



4-2021

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Emily Stauffer

Brigham Young University, emilyjanestauffer@gmail.com

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### BYU ScholarsArchive Citation

Stauffer, Emily (2021) "Plea Bargains: Justice for the Wealthy and Fear for the Innocent," *Brigham Young University Prelaw Review*: Vol. 35 , Article 14.

Available at: <https://scholarsarchive.byu.edu/byuplr/vol35/iss1/14>

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# PLEA BARGAINS: JUSTICE FOR THE WEALTHY AND FEAR FOR THE INNOCENT

*Emily J. Stauffer<sup>1</sup>*

18-year-old George Alvarez faced an impossible choice. He had spent the last 6 months in jail awaiting trial for burglary. While in jail, a guard accused Alvarez of attacking him. If Alvarez was found guilty of assaulting the police officer, he would receive a minimum of ten years in prison. Alvarez knew the guard was lying; the guard had jumped him. However, spending ten years in prison was too high a risk to take. Alvarez pled guilty to assaulting the officer in exchange for a lesser sentence. He spent four years in prison before security camera footage exonerated Alvarez. This footage had been there all along; the prosecutor had the video proof of his innocence before Alvarez pled guilty to the crime. Furthermore, when Alvarez later sued for compensation for his time incarcerated, a United States Court of Appeals judge dismissed the lawsuit on the basis that Alvarez had pled guilty, so the state could not be held liable for withholding the video.<sup>2</sup>

The situation is not much better for people with limited resources who choose to assert their innocence. Kalief Browder was 16 years old when he was arrested for stealing a backpack. Browder knew he was innocent and refused to plead guilty. Despite his innocence, he

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1 Emily is a senior at Brigham Young University studying Political Science and Legal Studies. She plans to attend law school in Fall 2022. She would like to express his gratitude for her editor Pavel Bermudez for all his incredible work on this paper.

2 See Somil Trivedi, *This impossible choice we call plea bargaining*, St. Louis Am., (Jan. 24, 2020), [http://www.stlamerican.com/news/columnists/guest\\_columnists/this-impossible-choice-we-call-plea-bargaining/article\\_ab959a96-3d5f-11ea-98ca-334757e00b92.html](http://www.stlamerican.com/news/columnists/guest_columnists/this-impossible-choice-we-call-plea-bargaining/article_ab959a96-3d5f-11ea-98ca-334757e00b92.html).

spent three years behind bars awaiting a trial (which is much longer than the sentence he probably would have received for stealing a backpack). Browder spent almost two years in solitary confinement and attempted suicide several times. After three years of enduring the grueling incarceration, Browder was released from his pretrial detention. After his release from jail, video footage surfaced of officers and large groups of inmates assaulting him. Browder also told stories of being starved by guards. Outside of jail, he finished his GED and began community college; however, his time in jail – especially his time in solitary confinement – was a wound too deep to heal. Kalief Browder committed suicide shortly after being released. Kalief often asserted that his time in jail, which eventually led to his death, was a punishment for his assertion of innocence rather than pleading guilty to a crime that he did not commit.<sup>3</sup>

Courts do not have the capacity to give every defendant a trial by jury, so courts rely heavily on plea bargaining because it is a quick way to get through the extreme volume of cases.<sup>4</sup> Although the criminal justice system is a hotly debated topic, the overbooked nature of the criminal justice system is backed by evidence and is relatively uncontested. Only five percent of the world's population lives in the United States, but twenty-five percent of the world's prison population lives in United States prisons.<sup>5</sup> Furthermore, United States residents have a higher chance of being incarcerated than residents of any other country with one in every 136 United States residents

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3 See Jennifer Gonnerman, *Before The Law*, *The New Yorker*, (Sept. 29, 2014), <https://www.newyorker.com/magazine/2014/10/06/before-the-law>; See also Jennifer Gonnerman, *Kalief Browder, 1993-2015*, *The New Yorker*, (June 7, 2015), <https://www.newyorker.com/news/news-desk/kalief-browder-1993-2015>.

4 *E.g.*, Lindsey Devers, *Plea and Charge Bargaining Research Summary*, (Jan. 24, 2011), <https://bja.ojp.gov/sites/g/files/xyckuh186/files/media/document/PleaBargainingResearchSummary.pdf>, (Scholars estimate that about 90-95 percent of cases are disposed of through plea bargaining).

5 ACLU, *Mass Incarceration*, (last visited Feb. 1, 2021), <https://www.aclu.org/issues/smart-justice/mass-incarceration>.

being incarcerated.<sup>6</sup> Due to the sheer number of Americans going to prison, the United States criminal justice system does not have the resources to grant every defendant a trial by jury. As a result, the system relies heavily on plea deals to process cases efficiently.<sup>7</sup> In 2018, only 2 percent of defendants in federal criminal cases went to trial and an overwhelming 90 percent of defendants pled guilty before trial.<sup>8</sup> Moreover, 97 percent of current United States prisoners have taken plea bargains.<sup>9</sup> Due to its widespread impact, plea bargaining is at the very center of the American criminal justice system. As Supreme Court Justice Anthony Kennedy said, “plea bargaining . . . is not some adjunct to the criminal justice system; it is the criminal justice system.”<sup>10</sup>

Unlike trials, where constitutional law and case law strictly outline the process, the plea bargaining process is much more flexible. The structure of plea bargaining gives prosecutors wide discretion over the outcome of a case. One of the most effective techniques prosecutors use is pretrial detention. More than half a million people incarcerated in the United States, like Kalief Browder, have never been convicted of a crime.<sup>11</sup> About 65 percent of people in jail and 24 percent of people incarcerated at the state and local levels are in

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6 See BBC News, *World Prison Populations*, (last visited Feb. 1, 2021), <http://news.bbc.co.uk/2/shared/spl/hi/uk/06/prisons/html/nn2page1.stm>, (stating that 737 people out of every 100,000 are incarcerated).

7 See John F. Padgett, *Plea Bargaining and Prohibition in the Federal Courts, 1908-1934*, 24, L. & Soc’y REV. 413, 419-423 (1990) (showing empirical evidence of the effect caseloads have on public defenders).

8 John Gramlich, *Only 2% of federal criminal defendants go to trial, and most who do are found guilty*, (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/>.

