THE PRICE OF PARENTHOOD*

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INTRODUCTION

There was no food in the refrigerator and very little in the freezer. A bad odor filled the home, and flies flew around trash scattered on the floor. The lights had been turned off that morning; she couldn't pay the bill. Her ex-boyfriend was incarcerated for domestic abuse; he had choked her and destroyed their apartment. She didn't have a car, and she couldn't carry much food home on the bus. She was supposed to return to work at McDonald's but was waiting for paperwork to be completed.

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She couldn't return to the apartment with her children until repairs could be made. In June 2019, the state placed her five children into foster care, citing neglect as the basis for removal.

Before she could be reunited with her children, she would be required to maintain stable housing, ensure the home was free of safety hazards and had working utilities, seek employment, attend all scheduled visits with her children, and complete mental health and substance abuse assessments. Additionally, she would have to pay parental contributions toward the cost of care for her children while in foster care: $10 per month per child. She struggled with her case plan and couldn't make all of the monthly child support payments. Three years after separating the mother from her children, the state terminated her parental rights and the rights of the father. On appeal, the court upheld the decision on a single basis: there was a six-month gap in which the parents failed to pay the state for the cost of foster care. A $300 debt, $600 between both parents. This was all the statute required to terminate both of their parental rights. Although the parents made payments when they could, the court held that bringing toys, snacks, candy, and gifts to their visits with the children did not constitute significant contributions.[1] And with that, the parents were permanently separated from their five children.

States are terminating parental rights with increasing frequency. Today, roughly 1 in 100 American children experience termination of parental rights ("TPR") before the age of 18, double the rate from 20 years ago.[2] Native American and African American children are nearly three times more likely to experience TPR than white children.[3] There is robust scholarly debate surrounding the history, use, prevalence, bases, and disproportionality of TPR, as well as the due process requirements for TPR.[4] But to date, there has been almost no discussion concerning whether TPR is cruel and unusual punishment.[5] This is likely due to the

1. *See* State *ex rel.* I.K., 358 So. 3d 56, 65 (La. Ct. App. 1st Cir. 2022).

2. Christopher Wildeman, Frank R. Edwards, & Sara Wakefield, *The Cumulative Prevalence of Termination of Parental Rights for U.S. Children, 2000–2016*, 25 CHILD MALTREATMENT 32, 33 (2020).

3. *See id.*

4. A search of "termination of parental rights" in law reviews and journals dating from 2020 to the time of publication produced 683 results.

5. One law review article mentions the possibility, but only briefly to say that the question deserves more consideration. *See* Daniel L. Hatcher, *Collateral Children: Consequence and Illegality at the Intersection of Foster Care and Child Support*, 74 BROOK. L. REV. 1333, 1367–70 (2009).

Supreme Court's cruel and unusual punishments precedent, which makes it nearly impossible to challenge TPR as facially unconstitutional or unconstitutional as-applied to a particular parent in a particular situation. There is, however, a compelling case that terminating parental rights for failure to reimburse the state for foster care expenses constitutes cruel and unusual punishment under the Eighth Amendment.[6]

This article builds the case for such a challenge. Part I explains the history of foster care custody payments. Part II outlines the Supreme Court's cruel and unusual punishments precedent. Finally, Part III makes the case for a categorical rule against TPR for unpaid foster care bills.

I. THE BACKGROUND

The primary goal of foster care is to provide a temporary, safe, and supportive environment for children while their parents work towards resolving the issues that led to their removal.[7] States have a constitutional (and moral) obligation to provide for the basic needs of children taken into state custody.[8] Basic needs include, at minimum, food and water, clothing and shelter, safe and sanitary conditions, and medical care.[9] Up until the 1960s, states paid for the costs of these basic needs, and in the following two decades, the federal government partially reimbursed states for these costs, but only for certain eligible families.[10]

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6. Practitioners have had little success challenging this practice under Due Process and Equal Protection theories. *See, e.g.*, *In re* J.C.J., 381 N.C. 783, 792, 874 S.E.2d 888, 895 (2022); *In re* Biggers, 50 N.C. App. 332, 340, 274 S.E.2d 236, 241 (1981). They may have greater success under an Eighth Amendment theory. *See* Hatcher, *supra* note 5.

7. *See* Smith v. Org. of Foster Fams. for Equal. & Reform, 431 U.S. 816, 823–25 (1977) (citing CHILD WELFARE LEAGUE OF AMERICA, STANDARDS FOR FOSTER FAMILY CARE SERVICE 5 (1959)) ("Foster care has been defined as '[a] child welfare service which provides substitute family care for a planned period for a child when his own family cannot care for him for a temporary or extended period, and when adoption is neither desirable nor possible.'").

8. *See* Deshaney v. Winnebago Cty. Dep't of Soc. Servs., 489 U.S. 189, 200 (1989) ("[W]hen the State by the affirmative exercise of its power so restrains an individual's liberty that it renders him unable to care for himself, and at the same time fails to provide for his basic human needs—e.g., food, clothing, shelter, medical care, and reasonable safety—it transgresses the substantive limits on state action set by the Eighth Amendment and the Due Process Clause.").

9. *See id*.

10. *See* Joseph Shapiro, Teresa Wilitz, & Jessica Piper, *States Send Kids to Foster Care and Their Parents the Bill—Often One Too Big to Pay*, NPR (Dec. 27, 2021, 4:35 PM), https://www.npr.org/2021/12/27/1049811327/states-send-kids-to-foster-care-and-their-parents-the-bill-often-one-too-big-to-.

In 1984, Congress decided that parents should chip in. The Child Support Enforcement Amendments of 1984 mandated that states take steps to secure child support for foster children as a condition of federal funding.[11] At the signing ceremony, President Reagan lamented that millions of American children "endure needless deprivation and hardship due to lack of support by their absent parent" and called such parents "a blemish on America."[12] Reagan framed the law as "decent and caring people" (*i.e.*, federal and state governments, the American people) rescuing children from the "devil-may-care attitude" of parents who are unable or unwilling to pay child support to the state.[13]

Following the law's passage, all 50 states began billing parents for foster care expenses.[14] When parents don't pay, states can report them to credit bureaus, reducing their credit scores and making it harder for them to obtain loans; they can garnish tax refunds and stimulus checks.[15] They can even suspend driver's licenses, a particularly counterintuitive practice considering that many parents rely on private transportation for work.[16]

This policy is plagued with problems.[17] First, it does not achieve its fundamental goal of collecting money necessary to support the child. Quite the opposite: states spend more money trying to collect these debts than they actually collect. A study of Minnesota's child support services division calculated that the state collected about $0.25 for every dollar

11. Act of Aug. 16, 1984, Pub. L. No. 98-378, § 11, 98 Stat. 1310, 1318 (codified at 42 U.S.C. § 671(a)(17)) ("[W]here appropriate, all steps will be taken, including cooperative efforts with the State agencies administering the program funded under part A and plan approved under part D, to secure an assignment to the State of any rights to support on behalf of each child receiving foster care maintenance payments under this part."); Hatcher, *supra* note 5, at 1333 ("[F]ederal law forces a collaboration between child welfare and child support agencies to pursue child support obligations against the children's parents.").

12. President Ronald Reagan, Remarks on Signing the Child Support Enforcement Amendments of 1984, (Aug. 16, 1984) (transcript available at The American Presidency Project, UNIV. CAL. SANTA BARBARA, https://www.presidency.ucsb.edu/documents/remarks-signing-the-child-support-enforcement-amendments-1984).

13. *Id*.

14. For an in depth discussion, see Hatcher, *supra* note 5, at 1333.

15. Shapiro, Wilitz, & Piper, *supra* note 10 ("There's a lesson in the one year when collections soared: 2020. States returned $113 million to Washington, a 59% increase. The reason: That's when parents got the first round of relief checks, money meant to be a lifeline to families struggling during the pandemic. But those checks were easy for states to garnish.").

16. *See id*.

