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INTRODUCTION

The term "debtors' prison" may call to mind visions of antique London—the indolent rake of Hogarth's prints or Little Dorrit trudging home to the Marshalsea—but imprisonment for civil debt flourished on American as well as British soil well into the nineteenth century.[1] For a variety of humanitarian and practical reasons, public opinion gradually turned against the practice, and in 1821 states began acting to outlaw imprisonment for debt.[2] Congress passed a statute forbidding the federal government to imprison civil debtors in states with such laws;[3] at the same time, new bankruptcy laws helped to make such drastic remedies unnecessary.[4] Today most state constitutions explicitly forbid imprisonment for civil debts.[5] The United States Con-

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[1] See Richard Ford, *Imprisonment for Debt*, 25 Mich L Rev 24, 29 (1926) (quoting an estimate by an anti-debtors'-prison association in 1830 that three to five times as many persons in Northern states were incarcerated for debt as for criminal offenses; the practice was less common in the South). But see Edwin T. Randall, *Imprisonment for Debt in America: Fact and Fiction*, 39 Miss Valley Hist Rev 89, 98–102 (1952) (arguing that these statistics are unreliable and that imprisonment for debt even in Northern states had all but disappeared in the early nineteenth century).

[2] Charles Warren, *Bankruptcy in United States History* 52 (Harvard 1935). See 28 USC § 2007(a) ("A person shall not be imprisoned for debt on a writ of execution or other process issued from a court of the United States in any State wherein imprisonment for debt has been abolished.").

[3] An Act to abolish imprisonment for debt in certain cases, 5 Stat 321 (1839), codified as amended at 28 USC § 2007(a).

[4] See Bruce H. Mann, *Republic of Debtors: Bankruptcy in the Age of American Independence* (Harvard 2002).

[5] See, for example, Cal Const Art I § 10; Tex Const Art I § 18. Many state constitutional provisions have been interpreted to apply only to debts arising out of contract, thus excluding tort judgments and child support and alimony debts.

stitution is silent on the matter, though the Eighth and Thirteenth Amendments have been interpreted to prohibit debtors' prison in some circumstances.[6]

In the criminal context, however, the states have not been so scrupulous, and de facto debtors' prisons persist. Imprisonment for failure to pay a fine, restitution, or court costs can occur when repayment is made a condition of probation or parole and the defendant defaults.[7]

To some extent, the distinction between civil debts and debts owed to the state is sensible. One of the unsettling aspects of historical debtors' prisons was that the common-law writ of *capias ad satisfaciendum*, used in conjunction with the writ of *capias ad respondendum*, was a means by which individuals could elect to send their fellow citizens to prison[8]—a power that the modern state usually reserves to itself. Thus, the fact that courts treat civil debts differently than obligations that are imposed as part of a criminal sentence may be partially explained by the fact that in criminal cases, discretion is vested in the sentencing judge rather than a vindictive creditor. However, the distinction is also rationalized on the ground that court-imposed debts are punitive in nature and substitute for incarceration or a longer sentence. This argument neglects to consider that court-imposed debts are not all alike. Court costs include contribution and recoupment, recent legislative innovations that ask indigent defendants to pay for their court-appointed counsel.[9] These costs cannot be considered punitive: they are conceptually identical to a debt owed to a private attorney (except in some cases, defendants

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[6] See, for example, *US v Weldon*, 568 F Supp 516, 532 (D Ala 1983) ("No one doubts that simple and straight-forward imprisonment for debt violates the Eighth Amendment prohibition against 'cruel and unusual punishment.'") (dictum), revd on other grounds, *US v Satterfield*, 743 F2d 827 (11th Cir 1984); *Alkire v Irving*, 330 F3d 802, 816 (6th Cir 2003), citing *US v Kozminski*, 487 US 931, 943 (1988) ("The constitutional right against imprisonment for failure to pay a debt is well established under both the Thirteenth and Fourteenth Amendments. The Thirteenth Amendment prohibits 'condition[s] in which the victim is coerced by threat of legal sanction to work off a debt to a master.'"). See also Abraham L. Freedman, *Imprisonment for Debt*, 2 Temple L Q 330, 355 (1928) ("The Constitution of the United States contains no prohibitions of imprisonment for debt, except, it is said, that the Thirteenth Amendment operates as a limitation upon the power of the State to extend imprisonment for breach of obligations to such a degree as shall constitute a substantial servitude.").

[7] But see Ill Const Art I § 14 ("No person shall be imprisoned for failure to pay a fine in a criminal case unless he has been afforded adequate time to make payment, in installments if necessary, and has willfully failed to make payment.").

[8] See Freedman, 2 Temple L Q at 347 (cited in note 6).

[9] See Helen A. Anderson, *Penalizing Poverty: Making Criminal Defendants Pay for Their Court-Appointed Counsel through Recoupment and Contribution*, 42 U Mich J L Ref 323, 331 (2009).

were not informed there would be a charge for the services[10]). And while it is true that many fines are imposed as an alternative to incarceration, some are levied pursuant to statutes that do not even authorize imprisonment.[11]

Observing that "[t]he decision to place the defendant on probation . . . reflects a determination by the sentencing court that the State's penological interests do not require imprisonment," the Supreme Court in *Bearden v Georgia*[12] constrained state courts' ability to revoke probation for failure to pay fines, restitution, and court costs.[13] The Court held that when a defendant violates a probation condition relating to the repayment of court-imposed fines or restitution, the Fourteenth Amendment requires that the sentencing court inquire into the reasons a defendant has failed to pay.[14] (This inquiry takes place during the probation revocation hearing, already required under *Morrissey v Brewer*[15] and *Gagnon v Scarpelli.*[16]) If the defendant has the ability to pay, then the failure is deemed willful and incarceration is permissible; if the defendant has made reasonable attempts to gain the means to pay and yet cannot, through no fault of his or her own, then the court must seek alternative means of punishment and deterrence.[17] By requiring a finding of willfulness, *Bearden* prevented a revival of debtors' prison for criminal defendants. No longer would mere inability to pay a debt to the state be sufficient grounds for imprisonment.

Bearden was a narrow decision. It did not require an estimate of ability to pay at initial sentencing, although one might think that at least some repayment problems are avoided when sentencing judges make an effort to do so.[18] It drew a sharp line

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[10] See id at 349 ("Some statutes explicitly require that defendants be given notice of possible recoupment debt prior to accepting appointed counsel. But in other jurisdictions, courts have held that such notice is not required, and that failure to provide notice of possible recoupment debt is not unconstitutional.") (citations omitted).

[11] See Recent Legislation, *Alabama Raises the Rates at Which Individuals in Jail for Nonpayment of Fines Earn out Their Debts*, 116 Harvard L Rev 735, 735 n 3 (2002).

[12] 461 US 660 (1983).

[13] Id at 670.

[14] Id at 672.

[15] 408 US 471 (1972) (holding that minimal procedural due process requirements must be observed in parole-revocation hearings).

[16] 411 US 778, 782 (1973) (extending *Morrissey* to probation-revocation hearings).

