

## DEBT-FREE DELINQUENCY: CLEARING THE PATH FOR DEBT- IMPRISONED JUVENILES

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### I. INTRODUCTION

Modern-day psychologists have long recognized that “parental unemployment, low wages, and poverty” place immense stress on family relationships.<sup>1</sup> Child psychologists have gone a step further, emphasizing that this type of stress can cause worsening conditions for the children of the family, such as family separation, youth placement in foster or group homes, and child homelessness.<sup>2</sup> What has not yet been universally recognized by these experts, however, is the government’s role in exacerbating this family stress through the imposition of fines and fees in the juvenile justice system. A lifelong debt sentence can be just as hopeless as a prison sentence when your debt starts building before the age of ten.

Research shows that in almost every state, system-involved youth and their families are likely to pay multiple costs for varying levels of juvenile system involvement.<sup>3</sup> These costs can be imposed at various points throughout a juvenile offender’s time in the system, and even within one category of cost, an individual can be fined several times.<sup>4</sup> The fees continue to mount despite a child being actually incarcerated, as almost all states will still charge parents for a portion of that child’s care and support.<sup>5</sup> Criminal contempt, civil judgments, probation violations, compounding fees, ineligibility for expungement, and incarceration are just a few examples of consequences juveniles and their families can face for failure to pay any of these fees.<sup>6</sup> Most

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<sup>1</sup> Jordan Blair Woods, *Unaccompanied Youth and Private-Public Order Failures*, 103 IOWA L. REV. 1639, 1652 (2018).

<sup>2</sup> *Id.* at 1652–53.

<sup>3</sup> JESSICA FEIERMAN ET AL., JUV. L. CTR., DEBTORS’ PRISON FOR KIDS? THE HIGH COST OF FINES AND FEES IN THE JUVENILE JUSTICE SYSTEM 4 (2016) [hereinafter DEBTORS’ PRISON FOR KIDS], <http://debtorsprison.jlc.org/documents/jlc-debtors-prison.pdf>.

<sup>4</sup> *Id.* at 5.

<sup>5</sup> *Id.* at 15.

<sup>6</sup> *Id.* at 7.

troubling of all, however, is that not all states impose these punitive economic sanctions on juveniles constitutionally. In fact, many states do so without any inquiry into the ability to pay, meaning that, in practice, all families must pay regardless of their financial circumstances.<sup>7</sup>

On March 14, 2016, the U.S. Department of Justice (DOJ) circulated a letter to state and local courts, reminding courts to take extra care when imposing and enforcing fines and fees in all criminal justice proceedings.<sup>8</sup> The DOJ drafted this letter to remind courts of the factors they must consider prior to imposing an economic sanction, citing a fine's economically-debilitating effects as a reason for more serious deliberation.<sup>9</sup> Over a year later, the DOJ recognized the heightened need for cautionary recommendations in the juvenile system specifically, where fees can be even more economically devastating and have an enduring impact.<sup>10</sup> This advisory was intended to achieve two main goals: (1) to remind juvenile courts and probation departments that some discretion must be exercised prior to imposing an economic sanction on a juvenile offender, typically by investigating that juvenile's ability to pay; and (2) to ensure that other juvenile justice and state agencies, primarily those involved in collection, were not imposing fines and fees on juvenile offenders in a way that violated their constitutional rights or prevented future development and rehabilitation.<sup>11</sup>

Unfortunately, despite the DOJ's efforts, researchers estimate that incarcerated juveniles and their families across the country are still facing billions of dollars in outstanding fee assessments, with several millions of dollars in additional fees being imposed annually.<sup>12</sup> The Juvenile Law Center's research, which included a review of statutes and surveys of citizens in all fifty states, shows at least forty-one states reported that they impose costs, fines, and fees on juveniles.<sup>13</sup> In doing so, many of these states fail to acknowledge the serious harm the juveniles and their families face as a result.<sup>14</sup>

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<sup>7</sup> *Id.* at 6.

<sup>8</sup> See U.S. DEP'T OF JUST., ADVISORY FOR RECIPIENTS OF FINANCIAL ASSISTANCE FROM THE U.S. DEPARTMENT OF JUSTICE ON LEVYING FINES AND FEES ON JUVENILES 1 (2017) [hereinafter ADVISORY ON LEVYING FINES AND FEES ON JUVENILES], <http://ojp.gov/about/ocr/pdfs/AdvisoryJuvFinesFees.pdf>.

<sup>9</sup> *See id.*

<sup>10</sup> *Id.* at 2.

<sup>11</sup> *Id.*

<sup>12</sup> Jeffrey Selbin, *Juvenile Fee Abolition in California: Early Lessons and Challenges for the Debt-Free Justice Movement*, 98 N.C. L. REV. 401, 411–12 (2020).

<sup>13</sup> DEBTORS' PRISON FOR KIDS, *supra* note 3, at 4.

<sup>14</sup> *Id.* (discussing a national survey of lawyers, other professionals, adults with previous juvenile justice involvement, and families, which revealed that costs, fines, fees,

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Children in the justice system are entitled to all of the constitutional protections that adults receive. But when it comes to children, “courts cannot stop at the protections afforded to adults.”<sup>15</sup> When the first separate juvenile court system was established in Illinois in 1899, Illinois promised enhanced constitutional protection for children.<sup>16</sup> Early advocates of a separate juvenile system envisioned one that focused on rehabilitation, encouraged child development, and paid special attention to the differences between juveniles and adults.<sup>17</sup> Although the juvenile system has evolved over time, it still claims to focus on “supporting youth, assisting rehabilitation, developing youth competency, and improving outcomes.”<sup>18</sup>

In as early as the 1960s, however, critics began to grow skeptical of the efficacy of a separate juvenile system, questioning whether juvenile courts were more harmful than beneficial to young offenders.<sup>19</sup> These critics observed that juvenile courts were often arbitrary and punitive, which was contrary to the therapeutic and non-adversarial system that was initially promised.<sup>20</sup> It is the punitive nature of the U.S. criminal justice system that contributes to the unfair levying of fines and fees against system-involved youth and their families.

When scholars have explored the issue of fines in the juvenile system, they typically have analyzed the practice under the Due Process Clause and the Equal Protection Clause of the U.S. Constitution.<sup>21</sup> Few scholars, however, have addressed this issue under the Excessive Fines Clause, which is the focus of this Comment. Analyzing juvenile economic sanctions under the Excessive Fines Clause allows us to take a closer look at the root of the problem—sentencing—thus cutting off the problem at its source. While inquiries under the Due Process Clause and the Equal Protection Clause are of great significance, they focus on the

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and restitution in the juvenile justice system “posed significant problems for youth and families[.]” but noting that states regularly impose these fines and fees nonetheless).

<sup>15</sup> ADVISORY ON LEVYING FINES AND FEES ON JUVENILES, *supra* note 8, at 2.

<sup>16</sup> See DEBTORS’ PRISON FOR KIDS, *supra* note 3, at 4.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> Woods, *supra* note 1, at 1687–88.

<sup>20</sup> *Id.*

<sup>21</sup> While many arguments critiquing the constitutionality of economic sanctions employ the protections of the Fourteenth Amendment, there has been some argument that the limited protection of the Fourteenth Amendment is not enough because an equal protection analysis does not (1) address the question of whether pecuniary sanctions are fines, or (2) contemplate ability to pay in the context of the constitutional notion of ‘excess’ established in the Excessive Fines Clause. See Beth A. Colgan, *Reviving the Excessive Fines Clause*, 102 CALIF. L. REV. 277, 290 (2014) [hereinafter *Reviving the Excessive Fines Clause*] (arguing that relying on the Fourteenth Amendment does nothing but “write the Excessive Fines Clause out of the Constitution”).

