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Pretrial Detention of Indigents: A Standard Analysis of Due Process and Equal Protection Claims

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PRETRIAL DETENTION OF INDIGENTS: A STANDARD ANALYSIS OF DUE PROCESS AND EQUAL PROTECTION CLAIMS

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Over the past several years, criminal justice activists have sought to reform misdemeanor bail policies that condition pretrial release on an arrestee's ability to pay a predetermined cash bond. Activists have challenged such bail polices by filing lawsuits on behalf on indigent persons who have been exposed to such policies. Often, these lawsuits allege that bail policies violate both the Due Process and Equal Protection Clauses of the Fourteenth Amendment. While due process and equal protection analyses are generally well-defined, U.S. Supreme Court precedent does not offer a clear analysis for courts to apply to due process and equal protection claims alleging wealth-based discrimination by the criminal justice system. As a result, courts have struggled to apply a standard approach to such claims, which has resulted in inconsistent decisions. Two recent circuit court cases illustrate the mixed batch of analyses that courts have applied. This Note advocates for a standard approach to analyze all due process and equal protection challenges concerning wealth-based discrimination by the criminal justice system.

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I. INTRODUCTION

Nelson Mandela once said, "[n]o one truly knows a nation until one has been inside its jails. A nation should not be judged by how it treats its highest citizens, but its lowest ones."[1] After examining the bail policies of many U.S. jurisdictions, Mandela would likely criticize the nation founded on liberty and premised on equal justice for its treatment of indigent arrestees. Many U.S. jurisdictions condition pretrial liberty on a defendant's wealth, leaving destitute persons detained notwithstanding the presumption of innocence rooted in American criminal justice policy.[2]

The United States has experienced two periods of bail reform, and a third era is ongoing due to the inability of the first two eras to sufficiently achieve pretrial justice.[3] Activists leading this era of bail reform have focused on misdemeanor bail policies that condition pretrial release on an arrestee's ability to pay a predetermined amount of money.[4] These policies have contributed to the jail overcrowding phenomenon, as the percentage of total jail inmates awaiting trial has increased from roughly eighteen percent in 1990 to sixty-five percent in 2016.[5] Not only do Americans spend a large amount of tax dollars housing detainees who have yet to be

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[1] TIMOTHY R. SCHNACKE, NAT'L INST. OF CORR., FUNDAMENTALS OF BAIL: A RESOURCE GUIDE FOR PRETRIAL PRACTITIONERS AND A FRAMEWORK FOR AMERICAN PRETRIAL REFORM 3 (2014).

[2] *See id.* ("America tolerates its judges often conditioning pretrial freedom based on defendant wealth—or at least on the ability to raise money . . . .").

[3] *See id.* at 33–35 (discussing the previous generations and the current generation of bail reform in the United States).

[4] *See* Mel Gonzalez, Litigating Money Bail Away: A Dim Future for the Status of the Poor under the 14th Amendment 1 (March 3, 2017) (unpublished manuscript) (on file with the author) (noting that "a movement across the country is growing championing the reformation of this early stage of the criminal justice process").

[5] *See* PATRICK LIU ET AL., HAMILTON PROJECT, THE ECONOMICS OF BAIL AND PRETRIAL DETENTION 4 (2018), https://www.hamiltonproject.org/assets/files/BailFineReform_EA_121818_6PM.pdf ("The share of jail inmates who are unconvicted is high and has also increased, rising from about half the total jail population in 1990 to 65 percent in 2016. . . . However, the number of arrests has fallen since the mid-1990s and crime has declined since the early 1990s . . . .").

convicted of a crime,[6] but more importantly, these detainees suffer serious, life-altering consequences.[7]

Pretrial detention begins with an arrest and ends when the detainee is released on bail or after the disposition of a criminal case.[8] Bail is defined as "a process of conditional release," and the purpose of bail is "to effectuate and maximize release."[9] Bail can be conditioned on several means, including the payment of a secured cash bond that ensures an arrestee's presence at trial.[10] A substantial number of jurisdictions use bail schedules, which prescribe a predetermined cash bond amount based on the offense that an arrestee allegedly committed.[11] If the bond is satisfied, the arrestee will be released, ordered to appear in court, and have the money returned to him when his case concludes.[12] However, if the arrestee is unable to pay the cash bond, he will remain in jail until either (1) indigency is proven at a bail hearing or (2) the case's disposition.[13]

A common criticism of bail schedules is that they do not take into consideration the individual characteristics of each arrestee, such as his or her ability to pay a predetermined cash bond.[14] This results in the potential for an arrestee to be detained solely on the basis of

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[6] *See* MICHAEL P. BOGGS & CAREY A. MILLER, REPORT OF THE GEORGIA COUNCIL ON CRIMINAL JUSTICE REFORM 9 (2018), https://dcs.georgia.gov/important-links/georgia-council-criminal-justice-reform (stating that arrestees awaiting trial "contribute[] significantly to the $9-billion jail bill paid annually by local governments across the United States").

[7] *See* Paul Heaton et al., *The Downstream Consequences of Misdemeanor Pretrial Detention*, 69 STAN. L. REV. 711, 713 (2017) ("A person detained for even a few days may lose her job, housing, or custody of her children.").

[8] *See id.* at 718–22 (discussing the pretrial process).

[9] SCHNACKE, *supra* note 1, at 91, 93.

[10] *See* Wendy R. Calaway & Jennifer M. Kinsley, *Rethinking Bail Reform*, 52 U. RICH. L. REV. 795, 797 (2018) (defining one method of bail "as the temporary release of an arrested individual that is secured by a monetary payment and is contingent upon appearance at future court hearings").

[11] *See* Heaton et al., *supra* note 7, at 720–21 (describing bail schedules used by various jurisdictions).

[12] *Id.* at 718–19.

[13] *See id.* at 721 ("Once bail is set, detention status depends on a defendant's ability and willingness to pay bail. Those who post bail are released.").

[14] *See* Lindsey Carlson, *Bail Schedules: A Violation of Judicial Discretion?*, 26 CRIM. JUST. 12, 13 (2011) (noting that the use of bail schedules, which do not account for "the characteristics of an individual defendant," results in "detain[ing] large numbers of arrestees on relatively low bonds").

wealth.[15] Critics of bail schedules have recently begun to file lawsuits challenging the constitutionality of bail policies that use bail schedules.[16] These activists typically challenge bail policies as violations of the Due Process and Equal Protection Clauses of the Fourteenth Amendment of the U.S. Constitution.[17]

Recently, the Fifth and Eleventh Circuits have decided cases in which classes of indigents brought due process and equal protection claims to challenge bail policies. In *Walker v. City of Calhoun*, the U.S. Court of Appeals for the Eleventh Circuit held that the City of Calhoun's "Standing Bail Order" did not violate the Due Process or Equal Protection Clauses.[18] In *Walker*, the indigent class members argued that the Standing Bail Order violated the Due Process and Equal Protection Clauses because it allowed an affluent person charged with the same offense as an indigent person to be released by paying a secured cash bond, while an indigent person was required to remain detained for up to forty-eight hours pending a bail hearing at which the detainee could plead indigency.[19] Conversely, in *ODonnell v. Harris County*, the U.S. Court of Appeals for the Fifth Circuit ruled that the bail policy applied by Harris County violated the Due Process and Equal Protection Clauses.[20] In *ODonnell*, the bail policy at issue failed to provide individualized assessments of arrestees and required indigent arrestees to remain detained for several days before they received a hearing at which their initial bail conditions could be disputed.[21] While *Walker* and *ODonnell* presented similar questions, the Fifth and Eleventh

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[15] *See* Calaway & Kinsley, *supra* note 10, at 797–98 ("[I]ndigent defendants are penalized for their inability to pay the required bail amount . . . . [P]unishment and detention in jail occur before guilt has even been determined.").

