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Paying for Pretrial Detention

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PAYING FOR PRETRIAL DETENTION*

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American criminal law vastly overuses pretrial detention even as it purports to presume defendants innocent. This Article compares financial incentives in pretrial detention to those in civil preliminary injunctions. Both are procedures where one of the parties seeks relief before judgment. And yet, these two procedures employ financial incentives in opposite ways. Civil procedure discourages interim relief by requiring plaintiffs to bear financial risk when they obtain a preliminary injunction. Criminal law does the opposite—encouraging interim relief by requiring defendants to pay to avoid pretrial detention. The reasons that civil procedure relies on financial incentives to discourage requests for interim relief—to avoid undue settlement pressure and compensate for losses inflicted on defendants because of hasty procedure—apply with at least as much force in criminal law. Thus, this Article contends that employing diametrically opposed approaches to interim relief in the two systems is not justifiable.

This disparity is troubling because it better protects the property rights of the wealthy over the liberty rights of the poor. Perhaps this troubling disparity should not be altogether surprising, however, because it embodies well-recognized pathologies in criminal law. The incentive disparity is one more way in which criminal law allows prosecutors not to bear the full costs of their decisions and averts the budget discipline that could constrain prosecutors—a variant of the "correctional free lunch." This Article brings together several different strands of criminal law literature under the correctional free lunch umbrella while adding the financial incentive disparity regarding interim relief as yet one more correctional free lunch. Lastly, the comparative lens provides further support for widespread concern that criminal law is racist and classist because the financial

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incentive disparity tracks predictable disparities in race, wealth, and power between the civil and criminal systems.

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INTRODUCTION

Nearly half a million people sit in jail every day in America because they have been *accused* of a crime.[1] That is far too many.[2] In New York, for example, 88% of defendants remain jailed after arraignment—or at least did before the 2019 reforms.[3] Widespread pretrial detention has little to commend it: it deprives people of their liberty before being afforded much process,[4] trivializes

1. Wendy Sawyer & Peter Wagner, *Mass Incarceration: The Whole Pie 2020*, PRISON POL'Y INITIATIVE (Mar. 24, 2020), https://www.prisonpolicy.org/reports/pie2020.html [https://perma.cc/TQ9P-RMYS] (noting that 470,000 people were held in state pretrial detention in the United States).

2. *See, e.g.*, SHIMA BARADARAN BAUGHMAN, THE BAIL BOOK: A COMPREHENSIVE LOOK AT BAIL IN AMERICA'S CRIMINAL JUSTICE SYSTEM 77–92 (2018) (providing detailed cost-benefit analyses showing that an optimal resolution would mean detaining a very limited set of high-risk defendants pretrial). *See generally* Anna Roberts, *Arrests as Guilt*, 70 ALA. L. REV. 987 (2019) (explaining the many ways in which criminal law erroneously equates arrest with guilt).

3. Robert Lewis, *No Bail Money Keeps Poor People Behind Bars*, WNYC NEWS (Sept. 19, 2013), www.wnyc.org/story/bail-keeps-poor-people-behind-bars [https://perma.cc/NX3Z-X8JY]. Early results in New York show a more than 40% decrease in unsentenced defendants sitting in the State's jails. N.Y. STATE DIV. OF CRIMINAL JUSTICE SERVS., JAIL POPULATION IN NEW YORK STATE (2020), https://www.criminaljustice.ny.gov/crimnet/ojsa/jail_population.pdf [https://perma.cc/AU6E-4K57]; *see also* Lauren Jones, *On Bail Reform We Need Less Fear-Based Speculation—and More Data*, VERA INST. JUST.: THINK JUST. BLOG (Feb. 14, 2020), https://www.vera.org/blog/on-bail-reform-we-need-less-fear-based-speculation-and-more-data [https://perma.cc/8YTG-N234] (summarizing data on the early effects of New York bail reform). Yet those successes will likely wane amidst New York's recent rollback. *See* Melissa Gira Grant, *The Shock Doctrine Came for Bail Reform*, NEW REPUBLIC (Apr. 7, 2020), https://newrepublic.com/article/157205/shock-doctrine-came-bail-reform [https://perma.cc/WEH3-CPWN (dark archive)].

4. *See* Russell M. Gold, *Jail as Injunction*, 107 GEO. L.J. 501, 515–23 (2019) [hereinafter Gold, *Jail as Injunction*].

the presumption of innocence,[5] makes the public less safe because pretrial detention increases crime,[6] and wastes a lot of money in the process by locking up a lot of people who are not dangerous.[7]

In criminal law, prosecutors bring cases that seek to deprive defendants of their liberty, typically by way of incarceration. Such post-conviction punishment seeks to serve the familiar aims of criminal law, including deterrence, retribution, and incapacitation.[8] But *pretrial detention* allows prosecutors to obtain their ultimate goal of incarcerating defendants not after defendants are afforded process—such as the rights to see all material exculpatory evidence against them, to a trial by a jury of their peers, to call or cross-examine witnesses at such a trial, or to testify in their own defense. Rather, pretrial detention affords the government, before judgment, the ultimate relief that it seeks.[9]

Widespread pretrial detention was not always the American way. Historically, defendants had a right to release on bail in all non-capital cases rooted in the Due Process Clause's presumption of innocence.[10] Judges faced

5. *See generally* Shima Baradaran, *Restoring the Presumption of Innocence*, 72 OHIO ST. L.J. 723 (2011) (arguing that the dwindling presumption of innocence violates detainees' due process rights).

6. *See, e.g.*, BAUGHMAN, *supra* note 2, at 161 ("Even short periods of pretrial detention increase the risk of recidivism."); Arpit Gupta, Christopher Hansman & Ethan Frenchman, *The Heavy Costs of High Bail: Evidence from Judge Randomization*, 45 J. LEGAL STUD. 471, 494–96 (2016); Paul Heaton, Sandra Mayson & Megan Stevenson, *The Downstream Consequences of Misdemeanor Pretrial Detention*, 69 STAN. L. REV. 711, 759–68 (2017); CHRISTOPHER T. LOWENKAMP, MARIE VANNOSTRAND & ALEXANDER HOLSINGER, LAURA & JOHN ARNOLD FOUND., THE HIDDEN COSTS OF PRETRIAL DETENTION 19 (2013), https://www.arnoldfoundation.org/wp-content/uploads/2014/02/LJAF_Report_hidden-costs_FNL.pdf [https://perma.cc/63LS-C4Q5].

7. Detaining the accused costs between $9 billion and $12 billion per year in direct expenditures. *See* BAUGHMAN, *supra* note 2, at 158 (calculating a cost of $9 billion); PATRICK LIU, RYAN NUNN & JAY SHAMBAUGH, THE HAMILTON PROJECT, THE ECONOMICS OF BAIL AND PRETRIAL DETENTION 13 (2018), http://www.hamiltonproject.org/papers/the_economics_of_bail_and_pretrial_detention [https://perma.cc/L6LV-LLU6] (estimating a cost of $11.71 billion based on payments to private prisons). A robust cost-benefit analysis that goes beyond the mere financial outlay calculates that pretrial detention reform could save $78 billion over the course of a decade. Shima Baradaran Baughman, *Costs of Pretrial Detention*, 97 B.U. L. REV. 1, 10 (2017) [hereinafter Baughman, *Costs of Pretrial Detention*]. Shima Baughman rightly calls this "a massive burden on many state and local economies." BAUGHMAN, *supra* note 2, at 8.

8. *See, e.g.*, Darryl K. Brown, *Cost-Benefit Analysis in Criminal Law*, 92 CALIF. L. REV. 323, 325 (2004). So too could we add providing comfort to victims or rehabilitation to this list, though it is hard to see American criminal law as meaningfully serving either goal well.

9. *See* Gold, *Jail as Injunction*, *supra* note 4, at 509–14 (explaining that pretrial detention constitutes interim relief in criminal law akin to civil preliminary injunctions).

10. *See* BAUGHMAN, *supra* note 2, at 3; Baradaran, *supra* note 5, at 727–36; Shima Baradaran Baughman, *The History of Misdemeanor Bail*, 98 B.U. L. REV. 837, 857 (2018) [hereinafter Baughman, *The History of Misdemeanor Bail*]; *see also* Stack v. Boyle, 342 U.S. 1, 4 (1951) ("From the passage of the Judiciary Act of 1789 to the present Federal Rules of Criminal Procedure, Rule 46 (a) (1), federal law has unequivocally provided that a person arrested for a non-capital offense *shall* be admitted to bail." (citation omitted)).

fines if they did not release defendants charged with misdemeanors.[11] Although pretrial detention rates have waxed and waned over time, they have risen fairly steadily over the past three decades.[12] As Shima Baradaran Baughman explains it, "pretrial detention has become the norm rather than the exception."[13] Unfortunately, she's right. "Since the 1990s, pretrial detention rates have risen 72 percent."[14] In a short period of time, the United States went from detaining 44% of our accused to detaining 60%[15]—a sizable shift for a country that incarcerates as many people as ours does.[16] These numbers will hopefully decline again amidst recent reforms,[17] but the number of Americans deprived of their liberty on mere accusation remains high.

In the American *civil* legal system, by contrast, disputes typically involve money and property rights rather than liberty. Granting a civil litigant before trial the relief that it seeks from the litigation is "an extraordinary remedy."[18] Civil defendants' property interests are so important that we do not extinguish or even suspend them lightly.[19] The civil system does not rely solely on the due process backdrop or on judges to protect those rights by applying a stringent test that sparingly grants such relief.[20] Nor does the civil system merely trust

11. Baughman, *The History of Misdemeanor Bail*, *supra* note 10, at 845.

12. BAUGHMAN, *supra* note 2, at 4.

13. *Id.* at 3.

14. *Id.* at 4; *see also* LIU ET AL., *supra* note 7, at 4 fig.1A (charting this increase).

15. BAUGHMAN, *supra* note 2, at 4.

16. *See* DANIELLE KAEBLE & MARY COWHIG, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, CORRECTIONAL POPULATIONS IN THE UNITED STATES, 2016, at 2 (2018), https://www.bjs.gov/content/pub/pdf/cpus16.pdf [https://perma.cc/X8HM-5QDM] (reporting a total correctional population of 6.6 million and a total incarcerated population of 2.2 million at the end of 2016).

17. Although important, releases due to COVID-19 seem unlikely to meaningfully change the national numbers. *Cf.* Jenny E. Carroll, *Pretrial Detention in the Time of COVID-19*, NW. U. L. REV. (forthcoming 2020) (manuscript at 15) (on file with the North Carolina Law Review) (arguing for releasing pretrial detainees as a response to COVID-19).

18. Winter v. Nat. Res. Def. Council, Inc., 555 U.S. 7, 24 (2008). In a previous work I explain why civil preliminary injunctions provide a helpful basis for broadly rethinking the pretrial detention system. *See* Gold, *Jail as Injunction*, *supra* note 4, at 509–14.

19. Although most of this Article focuses on comparing pretrial detention to preliminary injunctions, procedural due process imposes significant restraints on prejudgment property restraints such as seizure or attachment in the civil system. *See* 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* Connecticut v. Doehr, 501 U.S. 1, 18 (1991) (reversing on due process grounds prejudgment attachment done without prior notice or hearing). For a more extensive explication of this case law, see generally Gary D. Spivey, Annotation, *Modern Views as to Validity, Under Federal Constitution, of State Prejudgment Attachment, Garnishment, and Replevin Procedures, Distraint Procedures Under Landlords' or Innkeepers' Lien Statutes, and Like Procedures Authorizing Summary Seizure of Property*, 18 A.L.R. Fed. 223 (2020).

20. *See Winter*, 555 U.S. at 20 (articulating that stringent doctrinal test as a gloss on Rule 65).

plaintiffs' lawyers' best "even-handed" judgment to limit their requests for interim relief to those cases where it is sufficiently important.[21] Rather, the civil system relies instead on financial incentives to limit *requests* for interim relief. Civil parties—the government included, in at least some jurisdictions[22]—accept monetary risk when they seek a preliminary injunction; plaintiffs who obtain a preliminary injunction accept the risk of paying damages that the preliminary injunction causes the defendant if the plaintiff ultimately loses on the merits.[23] Thus, civil parties seek interim relief only when it is sufficiently valuable to them to bear the risk, which limits the requests for such extraordinary relief.

In criminal law, where liberty is at stake and we purportedly presume defendants innocent until proven guilty, we should expect to see at least the same degree of caution before imposing a prejudgment deprivation. We would be sorely mistaken. Instead of treating prejudgment relief as extraordinary as the civil system does, criminal law deprives defendants of their liberty before trial as its default position.[24]

Disparate financial incentives encourage this disparity in defendants' prejudgment rights between the two systems.[25] Civil and criminal procedure both rely on financial incentives to regulate interim relief, but they do so in opposite ways. While civil plaintiffs bear a financial risk when they seek interim relief, prosecutors face no such financial incentive to discourage them from seeking to lock up those presumed innocent. Nor does the judge have any such incentive. To the contrary, in criminal law, the financial burden regarding interim relief typically falls on the detained defendant: most defendants are detained unless they can pay for their freedom by posting bail.[26] Thus, rather

21. Criminal law embraces a wide berth for prosecutorial discretion, including trusting prosecutors to protect the rights of the other side—criminal defendants. *See* MODEL RULES OF PROF'L CONDUCT r. 3.8 cmt. 1 (AM. BAR ASS'N 2018). By contrast, the analogous term on the civil side, "plaintiff's lawyer discretion," rings strangely and is never employed as a method of safeguarding defendants' rights. Indeed, the civil system deploys judges to formally rein in plaintiff's lawyer discretion such as through limiting punitive damages, *see* State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 429 (2003) (holding that a punitive damage award of $145 million violated defendants' due process rights when compensatory damages totaled only $1 million), or limiting attorney's fee awards, *e.g.*, FED. R. CIV. P. 23(h); *see also* Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4 (codified in scattered sections of 28 U.S.C.) (requiring that attorney's fees be based on actual benefit to class members).

22. *See infra* note 57 and accompanying text.

23. *See* FED. R. CIV. P. 65(c).

24. *See* BAUGHMAN, *supra* note 2, at 3–4. It is certainly at least arguable that criminal law should attach greater procedural due process protections pretrial. *See* Kuckes, *supra* note 19, at 7. But this Article is not focused on the due process floor but rather a sensible statutory or rule-based approach to pretrial detention.

25. Substantive and procedural differences between the way interim relief operates in the two different systems also contribute to the disparate outcomes. *See* Gold, *Jail as Injunction*, *supra* note 4, at 514–32.

26. *See, e.g.*, JESSICA EAGLIN & DANYELLE SOLOMON, BRENNAN CTR. FOR JUSTICE, REDUCING RACIAL AND ETHNIC DISPARITIES IN JAILS: RECOMMENDATIONS FOR

than imposing a financial incentive on the government to *limit* requests for interim relief akin to civil plaintiffs, criminal law frequently imposes monetary requirements on the targets of interim relief, therefore making interim relief *more* likely.

This disparity is troubling. The reasons that civil systems use financial risk to limit plaintiffs' use of preliminary injunctions—limiting requests for interim relief and compensating for harms caused by interim relief—apply with even greater force in criminal law.[27] Just as preliminary injunctions afford plaintiffs substantial settlement leverage and are therefore tactically quite desirable,[28] so too does pretrial detention afford massive settlement leverage to the government.[29] Financial incentives to temper strategic use of interim relief therefore make sense in criminal law as they do in civil procedure. Moreover, criminal defendants suffer serious harm because of pretrial detention—sometimes loss of employment, housing, custody of a child, and serious psychological harm.[30] Pretrial detention decisions are made following an extremely summary "judicial process" that may involve a one-minute hearing with no evidence, judge, lawyers, or written briefing.[31] In some places, bail is determined via videoconference with a judge or even by a bail commissioner in a jail through a speaker system in a plexiglass wall.[32] That the stakes for a criminal defendant are liberty rather than property (and sometimes both)[33] suggests too that some mechanism to encourage restraint and perhaps compensate for harms resulting from summary process makes even more sense

LOCAL PRACTICE 19 (2015), https://www.brennancenter.org/sites/default/files/publications/Racial%20Disparities%20Report%20062515.pdf [https://perma.cc/N6WA-TX7F] (finding that 61% of defendants are detained unless they can post bail). Some defendants are simply ordered detained without bail and others are released with or without conditions, but setting bail is the most common resolution.

