The Tragedy of the Criminal Justice Commons

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One of the criminal justice system's most overlooked features is that it is vulnerable to a tragedy of the commons: a collective action problem that destroys open-access resources. A tragedy of the commons occurs when too many users over-exploit an open-access resource, which results in its demise. Over-fishing, deforestation, and over-grazing are examples of this collective action problem. Two features of open-access resources expose them to tragedy: limited excludability — meaning a restricted power to exclude others — and subtractability — where one person's use of a resource lowers its quality for others.

This Article argues that the criminal justice system operates like a commons that is prone to tragedy. A tragedy of the criminal justice commons occurs when too many defendants enter the justice system and attempt to exploit its scarce resources, which lowers the overall quality of justice. Wrongful convictions, miscarriages of justice, excessive sentences, and assembly line guilty pleas all exemplify a tragedy of the criminal justice commons.

But why does a tragedy of the criminal justice commons occur? And what can be done about it? This Article shows how the justice system constitutes an open-access resource for defendants; one that is characterized by limited

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excludability and subtractability. Statutory and constitutional rights restrict the State's power to exclude defendants from using the justice system's resources to defend themselves. And each defendant's legal claims can impose unaccounted-for costs onto other defendants, such as delays, decreased scrutiny of individual cases, and stronger incentives to plead guilty. This Article elucidates how overcriminalization and the criminal procedure revolution laid the foundation for a tragedy of the criminal justice commons because they exacerbated the effects of limited excludability and subtractability. In response to greater resource pressures, the justice system embraced two mechanisms that encourage defendants to plead guilty and self-exclude from the criminal justice commons: coercive plea bargains and underfunding. The concluding parts of this Article offer concrete proposals that address the effects of overcriminalization and underfunding, and ultimately, aim to prevent a tragedy of the criminal justice commons: hard prosecutorial screening, misdemeanor decriminalization, and defense salary and caseload parity.

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INTRODUCTION

In 1992, cod fisheries collapsed in Eastern Canada.[1] At that time, cod levels had reached a historic low.[2] The federal government responded by imposing a complete moratorium on cod fishing.[3] But it was too late. Canada's greatest fishery — and one of the world's largest — was decimated.[4] Economic devastation followed.[5] Tens of thousands of people in the province of Newfoundland lost their jobs.[6] The province's unemployment rate doubled the national average for the next seven years.[7] Lack of regulation, technological advancements, and over-fishing all contributed to the cod fisheries' demise.[8]

The collapse of Canada's cod fishery exemplifies a tragedy of the commons: a unique type of collective action problem.[9] A tragedy of the commons occurs when too many users over-exploit an open-access resource, which results in its destruction.[10] Natural resources are vulnerable to various forms of tragedy, such as over-fishing,

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[1] Ransom A. Myers, Jeffrey A. Hutchings & Nicholas J. Barrowman, *Why Do Fish Stocks Collapse? The Example of Cod in Atlantic Canada*, 7 ECOLOGICAL APPLICATIONS 91, 91 (1997).

[2] Richard L. Haedrich & Lawrence C. Hamilton, *The Fall and Future of Newfoundland's Cod Fishery*, 13 SOC'Y & NAT. RES. 359, 362 (2000).

[3] R. Quentin Grafton, Leif K. Sandal & Stein Ivar Steinshamn, *How to Improve the Management of Renewable Resources: The Case of Canada's Northern Cod Fishery*, 82 AM. J. AGRIC. ECON. 570, 571 (2000).

[4] *See* William E. Schrank & Noel Roy, *The Newfoundland Fishery and Economy Twenty Years After the Northern Cod Moratorium*, 28 MARINE RES. ECON. 397, 397 (2013).

[5] *See* Lenard Milich, *Resource Mismanagement Versus Sustainable Livelihoods: The Collapse of the Newfoundland Cod Fishery*, 12 SOC'Y & NAT. RES. 625, 628 (1999).

[6] Sarah Coulthard, Derek Johnson & J. Allister McGregor, *Poverty, Sustainability and Human Wellbeing: A Social Wellbeing Approach to the Global Fisheries Crisis*, 21 GLOB. ENV'T CHANGE 453, 455 (2011).

[7] Schrank & Roy, *supra* note 4, at 407.

[8] *See* Graham D. Taylor, *The Collapse of the Northern Cod Fishery: A Historical Perspective*, 18 DALHOUSIE L.J. 13, 15-18 (1995).

[9] *See* Garrett Hardin, *The Tragedy of the Commons*, 162 SCIENCE 1243, 1244-45 (1968).

[10] *See* ELINOR OSTROM, GOVERNING THE COMMONS: THE EVOLUTION OF INSTITUTIONS FOR COLLECTIVE ACTION 2-3 (1990).

deforestation, and over-grazing.[11] But tragedies of the commons also occur outside of natural resource contexts. Public healthcare systems can deteriorate because of underfunding and overuse.[12]

Open-access resources share two features that expose them to tragedy: limited excludability and subtractability.[13] First, individuals can overexploit a commons because the power to exclude others is limited.[14] Second, open-access resources can result in subtractability, meaning that an individual's rational use of an open-access resource decreases its value for others.[15]

This Article argues that the criminal justice system operates like a commons that is prone to tragedy.[16] A tragedy of the criminal justice commons occurs when too many defendants enter the justice system and compete for its scarce resources, which lowers the quality of justice for all. This type of collective action problem results in familiar and

[11] Norman Uphoff & Jeff Langholz, *Incentives for Avoiding the Tragedy of the Commons*, 25 ENV'T CONSERVATION 251, 251-52 (1998).

[12] Khalil Hassanally, *Overgrazing in General Practice: The New Tragedy of the Commons*, 65 BRIT. J. GEN. PRACS. 81, 81 (2015).

[13] David Feeny, Fikret Berkes, Bonnie J. McCay & James M. Acheson, *The Tragedy of the Commons: Twenty-Two Years Later*, 18 HUM. ECOLOGY 1, 3 (1990).

[14] *See id.*

[15] *See id.*

[16] Some scholars have analogized the criminal justice system — or certain aspects of it — to a commons. *See, e.g.*, DAVID W. RASMUSSEN & BRUCE L. BENSON, THE ECONOMIC ANATOMY OF A DRUG WAR: CRIMINAL JUSTICE IN THE COMMONS 20 (1994) (analogizing public law enforcement to a commons dilemma); Bruce L. Benson & David W. Rasmussen, *The Context of Drug Policy: An Economic Interpretation*, 28 J. DRUG ISSUES 681, 684-87 (1998) (discussing how the criminal justice system operates like a commons given scarcity constraints); Kelse Moen, *Choice in Criminal Law: Victims, Defendants, and the Option of Restitution*, 22 CORNELL J.L. & PUB. POL'Y 733, 761 (2013) (noting that free public courts can generate a tragedy of the commons given its open-access nature); Michael Polakowski & Michael Gottfredson, *The Use of Prisons as a Commons Problem: An Exploratory Study*, 33 J. RSCH. CRIME & DELINQUENCY 70, 71-74 (1996) (noting that various actors compete for scarce justice system resources much like in a commons); David W. Rasmussen & Bruce L. Benson, *Rationalizing Drug Policy Under Federalism*, 30 FLA. ST. U. L. REV. 679, 721-22 (2003) (noting that criminal justice system actors do not fully internalize the costs of their conduct, much like in a tragedy of the commons).

devastating consequences: wrongful convictions, miscarriages of justice, excessive prison sentences, and assembly line guilty pleas.[17]

This Article demonstrates how the criminal justice system operates like an open-access resource for defendants — one that is characterized by limited excludability and subtractability. Constitutional and statutory rights limit the Government's capacity to exclude defendants from using the justice system's scarce resources to defend themselves.[18] Each defendant's legal claims can produce negative externalities — such as delays, decreased scrutiny of individual cases, and stronger incentives to plead guilty — that decrease the quality of justice for other defendants.[19]

Two interrelated factors worsened the effects of limited excludability and subtractability in the criminal justice commons and laid the foundation for tragedy: overcriminalization and the criminal procedure revolution. Overcriminalization increased the number of defendants who enter the justice system and compete for its finite resources — such as prosecutors, public defenders, and judges — that remain relatively constant.[20] The criminal procedure revolution expanded the number of claims that each non-excludable defendant can bring; claims that externalize unaccounted-for costs onto other defendants.[21]

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[17] *See* Donald A. Dripps, *Guilt, Innocence, and Due Process of Plea Bargaining*, 57 WM. & MARY L. REV. 1343, 1360-63 (2016); Andrew D. Leipold, *How the Pretrial Process Contributes to Wrongful Convictions*, 42 AM. CRIM. L. REV. 1123, 1149-52, 1153-58 (2005) (describing how the rules that govern evidentiary disclosure and guilty pleas can result in wrongful convictions).

[18] *See, e.g.*, William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 YALE L.J. 1, 13-14 (1997) [hereinafter Stuntz, *Uneasy Relationship*] (noting that individuals can exercise various constitutional rights in criminal proceedings).

[19] *See* Terry Skolnik, *Precedent, Principles, and Presumptions*, 54 U. BRIT. COLUM. L. REV. 935, 976-77 (2021) [hereinafter Skolnik, *Precedent, Principles, and Presumptions*].

[20] Sanford H. Kadish, *The Crisis of Overcriminalization*, 7 AM. CRIM. L.Q. 17, 26 (1968). Note, however, that prosecutorial resources have grown during certain periods. *See, e.g.*, Sara Sun Beale, *The Many Faces of Overcriminalization: From Morals and Mattress Tags to Overfederalization*, 54 AM. U. L. REV. 747, 755 (2005) (noting the expansion of federal criminal law and an increase in the number of defendants in federal criminal cases).

[21] *See* CRAIG M. BRADLEY, THE FAILURE OF THE CRIMINAL PROCEDURE REVOLUTION 18-20 (1993); Stuntz, *Uneasy Relationship*, *supra* note 18, at 26 (noting how the criminal procedure revolution expanded the number of claims that defendants can bring).

In response to these resource pressures, the criminal justice system embraced two mechanisms that encourage defendants to self-exclude from the criminal justice commons and consume minimal resources: coercive plea bargains and underfunding. Faced with crushing dockets, prosecutors issue exploding offers, overcharge defendants, and engage in charge bargaining — all of which incentivize defendants to plead guilty and waive their constitutional rights.[22] Lawmakers, for their part, underfund court-appointed counsel and public defenders.[23] According to some estimations, roughly eighty percent of defendants are indigent and qualify for free legal representation.[24] Due to underfunding, public defense attorneys face higher caseloads, minimally investigate cases, and litigate less aggressively — all of which push these attorneys to favor plea bargains over litigation.[25] Much like coercive plea-bargaining practices, underfunding of public defense nudges defendants to plead guilty and consume fewer justice system resources.

To be clear, the criminal justice commons differs in important respects from truly open-access commons, such as waterways, forests, and fields (more on this below). However, although the analogy between

[22] A similar argument was first advanced by William Stuntz. *See* William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 520 (2001) [hereinafter Stuntz, *Pathological Politics*]. *See also* Russell D. Covey, *Fixed Justice: Reforming Plea Bargaining with Plea-Based Ceilings*, 82 TUL. L. REV. 1237, 1281-82 (2008) [hereinafter Covey, *Fixed Justice*] (describing exploding offers); Russell Covey, *Reconsidering the Relationship Between Cognitive Psychology and Plea Bargaining*, 91 MARQ. L. REV. 213, 225-26 (2007) [hereinafter Covey, *Reconsidering the Relationship*] (describing the trial penalty); Andrew Manuel Crespo, *The Hidden Law of Plea Bargaining*, 118 COLUM. L. REV. 1303, 1311-14 (2018) (describing overcharging); Gregory M. Gilchrist, *Trial Bargaining*, 101 IOWA L. REV. 609, 617-18 (2016) (discussing how plea bargaining incentivizes defendants to waive their rights and plead guilty); Jane Campbell Moriarty & Marisa Main, *Waiving Goodbye to Rights: Plea Bargaining and the Defense Dilemma of Competent Representation*, 38 HASTINGS CONST. L.Q. 1029, 1031-32 (2011) (discussing how defendants who plead guilty waive their rights).

[23] Stuntz, *Uneasy Relationship*, *supra* note 18, at 4, 54.

[24] Nino C. Monea, *Low Income, Poor Outcome: Unequal Treatment of Indigent Defendants*, 67 WAYNE L. REV. 345, 347 (2022) (citing Stuntz, *Uneasy Relationship*, *supra* note 18, at 28); *see also* BUREAU OF JUST. ASSISTANCE, CONTRACTING FOR INDIGENT DEFENSE SERVICES, 3, n.1 (2000) (estimating the percentage to be 60–90%).

[25] *See* Stuntz, *Uneasy Relationship*, *supra* note 18, at 31-45. The term "public defense attorneys" implies attorneys that are publicly funded, such as court-appointed counsel and public defenders.

such open-access natural resources and the criminal justice commons is imperfect, it is nonetheless helpful and illuminating. We gain new insight into pervasive collective action problems in the criminal justice system when it is conceptualized as a commons.[26] We can better understand the incentives and conduct of various criminal justice actors — such as judges, prosecutors, and defense attorneys — when we consider the criminal justice system as an open-access resource for defendants.[27] And we can devise more effective solutions to mitigate a tragedy of the criminal justice commons when we understand its core features of limited excludability and subtractability.

The structure of this Article is as follows. Part II provides an overview of the tragedy of the commons. Part III demonstrates why the criminal justice system operates like a commons for defendants. It elucidates how the criminal justice commons is characterized by limited excludability and subtractability. And it shows how the criminal justice system is vulnerable to tragedy, where the overall quality of justice declines because too many defendants compete for scarce resources. Part IV shows how overcriminalization and the criminal procedure revolution aggravated the effects of limited excludability and subtractability in the criminal justice system. Part V describes how the criminal justice system embraced coercive plea bargains and underfunding so that defendants self-exclude from the criminal justice commons. Part VI concludes the Article by advancing three concrete proposals that attempt to counteract overcriminalization and underfunding, and ultimately, mitigate a tragedy of the criminal justice commons. These three proposals are: hard prosecutorial screening, misdemeanor decriminalization, and funding and caseload parity between prosecutors and public defense attorneys. Ultimately, this Article offers a new way to understand the criminal justice system, the

[26] On other discussions of collective action problems in the criminal justice system, see Oren Bar-Gill & Omri Ben-Shahar, *The Prisoners'* (*Plea Bargain*) *Dilemma*, 1 J. LEGAL ANALYSIS 737, 741-42 (2009) (discussing collective action problems in plea-bargaining); Andrew Manuel Crespo, *No Justice, No Pleas: Subverting Mass Incarceration through Defendant Collective Action*, 90 FORDHAM L. REV. 1999, 2016-17 (2022).

[27] *See, e.g.*, Benson & Rasmussen, *supra* note 16, at 684-87 (describing how collective action problems can structure incentives in the criminal justice commons).

forces that shape its incentive structures, and law reform proposals that seek to ameliorate the quality of justice.

I. THE TRAGEDY OF THE COMMONS

Garrett Hardin famously argued that certain types of open-access resources are vulnerable to a tragedy of the commons.[28] The term "tragedy of the commons" is a form of collective action problem that occurs when individuals over-exploit a scarce and open-access natural resource, which leads to the resource's demise.[29] An open-access resource's incentive structure promotes over-consumption. Each person incurs significant benefits when they over-exploit the resource.[30] Yet they internalize few of the costs of doing so, especially in the short-term.[31] Instead, the individual's excessive consumption externalizes certain costs — such as decreased resource availability or quality — onto others who wish to use the same resource.[32] As Elinor Ostrom notes, "individually rational strategies lead to collectively irrational outcomes" within a commons; each individual's tendency to over-exploit the resource ultimately destroys its value for all.[33]

Tragedies of the commons occur in various contexts. Lakes and rivers can be over-fished, which can endanger the fish population and decrease its availability as a communal food source.[34] Too many trees may be cut down within a particular area, which can result in deforestation, loss of biodiversity, and fewer fuel sources for local residents.[35] Oil and natural

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[28] Hardin, *supra* note 9, at 1244-45.

[29] Feeny et al., *supra* note 13, at 2.

[30] Abraham Bell & Gideon Parchomovsky, *The Privacy Interest in Property*, 167 U. PA. L. REV. 869, 879 (2019).

[31] *Id.*

[32] *See* Abraham Bell & Gideon Parchomovsky, *Of Property and Antiproperty*, 102 MICH. L. REV. 1, 6 (2003).

[33] OSTROM, *supra* note 10, at 5.

[34] *See* Fikret Berkes, *Fishermen and the 'Tragedy of the Commons,'* 12 ENV'T CONSERVATION 199, 202-04 (1985).

[35] *See* Greg Brown & Charles C. Harris, Jr., *National Forest Management and the "Tragedy of the Commons": A Multidisciplinary Perspective*, 5 SOC'Y. & NAT. RES. 67, 73-74 (1992); M.J. de la Paix, L. Lanhai, C. Xi, S. Ahmed & A. Varenyam, *Soil Degradation and Altered Flood Risk as a Consequence of Deforestation*, 24 LAND DEGRADATION & DEV. 478, 478-79 (2013).

gas reservoirs may be overused by rival corporations, which lowers the pressure within these reservoirs, complicates the extraction process, and increases production costs.[36] But these types of collective action problems are not confined to open-access natural resources.[37] Public property — such as parks, squares, streets, and sidewalks — can experience a tragedy of the urban commons.[38] Individuals can use or occupy public property in a manner that is inconsistent with its shared use and that decreases its collective value.[39] Public healthcare systems that are open to all persons can implode under the pressure of underfunding and overconsumption.[40] Monetary systems can face collective action problems that result in a debt crisis and inflationary bias.[41]

Open-access resources share two features that expose them to a tragedy of the commons: limited excludability and subtractability.[42] Begin with limited excludability. David Feeney and colleagues note that the power to exclude others from an open-access resource is limited for

[36] Gary D. Libecap, *The Tragedy of the Commons: Property Rights and Markets as Solutions to Resource and Environmental Problems*, 53 AUSTL. J. AGRIC. & RES. ECON. 129, 129-30 (2009).

[37] Joanna Burger & Michael Gochfeld, *The Tragedy of the Commons 30 Years Later*, 40 ENV'T SCI. & POL'Y FOR SUSTAINABLE DEV. 4, 7 (1998).

[38] TERRY SKOLNIK, HOMELESSNESS, LIBERTY, AND PROPERTY 62-76 (2024); *see, e.g.*, Robert C. Ellickson, *Controlling Chronic Misconduct in City Spaces: Of Panhandlers, Skid Rows, and Public-Space Zoning*, 105 YALE L.J. 1165, 1168 (1996) (noting that public spaces can experience a "tragedy of the commons"); Sheila R. Foster & Christian Iaione, *The City as a Commons*, 34 YALE L. & POL'Y REV. 281, 295 (2016) (highlighting how cities resemble an open-access commons that is vulnerable to tragedy).

[39] Sheila R. Foster, *Collective Action and the Urban Commons,* 87 NOTRE DAME L. REV. 57, 59-61 (2011); Terry Skolnik, *How and Why Homeless People Are Regulated Differently*, 43 QUEEN'S L.J. 297, 304 (2018).

[40] *See* Hassanally, *supra* note 12, at 81.

[41] *See, e.g.*, Philipp Bagus, *The Tragedy of the Euro*, 15 INDEP. REV. 563, 563 (2011) (drawing parallels between the European Monetary Union collapse and tragedies of the commons); Valeriya Dinger, Sven Steinkamp & Frank Westermann, *The Tragedy of the Commons and Inflation Bias in the Euro Area*, 25 OPEN ECON. REV. 71, 71-72, 84 (2014) (drawing a connection between the fragmentation of the European Central Bank's monetary policy and a tragedy of the commons).