[16] *See* Gonzalez, *supra* note 4, at 1 (stating that bail policies have been recently adjudicated in district and circuit courts).

[17] *See id.* at 8 (stating that recently filed cases have challenged bail policies under the Due Process Clause and the Equal Protection Clause, or both).

[18] 901 F.3d 1245, 1269 (11th Cir. 2018) (concluding that the class members failed to prove that they were likely to succeed on the merits of their claim that the Standing Bail Order was unconstitutional).

[19] *See id.* at 1252–53 (describing the forms of release of the City of Calhoun's Standing Bail Order).

[20] 892 F.3d 147, 163 (5th Cir. 2018) (finding that "constitutional violations occurred").

[21] *See id.* at 154 (discussing the "flawed procedural framework" of the bail policy utilized by Harris County).

Circuits applied different analyses to reach their conclusions.[22] Nevertheless, U.S. Supreme Court precedent indicates that neither the Fifth Circuit nor the Eleventh Circuit applied the correct standard.

This Note will advocate for a standard approach for analyzing due process and equal protection challenges regarding wealth-based discrimination of indigents by the criminal justice system. Part II will analyze U.S. Supreme Court precedent involving wealth-based discrimination challenges and provide an overview of the Eleventh Circuit's *Walker* decision and the Fifth Circuit's *ODonnell* decision. Part III will suggest the appropriate analysis that courts should apply to due process and equal protection challenges by indigents, who claim they have been discriminated against on the basis of wealth by the criminal justice system. Part IV will apply this analysis using the facts from *Walker*, which will reveal that, contrary to the Eleventh Circuit's holding, the City of Calhoun's Standing Bail Order does violate the Due Process and Equal Protection Clauses of the Fourteenth Amendment. Finally, Part V will provide a brief conclusion.

II. DUE PROCESS, EQUAL PROTECTION, AND THEIR APPLICATION TO WEALTH-BASED DISCRIMINATION CHALLENGES

The Due Process Clause of the Fourteenth Amendment states, "[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law."[23] Thus, due process ensures that the government does not arbitrarily deprive a person of life, liberty, or property.[24] Procedural due process claims are analyzed under a balancing test as set forth by the U.S. Supreme Court in *Mathews v. Eldridge*.[25] Although on its face the Due Process Clause appears

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[22] *Compare id.* at 157–63 (applying distinct due process and equal protection analyses), *with Walker*, 901 F.3d at 1265 (conceding that a hybrid style due process and equal protection analysis is proper but applying "something akin to a traditional due process rubric").

[23] U.S. CONST. amend. XIV, § 1.

[24] *See* Slochower v. Bd. of Higher Educ., 350 U.S. 551, 559 (1956) (stating that the "'protection of the individual against arbitrary action' . . . [is] the very essence of due process" (citing Ohio Bell Tel. Co. v. Pub. Utils. Comm'n, 301 U.S. 292, 302 (1937))).

[25] 424 U.S. 319, 335 (1976) (discussing the factors the Court balanced in its procedural due process analysis, including "the private interest that will be affected by the official action; . . . the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally the Government's interest").

to provide only procedural safeguards, the U.S. Supreme Court has interpreted the Due Process Clause to also include substantive protections against government regulation of certain activities.[26] Substantive due process claims are analyzed differently depending on whether or not the government interfered with a fundamental right.[27] If the government interferes with a fundamental right recognized under the U.S. Constitution, the interference will only prevail if it survives strict scrutiny review.[28] To survive strict scrutiny, the State must prove that the "regulation limiting these rights [are] justified only by a 'compelling state interest,' and that legislative enactments [are] narrowly drawn to express the only legitimate state interests at stake."[29] However, if the right interfered with is not designated as a fundamental right, the court will apply rational basis scrutiny, requiring only that the government prove that the interference is rationally related to a legitimate government interest.[30]

The Equal Protection Clause of the Fourteenth Amendment states, "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws."[31] Accordingly, the Equal Protection Clause ensures that the government does not discriminate against certain classes of persons.[32] Similar to a substantive due process analysis, an equal protection analysis applies either strict, intermediate, or rational basis scrutiny.[33] To determine the level of applicable scrutiny, courts will determine whether the challenged law discriminates against a suspect class or

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[26] *See, e.g.*, United States v. Salerno, 481 U.S. 739, 746 (1987) ("So-called 'substantive due process' prevents the government from engaging in conduct that 'shocks the conscience,' or interferes with rights 'implicit in the concept of ordered liberty.'" (internal citations omitted)).

[27] *See* Russell W. Galloway, Jr., *Basic Substantive Due Process Analysis*, 26 U.S.F. L. REV. 625, 627 (1992) ("[I]ntensified scrutiny applies only where the deprivation involves an infringement of a fundamental right.").

[28] *See* Johnson v. City of Cincinnati, 310 F.3d 484, 509 (6th Cir. 2002) ("If the right . . . had been a fundamental liberty interest, this court would have been required to apply strict scrutiny . . . .").

[29] Roe v. Wade, 410 U.S. 113, 155 (1973).

[30] *See, e.g.*, Washington v. Glucksberg, 521 U.S. 702, 728 (1997) (determining that the right to assisted suicide is not fundamental and thus only subject to rational basis review).

[31] U.S. CONST. amend. XIV, § 1.

[32] *See* Russell W. Galloway, Jr., *Basic Equal Protection Analysis*, 29 SANTA CLARA L. REV. 121, 121 (1989) (stating that the Equal Protection Clause "places strict limits on the government's ability to infringe fundamental constitutional rights of all classes of persons").

[33] *See id.* at 129 ("[D]ifferent kinds of classifications are subject to different levels of means-end scrutiny, varying from strict scrutiny all the way down to rationality review.").

whether the classification infringes upon a fundamental right.[34] If a suspect class or a fundamental right is present, courts will apply strict scrutiny review of the government classification.[35] When a "semi-suspect" class, such as gender, is present, courts will apply an intermediate level of scrutiny.[36] If neither a suspect class, nor semi-suspect class, nor a fundamental right is affected by a government classification, a court will apply rational basis scrutiny.[37]

These well-defined bodies of U.S. Supreme Court precedent have not, however, resulted in a clear analysis for lower courts to apply to claims of wealth-based discrimination by the criminal justice system.[38] Two reasons, both of which relate to the fact that claims of wealth-based discrimination by the criminal justice system typically involve both equal protection and due process claims, suggest why. First, when courts have applied distinct due process and equal protection analyses in wealth-based discrimination cases, there has been a lack of consensus about whether, under the equal protection analysis, the poor should be treated as a suspect class.[39] While the U.S. Supreme Court has held that indigent persons generally do not constitute a suspect class,[40] some courts have interpreted U.S. Supreme Court precedent to create an exception in the criminal context to this general rule.[41] Lower courts that have

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[34] *See id.* at 130 (discussing under what circumstances heightened scrutiny is applicable).