27. Pretrial detention should also employ a more stringent test—like preliminary injunctions—that requires the government to demonstrate likely irreparable injury if a defendant is not detained, balances the interests of all involved, and requires the government to submit evidence showing a likelihood of success on the merits. *See* Gold, *Jail as Injunction*, *supra* note 4, at 559. But the substantive test itself is beyond the scope of this Article.

28. *See infra* Section II.A.

29. *See infra* Section II.B.

30. *E.g.*, Baughman, *The History of Misdemeanor Bail*, *supra* note 10, at 842 n.33; Gold, *Jail as Injunction*, *supra* note 4, at 539–43.

31. *See, e.g.*, BAUGHMAN, *supra* note 2, at 1, 7; Gold, *Jail as Injunction*, *supra* note 4, at 515–19; Heaton et al., *supra* note 6, at 730; Crystal S. Yang, *Toward an Optimal Bail System*, 92 N.Y.U. L. REV. 1399, 1452 (2017).

32. *See* Douglas L. Colbert, Ray Paternoster & Shawn Bushway, *Do Attorneys Really Matter? The Empirical and Legal Case for the Right of Counsel at Bail*, 23 CARDOZO L. REV. 1719, 1733 & n.61 (2002); Megan Stevenson & Sandra G. Mayson, *Pretrial Detention and Bail*, *in* 3 REFORMING CRIMINAL JUSTICE 21, 25 (Erik Luna ed., 2017), https://law.asu.edu/sites/default/files/pdf/academy_for_justice/2_Reforming-Criminal-Justice_Vol_3_Pretrial-Detention-and-Bail.pdf [https://perma.cc/8G9Z-QTM2].

33. If the defendant has to pay a bail bondsman a 10% non-refundable fee for the privilege of securing freedom, then the defendant was first deprived of liberty and then property before trial.

in the criminal context than in the civil one. Without seeking to sketch out a structure for such a change, this Article broadly suggests resolving the disparity by leveling up protections for defendants in the criminal system to match those in the civil system.[34]

As troubling and unjustified as this disparity is, it should not be altogether surprising. Indeed, it evinces and bolsters the literature regarding two known pathologies in criminal law. First, financial incentives encouraging pretrial detention represent one more correctional free lunch: the idea, in its original form, that county-level prosecutors spend the state's money to imprison defendants and thus need not consider the full costs of their decisions.[35] This Article unites several strands of criminal law scholarship under a broader correctional free lunch umbrella because they all represent different ways of making criminal law too cheap by allowing prosecutors' offices to avoid bearing the full costs of their decisions. These misalignments of incentives avert the potentially constraining effect of budget discipline on prosecutors' decisions. This Article then situates financial incentives regarding pretrial detention as one more example of this broadened correctional free lunch literature. Second, that this disparity better protects the pretrial rights of civil defendants (who are often wealthy and White) rather than those of criminal defendants (who are often poor people of color) highlights a previously unrecognized source of structural racism and classism in American criminal law.[36]

This Article contends that the disparate use of financial incentives in the civil and criminal systems whereby civil procedure *dis*courages interim relief and criminal procedure *en*courages it is troubling and unjustifiable. The Article proceeds in three parts. Part I explains why preliminary injunctions provide a useful comparison for analyzing pretrial detention and situates this comparison in the emerging body of domestic civil-criminal comparative law literature. Part II explains how the preliminary injunction system employs financial incentives to limit parties' requests for such interim relief and why the justifications for such financial incentives apply with even more force to pretrial detention. Part III broadens the lens and situates this disparity within—and considers its contribution to—other existing bodies of criminal law scholarship.

34. This Article's objective is conceptual and focused on critiquing and explaining the existing disparity. It does not aim to address the practicalities of how financial incentives to limit pretrial detention would work, such as considering at which of the powerful actors in the pretrial detention system financial incentives should be targeted—judges, prosecutors, or both. Nor does it consider whether fines, rewards, or a limited fund would best implement such incentives.

35. *Infra* Section III.A.

36. *Infra* Section III.B.

I. EXPLAINING THE COMPARISON

Preliminary injunctions provide a useful comparison to pretrial detention because these procedures are the primary ways that the civil and criminal systems deal with the question of interim relief: what happens to the parties' rights before the case can be resolved.[37] Both bodies of law ultimately afford one side to a dispute, before judgment, at least some measure of the relief that it seeks. In so doing, these bodies of law seek to minimize harm during the pendency of the case.[38] So too do they seek to ensure the efficacy of judicial proceedings.[39] And, as a practical matter, both preliminary injunctions and pretrial detention have huge practical implications for the resolution of the dispute. In criminal law, for instance, defendants who are detained pretrial are much more likely to be convicted and face harsher sentences than defendants who can mount their defense from outside of jail.[40] Similarly, preliminary injunctions tip a judge's hand about her ultimate view on the case's merits and are thought to potentially lock in that view.[41]

This comparison between pretrial detention and preliminary injunctions is one line in an emerging literature comparing American criminal and civil procedure.[42] Although the systems of course differ in some respects, both seek to resolve disputes and, at least broadly, strive for "fairness, accuracy, and efficiency—albeit in different mixtures."[43] One seemingly insurmountable

37. *See* Gold, *Jail as Injunction*, *supra* note 4, at 509–14.

38. Pretrial detention serves this objective akin to the aim of preliminary injunctions. *Id.* at 507–09. This comparison fits more closely after the Bail Reform Act of 1966, Pub. L. No. 89-465, 80 Stat. 214 (codified as amended in scattered sections of 18 U.S.C.), allowed courts to consider the likelihood that the defendant will be arrested for another crime in the interim when determining bail. *See* BAUGHMAN, *supra* note 2, at 24–27 (describing the historical evolution of the purposes of bail); *see also* United States v. Salerno, 481 U.S. 739, 747–52 (1987) (countenancing preventing future crime as a permissible purpose of pretrial detention).

39. Gold, *Jail as Injunction*, *supra* note 4, at 509–14.

40. *E.g.*, BAUGHMAN, *supra* note 2, at 5; Heaton et al., *supra* note 6, at 715; CHRISTOPHER T. LOWENKAMP, MARIE VANNOSTRAND & ALEXANDER HOLSINGER, LAURA & JOHN ARNOLD FOUND., INVESTIGATING THE IMPACT OF PRETRIAL DETENTION ON SENTENCING OUTCOMES 10–11 (2013), https://craftmediabucket.s3.amazonaws.com/uploads/PDFs/LJAF_Report_state-sentencing_FNL.pdf [https://perma.cc/YKM7-NNL2].

41. Kevin J. Lynch, *The Lock-in Effect of Preliminary Injunctions*, 66 FLA. L. REV. 779, 779 (2014); *see also* Jean O. Lanjouw & Josh Lerner, *Tilting the Table? The Use of Preliminary Injunctions*, 44 J.L. & ECON. 573, 600 (2001).

42. *See generally, e.g.*, Russell M. Gold, *"Clientless" Lawyers*, 92 WASH. L. REV. 87 (2017) [hereinafter Gold, *"Clientless" Lawyers*] (comparing class counsel to prosecutors and arguing that internal checks similar to those in prosecutors' offices would improve class counsel accountability); Ion Meyn, *The Unbearable Lightness of Criminal Procedure*, 42 AM. J. CRIM. L. 39 (2014) (arguing that the civil and criminal procedural systems should be more similar than different); 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 comparative work between domestic civil and criminal procedure and laying out the theoretical foundations for such work). For more information canvassing the literature, see also Gold, *Jail as Injunction*, *supra* note 4, at 509–14.

43. Sklansky & Yeazell, *supra* note 42, at 684.

difference between criminal and civil procedure is the divide between public and private law. But criminal law is not purely public law nor is civil litigation purely private.[44] Prosecutors are required to consider victims' interests and may often seek restitution, including substantial amounts in some cases.[45] Civil litigation not only seeks to provide redress to particular plaintiffs but also seeks to deter wrongdoing, which benefits non-parties.[46]

Previous work has considered how criminal law could develop a more robust and balanced test for pretrial detention modeled on the preliminary injunction standard.[47] In short, such an approach would treat relief before judgment as an extraordinary measure that should be available only when the side seeking it would likely suffer irreparable harm absent such relief.[48] In the pretrial detention context, that would mean that detention—the relief the government seeks—is available only when the defendant is likely to abscond from the jurisdiction or likely to commit a serious crime while on release;[49] both

44. *See id.* at 701–04; Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1085–87 (1984) (arguing that the purpose of adjudication is not merely private dispute resolution and that settlement often brings peace for the parties at the expense of justice for society); Gold, *"Clientless" Lawyers*, *supra* note 42, at 99–100 (explaining that class actions and criminal prosecutions share important similarities, including in their public and private law objectives). That some conduct such as subway fare evasion has been reclassified from criminal to civil or administrative also suggests as much. *See, e.g.*, Faiz Siddiqui, *D.C. Council Decriminalizes Metro Fare Evasion: 'I'm Sad That's Metro's Losing Money, but I'm More Sad About What's Happening to Black People.'*, WASH. POST (Dec. 4, 2018, 7:17 PM), https://www.washingtonpost.com/transportation/2018/12/05/dc-council-decriminalizes-metro-fare-evasion-giving-its-final-approval-contested-measure/ [https://perma.cc/58B2-XZX2 (dark archive)]; *Council Votes To Make Major Changes to Metro's Fare Enforcement Policy*, KING COUNTY COUNCIL NEWS (Oct. 26, 2015), https://www.kingcounty.gov/council/news/2015/October/10-26-DU-fareenforcement.aspx [https://perma.cc/PH2Q-TVU7].

45. *See* Adam S. Zimmerman & David M. Jaros, *The Criminal Class Action*, 159 U. PA. L. REV. 1385, 1387–88, 1398 (2011) (discussing criminal cases establishing large "restitution funds" to compensate victims and comparing these restitution remedies to class actions).

46. RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 785 (8th ed. 2011).

47. Gold, *Jail as Injunction*, *supra* note 4, at 532–58.

48. *Id.*

49. Absconders and further crime are serious concerns that pretrial detention seeks to avoid, but only in cases where such concerns are quite strong will they likely outweigh the harm that pretrial detention will inflict on the defendant. *See id.*

This Article and my prior work conceive of the government's request for pretrial detention as the relevant request for interim relief. Existing doctrine and its use of money bail seem to conceive instead of the government having widespread ability to detain defendants upon arrest and rather view the defendant's request for bail or other form of pretrial liberty as the request for interim relief. This divergence poses a difficult baseline or status-quo-definition problem that these works do not address in detail. For these purposes, suffice it to say that this Article and *Jail as Injunction* view the government's request for pretrial detention—whether through unaffordable bail or more directly—as the requested interim relief because that is the first request for a judicial order to change the rights that the parties had prior to the commencement of criminal enforcement. *See* Gold, *Jail as Injunction*, *supra* note 4, at 509–14. Moreover, such an approach better respects the presumption of innocence than does a baseline notion that the government can typically detain defendants on a mere accusation of wrongdoing and a finding that the low probable cause threshold has been met. *See* Baradaran, *supra*

formulations are much more stringent thresholds than the bases on which judges now detain defendants, including by setting unaffordable bail.[50] So too would a pretrial detention regime based on preliminary injunctions account for the substantial harm that pretrial detention would inflict on each defendant and her loved ones—such as loss of employment, housing, or custody of a child; increased likelihood of conviction; and the likelihood of a longer sentence.[51] Courts would balance these harms to the defendant against the benefits of detaining the defendant—namely, avoiding flight and further crime while on release.[52] Lastly, courts would detain defendants only when the government is likely to succeed on the merits of its case.[53]

Even if the substantive and procedural law of pretrial detention were reformed to better align with the preliminary injunction standard, one particularly troubling aspect of the disparity between those two procedures would remain: criminal law structures financial incentives to *encourage* pretrial detention while civil procedure structures financial incentives to *discourage* it. This Article critiques that disparity.

II. FINANCIAL INCENTIVES FOR INTERIM RELIEF

Interestingly, both preliminary injunctions and pretrial detention employ financial incentives. They just do so in opposite ways. With preliminary injunctions, defendants who are preliminarily enjoined but are ultimately victorious on the merits get compensated because their property interests were "wrongfully enjoined" during the pendency of the case.[54] But barring truly egregious circumstances, criminal defendants whose liberty was wrongfully restrained during the pendency of the case receive nothing.[55] In fact, in criminal law, it is the party to be restrained—the defendant—who (often) must pay money bail to avoid that restraint.[56] Preliminary injunctions, on the other hand,

note 5, at 767–68 (explaining that the presumption of innocence is rooted in the Due Process Clause and that it requires pretrial liberty absent serious flight risk).

50. Gold, *Jail as Injunction*, *supra* note 4, at 523–32 (discussing the empirical literature); Paul Heaton, *The Expansive Reach of Pretrial Detention*, 98 N.C. L. REV. 369, 371–73 (2020) (summarizing the recent empirical evidence); *see also* BAUGHMAN, *supra* note 2, at 4 (providing powerful statistics regarding the widespread use of pretrial detention in America).

51. Gold, *Jail as Injunction*, *supra* note 4, at 540–45; *see also* Rachel A. Harmon, *Why Arrest?*, 115 MICH. L. REV. 307, 313–20 (2016) (describing harms that arrests cause).

52. Gold, *Jail as Injunction*, *supra* note 4, at 539–52.

53. *Id.*

54. *See* FED. R. CIV. P. 65(c). In this context, "wrongfully" does not mean issued in error but simply issued in a way that does not align with the ultimate merits outcome. *See* Nintendo of Am., Inc. v. Lewis Galoob Toys, Inc., 16 F.3d 1032, 1036 (9th Cir. 1994); Am. Bible Soc'y v. Blount, 446 F.2d 588, 594–95 (3d Cir. 1971).

55. *See* Jeffrey Manns, *Liberty Takings: A Framework for Compensating Pretrial Detainees*, 26 CARDOZO L. REV. 1947, 1952 (2005).

56. *See* BAUGHMAN, *supra* note 2, at 157–85 (explaining the continued prevalence of money bail despite recent reforms eliminating it in some jurisdictions). Further reforms have come into effect

require the party *seeking* interim relief to post a bond to obtain such relief, and that bond gets paid to the restrained party if the movant ultimately loses on the merits.

Plaintiffs—including the government, in at least some jurisdictions[57]—bear financial risk when seeking interim relief in the civil system for two reasons: First, so that they will not overuse that extraordinary mechanism, including by using it simply to procure a settlement advantage.[58] Second, preliminary injunction damages can compensate defendants whose property interests are wrongfully restrained during the pendency of the case.[59] Like preliminary injunctions, this Article explains that pretrial detention is an

since Baughman's book was published, though some of those sit on fragile footing. *See, e.g.*, INSHA RAHMAN, VERA INST. OF JUSTICE, NEW YORK, NEW YORK: HIGHLIGHTS OF THE 2019 BAIL REFORM LAW 11 (July 2019), https://www.vera.org/downloads/publications/new-york-new-york-2019-bail-reform-law-highlights.pdf [https://perma.cc/26HK-BRGC] (discussing New York's 2019 reforms); Diana Dabruzzo, *New Jersey Set Out To Reform Its Cash Bail System. Now, the Results Are in.*, ARNOLD VENTURES (Nov. 14, 2019), https://www.arnoldventures.org/stories/new-jersey-set-out-to-reform-its-cash-bail-system-now-the-results-are-in/ [https://perma.cc/Z4ZG-BG9U] (discussing New Jersey bail reform); Grant, *supra* note 3 (explaining that the Governor of New York signed a partial repeal of the bail reform in the most recent budget bill); Vanessa Romo, *California Becomes First State To End Cash Bail After 40-Year Fight*, NPR (Aug. 28, 2018, 10:49 PM), https://www.npr.org/2018/08/28/642795284/california-becomes-first-state-to-end-cash-bail [https://perma.cc/PR7X-HN5Y].

