School of Law
UNIVERSITY OF GEORGIA
Prepare. Connect. Lead.

Georgia Criminal Law Review

Volume 2 | Number 2 Article 5

2024

Paying for Prison: Equal Protection Remedies for the United States' Wealth Discrimination Problem

Alexandra Smolyar
University of Georgia School of Law

Paying for Prison: Equal Protection Remedies for the United States' Wealth Discrimination Problem

Cover Page Footnote

* J.D. Candidate, 2024, University of Georgia School of Law; B.A., 2021, University of Georgia. I thank Professor Lori Ringhand for her guidance and feedback on this Note.

PAYING FOR PRISON: EQUAL PROTECTION REMEDIES FOR THE UNITED STATES' WEALTH DISCRIMINATION PROBLEM

Alexandra Smolyar[*]

The American dream promises wealth, mobility, and security, yet daily millions of Americans live in abject poverty. What's more, state and local policies render low-income people uniquely vulnerable to criminalization, further lessening their ability to attain this purported American dream. These effects are not incidental. Rather, they reflect a complexly interwoven system of wealth-based discrimination oftentimes promulgated and perpetuated by government actors. Yet, most constitutional anti-discrimination measures do not reach wealth-based discrimination despite the horrific everyday effects felt by low-income communities nationwide. The criminalization of poverty compounds these problems to create a never-ending cycle of discrimination and collateral consequences whose aftershocks are felt for generations to come. These problems beg solutions in the form of expanded constitutional protection for low-income people, namely, in holding government actors accountable for their anti-poor policies by creating a bright-line rule for wealth-based discrimination to be regarded at a higher level of scrutiny. Modern reality elucidates the extent to which the current body of relevant law is not only muddled, but out of touch with Americans' every-day, and creates more questions than answers as to how to reconcile this ever-growing problem. As more and more low-income people face jail solely on account of their poverty by the day, recognizing their plight as one of discrimination highlights the systemic importance of this issue. Recognizing the criminalization of poverty as a constitutional problem rather than isolated within the criminal justice context commands the gravity of the courts that it deserves, while preserving remedies for low-income people whose rights are violated on the daily.

This Note explores how the Supreme Court's current Equal Protection jurisprudence inadequately addresses issues of

[*] J.D. Candidate, 2024, University of Georgia School of Law; B.A., 2021, University of Georgia. I thank Professor Lori Ringhand for her guidance and feedback on this Note.

wealth-based discrimination, particularly within the criminal justice system. The Note proposes a strict scrutiny framework towards wealth-based discrimination based on the complex social, political, economic, and legal forces that render low-income people disproportionately vulnerable to criminalization. Above all, this Note advocates for a reconsideration of how legal advocates address this complex sociopolitical issue as a means of radical lawyering and holding the government accountable for its discrimination against low-income people.

.

TABLE OF CONTENTS

I. INTRODUCTION

For many Americans, the American dream is not a dream—it is a nightmare. Since its dawn, the American ethos has promoted a vision of upwards mobility incompatible with its reality. While this purported dream promises upwards social mobility, economic enterprise, and abundance, this vision is inaccessible for most Americans. Rather, many Americans face turbulent economic instability throughout their lives. Nearly one in ten Americans fall below the poverty line.[1] Higher-income households continue to gain greater shares of the country's capital while low-income people lose more and more.[2] Higher-income Americans hold 79% of the United States' aggregated wealth shares, while low-income Americans hold a mere 4% and struggle to get by.[3] Intersecting with this growing trend of economic instability, the United States also incarcerates a staggering two million people, more than any other country in the world.[4] Low-income people are disproportionately more likely to encounter the criminal justice system throughout their lives.[5] Most of the incarcerated population faces poverty before entering the

[1] Juliana Menasce Horowitz, et al., *Trends in income and wealth inequality*, PEW RSCH. CTR. (Jan. 9, 2020) https://www.pewresearch.org/social-trends/2020/01/09/trends-in-income-and-wealth-inequality/. It is worth noting that the poverty line is perhaps not the best metric for assessing income inequality in the United States, or for defining "low income" as a whole. The poverty line presents challenges with defining low income in the United States because this number often does not accurately reflect the "minimum" to satisfy the cost of living. For the purposes of this Note, when relevant, "low income" will be defined roughly at the poverty line. For more information about the difficulty of measuring poverty, *see*, *e.g.*, Lillian Kilduff, *How Poverty in the United States Is Measured and Why It Matters*, POPULATION REFERENCE BUREAU (Jan. 31, 2022), https://www.prb.org/resources/how-poverty-in-the-united-states-is-measured-and-why-it-matters/.

[2] Horowitz et al., *supra* note 1.

[3] *Id.*

[4] Wendy Sawyer & Peter Wagner, *Mass Incarceration: The Whole Pie 2022*, PRISON POL'Y INITIATIVE (Mar. 14, 2022), https://www.prisonpolicy.org/reports/pie2022.html.

[5] Benjamin H. Harris & Melissa S. Kearney, *The Unequal Burden of Crime and Incarceration on America's Poor*, BROOKINGS INST. (Apr. 28, 2014), https://www.brookings.edu/blog/up-front/2014/04/28/the-unequal-burden-of-crime-and-incarceration-on-americas-poor/ (explaining that low-income and minority communities disproportionately bear the burden of high crime and incarceration rates).

criminal justice system and will remain impoverished, if not becoming more deeply so, after incarceration.[6]

This state of affairs reflects a long and complex history of wealth-based discrimination at the hands of both government and private actors dating back to the founding of the United States. Today, discrimination based on wealth is generally legally permissible insofar as it rationally relates to legitimate government interests.[7] Accordingly, the Fourteenth Amendment's Equal Protection clause, the primary constitutional mechanism for addressing government-inflicted discrimination, does little to address the plights of low-income Americans. This is in part because the Supreme Court requires only rational basis review for laws leveraged against low-income people, creating a presumption of validity for laws that often leverage extraordinary harm against low-income communities.[8]

Over the past fifty or so years, distinctions based on individuals' socioeconomic status have rendered low-income people more and more vulnerable to exploitation by the government, and particularly vulnerable to over-criminalization. The United States' extensive history of criminalizing the poor resurged in modern times during the Reagan administration at the outset of the War on Drugs and the push towards heightened policing to make American communities "safer."[9] Since then, incarceration has boomed into a large industry, interested in and premised on the growth of capital

[6] For data on indigent criminal defendants' income before incarceration, *see* BERNADETTE RABUY & DANIEL KOPF, DETAINING THE POOR: HOW MONEY BAIL PERPETUATES AN ENDLESS CYCLE OF POVERTY AND JAIL TIME (2016), https://www.prisonpolicy.org/reports/DetainingThePoor.pdf. For information demonstrating the link between incarceration and poorer social and economic outcomes, *see Connections Among Poverty, Incarceration, and Inequality*, INST. FOR RSCH. ON POVERTY (May 2020), https://www.irp.wisc.edu/resource/connections-among-poverty-incarceration-and-inequality/.

[7] *See* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973) (synthesizing a body of law to reaffirm that wealth-based discrimination is only reviewed at the rational basis level).

[8] *Id.* Most scholars agree that *Rodriguez* is the case on point about wealth-based discrimination, but as discussed further throughout this Note, other case law and scholars suggest that this issue is much more multi-faceted than *Rodriguez*.

[9] For an overview on the policies leading to this moment of historical mass incarceration, *see generally* Monique Ositelu, *Mass Incarceration in the U.S.* in *Equipping Individuals for Life Beyond Bars*, NEW AMERICA, https://www.newamerica.org/education-policy/reports/equipping-individuals-life-beyond-bars/mass-incarceration-in-the-us (last updated Nov. 4, 2019).

and generating greater revenues.[10] As incarceration has boomed, so too has the wealth inequality gap, and the two trends converge to create a general socioeconomic climate hostile and predatory towards the majority of low-income Americans.[11]

Into the modern day, government policies serve to disproportionately target and impact the poor while presenting opportunities for local governments to generate revenue at low-income people's expense.[12] Cities charge inordinate fines and fees for petty misdemeanor offenses, resulting in low-income Americans' incarceration and bankruptcy.[13] These discriminatory practices result in myriad collateral consequences not only for the individual, but for low-income communities at large.[14] In a country founded upon the principle of equal justice for all, the Supreme Court turns a blind eye to low-income Americans' experiences by deferring to state and local governments' judgment on what constitutes a legitimate exercise of power. Because of the increasing salience of wealth-based discrimination in the United States, the Court should reconsider its Equal Protection jurisprudence and apply heightened scrutiny to cases involving wealth-based discrimination.

This Note challenges Equal Protection jurisprudence placing socioeconomic status in the category of rational basis review, ultimately concluding that the social, economic, and legal problems evinced by the criminalization of poverty support the proposition that the Court should review poverty-based classifications at a higher level of scrutiny. First, this Note examines Equal Protection jurisprudence relating to wealth-based discrimination, which places socioeconomic status at the level of rational basis review rather than strict or intermediate scrutiny.[15] This Note then assesses the legal inconsistencies over time and the difficulty of applying

[10] *Id.*

[11] *See* Horowitz et al. *supra* note 1 (illustrating the growth in the wealth gap between 1983 and 2016); *see also Prison Population Over Time*, SENT'G PROJECT, https://www.sentencingproject.org/research/ (demonstrating that the American prison population has increased by 500% since the early 1980s).

[12] *See generally* PETER EDELMAN, NOT A CRIME TO BE POOR (2017) (outlining many of the ways state and local governments criminalize poverty, like through the imposition of legal financial obligations, modern day debtors' prisons, money bail schemes, and more).