[35] *See id.* (stating that if the challenged law discriminates against a suspect class or the classification infringes upon a fundamental right "the Court will . . . require the government to show that its conduct has a strong justification").

[36] *See id.* at 142 (noting that gender, racial, and alienage-based classifications are semi-suspect and must survive intermediate scrutiny).

[37] *See id.* at 130 ("If no basis for intensified scrutiny is present, rationality review should be applied.").

[38] *See* Walker v. City of Calhoun, 901 F.3d 1245, 1265 (11th Cir. 2018) (conceding that precedent concerning Fourteenth Amendment wealth-based discrimination challenges is not "a model of clarity in setting out the standard of analysis to apply").

[39] *See* Henry Rose, *The Poor as a Suspect Class under the Equal Protection Clause: An Open Constitutional Question*, 34 NOVA. L. REV. 407, 421 (2010) (arguing that whether indigency should be treated as a suspect or semi-suspect class under the Equal Protection Clause "has not yet been decided by the United States Supreme Court"). *But see* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 786 (3d ed. 2006) ("[T]he Supreme Court [has] expressly held that poverty is not a suspect classification and that discrimination against the poor should only receive rational basis review.").

[40] *See, e.g.*, Harris v. McRae, 448 U.S. 297, 323 (1980) ("[T]his Court has held repeatedly that poverty, standing alone is not a suspect classification.").

[41] *See* ODonnell v. Harris Cty., 892 F.3d 147, 161 (5th Cir. 2018) ("[T]he Supreme Court has found that heightened scrutiny is required when criminal laws detain poor defendants

followed this exception have applied a test articulated by the U.S. Supreme Court in *San Antonio Independent School District v. Rodriguez* to determine whether or not strict scrutiny should apply to a classification of indigents.[42] Second, in *Bearden v. Georgia*, a case involving due process and equal protection challenges to a probation revocation, the U.S. Supreme Court abandoned the distinct due process and equal protection analyses in favor of a hybrid analysis.[43] Therefore, when faced with a due process and equal protection claim, lower courts must determine whether to apply this hybrid analysis, or distinct due process and equal protection analyses. These issues have produced ambiguities and confusion for courts reviewing government actions that allegedly discriminate on the basis of wealth.[44]

A. SUPREME COURT PRECEDENT ON WEALTH-BASED DISCRIMINATION

Two U.S. Supreme Court decisions, *Rodriguez* and *Bearden*, referenced above, are of significant importance to understand the current difficulty that lower courts face when analyzing due process and equal protection claims of wealth-based discrimination by the criminal justice system.

1. An Analysis of Rodriguez.

In *Rodriguez*, a class of indigents claimed that Texas's school financing policy violated the Equal Protection Clause of the Fourteenth Amendment because geographical areas that had low property values received a lower quality education.[45] In reaching its holding that the financing system did not violate the Equal Protection Clause, the Court set forth a two-step test for determining whether courts should apply strict scrutiny review

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because of their indigence." (first citing Tate v. Short, 401 U.S. 395, 397–99 (1971); and then citing Williams v. Illinois, 399 U.S. 235, 241–42 (1970))).

[42] *See* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 20 (1973) (describing the two-part test, which asks whether a group of indigents was "completely unable to pay for some desired benefit, and as a consequence, they sustained an absolute deprivation of a meaningful opportunity to enjoy that benefit").

[43] 461 U.S. 660, 665 (1983) ("Due process and equal protection principles converge in the Court's analysis in these cases.").

[44] *See, e.g.*, Buffin v. City & Cty. of San Francisco, No. 15-cv-04959-YGR, 2018 WL 424362, *8–10 (N.D. Cal. Jan. 16, 2018) (acknowledging the hybrid analysis set forth in *Bearden* but applying a traditional strict scrutiny analysis to a bail policy).

[45] *See Rodriguez*, 411 U.S. at 4–5 (discussing the facts that prompted the lawsuit).

when a classification discriminates on the basis of wealth.[46] The first element requires a court to determine whether an identifiable class of indigent persons was discriminated against because they were unable to pay for a desired benefit, and the second element asks whether that class of indigent persons suffered a complete deprivation of the desired benefit.[47] If both elements are met, courts apply strict scrutiny review to the government classification.[48] Applying the two-step test to the financing system, the *Rodriguez* Court determined that neither element was satisfied.[49] The Court first determined that the financing system did not "operate[] to the peculiar disadvantage of any class fairly definable as indigent" because "there [was] no basis on the record in [the] case for assuming that the poorest people . . . [were] concentrated in the poorest [school] districts."[50] For the second element, the Court determined that a lack of personal resources did not constitute a complete deprivation because low property values did not mean that children were denied an education altogether—rather, they simply received a lower quality education.[51]

2. An Analysis of Bearden.

A decade after deciding *Rodriguez*, the U.S. Supreme Court decided *Bearden*, which served as the culmination of a line of wealth-based discrimination challenges involving the criminal justice system. In *Bearden*, the Court held that the Fourteenth Amendment prohibited a State from revoking an indigent defendant's probation for failure to pay a fine and restitution because "[s]uch a deprivation would be contrary to the fundamental fairness required by the Fourteenth Amendment."[52] In reaching its

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[46] *See id.* at 20 (developing what has become the two-part *Rodriguez* test by deriving two "distinguishing characteristics" that are common to classes that the U.S. Supreme Court concluded were discriminated against).

[47] *See id.* (describing the two characteristics present in prior cases in which the Court has applied strict scrutiny).

[48] *See* ODonnell v. Harris Cty., 892 F.3d 147, 161–62 (5th Cir. 2018) ("[T]he Supreme Court . . . noted that indigents receive a heightened scrutiny where two conditions are met . . . ." (citing *Rodriguez*, 411 U.S. at 20)).

[49] *See Rodriguez*, 411 U.S. at 22 ("[N]either of the two distinguishing characteristics of wealth classifications can be found here.").

[50] *Id.* at 22–23.

[51] *See id.* at 23 (stating that children receiving a lesser education does not constitute a complete deprivation).

[52] Bearden v. Georgia, 461 U.S. 660, 672–73 (1983).

conclusion, the Court departed from the traditional due process and equal protection analyses in stating that "[w]hether analyzed in terms of equal protection or due process, the issue cannot be resolved by resort to easy slogans or pigeonhole analysis, but rather requires a careful inquiry into [several] factors."[53] The Court cited a concurring opinion in *Williams v. Illinois* to list the following factors that courts should employ: "[1] the nature of the individual interest affected, [2] the extent to which it is affected, [3] the rationality of the connection between legislative means and purpose, [and 4] the existence of alternative means for effectuating the purpose."[54]

B. RECENT CIRCUIT COURT CASES CONSIDERING WEALTH-BASED DISCRIMINATION IN BAIL POLICIES

Two recent circuit court cases, discussed below, illustrate the difficulty of lower courts to synthesize *Rodriguez* and *Bearden*, and as a result, the divergent analyses they have applied to due process and equal protection challenges concerning wealth-based discrimination by the criminal justice system.