9 Innocence Project, *Report: Guilty Pleas on the Rise, Criminal Trials on the Decline*, (Aug. 7, 2018), <https://innocenceproject.org/guilty-pleas-on-the-rise-criminal-trials-on-the-decline>.

10 *Missouri v. Frye*, 566 U.S. 134, 144 (2012).

11 Jacob Goldin, Will Dobbie & Crystal S. Yang, *The Effects of Pretrial Detention on Conviction, Future Crime, and Employment: Evidence from Randomly Assigned Judges*, 108, AM. ECON. REV., 201, 201, (Feb. 2018).

pretrial detention and have not yet been convicted.<sup>12</sup> Many of these people are in pretrial detention simply because they cannot afford bail. When defendants are in pretrial detention, they cannot go to work, go home, or see their family. Therefore, people in pretrial detention get more pressure to plead guilty, so that they can get out of jail.

Another tactic that prosecutors can use to convince defendants to accept plea deals is using the trial penalty to their advantage. The trial penalty is the idea that those who accept plea bargains get less severe sentences than those who go to trial. As in the case of George Alvarez, defendants may plead guilty in fear of getting a more severe sentence at trial.

America's criminal justice system cannot exist without plea deals, but the plea-bargaining process protects the prosecutors' discretion rather than individuals' rights. Because of this, courts convict defendants because they are too poor to assert their constitutional right to go to trial. Although the direct costs of a trial can be covered by the state, many indirect costs keep people from going to trial and instead force them to take plea deals. These indirect costs include pretrial detention, the trial penalty, and the costs of a trial. Additionally, people who live in poverty are disadvantaged in the plea-bargaining process because of poor representation and psychological factors.

Supreme Court precedence requires that under the Fourteenth Amendment, the poor must have equal access to the criminal justice system.<sup>13</sup> If poverty restricts a person from a part of the justice system, states must remedy that flaw. Although the historical court rulings have left states to decide how to remedy such unequal access, I suggest several remedies. Under these proposals, state reforms will

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12 Patrick Liu, Ryan Nunn & Jay Shambaugh, *The Economics of Bail and Pretrial Detention*, (Dec. 19, 2018), [https://www.hamiltonproject.org/papers/the\\_economics\\_of\\_bail\\_and\\_pretrial\\_detention](https://www.hamiltonproject.org/papers/the_economics_of_bail_and_pretrial_detention).

13 *See e.g., Griffin v. Illinois*, 351 U.S. 12, 19 (1986) (stating "Such a denial is a misfit in a country dedicated to affording equal justice to all and special privileges to none in the administration of its criminal law. There can be no equal justice where the kind of trial a man gets depends on the amount of money he has").

create a more equal justice system and will restore equal protection under the constitution.

Part I explains the lack of regulation in the plea-bargaining process and how, because of the unregulated structure of the plea-bargaining process, prosecutors and defendants are not on a level playing field. This section also lays out the relevant constitutional principles. Part II sets out legal precedents and establishes general rules to guide discussions of plea-bargaining's relationship with the constitution. Part III explains how both prosecutorial tactics and flaws in the criminal justice system restrict the poor from full access to the criminal justice system, specifically access to a trial. Part IV reiterates the obligation that states have under the constitution to resolve these issues. Part V suggests actions states can take to resolve the constitutional issues.

## I. BACKGROUND

### *A. Waiving Rights*

Plea bargaining is a contract between the state and the defendant where the state agrees to lower the penalties and the defendant agrees to waive their right to trial by jury, saving the court time and resources and expediting the sentencing process.<sup>14</sup>

Despite the less extreme sentences that plea bargains usually offer, plea bargains are not always the best option for defendants. When defendants waive their right to a trial by jury, they also waive other rights guaranteed to the accused, such as their privilege against self-incrimination, the right to confront one's accusers, the right to plead "not guilty," the right to require the prosecution to prove guilt beyond a reasonable doubt, the right to compel favorable witnesses,

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14 See Sara J. Berman, *The Basics of a Plea Bargain*, (last visited Feb. 1, 2021), <https://www.nolo.com/legal-encyclopedia/the-basics-plea-bargain.html#:~:text=A%20plea%20bargain%20is%20an,the%20judge%20a%20specific%20sentence.>

and the right to present any available defenses at trial.<sup>15</sup> Defendants also lose the right to appeal any case because they were not given these rights.<sup>16</sup> In some cases, defendants waive their right to challenge issues related to pretrial rights, such as there being no probable cause for arrest, improperly seized evidence, an illegally obtained confession, and more.<sup>17</sup> The court upheld these waivers of rights as constitutional in *Brady v. United States*.<sup>18</sup> Although plea bargains help defendants get lesser punishments, the lesser punishments often come at a high cost. These costs are especially high for defendants who are innocent of the crime they were indicted for, as in the cases of George Alvarez and Kalief Browder.

### *B. Prosecutorial Discretion*

Additionally, when defendants enter the plea bargaining process, they are subject to the prosecutor's discretion. Plea bargains are handled at the prosecutor's discretion in four ways. First, prosecutors alone draft the bargains which judges can only approve or deny.<sup>19</sup> In fact, in most cases, judges are prohibited from participating in or commenting on the plea negotiations, leaving the sentencing power almost entirely to the prosecutors.<sup>20</sup> Second, unlike in other areas of

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15 See Daniel P. Blank, *Plea Bargain Waivers Reconsidered: A Legal Pragmatist's Guide to Loss, Abandonment and Alienation*, 68 Fordham L. Rev. 2011, 2011 (2012); See also Lee Sheppard, *Disclosure to the Guilty Pleading Defendant: Brady v. Maryland and the Brady Trilogy*, 72 J. OF CRIM. L. AND CRIMINOLOGY 165, 165 (1981). See also Plea Agreements And Sentencing Appeal Waivers -- Discussion Of The Law, <https://www.justice.gov/archives/jm/criminal-resource-manual-626-plea-agreements-and-sentencing-appeal-waivers-discussion-law> (last visited Feb. 23, 2021).

16 See Plea Agreements And Sentencing Appeal Waivers -- Discussion Of The Law, *supra* note 15.

17 See Alexandra W. Reimelt, *Plea Bargains and Waiver of the Right to Appeal*, 51 B.C. L. REV. 871, 873 (2010).

18 *Brady v. U.S.*, 397 U.S. 742, (1969).

