REVIVING CRIMINAL EQUITY

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Recent scholarship has begun to take note of a resurgence of equity in civil cases. Due to a long-accepted premise that equity does not apply in criminal cases, no one has examined whether this quiet revival is occurring in criminal jurisprudence as well. After undertaking such an investigation, this Article uncovers the remarkable discovery that equitable remedies, including injunctions and specific performance, are experiencing a resurgence in both federal and state criminal jurisprudence. Courts have granted equitable relief in a range of scenarios, providing reprieve from unconstitutional bail and probation practices and allowing for an appropriate remedy to ineffective assistance of counsel during the plea-bargaining process. In this regard, equity operates as moral philosophers and early legal scholars envisioned it might: as a corrective to law. Moral philosophers contemplated equity as a complement to the rule of law and legal justice. Equity was to step in when a strict application of the law rendered an unjust result. After the supposed merger of law and equity in the Federal Rules of Civil Procedure, scholars and jurists believed equity had been subsumed under legal processes and structures. This assumption of fusion remained the dominant narrative until recently, when scholars began to note equity's resurgence in civil cases. This Article contributes to the literature challenging this presumption of equity's demise. Shifting the lens toward criminal cases, this Article illuminates that equitable remedies are experiencing a similar resurgence in the criminal sphere. A review of the case law confirms that parties in criminal cases are seeking equitable relief with increasing regularity, and courts are often granting such relief. This Article sets the stage for a more robust conversation about what the balance between equity and law is—and what it should be—in the context of our deeply troubled criminal legal system.

INTRODUCTION

On August 27, 2017, thirty-five-year-old Bradley Hester was arrested in Cullman, Alabama, for possession of drug paraphernalia, a misdemeanor.[1] He was taken to the Cullman County jail and told that he would be released if he paid a $1000 bond. He could not pay that bond. He finally "appeared" in court for the first time a day or two later, via a video link from the jail. He was unrepresented by counsel, and the hearing lasted less than two minutes. The magistrate judge informed him of his charges and set bond at $1000, never inquiring as to Hester's ability to pay. The judge asked Hester no questions and gave him

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1. The facts in these two paragraphs all come from Hester's complaint. Intervenor Complaint at 2, 8–9, 21, Schultz v. State, 330 F. Supp. 3d 1344 (N.D. Ala. 2018) (No. 5:17-cv-00270-MHH).

no information about when his next court date might be. As a result, the judge never learned that Hester could not afford his bond. He had worked odd jobs during the prior two years but had no steady income, no assets, and no real property. The magistrate told him he could apply for an attorney, but a jail official told him he did not need one, since he was only charged with a misdemeanor.

Hester was still sitting in jail on March 9, 2018, solely because he could not pay the $1000 bond. And he still did not know when his next court date would be. Lawyers acting on his behalf filed a request for a civil injunction to prevent the sheriff's office from prospectively jailing Hester and other arrestees due to their inability to pay the amount of bail set by a bail schedule without holding a prompt individualized hearing to determine the arrestee's ability to pay and whether alternate conditions of release might be available. Six months later, a federal district court issued a preliminary injunction in Hester's case, finding that he was substantially likely to prevail on his claim of wealth-based discrimination in Cullman County's bail practices.[2]

Attorneys are increasingly utilizing equitable remedies like injunctions to challenge various troubling criminal legal practices. A federal court in Massachusetts granted William Merlino's motion to vacate his conviction after his attorney failed to convey a plea offer to him prior to trial; the court ordered specific performance of that plea offer.[3] Plaintiffs in Alabama brought a state lawsuit seeking injunctive relief to prevent sheriffs who were running local jails from pocketing as personal income the money designated for providing food to inmates.[4] Some of these equitable remedies have seen more success than others. But even when a state or federal court denies the requested equitable relief, the court is almost always contemplating equity's application to the specific facts of a particular criminal case.[5]

This slow-burning revival of equity is not unique to the criminal sphere. Equitable remedies have seen a recent resurgence in the Supreme Court's civil jurisprudence as well, despite the generally accepted wisdom that the legislature and courts have rejected a distinction between legal and equitable remedies.[6] In recent years, the Supreme Court has increasingly looked to equity in the context

2. *Schultz*, 330 F. Supp. 3d at 1361.

3. United States v. Merlino, 109 F. Supp. 3d 368, 377 (D. Mass. 2015).

4. Complaint, S. Ctr. For Human Rights v. Ellis, No. CV-2018-900001.00 (Cir. Ct. of Hale Cty., Ala. Aug. 3, 2018) (Alacourt), https://www.schr.org/files/post/files/HaleCountyAL.PDF.

5. The context in which courts are considering equitable remedies remains separate from the merits of the charged crime. Rather, courts use equitable remedies to address issues stemming from and collateral to the criminal charges.

6. *See* IRIT SAMET, EQUITY: CONSCIENCE GOES TO MARKET 5 (2018); Samuel L. Bray, *The Supreme Court and the New Equity*, 68 VAND. L. REV. 997, 999–1000 (2015); Mark P. Gergen et al., *The Supreme Court's Accidental Revolution? The Test for Permanent Injunctions*, 112 COLUM. L. REV. 203, 204 (2012).

of civil cases to help resolve disputes.[7] For example, the Court issued an opinion in *Kansas v. Nebraska* regarding the allocation of water resources between the two states.[8] In what many remedies scholars viewed as a significant and unpredicted remedial move, the Court went beyond ordering compensatory damages and required Nebraska to pay a $1.8 million disgorgement award to Kansas for the breach in their agreement.[9] Thus, rather than rejecting the distinction between legal and equitable remedies, the Court's jurisprudence leading up to *Kansas v. Nebraska* "repeatedly underscored the distinction between legal and equitable remedies."[10] As Professor Samuel Bray has noted, "the Court has been slowly, perhaps even accidentally, laying the foundation for a very different future for the law of remedies" than predicted by scholarship or overtly recognized by the Court.[11]

Left largely unexplored is whether this resurgence in equitable remedies can also be observed in criminal jurisprudence. In fact, relatively little has been written on the role of equity in criminal jurisprudence.[12] This lack of attention to the role of equity in criminal cases is unsurprising. Early in the twentieth century, when courts of equity and law remained separate, equity courts regularly disclaimed any role in criminal cases.[13] Eventually, courts allowed for the occasional exception in circumstances when property or "personal liberties" were at

7. *See, e.g.*, Grupo Mexicano de Desarrollo, S.A. v. All. Bond Fund, Inc., 527 U.S. 308, 318–19 (1999); U.S. Airways, Inc. v. McCutchen, 569 U.S. 88, 94–101 (2013); *see also* Bray, *supra* note 6, at 999–1000; *cf.* Caprice L. Roberts, *Supreme Disgorgement*, 68 FLA. L. REV. 1413, 1415–20 (2016).

8. 135 S. Ct. 1042, 1048–49 (2015). According to remedies scholar Caprice Roberts, this ruling provided a "bold, powerful remedy" that amounted to a "novel expansion of American contract law." Roberts, *supra* note 7, at 1415.

9. *Kansas*, 135 S. Ct. at 1059, 1064. *See generally* Roberts, *supra* note 7. Some scholars have questioned the use of the equitable move in this case. *See, e.g.*, Theodore E. Yale, *A Recipe for Breach:* Kansas v. Nebraska*'s Unclear Equity Standards Will Breed Interstate Water Litigation*, 20 U. DENV. WATER L. REV. 53 (2016). Others have noted that it is unclear how the special master reached the $1.8 million disgorgement amount. *See, e.g.*, Amelia I.P. Frenkel, *Interstate Water Rights: Take No Drop for Granted*, 40 HARV. ENVTL. L. REV. 253, 273, 278–79 (2016). These scholars draw attention to the potentially odd and problematic ways that special masters work in original jurisdiction cases, particularly in the context of water law, thereby raising the question of whether this equitable move by the court in *Kansas v. Nebraska* is anomalous. *See* Vanessa Casado Pérez, *Specialization Trend: Water Courts*, 49 ENVTL. L. 587, 609–10 (2019). *See generally* L. Elizabeth Sarine, Note, *The Supreme Court's Problematic Deference to Special Masters in Interstate Water Disputes*, 39 ECOLOGY L.Q. 535 (2012).

10. Bray, *supra* note 6, at 999–1000.

11. *Id.* at 999.

12. *See, e.g.*, Rachel E. Barkow, *Recharging the Jury: The Criminal Jury's Constitutional Role in an Era of Mandatory Sentencing*, 152 U. PA. L. REV. 33, 59–84 (2003); Josh Bowers, *Legal Guilt, Normative Innocence, and the Equitable Decision Not to Prosecute*, 110 COLUM. L. REV. 1655 (2010); Shon Hopwood, *Clarity in Criminal Law*, 54 AM. CRIM. L. REV. 695 (2017) (discussing history of rule of lenity in criminal jurisprudence and advocating for more use of this equitable relief); Andrea Roth, *Trial by Machine*, 104 GEO. L.J. 1245, 1285–90 (2016); Fred O. Smith, Jr., *Abstention in the Time of Ferguson*, 131 HARV. L. REV. 2283 (2018); *cf.* Cortney E. Lollar, *What Is Criminal Restitution?*, 100 IOWA L. REV. 93 (2014).

13. *E.g.*, *In re* Sawyer, 124 U.S. 200, 210 (1888); *see* Comment, *Federal Injunctions and State Enforcement of Invalid Criminal Statutes*, 65 COLUM. L. REV. 647, 649 (1965); F.W. Maitland, Injunctions, *in* EQUITY: ALSO THE FORMS OF ACTION AT COMMON LAW 254, 260 (A.H. Chaytor & W.J. Whittaker eds., 1910) ("[T]he Chancery having no jurisdiction in criminal matters steered very clear of the field of crime—there was to be no criminal equity.").

issue,[14] but these circumstances were few and far between. Most criminal law-related issues were referred to courts of law. If there was an adequate remedy at law, a petitioner could not seek relief from a court of equity.[15] Upon the merger of law and equity in the 1930s through the Federal Rules of Civil Procedure, the relationship of equity to criminal law appears to have no longer generated much interest, in practice or scholarship.

Despite the historically rare application of equity to criminal proceedings, both state and federal courts have begun to entertain equitable remedies in the context of criminal cases in recent years. To date, this remarkable trend remains unexamined.[16] This Article aims to fill that gap. This Article examines recent state and federal criminal jurisprudence and draws out the important shift toward consideration of equitable remedies in the context of various issues that arise in criminal cases.[17]

Before turning to examine these cases, however, this Article begins with a discussion of what exactly an equitable remedy *is*. Highlighting the distinction between equity as a concept in moral and legal philosophy and equity as applied by modern courts, Part I proceeds to engage with the question of why the distinction between legal and equitable remedies matters and what the shift signifies. After defining equity's parameters and exploring the move back toward equity in Part I, this Article turns, in Part II, to examine several equitable remedies that parties, and sometimes nonparties, have sought in criminal cases, with varying degrees of success.

Finally, Part III begins the work of contemplating the significance of the courts' engagement with this topic. Employing equity in the criminal law context may provide relief to some of the more vexing criminal justice issues of our time. Against the backdrop of a half-century of increasingly punitive impulses, equitable remedies could play a crucial role in tempering out the substantive law's overinclusivity, the narrowing of procedural protections for criminal defendants, and the staggering expansion of criminal sentences in the form of both detention lengths and monetary sanctions imposed. Equity in the context of criminal jurisprudence is worth renewed consideration.

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14. *Federal Injunctions and State Enforcement of Invalid Criminal Statutes*, *supra* note 13, at 649; Robert A. Leflar, *Equitable Prevention of Public Wrongs*, 14 TEX. L. REV. 427, 427 (1936).

15. Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909, 920 (1987) (citing ROBERT M. HUGHES, HANDBOOK OF JURISDICTION AND PROCEDURE IN UNITED STATES COURTS 418–20 (2d ed. 1913)).

16. Fred O. Smith highlights one particular aspect of this trend in his groundbreaking article, *Abstention in the Time of Ferguson*. *See* Smith, *supra* note 12. But, to this author's knowledge, his is the only work to draw attention to any aspect of this equitable revolution in the criminal sphere.

17. Because the courts' consideration of equity is limited to remedies identified by the Chancery Courts, most of these remedies for harms occurring in the context of criminal cases are pursued in civil-styled actions.

I. EQUITY AND CRIMINAL LAW

Any discussion of equity has to begin with a common understanding of how we define the concept, as the term "equity" can be interpreted in many different ways. At one end of the spectrum is a broad interpretation of equity, referring to a general notion of fairness. Ancient Greek and Roman philosophers identified equity as a method of judging so "as to respond with sensitivity to all the particulars of a person and situation."[18] They conceptualized equity as "taking up a gentle and lenient cast of mind toward human wrongdoing."[19] At the other end is the narrow conception of equity that references a specific body of doctrines and rules contemplated in English Chancery Courts and applied in the United States after its founding.[20]

Most modern courts' consideration of equity is limited to the circumscribed set of remedies that emerged in the seventeenth century with the curtailment of the Chancery Courts' discretion. An understanding of how equity initially was envisioned and incorporated into our legal system and an explanation as to how equity currently manifests are important for understanding why the courts' current openness to equitable remedies matters. After all, how courts ultimately define equity informs how they approach equity. This Part lays out the differing conceptions of the term "equity" before turning, in the next Part, to discuss how equity has been applied in recent years in criminal jurisprudence.

