

The Shadow Defendants

MARIAM A. HINDS*

Although the overrepresentation of men, specifically Black men and men of color, in the criminal legal system is well documented, the people who support these men, especially women, have garnered less attention. Women who are proximate to system-involved men—mothers, grandmothers, sisters, daughters, girlfriends, and wives—are invisible actors in the criminal legal system who perform critical tasks and provide essential support. They appear in court to demonstrate a person’s family and community ties, use their assets as collateral for bail, deposit money in commissary accounts, maintain social ties during imprisonment through letters and visits, and bear the burden of filling the gap left by an absent father, brother, husband, or caregiver.

Building on work from other disciplines that identifies how the criminal legal system creates a group of people in need of caretaking and appoints women, especially Black women and women of color, as the primary performers of this caretaking labor, this Article excavates the burdens and consequences suffered as a result of this labor’s performance. It argues that the criminal legal system subjects women—whom it calls “shadow defendants”—to a form of “secondary criminalization,” whereby they experience many of the same consequences of criminal legal system involvement as the loved ones they support.

Secondary criminalization flows from laws, norms, procedures, and mechanisms that invite the criminal legal system into every aspect of a woman’s life, including her schedule, bedroom, bank account, mind, body, reputation, and social ties. This Article unearths these legal mechanisms and examines how secondary criminalization impacts shadow defendants’ time, financial resources, privacy, liberty, and physical and mental health, as well as the wellbeing of their relationships. It concludes by outlining reforms that can reduce the consequences and burdens that shadow defendants bear.

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TABLE OF CONTENTS

INTRODUCTION. 825

I. THE CRIMINAL LEGAL SYSTEM’S NEED FOR CARE 829

 A. WHO NEEDS CARE? THE CRIMINAL LEGAL SYSTEM’S CREATION OF
 NEEDS 830

 1. Arrest, Prosecution, and Incarceration 830

 2. What Are Their Needs?. 833

 B. WHY WOMEN? 834

 C. THE FOURTH SHIFT. 836

II. SECONDARY CRIMINALIZATION. 839

 A. SECONDARY PRISONIZATION 840

 B. THE FIVE DOMAINS OF SECONDARY CRIMINALIZATION. 841

III. WOMEN AS SHADOW DEFENDANTS: THE COSTS AND CONSEQUENCES . . . 845

 A. TIME. 846

 B. ECONOMIC CONSEQUENCES 851

 1. Fines, Fees, and Restitution 852

 2. The Bail Bond System. 855

 3. Costs of Incarceration 859

 4. Collateral Consequences. 862

 C. DEPRIVATION OF LIBERTY AND PRIVACY 866

 D. PHYSICAL, MENTAL, AND EMOTIONAL HEALTH CONSEQUENCES. 872

 E. IMPACT ON RELATIONSHIPS. 873

IV. SHINING LIGHT ON THE SHADOWS 875

 A. WHO CARES? SECONDARY CRIMINALIZATION’S IMPORTANCE. 875

 1. Between a Rock and a Hard Place: The Illusion of Choice 875

 2. Shadow Defendants Make Us Safer 877

 3. Shadow Defendants Subsidize the Criminal Legal System 878

2025]	THE SHADOW DEFENDANTS	825
4.	Shadow Defendants as Shadow Defenders	879
5.	Shadow Defendants and Vulnerability	879
6.	Shadow Defendants Reveal Critiques of the Criminal Legal System	880
B.	SHADOW DEFENDANTS, THE FUTURE, AND RESISTANCE	880
	CONCLUSION	884

INTRODUCTION

To a public defender, phone numbers are gold. It is conventional wisdom among public defenders that when you meet a client, you ask for both their contact information *and* the phone numbers of family members, friends, and others who live with or frequently interact with the client. However, during my years as a public defender, I developed a more nuanced version of this pattern. After much trial and error (and many bench warrants issued for absent clients), I began to specifically request the contact information for the closest woman—be it a mother, sister, grandmother, wife, or girlfriend—to my clients.

Although the overwhelming majority of my clients were men, specifically Black men and other men of color, women played a critical role in clients’ cases, often performing crucial tasks.¹ Many acted as de facto case managers—reliably answering their phones, returning voicemails, responding to reminders about upcoming court appearances, and appearing at night arraignments to show the judge that my client had robust community ties. They notified me about new arrests and appeared at sentencing hearings. They assumed financial responsibilities: finding and hiring bail bondsmen, paying bail or putting up assets as collateral for bond, and paying fines, fees, and court costs.

When a client’s case culminated in a conviction and incarceration, the women paid for jail or prison calls, put money in the client’s commissary account, wrote to and visited the client, and bore the burden of filling the gap left by an absent father, brother, husband, or caretaker. Even after an incarcerated loved one returned home, the women shared the collateral consequences of criminal legal system involvement, including losses of privacy and liberty, fewer job opportunities, ineligibility for housing or social services, and immigration implications.

1. In using the term “women,” this Article takes guidance from a study examining the impact that having an incarcerated loved one has on women. The study authors used the term “women” to include “cisgender women, transgender women, and genderqueer and gender nonconforming people” and recognized that “its value as a term is limited by the gender binary it often operates to reinforce.” GINA CLAYTON, ENDRIA RICHARDSON, LILY MANDLIN & BRITTANY FARR, ESSIE JUST. GRP., *BECAUSE SHE’S POWERFUL: THE POLITICAL ISOLATION AND RESISTANCE OF WOMEN WITH INCARCERATED LOVED ONES* 11 n.** (2018), https://www.becauseshespowerful.org/wp-content/uploads/2018/05/Essie-Justice-Group_Because-Shes-Powerful-Report.pdf [<https://perma.cc/5Y25-MME8>]. Similarly, the use of the term “women” and many of this Article’s observations rest on heteronormative values reflective of society’s gender binary. The limitations of the term “women” are abundant, and it is used solely as a descriptive term, absent an intent to exclude or discount anyone’s lived experience.

The overrepresentation of men, particularly Black men and men of color, in the criminal legal system is well documented.² So too are the direct and collateral consequences of criminal legal system involvement.³ There is also a body of literature, particularly in sociology and criminology, documenting the impact that the criminal legal system has on families and communities with system-involved loved ones,⁴ with some articles emphasizing how these consequences are disproportionately borne by women.⁵ Some scholars argue that the criminal legal system

2. See, e.g., ELIZABETH DAVIS, ANTHONY WHYDE & LYNN LANGTON, BUREAU OF JUST. STAT., U.S. DOJ, SPECIAL REPORT: CONTACTS BETWEEN POLICE AND THE PUBLIC, 2015, at 4, 9–10 (2018), <https://bjs.ojp.gov/content/pub/pdf/cpp15.pdf> [<https://perma.cc/U962-342P>]; Cynthia E. Jones, “Give Us Free”: Addressing Racial Disparities in Bail Determinations, 16 N.Y.U. J. LEGIS. & PUB. POL’Y 919, 938–42 (2013); Marc Mauer, *Addressing Racial Disparities in Incarceration*, 91 PRISON J. 87S, 88S–89S (2011); TUSHAR KANSAL, THE SENT’G PROJECT, RACIAL DISPARITY IN SENTENCING: A REVIEW OF THE LITERATURE 4, 10 (Marc Mauer ed., 2005); Stephen Demuth, *Racial and Ethnic Differences in Pretrial Release Decisions and Outcomes: A Comparison of Hispanic, Black, and White Felony Arrestees*, 41 CRIMINOLOGY 873, 897 (2003).

3. See generally, e.g., MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS (2010); MARGARET COLGATE LOVE, JENNY ROBERTS & WAYNE A. LOGAN, COLLATERAL CONSEQUENCES OF CRIMINAL CONVICTION: LAW, POLICY AND PRACTICE (2021–2022 ed. 2021); Naomi F. Sugie & Kristin Turney, *Beyond Incarceration: Criminal Justice Contact and Mental Health*, 82 AM. SOCIO. REV. 719 (2017); Gabriel J. Chin, *The New Civil Death: Rethinking Punishment in the Era of Mass Conviction*, 160 U. PA. L. REV. 1789 (2012); Corinne A. Carey, *No Second Chance: People with Criminal Records Denied Access to Public Housing*, 36 U. TOL. L. REV. 545 (2005); *Welcome to the NICCC*, NAT’L INVENTORY COLLATERAL CONSEQUENCES CONVICTION, <https://niccc.nationalreentryresourcecenter.org> [<https://perma.cc/6JZU-WE29>] (last visited Feb. 25, 2025).

4. See generally, e.g., Erin Eife & Beth E. Richie, *Punishment by Association: The Burden of Attending Court for Legal Bystanders*, 47 LAW & SOC. INQUIRY 584 (2022); Megan Comfort, “A Twenty-Hour-a-Day Job”: The Impact of Frequent Low-Level Criminal Justice Involvement on Family Life, 66S ANNALS AM. ACAD. POL. & SOC. SCI. 63 (2016) [hereinafter Comfort, *The Impact*]; Mary Fainsod Katzenstein & Maureen R. Waller, *Taxing the Poor: Incarceration, Poverty Governance, and the Seizure of Family Resources*, 13 PERSPS. ON POL. 638 (2015); Megan Comfort, *Punishment Beyond the Legal Offender*, 3 ANN. REV. L. & SOC. SCI. 271 (2007) [hereinafter Comfort, *Punishment*]; DONALD BRAMAN, DOING TIME ON THE OUTSIDE: INCARCERATION AND FAMILY LIFE IN URBAN AMERICA (1st paperback ed. 2007); Johnna Christian et al., *Social and Economic Implications of Family Connections to Prisoners*, 34 J. CRIM. JUST. 443 (2006); IMPACTS OF INCARCERATION ON THE AFRICAN AMERICAN FAMILY (Othello Harris & R. Robin Miller eds., 2003); JOE BLAKE, SENTENCED BY ASSOCIATION: THE NEEDS OF PRISONERS’ FAMILIES (1990); John Hagan & Ronit Dinovitzer, *Collateral Consequences of Imprisonment for Children, Communities, and Prisoners*, 26 CRIME & JUST. 121 (1999); BRIAN ELDERBROOM, LAURA BENNETT, SHANNA GONG, FELICITY ROSE & ZOË TOWNS, FWD.US, EVERY SECOND: THE IMPACT OF THE INCARCERATION CRISIS ON AMERICA’S FAMILIES (2018), <https://static.prisonpolicy.org/scans/EverySecond.fwd.us.pdf> [<https://perma.cc/T3X9-XZXT>]. But see generally DAN MARKEL, JENNIFER M. COLLINS & ETHAN J. LEIB, PRIVILEGE OR PUNISH: CRIMINAL JUSTICE AND THE CHALLENGE OF FAMILY TIES (2009) (examining the reverse relationship—the privileges and burdens imposed on system-involved people based on their family status).

5. See generally, e.g., Joshua Page & Joe Soss, *The Predatory Dimensions of Criminal Justice*, 374 SCI. 291 (2021); Joshua Page, Victoria Piehowski & Joe Soss, *A Debt of Care: Commercial Bail and the Gendered Logic of Criminal Justice Predation*, 5 RSF: RUSSELL SAGE FOUND. J. SOC. SCIS. 150 (2019); CLAYTON ET AL., *supra* note 1; SANETA DEVUONO-POWELL, CHRIS SCHWEIDLER, ALICIA WALTERS & AZADEH ZOHRABI, ELLA BAKER CTR. FOR HUM. RTS., FORWARD TOGETHER & RSCH. ACTION DESIGN, WHO PAYS? THE TRUE COST OF INCARCERATION ON FAMILIES (2015), <https://static.prisonpolicy.org/scans/who-pays%20Ella%20Baker%20report.pdf> [<https://perma.cc/2SZK-DJCG>]; MEGAN COMFORT, DOING TIME TOGETHER: LOVE AND FAMILY IN THE SHADOW OF THE PRISON (2007); LORI B. GIRSHICK, SOLEDAD WOMEN: WIVES OF PRISONERS SPEAK OUT (1996); LAURA T. FISHMAN, WOMEN AT THE WALL: A STUDY OF PRISONERS’ WIVES DOING TIME ON THE OUTSIDE (1990).

extracts resources from these women, including economic resources, as a source of revenue generation.⁶ Finally, feminist theorists have identified and cataloged the invisible, often caretaking, labor that women perform in society.⁷

This Article marries these theories and draws this conversation into legal discourse. It reviews scholarship describing how the criminal legal system creates a group of people in need of caretaking and appoints women as the primary performers of this labor. It argues that performing this labor subjects women—whom it calls “shadow defendants”—to secondary criminalization. The Article uses the term “secondary criminalization” to describe the process by which women are subjected to the economic, social, emotional, and collateral consequences that the criminal legal system imposes.⁸ Stated plainly, women are prosecuted and penalized right alongside their system-involved loved ones.⁹ The Article surveys the statutes, case law, court norms, litigation, and other legal mechanisms that cause secondary criminalization and impose these consequences on women, particularly Black women and women of color.

Shadow defendants are often specters in the criminal legal system: their presence and participation are anticipated, expected even, by judges, prosecutors, defense attorneys, and system-involved people alike, but rarely acknowledged. The criminal legal system relies on their contributions but fails to recognize their burdens or suffering. And although the system eagerly punishes those convicted of committing crimes, it also indiscriminately penalizes those who stand beside them.

The use of the term “shadow” to describe this population of women is intentional. Merriam-Webster defines a shadow as “an inseparable companion or follower” and “a state of ignominy or obscurity.”¹⁰ Both definitions describe shadow defendants’ experiences. Shadow defendants suffer consequences inseparable from those of their loved ones: a fine is an economic sanction for them both; a prison sentence is a sentence for them both; a search warrant is a loss of privacy for them both. The latter definition highlights that women’s suffering happens in obscurity—in the darkness. Their plight is unacknowledged; their suffering too

6. See, e.g., Cory Fischer-Hoffman, *The Quadruple Burden: Reproductive Labor & Prison Visitation in Venezuela*, 24 PUNISHMENT & SOC’Y 95, 108 (2022); Eife & Richie, *supra* note 4, at 593–96; Page & Soss, *supra* note 5, at 293; Page et al., *supra* note 5, at 152, 155; CLAYTON ET AL., *supra* note 1, at 34; DEVUONO-POWELL ET AL., *supra* note 5, at 9; Katzenstein & Waller, *supra* note 4, at 639, 644.

7. See, e.g., EVELYN NAKANO GLENN, FORCED TO CARE: COERCION AND CAREGIVING IN AMERICA 17, 36, 160 (2010); MARTHA ALBERTSON FINEMAN, THE AUTONOMY MYTH: A THEORY OF DEPENDENCY 38, 40 (2004); LEOPOLDINA FORTUNATI, THE ARCANES OF REPRODUCTION: HOUSEWORK, PROSTITUTION, LABOR AND CAPITAL 131, 146 (Jim Fleming ed., Hilary Creek trans., Autonomedia 1995) (1981); see also LINDA GORDON, PITIED BUT NOT ENTITLED: SINGLE MOTHERS AND THE HISTORY OF WELFARE 1890–1935, at 7 (1994); ARLIE HOCHSCHILD & ANNE MACHUNG, THE SECOND SHIFT: WORKING FAMILIES AND THE REVOLUTION AT HOME 3 (3d ed. 2012).

8. The term secondary criminalization is an extension of a term introduced by Megan Comfort, secondary prisonization, which is discussed in further detail in Section II.A. For a discussion of other definitions of secondary criminalization, see *infra* Section II.B.

9. See generally sources cited *supra* notes 4, 5, and 6.

10. *Shadow*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/shadow> [https://perma.cc/BLC4-URRT] (last visited Feb. 26, 2025).

often silent.¹¹ They occupy the courtrooms, hallways, and visitation rooms of the criminal legal system's hallowed institutions as silent sentries determined to bear witness. They respond to the call to arms and demands for their labor, capital, and participation and then are shuffled to the sidelines.

These women are not "defendants" in the legal sense, which would trigger constitutional and statutory protections, judicial oversight, and scrutiny.¹² Rather, this is a role they play pragmatically, which leaves them unprotected, unseen, and unrecognized. Their names appear in invisible ink beside those of their loved ones, on the opposite side of the "v." in charging documents, motions, and decisions—present yet undetectable.

This Article explores the full panoply of consequences that shadow defendants face and highlights the legal mechanisms that impose them. It proceeds in four parts. Part I briefly describes the size and scope of the criminal legal system, paying particular attention to the populations and communities that are disproportionately represented in its ranks. Understanding who is prosecuted informs which populations of women disproportionately assume caregiving responsibilities for system-involved people. It then reviews a framework that explains how society's expectation that women serve as primary caregivers influences the role shadow defendants play in the criminal legal system. Part II defines and describes the term "secondary criminalization" and introduces it as the theoretical lens through which the Article examines this phenomenon.

Part III turns to the role that women play, examining how the criminal legal system penalizes them and transforms them into shadow defendants who effectively do time, even if they themselves did not commit a crime. It also explains how secondary criminalization is a byproduct of the invisible labor that shadow defendants perform in other parts of their lives. Here, the Article pays particular attention to legal doctrine and practices that reinforce the "woman as caregiver" expectation and perpetuate the disproportionate representation of Black women and women of color in shadow defendants' ranks.¹³ It highlights how the criminal

11. See Kimberlé W. Crenshaw, *From Private Violence to Mass Incarceration: Thinking Intersectionally About Women, Race, and Social Control*, 59 UCLA L. REV. 1418, 1427 (2012) (discussing the "intersectional subordination" of women of color and their marginalized position within public, academic, and political discussions of mass incarceration and social control).

12. I decline to refer to people charged with committing crimes as defendants and instead refer to them as system-involved or incarcerated people throughout this piece. I do so to center their humanity and identity without reducing their personhood solely to their connection to the criminal legal system. The use of the term shadow defendants to refer to women who support their system-involved loved ones serves dual purposes and is done with a hint of irony—it both acknowledges that they are not literally the accused, and thus not technically defendants, while also intentionally invoking language that centers their proximity to (and the resultant consequences of involvement with) the criminal legal system.

13. See KHIARA M. BRIDGES, *CRITICAL RACE THEORY: A PRIMER* 14 (2019) (positing that the law perpetuates racial hierarchies even in areas of law that "seemingly have nothing to do with race—like the tax code, securities laws, land use laws, and intellectual property laws"). See generally Adrien Katherine Wing, *Introduction to CRITICAL RACE FEMINISM: A READER*, at xiii (Adrien Katherine Wing ed., 1997); *CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT* (Kimberlé Crenshaw, Neil Gotanda, Gary Peller & Kendall Thomas eds., 1995); Richard Delgado, *Introduction to CRITICAL RACE THEORY: THE CUTTING EDGE*, at xiii (Richard Delgado ed., 1995). This Article acknowledges and investigates the seemingly race-neutral laws, mechanisms, and procedures that

legal system relies on and forcibly extracts their labor and resources—both economic and otherwise—while also elevating examples of shadow defendants’ resistance and advocacy. Part IV posits that shadow defendants’ labor contributes to public safety, subsidizes government functions, protects the vulnerable, aids in the exercise of constitutional and statutory protections, and reveals distinct critiques of the criminal legal system. It concludes by identifying a path forward and offering recommendations for minimizing the consequences that shadow defendants suffer, like eliminating cash bail. However, eradicating secondary criminalization will require a substantial and dramatic shrinking of the criminal legal system’s footprint.

I. THE CRIMINAL LEGAL SYSTEM’S NEED FOR CARE

In their research—the Debt of Care study—Joshua Page and his colleagues examine predatory practices in the bail bond industry to “clarify how relations and practices in the bail field are structured by the broader social organization of care in American society.”¹⁴ Page went “undercover” as a bail bond agent working to solicit incarcerated people’s families and friends to pay bail premiums and serve as cosigners on bail bond contracts.¹⁵ Drawing on sociological and feminist theories, the authors offer a framework for contextualizing the commercial bail industry’s systematic predation upon and extraction of resources from women, particularly women of color.¹⁶

The study examines how the rise of mass incarceration and corresponding growth in the commercial bail industry generate a distinct financial need: incarcerated people (who often have limited resources) rely on loved ones to contract with bail bond companies to secure their release from custody.¹⁷ The authors theorize that women, especially women of color, are targeted to fulfill this financial need based on society’s racialized, gendered, and class-based expectation of caring that is rooted in historical systems of social subordination.¹⁸ They explore these concepts through the lens of Page’s experiences and observations as a bail bond agent.¹⁹

perpetuate and reinforce the racial disparities of secondary criminalization. To do otherwise—to silence the racial dimensions of secondary criminalization—would be to ignore the historical context that colors its formation and forego a framework that generates distinct critiques, responses, and solutions.

14. Page et al., *supra* note 5, at 164. “Social organization of care” refers to society’s expectation of who provides care for populations in need of assistance, such as children, the elderly, and people with disabilities. See GLENN, *supra* note 7, at 5–6. Caring is “the relationships and activities involved in maintaining people on a daily basis and intergenerationally.” *Id.* at 5. This includes three types of activities: (1) “physical care . . . , emotional care . . . , and services to help people meet their physical and emotional needs” (e.g., attending appointments), (2) caring for people’s environments (e.g., household maintenance), (3) and “fostering people’s relationships and social connections.” *Id.*

15. Page et al., *supra* note 5, at 157–59.

16. *See id.* at 165.

17. *Id.* at 156–59.

18. *Id.* at 153–56.

19. *See id.* at 158–67.

In other work, the authors extend their predation framework to the criminal legal system's other economic and financial takings.²⁰

This Part relies and builds on the Debt of Care theory, extending it beyond financial resource extraction and applying it to other forms of labor that women perform. Section I.A details the criminal legal system's size, scope, and disproportionate impact on certain populations. Using the Debt of Care framework, Section I.B tackles the question "why women?" by exploring cultural norms and systems of coercion that exploit women's labor and assign them the duty of fulfilling unmet caretaking needs. Finally, Section I.C considers how women, as society's de facto caretakers, predictably intervene to fulfill their system-involved loved ones' unmet needs, both economic and otherwise.

A. WHO NEEDS CARE? THE CRIMINAL LEGAL SYSTEM'S CREATION OF NEEDS

The explosion of mass incarceration in the last four decades has transformed our social landscape and created a population of people in need of care. Thus, before considering how the criminal legal system affects women who support their system-involved loved ones, it is important to understand the size and scope of the system, as well as whom it disproportionately impacts. The same disparities in who gets arrested, detained pretrial, and incarcerated will be reflected in which women are subjected to secondary criminalization and transformed into shadow defendants.

1. Arrest, Prosecution, and Incarceration

Nearly two million people are incarcerated in jails, prisons, and correctional facilities across the nation.²¹ However, this startling figure does not reveal the criminal legal system's true footprint because it does not account for the "enormous churn in and out of our correctional facilities": in fact, there are over

20. See generally Page & Soss, *supra* note 5; Joe Soss, *Preying on the Poor: Criminal Justice as Revenue Racket*, YOUTUBE (Oct. 22, 2019), <https://www.youtube.com/watch?v=DdSCbb-stMQ>; Joshua Page & Joe Soss, *Criminal Justice Predation and Neoliberal Governance*, in *RETHINKING NEOLIBERALISM: RESISTING THE DISCIPLINARY REGIME* 141 (Sanford F. Schram & Marianna Pavlovskaya eds., 2017). The authors also have two forthcoming books covering the same. See generally JOSHUA PAGE & JOE SOSS, *LEGAL PLUNDER: PREDATORY POLICING AND PUNISHMENT IN THE UNITED STATES* (forthcoming Aug. 2025); JOSHUA PAGE & JOE SOSS, *PREYING ON THE POOR: CRIMINAL JUSTICE AS REVENUE RACKET* (forthcoming).

21. Leah Wang, *Punishment Beyond Prisons 2023: Incarceration and Supervision by State*, PRISON POL'Y INITIATIVE (May 2023), <https://www.prisonpolicy.org/reports/correctionalcontrol2023.html> [<https://perma.cc/6EC6-57C6>]; *Growth in Mass Incarceration*, SENT'G PROJECT, <https://www.sentencingproject.org/research/> [<https://perma.cc/Z2DC-U5UZ>] (last visited Feb. 26, 2025). The United States stands out internationally for the number of people it incarcerates: Despite having approximately 5% of the world's population, the nation incarcerates over 20% of the world's prisoners. *Mass Incarceration*, ACLU, <https://www.aclu.org/issues/smart-justice/mass-incarceration> [<https://perma.cc/R7XA-3FAQ>] (last visited Feb. 26, 2025); see also ELDERBROOM ET AL., *supra* note 4, at 20 ("[T]he United States continues to incarcerate more people than any other country in the world."). For commentary on the overall growth of the U.S. prison population and the corresponding consequences, see generally ALEXANDER, *supra* note 3; TODD R. CLEAR, *IMPRISONING COMMUNITIES: HOW MASS INCARCERATION MAKES DISADVANTAGED NEIGHBORHOODS WORSE* (2007).