[13] *Id.*

[14] *Id.*

[15] *See infra* Part II.

standards, in particular where wealth-based discrimination takes form by criminalizing poverty.[16] Other scholars similarly acknowledge the unresolved tensions between these two different lines of case law, although they come to a different conclusion about which standard should govern.[17] This Note, however, distinctly analyzes these two confounding standards in conjunction with the greater climate of anti-poor, wealth discriminatory practices within society and government at large to carve out greater protection for low-income people while demonstrating how wealth-based discrimination fits within the preexisting three-tier scrutiny system.

Further, this Note explores how the Supreme Court erred in its characterization of socioeconomic status as at the level of rational basis review.[18] This assertion branches from the basic proposition that anti-poor discrimination began with the founding of the United States and was rampantly exacerbated through the mid-to-late 20th century, culminating in a pronounced era of government-endorsed anti-poor sentiment.[19] This history, combined with the realities of low-income people in the United States today, demonstrates how impoverished people as a class fit the already-established criteria that the Court requires for heightened scrutiny. This Note likewise addresses some of the tensions created by the lack of clarity offered by the Court when it comes to analyzing wealth-based discrimination. Finally, this Note engages with modern-day examples of the criminalization of poverty and how heightened scrutiny could provide greater protection to not only indigent criminal defendants specifically, but all low-income Americans by

[16] *See infra* Parts II, III.

[17] *See*, *e.g.*, Robert William Gordon Wright, Note, *Pretrial Detention of Indigents: A Standard Analysis of Due Process and Equal Protection Claims*, 51 GA. L. REV. 707 (2020) (specifically applying *Rodriguez* and *Bearden* to bail reform measures and concluding that the hybrid, factors-based approach in *Bearden* is appropriate for wealth-based discrimination of indigent defendants facing pretrial detention); *see also* Tyler Smoot, *Punishing the Poor: Challenging Carceral Debt Practices under Bearden and M.L.B.*, 23 U. PA. J. CONST. L. 1086 (Dec. 2021) (analyzing *Rodriguez* and *Bearden* and arguing that *Bearden* is an appropriate standard for criminal debt collection). While other scholars have written on this topic in recent years, the amount of scholarship is nonetheless surprisingly lacking despite growing popular concern about the criminal justice system.

[18] *See infra* Part III.

[19] *See infra* Part IV.B (discussing the history of wealth-based discrimination in the U.S.).

creating greater government accountability and providing more protection to vulnerable members of society.

This Note synthesizes a body of literature concerning the criminalization of poverty, Equal Protection law, and Equal Protection law as applied to socioeconomic status, but carves out a new path to approach issues of low-income people facing discrimination within the criminal justice system while preserving the tiers of scrutiny used by the Court. At the time of writing,[20] most of the Supreme Court decisions dictating the treatment of wealth-based discrimination within the criminal justice system came down in the mid to late-20th century during a time of rampant social, economic, and political change. While the foundation for wealth-based discrimination in the United States has existed since the nation's inception, the period surrounding these decisions throughout the late 1970s and early 1980s accelerated and worsened anti-poor sentiment in the criminal justice system, culminating in an era of mass incarceration that disproportionately burdens low-income people.[21] Because the current climate for indigent defendants grows more and more dire by the day, the Court should revisit its Equal Protection analysis as applied to low-income defendants and invoke a higher standard of scrutiny.

II. EXISTING EQUAL PROTECTION JURISPRUDENCE & ANALYSIS OF WEALTH-BASED DISCRIMINATION

As it stands, the Supreme Court generally reviews challenges to discrimination based on socioeconomic status at the rational basis level.[22] To survive rational basis review, a statute or policy need only operate rationally to further a legitimate government interest.[23] Typically, the Court affords broad discretion and deference to the states in what states consider to be a "legitimate"

[20] This Note was primarily drafted and researched between August 2022 and January 2022. Unless otherwise noted, all research and analysis reflects understandings as of that time period.

[21] *See infra* Part IV (discussing the conditions of wealth-based discrimination in the U.S. throughout time as both a historical and modern-day practice).

[22] *See generally Rodriguez*, 411 U.S. 1.

[23] *Id.* at 40 (stating that rational basis review "only requires that the State's system be shown to bear some rational relationship to legitimate state purposes").

interest.[24] Generally, states can name any number of their police powers—pertaining to the health, safety, and wellbeing of their population—to justify the basis for such a discriminatory policy without much pushback from the courts. Thus, to be subject to rational basis review is oftentimes to escape protection from the judiciary.

Conversely, courts review a narrow set of classifications—chiefly race-based classifications—under a strict scrutiny standard.[25] To determine whether a classification warrants heightened scrutiny, the Court analyzes characteristics of the affected class, such as the characteristic's general immutability, whether there is any history of discrimination, and the protections awarded to that group through the political process. In the 1940s, Justice Stone introduced the idea that "discrete and insular minorities" subject to historical discrimination may require greater protection under the law in the ever-famous fourth footnote of *United States v. Carolene Products Co*.[26] Over time, the Court has gradually fleshed out what constitutes a "discrete and insular minority" and has accordingly afforded lesser or greater levels of scrutiny to different types of discrimination depending on the type of classification. In its infamous *Korematsu* decision, the Court asserted that "all legal restrictions which curtail the civil rights of a single racial group are immediately suspect" and accordingly that racial classifications require heightened review because of the United States' deeply-held history of vitriolic racial discrimination.[27] Later, the Court carved out intermediate scrutiny for sex-based discrimination, requiring that state and local governments justify sex-based classifications in

[24] *Id.* at 41 (asserting that generally, "the members of a legislature necessarily enjoy a familiarity with local conditions which this Court cannot have [thus] the presumption of constitutionality can be overcome only by the explicit demonstration that a classification is a hostile and oppressive discrimination against particular persons and classes . . . .").

[25] *See* Korematsu v. United States, 323 U.S. 214, 215 (1944). While the *Korematsu* decision is disfavored and infamous for its racist implications, it is generally considered the first case to expressly place racial discrimination at the level of strict scrutiny.

[26] United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938).

[27] *Korematsu*, 323 U.S. at 215.

a manner less exacting than strict scrutiny, but more so than rational basis.[28]

Laws that discriminate solely based on wealth, however, do not trigger heightened scrutiny.[29] Since 1973, the Court has squarely established that discrimination based on socioeconomic status need only satisfy rational basis review to survive challenges. In the seminal case *San Antonio Independent School District v. Rodriguez*, the Court considered an Equal Protection challenge to the State of Texas's school funding scheme.[30] This arrangement, which funded public schools through local property taxes, caused lower-income areas to be taxed at higher rates leaving them less to spend on education, while wealthy areas benefitted from lower tax rates with conversely *more* to spend on schooling.[31] As a result of this policy, lower-income school districts suffered from disparate—and worse—educational outcomes while higher-income schools in the same geographic area excelled.[32] While the Court conceded that poorer communities suffered distinctly from this policy as opposed to their wealthier counterparts, the Court ultimately still declined to recognize the "poor" as a suspect class.[33] Because *Rodriguez* neither involved "the absolute deprivation of a fundamental right" nor a distinctly, definable suspect class, the Court reasoned that applying strict scrutiny would be inappropriate.[34]

In doing so, the Court set forth a two-part test to determine whether policies that discriminate on the basis of wealth trigger heightened scrutiny, first, requiring identification of a class that "because of their impecunity they were completely unable to pay for some desired benefit," and second, finding that the challenged law functions to absolutely deprive that class of a fundamental right.[35] In the case of *Rodriguez*, the Court could not identify a burdened classification with enough specificity to warrant applying

[28] *See* Craig v. Boren, 429 U.S. 190, 198 (1976) ("[C]lassifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives").

[29] Harris v. McRae, 448 U.S. 297, 323 (1980).

[30] San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973)

[31] *Id.* at 11–13.

[32] *Id.*

[33] *Id.* at 19.

[34] *Id.* at 29.

[35] *Id.* at 20.

heightened scrutiny. Moreover, the Court found that regardless of the classification, the affected people were not *absolutely* deprived of their right to education. Since the Court handed down *Rodriguez*, it has been widely cited as the decisive case on point about wealth-based discrimination, and accordingly wealth-based discrimination is mostly afforded rational basis review.[36]

Despite the consensus that *Rodriguez* guides the legal analysis of wealth-based discrimination, the Court's approach to wealth-based discrimination has been, in large part, inconsistent and lacking legal clarity. Some scholars question whether the Court has even decisively concluded how to classify wealth-based discrimination for Equal Protection purposes, and whether *Rodriguez* truly established that wealth-based classifications are automatically all reviewed at the rational basis level.[37] These scholars assert that rather than having any bright line rules, the Court instead applies its jurisprudence differently depending on the context, with no clear parameters circumscribing the issue of wealth-based discrimination more generally.[38] In fact, while *Rodriguez* is most cited as the seminal case on classifying the poor for Equal Protection purposes, some scholars point out that "the Court never actually decided the question in this case," making it even more unclear what the proper standard should be for low-income people facing discrimination.[39]

Of course, wealth-based discrimination often also intersects with other forms of oppression, creating difficulties in neatly classifying the type of discrimination and consequently, the appropriate level of judicial scrutiny.[40] While outside the scope of this particular Note,

---

[36] *See generally Rodriguez*, 411 U.S. 1. *See also* Ross *infra* note 39, at 342 (acknowledging that "[i]n the early 1970s, the Court decided the case of *San Antonio Independent School District v. Rodriguez*, which would serve as the foundation for the Court's eventual denial of suspect class status to the poor").

[37] *See* Henry Rose, *The Poor as a Suspect Class under the Equal Protection Clause: An Open Constitutional Question*, 34 NOVA L. REV. 407, 420–21 (2010) (asserting that the classification of the poor for Equal Protection purposes remains "an open constitutional question").

[38] *See*, *e.g.*, *id*.

[39] Bertrall L. Ross II & Su Li, *Measuring Political Power: Suspect Class Determinations and the Poor*, 104 CALIF. L. REV. 323, 342 (2016).