A. Moral Philosophy Conception of Equity

Ancient Greek and Roman philosophers embraced an expansive view of equity. These philosophers identified equity as a method of judging so "as to respond with sensitivity to all the particulars of a person and situation."[21] They conceptualized this approach as "taking up a gentle and lenient cast of mind toward human wrongdoing."[22] As moral philosopher Martha Nussbaum describes it, "[t]he world of *epieikeia* or equity . . . is a world of imperfect human efforts and of complex obstacles to doing well, a world in which humans sometimes deliberately do wrong, but sometimes also get tripped up by ignorance, passion, poverty, bad education, or circumstantial constraints of various sort."[23]

18. Martha C. Nussbaum, *Equity and Mercy*, 22 PHIL. & PUB. AFF. 83, 85 (1993).

19. *Id.* at 87.

20. *See* Richard H.W. Maloy, *Expansive Equity Jurisprudence: A Court Divided*, 40 SUFFOLK U. L. REV. 641, 642 (2007).

21. Nussbaum, *supra* note 18, at 85. This concept was identified by the term "epieikeia." *Id.*

22. *Id.* at 87.

23. *Id.* at 91–92.

From this view, equity is seen as a complement to or a "'correcting' and 'completing' of [strict] legal justice."[24] Rather than having to choose between equity and the rule of law, justice requires a consideration of both:

> The point of the rule of law is to bring us as close as possible to what equity would discern in a variety of cases, given the dangers of carelessness, bias, and arbitrariness endemic to any totally discretionary procedure. But no such rules can be precise or sensitive enough, and when they have manifestly erred, it is justice itself, not a departure from justice, to use equity's flexible standard.[25]

Equity is often used interchangeably with the term "mercy,"[26] although, as Nussbaum points out, the two are distinct categories. Professor Andrea Roth explains the distinction in the following way: "Unlike equity, which is a necessary part of rendering overinclusive laws just, mercy is leniency granted by the grace of private persons beyond what justice alone demands or even allows."[27] Nussbaum herself has articulated the distinction by identifying equity as "the ability to judge in such a way as to respond with sensitivity to all the particulars of a person and situation" and mercy as "the 'inclination of the mind' toward leniency in punishing."[28] As such, equity is a necessary part of justice, whereas mercy goes a step beyond "gentleness . . . *beyond* due proportion."[29]

Put another way, "at every point [equity] presuppose[s] the existence of common law."[30] As Roth clarifies,

> [E]quitable discretion is not understood by moral philosophers as a flouting of the law, but as a necessary part of making it whole; that is, equity "may be regarded as a 'correcting' and 'completing' of legal justice." Logically, then, the more potentially overbroad a rule of criminal liability and punishment, the greater the need for equity.[31]

Professor Josh Bowers provides a similar explanation, "Law needs equitable discretion to 'mitigate or temper' broad statutes, and equity needs law to provide the superstructure. Thus, equity and law are not mutually exclusive; rather, equity may serve to refine law."[32] Equity is the counterpart to law, both of which are necessary components of justice.

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24. *Id.* at 93.

25. *Id.* at 96.

26. *See* Bowers, *supra* note 12, at 1681 (citing Nussbaum, *supra* note 18, at 85–86).

27. Roth, *supra* note 12, at 1285; *cf.* Timothy A.O. Endicott, *The Conscience of the King: Christopher St. German and Thomas More and the Development of English Equity*, 47 U. TORONTO FAC. L. REV. 549, 554 (1989) (citing Saint Cyprian's maxim: "[E]quity is justice tempered by the sweetness of mercy").

28. Nussbaum, *supra* note 18, at 85–86.

29. *Id.* at 97.

30. Maitland, The Origin of Equity (II), *in* EQUITY: ALSO THE FORMS OF ACTION AT COMMON LAW, *supra* note 13, at 12, 19.

31. Roth, *supra* note 12, at 1285 (footnote omitted) (quoting Nussbaum, *supra* note 18, at 93).

32. Bowers, *supra* note 12, at 1671 (footnotes omitted) (quoting FREDERICK SCHAUER, PROFILES, PROBABILITIES, AND STEREOTYPES 42 (2003)).

Yet this corrective vision of equity has been viewed through a restrictive lens by English and American courts. As one equities scholar from the early twentieth century observed, "The systems of jurisprudence in our courts both of law and equity are now equally artificial systems, founded in the same principles of justice and positive law; but varied by different usages in the forms and mode of their proceedings . . . ."[33] Rather than applying equity as a complement to legal justice, courts approach equity as a set of solidified principles derived from the English Court of Chancery, from which deviation is not permitted. Consequently, these equitable remedies are only occasionally available as corrective measures even when a legal remedy leaves an unsatisfactory result.

B. Equity as Derived from Chancery Courts

Initially, equity entailed a recognition that inflexible legal rules and remedies do not always address the full complement of factors relevant to a given situation, leaving some party or issue unsatisfactorily resolved when only legal rules are invoked. Equity was intended to be a corrective to this lacuna, a method of facilitating a just result when legal rules fail. As Alexander Hamilton declared, "The great and primary use of a court of equity is to give relief in extraordinary cases, which are exceptions to general rules."[34] However, equity evolved from a conscience-driven framework that chancellors used to grant relief to deserving parties when a legal option was unavailing to a set of settled principles governing particular aspects of jurisdiction, procedure, substantive law, and remedies.[35] As part of this evolution, equity courts ceased to view criminal cases as being in their orbit.

Early in English history, courts approached equity in the manner contemplated by moral philosophers—as a method of correcting, completing, and refining legal rules. Equity offered relief to both procedural and substantive deficiencies in the courts of law.[36] In the fourteenth and fifteenth centuries, England developed a two-court system with courts of law and courts of equity.[37] Parties appealed to courts of equity, also known as Chancery Courts, to "relieve the petitioner from an alleged injustice that would result from rigorous application of the common law."[38] A petitioner could turn to a court of equity only if their concerns were not sufficiently addressed by the existing legal rules

33. Maitland, The Origin of Equity (II), *in* EQUITY: ALSO THE FORMS OF ACTION AT COMMON LAW, *supra* note 13, at 12, 19 (quoting 3 WILLIAM BLACKSTONE, COMMENTARIES *429).

34. Michael T. Morley, *The Federal Equity Power*, 59 B.C. L. REV. 217, 231 (2018) (quoting THE FEDERALIST NO. 83, at 438 (Alexander Hamilton) (George W. Carey & James McClellan eds., 2001)).

35. *See id.* at 232.

36. Thomas O. Main, *Traditional Equity and Contemporary Procedure*, 78 WASH. L. REV. 429, 442 (2003) (citing Robert Severns, *Nineteenth Century Equity: A Study in Law Reform*, 12 CHI.-KENT L. REV. 81, 84 (1934)).

37. *Id.*

38. Subrin, *supra* note 15, at 918.

and remedies.[39] Chancellors, who were usually bishops,[40] decided these appeals to conscience, resulting in a remedial order for a defendant "to perform or not perform a specific act."[41] Chancellors were to "consider the larger moral issues and questions of fairness" in adjudicating these claims.[42] As a result, equity jurisdiction allowed courts to consider "the broader and deeper reality behind appearances, and the subtleties forbidden by the formalized" processes of strictly applied law.[43] Equity courts were therefore "more flexible, discretionary, and individualized."[44] Equity and law courts worked in tandem with one another, with equity seen "as a necessary companion" to common law.[45]

This broad conception of equity began to change in the sixteenth century. Consistent with the corrective view of equity, early chancellors decided cases solely based on their "conscience," with little regard for precedent.[46] "Chancellors exercised extremely broad discretion, doing justice in individual cases based on their personal notions of fairness, informed by natural law principles . . . ."[47] As a result, "[e]quity enabled the continued development of the law despite the rigidity of the common-law courts."[48] Without equity, the common law remained stilted, unable to respond appropriately to situations that manifestly warranted relief.

A tension remained, however, between "Church and king [that] was institutionalized in the Chancery: the chancellor was a minister of the crown, and yet he was also, by the king's own custom, an eminent churchman."[49] This tension, combined with the reality of the chancellors' essentially unlimited discretion, led Chancery Courts to receive substantial pushback from both the reigning king and those who believed the law needed to be uniform and certain.[50] After Lord Chancellor Thomas Wolsey "proved unable to secure a papal annulment of Henry's marriage to Katherine of Aragon," the demise of equity as a conscience-based force external to the common law proceeded apace.[51]

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39. *Id.* at 920.

40. *Id.*; *see also* Endicott, *supra* note 27, at 549–50 ("[E]quity developed as the expression of a conscience founded on the authority of the Church . . . .").

41. Subrin, *supra* note 15, at 918–19; *see also* Main, *supra* note 36, at 441.

42. Subrin, *supra* note 15, at 919.

43. *Id.* at 918.

44. *Id.* at 920.

45. *Id.*

46. Main, *supra* note 36, at 445 (quoting 1 JOHN NORTON POMEROY, A TREATISE ON EQUITY JURISPRUDENCE § 385, at 524 (2d ed. 1892)).

47. Morley, *supra* note 34, at 227; *see also* Endicott, *supra* note 27, at 553 ("Decisions were rendered at the pure discretion of the chancellor, and without written reasons.").

48. Morley, *supra* note 34, at 228 (citing 2 WILLIAM SEARLE HOLDSWORTH, A HISTORY OF ENGLISH LAW 346–47 (A.L. Goodhart & H.G. Hanbury eds., 7th ed. 1956)).

49. Endicott, *supra* note 27, at 552.

50. Main, *supra* note 36, at 444–46.

51. Endicott, *supra* note 27, at 555–57.

Ultimately, when Francis Bacon became Lord Chancellor in 1618, he transformed the Chancery by issuing "one hundred rules of equity."[52] These directives led equity courts to rule in "more circumscribed, if not predictable" ways.[53] Under subsequent chancellors, the jurisdiction of equity became more "crystallized," turning equity into a "system of rules established by precedent"[54] structured similarly to the common law.[55] As a result, equity lost "its freedom, elasticity and luminance."[56] By the early nineteenth century, equity had become "bound and confined by the channels of its own precedents and the technicalities of its own procedures" in a manner that mirrored courts of law.[57] By the time equity courts migrated to the United States, equity had become "fixed" and "certain,"[58] an "internal mechanism of correction for the common law."[59] As Thomas Endicott has observed, "In this view of equity, there is no longer any external check on the law at all, but only an internal process of reconciling a rule to its rationale."[60]

Despite these limitations—and, perhaps, because of them—equity continued to be an integral part of the English legal system and, from its inception, the burgeoning legal system in the United States. In the face of some skepticism,[61] federal courts and many state courts in the United States embraced equity courts. The United States Constitution granted federal courts jurisdiction over certain cases "in Law and Equity."[62] The Judiciary Act of 1789 likewise gave federal circuit courts jurisdiction over "suits of a civil nature at common law or in equity."[63] The first rules promulgated by the Supreme Court in 1822 allowed for equity jurisdiction in all cases where "the rules prescribed by this court or by the Circuit Court do not apply."[64] The first set of Federal Equity Rules contained thirty-three "concise rules of practice and procedure"[65]

52. Main, *supra* note 36, at 447.

53. *Id.* at 448.

54. *Id.* (first quoting James O'Connor, *Thoughts About the Common Law*, 3 CAMBRIDGE L.J. 161, 164 (1928); then quoting Severns, *supra* note 36, at 105–06).

55. Morley, *supra* note 34, at 230.

56. Main, *supra* note 36, at 448.

57. *Id.* at 448–49.

58. *Id.* at 449 (quoting Severns, *supra* note 36, at 106).

59. Endicott, *supra* note 27, at 564, 559.

60. *Id.* at 563.

61. Morley, *supra* note 34, at 230.

62. U.S. CONST. art. III, § 2.

63. Morley, *supra* note 34, at 232 (quoting Judiciary Act of 1789, ch. 20, § 11, 1 Stat. 73, 78).

64. JAMES LOVE HOPKINS, THE NEW FEDERAL EQUITY RULES 5 (1913).

65. Main, *supra* note 36, at 469; EQUITY RULES (1822) (repealed 1842), *reprinted in* HOPKINS, *supra* note 64, at 37–42. Two further sets of equity rules were promulgated in 1842 and 1912 before the courts of law and equity merged. Main, *supra* note 36, at 469–70.

grounded in the Constitution, which, according to the Supreme Court, bestowed "original jurisdiction of equity causes . . . in the district courts."[66] Shortly after the Continental Congress allowed colonies to adopt the common law of England, many states established equity courts or at least permitted common law judges to hear equity cases.[67]

Both the rules and courts of equity generally contemplated equity's application only in civil cases, however. Equity rarely was applied in the context of criminal law.[68] Although parallels existed in the context of equity's procedural rules,[69] equity seldom was seen in criminal cases in its substantive, remedial, and defensive applications. As Doug Rendleman has clarified, "Substantive areas formerly associated with Chancery are trusts, fiduciary relationships, mortgages and liens, wills, estates, and divorce," many of which "have developed into independent substantive-law fields, often heavily statutory" in nature[70] but none of which have much overlap with criminal law.

Remedies remained available in equity that were not present in law, such as preliminary and permanent injunctions, specific performance, subrogation, constructive trusts, disgorgement, and restitution.[71] Remedies at law typically only pertained to "attempt[ing] to obtain a specified amount of money from the defendant," whereas equitable remedies could prohibit the defendant from

66. HOPKINS, *supra* note 64, at 8 (citing JAMES LOVE HOPKINS, THE NEW ANNOTATED FEDERAL JUDICIAL CODE § 24 (1911)) (with an exception for those cases in which original jurisdiction is conferred on the Supreme Court). The rules are strikingly procedure-based, resembling the future Rules of Civil Procedure more than any articulation of guiding substantive principles. In fact, the Federal Equity Rules of 1912 did end up being the model for the Federal Rules of Civil Procedure, which ultimately were adopted and governed the merged law and equity system. Subrin, *supra* note 15, at 970, 973.

