felony disenfranchisement must be abolished. Disenfranchisement has almost no relation to preventing future crimes. In fact, an alternative argument is that there is actually an increase, given that it excludes and alienates ex-prisoners and acts as an inhibitor to re-socialization and reintegration. This article argues that the ability to vote is an integral part of a successful reintegration process. Similar to countries explained below, the United States should allow its citizens, including those in prison and ex-offenders, to participate in the political process because the equal right to vote is a key aspect for the success of a democratic society. As Robert Dahl portrayed in his study of democratization, a vital component of democracy is “that citizens have an opportunity to participate in the governance of their country and that this participation is equal.” Opponents to this argument respond that disenfranchisement is the punishment for breaking the “social contract,” thus an ex-offender forfeits their right to participate in democracy, or that the only voters should be “moral persons.” In furthering the argument to stop disenfranchisement, proponents respond that prison is a physical, dislocating element of punishment and formed to rehabilitate individuals; however, disenfranchisement does not meet such a goal.

A look at other countries may help better recognize which argument is stronger. Interestingly enough, the countries with the most restrictive voting laws, such as Russia and the United States, also have the largest prison populations. There is no evident pattern with regard to a country’s geography, age, or size of democracy. Rather, felon disenfranchisement depends on the specific country’s history (including its treatment of minority groups), along with the size of penal population and public politicization of crime. Although many would expect “westernized” countries to not disenfranchise prisoners or ex-prisoners, in reality, no such

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213 Uggst et al., supra note 173, at 237.
214 Pinard, supra note 118, at 496.
215 Rottinghaus, supra note 77, at 4.
217 See Travis, supra note 2, at 20. For example, an 18-year-old individual, serving his sentence, loses his right to vote in the first election he can participate in, further alienating and extricating him from society after release. It would be foolish to think this individual will feel like he has a stake in society and even think about the political process. Id. at 31.
218 Rottinghaus, supra note 77, at 25. United States has the largest rate of incarceration.
219 Id. at 27.
220 Id. The country’s historical, social, and colonial legacies seem to have the big impact.
pattern exists. Today, 30 countries allow prisoners to vote. The two countries that stand out are Canada and Sweden. Also, several recently democratized countries in Central and Eastern Europe also allow inmates the right to vote. Other countries extend voting rights only under certain circumstances or based on the underlying offense. For example, in Germany, only those convicted of treason, electoral fraud, espionage, or membership in illegal organizations are banned. This ban seems to better parallel the “invisible punishment” with the underlying offense, as opposed to a drug offender disenfranchised. Even more, such crimes are considered the most egregious and somewhat follow the “social contract” argument. Several countries, including many in Latin America and Africa, disenfranchise prisoners. An argument can be made that “state-dominated hegemony, the colonial legacy in Africa and the political and social history of strong . . . dictatorships in Latin America may contribute” to the practice of disenfranchisement. However, in direct contrast to the aforementioned argument, England is also included in such countries. Recently, the European Convention on Human Rights ruled that a blanket ban from voting on those imprisoned is illegal. Finally, the most restrictive countries are those where prisoners and ex-prisoners are banned from voting. Even within this restrictive group of only eight countries, the United States has the most restrictive practice, with some states permanently disenfranchising ex-felons.

The three countries that portray a philosophical difference in treatment of felon disenfranchisement are Germany, Sweden, and Canada. Germany actually requires its inmates to register to vote while in prison. However, an offender may be stripped of his voting rights by the power and authority of the judiciary rather than by operation of law, in contrast to the practice carried out in the United States. Therefore, it becomes less of an “invisible” punishment. Comparably, in Sweden, in addition to universal suffrage, the country carries out a

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221 Id. at 21.  
222 Id. at 22.  
223 Id. at 22 tbl.1. Other Scandinavian countries such as Norway and Finland also allow prisoners the right to vote.  
224 Id. at 21.  
225 Id. at 22.  
226 Id. at 23.  
227 Id.  
228 Id. at 24.  
229 Council of Europe warns over UK’s prisoner vote option, supra note 131.  
230 Rottinghaus, supra note 77, at 24.  
231 Id. at 35. Although, judges have the power and authority to disenfranchise certain criminals convicted for treason, electoral fraud, espionage, or membership in illegal organization. Id.  
232 Id.
detailed and impressive process to administer inmates’ ballots.  

Similarly, the Canadian Supreme Court overruled a statute banning federal inmates from voting, because the right to vote teaches “democratic values and social responsibility.” To ensure successful reintegration, the United States should follow these countries and reinstate inmates and ex-felons’ right to vote, especially considering the trend among those newly democratized countries, the disproportionate effect on minorities and the poor, the human rights protocols, and the importance of the political process.

Finally, similar to the sentencing grids, the collateral sanctions should at least be proportional to the criminal offense. Currently, a serial murderer loses his right to vote, as does a one-time felon convicted of the lowest felony. One suggestion is for states to adopt the Uniform Collateral Consequences of Conviction Act’s (“UCCCA”) relief provision. The UCCCA asks for an “individualized assessment” to grant or deny a right based on the “particular facts and circumstances” involved in the offense, and it establishes a paramedic to determine whether there is a “substantial relationship” between the offense and the collateral consequence. An Order of Limited Relief is available starting at the sentencing phase and allows the court or agency to remove the automatic collateral restriction, based on each individual’s merits. An additional form of relief provided by the UCCCA is a Certificate of Restoration of Rights. This relief is available after a certain “law-abiding” period, and offers all potential employers, landlords, and licensing agencies objective information about the ex-offender’s progress toward rehabilitation and a degree of assurance.

F. Reverse in the Philosophical and Moral Treatment of Prisoners and Ex-Prisoners and Enactment of Uniform Collateral Consequences of Conviction Act

The strongest recommendation and the one which is the hardest to implement, is a switch from exclusion to reintegration. Due to the “get tough movement” of the mid-1970s, the United States has adopted an incredibly narrow vision of the dignity interests of currently and formerly

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233 Id. at 36. Sweden uses two processes: a special polling place and proxy voting via the mail.
236 Travis, supra note 2, at 35.
238 Id. at § 10.
239 Id. at § 11.
240 Id. at §§ 11, 14.
incarcerated individuals.\textsuperscript{241} We must re-think our concept of the social safety nets,\textsuperscript{242} as well as the dignity and humanity of ex-offenders.

Modern Americans are far more isolated from society than their forefathers, lacking personal connections and supportive bonds with those unlike themselves. These trends would indicate shallow social support systems and a reflection that civic virtue and social capital do not matter.\textsuperscript{243} These trends result in shallow social support systems, a decrease in the collective responsibility for the plight of one’s “neighbors,” and the fear of the “other” as cultural distance and stereotyping between different classes increases. As the social and cultural distance from between the underprivileged and the body of society expands, the more likely that collateral consequences are to be implemented.\textsuperscript{244}

The more money we spend on prisons, the less money we spend on education and social services.\textsuperscript{245} This leads to the creation of two groups: those who are uneducated and unable to survive in a competitive job market and those with untreated substance abuse or mental health issues.\textsuperscript{246} Both groups are associated with increased crime.\textsuperscript{247} Two-thirds of the public agree that because social and economic problems lead to crime, the best tools to prevent crime are education and jobs.\textsuperscript{248} Two-thirds of the public also support rehabilitation over longer sentencing.\textsuperscript{249} However, rehabilitative programs are not enough. We must re-consider our stance on such a large prison-industrial complex as well as the long, sometimes permanent, collateral consequences faced by ex-offenders. We must reverse the post-imprisonment punishment by providing ex-offenders with the tools necessary to become free-citizens with opportunities to contribute productively to society. Currently, the United States’ post-imprisonment policies differ significantly from countries discussed above, because the United States continues to punish, degrade, marginalize, and suppress those who have already paid for their crimes. One suggestion is for states to enact the relief provision of the UCCCA. The Act’s Section 10 permits an ex-prisoner to receive relief from a specific collateral sanction if they can prove that such relief would “materially assist” in gaining employment, education, housing, public benefits, public benefits,

\textsuperscript{241} Pinard, supra note 90, at 519.
\textsuperscript{244} PETERSILIA, supra note 7, at 245.
\textsuperscript{245} CHRISTIAN PARENTI, LOCKDOWN AMERICA: POLICE AND PRISONS IN THE AGE OF CRISIS 213 (2008).
\textsuperscript{246} Id.
\textsuperscript{247} Id.
\textsuperscript{248} Travis, supra note 2, at 27-28.
\textsuperscript{249} Id.
and that he or she has “substantial need” for the benefit to live a law-abiding life. This parallels Sweden’s and Germany’s reintegration policies, treating the ex-offenders with dignity by providing each of them with a chance to reintegrate into society. Instead of ostracizing and silencing ex-offenders, we should promote the role of ex-offenders within our communities.

VII. CONCLUSION

This article advocates for the destruction of collateral consequences as institutionalized tools for social exclusion. With the highest incarceration rate in the world, an alarming number of America’s ex-offenders are returning to their communities in which strict collateral consequences continue to punish and exclude them from society. Such consequences hinder the reintegration processes, disproportionately affect minorities, and lead to future crimes. This article argues that such ex-offenders, when compared to their counterparts in countries such as Canada, Germany, Sweden, and England, face the harshest formal restrictions. Such post-imprisonment consequences affect both the ex-offender and members of his or her community.

