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HIGHWAY ROBBERY: DUE PROCESS, EQUAL PROTECTION, AND PUNISHING POVERTY WITH DRIVER'S LICENSE SUSPENSIONS

Thomas Capretta*

INTRODUCTION

Since graduating from high school with a 3.9 GPA, Damian Stinnie has bounced around in various retail jobs.¹ In December 2012, he lost a job at Walmart and began a search that lasted four months, ultimately taking a position as a sales clerk at Abercrombie & Fitch.² During those four months, he received four traffic citations issued by various Virginia courts.³ Between April and July 2013, Mr. Stinnie was convicted on three of these citations, which resulted in over \$700 in fines and \$288 in administrative fees owed to the courts.⁴ On the fourth charge, which was dismissed, Mr. Stinnie was nevertheless assessed \$10 in court costs, for a total of \$1,002 owed to the Virginia court system.⁵

Mr. Stinnie's employment began just as these costs were imposed.⁶ At Abercrombie, Mr. Stinnie earned minimum wage, totaling approximately \$300 a week—a generous estimate, according to a complaint filed on his behalf against the Commissioner of the Virginia Department of Motor Vehicles (DMV).⁷ When the fines and fees were assessed by the courts, no inquiry was made by the courts into Mr. Stinnie's ability to pay, nor was he given any financing options other than immediate payment.⁸

Thirty-five days after the fees were assessed on May 20, 2013, the Virginia DMV suspended Mr. Stinnie's driver's license automatically.⁹ Then, on May 27, 2013, he was cited for driving with a suspended license, completely unaware that his license had been suspended.¹⁰ For this violation, Mr. Stinnie was assessed an additional

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¹ Class Action Complaint at 7, *Stinnie v. Holcomb*, 2017 WL 963234 (W.D. Va. Mar. 13, 2017) (No. 3:16-cv-00044-NKM), *appeal filed*, No. 17-1740 (4th Cir. June 16, 2017).

² *Id.*

³ *Id.* at 7–8.

⁴ *Id.* at 8.

⁵ *Id.*

⁶ *Id.* at 7–8.

⁷ *See id.* at 8 (“Mr. Stinnie’s hours varied, but he consistently worked less than full time and always earned minimum wage.”).

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.* at 9.

\$302 in fines and court costs.¹¹ Once again, the court did not inquire into his ability to pay these costs.¹²

A few months later, Mr. Stinnie was diagnosed with lymphoma; he then went through a stem cell transplant and chemotherapy, but remained in fragile condition.¹³ He pooled resources with his brother and bounced around from place to place, nonetheless becoming homeless for some short periods of time.¹⁴ Due to his poor health and occasional homelessness, he became eligible for a guaranteed housing program in Charlottesville, Virginia, and moved there with his brother, who was working odd jobs.¹⁵ They also collaborated in the purchase of a used car, which provided Mr. Stinnie's brother transportation to get to his jobs and Mr. Stinnie some security and stability in his unreliable housing situation.¹⁶

Mr. Stinnie was pulled over once again on January 1, 2016, which resulted in another conviction for driving with a suspended license.¹⁷ During this trial, the court determined that he was indigent for the purposes of obtaining representation and assigned a lawyer to him.¹⁸ He spent a weekend in jail as a result of this conviction and was assessed \$257 in fees and court costs.¹⁹

Mr. Stinnie has not been employed in the years since his cancer diagnosis, subsisting on Supplemental Security Income and food stamps and relying upon placement in a housing program.²⁰ He frequently missed payments on his car during these years, but he knew he needed to keep it in the event that his housing placement was revoked.²¹

The non-payment of the 2016 fees and costs again resulted in a suspended license for Mr. Stinnie.²² The Legal Aid Justice Center took on Mr. Stinnie's case in the summer of 2016 and filed a class action lawsuit against the Virginia DMV, in the person of the commissioner, contesting the constitutionality of automatic driver's license suspensions for those without the means to pay.²³ Commenting on the matter, Mr. Stinnie said: "I guess people say driving is a privilege, but its really a necessity. . . . Nobody wants to break the law."²⁴ The suit was subsequently dismissed by

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.* at 10.

¹⁵ *Id.*

¹⁶ *Id.* ("Occasionally, the brothers had to sleep in the car when they were unable to find another place to stay for the night.")

¹⁷ *Id.* at 11.

¹⁸ *Id.*

¹⁹ *Id.* at 12.

²⁰ *Id.*

²¹ *Id.* at 12–13.

²² *Id.* at 12.

²³ *Id.* at 1–2.

²⁴ *Man Who Loses License over Court Fines Talk About Implications*, NBC 29 WVIR-TV (Dec. 2, 2016, 5:36 PM), <http://www.nbc29.com/story/33856437/man-who-loses-license-over-court-fines-talk-about-implications>.

the district court for standing and jurisdictional issues, and appeal is pending before the Fourth Circuit, so the issues on the merits remain to be adjudicated.²⁵

This Note will analyze the constitutional arguments at the center of the case brought by Mr. Stinnie. It concludes that Virginia's driver's license suspension scheme violates the Fourteenth Amendment because some ability-to-pay determination is demanded by the Due Process Clause prior to a license suspension. The Note is split into four parts. Part I will examine the background of Virginia's driver's license suspension scheme, as well as the larger backdrop of the criminalization of poverty more generally, and posit that the Virginia statutory scheme is a part of that trend.²⁶ Part II will develop the procedural due process portion of the argument and examine the normative concerns at the heart of that argument. It will argue that some opportunity to be heard is necessary prior to suspending a license for unpaid debts.²⁷ Part III will introduce the Fourteenth Amendment's prohibition on punishing people for their poverty, which merges equal protection and due process principles.²⁸ It will also posit that this merging is not a uniform convergence, but rather that the line of cases that give weight to this principle exists along a spectrum, with equal protection on one end and due process on the other. Part IV will argue that, in contrast to equal protection principles, the fundamental fairness principle of the Due Process Clause provides the best challenge to the Virginia statutory scheme, and argue that it in fact prohibits the state from automatically suspending licenses of those without the ability to pay.²⁹

I. VIRGINIA'S DRIVER'S LICENSE SUSPENSION SCHEME AND THE CRIMINALIZATION OF POVERTY

A. Virginia's Driver's License Suspension Scheme

In the Commonwealth of Virginia, the fines and fees levied by the courts have risen substantially in the past few decades.³⁰ Courts can assess fees for a number of operational concerns apart from the defendant's restitution to the state.³¹ Some of these

²⁵ *Stinnie v. Holcomb*, No 3:16-CV-00044, 2017 WL 963234, at *20 (W.D. Va. Mar. 13, 2017), *appeal filed*, No. 17-1740 (4th Cir. June 16, 2017).

²⁶ *See infra* Part I.

²⁷ *See infra* Part II.

²⁸ *See infra* Part III.

²⁹ *See infra* Part IV.

³⁰ In 1998, Virginia assessed \$281.5 million in fines and fees, compared to \$618.8 million in 2014. COMPENSATION BOARD, FY 2014, FINES & FEES REPORT 2 (2015), <https://rga.lis.virginia.gov/published/2016/RD179/pdf> [<https://perma.cc/6WCJ-Z32B>]. This represents over a 50% increase in assessed fines when accounting for inflation of 45.2% over that period. U.S. INFLATION CALCULATOR, <http://www.usinflationcalculator.com> [<https://perma.cc/M7P6-XV58>] (last visited Apr. 12, 2018).

³¹ *See* VA. CODE ANN. § 17.1-275.1 (2018) (designating apportionment of a "fixed felony fee" of \$375 to funds such as "Regional Criminal Justice Academy Training Fund"; "Virginia

costs bear directly upon a defendant's ability to seek justice, such as fees assessed for a trial.³² Failure to pay any portion of these debts to the Commonwealth may result in the automatic suspension of one's driver's license, whether one is licensed by Virginia or not.³³ Additionally, the type of violation that incurs the debt is irrelevant.³⁴ A driver who is cited for driving with an expired vehicle registration is subject to the same collection and suspension procedures as one who is cited for reckless driving or driving under the influence of alcohol or drugs (DUI).³⁵

As part of this scheme, the Virginia DMV suspended 366,773 driver's licenses due to unpaid court debts in fiscal year 2015 alone.³⁶ One in six drivers had his or her license suspended for unpaid debts during this fiscal year.³⁷ There is currently no statutory requirement for Virginia courts to make an inquiry into the ability of a person to pay these debts before issuing the suspension;³⁸ the failure to pay any debt owed to the Commonwealth of Virginia automatically triggers a driver's license suspension.³⁹ Reinstatement of driving privileges only occurs when the debt has been paid in full or the defendant has entered into a payment plan with the Commonwealth.⁴⁰ The purpose of this scheme is unquestionably incentivizing the

Crime Victim-Witness Fund"; "Courthouse [C]onstruction/[M]aintenance [F]und"; "Sentencing/[S]upervision [F]ee (General Fund)"; and "Intensified Drug Enforcement Jurisdiction Fund").

³² In addition to the the standard fees, some fees are determined by the procedure of the trial. For instance, following judgments in favor of the Commonwealth, the following fees are assessed: "Any amount paid by the Commonwealth for legal representation of the defendant" and "[a]ny jury costs." *Id.* § 17.1-275.5(A)(1), (7).

³³ See VA. CODE ANN. § 46.2-395(A) (2018) ("Any person, whether licensed by Virginia or not, who drives a motor vehicle on the highways in the Commonwealth shall thereby, as a condition of such driving, consent to pay all lawful fines, court costs, forfeitures, restitution, and penalties assessed against him for violations of the laws of the Commonwealth.").

³⁴ See *id.* § 46.2-395(A)-(B).

