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## Invoking Criminal Equity's Roots

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## Invoking Criminal Equity's Roots

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## INVOKING CRIMINAL EQUITY'S ROOTS

Cortney E. Lollar\*

*Equitable remedies have begun to play a critical role in addressing some of the systemic issues in criminal cases. Invoked when other solutions are inadequate to the fair and just resolution of the case, equitable remedies, such as injunctions and specific performance, operate as an unappreciated and underutilized safety valve that protects against the procedural strictures and dehumanization that are hallmarks of our criminal legal system. Less familiar equitable-like legal remedies, such as writs of mandamus, writs of coram nobis, and writs of audita querela, likewise serve to alleviate fundamental errors in the criminal process. Several barriers contribute to the limited use and efficacy of these longstanding remedies. Despite the vast numbers of people caught up in the criminal system, society's aversion to recognizing errors in the system or to acknowledging the humanity of those charged prohibits greater invocation of these remedies. When taken in conjunction with the historically-based fear of judicial arbitrariness and unchecked discretion associated with equity courts, these barriers can seem insurmountable. This Article highlights the pervasiveness of equitable remedies in the criminal system and advocates for an expanded use of equitable and equitable-like legal remedies in criminal cases. In an era with the odds so overwhelmingly stacked against criminal defendants, equity provides a much-needed check on our criminal system, allowing for the exercise of mercy and justice, not just punitiveness and retribution.*

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## INTRODUCTION

The one-sided retributive impulses that govern state and federal criminal legal systems have significantly expanded the substantive criminal law while curtailing the procedural mechanisms aimed at protecting the rights of the accused. Few safety valves remain in place to keep these retributive impulses in check. Equitable remedies remain one such safety valve. Equitable remedies allow a person accused or convicted of a crime to obtain relief from the restrictive criminal procedures states and Congress have implemented over the past half century. Here are a few examples:

Orville Hutton legally came to the United States as a child from his native Jamaica.<sup>1</sup> He became a lawful permanent resident and remained in the U.S.<sup>2</sup> At the age of forty-eight, he was accused of assaulting his live-in girlfriend.<sup>3</sup> Hutton entered an *Alford* plea—a plea of guilty without an admission of guilt<sup>4</sup>—and was sentenced to a term of imprisonment of one to five years.<sup>5</sup> Ten days before he was to be released, the Department of Homeland Security notified him that he was subject to a federal detainer, as the government had begun deportation proceedings against him.<sup>6</sup> Hutton's trial counsel never told him his guilty plea might have immigration consequences, and he had already waived his right to appeal.<sup>7</sup> After he was transferred into DHS custody, Hutton filed a pro se writ of coram nobis, a little heard of equitable remedy still available in federal courts and many states.<sup>8</sup> Hutton alleged a violation of his Sixth Amendment right to counsel based on his lawyer's failure to inform him of the likely immigration consequences of pleading guilty.<sup>9</sup> The West Virginia Supreme Court

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<sup>1</sup> *State v. Hutton*, 776 S.E.2d 621, 623 (W. Va. 2015).

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> *Id.* at 623–24, 624 n.1 (citing *North Carolina v. Alford*, 400 U.S. 25, 37 (1970)).

<sup>5</sup> *Id.* at 624.

<sup>6</sup> *Id.*

<sup>7</sup> *Hutton v. State*, No. 13P119, 2014 WL 8331419, at \*2–3 (W. Va. Cir. Ct. Apr. 28, 2014).

<sup>8</sup> A writ of coram nobis permits judges to grant relief to “correct grave injustices,” factual and legal “errors of the most fundamental character” in cases “where no more conventional remedy is applicable,” and “where equity appear[s] to require review of an otherwise final or non-appealable judgment.” Unlike with writs of habeas corpus, the person seeking relief no longer needs to be in custody to receive coram nobis relief. See *infra* Subsection I.C.2.

<sup>9</sup> *Hutton*, 776 S.E.2d at 624. Hutton's claim was grounded in the 2010 case, *Padilla v. Kentucky*, 559 U.S. 356 (2010). *Hutton*, 776 S.E.2d at 635.

granted the requested equitable relief, allowing him to withdraw his guilty plea and stand trial for the offenses with which he was initially charged.<sup>10</sup>

An Arkansas jury convicted Eugene Pitts of capital murder after a masked man broke into the home of a doctor and his wife. The evidence at trial consisted of the wife's positive identification of Pitts, despite the mask covering much of the assailant's face; FBI testimony about hair found on the decedent, purportedly belonging to Pitts; and Pitts' inability to account for his whereabouts at the time of the murder.<sup>11</sup> After his conviction, Pitts maintained his innocence and pursued every possible post-conviction remedy.<sup>12</sup> Subsequent DNA testing of the remaining hair sample was inconclusive, and the court denied a request for further testing.<sup>13</sup> The remaining sample was later lost.<sup>14</sup> Three years later, Pitts received a letter from the Department of Justice, informing him that the work of the FBI lab technician who did the hair analysis in his case "failed to meet professional standards," resulting in three types of errors in the testimony at Pitts' trial.<sup>15</sup> Pitts asked the Supreme Court of Arkansas to reinvest jurisdiction in the trial court to consider a remedy, including a writ of *coram nobis* and a writ of *audita querela*.<sup>16</sup> The court granted the motion.<sup>17</sup>

Maranda O'Donnell joined other plaintiffs in a class action suit against Harris County, Texas, alleging that the county's bail system for indigent misdemeanor arrestees violated both Texas statutory and constitutional law and the Fourteenth Amendment to the U.S. Constitution.<sup>18</sup> The Texas district court granted a preliminary injunction after eight days of hearings,<sup>19</sup> finding that "County procedures were dictated by an unwritten custom and practice that was marred by gross inefficiencies, did not achieve any individualized assessment in setting bail, and was

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<sup>10</sup> *State v. Hutton*, 806 S.E.2d 777, 788 (W. Va. 2017).

<sup>11</sup> *Pitts v. State*, 501 S.W.3d 803, 804, 804 n.1 (Ark. 2016) (quoting *Pitts v. State*, 617 S.W.2d 849, 851–52 (Ark. 1981)).

<sup>12</sup> *Id.* at 804–05.

<sup>13</sup> *Id.* at 805.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *Id.* at 804.

<sup>17</sup> *Id.* at 806.

<sup>18</sup> *O'Donnell v. Harris Cnty.*, 882 F.3d 528, 534–35 (5th Cir. 2018), withdrawn, superseded on reh'g, 892 F.3d 147 (5th Cir. 2018).

<sup>19</sup> *O'Donnell*, 892 F.3d at 152.

incompetent to do so.”<sup>20</sup> In various ways, “the imposition of secured bail specifically target[ed] poor arrestees,” resulting in a pretrial system where “an arrestee’s impoverishment increased the likelihood he or she would need to pay to be released.”<sup>21</sup> The district court found ODonnell had a likelihood of success on the merits of her claim that the County violated both the procedural due process rights and the equal protection rights of indigent misdemeanor detainees.<sup>22</sup>

In each of these instances, courts alleviated a significant injustice in the criminal legal system that would have remained but for the availability of an equitable remedy.

These are not isolated cases. Although equitable remedies in criminal cases remain largely undiscussed in scholarly literature and public dialogue,<sup>23</sup> they provide a critical safeguard in the criminal legal system worthy of deeper scholarly attention. Amidst a frustrating lack of progress toward reforming our criminal legal system, equitable remedies address some of the inadequacies and gaps in this lop-sided system. As I have noted previously, pretrial detainees have successfully challenged local bail systems, securing release from confinement through the equitable remedy of a preliminary injunction.<sup>24</sup> Individuals convicted of a crime but unable to pay the fines, fees, and costs imposed at sentencing have avoided continued incarceration through injunctions as well. When prosecutors renege on promises made as part of a plea agreement, courts have relied on the equitable remedy of specific performance to insist on

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<sup>20</sup> *Id.* at 153.

<sup>21</sup> *ODonnell*, 882 F.3d at 536.

<sup>22</sup> *ODonnell*, 892 F.3d at 155. The U.S. Court of Appeals for the Fifth Circuit affirmed that conclusion on appeal. *Id.* at 152.

<sup>23</sup> But see Cortney E. Lollar, *Reviving Criminal Equity*, 71 *Ala. L. Rev.* 311 (2019); Fred O. Smith, Jr., *Abstention in the Time of Ferguson*, 131 *Harv. L. Rev.* 2283 (2018).

Pardons are the occasional exception to the general silence. See, e.g., Brakkton Booker, *On His Way Out, Kentucky Gov. Matt Bevin Pardons Murderers, Rapists, Hundreds More*, NPR (Dec. 13, 2019, 12:52 PM), <https://www.npr.org/2019/12/13/787811560/on-his-way-out-kentucky-gov-matt-bevin-pardons-murderers-rapists-hundreds-more>

[<https://perma.cc/6M4H-N7LT>]; Adam H. Johnson, *Misplaced Outrage Over Kentucky Governor’s Pardons Harms Criminal Justice Reform*, *Appeal* (Dec. 20, 2019), <https://theappeal.org/misplaced-outrage-over-kentucky-governors-pardons-harms-criminal-justice-reform/> [<https://perma.cc/X8Y6-UK4M>]. However, pardons are left exclusively to the province of the governor or president and are generally underutilized as a criminal legal system check. See, e.g., Kathleen M. Ridolfi, *Not Just an Act of Mercy: The Demise of Post-Conviction Relief and a Rightful Claim to Clemency*, 24 *N.Y.U. Rev. L. & Soc. Change* 43, 46 (1998).

<sup>24</sup> See Lollar, *supra* note 23, at 327–48.

fulfillment of those promises.<sup>25</sup> In short, equitable remedies play a valuable role in providing a modicum of balance to the criminal legal process.

This Article suggests that equity can and should play a larger role in criminal cases. Using equitable remedies such as injunctions and specific performance as a jumping-off point, this Article examines several equitable-like legal remedies whose pre-equity roots are grounded in similar notions of fairness and which, like equitable remedies, compel action, not just monetary compensation.

“Special and equitable”<sup>26</sup> legal remedies in the form of writs of mandamus, writs of coram nobis, and writs of audita querela already play a role in addressing inequities in criminal cases, but as with injunctions and specific performance, they can play a broader role in balancing out the inequities in the current legal system.<sup>27</sup> Writs of mandamus, for example, more often assist prosecutors in limiting a lower court’s authority to challenge their actions than they aid a defendant in obtaining the personnel file of a police officer with a history of excessive force complaints. Writs of coram nobis historically have been available to a person claiming an error of “the most fundamental character” in that person’s criminal conviction.<sup>28</sup> But the availability of these writs in the federal system has been limited by prevailing precedent requiring the person to show an ongoing harm that is “more than incidental.”<sup>29</sup> Courts have discounted claims of continuing financial penalties and an inability to obtain certain professional licenses as ongoing harms sufficient to bring a claim for a writ of coram nobis.<sup>30</sup>

Embracing a reinvented use of equitable and equitable-like legal remedies would serve a crucial function in our criminal legal system. For example, writs of audita querela are an ideal equitable-like legal mechanism to request release from incarceration post-conviction due to

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<sup>25</sup> *Id.* at 342–44.

<sup>26</sup> I have created this term drawing on the use of the word “special” in this context by scholar Samuel Bray and the U.S. Supreme Court. See Samuel L. Bray, *The System of Equitable Remedies*, 63 *UCLA L. Rev.* 530, 564, 564 & n.176, 593 (2016); *Lemon v. Kurtzman*, 411 U.S. 192, 200 (1973) (plurality opinion) (“[I]n constitutional adjudication as elsewhere, equitable remedies are a special blend of what is necessary, what is fair, and what is workable.”).

<sup>27</sup> See *infra* Section I.B.

<sup>28</sup> See *infra* notes 169–73 and accompanying text.

<sup>29</sup> See *infra* notes 180–85 and accompanying text.

<sup>30</sup> *Id.*



the presence of COVID-19 in the prison or jail where one is serving a sentence. Writs of *audita querela* can issue when “it would be contrary to justice” to allow a criminal judgment “to be enforced, because of matters arising subsequent to the rendition thereof.”<sup>31</sup> In states that have not limited the remedy’s application, a request for release under *audita querela* due to the extraordinary and unpredicted consequences of COVID-19 could be an effective method of obtaining perhaps otherwise unattainable relief. These remedies can be an antidote to some of the criminal system’s ills, responding to the narrowing of procedural protections for those charged with a crime, challenging the staggering expansion of criminal sentences, and addressing the metastatic collateral consequences that attach to a criminal conviction.

This broad remedial conception is grounded in equity’s historical roots, yet limited in a manner that prevents unchecked, ad hoc judicial discretion. Focusing on judicially granted remedies,<sup>32</sup> this Article proposes ways in which equitable remedies can begin to effectively challenge certain aspects of the criminal legal system in an effort to make the system fairer and more balanced.

This is the second of two articles addressing the use of equitable remedies in the criminal system. My first article, *Reviving Criminal Equity*,<sup>33</sup> identified that courts are relying on equitable remedies, such as preliminary injunctions and specific performance, to counter inequities in the criminal legal system. *Reviving Criminal Equity* explored the use of the narrow category of remedies deemed equitable by early English courts in recent criminal cases. This Article takes off where *Reviving Criminal Equity* ends.

After beginning with a brief examination of the concept of equity and how it applies in the criminal legal system, Part I discusses the distinctions between equitable remedies and “special and equitable” legal remedies and describes how these “special and equitable” legal remedies are being effectively employed in a manner similar to equitable remedies in modern criminal cases. Part II recognizes the conceptual barriers to expanding the

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<sup>31</sup> *Villafranco v. United States*, No. Civ. 05-CV-368, 2006 WL 1049114, at \*11 (D. Utah Apr. 18, 2006) (quoting *Oliver v. City of Shattuck ex rel. Versluis*, 157 F.2d 150, 153 (10th Cir. 1946)).

<sup>32</sup> Although pardons are a well-recognized equitable remedy, the discretion to grant them remains with the governor of a state or President of the United States, raising fundamentally different issues than judicially granted remedies. For this reason, pardons are beyond the scope of this Article’s discussion. See sources cited *supra* note 23.

<sup>33</sup> See Lollar, *supra* note 23.

use of these equitable remedies, including a lack of familiarity with the remedies in a criminal context, and a societal and legal reluctance to give the benefit of the doubt to those accused of crimes. It then responds to these barriers by articulating a vision of a bounded equity. Pulling from historical equity principles that relied on an objective moral conscience quite different from this modern era's subjective ideas of conscience, Part II argues for the use of equitable remedies grounded in existing remedial principles rather than relying on a theory of shared morality. Finally, Part III provides specific examples of how a re-envisioned, expansive equity might look on the ground. Returning to the individual remedies outlined in Part I, Part III illustrates how courts could use equity to obtain a fairer and more just process and result in the face of a system full of procedural hurdles and punitive impulses.