[42] Nives Dolšak & Elinor Ostrom, *The Challenges of the Commons*, *in* THE COMMONS IN THE NEW MILLENNIUM: CHALLENGES AND ADAPTATION 7 (Nives Dolšak & Elenor Ostrom eds., 2003); Feeny et al., *supra* note 13, at 3.

various reasons.[43] A government may be unable to control excludability due to the physical size of a commons, such as large waterways or grasslands.[44] Attempts to manage exclusion may generate significant or unreasonable financial costs.[45] Certain legal, cultural, ethical, or social norms may also limit the power to exclude others from a commons.[46]

Subtractability (or rivalry), for its part, connotes that one individual's use of an open-access resource decreases its quality for others.[47] Subtractability occurs because an individual's actions impose negative externalities — meaning unaccounted-for costs — onto other persons.[48] For instance, a farmer may increase the number of cows that graze on a commons to maximize their profits associated with dairy or meat sales, which lowers the total amount of grass that other farmers' cattle can enjoy.[49]

Tragedies of the commons manifest themselves in various ways.[50] Congestion (or crowding) occurs when too many persons access a commons simultaneously, which limits its shared use or lowers its collective value.[51] Bottle-neck problems arise when too many users enter or exit a commons at the same time, which increases delays for all.[52]

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[43] Feeny et al., *supra* note 13, at 3.

[44] *Id.*

[45] *Id.*

[46] Georgette Chapman Phillips, *Boundaries of Exclusion*, 72 MO. L. REV. 1287, 1294 (2007). Although Phillips' argument applies to private property, similar concerns apply to public property. For instance, courts have struck down discriminatory municipal ordinances that limit certain groups' access to public property. *See* Parr v. Mun. Ct., 479 P.2d 353, 360 (Cal. 1971); Miranda Oshige McGowan, *From Outlaws to Ingroup: Romer, Lawrence, and the Inevitable Normativity of Group Recognition*, 88 MINN. L. REV. 1312, 1341 (2004).

[47] Dolšak & Ostrom, *supra* note 42, at 7; Feeny et al., *supra* note 13, at 3.

[48] Mahadev Ganapati Bhat, *Externalities and Property Rights*, *in* 1 21ST CENTURY ECONOMICS: A REFERENCE HANDBOOK 232-33 (Rhona C. Free ed., 2010).

[49] Hardin, *supra* note 9, at 1244.

[50] *See* Robert Wade, *The Management of Common Property Resources: Collective Action as an Alternative to Privatisation or State Regulation*, 11 CAMBRIDGE J. ECON. 95, 96 (1987).

[51] Todd Sandler, *Collective Action: Fifty Years Later*, 164 PUB. CHOICE 195, 198 (2015).

[52] Richard Arnott, André de Palma & Robin Lindsey, *A Structural Model of Peak-Period Congestion: A Traffic Bottleneck with Elastic Demand*, 83 AM. ECON. REV. 161, 162 (1993).

Over-exploitation occurs when a scarce resource is depleted unsustainably, such that others can no longer use or benefit from it.[53]

Different mechanisms can prevent a tragedy of the commons. Garrett Hardin famously argued that various systems of mutual coercion — such as property rights, taxation, regulation, usage fees, or access restrictions — can prevent the collective destruction of open-access resources.[54] Governments can impose a licensing regime and quotas to prevent over-fishing.[55] They can introduce tolls, congestion-pricing, and reserved lanes to reduce bottlenecks on highways.[56] And they can impose unitization regimes where each user owns a share of an open-access resource — such as natural gas extraction corporations — and pay a portion of costs and receive a percentage of production profits.[57]

To be clear, common pool resources do not inevitably result in tragedy. Scholars such as Elinor Ostrom have shown that for centuries, communities have prevented tragedies of the commons through various forms of self-governance and self-regulation.[58] Communities have protected open-access resources through various means: defining their boundaries, limiting their use and appropriation, excluding outsiders, imposing graduated sanctions on violators, and monitoring the resource's shared use, amongst others.[59] Such self-governance schemes tend to succeed where the community depends highly on the resource,

[53] Lisa M. Schenck, *Climate Change "Crisis" — Struggling for Worldwide Collective Action*, 19 COLO. J. INT'L ENV'T. L. & POL'Y 319, 321, 334 (2008).

[54] Hardin, *supra* note 9, at 1247.

[55] Berkes, *supra* note 34, at 205.

[56] Hai Yang & Hai-Jun Huang, *Carpooling and Congestion Pricing in a Multilane Highway with High-Occupancy-Vehicle Lanes*, 33 TRANSP. RSCH. PART A: POL'Y & PRAC. 139, 139-40 (1999).

[57] Gary D. Libecap & James L. Smith, *The Economic Evolution of Petroleum Property Rights in the United States*, 31 J. LEGAL STUD. S589, S596 (2002). Libecap and Smith's exact quote is: "If unit contracts are to succeed at internalizing the common-pool externality, they must award to each owner a fixed share of all production and costs associated with the reservoir." *Id.*

[58] OSTROM, *supra* note 10, at 61-88; Brett M. Frischmann, Alain Marciano & Giovanni Battista Ramello, *Retrospectives: Tragedy of the Commons After 50 Years*, 33 J. ECON. PERSPS. 211, 219-21 (2019).

[59] Elinor Ostrom, *Common-Pool Resources and Institutions: Toward a Revised Theory*, *in* 2 HANDBOOK OF AGRICULTURAL ECONOMICS 1315, 1325, 1331 (Bruce L. Gardner & Gordon C. Rausser eds., 2002); OSTROM, *supra* note 10, at 90; Feeny et al., *supra* note 13, at 3.

the locality is tight-knit and has a history of inter-dependency, and social capital is relatively strong amongst individuals — characteristics that inhere to smaller collectivities rather than larger ones.[60]

II. THE CRIMINAL JUSTICE COMMONS

Whether we notice it or not, the criminal justice system operates like an open-access commons for defendants who are charged with crimes. And much like a commons, it is susceptible to tragedy. The criminal justice system shares the same two features as open-access natural resources that can result in a tragedy of the commons: limited excludability and subtractability.

A. Limited Excludability

The criminal justice system is the sole common resource for individuals who are charged with crimes.[61] Defendants must use the criminal justice system — rather than some external system or parallel institution — to refute criminal charges. The State (or Government) maintains a monopoly on the criminal justice system.[62] It must allocate certain resources so that the criminal justice system can operate and respect basic requirements. For instance, the State must provide physical infrastructure (such as courthouses, courtrooms, tables, and chairs) and personnel (such as prosecutors, judges, public defenders, stenographers, and clerks) so that the criminal justice system can function.

Constitutional rights require the State to allocate certain resources as part of the criminal justice process, which defendants have the right to

[60] *See* OSTROM, *supra* note 10, at 26-27.

[61] Ric Simmons, *Private Criminal Justice*, 42 WAKE FOREST L. REV. 911, 918 (2007); *see also* Stephanos Bibas, *Victims Versus the State's Monopoly on Punishment?*, YALE L.J.F. 857, 857 (2021); Stephen C. Yeazell, *Socializing Law, Privatizing Law, Monopolizing Law, Accessing Law*, 39 LOY. L.A. L. REV. 691, 709 (2006).

[62] *See, e.g.*, Frank H. Easterbrook, *Criminal Procedure as a Market System*, 12 J. LEGAL STUD. 289, 326 (1983) (noting that the state has a monopoly on punishment); Robert Leider, *The State's Monopoly of Force and the Right to Bear Arms*, 116 NW. U. L. REV. 35, 41 (2021) (noting that the state normally has a monopoly on use of force).

use.[63] For instance, the Government must provide physical infrastructure and personnel to respect defendants' right to a speedy public trial and must implement a system of state-funded legal representation for indigent defendants.[64] The failure to allocate these types of resources can violate defendants' fundamental rights, which can result in dismissed charges or acquittals.[65] Constitutional criminal procedure — and constitutional law more generally — confer quasi-affirmative rights that require the Government to confer certain resources as part of the criminal justice process.[66] Defendants, for their part, exercise their rights within the same common resource: the criminal justice system.[67] Defendants who exercise their rights consume scarce justice system resources that all defendants share, such as judges, prosecutors, court rooms, stenographers, and so on.[68]

The open-access nature of the criminal justice commons is exemplified by defendants' *entitlement* to exercise their rights and

[63] David P. Currie, *Positive and Negative Constitutional Rights*, 53 U. CHI. L. REV. 864, 873 (1986).

[64] *See id.*; Bruce R. Jacob, *Memories of and Reflections About* Gideon v. Wainwright, 33 STETSON L. REV. 181, 256 (2003); Jenna MacNaughton, *Positive Rights in Constitutional Law: No Need to Graft, Best Not to Prune*, 3 U. PA. J. CONST. L. 750, 762 (2001); *see also* Argersinger v. Hamlin, 407 U.S. 25, 44 (1972); Gideon v. Wainwright, 372 U.S. 335, 345 (1963); David A. Sklansky, *Quasi-Affirmative Rights in Constitutional Criminal Procedure*, 88 VA. L. REV. 1229, 1238-89 (2002).

[65] Sklansky, *supra* note 64, at 1241-42 (discussing how the Fourth Amendment requires the State to allocate resources that ensure a "'prompt' judicial assessment" of probable cause for an arrest); Marie Zoglo, *Statutory Speedy Trial Period Calculations for Dismissed and Refiled Charges: A Case Study of Colorado's Approach*, 97 WASH. U. L. REV. 903, 905-07 (2020) (discussing dismissals in contexts where the right to a speedy trial is violated).

[66] Sklansky, *supra* note 64, at 1238-43 (discussing the notion of quasi-affirmative rights).

[67] *See* Stuntz, *Uneasy Relationship*, *supra* note 18, at 35-45 (discussing these different types of claims and how they are distributed in the criminal justice system based on the defendant's financial capacities). For example, substantive claims include defenses, procedural claims include applications to exclude evidence, and factual claims include witness testimony and cross-examination.

[68] *See* Crystal S. Yang, *Resource Constraints and the Criminal Justice System: Evidence from Judicial Vacancies*, 8 AM. ECON. J.: ECON. POL'Y 289, 289 (2016).

consume judicial resources as part of their defense.[69] The Constitution, legislation, and case law authorize defendants to bring substantive, procedural, and factual claims to defend themselves against criminal charges.[70] Even before the trial begins, defendants can challenge pre-trial delays, bring motions to exclude unconstitutionally obtained evidence or coerced confessions, and more.[71] At trial, defendants have the right to call witnesses in their defense, confront the prosecution's witnesses, object to the admission of irrelevant or prejudicial evidence, raise a defense, and so on.[72] Each of these claims are litigated in the criminal justice commons, and expend the time, effort, and scrutiny of its actors.

The waiver doctrine further underpins the open-access nature of the criminal justice commons.[73] Absent a waiver, defendants can exercise their constitutional rights as part of their defense.[74] And judges and prosecutors cannot lawfully deprive defendants of these rights without exposing themselves to legal consequences, such as the suppression of evidence, mistrials, reversals, or dismissal.[75] Unless defendants waive

[69] *See, e.g.*, Ralph Spritzer, *Criminal Waiver, Procedural Default and the Burger Court*, 126 U. PA. L. REV. 473, 492 (1978) (noting that defendants can assert their fundamental rights to defend themselves).

[70] *See, e.g.*, Renee Lettow Lerner, *The Resilience of Substantive Rights and the False Hope of Procedural Rights: The Case of the Second Amendment and the Seventh Amendment*, 116 NW. U. L. REV. 275, 294 (2021) (providing a table that sets out substantive and procedural constitutional rights for the first eight amendments).

[71] *See, e.g.*, Nadia Banteka, *Police Ignorance and* (*Un*)*Reasonable Fourth Amendment Exclusion*, 75 VAND. L. REV. 365, 376 (2022) (providing an overview of the exclusionary rule and the *Mapp v. Ohio* decision); Ryan Kerfoot, *The Speedy Trial Clause and Parallel State-Federal Prosecutions*, 71 CASE W. RSRV. L. REV. 325, 325, 328-32 (2020) (discussing the Sixth Amendment right to a speedy trial); Dallin H. Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. CHI. L. REV. 665, 665 (1970) (discussing the exclusionary rule).

[72] *See* Jason Mazzone, *The Waiver Paradox*, 97 NW. U. L. REV. 801, 831 (2003) (discussing constitutional rights that defendants enjoy in criminal trials).

[73] *See* Susan R. Klein, Aleza S. Remis & Donna Lee Elm, *Waiving the Criminal Justice System: An Empirical and Constitutional Analysis*, 52 AM. CRIM. L. REV. 73, 78-79 (2015) (providing an overview of the waiver doctrine).

[74] Kenneth W. Simons, *Rescinding a Waiver of a Constitutional Right*, 68 GEO. L.J. 919, 919 (1980).

[75] Pamela S. Karlan, *Race, Rights, and Remedies in Criminal Adjudication*, 96 MICH. L. REV. 2001, 2004 (1998) (describing the four conventional remedies for constitutional rights violations: suppression, damages, reversal, and dismissal); Michael E. Tigar,

their rights, justice system actors must devote their limited time and resources to resolve defendants' legal claims.

One might argue that the criminal justice system does not constitute an open-access resource for defendants because certain factors limit their capacity to extract resources from the criminal justice commons. For instance, due to financial constraints, impecunious defendants may not be able to afford to advance all legal claims, each of which costs money.[76] In other contexts, impecunious defendants cannot afford to hire a lawyer, plead guilty, and consume minimal judicial resources.[77] Yet natural resources retain their open-access nature even when individuals' financial capacities limit their ability to exploit these resources, and even when individuals self-exclude from the commons. Affluent individuals may be able to purchase machinery or resources to cut down more trees or catch more fish compared to less affluent persons.[78] Forests and waterways still constitute open-access resources even when certain individuals consume them disproportionately, cannot exploit them, or decide not to use them.[79] The problem is not that poverty converts open-access resources to closed ones. Rather, as discussed more below, impecunious persons disproportionately bear the costs of a tragedy of the criminal justice commons, and ultimately, can experience the lowest quality of justice.

Foreword: Waiver of Constitutional Rights: Disquiet in the Citadel, 84 HARV. L. REV. 1, 8 (1970) (discussing how the State and prosecutors cannot deprive individuals of their fundamental rights).

[76] *See* Stuntz, *Uneasy Relationship*, *supra* note 18, at 36.

[77] *See* Mirko Bagaric, Julie Clarke & William Rininger, *Plea Bargaining: From Patent Unfairness to Transparent Justice*, 84 MO. L. REV. 1, 25-26 (2019).

[78] *See, e.g.*, Stephen F. Pires & William D. Moreto, *Preventing Wildlife Crimes: Solutions That Can Overcome the "Tragedy of the Commons,"* 17 EUR. J. CRIM. POL'Y RSCH. 101, 114 (2011) (highlighting how industrial fisheries tend to have greater resources and use more sophisticated technologies compared to smaller scale fisheries that individuals operate); Robert J. Smith, *Resolving the Tragedy of the Commons by Creating Private Property Rights in Wildlife*, 1 CATO J. 439, 444-45 (1981) (describing competition between fishermen and differences in their capacities to catch fish).

[79] *See* Berkes, *supra* note 34, at 202-04; Brown & Harris, Jr., *supra* note 35, at 73-74.

B. Subtractability

Like other open-access resources, the criminal justice system is characterized by subtractability: where one person's use of the resource decreases its quality for others.[80] The degree of subtractability is shaped by three interrelated factors: the scarcity of justice system resources, the number of criminal charges that enter the justice system, and the availability of legal claims that defendants can advance in their defense.[81] Scarcity limits the pool of justice system resources for defendants.[82] The number of criminal charges increases the number of defendants who enter the justice system and compete for its finite resources.[83] The availability of legal claims increases the quantity of resources that defendants can consume throughout the criminal justice process.[84] More specifically, each defendant's legal claims exploit justice system resources that other defendants would otherwise use.[85] As discussed more below, subtractability occurs because criminal justice system actors do not fully internalize the costs of their individual actions.[86]

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[80] *See* Bruce L. Benson, *Corruption in Law Enforcement: One Consequence of "The Tragedy of the Commons" Arising with Public Allocation Processes*, 8 INT'L REV. L. & ECON. 73, 74-75 (1988).

[81] *See* Darryl K. Brown, *The Perverse Effects of Efficiency in Criminal Process*, 100 VA. L. REV. 183, 185 (2014) (describing how prosecutorial decisions influence caseloads faced by both prosecutors and courts); Stuntz, *Uneasy Relationship*, *supra* note 18, at 35-45 (describing how the criminal procedure revolution resulted in more procedural claims that displace substantive ones).

[82] Aviezer Tucker, *Scarce Justice: The Accuracy, Scope, and Depth of Justice*, 11 POL., PHIL. & ECON. 76, 77 (2012).

[83] *See, e.g.*, Erik Luna, *The Overcriminalization Phenomenon*, 54 AM. U. L. REV. 703, 726 (2005) (noting how over-criminalization monopolizes scarce judicial resources).

[84] *See, e.g.*, Terry Skolnik, *Criminal Justice Reform: A Transformative Agenda*, 59 ALTA. L. REV. 631, 652 (2022) [hereinafter Skolnik, *Criminal Justice Reform*] (arguing that mandatory minimum punishments may result in a large number of cruel and unusual punishment claims); Skolnik, *Precedent, Principles, and Presumptions*, *supra* note 19, at 976-77 (describing how defendants who plea-bargain may present more pre-trial motions).

[85] *See* Skolnik, *Precedent, Principles, and Presumptions*, *supra* note 19, at 976-77.

[86] *See id.*; Richard A. Bierschbach & Stephanos Bibas, *Rationing Criminal Justice*, 116 MICH. L. REV. 187, 195 (2017).

To illustrate this point, begin with the first factor that contributes to subtractability in the criminal justice commons: resource scarcity. The criminal justice system's resources are scarce.[87] There are only so many judges, prosecutors, and defense attorneys in the criminal justice system, and they only have so much time.[88] The time that each actor spends on one defendant's case — and the scrutiny that they devote to these cases — cannot be spent on other defendants.[89] Courthouses can only hear a limited number of cases per day due to limitations on physical infrastructure and court personnel.[90] Scarce criminal justice system resources resemble the finite number of fish in a lake, the amount of grass in a field, or the quantum of trees in a forest — all of which can be over-exploited.

The second factor that contributes to subtractability is the number of criminal charges — and thus the number of defendants — that enter the criminal justice system. The number of defendants and criminal charges dictate caseloads for judges, prosecutors, public defenders, and court-appointed attorneys.[91] Subtractability occurs in part because the number of justice system actors does not expand proportionally to caseloads, such that each actor handles more cases and devotes less time to them.[92] Instead, the amount of justice system resources — and the

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[87] *See* Bierschbach & Bibas, *supra* note 86, at 193 (noting that scarcity is a feature of the criminal justice system); Tucker, *supra* note 82, at 77.

[88] *See* Stuntz, *Uneasy Relationship*, *supra* note 18, at 45.

[89] *See, e.g.*, *id.* at 44-45 (describing how defense counsel must "trade off" claims across defendants in order to manage their caseload); Skolnik, *Precedent, Principles, and Presumptions*, *supra* note 19, at 975 (noting that "[t]he time that judges spend on deciding pre-trial motions is taken away from other areas of the criminal justice system").

[90] *See* Don Stemen & Bruce Frederick, *Rules, Resources, and Relationships: Contextual Constraints on Prosecutorial Decision Making*, 31 QUINNIPIAC L. REV. 1, 3, 46 (2013) (providing an example of limited physical infrastructure).

[91] *See, e.g.*, Adam M. Gershowitz & Laura R. Killinger, *The State* (*Never*) *Rests: How Excessive Prosecutorial Caseloads Harm Criminal Defendants*, 105 NW. U. L. REV. 261, 263, 275 (2011) (describing how prosecutors manage heavy caseloads); Issa Kohler-Hausmann, *Managerial Justice and Mass Misdemeanors*, 66 STAN. L. REV. 611, 654 (2014) (noting that courtroom actors manage high caseloads).

[92] *See* L. Song Richardson, *Systemic Triage: Implicit Racial Bias in the Criminal Courtroom*, 126 YALE L.J. 862, 864, 877 (2017); David C. Steelman, *What Have We Learned About Court Delay, "Local Legal Culture," and Caseflow Management Since the Late 1970s*, 19 JUST. SYS. J. 145, 159-60 (1997).

funding that justice system actors receive — can *shrink* over time and exacerbate docket pressures (more on this below).[93] If the justice system's resources resemble a finite amount of grass, fish, or trees in the commons, the number of criminal charges represent the quantity of defendants who enter the justice system and consume these scarce resources. At its root, the volume of criminal charges shapes the level of rivalry between defendants, all of whom must compete for justice system actors' finite time and attention.

