

# Redistributing Criminal Law Up and Down the Penal Pyramid

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## INTRODUCTION

This Essay calls attention to the ways in which law in general, and criminal law in particular, is a form of maldistributed wealth. Law is a valuable thing to have. Rich people expect the law to work for them; poor people typically don't. Powerful people deploy, shape, even manipulate the law; they understand that it is *for* them. Vulnerable people are usually stuck with law. They may hope that the law will protect and serve them, but all too often it doesn't, and they come to understand that the law is not for them.

The distribution of criminal law—the all-important determination of who will and will not be valued and served by it—is in part a function of the substantive law on the books. Legal rules and procedures are, after all, famously distributive.<sup>1</sup> But maldistribution is not solely the product of formal rules: it flows also from an inequalitarian criminal legal and institutional culture that prizes some people and some cases more than others, and thus lavishes time, attention, care, and resources unequally. This culture mirrors the major fault lines of American social

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<sup>1</sup> The literature on the distributive power of legal rules is enormous, diverse, and old. For a few not-necessarily-representative examples, see, e.g., Naomi Mezey, *Legal Radicals in Madonna's Closet: The Influence of Identity Politics, Popular Culture, and a New Generation on Critical Legal Studies*, 46 STAN. L. REV. 1835, 1838 (1994) (describing critical legal studies' classic articulations of "law's distributive power"); Louis Kaplow & Steven Shavell, *Why the Legal System Is Less Efficient Than the Income Tax in Redistributing Income*, 23 J. LEGAL STUD. 667, 667 (1994) (arguing against "redistribution through legal rules [because it] offers no advantage over redistribution through the income tax system and typically is less efficient"); see also Brooke D. Coleman, *One Percent Procedure*, 91 WASH. L. REV. 1005, 1008 (2016) (describing civil procedure as "a system where the metaphorical ninety-nine percent of relatively small cases that are the bread and butter of federal and state dockets are governed by a set of rules made by and for the elite"); Christine Desan, *The Market as a Matter of Money: Denaturalizing Economic Currency in American Constitutional History*, 30 LAW & SOC. INQUIRY 1, 8 (2005) (arguing that "[m]oney, it turns out, works through law because its value is at every moment based on arrangements concerted through law"). I am also not the first to ask how a distributive lens might be relevant to criminal law. See, e.g., Benjamin Levin & Kate Levine, *Redistributing Justice*, 124 COLUM. L. REV. 1531, 1534–35 (2024) (arguing against the notion that "criminal legal institutions might be justified as vehicles for redistributing power and resources to marginalized victims and away from defendants based on wealth, race, gender, sexuality, or other privileged societal positions").

disadvantage, but it also inflicts its own bespoke brand of inequality through the unique processes and consequences of criminalization.

Various insights flow from this way of understanding criminal inequality. For example, if we want criminal law to work in more egalitarian ways, it is not enough to change the rules. Rather, we need to figure out how to get that enormous, protean, inegalitarian criminal legal culture to value and work for more of the vulnerable, disadvantaged, and disfavored people who have been cut out of its care.<sup>2</sup>

This approach also naturally calls for an empirically rich story about the criminal process itself—its institutions, practices, and punishments—informed by the experiences of the millions of people who go through the system. How do state actors actually treat people? What do people actually experience? How does this culture really operate on the ground? The full story includes a lot of law, of course: doctrine, legal institutions, and criminal jurisprudence. But it also includes sociology, race, poverty, local governance, information deficits, and politics. All these ingredients are needed to understand how this vast array of forces – legal and nonlegal -- work together to constitute the inegalitarian criminal system that we actually have, and thus where redistribution might be possible or meaningful.

Since this is an Essay in honor of a public defender, it begins by appreciating that the right to counsel is the single most important formal mechanism that the criminal system has for redistributing the wealth of criminal law. It is through appointed counsel that the vulnerable have any meaningful chance of getting law to work on their behalf. It is through appointed counsel that we attempt to level the playing field between poor and rich defendants, and between vulnerable defendants and the powerful criminal apparatus. And it is the arena in which the Supreme Court was once quite vocal about the harms of inequality, following the general principle that “[t]here can be no equal justice where the kind of trial a man gets depends on the amount of money he has.”<sup>3</sup>

At the same time, it has always been abundantly clear that counsel is not enough. As a practical matter, the United States does not fund public defense well

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<sup>2</sup> This view is distinct from the argument that the criminal law should affirmatively be used to redistribute power or social goods. See Levin and Levine, *supra* note 1, at 1545 (objecting to the latter).

<sup>3</sup> Griffin v. Illinois, 351 U.S. 12, 19 (1956) (holding that equal protection prohibits denying access to the appellate process based on wealth), *relied on by* Douglas v. California, 372 U.S. 353, 355 (1963) (finding a right to counsel on appeal for the same reasons). On the intimate relationship between the right to counsel and principles of equality, see, e.g., Gideon v. Wainwright, 372 U.S. 335, 344 (1963) (“This noble ideal . . . in which every defendant stands equal before the law . . . cannot be realized if the poor man charged with crime has to face his accusers without a lawyer.”); Miranda v. Arizona, 384 U.S. 436, 472 (1966) (holding that police must inform suspects of their right to appointed counsel, reasoning that officials “have the obligation not to take advantage of indigence in the administration of justice”); cf. Ross v. Moffitt, 417 U.S. 600, 612 (1974) (finding no right to counsel on discretionary appeal and noting that “[t]he Fourteenth Amendment does not require absolute equality or precisely equal advantages. . . nor does it require the State to equalize economic conditions” (internal citations and quotation marks omitted)).

