POWER OVER PROCEDURE

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American law should better protect people's bodies from being caged than it should protect people's money. And yet in so many ways it does the opposite. Instead of calibrating protections for defendants to the importance of the interest at stake, disparities between pretrial protections in federal civil and criminal procedure instead track differences in race and class between defendants in the two systems. Criminal defendants, for instance, can be locked in cages for two days on a mere accusation by police before a magistrate considers the validity of that deprivation. Civil defendants, by contrast, typically cannot be deprived of their property without first having a judge hear their arguments. Criminal defendants sometimes do not learn about the government's evidence until the eve of or during trial—a trial that comes in scant few cases. Civil defendants would never be forced into such a trial by surprise but rather have numerous tools of formal discovery to compel evidence from the opposing party throughout the pretrial period. This Article argues that comparing federal criminal procedure to federal civil procedure across several substantive areas provides new and valuable insight into the systemic racism and classism woven into the fabric of U.S. law. Criminal defendants are disproportionately poor people of color, while civil defendants are often wealthy corporations whose executives are largely

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White; those wealthy civil defendants play an outsized role in developing civil procedure.

Trials are scarce in both civil and criminal procedure. But civil procedure—where wealthy White defendants are disproportionately powerful—offers significant pretrial protection for defendants that makes trials less necessary. Criminal law has also made trials largely disappear but not by affording procedural protections to defendants. Rather, criminal law made going to trial much too risky for defendants. Nonetheless, instead of recognizing the lack of trials and shifting procedural protections pretrial, criminal law continues to rest its faith on mythological trials to protect defendants' rights.

TABLE OF CONTENTS

INTRODUCTION

American law should better protect people's bodies from being caged than it should protect people's money. And yet it does the opposite. Federal civil procedure is disproportionately shaped by and for wealthy corporate defendants whose executives are often White.[1] In federal criminal procedure, by contrast, defendants are disproportionately poor people of color. The disparity in the identity of defendants and that a powerful actor (the government) brings criminal cases yields different political and rulemaking power; powerful actors do not seek or obtain defendant-favorable criminal procedure, and the race and class trends of criminal defendants as a

1. *See generally* Brooke D. Coleman, *One Percent Procedure*, 91 WASH. L. REV. 1005 (2016) [hereinafter Coleman, *One Percent Procedure*]; Brooke D. Coleman, *#SoWhiteMale: Federal Procedural Rulemaking Committees*, 68 UCLA L. REV. DISCOURSE 370 (2020) [hereinafter Coleman, *#SoWhiteMale*].

group may make this status quo tolerable. Power, race, and class undergird the way that American law better protects the rights of civil defendants than criminal defendants.[2]

Disparities in pretrial[3] procedure occur throughout civil and criminal procedure. In civil procedure, potential defendants can opt out of future litigation through boilerplate language in a contract of adhesion in favor of arbitrations that will rarely be filed. Should a defendant face a lawsuit, it will likely defend itself without its rights being encumbered during the pendency of the case. It will not be forced to undergo the hassles and expenses of discovery—let alone trial—unless the plaintiff can meet the fairly stringent plausibility pleading standard. And the defendant benefits from the fact that the plaintiff must muster those allegations without access to compulsory process. For those cases that survive motions to dismiss, defendants have access to a robust array of discovery tools—the ability to compel production of documents, compel answers to written questions, compel their opponents to admit allegations, and depose witnesses. After robust discovery, judges may resolve a case without trial by summary judgment; judges have proven quite willing to do so despite the constitutional problems.[4] As many of these procedures have become more favorable to civil defendants in the past few decades,[5] they have rendered trials less frequent and thus made *pretrial* procedure more important.[6]

Criminal procedure, by contrast, offers meager pretrial protections for defendants.[7] Unlike civil defendants who can usually

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2. This Article, in part, seeks to contribute to the conversation about how civil procedure may serve "as a tool to reinforce racial subjugation." *See* Portia Pedro, *A Prelude to a Critical Race Theoretical Account of Civil Procedure*, 107 VA. L. REV. ONLINE 143, 148 (2021) (calling for such an inquiry).

3. "Pretrial" is somewhat of a misnomer because trials are exceedingly rare in both the federal civil and criminal systems. *See* John H. Langbein, *The Disappearance of Civil Trial in the United States*, 122 YALE L.J. 522, 542 (2012) (making this point about the federal civil system).

4. *See* Suja A. Thomas, *Why Summary Judgment Is Unconstitutional*, 93 VA. L. REV. 139 (2007) (convincingly arguing that summary judgment is unconstitutional).

5. One scholar frames these shifts toward more-defendant-friendly civil procedure as evincing neoliberalism insofar as it focuses on efficiency and ignores power disparities. *See* Luke Norris, *Neoliberal Civil Procedure*, 12 U.C. IRVINE L. REV. 471, 476–511 (2022).

6. *See generally* Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. 459 (2004) (providing statistics about the decline of trials from 1962 to 2002); Langbein, *supra* note 3 (explaining the role of pretrial procedure in reducing the number of trials).

7. Darryl Brown convincingly attributes this lack of protections to a neoliberal ethos that ignores underlying power disparities and seeks to allow resolution by the invisible hand of a market-like force without a prominent role for government regulation (the judge). DARRYL K. BROWN, FREE MARKET

contest the allegations against them without their interests being encumbered, three-quarters of federal criminal defendants face charges from behind bars[8]—detention that imposes massive burdens on defendants' lives and makes defending themselves far more difficult.[9] Unlike in the civil system where a plaintiff's complaint must survive a plausibility threshold, criminal pleading requires very little. That is true even though prosecutors can compel production of evidence before bringing a case through policing or grand jury investigations. Once prosecutors cross the very low pleading threshold, criminal defendants do not have access to compulsory process anything like the document production, interrogatories, requests for admission, or discovery depositions to defend themselves that civil defendants have. And even when prosecutors cannot make out all the elements of the charged crimes, criminal law has no summary judgment mechanism to allow defendants to avoid trial.[10] Criminal procedure has no mechanism that compares to the power of arbitration. Its closest counterpart is diversion insofar as it provides a way for defendants to get outside of the standard criminal process; diversion is, however, a vastly less powerful tool than civil arbitration. Diversion comes only at the mercy of the opponent—the prosecutor—and that mercy rarely comes.

Instead of providing *pretrial* protections, criminal procedure places its protections for defendants *at trial*—the burden of proof beyond a reasonable doubt and confrontation rights, most importantly.[11] Even defendants' due process right to disclosure of

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CRIMINAL JUSTICE: HOW DEMOCRACY AND LAISSEZ FAIRE UNDERMINE THE RULE OF LAW 3–11, 80, 143–46 (2016).

8. Stephanie Holmes Didwania, *Discretion and Disparity in Federal Detention*, 115 NW. U. L. REV. 1261, 1264 (2021) (citing the statistic that 60 percent of federal criminal defendants are detained pretrial).

9. *See, e.g.*, Stephanie Holmes Didwania, *The Immediate Consequences of Federal Pretrial Detention*, 22 AM. L. & ECON. REV. 24 (2020) (discussing the consequences of pretrial detention for federal criminal defendants).

10. This Article focuses on disparities in procedure, but there are troublingly similar differences in the breadth of judicial review of substantive proportionality between criminal sentencing and punitive damages. *See* Adam M. Gershowitz, Note, *The Supreme Court's Backwards Proportionality Jurisprudence: Comparing Judicial Review of Excessive Criminal Punishments and Excessive Punitive Damages Awards*, 86 VA. L. REV. 1249, 1252–55 (2000).

11. *See, e.g.*, William Ortman, *Confrontation in the Age of Plea Bargaining*, 121 COLUM. L. REV. 451 (2021) (arguing that the confrontation right should be adapted to recognize the reality of vanishing trials in a system of plea bargaining); Anna Roberts, *Asymmetry as Fairness: Reversing a Peremptory Trend*, 92 WASH. U. L. REV. 1503, 1545 (2015) (arguing that asymmetrical trial rights that favor defendants "typically become moot" in an era of plea bargaining); Jocelyn Simonson, *The Criminal Court Audience in a Post-Trial World*, 127 HARV. L. REV. 2173 (2014) (making a similar argument regarding public access to proceedings in systems of vanishing trials).

material exculpatory evidence often depends on a trial.[12] But criminal procedure's insistence on trusting trials to protect defendants makes sense only if one ignores that criminal law has made trials vanish too.[13] Substantive criminal law and sentencing law have made it punishingly dangerous for defendants to risk trial. Prosecutors hold massive leverage over defendants that derives from a broad and deep criminal code and very harsh (often mandatory) sentencing, including "discretionary mandatories" that prosecutors can invoke, threaten, or dismiss at their option.[14] Even without mandatory minimums, defendants convicted at trial will likely face much harsher sentences.[15] Nor does the "beyond a reasonable doubt" burden provide robust protection against convicting the innocent that many think it does.[16] Trusting trials to protect defendants' rights is thus particularly problematic.

While a procedural due process frame would afford greater protections to criminal defendants who would be locked in cages rather than merely deprived of money like their civil counterparts,[17]

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12. *E.g.*, Jenia I. Turner & Allison D. Redlich, *Two Models of Pre-Plea Discovery in Criminal Cases: An Empirical Comparison*, 73 WASH. & LEE L. REV. 285, 301 (2016).

13. Even the Supreme Court has recognized that the existence of a fair trial alone cannot cure all defective pretrial processes. Missouri v. Frye, 566 U.S. 134, 143–44 (2012).

14. *See* Russell M. Gold, *Prosecutors and Their Legislatures, Legislatures and Their Prosecutors*, *in* THE OXFORD HANDBOOK OF PROSECUTORS AND PROSECUTION 327, 329–32, 335–37 (Ronald F. Wright, Kay L. Levine, & Russell M. Gold eds., 2021) (explaining discretionary mandatories and breadth of substantive law); Russell M. Gold, Carissa Byrne Hessick & F. Andrew Hessick, *Civilizing Criminal Settlements*, 97 B.U. L. REV. 1607, 1614–28 (2017) (explaining how criminal systems facilitate guilty pleas by affording prosecutors massive leverage over defendants instead of through procedure, as civil systems do).

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

16. Brandon L. Garrett & Gregory Mitchell, *Error Aversions and Due Process*, 121 MICH. L. REV. (forthcoming 2022) (manuscript at 16–24, 38–40, 42), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4000932 (finding based on survey data that most Americans view acquitting the guilty and convicting the innocent as similarly problematic—a finding that undermines the practical effect of a reasonable doubt instruction, counseling in favor of other responses to avoid convicting the innocent, such as increased pretrial procedural protections).

17. Although incarceration is the most vivid example, criminal defendants are deprived of their liberty in a host of ways, including through probation, diversion, or other means of social control. *See, e.g.*, Alexandra Natapoff, *Misdemeanor Decriminalization*, 68 VAND. L. REV. 1055, 1088–89 (2015).

It bears recognizing here that there are plenty of civil cases with quite important stakes. *See, e.g.*, Brooke D. Coleman, Lassiter v. Department of Social Services: *Why Is It Such a Lousy Case?*, 12 NEV. L.J. 591, 591–92, 594–95 (2012);

the reality of the contrast in pretrial rights is to the contrary, at least as a practical matter.[18] Instead of calibrating protections for defendants to the importance of the interests at stake, disparities between the civil and criminal systems' approaches to pretrial procedure track differences in race and class between the two systems.

That White, wealthy interests predictably find themselves on the defendant side of the "v"[19] in high-dollar civil litigation means that they have strong incentives to shape defendant-favorable pretrial procedures through rulemaking, legislation, and Supreme Court case law.[20] So too does another powerful actor—the government—more frequently appear on the defendant side in civil litigation.[21] By contrast, criminal defendants are disproportionately poor people of color against whom the government initiates cases.[22] These race, class, and power dynamics track differential access to rules and rule interpretation.[23]

Much of this Article considers the transsubstantive[24] (or non-subject-matter-specific) rules of civil and criminal procedure. But in civil procedure, wealthy, White defendants have secured favorable rules through legislation in particular types of cases where

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Kathryn A. Sabbeth & Jessica K. Steinberg, *The Gender of* Gideon, 69 UCLA L. REV. (forthcoming 2022) (manuscript at 1, 9, 44–45) (on file with author).

18. Criminal law has numerous hearings that ostensibly afford process to defendants, but such procedures are less robust than they seem at a glance. *See infra* notes 236–48 and accompanying text.

19. *See* Judith Resnik, *The Privatization of Process: Requiem for and Celebration of the Federal Rules of Civil Procedure at 75*, 162 U. PA. L. REV. 1793, 1795–97 (2014) (explaining that transsubstantivity and the fungibility of litigants as either plaintiff or defendant yielded balanced federal rules—a dynamic that changed as corporations and the government realized they were much more likely to be defendants than plaintiffs).

20. In Marc Galanter's parlance, these wealthy, White, corporate interests are repeat player "haves" able to play for rules. *See* Marc Galanter, *Why the "Haves" Come out Ahead: Speculations on the Limits of Legal Change*, 9 L. & SOC'Y REV. 95, 97–101 (1974).

21. The federal government may read as White and wealthy. *Cf.* Pedro, *supra* note 2, at 147–48 (alluding to the role of race and white supremacy in protecting white police defendants from recourse by Black plaintiffs). For present purposes the government as *powerful* will suffice.

22. Didwania, *supra* note 8, at 1285.

23. One scholar argues that having different rules for civil and criminal cases allows civil defendants and prosecutors—the "haves" in each set of systems who are on different sides of the "v"—to avoid a confrontation with each other over rules. Ion Meyn, *The Haves of Procedure*, 60 WM. & MARY L. REV. 1765, 1770–72 (2019).

24. David Marcus, *Trans-Substantivity and the Processes of American Law*, 2013 BYU L. REV. 1191, 1191 (defining "trans-substantive" as "doctrine that, in form and manner of application, does not vary from one substantive context to the next").

defendants are predictably either wealthy entities or the government; those are also types of cases where plaintiffs are disproportionately poor people of color.[25] Special defendant-favorable rules for prisoner litigation, employment discrimination, and habeas cases track the same race and class dynamics as do the transsubstantive rules of procedure. Criminal procedure, where defendants are disproportionately poor and particularly poor people of color, has no such subject-specific procedural legislation.

These disparities in civil and criminal pretrial procedure evince institutional racism. Institutional racism exists when racial status is enforced by "unrecognized reliance on racial institutions."[26] It does not depend on decisionmakers *purposefully* discriminating based on race,[27] and it can be seen in facially-race-neutral rules.[28] This Article seeks neither to prove that purposeful racism *created* disparities between civil and criminal procedure nor to refute an account of intentionality.[29] It instead seeks to demonstrate how race and class differences have been embedded into differences in procedure across the civil-criminal divide.[30] It canvasses numerous ways in which

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25. *See, e.g.*, Margo Schlanger, *Inmate Litigation*, 116 HARV. L. REV. 1555, 1558–62 (2003).

26. Ian F. Haney López, *Institutional Racism: Judicial Conduct and a New Theory of Racial Discrimination*, 109 YALE L.J. 1717, 1811 (2000).

27. *See, e.g.*, *id.*

28. *See, e.g.*, Derrick Bell, *Racial Realism*, 24 CONN. L. REV. 363, 376–78 (1992); I. Bennett Capers, *Critical Race Theory and Criminal Justice*, 12 OHIO ST. J. CRIM. L. 1, 2 (2014); Richard Delgado & Jean Stefancic, *Critical Race Theory and Criminal Justice*, 31 HUMAN. & SOC'Y 133, 136 (2007). Critical race theorists argue that racism is far from aberrational in American law. *See, e.g.*, RICHARD DELGADO & JEAN STEFANCIC, CRITICAL RACE THEORY: AN INTRODUCTION 7 (2001).

29. For an argument that race motivated disparities between civil and criminal procedure, see Ion Meyn, *Constructing Separate and Unequal Courtrooms*, 63 ARIZ. L. REV. 1, 1–4 (2021).

30. *See* Richard Delgado, *Words That Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling*, 17 HARV. C.R.-C.L. L. REV. 133, 140–41 (1982); López, *supra* note 26, at 1723; *see also* Francisco Valdes, Jerome McCristal Culp & Angela P. Harris, *Battles Waged, Won, and Lost: Critical Race at the Turn of the Millennium*, *in* CROSSROADS, DIRECTIONS, AND A NEW CRITICAL RACE THEORY 1, 1 (Francisco Valdes et al. eds., 2002) ("Critical race theorists assert that both the procedures and the substance of American law . . . are structured to maintain white privilege.").

As a heterosexual, White, cisgender man, I approach this task with humility and appreciation for the role of personal experiences and narrative in critical race theory scholarship. *See* Richard Delgado, *The Imperial Scholar: Reflections on a Review of Civil Rights Literature*, 132 U. PA. L. REV. 561, 571 (1984) (explaining that "privileged white male writer[s]" may have a difficult time adopting a perspective that sees institutional components of racism rather than seeing racism only in its most overt forms such as slurs or lynch mobs); Sheri Lynn Johnson, Batson *from the Very Bottom of the Well: Critical Race Theory and the Supreme Court's Peremptory Challenge Jurisprudence*, 12 OHIO ST. J. CRIM.

federal civil procedure better protects defendants pretrial than does criminal procedure.

There is no single actor or set of actors at whose feet the blame lies for these unjustified disparities in pretrial procedure. The nature of the critique here is rather about the way that diffuse power has been used across all branches of government in a way that disfavors criminal defendants compared to their civil counterparts. Power over procedural rules and their interpretation and implementation is diffuse in both civil and criminal procedure. Some of the disparity comes from the rules committees that create the Federal Rules of Criminal Procedure and the Federal Rules of Civil Procedure, such as the disparities in defendants' opportunities to discover the evidence against them or the fealty of the grand jury as a potential analog to summary judgment.[31] Some comes from Congress, such as the Bail Reform Act's presumption of detention for a set of crimes—a presumption that applies quite frequently.[32] Much of the disparity, however, lies with judges who interpret and apply the rules and statutes in both systems. For instance, although the text of the rules suggests that motions to dismiss would face a similar standard in civil and criminal procedure,[33] the jurisprudence has taken divergent paths.[34] Trial judges' implementation of these rules warrants blame too.

Arguing that race plays a central role in the criminal legal system, including in criminal procedure, is not new.[35] So too have

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L. 71, 72 (2014) (explaining her hesitance to embrace the mantle of critical race theory because she is not a person of color and agreeing with critical race theorists that "perspective matters").

This Article does not claim that race and class offer the only possible explanations for the disparities.

31. For more on these comparisons, see *infra* Subparts II.B–II.C. As one scholar has so cogently explained about the civil system, "[p]ower over meaningful procedural change has passed to other institutions" than the federal rules committee. David Marcus, *The Collapse of the Federal Rules System*, 169 U. PA. L. REV. 2485, 2487 (2021).

32. Amaryllis Austin, *The Presumption for Detention Statute's Relationship to Release Rates*, FED. PROB., June 2017, at 53, 60.

33. FED. R. CIV. P. 12(b)(6); FED. R. CRIM. P. 12(b)(3)(B)(v).

34. *See infra* Subpart II.C.1.

35. *See generally*, *e.g.*, Paul Butler, *The System Is Working the Way It Is Supposed to: The Limits of Criminal Justice Reform*, 104 GEO. L.J. 1419 (2016) (explaining that many of the "problems" that critics identify in the criminal legal system that yield widely disparate results based on race are indeed intentional features of policing and punishment); Paul Butler, *Racially Based Jury Nullification: Black Power in the Criminal Justice System*, 105 YALE L.J. 677 (1995) (arguing for some race-based jury nullification as a response to widespread disparities in criminal law enforcement); Johnson, *supra* note 30 (analyzing race-based jury selection); Cynthia Lee, *(E)Racing Trayvon Martin*, 12 OHIO ST. J. CRIM. L. 91 (2014) (critiquing the colorblind approach to the trial of George

civil procedure scholars identified that wealthy, White actors shape civil procedure to favor their own interests—what Brooke Coleman calls "one percent procedure."[36] This Article's new insight is the comparative one that draws these discussions into conversation with each other.[37]

This Article is part of an emerging body of domestic civil-criminal comparative scholarship. Scholars have recently considered the disparate ways that civil and criminal procedure approach interim relief,[38] discovery[39] and e-discovery,[40] settlement facilitation,[41] finality,[42] pursuit of mass harms,[43] the role of lawyers for aggregate clients,[44] and the right to counsel.[45] The core logic underlying these comparisons between civil and criminal procedure is that both fundamentally are adjudication systems that aim to resolve disputes and that at least ostensibly seek the same basic objectives—"fairness,

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Zimmerman in the shooting death of Trayvon Martin as a lens into the problems of purportedly treating self-defense in a colorblind manner).

36. *See generally* Coleman, *One Percent Procedure*, *supra* note 1; Coleman, *#SoWhiteMale*, *supra* note 1; *cf.* Norris, *supra* note 5, at 473–75 (arguing that a turn to neoliberalism in civil procedure has included the Supreme Court obscuring or even inverting questions of power).

37. *See generally* David A. Sklansky & Stephen C. Yeazell, *Comparative Law Without Leaving Home: What Civil Procedure Can Teach Criminal Procedure, and Vice Versa*, 94 GEO. L.J. 683 (2006) (calling for more domestic comparative work between civil and criminal procedure); *see also* Russell M. Gold, *Paying for Pretrial Detention*, 98 N.C. L. REV. 1255, 1262–64 (2020) (discussing the burgeoning body of civil-criminal comparative procedure literature).

38. *See generally* Russell M. Gold, *Jail as Injunction*, 107 GEO. L.J. 501 (2019) [hereinafter Gold, *Jail as Injunction*]; Gold, *supra* note 37.

39. "Disclosures" is the more apt term in most criminal law systems than "discovery." Darryl K. Brown, *Disclosure, Security, Technology: Challenges in Pre-Trial Access to Evidence*, *in* THE OXFORD HANDBOOK OF PROSECUTORS AND PROSECUTION 101, 104 (Ronald F. Wright, Kay L. Levine, & Russell M. Gold eds., 2021).

40. *See generally* Jenia I. Turner, *Managing Digital Discovery in Criminal Cases*, 109 J. CRIM. L. & CRIMINOLOGY 237 (2019).

41. *See generally* Gold, Hessick & Hessick, *supra* note 14.

42. *See generally* William B. Rubenstein, *Finality in Class Action Litigation: Lessons from Habeas*, 82 N.Y.U. L. REV. 790 (2007).

