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The Burden of Legal Financial Obligations on the Indigent: For More Proportionality in the Fourteenth Amendment Assessment

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Last December, Attorney General Jeff Sessions revoked the 2016 "dear colleague" letter issued by the Justice Department calling on jurisdictions around the country to cease certain punishments for the nonpayment of criminal fees and fines, including incarceration. The repeal of this letter suggests a withdrawal of the Justice Department's commitment to defending the constitutional rights of the poorest Americans. Study after study has shown the degree to which poor people are more likely to be hindered by economic sanctions imposed by the judicial system, and the Supreme Court and other courts have already judged some of these practices to be unconstitutional. Scholars have argued repeatedly that the enforcement of penalties for the nonpayment of fines and fees imposed for criminal misconduct are unlawful under the Eight Amendment (protection against excessive fines), the Twenty-Fourth Amendment (right to vote), the Fifth Amendment (due process and interdiction of double jeopardy), and the Thirteenth Amendment (prohibition of slavery and involuntary servitude—the so-called peonage prohibition). However, there are still many uncertainties regarding the scope of protections afforded by these amendments when it comes to legal financial obligations applied to the poorest Americans.

Although the most important cases from the Supreme Court striking down enforcement of fines and fees for criminal misconduct involve the Fourteenth Amendment, very few scholars have dealt thoroughly with the scope of its protection. Most of the time, the literature briefly tackles the issue as it appears in three notable Supreme Court cases: Williams v. Illinois, Tate v. Short, *and* Bearden v. Georgia. *In this context, the present note aims to question the practice of enforcement of fines and fees for criminal misconduct under the Fourteenth Amendment. There is an urgent need for courts to examine proportionality when due process and equal protection rights are at stake. Proportionality allows courts to address both categories when an objected practice appears to be deeply harmful and unfair, and yet no fundamental rights or suspect class are at stake.*

[1] This paper has been written for Prof. Owen Fiss' Class "A Community of Equals", Yale Law School (Spring 2018).

On April 5-6, 2018, the Arthur Liman Center for Public Interest Law at Yale Law School held a colloquium entitled *Who Pays? Fines, Fees, Bail, and the Cost of Courts*. In presentation after presentation, the disproportionate impact shouldered by poor Americans in the criminal justice system were depicted, revealing a situation unbefitting for a democratic country that prides itself on the rule of law and its protection of fundamental rights. Politicians, academics, and members of the judiciary denounced this practice unanimously.

The alarming practice of punishing poor people who cannot pay fines and fees for criminal misconduct is not a new one. As Neil E. Sobol observes: "Criminal justice debt has increased dramatically during the last forty years. Courts have imposed legal financial obligations on "[sixty-six percent] of felons sentenced to prison, and more than [eighty percent] of other felons and misdemeanants."[2] As a matter of fact, report after report[3] has shown the degree to which poor people are likely to be disproportionately impacted by economic sanctions imposed by the criminal justice system, although the Supreme Court and other courts have already found at least some of these practices to be unconstitutional.[4] Things have gotten worse since the Great Recession, which created a need for counties and states to find new revenue streams to fund their criminal justice systems.[5] The public has paid increasing attention to the issue of legal financial obligations since 2015.[6] In the past

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[2] Neil L. Sobol, *Charging the Poor: Criminal Justice Debt & Modern-Day Debtors' Prisons*, 75 MD. L. REV. 486, 508 (2016).

[3] SHAFROTH ABBY ET AL., CONFRONTING CRIMINAL JUSTICE DEBT: A GUIDE FOR LITIGATION *(*National Consumer Law Center, 2016); U.S. DEPARTMENT OF JUSTICE, INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT (2015); ACLU, MODERN-DAY DEBTORS' PRISONS: THE WAYS COURT-IMPOSED DEBTS PUNISH PEOPLE FOR BEING POOR (2014); WHITE HOUSE COUNCIL OF ECONOMIC ADVISERS, ISSUE BRIEF, FINES, FEES, AND BAIL: PAYMENTS IN THE CRIMINAL JUSTICE SYSTEM THAT DISPROPORTIONATELY IMPACT THE POOR (2015); ACLU, IN FOR A PENNY: THE RUSE OF AMERICA'S NEW DEBTORS' PRISONS (2010); HUMAN RIGHTS WATCH, PROFITING FROM PROBATION/AMERICA'S "OFFENDER-FUNDED" PROBATIO INDUSTRY (Feb. 2014); DILLER REBEKAH, BANNON ALICIA & NAGRECHA MITALI, CRIMINAL JUSTICE DEBT: A BARRIER TO REENTRY (Brennan Center for Justice, 2010).

[4] *Griffin v. Illinois*, 351 U.S. 12 76 S. Ct. 585 (1956); *Harper v. Virginia Board of Elections*, 383 U.S. 663 (1966); *Williams v. Illinois*, 399 U.S. 235, 90 S. Ct. 2018 (1970); *Tale v. Short*, 401 U.S. 395,91 S. Ct. 688 (1971); *Bearden v. Georgia*, 461 U.S. 660, 103 S. Ct. 2064 (1983).

[5] NATIONAL CENTER FOR STATE COURTS, FINES, FESS AND BAIL PRACTICES: CHALLENGES AND OPPORTUNITIES, TRENDS IN STATE COURTS (2017); Ann Cammett, *Shadow Citizens: Felony Disenfranchisement and the Criminalization of Debt*, 117 PENN ST. L. REV. 349, 382 (2012).

[6] ALEXES HARRIS AND AL., UNITED STATES SYSTEMS OF JUSTICE, POVERTY AND THE CONSEQUENCES OF NON-PAYMENT OF MONETARY SANCTIONS: INTERVIEWS FROM CALIFORNIA, GEORGIA, ILLINOIS, MINNESOTA, MISSOURI, TEXAS, NEW YORK, AND WASHINGTON, 3 (Laura and John Arnold Foundation, 2017).

few years, the legal literature dealing with this question has been prolific.[7] It comes as no surprise that Black Americans as well as Latino Americans are disproportionality affected by these economic sanctions, since they are overrepresented among the poor.[8] Children in the juvenile justice system are also deeply affected[9].

Following the 2014 police shooting and ensuing protests in Ferguson, Missouri, a report of the Justice Department published in 2015 issued an important warning according to which "Ferguson's law enforcement practices are shaped by the City's focus on revenue rather than by public safety needs."[10] After this report, the Justice Department wrote a "dear colleagues" letter drawing the attention of state and local courts to the growing problem of the illegal enforcement of fines and fees and its worrisome consequences for the indigent: escalating debt; repeated, unnecessary incarceration for nonpayment despite posing no danger to the community; loss of employment; and cyclical poverty that can be nearly impossible to escape[11]. In the letter, the Department of Justice invoked a set of basic constitutional principles grounded in the rights to due process and equal protection relevant to the enforcement of fines and fees. However, last December, Attorney General Jeff Sessions revoked the 2016 "Dear Colleague" letter.[12] This cancellation constitutes a withdrawal of the government's commitment to safeguard the constitutional rights of the poorest Americans and to tackle one of the

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7 Laura I. Appleman, *Nickel and Dimed Into Incarceration: Cash-Register Justice in the Criminal System*, 57 B.C. L. REV. 1483 (2016); 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 (2016); Note, *Fining the Indigent*, 71 COLUM. L. REV. 1281 (1971) [hereinafter: Note, *Fining the Indigent*]; Christopher D. Hampson, *The New American Debtors' Prisons*, 44 AM. J. CRIM. L. 1 (2016); Thomas B. Harvey, *Jailing the Poor*, 42 HUM. RTS. 16 (2017); Lisa Foster (Judge Ret.), *Injustice under Law Perpetuating and Criminalizing Poverty through the Courts*, 33 GA. ST. U. L. REV. 695 (2017); Andrea Marsh, Emily Gerrick, *Why Motive Matters: Designing effective Policy responses to Modern Debtors' Prisons*, 34 YALE L. & POL'Y REV. 93 (2015); Sobol *supra* note 2.

8 U.S. COMMISSION ON CIVIL RIGHTS, TARGETED FINES AND FEES AGAINST LOW-INCOME COMMUNITIES OF COLOR: CIVIL RIGHTS AND CONSTITUTIONAL IMPLICATIONS, BRIEFING BEFORE THE UNITED STATES COMMISSION ON CIVIL RIGHTS HELD IN WASHINGTON, DC (2017); ACLU, A POUND OF FLESH, THE CRIMINALIZATION OF PRIVATE DEBTS, 4 (2018); Tamar R. Birckhead, *The New Peonage*, 72 WASH. & LEE L. REV. 1595 (2015); Hampson, *supra* note 7.

9 Jeffrey Selbin, Stephanie Campos-Bui, Hamza Jaka, Tim Kline, Ahmed Lavalais & Alynia Phillips, *Making Families Pay: The Harmful, Unlawful, and Costly Practice of Charging Juvenile Administrative Fees in California*, BERKELEY LAW POL'Y ADVOCACY CLINIC (2017); Tamar R. Birckhead, *The New Peonage*, 72 WASH. & LEE L. REV. 1595 (2015); Foster, *supra* note 7.

10 U.S. DEPARTMENT OF JUSTICE, INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT (2015); See also Turner, Ryan K., *Lessons from Ferguson: What Every Government Lawyer in Texas Needs to Know*, TXCLE ADVANCED GOV'T L. 1.I (2016); Colgan Beth A., *Lessons from Ferguson on Individual Defense Representation as a tool of systemic reform*, 58 WM. & MARY L. REV. 1171 (2017 (b))

11 U.S. Department of Justice Civil Rights Division - Office for Access to Justice, Dear Colleagues Letter (March 14, 2016).

12 Rachel Stockman, *Sessions Made What Might be His Most Racially Discriminatory Decision Yet and Barely Anyone Noticed*, LAW & CRIME (2017).

most pressing problem in contemporary America: the entrapment of the indigent into a vicious circle of imprisonment, deprivation, and debts that cannot be repaid. This situation harms initially the victims of such practices, but also, the whole society. The lack of political will to tackle this issue contributes to the problem, so it is crucial that other parts of the society join together to try to eradicate these practices.

This paper aims to introduce one new element to the legal aspect of the debate. Scholars have repeatedly argued that the enforcement of penalties for unpaid fines and fees are unconstitutional under the Eight Amendment (protection against excessive fines)[13], the Twenty-Fourth Amendment (right to vote)[14], the Fifth Amendment (due process and interdiction of double jeopardy)[15], the Sixth Amendment (right to a fair trial)[16] and the Thirteenth Amendment (prohibition of slavery and involuntary servitude—the so-called peonage prohibition)[17]. Nevertheless, one surprising element is that, to my knowledge, no contribution has dealt thoroughly with the issue from the Fourteenth Amendment point of view—although the most important cases from the Supreme Court striking down enforcement of fines and fees practices were Fourteenth Amendment cases. Most of the time, the literature briefly tackles the issue as it appears in three notable Supreme Court cases:[18] *Williams v. Illinois*,[19] *Tate v. Short*[20], and *Bearden v. Georgia*[21]. It might be that scholars and lawyers have felt no need to further comment on the issue with regard to the Fourteenth Amendment. However, these cases have not addressed all aspects of the problem; they address one side of it—the imprisonment of

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13 *Development in the Law – Policing, Chapter One Policing and Profit*, 128 HARV. L. REV. 1723 (2015) [hereinafter *Chapter One Policing and Profit*]; Nicholas M. McLean, *Livelihood, Ability to Pay, and the Original Meaning of the Excessive Fines Clause*, 40 HASTINGS CONST. L.Q. 833, 886–87 (2013).

14 Cammett, *supra* note 5.

15 Atkinson, *supra* note 5.

16 Appleman, *supra* note 7; Sarah Morgan, *Civil Rights/constitutional Law – Indebted to the State: How the thirteenth Amendment's Promise of Abolition holds Protections against the Modern Debtors' Prisons*, 39 W. NEW ENG. L. REV. 327 (2016).

17 Tamar R. Birckhead, *The New Peonage*, 72 WASH. & LEE L. REV. 1595 (2015); Morgan, *supra* note 16.

18 Atkinson, supra note 7 ; Note, State Bans on Debtors Prisons and Criminal Justice Debt, 129 HARV. L. REV. 1024 (2016) [hereinafter: State Bans on Debtors Prisons and Criminal Justice Debt]..; Chapter One Policing and Profit, supra note 18; DEREK A. WESTEN, Comment, Fines, Imprisonment, and the Poor: "Thirty Dollars or Thirty Days, 57 CALIF. L. REV. 778 (1969).

19 Williams v. Illinois, 399 U.S. 235 (1979).

20 *Tate v. Short*, 401 U.S. 395 (1971).

21 *Bearden v. Georgia*, 461 U.S. 660 (1983).

people for default of payment of fines—and do even not address all elements of that side. Moreover, if the issue had been definitively settled by the Court under the Fourteenth Amendment, we would not see the many questionable practices that we do today.

In this context, this note aims to question the practice of penalizing nonpayment of criminal fines and fees under the principle of proportionality as applied under the Fourteenth Amendment. I argue that there is an urgent need for courts to use proportionality in adjudicating whether due process and equal protection rights are at stake in the penalization of nonpayment. Proportionality allows courts to address both categories when an objected practice appears to be deeply harmful and unfair, and yet no fundamental rights or suspect class are at stake.

In part I, I give a brief overview of the *ratio legis* and the consequences of fees and fines imposed to indigents. Indeed, even though fines and fees are two sides of the same coin, they must be distinguished when it comes to assessing their lawfulness. Moreover, the legal scrutiny is likely to be different depending on the consequences of fines and fees for defendants, especially with respect to proportionality. However, as I shall see, the nature of legal financial obligations is not easy to determine and is likely to have an impact on the way lawyers challenge the problematic practices under the Constitution. Part II broadly reviews the literature on the evaluation of law penalties for the nonpayment of fines and fees under the Constitution. Scholars have questioned these practices in the past few years under several Amendments, and I will show that although disputing fines, costs and fees under these Amendments is relevant, many legal issues and questions remain unaddressed as to the scope of their protection. Consequently, the Fourteenth Amendment remains to me the most promising path for challenging the practice of instituting criminal fines and fees on indigent Americans. Part III provides the reader with a theoretical framework of protection of the poor under the Fourteenth Amendment, especially regarding the different types of scrutiny and tries to establish this framework based on the nature of equal protection and the state's obligations toward the poor. Finally, Part IV argues for using proportionality to assess the application of fines costs and fees under

the Fourteenth Amendment.

I. Legal Financial Obligations Imposed to Indigents: Typology and Consequences

To begin, I will give a brief overview of the different types of criminal financial obligations likely to be imposed by local and state courts. Many authors have already dealt with this question, providing good definitions of these different categories.[22] Therefore, section 1 is limited to my explanation of these categories for the purpose addressing issues that can be raised under the Sixth, Eight, Thirteenth and Twenty-Fourth Amendments, as well as the question of proportionality under the Fourteenth Amendment. Section 2 examines the consequences imposed by fines and fees on the poor and indigent.

1. Legal Financial Obligations: Typology

Within the category of "legal financial obligations," often (improperly) called "economic sanctions,"[23] scholars distinguish between restitution, court costs and fees, fines, and forfeiture. Some scholars also include court-ordered child support[24] in these so-called sanctions. These economic sanctions usually build on top of each other and are not imposed independently.[25] This is an important element to bear in mind in the assessment of proportionality. These legal financial obligations can be divided in three categories based primarily on their purposes: (1) "public cost recovery"[26] (also called "society-focused sanctions[27]"), (2) punishment or "offender-focused economic sanctions"[28], and (3) "penalties levied for restitution to victims"[29] (or "victim focused economic sanctions[30]"). The nature

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22 See Ruback, B., & Bergstrom, M., *Economic sanctions in criminal justice: Purposes, effects, and implications*, 33 CRIMINAL JUSTICE AND BEHAVIOR 242 (2006); Appleman, *supra* note 7; Beth A. Colgan, *Reviving the Excessive Fines Clause*, 102 CAL. L. REV. 277 (2014); Sobol, *supra* note 2; Cammett, *supra* note 5; Hampson, *supra* note 7; Marsh & Gerrick, *supra* note 7.

23 Hampson, *supra* note 7.

24 The child support debt or alimony is also likely to be burdensome and to worsen the cycle of debts for imprisoned offenders. Indeed, being imprisoned is considered "voluntary unemployment," meaning the child support becomes ineligible for modification. Thus, offenders often leave prison with thousands of dollars of debts for child support, turning child support or alimony into a "proxy for further punishment." (Appleman, *supra* note 7, at 1505)

25 Ruback & Bergstrom, *supra* note 22, at 245.

26 Cammett, *supra* note 5, at 378.

27 Ruback & Bergstrom, *supra* note 22, at 253.

28 *Id*., at 256.

29 Cammett, *supra* note 5, at 378.

30 Ruback & Bergstrom, *supra* note 22, at 249.

of the legal financial obligations is debated in the legal literature. This is an important point, though. As I will argue in Part II, the nature of these obligations (whether the intention is punitive or otherwise) will impact the way constitutional amendments are interpreted and applied in order to assess their validity.

As for public cost recovery (also known as "society-focused sanctions")[31], states and counties have increasingly used the system of fines and fees to fund their criminal justice systems, in the past few years.[32] Their amounts often "surpass the value of sanctions directly related to the crime itself."[33&34] These "user fees or costs" are likely to be due at different stages of the criminal process, which Laura Appleman divided into three primary categories.[35] The pre-trial fees are imposed before an indictment. Among them, there are the booking fees, bail administrative fees, dismissal fees, public defender application fees, and private probation.[36] Court fees and disability and translation fees need to be paid during adjudication.[37] Court fees constitute the predominant category and have enormously increased since 2010.[38] Finally, jail and prison fees, post-conviction levies, community service, and

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31 Ruback & Bergstrom, *supra* note 22, at 253.

