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Nickels and Dimes? Rethinking the Imposition of Special Assessment Fees on Indigent Defendants

Ndjuoh MehChu

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NICKELS AND DIMES? RETHINKING THE IMPOSITION OF SPECIAL ASSESSMENT FEES ON INDIGENT DEFENDANTS*

NDJUOH MEHCHU**

*The Eighth Amendment to the U.S. Constitution bars the imposition of “excessive fines.” Despite this seemingly straightforward mandate, case law is not harmonious on the meaning of “excessive” under the Eighth Amendment. Significant questions persist as to whether imposing an economic sanction on a defendant that lacks any ability to pay is incongruous with the Amendment’s prohibition on excessive fines. Although the relevance of the “ability to pay” question to the excessiveness inquiry was acknowledged by the Supreme Court in the 2019 case *Timbs v. Indiana*, the Court left the resolution of the question for another day. This Article laments the Court’s decision to pass on this examination. It does so by analyzing the imposition of special assessment fees on indigent criminal defendants, an aspect of sentencing that has received remarkably little attention from legal scholars and practitioners.*

The starting point is an overview of the special assessment fee structure and how it compares to other economic sanctions imposed in the criminal legal system. When a defendant is sentenced, no fine is imposed if the judge determines that the defendant lacks the ability to pay any fine. In such circumstances, explicit in the judge’s determination is that the defendant is too poor to pay any amount of money. But the current special assessment fee structure requires every individual defendant to pay a \$100 special assessment fee for each count of conviction on a federal crime, even if the judge has already determined that the defendant is too poor to pay an accompanying fine. Because many Americans cannot relate to the jeopardy of being unable to pay a \$100 fee, it is taken for granted that individual defendants who cannot pay any amount of money should somehow be able to pay this amount. This thinking not only defies logic, it also ignores the reality that for people wrapped in the iron grip of poverty, even “small” legal financial obligations (“LFOs”) can have devastating consequences that trickle down to families and communities. The current special assessment scheme is also defective because it overlooks the administrative burdens of overseeing LFOs that will not be collected.

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With the consequences of these deficiencies in mind, this Article suggests a straightforward but overlooked reform to the special assessment scheme. It argues that a sentencing court should be permitted to, and ought to, waive the imposition of a special assessment fee if the court has already determined that a defendant is unable to pay any amount of money. At best, when a defendant's financial situation forecloses any payment, the status quo special assessment scheme is an administrative inefficiency because of the costs of overseeing LFOs. And at worst, it may violate the defendant's Eighth Amendment protections against excessive fines.

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INTRODUCTION

In criminal cases poor people lose most of the time, not because indigent defense is inadequately funded, although it is, and not because defense attorneys for poor people are ineffective, although some are. Poor people lose, most of the time, because in American criminal justice, poor people are losers.

—Paul Butler¹

The coronavirus (“COVID-19”) pandemic has laid bare the financial vulnerability of many Americans. In the communities most devastated by COVID-19, the problems are not confined to mourning the loss of life.² Instead, the challenges run in several different directions. Basic necessities are a primary concern.³ Families are going hungry⁴ and struggling to keep the lights on.⁵ An unprecedented eviction crisis has left its mark.⁶ Viewing the economic strife through the prism of the global experience with the crisis, it is fair to say that the United States bungled the economic response to the virus.⁷ But while the

1. Paul D. Butler, *Poor People Lose: Gideon and the Critique of Rights*, 122 YALE L.J. 2176, 2178 (2013).

2. Annie Correal & Andrew Jacobs, ‘*A Tragedy Is Unfolding*’: Inside New York’s Virus Epicenter, N.Y. TIMES (Apr. 9, 2020), <https://www.nytimes.com/2020/04/09/nyregion/coronavirus-queens-corona-jackson-heights-elmhurst.html> [<https://perma.cc/MGA6-5T3B> (dark archive)] (last updated Aug. 5, 2020).

3. *Id.* (“In the meantime, the needs of the living keep growing. Thousands have lost jobs, and the undocumented have so far been excluded from federal government aid.”); see also Annie Gasparro & Jaewon Kang, *From Flour to Canned Soup, Coronavirus Surge Pressures Food Supplies*, WALL ST. J. (July 12, 2020), <https://www.wsj.com/articles/coronavirus-surge-challenges-struggling-food-supply-chains-11594546200> [<https://perma.cc/THX3-5TG5>].

4. Francesca Giuliani-Hoffman, *The Hunger Crisis Linked to Coronavirus Could Kill More People than the Disease Itself, Oxfam Warns*, CNN (July 12, 2020), <https://www.cnn.com/2020/07/12/us/hunger-crisis-deaths-coronavirus-oxfam-trnd/index.html> [<https://perma.cc/VU7D-HCBQ>].

5. Anna Bahney, *What To Do if You’re Worried About Paying Your Bills*, CNN (Mar. 22, 2020, 2:56 PM), <https://www.cnn.com/2020/03/22/success/cannot-pay-bills-coronavirus/index.html> [<https://perma.cc/C5SD-JUSW>].

6. Matthew Haag, *A Moratorium on Eviction Ends, Leaving Thousands of Tenants Fearful*, N.Y. TIMES (June 22, 2020), <https://www.nytimes.com/2020/06/22/nyregion/nyc-evictions-moratorium-coronavirus.html> [<https://perma.cc/PG9F-ENDS> (dark archive)] (last updated May 4, 2020).

7. It is perhaps easiest to assess the shortcomings by comparing the economic relief the United States has provided to Americans during the pandemic to how other nations have dealt with the economic fallout. By this measure, the nation’s response leaves a lot to be desired. See Daniel Villarreal, *Here’s How U.S. Coronavirus Stimulus Package Compares to Other Countries Around the World*, NEWSWEEK (Apr. 10, 2020, 9:15 PM), <https://www.newsweek.com/heres-how-us-coronavirus-stimulus-package-compares-other-countries-around-world-1497360> [<https://perma.cc/S8J4-C8UV>] (“Australia’s stimulus package allows furloughed employees to receive \$1,500 AUD (\$996.65 USD) every two weeks . . . Britain’s government is issuing grants covering 80 percent of unemployed workers’ salaries up to a total of £2,500 (\$3,084) a month . . . Canada will give \$2,000 CAD (\$1,433 USD) each

pandemic put a microscope on the nation's flawed policies toward the indigent, it would be a mistake to think that these inadequacies are limited to short-term pandemic responses. Indeed, they stretch into nearly every American institution.⁸ On this account, those who are poor and justice-involved are caught in a double bind. The following example illustrates this predicament.

Sixteen-year-old Kalief Browder was detained on a \$3,000 bail at Rikers Island.⁹ Because he was too poor to post bail, he languished for three years in jail without trial—nearly two of those in solitary confinement.¹⁰ His alleged offense? Stealing a backpack.¹¹ Kalief was released after the prosecution failed to find any evidence to support his detainment.¹² It has now been more than six years since he hung himself at his parents' home with an air conditioner cord.¹³ The incalculable tragedy of Kalief's story is a painful reminder of how the treatment of the indigent in the criminal legal system in the United States cannot be harmonized with elemental notions of justice.¹⁴

Indeed, surveying the landscape of the criminal legal system, it is readily apparent that laws and policies are routinely adopted and enforced in ways that do not augur well for the constitutional rights of the indigent.¹⁵ Although the Eighth Amendment to the U.S. Constitution provides that “excessive fines”

month for up to four months to those who've lost jobs due to the epidemic . . . France will pay 70 percent of an employee's gross salary to a monthly maximum of €6,927 (\$7,575 USD).”).

8. See, e.g., Sasha Abramsky, *America's Shameful Poverty Stats*, NATION (Sept. 18, 2013), <https://www.thenation.com/article/archive/americas-shameful-poverty-stats/> [<https://perma.cc/A4QM-FC7Q> (dark archive)].

9. Udi Ofer, *Kalief Browder's Tragic Death and the Criminal Injustice of Our Bail System*, ACLU (Mar. 15, 2017, 2:45 PM), <https://www.aclu.org/blog/smart-justice/kalief-browders-tragic-death-and-criminal-injustice-our-bail-system> [<https://perma.cc/9X2A-ZDYQ>]; see also Ted Alcorn, *Jail or Bail? There's a New Option*, N.Y. TIMES (Feb. 1, 2019), <https://www.nytimes.com/2019/02/01/nyregion/rikers-supervised-release-bail.html> [<https://perma.cc/2N7Z-NUFB> (dark archive)] (“16-year-old [Kalief Browder] . . . became the face of pretrial reform, was held on Rikers for three years for allegedly swiping a backpack, all the while maintaining his innocence, before prosecutors ultimately dropped the charges for lack of evidence.”).

10. Michael Schwirtz & Michael Winerip, *Kalief Browder, Held at Rikers Island for 3 Years Without Trial, Commits Suicide*, N.Y. TIMES (June 8, 2015), <https://www.nytimes.com/2015/06/09/nyregion/kalief-browder-held-at-rikers-island-for-3-years-without-trial-commits-suicide.html> [<https://perma.cc/A5GZ-4LYZ> (dark archive)].

11. *Id.*

12. *Id.*

13. Ofer, *supra* note 9.

14. Colleen Long & Hannah Fingerhut, *AP-NORC Poll, Nearly All in U.S. Back Criminal Justice Reform*, ASSOCIATED PRESS (June 23, 2020), <https://apnews.com/ffaa4bc564afcf4a90b02f455d8fd03> [<https://perma.cc/DBX2-AQZ6>] (“[N]early all Americans favor at least some level of change to the nation's criminal justice system.”); *91 Percent of Americans Support Criminal Justice Reform, ACLU Polling Finds*, ACLU (Nov. 16, 2017), <https://www.aclu.org/press-releases/91-percent-americans-support-criminal-justice-reform-aclu-polling-finds> [<https://perma.cc/M9X3-HJBY>].

15. *US: Criminal Justice System Fuels Poverty Cycle*, HUM. RTS. WATCH (June 21, 2018, 4:00 PM), <https://www.hrw.org/news/2018/06/21/us-criminal-justice-system-fuels-poverty-cycle#> [<https://perma.cc/ELK4-3AAQ>] (“[A]uthorities should not rely on fines and fees to pay for government programs because they disproportionately hurt the poor.”).

shall not be “imposed,”¹⁶ this constitutional mandate appears to be no more than advisory when indigent defendants are concerned. This Article suggests one straightforward but underappreciated way policymakers can shore up constitutional protections for the most financially vulnerable defendants. It diverges from past scholarship in that it is the first Article to undertake a sustained analysis of special assessments within the context of the Excessive Fines Clause.¹⁷

What are special assessments? Special assessments are statutorily mandated fees imposed as part of a defendant’s sentence.¹⁸ The fees are used to finance crime victims’ funds.¹⁹ When a defendant is sentenced on a felony conviction, no criminal fine²⁰ is imposed if the court determines that the defendant is unable to pay one.²¹ But despite such a determination, the judge is statutorily required to impose a \$100 special assessment fee for each count of conviction.²² Therefore, if the defendant is convicted on ten felony counts, a \$1,000 special assessment fee is statutorily mandated, even though the court has already determined that the defendant’s financial situation forecloses any payment.

This Article argues for a rethinking of the special assessment scheme. Specifically, this Article demonstrates that the special assessment scheme should be recalibrated to allow judges to waive the imposition of special assessment fees. The argument comes in three parts. Part I provides background on the Eighth Amendment’s Excessive Fines Clause, describing how the Supreme Court has interpreted the meaning of the terms “fine” and “excessive” within the scope of the Amendment. It explains that from the very beginning

16. U.S. CONST. amend. VIII.

17. The writings on the Excessive Fines Clause tend to focus on forfeitures and restitution. Special assessments are largely ignored in the literature. *See, e.g.*, Beth A. Colgan, *The Excessive Fines Clause: Challenging the Modern Debtors’ Prison* 65 UCLA L. REV. 2, 2 (2018) [hereinafter Colgan, *Challenging the Modern Debtors’ Prison*] (discussing forfeitures and restitution but not covering special assessments); Beth A. Colgan, *Reviving the Excessive Fines Clause*, 102 CALIF. L. REV. 277, 277 (2014) [hereinafter Colgan, *Reviving the Excessive Fines Clause*] (same); Beth A. Colgan, *Graduating Economic Sanctions According to Ability To Pay*, 103 IOWA L. REV. 53, 53 (2017) [hereinafter Colgan, *Graduating Economic Sanctions*] (same); Nicholas M. McLean, *Livelihood, Ability To Pay, and the Original Meaning of the Excessive Fines Clause*, 40 HASTINGS CONST. L.Q. 833, 833, 849–50 (2013) (same); Kevin Bennardo, *Restitution and the Excessive Fines Clause*, 77 LA. L. REV. 21, 21 (2016) (same).

18. 18 U.S.C. § 3013.

19. 34 U.S.C. § 20101(b)(2).

20. Economic sanctions in the criminal legal system that are punitive are generally grouped under the label of fines. But fines are also a specific class of economic sanctions—distinct from restitution, forfeitures, and special assessments—“imposed as a penalty after a criminal conviction or admission of guilt to a civil infraction.” CRIM. JUST. POL’Y PROGRAM, HARVARD L. SCH., CONFRONTING CRIMINAL JUSTICE DEBT: A GUIDE FOR POLICY REFORM 6 (2016), <https://cjdebtreform.org/sites/criminaldebt/themes/debtor/blob/Confronting-Crim-Justice-Debt-Guide-to-Policy-Reform.pdf> [https://perma.cc/BUN4-QZVE].

21. U.S. SENT’G GUIDELINES MANUAL § 5E1.2(a) (U.S. SENT’G COMM’N 2018).

22. 18 U.S.C. § 3013.

when the Eighth Amendment was ratified, there has been ambiguity as to the meaning of the terms, particularly regarding what constitutes excessive.²³ Regrettably, the Court has yet to rule on whether a defendant's ability to pay is relevant in determining the excessiveness of a fine, passing on this decision as recently as 2019 in *Timbs v. Indiana*.²⁴ As a consequence of the narrow interpretative boundaries of the excessiveness inquiry, the Court has failed to guard against yet another dimension of the injustices that befall poor people in the criminal legal system.²⁵ Failing to adopt an "ability to pay" test disadvantages the poorest defendants and erodes any notion of fair sentencing because it ignores the reality that for offenders of equal blameworthiness, a fixed fine inflicts a harsher punishment on those who are more financially insecure. Indeed, indigent defendants often face legal financial obligations ("LFOs")²⁶ that may appear insignificant to a wealthy person (i.e., \$100) but that would in practice deprive the poor of their livelihoods.