[17] Id.

[18] But see *San Antonio Independent School District v Rodriguez*, 411 US 1, 22 (1973) ("The Court has not held that fines must be structured to reflect each person's ability to pay in order to avoid disproportionate burdens. Sentencing judges may, and often do, consider the defendant's ability to pay, but in such circumstances they are guided by sound judicial discretion rather than by constitutional mandate.").

between debt-related probation conditions, which trigger serious Constitutional concerns and correspondingly painstaking legal procedures, and ordinary probation conditions, which inspire no such qualms. As the Court explained,

> We do not suggest that, in other contexts, the probationer's lack of fault in violating a term of probation would necessarily prevent a court from revoking probation. For instance, it may indeed be reckless for a court to permit a person convicted of driving while intoxicated to remain on probation once it becomes evident that efforts at controlling his chronic drunken driving have failed. . . . In contrast to a condition like chronic drunken driving, however, the condition at issue here—indigency—is itself no threat to the safety or welfare of society.[19]

The Court singled out indigency for special treatment not because poverty is accorded any unusual level of attention under the Equal Protection Clause—indeed, *San Antonio Independent School District v Rodriguez* had recently foreclosed that possibility[20]—but more likely because, in the context of probation revocation, indigency raises the specter of debtors' prison. The Supreme Court has never had an opportunity to address the constitutionality of debtors' prison directly, but an institutional discomfort with the practice—"our traditional aversion to imprisonment for debt,"[21] as an earlier case put it—is the most persuasive explanation for *Bearden*'s heightened procedural requirements.

In the years since *Bearden*, some state courts have blurred the line between debt-related probation terms and ordinary probation terms, allowing trial courts to skirt the *Bearden* mandate that courts inquire into ability to pay before revoking probation. Since *Bearden* addressed a fact pattern in which the defendant had been sentenced by a trial court judge, these courts have carved out an exception to *Bearden* in situations in which the probationer has affirmatively agreed to pay as part of a plea bargain.[22] Other courts have resisted this shortcut, treating negotiated pleas no differently than judge-initiated conditions.[23]

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[19] *Bearden*, 461 US at 669 n 9 (citations omitted).

[20] *Rodriguez*, 411 US 1, 28–29.

[21] *US v Bishop*, 412 US 346, 352 (1973).

[22] See, for example, *State v Nordahl*, 680 NW2d 247, 251–52 (ND 2004) (holding that *Bearden* does not apply where a defendant has promised to pay restitution as part of a plea bargain rather than a court-imposed sentence).

[23] See, for example, *Jordan v State*, 939 SW2d 255 (Ark 1997) (holding that an in-

Bearden contained no explicit exception for plea bargains, and the courts that have deviated from its mandate often refer to pre-*Bearden* state precedent to bolster their holdings.[24] Courts have also justified their holdings with reference to the contract theory of plea bargaining.[25] However, these courts neglect the crucial difference between plea-bargained probation terms and ordinary contracts: the penalty for breach of a contract has long since ceased to be a prison sentence.[26]

In the current economic climate, resolution of this split of authority among state courts—which first emerged in the 1990s—takes on greater urgency. The rate of plea bargaining increases during economic downturns when budgets for prosecutors' and public defenders' offices are cut.[27] Increased caseloads for public defenders also make it less likely that plea bargains reflect genuine negotiations over total obligations and payment schedules.[28] Meanwhile, debt-related probation terms that seemed reasonable to a defendant and defense counsel at the height of the housing bubble—with its booming construction industry, a sector that has historically been more hospitable to workers with criminal convictions[29]—turn increasingly unrealis-

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quiry into ability to pay was required by *Bearden* even when the defendant had promised to pay restitution as part of a plea bargain).

[24] See, for example, *Nordahl*, 680 NW2d at 250–51 (citing *State v Thorstad*, 261 NW2d 899 (ND 1978), as support for the proposition that inquiry into ability to pay is not required where the defendant has promised to pay to restitution as part of a plea bargain).

[25] See, for example, *Thorstad*, 261 NW2d at 902 (reasoning in part that "[p]lea bargaining has been officially accepted in North Dakota, and . . . contract criteria have been superimposed upon it. This gives the courts justification to treat court-approved plea bargain agreements similarly to contracts.").

[26] See, for example, Robert J. Steinfeld, *Coercion, Contract, and Free Labor in the Nineteenth Century* 218 (Cambridge 2001) (describing the end of penal sanctions for breach of employment contracts in 1870s England).

[27] See Sheila K. Dean, *Prosecutors Say Cuts Force Plea Bargains*, NY Times B3 (Mar 10, 2004) ("Deep staffing cuts and increased caseloads are forcing prosecutors to accept plea bargains they would never have considered otherwise, the city's district attorneys said"); Michael Andersen, *County Offers a Mix of Cuts, Taxes*, The Columbian A1 (Nov 21, 2009) ("'We are planning for a long recession,' [Clark County, Washington] Commissioner Marc Boldt said Friday morning. 'Home growth, I think, isn't going to come back to where it was.' Commissioners' proposals, which are not final, include: $690,112 from the county prosecutor's office, including four attorneys, two support positions and a round of furloughs. Office administrator Shari Jensen said such cuts would drive up caseloads and increase plea bargaining.").

[28] See Deborah Hastings, *Nationwide, Public Defender Offices Are In Crisis*, The Associated Press (June 4, 2009), online at http://seattletimes.nwsource.com/html/nationworld/2009296604_apusnodefenseabridged.html (visited Oct 3, 2010) ("[E]ven in the best of times, public defenders say a quick plea bargain is sometimes as good as it gets.").

[29] See Jack Chang, *Felons Face Reality of Outside World; Laws, Prejudice Make It Hard to Get Work, Housing*, Contra Costa Times A1 (Aug 13, 2003) (describing industrial,

tic as the economy sours. The budget crises faced by many state and local governments have already led to other aggressive strategies to collect debts from probationers, prompting highly critical coverage in the press[30] and some litigation,[31] but the plea-bargain exception has not yet received a critical assessment.

This Comment argues that under *Bearden* there is no compelling justification for treating plea-bargained probation terms differently than judge-imposed probation terms. Both situations raise the constitutionally troublesome prospect of debtors' prison. The analogy between plea bargains and contracts, urged by some state courts as a reason to deviate from *Bearden*, should instead lead courts to approach plea bargains with the same concern with which they approach judge-imposed sentences, particularly because parity between sentences and plea bargains was the original objective of the contract theory of plea bargains. Conversely, there are important differences between plea bargains and contracts, and courts should avoid taking the analogy too far, especially in the constitutionally delicate area of debt-related probation terms. Contract theory aside, sending indigent defendants directly to prison because they broke a plea-bargained promise to pay contravenes the Fourteenth Amendment because it does not allow for a valid determination of willfulness. Finally, carving out a judge-made exception to *Bearden* is not justified by pragmatic considerations.