“narrow window of . . . post-sentencing collections” and thus are outside the scope of this Comment.<sup>22</sup>

The Eighth Amendment’s Excessive Fines Clause limits the government’s power to impose fines, whether in cash or in kind, “as punishment for some offense,”<sup>23</sup> and guarantees the right of adult and juvenile offenders alike to not be subjected to excessive sanctions.<sup>24</sup> An economic sanction is considered a fine for the purposes of the Clause if it is at least “partially punitive.”<sup>25</sup> A sanction is “partially punitive” if (1) it is employed in response to some prohibited conduct, or (2) it is treated like other common forms of punishment.<sup>26</sup> This broad standard reveals the Court’s interest in “capturing a broad array of economic sanctions within the Clause’s scope.”<sup>27</sup> A fine violates the Excessive Fines Clause and is thus unconstitutional if it is “grossly disproportional” to the gravity of the offense.<sup>28</sup> The Supreme Court only recently held that the Excessive Fines Clause is incorporated by the Due Process Clause of the Fourteenth Amendment, meaning the protection against excessive fines is a Bill of Rights protection applicable to the states.<sup>29</sup>

This Comment argues that all states should eliminate costs, fees, and fines in the juvenile system, as they are always excessive as applied to children who have no ability to pay, and thus are inherently unconstitutional under the Eighth Amendment’s Excessive Fines Clause. To further explore this issue, Part II of this Comment discusses the common types of economic sanctions imposed on juveniles and the economic and legal consequences of each sanction. Part III argues that imposing these costs, fees, and fines on juveniles is unconstitutional under the Excessive Fines Clause based on all juveniles’ lessened culpability and lack of ability to pay. Part IV explores current state approaches to the issue of juvenile economic sanctions, while Part V highlights proposed solutions to the problem, including universal legislative reform, additional sentencing considerations, and fee-free sentencing alternatives. Part VI concludes by suggesting ways to implement the proposed solutions detailed in Part V.

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<sup>22</sup> Beth A. Colgan, *The Excessive Fines Clause: Challenging the Modern Debtors’ Prison*, 65 UCLA L. REV. 2, 9 (2018) [hereinafter *The Modern Debtors’ Prison*].

<sup>23</sup> *United States v. Bajakajian*, 524 U.S. 321, 328 (1998) (quoting *Austin v. United States*, 509 U.S. 602, 609–10 (1993)).

<sup>24</sup> *Roper v. Simmons*, 543 U.S. 551, 560 (2005).

<sup>25</sup> *The Modern Debtors’ Prison*, *supra* note 22, at 13.

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> *Bajakajian*, 524 U.S. at 324.

<sup>29</sup> *Timbs v. Indiana*, 139 S. Ct. 682, 687 (2019).

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## II. CURRENT PRACTICES: PROBLEMATIC FINES, FEES, AND COSTS IN THE JUVENILE JUSTICE SYSTEM

Across the country, juvenile courts may require youth, parents, or both to pay a multitude of different costs, some of which may be imposed before the court has even made a delinquency determination.<sup>30</sup> While one might assume that judges treat all defendants who appear before them fairly, many judges refuse to consider a defendant's financial circumstances even when required to do so and ignore a defendant's attempts to explain serious financial hardship such as homelessness or the inability to support dependent children.<sup>31</sup> But judges are not always the actors to blame; in assessing many kinds of economic sanctions, courts have limited (if not a complete lack of) discretion.<sup>32</sup> Many statutes mandate the imposition of certain economic sanctions "without allowing the court any opportunity to assess whether such sanctions are reasonable."<sup>33</sup> In fact, some statutes go as far as to completely prohibit courts from considering a defendant's financial circumstances when assessing the amount of economic sanctions.<sup>34</sup>

Even outside of the juvenile context, scholars have called monetary sanctions "inherently inequitable," in that they are unfair to the many offenders who are struggling financially but nonetheless have judgments imposed against them or face court-related fee balances, which they are unlikely to ever be able to pay.<sup>35</sup> Critics of using monetary sanctions as a frequent form of punishment have cited several negative effects of unmanageable sanctions, including their tendency to increase financial instability, thus undermining any deterrent and rehabilitative goals of the punishment and potentially encouraging future crime.<sup>36</sup>

Critics also note the unique frequency with which monetary sanctions can create "derivative evils," usually by increasing the "financial and social instability of members of the debtor's family" in addition to the instability of the individual.<sup>37</sup> Another derivative evil is the disproportionate harm that economic sanctions impose on "low-

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<sup>30</sup> DEBTORS' PRISON FOR KIDS, *supra* note 3, at 5 (describing these costs as including court expenses, public defender fees, and costs for evaluations and testing).

<sup>31</sup> *The Modern Debtors' Prison*, *supra* note 22, at 59.

<sup>32</sup> *Reviving the Excessive Fines Clause*, *supra* note 21, at 289.

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> R. Barry Ruback, *The Benefits and Costs of Economic Sanctions: Considering the Victim, the Offender, and Society*, 99 MINN. L. REV. 1779, 1781 (2015) (citation omitted).

<sup>36</sup> *The Modern Debtors' Prison*, *supra* note 22, at 65-66.

<sup>37</sup> *Id.* at 66.

income families of color.”<sup>38</sup> Although an extended discussion of the racially disparate impact of juvenile economic sanctions is outside the scope of this Comment, it is important to note that minority youth are punished more frequently and harshly in the juvenile justice system relative to white youth, leading to a gross overrepresentation of racial and ethnic minorities.<sup>39</sup> Economic sanctions are imposed on minority youth with the same frequency and harshness, thus exacerbating existing racial and economic disparities.<sup>40</sup> It is fundamentally unfair for the government to place juveniles in such dire circumstances only to achieve a vague punitive purpose, especially when the economic sanctions often include a host of charges related to the functioning of the juvenile justice system, which has little relation to the crime itself.<sup>41</sup>

This inequity is only exacerbated in the juvenile context. Juvenile economic sanctions can encompass costs related to (A) appointment of counsel, (B) bail and detention, (C) probation supervision and placement fees, (D) informal adjustment and diversion, (E) evaluation and testing, (F) cost of care, (G) court proceedings or appearances, (H) fines, and (I) expungement or sealing. Because all of these economic sanctions meet the broad standard of being partially punitive,<sup>42</sup> they fall within the scope of the Excessive Fines Clause.<sup>43</sup> Each type of sanction is addressed in turn.

#### A. *Appointment of Counsel*

The imposition of fees interferes with a juvenile’s constitutional right to counsel because children themselves do not have the resources to pay for an attorney, family income is often considered before youth are presumed eligible for a public defender, and administrative fees are imposed beforehand, usually while offenders are applying for state-funded representation.<sup>44</sup> By not automatically presuming juveniles

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<sup>38</sup> Selbin, *supra* note 12, at 407.

<sup>39</sup> *Id.*

<sup>40</sup> *Id.* For a deeper discussion of the overrepresentation of racial and ethnic minorities in the juvenile justice system and its implications, see generally NAT’L COUNCIL ON CRIME & DELINQ., AND JUSTICE FOR SOME: DIFFERENTIAL TREATMENT OF YOUTH OF COLOR IN THE JUSTICE SYSTEM (2007), [https://www.evidentchange.org/sites/default/files/publication\\_pdf/justice-for-some.pdf](https://www.evidentchange.org/sites/default/files/publication_pdf/justice-for-some.pdf).

<sup>41</sup> *The Modern Debtors’ Prison*, *supra* note 22, at 67.

<sup>42</sup> See *supra* note 26 and accompanying text for a definition of “partially punitive.”

<sup>43</sup> See *Timbs v. Indiana*, 139 S. Ct. 682, 689 (2019) (citing *Austin v. United States*, 509 U.S. 602 (1993) for the proposition that even “forfeitures fall within the [Excessive Fine] Clause’s protection when they are at least partially punitive”).

<sup>44</sup> See NAT’L COUNCIL OF JUV. & FAM. CT. JUDGES, STATE JUST. INST. & NAT’L JUV. DEF. CTR., ENSURING YOUNG PEOPLE ARE NOT CRIMINALIZED FOR POVERTY: BAIL, FEES, FINES, COSTS, AND

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eligible for an attorney “by virtue of their status as children,” and by imposing application fees to determine eligibility for state aid in the first place, the government “present[s] a barrier to children asserting their right to counsel, as they must depend on their families to pay the fees.”<sup>45</sup>

Fees that are assessed as part of a juvenile’s case can result in (1) extended probation and (2) financial obligations that “follow children well into adulthood, impacting their ability to access education, housing, and employment.”<sup>46</sup> Conflicts can also arise even when families are able to pay for the youth’s counsel, as the family may “feel entitled to direct the representation of their child, rather than ensuring client-directed representation.”<sup>47</sup>

### B. *Bail and Detention*

According to the American Bar Association, “detaining children, even for minimal periods, has an enduring traumatic impact, and also increases recidivism.”<sup>48</sup> This evidence is worrisome in the context of economic sanctions because children can be detained for failure to pay fines, and research has shown that “[c]onditioning a child’s liberty on their ability to post cash bail” ignores the strong evidence of the negative impact of detention on juveniles.<sup>49</sup> Imposing bail that a juvenile or their family is unable to pay “fosters ‘class-driven preventive detention’” and fails to protect public safety, as the bail payment ends up penalizing poverty more than it encourages appearance in court.<sup>50</sup>

### C. *Probation Supervision Fees and Placement Fees*

Juvenile courts often require youth to pay a cost or fee for probation or other supervision.<sup>51</sup> These costs are often assessed monthly, and a failure to pay the fees on time can be treated like any other probation violation, constituting grounds for revocation of probation and reinstatement of all or part of the original prison

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RESTITUTION IN JUVENILE COURT (2018), [https://njdc.info/wp-content/uploads/2018/04/Bail-Fines-and-Fees-Bench-Card\\_Final.pdf](https://njdc.info/wp-content/uploads/2018/04/Bail-Fines-and-Fees-Bench-Card_Final.pdf).