43. *See generally* Adam S. Zimmerman & David M. Jaros, *The Criminal Class Action*, 159 U. PA. L. REV. 1385 (2011).

44. *See generally* Russell M. Gold, *"Clientless" Lawyers*, 92 WASH. L. REV. 87 (2017) [hereinafter Gold, *"Clientless" Lawyers*]; Russell M. Gold, *"Clientless" Prosecutors*, 51 GA. L. REV. 693 (2017).

45. *See* Sabbeth & Steinberg, *supra* note 17 (manuscript at 6–9). Others have argued that tort law's punitive damages proportionality analysis would provide a useful way to analyze criminal sentencing. *See* Jane Bambauer & Andrea Roth, *From Damage Caps to Decarceration: Extending Tort Law Safeguards to Criminal Sentencing*, 101 B.U. L. REV. 1667, 1672–73 (2021); *see also* Gershowitz, *supra* note 10, at 1255 (criticizing the disparity between these doctrines).

accuracy, and efficiency."[46] They thus often share sufficient similarities that one can offer lessons or insights to the other or that the differences offer a lens for critique. Rather than focusing in exhaustive depth on comparing one piece of criminal procedure to a comparable aspect of civil procedure as some of the prior literature does, this Article reveals the big picture comparison, demonstrating the broad systemic ways in which disparities between the systems privilege the White and wealthy.[47] Federal criminal and civil procedure need not be identical nor need they always serve the same values in the same proportions. But it is worth taking a critical eye to ostensible reasons that the systems approach similar tasks differently to consider whether differences are in fact justified.[48]

The comparisons here focus on federal law to eliminate differences between state and federal courts.[49] That said, the federal rules help shape state procedure, particularly civil procedure;[50] thus, federal civil defendants play an outsized role indirectly in shaping state civil procedure too.

This Article proceeds in four parts. Part I analyzes the disparity in the identity of defendants between the federal criminal and civil systems. Part II canvasses the core ways that transsubstantive federal civil pretrial procedure better protects defendants than does criminal procedure. Part III examines instances where Congress created subject-specific procedural protections for defendants in certain types of cases where defendants are nearly certain to be wealthy entities or where plaintiffs are disproportionately members of historically marginalized groups. Finally, Part IV abstracts out further to consider how these disparities interact with vanishing trials and the divergent ways that civil and criminal procedure have made trials vanish.

I. DIFFERENT DEFENDANTS WITH DIFFERENT ACCESS

Disparities in the identity of federal defendants between the federal criminal and civil systems are predictable in the United

46. Sklansky & Yeazell, *supra* note 37, at 684; *see also* Gold, *Jail as Injunction*, *supra* note 38, at 509–12 (explaining the basis for criminal-civil procedure comparisons with a particular focus on pretrial comparisons).

47. One article addresses the disparity in pleading and discovery standards while criticizing the separation between civil and criminal procedure rules. But it discusses these particular areas as case studies and does not span all aspects of procedure as this one does. *See generally* Meyn, *supra* note 23.

48. *See, e.g.*, Turner, *supra* note 40, at 288–309 (recognizing differences between civil and criminal procedure and considering how those differences affect the best approaches to e-discovery in each).

49. I will occasionally mention state courts in the analysis below, but the sizable role that state courts play in both civil and criminal procedure will provide no more than an aside in this Article.

50. Coleman, *One Percent Procedure*, *supra* note 1, at 1049.

States.[51] Criminal defendants in America are disproportionately poor people of color. Civil defendants, by contrast, are often corporations or other entities whose executives are largely White. Those wealthy, White civil defendants' interests have been disproportionately represented in crafting and in cases interpreting the Federal Rules of Civil Procedure.[52] Defendants' interests have been much less represented in crafting and interpreting the Federal Rules of Criminal Procedure.[53]

Data on the demographics of civil litigants is hard to come by.[54] But one helpful data point is that over the past two decades, only 2

51. This Article largely focuses on comparing defendants' situations between civil and criminal procedure except to note that even in federal cases when marginalized groups shift to the plaintiff side of the "v" so too do the procedural hurdles shift. It does not compare the treatment of victims of civil wrongs to that afforded to victims of criminal wrongs, in large part because the systems are too asymmetrical on that dimension insofar as the government (rather than the victim) controls prosecution. Although largely eliminating criminal prosecution by victims may protect criminal defendants more than civil defendants, I do not think it sufficiently likely to alter the analysis. Much more likely is that moving away from requiring crime victims to fund their own prosecutions makes criminal cases *more* likely and thus imperils criminal defendants more easily. *See* I. Bennett Capers, *Against Prosecutors*, 105 CORNELL L. REV. 1561, 1586 (2020) (arguing for a move back to private prosecution but not embracing the idea that wealth inequality should affect which victims can seek redress).

52. Coleman, *One Percent Procedure*, *supra* note 1, at 1013–28 (explaining that membership on the Civil Rules Committee and in the Supreme Court bar is heavily skewed toward corporate defendants' interests and toward white men); Coleman, *#SoWhiteMale*, *supra* note 1, at 411–22 (analyzing in detail the historical makeup of the rules committees); *see also* Jeffrey W. Stempel, *Politics and Sociology in Federal Civil Rulemaking: Errors of Scope*, 52 ALA. L. REV. 529, 563–70 (2001) (discussing the role of big-firm defense-side lawyers in the ABA's Litigation Section).

53. For instance, half of active federal judges were once prosecutors, while just more than 10 percent were public defenders, at least as of 2019. Rachel E. Barkow, *Criminal Justice Reform and the Courts*, U. CHI. L. REV. ONLINE (2019); *see also* Clark Neily, *There Are Way Too Many Prosecutors in the Federal Judiciary*, SLATE (Oct. 14, 2019), https://slate.com/news-and-politics/2019/10/too-many-prosecutors-federal-judiciary.html [https://perma.cc/F4FA-JS8R] (finding that seven times more federal judges were once courtroom advocates for the government—predominantly prosecutors—than those who were defense attorneys or public interest lawyers). To its credit, the Biden administration has been increasing professional diversity in the federal judiciary. *See, e.g.*, Sahil Kapur, *With Public Defenders as Judges, Biden Quietly Makes History on the Courts*, NBC NEWS (Oct. 18, 2021), https://www.nbcnews.com/politics/congress/new-public-defenders-joe-biden-quietly-makes-history-courts-n1281787 [https://perma.cc/VQ3U-KGXL].

54. Sabbeth & Steinberg, *supra* note 17 (manuscript at 8) ("[T]he civil courts and agencies do not collect demographic data on litigants, nor does any governmental agency have this charge.").

percent of federal civil defendants have appeared pro se.[55] Some of that representation may be appointed counsel, pro bono, or low bono, but the fact that 98 percent of defendants were represented suggests a certain measure of wealth for most federal civil defendants. And regardless of their numerical portion of the set of defendants, wealthy entities know ex ante that if they are involved in litigation they are much more likely to find themselves as civil defendants than as plaintiffs.[56] Moreover, most corporate executives in America are White.[57] As repeat players, these wealthy entity defendants have an incentive to help shape rules to favor defendants.[58] They can do so in litigation by choosing to seek certiorari or bring an appeal only in those cases most likely to yield favorable rules.[59] Such repeat players can settle other cases or choose not to appeal, thus trading a short-term loss for the potential of a longer-term victory—a calculation that a non-repeat-player would not make. So too can wealthy entity defendants spend money on amicus briefing or lobbying legislative bodies to pursue favorable rules.[60]

A nontrivial number of suits in federal court are filed against the United States,[61] which can also help create defendant-friendly civil

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55. *Just the Facts: Trends in Pro Se Civil Litigation from 2000 to 2019*, U.S. CTS. fig.3 (Feb. 11, 2021) [hereinafter *Just the Facts*], https://www.uscourts.gov/news/2021/02/11/just-facts-trends-pro-se-civil-litigation-2000-2019.

56. *See* Albert Yoon, *The Importance of Litigant Wealth*, 59 DEPAUL L. REV. 649, 663 (2010) (discussing allocation of sophistication between parties in various types of civil cases); *cf.* Resnik, *supra* note 19, at 1797 ("[When] '[p]laintiff' and 'defendant' became identity-based categories that meant that not all would benefit or suffer equally from the impact of civil rules . . . .").

57. *See, e.g.*, CTR. FOR TALENT INNOVATION, BEING BLACK IN CORPORATE AMERICA: AN INTERSECTIONAL EXPLORATION 2 (2019), https://www.talentinnovation.org/_private/assets/BeingBlack-KeyFindings-CTI.pdf [https://perma.cc/7VE8-D7UM] (reporting that 0.8 percent of Fortune 500 CEOs are Black and 3.2 percent of executive/senior-level officials and managers are Black); Cheryl L. Wade, *The Impact of U.S. Corporate Policy on Women and People of Color*, 7 J. GENDER, RACE & JUST. 213, 220, 220 n.36 (2003) (noting that only a "tiny percentage of corporate directors and senior executives are women or people of color" and that "only 0.6% of senior-level managers in major companies are African-American").

58. *See* Galanter, *supra* note 20, at 95–103 (discussing the ability of repeat players to pursue favorable rules, unlike one-shot actors).

59. *Id.* at 101–02.

60. *Id.*

61. The United States government has been the defendant in somewhere between 12 and 19 percent of federal filings in recent years (excluding 2020). *See* U.S. CTS., U.S. DISTRICT COURTS – JUDICIAL BUSINESS 2020, at tbl.4, https://www.uscourts.gov/statistics-reports/us-district-courts-judicial-business-2020 [https://perma.cc/9ZNW-JFVV] (last visited Nov. 18, 2021). I excluded fiscal year 2020 in this calculation out of concern that the pandemic might skew the data. Prisoner petitions also appear to be excluded from that number, *see id.* at

rules. The government is a powerful defendant that can help skew rules in a defendant-friendly direction—a dynamic that coheres with the thesis of this Article.

Federal criminal defendants are disproportionately men of color.[62] In fiscal year 2019, less than 20 percent of defendants sentenced in federal court were White.[63] More than half were Hispanic, and more than 20 percent were Black.[64] When defendants from districts bordering Mexico and noncitizen defendants are excluded, the majority of defendants—more than 55 percent—remain non-White.[65] With those same exclusions, Black people comprise 40 percent of federal criminal defendants even as they comprise only 12 percent of the U.S. population.[66] Criminal defendants across state and federal courts are also disproportionately poor: incarcerated people have a median annual income that is 41 percent less than nonincarcerated people of similar ages and a median annual preincarceration income of $19,185, based on a somewhat-recent data set.[67]

In both civil and criminal law, most of federal procedure comes from rules enacted pursuant to the Rules Enabling Act process, though courts interpret those rules.[68] Statutes also play a role in setting federal procedure, particularly in the pretrial detention, disclosures, and interlocutory appeal contexts.[69] Lastly, the Constitution creates a baseline of pretrial procedural protections, though in most respects the rule- or statutory-based protections will

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tbl.3, but prisoner suits are already subject to special procedural requirements, *see infra* Part III.

62. Didwania, *supra* note 8, at 1285.

63. These numbers come from the author's calculations based on U.S. Sentencing Commission data. *See* U.S. SENT'G COMM'N, INTERACTIVE DATA ANALYZER, https://ida.ussc.gov/analytics/saw.dll?Dashboard&PortalPath=%2Fshared%2FIDA%2F_portal%2FIDA%20Dashboards (last visited Nov. 18, 2021).

64. *Id.*

65. Didwania, *supra* note 8, at 1284–85. These statistics cover 2002–2016. The numbers change so much when border districts and noncitizen defendants are excluded because immigration cases have come to dominate federal criminal dockets. *See* Amy F. Kimpel, *Alienating Criminal Procedure* (unpublished manuscript) (on file with author).

66. *Id.* at 1285.

67. BERNADETTE RABUY & DANIEL KOPF, PRISON POLICY INITIATIVE, PRISONS OF POVERTY: UNCOVERING THE PRE-INCARCERATION INCOMES OF THE IMPRISONED (July 9, 2015), https://www.prisonpolicy.org/reports/income.html [https://perma.cc/2HGR-H6XK]. This data was collected in 2004, and the dollars are adjusted to 2014.

68. Federal courts also promulgate local rules and judges often have their own sets of rules. Local rules do not play an important role in this Article except in the disclosures section. *See infra* Subpart II.B.

69. *See, e.g.*, 18 U.S.C. §§ 3142, 3500; 28 U.S.C. § 1292.

exceed that procedural floor as the Supreme Court has interpreted it.[70]

These numerous sources of law bring different decisionmakers into the fold, but those different sets of decisionmakers bear striking demographic similarity to each other. Both the Civil Rules Committee and the Criminal Rules Committee have been extremely White in their membership—demographics that better represent civil defendants than criminal defendants.[71] Only 4 percent of the Criminal Rules Committee's members have been Black.[72] Unlike the Civil Rules Committee where wealthy, White, defense-side interests have been amply represented, neither formerly incarcerated persons nor criminal defense lawyers have been substantially represented on the Criminal Rules Committee.[73]

Although its racial and ethnic diversity have increased steadily and substantially in recent years, the current Congress is approximately 77 percent White.[74] If we go back just a decade, that number increases to approximately 85 percent White.[75]

Of the 115 Supreme Court Justices throughout American history, only three have been people of color.[76] To flip that number around, more than 97 percent of Supreme Court Justices have been White.

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70. For example, compare Brady v. Maryland, 373 U.S. 83 (1963) (requiring disclosure of only material exculpatory evidence), with FED. R. CRIM P. 16 (requiring disclosure of certain kinds of evidence that need not be material or exculpatory).

71. Coleman, *#SoWhiteMale*, *supra* note 1, at 388–90.

72. *See id.* at 388–91, 398 (demonstrating that the Civil Rules and Criminal Rules Committees have been overwhelmingly White and male and that the Criminal Rules Committee therefore vastly underrepresents the number of Black defendants subject to criminal enforcement).

73. *See* Ion Meyn, *Why Civil and Criminal Procedure Are So Different: A Forgotten History*, 86 FORDHAM L. REV. 697, 727–30 (2017) (demonstrating the sharply pro-prosecutor bent of the Criminal Rules Committee that drafted the initial set of Federal Rules of Criminal Procedure). Rules committee members are appointed by the Chief Justice, *Committee Membership Selection*, U.S. CTS., https://www.uscourts.gov/rules-policies/about-rulemaking-process/committee-membership-selection (last visited Nov. 18, 2021), who has always been a White man, Leah M. Litman, Melissa Murray & Katherine Shaw, *A Podcast of One's Own*, 28 MICH. J. GENDER & L. 51, 53 (2021).

74. Katherine Schaeffer, *Racial, Ethnic Diversity Increases Yet Again with the 117th Congress*, PEW RSCH. CTR. (Jan. 28, 2021), https://www.pewresearch.org/fact-tank/2021/01/28/racial-ethnic-diversity-increases-yet-again-with-the-117th-congress/.

75. That number was calculated based on the Pew Research Center's data. *See id.*

76. Justice Ketanji Brown Jackson will be the fourth person of color to serve on the Supreme Court once Justice Stephen Breyer's retirement becomes effective. *See* Lindsay Wise & Jess Bravin, *Ketanji Brown Jackson Confirmed as First Black Woman on Supreme Court*, WALL ST. J. (Apr. 8, 2022, 10:10 AM), https://www.wsj.com/articles/senate-set-to-confirm-ketanji-brown-jackson-to-

II. DIFFERENT PROCEDURES

Pretrial protections for defendants in American criminal and civil procedure differ widely in ways that track race and class differences across the systems rather than the importance of the interests at stake. Broadly, many civil defendants can opt out (ex ante) of the litigation system in favor of arbitration. Even when the parties have no arbitration agreement,[77] civil defendants have meaningful opportunities for judges to screen out cases against them for legal or factual insufficiency and ample tools to discover their opponent's evidence against them in excruciating detail; moreover, they can typically do all of that while not burdened by an interim restraint on their interests. Criminal defendants, by contrast, have limited opportunities to opt out of ordinary criminal process through diversion; those limited opportunities are often circumscribed by prosecutors' discretion and place substantial practical burdens on defendants. Most defendants' cases are not diverted out of the system. Defendants have limited meaningful opportunities for judges to dismiss even weak cases against them and limited rights to learn about the government's evidence; those meager opportunities are further weakened by the fact that many defendants lose their liberty while their cases are pending—limiting their practical ability to defend themselves and creating incentives to relent and plead guilty.

One scholar has argued that racial disparities between defendants in civil and criminal procedure yielded disparate rules of procedure.[78] Originally, the Federal Rules of Criminal Procedure were meant to closely mirror the Federal Rules of Civil Procedure.[79] But race played an important role in thwarting that plan.[80] Race factored into the drafters' decision to empower prosecutors at the expense of defendants in ways far different than the way the drafters of the civil rules structured power.[81] This Article seeks neither to defend nor to rebut the proposition that race or even race and class together prompted relevant actors to create these disparate rules. Rather, it identifies structural or institutional discrimination

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supreme-court-11649329202 [https://perma.cc/QU2A-JSBM]; *see also* Litman, Murray & Shaw, *supra* note 73, at 53; Shaun Ossei-Owusu, *Racial Revisionism*, 119 MICH. L. REV. 1165, 1165 (2021) (book review).

77. Plenty of litigation occurs between parties that have no prior contractual relationship and thus could not have previously "agreed" to arbitrate their disputes.

78. Meyn, *supra* note 29, at 2–3.

79. Meyn, *supra* note 73, at 709–12.

80. Meyn, *supra* note 29, at 7–8.

81. *Id.* at 3.

embedded into disparities between civil and criminal procedure regardless of their motivation.[82]

Systemic racism and classism persist within each system, although disparity within each system is largely not the focus of this Article. Intrasystem disparities are addressed in this Part to the extent that they fit within the Subparts below. For instance, diversion is much more readily available to White defendants than to Black defendants—a point that the diversion Subpart raises.[83] Similarly, Black and Hispanic defendants are both detained at much higher rates than White defendants.[84]

If there were to be substantial differences in the level of protection afforded to defendants' pretrial rights between the civil and criminal systems, due process would suggest that the greater protections should go to criminal defendants. Courts determine procedural due process rights by weighing the private interests at stake, the risk of error, and the burden on the government of affording greater procedures.[85] In most criminal cases, the defendant's liberty is at stake.[86] In most civil cases, by contrast, the defendant stands to lose property (typically money).[87] Not only are the defendants' interests at stake greater in the criminal context, the cost to a defendant of a court getting a case wrong—incarceration under terrible conditions—is greater than in a civil case.

When we focus on pretrial rights, this disparity in defendants' interests and the costs of error widen further. The cost of affording too little opportunity for defendants to have their cases dismissed before trial is that those defendants will typically feel incredible pressure to plead guilty, regardless of their actual guilt.[88] Mandatory minimums are so pervasive that prosecutors' charging (and then plea bargaining) decisions largely determine defendants' sentences as a

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82. *See* López, *supra* note 26, at 1811 (outlining a distinction between intentional and institutional discrimination). Nor does this Article seek to disaggregate race and class from each other.

83. *See infra* Subpart II.E.

84. Didwania, *supra* note 8, at 1290.

85. Mathews v. Eldridge, 424 U.S. 319, 335 (1976).

86. *See, e.g.*, *In re* Winship, 397 U.S. 358, 363–64 (1970).

87. Some civil defendants have interests at stake such as custody of their children, although such disputes are unlikely to be resolved in federal court. That said, I do not want to sleight the importance of these interests as the Supreme Court did in *Lassiter* when refusing to afford counsel. *E.g.*, Coleman, *supra* note 17, at 594–95. And some criminal cases are fine-only offenses where property is all that the defendant stands to lose, at least as a matter of the direct, formal sanction the court imposes in that case. But in the mine-run of cases, criminal defendants stand to lose more than do civil defendants.

88. *See, e.g.*, Rachel E. Barkow, *Separation of Powers and the Criminal Law*, 58 STAN. L. REV. 989, 1034 (2006) ("[P]lea bargaining pressures even innocent defendants to plead guilty . . . .").

practical matter.[89] Prosecutors choose whether to levy a charge (or several) that carries mandatory minimums, drop charges with mandatory minimums in exchange for the defendant's guilty plea, or threaten to charge a mandatory minimum if the defendant refuses to plead guilty.[90] Sentencing enhancements—such as for those defendants with prior felonies or who are alleged to have committed a drug trafficking crime or crime of violence while possessing a gun—offer particularly potent discretionary mandatories.[91] Defendants who plead guilty typically receive a sentencing reduction for "acceptance of responsibility."[92] Some defendants are eligible for "safety valve" relief whereby a judge can sentence below an otherwise-applicable mandatory minimum.[93] Because of these various avenues for prosecutorial discretion, in fiscal year 2020, more than a quarter of all federal defendants were convicted of offenses that carried mandatory minimum sentences; nearly half of those convicted defendants were not in fact subjected to those mandatory minimums at the time of sentencing because of prosecutorial discretion.[94] Even without mandatory minimums, defendants face sizable sentencing penalties for invoking their constitutional right to a trial.[95] Massive

89. *See* U.S. SENT'G COMM'N, QUICK FACTS: MANDATORY MINIMUM PENALTIES (2021), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Quick_Facts_Mand_Mins_FY20.pdf (reporting that in fiscal year 2020, 15,274 cases in the federal system carried a mandatory minimum, and 13.7 percent of all federal criminal defendants remained subject to mandatory minimums at sentencing); *see also* Galanter, *supra* note 6, at 493–95 (mentioning newly enacted mandatory minimums as a possible source for decreased trials).

90. *See, e.g.*, Darryl K. Brown, *How to Make Criminal Trials Disappear Without Pretrial Discovery*, 55 AM. CRIM. L. REV. 155, 193 (2018).

91. For more detail on "discretionary mandatories," see Gold, *supra* note 14, at 335–37. *See also* United States v. Kupa, 976 F. Supp. 2d 417, 420 (E.D.N.Y. 2013) (describing prior felony enhancements as "produc[ing] the sentencing equivalent of a two-by-four to the forehead").

92. U.S. SENT'G GUIDELINES MANUAL § 3E1.1 (U.S. SENT'G COMM'N 2021); *see also* Michael M. O'Hear, *Remorse, Cooperation, and "Acceptance of Responsibility": The Structure, Implementation, and Reform of Section 3E1.1 of the Federal Sentencing Guidelines*, 91 NW. U. L. REV. 1507, 1534 (1997) (referring to acceptance of responsibility as "an automatic discount for guilty pleas"); Galanter, *supra* note 6, at 494–95 (ascribing some responsibility for disappearance of criminal trials to sentencing guidelines and acceptance of responsibility reduction).