## I. EQUITY AND CRIMINAL LAW

From early in our legal history, equity served as a counterpart to the common law.<sup>34</sup> Parties and courts invoked equitable remedies when legal remedies were inadequate to the fair and just resolution of a case. Although scholars and courts have long discounted equity's continuing viability in our modern legal system, equitable remedies have experienced a quiet but noteworthy resurgence, particularly in criminal cases.<sup>35</sup> This Part provides a brief history of equity's role in criminal cases, followed by an examination of how those equitable remedies are currently being used. Several "special and equitable" legal remedies operate to obtain similar equitable results, and those remedies also are discussed below.

### A. Equity's Roots

Throughout history, equity has been intended to supplement the common law and our statutory legal framework. Early philosophers conceptualized equity as "taking up a gentle and lenient cast of mind toward human wrongdoing."<sup>36</sup> As I have highlighted previously,<sup>37</sup> according to Martha Nussbaum's influential 1993 essay, Equity and

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<sup>34</sup> See, e.g., Lollar, *supra* note 23, at 317–19.

<sup>35</sup> *Id.* at 313–14, 327–48.

<sup>36</sup> Martha C. Nussbaum, *Equity and Mercy*, 22 *Phil. & Pub. Affs.* 83, 87 (1993).

<sup>37</sup> See Lollar, *supra* note 23, at 316–17.

Mercy, equity was a method of judging so “as to respond with sensitivity to all the particulars of a person and situation.”<sup>38</sup> As Nussbaum explains,

The point of the rule of law is to bring us as close as possible to what equity would discern in a variety of cases, given the dangers of carelessness, bias, and arbitrariness endemic to any totally discretionary procedure. But no such rules can be precise or sensitive enough, and when they have manifestly erred, it is justice itself, not a departure from justice, to use equity's flexible standard.<sup>39</sup>

Reiterating this philosophical backdrop helps both in understanding the history of how equitable remedies evolved and in conceptualizing how they can remain useful today.

Drawing on the principles Nussbaum articulated, chancellor's courts, also known as equity courts, arose in fourteenth-century England alongside common law courts as religiously-based institutions grounded in spirituality and as a “way of charity.”<sup>40</sup> As one scholar observed, “a philosophical and theological conception of conscience was the one general principle that more than any others influenced equity.”<sup>41</sup> Conscience is the cornerstone of equity; “unconscionability . . . was and remains the fulcrum upon which entitlement to equitable relief turns.”<sup>42</sup>

However, contrary to our modern conception, “conscience was largely an objective matter.”<sup>43</sup> The equity of that time was based on articulated principles that were precise and juristic, in a manner similar to law.<sup>44</sup> The opinions reached did not rely on beliefs but on knowledge and facts.<sup>45</sup>

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<sup>38</sup> Nussbaum, *supra* note 36, at 85. Nussbaum identifies the ability of equity to both be lenient and flexible by the term *epieikeia*. *Id.* at 85–86.

<sup>39</sup> *Id.* at 96.

<sup>40</sup> Dennis R. Klinck, *Conscience, Equity and the Court of Chancery in Early Modern England* 13, 24 (2010).

<sup>41</sup> Irit Samet, *Equity: Conscience Goes to Market* 11 (2018) (citing Carleton Kemp Allen, *Law in the Making* 389 (6th ed. 1958)).

<sup>42</sup> *Id.* (quoting *Lift Capital Partners Pty. Ltd. v Merrill Lynch Int'l* (2009) 253 ALR 482, 507 (Austl.)).

<sup>43</sup> Klinck, *supra* note 40, at 31; accord Mike Macnair, *Equity and Conscience*, 27 *Oxford J. Legal Stud.* 659, 661–62 (2007).

<sup>44</sup> Klinck, *supra* note 40, at 25. Dennis Klinck notes, however, that some “dissident[.]” scholars disagree with this “probably predominant position.” *Id.* at 26.

<sup>45</sup> *Id.* at 3–4; Macnair, *supra* note 43, at 674. Although some were concerned about the subjectivity inherent in “conscience” as early as the sixteenth century, see Klinck, *supra* note 40, at 3–4, according to Klinck, “it is clear that at least pre-Reformation accounts of conscience included a significant objective dimension,” *id.* at 3, that “would ostensibly be easier to reconcile with its status as a juristic principle, a measure of law,” *id.* at 4.

Like common law courts, chancery courts aimed to reach decisions, not engage in theoretical inquiries.<sup>46</sup>

Because early courts of equity relied on an objective account of conscience, the approach of these courts was not inconsistent with courts of law. Chancellors were not deciding cases based on a “personal moral sensibility,” but on established principles administered by professionals: bishops of the church who were appointed chancellors.<sup>47</sup> The prevailing view embraced an “objective morality based on the place of human beings and human society in the divine creation.”<sup>48</sup> Equity courts were concerned with addressing specific actions deemed morally troubling but with no adequate redress available at law. As one scholar explains it, “[t]he positive law is thus the starting-point for conscientious reasoning, and it is only exceptionally that the conscience is bound to disregard the law.”<sup>49</sup>

Early chancellor courts developed the equitable remedies of injunctions and specific performance, remedies that we have seen manifest recently in the criminal sphere.<sup>50</sup> Although throughout most of the past century, neither parties nor judges considered equity applicable in criminal cases, chancellors in early equity courts issued injunctions as remedies in criminal cases, as well as civil cases.<sup>51</sup> Those injunctions look very different than the type of injunctions issued in criminal cases today. For the most part, criminal equity in the fourteenth and early fifteenth

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<sup>46</sup> Klinck, *supra* note 40, at 31.

<sup>47</sup> *Id.* at 2, 5, 32–35 (discussing how conscience was initially grounded in a “divinely ordained and objective moral order,” resulting in a particular moral judgment where conscience provides the governing rule and the facts are applied to that rule); Macnair, *supra* note 43, at 661 (“*Synderesis* is the faculty of moral reasoning, and conscience is the application of this faculty to particular cases.”); Macnair, *supra* note 43, at 667 (“[T]here are some fairly clear indications that [in the 1450s] there was a fairly definite conception of what ‘conscience’ implied.”); Timothy A. O. Endicott, *The Conscience of the King: Christopher St. German and Thomas More and the Development of English Equity*, 47 *U. Toronto Fac. L. Rev.* 549, 552, 553 (1989) (noting how in the twelfth century, Thomas à Becket “made the Chancery into an office which set the law of the Church as the standard for the king’s conscience,” such that ecclesiastical chancellors “would resort to a conscience informed by the principles of the Church”); Thomas O. Main, *Traditional Equity and Contemporary Procedure*, 78 *Wash. L. Rev.* 429, 441–42 (2003); Irit Samet, *What Conscience Can Do for Equity*, 3 *Juris.* 13, 21 (2012) (discussing medieval perception that conscience has a universal presence with objective principles that inform it based on the divine law of reason).

<sup>48</sup> Macnair, *supra* note 43, at 661.

<sup>49</sup> *Id.* at 662.

<sup>50</sup> David W. Raack, *A History of Injunctions in England Before 1700*, 61 *Ind. L.J.* 539, 555–58, 563 (1986); Lollar, *supra* note 23, at 327–48.

<sup>51</sup> Raack, *supra* note 50, at 560 n.131; Edwin S. Mack, *The Revival of Criminal Equity*, 16 *Harv. L. Rev.* 389, 392 (1903).

century involved efforts to prevent violence to a person or their property.<sup>52</sup> In other words, criminal equity usually involved crime prevention and preserving the peace.<sup>53</sup>

Occasionally, chancellors of the time confronted situations when an action that they viewed as not “intrinsicly a crime [was] made a crime by statute,” thereby

bind[ing] the conscience with this difference, if this thing prohibited was bad in itself . . . *malum in se* . . . there such an act binds the conscience, and it is not sufficient to submit oneself to the penalty. But if the thing was not bad before, but now is prohibited by the said act and a penalty is annexed, this binds the conscience only to the suffering in submission to the penalty and not to refrain [from] the thing.<sup>54</sup>

In other words, courts of equity could determine that someone's actions needed punishing beyond the sanction provided by the law, since the action violated moral precepts as well as legal ones, or, occasionally, the converse; chancellors could alleviate the sanction imposed by law as punishing someone unnecessarily because the wrong was a legal one, but not a moral one.<sup>55</sup> Yet because chancellors viewed the common law as largely a codification of positive law, only on exceptional occasions were chancellors willing to minimize or negate the established criminal law or punishment imposed by common law courts.<sup>56</sup>

The application of equitable remedies to criminal cases fell into disfavor by the end of the fifteenth century, and “as the government became more stable and the courts of law more efficient, the need for a criminal equity lessened,”<sup>57</sup> until chancellors largely ceased to apply equity to criminal cases. Instead of relying on equity, “the legal remedy by indictment and prosecution [was seen as] fully adequate and peculiarly

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<sup>52</sup> Raack, *supra* note 50, at 560 n.131; Mack, *supra* note 51, at 390.

<sup>53</sup> Mack, *supra* note 51, at 390.

<sup>54</sup> Klinck, *supra* note 40, at 169 (quoting Earl of Northumberland v. Bowes (1621), in 2 Cases Concerning Equity and the Courts of Equity 1550–1660 489 (W.H. Bryson ed., 2000)).

<sup>55</sup> Cf. Macnair, *supra* note 43, at 663 (describing how a “defendant in Chancery could demur to the plaintiff's bill because there was no equity in it”).

<sup>56</sup> See, e.g., Raack, *supra* note 50, at 560 n.131; Mack, *supra* note 51, at 391–92; Note, Developments in the Law—Injunctions, 78 Harv. L. Rev. 994, 1013–14 (1965); John Norton Pomeroy, Jr., Equity, in 7 Modern American Law 61 (Eugene Allen Gilmore & William Charles Wermuth eds., 1914); F.W. Maitland, The Origin of Equity (II), in Equity: Also the Forms of Action at Common Law: Two Courses of Lectures 19–20 (A.H. Chaytor & W.J. Whittaker eds., 1910).

<sup>57</sup> Lollar, *supra* note 23, at 322 (quoting Mack, *supra* note 51, at 391).

appropriate.”<sup>58</sup> As a result, ultimately, chancellors took the position that “a court sitting in ‘equity will not interfere with the enforcement of criminal law.’”<sup>59</sup>

By the time equity immigrated to the United States, neither chancery courts nor the rules applicable therein contemplated equity’s application in criminal cases.<sup>60</sup> When courts of law and equity merged through the Federal Rules of Civil Procedure in 1937, most believed equitable rules, procedures, and remedies had become obsolete.<sup>61</sup> And because equity rarely engaged with criminal processes, many thought equity had met its demise. Recent jurisprudence in both civil and criminal cases has brought those assumptions into question.<sup>62</sup>

In *Reviving Criminal Equity*, I illuminated how equitable remedies are now being utilized to resolve issues in individual criminal cases.<sup>63</sup> State and federal courts regularly employ preliminary and permanent injunctions, specific performance, and, on occasion, restitution to resolve problems related to unlawful pre-trial detention, conditions of pre-trial release, conditions of confinement, ineffective assistance of counsel in the plea bargaining process, and other matters that arise far too often in the context of criminal cases.<sup>64</sup>

### *B. The Roots of “Special and Equitable” Legal Remedies*

Equitable remedies carry with them certain hallmarks, which include a concern with the abuse of rights, a morally inflected language, a consideration of the relative moral position of the parties, inquisitorial

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<sup>58</sup> *Id.* (quoting 30A C.J.S. Equity § 66 (2018)).

<sup>59</sup> *Id.* (quoting *Graham v. Phinizy*, 51 S.E.2d 451, 457 (Ga. 1949)).

<sup>60</sup> See, e.g., *id.* at 320–21; *In re Sawyer*, 124 U.S. 200, 210 (1888) (“The office and jurisdiction of a court of equity, unless enlarged by express statute, are limited to the protection of rights of property. It has no jurisdiction over the prosecution, the punishment, or the pardon of crimes or misdemeanors, or over the appointment and removal of public officers. . . . Any jurisdiction over criminal matters that the English court of chancery ever had became obsolete long ago, except as incidental to its peculiar jurisdiction for the protection of infants, or under its authority to issue writs of *habeas corpus* for the discharge of persons unlawfully imprisoned.”).

<sup>61</sup> Lollar, *supra* note 23, at 322–23.

<sup>62</sup> See, e.g., *id.* at 313–14, 327–48; Samet, *supra* note 41, at 5; Caprice L. Roberts, *Supreme Disgorgement*, 68 Fla. L. Rev. 1413, 1415–20 (2016); Samuel L. Bray, *The Supreme Court and the New Equity*, 68 Vand. L. Rev. 997, 999–1000 (2015); Mark P. Gergen, John M. Golden & Henry E. Smith, *The Supreme Court’s Accidental Revolution? The Test for Permanent Injunctions*, 112 Colum. L. Rev. 203, 204 (2012).

<sup>63</sup> Lollar, *supra* note 23, at 327–48.

<sup>64</sup> *Id.*

procedure, an emphasis on conscience, a single expert decisionmaker who takes the whole into account, *in personam* remedies, conditional relief, and a set of flexible devices for supervising performance, among others.<sup>65</sup> Prior to the emergence of a discrete category of remedies considered equitable, early common law courts embraced equitable ideas in the remedies they issued, even though the courts did not contemplate the equitable/legal distinction at that time. As one scholar observed, “[i]n this early period, there were few judicial precedents and only a handful of statutes. The central common law courts possessed wide discretionary powers and could do whatever equity required.”<sup>66</sup> In other words, early common law courts administered both law and equity, although they did not conceive of this delineation.<sup>67</sup>

Writs were initially orders or mandates of the king issued to address individual disputes.<sup>68</sup> Before equity courts existed, common law courts began to rely on an evolved version of the king’s writ as a mechanism of administering what were, at their core, “‘equitable’ remedies.”<sup>69</sup> Thus, writs—writs of mandamus, writs of habeas corpus, writs of coram nobis, writs of audita querela, and others—are technically legal remedies,<sup>70</sup> but they are “special and equitable” in nature. Unsurprisingly, some modern courts and scholars mistakenly presume that these remedies *are* equitable remedies, originating in the chancery courts, even though they technically are not.<sup>71</sup>

These “special” legal remedies tend to be distinguished from equitable remedies partly due to their historical evolution and categorization but also in various other ways. As Samuel Bray noted,

[t]here is agreement that the distinction between legal and equitable remedies . . . is only a proxy for other things, more fundamental things about how courts put plaintiffs back in their rightful position . . . . [T]he

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<sup>65</sup> Samuel L. Bray, Equity and the Seventh Amendment 6, 10 & n.48 (Feb. 1, 2019) (unpublished manuscript), (available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3237907](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3237907) [<https://perma.cc/5E2C-JNRN>]).

