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PRETEXTUAL SANCTIONS, CONTEMPT, AND THE PRACTICAL LIMITS OF *BEARDEN*-BASED DEBTORS' PRISON LITIGATION

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TABLE OF CONTENTS

INTRODUCTION

At the time of this writing, recent events in Ferguson, Baltimore, New York City, and elsewhere have triggered quite justified social outrage at debtors' prisons. Our country's state and city courts keep scores of indigent people in jail for the crime of being poor, despite the Supreme Court's clear prohibition on the practice. Skilled litigators and their journalist allies have seized on the moment to win victories in court and in the public eye, which prevent unconscionable bond and probation practices and try to reduce our burgeoning jail populations. Lost in the uproar, though, are the many ways that a savvy anti-defendant judge could insulate herself from corrective litigation, evade effective judicial oversight, and essentially perpetuate current debtors' prisons by using pretextual sanctions and contempt orders to circumvent *Bearden v. Georgia* indigency determinations.

Contempt orders, bond increases, and drug testing are all means to jail the poor without facially violating the core holding of *Bearden*. As described in detail below, a judge who makes an effective record can use these processes to wring money, jail time, or guilty pleas out of reluctant defendants. This Essay is not a how-to guide for the antipathetic judges but rather an attempt to highlight how reliance on *Bearden* and procedural rights fail to rein in the more pernicious pretextual sanctions levied against

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the poor. The practices described in this Essay all occur with some frequency in the state and city criminal courts in New Orleans, where the author practices; presumably, the New Orleans judges are not alone in their use of quasi-legal procedural mechanisms to extort money and guilty pleas from indigent defendants.

Part I of this Essay reviews the Supreme Court's holding in *Bearden*. Part II explains a variety of methods that judges can use to circumvent *Bearden*'s requirements and keep the poor imprisoned. Part III suggests the first steps necessary to renew *Bearden*'s promise in future litigation.

True reform requires either long-term, time-intensive data collection to bring to light the insidiousness of the practices at issue or a sea change in how reviewing courts and the public at large view the purposes and procedures of the criminal justice system.

I. *BEARDEN*'S PROMISE

In 1983, the Supreme Court held in *Bearden v. Georgia* that "in revocation proceedings for failure to pay a fine or restitution, a sentencing court must inquire into the reasons for the failure to pay."[1] This holding encapsulates the core legal underpinning of the fight against debtors' prisons: "By sentencing petitioner to imprisonment simply because he could not pay the fine, without considering the reasons for the inability to pay or the propriety of reducing the fine or extending the time for payments or making alternative orders, the court automatically turned a fine into a prison sentence."[2] In other words, if a person is brought to court because he owes money, he cannot be sent to jail just because he does not have the money.

Today, *Bearden* is invoked in courtrooms throughout America to protest when judges attempt to jail a defendant for reasons that directly or indirectly stem from poverty.[3] State criminal codes have been explicitly judicially overridden to take *Bearden* into account.[4] So, how is it that every day in courtrooms across America criminal defendants are sent to jail for being poor? Have courts been ignoring the Supreme Court's mandate for thirty-three years? No. At least, not always. The answer, in part, is that the

1. 461 U.S. 660, 672 (1983).

2. *Id.*

3. *See, e.g.*, People v. Roletto, No. 13CA2315, 2015 WL 1660616, at *4 (Colo. App. Apr. 9, 2015) (explaining that Colorado's statutory scheme for probation revocation incorporates requirements of *Bearden*); Del Valle v. State, 80 So. 3d 999, 1010 (Fla. 2011) (discussing which party has the burden at *Bearden*-related proceedings); State v. Adams, 91 So. 3d 724, 742 (Ala. Crim. App. 2010) ("The statutory scheme thus creates a classification based on wealth, depriving a certain class of citizens indefinitely of their liberty as a result of their inability to pay.").

4. State v. Zabaleta, 689 So. 2d 1369 (La. 1997) ("Granted. The portion of relator's sentence which provides for a jail term in the event of default of payment of a fine is vacated. An indigent person may not be incarcerated because he is unable to pay a fine which is part of his sentence.").

criminal justice system sets up the poor by pressuring them to plead guilty and then requiring repeated and unreasonably frequent contact with the criminal justice system through probation oversight, court dates for paying outstanding court debt, and frequent drug testing. The methods courts use, as described below, put the poor under unique pressure that would be unlikely to influence more affluent defendants. By squeezing guilty pleas out of the poor, and then emptying their pockets or filling the jails with them when they fail to make payments, courts can perpetuate debtors' prisons.