19 21 Am. Jur. 2d *Judicial Participation in Plea Bargaining Process* § 619.

20 21 Am. Jur. 2d *supra* note 19.

law, the plea bargaining process is rather unrestricted. Depending on the state, prosecutors can present plea bargains before the trial, during the trial, or even after the trial in cases where the jury cannot decide.<sup>21</sup> This gives prosecutors discretion to strategically propose plea bargains when they are most likely to be accepted. Third, during the plea bargaining process, prosecutors can withhold evidence favorable to the defendant. This evidence would otherwise come out at trial.<sup>22</sup> Fourth, legislation has increasingly given prosecutors several tools to push plea deals onto defendants. For example, defendants can be forced into pretrial detention, which can pressure defendants into taking unfavorable deals.<sup>23</sup> Additionally, increased mandatory minimum sentencing (a legal requirement for the minimum penalty

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21 Berman, *supra* note 14.

22 *See, e.g., Brady v. Maryland*, 373 U.S. 83, 87 (1963) (stating “We now hold that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution”); *See also United States v. Ruiz*, 536 U.S. 622, 633 (2002) (stating “lead us to conclude that the Constitution does not require the Government to disclose material impeachment evidence prior to entering a plea agreement with a criminal defendant”).

23 *See, e.g., Bureau of Just. Assistance U.S. Dep’t. of Just., Plea and Charge Bargaining: Research Summary* (2011) (referring to Kellough and Wortley’s findings when saying, “Pretrial detention has a strong effect on the decision to offer and accept pleas. Those who are taken into custody are more likely to accept a plea and are less likely to have their charges dropped”); *See also Gail Kellough and Scot Wortley, Remand for Plea: Bail Decisions and Plea Bargaining as Commensurate Decisions*, 42 THE BRIT. J. OF CRIMINOLOGY 186, 186 (2002) (“rather than ‘managing risk,’ the findings showed that the detention of accused persons was an important resource that the prosecution used to encourage or coerce guilty pleas from accused persons.” “What is structured into this linkage between bail and plea bargaining is not a reduction of the accused’s opportunities for offending so much as a decrease in the ability of vulnerable groups to resist the system’s power to punish”); *See generally* Pretrial Policy: State Laws, <https://www.ncsl.org/research/civil-and-criminal-justice/pretrial-policy-state-laws.aspx> (last visited Feb. 9, 2021) (describing pretrial detention laws by state).

at trial) gives defendants even more reason to avoid trial.<sup>24</sup> All four forms of prosecutorial discretion put prosecutors at an advantage in the plea bargaining process.

### *C. Plea Bargaining Precedent*

The Sixth Amendment of the Constitution grants a right to a trial by jury, but this right can be waived in the plea bargaining process.<sup>25</sup> The Supreme Court has on numerous occasions upheld plea bargains.<sup>26</sup>

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- 24     *See* U. S. Sent’g. Commission, Quick Facts on Mandatory Minimum Penalties (2015). (stating “In 2015 at sentencing, 13.5 percent of all offenders in cases reported to the United States sentencing commission remained subject to a mandatory minimum penalty”) (“The average sentence length of offenders who remained subject to a mandatory minimum penalty at sentencing was 138 months, over twice the average sentence of offenders receiving relief from such a penalty (66 months). The average sentence for offenders not convicted of any offense carrying a mandatory minimum penalty was 28 months”); *See generally* Philip Oliss, *Mandatory Minimum Sentencing: Discretion, the Safety Valve, and the Sentencing Guidelines*, 63 U. CIN. L. REV. 1851, 1851-52 (1994-1995) (describing the history of mandatory minimum sentencing including related laws passed in the late 1900s).
- 25     *See* *Boykin v. Alabama*, 395 U.S. 238, 243 (1969) (stating “Several federal constitutional rights are involved in a waiver that takes place when a plea of guilty is entered in a state criminal trial. First is the privilege against compulsory self-incrimination guaranteed by the Fifth Amendment and applicable to the States by reason of the Fourteenth. *Malloy v. Hogan*, 378 U. S. 1. Second is the right to trial by jury”).
- 26     *See, e.g., Parker v. North Carolina*, 397 U.S. 790, 790 (1970) (stating “An otherwise valid plea is not involuntary because induced by a defendant’s desire to limit the possible maximum penalty to less than that authorized if there is a jury trial”); *See also* *North Carolina v. Alford*, 400 U.S. 25, 25 (1970) (stating “A guilty plea that represents a voluntary and intelligent choice among the alternatives available to a defendant, especially one represented by competent counsel, is not compelled within the meaning of the Fifth Amendment because it was entered to avoid the possibility of the death penalty.”); *See also* *Brady*, 397 U.S. at 742 (stating “A plea of guilty is not invalid merely because entered to avoid the possibility of the death penalty, and here, petitioner’s plea of guilty met the standard of voluntariness, as it was made “by one fully aware of the direct consequences” of that plea”).

However, courts have created guidelines for when defendants can legally waive their right to trial. For example, in multiple cases, the Supreme Court has held that confessions cannot be coerced or compelled.<sup>27</sup> In *Brady*, the Court expected plea bargains to only be used when there is overwhelming evidence that the defendant is guilty and, therefore, a trial would waste time and resources.<sup>28</sup> The Court further suggested that plea negotiations should not be used when evidence is uncertain.<sup>29</sup>

## II. RULE

The Equal Protection Clause of the Fourteenth Amendment states that a state cannot “deny to any person within its jurisdiction the equal protection of the law.” The following section analyzes Supreme Court decisions where the defendant lived in poverty and the decisions were based on the Fourteenth Amendment. The following analysis shows that when poverty impedes full access to the justice system, the state is required to correct that imbalance.

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27 *Brady*, 397 U.S. at 742.

28 *Id.* at 752 (stating “we take great precautions against unsound results, and we should continue to do so, whether conviction is by plea or trial. We would have serious doubts about this case if the encouragement of guilty pleas by offers of leniency substantially increased the likelihood that defendants, advised by competent counsel, would falsely condemn themselves. But our view is to the contrary, and is based on our expectation that courts will satisfy themselves that pleas of guilt are voluntarily and intelligently made by competent defendants with adequate advice of counsel, and that there is nothing to question the accuracy and reliability of the defendants’ admissions that they committed the crimes with which they are charged”).

