

**LOW INCOME, POOR OUTCOME: UNEQUAL TREATMENT
OF INDIGENT DEFENDANTS**

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ABSTRACT

It is no secret that the law treats poor people worse than rich ones. This is true in criminal law and everywhere else. But some laws do not simply result in disparate impact upon the poor—the way they are written explicitly targets or disadvantages the poor. This Article examines the spectrum of expressly biased laws in four major categories. First, laws

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that criminalize poverty: bans on poor housing or no housing, traffic laws that require nothing more than paying for things, and cash bail that imprisons people without access to credit. Second, courts impose an enormous number of unwaivable fees at every step of the criminal justice system, and failure to pay results in incarceration—a modern day debtor prison. Third, many criminal procedure rules place the needy on unequal footing. Only indigent defendants are required to suffer reduced expectations of privacy, disclose certain information, face judicial scrutiny, endure low caps on what their attorneys can be paid, or go into hearing without an attorney. And fourth, after conviction, these defendants face unique hurdles to recover for wrongful imprisonment or expensive expungement processes.

I. INTRODUCTION

The law benefits the rich in a thousand subtle ways. Defendants with wealth and robust social networks can often convince courts to impose lower sentences by organizing letter writing campaigns highlighting their good character.¹ Poor families cannot get personal letters from Bill Gates and Kofi Annan asking a court for mercy during sentencing hearings, but rich families can.² If an indigent defendant is assigned a lackluster defense counsel, and that counsel fails to properly preserve a legal argument, that argument will likely be barred on appeal through no fault of the defendant.³ Government regulators may decide to not even bother pursuing rich criminals because of the significant expense it would entail.⁴

Even systems designed to be equitable can usually be twisted to benefit those with means. The Individuals with Disabilities Education Act provides a number of rights with the intent of ensuring all children with disabilities have free, appropriate support from the public school system that addresses their unique needs.⁵ It was intended to share its benefits

1. Peter J. Henning, *The Challenge of Sentencing White-Collar Defendants*, N.Y. TIMES: DEALBOOK (Feb. 25, 2013, 2:14 PM), <https://dealbook.nytimes.com/2013/02/25/the-challenge-of-sentencing-white-collar-defendants/> [<https://web.archive.org/web/20211017173710/https://dealbook.nytimes.com/2013/02/25/the-challenge-of-sentencing-white-collar-defendants/>].

2. *See id.*

3. *E.g.*, *Darcy v. State*, 488 S.W.3d 325, 327–28 (Tex. Crim. App. 2016); *People v. Knapp*, 624 N.W.2d 227, 237–38 (Mich. Ct. App. 2001).

4. Eric Levitz, *American Winner: Treasury Secretary Steven Mnuchin Embodies the Plutocratic Principle That a Crisis is a Terrible Thing to Waste*, N.Y. MAG. (Apr. 27, 2020), <https://nymag.com/intelligencer/2020/04/steven-mnuchin-coronavirus-bailout.html> [<https://web.archive.org/web/20211004180123/https://nymag.com/intelligencer/2020/04/steven-mnuchin-coronavirus-bailout.html>].

5. 20 U.S.C. § 1400(d)(1)(a) (2010).

equally, and Congress has amended the law multiple times to make sure its benefits are accessible to poor students.⁶ Yet wealthy families are far more likely to invoke the law to require school districts to provide better services to their children, despite the fact that schools of wealthy children are probably providing better special education services in the first place.⁷ The Supreme Court has largely been unconcerned with this reality, saying “the Equal Protection Clause does not require absolute equality or precisely equal advantages” in the realm of education.⁸

But this Article is not about the subtle ways that the wealthy get better outcomes from the law. It is about the unsubtle. Those legal rules and systems that, by design, hurt the poor and help the rich. Rules that directly criminalize or disadvantage those in poverty or unabashedly favor wealth.

Criminal law is filled with explicitly inequitable rules like this. They start before any crime is charged and extend far past when the conviction is secured. Due to the nature of a typical criminal defendant, unequal rules have far-reaching impacts. Outside of white-collar crime, defendants tend to be poor. An estimated 90% of people accused of capital murder are indigent when arrested.⁹ Overall, 80% of defendants make little enough to qualify for appointed counsel.¹⁰

From the earliest days of this country, laws purposefully excluded the poor. The Articles of Confederation said that “paupers, vagabonds, and fugitives from justice” were excepted from “all privileges and immunities of free citizens in the several States.”¹¹ Early laws permitted the poor to be jailed or indentured, barred the poor from moving into communities, and criminalized begging, indebtedness, and failure to be become self-supporting.¹² Even into the 20th century, some states denied people on public assistance the right to vote.¹³

All of these problems persist today, though they have shifted in form. As the Article will go on to document, some of the most glaring examples are:

6. Eloise Pasachoff, *Special Education, Poverty, and the Limits of Private Enforcement*, 86 NOTRE DAME L. REV. 1413, 1417–18 (2011).

7. *Id.* at 1426–27.

8. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 24 (1973).

9. Douglas W. Vick, *Poorhouse Justice: Underfunded Indigent Defense Services and Arbitrary Death Sentences*, 43 BUFF. L. REV. 329, 334 (1995).

10. William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 YALE L.J. 1, 28 (1997).

11. ARTICLES OF CONFEDERATION OF 1781, art. IV, para. 1.

12. Jordan C. Budd, *A Fourth Amendment for the Poor Alone: Subconstitutional Status and the Myth of the Inviolable Home*, 85 IND. L.J. 355, 364 (2010).

13. *Id.* And of course, poll taxes limited the right to vote until the Twenty-Fourth Amendment.

- In many states, if a poor defendant cannot pay court fees for their public defender, they can be imprisoned, whereas if a rich person cannot pay their attorney, no such sanction is available;
- Sarasota, Florida makes it a crime for *homeless* people to sleep in public, but allows people who own homes to do so;
- Multiple states allow rich car owners to buy their way out of compliance of car insurance laws, but poor drivers are forced to comply without assistance;
- A number of states not only pay lousy wages to public defenders, they place hard caps on how much public defenders can spend on a case, ensuring they cannot do their job properly;
- Poor people are not given attorneys for critical, criminal adjacent settings.
- Several states require indigent defendants, but not wealthy ones, to disclose to the prosecution their theory of the case;
- Louisiana charges \$550 to expunge a criminal record, and does not have any sort of fee waivers available; and
- New Hampshire allows ordinary plaintiffs to sue the government for up to \$475,000 in tort damages, but lowers that cap to \$20,000 for plaintiffs suing because they were wrongfully convicted and imprisoned.

This Article proceeds in five parts. Part II looks at legal regimes that directly criminalize the act of being poor. Anti-homelessness laws are a prime example. These are statutes that make it illegal to exist for those living on the streets. Would be-defendants have no choice about whether to violate the law, and cities enforcing them are rarely willing to help them find a place to stay. Perhaps less considered are traffic laws. Though driving a car is a necessity for work and life in all but select cities, there are a great many laws that one can break for driving while poor. These include lack of insurance, lack of registration, lack of a driver license, and lack of adequate maintenance. But unlike other essential activities, such as health care, the government makes no effort to help poor people who cannot afford to comply with these laws. Once a person is brought before a judge for any crime, many jurisdictions use cash bail to determine whether they should await resolution of the case behind bars or while free. This often boils down to a question of nothing more than whether the person has money, or at least access to credit.

Part III examines debtor prisons. If one is convicted of a crime, they will often be fined. And before any conviction is entered, people start racking up fees in the criminal justice system. Most worrisome, people are levied additional costs if they exercise their right to an attorney, meaning there is a price to exercising one's rights. If people cannot pay these fines

or fees, they will be incarcerated, even though debtor prisons are thought of as a relic of a bygone era. Sometimes, people only owe money to private parties, not the government. But whether public or private, failure to pay these costs can still result in imprisonment. Absence of fee waivers ensures that these debts will be paid, either through money spent or time served.

Part IV is about rules that govern the procedure of criminal cases. To begin, poor people are entitled to less privacy from government searches. This is because apartments receive less legal protection than houses, and because welfare programs strip applicants of privacy in ways that other government aid programs do not. Once a poor person is accused of a crime, many jurisdictions subject indigent defendants to disclosure and scrutiny requirements that rich people can skip. Once a poor defendant is appointed a defense attorney, that attorney may find a hard cap on how much they can be compensated, ensuring they will not be able to provide zealous advocacy. And sometimes, a poor defendant will simply not be given an attorney at all, giving them no hope at all of a fair shake.

Part V considers post-conviction matters. Those who are later exonerated face high hurdles to collect a payment for wrongful imprisonment, and that payment is tightly limited. These restrictions do not exist for other types of claimants who sue the government. And if someone wishes to get their criminal record expunged, they may find high costs with no fee waiver available, meaning that rich people can clean their records, but poor people must continue living with them.

Part VI concludes.

II. CRIMINALIZING POVERTY

There are many laws that punish people, often with jail time, for no other reason than they are wanting for cash. This is not a niche part of the justice system either. A substantial portion of prison and jail populations are there because of one of these laws.

A. Outlawing Cheap Housing or No Housing

Anti-homelessness laws criminalize poverty. Homelessness as we know it is the direct result of government policy: steep cuts to affordable housing programs and shutting down mental health facilities without replacements.¹⁴ Legal aid groups used to fight against substandard

14. NAT'L COAL. FOR THE HOMELESS, *VULNERABLE TO HATE: A SURVEY OF BIAS-MOTIVATED VIOLENCE AGAINST PEOPLE EXPERIENCING HOMELESSNESS IN 2016–2017* 7

housing.¹⁵ Then they had to fight for any housing at all.¹⁶ Finally, they simply tried to stop homeless people from being jailed.¹⁷ They have many potential clients. More than half a million people experienced homelessness in 2017.¹⁸

After creating the problem of homelessness, government policy now seeks to punish it. Cities have banned loitering, loafing, vagrancy, sitting or lying down in public, begging, or living in vehicles.¹⁹ These policies have become more prevalent in recent years.²⁰ Violations of these sorts of laws can lead to jail time, not just a fine or an order by police to move on.²¹ Because there are hundreds of thousands more homeless people than there are available shelter beds,²² homeless people have no choice but to remain out in public.

Sarasota, Florida, ranks as the “meanest” city in the country when it comes to anti-homelessness laws.²³ Two times it passed a law prohibiting sleeping outside, and twice a court struck it down.²⁴ Undeterred, the City passed it a third time in August 2005, which gave police the power to arrest if they find a person asleep outside who “when awakened states that he or she has no other place to live.”²⁵ The third time proved the charm for the

(2018), http://nationalhomeless.org/wp-content/uploads/2018/12/hate-crimes-2016-17-final_for-web.pdf [https://web.archive.org/web/20211004180214/http://nationalhomeless.org/wp-content/uploads/2018/12/hate-crimes-2016-17-final_for-web.pdf].

15. Andrea Sachs, *A Right to Sleep Outside?: Law Designed to Keep Homeless Out of Public Areas Spurs Lawsuits*, 79 A.B.A. J. 38 (Aug. 1993) https://www.jstor.org/stable/27834915?read-now=1&refreqid=excelsior%3A6ba6348383d8e7b1311b149be11b6f&seq=1#page_scan_tab_contents [<https://web.archive.org/web/20211017174429/https://www.jstor.org/stable/27834915?read-now=1&refreqid=excelsior%3A6ba6348383d8e7b1311b149be11b6f&seq=1>].

16. *Id.*

17. *Id.*

18. NAT’L COAL. FOR THE HOMELESS, *supra* note 14, at 8.

19. Sara K. Rankin, *Punishing Homelessness*, 22 NEW CRIM. L. REV. 99, 109 (2019). These statutes are not unique to the United States. *E.g.*, Deena A. Zakim, *Housing Over Handcuffs: The Criminalization of Homelessness in Hungary*, 37 SUFFOLK TRANSNAT’L L. REV. 135 (2014).

20. Caleb Detwiler, *Breaking Bread and the Law: Criminalizing Homelessness and First Amendment Rights in Public Parks*, 51 VAL. U. L. REV. 695, 705 (2017).

21. Donald Saelinger, *Nowhere to Go: The Impacts of City Ordinances Criminalizing Homelessness*, 13 GEO. J. POVERTY L. & POL’Y 545, 552–53 (2006).

22. Jamie Michael Charles, “America’s Lost Cause”: *The Unconstitutionality of Criminalizing Our Country’s Homeless Population*, 18 B.U. PUB. INT. L.J. 315, 318 (2009).

23. NAT’L COAL. FOR THE HOMELESS & NAT’L LAW CTR. ON HOMELESSNESS & POVERTY, *A DREAM DENIED: THE CRIMINALIZATION OF HOMELESSNESS IN U.S. CITIES* 24 (2006), <http://www.nationalhomeless.org/publications/crimreport/report.pdf> [<https://web.archive.org/web/20211008104645/http://www.nationalhomeless.org/publications/crimreport/report.pdf>].

24. *Id.* at 25.

25. *Id.*

court, which upheld the law.²⁶ It is still on the books, and it forbids a person from sleeping outside if they “when awakened [tell police] that he or she has no other place to live.”²⁷

A common joke about the legal system from Anatole France is that “[t]he majestic equality of the la[w], . . . forbid[s] rich and poor alike to sleep under the bridges, to beg in the streets, and to steal their bread.”²⁸ But the Sarasota law takes it a step further: a rich person *could* sleep under the bridge, because when questioned by the police, they could truthfully answer they have somewhere else to live. Only the poor are forbidden. But the joke was lost on Florida lawmakers, who thought the law was such a brilliant idea that copycat laws spread across the state like a virus.²⁹

These laws are not just for show. They are often brutally enforced through police “sweeps” to clear homeless people out of an area, often during tourism season³⁰ or before large events.³¹ Miami, Florida launched a calculated campaign to rid its streets of the homeless by having police look for any pretext to arrest homeless people, research laws that could be used to arrest homeless people, and target food distributors to make life harder for the homeless.³²

Laws also fail to protect the homeless. Hundreds of hate crimes have been documented against homeless people over the years, many of them fatal.³³ Yet federal law does not include homelessness in its definition of hate crimes.³⁴ Only a smattering of states protect homelessness in their respective hate crime laws.³⁵ The homeless are largely overlooked by the decennial census count.³⁶

26. *Id.* at 26.

27. SARASOTA, FLA., CITY CODE ch. 34, art. V, § 34-41(c) (1971).

28. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 799 (2007) (Stevens, J., dissenting).

29. *E.g.*, CLEARWATER, FLA., CITY CODE ch. 21, art. 1, § 21.21(3)(e) (2012); BRADENTON, FLA., CITY CODE ch. 54, art. 1, § 54-12(c) (2006); EDGEWATER, FLA., CITY CODE, ch. 12, art. 6, § 12-101(c) (2016); OCALA, FLA., CITY CODE, art. 4, div. 2, § 46-213(g) (1994).

30. Charles, *supra* note 22, at 320.

31. Tami Iwamoto, *Adding Insult to Injury: Criminalization of Homelessness in Los Angeles*, 29 WHITTIER L. REV. 515, 524 (2007).

32. *Pottinger v. Miami*, 810 F. Supp. 1551, 1561 (S.D. Fla. 1992).

33. NAT’L COAL. FOR THE HOMELESS, *supra* note 14, at 4.

34. The Matthew Shepard and James Byrd Jr. Hate Crimes Prevention Act of 2009, 18 U.S.C. § 249 (2009).

35. NAT’L COAL. FOR THE HOMELESS, *supra* note 14, at 29–34.

36. Brendan Kearns, *Down for the Count: Overcoming the Census Bureau’s Neglect of the Homeless*, 8 STAN. J.C.R. & C.L. 155, 156 (2012).

A step up from homelessness, mobile homes are a popular form of housing for low-income, rural Americans.³⁷ In 1941, the Supreme Court struck down a California law that prohibited bringing an indigent person into the state.³⁸ Several towns in Arkansas have tried the next best thing: criminalizing the presence of indigent people within their borders by targeting mobile homes. These towns passed laws that banned mobile homes valued at less than an arbitrary level.³⁹ By the law's terms, if a person had a gold-plated trailer, they could stay. But if they bought it on the cheap, they had to leave.

B. Traffic Laws that Hinge on Wealth

Traffic laws are littered with offenses that measure nothing more than the wealth of the defendant. Nearly every state requires drivers to maintain insurance.⁴⁰ Given that the average annual cost of auto insurance for a good driver with good credit is about \$1,500,⁴¹ these laws amount to a requirement that a person have money in order to drive legally. The average cost for a good driver with bad credit is \$2,500.⁴²

The point on credit scores is worth emphasizing. Credit scores are rife with errors,⁴³ may be jacked up through no fault of the consumer,⁴⁴ and are

37. Katherine MacTavish et al., *Housing Vulnerability Among Rural Trailer-Park Households*, 13 GEO. J. POVERTY L. & POL'Y 95, 95 (2006).

38. *Edwards v. California*, 314 U.S. 160, 174–75, 177 (1941).

39. *Kilpatrick v. City of Newark*, EQUAL JUST. UNDER L. <https://equaljusticeunderlaw.org/kilpatrick-v-city-of-newark> [<https://web.archive.org/web/20211017175012/https://equaljusticeunderlaw.org/kilpatrick-v-city-of-newark>] (last visited Apr. 13, 2020); *Wallington v. City of McCrory*, EQUAL JUST. UNDER L., <https://equaljusticeunderlaw.org/case-buffin-v-san-francisco-1> [<https://web.archive.org/save/https://equaljusticeunderlaw.org/case-buffin-v-san-francisco-1>] (last visited Apr. 13, 2020).

40. Emily Delbridge, *These States Do Not Require Auto Insurance*, BALANCE (July 23, 2020), <https://www.thebalance.com/states-with-no-car-insurance-requirements-4121731> [<https://web.archive.org/save/https://www.thebalance.com/states-with-no-car-insurance-requirements-4121731>]. For examples of these sorts of “financial responsibility” laws, see OHIO REV. CODE § 4509.01.

41. Lisa Green, *Average Car Insurance Costs in 2020*, NERD WALLET (Aug. 20, 2021), <https://www.nerdwallet.com/blog/insurance/car-insurance-basics/how-much-is-car-insurance/> [<https://web.archive.org/web/20211017175503/https://www.nerdwallet.com/article/insurance/how-much-is-car-insurance/>].

42. *Id.*

43. CHI CHI WU & BIRNY BIRNBAUM, CREDIT SCORING AND INSURANCE: COSTING CONSUMERS BILLIONS AND PERPETUATING THE ECONOMIC RACIAL DIVIDE 7 (2007), http://www.cej-online.org/NCLC_C EJ_Insurance_Scoring_Racial_Divide_0706.pdf [https://web.archive.org/save/http://www.cej-online.org/NCLC_C EJ_Insurance_Scoring_Racial_Divide_0706.pdf].

44. *Id.* at 8.

strongly correlated with income⁴⁵ and race.⁴⁶ They are calculated based on a person's track record of bill-paying, types and age of accounts, whether they have debts in collection, and amount of outstanding debt.⁴⁷ Given that poor people will have a harder time paying off debts, and the racial wealth gap means nonwhite people are more likely to be poor,⁴⁸ it is easy to see how the pernicious correlation exists. Credit scoring systems have also been sued for disparate, negative impacts on minorities.⁴⁹

More than nine in ten auto insurers use credit scores to determine rates.⁵⁰ People with lower credit scores are funneled toward higher priced insurance plans, a fact the Supreme Court has greeted with nonchalance.⁵¹ By linking insurance rates to credit scores, the law in virtually every state mandates that poor people must pay more to stay in compliance with the law. And it is private corporations, not government actors, who get to decide how much people must pay to stay in compliance.

Falling out of compliance with the law can be costly. A woman in Montgomery, Alabama was ticketed for operating her vehicle without insurance.⁵² After she fell behind on fees associated with the tickets, her license was suspended.⁵³ Out of necessity, she kept driving without a license, resulting in more fines.⁵⁴ This continued for years until she was arrested at home and was sent to jail for failure to pay.⁵⁵

Some states let rich people buy their way out of the law. Virginia lets drivers get out of buying insurance if they pay the state \$500 per year.⁵⁶

45. Stefania Albanesi, Giacomo DeGiorgi & Jaromir Nosal, *Credit Growth and the Financial Crisis: A New Narrative*, (Nat'l Bureau of Econ. Rsch., Working Paper No. 23740, 2017), https://www.nber.org/system/files/working_papers/w23740/w23740.pdf [https://web.archive.org/web/20211017175643/https://www.nber.org/system/files/working_papers/w23740/w23740.pdf].