II. PUTTING ON THE SQUEEZE: HOW JUDGES SUBTLY LEVERAGE POVERTY INTO GUILTY PLEAS AND JAIL TIME

What follows is a non-exclusive set of examples of how the judiciary can circumvent the spirit of *Bearden* with what I refer to as pretextual measures that are facially legal but nonetheless result in the jailing of the indigent for the "crime" of poverty. The examples I have chosen are drug testing, bond modifications, and contempt of court sanctions, though again these are by no means the only ways to achieve this end result.

A. *Drug Testing*

Imagine that you are arrested for a minor drug offense, such as possession of prescription drugs without a prescription or possession of crack cocaine. The judge sets a reasonable bond, which you make and are released. Weeks or months later, you are subpoenaed to come to court for your arraignment on a Friday morning. In the interim, you also had minor surgery for which the doctor prescribed prescription painkillers. When you appear, the district attorney announces to the judge that they will offer you probation if you plead guilty to the felony charges. Unprepared to sully your record, you decline. The judge, wanting to "move her docket" (i.e., reduce the number of open cases in her court), disapproves of your decision and decides to turn the screws. She tells you to take a drug test since you are facing a drug charge and because a condition of bond is that you do not engage in illegal activities. After the results come back, the judge tells you that your opiate levels are "through the roof" and that she will need to take action. You try to explain that you are taking prescription painkillers (you do this yourself because the judge has not yet determined if she will appoint a lawyer to represent you). She asks if you brought proof of those prescriptions. Unsurprisingly, you did not. Now comes the moment of truth: the judge tells you she is going to remand you to jail, either by holding you in contempt or by raising your bond because of the failed drug test—in at least some states both options are available.[5] If

5. *See, e.g.*, LA. CODE CRIM. PROC. ANN. art. 336 (2011) (stating that drug test failure results in contempt of court); LA. CODE CRIM. PROC. ANN. art. 342 (2010) (providing that the court may increase bond on its own motion for good cause).

you have proof of the prescriptions, she says, you can bring it to court next week, but you will at least be in jail over the weekend. Or, she reminds you, you can plead guilty to probation today, and the case will close. What would you do?

Everything the judge did in the above scenario is legal, at least in some states, or is very hard to challenge. A lawyer who wants to challenge the judge's ordering of the drug test would have to find a person who chose *not* to plead guilty and instead went to jail, or there would be ripeness or mootness problems. The alternative would be to file some sort of injunctive action; winning would likely require sufficient data to convince a reviewing court that the judge's ostensibly legal actions were in fact nefarious.

Judges use drug testing as a tool to induce reluctant defendants to plead guilty. These judges are not actually concerned about whether the defendants are using drugs, as probation would not be an option if they plead guilty. This pretextual practice disproportionately affects the poor, who come to court without counsel and without the ability to pay the threatened increase in bonds. Yet, as noted above, proving that any individual order to submit to a drug test was pretextual and unjustified by the defendant's appearance or charges is extremely difficult due to the posture of the cases and the wide discretion judges have in bond setting.

B. *Bond Increases*

The above drug-testing scenario is a multi-step process that in some ways insulates the judge from effective review. But even a stripped-down version is frustratingly hard to challenge. Imagine instead that you arrive in court for your arraignment under the same circumstances as described in the original drug-testing scenario. Instead of asking you to submit to a drug test, though, the judge asks the district attorney about your bond. The judge learns you received a recognizance bond, also called a "free bond" or "signature bond," which is not secured with any sort of collateral. Prompted by the judge's question, the prosecutor moves to raise your bond in light of the more detailed police report that has been generated since your bond was set. That report includes some new details of your arrest, which the state says merit a bond increase. Now, those details are unimportant because the prosecutor and the judge have an unspoken understanding: when the judge asks the state what an out of jail defendant's bond is at arraignment, that is the prosecutor's cue to ask for a bond increase. To withstand review, the judge must have "good cause" to raise the bond. A new fact, even a small one, is probably enough to pass muster. So as long as the prosecutor finds *something* to say based on the full police report when moving for the bond increase, the judge will be authorized to

increase the bond.[6] Bond setting is extremely discretionary, and reviewing courts very rarely will overturn a bond increase.[7] Furthermore, the judge does not need to raise the bond very much to achieve her goal: any increase at all will land you in jail, which is the consequence the judge desires to hold over your head unless, of course, you decide to plead guilty, which you would likely do under such circumstances. After a guilty plea, the case and the judge's methods will never actually be reviewed.