<sup>66</sup> Raack, *supra* note 50, at 544.

<sup>67</sup> *Id.*

<sup>68</sup> *Id.* at 541–42.

<sup>69</sup> *Id.* at 544–45.

<sup>70</sup> John Norton Pomeroy, A Treatise on Equity Jurisprudence (Students’ Edition) § 175 (1907).

<sup>71</sup> Samuel L. Bray, The System of Equitable Remedies, 63 UCLA L. Rev. 530, 540–42, 546, 559 n.141 (2016).

law-equity distinction captures differences in policy that are not captured by other ways of dividing the universe of remedies.<sup>72</sup>

Some “special” legal remedies, such as writs of mandamus and habeas corpus, are distinct from equitable remedies because they “require actions that are narrow and discrete, rather than open-ended and indeterminate.”<sup>73</sup> Equitable remedies also tend to be non-monetary—compelling an action or inaction—whereas legal remedies typically involve monetary relief as a substitution that attempts to “compensat[e] for the wrong done to the plaintiff by the defendant.”<sup>74</sup> That said, the legal remedies discussed herein are of a part with equitable remedies, in that they generally compel an action or inaction, not monetary relief.

Indeed, Bray recognizes:

There is a need for remedies that compel action or inaction. Those remedies need not be given a distinctive classification. But it is a contingent fact that in the United States most of those remedies are classified as equitable. There are some legal remedies that compel action, but they are narrower and more limited. In contemporary American law the remedies that compel action or inaction are paradigmatically equitable ones. And the remedies that not only compel action or inaction, but also do so in an open-ended and less determinate fashion, are wholly equitable.<sup>75</sup>

The need for remedies that compel action is particularly acute in the context of criminal cases. The official classification of a remedy as equitable or legal need not be the determinate factor as to whether the remedy should be employed to alleviate some of the pressing problems of the criminal legal system.

### *C. Modern Applications of “Equitable” Legal Remedies*

The following “special and equitable” legal remedies already are being used to address some of the issues that arise in criminal cases—namely, writs of mandamus, writs of coram nobis, and writs of audita querela. This section describes those remedies and offers some illustrations of how

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<sup>72</sup> Id. at 535.

<sup>73</sup> Id. at 559.

<sup>74</sup> Id. at 551–53.

<sup>75</sup> Id. at 562–63.



courts and parties invoke them to address various aspects of the criminal legal system.

### *1. Writs of Mandamus and Prohibition*

One of the most commonly invoked equitable-like legal remedies is the writ of mandamus, and sometimes its counterpart, the writ of prohibition. The writ of mandamus is invoked to mandate a lower court's action, whereas a writ of prohibition prohibits a lower court's action. Courts often note that “[m]andamus is an extraordinary remedy.”<sup>76</sup> According to the Supreme Court, the writ of mandamus “has traditionally been used in the federal courts only ‘to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so.’”<sup>77</sup>

In order to succeed on a writ of mandamus, the petitioner must have no other adequate legal remedy that will allow for relief (a parallel to equitable remedies), must show that her right to the requested relief is “clear and indisputable,” and the appellate court must determine, using its discretion, that the writ is appropriate.<sup>78</sup> A writ of mandamus is not available to compel discretionary acts of the judiciary.<sup>79</sup> Despite its “extraordinary” and “drastic” nature, the writ of mandamus is regularly invoked and granted in the context of criminal cases. The examples below illustrate how the writ has been used to alleviate particular harms in criminal cases, by ordering courts to act or refrain from acting.

#### *a. Writ to Establish Status as Crime Victim or Rights Related Thereto*

People in criminal cases regularly employ writs of mandamus to establish their status as crime victims under federal law. Under the Crime Victims Rights Act (“CVRA”), a crime victim is someone “directly and proximately harmed as a result of the commission of a Federal offense.”<sup>80</sup> If one is designated as a crime victim under the CVRA, one is entitled to reasonable protection from the accused and notice of court proceedings, as well as the right to participate in court proceedings, confer with

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<sup>76</sup> In re El Mujaddid, 563 F. App'x 874, 874 (3d Cir. 2014).

<sup>77</sup> Kerr v. U.S. Dist. Ct. for N.D. Cal., 426 U.S. 394, 402 (1976) (quoting Will v. United States, 389 U.S. 90, 95 (1967)).

<sup>78</sup> Cheney v. U.S. Dist. Ct. for D.C., 542 U.S. 367, 380–81 (2004) (quoting Kerr, 426 U.S. at 403).

<sup>79</sup> See, e.g., Allied Chem. Corp. v. Daiflon, Inc., 449 U.S. 33, 36 (1980) (per curiam).

<sup>80</sup> 18 U.S.C. § 3771(e)(2)(A).

government counsel, receive restitution, have proceedings free from unreasonable delay, and be treated with fairness.<sup>81</sup> The CVRA provides that a person who asserts they are a crime victim under the statute “may petition the court of appeals for a writ of mandamus” if the district court either denies the relief sought by the petitioner or determines the petitioner is not a crime victim as defined by the statute.<sup>82</sup> The court of appeals is directed to rule on the writ within seventy-two hours of it being filed.<sup>83</sup> Thus, an individual asserting they are a victim of the charged crime often turns to a writ of mandamus in order to challenge a lower court’s determination to the contrary. A review of the voluminous decisions in this area suggests that many who file this type of writ either file *pro se*<sup>84</sup> and/or seem to be falling just short of filing a frivolous claim.<sup>85</sup> A fair number of claims are dismissed within two paragraphs.<sup>86</sup>

However, examples abound of people who have filed legitimate claims for writs of mandamus. In a recent federal case, two men, including Bryan Binkholder, were involved in a real estate investment scheme that defrauded more than a dozen individuals.<sup>87</sup> Subsequent to Binkholder’s guilty plea, the parties disagreed as to whether another person, M.U., was a crime victim under the CVRA for sentencing purposes.<sup>88</sup> This classification mattered to Binkholder because, he believed, it affected the amount of loss for which he could be held responsible under the U.S. Sentencing Guidelines.<sup>89</sup> The greater the loss amount, the greater the amount of time he likely faced.

The district court conducted a hearing and determined that the purported crime victim was “a sophisticated businessperson who was complicit in Binkholder’s scheme, and the mere fact that he lost money as a result of his involvement with Binkholder was insufficient to make

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<sup>81</sup> *Id.* § 3771(a).

<sup>82</sup> *Id.* § 3771(d)(3), (e)(2).

<sup>83</sup> *Id.* § 3771(d)(3).

<sup>84</sup> See, e.g., *Lewis v. U.S. Att’y Gen.*, No. 10-1624, 2010 WL 4069151 (D.D.C. Oct. 15, 2010).

<sup>85</sup> See, e.g., *In re Linlor*, 713 F. App’x 228 (4th Cir. 2018).

<sup>86</sup> These are so common that a Westlaw search for “writ of mandamus” within the same paragraph as 18 U.S.C. § 3771, the Crime Victims Rights Act, returned 10,000 hits; a similar search but with 18 U.S.C. § 3771 within a sentence of “writ of mandamus” returned similar results.

<sup>87</sup> *United States v. Binkholder (Binkholder II)*, 909 F.3d 215, 216 (8th Cir. 2018).

<sup>88</sup> *United States v. Binkholder (Binkholder I)*, 832 F.3d 923, 928 (8th Cir. 2016).

<sup>89</sup> *Id.*

him a victim.”<sup>90</sup> In response, M.U. filed a writ of mandamus, asking the appellate court to order the district court to vacate its prior decision and recognize him as a crime victim under the CVRA.<sup>91</sup> The U.S. Court of Appeals for the Eighth Circuit granted the writ and directed the lower court to declare M.U. a victim, which the district court did.<sup>92</sup>

In another representative case out of California, two men—a father and son—“swindled scores of victims out of almost \$100 million” through a wire fraud and money laundering scheme.<sup>93</sup> Both pled guilty to several counts, and more than sixty victims submitted written victim impact statements in preparation for sentencing.<sup>94</sup> The two men were sentenced on separate dates. Several victims allocuted at the father’s sentencing, which came first, telling the court about the effect of the crimes on their lives.<sup>95</sup> Three months later, the court denied the same victims the opportunity to allocute at the son’s sentencing.<sup>96</sup> In response, a victim sought a writ of mandamus, requesting that the court vacate the son’s sentence and “comman[d] the district court to allow the victims to speak at the resentencing.”<sup>97</sup> Finding “a clear congressional intent to give crime victims the right to speak at proceedings covered by the CVRA,” the appellate court granted the writ of mandamus.<sup>98</sup>

Despite the prevalence of flimsy claims to crime victim status, when appellate courts see a legitimate request that a lower court denied, they tend to grant the writ of mandamus.

### *b. Right to Counsel of One’s Choice . . . if One Can Afford to Pay*

Crime victims are not the only beneficiaries of writs of mandamus. This remedy is also valuable to defendants who wish to obtain

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<sup>90</sup> Id.

<sup>91</sup> Id.

<sup>92</sup> Id. at 928–29. The Eighth Circuit later clarified, however, that being declared a crime victim under the CVRA “is not necessarily dispositive of who is a victim under the Sentencing Guidelines” and instructed the lower court to make separate inquiries based on the respective definitions before enhancing Binkholder’s sentence based on the amount of the M.U.’s losses. Id. at 929–30. On remand, the district court reached the conclusion that M.U. was a crime victim both under the CVRA and under the relevant sentencing guidelines and sentenced Binkholder accordingly. *Binkholder II*, 909 F.3d at 217.

<sup>93</sup> *Kenna v. U.S. Dist. Ct. for C.D. Cal.*, 435 F.3d 1011, 1012–13 (9th Cir. 2006).

<sup>94</sup> Id. at 1013.

<sup>95</sup> Id.

<sup>96</sup> Id.

<sup>97</sup> Id.

<sup>98</sup> Id. at 1016, 1018.

representation by counsel of their choosing, so long as that counsel is not court-appointed. The Supreme Court has found that, for defendants who can afford to hire counsel, the Sixth Amendment right to counsel includes the right to choose who will represent them.<sup>99</sup> For those who cannot afford to pay for counsel, however, writs of mandamus are generally unsuccessful.

The following example is illustrative. Miriam Santos, the treasurer of the city of Chicago, Illinois, was charged with mail fraud and extorting campaign contributions from banks and securities firms that held or invested money controlled by the treasurer's office.<sup>100</sup> She retained counsel to represent her. At arraignment in early February, the prosecution asked the judge to set the trial date for April or May.<sup>101</sup> Defense counsel indicated that he was scheduled to start a federal trial on February 15 that the parties expected to take about four months, putting its completion in June.<sup>102</sup> Defense counsel asked the court to schedule the trial for July and indicated that he would prepare for the Santos trial during his four-month trial and would not ask for any further continuances.<sup>103</sup> The court scheduled the trial for April 14.<sup>104</sup> Counsel filed a formal motion to continue the trial a week after the arraignment, but that motion was denied on speedy trial grounds, even though the government did not oppose it.<sup>105</sup> Santos went to trial with a different lawyer and was convicted.<sup>106</sup>

On appeal, the U.S. Court of Appeals for the Seventh Circuit denied Santos' ineffective assistance claim and noted that the appropriate remedy for Santos would have been to file a writ of mandamus because the trial judge denied her the counsel of her choosing by scheduling the trial at a

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<sup>99</sup> See, e.g., *United States v. Gonzalez-Lopez*, 548 U.S. 140, 144 (2006); *Wheat v. United States*, 486 U.S. 153, 159 (1988). That right does not extend to those who cannot afford to hire counsel. *Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617, 624 (1989) (quoting *Wheat*, 486 U.S. at 159) ("Petitioner does not, nor could it defensibly do so, assert that impecunious defendants have a Sixth Amendment right to choose their counsel. The Amendment guarantees defendants in criminal cases the right to adequate representation, but those who do not have the means to hire their own lawyers have no cognizable complaint so long as they are adequately represented by attorneys appointed by the courts. '[A] defendant may not insist on representation by an attorney he cannot afford.'").

<sup>100</sup> *United States v. Santos*, 201 F.3d 953, 957 (7th Cir. 2000).

<sup>101</sup> *Id.*

<sup>102</sup> *Id.* at 957-58.

<sup>103</sup> *Id.* at 958.

<sup>104</sup> *Id.* at 957.

<sup>105</sup> *Id.* at 958.

<sup>106</sup> *Id.* at 957-58.

date when counsel was unavailable.<sup>107</sup> “Mandamus would fit this case to a T,” since “mandamus is an available remedy when an abuse of discretion by the trial judge cannot effectively be remedied by appealing the final decision.”<sup>108</sup> Here, the appellate court found the trial judge abused his discretion by not granting a continuance.<sup>109</sup> The court relied on other grounds to grant Santos a retrial, however, rendering the mandamus claim moot.

Outside the context of defendants who can afford to hire an attorney, however, courts have been markedly unwilling to grant mandamus relief, even in the most compelling of circumstances. For example, in a death penalty case out of Texas, at the late stages of the appellate process, the court stayed Allen Bridgers’ execution due to outstanding claims on his habeas application.<sup>110</sup> At the time Bridgers filed for a writ of mandamus, his habeas appeal remained pending.<sup>111</sup> The court appointed counsel to represent Bridgers in his habeas proceeding, but did not appoint an attorney “on the approved list of attorneys qualified to represent” someone in a death penalty appeal, as Bridgers argued was required by Texas statute.<sup>112</sup> Finding the statute only permitted the appointment of counsel for an initial application for habeas, and not for a subsequent application, the Texas Court of Criminal Appeals determined that Bridgers was not entitled to the appointment of any counsel for his death penalty appeal, “much less counsel appointed from the Court’s approved list.”<sup>113</sup> The court noted, however, “Notwithstanding this, we note that the trial court has appointed and agreed to reasonably compensate counsel.”<sup>114</sup> They thus dismissed the writ.

Public defender offices also have sought writs of mandamus in ill-conceived attempts to address issues of severe underfunding and increase

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<sup>107</sup> *Id.* at 960–61.