46. Sarah L. Rosenbluth, *Fair Housing Act Challenges to the Use of Consumer Credit Information in Homeowners Insurance Underwriting: Is the McCarran-Ferguson Act a Bar?*, 46 COLUM. J.L. & SOC. PROBS. 49, 71 (2012).

47. WU & BIRNBAUM, *supra* note 43, at 2.

48. *Id.* at 2.

49. *Ojo v. Farmers Grp., Inc.*, 356 S.W.3d 421, 422 (Tex. 2011); *Owens v. Nationwide Mut. Ins. Co.*, No. 3:03-CV-1184-H, 2005 U.S. Dist. LEXIS 15701 (N.D. Tex. Aug. 2, 2005); *Dehoyos v. Allstate Corp.*, 345 F.3d 290 (5th Cir. 2003).

50. WU & BIRNBAUM, *supra* note 43, at 4.

51. *Safeco Ins. Co. of Am. v. Burr*, 551 U.S. 47, 53–54 (2007).

52. Christopher D. Hampson, *State Bans on Debtors' Prisons and Criminal Justice Debt*, 129 HARV. L. REV. 1024, 1025 (2016).

53. *Id.*

54. *Id.*

55. *Id.* at 1025–26.

56. *Uninsured Motor Vehicle Fee*, VA. DEP'T MOTOR VEHICLES, https://www.dmv.virginia.gov/vehicles/#uninsured_fee.asp [<https://web.archive.org/web/20211014131735/https://www.dmv.virginia.gov/vehicles/>] (last visited May 11, 2020).

Known as the Virginia Uninsured Motor Vehicle (UMV) fee, it does not provide any insurance coverage; it only gets drivers out of purchasing insurance. That might not sound like a lot, but the Federal Reserve found in 2018 that nearly half of the county would be unable to cover an unexpected expense of \$400.⁵⁷ So one cannot assume even a \$500 buyout is accessible to everyone. Other states offer alternatives to purchasing insurance, such as putting up a cash bond or money deposit to cover the cost of a crash.⁵⁸ Wisconsin, for example, allows a person to provide \$60,000 cash to the Secretary of State in order to get out having insurance.⁵⁹ Almost every state offers a cash deposit in lieu of insurance option, with the cost ranging from \$10,000 to \$160,000.⁶⁰ These laws offer an explicit loophole for rich people to avoid compliance.

More informally, wealthy defendants may be able to buy their way out of other crimes. In New York, prosecutors offered a defendant a choice between pleading to a misdemeanor with \$5,000 in restitution or going to trial on a felony.⁶¹ The defendant was indigent and could not afford the restitution, so the prosecution went forward with the felony.⁶² This was challenged as unequal treatment on the basis of wealth, but the court rejected the argument.⁶³

If someone cannot afford insurance, they may not legally drive. Though federal programs exist to help with basic necessities like food⁶⁴ or housing,⁶⁵ nothing exists to help poor people get car insurance. This is despite the fact that the federal government has recognized that medical

57. BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM, REPORT ON THE ECONOMIC WELL-BEING OF U.S. HOUSEHOLDS IN 2017 2 (2018), <https://www.federalreserve.gov/publications/files/2017-report-economic-well-being-us-households-201805.pdf> [<https://web.archive.org/save/https://www.federalreserve.gov/publications/files/2017-report-economic-well-being-us-households-201805.pdf>].

58. *E.g.*, WIS. STAT. § 344.30 (2021).

59. WIS. STAT. § 344.37 (2021).

60. Aubrey Cohen, *States Where You Might Not Have to Get Car Insurance*, NERD WALLET (Aug. 10, 2015), <https://www.nerdwallet.com/blog/insurance/auto/states-not-get-car-insurance/> [<https://web.archive.org/save/https://www.nerdwallet.com/blog/insurance/auto/states-not-get-car-insurance/>].

61. *People v. Memminger*, 469 N.Y.S.2d 323, 324 (N.Y. Sup. Ct. 1983).

62. *Id.*

63. *Id.* at 325. *But see* *Moody v. State*, 716 So.2d 562, 565 (Miss. 1998) (striking a program that allowed defendants who wrote bad checks to get out of prosecution if they paid a \$500 fine plus restitution).

64. *Supplemental Nutrition Assistance Program (SNAP)*, BENEFITS.GOV, <https://www.benefits.gov/benefit/361> [<https://web.archive.org/web/20211017180617/https://www.benefits.gov/benefit/361>] (last visited Jan. 18, 2021).

65. John J. Infranca, *Housing Resource Bundles: Distributive Justice and Federal Low-Income Housing Policy*, 49 U. RICH. L. REV. 1071, 1071 (2015).

insurance—which also only functions if there is broad buy-in from the public—is necessary and should be supported.

When Congress passed the Affordable Care Act, better known as Obamacare, it required everyone to get health insurance or else face a “shared responsibility payment.”⁶⁶ But recognizing that low-income people might not be able to afford health insurance, the law provided subsidies to people who earned up to 400% of the poverty level (which works out to about \$50,000 for an individual, and \$100,000 for a family of four).⁶⁷ With subsidies, a person would only need to pay a fraction of the total price of medical insurance.⁶⁸ People who earn less than 139% of the federal poverty line would simply get insurance through Medicaid.⁶⁹ And if somehow a poor person still bucked the system and went without insurance, the law’s penalty exempted low income individuals and Indian tribes.⁷⁰

No analogy exists for car insurance. If a poor person cannot afford it, they will be breaking the law every time they get behind the wheel. In spite of the fact that the Supreme Court has recognized driving is “a virtual necessity for most Americans,”⁷¹ not unlike health care, there is no subsidy system for poor drivers. This is doubly ironic because the government spends trillions of dollars subsidizing the auto industry and drivers in various ways,⁷² but cannot spare anything to help poor drivers. South Carolina does not help poor residents get insurance but has set up a monitoring system so that it can track and quickly punish drivers without insurance.⁷³ Since the system has automatic punishment, the government does not need to go through the normal criminal process to prove a violation.

Other traffic laws follow a similar pattern: spend money or violate the law. Driver licenses cost money to renew, which must be done

66. Nat’l Fed’n of Indep. Bus. v. Sebelius, 567 U.S. 519, 539 (2012).

67. Alex Ghemis, *The Three Pillars of the Affordable Care Act*, NEW MOBILITY (Mar. 1, 2017), <https://www.newmobility.com/2017/03/the-three-pillars-of-the-affordable-care-act/> [<https://web.archive.org/web/20211017180704/https://newmobility.com/the-three-pillars-of-the-affordable-care-act/>].

68. *Id.*

69. *Id.*

70. *Sebelius*, 567 U.S. at 539–40.

71. *Wooley v. Maynard*, 430 U.S. 705, 715 (1977).

72. *See generally* Gregory H. Shill, *Should Law Subsidize Driving?*, 95 N.Y.U. L. REV. 498 (2020).

73. *Facts About Driving Uninsured*, S.C. DEP’T MOTOR VEHICLES, <https://www.scdmvonline.com/Driver-Services/Drivers-License/Insurance-Requirements/Facts-About-Driving-Uninsured> [<https://web.archive.org/web/20220109154335/https://www.scdmvonline.com/Driver-Services/Drivers-License/Insurance-Requirements/Facts-About-Driving-Uninsured>] (last visited Jan. 9, 2022).

periodically.⁷⁴ Montana, for instance, also suspends driver licenses automatically if a person fails to pay court-ordered fines.⁷⁵ This has been called an “unconstitutional wealth-based suspension scheme” that traps victims “in an inescapable cycle of poverty.”⁷⁶ Because the system is automatic, it is easy to imagine how poor people who cannot pay might get swept up along with people who choose not to pay.

Every state requires that motor vehicles be registered and titled, which tacks on another fee.⁷⁷ These fees vary wildly in amount and method of calculation, ranging from a \$15 flat fee in Mississippi to \$300 for vehicles over 10,000 pounds in Hawaii.⁷⁸ State laws widely require cars to be in good condition by mandating operational headlights and taillights.⁷⁹ Some states have vague, blanket laws requiring a vehicle to be in good repair. Vermont broadly requires that all vehicles “shall be in good mechanical condition and shall be properly equipped,”⁸⁰ and Oklahoma makes it a crime to drive a vehicle that is “known to be in such unsafe condition as to endanger any person.”⁸¹

There is a valid reason to require everyone to register, insure, license, and maintain their cars. But ordinarily, if the law requires a payment, there is an option for indigency. Bankruptcy court has a filing fee, but this may

74. *E.g.*, *Renew Your License*, WASH. ST DEP’T LICENSING, <https://www.dol.wa.gov/driverslicense/renew.html> [<https://web.archive.org/web/20211017181245/https://www.dol.wa.gov/driverslicense/renew.html>] (last visited May 11, 2020) (\$9 annual license fee); *Renew Your Driver’s License*, MASS.GOV, <https://www.mass.gov/how-to/renew-your-drivers-license> [<https://web.archive.org/web/20211017181358/https://www.mass.gov/how-to/renew-your-drivers-license>] (last visited May 11, 2020) (up to \$65 annual license fee depending on license type); *DMV Fees*, COLO. DEP’T REVENUE, <https://dmv.colorado.gov/dmv-fees> [<https://web.archive.org/web/20211017181523/https://dmv.colorado.gov/dmv-fees>] (last visited May 11, 2020) (\$28 renewal fee).

75. Whitney Bermes, *Lawsuit Alleges Montana Discriminates Against its Poor*, BOZEMAN DAILY CHRON. (Sept. 2, 2017), https://www.bozemandailychronicle.com/news/crime/lawsuit-alleges-montana-discriminates-against-its-poor/article_d5b2ba48-9e86-54cd-a7dc-89a436467662.html/ [https://web.archive.org/web/20211017181744/https://www.bozemandailychronicle.com/news/crime/lawsuit-alleges-montana-discriminates-against-its-poor/article_d5b2ba48-9e86-54cd-a7dc-89a436467662.html/].

76. *Id.*

77. *See generally Vehicle Registration Fees by State*, NAT’L CONF. STATE LEGISLATURES (Feb. 4, 2020), <https://www.ncsl.org/research/transportation/registration-and-title-fees-by-state.aspx> [<https://web.archive.org/web/20211017181851/https://www.ncsl.org/research/transportation/registration-and-title-fees-by-state.aspx>].

78. *Id.* at 12, 25.

79. *E.g.*, N.C. GEN. STAT. § 20-129 (2016); VT. STAT. ANN. tit. 23, § 1243 (2018).

80. VT. STAT. ANN. tit. 23, § 1221 (2018).

81. OKLA. STAT. ANN. tit. 47, § 12-101 (1961).

be waived if the filer is below a certain income.⁸² If the government prosecutes a poor person for a crime, they are entitled to a public defender.⁸³ Driving is essential for nearly everyone, and criminal sanctions can be invoked if a person does not purchase all the necessary accoutrements, yet there is neither a waiver for indigency nor subsidies available.

C. Cash Bail

Late in the summer of 1798 in Philadelphia, while the City was half-abandoned due to a yellow fever epidemic, the Bank of Pennsylvania was robbed. Lacking suspects, but observing that the locks were undamaged, bank officials suspected the lock-maker: Patrick Lyon. Lyon was arrested and thrown in jail sans evidence, and bail was set at \$150,000—far more than the blacksmith could pay. Even after the true thief confessed and returned the money, Lyon remained in jail under squalid conditions until a grand jury refused to indict him.⁸⁴

Forgetful of history, the Supreme Court later wrote “[t]he fundamental tradition in this country is that one charged with a crime is not, in ordinary circumstances, imprisoned until after a judgment of guilt.”⁸⁵ But this was not true in the past, and it is not true today, thanks to the cash bail system, which is authorized in every American jurisdiction.⁸⁶ One’s freedom is a function of whether they can pay.

Typically, when a person is brought before a court to answer for an alleged crime, the judge will set bail as a means to ensure they show up for their trial date.⁸⁷ Bail can range from a few thousand to a few hundred

82. *Official Form 103B Application to Have the Chapter 7 Filing Fee Waived*, U.S. BANKR. CT., https://www.uscourts.gov/sites/default/files/form_b103b.pdf [https://web.archive.org/web/20211017181945/https://www.uscourts.gov/sites/default/files/form_b103b.pdf].

83. See generally *Gideon v. Wainwright*, 372 U.S. 335 (1963). Although public defenders are thought of as free, several states do charge for them, as will be discussed below.

84. The account in this paragraph comes from Whitney Rakich, *Patrick Lyon (1769–1829)*, GEORGE WASHINGTON’S MOUNT VERNON, <https://www.mountvernon.org/library/digitalhistory/digital-encyclopedia/article/patrick-lyon-1769-1829/> [<https://web.archive.org/web/20211017182114/https://www.mountvernon.org/library/digitalhistory/digital-encyclopedia/article/patrick-lyon-1769-1829/>] (last visited May 26, 2020).

85. *Bandy v. United States*, 81 S. Ct. 197, 197 (1960).

86. Jordan Gross, *Devil Take the Hindmost: Reform Considerations for States with a Constitutional Right to Bail*, 52 AKRON L. REV. 1043, 1047 (2018).

87. Adureh Onyekwere, *How Cash Bail Works*, BRENNAN CENTER FOR JUST. (Dec. 10, 2019), <https://www.brennancenter.org/our-work/research-reports/how-cash-bail-works> [<https://web.archive.org/web/20211017182211/https://www.brennancenter.org/our-work/research-reports/how-cash-bail-works>].

thousand dollars.⁸⁸ Some jurisdictions have recommended bail amounts for crimes, which does not take into account the defendant's ability to pay.⁸⁹ Others explicitly base it on previous failures to pay,⁹⁰ which means the less money one has, the worse bail will be.

If a person cannot afford bail, they can go to a private bail bond company, which covers defendant's bail obligation in exchange for a nonrefundable fee, which is usually 10% to 15% of the bail amount, and the rest is collected via collateral, like a car, house, jewelry, and so forth.⁹¹ The collateral will be seized if a person does not appear, and if they cannot pay the bail amount to begin with, the defendant must wait in jail until court.⁹² Even if the defendant shows up, they have to pay a processing fee, which may be as high as 30% of the bail fee.⁹³ A hundred years ago, Arthur L. Beeley observed "in too many instances, the [bail] system . . . neither guarantees security to society nor safeguards the right of the accused."⁹⁴ Faults notwithstanding, the system has chugged right along.

Seventy percent of the country's jail population—over 500,000 people—are there not because they have committed a crime but have simply been accused of one and are awaiting trial.⁹⁵ In 2016, as much as 80% of New York's jail population was in for pretrial detention.⁹⁶

While in pretrial confinement, people are not only ripped away from their lives and families, but they lose their jobs, live in misery, and feel pressure to plead guilty to get out.⁹⁷ Perhaps for this reason, a person is 50% to 92% more likely to be convicted when held in pretrial detention,

88. Elizabeth Hardison, *Cash Bail, Explained: How It Works and Why Criminal Justice Reformers Want to Get Rid of It*, PENN. CAPITAL-STAR (July 14, 2019, 7:42 AM), <https://www.penncapital-star.com/criminal-justice/cash-bail-explained-how-it-works-and-why-criminal-justice-reformers-want-to-get-rid-of-it/> [<https://web.archive.org/web/20211017182306/https://www.penncapital-star.com/criminal-justice/cash-bail-explained-how-it-works-and-why-criminal-justice-reformers-want-to-get-rid-of-it/>].

89. *E.g.*, ALA. R. CRIM. P. 7.2.

90. CALIF. CT. R. 4.105, cmt. (c)(3).

91. Onyekwere, *supra* note 87.

92. *Id.*

93. Hardison, *supra* note 88.

94. TIMOTHY R. SCHNACKE, MICHAEL R. JONES & CLAIRE M.B. BROOKER, *THE HISTORY OF BAIL AND PRETRIAL RELEASE*, PRETRIAL JUST. INST. 7 (2010).

95. Onyekwere, *supra* note 87.

96. Ariana K. Connelly & Nadin R. Linthorst, *The Constitutionality of Setting Bail Without Regard to Income: Securing Justice or Social Injustice?*, 10 ALA. C.R. & C.L. L. REV. 115, 145–46 (2019).

97. Jamiles Lartey, *New York Tried to Get Rid of Bail. Then the Backlash Came.*, POLITICO (Apr. 23, 2020, 5:08 AM), <https://www.politico.com/news/magazine/2020/04/23/bail-reform-coronavirus-new-york-backlash-148299> [<https://web.archive.org/web/20211017182411/https://www.politico.com/news/magazine/2020/04/23/bail-reform-coronavirus-new-york-backlash-148299>].

even after controlling for other variables.⁹⁸ Because it destabilizes people, it may lead to more crime, not less.⁹⁹ Some evidence suggests that people placed in pretrial detention are *more* likely to commit subsequent crimes.¹⁰⁰ The system, “without a doubt favors the wealthy and hurts those who are poor”¹⁰¹ and “effectively criminalizes poverty.”¹⁰² Some jurisdictions have even attempted to avoid awarding time-served credit for days spent incarcerated as a result of not making bail.¹⁰³ The unfairness of cash bail was well recognized since at least the 1960s.¹⁰⁴

In recent years, cash bail reform has been gaining momentum. A handful of states successfully limited or eliminated the practice.¹⁰⁵ When New Jersey ended mandatory cash bail, its jail population shrank by 30%.¹⁰⁶ Philadelphia ended the practice and saw no negative impact on recidivism or courtroom appearance rates.¹⁰⁷ Michigan’s Supreme Court Chief Justice has convinced several local courts to replace cash bail with bail decisions based on statistical risk.¹⁰⁸

Although efforts to reform or end cash bail are relatively new, the problem is not. Cash bail dates to at least the year 400 A.D., where defendants in Anglo-Saxon courts in England had to find a friend or family

98. AM. C.L. UNION, *SELLING OFF OUR FREEDOM: HOW INSURANCE CORPORATIONS HAVE TAKEN OVER OUR BAIL SYSTEM* 18 (2017), https://www.aclu.org/sites/default/files/field_document/059_bail_report_2_1.pdf [https://web.archive.org/web/20211017182457/https://www.aclu.org/sites/default/files/field_document/059_bail_report_2_1.pdf].

99. Lartey, *supra* note 97.

100. Hardison, *supra* note 88 (citing a study showing people who suffered pretrial detention for misdemeanors were 30% more likely to commit a felony in the 18 months after the bail hearing, and 20% more likely to commit a new misdemeanor).

101. Connelly & Linthorst, *supra* note 96, at 141.

102. Hardison, *supra* note 88.

103. This rule was employed in Pennsylvania until it was overturned in *Martin v. Pa. Bd. of Prob. & Parole*, 840 A.2d 299, 301 (Pa. 2003). Before that, the rule had denied credit to poor defendants for decades. *E.g.*, *Smarr v. Pa. Bd. of Prob. & Parole*, 748 A.2d 799, 800 (Pa. Commw. Ct. 2000); *Rodriques v. Commonwealth, Pa. Bd. of Prob. & Parole*, 403 A.2d 184, 186 (Pa. Commw. Ct. 1979). Other states had the same disparity until it was eliminated by statute. *See In re Rojas*, 588 P.2d 789, 791 (Cal. 1979); *Schubert v. People*, 698 P.2d 788, 794 (Colo. 1985).