³⁵ See *id.*

³⁶ LEGAL AID JUSTICE CTR., DRIVEN DEEPER INTO DEBT: UNREALISTIC REPAYMENT OPTIONS HURT LOW-INCOME COURT DEBTORS 2 (2016), <https://www.justice4all.org/wp-content/uploads/2016/05/Driven-Deeper-Into-Debt-Payment-Plan-Analysis-Final.pdf> [<https://perma.cc/2LRN-TS2P>].

³⁷ Class Action Complaint, *supra* note 1, at 35-36.

³⁸ See § 46.2-395.

³⁹ See § 46.2-395(B) ("[W]hen any person is convicted of any violation of the law of the Commonwealth or of the United States or of any valid local ordinance and fails or refuses to provide for immediate payment in full of any fine, costs, forfeitures, restitution, or penalty lawfully assessed against him, or fails to make deferred payments or installment payments as ordered by the court, the court shall forthwith suspend the person's privilege to drive a motor vehicle on the highways in the Commonwealth.").

⁴⁰ See *id.* ("The driver's license of the person shall continue suspended until the fine, costs, forfeiture, restitution, or penalty has been paid in full. However, if the defendant, after having his license suspended, pays the reinstatement fee to the Department of Motor Vehicles and enters into an agreement under § 19.2-354 that is acceptable to the court to make deferred payments or installment payments of unpaid fines, costs, forfeitures, restitution, or penalties as ordered by the court, the defendant's driver's license shall thereby be restored.").

payment of court debts.⁴¹ Despite these punitive measures, Virginia only actually collects about half of the revenue assessed by the citations it imposes.⁴²

The practice of suspending driver's licenses for unpaid court debts is not unique to Virginia; many states have similar schemes.⁴³ In recent years, however, some states have been working towards reforming their systems.⁴⁴ The State of Washington stopped its practice of suspending driver's licenses for failing to pay debts originating from nonmoving violations, such as expired registrations.⁴⁵ Other states have practices that have proven less burdensome to drivers. In California, only seventeen percent of drivers had their license suspended over an eight-year period for failure to pay debts or failure to appear in court.⁴⁶

There have been some attempts at reform of Virginia's scheme, coming from both within the legislature and as recommendations from the Department of Justice. The Department of Justice has stated: "If a defendant's driver's license is suspended because of failure to pay a fine, such a suspension may be unlawful if the defendant was deprived of his due process right to establish inability to pay."⁴⁷ On January 3, 2017, Governor Terry McAuliffe gave a press conference where he called reform of the current system "common sense" and announced that he will advocate for legislation changing the practice.⁴⁸ In January 2017, the Virginia General Assembly introduced

⁴¹ The Virginia DMV itself asserted:

The Virginia Supreme Court articulated the purposes of the statutory court collection process, which are achieved through the license suspension provision in § 46.2-395. The purposes are: (i) to facilitate the payment of fines, court costs, penalties, restitution and other financial responsibilities assessed against defendants convicted of a criminal offense or traffic infraction, (ii) to collect the monies due to the Commonwealth and localities as a result of these convictions, and (iii) to assure payment of court-ordered restitution to victims of crime.

Defendant's Reply to Plaintiffs' Memorandum in Opposition to Defendant's Motion to Dismiss at 7, *Stinnie v. Holcomb*, 2017 WL 963234 (W.D. Va. Mar. 13, 2017) (No. 3:16-cv-00044-NKM-JCH), *appeal filed*, No. 17-1740 (4th Cir. June 16, 2017).

⁴² Carolyn Kalantari, Opinion, *Kalantari: Further Criminalizing Debtors Doesn't Make Sense*, RICHMOND TIMES-DISPATCH (May 3, 2013), http://www.richmond.com/opinion/their-opinion/guest-columnists/article_084eb03e-3509-50f6-9bce-801ac91739cf.html [<https://perma.cc/QY7E-CJPK>] ("On average the [C]ommonwealth has assessed \$357 million and collected \$185 million, leaving an average of \$170 million uncollected each year.").

⁴³ See Shaila Dewan, *Driver's License Suspensions Create Cycle of Debt*, N.Y. TIMES, Apr. 15, 2015, at A1.

⁴⁴ See *id.*

⁴⁵ *Id.*

⁴⁶ Statement of Interest of the United States at 3–4, *Stinnie*, 2017 WL 963234 (No. 3:16-CV-00044-NKM-JCH).

⁴⁷ Letter from Vanita Gupta, Principal Deputy Assistant Attorney Gen., Civil Rights Div., U.S. Dep't of Justice, & Lisa Foster, Dir., Office for Access to Justice, U.S. Dep't of Justice, at 6 (Mar. 14, 2016) (on file with author) [hereinafter Gupta & Foster Letter].

⁴⁸ Graham Moomaw, *McAuliffe Looks to Roll Back Driver's License Suspensions As Part of Criminal Justice Reform Package*, RICHMOND TIMES-DISPATCH (Jan. 3, 2017), <http://www>

a bill that would have significantly addressed the issues in the current scheme.⁴⁹ This bill did not pass, but the legislature did attempt to alleviate some of the issues with the passage of Virginia Code Section 19.2-354.1, which is a statutory version of Virginia Supreme Court Rule 1:24.⁵⁰ The idea behind this statute is that general district courts would provide payment plans that would help debtors, thus making it easier for them to reinstate driver's licenses.⁵¹ This has not worked out as planned, as troubling rates of license suspension continue apparently unaffected.⁵² More recently, the Virginia Senate passed a bill that would eliminate the automatic suspensions of driver's licenses, but a House subcommittee voted to shelve the issue until next year's legislative session.⁵³ However, the Commonwealth of Virginia has yet to pass any significant reforms to its current system, and it has contested the suit filed by Mr. Stinnie in July 2016.⁵⁴

B. The Criminalization of Poverty in Virginia's Driver's License Suspension Scheme

Virginia's practice of automatically suspending licenses for unpaid debt could be classified as part of a troubling trend that is known as the "criminalization of

.richmond.com/news/virginia/article_390e9595-bf77-56d1-ab5e-f51871cd4243.html [https://perma.cc/FM5B-KG5X].

⁴⁹ H.B. 1862, 2017 Gen. Assemb., Reg. Sess. (Va. 2017). This bill would change the language of Section 46.2-395 of the Virginia Code to remove the automatic suspension provision and

[u]pon a finding that the defendant's default was not due to an intentional refusal of the defendant to obey the sentence of the court, nor attributable to a failure on the defendant's part to make a good faith effort to obtain the necessary funds for payment, the court shall not suspend the defendant's driver's license but may enter an order (i) providing additional time for payment, (ii) reducing the amount of each installment, (iii) assigning the person to perform community service in lieu of payment, or (iv) waiving the unpaid portion in whole or in part.

Id.

⁵⁰ See VA. CODE ANN. § 19.2-354.1 (2018); VA. SUP. CT. R. 1:24.

⁵¹ See § 19.2-354.1.

⁵² See generally LEGAL AID JUSTICE CTR., DRIVING ON EMPTY: PAYMENT PLAN REFORMS DON'T FIX VIRGINIA'S COURT DEBT CRISIS (2018), <https://www.justice4all.org/wp-content/uploads/2018/01/Driving-on-Empty-Payment-Plan-Analysis-FINAL.pdf> [https://perma.cc/PR6L-5JUT] [hereinafter DRIVING ON EMPTY].

⁵³ Michael Martz, *House Panel Puts Off Bill to Repeal Law on Court Fines, Driver's Licenses*, RICHMOND TIMES-DISPATCH (Mar. 2, 2018), http://www.richmond.com/news/virginia/government-politics/general-assembly/house-panel-puts-off-bill-to-repeal-law-on-court/article_018d9124-3c02-54e6-b978-8fd748ab784e.html [https://perma.cc/V7UZ-UT9P].

⁵⁴ See Justin Wm. Moyer, *'DMV Is Not Responsible': Va. Denies Claim It Unfairly Suspends Driver's Licenses*, WASH. POST (Oct. 5, 2016), https://www.washingtonpost.com/local/public-safety/dmv-is-not-responsible-va-denies-claim-it-unfairly-suspends-drivers-licenses/2016/10/04/6bc19eae-8a68-11e6-b24f-a7f89eb68887_story.html?utm_term=.49100efdb8c7 [https://perma.cc/RR53-H28W].

poverty.”⁵⁵ The “criminalization of poverty” is an inflammatory name, but in practice, it is a concept that functions exactly as described.⁵⁶ At its core, it is the line that is crossed when enforcement of ordinances leaves the realm of public safety and becomes merely a means of revenue generation.⁵⁷ In the typical context, this is seen when municipalities exact exorbitant fees for violations that are not especially dangerous or harmful to public safety.⁵⁸ For example, in Ferguson, Missouri, “this included outrageous fines for minor infractions like failing to show proof of insurance and letting grass and weeds in a yard get too high.”⁵⁹ To be sure, there is some difficulty in drawing the line between the uniform enforcement of the law and the exploitative practices that amount to the criminalization of poverty. However, in some cases, the practical effects of enforcement make plain the ways in which they cripple the poor specifically through a focus on revenue generation.⁶⁰

This focus on revenue generation was at the forefront of the Department of Justice’s inquiry into the policing practices of the Ferguson, Missouri, police department in the wake of the death of Michael Brown: “The Department of Justice found each year Ferguson set targets for the police and the courts to generate more and more money from municipal fines. And Ferguson isn’t alone. The criminalization of poverty is a growing trend in states and localities across the country.”⁶¹ In the Department of Justice’s Ferguson Report, the investigators noted this phenomenon in several different ways: the use of arrest warrants as a means of collection, the ways in which officials spoke of revenue generation, and the procedural hurdles imposed by the courts in order to generate revenue.⁶²

One can also understand this drive for revenue generation through the raw numbers of increased expenditures. In recent years, criminal justice expenditures in the states have continued to grow.⁶³ Between 1993 and 2012, “total nominal spending

⁵⁵ See Marian Wright Edelman, *Criminalizing Poverty*, HUFFPOST (May 8, 2016), http://www.huffingtonpost.com/marian-wright-edelman-criminalizing-poverty_b_7245538.html [<https://perma.cc/8K6R-BRGP>].