enough to truly level the playing field.<sup>4</sup> And even if it did, there are too many inegalitarian dynamics baked into the criminal process that no public defender, no lawyer could do anything about in any particular case.<sup>5</sup> No lawyer, no matter how good, can stop their poor clients of color from being racially profiled by police and brought into the criminal system in the first instance. By the time counsel is appointed, it's too late. No defense lawyer, no matter how good, can eliminate the pressure on their client to take a plea to "time served" because they can't afford bail and will thus remain incarcerated—at risk of losing their job, their car, or even their children—unless they plead guilty. The very best defense lawyers cannot eliminate the cumulative effects that intergenerational poverty, poor education, racism, and underemployment have on their clients or on the ways that the criminal system treats them.

And so this is not an Essay about public defense, at least not in the conventional sense.<sup>6</sup> It offers a less legalistic, more interdisciplinary take on inequality in the criminal system by examining its internal structures, institutions and hierarchies, and the many organizational dynamics that persistently and predictably create inequality. Or, more bluntly, this Essay is about the hydraulic forces that make the criminal legal apparatus work so much better for some people than it does for others.

## I. THE PENAL PYRAMID: STRUCTURES OF INEQUALITY

I have been preoccupied with some version of this distributional problem ever since I started working in and around the criminal system.<sup>7</sup> Specifically, I have long wondered how it is that criminal law manages to have such a completely different character in elite spaces, what I have described as the top of the "penal pyramid," than it has at the bottom.<sup>8</sup>

### A. *Top of the Pyramid*

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<sup>4</sup> David Carroll & Aditi Goel, *The State of the Nation on Gideon's 60th Anniversary*, SIXTH AMEND. CTR. (Mar. 14, 2023), <https://6ac.org/the-state-of-the-nation-on-gideons-60th-anniversary/> [<https://perma.cc/HZH8-4FEP>] (estimating that the U.S. spends approximately \$19.82 per capita on public defense); see Lauren Sudeall Lucas, *Reclaiming Equality to Reframe Indigent Defense Reform*, 97 MINN. L. REV. 1197, 1201 (2013) (arguing that *Griffin*-based principles of equal access to justice offer stronger protection against funding inequality than conventional Sixth Amendment doctrine).

<sup>5</sup> See generally Alexandra Natapoff, *Gideon Skepticism*, 70 WASH. & LEE L. REV. 1049 (2013) (documenting the limited ability of defense counsel to counteract the unfair treatment, conviction, and punishment of their clients).

<sup>6</sup> Cf. *infra* text accompanying note 45 (offering unconventional view of public defense).

<sup>7</sup> I served as an Assistant Federal Public Defender in Baltimore, Maryland, from 2000 to 2003.

<sup>8</sup> See generally Alexandra Natapoff, *The Penal Pyramid*, in *THE NEW CRIMINAL JUSTICE THINKING* (Sharon Dolovich & Alexandra Natapoff eds., 2017) (theorizing the criminal system as a "pyramid in which the law functions very differently at the elite top than it does at the sprawling bottom").

The top of the penal pyramid is a high-profile and familiar place. This is where serious criminal charges or federal cases are brought against well-resourced defendants with robust defense counsel, historically a space of relative accountability and transparency.<sup>9</sup> Many law students will go on to work in such spaces: they will clerk for skilled and careful judges, they will work in rigorous and ethical prosecutor offices and in excellent public defense offices, or in big law firms with high-powered defense practices. And they will recognize this version of criminal law, more or less, from what they were taught in law school. In these spaces, law works basically the way it is supposed to on paper. The language of statutes matters. Judicial interpretations of those statutes matter. That language and those interpretations have traction, they alter outcomes on the ground. Legal actors at the top of the pyramid operate, as it were, under the influence of law. The FBI drafts affidavits in support of search warrants knowing that the law of probable cause will need to be reckoned with. Prosecutors make charging decisions knowing that the law and the evidence will be litigated. Defendants have lawyers who are equipped to wield legal rules and principles on behalf of their clients. And judges make decisions in response to all this evidence and all these arguments about what law requires. People pay attention; state actors exhibit restraint; defendants and their cases matter. Defendants might not win, but they matter.

To be clear, this does not mean that the law at the top of the pyramid is fair or just. Law can work exactly the way it is meant to and still be unjust and oppressive. But here, when law is oppressive, the institutional mechanisms for legal change have some traction. The people subject to law have status and resources, either because they are privileged themselves or because the nature of their cases commands attention. Their attorneys have the commensurate wherewithal to engage and challenge legal institutions and to make their voices heard. Likewise, top-of-the-pyramid legal decision-makers have the status and resources to check each other. Judges have the time to make decisions that will be both honored and scrutinized; legislatures pay attention and may occasionally intervene; police and prosecutors can be held accountable. And just as importantly, we know about it. Data will be collected and the fight will be written down: it will be recorded in transcripts, on the pages of reporters, in legislative debates and in newspapers. In other words, the

