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How the Rational Basis Test Protects Policing for Profit

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HOW THE RATIONAL BASIS TEST PROTECTS POLICING FOR PROFIT

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ABSTRACT

Since the police shooting of Michael Brown in 2014 and the civil unrest that followed, numerous lawsuits have challenged laws that use the government's ability to impose fines and fees for reasons other than the protection of the public. These challenges have usually raised equal protection challenges to these laws—that is, that the laws punish the poor more harshly than others. The challenges have been unsuccessful, largely because courts examine these laws using "rational basis review," a standard that is highly deferential to the government and one in which the courts themselves are often required to actively advocate for the government's position. This article explains these challenges, outlines the critiques of rational basis review, and argues that courts should abandon the use of this standard in cases in which punitive sanctions fall more heavily on the poor than others.

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INTRODUCTION

The shooting of Michael Brown by an officer of the Ferguson, Missouri, police force in 2014, and the Department of Justice's subsequent

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report on Ferguson's police department[1] brought attention to a harmful and widespread, but largely ignored, problem in the United States: the use of the government's criminal and civil enforcement powers not to protect the public, but to raise revenue. In Ferguson and countless other jurisdictions, maximizing financial penalties, sometimes called "policing for profit," has led to the criminalization of mundane conditions, heavy-handed law enforcement, biased policing, and courts operating to quickly convict and obtain fines from defendants who are often financially incapable of satisfying the fines and fees imposed by the government.

In the wake of the civil unrest in Ferguson and the Department of Justice's report, those affected by these fines and fees regimes began filing lawsuits challenging revenue-based law enforcement. Many of these challenges claimed that policing for profit violated the Equal Protection Clause by imposing harsher penalties on those unable to pay fines and fees than on those who could pay, simply because of their impoverishment—that is, the government was discriminating against them because of their poverty. The suits argued that imposing monetary obligations on those who could not pay, and then punishing them for being unable to do what they literally could not do, was irrational and discriminatory.

These arguments are correct. Unfortunately, they have also been largely unsuccessful. This is because courts have analyzed the constitutionality of such schemes using a deferential mode of judicial review typically associated with review of economic regulation: the Rational Basis Test. Under this test, a court will uphold a law if it is "rationally related to some legitimate government interest."[2] Although, as discussed below, the level of deference courts will apply in a rational basis case varies, this test is always highly biased in favor of the government and extraordinarily difficult for challengers to overcome. Courts using the Rational Basis Test when considering fines and fees regimes have thus upheld irrational and discriminatory criminal and civil enforcement systems. These systems trap defendants in poverty, distort policing goals, erode the impartiality of the courts, and promote distrust between the police and the communities they purport to serve. Moreover, they fail to achieve the government's stated goals and they ultimately make society less safe.

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1. C.R. DIV., U.S. DEP'T OF JUST., INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT (2015), https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf [https://perma.cc/P59A-WWDQ].

2. *See* Jones v. Governor of Florida, 975 F.3d 1016, 1034 (11th Cir. 2020) ("A classification survives rational basis review if it is rationally related to some legitimate government interest . . . ." (citing Heller v. Doe *ex rel.* Doe, 509 U.S. 312, 320 (1993))).

The first Part of this Article outlines the Rational Basis Test and how the courts apply it and examines some of the many critiques of the method. The second Part examines a series of cases that applied a far more searching scrutiny to government actions that discriminated against individuals simply because of their poverty. The third Part examines how courts have applied the Rational Basis Test in fines and fees cases post-Ferguson. The fourth Part discusses a number of irrational and discriminatory criminal and civil enforcement policies. The fourth Part then argues that if and when the courts examine the constitutionality of these policies, they should consider their constitutionality on a full evidentiary record, determine whether the laws at issue comply with logic and reality, and examine whether they actually deprive people of the equal protection of the law. If they do, the courts should not hesitate to strike them down. This Article concludes by calling on the courts to do away with the Rational Basis Test in all circumstances and instead engage in real judging that treats the governed and the government equally, relies on evidence and proof, and protects the constitutional rights of all Americans, regardless of how rich or poor they are. Short of that, the courts should examine policing for profit to determine whether fining people who cannot pay for purposes of raising revenue is rationally related to a legitimate government purpose and recognize that it is not.

I. THE RATIONAL BASIS TEST

A. *What the Courts Say It Is*

It is telling that a method of judicial review that leaves so much government activity free from constitutional restraints derives not from a meaningful source like centuries-old Anglo-American common law, *The Federalist Papers,* an opinion by John Marshall, commentary by William Blackstone, or even the U.S. Constitution itself. Instead, the Rational Basis Test derives from a short, opaque, sparsely referenced (for its main point) footnote in an otherwise "unremarkable"[3] case about milk. In footnote four of *United States v. Carolene Products Co.*,[4] Justice Harlan Fiske Stone, writing for a unanimous Court, created tiers of constitutional judicial scrutiny. In one tier, laws that affect some rights (like those specifically mentioned in the U.S. Constitution) or that discriminate against "discrete and insular minorities," (sometimes referred to as a "suspect class") receive meaningful review (usually called

3. Lewis F. Powell, Jr., Carolene Products *Revisited,* 82 COLUM. L. REV. 1087, 1087 (1982).

4. United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938).

"strict scrutiny"). Meanwhile laws affecting everything else are presumed to be constitutional and receive minimal scrutiny.[5] This lower-level of scrutiny came to be known as the Rational Basis Test.