<sup>108</sup> *Id.*

<sup>109</sup> *Id.* at 959.

<sup>110</sup> *Bridgers v. Kent*, No. WR-45,179-03, 2006 WL 8430864, at \*1 (Tex. Crim. App. Nov. 13, 2006).

<sup>111</sup> *Id.*

<sup>112</sup> *Id.* See also Tex. Code Crim. Proc. Ann. art. 11.071 (West 2005) (requiring the court of criminal appeals to “adopt rules for the appointment of attorneys as counsel” in death penalty cases and the convicting court to appoint an attorney as counsel “only if the appointment is approved by the court of criminal appeals in any manner provided by those rules”).

<sup>113</sup> *Bridgers*, 2006 WL 8430864, at \*1.

<sup>114</sup> *Id.* at \*1 n.1.

the quality of indigent defense.<sup>115</sup> Although the aim is broadly similar to that of plaintiffs seeking to lower caseloads or increase state funds for public defenders via injunctions,<sup>116</sup> the mechanism used in this type of case is quite distinct and quite controversial. Rather than requesting permission to stop taking cases, some offices seeking writs of mandamus attempt to fund public defender offices by imposing costs on the same indigent defendants who cannot afford to pay for counsel in the first place.

A case out of Louisiana provides a prime example. In the late 1980s, Louisiana's Twenty-Fourth Judicial District's Indigent Defender Board filed a writ of mandamus directing the judges and magistrates of the local courts to increase indigent defender fund assessments on defendants convicted of traffic and misdemeanor offenses, in line with the majority vote of the Defender Board.<sup>117</sup> An out-of-district judge denied the writ, since, in his reading of the law, judges in the district had "unbridled discretion" to suspend court costs.<sup>118</sup> The appellate court took a different view, concluding that an interpretation of the statutes that left "the funding of the indigent defender system to the whim and caprice of individual judges" was inconsistent with legislative intent.<sup>119</sup> The case was remanded to the lower court to grant the writ of mandamus and require all sentencing judges to impose and collect the fees approved by the local board.<sup>120</sup>

### *c. Writ to Require Production of Police Personnel Files*

Defendants, indigent and not, have had limited success using writs of mandamus to obtain police personnel files for officers involved in their cases. Police personnel files can be important documents in a criminal case, particularly when the allegation is one related to assaulting a police officer. Even in those jurisdictions where personnel files include the type

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<sup>115</sup> See, e.g., *State ex rel. Garvey v. County Bd. Of Comm'rs of Sarpy Co.*, 573 N.W.2d 747 (Ne. 1998); *Kuren v. Luzerne County*, 146 A.3d 715 (Pa. 2016) (seeking writ of mandamus to require the county to fund the public defender office; in this case, however, the former chief public defender, along with several former defendants, sought the writ).

<sup>116</sup> See, e.g., *Hurrell-Harring v. State*, 930 N.E.2d 217, 219, 222 (N.Y. 2010); *Kuren*, 146 A.3d at 718; *Church v. Missouri*, 913 F.3d 736, 741–42 (8th Cir. 2019); *Wilbur v. City of Mount Vernon*, 989 F. Supp. 2d 1122, 1123–24 (W.D. Wash. 2013).

<sup>117</sup> *Twenty-Fourth Jud. Dist. Indigent Def. Bd. v. Molaison*, 522 So. 2d 177, 177–78 (La. Ct. App. 1988).

<sup>118</sup> *Id.* at 178.

<sup>119</sup> *Id.* at 181.

<sup>120</sup> *Id.*

of information that would be helpful for a criminal defendant challenging a police officer's credibility, it can be extraordinarily difficult for the defense to obtain that information.<sup>121</sup> A handful of defendants, or counsel on their behalf, have pursued writs of mandamus in an effort to force disinclined police agencies to hand over this information, either for use at trial or during post-conviction proceedings.<sup>122</sup>

Most jurisdictions have laws that protect the confidentiality of police personnel records, even when being sought by defense counsel in the aforementioned circumstance.<sup>123</sup> The laws vary in what they permit, but the strictest laws protect the disclosure of police personnel files in almost every circumstance, while most jurisdictions impose a variety of requirements that must be met in order to obtain files.<sup>124</sup> Many states require defendants to "assert specific facts showing both that the requested police records exist and that they would involve information material to the defense."<sup>125</sup> This hurdle is a particularly high one for most defendants, as approximately eighty percent of states do not permit depositions in criminal cases, most police officers would not willingly provide this information to defense counsel, and this information is not typically covered by the discovery rules.<sup>126</sup> Some states require that the case no longer be pending.<sup>127</sup> Others allow a defendant to subpoena this information, but only when the defendant is charged with certain narrow categories of offenses.<sup>128</sup> Short of a court order, police personnel files are often simply unobtainable.

However, assuming a colorable showing under a state's particular disclosure law, a writ of mandamus can be an effective method of enforcing these disclosure obligations. For example, in a case out of Oakland, California, David Long was charged with assaulting and

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<sup>121</sup> Rachel Moran, *Contesting Police Credibility*, 93 Wash. L. Rev. 1339, 1340–42 (2018).

<sup>122</sup> See, e.g., *State ex rel. Glover v. Lashutka*, No. 96APD10-1433, 1996 WL 751548 (Ohio Ct. App. Dec. 31, 1996); *In re Willard*, No. 07-16-00274-CR, 2016 WL 4158024 (Tx. App. Aug. 3, 2016).

<sup>123</sup> Moran, *supra* note 121, at 1368.

<sup>124</sup> *Id.* at 1370–76.

<sup>125</sup> *Id.* at 1372.

<sup>126</sup> *Id.* at 1373.

<sup>127</sup> See, e.g., Tex. Gov't Code Ann. § 552.103 (West 1999); *State ex rel. Coleman v. City of Cincinnati*, 566 N.E.2d 151, 152 (Ohio 1991) (*per curiam*) (discussing Ohio's exemption of records containing information related to an anticipated or ongoing case from the state's general public records rule).

<sup>128</sup> Moran, *supra* note 121, at 1373.

obstructing a police officer.<sup>129</sup> Planning to plead self-defense, Long requested a subpoena duces tecum for any reports, records, or investigations into allegations of excessive use of force by the two officers involved and the names and addresses of any people who had complained to the Oakland Police Department about excessive force committed by the police officers in question.<sup>130</sup> After reviewing the records *in camera*, the lower court declined to turn any over, finding, “there is nothing contained in either officer’s file which shows a propensity for violence. There is no relevant material to the offense charged nor is there any material relevant to any self-defense.”<sup>131</sup>

In a subsequent writ of mandamus, defense counsel argued, “[A] determination as to the usefulness to the defense of any complaints contained in the files should be made not by the judge but by defense counsel . . . . [T]o deny discovery on the basis that information contained in the files [is] irrelevant is a violation of due process.”<sup>132</sup> Concluding that plaintiff Long had made the requisite showing that discovery of the police files was required and that the Attorney General had not asserted a privilege in response to the request, the appellate court ordered that Long be provided with the information he requested and was entitled to have.<sup>133</sup>

Writs of mandamus also can be used to obtain other documents within the sole purview of the police. For example, an attorney with the Ohio Innocence Project filed for a writ of mandamus in the murder, kidnapping, and attempted rape conviction of Adam Saleh.<sup>134</sup> At the time the attorney sought the writ, the Ohio Innocence Project had not yet agreed to take Saleh’s case—the Project requested records in order to determine whether Saleh’s case was appropriate for legal intervention.<sup>135</sup>

Prior to seeking the writ, the office requested the police records related to Saleh’s arrest and investigation.<sup>136</sup> The Columbus Division of Police denied the request, asserting that, pursuant to state law, “information assembled by law enforcement officials with a probable or pending criminal proceeding is . . . excepted from required release as [it] is

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<sup>129</sup> Long v. Municipal Ct., 128 Cal. Rptr. 918, 918 (Ct. App. 1976).

<sup>130</sup> Id.

<sup>131</sup> Id. at 919.

<sup>132</sup> Id.

<sup>133</sup> Id. at 919–20.

<sup>134</sup> State ex rel. Caster v. City of Columbus, 89 N.E.3d 598, 599–601 (Ohio 2016).

<sup>135</sup> Id. at 600.

<sup>136</sup> Id.



compiled in anticipation of litigation.”<sup>137</sup> According to the police, the requested files were “confidential law-enforcement investigatory records” and “the personal notes, working papers, memoranda, evidentiary findings, and similar materials compiled by the law enforcement investigators in anticipation of criminal proceedings.”<sup>138</sup>

Pointing out that all appeals had been exhausted, and that “[n]o proceedings are currently pending regarding the convictions in any court, nor were they” for the previous three years,<sup>139</sup> the court questioned “[h]ow long must a convicted defendant or a member of the public wait” for law enforcement to view such records as disclosable?<sup>140</sup> The Ohio Supreme Court ultimately granted the writ, requiring production of the requested documents and, in the process, overruling precedent suggesting law enforcement could continue to claim a work product exception beyond trial.<sup>141</sup> This use of the writ of mandamus is an excellent example of equity at work.

Despite the writ’s success in numerous cases such as these,<sup>142</sup> in others, courts have declined to grant the requested relief. Although these denials are often on state law-specific grounds,<sup>143</sup> some courts have invoked constitutional reasons for denying relief. One court, for example, relied on the “constitutional right of privacy” to reject an otherwise valid claim for a writ of mandamus.<sup>144</sup> This invocation of the Constitution is rare and poorly chosen. More often, state-specific laws—and courts’

<sup>137</sup> *Id.* at 599–600.

<sup>138</sup> *Id.* at 601.

<sup>139</sup> *Id.* at 600.

<sup>140</sup> *Id.* at 602.

<sup>141</sup> *Id.* at 609. The court continued to recognize exceptions, such as the protection of the identity of confidential informants or specific confidential investigatory techniques. *Id.*

<sup>142</sup> Flipping the script, in one instance, the police department and city of Austin, Texas, obtained a conditional writ of mandamus challenging a lower court’s denial of their motion to quash a capital defendant’s subpoena for police personnel records. *In re Moore*, 615 S.W.3d 162 (Tx. Crim. App. 2019).

<sup>143</sup> See, e.g., *Giovanni B. v. Superior Ct.*, 60 Cal. Rptr. 3d 469, 476 (Ct. App. 2007) (denying writ because the trial court was judged not to have abused its discretion in rejecting an *in camera* review of police records); *State ex rel. Donovan v. Portage Cnty. Sheriff’s Dept.*, No. 90-P-2166, 1991 WL 260193, at \*1–2 (Ohio Ct. App. Dec. 6, 1991) (granting writ related to information that purportedly would endanger the safety of law enforcement officers, but denying writ as to confidential investigatory techniques); *Whittle v. Munshower*, 155 A.2d 670, 671 (Md. 1959) (dismissing appeal as premature but addressing merits of the writ of mandamus claim); cf. *Moran*, *supra* note 121, at 1368–74 (discussing range of state statutes governing disclosure of police records).

<sup>144</sup> *State ex rel. Keller v. Cox*, 707 N.E.2d 931, 934 (Ohio 1999) (*per curiam*).

interpretations of them—remain the biggest obstacle to granting writs of mandamus in this context.<sup>145</sup>

*d. Government-Requested Writs of Mandamus*

Crime victims and defense counsel are not the only ones to utilize writs of mandamus. Prosecutors regularly use writs of mandamus to limit the court's authority when they feel a court has acted outside its scope. Generally, government appeals are limited in the criminal sphere by the double jeopardy clause.<sup>146</sup> Likewise, "the orders of sentence and probation are not possessed of 'sufficient independence' from the criminal case to permit a Government appeal."<sup>147</sup> In a federal case, the U.S. may seek an interlocutory appeal in three seemingly narrow, statutorily defined circumstances.<sup>148</sup> The federal statute creating these appellate rights for the government was "intended to remove all statutory barriers to Government appeals and to allow appeals whenever the Constitution would permit."<sup>149</sup> It has succeeded in doing so.

Prosecutors have successfully obtained writs of mandamus in a copious number of cases. In fact, a review of cases suggests that the government successfully obtains writs of mandamus in the majority of cases in which it seeks such relief. Consistent with legislative intent, appellate courts usually find the writ of mandamus the "only means by which petitioner can obtain review of its argument."<sup>150</sup> Appellate courts have authorized government writs to prevent prosecutors from having to comply with a lower court's discovery order in a case where racially discriminatory charging practices were alleged,<sup>151</sup> to challenge what the government disclaims as an unauthorized sentence,<sup>152</sup> to prevent a trial judge in a bench trial from considering a claim of selective or vindictive prosecution

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<sup>145</sup> Cf. Moran, *supra* note 121, at 1374–77 (discussing how even potential constitutional implications of failing to disclose police personnel files do not necessarily render the records disclosable under state statutory law).

<sup>146</sup> U.S. Const. amend. V ("No person shall . . . be subject for the same offence to be twice put in jeopardy of life or limb.")

<sup>147</sup> *United States v. Dean*, 752 F.2d 535, 540 (11th Cir. 1985) (quoting *United States v. Denson*, 588 F.2d 1112, 1126 (5th Cir. 1979), *aff'd* in part and modified in part en banc, 603 F.2d 1143 (5th Cir. 1979)).

<sup>148</sup> 18 U.S.C. § 3731.

<sup>149</sup> *United States v. Wilson*, 420 U.S. 332, 337 (1975).

<sup>150</sup> See, e.g., *United States v. Choi*, 818 F. Supp. 2d 79, 84, 87 (D.D.C. 2011).

<sup>151</sup> *In re United States*, 397 F.3d 274, 278, 287 (5th Cir. 2005) (*per curiam*).

<sup>152</sup> *District of Columbia v. Fitzgerald*, 953 A.2d 288, 291–92 (D.C. 2008) (*per curiam*), amended on denial of reh'g, 964 A.2d 1281 (D.C. 2009) (*per curiam*).

as a substantive defense to the merits of the government's underlying prosecution,<sup>153</sup> and many others.<sup>154</sup> Usually, the claims allege some failure by the lower court judge to follow the proper procedures or rules.<sup>155</sup> Typically, appellate courts review these writ applications, but at least one district judge granted a government-sought writ to prevent a magistrate judge from acting.<sup>156</sup>

Reviewing courts occasionally deny government-sought writs. For example, courts have rejected writs in cases involving a challenge to the jury instructions the trial court intended to give,<sup>157</sup> and when the government sought to prevent the trial court from holding probable cause hearings subsequent to arrest in cases where the prosecution initiated a complaint.<sup>158</sup> But these instances are relatively rare.