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<sup>9</sup> Emphasis on the term “relative” as recent changes in federal law enforcement may eventually undermine some of this traditional narrative. See, e.g., Alan Feuer & Glenn Thrush, *Trump White House Exerts Enormous Influence Over F.B.I., Lawsuit Says*, N.Y. TIMES (Sep. 10, 2025), <https://www.nytimes.com/2025/09/10/us/politics/trump-fbi-lawsuit.html> [https://perma.cc/LX8P-B3QH]; Radley Balko, *The Police Militarization Debate is Over*, THE WATCH (July 15, 2025), <https://radleybalko.substack.com/p/the-police-militarization-debate> [https://perma.cc/45QF-S9KQ] (describing the evolution and expansion of ICE as an unaccountable paramilitary force); Kaye Wiggins, Chris Cook & Paul Caruana Galizia, *How Pressure from Trump is Demoralizing the US's Top Financial Prosecutors*, FIN. TIMES (Sep. 29, 2025) (describing how new policies at the U.S. Department of Justice are eroding the independence and efficacy of federal prosecutors); J. Michael Luttig, *The End of Rule of Law in America*, THE ATLANTIC (May 14, 2025), <https://www.theatlantic.com/ideas/archive/2025/05/law-america-trump-constitution/682793/> [https://perma.cc/C6DK-37E5] (criticizing Trump administration’s policies as a “reign of lawless aggression”).

process works in the highly contested and publicly engaged way that a rule-bound democracy is supposed to work.

Although this is the gold standard, we all understand that it is deeply flawed. Even when everything is working more or less according to the rules, the U.S. criminal system is still uniquely harsh, skewed against the vulnerable, and subject to opacity and error.<sup>10</sup> We might say something like: this is the best that democratic rule of law has to offer, with all its strengths and weaknesses, no more and no less.<sup>11</sup> At the same time, this admittedly imperfect model is often held up as an empirical description of how criminal law works. But the top is not representative. This is not what most of the American criminal system actually looks like, and it does not accurately capture the experiences of millions of Americans who are touched by that system.

### B. *Bottom of the Pyramid*

More often, criminal law is informal, thinly accountable, and barely restrained, a general devolution that creates the “bottom” of the penal pyramid. This is the space of low-level courts, misdemeanors and low-status felonies, crimes of poverty, bail schedules, and debtors’ prison. Punishment tends to take the form, not necessarily of prison, but of probation and fines, while incarceration is sprinkled casually throughout like too much salt. Dockets are crowded and data is scarce. Vulnerable defendants are overexposed to harm, and the law and legal actors rarely protect them.

As a formal matter, the bottom is in some ways a distinctive legal arena. Sometimes substantive and procedural rules are just looser. The Supreme Court has held that misdemeanor defendants who face crushing, life-altering fines are not entitled to counsel unless they are actually sentenced to incarceration.<sup>12</sup> Municipal courts, which produce at least one quarter of the entire national misdemeanor docket, have been excused from some basic legal requirements including trial by jury, judges who are lawyers, and the requirement that proceedings be conducted on the

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<sup>10</sup> For some classic articulations, see JAMES Q. WHITMAN, *HARSH JUSTICE: CRIMINAL PUNISHMENT AND THE WIDENING DIVIDE BETWEEN AMERICA AND EUROPE* (2003) (describing the historic roots and causes of U.S. carceral harshness in comparative perspective); LOIĆ WACQUANT, *PUNISHING THE POOR: THE NEOLIBERAL GOVERNMENT OF SOCIAL INSECURITY* (2009) (arguing that the U.S. criminal system is designed to control the poor who have been abandoned by a shrinking welfare state); MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (2010) (arguing that racial disparity is built into the design of the criminal system); BRANDON L. GARRETT, *CONVICTING THE INNOCENT: WHERE CRIMINAL PROSECUTIONS GO WRONG* (2011) (describing widespread structural sources of error leading to wrongful conviction).

<sup>11</sup> And thus why some argue for its abolition. See, e.g., Dorothy E. Roberts, *Foreword: Abolition Constitutionalism*, 133 *HARV. L. REV.* 1, 4 (2019) (arguing for prison abolition on a constitutional basis).

<sup>12</sup> *Scott v. Illinois*, 440 U.S. 367, 373 (1979) (adopting “actual imprisonment as the line defining the constitutional right to appointment of counsel”).

record.<sup>13</sup> The U.S. Supreme Court has considered the constitutionality of Ohio’s Mayor’s Courts three times, and decided that it is permissible to have criminal courts presided over by mayor-judges who are not lawyers even as they manage city budgets funded by those courts.<sup>14</sup> In 1972, the Supreme Court went further and opined that “inferior courts are not designed or equipped to conduct error-free trials, or to insure full recognition of constitutional freedoms. They are courts of convenience, to provide speedy and inexpensive means of disposition of charges of minor offenses.”<sup>15</sup> In other words, as a matter of law, these are second-class institutions.

Sometimes the law at the bottom is the same on paper but so different in practice as to be unrecognizable. Police, for example, arrest thousands of people for misdemeanors not *because* the police have probable cause — they might or might not — but for more diffuse reasons: to clear a street corner, to assert authority in a neighborhood, to enforce gentrification boundaries, or perhaps to meet a departmental arrest quota. Prosecutors routinely make charging decisions on the fly, in minutes, sometimes even seconds, based not on individuated evidence or the equities, but driven by institutional habit and under pressure from police and large dockets.<sup>16</sup> Defendants commonly go through the process without a lawyer, even when they are constitutionally entitled to one. Public defenders are overburdened with both felonies and misdemeanors and often lack the time and resources to make law and evidence matter in their cases. Judges in some courts are infamous for running what is sometimes referred to as a “plea mill,”<sup>17</sup> or what the Supreme Court has referred to as “assembly line justice.”<sup>18</sup> Hearings and trials are rare, which means that engaging the law and the evidence is rare. In contrast to its more careful top, the bottom of the penal pyramid is characterized by informality, opacity, a lack of individuated justice, and a culture in which legal rules often do relatively little work.