67. Main, *supra* note 36, at 449–50; Morley, *supra* note 34, at 230; Subrin, *supra* note 15, at 928. In fact, equity courts remain a part of the legal landscape today. Virginia did not merge its courts of law and equity until 2006, and Delaware continues to have the Delaware Chancery, "the nation's premier business court." Doug Rendleman, *The Triumph of Equity Revisited: The Stages of Equitable Discretion*, 15 NEV. L.J. 1397, 1402 (2015). Bankruptcy courts are also courts of equity. Main, *supra* note 36, at 510.

68. *See, e.g.*, *In re* Sawyer, 124 U.S. 200, 210 (1888) ("The office and jurisdiction of a court of equity, unless enlarged by express statute, are limited to the protection of rights of property. It has no jurisdiction over the prosecution, the punishment, or the pardon of crimes or misdemeanors, or over the appointment and removal of public officers. . . . Any jurisdiction over criminal matters that the English court of chancery ever had became obsolete long ago, except as incidental to its peculiar jurisdiction for the protection of infants, or under its authority to issue writs of *habeas corpus* for the discharge of persons unlawfully imprisoned.").

69. In the context of equity's procedural rules, the narrowness in equity's application meant parties to criminal cases were not given the same flexibility civil litigants could access when facing procedural impediments. However, until the merger of law and equity in 1938, civil and criminal procedures paralleled each other in the courts of law. Ion Meyn, *Why Civil and Criminal Procedure Are So Different: A Forgotten History*, 86 FORDHAM L. REV. 697, 699, 701 (2017). As William Clark wrote in 1918, "'[T]he rules and principles of pleading with respect to . . . a civil action are applicable to [a criminal] indictment . . . where the criminal law is silent as to the form of an indictment in a particular case,' a litigant could look to 'pleading in civil actions' for guidance." *Id.* at 701–02 (alteration in original) (quoting WILLIAM L. CLARK, HANDBOOK OF CRIMINAL PROCEDURE 158 (William E. Mikell ed., 2d ed. 1918)). Notably, this parallel between civil and criminal procedure did not continue despite initial indications that the Federal Rules of Criminal Procedure might mirror the Federal Rules of Civil Procedure. *See id.* at 698.

70. Rendleman, *supra* note 67, at 1402.

71. *Id.* at 1404; Main, *supra* note 36, at 477–78.

acting or require her to do so and do so in a particular manner.[72] Put another way, "[r]elief in equity . . . tended to be specific, rather than substitutionary."[73] But again these remedies primarily applied in the civil context.[74] A note from the *Harvard Law Review* in 1900 observed, "It was the old idea . . . that courts of equity had no jurisdiction to enjoin criminal proceedings of any sort."[75]

In light of equity's historical roots—both the moral-philosophy roots and those grounded in the early history of equity courts in England—this limitation of equity to civil cases seems somewhat surprising. Certainly early equity courts did not distinguish between civil and criminal cases. This narrowing of equity's scope led one early-twentieth-century scholar to observe that criminal equity "was always unpopular; and gradually, as the government became more stable and the courts of law more efficient, the need for a criminal equity lessened, and little by little the chancellor's criminal jurisdiction fell off, until finally toward the end of the fifteenth century its exercise ceased entirely."[76] By that point, "almost all criminal justice was gradually being claimed for the king; such justice was a profitable source of revenue, of forfeitures, fines and amercements."[77] Instead of relying on equity "[f]or the mere vindication of the criminal law and the enforcement of the public policy of the state, . . . the legal remedy by indictment and prosecution [was seen as] fully adequate and peculiarly appropriate."[78] In other words, a court sitting in "equity will not interfere with the enforcement of criminal law."[79]

Consequently, even prior to the merger of law and equity, neither parties nor judges invoked equity as a consideration in criminal cases. After the enactment of the Federal Rules of Civil Procedure, which contemplated the procedural rules subsuming the remainder of equitable rules and remedies into a new statutory framework, the presumption became that equitable remedies were of limited applicability in the civil context as well.

72. Morley, *supra* note 34, at 228.

73. *Id.*

74. In recent years, restitution has seen a resurgence in criminal cases, but the term "restitution," historically thought to mean the disgorgement of an unlawful gain, hardly seems to fit the remedy applied in most criminal cases these days. *See infra* Part II.C.

75. Note, *Injunctions Against Criminal Proceedings*, 14 HARV. L. REV. 293, 293 (1900) (citation omitted).

76. Edwin S. Mack, *The Revival of Criminal Equity*, 16 HARV. L. REV. 389, 391 (1903).

77. Maitland, Lecture II, *in* EQUITY: ALSO THE FORMS OF ACTION AT COMMON LAW, *supra* note 13, at 306, 306.

78. 30A C.J.S. *Equity* § 66 (2018).

79. Graham v. Phinizy, 51 S.E.2d 451, 457 (Ga. 1949).

C. Courts' Current Consideration of Equity

For a time, equity seemed to have met its demise. Fusion ruled the day. Most judges and scholars viewed the Federal Rules of Civil Procedure as a set of laws that expressly limited the applicability and validity of equitable rules, procedures, and remedies in civil cases. And because equity did not generally engage with criminal proceedings, equity appeared an antiquated conception that had finally met its end. Yet this belief in the apparent end to equity turns out to have been premature. Openings remained that courts continued to expand and parties have started to use. As several scholars have illuminated, courts engaged in a quiet return to equitable remedies in civil cases when confronted with situations that current laws simply did not seem to adequately or appropriately address.[80] Internationally, an active discussion about whether the fusion of law and equity is truly possible—and even if so, whether it is a good idea—remains ongoing.[81]

To date, however, no one has paid much attention to whether a similar trend is or should be occurring in the context of criminal cases.[82] The presumption continues to be that equity simply does not apply to criminal cases. Yet an examination of case law reveals that, contrary to expectation, equity has been resurrected in the context of criminal cases as well. In a manner not inconsistent with the rare applications of equity to criminal cases in the early twentieth century,[83] courts are gradually employing equity to address issues separate from the merits of the charged crime. So long as equity is not being used to challenge the actual indictment or to address the evidence of the underlying charge, most courts do not see equitable remedies as being wholly inapplicable to criminal cases. Those courts acknowledge the continuing importance of equitable remedies to provide relief in the very narrow category of cases where the existing legal scheme leaves a criminal defendant or crime victim in a troubling position without appropriate recourse from a traditional legal remedy.[84] Thus, despite the intended merger between equity and law, equity remains a complement to statutory and common law in a narrow class of cases. In the criminal context, courts and parties invoke equitable remedies to supplement the legal remedies available.

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80. *See, e.g.*, Bray, *supra* note 6, at 999, 1004; Main, *supra* note 36, at 477–78; Maloy, *supra* note 20, at 670, 676.

81. SAMET, *supra* note 6, at 2; Lionel Smith, *Common Law and Equity in R3RUE*, 68 WASH. & LEE L. REV. 1185, 1193 (2011).

82. *See supra* note 16.

83. *See supra* note 14 and accompanying text.

84. In every example from a criminal case about which this author knows, equity has concurrent jurisdiction with law. "Concurrent jurisdiction" refers to scenarios where "the plaintiff has a legal right and yet goes to Equity for some remedy that the common law cannot provide. Injunctions and specific performance are the core examples." Smith, *supra* note 81, at 1195; *see also* Samuel L. Bray, Equity and the Seventh Amendment 3–4 (Feb. 7, 2019) (unpublished manuscript) (on file with author), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3237907.

This increased reliance on equitable remedies to resolve certain criminal issues is not a development that should go unnoticed. But why is this development significant? Why does the distinction between law and equity even matter? Why isn't this division just a historical relic, an outdated system that sets the backdrop for our current procedure and remedies but that has evolved past the point of utility or importance?

At its core, equity continues to maintain an "overtone . . . of general fairness or justice,"[85] a "philosophical and theological conception of conscience . . . that more than any others influenced equity."[86] In Professor Irit Samet's estimation,

> Equity . . . plays the essential role of promoting a legal virtue that is neglected by Common Law's fixation on the ideal of the ROL [rule of law]. This legal virtue, which I call 'Accountability Correspondence', requires that legal liability tallies with the pattern of moral duty in the circumstances to which it applies. . . . [B]y attending to the ethical underpinnings of the parties' rights and duties, [Equity] reintroduces equilibrium between 'Accountability Correspondence' and the ROL.[87]

Samet recognizes that equity can play a critical role in the resolution of criminal cases, observing:

> The impetus to implement the Accountability Correspondence ideal is vividly demonstrated in the slow but determined move to lessen the effects of 'legal luck' on criminal responsibility. The idea behind these efforts is that criminal responsibility should reflect the fact that (at least in principle) moral responsibility does not depend on factors over which the agent has no control.[88]

Although the manner in which courts currently employ equity does not go as far as she suggests it might, given courts' deep aversion to using equity in any evaluation of the merits of a prosecution, one begins to understand the important role that equity can play in balancing out the disparities and inequities regularly arising in criminal cases.

In a review of Samet's book, Professor Samuel Bray recognizes that "the need for accountability correspondence may be greatest in the criminal law" but asserts that "it is precisely in the criminal law that there has been no role for equity for four centuries."[89] A recognition of equity's renewed presence in the resolution of particular aspects of a criminal case is necessary to counter this continued narrative that equity has not been utilized in criminal jurisprudence

85. Mike MacNair, *Equity and Conscience*, 27 OXFORD J. LEGAL STUD. 659, 659 (2007).

86. SAMET, *supra* note 6, at 11 (quoting CARLETON KEMP ALLEN, LAW IN THE MAKING 389 (6th ed. 1958)).

87. *Id.* at 2.

88. *Id.* at 28–29.

89. Samuel L. Bray, *A Parsimonious Equity?: Discussion of* Equity: Conscience Goes to Market, JERUSALEM REV. LEGAL STUD. (forthcoming 2019) (manuscript at 9), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3289735.

for four hundred years. Undoubtedly, equity's role is limited, given courts' refusal to interfere in the merits of a prosecution. But as the next Part of this Article illustrates, equity's potential to resolve other aspects of a criminal case is critical to a fair system of criminal justice.

Indeed, Bray himself acknowledges equity's hallmarks as, among others, "a concern not so much with the definition of rights as with the abuse of rights, a morally inflected language, a consideration of the relative moral position of the parties, a single expert decisionmaker who takes in the whole, . . . *in personam* remedies, conditional relief, and a set of flexible devices for supervising performance."[90] One can imagine how equitable relief might serve a person on probation, suddenly subject to unexpected, costly conditions imposed by the private probation company supervising her, and then incarcerated for being unable to pay the costs of those newly imposed conditions. An injunction prohibiting the company from acting ultra vires in this manner could be a useful and effective remedy.

Particularly in the context of criminal cases, then, one begins to see why equity remains salient. The current criminal system errs on the side of rigidity and inflexibility. In light of the immense power given to prosecutors,[91] judges have a relatively limited ability to take individual circumstances into consideration, and consequently, defense attorneys have relatively limited arguments they can reasonably make for judges to consider. In the rare instances in which juries are involved, they are not told they have the power to nullify if they see fit. Sentencing is the most obvious forum in which a judge can individualize a remedy, yet statutory mandatory minimums, penalty provisions, and other collateral consequences regularly tie judges' hands. Equity—with its focus on fairness, protection of rights, and moral conscience—provides *some* avenue for judges to work within and around these statutory constraints, even in its narrowly conceived form.

With an understanding of the potential impact equity can have in a criminal case, one begins to understand why courts are now entertaining these remedies in a manner they might not have previously. To be sure, parties are seeking these remedies with greater frequency. This may just be creative lawyering. But in light of the punitive, regressive instinct currently manifest in criminal justice policies and laws, defendants and their lawyers are looking for new avenues of relief. When other methods of obtaining relief are unavailing, particularly in compelling cases, those feeling railroaded by the criminal legal system are turning to remedial mechanisms relatively unexplored in recent times. And courts likely are entertaining these remedies for similar reasons—to help respond to

90. Bray, *supra* note 84, at 6.

91. *See, e.g.*, JOHN F. PFAFF, LOCKED IN: THE TRUE CAUSES OF MASS INCARCERATION—AND HOW TO ACHIEVE REAL REFORM 133 (2017).

legal processes and laws that seem to result in blatantly unfair, and often unconstitutional, outcomes. Equitable remedies allow for a limited release valve that can be used to obtain the right outcome when legal remedies fail.

Courts also may be engaging with these remedies with increasing regularity because of the systematic nature of certain criminal justice issues. Although some equitable remedies employed in criminal cases apply solely to the petitioner seeking the remedy in that case, such as restitution or specific performance in the context of plea bargaining, in other instances, the remedy sought is systemic, sought on behalf of a class of individuals seeking relief, as in the case of injunctions. For some, the pursuit of systemic relief through circumstances arising out of an individual criminal case is both unexpected and somewhat jarring. After all, criminal cases are usually the-government-versus-one-or-a-few-defendants affairs. Yet one can understand how bail policies or probation conditions imposed by a private probation company affect more than the individual criminal defendant. These systemic policies have an impact on numerous similarly situated individuals, and the relief sought would seem anemic if just granted in one individual case.[92] For this reason, attorneys often seek to certify similarly situated individuals challenging the policies and practices as a class so that the relief hopefully gained for one can be shared by others experiencing unjust policies. Although it is an unusual move in criminal cases, this application of equity should not be quite as surprising as it may feel, as the creation of a "class suit" originally arose out of equity.[93] In fact, many well-established criminal defense offices have long taken on the work of challenging systemic issues that affect hundreds or thousands of people under criminal court supervision or suffering from a criminal conviction.[94] Equity provides both a procedural mechanism for seeking systemic relief and a remedy for the harms that would otherwise be litigated individually in case after case.