32 REBEKAH DILLER, ALICIA BANNON & MITALI NAGRECHA, CRIMINAL JUSTICE DEBT: A BARRIER TO REENTRY (Brennan Center for Justice, 2010), NATIONAL CENTER FOR STATE COURTS, TRENDS IN STATE COURTS, FINES, FEES, AND BAIL PRACTICES: CHALLENGES AND OPPORTUNITIES (2017), Cammett, *supra* note 5, at 379. See also Jaclyn Kurin, *Indebted to Injustice: Thee meaning of "Willfulness" in a Georgia v. Bearden ability to pay hearing*, 27 GEO. MASON U. CIV. RTS. L.J. 265 (2017). Kurin Jaclyn explains that "Texas has 143 separate court cost and fees that may be potentially imposed on a defendant. The Texas Office of Court Administration found some "costs and fees have no explicitly stated statutory purpose." In Florida, there are more than 60 statutory fees that can be assessed against defendants. In the last decade, Florida has added more than "20 new categories of financial obligations to the criminal justice process" and increased the costs for current charges. In Washington, a defendant can face 28 separate fines and fees and 12% interest in penalties for unpaid LFOs" (at 267 – 268).

33 Colgan, *Reviving the Excessive Fines Clause*, *supra* note 22, at 286; Sobol, *supra* note 2, at 503 and 509-510: "A recent NPR survey found that since 2010, forty-eight states have increased their fees. A nationwide survey found that the percentage of state and federal felony inmates with court-imposed monetary sanctions increased from 25% in 1991 to 66% in 2004. Between 1991 and 2004, the percentage of felony inmates assessed restitution and fees increased from approximately 10% to approximately 25% and 35%, respectively, while the percentage of felons assessed fees increased from approximately 10% to over 50%." (at 509 – 510).

34 Meredith and Morse have shown that in Alabama, the "fees compose about 44 percent of the total amount of LFOs assessed" and "make up about 57 percent of an individual's total LFO assessment." Marc Meredith and Michael Morse, *Discretionary Disenfranchisement: The Case of Legal Financial Obligations*, 46 J. LEGAL STUD. 309 (2017), at 324.

35 Appleman, *supra* note 7; See Sobol, *supra* note 2, at 499 and seq. [identifying the same stages]. See also Cammett, *supra* note 5, at 278 [distinguishing two distinct variants of "carceral debts": the first one includes "criminal financial penalties, such as restitution, court costs, and other fees that are directly associated with criminal convictions" and the second variant "includes lingering debt accumulated during or as a result of incarceration, often acts as a gateway to re-incarceration."]

36 Appleman, *supra* note 7, at 1497 and seq.

37 *Id.*, at 1505.

38 "Since 2010, forty-eight out of fifty states have increased criminal court fees." These court fees include the cost of public defender attorney in many states, and disproportionately affect poor defendants who choose either not to apply for a public defender or to borrow the funds to pay for one (Appleman, *supra* note 7, at 1497). These fees can also include disability and translation fees for disabled defendants or those who are not proficient in English, as well as fees for pre-sentencing and investigatory reports, court

expungement charges are fees due after conviction.[39] The post-conviction fees have increased substantially with the Great Recession[40] and can be very high especially jail and prison fees.[41] States and counties have even started suing released defendants in order to recover fees. [42] Such fees aim to fund the justice, punishment, and collection systems. In addition, there are the probation, parole, & post-release supervision fees for which offenders are usually billed.[43] Many warrants are delivered each year to defenders unable to pay probation fees.[44]

There is a debate about the nature of these court costs and fees. Some authors contend that, as opposed to fines, court cost and fees do not have a punitive function but instead seek to reimbursing the criminal justice system for its expenses.[45] In other words, these "user-fees"[46] "reflect the efforts of states to pass the costs of criminal justice and other state deficits onto prisoners."[47] In this view, court costs and fees serve no punitive function. On the other hand, some authors have argued that these fees and costs are in fact punishment.[48]

Secondly, the statutory economic penalties are part of what Ruback calls "offender-focused

administration and designated funds, and reimbursement for the prosecutor (Appleman, *supra* note 7, at 1499 – 1500; Sobol, *supra* note 2, at 502). These fees can also vary depending on the judicial district (Meredith & Morse, *supra* note 34, at 324).

39 *Id.*

40 Appleman, *supra* note 7.

41 Appleman, *supra* note 7, 1499 – 1501.

42 Colgan, *Reviving the Excessive Fines Clause*, *supra* note 22, at 286, Sobol, *supra* note 2, at 502.

43 *Id.*, at 1506 (2016). Ruback and Bergstrom argue that the most significant fees are probation fees that cover the costs of the offenders' supervision during their probation (Ruback & Bergstrom, *supra* note 22, at 255).

44 Appleman, *supra* note 7, at 1508. Beyond fees for probation and parole supervision, there are also fees for drug testing, vehicle interlock devices, electronic monitoring, mandatory treatment, required classes, and expungement (Sobol, *supra* note 2, at 503). Even when the offender is convicted for community services, fees are required (Appleman, *supra* note 7, at 1510 – 1511). On top of all these fees, there are additional penalties (including interest payments) levied for the non-payment of judicial debts (Appleman, *supra* note 7, at 1513, [explaining that in some jurisdictions interest rates are higher than ten percent]).

45 Sobol, *supra* note2, at 503.

46 Marsh & Gerrick, *supra* note 7, at 95.

47 Cammett, *supra* note 5, at 379. Hampson also argues that these fees and costs "seem quite *civil* in various respects." (Hampson, *supra* note 7, at 29)

48 Lauren-Brooke Eisen, *Paying for Your Time: How Charging Inmates Fees Behind Bars May Violate the Excessive Fines Clause*, 15 LOY. J. PUB. INT. L. 319, 323 (2014). Eisen notes that "[o]ne Iowa Sheriff said about the practice of charging inmates, "if they are violating the law, then they should be the ones to pay for it. Officials in Riverside County, California who voted to approve a plan to charge inmates for their stay and reimburse the county for food, clothing and health care stated, "You do the crime, you will serve the time, and now you will also pay the dime." Eisen identifies two additional rationale for implementing inmate fees: (1) a political rational which helps policy makers, judges, and sheriffs to gain the support of constituents and (2) a rational which implies reducing frivolous requests for services by inmates" (at 323 – 324). In the same vein, Eisen notes that some policymakers and correctional official have argued that charging defendants for fees (e.g., stay in prison …) "is grounded in rehabilitation or deterrence" or "teach[es] inmates valuable lessons." (Eisen, *supra* note 48 , at 323.)

economic sanctions."[49] These sanctions mainly include forfeitures[50] and fines. Fines can be described as "monetary penalties for crime,"[51] and they have a punitive function.[52] They can also serve as a deterrent. However, "[t]he deterrent effect of a fine depends in part upon its impact on the financial resources of the defendant."[53] Appleman explains that "[a] variety of jurisdictions apply surcharges in addition to the fine, either a percentage or a flat fee, thus increasing the fine amount right at the outset."[54] Therefore, jurisdictions "essentially impose fines on top of fines."[55] Fines appear to be grounded in a punitive conception of the justice system, and Hampson has started questioning this very grounding itself, arguing that the "civil nature of the fine is especially open to question for strict liability offenses."[56]

Finally, criminal restitution —also called "victim focused economic sanctions"[57]—is "aimed at doing justice by having the offender compensate a victim for damages caused by the crime."[58] If the initial aim of restitution only focused on restoring a victim's economics losses caused by the offender's actions, the "modern-day restitution" pursues not only retribution but also punishment.[59]

2. Consequences of Economic sanctions for the indigent

The legal financial obligations generated by the criminal system usually overlap each other to

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49 Ruback & Bergstrom, *supra* note 22, at 256.

50 Criminal forfeitures can be defined as "the taking of property by the state as an incident of conviction for crime." (David J. Fried, *Rationalizing Criminal Forfeiture,* 79 J. CRIM. L. & CRIMINOLOGY 328, 329 (1988-1989). As opposed to criminal forfeiture, Civil forfeiture of property does not require a conviction and is not punitive (Ruback & Bergstrom, *supra* note 22, at 257). Even though forfeitures are used to support law enforcement and the funding of the justice system, their first goal is mainly punitive and linked to the criminal offenses. (Ruback & Bergstrom, *supra* note 22, at 256). In the meaning of the Eight Amendment a forfeiture is a fine (*United States v. Bajakajian*, 524 U.S. 32 (1998).

51 *Id.*, at 258.

52 Sobol, *supra* note 2, at 499; Marsh & Gerrick, *supra* note 7, *supra* note 7, at 95; Note, *Fining the Indigent*, *supra* note 7, at 1284

53 Note, *Fining the Indigent*, *supra* note 7, at 1285.

54 Appleman, *supra* note 7, at 1503 – 1504 (2016).

55 Colgan, *Reviving the Excessive Fines Clause*, *supra* note 22.

56 Hampson, *supra* note 7, at 30. Like other scholars (Sobol, *supra* note 2, at 499), Hampson recalls that the system of fines developed in England originally aimed at funding jails and the state. It was only later that the nature of the fines became associated with the penal system.

57 Ruback & Bergstrom, *supra* note 22, at 249.

58 *Id.*, at 250.

59 Sobol, *supra* note 2, at 500. See also Kevin Bennardo, *Restitution and the Excessive Fines Clause*, 77 LA. L. REV. 21 (2016). More recently, restitution has increasingly been implemented by courts as a way "to compensate victims for a growing category of losses, including economic, emotional and psychological losses, as well as losses for which the defendant was not even found guilty."(Appleman, *supra* note 7, at 1505).

create legal debts for offenders. They are likely to have a particularly damaging effect on the poor and indigent who are most of the time unable to extract themselves from this vicious circle. Scholars have denounced these negative consequences and their counter-productive effect on rehabilitating offenders into the society. As for the typology of legal financial obligations, it is important to provide an overview of their consequences, since these consequences are decisive in the assessment of proportionality. I will limit myself to providing an overview of the general consequences of legal financial obligations without providing the differences according to jurisdictions and states. It seems, however, important to keep in mind that the experience of legal financial obligations vary across jurisdictions.[60] These experiences can vary even within the same state.

The consequences are of a different nature —legal, economic, social—and are most of the time intertwined. As long as legal financial obligations do not represent a significant burden, consequences are limited. These consequences are likely to become much more serious when it comes to the indigent and the poor: legal financial obligations often trap them in a circle of debt impossible to escape, leading to further significant consequences.

The direct economic effect constitutes the primary and most obvious consequence, especially for poor and indigent. Most of the time, the legal financial burden is so high that it is impossible for the poor to pay, given the fact that they are already struggling with their finances. This money cannot be spent on other needs, such as food, housing, education, or childcare.[61] For the poor and indigent "legal debt becomes a crushing hardship in nearly every corner of daily life,"[62] says Atkinson. He explains that "without the ability to accumulate wealth or capture even the smallest windfall for themselves, the poor become poorer, unable to climb out of an economic chasm."[63] Legal debts are just the starting point of a mass of problems and hurdles for the indigent. Therefore, the fact that the

60 HARRIS AND AL., *supra* note 6, at 4.
61 Atkinson, *supra* note 7, at 217.
62 *Id.*
63 *Id.*

indigent is unable to pay becomes a trigger for many other legal and economic consequences.[64]

As for the legal consequences, there are many: obligatory appearances before court, warrants issued, loss of driving privileges, jail and/or revocation of probation. Offenders will often be levied fines for only minor offenses. However, if they are unable to pay their debt, they will need to appear several times before courts, which can be practically difficult to negotiate alongside a job and family obligations. Moreover, because of this inability to pay, their driving license could be suspended or revoked.[65] It is not a secret that a valid driving license is essential to go to work and to perform everyday tasks. Studies have shown that in many cases, offenders actually lose their jobs.[66] Aside from the suspension or revocation of their driving license, low-income defenders are also likely to be under "bank account or wage garnishment, extended supervision until debts are paid, additional court appearances or warrants related to debt collection and non payment, and extra fines and interest for late payment."[67] In addition, offenders are likely to be sent to jail for non-payment of their criminal debts or receive an outstanding warrant—which is public information. Time in jail or a warrant[68] can make it very difficult to keep a job or find a new one.[69] This is just the beginning of a mass of other problems: without a job, people lose their housing and are likely to become homeless.[70] In such a catastrophic situation, could the poor ask the help of the government for support? In many cases, the answer would be no: because of their outstanding debts, they will be refused welfare benefits or find them terminated.[71] Another consequence that can arise is when fine collection is outsourced to private companies. Debtors can see their consumer credit damaged, which "limits opportunities for work and

64 Colgan, *The Excessive Fines Clause: Challenging the Modern Debtors' Prison, supra* note note 97, at 8 – 9.
65 Atkinson, *supra* note 7, at 18; Colgan, *Reviving the Excessive Fines Clause*, *supra* note 22, at 292.
66 See for example, HARRIS AND AL., *supra* note 6.
67 Birckhead, *supra* note 17, at 1603 – 1604.
68 Atkinson explains that "Arrest warrants are particularly harmful because they are public information. When an unpaid debt or missed court appearance become a warrant, a minor traffic ticket can suddenly include the same collateral consequences as a felony conviction, making it difficult for debtors to find or keep a job, home, or educational license, or participate in mainstream markets and economies." (Atkinson, *supra* note 7, at 217)
69 Colgan, *Reviving the Excessive Fines Clause*, *supra* note 22, at 290 – 291.
70 Atkinson, *supra* note 7, at 219
71 *Id*.; Colgan, *Reviving the Excessive Fines Clause*, *supra* note 22, at 293.

housing and prevents debtors from opening bank accounts or from borrowing on favorable terms".[72] And even when they have a job, they can see their wages and in some states—that of their spouse—heavily reduced. Economic sanctions against minors can also affect a family's total income: in some instances, parents have the choice to pay or face incarceration.[73] Colgan explains that "some people spend more time in jail or prison for failure to pay than for their original sentence."[74] Moreover, people who are incarcerated only because of their inability to pay are likely to see their debts extended because of the costs associated to their incarceration.[75] Finally, "because some people are never able to pay off economic sanctions, the threat of arrest and incarceration may be perpetual."[76] In some instances, Courts have proposed highly questionable deals to debtors for criminal debts such as janitorial work or giving blood instead of paying debts.[77] When offenders are sentenced to prison in addition to assigned fines, legal financial obligations will have a huge impact on the opportunity of probation and rehabilitation. [78] It is worth nothing that these consequences are not limited to debtors under criminal debts. Some of civil debtors are likely to face the such legal consequences, as well.[79]

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72 Atkinson, *supra* note 7, at 219.

73 Colgan, *Reviving the Excessive Fines Clause*, *supra* note 22, at 292.

74 Colgan, *Reviving the Excessive Fines Clause*, *supra* note 22, at 290 – 291.

75 *Id.*

76 *Id.*

77 Hampson, *supra* note 7, at 10; *For Offenders Who Can't Pay, It's a Pint of Blood or Jail Time*, N.Y. TIMES (Oct. 19, 2015), http://nyti.ms/1GQ91ii.

78 First, in prison, offenders will have no way to reimburse their legal debts. They will accumulate all of the interest attached to it, on top of many other costs and fees associated with their conviction. (Cammett, *supra* note 5, at 381. See also Birckhead, *supra* note 17, at 1605 [explaining that "[f]or non-custodial parents, failure to pay child support can lead to time in jail, and the debt often continues to accrue during the period of incarceration, making it nearly impossible for the parent to become current"]. Some of them will leave jail with outstanding debt and no prospect of finding a job, which can be totally destructive for rehabilitation into the society. Moreover, a common practice among jurisdiction is authorizing probation under the condition of the payment of processing fees. Colgan, *Reviving the Excessive Fines Clause*, *supra* note 22, at 286 [giving the example of Pennsylvania where "individuals are ineligible for parole unless they can pay a $60 fee; those who cannot pay the fee remain in prison at a cost to taxpayers of approximately $80 to $110 per day regardless of the defendant's ability to successfully reintegrate into society"] Such practices "make it much harder for parolees to return to a normal life post-prison (and thus avoid recidivism), as they often leave offenders destitute." (Appleman, *supra* note 7, at 1502). In these cases, indigents or poor who are unable to pay these amounts will often be sent back to jail with more fees and interests to pay. In other jurisdictions, offenders are eligible for parole and probation only if they are able to pay their fines and fees linked to their sentences (Colgan, *Reviving the Excessive Fines Clause*, *supra* note 22, at 286). This situation makes reintegration into society much more cumbersome (Cammett, *supra* note 5, at 380 – 381).

79 Although the present piece only focusses on debt linked to the criminal justice system and does not tackle the question of civil debts, it is worth saying a word about these types of debts. In principle, "pure" civil debts—i.e. debts that do not have anything to do with the criminal justice system—can also be very damaging for the poor, although they are treated differently by local and federal courts. Since the start of the abolitionist movement in the eighteenth century, debtors' prison for civil debts has gradually been forbidden in most states. (The ban of imprisonment for civil debts mainly occurred in the nineteenth century. Hampson, *supra* note 7 at 23 and seq [explaining the history of Debtors' prison for civil debts and the abolitionist movement]). However, in the past few years, some "civil debtors" have been sent to jail through an insidious mechanism put in place by some jurisdictions. In a recent report, the ACLU showed that private collection agencies use the criminal justice system to "indirectly" punish debtors. These agencies go before courts

Finally, the damaging effect of criminal justice debts is not limited to these legal and economic effects. Regarding families more specifically, Birckhead explains the difficulties for parents who are under debt to meet the most basic needs of their children with some consequences such as "the intervention of Child Protective Services, potential neglect allegations, and further court hearings and fees."[80] Scholars have also shown the bad effects on health—including mental health outcomes—for people who live in the fear of being incarcerated because they are unable to pay their debts.[81] This is particularly true for people under warrants. The health issues are even worse for those who are incarcerated.[82] They also have damageable effects on the way people see themselves[83] and their cynicism toward the criminal justice system. [84]

Aside from health issues, there is also the risk of unconstitutional practices motivated by the goal of revenue.[85] Beyond the unconstitutional practices, people unable to pay fees and debts are likely to be deprived of some constitutional rights, or have some of these protections undermined. For example, in some states, former felons are likely to not be re-enfranchised because they have not reimbursed their debts.[86] Appeal courts have ruled the practice constitutional.[87] Moreover, since the decision of the Supreme Court *Utah v. Strieff*[88], stop and frisk seem to be constitutional under the Fourth Amendment even without probable cause, so long as the arrested person is under a warrant.