1. An Analysis of ODonnell.

In *ODonnell*, several petitioners brought a class action alleging that the bail policy in Harris County, Texas violated the Due Process and Equal Protection Clauses of the Fourteenth Amendment.[55] Specifically, the petitioners' constitutional claims concerned Harris County's "system of setting bail for indigent misdemeanor arrestees."[56] The Harris County bail policy was set by Texas statutory law, which provides formal requirements for the administration of such bail policies.[57] The trial court, however,

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[53] *Id.* at 666 (footnote omitted).

[54] *Id.* at 666–67 (citing Williams v. Illinois, 399 U.S. 235, 260 (1970) (Harlan, J., concurring)). While Justice Harlan's concurrence in *Williams* listed an additional factor, Justice O'Connor did not include the factor in her majority opinion in *Bearden*. The additional factor listed by Justice Harlan was "the degree of confidence we may have that the statute reflects the legislative concern for the purpose that would legitimately support the means chosen." *Williams*, 399 U.S. at 260 (Harlan, J., concurring).

[55] ODonnell v. Harris Cty., 892 F.3d 147, 152 (5th Cir. 2018).

[56] *Id.*

[57] *See id.* at 153 (discussing "[t]he basic procedural framework governing the administration of bail in Harris County").

found that Harris County was not adhering to these requirements.[58] Instead, the court found that the county's magistrate judges set monetary bail in nearly every case according to a bail schedule, without consideration of an arrestee's ability to pay his or her cash bond.[59] Furthermore, the court found that indigent detainees were required to wait several days for their "Next Business Day" meeting at which a judge would review initial bail determinations.[60]

In reaching its holding that the Harris County bail policy violated the Due Process and Equal Protection Clauses, the Fifth Circuit analyzed the due process and equal protection claims individually.[61] For the due process claim, the court applied the *Mathews v. Eldridge* balancing test and concluded that the procedures afforded by Harris County did "not sufficiently protect detainees from magistrates imposing bail as an 'instrument of oppression.'"[62] For the equal protection claim, the court applied the two-step *Rodriguez* test to determine that heightened scrutiny was appropriate in reviewing the Harris County bail policy.[63] The court stated that "[b]oth aspects of the *Rodriguez* analysis apply here: indigent misdemeanor arrestees are unable to pay secured bail, and, as a result, sustain an absolute deprivation of their most basic liberty interests—freedom from incarceration."[64] The court's heightened scrutiny analysis revealed that although "the County had a compelling interest in the assurance of a misdemeanor detainee's future appearance and lawful behavior, its policy was not narrowly tailored to meet that interest."[65]

2. An Analysis of Walker.

In *Walker*, the class representative, Maurice Walker, was arrested in Calhoun, Georgia "for being a pedestrian under the

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[58] *See id.* ("[T]he district court found that, in practice, County procedures were dictated by an unwritten custom and practice that was marred by gross inefficiencies . . . .").

[59] *See id.* at 154 (stating that detainees were "not offered any opportunity to submit evidence of relative ability to post bond at the scheduled amount").

[60] *See id.* (describing the findings of the district court regarding Harris County's bail policy).

[61] *See id.* at 157–63 (addressing the merits of the petitioners' constitutional claims by analyzing due process and equal protection claims separately).

[62] *Id.* at 159.

[63] *See id.* at 162 (applying the analysis articulated by the U.S. Supreme Court in *Rodriguez*).

[64] *Id.*

[65] *Id.*

influence of alcohol."[66] Neither Walker nor his family was able to pay the cash bond determined by the City of Calhoun's bail schedule.[67] Therefore, Walker remained in jail.[68] While detained, Walker filed a lawsuit "on behalf of himself and similarly situated indigent arrestees" alleging that the City of Calhoun's bail policy violated the Due Process and Equal Protection Clauses of the Fourteenth Amendment.[69] After the lawsuit was filed, Walker was released from jail without paying a cash bond.[70] Shortly thereafter, the City of Calhoun altered its bail policy by implementing a standing bail order,[71] which was the subject of the lawsuit that ensued.

Under the City of Calhoun's Standing Bail Order, arrestees charged with State offenses were assigned a cash bond amount based on a bail schedule.[72] After a cash bond amount was set, an arrestee could either pay the surety and be released, or dispute the bond amount at a hearing that occurred within forty-eight hours after the arrest.[73] At this hearing, an arrestee could claim indigency. If the municipal court determined that the arrestee met a standard of indigency, the arrestee would be released on a recognizance bond, meaning that the arrestee is not required to pay cash to be released from pretrial detention.[74] Alternatively, if the arrestee was not provided a hearing within forty-eight hours, the arrestee would be released on a recognizance bond.[75]

The district court determined that the bail policy utilized by the City of Calhoun violated the Fourteenth Amendment and issued a preliminary injunction that established an affidavit-based process for making an indigency determination.[76] The affidavit-based process allowed the arrestee "as soon as practicable after booking"

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66 Walker v. City of Calhoun, 901 F.3d 1245, 1251 (11th Cir. 2018).

67 *See id.* (stating that Walker was unable to pay $160 cash bond).

68 *See id.* ("Walker alleges that, after he was taken to jail, he was told by an officer that 'he would not be released unless he paid the . . . cash bond' . . . .").

69 *Id.* at 1251–52.

70 *See id.* at 1252 ("Walker was released on a personal-recognizance bond . . . .").

71 *Id.*

72 *See id.* (stating that the Standing Bail Order "adopted a bail schedule").

73 *See id.* at 1252–53 (describing forms of release available to arrestees).

74 *See id.* at 1252 (describing the bail hearing and the standard of indigency that one must plead in order to be released on personal recognizance).

75 *See id.* (noting the consequences of the court failing to provide a bail hearing within 48 hours).

76 *See id.* at 1253 (describing the affidavit-based process for determining indigency).

to indicate his indigency through "an affidavit sworn before an authorized official."[77] The process required that an official review the affidavit "within twenty-four hours after arrest."[78]

The Eleventh Circuit, however, overturned the preliminary injunction because it determined that the petitioners did not establish a likelihood of success on the merits.[79] In doing so, the Eleventh Circuit concluded that the City of Calhoun's Standing Bail Order in no way violated the Due Process Clause or the Equal Protection Clause.[80] The Eleventh Circuit relied on *Rodriguez* when it rejected the district court's holding that "detention based on wealth is an exception to the general rule that rational basis review applies to wealth-based classifications."[81] In applying the *Rodriguez* test, the Eleventh Circuit only applied step two of the two-step test[82] to conclude that strict scrutiny was inappropriate to review the equal protection analysis of the City of Calhoun's Standing Bail Order.[83] Specifically, the court determined that the second element of the *Rodriguez* analysis, whether a class of indigents suffered a complete deprivation, was not satisfied.[84] The court determined that a forty-eight hour detention based solely on the ability to pay a cash bond does not constitute an absolute deprivation of a benefit.[85] Instead of a complete deprivation of a benefit, the court stated that the class members "merely wait some appropriate amount of time to receive the same benefit as the more affluent."[86] The court continued, "[i]ndeed after such delay, [the class members] arguably

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77 *Id.*

78 *Id.*

79 *See id.* at 1257, 1272 (overturning the judgment of the district court after determining that it abused its discretion because petitioners could not establish likelihood of success on the merits).