Notwithstanding courts' repeated pronouncements that writs of mandamus are extraordinary remedies, only to be employed in the most drastic of circumstances, prosecutors are able to obtain these writs at a far greater rate than any other party seeking such writs. Despite reluctance to interfere with prosecutorial discretion, one would hope that courts would be a little more circumspect in granting this type of writ with such regularity, especially given the premise that this is a rarely employed remedy.

## 2. *Writs of Coram Nobis*

Writs of mandamus apply during the pendency of the criminal case. By contrast, several writs are available to defendants only after they have been convicted. The most familiar is the writ of habeas corpus, a remedy available to persons in federal or state custody "in violation of the

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<sup>153</sup> *Choi*, 818 F. Supp. 2d at 82.

<sup>154</sup> See generally *United States v. Fei Ye*, 436 F.3d 1117 (9th Cir. 2006) (granting writ after trial judge ordered that defendants could depose the government's expert witnesses prior to trial); *United States v. Vinyard*, 539 F.3d 589 (7th Cir. 2008) (granting writ after trial judge sua sponte ordered defendant's release from incarceration and vacated his plea agreement and sentence); *United States v. U.S. Dist. Ct. for E. Dist. Cal.*, 464 F.3d 1065 (9th Cir. 2006) (per curiam) (granting writ after trial judge granted defense motion for a bench trial without government's consent); *United States v. Amante*, 418 F.3d 220 (2d Cir. 2005) (granting writ after judge sua sponte bifurcated trial on the elements of a single count charged).

<sup>155</sup> See, e.g., *In re United States*, 397 F.3d at 278; *Choi*, 818 F. Supp. 2d at 82.

<sup>156</sup> *Choi*, 818 F. Supp. 2d at 83–87.

<sup>157</sup> *United States v. Farnsworth*, 456 F.3d 394, 396 (3d Cir. 2006).

<sup>158</sup> *In re People*, 49 V.I. 297, 300 (2007).

Constitution.”<sup>159</sup> Much has been written about the writ of habeas corpus in recent years, so this Article will only mention a few relevant points. As a general principle, legal rules now prevail in the area of habeas corpus. Statutory regulations abound at both the state and federal level that limit relief for a person who remains incarcerated but claims a constitutional error in their conviction. Those legal rules, such as those contained in the Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”),<sup>160</sup> have restricted habeas relief, and courts’ interpretations of those statutes<sup>161</sup> follow suit. Writs of habeas corpus require a person to still be in the custody of the state, significantly limiting the claims that can be made. Recent noteworthy articles have discussed the continued presence of equitable exceptions in the habeas context, however, and this author recommends those articles for a more robust discussion of this remedy.<sup>162</sup>

A defendant who has fully served their sentence, placing them outside the possibility of benefitting from habeas corpus, may still challenge their conviction through a petition for a writ of coram nobis.<sup>163</sup> This “often overlooked” remedy “is essentially an assurance that the guaranties of due process under the Federal Constitution will not be denied as a result of the technical limitations of other remedies,”<sup>164</sup> such as the writ of habeas corpus.<sup>165</sup> Common law courts created the writ of coram nobis as a “highly unusual remedy, available only to correct grave injustices in a narrow range of cases where no more conventional remedy is

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<sup>159</sup> 28 U.S.C. § 2241; see also Nancy J. King, Fred L. Cheesman II & Brian J. Ostrom, Executive Summary: Habeas Litigation in U.S. District Courts I (2007), <https://www.ncjrs.gov/pdffiles1/nij/grants/219558.pdf> [<https://perma.cc/D9HU-35DA>].

<sup>160</sup> Pub. L. No. 104-132, 110 Stat. 1214 (1996) (codified in scattered sections of 28 U.S.C., including §§ 2254, 2255).

<sup>161</sup> See, e.g., *Teague v. Lane*, 489 U.S. 288 (1989).

<sup>162</sup> See, e.g., Eve Brensike Primus, *Equitable Gateways: Toward Expanded Federal Habeas Corpus Review of State-Court Criminal Convictions*, 61 *Ariz. L. Rev.* 291, 293 (2019); Eve Brensike Primus, *Litigating Federal Habeas Corpus Cases: One Equitable Gateway at a Time*, *Am. Const. Soc’y Issue Brief* (July 2018), <https://acslaw.org/wp-content/uploads/2018/07/July-2018-Primus-Issue-Brief-Habeas-Corpus.pdf> [<https://perma.cc/TM4T-WXT5>]; Leah M. Litman, *Legal Innocence and Federal Habeas*, 104 *Va. L. Rev.* 417 (2018).

<sup>163</sup> David Wolitz, *The Stigma of Conviction: Coram Nobis, Civil Disabilities, and the Right to Clear One’s Name*, 2009 *BYU L. Rev.* 1277, 1287 (2009) (explaining that coram nobis is the “companion writ to habeas corpus . . . in essence, habeas for those not in federal custody”).

<sup>164</sup> William G. Wheatley, *Coram Nobis Practice in Criminal Cases*, 18 *Am. Jur. Trials* 1, § 1 (1971; updated 2020) (footnote omitted).

<sup>165</sup> Wolitz, *supra* note 163, at 1283.

applicable,”<sup>166</sup> and “where equity appeared to require review of an otherwise final or non-appealable judgment.”<sup>167</sup> Consequently, *coram nobis* is seen as primarily, if not exclusively, available to convicted defendants who are no longer “in custody.”<sup>168</sup>

Historically, courts granted a *coram nobis* writ only if there was a factual error during the proceedings,<sup>169</sup> now the Supreme Court,<sup>170</sup> most federal courts,<sup>171</sup> and many state courts<sup>172</sup> have expanded the writ's scope to cover legal errors too. In a groundbreaking case, *United States v. Morgan*, the Supreme Court established that *coram nobis* is available for all “errors of the most fundamental character.”<sup>173</sup>

Prior to the court's holding in *Morgan*, the continuing applicability of *coram nobis* to federal cases remained an open question. With the passage

<sup>166</sup> *United States v. Riedl*, 496 F.3d 1003, 1005 (9th Cir. 2007).

<sup>167</sup> Wolitz, *supra* note 163, at 1283.

<sup>168</sup> 7 Wayne R. LaFave, Jerold H. Israel, Nancy J. King & Orin S. Kerr, *Criminal Procedure* § 28.9(a) at 378 (4th ed. 2015) (citation and internal quotation marks omitted); Wolitz, *supra* note 163, at 1287 (“[In *United States v. Morgan*, 346 U.S. 502 (1954)], the Court effectively created a companion writ to habeas corpus. *Coram nobis* became, in essence, habeas for those not in federal custody.”).

<sup>169</sup> Wolitz, *supra* note 163, at 1283–84; Kathleen M. Bure, Note, *Coram Nobis* and *State v. Stinney*: Why South Carolina Should Revitalize America's Legal “Hail Mary,” 68 S.C. L. Rev. 917, 923 (2017).

<sup>170</sup> *United States v. Denedo*, 556 U.S. 904, 912–13 (2009); *United States v. Morgan*, 346 U.S. 502, 512 (1954) (indicating writ is available for “errors of the most fundamental character”) (citation and internal quotation marks omitted); LaFave et al., *supra* note 168, at 378; Wolitz, *supra* note 163, at 1286 (“[*Morgan*] transformed *coram nobis* from its traditional function as a means for curing *factual* errors, unknown to the trial court, to a new function of curing any error of ‘the most fundamental character,’ including legal error.”).

<sup>171</sup> See, e.g., *United States v. Akinsade*, 686 F.3d 248, 256 (4th Cir. 2012) (ineffective assistance of counsel is a “fundamental error necessitating *coram nobis* relief”); *United States v. Mandel*, 862 F.2d 1067, 1075 (4th Cir. 1988) (granting relief after the Supreme Court found mail fraud statute did not cover acts for which defendants were convicted); Wolitz, *supra* note 163, at 1289–91 (discussing federal circuit courts' application of *Morgan* and the type of claims these courts tend to consider as triggering *coram nobis* relief).

<sup>172</sup> See, e.g., *State v. Hutton*, 776 S.E.2d 621, 623 (W. Va. 2015) (granting writ based on ineffective assistance of counsel); *State v. Sinclair*, 49 A.3d 152, 157–58 (Vt. 2012) (concluding *coram nobis* can be used to challenge defective criminal convictions); *Magnus v. United States*, 11 A.3d 237, 246 (D.C. 2011) (“[E]ven if the error claimed by Magnus was a legal one . . . he still may pursue *coram nobis* relief.”); *Skok v. State*, 760 A.2d 647, 660 (Md. 2000) (holding that the scope of *coram nobis* includes errors of a constitutional or fundamental nature on public policy grounds); *Chambers v. State*, 158 So. 153, 158–59 (Fla. 1934) (holding that *coram nobis* can be used where there is evidence of coerced confessions); Bure, *supra* note 169, at 929 (noting court granted *coram nobis* relief based on coerced confession, ineffective assistance of counsel, failure to select an impartial jury, and execution of a minor).

<sup>173</sup> 346 U.S. at 512 (citation and internal quotation marks omitted).

of the Federal Rules of Civil Procedure, Congress abolished the writ in civil actions.<sup>174</sup> The Federal Rules of Criminal Procedure, promulgated nine years later in 1946, and the passage of a statutory scheme for habeas corpus writs after another two years, did not shed any light on whether coram nobis remained a remedy available in criminal cases.<sup>175</sup> Until *Morgan*, federal courts rarely issued the writ.

Since *Morgan*, federal courts have considered writs of coram nobis at a slow but steady rate in criminal cases. According to one scholar, post-*Morgan* courts have deemed errors that would be grounds for statutory habeas relief, but for the lack of custody, to be “error[s] of the most fundamental character.”<sup>176</sup> Two types of claims seem to predominate: first, traditional claims of new facts that emerged subsequent to trial, revealing a “fundamental error” in the conviction; second, a subsequent interpretation of a criminal statute, by the Supreme Court or federal court of appeals, decriminalizing the actions for which the defendant was convicted.<sup>177</sup> In an era of ever-expanding collateral consequences,<sup>178</sup> the writ of coram nobis recognizes that these consequences remain, even after incarceration or supervision is over.<sup>179</sup>

In the past thirty years, however, a majority of federal circuits have further limited the availability of coram nobis. Beginning with a trilogy of cases from the late 1980s,<sup>180</sup> the Seventh Circuit read into the writ’s requirements a threshold showing of harm.<sup>181</sup> In order to be eligible for the writ, a petitioner must show that she is actually suffering from the ongoing collateral consequences of her conviction.<sup>182</sup> To qualify as a

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<sup>174</sup> Wolitz, *supra* note 163, at 1284.

<sup>175</sup> *Id.*

<sup>176</sup> *Id.* at 1289; see also *United States v. Doe*, 867 F.2d 986, 988, 990 (7th Cir. 1989) (denying petition for writ because defendant could not show erroneous jury instructions would have justified habeas relief); *Pitts v. United States*, 763 F.2d 197, 199 n.1 (6th Cir. 1985) (*per curiam*) (noting the standards for granting relief under a habeas statute and through a writ of coram nobis are “substantially the same”); *United States v. Little*, 608 F.2d 296, 299 (8th Cir. 1979) (interpreting defendant’s appeal from denial of coram nobis relief to be a petition under a habeas statute since he remained in custody and the two remedies were “substantially equivalent”).

<sup>177</sup> Wolitz, *supra* note 163, at 1290.

<sup>178</sup> See, e.g., *Sibron v. New York*, 392 U.S. 40, 55, 57 (1968).

<sup>179</sup> See, e.g., *Hirabayashi v. United States*, 828 F.2d 591, 605–06 (9th Cir. 1987).

<sup>180</sup> *United States v. Keane*, 852 F.2d 199 (7th Cir. 1988); *United States v. Bush*, 888 F.2d 1145 (7th Cir. 1989); *United States v. Craig*, 907 F.2d 653 (7th Cir. 1990).

<sup>181</sup> Wolitz, *supra* note 163, at 1292–99.

<sup>182</sup> *Keane*, 852 F.2d at 203 (“[Petitioner] must demonstrate that the judgment of conviction produces lingering civil disabilities (collateral consequences).”).

collateral consequence, or a “civil disability,” as the Seventh Circuit termed it, the collateral consequence must stem from the criminal conviction, result in harm that is “more than incidental,” and cause a “present harm; it is not enough to raise purely speculative harms or harms that occurred completely in the past.”<sup>183</sup> Financial penalties, reputational injury, the stigma of a criminal conviction, and difficulty obtaining work or licensure for particular employment are not “legal disabilit[ies] ‘unique to criminal convictions,’” according to the court.<sup>184</sup> Six circuits have subsequently adopted this “civil disabilities” requirement into their *coram nobis* analysis.<sup>185</sup>

The U.S. Court of Appeals for the Ninth Circuit remains the notable exception. Holding there is a “presumption that collateral consequences flow from any criminal conviction,” the court declined to require a petitioner to show a “special legal disability.”<sup>186</sup> Rather, under the Ninth Circuit’s precedent, the government has the burden of showing that no possible collateral consequence stems from the petitioner’s conviction.<sup>187</sup> The court rejected a requirement that the petitioner show harm in order to establish standing for *coram nobis*.<sup>188</sup>

The Ninth Circuit’s approach allowed for a grant of a *coram nobis* writ in two prominent cases. Fred Korematsu and Gordon Hirabayashi were American-born citizens of Japanese origin.<sup>189</sup> During World War II, they protested their internment and challenged the government’s laws requiring such internment.<sup>190</sup> Their cases, along with those of two other Japanese Americans, made their way up to the Supreme Court, which

<sup>183</sup> *Craig*, 907 F.2d at 658.

<sup>184</sup> *Keane*, 852 F.2d at 203; *Bush*, 888 F.2d at 1148–50.

<sup>185</sup> See *United States v. Castano*, 906 F.3d 458, 463 (6th Cir. 2018); *United States v. Hernandez*, 94 F.3d 606, 613 n.5 (10th Cir. 1996); *Hager v. United States*, 993 F.2d 4, 5 (1st Cir. 1993); *Nicks v. United States* 955 F.2d 161, 167 (2d Cir. 1992); *United States v. Drobny*, 955 F.2d 990, 996 (5th Cir. 1992); *United States v. Stoneman*, 870 F.2d 102, 106 (3d Cir. 1989); see also *Stewart v. United States*, 446 F.2d 42, 43–44 (8th Cir. 1971) (*per curiam*) (denying *coram nobis* relief for defendant who did not demonstrate “present adverse consequences”).