7 million jail admissions yearly.²² In addition to incarceration, the criminal legal system also places people under various forms of community supervision, such as probation and parole. “[A]n estimated 3.7 million adults are under community supervision” and “1 in 61 . . . are under some form of correctional control.”²³

Mass incarceration and its corresponding costs impact some people and communities more severely than others. Men, for example, are over thirteen times more likely to be incarcerated than women.²⁴ Minorities—particularly Black and Latino men—are grossly overrepresented at critical stages of the criminal legal system, including stop rates, arrest rates, pretrial detention rates, and sentencing severity.²⁵ These disparities continue after arrest and carry over into the courtroom.²⁶ “Blacks and Latinos are more likely than whites to be denied bail, to have a higher money bond set, and to be detained because they cannot pay their bond.”²⁷ These disparities have critical consequences for how a criminal case

22. See Wendy Sawyer & Peter Wagner, *Mass Incarceration: The Whole Pie 2025*, PRISON POL’Y INITIATIVE (Mar. 11, 2025), <https://www.prisonpolicy.org/reports/pie2025.html> [<https://perma.cc/9BVG-3L89>].

23. Wang, *supra* note 21; see also Kate Weisburd, *Punitive Surveillance*, 108 VA. L. REV. 147, 147 (2022) (detailing the prolific use of electronic-surveillance technology to monitor people on supervised release, probation, and parole); Jenny E. Carroll, *Beyond Bail*, 73 FLA. L. REV. 143, 172–76 (2021) (discussing the replacement of monetary bail with nonmonetary conditions of release); MAYA SCHENWAR & VICTORIA LAW, PRISON BY ANY OTHER NAME: THE HARMFUL CONSEQUENCES OF POPULAR REFORMS 30 (2020) (describing how alternatives to incarceration widen the net of people subjected to carceral control); Cecelia Klingele, *Rethinking the Use of Community Supervision*, 103 J. CRIM. L. & CRIMINOLOGY 1015, 1015 (2013) (arguing that “community supervision is not an alternative to imprisonment but only a delayed form of it”).

24. See E. ANN CARSON, BUREAU OF JUST. STAT., OFF. OF JUST. PROGRAMS, U.S. DEP’T OF JUST., PRISONERS IN 2016, at 8 (2018), <https://bjs.ojp.gov/content/pub/pdf/p16.pdf> [<https://perma.cc/CB6W-V5NV>].

25. See Wendy Sawyer, *Visualizing the Racial Disparities in Mass Incarceration*, PRISON POL’Y INITIATIVE (July 27, 2020), <https://www.prisonpolicy.org/blog/2020/07/27/disparities> [<https://perma.cc/PWZ7-ZV32>]. Depending on the jurisdiction, Black people are anywhere from five to ten times more likely to be arrested than white people. Pierre Thomas, John Kelly & Tonya Simpson, *ABC News Analysis of Police Arrests Nationwide Reveals Stark Racial Disparity*, ABC NEWS (June 11, 2020, 5:04 AM), <https://abcnews.go.com/US/abc-news-analysis-police-arrests-nationwide-reveals-stark/story?id=71188546> [<https://perma.cc/8CBZ-SCFT>]. Another analysis estimates that despite constituting only 12% of the overall population, Black people comprised 30% of property-crime arrests and 39% of violent-offense arrests each year. Mauer, *supra* note 2, at 89S.

26. See generally Carlos Berdejó, *Criminalizing Race: Racial Disparities in Plea-Bargaining*, 59 B. C. L. REV. 1187 (2018) (finding racial disparities in the plea-bargaining process).

27. THE SENT’G PROJECT, REPORT OF THE SENTENCING PROJECT TO THE UNITED NATIONS SPECIAL RAPPORTEUR ON CONTEMPORARY FORMS OF RACISM, RACIAL DISCRIMINATION, XENOPHOBIA, AND RELATED INTOLERANCE 1, 6 (2018), <https://www.sentencingproject.org/app/uploads/2022/08/UN-Report-on-Racial-Disparities.pdf> [<https://perma.cc/26W4-SZBT>]; see also Megan Stevenson & Sandra G. Mayson, *Pretrial Detention and Bail*, in REFORMING CRIMINAL JUSTICE: A REPORT BY THE ACADEMY FOR JUSTICE 21, 30–31 (Erik Luna ed., 2018) (discussing the causes of racial disparities in pretrial detention rates); Jones, *supra* note 2, at 938–42 (reviewing the last fifty years of studies on racial disparities in bail determinations and concluding that almost all find that “African Americans are subjected to pretrial detention at a higher rate and are subjected to higher bail amounts than are white arrestees with similar charges and similar criminal histories”); KANSAL, *supra* note 2, at 10 (reviewing two studies that found that “black defendants were more likely to be detained pending trial, and as a result, received harsher sentences”); Demuth, *supra* note 2, at 897 (“The results . . . indicate that both black and Hispanic defendants are more likely to be held on bail (i.e., less likely to pay bail) than white

resolves: people detained pretrial are more likely to be convicted, to agree to harsher plea offers, to be sentenced to a period of incarceration, and to receive a lengthier sentence than those released pretrial.²⁸

Racial disparities also arise at the sentencing phase, as illustrated by the fact that Black and Latino men tend to be sentenced more harshly than other groups.²⁹ These disparities are reflected in incarceration rates in state prisons, with Black people almost five times more likely and Latinx people 1.3 times more likely to be incarcerated than white people.³⁰

Low-income residents are also overrepresented in the criminal legal system.³¹ “More than half of those entering the criminal justice system live at or below the poverty line . . . when sentenced and over two-thirds of those in jail reported incomes of less than \$12,000 per year. In total, at least 80% of incarcerated individuals are indigent.”³²

The pervasiveness of carceral intervention and control has a tremendous and deleterious impact on families, especially minority and low-income families.

More than six in 10 (63 percent) black adults have had an immediate family member incarcerated and nearly one-third (31 percent) have had an immediate family member incarcerated for more than one year. These rates are 42 percent and 10 percent, respectively, for white adults and 48 percent and 17 percent for Latino adults.³³

Furthermore,

Black people are 50 percent more likely than white people to have had a family member incarcerated, and three times more likely to have had a family member incarcerated for one year or longer. People earning less than \$25,000 per year are 61 percent more likely than people earning more than \$100,000 to have had a family member incarcerated, and three times more likely to have had a family member incarcerated for one year or longer.³⁴

defendants, controlling for relevant factors. Among defendants required to pay bail, the odds of detention for black and Hispanic defendants are more than twice those for white defendants.”).

28. THE SENT’G PROJECT, *supra* note 27, at 6; *see also* Paul Heaton, Sandra G. Mayson & Megan Stevenson, *The Downstream Consequences of Misdemeanor Pretrial Detention*, 69 STAN. L. REV. 711, 711 (2017).

29. *See, e.g.*, KANSAL, *supra* note 2, at 2.

30. ASHLEY NELLIS, THE SENT’G PROJECT, *THE COLOR OF JUSTICE: RACIAL AND ETHNIC DISPARITY IN STATE PRISONS* 5–6 (2021).

31. Specific neighborhoods and communities have a high geographic concentration of system-involved residents due to “[r]acially segregated housing patterns [that] interact with socioeconomic status.” Deborah N. Archer, *The New Housing Segregation: The Jim Crow Effects of Crime-Free Housing Ordinances*, 118 MICH. L. REV. 173, 214 (2019). For more on the geographic concentration of incarceration, *see* CLEAR, *supra* note 21, at 64.

32. DEVUONO-POWELL ET AL., *supra* note 5, at 11.

33. ELDERBROOM ET AL., *supra* note 4, at 28.

34. *Id.* at 9.

Understanding the contours of who is ensnared in the criminal legal system is critical because that influences which populations of women will be expected to fulfill their needs. The next Section turns to an analysis of those needs.

2. What Are Their Needs?

Participation in the criminal legal system creates a set of needs for system-involved people. Although these needs and how they are fulfilled are examined in further detail in Part III, a brief overview is instructive. For those who are released pretrial, these needs can include financial resources to pay criminal justice debt or bail, assistance with keeping track of court appearances and other appointments, transportation to and from court dates and appointments, a loved one's physical presence in court, or even housing during the pendency of a criminal case.

The needs of those in custody are even more pronounced because they lack access to goods and resources.³⁵ Incarcerated people may require extensive financial assistance and ask loved ones to provide funds—referred to as “put[ting] money on the books”—to purchase food or hygiene products from the correctional facility's commissary.³⁶ Loved ones may also be called upon to supply goods such as clothing.³⁷ Finally, providing social support and connection through in-person visits, phone calls, and videoconferencing is a frequent request to combat the isolation and loneliness of incarceration.³⁸

Before proceeding with this discussion of unmet needs, it is important to acknowledge and resist the tendency to further strip system-involved people of their agency and autonomy. Discussing a need for assistance or care is not intended to suggest that system-involved people lack the capacity or ability to fulfill their own needs, but rather an acknowledgement of the tremendous consequences that attach from criminal legal system involvement. The United States' criminal legal system is widely regarded as one of the most punitive in the world and immediately constrains a person's autonomy from the first moment he interacts with the police.³⁹ Constraints on incarcerated people's liberty are severe: they are stripped of their belongings, freedom of movement, the ability to freely communicate with the outside world, the choice of food they consume, and the

35. See Fischer-Hoffman, *supra* note 6, at 110.

36. See Anna VanCleave, *Prison Banking*, 112 CALIF. L. REV. 1699, 1702–03 (2024).

37. See, e.g., COMFORT, *supra* note 5, at 80; Taylor Elizabeth Eldridge, *The Big Business of Prisoner Care Packages*, MARSHALL PROJECT (Dec. 21, 2017, 7:00 AM), <https://www.themarshallproject.org/2017/12/21/the-big-business-of-prisoner-care-packages> [<https://perma.cc/XRC6-C283>] (explaining how loved ones who wish to send clothing may be required to go through private vendors).

38. See, e.g., Erica Bryant, *Video Visits for Families of People in Jail and Prison Should Be Free*, VERA INST. JUST. (Jan. 9, 2024), <https://www.vera.org/news/video-visits-for-families-of-people-in-jail-and-prison-should-be-free> [<https://perma.cc/T3B4-2986>].

39. See generally ALEXANDER, *supra* note 3 (arguing that the punitive nature of the American criminal legal system serves to reinforce racial subordination); PETER K. ENNS, *INCARCERATION NATION: HOW THE UNITED STATES BECAME THE MOST PUNITIVE DEMOCRACY IN THE WORLD* (2016) (demonstrating how the American criminal legal system became increasingly punitive in the latter half of the 20th century).

ability to freely exercise, read, or engage in other leisure activities.⁴⁰ Their access to hygiene products, clothing, and other personal items is monitored and limited, and their ability to earn a wage and economically provide for themselves is nearly extinguished.⁴¹

Even for those at liberty, the criminal legal system can impose significant obligations and requirements that constrain a person's autonomy: electronic monitoring, curfews, check-ins with pretrial agencies or probation agents, house arrest, stay-away orders, and court appearances can impact a person's employment, education, custody arrangement, and housing. These constraints and obligations impose a severe burden on system-involved people, many of whom—perhaps unsurprisingly—require assistance. The next Section examines why women are often enlisted to provide such assistance.

B. WHY WOMEN?

Scholars have extensively detailed the household and childrearing responsibilities that fall disparately on women.⁴² In a groundbreaking study, Arlie Hochschild investigated the distribution of household and childrearing labor amongst married, heterosexual couples with young children.⁴³ She concluded that the unequal distribution of housework and childrearing responsibility often resulted in working women performing a “second shift” at home following a first shift at their place of employment.⁴⁴

Other scholars have made similar observations with respect to housework, childrearing, and caregiving.⁴⁵ “[M]others continue to spend more time with

40. See, e.g., Erica J. Hashimoto, *Resurrecting Autonomy: The Criminal Defendant's Right to Control the Case*, 90 B.U. L. REV. 1147, 1170–74 (2010) (describing how prosecution, conviction, incarceration, and probation have “serious consequences for a defendant’s autonomy”); Youngjae Lee, *Valuing Autonomy*, 75 FORDHAM L. REV. 2973, 2974–75 (2007) (positing that a discussion of autonomy must account for our system of punishment, which routinely deprives people of autonomy through incarceration and even death); David McCord, *Imagining a Retributivist Alternative to Capital Punishment*, 50 FLA. L. REV. 1, 60–62 (1998) (arguing that the rules and regulations imposed on incarcerated people control “every aspect of the [prisoners’] lives”).

41. See sources cited *supra* note 40.

42. See HOCHSCHILD & MACHUNG, *supra* note 7, at 2–3; see also Jorge Moreira da Silva, *Why You Should Care About Unpaid Care Work*, OECD: DEVELOPMENT MATTERS (Mar. 18, 2019), <https://oecd-development-matters.org/2019/03/18/why-you-should-care-about-unpaid-care-work> [<https://perma.cc/37WD-3N6Y>] (finding that across the globe, women and girls “are responsible for 75% of unpaid care and domestic work in our homes and communities”); Suzanne M. Bianchi, Liana C. Sayer, Melissa A. Milkie & John P. Robinson, *Housework: Who Did, Does or Will Do It, and How Much Does It Matter?*, 91 SOC. FORCES 55, 58 (2012) (finding that women do more housework and childcare than men, but noting that men’s and women’s overall work hours (paid, household, and childcare) were similar); Suzanne M. Bianchi, Melissa A. Milkie, Liana C. Sayer & John P. Robinson, *Is Anyone Doing the Housework? Trends in the Gender Division of Household Labor*, 79 SOC. FORCES 191, 218 (2000) (finding that housework continues to fall more often on women, though not as disproportionately as in earlier years); SARAH FENSTERMAKER BERK, *THE GENDER FACTORY: THE APPORTIONMENT OF WORK IN AMERICAN HOUSEHOLDS* 160–61 (1985) (finding that “how much was done in the household was the overwhelming determinant” of how much work wives undertook outside the home).

43. See HOCHSCHILD & MACHUNG, *supra* note 7, at 2–3.

44. *Id.* at 4.

45. See sources cited *supra* note 40; see also Page et al., *supra* note 5, at 155.

children than do fathers and do twice as much of the ‘custodial’ care involving feeding and cleaning—even as they have entered the paid labor force.’⁴⁶ More recently, the COVID-19 pandemic increased parents’ household, childrearing, and caregiving responsibilities because the lockdowns interfered with their access to outside support and childcare.⁴⁷ Researchers worldwide have found that the same pattern persisted: women bore a disproportionate share of these increased responsibilities.⁴⁸

The second shift analogy has also been extended to a “third shift,” although less uniformly. For some, the third shift entails the responsibility of “ensuring the emotional wellbeing of not only [a woman’s] children but also parents and other family members.”⁴⁹ In other words, it refers to the emotional mental load that disparately falls on women.⁵⁰ For others, the third shift refers to “community organizing, service and activism that has increasingly been a necessity with the . . . decline of state support.”⁵¹ Still others use the term third shift to describe additional employment that women may seek out to compensate for a partner’s incarceration.⁵² Overall, the second and third shifts collectively refer to additional labor—whether housework, childcare, emotional support, or additional employment—that researchers suggest falls disproportionately on women.

Why does this additional labor fall to women? The Debt of Care authors posit that our social organization of care is rooted in historical systems of labor, coercion, and oppression that intersect with gender, race, and class.⁵³ They discuss how industrialization in the late eighteenth and early nineteenth centuries drew men outside the home into the paid workforce while women performed domestic

46. Melissa A. Milkie et al., *Gendered Division of Childrearing: Ideals, Realities, and the Relationship to Parental Well-Being*, 47 *SEX ROLES* 21, 22 (2002).

47. See Grace L. Whaley & Betty Pfefferbaum, *Parental Challenges During the COVID-19 Pandemic: Psychological Outcomes and Risk and Protective Factors*, 25 *CURRENT PSYCHIATRY REPS.* 165, 171 (2023).

48. See, e.g., Usha Ranji et al., *Women, Work, and Family During COVID-19: Findings from the KFF Women’s Health Survey*, KFF (Mar. 22, 2021), <https://www.kff.org/womens-health-policy/issue-brief/women-work-and-family-during-covid-19-findings-from-the-kff-womens-health-survey> [https://perma.cc/WN8N-VV84]; Enrica Croda & Shoshana Grossbard, *Women Pay the Price of COVID-19 More Than Men*, 19 *REV. ECON. HOUSEHOLD* 1, 8 (2021); Daniela Del Boca et al., *Women’s and Men’s Work, Housework and Childcare, Before and During COVID-19*, 18 *REV. ECON. HOUSEHOLD* 1001, 1005 (2020).

49. Heejung Chung, *Return of the 1950s Housewife? How to Stop Coronavirus Lockdown Reinforcing Sexist Gender Roles*, *CONVERSATION* (Mar. 30, 2020, 7:01 AM), <https://theconversation.com/return-of-the-1950s-housewife-how-to-stop-coronavirus-lockdown-reinforcing-sexist-gender-roles-134851> [https://perma.cc/F8EM-NT44].

50. *Id.* For additional work on women bearing the brunt of the mental load, see generally Natalia Reich-Stiebert et al., *Gendered Mental Labor: A Systematic Literature Review on the Cognitive Dimension of Unpaid Work Within the Household and Childcare*, 88 *SEX ROLES* 475 (2023).

51. Fischer-Hoffman, *supra* note 6, at 97.

52. See Angela Bruns, *The Third Shift: Multiple Job Holding and the Incarceration of Women’s Partners*, 80 *SOC. SCI. RSCH.* 202, 211–12 (2019).

53. See Page et al., *supra* note 5, at 159.

labor in the private sphere of the home.⁵⁴ The authors rely on Evelyn Nakano Glenn's cogent argument that intersecting forms of coercion "have induced women to assume responsibility for caring for family members and . . . tracked poor, racial minority, and immigrant women into positions entailing caring for others."⁵⁵ These coercive forces date back to slavery, when Black women's coerced labor occurred both in the fields and in the household through performance of domestic tasks.⁵⁶ They endured after the Civil War when less privileged groups, including immigrants, indentured servants, Native Americans, and other minority women, were tracked into care work by coercive labor practices and policies of segregation, discrimination, and subordination.⁵⁷ As the Debt of Care authors point out, these disparities persist today: women working outside the home outsource childcare to other women, often women of color, who are exploitatively paid low wages and offered few benefits.⁵⁸

With this understanding of our social organization of care, the following Section explores how these norms pervade the criminal legal system.

C. THE FOURTH SHIFT

"Travis just got arrested." These are Sarah's first words after I answer her midnight phone call. Travis is my eighteen-year-old client and Sarah is his sister. She sounds breathless, but matter of fact. She immediately responds when I ask where he was arrested, by what precinct, and how long ago. "Since court is going to close in an hour, he probably won't be seen until morning, right?" We

54. See *id.* at 154; GLENN, *supra* note 7, at 16–17, 91; see also JOAN C. TRONTO, *CARING DEMOCRACY: MARKETS, EQUALITY, AND JUSTICE* 1 (2013) (stating that in nineteenth century American ideology, the public was a masculine sphere and the home a private, feminine sphere); FORTUNATI, *supra* note 7, at 7–32 (examining how the transition from a precapitalist to a capitalist society impacted the value assigned to productive and reproductive labor); GORDON, *supra* note 7, at 7 (examining how the ideal of men laboring outside of the home and women overseeing the domestic sphere became a deeply held cultural value and influenced the development of welfare programming).

55. GLENN, *supra* note 7, at 5; see also TRONTO, *supra* note 54, at 99 (concluding that the allocation of responsibility for care work to women and people of lower class or status is a result of workforce discrimination, which in turn contributes to informal care workers being underpaid, less protected, and the recipients of fewer benefits). Glenn describes how two overlapping forms of coercion propelled women into the caretaker role and are particularly relevant here: (1) racialized gendered servitude and (2) status obligations. GLENN, *supra* note 7, at 6–7. Racialized gendered servitude is "a labor system in which one party has the power to command the services of another" based on race and gender. *Id.* at 7. A status obligation refers to expectations of behaviors or duties that are assigned based on an identity or role that a person occupies. *Id.* at 6–7 (citing Alvin W. Gouldner, *The Norm of Reciprocity: A Preliminary Statement*, 25 AM. SOCIO. REV. 161, 170 (1960)). Glenn asserts that "women are charged with a triple status duty to care, on the basis of (1) kinship (wife, daughter, mother), (2) gender (as women), and (3) sometimes race/class (as members of a subordinate group)." *Id.* at 7.

56. See GLENN, *supra* note 7, at 25–31; see also Page et al., *supra* note 5, at 154.

57. See GLENN, *supra* note 7, at 31–38. These labor practices included coercive tenancy arrangements, apprenticeships, convict labor, indentured servitude, and labor contracts. *Id.* at 29–31, 34; Page et al., *supra* note 5, at 154.

58. Page et al., *supra* note 5, at 154–55; see FINEMAN, *supra* note 7, at 40; see also Mignon Duffy, *Doing the Dirty Work: Gender, Race, and Reproductive Labor in Historical Perspective*, 21 GENDER & SOC'Y 313, 324–27 (2007) (illustrating that women and racial-ethnic workers are also overrepresented among jobs involving "nonnurturant reproductive labor" such as public cleaners, drycleaners and launderers, and food preparers).

make plans to meet in the arraignments courtroom midmorning the following day and for her to bring whatever funds she can gather between now and then for bail.⁵⁹

Perhaps unsurprisingly, society's expectations around the social organization of care are reflected in the criminal legal system.⁶⁰ Women already perform second shift and third shift labor in their households, childcare responsibilities, and communities. But, as the Debt of Care study demonstrates through economic-resource extraction in the bail bond industry, their extra labor extends to the criminal legal system as well. Women are expected to, and do in fact, fulfill the needs of their system-involved loved ones who are overwhelmingly male. Indeed, while 42% of men have an immediate family member who has been incarcerated, that number increases to 48% for women.⁶¹

For Black women and women of color, the impact is particularly acute, which in turn exacerbates existing disparities. "Just as men of color are disproportionately targeted for arrest and incarceration, women of color disproportionately shoulder the burdens of" fulfilling the caregiver role for their system-involved families and friends.⁶² Low-income women of color are thus hit with a double burden: they are both more likely to be relied upon to provide care in society generally *and* more likely to provide care for their men because of disparities in policing and prosecution. Indeed, while just under 25% of women generally are related to someone who is incarcerated, that figure rises to 40% among Black women.⁶³

In an examination of reproductive labor and prison visitation practices in Venezuela, Cory Fischer-Hoffman labeled the labor that women perform for their incarcerated loved ones the "fourth shift" or "quadruple burden."⁶⁴ The criminal

59. This vignette is based on interactions that I had with my clients' loved ones during my time as a public defender. Although it does not directly recount one individual's experience, it represents a common interaction and relationship.

60. See generally Fischer-Hoffman, *supra* note 6; Page et al., *supra* note 5. Although the focus of this Article is on how the social organization of care impacts women who support system-involved men, society's expectations are reflected in other stages of the criminal legal system as well. For example, a study investigating the gender gap—why women are dramatically underrepresented in prisons—concluded that "women are assumed to be the caretakers in their families, [and] that defendants with caretaking responsibilities are generally granted leniency, particularly when they are the primary caretaker of children." Katharina Geppert, *Explaining the Gender Gap in the Criminal Justice System: How Family-Based Gender Roles Shape Perceptions of Defendants in Criminal Court*, INQUIRIES J., 2022. In other words, the "woman as caretaker" archetype influences one of the most consequential outcomes in a criminal case: the sentence.

61. Peter K. Enns et al., *What Percentage of Americans Have Ever Had a Family Member Incarcerated?: Evidence from the Family History of Incarceration Survey (FamHIS)*, SOCIUS: SOCIO. RSCH. FOR DYNAMIC WORLD, Mar. 4, 2019, at 1, 7.

62. Page et al., *supra* note 5, at 152.

63. See DEVUONO-POWELL ET AL., *supra* note 5, at 9.

64. Fischer-Hoffman, *supra* note 6, at 95. Despite its focus on Venezuela, this study catalogs the support women provide for their incarcerated male loved ones, which bears a striking resemblance to the corresponding care women provide in the United States. The author similarly frames the women's efforts as a form of labor and describes that labor as a "fourth shift," hence its relevance here. *Id.*

system in Venezuela relies even more heavily than the American one on visitors—namely women—to support incarcerated men, encouraging them to launder clothing, deliver food, perform chores inside the prison, and provide emotional and sexual intimacy during visits.⁶⁵ Fischer-Hoffman concluded that “the deprivation inside of the prisons places a serious burden on women visitors who assume responsibility for the care of a[n incarcerated] loved one.”⁶⁶ Indeed, the lack of sufficient food, resources, and provisions ensures that this labor is “absolutely necessary for the everyday functioning of the prison.”⁶⁷

Women’s labor is likewise relied upon domestically. For example, in a study where researchers interviewed family members with incarcerated or recently incarcerated loved ones, they observed that “the family members most frequently relied upon [to provide support] appear to be mothers, sisters, and intimate partners.”⁶⁸

As scholars such as Erin Eife and Beth Richie have argued, the fourth shift or “secondary prisonization begins not at the point of incarceration, but at the moment a loved one’s contact with the criminal legal system begins.”⁶⁹ Being taken into custody is the catalyst for a cascading series of obligations and needs. Consider the conversation between defense counsel and the sister of a young, male client that began this Section. What needs has Sarah identified and begun to address from the moment of Travis’s arrest? She has notified Travis’s attorney of the arrest and provided critical information to counsel. Early notification of an arrest allows counsel to immediately mobilize and take measures that can positively impact the outcome of Travis’s criminal case.⁷⁰ Sarah will appear in court when Travis is arraigned, demonstrating to the court that he has robust family support and community ties—an important consideration for a judge when arraigning an eighteen-year-old. This may necessitate her taking time away from work, finding childcare, and spending hours in court waiting for his case to be called.