92. In contrast to the normal criminal case, which litigates charges against one or several distinct individuals, class action cases are brought on behalf of multiple similarly situated individuals, and the remedies applied correspondingly. Thus the scope of the remedy tends to reach farther than in the average criminal case. To be clear, this Article takes no position in the hotly contested debate about the scope of injunctions and whether they can or should apply nationwide. *See, e.g.*, Michael T. Morley, *Nationwide Injunctions, Rule 23(b)(2), and the Remedial Powers of the Lower Courts*, 97 B.U. L. REV. 615 (2017); Zayn Siddique, *Nationwide Injunctions*, 117 COLUM. L. REV. 2095 (2017); Amanda Frost, *In Defense of Nationwide Injunctions*, 93 N.Y.U. L. REV. 1065 (2018).

93. Bray, *supra* note 84, at 23.

94. For example, the Public Defender Service for the District of Columbia has a Special Litigation Division that "handles a wide variety of litigation that seeks to vindicate the constitutional and statutory rights of PDS clients and to challenge pervasive unfair criminal justice practices." *Special Litigation Division*, PUB. DEFENDER SERV. FOR D.C., https://www.pdsdc.org/about-us/legal-services/special-litigation-division (last visited Oct. 7, 2019). The Bronx Defenders has an Impact Litigation practice as well. *Impact Litigation*, BRONX DEFENDERS, https://www.bronxdefenders.org/programs/impact-litigation/ (last visited Oct. 7, 2019).

II. EQUITY IN ACTION

With some understanding as to what this Article refers when discussing the term "equitable remedy," Part II turns to an examination of when and how courts utilize equitable remedies in the resolution of criminal cases or proceedings closely intertwined with criminal cases. A survey of case law reveals that both lower courts and the Supreme Court have increasingly relied on equitable remedies in cases where the available legal remedies simply do not seem to adequately address the issues raised. Criminal defendants seek injunctions to rectify unnecessary pretrial detention, challenge unconstitutional bail practices, change prosecutor behavior, or rectify unlawful probation and parole conditions. The Supreme Court has invoked specific performance in noteworthy cases regarding the government's obligations in, and ineffective assistance of counsel claims during, the plea-bargaining process. Restitution is the most recognizable equitable remedy in criminal cases today, yet courts usually apply it as a legal remedy rather than a strictly equitable one. The range of harms that can be addressed by equitable remedies is fairly broad, as the cases reveal.

A. Injunctive Relief

In recent years, criminal defendants have sought preventive relief through injunctions. In all of the cases discussed here, criminal defendants as civil plaintiffs sought injunctions to remedy some type of harm experienced in their criminal cases. Generally, injunctive relief is sought for one of several broad reasons: to rectify unnecessary pretrial detention; to challenge unconstitutional bail practices; to challenge the imposition of criminal fines and fees; to change prosecutor behavior; to rectify unlawful probation and parole conditions; or to remedy problematic prison conditions. Many of these requests for injunctions have been successful.

The vast majority of crimes are prosecuted at the state level. Prior to *Younger v. Harris*,[95] under established principles of equity, an individual charged with a state crime could challenge certain aspects of that prosecution, or anticipated prosecution, in federal court.[96] Based on an early twentieth-century case, when the courts of law and equity were still distinct, federal courts could enjoin state criminal proceedings, such as in a case where the plaintiff alleged that the statute under which she was being prosecuted was unconstitutional.[97] As the Supreme Court announced in the cornerstone case, *Ex parte Young*,

95. 401 U.S. 37 (1971).

96. *See, e.g.*, *Ex parte* Young, 209 U.S. 123, 159–60 (1908); Dombrowski v. Pfister, 380 U.S. 479, 492 (1965).

97. *Ex parte Young*, 209 U.S. at 159–60; Smith, *supra* note 12, at 2290.

> [I]ndividuals, who, as officers of the State, are clothed with some duty in regard to the enforcement of the laws of the State, and who threaten and are about to commence proceedings, either of a civil or criminal nature, to enforce against parties affected an unconstitutional act, violating the Federal Constitution, may be enjoined by a Federal court of equity from such action.[98]

Responding to the argument that courts of equity have no jurisdiction to intervene in criminal proceedings, the *Ex parte Young* Court explicitly carved out an exception "[w]hen such indictment or proceeding is brought to enforce an alleged unconstitutional statute, which is the subject matter of inquiry in a suit already pending in a Federal court."[99] In that circumstance, "the latter court having first obtained jurisdiction over the subject matter, has the right, in both civil and criminal cases, to hold and maintain such jurisdiction, to the exclusion of all other courts, until its duty is fully performed."[100]

The Court later backtracked from its *Ex parte Young* holding in a series of cases beginning with *Younger v. Harris*[101] and culminating in *Rizzo v. Goode*,[102] effectively precluding this avenue of equitable relief in all but the rarest of cases.[103] After *Younger*, a federal court can enjoin a state criminal prosecution only if there is no prosecution pending in state court at the time the federal prosecution is begun, if a "great and immediate" irreparable injury will result if the federal court does not issue the injunction, and if "the threat to the plaintiff's federally protected rights . . . cannot be eliminated by his defense against a single criminal prosecution."[104] A plaintiff who fails to meet this criteria can nevertheless obtain relief if they can show "bad faith, harassment, or [another] unusual circumstance that would call for equitable relief."[105]

After *Younger*, although attorneys representing criminal defendants in state cases can rarely challenge the constitutionality or enforcement of a state statute in federal courts, they can and have utilized other avenues for obtaining injunctive relief in a state criminal case. *Younger* generally does not prohibit the injunctions because they are not aimed directly at the prosecution itself but, rather, at

98. *Ex parte Young*, 209 U.S. at 155–56.

99. *Id.* at 161 (citing Prout v. Starr, 188 U.S. 537, 544 (1903)).

100. *Id.* at 161–62 (citing *Prout*, 188 U.S. at 544).

101. 401 U.S. 37 (1971). Arguably, the Court more fully opened the door to the decision in *Younger* in a 1965 case, *Dombrowski v. Pfister*. 380 U.S. 479 (1965). "The initial dominant view was that the case [*Dombrowski*] boldly opened a new door for civil rights claims against unconstitutional state prosecutions." Smith, *supra* note 12, at 2292. However, prominent scholars—notably Owen Fiss and Douglas Laycock—later pointed out how "the *Dombrowski* decision arguably undermined the foundation of precedent on which the opinion should have stood, leading to the presumption against such injunctions that we generally associate with *Younger v. Harris*." *Id.* at 2292–93. *See generally* Owen M. Fiss, Dombrowski, 86 YALE L.J. 1103 (1977); Douglas Laycock, *Federal Interference with State Prosecutions: The Cases* Dombrowski *Forgot*, 46 U. CHI. L. REV. 636 (1979).

102. 423 U.S. 362 (1976); *see also* Fiss, *supra* note 101, at 1154.

103. Fiss, *supra* note 101, at 1154.

104. *Younger*, 401 U.S. at 45–46 (first quoting Fenner v. Boykin, 271 U.S. 240, 243 (1926); then citing *Ex parte Young*, 209 U.S. at 145–47).

105. *Id.* at 54.

some specific aspect of the criminal proceeding, such as pretrial detention or bail, the detention of witnesses, or conditions of probation and parole.[106]

1. Pretrial Detention of Criminal Defendants

A significant criminal procedure case, *Gerstein v. Pugh*,[107] is an early example of how the Supreme Court relies on equity to grant relief in a criminal case despite *Younger*. In Dade County, Florida, prior to the litigation in *Gerstein*, prosecutors could charge a person by an information with any noncapital crime and detain the person subject to that charge, usually for thirty days or more, without a preliminary hearing—the proceeding where a judge determines whether there is probable cause that the person committed the crime.[108] In other words, the charged individual could have her liberty restrained for a hefty period of time on the allegation of only a prosecutor, without any judicial review to determine whether sufficient evidence existed to establish probable cause.

Robert Pugh and Nathaniel Henderson filed a class action seeking injunctive relief in federal district court, "claiming a constitutional right to a judicial hearing on the issue of probable cause."[109] The trial court granted the injunction, holding that the Fourth and Fourteenth Amendments give all arrested persons charged by information a right to "an immediate preliminary hearing to determine probable cause for further detention."[110] The Court ordered Dade County to promptly give the plaintiffs a preliminary hearing to determine probable cause.[111] According to the Court, *Younger* did not prohibit the injunction because

> [t]he injunction was not directed at the state prosecutions as such, but only at the legality of pretrial detention without a judicial hearing, an issue that could not be raised in defense of the criminal prosecution. The order to hold preliminary hearings could not prejudice the conduct of the trial on the merits.[112]

Gerstein paved the way for granting other injunctions, primarily in cases where criminal defendants are challenging bail or a crime victim or witness is challenging her detention prior to a trial, as it provides plaintiffs a legal hook to challenge often lengthy pretrial detentions. Recently, criminal defendants as

106. Some state courts are finding remedies to unconstitutional bail practices at the state level as well, thereby avoiding the need to seek injunctive relief at the federal level. *See, e.g.*, *In re* Humphrey, 228 Cal. Rptr. 3d 513, 544 (Cal. Ct. App. 2018). The California District Attorneys Association and several district attorneys' offices around California subsequently sought depublication of the aforementioned California appellate case, which the California Supreme Court denied. Humphrey (Kenneth) on H.C., 417 P.3d 769, 769 (Cal. 2018). But the Court then ordered review of the appellate opinion on its own motion. *Id.*

107. 420 U.S. 103 (1975).

108. *Id.* at 105–06.

109. *Id.* at 107.

110. *Id.* at 107–08.

111. *Id.*

112. *Id.* at 108 n.9.

civil plaintiffs have been filing suit in jurisdictions across the country, alleging that their local courts' bail practices violate the Constitution.[113] Several federal courts have granted such injunctions.[114]

For example, in 2018, Maranda ODonnell joined other plaintiffs in a class action suit against Harris County, Texas, alleging that the county's bail system for indigent misdemeanor arrestees violated both Texas statutory and constitutional law and the Fourteenth Amendment to the U.S. Constitution.[115] The Texas district court granted the injunction after eight days of hearings.[116] Agreeing that "the relief sought by ODonnell—i.e., improvement of pretrial procedures and practice—is not properly reviewed by criminal proceedings in state court," a panel of the Fifth Circuit found that *Younger* did not preclude the injunctive relief plaintiffs sought, relying on *Gerstein* to reach this conclusion.[117]

Bradley Hester filed a similar suit against officials in Cullman County, Alabama, alleging that the county's practice of detaining people pretrial who could not afford to post a property or surety bond violated the Fourteenth Amendment.[118] Distinguishing an Eleventh Circuit case in which the circuit court found the pretrial bail procedures in Calhoun County, Georgia, did not demonstrate a likelihood of success on the claim of wealth-based discrimination in its bail practices,[119] the district court issued a preliminary injunction in Hester's

113. Smith, *supra* note 12, at 2285.

114. *See, e.g.*, Walker v. City of Calhoun, No. 4:15-cv-0170-HLM, 2016 WL 361612, at *14 (N.D. Ga. Jan. 28, 2016), *vacated*, 682 F. App'x 721 (11th Cir. 2017); Smith, *supra* note 12, at 2287, 2311–12 (citing ODonnell v. Harris County, 251 F. Supp. 3d 1052, 1161–64 (S.D. Tex. 2017), *aff'd in part, rev'd in part*, 892 F.3d 147 (5th Cir. 2018)). Plaintiffs have also sought other forms of relief, such as declaratory judgments, which are considered milder versions of injunctions. *See* Perez v. Ledesma, 401 U.S. 82, 111–12 (1971) ("The express purpose of the Federal Declaratory Judgment Act was to provide a milder alternative to the injunction remedy. . . . [T]he declaratory judgment was designed to be available to test state criminal statutes in circumstances where an injunction would not be appropriate . . . ."). However, declaratory judgments are purely a statutory creation from the twentieth century and therefore do not fall under the category of claims considered equitable claims according to the English Chancery. *See* Federal Declaratory Judgment Act of June 14, 1934, ch. 512, 48 Stat. 955 (codified as 28 U.S.C. § 2201 (2018)).

115. ODonnell v. Harris County, 882 F.3d 528, 535 (5th Cir. 2018), *withdrawn, superseded on reh'g*, 892 F.3d 147, 152 (5th Cir. 2018).

116. *ODonnell*, 892 F.3d at 152.

117. *Id.* at 156 (citing *Gerstein*, 420 U.S. at 108 n.9). Harris County et al. petitioned for and received a rehearing, but the panel reached the same conclusion on this issue as it did in the first instance. *Id.* On remand, the district court entered a more narrowly tailored injunction, as ordered by the Fifth Circuit panel. ODonnell v. Harris County, 321 F. Supp. 3d 763, 778–85 (S.D. Tex. 2018). It differed in certain regards from the changes suggested by the Fifth Circuit panel, and Harris County et al. sought a stay, which the Fifth Circuit subsequently granted in August 2018. ODonnell v. Goodhart, 900 F.3d 220, 221 (5th Cir. 2018). Many of the appellants who sought the stay were voted out of office in November 2018, and the new appellants moved for voluntary dismissal of the appeal in January 2019. ODonnell v. Salgado, 913 F.3d 479, 481 (5th Cir. 2019). Plaintiffs (appellees) then sought an unopposed motion to vacate the August 2018 appellate opinion authorizing the stay, which the appellate court denied. *Id.* at 482.