Over the decades, the U.S. Supreme Court developed a more thorough elucidation of this test. Now, at least on paper, the modern federal Rational Basis Test has the following components, as set out by the Supreme Court in 1993: [6]

> [R]ational-basis review in equal protection analysis is not a license for courts to judge the wisdom, fairness, or logic of legislative choices. Nor does it authorize the judiciary to sit as a superlegislature to judge the wisdom or desirability of legislative policy determinations made in areas that neither affect fundamental rights nor proceed along suspect lines. For these reasons, a classification neither involving fundamental rights nor proceeding along suspect lines is accorded a strong presumption of validity. Such a classification cannot run afoul of the Equal Protection Clause if there is a rational relationship between the disparity of treatment and some legitimate governmental purpose. Further, a legislature that creates these categories need not actually articulate at any time the purpose or rationale supporting its classification. Instead, a classification must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification.
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> A State, moreover, has no obligation to produce evidence to sustain the rationality of a statutory classification. A legislative choice is not subject to courtroom factfinding and may be based on rational speculation unsupported by evidence or empirical data. A statute is presumed constitutional . . . and the burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it, . . . whether or not the basis has a foundation in the record. Finally, courts are compelled under rational-basis review to accept a legislature's generalizations even when there is an imperfect fit between means and ends. A classification does not fail rational-basis review because it is not made with mathematical nicety or be-

5. *Id*.

6. State courts sometimes apply more stringent tests under state equivalents of the Equal Protection Clause while confusingly labeling this test the "Rational Basis Test." *See* Robert F. Williams, *State Constitutional Law Processes*, 24 WM. & MARY L. REV. 169, 187 (1983) (discussing state court approaches to the rational basis test).

> cause in practice it results in some inequality. The problems of government are practical ones and may justify, if they do not require, rough accommodations—illogical, it may be, and unscientific.[7]

Any "conceivable state of facts,"[8] means, by definition, not necessarily relevant facts or even the truth. Under the Rational Basis Test, the government may justify its policies with false assertions or not justify them at all. And even if the court knows the government's justification is false, the standard requires the court to close its eyes and accept fiction as the truth. This is precisely what the Supreme Court did in one of the seminal Rational Basis Test cases, *Williamson v. Lee Optical of Oklahoma, Inc.*, where Justice Douglas, writing for the Court, deliberately closed his eyes to a statute's nakedly anticompetitive purpose and imagined several *post hoc*, fictitious safety rationales to support the law.[9]

Unfortunately for those whom the government has discriminated against and treated more harshly because of their poverty, indigency is not a suspect class, and laws that treat people differently based on their wealth (or the lack thereof) are subject to the Rational Basis Test.[10]

B. *What It Actually Is*

As my colleague Dana Berliner has noted, the Rational Basis Test that the courts expound is not always the version that they apply.[11] This is not surprising. Taken literally, almost every suit challenging a law under the Rational Basis Test, as articulated above, would not survive a motion to dismiss, regardless of how irrational, harmful, useless, or

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7. *Heller*, 509 U.S. at 319–21 (quotation marks, ellipses, brackets, and citations omitted).

8. *See id.* at 320.

9. *See* Williamson v. Lee Optical of Okla., Inc., 348 U.S. 483, 486, 490 (1955). The statute in that case forbade opticians from fitting or duplicating lenses without a prescription from an ophthalmologist or optometrist, essentially making it impossible for a consumer to obtain new frames or get a lens, whether it be a new lens or one to duplicate a lost or broken lens, without a prescription. *Id.* at 486. The consumer did not need a new prescription, however. They just needed a new lens. The statute thus increased the cost of medical care for consumers, inserted ophthalmologists and optometrists into a transaction in which they were not needed, and did much to reduce or even eliminate low-cost competition to ophthalmologists and optometrists. Nonetheless, the Court simply invented several far-fetched rationales of varying degrees of believability to uphold the law. *See id.* at 487–88.

10. *See* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 29 (1973) ("[T]his Court has never heretofore held that wealth discrimination alone provides an adequate basis for invoking strict scrutiny . . . .").

11. *See* Dana Berliner, *The Federal Rational Basis Test—Fact and Fiction*, 14 GEO. J.L. & PUB. POL'Y 373, 378–82 (2016) (describing how courts sometimes deviate from the traditional articulation of the Rational Basis Test while purporting to follow it).

counterproductive the law at issue is. On paper, the modern test appears to simply ask whether the legislature was out of its collective mind when it passed a law; if it was not, the courts will uphold the law at issue. In other words, if the Rational Basis Test were as deferential to the government as the Supreme Court has said that it is, the government's power would be limited only by the ability of one of its lawyers or a judge to imagine a non-insane connection—regardless of how absurd—between what the government says is its goal and the means it has chosen to achieve it. That would not be deferential judicial review. It would be no review at all.