57. N.C. R. CIV. P. 65(c) ("No restraining order or preliminary injunction shall issue except upon the giving of security by the applicant, in such sum as the judge deems proper, for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained. No such security shall be required of the State of North Carolina or of any county or municipality thereof, or any officer or agency thereof acting in an official capacity, *but damages may be awarded against such party in accord with this rule*." (emphasis added)); Marine Constr. & Dredging v. U.S. Army Corps of Eng'rs, No. 88-3963, 1989 U.S. App. LEXIS 23496, at *8–9 (9th Cir. Dec. 13, 1989) (explaining in dictum that the United States is "potentially liable for damages for allegedly wrongfully seeking an injunction . . . despite the fact that no bond was posted"); Corpus Christi Gas Co. v. City of Corpus Christi, 46 F.2d 962, 963 (5th Cir. 1931) (holding that the City of Corpus Christi was required to pay damages caused by an injunction that it obtained even though it was excused from the bond requirement); Provident Mgmt. Corp. v. City of Treasure Island, 796 So. 2d 481, 487 (Fla. 2001) (holding that government entities excluded from bond requirements may nevertheless be liable for monetary damages upon the reversal of "an improperly entered temporary injunction"); Juniata Foods, Inc. v. Mifflin Cty. Dev. Auth., 486 A.2d 1035, 1037 (Pa. Commw. Ct. 1985) (finding a government agency liable for damages despite bond exemption because "a bond is not a condition precedent to obtaining damages from a governmental entity"). *But see* FTC v. Apply Knowledge, LLC, No. 2:14-cv-00088 (DB), 2015 U.S. Dist. LEXIS 188887, at *6–7 (D. Utah Apr. 9, 2015) (holding that the United States was not required to pay damages for a wrongful injunction claim because such a claim was barred by sovereign immunity but offering no opinion on whether such a claim would be viable in contract and thus fall within the federal government's waiver of sovereign immunity under the Tucker Act); FTC v. Bf Labs Inc., No. 4:14-CV-00815-BCW, 2015 U.S. Dist. LEXIS 184640, at *4–7 (W.D. Mo. June 15, 2015) (relying on *Apply Knowledge* for the conclusion that sovereign immunity bars a claim for wrongful injunction); Egge v. Lane County, 556 P.2d 1372, 1373 (Or. 1976) (in banc) (hypothesizing that the legislature's intent in exempting state governmental bodies from the bond requirement was to ensure their immunity).

58. *See* Dan B. Dobbs, *Should Security Be Required as a Pre-Condition to Provisional Injunctive Relief*, 52 N.C. L. REV. 1091, 1094, 1112 (1974).

59. *See id.* at 1094.

extraordinary measure that affords one side (the government) substantial settlement leverage. That mechanism thus could be usefully limited by imposing a financial incentive to discourage the government from seeking such relief rather than using financial incentives to discourage the defendant from avoiding pretrial detention. So too could a financial structure parallel to that for preliminary injunctions sensibly compensate defendants for the harm that interim relief causes after a very hasty judicial process.

Section I.A explains why the civil system requires injunction bonds—a financial incentive meant to limit requests for interim relief and compensate for the harms that such relief may cause. Section I.B then explains why those same reasons that justify injunction bonds apply with at least as much force to similar concerns in the criminal legal system with pretrial detention.

A. *Financial Incentives To Limit Preliminary Injunctions*

Civil procedure[60] treats preliminary injunctions—orders restraining a defendant's property interest before the defendant has been afforded adjudicatory process[61]—as "extraordinary remed[ies] never awarded as of right."[62] But it does not merely rely on judges to say so and deny the vast majority of requests to ensure that interim relief remains extraordinary. Rather, civil procedure relies on financial incentives to limit *requests* for this extraordinary relief before judges are ever called upon to resolve them. Plaintiffs cannot obtain a preliminary injunction unless they first post a bond.[63] In posting a bond, plaintiffs bear a financial risk: if the plaintiff obtains a preliminary injunction but the court ultimately holds that the defendant is entitled to conduct the enjoined activity, the bond money goes to pay the

60. Although there are multiple systems of civil procedure in the United States, this Article focuses largely on the federal system for purposes of the comparison. Aside from an important difference as to whether the government bears financial risk when seeking interim relief, *see* sources cited *supra* note 57, the differences between the way that different states and the federal system handle preliminary injunctions are fairly minimal, *see, e.g.*, Sun Oil Co. v. Whitaker, 424 S.W.2d 216, 218 (Tex. 1968) (reciting a standard similar to the federal one); *see also* DAN B. DOBBS & CAPRICE L. ROBERTS, LAW OF REMEDIES: DAMAGES, EQUITY, RESTITUTION 203 & n.783 (3d. ed. 2018) (explaining that "[v]irtually all states have statutes or court rules," and many of them replicate the federal rule as to injunction bonds); Dobbs, *supra* note 58, at 1096–97 ("Except for Massachusetts, all states make some statutory (or rule) provision for an injunction bond. Historically most of them seem to have been derived, ultimately, from either the federal rule or its statutory predecessors, or from the New York Code of 1848.").

61. *See, e.g.*, 11A CHARLES ALAN WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE § 2947 (2013) (describing preliminary injunctions as restraints on conduct—typically the defendant's—that go into effect pending a decision on the merits of a case); *see also, e.g.*, John Leubsdorf, *The Standard for Preliminary Injunctions*, 91 HARV. L. REV. 525, 525 (1978) (explaining the practical ramifications of preliminary injunctions in various types of cases and explaining that they are "[i]ssued without a full hearing on the merits of the case").

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

63. *See* FED. R. CIV. P. 65(c).

defendant for damages caused by the preliminary injunction.[64] When the government seeks a preliminary injunction it need not post a bond, but it remains liable for damages as private plaintiffs do, at least in some jurisdictions.[65] Requiring an American litigant to compensate an opponent for erroneous judicial decisionmaking is itself extraordinary,[66] and exploring the reasons for this extraordinary measure in the preliminary injunction context proves helpful for the comparison to pretrial detention.

That plaintiffs bear financial risk limits preliminary injunctions by discouraging plaintiffs from seeking them.[67] Remedies scholars recognize that preliminary injunctions afford plaintiffs substantial leverage over defendants,[68] and plaintiffs' potential responsibility for damages on a preliminary injunction urges hesitation before acquiring such leverage.[69] The origins of this leverage are two-fold: First, the defendant is prevented from engaging in potentially lucrative behavior while the case is pending, so the defendant has a strong incentive to seek some resolution that allows it to continue the behavior in question.[70] Second, because ruling on a preliminary injunction requires a court to consider the plaintiff's likelihood of success on the merits, the parties can rightly view any ruling on such a motion as a strong indication of the judge's view of the merits.[71] Of course that indication is preliminary and without the benefit of a fully developed record, but it provides a useful signal to the parties nonetheless.[72] A grant therefore provides significant settlement leverage for plaintiffs.[73] To gain that settlement leverage, plaintiffs—at least in the absence

64. *Id.*

65. *See* sources cited *supra* note 57.

66. Ofer Grosskopf & Barak Medina, *Remedies for Wrongfully-Issued Preliminary Injunctions: The Case for Disgorgement of Profits*, 32 SEATTLE U. L. REV. 903, 920–21 (2009); *cf.* Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 247 (1975) (explaining the American rule that losing parties do not pay the attorney's fees of the winning party), *superseded in part by statute*, Civil Rights Attorney's Fees Awards Act of 1976, Pub. L. No. 94-559, 90 Stat. 2641 (codified as amended at 42 U.S.C. § 1988 note (2018)).

67. Dobbs, *supra* note 58, at 1094.

68. *See, e.g.*, Lanjouw & Lerner, *supra* note 41, at 573–74.

69. Dobbs, *supra* note 58, at 1094.

70. *See id.* (explaining that plaintiffs can face "enormous pressures" as a result of the immediacy of having to cease an activity that allegedly constitutes a nuisance without an opportunity to defend itself in full).

71. *See* Lanjouw & Lerner, *supra* note 41, at 586–87 (explaining that a "preliminary injunction hearing may be a relatively cheap way to obtain information about how a court would rule in an eventual trial," thus facilitating settlement).

72. *See id.*

73. *See id.* at 573–74 (describing strategic use of preliminary injunctions to improve bargaining position); Lynch, *supra* note 41, at 781 (expressing concern that judges articulating a view of the merits of a case for purposes of a preliminary injunction would be too inclined to maintain that view even on a more developed record); *cf.* Bert I. Huang, Essay, *Trial by Preview*, 113 COLUM. L. REV. 1323, 1341–42 (2013) (explaining, in regard to summary judgment and settlement dynamics, that "[n]othing quite cures overoptimism like a judge remarking, on the eve of trial, that in her view the case is a loser").

of any financial risk—would have a strong tactical incentive to pursue preliminary injunctions in every case where such a request was nonfrivolous.[74]

Requiring plaintiffs to bear the risk of compensating wrongfully enjoined defendants helps alter the incentive to pursue every nonfrivolous request by encouraging plaintiffs to limit their requests to the most important and meritorious cases.[75] It discourages them from using preliminary injunctions solely to gain a leverage advantage.[76] It seeks to "discourage too easy an access to the judicial process in those cases where that process does not involve a full trial of the issues."[77] Or to put this in law and economics terms, the requirement for plaintiffs to pay damages to wrongfully enjoined defendants seeks to force plaintiffs to internalize the risks that their request poses to defendants whose rights are subject to less than full judicial process. A plaintiff should seek a preliminary injunction when its expected benefits to the plaintiff outweigh its expected costs—damages.[78]

The bond requirement and damages paid to preliminarily-enjoined defendants who prevail on the merits also serve a compensatory purpose.[79] The idea is that defendants who have not yet been afforded full process and the opportunity to develop their factual records or legal arguments should not bear

74. Dobbs, *supra* note 58, at 1094. Courts do not frequently deem litigation or even a particular litigation tactic frivolous. *See, e.g.*, Elizabeth C. Wiggins, Thomas E. Willging & Donna Stienstra, *The Federal Judicial Center's Study of Rule 11*, FJC DIRECTIONS (SPECIAL ISSUE), Nov. 1991, at 12 (reporting empirical results showing that the median judges surveyed imposed sanctions in two cases over a one-year period); Mark R. Kravitz, *Unpleasant Duties: Imposing Sanctions for Frivolous Appeals*, 4 J. APP. PRAC. & PROCESS 335, 343 (2002) (noting that some courts are reluctant to impose sanctions for frivolous appeals even though they have the statutory authority to do so, which, of course, would have a negative effect on deterrence); Roger J. Miner, Lecture, *Professional Responsibility in Appellate Practice: A View from the Bench*, 19 PACE L. REV. 323, 341 (1999) ("[I]t is a rare case in which we sanction even those who take frivolous appeals.").

75. Dobbs, *supra* note 58, at 1094 (explaining that plaintiffs will seek interim relief only when "in genuine need of such relief and reasonably confident of the outcome"); *id.* at 1112 ("The threat of *potential liability*, however, may serve to screen out unwarranted claims . . . ."); *see also* Edgar v. MITE Corp., 457 U.S. 624, 649 (1982) (Stevens, J., concurring) (explaining that a plaintiff will not seek a preliminary injunction unless he is "confiden[t] in his legal position" because of the risk of paying damages and analogizing the damages requirement to a warranty).

76. Dobbs, *supra* note 58, at 1094, 1112.

77. *Id.* at 1094; Erin Connors Morton, Note, *Security for Interlocutory Injunctions Under Rule 65(c): Exceptions to the Rule Gone Awry*, 46 HASTINGS L.J. 1863, 1867 (1995) (requiring plaintiffs to bear the risk of damages serves to "deter rash applications for interlocutory orders and thus avoids wasting the court's time with flimsy applications").

78. *See generally* Richard R.W. Brooks & Warren F. Schwartz, *Legal Uncertainty, Economic Efficiency, and the Preliminary Injunction Doctrine*, 58 STAN. L. REV. 381 (2005) (arguing that an important function of preliminary injunctions is to promote efficiency); Thomas D. Jeitschko & Byung-Cheol Kim, *Signaling, Learning, and Screening Prior to Trial: Informational Implications of Preliminary Injunctions*, 29 J.L. ECON. & ORG. 1085 (2013) (finding that some plaintiffs request preliminary injunctions "to signal bounds on their damages in order to elicit better settlement offers").

79. Dobbs, *supra* note 58, at 1112 (explaining that the financial risk to plaintiffs of wrongfully obtaining a preliminary injunction "protect[s] defendants whose rights have been dismembered without a full hearing").

the risk of an erroneous judicial decision; they thus should be compensated to the extent that the court's quick resolution of the issue turns out, on further consideration, not to in fact reflect the merits of the dispute.[80]

In sum, the civil system requires plaintiffs to bear the financial risk of seeking a preliminary injunction by paying damages when defendants are wrongfully preliminarily enjoined. Requiring plaintiffs to bear such risk recognizes that plaintiffs receive substantial settlement leverage from a preliminary injunction and imposes a financial incentive to dissuade plaintiffs from pursuing interim relief too frequently. So too does it compensate defendants for harms they incur from abbreviated judicial process.

B. *Bases for Financial Incentives Limiting Pretrial Detention*

The reasoning that makes financial incentives a sensible way to limit interim relief in the civil system applies with at least as much force to prosecutors' pretrial detention decisions.[81] Detaining a defendant pretrial affords the government a massive advantage in securing guilty pleas.[82] Financial incentives could help limit that leverage.[83] As with the civil system, so too would any compensatory scheme help criminal defendants who are harmed by drive-by judicial process (if that process involves a judge at all).

Section II.B.1 explains how pretrial detention affords substantial leverage to prosecutors and imposes substantial costs on defendants as a result of summary judicial process, much as with preliminary injunctions in civil litigation. Section II.B.2 accounts for differences between the civil and criminal

80. *Id.* at 1093–94.

81. *See, e.g.*, Jocelyn Simonson, *Bail Nullification*, 115 MICH. L. REV. 585, 608 (2017) ("[P]rosecutors . . . have an incentive to request high bail to ensure leverage over plea bargaining negotiations."); *see also* Marc Miller & Martin Guggenheim, *Pretrial Detention and Punishment*, 75 MINN. L. REV. 335, 410–11 (1990).

Pretrial detention in America often turns, as a practical matter, on whether the defendant can afford to pay bail rather than on a binary of a court ordering a defendant released or detained—though those options too are possible. As in prior work, I refer to pretrial detention here as either a court denying bail entirely or a court setting bail that the defendant cannot afford and therefore results in the defendant's detention.

82. *E.g.*, Lauryn P. Gouldin, *Disentangling Flight Risk from Dangerousness*, 2016 BYU L. REV. 837, 860; Sandra G. Mayson, *Dangerous Defendants*, 127 YALE L.J. 490, 556 (2018); Simonson, *supra* note 81, at 610.

83. Although they have done so without the civil system as a basis for comparison, some scholars have called for compensation for acquitted defendants who were detained pretrial. *See generally, e.g.*, Gabriel Doménech & Miguel Puchades, *Compensating Acquitted Pre-Trial Detainees*, 43 INT'L REV. L. & ECON. 167 (2015) (analyzing the deterrent effect of compensating acquitted pretrial detainees and arguing that in some situations compensation can deter crime); Manns, *supra* note 55 (conceptualizing pretrial detentions as "liberty takings" that require compensation); *see also* Miller & Guggenheim, *supra* note 81, at 411 (mentioning in passing the idea of requiring the government to compensate acquitted defendants for time spent in pretrial detention in an amount determined by the number of days detained). One article suggests such compensation to "temper[]" the government's incentive to seek pretrial detention. Manns, *supra* note 55, at 1950.

systems, many of which make the disparate use of financial incentives all the more egregious.

1. Pretrial Detention as Prosecutorial Leverage

As with preliminary injunctions,[84] pretrial detention skews case outcomes on the merits. This leverage dynamic in civil procedure is intuitively sensible for reasons explained earlier,[85] though I am not aware of empirical evidence trying to demonstrate its effects. In criminal law, it is quite clear through empirical evidence that pretrial detention worsens defendants' outcomes, albeit for somewhat different reasons: defendants detained before trial are more likely to plead guilty, more likely to be convicted, and face longer sentences than similarly situated defendants who are not detained before trial.[86]

One extraordinarily important reason for defendants' worse outcomes when detained pretrial is that pretrial detention provides a powerful prod for defendants to plead guilty.[87] This leverage is particularly powerful when prosecutors offer defendants the opportunity to go home immediately by pleading guilty and receiving a sentence of time served rather than staying in jail for how many ever months (or years) it may take for a court to try their case.[88] Pretrial detention also skews merits outcomes because it is quite difficult

84. *See generally* Lynch, *supra* note 41 (expressing concern that courts finding plaintiffs are likely to succeed on the merits at the preliminary injunction stage will then be "locked in" to that finding and, thus, more likely to ultimately side with the plaintiff on the merits).