As this hypothetical demonstrates, a threatened bond increase is likely to cause someone who would otherwise fight his case to plead guilty if it means remaining out of jail. But due to the discretion afforded to judges and the ostensible legality of the judge's determination, proving that any individual bond increase is illegal verges on impossible, so judges will continue to employ the practice to ensure that as few defendants as possible "clog" their court dockets.

C. *Contempt Orders*

The first two scenarios involve pressuring defendants to plead guilty in order to close their cases and to secure the court costs and fines assessed at the time of the plea.[8] The last scenario involves post-disposition efforts to wring payments out of poor defendants who owe money to the court. It is clearly established that a person too poor to pay cannot be arrested simply for being delinquent on his payments.[9] But, unsurprisingly, the poor are frequently reluctant to come to court when they owe money and cannot afford to pay it.[10] If the court is willing to act as a collections agent, it can require that a convicted defendant report for court for a "payment status date" each time a payment is owed. If the defendant misses the next payment date set, for either justifiable or non-justifiable reasons, the court can sentence him to contempt when he next appears in court.[11] Generally, this means that the defendant is arrested on a bench warrant for missing court and must then appear in court to answer to the judge for missing his payment date.[12] This sequence raises a number of questions and problems:

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6. *See, e.g.*, LA. CODE CRIM. PROC. ANN. art. 342 (2010) (allowing judges to increase bond for good cause).

7. *See, e.g.*, Westinghouse Credit Corp. v. Bader & Dufty, 627 F.2d 221, 224 (10th Cir. 1980) (applying the abuse of discretion standard of review to bond amount challenges); *Ex parte* Flores, No. 14–15–00619–CR, 2015 WL 9241455, at *1 (Tex. App. Dec. 15, 2015) ("Under this standard, we may not disturb the trial court's decision if it falls within the zone of reasonable disagreement.").

8. *See supra* Part II.A-B.

9. *See* Bearden v. Georgia, 461 U.S. 660, 672 (1983).

10. *See* Sarah Stillman, *Get Out of Jail, Inc.: Does the Alternatives-to-Incarceration Industry Profit from Injustice?*, THE NEW YORKER, June 23, 2014.

11. *See, e.g.*, LA. CODE CRIM. PROC. ANN. art. 21 (1966) (indicating that missing court is direct contempt).

12. In New Orleans, judges will occasionally issue "pay or stay" orders in these circumstances, which are patent *Bearden* violations. For example, the judge would give the defendant a

reduced oversight of misdemeanor plea process; findings of direct contempt when defendants are absent from court; what amount of process is due at contempt hearings; and whether the right to counsel applies at contempt hearings.

1. The Scenario

This scenario happens as follows: the defendant comes to court charged with a municipal offense. Potentially, he is in jail at that time. The judge calls the case and advises the defendant that if he would like to waive his rights, including the right to counsel, he may plead guilty and receive a fine and a suspended sentence contingent on payment of the fine. If he pleads guilty, he will get out of jail. The defendant accepts the offer, and the judge conducts a formal *Boykin* procedure,[13] in which the defendant acknowledges that he is pleading without counsel and accepts that he is doing so. At the end of the colloquy, the judge orders the defendant to return in thirty days to make his first payment toward the costs and fines that he has been assessed as part of the plea. When the defendant misses his payment date, he is soon arrested on a bench warrant for missing court. When he appears, the judge sentences him to ten days in jail as direct contempt for missing court.[14] A lawyer is never involved in the process, so a lawyer never has the chance to determine whether the defendant's charges are valid or to warn the defendant about the potential consequences of a plea.

Several points during this process are legally suspect. Can the judge actually advise someone of his option to plead without first determining whether he wants or needs counsel? Can a person waive his right to counsel in order to plead without a full *Faretta*[15] hearing? Can a person who pled guilty without counsel later be sentenced to contempt—technically a new crime apart from the underlying plea—without running afoul of *Shelton*?[16]

It is clear that misdemeanants frequently plead to suspended sentences or court costs that require them to return to court, pay fines, and otherwise subject themselves to the supervision of the court and ongoing

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choice between paying $200 and spending ten days in jail. Obviously the Constitution does not permit the judge to allow some defendants to buy their freedom and to incarcerate those who cannot afford to pay. *Bearden*, 461 U.S. at 672.