118. Schultz v. State, 330 F. Supp. 3d 1344, 1348 (N.D. Ala. 2018).

119. Walker v. City of Calhoun, 901 F.3d 1245 (11th Cir. 2018), *cert. denied*, 139 S. Ct. 1446 (2019). Notably, the court did find that *Younger* does not preclude the issuance of an injunction in the context of bail practices. The court just did not think the plaintiffs were likely to succeed on the merits of their argument. *Id.* at 1269.

case, finding he was substantially likely to prevail on his claim of wealth-based discrimination in Cullman County's bail practices.[120] *Younger* abstention is nowhere raised in the court's order.

Federal courts in northern Texas[121] and the Middle District of Alabama[122] likewise have issued preliminary injunctions in response to plaintiffs' claims of wealth-based disparities related to pretrial detention in violation of the U.S. Constitution. Litigation seeking injunctions against local officials for their pretrial detention and bail practices remains pending in federal district courts in western Louisiana[123] and California.[124] The litigation that continues in the Georgia case is on the merits of whether the bail practices in question actually violate the Constitution, as the district court found that *Younger* did not preclude the issuance of an injunction.[125] On appeal, the Eleventh Circuit went as far as to say that *Younger* "[a]bstention . . . has become disfavored in recent Supreme Court decisions."[126] The Eleventh Circuit's view of *Younger* abstention is by no means universal, however, as other federal courts have continued to deny injunctions on *Younger* abstention grounds.[127]

120. *Schultz*, 330 F. Supp. 3d at 1358.

121. Daves v. Dallas County, 341 F. Supp. 3d 688, 698 (N.D. Tex. 2018).

122. Edwards v. Cofield, No. 3:17-cv-321-WKW, 2017 WL 2255775, at *1–2 (M.D. Ala. May 8, 2017) (issuing a temporary restraining order that, according to the court, "requires the same four elements as a preliminary injunction," as well as an injunction against further detention of Edwards "based *solely* on her inability to pay" (footnote omitted)).

123. Little v. Frederick, No. 6:17-cv-0724, 2019 WL 208947, at *1–2 (W.D. La. Jan. 15, 2019) (outlining the status of a request for an injunction and a declaratory judgment in a challenge to the bail system in three Louisiana parishes).

124. Buffin v. City and County of San Francisco, No. 15-cv-04959-YGR, 2019 WL 1017537, at *24 (N.D. Cal. Mar. 4, 2019) ("[T]he Court will issue an injunction enjoining the Sheriff from using the Bail Schedule as a means of releasing a detainee who cannot afford the amount but will delay issuing the injunction pending briefing."); Plaintiffs' Notice of Motion & Motion for Summary Judgment; Memorandum of Points & Authorities in Support at 1, *Buffin*, 2018 WL 5003609 (No. 15-cv-04959) (alleging a violation of the Due Process and Equal Protection Clauses of the Fourteenth Amendment in relation to San Francisco's bail schedule and seeking an injunction to prohibit the use of a bail schedule and detention of arrestees).

125. Walker v. City of Calhoun, 901 F.3d 1245, 1254 (11th Cir. 2018), *cert. denied*, 139 S. Ct. 1446 (2019).

126. *Id.* (citing Sprint Commc'ns Inc. v. Jacobs, 571 U.S. 69, 77–78 (2013)).

127. *See, e.g.*, Burks v. Scott County, No. 3:14-cv-745-HTW-LRA, at *2 (S.D. Miss. Sept. 30, 2015) (Bloomberg Law, Dockets); *cf.* Bice v. La. Pub. Def. Bd., 677 F.3d 712, 715 (5th Cir. 2012) (finding that *Younger*'s abstention doctrine prevented plaintiff from pursuing a federal remedy for an alleged violation of the Sixth and Fourteenth Amendments based on a fee that Louisiana requires indigent criminal defendants to pay to the public defender's office for appointed counsel's services). Professor Fred Smith has written a compelling article outlining why *Younger* should not preclude injunctive relief in criminal fines, fees, and bail cases. Smith, *supra* note 12.

2. Legal Financial Obligations

Plaintiffs also have sought injunctions related to court fines, fees, and collections.[128] In terms of injunctive relief, these claims have been less successful than many of the bail claims mentioned in the previous Subpart—sometimes on *Younger* abstention grounds, sometimes on other grounds.

In a case filed in Louisiana, *Cain v. City of New Orleans*,[129] the plaintiffs challenged New Orleans's post-conviction debt-collection measures. At sentencing, judges imposed various court fines, fees, and costs.[130] Judges typically imposed four types of financial obligations in a criminal case at the time of sentencing: a fine, which was divided between the court's operating budget and the district attorney's office; restitution, which would go to a crime victim; fees, including a mandatory $5 fee, a fee whose amount was determined by whether the crime of conviction was a misdemeanor or a felony, $100 in court costs, and a $14 fee to pay court reporters, all of which went into the court's operating budget; and "court costs," which funded the public defender's office, the prosecutor's office, and the Supreme Court.[131] Approximately "$1,000,000 [of the court's annual general operating budget each year] came from bail bond fees, and another $1,000,000 [came] from fines and other fees."[132]

The plaintiffs were individuals convicted of a crime but ultimately unable to pay the fines, fees, and costs imposed by the court at sentencing.[133] All were arrested on a warrant for contempt of court, based solely on their failure to pay these financial obligations.[134] The warrants set bail at $20,000.[135] Individuals arrested pursuant to this type of warrant "ordinarily remained in jail until their family or friends could make a payment on their court debt, or until a judge released them."[136] The plaintiffs in this case each remained in jail for a period of six days to two weeks.[137] The plaintiffs alleged violations of their Fourth and Fourteenth Amendment rights, and they sought declaratory judgments that the state officials named in the complaint had violated the plaintiffs' constitutional rights, an injunction prohibiting defendants from enforcing the unconstitutional policies, and money damages.[138]

128. *See, e.g.*, Cain v. City of New Orleans, 281 F. Supp. 3d 624, 628 (E.D. La. 2017), *aff'd*, Cain v. White, 937 F.3d 446 (5th Cir. 2019).

129. 184 F. Supp. 3d 349 (E.D. La. 2016).

130. *Cain*, 281 F. Supp. 3d at 628–29.

131. *Id.*

132. *Id.* at 630.

133. *Id.* at 629–31.

134. *Id.* at 631–32.

135. *Id.* at 631.

136. *Id.*

137. *Id.*

138. *Id.* at 634.

The defendants argued that since plaintiffs had not "paid in full" their court costs, their cases remained pending and would stay pending "until all assessed costs are paid,"[139] thereby precluding *Younger* relief. The district judge found *Younger* abstention inapplicable because each of the defendants had been convicted and sentenced more than a year prior to the filing of the lawsuits in this case.[140] The court noted that each plaintiff's case was marked as "closed" in the court record, no plaintiff was incarcerated or had an outstanding warrant for failure to pay, and none of the plaintiffs directly appealed. Consequently, the district judge found that "an incomplete sentence, such as an undischarged term of imprisonment, probation, or parole, does not constitute an 'ongoing state judicial proceeding' for purposes of *Younger* abstention."[141] The only contested issue for injunctive relief purposes was "whether plaintiffs, merely because their court costs remain unpaid, are subject to ongoing state judicial proceedings."[142] The court concluded that the "mere existence of plaintiffs' undischarged debts does not constitute an 'ongoing state judicial proceeding'" for *Younger* purposes.[143]

Ultimately, the court dismissed the counts for which the plaintiffs were seeking injunctive relief.[144] However, the court granted the plaintiffs' summary judgment motion for a declaratory judgment that the judges' practice of imposing court fines and fees on a criminal defendant and then imprisoning that person for nonpayment without any determination of her ability to pay violates the Fourteenth Amendment and the Supreme Court's holding in *Bearden v. Georgia*.[145]

Plaintiffs had less luck in another Louisiana case, *Bice v. Louisiana Public Defender Board*[146]—this time on *Younger* grounds. The plaintiffs were indigent criminal defendants who challenged a $35 fee imposed on convicted defendants at the end of the criminal proceedings.[147] Indigent criminal defendants found not guilty were not required to pay the fee.[148] Steven Bice asserted that this system violated his Sixth and Fourteenth Amendment rights, as it creates a perverse

139. Cain v. City of New Orleans, 186 F. Supp. 3d 536, 549 (E.D. La. 2016).

140. *Id.*

141. *Id.* at 550 (quoting Trombley v. County of Cascade, 879 F.2d 866, at *1 (9th Cir. 1989)).

142. *Id.*

143. *Id.* (quoting *Trombley*, 879 F.2d, at *1).

144. Cain v. City of New Orleans, 281 F. Supp. 3d 624, 633–34 (E.D. La. 2017). The court dismissed count four, a claim for injunctive relief, as moot. *Id.* at 637–39. Plaintiffs filed a motion for summary judgment on count seven, the second count with a request for injunctive relief, in spite of a court-ordered stay on certain motion practice. *Id.* at 634 n.80. As a result, the court dismissed the motion for summary judgment without prejudice. *Id.*

145. *Id.* at 649–52. *Bearden* requires that a court establish a defendant's willful failure to pay a fine or restitution before revoking the defendant's probation for failure to pay. Bearden v. Georgia, 461 U.S. 660, 672 (1983).

146. 677 F.3d 712 (5th Cir. 2012).

147. *Id.* at 714.

148. *Id.*

incentive for an indigent defendant's lawyer to not pursue a finding of not guilty for her client, given that public defenders are paid in part by the fees collected only pursuant to a finding of their clients' guilt.[149] Finding that a successful challenge to the state's statutory funding scheme would "require the state to postpone Bice's prosecution until adequate funding is located," the district court concluded this was sufficient federal "'interference' with a state court proceeding" to satisfy *Younger*.[150] Because Bice had not yet managed to get a class certified and did not raise the issue presented in his federal pleading before the state court, the federal district judge determined that "the municipal court can simply enjoin the collection of the fee as it pertains to Bice, which would protect him against any asserted constitutional violations."[151] Consequently, *Younger* abstention prevented the court from reaching the request for injunctive relief.[152]

Although plaintiffs have had limited success using injunctions in the context of legal financial obligations, the relative paucity of cases in this area suggests injunctions still may be an effective avenue of obtaining relief.

3. Changing Prosecutor Behavior Toward Witnesses

In several jurisdictions, judges, prosecutors, or both have attempted to coerce reluctant crime victims and witnesses to participate in a prosecution through the threat of fines and incarceration. Crime victims and witnesses have turned to equitable injunctions for relief from these practices.

Twenty-two-year-old Cleopatra Harrison appeared in court in Columbus, Georgia, "at a preliminary hearing for her boyfriend, who was charged with assaulting her."[153] When asked to affirm the facts as recounted by the officer during the hearing, Harrison "truthfully affirmed" them but indicated a desire "not to serve as a witness for the prosecution."[154] With no further inquiry and according to a municipal ordinance, the judge assessed a $150 "'victim assessment' fee" against Harrison, who was indigent and did not have the funds to pay the fee.[155] The court informed her that if she did not pay the fee within a week, a warrant would issue for her arrest.[156] The city's policy required courts

149. *Id.* at 714–15.

150. *Id.* at 717–18 (quoting State v. Citizen, 898 So. 2d 325, 338–39 (La. 2005)).

151. *Id.* at 719–20.

152. *Id.* at 720.

153. Complaint at 2, Harrison v. Consol. Gov't of Columbus, No. 4:16-cv-329-CDL, 2016 WL 5859069 (M.D. Ga. 2016).

154. *Id.*

155. *Id.*

156. *Id.* The police officer who testified at her boyfriend's hearing, *id.* at 15–16, arrested Harrison after the hearing for purportedly filing a false police report, *id.* at 17–18. When her boyfriend paid to get her out of jail, it appears as though the $212.50 payment he made to get her out of jail was applied to Harrison's fee, as her case was subsequently closed. *Id.* at 19. Harrison was never given any notice of a hearing date for a charge of filing a false report. *Id.*

to impose a "minimum charge of $50.00 for dismissing a case in recorder's court, such charge to be paid by the prosecuting witness that refuses to prosecute the case."[157] Harrison sought an injunction to prevent Columbus court officials from implementing the ordinance and the court's customary policy of ensuring enforcement.[158] Ultimately, Harrison's case against the city and its officers settled, as the city repealed the ordinance upon the filing of the lawsuit and agreed to compensate those who had paid such fees.[159] Thus, an injunction never issued.

Prosecutors in Orleans Parish, Louisiana, purportedly continue to engage in a similar practice, but their behavior is even more egregious. According to the complaint in *Singleton v. Cannizzaro*, "prosecutors routinely issue their own fabricated subpoenas directly from the District Attorney's Office . . . in order to coerce victims and witnesses into submitting to interrogations by prosecutors outside of court . . . . [T]hey threaten crime victims and witnesses with fines, arrest, and imprisonment if they do not obey."[160] If these tactics are unsuccessful, "[d]efendants routinely obtain arrest warrants to put crime victims and witnesses in jail."[161] Once witnesses are arrested on these outstanding warrants, the complaint avers, "[d]efendants habitually seek and obtain extraordinarily high secured money bonds . . . ranging up to $500,000, and sometimes no bond at all. These amounts often dwarf the bond amounts set for criminal defendants themselves . . . ."[162] As a result, witnesses "languish" in jail.[163] The complaint alleges that prosecutors have sought at least 150 material witness warrants in a recent five-year period, "mak[ing] false statements, omit[ting] material facts, and rely[ing] on plainly insufficient allegations no reasonable prosecutor would believe could justify the arrest of a witness or a victim of crime."[164] The complaint lists the stories of seven plaintiffs in support of the summarized allegations.[165] Among other relief, the plaintiffs are seeking an injunction and "equitable relief" requiring the prosecutor's office to permanently end these practices and

157. *Id.* at 7.

158. *Id.* at 7–8.