[40] It is important to note that poverty and wealth-based discrimination is an intersectional issue, touching race, gender, queer identity, ability, and more, and that these interact with one another to create vast webs of oppression. While this Note limits its focus to socioeconomic

it bears worth noting that courts have long grappled with how to classify discrimination when two "competing" protected classes exist, an issue more than ripe for consideration. In the voting context, for example, the Court has compared its approach to wealth-based discrimination to that of racial discrimination, stating that "[l]ines drawn on the basis of wealth or property, like those of race, are traditionally disfavored," although the Court ultimately decides cases in the voting context based on the deprivation of a fundamental right rather than of a discriminatory classification.[41] Despite precedent to the contrary, this language makes clear that there is some fundamental interest in protecting low-income people in society. The Court has not clarified to what extent this language extends to wealth-based discrimination in non-voting contexts, however, making it difficult to properly analyze wealth-based discrimination claims under the Equal Protection clause.[42] And, as discussed above, *Rodriguez* does not necessarily make a truly binding judgment about how to classify low-income people.[43] It is thus unclear when and where the Court considers wealth-based discrimination to be so distinctly severe as to justify applying heightened scrutiny.

On the other hand, the Court switches course when confronted with discrimination against indigent criminal defendants. In the criminal justice context, the Court has held that indigent defendants may not be denied their rights solely on the basis of their indigency. In 1956, the Court considered whether two indigent petitioners earlier convicted of armed robbery were entitled to free, certified copies of the court record upon appeal.[44] Writing for the Court, Justice Douglas asserted that "all people charged with crime must, so far as the law is concerned, 'stand on an equality before the bar of justice in every American court.'"[45] The Court applied rational basis review, concluding that "the ability to pay costs… bears no

status for operational purposes, full consideration of this topic warrants a greater conversation about other forms of oppression.

[41] Harper v. Virginia Bd. of Elections, 383 U.S. 663, 668 (1966).

[42] Rose, *supra* note 37.

[43] *See supra* Part II (discussion about *Rodriguez*'s clarity as a legal standard and scholars' qualms with *Rodriguez* as a whole).

[44] Griffin v. Illinois, 351 U.S. 12, 13 (1956) (outlining the facts of the case).

[45] *Id.* at 1.

rational relationship to a defendant's guilt or innocence" and therefore that states could not discriminate against criminal defendants solely because of their poverty.[46] The Court ultimately ruled in the indigent petitioners' favor, requiring that the government find an alternative means to promulgate their interests without similarly disadvantaging them because of their indigency.[47]

Fifteen years later, in *Tate v. Short*, the Court similarly held that it violated the Equal Protection clause to incarcerate indigent defendants because they are unable to pay off court fines, but to permit payment-only punishment for people of greater economic means.[48] Here, the Court applied Equal Protection analysis to a Texas law requiring incarceration for indigent defendants for a "sufficient time to satisfy the fines" if they could not pay off their fines.[49] For the petitioner, who owed a cumulative $425 in fines related to various traffic offenses, this amounted to 85 days of incarceration solely because he was too poor to outright pay off his fines.[50] The Court rejected the State's rationale that this policy "augment[ed] the State's revenues," stating that "the defendant cannot pay because he is indigent and his imprisonment, rather than aiding collection of the revenue, saddles the State with the cost of feeding and housing him for the period of his imprisonment."[51]

In 1983, the Court yet again addressed the issue of whether a state could incarcerate an indigent probationer simply because he was unable to pay off fines associated with his probation.[52] Here, the Court held that the State unconstitutionally discriminated against the probationer because of his socioeconomic status using a hybrid factors-based test, finding that a sentencing court should consider "the entire background of the defendant, including his

[46] *Id.* at 17–18.

[47] *Id.* at 19–20 (holding that petitioners' constitutional rights were violated by being denied copies of the court record upon appeal solely by way of their indigency, and that rights obligations may be satisfied through "other means of affording adequate and effective appellate review to indigent defendants" if not through providing entitlement to a court record outright).

[48] Tate v. Short, 401 U.S. 395, 397–98 (1971) (holding that indigent petitioner's incarceration for nonpayment constituted unconstitutional wealth-based discrimination).

[49] *Id.* at 396.

[50] *Id.*

[51] *Id.* at 398.

[52] Bearden v. Georgia, 461 U.S. 660, 666–67 (1983).

employment history and financial resources," before deciding whether incarceration reasonably related to State interests.[53] The Court rejected the assertion that "a probationer's poverty by itself indicates that he may commit crimes in the future and thus that society needs for him to be incapacitated," finding the policy unconstitutional.[54] Under *Bearden*, then, the Court held that "[o]nly if alternate measures are not adequate to meet the State's interest in punishment and deterrence may the court imprison a probationer who has made sufficient bona fide efforts to pay."[55] In a novel holding, this decision thus created an interesting convergence between the Equal Protection and Due Process clauses. While the Court facially applied rational basis review, in practice the court departed from the typical format of rational basis review by incorporating Due Process considerations otherwise absent from rational basis review. Instead, the Court's intensive factual analysis of the case at hand resembled something akin to heightened scrutiny with an eye towards curtailing the government's abuse of low-income defendants.

These concurrent lines of case law create a legal conniption. On the one hand, there is a consensus that—for the most part—courts should apply a straightforward rational basis review to issues of wealth-based discrimination under *Rodriguez*.[56] On the other hand, wealth-based discrimination cases in the criminal justice context indicate that the Court takes greater care in matters involving criminal defendants.[57] *Bearden* proposes a more demanding standard involving a factors-based analysis focused on achieving justice for individual defendants.[58] While the Court has sometimes come to equitable conclusions applying rational basis review, like in *Griffin,* the Court seems to mostly apply a standard unlike that of

[53] *Id.* at 670.

[54] *Id.* at 671.

[55] *Id.* at 672–73.

[56] *See generally* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973). *See also* Ross *supra* note 39, at 352 (highlighting that *Rodriguez* is recognized as the foundational case for denying suspect class status to the poor).

[57] *See generally supra* Part II (outlining the Court's jurisprudential approaches to wealth-based discrimination and highlighting the Court's more exacting approach when considering challenges involving criminal defendants); *see also* Bearden v. Georgia, 461 U.S. 660 (1983); Griffin v. Illinois, 352 U.S. 12 (1956); Tate v. Short, 401 U.S. 395 (1971).

[58] *See generally* Bearden, 461 U.S. 660.

other rational basis cases by conducting a more intensive analysis of the facts applied to defendants.[59] *Rodriguez* thus provides a less-than-straightforward approach to analyzing wealth-based discrimination cases that the Court indeed often departs from. Surveying the associated cases on wealth-based discrimination reveals that the Court approaches wealth-based discrimination inconsistently depending on the context without seemingly any rhyme or reason. When muddled with the possibly open question about whether *Rodriguez* even definitively concluded that low-income people do not receive heightened scrutiny, this line of cases makes it even more difficult to distinguish between the appropriate standards when faced with a policy that discriminates amongst individuals on the basis of wealth.

III. LEGAL INCONSISTENCIES WITHIN THE COURT'S APPROACH TO WEALTH-BASED DISCRIMINATION

The interplay between the Court's decision in *Rodriguez* and the Court's decisions in cases like *Griffin*, *Bearden*, and *Tate*, reveal a muddled standard applied to Equal Protection challenges of wealth-based discrimination. *Rodriguez* advances two main principles: first, in conjunction with *Harris v. McRae*,[60] that socioeconomic status standing alone does not trigger heightened scrutiny, and instead is reviewed at a level of rational basis review.[61] Second, that there may be some instances where wealth-based scrutiny triggers heightened scrutiny when the government deprives a definable class of citizens of an "absolute right," although it fails to make clear what may or may not constitute deprivation of a fundamental right.[62]

On the other hand, *Griffin, Bearden*, and *Tate*, demonstrate that there is something unique about the experience of low-income defendants in the criminal justice system that warrants heightened

[59] *See generally* Griffin, 351 U.S. 12.

[60] *See* Harris v. McRae, 448 U.S. 297, 323 (1980) (reiterating that "poverty, standing alone, is not a suspect classification" and that in the context of the Hyde Amendment, the fact that the indigent principally bear the burden of a legal restriction does not render the restriction "constitutionally invalid").

[61] San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973).

[62] *Id.*

scrutiny.[63] In *Bearden*, the Court departed from *Rodriguez* and the traditional framework of rational basis review—simply requiring that the government demonstrate that their laws are rationally related to a legitimate government purpose—by instead using a factors test, as discussed above.[64] In *Griffin* and *Tate,* similarly, the Court urged that defendants cannot face incarceration solely because of their indigency.[65] But these outcomes stem from something more than meets the eye, lending support to the idea that courts should adapt their Equal Protection analysis to reality by adopting a heightened scrutiny standard for wealth-based discrimination cases. Simply adhering to a basic rational basis level review only accelerates and compounds the problem of rampant wealth-based discrimination throughout the country.

This muddled, multi-layer analysis creates significant obstacles to justice because these two approaches can create completely disparate effects for those subject to wealth-based discrimination within the criminal justice system. Moreover, *Bearden* fails to meaningfully clarify when and where to apply its factors, how it precisely interacts with *Rodriguez*, and the correct way to apply it. All told, this line of cases suggests that the Court generally requires greater protections against wealth-based discrimination within the criminal justice system. Yet, this body of case law leaves a tremendous vacuum in which it is unclear what standards govern where, and where the Court limits its willingness to ward off wealth-based discrimination. This lack of judicial uniformity creates doubts when courts are tasked with resolving issues of wealth-based discrimination, especially within the criminal justice context. Indeed, in analyzing Florida's pretrial detention scheme, the Fifth Circuit in 1978 asserted that "[r]esolutions of the problems concerning pretrial bail requires a delicate balancing of the *vital interests* of the state with those of the individual," diverging from the typical language used to reflect a standard of rational basis review.[66]

Compounded with the hybrid approach set forth in *Bearden* a mere seven years later and the earlier body of case law reserving

[63] *Griffin*, 351 U.S. 12; *Bearden*, 461 U.S. 660; *Tate*, 401 U.S. 395.

