Monetizing the Super-Predator

AHMED LAVALAIS*

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I. INTRODUCTION

Tragically, Black people in America continue to experience disproportionately high levels of contact with the criminal legal system.[1] This contact exposes them to unwarranted dignity harms, harassment, family separation, incarceration, and violence.[2] Black Americans also experience poverty at disproportionate rates.[3] In fact, Black poverty is one mechanism

* Clinical Teaching Fellow, Policy Advocacy Clinic, University of California, Berkeley, School of Law. For conversations about or comments on this Article, I thank Anavictoria Avila, Olivia Layug Balbarin, Stephanie Campos-Bui, Asad Rahim, Jeffrey Selbin, Devan Shea, Rachel Wallace, Ronald Williams II, and Maiya Zwerling. I am also indebted to Dean Rowan and the Berkeley Law Library staff for superb research services. Finally, my sincere thanks to the editors of the *Ohio State Law Journal* for their rigorous editorial support.

[1] *See, e.g.*, *Criminal Justice Facts*, SENT'G PROJECT, https://www.sentencing project.org /criminal-justice-facts/ [https://perma.cc/R6WE-KF2A].

[2] *See* Devon W. Carbado, *Blue-on-Black Violence: A Provisional Model of Some of the Causes*, 104 GEO. L.J. 1479, 1509–12 (2016); *see, e.g.*, Press Release, Roderick & Solange MacArthur Justice Ctr., Univ. of Miss., City of Pearl, Mississippi Youth Court Judge Resigns Under Pressure; City Closes Court Upon Learning that Judge Prohibited Young Mother from Seeing Her Baby Due to Unpaid Court Fees (Oct. 26, 2017), https://www.washingtonpost.com/r/2010-2019/WashingtonPost/2017/10/26/Editorial-Opinion/Graphics/Pearl_Press_Release_FINAL.pdf?itid=lk_inline_manual_2 [https://perma.cc/98UQ-YXBX] (describing how a youth court judge entered an order in August of 2016 prohibiting "Mother A," an African-American resident of Jackson, Mississippi, from having any contact with her baby until she paid outstanding court fees in full. At the time of the order's reversal, the child was eighteen months old and the "no contact" order had been in place for fourteen months).

[3] JESSICA SEMEGA, MELISSA KOLLAR, JOHN CREAMER, & ABINASH MOHANTY, U.S. CENSUS BUREAU, P60-266(RV), INCOME AND POVERTY IN THE UNITED STATES: 2018 13–15 (June 2020), https://www.census.gov/content/dam/Census/library/publications/ 2019/de

through which increased contact with the criminal system is facilitated.[4] Monetary sanctioning—the imposition of often steep financial costs before, during, or after a criminal or delinquency adjudication—is situated where race, poverty, and the criminal legal system meet.

In recent years, the role of money in the criminal system has been hotly debated.[5] Concerns over the criminalization of poverty and the capacity of economic injustice to perpetuate racial injustice have brought renewed calls from across the ideological spectrum for reconsideration of the role money plays in the administration of the U.S. criminal system.[6]

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mo/p60-266.pdf [https://perma.cc/69RN-F55U] (showing that more than one-fifth of Black people in the United States, roughly nine million people, lived in poverty at some point during 2018).

[4] *See* PETER EDELMAN, NOT A CRIME TO BE POOR: THE CRIMINALIZATION OF POVERTY IN AMERICA 21–22 (2017); LOÏC WACQUANT, PUNISHING THE POOR: THE NEOLIBERAL GOVERNMENT OF SOCIAL INSECURITY 83 (2009); Press Release, Bernadette Rabuy & Daniel Kopf, Prison Policy Initiative, Prisons of Poverty: Uncovering the Pre-incarceration Incomes of the Imprisoned (July 9, 2015), https://www.prisonpolicy.org/reports/income.html [https://perma.cc/EH8Z-FN55].

[5] *See* U.S. COMM'N ON CIVIL RIGHTS, TARGETED FINES AND FEES AGAINST COMMUNITIES OF COLOR: CIVIL RIGHTS & CONSTITUTIONAL IMPLICATIONS 4, 186 (Sept. 2017), https://www.usccr.gov/pubs/docs/Statutory_Enforcement_Report2017.pdf [https://perma.cc/6HR8-646J] [hereinafter TARGETED FINES AND FEES] (comparing Commissions' finding that "[m]unicipalities target poor citizens and communities of color for fines and fees" with statements by Commissioner Gail Heriot challenging this finding and suggesting that race may be less of a factor in the assessment of fines and fees than the Commission finds); Matt Sledge & Bryn Stole, *Supreme Court Panel Urges Revamp of Louisiana's 'User Pay' Criminal Justice System, but Implementing It Will Be Hard*, ADVOCATE (Apr. 28, 2019), https://www.theadvocate.com/baton_rouge/news/politics/legislature/article_5b63ded0-6924-11e9-8362-4313df8c1ea6.html (on file with the *Ohio State Law Journal*) (describing state lawmaker's characterizations of the difficulties of attempting to wean the state's criminal system from its current reliance on a "user pay" model).

[6] *See*, Chuck DeVore, *Police-Collected Fines, Fees and Forfeitures: How Does Your City Rank?*, RIGHT ON CRIME (Nov. 2, 2016), https://rightoncrime.com/2016/11/police-collected-fines-fees-and-forfeitures-how-does-your-city-rank/ [https://perma.cc/G9CY-6RTE] (urging city council members and police chiefs in several large cities to prioritize "basic policing" over revenue generation); *Ending Modern-Day Debtors' Prisons*, AM. C.L. UNION, https://www.aclu.org/issues/smart-justice/sentencing-reform/ending-modern-day-debtors-prisons [https://perma.cc/J8XQ-HSE8] (describing fines and fees as facilitating modern-day debtors' prisons). *See generally* Nikki Trautman Baszynski, *Uncovering Official Lawlessness in Ohio's Criminal Court-Debt Assessment and Collection: A Toolkit for Defenders*, 81 OHIO ST. L.J. 1065 (2020) (discussing the ways in which the government illegally charges court costs and recklessly increases court fees).

Monetary sanctions[7] are frequently identified as one of the most pervasive and troubling examples of the toxic effects money has on our criminal system.[8] After the murder of Black teenager Michael Brown by White police officer Darren Wilson in 2014,[9] the U.S. Department of Justice began a "pattern-or-practice"[10] investigation into the Ferguson, Missouri police department and municipal court. That investigation, the results of which are detailed in a 102 page report released in March of 2015, found substantial evidence of unconstitutional racial discrimination.[11] Deeply connected to the discrimination experienced at the hands of Ferguson's police and courts was the city's reliance on monetary sanctioning to generate revenue.[12] The Ferguson Report described how Black residents and motorists in Ferguson were seen as a source of revenue whose constitutional rights could be easily overridden, rather than as a constituency city leaders had sworn to treat fairly.[13] Soon enough, it became clear that these troubling forms of exploitation were not confined to Ferguson—every state in the country authorizes comparable practices, and abuses appear widespread.[14]

In the years since Ferguson, monetary sanctioning has received significant scholarly attention.[15] Even with this rich discourse, several facets of monetary

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[7] Here, the phrase "monetary sanctions" should be taken to include any costs imposed as part of an interaction with the carceral system. There is no unified terminology for describing these costs. Terms include, but are not limited to, "Fines," "Fees," "User Fees," "Restitution," "Court Costs," "Legal Financial Obligations," and "Court-Ordered Debt"—all of which I will generally refer to as "monetary sanctions."

[8] Cash bail is another prominent example and one with much overlap with monetary sanctioning. *See e.g.*, MATHILDE LAISNE, JON WOOL, & CHRISTIAN HENRICHSON, VERA INST. OF JUSTICE, PAST DUE: EXAMINING THE COSTS AND CONSEQUENCES OF CHARGING FOR JUSTICE IN NEW ORLEANS 2–3 (Jan. 2017), https://www.vera.org/downloads/publications/past-due-costs-consequences-charging-for-justice-new-orleans.pdf [https://perma.cc/UQ7F-7CWT].

[9] Danielle Cadet, *Darren Wilson Identified as Officer Who Fatally Shot Michael Brown*, HUFFPOST (Aug. 15, 2014), https://www.huffpost.com/entry/darren-wilson-michael-brown _n_5681340 [https://perma.cc/6HWX-LD2R].

[10] *How Department of Justice Civil Rights Division Conducts Pattern-or-Practice Investigations*, U.S. DEP'T OF JUST., https://www.justice.gov/file/how-pp-investigations-work/download [https://perma.cc/E5M6-SA2P].

[11] U.S. DEP'T OF JUSTICE, CIVIL RIGHTS DIV., INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT 5 (Mar. 2015), https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf [https://perma.cc/N37U-PXR4] [hereinafter FERGUSON INVESTIGATION].

[12] *Id.* at 10.

[13] *Id.* at 4–5.

[14] *See* EDELMAN, *supra* note 4, at 22; LAWYERS' COMM. FOR CIVIL RIGHTS OF THE S.F. BAY AREA ET AL., NOT JUST A FERGUSON PROBLEM: HOW TRAFFIC COURTS DRIVE INEQUALITY IN CALIFORNIA 7 (2015), https://lccrsf.org/wp-content/uploads/Not-Just-a-Ferguson-Problem-How-Traffic-Courts-Drive-Inequality-in-California-4.20.15.pdf [https://perma.cc/3WQA-XUDE]; TARGETED FINES AND FEES, *supra* note 5, at 19.

[15] *See, e.g.*, Sharon Brett, *Reforming Monetary Sanctions, Reducing Police Violence*, 4 UCLA CRIM. JUST. L. REV. 17, 19 (2020).

sanctioning remain underexamined.[16] In particular, and despite interest across the disciplinary spectrum,[17] the role of race in monetary sanctioning is still underexplored.

Race is a persistent theme in criminal system discussions, but many accounts of monetary sanctioning are still rooted, explicitly or implicitly, in critiques of the financial exploitation of low-income communities, the inability of current legal doctrine to protect the poor, or the failures of local court and government funding paradigms.[18] The focus on economic concerns and harms experienced by the indigent are not unjustified. Many local courts and governments, as in Ferguson, fund themselves, in substantial part, via monetary sanctioning.[19] These funding constructs can incentivize or exacerbate systemic abuses.[20] In addition, states and localities siphon billions of dollars in wealth from communities across the country, with low-income persons especially vulnerable to abusive sanctioning regimes that leverage the power imbalance between indigent individuals and local courts and law enforcement systems.[21]

But while economic concerns and the impact on low income persons are an integral part of the monetary sanctioning picture, the harms of monetary sanctioning are borne disproportionately by communities of color—with the

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[16] For example, the impact of monetary sanctioning on women of color stands out as one area in need of more detailed examination. See SANETA DEVUONO-POWELL, CHRIS SCHWEIDLER, ALICIA WALTERS, & AZADEH ZOHRABI, ELLA BAKER CTR. FOR HUMAN RIGHTS, FORWARD TOGETHER, & RESEARCH ACTION DESIGN, WHO PAYS? THE TRUE COST OF INCARCERATION ON FAMILIES 9 (Sept. 2015), https://ellabakercenter.org/sites/default/files/downloads/who-pays.pdf [https://perma.cc/FVA6-S4U3] for one example of research involving this under-researched topic.