17. *See* Diana Azevedo-McCaffrey, *States Should Use New Guidance to Stop Charging Parents for Foster Care, Prioritize Family Reunification,* CTR. ON BUDGET & POL'Y PRIORITIES (Oct. 13, 2022), https://www.cbpp.org/research/income-security/states-should-use-new-guidance-to-stop-charging-parents-for-foster-care.

spent to collect.[18] California collected $0.41 for each dollar expended; Washington, $0.39 for each dollar.[19] The policy is ineffective because it does not successfully collect the payments, and it is inefficient because it wastes money attempting to collect the payments. Taxpayers bear the burden of paying for the state's ineffective and inefficient policies.

Second, the policy does not support foster care's ultimate goal of safely reunifying children with their parents. Just the opposite, it reduces the chances of reunification. Parents often take second and third jobs to pay debts, which reduces meaningful time with their children,[20] a typical requirement of their case plans.[21] Parents who are unable to pay first and last months' rent cannot secure stable housing, a precondition for reunification.[22] Based on these added financial burdens, one study estimated that "a $100 increase in the monthly child support order amount is predicted to increase the months to reunification by 6.6 months . . . ."[23]

For these reasons, the Administration for Children and Families (ACF), Children's Bureau (CB), and Office of Child Support Enforcement (OCSE) recently encouraged child welfare agencies to reserve this practice for "very rare circumstances."[24] Many of the parents who receive these child support bills are living in poverty, and "[i]t is not

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18. Trish Skophammer, Child Support Collections to Offset Out of Home Placement Costs: A Study of Cost Effectiveness (June, 2017) (Ph.D. dissertation, Hamline University) (available at DigitalCommons @Hamline, https://digitalcommons.hamline.edu/cgi/viewcontent.cgi?article=1014&context=hsb_all).

19. ORANGE CNTY. DEP'T OF CHILD SUPPORT SERVS. CHILD SUPPORT AND FOSTER CARE 34 (2d ed. 2020), https://www.css.ocgov.com/sites/css/files/import/data/files/116568.pdf; *Washington's Cost Effectiveness for Foster Care Child Support Cases*, WASH. STATE DEP'T SOC. & HEALTH SERVS., DIV. OF CHILD SUPPORT (June 7, 2019), https://www.dshs.wa.gov/sites/default/files/ESA/dcs/documents/Cost%20Effectiveness%20-FC%20collections%20FINAL.pdf.

20. *See, e.g.*, Shapiro, Wilitz, & Piper, *supra* note 10.

21. *See, e.g.,* N.C. DEP'T OF HEALTH & HUM. SERVS., NORTH CAROLINA CHILD AND FAMILY SERVICES PLAN 2020–2024, at 126 (2019) ("A commitment to early and consistent child-family visiting is an essential ingredient in preparing for and maintaining reunification.").

22. *See* Shapiro, Wilitz, & Piper, *supra* note 10.

23. Maria Cancian, Steven T. Cook, Mai Seki, & Lynn Wimer, *Making Parents Pay: The Unintended Consequences of Charging Parents for Foster Care*, 72 CHILD. & YOUTH SERVS. REV. 100, 108 (2017).

24. Letter from Admin. for Child. & Fams., U.S. Dep't of Health & Hum. Servs. to Colleagues (July 29, 2022), https://www.acf.hhs.gov/sites/default/files/documents/cb/letter_regarding_assignment_rights_child_support_for_children_foster_care.pdf; *see also* Joseph Shapiro, *The Federal Government Will Allow States to Stop Charging Families for Foster Care*, NPR (July 1, 2022, 1:41 PM), https://www.npr.org/2022/07/01/1107848270/foster-care-child-support.

in the best interest of any family to be pursued for child support when they have already been whipsawed by economic insecurity, family instability, and separation."[25] Although this guidance represents a welcome philosophical shift, the statute still grants states discretion to pursue parents for child support "where appropriate"; for example, when parents are able but unwilling to pay.[26]

A bad policy, however, is not necessarily an unconstitutional one. Although the practice of billing parents for the cost of foster care concerns fundamental rights to parenthood and disproportionately affects low-income parents, it is, at least, rationally related to the legitimate government purpose of supporting foster children,[27] and, at most, narrowly tailored to the compelling interest in the health and welfare of children in foster care.

But when a state ties unpaid foster care bills to TPR, it's a different story. 15 states make willful failure to pay a basis for TPR: Alabama,[28] North Carolina,[29] Georgia,[30] Kansas,[31] Kentucky,[32] Massachusetts,[33] Minnesota,[34] Nebraska,[35] Oklahoma,[36] Oregon,[37] Rhode

25. Letter from Admin. for Child. & Fams., *supra* note 24.

26. *See* Child Welfare Policy Manual, ADMIN. FOR CHILD. & FAMS. (Oct. 15, 2023), https://www.acf.hhs.gov/cwpm/public_html/programs/cb/laws_policies/laws/cwpm/policy_dsp_pf.jsp?citID=170 ("Given this, previous policy directing title IV-E agencies to determine 'where appropriate' on a case-by-case basis is withdrawn. Consequently, while each title IV-E agency may determine what constitutes 'where appropriate,' agencies should consider across-the-board policies. These policies may reflect that an assignment of the rights to child support for children in title IV-E foster care is not required except in very rare instances where there will be positive or no adverse effects on the child, or the assignment will not impede successful achievement of the child's permanency plan. For example, title IV-E agencies might consider policies reflecting that securing an assignment of the rights to child support isn't appropriate unless the parent(s) income is above a specified income level.").

27. *See* FCC v. Beach Commc'ns, 508 U.S. 307, 315 (1993) ("Legislative choice is not subject to courtroom factfinding and may be based on rational speculation unsupported by evidence or empirical data.").

28. ALA. CODE § 12-15-319(a)(9) (2023).

29. N.C. GEN. STAT. § 7B-1111(a)(3) (2023).

30. GA. CODE ANN. § 15-11-310(a)(3) (2023).

31. KAN. STAT. ANN. § 38-2269(c)(4) (2023).

32. KY. REV. STAT. ANN. § 625.090(3)(f) (West 2023).

33. MASS. ANN. LAWS ch. 210, § 3(c)(xi) (2023).

34. MINN. STAT. § 260C.301 (b)(3) (2023).

35. NEB. REV. STAT. § 43-292(3) (2023).

36. OKLA. STAT. tit. 10A, § 1-4-904(B)(7) (2023).

37. OR. REV. STAT. § 419B.506(1) (2023).

Island,[38] Vermont,[39] Louisiana,[40] Texas,[41] and Delaware.[42] Parental rights have been terminated for unpaid bills as low as $121.[43] Usually, failure to pay is one of several grounds cited in a TPR petition.[44] But there are unusual cases where failure to pay is the only ground for TPR upheld on appeal.[45] Forever severing the sacred bond between child and parent for failure to pay a government-owned debt is cruel and unusual. It isn't merely bad policy. It's bad law.

II. THE EIGHTH AMENDMENT

The Eighth Amendment states: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."[46] "Bail, fines, and punishment traditionally have been associated with the criminal process."[47] But the Eighth Amendment is not limited to criminal punishments.[48] In *Austin v. United States*, the Supreme Court held that neither the text nor history of the Eighth Amendment limited its application to criminal offenses,[49] explicitly overruling its

38. 15 R.I. GEN. LAWS. § 15-7-7(a)(1) (2023).

39. VT. STAT. ANN. tit. 15A, § 3-504(a)(1)(A-B), (a)(2)(A) (2023).

40. LA. CHILD. CODE ANN. art. 1015(4)(b) (2023).

41. TEX. FAM. CODE ANN. § 161.001(b)(1)(F) (West 2023).

42. DEL. CODE ANN. tit. 13, § 1103(a)(3)(b)(1) (2023).

43. *In re* S.D.B., No. COA16-1265, 2017 WL 2950777, at *2 (N.C. Ct. App. July 5, 2017).

44. *See infra* notes 95–97.

45. *See, e.g.*, State *ex rel.* I.K., 358 So. 3d 56, 63–64 (La. Ct. App. 1st Cir. 2022) (holding that the state failed to establish ground for termination on the basis that the father failed to visit children, but that the state *had* established ground for termination on the basis that the father failed to provide significant contributions to children's care and support).