159. Final Approval Order & Judgment, *Harrison*, 2017 WL 6210319 (No. 4:16-cv-329-CDL); *Columbus Court Abolishes "Victim Fee," Pays Restitution to Survivors of Crime*, S. CTR. FOR HUM. RTS. (Oct. 12, 2017), https://www.schr.org/resources/columbus_court_abolishes_victim_fee_pays_restitution_to_survivors_of_crime.

160. Complaint at 2, Singleton v. Cannizzaro, 372 F. Supp. 3d 389 (E.D. La. 2019) (2:17-cv-10721).

161. *Id.*

162. *Id.* at 2–3.

163. *Id.* at 2.

164. *Id.*

165. *Id.* at 4–6.

"ensure[] that the violations do not recur."[166] The litigation remains ongoing, with claims for injunctive relief still pending before the court.[167]

It remains unclear whether injunctive relief will be successful in Orleans Parish.[168] *Younger* abstention does not appear to have been raised by the defendants in the case. In Columbus, Georgia, the legal effort to obtain injunctive relief brought about change but not directly by way of an injunction. As a result, the verdict is still out as to whether equitable remedies are an effective mechanism for attempting to change prosecutor behavior.

4. Rectifying Unlawful Probation or Parole Conditions

As of the end of 2016, more than 4.5 million adults, or one in fifty-five, were under community supervision—on probation or parole—in the U.S.[169] This number is double the number of people incarcerated in this country.[170] State agencies and local law enforcement traditionally managed the supervision of individuals under community supervision. However, in many states, community supervision has been increasingly outsourced to for-profit, private companies.[171] A recent report from Human Rights Watch observed:

> [P]rivate probation companies exert significant control over the lives of people on probation. In the states studied for this report, private probation companies can impose supervision fees, order drug and alcohol tests, and, if a person does not fulfill all the terms and conditions of their probation, they can issue a violation of probation and request arrest, which can lead to jail time.[172]

Some individuals on probation and parole have started to challenge private probation companies' ability to *sua sponte* impose new conditions on them. At

166. *Id.* at 61.

167. Although the trial court dismissed several of the plaintiffs' claims in response to a defense motion to dismiss, several claims for injunctive relief remain. *See* Singleton v. Cannizzaro, No. 2:17-cv-10721-JTM, 2019 WL 2755090, at *1 (E.D. La. July 2, 2019); *Singleton*, 372 F. Supp. 3d at 430.

168. The court entered an order allowing the plaintiffs to proceed with many of their claims, denying in part the Government's motion to dismiss. Singleton v. Cannizzaro, No. 2:17-cv-10721-JTM at 51–52 (E.D. La. Feb. 28, 2019) (order granting in part defendants' joint motion to dismiss). The defendants appealed the order, *Singleton*, 2019 WL 2755090, at *1, and that appeal remains pending in the Fifth Circuit. An injunction was not issued at this juncture. Singleton v. Cannizzaro, No. 2:17-cv-10721-JTM at 51–52 (E.D. La. Feb. 28, 2019). However, the district court's language suggests the court is troubled by the allegations in the case. *Id.* at 10–11. A recent ruling by the district court confirmed that "[p]laintiffs[']' numerous claims seeking injunctive relief . . . will remain." *Singleton*, 2019 WL 2755090, at *3.

169. BUREAU OF JUSTICE STATISTICS, PROBATION AND PAROLE IN THE UNITED STATES, 2016 (2018), https://www.bjs.gov/content/pub/pdf/ppus16_sum.pdf.

170. *Probation and Parole System Marked by High Stakes, Missed Opportunities*, PEW CHARITABLE TR. 1, 4 (2018), http://www.pewtrusts.org/-/media/assets/2018/09/probation_and_parole_systems_marked_by_high_stakes_missed_opportunities_pew.pdf.

171. *"Set Up to Fail": The Impact of Offender-Funded Private Probation on the Poor*, HUM. RTS. WATCH 1, 2 (2018), https://www.hrw.org/sites/default/files/report_pdf/usprobation0218_web.pdf.

172. *Id.* at 3.

least two sets of plaintiffs filed to enjoin private probation companies from requiring probationers to submit to drug testing that was not court ordered and then making them pay for those tests, threatening revocation and incarceration if they could not afford to pay. In one case, *Luse v. Sentinel Offender Services, LLC*, the parties settled, so no injunction issued.[173] However, in a second case, *Rodriguez v. Providence Community Corrections, Inc.*, the district court granted a preliminary injunction enjoining the private probation company from seeking or executing arrest warrants on misdemeanor probationers solely due to the nonpayment of probation fees[174] and from imposing preset secured-money bonds without any hearing or inquiry into the probationer's ability to pay, in violation of the Supreme Court case *Bearden v. Georgia*.[175]

In broad language, the district court found that *Younger* abstention did not preclude injunctive relief for two reasons:

> "Plaintiffs challenge the constitutionality of certain discrete aspects of Defendants' post-judgment procedure. The harm alleged—that probationers do not receive inquiries into indigency as required by the Fourteenth Amendment—has been inflicted before a probationer could voice any constitutional concerns. This alleged constitutional infirmity could be remedied without affecting the underlying state court judgments. . . ." In addition to the fact that Plaintiffs do not have an adequate opportunity to raise constitutional challenges before they suffer a constitutional injury, the Court finds that an incomplete sentence, such as an undischarged term of imprisonment, probation, or parole, does not constitute an 'ongoing state judicial proceeding' for purposes of *Younger* abstention.[176]

Ultimately, because Rutherford County, Tennessee, chose not to renew its contract with Providence Community Corrections, the claims became moot.[177] However, the court noted that since "[t]he County [itself] intend[ed] to take over the supervision of misdemeanor probationers," the possibility remained that "the County could resume the constitutionally infirm conduct."[178] As such, the equitable claims against the County were still viable. This case, too, ultimately settled, with the County agreeing to an injunction that

> under the County's probation program, 'no individual may be held in jail for nonpayment of fines, fees, costs, or a pre-probation revocation money bond imposed by a court without a determination, following a meaningful inquiry

173. Luse v. Sentinel Offender Servs., LLC, No. 2:16-cv-30-RWS (N.D. Ga. Aug. 21, 2017) (Bloomberg Law, Dockets) (order granting final approval of class settlement).

174. Rodriguez v. Providence Cmty. Corr., Inc., 191 F. Supp. 3d 758, 762 (M.D. Tenn. 2016).

175. 461 U.S. 660 (1983).

176. *Rodriguez*, 191 F. Supp. 3d. at 763 (citation omitted) (quoting Rodriguez v. Providence Cmty. Corr., Inc., No 3:15-cv-01048-MTT (M.D. Tenn. Dec. 17, 2015) (memorandum decision granting preliminary injunction, appearing as Document 68 on the docket)) (citing Trombley v. County of Cascade, 879 F.2d 866 (9th Cir. 1989)).

177. *Id.* at 770–72. The court was not persuaded by plaintiffs' argument that Providence Community Corrections' conduct was "capable of repetition yet evading review." *Id.*

178. *Id.* at 772.

> into the individual's ability to pay, that the individual has the ability to pay such that any nonpayment is willful. The meaningful inquiry into the individual's ability to pay includes, but is not limited to, notice, an opportunity to present evidence, and the assistance of appointed counsel.'[179]

The pursuit of injunctions against private probation companies thus seems to be an effective avenue for obtaining relief. Although an injunction was issued in only one case, in both circumstances, the act of seeking an injunction changed the probation company's and the government's policies and behaviors.

5. Challenging Conditions of Confinement

A final area in which those accused or convicted of a crime have sought injunctive relief occurs in the context of prison conditions. Indirectly, injunctions have been successful in addressing and alleviating troubling pretrial and postconviction conditions of confinement. In one prominent case, Timothy Gumm and Robert Watkins sought injunctive relief after spending seven-and-one-half and ten years, respectively, in solitary confinement in the Georgia Department of Corrections Special Management Unit (SMU).[180] According to the complaint, those whom the Georgia Department of Corrections (DOC) assigned to the SMU were detained in a parking-space-sized cell for an average of twenty-three to twenty-four hours a day, unable to see out any doors or windows or have substantive interactions with others.[181] Half of the people detained in the SMU were required to shower in their cells, and in the best case scenario, recreation consisted of being alone in a slightly larger metal cage for two sessions of two-and-a-half hours a week.[182] In some cases, recreation was prohibited altogether.[183] As a consequence of SMU's policies, "people in the SMU [were] utterly isolated, many of them for years on end, with little if any meaningful human interaction."[184]

Due to these conditions, almost half of those detained in the SMU "had documented mental disorders requiring treatment, and [detainees] frequently

179. Rodriguez v. Providence Cmty. Corr., Inc., No. 3:15-cv-01048, at 3–4 (M.D. Tenn. July 18, 2018) (amended order granting final approval of class settlement and plan of allocation, granting motions for attorney's fees, granting permanent injunction, and dismissing the case, appearing as Document 229 on the docket). The order goes on to lay out in great detail how the enjoined parties need to act in order to be in accord with the permanent injunction. *Id.* at 21–26.

180. Press Release, S. Ctr. for Human Rights, Georgia Prisoners Reach Settlement to Reform One of the "Harshest and Most Draconian" Solitary Confinement Units in the Nation (Jan. 9, 2019), https://www.schr.org/resources/georgia_prisoners_reach_settlement_to_reform_one_of_the_harshest_and_most_draconian.

181. *Id.*; *see* Second Amended Complaint at 4, Gumm v. Jacobs, No. 5:15-cv-41, 2017 WL 4106240 (M.D. Ga. July 20, 2017).

182. Second Amended Complaint, *supra* note 181, at 4.

183. *Id.*

184. *Id.*

resorted to extreme measures to cope with the stress of isolation, including cutting themselves, swallowing harmful objects or pills, banging their heads against the wall, and smearing feces on their cells and bodies."[185] In 2017, two people committed suicide.[186] According to an extensive expert report, the SMU was "one of the harshest and most draconian" facilities in the country and those detained in the SMU were "among the most psychologically traumatized persons [the expert had] ever assessed in this context" and were at "grave risk of harm."[187] The expert report included pages of deeply disturbing photographs from within the SMU.[188]

Plaintiffs alleged violations of their Eighth and Fourteenth Amendment rights because the DOC failed to meaningfully review confinement in the SMU, "deprive[d] [them] of basic human needs, create[d] a substantial risk of serious mental and physical harm, violate[d] basic standards of decency, and constitute[d] grossly disproportionate punishment."[189] Gumm alleged that while in the SMU, he received inadequate food, causing severe weight loss and putting him at a substantial risk of serious medical harm.[190] Initially, Gumm sought preliminary and permanent injunctions requiring the defendants to transfer him to the general population and establish procedural safeguards and "conditions of confinement that reasonably mitigate the substantial risk of serious harm caused by prolonged isolation."[191] Once other plaintiffs joined his lawsuit, they sought preliminary injunctions requiring defendants to "[o]ffer at least three hours of daily out-of-cell time to all prisoners in the SMU" and, within thirty days, establish a plan for providing "meaningful activities and opportunities for social interaction" and for "evaluat[ing] all prisoners in the SMU to determine which prisoners have mental illness and to promptly transfer such persons out of the SMU."[192]

The case ultimately settled, with a permanent injunction issuing. As part of the settlement, the DOC agreed that all inmates would receive at least four hours of daily out-of-cell time during the week, including access to an outdoor recreation area; that inmates would receive access to the library and to at least two hours a week of programming, including GED classes, if desired; that inmates housed in the SMU would receive food that is the same as the food given to those housed elsewhere; and that, with a few exceptions, no one is to remain

185. Press Release, S. Ctr. for Human Rights, *supra* note 180.

186. *Id.*

187. Expert Report and Declaration of Professor Craig Haney, Ph.D., J.D. at 9–10, Gumm v. Jacobs, No. 5:15-cv-41-MTT, 2017 WL 4106240 (M.D. Ga. July 10, 2018).

188. *Id.* at 119–68.

189. Second Amended Complaint, *supra* note 181, at 5.

190. *Id.*

191. *Id.* at 70–71.

192. Plaintiffs' Motion for Preliminary Injunction at 2, *Gumm*, No. 5:15-cv-41-MTT, 2017 WL 4106240.

housed in the SMU longer than two years.[193] The court noted that the "relief provided in the Settlement Agreement is necessary to prevent violations of prisoners' constitutional rights . . . and constitutes the least intrusive means of ensuring compliance with minimal constitutional requirements."[194]

A recent case out of Alabama provides another illustration. A state law in Alabama purportedly permits sheriffs to "keep and retain," as part of their income, taxpayer dollars allocated for feeding people in jails.[195] In an effort to learn which sheriffs have interpreted the law in this way and by how much they have profited, two nonprofit organizations—the Southern Center for Human Rights and the Alabama Appleseed Center for Law and Justice—sent letters to every sheriff in Alabama requesting copies of financial records that show how much of the jail-food budget each has kept for personal use.[196] Forty-nine of sixty-seven sheriffs refused to produce the records, claiming that these documents are "personal."[197] One sheriff who responded indicated that he "took more than $250,000 in 'compensation' from 'food provisions' in both 2016 and 2015. Another sheriff was held in contempt of a federal court in 2017 after removing $160,000 from the jail food account and investing it in a used car dealership."[198] A third sheriff, who was subsequently voted out of office, released tax forms showing he made a profit of $672,392 from the prisoner food funds in 2015 and 2016.[199]

After not hearing back from an open-records request, the two organizations filed a state lawsuit against Alabama officials, alleging that they were appropriating funds designated for the provision of food to inmates.[200] The lawsuit sought a declaratory judgment that the requested records are public, not "personal," and unspecified injunctive relief.[201] Ultimately, the court granted

193. Final Order and Permanent Injunction, App. A at 4–8, *Gumm*, No. 5:15-cv-41-MTT, 2017 WL 4102640.

194. Final Order and Permanent Injunction at 7, *Gumm*, No. 5:15-cv-41_MTT, 2017 WL 4102640.

195. Press Release, S. Ctr. for Human Rights, Civil Rights Groups Sue 49 Alabama Sheriffs for Access to Public Records Showing How Sheriffs Personally Profit from Funds Allocated for Feeding People in Jail (Jan. 8, 2018), https://www.schr.org/resources/civil_rights_groups_sue_49_alabama_sheriffs_for_access_to_public_records_showing_how.