93. *See* 18 U.S.C. § 3553(f).

94. U.S. SENT'G COMM'N, *supra* note 89. Prosecutorial "relief" from mandatory minimums is itself racially disparate: Hispanic defendants are far more likely to remain subject to those mandatory minimums than are defendants of other races. *Id.*

95. *See* Andrew Chongseh Kim, *Underestimating the Trial Penalty: An Empirical Analysis of the Federal Trial Penalty and Critique of the Abrams Study*, 84 MISS. L.J. 1195, 1243, 1252–54 (2015) (calculating that defendants

pressure to plead guilty is part of the cost of affording too little meaningful pretrial process.

A civil defendant will likely pay less money if it reaches a negotiated settlement with the plaintiff rather than if found liable after trial, of course. But the pressure to resolve a civil case through settlement when a defendant cannot prevail through pretrial processes pales in comparison to the pressure on a criminal defendant to plead guilty to avoid draconian terms of incarceration under often-terrible conditions.[96] Thus, the need for pretrial protections that offer defendants ways short of risking trial to dispose of the charges against them is greater in criminal procedure than in civil procedure. Even procedures like partial summary judgment whereby criminal defendants could get a court to dispose of the harshest charges that impose the most pressure to plead guilty would be incredibly valuable.[97] Yet the reality of this contrast in pretrial rights across civil and criminal procedure, as the rest of this section shows, is quite to the contrary. The following table summarizes those differences.

convicted at trial receive sentences that are, on average, 64 percent longer than those who plead guilty to similar crimes).

96. *See* Gold, *"Clientless" Lawyers*, *supra* note 44, at 139–40 (analyzing the difference in settlement pressure on criminal defendants versus class action defendants).

97. Gold, Hessick & Hessick, *supra* note 14, at 1648–51 (discussing the benefits of a criminal-law analog to summary judgment, including mentioning partial summary judgment).

TABLE 1. SUMMARIZING THE DISPARITIES

	Civil	**Criminal**
Interim Relief	Stringent test and financial incentives make interim relief infrequent	Pretrial detention is quite common
Discovery	Robust tools for affirmative discovery by way of discovery depositions, interrogatories, requests for production of documents, and requests for admissions	Very limited subpoena power and no other affirmative discovery tools; very limited opportunities for defendants to learn the government's evidence against them except in rare case that goes to trial
Pretrial Screening on Motion to Dismiss	Plaintiff must overcome plausibility pleading standard	Government need only recite elements of the crime and provide time and place
Pretrial Screening for Lack of Evidence	Summary judgment is granted if a reasonable jury could not find for plaintiff on an element of a claim	No analogous mechanism
Interlocutory Appeal	Substantial exceptions to final judgment rule	Limited exceptions to final judgment rule; defendants may be able to plead guilty and then appeal
Arbitration and Diversion	Widely enforceable arbitration before favorable decisionmakers based on very liberally defined consent	Limited opportunities for diversion that come only by the grace of the prosecutor and indeed rarely come

This Part analyzes each of the important comparisons between civil and criminal pretrial procedure that preserve power hierarchies and evince institutional racism and classism by (roughly) tracking the order of the adjudicative processes.[98] This Article does not argue that civil and criminal procedure should be identical at every turn; rather, while civil procedure is at least formally quite symmetrical between plaintiffs and defendants, preserving asymmetry in criminal

98. Differences such as summary judgment and discovery make a perfect case-chronological sequence of comparisons impossible, and the potential timing of interlocutory appeals further defies a chronological scheme. On topics where an analogy between civil and criminal procedure would be too strained, this Article does not seek to draw a comparison.

procedure rights is important.[99] That criminal defendants are protected against compulsory self-incrimination means and should continue to mean that they cannot be deposed as civil defendants can be. Similarly, criminal defendants have the right to appointment of counsel that civil defendants lack.[100] At least for *federal* civil cases, however, that disparity has little practical import because most federal civil defendants can afford to retain counsel.[101]

This Article does, however, contend that the systems are often more different than can be justified. Thus, each Subpart considers why civil and criminal procedure might take a different approach to similar issues and whether such a disparity is justified.

A. Civil Interim Relief and Pretrial Detention

Criminal defendants frequently lose their liberty on a mere accusation of wrongdoing, whereas civil defendants are rarely deprived of their property before a final judgment.[102] Civil defendants' rights are protected during the pendency of a case by doctrine that disfavors the "extraordinary remedy"[103] of a preliminary injunction, financial incentives that discourage preliminary injunctions,[104] and due process or other limits on prejudgment seizure.[105] Criminal defendants can lose their liberty for two days on

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99. *See* Roberts, *supra* note 11, at 1544–49 (arguing that asymmetric procedures favoring defendants are important to preserve).

100. *See, e.g.*, Sabbeth & Steinberg, *supra* note 17 (manuscript at 1) (arguing that this disparity is gendered).

101. *See Just the Facts*, *supra* note 55, at fig.3 (showing that only 2 percent of civil defendants in federal court appear pro se). In some types of cases that are quite common in state court—family law or debt collection—the lack of right to counsel has important and problematic implications for a system of justice. *See generally* Sabbeth & Steinberg, *supra* note 17.

102. *See* Gerstein v. Pugh, 420 U.S. 103, 127 (1975) (Stewart, J., concurring) ("[T]he Constitution extends less procedural protection to an imprisoned human being than is required to test the propriety of garnishing a commercial bank account, the custody of a refrigerator, the temporary suspension of a public school student, or the suspension of a driver's license." (citations omitted)); Niki Kuckes, *Civil Due Process, Criminal Due Process*, 25 YALE L. & POL'Y REV. 1, 22 (2006) ("It is not an exaggeration to say that defendants constitutionally may be arrested, charged, prosecuted, and detained in prison pending trial with fewer meaningful review procedures—that is to say, procedures to test the legitimacy of the underlying charges—than due process would require in the preliminary stages of a private civil case seeking the return of household goods."); *see also* Gold, *Jail as Injunction*, *supra* note 38, at 501 (arguing that civil preliminary injunctions provide a useful way to reconstruct pretrial detention doctrine).

103. Winter v. Nat. Res. Def. Council., Inc., 555 U.S. 7, 24 (2008).

104. Gold, *supra* note 37, at 1264–69 (explaining these financial incentives in detail).

105. Civil procedure can afford other interim remedies such as lis pendens, attachment, replevin, sequestration, temporary receivership, and garnishment, each of which is subject to different restrictions. *See, e.g.*, 2 BUSINESS AND

the mere say-so of a police officer before a judge passes on the validity of the detention.[106] A staggeringly high 75 percent of criminal defendants are then detained pretrial, although the number comes down to a still-very-high 60 percent when immigration cases are excluded.[107] Even defendants who are not detained pretrial may face release conditions that deprive them of some of their liberty.[108]

In civil procedure, defendants cannot have their property interests restrained during the pendency of a case by preliminary injunction unless the plaintiff is able to satisfy a stringent test: the plaintiff must demonstrate that they would suffer irreparable injury without a preliminary injunction, that the plaintiff would be harmed more without a preliminary injunction than the defendant would be by a preliminary injunction, that the plaintiff is likely to succeed on the merits, and that an injunction serves the public interest.[109] Civil procedure also structures financial incentives to discourage preliminary injunctions.[110] Plaintiffs seeking to have a defendant's rights restrained during a case must post a bond—money that gets paid to the defendant if the defendant ultimately prevails on the merits.[111]

So that civil defendants will not too easily be dispossessed of their property during the pendency of a case, due process typically requires a pre-deprivation hearing before a court can restrict the use of an asset prejudgment.[112] Indeed, that remains true even when the property to be restrained—such as a stove—forms the subject of the dispute.[113]

COMMERCIAL LITIGATION IN FEDERAL COURTS § 23:64 (Robert L. Haig ed., 5th ed. 2020) (describing some interim remedies under state law that are available in federal court under Rule 64); *id.* § 148:25 (discussing lis pendens). But these remedies are bounded by the strictures of procedural due process, *e.g.*, *id.* § 23:63, so they will be discussed below in that context. More detail regarding the statutory requirements of each mechanism that vary even across federal courts depending on the forum state falls outside the scope of this Article. *See* FED. R. CIV. P. 64.

106. *See* County of Riverside v. McLaughlin, 500 U.S. 44, 56 (1991).

107. Didwania, *supra* note 8, at 1264, 1285.

108. *See* Jenny E. Carroll, *Beyond Bail*, 73 FLA. L. REV. 143, 143 (2021) (arguing that conditions on pretrial release can be incredibly burdensome for defendants).

109. Winter v. Nat. Res. Def. Council, Inc., 555 U.S. 7, 20 (2008).

110. Gold, *supra* note 37, at 1264–69 (explaining these financial incentives in detail).

111. FED. R. CIV. P. 65(c).

112. *See, e.g.*, Connecticut v. Doehr, 501 U.S. 1, 4–8, 18–21 (1991) (holding that pre-deprivation hearings are required unless exigent circumstances exist).

113. *E.g.*, Fuentes v. Shevin, 407 U.S. 67, 96 (1972) (holding unconstitutional prejudgment seizure of a stove and phonograph in a suit alleging default on debt as to those items); *see also* Mitchell v. W. T. Grant Co., 416 U.S. 600, 616–20 (1974) (upholding Louisiana statute as consistent with due process because it

In criminal law, by contrast, police can arrest a defendant in public without judicial approval and even on charges where state law does not afford jail time for the offense.[114] They can then lock up a defendant for two days before a magistrate ever considers whether the arrest was supported by probable cause.[115]

Even after that pre-hearing period, "pretrial detention for federal defendants . . . is not the exception but the rule."[116] According to the most recent data, 75 percent of defendants are detained pretrial.[117] That number is a still-very-high 60 percent if immigration cases are excluded.[118] From 2008 to 2010, 64 percent of defendants were detained.[119] One reason for such large percentages of detention is that in a large set of cases, the Bail Reform Act presumes that defendants should be detained pretrial—a set that includes any drug case that could legally yield a sentence of ten years' imprisonment or more and cases in which a defendant used or possessed a firearm in furtherance of a drug crime or crime of violence.[120] When that presumption does not apply, federal law, at least on the face of the statute, presumes that many defendants should be released

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required proof presented to a judge of the existence of a lien on the property and prompt judicial process to dissolve the attachment).

114. *E.g.*, Atwater v. City of Lago Vista, 532 U.S. 318, 323 (2001) (holding that the Fourth Amendment does not prohibit arrests for fine-only offenses); United States v. Watson, 423 U.S. 411, 423–24 (1976) (holding that warrants are unnecessary for arrests in public). Although issuing a summons in lieu of custodial arrest is possible, it is not common in federal court. *See, e.g.*, Matthew G. Rowland, *The Rising Federal Pretrial Detention Rate, in Context*, FED. PROB., Sept. 2018, at 13, 18.

115. *See* County of Riverside v. McLaughlin, 500 U.S. 44, 56–57 (1991) (imposing a presumptive limit of forty-eight hours to bring a defendant before a magistrate for a probable cause determination).

116. J.C. Oleson et al., *Pretrial Detention Choices and Federal Sentencing*, FED. PROB., June 2018, at 14; *see also* Austin, *supra* note 32, at 52 ("Since 1984, the pretrial detention rate for federal defendants has been steadily increasing."); Rowland, *supra* note 114, at 15 (federal "pretrial detention rates are at record high levels and on an upward trend for all demographic groups").

117. Didwania, *supra* note 8, at 1264.

118. *Id.*

119. THOMAS H. COHEN, U.S. DEP'T OF JUST., BUREAU OF JUST. STATS., PRETRIAL RELEASE AND MISCONDUCT IN FEDERAL DISTRICT COURTS, 2008-2010, at 9 (2012).

120. 18 U.S.C. § 3142(e)(3); *see also* Erica Zunkel & Alison Siegler, *The Federal Judiciary's Role in Drug Law Reform in an Era of Congressional Dysfunction*, 18 OHIO ST. J. CRIM. L. 283, 290–94 (2020) (discussing the history and breadth of the presumption of pretrial detention in drug cases); Austin, *supra* note 32, at 61 (explaining that the presumption "has become an almost de facto detention order for almost half of all federal cases"). So too is there a presumption of detention for defendants with certain previous offenses while on release. 18 U.S.C. § 3142(e)(2), (f)(1).

pretrial.[121] It presumes that judges should release defendants on personal recognizance or on an unsecured bond rather than on a secured bond that requires upfront payment.[122] Judges may not use financial conditions as a backdoor means of detention.[123] When determining whether to detain a defendant pretrial, federal courts should consider whether detention is necessary to ensure the defendant's appearance and the safety of the community.[124] Judges may impose no more of a restriction on pretrial liberty than necessary to achieve these ends—meaning that a court should release the defendant without any conditions or on the least restrictive conditions necessary to assure these objectives.[125] In theory, the statute sounds like detention might require irreparable injury akin to the injury that would warrant a civil preliminary injunction.[126] But as Jenny Carroll rightly puts it, "the world of pretrial release operates outside of theory."[127]

Although criminal defendants enjoy a fairly robust process by which courts determine whether they should continue to be detained pretrial, that process comes at a *post*-deprivation hearing rather than what is required for a preliminary injunction and is typically required for prejudgment seizure. Defendants have the right to counsel, testify, present witnesses, cross-examine witnesses, and present information by other means.[128] But many defendants begin facing a presumption of detention.[129] Moreover, the government may proceed by proffer rather than by introducing evidence at the hearing,[130] and

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121. *See* Carroll, *supra* note 108, at 158–59. For a helpful and concise description of the statute's operation, see Austin, *supra* note 32, at 53.

122. 18 U.S.C. § 3142(b); *see also* SHIMA BARADARAN BAUGHMAN, THE BAIL BOOK: A COMPREHENSIVE LOOK AT BAIL IN AMERICA'S CRIMINAL JUSTICE SYSTEM 43 (2017) (explaining the difference between secured and unsecured bail).

123. 18 U.S.C. § 3142(c)(2). *But see* Samuel R. Wiseman, *Bail and Mass Incarceration*, 53 GA. L. REV. 235, 263–64 (2018) (demonstrating that judges sometimes do just that).

124. 18 U.S.C. § 3142(g); *see also, e.g.*, Lauryn P. Gouldin, *Disentangling Flight Risk from Dangerousness*, 2016 BYU L. REV. 837, 847, 885; Lauryn P. Gouldin, *Reforming Pretrial Decision-Making*, 55 WAKE FOREST L. REV. 857, 863 (2020) [hereinafter Gouldin, *Reforming Pretrial Decision-Making*].

125. 18 U.S.C. § 3142(b).

126. *See* Gold, *supra* note 37, at 1260 n.27 (arguing for such a standard).

127. Carroll, *supra* note 108, at 147.

128. 18 U.S.C. § 3142(f).

129. *See* Austin, *supra* note 32, at 53.

130. *See, e.g.*, United States v. Abuhamra, 389 F.3d 309, 321 n.7 (2d Cir. 2004) ("Most [bail hearings] proceed on proffers."); United States v. Little, 235 F. Supp. 3d 272, 274–77 (D.D.C. 2017) (relying on the government's proffer to evaluate the weight of evidence); *see also* Gold, *Jail as Injunction*, *supra* note 38, at 521–23 (criticizing the ability for prosecutors to proceed by proffer); Marc Miller & Martin Guggenheim, *Pretrial Detention and Punishment*, 75 MINN. L. REV. 335, 408 (1990) (same).

defendants typically have no right to discovery at this stage of the case.[131]

There are no meaningful standards to determine when a court should detain a defendant or impose release conditions to ensure that defendants appear in court and do not commit a crime during the pretrial period.[132] Pretrial risk assessment algorithms play some role in federal detention decisions.[133] But there are not meaningful standards as to what threshold of algorithmic risk indicates pretrial detention,[134] nor do current risk assessment tools indicate whether a particular condition of release would suffice to mitigate the risk—the statutory standard.[135]

Piled atop the doctrinal uncertainty and lack of procedure are cognitive biases and judicial incentives that favor overdetention.[136] Because the Bail Reform Act allows judges to consider whether the defendant "will endanger the safety of any other person or the community," it provides a vehicle for bias that disproportionately harms a group already disproportionately represented as defendants in the criminal legal system—Black men.[137] Pretrial detention also helps judges and prosecutors move dockets by securing quick guilty pleas.[138] Although unnecessary detention harms a defendant, her family, and perhaps her community,[139] that burden is largely invisible to many judges.[140] By contrast, if a judge releases a defendant and that defendant goes on to commit a crime—particularly a serious crime—the *perceived* downside risk to the judge

131. *See* 18 U.S.C. § 3500(b) (providing that the government must produce witness statements only after the witness has testified on direct examination).

132. *See* Carroll, *supra* note 108, at 163–64.

133. For normative critiques of risk-assessment tools, see, e.g., Jessica M. Eaglin, *Constructing Recidivism Risk*, 67 EMORY L.J. 59, 61–62 (2017); Sandra G. Mayson, *Bias in, Bias Out*, 128 YALE L.J. 2218, 2218 (2019).

134. *See, e.g.*, Sandra G. Mayson, *Dangerous Defendants*, 127 YALE L.J. 490, 494–96 (2018) (explaining that several risk assessment tools deem defendants as "high risk" at surprisingly low thresholds and explaining the lack of clarity as to when a risk is high enough to warrant preventative detention).

135. Gouldin, *Reforming Pretrial Decision-Making*, *supra* note 124, at 865.

136. *Id.* at 866–68 (analyzing more problems with judicial decisionmaking in this context); Wiseman, *supra* note 123, at 268–72.

137. Didwania, *supra* note 8, at 1303–05.

138. Wiseman, *supra* note 123, at 268–73.

139. *See, e.g.*, Gold, *Jail as Injunction*, *supra* note 38, at 501–02 (arguing that these harms of pretrial detention should factor into the doctrinal calculus of whether to detain a defendant pretrial).

140. The Bail Reform Act does not require judges to consider the harms that detention would inflict even though it should. *Id.* at 539–45; Didwania, *supra* note 8, at 1315–18.

can be quite significant.[141] This risk aversion largely does not apply to preliminary injunctions or even prejudgment seizures.[142]

Financial incentives also favor overuse of pretrial detention. Civil preliminary injunctions require the party seeking an injunction to bear financial risk, thus discouraging interim relief.[143] Financial incentives in criminal procedure *encourage* interim restraints—pretrial detention—by requiring the restrained party to pay bail to gain their freedom rather than placing the financial onus on the one seeking a restraint as civil procedure does.[144] To its credit, the federal system uses either release with nonmonetary conditions or unsecured bonds rather than secured bonds in nearly three quarters of cases, which means that the defendant typically need not pay money in advance.[145] The federal criminal system thus does not *dis*courage interim relief through use of financial incentives as the federal civil system does.

In addition to the disparities *between* civil and criminal procedure regarding interim restraint, federal magistrate judges detain Black defendants more than White defendants and poor defendants more than rich defendants.[146]

Some readers might think that the interest in protecting the public from dangerous defendants might justify greater use of pretrial restraint in a criminal case than in civil ones, even though the individual defendants' interests are also stronger on the criminal side. That may be right in a very small number of cases where defendants pose a substantial risk of committing a serious crime with an identifiable victim if given pretrial liberty, but that level of risk

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141. The actual magnitude of risk that a defendant will commit a violent crime while on pretrial release is very low. *See* Didwania, *supra* note 8, at 1305 (explaining that federal defendants on pretrial liberty rarely fail to appear or commit a crime); COHEN, *supra* note 119, at 13 (finding that only 1 percent of released federal defendants failed to appear for court and only 4 percent were arrested for new offenses during a two-year period); *see also* Shima Baradaran & Frank L. McIntyre, *Predicting Violence*, 90 TEX. L. REV. 497, 527, 549 (2012) (looking beyond the federal system and finding that fewer than 2 percent of released defendants were charged with a violent felony and that judges worried only about violent crime as affecting their self-interest).

142. The incentives for judges to overdetain defendants is even greater for the many state judges who are elected than it is for federal judges. *See, e.g.*, Gouldin, *Reforming Pretrial Decision-Making*, *supra* note 124, at 868 n.60.

143. *See* Gold, *supra* note 37, at 1259–60.

144. *See id.* at 1260–61 (criticizing this disparity).

145. *See* COHEN, *supra* note 119, at 5 tbl.3; Didwania, *supra* note 8, at 1279–80. Whether a defendant is detained pretrial in many state systems continues to turn on his ability to afford secured cash bail despite successful reform efforts in many places. *Id.* at 1279. These burdens of money bail persist in part because the system they create separates defendants with resources from those without. Wiseman, *supra* note 123, at 258–68.

146. Didwania, *supra* note 8, at 1300.

occurs far less often than one might think and far less often than the current pretrial detention process or widespread use of pretrial detention would justify.[147] Even that conclusion, however, is tentative; some civil cases might similarly require restraining a defendant's interest pretrial to protect the broader public. Consider, for instance, a defendant who operates a hazardous waste incinerator facility and is dumping excessive amounts of mercury into a waterway that pose a serious risk to the broader public.[148] That too could pose a scenario like the dangerous criminal defendant where societal interests favor interim restraints.

B. Discovery and Disclosures

In civil cases, defendants have access to an array of formal discovery tools that they can use to compel evidence from the plaintiff or other sources.[149] Criminal defendants, however, have much more limited opportunities to access their opponent's evidence against them.[150] Instead of the interrogatories or discovery depositions that are common fare in civil litigation, federal criminal defendants are largely relegated to reviewing the set of disclosures that the government provides—information that is narrowly limited to particular categories, such as the defendant's own prior statements, and also limited based on materiality or other narrow relevance standards.[151] Any such disclosures may be rendered irrelevant as a matter of timing in any event because the disclosures may be required only in advance of trial—a trial that rarely comes.[152] The United States is also required to disclose prior statements made by government witnesses, but it need not (and indeed cannot) disclose them until during trial after the witness has already testified on direct examination.[153]

Well before trial, civil defendants can propound interrogatories to plaintiffs, requiring them to answer in writing and under oath questions of the defendant's choosing that the defendant

147. *See, e.g.*, Mayson, *supra* note 134, at 492–93 (analyzing when preventative detention may be justified and explaining the low thresholds by which algorithmic risk-assessment tools label defendants as "high risk").