104. Gross, *supra* note 86, at 1046.

105. Lartey, *supra* note 97.

106. *Id.*

107. Onyekwere, *supra* note 87.

108. Associated Press, *Sensible Bonds Will Be Part of Project in 5 Courts to Reduce Jail Costs*, DETROIT FREE PRESS (Feb. 14, 2019, 8:22 PM), <https://www.freep.com/story/news/local/michigan/2019/02/14/jail-costs-bond/2876801002/> [<https://web.archive.org/web/20211017182554/https://www.freep.com/story/news/local/michigan/2019/02/14/jail-costs-bond/2876801002/>]. It should be noted that the progress on this front, when opponents started pushing (disputed) statistics claiming that bail reform increased crime, support evaporated in New York. Lartey, *supra* note 97.

member to pay a settlement if they failed to appear in court.¹⁰⁹ But even twenty-five years ago, most people who were arrested for felonies were simply released without having to pay bail.¹¹⁰ From 1990 to 2009, the share of defendants charged with felonies who were required to pay bail grew from 37% to 61%.¹¹¹ Today, millions are forced to pay bail.¹¹²

So, if cash bail causes great harm and produces small benefit, why is it still around? It might have something to do with the fact that the United States is one of only two countries in the world with a commercial bail industry.¹¹³ The bail bond industry has made over \$3 million in political contributions.¹¹⁴ There are about 15,000 bail bond agents writing bonds for about \$14 billion annually.¹¹⁵ The North Carolina Bail Agents Association has gotten sixty laws passed, and claims the only people who cannot afford a bail bond are “pure transients or . . . persons who are so extremely recalcitrant that they have burned every bridge with family and community.”¹¹⁶ Behind the bail bond industry, the insurance industry lurks, underwriting the vast majority of the millions of bail bonds, giving them a vested interest in seeing the system roll on.¹¹⁷ These insurance companies have spent millions of dollars in donations to politicians.¹¹⁸

III. DEBTOR PRISONS

Even by the moral standards of ancient Greece and Rome, jailing people for failure to pay debts was considered primitive.¹¹⁹ Early

109. Hardison, *supra* note 88.

110. AM. C.L. UNION, SELLING OFF OUR FREEDOM, *supra* note 98, at 2.

111. *Id.* at 9.

112. *Id.* at 2.

113. Lartey, *supra* note 97.

114. Jessi Stone, *Bail Bond Industry a Strong Lobby in Raleigh*, SMOKY MOUNTAIN NEWS (Aug. 29, 2018), <https://smokymountainnews.com/news/item/25440-bail-bond-industry-a-strong-lobby-in-raleigh> [<https://web.archive.org/web/20211017182759/https://smokymountainnews.com/news/item/25440-bail-bond-industry-a-strong-lobby-in-raleigh>].

115. *Id.*

116. *Id.*

117. Joseph Neff, *Senators Take Aim at Bail Industry Backers*, THE MARSHALL PROJECT (Aug. 6, 2018, 4:44 PM), <https://www.themarshallproject.org/2018/08/06/senators-take-aim-at-bail-industry-backers> [<https://web.archive.org/web/20211017182720/https://www.themarshallproject.org/2018/08/06/senators-take-aim-at-bail-industry-backers>].

118. AM. C.L. UNION, SELLING OFF OUR FREEDOM, *supra* note 98, at 7.

119. Eli Hager, *Debtor's Prisons, Then and Now: FAQ*, THE MARSHALL PROJECT (Feb. 24, 2015, 7:15 AM), <https://www.themarshallproject.org/2015/02/24/debtors-prisons-then-and-now-faq> [<https://web.archive.org/web/20211017182836/https://www.themarshallproject.org/2015/02/24/debtors-prisons-then-and-now-faq>].

American colonies started setting them up anyway.¹²⁰ Two signers of the Declaration of Independence spent time in debtor prison (James Wilson and Robert Morris) and some inmates could stay for life.¹²¹ Today, de facto debtors' prisons have come back with a vengeance.

A. *Mountainous Fines*

An article in the *Yale Law Journal* described the law enforcement system thusly:

Courts will enforce a judgment for civil liability against specific property of the debtor, but not against the person of the debtor. That is, the sheriff will take property of the debtor and sell it to satisfy the judgment, but the sheriff will not arrest or incarcerate the nonpaying debtor.¹²²

But they apparently do not read the *Yale Law Journal* in the Flowood Restitution Center. Located in Mississippi, the Center is an old motel that has been converted to a jail, complete with a barbed wire fence, to house criminal debtors.¹²³ It bills itself as “an alternative to incarceration for minimal risk offenders who are in need of a more structured environment” and refers to inmates as “residents” who are “assigned” to the center.¹²⁴ A fairer term would be debtors' prison.

That is because Mississippi allows judges to lock people up indefinitely for unpaid, court-ordered debt.¹²⁵ Hundreds of people still get sentenced to “restitution centers” like Flowood throughout Mississippi, condemned to stay and toil away until they pay off court fees, fines, and restitution.¹²⁶ Ironically, the crimes they committed may not have included

120. *Id.*

121. *Id.*

122. Lynn M. LoPucki, *The Death of Liability*, 106 *YALE L.J.* 1, 9 (1996).

123. Anna Wolfe & Michelle Liu, *Modern Day Debtors Prison? Mississippi Makes People Work to Pay Off Debt*, *CLARION LEDGER* (Jan. 9, 2020), <https://www.clarionledger.com/in-depth/news/local/2020/01/09/debtors-prison-miss-still-sends-people-jail-unpaid-debt/2742853001/> [https://web.archive.org/web/20220110040926/https://www.clarionledger.com/in-depth/news/local/2020/01/09/debtors-prison-miss-still-sends-people-jail-unpaid-debt/2742853001/].

124. *Restitution Centers*, *MISS. DEP'T CORR.*, <https://www.mdoc.ms.gov/Community-Corrections/Pages/Restitution-Centers.aspx> [https://web.archive.org/web/20211017183056/https://www.mdoc.ms.gov/Community-Corrections/Pages/Restitution-Centers.aspx] (last visited May 12, 2020).

125. Wolfe & Liu, *supra* note 123.

126. *Id.*

jail time as a punishment, but if it carries a fine they cannot repay, they will end up behind bars anyway.¹²⁷ Inmates are bused to jobs paying cut-rate wages and the proceeds go to pay their debt (minus room and board); by night, they endure strip searches and sleep eight to a room.¹²⁸ They will stay in until the debts are paid, which can take years.

Mississippi may be the only state that officially allows people to be incarcerated indefinitely for failing to pay fines, but many others do so covertly, and for the same reason: because people have not paid fines. One woman in Ferguson, Missouri was jailed for \$300 in old traffic tickets she owed to the City of Jennings, Missouri.¹²⁹ When her family paid off the debt, she was “released” for the charges brought by the City of Jennings, but held in the same jail for separate debts owed to the next town over: Bellefontaine Neighbors, Missouri.¹³⁰ Her family again paid off the debt, and she was again “released” and re-imprisoned for a third, fourth, and fifth city that claimed she owed money, and then transferred to a new court that imprisoned her again.¹³¹ When she finally got out, she was quickly arrested again.¹³²

She wasn’t the only one. As documented by a lawsuit over the abuses of Jennings, impoverished defendants were jailed because they could not pay debts for traffic tickets or other minor offenses.¹³³ They pleaded they were unable to pay due to poverty, but were jailed anyway without the benefit of a lawyer, and were threatened and abused for days or weeks.¹³⁴ Their cells were overcrowded, filthy, and lacked toothbrushes, toothpaste, blankets, and soap.¹³⁵ Some even committed suicide.¹³⁶ The City, however, was well compensated. In 2014, the City averaged 2.1 arrest warrants per household and 1.4 arrest warrants per adult, mostly in cases involving unpaid debt for tickets, earning millions.¹³⁷

127. *Id.*

128. *Id.*

129. Christopher D. Hampson, *The New American Debtors’ Prisons*, 44 AM. J. CRIM. L. 1, 3–4 (2016).

130. *Id.* at 4.

131. *Id.*

132. *Id.*

133. Complaint at para. 1, *Jenkins v. City of Jennings*, 4:15-cv-00252 (E.D. Mo. Feb. 8, 2015), <https://static1.squarespace.com/static/5aab27d96e76f3205f18a55/t/5ae8ac0803ce6450c6c202ec/1525197836152/Doc+%231+++++2015-02-08+++Complaint-Jennings-Debtors-Prisons-FILE-STAMPED.pdf> [<https://web.archive.org/web/20220109193812/https://static1.squarespace.com/static/5aab27d96e76f3205f18a55/t/5ae8ac0803ce6450c6c202ec/1525197836152/Doc+>].

134. *Id.*

135. *Id.* at para. 2.

136. *Id.* at para. 3.

137. *Id.* at paras. 6–7.

Despite laws to the contrary, people in Michigan can still be thrown in jail for failure to pay fines—one woman was sent to jail five separate times for being unable to pay fines related to minor crimes.¹³⁸ While imprisoned, they rack up fees to enter jail, fees to stay in jail, and a fee to exit jail.¹³⁹ The State Court Administrative Office has issued a rule requiring defendants to pay fees and disallowing the performance of community service in lieu of paying fees.¹⁴⁰ One Michigan court jailed a mother for failure to pay her son's incarceration fees.¹⁴¹ Another Michigander went to jail after he failed to pay his fines from catching a fish out of season when he was nineteen.¹⁴² Elsewhere, a woman was booked for a traffic ticket and told she would serve forty-five days in jail if she could not come up with \$1,000 that day.¹⁴³

Louisiana judges have circumvented the rule against debtor prisons by holding people in contempt for failure to pay fines, and having them sent to jail for the contempt.¹⁴⁴ A number of courts have used contempt with the threat of jail to force the payment of fees.¹⁴⁵ Also, people can be jailed for failing to appear at post-judgment court proceedings about debt, or for not providing information about finances or tax returns.¹⁴⁶ It does not matter that people may not show up to court proceedings for a variety of reasons, like work, childcare, lack of transportation, disability, or terminal

138. AM. C.L. UNION, IN FOR A PENNY: THE RISE OF AMERICA'S NEW DEBTORS' PRISON 30 (2010), https://www.aclu.org/sites/default/files/field_document/InForAPenny_web.pdf [https://web.archive.org/web/20211017183146/https://www.aclu.org/sites/default/files/field_document/InForAPenny_web.pdf].

139. *Id.*

140. *Id.* at 34.

141. *Id.* at 35.

142. Joseph Shapiro, *Supreme Court Ruling Not Enough to Prevent Debtors Prisons*, NPR (May 21, 2014, 5:01 AM), <https://www.npr.org/2014/05/21/313118629/supreme-court-ruling-not-enough-to-prevent-debtors-prisons> [<https://web.archive.org/web/20220109194436/https://www.npr.org/2014/05/21/313118629/supreme-court-ruling-not-enough-to-prevent-debtors-prisons>].

143. Jazmine Ulloa, *The Price They Pay*, AUSTIN AM.-STATESMAN (May 20, 2016), http://specials.mystatesman.com/traffic-fines/?_ga=2.215508055.1907922730.1586874373-655010590.1586874373 [https://web.archive.org/web/20211017183238/http://specials.mystatesman.com/traffic-fines/?_ga=2.215508055.1907922730.1586874373-655010590.1586874373].

144. AM. C.L. UNION, IN FOR A PENNY, *supra* note 138, at 18.

145. Jayne S. Ressler, *Civil Contempt Confinement and the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005: An Examination of Debtor Incarceration in the Modern Age*, 37 RUTGERS L. J. 355, 367 (2006) (citing cases).

146. AM. C.L. UNION, A POUND OF FLESH: THE CRIMINALIZATION OF PRIVATE DEBT 12 (2018), https://www.aclu.org/sites/default/files/field_document/022318-debtreport_0.pdf [https://web.archive.org/web/20211017183318/https://www.aclu.org/sites/default/files/field_document/022318-debtreport_0.pdf].

illness.¹⁴⁷ Failure to pay child support can also result in prison time: 15% of black fathers have at some point been incarcerated for this.¹⁴⁸

B. Collateral Expenses

Even if a person is not fined directly as punishment, debts may build up in other ways, and these debts can lead directly to jail. Collateral expenses are costs other than those directly associated with the crime, such as fines or restitution. Possibilities are nearly infinite. Long before a person is ever adjudged guilty of any crime, costs start piling up.¹⁴⁹ Fees can be for anything from counsel fees to GPS monitoring.¹⁵⁰ Cities have come to depend on bilking the poor through fees as a means to patch holes in their budgets.¹⁵¹

The purpose behind this system was made plain in a commendably frank report from the Massachusetts Legislative Report entitled “Probation Service Fees: Shifting Costs to the Offender.”¹⁵² It noted that the supervision fees at the time were \$20 per month but fantasized that “if a higher fee were imposed, even greater sums could be realized.”¹⁵³

147. Jennifer Turner, *Debt Collectors Hijacking Justice System*, YAMHILL COUNTY’S NEWS-REGISTER (May 11, 2018), <https://newsregister.com/article?articleTitle=jennifer-turner-debt-collectors-hijacking-justice-system--1526058606--29594--commentary> [<https://web.archive.org/web/20211017183342/https://newsregister.com/article?articleTitle=jennifer-turner-debt-collectors-hijacking-justice-system--1526058606--29594--commentary>].

148. Noah D. Zatz, *A New Peonage?: Pay, Work, or Go to Jail in Contemporary Child Support Enforcement and Beyond*, 39 SEATTLE U. L. REV. 927, 933 (2016).

149. Wayne A. Logan & Ronald F. Wright, *Mercenary Criminal Justice*, 2014 U. ILL. L. REV. 1175, 1186 (2014).

150. WENDY SAWYER, PRISON POL’Y INITIATIVE, PUNISHING POVERTY: THE HIGH COST OF PROBATION FEES IN MASSACHUSETTS, (2016), https://www.prisonpolicy.org/probation/ma_report.html [https://web.archive.org/web/20211017183403/https://www.prisonpolicy.org/probation/ma_report.html].

151. U.S. DEP’T OF JUST., C.R. DIV., INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT 2 (2015), https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf [https://web.archive.org/web/20211017183426/https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf]; Logan & Wright, *supra* note 149, at 1177.

152. CHARLES R. RING, MASS. LEGIS. RSCH. BUREAU, PROBATION SUPERVISION FEES: SHIFTING COSTS TO THE OFFENDER (1988), https://archive.org/stream/probationsupervising/probationsupervising_djvu.txt. It was also very frank in what it thought of people trying put their lives back together and reenter society. The opening line of the report describes probationers as “[r]apists, child abusers, pimps, prostitutes, thieves, drunken drivers, shoplifters, trespassers, even uninsured motorists.” *Id.* at 1.

153. *Id.*

Defendants may also be sentenced to probation as part of a punishment for a crime. This is much more likely to happen to defendants in poor areas.¹⁵⁴ A term of that probation may be to pay fines, or pay for and attend treatment programs, which can add up quickly.¹⁵⁵ One woman paid 26 separate fees, \$2,464 in all, an amount three times greater than her criminal fines and restitution combined.¹⁵⁶ If a person cannot pay the various fees, they may be deemed to have violated probation and be subject to revocation and confinement.¹⁵⁷ Courts have upheld this practice.¹⁵⁸

Probation or parole violations are responsible for a third of the country's jail population.¹⁵⁹ Inability to pay fees may also prevent a person from getting off of probation.¹⁶⁰ Although some people do not have the ability to pay, "numerous jurisdictions allow no possibility for waiver and assess a flat fee for every offender."¹⁶¹ Disturbingly, probation may be run by private businesses that profit off of human suffering.¹⁶²

High costs of probation are something of a hidden underbelly of the justice system. Charging defendants has long been present in Anglo-Saxon law.¹⁶³ The modern system stems from Michigan and Colorado, which spearheaded the concept of nickel and diming defendants in the 1930s, and

154. SAWYER, *supra* note 150.

155. Ebony Ruhland, *The Impact of Fees and Fines for Individuals on Probation and Parole*, ROBINA INST. (May 23, 2016), <https://robinainstitute.umn.edu/news-views/impact-fees-and-fines-individuals-probation-and-parole> [<https://web.archive.org/web/20211017183500/https://robinainstitute.umn.edu/news-views/impact-fees-and-fines-individuals-probation-and-parole>].

156. ALICIA BANNON, MITALI NAGRECHA & REBEKAH DILLER, BRENNAN CENTER FOR JUST., *CRIMINAL JUSTICE DEBT: A BARRIER TO REENTRY* 9 (2010), <https://www.brennancenter.org/sites/default/files/legacy/Fees%20and%20Fines%20FINAL.pdf> [<https://web.archive.org/web/20211017183520/https://www.brennancenter.org/sites/default/files/legacy/Fees%20and%20Fines%20FINAL.pdf>].

157. Ruhland, *supra* note 155.

158. *E.g.*, *State v. Huth*, 334 N.W.2d 485, 489–90 (S.D. 1983) (allowing imprisonment for failure to pay probation costs and fines).

159. RONALD P. CORBETT & KEVIN R. REITZ, ROBINA INST., *PROFILES IN PROBATION REVOCATION: EXAMINING THE LEGAL FRAMEWORK IN 21 STATES* 3 (2014), <https://robinainstitute.umn.edu/sites/robinainstitute.umn.edu/files/robina-report-2015-web.pdf> [<https://web.archive.org/web/20211017183539/https://robinainstitute.umn.edu/sites/robinainstitute.umn.edu/files/robina-report-2015-web.pdf>].

160. *See, e.g.*, IOWA CODE § 907.9 (2014).

161. S. CHRISTOPHER BAIRD, DOUGLAS A. HOLIEN & AUDREY J. BAKKE, NAT'L COUNCIL ON CRIME & DELINQUENCY, *PROJECTING PROBATION FEE REVENUES: A REVENUE PROJECTION MODEL FOR AGENCIES BASED ON LOCAL POLICIES AND DEMOGRAPHIC DATA* 3 (1986), <https://s3.amazonaws.com/static.nicic.gov/Library/004915.pdf> [<https://web.archive.org/web/20211017183612/https://s3.amazonaws.com/static.nicic.gov/Library/004915.pdf>].

162. Wayne A. Logan, *Possibilities and Limits: What the Feds Can Do to Rein in Local Mercenary Criminal Justice*, 18 U. ILL. L. REV. 1731, 1739–40 (2018).

163. Logan & Wright, *supra* note 149, at 1179.

the practice rapidly grew in popularity over the rest of the century.¹⁶⁴ It has not stopped growing since. In 1986, a total of 109 agencies around the country reported collecting almost \$30 million in fees.¹⁶⁵ By 2016, Massachusetts alone vacuumed up more than \$20 million in probation fees.¹⁶⁶ This can translate into fees of \$850 to \$1,300 per month.¹⁶⁷ The total amount of fees outstanding around the country went from \$260 million to \$13 billion between 1985 and 2001 and was estimated at \$100 billion in 2014.¹⁶⁸

Massachusetts is not alone. Kings County, California charges \$20 to \$50 in base fees per month for probation, along with a slew of other fees, such as \$650 to get a certain report, and up to \$2 per page for printing costs.¹⁶⁹ Barberton, Ohio charges \$50 per month, \$100 for the presentence report, a \$50 eligibility assessment, \$50 for a community service fee, and several other fees.¹⁷⁰ Electronic monitoring in Carver County, Minnesota will set you back up to \$23 per day (with discounts available for children), with annual supervision fees of up to \$300, and \$35 for each drug screening.¹⁷¹ Courts may also have the power to impose “discretionary” conditions such as finding employment or reporting regularly to a probation officer.¹⁷² Fees are typically imposed without regard for a person’s ability to pay, and can snowball to be thousands of dollars when accounting for late fees, interest, and collection fees for failure to pay.¹⁷³ It is easy to imagine how these fines could land a person back in jail.

164. BAIRD, HOLIEN & BAKKE, *supra* note 161, at 2.

165. *Id.* at 4.

166. SAWYER, *supra* note 150.

167. *Id.*

168. Claire Greenberg, Marc Meredith & Michael Morse, *The Growing and Broad Nature of Legal Financial Obligations: Evidence from Alabama Court Records*, 48 CONN. L. REV. 1079, 1081 (2016).

169. *Probation Department Fee Schedule*, COUNTY OF KINGS, CALIFORNIA, <https://www.countyofkings.com/departments/public-safety/fee-schedule> [<https://web.archive.org/web/20211017183638/https://www.countyofkings.com/departments/public-safety/fee-schedule>] (last visited May 17, 2020).

170. *Appendix B: Schedule of Court Costs*, CITY OF BARBERTON, <http://cityofbarberton.com/222/Appendix-B-Schedule-of-Court-Costs> [<https://web.archive.org/web/20211017183703/http://cityofbarberton.com/222/Appendix-B-Schedule-of-Court-Costs>] (last visited May 17, 2020).