In light of that reality, Part II focuses its attention on special assessment fees. It begins by sketching the historical context in which special assessment fees were established, explaining that their provenance is tied to the victims' rights movement that emerged in the aftermath of the sensationalized violence of the 1960s civil rights revolution and peaked in the "tough on crime" era of mass incarceration in the mid-1980s. Through this examination, the Article historicizes the special assessment scheme as an artifact of a period where criminal law was guided primarily by the belief that punishing individuals to the harshest extent of the law was in the interest of "justice." But these beliefs no longer reflect prevailing understandings of crime and punishment.²⁷ Some aspects of the special assessment statute itself seem outmoded with the clarity

23. See Colgan, *Reviving the Excessive Fines Clause*, *supra* note 17, at 321 (explaining that "subsequent provisions of the Magna Carta [the Eighth Amendment's predecessor] underscore the importance of [the] proportionality requirement," which contemplate specifically that "defendants not be ruined by fines—that their ability to maintain a livelihood be saved").

24. 139 S. Ct. 682 (2019).

25. See Kaaryn Gustafson, *The Criminalization of Poverty*, 99 J. CRIM. L. & CRIMINOLOGY 643, 643 (2009) (examining the interconnectedness between the American welfare system and criminal legal system, and finding that in courts, the "poor have been relegated to an inferior status of rights-bearing citizenship, a status on par with parolees and probationers"); see also Butler, *supra* note 1, at 2178 ("In criminal cases poor people lose most of the time, not because indigent defense is inadequately funded, although it is, and not because defense attorneys for poor people are ineffective, although some are. Poor people lose, most of the time, because in American criminal justice, poor people are losers. Prison is designed for them.").

26. Criminal justice debt, also known as legal financial obligations ("LFOs"), refers to any debt accrued as a result of criminal justice involvement. For comprehensive coverage on the types of criminal justice debt, see generally Neil L. Sobol, *Charging the Poor: Criminal Justice Debt & Modern-Day Debtors' Prisons*, 75 MD. L. REV. 486 (2016).

27. Megan Brenan, *Fewer Americans Call for Tougher Criminal Justice System*, GALLUP (Nov. 16, 2020), <https://news.gallup.com/poll/324164/fewer-americans-call-tougher-criminal-justice-system.aspx> [<https://perma.cc/GQ5G-UPL2>] ("Americans' belief that the U.S. criminal justice system is 'not tough enough' on crime is now half of what it was in Gallup's initial reading of 83% in 1992.").

of hindsight. To provide background on these statutory defects, Part II then turns to the particularities of the special assessment statute and situates the special assessment scheme relative to other economic sanctions that are imposed after a criminal defendant is convicted: fines, restitutions, and forfeitures.

Part III laments the Court's failure to adopt an ability-to-pay test in determining whether an economic sanction is a constitutional impropriety under the Eighth Amendment. It begins by defending the threshold claim that special assessments are economic sanctions that should be considered "fines" under the Excessive Fines Clause. Part III then argues that special assessments fall comfortably within the meaning of fines for purposes of the Clause. The criteria are met for several reasons. One reason is because, like forfeitures and criminal fines, which are both nominally titled "fines" within the meaning of the Clause, special assessments are imposed by the government following conviction of a crime. Additionally, special assessment fees are statutorily mandated to be collected in the same manner as criminal fines.²⁸

With this foundation in place, Part III makes the case that the special assessment penalty scheme is in tension with current sentencing decisions involving the financial condition of criminal defendants. Judges routinely make evaluations about defendants, including their ability to satisfy legal financial obligations.²⁹ When a judge determines that a defendant lacks the ability to pay a fine, the judge's assessment will explicitly find that the defendant is *too poor to pay any amount of money*. Yet, in cases where the judge has already deemed the defendant incapable of paying any amount of money, the special assessment scheme is an administrative layer that can only be waived by the U.S. Attorney present at sentencing.³⁰ Compounding the problem, prosecutors rarely move for the judge to take such action.³¹ As a result, many criminal defendants wind up with unmanageable LFOs even though the court has already determined that they cannot pay any amount of money.

With due attention to these considerations, this Article proposes that when a sentencing court has decided against imposing any fine on the theory that a defendant is unable to pay one, the court should be permitted to, and

28. Referring to special assessment fees, 18 U.S.C. § 3013(b) states that "[s]uch amount so assessed shall be collected in the manner that fines are collected in criminal cases."

29. See, e.g., *United States v. Watts*, 519 U.S. 148, 151 (1997) (noting "the longstanding principle that sentencing courts have broad discretion to consider various kinds of information"); *Payne v. Tennessee*, 501 U.S. 808, 820–21 (1991) ("[T]he sentencing authority has always been free to consider a wide range of relevant material."); *United States v. Tucker*, 404 U.S. 443, 446 (1972) ("[B]efore [determining what sentence to impose], a judge may appropriately conduct an inquiry broad in scope, largely unlimited either as to the kind of information he may consider, or the source from which it may come.").

30. See 18 U.S.C. § 3573.

31. The basis of this conclusion is a study conducted by this author involving 112 federal criminal cases across the country where defendants were deemed at sentencing to be poor to pay a fine. See *infra* Appendix.

should, waive the special assessment on its own accord. On this view, whether a special assessment fee is waived would not depend on the prosecution's motion. In contrast to the current special assessment scheme, the proposed reform would advance the interests of the court by recognizing and affirming judges' sentencing discretion, protecting indigent defendants against unmanageable criminal justice debt, and reducing the costs to the government of overseeing criminal justice debt that is unlikely to be collected. With respect to victims, there is clearly no benefit to imposing a fee that cannot actually be collected and transferred to victims. Instead, this Article suggests the obligation to pay the special assessment fee can be profitably converted to an obligation to perform community service that will benefit the population harmed by the defendant's criminal conduct.

Part III ends by exploring the likely objections against the proposal. To give just one example, commentators advance arguments to the effect that waiving the imposition of special assessment fees on indigent defendants would under-deter the poor.³² This argument has roots in the Aristotelian notion of corrective justice, which says that "sanctions should be based on the wrong done rather than on the status of the defendant; a person is punished for what he does, not for who he is . . ."³³ To accept this argument is first to ignore that wealthy people who commit crimes usually receive lower sentences than poor people who commit the *same* offense in part because wealthy people have the resources to afford better representation.³⁴ Thus, while there may be legitimate policy reasons for conditioning punishment solely on the gravity of the offense, we should not ignore the reality that much of how society punishes individuals is based on the individual, not the crime.

Moreover, the under-deterrence theory also overlooks that people in dire financial straits who commit crimes typically do not vary their conduct based on the likelihood that they will be subjected to financial consequences.³⁵ The

32. Alec Schierenbeck, *The Constitutionality of Income-Based Fines*, 85 U. CHI. L. REV. 1869, 1882 (2018) (explaining that critiques of income-based fines often rail against such schemes on the ground that they will under-deter the poor).

33. *Mathias v. Accor Econ. Lodging, Inc.*, 347 F.3d 672, 676 (7th Cir. 2003).

34. Adam J. Kolber, *The Subjective Experience of Punishment*, 109 COLUM. L. REV. 182, 232 (2009).

35. See Torie Atkinson, *A Fine Scheme: How Municipal Fines Become Crushing Debt in the Shadow of the New Debtors' Prisons*, 51 HARV. C.R.-C.L. L. REV. 189, 237 (2016) ("The indigent cannot be deterred from 'crimes' that they must commit because of their poverty, particularly the crime of not paying a fine or fee."); see also Katherine Beckett & Alexis Harris, *On Cash and Conviction: Monetary Sanctions as Misguided Policy*, 10 CRIMINOLOGY & PUB. POL'Y 505, 506 (2011) ("For a penalty to effectively deter wrong-doing, its consequences must be known to potential offenders as they contemplate their options; swiftness and certainty are key. But the assessment of monetary sanctions is characterized by neither swiftness nor certainty."); Hannah Turner, *The Price of Freedom: An Analysis of Monetary Sanctions in the United States*, CLASSIC J. (2019), <http://theclassicjournal.uga.edu/index.php/2019/02/06/the-price-of-freedom-an-analysis-of-monetary-sanctions-in-the-united-states/> [<https://perma.cc/L37Y-SQAB>].

reason is because facing abject poverty is like living in a burning building. When the fire starts, fleeing takes over the mind; cost-benefit analyses do not play a prominent role in the deliberations.³⁶ Whatever route might lead to escape becomes attractive, regardless of what awaits on the other side. As the inimitable James Baldwin related the interplay of deterrence and severe hardship, “[i]f one is continually surviving the worst that life can bring, one eventually ceases to be controlled by a fear of what life can bring; whatever it brings must be borne.”³⁷

I. THE SUPREME COURT’S EXCESSIVE FINES JURISPRUDENCE

To promote equality in sentencing and alleviate the corrosive effects of poverty, we must bear in mind that “\$10 doesn’t sound like a lot, but it is a lot when you’re living on \$300 a month.”³⁸ Because many Americans—especially those in positions of power responsible for crafting criminal law and trying or adjudicating defendants—cannot fathom such economic hardship, the realities of the financial strife faced by the most indigent are often overlooked. But the situation just described sums up a common predicament for millions in the United States who are wrapped in the iron grip of poverty³⁹ and the criminal legal system. This part covers the doctrinal preliminaries of the Excessive Fines Clause, which the framers of the Eighth Amendment had hoped would save the poor from ruin.

A. *The Excessive Fines Clause and the Meaning of “Fines”*

The Excessive Fines Clause of the Eighth Amendment to the U.S. Constitution provides that “[e]xcessive bail shall not be required, *nor excessive fines imposed*, nor cruel and unusual punishment inflicted.”⁴⁰ The first Supreme Court case examining the Clause was *Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.*,⁴¹ involving a dispute related to waste disposal businesses

36. See Atkinson, *supra* note 35, at 237.

37. JAMES BALDWIN, *THE FIRE NEXT TIME* 106 (1963).

38. See KATHERINE A. BECKETT, ALEXES M. HARRIS & HEATHER EVANS, WASH. STATE MINORITY & JUST. COMM’N, *THE ASSESSMENT AND CONSEQUENCES OF LEGAL OBLIGATIONS IN WASHINGTON STATE* 42 (2008) [hereinafter BECKETT ET AL., *CONSEQUENCES OF LFOs*], https://media.spokesman.com/documents/2009/05/study_LFOimpact.pdf [https://perma.cc/RAT9-KSQE].

39. Pam Fessler, *U.S. Census Bureau Reports Poverty Rate Down, but Millions Still Poor*, NPR (Sept. 10, 2019), <https://www.npr.org/2019/09/10/759512938/u-s-census-bureau-reports-poverty-rate-down-but-millions-still-poor> [https://perma.cc/SFH5-MXU6] (“Despite the decline in poverty, the Census Bureau found that 38.1 million people in 2018 were poor. This was 1.4 million fewer poor people than in 2017, but about one in eight Americans still lived below the poverty line—\$25,465 for a family with two adults and two children.”).

40. U.S. CONST. amend. VIII (emphasis added).

41. 492 U.S. 257 (1989).

in Burlington, Vermont.⁴² Rejecting the claim that punitive damages awards in civil cases between private parties were “fines” within the meaning of the Excessive Fines Clause, the Court held that “the Excessive Fines Clause was intended to limit only those fines *directly imposed by, and payable to, the government.*”⁴³ The Court’s conclusion was anchored by the evolution of the Eighth Amendment, specifically the “purposes and concerns”⁴⁴ of the Amendment “as illuminated by its history.”⁴⁵

To begin with, the Court reasoned that the Eighth Amendment “clearly was adopted with the particular intent of placing limits on the powers of the new Government.”⁴⁶ It then observed that the Eighth Amendment was modeled on a provision of the English Bill of Rights of 1689 that was adopted to restrain government excesses.⁴⁷ That provision of the English Bill of Rights provided, in relevant part: “[E]xcessive Baile ought not to be required nor excessive Fines imposed *nor cruell and unusuall Punishments inflicted.*”⁴⁸ From these insights the Court concluded that, in the context of the Excessive Fines Clause, “the word ‘fine’ was understood to mean a payment to a sovereign as punishment for some offense.”⁴⁹ The ruling greatly narrowed the types of monetary sanctions that would be considered “fines” under the Eighth Amendment.⁵⁰

Given this background, one might understandably read *Browning-Ferris* as effectively cabining the meaning of “fines” under the Eighth Amendment to include only economic sanctions arising from criminal cases. But the Court in *Austin v. United States*⁵¹ made clear that the definition is more capacious. In *Austin*, the defendant Richard Lyle Austin was arrested after a search warrant executed on his autobody business revealed that he had been in possession of illegal contraband and \$4,700 in cash.⁵² After he was convicted of one count of possessing cocaine with intent to distribute, the government sought forfeiture

42. See *id.* at 260, 262 (“[T]his Court has never considered an application of the Excessive Fines Clause . . .”).

43. *Id.* at 268 (emphasis added).

44. *Id.* at 264.

45. *Id.*

46. *Id.* at 266.

47. *Id.* at 266–67.

48. An Act Declaring the Rights and Liberties of the Subject and Settling the Succession of the Crowne, 1688, 1 W. & M., sess. 2, § 9 (Eng.), reprinted in VI THE STATUTES OF THE REALM 142, 143 (Dawsons of Pall Mall 1963) (1819) (emphasis added).

49. *Browning-Ferris*, 492 U.S. at 265.

50. Colgan, *Reviving the Excessive Fines Clause*, *supra* note 17, at 298 (explaining that the *Browning-Ferris* Court “determined that the historical considerations mandated a narrow definition of ‘fines’ that limited the term to ‘payment to a sovereign as a punishment for some offense’”) (quoting *Browning-Ferris*, 492 U.S. at 265).

51. 509 U.S. 602 (1993).

52. *Id.* at 605.

of his home and business.⁵³ Austin challenged the *in rem* (against the property) action on the ground that it violated the Excessive Fines Clause of the Eighth Amendment.⁵⁴ Over the government's objection that the Eighth Amendment did not apply because the forfeiture sought was civil in nature, the Court ruled that assets obtained through civil forfeiture fall under the ambit of the Excessive Fines Clause.⁵⁵ As the *Austin* Court explained, "the notion of punishment . . . cuts across the division between the civil and the criminal law."⁵⁶

The Court further elaborated, stating that, "a civil sanction that cannot fairly be said solely to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes, is punishment . . ."⁵⁷ This ruling did not alter the earlier established requirements that a "fine" be a payment made to the government as a punitive measure. Rather, it provided additional color on what types of payments would be considered punitive and thus constitute a fine for purposes of the Excessive Fines Clause. Professor Beth A. Colgan has summed up that doctrinal expansion as follows: "If the government imposes the economic sanction upon a determination that the person committed a prohibited activity, or links the economic sanction to other recognized forms of punishment, the economic sanction constitutes a fine for the purposes of the Excessive Fines Clause."⁵⁸

A good question to ask at this point is what makes a payment to the government punitive as opposed to merely administrative or compensatory? Take the following example: imagine that you are issued a \$60 traffic ticket for driving over the speed limit. The \$60 payment to the government for breaking the law is punitive and thus a fine. By contrast, paying \$60 in damages to the local U.S. post office for accidentally backing into a public mailbox is not a fine. Otherwise said, a payment that is strictly remedial is not a fine.⁵⁹ While the Court has not yet addressed whether special assessment fees should be considered "fines" under the Eighth Amendment, I argue in Part III that they should.