46. U.S. CONST. amend VIII.

47. Ingraham v. Wright, 430 U.S. 651, 664 (1977).

48. Austin v. United States, 509 U.S. 602, 609–10 (1993) ("The purpose of the Eighth Amendment . . . was to limit the government's power to punish . . . . The notion of punishment, as we commonly understand it, cuts across the division between the civil and the criminal law. It is commonly understood that civil proceedings may advance punitive as well as remedial goals, and, conversely, that both punitive and remedial goals may be served by criminal penalties. Thus, the question is not . . . whether [the government action] is civil or criminal, but rather whether it is punishment." (internal quotations and citations omitted)).

49. *Id.* at 608–09 ("Consideration of the Eighth Amendment immediately followed consideration of the Fifth Amendment. After deciding to confine the benefits of the Self-Incrimination Clause of the Fifth Amendment to criminal proceedings, the Framers turned their attention to the Eighth Amendment. There were no proposals to limit that Amendment to criminal proceedings.").

prior interpretation to the contrary.[50] To determine whether the Eighth Amendment applies to a particular sanction, the Court considers "whether, at the time the Eighth Amendment was ratified, [the sanction] was understood at least in part as punishment and whether [the sanction] should be so understood today."[51]

After establishing that a sanction is sufficiently punitive for Eighth Amendment purposes, the analysis turns to whether the punishment is cruel and unusual.[52] "Cruel punishments are ones that are excessive in light of the offense": either "an unwarranted amount of physical pain and suffering" or "a deprivation of life or liberty incongruent with the conduct of the offender."[53] "Unusual punishments, by contrast, are those that states rarely impose."[54]

These basic definitions are boundlessly ambiguous. The phrase can be viewed in the conjunctive (cruel and unusual) or the disjunctive (cruel or unusual), or even as a singular idea ("cruel punishments are by their nature unusual, and unusual punishments are, by their nature, cruel").[55] Under the originalist approach championed by Justices Thomas and Scalia, the definition is limited to punishments proscribed in 1787 (at

50. *See id.* at 609 n.5 ("In *Ingraham* v. *Wright*, we concluded that the omission of any reference to criminal cases in § 10 was without substantive significance in light of the preservation of a similar reference to criminal cases in the preamble to the English Bill of Rights. This reference in the preamble, however, related only to excessive bail. Moreover, the preamble appears designed to catalog the misdeeds of James II rather than to define the scope of the substantive rights set out in subsequent sections." (internal quotations and citations omitted)).

51. *Id.* at 610–11.

52. To the extent that children are conceptualized as "collateral, mortgaged to secure the debt for their own care," a court could conduct a similar Eighth Amendment analysis under the excessive fines clause, rather than the cruel and unusual clause. *See* Hatcher*, supra* note 5, at 1334; Brief for Law Professors as Amici Curiae in Support of Plaintiffs' Opposition to Motion to Dismiss at 6, D.J.C.V. v. United States, 605 F. Supp. 3d 571 (S.D.N.Y Dec. 22, 2020) (No. 1:20-CV-05747) ("Breaking familial bonds reinforced the notion of the slave as a commodity, rather than as the child of parents, or a member of a community or a nation."); *Austin*, 509 U.S. at 609–10 ("The Excessive Fines Clause limits the government's power to extract payments, whether in cash or in kind, as *punishment* for some offense."); Timbs v. Indiana, 139 S. Ct. 682, 687 (2019); United States v. Bajakajian, 524 U.S. 321, 324 (1998); Tyler v. Hennepin County, 598 U.S. 631, 648–50 (2023) (Gorsuch, J., concurring) (writing separately from the Court's Takings Clause holding to note that the taking at issue would also violate the Excessive Fines Clause).

53. William W. Berry III, *Eighth Amendment Differentness*, 78 MO. L. REV. 1053, 1057 (2013).

54. *Id.*

55. *Id.* at 1057–58.

the ratification of the Constitution),[56] whereas under a living constitution approach, the definition "draw[s] its meaning from the evolving standards of decency that mark the progress of a maturing society."[57] But within this ambiguity lies a central principle: "that punishment for crime should be graduated and proportioned to [the] offense."[58]

The Court's proportionality cases fall within two general classifications. In the first, "the Court considers all of the circumstances of the case to determine whether the sentence is unconstitutionally excessive."[59] In the second, the Court uses "categorical rules to define Eighth Amendment standards."[60]

"The [categorical] classification in turn consists of two subsets, one considering the nature of the offense, the other considering the characteristics of the offender."[61] For example, the Court has held that the death penalty is categorically barred for nonhomicide offenses.[62] In other cases, the Court has adopted categorical rules against death sentences for juveniles and low-functioning adults, and against life sentences for juveniles.[63]

In the categorical analysis, "[t]he Court first considers 'objective indicia of society's standards, as expressed in legislative enactments and state practices' to determine whether there is a national consensus against the sentencing practice at issue," and second, the Court "determine[s] in

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56. Berry, *supra* note 53, at 1058–60 (explaining and critiquing Scalia's originalist approach); *see also* Graham v. Florida, 560 U.S. 48, 99 (2010) (Thomas, J., dissenting); Jamal Greene, *Fourteenth Amendment Originalism*, 71 MD. L. REV. 978, 978–79 (2012) ("[S]uppose that Justice Thomas is correct that the Eighth Amendment was not originally understood to forbid a particular method of punishment solely based on an unintended risk of significant pain. Suppose further that those who ratified the Fourteenth Amendment believed that the Eighth Amendment in fact erected a constitutional prohibition against such a method of punishment. In a case in which the alleged infringer is a state or local rather than a federal actor, it is difficult to understand a top-down theory of interpretation under which the first view would control over the second. Indeed, for an originalist who believes *Barron v. Baltimore* was correctly decided, it is difficult to understand why the original understanding of the Bill of Rights ever should, in itself, control a constitutional case involving state and local action.")

57. Trop v. Dulles, 356 U.S. 86, 101 (1958).

58. *Graham,* 560 U.S. at 59 (quoting Weems v. United States, 217 U.S. 349, 367 (1910)).

59. *Id.*

60. *Id*. at 60.

61. *Id*.

62. Kennedy v. Louisiana 554 U.S. 407, 438 (2008); see *also* Enmund v. Florida, 458 U.S. 782, 797 (1982) (felony murder); Coker v. Georgia, 433 U.S. 584 (1977) (rape).

63. Roper v. Simmons, 543 U.S. 551, 578–79 (2005); Atkins v. Virginia, 536 U.S. 304, 321 (2002); *Graham*, 560 U.S. at 61.

the exercise of its own independent judgment whether the punishment in question violates the Constitution."[64] In this second (subjective) prong, the Court considers "the culpability of the offenders at issue in light of their crimes and characteristics, along with the severity of the punishment in question," and also "whether the challenged sentencing practice serves legitimate penological goals."[65]

III. THE CASE

Terminating parental rights was and is understood at least in part as punishment. This proposed challenge to TPR for failure to reimburse the state for foster care falls into the categorical classification of cruel and unusual punishment cases because, unlike the Court's length-of-sentence cases, this challenge does not question a particular sentence as applied to a particular offender who committed a particular offense. Instead, it seeks a categorical rule against a single sentence (TPR) for an entire class of offenders (parents) who have committed a single offense (willful failure to pay foster care bill).[66] There is a clear national consensus against this sentence for this offense; 35 states do not permit TPR for failure to reimburse the state for foster care costs. The severity of the sentence is grossly disproportionate to the nature of the offense and the characteristics of the offender. And the penological justifications are either nonexistent or grossly disproportionate to the offense. There is a compelling case that TPR for willful failure or inability to pay foster care bills is cruel and unusual punishment prohibited by the Eighth Amendment.

64. *Graham*, 560 U.S. at 61 (quoting *Roper*, 543 U.S. at 563).

65. *Id.* at 67.