13. *Boykin v. Alabama*, 395 U.S. 238 (1969) (establishing the rights that must be read to defendants at the time of a knowing and voluntary guilty plea).

14. *See, e.g.*, LA. CODE CRIM. PROC. ANN. art. 25 (1991) (providing that contemnors can be sentenced to up to six months in prison).

15. *Faretta v. California*, 422 U.S. 806, 835 (1975) (holding that a defendant must be fully apprised of the pitfalls of uncounseled legal practice before proceeding *pro se*).

16. *Alabama v. Shelton*, 535 U.S. 654, 658 (2002) (holding a suspended sentence illegal if the defendant was not provided counsel prior to guilty plea).

contact with the criminal justice system.[17] It is less clear whether they understand the real consequences of making these pleas. Unfortunately, as explained below, courts have generally concluded that misdemeanor and municipal courts are low-stakes affairs meriting somewhat less protection than felony courts.[18]

2. Misdemeanor Plea Process

In *Alabama v. Shelton*, the United States Supreme Court promised that "a suspended sentence that may 'end up in the actual deprivation of a person's liberty' may not be imposed unless the defendant was accorded 'the guiding hand of counsel' in the prosecution for the crime charged."[19] *Shelton* was an extension of the principles in *Argersinger v. Hamlin*, in which the Court held that defense counsel must be appointed in any criminal prosecution—"whether classified as petty, misdemeanor, or felony"—"that actually leads to imprisonment even for a brief period."[20] *Shelton* and *Argersinger* require courts to *offer* the assistance of counsel at the state's expense.[21] They do not require that counsel actually be present or appointed.[22] As explained below, the Court has since stripped the protections afforded in *Shelton* and *Argersinger* by permitting defendants to waive counsel when they plead after only minimal process.[23] Because of this, the "guiding hand of counsel," while theoretically available, is often absent in misdemeanor courts, despite pleas that "actually lead[ ] to imprisonment."[24]

Case law throughout the United States is generally rather permissive in terms of allowing uncounseled pleas to low-level offenses, provided that judges perform a proper colloquy about the waiver.[25] In *Iowa v. Tovar*, the United States Supreme Court addressed the question of whether the Iowa Supreme Court's holding that a full and rigorous colloquy was required

17. *See, e.g.*, Ethan Bronner, *Poor Land in Jail as Companies Add Huge Fees for Probation*, N.Y. TIMES, July 2, 2012, at A1; *see also* Stillman, *supra* note 10.

18. *See infra* note 30.

19. Alabama v. Shelton, 535 U.S. 654, 658 (2002) (quoting Argersinger v. Hamlin, 407 U.S. 25, 40 (1972)).

20. *Argersinger*, 407 U.S. at 33, 37.

21. *See id.* at 32-33, 37.

22. *See id.* at 37-38.

23. *See infra* note 34.

24. *Shelton*, 535 U.S. at 657, 658 (quoting *Argersinger*, 407 U.S. at 33, 40).

25. *See, e.g.*, Iowa v. Tovar, 541 U.S. 77, 88 (2004) ("We have described a waiver of counsel as intelligent when the defendant knows what he is doing and his choice is made with eyes open.") (internal citations omitted); United States v. Ruiz, 536 U.S. 622, 629 (2002) ("[T]he law ordinarily considers a waiver knowing, intelligent, and sufficiently aware if the defendant fully understands the nature of the right and how it would likely apply *in general* in the circumstances—even though the defendant may not know the *specific detailed* consequences of invoking it.") (emphasis in original).

exceeded federal constitutional minimums.[26] The Iowa Supreme Court held:

> [A] defendant such as Tovar who chooses to plead guilty without the assistance of an attorney must be advised of the usefulness of an attorney and the dangers of self-representation in order to make a knowing and intelligent waiver of his right to counsel . . . . [T]he trial judge [must] advise the defendant generally that there are defenses to criminal charges that may not be known by laypersons and that the danger in waiving the assistance of counsel in deciding whether to plead guilty is the risk that a viable defense will be overlooked. The defendant should be admonished that by waiving his right to an attorney he will lose the opportunity to obtain an independent opinion on whether, under the facts and applicable law, it is wise to plead guilty. In addition, the court must ensure the defendant understands the nature of the charges against him and the range of allowable punishments.[27]