Sarah has committed to financial investments as well. She has begun to gather funds for bail, an endeavor that can involve assessing her own financial status, identifying loved ones who are both willing and able to contribute, and obtaining the funds, which often involves trips to several people’s houses and banks. Perhaps Sarah, if she was with Travis when he was arrested, has taken possession of some of his property such as a cell phone or car. She may also have been tasked with contacting his employer or school to alert them of his absence. All of this is labor performed after a mere arrest, when Travis is presumed innocent, and well before any finding of guilt. With Travis’s arrest, Sarah’s fourth shift commences.

65. *See id.* at 97, 110.

66. *Id.* at 110.

67. *Id.*

68. Rebecca L. Naser & Christy A. Visher, *Family Members’ Experiences with Incarceration and Reentry*, 7 W. CRIMINOLOGY REV. 20, 28 (2006); *see also* sources cited *supra* note 5.

69. Eife & Richie, *supra* note 4, at 584.

70. For example, Travis’s attorney can contact the police and invoke his right to remain silent on his behalf, rendering any statements made to the police while he was interrogated in custody inadmissible.

* * *

Although the total rates of incarceration for women are far lower than for men, women are the fastest-growing demographic in jails and prisons.⁷¹ And the racial and ethnic disparities for men discussed above persist among women involved in the criminal legal system.⁷² This Article's focus on women as shadow defendants does not diminish women's positions on both sides of the system. Women can be and are both defendants and shadow defendants, sometimes simultaneously.

Women's role as society's de facto caretakers and their rising rate of incarceration interact in complicated ways. The "woman as caretaker" expectation influences system-involved women's experiences in the criminal legal system. For example, some research indicates that women's role as traditional caretakers leads to leniency in the criminal legal system.⁷³ But other scholars suggest that, in some instances, "women are sanctioned more harshly because their criminality defies gender norms."⁷⁴

Women's role as the primary parent is also implicated by female incarceration. "Researchers estimate that increases in female incarceration rates explain 40 percent of the increase in foster care caseloads, which more than doubled between 1985 and 2000."⁷⁵

Our society's expectation that women will support those involved in the criminal legal system applies irrespective of the sex or gender of the system-involved person. In other words, women can be shadow defendants who support system-involved women as well as men. The dual role that some women occupy—as both defendants and shadow defendants—may exacerbate their burdens as they experience the effects of criminalization and secondary criminalization simultaneously.

II. SECONDARY CRIMINALIZATION

What price do women pay for working the fourth shift? Before turning to that topic, this Part situates the fourth shift in a theoretical framework known as

71. CLAYTON ET AL., *supra* note 1, at 15; Lynne Haney, *Motherhood as Punishment: The Case of Parenting in Prison*, 39 SIGNS: J. WOMEN CULTURE & SOC'Y 105, 105 (2013) ("In the past decade, women's incarceration rates increased more rapidly than men's. Although women make up roughly 7 percent of state and federal prisoners, their numbers increased by 650 percent since 1980, as compared to men's 300 percent increase."); *see also* Crenshaw, *supra* note 11, at 1439–41. Disparities in men's and women's incarceration rates are explained by findings that women commit fewer crimes than men, the crimes that women commit tend to be non-violent and carry lighter sentences, and women benefit from leniency in various stages of the criminal legal system. *See, e.g.*, Haney, *supra*, at 105 ("Most women are doing time for drug-related offenses and property crimes; about 10 percent are convicted of violent offenses."); Ilene H. Nagel & John Hagan, *Gender and Crime: Offense Patterns and Criminal Court Sanctions*, 4 CRIME & JUST. 91, 129–34 (1983) (conducting a literature review and concluding that women are afforded leniency in sentencing except for severe offenses); *see also* Myrna S. Raeder, *Gender and Sentencing: Single Moms, Battered Women, and Other Sex-Based Anomalies in the Gender-Free World of the Federal Sentencing Guidelines*, 20 PEPP. L. REV. 905, 907 (1993) (observing that "[h]arsh mandatory minimums" and "inflexible" sentencing guidelines sometimes lead to women being incarcerated, but that sentences for property offenses tend to be lower than for other types of crimes).

72. *See* Mauer, *supra* note 2, at 88S.

73. *See* Geppert, *supra* note 60.

74. *Id.* at 4.

75. ELDERBROOM ET AL., *supra* note 4, at 40.

secondary criminalization. This Part introduces the concept of secondary prisonization before zooming out to the broader process of criminalization, or the experiences and consequences that typify criminal legal system involvement for the accused. It then offers the term secondary criminalization to describe the processes and mechanisms that exploit shadow defendants' labor and subject them to experiences and consequences comparable to those of their system-involved loved ones.

A. SECONDARY PRISONIZATION

Sociologist Megan Comfort coined the term "secondary prisonization" to describe the assimilation process of women visiting their incarcerated partners, illustrating how they are socialized and subjected to the regulations, culture, and norms of imprisonment.⁷⁶ Conducting an ethnography of women visiting loved ones at San Quentin Prison in California, Comfort analogizes the women's acculturation process to the "prisonization" of their partners—meaning, the assimilation of new behaviors, beliefs, and values during incarceration.⁷⁷ Comfort theorizes that women who visit their incarcerated romantic partners experience a secondary version of prisonization as they adjust and adapt to the prison's regulations.⁷⁸

Comfort illustrates secondary prisonization by describing the routine degradations that women visiting their incarcerated partners experienced, demonstrating how physical spaces were used to assert hierarchical power; detailing the continual surveillance of women's bodies, belongings, interactions, and comportment; and describing the strict enforcement of complicated, seemingly arbitrary regulations.⁷⁹ She details, for example, the demoralizing process women went through just to make appointments for certain restricted visits.⁸⁰ Women were required to call at a certain time on a specific day and were often confronted with busy signals, recordings, and error messages requiring back-to-back continuous calls.⁸¹ Women often enlisted family or friends and used multiple phones simultaneously to increase their chances of reaching a human being.⁸² This process could last

76. COMFORT, *supra* note 5, at 13–16.

77. *See generally id.* at 14, 21–125. Comfort expands on sociologist Donald Clemmer's description of the assimilation process. She writes:

In his argument, variables such as the duration of an individual's contact with the correctional facility, ability to maintain relationships with nonincarcerated people, degree of absorption into a "prison primary group," and level of resistance to the penitentiary culture's dogmas and codes influence the extent to which that person eventually will exhibit the "universal factors of prisonization."

Id. at 14.

78. *See id.* at 14–16.

79. *See generally id.* at 21–64.

80. *Id.* at 40–42.

81. *Id.* at 41–42.

82. *See id.* at 41.

between twenty and forty minutes and necessitate dozens⁸³ of repeated attempts—only for the women to learn that all of the appointment slots were full.⁸⁴

Comfort’s description of the women’s experiences exemplifies how the prison setting, policies, and practices conspired to engender powerlessness, submission, disorientation, and feelings of inferiority among the women in the same manner as among their incarcerated partners. These include a lack of basic amenities (e.g., sufficient, comfortable seating; clean bathrooms; and an insect-free waiting area), the seemingly intentional creation of an information void (e.g., a lack of instructive signage about visitation rules and policies, lack of updates about when visits would resume after interruptions, and lack of adequate notice about changing regulations or requirements), and endless waiting.⁸⁵

Women with incarcerated loved ones thus “experience restricted rights, diminished resources, social marginalization, and other consequences of penal confinement, even though they are legally innocent and dwell outside of the prison walls.”⁸⁶ In other words, these women experience aspects of confinement that typify their incarcerated partners’ prison stays, subjecting them to secondary prisonization.

B. THE FIVE DOMAINS OF SECONDARY CRIMINALIZATION

Secondary criminalization refers to the legal mechanisms—laws, caselaw, and court administrative norms—that cause women working the fourth shift to themselves experience the consequences of criminal legal system involvement.⁸⁷ However, before turning to shadow defendants’ experiences with secondary criminalization, it is important to briefly outline the common penalties imposed on those who are directly arrested, prosecuted, and convicted. Understanding how the criminal legal system impacts those who are accused or convicted allows direct parallels to be drawn between their experiences and those of shadow defendants. It highlights a shadow defendant’s status as “an inseparable companion or follower” who walks in lockstep with their system-involved loved one.⁸⁸

This Section briefly considers how the criminal legal system impacts system-involved people along the same five domains later explored in Part III: time,

83. *See id.* at 41–42. Comfort experienced this firsthand when she made an appointment for one of her interviewees, a process that took thirty-nine minutes and involved redialing 190 times. *Id.*

84. *See id.* at 42.

85. *See id.* at 45–50.

86. *Id.* at 7.

87. The term “criminalization” describes the process of defining certain acts or behaviors as illegal, unlawful, or criminal. *See* Lindsay Farmer, *Criminalization and Decriminalization*, in ELGAR ENCYCLOPEDIA OF CRIME AND CRIMINAL JUSTICE 636, 636 (Pedro Caeiro et al. eds., 2024). When a behavior is criminalized, those who engage in that behavior are subjected to a range of penalties, consequences, and punishments by the criminal legal system. As discussed above, in this Article, secondary criminalization refers to the legal mechanisms that cause a group of bystanders, in this case women, to experience consequences when their loved ones are prosecuted by the criminal legal system for engaging in behavior that has been criminalized.

88. *See* MERRIAM-WEBSTER, *supra* note 10.

finances, privacy and liberty, physical and mental health, and social relationships. It then posits that shadow defendants are impacted along those same five domains.

Involvement in the criminal legal system places significant demands on the accused's time and finances. Their pretrial experience can require securing counsel; meeting with attorneys; attending court dates; lengthy periods of waiting in court; travel to and from the court; check-ins with case managers, pretrial services, or probation officers; and lost employment and educational opportunities.⁸⁹ System-involved people can be required to pay for the cost of a public defender, of electronic monitoring, and even for their own jury trial.⁹⁰ This has led scholars to conclude that "the temporal and monetary time costs of the pretrial process can be substantial, and often more punitive than the formal sanction itself."⁹¹ If convicted, system-involved people face additional economic sanctions, such as fines, fees, surcharges, and restitution,⁹² as well as reduced employment opportunities.⁹³

In addition, the criminal legal system can significantly constrain the liberty of the accused and intrude upon their privacy. Some are incarcerated (both pretrial and following conviction) while others are let out on bail, released on recognizance, or released with specific conditions. They can be required to abide by protective orders or curfews, submit to drug testing, participate in treatment programs, acquiesce to supervision by a caseworker, or be electronically

89. See, e.g., Nick Petersen & Marisa Omori, *Is the Process the Only Punishment?: Racial-Ethnic Disparities in Lower-Level Courts*, 42 LAW & POL'Y 56, 58 (2020) (describing the "informal sanctions," "surveillance conditions," and "procedural hassles" that people charged with misdemeanors experience); Will Dobbie, Jacob Goldin & Crystal S. Yang, *The Effects of Pretrial Detention on Conviction, Future Crime, and Employment: Evidence from Randomly Assigned Judges*, 108 AM. ECON. REV. 201, 236 (2018) (finding that pretrial release increases employment prospects compared to pretrial detention). See generally ISSA KOHLER-HAUSMANN, MISDEMEANORLAND: CRIMINAL COURTS AND SOCIAL CONTROL IN AN AGE OF BROKEN WINDOWS POLICING 183–220 (2018) (describing the hassles and indignities that attend a misdemeanor arrest, including long periods of waiting, filthy environmental conditions in jail and holding cells, and numerous court appearances stretching over months or even years).

90. See JESS ZHANG, JACOB KANG-BROWN & ARI KOTLER, VERA INST. OF JUST., PEOPLE ON ELECTRONIC MONITORING 14, 17 (2024), <https://vera-institute.files.svdcn.com/production/downloads/publications/Vera-People-On-Electronic-Monitoring-FINAL-120423.pdf> [<https://perma.cc/AJA7-XK9M>] (finding that people on electronic monitors are often required to pay user fees); DEVON PORTER, ACLU OF S. CAL., PAYING FOR JUSTICE: THE HUMAN COST OF PUBLIC DEFENDER FEES 2 (2017), <https://www.aclusocal.org/sites/default/files/pdfees-report.pdf> [<https://perma.cc/2BLL-WX3J>] (finding that many states require people to pay for the cost of a public defender); DEVUONO-POWELL ET AL., *supra* note 5, at 14–15.

91. Petersen & Omori, *supra* note 89, at 57 (citing MALCOLM M. FEELEY, THE PROCESS IS THE PUNISHMENT: HANDLING CASES IN A LOWER CRIMINAL COURT (1979)).

92. See COUNCIL OF ECON. ADVISERS, EXEC. OFF. OF THE PRESIDENT, FINES, FEES, AND BAIL: PAYMENTS IN THE CRIMINAL JUSTICE SYSTEM THAT DISPROPORTIONATELY IMPACT THE POOR 3 & n.5 (2015), https://obamawhitehouse.archives.gov/sites/default/files/page/files/1215_cea_fine_fee_bail_issue_brief.pdf [<https://perma.cc/XV52-C9SP>].

93. See *infra* Section III.B.1.e. See generally Devah Pager, Bruce Western & Naomi Sugie, *Sequencing Disadvantage: Barriers to Employment Facing Young Black and White Men with Criminal Records*, 623 ANNALS AM. ACAD. POL. & SOC. SCI. 195 (2009) (studying the effects of a prison record on employment).

monitored.⁹⁴ Attending court appearances, incarceration, or being on probation or parole can result in searches of their person, property, or residences. While in court or while incarcerated, their comportment, appearance, and behaviors are strictly scrutinized and controlled.⁹⁵ These liberty constraints and intrusions on privacy occur both pre- and post-conviction.

Beyond these formal sanctions, criminal legal system involvement has a profound negative impact on people's physical and mental health⁹⁶ as well as their social relationships.⁹⁷ The recent COVID-19 pandemic exemplifies the catastrophic impact that incarceration can have on a system-involved person's physical health: estimates suggest that there were over half a million infections and 3,000 deaths due to COVID-19 in the nation's jails and prisons.⁹⁸

There is a similarly negative impact on a system-involved person's social relationships, though the two factors—health and social relationships—are connected. “Criminal legal involvement can . . . affect one's social environment, severing social relationships and limiting social support, which can further impede health following release.”⁹⁹ This can result in “social isolation,” withdrawal from community participation, and “impaired access to resources.”¹⁰⁰

The women who support their system-involved loved ones experience a secondary version of the formal and informal penalties that typify criminal legal system involvement. Like the women in Comfort's study, shadow defendants experience “restricted rights, diminished resources, social marginalization, and other consequences” of criminal legal system involvement.¹⁰¹ By working the

94. See Weisburd, *supra* note 23, at 154–59 (describing the prolific use of various forms of electronic monitoring for pretrial populations and people on probation or parole); KOHLER-HAUSMANN, *supra* note 89, at 204–14 (discussing the widespread issuance of orders of protection in misdemeanor cases and the difficulties they cause for prosecuted people); AM. BAR ASS'N, ABA STANDARDS FOR CRIMINAL JUSTICE: PRETRIAL RELEASE 1–2, 39 (3d ed. 2007) (endorsing the use of “drug treatment, diversion programs or other pre-adjudication alternatives” as conditions of release).

95. See Petersen & Omori, *supra* note 89, at 58. See generally KOHLER-HAUSMANN, *supra* note 89, at 183–220.

96. See *infra* Section III.D; see also Sugie & Turney, *supra* note 3, at 719 (finding that criminal legal system involvement, even a mere arrest, is “deleteriously associated with mental health,” irrespective of race and ethnicity). The American Academy of Family Physicians recognizes the deleterious impact of incarceration on people's health, finding that “[i]ncarcerated individuals and those detained in immigration facilities are disproportionately affected by chronic health conditions, mental illness, and substance abuse.” *Incarceration and Health: A Family Medicine Perspective (Position Paper)*, AM. ACAD. FAM. PHYSICIANS (Jan. 2022), <https://www.aafp.org/about/policies/all/incarceration.html> [<https://perma.cc/ZHH7-33T2>].

97. See *infra* Section III.E. See generally Brad Tripp, *Incarcerated African American Fathers: Exploring Changes in Family Relationships and the Father Identity*, in *IMPACTS OF INCARCERATION ON THE AFRICAN AMERICAN FAMILY* 17 (Othello Harris & R. Robin Miller eds., 2003) (exploring the negative impact of incarceration on the parent–child relationship among incarcerated African-American fathers).

98. *COVID-19 in Prisons and Jails*, PRISON POL'Y INITIATIVE (July 2024), <https://www.prisonpolicy.org/virus> [<https://perma.cc/6SGD-NF4F>].

99. Benjamin A. Howell et al., *The Stigma of Criminal Legal Involvement and Health: A Conceptual Framework*, 99 J. URB. HEALTH 92, 93 (2022).

100. See *id.* at 94–97.

101. COMFORT, *supra* note 5, at 7.

fourth shift, women pay a price with their time, financial resources, privacy, liberty, physical and mental health, and relationships. The fourth shift impacts every aspect of a woman's life, invading her schedule, bedroom, bank account, mind, body, reputation, and social ties.

Secondary criminalization occurs irrespective of both the liberty status of women's loved ones—be they at liberty, under supervision, or incarcerated—and regardless of the procedural posture of their loved one's criminal case—be it a mere arrest, pending prosecution, or penal confinement.¹⁰² Regardless of how extensive or limited a woman's support of a system-involved person is—from a single appearance in court to providing shelter and resources when an incarcerated person returns home—the long reach of the criminal legal system ensures that the price of participation is paid.

Scholars have used different terms to describe how family members and friends are impacted or harmed by their loved ones' imprisonment or system involvement.¹⁰³ Some have described the limitations of terms such as “collateral consequences” and “secondary punishment” while offering alternatives like “symbiotic harms.”¹⁰⁴ The term “secondary criminalization,” as used here, is distinct in several ways. First, it encompasses the penalties and consequences imposed across all stages of the criminal legal system, not only those caused by a loved one's incarceration. Second, the use of the word “criminalization” makes the criminal legal system agentic by focusing on the legal mechanisms that impose these consequences on shadow defendants. Finally, “secondary” acknowledges the temporal sequencing of this phenomenon (i.e., a person is first targeted for arrest, prosecution, or incarceration, and *thereafter* shadow defendants experience the consequences), while “criminalization” emphasizes how shadow defendants are converted into subjects of the criminal legal system—subjects of attention, surveillance, extraction, and harm. It also highlights how shadow defendants experience the same or very similar consequences of criminal legal system involvement as the loved ones they support.

The term “secondary criminalization” has also previously been defined as “the enforcement of the law by police officers, the court processes carried out by prosecutors, defense lawyers, judges, and juries, and the administration of punishment by prison officers and parole boards.”¹⁰⁵ The word “secondary” in this term can

102. See generally Eife & Richie, *supra* note 4.

103. See, e.g., Rachel Condry & Shona Minson, *Conceptualizing the Effects of Imprisonment on Families: Collateral Consequences, Secondary Punishment, or Symbiotic Harms?*, 25 THEORETICAL CRIMINOLOGY 540, 541 (2021). For scholarship using the term “collateral consequences,” see generally David S. Kirk & Sara Wakefield, *Collateral Consequences of Punishment: A Critical Review and Path Forward*, 1 ANN. REV. CRIMINOLOGY 171 (2018), and Jillian J. Turanovic, Nancy Rodriguez & Travis C. Pratt, *The Collateral Consequences of Incarceration Revisited: A Qualitative Analysis of the Effects on Caregivers of Children of Incarcerated Parents*, 50 CRIMINOLOGY 913 (2016). For scholarship using the term “punishment,” see generally Eife & Richie, *supra* note 4, and Comfort, *Punishment*, *supra* note 4, and INVISIBLE PUNISHMENT: THE COLLATERAL CONSEQUENCES OF MASS IMPRISONMENT (Marc Mauer & Meda Chesney-Lind eds., 2002).

104. Condry & Minson, *supra* note 103, at 541.

105. Valeria Vegh Weis, *Operationalizing Injustice. Criminal Selectivity as a Tool for Understanding (and Changing) Criminalization in Argentina*, 4 CRIMINOLOGICAL ENCOUNTERS 13, 14 (2021).

refer, as it does in this particular definition, to the people responsible for enforcing the law. But it could also arguably be used to refer to the secondary group of people affected by how the criminal legal system enforces the law. This Article offers the latter, alternative definition and centers the other populations—here shadow defendants—who are impacted by their loved ones’ criminal legal system involvement.

III. WOMEN AS SHADOW DEFENDANTS: THE COSTS AND CONSEQUENCES

Shadow defendants pay the consequences of their loved ones’ involvement in the criminal legal system. What is the currency of their payment? And what legal mechanisms extract this payment? This Part answers these questions, considers the legal doctrines and practices that cause secondary criminalization, and unearths secondary criminalization’s hidden penalties. It examines how performing this labor impacts women’s time, financial resources, privacy, liberty, physical and mental health, and the wellbeing of their relationships.

There is a body of literature, particularly in the sociology and criminology fields, that also considers these issues. Some research focuses on how criminal legal system involvement and imprisonment impact all families and loved ones, not just women.¹⁰⁶ Indeed, in 2007, Comfort surveyed research studies and described how the criminal legal system impacts bystanders, concluding that “various forms of discipline that are legally imposed on an individual lawbreaker in reality reverberate far beyond this narrow target, affecting kin, friends, and neighbors of the suspected or sentenced person.”¹⁰⁷ Erin Eife and Beth Richie recently extended Comfort’s secondary prisonization theory to legal bystanders who support their accused loved ones by attending bond court in Chicago.¹⁰⁸ Other studies pay close attention to how *incarceration* impacts women or romantic partners.¹⁰⁹ Still others highlight how predatory bail practices and the criminal legal system’s extraction of resources—especially economic and financial resources—target women.¹¹⁰

This Part sits at the intersection of these bodies of scholarship, brings together their findings, builds on them, and contributes to the literature in several ways. First, it investigates a specific population—women—rather than all family members or loved ones who provide support. Moreover, it focuses on women who (1) have diverse relationships to system-involved people (e.g., mothers, sisters, daughters, wives, girlfriends, grandmothers, etc.) and are not solely romantic

106. See generally sources cited *supra* note 4.

107. Comfort, *Punishment*, *supra* note 4, at 289. In the nearly 20 years that have passed, little has changed. Today, the impact may be more acute, as courts have tacitly endorsed or turned a blind eye to the law’s impact on third parties and advancing technologies have extended carceral surveillance into communities and homes through mechanisms like electronic monitoring. This Article assesses this dynamic today, focusing particularly on women and the legal mechanisms that formalize their role as shadow defendants.

108. Eife & Richie, *supra* note 4.

109. See generally sources cited *supra* note 5.

110. See generally sources cited *supra* note 20.

partners, and (2) support system-involved people regardless of the procedural posture of the case or their custody status, be they at liberty or incarcerated.

Second, it draws the legal framing to the forefront and focuses on the statutes, caselaw, court norms, practices, and other legal mechanisms that cause secondary criminalization and impose these consequences on women. It does so by drawing on the experience of the Author, who was an actor within the criminal legal system—specifically, a public defender. Third, this Part describes a wide array of consequences across five domains: time, finances, privacy and liberty, physical and mental health, and social relationships. Finally, it elevates instances of resistance and advocacy that shadow defendants engage in despite their experiences with secondary criminalization.

A. TIME

Sarah checks in with me when the court adjourns for the lunch hour. She nudges the diaper bag up her shoulder as she grasps the handles of the stroller her two-year-old daughter, Ariel, occupies. “2:15, right?” she asks. I tell her that Travis’s case likely won’t be heard before 2:30 p.m. “I’ll be back, but I may wait in the hallway because Ariel is loud.”

After Travis’s case is heard at 3:30 p.m., she approaches me again. “I’ll see you at the next court date in two months. I may only be able to stay until 1 p.m. if my boss puts me in the afternoon shift and won’t give me the day off. Let me know what the prosecutor says about getting Travis a deal.” I bid her goodbye and realize that she waited six hours to peer at the back of Travis’s head for no more than six minutes.

In 1979, Malcolm Feeley introduced the idea that “the process is the punishment” for people involved in the lower criminal court system.¹¹¹ In his work, he provides a rich and detailed description of how pretrial practices impose informal sanctions in the trial court that are often more severe than the formal sanctions imposed following a conviction.¹¹² These informal sanctions can include long periods of waiting, lost time and wages, routine degradations and humiliations, and numerous court appearances stretching over the span of many months.¹¹³

Despite the decades that have passed since Feeley’s initial observations, they are still relevant today. In fact, in some jurisdictions, court delays have become so severe and pervasive that they have sparked litigation. For example, in *Trowbridge v. Cuomo*, a group of plaintiffs whose misdemeanor cases were pending for over 1,000 days sued the New York court system for violating their due process rights and right to a speedy trial.¹¹⁴

As Sarah’s story shows, women share in the procedural injustices of court administration such as court delay. Indeed, in the aforementioned study examining the experience of people attending bond hearings in Cook County, Chicago,

111. See generally FEELEY, *supra* note 91.

112. See *id.* at 199–243; see also Petersen & Omori, *supra* note 89, at 58 (describing these informal sanctions); KOHLER-HAUSMANN, *supra* note 89, at 183–220 (same).