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warehouse, and construction jobs as the most likely employment options for parolees and ex-felons); Kathleen Chapman, *Job Market Tough for Ex-Convicts*, Palm Beach Post 1C (Mar 30, 2003) (reporting that in a survey of Palm Beach County, Florida, employers, a quarter of all employers said they would consider hiring a former offender, while half of employers in the manufacturing and construction industries would consider doing so).

[30] See, for example, John Schwartz, *As State Courts Face Cuts, A New Push to Squeeze Defendants*, NY Times A17 (Apr 7, 2009) (describing the Florida system of collection courts, which routinely jail debtor defendants for failing to appear in court, and noting that "[a]s Florida's budget has tightened with the economic crisis, efforts to step up the collections process have intensified, and court clerks say the pressure is on them to bring in every dollar"); Editorial, *Debtor's Prison—Again*, St Petersburg Times 8A (Apr 14, 2009), (decrying Florida collection courts); Jody Lawrence-Turner, *Debt to Society*, Spokesman Review A1 (May 24, 2009) (describing in general terms the aggressive collection policy in Spokane County, Washington); Jody Lawrence-Turner, *High Court Take Criminal Fees Case*, Spokesman Review A8 (May 24, 2009) (explaining that a Spokane county clerk visited every inmate booked into jail for charges relating to the failure to pay court debts and asked him or her to sign an agreed order promising to adhere to a payment schedule for outstanding fines, restitution, and/or court costs—or return to jail).

[31] See, for example, *State v Nason*, 233 P3d 848, 851–52 (Wash 2010) (holding, in a case challenging the Spokane County policy described in note 30, that "[b]ecause due process requires the court to inquire into [the defendant's] reason for nonpayment, and because the inquiry must come at the time of the collection action or sanction, ordering [the defendant] to report to jail without a contemporaneous inquiry into his ability to pay violated due process").

This Comment does not assert that courts must disregard the fact that a debt-related probation term was agreed to as part of a negotiated plea. To the contrary, this fact should be considered at the probation-revocation hearing in order to guard against strategic behavior on the part of defendants. However, agreeing to payment terms at one point in time should not be treated as conclusive evidence of bad faith or ability to pay at a later date.

I. *BEARDEN V GEORGIA* AND THE SPLIT OF AUTHORITY AMONG STATE COURTS

During the 1970s and '80s, the Supreme Court imposed increasing restrictions on the practice of imprisoning criminal defendants for failing to pay fines, restitution, and court costs. The first major case in this area, *Griffin v Illinois*,[32] established that the Court would entertain equal protection and due process claims with regard to the indigent status of criminal defendants, and suggested that indigency might be a suspect classification.[33] On the subject of fines, the Supreme Court held in *Williams v Illinois*[34] that under the Equal Protection Clause of the Fourteenth Amendment, an indigent criminal defendant may not be subjected to a prison term beyond the statutory maximum merely because he or she is unable to pay a fine or court costs.[35] Again under the Equal Protection Clause, the Court held in *Tate v Short*[36] that a state may not incarcerate an indigent defendant under a fine-only statute for failure to pay the fine immediately.[37] Citing these cases, *Bearden* then held:

> [I]n revocation proceedings for failure to pay a fine or restitution, a sentencing court must inquire into the reasons for the failure to pay. If the probationer willfully refused to pay or failed to make sufficient bona fide efforts legally to acquire the resources to pay, the court may revoke probation and sentence the defendant to imprisonment within the authorized range of its sentencing authority. If the probationer could not pay despite sufficient bona fide

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[32] 351 US 12 (1956).

[33] Id at 17 ("In criminal trials a State can no more discriminate on account of poverty than on account of religion, race, or color.").

[34] 299 US 235 (1970).

[35] Id at 240–41.

[36] 401 US 395 (1971).

[37] Id at 399.

> efforts to acquire the resources to do so, the court must consider alternate measures of punishment other than imprisonment. 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. To do otherwise would deprive the probationer of his conditional freedom simply because, through no fault of his own, he cannot pay the fine. Such a deprivation would be contrary to the fundamental fairness required by the Fourteenth Amendment.[38]

The phrase "fundamental fairness" reflects the Court's understanding that the equal protection rationale of the earlier cases was falling out of favor; substantive due process had become the preferred mode of analysis.[39]

This shift was necessary because shortly after *Tate*, the Court had made clear that the poor are not a suspect class for the purpose of equal protection analysis.[40] Mindful of this precedent, Justice O'Connor in *Bearden* formally announced the Court's holding under both the equal protection and due process clauses, while suggesting in a footnote that the more suitable mode of analyzing these questions might be substantive due process:

> A due process approach has the advantage in this context of directly confronting the intertwined question of the role that a defendant's financial background can play in determining an appropriate sentence. When the court is initially considering what sentence to impose, a defendant's level of financial resources is a point on a spectrum rather than a classification. Since indigence in this context is a relative term rather than a classification, fitting "the problem of this case into an equal protection framework is a task too Procrustean to be rationally accomplished." The more appropriate question is whether consideration of a defendant's financial background in setting

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[38] *Bearden*, 461 US at 672–3.

[39] See Sundeep Kuthari, *And Justice for All: The Role Equal Protection and Due Proces Principles Have Played in Providing Indigents with Meaningful Access to the Courts*, 72 Tulane L Rev 2159, 2161–80 (1998).

[40] *Rodriguez*, 411 US at 28–29 ("[T]his Court has never heretofore held that wealth discrimination alone provides an adequate basis for invoking strict scrutiny.").

> or resetting a sentence is so arbitrary or unfair as to be a denial of due process.[41]

The question for state courts considering plea-bargained probation terms is the same: whether the decision to imprison the defendant without assessing his or her ability to pay is so arbitrary or unfair as to be a denial of substantive due process.

Bearden addressed a criminal defendant who, having pled guilty to burglary and theft of stolen property, was sentenced by the trial court to three years on probation.[42] As a condition of probation, the defendant was ordered to pay both a fine and restitution.[43] After paying an initial installment, the defendant was laid off from his job and he was unable to find new work.[44] Although he informed the probation office that he would be unable to pay the remainder of his obligation on time, the trial court held an evidentiary hearing, made no findings as to his ability to pay, and revoked his probation.[45] *Bearden* made no pronouncement about whether a plea-bargained probation term would carve out an exception to the rule, but emphasized that the reason courts were justified in imprisoning a defaulting probationer when an evidentiary hearing had determined that he or she had the means to pay was that such a probationer had "willfully refused to pay."[46]

In the years since *Bearden* was decided, some courts have inferred a willful refusal to pay at the time the probation term was violated whenever a defendant had initially agreed to pay as part of a plea bargain—regardless of how much time had intervened. In *State v Nordahl*,[47] the North Dakota Supreme Court looked first to *State v Thorstad*,[48] a North Dakota case decided prior to *Bearden* that concluded on statutory and policy grounds that a hearing to determine ability to pay was not required before the defendant's probation could be revoked when the defendant had agreed to pay restitution as part of a plea bargain and failed to do so.[49]

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[41] *Bearden*, 461 US at 667 n 8 (citation omitted).

[42] Id at 662.

[43] Id.

[44] Id at 663.