Plaintiffs, however, have won more than twenty rational basis cases before the Supreme Court since 1970, so there is more to rational basis review than the Supreme Court's articulation of the test would suggest.[12] Instead, both the U.S. Supreme Court and the lower federal courts strike down laws under the Rational Basis Test when there is no logical connection between the law and the government's purported interest,[13] when the law imposes a harm that vastly outweighs any plausible benefit,[14] or when the government is demonstrating animus to a particular group, even when that group has not been viewed as a "discrete and insular minority."[15]

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12. *See* United States v. Windsor, 570 U.S. 744, 774–75 (2013); *id.* at 793–94 (Scalia, J., dissenting) (noting that the Court relied on rational basis review); Lawrence v. Texas, 539 U.S. 558, 578 (2003); United States v. Morrison, 529 U.S. 598, 614–15 (2000); Village of Willowbrook v. Olech, 528 U.S. 562, 565 (2000) (per curiam); Romer v. Evans, 517 U.S. 620, 634–35 (1996); United States v. Lopez, 514 U.S. 549, 567 (1995); Quinn v. Millsap, 491 U.S. 95, 108 (1989); Allegheny Pittsburgh Coal Co. v. Ctny. Comm'n, 488 U.S. 336, 345 (1989); City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 449–50 (1985); Hooper v. Bernalillo Cnty. Assessor, 472 U.S. 612, 623 (1985); Williams v. Vermont, 472 U.S. 14, 24–25 (1985); Metro. Life Ins. Co. v. Ward, 470 U.S. 869, 880 (1985); Plyler v. Doe, 457 U.S. 202, 230 (1982); Zobel v. Williams, 457 U.S. 55, 61–63 (1982); Chappelle v. Greater Baton Rouge Airport Dist., 431 U.S. 159, 159 (1977) (per curiam); U.S. Dep't of Agric. v. Moreno, 413 U.S. 528, 534 (1973); James v. Strange, 407 U.S. 128, 141–42 (1972); Lindsey v. Normet, 405 U.S. 56, 76–78 (1972); Mayer v. City of Chicago, 404 U.S. 189, 196–97 (1971); Reed v. Reed, 404 U.S. 71, 76–77 (1971); Turner v. Fouche, 396 U.S. 346, 363–64 (1970).

13. *See Zobel*, 457 U.S. at 56–58 (striking down an Alaskan law that distributed oil money to residents based on the length of their state residency because of the government's asserted justification—encouraging settlement in Alaska—and the means the government chose to accomplish this goal—paying long-term residents more than recent ones).

14. *See Plyler*, 457 U.S. at 206–07 (striking down a law that denied public education funding to the children of undocumented immigrants because of the harm to these children, even though the law accomplished the government's purported goal of saving money).

15. *See Romer*, 517 U.S. at 635 (striking down a state statute that demonstrated anti-gay animus); *City of Cleburne*, 473 U.S. at 449–50 (striking down a city ordinance that restricted a group home for individuals with developmental disabilities when the city allowed other group homes of the same size to operate).

C. *Flaws in the Rational Basis Test*

The flaws in the Rational Basis Test are obvious and almost innumerable. As an initial matter, the test cleaves "fundamental rights" from "nonfundamental rights" without ever describing clearly what makes a right fundamental or nonfundamental, except that the rights listed in the Bill of Rights and those rights "traditionally protected by our society" and "rooted in the traditions and conscience of our people,"[16]—whatever that means—are fundamental. Everything else is not. The list of rights deemed "fundamental" by the Court includes the specific liberties listed in the Bill of Rights, in addition to the rights to marry, to have children and direct their education and upbringing, to use contraception, to engage in intimate relations, and to obtain an abortion.[17] Beyond these rights and others like them, whether something is "fundamental" is anyone's guess.

Of course, the real reason a court thinks a right is fundamental is simply that a federal or state judge believes it is important. Judicial decisions about what is important enough to warrant constitutional protection often coincide with what the well-educated, affluent men and women who make up the federal and state judiciaries find is important to them. For such people, the harm that befalls a person when they lose their driver's license or are barred from their chosen profession is simply not something with which they have much experience. This disconnect becomes more pronounced if we are talking about people far outside of the judges' environment, like unhoused populations, undocumented immigrants, or people who have lived their entire lives viewing the police with suspicion.

The Rational Basis Test also requires the court to abandon its role as a neutral adjudicator making decisions based on admissible evidence in an adversarial contest between two parties. Instead, "judges in rational basis cases are instructed to place a heavy judicial thumb on the government's side of the scales in the form of an essentially irrebuttable presumption that the government is pursuing constitutionally permissible ends, regardless of whether it actually is."[18] Thus, unique among all other forms of litigation in the United States, the Rational Basis Test encourages one party to pervert the truth (or at least engage in an alarming lack of candor) in presenting its case to a court.[19] And if the government is unable or unwilling to make up a reason, the test re-

16. Michael H. v. Gerald D., 491 U.S. 110, 122–23 (1989) (citation omitted).

17. Washington v. Glucksberg, 521 U.S. 702, 720 (1997).

18. Clark Neily, *Litigation Without Adjudication: Why the Modern Rational Basis Test Is Unconstitutional*, 14 GEO. J.L. & PUB. POL'Y 537, 543 (2016).

19. *Id*.

quires the court to do it for them.[20] This is not the judiciary acting as an umpire calling "balls and strikes"[21]—this is the umpire taking away one team's mitts, picking up a foul ball, throwing it over the left field fence, and calling it a home run.