80 *See id.* at 1272 (noting that the Standing Bail Order was "entirely constitutional").

81 *Id.* at 1260 (quoting Walker v. City of Calhoun, No. 4:15-cv-0170-HLM, 2017 WL 2794064, at *3 n.2 (N.D. Ga. June 16, 2017)).

82 *See id.* at 1273 (Martin, J., concurring in part and dissenting in part) ("The Majority never addresses whether the Standing Bail Order discriminates against indigents.").

83 *See id.* at 1261–62 (majority opinion) (finding that the indigents did not suffer an absolute deprivation and thus "the district court was wrong to apply heightened scrutiny under the Equal Protection Clause").

84 *See id.* at 1261 ("Walker and other indigents suffer no 'absolute deprivation' of the benefit they seek, namely pretrial release.").

85 *See id.*

86 *Id.*

receive preferential treatment, in at least one respect, by being released on recognizance without having to provide any security."[87]

After using the *Rodriguez* two-step test to dispose of the district court's holding, the Eleventh Circuit acknowledged that a *Bearden*-style analysis applied to the class's due process and equal protection claims.[88] However, the court interpreted this analysis as "something akin to a traditional [procedural] due process rubric."[89] The court then turned its focus to a comparison between the affidavit-based process and the Standing Bail Order.[90] Ultimately, the court concluded that the Standing Bail Order "is well within the range of constitutionally permissible options."[91]

III. *BEARDEN*, NOT *RODRIGUEZ*, GOVERNS DUE PROCESS AND EQUAL PROTECTION CHALLENGES OF WEALTH-BASED DISCRIMINATION IN THE CRIMINAL JUSTICE SYSTEM

Because U.S. Supreme Court precedent on wealth-based discrimination is unclear, courts have struggled to apply a clear and consistent standard to due process and equal protection claims when indigents claim the criminal justice system discriminated against them on the basis of wealth.[92] When reviewing bail policies for discrimination against indigents, courts must decide which approach to apply to a challenged policy: (1) the hybrid due process and equal protection analysis set forth in *Bearden*,[93] or (2) the distinct due process and equal protection analyses, which involve applying the *Mathews v. Eldridge* analysis to the due process claim and the *Rodriguez* test to the equal protection claim, as demonstrated in *ODonnell*.[94]

This Part argues that *Bearden*'s hybrid analysis should govern all due process and equal protection challenges by indigents who claim they have been discriminated against on the basis of wealth

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[87] *Id.* at 1261–62.

[88] *See id.* at 1265 (noting that it is "correct to apply the *Bearden* . . . style of analysis for cases in which 'due process and equal protection converge'").

[89] *Id.*

[90] *See id.* ("[W]e must focus our inquiry on the concrete distinctions between the preliminary injunction and the Standing Bail Order.").

[91] *Id.* at 1269.

[92] *See supra* text accompanying notes 39–55 (discussing the challenges of synthesizing U.S. Supreme Court precedent in the context of wealth discrimination).

[93] *See supra* text accompanying notes 52–54.

[94] *See supra* text accompanying notes 61–65.

by the criminal justice system. Universal application of the *Bearden* analysis will provide clarity for courts, petitioners, and jurisdictions instituting bail policies and will ensure that courts provide adequate consideration to the serious interests at stake when the criminal justice system discriminates on the basis of wealth.

A. APPLICATION OF *RODRIGUEZ* IS INAPPROPRIATE IN THE CRIMINAL CONTEXT

Courts, including the Fifth Circuit in *ODonnell* and the Eleventh Circuit in *Walker*, have applied *Rodriguez* to analyze due process and equal protection claims concerning wealth-based discrimination in the pretrial detention context.[95] Courts, however, should apply *Bearden*, not *Rodriguez*, to analyze *all* due process and equal protection claims of wealth-based discrimination by the criminal justice system. *Rodriguez* should not govern such challenges in the criminal context for two reasons: first, the Court's language in *Rodriguez* suggests it would be inappropriate, and second, the cases relied on by the Court in *Rodriguez* ultimately culminated in the Court's *Bearden* decision, which limited the applicability of *Rodriguez* and was clearly intended to govern subsequent due process and equal protection wealth-based discrimination claims brought by indigents in the criminal context.

First, the *Rodriguez* two-part test speaks in terms of benefits rather than rights.[96] Specifically, for a classification of indigents to be considered a suspect class, *Rodriguez* states that a class of indigents must be "completely unable to pay for some desired *benefit*" and that the class of indigents "sustained an absolute deprivation of a meaningful opportunity to enjoy that *benefit*."[97] A benefit is defined by Black's Law Dictionary as "[t]he advantage or privilege something gives; the helpful or useful effect something has."[98] In the civil context, speaking in terms of benefits makes sense. For example, in *Rodriguez*, a civil case, the benefit that the

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[95] *See Walker*, 901 F.3d at 1261 (stating that the "definitive explanation" regarding differential treatment by wealth analyzed under the Equal Protection Clause "comes from *San Antonio Independent School District v. Rodriguez*"); *see also* ODonnell v. Harris Cty., 892 F.3d 147, 162 (5th Cir. 2018) (applying the two-part test from *Rodriguez*).

[96] *See* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 20 (1973).

[97] *Id.* (emphasis added).

[98] *Benefit*, BLACK'S LAW DICTIONARY (11th ed. 2019).

indigent petitioners sought was a higher quality education.[99] The majority opinion in *Walker* provides another hypothetical example of a benefit in the civil context—indigents who seek express postal service as opposed to standard priority postal service.[100] In the criminal context, however, rights, not benefits, are generally at issue. Misdemeanor arrestees who are detained in jail because of an inability to pay a cash bond are not seeking a benefit. Instead, such arrestees are seeking to regain their right to physical liberty.[101] Indeed, U.S. Supreme Court case law involving wealth-based discrimination by the criminal justice system frames the relevant interests sought to be protected as "rights," not "benefits."[102]

Second, the cases cited in *Rodriguez* comprise a line of cases that culminated in *Bearden*, which limited the applicability of *Rodriguez*. In *Rodriguez*, the Court cited cases in which the Court ruled that several criminal justice policies discriminated against classes of indigents in violation of the Due Process and Equal Protection Clauses.[103] The *Rodriguez* Court relied on these cases, along with other cases, to formulate the two-part test used to determine when to apply strict scrutiny to equal protection claims brought by indigent classes.[104] Thus, the *Rodriguez* court possibly intended its two-part test to apply in all contexts, including equal protection claims involving the criminal justice system. *Bearden*, however, was decided ten years after *Rodriguez* and provided controlling authority for all due process and equal protection claims

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[99] *See Rodriguez*, 411 U.S. at 23 ("[Petitioners] are receiving a poorer quality education than that available to children in districts having more accessible wealth.").

[100] *See Walker*, 901 F.3d at 1262 (explaining that "courts would be flooded with litigation" if wealth were treated as a suspect class).

[101] *See id.* at 1274 (Martin, J., concurring in part and dissenting in part) (explaining that "48 hours in jail . . . [is not] a mere delay or 'diminishment' of the benefit of being released, [but is] instead . . . [a] deprivation of liberty").