The third factor that contributes to subtractability is the availability of legal claims that each defendant can advance as part of their defense. Subtractability occurs because each defendant's claims can impose negative externalities onto other defendants, such as delays, decreased scrutiny of individual cases, and stronger incentives to plead guilty.[94] The time that justice system actors devote to a defendant's legal claims can create delays for other defendants who must queue in line and wait for their own claims to be adjudicated.[95] Justice system actors may devote minimal scrutiny to low-salience guilty pleas that result in excessive punishments because they are focused on high-salience pre-trial claims in felony proceedings.[96] A prosecutor may spend significant time and resources to refute multiple legal claims in a felony case; time that they cannot spend on other defendants who were denied bail and whose cases require prosecutorial scrutiny.[97] The upshot: while another defendant's legal claims are resolved, those detained pending trial lose their jobs and income, cannot provide for their families, and cannot fund their defense, which induce them to plead guilty to be released from pre-trial custody.[98]

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[93] *See, e.g.*, Samantha Jaffe, *It's Not You, It's Your Caseload: Using* Cronic *to Solve Indigent Defense Underfunding*, 116 MICH. L. REV. 1465, 1468 (2018) (discussing cuts to New York public defender offices); Peter A. Joy & Kevin C. McMunigal, *Overloaded Prosecutors*, 33 CRIM. JUST. 31, 31-32 (2018) (discussing budgetary cuts to prosecutors' offices); Yang, *supra* note 68, at 289-90 (discussing judicial vacancies).

[94] *See* Skolnik, *Precedent, Principles, and Presumptions*, *supra* note 19, at 976-77.

[95] *See id.*

[96] *See id.*

[97] *See id.*

[98] *See id.* (describing how some defendants' claims externalize costs onto others, including longer delays); Jenny E. Carroll, *Beyond Bail*, 73 FLA. L. REV. 143, 196 (2021)

The volume of defense claims completes the picture of the criminal justice commons. Recall how scarcity dictates the extent of justice system resources, while the number of charges represents the quantum of defendants who enter the commons and compete for its resources. The availability of defense claims, for their part, represent the quantity of justice system resources that each defendant can consume — how much grass they can graze, how many fish they can catch, and how many trees they can cut down.

Despite their differences, subtractability related to criminal charges and subtractability related to defense claims are driven by the same reality: justice system actors do not fully internalize the costs of their conduct.[99] Police officers may not realize how an individual charging decision affects a prosecutor, defense attorney, or judge's caseload.[100] Prosecutors, in turn, may not grasp how the decision to prosecute a defendant impacts judicial resources, or how a prison sentence influences correctional facility capacity.[101] Correctional officials may not consider how harsh internal policies — such as administrative punishments or solitary confinement — can contribute to recidivism, which in turn impacts police officers, prosecutors, and judges down the line.[102] Nor do these State actors fully internalize the financial costs of their conduct because different levels of government — local, state, and federal — pay for different parts of the criminal justice system.[103] As Richard Bierschbach and Stephanos Bibas note: "[P]olice are funded

(noting how defendants who are detained in custody may lose their employment and housing and plead guilty).

[99] *See, e.g.*, Bierschbach & Bibas, *supra* note 86, at 196 (citing FRANKLIN E. ZIMRING & GORDON J. HAWKINS, THE SCALE OF IMPRISONMENT 211-15 (1991)); *see also* Maria Ponomarenko, *Our Fragmented Approach to Public Safety*, 59 AM. CRIM. L. REV. 1665, 1667 (2022).

[100] *See* Bierschbach & Bibas, *supra* note 86, at 198.

[101] *See id.*; Adam M. Gershowitz, *Consolidating Local Criminal Justice: Should Prosecutors Control the Jails*, 51 WAKE FOREST L. REV. 677, 679, 687-88 (2016); Russell M. Gold, *Promoting Democracy in Prosecution*, 86 WASH. L. REV. 69, 104-05 (2011).

[102] *See* Bierschbach & Bibas, *supra* note 86, at 198.

[103] *See* Rachel E. Barkow, *Administering Crime*, 52 UCLA L. REV. 715, 810-11 (2005) (discussing how one percent of Congress' budget funds federal prisons, while roughly ten percent of some state's budgets fund state prisons); Bierschbach & Bibas, *supra* note 86, at 190, 196.

locally, prosecutors are funded by counties, and prisons are funded by states."[104] This budgetary fragmentation explains why justice system actors may maintain zealous enforcement practices whose costs they do not bear, and which they externalize onto other agencies.[105]

Defendants represent the mirror image of this paradigm. They wish to be released from custody, acquitted, or receive the most lenient sentence.[106] They care less — if at all — about how their various claims can generate delays for other defendants, or how the number of claims they advance can reduce how much scrutiny prosecutors and judges accord to others.[107] Subtractability is partly explained by how various justice system actors — police officers, prosecutors, judges, and defendants — engage in individually rational actions that can produce a collectively irrational outcome: a tragedy of the criminal justice commons.

III. OVERCRIMINALIZATION AND THE CRIMINAL PROCEDURE REVOLUTION

Overcriminalization and the criminal procedure revolution set the stage for a tragedy of the criminal justice commons. Overcriminalization worsens the consequences of non-excludability; more defendants enter the criminal justice commons and compete for scarce resources. The criminal procedure revolution exacerbated subtractability; defendants were able to bring more claims as part of their defense, each of which can generate negative externalities. As discussed more below, these two forces — overcriminalization and the criminal procedure revolution — exponentially increased the amount of pressure on finite justice system resources.

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[104] Bierschbach & Bibas, *supra* note 86, at 190.

[105] *Id.*

[106] *See, e.g.*, John H. Blume & Rebecca K. Helm, *The Unexonerated: Factually Innocent Defendants Who Plead Guilty*, 100 CORNELL L. REV. 157,173-74 (2014) (describing the various reasons why defendants plead guilty).

[107] To be clear, not all defendants are self-interested. *See, e.g.*, Nirej Sekhon, *Representative Defendants*, 81 OHIO ST. L.J. 19, 20 (2020) (noting that defendants may internalize third party interests or act as "representative defendants" who seek to improve the plight of other defendants or individuals).

A. Overcriminalization and Non-excludability

Governments criminalize a notoriously broad range of conduct.[108] In theory, the criminal law is reserved for the most morally reprehensible conduct that is inherently wrong (or *mala in se*) and is a matter of concern for the entire community.[109] But in practice, the criminal law proscribes a much broader array of acts and omissions.[110] As Erik Luna notes, the concept of overcriminalization refers to various problems associated with the criminal law's overuse, including its overbreadth, over-enforcement, disparate impact, and punitive excess.[111]

The reality of overcriminalization extends to various spheres of life and stems from the proliferation of crimes at the federal and state level.[112] Traffic codes regulate a litany of conduct by drivers, cyclists, and pedestrians.[113] Low-level misdemeanor offenses — some of which govern conduct that was traditionally captured by regulatory offenses — make up roughly eighty percent or more of all criminal convictions and result in guilty pleas in ninety-five percent of cases.[114] As Alexandra

[108] *See, e.g.*, Luna, *supra* note 83, at 704-11 (discussing the broad range of conduct that is criminalized).

[109] *See* R.A. DUFF, *Responsibility, Citizenship, and Criminal Law*, *in* PHILOSOPHICAL FOUNDATIONS OF CRIMINAL LAW 127, 128-29 (R.A. Duff & Stuart P. Green eds., 2011); *see also* Andrew Ashworth, *Conceptions of Overcriminalization*, 5 OHIO ST. J. CRIM. L. 407, 408-09 (2008); Benjamin Levin, *Criminal Law Exceptionalism*, 108 VA. L. REV. 1381, 1392-94 (2022); Terry Skolnik, *Use of Force and Criminalization*, 85 ALB. L. REV. 663, 681 (2022) [hereinafter Skolnik, *Use of Force and Criminalization*].

[110] *See, e.g.*, David A. Sklansky, *Cocaine, Race, and Equal Protection*, 47 STAN. L. REV. 1283, 1283 (1995) (noting that the trafficking of crack cocaine is punished one hundred times more severely than the trafficking of powdered cocaine); Stuntz, *Pathological Politics*, *supra* note 22, at 515-18 (describing the "sheer amount of conduct [state and federal criminal codes] render punishable").

[111] Luna, *supra* note 83, at 712-13; *see also* DOUGLAS HUSAK, OVERCRIMINALIZATION: THE LIMITS OF THE CRIMINAL LAW 3-12 (2008).

[112] *See, e.g.*, HUSAK, *supra* note 111, at 3 ("The two most distinctive characteristics of both federal and state systems of criminal justice in the United States during the past several years are the dramatic expansion in the substantive criminal law and the extraordinary rise in the use of punishment.").

[113] *See* Douglas Husak, *Six Questions About Overcriminalization*, 6 ANN. REV. CRIMINOLOGY 265, 267 (2023); Jordan Blair Woods, *Traffic Without the Police*, 73 STAN. L. REV. 1471, 1480-82 (2021).

[114] Alexandra Natapoff, *Misdemeanors*, 85 S. CALIF. L. REV. 1313, 1320-21, 1343 (2012) [hereinafter Natapoff, *Misdemeanors*].

Natapoff notes, misdemeanors proscribe acts such as driving with a suspended license, public urination, possession of marijuana, and more.[115] Governments also criminalize or prohibit conduct associated with social problems — such as homelessness — that the criminal law may exacerbate rather than rectify.[116] Some estimate that individuals commit roughly three felonies per day because so much conduct is criminalized.[117] Given the criminal law's growth over the past several decades — and the increasing severity of punishments — it is no surprise that incarceration rates quadrupled between 1970–2008.[118]

Two main factors contribute to overcriminalization. First, as William Stuntz observes, criminal codes have expanded significantly over the past several decades and capture an ever-growing range of behaviors, such that more defendants enter the criminal justice commons.[119] Some observe that federal criminal statutes span more than 27,000 pages.[120] Others note that the number of federal crimes increased from 183 in 1873 to roughly 3,000 in the 1980s; a number that has since grown considerably.[121]

[115] Alexandra Natapoff, *The High Stakes of Low-Level Criminal Justice*, 128 YALE L.J. 1648, 1663 (2019) [hereinafter Natapoff, *The High Stakes of Low-Level Criminal Justice*] (providing these examples in her article); *see also* Wayne A. Logan, *The Shadow Criminal Law of Municipal Governance*, 62 OHIO ST. L.J. 1409, 1464 (2001); Henry Ordower, J.S. Onésimo Sandoval & Kenneth Warren, *Out of Ferguson: Misdemeanors, Municipal Courts, Tax Distribution and Constitutional Limitations*, 61 HOW. L.J. 113, 121 (2017).

[116] *See* Skolnik, *Use of Force and Criminalization*, *supra* note 109, at 678 (mentioning the criminalization of homelessness); SKOLNIK, HOMELESSNESS, LIBERTY, AND PROPERTY, *supra* note 38, at 107-15 (describing how the prohibition and punishment of conduct associated with homelessness can entrench individuals in that condition).

[117] *See* HARVEY SILVERGLATE, THREE FELONIES A DAY: HOW THE FEDS TARGET THE INNOCENT, at XXXVI-XXXVII (2011).

[118] Robert Smith, Zoë Robinson & Emily Hughes, *State Constitutionalism and the Crisis of Excessive Punishment*, 108 IOWA L. REV. 537, 542 (2023); *see also* HUSAK, *supra* note 111, at 5.

[119] Stuntz, *Pathological Politics*, *supra* note 22, at 513-15; *see also* Paul H. Robinson & Michael T. Cahill, *Can a Model Penal Code Second Save the States from Themselves?*, 1 OHIO ST. J. CRIM. L. 169, 172-73 (2003); Paul H. Robinson & Michael T. Cahill, *The Accelerating Degradation of American Criminal Codes*, 56 HASTINGS L.J. 633, 635-44 (2005); Stephen F. Smith, *Overcoming Overcriminalization*, 102 J. CRIM. L. & CRIMINOLOGY 537, 538 (2013).

[120] Pierce, *supra* note 112, at 59.

[121] Husak, *supra* note 113, at 269; *see also* Ellen S. Podgor, *Overcriminalization: New Approaches to a Growing Problem*, 102 J. CRIM. L. & CRIMINOLOGY 529, 530-32 (2012).

State criminal codes also became more voluminous over the past several decades.[122] For instance, the State of Illinois added approximately fifty new crimes to its *Criminal Code* in the 1980s and roughly seventy new crimes in the 1990s, many of which overlapped with existing offenses.[123] During this time, the State of Illinois also criminalized a range of behaviors in other statutes.[124] Similarly, the State of Kentucky's *Criminal Code* grew significantly since its enactment in 1974, and the State created new crimes in other pieces of legislation.[125] Other states criminalize an impressive array of crimes. Marc Levin notes that the State of Arizona has over 4,000 statutory offenses.[126] To be clear, not all criminalized conduct is serious. Governments also criminalize trivial acts — such as tearing the tag off a mattress,[127] selling untested sparklers,[128] unlawfully transporting or selling dentures across state lines,[129] and issuing a false weather report — that could be regulated through civil or administrative means.[130]

But the increasing volume of state criminal codes understates the problem of overcriminalization. Governments also enact a host of crimes *outside* of their criminal codes.[131] For instance, although the State

[122] *See* Marc A. Levin, *At the State Level, So-Called Crimes Are Here, There, Everywhere*, 28 CRIM. JUST. 4, 4-5 (2013).

[123] Robinson & Cahill, *Accelerating Degradation of American Criminal Codes*, *supra* note 119, at 636.

[124] *Id.* at 636.

[125] Paul Robinson, *Democratizing Criminal Law: Feasibility, Utility, and the Challenge of Social Change*, 111 NW. U. L. REV. 1565, 1579 (2017).

[126] Levin, *supra* note 122, at 5.

[127] Stuart P. Green, *Why It's a Crime to Tear the Tag Off a Mattress: Overcriminalization and the Moral Content of Regulatory Offenses*, 46 EMORY L.J. 1533, 1540 (1997).

[128] Stuntz, *Pathological Politics*, *supra* note 22, at 515.

[129] Chad Flanders & Desiree Austin-Holliday, *"Dangerous Instruments": A Case Study in Overcriminalization*, 83 MO. L. REV. 259, 262 n.11 (2018). This example is cited in *13 Federal Crimes That Are Almost Too Bizarre to Believe*, VARGHESE SUMMERSETT, https://versustexas.com/blog/bizarre-federal-crimes/ (last visited Dec. 18, 2024) [https://perma.cc/5BYQ-HCPJ].

[130] Hans Christian Linnartz, *Lies, Damn Lies, and Lies Involving Moral Turpitude: When Does a False Statement Carry Immigration Consequences*, 11 CHARLESTON L. REV. 665, 670-71 (2017); Varghese Summersett, *supra* note 129.

[131] *See* Paul H. Robinson, Michael T. Cahill & Usman Mohammad, *The Five Worst (and Five Best) American Criminal Codes*, 95 NW. U. L. REV. 1, 6 (2000).

of Texas' *Penal Code* contains 254 crimes, other Texas statutes criminalize approximately 1,500 offenses.[132] Less than one tenth of misdemeanors in the State of Texas are in its *Penal Code* or its *Code of Criminal Procedure*.[133] And less than one sixth of Texas' felonies are contained in these codes.[134] Together, the expansion of criminal codes and the enactment of crimes in other statutes explain why more defendants enter the criminal justice system and compete for its resources.[135]

The second factor that contributes to overcriminalization is that lawmakers increasingly enact overlapping crimes, which results in more criminal charges per defendant.[136] Individuals can be charged with multiple offenses for the same act, which inflates the number of charges that the justice system must manage.[137] Prosecutors use overlapping crimes to stack charges against defendants; a strategy that confers more prosecutorial leverage during plea bargaining.[138] Overlapping crimes function as bargaining chips that push defendants to plead guilty.[139]

Overcriminalization exacerbates the effects of non-excludability in the criminal justice commons. More crimes — especially overlapping ones — shape how many defendants and criminal charges enter the criminal justice system. Empirical studies underscore this phenomenon. The number of criminal cases at the federal level — and the number of defendants who entered the criminal justice system — dovetailed with the expansion of federal criminal law.[140] In 1980, roughly 29,380 federal

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[132] Levin, *supra* note 122, at 5.

[133] *See* MARC LEVIN, TEX. PUB. POL'Y FOUND., NOT JUST FOR CRIMINALS: OVERCRIMINALIZATION IN THE LONE STAR STATE 1 (Apr. 2015).

[134] *See id.*

[135] *See* Stuntz, *Pathological Politics*, *supra* note 22, at 508-09.

[136] *See id.* at 518-19; Kay L. Levine, *The External Evolution of Criminal Law*, 45 AM. CRIM. L. REV. 1039, 1098 (2008).

[137] *See* Stuntz, *Pathological Politics*, *supra* note 22, at 519; *see, e.g.*, Robinson et al., *supra* note 131, at 36-37 (providing examples of overlapping offenses).

[138] Covey, *Fixed Justice*, *supra* note 22, at 1254; *see also* Crespo, *supra* note 22, at 1313; Stuntz, *Pathological Politics*, *supra* note 22, at 520.

[139] *See* Stuntz, *Pathological Politics*, *supra* note 22, at 519-20; William Stuntz, *The Political Constitution of Criminal Justice*, 119 HARV. L. REV. 780, 803 (2006) [hereinafter Stuntz, *The Political Constitution of Criminal Justice*].

[140] *See* Beale, *supra* note 20, at 753-56.

criminal cases were brought against 39,914 defendants.[141] By 2003, these numbers more than doubled.[142] In 2003, approximately 70,642 federal criminal charges were brought against 92,714 defendants.[143]

Furthermore, crimes can produce "criminalization cascades", meaning that a criminal charge's collateral consequences can expose defendants to multiple new accusations.[144] Defendants who are charged with a crime may breach their bail or probation conditions, commit some type of administration of justice-related offense while awaiting trial, or violate their parole — all of which may lead to new criminal charges that consume more justice system resources.[145] Overcriminalization broadens the scope of conduct that brings individuals into the justice system, and ultimately, can result in criminalization cascades that result in additional charges.

B. *The Criminal Procedure Revolution and the Rise of Constitutional Claims*

The criminal procedure revolution — and the ensuing explosion in constitutional claims — worsened the effects of subtractability in the criminal justice commons.[146] The Warren Court's criminal procedure revolution began in the 1960s.[147] During that time, the Supreme Court selectively incorporated various provisions of the Bill of Rights into the states through the Fourteenth Amendment.[148] By constitutionalizing

[141] *Id.* at 755.

[142] *Id.*

[143] *Id.*

[144] For a similar example in police investigation contexts, see Terry Skolnik, *Policing in the Shadow of Legality: Pretext, Leveraging, and Investigation Cascades*, 60 OSGOODE HALL L.J. 505, 531 (2023).

[145] *See, e.g.*, Jenny E. Carroll, *Beyond Bail*, 73 FLA. L. REV. 143, 148 (2021) [hereinafter Carroll, *Beyond Bail*] (noting: "Noncompliance may place such a defendant at risk of either additional criminal charges or future pretrial detention").

[146] *See* Stuntz, *Uneasy Relationship*, *supra* note 18, at 4-5, 35-44 (discussing how procedural claims displace substantive claims because of the criminal procedure revolution and funding cuts to public defenders and court-appointed attorneys).

[147] BRADLEY, *supra* note 21, at 1.