66. Chief Justice Roberts rejected the *Graham* majority's categorical approach based on his belief that life without parole may sometimes be proportionate depending on the particular offense committed. *See id.* at 93–94 (Roberts, C.J., concurring) ("But what about Milagro Cunningham, a 17-year-old who beat and raped an 8-year-old girl before leaving her to die under 197 pounds of rock in a recycling bin in a remote landfill? Or Nathan Walker and Jakaris Taylor, the Florida juveniles who together with their friends gang-raped a woman and forced her to perform oral sex on her 12-year-old son? The fact that Graham cannot be sentenced to life without parole for his conduct says nothing whatever about these offenders, or others like them who commit nonhomicide crimes far more reprehensible than the conduct at issue here." (citations omitted)). Roberts's concern is not present in this categorical challenge because there isn't a range of offenses at issue. There is only one offense: willful failure to pay a foster care bill. The debt may be $100 or $1000, but that is a difference in degree rather than kind.

A. Punishment

Parental rights as understood today—the fundamental rights shaped by the Supreme Court throughout the 20th century—did not exist at the time the Eighth Amendment was ratified in the United States.[67] Paternal rights, however, were well-established, and so too the termination of paternal rights.

In 17th century England, parental rights were vested solely in the father.[68] With the passage of the Tenures Abolition Act in 1660, fathers were given the right to appoint guardians to their heirs, thereby extending "the empire of the father."[69] These testamentary guardianships were intended "to be equivalent to that held by the father himself."[70] The Court of Chancery, charged with regulating guardianships, terminated guardianships when the guardian mismanaged the child.[71] In *Beaufort v. Berty*, the Chancery held that "it could best oversee guardians by acting, not only to punish a breach of guardian's duty once it had occurred, but also to prevent such a breach of duty from occurring in the first place, because '[a] preventing justice was to be preferred to [a] punishing justice.'"[72] Although the Chancery justified state interference into

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67. Sarah Abramowicz traces the origins of judicial intervention in parental rights to 1660 and the regulation of testamentary guardianships and paternal rights predating the doctrine of *parens patriae*. Sarah Abramowicz, Note*, English Child Custody Law, 1660–1839: The Origins of Judicial Intervention in Paternal Custody*, 99 COLUM. L. REV. 1344, 1345 (1999). Other historians trace the origins of judicial intervention to the *parens patriae* doctrine. *See, e.g.*, Neil Howard Cogan, *Juvenile Law, Before and After the Entrance of "Parens Patriae,"* 22 S.C. L. REV. 147 (1970); Lawrence Custer, *The Origins of the Doctrine of Parens Patriae*, 27 EMORY L.J. 195 (1978); John Seymour, *Parens Patriae and Wardship Powers: Their Nature and Origins*, 14 OXFORD J. LEGAL STUDS. 159, 159–62, 178–87 (1994).

68. 1 WILLIAM BLACKSTONE, COMMENTARIES *453 ("The legal power of a father, — for a mother, as such, is entitled to no power, but only to reverence and respect . . . over the persons of his children ceases at the age of twenty one: for they are then enfranchised by arriving at years of discretion, or that point which the law has established (as some must necessarily be established) when the empire of the father, or other guardian, gives place to the empire of reason. Yet, till that age arrives, this empire of the father continues even after his death; for he may by his will appoint a guardian to his children.").

69. *Id.*; *see also* Abramowicz, *supra* note 67, at 1369.

70. Abramowicz, *supra* note 67, at 1369 n.153; *see also* BLACKSTONE, *supra* note 68, at *462 ("The power and reciprocal duty of a guardian and ward are the same, *pro tempore*, as that of a father and child.").

71. Abramowicz, *supra* note 67, at 1355; *see also id.* at 1345 (noting the "irony that the origin of incursions into [the empire of the father] was the father's acquisition of the right to appoint testamentary guardians").

72. *Id.* at 1372 (quoting Beaufort v. Berty (1721) 24 Eng. Rep. 579, 579 (Ch.) (emphasis omitted).

parental rights by invoking the King's duty, as the father of the nation, to protect the nation's children (the *parens patriae* doctrine), the termination of a guardianship was also understood as punishment for the guardian's mismanagement of the child's care.[73]

Soon thereafter, paternal rights became subject to termination.[74] Beginning in 1789, with *Powel v. Cleaver*, the Chancery established the principle that "wherever a father had breached his duty to his child, he thereby lost his paternal rights."[75] After *Powel*, the Chancery repeatedly found that a father's breach of parental duties was sufficient to abrogate paternal rights.[76] As the court explained in *de Manneville v. de Manneville*:

> [T]he Law imposed a duty upon parents; and in general gives them a credit for ability and inclination to execute it. But that presumption, like all others would fail in particular instances; and if an instance occurred, in which the father was unable, or unwilling, to execute that duty, and, farther, was actively proceeding against it, of necessity the State must place somewhere a superintending power over those, who cannot take care of themselves; and have not the benefit of that care, which is presumed to be generally effectual. In [*Powel*] there was a struggle between the feelings of the father and a due attention to the interests of the child . . . . [The Lord Chancellor] took upon him the jurisdiction on this ground, that he would not suffer the feelings of the parents to have effect against that duty, which upon a tender, just, and legitimate, deliberation the parent owed

73. BLACKSTONE, *supra* note 68, at *463 ("For the lord chancellor is, by right derived from the crown, the general and supreme guardian of all infants . . . In case therefore any guardian abuses his trust, the court will check and punish him; nay sometimes proceed to the removal of him, and appoint another in his stead.").

74. Abramowicz, *supra* note 67, at 1381–91; *see also id.* at 1390 ("[T]he House of Lords concluded that if the Court of Chancery could regulate testamentary guardianships, then so too could it regulate fatherhood, which the law 'has always considered . . . as a trust.'" (quoting Wellesley v. Wellesley (1828) 4 Eng. Rep. 1078, 1081, 1084 (H.L.))).

75. *Id.* at 1385 (citing Powel v. Cleaver (1789) 29 Eng. Rep. 274, 279 (Ch.)).

76. *Id.* at 1387.

> to the true interests of the child; and [therefore] separated the person of the child from the father.[77]

The Chancery regularly terminated paternal rights where the father was insolvent or refused to accept a lucrative legacy for the child.[78] As with terminating guardianships, terminating paternal rights was understood in part as punishment for a breach of parental duty.[79]

This understanding carried over into the American colonies, where "indigent parents who could not support their children simply lost custody of them; [and] the children were indentured as apprentices on such terms and to such parties as the local authorities prescribed."[80]

Post-emancipation, the children of newly freed enslaved people were routinely separated from their parents and bound to their former slaveowners based on "a finding that the parent of the child was vagrant, destitute, of poor character, or incompetent to instill habits of industry."[81] For example, the North Carolina Black Code enacted after the abolition of slavery stated:

> It shall be the duty of the several courts of pleas and quarter-sessions to bind out, as apprentices, all orphans whose estates are of so small value that no person will educate and maintain them for the profits thereof; . . . also the children of free negroes, where the parents with whom such children may live, do not habitually employ their time in some honest, industrious occupation; and all free base born children of color.[82]

Parens patriae was a pretext for the real motivation behind systematic separation of formerly enslaved families: "to maintain[] the social

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77. *Id.* at 1385–86 (quoting de Manneville v. de Manneville (1804) 32 Eng. Rep. 762, 767 (Ch.)).

78. *Id.* at 1385.

79. *Id.* at 1389–90 (quoting Mr. Long Wellesley's Case (1831) 39 Eng. Rep. 243, 247 (Ch.)).