[45] *Bearden*, 461 US at 663.

[46] Id at 668.

[47] 680 NW2d 247 (ND 2005).

[48] 261 NW2d 899 (ND 1978).

[49] Id.

Surprisingly, the *Thorstad* court's reasoning survived *Bearden* intact. The *Nordahl* court's post-*Bearden* analysis found support in *US v Mitchell*,[50] in which a military court had also concluded that *Bearden*'s hearing mandate did not apply to a defendant's plea-bargained probation term.[51] *Mitchell* contained a relatively extensive discussion of why a finding of bad faith was merited for this particular defendant:

> Based on the record before him, the convening authority was justified in concluding that appellant either bargained in bad faith by misrepresenting his net worth, or he failed to take reasonable steps to safeguard his assets and convert them to cash after he was convicted and sentenced. The record reflects that appellant either made a bargain that he knew he could not keep, or he allowed his assets to be dissipated instead of taking prompt and reasonable measures to secure them. Either alternative constitutes bad faith.[52]

The *Mitchell* holding does not necessarily recognize a blanket rule that willfulness should be inferred whenever the defendant has failed to adhere to the terms of a plea bargain,[53] but uses the plea bargain as one piece of evidence alongside either willful misrepresentation at the time of the plea bargain ("made a bargain he *knew* he could not keep") or reckless behavior thereafter ("allowed his assets to be dissipated instead of taking prompt and reasonable measures to secure them"). This analysis, although highly skeptical of the defendant, more or less accords with *Bearden*'s requirement that courts find that the defendant "willfully refused to pay or failed to make sufficient bona fide efforts legally to acquire the resources to pay."[54] Still, the alternative finding of mere recklessness in "allow[ing] his assets to be dissipated" is an exceedingly loose interpretation of *Bearden*, and

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[50] 51 MJ 490 (US Armed Forces 1999).

[51] See id at 494 (holding that "the Due Process Clause does not protect an accused who offers to make full restitution, knowing full well that he cannot; nor does it protect an accused who fails to take timely and reasonable steps to safeguard his assets so that he can make restitution as promised").

[52] Id.

[53] But see id at 494 (Sullivan concurring) ("'A deal is a deal' sums up this case. Appellant failed to live up to his pretrial agreement by paying full restitution. Therefore, the convening authority lawfully vacated appellant's suspended sentence.").

[54] *Bearden*, 461 US at 672.

probably represents the outer bounds of a proper willfulness inquiry.

Though the *Nordahl* court claimed to be following *Mitchell*, its holding went much further. The defendant in *Nordahl* had entered into contracts to sell a future crop of hay and had accepted some payment in advance, but he was not able to secure as much land to grow the hay as he had expected.[55] Unfavorable weather then reduced his yield.[56] The farmers he had contracted with filed civil suits for damages, but also contacted the state's attorney, who eventually charged Nordahl with felony theft of property by deception.[57] Nordahl pleaded this charge down to a misdemeanor and agreed to probation and to pay $107,897.15 in restitution.[58] After making what would seem to qualify as *Bearden*'s "bona fide efforts legally to acquire the resources to pay"[59]—including an attempt to sell a mortgage-encumbered bus (naturally, the proceeds went to the bank) and an agreement to sell the hay operation in which Nordahl would continue working for the new owners—the trial court revoked his probation and imposed a one-year sentence.[60]

Affirming the trial court, the North Dakota Supreme Court accepted what amounts to a negligence standard (assessed solely at the time of the plea agreement) where the military court had required a standard closer to recklessness or willfulness (measured from the point of the plea agreement through the revocation hearing). The North Dakota Supreme Court reasoned that "[u]nlike *Bearden* . . . Nordahl knew his financial situation before he entered into the plea agreement with the State's Attorney. Nordahl *was in a position to know* the nature and extent of his finances and to evaluate his ability to pay the restitution obligation."[61] The court repeatedly emphasized it was not inquiring into Nordahl's actual mental state, but merely judging him by a reasonable-person standard: Nordhal "is presumed to have had knowledge;" he "knew or should have known."[62] Rather than

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[55] *Nordahl*, 680 NW3d at 249.

[56] Id.

[57] Id.

[58] Id.

[59] *Bearden*, 461 US at 672.

[60] *Nordahl*, 680 NW2d at 249; Brief of Appellant, *State v Nordahl*, No 20030269 (ND filed Dec 4, 2003) (available on Westlaw at 2003 WL 23695907); Brief of Appellee, *State v Nordahl*, No 20030269 (ND filed Dec 30, 2003) (available on Westlaw at 2003 WL 23695906) (conceding that the facts were not in dispute).

[61] *Nordahl*, 680 NW2d at 252 (emphasis added).

[62] Id.

serving as evidence of willfulness, the plea bargain was itself the decisive element.[63] Analogizing the plea bargain to a contract, the court quoted approvingly a revealing statement by the trial judge:

> [I]t would weigh more heavily with the Court if Mr. Nordahl had been ordered by the Court to pay restitution, then I would be more concerned with his ability to pay and the circumstances that have prevented him from paying. The fact is, he made a promise as part of his plea agreement that he would pay. He's violated that agreement. There may be circumstances that justify that. But, for whatever reason, he's violated that agreement and therefore he is in violation of the Court Order. I agree with Mr. Secrest, this is in criminal court. The consequence of violating the Court's Order is that the Court will revoke his sentence and impose a new sentence.[64]

Nordhal's state of mind was no longer the focus of the inquiry; rather, in light of the plea bargain, it was irrelevant.

Similar decisions have been reached in lower state and federal courts, including a federal district court in Alabama (*US v Johnson*[65]), a Kentucky appellate court (*Gamble v Commonwealth*[66]), and a Georgia appellate court (*Dickey v State*[67]); other courts have held that defendants whose plea bargain included an explicit promise not to plead indigence had waived their right to an inquiry into ability to pay later on.[68] Courts have also refused

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[63] Id at 251 ("Nordahl's situation is sufficiently distinguishable from the *Bearden* case. In *Bearden*, the defendant did not agree to the restitution as part of a plea agreement; rather, restitution was imposed by the court as a part of Bearden's sentence. In this case, Nordahl agreed to the restitution amount and agreed to the due date in a plea agreement.") (citation omitted).

[64] Id at 253.

[65] 767 F Supp 243, 248 (ND Ala 1991) (distinguishing *Bearden* on the grounds that the "restitution obligations were carefully bargained for after notice to the victims").

[66] 293 SW3d 406, 411–13 (Ky App 2009) (distinguishing *Bearden* on the grounds that it did not address plea-bargained probation terms, but holding in the alternative that the defendant waived his right to an inquiry by refusing to testify at the revocation hearing).

[67] 570 SE2d 634, 636 (Ga App 2002) (holding that *Bearden* does not apply to plea-bargained probation terms).