To resolve the aforementioned problem, invisible punishments must become visible. Furthermore, rehabilitation reform is necessary throughout the imprisonment period in order to reduce the need for severe post-imprisonment restrictions. Once convicted, one is tremendously restricted by his or her criminal status through collateral consequences; thus, the process for pardons must effectively help ex-offenders to rewrite their identity, break self-fulfilling prophecies, and avoid social and economic ostracism. Also, drug offense policies must be re-analyzed, where the end result is further exclusion of ex-drug offenders through harsh collateral consequences that have proven to be not only ineffective but also counteractive. The current broad collateral consequences must also be reduced and made proportional to the underlying offense or rehabilitation progress. Finally, successful reintegration must become the main goal, as opposed to social exclusion. Instead of ostracizing and silencing those returning to our communities, the post-imprisonment treatment should at least incorporate dignity in order to help ex-offenders successfully reintegrate into society.

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DEFERRED ACTION FOR CHILDHOOD ARRIVALS: ONE SMALL STEP FOR CERTAIN UNDOCUMENTED IMMIGRANTS, POTENTIALLY THE PREFACE TO ONE GIANT LEAP IN IMMIGRATION REFORM

MEGAN HUNSICKER

INTRODUCTION

Imagine the confusion and angst one feels when uprooted from their home in order for their family to pursue the American Dream. Once in this new location, imagine growing up differently from all of the other children, because of a lack of proper documentation, which means that obtaining a driver’s license, a college education, and a career is nearly impossible. Welcome to Jose Quintero’s life.1 He was only six years old when he departed with his immediate family and crossed the brutal Arizona desert on foot in order to enter the United States.2 Overcoming the odds, Quintero later reunited with his family in Chicago, graduated from high school, and earned an associate’s degree in science from Harold Washington College.3 For two years, Quintero volunteered to help many other immigrants complete complicated work authorization forms and citizenship applications.4 He, however, was not eligible to do the same.5 When President Barak Obama announced the Deferred Action for Childhood Arrivals Program (“DACA” or the “Program”), Quintero applied and was approved.6 When he received the news, Quintero was speechless; “it still doesn’t seem real,” he remarked.7 After acceptance into the Program, Quinterro applied for his dream job at a number of architectural firms, and “after spending so much time helping others find work, he can finally do it himself.”8

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2 Id.
3 Id.
4 Id.
5 Id.
6 Id.
7 Id.
8 Id.
DACA is a recent policy change announced by President Barak Obama, on June 15, 2012, that allows “young illegal immigrants to come out of the shadows, work legally [, and potentially] obtain driver’s license and many other [benefits] they have lacked.” 9 The Department of Homeland Security, specifically, the United States Citizenship and Immigration Services, will exercise prosecutorial discretion, and no longer initiate the deportation of illegal immigrants who were brought to the United States before reaching sixteen years of age, have lived in the United States for at least five years, are enrolled in school, have graduated from high school or are military veterans, and have clean criminal records. 10 Undocumented immigrants will benefit similarly to those who were eligible to become legal permanent residents under the DREAM Act, legislation that has repeatedly failed to gain sufficient support in Congress. 11 Deferred action, however, is a discretionary decision that defers removal action of an undocumented individual, but does not provide a pathway to citizenship. 12

This Note provides an analysis of DACA by considering the context in which the policy developed, in addition to focusing on the history of deferred action and the failed DREAM Acts, both of which were precursors to the policy change. Many of the DACA’s eligibility requirements resemble the requirements of proposed DREAM Act. The implications of the policy change are explored to determine the effectiveness of the policy standing on its own and as a precursor to potential legislation. Future legislation will be necessary to provide deferred action recipients with a path to citizenship and legal status.

In Section I, this Note provides an overview of the exercise of prosecutorial discretion in the immigration context by considering its rationale and the number of ways it can be employed. In Section II, this Note focuses on a particular type of prosecutorial discretion, deferred action, and compares its past history to its present components. In Section III, this Note summarizes the process and implications of deferred action. In Section IV, this Note identifies the most recent exercise of deferred action with the DACA program. In Section V, this Note describes state responses to the policy change and, specifically, whether states have embraced or provided further restrictions for deferred action recipients. Finally, Section VI of this Note discusses the limitations of the Deferred Action for Childhood Arrivals program and suggests the policy could be used as an impetus, in light of President Obama’s re-election, to garner support for enacting a DREAM Act.

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I. IMMIGRATION LAW AND PROSECUTORIAL DISCRETION

Prosecutorial discretion is an awesome power\(^{13}\) that is fundamental to the American legal system.\(^{14}\) In the immigration context, it “affects the fate of more noncitizens than any other government action.”\(^{15}\) As defined by Director John Morton, of the United States Immigration and Customs Enforcement (ICE), in a 2011 memorandum, “prosecutorial discretion is the authority of an agency charged with enforcing a law to decide to what degree to enforce the law against a particular individual.”\(^{16}\)

Immigration enforcement agencies are motivated by monetary and humanitarian motives when applying prosecutorial discretion.\(^{17}\) Prosecutorial discretion acknowledges that the government has limited resources and allows immigration enforcement agencies to refrain from asserting the full scope of their enforcement authority against particular populations or individuals\(^{18}\) and, instead, focus on high-risk undocumented immigrants, who pose a danger to national security or a risk to public safety, as a cost-saving measure.\(^{19}\) Alternatively, the

\(^{13}\) As early as 1931, prosecutors’ authority was described as, “[i]n every way[,] the Prosecutor has more power over the administration of justice than the judges, with much less public appreciation of . . . [their] power. . . .” in a report by the National Commission on Law Observance and Enforcement. Angela J. Davis, The American Prosecutor: Independence, Power, and the Threat of Tyranny, 86 IOWA L. REV. 393, 452 (2001) (quoting the National Commission on Law Observance and Enforcement, Report on Prosecution 11 (1931)).

\(^{14}\) See id. at 449-53. (discussing criminal prosecutions in colonial America).

\(^{15}\) Shoba Sivaprasad Wadhia, The Role of Prosecutorial Discretion in Immigration Law, 9 CONN. PUB. INT. L.J. 243, 246 (2010) [hereinafter Role of Prosecutorial Discretion].


\(^{18}\) While prosecutorial discretion is commonly employed on an individual, case-by-case basis, with individuals who have had contact with law enforcement authorities, it can also be exercised on individuals from explicitly defined populations, who are not considered enforcement priorities. Oversight Hearing on U.S. Immigration and Customs Enforcement: Priorities and the Rule of Law Before the H. Comm. on the Judiciary, 112th Cong. 3 (2011) (statement of Paul W. Virtue, Esq., Partner, Baker & McKenzie, LLP), available at http://judiciary.house.gov/hearings/pdf/Virtue%2010122011.pdf [hereinafter Oversight Hearing].

\(^{19}\) See id. (“ICE . . . only has resources to remove approximately 400,000 aliens per year, less than 4% of the estimated illegal alien population in the United States.”); see also 2014 Appropriations: Homeland Security: Hearing Before Subcomm. on Homeland Sec. of the H. Comm. on Appropriations, 113th Cong. (2013) (statement of Janet Napolitano, Sec’y of Homeland Sec., Dep’t of Homeland Sec.), available at http://www.dhs.gov/news/2013/04/11/written-testimony-dhs-secretary-janet-napolitano-house-committee-appropriations.
humanitarian motivation observes that “[s]ome individuals who are in technical violation of the law . . . have redeeming qualities such as”20 lengthy residences, familial ties, and/or intellectual and professional promise.21 Thus, these redeeming qualities are weighed against the gravity of an undocumented immigrant’s immigration transgression.22 Since society favors undocumented immigrants whose redeeming humanitarian considerations outweigh their immigration transgression, those individuals are more likely to remain free from apprehension, detention, or deportation.23

Prosecutorial discretion encompasses a vast array of governmental action at various stages in the immigration enforcement context including interrogation, arrest, charging, detention, trial, and removal.24 Immigration authorities may exercise favorable discretion through various actions including: “cancelling a charging document ("Notice to Appear" or "NTA");25 granting deferred action;26 granting a stay of removal;27 joining in a Motion to Terminate Proceedings;28 and refraining from executing a removal order,29 among other[s].”30 While each of the

20 Role of Prosecutorial Discretion, supra note 15, at 245.
22 Role of Prosecutorial Discretion, supra note 15, at 245.
23 Id. “In the first two years of the Obama Administration, such humanitarian cases have swelled in the wake of congressional stalemates over even discrete immigration reforms.” Sharing Secrets, supra note 21, at 6.
24 Sharing Secrets, supra note 21, at 6-7.
25 An NTA is a charging document meant to notify an individual of the reason(s) why the government believes they should be removed from the United States. An NTA is typically issued by Immigrations and Customs Enforcement, U.S. Customs and Border Control at a port of entry, or U.S. Citizenship and Immigration Services after denying an immigration benefit. Garfinkel Immigration Law Firm, Notice to Appear, http://www.garfinkelimmigration.com/resources-for-individuals/removaldeportation-defense/notice-to-appear-nta/ (last visited Dec. 7, 2012).
26 “Deferred action is a discretionary determination to defer a removal action of an individual.” DHS DACA, supra note 12.
29 “The Immigration and Nationality Act by its terms grants the Attorney General a full [ninety] days to effect an alien’s removal after the alien is ordered removed . . . and it imposes no duty on the Attorney General to act as quickly as possible, or with any particular degree of dispatch, within the [ninety]-day period.” Thus, the Attorney General has discretion as to when to remove the alien as long as a delay is for the purpose of “effectuating the immigration laws and the nation’s immigration policies.” Limitations on the Detention Authority of the Immigration and Naturalization Service (Feb. 20, 2003), http://www.justice.gov/olc/INSDetention.htm.
aforementioned governmental acts technically exercise prosecutorial discretion, there are different implications depending on the act employed.31 For example, an undocumented immigrant can apply for work authorization after receiving a grant of deferred action; however, such application cannot be made after only receiving notice of the cancellation of a NTA.32