[148] *See, e.g.*, Carol S. Steiker, *Counter-Revolution in Constitutional Criminal Procedure? Two Audiences, Two Answers*, 94 MICH. L. REV. 2466, 2474 n.33 (1996) (noting the incorporation of the Sixth Amendment); William J. Stuntz, *The Substantive Origins of*

various aspects of criminal procedure, the Court expanded the scope of defendants' constitutional rights.[149] As a result of the criminal procedure revolution, defendants could bring a litany of novel constitutional claims that challenged the propriety of police and prosecutorial conduct.[150] For instance, defendants could argue that police officers conducted an unlawful traffic stop or frisk-search, violated their *Miranda* right to an attorney, or compelled them to incriminate themselves.[151] Defense attorneys could contend that prosecutors failed to disclose exculpatory evidence, or made an inappropriate comment regarding the defendant's silence.[152] Indigent

Criminal Procedure, 105 YALE L.J. 393, 439 (1995) (noting the incorporation of the Fourth and Fifth Amendments); Michael Vitiello, *Introducing the Warren Court's Criminal Procedure Revolution: A 50-Year Retrospective*, 51 U. PAC. L. REV. 621, 623 (2020) (describing how the Warren Court engaged in selective incorporation).

[149] *See, e.g.*, Eric J. Miller, *The Warren Court's Regulatory Revolution in Criminal Procedure*, 43 CONN. L. REV. 1, 3 (2010) (noting that the Warren Court involved a "rights-expanding jurisprudence that made it harder for police to search, seize, and interrogate criminal defendants"); Donald A. Dripps, *Beyond the Warren Court and Its Conservative Critics: Toward a Unified Theory of Constitutional Criminal Procedure*, 23 U. MICH. J.L. REFORM 591, 601 (1990) (describing how the Warren Court selectively incorporated the first eight amendments via the Fourteenth Amendment's Due Process Clause); Akhil Reed Amar, *The Warren Court and the Constitution (with Special Emphasis on* Brown *and* Loving), 67 S.M.U. L. REV. 671, 684 (2014) (noting that the Warren Court selectively incorporated "virtually all of the provisions of the Bill of Rights").

[150] *See* Peter Arenella, *Rethinking the Functions of Criminal Procedure: The Warren and Burger Courts' Competing Ideologies*, 72 GEO. L. J. 185, 189-90 (1983).

[151] Terry v. Ohio, 392 U.S. 1, 27-8 (1968) (delineating police officers' power to stop-and-frisk individuals); Miranda v. Arizona, 384 U.S. 436, 479 (1966) (setting out the *Miranda* warning and recognizing the right to have an attorney present during a police interrogation); Schmerber v. California, 384 U.S. 757, 761 (1966) (recognizing that defendants cannot be compelled to provide physical evidence to the State).

[152] *See, e.g.*, Griffin v. California, 380 US 609, 613 (1965) (holding that the Fifth Amendment prohibits prosecutors from commenting on the defendant's silence at trial); Brady v. Maryland, 373 U.S. 83, 87 (1963) (noting that the Fourteenth Amendment's Due Process Clause requires the prosecution to disclose material exculpatory evidence to the defense before a trial); *see also* Donald B. Ayer, *The Fifth Amendment and the Inference of Guilt from Silence:* Griffin v. California *After Fifteen Years*, 78 MICH. L. REV. 841, 841-42 (1980); Bennett L. Gershman, *Reflections on* Brady v. Maryland, 47 S. TEX. L. REV. 685, 685-86 (2006).

defendants were granted a right to free legal representation.[153] And defendants could bring motions to suppress unconstitutionally obtained evidence.[154]

Around the same time, the Court also broadened the scope of other constitutional rights that apply in the criminal justice process. For instance, decisions such as *Robinson v. California* allowed defendants to attack the constitutionality of crimes that criminalize status, impose cruel and unusual punishments, and violate the Eighth Amendment.[155] *Papachristou v. Jacksonville* permitted defendants to challenge the constitutionality of crimes — such as vagrancy and loitering — that were unconstitutionally vague.[156] Ultimately, the Warren Court's criminal procedure revolution expanded the number of claims that each defendant can bring and the quantity of resources they can consume as part of their defense.

It is easy to discount the effects of this expansion given the asymmetric relationship between crimes, criminal charges, and constitutional claims. Defendants can bring a quantity of constitutional claims that are orders of magnitude greater than a single crime or criminal charge.[157] As part of their defense — and depending on the nature of the crime — defendants can argue that a crime is unconstitutionally vague, overbroad, imposes a cruel and unusual

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[153] *See* Gideon v. Wainright, 372 U.S. 335, 342, 344 (1963) (guaranteeing a right to free legal representation for indigent defendants); Stephen B. Bright & Sia M. Sanneh, *Fifty Years of Defiance and Resistance After* Gideon v. Wainwright, 122 YALE L. J. 2150, 2153 (2013).

[154] *See* Mapp v. Ohio, 367 U.S. 643, 655 (1961); Corinna Barrett Lain, *Countermajoritarian Hero or Zero? Rethinking the Warren Court's Role in the Criminal Procedure Revolution*, 152 U. PA. L. REV. 1361, 1373 (2004).

[155] *See* Robinson v. California, 370 U.S. 660, 666 (1962); John B. Neibel, *Implications of* Robinson v. California, 1 HOUS. L. REV. 1, 2-5 (1963).

[156] *See* Papachristou v. City of Jacksonville, 405 U.S. 156, 171 (1972); Dorothy E. Roberts *Foreword: Race, Vagueness, and the Social Meaning of Order-Maintenance Policing*, 89 J. CRIM. L. & CRIMINOLOGY 775, 783-85 (1999). The void for vagueness doctrine was employed subsequently to strike down loitering laws. *See, e.g.*, City of Chicago v. Morales, 527 U.S. 41 (1999) (striking down a loitering ordinance that was unconstitutionally vague).

[157] *See, e.g.*, Henry Friendly, *The Bill of Rights as a Code of Criminal Procedure*, 53 CALIF. L. REV. 929, 931-32 (1965) (providing an example of how the number of claims can exceed a single criminal charge).

punishment, and more.[158] They can advance various claims that contest the lawfulness of police officers' or prosecutors' conduct, or that challenge their lack of access to an attorney or the quality of their legal representation.[159] They can also bring claims related to the partiality of jurors' or judges' conduct or that touch on other forms of adjudicative impropriety.[160] This asymmetry explains why defendants can advance more claims than the number of criminal charges they face. Overcriminalization, in turn, exponentially increased the effects of this disparity; each additional charge significantly augments the total number of claims that enter the criminal justice system and that must be adjudicated.[161]

Following the criminal procedure revolution, defendants brought a greater number of constitutional claims for various reasons. First, certain types of constitutional claims — such as motions to suppress evidence or to dismiss charges for an oppressive delay — can help factually guilty defendants avoid conviction.[162] Scholars suggest that

[158] *See* William W. Berry III, *Cruel and Unusual Non-Capital Punishments*, 58 AM. CRIM. L. REV. 1627, 1637-52 (2021) (discussing cruel and unusual punishments in state contexts); John F. Decker, *Addressing Vagueness, Ambiguity, and Other Uncertainty in American Criminal Laws*, 80 DENV. U. L. REV. 241, 265-84 (2002) (discussing vagueness and overbreadth challenges).

[159] On challenging police misconduct, see Friendly, *supra* note 157, at 932 (providing an example of how defendants can challenge various aspects of police officers' investigation). On the right to court-appointed counsel, see Erwin Chemerinsky, *Lessons from* Gideon, 122 YALE L.J. 2676, 2678 (2013). On ineffective assistance of counsel claims, see Justin F. Marceau, *Embracing a New Era of Ineffective Assistance of Counsel*, 14 U. PA. J. CONST. L. 1161, 1161-62 (2012) (citing Keith Cunningham-Parmeter, *Dreaming of Effective Assistance: The Awakening of* Cronic*'s Call to Presume Prejudice from Representational Absence*, 76 TEMP. L. REV. 827, 832 (2003)).

[160] *See, e.g.*, Douglas R. Richmond, *Judicial Impartiality and the Extrajudicial Divide*, 2022 U. ILL. L. REV. 1539, 1545 (discussing motions to disqualify judges for partiality); Ericka Webster, *Preserving Fundamental Rights in the Realm of Mid-Deliberation Juror Removal*, 52 U. MEM. L. REV. 1069, 1077-78 (2022) (discussing motions for a mistrial based on juror partiality).

[161] *See, e.g.*, Stuntz, *Uneasy Relationship*, *supra* note 18, at 59 (noting that the significant increase in procedural claims coincided with overcriminalization).

[162] *See, e.g.*, Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 797 (1994) (describing how successful suppression motions benefit the factually guilty); John Kaplan, *The Limits of the Exclusionary Rule*, 26 STAN. L. REV. 1027, 1036 (1974) (noting that the exclusionary rule results in the acquittal of factually guilty defendants); Zoglo,

most defendants are probably guilty.[163] Although many defendants would be convicted at trial (and receive a higher sentence than if they pleaded guilty), successful constitutional claims may result in dismissals, dropped charges, sweeter plea deals, or acquittals on the merits.[164] Guilty defendants are encouraged to advance these types of constitutional claims when their other options are less appealing, and as a last-ditch effort before they plead guilty.

Second, as William Stuntz argues, certain constitutional claims are much cheaper than traditional claims on the merits — such as self-defense or mistaken identification — that require more thorough investigation and preparation by the defense.[165] A defense attorney may be constrained by statutory fee schedules and hourly caps that make trials cost-prohibitive, and which may encourage them to prioritize cheaper procedural claims over expensive substantive ones.[166]

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supra note 65, at 905-07 (discussing the right to a speedy trial, dismissals, and the inability to prosecute factually guilty defendants).

[163] *See, e.g.*, Morris B. Hoffman, *The Myth of Factual Innocence*, 82 CHI.-KENT L. REV. 663, 663 (2007) (noting: "Almost all criminal defendants plead guilty, and almost all of them do so because they are guilty"); Anna Roberts, *Convictions as Guilt*, 88 FORDHAM L. REV. 2501, 2531 (2020) (providing an overview of this claim by other scholars).

[164] For examples of remedies for police misconduct or other constitutional rights violations, see Karlan, *supra* note 75, at 2004. Note, however, that even successful suppression motions can result in dropped charges in a relatively low percentage of cases. *See* Craig D. Uchida & Timothy S. Bynum, *Search Warrants, Motions to Suppress and Lost Cases: The Effects of the Exclusionary Rule in Seven Jurisdictions*, 81 J. CRIM. L. & CRIMINOLOGY 1034, 1063-64 (1990-91). Furthermore, other studies suggest that the exclusion of evidence minimally impacts conviction rates. *See, e.g.*, Peter F. Nardulli, *The Societal Costs of the Exclusionary Rule Revisited*, 1987 U. ILL. L. REV. 223, 234, 239 (suggesting the exclusionary rule results in an acquittal in only 1.7% of cases in Chicago, and 0.69% of cases in mid-size counties).

[165] *See* Stuntz, *Uneasy Relationship*, *supra* note 18, at 4, 39-41.

[166] *See* Stephanos Bibas, *Transparency and Participation in Criminal Procedure*, 81 N.Y.U. L. REV. 911, 922 (2006) [hereinafter Bibas, *Transparency and Participation in Criminal Procedure*]; Hannah Haksgaard, *Court-Appointment Compensation and Rural Access to Justice*, 14 U. ST. THOMAS J.L. & PUB. POL'Y 88, 93-99 (2020); Stuntz, *Uneasy Relationship*, *supra* note 18, at 10-12, 23, 38-39; Neel U. Sukhatme & Jay Jenkins, *Pay to Play? Campaign Finance and the Incentive Gap in the Sixth Amendment's Right to Counsel*, 70 DUKE L.J. 775, 797 (2021).

Defendants may prefer to bring multiple constitutional claims that cost less than going to trial.[167]

Third, many constitutional claims can be adjudicated faster and sooner than substantive claims on the merits that arise at trial; a crucial consideration given the rise in pre-trial custody following the criminal procedure revolution.[168] Between 1970–2017, the pre-trial incarceration rate rose by roughly 430%.[169] Furthermore, as Jenny Carroll notes, pre-trial release conditions — which adversely impact defendants' employment, housing, and educational opportunities — have become normalized.[170] Defendants may be incarcerated for months before they stand trial, and may be subject to restrictive bail conditions if they are released.[171] Those who are detained pending trial or who must respect onerous bail requirements are encouraged to bring constitutional claims that can lead to dismissals or dropped charges, or, that terminate their release conditions.

Fourth, defendants who bring constitutional claims have less to lose compared to those who bring substantive claims on the merits at trial. In contrast to defendants who plea bargain, defendants who stand trial face a substantially harsher sentence if they are convicted.[172] According to some estimates, the trial penalty is approximately 333% for felony cases that are adjudicated by jury (other studies estimate the trial penalty to be between 29%–109% depending on the crime).[173]

[167] *See Fees*, THE LAW OFFICES OF LANCE FLETCHER PLLC, https://www.lawfletcher.com/Fees.aspx (last visited Dec. 25, 2024) [https://perma.cc/8QUU-YT4U] (estimating the average hourly rate for New York City defense attorneys to be roughly $241 per hour); *How Much Does a Felony Defense Attorney Cost?*, COSTHELPER, https://personalfinance.costhelper.com/felony-attorney.html] (last visited Dec. 25, 2024) [https://perma.cc/SH4L-KBPS] (describing the average hourly rate of defense attorneys in felony cases).

[168] *See* Shima Baradaran Baughman, Lauren Boone & Nathan Jackson, *Reforming State Bail Reform*, 74 SMU L. REV. 447, 450-51 (2021).

[169] *Id.*

[170] Carroll, *Beyond Bail*, *supra* note 145, at 189.

[171] *Id.* at 146-47; Samuel R. Wiseman, *Pretrial Detention and the Right to Be Monitored*, 123 YALE L.J. 1344, 1354, 1400 (2014).

[172] *See* Covey, *Fixed Justice*, *supra* note 22, at 1243-44; Covey, *Reconsidering the Relationship*, *supra* note 22, at 225-56.

[173] Covey, *Reconsidering the Relationship*, *supra* note 22, at 225-26. Note that other scholars challenge the existence and extent of trial penalties. *See* David S. Abrams,

Defendants who go to trial, present merit-based claims, and are convicted have a lot to lose. In contrast, those who advance unsuccessful pre-trial constitutional claims face fewer consequences. Although they bear the financial loss and its collateral effects of failed constitutional claims, defendants are not penalized with harsher sentences or imprisonment when these claims are rejected.

C. The Criminal Procedure Revolution and Increased Subtractability

The criminal procedure revolution worsened subtractability in the criminal justice commons for a simple reason. By expanding the number of defense claims, the criminal procedure revolution increased the negative externalities that individual defendants can impose onto others. Certain empirical studies indicate that the number of motions and petitions in district courts have increased significantly over the past several decades.[174] Furthermore, a defendant may present multiple motions in a single case, which prosecutors and judges must assess at the expense of other defendants' claims.[175] Each defendant's claims can impose three types of unaccounted-for costs onto other defendants: delays, under-investigation, and stronger incentives to plead guilty.

Begin with delays. Each defendant's claims consume justice system resources that other defendants would otherwise use. As a result, defendants must wait in line — and often in jail — for weeks or months until their own claims are adjudicated.[176] Yet pre-trial delays incentivize guilty pleas.[177] Defendants who are detained pre-trial may plead guilty to

Putting the Trial Penalty on Trial, 51 DUQ. L. REV. 777, 780-85 (2013). And see the rejoinder to Abrams' arguments: Andrew Chongseh Kim, *Underestimating the Trial Penalty: An Empirical Analysis of the Federal Trial Penalty and Critique of the Abrams Study*, 84 MISS. L.J. 1195, 1215-28, 1254 (2015) (providing a table with trial penalties that range between 29%–109% depending on the crime).

[174] *See* Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. 459, 537 (2004).

[175] *See* Stuntz, *Uneasy Relationship*, *supra* note 18, at 36 (noting that multiple claims can increase the level of litigation).

[176] *Id.;* Gershowitz & Killinger, *supra* note 91, at 264.

[177] *See* Meghan Sacks & Alissa R. Ackerman, *Pretrial Detention and Guilty Pleas: If They Cannot Afford Bail, They Must Be Guilty*, 25 CRIM. JUST. STUD. 265, 266, 276 (2012).

be released from custody.[178] Indigent defendants are especially vulnerable to pre-trial detention and incentives to plead guilty because they cannot afford cash bail.[179] Defendants who are detained for long periods of time pre-trial but go to trial face higher conviction prospects and harsher sentences.[180]

Delays produce other downstream effects. Defendants who are released from custody may be required to respect stringent release conditions that last for months and are difficult to respect.[181] Those who are subject to multiple and long-lasting bail conditions are more likely violate them and be charged with new crimes.[182] Prosecutors may leverage the breach of release conditions to revoke bail and encourage defendants to plead guilty.[183] In other cases, defendants who face multiple long-lasting release conditions may plead guilty to regain their freedom to travel, work, see their families, and ultimately, avoid the uncertainty and costs of a trial.[184] And individuals may forget to appear in court given the long delay between their arrests and court date, which can result in additional criminal charges that result in guilty pleas.[185] A defendant's individual claims can thus externalize delays onto other defendants, lengthen the duration of pre-trial detention or release conditions, and encourage guilty pleas.[186]

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[178] *See* Jenny E. Carroll, *The Due Process of Bail*, 55 WAKE FOREST L. REV. 757, 773 (2020) [hereinafter Carroll, *The Due Process of Bail*]; Sacks & Ackerman, *supra* note 177, at 266.

[179] Cynthia E. Jones, *"Give Us Free": Addressing Racial Disparities in Bail Determinations*, 16 N.Y.U. J. LEGIS. & PUB. POL'Y 919, 935-36 (2013).

[180] *See* Ellen A. Donnelly & John M. MacDonald, *The Downstream Effects of Bail and Pretrial Detention on Racial Disparities in Incarceration*, 108 J. CRIM. L. & CRIMINOLOGY 775, 805 (2019).

[181] John D. Parron, Comment, *Pleading for Freedom: The Threat of Guilty Pleas Induced by the Revocation of Bail*, 20 U. PA. J. CONST. L. 137, 146 (2017).

[182] *See* Nicole Marie Myers, *Eroding the Presumption of Innocence: Pre-Trial Detention and the Use of Conditional Release on Bail*, 57 BRIT. J. CRIMINOLOGY 664, 678 (2017).

[183] Parron, *supra* note 181, at 146.

[184] Blume & Helm, *supra* note 106, at 174.

[185] John Logan Koepke & David G. Robinson, *Danger Ahead: Risk Assessment and the Future of Bail Reform*, 93 WASH. L. REV. 1725, 1765-66 (2018).

[186] *See* Skolnik, *Precedent, Principles, and Presumptions*, *supra* note 19, at 976-77 (describing how the adjudication of individual motions externalizes delays onto other defendants).

Individual constitutional claims can externalize a second type of cost onto other defendants: under-investigation.[187] Scholars observe that excessive caseloads decrease the level of scrutiny that prosecutors and public defense attorneys can devote to cases.[188] But this picture is incomplete. The quantum of constitutional claims also affect caseload pressures because they require justice system actors to ration their resources and make trade-offs.[189] Justice system actors must prioritize some claims over others.[190] Overburdened public defense attorneys who spend more time on some defendants' constitutional claims may be forced to under-litigate other clients' cases.[191] Public defense attorneys who focus on a particular client's constitutional claims may be unable to thoroughly investigate other clients' cases, and ultimately, may push these other defendants to plead guilty.[192] Prosecutors must also make trade-offs when they attempt to refute defendants' constitutional claims. A prosecutor may prioritize defendants' claims that are time sensitive, arise in serious cases, or would result in acquittals or dismissals.[193] Given their crushing caseloads and the need to focus on

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[187] *See* Heather Baxter, *Too Many Clients, Too Little Time: How States Are Forcing Public Defenders to Violate Their Ethical Obligations*, 25 FED. SENT'G REP. 91, 91 (2012); Darryl K. Brown, *The Decline of Defense Counsel and the Rise of Accuracy in Criminal Adjudication*, 93 CALIF. L. REV. 1585, 1604-05 (2005) (describing the problem of under-scrutinization, especially with respect to wealthy versus socioeconomically disadvantaged defendants); Taylor Payne, Note, *Plight of the Public Defender: Excessive Caseload as a Non-Mitigating Factor in Sanctions for Ethical Violations*, 83 MO. L. REV. 1087, 1101, 1103 (2018).