[17] *See* Alexes Harris, Heather Evans, & Katherine Beckett, *Drawing Blood from Stones: Legal Debt and Social Inequality in the Contemporary United States*, 115 AM. J. SOCIOLOGY 1753, 1792–93 (2010); Cortney E. Lollar, *What Is Criminal Restitution?*, 100 IOWA L. REV. 93, 104–05 (2014); R. Barry Ruback, *The Benefits and Costs of Economic Sanctions: Considering the Victim, the Offender, and Society*, 99 MINN. L. REV. 1779, 1810, 1835 (2015); R. Barry Ruback & Mark H. Bergstrom, *Economic Sanctions in Criminal Justice: Purposes, Effects, and Implications*, 33 CRIM. JUST. & BEHAV. 242, 261 (2006).

[18] *But see* Dan Kopf, *The Fining of Black America*, PRICEONOMICS (June 24, 2016), https://priceonomics.com/the-fining-of-black-america/ [https://perma.cc/3FED-2T5W] (economic analysis based on government data on the revenues and expenditures of nearly 20,000 municipalities, finding that "the use of fines as a source of revenue is not a socioeconomic problem, but a racial one. The cities most likely to exploit residents for fine revenue are those with the most African Americans").

[19] *Id.*

[20] *See* FERGUSON INVESTIGATION, *supra* note 11, at 2; Press Release, U.S. Dep't of Justice, Office for Civil Rights, Office of Justice Programs, Office for Access to Justice, Advisory for Recipients of Financial Assistance from the U.S. Department of Justice on Levying Fines and Fees on Juveniles 1–2 (Jan. 2017), https://www.ojp.gov/sites/g/files/xyckuh241/files/media/document/advisoryjuvfinesfees.pdf [https://perma.cc/C9N3-FRFF].

[21] *See* LAISNE, *supra* note 8, at 3; Michael W. Sances & Hye Young You, *Who Pays for Government? Descriptive Representation and Exploitative Revenue Sources*, 79 J. POLITICS 1090, 1091 n.6 (2017). *But see* Kopf, *supra* note 18, for an analysis of the "tiny" proportion of revenue that comes from monetary sanctioning according to U.S. Census data.

Black community made to bear an especially heavy load.[22] Despite this, much of the scholarly discussion on monetary sanctioning is still somewhat disconnected from the racialized contexts in which modern monetary sanctioning plays out.[23] Race is often treated as a secondary phenomenon—important to acknowledge in terms of disparate impact, but frequently decentered or subsumed within a poverty analysis.[24] The tightly interwoven nature of race and poverty in the United States may lead to expectations that the detrimental effects monetary sanctioning visits on communities of color will naturally alleviate if economic fairness concerns are addressed.[25]

The purpose of this Article is to challenge that thinking by showing how race can operate, in sometimes inconspicuous or unexpected ways, to influence monetary sanctioning practices. The primary question I pose is: How might racial dynamics shape how courts utilize monetary sanctions? Asked more specifically, what do existing theories about race, and empirical and historical analyses, suggest about how monetary sanctioning will be deployed against Black communities?

My exploration focuses on monetary sanctioning within the juvenile system.[26] The juvenile court is situated at the intersection of criminal law and

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[22] *See* Sances & You, *supra* note 21, at 1093; Kopf, *supra* note 18.

[23] *But see* Sances & You, *supra* note 21, at 1093; Theresa Zhen, *(Color)Blind Reform: How Ability-to-Pay Determinations Are Inadequate to Transform a Racialized System of Penal Debt*, 43 N.Y.U. REV. L. & SOC. CHANGE 175, 178–79 (2019).

[24] *See* ANTI-POVERTY NETWORK OF N.J. & STRUCTURAL RACISM & POVERTY WORKING GRP., THE UNCOMFORTABLE TRUTH: RACISM, INJUSTICE, AND POVERTY IN NEW JERSEY 3 (Sept. 2017), http://www.antipovertynetwork.org/resources/Documents/The%20Uncomfortable%20Truth%20Final%20-%20web.pdf [https://perma.cc/93XU-XV4R]; Shaun Ossei-Owusu, *The Sixth Amendment Façade: The Racial Evolution of the Right to Counsel*, 167 U. PA. L. REV. 1161, 1165 (2019) (observing, in the context of indigent defense, that race is often "subsumed within the proxy category of class").

[25] *See* CRIMINAL JUSTICE POLICY PROGRAM, HARVARD LAW SCH., CONFRONTING CRIMINAL JUSTICE DEBT: A GUIDE FOR POLICY REFORM 1 (Sept. 2016) [hereinafter CONFRONTING CRIMINAL JUSTICE DEBT] (observing that "[t]he financial and social costs associated with criminal justice debt have had a disparate impact on the poor and people of color," and noting that "because race intersects with class, with Black and Latino families disproportionately facing poverty, fees and fines that impose special hardships on impoverished individuals and communities will reinforce racially unequal outcomes") (citations omitted); *see also* Jeffrey Selbin, *Juvenile Fee Abolition in California: Early Lessons and Challenges for the Debt-Free Justice Movement*, 98 N.C. L. REV. 401, 418 (2020) (concluding that "[j]uvenile fee abolition in California has the potential to undo a key driver of racial . . . injustice in the legal system," if current user-funded models are replaced by "publicly funded justice models").

[26] Though distinct in some ways from its adult counterpart, the juvenile system is fully integrated into the broader criminal system. *See, e.g.*, Barry C. Feld, *Race, Politics, and Juvenile Justice: The Warren Court and the Conservative "Backlash"*, 87 MINN. L. REV. 1447, 1493–94 (2003) [hereinafter Feld, *Race, Politics, and Juvenile Justice*] (observing that by the late 20th century the juvenile court had become a "wholly owned subsidiary of the criminal justice system").

state interventions into childrearing.[27] When a child is brought into a juvenile court, the judge is given considerable authority over the child, the parents, and potentially even the child's extended family.[28] In claiming *parens patriae* powers, the state asserts a virtually unlimited authority to intervene in the raising of children it deems "delinquent" or without proper parental supervision.[29]

The juvenile system's focus on the entire family affords unique perspective on the way Blackness is constructed in relation to crime. That said, the juvenile-adult system distinctions should be understood as limited. The juvenile system is fully integrated into the broader criminal system, and monetary sanctioning functions in much the same way regardless of where a case originates, or where it is ultimately adjudicated.[30]

Drawing on insights from sociology, social psychology, and critical race theory, I show how racialized judgments of Black youth, families, and communities might impact decisions to impose monetary sanctions.

Part II explores the racial history of the juvenile court, drawing out how the Black community is regarded as intergenerationally criminal, and how the modern juvenile court positions itself as a manager of the supposedly degenerate Black family.

Part III considers the racial dimension of monetary sanctioning within the modern juvenile system. Part of the aim here is to show how blame-based rationalizations that pathologize Blackness and elevate racialized notions of personal responsibility give rise to laws, practices, and attitudes that might systematically disadvantage Black youth and their families. Linking historical narratives and empirical studies of attitudes toward Black children and Black families with research on implicit bias in courtroom settings, I illustrate how

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[27] *See generally* ANTHONY M. PLATT, THE CHILD SAVERS: THE INVENTION OF DELINQUENCY (Rutgers University Press 2009) (1969); GEOFF K. WARD, THE BLACK CHILD SAVERS: RACIAL DEMOCRACY & JUVENILE JUSTICE (2012) [hereinafter, WARD, THE BLACK CHILD-SAVERS].

[28] *See, e.g.*, LA. CHILD. CODE ANN. art. 726 (2019) (identifying one purpose of the state's juvenile system as remedying family dysfunction and establishing a "service plan binding upon all family members"); LA. CHILD. CODE ANN. art. 744 (2019) (identifying one purpose of the state's juvenile system as remedying family dysfunction by establishing an informal family service plan that describes "all expected action to be taken by the child, his caretakers, or other family members").

[29] *See, e.g.*, Illinois Juvenile Court Act § 9, 1899 Ill. Laws 132 et. seq.; People v. Day, 152 N.E. 495, 496 (Ill. 1926) ("[A] delinquent child . . . is any male . . . or female who while under the age of eighteen (18) years violates any law of this State; or is incorrigible, or knowingly associates with thieves, vicious or immoral persons; or without just cause and without the consent of its parents, guardian or custodian absents itself from its home or place of abode, or is growing up in idleness or crime . . . or knowingly frequents any policy shop or place where any gambling device is operated; or frequents any saloon or dram-shop . . . or wanders about the streets in the night-time . . . or uses vile, obscene, vulgar, profane or indecent language in any public place.").

[30] *See, e.g.*, ALEXES HARRIS ET AL., MONETARY SANCTIONS IN THE CRIMINAL JUSTICE SYSTEM 127–28, 148 (Apr. 2017), http://www.monetarysanctions.org/wp-content/uploads/2017/04/Monetary-Sanctions-Legal-Review-Final.pdf [https://perma.cc/K7DF-KND6].

courts might utilize monetary sanctioning in furtherance of conscious, unconscious, or institutional racial biases.

I conclude by suggesting that despite the deeply intertwined nature of race, poverty, and criminalization, we should exercise caution when deploying anti-poverty framings as a means of achieving anti-racism ends.

II. THE SUPER-PREDATOR

Founded in the late nineteenth century,[31] the first juvenile court was the result of decades of effort by progressive reformers eager to create a system where young lawbreakers might be removed from environments that were perceived as corrupting and out of alignment with upper-class White understandings of American values.[32]

Though the broad project of the juvenile court was at least partially rooted in a desire to assert control over potentially disruptive subgroups, particularly the poor, the court was designed with some explicitly altruistic elements.[33] The intended beneficiaries of this initial "child-saving" project were the children of working and lower class Whites.[34] The progressive child-savers thought that removal from the corrupting influence of families and communities that were inclined toward criminality and unprepared to properly "Americanize" their children could save young people from lives of lawless degeneracy, and, perhaps more importantly from the perspective of the child-savers, protect the polity from the dangers of an underclass of poor White males that was disconnected from the American mainstream.[35]

Utilizing *parens patriae*, the state's authority to intervene in child rearing decisions expanded dramatically.[36] The progressive's assimilationist agenda

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[31] The first juvenile court was founded in Cook County, Illinois in 1899. L. Mara Dodge, *"Our Juvenile Court Has Become More Like a Criminal Court": A Century of Reform at the Cook County (Chicago) Juvenile Court*, 26 MICH. HIST. REV. 51, 51 (2000).