Agency authority to exercise prosecutorial discretion has long been recognized. In Heckler v. Chaney, Supreme Court Justice Rehnquist noted that: “an agency’s decision not to prosecute or enforce, whether through civil or criminal process, is a decision generally committed to an agency’s absolute discretion.”33 In Heckler, the Court described several reasons for the existence of such discretion:

[A]n agency decision not to enforce often involves a complicated balancing of a number of factors which are peculiarly within its expertise. Thus, the agency must not only assess whether a violation has occurred, but whether agency resources are best spent on this violation or another, whether the agency is likely to succeed if it acts, whether the particular enforcement action requested best fits the agency’s overall policies, and, indeed, whether the agency has enough resources to undertake action at all. An agency generally cannot act against each technical violation of the statute it is charged with enforcing. The agency if far better equipped . . . to deal with the many variables involved in the proper ordering of its priorities . . . Finally we recognize an agency’s refusal to institute proceedings shares to some extent the characteristics of the decision of a prosecutor in the Executive Branch not to indict—a decision which has long been regarded as the special province of the Executive Branch, inasmuch it is the Executive who is charged by the Constitution to “take Care that the Laws be faithfully executed.”34

With respect to immigration, the authority to exercise prosecutorial discretion was bestowed to United States Immigration and Naturalization Services (“INS”) and, specifically, the Attorney General pursuant to the Immigration and Nationality Act of 1952.35 Subsequent courts reaffirmed that grant of authority to exercise prosecutorial discretion.36 In Medina v. United States, the court specifically stated, “[t]he [Immigration and Naturalization] Service . . . has prosecutorial discretion, which includes the

31 Id. at 2.
32 Id.
34 Id. at 831-32 (quoting U.S. CONST. art. II, § 3).
discretion to address the equities of individual cases . . . [and] the decision to institute deportation proceedings.”

II. HISTORY OF DEFERRED ACTION

The INS did not publicize its use of prosecutorial discretion until 1975, following litigation involving John Lennon and Yoko Ono. Prior to that litigation, the INS non-priority program was kept secretive, as the parameters of the program were only accessible in INS Operations Instructions in unpublished “blue sheets,” available only to INS personnel. Following the Lennon litigation, the INS clarified its non-priority program by publishing its deferred action operations instructions in “white sheets,” which placed the information in the public domain. Thus, deferred action was originally known as non-priority and described as “an act of administrative choice to give some cases lower priority” in the unpublished INS Operations Instructions.

Despite amendments and revocations of those original, publicized Operations Instructions, the description of deferred action and related humanitarian factors contained therein have been

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38 Leon Wildes, The Deferred Action Program of the Bureau of Citizenship and Immigration Services: A Possible Remedy for Impossible Immigration Cases, 41 SAN DIEGO L. REV. 819, 824 (2004). Lennon and Ono entered the United States as visitors in the summer of 1971 in order to gain custody of Kyoko, Ono’s daughter from a prior marriage. Although Lennon and Ono were awarded custody of Kyoko, they were unable to secure custody of Kyoko, as the child’s father had absconded and could not be found. Consequently, while searching for Kyoko, Lennon and Ono overstayed their visas, were refused additional time as visitors to carry on their search, and were subject to deportation proceedings. One of the remedies they sought was consideration for “nonpriority” status based upon the hardship that would result from removal proceedings. When correspondence with INS, efforts to depose a government witness who had knowledge of the program, and administrative attempts to secure records of nonpriority cases were all unavailing, Lennon filed an action requesting injunctive relief under the Freedom of Information Act (FOIA). As a result of that litigation, Lennon was finally able to obtain records regarding the INS nonpriority program. Id. at 820-21.
39 Id. at 823.
40 Thus, the internal, unpublished nonpriority program preceded what is now known as deferred action. See id. at 824.
41 Id.
42 See Reno, 525 U.S. at 484.
reiterated in subsequent agency policy publications. The 1975 publicized INS Operations Instructions advised undocumented immigrants that they would be considered for deferred action if adverse action would lead to an unconscionable outcome due to the existence of appealing humanitarian factors. The specified humanitarian factors included: “(1) advanced or tender age; (2) many years’ presence in the United States; (3) physical or mental conditions requiring care or treatment in the United States; (4) family situation in the United States—effect of expulsion; (5) criminal, immoral or subversive activities or affiliations—recent conduct.”

In 2000, Doris Meissner, then Commissioner of the INS, issued a memorandum detailing the principles with which INS exercises prosecutorial discretion and factors that should be taken into account when determining whether to exercise “a discretionary decision not to assert the full scope of the INS’ enforcement authority.” The delineated factors included, but were not limited to, length of residence in the United States, criminal history, humanitarian concerns, immigration history, and current or past cooperation with law enforcement authorities.

Although INS was abolished with the passage of the Homeland Security Act of 2002, which transferred immigration services, enforcement, and related policymaking to the Department of Homeland Security (“DHS”), subsequent memoranda issued by DHS entities followed, referenced, or explicitly reaffirmed the Meissner Memorandum. For example, in June 2011, United States Immigration and Customs Enforcement (“ICE”) Director John Morton

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46 Id.


48 Id.


issued a memorandum (the “Morton Memorandum”), which advised ICE personnel on the exercise of prosecutorial discretion, specifically built on the Meissner Memorandum.\(^{51}\) The Morton Memorandum included a non-exhaustive list of humanitarian factors, many of which were previously contained in the Meissner Memorandum.\(^{52}\) As evidenced by the aforementioned memoranda, agency guidance on prosecutorial discretion and deferred action was generally issued gradually through memoranda that build on the contours first publicized in 1975.

### III. IMPLICATIONS OF DEFERRED ACTION

While ICE’s decision-making authority to exercise deferred action entails “suspend[ing] removal proceedings against a particular individual or group of individuals for a specific timeframe . . . [it] does not resolve an individual’s underlying immigration status;”\(^{53}\) however, deferred action recipients are protected from removal and are authorized to apply for and receive public benefits.\(^{54}\)

To be considered for deferred action, one must make a request\(^{55}\) to the local ICE Enforcement and Removal Operations (“ERO”) Field Office Director or to the appropriate office of Homeland Security Investigation’s (““is”) Special Agent in Charge.\(^{56}\) Although there is no official standard operating procedure as to the process of either type of request, there are typically three levels of review.\(^{57}\) First, the local office reviews and summarizes the positive and

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\(^{51}\) “This memorandum builds on several existing memoranda related to prosecutorial discretion with special emphasis on the following: . . . Doris Meissner, INS Commissioner, Exercising Prosecutorial Discretion (Novembers 17, 2000).” Morton Memo, *supra* note 16, at 1.

\(^{52}\) *Id.* The Morton Memo expands upon themes listed in the Meissner Memo. For instance, Meissner’s non-exhaustive humanitarian concerns arguably embraced Morton’s delineated factors of whether the person or the person’s spouse is pregnant or nursing; whether the person or the person’s spouse suffers from severe mental or physical illness; whether the person is the primary caretaker of a person with a mental or physical disability, minor, or seriously ill relative; etc. See Morton Memo, *supra* note 16, at 4; Meissner Memo, *supra* note 47, at 7.


\(^{55}\) There are two distinct types of deferred action requests—one for “those seeking [deferred action] on sympathetic facts and a low-enforcement priority, and [another for] those seeking [deferred action] based on his/her status as an important witness in an investigation or prosecution.” Toolkit, *supra* note 27, at 5.

\(^{56}\) *Id.* at 4.

negative equities associated with the request. The second level occurs when the district director reviews the local office summary and makes a recommendation to the regional director, and the last level is when the regional director issues a decision on the recommendation.

If deferred action is granted, it is usually for one to two years. Consequently, the recipient may “remain, temporarily, in the United States: [United States Citizenship and Immigration Services] USCIS declines to exercise its authority to issue a [NTA] and does not place the individual in removal proceedings” unless, and until, the agency decides to terminate the deferred action. A deferred action recipient can request an application for renewal. Thus, while a form of relief, deferred action does not confer any specific immigration status or provide a pathway to permanent residency. A deferred action recipient is eligible, though, to apply for work authorization and other public benefits.

When deferred action is denied, the agency or immigration courts will not engage in automatic review; such decisions about prosecutorial discretion are overwhelmingly immune from judicial review. The Meissner Memorandum explained, “‘Discretion’ in prosecutorial discretion means that prosecutorial decisions are not subject to review or reversal, except in extremely narrow circumstances.” In some instances, review is exercised internally by the agency or by the federal court system if there is an Equal Protection claim involving outrageous discrimination. During internal review, if there is a dispute between the ERO, HIS, CBP, or USCIS charging official and the ICE attorney regarding the decision to exercise prosecutorial

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58 Id.
59 Id.
60 Id.
61 Id. at 1.
62 Toolkit, supra note 27, at 6.
63 Id.
64 Id. at 5.
65 See 8 C.F.R. § 274a.12(c)(14) (2011) (“An alien who has been granted deferred action, an act of administrative convenience to the government which gives some cases lower priority, if the alien establishes an economic necessity for employment . . . ”).
66 A Year in Review, supra note 30, at 2. See also Heckler, 470 U.S. at 831 (“[A]n agency’s decision . . . to prosecute . . . is a decision generally committed to an agency’s absolute discretion.”); Reno, 525 U.S. at 489-90 (“. . . recognition that the decision to prosecute is primarily ill-suited to judicial review.”). See 8 U.S.C. § 1252(g) (2006) (“Except as provided in this section and notwithstanding any other provision of law, . . . no court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien under this Act.”).
67 Meissner Memo, supra note 47, at 3.
68 See Morton Memo, supra note 16, at 3; Reno, 525 U.S. at 491 (“To resolve the present controversy, we need not rule out the possibility of a rare case in which the alleged basis of discrimination is so outrageous that the foregoing considerations can be overcome. Whether or not there be such exceptions…”).
discretion, “the ICE Chief Counsel should attempt to resolve the dispute with the local supervisors of the charging official [;] if local resolution is not possible, the matter should be elevated to the Deputy Director of ICE for resolution.” As to federal court involvement, there was litigation alleging that immigration agencies selectively enforced immigration laws against certain individuals due to their affiliation with a particular group. In *Reno v. American-Arab Anti-Discrimination Comm.*, the Court noted, “[w]e need not rule out the possibility of a rare case in which the alleged basis of discrimination is so outrageous that the foregoing considerations can be overcome.” The standard for proving such a case is also demanding, because the petitioner must “introduce ‘clear evidence’ [to] displace[e] the presumption that a prosecutor has acted lawfully.” Thus, review and reversal of a deferred action denial is unlikely.