<sup>186</sup> *Hirabayashi v. United States*, 828 F.2d 591, 605–06 (9th Cir. 1987) (citing *Sibron v. New York*, 392 U.S. 40, 55–57 (1968)).

<sup>187</sup> *Id.* at 606.

<sup>188</sup> *Id.*

<sup>189</sup> *Korematsu v. United States*, 584 F. Supp. 1406, 1409 (N.D. Cal. 1984); *Hirabayashi*, 828 F.2d at 592.

<sup>190</sup> Margaret Chon, *Remembering and Repairing: The Error Before Us, In Our Presence*, 8 *Seattle J. for Soc. Just.* 643, 646 (2010).

ultimately rejected each of their constitutional challenges.<sup>191</sup> In so doing, the Court relied on the “military exigency” that justified a deviation from the norm against race-based government action.<sup>192</sup> Forty years later, Korematsu filed for a writ of coram nobis in the U.S. District Court for the Northern District of California, and Hirabayashi in the U.S. District Court for the Western District of Washington, alleging governmental misconduct in their initial convictions.<sup>193</sup> Specifically, they asserted that “evidence was suppressed or destroyed in the proceedings that led to [their] conviction[s] and [their] affirmance[s].”<sup>194</sup> Finding that the court had before it “a selective record” in Korematsu’s case, the district court held that “[w]here relevant evidence has been withheld, it is ample justification . . . that the conviction should be set aside.”<sup>195</sup> Consequently, the court granted Korematsu’s writ. The Ninth Circuit later granted Hirabayashi’s writ.<sup>196</sup>

The U.S. Courts of Appeals for the Fourth and Eleventh Circuits also appear to have taken a more liberal approach to coram nobis by not requiring a specific showing of civil disabilities.<sup>197</sup> However, the U.S. Court of Appeals for the Fourth Circuit has implied that coram nobis can only apply to a felony conviction,<sup>198</sup> whereas the Ninth Circuit explicitly

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<sup>191</sup> *Korematsu v. United States*, 323 U.S. 214 (1944); *Hirabayashi v. United States*, 320 U.S. 81 (1943); *Yasui v. United States*, 320 U.S. 115 (1943). Cf. *Ex parte Endo*, 323 U.S. 283 (1944) (declining to address the constitutional arguments, the Court ultimately ruled in favor of Endo’s challenge on statutory grounds).

<sup>192</sup> *Hirabayashi*, 320 U.S. at 100–01; *Korematsu*, 323 U.S. at 219–20.

<sup>193</sup> *Korematsu*, 584 F. Supp. at 1409–10; *Hirabayashi*, 828 F.2d at 593.

<sup>194</sup> *Korematsu*, 584 F. Supp. at 1410. See also *Hirabayashi v. United States*, 627 F. Supp. 1445, 1447 (W.D. Wash. 1986) (detailing the evidence in Hirabayashi’s case), *aff’d in part, rev’d in part* by *Hirabayashi v. United States*, 828 F.2d 591 (9th Cir. 1987). The newly discovered evidence was a suppressed draft of a wartime report that specified the real rationale behind the curfew and exclusion orders aimed at Japanese Americans during the war: racial prejudice, not military exigency. *Hirabayashi*, 828 F.2d at 598; Wolitz, *supra* note 163, at 1300. In fact, contrary to the representations made to the Supreme Court during the war-era cases, there was no military basis for the exclusion order. *Hirabayashi*, 828 F.2d at 598; *Korematsu*, 584 F. Supp. at 1416–17.

<sup>195</sup> *Korematsu*, 584 F. Supp. at 1419.

<sup>196</sup> *Hirabayashi*, 828 F.2d at 608.

<sup>197</sup> *United States v. Peter*, 310 F.3d 709, 715–16 (11th Cir. 2002) (*per curiam*) (quoting *Spencer v. Kemna*, 523 U.S. 1, 12 (1998)) (“[I]t is an obvious fact of life that most criminal convictions do in fact entail adverse collateral legal consequences.”); *United States v. Mandel*, 862 F.2d 1067, 1075 (4th Cir. 1988) (“[P]etitioners . . . would face the remainder of their lives branded as criminals . . .”).

<sup>198</sup> *Mandel*, 862 F.2d at 1075 n.12 (discussing how “[c]onviction of a felony imposes a *status* upon a person” that makes him “vulnerable to future sanctions through new civil disability statutes, but which also seriously affects his reputation and economic opportunities”).



allows for the writ to challenge a misdemeanor conviction.<sup>199</sup> In short, the writ of coram nobis is available in all federal courts, but in certain jurisdictions, one has a better chance of success than others.

A federal coram nobis claim generally cannot be used to challenge a state court conviction.<sup>200</sup> However, most states have their own version of the coram nobis writ, “unless superseded or abolished by statute,” and likewise, most states have extended coram nobis relief to fundamental and constitutional errors, as the Supreme Court did in *Morgan*.<sup>201</sup> Several notable exceptions, such as California and Wisconsin, continue to limit the writ’s scope to a review of only newly discovered facts that “affect the validity of the legal proceeding.”<sup>202</sup>

South Carolina used a writ of coram nobis to vacate the conviction of George Stinney Jr., a fourteen-year-old African American youth taken into custody in 1944 on suspicion of murdering two girls.<sup>203</sup> The two White girls, ages seven and eleven, were out riding their bicycles in a field near Stinney’s home.<sup>204</sup> The day after they did not return home, a search party found their bodies lying in a ditch.<sup>205</sup> Shortly thereafter, police arrested Stinney, who “confessed” to the murders within hours, and then a month later was tried for one of the murders.<sup>206</sup> According to court documents, “[n]othing remains from documentary evidence indicating whether a murder weapon [which was alleged to have been a spike], bloody clothes or other demonstrative evidence were admitted at trial.”<sup>207</sup> The all-White jury deliberated for ten minutes before convicting Stinney.<sup>208</sup> That same day, he was sentenced to death by electrocution.<sup>209</sup>

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<sup>199</sup> *Hirabayashi*, 828 F.2d at 606–07. The U.S. Court of Appeals for the Eleventh Circuit has never addressed this issue.

<sup>200</sup> Steven J. Mulroy, *The Safety Net: Applying Coram Nobis Law to Prevent the Execution of the Innocent*, 11 Va. J. Soc. Pol’y & L. 1, 7 & n.33 (2003); see also *Sinclair v. Louisiana*, 679 F.2d 513, 514–15 (5th Cir. 1982) (discussing the scope of the prohibition on using coram nobis to attack state criminal judgments); *Brooker v. Arkansas*, 380 F.2d 240, 244 (8th Cir. 1967) (same); *Rivenburgh v. Utah*, 299 F.2d 842, 843 (10th Cir. 1962) (same).

<sup>201</sup> *State v. Sinclair*, 49 A.3d 152, 156 (Vt. 2012) (quotations and citation omitted); see also *Skok v. State*, 760 A.2d 647, 658–59 (Md. 2000) (explaining that while it was not binding on them, most state appellate courts that have considered *Morgan* have followed it).

<sup>202</sup> *Sinclair*, 49 A.3d at 156.

<sup>203</sup> *Bure*, supra note 169, at 927–29.

<sup>204</sup> *Id.* at 927.

<sup>205</sup> *Id.*

<sup>206</sup> *Id.*

<sup>207</sup> *Id.* at 928.

<sup>208</sup> *Id.*

<sup>209</sup> *Id.*

Between the time of his arrest and the time of his trial, his parents were not able to visit him, and none of his relatives attended the trial or sentencing.<sup>210</sup> He did not appeal nor request a stay of execution.<sup>211</sup> Less than three months later, on June 16, 1944, the state put him to death.<sup>212</sup>

Seventy years later, Stinney's two siblings filed for a writ of coram nobis in South Carolina, alleging that Stinney had been denied due process and effective assistance of counsel.<sup>213</sup> The court granted the petition, finding violations of Stinney's procedural due process rights "tainted his prosecution."<sup>214</sup> Specifically, the court found Stinney's confession was coerced, he received ineffective assistance of counsel, the jury was not impartial, and he was improperly executed due to his young age.<sup>215</sup>

Other less well-known petitioners with more recent convictions also have been granted coram nobis relief in state proceedings.<sup>216</sup> For instance, an Arkansas court vacated a life sentence for two minor drug convictions because the state failed to disclose exculpatory evidence in violation of *Brady v. Maryland*.<sup>217</sup> Another defendant's *Alford* plea<sup>218</sup> was vacated by an appellate court in West Virginia due to his attorney's ineffective assistance of counsel during the plea proceedings.<sup>219</sup>

Writs of coram nobis, although not granted often, remain an important equitable source of relief for those who are no longer serving a sentence but can point to "fundamental" errors in their trial or plea proceedings.

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<sup>210</sup> Id. at 927–28.

<sup>211</sup> Id. at 928.

<sup>212</sup> Id.

<sup>213</sup> Id. at 927–28. Stinney's siblings had standing to assert their brother's rights under *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 629 (1991). See Bure, *supra* note 169, at 925 & n.58.

<sup>214</sup> Bure, *supra* note 169, at 929.

<sup>215</sup> Id.

<sup>216</sup> See, e.g., *Magnus v. United States*, 11 A.3d 237, 246–47 (D.C. 2011); *State v. Ledezma*, No. IK83-09-0062-R1, 1989 WL 64151, at \*2 (Del. Super. Ct. May 3, 1989).

<sup>217</sup> J. Thomas Sullivan, *Brady*-Based Prosecutorial Misconduct Claims, *Buckley*, and the Arkansas *Coram Nobis* Remedy, 64 Ark. L. Rev. 561, 561 & n.1 (2011).

<sup>218</sup> An *Alford* plea allows a defendant to enter a guilty plea without admitting guilt. See *North Carolina v. Alford*, 400 U.S. 25 (1970).

<sup>219</sup> *State v. Hutton*, 776 S.E.2d 621, 623 (W. Va. 2015). Specifically, Mr. Hutton's trial counsel failed to inform him of the deportation consequences of his criminal conviction. Id.

### 3. *Writs of Audita Querela*

An even less familiar writ is the writ of *audita querela*. Historically, debtors pursued writs of *audita querela* against creditors when debtors had paid the judgment debt but the creditor still was trying to press the claim against them.<sup>220</sup> Incarcerated debtors sought relief from that financial judgment<sup>221</sup> and from their related incarceration. Eventually, the writ evolved and applied more broadly: it “allowed petitioners to concede the legal validity of a judgment at the time it was rendered, but challenge its continued execution due to inequities at the time of judgment in conjunction with matters that arose after the [sic] its rendition.”<sup>222</sup> In some scenarios, courts also provided *audita querela* relief for matters that arose prior to judgment.<sup>223</sup> As one commentator observed, “[t]he courts used the concept of a person never having had his or her day in court to stretch the writ to grant relief in another category of situations: where the matter had occurred *prior* to judgment,” such as when the creditor obtained judgment in an improper way or the court did not have jurisdiction.<sup>224</sup> Some courts have rejected this expansion, however.<sup>225</sup>

Traditionally, *audita querela* was considered similar to *coram nobis*, except the writ of *coram nobis* attacks the judgment itself, whereas *audita querela* attacks the consequences or enforcement of the judgment.<sup>226</sup> In most of the recent scenarios in which a federal district court has granted a writ of *audita querela*, it was to vacate a federal criminal conviction of a lawful permanent resident who suffered adverse post-judgment immigration consequences.<sup>227</sup> These convictions were vacated “solely on

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<sup>220</sup> Ira P. Robbins, *The Revitalization of the Common-Law Civil Writ of Audita Querela as a Postconviction Remedy in Criminal Cases: The Immigration Context and Beyond*, 6 *Geo. Immigr. L.J.* 643, 645, 647 (1992).

<sup>221</sup> Caleb J. Fountain, Note, *Audita Querela and the Limits of Federal Nonretroactivity*, 70 *N.Y.U. Ann. Surv. Am. L.* 203, 211–14 (2014).

<sup>222</sup> *Id.* at 207.

<sup>223</sup> Robbins, *supra* note 220, at 650.

<sup>224</sup> *Id.* at 650–51, 653.

<sup>225</sup> *Id.* at 653.

<sup>226</sup> *Id.* at 656.

<sup>227</sup> *Villafranco v. United States*, No. Civ. 05-CV-368, 2006 WL 1049114, at \*6 (D. Utah Apr. 18, 2006); *United States v. Ghebreziabher*, 701 F. Supp. 115 (E.D. La. 1988); *United States v. Salgado*, 692 F. Supp. 1265 (E.D. Wash. 1988); *United States v. Khalaf*, 116 F. Supp. 2d 210 (D. Mass. 1999); cf. *Ejelonu v. I.N.S.*, 355 F.3d 539, 541 (6th Cir. 2004) (granting a petition for writ of *audita querela* for a legal immigrant INS sought to deport to Nigeria, though the opinion was later vacated), *reh'g en banc* granted, opinion vacated, No. 01-3928, 2004 U.S. App. LEXIS 15581 (6th Cir. July 27, 2004), appeal dismissed (Oct. 18, 2004).

equitable grounds,” according to the Ninth Circuit, “that is, not based on any error in the conviction . . . [but] to protect defendants from adverse collateral consequences.”<sup>228</sup> However, as the court went on to note, “every court of appeals to consider the question has ruled that, as a matter of law, the writ of *audita querela* is not available to vacate an otherwise valid conviction for solely equitable reasons.”<sup>229</sup> Those circuit courts have found the writ available only “if a defendant has a legal defense or discharge to the underlying judgment”<sup>230</sup> that is “not cognizable under the existing scheme of federal postconviction remedies.”<sup>231</sup> In other words, under this approach, the writ could only be granted if there is a legal objection to a conviction that has arisen subsequent to the conviction but “is not redressable pursuant to another post-conviction remedy.”<sup>232</sup>

As both scholars and courts have pointed out, this definition seems to unnecessarily blur the lines between the writ of *coram nobis* and the writ of *audita querela*, while simultaneously minimizing *audita querela*’s equitable origins.<sup>233</sup> As one judge noted,

The view that the writ of *audita querela* “had traditionally been available only to remedy a legal defect in or defense to the underlying judgment,” reads the historical sources a little too narrowly, particularly if the scope of *audita querela* is thus to be limited to a collateral attack on the petitioner’s conviction and sentence, much akin to § 2255, habeas corpus or *coram nobis*.<sup>234</sup>

Rather, a court “may mitigate a judgment’s collateral consequences through a writ of *audita querela* issued for equitable reasons, regardless of the presence of a legal defect in the original proceeding[s].”<sup>235</sup> Thus, more recent courts have interpreted the writ of *audita querela* to issue to a judgment in a criminal case “which it would be contrary to justice to allow to be enforced, because of matters arising subsequent to the

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<sup>228</sup> *Villafranco*, 2006 WL 1049114, at \*7.