196. *Id.*

197. *Id.*

198. *Id.*

199. *Alabama Sheriff Kept over $600k Meant for Inmates' Food, then He Lost Reelection*, USA TODAY (Jun. 7, 2018, 9:46 AM), https://www.usatoday.com/story/news/politics/2018/06/07/alabama-sheriff-kept-thousands-meant-inmates-food-lost-reelection/679929002/; Mary Papenfuss, *Alabama Sheriff Pocketed $1.5 Million in ICE Funds for Immigrant Food: Report,* HUFFPOST (Jan. 1, 2019, 8:05 AM), https://www.huffingtonpost.ca/entry/alabama-sheriff-pockets-federal-funds-immigrant-inmate-food_n_5c29a81de4b0407e908400a8.

200. S. Ctr. for Human Rights v. Ellis, No. CV-2018-900001.00 (Cir. Ct. of Hale Cty., Ala. Aug. 3, 2018) (Alacourt).

201. Complaint, *Ellis* (Alacourt), https://www.schr.org/files/post/files/HaleCountyAL.PDF.

the defendants' motion for judgment on the pleadings, thereby dismissing the lawsuit.[202]

After the nonprofits filed the lawsuit, but prior to the dismissal of the case, the Governor of Alabama directed the state comptroller to no longer pay jail-food money directly to the sheriffs.[203] In response, one former county sheriff sued the state comptroller, seeking a declaratory judgment to try to keep the money, saying the Governor had no authority to change the practice.[204] Subsequently, the two nonprofits, joined by other organizations, sent a letter to all three U.S. Attorneys' Offices in Alabama, encouraging them to investigate Alabama sheriffs with federal detention contracts who have personally profited from the jail-food funds.[205] In May 2019, the Alabama Legislature enacted restrictions on the use of money allocated to counties to provide food for jail inmates, requiring that counties establish a "prisoner feeding fund" to safeguard the money designated for that purpose.[206] Thus, although the request for an injunction was unavailing in this case, it triggered state officials to review the policies affecting inmates on a daily basis.

These are only two in a long string of cases litigating conditions of confinement and pretrial and postconviction institutions.[207] Equitable relief, particularly at the state level, seems like an important option for courts to consider in this type of case or other cases challenging conditions of confinement. An injunction can prevent the parties from continuing to deny inmates the nutrition

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202. *Ellis*, at 14 (Alacourt). The court cited three reasons for the dismissal: the lack of standing of Alabama Appleseed Center for Law and Justice, *id.* at 4–9; the ripeness of the claim, *id.* at 9–10; and abatement of the claim due to a pending lawsuit against the Southern Center for Human Rights filed by one of the named defendants addressing these same issues, *id.* at 10–13.

203. Jalea Brooks, *Alabama Will No Longer Give Jail Food Funds to "Sheriff's* [sic] *Personally,"* ALA. NEWS NETWORK (Jul. 11, 2018, 6:54 PM), https://www.alabamanews.net/2018/07/11/alabama-will-no-longer-give-jail-food-funds-to-sheriffs-personally/.

204. Joel Porter, *Former Marshall County Sheriff Sues to Keep Jail Food Money*, WHNT NEWS 19 (Feb. 1, 2019, 10:46 PM), https://whnt.com/2019/02/01/former-marshall-county-sheriff-claims-jail-food-funding-should-be-his/.

205. Press Release, S. Ctr. for Human Rights, Groups Call for Investigation into Potential Violations of Federal Law by Alabama Sheriffs with Federal Detention Contracts Who Convert Jail Food Funds to Personal Use (Oct. 17, 2018), https://www.schr.org/resources/groups_call_for_investigation_into_potential_violations_of_federal_law_by_alabama_sheriffs. Numerous counties house federal detainees in county jails based on contracts with the U.S. Marshals Service and U.S. Immigration and Customs Enforcement. *Id.* The nonprofits cite a specific example of a sheriff profiting far more than he received from state and municipal sources combined, suggesting that the funds he pocketed must have been federal. *Id.*

206. Mike Cason, *Alabama Lawmakers Pass Bill to Protect Jail Food Funds*, AL.COM (May 2, 2019), https://www.al.com/news/2019/05/alabama-lawmakers-pass-bill-to-protect-jail-food-funds.html.

207. *See, e.g.*, *Agreement Settles Lawsuit Challenging Overcrowded and Dangerous Conditions at Donaldson Correctional Facility*, S. CTR. FOR HUM. RTS. (Apr. 21, 2011), https://www.schr.org/action/resources/agreement_settles_lawsuit_challenging_overcrowded_and_dangerous_conditions_at_donal; Derek Gilna, *California Jail Settles Class-Action Lawsuit Over Conditions of Confinement*, PRISON LEGAL NEWS (Apr. 2, 2019), https://www.prisonlegalnews.org/news/2019/apr/2/california-jail-settles-class-action-lawsuit-over-conditions-confinement/; *Healthcare*, S. CTR. FOR HUM. RTS., https://www.schr.org/our-work/prisons-jails/healthcare (last visited Oct. 17, 2019).

and sustenance they need, or it can ensure that jails and prisons provide adequate medical care, as just two prominent examples. Often, these cases are resolved through the issuance of injunctions—preliminary, permanent, or both—sometimes after settlement and other times as a result of a judge's order or a trial verdict.

* * *

Injunctions aim to prevent harm on the front end—to stop a party from acting in a manner that causes a particular harm. The other two equitable remedies discussed are aimed at establishing a particular right or recovering an existing right. For example, a court may order specific performance of a plea agreement after the government breaches it or when defense counsel provides ineffective assistance of counsel to a defendant in the context of that plea agreement.

B. Specific Performance of Plea Offers and Plea Bargains

Much of the appellate litigation occurring in criminal cases involves appeals from some aspect of the plea-bargaining process. After all, 97% of federal convictions and 94% of state felony convictions are the result of guilty pleas.[208] *Santobello v. New York* was the first significant case in which the Supreme Court invoked equity, specifically the doctrine of specific performance, to resolve an issue with the plea process.[209] Since that time, both federal and state courts have continued to rely on specific performance as an effective remedy for wrongs incurred during the plea process.

Rudolph Santobello was indicted on two gambling-related charges. After entering an initial plea of not guilty, his attorney worked out a deal with the prosecutor wherein Santobello would agree to plead guilty to a lesser-included offense that carried a maximum sentence of one year of incarceration.[210] In return, the government attorney "agreed to make no recommendation as to the sentence."[211] Consistent with this agreement, Santobello entered a guilty plea, and the court set a date for sentencing.[212] A number of delays occurred, and after about seven months, Santobello had his sentencing hearing with new counsel, a new prosecutor, and in front of a new judge.[213] The new prosecutor

208. *See* UNIVERSITY AT ALBANY, HINDELANG CRIMINAL JUSTICE RESEARCH CTR., SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS, tbl. 5.22.2009, http://www.albany.edu/sourcebook/pdf/t5222009.pdf (last visited Oct. 20, 2019); *id.* at tbl. 5.46.2006, https://www.albany.edu/sourcebook/pdf/t5462006.pdf (last visited Oct. 20, 2019).

209. 404 U.S. 257 (1971).

210. *Id.* at 258.

211. *Id.*

212. *Id.*

213. *Id.* at 258–59.

requested a one-year sentence over defense counsel's objection, in light of the initial prosecutor's promise not to make a sentencing recommendation.[214] Defense counsel asked to adjourn the proceeding to get proof of the first prosecutor's promise, as the new prosecutor claimed there was nothing in the record to indicate such a promise had been made.[215] Assuring defense counsel that he was "not at all influenced by what the District Attorney [said]," the judge proceeded to sentence Santobello to the maximum sentence of one year.[216] Santobello appealed, and the Government conceded on appeal that the initial prosecutor had promised to make no recommendation at sentencing.[217]

Finding that "[d]isposition of charges after plea discussions is not only an essential part of the process but a highly desirable part for many reasons,"[218] the Supreme Court found "[t]his phase of the process of criminal justice, and the adjudicative element inherent in accepting a plea of guilty, must be attended by safeguards to insure the defendant what is reasonably due in the circumstances."[219] Although the individual circumstances in any given case might vary, "a constant factor is that when a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled."[220] Despite the fact that the second prosecutor only "inadvertently" breached the agreement made with Santobello and notwithstanding the judge's comment that he was not influenced by the prosecutor's sentencing argument, "the interests of justice and appropriate recognition of the duties of the prosecution in relation to promises made in the negotiation of pleas of guilty will be best served by remanding the case to the state courts for further consideration."[221]

The remedy for this breach, of course, is the critical issue. The Court contemplated two potential remedies on remand: specific performance of the plea agreement in front of a different sentencing judge or the opportunity for Santobello to withdraw his guilty plea, as he was requesting.[222] On remand, the lower court required specific performance, finding Santobello's plea had been entered into voluntarily by a defendant "not inexperienced in criminal proceedings," with the assistance of the counsel of his choice.[223] The sole dissenting justice thought the State should have the option of reprosecuting the initial charges.[224]

214. *Id.* at 259.
215. *Id.*
216. *Id.* at 259–60.
217. *Id.* at 262.
218. *Id.* at 261.
219. *Id.* at 262.
220. *Id.*
221. *Id.* at 262–63.
222. *Id.*
223. People v. Santobello, 39 A.D.2d 654, 655 (N.Y. App. Div. 1972).
224. *Id.* at 656 (Steuer, J., dissenting).

The Ninth Circuit has reinforced *Santobello*'s holding and the appropriateness of the specific performance remedy in the case of government breach. In the context of a plea agreement where the Government agreed to recommend a certain sentence or sentencing range at the time the plea was entered but then subsequently breached that aspect of the plea agreement, the court said the following: if the defendant "timely moves for specific performance, the district court must grant the motion, order the government to fulfill its obligations under the agreement, and immediately transfer the case to a different district judge to ensure that the decision to accept or reject the agreement will be untainted by the breach."[225] If the district court fails to grant the defense's motion for specific performance and rejects the agreement that the parties reached, "it commits an error of law and thereby abuses its discretion."[226]

The Supreme Court contemplated the remedy of specific performance in another significant plea-bargaining case more than forty years after *Santobello*, *Lafler v. Cooper*.[227] This time, rather than an allegation of government breach, the issue before the Court involved the proper remedy when constitutionally ineffective counsel prejudiced the defendant by encouraging a trial rather than communicating the substantially more appealing plea offer.[228] Sometimes this scenario arises when the plea offer allows for a guilty plea to a lesser charge; other times it arises when the plea is to a lesser sentence or to a charge that does not carry a mandatory minimum sentence. Although the Court contemplated specific performance as a remedy, the Court was less convinced that specific performance was the sole or most appropriate remedy.[229]

Blaine Lafler was charged with assault with intent to murder and several other firearm-related charges, in addition to a misdemeanor marijuana charge.[230] The Michigan prosecutor twice offered to dismiss two charges and recommend a sentence of fifty-one to eighty-five months, in exchange for Lafler's plea to the other two charges.[231] Despite expressing a willingness to accept the offer, Lafler ultimately rejected it, purportedly at the recommendation of counsel, who told Lafler he could not be convicted of assault with intent to murder because he shot the complainant below the waist.[232] Lafler went to trial, was convicted, and received a mandatory-minimum sentence of 185 to 360 months in prison—more than three times the initial offer.[233]

225. United States v. Heredia, 768 F.3d 1220, 1236 (9th Cir. 2014).
226. *Id.*
227. 566 U.S. 156 (2012).
228. *Id.* at 160.
229. *Id.* at 174.
230. *Id.* at 161.
231. *Id.*
232. *Id.*
233. *Id.*

On appeal, Lafler claimed ineffective assistance of counsel. The state appellate courts rejected his argument, but the federal district court granted an initial writ of habeas corpus, finding the lower courts "had unreasonably applied the [test] for [in]effective assistance of counsel [from] *Strickland v. Washington*."[234] The district court ordered "specific performance of [respondent's] original plea agreement" as the remedy.[235] Having earlier that day found the "Sixth Amendment right to counsel . . . extends to the plea-bargaining process,"[236] the Supreme Court agreed that the lower courts erred in how they applied *Strickland* in the context presented by Lafler, but the Court was not convinced that the district court's remedy was the right one.

Reiterating that the remedy "must 'neutralize the taint' of [the] constitutional violation," the Court noted that "Sixth Amendment remedies [likewise] should be 'tailored to the injury suffered from the constitutional violation and should not unnecessarily infringe on competing interests.'"[237] The remedy cannot "grant a windfall to the defendant or needlessly squander the considerable resources the State properly invested in the criminal prosecution."[238] Here, the Court observed that "[t]he specific injury suffered by defendants who decline a plea offer as a result of ineffective assistance of counsel and then receive a greater sentence as a result of trial can come in at least one of two forms"[239]: a lesser sentence under the plea than they got at trial or a conviction for a lesser offense than the charge of conviction received at trial—which sometimes might involve the imposition of a mandatory minimum sentence.[240] If the constitutional injury was a greater sentence, the Court suggested that the lower court

> conduct an evidentiary hearing to determine whether the defendant has shown a reasonable probability that but for counsel's errors he would have accepted the plea. If the showing is made, the court may exercise discretion in determining whether the defendant should receive the term of imprisonment the government offered in the plea, the sentence he received at trial, or something in between.[241]

In the second scenario, that of a conviction for a greater charge or a charge carrying a mandatory minimum, the Court indicated that reoffering the initial

234. *Id.* at 162; *see also* Strickland v. Washington, 466 U.S. 668 (1984). *Strickland* established a two-part test for determining whether defense counsel is ineffective in a criminal case: the defendant must show, first, "that counsel's representation fell below an objective standard of reasonableness" (the "performance" prong) and, second, that but for counsel's errors, there is a reasonable probability that the result of the proceeding would have been different. *Id.* at 688, 694.