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to ask for reimbursement of the private debts. If private debtors fail to appear to Court for any reason—even if they never received notice—they are likely to be under a warrant, which can lead to jail. The ACLU has described this mechanism as the "criminalization of private debt." (ACLU, A POUND OF FLESH, THE CRIMINALIZATION OF PRIVATE DEBTS, a 4, (2018). See also Birckhead, *supra* note 17, at 1626 and Cammett, *supra* note 5, at 403.) Therefore, the economic and legal consequences are also likely to affect poor debtors with civil financial obligations, albeit to a lesser extent. Moreover, civil cases that may lead to incarceration do not have an automatic constitutional right to counsel, as the Supreme Court recently ruled in *Turner v. Rogers*, a case involving the non-payment of child support (Cammett, *supra* note 5, at 279; *Turner v. Rogers* 564 U.S. 431 (2011)).

80 Birckhead, *supra* note 17, at 1604. See also Colgan, *Reviving the Excessive Fines Clause*, *supra* note 22, at 294; HARRIS AND AL., *supra* note 6, at 34.

81 Atkinson, *supra* note 7, at 222; HARRIS AND AL., *supra* note 6, at 34.

82 Atkinson, *supra* note 7, at 222.

83 *Id*., at 217.

84 HARRIS AND AL., *supra* note 6, at 42.

85 This is revealed in a report conducted by the Department of Justice in Ferguson, Missouri. *Id.*, at 3; U.S. DEPARTMENT OF JUSTICE, INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT (2015); Atkinson, *supra* note 7, at 225.

86 Atkinson, *supra* note 7, at 224. In the past years, states statutes have increasingly required ex-felons to satisfy the payment of their legal financial obligations in order to be re-enfranchised (Cammett, *supra* note 5; Marc Meredith and Michael Morse, *supra* note 34 at 310).

87 Meredith & Morse, *supra* note 34, at 310 – 311.

88 *Utah v. Strieff*, 579 U.S. _ (2016).

The risk is that people who are under a warrant only because they cannot pay their debts will have much less protection under the Fourth Amendment when it comes to stop and frisk. On top of this, Harris finds the emergence of system avoidance mechanisms: people seem to avoid "traditional supportive institutions to evade detection by criminal justice agents. [89]

II. Challenging Fees and Fines imposed to the Indigent under the Federal Constitution

Fines, costs and fees imposed to indigents in the criminal field are likely to be disputed on the basis of several amendments of the Constitution. Besides the application of Fourteenth Amendment, authors have called for the application of (1) the Eight Amendment on excessive fines, (2) the Sixth Amendment guaranteeing rights designed to make criminal prosecutions more accurate, fair, and legitimate, and (3) Thirteenth Amendment related to the interdiction of peonage. The imposition of fines and fees to the poor have also raised a question of compatibility with the fundamental right to vote in the case of disfranchisement (4). These all appear to complement each other to reinforce the rights of a defendant unable to pay their criminal fines and fees. However, they still raise important questions and difficulties that have not been ruled by the Supreme Court. I conclude this section by arguing that given the numerous doubts regarding the defense of the indigents economically sanctioned under these Amendments, the Fourteenth Amendment still appears to be the most suitable tool for the defense of indigents unable to comply with their legal financial obligations. Going into detail regarding each amendment would go beyond the scope of this paper. However, it seems important to give an overview of the legal issues at stake, not only to have an idea of the existing means of defense for poor and indigent who are fined but also to understand why the application of the Fourteenth Amendment through the principle of proportionality should be a path to explore.

1. Amendment Eight: Prohibition of Excessive Fines

Scholars have increasingly argued that fines required from the poor and indigent could be

[89] HARRIS AND AL., *supra* note 6, at 46.

successfully disputed under the Eighth Amendment, which prohibits "excessive fines". For example, Colgan contends that this amendment might be better suited to addressing the debtors' prison crisis, compared to Fourteenth Amendment.[90] The case-law of the Supreme Court regarding the Excessive Fines Clause is scarce though.[91] The *Bajakajian* case is the leading case on the question of the Excessive Fines Clause.[92] Three important points regarding this case and the interpretation and limits of the Eight Amendment are worth mentioning.

Firstly, in *Bajakajian*, the Supreme Court stated that the punitive forfeiture violates the Excessive Fines Clause "if it is grossly disproportional to the gravity of the offense that it is designed to punish."[93] It assessed the proportionality only regarding the gravity of the offense that it is designed to punish. Many lower Courts have inferred from *Bajakajian* that the proportionality test under the Excessive Fines Clause was only about the gravity of the offense and have refused to take into account other aspects or characteristics of the defendants' situation, such as the ability of the defendants to pay the fine.[94] However, as powerfully articulated by McLean, this approach is incorrect, inequitable, and ahistorical. McLean argues that the excessive Fines Clause contains an additional limiting principle linking the penalty imposed to the offender's economic status and circumstances. [95] Despite

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90 Colgan, *The Excessive Fines Clause: Challenging the Modern Debtors' Prison, supra* note 97, at 10.

91 Colgan, *Reviving the Excessive Fines Clause*, *supra* note 22, at 281 – 282 [identifying four cases in total].

92 Bajakajian and his family were found by customs inspectors while preparing to board an international flight to be carrying $357,144 in cash, while the limit is $10,000 in currency. In this case, the Supreme Court found that full forfeiture of *Bajakajian*'s $357,144 would violate the Excessive Fines Clause. *U.S. v. Bajakajian*, 524 U.S. 321(1998). See also *Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal*, Inc. 492 U.S. 257 (1989); *Austin v. United States*, 509 U.S. 602 (1998) and *Alexander v. United States*, 509 U.S. 544 (1993).

93 *U.S. v. Bajakajian*, 524 U.S. 321(1998).

94 McLean, *supra* note 13, at 846.

95 *Id*., at 835. First, it is simply not correct to interpret *Bajakajian*'s decision as precluding courts to take into account defendants' ability to pay. The Supreme Court did not tackle this question not because it is not part of the proportionality test, but because *Bajakajian* did not raise it (Colgan, *The Excessive Fines Clause: Challenging the Modern Debtors' Prison, supra* note 97, at 47). Secondly, this approach is inconsistent "with the analytical frameworks the Supreme Court has adopted in other Eighth Amendment contexts."(McLean, *supra* note 13, at 847). Third, an historical approach shows that excessive fine clause actually requires that the ability of the applicant should be taken into account (McLean, *supra* note 13, at 847). On this last point, relying on an analysis the Magna Carta and the English Bill of Rights, McLean contends that the *salvo contenemento suo* principle, which required that a defendant cannot be fined an amount that exceeded his ability to pay, should be resurrected (McLean, *supra* note 13, at 835). In other words, the excessive Fines Clause contains two constitutional principles: "(1) a proportionality principle, linking the penalty to the offense, and (2) an additional limiting principle linking the penalty imposed to the offender's economic status and circumstances. We might call this second principle the Eighth Amendment's "economic survival" (or perhaps "livelihood-protection") norm" (McLean, *supra* note 13, at 836. See also Colgan, *The Excessive Fines Clause: Challenging the Modern Debtors' Prison, supra* note 97, at 47 [identifying five key principles emerging from the proportionality cases of the Cruel and Unusual Punishments Clause: "A desire for equality in sentencing; the need for comparative proportionality of sentencing based on offense seriousness; the importance of harnessing the expressive function of

the fact that this approach should be privileged and the First Circuit's followed this approach[96], it remains that most courts today adopt a restrictive interpretation of the proportionality test under the Excessive Fines Clause. Consequently, under this interpretation, the protection of indigents unable to pay fines and administrative fees has been highly curtailed—at least for the moment.

Secondly, I have shown previously that the difficulties faced by indigents were linked not only to the fines as the "prime" punishment but also—and importantly—to the surcharges associated to it, the court costs and fees (including those imposed due to an inability to pay either at sentencing or during the payment)[97] and the restitution. One important issue that has yet to be decided by the Supreme Court is the question of whether surcharges and administrative fees can be considered "fines" in the sense of the Eight Amendment. This is still an open question, yet an essential one: indeed, surcharges and administrative fees are likely to be higher than the fines themselves and to contribute to the precarious situation of the defendants who are indigent. As a consequence, the propensity of the Eight Amendment to protect the indigents depends on whether it is likely to encompass these courts costs and fees as well as restitution. Colgan argues that fine, court costs and fees and surcharges as well as restitution constitute "fines" in the sense of the Eighth Amendment.[98]

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punishment; a concern for the potential criminogenic effect of, and other social harms created by, punishment; and a constraint that punishment not unreasonably undermine basic concepts of human dignity. On this basis, she concludes that "[a]n examination of those principles supports the conclusion that a defendant's financial condition is relevant to assessing the severity of punishment for use in weighing its proportionality."]

96 McLean, *supra* note 13, at 835. *Id.*; *United States v. Jose*, 499 F.3d 105, 113 (1st Cir. 2007); *United States v. Levesque*, 546 F.3d 78, 83–85 (1st Cir. 2008).

97 Beth A. Colgan, *The Excessive Fines Clause: Challenging the Modern Debtors' Prison*, 65 UCLA L. REV. 2, 48 (2018), at 48.

98 As for fines, Colgan bases her argument on *Austin v. United States* (*Austin v. United States*, 509 US 602 (1993)), a case related to the application of the Excessive fines clause to *in rem civil forfeitures*, where the Court held that to constitute a fine an economic sanction need only to be partially punitive. According to the author: "With the limited exception of administrative fees imposed without a determination that prohibited conduct occurred and provided the full protections of civil debt, each of these common forms of sanction are employed where punitive intent is evident and where the risk of prosecutorial abuse for fiscal gains is high, and thus constitute fines for purposes of the Excessive Fines Clause" (Colgan, *The Excessive Fines Clause: Challenging the Modern Debtors' Prison, supra* note 97, at 13 – 14). As for statutory fines and surcharges—directly connected to the imposition of statutory fines— Colgan explains that they easily satisfy the partially punitive test since they are imposed as a punishment for prohibited behavior (*Id*., at 33). In addition, she contends that court costs and fees also satisfy the partially punitive test when they are linked to a condemnation. In order words, administrative fees and costs are partially punitive in that they are linked to service due to the defender's engagement in prohibited conduct (*Id*., at 37). Even when there is no condemnation, Colgan argues that administrative fees should be seen as fines in the sense of the Eight Amendment since "[i]t would be nonsensical if the Clause protected defendants from government overreach only in cases where the government met its burden of showing prohibited conduct occurred." (*Id*., at 40). Colgan points out these fees are also fines in the sense of the Eight Amendment even when they have been privatized, i.e., they result in the imposition of fees payable to private entities for pre- and post-trial incarceration, probation and collections, electronic monitoring etc ((*Id.*, at 24).

However, as for Court costs and fees in particular, I have previously shown that the question of their punitive character is much less obvious. As opposed to Colgan, some authors believe that court costs and fees do not have a punitive aim.[99] They contend that they have a remedial goal in order to recoup costs and fees. The same goes for restitution. [100] Thus, the question of whether court costs and fees and restitution constitute a punishment is not quite so straightforward. The pending question of the *rationae materiae* scope of the Eight Amendment and the punitive character of court costs and fees is essential in assessing the added-value of this Amendment in the protection of the indigents under heavy legal financial obligations. Indeed, the proportionality of the "fines" will be understood very differently depending on whether they encompass all the court fees and costs as well as restitution or not. Moreover, as explained in the following sections, in the instance of a criminal prosecution, if courts fees and costs are considered to be punitive, it is less likely that they will fall into the scope of Amendments Thirteenth or Twenty-fourth. Thus, the nature of court fees and costs in particular is likely to have some important strategic litigation impact. Consequently, the efficacy of the Eight Amendment in protecting indigents under heavy legal financial obligations will primarily depend on the court's interpretation of the term "fines".

Finally, a third important doubt concerning the application of the Excessive Fines Clause is its incorporation through the Due Process Clause of the Fourteenth Amendment. Indeed, without such an incorporation, the excessive Fines Clause would not be applicable to the states but only to the federal government. This would heavily reduce its scope and impact. This question is uncertain since

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She explains that "the elimination of the to-a-sovereign restriction and inclusion of fees related to privatized services as fines does not preclude privatization, but instead ensures consistency with the Court's understanding of the Clause as providing protection against excessive punishments. Nor does it suggest that privatization is necessarily more abusive than the practices employed by the government directly. Rather, that inclusion merely restricts the quantity of such fees, along with any other sanctions which meet the partially punitive test, to an amount proportional to the offense" (at 31 – 32). As for restitution, Colgan contends that lower courts have judged that punishment is a key goal of restitution (at 41 – 42). Kevin Bennardo also argues that there is no doubt that restitution falls into the scope of the Excessive Fines Clause (Kevin Bennardo, *Restitution and the Excessive Fines Clause*, 77 LA. L. REV. 21 (2016)).

[99] See also the literature quoted by McLean in footnote 29 (McLean, *supra* note 13, at 893).

[100] See McLean, *supra* note 13, at 893 [explaining that "there is some uncertainty among courts and commentators on the question of whether restitution is imposed in furtherance of punitive or compensatory goals. […] As a result, there is some lack of clarity on the issue of whether the Excessive Fines Clause applies to restitution orders imposed in the criminal sentencing context].

the *McDonald v. City of Chicago* case.[101] The doctrine is divided on the question.[102] As a matter of fact, without such incorporation, it will be impossible to dispute many fines and fees imposed to indigents since most of them derive from State law.

2. Punishment under the Sixth Amendment

In *Apprendi*, the Supreme Court hold that the Sixth Amendment requires that "any fact that increases the penalty for a crime beyond the prescribed statutory maximum, other than the fact of a prior conviction, must be submitted to a jury and proved beyond a reasonable doubt."[103] The Court repeated that principle in *Blakely*.[104] A decade later, the Court applied *Apprendi* to *Sourthern Union*, in which the District Court and then the First Circuit of Appeals imposed a fine that enlarged the maximum punishment for storing hazardous waste without a permit.[105] *Apprendi* was mainly about going beyond the statutory maximum of the penalty. So was *Southern Union*.

However, *Apprendi*, *Blakely*, *Sourthern Union* should not be interpreted as limiting the protection of the Sixth Amendment only to the situation where the increase of the penalty goes beyond prescribed statutory maximum. Appleman argues that as long as it can be qualified of "punishment"—as per the Eighth Amendment —the Sixth Amendment requires that all aspects of a conviction ought to be determined by a jury. According to Appleman, the protection set by the Supreme Court in *Blakely* regarding the requirement of a jury is quite wide. [106] In other words, the Sixth Amendment jury trial right dictates that the community must have a say in any punishment imposed, including fines. As a matter of fact, it is striking that by imposing criminal fines, many courts actually

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101 *McDonald v City of Chicago*, 561 U.S. 742 (2010). In this case, the Supreme Court was ambiguous with respect to the question of whether the Excessive Fines Clause should be seen as incorporated under the Fourteenth Amendment, holding that "We never have decided whether the Third Amendment or the Eighth Amendment's prohibition of excessive fines applies to the States through the Due Process Clause" (at 765). See also *Browning–Ferris Industries of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 276 (1989) where the Supreme Court declines to decide whether the Excessive Fines Clause applies to the states. However, as McLean states, earlier in 2001 the Supreme Court hold that the Due Process Clause "makes the Eighth Amendment's prohibition against excessive fines and cruel and unusual punishments applicable to the States." (*Cooper Indus., Inc. v. Leatherman Tool Grp, Inc*., 532 U.S. 424, 433–34 (2001); McLean, *supra* note 13, at 874).

102 McLean, *supra* note 13, at 874.

103 *Charles C. Apprendi v. New Jersey*, 530 U.S. 466 (2000).

104 *Blakely v. Washington*, 542 U.S. 296 (2004).

105 *Southern Union Company v. United States*, 567 U.S_ (2012).

106 Appleman, *supra* note 7, at 1517.

undermine the right of the community to determine all punishments.[107] There is an important nuance, however: the Supreme Court states that when it comes to fines "so insubstantial that the underlying offense is considered ''petty,'' the Sixth Amendment right of jury trial is not triggered, and no *Apprendi* issue arises."[108] What does "petty" mean? Can it be argued that in the case of indigent, any fines—even the ones which seem "petty"—would be substantial given the vicious circle of debt they are likely to become caught in? In that case, it could be argued that any fines imposed to poor or indigent triggers the Sixth Amendment and the right to benefit from a jury trial. However, as the proportionality principle, in the instance where the "petty" character is determined in "absolute" terms without taking a defendant's circumstances into account, the risk exists that only very few fines would trigger the Sixth Amendment.

Moreover, as for the Eight Amendment, another issue is whether the imposition of criminal justice fees and costs—for instance when a defender has been acquitted—trigger the Sixth Amendment community jury trial right. In the same vein, is imprisonment or any other "sanction" which can be applied following the defender's default to pay the fine, a punishment? [109] These questions are particularly tricky and the literature does not seem to have addressed the issues so far. It goes beyond the scope of the article. However, it seems that despite the Sixth Amendment serving as an additional protection tool when imposing financial legal obligations to the poor and indigent, there are still many essential issues regarding the scope of its protection, particularly when it comes to court fees and costs, which do not constitute criminal fines *stricto sensu*.

3. Interdiction of Peonage and the Thirteenth Amendment

Several authors have argued that peonage practices still exist today through the system of criminal fines and fees towards the poor and indigents, especially through the system of modern

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107 Appleman, *supra* note 7, at 1486.

108 *Southern Union Company v. United States*, 567 U.S_ (2012).