113. See generally sources cited *supra* note 112.

114. See Complaint at ¶¶ 4, 131, *Trowbridge v. Cuomo*, No. 16-cv-03455 (S.D.N.Y. May 10, 2016).

researchers concluded that “supporters [of the accused] experience punishment through extraction of resources [including financial resources and time], destabilization, and degradation.”¹¹⁵ They recounted how “[i]t took time to travel to and from court, to wait for bond court to begin, . . . to wait until the support’s loved one is called in court,” to wait to post bond, and to wait for their loved one to be released.¹¹⁶ They further observed that these consequences are felt most acutely by low-income, Black women.¹¹⁷

In many cases, women also take on the informal, invisible role of case managers. But whereas case managers receive compensation in exchange for their services, the role played by shadow defendants requires an investment of time, carries a substantial mental load, and costs money. Consider the time investment required to effectively manage a criminal case. Shadow defendants are often tasked with scheduling responsibilities: making calls to and receiving calls from their loved one’s attorney or keeping track of court dates, appointments, and court-mandated reporting obligations.¹¹⁸ When cases last months or even years, women are unacknowledged victims of court delay: they miss work or school, arrange childcare or weather the storm of bringing young children into unforgiving courthouses, and spend countless hours waiting for their loved one’s case to be called.¹¹⁹ They accompany their loved ones to appointments with their actual case managers, treatment providers, or attorneys. Visits to jails or prisons are often plagued by strict visitation hours, inefficiency, and long wait times.¹²⁰ Thus, they pay the price of support with their time.¹²¹

The law rewards system-involved people whose loved ones are willing to pay this price.¹²² When conducting an arraignment, judges rely on bail statutes that often explicitly list community and family ties as a factor for consideration.¹²³ For example, in Virginia the bail statute states that in making a bail determination, the judicial officer shall consider “the history of the accused or juvenile, *including his family ties* or involvement in employment, education, or medical, mental health, or substance abuse treatment . . . [and] his length of residence in, or

115. Eife & Richie, *supra* note 4, at 585, 595.

116. *Id.* at 595.

117. *See id.* at 586.

118. Cf. Samuel R. Wiseman, *Pretrial Detention and the Right to Be Monitored*, 123 YALE L.J. 1344, 1355–56 (2014) (describing how pretrial incarceration requires the accused to rely on family and friends on the outside to aid in the preparation of their defense).

119. *See* Eife & Richie, *supra* note 4, at 595–96.

120. *See, e.g.*, COMFORT, *supra* note 5, at 29–39.

121. There is also a significant emotional toll associated with providing this support. *See infra* Section III.D.

122. For a survey of benefits that the criminal legal system bestows upon system-involved people based on family status, see generally MARKEL ET AL., *supra* note 4, at 3–19.

123. *E.g.*, FLA. STAT. § 903.046(2)(c) (listing family ties as a factor the court shall consider when making a bail determination); MD. CODE ANN., CRIM. LAW 4-216.1(f)(2)(C) (stating that in making a bail determination, the judicial officer shall consider “the defendant’s family ties, employment status and history, financial resources, reputation, character and mental condition, length of residence in the community, and length of residence in this State”); N.J. STAT. ANN. § 2A:162-20(c)(1) (stating that the court may consider the defendant’s “family ties, employment, financial resources, length of residence in the community, [and] community ties”).

other ties to, the community.”¹²⁴ Indeed, judges will frequently refuse to release young people unless and until a parent or guardian is present in the courtroom.¹²⁵ It is common practice for defense counsel to reach out to family and friends and request that they come to court to be present for a client’s arraignment. If loved ones are present, defense counsel will highlight their presence in the client’s bail application.¹²⁶

Similar benefits flow to system-involved people during sentencing and post-conviction petitions for release. Judges afford the accused an opportunity to make a statement to the court during sentencing or resentencing hearings,¹²⁷ but many elect not to do so as part of their legal strategy.¹²⁸ However, their silence forsakes a rare opportunity to present personal, mitigating evidence to the sentencing judge. Working with defense counsel, women fill this gap and deliver verbal statements, letters, or videotaped recordings that humanize the accused, provide information on their character and childhoods, and explain the impact that a feared sentence could have on their family, loved ones, and communities.¹²⁹ In fact, there is a growing movement promoting participatory defense, which is “a community organizing model for people facing charges, their families, and communities to impact the outcome of cases and transform the landscape of power in the court system.”¹³⁰ One strategy employed by the participatory defense model

124. VA. CODE ANN. § 19.2-120(C) (emphasis added).

125. *Cf. Bail for Juveniles: Understand the Difficult Process*, NOT GUILTY BAIL BONDS (Sept. 18, 2023), <https://ngbbtx.com/bail-for-juveniles-understand-the-difficult-process> [<https://perma.cc/JG55-YWTW>] (explaining that “the availability of a stable and supportive family environment is often seen as a positive factor in bail decisions” for juvenile bail determinations).

126. *Cf. ACLU of N.J., NAT’L ASS’N OF CRIM. DEF. LAWS. & STATE OF N.J. OFF. OF THE PUB. DEF., THE NEW JERSEY PRETRIAL JUSTICE MANUAL* 21 (2016), <https://www.nacdl.org/getattachment/50e0c53b-6641-4a79-8b49-c733def39e37/the-new-jersey-pretrial-justice-manual.pdf> [<https://perma.cc/TG97-E5PH>] (encouraging defense attorneys to bring evidence of family and community ties to the court’s attention at a pretrial release hearing).

127. *See, e.g., N.Y. CRIM. PROC. LAW* § 380.50(1) (“At the time of pronouncing sentence, . . . [t]he defendant also has the right to make a statement personally in his or her own behalf, and before pronouncing sentence the court must ask the defendant whether he or she wishes to make such a statement.”); *MD. CODE ANN., CRIM. LAW* 4-342(e) (“Before imposing sentence, the court shall afford the defendant the opportunity, personally and through counsel, to make a statement and to present information in mitigation of punishment.”).

128. On advice of counsel, the accused may decline to make a statement at sentencing for many reasons, including an intent to appeal, discomfort with addressing the court, a language barrier, an inability to demonstrate the remorse that the court typically wants to hear, or having an open, related case. *See Alexandra Natapoff, Speechless: The Silencing of Criminal Defendants*, 80 N.Y.U. L. Rev. 1449, 1469–70 (2005) (“Under the adversarial, representative model . . . the best defense tends to be decimation of the evidentiary record—eliminating facts from which guilt could be inferred—rather than the construction of an alternative, richer factual story line that might elevate the defendant’s individuated voice.”).

129. *See LINDSEY CRAMER, BRYCE PETERSON, EMMA KURS & JOCELYN FONTAINE, URB. INST., TOOLKIT FOR DEVELOPING FAMILY IMPACT STATEMENTS* 3–4, 8 (2015), <https://www.urban.org/sites/default/files/publication/53651/2000253-Toolkit-for-Developing-Family-Impact-Statements.pdf> [<https://perma.cc/JQ5V-H397>]; *see also Participatory Defense: A Community Organizing Model*, PARTICIPATORY DEF., <https://www.participatorydefense.org/about> [<https://perma.cc/KAY9-HLAZ>] (last visited Feb. 26, 2025). *See generally* RAJ JAYADEV, PROTECT YOUR PEOPLE: HOW ORDINARY FAMILIES ARE USING PARTICIPATORY DEFENSE TO CHALLENGE MASS INCARCERATION (2024).

130. *Participatory Defense*, *supra* note 129.

for centering the community and family in criminal cases is to create “social biography videos . . . to humanize clients.”¹³¹ In my experience as a criminal defense attorney, women are often at the forefront of creating and participating in these mitigation videos.

Beyond interactions with the court system, shadow defendants are often integral members of a client’s defense team—a role fraught with both ethical and personal considerations. Defense counsel may call upon them to gather relevant documentation, provide information on potential witnesses, offer mitigating information, or serve as witnesses themselves.¹³² They accompany their loved ones to appointments with defense counsel, often providing valuable context, information, and details. Their loved ones consult them, even against the advice of counsel, when making important decisions such as whether to accept a plea offer or testify at trial.

The relationship between the system-involved person, defense counsel, and a shadow defendant is complex. Though shadow defendants are recruited to participate in the defense team, ethical and privilege rules governing attorneys force shadow defendants to perform these services in an information and decisionmaking vacuum. Confidentiality rules limit the information that an attorney may disclose to a shadow defendant.¹³³ So too does attorney–client privilege, which protects communications between the attorney and client if they are not disclosed to third parties, including shadow defendants. Rules regarding the allocation of decisionmaking authority vest power in the client, not the shadow defendant, to decide the objectives of the representation.¹³⁴ Thus, regardless of how much support a shadow defendant provides, they are told only the information the system-involved person permits, can only try their best to persuade their loved one to pursue particular objectives, and must be excluded from certain attorney–client communications to avoid breaking the privilege.

This Article does not deny the propriety of these rules and privileges. They are necessary to protect the system-involved person’s constitutional and statutory rights. But one must acknowledge the frustration and powerlessness that these limitations engender for shadow defendants. They become shadow *defenders*; their labor is extracted to support the defense, but they lack both information and decisionmaking authority. They must provide their labor unconditionally, altruistically, and then be shuttled to the sidelines.

As the discussion about the third shift suggests,¹³⁵ women are often also the leaders of larger community and advocacy movements focused on reforming the criminal legal system. “[W]omen have assumed key leadership positions, advocating for critical resistance to the prison-industrial complex, sentencing reform, a moratorium on the death penalty, and the development of alternative

131. *Social Biography Videos*, PARTICIPATORY DEF., <https://www.participatorydefense.org/social-biography-videos> [<https://perma.cc/PL7E-6W84>] (last visited Feb. 26, 2025); see also Video Mitigation Project, LEGAL AID SOC’Y, <https://legalaidnyc.org/programs-projects-units/the-video-mitigation-project> [<https://perma.cc/G9UR-2Y7M>] (last visited Mar. 16, 2025).

132. Cf. Wiseman, *supra* note 118, at 1355–56.

133. See MODEL RULES OF PRO. CONDUCT r. 1.6(a) (AM. BAR ASS’N 1983).

134. See MODEL RULES OF PRO. CONDUCT r. 1.2(a) (AM. BAR ASS’N 1983).

135. See *supra* text accompanying notes 49–52.

sanctions.”¹³⁶ Consider the work of organizations like Essie Justice Group. The organization’s mission is to “harness the collective power of women with incarcerated loved ones to end mass incarceration’s harm to women and communities.”¹³⁷ Essie sponsors and supports bills, raises money, campaigns, partners with other organizations, joins coalitions, and organizes to support policies, initiatives, and legislation.¹³⁸

This time investment is not free. There is a tangible opportunity cost associated with performing this labor. Most notably, every hour spent in court or fulfilling the case manager role is time taken away from employment, school, child rearing, or other income-generating labor. The cost is not limited exclusively to lost wages; some women pay directly for their participation through transportation and childcare costs.¹³⁹

This cost is also not borne by all women equally: Black women and women of color are disproportionately tasked with investing their time to support their system-involved loved ones.¹⁴⁰ One must only observe the pews of a courtroom or the visitor room of a prison to notice a distinct racial pattern. The community-and-family-ties bail factor discussed above¹⁴¹ exemplifies how a race-neutral legal factor has a disparate impact on Black women and women of color.¹⁴² Because of the frequency with which Black and Brown men are arrested and arraigned, bail statutes operate in a manner that demands more time from Black and Brown women who are called upon to appear and support their loved ones.

Two factors make this particularly alarming. The first is the amount of time that each shadow defendant may be called upon to invest. The anecdote that began this Section describes Sarah’s time investment to support Travis for a single court appearance—six hours in exchange for six minutes. The cumulative investment of attending multiple court appearances, making frequent visits to the jail, arranging and sending care packages, and meeting with defense counsel is

136. Beth E. Richie, *The Social Impact of Mass Incarceration on Women*, in *INVISIBLE PUNISHMENT*, *supra* note 103, at 136, 147.

137. *Mission: About Essie Justice Group*, ESSIE JUST. GRP., <https://essiejusticegroup.org/mission> [<https://perma.cc/66NA-DRRM>] (last visited Feb. 26, 2025).

138. *See id.*

139. *See* Eife & Richie, *supra* note 4, at 594–96.

140. *See id.* at 586 (“Importantly, historic and current criminalization of Blackness and poverty ensures that those most likely to be impacted by attending court are disproportionately poor and Black or Latinx. They are also most likely to be poor, Black women.” (citations omitted)).

141. *See supra* text accompanying notes 122–26.

142. Note, however, that this argument stands in sharp contrast to the trajectory of the Supreme Court’s jurisprudence, which has increasingly endorsed colorblindness and gutted the ability of litigants to make race-based challenges in criminal law and beyond. *See, e.g.,* *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 600 U.S. 181, 230 (2023) (finding that race-based affirmative action in the college admissions process violates the Equal Protection Clause of the Fourteenth Amendment); *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 748 (2007) (“The way to stop discrimination on the basis of race is to stop discriminating on the basis of race.”); *McCleskey v. Kemp*, 481 U.S. 279, 279–80 (1987) (holding that the racially disproportionate impact of the death penalty does not violate the Equal Protection Clause and instead requiring a showing of racially discriminatory purpose to establish such a violation).

substantial. This would be significant even if it were only one woman's experience. But alas, it is not. The second factor—the number of women called upon to perform this labor—amplifies the time investment and increases the impact by magnitudes. A study analyzing the impact that having an incarcerated loved one has on women (the *Because She's Powerful* study) found that nearly 70% of participants “act[ed] as a primary support for at least one of their incarcerated loved ones.”¹⁴³ Mass incarceration and the overrepresentation of Black and Brown men has ensnared not only entire communities of men (and a growing number of women) in the criminal legal system, but has forfeited time from entire communities of Black and Brown women in their role as shadow defendants.

B. ECONOMIC CONSEQUENCES

Amid growing concern about who would fund the rapidly expanding criminal legal system, policymakers began addressing budgetary shortfalls by imposing economic sanctions as a consequence for involvement in the criminal legal system.¹⁴⁴ People who commit crimes, not taxpayers, they rationalized, should bear the cost of maintaining the criminal legal system.¹⁴⁵ As a result, the number of economic sanctions has dramatically increased over the last several decades, making them “the most common form of punishment in the United States.”¹⁴⁶

These economic sanctions take many forms, including fines,¹⁴⁷ fees,¹⁴⁸ surcharges,¹⁴⁹ and restitution.¹⁵⁰ Other expenditures, such as bail,¹⁵¹ the costs of

143. CLAYTON ET AL., *supra* note 1, at 16. For an examination of how many people support multiple incarcerated family members, see generally Christopher Wildeman & Sara Wakefield, *The Long Arm of the Law: The Concentration of Incarceration in Families in the Era of Mass Incarceration*, 17 J. GENDER RACE & JUST. 367 (2014).

144. See Page & Soss, *supra* note 5, at 4; Lisa Foster, *The Price of Justice: Fines, Fees and the Criminalization of Poverty in the United States*, 11 U. MIAMI RACE & SOC. JUST. L. REV. 1, 3 (2020); see also CLAYTON ET AL., *supra* note 1, at 65 & 93 n.67.

145. See Foster, *supra* note 144, at 3.

146. Beth A. Colgan, *Beyond Graduation: Economic Sanctions and Structural Reform*, 69 DUKE L.J. 1529, 1537–38 (2020); see Foster, *supra* note 144, at 3.

147. Fines are monetary punishments imposed as part of a sentence following conviction of an infraction or crime. They are intended to both deter and punish, and they are typically determined by a statute that provides a range within which judges may exercise discretion in determining the specific monetary penalty. See MATTHEW MENENDEZ, MICHAEL F. CROWLEY, LAUREN-BROOKE EISEN & NOAH ATCHISON, BRENNAN CTR. FOR JUST., *THE STEEP COSTS OF CRIMINAL JUSTICE FEES AND FINES* 6 (2019), <https://www.brennancenter.org/our-work/research-reports/steep-costs-criminal-justice-fees-and-fines> [<https://perma.cc/UB5F-X457>].

148. Fees are “itemized payments for court activities, supervision, or incarceration” and are “intended to support operational costs in the criminal justice system and may also be used to compensate victims for losses.” COUNCIL OF ECON. ADVISERS, *supra* note 92, at 1.

149. “[I]nterest, surcharges, and/or collection fees” are charged for collecting unpaid criminal justice debt. Katherine Beckett & Alexes Harris, *On Cash and Conviction: Monetary Sanctions as Misguided Policy*, 10 CRIMINOLOGY & PUB. POL’Y 509, 513 (2011).

150. Traditionally, restitution is a monetary payment intended to “financially restore a person economically damaged by another’s actions, thereby preventing the unintended beneficiary from being unjustly enriched at the aggrieved party’s expense.” Cortney E. Lollar, *What Is Criminal Restitution?*, 100 IOWA L. REV. 93, 99 (2014).

151. Bail is a financial payment made to secure a defendant’s release while a criminal case is pending. See COUNCIL OF ECON. ADVISERS, *supra* note 92, at 1. Bail is primarily intended to secure a defendant’s appearance in court, and sometimes to ensure community safety. See *id.*

incarceration, child-support debt, and collateral consequences, add to this financial liability. Taken together, they impose a tremendous debt burden on system-involved people and their families.¹⁵²

Given that 80% of prosecuted people are sufficiently poor to qualify for indigent defense services,¹⁵³ they themselves are often unable to bear the burden of repaying this massive criminal justice debt. Instead, family members, especially women, bear the burden of repaying it. This has led some scholars to frame this financial extraction as a “tax on the poor” or an interconnected system of “predatory criminal justice revenue” generation that disproportionately impacts women—especially women of color.¹⁵⁴ Some scholars have recently argued that such extraction may violate the Fifth Amendment’s Takings Clause.¹⁵⁵

Indeed, despite efforts to foist the criminal legal system’s operating costs onto the people being prosecuted, the system instead penalizes women, especially women of color, and perpetuates cycles of generational poverty that further disadvantage marginalized communities. “One recent study has shown that the use of economic sanctions increases along with the percentage of the community that’s African American.”¹⁵⁶ Moreover, in a rare study (the Who Pays study) investigating who ultimately pays the costs and penalties associated with the criminal legal system, researchers found that “[i]n 63% of cases, family members on the outside were primarily responsible for court-related costs associated with conviction. *Of the family members primarily responsible for these costs, 83% were women.*”¹⁵⁷

The Sections that follow consider the caselaw, statutes, and other legal mechanisms that inflict this financial burden and how women assume responsibility for paying some of the most common economic sanctions and other costs imposed on system-involved individuals.

1. Fines, Fees, and Restitution

Court decisions addressing fines, fees, and restitution have contributed to the secondary criminalization of shadow defendants. In the landmark case

152. For example, in 2017, “the [federal] government collected nearly \$8 billion in fines and restitution.” Colgan, *supra* note 146, at 1542. Estimates suggest that “tens of millions of U.S. residents have been assessed financial penalties.” Beckett & Harris, *supra* note 149, at 516.

153. See BERNADETTE RABUY & DANIEL KOPF, PRISON POL’Y INITIATIVE, DETAINING THE POOR: HOW MONEY BAIL PERPETUATES AN ENDLESS CYCLE OF POVERTY AND JAIL TIME 7 (2016), <https://www.prisonpolicy.org/reports/DetainingThePoor.pdf> [<https://perma.cc/6BET-W5B9>].

154. MENENDEZ ET AL., *supra* note 147, at 10; Page & Soss, *supra* note 5, at 2; Page et al., *supra* note 5, at 153–56; see Katzenstein & Waller, *supra* note 4, at 639 (“This system of seizure levies tariffs on the mother, grandmother, partner, sister, daughter, or friend (mostly women) of the incarcerated poor (mostly men) to subsidize the carceral state.”); DEVUONO-POWELL ET AL., *supra* note 5, at 15.

155. See G. Alex Sinha & Janani Umamaheswar, *Hidden Takings and the Communal Burden of Punishment*, 60 HARV. C.R.-C.L. L. REV. (forthcoming 2025).

156. Beth A. Colgan, *Economic Liberty and Criminal Justice*, 43 HARV. J.L. & PUB. POL’Y 31, 39 (2020).

157. DEVUONO-POWELL ET AL., *supra* note 5, at 9 (emphasis added).

Gideon v. Wainwright, the U.S. Supreme Court unanimously ruled that states must provide defense counsel to indigent criminal defendants under the Sixth and Fourteenth Amendments.¹⁵⁸ However, the Court quietly started chipping away at *Gideon* only a decade later. In *Fuller v. Oregon*, the Court upheld a state statute that allows courts to charge indigent defendants a fee for their legal representation.¹⁵⁹ In other words, the Court paradoxically permits states to charge indigent people accused of committing crimes for the services of a public defender that they qualify for because of their indigence. A 2022 report published by the National Legal Aid and Defender Association analyzes the *Gideon* and *Fuller* decisions and explains how charging fees for a public defender has become commonplace.¹⁶⁰ These fees include application or appointment fees,¹⁶¹ as well as reimbursement fees for services provided.¹⁶²

In addition to further miring people in debt, charging these fees has a deleterious impact on criminal cases and dispositions. They can lead people to waive the right to counsel and take a plea rather than incur additional debt by exercising their right to a trial, as well as strain the attorney–client relationship.¹⁶³ Nonpayment can also lead to probation violations and arrest.¹⁶⁴ Additional costs are imposed during the trial, plea, and sentencing phases of

158. 372 U.S. 335, 342–44 (1963).

159. 417 U.S. 40, 54 (1974). Note, however, that the Oregon statute required a court to conclude that the convicted person “is or will be able to pay” the expenses before imposing them, and the Supreme Court did provide an exemption, stating that “[t]hose who remain indigent or for whom repayment would work ‘manifest hardship’ are forever exempt from any obligation to repay.” *Id.* at 45, 53.

160. See MAREA BEEMAN, KELLIANNE ELLIOTT, ROSALIE JOY, ELIZABETH ALLEN & MICHAEL MROZINSKI, NAT’L LEGAL AID & DEF. ASS’N, AT WHAT COST? FINDINGS FROM AN EXAMINATION INTO THE IMPOSITION OF PUBLIC DEFENSE SYSTEM FEES 3–5, 21–25 (2022), https://www.nlada.org/sites/default/files/NLADA_At_What_Cost.pdf?v=2.0 [<https://perma.cc/ASF2-LCJ2>]; PORTER, *supra* note 90, at 2; DEVUONO-POWELL ET AL., *supra* note 5, at 14. A small number of states—California, Delaware, Hawaii, Mississippi, Nebraska, New Jersey, New York, Pennsylvania, and Rhode Island—do not permit the assessment of such fees. See BEEMAN ET AL., *supra*, at 14 (identifying the seven states that did not permit such fees at the time this report was written; however, following publication of this report, Delaware and New Jersey repealed their statutes authorizing public defender fees). Recently, a few states have repealed statutes permitting the assessment of public defender fees. See, e.g., LEGIS. FISCAL ESTIMATE ASSEMB. 5587, 220th Gen. Assemb., 2022–23 Sess. (N.J. 2023) (eliminating all public defender fees, including unpaid civil judgments, liens, and warrants); H.B. 244, 151st Gen. Assemb., 83 Del. Laws 441 (repealing the statute assessing public defender fees); Assemb. B. 1869, 2019–2020 Leg., Reg. Sess. (Cal. 2019) (amending and repealing CAL. PENAL CODE § 987.5, which had permitted the assessment of such fees).

161. BEEMAN ET AL., *supra* note 160, at 4–5; see also Ronald F. Wright & Wayne A. Logan, *The Political Economy of Application Fees for Indigent Criminal Defense*, 47 WM. & MARY L. REV. 2045, 2046 (2006).

162. BEEMAN ET AL., *supra* note 160, at 4–5; see also PORTER, *supra* note 90, at 1–2.

163. See BEEMAN ET AL., *supra* note 160, at 12; PORTER, *supra* note 90, at 1.

164. See BEEMAN ET AL., *supra* note 160, at 7, 13.

a criminal case. People are charged for the cost of their own jury trials,¹⁶⁵ probation and parole supervision,¹⁶⁶ fines,¹⁶⁷ restitution, and fees.¹⁶⁸

As scholars have noted, although the law does not and cannot require family members to provide financial support to system-involved loved ones, it certainly envisages such assistance.¹⁶⁹ In *Bearden v. Georgia*, the Supreme Court considered whether a person can be incarcerated for failure to pay a fine.¹⁷⁰ Mr. Bearden pled guilty to burglary and theft by receiving stolen property, was sentenced to a term of probation, and was required to pay a \$500 fine and \$250 in restitution on a specific, court-determined schedule.¹⁷¹ Mr. Bearden initially paid \$200 by borrowing money from family, but he was unable to pay the remainder after losing his job.¹⁷² The trial court revoked his probation and sentenced him to prison.¹⁷³

In its decision, the Court reiterated its prohibition on debtors' prisons under the Due Process Clause of the Fourteenth Amendment.¹⁷⁴ However, it also held that:

[A] probationer's failure to make sufficient bona fide efforts to seek employment *or borrow money* in order to pay the fine or restitution may reflect an

165. DEVUONO-POWELL ET AL., *supra* note 5, at 14; *see also* ALICIA BANNON, MITALI NAGRECHA & REBEKAH DILLER, BRENNAN CTR. FOR JUST., CRIMINAL JUSTICE DEBT: A BARRIER TO REENTRY 7, 35 n.18 (2010), <https://www.brennancenter.org/our-work/research-reports/criminal-justice-debt-barrier-reentry> [<https://perma.cc/976U-29JN>].