[188] *See* Gershowitz & Killinger, *supra* note 91, at 265; Jaffe, *supra* note 93, at 1478; Payne, *supra* note 187, at 1101, 1103.

[189] *See* Darryl K. Brown, *Defense Attorney Discretion to Ration Services and Shortchange Some Clients*, 42 BRANDEIS L.J. 207, 207-08, 210-11 (2003) (discussing how defense attorneys must ration their resources); Stuntz, *Uneasy Relationship*, *supra* note 18, at 44.

[190] Jessica Blakemore, *Implicit Racial Bias and Public Defenders*, 29 GEO. J. LEGAL ETHICS 833, 840 (2016); Ronald F. Wright, *Prosecutors and Their State and Local Polities*, 110 J. CRIM. L. & CRIMINOLOGY 823, 847 (2020).

[191] Stuntz, *Uneasy Relationship*, *supra* note 18, at 31-45 (describing the problem of under-litigation and explaining how procedural claims can displace substantive ones).

[192] Stephanos Bibas, *Shrinking* Gideon *and Expanding Alternatives to Lawyers*, 70 WASH. & LEE L. REV. 1287, 1292 (2013); Lisa C. Wood, Daniel T. Goyette & Geoffrey T. Burkhart, *Meet and Plead: The Inevitable Consequence of Crushing Defender Workloads*, 42 LITIG. 20, 23-24 (2016).

[193] *See, e.g.*, Anthony G. Amsterdam, *Speedy Criminal Trial: Rights and Remedies*, 27 STAN. L. REV. 525, 531 (1975) (noting the risk of dismissal for speedy trial claims). For this

defendants' claims that are the most urgent or important, prosecutors may under-investigate certain cases and may not screen out weak criminal charges.[194] As a result, innocent defendants may be needlessly incarcerated until their charges are dropped or dismissed, and they may plead guilty to regain their liberty.[195]

Delays and under-investigation drive the third unaccounted-for cost associated with more constitutional claims: stronger incentives to plead guilty. As discussed above, constitutional claims can generate delays that lengthen the duration of pre-trial detention and release conditions, both of which nudge defendants to plead guilty.[196] The attention that public defense attorneys and prosecutors devote to some constitutional claims decreases the scrutiny that they accord to other defendants' cases.[197] Together, the pressure exerted by heavy caseloads and constitutional claims align prosecutorial and defense incentives.[198] Although prosecutors and defense attorneys may have little in common,

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reason, prosecutors may prioritize such claims; Emily Rose, *Speedy Trial as a Viable Challenge to Chronic Underfunding in Indigent-Defense Systems*, 113 MICH. L. REV. 279, 307 (2014) (noting that speedy trial claims can result in dismissal in exceptional cases); Stephen G. Valdes, Comment, *Frequency and Success: An Empirical Study of Criminal Law Defenses, Federal Constitutional Evidentiary Claims, and Plea Negotiations*, 153 U. PA. L. REV. 1709, 1728 (2005) (demonstrating acquittal and dropped charges rates associated with successful suppression motions).

[194] Gershowitz & Killinger, *supra* note 91, at 285-86; *see also* Natapoff, *Misdemeanors*, *supra* note 114, at 1337-40 (discussing the lack of adequate screening for misdemeanors).

[195] Adam M. Gershowitz, *Justice on the Line: Prosecutorial Screening Before Arrest*, 2019 U. ILL. L. REV. 833, 836 (2019) [hereinafter Gershowitz, *Justice on the Line*].

[196] Blume & Helm, *supra* note 106, at 174; Carroll, *The Due Process of Bail*, *supra* note 178, at 773.

[197] Stuntz, *Uneasy Relationship*, *supra* note 18, at 44.

[198] Stephanos Bibas, *Incompetent Plea Bargaining and Extrajudicial Reforms*, 126 HARV. L. REV. 150, 164-65 (2012) [hereinafter Bibas, *Incompetent Plea Bargaining and Extrajudicial Reforms*]; F. Andrew Hessick III & Reshma Saujani, *Plea Bargaining and Convicting the Innocent: The Role of the Prosecutor, the Defense Counsel, and the Judge*, 16 BYU J. PUB. L. 189, 191-93, 207-11 (2002) (describing how prosecutors and defense attorneys have incentives to plea bargain).

they both wish to manage their heavy dockets and dispose of many cases quickly.[199] Plea bargaining achieves these objectives.[200]

The three negative externalities associated with constitutional claims contribute to lasting problems that exemplify a tragedy of the criminal justice commons. The vast majority of cases are resolved through guilty pleas where defendants waive their rights and never get their day in court.[201] Given plea bargaining's dominance, prosecutors are the primary adjudicators who determine the defendant's guilt and dictate their sentence, while judges and juries play a less prominent role in the criminal justice commons.[202] Given longer delays in pre-trial custody and minimal case scrutiny, factually innocent defendants may plead guilty to crimes they did not commit.[203] And defendants who are convicted at trial may receive inordinately harsh sentences because they refused to plead guilty and accept a sentencing discount.[204]

These negative externalities skew along socioeconomic lines. Higher-income defendants can impose unaccounted-for costs onto lower-income ones for various reasons. For one, affluent defendants are disproportionately charged with complex financial or white-collar crimes, which may consume heavy justice system resources.[205]

[199] Bibas, *Incompetent Plea Bargaining and Extrajudicial Reforms*, *supra* note 198, at 164-65; Hessick III & Saujani, *supra* note 198, at 191-93, 207-15.

[200] Stephanos Bibas, *Restoring Democratic Moral Judgment Within Bureaucratic Criminal Justice*, 111 NW. U. L. REV. 1677, 1683 (2017).

[201] Brandon L. Garrett, *Why Plea Bargains Are Not Confessions*, 57 WM. & MARY L. REV. 1415, 1417 (2016) (noting that "almost all cases are plea-bargained"); Carlie Malone, Note, *Plea Bargaining and Collateral Consequences: An Experimental Analysis*, 73 VAND. L. REV. 1161, 1162 (2020).

[202] Rachel E. Barkow, *Institutional Design and the Policing of Prosecutors: Lessons from Administrative Law*, 61 STAN. L. REV. 869, 871, 876-87 (2009) [hereinafter Barkow, *Institutional Design and the Policing of Prosecutors*].

[203] Blume & Helm, *supra* note 106, at 169. However, as some scholars note, defendants who are wrongfully convicted tend to be convicted at trial rather than plea bargain. *See* Oren Gazal-Ayal & Avishalom Tor, *The Innocence Effect*, 62 DUKE L.J. 339, 352-55 (2012).

[204] Rachel E. Barkow, *Separation of Powers and the Criminal Law*, 58 STAN. L. REV. 989, 1034 (2006) [hereinafter Barkow, *Separation of Powers and the Criminal Law*].

[205] *See* William J. Stuntz, *Race, Class, and Drugs*, 98 COLUM. L. REV. 1795, 1802-03 (1998); Samuel W. Buell, *Is the White Collar Offender Privileged*? 63 DUKE L.J. 823, 879-80 (2014) (noting the steep cost of defense attorneys in certain white collar criminal

Prosecutors and judges must spend significant time evaluating the factual and legal issues associated with these complicated cases.[206] These types of prosecutions steer justice system resources towards high-income defendants and away from indigent ones. Yet even outside of white-collar contexts, affluent defendants can afford private attorneys who need not ration their resources, under-investigate cases, or limit their constitutional claims to ease docket pressures.[207] Indeed, empirical studies suggest that private defense attorneys tend to bring more motions than public defense attorneys.[208] Furthermore, private defense attorneys face few perverse incentives that encourage under-litigation and minimal resource consumption, such as maximum hour caps and flat fees.[209] Prosecutors may respond to these pressures in various ways, all of which are more resource intensive: they may screen cases more carefully, investigate their cases more thoroughly, or go to trial because defendants refuse to plead guilty.[210] This explains why prosecutors and judges' increased scrutiny of high-income defendants may externalize delays, under-investigation, and strong incentives to plead guilty onto low-income defendants.

But this is only half the story. Unlike indigent defendants, affluent ones can also insulate themselves against these types of negative externalities. Consider how wealthy defendants avoid the incentives to plead guilty that typically flow from the combination of cash bail, pre-trial detention, and delay. Recall how indigent defendants who cannot

prosecutions, which can provide some insight into the costs of prosecuting such crimes); Ilene H. Nagel & John L. Hagan, *The Sentencing of White-Collar Criminals in Federal Courts: A Socio-Legal Exploration of Disparity*, 80 MICH. L. REV. 1427, 1447-8 (1982) (noting that white collar prosecutions can consume disproportionate resources).

[206] *See* Sarah Ribstein, *A Question of Costs: Considering Pressure on White-Collar Criminal Defendants*, 58 DUKE L.J. 857, 864-66 (2009).

[207] Stuntz, *Uneasy Relationship*, *supra* note 18, at 35-36, 56.

[208] *Id.* at 35; *see also* Pauline Houlden & Steven Balkin, *Quality and Cost Comparisons of Private Bar Indigent Defense Systems: Contract vs. Ordered Assigned Counsel*, 76 J. CRIM. L. & CRIMINOLOGY 176, 187-194 (1985).

[209] Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2463, 2476-79 (2004) [hereinafter Bibas, *Plea Bargaining Outside the Shadow of Trial*]; Stuntz, *Uneasy Relationship*, *supra* note 18, at 35-36 (noting that private defense attorneys can litigate more aggressively than public defense attorneys).

[210] Stuntz, *Uneasy Relationship*, *supra* note 18, at 27-28, 46.

afford cash bail can be detained pending trial for long periods of time and are encouraged to plead guilty.[211] In contrast, affluent defendants have the financial capacity to pay expensive cash bail and may have access to a high-income social circle whose members can act as sureties, both of which increase their prospect of pre-trial release.[212] The upshot: affluent defendants face fewer pressures to plead guilty in the bail process. But wealthy defendants can also exploit delays to their advantage. Affluent defendants can afford to bring many motions that delay trials and increase their complexity, which drives up the cost of prosecution.[213] Prosecutors may not pursue these cases or may offer sweeter plea deals to avoid these costs.[214] Furthermore, given their capacity to hire private defense attorneys that are not overburdened by heavy dockets, wealthy defendants' cases are generally not subject to under-investigation.[215] And wealthy defendants who hire private attorneys are not subject to a "meet and plead" culture that drives guilty pleas.[216] As William Stuntz observes, defendants who hire private attorneys meet with them earlier in the criminal justice process, and when they plead guilty, do so later than defendants who are represented by public defense attorneys.[217] These considerations show how wealthy defendants can disproportionately externalize unaccounted-for costs onto indigent defendants and insulate themselves against these same costs.

[211] Carroll, *The Due Process of Bail*, *supra* note 178, at 773; Muhammad B. Sardar, *Give Me Liberty or Give Me . . . Alternatives? Ending Cash Bail and Its Impact on Pretrial Incarceration*, 84 BROOK. L. REV. 1421, 1421-23 (2019); Cydney Clark, Note, *Bailing on Cash Bail: A Proposal to Restore Indigent Defendants' Right to Due Process and Innocence Until Proven Guilty*, 29 WASH. & LEE J. CIV. RTS. & SOC. JUST. 111, 113, 128 (2023).

[212] *See* Carroll, *The Due Process of Bail*, *supra* note 178, at 786 (noting that affluent defendants can afford cash bail); Myranda Sandberg, *The Presumption of Wealthiness: How the Current Bail System in Minnesota Is Problematically Classist*, 49 MITCHELL HAMLINE L. REV. 57, 76 (2023).

[213] Stuntz, *Uneasy Relationship*, *supra* note 18, at 28.

[214] *See id.* at 27-30.

[215] Bibas, *Plea Bargaining Outside the Shadow of Trial*, *supra* note 209, at 2479.

[216] *See* Stuntz, *Uneasy Relationship*, *supra* note 18, at 35.

[217] *Id.*

IV. Coercive Plea Bargains, Underfunding, and Self-exclusion

The criminal justice system responded to the effects of overcriminalization and the criminal procedure revolution through two mechanisms that motivate defendants to self-exclude from the criminal justice commons and consume few of its resources.[218] First, prosecutors engaged in coercive plea bargaining practices so that defendants plead guilty, waive their rights, and forgo justice system resources.[219] Second, lawmakers underfunded public defense attorneys so that they can bring fewer cases to trial, advance fewer claims, and encourage more defendants to plead guilty.[220]

A. Maximizing Self-exclusion Through Plea Bargaining

Coercive plea bargains are the first mechanism that push defendants to self-exclude from the criminal justice system and consume minimal resources. Roughly ninety-five percent of cases are resolved by a plea bargain.[221] Defendants who plead guilty waive their constitutional rights.[222] They waive their right to a trial, their capacity to confront witnesses, their protection against self-incrimination, their ability to suppress unconstitutionally obtained evidence, and more.[223]

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[218] For a similar argument, see Stuntz, *Uneasy Relationship*, *supra* note 18, at 4, 26.

[219] *See* H. Mitchell Caldwell, *Coercive Plea Bargaining: The Unrecognized Scourge of the Justice System*, 61 Cath. U. L. Rev. 63, 64-66, 83-5 (2011) (discussing coercive plea-bargaining practices, such as over-charging); Clark Neily, *Jury Empowerment as an Antidote to Coercive Plea Bargaining*, 31 Fed. Sent'g Rep. 284, 285-87 (2019).

[220] With respect to public defense under-funding, see Paul Calvin Drecksel, *The Crisis in Indigent Criminal Defense*, 44 Ark. L. Rev. 363, 363-64, 375-83 (1991); Lauren Sudeall Lucas, *Public Defense Litigation: An Overview*, 51 Ind. L. Rev. 89, 89 (2018); Stuntz, *Uneasy Relationship*, *supra* note 18, at 4; Ronald Wright & Jenny Roberts, *Expanded Criminal Defense Lawyering*, 6 Ann. Rev. Criminology 241, 245-46, 248 (2023).

[221] Malone, *supra* note 201, at 1162; Thea Johnson, *Public Perceptions of Plea Bargaining*, 46 Am. J. Crim. L. 133, 135 n.1 (2019).

[222] Moriarty & Main, *supra* note 22, at 1031-32.

[223] *Id.* (noting that defendants waive these rights); Jenia I. Turner, *Virtual Guilty Pleas*, 24 U. Pa. J. Const. L. 211, 217, 220 (2022); Klein et al., *supra* note 73, at 79 (describing how guilty pleas waive the right to request the suppression of unconstitutionally obtained evidence). Note, however, that defendants may make a conditional guilty plea contingent on a successful pre-trial motion, which permits the

The exercise of constitutional rights consumes justice system resources for a simple reason: it imposes administrative burdens on defense attorneys, prosecutors, and judges.[224] The term "administrative burden" refers to "an individual's experience of a policy's implementation as onerous."[225] As Pamela Herd and Donald Moynihan note, administrative burdens include the time and effort associated with learning costs (meaning the costs to acquire information), compliance costs (meaning the costs to adhere to a policy), and psychological costs (meaning the mental toll individuals face when they comply with a policy).[226] Each constitutional claim allocates learning costs on defense attorneys, prosecutors, and judges — all of whom must investigate a case's factual circumstances and assess a claim's validity.[227] Constitutional claims also generate compliance costs, such as filling out documentation, respecting motion requirements, and drafting written proceedings or decisions.[228] These claims can also impose added stress and frustration on justice system actors who are already overburdened and must manage high caseloads.[229]

Plea bargaining avoids these administrative burdens. Defendants who plead guilty not only waive their constitutional rights. They also waive their more general right to use resources to defend themselves against criminal charges. Guilty pleas and waivers are amongst the most effective ways to reduce justice system actors' learning costs,

defendant to withdraw their guilty plea subsequently. *See* Julian A. Cook, III, *Federal Guilty Pleas: Inequities, Indigence, and the Rule 11 Process*, 60 B.C. L. REV. 1073, 1084 (2019).

[224] *See* Bibas, *Plea Bargaining Outside the Shadow of Trial*, *supra* note 209, at 2470-71 (discussing how trials consume significant judicial resources); *cf.* Donald Moynihan, Pamela Herd & Hope Harvey, *Administrative Burden: Learning, Psychological, and Compliance Costs in Citizen-State Interactions*, 25 J. PUB. ADMIN. RSCH. & THEORY 43, 44-47 (2015) (describing the notion of administrative burden).

[225] PAMELA HERD & DONALD P. MOYNIHAN, ADMINISTRATIVE BURDEN: POLICYMAKING BY OTHER MEANS 22 (2019).

[226] *Id.* at 23.

[227] Moynihan et al., *supra* note 224, at 46 (describing learning costs).

[228] *Id.* (describing compliance costs).

[229] *See, e.g.*, Lauren K. Robel, *Caseload and Judging: Judicial Adaptations to Caseload*, 1990 BYU L. REV. 3, 3, 11, 36 (1990) (noting that federal judges experience stress from high caseloads).

compliance costs, and psychological costs that flow from defendants' constitutional claims.

Plea bargaining optimally increases self-excludability and decreases the consumption of scarce justice system resources for other reasons.[230] For one, plea bargains are efficient.[231] Typically, plea hearings are relatively quick, and may last only several minutes.[232] Judges are supposed to verify whether a guilty plea is voluntary and whether the defendant understood the consequences of pleading guilty.[233] Yet judges tend to minimally scrutinize whether guilty pleas satisfy these conditions.[234] Additionally, guilty pleas may also incorporate waivers that further limit defendants' use of judicial resources. For instance, in certain states, defendants who plead guilty also waive their right to appeal, which insulates the plea's validity against appellate review.[235] The absence of certain legal requirements further reduces prosecutors' and judges' administrative burden in the plea-bargaining process. For instance, many jurisdictions do not require prosecutors to take written

[230] Stuntz, *Pathological Politics*, *supra* note 22, at 536.

[231] Talia Fisher, *The Boundaries of Plea Bargaining: Negotiating the Standard of Proof*, 97 J. CRIM. L. & CRIMINOLOGY 943, 944 (2007); Rebecca Hollander-Blumoff, *Getting to "Guilty": Plea Bargaining as Negotiation*, 2 HARV. NEGOT. L. REV. 115, 131 (1997).

[232] MILTON HEUMANN, PLEA BARGAINING: THE EXPERIENCES OF PROSECUTORS, JUDGES, AND DEFENSE ATTORNEYS 35 (1978); Stephen B. Bright, *Rigged: When Race and Poverty Determine Outcomes in the Criminal Courts*, 14 OHIO ST. J. CRIM. L. 263, 276 (2016); Amy Dezember, Samantha Luna, Skye A. Woestehoff, Megan Stoltz, Melissa Manley, Jodi A. Quas & Allison D. Redlich, *Plea Validity in Circuit Court: Judicial Colloquies in Misdemeanor vs. Felony Charges*, 28 PSYCH., CRIME & L. 268, 281-82 (2022); Allison D. Redlich, Kirsten Domagalski, Skye A. Woestehoff, Amy Dezember & Jodi A. Quas, *Guilty Plea Hearings in Juvenile and Criminal Court*, 46 L. & HUM. BEHAV. 337, 347 (2022) (noting that plea hearings in juvenile criminal courts typically lasted a few minutes).

[233] Allison D. Redlich & Alicia Summers, *Voluntary, Knowing, and Intelligent Pleas: Understanding the Plea Inquiry*, 18 PSYCH., PUB. POL'Y & L. 626, 626-27 (2012). *But see* Jenny Roberts, *Ignorance is Effectively Bliss: Collateral Consequences, Silence, and Misinformation in the Guilty-Plea Process*, 95 IOWA L. REV. 119, 125-26 (2009) (noting that courts do not have the constitutional obligation to inform defendants of the collateral consequences of a guilty plea).

[234] Turner, *supra* note 223, at 217.

[235] Alexandra W. Reimelt, *An Unjust Bargain: Plea Bargains and Waiver of the Right to Appeal*, 51 B.C. L. REV. 871, 873 (2010); Derek Teeter, Comment, *A Contracts Analysis of Waivers of the Right to Appeal in Criminal Plea Bargains*, 53 U. KAN. L. REV. 727, 727-28 (2005).

notes of plea conversations or to provide a plea agreement in writing.[236] The lack of such legal requirements also reduces the administrative burden for judges who have fewer written records and agreements to scrutinize. These efficiency gains help explain how plea bargains encourage defendants to self-exclude from the criminal justice commons and consume few resources.