B. Bajakajian and the Meaning of Constitutionally "Excessive" Fines

Having established the meaning of "fines" within the context of the Eighth Amendment in *Browning-Ferris, United States v. Bajakajian*⁶⁰ provided an

53. *Id.* at 604. A forfeiture occurs when the government seizes property in the control of a defendant. See Beth A. Colgan, *Fines, Fees and Forfeitures*, 18 CRIMINOLOGY, CRIM. JUST., L. & SOC'Y 22, 23 (2017).

54. *Austin*, 509 U.S. at 604.

55. *Id.* at 622.

56. *Id.* at 610 (quoting *United States v. Halper*, 490 U.S. 435, 447–48 (1989)).

57. *Id.* (quoting *Halper*, 490 U.S. at 448).

58. Colgan, *Challenging the Modern Debtors' Prison*, *supra* note 17, at 23–24.

59. See *Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 265 (1989).

60. 524 U.S. 321 (1998).

opportunity for the Court to explicate the meaning of “excessive.”⁶¹ *Bajakajian* involved an interaction of federal statutes where the Court held that forcing a traveler to forfeit \$357,144 for failing to declare on his customs form that he had carried more than \$10,000 in cash out of the United States violated the Excessive Fines Clause.⁶² Defendant Hosep Bajakajian and his wife had attempted to board an international flight from Los Angeles when customs inspectors found \$357,144 in their checked luggage.⁶³ Bajakajian was required by federal law to report that he was transporting more than \$10,000 out of the country.⁶⁴ He did not do so and pleaded guilty to the crime of failing to report.⁶⁵ Because forfeiture laws make “any property . . . involved in such offense” subject to forfeiture, the government sought forfeiture of \$357,144.⁶⁶

The district court instead ordered a \$15,000 forfeiture, recognizing that requiring Bajakajian to surrender all the money would be “extraordinarily harsh” and “grossly disproportionate to the offense in question” and thus violate the Excessive Fines Clause.⁶⁷ The government appealed the \$15,000 forfeiture order⁶⁸ and the Ninth Circuit affirmed.⁶⁹ The Supreme Court granted certiorari.⁷⁰ Although the Court’s Excessive Fines Clause jurisprudence had, to that point, only examined the meaning of “fines” within the Clause,⁷¹ the Court had “little trouble concluding that the forfeiture of currency” was “punishment” and thus a fine within the scope of the Eighth Amendment.⁷² Of particular importance to the Court’s conclusion was its observation that the forfeiture order in *Bajakajian* was imposed at the “culmination of a criminal proceeding and require[d] conviction of an underlying felony.”⁷³

Turning to whether the fine imposed was constitutionally excessive, the Court did not rely on the historical definition of “excessive” for an interpretive roadmap⁷⁴ because “[t]he text and history of the Excessive Fines Clause . . .

61. *See id.* at 334–37.

62. *Id.* at 324–25, 334.

63. *Id.* at 324–25.

64. *Id.* at 325.

65. *Id.*

66. *Id.*

67. *Id.* at 326.

68. *Id.*

69. *See United States v. Bajakajian*, 84 F.3d 334, 335 (9th Cir. 1996).

70. The Court had not yet had the occasion to address the question of what constitutes an “excessive” fine under the Eighth Amendment.

71. *See Bajakajian*, 524 U.S. at 334.

72. *See id.* at 328.

73. *Id.*

74. After completing a historical analysis of the Eighth Amendment, the *Bajakajian* Court “[r]ecogniz[ed] that none of the historical sources examined ‘suggests how disproportionate to the gravity of an offense a fine must be in order to be deemed constitutionally excessive[.]’ [T]he Court then turned to its prior ‘gross disproportionality’ case law, developed in the Cruel and Unusual Punishments Clause context.” McLean, *supra* note 17, at 842; *see also* *Austin v. United States*, 509 U.S.

provide[d] little guidance as to how disproportional a punitive forfeiture must be to the gravity of an offense in order to be ‘excessive.’”⁷⁵ Since there was no textual guidance from which to draw, the Court instead leaned “on other considerations in deriving a constitutional excessiveness standard.”⁷⁶ The proportionality test from its Cruel and Unusual Punishments Clause precedents served as an entry point to the excessiveness inquiry.⁷⁷

The “touchstone” of the inquiry, the Court noted, “is the principle of proportionality: The amount of the forfeiture must bear some relationship to the gravity of the offense that it is designed to punish.”⁷⁸ Applying this standard, two factors were dispositive to the Court’s holding that the forfeiture order of \$357,144 was constitutionally excessive. First, the “reporting offense”⁷⁹ was a crime that had “a minimal level of culpability”⁸⁰ and carried only a maximum fine of \$5,000.⁸¹ The seriousness of the offense was mitigated by the defendant’s conduct, which “was unrelated to any other illegal activities” in that “[t]he money was the proceeds of legal activity and was to be used to repay a lawful debt.”⁸² That added fact made it clear to the Court that Bajakajian did “not fit into the class of persons for whom the statute was principally designed: He [was] not a money launderer, a drug trafficker, or a tax evader.”⁸³ In other words, had he been a money launderer or engaged in any unlawful activity that evinces a greater degree of seriousness than failing to report money on his customs form, a \$357,144 fine might have been more proportional to the offense.

The second factor compelling the Court’s decision was that the harm to the government was “relatively minor.”⁸⁴ “Had his crime gone undetected, the Government would have been deprived only of the information that \$357,144 had left the country.”⁸⁵ Because of the comparatively exiguous nature of the offense and the magnitude of the fine, the Court concluded that the forfeiture

602, 611 (1993); McLean, *supra* note 17, at 838 n.14 (“In *Bajakajian*, the Supreme Court simply stated that Webster’s 1828 dictionary defines ‘excessive’ as ‘beyond the common measure or proportion.’ The Court’s decision to ignore the second definition provided, and instead to quote only half of the first definition, is a somewhat surprising one—particularly because the example Webster provides in support of the *second* (much broader) definition of ‘excessive’ is the following: ‘Excessive bail shall not be required.’”) (citations omitted).

75. *Bajakajian*, 524 U.S. at 335.

76. *Id.* at 336.

77. *See id.* at 334.

78. *Id.*

79. *Id.* at 337.

80. *Id.* at 339.

81. *Id.* at 338.

82. *Id.*

83. *Id.*

84. *Id.* at 339.

85. *Id.*

sought by the government “would be grossly disproportional to the gravity of his offense” and thus violate the Excessive Fines Clause.⁸⁶

If there is any point of consensus about the grossly disproportionate standard announced in *Bajakajian*, it is that the inquiry into the excessiveness of a fine remains unclear. We now know that measuring excessiveness requires considering the *severity* of a punishment against the *seriousness* of the conduct.⁸⁷ But as Adam J. Kolber has argued persuasively, “[o]ffenders can be sentenced to punishments that are identical in name but that differ substantially in their severity”⁸⁸ because of how they impact a particular defendant. This logical reality suggests that an individualized look at the hardship a punishment would inflict on that specific defendant is relevant to the proportionality analysis. However, since the respondent in *Bajakajian* did not raise an argument to the effect that the proportionality determination should consider the consequences of the punishment on his specific livelihood, the Supreme Court declined to consider the issue.⁸⁹

C. *Timbs v. Indiana and Defendants’ Ability To Pay*

Predictably, the resulting doctrinal gap in *Bajakajian* has frustrated lower courts and generated inconsistency in the application of the Excessive Fines Clause.⁹⁰ Recently, the Court has acknowledged that a defendant’s ability to pay a fine may be relevant to the assessment of punishment severity. Chief Justice Roberts conveyed this understanding most recently at oral arguments in the 2019 case *Timbs v. Indiana*.⁹¹

Defendant Tyson Timbs pleaded guilty to a drug violation and conspiracy to commit theft after he was arrested for attempting to sell heroin to an undercover officer.⁹² Because he drove a \$42,000 Land Rover to the site of the arranged transaction, the State of Indiana sought forfeiture of the vehicle on

86. *Id.* at 339–40.

87. *Id.* at 336.

88. Kolber, *supra* note 34, at 188.

89. *Bajakajian*, 524 U.S. at 340 n.15 (“Respondent does not argue that his wealth or income are relevant to the proportionality determination or that full forfeiture would deprive him of his livelihood . . . and the District Court made no factual findings in this respect.”).

90. *See, e.g.*, *State v. Goodenow*, 282 P.3d 8, 17 (Or. Ct. App. 2012) (“Whether an otherwise proportional fine is excessive can depend on, for example, the financial resources available to a defendant, the other financial obligations of the defendant, and the effect of the fine on the defendant’s ability to be self-sufficient.”) (citing *Bajakajian*, 524 U.S. at 335–36). *But see* *Duckworth v. United States ex rel. Locke*, 705 F. Supp. 2d 30, 48 (D.D.C. 2010) (concluding after analyzing *Bajakajian* that “ability to pay is not a component of the Eighth Amendment proportionality analysis”), *aff’d*, 418 F. App’x 2 (D.C. Cir. 2011).

91. Oral Argument at 24:06, *Timbs v. Indiana*, 139 S. Ct. 682 (2019) (No. 17-1091), <https://www.oyez.org/cases/2018/17-1091> [<https://perma.cc/YZE3-GVD4>].

92. *Timbs*, 139 S. Ct. at 686.

the ground that it was “used to facilitate violation of a criminal statute.”⁹³ Timbs challenged the forfeiture as unconstitutional under the Eighth Amendment’s Excessive Fines Clause, arguing that it would be grossly disproportional to the offense.⁹⁴ The trial court agreed and Indiana’s appellate court affirmed the decision.⁹⁵ The Supreme Court of Indiana reversed, finding that the Excessive Fines Clause was not incorporated against the states.⁹⁶

The U.S. Supreme Court granted certiorari and, by a 9-0 vote, held that the Excessive Fines Clause constrains the states under the Fourteenth Amendment’s Due Process Clause.⁹⁷ At oral argument, Chief Justice John Roberts raised a pointed question indicating that an individualized inquiry into one’s financial status may bear on the analysis of punishment severity and thus under *Bajakajian* would also bear on its constitutional “excessiveness.”⁹⁸ He queried whether a forty-two thousand dollars forfeiture that may not “seem excessive” to a wealthy person would be excessive “if someone is impoverished.”⁹⁹ Even after this explicit acknowledgement of the potential relevance of the ability to pay on measuring the excessiveness of fines, the Court did not probe deeper into the issue to develop the analysis.¹⁰⁰ The Court’s refusal to clarify what role, if any, a defendant’s financial situation should factor into the excessiveness inquiry is lamentable, particularly since fines are increasingly used in the United States as an instrument of punishment.¹⁰¹

A breakthrough case decided after *Timbs v. Indiana* that took advantage of the clear opening created by Justice Roberts’ above-referenced inquiry is *Colorado Department of Labor & Employment v. Dami Hospitality, LLC*.¹⁰² The *Dami* court found that a defendant’s inability to pay a fine as part of their sentence can make the fine constitutionally excessive, “steer[ing] excessive fines jurisprudence toward a faithful, historically rooted understanding of the clause.”¹⁰³ *Dami*, the owner-operator of a Denver motel with fewer than ten

93. *Id.*

94. *Id.*

95. *State v. Timbs*, 62 N.E.3d 472, 473 (Ind. Ct. App. 2016).

96. *State v. Timbs*, 84 N.E.3d 1179, 1184 (Ind. 2017).

97. *Timbs*, 139 S. Ct. at 689.

98. Oral Argument, *supra* note 91, at 24:18.

99. *Id.*

100. *See id.*

101. The rise in the use of fines as a form of punishment comes as the increasingly high cost of financing the mass incarceration apparatus puts pressure on state budgets. *See, e.g.*, Jessica M. Eaglin, *Improving Economic Sanctions in the States*, 99 MINN. L. REV. 1837, 1845 (2015) (“Due to the pressures on justice systems created by mass incarceration, some states are shifting toward fines-based punishment as a viable alternative to incarceration for low-level offenses.”).

102. 442 P.3d 94 (Colo. 2019).

103. Recent Cases, *Eighth Amendment — Excessive Fines Clause — Colorado Supreme Court Extends Excessive Fines Clause Protections to Corporations and Requires Ability to Pay Be Considered*. — Colorado Department of Labor & Employment v. *Dami Hospitality, LLC*, 442 P.3d 94 (Colo. 2019), 133 HARV. L. REV. 1492, 1492 (2020).

workers, was statutorily required to maintain workers' compensation insurance for its employees.¹⁰⁴ Having failed to comply with the statute by allowing its insurance coverage to lapse on several occasions, Dami was issued per diem fines totaling \$841,200.¹⁰⁵ The fines were assessed pursuant to a mandatory fee schedule.¹⁰⁶ Dami challenged the fines on several grounds, including that the company's annual payroll was less than \$50,000 so payment could not be made.¹⁰⁷ To induce Dami to settle, the Division of Workers' Compensation offered to reduce the fee to \$425,000, but the settlement was not consummated.¹⁰⁸

Dami sued, alleging in relevant part that the assessed per diem fines were constitutionally excessive under the Eighth Amendment.¹⁰⁹ Observing that the Eighth Amendment also protects corporations from excessive fines, the Colorado Supreme Court found "persuasive evidence that a fine that is more than a person can pay may be 'excessive' within the meaning of the Eighth Amendment."¹¹⁰ It thus concluded that, "in considering the severity of the penalty, the ability of the regulated individual or entity to pay is a relevant consideration."¹¹¹ The case was remanded to the lower court to "permit the development of an evidentiary record sufficient to allow the application of [the] Excessive Fines Clause analysis."¹¹²

Having said all this, *Dami* should be considered the exception, not the norm. The trend in lower courts has been to read *Bajakajian*—the only Supreme Court case to opine on the meaning of excessiveness—as foreclosing an inquiry into the financial situation of a defendant as part of a proportionality analysis.¹¹³

104. *Dami*, 442 P.3d at 96.