[64] *Compare Bearden*, 461 U.S. 660 *with Rodriguez*, 411 U.S. 1.

[65] *Griffin*, 351 U.S. 12; *Tate*, 401 U.S. 395.

[66] Pugh v. Rainwater, 572 F.2d 1053, 1056 (5th Cir. 1978) (emphasis added).

special care for indigent criminal defendants,[67] there appears to be no practically uniform approach to wealth-based discrimination in the criminal justice context. These standards also confound one another where instead the qualities of low-income communities as a class can pave the way for greater constitutional protections. Most importantly, this impedes the Court's ability to come to equal and just resolutions for low-income defendants. Further, criminalization can happen before defendants technically enter the system in the form of increased neighborhood policing.[68] Low-income people are vulnerable to discrimination at the outset, as discussed in the following section of this Note. Considering the practices of local governments within the criminal justice system within the greater context of wealth-based discrimination paints a much-needed holistic picture of today's social ills to reach a generally applicable standard of strict scrutiny. In an era where wealth-based discrimination is increasingly socially, economically, and politically salient, these standards fail to provide clear guidance as issues of wealth-based discrimination hit the national litigation stream.

IV. ADAPTING STANDARDS TO REALITY

To complicate matters, the Court's approach to socioeconomic status is largely incompatible with the American realities of wealth-based discrimination. Low-income Americans experience discrimination at alarming rates, both legally and socially, in a large number of contexts. Moreover, this approach is incompatible with the framework set forth for Equal Protection jurisprudence because low-income status often constitutes an immutable characteristic, reflects a cognizable history of discrimination, and low-income people are often functionally deprived of meaningful access to the political process.[69] This problem is compounded by the

[67] *See Bearden*, 461 U.S. 660. *See also Griffin*, 352 U.S. 12; *Tate*, 401 U.S. 395.

[68] *See*, *e.g.*, David E. Patton, *Policing the Poor and the Two Faces of the Justice Department*, 44 FORDHAM URB. L. J. 1431, 1431–1435 (2017) (acknowledging the disproportionate effect of police misconduct on the poor and people of color).

[69] The Court has not always uniformly explained what makes a class suspect, but this Note proceeds on the widely understood notion that core factors include (1) the immutability of a characteristic, (2) a history of discrimination, and (3) deprivation of access to the political process. There is much discussion to be had about whether this is truly what makes a class "suspect," however, most practitioners agree that courts look to at least these three factors in

pressures of the criminal justice system, which implicates disproportionate rates of incarceration for low-income people, its collateral consequences, and the devastating effects of high fines and fees that impose serious financial hardship onto low-income families. A bright line approach to wealth-based discrimination would ensure more consistent applications of constitutional anti-discrimination law, ensure greater accountability when government actors harm low-income Americans, and assist in promoting judicial efficiency.

A. IMMUTABILITY OF SOCIOECONOMIC STATUS

Given the celebration of the American values of upward mobility and perseverance through financial difficulty, socioeconomic status hardly seems immutable or particularly discriminated-upon when it is taken for granted that people work hard and persevere through financial difficulty. However, the academic literature over the past fifty or so years demonstrates how socioeconomic status *is,* in fact, often static and difficult to change.[70] Despite the United States' characterization as the "land of opportunity," opportunity has become harder and harder to come by for most Americans.[71] Indeed, upwards social mobility has become more myth than reality for most Americans.

Today, economic status is increasingly governed by familial wealth. Between 1980 and 2000, the elasticity between parental income and a middle-age adult child nearly doubled, meaning that a parent's income and their child's future adult income is more and

determining the suspectness of a class. For a discussion on the development of these criteria but also an analysis on their inherent ambiguity, *see* Marcy Strauss, *Reevaluating Suspect Classifications*, 35 SEATTLE UNIV. L. R. 135, 142–168 (2011) (explaining the development of the factors used to assess the "suspectness" of a class and arguing that these criteria are highly discretionary to the detriment of cogent law).

[70] *See generally* ARIEL GELRUD SHIRO ET AL., STUCK ON THE LADDER: INTRAGENERATIONAL WEALTH MOBILITY IN THE UNITED STATES 5 (2022) (analyzing wealth mobility and the wealth inequality gap, specifically highlighting that "people with high incomes across their prime wealth accumulation years also tend to have more wealth and more upward mobility" as contrasted with people of lower income levels).

[71] *Id.*

more connected.[72] As of 2015, "approximately half of parental income advantages are passed on to children," demonstrating how the United States grows more and more socially and economically immobile by the day.[73] Low-income people are thus less and less likely to escape poverty by experiencing upwards social mobility, which contravenes the idea that socioeconomic status is fluid and easily changeable. Further, the plight of intergenerational poverty makes poor families' odds of fiscal solvency in the future slim to none given current economic conditions.[74] Thus, it is increasingly clear that low-income people cannot change their economic conditions as easily as convention would have it.

Moreover, income and wealth inequality continue to skyrocket. In 2021, Americans at the top of the income distribution spectrum earned 13.53 times higher income than those at the bottom, a number that continues to rapidly increase.[75] Poor Americans are thus at a severe economic disadvantage compared to the wealthy. While the ultra-wealthy may not represent a majority of the country's population, the wealth of the top 0.1% of earners represents 12.6% of shares in the American economy: the top 10% hold 68%.[76] In sharp contrast, the bottom 50% of earners hold a mere 3.2% of economic shares.[77] The ability of low-income people to attain valuable social and economic capital thus continues to evade them in the face of social and economic policy that widens the growing wealth gap. Because people cannot change their socioeconomic status, they remain stuck in the cycle of poverty.

---

[72] Tim Koechlin, *The Rich Get Richer: Neoliberalism and Soaring Inequality in the United States*, 56 CHALLENGE 5, 16 (2013).

[73] PABLO A. MITNIK AND DAVID B. GRUSKY, ECONOMIC MOBILITY IN THE UNITED STATES 4 (2015).

[74] *Id.*

[75] Jessica Semega & Melissa Kollar, *Increase in Income Inequality Driven by Real Declines in Income at the Bottom*, U.S. CENSUS BUREAU (Sept. 13, 2022), https://www.census.gov/library/stories/2022/09/income-inequality-increased.html#:~:text=That%20means%20income%20at%20the,2020%20to%204.52%20in%202021.

[76] FED. RSRV., DISTRIBUTION OF HOUSEHOLD WEALTH IN THE U.S. SINCE 1989, https://www.federalreserve.gov/releases/z1/dataviz/dfa/distribute/table/#quarter:129;series:Net%20worth;demographic:networth;population:all;units:shares (last updated Sept. 23, 2022) (select "Wealth" as wealth component, distribute by "Wealth Percentile", select units as "Shares (%)"),

[77] *Id.*

Low-income people's immutability also makes them highly visible to government actors and thus often much more vulnerable to anti-poor discrimination. As discussed further in this Note, this often results in increased criminalization. Increased criminalization creates paper trails, resulting in the creation of criminal records that follow low-income people throughout their lives. This type of discrimination may even result in the denial of life-sustaining welfare benefits, showing how wealth-based discrimination manifests in a variety of contexts to disempower and disable low-income people at every social turn.

B. HISTORY OF WEALTH-BASED DISCRIMINATION

Low-income people also bear the brunt of historical discrimination consistent with the criteria required for heightened scrutiny. In the earliest days of the United States, only landowning white men could vote and wielded all social, political, and economic capital at the expense of non-white, non-male, non-landed peoples.[78] Now, while that has changed by law,[79] the ills associated with economic deprivation still haunt the abilities of low-income people to fully function in society. Today, this historical discrimination manifests in government policies that subject low-income people to discrimination in myriad contexts.

This problem has resurged with a vengeance in modern times. In the 1980s, the Reagan administration promoted de-regulation and economic enterprise at the upper echelons at the expense of low-income communities.[80] Since 1983, higher-income families' shares of American wealth have rapidly increased, whereas middle-income and low-income wealth shares have steadily declined.[81] Over time, the government has done little to address this plight, with the

[78] *See* Stuart M. Blumin, *Making (White Male) Democracy: Suffrage Expansion in the United States from the Revolution to the Civil War*, The Gilder Lehrman Inst. of Am. Hist. (2018),https://www.gilderlehrman.org/history-resources/essays/making-white-male-democracy-suffrage-expansion-united-states-revolution (explaining that suffrage was highly restricted at the inception of American politics and gradually expended over time).

[79] *See infra* note 94 (citing the Fourteenth, Fifteenth, and Nineteenth Amendments to the Constitution, guaranteeing equal protection and due process of law, and granting all U.S. citizens the right to vote).

[80] *See generally* Koechlin, *supra* note 72.

[81] Horowitz et al., *supra* note 1.

United States rapidly defunding social welfare programs.[82] But, it was not always this way: this development represents a sharp turn away from the welfare-centered governance of President Roosevelt's New Deal and President Johnson's Great Society towards a system of governance actively perpetuating income inequality.[83] In the years preceding Reagan's presidency and pivotal reshaping of the American economy, government leaders greatly emphasized welfare programs and remedies for wealth inequality.[84] During the Reagan administration, however, low-income people were blamed for government failures and inefficiency and bore the burden of these reforms as the notorious image of the "welfare queen" proliferated throughout the country.[85] Now, the national government spends about 2% of its national income on "law and order" measures while it spends a mere 0.8% on welfare spending, and municipal governments often spend as much as 40% of their funding on policing.[86] This characterization of low-income communities continues to drive wealth-based discrimination today, in both common parlance and in chief, government policy.