Related to this problem is the fact that a strict reading of the Rational Basis Test either forbids or at least strongly discourages the development of an evidentiary record.[22] This approach applies even though the challenger is required to negate every conceivable basis for the law to succeed. The challenger is left with nothing with which to negate the government's assertions. In other words, in the harshest form of the test, one party is forbidden from putting on a case, and the question of whether something is true or false becomes extraneous. What the government—a party, one should recall, which is encouraged by the case law to simply make stuff up if it is convenient—says is determinative.[23] Why should a court act as a factfinder when the truth is irrelevant?

One could go on. It is enough to say at this point, however, that the application of the Rational Basis Test almost always results, not in a search for truth, but in a biased simulacrum of a judicial proceeding.[24] Its inherent unfairness means that such a case is a challenge for any plaintiff. It is especially a challenge for the impoverished targets of policing for profit, who are often incarcerated and usually cannot afford the sophisticated, experienced counsel necessary to have even a chance at prevailing in a Rational Basis Test. If not for the existence of public interest law firms, these defendants would never have the chance to bring, much less win, a case challenging a fines and fees regime under the Rational Basis Test.

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20. *See* FCC v. Beach Commc'ns, Inc., 508 U.S. 307, 315 (1993) ("[I]t is entirely irrelevant for constitutional purposes whether the conceived reason for the challenged distinction actually motivated the legislature."); Williamson v. Lee Optical of Okla., Inc., 348 U.S. 483, 487–88 (1955) (speculating on what might have motivated the Oklahoma legislature to pass the law at issue).

21. *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to Be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 56 (2005) (statement of John G. Roberts, Jr.).

22. *See Beach Commc'ns*, 508 U.S. at 315 (1993) ("[A] legislative choice is not subject to courtroom fact-finding and may be based on rational speculation unsupported by evidence or empirical data." (citation omitted)).

23. *See* Neily, *supra* note 18, at 552 (discussing cases and how the Rational Basis Test encourages the government to dissemble and misrepresent the government's true reason for legislation).

24. *But see* Erwin Chemerinsky, *The Rational Basis Test Is Constitutional (and Desirable)*, 14 GEO. J.L. & PUB. POL'Y 401 (2016). Even such a strong proponent of the test as Professor Chemerinsky finds the test as articulated too deferential to the government, however. *See id.* at 403. "A rational basis can never justify government deprivation of life, but it can justify the taking of liberty or property. But a merely conceivable purpose should be insufficient to do so. There should have to be an actual legitimate purpose, and there should be a meaningful relationship between the means chosen and the ends sought to be achieved." *Id.*

II. THE *GRIFFIN/BEARDEN* LINE OF CASES

Those challenging the constitutionality of fines and fees regimes believed, with some justification, that cases revolving around a challenger's indigency would not be subject to the Rational Basis Test. This was because, in a series of cases stretching from *Griffin v. Illinois*[25] in 1956 to *M.L.B. v. S.L.J.*[26] in 1996, the U.S. Supreme Court held that when the justice system treats the indigent more harshly solely because they are poor, due process and equal protection converge in ways that defy the rote application of the Court's traditional tiers of judicial scrutiny.[27] Specifically, in *Bearden v. Georgia*,[28] a case concerning whether the state could revoke probation for someone too poor to pay his legal financial obligations, the Court set out a more searching approach for laws that implemented economic disparities in the justice system. Under the *Bearden* approach, the Court examines (1) the nature of the individual interest affected, (2) the extent to which it is affected, (3) the rationality of the connection between the legislative means and purpose, and (4) any alternative means to effectuate this purpose.[29] The Court held that in making this decision, due process and equal protection considerations converged and that, when a person who is indigent has made all reasonable efforts to pay outstanding fines or restitution, it is "fundamentally unfair" to punish them without considering whether any alternatives exist.[30]

While the *Bearden* line of cases does provide a more searching inquiry into the government's justifications and evidence than the Rational Basis Test, it also contains caveats that severely limit its applicability. Foremost is the fact that the decisions do not prohibit the government from engaging in unfair wealth discrimination; they forbid the government from engaging in "fundamentally unfair" wealth discrimination.[31] Thus, the government may discriminate against people solely for their wealth, but it cannot do so in a "fundamentally unfair" way. Put another way, the state can treat a poor person worse than a rich person just so long as it does not do it too much. But how much is too much is anyone's guess.

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25. Griffin v. Illinois, 351 U.S. 12 (1956).

26. M.L.B. v. S.L.J., 519 U.S. 102 (1996).

27. *See also* Tate v. Short, 401 U.S. 395 (1971); Williams v. Illinois, 399 U.S. 235 (1970); Mayer v. City of Chicago, 404 U.S. 189 (1971); Roberts v. LaVallee, 389 U.S. 40 (1967); Douglas v. California, 372 U.S. 353 (1963).

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

29. *Id.* at 666–67.

30. *Id.* at 666.

31. *Id.* at 666 n.7.