[32] ELLEN RYERSON, THE BEST-LAID PLANS: AMERICA'S JUVENILE COURT EXPERIMENT 47 (1978) ("[T]he juvenile court reformers were placing their movement among a number of others which were, in the progressive period, sending numerous missionaries from the dominant culture to the lower classes to acculturate immigrants, to teach mothers household management, and to supervise the recipients of charity.").

[33] *See, e.g.*, Tamar R. Birckhead, *Delinquent by Reason of Poverty*, 38 WASH. U. J.L. & POL'Y 53, 61–62 (2012).

[34] *See generally* STEVEN L. SCHLOSSMAN, LOVE AND THE AMERICAN DELINQUENT: THE THEORY AND PRACTICE OF "PROGRESSIVE" JUVENILE JUSTICE, 1825–1920 (1977).

[35] *See* Randall G. Shelden & Lynn T. Osborne, "*For Their Own Good": Class Interests and the Child Saving Movement in Memphis, Tennessee, 1900–1917*, 27 CRIMINOLOGY 747, 748 (1989).

[36] *See, e.g.*, PLATT, *supra* note 27, at 135 ("Although the child savers affirmed the value of the home and family as the basic institutions of American society, they facilitated the removal of children from 'a home which fails to fulfill its proper function.' The child savers set such high standards of family propriety that almost any parent could be accused of not fulfilling his 'proper function.' In effect, only lower-class families were evaluated as to their

was mediated through a system characterized as informal, and focused on the perceived needs of the child, rather than the particular act that brought the youth before the court.[37] This child-centric mandate and planned informality comingled with the coercive nature of criminal law to form a system with sweeping powers and little oversight.[38]

Despite its invasiveness, the early juvenile system was still understood as a relatively advantageous social welfare program, promising, at least for White children, education, vocational training, and more patient and humane treatment than the adult criminal system.[39]

Communities of color were generally denied access to the early juvenile systems.[40] Even after gaining admittance, youth of color faced disparate treatment or substandard segregated facilities that reinforced racial hierarchy by providing guidance and instruction commensurate with racialized expectations of opportunity, capacity, and societal position.[41] Professor Geoff Ward succinctly describes this period: "The parental state was thus formalized over the first half-century of juvenile justice in the image of a white polity, with an ethic of care centered on white native-born and immigrant youth, who were considered distinctly assimilable into a resurgent white democracy."[42]

By the second half of the twentieth century, demographic shifts, increased Black political power, and the changing White attitudes about the political salience of race fostered a reckoning over the role of racism throughout American society, including within the juvenile court.[43] As the Civil Rights

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competence, whereas the propriety of middle-class families was exempt from investigation and recrimination.").

[37] NAT'L RESEARCH COUNCIL INST. OF MED., JUVENILE CRIME, JUVENILE JUSTICE: PANEL ON JUVENILE CRIME: PREVENTION, TREATMENT, AND CONTROL 154 (Joan McCord, Cathy Spatz Widom, & Nancy A. Crowell eds., 2001) (summarizing the Progressive's conception of juvenile court procedures as intended to focus on the youth as a person in need of assistance, not on the act that brought him or her before the court and identifying the proceedings as intentionally "informal, with much discretion left to the juvenile court judge").

[38] *See id.* ("Because the judge was to act in the best interests of the child, procedural safeguards available to adults, such as the right to an attorney, the right to know the charges brought against one, the right to trial by jury, and the right to confront one's accuser, were thought unnecessary. Juvenile court proceedings were closed to the public and juvenile records were to remain confidential so as not to interfere with the child's or adolescent's ability to be rehabilitated and reintegrated into society.").

[39] *See generally* PLATT, *supra* note 27.

[40] *See generally* WARD, THE BLACK CHILD-SAVERS, *supra* note 27 (describing the efforts of the Black community to forge and enact their own vision of a system to care for Black youth that strayed from perceived behavioral norms).

[41] *See id.* at 10–16 (describing the decades long struggle waged by Black communities against racialized mistreatment of Black youth within the juvenile system).

[42] Geoff Ward, *The "Other" Child Savers: Racial Politics of the Parental State*, *in* ANTHONY M. PLATT, THE CHILD SAVERS: THE INVENTION OF DELINQUENCY 228 (Rutgers University Press 2009).

[43] *See* Feld, *Race, Politics, and Juvenile Justice*, *supra* note 26, at 1505–06.

Movement approached its apex in the 1960s, the juvenile court came under increasing scrutiny from the right and the left.[44] Liberals worried that the court's traditional foundation of paternalistic informality left youth of color at the mercy of judges' biases.[45] Conservatives pointed to the court's perceived leniency as ill-equipped to meet the challenges of rising rates of youth crime.[46]

In 1966, Justice Abe Fortas observed that "the child receives the worst of both worlds: that he gets neither the protections accorded to adults nor the solicitous care and regenerative treatment postulated for children."[47] Solicitous care was in particularly short supply where children of color were concerned.[48] The Warren Court, keen to impose northern procedural mores on southern criminal courts that were increasingly viewed as disinterested in even the perception of just outcomes for Black defendants, implemented constitutional oversight that fundamentally reshaped the functioning (if not the actual outcomes) of the juvenile court.[49] In the 1960s and '70s, the Court grafted most of the procedural safety measures of the criminal system onto the juvenile court.[50] The increased protections afforded a nominal set of safeguards against abuses, but also facilitated the juvenile court's transformation into a fully integrated subpart of the broader criminal system, still ostensibly child-oriented,

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[44] *See* Barry C. Feld, *The Transformation of the Juvenile Court—Part II: Race and the "Crack Down" on Youth Crime*, 84 MINN. L. REV. 327, 347–48 (1999) [hereinafter Feld, *Race and the "Crack Down"*].

[45] *See* Feld, *Race, Politics, and Juvenile Justice*, *supra* note 26, at 1483–84.

[46] *See* Barry C. Feld, *The Politics of Race and Juvenile Justice: "The Due Process Revolution" and the Conservative Reaction*, 20 JUST. Q. 765, 772, 781 (2003) [hereinafter, Feld, *The Politics of Race*].

[47] Kent v. United States, 383 U.S. 541, 556 (1966); *see id.* at 552–53 (holding that a juvenile court cannot waive jurisdiction without providing a full investigation, including a hearing, representation by counsel, and access to court records).

[48] *See* TERA EVA AGYEPONG, THE CRIMINALIZATION OF BLACK CHILDREN: RACE, GENDER, AND DELINQUENCY IN CHICAGO'S JUVENILE JUSTICE SYSTEM, 1899–1945, at 35 (2018); WILLIAM S. BUSH, WHO GETS A CHILDHOOD?: RACE AND JUVENILE JUSTICE IN TWENTIETH-CENTURY TEXAS 89–90 (2010) (describing a late 1940s Texas juvenile detention center for Black girls where whippings were administered to girls as young as twelve, and for reasons that included "insubordination" and "homosexual practices"); MIROSLAVA CHÁVEZ-GARCÍA, STATES OF DELINQUENCY: RACE AND SCIENCE IN THE MAKING OF CALIFORNIA'S JUVENILE JUSTICE SYSTEM 130–43 (2012) (describing forced sterilizations performed on youth of color confined in California's juvenile system).

[49] *See* LUCAS A. POWE, JR., THE WARREN COURT AND AMERICAN POLITICS 490 (2000) (Powe concludes that the Warren Court explicitly set out to dismantle a southern legal system that furthered White supremacy).

[50] In this period the Court decided, along with *Kent*, *In re Gault*, 387 U.S. 1, 53–57 (1967) (holding that juvenile court proceedings must include adequate notice of charges, notification of the juvenile's right to counsel, opportunity for confrontation and cross-examination, and protection against self-incrimination) and *In re Winship*, 397 U.S. 358, 364 (1970) (holding that guilt in juvenile court must be established by the stricter "reasonable doubt" standard). *But see* McKeiver v. Pennsylvania, 403 U.S. 528, 545 (1971) (plurality opinion) (holding that because juvenile proceedings are not considered either civil or criminal, the Sixth Amendment right to a jury trial is not required in juvenile cases).

but functionally more concerned with punitiveness and retribution than youth outcomes.[51] "It is a[] historical irony," Professor Barry Feld writes, "that concern about racial inequality provided the initial impetus for the Supreme Court's focus on procedural rights in states' juvenile justice systems, because it was the existence of those procedural rights that rationalized increasingly punitive penalties that fall most heavily on minority juvenile offenders."[52]

Concern that the due process revolution may have worked to the detriment of minority youth in juvenile courts is likely overstated. While the procedural turn may indeed have provided a legitimating veneer to a racially discriminatory system, the record suggests that the extraordinary power afforded police, prosecutors, and judges, along with the commonness of racial antipathy, meant that outcomes—whether more formal or less formal—would continue to disfavor minority youth.[53] A more procedurally intense juvenile system was no more or less likely, absent a deep investment in rooting out structural racism, to produce racially-biased outcomes than the more explicitly subjective and discretionary model of juvenile justice that the Warren Court's due process revolution displaced.[54]

As conservative backlash to the gains of the Civil Rights Movement spawned the racially coded War on Drugs and the tough-on-crime policies of the 1970s and '80s, the juvenile court took its place within the broader structure of Mass Incarceration.[55] By 1995, the incarceration rates of youth of color had overtaken incarceration rates of White youth.[56] Increasingly, crime was presented by politicians and the media as perpetrated by young Black and Brown males, and the juvenile court was painted as an overly lenient social welfare program that coddled out-of-control youth of color.[57]

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[51] *See* Feld, *Race, Politics, and Juvenile Justice*, *supra* note 26, at 1451.

[52] *Id.* at 1494.

[53] *See* Mae C. Quinn, *Giving Kids Their Due: Theorizing a Modern Fourteenth Amendment Framework for Juvenile Defense Representation*, 99 IOWA L. REV. 2185, 2187 (2014).

[54] *See, e.g.*, Paul Butler, *The System Is Working the Way It Is Supposed To: The Limits of Criminal Justice Reform*, 104 GEO. L.J. 1419, 1452–57 (2016) (identifying within the Court's recent criminal procedure jurisprudence a non-exhaustive list of "super powers" that the Court has granted to police officers, which, working in concert with existing explicit, implicit, or systemic biases, may authorize police officers to utilize particularly invasive and violent tactics when engaging with people of color).