105. *Id.* at 97.

106. *Id.*

107. *Id.*

108. *Id.* at 98.

109. *Id.*

110. *Id.* at 101. The court was mindful of historic evidence cited by the Supreme Court in cases involving the Excessive Fines Clause. One example of such evidence is the Magna Carta's requirement that the size of fines not deprive individuals of their livelihoods. Another is Blackstone's Commentaries on the Laws of England, which states that "no man shall have a larger amercement imposed upon him, than his circumstances or personal estate will bear." *Id.* (citing *Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 271 (1989)); see also *Timbs v. Indiana*, 139 S. Ct. 682, 688 (2019). With these observations in mind, the court concluded that that the defendant's ability to pay a fine is a "relevant consideration" in determining the "severity of the penalty." *Id.* at 103.

111. *Timbs*, 139 S. Ct. at 103.

112. *Id.*

113. This assumption is based on existing evidence about how lower courts have attempted to resolve the doctrinal gap in the Excessive Fines Clause. See, e.g., *United States v. 817 N.E. 29th Drive*, 175 F.3d 1304, 1311 (11th Cir. 1999) ("[E]xcessiveness is determined in relation to the characteristics of the offense, *not in relation to the characteristics of the offender.*") (emphasis added); *United States v. Dicker*, 198 F.3d 1284, 1292 n.11 (11th Cir. 1999) ("[W]e do not take into account the personal impact of a forfeiture on the specific defendant in determining whether the forfeiture violates the Eighth Amendment."); *United States v. Dubose*, 146 F.3d 1141, 1146 (9th Cir. 1998) ("[A]n Eighth

Thus, it is likely that many courts will be inclined to omit a defendant's financial status in their evaluation of proportionality until an ability-to-pay test is adopted, a situation that will continue to disadvantage the poorest defendants.

II. ECONOMIC SANCTIONS

In order to determine whether the Excessive Fines Clause applies to special assessments, we must first determine whether special assessment fees constitute "fines." In this determination, it is helpful to consider special assessments in the context of other economic sanctions. This part provides a brief overview of the different economic sanctions that can be imposed as part of a criminal sentence: special assessments, fines, restitution, and forfeiture.

A. *Special Assessments*

The special assessment scheme originated as a result of the interlocking gears of advocacy in the 1960s and 1970s to provide reparations for crime victims.¹¹⁴ During this time, policymakers were focused on making punishment for criminal wrongdoers more punitive while also seeking to shore up protections for crime victims.¹¹⁵ These two pursuits conveniently overlapped to result in the adoption of a number of criminal mechanisms to reform the criminal legal system, including the special assessment statute.¹¹⁶

As social unrest was sweeping through cities across the country in the late 1960s, reports that crime and violence were on the rise blanketed the nation's press.¹¹⁷ Observing that the uprisings followed the civil rights gains of that era, the civil rights movement was blamed for the rise in crime (real or perceived).¹¹⁸ As a result, the idea that crime was primarily a result of individual choices—and not social and economic dislocation, as had been put forth by civil rights

Amendment gross disproportionality analysis does not require an inquiry into the hardship the sanction may work on the offender.").

114. Much of the change in crime control policy—hardening criminal laws and shoring up protections for victims—was driven by the "law and order" rhetoric that followed the civil rights gains of the same era. To be sure, while crime rates had increased at that time, the accounts of turmoil were sensationalized to justify increasing incarceration of offenders and the use of economic sanctions. *See generally* PRESIDENT'S TASK FORCE ON VICTIMS OF CRIME, VICTIMS OF CRIME IN AMERICA (1982), <https://www.ojp.gov/pdffiles1/ovc/87299.pdf> [<https://perma.cc/RWR9-Y5M4>] (making recommendations for action by governmental agencies).

115. *Id.*

116. *See* Lynne N. Henderson, *The Wrongs of Victim's Rights*, 37 STAN. L. REV. 937, 949–50 (1985).

117. ARI BERMAN, GIVE US THE BALLOT: THE MODERN STRUGGLE FOR VOTING RIGHTS IN AMERICA 65 (2015) ("The riots were front-page news across the country, covered in the most sensationalized tones. The cover of *Life* showed a black youth carrying a table and chair out of a burning home. The magazine sent nine correspondents to cover the story and ran eleven pages of color photos in its August 27, 1965, edition, with captions like "Get Whitey!" The War Cry That Terrorized Los Angeles, and 'In a Roaring Inferno "Burn Baby Burn."").

118. *Id.* at 67.

advocates—began to gain traction in public discourse.¹¹⁹ This development intensified the public’s desire to punish criminal wrongdoers.¹²⁰

Around the same time, the view that the interests of victims were not being adequately addressed by the states was frequently expressed.¹²¹ It is no accident that the rumblings about victims’ interests started around the same time *Miranda v. Arizona*¹²² was decided. The Warren Court’s rights-protective orientation toward criminal defendants in cases like *Miranda* was an important signpost for the victims’ rights movement. While the Court was carving out protections for criminal defendants, commentators were ringing the alarm bell that the Court was not doing enough to protect crime victims.¹²³ The increasing centrality of these two complementary issues gave legislatures a freer hand to pass “tough” sentencing laws and address both issues at once. Lawmakers responded by adopting criminal laws and penalties that hardened punishment for wrongdoers while simultaneously accounting for the allegedly historically neglected rights of victims.¹²⁴

In 1984, after “a decade long bipartisan effort of the Senate Committee on the Judiciary,”¹²⁵ special assessments were created as Title II, Chapter XIV of the Victims of Crime Act of 1984 (“VOCA”).¹²⁶ VOCA was designed to “provide limited Federal funding to the States, with minimal bureaucratic ‘strings attached,’ for direct compensation and service programs to assist victims of crime”¹²⁷ Codified in § 3013 of Title 18 of the U.S. Code, special assessments are nominal fees assessed upon defendants convicted of a misdemeanor or felony against the United States.¹²⁸ A special assessment fee is imposed for each count of conviction.¹²⁹ This means that a “defendant convicted of multiple felonies [or misdemeanors] is subject to multiple assessments.”¹³⁰

119. Henderson, *supra* note 116, at 943–45.

120. *Id.* at 945.

121. *Id.* at 947–48.

122. 384 U.S. 436 (1966).

123. Henderson, *supra* note 116, at 948.

124. See Caitlyn Curley, *Tough on Crime: How the United States Packed Its Own Prisons*, GENBIZ (Dec. 3, 2015), <http://www.genfkd.org/tough-on-crime-united-states-packed-prisons> [https://perma.cc/7QCS-ZZJM].

125. S. REP. NO. 98-225, at 1 (1983), as reprinted in 1984 U.S.C.C.A.N. 3182, 3184.

126. Victims of Crime Act of 1984, Pub. L. No. 98-473, Title II, ch. XIV, 98 Stat. 2171 (codified as amended at 18 U.S.C. § 3013).

127. S. REP. NO. 98-497, at 1 (1984), as reprinted in 1984 U.S.C.C.A.N. 3607, 3607 [hereinafter 1984 *Senate Report*].

128. 18 U.S.C. § 3013. I have deliberately only mentioned felonies (and not misdemeanors) thus far because the subject of this Article is the imposition of special assessment fees on indigent felony defendants.

129. U.S. SENT’G GUIDELINES MANUAL § 5E1.3 cmt. n.3 (U.S. SENT’G COMM’N 2021); Marie T. Farrelly, *Special Assessments and the Origination Clause: A Tax on Crooks?*, 58 FORDHAM L. REV. 447, 447 (1989).

130. 9A FED. PROC., L. ED. § 22:1753 (2021).

The amount imposed is fixed by statute¹³¹ and is to be collected “in the manner that fines are collected in criminal cases.”¹³² The provision of VOCA mandating special assessments for felony offenses provides that:

- (a) The court *shall* assess on any person convicted of an offense against the United States . . .
 - (2) in the case of a felony—
 - (A) the amount of \$100 if the defendant is an individual; and
 - (B) the amount of \$400 if the defendant is a person other than an individual
- (b) Such amount so assessed shall be collected in the manner that fines are collected in criminal cases.
- (c) The obligation to pay an assessment ceases five years after the date of the judgment. This subsection shall apply to all assessments irrespective of the date of imposition.
- (d) For the purposes of this section, an offense under section 13 of this title is an offense against the United States.¹³³

The proceeds are collected by the government and deposited into the Crime Victims Fund to finance victims’ aid programs at the state level.¹³⁴ The Office for Victims of Crime administers the Crime Victims Fund,¹³⁵ which primarily benefits the most vulnerable in our society.¹³⁶

131. U.S. SENT’G GUIDELINES MANUAL § 5E1.3 (U.S. SENT’G COMM’N 2021).

132. 18 U.S.C. § 3013(b).

133. *Id.* § 3013(a)(2), (b)–(d) (emphasis added). Special assessments are also imposed for misdemeanor convictions. The relevant provision is as follows:

- (1) in the case of an infraction or a misdemeanor—
 - (A) if the defendant is an individual—
 - (i) the amount of \$5 in the case of an infraction or a class C misdemeanor;
 - (ii) the amount of \$10 in the case of a class B misdemeanor; and
 - (iii) the amount of \$25 in the case of a class A misdemeanor; and
 - (B) if the defendant is a person other than an individual—
 - (i) the amount of \$25 in the case of an infraction or a class C misdemeanor;
 - (ii) the amount of \$50 in the case of a class B misdemeanor; and
 - (iii) the amount of \$125 in the case of a class A misdemeanor.

Id. § 3013(a)(1).

134. 34 U.S.C. § 20101.

135. Victims of Crime Act Victim Assistance Program, 81 Fed. Reg. 44515, 44515 (July 8, 2016).

136. The administration of the funds from the Crime Victims Fund is set out by statute. The process is described in the Federal Register, which is worth quoting at length:

The VOCA formula specifies that (in most years) the first \$20M available in the Fund for that year will go toward child abuse prevention and treatment programs, with a certain amount to be set-aside for programs to address child abuse in Indian Country. After that, such sums as may be necessary are available to the Federal Bureau of Investigation and the U.S.

B. *Criminal Fines*

Fines are economic sanctions used to punish defendants and deter wrongdoing.¹³⁷ Some jurisdictions utilize fines as prosecution diversion devices, whereby charges against a defendant are dismissed when the court-ordered fines are paid in full.¹³⁸ The fines are typically imposed in combination with another penalty rather than as the sole sanction.¹³⁹ The majority of fines imposed by district court judges are deposited in the Crime Victims Fund—the same fund in which special assessment fees are deposited.¹⁴⁰ Despite its illegality under *Bearden v. Georgia*,¹⁴¹ which held that imprisoning someone simply for being too poor to pay a fine violates the Equal Protection Clause of the Fourteenth Amendment,¹⁴² there can be no doubt that the practice has not been eradicated.¹⁴³ The reason is because although *Bearden* made clear that people cannot be imprisoned simply for being poor, it conditioned the prohibition on whether the failure to pay was “willful[.]”¹⁴⁴ But since the Court did not define the meaning of “willful[.]” ad hoc judicial interpretation of the term has resulted in some judges incarcerating people for exactly what *Bearden* had proscribed—simply being poor.¹⁴⁵ The close connection to other recognized forms of punishment and the clear punitive intent in the scheme means that criminal fines are unquestionably covered under the Excessive Fines Clause.

Attorneys Offices to improve services to victims of Federal crime, and to operate a victim notification system. The remaining balance is allocated as follows: 47.5% for OVC's Victim Compensation Program, 47.5% for OVC's Victim Assistance Program, and 5% for the OVC Director to distribute in discretionary awards in certain statutorily defined categories. Generally, under the distribution rules for the Victim Compensation Program, if a portion of the 47.5% available for Compensation is not needed for that purpose, it is (per the statutory formula) made available to augment the Victim Assistance Program. The Victim Assistance Program distributes funds to States as mandated by VOCA, at 42 U.S.C. 10603. The VOCA statutory distribution formula provides each State with a base amount (presently \$500,000 for each State and the District of Columbia; \$200,000 for each eligible territory), and distributes the remainder proportionately, based on population.

Id. at 44516.

137. See Sobol, *supra* note 26, at 499.

138. See Michael Tonry & Mary Lynch, *Intermediate Sanctions*, 20 CRIME & JUST.: A REV. OF RSCH. 99, 128 (1996).

139. See Sally T. Hillsman, *Fines and Day Fines*, 12 CRIME & JUST.: A REV. OF RSCH. 49, 49

140. U.S. GEN. ACCT. OFF., FEDERAL COURTS: DIFFERENCES EXIST IN ORDERING FINES AND RESTITUTION 1 (1999), <https://www.gao.gov/assets/ggd-99-70.pdf> [<https://perma.cc/5D2P-CQFL>].

141. 461 U.S. 660 (1983).

142. *Id.* at 672–73.

143. See Sobol, *supra* note 26, at 499–500.

144. *Bearden*, 461 U.S. at 672.

145. Joseph Shapiro, *Supreme Court Ruling Not Enough To Prevent Debtors Prisons*, NPR (May 21, 2014), <https://www.npr.org/2014/05/21/313118629/supreme-court-ruling-not-enough-to-prevent-debtors-prisons> [<https://perma.cc/D22X-VXA9>].

C. *Restitution*

Another type of economic sanction that can be imposed as a consequence of a criminal conviction is restitution. Restitution refers to a court-ordered payment by the convicted defendant to compensate the victim of a crime for tangible financial losses suffered as a result of the crime.¹⁴⁶ Although it is now a victim-oriented device, restitution was historically used to rehabilitate the wrongdoer.¹⁴⁷ Today, a court may order restitution against a convicted defendant in any federal criminal case.¹⁴⁸ Unlike special assessments and fines, restitution is paid to a specific victim of a particular crime and is intended to make the victim whole to the extent possible.¹⁴⁹ Restitution is “[u]sually defined in terms of actual damages and restoration of property, [and] . . . does not encompass . . . concepts such as damages for pain and suffering.”¹⁵⁰ Recognized by statute in all fifty states,¹⁵¹ the right to restitution is codified in § 3663 of Title 18 of the U.S. Code; it reads in relevant part:

The court, when sentencing a defendant convicted of an offense under this title, section 401, 408(a), 409, 416, 420, or 422(a) of the Controlled Substances Act (21 U.S.C. 841, 848(a), 849, 856, 861, 863) (but in no case shall a participant in an offense under such sections be considered a victim of such offense under this section), or section 5124, 46312, 46502, or 46504 of title 49, other than an offense described in section 3663A(c), may order, in addition to or, in the case of a misdemeanor, in lieu of any other penalty authorized by law, that the defendant make restitution to any victim of such offense¹⁵²

Whether restitution constitutes a fine for purposes of the Clause is a question that the Supreme Court has not yet answered. Lower courts are divided on the issue. Some courts have concluded that restitution constitutes a fine since it advances the “deterrent, rehabilitative, and retributive purposes”¹⁵³ of punishment and “is not separate from the offender’s punishment but is an aspect of it.”¹⁵⁴ Other courts, however, have applied more stringent definitions of “punitiveness” that were explicitly rejected by the Supreme Court in *Austin*

146. R. Barry Ruback & Mark H. Bergstrom, *Economic Sanctions in Criminal Justice: Purposes, Effects, and Implications*, 33 CRIM. JUST. & BEHAV. 242, 249 (2006).