Although “deferred action determinations are made on a case-by-case basis, . . . eligibility for such discretionary relief can be extended to individuals based on their membership in a discrete class.” Indeed, deferred action has been applied at a macro level more recently. In June 2009, DHS “granted deferred action for two years to widows and widowers of U.S. citizens—as well as their unmarried children under 21 years old—who reside in the United States and who were married for less than two years prior to their spouse’s death.” Deferred action was also extended to select “DREAM Act” students in 2009. The Development, Relief, and Education for Alien Minors Act, or “DREAM Act,” was federal legislation that sought to provide a pathway to citizenship for undocumented students, who were brought to the United States before the age of sixteen, lived in the United States for at least five years, and remained in good, moral character since entering the United States. Even though the DREAM Acts were defeated in Congress, in June, 2012, President Obama announced that his administration would

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70 See, e.g., *Reno*, 525 U.S. at 472.

71 *Id.* at 491.

72 *Id.* at 489.

73 *Oversight Hearing, supra* note 18, at 4.

74 Maria A. Fufidio, "You May Say I'm A Dreamer, but I'm Not the Only One": Categorical Prosecutorial Discretion and Its Consequences for Us Immigration Law, 36 *FORDHAM INT'L L.J.* 976, 993 (2013).

75 Interim Relief, *supra* note 53.


no longer deport undocumented immigrants who fulfilled certain criteria under the DREAM Act by way of the new DACA program.\footnote{Preston & Cushman, supra note 9.}

IV. DEFERRED ACTION FOR CHILDHOOD ARRIVALS

When announcing the new policy, which could potentially allow thousands of illegal immigrants who entered the United States as children, to remain in their adopted homeland without fear of deportation, President Obama noted, “they are Americans in their heart, in their minds, in every single way but one: on paper.”\footnote{Id.} Secretary of the DHS, Janet Napolitano, also rationalized the exercise of prosecutorial discretion, “as a general matter, these individuals lacked the intent to violate the law . . . . [a]dditional measures are necessary to ensure that our enforcement resources are not expended on these low priority cases.”\footnote{Memorandum from Janet Napolitano, Sec’y of Homeland Sec., Dep’t of Homeland Sec., on Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children (June 15, 2012), available at http://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf. (hereinafter Napolitano Memo).}

The new policy defers removal action for a term of two years and enables eligibility for employment authorization during the same period.\footnote{DHS DACA, supra note 12.} To be considered, individuals\footnote{Individuals “must be at least [fifteen] years or older to request deferred action, unless [they] are currently in removal proceedings or have a final removal or voluntary departure order,” in which case the individual may be younger than fifteen years of age. U.S. Citizenship and Immigration Services, Consideration of Deferred Action for Childhood Arrivals Process, (last updated Sept. 14, 2012), http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnextoid=f2ef2f19470f7310VgnVCM10000082ca60aRCRD&vgnextchannel=f2ef2f19470f7310VgnVCM10000082ca60aRCRD.} must submit various forms,\footnote{The specific forms are Form I-821D, Consideration of Deferred Action for Childhood Arrivals, and Form I-765, Application for Employment Authorization, and a Form I-765WS, Worksheet for Application for Employment Authorization. DHS DACA, supra note 12.} a $465 application fee, verifiable documentation and biometrics to USCIS. The documentation required closely resembles the provisions in the failed DREAM Act\footnote{See DREAM Act of 2011, S. 952 112th Cong. § 3 (2011); DREAM Act of 2011, H.R. 1842, 112th Cong. § 3 (2011).} and must establish all of the following:

1. Were under the age of [thirty-one] as of June 15, 2012;

2. Came to the United States before reaching [their] [sixteenth] birthday;
3. Have continuously resided in the United States since June 15, 2007, up to the present time;

4. Were physically present in the United States on June 15, 2012, and at the time of making your request for consideration of deferred action with USCIS;

5. Entered without inspection before June 15, 2012, or your lawful immigration status expired as of June 15, 2012;

6. Are currently in school, have graduated or obtained a certificate of completion from high school, have obtained a general education development (GED) certificate, or are an honorably discharged veteran of the Coast Guard or Armed Forces of the United States; and

7. Have not been convicted of a felony, significant misdemeanor, three or more other misdemeanors, and do not otherwise pose a threat to national security or public safety].

The Pew Hispanic Center, a nonpartisan research group in Washington, D.C., estimates as many as 1.7 million immigrants, or 39%, of the 4.4 million immigrants ages thirty and under are potentially eligible for the DACA program. Upon receipt of the application, the USCIS, through one of its four Service Centers, reviews the individual’s request to determine, on a case-by-case basis, whether the exercise of prosecutorial discretion is appropriate.

If USCIS does not defer action in a particular case, the denied individual does not have an option to appeal the decision unless the individual meets all of the guidelines and believes the denial was due to one of the listed administrative errors. In these instances, there is

86 DHS DACA, supra note 12.

87 While 950,000, or 55%, of unauthorized immigrants ages thirty and under who are eligible for deportation relief immediately, the Pew Hispanic Center estimates there are an additional 770,000 young unauthorized immigrants who are not currently eligible but may become eligible for the program in the future; that population includes 450,000 unauthorized immigrants under the age of fifteen, who are currently enrolled in school, have been in the United States continuously for at least five years, and would eventually age into program eligibility. The remaining 320,000 unauthorized immigrants consist of individuals between the ages of sixteen and thirty who do not currently qualify for the program because they do not have a high school diploma or GED; upon gaining one of those documents, however, those individuals could qualify for the DACA program. Jeffrey Passel & Mark Hugo Lopez, Up to 1.7 Million Unauthorized Immigrant Youth May Benefit from New Deportation Rules, PEW HISPANIC CENTER (August 14, 2012), http://www.pewhispanic.org/2012/08/14/up-to-1-7-million-unauthorized-immigrant-youth-may-benefit-from-new-deportation-rules/.

88 Id.

89 See DHS DACA, supra note 12.

90 Id.

91 The specified errors include: “USCIS denied the request for consideration of deferred action for childhood arrivals based on abandonment and [the individual] claims that [he or she] did respond to a Request for Evidence within the prescribed time; or USCIS mailed the Request for Evidence to the wrong address, even though
available recourse using the Service Request Management Tool (“SRMT”) process. The USCIS also implemented a supervisory review process in all four of its Service Centers to ensure consistency amongst processing requests. If an application includes certain factors, the case will be elevated for required supervisory review.

It should also be noted that a decision not to exercise deferred action in a particular individual’s case does not mean that an individual is placed in removal proceedings; instead, USCIS implements its policy governing case referral to ICE and the issuance of NTA. Thus, if an applicant’s “case does not involve a criminal offense, fraud, or a threat to national security, [the] case will not be referred to ICE for purposes of removal proceedings” unless there are exceptional circumstances as determined by DHS.

Alternatively, if USCIS exercises deferred action an individual may be granted employment authorization for a period of two years, unless deferred action is terminated. Between August 15 and December 13, 2012, USCIS granted 102,965 approvals. During that same time frame, USCIS accepted 355,889 requests for processing. According to a spokesman for DHS, “[the] process is [still] in its initial stages” and “it is expected that the average length of time to process a request will be between four and six months . . .”

[the individual] had submitted a Form AR-11, Change of Address, or changed [his/her] address online at www.uscis.gov before the issuance of the Request for Evidence. Id.

SMRT is an electronic inquiry system, developed by USCIS, “to track and transfer an inquiry from an individual or employer to the USCIS office best able to assist.” U.S. DEP’T OF HOMELAND SEC., USCIS Service Requests: Recommendations to Improve the Quality of Responses to Inquiries From Individuals and Employers, http://www.dhs.gov/uscis-service-requests-recommendations-improve-quality-responses-inquiries-individuals-and-employers#0 (last visited Nov. 20, 2012); see also, DHS DACA, supra note 12.

DHS DACA, supra note 12.

See id.

Id.

Id.

Id.

Although the Deferred Action for Childhood Arrivals program was revealed on June 15, 2012, USCIS did not begin processing the requests until August 15, 2012, following a sixty-day implementation period. See Napolitano Memo, supra note 81, at 1; Ted Hessen, Nearly 4,600 DREAMers Approved for Deferred Action, ABC NEWS (Oct. 12, 2012), http://abcnews.go.com/ABC_Univision/News/4500-dreamers-approved-deferred-action/story?id=17466892#.UNDsTI7R3zI.


Id.

Id. 