[55] *See* Feld, *Race, Politics, and Juvenile Justice*, *supra* note 26, at 1523; Feld, *The Politics of Race*, *supra* note 46, at 791 n.4, 791–92.

[56] NAT'L JUVENILE JUSTICE NETWORK, CHILDREN IN CONFLICT WITH THE LAW: JUVENILE JUSTICE & THE U.S. FAILURE TO COMPLY WITH OBLIGATIONS UNDER THE CONVENTION FOR THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION 6, https://www.njjn.org/uploads/digital-library/resource_603.pdf [https://perma.cc/964W-9AEQ].

[57] MARTIN GILENS, WHY AMERICANS HATE WELFARE: RACE, MEDIA, AND THE POLITICS OF ANTIPOVERTY POLICY 116–23 (1999) (discussing the "racialization" of poverty in the news in the mid-1960s and 1970s).

By the mid-1990s, mainstream attitudes toward the juvenile court had reached a fever pitch.[58] In 1995, then-Princeton criminologist John Dilulio penned an article for *The Weekly Standard*—"The Coming of the Super-Predators."[59] In it, Dilulio predicted that the nation's cities and towns would, during the second half of the decade, be overrun by waves of violent and remorseless Black and Latinx teenaged criminals—"super-predators."[60]

Dilulio explicitly identified Black communities as the primary producers of the coming army of murderous youth.[61] Laden with familiar dog whistles suggesting Black parents were disinterested in their children's upbringing, Dilulio predicted that at least fifty percent of the coming super-predators would be Black.[62] He centered his super-predator predictions on what he called the "theory of moral poverty."[63] For Dilulio, moral poverty, "is the poverty of growing up surrounded by deviant, delinquent, and criminal adults in abusive, violence-ridden, fatherless, Godless, and jobless settings."[64] By the turn of century, the prediction went, there would be "at least 30,000 more murderers, rapists, and muggers on the streets than we have today."[65] Finally, and perhaps most frightening of all for White America, it was suggested that the coming crime wave would not be confined to Black and Brown neighborhoods.[66] Dilulio's monsters were set to venture into "upscale central-city districts . . . and even the rural heartland."[67]

As it turned out, the super-predator predictions were entirely false.[68] In fact, juvenile crime had already begun to decrease when the first predictions of a

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[58] *See, e.g.*, FRANKLIN E. ZIMRING, AMERICAN JUVENILE JUSTICE 120 (2005) (citing an "epidemic of alarm" about youth violence emerging from the work of John Dilulio and his colleagues in the mid-1990s).

[59] John J. Dilulio, Jr., *The Coming of the Super--Predators*, THE WEEKLY STANDARD, Nov. 27, 1995, at 23.

[60] *Id.*

[61] *Id.*

[62] *Id.* Dilulio was not the only academic of the day suggesting that youth of color were at the leading edge of violent crime in the United States, but he was among the most prominent and best connected, and his "super-predator" characterization struck a particular chord. Dilulio's profile as a leading academic at a top Ivy League university lent his predictions substantial weight in certain quarters and allowed him to pitch his ideas in influential circles. Earlier in 1995, Dilulio was one of a dozen guests invited to a working White House dinner on juvenile crime. *Id.* In Dilulio's telling, President Clinton paid close attention that night, taking copious notes and asking numerous questions. *Id.*

[63] *Id.*

[64] *Id.*

[65] Dilulio, *supra* note 59.

[66] *Id.*

[67] *Id.*

[68] *The Superpredator Myth, 20 Years Later*, EQUAL JUST. INITIATIVE (Apr. 7, 2014), https://eji.org/news/superpredator-myth-20-years-later/ [https://perma.cc/L8DB-729T] [hereinafter *The Superpredator Myth*]. For a brief description of some of the methodological concerns with the predictions offered by DiLulio and his contemporaries, see ZIMRING, *supra* note 58, at 110–22.

youth of color-led crime wave emerged.[69] Unfortunately, the damage was done. Local and national media ran with the sensational narrative underpinning the super-predator predictions.[70] Local, state, and federal authorities doubled down on the punitive agendas of the previous two decades, trading on perceptions of the juvenile court as too permissive and stereotypes of Black parents as unwilling or unable to effectively engage with their children.[71] By the close of the century, the juvenile court's founding motivations of class-based social control and assimilation had been overtaken by racially motivated concerns about violent Black and Brown teenagers for whom assimilation was viewed as less important than incapacitation and oversight.[72]

* * *

Though the term "super-predator" and related rhetoric have been broadly disavowed, it is useful to recall this flashpoint in the juvenile court's recent history. The current juvenile system is still reckoning with the fallout of the racially motivated policies of the last quarter of the twentieth century.[73] The super-predator moment can help us understand how it is that today's juvenile system still lays much of the sociocultural and economic responsibility for youth crime at the feet of Black and Brown communities.

New empirical evidence supports what the super-predator appellation implied—some, including some system actors, are unable or unwilling to afford Black children the traditional allowances of childhood.[74] Whether consciously

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[69] *The Superpredator Myth*, *supra* note 68.

[70] *See, e.g.*, Ted Gest & Victoria Pope, *Crime Time Bomb*, U.S. NEWS & WORLD REPORT, Mar. 25, 1996, at 28 (highlighting problem of children who kill or maim "with little moral compunction," linking the projected rise in African Americans aged 14–17 with expected increases in violent juvenile crime, and quoting criminologist John Dilulio in identifying inner city neighborhoods as "chaotic, dysfunctional, fatherless, Godless and jobless settings"); '*Superpredators' Arrive*, NEWSWEEK (Jan. 21, 1996), https://www.newsweek.com/superpredators-arrive-176848 (on file with the *Ohio State Law Journal*) (article considering the expected increase in "predator" juveniles and highlighting the construction in Illinois of a "kiddie prison," intended to hold children under thirteen).

[71] ASHLEY NELLIS, A RETURN TO JUSTICE: RETHINKING OUR APPROACH TO JUVENILES IN THE SYSTEM 42–43 (2016) (describing measures proposed by federal politicians in response to the super-predator rhetoric); Cheryl D. Hicks, *"In Danger of Becoming Morally Depraved": Single Black Women, Working-Class Black Families, and New York State's Wayward Minor Laws, 1917-1928*, 151 U. PA. L. REV. 2077, 2087–88 (2003).

[72] Kenneth B. Nunn, *The Child as Other: Race and Differential Treatment in the Juvenile Justice System*, 51 DEPAUL L. REV. 679, 706–07, 711–12 (2002).

[73] Krista Larson & Hernan Carvente, *Juvenile Justice System Still Grappling with Legacy of the "Superpredator" Myth*, VERA INST. JUSTICE (Jan. 24, 2017), https://www.vera.org/blog/juvenile-justice-systems-still-grappling-with-legacy-of-the-superpredator-myth [https://perma.cc/J786-P4RZ].

[74] *See* REBECCA EPSTEIN, JAMILIA J. BLAKE, & THALIA GONZÁLEZ, GEORGETOWN LAW CTR. ON POVERTY AND INEQUALITY, GIRLHOOD INTERRUPTED: THE ERASURE OF BLACK GIRLS' CHILDHOOD 4 (2017), https://www.law.georgetown.edu/poverty-inequality-center/wp-content/uploads/sites/14/2017/08/girlhood-interrupted.pdf [https://perma.cc/4C25-G8LN].

or unconsciously, many still see Black children as dangerous, and even animalistic.[75] Despite this animalization, Black youth are still seen as criminally sophisticated and culpable beyond their years.[76] This is a double-edged construct, one that simultaneously makes the young Black lawbreaker uniquely easy to punish and exceptionally difficult to absolve.

In the next part, I discuss how this institutional dehumanization serves to delegitimize the Black family and cast the Black community as a breeding ground for young criminals. I show how empirical analyses can map onto existing theories about race, and the implications for how punitive measures, including monetary sanctioning, might be deployed against Black families.

III. MONETIZING THE SUPER-PREDATOR

As in the adult system, monetary sanctions generally fall into one of three categories:[77]

- Fines are usually intended to serve as the sole or primary punishment for a crime.[78] (Parking tickets are a common example.)[79]
- Restitution is generally intended to provide remuneration to victims for economic losses suffered as a result of the crime.[80]
- Fees are ostensibly imposed as a way for governments to recoup costs associated with the administration of their criminal system.[81]

Persons may be made to pay some form of monetary sanction for a wide range of "services" associated with system involvement, including, but not limited to, general court costs,[82] diversion program costs,[83] costs of attorney

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[75] *Preface*, *in* YOUNG, BLACK, AND MALE IN AMERICA: AN ENDANGERED SPECIES xxi, xxii (Jewelle Taylor Gibbs et al. eds., 1988) [hereinafter YOUNG, BLACK, AND MALE IN AMERICA] (noting that Black children are "still dehumanized and depersonalized[,]" and treated as second class citizens).

[76] *See* Philip Bump, *People—Including Cops—See Black Kids as Less Innocent and Less Young than White Kids*, ATLANTIC (Mar. 10, 2014), https://www.theatlantic.com/politics/ archive/2014/03/people-including-cops-view-black-kids-less-innocent-and-less-young-whi te-kids/359026/ [https://perma.cc/F4EW-4W6Q].

[77] Jessica M. Eaglin, *Improving Economic Sanctions in the States*, 99 MINN. L. REV. 1837, 1844 (2015).

[78] *Id.*

[79] HARRIS, *supra* note 30, at 125.

[80] Eaglin, *supra* note 77, at 1844.

[81] *Id.*

[82] *See, e.g.*, N.M. STAT. ANN. § 32A-1-19(A)(3), (B)(3) (2020) (allowing the court to hold parents responsible for the costs of a variety of routine court functions). *See generally* Baszynski, *supra* note 6 (discussing the ways in which the government illegally charges court costs and recklessly increases court fees).

[83] *See, e.g.*, ARIZ. REV. STAT. ANN. § 8-321(N) (2020) (allowing the county attorney or juvenile court to assess a fee of no more than fifty dollars for participation in diversion).

representation,[84] costs for court imposed drug and alcohol treatment,[85] costs for medical evaluations,[86] judicial expense funds,[87] costs resulting from injuries suffered by a defendant during an arrest,[88] costs for room and board while incarcerated,[89] costs stemming from self-inflicted injuries suffered while incarcerated,[90] and costs for record expungement.[91]

The ability of the child or their family to pay these costs frequently has direct bearing on the disposition of the child's case.[92] Children that can pay may receive more favorable plea deals, access to diversion programs, reduced terms of probation, or reduced periods of incarceration.[93] Beyond facilitating de facto debtor's prisons for children, the collateral consequences of juvenile monetary sanctions can be significant.[94] Inability to pay can result in suspended drivers licenses, garnished wages, frozen bank accounts, seized tax returns, property liens, and reduced access to housing, employment opportunities, educational

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[84] *See, e.g.*, ARK. CODE ANN. § 9-27-316(b)(2) (West 2020) (stating that the court may order financially able juveniles, parents, guardians, or custodians to pay all or part of attorney's fees and expenses related to representation).