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> *Id.* For a comprehensive understanding of the difficulty juveniles face in attempting to get access to free counsel and the costs that go along with it, see generally JESSICA FEIERMAN ET AL., JUV. L. CTR., THE PRICE OF JUSTICE: THE HIGH COST OF “FREE” COUNSEL FOR YOUTH IN THE JUVENILE JUSTICE SYSTEM (2018).

<sup>48</sup> NAT’L COUNCIL OF JUV. & FAM. CT. JUDGES, STATE JUST. INST. & NAT’L JUV. DEF. CTR., *supra* note 44 (internal punctuation omitted).

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

sentence.<sup>52</sup> Twenty states have statutes requiring some payment for probation or supervision.<sup>53</sup> In many states, such as Florida, judges have the discretion to waive costs for juveniles: judges can waive fees due to an inability to pay, or replace fees with community service or the “writing of book reports.”<sup>54</sup> Despite this discretion, not all judges elect to waive these fees, and accurately determining a juvenile’s ability to pay requires detailed information, such as “tax records, links to the IRS and state agencies, [and a] listing[] of all bank accounts . . . that judges in the United States currently do not have available to them.”<sup>55</sup> Even with prosecutorial and judicial discretion, the practice of requiring juvenile offenders to pay fees for probation supervision and other related services “prolongs justice system involvement, puts youth at higher risk for probation violations, and traps families in debt.”<sup>56</sup>

#### D. Fees for Informal Adjustment and Diversion

Diversion programs and informal adjustment programs are programs that divert juveniles out of the justice system, which allow young people to avoid its associated stigma, reduce costs to the state or federal government, and improve access to mental health treatment.<sup>57</sup> Unfortunately, these positive effects are offset by the fact that several states charge diversion fees, which juvenile offenders must pay before they can be diverted away from formal processing.<sup>58</sup> These fees can be recurring, with a monthly charge until “the informal adjustment or diversion conditions have been completed.”<sup>59</sup> Twenty-two states have statutes requiring some sort of payment to receive an informal adjustment or become a part of a diversion program, and many impose serious consequences when an offender falls behind on payments.<sup>60</sup> If a juvenile-offender fails to pay his or her diversion fees, he or she will likely be excluded from the program, forced into formal processing, and the payment will turn into a civil judgment.<sup>61</sup>

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<sup>52</sup> DEBTORS’ PRISON FOR KIDS, *supra* note 3, at 10.

<sup>53</sup> *Id.*

<sup>54</sup> VANESSA PATINO LYDIA ET AL., DELORES BARR WEAVER POL’Y CTR., ASSESSING THE IMPACT OF COURT COSTS AND FEES ON JUVENILES AND FAMILIES 10 (2017), <https://www.seethegirl.org/wp-content/uploads/2019/05/Assessing-Impact-Court-Costs.pdf>.

<sup>55</sup> Ruback, *supra* note 35, at 1807.

<sup>56</sup> NAT’L COUNCIL OF JUV. & FAM. CT. JUDGES, STATE JUST. INST. & NAT’L JUV. DEF. CTR., *supra* note 44.

<sup>57</sup> DEBTORS’ PRISON FOR KIDS, *supra* note 3, at 12.

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

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*E. Evaluation and Testing*

Juveniles may need various exams or assessments during their participation in any juvenile justice system program, and fees often come with each separate assessment. Such exams include mental health evaluations, drug and alcohol assessments, tests for sexually transmitted diseases, and DNA or blood tests.<sup>62</sup> While the fees associated with these tests are not intended to be punitive, they “place youth who cannot pay at risk of juvenile justice placement, as well as family strain and financial debt,” thus giving them the same punitive effect as any other fee or fine.<sup>63</sup> According to Juvenile Law Center research, thirty-one states have statutes that impose costs of evaluation or testing on the juvenile offender.<sup>64</sup>

*F. Cost of Care*

The fee cycle does not stop once the child is incarcerated or in the state’s care. Nearly all states continue to charge parents for their child’s care and support if they have a child involved in the juvenile justice system, and a significant number of these states charge the juveniles themselves for the cost of their care.<sup>65</sup> These fees charge for what the government identifies as “expense and maintenance” costs, which include “food, clothing, shelter, [child supervision], child support payments to the state,” and sometimes additional charges for “a child’s custody, confinement, or placement in a residential facility.”<sup>66</sup> Parents also can be charged for other specific costs, including physical or mental health treatment, case management, and education programs.<sup>67</sup> When parents are unable to afford the cost of care fees, juveniles may be “deprived of treatment, held in violation of probation, or even fac[e] extended periods of incarceration.”<sup>68</sup>

*G. Court Costs*

Court costs and fees are sometimes a specified dollar amount but are more often a general obligation to cover any costs related to “service, notice, deposition, travel expenses, prosecution costs, and other legal expenses,” which cumulatively can result in thousands of dollars of

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<sup>62</sup> *Id.* at 13.

<sup>63</sup> DEBTORS’ PRISON FOR KIDS, *supra* note 3, at 13.

<sup>64</sup> *Id.*

<sup>65</sup> *See id.* at 15.

<sup>66</sup> *Id.*

<sup>67</sup> *See id.*

<sup>68</sup> *Id.*

debt.<sup>69</sup> In addition to the debilitating debt imposed on juveniles as a result of court costs, courts face severe reputational consequences when the government imposes court costs on juveniles who are unable to pay.<sup>70</sup> Court costs and fees that are mainly “geared toward raising revenue rather than addressing public safety” can create doubts about the fairness and impartiality of the court imposing those fees, encouraging distrust of the government-run justice system by its local taxpayers.<sup>71</sup>

These court costs can undermine the court’s authority in the eye of the juvenile offender specifically; a court that seems to be more focused on raising revenue acts more like a “collection agency rather than a neutral arbiter,” leaving offenders feeling as if they have not been given a fair opportunity to try their case.<sup>72</sup> Although the appearance of an inequitable court system is damaging in all criminal justice systems, it is particularly damaging in the juvenile system where “research demonstrates that outcomes are improved when children and their families feel they have been treated fairly.”<sup>73</sup>

#### H. *Fines*

A majority of states impose fines on youth and their parents.<sup>74</sup> While some fines are imposed only for designated offenses as an alternative to incarceration, others are “available as a general dispositional option,” which means that the court has discretion to impose these fines in cases they see fit.<sup>75</sup> Unfortunately, regardless of the type, fines have an “economically debilitating effect” on the lives of juveniles and their families because they disrupt education and employment opportunities, thus providing juvenile offenders with fewer avenues to success.<sup>76</sup> “Once a court orders juvenile [fines] to be paid, the debt becomes a civil judgment enforceable against the parent or guardian,” and—unlike some other civil judgments which can be discharged in bankruptcy—debts owed to the juvenile justice system never go away.<sup>77</sup>

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<sup>69</sup> DEBTORS’ PRISON FOR KIDS, *supra* note 3, at 17.

<sup>70</sup> See NAT’L COUNCIL OF JUV. & FAM. CT. JUDGES, STATE JUST. INST. & NAT’L JUV. DEF. CTR., *supra* note 44.

<sup>71</sup> *Id.* at 3.

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> DEBTORS’ PRISON FOR KIDS, *supra* note 3, at 18.