[68] See *Wright v State*, 610 So2d 1187 (Ala Crim App 1992) ("In the usual case in which restitution is imposed by the court, a factual determination of indigence is appropriate before a defendant is incarcerated for nonpayment. In the present case, however, such a determination would be irrelevant. Here, the appellant helped to formulate the conditions of a plea agreement that included the specific consequence of revocation of probation for failure to pay restitution. He specifically waived the right to plead poverty in the event of such nonpayment.").

to extend *Bearden* in the related but factually distinct scenario in which the restitution was not agreed to as a condition of probation, but was instead promised prior to formal sentencing.[69] These decisions are sometimes cited in support of the cases holding that *Bearden* does not apply to plea-bargained probation terms, but pre-sentencing agreements usually involve much shorter repayment periods during which dramatically changed circumstances are less likely. Moreover, in *Bearden*, the fact that a judge had at some point determined that prison was unnecessary played an important role: "The decision to place the defendant on probation, however, reflects a determination by the sentencing court that the State's penological interests do not require imprisonment."[70] In pre-sentencing agreement cases, this determination was never made.

Other courts, in contrast, treat negotiated pleas no differently than judge-imposed conditions.[71] Most are primarily concerned with conforming their decisions to state mandatory authority and *Bearden*, and in the absence of precedent to the contrary, they summarily dismiss any effort to distinguish plea-bargained conditions and judge-imposed conditions.[72] Rejecting the charac-

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[69] See *Commonwealth v Payne*, 602 NE2d 594 (Mass App 1992) (holding that *Bearden* did not apply to a pre-sentencing restitution requirement imposed after the physician defendant had agreed to a plea-bargained probation term requiring restitution within six weeks); *Sichenzia v Supreme Court, Suffolk County*, 1990 US Dist LEXIS 1582 (EDNY) (denying a habeas petition on the grounds that *Bearden* did not apply to a plea bargain requiring defendant to pay partial restitution prior to sentencing and to complete restitution payments within ninety days of a sentence imposing both a prison term and probation); *Patton v State*, 458 NE2d 657, 660 (Ind App 1984) (holding that *Bearden* did not apply to a plea bargain requiring the payment of restitution prior to sentencing).

[70] *Bearden*, 461 US at 670.

[71] See, for example, *State v Myles*, 882 So2d 1254, 1256–57 (La App 2004) (applying the *Bearden* requirement that a trial court must inquire into ability to pay before revoking probation to a plea-bargained probation term); *Dirico v State*, 728 So2d 763, 767 (Fla App 1999) (holding that a plea agreement that included, as a condition of probation, a waiver of the defense of inability to pay was illegal under *Bearden*); *Jordan*, 939 SW2d 255 (holding that an inquiry into ability to pay was required by *Bearden* even when the defendant had promised to pay restitution as part of a plea bargain); *Molina's v Commissioner of Correction*, 652 A2d 481 (Conn 1994) (granting on the basis of the Fourteenth Amendment and Connecticut statutes the habeas petition of a prisoner who remained in prison solely due to his inability to pay the "committed fine" he had agreed to as part of his plea bargain).

[72] See, for example, *Dirico*, 728 So2d at 766 ("Upon closer review . . . however, we do not believe that the supreme court intended to limit its disapproval of the waiver of the defense of inability to pay to those circumstances where the waiver was judge initiated. . . . [I]t seems that the supreme court was distinguishing *Doherty* not because it involved a negotiated plea, as opposed to a judge-initiated condition, but because the supreme court believed . . . that the agreement in *Doherty* was somehow atypical because the defendant himself had taken some extraordinary measures in seeking to have the trial court accept, as part of the plea, his agreement to waive inability to pay as a defense

terization of plea bargains as purely private contracts, these courts note that the trial judge must approve any proposed agreement. The Arkansas Supreme Court, for example, observed that "[i]n agreeing to the plea bargain, the State recognized that its interest in punishment and deterrence did not require imprisonment, but would be satisfied by probation and restitution."[73] Beyond these cursory distinctions, however, no court has engaged in a sustained defense of treating plea-bargained and judge-imposed probation terms identically for the purposes of *Bearden* inquiries. Tellingly, neither the courts that consider plea bargains an exception to *Bearden* nor the courts that believe *Bearden* controls plea-bargained probation terms have discussed contrary authority in other jurisdictions in any detail.

II. THE ANALOGY TO PRIVATE CONTRACTS

Courts that refuse to extend *Bearden* to plea-bargained probation terms often justify their position by drawing an analogy between plea bargains and contracts.[74] Plea bargains resemble private contracts in that each party makes concessions (the defendant waives the right to trial by jury; the prosecution agrees to a reduced sentence) in order to achieve a more highly desired outcome (the defendant receives a reduced sentence; the prosecution conserves resources and secures a conviction).[75] But when academics argue that plea bargains should be "enforceable," they are usually arguing against scholars such as Albert W. Alschuler, who maintain that the entire process is tainted by coercion and should be abolished.[76] The claim that a

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to any failure to pay the restitution. Since the instant case does not involve some extraordinary act on the part of the defendant above and beyond agreeing to the terms of the negotiated plea, we find that *Stephens* controls and that the condition of probation waiving [the defendant's] defense of inability to pay is illegal."). See also *People v Wilkes*, 232 Ill App 3d 669, 671–2 (1992) (rejecting the state's argument that "this is not a question of the defendant being penalized from the Court's standpoint. It's a question of there having been an agreement which the State carried out on their side and the defendant did not carry out on his" because the Illinois constitution [cited in note 7] specifically mandates a finding of willfulness before a criminal defendant may be imprisoned for failure to pay a fine).

[73] *Jordan*, 939 SW2d at 255.

[74] See *Thorstad*, 261 NW2d at 902 (reasoning in part that "[p]lea bargaining has been officially accepted in North Dakota, and . . . contract criteria have been superimposed upon it. This gives the courts justification to treat court-approved plea bargain agreements similarly to contracts."); *Dickey*, 570 SE2d at 636 (characterizing plea bargain exception decisions in other jurisdictions as "rely[ing] on principles of contract law").

[75] Robert E. Scott and William J. Stunts, *Plea Bargaining as Contract*, 101 Yale L J 1909, 1909 (1992).

[76] See Albert W. Alschuler, *The Changing Plea Bargaining Debate*, 69 Cal L Rev 652

plea bargain should be enforceable because it resembles a private contract leads to the conclusion that the resulting negotiated sentence should be treated as an equal substitute for and in the same manner as a judge-imposed sentence, not that it should be treated as an inferior form of sentence, stripped of post-sentencing procedural safeguards.

At the same time, plea-bargained probation terms differ from private contracts in one important way: while breach of private contract leads only to damages, breach of a probation condition strips the defendant of his or her personal liberty. Ordinary contractual debts never lead to imprisonment because of "our traditional aversion to imprisonment for debt"[77] and state constitutional prohibitions. Indeed, some scholars defend the enforceability of plea bargains precisely by pointing out that they are not contracts for enslavement. As Robert E. Scott and William J. Stunts argue, "The defendant's liberty is not being traded for something else; rather, a *risk* of 'enslavement' (prison) is being traded for a *certainty* of somewhat less enslavement."[78] This is not always true of probation conditions. Defendants agreeing to probation terms may have committed minor crimes that would not normally result in a prison sentence.[79] In these cases, the risk of loss of personal liberty is as much introduced by the plea bargain as it is foreclosed by it. Even in the more common scenario, where a defendant is trading the possibility of a longer prison sentence for probation and a promise to pay restitution on some future schedule, the trade is one kind of

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(1981) (arguing that plea bargaining is an "inherently unfair and irrational process"); John H. Langbein, *Torture and Plea Bargaining*, 46 U Chi L Rev 3, 13 (1978) ("Plea bargaining, like torture, is coercive.").