29 *Id.* at 752 (stating “with the avoidance of trial, scarce judicial and prosecutorial resources are conserved for those cases in which there is a substantial issue of the defendant’s guilt or in which there is substantial doubt that the State can sustain its burden of proof”); *See also id.* at 742 (stating “That a guilty plea is a grave and solemn act to be accepted only with care and discernment has long been recognized”).

In *Griffin v. Illinois*,<sup>30</sup> two defendants, Griffin and Crenshaw, were convicted of armed robbery. Immediately, the two wanted to appeal their case but needed a transcript to do so. They filed a motion asserting that they could not afford to pay the transcript fees. The Supreme Court held that transcript fees violated the 14<sup>th</sup> Amendment.<sup>31</sup> In the majority opinion, the Supreme Court affirmed that the state could not discriminate on account of poverty and that to deny the poor the right to appeal was no different than denying them a trial.<sup>32</sup> *Griffin* is the beginning of a series of rulings that all have the same conclusion: poverty cannot impede access to the criminal justice system under the Fourteenth Amendment. The state must compensate and provide the poor with equal footing so there is equal protection under the law.

*Eskridge v. Washington*<sup>33</sup> was similar to *Griffin*. Eskridge was in prison and wanted to appeal his conviction. A transcript was required to do so, but Eskridge could not afford it. Under Washington law, the state would only provide the appeal if a judge thought it

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30 *Griffin v. Illinois*, 351 U.S. 12 (1986).

31 *See Griffin*, 351 U.S. at 19 (stating “Such a denial is a misfit in a country dedicated to affording equal justice to all and special privileges to none in the administration of its criminal law. There can be no equal justice where the kind of trial a man gets depends on the amount of money he has”).

32 *See Griffin*, 351 U.S. at 17 (stating “Surely no one would contend that either a State or the Federal Government could constitutionally provide that defendants unable to pay court costs in advance should be denied the right to plead not guilty or to defend themselves in court. Such a law would make the constitutional promise of a fair trial a worthless thing. Notice, the right to be heard and the right to counsel would, under such circumstances, be meaningless promises to the poor. In criminal trials, a State can no more discriminate on account of poverty than on account of religion, race, or color. Plainly, the ability to pay costs in advance bears no rational relationship to a defendant’s guilt or innocence, and could not be used as an excuse to deprive a defendant of a fair trial... There is no meaningful distinction between a rule which would deny the poor the right to defend themselves in a trial court and one which effectively denies the poor an adequate appellate review accorded to all who have money enough to pay the costs in advance”).

33 *Eskridge v. Washington Prison Bd.*, 357 U.S. 214 (1958).

would promote the interests of justice. In this case, the court denied Eskridge the requested transcript. With *Griffin* as precedence, the Supreme Court reaffirmed that the denial of a transcript based on poverty was a violation of the Fourteenth Amendment and that destitute defendants must be given equally adequate appellate reviews as those who can afford transcripts.

Likewise, in *Smith v. Bennet* the Supreme Court ruled that the state of Iowa violated the Fourteenth Amendment by denying an indigent prisoner a writ of habeas corpus because he could not afford to pay the associated fees.<sup>34</sup> The Court stated that to impose any financial consideration between a prisoner and their right to sue is to deny equal protection of the law.<sup>35</sup> They also reaffirmed *Griffin's* decision that “there can be no equal justice where the kind of trial a man gets depends on the amount of money he has.”<sup>36</sup> This case extended the *Griffin* doctrine beyond appellate proceedings into post-conviction proceedings.

In *Lane v. Brown*,<sup>37</sup> a respondent was convicted and sentenced to death. He tried appealing with the help of the public defender but lost. Lane wanted to appeal his case again, but the public defender thought they would be unsuccessful and stopped representing him. Undeterred, Lane tried to continue appealing his case, but first, he needed a transcript—which he could not afford. He appealed to receive the transcript for free and for counsel to be appointed. The Supreme Court of Indiana denied both requests. Under the law, the only way for an indigent to receive the transcript was with the help of a public defender. The Supreme Court ruled that denying Lane’s

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34 *Smith v. Bennett*, 365 U.S. 708, 714 (1961) (stating “In failing to extend the privilege of the Great Writ to its indigent prisoners, Iowa denies them equal protection of the laws”).

35 *Smith*, 365 U.S. at 709 (stating “We hold that to interpose any financial consideration between an indigent prisoner of the State and his exercise of a state right to sue for his liberty is to deny that prisoner the equal protection of the laws”).

36 *Smith*, 365 U.S. at 710.

37 *Lane v. Brown*, 372 U.S. 477 (1963).

appellate review because of his poverty was a violation of the Fourteenth Amendment.<sup>38</sup>

That same year, the Supreme Court issued the *Gideon v. Wainwright* ruling.<sup>39</sup> Gideon was charged with felony breaking and entering. At his trial, he requested a lawyer to represent him. Under Florida law, attorneys were only appointed for capital cases, so Gideon had to represent himself. The Supreme Court ruled unanimously that the denial of representation violated the Fourteenth Amendment and the Sixth Amendment.<sup>40</sup>

These cases show that when poverty becomes an impediment to full access to the justice system, the impediment violates the Fourteenth Amendment. The Supreme Court recognizes the equal right of all, rich or poor, in all stages of the legal process, from trial to post-conviction. When poverty creates an imbalance, the state has the responsibility to correct that imbalance and to ensure equal protection for all. The Court has left states to decide how best to correct that imbalance.<sup>41</sup> In the past, this has included paying for an attorney or paying for a transcript; however, today, the unique combination of the burden of indirect trial costs and the restraints of a broken

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38 *Id.* at 478 (stating “We agree that the Indiana procedure at issue in this case falls short of the requirements of the Fourteenth Amendment”).

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

40 *See id.* at 335 (stating “The right of an indigent defendant in a criminal trial to have the assistance of counsel is a fundamental right essential to a fair trial, and petitioner’s trial and conviction without the assistance of counsel violated the Fourteenth Amendment”). *See also id.* at 348 (stating “That the Sixth Amendment requires appointment of counsel in ‘all criminal prosecutions’ is clear, both from the language of the Amendment and from this Court’s interpretation”).