⁵⁶ See Gupta & Foster Letter, *supra* note 47, at 2 (“[T]o the extent that these practices are geared not toward addressing public safety, but rather toward raising revenue, they can cast doubt on the impartiality of the tribunal and erode trust between local governments and their constituents.”).

⁵⁷ See *id.*

⁵⁸ For an example of exorbitant fees, see Edelman, *supra* note 55.

⁵⁹ *Id.*

⁶⁰ See *id.*

⁶¹ *Id.*

⁶² See U.S. DEP’T OF JUSTICE, CIVIL RIGHTS DIV., INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT 42–62 (2015).

⁶³ See, e.g., Suzy Khimm, *Will the Government Stop Using the Poor as a Piggy Bank?*, MSNBC (Sept. 9, 2014, 1:38 PM), <http://www.msnbc.com/msnbc/will-the-government-stop-using-the-poor-piggy-bank> [<https://perma.cc/K554-LLTN>] (“Court fees and fines have been on the rise nationwide on the state level and in some municipalities as government officials

on the criminal justice system grew from \$97 billion to \$265 billion, a growth rate of over 170 percent.”⁶⁴

Courts around the country have begun to internalize this economic pressure. In some cases, one can find court officials holding the view that funding their operations is not a necessary condition of administering justice, but instead is part and parcel of justice itself. For example, one state court administrator in Michigan stated:

The only reason that the court is in operation and doing business at this point in time is because that defendant has come in and is a user of those services [Defendants] don’t necessarily see themselves as a customer because, obviously, they’re not choosing to be there. But in reality they are.⁶⁵

In the context of traffic violations and fines, this profit motive is especially grim: some cities have been caught shortening yellow lights in an effort to generate more camera-generated traffic tickets,⁶⁶ which is a practice that has been shown to make intersections more dangerous.⁶⁷ Consistent with these trends across the United States, fees and fines assessed by courts in Virginia have risen at a rate that substantially outpaces inflation.⁶⁸ This revenue generation motive affects the poor harshly; the accumulation of debts owed to courts can result in something of a debt collections spiral, leading to imprisonment in some cases.⁶⁹ Mr. Stinnie found himself in such a spiral, and he

have cobbled together budgets in an era of budget cuts and growing resistance to tax hikes.”). *See generally* WHITE HOUSE COUNCIL OF ECON. ADVISERS, EXEC. OFFICE OF THE PRESIDENT, FINES, FEES, AND BAIL: PAYMENTS IN THE CRIMINAL JUSTICE SYSTEM THAT DISPROPORTIONATELY IMPACT THE POOR (2015), https://obamawhitehouse.archives.gov/sites/default/files/page/files/1215_cea_fine_fee_bail_issue_brief.pdf [<https://perma.cc/3H8B-3TPS>] [hereinafter FINES, FEES, AND BAIL].

⁶⁴ FINES, FEES, AND BAIL, *supra* note 63, at 2 n.4.

⁶⁵ Joseph Shapiro, *As Court Fees Rise, the Poor Are Paying the Price*, NPR (May 19, 2014, 4:02 PM), <http://www.npr.org/2014/05/19/312158516/increasing-court-fees-punish-the-poor>.

⁶⁶ *6 Cities that Were Caught Shortening Yellow Light Times for Profit*, NAT’L MOTORISTS ASS’N BLOG (Mar. 26, 2008), <https://www.motorists.org/blog/6-cities-that-were-caught-shortening-yellow-light-times-for-profit/> [<https://perma.cc/F8F4-944B>].

⁶⁷ *See generally* William A. Stimpson et al., *The Influence of the Time Duration of Yellow Traffic Signals on Driver Response*, ITE J. (1980), <https://www.motorists.org/wp-content/themes/nma/pk/lib/pdf/web/viewer.html?file=https://www.motorists.org/wp-content/uploads/2015/09/yellow-duration.pdf> (discussing the safety hazards associated with short yellow lights).

⁶⁸ Even when accounting for inflation, assessed fines and fees grew by over 50% between 1998 and 2014. *See supra* note 30.

⁶⁹ *See, e.g.*, Radley Balko, Opinion, *States and Cities Choose Dollars over Safety*, WASH. POST (Jan. 10, 2014), https://www.washingtonpost.com/news/opinions/wp/2014/01/10/revenue-generation-over-public-safety/?tid=a_inl&utm_term=.1226414e4002 [<https://perma.cc/695T-FLZA>] (“I had many clients tell me, ‘I had to keep working to have a chance to raise the money I needed to fix this situation, and in order to work, I had to drive.’ Bam. It’s a [driving with suspended license] charge waiting to happen.”).

spent a weekend in jail as the result of his second misdemeanor conviction for driving with a suspended license.⁷⁰

Like other states, Virginia remits court debts to state and local treasuries.⁷¹ The Code of Virginia lays out this distribution: “[O]ne-half of such fee shall be paid into the treasury of the county or city in which the offense for which warrant issued was committed, and the other one-half of such fees shall be paid by such clerk on his monthly remittance into the state treasury.”⁷² Thus the economic pressure to balance state and local budgets is logically transferred from the state to those assessed court fines and fees. For those well above the poverty line, paying these court costs and fines is a mere inconvenience; but for the poor, however, they represent a burden on personal liberty.⁷³ Intuitively, one understands that a debt assessed on people of differing incomes will have different effects. Studies have borne out this intuition: drivers with more economic means are less likely to change their behavior in response to more economically punitive fines.⁷⁴ For instance, studies have shown that increasing fines for red light violations impacts the driving behaviors of the indigent more than the wealthy.⁷⁵ When fines are increased for red light violations, the poor are more likely to change their driving behaviors to avoid such a violation.⁷⁶

Like the red light violators, it is logical to assume that people who owe debts to the court will be affected differently depending on their economic circumstances. As Virginia’s assessed fines and fees have increased above the rate of inflation and without regard for the economic health of the indigent, it is reasonable to conclude that the enforcement mechanism of the suspended driver’s license has produced more and more economic pressure for the indigent who hope to maintain their licenses. This economic pressure that is transferred to the poor in response to pressures of Virginia to collect its debts is the core of the “criminalization of poverty.” The creeping nature of this injustice has opened the Virginia statutory scheme up to several constitutional challenges.

II. PROCEDURAL DUE PROCESS: THE *MATHEWS* STANDARD AND THE NECESSITY FOR AN OPPORTUNITY TO BE HEARD

The first such challenge is given by procedural due process. Procedural due process is granted by the Fourteenth Amendment’s guarantee that states shall not “deprive

⁷⁰ Class Action Complaint, *supra* note 1, at 11–12.

⁷¹ *See, e.g.*, KAREN DOLAN & JODI L. CARR, INST. FOR POLICY STUDIES, THE POOR GET PRISON: THE ALARMING SPREAD OF THE CRIMINALIZATION OF POVERTY 30 (2015), <http://www.ips-dc.org/wp-content/uploads/2015/03/IPS-The-Poor-Get-Prison-Final.pdf> [<https://perma.cc/3K2Z-H2LF>]; *see also* VA. CODE ANN. § 16.1-69.48 (2018).

⁷² § 16.1-69.48(A).

⁷³ *See* Barbara Ehrenreich, *Foreword* to DOLAN & CARR, *supra* note 71, at 5.

⁷⁴ *See* FINES, FEES, AND BAILS, *supra* note 63, at 4.

⁷⁵ *See id.*

⁷⁶ *See id.*

any person of life, liberty, or property, without due process of law.”⁷⁷ Prior to any such deprivation, the state must provide some process that is specific to the interest at stake.⁷⁸ The first question to be answered, however, is: was there deprivation of a protected life, liberty, or property interest?⁷⁹ If a life, liberty, or property interest is in fact implicated, the Court analyzes the procedural protections of the statute under the standard laid out in *Mathews v. Eldridge*⁸⁰ to determine if they are adequate.⁸¹

Virginia’s scheme unquestionably implicates a property interest.⁸² The Court has repeatedly held that a deprivation of the continued use and possession of a driver’s license through a suspension of that license implicates due process.⁸³ The Court even expounded upon the nature of this property interest in *Mackey v. Montrym*,⁸⁴ noting that the interest in the “continued possession and use of [a driver’s] license” is “substantial.”⁸⁵ Notably, the Court acknowledged that the removal of this interest constitutes not only a “personal inconvenience,” but also an “economic hardship.”⁸⁶ This candid acknowledgment by the Court that the property interest in driver’s licenses is economic is supported by findings that show the economic importance of car access.⁸⁷ It is also of critical importance to the analysis of procedural protections due to drivers under the *Mathews* standard, because the nature of the property interest is one of the three factors of the standard.⁸⁸

In the case of the Virginia driver’s license scheme, the *Mathews* standard unquestionably calls for an opportunity to be heard for several reasons. Under the *Mathews* standard for evaluating procedural due process, the court must address three factors. For the purposes of this Note, these three are split into four: (1) the nature and importance of the private interest affected; (2) the nature and importance of the government’s interest; (3) the risk that the procedure will result in erroneous deprivations and what value additional or different procedures would provide; and (4) what

⁷⁷ U.S. CONST. amend. XIV, § 1.

⁷⁸ See, e.g., *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972).

⁷⁹ Erwin Chemerinsky, *Procedural Due Process Claims*, 16 *TOUROL. REV.* 871, 871 (2000). Chemerinsky breaks this part of the analysis into two questions: (1) was there a “deprivation,” and (2) was the deprivation of a life, liberty or property interest? *Id.*

⁸⁰ 424 U.S. 319 (1976).

⁸¹ See *id.* at 335.

⁸² Cf. *Mackey v. Montrym*, 443 U.S. 1, 10 (1979) (holding that there is a property interest in driver’s licenses).

⁸³ *Id.* at 10 n.7.

⁸⁴ 443 U.S. 1 (1979).