The decisions also emphasize the "character and intensity of the individual interest at stake."[32] By suggesting that a more searching scrutiny would occur only when the interests at stake were extremely high, the decisions have allowed judges to limit their applicability to those instances that have involved such weighty matters as a person's individual liberty, their ability to maintain family bonds, and the capacity to marry or divorce.[33] If these interests are sufficiently important that their deprivation due to indigency would be "fundamentally unfair," however, why are these interests not "fundamental rights" subject to strict scrutiny under traditional Equal Protection Clause analysis? By limiting the application of the *Bearden* line of cases to such weighty matters, the courts have reduced it to little more than another version of the "fundamental rights" requirement for strict scrutiny, all while fashioning a test that purports to provide greater protections for the indigent but which results in less judicial scrutiny, not more.

This has led courts examining fines and fees cases post-Ferguson to avoid applying the more searching scrutiny of *Bearden* by drawing artificial distinctions between the interests in the *Griffin/Bearden* line of cases and whatever is not as important as the loss of one's personal liberty or the structure of one's family. For instance, in *Fowler v. Benson*, a case concerning whether Michigan could suspend the licenses of those unable to pay their court debt because of their poverty, the Sixth Circuit held that the *Griffin/Bearden* line of cases did not apply because the interest at issue in that case was a property interest, not a liberty interest.[34] Specifically, the court refused to apply the more searching scrutiny of the *Griffin/Bearden* line of cases because "[t]hose cases dealt with the basic features of the criminal justice system—imprisonment, probation, and appeals. Property interests are not due the same degree of legal protection as the fundamental liberty interests implicated in the *Griffin* line of cases."[35]

Similarly, in *Jones v. Governor of Florida*, a case concerning whether the state may condition restoring a felon's voting rights on the felon's payment of all fines, fees, costs, and restitution, the Eleventh Circuit specifically limited the *Griffin/Bearden* line of cases to instances where the government is extending punishment based on poverty.[36] The court

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32. M.L.B. v. S.L.J., 519 U.S. 102, 120–21 (1996) ("[W]e inspect the character and intensity of the individual interest at stake, on the one hand, and the State's justification for its exaction, on the other." (citing *Bearden*, 461 U.S. at 666–67)).

33. *See M.L.B.*, 519 U.S. at 113–17 (discussing the series of cases where the Court found the interests at issue to be sufficiently important to warrant more searching scrutiny).

34. Fowler v. Benson, 924 F.3d 247, 260–61 (6th Cir. 2019).

35. *Id.* (footnote omitted).

36. Jones v. Governor of Florida, 975 F.3d 1016, 1032 (11th Cir. 2020).

ultimately held that the *Griffin/Bearden* cases simply do not apply in cases outside of "the contexts in which they arose."[37]

The focus on the importance of the interest at stake has limited the application of these cases, but making the interest the determinative (or even the only) factor is incorrect. What ultimately mattered in the *Griffin/Bearden* line of cases was that the poor were treated more harshly by the justice system simply because they were poor. While the cases do evince a concern about the nature of the interest affected by the discrimination, the cases rest on the idea that, in the criminal and civil justice systems, the poor should not face consequences that the well-off do not for the sole reason of their indigency. When faced with a *Griffin/Bearden* claim, courts should recognize that government interference with interests other than the ones at issue in those cases can be "fundamentally unfair."

In the end, the focus on the interest at stake obscures the more fundamental point that the criminal and civil justice system may not, under either the Due Process Clause or the Equal Protection Clause, operate as a two-tier system, treating the poor and those who are not poor differently. This is not to suggest that courts should treat poverty as a suspect class. This is not because those in poverty are not significantly disadvantaged in modern society. It is instead because courts should not be in the business of providing some Americans meaningful judicial analysis and refusing to provide it to others. The Equal Protection Clause robustly guarantees all Americans equal justice. Everyone should receive meaningful assessment of their claims. When courts fail to undertake a substantive examination of claims and allow the government to punish the poor more harshly than the rich, they are accepting an artificial and extraconstitutional classification created to withhold real scrutiny of government action.

Nonetheless, in the post-Ferguson cases, the courts have declined to apply meaningful scrutiny to claims that punish the poor more than the rich and have instead applied the Rational Basis Test to fines and fees regimes. The next section analyzes these cases.

III. APPLYING THE RATIONAL BASIS TEST POST-FERGUSON

As of mid-2021, all the cases challenging fines and fees regimes post-Ferguson have failed the Rational Basis Test.[38] Most of these cases

37. *Id.* at 1033. *See also* Mendoza v. Garrett, 358 F. Supp. 3d 1145, 1171 (D. Or. 2018) (upholding Oregon's driver's license suspension statute and declining to apply *Griffin/Bearden* review because "[w]hat all of these cases teach is that the 'fundamental fairness' principles of due process and equal protection originating in *Griffin* have been applied when either incarceration or access to the courts, or both, is at stake.").

have arisen in the context of laws requiring or permitting states to rescind the driver's license of those who have not paid their court debt, while two have involved other types of regimes.