235. *Lafler*, 566 U.S. at 162 (quoting Cooper v. Lafler, No. 06–11068, 2009 WL 817712, at *9 (E.D. Mich. Mar. 26, 2009)).

236. *Id.* (citing Missouri v. Frye, 566 U.S. 134, 142–44 (2012)).

237. *Id.* at 170 (quoting United States v. Morrison, 449 U.S. 361, 364 (1981)).

238. *Id.*

239. *Id.*

240. *Id.* at 170–71.

241. *Id.* at 171.

plea might well be the most appropriate remedy.[242] Essentially, in either scenario, the remedy is simply left to the trial judge. Specific performance might be appropriate, or it might not.

On the facts of *Lafler*, the Court held that the district court's specific-performance remedy was not the appropriate one.[243] Rather, the state should be required to reoffer the initial plea bargain, and then, if the defendant accepts it, the state trial court could "exercise its discretion" and decide "whether to vacate the convictions and resentence respondent pursuant to the plea agreement, to vacate only some of the convictions and resentence respondent accordingly, or to leave the convictions and sentence from trial undisturbed."[244]

Subsequent to *Lafler*, several lower courts—both state and federal—have ordered specific performance of the initial plea offer,[245] although a few others have rejected the remedy.[246] In most cases, courts never reach the issue of remedy, as they reject the claim of ineffective assistance or find that procedural hurdles bar consideration of the claim.

C. Restitution

Restitution is one of the few equity-based remedies to appear regularly in criminal court proceedings. Restitution traditionally has been defined as a remedy intended to rectify one party's unjust enrichment at another party's expense by requiring the erring party to disgorge her unlawful gain.[247] The "restitution" remedy used with regularity in criminal sentencing proceedings, however, is often distinct from this familiar principle. Criminal courts now employ what many call "criminal restitution" but what is more aptly termed "punitive compensation,"[248] a remedy intended to "make [a] victim 'whole'" by requiring a criminal defendant to compensate the victim for financial, physical, and emotional losses.[249] Resembling civil damages, punitive compensation does not involve the disgorgement of unlawful gain, but rather it involves payments to a victim as reimbursement of losses and compensation for intangible harms. Although restitution in its traditional sense—the disgorgement of unjust enrichment—

242. *Id.*

243. *Id.* at 174.

244. *Id.*

245. *See, e.g.*, United States v. Brunsman, No. 1:11-cr-014-SJD-MRM, 2016 WL 2998110, at *8–9 (S.D. Ohio May 25, 2016); United States v. Merlino, 109 F. Supp. 3d 368, 377 (D. Mass. 2015); Soto-Lopez v. United States, No. 07-cr-3475-IEG, 2012 WL 3134253, at *8 (S.D. Cal. Aug. 1, 2012)); State v. Lopez, 872 N.W.2d 159, 181 (Iowa 2015); McAmis v. State, 317 P.3d 49, 53 (Idaho Ct. App. 2013); State v. Dennis, No. A-1843-11T2, 2013 WL 2459864, at *3–4 (N.J. Super. Ct. App. Div. June 10, 2013).

246. Rodriguez v. State, 470 S.W.3d 823, 831 (Tex. Crim. App. 2015); *cf.* State v. Estrada, No. A-2078-14T3, 2018 WL 2925776, at *12–13 (N.J. Super. Ct. App. Div. June 12, 2018).

247. RESTATEMENT OF THE LAW (THIRD) RESTITUTION AND UNJUST ENRICHMENT § 1, cmts. a, b (AM. LAW INST. 2011).

248. *See* Cortney E. Lollar, *Punitive Compensation*, 51 TULSA L. REV. 99, 100 (2015).

249. *Id.*; Lollar, *supra* note 12.

does sometimes play a role in criminal cases, particularly cases involving theft, fraud, or embezzlement, punitive compensation is also frequently imposed. In fact, most state and federal "restitution" statutes are compensation statutes, not disgorgement statutes.[250] However, both punitive compensation and traditional restitution fall under the auspices of what most call "criminal restitution."

Although restitution began as an equitable remedy, at this point, all but the most immersed scholars have difficulty parsing out whether restitution is a legal remedy, an equitable remedy, or some combination thereof.[251] According to the Restatement (Third) of Restitution and Unjust Enrichment, "[t]he status of restitution as belonging to law or to equity has been ambiguous from the outset. The answer is that restitution may be either or both."[252] This ambiguity is due to the fact that restitution "acquired its modern contours as the result of an explicit amalgamation of rights and remedies drawn from both systems," law and equity.[253] As a rule of thumb, the Restatement reporters suggest that "[i]f restitution to the claimant is accomplished exclusively by a judgment for money, without resort to any of the ancillary . . . devices traditionally available in equity but not at law," such as constructive trusts or subrogation, "the remedy is presumptively legal."[254]

When restitution is imposed in criminal cases, it is almost always imposed as a judgment for money, without resort to "ancillary . . . devices traditionally available in equity."[255] Rarely is a defendant ordered to return a stolen watch, for example, as most of the time the appropriated item is long gone. As a result, in most criminal cases, restitution operates as a legal, rather than an equitable, device. For another critical reason, in most cases, restitution can only be a legal, not an equitable, remedy: the equitable remedy of restitution only contemplated disgorgement of a person's unlawful gain, not the broader conception of reim-

250. *See, e.g.*, 18 U.S.C. § 3664(f)(1)(A) (2015) ("In each order of restitution, the court shall order restitution to each victim in the full amount of each victim's losses as determined by the court . . . ."); *id.* § 3663A(b)(2)–(4) (requiring a court to order a defendant to reimburse the victim for medical, psychiatric, and psychological treatment; physical and occupational therapy; lost income; child care costs; and other expenses stemming from the offense itself and the investigation and prosecution of the offense); *id.* § 3663(b)(2)–(6); *id.* § 2259 (b)(1)–(2) (Supp. 2019) (requiring a court to order defendant to pay the "full amount of the victim's losses").

251. RESTATEMENT OF THE LAW (THIRD) RESTITUTION AND UNJUST ENRICHMENT § 4(1).

252. *Id.* § 4 cmt. a. According to the Restatement reporters, this question would be merely of historical interest "were it not for two peculiarities of American law." *Id.* The first relates to the Seventh Amendment jury-trial right, a right not generally applicable in the criminal context. *Id.* The second occurs when a federal statute provides that the rights authorized by that statute "may be judicially enforced via 'equitable relief.'" *Id.* With regard to both "peculiarities," "[r]esolution of such problems turns on issues of constitutional and statutory interpretation that are beyond the reach of legal history and outside the scope of this Restatement." *Id.*

253. *Id.* § 4 cmt. b.

254. *See id.* § 4 cmt. d. If the money does not need to be traced or is not coming from a particular source, legal restitution is appropriate. *Id*; Rendleman, *supra* note 67, at 1433.

255. RESTATEMENT OF THE LAW (THIRD) RESTITUTION AND UNJUST ENRICHMENT § 4 cmt. d.

bursement for victim losses that the vast majority of criminal "restitution" statutes currently contemplate. Criminal restitution statutes confirm this legal grounding, with numerous statutes allowing for, or requiring, compensation for losses to be imposed in a range of criminal cases.[256] Allusions to equitable principles are markedly absent.

Although much can be written about restitution,[257] most of the current issues related to restitution involve its operation as a legal mechanism rather than an equitable one.[258]

III. THE SIGNIFICANCE OF COURTS' ENGAGEMENT WITH EQUITABLE REMEDIES

The circumstances in which parties and courts have invoked equitable remedies give testament to the remaining need for these remedies. In various scenarios—from financial obligation relief to prosecutorial abuse of witnesses, from untenable practices of prison officials to ineffective lawyering by defense counsel—parties and crime victims have sought equitable relief from some disquieting aspects of the criminal legal process. These remedies do not always inure to a criminal defendant's benefit, but most of the time, they provide important relief to people charged with or convicted of crimes. When taken as a whole, these equitable avenues for relief afford a necessary complement to the legal remedies currently available in criminal cases.

In light of the range of troubling issues resolved via equity, the importance of equitable remedies appears undeniable, not only for the critical role they once served but also for the role they continue to serve in balancing out the legal rules and procedures that are the backbone of our legal system. Harkening back to Martha Nussbaum's observations, we are reminded that, although "[t]he point of the rule of law is to bring us as close as possible to what equity would discern in a variety of cases, . . . no such rules can be precise or sensitive enough, and when they have manifestly erred, it is justice itself . . . to use equity's flexible standard."[259]

The equity to which Nussbaum refers is broader than the bounded notion of equity with which courts currently engage. Even within narrowly conscripted bounds, however, employing equity in the criminal context can and does allow relief, both in individual cases and on a more systemic level, as the illustrations throughout this Article show. Equitable remedies are a viable method for chal-

256. *See, e.g.*, 18 U.S.C. § 1593 (2015 & Supp. 2019); *id.* § 2248 (2015); *id.* § 2259 (2015 & Supp. 2019); *id.* §§ 3663, 3663A, 3664 (2015).

257. For those interested in a more in-depth discussion of criminal restitution, two of my previous articles discuss the subject in depth. *See, e.g.*, Lollar, *supra* note 12; Lollar, *supra* note 248.

258. *Id.*

259. Nussbaum, *supra* note 18, at 96.

lenging the increasing, troubling use of legal financial obligations and unnecessarily punitive bail practices. They provide an avenue for taking on the more unscrupulous practices of private probation companies and prison officials. They allow for relief from a criminal conviction when evidence of ineffective assistance of counsel in plea negotiations only comes to light after a person has been sentenced. These are but a few of the situations in which an equitable remedy has provided relief.

The need for equity to continue as a counterpart to law, for equitable remedies to remain a part of our legal system, is particularly pressing after a half-century or more of increasingly punitive impulses. Equitable remedies can play a crucial role in beginning to balance out the substantive law's overinclusivity, the narrowing of procedural protections for criminal defendants, and the staggering expansion of criminal sentences, both in the form of length of sentence and monetary sanctions imposed. Yet in light of equity's current inability to directly challenge any aspect of the investigation or prosecution of a criminal case, equitable remedies cannot address some of the most pervasive and troubling aspects of the criminal process. At this point, equity simply does not have authorization to reach the more significant inequities in the system.

But the growing litigation around equitable remedies in criminal cases and the greater prevalence of judges at the state and federal levels who are willing to consider, analyze, and sometimes even grant equitable relief is a start in the right direction. As this Article shows, even when cases settle, the request for an equitable remedy often leads to the positive resolution of the case from the perspective of fairness and justice.

This Article also raises the question of what role equity can and should play in the resolution of criminal cases. Equity came into being to refine and balance out the rule of law, but it became too unbounded, too subject to the "carelessness, bias, and arbitrariness endemic to any totally discretionary" system.[260] Arguably, the pendulum has swung too far in the other direction. In the context of criminal cases, the current legal system errs on the side of rigidity and inflexibility. Perhaps there is an expanded role for equity in this new criminal legal reality.

Equity, as it is narrowly conceived, provides only a limited avenue for judges to circumvent many statutory and extralegal constraints. But the potential is there. One can envision equity providing a much needed counterbalance desired by both advocates and scholars alike. This is not a call for a system wholly grounded in equity. Allowing judges unbridled discretion to make rulings based on their own personal view of what is "equitable" and free of standards, predictability, and structure is likely to result in an undesirable system subject to "arbitrariness and corruption," and dependent "upon constitution,

260. *Id.* at 96.

temper, and passion."[261] A more balanced system, with a bounded form of equity that is truly able to serve as a counterweight and corrective to law, can be achieved.[262] The next step is to ascertain how best to adjust the current balance between law and equity in order to reach equipoise. This Article aims to be the starting point for that conversation.

CONCLUSION

> [E]quitable jurisdiction exists and will be exercised in all cases, and under all circumstances, where the remedy at law is not adequate, complete, and certain, so as to meet all the requirements of justice. That there *is* a legal remedy is not enough; such remedy . . . must be in all respects as satisfactory as the relief furnished by a court of equity.[263]

Although these words were written by John Pomeroy more than a century ago, they remain important guiding principles for today's criminal jurisprudence. If the legal remedy is insufficient, courts must look to equity to fill the gaps, to act as a corrective to the inequities presented by the legal system. Courts have started to make this move in criminal cases. This Article takes note of numerous instances in which courts have engaged with criminal equity, granting remedial relief in a criminal case or group of cases, and hopes to encourage a richer and more substantive discussion of how courts might further engage with equity to help right the current imbalances in the criminal legal system.

261. Rendleman, *supra* note 67, at 1400–01 (quoting JAMES OLDHAM, THE MANSFIELD MANUSCRIPTS AND THE GROWTH OF ENGLISH LAW IN THE EIGHTEENTH CENTURY 1356 (1992)).

262. See SAMET, *supra* note 6, for one potential method of employing equity more broadly but with clear boundaries.

263. JOHN NORTON POMEROY, A TREATISE ON EQUITY JURISPRUDENCE § 297 (Students' ed. 1907).