171. *Schedule of County Fees 2022*, CARVER COUNTY, MINN., at 4 (2022), <https://www.co.carver.mn.us/home/showdocument?id=12436> [<https://web.archive.org/web/20211017183727/https://www.co.carver.mn.us/home/showdocument?id=12436>].

172. Ruhland, *supra* note 155.

173. Bannon, Negrecha & Diller, *supra* note 156, at 1.

C. Public Defender Fees

Perhaps the most troubling fees are ones that charge people for exercising their constitutional rights. For example, a person can be charged for exercising their right to a jury.¹⁷⁴ In this way, the system essentially allows wealthier defendants to purchase procedural protections. Because jury trials are relatively rare, many defendants will never end up having to pay this fee.¹⁷⁵ The same cannot be said for public defender fees.

In *Miranda v. Arizona*,¹⁷⁶ the Supreme Court famously said that police must, before an interrogation, inform defendants if they “cannot afford an attorney one will be appointed.” What it did not mention was that, even if someone cannot afford an attorney, they may have to pay anyway.

“Contrary to popular belief,” the New Jersey Office of the Public Defender cautions potential clients, their “representation is not free.”¹⁷⁷ Very true. On the front-end, defendants may have to pay an application fee for a public defender. A Florida man had his driver license indefinitely suspended for failure to pay traffic tickets.¹⁷⁸ He was later arrested for driving on that suspended license.¹⁷⁹ Because he could not afford a \$50 application fee for a public defender, he languished in jail for 59 days.¹⁸⁰ Vermont’s application for a public defender demands that even the most impoverished applicants have to pay a minimum fee within 60 days.¹⁸¹ Newark, New Jersey recently quadrupled the application fee for public

174. Darryl K. Brown, *The Case for a Trial Fee: What Money Can Buy in Criminal Process*, 107 CALIF. L. REV. 1415, 1416 (2019). This sort of impingement on the right to a jury has been upheld. *E.g.*, *Kincaid v. Commonwealth*, 105 S.E.2d 846 (Va. 1958).

175. John Gramlich, *Only 2% of Federal Criminal Defendants Go to Trial, and Most Who Do Are Found Guilty*, PEW RES. CENTER (June 11, 2019), <https://www.pewresearch.org/fact-tank/2019/06/11/only-2-of-federal-criminal-defendants-go-to-trial-and-most-who-do-are-found-guilty/> [<https://web.archive.org/web/20211017183754/https://www.pewresearch.org/fact-tank/2019/06/11/only-2-of-federal-criminal-defendants-go-to-trial-and-most-who-do-are-found-guilty/>].

176. 384 U.S. 436, 479 (1966).

177. *Apply for a Public Defender*, N.J. OFFICE OF THE PUB. DEFENDER, <https://www.nj.gov/defender/apply/index.shtml> [<https://web.archive.org/web/20211017183823/https://www.nj.gov/defender/apply/index.shtml>] (last visited May 21, 2020).

178. Beth A. Colgan, *The Excessive Fines Clause: Challenging the Modern Debtors’ Prison*, 65 UCLA L. REV. 2, 5 (2018).

179. *Id.*

180. *Id.*

181. *Application for Public Defender Services—Criminal*, STATE OF VT., <https://www.vermontjudiciary.org/sites/default/files/documents/200-00358CR.pdf> [<https://web.archive.org/web/20211017184020/https://www.vermontjudiciary.org/sites/default/files/documents/200-00358CR.pdf>] (last visited Nov. 1, 2021).

defenders in municipal court, from \$50 to \$200.¹⁸² Defendants can be charged as much as \$1,500 for applying for a Missouri State Public Defender.¹⁸³ This is not because the public defenders are looking to profit; state law mandates that fees be charged.¹⁸⁴ Colorado charges a nonrefundable processing fee to apply for a public defender.¹⁸⁵ It is possible to have the fee waived, though the prosecutor is able to contest the appointment of a public defender.¹⁸⁶

Indigent defendants also pay on the way out. Two-thirds of states statutorily authorize recoupment of costs for a public defender against a person who is convicted, and the remaining states give judges discretion to order repayment of costs, which might include attorney fees.¹⁸⁷ Sometimes, a defendant is on the hook only if they are guilty. Indigent defendants in Alaska, for example, will be charged for their public defender if they are convicted, and the court can take actions to prevent the defendant from dissipating assets to avoid paying.¹⁸⁸ North Carolina has a specific form to assign public defender fees to poor people who have

182. Naomi Nix, *Fee for Public Defender Jumps \$150 in Newark*, NJ.COM, (Mar. 29, 2019, 12:23 PM), https://www.nj.com/essex/2014/11/newark_council_approves_public_defender_fee_increase.html [https://web.archive.org/web/20211017184037/https://www.nj.com/essex/2014/11/newark_council_approves_public_defender_fee_increase.html].

183. *Fee Schedule*, MO. STATE PUB. DEFENDER, <https://publicdefender.mo.gov/clients-and-families/fees-for-services/fee-schedule/> [<https://web.archive.org/web/20211017184103/https://publicdefender.mo.gov/clients-and-families/fees-for-services/fee-schedule/>] (last visited May 21, 2020).

184. *Fees for Services*, MO. STATE PUB. DEFENDER, <https://publicdefender.mo.gov/clients-and-families/fees-for-services/> [<https://web.archive.org/web/20211017184133/https://publicdefender.mo.gov/clients-and-families/fees-for-services/>] (last visited Jan. 18, 2021).

185. COLO. REV. STAT. § 21-1-103(3) (2016).

186. *Id.*

187. Helen A. Anderson, *Penalizing Poverty: Making Criminal Defendants Pay for Their Court-Appointed Counsel Through Recoupment and Contribution*, 42 U. MICH. J.L. REFORM 323, 330 (2009).

188. ALASKA R. CRIM. P. 39(b) (1959). The Chief Justice of the Alaska Supreme Court said this would have a “chilling effect” on poor people seeking counsel, but the rule was adopted over his objection. *See Alaska Court Rules: Dissent to SCO 1088*, ALASKA.GOV, at 66, <https://public.courts.alaska.gov/web/rules/docs/crpro.pdf> [<https://web.archive.org/web/20211017184158/https://public.courts.alaska.gov/web/rules/docs/crpro.pdf>]. Many other states also apply “defender fees” that can amount to thousands of dollars. Bannon, Negrecha, & Diller, *supra* note 156, at 12.

just been sentenced to death.¹⁸⁹ These sorts of fees have been widely challenged, and widely upheld.¹⁹⁰

Sometimes, a defendant may be charged even if they are acquitted, a mistrial occurs, or the conviction is overturned on appeal.¹⁹¹ Virginia law states that an indigent person “shall” be charged a public defender fee in “any case” where they receive representation, and makes no mention of exceptions.¹⁹² This means an innocent person could be charged by the government for a crime and then forced to pick up the tab for a proceeding they neither benefited from nor were responsible for starting.

Even police officers may recognize this fact. As one officer in North Carolina told a defendant, after reading a form that said he could have a court-appointed attorney at no cost, “I don’t know why they put in this at no cost. If you are found innocent, it is no cost but if you are found guilty there is a chance the state will require you to reimburse them for the attorney fees.”¹⁹³

The Supreme Court has upheld this system. In *Fuller v. Oregon*, the defendant was charged with sodomy.¹⁹⁴ Because he was indigent, he was provided with an attorney and investigator to help put a case together.¹⁹⁵ Alas, he ultimately decided to plead guilty, and was sentenced to five years’ probation, conditioned in part on repaying the costs of the attorney and investigator.¹⁹⁶ He appealed, arguing that the state could not force him to repay these expenses.¹⁹⁷ The Court said this was fine, since the state would not actually try to collect the fees until some point in future when the defendant was capable of repaying.¹⁹⁸

As Justice Thurgood Marshall noted in his dissent, under the law “the repayment of the indigent defendant’s debt to the State can be made a

189. *Capital Case Fee Application Order for Payment Judgment against Indigent*, N.C. ADMIN. OFFICE OF THE CTS., <https://www.nccourts.gov/assets/documents/forms/cr425-en.pdf?pRIKHg4KzDlqBwCbDsOtdHYOIvvh7FYB> [<https://web.archive.org/web/20211017184231/https://www.nccourts.gov/assets/documents/forms/cr425-en.pdf?pRIKHg4KzDlqBwCbDsOtdHYOIvvh7FYB>] (last visited Nov. 1, 2021).

190. *See, e.g.*, *State v. Albert*, 899 P.2d 103, 113 (Alaska 1995); *State v. Kottenbroch*, 319 N.W.2d 465, 472 (N.D. 1982); *Wicks v. Charlottesville*, 208 S.E.2d 752, 756 (Va. 1974).

191. Anderson, *supra* note 187, at 330.

192. VA. CODE ANN. § 19.2-163.4:1.

193. *Cummings v. Polk*, 475 F.3d 230, 233 (4th Cir. 2007).

194. *Fuller v. Oregon*, 417 U.S. 40, 41 (1974).

195. *Id.* at 41.

196. *Id.* at 41–42.

197. *Id.* at 42.

198. *Id.* at 53. A similar version of the law is still on the books in Oregon, decades later. OR. REV. STAT. § 161.665(4) (1974) (allowing courts to order defendants to pay costs if “the defendant is *or may be able* to pay them”) (emphasis added). *See also White Eagle v. State*, 280 N.W.2d 659, 661 (S.D. 1979) (citing *Fuller* to uphold a similar system).

condition of his probation . . . [So a defendant's] failure to pay his debt can result in his being sent to prison."¹⁹⁹ Furthermore, one who hired a private attorney, and then failed to pay them, could not be imprisoned under state law, meaning that poor people who do not pay their lawyers are subject to harsher punishment.²⁰⁰

D. Private Debts, Public Enforcement

At least all of the above jurisdictions were targeting people who failed to repay *public* debts, like court fees or fines. Not so everywhere. Illinois jailed someone for owing \$730 on private medical debt.²⁰¹ The collection agency filed a lawsuit against her, and she was arrested for failing to appear at the court hearing.²⁰² An Alabama woman spent seven weeks in jail for failure to pay fees to a private probation company and was on probation due to a traffic violation.²⁰³

How is this possible? A private creditor, such as a predatory lender, landlord, or utility provider, can file a civil lawsuit. When the debtor does not show up the judge can issue a warrant for arrest for contempt of court, and then hold them in jail until they pay.²⁰⁴ It is almost a certainty that the people not showing up are poor. Ninety-five percent of default judgments in debt collection suits, after all, are against low-or-moderate income households—and usually involve people who live in black or Latino neighborhoods.²⁰⁵

What is more, public debts can be turned over to private debt collectors, who may in turn file civil lawsuits to recover the money.²⁰⁶ Even worse, over 200 district attorney offices contract with private debt collectors to use public enforcement on private debts—sometimes, getting

199. *Id.* at 60 (Marshall, J., dissenting).

200. *Id.*

201. Hager, *supra* note 119.

202. *Id.*

203. *Id.*

204. *Id.*

205. NEIGHBORHOOD ECON. ADVOC. PROJECT, LEGAL AID SOC'Y, MFY LEGAL SERV. & URBAN JUST. CTR., DEBT DECEPTION: HOW DEBT BUYERS ABUSE THE LEGAL SYSTEM TO PREY ON LOWER-INCOME NEW YORKERS 1 (2010), https://www.neweconomynyc.org/wp-content/uploads/2014/08/DEBT_DECEPTION_FINAL_WEB-new-logo.pdf [https://web.archive.org/web/20211017184301/https://www.neweconomynyc.org/wp-content/uploads/2014/08/DEBT_DECEPTION_FINAL_WEB-new-logo.pdf].

206. Hager, *supra* note 119.

a kickback for the fees collected.²⁰⁷ District attorney offices sent out millions of threatening demand letters to debtors each year on behalf of private parties.²⁰⁸

The private debt industry is far-reaching. One in three Americans have a delinquent debt in the hands of a private collection agency, about \$1,300 on average.²⁰⁹ This amounts to seventy-seven million Americans with debt in collection.²¹⁰ Some debt collection agencies file hundreds of collection suits on the same day, often rubberstamped by judges.²¹¹ They are so prolific that in Massachusetts, roughly two-thirds of *all* small-claims lawsuits are consumer debt collections.²¹² Sometimes, arrest warrants are signed by a member of the judge's staff based on as little as a phone call by the creditor.²¹³ Staff may sign the warrants as the judge and not bother to tell their boss.²¹⁴ Due to a lack of oversight, people can get jailed for debts that are cleared from bankruptcy, that they did not owe, or had already paid off.²¹⁵ It is common practice in small claims court to have one or two collections attorneys to cover for all debt collection agencies that are seeking arrest warrants for the day, substituting as the attorney of record.²¹⁶ Debtors have no such attorney.²¹⁷

Underhanded tactics are the norm. Intentional failure to serve defendants, known as sewer service, is commonplace, and process servers

207. David Dayen, *Prosecutors and Judges Have Brought Back Debtors' Prisons*, NATION (Feb. 22, 2018), <https://www.thenation.com/article/archive/prosecutors-and-judges-have-brought-back-debtors-prisons/> [<https://web.archive.org/web/20211017184321/https://www.thenation.com/article/archive/prosecutors-and-judges-have-brought-back-debtors-prisons/>].

208. AM. C.L. UNION, *A POUND OF FLESH*, *supra* note 146, at 4.

209. Dayen, *supra* note 207.

210. Dalie Jimenez, *Dirty Debts Sold Dirt Cheap*, 52 HARV. J. ON LEGIS. 41, 42 (2015).

211. Dayen, *supra* note 207.

212. *Testimony of April Kuehnhoff, Staff Attorney at the National Consumer Law Center on Behalf of Its Low-Income Clients, before the Massachusetts Legislature Joint Financial Services Committee, in Support of S.146/H.804, An Act Relative to Family Financial Protection*, NAT'L CONSUMER L. CTR., at 2 (Sept. 25, 2017), https://www.nclc.org/images/pdf/debt_collection/testimony-s120-h2811.pdf [https://web.archive.org/web/20211017184351/https://www.nclc.org/images/pdf/debt_collection/testimony-s120-h2811.pdf].

213. AM. C.L. UNION, *A POUND OF FLESH*, *supra* note 146, at 16.

214. Complaint at 1, *Cain v. City of New Orleans*, 2:15-cv-04479 (E.D. La., Sept. 17, 2015), <https://static1.squarespace.com/static/5aabd27d96e76f3205f18a55/t/5ae8ac5970a6ad56b0d96ea7/1525197917115/Doc+%231+++++2015-09-17++Complaint.pdf> [<https://web.archive.org/web/20211017184415/https://static1.squarespace.com/static/5aabd27d96e76f3205f18a55/t/5ae8ac5970a6ad56b0d96ea7/1525197917115/Doc+%231+++++2015-09-17++Complaint.pdf>].

215. Dayen, *supra* note 207.

216. AM. C.L. UNION, *A POUND OF FLESH*, *supra* note 146, at 16.

217. *Id.*

have a financial incentive to falsify service affidavits.²¹⁸ Of course, if someone is not served, they will not show up to court, and this can easily lead to them being held in contempt. Debt collectors rarely have valid evidence proving their assertions of who owes what.²¹⁹ When debtors in Haverhill and Lowell, Massachusetts fail to show up to court, constables send them a letter saying “[i]t appears you have chosen to be arrested, put in handcuffs in front of your family, friends and/or coworkers and brought before the court.”²²⁰ If they ignore the letter, they are warned, “you will be arrested as soon as you are found; this could be tomorrow morning coming out of your home, at work, or anywhere you are found.”²²¹ At the same time, the trade group for debt collectors has said that limitations on when and how debt collectors can call consumers are “arbitrary and capricious.”²²²

E. Lack of Fee Waivers

Theoretically, no one should be thrown in jail because they cannot pay a bill, public or private. But fee waivers are not a given. Sometimes, fee waivers are inaccessible. Oklahoma insists that those seeking appointed counsel call three attorneys and ask them how much it would cost for representation.²²³ Alabama defendants who claim indigency must be advised about the penalties for perjury as part of the screening process,²²⁴ a precaution that is not required for law enforcement officials swearing an

218. NEW YORK APPLESEED, DUE PROCESS AND CONSUMER DEBT: ELIMINATING BARRIERS TO JUSTICE IN CONSUMER CREDIT CASES 12, 17 (2010), https://www.ftc.gov/sites/default/files/documents/public_comments/protecting-consumers-debt-collection-litigation-and-arbitration-series-roundtable-discussions-august/545921-00031.pdf [https://web.archive.org/web/20211017184432/https://www.ftc.gov/sites/default/files/documents/public_comments/protecting-consumers-debt-collection-litigation-and-arbitration-series-roundtable-discussions-august/545921-00031.pdf].

219. NEIGHBORHOOD ECON. ADVOC. PROJECT ET AL., *supra* note 205, at 1.

220. AM. C.L. UNION, A POUND OF FLESH, *supra* note 146, at 17.

221. *Id.* at 17–18.

222. Letter from ACA International to the Consumer Financial Protection Bureau 3 (Sept. 17, 2019), <https://www.acainternational.org/assets/advocacy-resources/aca-comment-cfpb-reg-f-9.17.19.pdf> [<https://web.archive.org/web/20211017184453/https://www.acainternational.org/assets/advocacy-resources/aca-comment-cfpb-reg-f-9.17.19.pdf>].

223. *Application for Public Defender (For Defenedants who Made Bond)*, OKLA. DIST. CT., <https://oklaw.org/files/CB59BD67-E9D4-A408-BB53-C676C85FEED2/attachments/2B83E353-442A-4A75-B4A0-075838BB2E23/application-for-public-defender.pdf> [<https://web.archive.org/web/20210924191218/https://oklaw.org/files/CB59BD67-E9D4-A408-BB53-C676C85FEED2/attachments/2B83E353-442A-4A75-B4A0-075838BB2E23/application-for-public-defender.pdf>] (last visited Jan. 9, 2022).

224. ALA. R. CRIM. P. 6.3(b).

oath before a judge.²²⁵ Bankruptcy court is another good example. To prove indigency, one must fill out a form that is rather complicated for a person who does not read contracts for fun.²²⁶ It is not essential that systems be so convoluted. Many jurisdictions simply presume that if a person is receiving public aid, they are indigent unless proven otherwise,²²⁷ which is a much simpler way to identify a good chunk of the truly needy.

Sometimes, fee waivers are arbitrary. One judge determined whether someone had the ability to pay based on what they were wearing or if they had expensive-looking tattoos.²²⁸ Other judges told defendants they could pay off their debts by quitting smoking, cancelling their phone service, or handing over their welfare checks.²²⁹ Some have even claimed homeless people have the ability to pay because they can beg for money or pick up aluminum cans.²³⁰ Massachusetts law authorizes judges to waive costs of probation, but “this discretion is used infrequently and unevenly.”²³¹ Data suggests that the number of fee waivers is actually going down in the Bay State, and that rich communities were more likely to be given fee waivers than poor ones.²³²

And sometimes, fee waivers do not exist. This can be true for anything from probating an estate²³³ to Freedom of Information Act requests,²³⁴ but it is most troubling in the criminal realm. Judges in Kent County, Michigan rarely waive court fees for indigent defendants unless they are sentenced to prison.²³⁵ Detroit judges, too, skip right over ability-to-pay determinations when setting bail.²³⁶ Courts’ failure to inquire into a

225. ALA. R. CRIM. P. 2.3; 2.4; 3.9(a).

226. U.S. BANKR. CT, *supra* note 82.

227. *See, e.g.*, WASH. REV. CODE § 10.101.010(3)(a) (2011); LA. REV. STAT. ANN. § 15:175(A)(1)(b) (2007); MICH. COMP. LAWS § 780.991(3)(b) (2013).

228. Shapiro, *supra* note 142.

229. *Id.*

230. Olivia C. Jerjian, *The Debtors’ Prison Scheme: Yet Another Bar in The Birdcage of Mass Incarceration of Communities of Color*, 41 N.Y.U. REV. L. & SOC. CHANGE 235, 252 (2017).

231. Sawyer, *supra* note 150.

232. *Id.* at n.22.

233. *See* Watson v. Unknown Clerk, No. 12-12187-RWZ, 2013 U.S. Dist. LEXIS 109557, at *4 (D. Mass. Aug. 5, 2013).