41 *See Griffin*, 351 U.S. at 20 (stating “The Illinois Supreme Court appears to have broad power to promulgate rules of procedure and appellate practice. We are confident that the State will provide corrective rules to meet the problem which this case lays bare”). *See also Lane*, 372 U.S. at 483. *See also Eskridge*, 357 U.S. at 216 (stating “We do not hold that a State must furnish a transcript in every case involving an indigent defendant. But here, as in the *Griffin* case, we do hold that “[d]estitute defendants must be afforded as adequate appellate review as defendants who have money enough to buy transcripts”).

criminal system forces the poor to plead guilty before trial. Poor people do not have equal access to a trial—an essential part of the criminal justice system—and states must correct this issue.

### III. POOR PEOPLE DO NOT HAVE EQUAL ACCESS TO TRIAL

#### A. Indirect Costs

The Sixth Amendment of the Constitution grants the right to a trial by jury. However, poor defendants cannot afford the indirect costs of trial and therefore must waive that right and plead guilty. The indirect costs of trials include pretrial detention, the trial penalty, and the cost of court appearances. If poor defendants have no choice but to waive their constitutional right to a trial by jury, this begs the question of whether they truly had this right to begin with.

#### i. Pretrial Detention

In 2017, 65 percent of the United States prison population, totaling approximately 480,000 individuals, was held in detention awaiting trial or court action.<sup>42</sup> Pretrial detention forces defendants to miss work, causing defendants to lose days, weeks, or even months of income. In fact, in 2010, about 64 percent of defendants were detained for the entirety of their case.<sup>43</sup> This can lead to debt, lost housing, family stress, and unemployment.<sup>44</sup> Although pretrial detention can be stressful for anyone, it is especially stressful for poor defendants for two reasons: (1) they cannot afford bail and, therefore are more likely to be held in pretrial detention, and (2) they have fewer savings for family members to rely on while the defendant is away from work.

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42 Liu & Nunn, *supra* note 12.

43 Thomas H. Cohen, *Pretrial Detention and Misconduct in Federal District Courts, 1995-2010*, (Feb. 2013), <https://www.bjs.gov/content/pub/pdf/pdmfde9510.pdf>.

44 See Mathieu R. Despard, Terri Friedline, & Stacia Martin-West, *Why Do Households Lack Emergency Savings? The Role of Financial Capability*, J. OF FAM. & ECON. ISSUES, 1, 1, (2020).

Data from the 2017 Survey of Household Economics and Decision Making shows that four in ten households would need to borrow money, sell some of their assets, or would be unable to pay if faced with a \$400 emergency expense.<sup>45</sup> However, bail is usually much higher than \$400. Researchers have found that 70 percent of felony defendants have been assigned bail amounts greater than \$5000, with the average bail for felony defendants at \$55,400.<sup>46</sup> Currently, over 90 percent of people in pretrial detention are eligible for bail but have not posted it.<sup>47</sup> Because people stay in pretrial detention when they cannot afford to get out, the poor are more likely to be held in pretrial detention.

Not only are poor defendants less likely to pay bail, but they are also more likely to experience adverse financial consequences of pretrial detention. Prosecutors know that defendants who do not have savings and need to get out of jail to work and provide for their families are more likely to plead guilty. As one prosecutor said, “When you hold somebody’s freedom, you limit their ability to hold a job [and] pay their bills [so] they will take the deal pretty much no matter what.”<sup>48</sup> In fact, pretrial detention is linked to a greater

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- 45 See Board of Governors of The Fed. Res. Sys., *Report on the Economic Well-Being of U.S. Households in 2017*, (2018), <https://www.federalreserve.gov/publications/files/2017-report-economic-well-being-us-households-201805.pdf> (stating “When faced with a hypothetical expense of only \$400, 59 percent of adults in 2017 say they could easily cover it, using entirely cash, savings, or a credit card paid off at the next statement”).
- 46 Jacob Goldin, Will Dobbie & Crystal S. Yang, *The Effects of Pretrial Detention on Conviction, Future Crime, and Employment: Evidence from Randomly Assigned Judges*, 108, AM. ECON. REV., 201, 201, (Feb. 2018).
- 47 Brian A. Reaves, *Felony Defendants in Large Urban Counties, 2009 – Statistical Tables*, December 2013, [https://jpp.whs.mil/Public/docs/03\\_Topic-Areas/07-CM\\_Trends\\_Analysis/20160122/04\\_BJS\\_Report\\_State\\_Felony\\_Sentencing\\_2009.pdf](https://jpp.whs.mil/Public/docs/03_Topic-Areas/07-CM_Trends_Analysis/20160122/04_BJS_Report_State_Felony_Sentencing_2009.pdf).
- 48 William R. Kelly, *Confronting Underground Justice: Reinventing Plea Bargaining For Effective Criminal Justice Reform* 79 (Rowman & Littlefield, 1<sup>st</sup> ed. 2018).

likelihood of receiving harsher sentences.<sup>49</sup> On the other hand, those who have the financial stability to provide for their families while not working do not have the same pressure to get out of detention quickly through a guilty plea.

Evidence supports this claim. In a study of criminal cases in Philadelphia, researchers found that defendants who were held in pretrial detention were less likely to get their charges reduced in their plea deals.<sup>50</sup> Other researchers found that pretrial detention increases the likelihood of conviction, whether at trial or through a plea, by 13 percent. On the other hand, defendants who were released from pretrial detention were 14 percent less likely to be found guilty than those who were not released.<sup>51</sup> This disparity disproportionately affects those who cannot afford bail and therefore have no choice but to spend days, weeks, months, or years in pretrial detention. Although pretrial detention pushes all detained defendants to plead guilty, the poor are disproportionately affected, because they are overrepresented in pretrial detention and have stronger incentives to get out of detention.

## ii. Trial Penalty

Research shows that people who go to trial often get more extreme sentences than those who take plea deals.<sup>52</sup> This concept is known as the trial penalty. Prosecutors use the trial penalty to convince defendants to plead guilty rather than go to trial.

The trial penalty is especially intimidating for the poor. Consider the following hypothetical situation. A woman is arrested for a crime she did not commit. Both the woman and her husband make minimum wage, so after providing for their children they have no savings. A prosecutor tells the woman that she can plead guilty to the crime and spend three months in jail, or she can assert her innocence

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49 See Emily Leslie & Nolan G. Pope, *The Unintended Impact of Pretrial Detention on Case Outcomes: Evidence from New York City Arraignments*, 60, J. OF L. & ECON. 529 (2017).