109 For the sake of application of Amendment Thirteenth, Morgan has argued that this cannot be seen as a punishment since, by pursuing such practice, the states does not have a punitive purpose: their goal is to raise and maximize revenue. Morgan, *supra* note 16, at 360.

debtors' prison.[110] To this argument, it could be opposed that the Thirteenth Amendment does not apply "to punishment for crimes whereof the party shall have been duly convicted."[111] However, these authors have contended that the "duly convicted" exception does not apply to the practices of fining indigent and sending them to jail when they are unable to pay.

According to Birckhead, this exception can be overcome by the fact that most of the defenders who face unbearable criminal debts have been entrapped in the criminal system because they do not have the sufficient tools to defend themselves.[112] They have not been "duly" sentenced when their punishment includes financial obligations that these individuals have no viable means to meet. In the same vein, Morgan argues that the exception of Amendment Thirteenth is not applicable to modern debtors' prison "because the practices which give rise to it do not constitute "punishment" as used in contemporary legal discussion."[113] However, according to Zatz, the "courts have long assumed that a sentence of hard labor in lieu of a fine falls within the Amendment's penal exception."[114] He concludes the Thirteenth Amendment does not apply to fines in any event. However, he acknowledges that this does not apply to administrative fees, and consequently, uncompensated labor for such fees would be prohibited under the Thirteenth Amendment.[115]

The argument that fines and fees levied on the indigent violate the Thirteenth Amendment is promising. Some defendants have invoked it with success in the 1960s.[116] These cases were adopted

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110 *Id.*; Morgan, *supra* note 16. For a more restrictive approach regarding the application of the Thirteenth Amendment; Noah D. Zatz, *A New Peonage?: Pay, Work, or Go to Jail in Contemporary Child Support Enforcement and Beyond*, 39 SEATTLE U. L. REV. 927 (2016).

111 Birckhead, *supra* note 17, at 1606.

112 *Id*., at 1638.

113 Morgan, *supra* note 16, at 331. Regarding the purpose of imprisonment for non-payment of criminal debts, Morgan contends that it cannot be seen as pursuing a "punishing" goal: "Instead, the imprisonment is intended to satisfy the debt or to compel the debtor to seek his outside resources to repay the debt. Under this system, serving time takes on a new meaning—rather than repaying one's debt to society, a valid form of punishment, the criminal debtor serves his time for the economic benefit of the municipal body to which he is indebted." (*Id*., 357 – 358).

114 Zatz, *supra* note 110, at 932; *United States v. Reynolds*, 235 U.S. 133, 149 (1914).

115 *Id.*, at 932.

116 Morgan, *supra* note 16, at 360-361: Several state courts have agreed with this reasoning. In 1969, the Tennessee District Court voided a Tennessee statute, which permitted imprisonment for nonpayment of debt as a Thirteenth Amendment violation. It found that "costs are treated both substantively and procedurally in a manner inconsistent with the punishment theory." Similarly, the Supreme Court of Appeals of Virginia reasoned that "costs assessed against a person who has been convicted of a crime *are not part of his punishment* for the crime," and rejected its comparable state law in 1968.

before *Bearden*[117], however, where the Supreme Court, under the Fourteenth Amendment, did not forbid in absolute terms the practice of jailing someone for not paying a fine, yet established some limits to the practice. Moreover, it seems also complicated to reach a "middle ground" solution when it comes to Amendment Thirteenth, as opposed to the instance of the proportionality principle applied in the instance of the Fourteenth or Eight Amendment. In other words, applying the Thirteenth Amendment would imply that the practice of imposing fines or fees to indigent is either seen as a prohibited peonage or is not. Although the solution of considering such a practice on its whole as new peonage is appealing, it is doubtful that courts will follow such a "radical" solution, especially post-*Bearden*.

4. The Right to Vote and the Twenty-Fourth Amendment

I have seen that another important consequence of Legal financial obligations for defendants is their disfranchisement until they pay all their legal debts.[118] Courts have thus far refused to see legal financial obligations as poll tax.[119] However, such a position is questionable, particularly when legal financial obligations that ex-felons are unable to pay are mainly composed of court fees. Meredith and Morse also compellingly argue that this system is likely to be seen as a system poll tax, which is forbidden under the Twenty-Fourth Amendment.[120] The challenge of invoking the Twenty-

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117 See the cases mentioned by Sarah Morgan in footnotes 265 and 267, including Anderson v. Ellington, 300 F. Supp. 789 (M.D. Tenn. 1969: "finding defendant's imprisonment for failure to pay $892.38 court costs--spent working off costs for an additional eleven months after completing his sentence for three criminal convictions--involuntary servitude prohibited by the Thirteenth Amendment."; Dillehay v. White, 264 F. Supp. 164 (M.D. Tenn. 1966): prompting "the state legislature to forbid imprisonment for nonpayment of LFO's." ; Wright v. Matthews, 163 S.E.2d 158, 160 (Va. 1968); State ex rel. Hobbs v. Murrell, 93 S.W.2d 628 (Tenn. 1935): "determining that after entering nolle prosequi, the defendant stood uncharged with any crime and therefore any imprisonment was unlawful unless he consented--even consenting to involuntary servitude without a conviction is forbidden by Thirteenth Amendment." *contra* Milwaukee v. Horvath, 143 N.W.2d 446 (Wis. 1966): "holding that imprisonment for failure to pay a fine does not constitute involuntary servitude because imprisonment alone is not servitude; further, adopting defendant's reasoning would mean that anyone who qualifies as indigent could violate city ordinances with impunity." (Morgan, *supra* note 16, at 360 – 361).

118 Cammett, *supra* note 5; Meredith & Morse, *supra* note 34.

119 *Johnson v. Bredesen* (624 F.3d 742, 751 [6th Cir. 2010] [finding that Tennessee's re-enfranchisement statute does not violate the Twenty-fourth Amendment because the restitution and child-support payment provisions fail to qualify as the sort of taxes the Amendment seeks to prohibit); *Harvey v. Brewer* (605 F.3d 1067 [9th Cir. 2010]) and *Johnson v. Bush* (214 F. Supp. 2d 1333 [S.D. Fla. 2002] [finding that that Arizona and Florida were not violating the Twenty-fourth Amendment by conditioning ex-felons' restoration of voting rights on the full payment of fines and restitution]: see Meredith & Morse, *supra* note note 34, at 316

120 Based on data collected in Alabama and Tennessee, Meredith and Morse argue that "court fees more closely resemble a tax than these other LFOs, both in how they are structured and in how they are distributed" and conclude that "knowledge of the share of LFOs that are assessed for fees, as opposed to fines, restitution, or child support, may be useful when assessing Twenty-Fourth Amendment challenges to tying LFOs to voting rights." (Meredith & Morse, *supra* note 34, at 316) It also seems that fees constitute an important part of legal financial obligations. Meredith and Morse found that, in Alabama, these fees compose about 44 percent of

Fourth Amendment consists in demonstrating that legal financial obligations can be likened to a poll tax. While it seems difficult to argue that restitution and fines are taxes since their goal is primarily punishment or reparation, it can be argued, on the other hand, that Court fees and costs are similar to tax, which cannot condition the right to vote even for disfranchised ex-felons. Should fees be considered as punishment as argued by Colgan[121] under the Eight Amendment and by Appleman[122] under the Sixth Amendment, could it be still assimilated as a tax under the Twenty-Fourth Amendment? I have seen that depending on their nature, legal financial obligations are likely to have different legal impact on the defendant's or ex-felon's situation. It seems that the nature of the legal obligation is likely to play an important role in the assessment of the Twenty-Fourth Amendment.

To conclude, several Amendments—the Sixth, Eight, Thirteenth and Twenty-Fourth—enshrined in the Constitution present potential means for protecting the poor and the indigents against legal financial obligations in the criminal field (i.e., fines, fees, restitution). However, the Supreme Court has never ruled on the question of the validity of legal financial obligations under these amendments and, as I have demonstrated, many uncertainties remain regarding the scope of their application. One of the trickiest questions is the nature of the legal financial obligations, especially court fees and costs, which constitute a huge part of these legal financial obligations. I have seen that depending on their nature—e.g., whether they are punitive—some of the Amendments might be applicable while others might be more difficult to apply. The defense of the indigents with legal financial obligations in the criminal system requires from attorneys to adopt strategic positions regarding the nature of the legal financial obligations at stake.

Finally, if the Sixth and Twenty-Fourth Amendment give certain legal guarantees to the poor

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the total amount of LFOs assessed and that "fees make up about 57 percent of an individual's total LFO assessment." (Meredith & Morse, *supra* note note 34, at 324).

121 Colgan, *The Excessive Fines Clause: Challenging the Modern Debtors' Prison, supra* note 97.

122 Appleman, *supra* note 7.

and indigent, they are not likely to by themselves end the practice of imposing legal financial obligations on the poor and indigents. In this context, I argue that the Fourteenth Amendment constitutes the best constitutional way to contest the disproportionate practice of legal financial obligations against the most vulnerable. More specifically, the principle of proportionality appears to be a particularly suitable tool to protect the poor and indigent, especially given the fact that courts can rely on case-law and stare decisis.

III. Protection of the Poor Under the Fourteenth Amendment: Theoretical Framework

The protection of the poor under the Fourteenth Amendment is a much talked about point in the literature.[123] Since *San Antonio v. Rodriguez*[124], it is well established that the poor and indigent are not a suspect class and therefore subject to the rational basis test, which is generally unsuccessful for claimants.[125] Indeed, as opposed to the strict scrutiny offered to suspect classes, rational basis scrutiny implies that "[i]n applying the *Equal Protection Clause* to most forms of state action," the court seeks "only the assurance that the classification at issue bears some fair relationship to a legitimate public purpose."[126] The Supreme Court endorses the application of rational basis scrutiny because applying a high standard to every classification would not be "faithful."[127] It further explains that it has "treated as presumptively invidious [only] those classifications that disadvantage a "suspect class," or that impinge upon the exercise of a "fundamental right."[128]

However, this is not to say that there is no protection whatsoever for the indigent under the Fourteenth Amendment. The Court has developed other ways to protect the poor under this provision

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123 See for example Frank I. Michelman, *The Supreme Court, 1968 Term, Foreword - On protecting the poor through the fourteenth Amendment*, 83 HARV. L. REV. 7 (1969); Note, *Discriminations Against the Poor and the Fourteenth Amendmen*t, 81 HARV. L. REV. 435 (1967); Gerald N. Neuman, *Equal Protection, "General Equality" and Economic Discrimination from a U.S. Perspective*, 5 COLUM. J. EUR. L. 281 (1999); Richard M. Re, *Equal Right to the Poor*, 84 U. CHI. L. REV. 1149 (2017).

124 *San Antonio Independent School District et al., v. Demetrio P. Rodriguez et al*., 411 U.S. 1 (1973)

125 E. THOMAS SULLIVAN & RICHARD S. FRASE, PROPORTIONALITY PRINCIPLE IN AMERICAN LAW, CONTROLLING EXCESSIVE GOVERNMENT ACTIONS, 61 (2009) [explaining that rational basis review is rarely invalidated].

126 *Plyler v. Doe*, 457 U.S. 202, at 216 (1982).

127 "would not be faithful to our obligations under the *Fourteenth Amendment* if we applied so deferential a standard to every classification. The *Equal Protection Clause* was intended as a restriction on state legislative action inconsistent with elemental constitutional premises" (*Id).*

128 *Id.*, at 216 – 217.

and more specifically the Equal Protection Clause—either explicit or implicit— by applying a stricter scrutiny, in the case of "fundamental right or interest" or sometimes "intermediary scrutiny" in the absence of fundamental rights or interests.

This part reviews the protection of the poor under the Fourteenth Amendment and briefly outlines the way it has protected indigents who are under legal financial obligations. In the first section, on the basis of Franklin's forthcoming article in the *Yale Law Journal*[129], I show that even though "poverty" is not considered a suspect class under the Equal Protection Clause of the Fourteenth Amendment, the Court actually never stops protecting indigents. I distinguish between what I call the "*explicit*" and "*implicit*" protection of the poor. In the second section, I briefly review the Fourteenth Amendment case-law, which recognizes some protection to indigents who have been burdened legal financial obligations, demonstrating that the case-law embodies an idea of *proportionality*.

As a preliminary remark, it is important to mention that it is difficult to detangle the Due Process Clause from the Equal Protection Clause.[130] Moreover, it is also difficult to distinguish between what the Court has recognized as the fundamental interests and rights under the Due Process and the Equal Protection Clauses.[131] For a long time, the Courts and scholars have been divided on the issue of which clause offers the best framework. [132]

Why is the question of the relationship between the Due Process Clause and the Equal Protection Clause important for the purpose of this note? Since I argue that the Fourteenth Amendment provides the best framework to dispute the court fines, fees and costs imposed on the indigent, it seems important to understand the interplay between the two clauses and how they can complement each

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129 Cary Franklin, *The New Class-Blindness*, YALE L. J., at 6 (forthcoming 2018). I thank you very much Prof. Franklin for having authorized me to quote her article for the purpose of this paper.

130 P. BREST & AL., PROCESS OF CONSTITUTIONAL DECISION MAKING, CASES AND MATERIALS, 1680 – 1681 (6th ed. 2015) [explaining the debate between the proponents of the Due Process Clause and these of the Equality Clause in light of *Lawrence*].

131 Franklin, *supra* note 132, at 6.

132 Cary Franklin, *supra* note 129, at 6.

other in reaching the best protection of the most vulnerable. Indeed, the fact that these dispositions are set aside in the Fourteenth Amendment makes the protection both more efficient and "subtle," especially when it comes to the protection of the indigents and the question of proportionality.[133] Justices from the Supreme Court have also underlined the overlap and the convergence between the two clauses several times.[134] As a consequence, the two clauses are not entirely distinct and as put by Karlan, their relationship is in fact "bi-directional."[135] This synergy makes sense: the question of inequality implies a liberty or another right – in other words, equality requires rights and liberties in order to have substance and content. And the right to substantive due process is the closest to what the equal protection clause requires in order to be effective.[136]

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133 *Id.*, at 480.

134 For example, in *Lawrence*, Justice Kennedy explains that "Equality of treatment and the due process right to demand respect for conduct protected by the substantive guarantee of liberty are linked in important respects […] and a decision on the latter point advances both interests." (*John Geddes Lawrence and Tyron Garner v. Texas*, 539 U.S. 558, 574(2003)). In *Bearden v. Georgia*, O'Connor also underlines the convergence between the two clauses "Due process and equal protection principles converge in the Court's analysis in these cases. […] Most decisions in this area have rested on an equal protection framework, although Justice Harlan in particular has insisted that a due process approach more accurately captures the competing concerns. […] we generally analyze the fairness of relations between the criminal defendant and the State under the Due Process Clause, while we approach the question whether the State has invidiously denied one class of defendants a substantial benefit available to another class of defendants under the Equal Protection Clause." *Bearden v. Georgia*, 461 U.S. 660, at 665 (1983). She further makes the comparison between the two clauses when applying them to the case: "There is no doubt that the State has treated the petitioner differently from a person who did not fail to pay the imposed fine and therefore did not violate probation. To determine whether this differential treatment violates the Equal Protection. Clause, one must determine whether, and under what circumstances, a defendant's indigent status may be considered in the decision whether to revoke probation. This is substantially similar to asking directly the due process question of whether and when it is fundamentally unfair or arbitrary for the State to revoke probation when an indigent is unable to pay the fine. Whether analyzed in terms of equal protection or due process, the issue cannot be resolved by resort to easy slogans or pigeonhole analysis, but rather requires a careful inquiry into such factors as "the nature of the individual interest affected, the extent to which it is affected, the rationality of the connection between legislative means and purpose, [and] the existence of alternative means for effectuating the purpose ...." (*Id*., at 666 – 667).

As for civil procedure cases, Justice Ginsburg, in *M.L.B. v. S.J.L*., articulated further the relationship between the two clauses. She explained that no specific rationale can be drawn on the question as to which clause is applicable (*M.L.B. v. S.J.L*., 519 U.S. 102, 120-121 (1996): "We observe first that the Court's decisions concerning access to judicial processes, commencing with *Griffin* and running through *Mayer,* reflect both equal protection and due process concerns. […] in the Court's *Griffin*-line cases, "[d]ue process and equal protection principles converge." […] A "precise rationale" has not been composed, […] because cases of this order "cannot be resolved by resort to easy slogans or pigeonhole analysis.")

135 Pamela S. Karlan, *Equal Protection, Due Process, and the Stereoscopic Fourteenth Amendment*, 33 MCGEORGE L. REV. 473, at 474 (2002).

136 This also echoes the conception of equality on the other side of the Atlantic under the Equal Protection Clause enshrined in Article Fourteenth of the European Convention of Human Rights. This article can only be invoked in conjunction to another right of the Convention. This restriction is a guarantee that the question of equality would not bring additional obligations others than those related to the rights and liberties enshrined in the Convention. It is striking that Protocol Twelve of the Convention, which enshrines the right of equality and non-discrimination without requiring it to be invoked in conjunction with another right of the Convention, has been signed and ratified only by 20 member states so far (Protocol No. 12 to the Convention for the Protection of the Human Rights and Fundamental Freedoms, Rome, 4.XI.2000, European Treaty Series - No. 177. Eighteen States have signed the Protocol without ratifying it while only twenty states have ratified it so far (https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/177/signatures?p_auth=a1aBaK4X). The majority of the states actually did not want Protocol Twelve to be the provision through which rights other than those enshrined in the Convention can be invoked.