148. *See* Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc., 528 U.S. 167, 175–76 (2000) (describing that fact pattern).

149. *See, e.g.*, FED. R. CIV. P. 30–36.

150. *See, e.g.*, Gold, Hessick & Hessick, *supra* note 14, at 1624–27, 1633–35; *see also* Turner, *supra* note 40, at 288–96 (explaining differences between discovery in civil and criminal systems with an eye to other pretrial procedural differences).

151. *See, e.g.*, Ion Meyn, *Discovery and Darkness: The Information Deficit in Criminal Disputes*, 79 BROOK. L. REV. 1091, 1093 (2014).

152. *Id.* at 1139.

153. 18 U.S.C. § 3500(a).

formulated.[154] Indeed, civil defendants can require plaintiffs to state under oath all of the evidence that they plan to use to support each aspect of their claims.[155] Civil defendants can also compel plaintiffs or even nonparties to produce documents and electronically stored information that fits into categories that the defendant defines.[156] They can use these tools to obtain evidence that will ultimately be admissible and evidence that will not be admissible so long as it is relevant to a claim or defense and proportional to the needs of the case.[157] Civil defendants can use these discovery tools not only to gather evidence but also to narrow the scope of the plaintiffs' claims: Defendants can require plaintiffs to admit certain facts—at least unless the plaintiff has a good-faith basis to deny.[158] Defendants can depose witnesses—either parties or nonparties—for seven hours on a single day as a means of pretrial discovery regardless of whether that witness would ultimately be available at trial.[159] Civil defendants can do all of these things during the pretrial process without judicial permission, subject only to judicial limitation if the plaintiff has exceeded the broad scope of permissible discovery.[160]

Unlike in civil litigation, federal criminal defendants have meager tools of compulsory process to gather evidence from the government or nonparties in cases against them.[161] Indeed, "[c]ivil

154. FED. R. CIV. P. 33. Defendants can propound interrogatories to any party, not solely plaintiffs, but the above-the-line text refers only to plaintiffs for ease of understanding. *See id.*

155. *See* FED. R. CIV. P. 33(a)(2); *see also* THOMAS A. MAUET & DAVID MARCUS, PRETRIAL 224–29 (2019) (discussing strategic uses of interrogatories including contention interrogatories).

156. *See* FED. R. CIV. P. 34(a) (regarding parties); FED. R. CIV. P. 34(c), 45 (regarding nonparties).

157. FED. R. CIV. P. 26(b)(1).

158. FED. R. CIV. P. 36.

159. FED. R. CIV. P. 30.

160. *See* FED. R. CIV. P. 26(b)(1) ("[P]arties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case . . . ."). The scope of civil discovery was narrowed in the federal rules recently by shifting the location of its proportionality language, FED. R. CIV. P. 26(b)(1) advisory committee's note to 2015 amendment, in ways that protect corporate defendants' interests. *See, e.g.*, Norris, *supra* note 5, at 509–10. But it nonetheless remains extremely broad compared to criminal discovery.

161. *E.g.*, Brown, *supra* note 39, at 104 ("U.S. criminal discovery rules (unlike their civil litigation counterparts) largely provide only that one party must *disclose* something it knows to its opponent; they provide few tools to *discover* information previously unknown to either party."); Jennifer D. Oliva & Valena E. Beety, *Discovering Forensic Fraud*, 112 NW. U. L. REV. 121, 130 (2017) ("By contrast [to civil litigants], prosecutors are required to provide criminal defendants very limited pretrial discovery."); Turner, *supra* note 40, at 291 (explaining that civil defendants have "active discovery tools such as depositions and interrogatories" that criminal defendants lack).

litigators who venture into criminal cases tend to be stunned and often outraged by their inability to depose government witnesses or even to file interrogatories or requests for admissions."[162] Defendants cannot compel the government to respond to written questions under oath—the sort of interrogatories that American civil procedure systems provide as a matter of course.[163] Defendants cannot request that the government turn over categories of documents that the defendant specifies; defendants are instead limited to receiving (if they so request) narrower categories of documents permitted by rule.[164] Discovery depositions do not exist;[165] depositions are permitted only by court order in exceptional circumstances as necessary to preserve evidence for trial and only of the defendant's own witnesses.[166] Criminal defendants' subpoena power is vastly more limited than civil defendants':[167] Quite unlike under the civil rules,[168] criminal defendants must demonstrate that the evidence will itself be admissible—a burden that is often "difficult or even impossible to satisfy" at that stage.[169] Criminal defendants must also show that it is necessary to access the documents before trial.[170]

Criminal defendants' lack of opportunity to compel evidence from the other side or from nonparties is more problematic because prosecutors have robust tools to compulsorily gather evidence, whether through policing or grand jury subpoena.[171] Civil plaintiffs, by contrast, have the same access to discovery as do their adversaries.[172]

Compounding criminal defendants' inability to compel evidence is that the government is required to disclose only very limited

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162. Sklansky & Yeazell, *supra* note 37, at 714–15.

163. Brown, *supra* note 90, at 165; Meyn, *supra* note 151, at 1094.

164. FED. R. CRIM. P. 16; Meyn, *supra* note 151, at 1112.

165. 2 CHARLES ALAN WRIGHT & PETER J. HENNING, FEDERAL PRACTICE AND PROCEDURE § 242 (4th ed. 2022); *see also* FED. R. CRIM. P. 15(a)(1).

166. 2 WRIGHT & HENNING, *supra* note 165, § 242; *see also* FED. R. CRIM. P. 15(a)(1).

167. *See* Rebecca Wexler, *Life, Liberty, and Trade Secrets: Intellectual Property in the Criminal Justice System*, 70 STAN. L. REV. 1343, 1407–08 (2018); *see also* ROBERT M. CARY, CRAIG D. SINGER & SIMON A. LATCOVICH, FEDERAL CRIMINAL DISCOVERY 232 (2011).

168. *See* FED. R. CIV. P. 26(b)(1).

169. Rebecca Wexler, *Privacy Asymmetries: Access to Data in Criminal Defense Investigations*, 68 UCLA L. REV. 212, 225–26 (2021); *see also* United States v. Nixon, 418 U.S. 683, 698 (1974) (observing that subpoenas are "not intended to provide a means of discovery for criminal cases").

170. *See Nixon*, 418 U.S. at 699; Wexler, *supra* note 167, at 1408.

171. Brown, *supra* note 90, at 167–80; Turner & Redlich, *supra* note 12, at 291–93; *see also* Charles Eric Hintz, *Pleading for Justice: Why We Need a More Exacting Federal Criminal Pleading Standard*, 52 SETON HALL L. REV. 711, 729–30 (2022).

172. *See* Brown, *supra* note 90, at 167.

categories of information and often need not even meet those obligations because the timing is tied to a trial that may never come.[173] Due process requires the government to disclose only material exculpatory evidence, and due process does not require such disclosures before a defendant pleads guilty.[174] Requiring prosecutors to decide what evidence will help a defendant's case asks too much of prosecutors who face adversarial biases and thus tends to yield an even smaller subset of material than *Brady*[175] requires.[176] By federal statute, prosecutors should not disclose prior statements of a government witness until after the witness has testified at trial[177]—a moot point for the vast majority of cases that do not go to

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173. *See* BROWN, *supra* note 7, at 203 (explaining that *Brady* is a trial right rather than a pretrial one); Daniel S. McConkie, *The Local Rules Revolution in Criminal Discovery*, 39 CARDOZO L. REV. 59, 73 (2017); *see also* U.S. Dep't of Just., Just. Manual § 9-5.001.D (2020) (explaining the timing requirements and encouraging earlier disclosure of exculpatory information—"reasonably promptly after it is discovered").

The U.S. Department of Justice has successfully opposed proposals to broaden its disclosure obligations or require those disclosures before defendants plead guilty. McConkie, *supra*, at 76.

174. *E.g.*, Miriam H. Baer, *Timing* Brady, 115 COLUM. L. REV. 1, 12–13 (2015); Brown, *supra* note 39, at 105; Turner & Redlich, *supra* note 12, at 301; *see also* United States v. Ruiz, 536 U.S. 622, 633 (2002) (holding that due process does not require prosecutors to disclose impeachment evidence before a guilty plea). Ethical rules and local rules in some places require disclosure of all exculpatory evidence, regardless of materiality. ABA Comm. on Ethics & Pro. Resp., Formal Op. 09-454 (2009); Bruce A. Green, *Bar Authorities and Prosecutors*, *in* THE OXFORD HANDBOOK OF PROSECUTORS AND PROSECUTION 309, 319–20 (Ronald F. Wright, Kay L. Levine, & Russell M. Gold eds., 2021).

Even these disclosure obligations are violated. *See, e.g.*, United States v. Jones, 609 F. Supp. 2d 113, 119 (D. Mass. 2009) ("The egregious failure of the government to disclose plainly material exculpatory evidence in this case extends a dismal history of intentional and inadvertent violations of the government's duties to disclose in cases assigned to this court."); *see also* BRANDON L. GARRETT, CONVICTING THE INNOCENT: WHERE CRIMINAL PROSECUTIONS GO WRONG 168–70 (2011) (observing that *Brady* violations played a prominent role in a number of exonerations); Brown, *supra* note 39, at 102 ("Numerous reports and court decisions across jurisdictions document prosecutors' failure to disclose important evidence even when they are required to do so." (citations omitted)). I do not suggest that adherence to the rules is perfect in civil litigation either.

175. Brady v. Maryland, 373 U.S. 83 (1963).

176. *Id.* at 87 (holding that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material to either guilt or to punishment"); *see, e.g.*, Daniel S. Medwed, Brady*'s Bunch of Flaws*, 67 WASH. & LEE L. REV. 1533, 1542 (2010); Turner & Redlich, *supra* note 12, at 300–01.

177. 18 U.S.C. § 3500; *see also* FED. R. CRIM. P. 16(a)(2) (exempting from rule-based disclosure statements made by prospective witnesses except pursuant to 18 U.S.C. § 3500), FED. R. CRIM. P. 26.2 (providing a process for producing the statement of a witness who has already testified in a formal proceeding).

trial.[178] Indeed, the Jenks Act prohibits defendants from obtaining such statements before that time by "subpena [sic], discovery, or inspection."[179] The vast majority of information that the rules require the government to disclose relates to the defendant herself, and even those disclosure obligations are limited: Prosecutors must disclose to the defendant the defendant's own statements only when the prosecutor intends to use the statements at trial or when written and within the government's possession of which the prosecutor is aware or could be aware.[180] The government must also permit a defendant to view documents, other tangible items, or reports of an examination or scientific test; however, that obligation encompasses only things that are within the government's control, material to the defense, or that the government intends to use in its case-in-chief at trial.[181] The Department of Justice encourages prosecutors to provide a broader scope of exculpatory or impeachment material and to do so earlier than the rules or statutes require,[182] but that encouragement comes without an enforcement mechanism.[183] In sum, unlike the federal civil rules that permit compulsive requests for discovery of all "nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case,"[184] prosecutors' disclosure obligations are vastly more limited.[185]

Some local rules in federal courts have expanded prosecutors' disclosure obligations, but no such rules exist in many jurisdictions, and they necessarily vary from one place to another.[186] Nonetheless, where these rules exist, they provide defendants with more

178. Turner & Redlich, *supra* note 12, at 301 (noting that most criminal cases today are resolved through guilty pleas).

179. 18 U.S.C. § 3500(a).

180. FED. R. CRIM. P. 16(a)(1)(A); FED. R. CRIM. P. 16(a)(1)(B)(i)–(ii). Rule 16 also requires prosecutors to disclose to a defendant the defendant's own grand jury testimony regarding the charged offense. FED. R. CRIM. P. 16(a)(1)(B)(iii).

181. FED. R. CRIM. P. 16(a)(1)(E)(i)–(ii); FED. R. CRIM. P. 16(a)(1)(F). For documents or physical items, the government must also allow the defendant to inspect them if obtained from or belonging to the defendant. FED. R. CRIM. P. 16(a)(1)(E)(iii).

182. U.S. Dep't of Just., Just. Manual §§ 9-5.001, 9-5.002 (2020).

183. *Id.* §§ 1-1.200, 9-5.001.F.

184. FED. R. CIV. P. 26(b)(1).

185. *See supra* notes 173–81 and accompanying text; *see also* U.S. Dep't of Just., Just. Manual § 9-5.001.B.1 (2020) (explaining that prosecutors need not disclose evidence unless it is admissible but encouraging them to err on the side of disclosure when admissibility is a close question). Subpoenas are not discovery devices for criminal defendants but merely serve to secure attendance of a witness for a trial or other formal proceeding. *E.g.*, 2 WRIGHT & HENNING, *supra* note 165, § 272.

186. McConkie, *supra* note 173, at 78–93; *see also* FED. R. CRIM. P. 16. These rules may impermissibly conflict with the Federal Rules of Criminal Procedure. *See* McConkie, *supra* note 173, at 115–18.

information by way of required disclosures or provide defendants with information earlier in their cases. For instance, some courts require prosecutors to disclose search warrants and supporting affidavits, orders and other documentation relating to wiretaps, and evidence related to identification procedures.[187] Others require disclosures within seven, ten, or fourteen days after arraignment, at least for the narrow set of materials that must be disclosed under *Brady*.[188]

There is some inherent asymmetry in comparing discovery and disclosures across civil and criminal procedure. The Constitution offers criminal defendants protection that civil defendants lack: the government cannot depose an unwilling criminal defendant because of the Fifth Amendment's Self-Incrimination Clause.[189] But because of power dynamics, defendants can nonetheless be frequently interrogated without counsel present, at least before they are charged.[190] Civil plaintiffs can depose civil defendants by merely serving a notice of deposition, and self-incrimination concerns do not apply unless there are individuals involved subject to criminal proceedings.[191] That said, civil defendants typically have counsel present at their depositions who can object to questions or call for breaks to talk with their client.[192] And criminal defendants can be subjected to nontestimonial examination in other ways, such as by being required to give a handwriting exemplar or to say particular words to allow a witness to recognize the defendant's voice.[193] The police's ability to gather evidence from a criminal defendant directly is similarly limited by the Fifth Amendment, *Miranda*,[194] and the Sixth Amendment, though *Miranda*'s strictures are considerably less meaningful than they once were, and the Sixth Amendment does not apply prior to initiation of formal proceedings.[195]

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187. D. HAW. LOCAL R. CRIM. P. 16.1(a); D. MASS. LOCAL R. 116.1; D. UTAH LOCAL R. CRIM. P. 16-2; McConkie, *supra* note 173, at 80.

188. McConkie, *supra* note 173, at 82–83 (collecting citations).

189. 2 WRIGHT & HENNING, *supra* note 165, § 242; Robert P. Mosteller, *Discovery Against the Defense: Tilting the Adversarial Balance*, 74 CALIF. L. REV. 1567, 1572 (1986); *see also* FED. R. CRIM. P. 15(e)(1).

190. After charges attach, deliberate elicitation without counsel present would violate the Sixth Amendment. *See* Massiah v. United States, 377 U.S. 201, 206 (1964).

191. *See* U.S. CONST. amend. V ("nor shall be compelled *in any criminal case* to be a witness against himself" (emphasis added)).

192. *See generally* A. Darby Dickerson, *The Law and Ethics of Civil Depositions*, 57 MD. L. REV. 273 (1998).

193. *See* Caleb Lin, *Silence and Nontestimonial Evidence*, 58 AM. CRIM. L. REV. 387, 388–89, 389 n.18 (2021) (criticizing limits on Fifth Amendment protections to include only testimonial evidence and narrowing of *Miranda* protections).

194. Miranda v. Arizona, 384 U.S. 436 (1966).

195. *See, e.g.*, Berghuis v. Thompkins, 560 U.S. 370, 380–82 (2010) (holding that remaining silent is insufficient to invoke the *Miranda* right to silence and that a suspect must instead say out loud that he wishes to remain silent); Montejo

In sum, unlike civil defendants, criminal defendants have very limited means to compulsorily gather evidence for or against them from the other side. Rather, criminal "discovery"[196] occurs overwhelmingly through requirements that prosecutors disclose certain categories of evidence—a much narrower set of materials than are discoverable to civil defendants.[197] Leaving prosecutors to decide what to disclose to the defendant simply asks too much amidst their adversarial biases, particularly when many of the requirements apply only to evidence that prosecutors deem exculpatory (i.e., that will harm their cases). These disparities leave criminal defendants with less access to the information against them to use in making informed plea bargaining decisions, preparing for trial, or asking judges to screen out appropriate cases before trial.

Concerns about witness intimidation are sometimes used to justify limiting defendants' pretrial access to the evidence against them.[198] But there is no reason to think that witness intimidation is a concern in every criminal case,[199] nor is there reason to think witness intimidation is never a concern in civil cases. Civil cases handle this concern not with a sweeping rule barring parties from gaining access to the evidence against them but with protective orders to limit discovery in certain sensitive contexts.[200] A similar approach could work in those criminal cases where there is particularized concern about witness intimidation rather than denying all defendants access to the evidence against them as prophylaxis.[201]

C. Pretrial Screening

Compounding the informational disparities, civil and criminal procedure also provide vastly different opportunities for judges or civilian bodies to screen out cases before defendants have to go to trial, whether that screening is for legally insufficient allegations or

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v. Louisiana, 556 U.S. 778, 797 (2009); Rothgery v. Gillespie County, 554 U.S. 191, 194–95 (2008); *see also* Andrew Guthrie Ferguson, *The Dialogue Approach to* Miranda *Warnings and Waiver*, 49 AM. CRIM. L. REV. 1437, 1440, 1445–54 (2012) (describing government-favorable changes to law surrounding invocation of rights to counsel and silence).

196. *See* Brown, *supra* note 39, at 104 (explaining that "disclosures" is a better term than "discovery" for information exchange in criminal law).

197. Subpoena power is so tightly circumscribed that it does not provide a robust alternative. *See supra* text accompanying notes 167–70.

198. *E.g.*, United States v. Ruiz, 536 U.S. 622, 631–32 (2002).

199. Open-file discovery in Texas has yielded "no evidence of witness intimidation." Rachel E. Barkow, *Can Prosecutors End Mass Incarceration?*, 119 MICH. L. REV. 1365, 1390 (2021) (book review).

200. FED. R. CIV. P. 26(b)(2) (allowing courts to limit discovery); FED. R. CIV. P. 26(c) (allowing courts to issue protective orders).

201. *See* Gold, Hessick & Hessick, *supra* note 14, at 1647–48.

failure of proof.[202] Civil cases afford defendants an early opportunity to challenge the legal sufficiency of the allegations against them—motions to dismiss, particularly motions to dismiss for failure to state a claim.[203] Criminal systems offer a nominally similar procedure—failure to state a crime.[204] But as a practical matter, criminal defendants cannot have a case against them dismissed even when it is pleaded with the most threadbare of allegations and must instead remain subject to the criminal process and its attendant burdens on their liberty.[205] Nor can criminal defendants likely succeed at having some of the charges against them dismissed even if the government has charged some crimes more serious than what the factual allegations support; those charges then may force defendants to waive their constitutional right to trial. Civil defendants, by contrast, can have the entire case against them dismissed even when the plaintiffs have offered robust factual allegations if the court determines that those factual allegations are nonetheless implausible.[206] Civil defendants also benefit greatly from the fact that civil plaintiffs have no opportunity, at least at the pleadings stage, to compel information from anyone to help prove their case.[207] By contrast, prosecutors can work closely with police to gather evidence against criminal defendants.[208] This divergence between civil and criminal procedure has only widened in recent years as the Supreme Court has raised civil pleading standards. Criminal procedure, by contrast, tests not the legal sufficiency of allegations but only their factual sufficiency and does so often without affording defendants an opportunity to be

202. Civil systems offer one procedure to challenge sufficiency of allegations (motions to dismiss) and another to challenge defects in proof after opportunities to develop a factual record through discovery (summary judgment). *See* FED. R. CIV. P. 12(b)(6); FED. R. CIV P. 56. But criminal systems offer a less dichotomous approach to judicial screening, so this Article analyzes both defects together in this Part.

203. FED. R. CIV. P. 12(b)(6).

204. FED. R. CRIM. P. 12(b)(3)(B)(v).

205. For a recent exception, see United States v. Martin-Alfaro, No. 20-215 (FAB), 2021 WL 3556001, at *2–3 (D.P.R. Aug. 11, 2021) (dismissing bank fraud allegations in an indictment for failure to allege misrepresentation made to the bank).

206. *See, e.g.*, Turner, *supra* note 40, at 289–90 ("Pleading requirements are more demanding in civil cases and thus help the parties better understand the issues in dispute" and give "civil defendants . . . better notice than criminal defendants about the key facts supporting the allegations against them . . . ."); *see also* Hintz, *supra* note 171, at 714 (arguing that the federal criminal pleading standard should be at least as stringent as the civil one).

207. *See supra* Subpart II.C.1.

208. *See* Kami Chavis Simmons, *Increasing Police Accountability: Restoring Trust and Legitimacy Through the Appointment of Independent Prosecutors*, 49 WASH. U. J.L. & POL'Y 137, 145 (2015) (stating that prosecutors work closely with police to investigate and punish crimes).

heard or present evidence. Subpart 1 considers the disparity in opportunities to challenge the sufficiency of allegations. Subpart 2 then considers how judges test (or do not test) factual sufficiency across civil and criminal procedure.

1. Sufficient Allegations

In civil procedure, threadbare recitation of the elements of a cause of action does not suffice to meet the plaintiff's pleading burden.[209] In recent years, *Twombly*[210] and *Iqbal*[211] ushered in a more stringent era of plausibility pleading in the federal courts.[212] In so doing, the Supreme Court articulated concern that too liberal a pleading standard would require defendants to expend time, incur discovery costs, and feel settlement pressure even on "a largely groundless claim."[213] Civil plaintiffs must satisfy this pleading standard without access to discovery or means to compel evidence to support their cases, such as a police force with whom they work closely.[214] After *Iqbal*, Black plaintiffs alleging ambiguous race-based employment discrimination have seen their claims dismissed more frequently than before *Iqbal*.[215]

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209. *See, e.g.*, Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (holding that a complaint cannot contain only "a formulaic recitation of the elements of a cause of action" or "'naked assertion[s]' devoid of 'further factual enhancement'" (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555, 557 (2007))).

210. *Twombly*, 550 U.S. 544.

211. *Iqbal*, 556 U.S. 662.