80. Marsha Garrison, *Why Terminate Parental Rights*, 35 STAN. L. REV. 423, 434 (1983).

81. PEGGY COOPER DAVIS, NEGLECTED STORIES: THE CONSTITUTION AND FAMILY VALUES 152–53 (1997).

82. Act of 1854, ch. 5, § 1, 1854 N.C. Sess. Laws 77–78.

isolation needed to perpetuate the institution of slavery."[83] As Peggy Cooper Davis observed, "[a]brogation of the parental bond was a hallmark of the civil death that United States slavery imposed."[84]

Today, termination of parental rights is understood as "tantamount to a civil death penalty."[85] Indeed, the Supreme Court has found that "[f]ew forms of state action are both so severe and so irreversible."[86] Like the Chancery at the time the Eighth Amendment was ratified, courts today invoke the doctrine of *parens patriae* as a justification for terminating parental rights.[87] But despite the intent to protect the child, TPR was, and is at least in part, understood as a punishment for a breach of parental duty.[88]

B. Objective Prong

The categorical analysis begins with objective indicia of national consensus. "[T]he 'clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country's

83. Brief for Law Professors as Amici Curiae Supporting Plaintiffs' Opposition to Motion to Dismiss at 6, D.J.C.V. v. United States (S.D.N.Y 2022) (No. 1:20-CV-05747), 2020 WL 10867965 ("Breaking familial bonds reinforced the notion of the slave as a commodity, rather than as the child of parents, or a member of a community or a nation.").

84. Peggy Cooper Davis, "*So Tall Within"—The Legacy of Sojourner Truth*, 18 CARDOZO L. REV. 451, 452 (1996); s*ee also* DAVIS, *supra* note 81, at 152–53 ("Paternalistic sentiments about the children of former slaves, common at the time among American whites and used (however disingenuously) to justify seizures of this kind, were elaborated into a defense of former slaveholders' urgent efforts to have African-American children and young adults legally bound to their supervision and control . . . Gutman reports that post-emancipation apprenticeship laws typically required a finding that the parent of the child was vagrant, destitute, of poor character, or incompetent to instill habits of industry. Although the rationale was belied by the fact that 'younger children . . . [were often] left to be maintained by the parents,' children were 'taken from their parents under the pretense that . . . [the parents were] incapable of supporting them.' Claims of black parental incompetence were therefore featured—and the theory of black parental incompetence reinforced—in legal actions to bind children to former slaveholders or to secure their release.")

85. *In re* Montgomery, 917 P.2d 949, 954 (1996); *see also In re* K.A.W., 133 S.W.3d 1, 12 (Mo. 2004) (en banc); Agnel Philip, Eli Hager, & Suzy Khimm, *The "Death Penalty" of Child Welfare: In Six Months or Less, Some Parents Lose Their Kids Forever*, PROPUBLICA (Dec. 20, 2022, 08:30 AM), https://www.propublica.org/article/six-months-or-less-parents-lose-kids-forever.

86. Santosky v. Kramer, 455 U.S. 745, 759 (1982).

87. *Id.* at 766.

88. Austin v. United States, 509 U.S. 602, 610–11 (1993).

legislatures.'"[89] Only 15 states make failure to pay a basis for TPR,[90] a number that represents significantly less consensus than any of the Court's prior Eighth Amendment cases.[91] Additionally, there appears to be a consistent direction of change toward abolition of this sentence.[92] In North Carolina, for example, the legislature is considering a bill to eliminate nonpayment as a basis for TPR.[93]

Even where a sentence is prevalent among states, the Court may consider actual sentencing practices to determine whether there is a consensus against its use.[94] Although use varies among states (and among counties within states), failure to make payment is almost never used as the sole basis for TPR.[95] It is typically used as one of several bases cited to support TPR.[96] However, some state courts need only affirm a TPR on one basis.[97] And since nonpayment is the most clear cut basis to affirm, the unpaid foster care bill becomes the sole basis for TPR. North Carolina is particularly notorious for this practice. On at least three occasions, the

89. Graham v. Florida, 560 U.S. 48, 62 (2010) (quoting Atkins v. Virginia, 536 U.S. 304, 312 (2002)).

90. *See supra* notes 28–42 and accompanying text.

91. *See* Miller v. Alabama, 567 U.S. 460, 483–84 (2012) ("In *Graham*, we prohibited life-without-parole terms for juveniles committing nonhomicide offenses even though 39 jurisdictions permitted that sentence. That is 10 *more* than impose life without parole on juveniles on a mandatory basis. And in *Atkins*, *Roper*, and *Thompson*, we similarly banned the death penalty in circumstances in which 'less than half' of the 'States that permit[ted] capital punishment (for whom the issue exist[ed])' had previously chosen to do so." (alteration in original) (citations omitted) (quoting *Atkins*, 536 U.S. at 342)); *Graham*, 560 U.S. at 111 (Thomas, J., dissenting) ("[I]t is not the burden of [a State] to establish a national consensus approving what their citizens have voted to do; rather, it is the 'heavy burden' of petitioners to establish a national consensus against it." (second alteration in original) (quoting Stanford v. Kentucky, 492 U.S. 361, 373 (1989))).

92. *Cf.* Roper v. Simmons, 543 U.S. 551, 565–66 (2005) ("[W]ith respect to the States that had abandoned the death penalty for the mentally retarded since *Penry*, '[i]t is not so much the number of these States that is significant, but the consistency of the direction of change.'" (second alteration in original) (quoting *Atkins*, 536 U.S. at 315)).

93. Child Welfare, Safety and Permanency Reforms, S. 625, 2023 Gen. Assemb., Reg. Sess. (N.C. 2023).

94. *See Graham*, 560 U.S. at 62.

95. *See, e.g.*, *In re* J.P., No. COA14-857, 2015 WL 681131, at *2 (N.C. Ct. App. Feb. 17, 2015); *In re* A.N.R., No. COA12-1042, 2013 WL 793223, at *1 (N.C. Ct. App. Mar. 5, 2013).

96. *See, e.g., In re J.P.*, 2015 WL 681131, at *2; *In re A.N.R.*, 2013 WL 793223, at *1.

97. *See, e.g*., State *ex rel.* I.K., 358 So. 3d 56, 69 (La. Ct. App. 1st Cir. 2022) ("We hereby vacate the portion of the . . . judgment referencing the ground set forth in LSA-Ch.C. art. 1015(5)(c) as a basis for termination; we amend this portion of the . . . judgment to reflect that J.R.'s parental rights are terminated pursuant to LSA-Ch.C. art. 1015(5)(b) for his failure to provide significant contributions to the children's care and support for six consecutive months . . . .").

North Carolina Supreme Court has affirmed TPR solely for nonpayment.[98] The North Carolina Court of Appeals does so routinely.[99] Nevertheless, the unique and unusual nature of this sentencing practice provides additional support for a national consensus against TPR for unpaid foster bills.

C. Subjective Prong

The subjective prong of the analysis requires the Court to consider "the culpability of the offenders at issue in light of their crimes and characteristics, along with the severity of the punishment in question," and "whether the challenged sentencing practice serves legitimate penological goals."[100]

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98. *In re* S.E., 373 N.C. 360, 367, 838 S.E.2d 328, 333 (2020) ("We hold that the findings in this case fully support the trial court's conclusion that grounds exist to terminate respondent-mother's parental rights based upon her willful failure to pay a reasonable portion of the cost of care for the children during their placement in DHHS custody pursuant to N.C.G.S. § 7B-1111(a)(3). The trial court's conclusion that one ground existed to terminate parental rights 'is sufficient in and of itself to support termination of [respondent-mother's] parental rights[,]' and we need not address her arguments challenging the remaining grounds." (alteration in original) (citations omitted)); *In re* D.C., 378 N.C. 556, 564, 862 S.E.2d 614, 619 (2021) ("The trial court's conclusion that a ground for termination existed pursuant to N.C.G.S. § 7B-1111(a)(3) is sufficient in and of itself to support termination of respondents' parental rights. As such, we need not address respondents' arguments regarding N.C.G.S. § 7B-1111(a)(1), (2) and (6)." (citations omitted)); *In re* J.C.J., 381 N.C. 783, 793, 874 S.E.2d 888, 896 (2022) ("In light of our decision that the trial court did not err by concluding that both parents' parental rights in the twins were subject to termination pursuant to N.C.G.S. § 7B-1111(a)(3), we need not address their challenges to the trial court's [other] determination[s] . . . .").