Hesson, supra note 98.
As previously stated, a grant of deferred action will not confer lawful status nor provide a path to permanent resident status or citizenship; only Congress can confer such rights through its legislative authority.\textsuperscript{102} An individual may, however, at the end of the two year deferred action period, request consideration for an extension of that period in addition to concurrent continued employment authorization.\textsuperscript{103} Thus, while the DACA program may confer temporary permission to remain in the United States, it does not necessarily entitle recipients to other state benefits, such as driver’s licenses.\textsuperscript{104} Whether or not such benefits are conferred will entirely depend on the law of the state in which the recipient lives.\textsuperscript{105}

V. UNDOCUMENTED IMMIGRANTS’ ELIGIBILITY FOR PUBLIC BENEFITS

An often-invoked quote from Supreme Court Justice Louis Brandeis depicting states as laboratories of democracy is enlightening—

\textit{Whether [the state’s] view is sound nobody knows … [T]he advances in the exact sciences and the achievements in invention remind us that the seemingly impossible sometimes happens … The discoveries in physical science, the triumphs in invention, attest the value of the process of trial and error. In large measure, these advances have been due to experimentation. In those fields experimentation has, for two centuries, been not only free but encouraged … Denial of the right to experiment may be fraught with serious consequences to the Nation. It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel science and economic experiments without risk to the rest of the country,\textsuperscript{106}}

and applicable when discussing the irreconcilable reactions of individual states to the DACA program. Many of the states that have expressed strong reactions to the new policy hold the most significant number of deferred action recipients;\textsuperscript{107} thus, the reactions of Arizona, which

\begin{itemize}
\item \textsuperscript{102} Napolitano Memo, \textit{supra} note 81, at 3.
\item \textsuperscript{103} DHS \textit{DACA}, \textit{supra} note 12.
\item \textsuperscript{105} \textit{Id}.
\item \textsuperscript{106} New State Ice Co. v. Liebmann, 285 U.S. 262, 309-11 (1932) (Brandeis, J., dissenting).
\item \textsuperscript{107} See USCIS \textit{DACA Process}, \textit{supra} note 99; Shoichet & Castillo, \textit{supra} note 104.
\end{itemize}
received 12,924 deferred action requests as of December 13, 2012, Texas, which received 57, 542 such requests by that aforementioned date, and California, which received 98,531 such requests by that same date, have a strong impact on the deferred action recipient population. Although the promptness of official state responses to the new policy has been impressive, the resulting state policies, as outlined in the materials to follow, are somewhat predictable when compared to each respective state’s prior stance on granting undocumented immigrants public benefits.

Exploration of the federal-state dichotomy on undocumented immigrants receipt of public benefits provides context to what the approaches of the various states have been, and will better inform this Note’s analysis of specific states’ reception of the announcement of the DACA program. An established principle in immigration law has been the plenary power of the federal government to regulate immigration based on the notion that the “United States’ existence as a sovereign state should give it unfettered power to control immigration.” While immigration law was once the province of the federal government, there are now concurrent realms of authority between the federal government and sub-national governments; determining which realm is preeminent depends upon the context of whether the issue is perceived as a “matter of foreign policy and national identity or as a matter within the domain of traditional state powers.” To illustrate, the federal government has authority to ensure fundamental, and other rights, of undocumented immigrants, while state and local governments can legislate policy to address sub-national concerns relating to crime, employment, and welfare. In

109 Id.
110 Id.
114 See Plyer v. Doe, 457 U.S. 202, 212-13 (1982) (“The Fourteenth Amendment provides that ‘[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws.’ . . . [T]he Fourteenth Amendment to the Constitution is not confined to the protection of citizens. . . . [T]he Fourteenth Amendment protects equal laws. . . . [T]he Fourteenth Amendment protects equal laws.” (quoting Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886))) (emphasis in original)).
115 See id. at 221-23, 230 (holding that even though public education is not a fundamental right, undocumented students are entitled to equal protection under the Fourth Amendment and are entitled to receiving the free benefit of public education through secondary school).
recognizing that division, however, the authorities state that the “federal government has often used its immigration power to influence state policies affecting immigrants . . . in areas traditionally left to the states.” Employment of that power was evidenced in post-secondary education with the passage of the Illegal Immigration Reform and Immigration Responsibility Act (“IIRIRA”) 118, the Personal Responsibility and Work Opportunity Reconciliation Act (“PRWORA”) in 1996 119, and in state identification, specifically, driver’s licenses, with the enactment of the Real ID Act of 2005. 120

Among the IIRIRA provisions to deter illegal immigration through enhanced border patrol, modified deportation proceedings, employment restrictions, etc., 121 Section 505 provides that undocumented residents “shall not be eligible on the basis of residence within a state (or a political subdivision) for any postsecondary education benefit unless a citizen or national of the United States is eligible for such a benefit (in no less an amount, duration, and scope) without regard to whether the citizen or national is such a resident.” 122 Although the provision is arguably designed to prevent states from offering undocumented residents in-state tuition at public, post-secondary institutions, some states have curtailed the legislation’s effects by offering in-state tuition to those individuals on a basis other than residency. 123

In 1996, PRWORA, like IIRIRA, aimed to restrict “aliens[]” 124 access to state and local public benefits, including postsecondary education. 125 Despite that objective, it also contained a provision providing circumstances in which states could allow unlawful aliens to receive public benefits—

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121 Illegal Immigration Reform and Immigrant Responsibility Act of 1996, supra note 118.
122 Id.
123 See Jody Feder, CONG. RESEARCH SERV., RS 22500, UNAUTHORIZED ALIEN STUDENTS, HIGHER EDUCATION, AND IN-STATE TUITION RATES: A LEGAL ANALYSIS I (2011); see, e.g., Martinez v. Regents of Univ. of Cal., 241 P.3d 855, 863 (Cal. 2010) (noting California’s in-state tuition provision did not violate Section 505 because it was “based on other criteria, specifically, that persons possess a California high school degree or equivalent; that if they are unlawful aliens, they file an affidavit stating that they will try to legalize their immigration status; and . . . that they have attended ‘[h]igh school . . . in California for three or more years.’”).
A State may provide that an alien who is not lawfully present in the United States is eligible for any State or local public benefit for which such alien would otherwise be ineligible . . . through the enactment of a State law . . . which affirmatively provides for such eligibility.  

The vague language of PRWORA may be interpreted as allowing states to determine whether undocumented residents qualify for in-state tuition.

Historically, states had discretion when issuing licenses to drivers within their jurisdiction. In 2005, former President George W. Bush enacted the Real ID Act (“Real ID”), after perceiving security vulnerabilities in varying state standards for driver’s licenses, because licenses have evolved into a type of “de facto national identity card” with regard to terrorism. Among its provisions tailored to increase security, Real ID requires states to have applicants verify their lawful status in the country before the state can issue a driver’s license to the applicant. Even though valid documentation of one’s approved deferred action status is sufficient for that requirement under Real ID, not all states are as willing to grant deferred action recipients a driver’s license. Indeed, states have circumvented the aforementioned federal regulations and taken their own initiative following the announcement and implementation of DACA.

Arizona’s “Papers Please” Approach

On the same day the program was revealed, Arizona Governor Jan Brewer immediately issued an Executive Order preventing deferred action recipients from accessing “any additional

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131 Id.
133 Id. at 2.
public benefit.” Specifically, Governor Brewer mandated that state agencies “conduct a full statutory, rule-making and policy analysis and . . . initiate operational, policy, rule and statutory changes necessary to prevent deferred action recipients from obtaining eligibility . . . for any taxpayer-funded benefits and state identification, including a driver’s license . . . .” Noting that the deferred action program does not confer lawful authorized status in addition, citing to Arizona statutes that “limit access to public benefits to persons demonstrating lawful presence in the United States,” the Arizona Governor rationalized that “allowing more than an estimated 80,000 deferred action recipients improper access to state or local public benefits” would run afoul of the “intent of Arizona voters and lawmakers who enacted laws expressly restricting access to taxpayer funded benefits and state identification.”

Arizona also barred non-citizens from being considered residents for in-state tuition at public colleges and universities unless the student has an “eligible visa status.” The stance taken was predictable considering the recent string of legislation, which was intended to drive illegal immigrants out of Arizona through a policy known as “enforcement through attrition.” This action ended with the Support Our Law Enforcement and Safe Neighborhoods Act, which has been labeled the strictest anti-illegal immigration measure in decades.

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136 Id.


140 See Legal Arizona Workers Act, ARIZ. REV. STAT. § 23-212 (2008) (criminalizing the knowing or intentional employment of unauthorized alien workers); ARIZ. REV. STAT. § 16-166 (2004) (requiring voters to show proof of identification and citizenship to register to vote).

141 Marcos Restrepo, From ‘attrition through enforcement’ to ‘self-deportation,’ FLORIDA INDEPENDENT, (Jan. 1, 2012), http://florida-independent.com/66246/mitt-romney-newt-gingrich-immigration (statement by Mitt Romney) (“Immigration-control strategy to drive away the unauthorized population by making their lives so miserable that they will choose to ‘deport themselves’ rather than remain in the [United States]”).

142 S.B. 1070, 49th Leg., 2d Reg. Sess. (Ariz. 2010) (making it a state misdemeanor crime for an alien to be in Arizona without carrying required documents, and imposes penalties on those sheltering, hiring, and transporting unregistered aliens, thus, requiring state law enforcement officers to check an individual’s immigration status during any lawful contact or detention).)