[77] *US v Bishop*, 412 US 346, 352 (1973).

[78] Scott and Stunts, 101 Yale L J at 1929 (cited in note 75).

[79] See *Alabama Raises the Rates*, 116 Harvard L Rev at 735 n 3 (cited in note 11) ("[U]nder this scheme, incarceration may proceed from infractions as (relatively) benign as traffic offenses and disorderly conduct, offenses that the sentencing judge did not find to merit incarceration *ex ante*, or the underlying proscriptive statutes of which do not even authorize imprisonment."). For an example of probation being imposed where the underlying violation would not have merited a prison sentence, see *People v Gill*, 258 NW2d 493, 495 (Mich App 1977) (affirming a sentence of a $10 fine plus costs and six months probation for operating an unregistered motorcycle on a university campus even though the underlying ordinance specified a maximum penalty of a $25 fine). For an example of a much higher sentence being imposed after revocation than would have been imposed initially, see *United States v Green*, 162 Fed Appx 283 (5th Cir 2006) (affirming a revocation sentence significantly higher than the recommended Sentencing Guidelines range for the original offense and noting that the district court judge "wished to provide [the defendant] with an opportunity to participate in a comprehensive substance abuse treatment program provided by the Federal Bureau of Prisons").

uncertainty for another. The defendant's liberty is made a subject of the damages clause.

Again, this fact does not mean that debt-related probation conditions should not be allowed in plea bargains. As Scott and Stunts point out,

> Liberty *is* too important to be allocated by unregulated bargaining. The potential for irrationality and mistake to work irrevocable, life-destroying injustice *is* too high not to police the bargain. But that is the point—the argument does not imply *doing away with* plea bargaining; it only implies *regulating* plea bargains to a greater extent than we regulate other contracts.[80]

Courts should police debt-related probation conditions much more carefully than they would police contracts with ordinary damages clauses. The fact that the defendant's liberty is at stake means that prosecution arguments to the effect that revocation is merited simply because the plea agreement has been breached cannot be accepted complacently.

III. CONSTITUTIONAL REQUIREMENTS: DUE PROCESS

Under the Fourteenth Amendment's due process clause, the question whether courts may carve out an exception to the *Bearden* inquiry for probationers who agreed to their sentence through a plea bargain depends on "the fundamental fairness" of revoking probation regardless of present ability to pay.[81] Under *Bearden*, a sentencing court may revoke probation if it finds that "the probationer willfully refused to pay or failed to make sufficient bona fide efforts legally to acquire the resources to pay."[82] The probationer's state of mind is critical to this determination. The primary standard is clearly willfulness, although recklessness—being indifferent to whether the debt is paid and refusing to take steps to ensure that it is—may also suffice, depending on how courts read the "bona fide efforts" standard.

Courts that favor a plea bargain exception seem to approach this issue in one of two ways. The first is to use the fact of the plea bargain as evidence that the defaulting probationer acted willfully—or, in the *Mitchell* court's somewhat looser

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[80] Scott and Stunts, 101 Yale L J at 1930 (cited in note 75) (emphasis in original).

[81] *Bearden*, 461 US at 673.

[82] Id at 672.

terminology, that he acted in bad faith.[83] Under the *Mitchell* approach, a plea agreement, standing alone, presumably would not justify the sentencing court in making a determination of willful refusal to pay. However, the sentencing court could consider the totality of the circumstances, including the probationer's original affirmative agreement to pay, in deciding whether the present failure to pay was willful. This approach comports with *Bearden* and the Fourteenth Amendment, though it seems unnecessary and possibly misleading to announce a formal exception to the *Bearden* rule, or to create a rebuttable presumption that a plea-bargaining probationer has acted willfully. When a sentencing court takes this evidentiary approach, it is conducting an inquiry into ability to pay. It simply acknowledges that an affirmative agreement to pay at sentencing reduces the probability that the probationer later failed to pay "through no fault of his own."[84]

The second approach, typified by the *Nordahl* court and the *Mitchell* concurrence, permits a sentencing court to infer willfulness at the time the probationer violated his probation condition solely on the basis of a plea agreement made months and sometimes years earlier.[85] This shortcut contradicts *Bearden* and violates the Fourteenth Amendment because it is unconcerned with the subjective intent of the probationer. The *Nordahl* court, for example, is content with a finding of mere negligence, wholly divorced from the probationer's actual state of mind.[86] When Nordahl argues that he made a "good faith effort to make payment of the restitution obligation, but was unable to do so,"[87] the court counters that "Nordahl agreed to the restitution amount and agreed to the due date in a plea agreement"[88] and that Nordahl "knew or should have known the encumbrances on his assets could frustrate his ability to liquidate and fulfill the restitution obligation."[89] In this approach, the court announces a rule that *Bearden* is simply inapplicable to plea-bargained probation conditions.[90] It also fails to take into consideration the possibility

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[83] *Mitchell*, 51 MJ at 494.

[84] *Bearden*, 461 US at 673.

[85] See *Nordahl*, 680 NW2d at 253; *Mitchell*, 51 MJ at 494 (Sullivan concurring).

[86] *Nordahl*, 680 NW2d at 252.

[87] Id at 250.

[88] Id at 251.

[89] Id at 252.

[90] See *State v Jacobsen*, 746 NW2d 405, 410 (ND 2008) (reiterating the holding that "[i]n *State v Nordahl*, this Court held that Bearden does not apply when restitution is ordered as part of a plea agreement") (citation omitted).

that the probationer's circumstances may have changed in the intervening months or years since he or she agreed to the probation condition or that the probationer might have innocently overestimated the reasonableness of the repayment schedule.

Accepting provisionally the *Nordahl* court's confidence that defendants make rational projections about their ability to pay fines, restitution, and court costs, the courts still must contend with the possibility of radically changed financial circumstances. In *Bearden* itself, the defendant became unable to pay only after losing his job.[91] The facts of *Jordan v State*,[92] in which the Arkansas Supreme Court refused to carve out an exception to *Bearden*, concerned a defendant who had lost his job after agreeing to pay restitution as part of a plea bargain.[93]

Particularly during a recession, it is entirely plausible that a probationer might be laid off and unable to find another job. Current unemployment and underemployment estimates are over 17 percent.[94] Calling inability to pay in such circumstances "willful" is akin to saying the defendant willed the recession. Health care costs, the most frequent cause of bankruptcy in the United States,[95] are another source of unexpected financial burdens. A defendant could also be surprised by the cost of providing for a new child or caring for an infirm parent.