<sup>76</sup> NAT’L COUNCIL OF JUV. & FAM. CT. JUDGES, STATE JUST. INST. & NAT’L JUV. DEF. CTR., *supra* note 44.

<sup>77</sup> Selbin, *supra* note 12, at 402–03.

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The story of Brenda Tindal is one of many stories of crippling family debt as a result of juvenile fines. Tindal's encounters with the juvenile justice system began when her foster daughter was sentenced to three months in a California juvenile detention center.<sup>78</sup> As a consequence, Tindal owed \$16,000 in fines, which "resulted in the [seizure] of Tindal's income and tax returns" to satisfy the debts, and eventually the loss of her home.<sup>79</sup> Tindal's story is not uncommon. Because most of the youth and families in the juvenile system are low-income, many families like Tindal's are forced to choose between paying their outstanding court debts or paying for necessities like food, clothing, and housing.<sup>80</sup> The reality is that families faced with paying either their court debts or purchasing necessities do not have a choice: families unable to pay these fines will only be forced deeper into debt when their inability to pay "leads to [compounding] fees, late charges, extended probation, civil liens, license forfeiture, and even incarceration."<sup>81</sup>

### I. *Expungement and Sealing*

The imposition of fees does not end when juveniles attempt to exit the juvenile justice system.<sup>82</sup> While one of the purported benefits of the juvenile justice system is a child's ability to expunge or seal his or her records, this is not done automatically in most states.<sup>83</sup> On the contrary, juveniles usually need to petition the court to seal or expunge their records, and many offenders will need an attorney's help to file such a petition, thus resulting in additional attorney's fees.<sup>84</sup> Even if the juvenile proceeds without counsel, there still can be fees "to file petitions seeking sealing or expungement, to obtain criminal history reports, and to effectuate sealing or expungement."<sup>85</sup> These fees can dissuade many youths "from seeking sealing or expungement," which

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<sup>78</sup> Erin B. Logan, *Courts in Most States Charge Juveniles to Exist Inside the Justice System. This Movement Wants to Change That*, WASH. POST (Aug. 10, 2018), <https://www.washingtonpost.com/news/post-nation/wp/2018/08/10/courts-in-most-states-charge-juveniles-to-exist-inside-the-justice-system-this-movement-wants-to-change-that>.

<sup>79</sup> *Id.*

<sup>80</sup> NAT'L COUNCIL OF JUV. & FAM. CT. JUDGES, STATE JUST. INST. & NAT'L JUV. DEF. CTR., *supra* note 44.

<sup>81</sup> *Id.*

<sup>82</sup> *See* DEBTORS' PRISON FOR KIDS, *supra* note 3, at 20.

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

creates a barrier to future employment, impedes reintegration, and ultimately impacts that juvenile's future ability to pay.<sup>86</sup>

J. *Restitution and Punitive Community Service*

Although this Comment does not focus on the potential elimination of restitution awards in the juvenile justice system, it is worth noting that these restitution awards, which are “generally designed to provide economic compensation for [a victim’s] losses,” can be damaging if imposed without the appropriate supports.<sup>87</sup> For example, research shows that jurisdictions that integrate restitution with probation shift the bulk of probation officers’ work “from counseling, social services, or once-a-month visits to implementing and monitoring restitution requirements,” making them the juvenile’s debt collector instead of their counselor.<sup>88</sup> Thus, although restitution may serve a clear rehabilitative purpose, if imposed in the wrong way, these economic sanctions can undermine the goals of the juvenile system and lessen a juvenile’s chances of reintegration after finishing probation.

Like restitution, community service can be an appropriate sanction on qualifying juveniles. On the other hand, community service that is “merely punitive—including activities that impart punishment or humiliation . . . does nothing to encourage reflection and community engagement.”<sup>89</sup> Any community service imposed on juveniles should be focused on reparation and helping the juveniles “develop skills that will provide for long-term success in the community and workforce.”<sup>90</sup>

Each type of economic sanction comes with its unique consequences for juveniles, whether the fine serves as a barrier to reintegration or as a compounding fee that pushes juvenile offenders further into the system.<sup>91</sup> Because the evidence shows that juveniles almost always lack the ability to pay their own fines absent special circumstances, Part III will explain why all fines are excessive as applied to juveniles, thus making it unconstitutional to impose these fines under the Eighth Amendment.<sup>92</sup>

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<sup>86</sup> *Id.*

<sup>87</sup> NAT’L COUNCIL OF JUV. & FAM. CT. JUDGES, STATE JUST. INST. & NAT’L JUV. DEF. CTR., *supra* note 44.

<sup>88</sup> *Id.*

<sup>89</sup> *Id.* For example, community service such as picking up trash on the highway in a neon vest could be seen as merely punitive and humiliating.

<sup>90</sup> *Id.*

<sup>91</sup> *See supra* Part II.

<sup>92</sup> *See infra* Part III.

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### III. CONSTITUTIONAL ANALYSIS: WHY ANY FINE CAN BE EXCESSIVE IN THE JUVENILE CONTEXT

The juvenile fee problem implicates several constitutional questions: whether it is consistent with Due Process, Equal Protection, and—as this Comment will explore—the Eighth Amendment’s Excessive Fines Clause. Analyzing juvenile fines and fees under the Excessive Fines Clause allows a closer look at the root of the problem, and eliminating the practice of imposing fines and fees on juveniles at the sentencing stage avoids the imposition of debt in the first place. As mentioned, a fine violates the Excessive Fines Clause and is thus unconstitutional if it is “grossly disproportional to the gravity of [the] offense.”<sup>93</sup> The crux “of the constitutional inquiry under the Excessive Fines Clause is the principle of proportionality,” meaning “[t]he amount of the [fine] must bear some relationship to the gravity of the offense that it is designed to punish.”<sup>94</sup>

In the context of the Eighth Amendment, “excessive” means “surpassing the usual, the proper, or a normal measure of proportion.”<sup>95</sup> In *United States v. Bajakajian*, the Supreme Court established four factors to consider when determining if a fine is excessive under the Excessive Fines Clause: “(1) the defendant’s culpability; (2) the relationship between the harm and the penalty; (3) the penalties imposed in similar statutes; and (4) the defendant’s ability to pay.”<sup>96</sup> A look at the proportionality cases from which the excessiveness test is derived reveals a few key principals that guide the Excessive Fines Clause analysis: a “desire for equality in sentencing; the need for comparative proportionality of sentencing based on offense seriousness; . . . a concern for the potential criminogenic effect of . . . punishment; and [a desire to not] unreasonably undermine . . . human dignity.”<sup>97</sup>

It is worth noting, however, that federal circuit courts are divided on whether wealth and income are relevant to the *Bajakajian* excessive-fines analysis. Some courts have held that the ability to pay is relevant, either as a proportionality inquiry or in addition to one, while others have held that ability to pay should have no bearing on the *Bajakajian* analysis whatsoever.<sup>98</sup> What this circuit split underscores is that

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<sup>93</sup> *United States v. Bajakajian*, 524 U.S. 321, 324 (1998).

<sup>94</sup> *Id.* at 334.

<sup>95</sup> *Id.* at 335.

<sup>96</sup> *Lockyer v. R.J. Reynolds Tobacco Co.*, 124 P.3d 408, 421 (Cal. 2005) (citing *Bajakajian*, 524 U.S. at 337–38).

<sup>97</sup> *The Modern Debtors’ Prison*, *supra* note 22, at 47.

<sup>98</sup> *See id.* at 55–57.

determining ability to pay is not as straightforward as looking at a defendant's bank account or assets, and should not be treated as such a simple inquiry.<sup>99</sup>

The following Sections address the *Bajakaijan* factors as applied to juveniles, and ultimately conclude that juvenile economic sanctions are unconstitutional and in violation of both the Excessive Fines Clause and the Equal Protection Clause of the Fourteenth Amendment.<sup>100</sup>

#### A. *Juveniles and their Lessened Culpability*

It is a fundamental principle of justice that “two people equally culpable for the same offense deserve, and therefore should receive, the same punishment.”<sup>101</sup> An inquiry under the Excessive Fines Clause thus requires careful consideration of (1) the seriousness of the offense, and (2) the defendant's level of culpability.<sup>102</sup> Subjectivist and objectivist Eighth Amendment theorists agree that there is some validity to “subjective consideration of offender sensitivity in cases in which the use of a particular [form of punishment] may be cruel or excessive as a result of age or serious medical condition.”<sup>103</sup> The concept of equal culpability and offender sensitivity is particularly relevant in the context of juvenile proceedings; as explained below, the Supreme Court has recognized that juveniles are inherently less culpable for their crimes as a result of their age.<sup>104</sup> Because of this, the Court has recognized that only “the odd legal rule . . . does not have some form of exception for children.”<sup>105</sup> This means that judges should not levy the same fines against juveniles and adults alike.