From the 1980s onwards, neoliberal economic policies have exacerbated wealth inequality and in large part deconstructed the nascent welfare programs of the 1940s–1960s.[87] Less people receive

[82] Koechlin, *supra* note 72, at 14.

[83] For a general overview on the New Deal, *see generally* Catherine A. Paul, *The New Deal*, VCU LIBR. SOC. WELFARE HISTORY PROJECT (2018), https://socialwelfare.library.vcu.edu/eras/great-depression/the-new-deal/; for a general overview on the Great Society and President Johnson's War on Poverty, *see generally Great Society*, HISTORY, https://www.history.com/topics/1960s/great-society (last updated Aug. 28, 2018).

[84] *See generally* Paul, *supra* note 83; *Great Society*, *supra* note 83.

[85] *See generally* Kaaryn Gustafson, "The 1980s: The Rise of the Welfare Queen" in *The Criminalization of Poverty*, 99 NW. U. J. CRIM. L. & CRIMINOLOGY 643, 655-658 (2009) (describing President Reagan's use of the "welfare queen" stereotype during his campaign and later presidency to crack down on public welfare). As described in *The Criminalization of Poverty*, "welfare queen" was—and oftentimes still is—used as a pejorative stereotype against low-income women of color stemming from anecdotes of two women convicted of welfare fraud.

[86] Christopher Ingraham, *U.S. spends twice as much on law and order as it does on cash welfare, data show*, WASH. POST (Jun. 4, 2020, 8:54 AM), https://www.washingtonpost.com/business/2020/06/04/us-spends-twice-much-law-order-it-does-social-welfare-data-show/.

[87] *See generally* Koechlin, *supra* note 72 (addressing the role of neoliberal economic policies in dismantling social welfare programs).

welfare benefits now than before, in large part reflective of the stringent requirements the government imposes to qualify for welfare.[88] And as of 2006, the value of the American minimum wage had fallen by more than a third compared to its value in 1968.[89] The poor thus get poorer as the rich get richer as the direct result of these policy decisions.

In addition to policy decisions that directly disempower the poor, programs aiding the wealthy also demonstrate the discrepancies in the government's treatment between poor and wealthy individuals. Between 1981 and 1989, and again from 2001–2009, Presidents Ronald Reagan and George W. Bush aggressively promoted reducing tax burdens for wealthy Americans which resulted in collateral consequences for lower-income Americans.[90] Since 1980, the top marginal income tax rate has been cut in half.[91] Accordingly, wealthy people have been relieved of tax burdens on inheritances over $1 million.[92] And, throughout President Bush's presidency, 30% of tax cuts were leveraged towards the top 1 percent of income earners.[93] These policies purposefully and disparately confer benefits to the higher echelons at the expense of the working class.

These economic policies run concurrent with and directly feed the contemporaneous birth of American mass incarceration. The Reagan administration not only reshaped the American economy, but also the criminal justice system through the War on Drugs, Sentencing Reform Act of 1984, and Anti-Drug Abuse Acts of 1986 and 1988, all of which disproportionately punished low-income people.[94] Moreover, the characterization of low-income people as the source of America's woes resulted in "aggressive welfare fraud investigations and criminal prosecutions," which made low-income people even more vulnerable to heightened government scrutiny

[88] *Id.* at 14.

[89] *Id.*

[90] *See* David Kocieniwski, *Since 1980s, the Kindest of Tax Cuts for the Rich*, N.Y. TIMES (Jan. 18, 2012), https://www.nytimes.com/2012/01/18/us/politics/for-wealthy-tax-cuts-since-1980s-have-been-gain-gain.html (describing President Reagan's "overhaul" of the tax code and later, President George W. Bush's policy of lowering tax rates on capital gains and dividends, allowing wealthy Americans to gain higher returns on investment).

[91] *Id.* at 14–15.

[92] *Id.*

[93] *Id.*

[94] *See generally* Ositelu, *supra* note 9.

and surveillance.[95] These conservative reforms demonstrate not only a history of discrimination, but also indicate how government policies *make* poverty immutable, rigid, and largely unchangeable, intertwining with other indicia of "suspectness." Moreover, the fact that much of this discrimination is a direct result of government action thus makes the Equal Protection clause the appropriate vehicle to challenge wealth-based discrimination.

C. POLITICAL DISENFRANCHISEMENT OF LOW-INCOME PEOPLE

As briefly addressed above, at the inception of the United States only propertied white men could legally vote.[96] Of course, this changed constitutionally upon the passage of the Fourteenth, Fifteenth, and Nineteenth Amendments, which granted all citizens—all "persons born or naturalized in the United States" — the right to vote.[97] But unfortunately, it did not follow that all people *eligible* to vote could still feasibly vote. During the 2016 presidential election, "[t]he voting rate among low-income individuals . . . was about 46 percent compared to over 67 percent for those with income above twice the FPL [federal poverty line]," a trend that repeats across election cycles.[98] The absence of low-income voters most likely affects election outcomes, too: "if potential low-income voters participated in the 2016 election at a similar voting rate as those with higher incomes, then those additional low-income voters would match or exceed the presidential election margin in 15 states," including states that experienced tumultuous voting rights changes that limited peoples' ability to vote.[99] While most of these people are eligible or are even registered to vote, socioeconomic barriers prevent them from voting. These conditions, like issues with transportation, illness, disability, work scheduling, and the like,

[95] Gustafson, *supra* note 85, at 659.

[96] *See* Blumin *supra* note 78 (addressing the legal changes enfranchising all Americans).

[97] U.S. CONST. amend. XIV; U.S. CONST. amend. XV.; U.S. CONST. amend. XIX.

[98] ROBERT PAUL HARTLEY, THE VOTING POTENTIAL OF LOW-INCOME AMERICANS IN UNLEASHING THE POWER OF POOR AND LOW-INCOME AMERICANS: CHANGING THE POLITICAL LANDSCAPE (2020), https://www.poorpeoplescampaign.org/wp-content/uploads/2020/08/PPC-Voter-Research-Brief-18.pdf.

[99] *Id.*

make lower-income Americans much less likely than those at higher-incomes to vote when all else is held equally.[100] Government policies likewise directly and indirectly facilitate this inability to participate in the democratic process because election days are typically not provided off of work, and many districts have polling locations that may be difficult to access without proper transportation.[101]

Disenfranchisement of low-income people is also exacerbated by its intersection with the criminal justice system. Around 5.85 million Americans with felony convictions, and some with mere misdemeanor convictions, cannot vote.[102] Most of those with felony convictions are low-income before incarceration and remain impoverished upon release, compounding the already existing problem of de facto low-income voter disenfranchisement.[103] Even more precisely, some scholars have studied the link between wealth and voter disenfranchisement in the form of "penal disenfranchisement."[104] In Alabama, for example, a 2017 statute requires that offenders of crimes involving moral turpitude[105] pay off all court-related fines and fees in order to reinstate their voting rights.[106] Eight states require full payment of economic sanctions before re-enfranchisement can occur, while several other states impose conditions on consistent payment of fees or otherwise

---

[100] *Id.* at 14.

[101] *Id.*

[102] *Felony Disenfranchisement Laws (Map)*, AM. C.L. UNION, https://www.aclu.org/issues/voting-rights/voter-restoration/felony-disenfranchisement-laws-map (last visited Jan. 14, 2023).

[103] Beth A. Colgan, *Wealth-Based Penal Disenfranchisement*, 72 VAND. L. REV. 55 (Jan. 2019) (

[104] *Id.* at 58.

[105] Many kinds of crimes may constitute a "crime of moral turpitude" depending on the jurisdiction and context. The term is most often encountered in an immigration context, where a "crime involving moral turpitude" "has been vaguely defined as a depraved or immoral act, or a violation of the basic duties owed to fellow man, or recently as a 'reprehensible act' with a *mens rea* of at least recklessness." *See* IMMIGRANT LEGAL RES. CTR., § N.7 CRIMES INVOLVING MORAL TURPITUDE 112 (2010). For a brief discussion on what constitutes a "crime involving moral turpitude" under this particular Alabama provision, *see id.* at 57-58 (explaining that what constitutes a crime of moral turpitude under Alabama law sufficient to result in disenfranchisement is highly discretionary and varies county-by-county).

[106] *Id.*

payment-related conditions on parole and probation.[107] For low-income offenders, this is often far out of reach. These policies do little more than exclude low-income people from the political process, resulting in the vast under-representation of low-income people at the political level.

But, low-income communities' lack of political power does not end at the polls. In addition to voting impediments, low-income people are poorly represented in government.[108] This takes shape not only through the low number of low-income legislators and high number of extraordinarily wealthy legislators, but also through the ways that legislators fail to advocate for the wants and needs of their low-income constituents.[109] As discussed briefly above, much of the discrimination leveraged against low-income communities in recent history has taken form in government regulation that benefits the wealthy and disparages the poor.[110] Likewise, whatever political power low-income people may have commanded throughout the progressive reforms of the mid-1900s has since dissipated. Social science studies find that low-income communities have much less influence on legislative policy than other income classes, in particular "the poor have significantly less influence on public policy and legislators' roll call votes than members of other income classes," and specifically that "the views of the wealthy had a strong relationship with government policy."[111] Thus, in both the voting realm and sphere of general political influence, low-income people remain under-represented in government at every turn.

---

[107] *Id.* at 71–80.

[108] *See*, *e.g.*, Karl Evers-Hillstrom, *Majority of lawmakers in 116th Congress are millionaires*, OPEN SECRETS (Apr. 23, 2020, 9:14AM), https://www.opensecrets.org/news/2020/04/majority-of-lawmakers-millionaires/. While this information is a tad outdated as of the writing of this Note, it seems to largely hold true over time.

[109] Ross, *supra* note 30, at 344 (citing data from NICHOLAS CARNES, WHITE-COLLAR GOVERNMENT: THE HIDDEN ROLE OF CLASS IN ECONOMIC POLICY MAKING (2013)).