99. *See, e.g.*, *In re* T.D.P, 162 N.C. App. 287, 290–91, 595 S.E.2d 735, 738 (2004) ("Thus, because the trial court in the instant case correctly found that respondent was able to pay some amount greater than zero during the relevant time period, we hold that sufficient grounds existed for termination of respondent's parental rights under N.C. Gen. Stat. § 7B-1111(a)(3). Therefore, we need not address respondent's arguments concerning other grounds for termination of his parental rights.") (citations omitted); *In re J.P.*, 2015 WL 681131, at *2 ("On appeal, respondents challenge all four of the trial court's grounds for termination of their parental rights. But if we determine that the findings of fact support one ground for termination, we need not review the other challenged grounds. After reviewing the record, we conclude that the trial court's findings of fact are sufficient to support at least one ground for termination, failure to pay a reasonable portion of the juveniles' costs of care pursuant to N.C. Gen. Stat. § 7B–1111(a)(3) . . . ." (citations omitted)); *In re A.N.R.*, 2013 WL 793223, at *5 ("We note that in its application of N.C. Gen. Stat. § 7B–1111(a)(3), the trial court made no factual findings regarding Respondent-mother's income or ability to pay for her children's cost of care. However, even if this constitutes error, the error was not prejudicial because we determine the findings of fact satisfied two other grounds for termination.").

100. *See* Graham v. Florida, 560 U.S. 48, 67 (2010).

1. Nature of the Offender

In holding that the Eighth Amendment barred capital punishment for juveniles and low-functioning adults, the Court reasoned that the offenders' cognitive capacity reduced their culpability such that it would be cruel and unusual to sentence them to death; the same reasoning applied to the Court's prohibition against life sentences for juveniles.[101] Cognitive capacity certainly plays a role in TPR cases,[102] but this challenge seeks a categorical rule against TPR for all parents, regardless of cognitive capacity. Here, the culpability question concerns whether a parent is able and willing to pay foster care bills.

State courts typically conduct hearings to determine whether a parent is able to pay before accepting lack of payment as a basis for TPR, though this is not always the case.[103] Since the parent's obligation to remit payment is typically established by an order of the juvenile court, the parent's willful failure to comply with the order would be contempt.[104] But to save the time and expense of initiating contempt proceedings, the state typically pursues TPR instead. After all, TPR for nonpayment does not require a finding of contempt.[105] Indeed, in North Carolina, it does not even require a support order.[106] And unlike contempt, which requires the state to prove that the parent is *presently* able to make custody payments, the TPR route allows the state to rely on prior court findings to establish that a parent is able to make custody payments.[107] In other

101. *Graham*, 560 U.S. at 74–75, 88.

102. *See, e.g.,* Robyn M. Powell, Susan L. Parish, Monika Mitra, Michael Waterstone, & Stephen Fournier, *The Americans with Disabilities Act and Termination of Parental Rights Cases: An Examination of Appellate Decisions Involving Disabled Mothers*, 39 YALE L. & POL'Y REV. 157 (2020); Robyn Powell, *Legal Ableism: A Systematic Review of State Termination of Parental Rights Laws*, 101 WASH. U. L. REV. 423 (2023).

103. *See* JAN S. SIMMONS & SARA DEPASQUALE, *Termination of Parental Rights*, *in* ABUSE, NEGLECT, DEPENDENCY, AND TERMINATION OF PARENTAL RIGHTS PROCEEDINGS IN NORTH CAROLINA 9-1, 9-40 (2022 ed.), https://www.sog.unc.edu/sites/www.sog.unc.edu/files/book_chapter/Chapter%209%20Termination%20of%20Parental%20Rights.pdf.

104. N.C. GEN. STAT. § 7B-2706 (2024).

105. *See* SIMMONS & DEPASQUALE, *supra* note 103, at 9-5 to 9-7.

106. *In re* T.D.P., 164 N.C. App. 287, 289, 595 S.E.2d 735, 737 (2004) ("[R]espondent's assertion that a support order is necessary to require him to pay a portion of the cost of T.D.P.'s foster care is also without merit.").

107. *See* County of Durham v. Burnette, 262 N.C. App. 17, 17, 821 S.E.2d 840, 843 (2018) (holding that contempt for nonpayment requires an accurate assessment of present ability to pay), *aff'd*, 372 N.C. 64, 824 S.E.2d 397 (2019); *In re T.D.P.*, 164 N.C. App at 289, 595 S.E.2d at 737 (holding that TPR for nonpayment is permitted even though a court has not ordered the parent to remit payment).

words, parental rights may be terminated even though the parent lacks the present ability to pay.

Parents who lack the ability to pay certainly lack the requisite culpability for such a severe sentence. But courts have stretched the definition of "ability" into absurdity. In North Carolina, for example, a parent is considered financially capable if they are "able to pay some amount greater than zero."[108] In one case, an incarcerated father earning "40 cents a day or $2.80 a week" in a prison kitchen who used his meager earnings to "purchase[] toiletries and other items to care for himself" as well as "two stamps he used to mail two letters, including [a] birthday letter, to his daughter's social worker" was considered able to pay, and therefore his failure to pay some amount greater than zero satisfied the standard for TPR.[109] Some parents have argued that terminating parental rights based on their financial circumstances violates the Equal Protection Clause of the U.S. Constitution because it discriminates against poor parents.[110] But North Carolina courts have routinely rejected these challenges, reasoning that the statute "applies to all parents equally and allows due consideration of their specific individual financial circumstances."[111]

Parents who are able to pay but do not may indeed be culpable for the offense. But courts have also stretched the definition of "willful" into absurdity. Oftentimes, parents who are able to pay are not unwilling to pay; they simply do not receive adequate notice of their obligation to pay, nor any information about how to remit such payments. Nevertheless, the North Carolina Supreme Court has held that "[t]he absence of a court order, notice, or knowledge of a requirement to pay

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108. *In re* Bradley, 57 N.C. App. 475, 479, 291 S.E.2d 800, 802 (1982); *see also In re* S.E., 373 N.C. 360, 367, 838 S.E.2d 328, 333 (2020); *In re* Clark, 151 N.C. App. 286, 289, 565 S.E.2d 245, 247 (2002); *In re T.D.P.*, 164 N.C. App. at 290, 595 S.E.2d at 738.

109. *In re T.D.P.*, 164 N.C. App. at 295, 595 S.E.2d at 740 (Wynn, J., dissenting); *see also id.* at 295–96, 595 S.E.2d at 741 ("At Respondent's daily wage, he would have to work two months in order to meet this minimum amount of support. Moreover, the uncontroverted evidence indicates Respondent used his minimal wages to purchase toiletries and other items to care for himself. Given that Respondent earned a dollar or less per day, never had more than $ 7.00 in his account and used this money to care for basic needs, I would conclude the clear, cogent and convincing evidence indicates T.D.P.'s father did not have the means or ability to pay a reasonable portion of his daughter's foster care.").

110. *See In re* Biggers, 50 N.C. App. 332, 339–40, 274 S.E.2d 236, 240–41 (1981).

111. *Id.* at 340, 274 S.E.2d at 241; *see also In re* Wright, 64 N.C. App. 135, 138, 306 S.E.2d 825, 827 (1983) ("[T]he statute applies to all persons similarly situated and is reasonably related to the welfare and safety of the public.").

support is not a defense to a parent's obligation to pay reasonable costs, because parents have an inherent duty to support their children."[112]

Courtney Johnson petitioned the U.S. Supreme Court to consider whether the North Carolina Supreme Court's interpretation of the TPR statute "deprives parents in child welfare cases of their rights to due process and equal protection of the law by permitting terminations of parental rights for failing to pay the government money absent any preceding demand for payment."[113] She argued that the "inherent duty" interpretation violated due process because it permits the state to terminate parental rights "even if the government never asked the parent for any money during the relevant six-month period."[114] Additionally, she argued that the interpretation violated equal protection because, unlike parents in private actions, whose rights may only be terminated upon receiving actual notice of their obligation to pay, parents in child welfare cases may have their rights terminated without notice based on their "inherent duty" to provide such payments.[115] The Court denied her petition for certiorari.[116]

Parents who lack the ability to pay or who lack knowledge of their obligation to pay certainly lack the requisite culpability for such a severe