[85] *See, e.g.*, IND. CODE ANN. § 31-32-16-9 (West 2020) (requiring "parent, guardian or custodian" to pay costs of assessment and treatment pursuant to an order to participate in drug or alcohol treatment).

[86] *See, e.g.*, N.C. GEN. STAT. ANN. § 7B-2702(a) (West 2020) (requiring reimbursement for costs of "medical, surgical, psychiatric, psychological, or other evaluation[,]" both when ordered for the juvenile and when the court has ordered the parent to undergo evaluation or treatment).

[87] *See, e.g.*, LA. STAT. ANN. § 13:1565.2 (West 2019) (allowing a parish to utilize fees imposed pursuant to juvenile court proceedings for the court "judicial expense fund").

[88] *See, e.g.*, NEV. REV. STAT. ANN. § 62B.245(4)(b) (West 2020) (holding parents or guardians responsible for costs of medical expenses resulting from injuries "incurred by the child" pursuant to being taken into custody).

[89] *See, e.g.*, OHIO REV. CODE ANN. § 2152.20(A)(4)(b) (West 2020) (requiring repayment for costs of confinement including room and board).

[90] *See, e.g.*, NEV. REV. STAT. ANN. § 62B.245 (4)(d) (West 2020) (holding parents or guardians responsible for costs of medical expenses resulting from injuries that were "self-inflicted by the child" while incarcerated).

[91] *See, e.g.*, FLA. STAT. ANN. § 943.0515(2)(a) (West 2020) (requiring a $75 processing fee for expungement).

[92] JESSICA FEIERMAN, NAOMI GOLDSTEIN, EMILY HANEY-CARON, & JAYMES FAIRFAX COLUMBO, JUVENILE LAW CTR., DEBTORS' PRISON FOR KIDS? THE HIGH COST OF FINES AND FEES IN THE JUVENILE JUSTICE SYSTEM 23–24 (2016), https://debtorsprison.jlc.org/documents/JLC-Debtors-Prison.pdf [https://perma.cc/5MZ8-2E7F]; VANNESSA PATINO LYDIA, BLYTHE ZAYETS, NEKEA SANDERS, HALEY PRITCHARD, & RACHEL HAN, ASSESSING THE IMPACT OF COURT COSTS AND FEES ON JUVENILES AND FAMILIES 4–5 (Dec. 2017), https://www.seethegirl.org/wp-content/uploads/2019/05/Assessing-Impact-Court-Costs.pdf [https://perma.cc/6L47-2WPV].

[93] FEIERMAN ET AL., *supra* note 92, at 23–24.

[94] *E.g.*, POLICY ADVOCACY CLINIC, U. OF CAL. BERKELEY LAW, MAKING FAMILIES PAY: THE HARMFUL, UNLAWFUL, AND COSTLY PRACTICE OF CHARGING JUVENILE ADMINISTRATIVE FEES IN CALIFORNIA 32–35 (Mar. 2017), https://www.law.berkeley.edu/wp-content/uploads/2015/12/Making-Families-Pay.pdf [https://perma.cc/B6D3-BNJM] [hereinafter MAKING FAMILIES PAY].

loans, and public benefits.[95] Parents or guardians can also be incarcerated as a means of coercing payment.[96]

In most jurisdictions in the United States, the majority of youth brought before a court on a delinquency petition hail from low-income families.[97] Even relatively "minor" monetary sanctions (of a few hundred dollars or less) can be financially debilitating, particularly for low-income families.[98] Moreover, the siphoning of wealth from low-income households reduces the resources available to support vulnerable youth in important pro-social and pro-educational endeavors that reduce the probability of delinquent or criminal behavior.[99] In fact, empirical work has linked the imposition of monetary

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[95] *See* FEIERMAN ET AL., *supra* note 92, at 23–24.

[96] *Id.* at 23.

[97] *See* JUSTICE FOR FAMILIES, FAMILIES UNLOCKING FUTURES: SOLUTIONS TO THE CRISIS IN JUVENILE JUSTICE 28 (Sept. 2012), http://www.justice4families.org/media/Families_Unlocking_FuturesFULLNOEMBARGO.pdf [https://perma.cc/U3GQ-CNTQ] (finding that more than 50% of youth in the juvenile justice system came from families earning less than $25,000 per year, and that roughly one in five of these families spent over $1,000 per month on juvenile justice costs); Birckhead, *supra* note 33, at 53–54 (arguing that emphasis on family need when adjudicating delinquency has a disproportionate effect on low-income children); H. Ted Rubin, *Impoverished Youth and the Juvenile Court: A Call for Pre-Court Diversion*, JUV. JUST. UPDATE, December/January 2011, at 1 (observing that juvenile courts are considered courts of the poor and that it is less common to find juvenile courts in higher income jurisdictions).

[98] BD. OF GOVERNORS OF THE FED. RESERVE SYS., REPORT ON THE ECONOMIC WELL-BEING OF U.S. HOUSEHOLDS IN 2018 21–22 (May 2019), https://www.federalreserve.gov/publications/files/2018-report-economic-well-being-us-households-201905.pdf [https://perma.cc/SNY2-C6YR] (finding that roughly four in ten adults would have difficulty covering an unexpected expense, and that racial and ethnic minorities are even less able to handle financial setbacks).

[99] *E.g.*, FEIERMAN ET AL., *supra* note 92, at 7 (survey respondent reporting that paying juvenile monetary sanctions could impact the ability of a family to send a child to college or pay for school clothes); *see also* MARGO GARDNER, JODIE L. ROTH, & JEANNE BROOKS-GUNN, CAN AFTER-SCHOOL PROGRAMS HELP LEVEL THE PLAYING FIELD FOR DISADVANTAGED YOUTH? 13 (Oct. 2009), https://bgcutah.org/wp-content/uploads/2014/10/Gardner-Roth-and-Brooks-Gunn-Disadvantaged-Youth.pdf [https://perma.cc/F4EG-TAVG] (identifying cost as a salient and consistent barrier to participation in after-school programs); Denise C. Gottfredson, Stephanie A. Gerstenblith, David A. Soulé, Shannon C. Womer, & Shaoli Lu, *Do After School Programs Reduce Delinquency?*, 5 PREVENTION SCI. 253, 263 (2004) (finding that after-school programs reduce delinquent behavior for middle school youths); Allison Riley & Dawn Anderson-Butcher, *Participation in a Summer Sport-Based Youth Development Program for Disadvantaged Youth: Getting the Parent Perspective*, 34 CHILD. & YOUTH SERVS. REV. 1367, 1373 (2012) (parents reporting that participation in a sport-based summer program increased youth involvement in prosocial activities). *But see* Sema A. Taheri & Brandon C. Welsh, *After-School Programs for Delinquency Prevention: A Systematic Review and Meta-Analysis*, 14 YOUTH VIOLENCE & JUV. JUST. 272, 284 (2016) (finding that after-school programs had statistically nonsignificant effects on delinquency rates of groups of higher and mixed risk youth).

sanctions in delinquency cases to increased likelihood of youth recidivism.[100] Despite all of this, every state in the country authorizes or requires some form of monetary sanctioning in delinquency adjudications.[101]

Discussions about race and monetary sanctioning almost always have as their predicate the idea that it is the deep poverty experienced by Black communities that facilitates their vulnerability to the harms caused by monetary sanctioning.[102] One notion implicit in this thinking is that reducing legal avenues for the criminalization of poverty will serve to alleviate the brunt of the harms Black families experience due to monetary sanctioning.[103] Moreover, an anti-poverty approach has the additional benefit of offering much needed assistance to other (non-Black) low-income communities. The broad goal of this part is to explore the distinct work that race-biases may be doing to influence decisions to impose monetary sanctions on Black youth and families. In so doing, I seek to highlight the inherent limitations of deploying predominantly anti-poverty framings when seeking to mitigate race-based economic harms.

First, conscious or unconscious racial biases can lead judges and other court staff to perform their duties in ways that result in unwarranted harm to members of disfavored racial groups.[104] These biases may be interracial or intraracial.[105] That is, non-Black judges and court staff as well as Black judges and Black court staff may harbor unconscious or conscious biases that may cause them to utilize monetary sanctions in a more punitive fashion against Black people.[106]

Second, Black children may be viewed by judges and other system actors as less childlike, more adult, more culpable, or less deserving of protection.[107] A relatively new body of research confirms that Black children are often viewed as preternaturally violent, animalistic, and sexually promiscuous.[108] These views may increase the likelihood that monetary sanctioning will be imposed in an overly punitive or extralegal fashion, or that harsher sentencing measures will be utilized against Black children, thus activating attendant increases in monetary sanctioning.[109]

Third, Black families might be viewed as fundamentally lacking in the values deemed necessary to successfully raise children into healthy and

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[100] *E.g.*, Alex R. Piquero & Wesley G. Jennings, *Research Note: Justice System–Imposed Financial Penalties Increase the Likelihood of Recidivism in a Sample of Adolescent Offenders*, 15 YOUTH VIOLENCE & JUV. JUST. 325, 334 (2017).

[101] FEIERMAN ET AL., *supra* note 92, at 5.

[102] *See, e.g.*, CRIMINAL JUSTICE POLICY PROGRAM, *supra* note 25, at 1.

[103] *See* Zhen, *supra* note 23, at 222 (explaining the need to "not make ability-to-pay determinations a shortsighted 'economic policy masquerading as progressive penal reform'") (quoting Alexandra Natapoff, *Misdemeanor Decriminalization*, 68 VAND. L. REV. 1055, 1060 (2015)).

[104] *See infra* Part III.A.

[105] *See infra* notes 146–147 and accompanying text.

[106] *Id.*

[107] *See infra* Part III.B.