When it comes to the protection of the poor under the Fourteenth Amendment more specifically, the Supreme Court has relied on either both clauses or only one of them, somewhat inconsistently.[137] The Supreme Court held in *Griffin v. Illinois* that conditioning a criminal appeal to a trial transcript for which an applicant has to pay violates both the Equal Protection Clause and the Due Process Clause under the Fourteenth Amendment.[138] The Court applied similar reasoning in subsequent cases[139], including *Bearden v. Georgia*. The Supreme Court has also relied alternatively on the Equal Protection Clause and the Due Process Clause for similar issues. For example, in *Gideon v. Wainwright*[140], it stated that, by virtue of the Due Process Clause, states must provide indigent criminal defendants with lawyers at trial. At the same time, the Court held in *Douglas v. California*[141] that, under the Equal Protection Clause, states have to provide lawyers on criminal appeals as a right.[142] Consequently, when it comes to the protection of the poor under the Fourteenth Amendment, both the (Substantive) Due Process Clause and the Equal Protection Clause should be considered as an option of providing the economically vulnerable with the widest range of protection. It is very difficult to treat them separately. Thus, I will reference the Fourteenth Amendment as encompassing the protection offered by both the (Substantive) Due Process Clause and the Equal Protection Clause: even when the protection in question is offered only by the Equal Protection Clause (e.g., the claimant falls under a protected class), it is important to keep in mind the existence of the substantive Due Process Clause.

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137 Colgan, *Reviving the Excessive Fines Clause*, *supra* note 22, at 289.

138 *Griffin v. Illinois*, 351 U.S. 12 (1956).

139 See for example *Halbert v. Michigan*, 545 U.S. 605 (2005) where Justice Ginsburg, hold that "Due Process and Equal Protection clauses require appointment of counsel for indigent defendants, convicted on their pleas, who seek access to first-tier review in Michigan Court of Appeals, abrogating *People v. Harris*, 470 Mich. 882, 681 N.W.2d 653, and *People v. Bulger*, 462 Mich. 495, 614 N.W.2d 103, and defendant could not, via his plea, have waived his due process and equal protection rights to appointed counsel." See also KATHLEEN M. SULLIVAN & NOAH FELDMAN, CONSTITUTIONAL LAW, 786 and seq. (18th ed. 2015).

140 *Gideon v. Wainwright*, 372 U.S. 335 (1963).

141 *Douglas v. California*, 372 U.S. 353 (1963).

142 Karlan, *supra* note 135, at 475.

1. Protection of the Poor under the Fourteenth Amendment

Since *Antonio v. Rodriguez*[143], it is well established that poverty is not considered a "suspect class," meaning that it does not trigger a strict scrutiny under the Equal Protection Clause of the Fourteenth Amendment. Moreover, the Burger Court made it clear that the state is not constitutionally forced to provide people with goods and services.[144] On top of that, the Court has interpreted the Equal Protection Clause as applicable only to an intent to discriminate,[145] rendering almost impossible the ability of claimants to invoke disparate impact. Consequently, the protection of the poor under the Fourteenth Amendment and the Constitution more generally appears limited.

However, this does not mean that no protection exists for the poor who are discriminated against and that the Court is indifferent to this class. As Franklin showed in her forthcoming article "*The New Class-Blindness*":

> [N]ever held that when the state regulates fundamental rights and interests, the degree to which that regulation interferes with the ability of financially disadvantaged people to effectuate those rights and interests is irrelevant to determining its constitutionality.[146]

This protection intervenes either through what I call an "explicit mechanism" (2.1) (e.g., protected class, or else fundamental rights that directly concern the situation of the poor) or through an "implicit mechanism" that protects the poor indirectly (see the Court's discussion of birth control and abortion in *Griswold v. Connecticut*)[147] (2.2).

1.1.Explicit Protection

The *"explicit"* protection of the poor can happen through a right or an interest seen as "fundamental" under the Equal Protection Clause. For example, in *Harper v. Virginia* the Court stated that a poll tax violates the Equal Protection Clause of the Fourteenth Amendment since it makes the

143 *San Antonio Independent School District et al., v. Demetrio P. Rodriguez et al*., 411 U.S. 1 (1973).
144 Franklin, *supra* note 132, at 5.
145 Washington v. Davis, 426 U.S. 229 (1976).
146 Franklin, *supra* note 132, at 8.
147 *Griswold v. Connecticut*, 381 U.S. 479 (1965).

wealth of the voter or the payment of tax or fees a factor in the right to vote. Although the question of whether the poor and indigent are a suspect class was still pending at that time, Justice Douglas was unambiguous with regard to the right to participate in state elections[148] being a fundamental right under the Equal Protection Clause that demands to be "closely scrutinized and carefully confined."[149] These fundamental rights or interests are very limited, however.[150]

Fundamental rights or interests tend to require a closer scrutiny than the mere "rational basis scrutiny" usually applied by the Court, even though this is not always the case.[151] As explained by Winkler, "[s]ome fundamental rights trigger intermediate scrutiny, while others are protected only by reasonableness or rational basis."[152] Actually, "only a small subset of fundamental rights triggers strict scrutiny—and even among those strict scrutiny is applied only occasionally."[153] "Strict scrutiny" is the "holy grail" of judicial scrutiny: when a government action is subject to strict scrutiny the action is almost always invalidated.[154] If not all fundamental rights and interests trigger this scrutiny, this scrutiny seems only to be triggered by fundamental rights and interests or when there is

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148 The Court made clear that it has recognized "the fundamentality of participation in state "elections on an equal basis with other citizens in the jurisdiction," […] even though "the right to vote, *per se*, is not a constitutionally protected right." *San Antonio Independent School Dist.*, at 35, n. 78. With respect to suffrage, we have explained the need for strict scrutiny as arising from the significance of the franchise as the guardian of all other rights," *Plyler v. Doe*, 457 U.S. 202, at 216 (1982).

149 *Harper v. Virginia Board of Elections*, 383 U.S. 663 (1966). See also *Kramer v. Union Free School District n° 15*, 395 U.S. 621 (1969) [explaining more clearly "why 'equal' participation in the electoral process in a "fundamental interest" triggering equal protection strict scrutiny] KATHLEEN M. SULLIVAN & NOAH FELDMAN, *supra* note 139, at 772.

150 When it comes to the Fourteenth Amendment and the poor, the most protected rights are the right to participate in state elections (See for example, *Harper v. Virginia Board of Elections*, 383 U.S. 663 (1966) and *Kramer v. Union Free School District n° 15*, 395 U.S. 621 (1969)), the right to appeal in criminal cases (See for example *Griffin v. Illinois*, 351 U.S. 12 (1956); *Douglas v. California*, 372 U.S. 353 (1963). *Gideon v. Wainwright*, 372 U.S. 335 (1963)) as well as the 'marital relationship' (See for example *Boddie v. Connecticut*, 401 U.S. 371 (1971). In contrast, see *United States v. Kras*, 409 U.S. 434 (1973) where the Court judged that "$50 filing fee requirement in voluntary bankruptcy proceedings: the situation of bankruptcy was sufficiently distinguishable from divorce: "Boddie involved the 'fundamental' marital relationship; "the interest in discharge in bankruptcy did not "rise to the same constitutional level." KATHLEEN M. SULLIVAN & NOAH FELDMAN, *supra* note 139). The Court has refused to extend this fundamental interest or right doctrine to many field such as education (*San Antonio Independent School District et al., v. Demetrio P. Rodriguez et al*., 411 U.S. 1 (1973)), welfare benefits (Dandridge v. Williams, 397 U.S. 471 (1970); *Ortwein v. Schwab*, 410 U.S. 656 (1973) – $25 filing fee prerequisite to judicial review of administrative denial of welfare benefits. The interest in welfare payments "has far less constitutional significance than the interest of the Boddie appellants." KATHLEEN M. SULLIVAN & NOAH FELDMAN, *supra* note 139), and housing (*Lindsey v. Normet*, 405 U.S. 56 (1972); KATHLEEN M. SULLIVAN & NOAH FELDMAN, *supra* note 139).

151 Franklin, *supra* note 132; Adam Winkler, *Fundamentally Wrong About Fundamental Rights*, 23 CONST. COMMENT. 227, 228 (2006).

152 Adam Winkler, *supra* note 151, at 227.

153 Id., at 227 – 228.

154 E. THOMAS SULLIVAN & RICHARD S. FRASE, *supra* note 125, at 54. As a reminder, "To survive strict scrutiny, a government action must be necessary to achieve a compelling government interest". See also Richard H. Fallon, *Strict Judicial Scrutiny*, 54 UCLA L. REV. 1267 (2006-2007).

a suspect class at stake. This lead Franklin to conclude that the fact that the Court does not subject certain rights or interests to strict scrutiny (e.g., the right to abortion in *Casey*) does not imply that they do not constitute a fundamental right or interest.[155] In *Casey*[156], even though the Court reduced the constitutional protection for the access to abortion—applying an "intermediary scrutiny" instead of a strict scrutiny—it explicitly protected the access of people without financial resources.[157] *Griswold*, however, which used a higher level of scrutiny, never made this protection explicit. As far as the right of abortion is concerned, since *Casey*, protections for the poor are simultaneously weaker and yet more explicit: there are clear barriers concerning the protection of this category that states cannot cross. Moreover, the scrutiny used in examining some fundamental rights —for instance, the right to vote— has been watered down in the past few years.[158&159]

The explicit protection of the poor can also happen under the Equal Protection Clause even when there is no fundamental right or suspect class at stake and a rational basis scrutiny is applied. The three cases determining some limits regarding fines and fees are paradigmatic examples of this principle: *Bearden v. Georgia*[160], *Williams v. Illinois*[161] and *Tate v. Short.* [162] The three cases concern fines and fees imposed on indigents and their subsequent incarceration when they are not able to pay their legal financial obligations because of indigence (i.e., "debtors' prison"). In these cases, the Court failed to identify any fundamental interest and yet it explicitly protected the indigent against

155 Franklin, *supra* note 132, at 36 – 37.
156 *Planned Parenthood v. Casey*, 505 U.S. 833 (1992).
157 *Id.*, at 41.
158 See Burdick. Franklin explains that "For many years after *Harper*, the Court applied strict scrutiny to laws that infringed the right to vote. But in 1992, in the same month it decided *Casey*, the Court adopted a more "flexible" standard of review in a case called *Burdick v. Takushi*, which involved a Hawaii law that barred write-in voting. The Court had gestured in the direction of this new standard a few years earlier in a case involving a constitutional challenge to early filing deadlines for political candidates. But *Burdick* applied the new standard in a case involving a law that burdened the right to vote itself." Franklin, *supra* note 132, at 51 – 52.
159 The follow-up question then becomes: what is the advantage of classifying rights or interests as fundamental if they do not automatically trigger strict scrutiny? Are they still fundamental because they do not trigger a "heightened" scrutiny? Moreover, how are we to understand the situations where the Court applies heightened scrutiny —without reaching the point of "strict scrutiny", such as in *Plyler* and *Doe*— if there is not fundamental right or interest at stake? The question —which would go beyond the goal of this paper— is therefore how do we define fundamental rights and interests, and how do we interpret situations that do not involve a fundamental right or interest but that trigger heightened scrutiny? These questions deserve more attention.
160 *Bearden v. Georgia*, 461 U.S. 660 (1983).
161 *Williams v. Illinois*, 399 U.S. 235, (1970).
162 *Tale v. Short*, 401 U.S. 395, (1971).

discriminatory actions by the state, applying, as I will show, rational basis scrutiny "with a bite". Indeed, in these three cases the Court did not limit itself to assessing the connection between legislative means and purpose, but also the existence of alternative means to achieve the state's purpose (i.e., a component of the proportionality principle).

1.2.Implicit Protection

The Court is also likely to protect the poor implicitly either through a class that is mainly composed of poor people (e.g., illegal migrants) or through the protection of a right that is likely to indirectly protect people living in poverty (e.g., right to abortion). Protection by the Court happens "*implicitly*" via some fundamental right or interest that does not "directly" concern the poor. Cary Franklin explains this "indirect" or "implicit" protection in *Griswold*, a case in which the Court never mentions the question of class in its decision.[163] It is well known that the right to abortion intersects with the question of class: abortion is more readily available to women who can afford to pay for it. Franklin explains that, as in *Roe* —and in opposition to *Casey*— the Court in *Griswold v. Connecticut* framed its decision only in terms of right to privacy, without mentioning the question of class:

> [T]he Court recognized an unenumerated, constitutionally protected right to privacy that encompasses the use of birth control. Today, we do not think of *Griswold* as a case about class. But concerns about the ability of poor and low-income women to obtain birth control fueled the litigation in *Griswold* and informed the litigants' and the Court's sense of why judicial intervention was necessary to protect a fundamental right in this context.[164]

The Court has also protected indigents implicitly even in the absence of fundamental rights and interests. The majority decision in *Plyler v. Doe* constitutes a good example. In this case, the Court was asked whether, under the Fourteenth Amendment, "Texas may deny to undocumented school-age children the free public education that it provides to children who are citizens of the United

163 Franklin, *supra* note 132, at 8.
164 *Id.*, at 12 and 31.

States or legally admitted aliens."[165] Although there was a viable class dimension involved in the case —most of undocumented children's parents could not afford the fees which was required to go to school— the Court did not directly tackle the question of class and indigence. The Court only briefly addresses the important stigma attached to illiteracy for these children.[166] The Court relied on the Fourteenth Amendment only on grounds that the class of "undocumended" migrants —that which the court describes as an "underclass" — without mentioning the class of "poor" itself. In this case, the class of the undocumented migrants was not seen as suspect, and the right to education was not considered "fundamental." However, and despite the absence of elements likely to trigger heightened scrutiny, the Court applied "intermediate scrutiny."[167] The Court made clear that aside from the question of suspect class or fundamental rights, some situations are likely to trigger a higher standard of scrutiny:

> [It has] recognized that certain forms of legislative classification, while not facially invidious, nonetheless give rise to recurring constitutional difficulties; in these limited circumstances we have sought the assurance that the classification reflects a reasoned judgment consistent with the ideal of equal protection by inquiring whether it may fairly be viewed as furthering a substantial interest of the State.[168]

The Court applied this latter reasoning: although there was no suspect class or fundamental rights at stake, the case involved a recurring constitutional difficulty that triggered heightened scrutiny (i.e., the State has to show that the measure at stake pursues a substantial interest). The fact that the Court applied such scrutiny can be explained by many elements, among those being the fact that the

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165 *Plyler v. Doe*, 457 U.S. 202, at 205 (1982).

166 *Id.*, 222 – 223.

167 *Id*, at 218. See footnote 16 in *Plyler v. Doe* where the Court refers to *Craig v. Boren, 429 U.S. 190 (1976)* and *Lalli v. Lalli, 439 U.S. 259 (1978)*. It explains that "[t]his technique of "intermediate" scrutiny permits us to evaluate the rationality of the legislative judgment with reference to well-settled constitutional principles. 'In expounding the Constitution, the Court's role is to discern 'principles sufficiently absolute to give them roots throughout the community and continuity over significant periods of time, and to lift them above the level of the pragmatic political judgments of a particular time and place.' *University of California Regents v. Bakke, 438 U.S. 265, 299 (1978)* (opinion of POWELL, J.), quoting A. Cox, The Role of the Supreme Court in American Government 114 (1976)". According to the Justive Brennan "[o]nly when concerns sufficiently absolute and enduring can be clearly ascertained from the Constitution and our cases do we employ this standard to aid us in determining the rationality of the legislative choice". See also, Elizabeth Hull, *Undocumented Alien Children and Free Public Education: An Analysis of Plyler v. Doe*, 44 U. PITT. L. REC. 409, 423 – 424 (1983

168 *Plyler v. Doe*, 457 U.S. 202, at 217-218 (1982).

applicants were children who "can affect neither their parents' conduct nor their own status."[169] Consequently, through the requirement of the prove of some substantial state interest the Court has apply an "intermediary scrutiny" in *Plyler v. Doe*, directly protecting undocumented children and more implicitly protecting a class of poor children whose parents cannot afford the required tuitions.

In conclusion, the Supreme Court has protected the class of poor and indigents in many different ways and it is important to keep them all in mind since, as Franklin writes "When we divide this set of cases into different doctrinal categories, we might not notice that in all of the cases in which the Court seems to accord equal-protection-style heightened scrutiny to class-based discrimination."[170] Moreover, as I will show, these different kinds of scrutiny make up the premise of the principle of proportionality. This is an important element to keep in mind: courts should use more proportionality in protecting the poor and more specifically, the poor who face legal financial obligations in the criminal justice system.

2. Fines and Fees under the Fourteenth Amendment and the Indigent

*2.1.*Williams, Tate *and* Bearden *and other cases*

As for the fines and fees imposed on indigents, there are three leading cases: *Williams*, *Tate* and *Bearden*[171]. In *Williams v. Illinois*, recalling the principle that "a law nondiscriminatory on its face may be grossly discriminatory in its operation," the Court reasoned that imprisoning a defendant beyond the maximum authorized by the statute solely because he is unable to pay the fine constituted invidious discrimination.[172] The Court applies rational basis scrutiny in *Williams* by verifying whether jailing the poor for the non-payment of fines beyond the maximum imprisonment is rationally related

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169 According to the Court, "more is involved in these cases than the abstract question whether *§ 21.031* discriminates against a suspect class, or whether education is a fundamental right. *Section 21.031* imposes a lifetime hardship on a discrete class of children not accountable for their disabling status. […] the discrimination contained in *§ 21.031* can hardly be considered rational unless it furthers some substantial goal of the State", *Plyler v. Doe*, 457 U.S. 202, at 223 (1982).

170 Franklin, *supra* note 132, at 25.

171 *Williams v. Illinois*, 399 U.S. 235, (1970); *Tale v. Short*, 401 U.S. 395 (1971); *Bearden v. Georgia*, 461 U.S. 660 (1983). For a discussion of these three cases: see Atkinson, *supra* note 7; Cammett, *supra* note 5, at 382; Birckhead, *supra* note 17, at 1630 and seq.; Note, *Fining the Indigent*, *supra* note 7, 1300 and seq.

172 *Id.*, at 242.

to government interest. Its conclusion is limpid, however: a rational relationship does not imply "rational means."

Williams's decision goes even further. It applies "rational basis scrutiny with a bite" by examining a wide range of factors linked to a defendant's situation and assessing alternatives proposed by the appellant that could further the same objective.[173] The Court did not banish the concept of debtor's prison, however. It confirmed that a defendant may be imprisoned in order to work off unpaid fines, but did not specify the circumstances in which such imprisonment could be seen as valid under the Equal Protection Clause. The Court will give some more indications – although not specifically– in *Tate* and *Bearden*.