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112. *In re S.E.*, 373 N.C. at 366, 838 S.E.2d at 333; *see also In re* D.C., 378 N.C. 556, 562, 862 S.E.2d 614, 618 (2021) (upholding the inherent duty interpretation); *In re* J.C.J., 381 N.C. 783, 791, 874 S.E.2d 888, 894 (2022) ("In view of the fact that respondent-mother had an inherent duty to support the twins, she is not now entitled to argue that her failure to pay a reasonable portion of the cost of care that her children received while they were outside her home was not willful based upon the absence of an order requiring her to do so."); *In re Wright*, 64 N.C. App. at 138–39, 306 S.E.2d at 827 ("It was ingeniously argued upon behalf of respondent Robinson, the child's father, that G.S. 7A-289.32(4), authorizing parental rights to be terminated upon a parent's failure for six months preceding the filing of the petition to pay a reasonable portion of the cost of caring for the child, is unconstitutional as applied to him, in that the statute does not require notice that payment is due, no notice was received by him, and because he had received public assistance all of his life, he was unaware that anything was expected or required of him. Though this argument is novel, it is unavailing. Very early in our jurisprudence, it was recognized that there could be no law if knowledge of it was the test of its application. Too, that respondent did not know that fatherhood carries with it financial duties does not excuse his failings as a parent; it compounds them."); *In re Biggers*, 50 N.C. App. at 339, 274 S.E.2d at 241 ("All parents have the duty to support their children within their means, and the State, as the *parens patriae* of all children, may enforce that duty to prevent children from becoming public charges"); *In re T.D.P.*, 164 N.C. App. at 289, 595 S.E.2d at 737 ("[R]espondent's assertion that a support order is necessary to require him to pay a portion of the cost of T.D.P.'s foster care is also without merit.").

113. *See* Petition for Writ of Certiorari at i., Courtney v. Beaufort Cnty. Dep't of Soc. Servs., 143 S. Ct. 2616 (2023) (No. 22-6481) (mem.).

114. *Id.* at 12.

115. *Id.* at 12–13.

116. Courtney v. Beaufort Cnty. Dep't of Soc. Servs., 143 S. Ct. 2616 (2023) (mem.).

sentence. Parents who have the ability to pay and who receive sufficient notice of their payment obligation may be culpable for the offense, but their culpability for willful failure to remit payment to the state cannot mitigate the gross disproportionality of the sentence.

2. Severity of the Offense

"Given the Court's hesitancy to infringe on the power of states to impose punishments under the Eighth Amendment, it has often invoked the concept of 'differentness' as a justification for its few interventions."[117] The Court has repeatedly held that death is different due to its "severity and irrevocability."[118] Extending this severity and irrevocability rationale to juvenile offenders, the *Graham* plurality observed that life sentences "share some characteristics with death sentences that are shared by no other sentences;" most notably, life and death sentences both "alter[] the offender's life by a forfeiture that is irrevocable."[119] A life sentence "deprives the convict of the most basic liberties without giving hope of restoration,"[120] and "the remote possibility of [restoration] does not mitigate the harshness of the sentence."[121]

Terminating parental rights is similarly severe and irrevocable. The right of a parent to raise their child is fundamental to civilization and considered one of the "basic civil rights of man."[122] In *Santosky v. Kramer*, the Court held that due process requires clear and convincing evidence of parental unfitness "[b]efore a State may sever completely and

117. Berry, *supra* note 53, at 1069.

118. *See id.* at *1069*, n.119 (collecting cases).

119. Graham v. Florida, 560 U.S. 48, 69 (2010); *see also* William W. Berry III, *Unconstitutional Punishment Categories*, 84 OHIO STATE L.J. 1, 26–27 (2023) ("At a macro level, a decision to sentence a defendant to JLWOP is reaching the same kind of conclusion as a death sentence—the defendant deserves to die in the custody of the state and does not possess a redeemable quality that will permit him to ever return to society. The consequence of the crime is thus death. The time and circumstances of death may not be the same, but the remainder of life will be spent in prison in both cases. Practically, the outcome may be the same for those sentenced to death and those sentenced to JLWOP. The leading cause of death for death row inmates is old age and illness, not execution.").

120. *Graham*, 560 U.S. at 69–70.

121. *Graham*, 560 U.S. at 70; *cf.* Rummel v. Estelle, 445 U.S. 263, 281 (1980) (rejecting Eighth Amendment challenge because life sentence gave defendant possibility of parole).

122. Stanley v. Illinois, 405 U.S. 645, 651 (1972).

irrevocably the rights of parents in their natural child."[123] The Court observed that TPR is unique among deprivations of liberty because, unlike most, it is "final and irrevocable."[124] Indeed, "[f]ew forms of state action are both so severe and so irreversible."[125] A New York Family Court put it in stark terms: "the determination to terminate [a] parental right in the civil area is the jurisprudential equivalent of capital punishment in the criminal area—the declaration in legal terms of the death of the biologic child to the biologic parent, and the death of the biologic parent to the biologic child."[126]

Moreover, the possibility of restoration is remote and does not mitigate the severity of the sentence. Of the 15 states that permit TPR for unpaid foster care bills, only 5 allow those rights to be restored.[127] However, even in states with restoration laws, the circumstances of restoration are extremely limited,[128] and the number actually restored is low.[129]

3. Penological Goals

The final step of the subjective prong analysis requires the Court to consider "whether the challenged sentencing practice serves legitimate penological goals."[130] "Even if the punishment has some connection to a valid penological goal, it must be shown that the punishment is not grossly disproportionate in light of the justification offered."[131] "A

123. Santosky v. Kramer, 455 U.S. 745, 747–48 (1982).

124. *Id.* at 759.

125. *Id.*

126. *In re* Guardianship & Custody of Terrance G., 731 N.Y.S.2d 832, 836 (N.Y. Fam. Ct. 2001).

127. *See Reinstatement of Parental Rights State Statute Summary*, NAT'L CONF. STATE LEGISLATORS, https://www.ncsl.org/human-services/reinstatement-of-parental-rights-state-statute-summary (Jan. 17, 2020); *supra* notes 28–42 and accompanying text.

128. *See How Have States Implemented Parental Rights Restoration and Reinstatement?*, CASEY FAM. PROGRAMS (Feb. 5, 2018), https://www.casey.org/how-have-states-implemented-parental-rights-restoration-and-reinstatement/; LaShanda Taylor Adams, *Backward Progress Toward Reinstating Parental Rights*, 41 N.Y.U REV. L. & SOC. CHANGE 507, 519 (2017).

129. *See, e.g.*, Farrah Mina, *Reunifications are Rare Under Minnesota Law to Restore Parental Rights*, IMPRINT (July 19, 2023, 2:00 AM), https://imprintnews.org/top-stories/reunifications-are-rare-under-minnesota-law-to-restore-parental-rights/243104.

130. Graham v. Florida, 560 U.S. 48, 67–68 (2010).

131. *Id.* at 72.

sentence lacking any legitimate penological justification is by its nature disproportionate to the offense."[132]

First, TPR does not serve the penological goal of deterrence. For parents who are unable to pay, TPR serves no deterrent effect. It will not motivate them to take a fourth or fifth job to satisfy their debts, nor is it reasonable to expect them to. For parents who are able to pay, TPR has little to no deterrent effect on individual parents. Empirical evidence overwhelmingly disputes the proposition that the severity of the sentence deters misconduct; and given the unusual nature of this sentence, there is little certainty of punishment for nonpayment, and therefore little to no deterrent effect.[133] For the same reasons, TPR in any individual case is unlikely to deter other parents from failing to pay. Beyond the ineffectiveness of TPR as a deterrent, invoking the specter of such severe and disproportionate punishment proves that cruelty is the point of the entire enterprise. Even assuming that deterrence is plausible, "any limited deterrent effect provided by [TPR] is not enough to justify the sentence."[134]

Retribution may be the most conceivable justification for this sentence and states that assert a retributive justification are essentially conceding that TPR is at least in part intended to punish, thereby satisfying the first step of the Eighth Amendment analysis. In *Graham* the Court found "Society is entitled to impose severe sanctions . . . to express its condemnation of the crime and to seek restoration of the moral imbalance caused by the offense."[135] Offenses deserving such condemnation share a common characteristic: they harm individuals and society at large. Punishment for these crimes may not always correct the

132. *Id.* at 71; *see also* Daniel S. Nagin, *Deterrence in the Twenty-First Century*, 42 CRIME & JUST. 199, 206 (2013) ("The theory of deterrence is predicated on the idea that if state-imposed sanction costs are sufficiently severe, criminal activity will be discouraged, at least for some. Thus, one of the key concepts of deterrence is the severity of punishment. Severity alone, however, cannot deter. There must also be some possibility that the sanction will be incurred if the crime is committed. Indeed the argument that the probability of punishment, not severity, is the more potent component of the deterrence process goes back to Beccaria, who observed that 'one of the greatest curbs on crime is not the cruelty of punishments, but their infallibility . . . . The certainty of punishment even if moderate will always make a stronger impression.'").