Additionally, plea bargains facilitate self-exclusion and ease administrative burden because they receive some of the least constitutional protection in the criminal justice process.[237] The constitutionalization of criminal procedure resulted in various safeguards related to police investigations and trials, especially in the contexts of search and seizure, the right to an attorney, protection against self-incrimination, and evidentiary disclosure.[238] But as William Stuntz observes, prosecutorial discretion and plea bargains are largely unregulated by constitutional criminal procedure.[239] The failure to regulate these areas of criminal procedure shifts adjudicative power away from judges and towards prosecutors, and reduces the level of oversight that judges provide in the criminal justice process.[240] Courts have decided that many routine prosecutorial decisions — including plea bargaining — are largely protected against judicial review.[241] Prosecutors enjoy vast discretion in terms of *who* they charge, *which* charges they bring, and *how many* charges they add or drop.[242] The opacity of plea bargains — namely that they occur behind closed doors rather than in open court — further insulates them against effective

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[236] *See* Meghan J. Ryan, *Criminal Justice Secrets*, 59 AM. CRIM. L. REV. 1541, 1556 (2022).

[237] *See* Stuntz, *The Political Constitution of Criminal Justice*, *supra* note 139, at 790; Adam M. Gershowitz, *Prosecutorial Dismissals as Teachable Moments (and Databases) for the Police*, 86 GEO. WASH. L. REV. 1525, 1531-4 (2018) [hereinafter Gershowitz, *Prosecutorial Dismissals as Teachable Moments*] (noting that prosecutors dismiss a significant portion of cases and providing an overview of the reasons why these cases are dismissed).

[238] *See supra* Part IV.B.

[239] Stuntz, *The Political Constitution of Criminal Justice*, *supra* note 139, at 790.

[240] *See* Barkow, *Institutional Design and the Policing of Prosecutors*, *supra* note 202, at 881.

[241] Barkow, *Separation of Powers and the Criminal Law*, *supra* note 204, at 1025; *see* Crespo, *supra* note 22, at 1305.

[242] Barkow, *Separation of Powers and the Criminal Law*, *supra* note 204, at 1025.

judicial scrutiny.[243] Furthermore, when approving plea bargains, judges may not inquire into a case's factual circumstances or the strength or accuracy of a prosecutor's evidence.[244] Plea bargaining — the mechanism through which prosecutors push defendants to self-exclude from the justice system and use minimal resources — is largely unchallengeable. And plea bargaining's minimal constitutional regulation translates into a decreased administrative burden for justice system actors.

These considerations explain why prosecutors value coercive tactics to secure guilty pleas — strategies that tend to skirt constitutional safeguards.[245] Various types of coercive plea bargains have become normalized and accepted by courts.[246] First, prosecutors may overcharge defendants (or stack charges) to leverage guilty pleas more successfully.[247] Overcharging exists in various forms.[248] Prosecutors may engage in vertical overcharging, meaning that they inflate the gravity of the initial charge so that defendants plead guilty to a lesser and included offense.[249] They may also resort to horizontal overcharging, where a defendant is either "charged with a separate offense for every criminal

[243] *See* Stephanos Bibas, *Designing Plea Bargaining from the Ground Up: Accuracy and Fairness Without Trials as Backstops*, 57 WM. & MARY L. REV. 1055, 1077 (2016) [hereinafter Bibas, *Designing Plea Bargaining from the Ground Up*]; Bibas, *Transparency and Participation in Criminal Procedure*, *supra* note 166, at 912, 923 (discussing the opacity of plea bargaining); Ronald Wright & Marc Miller, *Honesty and Opacity in Charge Bargains*, 55 STAN. L. REV. 1409, 1411 (2003) (discussing the particular issue of opacity in charge bargaining).

[244] Bibas, *Designing Plea Bargaining from the Ground Up*, *supra* note 243, at 1059, 1065.

[245] Richard L. Lippke, *Plea Bargaining in the Shadow of the Constitution*, 51 DUQ. L. REV. 709, 717-18 (2013); *see* William J. Stuntz, *Unequal Justice*, 121 HARV. L. REV. 1969, 2018 (2008).

[246] Cynthia Alkon, *Hard Bargaining in Plea Bargaining: When Do Prosecutors Cross the Line*, 17 NEV. L. J. 401, 402-03 (2017); Norman L. Reimer & Martín Antonio Sabelli, *The Tyranny of the Trial Penalty: The Consensus That Coercive Plea Practices Must End*, 31 FED. SENT'G REP. 215, 215-16, 219 (2019).

[247] Albert W. Alschuler, *The Prosecutor's Role in Plea Bargaining*, 36 U. CHI. L. REV. 50, 85-87 (1968) (describing horizontal and vertical overcharging); Brian D. Johnson, *Plea-Trial Differences in Federal Punishment: Research and Policy Implications*, 31 FED. SENT'G REP. 256, 258 (2019).

[248] Kyle Graham, *Overcharging*, 11 OHIO STATE J. CRIM. L. 701, 703-06 (2014).

[249] Alschuler, *supra* note 247, at 85-90.

transaction in which he has allegedly participated," or where a prosecutor fragments "a single criminal transaction into numerous component offenses."[250]

Stacked and inflated charges function as bargaining chips that motivate defendants to plead guilty in exchange for more attractive sentencing discounts or dropped charges.[251] Second, prosecutors may also encourage guilty pleas through exploding offers, which pressure defendants to accept significant plea discounts that expire quickly.[252] Defendants may be pressured to accept these offers before they consult their attorney or bring constitutional claims.[253] Third, prosecutors tend to offer the steepest sentencing discounts at the earliest points of the criminal justice process — when the level of evidentiary disclosure is lowest and the perceived benefits of pleading guilty are highest.[254] Without sufficient evidentiary disclosure, defendants may plead guilty because they overestimate the strength of the prosecutor's case.[255]

These plea bargaining tactics coerce defendants to self-exclude from the criminal justice commons and consume few justice system resources — a strategy that skirts the Constitution's prohibition against directly excluding defendants from using these resources. Recall how the Constitution guarantees that defendants can exercise their fundamental rights and use justice system resources as part of their defense.[256] Recall further how prosecutors and trial judges face consequences if they *directly* prohibit defendants from exercising these rights, or *directly*

[250] *Id.* at 87.

[251] Ben Grunwald, *Distinguishing Plea Discounts and Trial Penalties*, 37 GA. ST. U. L. REV. 261, 282-83 (2021) (describing how extra criminal charges function as bargaining chips); Stuntz, *Pathological Politics*, *supra* note 22, at 520 (same); Bibas, *Plea Bargaining Outside the Shadow of Trial*, *supra* note 209, at 2519.

[252] Alkon, *supra* note 246, at 407-08; Mike Work, *Creating Constitutional Procedure:* Frye, Lafler, *and Plea Bargaining Reform*, 104 J. CRIM. L. & CRIMINOLOGY 457, 481 (2014).

[253] *See* Michael M. O'Hear, *Plea Bargaining and Procedural Justice*, 42 GA. L. REV. 407, 427-28 (2008).

[254] *See* Cynthia Alkon, *An Overlooked Key to Reversing Mass Incarceration: Reforming the Law to Reduce Prosecutorial Power in Plea Bargaining*, 15 U. MD. L. J. RACE, RELIGION, GENDER & CLASS 191, 195 (2015) (noting that subsequent plea offers are less advantageous than initial ones).

[255] Oren Gazal-Ayal, *Partial Ban on Plea Bargains*, 27 CARDOZO L. REV. 2295, 2332-33 (2006).

[256] *See supra* Part III.A.

exclude defendants from using justice system resources.[257] But the Constitution's failure to regulate coercive plea bargaining tactics — and the broad interpretation of voluntary waivers and guilty pleas — allow prosecutors to do indirectly what they cannot do directly. While prosecutors coerce defendants to plead guilty and waive their rights, criminal procedure construes these guilty pleas and waivers as a voluntary decision to self-exclude from the criminal justice commons. Coercive plea bargains are perhaps the most effective — and constitutionally permissible — tool that indirectly excludes defendants from extracting resources from the criminal justice commons to exercise their fundamental rights.

B. Maximizing Self-Exclusion Through Underfunding

Underfunding is the second mechanism that encourages defendants to self-exclude from the criminal justice commons and consume minimal resources. Court appointed counsel and public defenders are often underfunded.[258] Furthermore, many public defender offices are understaffed.[259] A 2010 U.S. Department of Justice study notes that "[seventy-three percent] of county-based public defender offices exceeded the maximum recommended limit of cases received per attorney in 2007."[260] A single public defender may manage upwards of 700 cases per year in certain jurisdictions.[261] And the numbers can be

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[257] *See supra* Part III.A.

[258] Benjamin H. Barton & Stephanos Bibas, *Triaging Appointed-Counsel Funding and Pro Se Access to Justice*, 160 U. PA. L. REV. 967, 972-77 (2012) (describing the underfunding of court appointed counsel); Alex Bunin, *Public Defender Independence*, 27 TEX. J. ON CIV. LIBERTIES & CIV. RIGHTS 25, 26-27 (2021) (describing the underfunding of public defender offices); *see also* John P. Gross, *Case Refusal: A Right for the Public Defender but Not a Remedy for the Defendant*, 95 WASH. U. L. REV. 253, 254-57 (2017).

[259] Mary Sue Backus & Paul Marcus, *The Right to Counsel in Criminal Cases: Still a National Crisis?*, 86 GEO. WASH. L. REV. 1564, 1598-99 (2018); *see also* Valerio Baćak, Sarah E. Lageson & Kathleen Powell, *"Fighting the Good Fight": Why Do Public Defenders Remain on the Job?*, 31 CRIM. JUST. POL'Y REV. 939, 941 (2020).

[260] DONALD J. FAROLE & LYNN LANGTON, U.S. DEP'T OF JUST., COUNTY-BASED AND LOCAL DEFENDER OFFICES 1 (2010).

[261] Heather Baxter, Gideon*'s Ghost: Providing the Sixth Amendment Right to Counsel in Times of Budgetary Crisis*, 2010 MICH ST. L. REV. 341, 356-57 (2010) [hereinafter Baxter, Gideon*'s Ghost*]; Jaffe, *supra* note 93, at 1467; *see also* Irene Oritseweyinmi Joe,

even higher in some cities and counties. A 2009 report by the National Right to Counsel Committee notes that public defenders in Miami Dade County, Florida, managed roughly 500 felony cases and 2,200 misdemeanors annually.[262]

Underfunding takes various forms, all of which can lower the quality of legal representation and encourage plea bargains.[263] First, in many jurisdictions, public defenders and court appointed counsel receive low hourly rates.[264] Defense attorneys may refuse to take on indigent clients because the hourly pay is too low.[265] Defendants may be subject to greater trial delays, longer periods of pre-trial custody, and stronger incentives to plead guilty while they await court-appointed legal representation.[266] Inexperienced counsel may gravitate towards cases that pay low hourly rates because they lack other income sources, which can result in worse quality justice for low-income defendants.[267] Second, jurisdictions impose low statutory caps that dictate the maximum

Systematizing Public Defender Rationing, 93 DENV. L. REV. 389, 394 (2016) [hereinafter Joe, *Systematizing Public Defender Rationing*].

[262] NAT'L RIGHT TO COUNS. COMM., JUSTICE DENIED: AMERICA'S CONTINUING NEGLECT OF OUR CONSTITUTIONAL RIGHT TO COUNSEL 68 (2009).

[263] On scholars who have discussed underfunding, see Barton & Bibas, *supra* note 258, at 972-77; Margaret A. Costello, *Fulfilling the Unfulfilled Promise of* Gideon*: Litigation as a Viable Strategic Tool*, 99 IOWA L. REV. 1951, 1956-57, 1964-65, 1969, 1973 (2014); Eve Brensike Primus, *The Problematic Structure of Indigent Defense Delivery*, 122 MICH. L. REV. 207, 207, 210, 219, 225-26 (2023); Stuntz, *The Uneasy Relationship*, *supra* note 18, at 4, 9-11, 54.

[264] BRYAN FURST, BRENNAN CTR. FOR JUST., A FAIR FIGHT: ACHIEVING INDIGENT DEFENSE RESOURCE PARITY 6, 9 (2019) (citing JOHN P. GROSS, NAT'L ASS'N OF CRIM. DEF. LAWS., GIDEON AT 50: A THREE-PART EXAMINATION OF INDIGENT DEFENSE IN AMERICA 12 (2013)).

[265] *See* Haksgaard, *supra* note 166, at 102-04.

[266] *See id*; *see also* Pamela R. Metzger & Janet C. Hoeffel, *Charging Time*, 108 IOWA L. REV. 1723, 1745-46, 1750 (2023).

[267] *See* Eve Brensike Primus, *Culture as a Structural Problem in Indigent Defense*, 100 MINN. L. REV. 1769, 1787-88, 1794-95 (2016) [hereinafter Primus, *Culture as a Structural Problem*]; *see also* Amanda Agan, Matthew Freedman & Emily Owens, *Is Your Lawyer a Lemon? Incentives and Selection in the Public Provision of Criminal Defense*, 103 REV. ECON. & STAT. 294, 297 (2021); Malia Brink, *Crisis in Court-Appointed Counsel Rates: Searching for Sustainable Reform*, 34 CRIM. JUST. 42, 42 (2020) (noting that inexperienced counsel may be more willing to accept these mandates).

number of payable hours for specific criminal charges.[268] Defense attorneys are discouraged from investing additional hours that exceed the cap.[269] They may accept high caseloads and plea bargain most cases, which avoids meagre hourly rates and maximum hour caps.[270] Third, jurisdictions can impose low flat fees (meaning the fees that are set for specific criminal charges).[271] Given low flat fees, attorneys are drawn to accept a high number of cases, devote minimal time to each defendant, and plea bargain as much as possible.[272]

Underfunding is problematic because it produces collective action problems within the system of public defense. Like the criminal justice commons itself, free legal representation — for which roughly eighty percent of defendants qualify in some jurisdictions — constitutes an open-access resource for indigent defendants.[273] Since most defendants are indigent, overcriminalization increases the number of defendants who require free legal representation.[274] Underfunding, in turn, concentrates the greater number of indigent defendants amongst fewer defense attorneys, each of whom must manage higher caseloads.[275]

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[268] *See* Eve Brensike Primus, *Defense Counsel and Public Defense*, *in* 3 REFORMING CRIMINAL JUSTICE: PRETRIAL AND TRIAL PROCESSES 125 (Erik Luna ed., 2017) [hereinafter Primus, *Defense Counsel and Public Defense*].

[269] Stuntz, *Uneasy Relationship*, *supra* note 18, at 33-35; Robert E. Toone, *The Absence of Agency in Indigent Defense*, 52 AM. CRIM. L. REV. 25, 55 (2014).

[270] Primus, *Culture as a Structural Problem*, *supra* note 267, at 1774-75.

[271] *See* Peter W. Tague, *Ensuring Able Representation for Publicly-Funded Criminal Defendants: Lessons from England*, 69 U. CIN. L. REV. 273, 284 (2000).

[272] FURST, *supra* note 264, at 6.

[273] *See, e.g.*, Jeanette Hussemann & Jonah Siegel, *Pleading Guilty: Indigent Defendant Perceptions of the Plea Process*, 13 TENN. J. L. & POL'Y 459, 464 (2019) (noting that between sixty to ninety percent of defendants in the criminal justice system require court-appointed counsel); Jaffe, *supra* note 93, at 1467 (reporting that, in 2000, over eighty percent of felony defendants in state court were indigent); Stephen J. Schulhofer, *Client Choice for Indigent Criminal Defendants: Theory and Implementation*, 12 OHIO ST. J. CRIM. L. 505, 507 n.14 (2015) (noting that indigent people account for eighty percent of felony defendants despite constituting ten to twenty percent of the population).

[274] Stephen B. Bright, *The Failure to Achieve Fairness: Race and Poverty Continue to Influence Who Dies*, 11 U. PA. J. CONST. L. 23, 23 (2008) (noting that most defendants are impecunious); *see also* Paul D. Butler, *Poor People Lose:* Gideon *and the Critique of Rights*, 122 YALE L. J. 2176, 2181 (2013) (same); Monea, *supra* note 24, at 347 (same).

[275] Lisa C. Wood et al., *supra* note 192, at 20-24 (describing heavy caseloads that affect individual attorneys).

The result is tragedy.[276] Too many indigent defendants are simultaneously allocated to overburdened public defenders or court appointed counsel who cannot manage their caseloads.[277] Public defenders and court appointed counsel are forced to under-investigate cases, forgo legal claims, and push plea bargains — all of which reduce the quality of justice and defendants' use of justice system resources.[278] Due to underfunding, each impecunious defendant's individually rational decision — obtaining constitutionally guaranteed free legal representation — results in a collectively irrational outcome: undermining the system of publicly funded legal defense.[279] This account explains how the criminal justice commons averts a particular type of overuse — defendants' overexploitation of justice system resources — through systematic underfunding that encourages guilty pleas and minimal resource consumption.[280]

Like coercive plea bargains, underfunding leads defendants to self-exclude from the criminal justice commons. The Sixth Amendment and decisions such as *Gideon v. Wainright* confer the constitutional right to free legal representation for indigent criminal defendants.[281] As a result, prosecutors and judges cannot exclude defendants from using a publicly funded system of free legal representation to defend themselves against

[276] *See, e.g.*, Gross, *supra* note 258, at 264 (describing the looming collapse of Missouri's public defender system due to high caseloads and underfunding); Sean D. O'Brien, *Strange Justice for Victims of the Missouri Public Defender Funding Crisis: Punishing the Innocent*, 61 ST. LOUIS U. L.J. 725, 727-28 (2017) (same).

[277] Ace M. Factor, *Lessons from New Orleans: A Stronger Role for Public Defenders in Spurring Indigent Defense Reform*, 66 DUKE L. J. 1565, 1566-67 (2017).

[278] Bagaric et al., *supra* note 77, at 25.

[279] Scholars have invoked a similar argument in relation to the appellate process. *See, e.g.*, A.C. Pritchard, *Auctioning Justice: Legal and Market Mechanisms for Allocating Criminal Appellate Counsel*, 34 AM. CRIM. L. REV. 1161, 1167-68 (1997) (describing how the appeals process can produce a tragedy of the commons).

[280] Vida B. Johnson, *A Plea for Funds: Suing* Padilla, Lafler, *and* Frye *to Increase Public Defender Resources*, 51 AM. CRIM. L. REV. 403, 404, 409 (2014) (discussing public defender underfunding and how the criminal justice system would collapse without guilty pleas).

[281] Gideon v. Wainwright, 372 U.S. 335, 344 (1963); Baxter, Gideon*'s Ghost*, *supra* note 261, at 344-46; Tracey L. Meares, *What's Wrong with Gideon*, 70 U. CHI. L. REV. 215, 215 (2003) (noting that *Gideon v. Wainwright* provides indigent persons with a constitutional right to free legal representation).

criminal charges.[282] Nor can these criminal justice system actors prohibit defense attorneys from bringing constitutional claims that consume judicial resources.[283] Underfunding allows the government to circumvent these constitutional safeguards. Inadequate funding destroys defense attorneys' financial incentives to adopt legal strategies that are time-consuming and consume justice system resources — the very tactics that promote greater scrutiny, accuracy, and fairness in the criminal justice process.[284] The predictable result is that attorneys encourage their clients to plead guilty, and to do it quickly.[285]

Although underfunding leads to under-investigation and more plea bargains, certain legal doctrines explain why courts treat indigent defendants' guilty pleas as informed and voluntary. Weak ineffective assistance of counsel doctrine permits defense attorneys to under-investigate cases, under-litigate claims, and push guilty pleas without violating the defendant's constitutional rights.[286] As William Stuntz observes, ineffective assistance of counsel arguments tend to succeed only where the defense attorney's conduct was grossly negligent.[287] The narrow interpretation of "ineffective assistance" constitutionally authorizes — and normalizes — a default state where defense attorneys consume little to no justice system resources to defend their clients. Interrelatedly, the fact that defendants were represented by a lawyer strengthens the inference that their guilty plea was voluntary, informed, and ultimately, a legitimate form of self-exclusion from the criminal justice commons.[288]

[282] *See* John P. Gross, *Too Poor to Hire a Lawyer but Not Indigent: How States Use the Federal Poverty Guidelines to Deprive Defendants of Their Sixth Amendment Right to Counsel*, 70 WASH. & LEE L. REV. 1173, 1174 (2013) (noting that indigent defendants have a constitutional right to counsel).