In case this sounds like an exaggeration, I’ll share what I think of as a paradigmatic example of the legal culture of the bottom. In 2007, Jean Hoefer Toal was Chief Justice of the South Carolina Supreme Court, the highest-ranking judicial official in the state. At a public meeting, she was asked about the well-known fact that South Carolina’s lower courts were not providing defense counsel even though

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<sup>13</sup> Alexandra Natapoff, *Criminal Municipal Courts*, 134 HARV. L. REV. 964, 993–1010 (2021).

<sup>14</sup> *Ward v. Village of Monroeville*, 409 U.S. 57, 59–61 (1972); *Dugan v. Ohio*, 277 U.S. 61, 63–64 (1928); *Tumey v. Ohio*, 273 U.S. 510, 534 (1927).

<sup>15</sup> *Colten v. Kentucky*, 407 U.S. 104, 117 (1972) (quoting *Colten v. Commonwealth*, 467 S.W.2d 374, 379 (Ky. 1971)).

<sup>16</sup> Alexandra Natapoff, *Misdemeanor Declination: A Theory of Internal Separation of Powers*, 102 TEX. L. REV. 937, 984–86 (2024).

<sup>17</sup> Verified Petition for Writ of Mandate and Complaint for Declaratory and Injunctive Relief, *UFW Found. v. Kern Cnty.*, No. BCV-23-101419 (Cal. Super Ct. May 8, 2023) (describing operation of “plea mill” in which thousands of unrepresented defendants plead guilty at their first court appearance).

<sup>18</sup> *Argersinger v. Hamlin*, 407 U.S. 25, 36 (1972).

required by the Sixth Amendment as interpreted by the U.S. Supreme Court in the leading case *Alabama v. Shelton*.<sup>19</sup> This is what Justice Hoefler-Toal said:

*Alabama v. Shelton* [is] one of the more misguided decisions of the United States Supreme Court, I must say. If we adhered to it in South Carolina we would [be] dragooning lawyers out of their law offices to take these cases . . . , and I have simply told my magistrates that we just don't have the resources to do that. So I will tell you straight up we [are] not adhering to *Alabama v. Shelton* in every situation.<sup>20</sup>

In other words, the highest judicial official in the state announced, in public, that the courts of South Carolina would continue to violate Supreme Court precedent and the U.S. Constitution. You might think, my goodness, what an admission! What happened then? And the answer is, nothing. For years.<sup>21</sup> Because this is the culture of the bottom. It expects the Constitution to be violated, it expects rules to lack traction and go unenforced, and it expects that defendant rights will be sacrificed for convenience and to save money.

Even the concept of innocence loses its force. At the top of the pyramid, when an innocent person is wrongfully convicted of a serious offense, we collectively acknowledge that the system has failed and that a terrible mistake has occurred. There are innocence projects and attorneys all over the country advocating to make sure that this doesn't happen. Legislatures pass reforms to stop it from happening and pay compensation when it does. At least in principle, law enforcement agrees that that is the correct answer and that it matters a great deal whether a defendant is actually guilty or innocent.

Travel down the pyramid, and actual innocence stops mattering in the same ways. In Baltimore, for example, police have a history of rounding up young Black men for loitering.<sup>22</sup> Most of these men were probably not loitering. The Baltimore City Code definition of loitering makes it a crime to “interfere with, impede, or

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<sup>19</sup> 535 U.S. 654 (2002).

<sup>20</sup> ROBERT C. BORUCHOWITZ, MALIA N. BRINK & MAUREEN DIMINO, NAT'L ASS'N OF CRIM. DEF. LAWYERS, *MINOR CRIMES, MASSIVE WASTE: THE TERRIBLE TOLL OF AMERICA'S BROKEN MISDEMEANOR COURTS* 15 (2009), <https://www.nacdl.org/getattachment/20b7a219-b631-48b7-b34a-2d1cb758bdb4/minor-crimes-massive-waste-the-terrible-toll-of-america-s-broken-misdemeanor-courts.pdf> [<https://perma.cc/XH3N-DF79>].

<sup>21</sup> *See generally* DIANE DEPIETROPAOLO PRICE ET AL., NAT'L ASS'N OF CRIM. DEF. LAWS., *SUMMARY INJUSTICE: A LOOK AT CONSTITUTIONAL DEFICIENCIES IN SOUTH CAROLINA'S SUMMARY COURTS* (2016), <https://www.nacdl.org/getattachment/c5b6c511-3d0d-41f2-b4ba-41f953af05dc/summary-injustice-a-look-at-constitutional-deficiencies-in-south-carolina-s-summary-courts-report-final.pdf> [<https://perma.cc/G5ZH-WZXC>] (documenting the ongoing history of constitutional violations in South Carolina's municipal and magistrate courts, called “summary courts”).