A year later, the Court, *in Tate v. Short,* stated that a state could not convert a fine into a jail term solely because the defendant is unable to pay the fine because he is poor.[174] Justice Brennan claimed that the Fourteenth Amendment requires that alternatives be considered. Hence, he introduced some clues as to the principle of proportionality.[175] However, if alternative means are unsuccessful despite the defendant's reasonable efforts to satisfy the fines by those means, the Court contended that "constitutionality of imprisonment in that circumstance must await the presentation of a concrete case."[176] In this second case, the Court also applied "rational basis scrutiny with a bite" by making clear that personal circumstances should be taken into account and alternatives must be considered.

Finally, in *Bearden v. Georgia* the Court precluded the revocation of probation solely because the defendant did not pay the imposed fine and restitution. Courts have to inquire whether the defendant has made sufficient *bona fide* effort in order to ascertain the defendant's resources.[177] In

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173 *Id.*

174 The Court adopted the view of *Morris v. Schoonfield (Morris v. Schoonfield*, 399 U.S. 508 (1970)) in which it stated that: [T]he Constitution prohibits the State from imposing a fine as a sentence and then automatically converting it into a jail term solely because the defendant is indigent and cannot forthwith pay the fine in full (*Tale v. Short*, 401 U.S. 395, at 398 (1971)).

175 *Id.*, 400 – 401.

176 *Id.*

177 According to Justice O'Connor: "If probationer has willfully refused to pay fine or restitution when he has the means to pay, state is perfectly justified in using imprisonment as a sanction to enforce collection" and "Similarly, a probationer's failure to make

other words, "If probationer has made all reasonable efforts to pay fine or restitution and yet cannot do so through no fault of his own, it is fundamentally unfair to revoke probation automatically without considering whether adequate alternative methods of punishing the defendant are available." As in *Williams* and *Tates*, the Court seems to apply a heightened scrutiny than the mere "rational basis" one by contenting that "When determining initially whether state's penological interests require imposition of a term of imprisonment, sentencing court can consider the entire background of the defendant, including his employment history and financial resources[178]". This test implies not only the ascertainment of the reasons a defendant has failed to pay but also alternative means of punishment.[179]

Consequently, it is striking that in the three cases concerning "debtors' prison", although there is no suspect class or fundamental interest as such, the Court goes beyond mere "rational basis" scrutiny by applying "rational basis scrutiny with a bite." Indeed, it examines not only the alternatives in each case but also the situation of the defendants in particular regarding the question of the "willfulness."[180] In other words, the Court initiates the premises of a proportionality control by applying —in a somewhat implicit manner— a legitimate purpose test[181], a suitability test (are the means chose rationally connected to the purpose?) and a minimal impairment test (is the restriction necessary? are there alternatives?). However, as opposed to other cases such as *Plyler* and *Doe*, the

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sufficient bona fide efforts to seek employment or borrow money in order to pay the fine or restitution may reflect an insufficient concern for paying the debt he owes to society for his crime. In such a situation, the State is likewise justified in revoking probation and using imprisonment as an appropriate penalty for the offense. *Bearden v. Georgia*, 461 U.S. 660, at 668 (1983). The Court adds that "[b]ut a probationer who has made sufficient bona fide efforts to pay his fine and restitution, and who has complied with the other conditions of probation, has demonstrated a willingness to pay his debt to society and an ability to conform his conduct to social norms" (*Id*., at 670).

178 *Id*., 669. According to the Court "[t]he State clearly has an interest in punishment and deterrence, but this interest can often be served fully by alternative means" (*Id*., at 671 – 672)

179 Although the Court applied a rational basis test with a bite as in the two previous cases, the "analysis grid of protection" through the bona fide test seems stricter for the defendant in *Bearden*. As Hampson points out: Willfulness doctrine under *Bearden* results in a challenging ability-to-pay threshold that demands not just the transfer of current assets, but also good faith efforts to secure new ones—including, the Supreme Court suggested, credit applications and job hunts (Hampson, *supra* note 7, at 35). Nonetheless, how courts apply *Bearden*'s bona-fide-efforts test was left unspecified and unregulated, and the Court has never revisited the issue.

180 However, in *Bearden*, the Court seems to apply a stricter "willfulness" test for the defendant, through the concept of "bona fide effort."

181 In *Williams* and *Tate*, the Supreme Court acknowledged that "[t]he State, of course, has a fundamental interest in appropriately punishing persons-rich and poor-who violate its criminal laws" *Williams v. Illinois*, 399 U.S. 235, 243 (1970).

Court in *Bearden, Williams* and *Tate* does not seem to take into account the harms caused to the defendant. This is one of the difference between the "rational basis test with a bite" and "intermediary scrutiny." Although authors tend to consider the two tests "interchangeable,"[182] I contend that they should be distinguished from each other, the intermediary scrutiny applying a higher standard than the "rational basis test with a bite." Sullivan and Fraser also distinguish between the two tests.[183] It is striking that the Court has applied "rational basis with a bite" in several cases concerning indigents, balancing state interest against those of the claimant. [184]

Tamar Birckhead explains that subsequent case law from lower courts have addressed other constitutional issues regarding "debtors' prison." Going through these cases would go beyond the scope of the article. However, based on Birckhead's article, some examples of these constitutional issues are worth mentioning: (1) courts have to give the opportunity to defendants to present evidence of their inability to pays at a hearing[185] and discharge the fine; (2) when the nonpayment is not "willful", courts have to consider alternatives.[186] However, the question of who bears the burden of proof of the "willful" character of the nonpayment, and whether plea bargains —automatic dismissal of the charges upon the payment of court costs— are constitutional, has not been settled yet.[187]

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182 P. BREST & AL., *supra* note 130, at 1689.

183 E. THOMAS SULLIVAN & RICHARD S. FRASE, *supra* note 125, at 55 and seq.

184 See for example, *Boddie v. Connecticut*, 401 U.S. 371, 381 – 3 (1971). In *Ortwein v. Schwab*, the Court did not apply this "rational basis scrutiny with a bite" but contended that "Appellants do not contend that the fee is disproportionate or that it is not an effective means to accomplish the State's goal. The requirement of rationality is met." (*Ortwein v. Schwab*, 410 U.S. 656 (1973).

185 Birckhead, *supra* note 17, at 1634 [quoting "Jordan v. State, 939 S.W.2d 255, 257 (Ark. 1997) (requiring written findings of fact regarding ability to pay); Greene v. Dist. Ct. of Polk Cty., 342 N.W.2d 818-21 (Iowa 1983) (requiring a hearing to determine responsibility for failure to pay prior to commitment and finding that jailing defendant without notice or an opportunity to explain why he had not satisfied the conditional order was a denial of due process); Hendrix v. Lark, 482 S.W.2d 427, 431 (Mo. 1972) (remanding indigent defendant to city court for a hearing to determine her ability to pay the fines and costs, and if unable to pay immediately, ordering an opportunity for her to pay in reasonable installments based upon her ability to pay)".

186 *Id.* See, e.g., [quoting "Gilbert v. State, 669 P.2d 699, 703 (Nev. 1983) ("[B] efore a defendant may be imprisoned for nonpayment of a fine, a hearing must be held to determine his financial condition, and an indigent defendant must be allowed reduction of fine or discharge of fine through installment payments."); State v. Townsend, 536 A.2d 782, 786 (N.J. Super. Ct. App. Div. 1988) (finding that defendant's willful failure to pay restitution obviated the need for sentencing court to consider alternatives)"].

187 *Id*., at 1634 and 1635 [Comparing "State v. Bower, 823 P.2d 1171, 1173 (Wash. Ct. App. 1992) (requiring the defendant to "show cause" why he should not be punished for failure to pay fines), with Del Valle v. State, 80 So. 3d 999, 1013 (Fla. 2011) (holding that the state must provide sufficient evidence of ability to pay and willful refusal to pay, after which the burden shifts to the probationer to prove inability to pay to rebut the state's evidence); Compare Moody v. State, 716 So. 2d 562, 565 (Miss. 1998) (holding that a felony statute for writing bad checks that requires an automatic payment of $500 plus restitution in exchange for dismissal violates the Equal Protection Clause of the Fourteenth Amendment, as it is "discriminating to the poor, in that only the poor will face jail time"), with People v. Memminger, 469 N.Y.S.2d 323, 325 (N.Y. Sup. Ct. 1983) (finding that defendants' inability to accept plea offer because of indigency did not violate their equal protection or due process rights). "All of these rules apply to the unequal treatment of indigent defendants after conviction and sentencing. They restrict the state's power to increase the stringency of sentences already imposed on

2.2.Critics and limits of the Fourteenth Amendment in the Protection of the Indigent

Some authors have called for the application of other amendments of the Constitution in order to protect indigents against disproportionate legal financial obligations. However, as I have shown, the protections likely to be afforded by the Sixth, Eight, Thirteenth, or Twenty-Fourth Amendments are either too limited (e.g., Sixth and Twenty-Fourth Amendments) or still too uncertain regarding the scope of their protection (this is particularly true for the Eight and Thirteenth Amendments). Moreover, the scope of protection offered by some amendments is likely to be in conflict with other provisions of the Constitution when it comes to determining the nature of court costs and fees.

What about the Fourteenth Amendment? Scholars have been quite critical about its scope of protection and this is why they argue for a protection under other provisions of the Constitution.[188] Colgan was particularly harsh in her critique of the Fourteenth Amendment. She argues that the protection under this provision is not enough. First, she contends that "Fourteenth Amendment cases provide little guidance in addressing the question of whether pecuniary sanctions are "fines," a critical threshold question in the Eighth Amendment context but essentially irrelevant in Fourteenth Amendment analysis."[189] Moreover, she says that "While these cases consider to some extent a defendant's ability to pay, they do not contemplate such ability in view of the constitutional notion of "excess" established in the Excessive Fines Clause."[190] Third, according to her, "The Fourteenth Amendment presumes that trial courts are engaging in a meaningful analysis of one's ability to pay. There is good reason to believe that judicial inquiries into these matters are largely futile."[191] She also explains that the Fourteenth Amendment has mostly focused on "the post-sentencing collections context" and fails to protect "against the difficulties that arise from the imposition of unmanageable

convicted indigent defendants. They do not restrict the District Attorney's authority."].

188 Eisen, *supra* note 48, at 330 – 331; McLean, *supra* note 13, at 893 [arguing that "rediscovering the indigency-protection promise of the Eighth Amendment would unquestionably be of value to litigants in the event that the Supreme Court elects to weaken current Equal Protection-grounded doctrine relating to indigency status"]; Morgan, *supra* note 16, at 361 [considering that "The Fourteenth Amendment protections under *Bearden* have failed to adequately protect against the emergence of modern debtors' prison].

189 Colgan, *Reviving the Excessive Fines Clause*, *supra* note 22, at 389

190 *Id.*

191 *Id.*

economic sanctions in the first instance. In many cases, interest, collections costs, and payment fees are sufficiently high that even when people make regular payments they cannot reach the principal debt, keeping them perpetually in the shadow of the punishment."[192]

Although I agree with some of this criticism, it is striking that this criticism can actually be addressed by developing the potentiality of this provision. Indeed, many of the issues have not been raised yet before the Supreme Court. These issues are therefore still unresolved, as are the issues raised under other provisions of the Constitution, particularly the Eighth Amendment.

For example, it has not been decided yet whether *Bearden* applies to "voluntary" imprisonment (also called the "fines or time" alternative[193]) when defendants have "accepted" to spend time in jail as a way of avoiding legal financial debts – most of the time the defendants do not even have the choice to request such a program when they have no way to make the payment.[194] The Supreme Court has not addressed the question of a "plea bargain" either. These questions are important, though, since "voluntary" imprisonment and plea bargains are common in the criminal system.[195] Furthermore, as Colgan has pointed out, the only cases that have been brought to the Court concern the limits of "working off" unpaid fines by being imprisoned, i.e., "post-sentencing context." Moreover, these cases intervene in the execution phase of the sentence. In addition, they mainly concern unpaid "fines"[196] and not costs and fees. There are many other issues which need to be brought under the Fourteenth Amendment: e.g., the meaning of "willingfully" and the "bona fide test," the constitutionality of legal financial obligations in light of the worrying consequences—besides imprisonment—under the Equal Protection Clause. If there are still many issues yet to be

192 Colgan, *The Excessive Fines Clause: Challenging the Modern Debtors' Prison, supra* note 97, at 9.
193 Birckhead, *supra* note 17, at 1635.
194 *Id*., at 1636; Cammett, *supra* note 5, at 382; ACLU, MODERN-DAY DEBTORS' PRISONS: THE WAYS COURT-IMPOSED DEBTS PUNISH PEOPLE FOR BEING POOR (2014); ACLU, IN FOR A PENNY: THE RUSE OF AMERICA'S NEW DEBTORS' PRISONS (2010).
195 Hampson, *supra* note 7, at 36.
196 In *Williams*, the defendant was condemned to a $500 fine and $5 Court cost. *Tate* concerns an accumulation of fines for a total of $425. *Bearden* was convicted to a $500 fine and $250 in restitution.

addressed, it does not mean that the protection under the Fourteenth Amendment has failed so far. It just means that the problem is highly complex and requires that litigators bring these issues before the courts.

Moreover, the fact that the Fourteenth Amendment provides little guidance when it comes to defining the nature of the legal obligations can be taken as a boon since, the violation of this disposition can be raised regardless of the nature of the legal obligation. As opposed to other amendments of the Constitution, the Equal Protection Clause and the Due Process Clause are likely to be invoked whatever the nature of the fees and costs —punitive or non-punitive, etc. This is not to say that the protection will be the same. However, the invocation and application of such a protection will not be determined by these highly contentious questions.

The lack of meaningful analysis by courts is probably one of the biggest issue under the Fourteenth Amendment. It can be explained by the fact that courts either do not have enough leeway in some cases to apply a proportional approach and/or a lack of guidance in adopting this proportional approach. This is why in the following point I call for more proportionality in the assessment of fines and fees under the Fourteenth Amendment when it comes to indigents. The proportionality analysis would provide a consistent framework and guidance for courts to help them to engage in such meaningful analysis.

Additionally, some of the critiques advanced by Colgan are actually not linked to the protection provided by the Fourteenth Amendment as such. Indeed, one of the biggest problems in the specific issue of debtors' prison—besides all the other damaging consequences of the legal financial obligations—is at the level of enforcement. *Williams*, *Bearden* and *Tate* are well established cases. However, states and municipalities and lower courts have not conformed to the prescriptions of the law. They continue to violate Due process and Equal Protection Clauses by jailing the poor and indigent who cannot pay they legal financial obligations without examining alternatives and by denying basic due process guarantees such as rights to notice and fair hearings. They also "neglect to

adequately inform or notify residents of their citations and fail to provide a meaningful opportunity to contest the charges."[197] Moreover, "judges fail to conduct an indigency analysis at all, or they consider improper, arbitrary, and irregularly applied factors to determine whether someone is willfully refusing to pay."[198] The issue in this case is not at the level of recognition but rather application, which is probably one of the biggest challenges regarding the issue of "debtors' prison" nowadays. Unfortunately, neither the Fourteenth Amendment nor any other provision of the constitution can efficiently enforce themselves: this is an issue that the government should urgently address, yet it does not seem to be willing to do so. The repeal of the "dear colleague letter" by Jeff Sessions a few months ago demonstrates the discretion available to the federal government to enforce these rulings.

In this context, I argue in the next section that some potentialities of the Fourteenth Amendment in protecting indigents who face legal financial obligations still need to be explored. (i.e., associating the principle of proportionality under "rational scrutiny with a bite" or the "intermediate scrutiny"). The Fourteenth Amendment is likely to constitute a "middle ground" in protecting the indigent against legal financial obligations even when there is no fundamental right or suspect class at stake.

IV. Legal Financial Obligations and the Indigent: Proportionality Analysis under the Fourteenth Amendment

In the last part of this paper, I argue that some potentialities of the Fourteenth Amendment in the protection of the indigents who are subjected to legal financial obligations have not yet been

197 Atkinson, *supra* note 7, at 213. On the enforcement issue, see Kurin, *supra* note 32, at 267 [discussing discusses the rise in modern-day debtors' prisons due to municipality practices that involve the supervision of and fine collection from probationers]. See also Cammett, *supra* note 5, at 382 [explaining that "According to a report by the American Civil Liberties Union, "[C]ourts across the United States routinely disregard the protections and principles the Supreme Court established in Bearden," noting that "[i]n the wake of the recent fiscal crisis, states and counties now collect legal debts more aggressively from men and women who have already served their criminal sentences, regardless of whether they demonstrate the ability to pay these debts."].

198 Atkinson, *supra* note 7, at 213.

explored, especially from the proportionality principle perspective. Building on Vicky Jackson's arguments[199], I first call for more proportionality under the Fourteenth Amendment. In the second section, I show that the principle of proportionality as applied under the Fourteenth Amendment constitutes a particularly suitable framework to protect the poor facing legal financial obligations. Finally, in the last section, I address and reply to one of the main objection of applying the principle of proportionality under the Fourteenth Amendment.

1. Proportionality and the Fourteenth Amendment

We retrieve some components of the proportionality test in the application of several amendments of the American Constitution, including the Fourteenth Amendment. [200] Some courts also refer to the term "proportional."[201] Moreover, courts apply balancing tests between benefits and harms that can be traced, to a certain extent, to proportionality. However, there is no case in which the four components of the concept of proportionality has been applied by courts so far, despite the insistence of Justice Breyer on this point.[202] According to Prof. Barack, adopting such a proportionality approach it its entirety "will require a review of both the scope of the constitutional right as well as the justification for its limitation."[203] He wonders whether American constitutional law is really ready for this change.[204] Prof. Jackson seems more optimistic about the integration of

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199 Vicky C. Jackson, *Proportionality and Equality, in* VICKY C. JACKSON, M. TUSHNET, PROPORTIONALITY AND EQUALITY IN PROPORTIONALITY, NEW FRONTIERS, NEW CHALLENGES 171, 175 (ed., Cambridge Univ. Press 2017); Vicki C. Jackson, *Constitutional Law in an Age of Proportionality*, 124 YALE L. J. 3101 (2015).