In the context of debts where the penalty for default is the deprivation of conditional liberty,[96] caution about taking judicial shortcuts is also warranted by the role cognitive biases may play in the plea agreement itself. Such factors as optimism bias and hyperbolic discounting, which enter into even the most optimal

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[91] *Bearden*, 461 US at 662–63.

[92] 939 SW2d 255 (Ark 1997).

[93] Id at 256.

[94] See Peter S. Goodman, *85,000 More Jobs Cut in December, Fogging Outlook*, NY Times A1 (Jan 8, 2010) ("The nation lost 85,000 jobs from the economy in December, the Labor Department reported Friday, as hopes for a vigorous recovery ran headlong into the prospect that paychecks could remain painfully scarce into next year. . . . Mark Zandi, chief economist at Moody'sEconomy.com, forecasts that the unemployment rate will reach 10.8 percent by October [2010]. The so-called underemployment rate—which counts people who have given up looking for work and those who are working part time for lack of full-time positions—now sits at 17.3 percent.").

[95] See David U. Himmelstein, et al, *Medical Bankruptcy in the United States, 2007: Results of a National Study*, 122 A J Medicine 741, 743 (2009) ("Illness or medical bills contributed to 62.1% of all bankruptcies in 2007.").

[96] See *Morrissey*, 408 US at 482 ("[T]he liberty of a parolee, although indeterminate, includes many of the core values of unqualified liberty and its termination inflicts a 'grievous loss' on the parolee and often on others. It is hardly useful any longer to try to deal with this problem in terms of whether the parolee's liberty is a 'right' or a 'privilege.' By whatever name, the liberty is valuable and must be seen as within the protection of the Fourteenth Amendment.").

decision making,[97] may lead defendants to agree to fines or restitution payments that do not reflect rational projections of earning potential and available assets during the probationary period. Optimism bias has most often been discussed in the plea-bargaining context as a factor that leads defendants to overestimate their chances at trial.[98] But overconfidence may also come into play when a defendant is projecting his or her future earning ability, especially in the wake of a new criminal conviction. Research has shown that overconfidence is a significant problem in "evaluating the likelihood of succeeding at a difficult task."[99] Raising the money required to adequately compensate a victim in restitution will often present a challenge for indigent defendants.[100] The closer to impossible a task becomes, the more pronounced the "difficulty effect" on predictions of success.[101] Optimism bias is also pronounced when people have a measure of control over outcomes.[102] Probationers certainly have some control over whether or not they work. Ultimately, however, cheery predictions made at sentencing will have to contend with the impact of a new or lengthier criminal record on earning potential.[103] A sudden economic shift like the present downturn is another potential drag on real-world ability to pay.[104]

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[97] See generally Christine Jolls, Cass Sunstein, and Richard Thaler, *A Behavioral Approach to Law and Economics*, 50 Stan L Rev 1471 (1998).

[98] See Stephanos Bibas, *Plea Bargaining outside the Shadow of Trial*, 117 Harv L Rev 2463, 2498–2502 (2004).

[99] Id at 2501, citing Dale Griffin and Amos Tversky, *The Weighing of Evidence and the Determinants of Confidence*, 24 Cognitive Psych 411, 425–28 (1992).

[100] See Rachel L. McLean and Michael D. Thompson, *Repaying Debts* 1 (Bureau of Justice Assistance and Council of State Governments Justice Center 2007), online at http://www.reentrypolicy.org/jcpublications/repaying_debts_full_report;file (visited Oct 3, 2010) ("Most people released from prisons and jails have few financial resources. It is unlikely their financial outlook will improve soon after their return to the community. On average, people released from prison are about 34 years old. Typically, 90 percent of these individuals are male, and more than half are African-American or Latino. They have little education and few marketable job skills. Generally, they return to the neighborhoods they came from or similar locales, where job opportunities are particularly limited.") (citations omitted).

[101] Griffin and Tversky, 24 Cognitive Psych at 426 (cited in note 99).

[102] See Bibas, 117 Harv L Rev at 2501 (cited in note 98).

[103] See Devah Pager, *Double Jeopardy: Race, Crime, and Getting a Job*, 2005 Wisc L Rev 617, 622–24 & nn 22–30, 642 (2005) (reviewing survey studies that observed a strong and significant negative correlation between incarceration and income or probability of current employment and reporting the results of an experimental audit, which isolated a statistically significant causal effect of prior incarceration on callback rates for entry-level jobs).

[104] See James Marschall Borbely, *U.S. Labor Market in 2008: Economy in Recession*, Monthly Labor Review 3, 6–13 (Bureau of Labor Statistics March 2009), online at http://www.bls.gov/opub/mlr/2009/03/art1full.pdf (visited Oct 3, 2010) (noting that blacks,

Another cognitive bias that might affect repayment-related plea bargains is hyperbolic discounting, a concept which may be briefly defined by the maxim "a day of freedom today is worth more than a day of freedom ten years from now."[105] Even if the defendant has little rational reason to expect to be able to adhere to the probation term in question, he or she may miscalculate the burden of the prosecution's proffered repayment schedule because the payments take place in the future, whereas the alternative prospect of being sentenced to additional prison time is a present threat. This tendency is exacerbated by the nature of the plea bargaining process, in which time is tightly constrained and the prosecution often sets the terms of the initial proposal. As empirical research has shown, defendants are not always in a position to actively negotiate the terms of plea offers, and they frequently accept prosecution proposals in the form they are presented.[106]

Finally, carving out a blanket exception to *Bearden* for plea-bargained probation terms would undermine current Supreme Court precedent. Ninety-five percent of convictions today are obtained by guilty plea.[107] The rates may be even higher for those defendants whom the mandate is designed to protect: Indigent defendants are more likely to be represented by public defenders or involuntarily appointed lawyers, whose workload and method of compensation make plea bargains far more attractive than going to trial.[108] In light of these practical realities, courts that endorse the plea-bargain exception have, in effect, narrowed *Bearden* into irrelevancy.

Hispanics, and those with less education suffered the biggest increases in unemployment rate in 2008, while the most jobs were shed by the construction industry).

[105] Bibas, 117 Harv L Rev at 2504 (cited in note 98).

[106] See Malcom M. Feely, *The Process Is the Punishment: Handling Cases in a Lower Criminal Court* 187 (Russell Sage 1992) ("Discussions of plea bargaining conjure up images of a Middle Eastern bazaar, in which each transaction appears as a new and distinct encounter, unencumbered by precedent and past association. Each transaction involves higgling and haggling anew, in an effort to obtain the best possible deal. American lower courts have a different reality. They are more akin to modern supermarkets in which prices for various commodities have been clearly established and labeled. Arriving at an exchange in this context is not an explicit negotiation and bargaining process—'You do this for me and I'll do that for you'—designed to reach a mutually acceptable agreement. To the extent that there is any negotiation at all, it is debate over the nature of the case, and hinges largely on establishing the relevant 'facts' which flow from various interpretations of the police report. . . .").

[107] Michael M. O'Hear, *Plea Bargaining and Procedural Justice*, 42 Ga L Rev 407, 409 (2008).