85. *See supra* Section II.A.

86. Heaton et al., *supra* note 6, at 717; Will Dobbie et al., *The Effects of Pretrial Detention on Conviction, Future Crime, and Employment: Evidence from Randomly Assigned Judges*, 108 AM. ECON. REV. 201, 201 (2018); Gupta et al., *supra* note 6, at 473, 475; Emily Leslie & Nolan G. Pope, *The Unintended Impact of Pretrial Detention on Case Outcomes: Evidence from NYC Arraignments*, 60 J.L. & ECON. 529, 543–48 (2017); Megan T. Stevenson, *Distortion of Justice: How the Inability To Pay Bail Affects Case Outcomes*, 34 J.L. ECON. & ORG. 511, 511 (2018).

87. BAUGHMAN, *supra* note 2, at 161–62; Gouldin, *supra* note 82, at 860; Mayson, *supra* note 82, at 556; Miller & Guggenheim, *supra* note 81, at 411; Simonson, *supra* note 81, at 608.

88. *See* Brief of Amici Curiae Current & Former District & State's Attorneys, State Attorneys General, United States Attorneys, Assistant United States Attorneys & Department of Justice Officials, in Support of Plaintiffs-Appellees at 7, ODonnell v. Harris County, 892 F.3d 147 (5th Cir. 2018) (No. 17-20333) ("[T]he accused may see an early guilty plea as the most expedient way to obtain release, as many misdemeanor defendants are sentenced to time served. This in turn may result in the conviction of innocent people . . . ."); Samuel R. Wiseman, *Pretrial Detention and the Right To Be Monitored*, 123 YALE L.J. 1344, 1356 (2014) ("In some cases, the periods that defendants spend in jail awaiting trial is comparable to, or even greater than, their potential sentences, thus substantially incentivizing quick plea deals regardless of guilt or innocence.").

Ultimately it is judges rather than prosecutors who control the defendant's sentence, but judges' review of a sentence recommended in a plea bargain is far from stringent. *See* Russell M. Gold, "*Clientless*" *Prosecutors*, 51 GA. L. REV. 693, 714–16 (2017) [hereinafter Gold, "*Clientless*" *Prosecutors*]. And prosecutors exercise a great deal of control over sentencing with their charging decisions. *See generally* Michael A. Simons, *Prosecutors as Punishment Theorists: Seeking Sentencing Justice*, 16 GEO. MASON L. REV. 303 (2009) (describing the evolution of prosecutorial discretion and a prosecutor's role in seeking substantive justice).

for the accused to mount a defense and coordinate with their lawyers from jail in ways that do not apply in the civil system because of the lack of physical restraint.[89]

That leverage dynamic is exacerbated because interim relief—pretrial detention—inflicts serious harm on criminal defendants and their loved ones.[90] Some defendants lose their jobs, housing, custody of children, and suffer reduced wages for years to come.[91] Many defendants suffer serious psychological harm.[92] For the children of incarcerated defendants, their parents' incarceration is worse for the children's health and behavior than divorce or even death of a parent.[93] Avoiding these harms creates an even stronger leverage dynamic than for civil defendants who seek to avoid having to cease profitable activity during civil litigation.

The strategic advantage for prosecutors of obtaining interim relief also exceeds the advantage for civil plaintiffs because the criminal system does not allow defendants any meaningful "outs" short of going to trial and risking a harsh penalty at sentencing for doing so.[94] Unlike in civil systems, criminal law typically affords defendants little meaningful relief on a motion arguing that the government has not stated a crime, nor do criminal systems have a procedure akin to summary judgment by which a defendant can argue before trial that the government has insufficient evidence to prove at least one element of its case.[95]

89. Gold, *Jail as Injunction*, *supra* note 4, at 521. For defendants who feel confident that they will be convicted, it is theoretically possible that some might prefer to serve time in county jail immediately in pretrial detention rather than serve that time later in state prison post-conviction, but conventional wisdom suggests that conditions in county jails are far worse. *See, e.g.*, Albert W. Alschuler, *Preventive Pretrial Detention and the Failure of Interest-Balancing Approaches to Due Process*, 85 MICH. L. REV. 510, 517 (1986); Kerry Rudd, Opinion, *Prop. 47 Spared Offenders from Prison, but They May Find County Jail Harsher*, S.F. CHRON. (Nov. 26, 2018), https://www.sfchronicle.com/opinion/article/Prop-47-spared-offenders-from-prison-who-then-13413021.php [https://perma.cc/HD2M-RRE9 (dark archive)].

90. Gold, *Jail as Injunction*, *supra* note 4, at 539–45.

91. BAUGHMAN, *supra* note 2, at 86; THE PEW CHARITABLE TRS., COLLATERAL COSTS: INCARCERATION'S EFFECT ON ECONOMIC MOBILITY 11–12 (2010), http://www.pewtrusts.org/~/media/legacy/uploadedfiles/pcs_assets/2010/collateralcosts1pdf.pdf [https://perma.cc/Y47M-VGWA].

92. Consider Kalief Browder who ended his life after several failed attempts during and after pretrial detention at Rikers Island. *See* Jennifer Gonnerman, *Kalief Browder, 1993–2015*, NEW YORKER (June 7, 2015), https://www.newyorker.com/news/news-desk/kalief-browder-1993-2015 [https://perma.cc/9XWJ-D6QE (dark archive)].

93. *See* Kristin Turney, *Stress Proliferation Across Generations? Examining the Relationship Between Parental Incarceration and Childhood Health*, 55 J. HEALTH & SOC. BEHAV. 302, 312, 314 (2014).

94. *See, e.g.*, Russell M. Gold, Carissa Byrne Hessick & F. Andrew Hessick, *Civilizing Criminal Settlements*, 97 B.U. L. REV. 1607, 1614–24 (2017) (explaining the sources of prosecutors' leverage); 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) (observing substantially higher sentences following jury trials than following guilty pleas for the same crime in the same courts).

95. Gold et al., *supra* note 94, at 1635–36, 1639.

Other criminal procedures do not meaningfully change the leverage disparity. Criminal law does afford some early review related to the merits whereas a motion for a preliminary injunction would typically precede any other merits-related review. But those criminal processes are far from robust inquiries into the merits and thus afford far less meaningful protection for defendants' interim interests than one might think at a glance.[96] A judge in a *Gerstein* hearing or a preliminary hearing need find only probable cause to believe that the defendant committed an offense[97]—a less stringent standard than the likelihood of success inquiry for a preliminary injunction.[98] Indeed, criminal preliminary hearings are so pro forma that many defendants waive them.[99]

The leverage disparity is exacerbated by resource disparities. On the civil side, defendants tend to have the resource advantage.[100] Most criminal defendants, by contrast, are vastly out-resourced by the government.[101] Interim relief affords settlement leverage to the actor who initiates the case—the civil plaintiff or the government in a criminal case. That leverage aids the less-resourced actor in the civil context but the better-resourced actor in criminal

96. For a more detailed explanation of this reasoning, see Gold, *Jail as Injunction*, *supra* note 4, at 522–23.

97. For a defendant to be detained, some judicial determination of probable cause is required either before or within forty-eight hours after a defendant is arrested. County of Riverside v. McLaughlin, 500 U.S. 44, 56 (1991) ("[A] jurisdiction that provides judicial determinations of probable cause within 48 hours of arrest will, as a general matter, comply with the promptness requirement of *Gerstein*."). That judicial determination within forty-eight hours is referred to as a *Gerstein* hearing, and the idea is that a police officer's determination of probable cause alone is not enough to detain a defendant for more than two days' time. *Id.*; Gerstein v. Pugh, 420 U.S. 103, 114 (1975) (requiring prompt judicial determination of probable cause). State practices surrounding preliminary hearings vary significantly, but they typically provide an avenue for a judge to pass upon the merits of felony allegations and serve as a sort of substitute for a grand jury. *See* 6 WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE § 14.2(c)–(d) (6th ed. 2017); *see also id.* § 14.2(a) (describing the lack of constitutional requirement for such a procedure that thus permits such substantial variation amongst the states).

98. Alschuler, *supra* note 89, at 518–19 (citing legislative history for the proposition that Congress considered and rejected a standard akin to the civil preliminary injunction standard and opted instead for a more lenient one); Kuckes, *supra* note 19, at 24 & n.132.

99. *See, e.g.*, 6 LAFAVE ET AL., *supra* note 97, § 14.2(e) ("[W]aivers by the defense exceed fifty percent in a substantial number of jurisdictions which provide quite extensive preliminary hearings."); *see also* Mary Prosser, *Reforming Criminal Discovery: Why Old Objections Must Yield to New Realities*, 2006 WIS. L. REV. 541, 576 ("[E]ven where a defendant has a right to a preliminary hearing, it has become so meaningless in some jurisdictions that the defendant typically waives the right . . . .").

100. Gold, *"Clientless" Lawyers*, *supra* note 42, at 123–24; Ion Meyn, *The Haves of Procedure*, 60 WM. & MARY L. REV. 1765, 1774 (2019) (mapping Marc Galanter's terminology about "haves" and "have-nots" onto a comparison of resource and power between the civil and criminal systems including identifying corporate or other entities who are typically defendants as the "haves" of civil litigation). This resource disparity may be less predictable in some cases where preliminary injunctions are at issue, such as in patent litigation, but defendants remain the more powerful actors in many civil cases.

101. Gold, *"Clientless" Lawyers*, *supra* note 42, at 123–24; Meyn, *supra* note 100, at 1774 (identifying prosecutors as the "haves" of criminal law and criminal defendants as the "have-nots").

cases. As such, the resource disparity compounds the effect of the settlement leverage that interim relief affords to prosecutors.

Further, compensating defendants for the harms caused by hasty judicial process makes at least as much sense in pretrial detention as for preliminary injunctions. Pretrial detention proceedings are far more summary—and thus error prone—than are civil preliminary injunctions. So too are the costs of interim deprivation higher from pretrial detention than from preliminary injunctions.

Preliminary injunctions may seem summary when compared to trials, but both are vastly more extensive than pretrial detention hearings.[102] Initial pretrial detention hearings often last as little as one minute.[103] Some systems determine that an accused defendant should remain incarcerated following an arrest without any judicial involvement for days.[104] Some systems set an accused defendant opposite a plexiglass wall from a bail commissioner, and others simply let the defendant participate through videoconference.[105] By contrast, even if the briefing schedules are hasty, preliminary injunction motions are resolved after written briefing and a hearing. To pick a recent example, consider a preliminary injunction motion in a false advertising dispute: the plaintiff submitted a 30-page written brief[106] supported by declarations of several witnesses and more than 300 pages of supporting exhibits.[107] In striking contrast to criminal defendants' two-minute "hearing" without briefing, the false-advertising defendant filed a 29-page written brief supported by expert declarations, a lay witness declaration, and 122 pages of documents[108] prior to

102. For more details, see Gold, *Jail as Injunction*, *supra* note 4, at 514–32. I am not proposing a compensation scheme here, though others have. *See supra* note 83. I am simply mapping the compensatory justification for injunction bonds on the pretrial detention context.

103. *Change Difficult as Bail System's Powerful Hold Continues Punishing the Poor*, INJUSTICE WATCH: UNEQUAL TREATMENT (Oct. 14, 2016), http://injusticewatch.org/interactives/bent-on-bail [https://perma.cc/7XKK-XKMJ] [hereinafter *Change Difficult*] (explaining that pretrial detention hearings in Chicago often last less than two minutes); *Length of a Bail Hearing in North Dakota: 3 Minutes*, NAT'L CTR. FOR ACCESS TO JUST. (Jan. 25, 2013), http://ncforaj.org/2013/01/25/length-of-a-bail-hearing-in-north-dakota-3-minutes [https://perma.cc/G6PB-JDAM] [hereinafter *Length of a Bail Hearing*] (finding that pretrial detention hearings in North Dakota last for about three minutes); *see also* Stevenson & Mayson, *supra* note 32, at 32 ("Currently, bail hearings in many jurisdictions are shockingly short: only a few minutes per case.").

104. Colbert et al., *supra* note 32, at 1719–20.

105. *Id.* at 1733 & n.61; Heaton et al., *supra* note 6, at 730.

106. Brief in Support of Elanco's Motion for a Preliminary Injunction, Eli Lilly & Co. v. Arla Foods Inc., No. 1:17-cv-703-WCG (E.D. Wis. June 15, 2017), 2017 WL 4570547.

107. Declaration of Grady Bishop, *Eli Lilly & Co.*, 2017 WL 4570547; Declaration of Roger A. Cady, *Eli Lilly & Co.*, 2017 WL 4570547; Declaration of Robert J. Collier, *Eli Lilly & Co.*, 2017 WL 4570547; Supplemental Declaration of Grady Bishop, *Eli Lilly & Co.*, 2017 WL 4570547. I excluded cover pages from this count.

108. Defendants' Brief in Opposition to Plaintiffs' Motion for Preliminary Injunction, *Eli Lilly & Co.*, 2017 WL 4570547.

the five-and-a-half-hour hearing in a courtroom before a judge to resolve the motion.[109]

Moreover, as discussed in more detail earlier in this section, accused defendants are substantially harmed by this necessarily hasty judicial process used to determine pretrial detention. Some defendants will lose employment, housing, or custody of a child, and defendants may suffer serious psychological harm.

Based both on the lack of process and the harm of an error against the criminal defendant, error costs are higher for pretrial detention than for preliminary injunctions.[110] Financial incentives that compensate for such error costs could accordingly play an even more important role than their civil counterpart.

Thus, both reasons that animate the injunction bond requirement for preliminary injunctions—deterring unnecessary requests and compensating defendants for harms they suffer from summary judicial process—apply with at least as much force to pretrial detention as to preliminary injunctions.

2. Accounting for Differences Between the Systems

Many of the differences between the civil and criminal systems that bear on whether to use financial incentives to limit requests for interim relief and compensate defendants for harm incurred suggest that such an approach makes more sense in criminal law than in civil procedure.

Pretrial detention involves the government encroaching on defendants' liberty rather than a dispute between private parties, which suggests the need for greater restraint on pretrial detention, perhaps by better allocating financial incentives.[111] Although the injunction bond requirement appears to be mandatory on its face,[112] courts sometimes excuse the requirement or set the bond at a nominal amount when an injunction bond would overly dissuade challenges to government action. For instance, in lawsuits challenging cutbacks to public benefits or in environmental litigation, courts have excused or set the

109. Appellants' Separate Appendix at 35, 78, 144, 183, 226, Arla Foods Inc. v. Eli Lilly & Co., 893 F.3d 375 (7th Cir. 2018) (No. 17-2252) (stating that the hearing began at 9:30 AM and ended at 4:52 PM; recesses occurred from 10:33–10:45 AM, 12:22–1:34 PM, 2:29–2:40 PM, and 3:51–3:57 PM).

110. *Cf.* Mathews v. Eldridge, 424 U.S. 319, 334–35 (1976) (weighing error costs for purposes of procedural due process).

111. *See* Kuckes, *supra* note 19, at 14 (criticizing that "due process hearing rights that are routine in the pretrial stages of civil cases can be absent from parallel stages of the criminal process, despite the comparable or greater interests at stake"). It bears repeating here that although that calculus might affect the due process floor, the argument here is about a sensible statutory or rule-based regime rather than the contours of due process.

112. *See, e.g.*, FED. R. CIV. P. 65(c) ("The court may issue a preliminary injunction or a temporary restraining order only if the movant gives security in an amount that the court considers proper to pay the costs and damages sustained by any party found to have been wrongfully enjoined or restrained.").

bond quite low.[113] When the government seeks to restrain the liberty of criminal defendants then, the same principle of facilitating checks on government overreach counsels in favor of excusing defendants from paying a bond to avoid that restraint. To be sure, this analogy is imperfect insofar as excusing the bond requirement or setting nominal bond for a civil plaintiff challenging government action is meant to preserve an opportunity for the plaintiff to be heard in court; criminal defendants already have that opportunity regarding pretrial detention, at least technically. But pretrial detention hearings do not provide a meaningful opportunity to be heard; they often last for a minute or two and defendants often lack counsel.[114] And detaining defendants chills their future opportunities to participate in their own proceedings.[115] Thus, that the government is the party seeking to impinge on defendants' liberty in the criminal system suggests at least that defendants should not be required to pay bail to challenge governmental overreach.