147. Matthew Dickman, *Should Crime Pay?: A Critical Assessment of the Mandatory Victims Restitutions Act of 1996*, 97 CALIF. L. REV. 1687, 1702–03 (2009).

148. 18 U.S.C. § 3663(a)(1)(A) (providing that restitution can be imposed for all offenses under Title 18).

149. *United States v. Simmonds*, 235 F.3d 826, 830–31 (3d Cir. 2000).

150. Henderson, *supra* note 116, at 1007 (citing Alan T. Harland, *Monetary Remedies for the Victims of Crime: Assessing the Role of the Criminal Courts*, 30 UCLA L. REV. 52, 60–64 (1982)).

151. See, e.g., PEGGY M. TOBOLOWSKY, DOUGLAS E. BELOOF, MARIO T. GABOURY, ARRICK L. JACKSON & ASHLEY G. BLACKBURN, *CRIME VICTIM RIGHTS AND REMEDIES* 171 (3d ed. 2016).

152. 18 U.S.C. § 3663(a)(1)(A).

153. *United States v. Dubose*, 146 F.3d 1141, 1144 (9th Cir. 1998).

154. *State v. Good*, 100 P.3d 644, 649 (Mont. 2004).

in its determination that restitution does not constitute a fine based on these definitions.¹⁵⁵

D. *Forfeitures*

Unlike restitution, little controversy exists about whether forfeitures are punitive, a question the Supreme Court recently answered in the affirmative in *Timbs*.¹⁵⁶ Forfeiture refers to the government's seizure of property in the control of a defendant.¹⁵⁷ In response to the rise of organized crime¹⁵⁸ and the "epidemic" drug problem in the 1970s,¹⁵⁹ Congress passed two significant pieces of legislation in 1970 that altered the landscape of federal criminal law and made criminal forfeiture a fixture in sentencing proceedings. The first statute is the Racketeer Influenced and Corrupt Organizations Act ("RICO"),¹⁶⁰ adopted as Title IX of the Organized Crime Control Act.¹⁶¹ A violation of RICO triggers a forfeiture penalty of "any property constituting, or derived from, any proceeds which the person obtained, directly or indirectly, from racketeering activity"¹⁶²

The second statute Congress enacted in 1970, as organized crime and illegal drug trafficking raged on,¹⁶³ is the Continuing Criminal Enterprise ("CCE")¹⁶⁴ Statute. This statute was part of the Comprehensive Drug Abuse

155. Colgan, *Challenging the Modern Debtors' Prison*, *supra* note 17, at 43–44 ("[L]ower courts have determined that restitution does not constitute a fine based on an improper substitution of more restrictive tests for punitiveness used to determine the applicability of the Double Jeopardy and Ex Post Facto Clauses. Unlike the excessive fines test, in the double jeopardy and ex post facto contexts, the Supreme Court has held that the relevant inquiry is whether a penalty is so punitive that it overwhelms any remedial goal so as to exhibit a legislative intent that the penalty be criminal in nature despite the fact that the penalty is nominally civil. The *Austin* Court explicitly rejected the application of this stricter standard in favor of the partially punitive test.").

156. *Timbs v. Indiana*, 139 S. Ct. 682, 690 (2019). In previous cases, the Court held that forfeitures are fines for purposes of the Excessive Fines Clause. *See, e.g., Alexander v. United States*, 509 U.S. 544, 558–59 (1993) (regarding criminal forfeitures); *Austin v. United States*, 509 U.S. 602, 604 (1993) (regarding civil forfeitures).

157. Alice W. Dery, *Overview of Asset Forfeiture*, A.B.A. (June 30, 2012), https://www.americanbar.org/groups/business_law/publications/blt/2012/06/02_dery/ [<https://permacc/5P3D-FMK8>].

158. *See, e.g., DONALD R. CRESSY, THEFT OF THE NATION: THE STRUCTURES AND OPERATIONS OF ORGANIZED CRIME IN AMERICA* 1–3 (1969); Craig M. Bradley, *Racketeers, Congress and the Courts: An Analysis of RICO*, 65 IOWA L. REV. 837, 837–38 (1980).

159. H.R. REP. NO. 91-1444, pt. 1, at 6 (1970), *as reprinted in* 1970 U.S.C.C.A.N. 4566, 4572. According to the drafters of the Act, illegal drug abuse and trafficking at the time had reached "epidemic proportions." *Id.*

160. 18 U.S.C. §§ 1961–68.

161. Organized Crime Control Act of 1970, Pub. L. No. 91-452, § 901(a), 84 Stat. 922, 941 (codified at 18 U.S.C. §§ 1961–68).

162. 18 U.S.C. § 1963(a)(3).

163. *See* S. REP. NO. 91-617, at 1 (1969).

164. 21 U.S.C. § 848.

Prevention and Control Act of 1970.¹⁶⁵ The penalty for violating the CCE Statute includes forfeiture of property obtained from the crime.¹⁶⁶ The use of forfeiture has expanded considerably since the federal forfeiture statutes were enacted.¹⁶⁷ More than 200 federal offenses are now punishable by forfeiture,¹⁶⁸ including mail fraud, federal program fraud, and wire fraud.¹⁶⁹

III. A NEW APPROACH TO IMPOSING SPECIAL ASSESSMENTS

Given the breadth of economic sanctions that can be imposed on indigent defendants, the Court's failure to adopt an ability-to-pay test in determining the constitutionality of imposing such sanctions demonstrates a lack of commitment to protect poor people against unmanageable fines. Indeed, "failure to adjust economic sanctions according to financial capacity results in a flattening of punishment, which undermines the Court's interest in promoting comparative proportionality between offenses of different seriousness."¹⁷⁰ With that in mind, this part suggests one workable but underappreciated way policymakers can afford protections to the most financially vulnerable in our criminal legal system.

The starting point is Section III.A, which makes the case that special assessment fees are punitive and are thus fines within the meaning of the Excessive Fines Clause. Section III.B then argues that the special assessment scheme is in tension with current sentencing practices. Sentencing is a holistic undertaking whereby judges exercise discretion to make sound decisions based on information including a defendant's background.¹⁷¹ Mandating the

165. Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91-513, 84 Stat. 1236, 1265–66 (codified as amended at 21 U.S.C. §§ 801–904, 951–71).

166. 21 U.S.C. § 848(a) ("Any person who engages in a continuing criminal enterprise shall be sentenced . . . to the forfeiture prescribed in section 853 of this title."); 21 U.S.C. § 853(a)–(b) (defining property that is subject to criminal forfeiture).

167. See COUNCIL OF ECON. ADVISERS ISSUE BRIEF, FINES, FEES, AND BAIL: PAYMENTS IN THE CRIMINAL JUSTICE SYSTEM THAT DISPROPORTIONALLY IMPACT THE POOR 3 (2015), https://obamawhitehouse.archives.gov/sites/default/files/page/files/1215_cea_fine_fee_bail_issue_brief.pdf [<https://perma.cc/VG7U-B8EL>]; KARIN D. MARTIN, SANDRA SUSAN SMITH & WENDY STILL, HARVARD KENNEDY SCH.: PROGRAM IN CRIM. JUST. POL'Y & MGMT., SHACKLED TO DEBT: CRIMINAL JUSTICE FINANCIAL OBLIGATIONS AND THE BARRIERS TO RE-ENTRY THEY CREATE 4–5 (2017), https://www.hks.harvard.edu/sites/default/files/centers/wiener/programs/pcj/files/shackled_to_debt.pdf [<https://perma.cc/5QHS-PLND>].

168. Dery, *supra* note 157.

169. 18 U.S.C. § 982(a)(3).

170. Colgan, *Challenging the Modern Debtors' Prison*, *supra* note 17, at 16.

171. See *United States v. Watts*, 519 U.S. 148, 151 (1997) (noting "the longstanding principle that sentencing courts have broad discretion to consider various kinds of information"); *Payne v. Tennessee*, 501 U.S. 808, 820–21 (1991) ("[T]he sentencing authority has always been free to consider a wide range of relevant material."); *United States v. Tucker*, 404 U.S. 443, 446 (1972) ("[B]efore [determining what sentence to impose], a judge may appropriately conduct an inquiry broad in scope, largely unlimited either as to the kind of information he may consider, or the source from which it may come.").

imposition of special assessment fees when the judge has already determined that a defendant is too poor to pay any amount of money erodes the value of that discretion. Section III.B concludes by advocating for a new approach that allows for judicial leeway in the imposition of special assessment fees. Section III.C addresses some implementation and cost concerns with the approach advocated, including that waiving the imposition of special assessment fees on indigent defendants may under-deter the poor.

A. *Why Special Assessment Fees Are Punitive*

One of the threshold claims of this Article is that special assessment fees qualify as fines within the scope of the Excessive Fines Clause. Monetary penalties need not be completely punitive to qualify as a fine under the Excessive Fines Clause.¹⁷² The test for determining whether an economic sanction is partially punitive is broad.¹⁷³ An economic sanction is punitive when: (1) it is imposed as a consequence of engaging in prohibited conduct and the money is owed to the government rather than a private party,¹⁷⁴ or (2) the economic sanction is “link[ed] . . . to other recognized forms of punishment.”¹⁷⁵ Special assessment fees satisfy the first definition of the test, as they are economic sanctions paid to the government for engaging in prohibited conduct.¹⁷⁶ We can hence end the analysis there since an economic sanction need only satisfy one of the definitions of the partially punitive test. But we need not rely on this point alone because there is a nonfrivolous argument to be made that the fees are also punitive under the second means of satisfying the test.

The evidentiary basis for this conclusion comes from applying the statute. Like other forms of punishment, special assessment fees are imposed only after a defendant is convicted of an offense against the United States.¹⁷⁷ The Supreme Court observed in *Austin v. United States* that punitive intent can be discerned when an economic sanction is treated like other kinds of punishment.¹⁷⁸ In *Austin*, the Court reasoned that merely listing forfeitures “alongside the other provisions for punishment” in a statute substantiated the claim that forfeitures are punitive.¹⁷⁹ Here, special assessments are economic sanctions “link[ed] . . . to other recognized forms of punishment,”¹⁸⁰ i.e., forfeitures, because they are

172. Colgan, *Challenging the Modern Debtors' Prison*, *supra* note 17, at 18.

173. *Id.* at 23 (“[I]n announcing the partially punitive test, the Court provided . . . a broadly protective understanding of the Clause.”).

174. *See id.* at 21–23.

175. *Id.* at 24.

176. *See supra* Section II.A.

177. *See supra* Section II.A.

178. *See* 509 U.S. 602, 613–14 (1993).

179. *Id.* at 614.

180. Colgan, *Challenging the Modern Debtors' Prison*, *supra* note 17, at 24.

imposed as a direct result of a defendant's conviction.¹⁸¹ The *Bajakajian* Court said much the same thing about the meaning of punitiveness when it concluded that the forfeiture order at issue in that case was punitive because it was imposed at the "culmination of a criminal proceeding and require[d] conviction of an underlying felony."¹⁸² Additionally, special assessment fees are associated with other recognized forms of punishment because they are statutorily mandated to be collected in the same manner as criminal fines,¹⁸³ which are undisputedly punitive.

These obvious parallels to punitive sanctions lead to the conclusion that special assessments are punitive under the second branch of the test. But taking the argument yet further, legislative history suggests that special assessment fees were always intended to be punitive. The Senate Report on the statute lends additional support to this conclusion. Not only did the Senate refer to special assessments as "penalty assessment fines," "penalty assessment[s]," "penalties," and "penalty fee[s]" throughout the Report,¹⁸⁴ but it also noted that the Victims of Crime Act, which established the special assessments statute,¹⁸⁵ was intended to "provide limited Federal funding to the States . . . to assist victims of crime."¹⁸⁶ This point requires further explanation. While the reference to "limited" funding alone is not significant, it is incongruous to everything else we know about the development of the special assessment statute, suggesting that funding for crime victims was not the only motivation for its adoption.

The Act was adopted in the mid-1980s, a period when violent crime was in the ascendancy, as was the number of victims.¹⁸⁷ If the Senate's objective in adopting the statute was *solely* to finance crime victims' programs, it follows that the resulting fee structure would have done more to ensure there would be enough funding to support all crime victims—an unknowable but expectedly high number at the time. For example, perhaps the fee structure would have looked more restitutionary in nature, with ties to specific victim needs. Instead, the structure is more akin to a standardized fee that—like criminal fines—

181. *United States v. Mayberry*, 774 F.2d 1018, 1021 (10th Cir. 1985).

182. *United States v. Bajakajian*, 524 U.S. 321, 328 (1998).

183. 18 U.S.C. § 3013(b) ("Such amount so assessed shall be collected in the manner that fines are collected in criminal cases.").

184. 1984 *Senate Report*, *supra* note 127, at 13.

185. Victims of Crime Act of 1984, Pub. L. No. 98-473, Title II, ch. XIV, 98 Stat. 2171 (codified as amended at 18 U.S.C. § 3013).

186. 1984 *Senate Report*, *supra* note 127, at 1.

187. Scott Boggess & John Bound, *Did Criminal Activity Increase During the 1980s? Comparisons Across Data Sources*, 78 SOC. SCI. Q. 725, 725 (1997) ("When the focus is on serious violent crime, all indicators show a rise in the mid-1980s. The timing and nature of the rise in criminal activity seem to implicate crack cocaine.").

merely happens to be placed into a fund for unspecified victim needs.¹⁸⁸ Alternatively, if the goal of the statute was *solely* to raise revenue, perhaps the fee simply would have been set at a higher amount, in light of the unknowable but expectedly high number of crime victims. But the current fee structure evidences other intentions.