⁸⁵ *Id.* at 11.

⁸⁶ *Id.*

⁸⁷ See Adie Tomer & Joseph Kane, *Cars Remain King and Barrier to Economic Opportunity*, BROOKINGS INST. (Oct. 23, 2014), <https://www.brookings.edu/blog/the-avenue/2014/10/23/cars-remain-king-and-barrier-to-economic-opportunity/> [<https://perma.cc/HK4E-2A-SW>] (discussing the central role of cars in job commutes, even in urban environments).

⁸⁸ 424 U.S. 319, 335 (1976).

additional fiscal or administrative burdens would be imposed by additional or different procedures.⁸⁹

The current scheme is inadequate under this standard. Prior to November 2016, only a thirty-day notice to pay was required for persons facing court debts.⁹⁰ On November 1, 2016, the Virginia Supreme Court adopted a rule that calls for the thirty-day notice as well as the ability of persons to request deferred payments, installment plans, or community service in lieu of payment.⁹¹ This rule may in fact address some of the concerns surrounding the previous scheme, though the evidence shows that it has not done so to date.⁹² The rule also does not provide any solutions for Mr. Stinnie, his fellow class action plaintiffs, or the many others in his situation—they still have not been granted their proper due process, as their licenses were suspended without such opportunity.⁹³ For them, an opportunity to be heard is thus required under *Mathews* because the property interest in a driver's license is "substantial" and "economic";⁹⁴ the government interest in the collection of the debts is low, especially when compared to other possible reasons to suspend a driver's license;⁹⁵ and the risk of erroneous deprivations is substantial, especially when considering the plight of the indigent facing such a suspension.⁹⁶ The Complaint in Mr. Stinnie's case alleged this violation of procedural due process, and the Department of Justice submitted a Statement of Interest which gave color to the precedential basis for this claim.⁹⁷ The *Mathews* analysis in this Note focuses on the normative concerns at the heart of these arguments.

A. The Nature and Importance of the Driver's License as a Property Interest

The first factor, the nature and importance of the private interest, is a "substantial" one, as well as "economic," as noted above.⁹⁸ The economic importance of a driver's license has remained substantial in the years since the Court recognized it as a property interest in *Mackey*, if not increased, especially for the poor.⁹⁹ Sociological studies

⁸⁹ *Id.*

⁹⁰ See VA. CODE ANN. § 46.2-395(C) (2018).

⁹¹ VA. SUP. CT. R. 1:24(b)–(c); see DRIVING ON EMPTY, *supra* note 52, at 8.

⁹² See generally DRIVING ON EMPTY, *supra* note 52.

⁹³ See Class Action Complaint, *supra* note 1, at 47–49.

⁹⁴ *Mackey v. Montrym*, 443 U.S. 1, 11 (1979).

⁹⁵ See Class Action Complaint, *supra* note 1, at 48–49.

⁹⁶ See *id.* at 49.

⁹⁷ See *id.* at 47–49; Statement of Interest of the United States, *supra* note 46, at 6–14.

⁹⁸ See *supra* notes 80–86 and accompanying text.

⁹⁹ See S.F. OFFICE OF ECON. & WORKFORCE DEV., DRIVER'S LICENSE SUSPENSIONS AS A WORKFORCE BARRIER, <http://oewd.org/sites/default/files/FileCenter/Documents/759-4c%20-%20Driver%27s%20License%20Suspensions.pdf> [https://perma.cc/A6PS-E72C] (last visited Apr. 12, 2018) ("Mothers with young children on welfare and in subsidized child care are twice as likely to find sustained employment if they had a driver's license. For this population, having a driver's license is more important for finding steady work than a high school diploma.").

have shown that access to a car leads to an increased “probability of becoming employed and leaving [welfare].”¹⁰⁰ As Ryan Schwier and Autumn James pointed out, “[n]umerous studies have shown a positive correlation between car ownership, job security, and higher earnings.”¹⁰¹ They elaborated: “As one study reported, ‘[c]ars ensure that more people can fully contribute to the local economy because vehicle ownership increases employment opportunities, hours worked, and wages earned.’”¹⁰² Thus, it is clear that not only is vehicle access important to the economic interests of all, it is especially important to the economic interests of the indigent. So, the interest at stake, when considering potential procedural protections due under *Mathews*, is both significant and economic.

The property interest in question is also a government-granted one.¹⁰³ It thus finds analogy in other government-granted property interests for those experiencing poverty. When one examines the treatment of the courts of other government-granted property interests with similar qualities, it becomes clear that increased procedural protections are due. In *Goldberg v. Kelly*,¹⁰⁴ the Court held that the termination of public assistance by New York State prior to affording a particular recipient an evidentiary hearing is a violation of procedural due process.¹⁰⁵ This case exemplifies the idea that government-granted property rights that implicate the economic well-being of the indigent should be granted protections because of this importance.¹⁰⁶ In *Goldberg*, the Court stated: “We have come to recognize that forces not within the control of the poor contribute to their poverty.”¹⁰⁷ Continuing, the Court asserted: “Public assistance, then, is not mere charity, but a means to ‘promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity.’”¹⁰⁸ This strident defense of the property interest in *Goldberg* thus showed the Court’s desire to afford

¹⁰⁰ Tami Gurley & Donald Bruce, *The Effects of Car Access on Employment Outcomes for Welfare Recipients*, 58 J. URB. ECON. 250, 262 (2005).

¹⁰¹ RYAN T. SCHWIER & AUTUMN JAMES, HEALTH & HUMAN RIGHTS CLINIC, IND. UNIV. ROBERT H. MCKINNEY SCH. OF LAW, ROADBLOCK TO ECONOMIC INDEPENDENCE: HOW DRIVER’S LICENSE SUSPENSION POLICIES IN INDIANA IMPEDE SELF-SUFFICIENCY, BURDEN STATE GOVERNMENT & TAX PUBLIC RESOURCES 31 (2016), https://mckinneylaw.iu.edu/practice/clinics/_docs/DL_Rpt_2-1-16.pdf [<https://perma.cc/CHK8-S2X5>].

¹⁰² *Id.* (citing *Access to Driving*, MOBILITY AGENDA, <http://www.mobilityagenda.org/page/Access-to-Driving.aspx> [<https://perma.cc/AWE4-74UX>] (last visited Apr. 12, 2018)).

¹⁰³ Driver’s Licenses in Virginia are issued after submitting an application to the Virginia Department of Motor Vehicles. See *Applying for a Driver’s License*, VA. DEP’T OF MOTOR VEHICLES, <https://www.dmv.virginia.gov/drivers/#applying.asp> [<https://perma.cc/V6QC-6JKQ>] (last visited Apr. 12, 2018).

¹⁰⁴ 397 U.S. 254 (1970).

¹⁰⁵ *Id.* at 264–66.

¹⁰⁶ See *id.* at 264–65 (discussing the prudence in protecting the process rights of indigent defendants).

¹⁰⁷ *Id.* at 265.

¹⁰⁸ *Id.* (quoting U.S. CONST. pmbl.).

procedural protections that reflected the gravity of property interest that it found in welfare benefits.

This principle of providing protections to the government-granted property interests of the indigent is far-reaching. Another example is found in the administration of the federal government's housing assistance programs. Housing vouchers are provided to those who are unable to secure assistance themselves.¹⁰⁹ These vouchers are granted on the basis of the inability of the applicants to secure housing due to their economic circumstances.¹¹⁰ Once granted, courts have held that such a voucher constitutes a property interest that cannot be revoked without procedural due process protections.¹¹¹ Persons facing revocation of their voucher for any reason are granted the right to an administrative hearing to hear the evidence against them and to present their own.¹¹² The federal housing voucher program is thus an example of the federal government adhering to principles that were laid out in *Goldberg*.¹¹³

A driver's license is not usually considered a welfare benefit per se. However, in its practical applications, it functions similarly to one.¹¹⁴ It is an economic property interest, granted by the state, that has increased significance to those experiencing poverty.¹¹⁵ The principle that led the Court to find a substantial interest in welfare benefits should thus be extended to driver's licenses. Therefore, the economic importance in driver's licenses, as well as the Court's eagerness to protect the government-granted property interests of the indigent, should lead the Court to find that the private interest in driver's licenses is very substantial.

B. The Nature and Importance of the Government's Interest in Collections

The next factor that requires analysis under the *Mathews* standard is the state's interest in the scheme.¹¹⁶ The Commonwealth of Virginia's interest in this scheme

¹⁰⁹ *Housing Choice Vouchers Fact Sheet*, U.S. DEP'T OF HOUSING & URB. DEV., http://portal.hud.gov/hudportal/HUD?src=/topics/housing_choice_voucher_program_section_8 [<https://perma.cc/9DD4-U5UD>] (last visited Apr. 12, 2018).

¹¹⁰ *Id.* ("Eligibility for a housing voucher is determined by the [public housing agencies] based on the total annual gross income and family size . . .").

¹¹¹ *See, e.g.,* *Nozzi v. Hous. Auth. of L.A.*, 806 F.3d 1178, 1191 (9th Cir. 2015).

¹¹² U.S. DEP'T OF HOUSING & URBAN DEV., HOUSING CHOICE VOUCHER PROGRAM GUIDEBOOK—CHAPTER 16: INFORMAL REVIEWS AND HEARINGS § 16.2, https://portal.hud.gov/hudportal/documents/huddoc?id=DOC_11760.pdf [<https://perma.cc/R4A7-DTUB>] (last visited Apr. 12, 2018).

¹¹³ *See* 397 U.S. at 264–65.

¹¹⁴ One interesting debate that frames driver's licenses similarly to welfare benefits is seen in the immigration context. *See* LYNN A. KAROLY & FRANCISCO PEREZ-ARCE, RAND CORP., A COST-BENEFIT FRAMEWORK FOR ANALYZING THE ECONOMIC AND FISCAL IMPACTS OF STATE-LEVEL IMMIGRATION POLICIES 59 (2016), http://www.rand.org/content/dam/rand/pubs/research_reports/RR1300/RR1397/RAND_RR1397.pdf [<https://perma.cc/2KCT-P9HW>].