The Supreme Court solidified this principle in *Roper v. Simmons*, holding that the Eighth Amendment forbids the imposition of the death penalty on offenders under the age of eighteen.<sup>106</sup> The Court recognized that children have lessened culpability when they offend, citing the fact that children are not trusted with the same “privileges and responsibilities” as adults to illustrate why their conduct is less morally

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<sup>99</sup> Ruback, *supra* note 35, at 1809.

<sup>100</sup> Note that the Eighth Amendment is an incorporated protection, and thus the restraints of the Eighth Amendment apply with equal force to the states and can be analyzed under the Equal Protection Clause of the Fourteenth Amendment. *See generally* *Timbs v. Indiana*, 139 S. Ct. 682, 687 (2019).

<sup>101</sup> *The Modern Debtors' Prison*, *supra* note 22, at 48.

<sup>102</sup> *Id.*

<sup>103</sup> *Id.* at 51 n.273.

<sup>104</sup> *See Roper v. Simmons*, 543 U.S. 551, 567 (2005).

<sup>105</sup> *Miller v. Alabama*, No. 10-9646, slip op. at 19 (U.S. June 25, 2012).

<sup>106</sup> 543 U.S. at 568.

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reprehensible.<sup>107</sup> There are three notable differences bearing upon a juvenile's lessened culpability for the same crime: (1) a lack of maturity and an underdeveloped sense of responsibility; (2) increased vulnerability and susceptibility to negative influences and outside pressures; and (3) the transitory nature of a juvenile's character and personality traits, making the juvenile more likely to rehabilitate.<sup>108</sup> The government already recognizes these differences by treating juveniles differently, affording them less freedom by prohibiting them from "voting, serving on juries, or marrying without parental consent."<sup>109</sup> The Court concluded that "[t]he susceptibility of juveniles to immature and irresponsible behavior" was relevant to assessing a juvenile's culpability, and juveniles thus should be more easily "forgiven for failing to escape negative influences in their whole environment."<sup>110</sup> For these reasons, the Court extended the ruling of *Thompson v. Oklahoma*, which prohibited the death penalty for juveniles under sixteen, to apply to all juveniles under the age of eighteen, as eighteen is the "point where society draws the line for many purposes between childhood and adulthood."<sup>111</sup>

*Graham v. Florida* further extended the holdings set forth in *Thompson* and *Roper*, prohibiting life-without-parole sentences for juvenile offenders "who do not kill, intend to kill, or foresee that life will be taken . . ." <sup>112</sup> The Court held that the Eighth Amendment forbids life sentences without parole for non-homicide juvenile offenders because of their limited culpability as compared to the severity of the sentence.<sup>113</sup> The Court reasoned that holding otherwise would be cruel, as juvenile defendants deserve "some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation" once they have reached adulthood and can fully appreciate the severity of their crimes.<sup>114</sup> According to the opinion, sentencing juveniles requires greater leniency because juveniles are inherently at a "significant disadvantage in criminal proceedings" since many juveniles "mistrust adults and have limited understandings of the criminal justice

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<sup>107</sup> *Id.* at 561 (quoting *Thompson v. Oklahoma*, 487 U.S. 815, 835 (1988)).

<sup>108</sup> *Id.* at 569.

<sup>109</sup> *Id.* at 569.

<sup>110</sup> *Id.* at 570.

<sup>111</sup> *Id.* at 574.

<sup>112</sup> See *Graham v. Florida*, 560 U.S. 48, 69, 74 (2010); see also *Miller v. Alabama*, No. 10-9646, slip op. at 17 (U.S. June 25, 2012) (agreeing with the holdings set forth in *Roper* and *Graham* and emphasizing that making youth and all that accompanies it irrelevant to imposition of prison sentences poses "too great a risk of disproportionate punishment" under the Eighth Amendment).

<sup>113</sup> *Graham*, 560 U.S. at 74.

<sup>114</sup> *Id.*

system.”<sup>115</sup> These disadvantages in criminal proceedings can be attributed to a juvenile’s “[d]ifficulty in weighing long-term consequences . . . [and] a corresponding impulsiveness.”<sup>116</sup> Finally, the Court took issue with the fact that life-without-parole sentences deprive juveniles of “the opportunity to achieve maturity of judgment and self-recognition of human worth and potential.”<sup>117</sup>

Just as life-without-parole sentences give juveniles “no chance for reconciliation with society [and] no hope,”<sup>118</sup> imposing economic sanctions on juveniles who lack the ability to pay deprives juveniles of the same opportunities by sentencing them to a life of poverty with little hope of rehabilitation. For this reason, *Graham*’s point that juveniles should be treated differently than adults over eighteen for the purposes of sentencing should apply with equal force to economic sanctions.<sup>119</sup> Critics of the more lenient approach to sentencing for juveniles argue that because the death penalty, which was the punishment at issue in *Roper* and *Thompson*, is the most severe punishment, “the Eighth Amendment applies to it with special force,” meaning that the reasoning in *Roper* and *Thompson* cannot be extended to less severe punishments such as economic sanctions.<sup>120</sup> While it may be true that the Eighth Amendment does not apply to economic sanctions with as much force as it does capital punishment, this does not mean that economic penalties are exempt from the purview of the Eighth Amendment. In *Harmelin v. Michigan*, for example, the Court declined to extend the sentencing requirements articulated in *Roper* and *Graham* to a drug possession conviction because of “the qualitative difference between death and all other penalties.”<sup>121</sup> *Harmelin* did not deal with juvenile offenders, but this qualitative difference in treatment between death and economic sanctions is important to note, especially since it is clear from *Roper* and *Graham* that juveniles have traditionally been treated differently under the law.

#### B. Juveniles’ Inherent Inability to Pay

Courts should likewise examine juveniles’ ability to pay, both now and in the future, before imposing a fine or punishment for nonpayment because juveniles inherently lack the ability to pay almost any fine or

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<sup>115</sup> *Id.* at 78.

<sup>116</sup> *Id.*

<sup>117</sup> *Id.* at 79.

<sup>118</sup> *Id.*

<sup>119</sup> *See Graham*, 560 U.S. at 82.

<sup>120</sup> *Roper v. Simmons*, 543 U.S. 551, 568 (2005).

<sup>121</sup> 501 U.S. 957, 995 (1991).

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fee, and this problem only compounds into their futures. For example, children presumptively lack their own financial resources, and “[m]any states restrict work for those under eighteen and limit their ability to enter into contracts.”<sup>122</sup> When considering a juvenile’s future ability to pay, it is important to recognize that a juvenile offender facing probation or participating in a diversion program will likely struggle to balance the requirements of their probation or program, school, and a job.<sup>123</sup> In many states, juveniles can face extended probation or even jail time for failure to pay juvenile fees that they were never equipped to pay in the first place.<sup>124</sup> The Constitution requires that, before punishing someone for failing to pay a fee or fine, a court must inquire into that individual’s ability to pay.<sup>125</sup> Unfortunately, this almost never happens in juvenile sentencing.

The Supreme Court established the requirement that judges are to consider one’s ability to pay a fine or fee in *Bearden v. Georgia*.<sup>126</sup> In *Bearden*, the Court held that “a sentencing court cannot properly revoke a defendant’s probation for failure to pay a fine and make restitution” without evidence that: (1) he was responsible for the failure to pay, or (2) other forms of punishment were inadequate to accomplish the goals of punishment and deterrence.<sup>127</sup> This holding was among the first to establish that courts must inquire into the ability to pay a fine or fee before imposing serious punishments. In *Bearden*, the petitioner was indicted for the felonies of burglary and theft and was sentenced to three years of probation.<sup>128</sup> As a condition of his probation, the petitioner had to pay \$750 in fines and restitution.<sup>129</sup> The trial court never considered the petitioner’s ability to pay before imposing these fines.<sup>130</sup> In order to pay the first \$200 of his fines and restitution, the petitioner had to borrow money from his parents, and payment of the remaining balance was made even more difficult when the petitioner was subsequently laid off from his job.<sup>131</sup> When the petitioner notified the probation office that he was going to be late with payments, the state immediately filed a petition to revoke the petitioner’s probation, based

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<sup>122</sup> ADVISORY ON LEVYING FINES AND FEES ON JUVENILES, *supra* note 8, at 8.