The driver's licenses cases should have been the most susceptible to attack. If there was any policy that could be classified as irrational to the point of being practically insane, it is this one.[39] As Justice Sotomayor has noted, losing one's vehicle interferes "not only with [one's] ability to earn an income and pay their creditors but also with their access to childcare, groceries, medical appointments, and other necessities."[40] Quite simply, such laws drive people into poverty[41] by depriving them of their ability to get to work and their access to medical care, schooling, and childcare.[42] They disproportionately harm the poor—the very people who are least likely to be able to pay their court debt[43]—and fore-

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38. *See* Robinson v. Long, 814 F. App'x 991 (6th Cir. 2020) (upholding Tennessee's driver's license suspension statute); Jones v. Governor of Florida, 975 F.3d 1016, 1025 (11th Cir. 2020). Fowler v. Benson, 924 F.3d 247 (6th Cir. 2019) (upholding Michigan's driver's license suspension statute); White v. Shwedo, No. 19-3083, 2020 U.S. Dist. LEXIS 83057 (D.S.C. May 11, 2020) (upholding South Carolina's driver's license suspension statute); Motley v. Taylor, 451 F. Supp. 3d 1251 (M.D. Ala. 2020) (upholding Alabama's driver's license suspension statute); Johnson v. Jessup, 381 F. Supp. 3d 619 (M.D.N.C. 2019) (upholding North Carolina's driver's license revocation statute); Mendoza v. Garrett, 358 F. Supp. 3d 1145 (D. Or. 2018) (upholding Oregon's driver's license suspension statute); State v. Doe, 927 N.W.2d 656 (Iowa 2019) (upholding a state statute that created a right to expungement of criminal records, provided the formerly convicted person paid all their court-imposed costs and fees).

39. It is difficult to fully express how harmful and counter-productive this approach to collecting court debt is, although some have made heroic efforts to do so. *See Resources*, FREE TO DRIVE, https://www.freetodrive.org/resources/#page-content [https://perma.cc/EJG7-NZFG] (last visited Dec. 6, 2020).

40. City of Chicago v. Fulton, 141S. Ct. 585, 593–94 (2021) (Sotomayor, J., concurring).

41. One study of New Jersey found that "42% of drivers lost their job after their driving privilege was suspended. Of those drivers, 45% were unable to find new employment. Of those that were able to find another job, 88% reported a decrease in income." AM. ASS'N OF MOTOR VEHICLE ADM'RS, BEST PRACTICES GUIDE TO REDUCING SUSPENDED DRIVERS 6 (2013), https://www.aamva.org/WorkArea/linkit.aspx?LinkIdentifier=id&ItemID=3723&libID=3709 [https://perma.cc/V9NR-JTX8].

42. Andrea Marsh, *Rethinking Driver's License Suspensions for Nonpayment of Fines and Fees*, *in* NAT'L CTR. FOR STATE CTS., TRENDS IN STATE COURTS: FINES, FEES, AND BAIL PRACTICES: CHALLENGES AND OPPORTUNITIES 20, 22 (Deborah W. Smith et al. eds., 2017), https://ncsc.contentdm.oclc.org/digital/collection/accessfair/id/787 [https://perma.cc/5ANH-9X76]; SANDRA GUSTITUS, MELODY SIMMONS & MARGY WALLER, ACCESS TO DRIVING AND LICENSE SUSPENSION POLICIES FOR THE TWENTY-FIRST CENTURY ECONOMY 4 (2008), https://core.ac.uk/download/pdf/71349179.pdf [https://perma.cc/TU9F-XYLR].

43. *See* RYAN T. SCHWIER & AUTUMN JAMES, IND. UNIV. ROBERT H. MCKINNEY SCH. OF L., ROADBLOCK TO ECONOMIC INDEPENDENCE: HOW DRIVER'S LICENSE SUSPENSION POLICIES IN INDIANA IMPEDE SELF-SUFFICIENCY, BURDEN STATE GOVERNMENT & TAX PUBLIC RESOURCES 33 (2016), https://mckinneylaw.iu.edu/practice/clinics/_docs/DL_Rpt_2-1-16.pdf [https://perma.cc/7HPM-SRPL] ("For those without regular access to a car, access to jobs, medical care, and leisure are incomplete, inefficient and inconvenient.") (quoting CENTRAL IND. TRANSIT TASK FORCE, SUMMARY REPORT ON TRANSPORTATION ALTERNATIVES IN CENTRAL INDIANA 3 (2010)).

close a defendant's ability to access certain lines of work, like construction, driving a cab or working for a ride-share company, or driving an ambulance.[44] Because of the harsh consequences of not having a license, many people simply continue to drive after their license has been suspended or revoked, often times without insurance.[45] In some cases, driving without a license can lead to incarceration in state prison, a pointless waste for the driver, prison security, the state budget, and taxpayers.[46] This is in addition to the time and resources that the police must devote to tracking down, arresting, and helping convict people who often pose no threat to the community.[47] And all this harm occurs without any evidence suggesting that suspending or revoking someone's driver's license for failure to pay court debt increases the likelihood that they will repay their debt.[48]

In sum, a law suspending or rescinding drivers' licenses for failure to pay court debt makes people poorer, prevents the police from protecting the public, consumes limited resources, and encourages lawbreaking. Such a law inflicts all this harm in the name of an impossible objective: to force people to pay a debt they cannot pay. Nonetheless, courts examining these harmful, irrational, and unproductive laws have upheld them under the Rational Basis Test.[49]

In *Fowler*, which has become the leading case on the issue, the Sixth Circuit found that Michigan's law was motivated not by a desire for revenue but by a legitimate goal of incentivizing compliance with traffic laws and court orders.[50] When the plaintiffs pointed out that by fulfilling this goal, it becomes more difficult for people who owe court debt to get to work to earn the money to pay off that court debt, the court rejected that argument by relying on the Rational Basis Test's extreme deference to legislative judgments, even while recognizing that the plaintiffs had a point:

> Perhaps Plaintiffs are right that the policy is unwise, even counterproductive. But under rational basis review we ask only whether Michigan's statutes are rationally related to legitimate government interests. Michigan's choice to wield the cudgel of driver's-license suspension for nonpayment of court debt dra-

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44. *See* GUSTITUS ET AL., *supra* note 42, at 9 ("[S]ome employers, particularly in the construction and health care fields, require a driver's license as a precondition for employment—either because driving is part of the job, or as a way to screen applicants.").