¹¹⁵ *See supra* notes 77–108 and accompanying text.

¹¹⁶ 424 U.S. 319, 335 (1976).

is in the collection of court debts.¹¹⁷ The simplest way to analyze the importance of this interest is through comparison to other potential interests that compel the state to suspend driver's licenses.

In *Mackey*, the Court addressed the question of procedural due process in the context of driver's license suspensions for drivers who refuse breathalyser tests during police traffic stops.¹¹⁸ Massachusetts had a policy of requiring an automatic suspension of driver's licenses for persons who refuse to take a breathalyser test.¹¹⁹ The suspension was immediate and lasted for ninety days.¹²⁰ There was also the option for the driver to seek a post-suspension hearing.¹²¹

In *Mackey*, it was clear that the government's interest was an important one: highway safety.¹²² Drunk drivers pose an acute threat to themselves and others on the road.¹²³ People who refuse breathalyser tests are probably those who have been drinking. The automatic suspension of driver's licenses prevents such persons from driving while the state contemplates prosecution.¹²⁴ It also incentivizes people to not frivolously refuse such tests, thus further ratifying the suspicion placed upon those who do refuse.¹²⁵ The government certainly has a compelling safety interest in this scheme.¹²⁶

In comparison, the interest that the Commonwealth of Virginia has in the collection of its debts is much less compelling. It is clear that the government's objective is in the collection of all assessed fines and court costs.¹²⁷ The Virginia DMV has admitted as much on the record, and there is no evidence to show that the deprivation of the license is being done for any other reason, such as highway safety as in *Mackey*.¹²⁸ This obvious effort to use the threatened suspension of a driver's license amounts to a coercive incentive for defendants to pay their assessed fines, lest

¹¹⁷ See Defendant's Reply to Plaintiffs' Memorandum in Opposition to Defendant's Motion to Dismiss, *supra* note 41, at 7.

¹¹⁸ 443 U.S. 1, 3–4 (1979).

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *Id.* at 7.

¹²² *Id.* at 19.

¹²³ In Virginia, for example, 2,613 people were killed by drunk drivers between 2003 and 2012. CTRS. FOR DISEASE CONTROL & PREVENTION, SOBERING FACTS: DRUNK DRIVING IN VIRGINIA (2014), http://www.cdc.gov/motorvehiclesafety/pdf/impaired_driving/drunk_driving_in_va_custom.pdf [<https://perma.cc/VX4C-9USB>]. "Every day, 28 people in the United States die in motor vehicle crashes that involve an alcohol-impaired driver. This is one death every 51 minutes. The annual cost of alcohol-related crashes totals more than \$44 billion." *Impaired Driving*, CTR. FOR DISEASE CONTROL & PREVENTION, http://www.cdc.gov/motorvehiclesafety/impaired_driving/ [<https://perma.cc/M9RD-U3BC>] (last updated June 15, 2017).

¹²⁴ See, e.g., *Mackey*, 443 U.S. at 19.

¹²⁵ See *id.* at 18.

¹²⁶ See *id.* at 19.

¹²⁷ See Defendant's Reply to Plaintiffs' Memorandum in Opposition to Defendant's Motion to Dismiss, *supra* note 41, at 7.

¹²⁸ Compare *id.*, with *Mackey*, 443 U.S. at 11.

they lose the substantial property interest in their driver's licenses, potentially leading them further into "economic hardship."¹²⁹

To be sure, the state does have an interest in the collection of debts owed to it.¹³⁰ However, it is important to note the efficacy of the scheme. As noted above, a huge amount of court costs and fees go unpaid each year—despite the large number of driver's license suspensions issued.¹³¹ The failure of this system is pretty simple to understand from an economic perspective. Take Mr. Stinnie for example. By the time he had received over \$1,000 in court costs and his driver's license suspended, he was already in dire financial straights.¹³² So dire, in fact, that he was having difficulty making his monthly car payments, despite pooling resources with his brother.¹³³ His housing situation was unstable as well, only finding a subsidized housing arrangement after three months of searching, and even then only given guaranteed placement for a year.¹³⁴ In such a situation, the economic incentives are simply not there for Mr. Stinnie to prioritize his court debts. If he does not have a car, then there is no use in having a valid driver's license; and if he does not have housing, then all other priorities are moot, and his car becomes of the utmost importance. So it is not only understandable that he does not prioritize his court debts, it is also completely rational.

In fact, not only does the scheme fail to provide proper economic incentives for the collection of debts, it may also make the road less safe. As noted above, Mr. Stinnie has a substantial material interest in keeping possession of his car, because there is a significant chance that he may end up without shelter. Additionally, despite his license suspension, he may have to use his vehicle for basic necessities and emergencies, which are likely to occur given his precarious housing situation. In the event that he does drive his vehicle with a suspended license, he will be putting other drivers at risk.¹³⁵ Therefore, while Virginia's interest in recovering court costs is compelling, it does not rise to level of highway safety, and the suspension of a driver's license is, at best, ineffectual for those in deep poverty, and may even harm others on the road.

C. The Risk of Erroneous Deprivations

As discussed, there is an important property interest in driver's licenses, and the government does have some lesser interest in its collections through the suspension

¹²⁹ See *supra* notes 84–88 and accompanying text.

¹³⁰ See, e.g., Class Action Complaint, *supra* note 1, at 49.

¹³¹ See *supra* notes 36–42 and accompanying text.

¹³² See Class Action Complaint, *supra* note 1, at 7–9.

¹³³ *Id.* at 10–13.

¹³⁴ *Id.* at 10.

¹³⁵ See, e.g., LINDSAY I. GRIFFIN, III & SANDRA DELAZERDA, AAA FOUND. FOR TRAFFIC SAFETY, UNLICENSED TO KILL 10 (2000), <http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.610.9773&rep=rep1&type=pdf> [<https://perma.cc/EN3P-84VX>].

scheme. The next step of the *Mathews* analysis of procedural protections requires the Court to look at the risk that the procedure will result in an erroneous deprivation.¹³⁶ The frame of analysis that one takes here is largely determined by the normative view that one takes toward those in poverty. In other words, if one believes that all people who refuse to pay their fines are doing so *willingly*, then no such “erroneous deprivation[s]” take place under the scheme.¹³⁷ Alternatively, if some people do not pay their fines through no fault of their own, but rather because of their inability to pay, then the suspension of their driver’s licenses is in fact erroneous.

Under the first view, refusal to pay becomes *prima facie* evidence of unwillingness to pay, allowing for a license suspension. Therefore, no one is erroneously deprived of this driver’s license under this view. The government’s interest in collections is properly served by the suspension of a driver’s license, and thus the statute would be more likely to hold up to procedural due process challenges. The alternative view is that some people who refuse to pay the court fees and fines assessed against them are simply unable to pay them. Under this view, Virginia is depriving some persons of a property interest because of their inability to pay rather than their willful refusal. The scheme is thus inadequate under the *Mathews* standard. The procedural protections must be such that the risk of “erroneous deprivation[s]” is low.¹³⁸ Since about half of fees assessed by Virginia go uncollected,¹³⁹ it becomes clear that some people, such as Mr. Stinnie, are being erroneously deprived of this property interest.

Thus the argument is reduced to whether or not people who refuse to pay are doing so willingly. When one considers the economics of poverty, the answer becomes more clear, and Mr. Stinnie’s story helps provide an answer to this question. To be sure, Mr. Stinnie could potentially pool his resources and save for many months, or even years, to pay off his court debts, but prioritizing these debts would be costly, and even unwise. As noted above, Mr. Stinnie does not have a stable housing situation.¹⁴⁰ Housing is the first priority of all consumers, and sits atop the “hierarchy of needs.”¹⁴¹ Mr. Stinnie’s precarious living arrangement makes his payments on his used car even more essential. Prioritizing his court debts, and thus further jeopardizing his ability to find shelter, would be irresponsible in his situation.

Additionally, the ineffectual nature of the collections effort has implications to the view one takes.¹⁴² The large number of people who have not repaid their debts

¹³⁶ *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

¹³⁷ *Id.*

¹³⁸ *See id.*

¹³⁹ *See Kalantari, supra* note 42.

¹⁴⁰ *See Class Action Complaint, supra* note 1, at 10.

¹⁴¹ *See Shadiya Mohamed Saleh Baqutayan et al., Describing the Need for Affordable Livable Sustainable Housing Based on Maslow’s Theory of Need*, 6 MEDITERRANEAN J. SOC. SCI. 353, 353 (2015) (“Housing is a basic human need that Maslow explained in the hierarchy of needs as a first important level of need similar to food and drink; therefore, it is at the centre of wellbeing.” (internal citation omitted)).

¹⁴² *See supra* notes 36–42 and accompanying text.

to the Commonwealth of Virginia could in fact all be refusing to pay as opposed to unable. This is unlikely, however. Mr. Stinnie's example gives context to the easy ways in which court debts can become insurmountable when one is facing the possible deprivation of more critical needs. Therefore, it is reasonable to view the deprivation of a driver's license of someone who lacks the ability to pay as erroneous, and thus the scheme has a high level of erroneous deprivation.