[283] *See supra* Part V.A (discussing how prosecutors and judges cannot prohibit defendants from advancing constitutional claims that consume judicial resources).

[284] Charlie Gerstein, *Dependent Counsel*, 16 STAN. J. CIV. RIGHTS & CIV. LIBERTIES 147, 149-50 (2020); Sukhatme & Jenkins, *supra* note 166, at 796-801.

[285] Bibas, *Plea Bargaining Outside the Shadow of Trial*, *supra* note 209, at 2477.

[286] Stuntz, *Uneasy Relationship*, *supra* note 18, at 20-21. Note that defense attorneys are presumed to provide adequate assistance. *See* Roberts, *supra* note 233, at 161.

[287] Stuntz, *Uneasy Relationship*, *supra* note 18, at 20.

[288] *See, e.g.*, Alexandra Natapoff, *Gideon Skepticism*, 70 WASH. & LEE L. REV. 1049, 1059-60 (2013) (citing Daniel P. Blank, *Plea Bargain Waivers Reconsidered: A Legal Pragmatist's*

V. LIMITING ENTRY AND REDUCING RIVALRY

Because we do not understand the criminal justice system as an open-access resource for defendants, we ignore how certain law reform mechanisms can address the two main features that drive tragedy: limited excludability and subtractability. Everything changes once we conceptualize the criminal justice system as a commons. We can identify — and develop — law reform initiatives that restrict individuals' entry into the commons, reduce the level of resource consumption and rivalry between defendants, and ultimately, improve the quality of justice.

This Part demonstrates how certain law reform initiatives do precisely this and aim to prevent a tragedy of the criminal justice commons. These mechanisms include hard screening, misdemeanor decriminalization, and defense funding and caseload parity.[289] Each of these mechanisms limit entry into the criminal justice commons and reduce subtractability. They also counteract the effects of overcriminalization and underfunding that worsen the quality of criminal justice.

A. *Hard Screening*

First, prosecutors can engage in hard screening practices that lower the number of individuals who enter the justice system and compete for its resources.[290] The concept of screening refers to whether prosecutors

Guide to Loss, Abandonment and Alienation, 68 FORDHAM L. REV. 2011, 2021-22 (2000)) (noting that courts may equate voluntariness with the presence of counsel).

[289] *See, e.g.*, Alexandra Natapoff, *Misdemeanor Decriminalization*, 68 VAND. L. REV. 1055, 1057-58 (2015) [hereinafter Natapoff, *Misdemeanor Decriminalization*] (describing full versus partial misdemeanor decriminalization); Ronald Wright & Marc Miller, *The Screening/Bargaining Tradeoff*, 55 STAN. L. REV. 29, 32 (2002) (describing strong prosecutorial screening); Ronald F. Wright, *Parity of Resources for Defense Counsel and the Reach of Public Choice Theory*, 90 IOWA L. REV. 219, 230-44 (2004) (describing mechanisms such as funding and caseload parity and acknowledging the difficulties of resource parity).

[290] *See, e.g.*, Wright & Miller, *supra* note 289, at 32 (noting that prosecutors play a preliminary role in the criminal justice system through the use of screening practices); Ronald F. Wright & Marc L. Miller, *The Worldwide Accountability Deficit for Prosecutors*, 67 WASH. & LEE L. REV. 1587, 1596 (2010) (describing prosecutors as "key actors" in determining who will face criminal penalties).

accept or reject a case brought by police officers.[291] Screening dictates whether arrests lead to criminal charges.[292] As part of this process, prosecutors assess whether there is sufficient evidence to prosecute the defendant and determine the appropriate criminal charge given the circumstances.[293]

Typically, weak screening imposes a low legal threshold on prosecutors. A prosecutor can proceed where there is probable cause that the defendant committed a crime.[294] The prosecutor is not required to satisfy the preponderance of evidence standard, meaning that it is more likely than not that the defendant committed the crime.[295] Nor is the prosecutor required to personally believe that the defendant is guilty given the available evidence.[296] In some jurisdictions, prosecutors spend several minutes screening certain types of cases and investigate them minimally.[297]

Weak screening results in various consequences. For one, prosecutors are encouraged to under-investigate criminal cases because the probable cause standard is easy to satisfy.[298] Due to under-investigation, prosecutors may overcharge defendants or proceed with charges that have low conviction prospects.[299] Weak screening practices can also contribute to wrongful convictions, as factually innocent defendants

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[291] Jeffrey Bellin, *Theories of Prosecution*, 108 CALIF. L. REV. 1203, 1220-21 (2020).

[292] *See* Jenny F. Roberts, *Prosecuting Misdemeanors*, *in* THE OXFORD HANDBOOK OF PROSECUTORS AND PROSECUTIONS 513, 520-21 (Ronald F. Wright, Kay Levine & Russell M. Gold eds., 2021) (describing prosecutorial screening in misdemeanor cases).

[293] *See id.*

[294] William Ortman, *Probable Cause Revisited*, 68 STAN. L. REV. 511, 561 (2016); Alafair S. Burke, *Prosecutorial Agnosticism*, 8 OHIO STATE J. CRIM. L. 79, 83-84 (2010) (cited by Ortman).

[295] Ortman, *supra* note 294, at 561; *see also* Bennett L. Gershman, *The Prosecutor's Duty to Truth*, 14 GEO. J. LEGAL ETHICS 309, 338 (2001) ("[P]robable cause is substantially less than sufficient admissible evidence to sustain a conviction.").

[296] Ortman, *supra* note 294, at 561; Fred C. Zacharias & Bruce A. Green, *The Duty to Avoid Wrongful Convictions: A Thought Experiment in the Regulation of Prosecutors*, 89 B. U. L. REV. 1, 22 (2009).

[297] Kenneth J. Melilli, *Prosecutorial Discretion in an Adversary System*, 1992 BYU L. REV. 669, 687 (1992).

[298] *See* Ortman, *supra* note 294, at 561.

[299] *See* Joy & McMunigal, *supra* note 93, at 32.

may plead guilty to unsupported or erroneous charges.[300] This low legal threshold may explain why a significant portion of defendants' cases that survived the prosecutorial screening process are subsequently dismissed.[301] To be clear, prosecutors who engage in weak screening still reject many police cases.[302] However, hard screening — especially when coupled with a higher legal threshold and restrictions on charge bargaining — can limit entry into the criminal justice commons and reduce rivalry between defendants.[303]

Ronald Wright and Marc Miller have argued that hard screening practices incorporate four mechanisms: early and careful assessment, filing appropriate charges, prohibitions on charge bargaining, and adequate training and oversight mechanisms.[304] First, prosecutors must screen the police's case as soon as possible and evaluate it thoroughly.[305] As part of this process, prosecutors may reject cases that lack an adequate evidentiary foundation, or may request further information from law enforcement to substantiate a charge.[306] Second, rather than vertically or horizontally overcharge defendants, prosecutors should only file criminal charges that are supported by the evidence and for

[300] Gershowitz, *Justice on the Line*, *supra* note 195, at 857 (describing how innocent defendants may plead guilty); *see also* Leipold, *supra* note 17, at 1154; Natapoff, *Misdemeanors*, *supra* note 114, at 1343-44 (describing how most criminal charges result in guilty pleas).

[301] *See* Daniel Givelber, *Meaningless Acquittals, Meaningful Convictions: Do We Reliably Acquit the Innocent*, 49 RUTGERS L. REV. 1317, 1336 (1997) (estimating the proportion of dismissed cases to be roughly forty percent for defendants charged with violent felonies); Gershowitz, *Prosecutorial Dismissals as Teachable Moments*, *supra* note 237, at 1527 (noting: "Prosecutors dismiss a huge number of cases with no conviction being entered").

[302] *See* Barbara Boland & Brian Forst, *Prosecutors Don't Always Aim to Pleas*, 49 FED. PROB. 10, 11 (1985); Gershowitz, *Prosecutorial Dismissals as Teachable Moments*, *supra* note 237, at 1531-34 (noting that prosecutors dismiss a significant portion of cases and providing an overview of the reasons why these cases are dismissed).

[303] Skolnik, *Criminal Justice Reform*, *supra* note 84, at 662 (noting how some jurisdictions impose a "substantial likelihood of conviction" standard for a prosecutor to bring a criminal charge).

[304] Wright & Miller, *supra* note 289, at 32.

[305] *Id.* at 49. Wright and Miller suggest that prosecutors should devote resources *immediately* to a case once they receive it.

[306] *Id.* at 32.

which they seek to obtain a conviction.[307] Third and interrelatedly, hard screening proscribes charge bargaining, meaning that defendants plead guilty to some charges on the condition that the prosecutor drops others.[308] Fourth, prosecutor offices must integrate appropriate training and oversight practices to ensure that hard screening policies are respected.[309] A more demanding legal threshold — such as preponderance of evidence rather than probable cause — can further strengthen screening's ability to limit entry into the criminal justice commons.[310] For instance, some jurisdictions in Canada require prosecutors to satisfy a "substantial likelihood of conviction" threshold that respects the preponderance of evidence standard, rather than a "reasonable prospect of conviction" threshold that resembles probable cause.[311]

Some jurisdictions incorporate relatively hard screening practices that contain these types of safeguards. Take the example of Milwaukee County. Rather than overcharge defendants to gain leverage in plea bargaining, prosecutors in Milwaukee County tend to file a low number of charges per case.[312] The County's charging policy requires prosecutors to only file charges for which they seek to secure a conviction.[313] Prosecutors in Milwaukee County screen out approximately forty percent of felony charges.[314] Other jurisdictions, such as Harris County in Houston, Texas, employ a pre-arrest screening mechanism.[315] Prosecutors must approve a warrantless arrest in contexts where the defendant will be jailed.[316] As part of this screening process, prosecutors

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[307] *Id.* at 32, 49.

[308] *Id.* at 32 n.10; *see also* Nancy Amoury Combs, *Rehabilitating Charge Bargaining*, 96 IND. L. J. 803, 805-06 (2021).

[309] Wright & Miller, *supra* note 289, at 32.

[310] Skolnik, *Criminal Justice Reform*, *supra* note 84, at 662.

[311] *Id.* (providing the example of British Columbia, Canada, which imposes a substantial likelihood of conviction standard).

[312] Don Stemen & Gipsy Escobar, *Whither the Prosecutor? Prosecutor and County Effects on Guilty Plea Outcomes in Wisconsin*, 35 JUST. Q. 1166, 1186 (2018).

[313] *Id.*

[314] *Id.*

[315] Gershowitz, *Justice on the Line*, *supra* note 195, at 835-36.

[316] *Id.* at 836.

can reject or downgrade criminal charges.[317] As Adam Gershowitz notes, this early screening process prevents collateral consequences that occur when defendants are arrested but subsequently acquitted, such as loss of employment, housing, or immigration status.[318] Franklin County, Ohio, also employs pre-arrest screening for felony cases.[319] According to 2016 statistics, prosecutors in Franklin County rejected roughly 17.5 percent of felony charges, which prevented 700 individuals from being charged with crimes.[320] Other jurisdictions that employ pre-arrest screening have even higher rejection rates.[321]

At its root, hard screening addresses the underlying factors that contribute to a tragedy of the criminal justice commons. Prosecutors who screen cases more thoroughly limit the number of defendants who enter the criminal justice system and compete for its finite resources. Individuals who never enter the criminal justice commons bring no constitutional claims, which prevents rivalry that would otherwise occur. For these reasons, hard screening can be understood as a mechanism that limits the effects of overcriminalization and the constitutionalization of criminal procedure. And by filtering out defendants' weak and unsubstantiated cases, stronger screening practices ensure that these individuals are not subject to the effects of coercive plea bargains and underfunding.

B. Misdemeanor Decriminalization

Second, the misdemeanor decriminalization movement aims to reduce the quantity of defendants who enter the criminal justice commons and consume its resources.[322] Misdemeanors are estimated to

[317] *Id.*

[318] *See id.*; Eisha Jain, *Arrests as Regulation*, 67 STAN. L. REV. 809, 826-44 (2015) (describing various collateral consequences that flow from arrests).

[319] Belén Lowrey-Kinberg, Rachel Bowman & Jon Gould, "*Extremely Creepy, but Nothing He Did was Illegal*": *Charging Patterns During Prearrest Screening*, 33 CRIM. JUST. POL'Y REV. 918, 922 (2022).

[320] *Id.* at 936.

[321] *See id.* at 921-22.

[322] *See* Megan Stevenson & Sandra Mayson, *The Scale of Misdemeanor Justice*, 98 B.U. L. REV. 731, 767 (2018) (describing the misdemeanor decriminalization movement).

comprise roughly eighty percent of criminal cases.[323] These offenses are punishable by up to one year of imprisonment in most jurisdictions and can result in a criminal record.[324] Most defendants are charged with a misdemeanor rather than felony.[325] The ratio of misdemeanors to felonies is estimated to be somewhere between 3:1 and 5:1.[326] Examples of misdemeanors include low-level driving offenses (such as driving with a suspended license or driving under the influence), various forms of disorderly conduct, simple possession of marijuana, vandalism, and more.[327] Jenny Roberts notes that the number of misdemeanor cases filed per year increased from approximately 5 million in 1972 to 13.2 million in 2016.[328] Studies indicate that persons of color and indigent persons are disproportionately charged with misdemeanors.[329]

Misdemeanor convictions carry important consequences. For one, they can result in a criminal record.[330] Defendants who are convicted of misdemeanors may lose access to housing, face employment barriers, be

[323] *Id.* at 746; Alexandra Natapoff, *Misdemeanors*, 11 ANN. REV. L. SOC. SCI. 255, 256 (2015).

[324] Irene Oritseweyinmi Joe, *Rethinking Misdemeanor Neglect*, 64 UCLA L. REV. 738, 758 (2017) [hereinafter Joe, *Rethinking Misdemeanor Neglect*].

[325] *Id.* at 778.

[326] Eisha Jain, *Capitalizing on Criminal Justice*, 67 DUKE L.J. 1381, 1392 (2018) (citing Natapoff, *Misdemeanors*, *supra* note 114, at 1320-21); Nancy J. King & Michael Heise, *Misdemeanor Appeals*, 99 B.U. L. REV. 1933, 1933 (2019) (estimating the ratio to be 3:1).

[327] Eisha Jain, *Proportionality and Other Misdemeanor Myths*, 98 B.U. L. REV. 953, 956 (2018); Sandra G. Mayson & Megan T. Stevenson, *Misdemeanors by the Numbers*, 61 B.C. L. REV. 971, 980 (2020); Natapoff, *Misdemeanors*, *supra* note 114, at 1321.

[328] Jenny Roberts, *Informed Misdemeanor Sentencing*, 46 HOFSTRA L. REV. 171, 172 (2017) (citing Stevenson & Mayson, *supra* note 322, at 744-45). Stevenson & Mayson also note: "The number of misdemeanor cases filed has been falling for at least ten years, which is as far back as national-level data can be trusted." Stevenson & Mayson, *supra* note 322, at 737, 747. Note that in some jurisdictions, misdemeanor arrest rates increased between 1980–2013. *See* Greg Berman & Julian Adler, *Toward Misdemeanor Justice: Lessons from New York City*, 98 B.U. L. REV. 981, 982 (2018).

[329] Mayson & Stevenson, *supra* note 327, at 979-80; *see, e.g.*, Issa Kohler-Hausmann, *Misdemeanor Justice: Control Without Conviction*, 119 AM. J. SOCIO. 351, 360 (2013) (describing racial disparities for misdemeanor arrest rates in New York City and noting that "[i]n 2010, about 49% of all misdemeanor arrests were of [B]lack, 33% Hispanic, and 13% white individuals").

[330] Joe, *Rethinking Misdemeanor Neglect*, *supra* note 324, at 770; Natapoff, *Misdemeanors*, *supra* note 114, at 1316.

barred from international travel, be disqualified from social benefits, and more.[331] Misdemeanor convictions can also result in expensive fines, fees, and surcharges.[332] Indigent and unhoused persons are disproportionately impacted by the quantum of fixed financial penalties that do not consider their personal financial circumstances.[333] Unpaid fines can lead to criminal justice debt that results in bench warrants, a destroyed credit rating, driver's license suspensions, default civil judgments, and more.[334] These types of collateral consequences can entrench individuals in poverty and homelessness.[335]

Despite these potential consequences, prosecutors may screen misdemeanor charges minimally, if at all.[336] This may explain why prosecutorial declination rates are significantly lower for misdemeanors than for felonies.[337] Similarly, due to high caseloads, public defenders and court appointed counsel tend to focus more heavily on higher stakes felony cases and may devote less time and effort to misdemeanors.[338] Certain studies suggest that the duration of an average plea colloquy hearing for a misdemeanor is roughly eight minutes.[339] In some

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[331] *See, e.g.*, JAMES B. JACOBS, THE ETERNAL CRIMINAL RECORD 227-38 (2015) (discussing the collateral consequences of a criminal record); Peter Leasure, *Misdemeanor Records and Employment Outcomes: An Experimental Study*, 65 CRIME & DELINQ. 1850, 1864 (2019) (demonstrating how minor criminal convictions can worsen employment outcomes); Terry Skolnik, *Two Criminal Justice Systems*, 56 U. BRIT. COLUM. L. REV. 285, 289-91 (2023) (providing an overview of certain consequences of criminal records).

[332] Beth A. Colgan, *Fines, Fees, and Forfeitures*, 18 CRIMINOLOGY, CRIM. JUST. L & SOC'Y 22, 22-23 (2017).

[333] Beth A. Colgan, *The Excessive Fines Clause: Challenging the Modern Debtors' Prison*, 65 UCLA L. REV. 2, 7-8, 55-57 (2018).

[334] Terry Skolnik, *Rethinking Homeless People's Punishments*, 22 NEW CRIM. L. REV. 73, 77-81 (2019).

[335] SKOLNIK, *supra* note 38, at 112-15.

[336] Roberts, *supra* note 292, at 521; Natapoff, *Misdemeanors*, *supra* note 114, at 1328.

[337] *See* Roberts, *supra* note 292, at 521-22; Jenny Roberts, *Crashing the Misdemeanor System*, 70 WASH. & LEE L. REV. 1089, 1108 (2013).

[338] *See* Erica J. Hashimoto, *The Price of Misdemeanor Representation*, 49 WM. & MARY L. REV. 461, 473 (2007); Natapoff, *Misdemeanors*, *supra* note 114, at 1328; Jenny Roberts, *Why Misdemeanors Matter: Defining Effective Advocacy in the Lower Criminal Courts*, 45 UC DAVIS L. REV. 277, 282 (2011).

[339] Dezember et al., *supra* note 232, at 275; Turner, *supra* note 223, at 222; Kelsey S. Henderson, Erika N. Fountain, Allison D. Redlich & Jason A. Cantone, *Judicial Strategies*

jurisdictions, misdemeanor trials last only three minutes.[340] Bail hearings for misdemeanor charges last a similarly short length of time in certain jurisdictions.[341]

Although misdemeanors may seem to consume minimal judicial resources, the opposite is true. The sheer volume of charges produces an aggregation effect that saps justice system resources. Nationally, approximately 4 per every 100 individuals are charged with a misdemeanor.[342] Recall that 13.2 million misdemeanor cases were brought in 2016.[343] To grasp the true scope of resource consumption, the seemingly minimal time spent on misdemeanors — such as minutes-long bail hearings, plea colloquies, and trials — must be multiplied by the millions of defendants who are charged with these crimes.[344] Defendants who are charged with misdemeanors may also fail to appear in court, which can result in new criminal charges that consume additional resources (note that misdemeanor charges have higher failure to appear rates compared to felonies).[345] Additionally, many defendants who are charged with misdemeanors lack legal representation.[346] Courts may delay hearings until defendants receive

for Evaluating the Validity of Guilty Pleas, 59 CT. REV. 44, 47 (2023). Note that defendants may also waive plea colloquy hearings.