[108] *Id.*

[109] *Id.*

productive adults.[110] For over a decade, research has shown that other racial and ethnic groups, and many Black people themselves, frequently attribute the inability of Black people to keep pace economically with Whites to pathological features unique to Black communities.[111] This "Black blame"[112] may influence how judges view children and families that appear before them in ways that increase the likelihood that monetary sanctions will be imposed in an unnecessarily harmful or extralegal fashion.[113]

Finally, the legal backdrop against which monetary sanctioning decisions are made empowers judges, as well as other court and system actors, to target Black families. Courts and lawmakers have largely organized legal protections to prevent monetary sanctioning from abusing the poor, but, despite monetary sanctioning's highly racialized context, very little consideration has been given to whether existing protections are sufficient to protect against the impacts of race-bias.[114] To be clear, the protections afforded the poor in these contexts is limited, and likely wanting. The overlaying of race-biases onto these already inadequate legal protections further enhances the likelihood that disfavored racial minorities will experience inordinate levels of harm. I begin with a discussion of unconscious biases.

A. *Unconscious Biases*

Research in the field of social psychology has uncovered that human beings have developed unconscious (implicit) associations connected to race that result in stereotyping and attitudes about racial groups that may be in direct conflict with the participant's consciously held beliefs.[115] As it relates to Black people, these unconscious biases include perceptions of Black people, including Black children, as animalistic, violent, and criminal.[116] For example, professors Sandra Graham and Brian Lowery have found that priming participants with words related to the category "Black" engendered more negative responses to a hypothetical adolescent lawbreaker.[117] Notably, police and probation officers also displayed these biases, and the effect held whether the officer was non-Black or Black.[118] In addition, participants' responses were not linked to

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[110] *See infra* note 154 and accompanying text.

[111] *See* Shayla C. Nunnally & Niambi M. Carter, *Moving from Victims to Victors: African American Attitudes on the "Culture of Poverty" and Black Blame*, 16 J. AFR. AM. STUD. 423, 431–32 (2012).

[112] *Id.* at 132.

[113] *See infra* Part III.C.

[114] *Id.*

[115] *See* Jean Moule, *Understanding Unconscious Bias and Unintentional Racism*, 90 PHI DELTA KAPPAN 321, 321 (2009).

[116] *See* YOUNG, BLACK, AND MALE IN AMERICA, *supra* note 75, at xxii; Sandra Graham & Brian S. Lowery, *Priming Unconscious Racial Stereotypes About Adolescent Offenders*, 28 L. & HUM. BEHAV. 483, 485–86 (2004).

[117] *Id.* at 493.

[118] *Id.* at 499.

consciously held attitudes toward Blacks, indicating that even officers who value equity may still hold these biases.[119]

Similarly, decades of research conducted in courtroom settings, and on judges specifically, reveals analogous results.[120] Black persons frequently experience worse outcomes in court than similarly-situated Whites.[121] For example, while the finding is less common, research shows that Black defendants are more likely than White defendants to receive the death penalty.[122] Professor David Mustard found that federal judges imposed substantially longer sentences when the person convicted was Black than when the defendant was White.[123] And in a study of bail-setting, a context with significant comparisons to monetary sanctioning, David Arnold, Will Dobbie, and Crystal S. Yang found a correlation between race and bail-setting, which likely means that racial bias in bail-setting is driven by bail judges relying on inaccurate stereotypes about the relative danger posed by Black defendants.[124] And, in a multi-part study of trial judges involving a large sample of judges drawn from around the country, Rachlinski et al. found that judges hold comparable anti-Black implicit biases and that these biases can influence their judgment.[125] The authors conclude, "[O]ur data suggest that an invidious homunculus might reside in the heads of most judges in the United States, with

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[119] *Id.* at 492.

[120] Jeffrey J. Rachlinski, Sheri Lynn Johnson, Andrew J. Wistrich, & Chris Guthrie, *Does Unconscious Racial Bias Affect Trial Judges?*, 84 NOTRE DAME L. REV. 1195, 1223 (2009). Even beyond the implicit bias context, there is abundance of evidence that race has significant effect on sentencing outcomes. Cassia C. Spohn, *Thirty Years of Sentencing Reform: The Quest for a Racially Neutral Sentencing Process*, *in* 3 POLICIES, PROCESSES, AND DECISIONS OF THE CRIM. JUST. SYST. 2000 427, 428 (2000); *see, e.g.*, Ojmarrh Mitchell, *A Meta-Analysis of Race and Sentencing Research: Explaining the Inconsistencies*, 21 J. QUANTITATIVE CRIMINOLOGY 439, 462–64 (2005).

[121] EMILY OWENS, ERIN M. KERRISON, & BERNARDO SANTOS DA SILVEIRA, EXAMINING RACIAL DISPARITIES IN CRIMINAL CASE OUTCOMES AMONG INDIGENT DEFENDANTS IN SAN FRANCISCO 6 (2017), https://www.law.upenn.edu/live/files/6791-examining-racial-disparities-may-2017combinedpdf (on file with the *Ohio State Law Journal*); KATHERINE J. ROSICH, AMERICAN SOCIOLOGICAL ASS'N, RACE, ETHNICITY, AND THE CRIMINAL JUSTICE SYSTEM 11 (Sept. 2007), https://www.asanet.org/sites/default/files/savvy/images/press/docs/pdf/ASA Race Crime.pdf [https://perma.cc/W8TC-A3CZ]; M. Marit Rehavi & Sonja B. Starr, *Racial Disparity in Federal Criminal Sentences*, 122 J. POL. ECON. 1320, 1335–36 (2014).

[122] R. Richard Banks, Jennifer L. Eberhardt, & Lee Ross, *Discrimination and Implicit Bias in a Racially Unequal Society*, 94 CALIF. L. REV. 1169, 1175 (2006).

[123] *See* David B. Mustard, *Racial, Ethnic, and Gender Disparities in Sentencing: Evidence from the U.S. Federal Courts*, 44 J.L. & ECON. 285, 310–11 (2001).

[124] David Arnold, Will Dobbie, & Crystal S. Yang, *Racial Bias in Bail Decisions*, 133 Q.J. ECONOMICS 1885, 1885–86 (2018). To get a sense of the persistence of this bias, compare a similar study conducted 24 years earlier: Ian Ayres & Joel Waldfogel, *A Market Test for Race Discrimination in Bail Setting*, 46 STAN. L. REV. 987, 992 (1994) (finding that judges set bail amounts that were 35% higher for Black defendants than what was set for similarly-situated White defendants).

[125] *See* Rachlinski et al., *supra* note 120, at 1221.

the potential to produce racially-biased distortions."[126] Notably though, other research has found that some Whites, those with deeply held personal commitments to eradicating bias within themselves, "chronic egalitarians," may be able to avoid anti-Black bias.[127]

Juvenile courts are designed to afford judges an exceptional amount of discretion.[128] This discretion, combined with unconscious bias, can influence how monetary sanctions are deployed against Black youth or families in two distinct ways. First, judges are empowered to waive many monetary sanctions.[129] They usually have authority to waive for indigence, but in the juvenile court context, they also may choose not to impose monetary sanctions if not doing so is deemed to be in the best interests of the child.[130] A judge influenced by unconscious anti-Black biases may be less likely to see a Black youth or family as deserving of a waiver. Second, implicit biases may result in Black youth receiving harsher sentences than similarly situated White youth. When, for example, a child is incarcerated, placed on electronic monitoring, or made to serve an extended term of supervised probation, the dollar amount imposed can increase substantially.[131]

The focus here on implicit biases is not to suggest that explicit biases are not a factor. They quite probably are.[132] The point is that, even ignoring explicit biases, implicit biases alone can open Black youth and families up to harsher sanctioning determinations, and increased system contact, including the higher levels of monetary sanctioning that go along with it.[133]

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[126] *Id.*

[127] Gordon B. Moskowitz, Amanda R. Salomon, & Constance M. Taylor, *Preconsciously Controlling Stereotyping: Implicitly Activated Egalitarian Goals Prevent the Activation of Stereotypes*, 18 SOC. COGNITION 151, 155–56 (2000).

[128] *See* Jyoti Nanda, *Blind Discretion: Girls of Color & Delinquency in the Juvenile Justice System*, 59 UCLA L. REV. 1502, 1519–20 (2012); Charles W. Thomas & W. Anthony Fitch, *The Exercise of Discretion in the Juvenile Justice System*, 32 JUV. & FAM. CT. J. 31, 33 (1981).

[129] *See* FEIERMAN ET AL., *supra* note 92, at 11 (finding that courts in some states may waive "mandatory" fees for inability to pay).

[130] *E.g.*, OHIO REV. CODE ANN. § 3109.051(L) (West 2020) (finding that "[i]f the court determines that the movant is indigent and that the waiver is in the best interest of the child," the court may waive all costs associated with the proceedings).

[131] *See, e.g.*, ALEXANDRA BASTIEN, ENDING THE DEBT TRAP: STRATEGIES TO STOP THE ABUSE OF COURT-IMPOSED FINES AND FEES 6 (Mar. 2017); Kate Weisburd, *Monitoring Youth: The Collision of Rights and Rehabilitation*, 101 IOWA L. REV. 297, 304 (2015) (describing the case of a 16-year-old whose mother was billed $15 per day for seven months that the boy spent on electronic monitoring).

[132] TARGETED FINES AND FEES, *supra* note 5, at 1 (discussing the evidence of "intentional racism" connected to the Ferguson police department).

[133] *See* Rachlinski et al., *supra* note 120, at 1221–23.

B. *Denial of Childhood*

Beyond general attitudes about Black people, specific attitudes and unconscious and conscious beliefs about Black children likely impact the way Black youth are treated within the juvenile system. Every state is still committed, at least rhetorically, to an abstract vision of youth justice founded on the principle that all children should be afforded solicitous care, and the space required to grow and learn from youthful mistakes.[134] Despite this commitment, recent research demonstrates that Black children do not receive the traditional privileges afforded to other children.[135] In a groundbreaking study, Philip Atiba Goff and several colleagues found evidence that Black boys are viewed as less innocent, and that they are perceived as less in need of, and less deserving of, protection than their same-age White peers.[136] In addition, researchers demonstrated that Black children are implicitly associated with apes, and that these associations predicted racial disparities in police violence against Black children.[137] These two sets of findings—that Black children are seen as less deserving of the protections traditionally afforded to children, and that Black children are associated with apes—are highly significant to the entire functioning of the modern U.S. justice system, and specifically relevant to how monetary sanctions might be assessed in juvenile courts.[138]

Goff's study found that Black boys were perceived as 4.53 years older than they actually were, meaning that Black boys could, depending on the charge and age of criminal responsibility in the jurisdiction, be perceived as legal adults at age thirteen and a half.[139] If juvenile courts and other system actors fail to afford

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[134] *See, e.g.*, ANNE TEIGEN, NAT'L CONFERENCE OF STATE LEGISLATURES, PRINCIPLES OF EFFECTIVE JUVENILE JUSTICE POLICY vi (Jan. 2018).