[102] *See, e.g.*, Ross v. Moffitt, 417 U.S. 600, 619 (1974) (holding that indigents had no constitutional *right* to be appointed counsel on appellate review); Williams v. Illinois, 399 U.S. 235, 237, 263 (1970) (Harlan, J., concurring) (framing the individual interest as an individual's liberty—that is, "his right to remain free"—when an appellant sought to vacate an order requiring him to remain imprisoned after his term expired because he was unable to pay fines and court costs); Griffin v. Illinois, 351 U.S. 12, 18 (1956) (holding that petitioners constitutional *rights* were violated by a rule "which effectively denie[d] the poor an adequate appellate review accorded to all who have money enough to pay the costs in advance").

[103] *Rodriguez,* 411 U.S. at 20–22.

[104] *See id.* at 20 ("The precedents of this Court provide the proper starting point. The individuals, or groups of individuals, who constituted the class discriminated against in our prior cases shared two distinguishing characteristics . . . .").

alleging wealth-based discrimination by the criminal justice system.

Notwithstanding these aforementioned reasons for applying *Bearden* in the criminal context, courts may still hesitate in applying *Bearden* to pretrial detention due process and equal protection challenges. *Bearden* and the line of cases culminating in *Bearden* involved indigents who were already convicted.[105] While the Court has not indicated whether the *Bearden* analysis should apply equally in the pretrial detention context, the Fifth Circuit concluded that "the distinction between post-conviction detention targeting indigents and pretrial detention targeting indigents is one without difference" and explained "that, regardless of its timing, 'imprisonment solely because of indigent status is invidious discrimination and not constitutionally permissible.'"[106] Therefore, courts should not limit *Bearden* to post-conviction due process and equal protection challenges but can and should apply the *Bearden* analysis to all due process and equal protection claims concerning wealth-based discrimination of indigents by the criminal justice system.

B. APPLICATION OF *BEARDEN* ENSURES A STANDARD, COMPREHENSIVE ANALYSIS OF THE SERIOUS INTERESTS AFFECTED

Application of *Rodriguez* potentially undermines the serious interests involved when an indigent or class of indigents claims that they were discriminated against by the criminal justice system. Under the *Rodriguez* analysis, courts will apply the two-part test to determine whether an equal protection claim brought by an indigent or a class of indigents warrants strict scrutiny.[107] If a court determines that a policy that discriminates on the basis of wealth warrants only rational basis scrutiny, the court will neither ensure that the policy furthers a compelling governmental interest nor

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[105] *See* Bearden v. Georgia, 461 U.S. 660, 662 (1983) ("[P]etitioner was indicted for felonies of burglary and theft by receiving stolen property."); *see also* Tate v. Short, 401 U.S. 395, 396 (1971) ("Petitioner accumulated fines of $425 on nine convictions . . . for traffic offenses."); *Williams*, 399 U.S. at 236 ("[A]ppellant was convicted of petty theft . . . ."); Douglas v. California, 372 U.S. 353, 353 (1963) ("Petitioners . . . were jointly tried and convicted in a California court on an information charging them with 13 felonies."); *Griffin*, 351 U.S. at 13 ("[P]etitioners . . . were tried together and convicted of armed robbery . . . .").

[106] ODonnell v. Harris Cty., 892 F.3d 147, 162 n.6 (5th Cir. 2018) (quoting Pugh v. Rainwater, 572 F.2d 1053, 1056 (5th Cir. 1978)).

[107] *See supra* Section II.A.1 (discussing the two-part test introduced in *Rodriguez*).

consider whether alternative means would be less onerous on the indigents' liberty interests.[108] Rather, the court will only look into whether the policy is arbitrary.[109] Thus, under *Rodriguez*, to have realistic success challenging a criminal justice policy that discriminates on the basis of wealth, an indigent or a class of indigents must seek strict scrutiny by passing both steps of the *Rodriguez* test.[110]

The second step of the *Rodriguez* test, whether there has been an "absolute deprivation," will often be determinative of whether a court applies strict scrutiny. This step requires courts to engage in line-drawing and word-play to determine whether there has been an absolute deprivation, a significant deprivation, merely a partial deprivation, or no deprivation at all. For example, courts may have to determine how many hours a misdemeanor arrestee must be detained on the basis of wealth for the detention to be considered absolute deprivation. One hour? Twenty-four hours? Forty-eight hours? Additionally, the U.S. Supreme Court stated in *Addington v. Texas* that it "repeatedly has recognized that civil commitment for any purpose constitutes a *significant* deprivation of liberty."[111] Thus, since indigents who are civilly committed only sustain a *significant* rather than *absolute* deprivation, would a civil commitment policy that discriminates on the basis of wealth receive only rational basis scrutiny under *Rodriguez*?

This exercise of line-drawing and word-play has led to inconsistent decisions by courts. In *Walker*, the Eleventh Circuit determined that a forty-eight hour detention of misdemeanor arrestees based solely on wealth did not constitute an absolute deprivation.[112] Conversely, in *ODonnell*, the Fifth Circuit determined that detaining misdemeanor arrestees solely on the basis on wealth did constitute an absolute deprivation.[113] While the bail policy utilized in *ODonnell* required misdemeanor arrestees to

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[108] *See supra* text accompanying notes 29–30 (discussing strict and rational basis scrutiny).

[109] *See supra* text accompanying notes 29–30 (discussing strict and rational basis scrutiny).

[110] *See* Galloway, *supra* note 32, at 161 ("[R]ational basis is usually a mere formality leading to the foregone conclusion that the government action is constitutional.").

[111] 441 U.S. 418, 425 (1979) (emphasis added).

[112] *See supra* Section II.B.2 (discussing the Eleventh Circuit's reasoning in *Walker* for determining that a 48-hour detention does not constitute an absolute deprivation).

[113] *See* ODonnell v. Harris Cty., 892 F.3d 147, 162 (5th Cir. 2018) ("[I]ndigent misdemeanor arrestees are unable to pay secured bail, and, as a result, sustain an absolute deprivation of their most basic liberty interests—freedom from incarceration.").

occasionally be detained for longer than forty-eight hours, the court did not consider this fact when determining the bail policy caused the detainees to suffer an absolute deprivation. [114] Thus, the Fifth Circuit implied that *any length* of detention based solely on the basis of wealth was an absolute deprivation.

In contrast to the *Rodriquez* test, the *Bearden* analysis ensures that courts apply a standard, comprehensive analysis to all criminal justice due process and equal protection claims of wealth-based discrimination. Courts that apply the *Bearden* analysis will perform a quasi-heightened scrutiny analysis by analyzing four factors: "[1] the nature of the individual interest affected, [2] the extent to which it is affected, [3] the rationality of the connection between legislative means and purpose, [and 4] the existence of alternative means for effectuating the purpose."[115] Similar to the *Rodriguez* analysis, the *Bearden* analysis will not provide flawless consistency. However, the *Bearden* analysis ensures courts examine the totality of the circumstances. Thus, the comprehensive nature of the *Bearden* analysis, as compared to the unpredictable and under-encompassing *Rodriguez* analysis, affords superior justice to those who have been discriminated against by the criminal justice system on the basis of wealth, especially when the individual interest at stake is liberty.