<sup>123</sup> *Id.*

<sup>124</sup> Selbin, *supra* note 12, at 412.

<sup>125</sup> *Id.* at 406.

<sup>126</sup> 461 U.S. 660, 661–62 (1983).

<sup>127</sup> *See id.*

<sup>128</sup> *Id.*

<sup>129</sup> *Id.*

<sup>130</sup> *Id.*

<sup>131</sup> *Id.*

on his inability to pay the relevant fines and fees.<sup>132</sup> The Court, quoting Justice Black, agreed that “[t]here can be no equal justice where the kind of trial a man gets depends on the amount of money he has.”<sup>133</sup> The Court ultimately held that “in revocation proceedings for failure to pay a fine or restitution, a sentencing court must inquire into the reasons for the failure to pay,” as it is fundamentally unfair to punish a person further solely because they lacked the resources to pay their fines at no fault of their own.<sup>134</sup>

The ability to pay should be considered in the initial sentencing to ensure defendants are not forced into debt in the first place. In fact, most sentencing guidelines “mandate that this factor be considered.”<sup>135</sup> In *People v. Cowan*, the First Appellate District of California held that, based on previous Supreme Court precedent and because “ability to pay is an element of the excessive fines calculus under both the federal and state Constitutions,” a sentencing court may not impose certain fines without giving the defendant some opportunity to present evidence as to why an economic sanction exceeds his ability to pay.<sup>136</sup> The court also postulated that it is often “irrational to impose a funding burden on litigants who are unable to pay, for collection from them, by definition, is futile.”<sup>137</sup> Further, in the context of the juvenile justice system, the cost of collecting levied fees often outweighs any revenue that the fees were supposed to provide in the first place.<sup>138</sup>

### C. *Balancing the Harm and the Penalty*

Many fines and fees imposed in juvenile court are punishment for a defendant’s inability to pay the initial sanction or the resulting administrative fees. Juvenile courts purport to focus on rehabilitation, but these fines and fees arguably do nothing to repair the harm caused

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<sup>132</sup> *Bearden*, 461 U.S. at 663.

<sup>133</sup> *Id.* at 664 (quoting *Griffin v. Illinois*, 351 U.S. 12, 19 (1956) (plurality opinion)); see also *Williams v. Illinois*, 399 U.S. 235, 243 (1970) (holding that a State cannot subject convicted defendants to a period of imprisonment beyond the maximum solely because they are unable to pay their fines); *Tate v. Short*, 401 U.S. 395, 398 (1971) (holding that a State cannot convert a fine-only sentence into a jail term solely because the defendant is indigent and cannot pay a fine in full).

<sup>134</sup> *Id.* at 672–73.

<sup>135</sup> *United States v. Hines*, 88 F.3d 661, 664 (8th Cir. 1996).

<sup>136</sup> *People v. Cowan*, 260 Cal. Rptr. 3d 505, 521 (Cal. Ct. App., 1st App. District, Div. 4 2020).

<sup>137</sup> *Id.* at 530.

<sup>138</sup> See Selbin, *supra* note 12, at 408 (noting that most jurisdictions in California collected fees at very low rates and did not generate significant net revenue. Research also showed that counties spent, on average, more than seventy cents of every dollar of fee revenues on the collection of them).

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or further that goal—instead, they drive juveniles further into poverty.<sup>139</sup>

As the Supreme Court recognized in *Harmelin*, it is a legitimate concern that monetary fines, unlike other forms of punishment, will be imposed in a way that goes against the justice system's goals of rehabilitation and deterrence, since fines are a source of revenue that the state stands to benefit from.<sup>140</sup> Taking this concern further, it can be argued that "the state will behave unfairly, and even nonsensically, in the quest to obtain revenue."<sup>141</sup> The risk of unfair treatment by the states is particularly harmful in the juvenile justice system where, for the neediest defendants, excessive fines may result in the potential loss of shelter, transportation, food and clothing, and can result in years of lasting consequences.<sup>142</sup> In fact, "court-imposed debt, even in small amounts, may threaten an indigent person's means of subsistence when penalties, interest, and collections costs" flowing from the inability to pay a sanction are considered.<sup>143</sup> The "comparative disproportionality of both immediate and post-sentencing poverty penalties is readily apparent because they are triggered by a defendant's inability to pay rather than her culpability for the underlying offense."<sup>144</sup> Failing to pay court-ordered debt may block access to early probation release and hinder eligibility for expungement, both of which are essential to rehabilitation after a juvenile is out of the system.<sup>145</sup> Further, delinquency on court-ordered debt may "diminish prospects for employment and housing, disqualify the debtor from government benefits[,] . . . put public housing out of reach, and create incentives to obtain money by illegal means . . ."<sup>146</sup> This further works against the rehabilitative goals of the juvenile justice system.

Moreover, the Eighth Amendment's protection of human dignity prohibits penalties that "degrade[] through the deprivation of basic human needs such as food, shelter, health, and hygiene."<sup>147</sup> The consequences of economic sanctions imposed on those juveniles unable to pay are in clear violation of this dignity principle when families are forced to pay juvenile court fees instead of buying their children food or

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<sup>139</sup> See ADVISORY ON LEVYING FINES AND FEES ON JUVENILES, *supra* note 8, at 10.

<sup>140</sup> *Harmelin v. Michigan*, 501 U.S. 957, 978–79 n.9 (1991).

<sup>141</sup> *The Modern Debtors' Prison*, *supra* note 22, at 59.

<sup>142</sup> *Cowan*, 260 Cal. Rptr. 3d. at 530.

<sup>143</sup> *Id.* at 533.

<sup>144</sup> *The Modern Debtors' Prison*, *supra* note 22, at 55.

<sup>145</sup> *People v. Cowan*, 260 Cal. Rptr. 3d. 505, 533 (Cal. Ct. App., 1st App. District, Div. 4 2020).

<sup>146</sup> *Id.*

<sup>147</sup> *The Modern Debtors' Prison*, *supra* note 22, at 69.

paying for probation supervision instead of the utility bill.<sup>148</sup> Juvenile courts should consider whether imposing financial burdens on juveniles serves a rehabilitative purpose at all—in many cases, “fines and fees will be more punitive than rehabilitative, and they may, in fact, present an impediment to other rehabilitative steps, such as employment and education.”<sup>149</sup>

Proponents of juvenile economic sanctions as an alternative to traditional probation and incarceration point out that economic sanctions have four distinct advantages over traditional probation and incarceration. Economic sanctions (1) use a metric that is universally understood; (2) provide flexibility, in that they can be adjusted to suit an offender’s specific circumstances; (3) can be used to help the victim, restore justice, and punish the offender; and (4) can be used to provide intermediate punishments, somewhere between probation and incarceration.<sup>150</sup> Unfortunately, these so-called advantages are idyllic. Economic sanctions are typically not adjusted to suit the offender’s circumstances, as courts oftentimes ignore the ability to pay and, as argued here, do not consider potential mitigating circumstances such as a defendant’s age and maturity.<sup>151</sup> Economic sanctions also are unique in that they “automatically invoke factors associated with wealth and poverty, including race, class, education, job skills, and employment.”<sup>152</sup> Further, only restitution and community service potentially serve the purpose of restoring justice and helping the victim—the majority of fines do nothing except benefit private corporations or go back into the juvenile court system, causing a conflict of interest in courts and agencies that impose, collect, and use the revenues collected.<sup>153</sup> Finally, economic sanctions imposed on juveniles are not the intermediate alternative that scholars typically associate with monetary punishments for adults.<sup>154</sup> Unlike juvenile offenders, adult offenders typically have some level of income and thus are more likely to have the ability to pay fines and fees.<sup>155</sup> This is not the case in the juvenile justice system, where economic sanctions put juveniles in a “debtor’s prison” for life, making the punishment far more serious than the initial fine.<sup>156</sup>

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<sup>148</sup> See *supra* Part II, Section H (outlining Brenda Tindal’s story).

<sup>149</sup> ADVISORY ON LEVYING FINES AND FEES ON JUVENILES, *supra* note 8, at 10.