200 Prof. Vicky Jackson depicts these four steps through the following questions: (1) Is the "purpose of the law that constitutes a presumptive interference with rights […] itself consistent with the aims of a free and democratic society?" (legitimate purpose test); (2) are "the means chosen […] rationally connected to the purpose?" (3) Is the restriction "necessary" to achieve the government's purpose or are there ways of achieving that purpose that would intrude less on the arena of the protecting right? (requirement of "minimal impairment"); "even if a scheme is "minimally impairing" vis-à-vis the government's goals, are the benefits towards achieving those goals of sufficient weight to warrant intrusion on an area protected by rights?" ("proportionality as such question"). She insists on balancing between rationales and harms: "A principle and as a goal of constitutional government, proportionality is a "precept of justice," embodying the idea that larger harms imposed by government should be justified by more weighty reasons and that more severe transgressions of the law be more harshly sanctioned than less severe ones." (Vicki C. Jackson, *Constitutional Law in an Age of Proportionality*, 124 YALE L. J. 3101, 3098 (2015)). See also AHARON BARAK, PROPORTIONALITY, CONSTITUTIONAL RIGHTS AND THEIR LIMITATIONS, 131 (Doron Kalir trans., Cambridge Univ. Press 2012).

201 *Id.*

202 *Id.*, at 206.

203 *Id.*

204 *Id.*, at 207.

the principle of proportionality into U.S. Constitutional law. She argues that it is already an element of constitutional analysis.[205]

What of proportionality in the application of the Fourteenth Amendment? I will briefly develop this question on the basis of Prof. Vicky Jackson's approach, who in two recent articles called for "greater use of proportionality as a principle and for structured proportionality as a standard of review in the United States."[206] I have previously shown that, the Court remains sensitive to the protection of the most "vulnerable" by adopting a heightened scrutiny that balances harms against the state interests at stake —see *Plyler v. Doe* or *Casey*— or, at least, by looking for the existence of potential alternatives—see *Bearden*, *Willams*, or *Tate*. These standards constitute a "soft" application of the principle of proportionality.[207] Moreover, the "intermediary scrutiny" and "rational basis scrutiny with a bite" demonstrate the importance of a "soft type" of proportionality even when there is no suspect class or fundamental right at stake. This helps to "water down" the "dichotomist" view of the categorical approach, especially the distinction between rational scrutiny and strict scrutiny. [208] In other words, this shows that there is room in the American constitutional tradition for the principle of proportionality. As put by Sullivan, it is not surprising that this intermediary scrutiny encompasses a "balancing approach", close to the proportionality analysis:

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205 She observes that the proportionality principle is recognized in American constitutional law as such, albeit sometimes only partially "[S]ome areas of U.S. constitutional law embrace proportionality as a principle, as in Eighth Amendment case law, or contain other elements of the structured "proportionality review" widely used in foreign constitutional jurisprudence, including the inquiry into "narrow tailoring" or "less restrictive alternatives" found in U.S. strict scrutiny." (Jackson, *Constitutional Law in an Age of Proportionality*, *supra* note 200 at 3094 – 95. She also explores "why proportionality has not been used as a general principle of constitutional law in the United States. It suggests that the aversive impact of Lochner v. New York and Dennis v. United States, as "negative precedents," led to a search for categorical approaches to constrain judicial discretion. Moreover, the age of the Constitution and related interpretive practices help account for the absence of any general embrace of proportionality." (*Id.*, at 3101 – 3102). Finally, she explains that "Americans are already familiar with the legal principle of proportionality in constitutional law. The Eighth Amendment's case law has long recognized that punishments grossly disproportionate to the severity of the offense are prohibited as cruel and unusual punishment, although the Court's willingness actually to scrutinize the proportionality of sentences has varied over time and contexts." (*Id.*, at 3104)).
Jackson points out general advantages of the proportionality approach. She argues that it "helps bring constitutional law closer to constitutional justice," provides "a better bridge between courts and other branches of government, offering criteria for constitutional behavior that are usable by, and open to input from, legislatures and executives" and "reveals process failures, including departures from impartial governance, warranting heightened judicial scrutiny." On this basis, she provides some theoretical arguments for greater use of a proportionality analysis as part of constitutional adjudication (Jackson, *Constitutional Law in an Age of Proportionality*, *supra* note 200 at 3102, 3130, 3142 and seq.).

206 *Id*., at 3102; Jackson, *Proportionality and Equality*, *supra* note 199.

207 BARAK, *supra* note 200.

208 Fallon, see *supra* note 154, at 1302-1303.

> "After all, the move to a more flexible mode of constitutional review in several limited areas is consistent with the ideal of a sliding-scale judicial review that usually involves a degree of constitutional balancing. Such balancing of competing interests resembles ends-benefits proportionality analysis, although the Court rarely uses the language of proportionality."[209]

Some justices, especially Justice Breyer, also adopt this approach. [210]

One of the paradigmatic examples of the application of proportionality is the "intermediary scrutiny" applied in *Plyler v. Doe* where the Court considered that "In determining the rationality of *§ 21.031*, we may appropriately take into account its costs to the Nation and to the innocent children who are its victims. In light of these countervailing costs, the discrimination contained in *§ 21.031* can hardly be considered rational unless it furthers some substantial goal of the State"[211] and concludes that "we are unable to find in the congressional immigration scheme any statement of policy that might weigh significantly in arriving at an equal protection balance concerning the State's authority to deprive these children of an education."[212] What is this scrutiny if not a cousin of proportionality? The Court actually concludes that the legitimate purpose at stake does not warrant the intrusion on the right of undocumented children to be treated equally. Moreover, the more "flexible" standard of "undue burden" —compared to strict scrutiny— can also be seen as a premise of the application of proportionality. This standard is less protective than the strict scrutiny, yet it embodies the idea of proportionality.

It is true that the proportionality principle does not always lead to the protection of the most vulnerable groups, which can appear deeply unfair as in *Crawford v. Marion County*.[213] This is

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209 SULLIVAN & FRASE, *supra* note 125, at 53 – 54.

210 Specifically, in dissenting opinions in several cases (Especially under the First and the Second Amendments. See Jackson, *Constitutional Law in an Age of Proportionality*, *supra* note 200; BARAK, *supra* note 200; S. BREYER, MAKING OUR DEMOCRACY WORK: A JUDGE'S VIEW (Knopf, 2010)), Justice Breyer has called for the application of the proportionality principle and argued that the Courts had already actually "turned to a balancing test between competing interests, which included asking whether the limitation of a constitutional right is not proportional." (BARAK, *supra* note 200, at 206: Jackson, *Constitutional Law in an Age of Proportionality*, *supra* note 200, at 3094 – 3095). Moreover, Justice Marshall has argued for a "sliding scale" approach to Equal Protection (P. BREST & AL., *supra* note 130, at 1501). rejecting "a priori definitions in defining the standard of review." (Jackson, *Constitutional Law in an Age of Proportionality*, *supra* note 200, at 3173). This approach is similar to a proportionality approach and similar also to a "middle ground scrutiny" applied in a different fashion —"undue burden standards," "intermediary scrutiny" and "rational basis scrutiny with a bite."

211 *Id.*, at 224.

212 *Id.*, at 224 – 225.

213 *Crawford v. Marion County*, 553 U.S. 181(2008). This case concerns a statute that imposed voter I.D. law and hindered the ability of the poor and other vulnerable populations to vote. In this case, the Court applied the "undue burden standard" and upheld the

certainly an objection that can be applied to the proportionality principle, but it is not inevitable. Indeed, as Alec Stone Sweet and Jud Mathews point out, the proportionality analysis "is an *analytical procedure*—it does not, in itself, produce substantive outcomes."[214] It is important that the balancing test be applied in a consistent, precise, and coherent way —rather than superficially, as in *Crawford*.[215] The principle of proportionality with its four steps would constitute a consistent and coherent framework to avoid such superficial approaches. Indeed, "Disproportionalities in the effects of government action may be a signal of failures in the legislative process that warrant increased scrutiny by the courts,"[216] and in this case, it seems important to apply it in a more systematic way under the Fourteenth Amendment.

First, the proportionality approach helps to soften the rigidity of the "tiers" of equal protection.[217] Indeed, rational basis review implies most of the time that as long as the legislator has acted "for any conceivable rational reason," a disputed statute may be upheld.[218] However, as Marshall argues in his dissent in *Dandridge v. Williams*, the violation of the Equal Protection Clause should depend on a more proportionate approach and not on "rigid ex ante categories."[219] Justice Marshall also stood "for a more graduated approach to applying the equal protection clause,

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disputed statute which is deemed did not unduly hinder the right to vote (See also *Burdick v. Takushi* making application of the test of "minimal impairment" by stating that state's regulation must be "narrowly drawn to advance a state interest of compelling importance." (Franklin, *supra* note 132, *at 51 – 52)*.. Thus, the Court was unable to protect the vulnerable group in this case.

214 Alec Stone Sweet and Jud Mathews, *Proportionality Balancing and Global Constitutionalism*, 47 COLUM. J. TRANSNAT'L L. (2008).

215 One nuance regarding *Crawford* worth mentioning, though. As Franklin argues: "[The court in *Crawford*] rejected the suggestion that the non-suspect status of class under equal protection means that courts are barred from paying special attention to the interaction between financial disadvantage and laws restricting the right to vote. […] *Crawford* upheld the idea that voting, like abortion, is different. There are fundamental liberties at stake in these contexts, which justifies preserving a doctrine that enables courts to inquire into whether people without financial resources are being shut out" (Franklin, *supra* note 132, at 54). In order words, as in *Plyler v. Doe*, the Court applied heightened scrutiny in *Crawford*. This can be explained by the Court's interest in avoiding deep harms to a class of particularly vulnerable people. However, the balancing test sometimes seems too light and superficial. Endorsing the principle of proportionality would be a way to address this criticism.

216 Jackson, *Constitutional Law in an Age of Proportionality*, *supra* note 200, at 3151.

217 Vicky Jackson summarizes this idea by explaining that: A more contextualized and less rigidly categorical approach to equal protection analysis, that seeks weightier reasons for practices more likely to have more serious effects inconsistent with constitutional commitments to equality and fairness, might produce not only more of the equality towards which the Constitution aims but more coherent doctrine as well. Jackson, *Proportionality and Equality*, see *supra* note 199, at 171 and 172. She also gives the example of the case Armour v. *City of Indianapolis which illustrates* the negative effects of the rigid tier system under the Equal Protection clause (*Id*., at 181 – 182).

218 *Id.*, at 172 [giving the example of *Armour* "as illustrating some of the adverse effects of the categorical nature of "tiered" Equal Protection review" and where "application of rational basis review likewise allowed the majority to avoid acknowledging the human cost of the substantive inequality imposed by the tax scheme."] (*Id*, at 181 – 182).

219 Jackson, *Constitutional Law in an Age of Proportionality*, *supra* note 200, at 3151.

suggesting that the nature of the government's interest justifying burdens on relative powerless and disadvantaged groups would need to be stronger than for laws regulating less disadvantaged groups."[220] In other words, "[A] 'rational basis' test could be applied if it were understood not as a static inquiry into whether there is any plausible reason, but rather as a more dynamic inquiry asking […] whether – given the nature of the alleged injury – there is a substantial enough reason for the challenged practice; the more damaging the discrimination to a more disadvantaged group, the greater degree of justification would be required."[221]

It is perfectly imaginable that a single standard as the rational basis test would "be implemented with varying degrees of seriousness depending on the impact of the classification."[222] As put by Brest & Al., "the model of multiple tiers won in the 1970s and 1980s under the influence of Kennedy who wrote key opinion in Gay rights."[223] And it would not be practicable to completely move away from the tier approach. However, the Court could take a step back—as it already has—and be less shy when it comes to applying proportionality by developing the above mentioned four steps explained by Prof. Barack.[224] A "softer multiple tiers approach" is compatible with the application of the proportionality principle. The European Court of Human rights has proven the compatibility of both systems by adopting a "suspect class approach" under the nondiscrimination principle, triggering a "higher scrutiny" while applying the proportionality principle.[225] Thus, applying proportionality under the Fourteenth Amendment would also be a way to overcome

220 Jackson, *Proportionality and Equality*, see *supra* note 199, at 195.

221 *Id*., at 195.

222 Jackson, *Constitutional Law in an Age of Proportionality*, *supra* note 200, at 3174.

223 P. BREST & AL., *supra* note 130, at 1501.

224 In this vein, Jackson has argued that "[g]iven the need in the United States to have guidance for the hundreds of lower federal and state courts that can adjudicated constitutional claims, it may be too much to expect the Court to move entirely away from tiers of review. But movement away has already begun, as the Court has repeatedly declined to determine what "tier" of scrutiny applies to challenges involving discrimination against gay or lesbian persons based on their sexual orientation. Proportionality as a principle has much to offer US law in this area – if nothing else, an understanding that categories should not be given talismanic weight – either in presumptively precluding use of "suspect" classifications (especially when they are used to promote integration rather than maintain a hierarchical separation) or in presumptively permitting other forms of classifications without regard to their actual justification and effect." (Jackson, *Proportionality and Equality*, see *supra* note 200, at 196).

225 See for example, Janneke Gerards, *The Discrimination Grounds of Article 14 of the European Convention on Human Rights*, HUM. RTS. L. REV. 1 – 26 (2013).

Washington v. Davis and the paralysis posed by some disparate impact analyses.[226] Adopting a more "fluid" view of the tier approach via an analysis of proportionality would help to overcome the overly strict application of the rational basis scrutiny when disparate impact is invoked. Consequently, the approach of the Court in moving away from the tiers standard and in focusing on the nature of the harm—as in *Plyler v. Doe*—and not only on the nature of the classification or the right at stake, offers an interesting response to the rigid interpretation of *Washington v. Davis* and the attitude of courts towards disparate impact.[227] In this context, proportionality applied in its entirety would constitute a middle ground solution for, on the one hand, preserving the "democratic decision making" and the "stability of the law"—not automatic invalidation when there is disparate impact as when a "suspect class" is at stake—and, on the other hand, "recognizing differences in the severity of impacts, especially on historically disadvantaged groups."[228]

Aside from this, the principle of proportionality also better identifies and evaluates the harm suffered[229]—which is not assessed in many cases under the rational basis test.

I now turn to the application of this principle in the protection of the indigent with respect to legal financial obligations imposed by criminal courts.

2. Proportionality applied to Fines and Fees imposed to the Poor and Indigent

In this last section, I argue that in order to protect the indigent, courts should rely on the principle of proportionality explicitly and in its entirety when applying the Fourteenth Amendment.

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226 Jackson, *Constitutional Law in an Age of Proportionality*, *supra* note 200, at 3175.

227 *Id*., at 3178.

228 *Id*., at 3172. Jackson identifies many other benefits of applying proportionality in the framework of the Fourteenth Amendment. She summarizes them as follows: Conscientiously applied, proportionality doctrine can generate insights into the nature and structure of inequality that might otherwise elude judges (or other decisionmakers) who reason only through existing categories or only through intuition, by challenging what is accepted as "natural." It can also be a tool for revealing invidious motivation, and a useful framework for more fine-grained, contextual analyses of the governmental interests asserted and for more transparent consideration of competing constitutional values and governmental interests (Jackson, *Proportionality and Equality*, see *supra* note 199, at 183 – 184. More specifically, the author identifies four main benefits of the proportionality test: expressing the importance of rights through the minimal impairment or "necessity" tests, testing the genuineness of the asserted object via the minimal impairment, revealing stereotyped or unjust assumptions subject to critique (obtained through the question of the relationship of means and ends) and Providing a Framework for More Contextualized Evaluation of Government Purposes (proportionality test *stricto sensu*) (*Id*., at 174 – 178))

229 *Id.*, at 183 – 184.

The argument here is not revolutionary: a "soft" version of proportionality already exists in case law, especially under the Fourteenth Amendment. I have shown that *Williams, Tate* and *Bearden* invoke an idea of proportionality. More generally, when the Supreme Court applies "rational basis scrutiny with a bite" or the intermediary scrutiny under the Fourteenth Amendment, it also borrows some elements of the proportionality analysis.

My objective here is to show that the way the Court uses the idea of proportionality should be to clarify the scope of proportionality that should be extended through the application of the four-step analysis. This would help ensure a coherent and consistent framework when it comes to the protection of the indigents who face legal financial obligations that they are unable to pay. First, I argue that applying a proportionality analysis would help extend the "time scale" of the protection. It would be applied not only in a "post-sentencing" phase but also at the "sentencing phase" (3.1.). Second, the "necessity test" under the principle of proportionality—the third step of the proportionality analysis—should also be widened to fees and costs specifically by a more careful evaluation of state goals and means. For instance, many states tend to spend more money in the collection of fines and fees than they receive from it (3.2). Third, the scope of scrutiny must be broadened by taking into account the harms caused by these legal obligations to indigent defendants through the proportionality test *stricto sensu* (3.3). Applying the principle of proportionality in a more comprehensive and explicit manner would help achieve a more consistent protection while also taking into account state interests.

2.1.Extending the "time scale" protection to the "Sentencing Phase"

Williams, Tate and *Bearden* concern the "post-sentencing" phase, meaning that they only concern discrimination results as a consequence of nonpayment. Moreover, within this "post-sentencing" phase, these cases only concern the consequence of 'working off' the fine through imprisonment. Although this is one of the most damageable consequences of judicial debts, it is not the only one likely to deeply affect the poor and indigent after they have been levied fines, fees, and/or

costs.