The Lone Star State\textsuperscript{144}

Despite Texas Governor Rick Perry’s August 16, 2012, memorandum regarding the DACA program that emphasized that the program confers “absolutely no legal status whatsoever to an alien who qualifies,”\textsuperscript{145} it noted that the guidelines “do not change our obligation sunder federal and Texas law to determine a person’s eligibility for state and local public benefits.”\textsuperscript{146} Although it sounds akin to the Arizona Governor’s rhetoric,\textsuperscript{147} Texas’ policies on deferred action recipients’ eligibility for a driver’s license and in-state tuition are vastly different from Arizona’s. With regard to licensing, a spokesman for the Public Safety Department relayed, “someone who has been granted deferred action and presents an employment authorization document meets the department’s current lawful presence and identification policy” and therefore can receive a driver’s license.\textsuperscript{148} Since the license is attached to the two-year deferred action period and employment authorization document, the driver’s license is only temporary and “will expire when the employment authorization permit expires.”\textsuperscript{149}

Governor Perry has also supported state laws granting in-state tuition for Texas undocumented immigrants.\textsuperscript{150} In fact, he signed the provision into law in 2001,\textsuperscript{151} becoming one of the first states to enact such legislation.\textsuperscript{152} This legislation enabled undocumented individuals access to in-state tuition rates at Texas public institutions. The Bill reads in pertinent part: An individual shall be classified as a Texas resident . . . if the individual resided with the [his or her] parent, guardian, or conservator while attending a public or private high school in [Texas] and[ ](1) graduated from a public or private high school or received the equivalent of a high school diploma in [Texas]; (2) resided in [Texas] for at least three years as of the date the person graduated from high school or received the equivalent of a high school diploma; (3) registers as an entering student in an institution of higher education not earlier than the 2001 fall semester; and (4) provides to the

\begin{thebibliography}{9}
\bibitem{146} Dianne Solis, Deferred action should lead to Texas driver’s licenses for young illegal immigrants, DALLAS MORNING NEWS (Aug. 23, 2012), http://www.dallasnews.com/news/state/headlines/20120823-deferred-action-should-lead-to-texas-drivers-licenses-for-young-illegal-immigrants.ece.
\bibitem{147} See Ariz. Exec. Order, supra note 135.
\bibitem{148} Solis, supra note 146.
\bibitem{149} Id.
\bibitem{150} Id.
\end{thebibliography}
institution an affidavit stating that the individual will file an application to become a permanent resident at the earliest opportunity the individual is eligible to do so. 153

This statute was subsequently amended in 2005 to “allow all persons . . . to establish an independent claim to residency based on graduation from high school or the completion of its equivalent after residing in the state for at least [thirty-six] months.” 154 Consequently, with regard to in-state tuition at public higher education institutions, non-residents are classified as bona fide residents under current state legislation. 155 However, as of fall 2007, .8% of Texas’ public institution enrollment of 1,102,572 that semester qualified under the amended measures. 156

The “California Dream”157

Similar to Texas, following through on statements from the Department of Motor Vehicles that deferred action participants would be eligible for driver’s licenses, 158 California enacted legislation making deferred action recipients eligible for driver’s license with the following provision: “any federal document demonstrating favorable action by the federal government for acceptance of a person into the [DACA] program shall satisfy the [proof of presence in the United States requirements].” 159 Unlike the aforementioned states, however, California lawmakers are also considering enabling deferred action recipients to be eligible for other public benefits, including unemployment benefits and state-administered medical assistance “to the same extent that a legal resident of California is eligible for those benefits.” 160

Such unprecedented action is not foreign to California, considering it was one of the first states to enact legislation in 2001, which allowed undocumented students to receive in-state


155 Id.

156 Texas Higher Education Coordinating Board, Overview: Residency and In-State Tuition, (Sept. 2008), available at http://www.thecb.state.tx.us/reports/PDF/1528.PDF.


159 Cal. Vehicle C. §12801.6(a) (2012).

tuition rates at public postsecondary institutions.\textsuperscript{161} To qualify for the in-state rate, the undocumented immigrant “must have attended high school in California for at least three years, . . . graduated from high school, . . . [and] are required to file an affidavit stating [he or she] have either filed an application to legalize status or will file such an application as soon as they become eligible.”\textsuperscript{162} In 2011, California expanded that initiative with the enactment of the California Dream Act, which makes undocumented students eligible for state college aid and went into effect in 2013.\textsuperscript{163} The state’s Department of Finance predicts 2,500 undocumented college students will qualify for waivers, Cal Grants, and other aid.\textsuperscript{164}

Thus, “[s]tates that have chosen to be welcoming towards immigrants [have] embrace[d] this program through their state policies, and states that have been somewhat restrictive toward immigration and immigrants [viewed the DACA program] as a new occasion to restrict state benefits.”\textsuperscript{165}

\textbf{VI. FUTURE OF DEFERRED ACTION}

Borrowing from Neil Armstrong’s infamous quote during Apollo 11—while Deferred Action for Childhood Arrivals program was “one small step for [certain undocumented immigrants], [it was nowhere near] one giant leap for [all, present and future, undocumented immigrants].”\textsuperscript{166} Indeed, the DACA program is limited considering President Obama’s acknowledgement that the Program was a “temporary stopgap measure.”\textsuperscript{167} The Program’s provisions do not benefit many of the undocumented immigrants,\textsuperscript{168} but they do require individualized and continual renewal every two years if a recipients wants to maintain his or her status.\textsuperscript{169} Some states have also been less than receptive by enacting subsequent policies concerning the recipients.\textsuperscript{170}

\begin{itemize}
\item[]  \textsuperscript{161} National Conference of State Legislatures, \textit{supra} note 152.
\item[]  \textsuperscript{162} Feder, \textit{supra} note 123, at 3.
\item[]  \textsuperscript{163} Jacobs, \textit{supra} note 157.
\item[]  \textsuperscript{164} \textit{Id.}
\item[]  \textsuperscript{165} Shoichet & Castillo, \textit{supra} note 104.
\item[]  \textsuperscript{167} Preston & Cushman, \textit{supra} note 9.
\item[]  \textsuperscript{168} Passel & Lopez, \textit{supra} note 87.
\item[]  \textsuperscript{169} DHS DACA, \textit{supra} note 12.
\item[]  \textsuperscript{170} See Shoichet & Castillo, \textit{supra} note 104.
\end{itemize}
When President Obama announced the policy change in the White House Rose Garden, he specified, “This is not a path to citizenship. It is not a permanent fix.” Secretary of Homeland Security Janet Napolitano, in a June 15, 2012 memorandum, set forth the policy, noting that it “confers no substantive right, immigration status or pathway to citizenship. Only Congress, acting through its legislative authority, can confer those rights.” Thus, the passage of a DREAM Act or similar legislation by Congress is still necessary to provide a pathway to permanent lawful status for deferred action recipients.

Although 1.7 million undocumented immigrants ages thirty and under are potentially eligible for the deferred action program, 2.4 million of undocumented immigrants of that same age group are ineligible. According to the Pew Hispanic Center analysis, those individuals meet the age requirements for the program, but unfortunately, they arrived in the United States after the requisite age or have been in the United States for less than five years, which also makes them ineligible. However, of the estimated 11.2 million undocumented immigrants in the United States, 6.8 million (60%) of those immigrants are over the age of thirty and, consequently, are not addressed by the DACA program. The program also does not cover the undocumented immigrant childhood population who arrived in the United States after the cut-off date, June 15, 2012.

Not only are many undocumented individuals ineligible for the program, but eligible individuals cannot request deferred action on behalf of others, such as their parents and siblings; “[t]o receive deferred action, individuals must submit their own request.” For the individuals who do receive assistance, the deferred action period is only for two years; and while that period may be extended, the recipient must request consideration for an extension. Thus, unless a DREAM Act or similar legislation is passed, to maintain one’s eligibility for employment authorization and potentially other public benefits, the deferred action recipient must continually request an extension of benefits.

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171 Preston & Cushman, supra note 9.
172 Napolitano Memo, supra note 81.
173 DHS DACA, supra note 12.
174 Passel & Lopez, supra note 87.
175 Id.
176 Id.
177 Id.
179 DHS DACA, supra note 12.
180 See id.
In addition to the burden of continually requesting extensions, deferred action recipients are not automatically able to travel outside the United States. In order for a deferred action recipient to travel outside the United States, he or she must apply for USCIS approval by submitting Form I-131, an Application for Travel Document, and paying the applicable fee of $360. USCIS will typically only accept justifications for international travel if the deferred action recipient is traveling for “humanitarian purposes, educational purposes, or employment purposes.” Thus, while there are many benefits to the DACA program, there are also many strings of control, which limits one’s autonomy.

While an individual may receive deferred action and employment authorization, his or her eligibility for public benefits, such as a driver’s license to be able to drive to work, may be curtailed depending on the state where he or she lives. Subsequent to the announcement of the deferred action policy, many states, such as Arizona, relayed they would expressly prevent undocumented immigrants’ access to additional public benefits. Nebraska and Michigan, for example, followed Arizona’s lead. Nebraska State Governor Dave Heineman exclaimed that Nebraska “will continue its practice of not issuing driver’s licenses, welfare benefits[,] or other public benefits to illegal immigrants” regardless of deferred action status. Similarly, Michigan Secretary of State Ruth Johnson announced Michigan would not be issuing driver’s licenses or state identification of any kind to deferred action recipients. Consequently, in such states, while the deferred action recipients would be allowed to legally work, they would not be allowed to legally drive to that workplace. As a supervising attorney for the Michigan Immigrant Rights Center noted, since

[Ninety] percent of people drive to work [in Michigan,] I’m hearing from young immigrants that not being allowed to drive does not allow them to make use of the deferred action opportunity, and they are terrified of taking a risk and driving without a license. . . . It takes the wind out of their sails.