[108] See Bibas, 117 Harv L Rev at 2477–82 (cited in note 98).

It is, of course, likely that in many cases there will be no evidence of changed circumstances and the impact of cognitive biases will be negligible. It seems at least possible that some defendants, knowing that indigent status prevents a court from incarcerating a probationer for failure to pay, will behave strategically at sentencing, agreeing to wildly unrealistic restitution figures without any intention of adhering to the repayment schedule. Similarly, highly informed probationers may deliberately seek out post-sentencing obligations that impair their ability to pay. The possibility of such bad-faith behavior was one of the primary concerns of the *Nordahl* court.[109] Nonetheless, the existence of an opportunity for bad faith does not justify a presumption of bad faith. Under the *Bearden* inquiry, a court has ample authority to probe both why the probationer initially believed he or she would be able to pay and why that prediction unraveled.

IV. PRAGMATIC CONSIDERATIONS

In addition to legal arguments about whether *Bearden* applies to plea bargains, there are several policy considerations that make carving out a plea-bargain exception inadvisable. The inquiry into ability to pay takes place during an already mandated probation-revocation hearing and thus does not add significantly to the judiciary's administrative costs. By preventing defendants who truly cannot pay from being subjected to coercive incarceration, the state avoids the significant costs of imprisoning them.[110] At the same time, nothing about *Bearden* prevents probation officers from *threatening* to revoke probation for failure to pay, so the prospect of imprisonment remains a powerful stimulus to payment. Finally, courts that recognize the efficiency of plea bargaining should realize that stripping plea bargains of Fourteenth Amendment guarantees may have the effect of disincentivizing their formation.

Bearden applies not only to failure to pay restitution, where the defendant owes money to one or more victims, but to also fines and court costs, which are owed directly to the state. When

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[109] *Nordahl*, 680 NW2d at 252 ("[A]llowing a defendant to avoid restitution by subsequently pleading indigency after entering into a valid plea agreement would cause a windfall to the defendant").

[110] In 2001, the average annual cost of incarcerating an inmate in state prison was $22,650, but costs ranged from a low of $8,128 (Alabama) to a high of $44,379 (Maine). James J. Stephan, Bureau of Justice Statistics, *State Prison Expenditures, 2001* 2–3 (DOJ 2004).

a sentencing court is considering revoking probation because of a failure to pay a debt directly to the state, purely economic considerations may come into play. As Justice Brennan observed in *Tate*, imprisoning an indigent defendant for failure to pay a fine or court costs not only prevents the defendant from acquiring the means to pay but also imposes the additional cost of his or her confinement on the state.[111] Although empirical data cannot distinguish between those individuals who are truly unable to pay a fine or fee and those who have refused to do so, some studies suggest that the administrative cost associated with collection or incarceration not infrequently outweighs the revenue collected thereby.[112] This argument applies with even more force to fees that states have applied solely to raise revenue. These "legal financial obligations" or "court costs" attempt to recoup from the defendant the cost of, for example, the individual's initial arrest, a public defender, or the probation officer.[113] The goal of saving taxpayers money by imposing the cost of prosecution on defendants is entirely undercut by imprisoning those who cannot pay.

At the same time, empirical research has shown that the threat of incarceration is particularly effective at persuading probationers to repay their court-ordered financial obligations.[114] The prospect of prison time may also be a powerful incentive to secure employment, assuming employment is both available and accessible to the probationer. By placing the court's obligation to inquire into ability to pay at the probation revocation hearing rather than at initial sentencing, the *Bearden* standard (which instructs courts to make a determination as to whether the defendant "failed to make sufficient bona fide efforts legally to

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[111] *Tate*, 401 US at 399.

[112] See Rebecca Diller, Judith Greene, and Michelle Jacobs, *Maryland's Parole Supervision Fee: A Barrier to Reentry* 23 (Brennan Center for Justice 2009) (describing the costly administrative burden associated with collection of a relatively small parole supervision fee in Virginia), online at http://www.brennancenter.org/content/resource/marylands_parole_supervision_fee_a_barrier_to_reentry/ (visited Oct 3, 2010); Rhode Island Family Life Center, *Court Debt and Related Incarceration in Rhode Island* 19 (2007) (estimating that 17 percent of Rhode Island cases in which individuals were jailed for failure to pay court debts resulted in a net loss for the state), online at http://opendoorsri.org/courtdebtreform (visited Oct 3, 2010).

[113] See Anderson, 42 U Mich J L Ref at 327–40 (cited in note 9) (noting that the majority of states use recoupment or contribution as a means to collect defense costs from defendants).

[114] See David Weisburd, Tomer Einat, and Matt Kowalski, *The Miracle of the Cells: An Experimental Study of Interventions to Increase Payment of Court-Ordered Financial Obligations*, 7 Criminol & Pub Pol 9, 31 (2008) (finding that the threat of probation violation was the most effective means of recovering court-ordered financial obligations from probationers).

acquire the resources to pay") is designed so that the willfulness determination functions as a safety valve, allowing the deterrent power of a prison term to influence the probationer's conduct consistently until the probation revocation hearing.

Plea bargaining allows courts to process many more cases at a lower cost than would be possible if the practice were eliminated.[115] Courts that value the efficiency of the plea bargaining system should be wary of any rule that reserves additional constitutional rights to judge-imposed sentences, since zealous defense attorneys will alert their clients to the hidden cost of bargaining over debt-related probation terms. Perhaps it is unrealistic to think that procedural deprivations alone will dissuade many defendants from entering into plea bargains, given the powerful incentives that push defendants, defense attorneys, and prosecutors in the other direction. But even an incremental shift away from plea bargains could strain the resources of state judicial systems. In the current economic climate, states would be well advised not to experiment with incentives that have the potential to change the way defendants and their attorneys evaluate the relative risk exposure of plea bargains and trials.

CONCLUSION

Bearden v Georgia reflects the longstanding intuition that in the United States, individuals—whether criminal defendants or civil debtors—should not be incarcerated because they are unable to meet their financial obligations. In the intervening years, state courts have carved out a plea-bargain exception to this guarantee that threatens to swallow the rule, and still more may be tempted to do so as the recession strangles state budgets and puts greater pressure on courts to extract fines and fees from probationers. The economic tailspin also makes it more likely that criminal defendants will be asked to agree to plea bargains rather than go to trial, puts probationers at greater risk of indigence, and increases the chances that probationers' personal wealth and employment prospects at probation revocation hearings will have deteriorated in the time since they entered into their original plea agreements. The comparison of plea bargains to contracts fails—in light of due process requirements set forth in *Bearden* and more pragmatic considerations—to justify a

[115] See Scott and Stunts, 101 Yale L J at 1932 (cited in note 75) (describing the pernicious consequences that would follow from the abolition of plea bargaining).

blanket plea-bargain exception to *Bearden*. When the evidence warrants, courts may take into consideration the fact that the debt-related probation term was agreed to as part of a plea bargain, but such a fact is properly understood as one piece of evidence to be weighed alongside others at a probation revocation hearing.