IV. APPLICATION OF *BEARDEN* IN THE PRETRIAL DETENTION CONTEXT

As stated in *Bearden*, due process and equal protection challenges regarding the treatment of indigents by the criminal justice system "cannot be resolved by resort to easy slogans or pigeonhole analysis."[116] Rather, the analysis consists of "a careful inquiry" into the four factors articulated by the Court.[117]

The U.S. Supreme Court has provided limited guidance on how the *Bearden* analysis should be applied, and this guidance has been limited to the post-conviction context. In a concurring opinion in *Williams v. Illinois*, Justice Harlan first introduced the factors that

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[114] *See supra* Section II.B.1 (discussing Harris County's misdemeanor bail policy).

[115] Bearden v. Georgia, 461 U.S. 660, 666–67 (1983) (quoting Williams v. Illinois, 399 U.S. 235, 260 (1970) (Harlan, J., concurring)).

[116] *Id.* at 666.

[117] *Id.* at 666–67 (quoting *Williams*, 399 U.S. at 260 (Harlan, J., concurring)).

form the *Bearden* analysis.[118] In his opinion, Justice Harlan stated that these factors are "more conducive to judicial restraint than an approach couched in slogans and ringing phrases, such as 'suspect' classification or 'invidious' distinctions, or 'compelling' state interest."[119] However, later in his opinion, Justice Harlan stated that "this Court will squint hard at any legislation that deprives an individual of his liberty—his right to remain free."[120] Based on this reasoning, Justice Harlan intended this analysis to provide more judicial restraint than the traditional due process and equal protection analyses, *except when* physical liberty is at stake.

The *Bearden* opinion also offers limited guidance on how courts should apply the analysis. The *Bearden* Court did not explicitly analyze each factor. Still, in reaching its holding that the Fourteenth Amendment prohibited the State from incarcerating a probationer for failure to pay a fine and restitution, the Court stated that "the [sentencing] court *must* consider alternative measures of punishment other than imprisonment."[121] The Court continued: "*[O]nly if* alternate measures are not adequate to meet the State's interests . . . may the [sentencing] court imprison a probationer."[122] Based on the Court's reasoning, if the first factor of the *Bearden* analysis (the nature of the individual interest at stake) is post-conviction physical liberty and the second factor (the extent to which the individual interest is affected) is incarceration, then the fourth factor (the existence of alternative means for effectuating the state's purpose) cannot be ignored. In other words, when a petitioner's liberty interests are substantially affected by a period of incarceration, the government entity *must* consider alternative means. In contrast, if a petitioner's individual interests at stake are less significant than liberty and are affected only slightly, it can be inferred that a court would give less weight to alternative means (fourth *Bearden* factor), and more weight to the rationality of the state action (third *Bearden* factor). Such a scenario may occur, for instance, when a petitioner who has already served his sentence challenges a felon disenfranchisement law that discriminates on the

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118 *Williams*, 399 U.S. at 260.
119 *Id.*
120 *Id.* at 263.
121 *Bearden*, 461 U.S. at 672 (emphasis added).
122 *Id.* (emphasis added).

basis of wealth.[123] Notably, the Court has not applied the *Bearden* analysis to another case since *Bearden* itself was decided in 1983.

Next, this Part draws on the Court's limited guidance in *Williams* and *Bearden* to apply the four-factor *Bearden* framework to the City of Calhoun's Standing Bail Order at issue in *Walker*. As discussed in Part II, the Standing Bail Order assigned a secured cash bond to each arrestee determined by a bail schedule.[124] Those who could pay the secured cash bond would be released from jail.[125] Those who could not would be provided a bail hearing within forty-eight hours at which an arrestee could plead indigency, and if successful, be released on personal recognizance.[126] The indigent class claimed that this policy violated the Due Process and Equal Protection Clauses of the Fourteenth Amendment.[127]

A. NATURE OF THE INDIVIDUAL INTEREST AFFECTED

In *Walker*, the class members' individual interests could be defined narrowly or broadly. For instance, in *Walker* itself, the Eleventh Circuit narrowly defined the individual interest as immediate pretrial release.[128] The Court, however, has not framed the individual interest in this manner in cases involving pretrial detention. For example, in *United States v. Salerno*, after the petitioners were denied bail due to the danger they posed to the public,[129] the Court framed the petitioners' individual interest broadly as "liberty."[130] In the same vein as the petitioners in *Salerno*, the class members challenging the City of Calhoun's

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[123] Felon disenfranchisement laws prohibit citizens who have a felony record from voting. Nora Demleitner, *Felon Disenfranchisement*, 49 U. MEM. L. REV. 1275, 1276 (2019). Several states require disenfranchised citizens to pay economic sanctions prior to regaining the right to vote. *See* Beth A. Colgan, *Wealth-Based Penal Disenfranchisement*, 72 VAND. L. REV. 55, 59–60 (2019).

[124] *See supra* Section II.B.2 (describing the City of Calhoun's Standing Bail Order).

[125] *See supra* Section II.B.2 (describing the City of Calhoun's Standing Bail Order).

[126] *See supra* Section II.B.2 (describing the City of Calhoun's Standing Bail Order).

[127] *See supra* Section II.B.2 (describing the City of Calhoun's Standing Bail Order).

[128] *See* Walker v. City of Calhoun, 901 F.3d 1245, 1261 (11th Cir. 2018) ("Walker and other indigents suffer no 'absolute deprivation' of the benefit they seek, namely pretrial release. Rather, they must merely wait some appropriate amount of time to receive the same benefit as the more affluent.").

[129] *See* United States v. Salerno, 481 U.S. 739, 744 (1987) ("[N]o condition or combination of conditions of release would ensure the safety of the community . . . .").

[130] *See id.* at 750 ("On the other side of the scale, of course, is the individual's strong interest in liberty.").

Standing Bail Order have a similar individual interest: liberty—to be free from pretrial incarceration.

B. EXTENT TO WHICH THE INDIVIDUAL INTEREST IS AFFECTED

When an individual's liberty interests are at stake, the extent to which those interests are affected can vary significantly. For example, in *United States v. Johnson*, the Second Circuit denied the defendant's claim that the lower court violated the Due Process Clause by extending his probation term due to his inability to pay restitution.[131] Applying the *Bearden* analysis, the Second Circuit indicated that a term of probation has a significantly lesser effect on an individual's liberty interests than a term of incarceration.[132]

Unlike the defendant in *Johnson*, class members challenging the Standing Bail Order had their liberty interests affected by up to forty-eight hours of incarceration. The U.S. Supreme Court has stated that an individual's "[f]reedom from imprisonment lies at the heart of liberty."[133] Furthermore, the Court has stated that arrestees who maintain the presumption of innocence have a "strong interest in liberty."[134] Thus, the class members challenging the Standing Bail Order have an especially strong liberty interest, arguably more so than the probationer in *Bearden* who had already been convicted.

It may be argued that, under the *Bearden* analysis, the length of incarceration should affect a court's determination regarding the effect to which the individual interest is affected. For some, a forty-eight-hour detention may seem insignificant. However, several studies indicate the contrary. One study found that pretrial detention of indigents—for as little as forty-eight hours—can have a drastic effect on the disposition of their case and on their lives after detention.[135] For example, pretrial detention affects the disposition of a case because a detained defendant "is hindered in

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[131] *See* United States v. Johnson, 347 F.3d 412, 415 (2d Cir. 2003) ("Johnson contends that the court below, by extending the term of probation to five years on account of his financial situation and current inability to pay restitution, acted inconsistently with the fundamental fairness that the Due Process Clause of the Fifth Amendment requires.").