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181 Id.
182 Id.
183 Id.
185 See Shoichet & Castillo, supra note 104.
188 See id.
189 Id.
Recognizing the limitations of DACA, President Obama announced during his 2012 election campaign, “[t]o secure prosperity for all Americans, we must out-innovate, out-educate, and out-build the rest of the world, and fixing our broken immigration system plays an important part in our plan.” President Obama also noted that his support for comprehensive immigration reform has been limited only by Congress’ inability to compromise on immigration legislation. President Obama’s vision for a 21st immigration policy entails:

“Strengthening our economic competitiveness by creating a legal immigration system that reflects our values and diverse needs: Our immigration laws should continue to reunify families and encourage individuals we train in our world-class institutions to stay and develop new technologies and industries in the United States rather than abroad. The law should stop punishing innocent young people whose parents brought them here illegally and give those young men and woman a chance to stay in this country if they serve in the military or pursue higher education . . . We can create a pathway for legal status that is fair and reflects our values.”

Democrats, Republicans, and Independents are able to compromise and enact immigration reform which may be more likely in an upcoming legislative session than when the DREAM Act was previously introduced to Congress. Considering comments from former House speaker Newt Gingrich, and other individuals such as former President George W. Bush strategist Karl Rove, the Republican Party “need[s] a rethink, to reach out to Latinos and other ethnic groups. ‘Unless we do that we’re going to be a minority party.’” Florida Senator Marco Rubio, a frontrunner for the 2016 presidential nomination, also believes the Republican Party needs to reach out to ethnic minorities—“The conservative movement should have particular appeal to people in minority and immigrant communities who are trying to make it, and Republicans need to work harder than ever to communicate our beliefs to them.” In reference to 2012 election exit polls, which found seventy-one percent of the Latino vote for President Obama compared to a mere twenty-seven percent for Republican candidate Mitt Romney, Stanford University professor Gary Segura, “who conducted the survey by Latino

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191 See id.

192 Id.

193 Ewen MacAskill, Republican Defeat has Conservative Factions Fighting for Party Control, GUARDIAN (Nov. 7, 2012, 2:47 PM), http://www.guardian.co.uk/world/2012/nov/07/republican-defeat-factions-fighting-control.

194 Id.

195 Id.
Decisions, which has done extensive polling of Hispanic voters, [remarked,] ‘For the first time in U.S. history, the Latino vote can plausibly claim to be nationally decisive.”

In consideration of that Republican sentiment, a Dream Act of 2013 may be possible. The provisions of such an Act would likely be comparable to, and mostly consistent with, its failed predecessors with an aim to provide permanent residency to certain undocumented immigrants of good moral character who graduated from U.S. high schools, arrived in the United States as minors, lived in the United States continuously for at least five years prior to the bill’s enactment, etc. However, in order to prevent the same result as the past failed DREAM proposals, proponents should examine state efforts. Perhaps states can be used as laboratories of democracy in relation to immigration efforts. Although very few social studies have analyzed state efforts, at least one study by Roger Williams University analyzed the cost-benefit debate over providing in-state tuition to undocumented students. The study confirmed in-state tuition legislation increased college enrollment amongst undocumented students and decreased high school dropout rates. Overall, states with such legislation appeared to benefit from the policies. With so many states enacting legislation in response to DACA, it is only a matter of time before more studies become available. With that evidence in hand, Congress can implement a wholly informed measure by using the states as laboratories of democracy.

CONCLUSION

The Deferred Action for Childhood Arrivals program has opened the door to opportunities for many undocumented immigrants and allowed them to dream. While some states have provided additional resources to deferred action recipients to make those dreams become a reality, there is still a hurdle to overcome as a path to citizenship for those undocumented immigrants has not yet been provided. The federal government ought to examine states’ efforts and, with forthcoming studies establishing the benefits and detriments of those policies, Congress will be able to draft informed legislation that is likely to surpass the prior failed DREAM Acts. Considering the results of the last election, even Republicans have realized

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199 Id. at 11-14.
200 Id.
the time for change is now. It is high time to allow the undocumented immigrants, who are Americans in their hearts, minds, and every single way but on paper, to become American citizens.
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

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, BRENNAH 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.\footnote{8}{Id. at 5.}

The specific facts of Bearden required the Court to review to constitutionality of incarcerating defendants for their failure to pay traditional legal debts: fines and restitution.\footnote{9}{Bearden, 461 U.S. at 660.} Recently, a new kind of legal debt has emerged.\footnote{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.”).} 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.\footnote{11}{See Bannon et al., supra note 6, at 4 (“[c]ash-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”).} “Across the country, individuals face an increasing number of ‘user fees’ as part of their criminal cases.”\footnote{12}{Id. at 4 (“[T]he decision to raise or create new user fees is rarely made with much deliberation or thought about the consequences.”).} As a result of this trend, legislatures have been able to enact statutes that impose politically popular, mandatory sentences without consideration of their costs.\footnote{13}{Id. at 7.} 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.\footnote{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.”).} “[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.”\footnote{15}{Id. at 7.} For instance, Georgia requires all defendants to pay for the cost of their probation\footnote{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.”).} and imposes fees on defendants who receive state-appointed counsel, who by definition have already been deemed indigent by the court.\footnote{17}{See O.C.G.A. § 15-21A-6.}
This is in addition to any fine, fee, restitution, or other amount ordered by the sentencing judge.\textsuperscript{18} 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.”\textsuperscript{19}

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.\textsuperscript{20} 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.\textsuperscript{21}

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.\textsuperscript{22} 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.\textsuperscript{23} 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.”\textsuperscript{24}

\textsuperscript{18} BANNON ET AL., \textit{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.”).

\textsuperscript{19} Id.

\textsuperscript{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.”).

\textsuperscript{21} See, e.g., REBEKAH DILLER, THE HIDDEN COSTS OF FLORIDA’S CRIMINAL JUSTICE FEES, BRENNAN 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.”).


\textsuperscript{23} Id.

\textsuperscript{24} IN FOR A PENNY, \textit{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.\(^{25}\)

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.\(^{26}\) 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.”\(^{27}\)\(^{28}\) However, not all individuals who have

\(^{25}\) 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 \textit{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.”

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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 \textit{supra}. The 1993 definition includes felonies and the misdemeanor of unlawful restraint, which the 2002 definition omits. \textit{See} O.C.G.A. § 19-13-1. \textit{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. \textit{See} § 19-13-10 (“As used in this article, the term… ‘family 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. \textit{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. \textit{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. \textit{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. \textit{See} Rule 125-4-9-.03(i)(1) (“Commission of the offense of battery, simple 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 \textit{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.” \textit{See} O.C.G.A. § 19-13-1. \textit{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). \textit{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. \textit{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.”31 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.”32 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.33 Though it appears from practice in Georgia that poverty is not such a justifying circumstance.34

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.35 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

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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 emotion 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.gefv.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.\textsuperscript{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.\textsuperscript{41} However, Rule 125-4-9-.04(a)(3) provides that service providers may “pass this cost on to the participant.”\textsuperscript{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.”\textsuperscript{43} Upon the individual’s fourth absence, they will be automatically terminated from the program.\textsuperscript{44} The Rules further specify that each individual, once-a-week class must be no less than ninety minutes long.\textsuperscript{45} Second, the Rules require that each program “conduct an initial orientation and an intake/screening interview” on each new offender.\textsuperscript{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

\textsuperscript{40} Adopted Apr. 23, 2003.
\textsuperscript{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.”).
\textsuperscript{42} Rule 125-4-9-.04(a)(3).
\textsuperscript{43} Rule 125-4-9-.07(c)(1).
\textsuperscript{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.”).
\textsuperscript{45} Rule 125-4-9-.07(c)(2) (“Classes must be at least ninety (90) minutes in length.”).
\textsuperscript{46} Rule 125-4-9-.07(a).
intake/screening interview count toward the 24 class requirement."\textsuperscript{47} 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.\textsuperscript{48} 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.\textsuperscript{49}

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.”\textsuperscript{50} 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.\textsuperscript{51} 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.”\textsuperscript{52} The Rules do set an upper limit on the amount each service provider may charge an offender \textit{per class}—fifty dollars.\textsuperscript{53} 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.”\textsuperscript{54} So the Rules also answer the question of \textit{who} makes the determination of indigence—the court,\textsuperscript{55} however, the Rules, like the authorizing statutes, provide no guidance as to how a court should make that determination.\textsuperscript{56}

\textsuperscript{47} Id.
\textsuperscript{48} But note that it could possibly be argued that the sliding scale discussed \textit{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).
\textsuperscript{49} Id.
\textsuperscript{50} O.C.G.A. § 19-13-16(c).
\textsuperscript{51} O.C.G.A. § 19-13-14(a).
\textsuperscript{52} Rule 125-4-9-.07(d).
\textsuperscript{53} Id.
\textsuperscript{54} Id.
\textsuperscript{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.
\textsuperscript{56} Rule 125-4-9-.07(d).
\textsuperscript{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, \textit{the burden falls on individual providers to determine indigency}. Interview with John Lee, Family Counseling of Athens (Jan. 22, 2013).
\textsuperscript{58} See \textit{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.\(^59\) 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.\(^60\) Nor is there any indication as to what factors may be relevant to that determination.\(^61\) 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.\(^62\)

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.\(^63\) Rule 125-4-9-.09(b) specifies the circumstances under which a participant must be terminated and prohibited from completing an FVIP class.\(^64\) Among those circumstances listed, in addition to termination for absences, discussed supra, is the failure to make fee payments.\(^65\) 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.\(^66\) So other than trying to find another FVIP service

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\(^{59}\) 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,\textsuperscript{67} 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.\textsuperscript{68}

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.\textsuperscript{69} 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.\textsuperscript{70} That same fact sheet states that the most common cost of an FVIP class in Georgia is $30 per class.\textsuperscript{71} It also reiterates that “FVIPs are required to have a sliding fee scale for offenders declared indigent by the court.”\textsuperscript{72} The author contacted the Department of Corrections’ Office of Legal Services in hopes of getting access to these fee reduction plans that practice, including the fact that, in many cases, an individual is incarcerated while awaiting a probation hearing, sometimes for a month or longer.