133. *See Graham*, 560 U.S. at 72. Moreover, invoking deterrence as a justification concedes that TPR is at least in part intended to punish, thereby satisfying the first step of the Eighth Amendment analysis. *See* Tyler v. Hennepin County, 598 U.S. 631, 649–50 (2023) (Gorsuch, J., concurring).

134. *Graham*, 560 U.S. at 72.

135. *Id.* at 71.

moral imbalance or make the victims whole, but it is a conceivable step towards making society whole. TPR for unpaid bills does not make anyone whole: not the parent, the child, or the state.

In theory, garnishing wages might make the state whole. But in reality, these collection practices cost the state more money than it can collect.[136] TPR is even more costly. It consumes a significant amount of time and resources to gather and present evidence and to defend a decision on appeal.[137] Indeed, some states are reluctant to pursue TPR because of the cost of doing so. The process places parents in a more precarious financial situation and further prevents them from making payment.[138] TPR simply cannot make the state whole.

Separating a child from their parent cannot make the child whole. A parent's inability or failure to compensate the state does not reflect on the parent's fitness to care for the child. Severing these sacred bonds for an offense that is wholly unrelated to the parent's fitness causes far greater harm to individuals (parents, children, and kin) and society at-large than a parent's failure to reimburse the state. In this context, TPR does not correct a moral imbalance.[139] It creates one.

A parent's failure to make custody payments to the custodial parent may cause harm to the custodial parent and children, and this harm may serve as retributive justification for terminating parental rights. But failure to make custody payments to the state does not cause the same type or degree of harm to justify such severe punishment. Unlike states, private individuals do not receive millions of dollars in federal aid to support children in their custody. Unlike states, custodial parents often

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136. *See* Letter from Admin. for Child. & Fams., *supra* note 24.

137. Santosky v. Kramer, 455 U.S. 745, 763 (1982) (The State's ability to assemble its case almost inevitably dwarfs the parents' ability to mount a defense. No predetermined limits restrict the sums an agency may spend in prosecuting a given termination proceeding. The State's attorney usually will be expert on the issues contested and the procedures employed at the factfinding hearing, and enjoys full access to all public records concerning the family. The State may call on experts in family relations, psychology, and medicine to bolster its case. Furthermore, the primary witnesses at the hearing will be the agency's own professional caseworkers whom the State has empowered both to investigate the family situation and to testify against the parents. Indeed, because the child is already in agency custody, the State even has the power to shape the historical events that form the basis for termination.").

138. *See* Cancian, Cook, Seki, & Wimer, *supra* note 23.

139. *See* AM. BAR ASS'N, TRAUMA CAUSED BY SEPARATION OF CHILDREN FROM PARENTS: A TOOL TO HELP LAWYERS, CHILDREN'S RIGHTS LITIGATION COMMITTEE (2020), https://www.americanbar.org/content/dam/aba/publications/litigation_committees/childrights/child-separation-memo/parent-child-separation-trauma-memo.pdf.

rely upon custody support payments to provide for their children. A government-owed debt cannot justify the permanent separation of familial bonds. For these reasons, retribution cannot serve as a justification for this sentence. Even if there were some valid connection to retribution, the punishment would still be grossly disproportionate in light of the justification offered.[140]

Incapacitation is often invoked as a justification for caging individuals whom the state deems a threat to society.[141] Separated from society, they can do no harm to others.[142] Removal of the child and placement into temporary care may be justified when a parent poses an immediate risk to the child's life. And a parent's incorrigible unfitness may justify TPR. But a parent's failure to reimburse the state does not pose a risk to the child or to the public and cannot justify permanent separation from their children.

Finally, TPR for nonpayment does not serve the penological goal of rehabilitation. Indeed, "[t]he penalty forswears altogether the rehabilitative ideal."[143] By denying a parent the possibility of reunification, the state makes an irrevocable judgement about the parent's fitness. In this way, "the absence of [such] rehabilitative opportunities . . . makes the disproportionality of the sentence all the more evident."[144] States may point to restoration laws as evidence for the rehabilitative justification but the criteria for restoration negate any rehabilitative justification. First, restoration laws are wholly unconcerned with the parent's rehabilitation.[145] They are solely concerned with the state's failure to find a permanent home for the child. For example, in 12 states, "reinstatement is available only to older children who have not attained a permanent placement,"[146] and in 18 states, a reinstatement petition can

140. *See Graham*, 560 U.S. at 71–72, 74.

141. *See* 1 WAYNE LAFAVE, SUBSTANTIVE CRIMINAL LAW § 1.5(a)(2) (2003) (explaining theories of punishment).

142. *See id.*

143. *Graham*, 560 U.S. at 74.

144. *Id.*

145. *See* Adams, *supra* note 128, at 521 ("[I]t is not surprising that reinstatement laws and policies reflect bias against terminated parents. Once adjudicated as 'bad,' it is nearly impossible for them to shed the label and prove that they are 'good' enough to have their parental rights reinstated." (citation omitted)).

146. CHILD INFO. GATEAWAY & CHILD.'S BUREAU, GROUNDS FOR INVOLUNTARY TERMINATION OF PARENTAL RIGHTS 4 n.18 (2021), https://www.childwelfare.gov/pubpdfs/groundtermin.pdf ("Delaware (age 14), Hawaii (age 14), Illinois (age 13), Louisiana (age 15), New York (age 14), North Carolina (age 12), Oklahoma (age 14), Oregon (age 12), Texas (age 12), Utah (age 12), Virginia (age 14), and Washington (age 12)").

only be filed "if a permanent placement has not been achieved within a specific timeframe."[147] Second, even if restoration laws could be construed as rehabilitative, the criteria for restoration make the possibility of restoration so remote as to functionally deprive parents of any hope that they will be reunited with their children. Restoration laws in the abstract may appear rehabilitative, but the criteria indicate a concern for the child's permanency, not the parents' rehabilitation, and "the remote possibility of [restoration] does not mitigate the harshness of the sentence."[148]

CONCLUSION

By definition, sentences that are cruel and unusual under the Eighth Amendment impact a small number of individuals. But these most severe and irrevocable sentences typically impact society's most marginalized people—in this case, parents languishing in poverty, unable to provide for their children; children suffering from abuse and neglect, at risk of becoming legal orphans; and kin, the grandparents, aunts, uncles, cousins, and extended family members who themselves are struggling to get by and do not have the resources to support additional children. The sentence itself may impact a small number of marginalized parents, but the devastating effects of TPR ripple throughout the entire family network and disrupt generations past and future. And the constant threat of this sentence plagues tens of thousands of families living in states with such laws. Holding that TPR in these circumstances violates the Eight Amendment would acknowledge our society's evolving standards of decency and erase the stain of slavery inherent in this cruel and unusual punishment.

147. *Id.* at 4 n.17 ("Arkansas (3 years), California (3 years), Colorado (3 years), Delaware (2 years), Georgia (3 years), Hawaii (1 year), Illinois (3 years), Maine (1 year), Minnesota (4 years), New York (2 years), North Carolina (3 years), Oklahoma (3 years), Oregon (18 months), Texas (2 years), Utah (2 years), Virginia (2 years), Washington (3 years), and Wisconsin (1 year)").

148. *Graham*, 560 U.S. at 70 (citation omitted).