166. *See* Katzenstein & Waller, *supra* note 4, at 645.

167. Even though jurisdictions impose millions of dollars in fines and restitution annually, a lack of data renders the total amount unknown. The Fines and Fees Justice Center estimates that "at least \$27.6 billion of fines and fees is owed across the nation." BRIANA HAMMONS, FINES & FEES JUST. CTR., TIP OF THE ICEBERG: HOW MUCH CRIMINAL JUSTICE DEBT DOES THE U.S. REALLY HAVE? 4 (2021), https://finesandfeesjusticecenter.org/content/uploads/2021/04/Tip-of-the-Iceberg_Criminal_Justice_Debt_BH1.pdf [<https://perma.cc/25FF-K8JE>]. Despite the lack of an overall estimate, some jurisdictions that collect data provide insight. For instance, "[i]n 2017, New York City Criminal and Supreme Courts imposed 128,000 fines, totaling \$56 million," and "about \$18 million in restitution was ordered across close to 1,500 cases." SCOTT M. STRINGER, OFF. OF THE N.Y. CITY COMPTROLLER, BUREAU OF BUDGET & BUREAU OF POL'Y AND RSCH., FEES, FINES AND FAIRNESS: HOW MONETARY CHARGES DRIVE INEQUITY IN NEW YORK CITY'S CRIMINAL JUSTICE SYSTEM 16 (2019).

168. There may be fees relating to court costs, prosecution, fine and forfeiture funds, crime-victim-assistance funds, DNA databanks, sex offender registration, and sex offender victims' funds. For example, in New York City, a baseline fee—"95 for a penal code violation, \$175 for a misdemeanor, and \$300 for a felony"—is charged for each conviction. STRINGER, *supra* note 167, at 14. A \$25 Crime Victim Assistance fee and a \$50 DNA fee for misdemeanors and felonies are also tacked on. *Id.* at 15. Although courts are often authorized to waive fees and costs for indigent people, how often they do so varies by jurisdiction. *See* OFF. FOR ACCESS TO JUST., DEP'T OF JUST., ACCESS TO JUSTICE SPOTLIGHT: FINES & FEES 5 (2023), <https://www.justice.gov/d9/2023-11/doj-access-to-justice-spotlight-fines-and-fees.pdf> [<https://perma.cc/86QV-35XL>] ("The categories of fines and fees, affiliated costs, and discretion to impose or waive them, can vary greatly between, and even within, jurisdictions."); MENENDEZ ET AL., *supra* note 147, at 8 ("The issuance of waivers varies considerably among jurisdictions and states.").

169. *See* Katzenstein & Waller, *supra* note 4, at 647 (discussing *Bearden* and other caselaw that "seems in fact to assume such borrowing as a taken-for-granted occurrence").

170. 461 U.S. 660, 661 (1983).

171. *Bearden*, 461 U.S. at 662.

172. *Id.* at 662–63.

173. *Id.* at 663.

174. *See id.* at 674.

insufficient concern for paying the debt he owes to society for his crime. In such a situation, the State is likewise justified in revoking probation and using imprisonment as an appropriate penalty for the offense.¹⁷⁵

The impact of *Bearden* has been evident over the four decades since it was decided. In *State v. Bower*, for example, the Court of Appeals of Washington affirmed a lower court's decision to sentence a man to a term of imprisonment for failing to pay his financial obligations.¹⁷⁶ The *Bower* court noted that he had "made no showing of bona fide efforts to acquire the resources from which to meet his court-ordered obligations, by borrowing or other legal means."¹⁷⁷ Judges have used similar reasoning in other cases, stating, for instance, that "[a]lthough it may take [the accused] time to pay his [court costs and restitution], he can make payments from either prison wages or *monetary gifts from family and friends*."¹⁷⁸

These cases demonstrate that courts encourage people to seek financial support from their loved ones to avoid incarceration for failure to pay a fine. Indeed, the decisions indicate that making such requests is required to demonstrate sufficient "bona fide efforts."¹⁷⁹ The implications of this seemingly offhand remark in the *Bearden* decision are far-reaching. This exemplifies how the normal functioning of the criminal legal system not only contemplates the support of family members and women but indeed demands it. Or as researchers Mary Fainsod Katzenstein and Maureen R. Waller put it: "Even by the letter of the law, then, the state is siphoning dollars from mostly low-income families to 'make good' on legal violations which they, themselves, did not commit."¹⁸⁰ Given these pressures, it is unsurprising that the Who Pays study found that conviction-related costs totaled an average of \$13,607 and that "[a]lmost half of the family members primarily responsible for paying court-related costs were mothers, and one in ten were grandmothers."¹⁸¹

Unfortunately, criminal justice debt is not limited to fines, fees, surcharges, and restitution. Bail and bond are also significant expenses that impact people charged with crimes, their families, and the shadow defendants who support them.

2. The Bail Bond System

Sarah contacts me again after Travis has been at Rikers for three months awaiting trial. She wants to try to bail him out again. The first two attempts were unsuccessful, but she has recruited two friends who have agreed to be cosigners—both women, one only eighteen.

175. *Id.* at 668 (emphasis added).

176. 823 P.2d 1171, 1174 (Wash. Ct. App. 1992).

177. *Id.* at 1173 (emphasis added).

178. *People v. Son*, 262 Cal. Rptr. 3d 824, 852 (Ct. App. 2020) (Franson, J., concurring in part and dissenting in part) (emphasis added).

179. *Bearden*, 461 U.S. at 668.

180. Katzenstein & Waller, *supra* note 4, at 647.

181. DEVUONO-POWELL ET AL., *supra* note 5, at 14.

Sarah and her two friends come to court the following day. When we approach the judge with the application, she is skeptical. One friend works seasonally while the other does temp jobs. Although they bring paystubs, the judge presses them on the consistency of their earnings and yearly income. Despite our best efforts, she rejects the application.

Another cost imposed pretrial is bail. As the number of incarcerated people has increased, so too have the number of people assigned bail and the average amount of bail.¹⁸² These increases have corresponded to a rapid rise in the pretrial jail population¹⁸³—a population that is subjected to the cruelty and abuses typical of incarceration while still being presumed innocent.¹⁸⁴

Unsurprisingly, these bail practices disproportionately impact system-involved, low-income people of color. Poor people charged with comparatively low-level offenses will often be detained pretrial because they cannot afford bail, while wealthy people charged with more serious, even violent, offenses will remain free after posting bail. This has led activists to argue that the nation has a wealth-based bail system in which people of means can “buy their freedom” while the poor remain incarcerated.¹⁸⁵ Advocates also argue that bail practices are often discriminatory, “with Black and Latino men assessed higher bail amounts than white men for similar crimes by 35 and 19 percent on average, respectively.”¹⁸⁶

The increase in the use and amount of bail begs the recurring question: Who pays? In practice, many people incarcerated pretrial are unable to pay any bail.¹⁸⁷ Researchers in the Debt of Care study observed that, instead, this burden is

182. See *Bail Reform*, ACLU: SMART JUST., <https://www.aclu.org/issues/smart-justice/bail-reform> [<https://perma.cc/6YXG-TM8H>] (last visited Feb. 26, 2025); see also Page et al., *supra* note 5, at 156 (“In recent decades, jail systems and commercial bail have expanded together, and quickly. Between 1980 and 2015, local jail populations in the United States roughly quadrupled. Trends in the bail industry followed right alongside . . .” (citation omitted)).

183. See *Bail Reform*, *supra* note 182.

184. See *Smart Justice - Ending Cash Bail*, ACLU PA., <https://www.aclupa.org/en/smart-justice-ending-cash-bail> [<https://perma.cc/5CME-S7QW>] (last visited Feb. 26, 2025) (“Nationwide, three-quarters of jail deaths occur among people in pretrial detention, and more than one-third of deaths occur within seven days of incarceration.”); Nazish Dholakia, *Prisons and Jails Are Violent; They Don’t Have to Be*, VERA INST. JUST. (Oct. 18, 2023), <https://www.vera.org/news/prisons-and-jails-are-violent-they-dont-have-to-be> [<https://perma.cc/M67N-SJHP>]; Sam McCann, *Amid Another Report of Rampant Abuse on Rikers, It’s Time to Hold City Jails Accountable*, VERA INST. JUST. (Apr. 27, 2023), <https://www.vera.org/news/amid-another-report-of-rampant-abuse-on-rikers-its-time-to-hold-city-jails-accountable> [<https://perma.cc/8VME-88QP>].

185. *Bail Reform*, *supra* note 182; Will Snowden, *Money Bail Is Unjust and Should End*, FORBES (Apr. 21, 2022, 8:14 AM), <https://www.forbes.com/sites/forbeseq/2021/10/01/money-bail-is-unjust-and-should-end/?sh=4e37414c6f06>.

186. Adureh Onyekwere, *How Cash Bail Works*, BRENNAN CTR. FOR JUST. (Feb. 24, 2021), <https://www.brennancenter.org/our-work/research-reports/how-cash-bail-works> [<https://perma.cc/HA7G-45SU>].

187. See Snowden, *supra* note 185. During my time as a public defender, I observed this dynamic occurring for several reasons. First, to bail oneself out of custody, a person must have the full bail amount on their person, in cash, when they are arrested, unless they are being released on an unsecured personal bond. (Unsecured personal bonds are bonds that require no payment up front, which some

shifted to an incarcerated person's family, friends, and loved ones—often women, and particularly women of color.¹⁸⁸ The study found that although most incarcerated people were men, bail bondsmen primarily worked with women as cosigners.¹⁸⁹ Joshua Page, while employed as a bondsman, was encouraged to target a hierarchy of preferred cosigners, with mothers, wives, and daughters resting at the top.¹⁹⁰ He also observed the ways in which gender, race, and class intersected, concluding that “[p]oor women of color are especially subject to bail predation because they are seen within the larger social organization of care as bearing primary responsibility for defendants.”¹⁹¹ He described the potentially devastating consequences of these predatory practices, finding that they “raise[] the odds that bail will be offered to cosigners from subjugated groups only on riskier or more costly terms—for example, with higher premiums, stronger collateral requirements, and stricter payment conditions.”¹⁹²

In recognition of the predatory practices that dominate the bail bond industry, calls to reform state bail practices have gained traction in recent years. For

states allow as a substitute for cash bail. *See, e.g.,* TEX. CODE CRIM. PROC. ANN. art. 17.03(a) (“[A] magistrate may, in the magistrate’s discretion, release the defendant on personal bond without sureties or other security.”) With bail amounts being set increasingly high, it is unlikely that someone would have the necessary amount of money on their person at the time of arrest. *Cf. State v. Wilkins*, 703 S. E.2d 807, 809 (N.C. Ct. App. 2010) (noting that Wilkins was carrying \$1,264 in cash at the time of his arrest because “he was ‘on the run’ and if he were arrested the bail bondsman would not accept a check”). Additionally, even if a person is arrested with sufficient cash to pay their bail, it is common practice for law enforcement to search each arrestee and hold their property—including cash—for safekeeping or other purposes. Kenneth M. Stroud, *The Inventory Search and the Fourth Amendment*, 4 IND. LEGAL F. 471, 471 (1971); *see also What to Expect If You’re Arrested*, LEGAL AID SOC’Y (July 25, 2019), <https://legalaidnyc.org/get-help/arrests-policing/what-to-expect-if-youre-arrested> [<https://perma.cc/8A7T-N5PS>] (“At the precinct, a police officer will search you and take personal property, such as house keys, backpacks, purses, medication, large sums of money, or valuable jewelry, as well as any unlawful items you happen to have in your possession (contraband). Items other than contraband are held for safekeeping while you are in custody.”). Thus, a person may have been arrested with sufficient funds to pay their bail, but no longer have access to those funds after their arrest has been processed. In rare instances, a person may have sufficient funds in the bank and can direct a loved one to retrieve and utilize those funds to pay their bail. Ultimately, though, many people who are arrested—especially those who are indigent and qualify for the services of a public defender—simply cannot afford to pay the bail themselves.

188. *See generally* Page et al., *supra* note 5.

189. *See id.* at 158–59. A cosigner is a person who enters into a bail contract. The cosigner pays a nonrefundable premium in exchange for the bail bondsman paying the incarcerated person’s bail to the court. These premiums are typically 10% of the bail amount. The cosigner is responsible for making sure that the accused appears for each court date. “Should the accused fail to appear, the court can collect the full amount of the bail from the company,” which in turn “works to recoup the amount of the bail from the bond’s cosigners.” *Id.* at 156. *See generally* Faith M. Deckard, *Surveilling Sureties: How Privately Mediated Monetary Sanctions Enroll and Responsibilize Families*, SOC. PROBLEMS (forthcoming) (highlighting that “Black and Brown women are disproportionately targeted for enrollment” as cosigners on bail bond contracts and the attendant surveillance to which they are subjected).

190. Page et al., *supra* note 5, at 159. Notably, Page also described a common practice whereby the bail companies would “strategically hire[] female agents, believing that as women they would connect emotionally with the mothers, girlfriends, and female friends of defendants.” *Id.* at 160.

191. *Id.* at 150.

192. *Id.* at 159.

example, New York reformed its state bail statute in 2019.¹⁹³ One change to that bail statute now requires judges to set three or more forms of bail, with at least one being an unsecured or partially secured bond.¹⁹⁴ An unsecured bond does not require payment of any money upfront.¹⁹⁵ Instead, a cosigner agrees to be on the hook for the full bond amount if the accused fails to appear and the judge forfeits the bail.¹⁹⁶ A partially secured bond, meanwhile, requires payment of no more than 10% of the full bond amount to the court.¹⁹⁷ If the accused appears for all of his court dates, the cosigner is refunded all or nearly all of the partially secured bond payment.¹⁹⁸ This differs from typical bail bond contracts, wherein the cosigner must pay a nonrefundable 10% premium that the bondsman keeps as profit.¹⁹⁹

Consider how these reforms impacted Sarah and her friends as they attempted to bail out Travis.²⁰⁰ First, rather than working with a bail bondsman, they went directly to the court to post the partially secured bond. Although this eliminates the third-party intermediary (who often engages in predatory practices),²⁰¹ it converts the court into another site of extraction and surveillance. Should the accused fail to appear, it is the court that will demand payment of the full bond amount. Additionally, it subjects the potential cosigner's income and finances to the court's scrutiny. The judge can inspect and question the potential cosigner's employment, tax returns, paystubs, other sources of income, assets, relationship to the accused, financial obligations, and other information relevant to assessing their fitness to serve as a cosigner. In a study of the bail bond industry, Faith Deckard notes that in determining whether and how to grant bail, "judges, like [bail] agents, assess the financial and social stability of defendants *and their loved ones*," which subjects potential cosigners to judicial inspection.²⁰² In other words, regardless of whether the accused is released on recognizance, an unsecured or partially secured bond is posted directly with the court, or a bail bond contract is entered into with a commercial bail company, shadow defendants are consistently the subjects of scrutiny and surveillance.

193. S. 1509C, 2019–2020 Legis. Sess. (N.Y. 2019). However, since the initial passage of bail reform, the New York legislature has rolled back the changes multiple times. See Peter Sterne, *A (Not So) Brief Guide to New York's Bail Reform Evolution*, CITY & STATE N.Y. (May 5, 2023), <https://www.cityandstateny.com/policy/2023/05/not-so-brief-guide-new-yorks-bail-reform-evolution/385379> [<https://perma.cc/32VL-FSXP>].

194. N.Y. CRIM. PROC. LAW § 520.10(2)(b).

195. *Id.* § 500.10(19).

196. See *id.* § 500.10(10), (19).

197. *Id.* § 500.10(18).

198. See *Bail*, N.Y. STATE UNIFIED CT. SYS., <https://ww2.nycourts.gov/courts/7jd/courts/city/bail.shtml> [<https://perma.cc/LTX4-DFNN>] (last visited Feb. 26, 2025). If the case results in a dismissal or acquittal, then the full payment is returned. *Id.* If, however, the case results in a conviction, then the court keeps 3% of the payment. *Id.*

199. See Will Kenton, *What Is a Bail Bond, and Do You Get Bail Money Back?*, INVESTOPEDIA (Feb. 4, 2025), <https://www.investopedia.com/terms/b/bail-bond.asp>.

200. See *supra* vignette at the beginning of Section III.B.2.

201. See *supra* notes 189–92 and accompanying text.

202. Deckard, *supra* note 189, at 14 (emphasis added).

System-involved people who are released and not assigned bail do not necessarily escape other pretrial costs and fees. For those released on electronic monitoring, nearly all states charge a fee for the cost of the devices.²⁰³ When states contract with private companies to install and monitor these devices, “[t]he charges are unregulated and come with exorbitant fees, enabling the private firms’ profit.”²⁰⁴ Although there is a distinct lack of information and data about who pays the costs and fees related to electronic monitoring, they are likely distributed in the same manner as other fines, fees, and costs—to women. The next Section turns to the economic costs associated with incarceration.

3. Costs of Incarceration

If an accused person’s criminal case ends with a carceral sentence, there are a number of additional fees and costs that women pay, including pay-to-stay charges,²⁰⁵ medical copayments, commissary deposits, telecommunications charges, and visitation costs and fees.²⁰⁶ Some of these costs—namely, pay-to-stay charges, medical copayments, and preexisting criminal justice debt—are charged directly to incarcerated people but can be deducted from commissary funds deposited by shadow defendants and other family members.²⁰⁷ This practice ensures that whether they agree to assist with paying fines and fees up front or simply attempt to support their incarcerated loved one during their imprisonment, the criminal legal system imposes a financial penalty not only on the people convicted but on shadow defendants and family members as well.²⁰⁸

There is also significant pressure placed on family and friends to support their incarcerated loved one by depositing money into commissary accounts. These deposits are typically used to pay for food, toiletries, clothing, stamps, and other basic necessities,²⁰⁹ which are often marked up to exorbitant prices far outpacing

203. DEVUONO-POWELL ET AL., *supra* note 5, at 15; Shapiro, *supra* note 166.

204. DEVUONO-POWELL ET AL., *supra* note 5, at 15.

205. Perhaps paradoxically, a majority of states have pay-to-stay fees, whereby incarcerated people are charged for the cost of their jail and prison stays. Katzenstein & Waller, *supra* note 4, at 642–43. These fees are “inevitably paid for by funds deposited by family in an inmate’s account.” *Id.* at 643.

206. See Christian et al., *supra* note 4, at 449 (studying the financial impact incarceration has on families and finding that “[t]he expenses that family members incur are primarily focused on visitation, providing money for the prisoner’s commissary account, sending gift packages, and receiving collect calls”).

207. See Katzenstein & Waller, *supra* note 4, at 639, 642–43. In a study, Katzenstein and Waller found that after Texas passed a law charging incarcerated people \$100 annually for medical care, “payments from family members into commissary accounts [were] underwriting these basic medical provisions.” *Id.* at 643. On its face, this practice seems to distort the correctional facilities’ obligation to provide adequate medical care. See *Estelle v. Gamble*, 429 U.S. 97, 103 (1976). However, although correctional facilities are required to provide medical care to incarcerated people, the standard for alleging a violation of this obligation is high. See *id.* at 105–06. To state a claim for cruel and unusual punishment under the Eighth Amendment, an incarcerated person must demonstrate “deliberate indifference to serious medical needs.” *Id.* at 106.

208. See generally Page & Soss, *supra* note 5.

209. The Marshall Project recently published personal stories of how incarcerated people earn and spend money. See Beth Schwartzapel, *Prison Money Diaries: What People Really Make (and Spend) Behind Bars*, MARSHALL PROJECT (Aug. 4, 2022, 9:00 AM), <https://www.themarshallproject.org/2022/>

their cost in the community.²¹⁰ Family and friends pay fees to transfer those funds, often per transaction, that further drive up the cost of supporting their loved one.²¹¹ For example, in 2018 in New York City, people transferred over \$17.5 million into jail commissary accounts, at a cost of \$2 million in transfer fees.²¹²

Other costs of incarceration, such as visitation costs and telecommunication fees, are charged directly to family members. Although shadow defendants can stay in contact with incarcerated loved ones through in-person visits, they face significant challenges in doing so.²¹³ In a study that interviewed family members with incarcerated or recently incarcerated loved ones, 75% of participants reported that the distance to the prison made visitation difficult.²¹⁴ For participants who made in-person visits, the median travel time was three hours, with an additional forty minutes spent waiting at the facility.²¹⁵ The study specifically notes that these burdens most frequently fall on mothers, sisters, and partners.²¹⁶

An additional barrier to in-person visits is the cost. People incur costs for gas, tolls, or public transportation.²¹⁷ In the aforementioned study, “[o]n average, it cost [participants] \$55 to visit their imprisoned family member.”²¹⁸ Moreover, people visiting jails and prisons may be required to pay other costs such as background check fees.²¹⁹

In place of or in addition to in-person visits, shadow defendants stay in touch with incarcerated loved ones through phone calls and video visits. Until recently, the average cost of a fifteen-minute call from a county jail was three dollars, or twenty cents per minute, but “[i]n 34 states, at least one jail charge[d] in-state

08/04/prison-money-diaries-what-people-really-make-and-spend-behind-bars [https://perma.cc/ZKL3-EHRK].

210. Elizabeth Weill-Greenberg & Ethan Corey, *Locked In, Priced Out: How Prison Commissary Price-Gouging Preys on the Incarcerated*, APPEAL (Apr. 17, 2024), <https://theappeal.org/locked-in-priced-out-how-much-prison-commissary-prices> [https://perma.cc/PHK7-BDBZ]; see Alexandra Arriaga, *Why Inflation Price Hikes Are Even Worse Behind Bars*, MARSHALL PROJECT (May 2, 2023, 6:00 AM), <https://www.themarshallproject.org/2023/05/02/why-inflation-price-hikes-are-even-worse-behind-bars> [https://perma.cc/KQL7-764T].

211. See, e.g., STRINGER, *supra* note 167, at 5–7.

212. *Id.* at 5.

213. See, e.g., Sarah Stillman, *Do Children Have a “Right to Hug” Their Parents?*, NEW YORKER (May 13, 2024), <https://www.newyorker.com/magazine/2024/05/20/the-jails-that-forbid-children-from-visiting-their-parents>.

214. Naser & Visher, *supra* note 68, at 23.

215. *Id.*

216. See *id.* at 26.

217. *Id.* at 23.

218. *Id.* at 25.

219. DE VUONO-POWELL ET AL., *supra* note 5, at 30. A 2011 report on such fees in Arizona found that they were not in fact being used to cover the cost of conducting the background checks, but instead to cover gaps in the budget for building maintenance. Erica Goode, *Inmate Visits Now Carry Added Cost in Arizona*, N.Y. TIMES (Sept. 4, 2011), <https://www.nytimes.com/2011/09/05/us/05prison.html#:~:text=For%20the%20Arizona%20Department%20of,complexes%20that%20house%20state%20prisoners.>

rates higher than 21¢ per minute.”²²⁰ However, women with incarcerated loved ones have led a decades-long national campaign to combat the predatory practice of charging exorbitant prices for phone calls.²²¹ Following community organizing efforts, lawsuits, and a national media campaign, it appeared that they had succeeded in 2014. That year, the Federal Communication Commission (FCC) capped charges for out-of-state calls from correctional facilities.²²² However, telecommunications companies successfully challenged a subsequent attempt to cap in-state phone calls.²²³ In 2017, the D.C. Circuit struck down the FCC cap on in-state calls, reasoning that it exceeded the FCC’s statutory authority.²²⁴

In the face of this defeat, shadow defendants remained undeterred. After renewed advocacy efforts, in January 2023, President Biden signed the Martha Wright-Reed Just and Reasonable Communications Act of 2022 (Martha Wright-Reed Act) into law, which authorizes the FCC to regulate the cost of in-state calls from jails and prisons and clears up any ambiguity about the FCC’s authority to regulate video calls from correctional facilities.²²⁵ Recently, the FCC voted to cap phone and video call rates and ban payment of most kickbacks from telecommunications companies to the facilities.²²⁶

This battle to regulate call rates from correctional facilities is illuminating. First, it exemplifies the systematic predation of shadow defendants’ economic resources that Page and others have highlighted.²²⁷ According to the Who Pays study, “[e]ighty-two percent of survey participants reported that family members were primarily responsible for phone and visitation costs. *Of the family members who were responsible for the costs, 87% were women.*”²²⁸ This is unsurprising given that incarcerated people are rarely able to afford these costs themselves.

220. Peter Wagner & Wanda Bertram, *State of Phone Justice 2022: The Problem, the Progress, and What’s Next*, PRISON POL’Y INITIATIVE (July 18, 2024), https://www.prisonpolicy.org/phones/state_of_phone_justice_2022.html [https://perma.cc/2PNT-R2GV]; see also Shira Hoffer, *Mother or Money? The Exorbitant Cost of Phone Calls from Jail*, HARV. POL. REV. (Jan. 15, 2022), <https://harvardpolitics.com/jail-phone-calls> [https://perma.cc/A4SW-H4PW]; Comfort, *Punishment*, *supra* note 4, at 284.