234. *See* Friends of the Coast Fork v. United States DOI, No. 94-6140-CO, 1994 U.S. Dist. LEXIS 21675, at *5 (D. Or. Nov. 10, 1994).

235. Bannon, Negrecha & Diller, *supra* note 156, at 10.

236. Aleanna Siacon, *ACLU: Detroit Court’s Bail System Discriminates Against Poor Defendants*, DETROIT FREE PRESS (Apr. 14, 2019, 1:39 PM), <https://www.freep.com/story/news/local/michigan/wayne/2019/04/14/lawsuit-aclu-detroit-court-bail-punishes-poor/3465323002/> [<https://web.archive.org/web/20210924191820/https://www.freep.com>]

person's ability to pay is a rampant problem.²³⁷ Florida mandates that indigents pay a public defender fee "notwithstanding the defendant's present ability to pay."²³⁸ Austin, Texas did not give a single waiver for indigency in 2015.²³⁹

In *People v. Trask*, defendant Anita Marie Trask pled guilty to a drug charge in California and the court ordered her to enroll in a diversion program.²⁴⁰ When she attempted to do so, she found she could not afford the intake fee or monthly payments.²⁴¹ She asked to be assigned to a no-cost drug diversion program or else be given a fee waiver, but despite the fact that she was a mother of five, only had Social Security as income, and was sporadically homeless, she was met with no success.²⁴² Ironically, two programs would have paid for the drug diversion program fee, but the defendant was not eligible for them because of her drug charge.²⁴³ Her first appeal was dismissed by the appellate court because the command to go to a drug treatment was a "non-appealable order."²⁴⁴

After her first appeal failed, the trial court terminated the defendant from diversion, reinstated criminal proceedings, and sentenced her to sixty days in jail plus three years' probation.²⁴⁵ Only then did the appellate court consider the issue and ruled that a person could not be deemed to have violated a diversion program solely because they could not pay for it.²⁴⁶ Forcing a person to go through such a gauntlet in order to waive a fairly small program fee is only marginally better than no waiver at all.

/story/news/local/michigan/wayne/2019/04/14/lawsuit-aclu-detroit-court-bail-punishes-poor/3465323002/].

237. *E.g.*, *Turner v. Rogers*, 564 U.S. 431, 449 (2011); *Cty. of Durham by & through Durham DSS v. Burnette*, 821 S.E.2d 840, 843–44 (N.C. 2018), *aff'd*, 824 S.E.2d 397 (N.C. 2019); Final Judgment, In the Matter of Armstead Lester Hayes III, CITY OF MONTGOMERY, at 3 (Ala. Ct. Jud. 2017), <https://graphics.thomsonreuters.com/data/judges/5.pdf> [<https://web.archive.org/web/20220109204309/https://graphics.thomsonreuters.com/data/judges/5.pdf>]; Formal Complaint, In re Roy C. Vance, No. 18.019, at 4, STATE OF VT. JUD. CONDUCT BD. (2019), <https://graphics.thomsonreuters.com/data/judges/1418.pdf> [<https://web.archive.org/web/20211003025653/https://graphics.thomsonreuters.com/data/judges/1418.pdf>].

238. FLA. STAT. § 938.29(1)(b) (2021).

239. Ulloa, *supra* note 143.

240. *People v. Trask*, 119 Cal. Rptr. 3d 91, 92 (Cal. Ct. App. 2010).

241. *Id.*

242. *Id.* at 92–93.

243. *Id.* at 93.

244. *Id.*

245. *Id.*

246. *Id.* at 96. *See also* *Ortwein v. Schwab*, 410 U.S. 656, 656 (1973) (rejecting argument that non-waivable filing fee for civil appeals violated the Equal Protection Clause or First Amendment).

The Supreme Court has looked at this unjust system and shrugged. In the 1970s, the Supreme Court said, “there is no constitutional right to obtain a discharge of one’s debts in bankruptcy,” and rejected a claim that a lack of fee waivers violated due process or equal protection.²⁴⁷ *Ortwein v. Schwab*²⁴⁸ argued that a non-waivable fee for filing an appeal was unconstitutional. The Court applied a rational basis standard to assess the absence of a fee waiver and dispatched the issue in one paragraph of analysis.²⁴⁹

IV. CRIMINAL PROCEDURE RULES

It is no secret that wealthy criminals get kid gloves treatment when they break the law. Rich people can get out of jail time because they would not “fare well in prison” or because they can argue their privileged upbringing absolves them of responsibility.²⁵⁰ Data from 2003 show that white collar criminals still receive substantially shorter prison sentences.²⁵¹ JPMorgan Chase made “serious misrepresentations to the public” and “knowingly bundl[ed] toxic loans and [sold] them to unsuspecting investors,” but only had to pay a fine, not having any executive suffer jail time.²⁵² Ditto for HSBC Bank, which laundered money for Mexican drug cartels that executed captives with chainsaws.²⁵³ When corruption cases get to the Supreme Court, they let defendants

247. *United States v. Kras*, 409 U.S. 434, 446 (1973). Congress later added a fee waiver by statute. 28 U.S.C. § 1930(f)(1).

248. 410 U.S. at 656.

249. *Id.* at 660. Justice Douglas accused the majority of upholding a “scheme of judicial review whereby justice remains a luxury for the wealthy.” *Id.* at 662 (Douglas, J., dissenting). *Cf. Heckler v. Ringer*, 466 U.S. 602, 628 (1984) (Stevens, J., dissenting) (explaining that the majority required a poor Medicaid recipient to pay upfront for an expensive surgery in order to challenge a government order that such a surgery was not covered by Medicaid).

250. Liana Pennington, *Rich Defendant, Poor Defendant*, CONTEXTS (Nov. 20, 2014), <https://contexts.org/articles/rich-defendant-poor-defendant/> [<https://web.archive.org/web/20210924192611/https://contexts.org/articles/rich-defendant-poor-defendant/>].

251. Drew Feeley, *Personality, Environment, and the Causes of White-Collar Crime*, 30 L. & PSYCH. REV. 201, 208 (2006).

252. Complaint for Declaratory & Injunctive Relief at para. 3, *Better Mkts, Inc. v. U.S. Dep’t of Just.*, No. 1:14CV00190, 2014 WL 515658, at *1 (D.D.C. 2014).

253. Matt Taibbi, *Eric Holder, Wall Street Double Agent, Comes in From the Cold*, ROLLING STONE (July 8, 2015, 4:39 PM), <http://www.rollingstone.com/politics/news/eric-holder-wall-street-double-agent-comes-in-from-the-cold-20150708> [<https://web.archive.org/web/20210924193053/https://www.rollingstone.com/politics/politics-news/eric-holder-wall-street-double-agent-comes-in-from-the-cold-49262/>].

walk.²⁵⁴ Normal defendants are rarely so fortunate.²⁵⁵ A woman in Jackson, Mississippi was sentenced to three years in prison for failing to note on a food stamp application that she had a criminal conviction.²⁵⁶

But just as bad, sometimes unfairness is baked right into the rule.

A. *Reduced Privacy against Law Enforcement for Poor Households*

As a class, people who own their homes are much richer than those who rent. The average homeowner has a net worth of \$195,400, while the average renter has a net worth of \$5,400.²⁵⁷ Households that live in mobile homes, also known as manufactured housing, have an average net worth of \$26,000.²⁵⁸ There are many, many benefits that the government disproportionately awards to single family homes,²⁵⁹ but this pro-homeowner bias also spills into the criminal law.

254. See, e.g., *Kelly v. United States*, 140 S. Ct. 1565 (2020) (unanimously letting off corrupt political staffers who shut down the bridge of a town where the mayor refused to support their boss); *McDonnell v. United States*, 136 S. Ct. 2355 (2016) (unanimously overturning a public corruption conviction by narrowly defining federal bribery statute); *Black v. United States*, 561 U.S. 465 (2010) (unanimously overturning mail and wire fraud convictions for corporate executives); *Skilling v. United States*, 561 U.S. 358 (2010) (vacating an Enron executive's conspiracy to commit wire fraud conviction). One study found that Justice Antonin Scalia voted in favor of white-collar defendants 82% of the time, but only 7% of the time for other defendants. Adam Cohen, *How the Supreme Court Favors the Rich and Powerful*, TIME (Mar. 3, 2020, 7:00 AM), <https://time.com/5793956/supreme-court-loves-rich/> [<https://web.archive.org/web/20210924193444/https://time.com/5793956/supreme-court-loves-rich/>].

255. For example, a man was sentenced to eight years in prison for killing three others when he lost control of his Toyota. Toyota later recalled that defendant's car for an unintended acceleration defect that caused the crash, yet no one from Toyota was even charged. Rena Steinzor, *(Still) "Unsafe at Any Speed": Why Not Jail for Auto Executives?*, 9 HARV. L. & POL'Y REV. 443, 467–68 (2015).

256. Kaaryn Gustafson, *Degradation Ceremonies and the Criminalization of Low-Income Women*, 3 U.C. IRVINE L. REV. 297, 307 (2013).

257. Matthew Desmond, *How Homeownership Became the Engine of American Inequality*, N.Y. TIMES (May 9, 2017) <https://www.nytimes.com/2017/05/09/magazine/how-homeownership-became-the-engine-of-american-inequality.html> [<https://web.archive.org/web/20220109211250/https://www.nytimes.com/2017/05/09/magazine/how-homeownership-became-the-engine-of-american-inequality.html>].

258. CONSUMER FIN. PROT. BUREAU, MANUFACTURED-HOUSING CONSUMER FINANCE IN THE UNITED STATES 17 (2014), https://files.consumerfinance.gov/f/201409_cfpb_report_manufactured-housing.pdf [https://web.archive.org/web/20210924193658/https://files.consumerfinance.gov/f/201409_cfpb_report_manufactured-housing.pdf].

259. E.g., Rachel D. Godsil & David V. Simunovich, *Protecting Status: The Mortgage Crisis, Eminent Domain, and the Ethic of Homeownership*, 77 FORDHAM L. REV. 949, 956–57 (2008); Rebecca N. Morrow, *Billions of Tax Dollars Spent Inflating the Housing Bubble: How and Why the Mortgage Interest Deduction Failed*, 17 FORDHAM J. CORP. & FIN. L. 751, 753 (2012); Stephanie M. Stern, *Residential Protectionism and the Legal Mythology of Home*, 107 MICH. L. REV. 1093, 1094–95 (2009).

Homes offer far greater privacy protections. Because of the “traditional property-based understanding of the Fourth Amendment,” privacy is directly tied to physical space.²⁶⁰ The more steps a person takes to seal their home off from prying eyes, the more privacy the law grants them.²⁶¹ Police officers may not take a drug-sniffing dog up to the doorway of a home,²⁶² but may stoop in an apartment dwellers’ bushes for several minutes with their noses pressed up against the windows.²⁶³ Mobile homes do not enjoy the same protections as site-built homes,²⁶⁴ and public housing residents may be subject to violations of privacy as the price of having a roof over their heads.²⁶⁵ Homeowners may even have the right to employ deadly force in protection of their property in a manner that renters may not.²⁶⁶

Poor people also get less privacy protections in other parts of their lives. Poor people are not deemed a suspect class, giving government a freer hand to discriminate against them.²⁶⁷ Welfare applicants must tolerate warrantless, intrusive government searches to verify they are not hiding assets in their homes.²⁶⁸ Nor do police need a warrant to arrest a person outside of a home, which could include a homeless person.²⁶⁹ No-cause drug testing of welfare recipients is commonplace.²⁷⁰ Professor Christopher Slobogin has called these disparities a “poverty exception” to the Fourth Amendment.²⁷¹ Removing all these privacy protections not only

260. *Florida v. Jardines*, 569 U.S. 1, 11 (2013).

261. *United States v. Dunn*, 480 U.S. 294, 301 (1987); *Rawlings v. Kentucky*, 448 U.S. 98, 106 (1980); William J. Stuntz, *The Distribution of Fourth Amendment Privacy*, 67 GEO. WASH. L. REV. 1265, 1270 (1999).

262. *Jardines*, 569 U.S. at 9.

263. *Minnesota v. Carter*, 525 U.S. 83, 104–05 (1998) (Breyer, J., concurring).

264. *See California v. Carney*, 471 U.S. 386, 394 (1985).

265. *See, e.g., Wyman v. James*, 400 U.S. 309 (1971); *Sanchez v. County of San Diego*, 464 F.3d 916, 920 (9th Cir. 2006); *S.L. v. Whitburn*, 67 F.3d 1299, 1307 (7th Cir. 1995). Corporations on the other hand, can insist on a warrant. *See G.M. Leasing Corp. v. United States*, 429 U.S. 338, 359 (1977); *Camara v. Municipal Court*, 387 U.S. 523 (1967).

266. *Compare Smith v. State*, 403 N.E.2d 869, 875 (Ind. Ct. App. 1980) (“There is no question that . . . ‘[a homeowner’s] front porch is part of her premises, upon which that right to defense can arise’ is a correct statement of the law.”), with *People v. Aiken*, 828 N.E.2d 74, 79 (N.Y. 2005) (holding no affirmative defense for use of deadly force where renter was in the indoor doorway of their apartment unit).

267. *See Maher v. Roe*, 432 U.S. 464, 471 (1977); *Harris v. McRae*, 448 U.S. 297 (1980); Jordan C. Budd, *Pledge Your Body for Your Bread: Welfare, Drug Testing, and the Inferior Fourth Amendment*, 19 WM. & MARY BILL OF RTS. J. 751, 753 (2011).

268. *See Wyman*, 400 U.S. 309; *Sanchez*, 464 F.3d at 918–20.

269. *See United States v. Watson*, 423 U.S. 411, 423 (1976).

270. *See Budd, Pledge Your Body for Your Bread*, *supra* note 267, at 783, 788.

271. Christopher Slobogin, *The Poverty Exception to the Fourth Amendment*, 55 FLA. L. REV. 391, 392 (2003).

humiliates the needy, it makes it more likely the government will find evidence of a crime and charge them in the first place.

B. Indigent-Only Disclosures and Scrutiny

Judge Learned Hand once said, “[u]nder our criminal procedure the accused has every advantage. While the prosecution is held rigidly to the charge, he need not disclose the barest outline of his defense.”²⁷² That might be true for rich people accused of crimes, but not poor ones. Federal Rule of Criminal Procedure 17 governs subpoenas. Back in the 1960s, Rule 17 provided that a defendant with wealth could obtain all of the subpoenas they needed by simply paying a fee and designating the desired witness.²⁷³ However, an indigent defendant had to submit a detailed affidavit explaining why they needed the witness and what the substance of their expected testimony might be.²⁷⁴ Because prosecutors could see these filings, poor defendants were forced to provide their case theory in advance.²⁷⁵ In 1966, the rule was amended to allow poor defendants to submit subpoena requests to the judge alone.²⁷⁶

But changing the federal rule did not solve all the problems. It took decades for states to apply the same basic principle of equity to their own systems.²⁷⁷ Kentucky was still stamping out vestiges of the unfairness in 2018.²⁷⁸ Who knows how many poor defendants lost the element of surprise over the years.²⁷⁹

And even the federal rule is not free from problems. The revised rule requires the defendant to demonstrate “the necessity of the witness’s

272. *United States v. Garsson*, 291 F. 646, 649 (S.D.N.Y. 1923).

273. *United States v. Beckford*, 964 F. Supp. 1010, 1015 (E.D. Va. 1997).

274. *Id.* at 1015.

275. *Id.*

276. *Id.* at 1016.

277. *E.g.*, *Brooks v. State*, 385 S.E.2d 81 (Ga. 1989) (citing cases); *see also Ex parte Moody*, 684 So. 2d 114, 121 nn. 1–2 (Ala. 1996), *as modified on denial of reh’g* (Sept. 27, 1996) (citing state legislative and judicial fixes in the 1980s and 1990s to save poor defendants from having to explain to prosecutors why they sought court-appointed experts).

278. *See, e.g.*, *Commonwealth v. Grise*, 558 S.W.3d 923, 931 (Ky. 2018) (deciding in 2018 that indigent defendants did not have to reveal their explanation of why they wanted an expert witness appointed).

279. We know of at least a handful because several state courts rejected requests for confidentiality by poor defendants. *See, e.g.*, *State v. Apelt*, 861 P.2d 634 (Ariz. 1993); *State v. Wood*, 967 P.2d 702, 714 (Idaho 1998); *Stevens v. State*, 770 N.E.2d 739, 759 (Ind. 2002); *State v. Phipps*, 418 S.E.2d 178, 190 (N.C. 1992); *State v. Sahlie*, 277 N.W.2d 591, 593–94 (S.D. 1979); *Ramdass v. Commonwealth*, 437 S.E.2d 566, 571 (Va. 1993), *cert. granted, judgment vacated sub nom.* *Ramdass v. Virginia*, 512 U.S. 1217 (1994).

presence for an adequate defense.”²⁸⁰ By its own terms, a judge could reject a witness if they were helpful, but not “necessary.” Defendants bear the burden of showing that the witness is necessary.²⁸¹ Judges are still able to scrutinize the subpoena requests and deny them if the judge believes the testimony would be cumulative or simply unnecessary.²⁸² Trial judges have great discretion on this matter, so the defendant will probably not be able to successfully challenge a struck witness.²⁸³ Plus, on appeal, the government gets access to the information about the witness and can argue they are not necessary.²⁸⁴ Rich defendants do not need to prove that each of their witnesses will be a sufficient value-add to their theory of the case.

Yet many states emulate the federal rule.²⁸⁵ In South Carolina, only \$500 is authorized for investigative, expert, or other services necessary to representation of a criminal defendant. To go above that amount, the court “certifies, in a written order with specific findings of fact, prior to the expense being incurred, that payment in excess of the limit is appropriate because the services to be provided are reasonable and necessary to provide adequate defense.”²⁸⁶

Worse still, some states have not adopted confidentiality protections for indigent defendants. Colorado requires indigent defendants to submit an affidavit along with subpoena requests stating that the “facts supporting the contention that the witness or the items sought to be subpoenaed are material and relevant and that the defendant cannot safely go to trial without the witness or items which are sought by subpoena.”²⁸⁷ It makes

280. FED. R. CRIM. P. 17(b).

281. *United States v. Hegwood*, 562 F.2d 946, 953 (5th Cir. 1977).

282. *See, e.g.*, *United States v. Weischedel*, 201 F.3d 1250, 1255 (9th Cir. 2000) (“A district court can properly deny a Rule 17(b) subpoena request when the testimony sought would be cumulative.”); *United States v. Merrill*, 746 F.2d 458, 465 (9th Cir. 1984) (“[A] rule 17(b) motion is addressed to the sound discretion of the trial court”); *United States v. Sims*, 637 F.2d 625, 629 (9th Cir. 1980) (holding subpoena may be rejected when it would be an “oppressive and unreasonable use of the process of the court”); *Hegwood*, 562 F.2d at 953 (citing cases); *United States v. Cramer*, No. 3:17-267-SI, 2019 U.S. Dist. LEXIS 125336, at *3 (D. Or. July 26, 2019) (stating judges have a responsibility to “protect public funds” when deciding whether to grant subpoena requests).

283. *United States v. Moore*, 917 F.2d 215, 230 (6th Cir. 1990) (“[A] reviewing court should not reverse unless the exceptional circumstances of the case indicate that defendant’s right to a complete, fair and adequate trial is jeopardized.” (quoting *Terlikowski v. United States*, 379 F.2d 501, 508 (8th Cir. 1967))).

284. *E.g.*, *United States v. Link*, 921 F.2d 1523, 1528 (11th Cir. 1991).

285. *E.g.*, DEL. R. CRIM. P. 17(b); OHIO R. CRIM. P. 17(b).

286. Section 61—E23-Commission on Indigent Defense, SC.GOV, <https://sccid.sc.gov/docs/SCCID%20FY19-20%20Budget%20Provisos.pdf>. [<https://web.archive.org/web/20210924193742/https://sccid.sc.gov/docs/SCCID%20FY19-20%20Budget%20Provisos.pdf>] (last visited Jan. 9, 2022).