[110] *See supra* Section III.B, III.C (discussing the history of wealth-based discrimination in the United States and government policies contributing to wealth disparities).

[111] *Id.* at 346–47 (citing MARTIN GILENS, AFFLUENCE AND INFLUENCE: ECONOMIC INEQUALITY AND POLITICAL POWER IN AMERICA 1-4 (2012)).

D. MODERN DAY EXAMPLES OF WEALTH-BASED DISCRIMINATION & THE CRIMINALIZATION OF POVERTY

Current Equal Protection jurisprudence has failed low-income people historically and remains poorly equipped to address modern wealth-based discrimination. These historical and social trends intertwine with the criminalization of poor people, resulting in discrimination of indigent defendants. In the criminal justice system, the consequences of wealth-based discrimination are particularly grave, ranging from the imposition of debilitating court debts to incarceration or even felon status, which directly disenfranchises and deprives criminal defendants of their rights.

The current legal landscape is also poorly equipped to moderate the myriad forms of criminalizing poverty, some of which could more clearly invoke the protections of a *Bearden*-style heightened scrutiny while others do not. This unclear approach makes it difficult to parse out the appropriate way to protect low-income people vulnerable to criminalization. Several modern-day examples demonstrate this point. In chief, jurisdictions across the country often assess legal financial obligations (LFOs) on criminal defendants, causing low-income offenders to rapidly accrue thousands of dollars in debt that are later compounded with hefty interest rates.[112] Depending on the jurisdiction, courts may impose up to 40% surcharges on court-related debt.[113] Failure to pay these debts carries the threat of incarceration or re-incarceration in 44 states.[114] For low-income defendants, this quickly becomes a never-ending cycle that results in deeper poverty and manifold collateral consequences. Applying simple rational basis review permits this discrimination to go on without a meaningful inquiry into how low-income people are uniquely impaired by these policies.

First, modern-day "debtor's prisons" reincarnate debtor's prisons from years' past, incarcerating people who cannot pay off fines or

[112] Monica Llorente, *Criminalizing Poverty Through Fines, Fees, and Costs,* AM. BAR ASS'N (Oct. 3, 2016), https://www.americanbar.org/groups/litigation/committees/childrens-rights/articles/2016/criminalizing-poverty-fines-fees-costs/.

[113] *Criminalization of Poverty as a Driver of Poverty in the United States,* HUM. RTS. WATCH (Oct. 4, 2017), https://www.hrw.org/news/2017/10/04/criminalization-poverty-driver-poverty-united-states.

[114] Llorente, *supra* note 112.

fees for traffic offenses and minor misdemeanors.[115] Many cities across the United States impose debts on low-income people in attempts to raise municipal revenues, which punishes people because of their inability to pay court fees.[116] As briefly discussed above, because state and local government actors impose these discriminatory policies onto their low-income populations, applying Equal Protection principles is appropriate, and here the need for its revision is particularly glaring.[117]

In particular, the city of Ferguson, Missouri, has been under continuous scrutiny and subject to extensive investigation over the past decade because of its well-known practice of criminalizing poverty through the use of modern-day debtors' prisons.[118] In 2010, the city of Ferguson reaped $1.38 million—a little under 1% of its annual general fund revenue—solely from fines and fees collected by the court.[119] This number increased significantly over the following years, yielding $2.11 million just two years later and projecting $3.09 million for the 2015 fiscal year.[120] In an investigatory report into Ferguson's police department, the Department of Justice found that "the penalties [Ferguson's municipal court] imposes are driven not by public safety needs, but by financial interests," by charging individuals exorbitant fines and fees and then erroneously issuing arrest warrants to secure citizens' compliance.[121] The report highlighted numerous instances of egregious penalties, for example, "in which the court charged $302 for a single Manner of Walking violation; $427 for a single Peace Disturbance violation; $531 for High Grass and Weeds; $777 for Resisting Arrest; $792 for Failure to Obey, and $527 for Failure to

[115] *See generally* AM. C.L. UNION, IN FOR A PENNY: THE RISE OF AMERICA'S NEW DEBTORS' PRISONS (2010) (describing the practice of assessing LFOs on low-income defendants as modern-day "debtors' prisons").

[116] *Id.*

[117] *See supra* Part III.B (discussing the history of wealth-based discrimination and government policies that contributed to wealth-based disparities).

[118] *See generally* U.S. DEP'T OF JUST. CIV. RTS. DIV., INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT (2015), https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf.

[119] *Id.* at 9.

[120] *Id.* at 10.

[121] *Id.* at 43.

Comply."[122] Moreover, according to the report, the city's policies disproportionately and severely affected people living in or near poverty because of the sharp disconnect between peoples' incomes and the high fees they were expected to pay.[123] These practices resulted in disparate and discriminatory effects on the low-income population of the city.

For impoverished defendants unable to pay right then and there, in Ferguson, their alternative was incarceration.[124] Unsurprisingly, this controversy generated litigation. According to the legal complaint in *Fant v. Ferguson*, in 2014 "the City of Ferguson issued an average of more than 3.6 arrest warrants *per household* and almost 2.2 arrest warrants *for every adult*, mostly in cases involving unpaid debt for tickets."[125] In efforts to avoid incarceration and its collateral consequences, this predatory policy resulted in the City generating millions of dollars of municipal profit from impoverished defendants' loved ones, emergency family funds, or income otherwise necessary for everyday living.[126] For those who could not pay their fees one way or another, Ferguson citizens were jailed indefinitely until "frightened family members could produce enough cash to buy their freedom or until City jail officials decided, days or weeks later, to let them out for free" in stark violation of the Equal Protection clause.[127]

Each of the plaintiffs in *Fant* tells a harrowing story. One story details a mother driving to school only to be arrested and held indefinitely for failure to pay off old traffic tickets; another highlights a disabled military veteran unable to pay off his fines in full, instead facing incarceration even after earnest attempts to partially pay off his tickets; among others, most of whom faced jail time due to rapidly accruing debt to the city.[128] Accordingly, the

[122] *Id.* at 52.

[123] *Id.*

[124] *Id.* at 55 (concluding that arrest warrants for missed appearances and missed payments were "used almost exclusively for the purpose of compelled payment through the threat of incarceration").

[125] Amended Complaint at 1–2, Fant v. City of Ferguson, No. 4:15-CV-00253-AGF (E.D. Mo. Apr. 13, 2016).

[126] *Id.*

[127] *Id.*

[128] *Id.* at 6–33 (providing the factual background for the case and detailing each of the plaintiffs' experiences).

complaint alleges that Ferguson violated the Equal Protection clause because of its pattern of wealth-based discrimination that created a class of people who *can* pay court fees—those of greater financial means—and a class of people who cannot, who instead remain detained "without any meaningful legal process to inquire into their ability to pay" solely because of their socioeconomic status.[129] This on-the-ground reality coupled with the more general realities about modern wealth inequality in the United States, discussed earlier in this Note,[130] demonstrate why this problem demands constitutional relief.

Unfortunately, Ferguson is not the only of its kind: as of October 2022, the American Civil Liberties Union (ACLU) had pending legal actions in fifteen states and numerous cities, all related to their allegedly unconstitutional debt collection practices.[131] But, wealth-based discrimination in the criminal justice system comes in other forms, too. In 2018, an adult on probation in Alameda County, California, was on average "assessed over $6,000 in probation supervision fees, public defender fees, and sheriff's work alternative program fees."[132] Like Ferguson, Alameda County's exorbitant fees primarily aim to generate greater revenues: during the 2009 recession, Alameda "increased fees for probation supervision from $30/month to $90/month and began charging new fees" in an effort to make profit at the expense of low-income arrestees.[133] And in Tulsa, Oklahoma, "about 28 percent of the nearly 23,000 people booked into the Tulsa Jail in 2014 were arrested on court debt-related complaints," nearly quadrupling from 2004.[134] Even

[129] *Id.* at 54.

[130] *See supra* Section IV.A-C (discussing historical and modern conditions of wealth disenfranchisement).

[131] *See Ending Modern-Day Debtors' Prisons*, AM. C.L. UNION, https://www.aclu.org/issues/smart-justice/sentencing-reform/ending-modern-day-debtors-prisons (last viewed Jan. 15, 2023).

[132] THERESA ZHEN & BRANDON GREENE, E. BAY CMTY. L. CTR., PAY OR PREY HOW THE ALAMEDA COUNTY CRIMINAL JUSTICE SYSTEM EXTRACTS WEALTH FROM MARGINALIZED COMMUNITIES 4 (2018), https://ebclc.org/wp-content/uploads/2018/10/EBCLC_CrimeJustice_WP_Fnl.pdf.

[133] *Id.*

[134] PETER EDELMAN, NOT A CRIME TO BE POOR, n.13 (citing Arianna Pickard, "Jail's Revolving Door: Thousands Arrested Every Year for Failure to Pay Court Costs," *Tulsa World* (Sept. 28, 2015)) (internal quotations omitted).

probation comes at a costly price. More than four million Americans were on probation as of 2010, and in 44 states offenders bear the brunt of costs related to their probation, including payments towards their probation officers, electronic monitoring devices, and more.[135]

In addition to the financial burden imposed by LFOs, the money bail system also disproportionately affects low-income defendants by keeping them detained until trial even in the absence of evidence suggesting they may be a flight risk.[136] Because most low-income people are unable to post bail, they remain detained before their guilt can even be adjudicated. Low-income defendants' inability to be released before trial also compounds with many social problems by removing them from their homes and livelihood: while incarcerated, their families lose not only financial support, but also valuable sources of moral, familial support.[137] From 2011 to 2015, "nearly a quarter of a million people were held in California jails due to their failure to pay bail though they were ultimately never charged for a crime."[138] The majority of people who cannot afford bail "fall within the poorest third of society . . . with a median annual income of $15,109 prior to incarceration, which is less than half (48%) of the median for non-incarcerated people of similar ages."[139] Moreover, "[t]he median bail bond amount in this country represents *eight months* of income for the typical detained defendant."[140]

Most defendants who are not released on bail remain in jail simply because they cannot pay bail. For example, in New York City, "an estimated 46 percent of all misdemeanor defendants and 30 percent of all felony defendants were detained before trial in 2013 because they were unable or unwilling to post bail set at $500 or less."[141] The vast majority of these defendants are low-income,

---

[135] *Id.* at 13.