Many constitutional issues can arise prior to the "post-sentencing" phase. Indeed, many discriminatory practices are likely to appear in the context of the sentencing phase itself. Some defendants face the alternative of "time or fine", which deprives them of a choice when they do not have the ability to pay a fine.[230] There is also the practice of "plea bargaining" in which charges are reduced if the defendants can immediately pay the costs, with the consequence that the indigent would never be able to see his or her charges reduced.[231] Moreover, the indigents are sometimes denied a hearing in order to plea their indigence when they are unable to pay the fines and the fees. These issues raise important constitutional questions under the Fourteenth Amendment that have never been brought before the Supreme Court. An application of the principle of proportionality in these cases would avert the risk of invidious discrimination under the Fourteenth Amendment. As I will argue in my next point, it would also have the advantage of assessing the necessity of imposing fines and fees earlier in the process, thus avoiding an intervention after the damages have already been caused (i.e., losing job, family consequences, the threat of imprisonment due to an inability to pay). Another advantage of applying the proportionality principle at this stage under the Fourteenth Amendment is that it is not necessary to determine the nature of the costs and the fees, as opposed to the other Amendments. What matters in the proportionality test under the Fourteenth Amendment is the purpose of such costs and fees.

Moreover, I have mentioned earlier that one of the important issues regarding *Williams, Tate,* and *Bearden* is the non-enforcement of the protection they recognize to indigent. Indeed, it often happens that indigent who cannot afford to pay the fines and fees are automatically put into jail. The Constitution itself contains no provisions with respect to enforcement.[232] However, this issue could

230 Birckhead, *supra* note 17, at 1635.
231 Hampson, *supra* note 7, at 36.
232 Sobol, *supra* note 2, at 528.

be avoided if the proportionality test were applied at an earlier stage, which would prevent placing the poor and indigent in a situation where they are unable to pay.

What would the proportionality test applied at an earlier stage involve? Aside from the question of the legitimacy of the aim pursued by fines, fees and costs, the courts should examine whether there is a rational relationship between this aim and the means. In the third phase, the necessity test would examine whether there is no alternative to the fines, fees and costs imposed when the defendant is indigent: isn't it possible to put in place a payment plan? Or should some fees and costs be waived given the fact that their collection would be more expensive anyway? Lastly – and this seems to be the stage which will be the most critical for courts to apply: are the benefits of imposing fines, fees and costs towards achieving their goals – whether punitive or otherwise – of sufficient weight to warrant intrusion into an area safeguarded by the Constitution? For example, is the fact that the defendant might lose his job if he decides to go to prison because he cannot pay the fine/fees/costs can be seen as sufficiently disruptive so as to render dubious his legal financial obligation? Fines and fees/costs should be considered together in assessing the fourth stage, but might be considered separately in assessing necessity since courts might consider that they do not pursue the same objective. I will come back to this question.

Finally, I have seen that fees and costs are likely to be imposed at many stages: before the trial, at the time of sentencing, after sentencing. A defendant should be able to contest these fees and costs under the principle of proportionality at each stage of the procedure.

2.2.Broadening the Minimal Impairment test to Fees and Costs

A second important point in applying the proportionality test in its entirety under the Fourteenth Amendment is clarifying and extending the third stage i.e., the "minimal impairment" step or the "necessary control" step. Depending on the measure contested and the stage of the process – "sentencing stage" where the fines/fees/costs are imposed or "post sentencing stage" related to

incarceration for nonpayment—this test would take different forms. Is the fine "necessary" to achieve the government's purpose or do alternatives exist?

Vicky Jackson identifies one important purpose of this test: it gives the opportunity to express "the importance of the interests protected by rights, by assuring that they are impinged on by social needs only when necessary"[233] including "the interests protected by commitments to fair and free governance embodied in principles of due process, equality, and freedom of expression."[234] Moreover, it helps to test "the genuineness of the asserted object"[235] and to reveal "that the asserted purpose is not genuine or is intermixed with a less legitimate purpose."[236]

The Supreme Court applied this "minimal impairment" step in *Williams, Tate* and *Bearden*. However, *Williams, Tate* and *Bearden* concern only the instance of fines *stricto sensu*. In none of these cases was there a question of paying court fees and costs, aside from a $5 fee in *Williams*, in addition to a fine *stricto sensu* of $500.

Extending the proportionality analysis, especially the "minimal impairment" step, to fees and costs—besides fines *stricto sensu*—would have the advantage to specifying their goals and evaluating whether their collection is truly necessary.[237] In this case, as Sobol argues, it is crucial to determine the true nature of the different kind of charges—fines, costs, fees, restitution— in assessing their primary purpose.[238]

Indeed, in the case of fines, if we consider that their main goal is punitive, their imposition and collection is likely to be judged by courts as "necessary" even though the collection might end

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233 Jackson, *Proportionality and Equality*, see *supra* note 199, at 175.

234 *Id.*

235 *Id*., at 175 – 176.

236 *Id*.

237 Note, *Fining the Indigent*, *supra* note 7, at 1282 [explaining that although the Williams and Tate decisions are undoubtedly significant developments in regard to the fining of indigents, they dealt only with equal treatment in the collection and enforcement of fines. The decisions did not deal with the important question of whether fines are a useful sanction in dealing with impecunious defendants].

238 Sobol, *supra* note 2, at 532-533 [arguing that "In practice, the terms "fines," "fees," "costs," and "restitution," are often used interchangeably. Legislatures and courts should evaluate monetary charges based on their primary penological rationale and recognize that other reasons for charges may exist. The label "fine" should be reserved for charges that have a primarily punitive or deterrent purpose, while "restitution" should be for charges primarily designed to compensate victims, and "fees" should refer to charges and costs that are primarily designed to reimburse expenses."].

up being more expensive than the fine itself. This could be justified by a penological goal that is greater than the goal of financing the judicial system.[239] However, if we consider that the incarceration for nonpayment of a fine pursues mainly a goal of "collection," and the defendant is financially unable to discharge his fine under the payment terms set by the court, "incarcerating him would not help the state collect its debt, and thus bears no relation to the legitimate state interest in fine collection."[240] Moreover, the very question of the inefficiency of incarceration, especially if there is no punitive goal —related to the abolitionist debate— could also be raised.[241]

However, when it comes to costs and fees, which today are often higher than the fines themselves[242], the conclusion could be different under the "minimal impairment" test. Indeed, if we consider that the main goal of cost and fees consist in financing the criminal justice system[243] and that the "cost of these sanctions outweighs the benefits"[244], their application to indigents might have a

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239 It is not to say that it would pass the fourth step consisting in the *stricto sensu* scrutiny test (see after). See Note, *Fining the Indigent*, *supra* note 7, at 1283 – 1286 [discussing the Penological Goals of the Fine and explaining that "a fine should not be imposed unless three criteria are satisfied: (1) the nature and circumstances of the crime and the history and character of the defendant must indicate that deterrence or intimidation is the appropriate penological objective; (2) a fine, alone or in combination with another disposition, must be an effective and fair means of achieving deterrence; (3) the defendant must be capable of paying a properly determined fine, either in lump sum or in installments"]

240 Note, *Fining the Indigent*, *supra* note 7, at 1293 [noting that this analysis "is rarely applicable, however, because in most jurisdictions default imprisonment is not truly a penalty for noncompliance with the court's order to pay a fine, but is instead a substitute sanction for the substantive offense of which the offender was convicted."].

241 Hampson, *supra* note 7, at 28 [explaining that "imprisonment as a punitive technique is a blunt instrument, no matter what doctrinal breach leads to its imposition. For some purposes, of course, blunt instruments may come in handy. But the abolitionists emphasized that imprisoning individuals who otherwise could work carried heavy social costs in addition to the costs of debtor upkeep. The risk of malnutrition, disease, and death that skyrocketed in close quarters seemed less and less worth it. Prison was socially disruptive too. Even though debtors were separated from the general population, they were nonetheless treated as criminals and, as the abolitionists complained, like slaves."].

242 Sobol, *supra* note 2, at 509 – 510 [stating that "While all monetary assessments have increased, the largest percentage increase has been in fees. "A recent NPR survey found that since 2010, forty-eight states have increased their fees. A nationwide survey found that the percentage of state and federal felony inmates with court-imposed monetary sanctions increased from 25% in 1991 to 66% in 2004. Between 1991 and 2004, the percentage of felony inmates assessed restitution and fees increased from approximately 10% to approximately 25% and 35%, respectively, while the percentage of felons assessed fees increased from approximately 10% to over 50%."]; See also Marsh & Gerrick, *supra* note 7, at 112[explaining that "available data does not appear to support the claim that debtors' prisons and related collection policies produce a net financial benefit for municipalities, despite their human cost. In Pennsylvania, for example, local governments must spend $ 7,000 to collect $ 4,000 in fines and court costs. Data from Texas shows that the vast majority of fines and costs are paid within thirty days, without any threats of incarceration, and suggests that any increases in collections that are later obtained with the aid of threats are marginal. There is no evidence to suggest that collection practices that are premised on the threat of incarceration for nonpayment are more necessary or cost-effective elsewhere."].

243 As a reminder, as opposed to Colgan, Hampson defends that "since costs are imposed primarily to defray the government's expenses, they are fundamentally different from monetary obligations imposed to punish wrong doers or compensate victims." (Hampson, *supra* note 7).

244 Sobol, *supra* note 2, at 509 – see also Beckett and Harris who argue that **"**The process should also examine situations where imposition of fees is fiscally counterproductive. For example, a study in Rhode Island from 2005 to 2007 found that "15% of the incarcerations [for court debt] cost the state more than the amount owed by the individuals." (Sobol, *supra* note 2, at 533 and Katherine Beckett & Alexes Harris, *On Cash and Conviction: Monetary Sanctions as Misguided Policy*, 10 CRIMINOLOGY & PUB. POL'Y 509 (2011).

difficult time meeting the necessity requirement. This is a crucial point since scholars have shown that, in many instances, the cost of collection is the same if not higher than the fees and cost imposed to the indigents.[245] Indeed, aside from the cost of the collection, imposing such costs and fees to indigents "has the paradoxical result of engendering more incarceration because the poor are unable to pay, and the monetary costs of such punitive jailing is still ultimately borne by the state."[246] In this vein, Cammett explains that:

> A true cost-benefit analysis of user fees would reveal that costs imposed on sheriffs' offices, local jails and prisons, prosecutors and defense attorneys, and the courts themselves surpass what the states take in as revenue and create a cycle of re-incarceration for poor defendants.[247]

Finally, the necessity test should also review the existing alternatives of imposing fines, fees and costs when indigents are unable to pay. Scholars have advanced many alternatives that have not been considered by legislators and courts so far, among them the so-called "day fine" system[248], suspended sentence or probation[249], abolishing Monetary Sanctions[250], prohibiting Incarceration for Failure to Pay Reimbursement Charges[251], community service,[252] etc.

2.3.Extending the Scope of the Scrutiny through the Stricto Sensu Proportionnality Test

Applying a proportionality analysis under the Fourteenth Amendment would also give a framework and guidance for balancing the harms posed to the indigent by fines, costs, and fees against the consequences to the state of the nonpayment of fines, costs, and fees (via the *stricto sensu* proportionality step). When it comes to the sentencing stage, Appleman explains that usually these sanctions are applied automatically "fees, fines, costs, and sanctions tend to be automatically

245 *Id.*; Cammett, *supra* note 5, at 383.
246 Cammett, *supra* note 5, at 383.
247 *Id*.; Note, *Fining the Indigent*, *supra* note 7, at 1290 [noting that "converting a fine to a prison sentence can be extremely costly to society"].
248 Note, *Fining the Indigent*, *supra* note 7, at 1286.
249 *Id.*
250 Sobol, *supra* note 2, at 524
251 Sobol, *supra* note 2.
252 Marsh & Gerrick, *supra* note 7.

imposed, which fails to account for the offender's baseline financial position. During the discussion of a defendant's severity of punishment, her baseline condition is usually ignored even though most standard punishments do not affect each offender's situation equally. Indeed, "it is the amount by which we change offenders' circumstances that determines the severity of their sentences."[253] She continues by explaining that it is important to take into account the harms caused: "Accordingly, it is important to recognize the comparative nature of punishment to justify some of the harsh treatment we impose on offenders, particularly if we want to stay true to a framework of proportional punishment."[254] This should also be applied even to fees and costs that do not pursue a penological goal.

The *stricto sensu* proportionality test would allow for taking into account the applicant's economic situation as well as potential harms. As for the consequences of nonpayment and the issue of "debtors' prison" more specifically, the *stricto sensu* proportionality step would also provide guidance for the "willfulness doctrine" set up in *Williams, Tate and Bearden*. As a reminder, the Court in the three cases contended that "willful nonpayment are not protected,"[255] thus instigating the "*bona fide efforts test*" in *Bearden*. This test has raised a lot of issues and has led lower courts to come to very different, and sometimes restrictive, conclusions. Hampton explains that "state and federal appellate courts have affirmed that some effort to find employment is required, and some have put the burden on the debtor or have established a burden-shifting framework."[256] In this context, the *stricto sensu* proportionality test would offer a framework to apply this "*bona fide efforts test*" and balance it with all other elements of a claimant's financial situation.

The *stricto sensu* proportionality test would also give the opportunity for courts to take into account the societal consequences of fines, fees and costs: e.g., unemployment and the cost of

253 Appleman, *supra* note at 1526.
254 *Id.*
255 Hampson, *supra* note 7, at 35.
256 *Id*. See also Kurin, *supra* note 32 at 267.

financing imprisonment. It is striking that, in this regard, even the Koch Brothers have argued for not jailing the poor who cannot afford fines, fees and costs for reasons related to the cost of these measures, even though the alternatives they propose seem no less troubling.[257] The Supreme Court has already insisted on the evaluation of societal consequences in cases such as *Plyler v. Doe*: "In determining the rationality of *§ 21.031*, we may appropriately take into account its costs to the Nation and to the innocent children who are its victims."[258]

3. The main objection Toward the Application of the Principle of Proportionality

Jackson summarizes the objects against the application of proportionality by reducing them to the following elements: they are irrational, insufficiently protective of rights[259], unduly intrusive on legislatures, and overempower courts.[260] Jackson responds to each critique in her article on "*Constitutional Law in an Age of Proportionality.*" [261]

I would like to respond to one main objection: that the principle of proportionality weakens some rights, particularly "fundamental" rights and interests. It seems either the glass is half empty or half full when it comes of the application of the proportionality principle under the Fourteenth Amendment. Indeed, on the one hand, the balancing approach applied so far by the Supreme Court is likely to recognize a stricter level of scrutiny in cases where there is no fundamental rights or suspect class at stake. On the other hand, this balancing test is also likely to weaken the protection afforded when the analysis does not reach strict scrutiny.

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257 Michelle Chen, *Beware of Big Philanthropy's New Enthusiasm for Criminal Justice Reform, Wealthy donors across the political spectrum are zeroing in on our jails and prisons as the latest locus of privatization*, THE NATION, March 16, 2018, at 1 [quoting the Koch declaring that this system "puts taxpayers on the hook, paying for jail time that is completely unnecessary and counterproductive."]

258 *Plyler v. Doe*, 457 U.S. 202, at 223 – 224 (1982).

259 By" insufficiently protective of rights, Jackson means that it focuses "too much attention on governmental justifications for its means and not enough on deontological understandings of rights", Jackson, *Constitutional Law in an Age of Proportionality*, *supra* note 200, at 3102 and seq. and 3153 and seq.

260 *Id.*

261 *Id.*

Rose Henry argues that if *M.L.B* had to be seen as "a trend in Supreme Court decisions to apply a "balancing test" to equal protection cases involving fundamental interests,"[262] "it would be an unfortunate development in equal protection doctrine because it would represent a diminution in the level of scrutiny that courts apply to government classifications that burden fundamental rights."[263] And she is right: in cases where the Court decides to lower the scrutiny by applying "just" an "intermediary scrutiny" instead of "strict scrutiny," the Court has taken a step back (see *Crawford* and *Casey*).

However, I contend that the advantages of applying the proportionality principle is greater than the disadvantages. First, scholars have shown that fundamental rights or interests do not automatically trigger strict scrutiny.[264] Second, it is true that the Court has sometimes applied the balancing test rather superficially, weakening some rights (e.g., the right to vote in *Crawford*). However, as I explained in the preceding section, such a superficial analysis could be overcome by applying the proportionality principle *in its entirety*, i.e., by applying the four steps articulated by Barak. Applying this principle in its entirety has the advantage of identifying the harms caused by states actions, even if the end result remains the same as if the rational basis test had been applied.[265] The argument of "the half full glass" in particularly true when it comes to the protection of the poor or indigent who have been imposed legal financial obligations because of offenses they committed and are unable to pay them. Most of the time, the issues they face do not constitute a fundamental right or interest. Likewise, the indigent are not a suspect class. This means that in most cases they will not benefit from strict scrutiny.

Consequently, the proportionality principle offers more pathways for protection than hindrances.

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262 Rose Henry, *The Constitutionality of Government Fees as Applied to the Poor*, 33 N. ILL. U. L. REV. 293, at 302 (2013).
263 *Id.*
264 See for example Adam Winkler, *supra* note 151, at 227.
265 Jackson, *Proportionality and Equality*, *supra* note199, at 183 – 184.

What struck me most about last April's colloquium at Yale Law School, *Who Pays? Fines, Fees, Bail, and the Cost of Courts*, was the point that collecting fines, costs, and fees from the indigent is perversely costly for not only the indigent (for whom the consequences can be disastrous) but society at large. During the colloquium judges, lawyers, academics, and politicians all expressed frustration about their powerlessness over the situation.

Can constitutional law come to the rescue? If political will is a major part of the problem, it also seems that unexplored questions in constitutional law is another. Scholars have argued that several provisions of the Constitution (e.g., the Sixth, Eighth, Thirteenth and Twenty Fourth Amendments) might be viable in addressing this problem. However, I have demonstrated that the scope of these provisions is yet to be resolved, and that the Fourteenth Amendment remains the most powerful legal tool in safeguarding the rights of the indigent. I have called for the application of the proportionality principle in its entirety to balance the harms levied on the individual against the interests of the state. My solution is not revolutionary: it follows in fact a pronounced drift by the Supreme Court away from the rigid tier system and toward a "balance of interests" in adjudicating protections for the economically vulnerable. It is urgent that the Supreme Court not only stays on this path but follows it to its natural terminus: the proportionality principle.

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