In rejecting this requirement, Justice Ginsburg voiced concern for the unanimous Court:

> The warnings the Iowa Supreme Court declared mandatory might be misconstrued as a veiled suggestion that a meritorious defense exists or that the defendant could plead to a lesser charge, when neither prospect is a realistic one. If a defendant delays his plea in the vain hope that counsel could uncover a tenable basis for contesting or reducing the criminal charge, the prompt disposition of the case will be impeded, and the resources of either the State (if the defendant is indigent) or the defendant himself (if he is financially ineligible for appointed counsel) will be wasted.[28]

In reaching this conclusion, the Court referred to its previous decision in *Patterson v. Illinois* for the proposition that at pretrial proceedings "the full dangers and disadvantages of self-representation . . . are less substantial and more obvious to an accused than they are at trial."[29]

State courts have also adopted this permissive, reduced-process view, allowing misdemeanor and municipal courts to engage in "group" or "mass" waivers of swaths of defendants at a time, including informing all incarcerated defendants (in some jurisdictions, those "in the box") of their

26. 541 U.S. at 86–87.

27. *Id.*

28. *Id.* at 90.

29. *Id.* (citing Patterson v. Illinois, 487 U.S. 285, 299 (1988)).

rights at once.[30] These courts have also put the burden on the defense to show an irregularity in a waiver proceeding, accepting, for example, judicial checklists as prima facie evidence that the court properly instructed a defendant of the rights being given up at a *pro se* plea.[31]

There is great danger in this logic. Essentially, the courts are presuming regularity in the proceedings of the least formal and least regulated courts in our country.[32] They are doing so because they presume the consequences of error are low, but their approach fails to account for the debtors' prison cycle discussed in this Essay. Failure to ensure that defendants understand that a plea will require ongoing and often onerous continued contact with the criminal justice system is a recipe for filling municipal jails with low-level offenders who failed to comply with misdemeanor probation or who were held in contempt when they missed court.[33] Yet, because summary warnings are considered sufficient for these "minor" offenses, few judges are likely to opt to fully convey this possible chain of events to a defendant who has professed his desire to plead guilty. Most judges will prefer a closed case to an informed defendant when given the choice.

3. Contempt Process

The original hypothetical in this subsection focused on contempt—specifically, direct contempt for absence from court. The use of direct contempt in the example is intentional, and significant due to the minimal process required before a direct contempt conviction. The United States Supreme Court has affirmed the right to counsel at contempt hearings,

30. *See, e.g.*, State v. Strain, 585 So. 2d 540, 544 (La. 1991) ("Determining the defendant's understanding of his waiver of counsel in a guilty plea to an uncomplicated misdemeanor requires less judicial inquiry than determining his understanding of his waiver of counsel for a felony trial."); State v. Miller, 404 N.W.2d 45 (Neb. 1987) (When there has been a group arraignment, the record must affirmatively disclose that the criminal defendant was present when the court advised those charged of their rights.); Picetti v. State, 192 P.3d 704, 708 (Nev. 2008) ("During the mass advisement for Picetti's first-offense DUI conviction, the justice court informed Picetti of his right to have an attorney at every stage of the proceeding and that if he could not afford an attorney, one would be provided without cost. The justice court also informed Picetti of the nature of the charges against him and the possible punishment involved, including the enhanced penalties involved in a DUI citation. The justice court further instructed misdemeanor defendants to ask any questions they wished during the individual colloquy."); *cf.* Hatten v. State, 89 S.W.3d 160, 163 (Tex. App. 2002) ("In misdemeanor cases where the defendant's guilt is not contested, the trial court is not required to admonish the defendant as to the dangers and disadvantages of self-representation, but must only see that the defendant voluntarily and intelligently waived his right to counsel.").

31. *See, e.g.*, State v. LeGrand, 541 N.W.2d 380, 387 (Neb. 1995) ("A checklist, authenticated by the signature or initials of the judge, which indicates that all constitutional requirements have been met, becomes a part of the record and may affirmatively establish an intelligent and knowing guilty plea.").