287. COLO. R. CRIM. P. 17(b).

no mention of *ex parte* submission, and prosecutors have successfully argued against inferring an *ex parte* gloss to the rule.²⁸⁸

Expert witnesses may present the same structural inequality. Failure to obtain an expert witness can be such a fundamental blunder that it amounts to ineffective assistance of counsel.²⁸⁹ Yet poor defendants may face inordinate barriers to this basic tenant of a fair trial. State funding for defense experts has historically been piddling,²⁹⁰ and were that not enough, many jurisdictions throw up additional obstacles.

Georgia allows *ex parte* briefs explaining the need for an expert witness, but still allows prosecutors to submit briefs in opposition, and has left the door open to the possibility that, sometimes, prosecutors might also be made privy to defense strategy.²⁹¹ Louisiana also notifies the prosecution about an indigent defendant's *ex parte* request for an expert, and allows them to file in opposition.²⁹² Indiana recognized there may be a need for confidentiality when requesting state-funded experts, but refused to create a blanket rule, meaning indigent defendants must fight for an *ex parte* proceeding every time.²⁹³ State courts "uniformly stress that the showing of need must set forth in detail what assistance is being requested and why it is needed. The defense must identify the expert, explain what the expert will do, and explain why that will be important in representing the defendant."²⁹⁴

Michigan demands a showing that the expert is a material witness without whom the case cannot proceed to trial, and to do so, they must reveal to the court and prosecutor how the expert fits into their trial

288. See e.g., *Colorado v. Holmes*, No. 12-CR-1522, 2014 Colo. Dist. LEXIS 1734 (D.C. Colo. June 5, 2014).

289. E.g., *Hinton v. Alabama*, 571 US 263, 274 (2014); *Jimenez v. Davis*, No. A-12-CA-0373-LY, 2018 U.S. Dist. LEXIS 154178, at *51 (W.D. Tex. Sep. 10, 2018). See also *Ake v. Oklahoma*, 470 U.S. 68, 87 (1985) (vacating death sentence where trial judge rejected request for a psychiatrist at government expense); *Strickland v. Washington*, 466 U.S. 668 (1984) (holding ineffective assistance of counsel in part because the defense attorney failed to seek a psychiatric examination).

290. *Vick*, *supra* note 9, at 392 (noting that various states once capped defense expenditures on experts at \$2,500, \$250, or \$100, even though expert costs could top \$40,000).

291. See *Brooks v. State*, 385 S.E.2d 81, 84 (Ga. 1989).

292. See *State v. Touchet*, 642 So. 2d 1213, 1214 (La. 1994).

293. See *Stevens v. State*, 770 N.E.2d 739, 759 (Ind. 2002).

294. *Ex parte Jimenez*, 364 S.W.3d 866, 878 (Tex. Crim. App. 2012) (quoting 3 WAYNE R. LAFAYE ET AL., *CRIMINAL PROCEDURE* § 11.2(e) at 654 (3d ed. 2007)).

strategy.²⁹⁵ No such requirement exists for wealthy defendants.²⁹⁶ In 2018, the Michigan Supreme Court sanded down the rough edges from the law, but still required a showing by an indigent defendant of “a reasonable probability both that an expert would be of assistance to the defense and that denial of expert assistance would result in a fundamentally unfair trial.”²⁹⁷ Virginia has rejected that indigent defendants have a right to *ex parte* proceedings,²⁹⁸ as have South Dakota²⁹⁹ and Idaho.³⁰⁰ So unless the defendant has money, the prosecution is free to listen for the juicy details of why a defendant might need an expert.³⁰¹ Plus, if a prosecutor knows a defendant sought a court-appointed expert, but the defendant chooses not to use that expert at trial, the prosecution can infer the expert was inculpatory.³⁰² This gives the prosecutor more leverage if they need to negotiate a plea or may embolden them to poke around for holes in the defense’s case.

The Supreme Court has resigned itself to inequality in the system, saying it has “not held that a State must purchase for the indigent defendant all the assistance that his wealthier counterpart might buy.”³⁰³ But the indigent defendant may also be denied all of the assistance that the state might buy.

In Texas, Rosa Estella Jimenez was babysitting a 21-month-old child.³⁰⁴ One day while Jimenez was babysitting, the child was found limp and purple, and died three months later from injuries sustained during the episode.³⁰⁵ Jimenez was charged with murder, and state experts testified that she shoved paper towels down the child’s throat, choking it, and a jury

295. MICH. COMP. LAWS § 775.15; *see* *People v. Tanner*, 671 N.W.2d 728 (2003), *overruled by* *People v. Kennedy*, 917 N.W.2d 355 (2018); *People v. Jacobsen*, 532 N.W.2d 838 (1995), *overruled by* *People v. Kennedy*, 917 N.W.2d 355 (2018).

296. Jim Kolosowsky, *Funding Expert Witnesses for Indigent Defendants: A Model for Unequal Protection*, 95 MICH. BAR. J. 18, 19 (May 2016), <http://www.michbar.org/file/barjournal/article/documents/pdf4article2855.pdf> [<https://web.archive.org/web/20210924193807/http://www.michbar.org/file/barjournal/article/documents/pdf4article2855.pdf>].

297. *Kennedy*, 917 N.W.2d at 367. This is similar to the standard that Ohio uses in *State v. Peeples*, 640 N.E.2d 208, 212 (Ohio App. 1994), along with some federal circuits. *See, e.g.*, *Little v. Armontrout*, 835 F.2d 1240, 1244 (8th Cir. 1987); *Moore v. Kemp*, 809 F.2d 702, 712 (11th Cir.) (en banc).

298. *Ramdass v. Commonwealth*, 437 S.E.2d 566, 570, *rev’d on other grounds*, *Ramdass v. Virginia*, 512 U.S. 1217 (1994).

299. *State v. Floody*, 481 N.W.2d 242, 256 (S.D. 1992).

300. *State v. Wood*, 967 P.2d 702, 714 (Idaho 1998).

301. Justin B. Shane, *Money Talks: An Indigent Defendant’s Right to an Ex Parte Hearing for Expert Funding*, 17 CAP. DEF. J. 347, 347–48 (2005).

302. *Id.* at 352.

303. *Ake v. Oklahoma*, 470 U.S. 68, 77 (1985).

304. *Jimenez v. State*, 240 S.W.3d 384, 387 (Tex. App. 2007).

305. *Id.* at 393.

convicted her.³⁰⁶ Her direct appeals were rejected.³⁰⁷ After the direct appeal concluded, she filed for habeas relief.³⁰⁸ Among other things, she argued that the defense experts were outclassed by what the prosecution had.³⁰⁹ The Texas Court of Criminal Appeals found this argument “compelling,” admitting the “trial was not a perfectly ‘level playing field’ in terms of the number of expert witnesses on each side.”³¹⁰ Regardless, the court said that defendants were not entitled to “absolute (or even rough) equivalency of experts” with the prosecution.³¹¹ The Supreme Court denied certiorari.³¹² Over the years, two more habeas petitions were filed, and two more were rejected.³¹³ In 2018, a federal magistrate agreed with her claim that she was denied adequate expert funding, and recommended that she be given a new trial.³¹⁴ The following year, her conviction was overturned and a new trial was ordered.³¹⁵ She remained in prison for two more years until she was released on bond, though the charge is not yet resolved.³¹⁶

There is no obvious reason why rules need to make it so difficult for poor people. North Dakota eliminated its statutory disparity for poor defendants in 2006 by having the North Dakota Commission on Legal Counsel for Indigents assume responsibility for providing subpoenas for indigent defendants.³¹⁷ Alaska’s rule for indigent subpoenas requires a showing of inability to pay, but nothing about scrutinizing subpoenas to

306. *Id.* at 398.

307. *Id.* at 418; *see In re Jimenez*, No. PD-1669-07, 2008 Tex. Crim. App. LEXIS 480 (Tex. Crim. App. Apr. 2, 2008); *Olvera Jimenez v. Texas*, 555 U.S. 892 (2008).

308. *Ex parte Jimenez*, No. AP-76,669, 2011 Tex. Crim. App. Unpub. LEXIS 815 (Tex. Crim. App. Nov. 2, 2011).

309. *Ex parte Jimenez*, 364 S.W.3d 866, 887 (Tex. Crim. App. 2012).

310. *Id.*

311. *Id.*

312. *Jimenez v. Texas*, 568 U.S. 1085 (2013).

313. *Jimenez v. Davis*, No. A-12-CA-0373-LY, 2018 U.S. Dist. LEXIS 154178, at *27–28 (W.D. Tex. Sep. 10, 2018).

314. *Id.* at *72, *74–75.

315. Order, *Jimenez v. Davis*, No. A:12-CV-00373-LY (W.D. Tex. Oct. 28, 2019) (on file with author).

316. *History of Rosa Jimenez Case: Woman Convicted in Child’s Choking Death 18 Years Ago*, KVUE ABC, (Jan. 27, 2021, 11:24 AM), <https://www.kvue.com/article/news/local/rosa-jimenez-child-choking-death-case-history/269-89ecd708-6e16-48ed-9fe3-fd1f5d151b47>

[<https://web.archive.org/web/20210924194000/https://www.kvue.com/article/news/local/rosa-jimenez-child-choking-death-case-history/269-89ecd708-6e16-48ed-9fe3-fd1f5d151b47>].

317. N.D. R. CRIM. P., *Rule 17. Subpoena, Explanatory Note*, STATE N.D. CTS. (Mar. 1, 2018), <https://www.ndcourts.gov/legal-resources/rules/ndrcrimp/17> [<https://web.archive.org/web/20210924194118/https://www.ndcourts.gov/legal-resources/rules/ndrcrimp/17>].

ensure they are necessary.³¹⁸ Utah allows defense attorneys to spend \$7,500 on experts before going to the court for a request.³¹⁹ Hawaii has court-appointed attorneys submit requests by providing the court with itemized and verified statements of expenses.³²⁰ None of these states have gone bankrupt.

C. Hard Pay Caps on Court-Appointed Attorneys and Public Defenders

Life is not easy for public defenders. Nowhere is this truer than in Wisconsin. Private attorneys who take public defender cases in the Badger State used to earn \$50 per hour.³²¹ In 1995, the powers-that-be decided that rate was too generous, and cut it to \$40 per hour, where it remained there for the next quarter of a century, making it the worst in the nation.³²² The Wisconsin Supreme Court rejected a plea to raise the salaries, saying that \$40 per hour was not unreasonable.³²³ In 2019, the legislatures approved a pay bump to \$70 per hour.³²⁴

Arguably even more troubling than low pay, some states place a hard cap on the quality of representation that poor defendants can receive, condemning those with difficult cases that require more hours of effort. All studies that have looked at indigent defense services have found that adequate funding is “essential” to quality representation.³²⁵ Yet court-appointed defense attorneys in Alabama are paid a meager \$70 per hour for work done on cases, with a cap of \$1,500 for non-felonies, and a max

318. ALASKA R. CRIM. P. 17(b).

319. Shane, *supra* note 301, at 362.

320. HAW. R. PENAL P. § 44(a).

321. Bruce Vielmetti, *A Long-Haul Defense Lawyer Makes Do With Wisconsin's Lowest-In-Nation Pay*, MILWAUKEE J. SENTINEL, (May 11, 2018, 10:31 AM), <https://www.jsonline.com/story/news/local/wisconsin/2018/05/11/wisconsins-lowest-nation-pay-defense-lawyers-crisis/579026002/> [<https://web.archive.org/web/20210924194153/https://www.jsonline.com/story/news/local/wisconsin/2018/05/11/wisconsins-lowest-nation-pay-defense-lawyers-crisis/579026002/>].

322. *Id.*

323. Shawn Johnson, *Wisconsin Supreme Court Raises Pay for Court-Appointed Defense Lawyers*, WIS. PUB. RADIO (May 18, 2018, 1:45 PM), <https://www.wpr.org/wisconsin-supreme-court-raises-pay-court-appointed-defense-lawyers> [<https://web.archive.org/web/20210924194312/https://www.wpr.org/wisconsin-supreme-court-raises-pay-court-appointed-defense-lawyers>].

324. *State Budget Proposal Moving with Private Bar, ADA, and SPD Pay Increases, Inside Track*, 11 ST. BAR. WIS. INSIDE TRACK 10 (June 5, 2019), <https://www.wisbar.org/NewsPublications/InsideTrack/Pages/Article.aspx?Volume=11&Issue=10&ArticleID=27050> [<https://web.archive.org/web/20210924194341/https://www.wisbar.org/NewsPublications/InsideTrack/Pages/Article.aspx?Volume=11&Issue=10&ArticleID=27050>].

325. Albert L. Vreeland II, *The Breath of the Unfee'd Lawyer: Statutory Fee Limitations and Ineffective Assistance of Counsel in Capital Litigation*, 90 MICH. L. REV. 626, 639 (1991).

of \$4,000 for the most serious felonies.³²⁶ New York offers \$60 per hour for trial court work, with a cap of \$2,400 earned.³²⁷ Hawaii pays \$90 per hour with a cap of \$900 to \$6,000, depending on case type.³²⁸ Mississippi's cap can be as low as \$200.³²⁹ New Mexico only guarantees that appointed counsel will receive at least \$1, and the caps are not that much higher.³³⁰

None of these states allow even 100 hours of billing at the standard rate for the most serious crimes, even though a death penalty case can consume 1,000 hours of attorney time for the trial alone,³³¹ and nearly 2,000 hours for the whole case.³³² The only consolation in these numbers is that it used to be even worse.³³³

Similar fee caps may be seen in appellate practice. South Carolina appellate attorneys representing indigent clients receive between \$40 and \$60 per hour depending on the work, with a cap of \$3,500 on noncapital appeals.³³⁴ Iowa authorizes a billing rate of between \$60 and \$70 per hour for appeals, and caps fees for crimes other than the most serious at \$3,600.³³⁵ New Mexico caps appeals to the state supreme court at \$500.³³⁶ Many courts have upheld hard limits.³³⁷

Depending on the case, this may fall far short. For reference, a successful civil case that made it to the United States Supreme Court cost \$1.5 million, including two appeals in the Ninth Circuit that cost \$82,023

326. ALA. CODE § 15-12-21(d).

327. N.Y. COUNTY LAW § 722-b (2021).

328. HAW. REV. STAT. § 802-5 (2013).

329. MISS. CODE ANN. § 99-15-17 (2018). One court upheld payment of \$32.10 per hour. *Evans v. State*, 725 So. 2d 613 (Miss. 1997). Another approved a total payment of \$150. *Young v. State*, 255 So. 2d 318, 320 (Miss. 1971).

330. N.M. STAT. ANN. § 31-16-8(B) (2011). *See also* NEV. REV. STAT. ANN. § 7.125 (LexisNexis 2021) (caps ranging from \$20,000 to \$750); *Martinez-Macias v. Collins*, 979 F.2d 1067, 1067 (5th Cir. 1992) (noting a court appointed attorney earned \$11.84 per hour).

331. Robert L. Spangenberg & Elizabeth R. Walsh, *Capital Punishment or Life Imprisonment—Some Cost Considerations*, 23 LOY. L.A. L. REV. 45, 53 (1989).

332. Vick, *supra* note 9, at 337.

333. *Id.* at 381–82 (citing examples of court-appointed attorneys earning \$35, \$25, \$20, \$10, or even \$3.33 per hour).

334. S.C. CODE ANN. § 17-3-50(A) (2007).

335. *Fee Claim Process*, IOWA OFF. OF THE STATE PUB. DEF. (last visited May 22, 2020) <https://spd.iowa.gov/contract-attorneys/fee-claim-process> [<https://web.archive.org/web/20210924194417/https://spd.iowa.gov/contract-attorneys/fee-claim-process>].

336. N.M. STAT. ANN. § 31-16-8(B)(4) (2011).

337. *See, e.g., State v. Rush*, 217 A.2d 441 (N.J. 1966) (rejecting a Sixth Amendment challenge to the underfunded court-appointment system); *Ex parte Brown*, 711 S.E.2d 899, 905 (S.C. 2011) (rejecting claim for more than the statutory cap, though recognizing a prospective right for court-appointed attorneys to argue the Takings Clause for low pay). *But see Makemson v. Martin County*, 491 So. 2d 1109, 1112 (Fla. 1986) (holding that fee caps without exceptions for special circumstances denied the right to effective assistance of counsel).

and \$56,412.³³⁸ By capping appellate fees, states do not account for the fact that special circumstances may justify paying more.³³⁹

Not only are these fees low in absolute terms, but they are also low in relative terms. On average, court-appointed counsel are paid “substantially less than the prevailing rates for private retained attorneys.”³⁴⁰ It is also less than what courts have deemed reasonable attorney fees for lawyers who represent plaintiffs in civil cases.³⁴¹ Attorneys who successfully sue the federal government can earn up to \$125 per hour.³⁴² The modern rate for court-appointed attorneys in state court appears to be frozen in time, as rates of \$40–\$90 per hour would have been found reasonable for private attorneys decades ago.³⁴³

When courts are tasked with calculating reasonable private attorney fees, they commonly use the “lodestar” approach, which involves (1) multiplying the hours spent on the case by a reasonable hourly fee, and (2) adjusting the fee as necessary to reflect the peculiarities of the case.³⁴⁴ The reasonable rate, in turn, is based on the “prevailing market rates in the relevant community.”³⁴⁵ In other words, courts have a great deal of discretion to fashion a fair payment. Fee-cap statutes deny judges this

338. Robert Barnes, *An Alaskan Moose Hunter Beat the Odds at the Supreme Court. It Cost \$1.5 Million.*, WASH. POST (Nov. 3, 2019), https://www.washingtonpost.com/politics/courts_law/an-alaskan-moose-hunter-beat-the-odds-at-the-supreme-court-it-cost-15-million-/2019/11/01/cd17eb4c-de14-11e9-8dc8-498eabc129a0_story.html [https://web.archive.org/web/20210924194500/https://www.washingtonpost.com/politics/courts_law/an-alaskan-moose-hunter-beat-the-odds-at-the-supreme-court-it-cost-15-million-/2019/11/01/cd17eb4c-de14-11e9-8dc8-498eabc129a0_story.html]. The cases were *Sturgeon v. Frost I*, 577 U.S. 424 (2016) and *Sturgeon v. Frost II*, 139 S. Ct. 1066 (2019).

339. South Carolina, for instance, at least explicitly authorizes courts to pay more than the ordinary rate of \$60 per hour if necessary to ensure effective assistance of counsel. S.C. CODE ANN. § 17-3-50(C) (2021). So too does the federal system. 18 U.S.C. § 3006A(d)(3).

340. Vreeland, *supra* note 325, at 627; *see also* Norman Lefstein, *In Search of Gideon’s Promise: Lessons from England and the Need for Federal Help*, 55 HASTINGS L.J. 835, 847 (2004) (noting that the average hourly rate of attorneys in 2002 was between \$178 and \$265 per hour).

341. *Potter v. Blue Cross Blue Shield of Mich.*, 10 F. Supp. 3d 737, 743 (E.D. Mich. 2014) (approving magistrate report finding rates of \$350–\$450 per hour was a reasonable rate); *Portland Audubon Soc’y v. Lujan*, 865 F. Supp. 1464, 1476 (D. Or. 1994) (finding rates between \$117 and \$205 per hour as reasonable); *Nelson v. State*, No. 2008-09503-WI, 2011 Ohio Misc. LEXIS 417, paras. 15–17 (Oh. Ct. Cl. Aug. 4, 2011) (finding a rate of \$150 per hour was a reasonable fee).

342. 28 U.S.C. § 2412(d)(2)(A).

343. *Pennsylvania v. Del. Valley Citizens’ Council for Clean Air*, 478 U.S. 546, 567 (1986) (approving rates between \$25 and \$100 per hour as reasonable); *Wilcox v. Ives*, No. 85-0342-P, 1989 U.S. Dist. LEXIS 17766, at *25 (D. Me. July 28, 1989) (approving a rate of \$60 per hour as reasonable); *Herrera v. Farm Prods. Co.*, 540 F. Supp. 433, 436 (N.D. Iowa 1982) (approving a rate of \$55 per hour as reasonable).

344. *Del. Valley Citizens’ Council for Clean Air*, 478 U.S. at 563.