Stepping back a bit, that criminal law uses financial incentives not to *limit* the massive settlement leverage that pretrial detention affords prosecutors but rather to *increase* that settlement leverage reflects a different normative judgment between the two systems: prosecutors should retain massive settlement leverage even as civil procedure strips that leverage away from plaintiffs' lawyers.[116] Caseload pressure is the classic explanation for what might justify that disparity; preserving prosecutors' leverage has practical appeal in a system that, according to some assumptions, depends on prosecutors pleading out most cases lest it be crushed under its own weight by case volume.[117]

113. 11A WRIGHT ET AL., *supra* note 61, § 2954; Morton, *supra* note 77, at 1869–70; *see also, e.g.*, Davis v. Mineta, 302 F.3d 1104, 1126 (10th Cir. 2002) ("Ordinarily, where a party is seeking to vindicate the public interest served by [the National Environmental Policy Act], a minimal bond amount should be considered."), *abrogated on other grounds by* Dine Citizens Against Ruining Our Env't v. Jewell, 839 F.3d 1276 (10th Cir. 2016); Johnson v. Bd. of Police Comm'rs, 351 F. Supp. 2d 929, 952 (E.D. Mo. 2004) (excusing the bond requirement in a suit brought by homeless persons challenging city police harassment because imposing the bond requirement would amount to denial of the claims).

114. *See, e.g.*, BAUGHMAN, *supra* note 2, at 1, 7; Douglas L. Colbert, *Prosecution Without Representation*, 59 BUFF. L. REV. 333, 386 (2011); Gold, *Jail as Injunction*, *supra* note 4, at 515–19; Heaton et al., *supra* note 6, at 730, 773–74. For more on the importance of counsel at pretrial detention, see also Wake Forest Law Review, *Right to Counsel*, YOUTUBE (Apr. 21, 2020), https://www.youtube.com/watch?v=FLt0g3LDC3s&feature=youtu.be [https://perma.cc/3MFR-4688].

115. Defendants detained pretrial are more likely to plead guilty than those who are not detained. *See, e.g.*, Dobbie et al., *supra* note 86, at 203; Gouldin, *supra* note 82, at 860. Moreover, it is simply much more difficult for an accused to coordinate with lawyers and mount a defense from jail than it would be while on liberty.

116. *See* Dobbs, *supra* note 58, at 1094 (explaining that financial incentives help limit undue settlement leverage in the civil system).

117. Prosecutors' need to plead out so many cases affords defendants leverage to "crash the justice system." Michelle Alexander, Opinion, *Go to Trial: Crash the Justice System*, N.Y. TIMES (Mar. 10, 2012), https://www.nytimes.com/2012/03/11/opinion/sunday/go-to-trial-crash-the-justice-system.html [https://perma.cc/7F5V-XVB2 (dark archive)]. *See generally* Jenny Roberts, *Crashing the Misdemeanor System*, 70 WASH. & LEE L. REV. 1089 (2013) (applying the same idea to the misdemeanor system).

But even the assumption that prosecutors must plead out most cases for the system to function makes sense only if one assumes that the criminal law must maintain its current caseload and that prosecutor budgets are static.[118] And those underlying assumptions are not obvious. Prosecutors could charge only the most important cases.[119]

In a world of mass misdemeanors and the war on drugs I am skeptical empirically of the claim that local prosecutors' budgets are largely consumed by politically mandatory cases.[120] But even if that description were accurate, simply charging fewer cases would not offer a politically feasible solution. If indeed prosecutor budgets are too tight for prosecutors to provide meaningful procedure and maintain what they perceive to be the optimal level of criminal law enforcement, they should need to ask the legislature for a larger appropriation. Prosecutors represent an important lobbying force that typically gets what it wants from legislatures,[121] in large part because their institutional incentives align.[122] But cost concerns can sometimes impede prosecutors' ability

118. Gold, *Jail as Injunction*, *supra* note 4, at 548–51. *See generally* Darryl K. Brown, *The Perverse Effects of Efficiency in Criminal Process*, 100 VA. L. REV. 183 (2014) (explaining that increased efficiency allows prosecutors to pursue more cases).

119. Which sorts of cases are the most important will depend on the locality and the enforcement preferences of the prosecutors' constituents. *See* Russell M. Gold, *Promoting Democracy in Prosecution*, 86 WASH. L. REV. 69, 80 (2011) [hereinafter Gold, *Promoting Democracy*](describing prosecutors as agents of their local constituencies who should make policy-level decisions such as discerning enforcement priorities as those constituents would wish within constitutional and other legal parameters); *see also* Ronald F. Wright, *Persistent Localism in the Prosecutor Services of North Carolina*, 41 CRIME & JUST. 211, 258–59 (2012) (demonstrating significant local variation across prosecutors' offices even in the face of efforts to centralize and standardize practices). *But see* Bruce A. Green & Rebecca Roiphe, *A Fiduciary Theory of Prosecution*, 69 AM. U. L. REV. 805, 819, 841–42 (2020) (arguing that to the extent prosecutors as fiduciaries should account for public sentiment and preferences on a policy level they should adhere to the preferences of their states as a whole—or the country as a whole, for federal prosecutors—rather than their particular localities).

120. *See* Daniel C. Richman & William J. Stuntz, *Al Capone's Revenge: An Essay on the Political Economy of Pretextual Prosecution*, 105 COLUM. L. REV. 583, 600 (2005) (arguing that prosecutors' budgets are largely consumed by politically mandatory cases). *See generally, e.g.*, ISSA KOHLER-HAUSMANN, MISDEMEANORLAND: CRIMINAL COURTS AND SOCIAL CONTROL IN AN AGE OF BROKEN WINDOWS POLICING (2018) (explaining misdemeanor prosecutions as a means of social control); Sandra G. Mayson & Megan T. Stevenson, *Misdemeanors by the Numbers*, 61 B.C. L. REV. 971 (2020) (empirically detailing the scope of misdemeanor prosecutions in eight jurisdictions); Roberts, *supra* note 117, at 1089–94 (explaining the rise of misdemeanor prosecutions).

121. Prosecutors' lobbying groups are sufficiently powerful that there is no reason to worry that they would go unheard. *See* Rachel E. Barkow, *Administering Crime*, 52 UCLA L. REV. 715, 728–29 & n.25 (2005) (explaining the power of pro-enforcement groups in criminal law). *But cf.* Jeffrey Bellin, *The Power of Prosecutors*, 94 N.Y.U. L. REV. 171, 174–76 (2019) (arguing that scholarly literature exaggerates prosecutors' "power" because prosecutors secure victories largely through their alignment of interests with legislatures rather than by overcoming resistance). *See generally* Rachel E. Barkow & Mark Osler, *Designed To Fail: The President's Deference to the Department of Justice in Advancing Criminal Justice Reform*, 59 WM. & MARY L. REV. 387 (2017) (arguing that prosecutorial interests in the Department of Justice inhibited criminal justice reform in the Obama administration).

122. William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 534–35 (2001).

to get what they want from legislatures—at least at the state level.[123] Indeed, cost concerns have led some states to eliminate mandatory minimums, reinstitute parole, or shorten some sentences to offset the cost of increasing other sentences.[124] Promoting the difficult political conversation about whether increased cost yields sufficient corresponding benefit can help restrain prosecutorial overreach and improves democratic accountability.[125]

Even if one were to conclude that securing guilty pleas in most cases remains an important goal, maximizing prosecutor leverage is not the only way to facilitate guilty pleas.[126] Criminal law could facilitate pleas in a way that more closely resembles the civil system[127]: it could improve information flow between the parties, afford input of judges or other neutrals, create procedures that impose transaction costs that both sides would prefer to avoid, and create procedural moments that encourage both sides to think about the case simultaneously.[128]

Other differences between the two systems might seem, at a glance, to undermine the effectiveness of financial incentives to limit pretrial detention, but those differences prove less problematic upon further inspection.

Financial incentives might seem to apply more naturally and effectively in the civil system, where disputes are often about finances, than in the criminal system where disputes typically involve liberty. But that distinction does not hold up as well as one might think. Although we tend to think of the civil system

123. Russell M. Gold, *Prosecutors and Their Legislatures, Legislatures and Their Prosecutors*, *in* THE OXFORD HANDBOOK OF PROSECUTORS AND PROSECUTION (Ronald F. Wright, Kay L. Levine & Russell M. Gold eds., forthcoming 2020) (manuscript at 561–64, 568) [hereinafter Gold, *Prosecutors and Their Legislatures*]; Ronald F. Wright, *Counting the Cost of Sentencing in North Carolina, 1980–2000*, 29 CRIME & JUST. 39, 67, 71–72 (2002) [hereinafter Wright, *Counting the Cost of Sentencing*]; Ronald F. Wright, *Parity of Resources for Defense Counsel and the Reach of Public Choice Theory*, 90 IOWA L. REV. 219, 258–59 (2004). Cost concerns are far less important at the federal level because criminal law represents such a small slice of the overall budget, and the budget need not balance. *See* Gold, *Prosecutors and Their Legislatures*, *supra* (manuscript at 563–64).

124. Nora V. Demleitner, *Is There a Future for Leniency in the U.S. Criminal Justice System?*, 103 MICH. L. REV. 1231, 1270–71 (2005) (discussing mandatory minimums and parole); Wright, *Counting the Cost of Sentencing*, *supra* note 123, at 78–79 (describing North Carolina decreasing sentences to offset other increases to address legislators' concerns about cost).

125. Josh Bowers, *Physician, Heal Thyself: Discretion and the Problem of Excessive Prosecutorial Caseloads, a Response to Adam Gershowitz and Laura Killinger*, 106 NW. U. L. REV. COLLOQUY 143, 148 (2011) ("[A] lack of resources may be the best available check against overzealous prosecution."); *Developments in the Law—Policing*, 128 HARV. L. REV. 1706, 1734 (2015) (discussing the accountability problem caused by police and prosecutors circumventing "normal budgeting politics"); Gold, *Prosecutors and Their Legislatures*, *supra* note 123 (manuscript at 561–64, 568) (explaining that cost concerns can cause legislatures not to provide prosecutors everything on their wish list).

126. *See generally* Gold et al., *supra* note 94 (proposing another way to maximize settlements in the criminal system).

127. *See generally id.* (arguing that rather than maximizing prosecutorial leverage, the criminal system can encourage settlements through procedures similar to those in the civil system).

128. *Id.* at 1631–52 (explaining the ways that civil procedure systems facilitate settlements and proposing mapping those lessons onto the criminal system).

as largely about providing monetary redress for harm, cases in which plaintiffs seek a preliminary injunction are nearly always also cases where plaintiffs seek permanent injunctive relief.[129] And if monetary relief were an adequate remedy, an injunction would not be available.[130] Some such disputes are, at their core, disputes where finances loom large, such as in some intellectual property litigation. But plaintiffs also seek preliminary injunctive relief in civil rights litigation where finances do not play a substantial role.[131] Thus, the injunction bond requirement might more naturally align incentives in some civil cases than in criminal cases, but the bond requirement applies nonetheless to discourage interim relief even in civil cases in which money is not the primary focus of the dispute.[132] Criminal cases are not altogether different from civil rights litigation in this way then; discouraging strategic use of a potent settlement lever makes sense even though such an incentive may not precisely align the incentives because money is not at the core of the dispute.

It might be tempting to justify the two systems' disparate use of financial incentives with the idea that prosecutors are government lawyers and the civil system often finds private parties on both sides of the "v." After all, financial incentives are one of the few available ways to steer the behavior of private litigants. But it does not follow that we should *entirely* trust government lawyers to make the right decisions without financial incentives and despite their own self interests. Simply trusting prosecutors to make the right decisions on behalf of the people is a common mechanism for prosecutor "accountability" in America.[133] And although I tend to think that most prosecutors seek to do the

129. *See* 11A WRIGHT ET AL., *supra* note 61, § 2948.1. The exception would be preliminary injunctions in damages cases where there is "a strong indication" that the defendant will become insolvent before judgment. *See* Micro Signal Research, Inc. v. Otus, 417 F.3d 28, 31 (1st Cir. 2005); *see also* 11A WRIGHT ET AL., *supra* note 61, § 2948.1.

130. eBay Inc. v. MercExchange, L.L.C., 547 U.S. 388, 391 (2006).

131. *See, e.g.*, Republican Nat'l Comm. v. Democratic Nat'l Comm., 140 S. Ct. 1205, 1207–08 (2020) (per curiam) (granting in part an application for stay in a case where the district court issued a preliminary injunction extending the postmark date for absentee ballots in the Wisconsin primary elections); Baqer v. St. Tammany Parish Gov't, No. 20-980-WBV-JCW, 2020 WL 1820040, at *1 (E.D. La. Apr. 11, 2020) (denying plaintiffs' motion for preliminary injunction seeking more humane conditions of pretrial confinement including conditions that provide for social distancing amidst a pandemic).

132. The bond requirement may be forgiven or set at a low amount in some jurisdictions, however, if the plaintiff is indigent. DOBBS & ROBERTS, *supra* note 60, at 206–09 (detailing a divide across jurisdictions regarding whether courts may excuse the injunction bond requirement); 11A WRIGHT ET AL., *supra* note 61, § 2954 (explaining that so long as "the [district] court considers the question, it then has discretion to decide not to require security" and endorsing courts' decision to excuse a bond when the movants are indigent, tying such discretion to the language of Rule 65 that affords flexibility to judges in setting the bond amount).

133. *See* Gold, *"Clientless" Prosecutors*, *supra* note 88, at 720 ("Accountability comes down to trusting prosecutors' commitment to public service and professional conscience in a regime where there are not well-established standards to guide them."); Ronald F. Wright, *How Prosecutor Elections Fail Us*, 6 OHIO ST. J. CRIM. L. 581, 588 (2009) ("To some extent, we rely on the chief prosecutor's professional

right thing most of the time, they face structural impediments to achieving those ends.[134] In the pretrial detention context, trusting prosecutors' judgment regarding when to deploy an extremely useful strategic tool that makes their jobs vastly easier and imposes no monetary cost on them or their offices simply asks too much.[135]

One other potential difference between the civil and criminal contexts is that relying on financial incentives that run against a government entity to incentivize the behavior of salaried public employees is more complicated than with individual parties where the incentive can apply directly. Achieving optimality through financial incentives on public agencies may be impossible,[136] but there is nonetheless reason to think that financial incentives applied to the organization can and do affect prosecutors to some extent.[137] Some European systems impose such a financial incentive by requiring the government to compensate defendants who are detained before trial but not convicted.[138] And indeed, many domestic civil systems must operate on this premise that government lawyers can be affected by financial incentives because they subject government lawyers to the same financial incentives regarding preliminary

conscience: the prosecutor must remain individually committed to the ideal of responsible prosecution. Our most beloved descriptions of the job speak to the importance of a prosecutor doing the job well without any prompting from the outside.").

134. *See* Ronald F. Wright, *Prosecutor Institutions and Incentives*, *in* 3 REFORMING CRIMINAL JUSTICE, *supra* note 32, at 50 (describing prosecutors as "flying blind" and "fly[ing] solo"). *But cf.* Abbe Smith, *Can You Be a Good Person and a Good Prosecutor?*, 14 GEO. J. LEGAL ETHICS 355, 396–400 (2001) (explaining why it is difficult to be both a good person and a good prosecutor, despite pure intentions). *See generally* Jocelyn Simonson, Essay, *The Place of "The People" in Criminal Procedure*, 119 COLUM. L. REV. 249 (2019) (questioning the extent to which prosecutors alone should be thought to represent "the people").

135. *See, e.g.*, Miller & Guggenheim, *supra* note 81, at 410–11 (explaining the benefits and lack of cost to prosecutors of pretrial detention).

136. Daryl J. Levinson, *Making Government Pay: Markets, Politics, and the Allocation of Constitutional Costs*, 67 U. CHI. L. REV. 345, 345 (2000).

137. *See* Myriam E. Gilles, *In Defense of Making Government Pay: The Deterrent Effect of Constitutional Tort Remedies*, 35 GA. L. REV. 845, 848–49 (2001) (arguing that constitutional tort damages deter police officers even if not at a perfectly optimal level).