50 Liu & Nunn, *supra* note 12.

51 Leslie & Pope, *supra* note 49.

52 Devers, *supra* note 4.

at trial and risk spending three years in jail. If this woman goes to jail for three years, her family goes three years without her income and her husband will have to balance being the sole financial provider for the family and the sole caretaker for their children. Logically, the less financially stable her family is the more likely it is that the defendant will plead guilty to the crime and go to jail for three months rather than put her family in such an unpredictable situation for three years.

On the other hand, a defendant who has savings will surely not want to be separated from their family while in prison, nonetheless, they will have the assurance that their savings will provide for their family while they are incarcerated. Therefore, the wealthy defendant will feel less pressure to plead guilty and accept the less severe sentence. The trial penalty threatens the poor more than the non-poor and pushes the poor into accepting plea bargains rather than going to trial.

### iii. Court Appearances

Third, if a person perseveres through the costs of pretrial detention and discussion of the trial penalty, they must next face the indirect costs of court appearances. The costs of court appearances are like those of pretrial detention and the trial penalty. Trials can take several days, which means that not only do people need to find childcare for those days, but they also must miss work. If people miss work for that many days, they may lose their job. This situation is especially threatening for poor people who do not have savings to act as a safety net while they are without work.

The costs of pretrial detention, the trial penalty, and court appearances all have similar effects on defendants. When poor defendants are kept from providing for their families, they will make sacrifices to return to work and to continue to earn money, even if this means they take a bad deal or plead guilty to a crime they did not commit. These indirect costs of trial disadvantage the poor by encouraging defendants to plead guilty and discouraging defendants from going to trial. This gives defendants unequal access to trial.

## B. Broken System

Beyond the indirect costs of trial, the poor also have unequal access to trial because of flaws in the justice system. There are two flaws in the justice system that keep poor defendants from going to trial: ineffective public defenders and the existence of extreme psychological distress.

### i. Public Defenders

In *McCann v. Richardson*, the Supreme Court reasoned that defense counsel will keep defendants from being coerced into taking a plea deal.<sup>53</sup> However, this is not the case. Nationwide, public defenders are so overbooked that they cannot dedicate the time necessary to adequately represent their clients. In some states, the average workload for a public defender is over 365 cases a year. In Kentucky, it is over 448 cases.<sup>54</sup> In Kentucky, the average public defender, assuming they do not take a single day off work, is assigned 1.2 cases a day. In Maryland, 380 public defenders have a workload of 530.<sup>55</sup> Additionally, an American Bar Association study of the Missouri State Public Defender System caseloads concluded that the number of public defenders needed to be increased by 75 percent to provide basic services.<sup>56</sup> Even Colorado, which has the best-funded public defense system in the nation, operates at a 10 percent staff deficit in their public defense offices.<sup>57</sup> Nationwide, public defenders are overbooked.

Not only are public defenders overbooked, but they are often underfunded. Recently, Louisiana cut public trial defense funding

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53 *McCann v. Richardson*, 397 U.S. 759, 759 (1970) (stating “A defendant’s plea of guilty based on reasonably competent advice is an intelligent plea not open to attack as being involuntary”).

54 Kelly, *supra* note 48, at 66.

55 *Id.*

56 *Id.*

57 *Id.*

by 62 percent.<sup>58</sup> In certain places in Louisiana, funding was so low that judges had to appoint tax, family, real estate, and other attorneys to criminal cases where defendants could not afford an attorney.<sup>59</sup> In Wisconsin, private attorneys who take on public defense cases are paid only \$40 an hour, much lower than they can make elsewhere. As a result, fewer lawyers accept public defense cases.<sup>60</sup> Additionally, in Florida, the average entry-level salary of a public defender is \$41,570.<sup>61</sup> If a public defender supported four kids and was arrested, that public defender would qualify to be represented by a public defender.<sup>62</sup>

Although funding for public defense is sparse nationwide, poor communities receive even less funding than wealthy communities. In 13 states, counties must use their own money, rather than state funding, to provide counsel for poor defendants.<sup>63</sup> This means that in lower-income counties, public defenders have even fewer resources. In fact, in counties that fund their public defenders, 73 percent were operating above the recommended caseload per attorney.<sup>64</sup>

Public defenders are overworked, underpaid, and even sometimes absent at crucial points in a case. When public defenders are overworked, underpaid, and have minutes - rather than hours - to spend on cases, they have an incentive to get through cases quickly.<sup>65</sup> Defense attorneys often accept plea deals because it's the easiest

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58 *Id.* at 65.

59 *Id.*

60 *See id.* Assigned Counsel Rates Information <https://www.nacdl.org/Content/AssignedCounselRates> (last visited Feb. 23, 2021).

61 The Sad State of the Public Defender in America, <https://www.texasdefenselaw.com/library/sad-state-public-defender-america/#:~:text=Today%2C%20the%20guaranteed%20right%20to,defenders%20are%20overworked%20and%20underpaid> (last visited Feb. 23, 2021).

62 *Id.*

63 Kelly, *supra* note 48, at 66.

64 *Id.*

65 *See id.* at 68.

and quickest way to deal with their case, not because they are acting in the best interest of their client.<sup>66</sup> Alternatively, private attorneys have fewer incentives to advise their clients to accept a plea bargain. Compared to public defenders, private attorneys usually defend fewer clients at a time and have a bigger incentive to build clientele (because unlike public defenders, they are not assigned cases). To build clientele, private attorneys may want to spend more time on each case to get their client better outcomes and, therefore, to build a reputation as a reliable attorney.

Private and public defense are anything but equal. When public defenders do not have the time, resources, or (in some cases) the incentives to advocate for their clients, those who cannot afford private representation are pushed out of trials and into plea negotiations. The underfunded state of the public defense system is more than a simple inconvenience for the poor, it is a complete impairment to their chances of success.

## ii. People in Poverty are Less Likely to Take Risks

In *Bordenkircher v. Hayes*, the Supreme Court held that aggressive techniques used by prosecutors in the plea bargaining process are not coercive.<sup>67</sup> Although extreme prosecutorial techniques, such as pretrial detention and threatening the trial penalty, are not coercive to the general population, the unique environment that poor people live in makes it so these techniques are, in fact, coercive for the poor.