221. See, e.g., Candice Norwood & Bria Lloyd, *A Mother’s Calling: Inside the Fight to Make Prison Phone Calls Free*, EMANCIPATOR (June 6, 2024), <https://theemancipator.org/2024/06/06/topics/criminal-legal-system/a-mothers-calling-inside-the-fight-to-make-prison-phone-calls-free> [https://perma.cc/3PYV-5STZ]; see also Petition for Rulemaking, CC Docket No. 96-128, filed by Wright et al. (Nov. 3, 2003), on referral from Wright v. Corr. Corp. of Am., No. 00-293 (D.D.C. Feb. 16, 2000).

222. FCC Inmate Calling Services Interim Rate Cap, 47 C.F.R. § 64.6030 (2014).

223. See Wagner & Bertram, *supra* note 220; Cecilia Kang, *Court Strikes Obama-Era Rule Capping Cost of Phone Calls from Prison*, N.Y. TIMES (June 13, 2017), <https://www.nytimes.com/2017/06/13/technology/fcc-prison-phone-calls-regulations.html>.

224. See Glob. Tel*Link v. FCC, 866 F.3d 397, 412 (D.C. Cir. 2017).

225. See 47 U.S.C. §§ 152, 153, 276 (2023).

226. Wanda Bertram, *FCC Votes to Slash Prison and Jail Calling Rates and Ban Corporate Kickbacks*, PRISON POL’Y INITIATIVE (July 18, 2024), <https://www.prisonpolicy.org/blog/2024/07/18/fcc-vote> [https://perma.cc/W8EX-W2HC].

227. See sources cited *supra* note 20.

228. DEVUONO-POWELL ET AL., *supra* note 5, at 30 (emphasis added).

The “average maximum hourly wage [in prisons] is 52 cents” per hour,²²⁹ and incarcerated people “retain on average only 20 percent of their wages.”²³⁰ Given these pitiful wages and that most people entering the criminal legal system already live at or below the poverty line, family members—predominantly women—are left to assume these costs.

This fight also highlights the decades of labor that shadow defendants have expended during their third shift²³¹ to combat just one predatory and pernicious practice. Martha Wright-Reed, after whom the Martha Wright-Reed Act is named, was a grandmother and retired nurse spending over \$100 each month to stay in touch with her incarcerated grandson.²³² “As a blind elderly woman, who could neither write letters nor travel . . . long distances for in-person visits, a phone call was her only option to stay in touch” with him.²³³ She first appealed to the FCC for help in 2003, but it was only after years of organizing and advocating that victory was finally achieved.²³⁴ Sadly, Ms. Wright-Reed never saw the fruits of her and countless other shadow defendants’ labor: she passed away in 2015.²³⁵

Finally, this fight demonstrates how far there still is to go. Even under the new FCC rules, which cap phone call charges between six and twelve cents per minute and video call charges between eleven and twenty-five cents per minute,²³⁶ the cost of remaining in contact with an incarcerated loved one remains higher than the near-zero cost of making phone and video calls in the outside world.²³⁷

4. Collateral Consequences

If a criminal case results in a conviction or period of incarceration, women often compensate for reduced employment, housing, educational, and other opportunities even once a loved one returns home. People with criminal records are subjected to innumerable collateral consequences that impact nearly every facet of civic life, including employment, housing, education, voting, licensing, immigration, public assistance, and adoption.²³⁸ For those returning home after a period

229. ACLU & UNIV. OF CHI. L. SCH. GLOB. HUM. RTS. CLINIC, CAPTIVE LABOR: EXPLOITATION OF INCARCERATED WORKERS 10 (2022), <https://assets.aclu.org/live/uploads/publications/2022-06-15-captivelaborresearchreport.pdf> [https://perma.cc/2KPK-ZHWY].

230. Katzenstein & Waller, *supra* note 4, at 642.

231. *See supra* notes 50, 135–36, and accompanying text.

232. Cody Davis, *A Close Call: D.C. Circuit Court of Appeals Strikes Down Prison Call Regulations*, CAMPBELL L. OBSERVER (June 26, 2017), <http://campbelllawobserver.com/a-close-call-d-c-circuit-court-of-appeals-strikes-down-prison-call-regulations> [https://perma.cc/RJ49-VD7V].

233. Myaisha Hayes, *Prison Phone Justice is a Gender Justice Issue: The Legacy of Mrs. Martha Wright-Reed*, MEDIAJUSTICE (Mar. 8, 2019), <https://mediajustice.org/news/prison-phone-justice-is-a-gender-justice-issue-the-legacy-of-mrs-martha-wright-reed> [https://perma.cc/T64J-W8ZL].

234. *See id.*

235. Ann E. Marimow, *FCC Made a Case for Limiting Cost of Prison Phone Calls. Not Anymore.*, WASH. POST (Feb. 5, 2017, 8:00 AM), https://www.washingtonpost.com/local/public-safety/fcc-made-a-case-for-limiting-cost-of-prison-phone-calls-not-anymore/2017/02/04/9306fbf8-e97c-11e6-b82f-687d6e6a3e7c_story.html.

236. Bertram, *supra* note 226.

237. *See* Wagner & Bertram, *supra* note 220.

238. *See generally* LOVE ET AL., *supra* note 3.

of incarceration, the reentry process can require a significant amount of financial and emotional support. This Section focuses on two factors that reduce recidivism during the reentry period—employment²³⁹ and housing²⁴⁰—and reveals how regulatory rules, disclosure requirements, and the Supreme Court’s decision in *Department of Housing and Urban Development v. Rucker*²⁴¹ impact shadow defendants.

A criminal conviction has a devastating impact on a person’s employment prospects and opportunities. Many occupations, from driving a taxicab²⁴² to barbering,²⁴³ require an occupational license regulated by state and federal licensing agencies.²⁴⁴ A 2018 report found that “[n]early one-third of U.S. workers hold jobs that require an occupational license,”²⁴⁵ though licensing restrictions vary widely across states.²⁴⁶ As of 2020, thirty-three states permitted license denials to applicants who had been arrested, even if the arrest did not result in a

239. Kevin T. Schnepel, *Good Jobs and Recidivism*, 128 ECON. J. 447, 448 (2016) (finding that certain employment opportunities—specifically in manufacturing and construction—were associated with reduced recidivism); Mark T. Berg & Beth M. Huebner, *Reentry and the Ties That Bind: An Examination of Social Ties, Employment, and Recidivism*, 28 JUST. Q. 382, 387 (2011) (summarizing social science research that finds “a negative link between employment and criminal behavior”); JOAN PETERSILIA, *WHEN PRISONERS COME HOME: PAROLE AND PRISONER REENTRY* 112 (2003) (“Most experts, as well as prisoners themselves, believe that finding a job is critical to successful reintegration. Employment helps ex-prisoners be productive, take care of their families, develop valuable life skills, and strengthen their self-esteem and social connectedness. . . . [A] meta-analysis of nearly 400 studies from 1950 to 1990 found that the single most effective factor in reducing reoffending rates was employment.” (citing Mark W. Lipsey, *What Do We Learn from 400 Research Studies on the Effectiveness of Treatment with Juvenile Delinquents?*, in *WHAT WORKS: REDUCING REOFFENDING: GUIDELINES FROM RESEARCH AND PRACTICE* 63 (James McGuire ed., 1995))).

240. Leah A. Jacobs & Aaron Gottlieb, *The Effect of Housing Circumstances on Recidivism: Evidence from a Sample of People on Probation in San Francisco*, 47 CRIM. JUST. & BEHAV. 1097, 1111 (2020) (concluding that housing instability among people on probation is associated with higher rates of recidivism); David S. Kirk et al., *The Impact of Residential Change and Housing Stability on Recidivism: Pilot Results from the Maryland Opportunities Through Vouchers Experiment (MOVE)*, 14 J. EXPERIMENTAL CRIMINOLOGY 213, 213 (2018) (finding lower recidivism rates among recently released participants who received free housing versus those who did not); KATHARINE H. BRADLEY, R. B. MICHAEL OLIVER, NOEL C. RICHARDSON & ELSPETH M. SLAYTER, CMTY. RES. FOR JUST., *NO PLACE LIKE HOME: HOUSING AND THE EX-PRISONER* (2001) (“Housing is the lynchpin that holds the reintegration process together. Without a stable residence[,] continuity in substance abuse and mental health treatment is compromised. Employment is often contingent upon a fixed living arrangement. And, in the end, a polity that does not concern itself with the housing needs of returning prisoners finds that it has done so at the expense of its own public safety.”).

241. 535 U.S. 125 (2002); see also Comfort, *Punishment*, *supra* note 4, at 276 (discussing the Department of Housing and Urban Development’s “One Strike and You’re Out” eviction policy and highlighting its harmful impact on public housing tenants whose household members engage in criminal or drug activity).

242. See, e.g., N.Y. VEH. & TRAF. LAW § 148-a.

243. See, e.g., VA. CODE ANN. § 54.1-703.

244. For an example of a federal occupational license, see 7 U.S.C. § 2134 (laying out licensing requirements for the transportation and breeding of animals).

245. THE SENT’G PROJECT, *supra* note 27, at 9.

246. Compare, e.g., 225 ILL. COMP. STAT. 320/3 (plumbing license must be sponsored by an Illinois licensed plumber or an approved apprenticeship program), with MICH. COMP. LAWS § 339.6113(1)(d) (4,000 hours of experience required for master plumber license application).

conviction.²⁴⁷ Even absent a blanket ban, licensing authorities often consider discretionary factors such as an applicant's "good moral character" or "moral turpitude"—factors that are negatively impacted by a criminal record.²⁴⁸ Although many states are now enacting measures to reduce barriers to occupational licensing, advocates encourage additional reforms, including eliminating blanket bans, requiring a close nexus between an offense and the license to justify a denial, and requiring boards to consider rehabilitation and the recency of the conviction.²⁴⁹ Moreover, even when a formal license is not required for a job, employers often run background checks and require applicants to disclose any prior criminal convictions.²⁵⁰ All told, thanks to these various regulatory and disclosure requirements, people with criminal records face significant obstacles in obtaining employment. Researchers have found that "a criminal record reduces the likelihood of a callback or job offer by nearly 50 percent" and that this penalty is twice as harsh for Black applicants as for white applicants.²⁵¹ This impact is particularly acute for formerly incarcerated people, who can expect a 20% reduction in future earnings.²⁵² For formerly incarcerated African-American and Latino workers, that figure is about twice as high.²⁵³ Nearly two-thirds of formerly incarcerated people have not secured employment one year after being released from custody.²⁵⁴

Having a criminal record has a similarly harmful impact on people's ability to secure housing.²⁵⁵ Many public housing agencies require background checks for all applicants.²⁵⁶ Public housing agencies can then deny or evict tenants *whose household members* have criminal convictions.²⁵⁷ The Supreme Court endorsed

247. NICK SIBILLA, INST. FOR JUST., *BARRED FROM WORKING: A NATIONWIDE STUDY OF OCCUPATIONAL LICENSING BARRIERS FOR EX-OFFENDERS* 1 (2020), <https://ij.org/wp-content/uploads/2020/08/Barred-from-Working-August-2020-Update.pdf> [<https://perma.cc/M3D9-SAL6>].

248. *Id.* at 2, 15.

249. *See id.* at 1, 4.

250. *See* Pager et al., *supra* note 93, at 197.

251. *Id.* at 199.

252. DEVUONO-POWELL ET AL., *supra* note 5, at 21.

253. *See id.*

254. *See id.* at 20; Pager et al., *supra* note 93, at 195.

255. *See* LOVE ET AL., *supra* note 3, § 2:17; Archer, *supra* note 31, at 175; Amanda Geller & Marah A. Curtis, *A Sort of Homecoming: Incarceration and the Housing Security of Urban Men*, 40 SOC. SCI. RSCH. 1196, 1206 (2011) (finding that recently incarcerated men face greater housing insecurity, including homelessness and residential turnover); Yvette N.A. Pappoe, *The Scarlet Letter "E": How Tenancy Screening Policies Exacerbate Housing Inequity for Evicted Black Women*, 103 B.U. L. REV. 269, 274 (2023).

256. DEVUONO-POWELL ET AL., *supra* note 5, at 26; *see also* Archer, *supra* note 31, at 175, 186.

257. *See, e.g.*, 42 U.S.C. § 1437d(l) ("Each public housing agency shall utilize leases which . . . provide that any criminal activity that threatens the health, safety, or right to peaceful enjoyment of the premises by other tenants or any drug-related criminal activity on or off such premises, engaged in by a public housing tenant, *any member of the tenant's household*, or any guest or other person under the tenant's control, shall be cause for termination of tenancy.") (emphasis added); 24 C.F.R. § 982.553(a)(2)(ii) ("The [public housing agency (PHA)] may prohibit admission of a household to the program if the PHA determines that *any household member* is currently engaged in, or has engaged in during a reasonable time before the admission . . . [o]ther criminal activity which may threaten the health, safety, or right to peaceful enjoyment of the premises by other residents or persons residing in the immediate vicinity . . .") (second emphasis added); *see also* LOVE ET AL., *supra* note 3, § 2:17; DEVUONO-POWELL ET AL., *supra* note 5, at 20.

public housing agencies' eviction authority in *Department of Housing and Urban Development v. Rucker*.²⁵⁸ In *Rucker*, the leaseholders (and respondents) were the grandparents of two men caught smoking marijuana on apartment premises, a mother whose daughter was caught with cocaine and drug paraphernalia three blocks from the residence, and a man whose "caregiver and two others were found with cocaine" in his apartment.²⁵⁹ Following these incidents, the public housing authorities began eviction proceedings against the respondents.²⁶⁰ The respondents argued that they were innocent and lacked knowledge of the other residents' or guests' drug activity.²⁶¹ The Court rejected their arguments, holding that the statute properly "give[s] local public housing authorities the discretion to terminate the lease of a tenant when a member of the household or a guest engages in drug-related activity, regardless of whether the tenant knew, or should have known, of the drug-related activity."²⁶² Even in the context of private leasing contracts, landlords may elect to deny or fail to renew a lease because of an occupant's criminal history.²⁶³

Consequently, women are often relied upon to provide for formerly incarcerated or convicted loved ones and fill the gaps caused by diminished employment and housing opportunities, which in turn exposes them to the same collateral consequences.²⁶⁴ In a study that examined family members' experiences when an incarcerated loved one returned home, 76% of participants provided housing and 40% helped their returning loved one find housing.²⁶⁵ With respect to employment and financial assistance, 83% "provided their recently released family member with financial support" and approximately 20% assisted with finding employment.²⁶⁶ Again, this study noted that mothers, sisters, and partners were the primary providers of this aid.²⁶⁷

258. 535 U.S. 125, 130 (2002); see also Comfort, *Punishment*, *supra* note 4, at 276 (discussing the Department of Housing and Urban Development's "One Strike and You're Out" eviction policy and highlighting its harmful impact on public housing tenants whose household members engage in criminal or drug activity).

259. *Rucker*, 535 U.S. at 128.

260. *Id.*

261. *Id.* at 129–30.

262. *Id.* at 136.

263. See DEBORAH N. ARCHER, AM. CONST. SOC'Y, YOU CAN'T GO HOME AGAIN: RACIAL EXCLUSION THROUGH CRIME-FREE HOUSING ORDINANCES 3 (2019), <https://www.acslaw.org/wp-content/uploads/2019/11/Racial-Exclusion-Through-Crime-Free-Housing-Ordinances.pdf> [https://perma.cc/5YSY-USVQ]; see also Archer, *supra* note 31, at 186–95 (discussing the recent increase in crime-free ordinances as a way to "keep[] 'undesirable' people out of rental housing").

264. See Geller & Curtis, *supra* note 255, at 1206 (noting that formerly incarcerated men often rely on others for housing expenses); MARTA NELSON, PERRY DEESS & CHARLOTTE ALLEN, VERA INST. OF JUST., THE FIRST MONTH OUT: POST-INCARCERATION EXPERIENCES IN NEW YORK CITY 8 (1999) (reporting that approximately 80% of the parolees in their study resided with family members upon release from prison); Comfort, *Punishment*, *supra* note 4, at 283–84. For a poignant analysis of the housing crisis in the United States, see generally MATTHEW DESMOND, EVICTED: POVERTY AND PROFIT IN THE AMERICAN CITY (2016).

265. Naser & Visher, *supra* note 68, at 24.

266. *Id.*

267. See *id.* at 26.

Note how women are suffering a double loss: not only have they potentially lost the income or housing that the system-involved person could provide or contribute, but they are also tasked with providing resources and housing to their loved one from their own income. When it comes to housing, there is a triple loss because, pursuant to *Rucker*, shadow defendants themselves can lose their own housing. And although substantially reduced housing and employment opportunities are two of the most immediate consequences of having a criminal record, there are countless others that impact the women who support their system-involved loved ones. Among these other consequences, a criminal conviction can result in denial of financial aid for school, loss of access to public benefits, and even deportation.²⁶⁸ These losses are significant and can further destabilize already struggling families.

By providing employment and housing (or compensating for the lack thereof)—two factors which research demonstrates reduce recidivism—shadow defendants are contributing to public safety. Although this is discussed in further detail below,²⁶⁹ it is worth noting how compromising shadow defendants' housing—for example, via decisions such as *Rucker*—can lead to an increased risk of recidivism for the system-involved person in their household.²⁷⁰ Similarly, financially destabilizing shadow defendants through fines, fees, costs, travel, jail or prison calls, commissary deposits, etc., reduces their capacity to provide resources to the system-involved loved ones they support. Setting aside the question of whether relying on shadow defendants to subsidize recidivism reduction efforts is appropriate, this system of extraction is fundamentally unwise. It threatens to further destabilize already vulnerable families, households, and communities—the very same households to which incarcerated people eventually return.

C. DEPRIVATION OF LIBERTY AND PRIVACY

My husband isn't the only person locked up; with an incarcerated loved one I also feel like I've been doing time for the last 30 years. Society instills a sense of "guilt-by-association" that I am forced to live with. . . . I go to visit my husband in an unwelcoming environment, where I too am treated like an inmate.²⁷¹

Involvement in the criminal legal system is characterized by losses of liberty and privacy. Starting from the first moment of a police encounter, system-involved people suffer severe restrictions on their freedom of movement, as well as invasions of privacy.²⁷² Although incarceration is the most severe loss of liberty, passport surrender, travel restrictions, curfews, and various mandated

268. For a comprehensive catalog of the collateral consequences of a criminal conviction, see generally LOVE ET AL., *supra* note 3.

269. See *infra* Section IV.A.2.

270. See *supra* note 240.

271. DEVUONO-POWELL ET AL., *supra* note 5, at 27 (quoting Shamika Wilson, a participant in the Who Pays study).

272. See *supra* notes 94–95 and accompanying text.

check-ins with probation and parole officers, pretrial services, and the court all constrain a person's liberty.²⁷³ Invasions of privacy are similarly common. Probation and parole officers are often permitted to visit and search an individual's person and home, search warrants permit expansive intrusion into the private sphere,²⁷⁴ entry into correctional facilities requires extensive searches,²⁷⁵ and even ignition interlock devices (IIDs) require the collection of bodily matter: one's breath.²⁷⁶ In addition, the use of electronic monitoring through radio frequency monitoring, GPS-equipped ankle monitoring, and smartphone surveillance applications as well as electronic search conditions impose significant constraints on both liberty and privacy.²⁷⁷

Women working the fourth shift are subjected to similar deprivations of liberty and privacy that, when challenged, have been consistently upheld by caselaw. Visiting a correctional facility is a prime example. "[T]he Fourth Amendment does not afford a person seeking to enter a penal institution the same rights that a person would have on public streets or in a home."²⁷⁸ Thus, a shadow defendant's reasonable expectation of privacy is significantly curtailed when visiting a correctional facility. There, her expectation of privacy yields to the government's interest in maintaining the security of the correctional facility.²⁷⁹ Several Circuit Court decisions authorize correctional officers to require all visitors to submit to a pat down search, pass through a metal detector, monitor their conversations with incarcerated people, and conduct a strip search with mere reasonable

273. *See, e.g.*, 18 U.S.C. § 3142(c)(1)(B) (outlining permissible conditions of pretrial release, including restrictions on travel, reporting on a regular basis to pretrial services, and complying with a curfew); N.Y. CRIM. PROC. LAW § 500.10(3-a) (defining permitted nonmonetary conditions of release, including passport surrender, travel restrictions, and contact with pretrial services); D.C. CODE § 23-1321(c)(1)(B) (stating that a judicial officer may impose various pretrial release conditions, including travel restrictions, reporting to pretrial services, and compliance with a curfew).

274. *See, e.g.*, N.Y. CRIM. PROC. LAW §§ 690.10, 690.15 (allowing a court to issue a search warrant to search people, places, and premises for property that is stolen, unlawfully possessed, used to commit or conceal the commission of a crime, or evidence of a committed offense); VA. CODE ANN. § 19.2-53 (providing that search warrants may be issued to permit the search of places, things, people, and electronic devices or networks in order to recover weapons, stolen property, or "[a]ny object, thing, or person, including *without limitation*, documents, books, papers, records, or body fluids, constituting evidence of the commission of [a] crime" (emphasis added)).

275. *See infra* notes 281–83 and accompanying text.

276. *See What Is an Ignition Interlock Device (IID)?*, INTOXALOCK, <https://www.intoxalock.com/ignition-interlock-devices/what-is-an-ignition-interlock-device#:~:text=Once%20the%20device%20is%20installed,ignition%20and%20start%20the%20car> [https://perma.cc/8JF8-7USX] (last visited Feb. 27, 2025).

277. Weisburd, *supra* note 23, at 154–57; *see, e.g.*, N.Y. CRIM. PROC. LAW § 500.10(3-a)(j) (permitting the use of electronic monitoring as a substitute for other nonmonetary release conditions).

278. Spear v. Sowders, 71 F.3d 626, 629–30 (6th Cir. 1995).

279. *See id.*; Newman v. Alabama, 559 F.2d 283, 291 (5th Cir. 1977) ("Prison authorities have both the right and the duty by all reasonable means to see to it that visitors are not smuggling weapons or other objects which could be used in an effort to escape or to harm other prisoners. They have a duty to intercept narcotics and other harmful contraband."), *rev'd in part*, Alabama v. Pugh, 438 U.S. 781 (1978); *see also* Gray v. Bruce, 26 F. App'x 819, 823 (10th Cir. 2001) ("[A visitor's] privacy interests when visiting a prison facility are greatly diminished; . . . prison visitors may be subjected to searches as a condition of their visitation . . .").

suspicion.²⁸⁰ As discussed above,²⁸¹ Comfort describes the visitation experience as a form of secondary prisonization: women who visit their incarcerated partners become “quasi inmates,” “convert[ed] from legally free people into imprisoned bodies for the duration of their stay in the facility” through “elaborate regulations, concentrated surveillance, and corporeal confinement.”²⁸² Recently, scholars have extended these privacy concerns to individuals who communicate with incarcerated loved ones using digital tablets, warning that these tablets allow prisons to capture third parties’ data.²⁸³

Women are susceptible to indirect restrictions on their liberty even when their system-involved loved one is at liberty. For instance, travel restrictions—limitations on where a system-involved person can move or travel—are often imposed as a condition of pretrial release, probation, or parole.²⁸⁴ These travel restrictions can extend to shadow defendants if they are unable or unwilling to travel without their system-involved loved one; perhaps they rely on that person for transportation, or else want to visit family or friends that reside outside of the permitted travel area. In such circumstances, the women are also limited by the restrictions placed on the system-involved person.

The intrusions on privacy for women supporting their system-involved loved ones who are at liberty can be even more severe if they share a residence because courts have curtailed the privacy rights of third parties residing with people on probation or parole.²⁸⁵ People on probation and parole have reduced expectations of privacy under the Fourth Amendment. In *Griffin v. Wisconsin*, the Supreme Court held that neither a search warrant nor probable cause is required to justify the search of a probationer’s home,²⁸⁶ and in *United States v. Knights*, the Court permitted a search of a probationer’s home based only on reasonable suspicion.²⁸⁷ Statutes such as 18 U.S.C. § 3563(b)(16) authorize a court to require a person on

280. See *United States v. Willoughby*, 860 F.2d 15, 20 (2d Cir. 1988) (authorizing correctional facilities to record an incarcerated person’s phone conversations); *Spears*, 71 F.3d at 630 (authorizing pat downs and use of metal detectors for all visitors, as well as strip searches with reasonable suspicion); *Hunter v. Auger*, 672 F.2d 668, 674 (8th Cir. 1982) (requiring reasonable suspicion for a strip search); *Christman v. Skinner*, 468 F.2d 723, 726 (2d Cir. 1972) (authorizing an incarcerated person’s conversations with visitors to be monitored).

281. See *supra* text accompanying notes 76–85.

282. COMFORT, *supra* note 5, at 27, 29.

283. See generally, e.g., Zina Makar, *The Digital Prison Panopticon*, 38 HARV. J.L. & TECH. (forthcoming 2025).

284. See sources cited *supra* note 273; 18 U.S.C. § 3563(b)(14) (providing that a court may require a person on probation to “remain within the jurisdiction of the court, unless granted permission to leave by the court or a probation officer”); *Parole Conditions*, CAL. DEP’T CORR. & REHAB., <https://www.cdcr.ca.gov/parole/parole-conditions> [<https://perma.cc/9E4T-U5X2>] (last visited Feb. 27, 2025) (requiring people on parole to ask their parole agent for permission to travel more than fifty miles from their residence).