<sup>229</sup> *Id.* (quoting *United States v. Fonseca-Martinez*, 36 F.3d 62, 65 (9th Cir. 1994)).

<sup>230</sup> *Doe v. I.N.S.*, 120 F.3d 200, 204 (9th Cir. 1997).

<sup>231</sup> *United States v. Ayala*, 894 F.2d 425, 426 (D.C. Cir. 1990).

<sup>232</sup> *United States v. Holder*, 936 F.2d 1, 5 (1st Cir. 1991); *Ayala*, 894 F.2d at 426.

<sup>233</sup> See, e.g., Robbins, *supra* note 220, at 681–82; *Ejelonu v. I.N.S.*, 355 F.3d 539, 546–47 (6th Cir. 2004); *Villafranco*, 2006 WL 1049114, at \*11.

<sup>234</sup> *Villafranco*, 2006 WL 1049114, at \*11 (quoting *United States v. Reyes*, 945 F.2d 862, 866 (5th Cir. 1991)).

<sup>235</sup> *Id.*; *Ejelonu*, 355 F.3d at 548.

rendition thereof,”<sup>236</sup> including subsequent legislation affecting the collateral consequences of a conviction, for example.<sup>237</sup>

After the passage of the Federal Rules of Civil Procedure, uncertainty remained about the writ of *audita querela*'s applicability in criminal cases, and not many were sought. However, writs of *audita querela* had a resurgence in 1990: first from immigrants who were deprived of an opportunity to seek an order against removal under a statute that later was abolished, then after the passage of AEDPA, and finally after the Supreme Court in *United States v. Booker*<sup>238</sup> declared the U.S. Sentencing Guidelines advisory.<sup>239</sup>

Despite the fact that writs are legal remedies, courts granted several of the first wave of modern *audita querela* writs to vacate criminal convictions of immigrants seeking to take advantage of immigration amnesty provisions on strictly equitable bases.<sup>240</sup> For example, a judge in the Eastern District of Louisiana granted George Ghebreziabher's petition for a writ of *audita querela*, granting his motion to strike a misdemeanor plea to one count of food stamp trafficking.<sup>241</sup> Although Ghebreziabher, a native of Ethiopia, pled guilty to three counts of food stamp trafficking, he only sought to strike one count in order to be eligible for an amnesty program under the Immigration Reform and Control Act of 1986, allowing him to remain in the U.S.<sup>242</sup> The court was profuse in its praise for Ghebreziabher<sup>243</sup> and granted the requested relief.

Similarly, Trinidad Salgado sought and obtained relief in the U.S. District Court for the Eastern District of Washington. The judge noted

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<sup>236</sup> *Villafranco*, 2006 WL 1049114, at \*10 (quoting *Oliver v. City of Shattuck ex rel. Versluis*, 157 F.2d 150, 153 (10th Cir. 1946)).

<sup>237</sup> *Villafranco*, 2006 WL 1049114, at \*11.

<sup>238</sup> 543 U.S. 220 (2005).

<sup>239</sup> *Id.* at 246.

<sup>240</sup> *Robbins*, *supra* note 220, at 672.

<sup>241</sup> *United States v. Ghebreziabher*, 701 F. Supp. 115, 116–17 (E.D. La. 1988).

<sup>242</sup> *Id.* at 116.

<sup>243</sup> Remarking that “[i]t is apparent that he was approached by the other individual involved to accept the food stamps initially,” the court continued:

Mr. Ghebreziabher has been an industrious member of this community for almost ten years. He has four United States citizen children who will be deprived of his support if he should be deported. He has realized the American dream, owning his own home . . . . Except for these 3 incidents, he has no convictions. His former employer, a subsidiary of a shipyard where he worked as a carpenter and joiner, thought well of him and found him to be hard-working . . . . It is also likely that his family will suffer tremendously should he be deported and removed from the home.

*Id.* at 116–17.

Salgado's "peaceful, productive, and uneventful life" for more than twenty years after he unlawfully re-entered the country subsequent to being deported.<sup>244</sup> Consequently, the Court found,

[I]t would be a gross injustice to allow this man, who has by all accounts been a model resident for forty-five years save for a single period of unlawful conduct, to effectively serve a life sentence, and for his family to be deprived of benefits from a fund he has paid into throughout his working life.<sup>245</sup>

The writ's success in this context was subsequently limited by the passage of the Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA") of 1996,<sup>246</sup> which eliminated the amnesty program provided by the Immigration Reform and Control Act.<sup>247</sup>

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<sup>244</sup> United States v. Salgado, 692 F. Supp. 1265, 1268 (E.D. Wash. 1988).

<sup>245</sup> Id.

<sup>246</sup> Illegal Immigration Reform and Immigrant Responsibility Act, Pub. L. No. 104-208, 110 Stat. 3009 (1996) (codified in scattered sections of 8 U.S.C. and 18 U.S.C., including at 8 U.S.C. §§ 1229, 1366-74).

<sup>247</sup> One other person initially received *audita querela* relief even after the passage of IIRIRA, as her request for immigration relief was quite distinct from the circumstances of the three individuals discussed above. Ijeoma Ejelonu petitioned for relief after the Immigration and Naturalization Service (now Immigration and Customs Enforcement) inexplicably delayed processing her application for citizenship until after her eighteenth birthday, denying her citizenship and threatening to begin deportation proceedings against her. *Ejelonu v. I.N.S.*, 355 F.3d 539, 541 (6th Cir. 2004), rehearing en banc granted, opinion vacated, appeal dismissed. Ejelonu, originally from Nigeria, legally immigrated to the U.S. at age six with her parents and two younger sisters, all of whom were granted citizenship. Ejelonu graduated with honors from her high school, began college at Wayne State University, and maintained steady employment until the time of her arrest on criminal charges. Id. at 541-42. At age seventeen, she was charged as a juvenile with two counts of embezzlement. Id. at 542. She entered into a youthful offender program that permitted her to plead guilty to the charge, but without a judgment of conviction being entered. Id. at 542-43.

Despite her record being sealed, someone at INS obtained a copy of the record and began deportation proceedings against Ejelonu. Id. at 543. Authorities raided the Ejelonu home, seized Ejelonu, and held her for weeks, without any way to contact her family. Id. at 543. An immigration judge found her deportable for having a "conviction" for a crime of moral turpitude, and the Bureau of Immigration Appeals dismissed her appeal. Id.

Ejelonu petitioned the U.S. Court of Appeals for the Sixth Circuit for relief from deportation proceedings, which the court construed as a petition for *audita querela*. Id. at 544. The court found, "[w]e have no trouble concluding that the equities in this case overwhelmingly favor Petitioner—not just to the point where a reasonable person might sympathize with her plight, but to extent that to deport her under such circumstances would shock the conscience." Id. at 550. It continued, "*Audita querela* is appropriate because it would be contrary to justice[] to allow the collateral consequences of Petitioner's Youthful Trainee status to justify her deportation." Id. at 551-52 (quotations and citation omitted). The writ prohibited the

Subsequent to these cases, no other courts have granted relief on similar grounds. However, at least one federal court has granted *audita querela* relief in a different post-conviction context, after the Supreme Court rejected the mandatory application of the U.S. Sentencing Guidelines in federal cases. Donald Kessack was convicted as part of a cocaine distribution and money laundering scheme in 1990, and the judge sentenced him to thirty years of incarceration.<sup>248</sup> Each of his five co-defendants received sentences of 121 months or less, leaving him the only one of the six still incarcerated at the time of his petition.<sup>249</sup> Although the law subjected Kessack to a twenty-year mandatory minimum sentence, after the Supreme Court declared the mandatory sentencing guideline scheme unconstitutional in *Booker v. United States*, Kessack sought to have the lower court reconsider his sentence.<sup>250</sup>

The district court observed the lack of other available remedies: “Kessack was precluded from raising ‘*Booker* issues’ at the time of sentencing, at the time of his direct appeal, and at the time he filed his Section 2255 motion, by United States Supreme Court decisions that precluded challenges to the validity of the Federal Sentencing Guidelines.”<sup>251</sup> Finding that the writ of *audita querela* is “available in the federal criminal context to fill gaps in the current systems of postconviction relief,”<sup>252</sup> the court determined that Kessack’s sentence was “an extreme disparity” when compared with his compatriots and “grossly disproportionate to the offense.”<sup>253</sup> In short, “[t]he sentence imposed by this Court was greater than necessary to accomplish the goals of sentencing. Re-sentencing is necessary to avoid unwarranted sentence

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Department of Homeland Security from using Ejelonu’s youthful trainee status in determining her eligibility for deportation. *Id.* at 552.

Ultimately, the record is unclear as to what happened with Ejelonu. After granting a motion for rehearing en banc and vacating the panel’s opinion, the en banc court dismissed Ejelonu’s appeal by stipulation of the parties ten months after the initial decision. *Ejelonu v. I.N.S.*, No. 01-3928, 2004 U.S. App. LEXIS 15581, at \*1 (6th Cir. July 27, 2004), appeal dismissed (Oct. 18, 2004); *Sanchez-Montes v. Dept. Homeland Security*, No. 8:08-CV-157-T-27-TBM, 2008 WL 298967 n.10 (M.D. Fl. Jan. 31, 2008) (noting the appeal was dismissed by stipulation of the parties). Little is in the record that provides any indication as to why the parties decided to proceed in this manner.

<sup>248</sup> *Kessack v. United States*, No. C05-1828Z, 2008 WL 189679, at \*1 (W.D. Wash. Jan. 18, 2008).

<sup>249</sup> *Id.*

<sup>250</sup> *Id.* at \*1–3.

<sup>251</sup> *Id.* at \*3.

<sup>252</sup> *Id.* at \*2 (quotations and citation omitted).

<sup>253</sup> *Id.* at \*5 (quotations and citation omitted).

disparities among defendants with similar records who have been found guilty of similar conduct.”<sup>254</sup> Because *Booker* was not retroactive and “announced a new rule of constitutional law that was unforeseeable” at the time of Kessack’s sentencing, appeal, and habeas petitions, the court granted the writ.<sup>255</sup>

Another federal judge out of Pennsylvania reached a similar conclusion in a sentencing case. John Kenney was convicted of one count of possession by an inmate of a prohibited item, namely a razor blade, which he removed from a razor and secreted into a matchbook, “thus rendering, what, in its original form was a permitted object, a razor, into a prohibited object—a hidden blade.”<sup>256</sup> At sentencing, the district judge determined that this was a “crime of violence” under the U.S. Sentencing Guidelines, which thereby rendered Kenney a “career offender” for purposes of guideline calculations, bumping up his advisory guideline range by a significant amount.<sup>257</sup> Kenney contested the classification of possession of a prohibited item as a crime of violence. He exhausted his direct appeals and then filed a pro se motion to vacate, which the court took as a § 2255 habeas motion and similarly denied.<sup>258</sup> Six years later, the U.S. Court of Appeals for the Third Circuit overruled its previous determination that possession of a prohibited weapon by an inmate constituted a crime of violence.<sup>259</sup> Kenney, again on his own, asked the Third Circuit to recall the mandate in his case, which the court construed as a successive habeas petition and denied.<sup>260</sup> Kenney tried a third time before the Third Circuit and was denied again.<sup>261</sup> But this time, the Third Circuit suggested Kenney file for a writ of *audita querela* before the district court, which he did.<sup>262</sup> The court granted Kenney’s request, finding that “Kenney is entitled to a lowered guideline range because of a valid legal objection that only arose after judgment was entered for reasons that he could not raise in his original sentencing and the direct

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<sup>254</sup> *Id.* (quotations and citation omitted).

<sup>255</sup> *Id.* at \*6–7.

<sup>256</sup> *United States v. Kenney*, No. 99-cr-0280, 2017 WL 621238, at \*1 (M.D. Pa. Feb. 15, 2017).

<sup>257</sup> *Id.*

<sup>258</sup> *Id.*

<sup>259</sup> *Id.*

<sup>260</sup> *Id.*

<sup>261</sup> *Id.* at \*2.

<sup>262</sup> *Id.*



appeal of that sentence, and that he cannot currently address by other means.”<sup>263</sup>

Overall, the writ is recognized as a viable remedy far more often in federal courts than in state courts. Kentucky, Arkansas, Virginia, and Vermont are among the few states to consider, and occasionally grant, a writ of *audita querela*.<sup>264</sup> A greater number of courts—in states as diverse as California, Texas, South Carolina, Kansas, Maine, and Delaware—either have found the writ to be abolished by statute or simply unrecognized in their states.<sup>265</sup> Yet *audita querela* has provided important relief in those states where its continued jurisdiction is recognized.

## II. BARRIERS TO EQUITY’S USAGE IN CRIMINAL CASES

Although practitioners and scholars are largely familiar with injunctions and writs of *mandamus*, few have heard of writs of *audita querela* or *coram nobis*. The obscurity of these lesser-known remedies undoubtedly plays a role in the fact that they are rarely utilized. However, obscurity alone does not account for the scarcity with which equitable and “special and equitable” legal remedies are invoked in criminal cases. Probably the biggest barrier to courts’ use of equitable remedies is a lack of awareness that these remedies can be employed to address issues within criminal cases. An additional conceptual hurdle is the fear of unchecked judicial discretion that full-blown equity suggests. A valid aversion to any suggestion of arbitrariness leads to significant reluctance in considering equity’s expansion. These barriers to criminal equity’s use are worth deeper consideration.

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<sup>263</sup> *Id.* at \*4.

<sup>264</sup> See, e.g., *State v. Rosenfield*, 142 A.3d 1069, 1076 n.6 (Vt. 2016) (“There is also a strong possibility that the related doctrine of *audita querela* can be utilized to collaterally attack defendant’s conviction.”); *Commonwealth v. Mubarak*, 68 Va. Cir. 422 (2005) (granting *audita querela* petition); *Pitts v. State*, 501 S.W.3d 803, 804 (Ark. 2016) (granting petitioner’s request to reinvest trial court with jurisdiction to pursue writ of *audita querela* or writ of *coram nobis*); *Balsley v. Commonwealth*, 428 S.W.2d 614, 616–17 (Ky. 1967) (explaining that *audita querela* and *coram nobis* are preserved in Kentucky law).