The foregoing analysis may invite the objection that the Senate viewed special assessments as a revenue-raising tool but simply did not think the revenue generated would be significant. Rather, the objection might proceed, the Senate thought that special assessments would be imposed on defendants infrequently. This interpretation strains credulity when viewed in the context of the environment in which special assessment fees became part of the criminal legal system. First, from the very beginning, the imposition of special assessments could only be waived upon motion of the prosecutor present at sentencing.¹⁸⁹ As I have already noted, prosecutors rarely move for the court to remit special assessments today.¹⁹⁰ It is thus unlikely that in the heyday of the “tough on crime” period of the criminal legal system when the mass incarceration apparatus was expanding dramatically, prosecutors were more likely to request that judges waive the imposition of the special assessment on indigent defendants than they are now. Since special assessments come close to being *de facto* mandatory¹⁹¹ and the scheme was adopted when defendants were funneled through the criminal legal system at then-unprecedented levels, the better view appears to be that the Senate knew, or should have known, that special assessment fees would be imposed routinely.

A cynic might also contend that the Senate understood special assessment fees would be frequently imposed, but nevertheless thought that the scheme

188. Jeffery A. Parness, Laura Lee & Edmund Laube, *Monetary Recoveries for State Crime Victims*, 58 CLEV. STATE L. REV. 819, 849–50 (2010) (“The federal Crime Victims Fund assists states in funding their crime victim recovery schemes. Unlike state funds that provide monies directly to crime victims, the federal fund simply awards grants to states. Since 2002, the Crime Victims Fund makes annual grants constituting about sixty percent of the monies available to state funds. To receive grants, state funds must qualify. Eligible funds must be operated by the state, offer compensatory awards to victims, and promote victim cooperation with law enforcement. Grant recipients must also certify that the state will not cut funds already available, that the fund does not discriminate between citizens and non-citizens or between victims of state offenses and federal offenses, that the fund will not deny claimants based on their family or residential relationship with the alleged offender . . .”).

189. *See infra* Appendix. The criminal title of the U.S. Department of Justice manual states that, “where there is no likelihood that the [special] assessment will be paid, the Assistant United States Attorney who is present at sentencing should move for remission of the special assessments pursuant to 18 U.S.C. § 3573 at the time of sentencing. The absence of assets can be evidenced by the need for court appointed counsel or based on information from the border patrol in the case of an undocumented alien.” U.S. Dep’t of Just., Just. Manual § 9-143.520 (2020).

190. *See infra* Appendix.

191. The only “carve out” to the mandatory imposition of special assessment fees is when a prosecutor motions for the judge to remit the fee. Since prosecutors rarely move for such action, it is appropriate to refer to the fees as *de facto* mandatory. *See infra* Appendix.

would bring in limited revenue. That argument proceeds on the assumption that the Senate anticipated courts would have difficulties collecting the fees. It is true that like other LFOs imposed on poor defendants, special assessments *are* difficult to collect.¹⁹² But there is no evidence to support the argument that difficulties in collecting the fees factored into the decision to adopt the special assessment scheme. Even today, lawmakers generally do not weigh the likelihood that individuals will be able to satisfy LFOs before deciding whether the LFOs should be imposed in the first instance.¹⁹³ Thus, the Senate's reference to "limited" funding for victims should suggest skepticism about whether the scheme was adopted solely as a revenue-raising device. But even if the Senate so intended, present reality shows that special assessment fees are functionally punitive.

Despite the arguments in favor of characterizing special assessments as punitive, it would be error to dismiss outright the argument that special assessments are not punitive and thus do not qualify as fines under the Excessive Fines Clause. It can be argued that special assessments are not punitive because the amount assessed under § 3013 does not distinguish between offenders of different blameworthiness.¹⁹⁴ We cannot summarily preclude this inference because a penal precept is that courts invoking criminal fines have some general commitment to scaling the size of the penalty to the seriousness of the offense.¹⁹⁵ Indeed, this is precisely the relationship that the Indiana appellate court described in *Timbs*.¹⁹⁶

By contrast, so the argument goes, special assessments deviate from this practice and should not be treated as fines because the required payment is the same regardless of the seriousness of the offense. The problem with this argument is that special assessments *do* calibrate the seriousness of the offense into the size of the penalty imposed. For example, the statute imposes a higher

192. See, e.g., Colgan, *Graduating Economic Sanctions*, *supra* note 17, at 70 ("[C]ourt dockets are often clogged by hearings where courts require people with outstanding debt to appear periodically, as well as hearings triggered when debtors fall behind on payments.")

193. See, e.g., ALICIA BANNON, MITALI NAGRECHA & REBEKAH DILLER, BRENNAN CTR. FOR JUST., CRIMINAL JUSTICE DEBT: A BARRIER TO REENTRY 11 (2010), https://www.brennancenter.org/sites/default/files/2019-08/Report_Criminal-Justice-Debt-%20A-Barrier-Reentry.pdf [<https://perma.cc/37HE-WMT8>].

194. See Farrelly, *supra* note 129, at 466 ("[A special assessment] differs from a fine because it does not vary in amount according to the specific nature of the offense committed.")

195. *Mathias v. Accor Econ. Lodging, Inc.*, 347 F.3d 672, 676 (7th Cir. 2003) ("[A] standard principle of [punishment] theory is that 'the punishment should fit the crime' in the sense of being proportional to the wrongfulness of the defendant's action . . .").

196. See *State v. Timbs*, 62 N.E.3d 472, 476 (Ind. Ct. App. 2016) ("To determine whether a fine or forfeiture is 'excessive,' for purposes of the Excessive Fines Clause, we consider whether the amount of the forfeiture bears 'some relationship to the gravity of the offense that it is designed to punish.") (quoting *\$100 & A Black Cadillac v. State*, 822 N.E.2d 1001, 1011 (Ind. Ct. App. 2005)), *vacated*, 84 N.E.3d 1179 (Ind. 2016), *vacated*, 139 S. Ct. 682 (2019).

fee for felony convictions than for misdemeanors.¹⁹⁷ Assessing higher penalties for a more serious class of offenses suggests that Congress embraced an aspect of proportionality in adopting the statute.

Some commentators, primarily retributivists, might be dissatisfied with this account. They might contend that even though the special assessment fee is higher for felony convictions than for misdemeanors, it does not distinguish between offenders of different blameworthiness in any meaningful way unless the imposition of the fee is proportioned to the specific crime *within* the classes of offenses.¹⁹⁸ To appreciate this point, compare the crime of felony forgery involving a \$100 check with a multimillion dollar Ponzi scheme. The retributivist might say that even though the Ponzi scheme is objectively the more serious crime, an individual felony defendant in each case would be required to pay the same \$100 special assessment fee for each count of conviction. And so the lack of gradation within the felony class of offenses suggests we should view with serious skepticism the idea that special assessment fees comport with the penal precepts that punishment should be scaled to the seriousness of the crime.

This argument paints with too small a brush. A more sophisticated version of the argument recognizes that prosecutors are likely to charge felony defendants accused of more serious offenses with more counts.¹⁹⁹ The practical effect of this prosecutorial discretion is that the above-referenced forgery defendant is as a general matter more likely to face fewer counts than the Ponzi scheme. Because a \$100 special assessment is mandatory for *each count* of conviction, the odds are that the forgery defendant would be required to pay less than the Ponzi scheme defendant if convicted, evidencing an aspect of proportionality within the class of felony offenses. This means that in the final analysis, even if the special assessment scheme is not punitive on its face, it is punitive as applied. Thus, the conclusion that special assessments constitute fines for purposes of the Excessive Fines Clause retains its validity.

197. 18 U.S.C. § 3013(a).

198. See Elizabeth Bennett, *Neuroscience and Criminal Law: Have We Been Getting It Wrong for Centuries and Where Do We Go from Here?*, 85 *FORDHAM L. REV.* 437, 439 (2016) (“The retributivist theory of punishment is proportional punishment, or ‘just deserts.’”).

199. See Andrew Manuel Crespo, *The Hidden Law of Plea Bargaining*, 118 *COLUM. L. REV.* 1303, 1316 (2018) (explaining that prosecutors exercise discretion to “pile” charges by considering factors such as the potential incarceratory term a defendant faces—a proxy for the seriousness of the offense); see also James Vorenberg, *Decent Restraint of Prosecutorial Power*, 94 *HARV. L. REV.* 1521, 1525 (1981) (“Decisions whether and what to charge, and whether and on what terms to bargain, have been left in prosecutors’ hands with very few limitations.”). See generally Jeffrey M. Chemerinsky, *Counting Offenses*, 58 *DUKE L.J.* 709, 710 (2009) (“As Chief Justice Warren acknowledged in a case addressing how to divide drug charges, ‘[t]he problem of multiple punishment is a vexing and recurring one.’ . . . The law is unclear in this area, forcing prosecutors to determine on a case-by-case basis whether to charge a series of unlawful actions as a single, continuing course of conduct or as multiple separate offenses.” (alteration in original)).

B. *Recalibrating the Scheme for Imposing Special Assessments*

Having demonstrated why special assessments should be considered fines within the meaning of the Eighth Amendment, the central claim of this Article is that the special assessment scheme is in tension with current sentencing practices that allow judges to exercise discretion to waive the imposition of fines other than special assessment fees based on a defendant's financial situation. Accordingly, it advocates for a new approach permitting judges to unilaterally waive the imposition of special assessments on indigent defendants. To be sure, the number of stops between the status quo special assessment regime and a discretionary scheme may be limitless.²⁰⁰ Where the line should be drawn is not always clear. The argument in this Article is not meant to dictate the conclusion that the status quo special assessment fee structure should be changed to a purely discretionary one. Rather, it advocates for a special assessment system that is tethered to the amount of other fines imposed, meaning that if a court decides against imposing other fines because a defendant lacks the ability to pay, no special assessment fee should be imposed.

1. Tethering the Imposition of Special Assessments to Other Fines

The U.S. Supreme Court has explained that “[s]entencing judges may, and often do, consider the defendant’s ability to pay, but in such circumstances they are guided by sound judicial discretion rather than by constitutional mandate.”²⁰¹ Turning to current sentencing practices, section 5E1.2 of the U.S. Sentencing Guidelines (“Guidelines”) provides that:

- (a) The court shall impose a fine in all cases, except where the defendant establishes that he is unable to pay and is not likely to become able to pay any fine.
- (b) The applicable fine guideline range is that specified in subsection (c) below. If, however, the guideline for the offense in Chapter Two provides a specific rule for imposing a fine, that rule takes precedence over subsection (c) of this section.²⁰²

The minimum fine prescribed by the Guidelines is \$200.²⁰³ The Guidelines provide a list of factors that courts are required to consider when setting the amount of the fine, including “any evidence presented as to the defendant’s ability to pay the fine (including the ability to pay over a period of time) in light of his earning capacity and financial resources; [and] the burden that the

200. See Kevin R. Reitz, *The Enforceability of Sentencing Guidelines*, 58 STAN. L. REV. 155, 157 (2005) (“[T]here are an infinite number of stops between a purely advisory approach and a completely mandatory framework.”).

201. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 22 (1973).

202. U.S. SENT’G GUIDELINES MANUAL § 5E1.2(a)–(b) (U.S. SENT’G COMM’N 2018).

203. *Id.* § 5E1.2(c)(3) (imposing a minimum fine of \$200 for offenses level 3 and below).

fine places on the defendant and his dependents relative to alternative punishments.²⁰⁴ Importantly,

[i]f the defendant establishes that (1) he is not able and, even with the use of a reasonable installment schedule, is *not likely to become able to pay all or part of the fine* required by the preceding provisions, or (2) *imposition of a fine would unduly burden the defendant's dependents*, the court may impose a lesser fine or *waive the fine*.²⁰⁵

In many instances, a mandatory special assessment scheme runs headlong into these clear guidelines.

This reality is reinforced by the following example. Suppose a defendant is convicted on two counts of forgery, which carries a fine of \$200. Because of a drug addiction, the defendant was homeless and unemployed for five years predating the commission of the crime, and has no financial assets. Based on the defendant's financial situation, the judge decides to waive the \$200 fine.²⁰⁶ But the convictions on the two forgery counts also means that the judge is nevertheless statutorily required to impose a \$200 special assessment fee,²⁰⁷ even though the judge has already decided that the defendant lacks the ability to pay that exact amount. The logic of the special assessment scheme is incongruous with the Court's treatment of the historical sources informing the Excessive Fines Clause. Most recently, in *Timbs*, the Court approvingly cited a statement from Blackstone's Commentaries on the Laws of England that "[n]o man shall have a larger amercement imposed upon him, than his circumstances or personal estate will bear."²⁰⁸ In *Browning-Ferris* and *Bajakajian*, the Court observed that the Eighth Amendment's predecessor, the English Magna Carta, constrained the government's authority to impose fines by mandating that an economic sanction "not be so large as to deprive [a person] of his livelihood."²⁰⁹

While the Court did not specifically rule that a person's livelihood is a relevant consideration, these examples illustrate that the financial situation of a defendant is not only relevant to the concept of proportionality itself, but that a fine that is more than a defendant can pay may be properly understood as excessive within the meaning of the Eighth Amendment. When a court decides that a defendant cannot pay any amount of money on the basis of evidence

204. *Id.* § 5E1.2(d)(2)–(3).

205. *Id.* § 5E1.2(e) (emphasis added).

206. *See id.* § 5E1.2 (a)–(b) (allowing the judge to waive fines in limited circumstances).

207. 9A FED. PROC., L. ED. § 22:1753 (2021) (stating that an individual defendant convicted of a felony is assessed a \$100 special assessment fee for each count of conviction, so "multiple felonies [are] subject to multiple assessments").

208. *Timbs v. Indiana*, 139 S. Ct. 682, 688 (2019) (quoting 4 WILLIAM BLACKSTONE, COMMENTARIES *379).

209. *Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 271 (1989); *see also United States v. Bajakajian*, 524 U.S. 321, 335 (1989).

presented to the court, it conveys an understanding that even small economic sanctions can inflict undue hardship to poor defendants and their family members. For the reasons I develop below, mandating that a court impose a special assessment fee that is unlikely to be collected defies logic, is at worst a violation of a defendant's Eighth Amendment rights, and at best an administrative inefficiency on the courts.