32. *See id.*

33. *See supra* note 17.

except summary contempt proceedings.[34] The federal circuits overwhelmingly, though not universally, agree that absence from court—that is, "absconding" or failing to report when subpoenaed—is not subject to summary proceedings.[35] There is a divide among the states about the process required before it is appropriate to sentence a court absconder for contempt.[36] Generally, contempt is divided into two categories: direct and constructive, or indirect.[37] The underlying principles behind direct contempt, theoretically, are that a judge has before her all the facts necessary to impose a sanction—indeed, she has personal knowledge of all the facts—so the full panoply of rights otherwise required prior to imposing a jail sanction are not necessary and a defendant can be convicted without traditional trial-like protections.[38] Direct contempts, in their purest form, are limited to punishing actions that occur in the courtroom itself, such as a frustrated defendant's unruly outburst or an overzealous attorney's continued flouting of a judicial ruling. The courts and the legislatures have given the judiciary the tool of contempt as a means of maintaining order and decorum in the courtroom.[39]

At a direct contempt hearing, there is no formal opportunity for presenting facts or calling witnesses.[40] By contrast, constructive contempts are reserved for activities about which the court lacks all the necessary facts and therefore must rely on the testimony of witnesses.[41] Examples include prosecutorial failure to disclose evidence, violation of protective orders, and improper juror contact.[42] Before a defendant can be sentenced to con-

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34. *In re* Oliver, 333 U.S. 257, 275 (1948) ("Except for a narrowly limited category of contempts, due process of law as explained in the *Cooke* case requires that one charged with contempt of court be advised of the charges against him, have a reasonable opportunity to meet them by way of defense or explanation, have the right to be represented by counsel, and have a chance to testify and call other witnesses in his behalf, either by way of defense or explanation.").

35. *See, e.g.*, United States v. Onu, 730 F.2d 253, 255-56 (5th Cir. 1984); *In re* Allis, 531 F.2d 1391, 1392 (9th Cir. 1976); Jessup v. Clark, 490 F.2d 1068, 1072 (3d Cir. 1973); United States v. Delahanty, 488 F.2d 396, 397 (6th Cir. 1973); *In re* Lamson, 468 F.2d 551, 552 (1st Cir. 1972) (per curiam); United States v. Willett, 432 F.2d 202, 205 (4th Cir. 1970) (per curiam). *But see In re* Gates, 478 F.2d 998, 1000 (D.C. Cir. 1973) (per curiam); *In re* Niblack, 476 F.2d 930, 933 (D.C. Cir. 1973) (per curiam).

36. *See infra* note 48.

37. 17 AM. JUR. 2D *Contempt* § 157 (2015).

38. *Oliver*, 333 U.S. at 275 ("The narrow exception to these due process requirements includes only charges of misconduct, in open court, in the presence of the judge, which disturbs the court's business, where all of the essential elements of the misconduct are under the eye of the court, are actually observed by the court, and where immediate punishment is essential to prevent 'demoralization of the court's authority' before the public.").

39. *Id.*

40. *Id.*

41. *Constructive Contempt*, BALLENTINE'S LAW DICTIONARY (3d ed. 1969).

42. *See, e.g.*, On Command Video Corp. v. Lodgenet Entm't Corp., 976 F. Supp. 917 (N.D. Cal. 1997) (finding company in contempt for violation for protective order); Alan v. State, 39 So. 3d 343 (Fla. Dist. Ct. App. 2010) (contempt for improper juror contact); *In re* Burns, 800

structive contempt, the court must give the defendant notice of the charges against him and a hearing date.[43] At the hearing, the defendant is entitled to counsel, to call witnesses, and to cross-examine the witnesses against him.[44]

In some states, including Louisiana, the courts have explicitly held that missing court constitutes direct contempt, which, as discussed above can be punished summarily without a chance to speak in mitigation.[45] Indeed, in Louisiana contumacious failure to appear in court when subpoenaed is specifically enumerated as a direct contempt in the direct contempt statute.[46]

Rendering an absence from a court punishable by direct contempt is inherently illogical, not to mention "contumacious" absence. How can a judge have the information necessary to adjudge a person guilty of intentional failure to appear? The majority of federal courts have recognized this logical fallacy, and they have held that failure to appear cannot be punished with summary contempt proceedings.[47] Nonetheless, state courts have repeatedly overlooked, ignored, or rejected the *mens rea* requirement of direct contempt when it comes to allegations of absconding from court.[48]

So. 2d 833, 841 (La. 2001) (regarding prosecutor planting evidence); State v. Wisniewski, 708 P.2d 1031, 1036 (N.M. 1985) (upholding the sanctioning of a violation of the prosecution's duty to disclose potentially exculpatory evidence with indirect contempt).