<sup>22</sup> Recent reforms may have curtailed this particular policing phenomenon. *See, e.g.*, George Chidi, *How Baltimore's Violent Crime Rate Hit an All-Time Low: This is Not Magic. It's Hard Work*, THE GUARDIAN (Aug. 16, 2025), <https://www.theguardian.com/us-news/2025/aug/16/baltimore-violent-crime-trump> [<https://perma.cc/2XUK-VBS9>].

hinder the free passage of pedestrian or vehicular traffic,” or threaten a breach of the peace, *after* having been warned to desist, and *then* failing to do so.<sup>23</sup> One Maryland appellate court overturned a loitering conviction where the arrested person was simply standing at a bus stop, noting that “that one person alone cannot impede pedestrian traffic by standing on a sidewalk.”<sup>24</sup> And yet a 2016 Department of Justice investigation found that Baltimore police routinely arrested people for loitering for comparably innocent conduct, including standing in front of their own home, standing on the steps of their own home, standing next to a church, or standing on a street corner.<sup>25</sup>

The threats to the innocent, moreover, do not end with arrest. Once arrestees are taken to jail, many can’t make bail and are therefore under heavy pressure to plead guilty in order to obtain release.<sup>26</sup> When they do, these are wrongful convictions. And Baltimore is far from unique. New York has deployed trespass arrests in similarly baseless ways.<sup>27</sup> Seattle used to rely on specious arrests for “obstructing a police officer.”<sup>28</sup> If and when any of those arrestees pled guilty, their convictions were wrongful. That means in any given year, there may have been thousands of low-level wrongful convictions nationwide, imposed disproportionately on the Black men who are most likely to be overpoliced in these ways.<sup>29</sup>

But this is the bottom of the pyramid. There are no innocence projects devoted to these wrongful convictions, at least not yet.<sup>30</sup> The legal culture does not treat these

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<sup>23</sup> BALTIMORE CITY., MD., CODE art. 19, § 25-1(a)–(c), <https://codes.baltimorecity.gov/us/md/cities/baltimore/code/19/25> [<https://perma.cc/J6QY-EABY>] (2025).

<sup>24</sup> *Williams v. State*, 780 A.2d 1210, 1218 (Md. Ct. Spec. App. 2001).

<sup>25</sup> U.S. DEP’T OF JUST., INVESTIGATION OF THE BALTIMORE CITY POLICE DEPARTMENT 6–7, 29, 37–38, 86, 158 (2016), [https://www.justice.gov/d9/bpd\\_findings\\_8-10-16.pdf](https://www.justice.gov/d9/bpd_findings_8-10-16.pdf) [<https://perma.cc/PG5X-227L>]; see also Class Action Complaint at ¶¶ 45–48, *NAACP v. Baltimore City Police Dep’t*, No. 06-1863 (CCB) (D. Md. 2006), <https://clearinghouse.net/doc/17216/> [<https://perma.cc/3N6V-SF6E>] (documenting numerous instances of illegal loitering arrests).

<sup>26</sup> JEAN CHUNG, JUST. POL’Y INST., BAILING ON BALTIMORE: VOICES FROM THE FRONT LINES OF THE JUSTICE SYSTEM 5 (2012), <https://justicepolicy.org/wp-content/uploads/justicepolicy/documents/bailingtonbaltimore-final.pdf> [<https://perma.cc/65QR-KKHB>] (finding that 75 percent of people would have difficulty paying a bail bond); *id.* at 8 (describing pressures to plead guilty).

<sup>27</sup> *Ligon v. City of New York*, 925 F. Supp. 2d 478, 485 (S.D.N.Y. 2013) (finding “widespread practice of unconstitutional trespass stops by the NYPD”).

<sup>28</sup> Eric Nalder, Lewis Kamb & Daniel Lathrop, *Blacks Are Arrested on “Contempt of Cop” Charge at Higher Rate*, SEATTLE POST-INTELLIGENCER (Feb. 28, 2008), [https://web.archive.org/web/20080302164032/http://seattlepi.nwsource.com:80/local/353020\\_obstructmain28.asp](https://web.archive.org/web/20080302164032/http://seattlepi.nwsource.com:80/local/353020_obstructmain28.asp) [<https://perma.cc/LA62-ZUTH>] (describing police practice of making unfounded arrests of Black men for obstructing the police).

<sup>29</sup> ALEXANDRA NATAPOFF, PUNISHMENT WITHOUT CRIME: HOW OUR MASSIVE MISDEMEANOR SYSTEM TRAPS THE INNOCENT AND MAKES AMERICA MORE UNEQUAL 98–105 (2018).

<sup>30</sup> See *Why So Few Misdemeanor Exonerations?*, NAT’L REGISTRY OF EXONERATIONS, (Oct. 6, 2015), <https://www.law.umich.edu/special/exoneration/Pages/misdosoct2015.aspx> [<https://perma.cc/>

convictions as troubling miscarriages of justice and systemic failure. They take place every day, in full view, and almost nothing happens.

*C. Implications of the pyramid*

The result of this legal culture is to destroy many basic precepts of criminal law. Innocence, legality, and proportionality are often simply ignored. The foundational constraints imposed by the Bill of Rights—one of the central checks on the coercive power of the carceral state—are loosened in the name of localism, convenience, and saving money. At the very same time, these same principles and constraints are on display and in relatively good working order at the top of the pyramid. The tension between these top and bottom cultures is a deep feature of the American carceral state. And because the bottom is so much bigger than the top, lawfulness, restraint, and dignitary values turn out to be scarce commodities, something of a luxury.

Perhaps the most fundamental disparity is that the meaning of the term “criminal”—the significance of being convicted of a crime and labeled a criminal—is different at the top than it is at the bottom. At the top, being convicted of a crime generally means (not always but generally) that the defendant engaged in conduct that we have determined as a society to be culpable or harmful, that there was evidence to show that they actually did it, and the state went after them *because* they did it. Again, this does not automatically render such convictions fair or just—the substance of these laws may be good or bad—but a serious conviction produced at the top will generally be a product of both evidence and law.