[135] *See, e.g.*, AM. VALUES INST., TRANSFORMING PERCEPTION: BLACK MEN AND BOYS 9–10 (Mar. 2013), http://perception.org/wp-content/uploads/2014/11/Transforming-Perception.pdf [https://perma.cc/B52W-EC52]; KIMBERLÉ WILLIAMS CRENSHAW, PRISCILLA OCEN, & JYOTI NANDA, BLACK GIRLS MATTER: PUSHED OUT, OVERPOLICED AND UNDERPROTECTED 5 (2015), https://www.atlanticphilanthropies.org/wp-content/uploads/2015/09/BlackGirlsMatter_Report.pdf [https://perma.cc/NB8F-5WG2]; Calvin Rashaud Zimmermann, *The Penalty of Being a Young Black Girl: Kindergarten Teachers' Perceptions of Children's Problem Behaviors and Student–Teacher Conflict by the Intersection of Race and Gender*, 87 J. NEGRO EDUC. 154, 154–56 (2018).

[136] Phillip Atiba Goff, Matthew Christian Jackson, Brooke Allison Lewis Di Leone, Carmen Marie Culotta, & Natalie Ann DiTomasso, *The Essence of Innocence: Consequences of Dehumanizing Black Children*, 106 J. PERSONALITY & SOC. PSYCHOL. 526, 529, 540 (2014).

[137] *See id.* at 528, 535, 540. For a broader discussion of the racial construction of the concept of childhood innocence, and the implications for how various forms of "rough" treatment might be viewed as more appropriately utilized against Black children, see ROBIN BERNSTEIN, RACIAL INNOCENCE: PERFORMING AMERICAN CHILDHOOD FROM SLAVERY TO CIVIL RIGHTS 16 (2011).

[138] *See* Graham & Lowery, *supra* note 116, at 499.

[139] Goff, *supra* note 136, at 532. *But see* MICHAEL KIMMEL, GUYLAND: THE PERILOUS WORLD WHERE BOYS BECOME MEN 4–5 (2008) (suggesting that for middle-class White

Black children the rights of childhood, meaning that they see Black children as less childlike and less innocent, it is likely that juvenile courts will impose higher monetary sanctioning amounts (believing consciously or unconsciously that Black youth are more responsible for their actions than White children or children of other races).[140] It is also probable that juvenile courts will impose harsher sentences on Black youth, as judges may feel less solicitous toward Black youth, and prosecutors and probation officers may ascribe greater culpability to Black youth, which can affect charging decisions and status reports that judges rely on in determining punishments. In order to test the possibility that the dehumanization of Black children predicts worse outcomes in the criminal legal system, Goff et al. focused a portion of their study on police officers.[141] Consistent with their other findings, Goff and colleagues found that police viewed Black boys as older than they actually were, as more culpable for their actions, as less essentially childlike, and as more ape-like.[142]

A companion survey released three years later focused on Black girls.[143] The findings were equally disturbing. When compared to White girls of the same age, participants viewed Black girls as needing less nurturing, less protection, less support, less comfort, as being more independent, as more knowledgeable about adult topics generally, and more knowledgeable about sex in particular.[144]

These studies build on previous work, providing additional empirical evidence of the inequitable treatment Black children can receive within the criminal and juvenile systems. If Black children are likely to be viewed as more adult (and thus more culpable) and less deserving of protection, then monetary sanctioning decisions, or sentences implicating higher attendant monetary sanction amounts, may be harsher than they would be in cases involving White or non-Black youth defendants.

C. *Black Blame*

Even if we assume that judges and other juvenile court actors do not experience anti-Black implicit bias, and that they afford Black children the same privileges of childhood that White children enjoy, there still may be socially and

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males, the period of time where they are afforded privileges of childhood may extend into their late twenties).

[140] *See, e.g.*, EPSTEIN ET AL., *supra* note 74, at 12 (observing that Black females often receive more punitive responses from the juvenile system than similarly situated White females).

[141] Goff, *supra* note 136, at 535.

[142] *Id.* ("[T]he more officers implicitly associated Blacks with apes, the more officers had used force against Black children relative to children of other races.").

[143] *See generally* EPSTEIN ET AL., *supra* note 74 (explaining the societal belief that Black girls need less protection and support compared to White girls of the same age).

[144] *Id.* at 8; *see also* Priscilla A. Ocen, *(E)racing Childhood: Examining the Racialized Construction of Childhood and Innocence in the Treatment of Sexually Exploited Minors*, 62 UCLA L. REV. 1586, 1593 (2015).

institutionally structured anti-Blackness that could determine how courts employ punitive measures, including juvenile monetary sanctions.

Across a number of social indicators, Blacks lag significantly behind Whites.[145] When non-Blacks and Blacks evaluate persistent Black-White achievement gaps and are asked to speculate on what factors might explain the gaps, responses generally fall into two broad categories: systemic factors or shortcomings in the behaviors of Black people.[146] In other words, respondents either blame the system, or they blame Blacks themselves.[147]

System blame is akin to institutional racism, in that it identifies forms of racism that are "less overt, far more subtle, and less identifiable in terms of *specific* individuals committing [identifiably racist] acts."[148] System blame, much like institutional racism, can be understood "as policies and practices that, controlling for social class, subordinate blacks or maintain or 'freeze' them in a subordinate position."[149]

> Black blame is the attribution of fault to [Black groups (or subgroups)] for persistent problems or failure to keep pace socially and economically with whites and other minorities. This attribution often comes in the form of references to vague problems such as the inability to facilitate cooperative efforts or to poor behavioral choices such as failure to work, unplanned pregnancies, or illegal activities.[150]

Since the American ethos entails a belief that individual hard work and initiative will lead to success,[151] Black failures are often characterized as personal failings.[152] Black families appearing in juvenile court are easily constructed as being out of step with the values imbedded in these norms.[153] Unwedded Black mothers and unemployed Black fathers can be regular targets

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[145] *See* PEW RESEARCH CTR., ON VIEWS OF RACE AND EQUALITY, BLACKS AND WHITES ARE WORLDS APART 18 (June 2016) (including employment, wealth, educational attainment) [hereinafter ON VIEWS OF RACE AND EQUALITY].

[146] *See* Nunnally & Carter, *supra* note 111, at 425 (comparing opinions of African Americans with those of Whites and Latinos to understand the extent to which each group focuses on individual blame over systemic inequality to explain the failure of Blacks to make socioeconomic gains).

[147] *See id.* at 448–50.

[148] STOKELY CARMICHAEL & CHARLES V. HAMILTON, BLACK POWER: THE POLITICS OF LIBERATION IN AMERICA 4 (1967).

[149] ROBERT C. SMITH, RACISM IN THE POST–CIVIL RIGHTS ERA: NOW YOU SEE IT, NOW YOU DON'T 53 (1995).

[150] MELANYE T. PRICE, DREAMING BLACKNESS: BLACK NATIONALISM AND AFRICAN AMERICAN PUBLIC OPINION 91 (2009).

[151] *See* LOUIS HARTZ, THE LIBERAL TRADITION IN AMERICA: AN INTERPRETATION OF AMERICAN POLITICAL THOUGHT SINCE THE REVOLUTION 89 (1955); Caroline Torrance, *Blacks and the American Ethos: A Reevaluation of Existing Theories*, 21 J. BLACK STUD. 72, 73 (1990).

[152] *See, e.g.*, *supra* notes 146–147 and accompanying text.

[153] *See* Nunnally & Carter, *supra* note 111, at 423–25.

of this type of criticism in the juvenile court or comparable environments.[154] Attitudes consistent with Black blame could influence decisions to impose monetary sanctions. Consider the most common decision impacting whether monetary sanctions will be imposed: the ability-to-pay determination.

In many instances, courts are constitutionally or statutorily required to consider whether the assessment of monetary sanctions would impose an undue hardship on the individual or their family.[155] In practice, these ability-to-pay determinations fail to meet even the low standard of protection they are supposed to offer.[156] By design, ability-to-pay determinations are highly discretionary and generally operate along a continuum of invasiveness.[157] At one end, some courts ask no substantive questions and make determinations based on factors that are not necessarily connected to the actual income or resources of the person(s) whose ability to pay is being determined.[158] For example, a court officer admitted making decisions about whether parents were able to pay juvenile monetary sanctions based on how expensive the mother's handbag or clothing appeared to be.[159] At the other end of the spectrum inquiries into ability to pay can be degradingly intrusive and have unreasonable or unrealistic requirements.[160] Courts may even expect indigent families to attempt to borrow money from relatives, friends, or lending institutions in order to meet the court's financial demands.[161] Failure to do so can be taken as an indication that a defendant is flouting the court's demands.[162] Ability-to-pay determinations that rest on such questionable standards may be infected with biased judgments that wrongly associate inability to pay with the perceived failings of Black individuals or communities, possibly inclining judges or other

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[154] Ann Cammett, *Deadbeat Dads & Welfare Queens: How Metaphor Shapes Poverty Law*, 34 B.C. J. L. & SOC. JUST. 233, 237–38 (2014).

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

[156] *See, e.g.*, Zhen, *supra* note 23, at 187–88.

[157] *Id.* at 208.

[158] *See, e.g.*, Beth A. Colgan, *The Excessive Fines Clause: Challenging the Modern Debtor's Prison*, 65 UCLA L. REV. 2, 7 (2018) (discussing poverty penalties that are often put in place when families cannot afford the issued fines).

[159] *See e.g.*, MAKING FAMILIES PAY, *supra* note 94, at 16–17 (reporting that court officer made ability-to-pay determinations decisions based on perceived quality and cost of clothing and accessories such as "mom's handbag").

[160] *See* TARGETED FINES AND FEES, *supra* note 5, at 84–85 (highlighting the statement of Commission Vice Chair Patricia Timmons-Goodson on testimony provided to the Commission describing judges suggesting that defendants should pawn their earrings to pay the court, and recounting an instance where a judge was observed forcing a defendant to take off their shoes and give them over to the court as a form of monetary sanctions payment).

[161] *See* Bearden v. Georgia, 461 U.S. 660, 668 (1983) ("[A] probationer's failure to make 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.") (emphasis added).

[162] *See id.*

system actors to be harsher on Black youth and families than they would be on a comparable White family.[163]

Black blame, implicit bias, and the denial of childhood can, and of course often do, function in interdependent and mutually reinforcing ways.[164] Whether operating independently, or in concert, any of these factors could influence how judges and other system actors treat Black youth and families, including when making decisions that directly or indirectly determine monetary sanctioning amounts.