<sup>150</sup> Ruback, *supra* note 35, at 1782–83.

<sup>151</sup> See *Reviving the Excessive Fines Clause*, *supra* note 16, at 328–29.

<sup>152</sup> Ruback, *supra* note 35, at 1784.

<sup>153</sup> *Id.* at 1814–15.

<sup>154</sup> *Id.* at 1783.

<sup>155</sup> See *id.*

<sup>156</sup> See *The Modern Debtors’ Prison*, *supra* note 22, at 9; see generally DEBTORS’ PRISON FOR KIDS, *supra* note 3.

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## IV. CURRENT STATE REFORM: WHY IS IT WORKING?

Several states have already adopted legislation either eliminating or aggressively limiting the use of economic sanctions in the juvenile system. This includes, but is not limited to, the Washington State Youth Equality and Reintegration Act (YEAR Act), California Senate Bill 190, New Jersey Senate Bill Forty-Eight, and Maryland House Bill Thirty-Six. All states should adopt provisions similar to the four discussed in this Part. The experience of these states shows that eliminating fines and fees is unlikely to significantly impact state and local finances,<sup>157</sup> and in fact can eliminate the risk that state fee practices will violate state law, federal law, or constitutional guarantees of due process and equal protection.<sup>158</sup>

Washington State Senate Bill 5564,<sup>159</sup> more widely known as the YEAR Act, eliminated several legal financial obligations for juveniles, including general fines for felonies and misdemeanors; interest on financial obligations; conviction fees; public defense costs; and over a dozen more legal obligations.<sup>160</sup> When imposing any legal financial obligations that were not eliminated under the bill, the YEAR Act requires courts to consider factors such as “incarceration and the juvenile’s other debts, including restitution” when determining the juvenile’s ability to pay.<sup>161</sup> Similarly, New Jersey Senate Bill Forty-Eight,<sup>162</sup> which became law on January 20, 2020, incorporated the Juvenile Detention Alternative Initiative into the Code of Juvenile Justice. Among other changes, this law eliminated “certain fines imposed on juveniles.”<sup>163</sup> New Jersey previously had some of the most punitive fines in the country; however, the historic passage of Senate Bill Forty-Eight not only eliminates fines as a penalty for youth but also “allows for the termination of post-incarceration supervision even when a youth has not made a full payment of all outstanding fines[.]” thus

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<sup>157</sup> See H.B. 36, 2020 Gen. Assemb., 2020 Sess. (Md. 2020); see also DEBTORS’ PRISON FOR KIDS, *supra* note 3, at 7 (noting the fact that juvenile incarceration itself is highly expensive).

<sup>158</sup> BERKLEY L. POL’Y ADVOC. CLINIC, FEE ABOLITION AND THE PROMISE OF DEBT-FREE JUSTICE FOR YOUNG PEOPLE AND THEIR FAMILIES IN CALIFORNIA: A STATUS REPORT ON THE IMPLEMENTATION OF SENATE BILL 190 4 (2019) [hereinafter THE IMPLEMENTATION OF SENATE BILL 190].

<sup>159</sup> S.B. 5564, 2015 Reg. Sess. (Wash. 2015).

<sup>160</sup> WASH. S. COMM. ON WAYS & MEANS, ET AL., FINAL BILL REPORT, S. E2SSB 5564, 2015 Reg. Sess., at 3–4 (2015).

<sup>161</sup> *Id.* at 3.

<sup>162</sup> N.J.S.B. 48, 218th Leg., Gen. Sess. (N.J. 2020).

<sup>163</sup> *Id.*

abolishing the requirement that offenders seeking discharge from parole must provide proof that they have paid all fines and fees.<sup>164</sup>

Going even further, California passed Senate Bill 190<sup>165</sup> in October 2017, making California the first state to abolish entire categories of economic sanctions in the juvenile justice system and to eliminate a subset of fees for young people who do not qualify as juveniles and are in the adult criminal justice system.<sup>166</sup> Prior to this bill becoming law, almost every county in California was charging juveniles one or more administrative fees during their involvement in the system.<sup>167</sup> The legislative record in California showed that “administrative fees undermine[d] the rehabilitative and public safety goals of the juvenile legal system, [fell] hardest on low-income families of color, and [yielded] little net revenue.”<sup>168</sup> Other findings showed that several California county fee practices violated state law, federal law, and/or raised serious questions about the constitutionality of fee practices under due process and equal protection.<sup>169</sup> Counties that imposed fees in violation of state law often charged fees (1) not authorized by statute or (2) to families of youth who were not found guilty.<sup>170</sup> Counties that imposed fees in violation of federal law, on the other hand, engaged in practices such as charging families for “their children’s meals while seeking reimbursement for those same costs from national school lunch and breakfast programs.”<sup>171</sup> In response to many of these findings, counties across California began to voluntarily end all juvenile fee assessments and collections, until Senate Bill 190 made the end of these assessments mandatory statewide.<sup>172</sup>

Looking at the most recent legislation, Maryland House Bill Thirty-Six,<sup>173</sup> which was introduced in the 2020 session of the Maryland General Assembly, proposed to repeal all statutory provisions that “authorize the juvenile court to (1) impose civil fines or court costs; (2) assess attorney’s fees; and (3) order a parent to pay a sum to support

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<sup>164</sup> Katrina L. Goodjoint, Opinion, *New Jersey Just Eliminated Fines for Youth in the Juvenile System. And That’s a Good Thing*, STAR LEDGER / NJ.COM (Jan. 22, 2020), <https://www.nj.com/opinion/2020/01/new-jersey-just-eliminated-fines-for-youth-in-the-juvenile-system-and-thats-a-good-thing-opinion.html>.

<sup>165</sup> S.B. 190, 2017–2018 Reg. Sess. (Cal. 2017).

<sup>166</sup> THE IMPLEMENTATION OF SENATE BILL 190, *supra* note 158, at 1.

<sup>167</sup> *Id.* at 3.

<sup>168</sup> *Id.* at 4.

<sup>169</sup> *Id.*

<sup>170</sup> Selbin, *supra* note 12, at 405.

<sup>171</sup> *Id.* at 405–06.

<sup>172</sup> *Id.* at 409–10.

<sup>173</sup> H.B. 36, 2020 Gen. Assemb., 2020 Sess. (Md. 2020).

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the child.”<sup>174</sup> The bill became law on October 1, 2020, and renders uncollectable any court-ordered fines, fees, or costs with an outstanding balance.<sup>175</sup> At the time this Comment was written, the Maryland General Assembly anticipated that any potential loss of revenue as a result of the bill’s prohibition against specified economic sanctions in juvenile proceedings would not “materially affect State and local finances.”<sup>176</sup> In spite of this state reform, however, most states still impose fines and fees on juveniles, so more systemic solutions are necessary. Based on the success demonstrated by these states, it is clear that the system-wide reform and solutions recommended in this Comment can be implemented with no negative impact on the overall efficacy of the juvenile justice system.

V. PROPOSED SOLUTIONS: UNIVERSAL LEGISLATIVE REFORM, SENTENCING CONSIDERATIONS, AND FEE-FREE ALTERNATIVES

All states should follow the lead of states, like California, that eliminated juvenile costs, fines, and fees per the recommendations of the DOJ and the National Juvenile Defender Center.<sup>177</sup> As an interim remedy before juvenile fees and fines can be wholly eliminated, juvenile courts should be mandated to consider a juvenile defendant’s ability to pay and his or her culpability based on age before imposing any economic sanction. This would help to ensure that any fees or fines imposed in the interim are not excessive or unreasonable under the standard set forth in *Bajakajian*. Applying the same standard, courts should likewise strike down any existing excessive fees under the Eighth Amendment.

Congress and the states can also encourage change through practices such as (1) using the Taxing and Spending Power to place relevant conditions on state or federal prison funding; (2) encouraging collaboration between high-profile leadership, bipartisanship, and within the three branches; and/or (3) engaging with community service providers and employers to create more alternatives to economic penalties.<sup>178</sup> In terms of economic sanctions that should be wholly

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<sup>174</sup> *Id.*

<sup>175</sup> *Id.*

<sup>176</sup> *Id.*

<sup>177</sup> See NAT’L COUNCIL OF JUV. & FAM. CT. JUDGES, STATE JUST. INST. & NAT’L JUV. DEF. CTR., *supra* note 44; see generally ADVISORY ON LEVYING FINES AND FEES ON JUVENILES, *supra* note 8.