45. *See id*.

46. *See* SCHWIER & JAMES, *supra* note 43, at 25–26.

47. *See id*. at 35–36.

48. AM. ASS'N OF MOTOR VEHICLE ADM'RS, *supra* note 41, at 4.

49. *See* cases cited *supra* note 38.

50. *Fowler*, 924 F.3d at 262.

> matically heightens the incentive to pay. Such a policy is rationally related to the government's interest in prompt assessment and collection of civil penalties. That this policy may in many cases make that—now more highly incentivized—payment harder to accomplish does not show that the law lacks a rational basis.[51]

The federal district courts have followed this reasoning and have upheld driver's license laws against similar challenges in every case.[52]

The federal courts are not the only ones to come to such a conclusion about counterproductive and harmful laws, however. In *State v. Doe*, the Iowa Supreme Court considered a state statute that created a right to expungement of criminal records, provided the formerly convicted person paid all their court-imposed costs and fees.[53] An indigent defendant challenged the court-debt requirement, arguing that the state's condition discriminated against her because of her poverty.[54] Applying the Rational Basis Test (or, more accurately, Iowa's substantively identical version of the Rational Basis Test), the court found that Iowa had a legitimate purpose in encouraging payment of court debt.[55] Like the Sixth Circuit in *Fowler*, the Iowa court recognized the plaintiff's point while rejecting it under the Rational Basis Test:

> Doe offers policy arguments favoring expungement, noting an arrest record may limit employment opportunities that could enable defendants to pay off the underlying court debt. An arrest record may also limit available housing, and offenders realistically need a place to live in order to land and keep a job. Steady employment reduces recidivism. Our task, however, is not to weigh this statute's effectiveness but its constitutionality. Doe's policy arguments should be directed to the legislature.[56]

Finally, in *Jones*, the Eleventh Circuit upheld the requirement in Florida's Amendment 4 that required ex-felons to pay all of their outstanding court debt before they could regain the ability to vote.[57] The court held that "[t]he twin interests of disenfranchising those who disregard the law and restoring those who satisfy the demands of justice

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51. *Id.* at 262–63 (citations and quotation marks omitted).
52. *See* cases cited *supra* note 38.
53. State v. Doe, 927 N.W.2d 656 (Iowa 2019).
54. *Id*. at 659.
55. *Id*. at 665.
56. *Id*. (citation and quotation marks omitted).
57. Jones v. Governor of Florida, 975 F.3d 1016, 1025 (11th Cir. 2020).

are both legitimate goals for a State to advance."[58] Applying the extremely deferential version of the Rational Basis Test, the court determined that "[t]he people of Florida could rationally conclude that felons who have completed all terms of their sentences, including paying their fines, fees, costs, and restitution, are more likely to responsibly exercise the franchise than those who have not."[59]

Doe and the driver's license cases stretch the Rational Basis Test to its absolute limit. In each case, the courts disregarded two levels of irrationality: the first being the state's attempt to get money from people who simply do not have it, and the second being the state's effort to incentivize repayment by making it more difficult for debtors to earn money to the pay their debt to the government. If the Rational Basis Test does not forbid doubly irrational laws like these, then perhaps it needs a more accurate name, like "The Government Wins Test." In each of these cases, judges could have engaged in real fact-finding, including cross-examination of witnesses, expert testimony, and documentary proof, that tested whether the governments' interests were legitimate or were simply taxation by citation. The courts could have also engaged in real fact-finding to determine, if the government's interests were legitimate, whether the means chosen by the government to achieve these goals actually did so. Instead, in these cases, the courts allowed the government to irrationally discriminate against people for doing something they literally were unable to do, and then permitted the government make it even more difficult for defendants to do what the government wanted them to do in the first instance.

Jones is somewhat different in two ways. First, there was legitimate fact-finding in the case, though the majority did not analyze this evidence in its discussion of the Rational Basis Test—a point made by one of the dissents in that case.[60] Second, the law at issue did not make it more difficult for the plaintiffs to pay their fines and fees.[61] The decision still suffered, however, from the essential error that underlies the driver's license cases and *Doe*: a government policy that discriminates against the poor for failing to pay an amount they cannot pay is ultimately irrational. Whatever interest the government may have, that interest cannot be accomplished by asking someone to do something that is impossible.

These cases show how the Rational Basis Test allows the government to maintain irrational, counterproductive, harmful, and discriminatory laws that specifically harm the poor without the intervention of

58. *Id.* at 1034.
59. *Id.* at 1035.
60. *Id.* at 1066–74 (Jordan, J., dissenting) (discussing the evidence adduced at trial).
61. *Id.* at 1032.

the courts. This kind of purposeless distinction between people should be exactly what the Equal Protection Clause prevents. In modern American courts, however, the explicit constitutional protections of the Equal Protection Clause must take a back seat to an overly deferential test arising from a footnote.