138. Doménech & Puchades, *supra* note 83, at 168–70; Masson v. Netherlands, 327 Eur. Ct. H.R. (ser. A) at 10–11, 20 (1995) (reviewing domestic law that allows civil court to grant compensation from the state to defendants for damage suffered as a result of wrongful pretrial detention when a defendant is not convicted). The threshold for warranting compensation varies from acquittal, *e.g.*, Hugo Tiberg, *Compensation for Wrongful Imprisonment*, 48 SCANDINAVIAN STUD. L. 479, 480–81 (2005), to proof of innocence, *e.g.*, Strafrechtliches Entschädigungsgesetz [StEG], [Criminal Compensation Act] [BGB] No. 270/1969, as amended, § 2 ¶ 1 letter B, https://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=10002138&FassungVom=2004-12-31 [https://perma.cc/PU7V-W9HX] (Austria); 31 ch. 444 § LOV OM RETTERGANGSMÅTEN I STRAFFESAKER (STRAFFEPROSESSLOVEN) [CRIMINAL PROCEDURE ACT] (Norsk Lovtidend [LOV] 1981:05-22-25) (Nor.); Ley Orgánica 6/1985, de 1 de julio, del Poder Judicial arts. 293–294 (B.O.E. 1985, 12666) (Spain).

injunctions as they do private parties.[139] As Myriam Gilles explains, constitutional tort awards cause complex dynamics within an organization because they provide information to the public about that organization's behavior.[140] Organizations can also learn more about their own practices because of litigation.[141] Similarly, imposing a cost on pretrial detention would draw lead prosecutors' attention to when their line prosecutors decide to seek pretrial detention. Aurelie Ouss's recent work empirically demonstrating a prosecutor's office responding to changes in cost structure provides further reason to think that financial incentives at the organizational level would matter.[142] Moreover, we tend to think in the asset forfeiture context that prosecutors respond to financial gains that accrue to the office rather than the individual prosecutor.[143] Line prosecutors seem to care about forfeiture revenue as a matter of directives from superiors or organizational reputation.[144]

Lastly, even private entities face agency costs insofar as the party bearing financial risk is an entity rather than an individual decisionmaker. There may be reason to think that financial incentives within a private organization may help align decisionmakers' interests with the entity's, but the mechanisms by

139. *See, e.g.*, Corpus Christi Gas Co. v. City of Corpus Christi, 46 F.2d 962, 963 (5th Cir. 1931); Provident Mgmt. Corp. v. City of Treasure Island, 796 So. 2d 481, 487 (Fla. 2001); *see also* sources cited *supra* note 57. The only difference between the government and a private litigant in those jurisdictions is that the government need not post a bond in advance from which damages can be taken. *See, e.g.*, N.C. R. CIV. P. 65(c).

140. Gilles, *supra* note 137, at 854–55, 859–60.

141. *Cf.* Joanna C. Schwartz, *Introspection Through Litigation*, 90 NOTRE DAME L. REV. 1055, 1056–58 (2015) (explaining how litigation can provide information to organizational defendants).

142. Aurélie Ouss, Misaligned Incentives and the Scale of Incarceration in the United States 3 (Apr. 2020) (unpublished manuscript), http://aouss.github.io/ouss_incentives_justice.pdf [https://perma.cc/VPl6-MTVN] (finding that criminal justice decisionmaking is cost sensitive insofar as devolving costs of juvenile incarceration in California substantially reduced juvenile incarceration); *see also* John Rappaport, *How Private Insurers Regulate Public Police*, 130 HARV. L. REV. 1539, 1593–95 (2017) (explaining that concern about a police department's insurance costs deters police wrongdoing).

143. *See* Gold, *"Clientless" Lawyers*, *supra* note 42, at 108–10 (describing prosecutors' incentives regarding forfeiture); *see also* Margaret H. Lemos & Max Minzner, *For-Profit Public Enforcement*, 127 HARV. L. REV. 853, 863 (2014) ("It is true that public enforcers do not profit from successful litigation in the sense of taking home a percentage of awards, as private lawyers might. Nevertheless, the institutional structures in which many public enforcers work provide ample incentives for salaried government employees to prioritize and maximize financial recoveries.").

144. Gold, *"Clientless" Lawyers*, *supra* note 42, at 108–10; TOM R. TYLER & STEVEN L. BLADER, COOPERATION IN GROUPS: PROCEDURAL JUSTICE, SOCIAL IDENTITY, AND BEHAVIORAL ENGAGEMENT 143–44, 151 (2000) (discussing employees' preferences about being affiliated with a high-status organization and the way an organization's status influences self-perception); *see also* Lemos & Minzner, *supra* note 143, at 856–57 (discussing the relationship between agencies' reputations and financial recoveries). The Department of Justice "has regularly exhorted its attorneys to make 'every effort' to increase 'forfeiture production' so as to avoid budget shortfalls." Eric Blumenson & Eva Nilsen, *Policing for Profit: The Drug War's Hidden Economic Agenda*, 65 U. CHI. L. REV. 35, 63 (1998).

which financial incentives that run to an organization affect the behavior of its agents is complicated too.[145]

Admittedly, that prosecutors should not be merely advocates in a purely adversarial system but rather should be ministers of justice complicates the propriety of financial incentives in ways not present in the civil system.[146] But this concern about neither encouraging prosecutors to be too aggressive nor too passive to adhere to their minister of justice role would be best addressed by thinking carefully about how to design these incentives.[147]

✦ ✦ ✦

Although the reasons that civil procedure relies on financial incentives to limit interim relief make even more sense in criminal law, criminal law does not rely on any such financial incentives. Rather, it uses financial incentives in the opposite way—to *encourage* pretrial detention. That disparity contributes to a more troubling disparity: criminal defendants are routinely deprived of their liberty before trial—at least if they cannot pay to avoid that deprivation—but civil defendants will not be made to suffer the indignities of having a property interest restrained while the case is pending unless the plaintiff bears the risk of financial loss.[148]

This section has argued that such a disparity is unjustifiable. But eliminating that disparity could take at least two forms: leveling up the protections for defendants in the criminal system to better align with the civil system or leveling down protections for defendants in the civil system. In broad strokes, this Article embraces the former approach—increasing protections for criminal defendants.[149] In so doing, this proposal is consistent with a series of

145. *Cf.* Levinson, *supra* note 136, at 352 (discussing the presence of agency costs in the public and private sectors but focusing on civil service protections as a protracted source of public agency costs).

146. MODEL RULES OF PROF'L CONDUCT r. 3.8 cmt. 1 (AM. BAR ASS'N 2018) ("A prosecutor has the responsibility of a minister of justice and not simply that of an advocate.").

147. It bears repeating here that articulating the idea structure for such incentives is beyond the scope of this Article.

148. Within the criminal legal system, Black defendants are far more likely to be detained pretrial than White defendants and are assigned higher bail amounts. BAUGHMAN, *supra* note 2, at 9. A recent study using complex statistical tools and quasi-experimental design estimates that at least 68% of the racially disparate outcomes in the New York data are attributable to discrimination rather than differences in risk of nonappearance or further crime. David Arnold, Will Dobbie & Peter Hull, *Measuring Racial Discrimination in Bail Decisions* 20 (Becker Friedman Inst. for Econs. at Univ. of Chi., Working Paper No. 2020-33, 2020). Another study focused on Philadelphia demonstrated that the benefits of DA Larry Krasner's no-cash-bail policy run disproportionately to White defendants. Aurelie Ouss & Megan T. Stevenson, *Bail, Jail, and Pretrial Misconduct: The Influence of Prosecutors* 23 (George Mason Legal Studies, Research Paper No. LS 19-08, 2020).

149. This Article does not consider whether, in at least some cases, the financial incentives overly dissuade civil plaintiffs from seeking preliminary injunctions or even whether it might make sense to exclude some narrow category of criminal cases from a system of financial incentives. *See* DOBBS & ROBERTS, *supra* note 60, at 206–09 (describing variations between different systems regarding the

recent articles that consider systems built to protect favored defendants as a model for protecting all defendants.[150]

Leveling up here is the better approach because dissuading relief before judgment in civil and criminal cases makes sense.[151] Interim relief requires courts to make snap judgments, and those judicial snap judgments become a powerful tool for the winning side to facilitate "consensual" resolution of the dispute. Those snap judgments may hurt the restrained party who had no control over whether to pursue the interim relief in the first place. In short, the reasons that civil procedure requires an injunction bond—reducing strategic use of a procedural device to force settlement and compensating defendants for harms caused by hasty judicial process—make eminently good sense in either system.[152] Although such interim relief may sometimes be necessary, discouraging it where unnecessary is largely to the good. As an economic matter, requiring parties to internalize costs that they could otherwise externalize on the other side—as the injunction bond does—is also good. Cost externalization in criminal law under such a scenario would be far from perfect,[153] but some externalization is better than none.

Lastly, the criminal legal system detains far too many people before trial.[154] Consider some statistics from a recent empirical study of misdemeanors in several U.S. jurisdictions.[155] For alleged misdemeanants where judges saw little risk of release and thus set a bond of only $500, it is hard to see why more than

existence of judicial discretion not to require a bond); 11A WRIGHT ET AL., *supra* note 61, § 2954 (explaining that some courts "have found reversible error only when the district court failed to expressly consider the question of requiring a bond," meaning that so long as "the [district] court considers the question, it then has discretion to decide not to require security," and endorsing courts' decisions to excuse a bond when the movants are indigent). Nor does it argue that financial incentives should always be used to dissuade interim relief. In some contexts, such as domestic violence restraining orders, dissuading such requests through financial incentives would be a bad idea. There are plenty of barriers that already confront victims of domestic violence from seeking legal process.

150. *See* Gold et al., *supra* note 94, at 1659–60 (suggesting leveling up criminal procedure to match civil procedure with respect to means of facilitating settlements); Kate Levine, *Police Suspects*, 116 COLUM. L. REV. 1197, 1202–03 (2016) (suggesting leveling up protections for all suspects to match those afforded to police suspects whose unions secured favorable treatment through collective bargaining). *See generally* Anna Roberts, *Dismissals as Justice*, 69 ALA. L. REV. 327 (2017) (considering the judicial power to dismiss cases in furtherance of justice as a way to shed light on methods to increase justice for all).

151. In the criminal context, Miller and Guggenheim note in passing that prosecutors' incentive structure encourages overuse of pretrial detention. Miller & Guggenheim, *supra* note 81, at 410–11.

152. *See supra* Section II.A; *see also* Dobbs, *supra* note 58, at 1093–94.

153. Many of the ways in which prosecutors need not internalize all relevant costs are discussed below. *Infra* Section III.A.

154. *See generally* BAUGHMAN, *supra* note 2 (explaining that the costs of detaining as many people pretrial as the United States does now vastly outstrips the benefits); Baughman, *Costs of Pretrial Detention*, *supra* note 7, at 3–4 (same).

155. *See generally* Mayson & Stevenson, *supra* note 120, at 1009–10 (providing an empirical analysis of how misdemeanors are processed across eight diverse jurisdictions).

40% of those defendants should remain incarcerated as they did.[156] That pretrial detention is self-defeating—it increases failures to appear and the likelihood of a defendant committing a crime while on release—and that it is criminogenic more broadly make this outcome even worse than it may seem at first glance.[157] Indeed, narrowing the number of cases in which judges have to decide whether a defendant should be detained pretrial is a core piece of the newly emerging reform models in many jurisdictions.[158] Typically, that narrowing comes from issuing summons in lieu of custodial arrest.[159] But alleviating pressure on the bail system by deploying financial incentives to discourage prosecutors from requesting detention (whether through setting unaffordable bail or denying it entirely) can help achieve the same objective.

This section has treated the two goals of the injunction bond—dissuading requests for interim relief and compensating those harmed by interim relief—as necessarily running together because they do in the preliminary injunction system. The plaintiff bears financial risk and the money that the plaintiff puts up goes to compensate defendants. Although this Article does not consider what mechanism would best implement financial incentives in pretrial detention,[160] it is nonetheless worth noting at this point that not every structure meant to deter requests for interim relief need necessarily equate deterrence and compensation.[161] And if put to the choice broadly between deterrence and compensation, deterrence is the more important objective. Compensating pretrial detainees for harms such as lost housing or custody of a child will necessarily be imperfect remedies; the increased chance of avoiding that harm in the first place is better for defendants than imperfect compensation.[162]

156. *Id.*

157. *See, e.g.*, BAUGHMAN, *supra* note 2, at 161 ("Even short periods of pretrial detention increase the risk of recidivism."); *id.* at 82 (recounting findings that "[d]efendants held for 2–3 days were 22 percent more likely to fail to appear in court than similarly situated defendants who were held for less than 24 hours" and that "[d]efendants held for 15–30 days" failed to appear 41% of the time).

158. Wake Forest Law Review, *Risk Assessment*, YOUTUBE (Apr. 17, 2020), https://www.youtube.com/watch?v=UjMuu3_iRCA&feature=youtu.be [https://perma.cc/A8KY-6NVL]; *see also* RAHMAN, *supra* note 56, at 11 (explaining that the New York bail reform bill included mandatory issuance of summons in lieu of arrest for many offenses).

159. *See, e.g.*, RAHMAN, *supra* note 56, at 11.

160. Damages or a limited fund would be two plausible ways to implement financial incentives in the prosecutor context. Discussing the best mechanism for such incentives is beyond the scope of this Article, however.

161. In some class actions, for instance, defendants may pay settlement money that does not go directly to victims but rather funds a charitable endeavor or some very rough proxy of the victims' interests through the cy pres mechanism. *See generally, e.g.*, Russell M. Gold, *Compensation's Role in Deterrence*, 91 NOTRE DAME L. REV. 1997 (2016) (arguing that compensating victims in class actions is important to facilitating deterrence).

162. *Cf. generally* David Rosenberg, Response, *Mandatory-Litigation Class Action: The Only Option for Mass Tort Cases Response*, 115 HARV. L. REV. 831 (2002) (arguing that achieving broader deterrence by eliminating opt outs in mass tort class actions improves social welfare compared to letting some defendants with high-value claims opt out and receive more compensation).

III. DEEPENING EXISTING PATHOLOGIES

The existing disparity between the civil and criminal systems' uses of financial incentives surrounding interim relief advances two existing bodies of scholarship that recognize different pathologies in American criminal law.[163] Section III.A contends that the financial incentive disparity represents one more manifestation of criminal law not forcing prosecutors' offices to bear the full costs of their decisions—the correctional free lunch problem. It unites several different strands of criminal law scholarship under the correctional free lunch umbrella and then situates the pretrial financial incentive disparity as one more instance of a correctional free lunch. Section III.B then shows that the financial incentive disparity tracks predictable disparities in race, wealth, and power between civil and criminal defendants.[164]

A. *Prosecutors' Free Lunches*

That the government does not bear the financial risk of its pretrial detention decisionmaking but shifts the financial burden instead onto criminal defendants is another iteration of a familiar story: criminal law is too cheap. Prosecutors' offices do not bear the full costs of prosecutors' decisions, and criminal law thereby structurally encourages over-prosecution.[165] Criminal law enforcement of course imposes substantial costs on defendants and their lives, many of which are not easily monetized nor would they be easy to force prosecutors to internalize. But even for purely monetary costs, prosecutors' offices frequently do not bear the full financial costs of their decisions; indeed, in some instances, the government as a whole does not even bear those costs.

Scholars refer to this pathology of making prosecution too cheap by not requiring prosecutors' offices to bear the full costs of their decisions as a correctional free lunch.[166] This section begins by bringing scholarship regarding criminal fines and fees as well as asset forfeiture within the correctional free

163. This Article does not seek to explain historically why the two systems take different approaches.

164. *See generally* Ion Meyn, The Creation of Separate and Unequal Courtrooms (July 1, 2019) (unpublished manuscript) (on file with the North Carolina Law Review) (arguing that the race disparity between the parties in the civil and criminal systems accounts for procedural differences).

165. *Cf. generally* Brown, *supra* note 118 (arguing that increased efficiency in criminal law can be perverse insofar as it enables more prosecutions); Gold, *Promoting Democracy*, *supra* note 119, at 79–80 (arguing that prosecutions should be brought so long as their marginal social benefit exceeds or equals their marginal social cost, subject to other ethical constraints); Alexandra Natapoff, *Misdemeanor Decriminalization*, 68 VAND. L. REV. 1055, 1059, 1094–98 (2015) (describing decriminalization of misdemeanors as "the next generation of the 'net-widening' phenomenon"). Criminal law enforcement also includes policing, but the focus of this Article is on prosecutors and thus this section focuses on the prosecutors' decisionmaking and not prior policing expenditures.