[136] *See generally* Rabuy et al. *supra* note 6 at 1–3 (explaining that defendants who are unable to pay their bail are subject to incarceration).

[137] *See* Dobbie et al. *infra* note 141, at 260.

[138] HUM. RTS. WATCH, *supra* note 87.

[139] Rabuy, *supra* note 6.

[140] *Id.* (emphasis added).

[141] WILL DOBBIE & CRYSTAL YANG, THE ECONOMIC COSTS OF PRETRIAL DETENTION 258 (2021), https://www.jstor.org/stable/pdf/27093828.pdf?refreqid=fastly-

under-, or unemployed; "defendants often have low earnings and rates of employment, suggesting that detention for even relatively small amounts may be due to inability to pay bail, either directly or through a bail bondsman."[142] For families and individuals in already precarious socioeconomic circumstances, these collateral consequences can be devastating, pushing them deeper and deeper into abject poverty. Low-income households feel this impact much more gravely than households of greater means: these effects can be debilitating.

Each of these modern-day examples show how state and local governments impose conditions that create a discriminated-upon class of people who *can* pay fines and fees, versus people who cannot. This distinct classification grows sharper and sharper by the day as more and more low-income people are criminalized and penalized solely because they are impoverished. Pretrial detention, LFOs, and the other forms of wealth-based discrimination within the criminal justice system result in long-term collateral consequences that affect the ability of low-income individuals to survive.[143] Even short periods of pretrial detention "can be destabilizing for detained individuals, resulting in immediate job loss and affecting the extensive margin of employment, which can subsequently affect take-up of government benefits tied to formal sector employment" in addition to long-term consequences like "the stigma of a criminal conviction and lower future employment prospects."[144]

Thus, these policies create a distinct class of people who acutely feel the effects of the justice system while those who can financially stave off incarceration maintain longer-term safety and stability. Moreover, these policies often fail to do what they claim to achieve. While most governments assert that, for example, pretrial detention keeps communities safer, the evidence demonstrates how pretrial detention is actually wildly ineffective because "pretrial detention is determined by a defendant's wealth, not their risk to the community, which reduces the current system's effectiveness and

default%3A5445e8800b9a555028a94c26d0813850&ab_segments=&origin=&initiator=&acceptTC=1

[142] *Id.*

[143] *See* Section IV.D (discussing the effects of various government policies that disproportionately and acutely affect low-income defendants).

[144] *Id.* at 260.

simultaneously exacerbates socioeconomic disparities."[145] While rational basis review does not require that governments necessarily achieve the legitimate government purpose they assert for their policy, the gravity of the consequences within the criminal justice system should command more accountability for these important procedural and substantive safeguards for criminal defendants. Further, most criminal defendants retain an affirmative right to be released from detention prior to trial that is discriminatorily denied when defendants cannot exercise it solely based on their wealth or lack thereof.[146] This type of long-term, deep-seated, government-imposed discrimination is the type of discrimination the Equal Protection clause seeks to prevent. Accordingly, the Equal Protection clause offers a remedy: heightened scrutiny for wealth-based discrimination that places the burden of proof on the government to demonstrate how and why their policies further its needs.

E. OTHER PROPOSED SOLUTIONS & WHY THEY FALL SHORT

The criminalization of poverty has become a hot topic of discussion in recent years, stirring outrage about the inequities of the American criminal justice system at large. Reform has targeted changing carceral policies within the system, advocating for defendants once they enter the system, and more, all of which has rightfully taken center stage in the fight for justice.[147] Addressing this problem, however, can take on a new form as lawyers take an active role in the fight by treating the criminalization of poverty as an Equal Protection issue and seeking constitutional remedies to this problem. Applying heightened scrutiny to wealth-based discrimination, at least within a criminal justice context, acknowledges the fact that criminal justice issues are also civil

[145] *Id.* at 258.

[146] *Id.* at 255.

[147] *See, e.g.,* Nicole D. Porter, *Top Trends in Criminal Legal Reform, 2023*, SENTENCING PROJECT (Dec. 20, 2023), https://www.sentencingproject.org/publications/top-trends-in-criminal-legal-reform-2023/ (summarizing criminal legal reform advocacy efforts throughout 2023, including decarceration reforms, pursuit of increased medical and compassionate release, drug policy reforms, second look resentencing reforms, "clean slate" reforms, and more).

rights issues that warrant constitutional protection. This distinction is not only socially, politically, and legally salient, but also consistent with the goals of judicial efficiency and achieving equal justice for all. Moreover, other constructions of this issue outside of the constitutional rights context fall short of fully protecting low-income people from the structural beast of wealth-based discrimination embedded in the United States' profound, long history of wealth-based discrimination.[148] And further, the general lack of resources within the criminal justice system renders internal solutions to these discriminatory policies null and void much of the time.[149] Because public defender offices are often underfunded, understaffed, and overwhelmed with cases, indigent clients often inadvertently slip through the cracks.[150]

Acknowledging the discriminatory impact of wealth-based policies felt by low-income people as an Equal Protection issue first and foremost sets a higher standard of accountability for governments that criminalize the poor, but also creates viable avenues to strike at the real heart of this systemic problem. Further, it allows deeper questioning into the restrictiveness of the methods used to accomplish potentially legitimate government goals by ensuring that governments proceed in the least restrictive, discriminatory means possible. Finally, construing wealth-based discrimination within the criminal justice system acknowledges the complex history leading up to this moment of mass incarceration and the fact that for many years, low-income people and communities have lived in the shadows of a wealth-based society that deprives them of the right to justice and liberty in the criminal justice context.[151]

Wealth-based discrimination in the criminal justice system has been addressed by courts in various forms over time. In 1962, the

[148] *See infra* Section IV.E (discussing other avenues of addressing wealth disparities in the criminal justice system, including, for example, Eighth Amendment claims).

[149] *See*, *e.g.*, J. POL'Y INST., SYSTEM OVERLOAD: THE COSTS OF UNDER-RESOURCING PUBLIC DEFENSE (Jul. 2011).

[150] *See generally* Nicholas M. Pace et al., National Public Defense Workload Study 1–31 (2023) (summarizing findings of report about public defenders' excessive workload and describing pertinent background).

[151] *See supra* Part IV (discussing the history and background of wealth-based discrimination in the United States and within the criminal justice system, explaining how these phenomena amount to discrimination demanding of strict scrutiny in the courts).

Supreme Court decided *Robinson v. California*, where it held that a California statute criminalizing addiction to narcotics violated the Eighth Amendment's Cruel and Unusual Punishment clause because the statute punished people according to their "status" as addicts, rather than punishing them for tenable, criminal conduct.[152] Accordingly, some legal scholars have looked to the *Robinson* status doctrine as a vehicle for protecting low-income people as a "status."[153] Because laws disproportionately targeting low-income people do so on the basis of their "status" as impoverished, scholars argue that these laws violate the Eighth Amendment's proscription against excessive bail, fines, and cruel and unusual punishment.[154]

While this argument is certainly compelling, it does not strike at the heart of criminalizing poverty and ultimately falls short where laws discriminate upon the basis of wealth in much more covert ways. For example, as discussed earlier in this Note, many court fines and fees apply universally to criminal defendants, but low-income people bear the burden of this system because of how high these fees can be.[155] Moreover, presently, *Robinson* only applies to laws that directly criminalize one's status and does not extend to status-related acts.[156] Thus, the *Robinson* doctrine may not reach many of the standard procedures that apply generally but in fact discriminate based on wealth. Applying the *Robinson* doctrine and Eighth Amendment protection fails because at face value, many of these discriminatory policies do not facially implicate individuals' impoverished status.

---

[152] Robinson v. California, 370 U.S. 660 (1962).

[153] *See*, *e.g.*, Juliette Smith, *Arresting the Homeless for Sleeping in Public: A Paradigm for Expanding the Robinson Doctrine*, 29 COLUM. J. L. & SOC. PROBS. 293 (1996) (arguing that the *Robinson* doctrine criminalizes not only status, but status-related acts, specifically as related to anti-homeless, anti-sleeping ordinances); *see also* Lauren Bennett, *Punishing Poverty: Robinson & the Criminal Cash Bond System*, 25 WASH. & LEE J. CIV. RTS. & SOC. JUST. 315 (2019) (arguing that the cash bail system is unconstitutional under *Robinson* because it punishes poverty as a status).

[154] *Id.*

[155] *See supra* Section IV.D (discussing modern forms of wealth-based discrimination in the criminal justice system and addressing their acute impact on low-income people).

[156] *Robinson*, 370 U.S. 660.

In 2019, the Supreme Court denied certiorari in *Walker v. City of Calhoun*.[157] *Walker* presented two salient questions: first, whether the Equal Protection clause requires that the Court apply heightened scrutiny to government policies that allow extended pretrial detention of arrestees solely because they are too poor to pay off fines and fees associated with misdemeanor and traffic offenses; and, second, whether accordingly the government *can* detain arrestees for prolonged periods of time solely because of their low income.[158] *Walker* presents facts not at all unlike the other cases discussed throughout this Note, highlighting a city's discriminatory policy that resulted in jailing Maurice Walker, a 54-year-old low-income, unemployed man with a mental health disability, for his inability to pay a $160 cash bond.[159] In the Eleventh Circuit, the court concluded that heightened scrutiny was inappropriate because Mr. Walker was not absolutely deprived of his right to pretrial bail on account of his poverty, but merely delayed access to his right under *Rodriguez*.[160] Although the Supreme Court ultimately denied certiorari in this case, the very fact that this case appeared on the Court's radar illustrates the salience of criminal wealth-based discrimination in the courts.