D. The Burden of Additional Administrative Procedures

The last factor that needs to be analyzed under the *Mathews* standard is the burden of additional administrative procedures.¹⁴³ At first glance this appears challenging given the large number of people who have had their licenses suspended for unpaid debts.¹⁴⁴ In other contexts, this challenge was made clear following the imposition of new procedural requirements by the Supreme Court. In *Bearden v. Georgia*,¹⁴⁵ the Court held that there must be a determination of ability to pay prior to revoking probation for failure to pay in sentencing hearings.¹⁴⁶ One understands intuitively that this is a very difficult determination to make. One investigation surveyed various court systems and their judges and found wide-ranging approaches.¹⁴⁷ One judge said that he “ma[d]e judgments based on how people present[ed] themselves in court.”¹⁴⁸ “‘They come in wearing expensive jackets,’ he sa[id] referring to defendants who wear NFL football team jackets, ‘or maybe a thousand dollars’ worth or tattoos on their arms. And they say, ‘I’m just living on handouts.’”¹⁴⁹

This difficulty is easily avoided, however, in the context of driver's license suspension. A simple formula that accounts for the person's income, savings, and is calculated according to the cost of living in the District Court's jurisdiction would allow people such as Mr. Stinnie to provide a showing of inability to pay without even having to stand before a judge. One objection to this approach is that it amounts to trying to prove a negative: a court must make a determination that the person cannot pay by demanding to see as much evidence as possible that he or she can in fact pay. This is a fair objection, but income and savings can provide fairly reliable measures of a person's ability to pay. Additionally, the option of community service, in lieu of payment, as was enacted by the Virginia Supreme Court in November 2016,

¹⁴³ See *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

¹⁴⁴ See Class Action Complaint, *supra* note 1, at 4.

¹⁴⁵ 461 U.S. 660, 672 (1983).

¹⁴⁶ *Id.*

¹⁴⁷ See Joseph Shapiro, *Supreme Court Ruling Not Enough to Prevent Debtors Prisons*, NPR (May 21, 2014, 5:01 AM), <http://www.npr.org/2014/05/21/313118629/supreme-court-ruling-not-enough-to-prevent-debtors-prisons>.

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

is also a good one.¹⁵⁰ Such an option would provide an incentive for persons who do have the means to pay to seek out this alternative method of repayment. This calculation could all be done by court clerks, thus not hindering the busy schedules of judges. The last concern over this system is the exceptions that could fall through the cracks. For instance, someone could have a medical emergency that becomes a financial emergency, and therefore lack the ability to pay his or her court debts despite a high income. In that case, an initial finding of ability to pay by the formula should allow for the possibility of appeal and an opportunity to be heard in an administrative hearing. As such events are exceptions, this should result in minimal additional burden to the justice system. Therefore, the burden of different administrative procedures is low.

E. Virginia's Statute Violates Procedural Due Process

Thus, Virginia driver's license suspension scheme does, in fact, violate procedural due process under the *Mathews* standard. The risk of erroneous deprivation is not low, and some ability to pay determination should be made prior to suspending a driver's license. The burden that is imposed upon the poor in the assessment of these debts is substantial, and the courts should recognize this fact by allowing for an opportunity to be heard prior to the suspension of a driver's license.

The Virginia scheme's violation of procedural due process under the *Mathews* standard does not render unconstitutional the deprivation of a driver's license of someone without the means to pay, however. After hearing Mr. Stinnie's story, a court could still determine that he must pay or have his license suspended. Thus, some other constitutional argument must be made showing that the suspension of a driver's license of a person who lacks the ability to pay is unconstitutional in order to make the procedural due process requirement for an opportunity to be heard into a necessity of a determination of ability to pay.

III. THE FOURTEENTH AMENDMENT'S PROHIBITION OF PUNISHMENT DUE TO POVERTY

The Fourteenth Amendment's Equal Protection Clause and Due Process Clause both address issues of poverty, but in different ways. The Equal Protection Clause enshrines the right to "equal protection of the laws,"¹⁵¹ and in order to do so, it is wielded by the courts to carefully examine any statute that classifies people, or even has an effect on people that is disproportional.¹⁵² Traditionally, poverty has not been

¹⁵⁰ See VA. SUP. CT. R. 1:24(d); see also *DRIVING ON EMPTY*, *supra* note 52, at 8.

¹⁵¹ U.S. CONST. amend. XIV, § 1.

¹⁵² See Mitchell F. Rice, *The Discriminatory Purpose Standard: A Problem for Minorities in Racial Discrimination Litigation?*, 6 B.C. THIRD WORLD L.J. 1, 1-3 (1986) (discussing the disproportionate impact standard in Fourteenth Amendment jurisprudence).

granted any special status under the Equal Protection Clause.¹⁵³ *San Antonio Independent School District v. Rodriguez*¹⁵⁴ is often cited for the proposition that the Court has never granted a suspect or quasi-suspect classification to the poor.¹⁵⁵ The Court has repeated that assertion as well: “[T]his Court has held repeatedly that poverty, standing alone, is not a suspect classification.”¹⁵⁶ However, the actual treatment of poverty under the Equal Protection Clause has not been as clean cut as the Court indicated in *Rodriguez*.

For instance, the Court has held that, in the criminal context, a poor person may not be punished for being poor.¹⁵⁷ In *Bearden*, the Court held that the State may not punish someone for failure to pay his or her fines.¹⁵⁸ In that case, the Court determined that sentencing courts must inquire into the ability of defendants to pay their fines prior to revoking their probation and imprisoning them.¹⁵⁹ It is clear that the Court was mostly concerned about imprisoning people because of their inability to pay, and therefore found that such a practice violated the Fourteenth Amendment because of it.¹⁶⁰ Therefore, while poverty is not a “suspect class” for equal protection purposes, people cannot be punished due to their poverty under the Equal Protection Clause, as exemplified by *Bearden*. In this way, equal protection prevents different treatment by the justice system resulting from poverty.

The Due Process Clause of the Fourteenth Amendment provides a means to tackle issues of poverty in the criminal justice system as well, although more indirectly. The “fundamental fairness” principle of due process is vague, but essentially requires that the procedural administration of justice be just.¹⁶¹ One articulation is given in *Rochin v. California*.¹⁶² The question that needs to be addressed in a fundamental fairness inquiry is whether the state’s conduct “offends a ‘sense of justice’ or runs counter to the ‘decencies of civilized conduct.’”¹⁶³ In order to make this judgment, the court should look to “considerations deeply rooted in reason and in the

¹⁵³ See Henry Rose, *The Poor As a Suspect Class Under the Equal Protection Clause: An Open Constitutional Question*, 34 NOVA L. REV. 407, 408 (2010) (“[T]he poor are neither a quasi-suspect nor a suspect class under the Equal Protection Clause . . .”).

¹⁵⁴ 411 U.S. 1 (1973).

¹⁵⁵ See, e.g., Rose, *supra* note 153, at 408 n.1.

¹⁵⁶ *Harris v. McRae*, 448 U.S. 297, 323 (1980) (citing *James v. Valtierra*, 402 U.S. 137 (1971)).

¹⁵⁷ See generally *Bearden v. Georgia*, 461 U.S. 660 (1983) (holding that the State may not imprison an individual who has made bona fide efforts to pay fines but, because of his poverty, cannot pay the fine).

¹⁵⁸ See *id.* at 671–73.

¹⁵⁹ See *id.* at 672.

¹⁶⁰ See *id.* at 672–73.

¹⁶¹ See Paul T. Wangerin, “Plain Error” and “Fundamental Fairness”: Toward a Definition of Exceptions to the Rules of Procedural Default, 29 DEPAUL L. REV. 753, 765–67 (1980) (discussing the difficulty in defining “fundamental fairness” in express terms).

¹⁶² 342 U.S. 165 (1952).

¹⁶³ *Id.* at 175 (Black, J., concurring).

compelling traditions of the legal profession”¹⁶⁴ and “the community’s sense of fair play and decency.”¹⁶⁵ On issues of poverty in the justice system, such arguments can certainly be raised, and they were in *Bearden*.¹⁶⁶

In the class action suit involving Mr. Stinnie, filed by the Legal Aid Justice Center, both of these different arguments were outlined.¹⁶⁷ This Note advocates for the due process approach for several reasons. Before addressing the merits of these arguments, however, it is worth noting that they are actually intimately tied together. Mr. Stinnie and his fellow plaintiffs separated these arguments in their complaint, but the Department of Justice, in its Statement of Interest submitted in Mr. Stinnie’s case, converged them,¹⁶⁸ stating that “[t]he Fourteenth Amendment prohibits ‘punishing a person for his poverty.’”¹⁶⁹ *Bearden* actually exemplifies the convergence of these arguments in the Court’s jurisprudence.¹⁷⁰ Justice O’Connor laid the foundation of her opinion in *Bearden* by stating: “This Court has long been sensitive to the treatment of indigents in our criminal justice system. Over a quarter century ago, Justice Black declared that ‘[t]here can be no equal justice where the kind of trial a man gets depends on the amount of money he has.’”¹⁷¹ After laying out several cases that granted such holdings, she continued: “Due process and equal protection principles converge in the Court’s analysis in these cases.”¹⁷²

This Note contends that this is not a strict convergence of equal protection and due process principles in these cases, as the Department of Justice implies. Rather, there is a spectrum, and Mr. Stinnie’s suit exists closer to the due process end of that spectrum and should be argued as such. First, this Note will lay out the spectrum, then address the inadequacies of the equal protection arguments to Mr. Stinnie’s case, and finally move to the positive argument that Virginia’s driver’s license suspension scheme is in fact a violation of the “fundamental fairness” principle of the Due Process Clause.

A. The Spectrum of Due Process and Equal Protection Principles on Issues of Poverty

In Mr. Stinnie’s lawsuit against the Virginia DMV, the Department of Justice submitted a brief arguing that the Virginia statutory scheme does violate the Fourteenth

¹⁶⁴ *Id.* at 171 (majority opinion).

¹⁶⁵ *Id.* at 173.

¹⁶⁶ *See Bearden v. Georgia*, 461 U.S. 660, 672–73 (1983) (discussing potential alternative forms of punishment that consider a defendant’s financial resources).

¹⁶⁷ *See Class Action Complaint*, *supra* note 1, at 46, 49.

¹⁶⁸ *See Statement of Interest of the United States*, *supra* note 46, at 14–16.

¹⁶⁹ *Id.* at 14 (quoting *Bearden*, 461 U.S. at 671).