166. *See* FRANKLIN E. ZIMRING & GORDON HAWKINS, THE SCALE OF IMPRISONMENT 140 (1991) (coining the term); *see also* Richard A. Bierschbach & Stephanos Bibas, *Rationing Criminal Justice*, 116 MICH. L. REV. 187, 194–204 (2017) (discussing structural misalignment problems in criminal law).

lunch umbrella. It then contributes one more instance of a correctional free lunch—the financial incentive structure for pretrial detention.

Most famously, the correctional free lunch problem addresses the notion that counties pay prosecutors but states pay for prisons, so prosecutors can shift the incarceration costs of their decisions onto another geographic entity.[167] When county prosecutors secure convictions and sentences in excess of a year, defendants typically serve those sentences in state prisons rather than local jails; county prosecutors thus shift the cost of housing those inmates to a different geographic entity—the state.

When we view each county government not as a monolith but look instead at individual office budgets, the picture gets more complicated—and even worse—for incentive alignment. Adam Gershowitz rightly identifies separate prosecutor and jail budgets as another correctional free lunch problem even within a county.[168] Prosecutors may care about their conviction statistics and their own budgets but not about the cost to the jail budget for housing those inmates pretrial (or post-conviction for short sentences served in county jail).[169] These sorts of "horizontal misalignments" appear in several aspects of criminal law that relatedly yield more free lunches.[170] Police officers, to provide another example, might care only about arrest statistics and not prosecutions.[171]

Still other bodies of criminal law scholarship address what we can also think of as correctional free lunch problems but have not yet been categorized as such. The government in many jurisdictions shifts some of the costs of criminal law enforcement to defendants through prevalent use of fines and fees. Criminal defendants are assessed fees for "law enforcement investigations, prosecutors' preparation for trial, issuance of arrest warrants, and impaneling of a jury."[172] Defendants are also charged for pretrial detention and for post-

167. *See, e.g.*, ZIMRING & HAWKINS, *supra* note 166, at 140.

168. *See generally* Adam M. Gershowitz, *Consolidating Local Criminal Justice: Should Prosecutors Control the Jails?*, 51 WAKE FOREST L. REV. 677 (2016) (arguing that local prosecutors should bear responsibility for their local jails to eliminate this correctional free lunch).

169. Bierschbach & Bibas, *supra* note 166, at 198; *see also* Gershowitz, *supra* note 168, at 681 (proposing that prosecutors' offices control jails to prevent this second dimension of a correctional free lunch). On a federal level, the Bureau of Prisons is housed within the same agency as the prosecutors—the Department of Justice—albeit in such a large agency that one can hardly be expected to be responsive to the other. *Cf. generally* Rachel E. Barkow, *Prosecutorial Administration: Prosecutor Bias and the Department of Justice*, 99 VA. L. REV. 271, 336–40 (2013) (arguing that corrections and clemency functions should not be housed within a prosecution-driven agency like the Department of Justice).

170. Bierschbach & Bibas, *supra* note 166, at 198–200.

171. *Id.* at 198.

172. Beth A. Colgan, *Reviving the Excessive Fines Clause*, 102 CALIF. L. REV. 277, 286 (2014) [hereinafter Colgan, *Reviving*] (footnotes omitted). Alabama fills the coffers of its "Fair Trial Tax Fund" by charging fees to criminal defendants, to the tune of nearly $2.5 million. ALA. APPLESEED CTR. FOR LAW & JUSTICE, UNDER PRESSURE: HOW FINES AND FEES HURT PEOPLE, UNDERMINE PUBLIC SAFETY, AND DRIVE ALABAMA'S RACIAL WEALTH DIVIDE 17–19 (2018), http://

conviction incarceration.[173] Similarly puzzling is the filing fee, imposed not against the party that filed the case as it would be in the civil system[174] but against the *defendant* who would much prefer to both save the money and not be charged with a crime.[175] Moreover, "courts have assigned counsel to millions of American defendants too poor to pay for an attorney, and later required those defendants to pay for their counsels' services."[176] In short, the accused are charged for the privilege of being dragged through the criminal legal process and being housed in hellish conditions. If they receive a sentence of probation or are released on parole, defendants get to pay for those privileges too.[177] Convicted defendants may face fines and perhaps surcharges on top of those fines.[178] Compounding those fines and fees, defendants are charged interest, late fees, and collection costs, all of which count the time the defendant spends incarcerated where it is impossible to earn nearly enough money to afford the fees.[179]

In imposing all of these fines and fees, the government offloads costs of its own decisions onto defendants.[180] From an economic efficiency standpoint,

www.alabamaappleseed.org/wp-content/uploads/2018/10/AA1240-FinesandFees-10-10-FINAL.pdf [https://perma.cc/7J82-KVQX].

173. Colgan, *Reviving*, *supra* note 172, at 287; Beth A. Colgan, *Fines, Fees, and Forfeitures*, *in* 4 REFORMING CRIMINAL JUSTICE 205, 206 (Erik Luna ed., 2017), https://law.asu.edu/sites/default/files/pdf/academy_for_justice/Reforming-Criminal-Justice_Vol_4.pdf [https://perma.cc/K59Y-FGM8]; Wayne A. Logan & Ronald F. Wright, *Mercenary Criminal Justice*, 2014 U. ILL. L. REV. 1175, 1192.

174. *See, e.g.*, 28 U.S.C. § 1914(a) (2018) ("The clerk of each district court shall require the parties instituting any civil action, suit or proceeding in such court, whether by original process, removal or otherwise, to pay a filing fee of $350 . . . .").

175. *See* Beth A. Colgan, *Paying for* Gideon, 99 IOWA L. REV. 1929, 1935 (2014) [hereinafter Colgan, *Paying for* Gideon].

176. *Id.* at 1929. Indeed, every jurisdiction in the country has recoupment authority to require defendants to pay fees for their own lawyers even though those lawyers were appointed because of the defendants' poverty. *Id.* at 1931 n.4. Of the twenty-eight states and the District of Columbia that have indigent defense systems, twenty-three require defendants to pay for their attorneys. SUZANNE M. STRONG, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, STATE-ADMINISTERED INDIGENT DEFENSE SYSTEMS, 2013, at 1, 7 (2016), https://www.bjs.gov/content/pub/pdf/saids13.pdf [https://perma.cc/48TU-S2K3].

The constitutionality of assessing public defender fees against the indigent is questionable. *See, e.g.*, Kate Levine, Note, *If You Cannot Afford a Lawyer: Assessing the Constitutionality of Massachusetts's Reimbursement Statute*, 42 HARV. C.R.-C.L. L. REV. 191, 193 n.12 (2007) (collecting sources questioning the constitutionality of these fees). *But see* Fuller v. Oregon, 417 U.S. 40, 53–54 (1974) (declaring the assessment of public defender fees constitutional). For the surprising political story of application fees for defense counsel, see Ronald F. Wright & Wayne A. Logan, *The Political Economy of Application Fees for Indigent Criminal Defense*, 47 WM. & MARY L. REV. 2045, 2055–72 (2006).

177. Colgan, *Reviving*, *supra* note 172, at 287.

178. *Id.* at 285.

179. *Id.* at 288.

180. Defendants may also often be assessed restitution, but because that assessment compensates victims for their losses, *id.* at 285; *see also, e.g.*, 18 U.S.C. §§ 3663, 3663A (2018); ALA. CODE §§ 15-18-66 to -68 (Westlaw through Act 2020-88); WASH. REV. CODE ANN. § 9.94A.753(3) (Westlaw

perhaps most troubling of all is that sometimes fee proceeds go to prosecutors' offices,[181] which reduces the marginal cost of those prosecutions. Not only, then, do prosecutors' offices have their marginal cost of prosecution reduced by avoiding paying for parts of the criminal process, but sometimes that marginal cost is doubly reduced by actually obtaining revenue from those parts of the process. Other portions of those fines may go to defray other government expenses related to criminal law administration such as Alabama's Fair Trial Tax Fund.[182]

Not only do fees shift costs from prosecutors to defendants, they also create deadweight loss. Charging fees to defendants yields court debt that increases crime and thereby imposes broader social costs. In a recent study in Alabama, for instance, more than 38% of respondents reported committing at least one crime to pay their court debt;[183] for defendants who incurred debt from mere traffic violations, nearly 20% admitted to committing a more serious crime to service their debt.[184] More than 13% of respondents in the Alabama study skipped child support payments to pay off their criminal "justice" debt.[185] Lastly, because many defendants are poor and cannot afford to pay this debt, they may face further incarceration over their inability to pay, which of course also costs government money and results in further deadweight losses.[186]

Civil asset forfeiture too yields a free lunch problem because it allows prosecutors' offices to reduce the marginal costs of prosecution.[187] Federal law allows the government to broadly pursue forfeiture of assets bearing some relationship to an alleged crime[188] and allows the Department of Justice to retain

through Chapter 218 of the 2020 Reg. Sess.), it does not pose the same interest-alignment concerns as do the other fees and fines.

181. *See* STATE OF ALA. UNIFIED JUDICIAL SYS., FEE DISTRIBUTION CHART [hereinafter STATE OF ALA.], http://www.alacourt.gov/docs/FEE%20DISTRIBUTION%20CHART.pdf [https://perma.cc/T8DV-5LAQ] (providing a breakdown of where proceeds from various fees are distributed, including the "DA Fund"); *see also* ALA. CODE § 12-17-197(c) (Westlaw through Act 2020-88) (preserving a separate "district attorney's fund for the payment of any and all expenses to be incurred by [the district attorney] for law enforcement and in the discharge of the duties of his office, as he sees fit").

182. ALA. APPLESEED CTR. FOR LAW & JUSTICE, *supra* note 172, at 17–19 (explaining the "Fair Trial Tax Fund" and reporting that in 2017 that fund obtained nearly $2.5 million in fine proceeds); STATE OF ALA., *supra* note 181 (stating what portion of per-defendant fees goes to the Fair Trial Tax Fund).

183. ALA. APPLESEED CTR. FOR LAW & JUSTICE, *supra* note 172, at 31. Because this statistic relies on self-reporting, there is reason to think it is undercounting.

184. *Id.* at 32.

185. *Id.* at 31.

186. Colgan, *Reviving*, *supra* note 172, at 290–91; Colgan, *Paying for* Gideon, *supra* note 175, at 1934–35.

187. Blumenson & Nilsen, *supra* note 144, at 56; Logan & Wright, *supra* note 173, at 1195.

188. *See, e.g.*, 18 U.S.C. § 981 (2018). For a more detailed explanation of forfeiture law and the surrounding incentives, see, for example, Gold, *"Clientless" Lawyers*, *supra* note 42, at 108–10.

forfeiture proceeds.[189] Some state laws operate similarly.[190] States can participate in the "equitable sharing" program whereby the federal government uses its permissive regime to affect forfeiture on the State's behalf in exchange for a portion of the proceeds.[191] Federal proceeds from forfeitures totaled nearly $4.5 billion in 2014,[192] and that amount does not account for state-level forfeitures. That forfeiture proceeds go to prosecutors' offices—like some fines—is particularly troubling for economic efficiency purposes because it reduces the marginal cost of those prosecutions to prosecutors. So too does it circumvent an important legislative and democratic check on prosecutors—appropriations and budget discipline.[193]

Civil asset forfeiture and criminal fines and fees would seem to raise substantial due process concerns, but the Supreme Court has been utterly feckless when it comes to enforcing due process for criminal defendants outside the context of a trial.[194] That statement remains true even as the Court has recognized that "plea bargaining . . . *is* the criminal justice system"[195] and has clarified that the right to effective assistance of counsel extends to the bargaining context.[196] In the civil context, due process requires a pre-deprivation hearing before a court can restrict the use of an asset prejudgment.[197] Indeed, that remains true even when the property to be

189. *See* Blumenson & Nilsen, *supra* note 144, at 50.

190. Bruce A. Green & Rebecca Roiphe, *Rethinking Prosecutors' Conflicts of Interest*, 58 B.C. L. REV. 463, 477 & n.66 (2017) (collecting citations to state and federal laws that are on point with this issue).

191. Blumenson & Nilsen, *supra* note 144, at 50–51, 54.

192. DICK M. CARPENTER II ET AL., INST. FOR JUSTICE, POLICING FOR PROFIT: THE ABUSE OF CIVIL ASSET FORFEITURE 10–11 (2d ed. 2015); *see also* Michael Sallah et al., *Stop and Seize*, WASH. POST (Sept. 6, 2014), https://www.washingtonpost.com/sf/investigative/2014/09/06/stop-and-seize/ [https://perma.cc/HCD8-44AE (dark archive)] (finding that the federal Equitable Sharing Program involved seizures valued at over $2.5 billion dollars between September 2001 and September 2014).

193. *See* Bowers, *supra* note 125, at 148 ("[A] lack of resources may be the best available check against overzealous prosecution."); Katherine Baicker & Mireille Jacobson, *Finders Keepers: Forfeiture Laws, Policing Incentives, and Local Budgets*, 91 J. PUB. ECON. 2113, 2135 (2007) (explaining that state and local legislatures account for forfeiture proceeds in budgeting); Gold, *Prosecutors and Their Legislatures*, *supra* note 123 (manuscript at 561–64, 568) (explaining that cost sometimes prevents prosecutors from getting what they want from legislatures). That Ferguson, Missouri, for instance, could raise more than $2.4 million through fines and fees in 2013—its second largest source of income—without any legislative involvement, *see Developments in the Law—Policing*, *supra* note 125, at 1724, works an end run on legislative accountability.

194. *See generally* Kuckes, *supra* note 19 (arguing compellingly that the Supreme Court has provided vastly less protection for the pretrial procedural due process rights of criminal defendants than for civil defendants); *see also id.* at 14 ("[D]ue process hearing rights that are routine in the pretrial stages of civil cases can be absent from parallel stages of the criminal process, despite the comparable or greater interests at stake.").

195. Missouri v. Frye, 566 U.S. 134, 144 (2012).

196. *Id.* at 140–44; Padilla v. Kentucky, 559 U.S. 356, 364–66 (2010).

197. *See, e.g.*, Connecticut v. Doehr, 501 U.S. 1, 11–12, 24 (1991).

restrained—such as a stove—forms the subject of the dispute.[198] Refrigerators receive similar protection.[199] Justice Stewart criticized the Court for establishing that "the 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."[200] Although a civil creditor cannot constitutionally ask a court to limit a civil defendant's ability to control the property interest in his own home or stove without affording a pre-deprivation hearing,[201] the government can restrain the body of a criminal defendant with no such pre-deprivation hearing.[202] Rather, the Supreme Court has "rejected the argument that procedural protections required in [civil] due process cases should be afforded to a criminal suspect arrested without a warrant."[203]

That prosecutors need not bear the full costs of their decisionmaking encourages them to exceed optimal criminal enforcement. Financial incentives regarding pretrial detention are one more way in which the government need not bear the full costs of its decisionmaking. These financial incentives too are a form of free lunch, and they piggyback on the correctional free lunch between prosecutors and local jails. As Gershowitz rightly explains, prosecutors' budgets do not bear the strain of detaining defendants in local jails.[204] The jail budget does that. Prosecutors can (often successfully) ask the court to spend the jail's money in detaining defendants pretrial.

A financial incentive akin to preliminary injunctions where prosecutors bear financial risk to seek interim relief could eliminate that level of correctional free lunch problem. But criminal law takes the opposite tack. Many defendants are incarcerated pretrial unless they can afford their freedom, thereby shifting the financial burden onto defendants and away from the prosecutor with significant power to control these expenditures. Imposing the financial incentive to avoid interim relief on the defendant increases prosecutors' incentives to exploit the fact that someone else bears the cost of jailing defendants pretrial—the county-level correctional free lunch.

198. *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).

199. Mitchell v. W. T. Grant Co., 416 U.S. 600, 616–20 (1974) (upholding a Louisiana statute as consistent with due process because it required proof presented to a judge of the existence of a lien on the property and prompt judicial process to dissolve the attachment).

200. Gerstein v. Pugh, 420 U.S. 103, 127 (1975) (Stewart, J., concurring) (citations omitted).

201. *Doehr*, 501 U.S. at 11–12, 24 (home); *Fuentes*, 407 U.S. at 96 (stove).

202. *Gerstein*, 420 U.S. at 123 (majority opinion).