345. *Blum v. Stenson*, 465 U.S. 886, 895 (1984).

opportunity. One Illinois county even has the prosecutor review the public defender's funding requests for reasonableness before submitting them to the judge.³⁴⁶

Drunk driving costs help illustrate the disparity. First-time drunk driving is a misdemeanor in all fifty states and the District of Columbia.³⁴⁷ The nationwide average to hire a private defense attorney for a DUI case is between \$1,500 and \$3,000.³⁴⁸ And that's an average. One would expect that half of jurisdictions cost more than \$3,000. Yet caps on how much court-appointed attorneys can spend on misdemeanors falls far below this. Iowa limits "serious misdemeanors" at \$600.³⁴⁹ Nevada says no more than \$750.³⁵⁰ Alabama caps misdemeanors at \$1,500.³⁵¹

The attorney may struggle to get by, but poor defendants suffer too. Low pay invites incompetence. Studies have found that court-appointed attorneys in Alabama were more than twenty times more likely to have been subject to disciplinary action than the state bar as a whole.³⁵² Sadly, this even extends to defendants on death row. One-quarter of inmates on death row in Kentucky were represented by attorneys who were later disbarred or resigned to avoid disbarment, and defendants who were actually executed in Louisiana were represented by a cohort of attorneys nearly seventy times more likely to have been disciplined than the average Louisiana lawyer.³⁵³

D. Denying Poor People Attorneys

At least having a terribly compensated lawyer is better than none at all. The Supreme Court has made clear that poor people have no right to an attorney in most civil matters.³⁵⁴ But it has also held that people are not

346. Andrew Strickler, *In Oversight Void, Ill. Public Defenders 'Beholden' To Courts*, LAW360, (June 20, 2021, 8:02 PM), <https://www.law360.com/access-to-justice/articles/1393735/in-oversight-void-ill-public-defenders-beholden-to-courts-> [https://web.archive.org/web/20210924195133/https://www.law360.com/access-to-justice/articles/1393735/in-oversight-void-ill-public-defenders-beholden-to-courts-].

347. *When is a DUI a Misdemeanor?*, FINDLAW (Oct. 24, 2018), <https://dui.findlaw.com/dui-charges/when-is-a-dui-a-misdemeanor-.html> [https://web.archive.org/web/20210924195204/https://www.findlaw.com/dui-charges/when-is-a-dui-a-misdemeanor-.html].

348. *How Much Does a DUI Attorney Cost?*, THUMBSTACK (August 26, 2020), <https://www.thumbstack.com/p/dui-lawyer-cost> [https://web.archive.org/web/20210924195250/https://www.thumbstack.com/p/dui-lawyer-cost].

349. *Fee Claim Process*, *supra* note 335.

350. NEV. REV. STAT. § 7.125(2)(c) (2021).

351. ALA. CODE § 15-12-21(d)(6) (2017).

352. Vick, *supra* note 9, at 398.

353. *Id.*

354. *See Lassiter v. Dep't of Soc. Servs.*, 452 U.S. 18 (1981).

entitled to attorneys in many criminal settings. The Court has said states do not need to provide public defenders if a term of imprisonment will not be imposed, even if such a punishment is authorized.³⁵⁵ Poor people are thus unshielded against the numerous penalties that come with conviction of a crime irrespective of jail time, such as a harder time finding employment, exclusion from certain jobs, or restrictions on family relationships.³⁵⁶

More broadly, counsel is only guaranteed for “critical stage[s] of [a] prosecution.”³⁵⁷ The “prosecution” does not commence until “the initiation of adversary judicial criminal proceedings—whether by way of formal charge, preliminary hearing, indictment, information, or arraignment.”³⁵⁸ This cuts out many proceedings, such as pre-indictment lineups used to identify a defendant.³⁵⁹

Even after charges have been brought, many scenarios are exempt. Before a criminal sentence is imposed, the United States Probation Officer creates a presentence report that gives information on the defendant, the crime, and their criminal history.³⁶⁰ It is of monumental importance when it comes to determining a person’s sentence, and one of the key sources of information for them are the defendants themselves. Inculpatory statements are easy to imagine. If a defendant shares that they have used drugs, that could be used to argue they have a pattern of criminal conduct. Yet the interview with the defendant that is used to create them is not considered a critical stage.³⁶¹ This is because the probation officer is not considered part of the “prosecutorial forces,” and the pre-sentence report is said to be “nonadversarial.”³⁶² But by law, the pre-sentence report must be given to the prosecution and is used to “in collecting an assessment, criminal fine, forfeiture or restitution imposed.”³⁶³

355. *Scott v. Illinois*, 440 U.S. 367, 374 (1979).

356. Sarah B. Berson, *Beyond the Sentence—Understanding Collateral Consequences* 272 NAT’L INST. JUS. 25, 26 (2013).

357. *Simmons v. United States*, 390 U.S. 377, 382–83 (1968).

358. *Kirby v. Illinois*, 406 U.S. 682, 689 (1972); *see also* *Gilbert v. California*, 388 U.S. 263, 272 (1967).

359. *Id.*; *People v. Hawkins*, 435 N.E.2d 376, 389 (N.Y. 1982) (Meyer, J., dissenting) (citing cases).

360. *See The Presentence Report* U.S. PROBATION OFFICE FOR THE W. DIST. OF TEX., <https://www.txwp.uscourts.gov/presentence-report/index.html> [<https://web.archive.org/web/20210924195446/https://www.txwp.uscourts.gov/presentence-report/index.html>] (last visited May 22, 2020).

361. *See* *United States v. Johnson*, 935 F.2d 47, 50 (4th Cir. 1991); *United States v. Woods*, 907 F.2d 1540, 1543 (5th Cir. 1990), *cert. denied*, 498 U.S. 1070 (1991); *Brown v. Butler*, 811 F.2d 938, 941 (5th Cir. 1987); *United States v. Jackson*, 886 F.2d 838, 844–45 (7th Cir. 1989).

362. *Johnson*, 935 F.2d at 50.

363. 18 U.S.C. § 3552(d).

Roughly 1.5 million people were in prison in 2018.³⁶⁴ If they are charged at a disciplinary hearing with violating the rules of their confinement, odds are, they will have no right to an attorney at the hearing to determine the veracity of the accusations. The Supreme Court has said that prison disciplinary hearings are “not criminal proceedings,” so defendants are not entitled to appointed counsel.³⁶⁵ According to the Court, denying people attorneys is for their own good, as giving lawyers would make the proceedings less rehabilitative and more punitive.³⁶⁶

Another 4.5 million people were under court supervision, meaning either probation or parole, in 2016.³⁶⁷ They too may be denied counsel. Again, the Supreme Court has said that parole revocation hearings are not part of the criminal prosecution,³⁶⁸ nor is a probation revocation hearing.³⁶⁹ In neither case is the state obligated to provide counsel, and once again, this is said to be for the defendant’s own good.³⁷⁰ Keeping with this trend, the Supreme Court has said that deportation proceedings are “purely civil action[s]” that are “not to punish an unlawful entry,”³⁷¹ which exempts the government from a duty to provide an attorney.

Indigent criminal defendants are not entitled to an attorney after their first direct appeal.³⁷² After the direct appeal is concluded, defendants without money are also on their own for post-conviction proceedings, known as collateral attacks.³⁷³ This is true even in death penalty cases.³⁷⁴

States have created many other proceedings where the state invokes its power against individuals without giving them any state-funded defense. Delaware’s Supreme Court has ruled that probationers are not guaranteed counsel for probation violation proceedings, even though they can result in incarceration.³⁷⁵ Iowa’s Indigent Defense Fund does not cover

364. E. ANN CARSON, U.S. DEP’T OF JUST., PRISONERS IN 2018 (2020) 1, <https://www.bjs.gov/content/pub/pdf/p18.pdf> [<https://web.archive.org/web/20210924195538/https://www.bjs.gov/content/pub/pdf/p18.pdf>].

365. *Baxter v. Palmigiano*, 425 U.S. 308, 315–16 (1976).

366. *Wolff v. McDonnell*, 418 U.S. 539, 569–70 (1974).

367. DANIELLE KAEBLE, U.S. DEP’T OF JUST., PROBATION AND PAROLE IN THE UNITED STATES, 2016 (2018) at 1, <https://www.bjs.gov/content/pub/pdf/ppus16.pdf> [<https://web.archive.org/web/20211004011454/https://www.bjs.gov/content/pub/pdf/ppus16.pdf>].

368. *Morrissey v. Brewer*, 408 U.S. 471, 480 (1972).

369. *Gagnon v. Scarpelli*, 411 U.S. 778, 782 (1973); *Black v. Romano*, 471 U.S. 606, 612 (1985).

370. *Gagnon*, 411 U.S. at 787.

371. *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1038 (1984).

372. *Coleman v. Thompson*, 501 U.S. 722, 756 (1991); *Wainwright v. Torna*, 455 U.S. 586 (1982); *Ross v. Moffitt*, 417 U.S. 600 (1974).

373. *Pennsylvania v. Finley*, 481 U.S. 551, 555 (1987); *Grinols v. State*, 10 P.3d 600, 604 (Alaska Ct. App. 2000).

374. *Murray v. Giarratano*, 492 U.S. 1, 10 (1989).

375. *Jones v. State*, 560 A.2d 1056, 1059 (Del. 1989).

prison disciplinary hearings or forfeiture proceedings.³⁷⁶ Massachusetts defendants accused of a misdemeanor are generally entitled to a probable cause determination, known as a show cause hearing, held before a clerk magistrate.³⁷⁷ Nearly 100,000 of these hearings can occur in a year.³⁷⁸ But because a person typically won't have an attorney appointed until their first court appearance,³⁷⁹ they will have to brave the show cause hearing on their own.

V. POST-CONVICTION DISCRIMINATION

Merely being convicted and serving one's time does not end the unequal treatment for poor defendants. Inability to pay fees may prevent defendants from getting access to treatment, for instance. Connecticut requires defendants to pay fees for admission to pretrial diversion programs and does not provide statutory fee waivers for all of them.³⁸⁰ New Jersey requires drug offenders to pay a penalty of a \$1,000 or more as a precondition to enter into drug treatment programs.³⁸¹ When this system was challenged as an Equal Protection violation on the basis of wealth, the court said it was fine because the law provided for a waiver of the penalty—but only if the defendant paid at least some of the cost of the treatment program itself.³⁸²

376. *Fee Claim Process*, *supra* note 335.

377. *Before Your Arraignment*, MASS.GOV, <https://www.mass.gov/info-details/before-your-arraignment> [<https://web.archive.org/web/20210924195903/https://www.mass.gov/info-details/before-your-arraignment>] (last visited May 22, 2020); *Eagle-Tribune Publ'g Co. v. Clerk-Magistrate of the Lawrence Div. of the Dist. Court Dep't*, 863 N.E.2d 517, 522-23 (Mass. 2007) (describing show cause hearing process).

378. Memorandum from Hon. Lynda M. Connolly, Chief Judge, to Dist. Ct. Judges, Clerk-Magistrates, and Chief Probation Officers (Sept. 10, 2008), <https://www.mass.gov/doc/district-court-standards-of-judicial-practice-the-complaint-procedure/download> [<https://web.archive.org/web/20210924195935/https://www.mass.gov/doc/district-court-standards-of-judicial-practice-the-complaint-procedure/download>].

379. *Before Your Arraignment*, *supra* note 377.

380. CONN. GEN. STAT. § 54-56e(b), (d), (e) (2021).

381. *State v. Bulu*, 560 A.2d 1250, 1252 (N.J. Super. Ct. App. Div. 1989); N.J. STAT. ANN. § 2C:35-15 (2020) (mandating fees of up to \$3,000 for those convicted of drug offenses).

382. *Bulu*, 560 A.2d at 1257. *See also* *Schwarm v. Craighead*, 552 F. Supp. 2d 1056, 1087 (E.D. Cal. 2008) (refusing to consider claims that the prosecutor withheld a pretrial diversion program because of an inability to pay a fine). *But see* *Mueller v. State*, 837 N.E.2d 198, 204 (Ind. Ct. App. 2005) (a pretrial diversion program that was based solely on the ability to pay a \$230 fee was unconstitutional).

A. Wrongful Convictions

Few errors are more serious than sending an innocent person to prison. William Blackstone is often quoted as saying better that ten guilty men go free than one innocent man be punished. Though it is impossible to know how many guilty go free, an estimated 4.1% of convictions have the wrong defendant, which means tens of thousands of innocent people are punished.³⁸³ The rate may well be higher for people held in pretrial confinement for minor crimes, who are often given a choice between rotting in jail for months or pleading guilty and getting out on probation quickly.³⁸⁴

Despite the horror of false incarceration, the law holds exonerees in contempt. They have their compensation restricted in both size and method of collection. These restrictions are unique to people who have suffered at the hands of the justice system—other types of civil claimants do not have to put up with them. This is in spite of the fact that exonerees are almost certain to be poorer than a typical plaintiff. As noted earlier, defendants are likely to be poor, are frequently harried by fines, and, in all probability, not earning anything while incarcerated. Typical tort plaintiffs suing the government are often relatively well-off people, or at least not impoverished.³⁸⁵

To begin, every state at least partially waives sovereign immunity by allowing some tort claims.³⁸⁶ But not every state allows exonerees to sue for wrongful imprisonment. In 2004, Wilton Dedge was exonerated after

383. Samuel R. Gross, *The Staggering Number of Wrongful Convictions in America*, WASH. POST (July 24, 2015), https://www.washingtonpost.com/opinions/the-cost-of-convicting-the-innocent/2015/07/24/260fc3a2-1aae-11e5-93b7-5eddc056ad8a_story.html [https://web.archive.org/web/20210924200043/https://www.washingtonpost.com/opinions/the-cost-of-convicting-the-innocent/2015/07/24/260fc3a2-1aae-11e5-93b7-5eddc056ad8a_story.html].

384. *Id.*

385. *E.g.*, *Thacker v. TVA*, 139 S. Ct. 1435, 1440 (2019) (lawsuit by a boat owner against the government); *Daniel v. United States*, 139 S. Ct. 1713, 1713 (2019) (Thomas, J., dissenting) (lawsuit by Naval officer against the government); *Cent. Green Co. v. United States*, 531 U.S. 425, 427 (2001) (lawsuit by owner of 1,000 acres of land against the government).

386. *See* JAIME RALL, NAT'L CONF. OF STATE LEGIS., WEATHER OR NOT?: STATE LIABILITY AND ROAD WEATHER INFORMATION SYSTEMS (RWIS), (2010), https://www.ncsl.org/documents/transportation/Weather_or_Not_App_B_Rall_04.30.10.pdf [https://web.archive.org/web/20210924200111/https://www.ncsl.org/documents/transportation/Weather_or_Not_App_B_Rall_04.30.10.pdf].

spending twenty-two years in a Florida prison.³⁸⁷ Under state law at the time, Florida did not owe him anything.³⁸⁸ Today, the federal government, the District of Columbia, and thirty-five states (Florida now among them) have some kind of wrongful imprisonment compensation statute.³⁸⁹ Although certainly better than the fifteen states that refuse to accept responsibility for the harm caused, these statutes are far from perfect.

The Federal Tort Claims Act does not impose a hard limit on compensatory damages for general claims.³⁹⁰ But federal law does impose arbitrary caps on innocent people robbed of their freedom. In 1994, federal law only awarded \$5,000 to a person who managed to prove a wrongful conviction, regardless of how long they spent in prison.³⁹¹ Today, it is much improved, offering \$50,000 per year of non-death row confinement.³⁹² But it is still lacking. The statistical value of a human life is a number that is meant to approximate how much value we would get out of a regulation that would save a life; the person saved is unidentifiable. Most federal agencies peg the number at around \$10 million.³⁹³

Whether one believes that economic models like this should be used to guide policy, it still demonstrates the low value we place on the falsely imprisoned. The average life expectancy in the United States is about 79 years.³⁹⁴ If someone was wrongfully imprisoned from the moment of birth and remained incarcerated for the duration of a typical life span, they would be entitled to \$3.95 million, less than half of what federal agencies deem to be the value of a human life for modeling purposes. Congress has

387. *Compensating the Wrongly Convicted*, INNOCENCE PROJECT, <http://www.innocenceproject.org/compensating-wrongly-convicted/> [<https://web.archive.org/web/20210924200145/https://innocenceproject.org/compensating-wrongly-convicted/>] (last visited May 23, 2020).

388. *Id.*

389. *Id.*

390. 28 U.S.C. § 2674.

391. Albert B. Lopez, *\$10 and a Denim Jacket? A Model Statute for Compensating the Wrongly Convicted*, 36 GA. L. REV. 665, 673 (2002).

392. 28 U.S.C. § 2513(e).

393. Todd C. Frankel, *The Government Has Spent Decades Studying What a Life is Worth. It Hasn't Made a Difference in the Covid-19 Crisis.*, WASH. POST (May 23, 2020), <https://www.washingtonpost.com/business/2020/05/23/government-has-spent-decades-studying-what-life-is-worth-it-hasnt-made-difference-covid-19-crisis/> [<https://web.archive.org/web/20210924200404/https://www.washingtonpost.com/business/2020/05/23/government-has-spent-decades-studying-what-life-is-worth-it-hasnt-made-difference-covid-19-crisis/>].

394. *Life Expectancy at Birth, Total (Years)—United States*, WORLD BANK, <https://data.worldbank.org/indicator/SP.DYN.LE00.IN?locations=US> [<https://web.archive.org/web/20210924200437/https://data.worldbank.org/indicator/SP.DYN.LE00.IN?locations=US>] (last visited May 15, 2020).

also determined that American citizens detained by foreign governments have been given \$10,000 per day,³⁹⁵ which is seventy times more than people wrongfully detained by the American government.

Many states have offered compensation along the same lines as the federal standard.³⁹⁶ Some authorize far less. Once damages surpass \$2 million, Florida declares it can go no farther.³⁹⁷ Tennessee allows no more than \$1 million in compensation no matter the length, and partially bases the award on lost earnings, which privileges rich defendants.³⁹⁸ Texas used to cap it at \$50,000, but raised it to \$500,000 total and \$80,000 per year in 2001.³⁹⁹ Nebraska gives nothing past \$500,000.⁴⁰⁰ Illinois caps compensation at \$199,150 total.⁴⁰¹ If someone spent seventy-nine years behind bars for a crime they did not commit, that works out to \$2,520 per year in Illinois. That wouldn't even cover food expenses for a bottom-quintile household.⁴⁰² Wisconsin only gives \$5,000 per year, not to exceed \$25,000 total.⁴⁰³ When exonerees took to the private tort system and sued as ordinarily plaintiffs, rather than using these special wrongful conviction laws, the average amount awarded for each year of imprisonment was \$305,000.⁴⁰⁴

Nowhere is this disparity clearer than in New Hampshire. The Granite State ordinarily caps damages against the state at \$475,000 per claimant but lowers that cap to \$20,000 total for claims of unjust imprisonment.⁴⁰⁵ All in all, only five states lack a damages cap for wrongful incarceration claims.⁴⁰⁶ For comparison, seventeen states lack a general cap on ordinary

395. *Moradi v. Islamic Republic of Iran*, 77 F. Supp. 3d 57, 70 (D.D.C. 2015).

396. Lopez, *supra* note 391, at 698; N.J. STAT. ANN. § 52:4C-5. *But see, e.g.*, D.C. CODE § 2-423 (2017) (no hard limit on how much a person can seek for unjust imprisonment).

397. FLA. STAT. § 961.06(1) (2017).

398. TENN. CODE ANN. § 9-8-108(a)(7)(A) (2021). Massachusetts also caps damages at \$1 million. MASS. GEN. LAWS ch. 285D § 5(A) (2018).

399. *In re Blair*, 408 S.W.3d 843, 847–48 (Tex. 2013).

400. NEB. REV. STAT. § 29-4604(4) (2021).

401. 705 ILL. COMP. STAT. 505/8(c) (2018).

402. *Food Prices and Spending*, U.S. DEP'T OF AGRIC. <https://www.ers.usda.gov/data-products/ag-and-food-statistics-charting-the-essentials/food-prices-and-spending/> [<https://web.archive.org/web/20210924200519/https://www.ers.usda.gov/data-products/ag-and-food-statistics-charting-the-essentials/food-prices-and-spending/>] (last visited May 15, 2020).

403. WIS. STAT. § 775.05(4) (2021).

404. Jeffrey S. Gutman & Lingxiao Sun, *Why is Mississippi the Best State in Which to be Exonerated? An Empirical Evaluation of State Statutory and Civil Compensation for the Wrongfully Convicted*, 11 NE. U. L. REV. 694, 700 (2019).