212. A. Benjamin Spencer, *Plausibility Pleading*, 49 B.C. L. REV. 431, 431–32 (2008) ("In a startling move by the U.S. Supreme Court, the seventy-year-old liberal pleading standard of [Rule] 8(a)(2) has been decidedly tightened (if not discarded) in favor of a stricter standard requiring the pleading of facts painting a 'plausible' picture of liability."); *see also* Alexander A. Reinert, *The Costs of Heightened Pleading*, 86 IND. L.J. 119, 121–22 (2011). *But see* Adam N. Steinman, *The Rise and Fall of Plausibility Pleading?*, 69 VAND. L. REV. 333, 333 (2016) (arguing that the Supreme Court could—and indeed has—cabined its problematic decisions regarding pleading standards in *Twombly* and *Iqbal* in ways that do not reject notice pleading).

213. *Twombly*, 550 U.S. at 557–58. One scholar shows empirically that heightening the pleading standard created a vehicle for systemic racism. Victor D. Quintanilla, *Critical Race Empiricism: A New Means to Measure Civil Procedure*, 3 U.C. IRVINE L. REV. 187, 189 (2013) (finding that White judges became much more likely to dismiss the discrimination claims of Black defendants than were Black judges—a disparity that did not exist under the prior pleading regime).

214. *See, e.g.*, *Twombly*, 550 U.S. at 559 (explaining that meaningful pleading standards are important *because* they allow parties to avoid costs of discovery in appropriate cases).

215. Victor D. Quintanilla, *Beyond Common Sense: A Social Psychological Study of* Iqbal*'s Effect on Claims of Race Discrimination*, 17 MICH. J. RACE & L. 1, 35–38 (2011).

In criminal procedure, by contrast, a mere recitation of the elements of a crime plus mention of the approximate time and place of the crime will provide a defendant sufficient "notice" of the allegations against him.[216] For instance, an indictment alleging that *X* intentionally conspired with *Y* to maintain a monopoly in restraint of trade on a certain day and in a certain place suffices even though the indictment says nothing else about the nature of the scheme itself.[217] Although a bill of particulars may offer a criminal defendant an opportunity to seek more detailed notice of the allegations against them,[218] bills of particulars are rarely sought in federal practice and are committed to the discretion of the trial court in any event.[219] Moreover, a bill of particulars "is intended to give the defendant only that minimum amount of information necessary to permit the defendant to conduct his own investigation."[220] Lastly, that bills of particulars exist leads courts to deny motions to dismiss even when the government's allegations are sparse,[221] and their use may invite retaliation against a defendant.[222] Thus, even when combining bills of particulars and pleading standards on motions to dismiss for failure to state a crime, criminal systems leave pleading standards far short of the plausibility pleading standard required in civil cases.

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216. *See, e.g.*, Andrew Manuel Crespo, *The Hidden Law of Plea Bargaining*, 118 COLUM. L. REV. 1303, 1354 (2018) ("Criminal charging instruments, after all, are much sparser than civil complaints, often alleging little more than the time and place of the offense."); *see also, e.g.*, Gold, Hessick & Hessick, *supra* note 14, at 1626–27 (criticizing the disparity between the civil and criminal pleading standards); Charles Eric Hintz, *A Formulaic Recitation Will Not Do: Why the Federal Rules Demand More Detail in Criminal Pleading*, 125 PENN ST. L. REV. 631, 639–41 (2021) (same); Ion Meyn, *The Unbearable Lightness of Criminal Procedure*, 42 AM. J. CRIM. L. 39, 55–57 (2014) (same).

217. *See* United States v. Giordano, 261 F.3d 1134, 1138 (11th Cir. 2001).

218. 5 WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE § 19.4(a) (6th ed. 2017); *see also* FED. R. CRIM. P. 7(f).

219. Will v. United States, 389 U.S. 90, 98–99 (1967) (holding that trial courts hold broad discretion when ruling on whether to grant a bill of particulars); United States v. Sepúlveda, 15 F.3d 1161, 1192 (1st Cir. 1993) ("Motions for bills of particulars are seldom employed in modern federal practice."); 1 CHARLES ALAN WRIGHT & ANDREW D. LEIPOLD, FEDERAL PRACTICE AND PROCEDURE § 130 (4th ed. 2022) ("A defendant is not entitled to a bill of particulars as a matter of right."); *see also* Crespo, *supra* note 216, at 1356–57 (discussing widespread discretion to grant bills of particulars in state systems).

220. United States v. Smith, 776 F.2d 1104, 1115 (3d Cir. 1985) (holding that defendant was not entitled to a bill of particulars identifying unindicted co-conspirators).

221. 5 LAFAVE ET AL., *supra* note 218, § 19.4(a); *see also* Hintz, *supra* note 216, at 685–87 (criticizing courts that rely on the existence of bills of particulars to interpret the pleading standard as less stringent).

222. Turner, *supra* note 40, at 291; *see also* MILTON HEUMANN, PLEA BARGAINING: THE EXPERIENCES OF PROSECUTORS, JUDGES, AND DEFENSE ATTORNEYS 52–91 (1978).

This disparity in pleading standards between civil and criminal systems comes even though the criminal rule should be interpreted at least as generously to defendants as the civil rule as a matter of text, history, or context.[223] Nonetheless, when presented with an opportunity to reconcile differences in pleading standards between federal civil and criminal procedure, the Criminal Rules Advisory Committee declined.[224]

2. Sufficient Proof

Civil and criminal defendants have starkly different pretrial opportunities to challenge the factual sufficiency of the evidence against them. In civil cases, defendants need not endure the stress of trial and its concomitant fear that they may lose money if the plaintiff has not adduced evidence to support any element of its claim; instead, the court can grant summary judgment.[225] Criminal law, by contrast, tests the sufficiency of the government's evidence pretrial largely in the defendant's absence by considering merely what the government *says* it can prove and without opportunities for a defendant to gather or provide evidence.[226] It lacks any clear analog to a summary judgment procedure that allows defendants to avoid the stress and sentencing penalties of trial in cases where the government likely cannot meet its burden of proof. In civil procedure, after the parties have had opportunities to develop their factual record through formal discovery, a defendant can obtain summary judgment if there is "no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law."[227] Once a defendant moves for summary judgment, the plaintiff must submit evidence demonstrating that it can support every element of its case.[228] In so doing, the plaintiff must show that "a reasonable jury could return a verdict" in its favor[229]—a burden that requires more than a mere scintilla of evidence.[230] When a plaintiff cannot show more than a mere scintilla of evidence as to an element of its claim, the defendant

223. Hintz, *supra* note 216, at 643–80. *Compare* FED. R. CRIM. P. 12(b)(3)(B)(v) ("failure to state an offense"), *with* FED. R. CIV. P. 12(b)(6) ("failure to state a claim upon which relief can be granted").

224. Hintz, *supra* note 171, at 718.

225. FED. R. CIV. P. 56(a).

226. *See* Gold, Hessick & Hessick, *supra* note 14, at 1648–51 (arguing for a summary judgment procedure in criminal law).

227. FED. R. CIV. P. 56(a).

228. *See* Celotex Corp. v. Catrett, 477 U.S. 317, 321–23 (1986). Plaintiffs can move for summary judgment too, but the text above refers to the more common scenario of defendants moving for summary judgment.

229. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986).

230. *Id.* at 252.

need not continue to endure the hassle and expense of litigation.[231] And especially in classes of cases against powerful defendants—particularly employment discrimination suits—courts have been quite willing to grant summary judgment for those defendants.[232]

A civil defendant can also seek partial summary judgment—i.e., summary judgment on one claim but not others.[233] Partial summary judgment allows a court to clear out the issues that are not meaningfully in dispute and allows the parties to focus further settlement negotiations and proceedings on the most important issues.[234] Partial summary judgment lowers, even if it does not eliminate, defendants' trial risk.

One could imagine that criminal defendants would have *more* opportunities than civil defendants to avoid trial where the government cannot prove its case to the trial standard of proof beyond a reasonable doubt; criminal trials put defendants' liberty in jeopardy and risk much higher sentences than defendants would face following a guilty plea. But the reality is quite to the contrary. Criminal law has no strong analog to summary judgment, instead relying on hardly existent trials to allow defendants to challenge the lack of evidence against them.[235]

One might be tempted to say that *Gerstein*[236] hearings, preliminary hearings, or grand jury proceedings afford opportunities

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231. Like pleading standards, summary judgment has become even more protective of defendants' interests in recent decades with the 1986 summary judgment trilogy that invited courts to weigh evidence. *See Anderson*, 477 U.S. at 266–67 (Brennan, J., dissenting) (arguing that the Court improperly waded into the merits at summary judgment); *see also* Samuel Issacharoff & George Loewenstein, *Second Thoughts About Summary Judgment*, 100 YALE L.J. 73, 89 (1990) ("[S]ummary judgment . . . has been transformed into a mechanism to assess plaintiff's likelihood of prevailing at trial."); D. Theodore Rave, Note, *Questioning the Efficiency of Summary Judgment*, 81 N.Y.U. L. REV. 875, 894 (2006) (arguing that the Supreme Court has "sanctioned judicial evaluation of facts at the summary judgment stage").

232. *See* Arthur R. Miller, *The Pretrial Rush to Judgment: Are the "Litigation Explosion," "Liability Crisis," and Efficiency Clichés Eroding Our Day in Court and Jury Trial Commitments?*, 78 N.Y.U. L. REV. 982, 1052–54 (2003) (reporting increased frequency of summary judgment grants for defendants in a number of areas, including civil rights, age discrimination, securities fraud, and antitrust); *see also* Joseph A. Seiner, *The Trouble with* Twombly*: A Proposed Pleading Standard for Employment Discrimination Cases*, 2009 U. ILL. L. REV. 1011, 1032–34 (reporting that an employment discrimination defendant has more than an 80 percent likelihood of obtaining summary judgment at least in part if the court actually rules on the motion).

233. *See* FED. R. CIV. P. 56(a).

234. *See* EDWARD J. BRUNET, MARTIN H. REDISH & MICHAEL A. REITER, SUMMARY JUDGMENT: FEDERAL LAW AND PRACTICE § 7.11 (1994).

235. *See* Brown, *supra* note 90, at 163; Gold, Hessick & Hessick, *supra* note 14, at 1648–51.

236. Gerstein v. Pugh, 420 U.S. 103 (1975).

for a neutral to test the factual sufficiency of allegations against a defendant akin to a summary judgment motion. But those procedures all offer far less robust protection to defendants than does civil summary judgment.[237] The most glaring deficiency is that of these procedures only the preliminary hearing typically affords defendants the opportunity to be heard.[238]

After being arrested, federal rules provide defendants with an initial appearance before a magistrate judge "without unnecessary delay."[239] For defendants arrested without a warrant, that initial appearance often satisfies the requirement that some neutral arbiter determine that the government has demonstrated probable cause to detain a defendant.[240] But probable cause is not a difficult standard to meet.[241] And the initial appearance (and *Gerstein* hearing if it is separate) entails a one-sided presentation of the evidence: defendants need not be permitted to cross-examine government witnesses nor need they be permitted to put on their own evidence challenging the existence of probable cause.[242]

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237. For more detail about this claim, see Gold, *Jail as Injunction*, *supra* note 38, at 522–23. *See also* Kuckes, *supra* note 102, at 22 ("[D]efendants constitutionally may be arrested, charged, prosecuted, and detained in prison pending trial with fewer meaningful review procedures—that is to say, procedures to test the legitimacy of the underlying charges—than due process would require in the preliminary stages of a private civil case seeking the return of household goods.").

238. Gold, *Jail as Injunction*, *supra* note 38, at 522–23.

239. FED. R. CRIM. P. 5(a)(1)(A).

240. *See* 1 WRIGHT & LEIPOLD, *supra* note 219, § 58.

241. *See, e.g.*, Maryland v. Pringle, 540 U.S. 366, 371 (2003) ("[T]he substance of all the definitions of probable cause is a reasonable ground for belief of guilt."). By contrast, denying summary judgment requires the plaintiff to overcome what may be a more stringent standard—that a rational jury could find for the plaintiff. *Compare* Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986) ("rational trier of fact"), *with* 6 LAFAVE ET AL., *supra* note 218, § 14.3(a) ("probable cause to believe that an offense has been committed and that the defendant committed it"). *Cf.* Albert W. Alschuler, *Preventive Pretrial Detention and the Failure of Interest-Balancing Approaches to Due Process*, 85 MICH. L. REV. 510, 518–19 (1986) (explaining that the probable cause threshold that applies to preliminary hearings is less stringent than the likelihood of success on the merits threshold for civil preliminary injunctions); Kuckes, *supra* note 102, at 24 n.132 (same). Thoroughly comparing these standards' stringency is beyond the scope of this Article.

242. *See* Gerstein v. Pugh, 420 U.S. 103, 120 (1975) ("[A]dversary safeguards are not essential for the probable cause determination required by the Fourth Amendment. The sole issue is whether there is probable cause for detaining the arrested person pending further proceedings. This issue can be determined reliably without an adversary hearing."); Cordova v. City of Albuquerque, 816 F.3d 645, 657 (10th Cir. 2016) ("[A]n arrestee has a constitutional right to a prompt probable cause *determination*, not to any particular kind of adversary hearing."); 1 WRIGHT & LEIPOLD, *supra* note 219, § 58.

Preliminary hearings, at least when they occur, afford defendants the opportunity to be heard in an adversarial moment to challenge the evidence against them,[243] but they remain inferior to civil summary judgment in several ways. First, prosecutors can avoid preliminary hearings by charging via grand jury indictment,[244] or, for misdemeanors, by information.[245] And second, even when preliminary hearings occur, they operate under looser evidentiary requirements than do summary judgment motions. Summary judgment requires that the parties rely on admissible evidence or declarations under penalty of perjury akin to admissible evidence.[246] At preliminary hearings, prosecutors can rely on hearsay or illegally seized evidence.[247] Indeed, that many defendants waive their rights to a preliminary hearing suggests that they do not view that process as meaningful protection from unwarranted charges.[248]

Federal prosecutors must charge all serious crimes by grand jury indictment,[249] which could conceivably provide an early-stage analog to civil summary judgment. But grand juries typically do no such thing in practice. Prosecutors control grand juries and the evidence that they hear.[250] Defendants (or suspects, at that point) have no

243. 1 WRIGHT & LEIPOLD, *supra* note 219, § 92 (explaining that defendants may introduce evidence but that defendants are "unlikely to offer affirmative evidence unless there is a substantial chance of showing that probable cause does not exist" because they "typically will prefer not to preview [their] case[s] for the prosecution").

244. FED. R. CRIM. P. 5.1(a)(2).

245. FED. R. CRIM. P. 5.1(a)(4).

246. FED. R. CIV. P. 56(c)(2).

247. FED. R. CRIM. P. 5.1(e) (providing that the defendant "may not object to evidence on the ground that it was unlawfully acquired"); 1 WRIGHT & LEIPOLD, *supra* note 219, § 92 (explaining that the rules of evidence do not apply at preliminary hearings, and the government can introduce illegally obtained evidence); *see also* Roger A. Fairfax, Jr., *Testing Charges*, *in* THE OXFORD HANDBOOK OF PROSECUTORS AND PROSECUTION 59, 63–64 (Ronald F. Wright, Kay L. Levine, & Russell M. Gold eds., 2021) (explaining the benefits to defendants of preliminary hearings but recognizing the limitations and suggesting that these limitations may yield frequent waivers of such hearings).

248. *See* FED. R. CRIM. P. 5.1(a)(1) (permitting waiver). At least in state courts, such waivers are common. 6 LAFAVE ET AL., *supra* note 218, § 14.2(e).

249. Fairfax, Jr., *supra* note 247, at 65.

250. *Id.* at 66–67; *see also* William J. Campbell, *Eliminate the Grand Jury*, 64 J. CRIM. L. & CRIMINOLOGY 174, 174 (1973) ("[T]he grand jury is the total captive of the prosecutor who . . . can indict anybody, at any time, for almost anything . . . ."); Ric Simmons, *Re-Examining the Grand Jury: Is There Room for Democracy in the Criminal Justice System?*, 82 B.U. L. REV. 1, 2 (2002) (discussing "the anemic federal grand jury" while urging more attention to state grand jury procedures).

right to be present or testify before a grand jury.[251] Moreover, should a prosecutor ever fail to secure an indictment, she can try again.[252]

A few states afford something like summary judgment in self-defense cases on the self-defense issue alone. When defendants wish to argue self-defense, a few states require courts to dismiss cases pretrial where the defendant can demonstrate the applicability of the defense by a preponderance of the evidence.[253] The availability of a summary judgment analog in that one context further evinces rules that skew based on race. While this special self-defense procedure seems race-neutral, self-defense arguments are most viable for White defendants.[254]

The lack of an analog to *partial* summary judgment in criminal law is similarly concerning. One of the important sources of prosecutors' power to induce a guilty plea is the ability to overcharge—that is, charge an offense that would warrant or perhaps even require a judge to impose a sentence higher than even the prosecutor thinks appropriate.[255] To the extent that such a charge may be legally flawed or implausible to prove beyond a reasonable doubt, partial summary judgment could allow a court to remove that vice grip from the defendant.

Lastly, summary judgment *briefing* offers civil defendants protections that criminal defendants lack. To survive summary judgment, a plaintiff must gather and organize their evidence against the defendant in a form that is visible to that defendant.[256] The lack of a similar procedure in criminal law means that the government need not gather and present its case to the court or to the defendant

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251. *See* FED. R. CRIM. P. 6(d)(1); *see also* Simmons, *supra* note 250, at 23.

252. Roger A. Fairfax, Jr., *Grand Jury Discretion and Constitutional Design*, 93 CORNELL L. REV. 703, 743 (2008). Federal prosecutors are supposed to obtain approval from the United States Attorney before so doing. U.S. Dep't of Just., Just. Manual § 9-11.120(A) (2020).

253. *See, e.g.*, ALA. CODE § 13A-3-23(d)(2)–(3) (2022); People v. Malczewski, 744 P.2d 62, 65 (Colo. 1987); Dennis v. State, 51 So. 3d 456, 462–63 (Fla. 2010); Bunn v. State, 667 S.E.2d 605, 608 (Ga. 2008); State v. Duncan, 709 S.E.2d 662, 663–65 (S.C. 2011).

254. *See* Cynthia Kwei Yung Lee, *Race and Self-Defense: Toward a Normative Conception of Reasonableness*, 81 MINN. L. REV. 367, 368–452 (1996) (offering a rich explanation of race's role in self-defense law); Lee, *supra* note 35, at 100–13 (criticizing the "color-blind" nature of the George Zimmerman case and his self-defense argument).

255. *See* Russell D. Covey, *Fixed Justice: Reforming Plea Bargaining with Plea-Based Ceilings*, 82 TUL. L. REV. 1237, 1254–55 (2008).

256. *See* Edward Brunet, *The Efficiency of Summary Judgment*, 43 LOY. U. CHI. L.J. 689, 691 (2012) ("Summary judgment produces valuable fact clarification" because "[t]he nonmovant is essentially forced to identify facts in the record that demonstrate issues of fact that need to be tried"); Rave, *supra* note 231, at 894 ("In some ways, the post-Trilogy summary judgment motion can serve as an information-forcing device that may facilitate settlement.").

before trial. Indeed, even if the government were to afford the defendant with broader disclosures than it does now—as some state systems do—the lack of summary judgment briefing that forces the government to organize that material to support its case would make those disclosures much less meaningful than in the civil system.[257]

Coupling this summary judgment disparity with the discovery and disclosure disparity creates a result that is passing strange as a matter of doctrine or due process. We allow the government to seek to deprive a defendant of her liberty during a trial by surprise that may afford defendants last-minute disclosure of the evidence against them; civil defendants get to see an organized presentation of the evidence against them before trial that they can typically refute—at least as to whether a reasonable jury could find against them on such a record. The incongruity in liberty and property interests at stake should make any disparity cut in the other direction—one that is more protective of the rights of the disproportionately poor defendants of color in criminal systems.[258] But it does not.

This disparity in judicial screening mechanisms between civil and criminal systems is all the more troubling because of the costs that mere accusation of criminal wrongdoing can impose, especially for detained defendants.[259] Being detained pretrial can jeopardize housing, employment, or custody of a child;[260] so too can it exact a significant mental toll.[261] Being detained also likely increases the defendant's sentence that would follow a conviction.[262] Being a civil defendant imposes costs of hiring lawyers—at least for those fortunate enough to afford lawyers—and complying with discovery

257. *See* Brian P. Fox, Note, *An Argument Against Open-File Discovery in Criminal Cases*, 89 NOTRE DAME L. REV. 425, 446–48 (2013). The lack of organization is all the more problematic when public defenders have massive caseloads, as they do in most state courts. *See* Irene Oritseweyinmi Joe, *Systematizing Public Defender Rationing*, 93 DENV. L. REV. 389, 394 (2016) ("In the nation's 100 largest counties [current caseloads] mean[] that, on average, even if a defender works every single day without taking breaks for weekends or holidays, that defender cannot devote even one full day each year exclusively to each case on her docket.").

258. *See* Gold, *Jail as Injunction*, *supra* note 38, at 512.

259. Gerstein v. Pugh, 420 U.S. 103, 114 (1975) ("Pretrial confinement may imperil the suspect's job, interrupt his source of income, and impair his family relationships."); *see also, e.g.*, Shima Baradaran Baughman, *The History of Misdemeanor Bail*, 98 B.U. L. REV. 837, 872 (2018) (describing costs of pretrial detention to those accused of misdemeanors as similar to those accused of felonies including employment, housing, and sometimes children and family stability).

260. Gold, *Jail as Injunction*, *supra* note 38, at 540–41.

261. *Id.* at 544–45.