285. See, e.g., *United States v. Harden*, 104 F.4th 830 (11th Cir. 2024); *Smith v. City of Santa Clara*, 876 F.3d 987 (9th Cir. 2017); *State v. Kline*, 891 N.W.2d 780 (S.D. 2017); *People v. Smith*, 116 Cal. Rptr. 2d 694 (Ct. App. 2002); see also Comfort, *Punishment*, *supra* note 4, at 277 (describing how cohabitating with someone on probation or parole erodes co-residents’ privacy).

286. 483 U.S. 868, 868 (1987).

287. 534 U.S. 112, 121 (2001).

probation to “permit a probation officer to visit him at his home or elsewhere as specified by the court.”²⁸⁸ Under this authority, a standard condition of probation states: “You must allow the probation officer to visit you at any time at your home or elsewhere, and you must permit the probation officer to take any items prohibited by the conditions of your supervision that he or she observes in plain view.”²⁸⁹

Parolees, meanwhile, enjoy even fewer privacy rights than probationers and are subject to warrantless, suspicionless searches.²⁹⁰ Critically, however, parole imposes privacy intrusions not only on the parolee but also on all occupants of the parolee’s residence. When a parolee is returning home from prison, parole officers will gather information about each resident of the home²⁹¹—including their name, age, relationship to the system-involved person, and criminal history—by running a background check.²⁹² They may interview the homeowner and inquire about their “sources of income,” any “history of domestic violence,” and the “[p]resence of weapons in the home”—which, if present, will need to be removed.²⁹³ A parole officer may inspect the residence where the parolee will live, documenting all doors, windows, and manners of egress.²⁹⁴ Random home searches are often permitted as a condition of parole.²⁹⁵

The reduced expectation of privacy for people on probation and parole transfers to the shadow defendants with whom they reside—a deprivation of a constitutional right that caselaw explicitly upholds. The Eleventh Circuit, Ninth

288. 18 U.S.C. § 3563(b)(16).

289. PROB. & PRETRIAL SERVS. OFF., ADMIN. OFF. OF THE U.S. CTS., OVERVIEW OF PROBATION AND SUPERVISED RELEASE CONDITIONS 26 (2024), https://www.uscourts.gov/sites/default/files/overview_of_probation_and_supervised_release_conditions_0.pdf [<https://perma.cc/9KRW-TKW4>].

290. See *Samson v. California*, 547 U.S. 843, 857 (2006).

291. The Pennsylvania Department of Corrections and Pennsylvania Parole Board provide a Home Plan Brochure that outlines what expectations they have of the home provider for a person being released on parole:

Parole supervision staff must meet with the proposed home provider, in person, inside the residence. It is very important the home provider be available to meet with the agent, and review and sign the formal Home Provider Agreement Letter. Home plans are denied when the home providers do not answer or return phone calls, and do not respond to business cards left by the supervision staff. Refusal to cooperate means a likely denial of a home plan for the inmate.

PA. DEP’T OF CORR. & PA. PAROLE BD., HOME PLAN BROCHURE 1 (2020), <https://www.pa.gov/agencies/cor/resources/parole-supervision/home-plan-status.html> [<https://perma.cc/7FN3-25S4>] [hereinafter HOME PLAN].

292. See, e.g., Tyson Howard, *What Parole, Probation Officers Need to Know About Home Placement Investigations*, POLICE1 (July 20, 2017, 6:14 PM), <https://www.police1.com/evergreen/articles/what-parole-probation-officers-need-to-know-about-home-placement-investigations-L15MgkUb6wbbQzOe> [<https://perma.cc/WB7N-WRN6>]; see also Joy Radice, *Administering Justice: Removing Statutory Barriers to Reentry*, 83 U. COLO. L. REV. 715, 732 (2012) (discussing how parole officers conduct background checks as part of the process for determining parolees’ eligibility for certificates that provide additional opportunities during reentry). Other conditions of probation and parole also affect shadow defendants, including prohibitions on associating with other system-involved people.

293. HOME PLAN, *supra* note 291, at 1.

294. See *id.*

295. See, e.g., *Parole Conditions*, *supra* note 284 (informing people on parole that “[y]ou, your residence (where you live or stay) and your possessions can be searched at any time of the day or night, with or without a warrant, and with or without a reason, by any parole agent or police officer”).

Circuit, and several state courts have held that third parties who reside with a person on probation or parole enjoy a reduced expectation of privacy in areas of the residence that the supervisee can access.²⁹⁶ In *People v. Pleasant*, for example, the California Court of Appeal quite candidly stated that “[p]ersons who live with probationers cannot reasonably expect privacy in areas of a residence that they share with probationers.”²⁹⁷ As a result, shadow defendants have had their homes, purses, and makeup bags rifled through because of their proximity to a system-involved person and have been prosecuted because of the items recovered during those searches.²⁹⁸

These intrusions are particularly acute with the proliferation of electronic monitoring and surveillance. For example, GPS-equipped ankle monitors can have audio and listening capabilities,²⁹⁹ placing wearers of such monitors in a constant state of vigilance about what they say despite claims that those functions are not used.³⁰⁰ In addition, some people on probation and parole are required to consent to inspection of their personal electronic communications, including their emails, text conversations, social media accounts, and call logs.³⁰¹ As a result, anyone on the other side of these communications could have a state agent listening in on or reading their no-longer-so-private conversations.

These intrusions can extend to women’s bodies as well. Consider a woman who shares a family vehicle with a system-involved person convicted of driving while intoxicated. Following conviction, the person may be required to install an IID not only on any car registered in their name, but in any car that they

296. *United States v. Harden*, 104 F.4th 830 (11th Cir. 2024); *Smith v. City of Santa Clara*, 876 F.3d 987 (9th Cir. 2017); *State v. Kline*, 891 N.W.2d 780 (S.D. 2017); *State v. Bursch*, 905 N.W.2d 884 (Minn. Ct. App. 2017); *People v. Ermi*, 156 Cal. Rptr. 3d 848 (Ct. App. 2013); *State v. Finley*, 260 P.3d 175 (Mont. 2011); *State v. Adams*, 788 N.W.2d 619 (N.D. 2010); *State v. Walker*, 158 P.3d 220 (Ariz. Ct. App. 2007); *State v. Johnson*, 748 P.2d 1069 (Utah 1987), *abrogated on other grounds by State v. Doporto*, 935 P.2d 484 (Utah 1997).

297. *Pleasant*, 19 Cal. Rptr. 3d at 798; *see also Samson v. California*, 547 U.S. 843, 856–57 (2006) (“[P]etitioner’s concern that California’s suspicionless search law frustrates reintegration efforts by permitting intrusions into the privacy interests of third parties is also unavailing . . .”).

298. *See, e.g., People v. Ermi*, 156 Cal. Rptr. 3d 848, 848–49 (Ct. App. 2013) (upholding search of a makeup bag inside of a purse); *People v. Smith*, 116 Cal. Rptr. 2d 694, 696, 699 (Ct. App. 2002) (upholding search of a feminine purse); *People v. Boyd*, 274 Cal. Rptr. 100, 101 (Ct. App. 1990) (upholding search of a purse); *People v. LaJocies*, 174 Cal. Rptr. 100, 102–03, 105 (Ct. App. 1981) (upholding search of a home).

299. Weisburd, *supra* note 23, at 155.

300. *See Kira Lerner, Chicago Is Tracking Kids with GPS Monitors That Can Call and Record Them Without Consent*, APPEAL (Apr. 9, 2019), <https://theappeal.org/chicago-electronic-monitoring-wiretapping-juveniles> [https://perma.cc/DDT9-W7EC]; Joshua Kaplan, *D.C. Defendants Wear Ankle Monitors That Can Record Their Every Word and Motion*, WASH. CITY PAPER (Oct. 8, 2019), <https://washingtoncitypaper.com/article/178161/dc-agency-purchases-ankle-monitors-that-can-record-defendants-every-word-and-motion> [https://perma.cc/38L9-8YDF].

301. Weisburd, *supra* note 23, at 156.

operate.³⁰² An IID is installed directly into a vehicle and requires the operator to blow into the machine, which measures their blood alcohol content, before and during operation.³⁰³ Significantly, an IID does not distinguish between drivers—any operator of the vehicle is required to blow into it before driving.³⁰⁴ So, a shadow defendant could be forced to provide information about her body—her blood alcohol content—despite lacking any personal involvement in the criminal legal system.³⁰⁵

Moreover, these intrusions can be directly imposed on the women as a condition of their support for system-involved loved ones. As scholars have pointed out, the bail bond contracts discussed in Section III.B.2 often impose strenuous conditions on cosigners that infringe on their privacy.³⁰⁶ An examination of a form contract used by bail agents in Minnesota, for instance, found that the contract grants agents unfettered authority to enter a cosigner’s home, attach tracking devices to any vehicles owned or operated by the system-involved person, and use location technologies to track the system-involved person’s devices.³⁰⁷ As discussed above, Deckard concluded that family members who enter into bail contracts “inadvertently become subjects of surveillance and carceral control” and consequently experience the effects of criminalization.³⁰⁸ Like the authors of the Debt of Care study, she finds that women, particularly women of color, are especially susceptible to such privacy intrusions.³⁰⁹

The cumulative cost of these privacy deprivations can be steep—indeed, some women even pay with their lives. Breonna Taylor’s death is a devastating example of how even the perception—be it true or false—of providing support to a

302. See, e.g., N.Y. VEH. & TRAF. LAW § 1198(2) (requiring persons convicted of certain driving while intoxicated offenses to “install and maintain, as a condition of probation or conditional discharge, a functioning ignition interlock device” in any vehicle they own or operate).

303. See *What Is an Ignition Interlock Device (IID)?*, *supra* note 276.

304. See *Can Someone Else Drive My Car with a Breathalyzer?*, INTOXALOCK: BLOG (Apr. 26, 2016), <https://www.intoxalock.com/knowledge-center/can-other-people-drive-my-vehicle-if-i-have-an-ignition-interlock-device> [<https://perma.cc/EZ6Z-36N5>].

305. In my practice, I observed how this requirement could expose a woman or any other driver to criminal liability. IIDs are often equipped with cameras. See, e.g., *Interlock Device with Camera to Meet State Requirement*, INTOXALOCK: BLOG (May 17, 2020), <https://www.intoxalock.com/knowledge-center/camera-required-ignition-interlock-iid> [<https://perma.cc/Z9CD-DFBR>] (observing that “[t]he use of camera units on ignition interlock devices has grown nationwide and is now a common requirement for an ignition interlock device program”). If another driver were to blow into the device and register a blood alcohol content above the legal limit, the company that monitors the device would receive a notification that could be sent to law enforcement officials along with any photographs taken of the driver. See *id.* (confirming that other drivers may operate the vehicle in which the IID is installed, but they will need to provide breath samples *and photographs*). Even if a camera does not capture an image of the driver, the company could still send a notification to the prosecutor, who may then accuse the convicted person of violating a condition of their sentence. In that scenario, the convicted person would be faced with the choice of either implicating the other driver or taking the blame for the violation.

306. See *supra* notes 189–92 and accompanying text.

307. Brandie Burris, *A Moral and Legal Imperative to Act: The Bail Bond Industry, Consumer Protection, and Public Enforcers*, 106 MINN. L. REV. 1533, 1560 & n.195 (2022).

308. Deckard, *supra* note 189, at 2.

309. See *id.* at 3; *supra* notes 189–92 and accompanying text.

system-involved person can have deadly consequences. In March 2020, police executed a search warrant on Ms. Taylor's residence.³¹⁰ Police believed that a man with whom Ms. Taylor had a romantic history was using her address to receive packages—the perception of support—and suspected the man of drug activity.³¹¹ Police officers shot and killed Ms. Taylor during the execution of the warrant.³¹² They did not recover any drugs in her apartment.³¹³

Ms. Taylor's heartrending death illustrates the potentially deadly consequences of even being *perceived* as someone who provides support to a system-involved person. Notice that Ms. Taylor did not even share a residence with the target of the investigation, and the veracity of the evidence used to obtain the warrant has been called into question.³¹⁴ She did not volunteer to support a system-involved person; instead, she was unknowingly conscripted into the ranks of shadow defendants. And she paid the ultimate price as a result.

D. PHYSICAL, MENTAL, AND EMOTIONAL HEALTH CONSEQUENCES

Unsurprisingly, working the fourth shift negatively impacts women's physical, mental, and emotional health. This is true both for caregivers in society generally³¹⁵ and shadow defendants specifically: the *Because She's Powerful* study found that "[a] majority (63%) of all women reported that their physical health ha[d] been significantly or extremely affected by a loved one's incarceration."³¹⁶ 86% of participants with an incarcerated loved one reported suffering a significant or extreme strain on their mental health.³¹⁷ "That number jump[ed] to 94% for women whose partners [were] incarcerated."³¹⁸

These negative health consequences are not limited to adults with incarcerated loved ones. The health and wellbeing of children can be significantly impacted by the stress, trauma, and financial strain of having an incarcerated parent.³¹⁹

310. Richard A. Oppel Jr., Derrick Bryson Taylor & Nicholas Bogel-Burroughs, *What to Know About Breonna Taylor's Death*, N.Y. TIMES (Aug. 23, 2024), <https://www.nytimes.com/article/breonna-taylor-police.html>.

311. *Id.*

312. *Id.*

313. *Id.*

314. *See id.*

315. *See* GLENN, *supra* note 7, at 3 ("Numerous studies have shown that caregivers experience higher rates of heart disease, high blood pressure, diabetes, and depression.").

316. CLAYTON ET AL., *supra* note 1, at 12; *see also* Emily Widra, *New Data: People with Incarcerated Loved Ones Have Shorter Life Expectancies and Poorer Health*, PRISON POL'Y INITIATIVE (July 12, 2021), <https://www.prisonpolicy.org/blog/2021/07/12/family-incarceration> [https://perma.cc/53KB-LP4M]; Wildeman & Wakefield, *supra* note 143, at 372–73.

317. CLAYTON ET AL., *supra* note 1, at 16.

318. *Id.*

319. *See* ANNIE E. CASEY FOUND., A SHARED SENTENCE: THE DEVASTATING TOLL OF PARENTAL INCARCERATION ON KIDS, FAMILIES AND COMMUNITIES 1, 3 (2016), <https://assets.aecf.org/m/resourcedoc/aecf-asharedsentence-2016.pdf> [https://perma.cc/7T2S-YBNH]; Christopher Wildeman, *Parental Incarceration, Child Homelessness, and the Invisible Consequences of Mass Imprisonment*, 651 ANNALS AM. ACAD. POL. & SOC. SCI. 74, 77 (2014); PETERSILIA, *supra* note 239, at 8 ("[R]esearch shows that children always experience the loss of a parent as a traumatic event, and children of incarcerated parents are more likely to exhibit low self-esteem, depression, and disruptive behavior at

Parental incarceration makes children more likely to be homeless, less likely to finish high school, more likely to live in poverty, and more likely to have their parents' parental rights terminated.³²⁰ Parental criminality and incarceration are also predictors of a child's own criminal legal system involvement.³²¹ When a parent is incarcerated, the other parent, relatives, and communities left behind—often women—must then provide care for the children and reckon with the children's confusion, trauma, and pain. In the Who Pays study, 66% of children stayed with another parent, while 36% were taken in by an extended family member.³²² In this way, the economic instability, physical and mental impact, and trauma of having an incarcerated loved one are passed down intergenerationally.

E. IMPACT ON RELATIONSHIPS

System involvement or incarceration has a similarly negative impact on relationships. Incarceration, as compared to a mere conviction, seems to have a particularly deleterious impact on relationships. "One study found that men who were convicted and incarcerated were three times more likely to divorce as men who were convicted but not incarcerated."³²³

Certain conditions of probation and parole change the nature of relationships between shadow defendants and people under supervision. Probation and parole agreements contain conditions prohibiting supervisees from associating with individuals with criminal histories, restricting who they can reside with, impacting who they may date or marry, and sometimes forbidding them from interacting with children.³²⁴ Scholars have examined how these associational restrictions impact "constitutionally protected relationships, such as parent-child and spousal relationships," as well as how they "violate familial integrity rights protected by due process."³²⁵

home and in school."'). See generally SARA WAKEFIELD & CHRISTOPHER WILDEMAN, CHILDREN OF THE PRISON BOOM: MASS INCARCERATION AND THE FUTURE OF AMERICAN INEQUALITY (2013).

320. DEVUONO-POWELL ET AL., *supra* note 5, at 33–34; see also Comfort, *Punishment*, *supra* note 4, at 279–81.

321. PETERSILIA, *supra* note 239, at 8 ("Children of incarcerated parents are also five times more likely to serve time in prison than children whose parents have not been incarcerated."). See generally Ebony L. Ruhland et al., *Externalizing Behavior Among Youth with a Current or Formerly Incarcerated Parent*, 64 INT'L J. OFFENDER THERAPY & COMPAR. CRIMINOLOGY 3 (2020) (examining the relationship between parental incarceration and youth behavior).

322. DEVUONO-POWELL ET AL., *supra* note 5, at 34.

323. *Id.* at 31 (citing NAT'L RSCH. COUNCIL, THE GROWTH OF INCARCERATION IN THE UNITED STATES: EXPLORING CAUSES AND CONSEQUENCES 265 (Jeremy Travis et al. eds., 2014)). In the Who Pays study itself, "nearly half of survey respondents (47%) reported that members of their family separated, divorced, or dissolved their partnership as a result of incarceration." *Id.* at 31–32; see also Johnna Christian & Leslie W. Kennedy, *Secondary Narratives in the Aftermath of Crime: Defining Family Members' Relationships with Prisoners*, 13 PUNISHMENT & SOC'Y 379, 398 (2011) (finding that incarceration impacted relationships in different ways depending on the type of relationship—e.g., parent-child or husband-wife—between the incarcerated individual and their loved one on the outside).

324. See Kate Weisburd, *Carceral Control: A Nationwide Survey of Criminal Court Supervision Rules*, 58 HARV. C.R.-C.L. L. REV. 1, 16–17, 22–23 (2023) (discussing how probation and parole conditions impact families and others).

325. Alexis Karteron, *Family Separation Conditions*, 122 COLUM. L. REV. 649, 652–53 (2022).

Another unacknowledged consequence emphasized by the *Because She's Powerful* study is the isolation that women with incarcerated loved ones suffer.³²⁶ Many women feel ostracized from their families and communities while supporting their incarcerated loved one, and may choose to self-isolate because of feelings of deep shame or fear of judgment.³²⁷ In the study, “62% of women reported hiding the fact that they have an incarcerated loved one.”³²⁸ Over half of them had multiple loved ones who were incarcerated at the same time, and most saw their loved ones either monthly or only a handful of times per year.³²⁹

Incarceration has a similarly negative impact on parent–child relationships.³³⁰ The *Who Pays* study, for instance, found that incarceration negatively impacted parent–child relationships in 38% of participants’ families.³³¹ This finding is unsurprising given the difficulties associated with maintaining contact with an incarcerated loved one. Some of the financial and logistical challenges were previously discussed in Section III.B.3. However, other barriers are just as difficult to overcome. In the *Who Pays* study, 17% of the incarcerated participants “reported that their family members were mistreated or degraded when they visited and identified this [as] an important barrier to remaining in contact.”³³² One participant stated:

My kids tried to come up and visit and when they come they’re treated as if they are criminals They’re being patted down, searched, walked through metal detectors, x-ray machines, hearing the gates closed behind them and in front of them. They are being talked down to by guards as if they did something wrong.³³³

Ironically, maintaining contact and strong social ties with family aids successful reentry and correlates with reduced recidivism.³³⁴ By facilitating these connections despite the associated difficulties, women create a positive impact that

326. See CLAYTON ET AL., *supra* note 1, at 18.

327. See *id.* at 34–35, 38.

328. *Id.* at 48.

329. See *id.* at 18.

330. See Comfort, *Punishment*, *supra* note 4, at 279–81.

331. DEVUONO-POWELL ET AL., *supra* note 5, at 34.

332. *Id.* at 31.

333. *Id.*

334. See, e.g., Ryan Shanahan & Sandra Villalobos Agudelo, *The Family and Recidivism*, AM. JAILS, Sept.–Oct. 2012, at 17, 17; Berg & Huebner, *supra* note 239, at 385 (explaining that social ties affect criminal behavior in three ways: first, through “a controlling effect on returning offenders’ behavior; second, [by] provid[ing] a provision of emotional support; and third, [by] facilitate[ing] identity transformation”); NELSON ET AL., *supra* note 264, at 10 (observing that “people with strong, supportive families are more likely to succeed than those with weak or no family support . . . [and] that self-defined family support was the strongest predictor of individual success”); Creasie Finney Hairston, *Family Ties During Imprisonment: Do They Influence Future Criminal Activity?*, 52 FED. PROB. 48, 51 (1988) (concluding that receiving family support during incarceration reduces recidivism); Sheldon Ekland-Olson, Michael Supancic, James Campbell & Kenneth J. Lenihan, *Postrelease Depression and the Importance of Familial Support*, 21 CRIMINOLOGY 253, 258 (1983) (explaining that familial support is an important aspect of post-incarceration reintegration and that it impacts a person’s ability to become a productive citizen).

extends far beyond the system-involved people and their families. Society at large benefits from lower recidivism rates when previously incarcerated people successfully reintegrate into society during the reentry period.

IV. SHINING LIGHT ON THE SHADOWS

This Article has detailed the legal mechanisms that cause shadow defendants to be secondarily criminalized, the price they pay for supporting their system-involved loved ones, and the currency they pay with. Now, this Part turns to the significance of their participation in the criminal legal system and how to move forward.

A. WHO CARES? SECONDARY CRIMINALIZATION'S IMPORTANCE

A skeptic may acknowledge that although shadow defendants do indeed play a significant role in the criminal legal system and suffer consequences for doing so, their participation is voluntary and unrequired. To escape paying this price, the argument goes, one can simply choose not to pay it. This Section considers this argument and the significance of the role that shadow defendants play.

1. Between a Rock and a Hard Place: The Illusion of Choice

Women supporting system-involved loved ones are heavily incentivized—both positively and negatively—to provide care. Due to the criminal legal system's draconian penalties,³³⁵ withholding financial support can have terrible consequences for a system-involved person. An inability to pay a fine, for example, can result in additional interest or late charges, wage garnishment, loss of a driver's license, disenfranchisement, revocation of probation or parole, or loss of a trade license.³³⁶ A shadow defendant's rejection of a request for financial support can also result in the system-involved person being (re)arrested, not having an attorney to represent them, lacking adequate food or clothing during periods of incarceration, or being unable to maintain contact with loved ones while incarcerated.³³⁷ Similarly, a shadow defendant's failure to provide housing can result in the system-involved person experiencing homelessness, being denied bail or release, or violating the terms of probation or parole.³³⁸ Furthermore, given that strong social ties and housing correlate with reduced recidivism, a shadow defendant's failure to provide support can contribute to the system-involved person's re-engagement in criminal activity.³³⁹

335. See *supra* Section II.B.

336. See Katzenstein & Waller, *supra* note 4, at 645, 648; FLA. STAT. § 98.0751(2)(a)(5) (requiring a person convicted of a felony to make full payment of restitution, fines, fees, and costs before their voting rights are restored).

337. See Beckett & Harris, *supra* note 149, at 513, 517–18, 526.

338. See VA. CODE ANN. § 19.2-120(C) (listing length of residence in the community as a bail factor); see also 18 U.S.C. § 3563(b)(17) (describing probationers' obligation to notify their probation officer of any change in their residence).

339. See Shanahan & Agudelo, *supra* note 334, at 22.

Additionally, because women disproportionately bear both the burden of paying bail *and* the costs associated with incarceration (e.g., visitation, phone calls, commissary accounts, etc.),³⁴⁰ they suffer economic consequences regardless of the pretrial status of the system-involved person. In other words, the women can choose to either pay bail now to get their loved ones out of custody, or pay later for visits, phone calls, and putting money on the books if their loved ones remain incarcerated. The system extracts its pound of flesh either way.

Shadow defendants are caught between a rock and a hard place because, just as there are consequences for nonsupport of loved ones, there are also substantial consequences for support. Spouses of people with criminal justice debt can have *their* wages garnished and jointly held assets seized.³⁴¹ In addition, women frequently go into debt to support their loved ones financially: one-third of families in the Who Pays study went into debt to stay in contact with incarcerated loved ones.³⁴² Another study, of visitors at a prison in California, found that “[t]he majority of women . . . spen[t] as much as one-third of their annual income to maintain contact [with their incarcerated loved ones]. For a number of these women, including many who were mothers, these costs put them into debt.”³⁴³

Women and families often face an impossible choice between either supporting their system-involved loved one or meeting their own (and their children’s) basic needs.³⁴⁴ In the Who Pays study, two-thirds of families reported having “difficulty meeting basic needs”; “70% of these families were caring for children under 18.”³⁴⁵ Women often resort to desperate measures to provide these basic needs. Having an incarcerated partner makes women “more likely to work multiple jobs”³⁴⁶ and seek out public benefits.³⁴⁷ It also makes women more likely to receive monetary assistance from friends, family, and their communities.³⁴⁸

In short, supporting system-involved people places incredible financial strain on already impoverished women, families, and communities.³⁴⁹ This can lead to

340. See *supra* Sections III.B.1–3.

341. See Beckett & Harris, *supra* note 149, at 523; DEVUONO-POWELL ET AL., *supra* note 5, at 15.

342. DEVUONO-POWELL ET AL., *supra* note 5, at 30.

343. *Id.* (citing Olga Grinstead et al., *The Financial Cost of Maintaining Relationships with Incarcerated African American Men: A Survey of Women Prison Visitors*, 6 J. AFR. AM. MEN 59, 65 (2001)).