2. Administering the Proposed Scheme

A special assessment scheme that allows judicial leeway in imposing the fee would help to address the defects just mentioned. Such a scheme is desirable not only because it would do more to safeguard the Eighth Amendment protections against excessive fines that should be afforded to all defendants, but also because it may potentially benefit the government's purse. This idea might at first seem implausible, since one goal of the special assessment statute is to generate revenue (albeit "limited" revenue). Carrying the point further, intuition suggests that a revenue-raising scheme requiring all defendants to pay a fixed amount is more desirable than one where only some are required to pay. The problem is that "[t]o the extent that states evaluate fee collection processes at all, they seem to look at one side of the ledger—the money brought in—without taking into account the costs of collection incurred by various governmental entities."²¹⁰

Indeed, it is hardly clear that a mandatory special assessment scheme advances the states' interest in financing victims aids programs any better than a discretionary one would. Rather, the evidence suggests the mandatory scheme is at odds with the states' interests on this front. To sharpen this point, consider that a substantial amount of court resources are dedicated to overseeing delinquent criminal justice debt.²¹¹ "[C]ourt dockets are often clogged by hearings where courts require people with outstanding debt to appear periodically, as well as hearings triggered when debtors fall behind on payments."²¹² Many people with legal financial obligations who lack the ability to pay do not pay them. Acknowledging this precarity, one person burdened by unmanageable LFOs put the point this way: "You know, there's no way I can pay it, so I don't even think about, you know, one way or the other."²¹³

In light of this reality, it cannot be said with any confidence that "[t]he adverse consequences of LFOs for those who possess them are . . . outweighed" by the government collecting any outstanding fees.²¹⁴ We cannot ignore the

210. See, e.g., BANNON ET AL., *supra* note 193, at 11.

211. See *id.* (explaining hidden costs of delinquent debt collection).

212. Colgan, *Graduating Economic Sanctions*, *supra* note 17, at 70.

213. See BECKETT ET AL., CONSEQUENCES OF LFOs, *supra* note 38, at 46.

214. *Id.* at 5.

reality that a person with a felony conviction²¹⁵ is more likely to experience severe financial hardship predating the violation.²¹⁶ Compounding the hardship is that a conviction erects barriers to housing,²¹⁷ employment,²¹⁸ and other fixtures of a stable life.²¹⁹ With few prospects for satisfying their LFOs, some turn to extreme measures like forgoing necessary medical care or engaging in criminal activity,²²⁰ erecting still more barriers to stability.

Thus, the more likely scenario is that the direct and indirect costs²²¹ related to collection of payments exceed the amount that would be deposited into the crime victim funds—a counterproductive and wasteful outcome. While there is no silver bullet for alleviating the destructive effects of poverty in the United States, allowing judges to waive the imposition of special assessment on defendants who cannot pay benefits victims, defendants, and the state.

C. *Critiques of a Discretionary Special Assessment Scheme*

In the foregoing sections, I have argued that recalibrating the scheme for imposing special assessment fees to allow for judicial discretion furnishes greater Eighth Amendment protections to indigent defendants and is likely to benefit the state. Even so, baseline concerns with the proposal exist. Consider in this regard the following. There are well known arguments that penalty fees

215. In the spirit of affirming that people who have run afoul of the law are more than their worst deeds, this Article avoids using the phrase “convicted felon” to describe people who have been convicted of a felony.

216. Financial hardship is only one form of disadvantage more likely to be experienced by those with criminal convictions. See BECKETT ET AL., CONSEQUENCES OF LFOS, *supra* note 38, at 38. Others include “comparatively low levels of education attainment, high rates of unemployment” and “mental and/or physical health problems.” *Id.*

217. See, e.g., Mark Walker, *Finding a Home After Prison Tough for Released Felons*, USA TODAY (Feb. 28, 2015, 8:27 PM), <https://www.usatoday.com/story/news/nation/2015/02/28/another-barrier-prison-finding-home/24197429/> [<https://perma.cc/32CU-297D>] (last updated Feb. 28, 2015, 8:28 PM).

218. See, e.g., Amanda Agan & Sonja B. Starr, *The Effect of Criminal Records on Access to Employment*, 107 AM. ECON. REV. 560, 560 (2017).

219. Individuals with felony convictions also encounter challenges exercising their right to vote. See, e.g., Tyler Knutson, *Debts Paid: Ending Criminal Disenfranchisement*, 46 J. LEGIS. 93, 93 (2019) (“[S]tates have leveraged their constitutional powers to continually disenfranchise millions of voters by modifying qualifications to vote and forbidding felons and ex-felons from participating in the electoral process.”).

220. Colgan, *Challenging the Modern Debtors’ Prison*, *supra* note 17, at 8 (“Desperate to avoid these repercussions, people go to extremes to pay. In an alarming number of cases people report having to forego necessities like food, housing, hygiene, or medicine, in order to pay what little they can, even if just a few dollars at a time.”).

221. An adjacent problem is that imposing unmanageable fees may also incentivize people to turn towards crime to obtain the funds to satisfy the debt. See, e.g., Alexes Harris, Heather Evans & Katherine Beckett, *Drawing Blood from Stones: Legal Debt and Social Inequality in the Contemporary United States*, 115 AM. J. SOCIO. 1753, 1785 (2010). For example, one financially vulnerable individual trapped in the cycle of criminal justice debt described their frustration: “I’m not trying or wanting to do any crime, and I still can’t quite commit myself to do prostitution, but I think about it sometimes . . . at least that way I could pay some of these damn fines.” *Id.*

are instruments of accountability and that *all* lawbreakers should be held accountable for any harms to society caused by their criminal conduct.²²² So, waiving the imposition of penalty fees on indigent defendants, the argument maintains, would under-deter the poor.²²³

It is conceded that indigent defendants should be held accountable for their wrongdoing.²²⁴ And poor defendants do not contend that they should escape accountability for their actions simply because they are poor, as the following observation relates: “I think it is fair, I think that if you break the law like I did, there should be some . . . consequences for my behavior, and so I’m trying . . . to be responsible in other areas of my life too.”²²⁵ But the notion that income-based penalty fees might under-deter the poor rests on a faulty premise.

This notion assumes that poor people who commit crimes are driven to break the law in the first instance by cost-benefit calculations about the severity of the punishment they might receive. But closer inspection reveals a different story. Studies show that persistent social and economic dislocation *is* criminogenic.²²⁶ Poor people who break the law turn toward crime out of desperation—the sort of impulse where rational calculations do not play a prominent role. For those disadvantaged along multiple dimensions, the withdrawal of opportunities engenders a survival impulse that leaves little room for cost-benefit calculations about worst-case scenarios.²²⁷ James Baldwin put

222. See, e.g., Brittany Friedman & Mary Pattillo, *Statutory Inequality: The Logics of Monetary Sanctions in State Law*, 5 RUSSELL SAGE FOUND. J. SOC. SCIS. 173, 175 (2019) (“Of course, the concept of personal responsibility is not new in the criminal justice realm, where the law has always assumed an individual actor who is individually culpable. . . . In the criminal justice context, the intensified personal responsibility rhetoric allows for greater certainty of culpability and punitive severity.”); Gary Blankenship, *Senate Panel Reviews Fines and Fees*, FLA. BAR: FLA. BAR NEWS (Nov. 13, 2019), <https://www.floridabar.org/the-florida-bar-news/senate-panel-reviews-fines-and-fees/> [<https://perma.cc/4ZUK-S4Q5>] (reporting that Florida State Senator Jeff Brandes said “[convicted defendants] brought it on themselves by committing a crime If they’re found guilty it seems reasonable to have some kind of charge to them. If it were up to me, they’d pay the whole [cost]”).

223. Alec Schierenbeck, *The Constitutionality of Income-Based Fines*, 85 U. CHI. L. REV. 1869, 1882 (2018).

224. See Beckett & Harris, *supra* note 35 and accompanying text.

225. BECKETT ET AL., CONSEQUENCES OF LFOS, *supra* note 38, at 45.

226. See Mirko Bagaric, *Rich Offender, Poor Offender: Why It (Sometimes) Matters in Sentencing*, 33 LAW & INEQ. 1, 36 (2015) (“[I]t is incontestable not only that the poor have a limited sphere of choice, but also that it can induce a degree of frustration. Moreover, the poor are more inclined to commit crime than the rich, because they do not have the same incentive to comply with the law in order to maintain their own status.”); Stephen J. Morse, *Deprivation and Desert*, in FROM SOCIAL JUSTICE TO CRIMINAL JUSTICE 114, 141–42 (William C. Heffernan & John Kleinig eds., 2000) (“A poor person threatened with imminent death or starvation because he or she could not afford food or medicine could justifiably take these items from another, conduct that would otherwise be larceny . . .”).

227. Indeed, wealthy defendants are more likely to turn toward crime based on calculations about the type of punishment they might receive. See, e.g., Alec Schierenbeck, *A Billionaire and Nurse Shouldn’t Pay the Same Fine for Speeding*, N.Y. TIMES (Mar. 15, 2018), <https://www.nytimes.com/2018/03/15/opinion/flat-fines-wealthy-poor.html> [<https://perma.cc/T882-QVM6> (dark archive)] (“Some evidence shows the rich are more likely to break the law while driving.”).

the point this way, “[i]f one is continually surviving the worst that life can bring, one eventually ceases to be controlled by fear of what life can bring; whatever it brings must be borne.”²²⁸

But this is not the end of the story. The argument that waiving economic sanctions on the most financially vulnerable defendants might have an under-deterrent effect on those defendants also ignores the fact that special assessment fees are often imposed “on top” of the sentence, i.e., an incarceratory term of two years plus a special assessment fee, rather than as the sole punishment. And the collateral consequences of convictions are on their own often more debilitating than can be put in nominal terms.²²⁹ The typical person with a felony conviction is relegated to a second-class existence.²³⁰ Barriers to education, housing, employment, voting, and other paths that are staples of a dignified life become the norm.²³¹ Even if an economic sanction is not imposed, the consequences of a conviction are still severe. Thus, the argument that waiving special assessments on indigent defendants might have an under-deterrent effect on the poor does not carry the day.

Should skeptics be unsatisfied with the foregoing explanation, a more creative approach to accountability may address their concerns. For example, when a defendant’s financial circumstances counsel against the imposition of a special assessment fee, their financial obligation to crime victims can be converted into an obligation to perform community service work on behalf of the population harmed by their criminal conduct. Requiring persons with criminal convictions to fulfill community service obligations would not only advance the states’ interest in supporting crime victims, but it also has the potential to benefit defendants by integrating wrongdoers in productive, dignity-affirming activities that are important to reducing recidivism.²³²

228. JAMES BALDWIN, *THE FIRE NEXT TIME* 106 (1963).

229. See, e.g., Michael Pinard, *Collateral Consequences of Criminal Convictions: Confronting Issues of Race and Dignity*, 85 N.Y.U. L. REV. 457, 533 (2010) (“The reality is that it is nearly impossible for individuals convicted of criminal offenses to move past their criminal records because collateral consequences continue to punish them long after the completion of their sentences.”).

230. See, e.g., David J. Zeitlin, *Revisiting Richardson v. Ramirez: The Constitutional Bounds of Ex-Felon Disenfranchisement*, 70 ALA. L. REV. 259, 290 (2018) (“[A] criminal sentence does not make an individual irredeemable—once ex-felons have completed their sentences they have served their debt to society and should be able to reintegrate without permanently being second-class citizens.”).

231. See Pinard, *supra* note 229, at 459 (“[I]ndividuals [with criminal convictions] must confront a wide range of collateral consequences stemming from their convictions, including ineligibility for federal welfare benefits, public housing, student loans, and employment opportunities, as well as various forms of civic exclusion, such as ineligibility for jury service and felon disenfranchisement.”).

232. The collateral consequences of obtaining a criminal record are dignity-stripping. See *id.* at 522. Enhancing the “dignity of individuals with criminal records” is an important step in rehabilitation so that they can live productive lives. *Id.* at 464. This can be accomplished by affording individuals with criminal records the opportunity to engage in productive activities in the community. See *id.* at 464–65.

One might also object to the proposed scheme on the ground that tying the imposition of special assessment fees to defendants' ability to pay is a "redistributionist policy masquerading as criminal justice reform."²³³ Put differently, a logical outgrowth of tethering the imposition of special assessments to a defendant's financial status is that wealthy people will be left to shoulder the responsibility of financing the victims aid programs. That the scheme might have a redistributionist effect breaks no new ground and is not an argument that should stand in the way of the proposed reform. It is already the practice in many courts to undertake ability to pay calculations before imposing fines other than special assessment fees. The Supreme Court has acknowledged that trial judges can proportion economic sanctions other than special assessments according to a defendant's ability to pay. In such instances, doing so would not be a constitutional mandate, but an exercise in sound discretion.²³⁴ This indicates that economic justice concerns are on their own principled legal bases for gradations in monetary penalty. In short, the evidence is compelling that tethering the imposition of special assessments to the imposition of other fines has the potential to improve the overall financial standing of the government, which should mitigate concerns that the wealthy are shouldering any unwarranted responsibility.²³⁵

Still others might critique the scheme on the theory that its administrability and cost make it impractical.²³⁶ The opposite is true. A special assessment scheme allowing judicial leeway is feasible from an administrative and cost perspective. As an initial matter, to bring this scheme to life, § 3013 would have to be amended to give judges a free hand to waive the imposition of special assessments. There are reasons to think that Congress would be open to amending the statute along these lines. Lawmakers are "increasingly conducive to adopting policies allowing for the graduation of economic sanctions according to ability to pay."²³⁷ Coalitions involving liberal organizations such as the American Civil Liberties Union, conservative groups

233. Schierenbeck, *supra* note 32, at 1879.

234. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 22 (1973).

235. *See, e.g., Colgan, Graduating Economic Sanctions, supra* note 17, at 65.

236. For instance, in *Williams v. Illinois*, Chief Justice Burger noted that the Court was "not unaware that today's holding [that it is a violation of the Equal Protection Clause to convert involuntarily unpaid fines into incarceration beyond a statutory maximum] may place a further burden on States in administering criminal justice." 399 U.S. 235, 245 (1970). A 2019 report by the Brennan Center for Justice also found rampant inefficiency in the collection and enforcement of fines and fees, and recommended that "[s]tates and localities should pass legislation to eliminate court-imposed fees" in order to address these administrative burdens. Matthew Menendez, Michael F. Crowley, Lauren-Brooke Eisen & Noah Atchison, *The Steep Costs of Criminal Justice Fees and Fines: A Fiscal Analysis of Three States and Ten Counties*, BRENNAN CTR. FOR JUST. 5 (Nov. 21, 2019), https://www.brennancenter.org/sites/default/files/2020-07/2019_10_Fees%26Fines_Final.pdf [<https://perma.cc/UP2A-E8V4>].

237. Colgan, *Graduating Economic Sanctions, supra* note 17, at 60.

like American Legislative Exchange Council, and nonpartisan organizations like the Conference of State Court Administrators are coalescing around the issue of “the graduation of economic sanctions to account for a defendant’s ability to pay.”²³⁸ In view of the intervening developments since § 3013 was enacted in 1984, reforming the use of criminal justice fines by amending the special assessment statute is an idea that can gain traction in Congress.