IV. GOING FORWARD

These cases are not the end of the story. Unfortunately, there exists a panoply of irrational laws affecting indigent defendants across the country. Such laws include ones that criminalize homelessness—or restrict the ability of convicted offenders to house themselves near certain institutions, thereby making it far more likely that they to end up homeless—and laws that require towns to tow vehicles for failing to pay traffic and parking tickets.[62] These are in addition to laws that fall heavily on the poor and act as revenue generators, funding government on the backs of those least able to afford it.

How should courts analyze these cases if and when they come before them? As for the Supreme Court, it should do away with the Rational Basis Test in all circumstances as an unfair, biased, unconstitutional distortion of the judicial process.[63] Instead, the Court should extend the basic rules of adjudication to constitutional cases: an emphasis on the search for the truth, using evidence, fact-finding, and the application of neutral rules imposed by a disinterested adjudicator.

The lower courts, who are stuck with the Rational Basis Test until the Supreme Court finally undoes its almost-century-old error, should apply the version of the test that Dana Berliner and others have identified—a rational basis test with bite. This means that the courts should strike down laws affecting the poor (and everyone else) when there is no logical connection between the law and the government's purported interest, when the law imposes a harm that vastly outweighs any plausible benefit, or when the government is demonstrating animus to a particular group, even when that group has not been viewed as a "discrete and insular minority."

Lower courts could also apply the *Griffin/Bearden* standards more broadly to recognize that it would be "fundamentally unfair" for the government to discriminate in ways that harm fundamental interests

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62. *See, e.g.*, Scott Simon, Opinion, *Should It Be Illegal to Sleep Outside?*, NPR (Dec. 14, 2019, 8:04 AM); Julie Wartell, *Residency Restrictions: What's Geography Got to Do with It?*, GEOGRAPHY & PUB. SAFETY, May 2009, at 1.

63. *See* Andrew Ward, *The Rational-Basis Test Violates Due Process*, 8 N.Y.U. J.L. & LIBERTY 714, 727–35 (2014) (explaining how the Rational Basis Test violates due process, the ABA's Model Code of Judicial Conduct, and the United Nations' Basic Principles on the Independence of the Judiciary).

such as the ability to earn an honest living, get to work and school, receive medical care, or not descend into poverty simply because the jurisdiction in which they live would like more revenue. Put another way, the lower courts could recognize that the *Griffin/Bearden* line of cases are not limited to only those circumstances in which they arose.

Until these reforms occur, the courts will remain complicit in ensuring that poor defendants in this country will be subject to laws that make them poorer, destroy their ability to fully participate in society, and which contribute heavily to the distrust between the police and the communities that they purport to serve that sent many to streets of our cities after the killing of George Floyd by a Minneapolis police officer in the summer of 2020.[64] This result is not dictated by the Constitution, and the courts have an obligation to undo it at the first opportunity.

These reforms do not mean that the judiciary will infringe on the operation of the other branches. This kind of judicial engagement is instead an expression of the wisdom of the separation of powers. The U.S. Constitution and our judicial heritage do not recognize the judiciary as a supine branch, acceding to the executive and legislative branches in almost all circumstances. The judiciary's job is to enforce the Constitution and check the other branches when they go beyond the borders of that document. Under our constitutional system, judges are not tasked simply to work in concert with the other branches to infringe upon individual rights, especially when those rights are possessed by people who have little else. Without an engaged judiciary, constitutional guarantees like equal protection become just words on paper. And as the above discussion shows, an enervated judiciary can have devastating consequences for the individual and for society at large.

CONCLUSION

Of course, much of this would be unnecessary if state and local governments recognized the constitutional limitations on their actions without judicial intervention and simply passed fewer laws criminalizing behavior that does not harm others. As it stands, the Rational Basis Test gives governments far too much latitude to act beyond their constitutional boundaries. When the courts do not enforce the Constitution, the result is, among other things, more people in prison, more people in debt, and more people alienated from society, as the government takes

64. Lisa Shumaker, *U.S. Saw Summer of Black Lives Matter Protests Demanding Change*, U.S. NEWS (Dec. 7, 2020, 8:04 AM), https://www.usnews.com/news/top-news/articles/2020-12-07/us-saw-summer-of-black-lives-matter-protests-demanding-change [https://perma.cc/Z5SV-53JV].

more power and leaves individuals with less freedom. As Alec Karakatsanis has said:

> American courts have long required a high constitutional burden in criminal cases: no person can be imprisoned unless the government proves *beyond a reasonable doubt* that she is guilty. This reflects a paramount libertarian concern with agents of the state doing violence to a person's body by confining a person to a cage against her will. But while the legal system thinks of itself as applying extreme rigor to decisions about when a person can be caged, it does not apply any rigor to an antecedent question: Is this conduct something for which we should cage a human being?[65]

Until governments start asking themselves that question, the courts should stop acting as willing partners in the impoverishment, incarceration, and punishment of people simply because they are poor.

65. Alec Karakatsanis, *The Punishment Bureaucracy: How to Think About "Criminal Justice Reform,"* 128 YALE L.J. F. 848, 865 (2019) (footnotes omitted).