At the bottom, by contrast, the meaning of being convicted and labeled a criminal can be entirely different, and it might have little to do with either evidence or law. As we saw in Baltimore and New York, people may be arrested because of longstanding police practices, not because they engaged in behavior that was harmful, or blameworthy, or scary, or even for that matter, illegal. People are prosecuted, not because they are culpable, but because they are too poor to pay a fine or to afford car insurance. People are incarcerated, not because they are dangerous, but because they cannot make bail. They plead guilty, not because they are actually guilty, but because they succumb to the hydraulic pressures of the low-level criminal process. And then they are punished, often in life-altering ways, in wild disproportion to the nature of the underlying offense. At the bottom, in other words, being labeled and punished as a criminal very likely means that you are living from paycheck to paycheck or below the poverty line, or that you live in a highly policed neighborhood, that you lacked the resources to defend yourself, and that the criminal process did not bother to check either the evidence or the law before it convicted you. That formal conviction is thus a highly ambiguous artifact: it tells us little if anything about what you actually did, if you pose any threat to public safety,

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3L43-XCUJ]. (concluding that there are few exonerations because “[f]or misdemeanors, no one has the time”).

or whether you deserve to carry the permanent mark of criminality for the rest of your life.

This phenomenon—the contrast between the top and bottom of the pyramid, the fact that criminal law changes its reasoning and its reasons, the fact that criminality is produced and inflicted in such different ways—represents a profound form of inequality.

## II. EXAMPLES AT THE BOTTOM

This penal inequality comes in many forms, and each of the major criminal institutions mal-distributes in its own ways. Police, prosecutors, and courts are not unitary phenomena. Police do not all work or think in the same ways, nor do prosecutors. Different criminal courts operate according to very different legal, professional, and normative standards. These differences are themselves distributive. They mean that some groups of people and cases will routinely and predictably be treated better or worse than others.<sup>31</sup>

Some police departments, for example, use deadly force at significantly higher rates than other police departments. They are all engaged in “policing,” but they understand and perform that job differently, with enormous consequences on the ground for the people being policed. A 2024 study, for example, found that the deadliest police departments kill seven times more frequently than the least deadly, even when police face similar threats and risks.<sup>32</sup> We can understand this spread as a form of inequality: the unequal treatment and protection of people who happen to live in cities where the risk of being killed by police is especially high.

Prosecution also distributes law and care unequally. When police arrest someone, prosecutors must decide whether to decline the case or to file formal charges. Felony prosecutors and senior prosecutors<sup>33</sup> tend to screen arrests rigorously and decline high percentages: over a quarter of felony arrests never become cases at all. The significance of this fact is foundational: it means that just because a person gets arrested does not mean they will become a defendant. It means that being policed is not the same as being prosecuted. Notice that this is a very basic feature of how the criminal pipeline is supposed to work. By contrast, misdemeanor prosecutors, who often tend to be more junior, typically do not screen rigorously. Rather, they defer to police and to docket pressures by filing charges reflexively,

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<sup>31</sup> For an in-depth systemic exploration, see Alexandra Natapoff, *Institutional Structures of Penal Inequality*, 115 J. CRIM. L. & CRIMINOLOGY (forthcoming 2025) (manuscript at 3).

<sup>32</sup> Josh Leung-Gagné, *The Deadliest Local Police Departments Kill 6.91 Times More Frequently than the Least Deadly Departments, Net of Risk, in the United States*, 3 PNAS NEXUS 1, 1–10 (2024) (comparison limited to jurisdictions with 50,000 or more residents); see also POLICE SCORECARD, KEY FINDINGS: SOME POLICE DEPARTMENTS SHOW A CLEAR PATTERN OF USING MORE FORCE THAN OTHER DEPARTMENTS, <https://policescorecard.org/findings#clear-pattern> [<https://perma.cc/F93T-CNF8>] (last visited Sep. 14, 2025) (finding similarly large disparities in police shooting rates).

<sup>33</sup> Often, but not always, the same thing. See Ronald F. Wright & Kay L. Levine, *The Cure for Young Prosecutors' Syndrome*, 56 ARIZ. L. REV. 1065, 1068 (2014).

maybe in minutes, without checking the evidence or the equities.<sup>34</sup> As a result, just getting arrested for a misdemeanor *does* mean that you will probably become a criminal defendant. That is neither how policing nor prosecution is supposed to work.

Public defense also has a top and a bottom, where the institution works very differently depending on how it is organized and funded. Depending on whether a jurisdiction uses a flat fee system, an assigned counsel system, or a public defender office, defendants may receive a wildly different quality of representation. Professor Eve Primus, also a former public defender and an expert on public defense systems, has written, “The result is a fragmented patchwork of different indigent defense systems across the country where the quality of the representation provided to a poor person ... depends more on geography than anything else.”<sup>35</sup> That is not how the right to counsel is supposed to work either. The Constitution should not vary depending on which county you get arrested in—but it does.<sup>36</sup>

Criminal courts display a similar spread. There are at least 11,000 different criminal courts in America. Ninety-four of them are federal district courts, well-funded, and heavily scrutinized. At least two judges from these elite courts have gone on to sit on the U.S. Supreme Court—Justice Ketanji Brown Jackson and Justice Sonia Sotomayor. In these courts, law matters deeply, lawyers and judges tend to be careful, and numerous stakeholders are watching. By contrast, there are over 7,500 local municipal criminal courts, including 300 Ohio mayor’s courts. In many of these courts, proceedings might take place off the record, defense counsel may never be appointed, and the judge might not even be a lawyer.<sup>37</sup> These federal and local courts are two entirely different legal and cultural worlds in which defendants typically receive wildly divergent treatments. And yet, at the end of the day, both are criminal courts exercising similar powers, issuing formal convictions that can haunt people for a lifetime, and locking people up. Indeed, local courts incarcerate far more people than federal courts do.