¹⁷⁰ *See* 461 U.S. at 661–62 (discussing the Fourteenth Amendment as a single entity, without differentiating between due process and equal protection).

¹⁷¹ *Id.* at 664 (alteration in original) (quoting *Griffin v. Illinois*, 351 U.S. 12, 19 (1956) (plurality opinion)).

¹⁷² *Id.* at 665 (citing *Griffin*, 351 U.S. at 17).

Amendment's prohibition on punishing people for their poverty, under the line of cases that includes *Bearden*, but begins with *Griffin v. Illinois*.¹⁷³ The Department of Justice did not distinguish between the equal protection and due process principles at work.¹⁷⁴ This line of cases does not represent a uniform convergence, however. In *Bearden*, the Court acknowledged the distinction between the equal protection and due process arguments:

[W]e generally analyze the fairness of relations between the criminal defendant and the State under the Due Process Clause, while we approach the question whether the State has invidiously denied one class of defendants a substantial benefit available to another class of defendants under the Equal Protection Clause.¹⁷⁵

It is a subtle distinction, but an important one. Intuitively, one understands that there will be some overlap between these principles. A due process inquiry examines the entire process, while an equal protection inquiry is limited to the determination that all classes of defendants are treated equally.¹⁷⁶

When one examines further, it becomes clear that one principle usually supersedes another. For example, *Williams v. Illinois*¹⁷⁷ is a case that exemplifies the principle that the Constitution prohibits punishment due to poverty.¹⁷⁸ The Court held in *Williams* that “the Equal Protection Clause of the Fourteenth Amendment requires that the statutory ceiling placed on imprisonment for any substantive offense be the same for all defendants irrespective of their economic status.”¹⁷⁹ The Court did not address any due process arguments in its majority opinion.¹⁸⁰ This was because the issue was solely one of determining whether or not all defendants were being treated equally by the justice system.¹⁸¹ Therefore, while due process and equal principles

¹⁷³ See Statement of Interest of the United States, *supra* note 46, at 14–15 (“In a long line of cases beginning with *Griffin v. Illinois*, the Supreme Court has made clear that conditioning access or outcomes in the justice system solely on a person’s ability to pay violates the Fourteenth Amendment.” (internal citation omitted)).

¹⁷⁴ See *id.* (referencing only the “Fourteenth Amendment,” but not any of its clauses).

¹⁷⁵ 461 U.S. 660, 665 (1983).

¹⁷⁶ See *id.* (stating that the Court focuses on “fairness of relations between the criminal defendant and the State under the Due Process Clause,” and in contrast, under the Equal Protection Clause, the Court focuses on “whether the State has invidiously denied one class of defendants a substantial benefit available to another class of defendants”).

¹⁷⁷ 399 U.S. 235 (1970).

¹⁷⁸ See *id.* at 240–41 (“We conclude that when the aggregate imprisonment exceeds the maximum period fixed by statute and results directly from an involuntary nonpayment of a fine or court costs we are confronted with an impermissible discrimination that rests on ability to pay . . .”).

¹⁷⁹ *Id.* at 244.

¹⁸⁰ See *id.* at 235–45.

¹⁸¹ See *id.* at 236.

do merge in the cases prohibiting punishment for poverty, one principle often supersedes the other.¹⁸² In a case of the exception proving the rule, Justice Harlan offered the lone dissenting opinion in *Williams*, and argued that the Court was hiding the ball by choosing the equal protection framing rather than the due process one.¹⁸³ As we will see, the question in Mr. Stinnie's suit is best framed as a due process issue. The issue with the Virginia license suspension scheme is whether or not the entire system of collection of court debts through the suspension of driver's licenses, without inquiries into the ability to pay them, is intrinsically just, rather than whether each person who faces a license suspension is being treated equally.

B. The Inadequacy of Equal Protection Principles in Mr. Stinnie's Suit and the Preferable Nature of Fundamental Fairness Arguments

There are two reasons to prefer the due process framing to the equal protection one in Mr. Stinnie's case. First, a due process inquiry would be able to encapsulate not only the direct effects of the scheme on Mr. Stinnie and other indigent license holders, but also the overall mechanics by which the Commonwealth uses the scheme to provide funding for itself. The idea that the Commonwealth uses fines and fees to fund itself through these collections is part of the argument against it, and such an argument would not be applicable to an equal protection inquiry. This is because the equal protection framing restricts the argument to whether all defendants are being equally treated. Therefore, it does not concern itself with the system of debt collections as a whole, and arguments in reference to that system are not relevant to equal protection.

Second, it is more difficult to make an equal protection argument due to Mr. Stinnie's economic situation. *Bearden* exhibits well an exact convergence of the equal protection and due process principles, and would likely sit near the middle of the spectrum.¹⁸⁴ Even so, one can see that the equal protection arguments are stronger in *Bearden* than in Mr. Stinnie's case. In *Bearden*, the economic incentives to repay debts were extremely high for the petitioner, who faced the possibility of imprisonment.¹⁸⁵ One presumes that such a defendant would liquidate all assets in order to pay off a debt that must be paid in order to avoid incarceration. This further bolsters the argument in *Bearden* that the failure to repay the debt was due to poverty, and therefore that punishment was inflicted due to poverty.¹⁸⁶ Such an argument goes to the heart

¹⁸² See *supra* notes 177–81 and accompanying text (describing the Court's focus in *Williams v. Illinois* on the equal protection analysis); discussion *infra* Section III.B (describing a due process framing of *Stinnie v. Holcomb*).

¹⁸³ *Williams*, 399 U.S. at 259 (Harlan, J., dissenting).

¹⁸⁴ See 461 U.S. 660, 666–67 (1983).

¹⁸⁵ See *id.* at 662–63 (noting that the petitioner borrowed money in an attempt to pay his fines).

¹⁸⁶ See *id.* at 671 (stating that the State punishes a probationer for his poverty if they classify a probationer with poor people).

of an equal protection analysis: whether the petitioner is being treated differently because of poverty.

In contrast, it is more difficult to make this determination in Mr. Stinnie's situation. Mr. Stinnie does assert, as did the petitioner in *Bearden*, that he has no money to pay off his debt.¹⁸⁷ A court approaching the arguments in the two cases will much more readily believe that the petitioner in *Bearden* is being treated differently solely due to his poverty, however. Mr. Stinnie faces the threat of revocation of a driving license, while the petitioner in *Bearden* faced a threat to his personal liberty.¹⁸⁸ Clearly, the economic incentives for repayment of a debt are stronger in *Bearden*. Therefore, the difficulty in establishing conclusively that Mr. Stinnie's failure to pay was due to his inability to pay and the preferable nature of the due process arguments all militate towards a fundamental fairness focus in Mr. Stinnie's case.

IV. THE VIRGINIA DRIVER'S LICENSE SUSPENSION SCHEME VIOLATES THE DUE PROCESS PRINCIPLE OF FUNDAMENTAL FAIRNESS

The Due Process Clause of the Fourteenth Amendment provides a solid avenue to attack the Virginia driver's license suspension scheme, as it has been understood to protect our "sense of justice."¹⁸⁹ The development of substantive due process doctrine more generally provides justification for a more forward-looking understanding of fundamental fairness as well. The doctrine of fundamental fairness in this context is intimately linked to traditional substantive due process jurisprudence,¹⁹⁰ and has been considered a substantive due process doctrine in some contexts.¹⁹¹ For this reason, it is worthwhile to consider the development of substantive due process doctrine.

Traditionally, both the fundamental fairness and substantive due process doctrines are backward-looking. That is to say, fundamental fairness defines the rights of parties in the justice system as those that are "deeply rooted"¹⁹² in "compelling traditions."¹⁹³ Similarly, the traditional understanding of substantive due process has been backward-looking.¹⁹⁴ Substantive due process doctrine has sought to uphold fundamental and

¹⁸⁷ See Class Action Complaint, *supra* note 1, at 12–13.

¹⁸⁸ *Id.* at 8; see *Bearden*, 461 U.S. at 662–63 (discussing the legal consequences for the defendant for failing to pay his court fees and court-ordered restitution payments).

¹⁸⁹ *Rochin v. California*, 342 U.S. 165, 173 (1952) (citation omitted).

¹⁹⁰ See Edward G. Mascolo, *Due Process, Fundamental Fairness, and Conduct that Shocks the Conscience: The Right Not to Be Enticed or Induced to Crime by Government and Its Agents*, 7 W. NEW ENG. L. REV. 1, 11–12 (1984) (discussing the centrality of fundamental fairness and due process in the criminal justice system).

¹⁹¹ See 1 ENCYCLOPEDIA OF AMERICAN CIVIL LIBERTIES 608 (Paul Finkelman ed., 2006) (discussing how the fundamental fairness doctrine is used to create new constitutional rights).

¹⁹² *Rochin*, 342 U.S. at 171.

¹⁹³ *Id.*

¹⁹⁴ See generally Kenji Yoshino, *A New Birth of Freedom?: Obergefell v. Hodges*, 129 HARV. L. REV. 147 (2015) (discussing textualist interpretations of due process at the Roberts Court).

otherwise unenumerated rights, that are “deeply rooted in our [Nation’s] history and traditions.”¹⁹⁵ Recently, however, the doctrine of substantive due process has gone through some changes and become more forward-looking.¹⁹⁶ Professor Daniel Conkle has termed this move as one towards an “evolving national values” approach as opposed to the “historical traditions” and “reasoned judgment” arguments.¹⁹⁷ The substantive due process doctrine received another upheaval in *Obergefell v. Hodges*.¹⁹⁸ Professor Kenji Yoshino has argued that *Obergefell* represents “a game changer for substantive due process jurisprudence” by prioritizing liberty.¹⁹⁹ He believes the Court has created what he calls an “antisubordination liberty” principle, which means that the liberties protected by substantive due process are those of historically subordinated citizens.²⁰⁰ The *Obergefell* decision thus bolsters the idea that the Court has moved increasingly towards an “evolving national values” approach in substantive due process doctrine.