203. Ingraham v. Wright, 430 U.S. 651, 697–98 (1977) (White, J., dissenting); Kuckes, *supra* note 19, at 7 n.33.

204. Gershowitz, *supra* note 168, at 680.

B. *Race, Wealth, and Power*

Race, wealth, and power disparities between the two systems track the disparate financial incentives. Put most simply, most criminal defendants are disproportionately poor, politically powerless people of color.[205] Most civil defendants are corporations or entities whose interests hold some political clout and whose executives will most often be primarily White.[206] Critical race theory provides a useful lens through which to see these embedded power and race dynamics as structural causes for the disparity in protections against relief before judgment.

A quick overview of some aspects of critical race theory is necessary to help ground this discussion.[207] "Critical race theorists assert that both the procedure and the substances of American law, including American antidiscrimination law, are structured to maintain white privilege"[208] and that such racism is ordinary rather than aberrational.[209] They argue that law disproportionately harms people of color and maintains power hierarchies even when legal regimes appear facially race-neutral.[210]

Now let us consider the profile of a typical defendant in each of the two systems. Poor people of color are vastly disproportionately represented as

205. *Infra* notes 208–24 and accompanying text.

206. *Infra* notes 225–28 and accompanying text.

207. I recognize that I am not a person of color and that interposing my own voice risks distorting the perspective of critical race theorists. *See* 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. L. 71, 72–73 (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"); *see also, e.g.*, I. Bennett Capers, *Critical Race Theory and Criminal Justice*, 12 OHIO ST. J. CRIM. L. 1, 3 (2014) (explaining the importance of "legal storytelling" from outsider perspectives in Critical Race Theory).

For much more extensive explanations of critical race theory, see generally, for example, RICHARD DELGADO & JEAN STEFANCIC, CRITICAL RACE THEORY: AN INTRODUCTION (2d ed. 2012) [hereinafter DELGADO & STEFANCIC, CRITICAL RACE THEORY]; CRITICAL RACE THEORY: THE CUTTING EDGE (Richard Delgado & Jean Stefancic eds., 3d ed. 2013); Capers, *supra*; Richard Delgado & Jean Stefancic, Essay, *Critical Race Theory: An Annotated Bibliography*, 79 VA. L. REV. 461 (1993).

208. 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).

209. DELGADO & STEFANCIC, CRITICAL RACE THEORY, *supra* note 207, at 7.

210. *See, e.g.*, Capers, *supra* note 207, at 2 (explaining that a central tenet of critical race theory is that "color-blind laws often serve to marginalize and obscure social, political, and economic inequality"); *see also* Richard Delgado & Jean Stefancic, *Critical Race Theory and Criminal Justice*, 31 HUMAN. & SOC'Y 133, 136 (2007) ("Probably one tenet that most [critical race theorists] would endorse is that racism is ordinary, not exceptional—the usual way that society does business—and thus represents the common, everyday experience of most people of color in this country."); Derrick Bell, *Racial Realism*, 24 CONN. L. REV. 363, 369 (1992) (pointing to the Supreme Court's affirmative action decision in *Bakke* "as an example of how formalists may use abstract concepts, such as equality, to mask policy choices and value judgments").

targets of American criminal law enforcement.[211] A 2014 study found that many police departments arrested Black people at a rate ten times higher than people who are not Black.[212] To take a particular example, more than half of the people arrested in Dearborn, Michigan in 2011 and 2012 were Black even though the city's residents were overwhelmingly White.[213] FBI statistics from 2017 reveal that more than 27% of all arrestees nationally were Black or African American.[214] In cities, the numbers are even more disparate with Black or African American defendants comprising more than 29% of arrestees.[215] These percentages are more than double the percentage of Black or African American people in the U.S. population as a whole.[216]

Prison data reveals a starker disparity. In 2016, only 30% of prison inmates identified as White.[217] That percentage remained between 30% and 31% over the previous five years.[218] As of 2014, "[i]n twelve states, more than half of the prison population is black."[219] In Maryland, 72% of the prison population is African American.[220]

211. *See* James Forman Jr., *The Black Poor, Black Elites, and America's Prisons*, 32 CARDOZO L. REV. 791, 793 (2011) ("Blacks are about eight times as likely to go to prison as whites."); Alexandra Natapoff, *Misdemeanors*, 85 S. CAL. L. REV. 1313, 1365 (2012) ("[T]he petty offense process is permitted to distribute criminal liability based on race and social vulnerability rather than individual fault."); *id.* at 1368 ("Misdemeanors thus represent the concrete mechanism by which the system is able to generate 'criminals' based on race, class, and social vulnerability, unconstrained by standard evidentiary requirements."); Mayson & Stevenson, *supra* note 120, at 1017 ("[T]he per-capita misdemeanor case-filing rate is higher for black people than for white people for every offense type, in every jurisdiction. For most offenses, the per-capita case-filing rate for blacks is two to four times that of whites.").

212. Brad Heath, *Racial Gap in U.S. Arrest Rates: "Staggering Disparity"*, USA TODAY (Nov. 18, 2014), https://www.usatoday.com/story/news/nation/2014/11/18/ferguson-black-arrest-rates/19043207/ [https://perma.cc/C7HM-P9YW].

213. *Id.*

214. Criminal Justice Info. Servs. Div., U.S. Dep't of Justice, *Arrests*, *Table 43A*, FBI: UNIFORM CRIME REPORTING (2017), https://ucr.fbi.gov/crime-in-the-u.s/2017/crime-in-the-u.s.-2017/topic-pages/tables/table-43 [https://perma.cc/MH5K-D22U]. For these purposes I have used the labels from the Department of Justice's data table.

215. Criminal Justice Info. Servs. Div., U.S. Dep't of Justice, *Arrests*, *Table 49A*, FBI: UNIFORM CRIME REPORTING (2017), https://ucr.fbi.gov/crime-in-the-u.s/2017/crime-in-the-u.s.-2017/tables/table-49 [https://perma.cc/ZM4D-N6CQ].

216. U.S. CENSUS BUREAU, QUICKFACTS: UNITED STATES, https://www.census.gov/quickfacts/fact/table/US/POP010210 [https://perma.cc/CA5Y-SVFZ] (estimating that Black people or African Americans comprised 13.4% of the U.S. population as of July 1, 2018).

217. *See* JENNIFER BRONSON & E. ANN CARSON, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, PRISONERS IN 2017, at 6 tbl.3 (2019), https://www.bjs.gov/content/pub/pdf/p17.pdf [https://perma.cc/5Q69-TK6V].

218. *Id.* That number ticks up only as high as 30.8% over the previous five years. *See id.*

219. ASHLEY NELLIS, THE SENTENCING PROJECT, THE COLOR OF JUSTICE: RACIAL AND ETHNIC DISPARITY IN STATE PRISONS 3 (2016), https://www.sentencingproject.org/wp-content/uploads/2016/06/The-Color-of-Justice-Racial-and-Ethnic-Disparity-in-State-Prisons.pdf [https://perma.cc/KL8J-MNNY].

220. *Id.*

But race does not tell the whole story; intersectionality of race and class is important. "[P]rison has become the province of the poor and uneducated, even within the black community."[221]

Even within criminal law that has already disproportionately burdened poor people of color in its earliest stages through policing, we can see the importance of race where people of color are detained before trial more frequently and for longer than are White defendants.[222] Poor defendants of color also receive less process and enjoy less of what might seem like a presumption of innocence.[223] Most defendants' bail hearings last for a matter of minutes.[224] By contrast, however, some wealthy (often White) defendants receive much more process. For instance, Paul Manafort and Richard Gates's bail hearing lasted for thirty-eight minutes, and the government consented to pretrial liberty rather than detention.[225] When the government later accused Manafort of tampering with witnesses while out on bail, he had eleven days of freedom and written briefing by his lawyers while the government's motion to revoke bond was pending.[226] The court then held a one-hour hearing on the government's motion.[227] Such robust process that wealthy criminal defendants enjoy represents a marked exception in a system that routinely prosecutes underprivileged and under-resourced defendants of color.

By contrast, most civil defendants are powerful entities. And most corporate executives in America are White.[228] Powerful entities know in

221. Forman Jr., *supra* note 211, at 794; *see also* Valdes et al., *supra* note 208, at 2 (underscoring the importance of intersectionality).

222. Michael R. Menefee, *The Role of Bail and Pretrial Detention in the Reproduction of Racial Inequalities*, 12 SOC. COMPASS, Mar. 30, 2018, at 1, 4 (collecting sources); *see also, e.g.*, John Wooldredge, *Distinguishing Race Effects on Pre-Trial Release and Sentencing Decisions*, 29 JUST. Q. 41, 41 (2012); ACLU FLA. GREATER MIAMI, UNEQUAL TREATMENT: RACIAL AND ETHNIC DISPARITIES IN MIAMI-DADE CRIMINAL JUSTICE 5 (finding that Black defendants "are more likely than White defendants to suffer[] longer periods of pretrial detention [and] greater rates of pretrial detention").

223. *See* Gold, *Jail as Injunction*, *supra* note 4, at 515–23.

224. *See, e.g.*, *Change Difficult*, *supra* note 103; *Length of a Bail Hearing*, *supra* note 103.

225. *See* Court Docket at 8, United States v. Manafort, 314 F. Supp. 3d 258 (D.D.C. Oct. 30, 2018) (No. 1:17-CR-00201).

226. Peter Maass, *Paul Manafort Has Inadvertently Helped America by Showing the Absurdities of Its Bail System*, INTERCEPT (June 9, 2018, 9:04 AM), https://theintercept.com/2018/06/09/paul-manafort-bail-inequality/ [https://perma.cc/ZT48-X49E] ("That's an 11-day window, from June 4 until June 15, during which Manafort remains free — while other people in that situation would probably be put behind bars right away."); Tierney Sneed, *Judge Sends Manafort to Jail After Revoking His Bail*, TPM (June 15, 2018, 11:44 AM), https://talkingpointsmemo.com/muckraker/judge-sends-manafort-to-jail-after-revoking-his-bail [https://perma.cc/3XPC-3TRC].

227. Sneed, *supra* note 226.

228. *See, e.g.*, CTR. FOR TALENT INNOVATION, BEING BLACK IN CORPORATE AMERICA 2 (2019), https://www.talentinnovation.org/_private/assets/BeingBlack-KeyFindings-CTI.pdf [https://perma.cc/7VE8-D7UM] (reporting that 0.8% of Fortune 500 CEOs are Black and 3.2% 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 & n.36 (2003) (noting that only a "tiny percentage of corporate directors and senior executives are women or people of color" and

advance that they are much more likely to be defendants than plaintiffs in the civil justice system.[229] That advanced knowledge permits them to direct their considerable resources toward a defendant-friendly agenda, both through rulemaking and amicus briefing.[230] Repeat players, like corporate defendants, can also strategically settle and appeal individual cases to benefit from longer-term gains through favorable rules.[231] One-shot plaintiffs, however, have no such available strategy or even interest in a rule-based victory.[232]

The comparative lens between the civil and criminal systems helps reveal a mechanism of racism and classism built into the fabric of American criminal law and its lack of protection for the rights of the accused. While civil procedure ensures that defendants' property interests are not frequently restrained before judgment, criminal law's incentive structure encourages deprivation of defendants' pretrial liberty. These disparities in race, wealth, and political power between the two systems suggest significant structural impediments to eliminating the financial incentive disparity.

Civil asset forfeiture also provides a useful comparative lens because it eliminates the property/liberty distinction and focuses on property interests across both systems. Preliminary injunctions are difficult for plaintiffs to obtain—in part because they face a financial incentive to dissuade them from seeking such relief.[233] By contrast, criminal defendants can be deprived of their property rights without much meaningful protection at all via civil forfeiture.[234]

that "only 0.6% of senior-level managers in major companies are African-American"); Frank Dobbin & Alexandra Kalev, *Why Diversity Programs Fail*, HARV. BUS. REV., https://hbr.org/2016/07/why-diversity-programs-fail [https://perma.cc/HN8Z-FYG9 (dark archive)] (recounting that among all U.S. companies with 100 or more employees, Black men made up only 3.3% of management as of 2014).

229. *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, 1797 (2014) ("[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."); *see also* Albert Yoon, *The Importance of Litigant Wealth*, 59 DEPAUL L. REV. 649, 663 (2010) (discussing the typical allocation of sophistication between the parties in various types of civil cases). I have not been able to find any hard statistics about what portion of defendants in civil litigation are large corporations or other entities.

230. *See* Marc Galanter, Essay, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 L. & SOC'Y REV. 95, 97–103 (1974).

231. *Id.* at 100–02; *see also id.* at 103–04 (explaining that because "haves" tend to be repeat players while "have nots" tend to be one-shotters, "a legal system formally neutral as between 'haves' and 'have-nots' may perpetuate and augment the advantages of the former").

232. *Id.* at 100–03.

233. For more detail on the preliminary injunction standard and the comparison to criminal pretrial detention, see generally Gold, *Jail as Injunction*, *supra* note 4.

234. Leonard v. Texas, 137 S. Ct. 847, 848 (2017) (Thomas, J., respecting the denial of certiorari) (describing the civil forfeiture system as one "where police can seize property with limited judicial oversight and retain it for their own use" that "has led to egregious and well-chronicled abuses"); Stefan B. Herpel, *Toward a Constitutional Kleptocracy: Civil Forfeiture in America*, 96 MICH. L. REV. 1910, 1911 (1998) (reviewing LEONARD LEVY, A LICENSE TO STEAL: THE FORFEITURE OF PROPERTY (1996)) ("[C]ivil *in rem* forfeiture proceedings have been used—and increasingly are being used—as an

Civil forfeiture requires neither a conviction nor even a criminal charge[235] and lacks the procedural protections such as the burden of proof beyond a reasonable doubt or jury trial right.[236] Even Justice Thomas has expressed great concern that civil forfeiture proceedings "frequently target the poor and other groups least able to defend their interests."[237]

So too may we owe the persistence of widely disparate standards for pretrial procedural due process between the civil and criminal systems to the disparity in race, wealth, and power between defendants in the two systems.[238]

CONCLUSION

Financial incentives discourage plaintiffs from seeking preliminary injunctions. That tempering incentive is important because interim relief is an extraordinary remedy that affords one party substantial settlement leverage. So too do financial incentives compensate defendants for harms incurred because of summary judicial process in the preliminary injunction decision. Those same reasons—settlement leverage and compensating for summary process—apply with at least as much force to criminal pretrial detention. Indeed, discouraging the government from using one form of liberty deprivation—pretrial detention—as a means of facilitating a waiver of constitutional rights and further liberty deprivation—a guilty plea and ensuing sentence—makes even more sense in criminal law than do financial incentives for preliminary injunctions. But the criminal system does not use financial incentives to limit the number of accused defendants who lose their liberty before judgment. It does the opposite. Criminal law encourages interim relief—detaining criminal defendants unless they can pay to secure their freedom. This disparity is troubling and unjustified.

Recognizing this disparity contributes to the literature regarding well-recognized pathologies in criminal law: correctional free lunches and racism and classism. Scholars have articulated a few manifestations of the correctional free lunch problem whereby prosecutors do not bear the full costs of their decisions. After situating several other bodies of criminal law scholarship within the correctional free lunch umbrella, this Article explains how financial incentives surrounding pretrial detention constitute one more version of a correctional free lunch that evades the constraining force of budget discipline. The comparative lens helps bring to light this troubling disparity between a system that

expedient to circumvent the usual protections accorded to defendants in criminal proceedings, and to augment federal, state, and local treasuries.").

235. Brief of Amici Curiae Professors in Support of Petition for Writ of Certiorari at 14, Timbs v. Indiana, 139 S. Ct. 682 (2019) (No. 17-1091).

236. *Leonard*, 137 S. Ct. at 847–48.

237. *Id.* at 848.

238. *See generally* Kuckes, *supra* note 19 (detailing that disparity in pretrial due process).

structurally *protects* defendants against its overuse before judgment (civil) and one that structurally *facilitates* overuse (criminal). That the typical criminal defendant is a poor person of color without political power and the typical civil defendant is a wealthy corporation suggests that the financial incentive disparity may persist in part because of racism, classism, and power disparities.

The aim of this Article is conceptual; it builds out a novel comparison as a critique of disparities between the criminal and civil systems. And it argues that the disparity would be best resolved by importing some form of financial incentives to the pretrial detention context. It does not, however, seek to specify the mechanism by which pretrial detention should embrace financial incentives. A pure analog to the injunction bond seems quite unlikely to be the right answer. Rather, building such a structure for the criminal legal system will require careful attention to differences between the two systems, including the massive resource and leverage disparities discussed above. Such a task will have to be left for another day.