From a cost perspective, the proposed recalibration would not impose additional burdens on the courts. As already noted, ability-to-pay calculations are a common practice in criminal sentencing proceedings. Probation officers in the federal system dedicate considerable resources to developing a presentence investigation report (“PSR”) on the “defendant’s history and characteristics, including . . . the defendant’s financial condition.”²³⁹ Trial judges adopt the findings in PSRs to differentiate between defendants²⁴⁰ and make factual determinations about what punishment should be imposed.²⁴¹ The existing infrastructure in federal courts for determining a defendant’s ability to pay demonstrates that the special assessment scheme contemplated can be adopted in a straightforward fashion that would not require additional capacity.

CONCLUSION

This Article has argued that one straightforward but underappreciated way to reform the system is to recalibrate the scheme for imposing special assessments. Specifically, when a judge has determined that a defendant lacks the ability to pay *any* fine, the special assessment should be waived. This approach provides stronger Eighth Amendment protections for indigent defendants and comports with current sentencing practices. In light of the perverse consequences of unmanageable criminal justice debt on indigent defendants (including the trickle-down effects on their families and communities)²⁴² and the administrative inefficiencies inherent in overseeing debt that is unlikely to be collected, the status quo special assessment fee structure is in need of reform. Defendants who cannot pay, will not pay. But the cost of collecting an outstanding debt the size of typical special assessment

238. *Id.*

239. FED. R. CRIM. P. 32(d)(2)(A).

240. See Note, *A Proposal to Ensure Accuracy in Presentence Investigation Reports*, 91 YALE L.J. 1225, 1225 (1982) (“The Presentence Investigation Report (PSI) is the primary source of such information for all stages of the correctional process.”).

241. *Id.*

242. KARIN MARTIN & KIMBERLY SPENCER-SUAREZ, *THE FORTUNE SOC’Y, JOHN JAY COLL. OF CRIM. JUST., CRIMINAL JUSTICE DEBT: COSTS & CONSEQUENCES* 8 (2017), https://issuu.com/thefortunesociety/docs/cj_report_/8 [<https://perma.cc/F8T5-TWCL>] (“Because the burden of indebtedness frequently extends beyond the debtor, at stake is the potential for this debt to add an additional stressor to families, many of whom may already be struggling financially. This, ultimately, is yet another cost to both family and community.”).

fees is likely to be a net loss to the government's purse. Instead, a more desirable scheme would be to waive the penalty fee and/or convert indigent defendants' financial obligations to an obligation to perform community service work benefitting groups impacted by the type of crime involved.

APPENDIX

The chart below provides the results of a study conducted by this author involving 112 federal criminal cases across the country where defendants were deemed at sentencing to be poor to pay a fine. For a broad cross section of practices throughout the country, the study reviewed cases from every circuit court of appeals. The results showed that prosecutors waive special assessment fees less than twenty percent of the time when a judge has already determined that the defendant is too poor to pay a fine.

The breakdown of the study was as follows: Of the ten such cases from the First Circuit Court of Appeals, prosecutors did not waive the special assessment in any of the cases. From the nine Second Circuit cases reviewed, that number was zero. All of the ten reviewed Third Circuit cases yielded the same result. Of ten such cases from the Fourth Circuit, only one prosecutor moved to have special assessment fees waived, which was granted by the court. In the Fifth Circuit, out of ten cases, six prosecutors moved for special assessment fees, but only in four of those cases were those motions granted or the fees remitted by the government. No U.S. Attorneys arguing in the Sixth Circuit moved for special assessment fees to be waived out of ten reviewed cases. In the Seventh Circuit, of ten comparable cases, two motions were made for special assessment fees to be waived, both of which were granted. In the Eighth and Ninth Circuits, chances of special assessment fees being waived were significantly higher: in ten of ten reviewed Eighth Circuit cases, prosecutors moved for waiver of fees and each motion was granted by the court, while in the Ninth Circuit, ten of ten reviewed cases involved such motions and only one was denied. The Tenth and Eleventh Circuits, however, did not consider a single special assessment fee waiver motion, out of ten reviewed cases each. Similarly, in the D.C. Circuit, zero prosecutors in the three reviewed cases moved to waive special assessment fees.

Case Name	Docket No.	District	Circuit	Fine waived due to inability to pay?	Special assessment waived?
United States v. Dunston	1:15-cr-00162	D. Me.	1st	Yes	No
United States v. Crosby	1:17-cr-00123	D. Me.	1st	Yes	No

United States v. Goguen	1:11-cr-00003	D. Me.	1st	Yes	No
United States v. Perry	1:95-cr-00075	D.R.I.	1st	Yes	No
United States v. Cain	1:16-cr-001003	D. Me.	1st	Yes	No
United States v. Stone	1:08-cr-00006	D. Me.	1st	Yes	No
United States v. Trecartin	1:13-cr-00057	D. Me.	1st	Yes	No
United States v. Nobrega	1:10-cr-00186	D. Me.	1st	Yes	No
United States v. Hood	97-86-B	D. Me.	1st	Yes	No
United States v. Stile	1:11-cr-00185	D. Me.	1st	Yes	No
United States v. Djuric	1:96-cr-01079	S.D.N.Y.	2d	Yes	No
United States v. Beltre	1:00-cr-01306	S.D.N.Y.	2d	Yes	No
United States v. Keough	2:04-cr-00098	D. Vt.	2d	Yes	No
United States v. Trotter	1:15-cr-00382	E.D.N.Y.	2d	Yes	No
United States v. Chica-Villada	1:15-cr-00445	E.D.N.Y.	2d	Yes	No
United States v. Ramirez	1:17-cr-00676	E.D.N.Y.	2d	Yes	No
United States v. Santiago	1:16-cr-00615	E.D.N.Y.	2d	Yes	No
United States v. Morales	1:09-cr-00617	E.D.N.Y.	2d	Yes	No
United States v. Villavicencio	1:09-cr-00617	E.D.N.Y.	2d	Yes	No
United States v. Hamilton	3:10-cr-00038	M.D. Pa.	3d	Yes	No
United States v. Roach	2:02-cr-00405	E.D. Pa.	3d	Yes	No
United States v. Flick	2:98-cr-00137	W.D. Pa.	3d	Yes	No
United States v. Gardenhire	2:15-cr-00087	W.D. Pa.	3d	Yes	No
United States v. DeMarco	2:10-cr-00790	E.D. Pa.	3d	Yes	No

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United States v. Duncan	2:15-cr-00087-019	W.D. Pa.	3d	Yes	No
United States v. Fielder	2:13-cr-00125	W.D. Pa.	3d	Yes	No
United States v. Miller	2:07-cr-00100	W.D. Pa.	3d	Yes	No
United States v. Wells	2:08-cr-00068	W.D. Pa.	3d	Yes	No
United States v. Murin	2:09-cr-00279	W.D. Pa.	3d	Yes	No
United States v. Owens	2:05-cr-00004	N.D. W. Va.	4th	Yes	No
United States v. Devine	5:07-cr-00010	E.D.N.C.	4th	Yes	No
United States v. Turpin	2:01-cr-00261	S.D. W. Va.	4th	Yes	No
United States v. Brooks	3:02-cr-00092	S.D. W. Va.	4th	Yes	No
United States v. Hunt	2:06-cr-00133	E.D. Va.	4th	Yes	No
United States v. Green	1:05-cr-00102	N.D. W. Va.	4th	Yes	No
United States v. Blondeau	5:09-cr-00117	E.D.N.C.	4th	Yes	No
United States v. O'Connor	1:00-cr-00285	E.D. Va.	4th	Yes	Yes
United States v. Lewis	1:05-cr-00108	N.D. W. Va.	4th	Yes	No
United States v. Ohin	4:08-cr-00026	E.D. Va.	4th	Yes	No
United States v. Reyes-Renteria	3:07-cr-01624	W.D. Tex.	5th	Yes	No
United States v. Le	1:05-cr-00088	S.D. Miss.	5th	Yes	No
United States v. Salgado-Brito	5:15-cr-00822	S.D. Tex.	5th	Yes	Yes
United States v. Samson	4:19-cr-00172	S.D. Tex.	5th	Yes	No
United States v. Montrel	2:08-cr-00746	S.D. Tex.	5th	Yes	No
United States v. Rojas	2:10-cr-00884	S.D. Tex.	5th	Yes	No
United States v. Romero	1:05-cr-00949	S.D. Tex.	5th	Yes	Yes

United States v. Camacho	1:10-cr-00539	S.D. Tex.	5th	Yes	No
United States v. Santiago-Luegas	2:19-cr-01072	W.D. Tex.	5th	Yes	Yes
United States v. Arias-Lopez	2:10-cr-00595	S.D. Tex.	5th	Yes	No
United States v. Jamison	1:14-cr-00046	S.D. Ohio	6th	Yes	No
United States v. Henley	3:13-cr-00144	S.D. Ohio	6th	Yes	No
United States v. Mill	1:10-cr-00106	W.D. Mich.	6th	Yes	No
United States v. Fleischer	4:18-cr-00209	N.D. Ohio	6th	Yes	No
United States v. Jackson	3:05-cr-00179	S.D. Ohio	6th	Yes	No
United States v. Roe	5:15-cr-20581	E.D. Mich.	6th	Yes	No
United States v. McCord	2:13-cr-00059	S.D. Ohio	6th	Yes	No
United States v. Byrd	3:12-cr-00043	S.D. Ohio	6th	Yes	No
United States v. Daoud	3:12-cr-00021	S.D. Ohio	6th	Yes	No
United States v. Beasley	1:03-cr-00106	S.D. Ohio	6th	Yes	No
United States v. Miller	3:17-cr-00020	N.D. Ind.	7th	Yes	No
United States v. Casaca-Santos	3:06-cr-30013	C.D. Ill.	7th	Yes	No
United States v. Tolbert	3:14-cr-00034	N.D. Ind.	7th	Yes	No
United States v. Beck	3:07-cr-00057	N.D. Ind.	7th	Yes	No
United States v. Woods	3:18-cr-00051	N.D. Ind.	7th	Yes	No
United States v. Brandt	3:07-cr-00057	N.D. Ind.	7th	Yes	No
United States v. Shontel	3:07-cr-00072	N.D. Ind.	7th	Yes	No
United States v. Price	3:09-cr-30107	C.D. Ill.	7th	Yes	No
United States v. Jones	1:19-cr-00033	N.D. Ind.	7th	Yes	No

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United States v. Barreto			7th	Yes	Yes
United States v. Vargas-Dominguez	4:11-cr-00013	E.D. Ark.	8th	Yes	Yes
United States v. Meza-Magana	4:10-cr-00330	E.D. Ark.	8th	Yes	Yes
United States v. Ornelas-Cuellar	4:10-cr-00297	E.D. Ark.	8th	Yes	Yes
United States v. Valentin-Alvarado-Xar	2:08-cr-00814	S.D. Tex.	8th	Yes	No
United States v. Sheeler	4:06-cr-40022	D.S.D.	8th	Yes	No
United States v. Sam	0:15-cr-00161	D. Minn.	8th	Yes	No
United States v. Due	8:12-cr-00344	D. Neb.	8th	Yes	No
United States v. Gonzalez	5:14-cr-50065	W.D. Ark.	8th	Yes	No
United States v. Franklin	2:13-cr-20029	W.D. Ark.	8th	Yes	No
United States v. Ordaz	2:12-cr-20007	W.D. Ark.	8th	Yes	No
United States v. Garcia-Trujillo	4:20-po-21995	D. Ariz	9th	Yes	Yes
United States v. Yesca-Velasco	4:19-po-36393	D. Ariz	9th	Yes	Yes
United States v. Carbajal-Castro	4:18-po-30183	D. Ariz	9th	Yes	Yes
United States v. Ortiz-Mejia	4:18-po-30182	D. Ariz	9th	Yes	Yes
United States v. Lopez-Flores	4:18-po-26438	D. Ariz	9th	Yes	Yes
United States v. Torres-Lopez	4:18-po-23805	D. Ariz	9th	Yes	Yes
United States v. Pascual-Baltazar	4:17-po-31931	D. Ariz	9th	Yes	Yes
United States v. Uribe	1:06-cr-00267	E.D. Cal.	9th	Yes	Yes
United States v. Jimenez-Sanchez	3:09-cr-04261	S.D. Cal.	9th	Yes	No
United States v. Grogg	2:06-cr-00008	E.D. Cal.	9th	Yes	No

United States v. Darden	1:15-cr-00243	D. Colo.	10th	Yes	No
United States v. Warnes	1:13-cr-00393	D. Colo.	10th	Yes	No
United States v. Sandoval-Delao	1:15-cr-00039	D. Colo.	10th	Yes	No
United States v. Varela	1:14-cr-00249	D. Colo.	10th	Yes	No
United States v. Gandara-Chavez	1:14-cr-00096	D. Colo.	10th	Yes	No
United States v. Anthony	5:15-cr-00126	W.D. Okla.	10th	Yes	No
United States v. Rodriguez	CR 11-0288	D.N.M.	10th	Yes	No
United States v. Garcia	05-cr-133	D. Wyo.	10th	Yes	No
United States v. Elwood	5:11-cr-00079	W.D. Okla.	10th	Yes	No
United States v. Rausch	1:07-cr-00497	D. Colo.	10th	Yes	No
United States v. Corley	1:06-cr-00256	S.D. Ala.	11th	Yes	No
United States v. Thompson	1:08-cr-00069	S.D. Ala.	11th	Yes	No
United States v. Duane	1:07-cr-00232	S.D. Ala.	11th	Yes	No
United States v. Brito-Padilla	6:19-cr-00597	N.D. Ala.	11th	Yes	No
United States v. Patel	08-00182-cr-cc-1	N.D. Ga.	11th	Yes	No
United States v. DiFalco	8:13-cr-00072	M.D. Fla.	11th	Yes	No
United States v. Hicks	0:04-cr-60179	S.D. Fla.	11th	Yes	No
United States v. Kimbrough	1:08-cr-00150	S.D. Ala.	11th	Yes	No
United States v. Leonard	1:07-cr-00208	S.D. Ala.	11th	Yes	No
United States v. Scott	1:06-cr-00390	N.D. Ga.	11th	Yes	No
United States v. Royal	95-420 (GK)	D.D.C.	D.C.	Yes	No
United States v. King	1:15-cr-00140	D.D.C.	D.C.	Yes	No

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NICKELS AND DIMES?

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United States v. Destine	1:08-cr- 00126	D.D.C.	D.C.	Yes	No
United States v. Segovia	1:08-cr- 00018	D.D.C.	D.C.	Yes	No