D. *The Legal Backdrop for Monetary Sanctioning*

Though the Eighth Amendment prohibits excessive fines,[165] a coherent line of jurisprudence seeking to limit the severest effects of modern monetary sanctioning regimes did not begin to develop until the 1950s.[166] Principally aimed at eliminating debtor's prisons[167] and curbing the harshest collections practices[168], the Court saw itself as balancing what it understood as government's legitimate interest in recouping costs of administering the criminal system, and the state's penological concerns, with the economic realities of indigent defendants.

1. *Debtor's Prisons*

The Supreme Court addressed the problem of debtor's prisons in 1971 in *Tate v. Short*.[169] A local court, pursuant to a Texas law allowing courts to incarcerate individuals for nonpayment of fines, ordered Preston Tate imprisoned to "satisfy" debt arising from multiple traffic offenses.[170] Tate sought to avoid incarceration by claiming that he was too poor to pay what the court demanded.[171] State courts denied relief, holding that poverty did not

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[163] *See* Zhen, *supra* note 23, at 208–09.

[164] *See, e.g.*, CHERYL STAATS, KIRWIN INS., IMPLICIT RACIAL BIAS AND SCHOOL DISCIPLINE DISPARITIES: EXPLORING THE CONNECTION 6 (May 2014) (finding generally that the interplay of implicit bias, attitudes suggesting that minority students are culturally "deficient," and perceptions of Black people as criminal and animalistic can result in harsher punishment of Black youth, including more frequent referral to law enforcement).

[165] The Eighth Amendment was only recently made applicable to the states in *Timbs v. Indiana*, 139 S. Ct. 682, 686–87 (2019).

[166] *See generally* Bearden v. Georgia, 461 U.S. 660 (1983); James v. Strange, 407 U.S. 128 (1972); Mayer v. City of Chicago, 404 U.S. 189 (1971); Tate v. Short, 401 U.S. 395 (1971); Williams v. Illinois, 399 U.S. 235 (1970); Griffin v. Illinois, 351 U.S. 12 (1956).

[167] *See Bearden*, 461 U.S. at 661–63; *Tate*, 401 U.S. at 399.

[168] *See James*, 407 U.S. at 128–29.

[169] *Tate*, 401 U.S. at 399.

[170] In this case Tate's imprisonment was to satisfy his debt at the rate of $5 per day. *Id.* at 396–97.

[171] *Id.* at 397.

justify his release.[172] In reversing, the United States Supreme Court held that incarcerating Tate violated his rights under the Fourteenth Amendment's Equal Protection Clause.[173]

A decade later, in *Bearden v. Georgia*, the Court extended this constitutional protection to include additional classes of court-ordered debt.[174] After burglary and theft charges, a Georgia trial court suspended Danny Bearden's sentence but imposed a three-year probation term, a $500 fine, and $250 in restitution.[175] After being laid off from his job and being unable to find new work, Bearden could not keep up with the agreed upon payments.[176] The trial court revoked Bearden's probation for failure to pay, and ordered Bearden to prison.[177] The Supreme Court invalidated the revocation of Bearden's probation and his subsequent incarceration, concluding that the state court's actions violated the Equal Protection Clause and due process because Bearden was imprisoned for failure to pay his fine and restitution without the trial court conducting a meaningful inquiry into whether Bearden was actually *able* to pay.[178] "[I]f the State determines a fine or restitution to be the appropriate and adequate penalty for the crime, it may not thereafter imprison a person solely because he lacked the resources to pay it."[179]

Taken together, *Tate* and *Bearden* articulate the requirement that a defendant not be made to suffer imprisonment, or other punishment, solely due to *inability* to pay monetary sanctions.[180] That said, the Court has been careful to maintain that imprisonment for failure to pay can still be a constitutionally valid outcome: "[O]ur holding today does not suggest any constitutional

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[172] *Ex parte* Tate, 445 S.W.2d 210, 211 (1969) (overruling "appellant's contention that because he is too poor to pay the fines his imprisonment is unconstitutional"), *rev'd*, 401 U.S. 395 (1971).

[173] ABBY SHAFROTH, DAVID SELIGMAN, ALEX KORNYA, RHONA TAYLOR, & NICK ALLEN, NAT'L CONSUMER LAW CTR., CONFRONTING CRIMINAL JUSTICE DEBT: A GUIDE FOR LITIGATION 13 (Sept. 2016), https://www.nclc.org/images/pdf/criminal-justice/confronting-criminal-justice-debt-2.pdf [https://perma.cc/2H7A-N34Q]. The report states:

> *Tate* followed and extended the Court's holding from one year earlier in *Williams v. Illinois*, 399 U.S. 235 (1970), which held that the state may not continue to imprison an individual beyond the maximum sentence term specified by statute because the individual is unable to pay a fine. 399 U.S. at 243. *Tate* reaffirmed that "the Equal Protection Clause of the Fourteenth Amendment requires that the statutory ceiling placed on imprisonment for any substantive offense be the same for all defendants irrespective of their economic status." *Tate*, 401 U.S .398–99 (quoting *Williams*, 399 U.S. 244).

Id. at 14 n.50.

[174] Bearden v. Georgia, 461 U.S. 660, 673–74 (1983).

[175] *Id.* at 662.

[176] *Id.* at 663.

[177] *Id.*

[178] *Id.* at 673–74. *See generally* Tate v. Short, 401 U.S. 395 (1971).

[179] *Bearden*, 461 U.S. at 667–68.

[180] *Id*. at 674.

infirmity in imprisonment of a defendant with the means to pay a fine who refuses or neglects to do so."[181]

The Supreme Court has yet to provide meaningful instruction for how lower courts should determine whether failure to pay is willful.[182] This lack of guidance affords substantial leeway to lower courts. For reasons discussed in the preceding parts, juvenile court judges and other system actors may find it easier to discount Black individual's claims of indigence or to find that their failure to pay is willful.

2. *Collections Practices*

The government holds extraordinary coercive powers and can collect debts through mechanisms not available to private creditors.[183] Not long after deciding *Tate*, the Court heard *James v. Strange*,[184] which questioned what tools beyond incarceration the state can use to compel payment of monetary sanctions.[185] David Strange was provided with counsel in a criminal case, paid for, due to Strange's indigence, by the state of Kansas.[186] After Strange pled guilty, the state imposed $500 in administrative recoupment fees to reimburse the state for a portion of the money spent in providing Strange his right to counsel.[187] Strange was ordered to pay the debt within sixty days.[188] Otherwise, Kansas law allowed the state to convert the order to a civil judgment, which in turn allowed for garnishing or attachment of his wages, or for a lien on his property.[189]

While the Court ultimately struck down the Kansas statutory scheme, due to its excessively harsh nature (particularly as compared to collections mechanisms that were available to other civil judgment debtors), the Court did maintain that attempts to recover costs associated with operating a state's criminal system are not necessarily unconstitutional.[190] As with *Bearden* and *Tate*, the Court has yet to delineate anything beyond the most general descriptions of where the boundaries lie in regards to collections actions that the state may constitutionally undertake.[191] And while *Strange* can be read as

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[181] *Id.* at 668 (quoting Tate v. Short, 401 U.S. 395, 400 (1971)).

[182] *See, e.g.*, *id.*; Zhen, *supra* note 23, at 183 (noting the lack of concrete guidance provided by *Bearden* for how to conduct a sound ability-to-pay determination).

[183] *See* SHAFROTH ET AL., *supra* note 173, at 18.

[184] James v. Strange, 407 U.S. 128 (1972).

[185] *Id.* at 128.

[186] *Id.* at 129.

[187] *Id.* at 129; *see also* SHAFROTH, *supra* note 173, at 15.

[188] SHAFROTH ET AL., *supra* note 173, at 15.

[189] *Strange*, 407 U.S. at 131.

[190] *Id.* at 141–42 ("For Kansas to deny [wage garnishment exemptions] to the once criminally accused is to risk denying him the means needed to keep himself and his family afloat."); *see also* SHAFROTH, *supra* note 173, at 16.

[191] *See* CRIMINAL JUSTICE POLICY PROGRAM, *supra* note 25, at 5 (referring to such boundaries as "baseline").

binding certain collections measures to the relevant civil collections standard, the Court made clear that collections enforcement procedures stemming from criminal court debt "need not be identical" to the available civil procedures.[192]

Most juvenile monetary sanctioning determinations happen in the shadow of a significant power imbalance, and in an intimidating environment where the stakes are frighteningly high.[193] Parents have no right to counsel in delinquency cases, many lack a working knowledge of the system, and they may be made to feel that their child's freedom rests on their meeting the court's financial demands.[194] Given these pressures, parents may accept payment terms that they know they cannot meet, or that they know will cause substantial economic hardship for their family, and that have a high likelihood of ending in a damaging—and possibly criminalizing—collections action being taken by the court.[195] Nevertheless, the Supreme Court has tacitly endorsed the coercive and counterproductive nature of this interaction.[196]

If the problem with the Court's monetary sanctions jurisprudence was simply that it was underdeveloped or overly permissive, things would be bad enough. The reality is that the Court's conclusions about what constitutes an acceptable inquiry into ability to pay, whether a person is willful in their failure to pay, and what steps the government may take in seeking to collect monetary sanctions make it relatively easy for courts to justify decisions that may be motivated by extralegal factors, including by conscious or unconscious racial bias.

IV. CONCLUSION

Despite the salience of race in monetary sanctioning, courts, scholars, and advocates frequently foreground poverty concerns in their critiques. A focus on poverty may be understandable, even where the central goal is racial justice. The current demographic makeup of poverty in the United States makes it almost certain that any criminalizing of poverty will disproportionately impact Black communities. Moreover, the criminalization of poverty is a central channel through which Black people are exposed to the systemic degradation, exploitation, and violence of the criminal legal system.

Said differently, where poverty is decriminalized, Black communities are likely to see substantial benefits. That said, a central focus of this Article has been to disentangle the criminalization of race (specifically here the criminalization of Blackness) from the criminalization of poverty. I have advanced the claim that racial dynamics might influence decisions to impose juvenile monetary sanctions in ways that may be independent of, or superordinate to, the criminalization of poverty. I have done so in order to

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192 *Strange*, 407 U.S. at 138–39.
193 *See* JUSTICE FOR FAMILIES, *supra* note 97, at 28–30.
194 *Id.* at 30.
195 *See, e.g.*, *id.* at 28–29.
196 *See, e.g.*, Bearden v. Georgia, 461 U.S. 660, 664–74 (1983).

highlight the limits of criminalization of poverty framings as a means of circumventing racial bias within the criminal legal system.

To be clear, I am not arguing against the discursive value of poverty-centered analyses, or against efforts to approach system reform or reimagining from a decriminalization of poverty perspective. I am merely cautioning that the egalitarian reach of poverty-based framings may, at times, be ill-suited to redressing extant *racial* harms, in particular the entrenched realities of anti-Blackness.