Psychological research shows that poverty affects people's decision-making in high-stress environments. When people are stressed, they get an increase in a hormone named cortisol.<sup>68</sup> Sustained high

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66 *See id.*

67 *Bordenkircher v. Hayes*, 434 U.S. 357 (1978) (stating “The Due Process Clause of the Fourteenth Amendment is not violated when a state prosecutor carries out a threat made during plea negotiations to have the accused reindicted on more serious charges on which he is plainly subject to prosecution if he does not plead guilty to the offense with which he was originally charged”).

68 *See* Stephanie P. Bair, *Impoverished IP*, 81 OHIO ST. L.J. 523, 541 (2020).

levels of cortisol are closely linked to people who live in poverty.<sup>69</sup> Cortisol is also linked with people who “stick to what they know” rather than exploring new options.<sup>70</sup> In fact, consistently high levels of cortisol, as found in people who live in poverty, have been shown to negatively affect decision-making strategies both in the moment and over time.<sup>71</sup>

Researchers tested whether financial concerns affect creative decision-making. They found that poor people, when asked to make decisions after being asked about finances, were significantly less likely to take risks and think creatively than their non-poor counterparts.<sup>72</sup> Additionally, sleep deprivation, which has been proven to be more common among poor people, has also been linked to poor decision-making. People who regularly do not get enough sleep are also more likely to “stick to what they know” rather than exploring alternatives.<sup>73</sup>

With the combination of stress, sleep deprivation, and other factors, various studies have shown that people who live in poverty are more likely to rely on habit-based decisions rather than goal-directed

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69 *See id.* at 526.

70 *See id.*

71 *See id.*

72 *See, e.g.,* Anandi Mani et al., *Poverty Impedes Cognitive Function*, 341 SCIENCE 976, 977 (2013); Christina E. Shalley, *Effects of Coaction, Expected Evaluation, and Goal Setting on Creativity and Productivity*, 38 ACAD. MGMT. J. 483, 483 (1995); Mark M. Kishiyama et al., *Socioeconomic Disparities Affect Prefrontal Function in Children*, 21 J. COGNITIVE NEUROSCIENCE 1106, 1106 (2008).

73 *See e.g.,* Nirav P. Patel et al., “*Sleep Disparity*” in the Population: *Poor Sleep Quality Is Strongly Associated with Poverty and Ethnicity*, 10 BMC PUB. HEALTH 475, 475 (2010); Nurith Aizenman, *Sleepless Nights and Lighter Wallets: The Link Between Poverty and Sleep*, NPR (Dec. 6, 2015), <https://www.npr.org/2015/12/06/458662028/a-bad-nightssleep-might-do-more-harm-than-you-think>.

decisions.<sup>74</sup> Goal-directed decisions focus on the desired outcome and choose the most likely way to achieve that outcome. On the other hand, habit-based decision-makers do not consider options outside of what they are comfortable with.<sup>75</sup> This emphasizes that people who live in poverty are less likely to take risks, even if the risks are small and the most rational option available.

In the plea bargaining context, defendants are faced with many decisions with consequences that could follow them for the rest of their lives. Not only are these decisions important, but they are made under extreme stress. As discussed before, due to pretrial detention, the trial penalty, higher costs of trial, and inadequate representation, poor people are under more stress than the average defendant. But not only are poor people under more stress in the plea bargaining process, but they are also less able to deal with that stress because they are less likely to take risks, even if the risks are small and rational. For example, if a prosecutor explains the trial penalty and the defendant is poor, they will be more likely than their non-poor counterparts to waive their right to trial.

Some might object, arguing that all of this, while unfortunate, does not constitute a violation of the 14<sup>th</sup> Amendment. They might say that some people are poor, and we are not expected to fix inherent inequalities in everyone. It might be conceded that any one of these reasons alone would probably not be strong enough to count as a violation of equal protection. However, when we take all of them into account and see that they all single out a protected class, the poor, we realize that there is an inequality in access to the criminal justice system. The poor get an overburdened public defender; they get bails they cannot pay; they are held in jail to await their trial (causing them to miss work which only exacerbates the problem), and then, with the memories of jail fresh and worries about providing

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74 Bair, *supra* note 68, at 540 (stating “More recent empirical work in psychology and neuroscience also supports the hypothesis that those living in poverty may find it particularly difficult, psychologically speaking, to engage in creative pursuits. Specifically, the poor may be pressed by their circumstances to employ so-called exploitative and habit-based decision-making strategies that make creativity harder to come by”).

75 *See id.* at 543.

for their families at the top of their minds, they face a prosecutor bent on getting a conviction. There is undeniable inequality in the criminal justice system that the 14<sup>th</sup> Amendment was designed to prevent. These issues are more than simply unfortunate problems for the poor. They are an impediment to their promised equal treatment under the law. These obstacles embody the very inequalities that the Fourteenth Amendment was designed to prevent.

#### IV. APPLICATION

The costs inherent in pretrial detention, trial penalties, and court appearances in combination with flaws in the system – such as overburdened public defenders and the creation of inherent psychological distress for defendants – keep poor defendants from going to trial. This unequal access to trial violates the Fourteenth Amendment. The Supreme Court has not only recognized a constitutional right to a trial by jury but has also recognized on numerous occasions the poor’s disadvantage in the criminal justice system. Historical precedence shows that when the poor have unequal access to the criminal justice system, the Fourteenth Amendment is violated. Certainly, the current state of the criminal justice system unjustly forces poor defendants to accept plea bargains, keeping them from exercising their right to trial by jury.

Some may contend that historical precedence has only been applied to direct costs of a trial (such as transcript and attorney fees) and does not apply to indirect costs (such as those mentioned in this paper). This is simply not true. Although the Supreme Court has never held that a specific indirect cost in the criminal justice system violated the Fourteenth Amendment, the scope of Court decisions applies to any costs (direct or indirect) that deny access to a trial.