262. *See* Didwania, *supra* note 9, at 57–58 (using federal court data); *see also* Megan T. Stevenson, *Distortion of Justice: How the Inability to Pay Bail Affects Case Outcomes*, 34 J.L. ECON. & ORG. 511, 511–13 (2018) (reaching a similar finding from Philadelphia state court data).

obligations. Comparatively, the costs are far weightier in the ordinary criminal case than the ordinary civil one. And yet the pleading and motion to dismiss standards that protect defendants from having to face those costs cut decidedly the other way—offering civil defendants much more protections from the burdens of legal process.[263] So too does the presence of a robust summary judgment process without an analog on the criminal side.[264]

And even if a defendant's case were—against all odds—dismissed for failure to state a crime, the defendant would nonetheless have an arrest record, which would likely affect future interactions with law enforcement, potential employment, or housing.[265]

Before leaving this topic, let us briefly consider an argument for the lack of summary judgment in criminal cases:[266] Summary judgment would be less symmetrical in criminal procedure than in civil procedure. The government cannot constitutionally secure a conviction via summary judgment without a jury or the defendant's consent to a bench trial.[267] But the lack of symmetry is simply unconvincing as a reason to force defendants to gamble on their liberty at trial in an insufficiently meritorious case.[268] Moreover, summary judgment in favor of plaintiffs, although available, is far less common than summary judgment for defendants.[269]

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263. *Cf.* Gold, Hessick & Hessick, *supra* note 14, at 1640–44 (arguing that criminal systems should raise their pleading standard to be more like civil pleading standards); Hintz, *supra* note 171, at 714 (arguing for a federal criminal pleading standard that at least aligns with the federal civil standard).

264. *See* Gold, Hessick & Hessick, *supra* note 14, at 1648–51 (advocating a criminal analog to summary judgment).

265. *See, e.g.*, Adam M. Gershowitz, *Prosecutorial Dismissals as Teachable Moments (and Databases) for the Police*, 86 GEO. WASH. L. REV. 1525, 1530 (2018) (listing costs of an arrest: "incarceration, the need to post bail, internet-accessible arrest records, mug shots, immigration and housing consequences because agencies track arrest records, the prospect of job loss because of incarceration, and difficulty in finding new work"); Eisha Jain, *Arrests as Regulation*, 67 STAN. L. REV. 809, 810 (2015) (discussing in detail the noncriminal consequences of an arrest); Anna Roberts, *Dismissals as Justice*, 69 ALA. L. REV. 327, 373–74 (2017) (explaining consequences of an arrest for defendants including for housing, benefits, and employment).

266. For more on the argument that criminal summary judgment and other pretrial procedures would be problematic because they would reduce trials as they have in civil procedure, see *infra* Part IV.

267. *See* Brown, *supra* note 90, at 163 ("Summary judgment against a defendant would contravene the jury trial right.").

268. *See* Roberts, *supra* note 11, at 1544–49 (arguing that maintaining asymmetry in criminal processes to favor defendants is important).

269. Joe S. Cecil et al., *A Quarter-Century of Summary Judgment Practice in Six Federal District Courts*, 4 J. EMPIRICAL LEGAL STUD. 861, 886–89 (2007) (demonstrating that plaintiffs' motions for summary judgment are filed less frequently than defendants' and are less frequently successful); *cf.* Miller, *supra*

D. Interlocutory Appeals

In both civil and criminal cases, appeals are typically available only after final judgment.[270] But in some kinds of civil cases where a ruling is particularly consequential for the parties, interlocutory appeals may be available.[271] Criminal procedure affords interlocutory appeals for a narrower set of rulings than does civil procedure.[272] Criminal procedure in many jurisdictions affords another alternative—the conditional guilty plea.[273] Conditional guilty pleas are worse for defendants than are civil interlocutory appeals for two primary reasons: (1) a defendant must first be convicted of a crime, and (2) conditional guilty pleas require consent of both the prosecutor and the judge. Appeals without trial are important in both civil and criminal procedure because trials are rare.[274] But appeals without trial are particularly important in protecting the rights of *criminal* defendants because they risk onerous sentencing penalties for taking their case to trial.[275] The threat of that trial penalty chills appeals if appeals can lie only after trial.

The baseline civil procedure rule (as in criminal procedure) is that cases are appealable only after final judgment.[276] Nonetheless, some issues—such as the grant or denial of a preliminary injunction,[277] orders appointing receivers or refusing to wind down receiverships,[278] denial of arbitration,[279] or denial of immunity to a government official[280]—are thought to be so consequential that they are immediately reviewable. And so too do federal appellate courts have discretionary jurisdiction over interlocutory appeals when a

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note 232, at 1048–57 (discussing increased use of summary judgment in favor of defendants in response to the summary judgment trilogy).

270. *See* 28 U.S.C. § 1291; *see also, e.g.*, Adam N. Steinman, *Reinventing Appellate Jurisdiction*, 48 B.C. L. REV. 1237, 1238 (2007).

271. *Id.* at 1242.

272. *E.g.*, 16 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3936.1 (3d ed. 2022) ("Appeals by criminal defendants are treated more strictly than civil-action appeals in applying the final judgment rule.").

273. FED. R. CRIM. P. 11(a)(2).

274. *See* Steinman, *supra* note 270, at 1241 (describing commentators' calls to ensure interlocutory appellate review because of the rarity of trials); *see also* Gold, Hessick & Hessick, *supra* note 14, at 1614–28 (arguing that both civil and criminal procedure are systems designed to facilitate settlement).

275. *See* Nancy J. King et al., *When Process Affects Punishment: Differences in Sentences After Guilty Plea, Bench Trial, and Jury Trial in Five Guidelines States*, 105 COLUM. L. REV. 959, 973–75 (2005); *see also infra* Part IV.

276. 28 U.S.C. § 1291.

277. *Id.* § 1292(a)(1).

278. *Id.* § 1292(a)(2).

279. 9 U.S.C. § 16.

280. *E.g.*, Plumhoff v. Rickard, 572 U.S. 765, 770–71 (2014).

district court certifies an issue for review[281] or over any orders granting or denying a motion for class certification.[282] Lastly, the judicially created collateral order doctrine permits interlocutory appeals for issues that are fully disposed of by the trial court, separate from the merits of the case, too important to be denied review, that present a serious and unsettled question, and for which effective review would be doubtful if appeal had to await final judgment.[283] As one civil procedure scholar puts it, the final judgment rule "is more honored in the breach than in the observance."[284]

Civil litigants may also be able to obtain review through a writ of mandamus.[285] The Supreme Court has permitted mandamus review of a district court's decision to remand a case to state court[286] even though such orders are statutorily "not reviewable on appeal or otherwise."[287] It also permitted mandamus review of a district court's order for a mental and physical examination of one of the parties under Rule 35.[288]

The same statute establishes the same general rule of appeal only after final judgment in criminal procedure,[289] but it is subject to fewer exceptions.[290] The Supreme Court has emphasized that the "general policy against piecemeal appeals takes on added weight in criminal cases, where the defendant is entitled to a speedy resolution of the charges against him."[291] Separate and apart from a defendant's interests—and indeed sometimes in opposition to those interests—the Supreme Court has articulated a societal interest in prompt

281. 28 U.S.C. § 1292(b).

282. FED. R. CIV. P. 23(f). Discretionary interlocutory appeal in class actions constitutes a special procedural protection in a class of cases where defendants tend to be particularly wealthy corporations that face significant exposure. That plaintiffs who lose a motion for class certification can seek interlocutory review complicates but does not undermine that claim.

283. *See* Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 546–47 (1949); *see also* Steinman, *supra* note 270, at 1253 (clearly articulating these requirements).

284. Steinman, *supra* note 270, at 1238.

285. *See id.* at 1258–65 (describing the evolution of Supreme Court case law allowing for interlocutory appellate review via mandamus).

286. Thermtron Prods., Inc. v. Hermansdorfer, 423 U.S. 336, 337 (1976).

287. 28 U.S.C. § 1447(d).

288. *See* Schlagenhauf v. Holder, 379 U.S. 104, 109–11 (1964).

289. 28 U.S.C. § 1291.

290. *See* 7 LAFAVE ET AL., *supra* note 218, § 27.2(b) ("While Congress has adopted several statutory provisions allowing interlocutory appeals in civil cases, only three federal statutes authorize interlocutory review by appellate courts in criminal cases."); *see also* Abney v. United States, 431 U.S. 651, 657 (1977) ("Adherence to this [final judgment rule] has been particularly stringent in criminal prosecutions . . . .").

291. Will v. United States, 389 U.S. 90, 96 (1967).

resolution of criminal cases.[292] Unsurprisingly then, there is only one statutory avenue for interlocutory appeal by a defendant—appeal of a pretrial detention order.[293] The collateral order doctrine also applies to criminal cases, albeit more narrowly:[294] Under the collateral order doctrine, the Supreme Court has held that defendants can raise arguments regarding double jeopardy,[295] the Speech or Debate Clause,[296] and forcible medication.[297] Lower federal courts have also permitted review under the collateral order doctrine of orders committing the defendant to the custody of the Attorney General to determine whether there was a substantial probability that he would regain the capacity to stand trial and orders that juveniles be tried as adults.[298] The certification process does not apply to criminal cases.[299]

Because of these limited avenues for interlocutory appeal, criminal defendants' best chance for an appeal without incurring a trial penalty typically comes through conditional guilty (or no contest) pleas.[300] If a defendant is able to obtain consent of both the court and the prosecutor, she may plead guilty or no contest to the charges against her but reserve the right to appeal a specified pretrial ruling, such as a ruling denying a motion to suppress evidence.[301] If a defendant loses the appeal, her plea remains in place. A victorious defendant can withdraw her guilty plea.[302] Conditional guilty pleas

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292. Barker v. Wingo, 407 U.S. 514, 519 (1972) ("[T]here is a societal interest in providing a speedy trial which exists separate from, and at times in opposition to, the interests of the accused."); *see also* Cobbledick v. United States, 309 U.S. 323, 325 (1940) ("[E]ncouragement of delay is fatal to the vindication of the criminal law.").

293. *See* 18 U.S.C. § 3145(c). Many state courts protect this important avenue for a defendant's interlocutory appeal less well than do federal courts. Dorothy Weldon, Note, *More Appealing: Reforming Bail Review in State Courts*, 118 COLUM. L. REV. 2401, 2418 (2018).

294. *See* Flanagan v. United States, 465 U.S. 259, 265 (1984) ("[T]he Court has interpreted the requirements of the collateral-order exception to the final judgment rule with the utmost strictness in criminal cases."); Carroll v. United States, 354 U.S. 394, 403 (1957) (describing as "very few" the instances in which the collateral order doctrine applies to criminal cases); *see also* 7 LAFAVE ET AL., *supra* note 218, § 27.2(c).

295. *Abney*, 431 U.S. at 659.

296. Helstoski v. Meanor, 442 U.S. 500, 506–07 (1979).

297. Sell v. United States, 539 U.S. 166, 175–77 (2003).

298. *See, e.g.*, United States v. Ferro, 321 F.3d 756, 760 (8th Cir. 2003) (commitment to custody of the Attorney General); United States v. J.J.K., 76 F.3d 870, 871–72 (7th Cir. 1996) (order that a juvenile be tried as an adult); *see also* 7 LAFAVE ET AL., *supra* note 218, § 27.2(c).

299. 28 U.S.C. § 1292 ("in making in a *civil action* an order not otherwise appealable under this section" (emphasis added)).

300. *See* Fed. R. CRIM. P. 11(a)(2).

301. *Id.*; *see also* 5 LAFAVE ET AL., *supra* note 218, § 21.6(b).

302. 5 LAFAVE ET AL., *supra* note 218, § 21.6(b).

are quite important for defendants in some types of cases: In possession cases, for instance, the ruling on a suppression motion is typically outcome-determinative; the government cannot meet its burden of proof without the contraband, and a defendant is not terribly likely to avoid conviction if the jury hears that she was caught with contraband. Even though such motions may be outcome-determinative as a practical matter for defendants in possession cases, that only the prosecutor has the right to appeal adverse rulings on suppression motions leaves the conditional guilty plea as the only avenue for the defendant.[303]

But conditional guilty pleas protect criminal defendants' rights less well than do civil interlocutory appeals. Most fundamentally, they necessarily follow defendants' guilty (or no contest) pleas, meaning that a defendant must first be convicted of a crime. And that means that the appellate court will view the defendant through a lens of guilt.[304] Moreover, the opportunity to conditionally plead guilty comes only by permission of the government: it requires the assent of both the prosecutor and judge.[305] But prosecutors have an incentive to oppose requests for conditional pleas because the inability to plead conditionally may provide sufficient pressure to induce an unconditional guilty plea that is final and not subject to appeal. Conditional guilty pleas are thus even more restrictive than civil appeals via certification that require only consent of court.[306]

Criminal law too sometimes affords appellate review via writ of mandamus or writ of prohibition.[307] But mandamus should not be used to undermine the policy against piecemeal appeals—one that has particular importance in criminal cases, the Supreme Court said

303. 18 U.S.C. § 3731. Approaches vary across the states. *See, e.g.*, FLA. STAT. § 924.071 (2022) (permitting only the government to appeal rulings on suppression motions); PA. R. CRIM. P. § 581(j) (not permitting either side to appeal rulings on suppression motions).

304. *See, e.g.*, Keith A. Findley, *Innocence Protection in the Appellate Process*, 93 MARQ. L. REV. 591, 605–06 (2009); Keith A. Findley & Michael S. Scott, *Multiple Dimensions of Tunnel Vision in Criminal Cases*, 2006 WIS. L. REV. 291, 320–21.

305. FED. R. CRIM. P. 11(a)(2). Some states simply do not permit conditional pleas or permit them only in a few narrow instances. *See, e.g.*, Hooten v. State, 442 S.E.2d 836, 840 (Ga. Ct. App. 1994); Marjorie Whalen, Comment, *"A Pious Fraud": The Prohibition of Conditional Guilty Pleas in Rhode Island*, 17 ROGER WILLIAMS U. L. REV. 480, 481–82 (2012) (criticizing Rhode Island's unwillingness to embrace conditional pleas); *see also* Clark J. Brown, Comment, *Conditional Guilty Pleas in Arkansas: An Assessment and a Plea for Change*, 63 ARK. L. REV. 557, 557–59 (2010) (criticizing the narrowness of Arkansas law on conditional guilty pleas).

306. *See* 28 U.S.C. § 1292(b).

307. *See* 7 LAFAVE ET AL., *supra* note 218, § 27.4(a).

in *Will v. United States*.[308] "[F]ederal courts have limited the use of the writs in criminal cases" "in light of *Will*."[309] In some rare instances, however, mandamus may lie in favor of a criminal defendant to vindicate mandatory procedural rights, such as the right to a probable cause hearing or appointment of counsel.[310] An important treatise suggests that the "always stingy approach to mandamus" applies similarly infrequently in civil and criminal procedure.[311]

The most precise comparison to civil interlocutory appeals and civil mandamus review would require combining criminal interlocutory appeals, conditional guilty pleas, and mandamus review. That is not feasible with any precision. But in a rough sense, criminal defendants receive less protection from appellate courts without first having to go to trial—a trial that will carry massive sentencing penalties for a losing defendant. And even defendants' best opportunities to appeal without trial come typically after first pleading guilty to a crime and seeking the benevolence of the prosecutor and judge for such a conditional plea.

E. Arbitration and Diversion

Both civil and criminal procedure have mechanisms that allow some defendants an exit from formal legal proceedings and reduced publicity. In civil litigation, arbitration simply eliminates many potential civil claims.[312] Arbitration is a *vastly* more powerful tool for civil defendants than is its rough counterpart in the criminal system—diversion. Civil defendants can opt out of litigation through arbitration clauses before litigation is ever threatened, let alone filed. And they can do so with only the most passive, formalistic consent of the other party.[313] For those disputes that are not erased completely by an arbitration clause, arbitration offers freedom from collective action, and it offers decisionmakers who want repeat-player

308. 389 U.S. 90, 96–97 (1967) ("Mandamus, of course, may never be employed as a substitute for appeal in derogation of these clear policies.").

309. 7 LAFAVE ET AL., *supra* note 218, § 27.4(b).

310. *See In re* Sterling-Suarez, 306 F.3d 1170, 1172–73 (1st Cir. 2002) (appointment of counsel); Brown v. Fauntleroy, 442 F.2d 838, 842 (D.C. Cir. 1971) (probable cause hearing); *see also* 16 WRIGHT, MILLER & COOPER, *supra* note 272, § 3936.1 (collecting cases regarding criminal defendants obtaining mandamus relief).

311. 16 WRIGHT, MILLER & COOPER, *supra* note 272, § 3936.1.

312. Judith Resnik, *Diffusing Disputes: The Public in the Private of Arbitration, the Private in Courts, and the Erasure of Rights*, 124 YALE L.J. 2804, 2808 (2015) (explaining that "the Supreme Court open[ing] the floodgates" to arbitration has not led to "'mass arbitration'" but rather "eras[ure]" of potential claims).

313. *See id.* at 2839–40 (discussing the lack of meaningful consent in many contracts with arbitration clauses that the Supreme Court enforced).

defendants to hire that arbitrator in future cases.[314] Unlike some civil defendants who rely on their ex ante efforts to foist arbitration agreements on potential plaintiffs, criminal defendants typically must rely on prosecutors' grace (ex post) to permit them into diversion programs—grace that is rarely extended.[315] Moreover, such programs are narrowly circumscribed in their eligibility, onerous to successfully complete, and may nonetheless preserve a public record of an accusation of wrongdoing for nontrivial periods.[316] Federal courts have largely turned away from diversion and instead to specialized courts that typically do not even offer the prospect of dismissed charges.[317]

Civil defendants can opt out of legal proceedings in favor of arbitration prior to litigation with incredible (and increasing) ease and potency.[318] The Supreme Court has made arbitration clauses extraordinarily powerful.[319] Defendants may embed language that shields them from litigation in their boilerplate consumer contracts,

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314. *See* Catherine A. Rogers, *The Arrival of the "Have-Nots" in International Arbitration*, 8 NEV. L.J. 341, 343 (2007) ("Unlike judges, arbitrators only earn money if they are appointed by parties. Because one-shot players are unlikely to re-appoint an arbitrator in the future, the argument goes, arbitrators have an incentive to favor repeat players in the hopes that a favorable award will translate into future appointments.").

315. *See, e.g.*, Rachel E. Barkow, *Using the Corporate Prosecution and Sentencing Model for Individuals: The Case for a Unified Federal Approach*, 83 L. & CONTEMP. PROBS. 159, 178 (2020) (describing specialized courts and diversion as "the rare exception rather than the dominant approach" that is "reserved for the lowest-level offenses"). A look at state diversion programs would find somewhat more robust opportunities for defendants but many of the same problems as federal diversion plus financial obstacles to participation. *See, e.g.*, Amy Kimpel, *Paying for a Clean Record*, 112 J. CRIM. L. & CRIMINOLOGY (forthcoming 2022) (manuscript at 7–8) (on file with author).

316. *See infra* notes 329–51 and accompanying text.

317. *See* Christine S. Scott-Hayward, *Rethinking Federal Diversion: The Rise of Specialized Criminal Courts*, 22 BERKELEY J. CRIM. L. 47, 49–53 (2017).

318. *See, e.g.*, Pamela K. Bookman, *The Arbitration-Litigation Paradox*, 72 VAND. L. REV. 1119, 1120–21 (2019) ("Since [1983], the Court has enforced arbitration clauses in an ever-growing variety of contexts" and has "read the [Federal Arbitration Act] to require interpretations of arbitration clauses in a way that 'favors arbitration.'" (footnote omitted) (quoting Lamps Plus, Inc. v. Varela, 139 S. Ct. 1407, 1423 (2019))); David L. Noll, *Arbitration Conflicts*, 103 MINN. L. REV. 665, 669 (2018) ("Beginning in the 1980s, the Supreme Court dramatically expanded the scope of arbitration under the FAA, discarding readings of the statute that for most of the twentieth century limited arbitration's impact on federal regulatory programs.").

319. *See, e.g.*, Judith Resnik & David Marcus, *Inability to Pay: Court Debt Circa 2020*, 98 N.C. L. REV. 361, 363 n.10 (2020); Judith Resnik, Stephanie Garlock & Annie J. Wang, *Collective Preclusion and Inaccessible Arbitration: Data, Non-Disclosure, and Public Knowledge*, 24 LEWIS & CLARK L. REV. 611, 619–20 (2020).

which no consumer ever reads.[320] And they need not even put the arbitration clause in the original contract; companies can add an arbitration clause to adhesion contracts with existing customers, and the consumer's lack of written rejection of that term suffices for consent to the modification.[321] Requiring individual arbitration instead of permitting aggregate litigation eliminates most potential claims.[322] Because an "agreement" to arbitrate does not require anything like a bargained-for term between parties with relatively equal negotiating power,[323] the formal distinction that arbitration requires an arbitration clause and no such analog exists in criminal procedure is less meaningful than a casual observer might think.[324]

Even when arbitration does not eliminate a claim, it affords decisionmaking by someone—likely a White man[325]—who seeks the

320. *See, e.g.*, Stephen J. Ware, *The Centrist Case Against Current (Conservative) Arbitration Law*, 68 FLA. L. REV. 1227, 1266 (2016) ("Before *Concepcion* and *Amex*, courts rarely enforced class waivers in non-arbitration adhesion contracts.").

321. *See* David Horton, *The Shadow Terms: Contract Procedure and Unilateral Amendments*, 57 UCLA L. REV. 605, 623–29 (2010) (explaining the rise of unilateral amendments and courts' divergent approaches to when these amendments are permissible).

322. Resnik, *supra* note 312, at 2812–13, 2893–2910 (explaining that the push toward arbitration rather than aggregate litigation has not led to "mass arbitration" but rather "erasing" claims); Resnik, Garlock & Wang, *supra* note 319, at 628 tbl.1 (finding eighty-five arbitration claims against AT&T per year over the course of a decade, compared to its subscriber base of between eighty-five million and 165 million people); *see also* Andrea Cann Chandrasekher & David Horton, *Arbitration Nation: Data from Four Providers*, 107 CALIF. L. REV. 1, 9 (2019) (finding only a "modest" "uptick" in arbitration claims after *Concepcion* forced many cases or potential cases out of court). Classwide arbitration also cannot be compelled unless an arbitration agreement speaks clearly to the availability of classwide rather than bilateral arbitration. Lamps Plus, Inc. v. Varela, 139 S. Ct. 1407, 1415 (2019) (holding that ambiguity is insufficient to compel classwide arbitration); Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 559 U.S. 662, 684–86 (2010) (holding that silence is insufficient to compel classwide arbitration).

323. *See, e.g.*, Noll, *supra* note 318, at 679–80 ("[A]rbitration agreements contained in standard form contracts of adhesion had the same status as those contained in contracts negotiated by sophisticated parties."); Resnik, *supra* note 312, at 2810; *see also* Norris, *supra* note 5, at 494–502 (criticizing the Court's inattention to power dynamics in several civil procedure contexts including arbitration).

324. I do not suggest that arbitration and diversion *should* be equivalents. Far from it. That they are as similar as they are highlights the absurdity of the Supreme Court's arbitration jurisprudence. Nonetheless, a detailed exploration of this comparison is beyond the scope of this Article.