43. *See, e.g.*, *Oliver,* 333 U.S. at 275 ("Except for a narrowly limited category of contempts, due process of law as explained in the *Cooke* case requires that one charged with contempt of court be advised of the charges against him, have a reasonable opportunity to meet them by way of defense or explanation, have the right to be represented by counsel, and have a chance to testify and call other witnesses in his behalf, either by way of defense or explanation.").

44. *Id.*

45. *See, e.g.*, Lyons v. Superior Court, 278 P.2d 681 (Cal. 1955); State v. Owen (*In re* Hale), 893 P.2d 818 (Idaho Ct. App. 1995); *In re* Nasser, 644 N.E.2d 93 (Ind. 1994); State v. Clark, 275 P.3d 931 (Kan. Ct. App. 2012) (unpublished); State v. Williams, 637 So. 2d 1230 (La. App. 1994).

46. LA. CODE CRIM. PROC. ANN. art. 21 (1966) ("Contumacious failure to comply with a subpoena or summons to appear in court, proof of service of which appears of record.").

47. *See supra* note 35.

48. *See, e.g.*, *In re* Nasser, 644 N.E.2d 93, 95 (Ind. 1994) ("Courts are sharply divided, however, as to whether such an attorney may be summarily punished for the absence or whether some 'due process' is required. In most jurisdictions, the debate centers on whether the contempt was direct or indirect."). *Compare* Pennsylvania v. Marcone, 410 A.2d 759 (Pa. 1980) (direct contempt) *with In re* Williams, 817 P.2d 139, 144 (Idaho 1991) ("The court is aware that the attorney's presence is required, that the attorney was aware that his presence was necessary and that the attorney is absent. Once the attorney has been given the opportunity to explain the absence to the court, all elements of direct contempt are present. Therefore, the attorney's absence is a direct contempt."), People v. Mann, 460 N.E.2d 778 (Ill. App. Ct. 1984) (indirect contempt), State v. Williams, 637 So. 2d 1230, 1236 (La. App. 1994) ("Thus, the defendant's contention that such failure to appear resulted only in a constructive contempt has no merit."), *In re* Hampton, 919 So. 2d 949, 960 (Miss. 2006), *and In re* Yengo, 417 A.2d 533, 541 (N.J. 1980) ("We conclude that the mere unexplained absence of an attorney is a hybrid.").

The distinction between direct contempt and constructive contempt is critical for an additional reason: courts have concluded that the right to counsel attaches at a constructive contempt proceeding but not at a direct contempt proceeding.[49] This means that a person who fails to appear to pay his fine after pleading guilty at arraignment can then be sentenced to jail time for direct contempt without having the opportunity to confer with counsel, let alone to call witnesses to explain his absence.[50]

The promise of *Shelton* has been broken because the original uncounseled plea *leads* to jail time when the judge issues a direct contempt sentence based on failure to appear in the original case. The defendant pled guilty without speaking to a lawyer and was later held in contempt without a lawyer. And because these are "non-complex" cases, when the defendant first appeared in court he was only entitled to the most summary of warnings about the implications of waiving his right to counsel, no one is ever required to explain that the sentence imposed could set off a chain of unfortunate events that could end with jail time.[51]

On the other hand, a wealthy defendant would not face the same predicament. She could afford an attorney and in many cases would seek counsel. She could pay the imposed fine, so she would not fear going to court empty-handed. By contrast, in the case of the indigent defendant above, although no point on his path to jail violated *Bearden*, he was, for all intents and purposes, jailed for being poor.

III. RENEWING *BEARDEN*'S PROMISE

The injustices pervading our country's courtrooms should not drive us into despair. Policymakers are increasingly aware of the social and economic harm our over-incarceration addiction continues to cause.[52] Now is

49. *See, e.g.*, Davis v. Harmony House Nursing Home, 800 So. 2d 92, 95 (La. App. 2001) ("The procedural safeguards, including the right to a hearing and the right to counsel, do not attach to direct contempt, because all of the facts constituting a direct contempt are within the knowledge of the court."); State v. Newson, 753 S.E.2d 399 (N.C. Ct. App. 2013) ("Since we find Defendant was summarily punished for direct contempt, the right to counsel also did not attach."); State v. Pearson (Pearson & Pearson), 900 P.2d 533, 536 (Or. Ct. App. 1995) ("By express statutory terms, there is no right to counsel in a summary contempt proceeding."); *Ex parte* Flournoy, 312 S.W.2d 488, 492 (Tex. 1958) ("Litigants and others appearing in court are certainly not entitled to counsel and a hearing before they may be committed for every type of direct contempt.").