One final example of the culture at the bottom can be found in the experience of being incarcerated. It is safer in federal prison than in many state prisons and local jails. In Georgia, for example, the three white men who murdered Ahmaud Arbery while he was jogging were convicted of both state and federal offenses. They begged the judge to send them to federal rather than state prison. One of their lawyers asserted: “I have zero faith in the ability of the state of Georgia’s prison system to

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<sup>34</sup> Natapoff, *supra* note 16, at 983–85.

<sup>35</sup> Eve Brensike Primus, *The Problematic Structure of Indigent Defense Delivery*, 122 MICH. L. REV. 207, 211 (2023).

<sup>36</sup> *Kuren v. Luzerne County*, 146 A.3d 715, 717, 749 (Pa. 2016) (lamenting disparities and asserting that “[a]t the most fundamental level, compliance with *Gideon* should not—cannot—depend upon the county in which a crime is alleged.”).

<sup>37</sup> Natapoff, *supra* note 13, at 1000, 1013–14.

protect any inmate, much less my client.”<sup>38</sup> Around that same time, Lashawn Thompson was incarcerated in the Atlanta jail for a minor assault charge. He died in a filthy, bug-infested cell where he was eaten alive by insects.<sup>39</sup> In other words, in Georgia, it is safer and less punitive to be incarcerated in federal prison for murder and a federal hate crime than it is to get locked up in the Atlanta jail for misdemeanor assault. This is justice upside down.

### III. THE PENAL PYRAMID AS AN INSTITUTIONAL SOURCE OF SOCIAL INEQUALITY

In all of these ways, the ethos and practices at the bottom of the penal pyramid inflict their own brand of destructive inequality. They deprive people of the kinds of protection, resources, lawfulness and care that are commonly available at the top.

The distributional implications of this inequality are extensive because the criminal system touches so many people. As many as one-third of all Americans have a criminal record of some kind. One-third of all Americans will be arrested before they reach the age of 23. Thirteen million misdemeanor cases are filed every year.<sup>40</sup> Getting charged with a low-level crime is a normal part of American life, about as common as going to the doctor when you get the flu, or buying a truck or SUV, or attending a four-year college.<sup>41</sup> If you are surprised by the scale of criminalization, it might be because you are used to thinking about the top of the pyramid where crimes are serious and prosecution is less common. But the bottom of the pyramid, with all its inequalities, is a story of mass criminalization on a vast scale.

This enormous criminal apparatus, moreover, does not operate in isolation. Rather, it is in constant conversation with other major legal and socioeconomic institutions. Criminal law interferes with immigration. It derails young people’s education. It warps family law; it deforms the labor market; and it exacerbates

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<sup>38</sup> Shaddi Abusaid, *Sentencing Monday in Hate Crimes Case over Ahmaud Arbery’s Murder*, ATLANTA J.-CONST. (Aug. 5, 2022), <https://www.ajc.com/news/atlanta-news/sentencing-monday-in-hate-crimes-case-over-ahmaud-arberys-murder/SEBW4K6RGFB4PM6NZIOZ3WHRV4/> [<https://perma.cc/2US7-GPL3>].

<sup>39</sup> N’dea Yancey-Bragg & Minnah Arshad, *‘Dangerous and Unsanitary’ Conditions at Georgia Jail Violate Constitution, Feds Say*, USA TODAY (Nov. 14, 2024, at 5:47 PM ET), <https://www.usatoday.com/story/news/nation/2024/11/14/fulton-county-jail-dangerous-justice-department/76291979007/> [<https://perma.cc/6ADC-QEKJ>]; Audrey Conklin, *Georgia Inmate Eaten Alive by Bugs Died by Homicide, Autopsy Reveals*, FOX NEWS (May 22, 2023, at 2:02 PM EDT), <https://www.foxnews.com/us/georgia-inmate-eaten-alive-bugs-died-homicide-autopsy-reveals> [<https://perma.cc/3Y9F-N7HS>].

<sup>40</sup> U.S. DEP’T OF JUST., SURVEY OF STATE CRIMINAL HISTORY INFORMATION SYSTEMS, 2012 3 (2014), <https://www.ncjrs.gov/pdffiles1/bjs/grants/244563.pdf> [<https://perma.cc/YK5U-XAKP>] (finding that as of December 31, 2012, “[o]ver 100.5 million individual offenders were in the criminal history files of the state criminal history repositories”); see generally Robert Brame et al., *Demographic Patterns of Cumulative Arrest Prevalence by Ages 18 and 23*, 60 CRIME & DELINQ. 471 (2014) (finding that “25%–41% of [] youth reported having been arrested or taken into custody for a nontraffic offense by age 23”); NATAPOFF, *supra* note 29, at 41.

<sup>41</sup> NATAPOFF, *supra* note 29, at 41.

residential racial segregation. The scale of influence might not seem obvious if we look only at the top of the pyramid, but it becomes abundantly clear when we appreciate the scale and reach of the bottom. The criminal system should thus be understood as an engine of the redistribution of social capital in its own right, an institutional powerhouse of inequality. It should accordingly be held to account not only for its criminal outcomes but for its distributive decisions and impact.