\textsuperscript{67} But see supra note 60.
\textsuperscript{68} Id.
\textsuperscript{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.
\textsuperscript{70} See infra Appendix A. Emailed by La Donna Varner, FVIP Compliance Coordinator, Georgia Commission on Family Violence (Jan. 16, 2013).
\textsuperscript{71} Id.
\textsuperscript{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 allowing 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

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

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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.”).


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. 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. The Department of Corrections’ online fact sheet purports to answer the question “[w]hat happens if there is no certified FVIP in my area?” 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.

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 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.

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93 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”).

94 See O.C.G.A. § 19-13-16. Compare 18 U.S.C. § 3563(b) (requiring a domestic violence rehabilitation program to be imposed as a condition of federal probation, but only if “an approved program is readily available within a 50-mile radius of the legal residence of the defendant.”).


96 Id.

97 See supra note 14.
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. 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. Upon doing so, they found that only 36% of those offenders ordered to complete FVIP were actually successful in completing it. The remaining 64% 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. His data showed that only 30% of these offenders actually enrolled in an FVIP

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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% 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 actually enrolled in an FVIP class within 60 days. Of those that did enroll, 36% successfully attended FVIP to its completion, while 64% did not. Thus, out of the 199 probationers they supervised in 2011, only 22% 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% of people who enrolled in FVIP were unsuccessful in completing it. He found that 70% were terminated from FVIP for absences, 15% enrolled but never started, and 15% received new criminal charges before they could complete the 24-week course. Furthermore, Mr. Kelley’s data shows that, of those 64% of offenders terminated from their FVIP program for whatever reason, the probation office issued a warrant for their arrest in 72% 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% of cases, the probation officers gave the offenders the opportunity to re-enroll in FVIP within 15 days.

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103 73 of 199 offenders.
104 126 of 199 offenders.
105 45 of 126 offenders.
106 81 of 126 offenders.
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.
108 45 of 199 offenders.
109 81 of 126 offenders.
110 57 of 81 offenders.
111 12 of 81 offenders.
112 12 of 81 offenders.
113 81 of 126 offenders.
114 58 of 81 offenders.
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\(^\text{116}\) and the 72% of those who enrolled but were terminated before they completed it.\(^\text{117}\) This means that, in 66%\(^\text{118}\) of all the cases he reviewed, the offender was arrested for failing to complete FVIP.\(^\text{119}\) 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%\(^\text{120}\) of offenders were continued on probation and directed to continue with FVIP, 20%\(^\text{121}\) were continued on probation without FVIP, and 46%\(^\text{122}\) were discontinued from probation and given a confinement sentence. In all, in 2011, 30%\(^\text{123}\) 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\(^\text{124}\) 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\(^\text{125}\) 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.\textsuperscript{131}

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.\textsuperscript{132} Rather, it appeared that its holding was based on a confluence of principles found in both clauses.\textsuperscript{133} Subsequently, the Court has used varying formulations of this Equal Protection-Due Process analysis\textsuperscript{134} to strike down filing fees for habeas petitions,\textsuperscript{135} the requirement that indigent defendants make a preliminary showing of merit in order to be appointed counsel on direct appeal,\textsuperscript{136} and the denial of preliminary hearing transcripts to those who cannot afford to pay for them.\textsuperscript{137} These early cases, however, dealt with state procedures that denied or curtailed indigents’ \textit{access} to the court system.\textsuperscript{138}

It wasn’t until 1970 that the Supreme Court first used Fourteenth Amendment jurisprudence to invalidate variations in \textit{sentencing} that were based solely on wealth.\textsuperscript{139} In \textit{Williams}, an individual was sentenced to a $500 fine and a year imprisonment, the maximum sentenced authorized by state law for that offense.\textsuperscript{140} After completion of his one-year sentence, the defendant was kept incarcerated an additional 101 days in order to “work off” the fine, which

\textsuperscript{131}Id. (emphasis added).
\textsuperscript{132}See id. at 17.
\textsuperscript{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).
\textsuperscript{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.
\textsuperscript{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.”).
\textsuperscript{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.”).
\textsuperscript{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.”).
\textsuperscript{138}See, e.g., id. at 42 (“Our decisions for more than a decade now have made clear that differences in \textit{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).
\textsuperscript{140}Id. at 236.
he was unable 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. In 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.” The 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. 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.” 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. In Bearden, the defendant was sentenced to three years probation, a $500 fine, and $250 in restitution. 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. 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.

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149 Id. at 667.
150 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].”).
151 Id. at 670.
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.”).
153 Bearden, 461 U.S. at 662.
154 Id.
155 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.\footnote{\textit{Id.} at 663.} 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.\footnote{\textit{Id.} at 668.} 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.”\footnote{\textit{Id.} at 668-69.} Thus, after \textit{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.\footnote{See \textit{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).}

\textbf{B. Georgia: Equal Protection and Wealth After Bearden}

Subsequent to the Supreme Court’s decision in \textit{Bearden}, two areas of state court jurisprudence in Georgia are particularly noteworthy. The first area deals with the temporal requirements of \textit{Bearden}, for example, at what point(s) a determination of willfulness must be made. Second, Georgia courts consider the applicability of \textit{Bearden} to cases in which a defendant \textit{voluntarily} enters into a plea agreement with the State that includes the payment of a fine.\footnote{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 \textit{Penalizing Poverty: Making Criminal Defendants Pay for Their Court-Appointed Counsel Through Recoupment 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,

\(^{162}\) 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*.\footnote{171} 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.\footnote{172}

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.\footnote{173} 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.”\footnote{174} Georgia courts appeared to be headed that direction after the Court of Appeals’ decision in *Dickey v. State*.\footnote{175} 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.\footnote{176} After he failed to make payments in accordance with that schedule, the trial court revoked his probation.\footnote{177} 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.\footnote{178}

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.\footnote{179} In *Johnson*, the defendant was sentenced to eight years probation and a significant fine.\footnote{180} The trial court subsequently revoked his probation for failing to pay court-ordered fines,

\footnote{171 Id.\footnote{172 Id.\footnote{173 See *The Conflict Over Bearden v. Georgia in State Courts: Plea-Bargained Probation Terms and the Specter of Debtors’ Prison*, 2010 U. Chi. Legal F. 383 (2010).\footnote{174 Id. at 386.\footnote{175 257 Ga. App. 190 (2002).\footnote{176 Id. at 190.\footnote{177 Id. at 191.\footnote{178 Id. at 194.\footnote{179 Johnson v. State, 307 Ga. App. 570 (2011).\footnote{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.

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

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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) (“[If 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.

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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 work-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

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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

\footnotesize{206} But note that no such statute or Rule specifically authorizes a judge to do so.

\footnotesize{207} Tate, 401 U.S. at 399.

\footnotesize{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. As discussed in Section IIIA, 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, 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% 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. Absent a determination of willfulness, this would be a patent violation of 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 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 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.

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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. 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.

<table>
<thead>
<tr>
<th>Service Provider</th>
<th>Location</th>
<th>Required Prior to Enrollment</th>
<th>Cost Per Class (Once Enrolled)</th>
<th>Termination Policy</th>
</tr>
</thead>
</table>

Table 1
<table>
<thead>
<tr>
<th>Organization</th>
<th>Location</th>
<th>Fees</th>
<th>Sliding Scale Policy</th>
<th>Class Attendance Policy</th>
</tr>
</thead>
<tbody>
<tr>
<td>Person Centered Court Services</td>
<td>Athens, Clarke Co.</td>
<td>$10 assessment, $40 state fee</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.</td>
<td>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>
</tr>
<tr>
<td>Family Counseling of Athens</td>
<td>Athens, Clarke Co.</td>
<td>$100 assessment, $30 x 2 individual assessments</td>
<td>Once registered, if participants can’t pay, provider will negotiate fee down to $10/class.</td>
<td>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>
</tr>
<tr>
<td>Redirect Counseling</td>
<td>Valdosta, Lowndes Co.</td>
<td>$50 intake, $35 orientation</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.</td>
<td>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>
</tr>
<tr>
<td>Defying the Odds, Inc.</td>
<td>Atlanta, College Park, Fulton Co.</td>
<td>$50 evaluation/registration</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</td>
<td>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>
</tr>
<tr>
<td>Service Provider</td>
<td>Location</td>
<td>Fees and Costs</td>
<td>Notes</td>
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<tr>
<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>
<td></td>
</tr>
<tr>
<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>
<td></td>
</tr>
<tr>
<td>Parent &amp; Child Family Violence Intervention</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>
<td></td>
</tr>
<tr>
<td>Domestic Violence Intervention Program of Family Center</td>
<td>Columbus Muscogee Co.</td>
<td>$75 intake/orientation</td>
<td>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>
<td></td>
</tr>
<tr>
<td>Quality Directions Family Violence Intervention Program</td>
<td>Macon Bibb Co.</td>
<td>$75 assessment</td>
<td>Provider “doesn’t let them get too far behind.” Participants will not get a letter of completion until they pay off their balance.</td>
<td></td>
</tr>
<tr>
<td>Georgia Intervention</td>
<td>Gray</td>
<td>$45 fee due at $30/class</td>
<td>If participants can’t make payment, they will be deemed</td>
<td></td>
</tr>
<tr>
<td>Alternatives</td>
<td>Jones Co.</td>
<td>first class</td>
<td>absent</td>
<td></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>
<td>(have to wait until they can make payment). Must restart program after 3rd absence.</td>
<td></td>
</tr>
</tbody>
</table>