50. *See supra* note 45.

51. *See supra* note 49.

52. *See, e.g.*, Leigh Ann Caldwell, *Koch Brothers, White House Seize Momentum on Criminal Justice Reform*, NBC NEWS (Dec. 16, 2015, 7:29 AM), http://www.nbcnews.com/politics/barack-obama/kochs-white-house-seize-momentum-criminal-justice-reform-n480561.

the time to leverage that public sentiment into judicial and legislative action.[53]

I have repeatedly argued that the practices described in this Essay are, for the most part, legal. I should clarify at this juncture that each action, taken by itself, is facially legal. The collective result, however, is not.[54] How to effectively attack the collective result is the challenge facing modern litigators. In *Bearden*, the Court declined to determine whether equal protection or due process was the proper framework for analyzing the question of whether a court could legally imprison a defendant for failing to pay assessed court fees.[55] The Court intimated in a footnote that substantive due process was likely the better course,[56] but it has since emphasized the equal protection aspects of the holding.[57] Ultimately though, *Bearden* presented a straightforward question to the Court, which it could resolve on direct appeal rather than through complicated impact litigation.[58]

The more subtle but equally unjust practices described in this Essay are harder to litigate because each individual case may not run afoul of the law, but as demonstrated through the examples above, the collective, repeated practices undoubtedly have a disparate impact on the poor. Showing the frequency of the practices at issue can demonstrate the improper motives of the judges who use them. Proving the pernicious intent and the pretextual nature of these judges' actions is no small task. The first step,

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53. *See, e.g.*, Alex Altman, *Koch Brother Teams Up with Liberals on Criminal Justice Reform*, TIME (Jan. 29, 2015), http://time.com/3686797/charles-koch-criminal-justice/; Michael Schmidt, *U.S. to Release 6,000 Inmates from Prisons*, N.Y. TIMES, Oct. 6, 2015, at A1.

54. The disparate impact of the various courts' actions could conceivably be challenged as part of a 42 U.S.C. § 1983 action or, in some circumstances, on direct appeal. The specifics of how such a suit would look are outside the scope of this Essay.

55. 461 U.S. 660, 666 (1983).

56. *Id*. at n.8 ("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 indigency 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,' North Carolina v. Pearce, 395 U.S. 711, 723 (1969). The more appropriate question is whether consideration of a defendant's financial background in setting or resetting a sentence is so arbitrary or unfair as to be a denial of due process.").

57. *See* M.L.B. v. S.L.J., 519 U.S. 102, 105 (1996) ("Also rejected is respondents' suggestion that Washington v. Davis, 426 U.S. 229, 242, effectively overruled the *Griffin* line of cases in 1976 by rejecting the notion that a law, neutral on its face and serving ends otherwise within the power of government to pursue, is invalid under the Equal Protection Clause simply because it may affect a greater proportion of one race than of another. That this Court has not so conceived the meaning and effect of *Washington v. Davis* is demonstrated by *Bearden*, 461 U.S., at 664-665, in which the Court adhered in 1983 to *Griffin's* principle of 'equal justice.") (internal quotation marks omitted).

58. 461 U.S. at 662.

though, is apparent. Practitioners must document these practices and collect data when they occur. Since data collection is onerous, especially for practitioners in high volume courts, they should create a centralized method for data collection and make effective use of volunteers and court observers to help them document concerns.

Data is necessary because these practices are unlikely to be scrutinized carefully unless policymakers and appellate judges can see the frequency with which they occur and the damage being inflicted on our communities as a result. Advocates and litigators should use the data they collect to leverage legislatures to change these unjust practices or courts to mandate that such practices can no longer be used.

CONCLUSION

Bearden's importance to the quest for justice cannot be overstated. However, much like the modern civil rights battles that combat subtler but equally pernicious racism, the next wave of debtors' prison litigation must recognize the loopholes and shortcomings of existing precedent and seek to push courts and policymakers to acknowledge and address the myriad ways the poor continue to be ushered to jailhouses by our criminal injustice system.