From this institutional perspective, we can see how the penal process engages in a kind of dishonesty about criminalization and about the punishment that it imposes on so many millions of people. Criminalization and punishment do not mean what they claim to mean, because they are only loosely correlated with individual conduct and culpability. A comparison to education is helpful here. It is well understood that education and the school systems that deliver it are redistributive. The K-12 education system creates wealth and imposes disadvantage through the differential ways that it treats students. If you attend a school with low resources, poorly paid teachers, and crowded classrooms, you will have poorer educational outcomes that will warp the trajectory of your life. Conversely, if you go to a high-resource school that has the ability and commitment to support excellent teaching, that kind of wealth can benefit you for a lifetime.<sup>42</sup>

And here's the key. We also understand that this distribution and differential treatment are not about the individual student. The quality of the school you happen to attend is extrinsic to your inherent capacity as a learner. Bad educational outcomes are as much about the school as about the learner, which means that poor outcomes cannot fairly be attributed solely to individual students. The criminal system is unequally distributive in the same ways. There are a lot of extrinsic, institutional forces at work that generate differential outcomes, treatments, and punishments. But the criminal system claims that its outcomes *are* about the student, as it were, that they *are* about the defendant. The criminal system asserts that it treats you worse and punishes you more harshly because of what *you* did. But this isn't true at all. The process commonly treats some people better or worse, not because of what they did, but because of the inegalitarian allocations and decision-making cultures within the institution of criminal law itself. This harsher treatment cashes out as punishment, which we then blame on the defendant. And so, in effect, defendants are paying, not for their own sins, but for the sins of the system.

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<sup>42</sup> See generally JONATHAN KOZOL, *SAVAGE INEQUALITIES: CHILDREN IN AMERICA'S SCHOOLS* (2012) (documenting national inequalities in public school education and outcomes); see also Christopher Muller & Alexander F. Roehrkasse, *Falling Racial Inequality and Rising Educational Inequality in US Prison Admissions for Drug, Violent, and Property Crimes*, 122 *PROC. NAT'L ACAD. SCI.*, e2418077122 1, 2, <https://doi.org/10.1073/pnas.2418077122> [<https://perma.cc/G8YF-N4LF>] (finding that education is overtaking race as the most salient predictor of incarceration).

## CONCLUSION

The inequality of the penal pyramid reveals a normative tension baked into the criminal legal project itself: law both helps and hurts.<sup>43</sup> On the one hand, the pyramid showcases the profound influence of law and how its presence, application, and care can make a big difference in people's lives and their legal experiences. This is a vote for the redemptive possibilities of law and lawyering, and for the importance of the service and care that lawyers can provide to the vulnerable. At the same time, the pyramid also showcases the suffering and inequality experienced by millions of defendants, their families, and their communities at the hands of that very same law and legal apparatus.

The penal pyramid thus issues a kind of invitation: to channel and redirect the ethos and resources of the top in order to ease the injustices and inequality at the bottom.<sup>44</sup> This invitation includes conventional legal demands that the innocent be spared punishment, that defendants be given counsel, and that the Constitution be enforced, but it also exceeds such specific demands. It is a broad reminder to lawyers and legal professionals that the law we wield is a powerful form of wealth and that there are many concrete opportunities for redistribution. We can work to make the bottom look and behave more like the top. We can wield law and care on behalf of those for whom law and care are not typically wielded. We can insist on respectful lawfulness at the bottom where it is being ignored. We can make law relevant in spaces of deprivation, and we can use law to shine a light on people and problems that have been dismissed as unimportant.

And finally, we might even think broadly of this kind of top-to-bottom redistribution as a strong form of *public defense*. Or, to slightly misquote the Supreme Court, a way of ensuring that the kind of justice a person gets does not depend so heavily on the amount of social capital they have.<sup>45</sup> The inequality at the bottom of the penal pyramid is not just a story about individual deprivation: it

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<sup>43</sup> Compare Robert M. Cover, *Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4, 35–36 (1983) (describing a “redemptive constitutionalism” that “set[s] out to liberate persons and the law and to raise them from a fallen state”) with *id.* at 41 (“[L]egal meaning . . . never exists in isolation from violence. Interpretation always takes place in the shadow of coercion.”).

<sup>44</sup> Natapoff, *supra* note 8, at 92.

<sup>45</sup> *Griffin v. Illinois*, 351 U.S. 12, 19 (1956) (“There can be no equal justice where the kind of trial a man gets depends on the amount of money he has.”); see also *Douglas v. California*, 372 U.S. 353, 355 (1963) (finding a right to counsel on appeal for the same reasons). On the intimate relationship between the right to counsel and principles of equality, see, e.g., *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963) (“This noble ideal . . . in which every defendant stands equal before the law . . . cannot be realized if the poor man charged with crime has to face his accusers without a lawyer.”); *Miranda v. Arizona*, 384 U.S. 436, 472 (1966) (holding that police must inform suspects of their right to appointed counsel, reasoning that officials “have the obligation not to take advantage of indigence in the administration of justice”); cf. *Ross v. Moffitt*, 417 U.S. 600, 612 (1974) (finding no right to counsel on discretionary appeal and noting that “[t]he Fourteenth Amendment does not require absolute equality or precisely equal advantages, . . . nor does it require the State to equalize economic conditions” (internal citations and quotation marks omitted)).

represents the erosion of due process, rule of law, and many other basic principles of criminal justice. Redistribution is thus a way of *defending* the criminal process itself—with all the *public* values that it embodies—against the distortions of American social and economic inequality.