325. *See* Sarah Rudolph Cole, *Arbitrator Diversity: Can It Be Achieved?*, 98 WASH. U. L. REV. 965, 983–85 (2021) (explaining the lack of arbitrator diversity and arguing that even though the pool of potential arbitrators is diversifying,

defendant's future business,[326] limits publicity compared to litigation, and offers the ability to avoid unfavorable precedent.[327] Confidentiality agreements between the parties promise secrecy, at least to the extent that neither party files something in court to confirm or enforce the award.[328]

A federal criminal defendant's opportunity to access diversion, in the vast majority of instances,[329] depends entirely on prosecutorial discretion—discretion that is infrequently exercised.[330] Many U.S. Attorneys' Offices either formally or informally further discourage diversion.[331] Federal diversion is typically confined to those accused of nonviolent, first-time offenses that are not drug trafficking;[332] it is most available to those accused of white-collar crimes, such as fraud, theft, and embezzlement.[333] Federal diversion is also confined to those defendants who are released rather than detained pretrial—a

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that more diverse pool has not necessarily led to more diverse arbitrators actually being selected).

326. Catherine A. Rogers, *The Arrival of the "Have-Nots" in International Arbitration*, 8 NEV. L.J. 341, 343 (2007) ("Unlike judges, arbitrators only earn money if they are appointed by parties. Because one-shot players are unlikely to re-appoint an arbitrator in the future, the argument goes, arbitrators have an incentive to favor repeat players in the hopes that a favorable award will translate into future appointments."). Indeed, repeat player defendants in arbitration have a *huge* advantage in outcomes. David Horton & Andrea Cann Chandrasekher, *After the Revolution: An Empirical Study of Consumer Arbitration*, 104 GEO. L.J. 57, 110–11 (2015); David Horton & Andrea Cann Chandrasekher, *Employment Arbitration After the Revolution*, 65 DEPAUL L. REV. 457, 487–88 (2016).

327. Resnik, *supra* note 312, at 2855.

328. Christopher R. Drahozal, *Confidentiality in Consumer and Employment Arbitration*, 7 ARB. L. REV. 28, 30–31 (2015) (explaining that arbitration rules do not impose confidentiality obligations on the parties but that confidentiality agreements can).

329. Participation in court-based programs does not depend entirely on the prosecutor's say-so, but those programs are even less good for defendants than is diversion. *See infra* notes 335–37.

330. *See* OFF. OF INSPECTOR GEN., U.S. DEP'T OF JUST., AUDIT OF THE DEPARTMENT'S USE OF PRETRIAL DIVERSION AND DIVERSION-BASED COURT PROGRAMS AS ALTERNATIVES TO INCARCERATION 11–12 (2016) [hereinafter DOJ AUDIT] (calculating that approximately 21 percent of defendants charged with low-level nonviolent offenses who have minimal criminal history receive diversion—a calculation whose denominator is already seriously limited by those qualifiers).

331. *Id.* at 17–20.

332. *Id.* at 2, 18.

333. Scott-Hayward, *supra* note 317, at 65; Thomas E. Ulrich, *Pretrial Diversion in the Federal Court System*, FED. PROB., Dec. 2002, at 31; Joseph M. Zlatic, Donna C. Wilkerson & Shannon M. McAllister, *Pretrial Diversion: The Overlooked Pretrial Services Evidence-Based Practice*, FED. PROB., June 2010, at 30.

shrinking pool that excludes three-quarters of defendants at the outset.[334]

Instead of actual diversion with the limits described above, federal courts have largely turned toward an even weaker protection for defendants: specialized courts.[335] Many of these specialized courts result not in dismissal of charges but merely reduce the period of a defendant's incarceration, and even that shortened sentence is not guaranteed.[336] For those specialized courts that offer the prospect of outright dismissal, that outcome accrues to vanishingly few defendants.[337]

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334. *See* Scott-Hayward, *supra* note 317, at 62; *see also* ADMIN. OFF. OF THE U.S. CTS., JUDICIAL BUSINESS: FEDERAL PRETRIAL SERVICES TABLES tbl.H-14 (2019), https://www.uscourts.gov/statistics/table/h-14/judicial-business/2019/09/30 (click the top "download data table" button) (finding that 75 percent of federal defendants are detained pretrial). For more on pretrial detention, see *supra* Subpart II.A.

335. *See, e.g.*, Rachel E. Barkow, *Using the Corporate Prosecution and Sentencing Model for Individuals: The Case for a Unified Federal Approach*, 83 L. & CONTEMP. PROBS. 159, 178 (2020) (describing specialized courts and diversion as "the rare exception rather than the dominant approach" that is "reserved for the lowest-level offenses"); Scott-Hayward, *supra* note 317, at 72–80 (describing the types of specialized federal courts and their prevalence); *see also* U.S. SENT'G COMM'N, FEDERAL ALTERNATIVE-TO-INCARCERATION COURT PROGRAMS 15–30 (2017) (detailing the Sentencing Commission's observations of five specialized courts). A look at state diversion programs would find somewhat more robust opportunities for defendants but many of the same problems as federal diversion plus financial obstacles to participation. *See, e.g.*, Kimpel, *supra* note 315 (manuscript at 7–8).

336. *See* U.S. SENT'G COMM'N, *supra* note 335, at 19–20, 23–25, 27, 29 (describing the sentencing process for five specialized courts); DOJ AUDIT, *supra* note 330, at 2, 4 (noting that prosecutors retain discretion in program entry and sentencing recommendations for participants); U.S. DIST. CT. FOR THE E.D.N.Y., ALTERNATIVES TO INCARCERATION IN THE EASTERN DISTRICT OF NEW YORK 10 (Aug. 2015) [hereinafter ALTERNATIVES TO INCARCERATION] (explaining that successful completion of the Pretrial Opportunity Program in Brooklyn typically results in sentencing considerations, but only in three cases in the program's history has a defendant's case been dismissed outright); Scott-Hayward, *supra* note 317, at 78–79 (pointing out that the District of Massachusetts's diversion program requires a sentencing judge to only "consider" a defendant's participation).

337. *E.g.*, ALTERNATIVES TO INCARCERATION, *supra* note 336, at 10, 13, 19 (reporting three dismissals of cases in the then-three-year history of the Eastern District of New York's Pretrial Opportunity Program and two dismissals in the two-year history of its Special Options Services Program); *id.* at 36 (reporting forty dismissals over a period of more than ten years in the Central District of Illinois's Pretrial Alternatives to Detention Initiative). For thoughtful criticism of specialized courts, see generally Erin R. Collins, *The Problem of Problem-Solving Courts*, 54 U.C. DAVIS L. REV. 1573 (2021) (contrasting the growing popularity of specialized courts with the lack of data showing their efficacy); Erin R. Collins, *Status Courts*, 105 GEO. L.J. 1481 (2017) (balancing the potential for

Probation before judgment is available only to those accused of first-time drug offenses and only for simple possession.[338] It too is rarely used.[339]

Unlike the favorable decisionmakers in arbitration, the few defendants[340] who manage to get into diversion must clear numerous burdensome hurdles to successfully emerge from the maze of diversion.[341] Stories from federal diversion are hard to come by, but one poignant account of navigating diversion in state court comes from Emily Bazelon's book that chronicles "Kevin's" extraordinary efforts.[342]

Unlike with arbitration clauses that will tend to squelch even the *filing* of a public lawsuit, diversion sometimes begins only after criminal charges have been filed.[343] For post-charge diversion, accusations of criminal conduct remain pending and visible for all to see for an extended period until diversion is complete.[344] Many

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specialized courts to change the way in which we conceive of justice and punishment with their potential to disincentivize systematic reform).

338. 18 U.S.C. § 3607(a).

339. *See* Scott-Hayward, *supra* note 317, at 69–70 (reporting on informal conversations with stakeholders to show the rare use of probation before judgment).

340. One scholar importantly takes issue with diversion programs or scholars who refer to participants as "offenders" if the defendant has not been convicted of a crime. Anna Roberts, *LEAD Us Not into Temptation: A Response to Barbara Fedders's "Opioid Policing,"* 94 IND. L.J. SUPPLEMENT 91, 97–99 (2019).

341. *See, e.g.*, ALTERNATIVES TO INCARCERATION, *supra* note 336, at 46 (explaining that the Adelante Program in the Western District of Texas "lasts 18 months, but it can be extended up to 24 months"); *id.* at 44–45 (reporting that the Sentencing Alternatives Improving Lives Program in the Eastern District of Missouri involves "intensive supervision that includes regular court appearances" and other programs with three different phases that "last[] for 12 to 18 months").

342. *See generally* EMILY BAZELON, CHARGED: THE NEW MOVEMENT TO TRANSFORM AMERICAN PROSECUTION AND END MASS INCARCERATION (2019) (using the true account of "Kevin" to detail the nuances of a state diversion program). For less detailed profiles of participants in *federal* specialized courts, see ALTERNATIVES TO INCARCERATION, *supra* note 336, at 22–34.

343. *See, e.g.*, U.S Dep't of Just., Just. Manual § 9-22.010 (2011) (describing both pre- and post-charge diversion); *see also* Roberts, *supra* note 340, at 93–94 (explaining the importance of the fact that defendants must first be arrested before participating in diversion).

344. *See, e.g.*, MARGARET COLGATE LOVE, JENNY ROBERTS & WAYNE A. LOGAN, COLLATERAL CONSEQUENCES OF CRIMINAL CONVICTIONS: LAW, POLICY AND PRACTICE § 7:22 (2018) (explaining the distinction between "deferred adjudication" and "deferred prosecution" where the former occurs post-charge and the latter occurs pre-charge); Jenny Roberts, *Prosecuting Misdemeanors*, *in* THE OXFORD HANDBOOK OF PROSECUTORS AND PROSECUTION 513, 527 (Ronald F. Wright, Kay L. Levine, & Russell M. Gold eds., 2021) (explaining different forms of deferred adjudication). *But see* Colleen Chien, *America's Paper Prisons: The Second Chance Gap*, 119 MICH. L. REV. 519, 552–63 (2020) (explaining the

programs require defendants to publicly plead guilty to criminal wrongdoing before the alternative process begins.[345]

One subset of criminal defendants can more frequently avail themselves of diversion than can others: corporate defendants.[346] In corporate criminal cases, deferred prosecution agreements ("DPAs") or non-prosecution agreements ("NPAs") are commonplace ways to resolve cases that exist without a structured program.[347] Although a few companies in a few prominent cases have been convicted of crimes—such as BP for its role in the Deepwater Horizon spill or Arthur Andersen for its role in Enron's collapse—that outcome is far from typical.[348] Far more common is the resolution through DPA or NPA that leaves the public impression that the company has gotten away with its wrongdoing or perhaps even that it never did wrong[349]—a resolution much more like arbitration than that available to most criminal defendants.[350]

Diversion has significant racial disparities embedded within it. White people are vastly overrepresented in federal diversion relative to their portion of the population of federal criminal defendants with cases activated in pretrial services.[351]

"second chance gap" between defendants eligible to have their records cleared and those whose records are actually cleared).

345. COLGATE LOVE, ROBERTS & LOGAN, *supra* note 344, § 7:22.

346. *See* Barkow, *supra* note 315, at 178 (explaining that diversion is rarely available to individual federal defendants but that its DPA or NPA analog is widespread).

347. *See* David M. Uhlmann, *Deferred Prosecution and Non-Prosecution Agreements and the Erosion of Corporate Criminal Liability*, 72 MD. L. REV. 1295, 1311–20 (2013) (analyzing the dramatic increase in DPAs and NPAs); *see also* Ronald F. Wright & Kay L. Levine, *Models of Prosecutor-Led Diversion Programs in the United States and Beyond*, 4 ANN. REV. CRIMINOLOGY 331, 335 (2021) (explaining the ad hoc nature of DPAs and NPAs).

348. *See* SAMUEL W. BUELL, CAPITAL OFFENSES: BUSINESS CRIME AND PUNISHMENT IN AMERICA'S CORPORATE AGE 122–41 (2016) (analyzing obstacles to prosecuting corporations).

349. *See* BRANDON L. GARRETT, TOO BIG TO JAIL: HOW PROSECUTORS COMPROMISE WITH CORPORATIONS 61, 66–67, 77–78 (2014) (criticizing DPAs for, among other things, their lack of transparency). Even though such agreements may require a company to pay significant fines, they lack the moral force of a criminal conviction, which is precisely their point. *See, e.g.*, *id.* at 45–47; Uhlmann, *supra* note 347, at 1302 ("[D]eferred prosecution and non-prosecution agreements limit the punitive and deterrent value of the government's law enforcement efforts and extinguish the societal condemnation that should accompany criminal prosecution.").

350. For more on the ways in which federal prosecutors are more generous to entity defendants than individual defendants and criticism of that disparity, see Barkow, *supra* note 315, at 162–78.

351. *See* Ulrich, *supra* note 333, at 32.

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There are, of course, ways in which criminal defendants are *better* protected procedurally than their civil counterparts, but those differences mean less in practice than one might wish. Criminal defendants subject to jail or prison have a right to counsel at all critical stages.[352] The import of that distinction is heavily class-based;[353] a wealthy civil litigant of the sort who has outsized influence in shaping federal procedure has no need for appointed counsel. I do not overlook the critical value that appointed counsel could confer on the *many* civil defendants without resources[354]—such as Ms. Lassiter, whose parental rights were terminated without counsel and whose argument for counsel was rejected by a Supreme Court analysis that sounded in race and sex.[355] But civil defendants without resources are far more common in state courts and thus beyond the scope of this Article. To the extent that federal procedure helps shape state procedure,[356] these civil defendants without substantial resources become collateral damage amidst rules catered toward and shaped by wealthy civil defendants who need not play for a rule advocating a civil right to counsel.[357]

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352. That the Supreme Court has not labeled a pretrial detention hearing a critical stage leaves even the scope of the right to counsel woefully insufficient, however. *See, e.g.*, Paul Heaton, *The Expansive Reach of Pretrial Detention*, 98 N.C. L. REV. 369, 373–74 (2020) (noting that "the 'critical stage' analysis applied by the Supreme Court to preliminary stages of the adjudication process has yet to be definitively extended to bail hearings"). *See generally* Douglas L. Colbert, *Thirty-Five Years After* Gideon*: The Illusory Right to Counsel at Bail Proceedings*, 1998 U. ILL. L. REV. 1 (arguing that many jurisdictions incorrectly apply constitutional doctrine and deny counsel to indigent individuals during crucial pretrial proceedings). So too do public defender and other "criminal justice fees" weaken the right to counsel. *See generally* Beth A. Colgan, *Paying for* Gideon, 99 IOWA L. REV. 1929 (2014).

This difference in the right to counsel between civil and criminal procedure persists even when the interests at stake are identical, such as avoiding incarceration. *See generally* Brooke D. Coleman, *Prison Is Prison*, 88 NOTRE DAME L. REV. 2399 (2013) (criticizing the Court's refusal to afford counsel in civil contempt proceedings where alleged contemnors are subject to incarceration).

353. So too is it grounded in gender differences between civil and criminal defendants. *See* Sabbeth & Steinberg, *supra* note 17 (manuscript at 26–35).

354. *See, e.g.*, *id.* (manuscript at 21) (explaining that three-quarters of civil cases involve at least one party unrepresented by counsel).

355. *See generally* Lassiter v. Dep't of Soc. Servs., 452 U.S. 18, 32 (1981) (holding that the Constitution does not require the appointment of counsel for indigent parents in parental status termination proceedings); Coleman, *supra* note 17 (highlighting the way in which sex and race affected how the Supreme Court viewed the right to counsel in *Lassiter*).

356. Coleman, *One Percent Procedure*, *supra* note 1, at 1049.

357. *Cf.* Galanter, *supra* note 20, at 98–103 (discussing the interests of repeat players in playing for rules that favor their interests).

Criminal defendants cannot be convicted unless the government proves all elements of the charged crime(s) beyond a reasonable doubt.[358] Civil defendants, by contrast, can be held liable on a mere preponderance of the evidence standard in most cases.[359] But as powerful as that protection may be for criminal defendants at trial, it is far less clear what import it has over the overwhelming majority of convictions that come via guilty plea.[360] The same must be said for the confrontation right.[361]

In sum, civil procedure offers greater pretrial protections for defendants than does criminal procedure, even though the nature of the interests at stake would suggest the opposite.

III. SPECIFIC PROCEDURES FOR SPECIFIC TYPES OF CIVIL PARTIES

In some types of federal civil cases where race and wealth disparities between the parties are predictable, Congress has created nontranssubstantive rules on top of the already-defendant-friendly procedural rules.[362] These subject-specific rules provide extra

358. *In re* Winship, 397 U.S. 358, 364 (1970).

359. There are some exceptions, however, that tort defendants have secured for themselves, such as a clear and convincing evidentiary standard to evade damages caps or to award punitive damages. *See, e.g.*, COLO. REV. STAT. § 13-64-302 (2022) (setting noneconomic damages caps); NEV. REV. STAT. § 42.005 (2021) (limiting punitive damages).

360. *See, e.g.*, Oren Gazal-Ayal & Avishalom Tor, *The Innocence Effect*, 62 DUKE L.J. 339, 341 (2012) ("About 95 percent of felony convictions follow guilty pleas."). *See generally* Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2463 (2004) (arguing that shadow-of-trial models that forecast expected trial outcomes in order to strike bargains in civil litigation should not be applied to criminal cases where a defendant's interests in plea bargains may diverge from the shadows of trials); William J. Stuntz, *Plea Bargaining and Criminal Law's Disappearing Shadow*, 117 HARV. L. REV. 2548 (2004) (explaining why plea bargaining is less affected by legal change than is civil settlement).

361. *See generally* Ortman, *supra* note 11 (arguing that the system of plea bargaining has hollowed out the Confrontation Clause).

362. Two large classes of state civil cases where defendants are not typically wealthy and White also have subject-specific procedure—eviction and family law. *See* Marcus, *supra* note 24, at 1218; Cathy Lesser Mansfield, *Disorder in the People's Court: Rethinking the Role of Non-Lawyer Judges in Limited Jurisdiction Court Civil Cases*, 29 N.M. L. REV. 119, 150–51 (1999). In eviction cases, the plaintiff is the wealthier, whiter actor. *Cf.* Jung Hyun Choi, *Breaking Down the Black-White Homeownership Gap*, URBAN INST.: URBAN WIRE, https://www.urban.org/urban-wire/breaking-down-black-white-homeownership-gap [https://perma.cc/9F2M-J8AD] (explaining that homeownership rates and household income are much higher for White Americans than Black Americans). Landlord-plaintiffs have a special expedited process to obtain possession of the property. *See* Mansfield, *supra*, at 150–51. Family law cases too have nontranssubstantive procedure. Marcus, *supra* note 24, at 1218. And in at least one segment of family law—child welfare proceedings—women of color are vastly

protections to wealthier, whiter defendants, particularly in cases where plaintiffs are disproportionately poor people of color.[363] This is the flipside of the idea that transsubstantive procedure helps resist capture.[364] Indeed, Charles Clark feared that legislative control over procedural rules would enable "political manipulation."[365] No such subject-specific rules protect criminal defendants.

Prisoner-plaintiffs—who are necessarily drawn from the population of prisoners with its attendant race and class disparities[366]—face particularly high procedural hurdles. Under the Prison Litigation Reform Act ("PLRA"),[367] unlike other civil plaintiffs, prisoners must exhaust administrative remedies before filing suit and pay their filing fees without eligibility for a fee waiver.[368] Debts for those fees cannot even be eliminated through bankruptcy.[369] Courts then must screen prisoner suits at the complaint stage and dismiss them sua sponte if they fail to state a claim upon which relief

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disproportionately represented as defendants. Sabbeth & Steinberg, *supra* note 17 (manuscript at 13).

363. *Cf.* Jeffrey C. Dobbins, *Legislative Transsubstantivity*, 12 NE. U. L. REV. 707, 745–46 (2020) (arguing that nontranssubstantive procedure allows special interest groups to advocate procedures that help them to a legislature that lacks expertise in judicial procedure). This Article does not seek to delve deeply into whether our federal civil rules are indeed transsubstantive, *see, e.g.*, Stephen B. Burbank, *The Costs of Complexity*, 85 MICH. L. REV. 1463, 1474 (1987) (book review); Judith Resnik, *Failing Faith: Adjudicatory Procedure in Decline*, 53 U. CHI. L. REV. 494, 526 (1986), nor whether transsubstantivity is valuable, *see generally* Marcus, *supra* note 24.

364. Dobbins, *supra* note 363, at 711, 718; *see also* Pamela K. Bookman & David L. Noll, *Ad Hoc Procedure*, 92 N.Y.U. L. REV. 767, 778–79 (2017) ("[W]hen the state acts through formal, ex ante rules, lawmakers operate behind a veil of ignorance that prevents them from using the power to make law to redistribute resources to favored groups.").

365. David Marcus, *The Past, Present, and Future of Trans-Substantivity in Federal Civil Procedure*, 59 DEPAUL L. REV. 371, 395 (2010) (quoting Charles E. Clark, *The Challenge of a New Federal Civil Procedure*, 20 CORNELL L.Q. 443, 457 (1935)).

366. In 2019, only 30 percent of prison inmates identified as White. *See* E. ANN CARSON, U.S. DEP'T OF JUST., BUREAU OF JUST. STAT., PRISONERS IN 2019, at 6 tbl.3 (2020), https://bjs.ojp.gov/content/pub/pdf/p19.pdf [https://perma.cc/3EPT-9NF2]. That percentage has remained between 30 percent and 31 percent throughout the decade. *Id.* As of 2014, "[i]n twelve states, more than half of the prison population [wa]s [B]lack." ASHLEY NELLIS, SENT'G PROJECT, THE COLOR OF JUSTICE: RACIAL AND ETHNIC DISPARITY IN STATE PRISONS 3 (2016), https://perma.cc/KL8J-MNNY. In Maryland, a staggering 72 percent of the prison population is African-American. *Id.*

367. Prison Litigation Reform Act of 1995, Pub. L. No. 104-134, §§ 802–809, 110 Stat. 1321.

368. 42 U.S.C. § 1997e(a) (exhaustion); 28 U.S.C. § 1915(b) (filing fees); Marcus, *supra* note 365, at 405. For a rich discussion of the PLRA and its effects, see generally Margo Schlanger, *Inmate Litigation*, 116 HARV. L. REV. 1555 (2003).