<sup>178</sup> For examples of current strategies and practices being used to encourage prison reform in various states, see generally THE SENT’G PROJ., DECARCERATION STRATEGIES: HOW 5 STATES ACHIEVED SUBSTANTIAL PRISON POPULATION REDUCTIONS 4–8 (2018), <https://www.sentencingproject.org/publications/decarceration-strategies-5-states-achieved-substantial-prison-population-reductions/>.

eliminated in the juvenile system, states should no longer impose counsel fees; cash bail; probation supervision and placement fees; fees for informal adjustment/diversion; evaluation and testing fees; cost of care fees; court costs and fees; fines; and expungement/sealing fees. Based on the inherent unreasonableness and particularly damaging effects of fees for informal adjustment/diversion, cost of care, and expungement/sealing, these fees should be eliminated first. Courts may continue to impose (1) community service that promotes positive youth development; (2) fee-free diversion programs; and (3) periodic payment plans for existing fines and fees in the interim.<sup>179</sup>

A. *Economic Sanctions to be Eliminated*

In drafting and implementing a federal legislative solution, Congress should eliminate the following economic sanctions in the juvenile justice system. At the start of juvenile system involvement, counsel for youth should be appointed without consideration of family income, and children and their families should be exempt from the imposition of any counsel fees. Shelby County, Tennessee, for example, presumes that all children are indigent for the purposes of appointing counsel and setting bond, while Pennsylvania, Louisiana, and North Carolina all presume that all children are eligible for the appointment of state-provided counsel.<sup>180</sup> Both of these approaches are reasonable solutions because each recognizes that juveniles inherently lack an ability to pay. There should likewise be no general fines, evaluation and testing fees, or court costs imposed on juveniles in the juvenile justice system, especially when they are used as a source of revenue.

Similarly, Congress should prohibit the imposition of cash bail or financial conditions on the release of juveniles. Juveniles should never be detained for the inability to pay bail because, as this Comment argues, this is unconstitutionally punishing poverty by ignoring the requirement to assess the ability to pay under the Excessive Fines Clause.<sup>181</sup> Access to judicial hearings should not be conditioned on the prepayment of fines, and no juveniles should be incarcerated or detained for non-payment of financial obligations when the failure to pay stems from poverty, lack of income, or an inability to pay. If these fines and fees related to juvenile system involvement are no longer imposed on juveniles, courts and other agencies will no longer be at risk

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<sup>179</sup> See NAT'L COUNCIL OF JUV. & FAM. CT. JUDGES, STATE JUST. INST. & NAT'L JUV. DEF. CTR., *supra* note 44.

<sup>180</sup> ADVISORY ON LEVYING FINES AND FEES ON JUVENILES, *supra* note 8, at 7.

<sup>181</sup> See *supra* Part III.

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of enforcing fines and fees in a way that “punishes children for their poverty in violation of the Fourteenth Amendment.”<sup>182</sup>

Congress should excuse children and their families from paying probation and post-release supervision fees. There should be no fees imposed on juveniles for out-of-home placement. Even if Congress elects to continue imposing supervision fees, inability to pay should not be considered a probation violation, and failure to pay should never result in incarceration.<sup>183</sup> Additionally, no fees should be charged for juveniles participating in diversion programs. If Congress still allows courts to charge diversion fees, the ability to pay must be considered, and access should never be denied or revoked for a failure to pay. Congress should abolish the fees associated with juvenile expungement or sealing, and this should be made clear to any juveniles seeking to protect their records. Further, juveniles should be aware that their outstanding fees and/or finances will not be considered in determining eligibility for record sealing or expungement.

Finally, if a child remains stuck in the juvenile system, Congress should adjust the current cost of care policies, and any failure to pay these costs should not result in punitive action to the juvenile.

#### B. *Appropriate Alternatives to Fines and Fees*

While the majority of juvenile economic sanctions are inappropriate and often illegal under the Eighth Amendment, there are certain programs that may appropriately serve the rehabilitative goals of the juvenile system. Courts can impose community service that “promote[s] positive youth development and support[s] principles of restorative justice, allowing the youth to repair the harm caused by their actions.”<sup>184</sup> For example, if a juvenile’s offense is theft, the Constitutional Rights Foundation and the Office of Juvenile Justice and Delinquency Prevention suggested in a recent report that juveniles “talk to owners or managers of local stores to find out about the impact of shoplifting and write a letter to the editor of the school or local paper about the subject.”<sup>185</sup> In the case of vandalism, the same report suggested that juvenile offenders “partner with school administrators, local representatives, business owners, or park and recreation officials to restore a public wall or playground that has been the target of

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<sup>182</sup> ADVISORY ON LEVYING FINES AND FEES ON JUVENILES, *supra* note 8, at 7.

<sup>183</sup> DEBTORS’ PRISON FOR KIDS, *supra* note 3, at 10.

<sup>184</sup> NAT’L COUNCIL OF JUV. & FAM. CT. JUDGES, STATE JUST. INST. & NAT’L JUV. DEF. CTR., *supra* note 44.

<sup>185</sup> CHARLES DEGELMAN ET AL., GIVING BACK: INTRODUCING COMMUNITY SERVICE LEARNING 29 (2006).

vandalism.”<sup>186</sup> Fee-free diversion programs and evidence-based services to keep children in schools and out of court are similarly appropriate.

For fines that continue to be imposed in the time before a universal legislative solution is adopted, states should offer a periodic payment plan for youth that does not charge onerous user fees or interest; allows for electronic and web-based payments; and offers a mechanism for youth to seek a reduction in their debt if financial circumstances change.<sup>187</sup> In New York State, for example, the Lewis County Transitions to Independence Process (TIP) works with juveniles aged sixteen to twenty-one “who have a serious mental illness and are defendants/offenders under the probation department’s jurisdiction.”<sup>188</sup> TIP is an evidenced-based intervention program that focuses on improving juveniles’ prospects for “employment, education, housing and community life adjustment.”<sup>189</sup> The program assists participants in “obtaining and/or stabilizing resources related to these categories, including linkage to services, case monitoring and providing transportation as necessary.”<sup>190</sup> Programs like TIP would not only better serve the rehabilitative goals of the juvenile system while we await a legislative solution, but would also be more likely to improve outcomes for juveniles involved in the system during this time.

## VI. CONCLUSION

Consistent with Eighth Amendment jurisprudence and evidence-based research, economic sanctions, especially fines and fees, should not be imposed in the juvenile justice system. Juveniles should be presumed to lack the ability to pay from the beginning of their sentencing, and any punishments should be appropriately adjusted to match their lessened level of culpability. These changes would be best achieved through universal legislation, following the example of states like California and New Jersey, which have already expansively limited or completely eliminated juvenile fees and fines.<sup>191</sup>

In order for the changes proposed in this Comment to be successful, it is important to strike a balance between the uniformity and flexibility

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<sup>186</sup> *Id.* at 35.

<sup>187</sup> NAT’L COUNCIL OF JUV. & FAM. CT. JUDGES, STATE JUST. INST. & NAT’L JUV. DEF. CTR., *supra* note 44.

<sup>188</sup> N.Y. Div. of Crim. Just. Serv.’s, *Alternative to Incarceration (ATI) Programs*, N.Y. STATE, [https://www.criminaljustice.ny.gov/opca/ati\\_description.htm](https://www.criminaljustice.ny.gov/opca/ati_description.htm) (last visited Sept. 19, 2020).

<sup>189</sup> *Id.*

<sup>190</sup> *Id.*

<sup>191</sup> *See supra* Part IV.

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of laws. Bright-line rules make decisions more “consistent and predictable,” while discretion “promotes flexibility and efficiency, allowing atypical case facts to be considered in order to do justice and avoid unnecessary burdens and expense.”<sup>192</sup> Any bright-line rules in the juvenile system need to be created specifically for the juvenile offender because any child in the juvenile justice system is an atypical case when compared to the standard criminal offender. Economic sanctions can destroy a juvenile offender’s future just as much as a prison sentence. The rationale courts use to justify prohibiting juvenile life-without-parole sentences should thus extend to fines and fees with equal force.

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<sup>192</sup> Richard S. Frase, *Forty Years of American Sentencing Guidelines: What Have We Learned?*, 48 CRIME & JUST. 79, 115 (2019).