This turn of substantive due process gives weight to the idea that fundamental fairness should similarly be understood to address the forward-looking concerns of subordinated classes. While a substantive due process challenge is not being made to the Virginia driver’s license scheme, the doctrine of fundamental fairness is a similar standard that could certainly be deployed to address government conduct that offends our sense of justice in its treatment of historically subordinated classes. In the case of the Virginia driver’s license suspension scheme, a challenge is being made to the subordination of the poor facing a license suspension.²⁰¹ The modern development of substantive due process doctrine thus provides justification for a turn of fundamental fairness doctrine toward more similarly forward-looking protections.

The Virginia driver’s license suspension scheme is a violation of fundamental fairness. This is because it does in fact offend our sense of justice for two reasons: (1) the deprivation of a license of a person who lacks the ability to pay is unjust; and (2) the larger context of placing economic pressure on violators to collect debts contributes to this sense of injustice. The first argument, that the deprivation of license of a person without the ability to pay is fundamentally unfair, is essentially the same as the argument that it is an erroneous deprivation, which was the argument presented in Section II.C.²⁰² Mr. Stinnie’s example once again elucidates this point. His inability to pay is not the result of a willful refusal, but rather the result of a lack of financial resources, and this becomes clear when one examines the hierarchy of

¹⁹⁵ *Washington v. Glucksberg*, 521 U.S. 702, 727 (1997).

¹⁹⁶ *See generally, e.g.*, Daniel O. Conkle, *Three Theories of Substantive Due Process*, 85 N.C. L. REV. 63 (2006) (discussing the recent evolution of the due process doctrine).

¹⁹⁷ *See generally id.*

¹⁹⁸ 135 S. Ct. 2584, 2602–03 (2015).

¹⁹⁹ Yoshino, *supra* note 194, at 148.

²⁰⁰ *Id.* at 174.

²⁰¹ *See* Class Action Complaint, *supra* note 1, at 1–2.

²⁰² *See* discussion *supra* Section II.C.

human needs and his economic situation.²⁰³ This should twinge the conscience, if not shock it.

The second point—the larger context of placing economic pressure on Mr. Stinnie in a scheme that is merely designed for debt collections—is a critical one. Virginia driver’s license suspension scheme does not present any of the explicit evidence of disdain from law enforcement as did the police department in Ferguson, Missouri, but it does function in a way that bears at least a resemblance to the “criminalization of poverty,” as was argued in Part I. This should in fact offend our sense of justice. Certainly, the question over what in fact violates fundamental fairness is a question that is ultimately only determined by the judge hearing the case. However, the fact that there has been a large outcry over the scheme in the wake of public awareness raised by Mr. Stinnie’s lawsuit shows that it does at a minimum violate the consciences of many private citizens.²⁰⁴ As was noted in the *Rochin* case, the standard for justice in a fundamental fairness inquiry is given by the community as a whole, though the judge is issuing the decision.²⁰⁵ For these reasons, the due process principle of fundamental fairness provides a strong argument that it is in fact unconstitutional to deprive persons of their license who lack the ability to pay. In conjunction with the argument presented in Part II, this leads to the conclusion that the courts must allow for an ability to pay determination prior to the suspension of a license.

CONCLUSION

Mr. Stinnie’s case against the Virginia driver’s license suspension scheme is fairly strong. The scheme is crippling to Virginia residents. It suspends licenses at enormously high rates, with one in six drivers having his or her license suspended at some point in fiscal year 2015.²⁰⁶ It also is not very effective, in that half of court debts in Virginia are never collected.²⁰⁷ It is best understood as part of an unsettling trend towards the criminalization of poverty.²⁰⁸

The Constitution provides several avenues to challenge the scheme. The first is through procedural due process. The baseline processes by which driver’s licenses are suspended in Virginia for unpaid court debts was wholly inadequate: the only process was a thirty-day notice to pay prior to the automatic suspension.²⁰⁹ In fact, the

²⁰³ See discussion *supra* Section I.C.

²⁰⁴ See, e.g., Dahlia Lithwick, *Punished for Being Poor*, SLATE (July 16, 2016, 6:19 PM), http://www.slate.com/articles/news_and_politics/jurisprudence/2016/07/the_virginia_driver_s_license_scheme_that_punishes_poor_people.html [<https://perma.cc/W83Q-MW9A>] (discussing Mr. Stinnie’s case).

²⁰⁵ See 342 U.S. 165, 173 (1952).

²⁰⁶ See Class Action Complaint, *supra* note 1, at 36.

²⁰⁷ See *supra* note 42 and accompanying text.

²⁰⁸ See *supra* Part I.

²⁰⁹ See *supra* note 90 and accompanying text.

Mathews standard calls for much more than that: an opportunity to present evidence that a person is simply unable to pay the court debts.²¹⁰

The *Mathews* standard for evaluating procedural due process requires the balancing of three different factors. These three were split into four for the purposes of this Note's analysis. The first factor, the nature and importance of the private interest at stake, is certainly "substantial" and "economic" in the case of a driver's license.²¹¹ Studies confirm the importance of a driver's license to a person's economic well-being.²¹² Additionally, driver's licenses function very similarly to welfare benefits, which are property interests to which the Court has been willing to grant procedural protections partially because of their importance to the indigent.²¹³ The second factor, the nature of the government's interest, is relatively low. The suspension of licenses under the scheme is being effectuated merely for the purpose of collections and revenue generation, which is a much less critical priority than others such as highway safety.²¹⁴

The third factor, the risk of erroneous deprivations, is the most crucial one, and largely depends on the view that one takes towards the suspension of Mr. Stinnie's license.²¹⁵ If one believes that this deprivation is not erroneous, but rather that Mr. Stinnie, and others in his economic situation, are rightfully deprived of their licenses for refusing payment, then it is unlikely that one will find that the procedures are inadequate. However, if one believes that the suspension of license of a person who simply lacks the ability to pay is erroneous, then the procedural scheme is certainly unjust, and Mr. Stinnie deserves the opportunity to be heard and present his reasons for non-payment. This second view is persuasive when one examines the economic incentives of Mr. Stinnie. His housing and healthcare needs clearly provide stronger incentives for repayment than the court debt, and thus his inability to pay the debt should not be equated with a willful refusal to pay. Therefore, the risk of erroneous deprivations should be considered to be very high. The last factor of the *Mathews* standard is to determine the burden that additional procedures would impose. Ability to pay determinations do introduce some difficulties, as was made clear after *Bearden*. However, in the case of driver's license suspensions, the ability to pay determination could be made without ever having to appear before a judge.²¹⁶ Therefore, the burden of additional administrative procedures is not very high and Mr. Stinnie is owed an opportunity to be heard under the *Mathews* standard.

This requirement for an opportunity to be heard does not dispense with all the constitutional issues with the scheme, however. Procedural due process accounts for

²¹⁰ See discussion *supra* Part II.

²¹¹ See discussion *supra* Section II.A.

²¹² See *supra* notes 99–102 and accompanying text.

²¹³ See *supra* notes 103–15 and accompanying text.

²¹⁴ See discussion *supra* Section II.B.

²¹⁵ See discussion *supra* Section II.C.

²¹⁶ See discussion *supra* Section II.D.

the process that is owed to Mr. Stinnie, but it does not address whether or not it is constitutional to suspend his license even if he lacks the ability to pay. The Fourteenth Amendment provides two avenues to challenge the scheme at this point. The first is the Equal Protection Clause and its principle that no class of persons should be treated differently under the law.²¹⁷ The second is the due process principle that the relations of the state to defendants must be in accord with fundamental fairness.²¹⁸ These principles actually converge in a line of cases beginning with *Griffin*, creating a principle that the Fourteenth Amendment prohibits the state from punishing persons for their poverty.²¹⁹ The Department of Justice submitted a brief in Mr. Stinnie's case arguing exactly this point.²²⁰ Though the equal protection and due process principles converge in that line of cases, they remain distinct, and Mr. Stinnie's case is best argued under the due process principle of fundamental fairness because the doctrine of fundamental fairness allows for the court to take into account the whole of the scheme, including the way it in which it operates as a debt collection mechanism.²²¹

When applying the fundamental fairness doctrine to this scheme, it is apparent that the scheme is unconstitutional. Fundamental fairness is related to the doctrine of substantive due process doctrine, and substantive due process has recently taken a more forward-looking turn towards protecting subordinated classes.²²² Fundamental fairness should be read in a similar way. Virginia's scheme is fundamentally unfair in the way in which it deprives an indigent of an important property interest without inquiry into his or her ability to pay. Additionally, the context of rising court fees and fines and the widespread—and ineffectual—automatic license suspensions bolster the argument that the scheme is fundamentally unfair.

For these reasons, the Virginia driver's license scheme should be found to be unconstitutional. Public awareness of this injustice has grown, and ideally the Virginia legislature will step in and provide a remedy that addresses these concerns.²²³ Rule 1:24(d), enacted by the Virginia Supreme Court in November 2016, was a first step in this process, and may help alleviate some of these injustices into the future by allowing persons to apply for alternative methods of repayment, including a community service option.²²⁴ A bill passed by the Virginia Senate that would eliminate automatic suspensions would improve the situation for drivers placed in Mr. Stinnie's position if it became law.²²⁵ The public awareness raised by Mr. Stinnie's suit and lawmakers' willingness to address these concerns are hopeful signs of much-needed reform.

²¹⁷ See *supra* notes 151–60 and accompanying text.

²¹⁸ See *supra* notes 161–66 and accompanying text.

²¹⁹ See *supra* notes 173–81 and accompanying text.

²²⁰ See generally Statement of Interest of the United States, *supra* note 46.

²²¹ See discussion *supra* Section III.B.

²²² See *supra* notes 189–202 and accompanying text.

²²³ See *supra* note 203 and accompanying text.

²²⁴ See VA. SUP. CT. R. 1:24(d).

²²⁵ See Martz, *supra* note 53.