344. See Beckett & Harris, *supra* note 149, at 517.

345. DEVUONO-POWELL ET AL., *supra* note 5, at 13.

346. Bruns, *supra* note 52, at 202.

347. See Naomi F. Sugie, *Punishment and Welfare: Paternal Incarceration and Families’ Receipt of Public Assistance*, 90 SOC. FORCES 1403, 1403 (2012).

348. Angela Bruns, *Partner Incarceration and Financial Support from Kin*, 4 J. FAM. ISSUES 2112, 2112–26 (2020).

349. Damian J. Martinez & Johnna Christian, *The Familial Relationships of Former Prisoners: Examining the Link Between Residence and Informal Support Mechanisms*, 38 J. CONTEMP. ETHNOGRAPHY 201, 201 (2009) (“Existing research findings . . . demonstrate that the absence of an individual because of incarceration causes emotional suffering to the prisoner’s family and negatively affects the socioeconomic stability of his or her community.” (citations omitted)); see also KATHERINE A. BECKETT, ALEXES M. HARRIS & HEATHER EVANS, WASH. STATE MINORITY & JUST. COMM’N, *THE ASSESSMENT AND CONSEQUENCES OF LEGAL FINANCIAL OBLIGATIONS IN WASHINGTON STATE* 12–13 (2008), https://media.spokesman.com/documents/2009/05/study_LFOimpact.pdf [<https://perma.cc/>

deep poverty that perpetuates cycles of hardship across generations.³⁵⁰ Although there have been calls to reform criminal justice debt practices which cite the impact of these practices on families and communities, they remain largely unheard and unheeded.

These considerations highlight the impossible decisions that shadow defendants must make. Do I pay for bail now or pay for jail calls and visits later? Do I pay the rent or support my incarcerated loved one? Do I pay the fine or lose my partner's income when they are arrested for failure to pay? Even for a person who opts out and does not provide support, their "choice" is devastating: Do I refuse to pay bail and allow my loved one to be subjected to the pervasive violence that plagues correctional facilities? Do I invite my loved one to live with me, allow them to live on the streets, or watch them remain in custody and be denied parole because they have nowhere to go? Do I put money on their books or watch them lose weight and waste away in prison?

Predictably, many people would do anything, pay anything, borrow anything to protect their son, brother, spouse, or other loved one. And society demands no less. When a nineteen-year-old who has achieved the technical age of adulthood, but is still so young, is arrested, the first question we ask is: "Where is mom?" Not just "where are his parents?" but "where is mom?" One cannot discount the impact and pressure that our social organization of care places on women to fulfill unmet needs.³⁵¹ Women who are perceived to have abdicated this duty or who decline to fulfill society's expectation are villainized and criticized.³⁵² Thus, the notion of "choice" is illusory—it relieves society from engaging in self-reflection and scrutinizing the sheer breadth of the criminal legal system. It permits one to remain willfully ignorant of the people and marginalized communities who become collateral damage due to the system's expansiveness and are saddled with the costs and burdens of its operations. Instead of turning a blind eye by invoking the language of choice, we must engage in a rigorous analysis of the criminal legal system and its many deficiencies.

2. Shadow Defendants Make Us Safer

The labor that shadow defendants perform impacts public safety. The three key factors that impact recidivism during the reentry period are employment,³⁵³ housing,³⁵⁴ and social ties.³⁵⁵ Shadow defendants are often tasked with providing two of those three factors (housing and social ties) and often compensate for the lack of the third (employment). In other words, people returning home from a

ZS7B-BFVDJ]. See generally BRUCE WESTERN, PUNISHMENT AND INEQUALITY IN AMERICA (2006); Donald Braman, *Families and Incarceration*, in INVISIBLE PUNISHMENT, *supra* note 103, at 117.

350. See DEVUONO-POWELL ET AL., *supra* note 5, at 33.

351. See *supra* note 14 and Section I.B.

352. Cf. Geppert, *supra* note 60 (concluding that "women are punished more harshly if they cannot maintain the superior moral status associated with the female sex").

353. See sources cited *supra* note 239.

354. See sources cited *supra* note 240.

355. See sources cited *supra* note 334.

period of incarceration rely on family and loved ones—often women—for shelter and housing. Women play an integral role in incarcerated people’s reentry plans, often providing a stable residence and address for them to return to.³⁵⁶ Women are also the fulcrum of incarcerated people’s social network—visiting, calling, and sending money during incarceration.³⁵⁷ They help maintain an incarcerated person’s social ties, an effort which continues following release. When an incarcerated person returns home, their employment prospects are severely diminished.³⁵⁸ By providing housing, food, clothing, and other aid, women are filling the gap and providing economic resources until the person returning home can find employment. Even if this person is not incarcerated as a result of their system involvement, women still provide support: paying bail³⁵⁹ or fines and fees, providing housing, and offering social support all positively impact the economic and social stability of a system-involved person. Ultimately, women’s contributions make us safer by supporting people who may be at risk of (re)offending, thereby contributing to lower recidivism rates.

3. Shadow Defendants Subsidize the Criminal Legal System

As discussed above,³⁶⁰ several scholars have concluded that the criminal legal system operates as a revenue-generating enterprise that preys on poor communities of color, particularly the women in those communities. In addition to being subjects of extraction—both financial and otherwise, as this Article demonstrates—women also serve as essential economic contributors by offsetting criminal legal system-related costs.³⁶¹ Women who support their system-involved loved ones save the government and taxpayers money by performing and subsidizing government functions. By paying bail and playing a role in people’s reentry plans, for instance, women save both the federal government and local governments the costs of incarceration. By providing housing and financial support, they divert people from already overtaxed social safety systems that combat homelessness, hunger, and poverty. And by contributing to the factors that reduce recidivism, they reduce the costs associated with reoffending.

In her study of women’s reproductive labor for incarcerated people in Venezuela, Fischer-Hoffman concludes, “The failures of both the state and the market fall disproportionately on the bodies of women; but, the current crisis in Venezuela could mark the breaking point for how much the labor of poor women can be exploited to subsidize the state and fuel the for-profit prison regimes.”³⁶²

356. See *supra* note 264 and accompanying text.

357. See *supra* Section III.B.3.

358. See *supra* notes 242–54 and accompanying text.

359. See Dobbie et al., *supra* note 89, at 236 (finding that pretrial release increases employment opportunities).

360. See *supra* note 6 and accompanying text.

361. Cf. Fischer-Hoffman, *supra* note 6, at 97, 111 (finding that incarcerated men in Venezuelan prisons rely on economic support, material goods, and labor from visitors—predominantly women—to compensate for insufficient provisions from the state).

362. *Id.* at 111.

This critique is likewise applicable to the criminal legal system in the United States. Shadow defendants cannot continue to both serve as a site of extraction and subsidize the criminal legal and public safety systems.³⁶³ They should not be expected—through the financial and other responsibilities of their fourth shift—to subsidize government spending on crime, policing, and incarceration in perpetuity. Their financial resources are finite, their time valuable, and their capacity already stretched.

4. Shadow Defendants as Shadow Defenders

Shadow defendants play a role in vindicating their loved ones' constitutional and statutory rights. By providing financial assistance to cover the cost of an attorney, women are helping their loved ones realize their Sixth Amendment right to counsel. By paying bail, they are helping system-involved people to remain at liberty; this way, the system-involved people can more meaningfully aid their attorneys in investigating and preparing a defense. By assisting with the payment of fees, they help exercise individuals' Sixth Amendment right to a jury trial. And by engaging in participatory defense, they become part of the defense team. In short, despite being subjects of extraction and predation, they defend and protect the rights of their loved ones—shadow defenders indeed. In a society that purportedly holds constitutional rights to be inviolate, shadow defendants' contributions to the vindication of these rights are substantial and cannot be overlooked.

5. Shadow Defendants and Vulnerability

The women performing this labor are some of the most vulnerable and marginalized members of society. They are often low-income and reside in neighborhoods that are over-policed, over-surveilled, and disenfranchised.³⁶⁴ They are not entitled to even the limited constitutional protections and rights afforded to their system-involved loved ones.³⁶⁵ They are targeted by predatory industries—the bail bond industry, private electronic monitoring providers, and suppliers of marked-up commissary goods, to name but a few—that extract resources from the most impoverished and vulnerable communities.³⁶⁶

Shadow defendants are also disproportionately Black women and women of color.³⁶⁷ History and the racial composition of people ensnared in the criminal legal system contribute to the disproportionate representation of Black women and women of color among shadow defendants.³⁶⁸ The racial disparities within our social organization of care and the disproportionate representation of Black men, men

363. See *id.* (noting concern that “the disproportionate burdens that have fallen on women have stretched their personal reserves to capacity and there is no further ‘slack’ to be taken up” (quoting Sylvia Chant, *Urban Livelihoods, Employment and Gender*, in *LATIN AMERICA TRANSFORMED: GLOBALIZATION AND MODERNITY* 210, 214 (Robert N. Gwynne & Kay Cristobal eds., 2d ed. 2004))).

364. See Page et al., *supra* note 5, at 155.

365. See *supra* text accompanying note 12.

366. See *supra* notes 189–92, 203–04, 210, and accompanying text.

367. See Page et al., *supra* note 5, at 152; Norwood & Lloyd, *supra* note 221.

368. See Page et al., *supra* note 5, at 152, 154.

of color, and low-income people in the criminal legal system conspire to make Black women particularly susceptible to secondary criminalization. If these women are society's de facto caretakers—both within their own families and as “social supports for more privileged groups”³⁶⁹—and the men in their lives are the criminal legal system's primary targets, then unsurprisingly they are disproportionately drafted into the ranks of shadow defendants who are subjected to secondary criminalization.

Statistics about women's relationships to system-involved people support this conclusion. Again, although almost 25% of all women are related to someone who is incarcerated, 40% of Black women are related to an incarcerated person.³⁷⁰ Many of the race-neutral laws, procedures, practices, and mechanisms discussed above—bail laws, bail bond procedures, parole conditions, fines, and fees assessments—operate in practice to subject Black women to secondary criminalization at a rate far outpacing their representation in the general population.

6. Shadow Defendants Reveal Critiques of the Criminal Legal System

The vast and varied consequences that shadow defendants face highlight just how far the tentacles of the criminal legal system reach. Their experiences also demonstrate the extent to which the criminal legal system infringes upon certain fundamental norms and principles that we hold inviolate. For example, the penalties that the criminal legal system imposes are supposed to be reserved for criminal defendants who have been proven or pled guilty—not the innocent.³⁷¹ Yet, we see women sharing in the economic consequences, deprivations of liberty, invasions of privacy, and other consequences that are purportedly reserved for the guilty.³⁷² Indeed, even the most liberal constructions of accomplice liability require more than mere presence or acquaintanceship with a prosecuted person before criminal prosecution (and thus, criminal punishment) may attach.³⁷³ By reaching beyond the people being directly prosecuted and into their families and communities, the criminal legal system drains time, funds, dignity, and resources from women who are guilty of nothing more than supporting a loved one.

B. SHADOW DEFENDANTS, THE FUTURE, AND RESISTANCE

Shadow defendants are key, invisible players in the criminal legal system, whose role needs to be acknowledged, examined, and modified. Eliminating the consequences they suffer for supporting a system-involved loved one and relieving their burdens is an initial measure that will lead to a more equitable, safer system. Investing in women yields tremendous benefits for families and communities

369. *Id.* at 154.

370. DEVUONO-POWELL ET AL., *supra* note 5, at 9.

371. Megan T. Stevenson & Sandra G. Mayson, *Pretrial Detention and the Value of Liberty*, 108 VA. L. REV. 709, 712 (2022) (identifying “the central constraint on criminal punishment—that it may be imposed only for a past wrongful act”).

372. *See supra* Part III.

373. *See, e.g.*, John F. Decker, *The Mental State Requirement for Accomplice Liability in American Criminal Law*, 60 S.C. L. REV. 237, 303–04 (2008). Although shadow defendants do not experience technical criminal punishment, *see* Condry & Minson, *supra* note 103, at 8–11, this Article argues that the consequences they face seem, in effect, like a shared penalty.

because women invest more of their earnings than men back into their families.³⁷⁴ Empowering women in turn empowers families and communities, making shadow defendants an ideal site for intervention and support.³⁷⁵

The first step in that pursuit is to make shadow defendants' labor, contributions, and burdens visible. This Article has drawn from studies and scholarship that consider how the criminal legal system impacts women. Further research, especially empirical research, is needed to critically analyze and assess the magnitude of this impact. What percentage of bail cosigners are women? What are their relationships to the accused? How much do they pay? What are shadow defendants' firsthand observations and evaluations of the deprivations of liberty and privacy that they suffer? What informs and influences their decisionmaking processes? How many women are shadow defendants? Researchers must continue to rigorously study secondary criminalization and its disproportionate impact on Black women and women of color. To design effective and comprehensive interventions, additional research that centers the experiences and voices of shadow defendants and examines secondary criminalization is necessary.

There are other, modest reforms that can reduce the burden on women supporting their system-involved loved ones, some of which jurisdictions have begun to experiment with and implement. With respect to how the criminal legal system robs shadow defendants of their time, courts could expand the means by which audience members can attend and participate in court proceedings (e.g., allowing family members to videoconference into court to show family and community ties).³⁷⁶ Doing so would minimize the cost, travel time, and waiting time for people providing support.³⁷⁷ It would also likely increase the number of people who are able to

374. See, e.g., Maggie Germano, *How Women Can Change the World with Their Money Choices*, FORBES (Dec. 15, 2020, 2:18 AM), <https://www.forbes.com/sites/maggiegermano/2020/09/22/how-women-can-change-the-world-with-their-money-choices/> (“[W]omen tend to reinvest more than 90% of their assets and earnings back into their families for nutrition, education, healthcare, and more. In contrast, men only reinvest 44% of their income back into their families.”).

375. Recently, the Osbourne Association in New York City has begun to directly support households with loved ones returning home from a period of incarceration through their Kinship Reentry Housing Program. *Kinship Reentry Housing Program*, OSBORNE, <https://www.osborneny.org/our-services/kinship-reentry> [<https://perma.cc/3QF9-NHPT>] (last visited March 17, 2025). The program provides financial assistance, service referrals, and advocacy support to families to assist in the reentry process. *Id.* Although the program is relatively new, preliminary results are promising. See generally MARINA DUANE ET AL., CHAPIN HALL, UNIV. CHI., DIRECT CASH TRANSFERS TO SUPPORT REENTRY: KINSHIP REENTRY PROGRAM EVALUABILITY ASSESSMENT (2023).

376. See Amy Petkovsek, *A Virtual Path to Justice: Paving Smoother Roads to Courtroom Access*, HUM. RTS. MAG. (June 3, 2024), https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/technology-and-the-law/a-virtual-path-to-justice [<https://perma.cc/X8GS-6EES>] (describing the benefits and difficulties of making remote appearances in civil court); N.Y. LEGAL ASSISTANCE GRP., ACCESS TO JUSTICE IN VIRTUAL COURT PROCEEDINGS: LESSONS FROM COVID-19 AND RECOMMENDATIONS FOR NEW YORK COURTS 4 (2021), https://nylag.org/wp-content/uploads/2021/08/NYLAG_CourtsDuringCovid_WP_FINAL2.pdf [<https://perma.cc/29HT-DW29>] (evaluating the successes and challenges of New York civil courts' virtual proceedings during the COVID-19 pandemic). This recommendation is limited to allowing audience members to appear remotely and does not endorse implementing fully remote court proceedings for the prosecution, defense, or judges.

377. See Petkovsek, *supra* note 376.

appear thanks to the convenience and ease of logging in remotely. Given the extensive use of videoconferencing in courtrooms in response to the COVID-19 pandemic, many jurisdictions already have the necessary technology and processes in place to implement this recommendation.³⁷⁸ To further reduce the burdens that the process imposes on shadow defendants, courthouses could offer childcare facilities.³⁷⁹ Courts could also institute morning and afternoon call times for cases so that shadow defendants can better anticipate when their loved one's case will be heard by the judge.

To ease the strain on shadow defendants' financial resources, states can follow the burgeoning reform movement to eliminate cash bail.³⁸⁰ Other reforms that would reduce the financial burden include eliminating jail and prison call costs and fees,³⁸¹ as well as regulating and banning commissary good markups.³⁸²

Simplifying the jail and prison visitation experience could increase the frequency of familial and social visits, a favorable outcome given the many benefits of family members maintaining contact with incarcerated loved ones.³⁸³ In addition, expanding visitation hours and regularly posting and updating visitation schedule changes online would provide shadow defendants with more flexibility

378. *See id.*

379. There are already some jurisdictions that provide childcare to members of the public who have in-person business in the courthouse. For example, the D.C. courts offer free childcare services. *Child Care*, D.C. CTS., <https://www.dccourts.gov/childcare> [<https://perma.cc/6A7C-UERQ>] (last visited Feb. 28, 2025); *see also* Andy Grimm, *Day Care Center to Open at Leighton Criminal Courthouse*, CHI. SUN-TIMES (May 31, 2017, 5:45 PM), <https://chicago.suntimes.com/2017/5/31/18342927/day-care-center-to-open-at-leighton-criminal-courthouse> [<https://perma.cc/A7KK-35KV>]; Lance Benz, *Free, Licensed Day Care Offered at El Paso County Courthouse*, GAZETTE (Dec. 28, 2017) [<https://perma.cc/J27R-RHKJ>]; Wineka Column: *Child Care Center at Courthouse Has a Fresh Face*, SALISBURY POST (Feb. 19, 2014, 12:00 AM), <https://www.salisburypost.com/2014/02/19/wineka-column-child-care-center-at-courthouse-has-a-fresh-face> [<https://perma.cc/S6PH-4ZZZ>].

380. There is a robust campaign across the nation advocating for legislators to eliminate cash bail. *See, e.g., Our Work*, THE BAIL PROJECT, <https://bailproject.org> [<https://perma.cc/U65N-6BJP>] (last visited Feb. 28, 2025); *Bail Reform*, *supra* note 182; Gina Clayton, *End Money Bail to Transform the Lives of Women and Families Across the Nation*, THE HILL (Aug. 2, 2017, 12:00 PM), <https://thehill.com/blogs/congress-blog/judicial/344945-end-money-bail-to-transform-the-lives-of-women-and-families/> (“Essie Justice Group is a co-sponsor of [California Senate Bill] 10, which if passed w[ould] eliminate money bail and is steadily gaining traction in California’s legislature.”). Some states, such as Illinois and New Jersey, have eliminated or virtually eliminated cash bail. *Illinois Becomes First State to Abolish Cash Bail*, EQUAL JUST. INITIATIVE (Sept. 20, 2023), <https://eji.org/news/illinois-becomes-first-state-to-abolish-cash-bail> [<https://perma.cc/Z7Q5-ANGT>]; ARNOLD VENTURES, NEW JERSEY BAIL REFORM FACT SHEET 1 (2023), https://assets.arnoldventures.org/uploads/AV-New-Jersey-Bail-Reform-Fact-Sheet.pdf?_gl=1*rcufgv*_ga*MTc2Mzk5MzUyOS4xNzMxNjEyMzkw*_ga_J00GFVDRJS*MTc2MTYxMjM5MC4xLjEuMTczMTYxMjQ1NS42MC4wLjA [<https://perma.cc/B8R2-BZFD>].

381. *E.g., Ben Klein, San Francisco to Make Phone Calls from Jail Free, Eliminate Markups on Items Sold in Jail*, DAILY CALIFORNIAN (June 25, 2019), <https://www.dailycal.org/2019/06/24/san-francisco-to-make-phone-calls-from-jail-free-eliminate-markups-on-items-sold-in-jail> [<https://perma.cc/5P76-4W58>]; Zoe Greenberg, *Phone Calls from New York City Jails Will Soon Be Free*, N.Y. TIMES (Aug. 6, 2018), <https://www.nytimes.com/2018/08/06/nyregion/phone-calls-free-nyc-jails.html>.

382. *E.g., Klein, supra* note 381.

383. Leah Wang, *Research Roundup: The Positive Impacts of Family Contact for Incarcerated People and Their Families*, PRISON POL’Y INITIATIVE (Dec. 21, 2021), https://www.prisonpolicy.org/blog/2021/12/21/family_contact [<https://perma.cc/NL2N-N6SD>].

when planning visits and reduce the information vacuum that typifies the visitation experience.³⁸⁴

Each of these proposed reforms would mitigate the criminal legal system's expansive reach and reduce the consequences shadow defendants suffer. However, to the extent that secondary criminalization is an indictment of the criminal legal system's overreach, addressing the root cause of shadow defendants' plight requires shrinking the system's footprint. Shadow defendants suffer because the criminal legal system invades entire communities, households, and every facet of an impacted person's life.³⁸⁵ No one and no part of a person's life is off limits. By allowing consequences to spill over to the women, children, and communities who support prosecuted people, we condone a system that penalizes the innocent, targets the vulnerable, and preys on the defenseless—in other words, a system that perpetuates a racial hierarchy by subordinating Black women and women of color through predatory and extractive practices.

Although modest reforms that tinker on the edges of the problem may temporarily place a band-aid on the bleeding, they ultimately do nothing to stop the hemorrhaging. Scholars and activists have envisioned what transformative and radical change could dismantle and build, emphasizing the need for decarceration and community investment.³⁸⁶ Many of these proposed changes would alleviate some of the burdens that fall on shadow defendants' shoulders. As these ideals and other reforms gain traction in popular discourse, it is vital that one thinks critically about whose labor is required for implementation and who is both receiving and providing support. Even though crafting a comprehensive proposal is beyond the scope of this Article, future work will tackle this question and offer more detailed solutions.

* * *

Throughout this Article lies a thread of resistance—a quiet story of shadow defendants' advocacy, organizing, and activism. It is a story of their third shift: engaging in participatory defense; championing criminal legal system reforms; sparking legislation like the Martha Wright-Reed Act; and creating community and harnessing their power through organizations like Essie Justice Group. As advocates, scholars, stakeholders, elected officials, policymakers, and federal and local governments evaluate and reform a criminal legal system that is widely condemned, they must not only consider the people being directly arrested, prosecuted, punished, and imprisoned, but also the people and women standing in their

384. See *supra* text accompanying note 85.

385. See *supra* Part III.

386. See, e.g., John Washington, *What Is Prison Abolition?*, NATION (July 31, 2018), <https://www.thenation.com/article/archive/what-is-prison-abolition/>; *Mission & Vision*, CRITICAL RESISTANCE, <https://criticalresistance.org/mission-vision> [<https://perma.cc/MW6S-GQZK>] (last visited Feb. 28, 2025); *About the Prison Moratorium Project*, NO MORE PRISON, <http://www.nomoreprisons.org/about-us> [<https://perma.cc/N3D6-RG9Y>] (last visited Feb. 28, 2025). See generally, e.g., Allegra M. McLeod, *Prison Abolition and Grounded Justice*, 62 UCLA L. REV. 1156 (2015); ANGELA Y. DAVIS, ARE PRISONS OBSOLETE? (2003); MARIAME KABA, WE DO THIS 'TIL WE FREE US: ABOLITIONIST ORGANIZING AND TRANSFORMING JUSTICE (2021).

shadows. Through their blood, sweat, money, and tears, these women are invisible stakeholders in conversations surrounding public safety and the criminal legal system—women whose voices and burdens must be recognized and heard. Their wisdom, insight, and contributions are informed by their proximity to and involvement in each stage of the system's operations. Though their presence may be invisible and their voices muted, their contributions are mighty and their insights invaluable. We would do well to listen.

CONCLUSION

At the end of Travis's sentencing, I look back at Sarah. She sits quietly in the pews of the courtroom, steely-eyed and determined. Later, she thanks me and exits the courthouse without her brother beside her, braced against the years of calls, visits, and commissary deposits that will follow.

The criminal legal system is a complex morass of duties, obligations, and penalties that create a series of needs for system-involved people. Our social organization of care appoints women, especially Black women and women of color, as the people responsible for bearing the burden of meeting those needs. Through a web of norms, statutes, caselaw, and other legal mechanisms, the system engages in a process of secondary criminalization that steals women's time, extracts their economic resources, infringes on their privacy and liberty, negatively impacts their health, and harms their social relationships. During this fourth shift, women become shadow defendants who share the consequences of involvement in the criminal legal system despite being innocent third parties. Their contributions are essential to the functioning of the criminal legal system and positively promote public safety. Indeed, their activism, advocacy, and resistance advance reform movements and inspire change. Yet the burdens they carry are heavy, and the cost of their labor is high. As scholars, advocates, courts, public officials, and local governments critically analyze the criminal legal system with an eye towards reform or even transformative change, it is imperative that they enact measures to interrupt the predation of shadow defendants and, instead, uplift them as they have consistently done for their loved ones, their families, and their communities.