For example, in *Smith v. Bennet*, the Supreme Court reasoned that “to interpose *any financial consideration* between an indigent prisoner of the State and his exercise of a state right to sue for his liberty is to deny that prisoner the equal protection of the laws.”<sup>76</sup> “Consideration” is broader than simply fines or costs. “Financial

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76 *Smith*, 365 U.S. at 709.

considerations” should include stress, burdens, and obligations. Although financial considerations are an inherent and necessary part of the criminal justice system, according to the Supreme Court, financial considerations that are harsher on poor defendants than non-poor defendants violate the Fourteenth Amendment. Therefore, the indirect costs of trial are within the scope of court precedence and therefore are restricted by the Fourteenth Amendment.

## V. PRESCRIPTIVE CLAIM

The poor have a severe disadvantage in the court system. This disadvantage creates an impediment to full and equal access to the court systems. As discussed in Section II, historical court rulings such as those in *Griffin v. Illinois*, *Eskridge v. Washington*, *Smith v. Bennet*, *Lane v. Brown*, and *Gideon v. Wainwright* hold that when a group of people does not have equal access to the criminal justice system, the court must resolve the inequality. The courts have let states decide how to resolve the inequality. This section recommends solutions to the unequal access to trials.

### A. Reimbursement

Research suggests that the high indirect costs of trials, such as missing work, encourage defendants to plead guilty even if they are innocent. Therefore, if a person lives below the poverty line and is found innocent at trial, states should reimburse that person for their time away from work. To equalize the time taken away from work, states should pay the defendant at least minimum wage in that state for every hour, up to forty hours a week, that the defendant spent in pretrial detention, the plea bargain negotiations, or court. States can determine where these funds will come from. If innocent defendants get reimbursed for their time in the justice system, it will subset the costs of trial and encourage more innocent defendants to go to trial even if they live below the poverty line.

An obvious critique of this method will be its perceived financial burden on states. However, it may be the cheapest option for three reasons. First, under this suggestion, the court will only need to pay

the defendant minimum wage. This is much cheaper than the alternative of paying the higher salary of a mediator or judge to mediate the pre-trial process.

Second, the court will only have to reimburse defendants in a select few cases. As mentioned above, an estimated 90 percent of defendants plead guilty before trial, and in only a small fraction of cases, defendants are found innocent at trial. Although the reimbursement method will ideally make it easier for people who live in poverty to go to trial and be found innocent, the number of people found innocent at trial will still be a small fraction of the total number of criminal cases. Additionally, the state only needs to reimburse defendants who live in poverty, narrowing the cost for states even more.

Third, a reimbursement policy will strongly discourage prosecutors from wasting time and resources by pursuing weak cases. In the current system, even if a case against the defendant is weak, the defendant may plead guilty anyway. For example, in George Alvarez's case, the prosecutor knew that there was hidden evidence that could exonerate Alvarez, but Alvarez still pled guilty. The government wasted tax-payer dollars for four years by locking up an innocent man. Similarly, the government wasted money for three years by keeping Kalief Browder in pre-trial detention before releasing him without a trial. If the government is forced to compensate for keeping innocent Americans away from their work, family, and homes, the state will minimize their losses by only pursuing cases where there is a good chance of winning. When states only pursue strong cases, the justice system will be less overburdened, and judges, prosecutors, and public defenders will have more time.

### *B. Accessible Loans*

Another option is to provide easily accessible and low-interest loans to people who live in poverty and are in pretrial detention, in the plea bargaining system, or going through a trial. Because of fines, attorney fees, and time away from work and home, many people who enter the criminal justice system need money quickly. Currently, people who cannot access quick money may feel like they have no

choice but to plead guilty to get out of the system and return to work. These loans are not meant to be used to post bail but are instead meant to help defendants keep their life in order by paying bills, buying groceries, getting childcare, and more. However, these loans should not be predatory, meaning that they should not put people living in poverty in a worse situation. States should make these loans either low-interest or government-subsidized. Accessible loans will help defendants assert their innocence by minimizing the external concerns that trial places on the poor.

### *C. Other Options*

When there is unequal access to the criminal justice system, the Fourteenth Amendment requires states to remove that inequality. However, America's federalist system allows state officials to choose which solutions would work best for their state. Reimbursement and accessible loans are examples of solutions that use limited resources and are targeted to fix inequality. However, every state has different budgets, laws, cultures, and justice systems. State officials should closely analyze the problems in the criminal justice system in their state to create a custom-made solution to their unique situation. To be clear, while no particular solution is necessary, the states must do *something*. Exactly what they do is up to their discretion, but until they do something, the poor will continue to have unequal access to trials.

## CONCLUSION

Because most cases are resolved through plea deals, flaws in the plea bargaining process threaten many American citizens. These flaws in the plea bargaining system stem from its unregulated nature, which gives prosecutors unprecedented power to propose sentences and coerce defendants to accept those sentences.

Because of plea bargaining, prosecuting attorneys have replaced judges, juries are irrelevant, and sentences are agreed upon behind closed doors. Not only have prosecutors replaced the constitutional framework of a jury trial, but their work is virtually unregulated. Unlike in trial, prosecutors are not required to present evidence in

favor of the defendant, even if the evidence proves that the defendant is innocent. Additionally, in many states, defendants must waive certain constitutional rights before accepting a plea deal, such as the right to later claim that they had inadequate representation. Although the character of the plea bargaining system can be coercive for anyone, trial costs and the flawed structure of the bargaining system make it so that poor defendants have no choice but to plead guilty. Under this system, poor defendants cannot assert their constitutional right to trial and are instead forced into a process where they can be put in prison without sufficient proof of guilt.

Prosecutors have at least two tactics that are especially coercive for poor people: sending defendants to pretrial detention and using the trial penalty to instill fear in defendants. Both tactics play off the fact that poor defendants do not have savings, cannot provide for their family if they miss working for too long, and cannot afford childcare for extended periods. Due to these situations, poor defendants cannot afford to go to pretrial detention or get a longer sentence and, therefore, they plead guilty. The flaws in the bargaining system also keep defendants from going to trial. These flaws include the costs of trial, poor representation, and the psychological effects of the system. These factors disproportionately affect people living in poverty.

The combination of prosecutors' coercive tactics and flaws in the bargaining system deprive the poor of their constitutional right to trial, violating the Fourteenth Amendment. Historical precedent has shown that if people do not have equal access to the criminal justice system, the state must remedy the inequality. Courts have left the states to choose the remedy. States can protect defendants' constitutional right to a trial, rich or poor, by reimbursing innocent defendants for the costs of asserting their innocence, giving defendants easy access to loans, and more.