405. N.H. REV. STAT. ANN. 541-B:14(I)–(II) (LexisNexis 2018).

406. Jeffrey S. Gutman, *An Empirical Reexamination of State Statutory Compensation for the Wrongly Convicted*, 82 MO. L. REV. 369, 382–84 (2017) (noting that there used to be six, but Connecticut recently added caps).

tort damages against the state, and thirty-one do not impose a ban on punitive damages for general torts against the state.⁴⁰⁷

Beyond maximum caps, states may impose other kinds of restrictions. If a Kansas exoneree is awarded more than \$100,000, it must be paid out as an annuity not exceeding \$80,000;⁴⁰⁸ no such restraint is placed on general tort claims against the government, which may be up to \$500,000.⁴⁰⁹ West Virginia forces wrongful imprisonment plaintiffs to prove their claims by clear and convincing evidence, not the ordinary civil standard of preponderance of the evidence.⁴¹⁰ Connecticut lets the legislature review damage awards for wrongful compensation, and reject or modify them.⁴¹¹ Missouri only pays up if DNA evidence leads to exoneration.⁴¹² Maine requires not only a showing of innocence, but they must receive a full and free pardon from the governor.⁴¹³ And if a person was been wrongfully convicted of a crime, but simultaneously imprisoned for an untainted conviction, the state owes nothing for its blunder.⁴¹⁴

These systems hurt those who suffer the worst harms. The longer a person is wrongfully imprisoned, the less compensation they get per year. These damage caps also mean that those wrongfully convicted are entitled to much less than what a plaintiff could seek for the similar tort of false imprisonment. One plaintiff was awarded \$850,000 for being wrongly held for ten minutes in an Eddie Bauer store in Maryland.⁴¹⁵ A California plaintiff got \$10,000 for false imprisonment of four hours—which is the same amount he would have gotten if he been wrongly convicted and spent ten years on death row.⁴¹⁶

And those are just the caps. There is no guarantee a person will max out. One Illinois man was arrested and held for more than three years until the true perpetrator of the crime confessed.⁴¹⁷ The man was given \$15,000

407. See JAIME RALL, *supra* note 386.

408. H.R. 2579 § (e)(3), 87th Leg., Reg. Sess. (Kan. 2018).

409. KAN. STAT. ANN. § 75-6105 (2021).

410. W. VA. CODE § 14-2-13a(c) (2020). Nebraska also uses clear and convincing evidence for wrongful imprisonment. NEB. REV. STAT. § 29-4603 (2021).

411. CONN. GEN. STAT. § 54-102uu(d)(1) (2016).

412. Ariel Rothfield, *Missouri Man Freed From Prison May Not Receive Any Compensation*, 41 KSHB KAN. CITY (Aug. 15, 2019, 6:12 PM), <https://www.kshb.com/news/local-news/missouri-man-freed-from-prison-may-not-receive-any-compensation> [<https://web.archive.org/web/20210924200629/https://www.kshb.com/news/local-news/missouri-man-freed-from-prison-may-not-receive-any-compensation>].

413. MAINE REV. STAT. ANN. tit. 14, § 8241(2) (West 2021).

414. *Nelson v. State*, No. 2008-09503-WI, 2011 Ohio Misc. LEXIS 417, par. 8 (Ohio Ct. Cl. Aug. 4, 2011).

415. Lopez, *supra* note 391, at 706.

416. *Id.*

417. *McDonald v. State*, 33 Ill. Ct. Cl. 45, 46 (Ill. Ct. Cl. 1980).

for his troubles.⁴¹⁸ Another Illinois man was given \$12,000 for 17 months' confinement.⁴¹⁹

When a person's actual mental anguish is fairly calculated, damages become much higher. The District of Columbia does not impose damage caps on wrongful imprisonment, and does not circumscribe how compensation is to be calculated.⁴²⁰ A District of Columbia court was therefore able to engage in a searching inquiry into the harm suffered by a man who spent over twenty-six years in prison.⁴²¹ In addition to the loss of liberty, the man developed a drug habit, contracted diseases, experienced depression, was assaulted by guards and fellow inmates, and had been subjected to tasers, tear-gas, and held in restraints for days.⁴²² The court awarded him \$400,000 per year, or \$10.5 million total,⁴²³ far more than he could have hoped for in many other jurisdictions. A New York jury given a free hand to award damages thought a person deserved \$1.5 million per year of wrongful incarceration, which was \$18 million in the case.⁴²⁴

If the goal of all these laws is to stop exonerees from collecting, they are a rousing success. Only half of exonerees ever file a claim for compensation,⁴²⁵ and only a third actually get a reward.⁴²⁶ Thanks to damage caps, half of the years spent incarcerated by successful claimants went uncompensated.⁴²⁷ Compensation for people wrongfully imprisoned is only 0.03% of the \$46 billion that states collectively spend on corrections each year.⁴²⁸

Even if there are no hard caps, the method of compensating victims of wrongful prosecutions may disadvantage those without high incomes. Courts sometimes use lost wages to calculate harm. By tying damages to potential wages, civil law assigns a lower value to a poor person. Since lower earners tend to get in trouble with the law more often, it is not

418. *Id.* at 47.

419. *Lonzo v. State*, 32 Ill. Ct. Cl. 125, 127 (Ill. Ct. Cl. 1978).

420. D.C. CODE § 2-421 (1981).

421. *Tribble v. District of Columbia*, No. 2013-CA-003237-B, 2016 D.C. Super. LEXIS 4, at *59–62 (D.C. Super. Ct. Feb. 26, 2016).

422. *Id.* at *62.

423. *Id.*

424. *Newton v. City of New York*, 171 F. Supp. 3d 156, 162 (S.D.N.Y. 2016). The judge believed the generosity of the award “shocks the judicial conscience” and cut it by a third. *Id.* at 177. Evidently, the indignity of a wrongful prison sentence itself did not shock the judicial conscience.

425. Gutman & Sun, *supra* note 404, at 699.

426. Gutman, *supra* note 406, at 395.

427. Gutman & Sun, *supra* note 404, at 699.

428. Gutman, *supra* note 406, at 394.

surprising that so many cases involve people who get almost nothing for lost wages.

Ohio explicitly provides for lost wages as a means to compensate the wrongfully convicted, which makes it a good example.⁴²⁹ An Ohio man was wrongfully imprisoned and sought damages for lost wages.⁴³⁰ At the best of times, he only earned \$7.25 per hour, but because his employment was sporadic, the court only gave him \$4.25 per hour and a total of less than \$8,000 for about three years of incarceration.⁴³¹ Another Ohio victim received compensation of \$6.50 per hour for 25 hours of lost wages over an eleven day period in jail.⁴³² These sorts of cases are not hard to find.⁴³³ The statute does not provide for pain and suffering as a means of compensation.

Using lost wages as a method to compensate will always privilege the wealthy. But it is particularly inapt for compensating wrongful imprisonment. To say that a stockbroker in the same situation deserves far more essentially says that the agony of being senselessly locked in a cell is less visceral for a person with a lighter bank account. What is more, the minimum wage is set by the state. So, the state is artificially deflating the amount victims of wrongful imprisonment receive both by capping the max compensation and by depressing wages.

B. Expungement

If someone wants to put a criminal conviction behind them, regain their civil rights, and move forward with their life, they may find doing so impossible without sufficient funds. Neither the federal government nor the states of Alabama, Arkansas, Florida, Georgia, Hawaii, Iowa, Maine, Montana, Pennsylvania, South Dakota, Texas, and Virginia have a general means to expunge adult convictions, and many of these jurisdictions lack

429. OHIO REV. CODE ANN. 2743.48(E)(2)(c) (LexisNexis 2019).

430. *Nelson v. State*, No. 2008-09503-WI, 2011 Ohio Misc. LEXIS 417 (Ohio Ct. Cl. Aug. 4, 2011).

431. *Id.* at par. 14.

432. *Wilson v. Ohio Dep't of Rehab. & Corr.*, No. 2003-0446, 2004 Ohio Misc. LEXIS 630, par. 23 (Ohio Ct. Cl. Oct. 21, 2004).

433. *See, e.g.*, *Clark v. Ohio Dep't of Rehab. & Corr.*, 727 N.E.2d 986, 988 (Ohio Ct. Cl. 2000) (victim compensated \$7.50 per hour for 32 hours per week); *Lonzo v. State*, 32 Ill. Ct. Cl. 125, 126–27 (Ill. Ct. Cl. 1978) (awarding \$9,000 for 17 months' worth of lost wages); *Carter v. State*, 528 N.Y.S.2d 292, 296 (N.Y. Ct. Cl. 1988), *aff'd*, 546 N.Y.S.2d 648 (N.Y. App. Div. 2d Dept. 1989) (awarding \$40,000 in lost wages for 19 ½ months of lost wages).

a means to expunge misdemeanors as well.⁴³⁴ Even among jurisdictions that have a path to redemption, it is often a winding one.

Louisiana has the highest fees for expungement in the country.⁴³⁵ It charges \$550 dollars per event to expunge their record, even when they are found not guilty, or the case was dismissed.⁴³⁶ This could mean thousands of dollars if there are multiple events to clear. The state provides no process for waiver on account of indigence.⁴³⁷ There is a waiver for people with no prior convictions, but even participating in pretrial diversion counts as a prior that disqualifies someone from the waiver.⁴³⁸

Other states might have lower prices yet are still formidable. Pennsylvania has a fee of \$132 for expungement and does not mention waiver.⁴³⁹ Michigan's process is complex, can cost upwards of \$100 when all fees are taken into account, and lacks an explicit waiver for indigency,⁴⁴⁰ opting to depend on the kindness of judges.⁴⁴¹ Alabama charges an administrative filing fee of \$300 over and above the ordinary civil filing costs, the administrative fee "shall not be waived," and while the judge can put an indigent applicant on a payment plan, they cannot ignore the fee entirely.⁴⁴² Kentucky uses the same model of providing for

434. *50-State Comparison: Judicial Expungement, Sealing, and Set-Aside*, COLLATERAL CONSEQUENCES RES. CTR. (Oct. 2021), <https://ccresourcecenter.org/state-restoration-profiles/50-state-comparison-judicial-expungement-sealing-and-set-aside-2/> [<https://web.archive.org/web/20220110010623/https://ccresourcecenter.org/state-restoration-profiles/50-state-comparison-judicial-expungement-sealing-and-set-aside-2/>]. Some federal courts have expressly said they lack the power to expunge records. *Doe v. United States*, 833 F.3d 192, 195 (2d Cir. 2016); *United States v. Boniella*, 297 F. App'x 161, 161 (3d Cir. 2008); *United States v. Crowell*, 374 F.3d 790, 791 (9th Cir. 2004); *United States v. Sessions*, No. 4:00-cr-00739-CWH, 2006 U.S. Dist. LEXIS 76647 (D.S.C. Oct. 16, 2006); *United States v. Cavett*, No. 3:08CR28-LRA, 2015 U.S. Dist. LEXIS 125845, at *2 (S.D. Miss. Sep. 21, 2015) ("Congress has not expressly granted to the federal courts a general power to expunge criminal records.").

435. *E.B. et al v. Louisiana Attorney General*, EQUAL JUST. UNDER L., <https://equaljusticeunderlaw.org/case-eb-et-al-v-louisiana-attorney-general> [<https://web.archive.org/web/20210924200958/https://equaljusticeunderlaw.org/case-eb-et-al-v-louisiana-attorney-general>] (last visited Apr. 14, 2020).

436. *Id.*

437. Complaint at par. 2, *E.B. et al v. Louisiana Attorney General*, 3:19-cv-00862-JWD-SDJ (M.D. La. May 7, 2021).

438. *Id.* at par. 5.

439. 42 PA. CONS. STAT. § 1725.7(a) (2016).

440. J.J. Prescott & Sonja B. Starr, *Expungement of Criminal Convictions: An Empirical Study*, 133 Harv. L. Rev. 2460 (2020).

441. Sharon M. Dietrich, *From Expungement to Sealing of Criminal Records in Pennsylvania*, 87 PA BAR ASSN. Q. 161, 167, n.66 (2016) (noting that the drafters of the law considered spelling out waiver procedures but decided that this would be unnecessary because "the procedures for an *in forma pauperis* request are well known.").

442. ALA. CODE § 15-27-4 (2015).

a payment plan, but makes no mention of waiver.⁴⁴³ Kansas demands a fee of \$176 plus \$19 and does not mention any authority to waive them.⁴⁴⁴ Tennessee's attorney general has determined that the \$350 fee for expungement cannot be waived.⁴⁴⁵

States find other ways to charge. They may condition expungement on paying off debts racked up from convictions. But as an earlier section demonstrates, these fees may be ruinously expensive and an impossible mountain to climb, particularly for one whose job prospects are inhibited by an unexpunged conviction. New Mexico conditions expungement on the "the payment of any fines or fees owed to the state for the conviction,"⁴⁴⁶ with no mention to any power of the court to forgive these past expenses. Courts have rejected pleas to expunge records where applicants have not paid off their debts.⁴⁴⁷

Non-monetary barriers may also be present. The prosecution may have the power to object to expungement requests,⁴⁴⁸ or even to appeal a district court's judgment that a record should be expunged.⁴⁴⁹ Even if one succeeds and gets a record expunged, it may still come back to haunt them in other ways.⁴⁵⁰ Kentucky residents wishing to regain their right to

443. KY. REV. STAT. ANN. § 431.073(10)–(11) (West 2019).

444. KAN. STAT. ANN. § 21-6614(g)(2) (2021). Similarly, information sheets put out by Kansas counties or the Kansas Department of Corrections make no mention of a waiver petition. *E.g.*, *Shawnee Cnty. Dist. Att'y., Instructions for Filing Petitions and Orders of Expungement*, SHAWNEE CNTY. DIST. ATT'Y. (July 2011), http://www.snco.us/da/document/expungement_instructions.pdf [http://web.archive.org/web/20210924201247/http://www.snco.us/da/document/expungement_instructions.pdf]; *Kan. Dep't of Corr., Information Technology And Records: Expungement of Offender Records*, KAN. DEP'T OF CORR. (July 15, 2011), <https://www.doc.ks.gov/kdoc-policies/AdultIMPP/chapter-5/05102.pdf> [<https://web.archive.org/web/20210924201314/https://www.doc.ks.gov/kdoc-policies/AdultIMPP/chapter-5/05102.pdf>].

445. 2014 Op. Tenn. Att'y Gen. LEXIS 81, at *5 (2014).

446. N.M. STAT. ANN. § 29-3A-5 (2020). Similarly, to restore voting right in Alabama, one must have "paid all fines, court costs, fees, and victim restitution." ALA. CODE § 15-22-36.1(a)(3) (2021). Contrariwise, Colorado permits the court to vacate these sorts of costs. COLO. REV. STAT. § 24-72-706 (2021).

447. *Bryant v. Kansas*, No. 13-3153-SAC, 2014 U.S. Dist. LEXIS 156201, at *3 (D. Kan. Nov. 5, 2014).

448. ALA. CODE § 15-27-5 (2015); PA. R. CRIM. P. §§ 490(B)(1), 790(B)(1) (2019).

449. *E.g.*, *State v. Turner*, No. 112,633, 2015 WL 4487077, at *4 (Kan. Ct. App. July 17, 2015).

450. *See State v. Moore*, 569 N.W.2d 130, 130 (Iowa 1997) (suspending a driver license due to an expunged conviction); *Id.* at 131–32 (enhancing penalties for subsequent offense based on an expunged conviction); *see also United States v. Townsend*, 408 F.3d 1020, 1025 (8th Cir. 2005) (enhancing penalties for subsequent offense based on an expunged conviction).

franchise must submit an essay to the governor explaining why they deserve it.⁴⁵¹

It does not need to be this hard. South Carolina provides that if a person is found not guilty or the case against them is dismissed, the “arrest and booking record, associated bench warrants, mug shots, and fingerprints of the person must be destroyed and no evidence of the record pertaining to the charge or associated bench warrants may be retained by any municipal, county, or state agency.”⁴⁵² This sort of system is mandatory and free to the individual, as the government is explicitly barred from collecting a fee for this service.⁴⁵³

Expungement is “associated with large improvements in the employment rate and wages on average.”⁴⁵⁴ Presumably, this would result in large benefits to the state by having a gainfully employed, tax-paying citizen. But they would rather lose this windfall than waive fees for expungement.

VI. CONCLUSION

At times, the Supreme Court has recognized the unfairness of locking people out of the justice system for no other reason than their inability to pay. Sixty-five years ago, *Griffin v. Illinois*⁴⁵⁵ said that it violated Equal Protection to force defendants to pay for a transcript in order to appeal, quipping “[t]here can be no equal justice where the kind of trial a man gets depends on the amount of money he has.” *Ake v. Oklahoma*⁴⁵⁶ said “justice cannot be equal where, simply as a result of his poverty, a defendant is denied the opportunity to participate meaningfully in a judicial proceeding.” In *Bullock v. Carter*,⁴⁵⁷ the Court invalidated the Texas filing-fee requirement for primary elections, noting “potential office seekers lacking both personal wealth and affluent backers are in every practical sense precluded from seeking the nomination of their chosen

451. ELIZABETH A. WAHLER, THE SENTENCING PROJECT, LOSING THE RIGHT TO VOTE: PERCEPTIONS OF PERMANENT DISENFRANCHISEMENT AND THE CIVIL RIGHTS RESTORATION APPLICATION PROCESS IN THE STATE OF KENTUCKY, (2006), <http://www.sentencingproject.org/publications/losing-the-right-to-vote-perceptions-of-permanent-disenfranchisement-and-the-civil-rights-restoration-application-process-in-the-state-of-kentucky/> [<https://web.archive.org/web/20211004215606/http://www.sentencingproject.org/publications/losing-the-right-to-vote-perceptions-of-permanent-disenfranchisement-and-the-civil-rights-restoration-application-process-in-the-state-of-kentucky/>].

452. S.C. CODE ANN. § 17-1-40(B)(1) (2016).

453. *Id.* at § 17-1-40(D); *see also* TENN. CODE ANN. § 40-32-101(1)(A) (2010).

454. PRESCOTT & STARR, *supra* note 440, at 635.

455. 351 U.S. 12, 19 (1956).

456. 470 U.S. 68, 76 (1985).

457. 405 U.S. 134, 143 (1972).

party.” *Harper v. Virginia Board of Elections*⁴⁵⁸ said that even a \$1.50 poll tax was discriminatory.

These examples are praiseworthy. But for every discriminatory law struck down, two more replaced it. Eventually, the Court has seemingly become weary of hacking away at the hydra and has allowed it to grow unmolested. The result is a vast thicket of laws that do not bother to disguise their discriminatory intent against the poor.

State courts have sometimes picked up the slack. In 1992, the West Virginia Supreme Court ended the practice of allowing the prosecution to rescind a plea agreement if a defendant requested to be provided a transcript of the proceedings, but not if a defendant paid for the transcript on their own.⁴⁵⁹ But too often, state courts have also been deaf to pleas for aid.

Perhaps the ambivalence has something to do with the fact that the Supreme Court has “deconstitutionalized” poverty law, meaning that the national charter places few limits on what governments can do to treat the poor unfairly.⁴⁶⁰ When the government discriminates against other groups, such as racial minorities or women, its actions are subject to heightened scrutiny.⁴⁶¹ Somehow, discrimination on the basis of wealth has escaped any sort of suspect classification. Maybe this is because judges have bought into the view espoused by Judge Robert Bork that “the poor and the minorities . . . have done very well” in the political process, and thus need no other support.⁴⁶² Or maybe it is as simple as believing the rights of the poor are not worth very much.

458. 383 U.S. 663 (1966).

459. *State ex rel. Phillips v. Boggess*, 416 S.E.2d 270, 272–73 (W. Va. 1992).

460. Julie A. Nice, *No Scrutiny Whatsoever: Deconstitutionalization of Poverty Law, Dual Rules of Law, & Dialogic Default*, 35 *FORDHAM URB. L.J.* 629, 637 (2008).

461. *See generally* *United States v. Virginia*, 518 U.S. 515 (1996) (gender discrimination); *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995) (racial discrimination).

462. Budd, *Pledge Your Body for Your Bread*, *supra* note 267, at 760.