In 2018, the Fifth Circuit decided *ODonnell v. Harris County*, a case challenging a Texas county's bail scheme.[161] The facts mirror the above-told stories of discriminatory bail schemes, considering a defendant's poverty as a factor weighing against releasing them on bail.[162] This ad hoc policy resulted in an "arrestee's impoverishment increas[ing] the likelihood he or she would need to pay to be

[157] Walker v. Calhoun, 901 F.3d 1245 (11th Cir. 2016), *cert. denied*, No. 18-814 (U.S. 2019).

[158] Petition for Writ of Certiorari at 2, Walker v. Calhoun, No. 18-814 (U.S. 2019).

[159] *Walker*, 901 F.3d at 1251 (summarizing the alleged facts of Walker's claim).

[160] *Id.* at 1261–62 (explaining that there was a "line drawn in *Rodriguez* between mere diminishment of some benefit and total deprivation based solely on wealth," and that based on the facts alleged about the City's bail practices, "indigents suffer no 'absolute deprivation' of the benefit they seek, namely, pretrial release. Rather, they *must merely wait some appropriate amount of time* to receive the same benefit as the more affluent") (emphasis added).

[161] ODonnell v. Harris Cnty., 892 F.3d 147 (5th Cir. 2018).

[162] *See id.* at 154 (describing the County's bail practices, explaining that "under the County's risk-assessment point system used by Pretrial Services, poverty indicators (such as not owning a car) receive the point value as prior criminal violations or prior failures to appear in court" and resulted in "[the] arrestee's impoverishment increase[ing] the likelihood he or she would need to pay to be released").

released" regardless of whether or not the county knew that the defendant was indigent.[163] In a turn perhaps away from the general rational-basis review afforded to wealth-based discrimination, here, the Fifth Circuit applied an intermediate scrutiny adapted from *Rodriguez* because first, Harris County's policy created a separate class of indigent arrestees unable to pay their bail, and second, because the arrestees would "sustain an absolute deprivation of their most basic liberty interests—freedom from incarceration."[164]

To reach this conclusion, the Fifth Circuit applied the standard set forth in *Rodriguez*, requiring the "absolute deprivation" of a "fundamental right" to trigger heightened scrutiny.[165] Perhaps *ODonnell* is a case in point, illustrating how *Rodriguez* can be manipulated to a more exacting, heightened standard. Yet, despite the favorable result, *ODonnell* demonstrates the gaps created by attempting to apply *Rodriguez*. *ODonnell* was ultimately overruled in large part by January 2022,[166] but the Fifth Circuit's analysis of this issue in *ODonnell* nonetheless raises questions about the proper legal standard needed for these types of cases.[167] In July 2022, the Eleventh Circuit similarly decided *Schultz v. State*, which also involved the pretrial detention of indigent defendants when they could not pay bail.[168] The court once again upheld the bail scheme at issue, holding that the county's policy adequately showed that its policy served an important, legitimate governmental end.[169]

These kinds of questions related to discriminatory, wealth-based policies continue to flood lower courts, as more and more low-income criminal defendants face similarly discriminatory policies.[170] Accordingly, this is an issue ripe for resolution, with potential to be resolved in a uniform, expeditious manner that would promote more equitable outcomes for low-income criminal defendants moving forward. These disparate decisions and the wide, highly context-

[163] *Id.* at 154.

[164] *Id.* at 162.

[165] *Id.*

[166] *See* Daves v. Dallas Cnty., 22 F.4th 522 (5th Cir. 2022) (overruling *ODonnell* on procedural grounds).

[167] *See* ODonnell v. Harris Cnty., 892 F.3d 147 (5th Cir. 2018).

[168] Schultz v. State, 42 F.4th 1298 (11th Cir. 2022).

[169] *Id.*

[170] *See*, *e.g.*, *ODonnell*, 892 F.3d 147; *Schultz*, 42 F.4th 1298. These are just two cases representative of a growing phenomenon.

dependent body of case law leaves open many procedural and substantive questions about how to constitutionally structure policies that discriminate based on wealth in the criminal justice context. Moreover, the growing presence of these cases in federal appeals courts shows how many of these discriminatory policies there are throughout the country that continue to cause confusion in the courts.[171] Finally, as demonstrated throughout this Note, low-income criminal defendants as a class meet the criteria required of the Court to reach heightened scrutiny due to their immutability, history of discrimination and lack of general political power.[172] Rather than treating these instances as individual problems, they should be addressed under a catch-all standard that recognizes the strife experienced by low-income communities nationwide.

Universally applying heightened scrutiny also circumvents these problems by creating a more workable solution that already exists within Equal Protection jurisprudence, placing the burden on the government to show that its policies advance a substantial or important government purpose. Applying heightened scrutiny creates a cleaner standard that is easier to apply without being muddled by other unclear legal standards, or hyper-scrutinizing the context of each case. Heightened scrutiny would require that state and local governments provide a compelling government interest for their discriminatory policies and further that interest by the least restrictive means possible.[173] In the criminal justice context, this would require governments to move away from carceral, discriminatory policies and instead adopt a holistic review of indigent defendants' circumstances without weighing their ability to pay fees, and take a macro-level approach to municipal policies that enable this kind of abuse in the first instance. This would require courts to take a second look at cases like that of *Ferguson* and assess the true interest behind assessing hefty LFOs on low-

[171] *See generally id.*

[172] *See supra* Part IV (discussing and applying the criteria the Court generally considers in determining whether a class is subject to strict scrutiny).

[173] *See generally* Stephen A. Siegel, *The Origin of the Compelling State Interest Test and Strict Scrutiny*, 48 AM. J. LEGAL HIST. 355, 355 (2006) ("[T]he principle that some governmental actions are permissible only if they promote a 'compelling state interest,' and the doctrine of strict scrutiny of which it is an integral part, are among the most important and distinctive tenets and of modern constitutional law").

income citizens. Indeed, heightened scrutiny would undercut the rationale of high bail costs, LFOs, and the like, as the literature discussed above supports the conclusion that these discriminatory policies fail to advance asserted government interests.[174] Even if these interests were deemed sufficiently compelling, they certainly do not operate in the least restrictive means possible. Instead, they perpetuate cyclical poverty through exorbitant fines in a manner that can be outright debilitating for most indigent defendants. Not only would a heightened scrutiny approach undermine these specifically harmful policies, it would also require governments to structure policies in a manner least harmful to low-income people.

V. CONCLUSION

Wealth-based discrimination has always been a problem in the United States that only grows more and more pertinent by the day as the wealth gap continues to grow. Anti-poor policies continue to serve as fodder for discriminatory practices in the context of the criminal justice system. As addressed throughout this Note, pretrial detention, the assessment of legal financial obligations, money bail schemes, and more, all demonstrate how low-income people are uniquely impacted by governments' choices to prey on poverty, in addition to the complex web of social, economic, and political history that makes low-income people vulnerable to criminalization in the first instance. This predation results in countless downstream consequences that create complex, compounded socioeconomic problems whose importance cannot be understated.

Expanding the Equal Protection framework to accommodate wealth-based discrimination, specifically within the criminal context, underscores that criminal rights are civil rights. Moreover, construing the criminalization of poverty as an Equal Protection issue further commands the respect and gravity of the courts by giving them the power to invalidate statutory schemes that make this kind of discrimination possible. While many of the longer-term solutions to this problem involve the large-scale decarceration of the American justice system and providing greater support to

[174] *See supra* Section IV.D (discussing modern-day examples of wealth-based discrimination in the criminal justice system, such as the assessment of LFOs, discriminatory bail practices, and more).

communities historically subjected to judicial violence, treating this problem as a vital constitutional issue moves the justice system in the right direction as it reconsiders what it truly means for individuals to have equal protection under the law. Much has changed since the Court handed down *Rodriguez* in 1973. The Court should revisit its analysis of wealth-based discrimination and consider reviewing wealth-based discrimination at a higher level of scrutiny than rational basis review. Discrimination based on wealth within the criminal justice system invokes countless substantive and procedural due process concerns, as well creates judicial backlog, and confers distinct harms onto low-income communities.

First and foremost, low-income status constitutes a distinct class singled out by the criminalization of poverty. Not only does this class exist, but this class is plainly treated and affected differently than those outside of this class, namely people above the poverty line and of middle- and upper-income. While wealth-based discrimination affects large swaths of the population, for the operational purpose of this Note, people earning below the poverty line fall squarely within this classification. Low-income people experience an extensive history of legal disempowerment by and through the government, beginning with early laws only allowing landed men to vote and continuing well into the twenty-first century, bolstered by notable discriminatory policies that emerged in the 1970s and 1980s. The construction of the American economy has likewise rendered socioeconomic status as an immutable characteristic because low-income people are most often unable to change their economic circumstances. Finally, low-income people largely unprotected and unrepresented through the political process. The vast majority of government actors come from wealthy backgrounds, and low-income people turn out to vote at much lower rates than people of greater means often due to a lack of resources and government-imposed barriers to voting.

Protecting low-income people at a heightened level of scrutiny also aligns well with many social and economic policy goals. The legal debate about wealth-based discrimination and the criminalization of poverty piques interesting questions about how lawyers, as advocates, can advance not only criminal justice reform but also vital civil rights measures through radical advocacy efforts. Legally, adopting such a standard presents a progressive means of

addressing an increasingly important social, economic, and political trend while working within the frameworks already offered by the Court over time. Affording heightened scrutiny to wealth-based discrimination creates a bright line rule that makes it easier to hold governments accountable for their discriminatory actions against low-income Americans and opens up possibilities for low-income people to achieve equal justice before the court.