369. 11 U.S.C. § 523(a)(17).

may be granted.[370] Defendants need only respond to the complaint if ordered to do so by the court after it finds that the plaintiff has a reasonable opportunity to prevail on the merits.[371] Prisoner plaintiffs are also subject to a three-strikes rule that bars them from proceeding in forma pauperis (that is, without paying filing fees in advance) if that plaintiff has had three or more suits dismissed previously under the PLRA.[372] These added procedural protections for defendants have substantially reduced the volume of prisoner litigation and reduced prisoners' chances of success in such litigation.[373]

Congress (aided by federal court interpretation) has imposed huge procedural hurdles that do not apply to other types of litigation on defendants who challenge their convictions in federal court through petitions for a writ of habeas corpus.[374] The Antiterrorism and Effective Death Penalty Act ("AEDPA")[375] imposes strict time limits, limits inmates (with very narrow exceptions) to a single petition, and imposes an *incredibly* deferential standard of review for issues actually adjudicated in state courts.[376] Although the path for habeas review is a narrow one under the text of AEDPA, the Supreme Court has construed it even more narrowly than the face of the statute might suggest.[377]

Employer-defendants (or potential defendants) have garnered added procedural protection against discrimination claims insofar as plaintiffs must file a charge with the U.S. Equal Employment Opportunity Commission ("EEOC") or the relevant state agency before filing a lawsuit—another exhaustion requirement.[378] The EEOC charge requirement allows employers an opportunity to settle cases before a public lawsuit has been filed.[379] That requirement also

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370. 28 U.S.C. § 1915A; 42 U.S.C. § 1997e(c)(1); Marcus, *supra* note 365, at 405.

371. 42 U.S.C. § 1997e(g); Marcus, *supra* note 365, at 405.

372. 28 U.S.C. § 1915(g).

373. Schlanger, *supra* note 368, at 1658–64.

374. *See id.* at 1632–33; 28 U.S.C. §§ 2254–2255.

375. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214.

376. 28 U.S.C. §§ 2244(b)–(d); § 2254(d)–(e); § 2255(f), (h).

377. *See, e.g.*, Dunn v. Reeves, 141 S. Ct. 2405, 2410 (2021) (applying "doubly deferential" analysis with "wide latitude" to an ineffective assistance of counsel claim when a state court had found that counsel performed adequately); Shinn v. Kayer, 141 S. Ct. 517, 523 (2020) ("The prisoner must show that the state court's decision is so obviously wrong that its error lies 'beyond any possibility for fairminded disagreement.'" (quoting Harrington v. Richter, 562 U.S. 86, 103 (2011))).

378. *See, e.g.*, Age Discrimination in Employment Act (ADEA) of 1967, 29 U.S.C. § 626(d); Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(b); Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. § 12117(a).

379. *See* 42 U.S.C. § 2000e-5(b) (discussing the EEOC's role after an investigation to eliminate unlawful practices through informal methods); *see*

means that a potential plaintiff who has failed to file within 180 or 300 days of the alleged violation is barred from suing, which also may impede the ability of plaintiffs to proceed collectively.[380] Employment discrimination cases necessarily entail claims brought by a member of a protected class against an employing entity.

Congress has not passed subject-specific procedural protections for certain types of criminal cases. Instead, protecting wealthy, White defendants from criminal charges comes through other means, such as greater availability of diversion[381] or cases narrowing the substantive scope of white-collar crime.[382] In state courts, when police officers are suspects or defendants, they receive favorable treatment in the investigation and pretrial phase of a case.[383]

IV. VANISHING TRIALS

The vanishing trial affords another lens deeply connected to pretrial procedure through which to examine race and class disparities between the civil and criminal systems.[384] Both systems made trials vanish but did so in different ways. Civil procedure has

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also, e.g., Tolliver v. Xerox Corp., 918 F.2d 1052, 1058 (2d Cir. 1990) (discussing the purpose of the EEOC charge requirement under the ADEA as facilitating conciliation).

380. *See, e.g.*, Ruehl v. Viacom, Inc., 500 F.3d 375, 385–90 (3d Cir. 2007) (analyzing applicability of the "single filing rule" that could excuse a class member for not filing an EEOC charge if a named plaintiff filed a charge that raised classwide allegations); Paige v. California, 102 F.3d 1035, 1041–43 (9th Cir. 1996) (determining that a named plaintiff's EEOC charge sufficed to enable her to file a class action). Congress made more difficult vindication of wage and hour rights under the Fair Labor Standards Act by precluding them from Rule 23 opt-out class actions. Marc Linder, *Class Struggle at the Door: The Origins of the Portal-to-Portal Act of 1947*, 39 BUFF. L. REV. 53, 167–75 (1991).

381. *See supra* Subpart II.E.

382. Strict Scrutiny, *Standing Cheese*, CROOKED MEDIA, at 40:42 (Jan. 20, 2020), https://strict-scrutiny.simplecast.com/episodes/standing-cheese [https://perma.cc/U95E-FC7U] (featuring Melissa Murray, criticizing disparity in the Supreme Court's concern about the breadth of prosecutorial discretion in white-collar cases versus the mine-run of criminal cases and drug cases in particular); *see also, e.g.*, Kelley v. United States, 140 S. Ct. 1565, 1571 (2020); McDonnell v. United States, 136 S. Ct. 2355, 2375 (2016). So too might wealthy criminal defendants be privileged through ad hoc procedures. *See* Linda Silberman, *Judicial Adjuncts Revisited: The Proliferation of Ad Hoc Procedure*, 137 U. PA. L. REV. 2131, 2137 (1989) (explaining that special masters and magistrate judges deploy case-specific ad hoc civil procedure); *see also* Bookman & Noll, *supra* note 364, at 772–73 (describing ad hoc civil procedure created to address a procedural problem in a pending case that is then applied retroactively to achieve a desired result).

383. *See generally* Kate Levine, *How We Prosecute the Police*, 104 GEO. L.J. 745 (2016); Kate Levine, *Police Suspects*, 116 COLUM. L. REV. 1197 (2016).

384. For more detail on the vanishing trial, see Symposium, *The Vanishing Trial*, 1 J. EMPIRICAL LEGAL STUD. 459 (2004).

created pretrial procedures to protect its largely wealthy, White defendants from the hassles and stresses of trial. Criminal law has forged a "hammer"[385] through substantive law and sentencing law that prosecutors can wield against disproportionately poor defendants of color to dissuade those defendants from exercising their right to trial.[386] It then ties judges' hands from intervening in the ensuing carnage[387] while clinging to the notion that the vanished trial will somehow protect those defendants. This is a shell game between criminal law and procedure: Robust pretrial protections are not necessary because trials with a reasonable doubt burden and confrontation rights will protect defendants.[388] Broad substantive criminal law and harsh sentencing law then make trials exceedingly rare.

With the advent of the Federal Rules of Civil Procedure in 1938, pretrial procedures, such as robust discovery including deposition practice, began to render trials less necessary in many cases.[389] Indeed, the federal rules replaced a system of common law procedure that, much like the criminal system,[390] offered little way to probe factual questions before trial, obtain documentary evidence, or confront an adverse witness.[391] In more recent civil procedure reforms, system actors have crafted civil procedure with the sometimes-explicit objective of protecting defendants from the hassles and stresses of trial, pretrial processes, or settlement

385. *See* Stephen J. Schulhofer, *Rethinking Mandatory Minimums*, 28 WAKE FOREST L. REV. 199, 202 (1993) (using the term "hammer" to describe prosecutors' ability to deploy mandatory minimum sentences to secure guilty pleas).

386. *See, e.g.*, Barkow, *supra* note 199, at 1368–69 ("Prosecutors armed with the ability to threaten pretrial detention, mandatory minimums, and long sentences are easily able to extract guilty pleas in exchange for lesser punishments."); Brown, *supra* note 91, at 191–94 (arguing that broad substantive law and harsh sentencing law, including mandatory minimums, caused trials to further vanish).

387. *See* FED. R. CRIM. P. 11(c)(1) (barring judges from involvement in plea negotiations). *See generally* Nancy J. King & Ronald F. Wright, *The Invisible Revolution in Plea Bargaining: Managerial Judging and Judicial Participation in Negotiations*, 95 TEX. L. REV. 325 (2016) (analyzing some state court systems in which judges do involve themselves in plea negotiations).

388. *Cf.* Pamela S. Karlan, *Shoe-Horning, Shell Games, and Enforcing Constitutional Rights in the Twenty-First Century*, 78 UMKC L. REV. 875, 882–88 (2010) (describing a shell game whereby the existence of the exclusionary rule and the availability of damages actions are used as an excuse for each to weaken the other protection of constitutional criminal procedure rights).

389. Langbein, *supra* note 3, at 542–72.

390. As explained above, defendants can potentially confront adverse witnesses at a preliminary hearing should one occur, but that opportunity is far from certain to exist. And obtaining documentary evidence is far more difficult still.

391. Langbein, *supra* note 3, at 530–32.

pressure.[392] For those cases that survive a motion to dismiss, the Supreme Court amended the discovery rules to address concerns that those rules were proving too burdensome and costly for defendants; it did so despite the lack of empirical grounding for those concerns.[393] When amending the discovery rules, the Advisory Committee twice expressed concerns for the hassle and expense that discovery might impose on defendants.[394] In the summary judgment trilogy, the Supreme Court offered less detail about *why* it sought to help defendants avoid trial, but it nonetheless remained concerned that interpreting Rule 56 too liberally might unnecessarily subject defendants to trial.[395] Discretionary interlocutory appeals in class actions came about in part because "[a]n order granting certification . . . may force a defendant to settle rather than incur the costs of defending a class action and run the risk of potentially ruinous liability."[396]

It should come as no great surprise then that procedure reduced the number of civil trials.[397] "In the 1960s, trials took place in about 10 percent of the civil cases brought to federal courts. By 2010, trials began in about one case out of one hundred civil cases filed."[398] In

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392. Bell Atl. Corp. v. Twombly, 550 U.S. 544, 558–59 (2007) (explaining that "a plaintiff with 'a largely groundless claim' [could] be allowed to take up the time of a number of other people" and that "the threat of discovery expense will push cost-conscious defendants to settle even anemic cases" (quoting Dura Pharms., Inc. v. Broudo, 544 U.S. 336, 347 (2005))).

393. *See generally* Danya Shocair Reda, *The Cost-and-Delay Narrative in Civil Justice Reform: Its Fallacies and Functions*, 90 OR. L. REV. 1085 (2012).

394. FED. R. CIV. P. 26 advisory committee's note to 1993 amendment ("The information explosion of recent decades has greatly increased both the potential cost of wide-ranging discovery and the potential for discovery to be used as an instrument for delay or oppression."); *accord* FED. R. CIV. P. 26 advisory committee's note to 2015 amendment (quoting the 1993 note).

395. *See* Celotex Corp. v. Catrett, 477 U.S. 317, 327 (1986) ("Rule 56 must be construed with due regard not only for the rights of persons asserting claims and defenses that are adequately based in fact to have those claims and defenses tried to a jury, but also for the rights of persons opposing such claims and defenses to demonstrate in the manner provided by the Rule, prior to trial, that the claims and defenses have no factual basis.").

396. FED. R. CIV. P. 23(f) advisory committee's note to 1998 amendment. *But see generally* Charles Silver, *"We're Scared to Death": Class Certification and Blackmail*, 78 N.Y.U. L. REV. 1357 (2003) (criticizing the "blackmail settlement" narrative of class action defendants). As with the discovery rule amendments, the committee nodded to plaintiffs' interests.

397. In addition to the mechanisms discussed above, more judicial involvement in pretrial negotiations with the sometimes-explicit objective of facilitating settlement have also led to fewer trials. Gold, Hessick & Hessick, *supra* note 14, at 1631–39; Langbein, *supra* note 3, at 553–61; Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374, 391–402 (1982).

398. Resnik, *supra* note 312, at 2934–35; *see also* Galanter, *supra* note 6, at 462–63 (showing that the percentage of cases ending in trial cratered from 11.5

2019, a mere 0.7 percent of federal civil cases reached trial.[399] As trials have declined, the portion of cases resolved by summary judgment has vastly increased.[400] Increases in pretrial procedure in the federal rules as a means of resolving factual disputes led trials to become less necessary,[401] and the same thing happened as civil procedure became even more defendant-protective in the late twentieth and early twenty-first centuries.[402]

Having explained the connection between pretrial procedure and the vanishing trial, one might think that a reason for the disparities in federal pretrial procedure between the civil and criminal systems is that criminal law more highly values a public trial before a jury of the defendant's peers than does civil procedure. But that position has a fatal flaw: criminal law made trials vanish too; it just did so without affording defendants with pretrial protections. In 1962, 15 percent of cases were resolved by trial, whereas in 2002, that number dropped to less than 5 percent.[403] Indeed, even the raw number of trials *dropped* during that period by 30 percent even though the caseload

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percent in 1962 to 1.8 percent in 2002). For an especially poignant demonstration of the decline, see *id.* at 465 fig.2.

399. ADMIN. OFF. OF THE U.S. CTS., CIVIL STATISTICAL TABLES FOR THE FEDERAL JUDICIARY tbl.C-4 (2019), https://www.uscourts.gov/statistics/table/c-4/statistical-tables-federal-judiciary/2019/12/31. For a detailed explanation of some of the challenges with this data set, see Gillian K. Hadfield, *Where Have All the Trials Gone? Settlements, Nontrial Adjudications, and Statistical Artifacts in the Changing Disposition of Federal Civil Cases*, 1 J. EMPIRICAL LEGAL STUD. 705, 705 (2004).

400. Stephen B. Burbank, *Vanishing Trials and Summary Judgment in Federal Civil Cases: Drifting Toward Bethlehem or Gomorrah?*, 1 J. EMPIRICAL LEGAL STUD. 591, 603–16 (2004); Galanter, *supra* note 6, at 483–84; Hadfield, *supra* note 399, at 729–33. *See generally* Arthur R. Miller, *Simplified Pleading, Meaningful Days in Court, and Trials on the Merits: Reflections on the Deformation of Federal Procedure*, 88 N.Y.U. L. REV. 286 (2013) (lamenting the ways in which procedure has been used to avoid resolving disputes on their merits); Miller, *supra* note 232 (same).

401. Langbein, *supra* note 3, at 542–51; *see also* Gold, Hessick & Hessick, *supra* note 14, at 1628–39 (describing how the civil system uses procedure to facilitate settlement).

402. Despite the favorable pretrial protections, there nonetheless may be some meritless cases that defendants settle because hiring lawyers to defend them simply is not cost effective. *See, e.g.*, Randy J. Kozel & David Rosenberg, *Solving the Nuisance-Value Settlement Problem: Mandatory Summary Judgment*, 90 VA. L. REV. 1849, 1849–60 (2004) (analyzing nuisance-value settlements); Lance P. McMillian, *The Nuisance Settlement "Problem": The Elusive Truth and a Clarifying Proposal*, 31 AM. J. TRIAL ADVOC. 221, 221–22 (2007) (criticizing the narrative that nuisance-value settlements are prevalent).

403. Galanter, *supra* note 6, at 493–95.

increased by more than 250 percent.[404] In 2019, a mere 2.25 percent of federal criminal defendants went to trial.[405]

But criminal law performed the disappearing act quite differently than did civil procedure. Instead of making trials vanish by offering robust procedural protections for disproportionately poor defendants of color to help them avoid trials in cases where the government's legal theory or evidence are deficient, legislators afforded prosecutors sufficient leverage to vehemently discourage defendants from exercising those rights.[406] Substantive criminal law sweeps incredibly broadly to encompass a great deal of conduct,[407] and it runs deeply such that much conduct violates a number of different laws.[408] Prosecutors thus have a menu from which to choose what charges to bring, and the different options on that menu typically come with different likely sentences.[409] Prosecutors lobby (often successfully) for harsh mandatory minimum sentences and sentencing enhancements that they can invoke when they so choose.[410] And even aside from the staggering effect of mandatory minimums, defendants face substantial sentencing penalties should they choose to invoke their constitutional right to a trial.[411]

More pretrial procedure that alleviates the need for trials is not necessarily the first-best solution for both civil and criminal procedure.[412] But measures that would make it feasible for more

404. *Id.* at 492–93.

405. This number was calculated from ADMIN. OFF. OF THE U.S. CTS., CRIMINAL STATISTICAL TABLES FOR THE FEDERAL JUDICIARY tbl.D-4 (2019), https://www.uscourts.gov/statistics/table/d-4/statistical-tables-federal-judiciary/2019/12/31.

406. Brown, *supra* note 90, at 191–200; Crespo, *supra* note 216, at 1312; Gold, Hessick & Hessick, *supra* note 14, at 1614–28.

407. *E.g.*, Van Buren v. United States, 141 S. Ct. 1648, 1668–69 (2021) (Thomas, J., dissenting) ("Much of the Federal Code criminalizes common activity."). The @CrimeADay Twitter handle is dedicated to demonstrating the staggering breadth of federal criminal law. *See* A Crime a Day (@CrimeADay), TWITTER, https://twitter.com/CrimeADay (last visited Apr. 7, 2022).

408. *See, e.g.*, Michael L. Seigel & Christopher Slobogin, *Prosecuting Martha: Federal Prosecutorial Power and the Need for a Law of Counts*, 109 PENN ST. L. REV. 1107, 1119 (2005).

409. Stuntz, *supra* note 360, at 2549 (invoking the "menu" metaphor).

410. Gold, *supra* note 14, at 333–35; *see also supra* notes 89–95 and accompanying text.

411. *See* Kim, *supra* note 95, at 1243, 1252–54 (calculating that defendants convicted at trial receive sentences that are, on average, 64 percent longer than those who plead guilty to similar crimes); *see also supra* notes 92–93 and accompanying text (explaining the sentencing-law mechanisms by which defendants receive shorter sentences after pleading guilty than after trial).

412. *See, e.g.*, Arthur R. Miller, *From* Conley *to* Twombly *to* Iqbal: *A Double Play on the Federal Rules of Civil Procedure*, 60 DUKE L.J. 1, 2 (2010) (criticizing recent Supreme Court cases on pleading standards as undermining the model of litigation that prefers allowing plaintiffs to have their claims adjudicated on the

criminal cases to go to trial—such as narrowing the scope of substantive law, eliminating mandatory minimums, eliminating trial penalties, and vastly decreasing pretrial detention—seem quite unlikely. Affording more pretrial protection for criminal defendants akin to those afforded to civil defendants provides a second-best alternative.[413] And indeed, one can imagine that *greater* pretrial protections for criminal defendants than for civil defendants might be reasonable,[414] at least for civil cases with solely monetary stakes.[415]

Even as the rates of trials have declined in both civil and criminal systems, the public's imagination remains captured by the big, high-profile criminal trial.[416] Such a theoretical trial offers robust protections for criminal defendants with the representation of charismatic (too-often-male) counsel, offers the opportunity to cross-examine witnesses, and shields the defendant from losing her liberty unless a unanimous jury of her peers concludes that the government has surmounted a high hurdle—the burden of proof beyond a reasonable doubt. That such an archetypal trial captures a great deal of public attention enables criminal procedure to play a shell game with defendants' rights. Defendants need not have robust opportunities to discover documentary evidence against them pretrial or depose witnesses, including their accusers,[417] because trial provides the core protection for defendants, the story goes.[418] Defendants can be incarcerated upon a mere accusation of wrongdoing because they will have their day in court where their lawyer will robustly defend them against the state's accusations—leave aside the inconvenient reality that pretrial detention inflicts

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merits); Miller, *supra* note 400, at 307 ("Trials are open to the public, often use citizen jurors as fact finders and law applicators, provide transparency, are an important aspect of our democratic tradition, and preserve the credibility of our civil justice system.").

413. *See* Gold, Hessick & Hessick, *supra* note 14, at 1640 (arguing that criminal procedure could facilitate settlement through procedure as civil systems do rather than by giving massive power to one side—the prosecutor); *see also* William Ortman, *Second-Best Criminal Justice*, 96 WASH. U. L. REV. 1061, 1083–89 (2019) (discussing reducing sources of prosecutor leverage that currently facilitate guilty pleas).

414. *See* Gold, *Jail as Injunction*, *supra* note 38, at 507–08.

415. *But cf.* Sabbeth & Steinberg, *supra* note 17 (manuscript at 10–15) (providing data to show that cases involving important interests like housing and parental rights comprise the majority of civil cases in state courts).

416. *See* Lawrence M. Friedman, *The Day Before Trials Vanished*, 1 J. EMPIRICAL LEGAL STUD. 689, 690–92 (2004).

417. *See* Ortman, *supra* note 11, at 431 (proposing depositions as the way to protect confrontation rights even without trials).

418. *See* Garrett & Mitchell, *supra* note 16, at 42 (arguing that greater opportunities for discovery are necessary to protect against convicting the innocent because the reasonable doubt burden at trial offers less protection than previously thought).

substantial costs on defendants and their loved ones in the meantime and makes mounting a defense even more difficult. Judges need not screen out cases with defective legal theories or weak facts; trials will do that, it is said. That such trials rarely come makes no real difference to the public's imagination.

CONCLUSION

American law should better protect people's bodies from being caged than it should protect people's money. And yet in so many ways it does the opposite: Civil procedure better protects defendants pretrial than does criminal procedure. Criminal procedure purports to rest its faith on trials to protect defendants, but those trials rarely come because legislatures have given prosecutors so many tools to procure guilty pleas. These disparities troublingly track race and class. Criminal defendants can be jailed on a mere accusation of wrongdoing, threatened with massive and massively disproportionate punishment, forced to endure a trial by surprise should they try to exercise those rights, and have few meaningful avenues to escape the hydraulic pressures of the system. Civil defendants, by contrast, typically cannot be deprived of their property before judgment, will not be forced to endure discovery, let alone trial, if the plaintiff's allegations are insufficiently specific or implausible, have robust tools to compel evidence from others pretrial, and can escape the pressures of litigation and trial if they can show that the plaintiff has not adduced sufficient evidence against them. So too do civil defendants have more avenues to ask appellate courts for relief without first having to lose their case. Civil procedure provides special procedural protections through legislation in types of cases where defendants are particularly likely to be wealthy and White, where plaintiffs are particularly likely to be from historically unrepresented groups, or where both are likely.

The primary aim of this Article is to criticize disparities in existing procedure. But civil procedure offers insight into the sorts of procedures that a system creates and implements when the stakeholders care about the rights of defendants. For that reason, it offers a good place to start to think about how criminal legal systems could better protect defendants in a system with few trials.