340 Natapoff, *The High Stakes of Low-Level Criminal Justice*, *supra* note 115, at 1660-61.

341 Paul Heaton, Sandra Mayson & Megan Stevenson, *The Downstream Consequences of Misdemeanor Pretrial Detention*, 69 STAN. L. REV. 711, 720 (2017).

342 *See* Mayson & Stevenson, *supra* note 327, at 998.

343 Stevenson & Mayson, *supra* note 322, at 744-45; *see also* Mayson & Stevenson, *supra* note 327, at 975.

344 *See* Heaton et al., *supra* note 341, at 720 (describing the length of time for misdemeanor bail hearings in certain jurisdictions); Mayson & Stevenson, *supra* note 327, at 979 n.33 (noting the number of misdemeanor cases to be roughly 13.2 million annually).

345 Brian H. Bornstein, Alan J. Tomkins, Elizabeth M. Neeley, Mitchel N. Herian & Joseph A. Hamm, *Reducing Courts' Failure-to-Appear Rate by Written Reminders*, 19 PSYCH., PUB. POL'Y & L. 70, 70 (2013) (discussing additional criminal charges for failures to appear); Alexander M. Holsinger, Christopher T. Lowenkamp & Travis C. Pratt, *Is Pretrial Detention an Effective Deterrent? An Analysis of Failure to Appear and Rearrest Says No*, 87 FED. PROB. 3, 5 (2023) (discussing how misdemeanor charges have higher failure to appear rates than felonies).

346 Erica Hashimoto, *Abandoning Misdemeanor Defendants*, 25 FED. SENT'G REP. 103, 104 (2012); Erica Hashimoto, *The Problem with Misdemeanor Representation*, 70 WASH. & LEE

legal representation.[347] And in contrast to defendants with legal representation, unrepresented defendants' hearings and trials may be slower, and they may require more hearings per case.[348]

These types of concerns underpin the misdemeanor decriminalization movement. The notion of "decriminalization" implies that certain conduct is no longer regulated by the criminal law.[349] Instead, the behavior is regulated through civil or administrative offenses that are punishable by fines.[350] Misdemeanor decriminalization aims to decrease the number of arrests, criminal charges, convictions, and their collateral consequences, all of which profoundly impact defendants' lives.[351]

Some states have decriminalized an array of misdemeanors. The simple possession of marijuana constituted one of the most common misdemeanor charges in many U.S. jurisdictions.[352] Empirical studies demonstrate that police officers disproportionately arrested Black Americans for marijuana-related offenses.[353] Within the past several decades, many states shifted their approach towards the legal regulation of marijuana.[354] By February 2023, twenty U.S. states had legalized

L. REV. 1019, 1024 (2013) (noting that roughly thirty percent of defendants who were incarcerated for misdemeanors in 2002 were unrepresented).

347 Ben Kempinen, *The Ethics of Prosecutor Contact with the Unrepresented Defendant*, 19 GEO. J. LEGAL ETHICS 1147, 1150 n.9 (2006).

348 *Id.*

349 Natapoff, *Misdemeanor Decriminalization*, *supra* note 289, at 1057-58 (describing full decriminalization). Natapoff distinguishes between full and partial decriminalization. This Article uses the term "decriminalization" as a form of "full decriminalization," meaning that the conduct is no longer regulated by the criminal law.

350 *Id.*

351 *Id.* at 1057.

352 Mayson & Stevenson, *supra* note 327, at 980; Stevenson & Mayson, *supra* note 322, at 755.

353 Bernard E. Harcourt & Jens Ludwig, *Reefer Madness: Broken Windows Policing and Misdemeanor Marijuana Arrests in New York City, 1989–2000*, 6 CRIMINOLOGY & PUB. POL'Y 165, 165 (2007); *see* Deborah M. Ahrens, *Retroactive Legality: Marijuana Convictions and Restorative Justice in an Era of Criminal Justice Reform*, 110 J. CRIM. L. & CRIMINOLOGY 379, 391-92 (2020).

354 Nguyen K. Tran, Neal D. Goldstein, Jonathan Purtle, Philip M. Massey, Stephen E. Lankenau, Joanna S. Suder & Loni P. Tabb, *The Heterogeneous Effect of Marijuana Decriminalization Policy on Arrest Rates in Philadelphia, Pennsylvania, 2009–2018*, 212 DRUG

marijuana for recreational use, while twenty other U.S. states decriminalized the offense of simple possession.[355]

Studies indicate that arrest rates associated with marijuana declined meaningfully in some jurisdictions that decriminalized simple possession.[356] Following the legalization of marijuana in Washington in 2012, the average number of marijuana-related arrests per month decreased within the state.[357] Similarly, studies show that "decriminalization of cannabis resulted in decreased arrests for adults and youths in Massachusetts, Connecticut, Rhode Island, Vermont, and Maryland through 2015."[358] Cities that decriminalized marijuana produced similar results. In 2019, the City of Columbus, Ohio, decided to stop prosecuting simple possession of marijuana offences following a legislative amendment that re-classified cannabis according to the level of THC in marijuana versus hemp.[359] That same year, Columbus reduced the punishment for simple possession to a $10 fine for individuals who possessed under 100 grams of marijuana.[360] Following these changes, the number of simple possession of marijuana charges decreased from 2,567 in 2011 to 423 in 2020.[361]

Other jurisdictions have decriminalized certain driving offenses that made up a substantial portion of misdemeanor charges.[362] For instance,

& ALCOHOL DEPENDENCE 1, 1 (2020); *see also* Darryl K. Brown, *Democracy and Decriminalization*, 86 TEX. L. REV. 223, 244 (2007).

[355] Blair Lozier, Valerie Newberg & Dakota Thomas, *State Approaches to Marijuana Policy*, COUNCIL OF STATE GOV'TS (Feb. 13, 2023), https://www.csg.org/2023/02/13/state-approaches-to-marijuana-policy [https://perma.cc/DC8H-VPD5].

[356] Natapoff, *Misdemeanor Decriminalization*, *supra* note 289, at 1111.

[357] ERIN J. FARLEY & STAN ORCHOWSKY, JUST. RSCH. & STAT. ASS'N, MEASURING THE CRIMINAL JUSTICE SYSTEM IMPACTS OF MARIJUANA LEGALIZATION AND DECRIMINALIZATION USING STATE DATA 4 (2019) (noting this decrease between 2012-2014).

[358] Andrew Plunk, Stephanie L. Peglow, Paul T. Harrell & Richard A. Grucza, *Youth and Adult Arrests for Cannabis Possession After Decriminalization and Legalization of Cannabis*, 173 JAMA PEDIATRICS 763, 764 (2019).

[359] ALEX FRAGA, JANA HRDINOVÁ & DEXTER RIDGWAY, THE CHANGING LANDSCAPE OF MISDEMEANOR MARIJUANA: POSSESSION CHARGING IN COLUMBUS, OHIO: 2011–2021, at 2 (2022).

[360] *Id.*

[361] *Id.* at 3.

[362] Jordan Blair Woods, *Decriminalization, Police Authority, and Routine Traffic Stops*, 62 UCLA L. REV. 672, 698-704 (2015).

Jordan Blair Woods's research has shown that since the early 1970s, roughly twenty U.S. states have decriminalized an array of low-level traffic offenses.[363] In many states, traffic-related misdemeanors that previously carried prison terms were converted into civil or administrative offenses that were punishable by financial penalties.[364]

Jurisdictions that combine decriminalization and hard misdemeanor screening can further limit entry into the criminal justice commons. Although the number of misdemeanor charges dropped nationally from approximately 16 million in 2007 to 13 million in 2017, misdemeanor conviction rates remain surprisingly low in certain jurisdictions.[365] For instance, Sandra Mayson and Megan Stevenson's research elucidates that the misdemeanor conviction rate is twenty-seven percent in Chicago, thirty-eight percent in San Antonio, fifty percent in rural Virginia, fifty-one percent in Fairfax, and fifty-five percent in Philadelphia.[366] More rigorous prosecutorial screening — including pre-arrest screening — could prevent many of these weaker cases from entering the criminal justice system in the first place. Furthermore, more effective screening could potentially help reduce pre-trial detention for misdemeanors and lower defendants' incentive to falsely plead guilty to be released from custody.[367]

Hard screening and misdemeanor decriminalization help prevent a tragedy of the criminal justice commons for similar reasons. Both mechanisms restrict the number of defendants who enter the criminal justice system and consume its resources. They both counteract overcriminalization and limit the number of negative externalities that some defendants impose onto others. And they protect individuals from being exposed to the effects of coercive plea bargains and underfunding.

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[363] *Id.* at 698

[364] *See id.* at 699.

[365] *See* Stevenson & Mayson, *supra* note 322, at 744-45. Stevenson & Mayson also note that "[t]he number of misdemeanor cases filed has been falling for at least ten years, which is as far back as national-level data can be trusted." *Id.* at 737, 747; Mayson & Stevenson, *supra* note 327, at 1001 (describing misdemeanor conviction rates in these jurisdictions). Note that in some jurisdictions, misdemeanor arrest rates increased between 1980–2013. *See* Berman & Adler, *supra* note 328, at 982.

[366] Mayson & Stevenson, *supra* note 327, at 1005.

[367] *See* Heaton et al., *supra* note 341, at 715-16.

C. Defense Salary and Caseload Parity

Third, governments can reduce funding and caseload disparities that contribute to a tragedy of the criminal justice commons and that lead to weak legal representation.[368] Generally, prosecutors receive much greater funding than public defense attorneys.[369] Adam Gershowitz notes that states allocate roughly $5 billion to prosecution services but only $3 billion to indigent legal defense.[370] He observes that such funding disparities unfairly advantage prosecutors and disadvantage indigent defendants.[371] Funding disparities take various forms.[372] For one, public defenders receive lower salaries than prosecutors.[373] Low salaries incentivize experienced attorneys to leave public defense and seek higher paying jobs elsewhere.[374] Furthermore, funding disparities affect the level of resources that prosecutors and defense attorneys can allocate to their cases, such as investigators, expert witnesses, and so on.[375]

Unequal funding may also contribute to caseload disparities.[376] Given that defense underfunding can lead to understaffing, public defenders

[368] *See, e.g.*, COLTON BROWN, CELIA GIVENS, TERENCE JONES & JACQUELINE WINTON, SYSTEMIC JUST. PROJECT CLINIC, STRENGTHENING THE OFFICE OF THE PUBLIC DEFENDER: ANALYSIS AND RECOMMENDATIONS FOR MONTGOMERY COUNTY 34-37 (2021) (describing the value of funding, pay, and resource parity for prosecutors and public defenders); Sean D. O'Brien, *Missouri's Public Defender Crisis: Shouldering the Burden Alone*, 75 MO. L. REV. 853, 874-76 (2010) (describing funding and workload parity and their importance); Wright, *supra* note 289, at 222 (describing funding parity between prosecutors and defense counsel).

[369] Joe, *Systematizing Public Defender Rationing*, *supra* note 261, at 393; Mark Pickett, *Do Prosecutors Have a Voice in Public Defense Funding?*, 38 CRIM. JUST. 63, 63 (2023); Primus, *Defense Counsel and Public Defense*, *supra* note 268, at 125.

[370] Adam Gershowitz, *Raise the Proof: A Default Rule for Indigent Defense*, 40 CONN. L. REV. 85, 87 (2007).

[371] Gershowitz & Killinger, *supra* note 91, at 265.

[372] Note that these disparities were originally discussed in Wright, *supra* note 289, at 230.

[373] *Id.*

[374] *See id.*

[375] *See* Stephen B. Bright, *Legal Representation for the Poor: Can Society Afford This Much Injustice?*, 75 MO. L. REV. 683, 700, 703 (2010); Wright, *supra* note 289, at 231.

[376] *See* Carrie Dvorak Brennan, *The Public Defender System: A Comparative Assessment*, 25 IND. INT'L & COMP. L. REV. 237, 239, 242-48 (2015) (noting the connection between under-funding public defenders and caseload disparities).

may have higher caseloads than prosecutors.[377] A public defender may manage twice as many felonies and misdemeanors than a prosecutor in the same jurisdiction.[378] For example, in 2006 in Miami Dade County, Florida, prosecutors managed an average of 128 felonies and 194 misdemeanors, which is a relatively high caseload compared to other jurisdictions.[379] But as discussed above, a 2009 report detailed how public defenders in Miami Dade County managed closer to 500 felonies and 2,200 misdemeanors.[380] High caseloads reduce defense attorneys' capacity to investigate cases, advance constitutional claims, and litigate aggressively.[381]

A more egalitarian approach to public defense funding could ease resource pressures and improve the quality of justice for defendants. Salary parity between prosecutors and public defenders may improve retention rates for experienced counsel.[382] As Ronald Wright notes, certain states and localities already implement salary parity.[383] He offers the examples of "Kansas, Massachusetts, North Carolina, Tennessee, and Wyoming", as well as "Orange County, California and Maricopa County, Arizona."[384] Wright also suggests that jurisdictions can establish salary parity according to an attorney's number of years of relevant experience; a benchmark that can apply equally to prosecutors and public defenders.[385] Salary parity could help ensure that defendants have access to more experienced and competent counsel in more complex cases.

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[377] *See id.*

[378] *See infra* notes 379–380.

[379] *Id.* For example, an average prosecutor in San Diego or Sacramento managed half of that caseload. *Id.*

[380] NAT'L RIGHT TO COUNS. COMM., *supra* note 262, at 68; *see also* Wayne Logan, *Litigating the Ghost of* Gideon *in Florida: Separation of Powers as a Tool to Achieve Indigent Defense Reform*, 75 MO. L. REV. 885, 895 (2010).

[381] *See* NICHOLAS M. PACE, DULANI WOODS, ROBERTO GUEVARA, CHAU PHAM & SHAMENA ANWAR, PROVISIONAL CASELOAD STANDARDS FOR THE INDIGENT DEFENSE OF ADULT CRIMINAL AND JUVENILE DELINQUENCY CASES IN UTAH, at XV (2021).

[382] *See, e.g.*, FURST, *supra* note 264, at 11-12 (noting that salary parity may help retain experienced attorneys).

[383] Wright, *supra* note 289, at 233.

[384] *Id.*

[385] *Id.* at 234.

Other mechanisms can counteract caseload disparities between prosecutors and public defense attorneys. Some jurisdictions have conducted studies that establish public defense caseload standards.[386] Such standards aim to improve how thoroughly attorneys scrutinize and litigate their cases. The Missouri Project offers a helpful example.[387] The Project undertook an in-depth study of the state's public defender system and examined attorneys' caseloads.[388] The study established caseload standards and set out guidelines for the number of average hours per type of case, such as murders and homicides, classes of felonies, and misdemeanors.[389] Furthermore, the study's authors recommended that caseload recommendations and guidelines be reviewed periodically.[390]

Salary and caseload parity could produce an array of benefits. Public defender offices could better retain experienced attorneys. Such attorneys could offer higher quality legal representation in complex cases and mentor junior lawyers. Public defense attorneys who enjoy lower caseloads could devote more scrutiny to each client and litigate their cases more aggressively where necessary. And attorneys with lower caseloads may put less pressure on clients to plead guilty. In response

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[386] FURST, *supra* note 264, at 11; *see, e.g.*, KENT BAUSMAN, ABA, THE MISSOURI PROJECT: A STUDY OF THE MISSOURI PUBLIC DEFENDER SYSTEM AND ATTORNEY WORKLOAD STANDARDS 21 (2014) (providing a table of estimated case times); VANESSA COSGROVE FRY, SALLY SARGEANT-HU, LANTZ MCGINNIS-BROWN & GREG HILL, IDAHO PUBLIC DEFENSE WORKLOAD STUDY 2018, at 23 (2018) (providing case time standards); PACE, WOODS, GUEVARA, PHAM & ANWAR, *supra* note 381, at 53-61 (providing maximum caseload standards in adult and juvenile cases). Note that national caseload standards have been updated to reflect changes since the previous ones established by the 1973 National Advisory Commission on Criminal Justice Standards and Goals. *See* NICHOLAS M. PACE, MALIA N. BRINK, CYNTHIA G. LEE & STEPHEN F. HANLON, NATIONAL PUBLIC DEFENSE WORKLOAD STUDY, at xv, 111 (2023) (establishing new caseload guidelines). Previous standards were established in: *National Advisory Commission on Criminal Justice Standards and Goals, The Defense (1973)*, NAT'L LEGAL AID & DEF. ASS'N, https://www.nlada.org/defender-standards/national-advisory-commission/black-letter (last visited Jan. 14, 2025) [https://perma.cc/5J8Z-B27J] (Standard 13.12). For an overview of these previous standards, see Geoffrey T. Burkhart, *How to Leverage Public Defense Workload Studies*, 14 OHIO ST. J. CRIM. L. 403, 412 (2017).

[387] BAUSMAN, *supra* note 386, at 6, 21.

[388] *Id.* at 5-7 (providing an overview of the study).

[389] *Id.* at 6.

[390] *Id.* at 6-7.

to this shift in public defense, prosecutors may be more willing to screen out weaker cases because public defense attorneys investigate claims more thoroughly and are willing to litigate. Furthermore, improved defense funding may reduce certain negative externalities in the criminal justice commons. For instance, defendants may bring fewer claims for ineffective assistance of counsel that courts must adjudicate, which imposes fewer unaccounted for costs onto defendants, prosecutors, and judges. Much like hard screening and misdemeanor decriminalization, defense salary and caseload parity seek to prevent a tragedy of the criminal justice commons.

Conclusion

This Article demonstrated how and why the criminal justice system operates like a commons that is vulnerable to tragedy. Such tragedies occur when too many defendants enter the criminal justice system and can over-exploit its scarce resources, which lowers the quality of justice for all. Wrongful convictions, miscarriages of justice, excessive punishments, and assembly-line guilty pleas exemplify such tragedies. The justice system functions as an open-access resource for defendants. Open-access natural resources and the criminal justice system share two features that underpin tragedy: limited excludability and subtractability. Although the criminal justice system's resources are finite, constitutional rights prohibit the government from excluding defendants from using these resources to defend themselves. Each defendant's use of justice system resources can result in over-exploitation that imposes negative externalities onto other defendants — such as delays, under-investigation, and increased pressure to plead guilty — that reduce the quality of justice. Yet wealthier defendants disproportionately impose unaccounted-for costs onto lower-income ones. Furthermore, unlike indigent defendants, affluent ones can protect themselves against these negative externalities.

Various factors contribute to a tragedy of the criminal justice commons and produce injustices for defendants. Overcriminalization increased the number of defendants who enter the criminal justice commons and can consume its resources. Interrelatedly, the criminal procedure revolution drove up the number of claims that each defendant can bring, the resources they can consume, and the

unaccounted-for costs they can impose onto other defendants. The justice system responded to higher resource pressures through two mechanisms that encourage defendants to self-exclude from the criminal justice commons and consume few resources: coercive plea bargains and underfunding.

Three law reform initiatives — hard screening, misdemeanor decriminalization, and defense salary and caseload parity — aim to address the core factors that underpin a tragedy of the criminal justice commons. Hard screening and misdemeanor decriminalization limit individuals' entry into the criminal justice commons and insulate them against the downstream consequences of coerced plea bargains and underfunding. Defense salary and caseload parity, for its part, may protect defendants against under-investigation, under-litigation, and strong pressures to plead guilty — all of which flow from defense underfunding.

This Article offered a new way to understand the criminal justice system, the forces that shape its daily functioning, and its susceptibility to collective action problems. Once we conceptualize the justice system as a commons, we can devise novel law reform initiatives that address the problems of limited excludability and subtractability to prevent tragedy. We can explore mechanisms that protect open-access resources and their users against the collapse of criminal justice and its lasting devastation. And we can look into unexpected research areas — such as property law, natural resource law, and political economy — for insights into how we can improve the quality of criminal justice. Indeed, some scholars have shown that tragedies of the commons can — and have been — avoided in the context of open-access natural resources.[391] Ultimately, this Article lays the groundwork for future research into the criminal justice commons and the ways to prevent its further demise.

[391] OSTROM, *supra* note 10, at 58-101, 182-214.