[132] *See id.* at 416 ("The effect on defendant's liberty interest in this case is much less significant than it was in *Bearden* . . . .").

[133] Zadvydas v. Davis, 533 U.S. 678, 690 (2001).

[134] *Salerno*, 481 U.S. at 750.

[135] *See* Heaton et al., *supra* note 7, at 713–14 (identifying consequences that people encounter after only a few days of detention).

his ability to gather evidence, contact witnesses, or otherwise prepare his defense."[136] Furthermore, "[a] person detained for even a few days may lose her job, housing, or custody of her children."[137] These extreme results demonstrate the substantial effect that a forty-eight hour detention can have on an indigent person. Therefore, under this factor of the *Bearden* analysis, any length of incarceration should be treated the same.

C. RATIONALITY OF THE CONNECTION BETWEEN LEGISLATIVE MEANS AND PURPOSE

As previously discussed, since the class members who challenged the Standing Bail Order had had a liberty interest to remain free from pretrial detention, a court must consider the fourth *Bearden* factor—whether alternatives exist for effectuating consider alternatives.[138] However, a court should still inquire, under the third *Bearden* factor, whether the state action is rational. In his concurring opinion in *Williams,* Justice Harlan stated that "legislation usually will not be deemed arbitrary if its means can arguably be supposed to be related to a legitimate purpose."[139] If legislation is deemed arbitrary, a court would rule it unconstitutional and not need to proceed to the fourth factor in the *Bearden* analysis.

Georgia law states that "[w]hen determining bail for a person charged with a misdemeanor, courts . . . shall impose only the conditions reasonably necessary to ensure such person attends court appearances and to protect the safety of . . . the public given the circumstances."[140] Whether the City of Calhoun's Standing Bail Order has a rational connection between legislative means and purpose depends on whether the forty-eight hour waiting period between arrest and the hearing at which the arrestee can plead indigency can arguably be related to ensuring the arrestee's presence at trial and protecting the safety of the public. While the City of Calhoun gave "no reason to justify the 48-hour detention

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136 *Id.* at 714 (quoting Barker v. Wingo, 407 U.S. 514, 533 (1972)).
137 *Id.* at 713 (citing Curry v. Yachera, 835 F.3d 373, 377 (3d Cir. 2016)).
138 *See supra* text accompanying notes 123–24.
139 Williams v. Illinois, 399 U.S. 235, 262 (1970) (Harlan, J., concurring).
140 O.C.G.A. § 17-6-1(b)(1) (2018).

period under the Standing Bail Order,"[141] rational basis review is a very deferential standard.[142] Therefore, assuming that the City of Calhoun could provide *some* argument that detaining those unable to pay a secured cash bond for forty-eight hours before a hearing furthers a legitimate purpose, this factor of the *Bearden* analysis would weigh in its favor.

D. EXISTENCE OF ALTERNATIVE MEANS FOR EFFECTUATING THE PURPOSE

As implied by the U.S. Supreme Court's reasoning in *Bearden*, when an individual's liberty interests are affected by incarceration, a court must consider the fourth factor of the *Bearden* analysis—whether there are alternative means for effectuating the legislative purpose.[143] As previously established in the discussion of factor one[144] and factor two[145] of the *Bearden* analysis, the Standing Bail Order has affected the liberty interests of the class members through a period of incarceration. Thus, "[o]nly if alternative means are not adequate to meet the State's interest"[146] should the Standing Bail Order survive the constitutional challenge.

The City of Calhoun has an interest "to ensure such person[s] attend[] court appearances and to protect the safety of . . . the public given the circumstances."[147] However, this interest can be fully accomplished by means less onerous on the class members' pretrial liberty interests than the Standing Bail Order. Indeed, the affidavit-based process implemented by the district court in *Walker* would equally serve the City of Calhoun's interest.[148] While the City of Calhoun may argue that allowing bail through an affidavit-based process would negatively impact the court appearance rate of

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141 Walker v. City of Calhoun, 901 F.3d 1245, 1279 (11th Cir. 2018) (Martin, J., concurring in part and dissenting in part).

142 *See, e.g.*, Williams v. Pryor, 240 F.3d 944, 948 (11th Cir. 2001) ("Rational basis scrutiny is a highly deferential standard that proscribes only the very outer limits of a legislature's power.").

143 *See* discussion *supra* Part IV (discussing the application of the *Bearden* analysis in *Bearden v. Georgia*).

144 *See supra* Section IV.A.

145 *See supra* Section IV.B.

146 Bearden v. Georgia, 461 U.S. 660, 672 (1983).

147 O.C.G.A. § 17-6-1(b)(1) (2018).

148 *See supra* Section II.B.2 (discussing the affidavit-based process implemented by the district court).

arrestees and safety of the public, studies indicate otherwise. A recent report on misdemeanor bail reform suggests that "the use of secured bonds [has] no statistically significant difference in arrestees' court appearance rate or public safety rate."[149] Furthermore, the Court emphatically rejected the assertion "that a probationer's poverty by itself indicates he may commit crimes in the future and thus that society needs for him to be incapacitated."[150]

Application of the four-factor *Bearden* analysis to the City of Calhoun's Standing Bail Order demonstrates that the City of Calhoun's bail policy is unconstitutional. The nature of the class members' individual interest—pretrial liberty—was affected by the Standing Bail Order's policy of detaining those unable to pay a secured cash bond for up to forty-eight hours. Therefore, factor four of the *Bearden* analysis must be considered. Because there exist alternative means to meet Calhoun's statutory interests, the city must pursue those alternatives that are less onerous on the class members' pretrial liberty interests.

V. CONCLUSION

With the recent increase in wealth-based equal protection and due process challenges to criminal justice policies, including bail policies, courts must determine which legal standard to apply to such challenges. Unfortunately, the analysis that courts should apply is unclear. The U.S. Supreme Court has applied two approaches to wealth-based discrimination challenges brought under both the Due Process and Equal Protection Clauses of the Fourteenth Amendment. One approach is to apply the procedural due process analysis established in *Mathews v. Eldridge* and the equal protection analysis articulated in *Rodriguez*. Moving forward, however, this approach should yield to the analysis that the Court introduced in *Bearden*. The four-factor *Bearden* analysis ensures a comprehensive review of important interests at stake when a criminal justice policy discriminates on the basis of wealth. And application of the *Bearden* analysis to the City of Calhoun's Standing Bail Order illustrates that the Eleventh Circuit's analysis

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[149] WAYNE M. PURDOM, JUDICIAL COUNCIL OF GEORGIA, MISDEMEANOR BAIL REFORM REPORT 3 (2018).

[150] *Bearden*, 461 U.S. at 671.

in *Walker* undermined the serious interests at stake, which led to its erroneous holding. Ultimately, the uniform application of the *Bearden* analysis to due process and equal protection claims brought by indigents who have been discriminated on the basis of wealth will provide courts, petitioners, and states a greater understanding of the constitutional boundaries surrounding bail and other criminal justice policies.