<sup>265</sup> See, e.g., *State v. Hinson*, 2006 WL 337031, at \*2–3 (Del. Super. Ct. Feb. 10, 2006); *State v. Ali*, 32 A.3d 1019, 1024 (Me. 2011); *State v. Davis*, No. 96,688, 2007 WL 2080461, at \*1 (Kan. Ct. App. July 20, 2007) (per curiam); *Huston v. State*, 272 S.W.3d 420, 421 (Mo. Ct. App. 2008); *State v. Myers*, No. 2017-UP-260, 2017 WL 4641444, at \*1 (S.C. Ct. App. June 28, 2017).

*A. Limitations on Protections for Criminal Defendants*

As mentioned previously, lawyers carry a deep-rooted assumption that equity does not apply to criminal cases. Thus, neither parties nor judges tend to consider these remedies as possible avenues of relief applicable to criminal cases. Modern equity in the United States is limited to the circumscribed set of remedies that emerged in the seventeenth century with the curtailment of the chancery courts' discretion. By that time, neither chancery courts nor the rules applicable therein contemplated equity's application in criminal cases.<sup>266</sup>

Separate and apart from the procedural changes that led to a silencing of criminal equity's role, philosophically the criminal legal system has moved in a direction that leaves little room for early conceptions of equity to apply in criminal cases. The scarce application of equitable remedies in the criminal context may have as much to do with a general disdain for anyone accused of violating criminal laws as with fifteenth-century classifications of equity. When these two threads converge—history and our discomfort with leniency or gentleness toward criminal defendants—the result has been the rare application of equity in criminal cases.

Consequently, equity has not been permitted to provide the moral safety valve philosophers and early chancery courts envisioned. To be sure, even early scholars and legislators undoubtedly did not envision a world where criminal statutes are prolific and worded to encompass a shockingly broad range of behaviors. But, in contrast with civil procedure, legal leaders in this country did make deliberate choices to ground the federal criminal procedural framework in the legal system rather than the equitable one.<sup>267</sup> As part of the purported merger of law and equity, the

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<sup>266</sup> See, e.g., *In re Sawyer*, 124 U.S. 200, 210 (1888) (“The office and jurisdiction of a court of equity, unless enlarged by express statute, are limited to the protection of rights of property. It has no jurisdiction over the prosecution, the punishment, or the pardon of crimes or misdemeanors, or over the appointment and removal of public officers. . . . Any jurisdiction over criminal matters that the English court of chancery ever had became obsolete long ago, except as incidental to its peculiar jurisdiction for the protection of infants, or under its authority to issue writs of *habeas corpus* for the discharge of persons unlawfully imprisoned.”).

<sup>267</sup> Compare Ion Meyn, *Why Civil and Criminal Procedure Are So Different: A Forgotten History*, 86 *Fordham L. Rev.* 697 (2017) (discussing how crafters of the Federal Rules of Criminal Procedure made the intentional decision to ground them in legal rules and principles rather than equitable ones), with Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 *U. Pa. L. Rev.* 909 (1987) (discussing how the Federal Rules of Civil Procedure were crafted to embrace equitable rules and principles).

Federal Rules of Civil Procedure embraced a system quite grounded in equity. By contrast, those in charge of creating a comparable set of criminal procedure rules explicitly rejected significant incorporation of equitable rules and principles into that procedural framework, hewing to a more rigid, inflexible, and pro-prosecution set of procedures instead.<sup>268</sup> Simultaneously, substantive law, procedural law,<sup>269</sup> and remedies, continue to move toward overcriminalization and prosecution, harsher sentences, less flexibility for judges overall, and, as a result, a virtual silencing of the jury, as parties only present a rare case to a jury.<sup>270</sup>

Our contemporary reluctance to apply existing principles in a manner that might inure to the benefit of a criminal defendant has deep historical and racially-charged roots.<sup>271</sup> The modern criminal legal system is a direct descendent of slavery.<sup>272</sup> This heritage can be traced back to the Black Codes, laws passed before and immediately after the abolition of slavery explicitly criminalizing the everyday conduct of Black Americans, which gave way to facially race neutral laws enforced almost solely against Black Americans, again for basic day-to-day activities.<sup>273</sup> An organized

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<sup>268</sup> Meyn, *supra* note 267, at 699; Ion Meyn, *Constructing Separate and Unequal Courtrooms*, 63 *Ariz. L. Rev.* (forthcoming 2021) (on file with author), available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3657250](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3657250) [https://perma.cc/VA7S-D8C9] [hereinafter Meyn, *Separate and Unequal*].

<sup>269</sup> See Meyn, *Separate and Unequal*, *supra* note 268 (discussing why and how federal criminal procedure rules ended up diverging from civil procedural rules to the advantage of the prosecution and disadvantage of the defense).

<sup>270</sup> According to several recent studies, fewer than 3% of state and federal criminal cases result in a jury trial. Nat'l Assoc. Crim. Def. Lawyers, *The Trial Penalty: The Sixth Amendment Right to Trial on the Verge of Extinction and How to Save It* 5 & n.2 (2018); see also Hon. Robert J. Conrad, Jr. & Katy L. Clements, *The Vanishing Criminal Jury Trial: From Trial Judges to Sentencing Judges*, 86 *Geo. Wash. L. Rev.* 99, 102–04 (2018) (arguing that what were once trial judges and criminal trial attorneys now function more as “sentencing judges” and “sentencing advocates,” respectively).

<sup>271</sup> See, e.g., Meyn, *supra* note 267, at 732 (noting a “historical resistance to considering the rights of a criminal defendant”); Meyn, *Separate and Unequal*, *supra* note 268, at 3.

<sup>272</sup> See, e.g., Michele Goodwin, *The Thirteenth Amendment: Modern Slavery, Capitalism, and Mass Incarceration*, 104 *Cornell L. Rev.* 899 (2019); James Gray Pope, *Mass Incarceration, Convict Leasing, and the Thirteenth Amendment: A Revisionist Account*, 94 *N.Y.U. L. Rev.* 1465 (2019); Michelle Alexander, *The New Jim Crow: Mass Incarceration in the Age of Colorblindness* (2010); Khalil Gibran Muhammad, *The Condemnation of Blackness: Race, Crime, and the Making of Modern Urban America* (2010).

<sup>273</sup> Dennis Childs, *Slaves of the State: Black Incarceration from the Chain Gang to the Penitentiary* 77 (2015); Douglas A. Blackmon, *Slavery by Another Name: The Re-Enslavement of Black Americans from the Civil War to World War II* 99 (2008); Amy Dru Stanley, *From Bondage to Contract: Wage Labor, Marriage, and the Market in the Age of Slave Emancipation* 99–100 (1998).

market for prison labor emerged, predicated “on the absolute defenselessness of black men to the legal system, and the near certainty that most would be unable to bond themselves out of jail or pay fines imposed upon them.”<sup>274</sup> Although compelled labor eventually fell away, the continued arrest, prosecution, and incarceration of a disproportionate percentage of Black men continued. As James Gray Pope observed, “[n]o sooner had the Supreme Court at long last struck down traditional vagrancy laws, than they were replaced with a host of new statutory crimes, harsh sentences, and enforcement policies targeted at behaviors, conditions, and locations associated with poverty and racial disadvantage.”<sup>275</sup> States continued to criminalize and ratchet up the punishments for activities associated with race and poverty, shape enforcement priorities around these constructs, and structure procedural rules in a manner that explicitly disadvantaged those charged with crimes.<sup>276</sup> As a consequence, the population of state and federal prisons increased staggeringly beginning in the early 1970s, resulting in a current incarceration rate of approximately 2.3 million, with another almost 4.5 million people on probation, parole, or some other type of correctional control.<sup>277</sup>

In addition to the inequities baked into the criminal legal system, White Americans, who remain a majority of legislators and policymakers, continue to overestimate the proportion of crimes committed by people of color, and to associate people of color with increased criminality.<sup>278</sup> This remains true even though fear of crime, and relatedly, of people perceived to be “criminal,” does not correlate with actual crime levels.<sup>279</sup> Often people with a heightened fear of being the victim of a crime experience low levels of actual victimization.<sup>280</sup> Fear—of crime and of the people

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<sup>274</sup> Blackmon, *supra* note 273, at 64, 66.

<sup>275</sup> Pope, *supra* note 272, at 1528–29.

<sup>276</sup> *Id.* at 1529; Meyn, *Separate and Unequal*, *supra* note 268, at 3.

<sup>277</sup> Wendy Sawyer & Peter Wagner, *Prison Pol’y Initiative, Mass Incarceration: The Whole Pie 2020* (Mar. 24, 2020), <https://www.prisonpolicy.org/reports/pie2020.html> [<https://perma.cc/Q7PB-A4H6>].

<sup>278</sup> See, e.g., Nazgol Ghandnoosh, *The Sentencing Project, Race and Punishment: Racial Perceptions of Crime and Support for Punitive Policies* (Sept. 3, 2014), <https://www.sentencingproject.org/publications/race-and-punishment-racial-perceptions-of-crime-and-support-for-punitive-policies/> [<https://perma.cc/GD4R-J86L>].

<sup>279</sup> See, e.g., Rafael Prieto Curiel & Stephen Richard Bishop, *Fear of Crime: The Impact of Different Distributions of Victimization*, *Palgrave Comm* (Apr. 17, 2018), <https://doi.org/10.1057/s41599-018-0094-8> [<https://perma.cc/T6G6-NSGG>].

<sup>280</sup> *Id.* at 2.

perceived to commit crimes—has driven many of the punitive criminal legal policies currently in place, despite the lack of grounding in actual data.<sup>281</sup>

In part because of this racial history and the well-acknowledged racial bias that continues to flourish in the criminal legal system, many share a perpetual fear that “unscrupulous defendants” (which most take to mean *all* defendants) will take advantage of any procedural or substantive gains to manipulate the system to their advantage—and to the disadvantage of that which is right and just.<sup>282</sup> As Professor Jerome Hall noted in a 1942 article, despite our lofty assertions and purported ideals, even historically, our country’s approach to criminal proceedings “begins with the presumption of guilt.”<sup>283</sup> Our criminal legal system has “dual and conflicting” goals: “to convict the guilty and acquit the innocent.”<sup>284</sup> “The dilemma,” Hall maintained, “consists in the fact that the easier it is made to prove guilt, the more difficult does it become to establish innocence.”<sup>285</sup> Many scholars, legislators, and members of the public have no concern with a system that errs on the side of making it easier to prove guilt, despite the undeniable effects on those who are innocent but falsely charged. Most would endorse a view of criminal law and procedure as ultimately aiming to “convict the guilty and acquit the innocent.” Yet while this description of the criminal legal system’s goals may seem uncontroversial, the prevailing view of where the proper procedural and substantive balance lies, in light of these goals, has engendered a legal system that errs on the side of guilt rather than innocence.

This thumb on the scale in favor of guilt becomes even more troubling in light of how focused our system has become on technical guilt.<sup>286</sup> Over the course of the twentieth century, criminal law has become “*more rule-*

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<sup>281</sup> Ghandnoosh, *supra* note 278.

<sup>282</sup> See, e.g., Meyn, *supra* note 267, at 722 (quoting Hearing Before the Advisory Committee on Rules of Criminal Procedure, United States Supreme Court at 466 (Sept. 8–9, 1941) (statement of Asst. Att’y Gen. Holtzoff)).

<sup>283</sup> Jerome Hall, Objectives of Federal Criminal Procedural Revision, 51 *Yale L.J.* 723, 730 (1942).

<sup>284</sup> *Id.* at 728.

<sup>285</sup> *Id.*

<sup>286</sup> See Anna Roberts, Convictions as Guilt, 88 *Fordham L. Rev.* 2501 (2020); Josh Bowers, Probable Cause, Constitutional Reasonableness, and the Unrecognized Point of a “Pointless Indignity,” 66 *Stan. L. Rev.* 987 (2014).

bound,<sup>287</sup> with technical guilt “at its center”<sup>288</sup> and little encouragement to exercise prosecutorial discretion to limit the cases brought,<sup>289</sup> jury nullification, or judicial leniency. Our system has long operated on the premise that so long as a person is “legally guilty,” as opposed to “factually guilty,”<sup>290</sup> rarely will anyone look behind that legal judgment.<sup>291</sup> With this premise in mind, courts and legislatures have crafted and implemented procedural rules to encourage findings of legal guilt and limit assertions of factual guilt after a guilty plea or conviction at trial.<sup>292</sup> Likewise, legislatures have so narrowed the remedies for anyone who has been convicted under a “legal guilt” theory that it is virtually impossible to overcome the presumption of factual guilt, even if evidence overwhelmingly suggests that the person may be factually innocent.<sup>293</sup>

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<sup>287</sup> Bowers, *supra* note 286, at 997.

<sup>288</sup> *Id.* at 999. Bowers takes the accuracy of the guilt determination as the key; Roberts, meanwhile, draws even the accuracy of guilt determinations into question. See Roberts, *supra* note 286.

<sup>289</sup> Any doubt about this should be put to rest by the judicial and legislative responses to the so-called “progressive prosecutors” who have been elected in recent years. See, e.g., Richard A. Oppel Jr., *These Prosecutors Promised Change. Their Power Is Being Stripped Away*, N.Y. Times (updated Dec. 2, 2019), <https://www.nytimes.com/2019/11/25/us/prosecutors-criminal-justice.html> [<https://perma.cc/54YQ-2FT5>]; John Pfaff, *A No-Holds-Barred Assault on Prosecutors*, Appeal (Aug. 13, 2019), <https://theappeal.org/bill-barr-prosecutors/> [<https://perma.cc/8SNZ-P4DU>]; *Soares v. State*, 121 N.Y.S.3d 790, 799–800 (N.Y. Sup. Ct. 2020).

<sup>290</sup> I am drawing here on Anna Roberts’s definitions of “legal guilt” and “factual guilt.” She defines “legal guilt” as “a procedurally valid conviction.” Anna Roberts, *Arrests as Guilt*, 70 Ala. L. Rev. 987, 994 (2019). By contrast, “factual guilt” requires a person to have committed the crime, meaning the person had the requisite *actus reus* and *mens rea* and no defense that would negate her guilt. *Id.* at 990.

<sup>291</sup> See, e.g., Blackmon, *supra* note 273, at 7, 67 (noting the lack of process, including the pretrial practice of “confess[ing] judgment” for Black men who were dubiously convicted of crimes and then subjected to forced labor).

<sup>292</sup> See, e.g., *House v. Bell*, 547 U.S. 518, 522 (2006) (finding that a convicted man claiming actual innocence had met the stringent requirements necessary to proceed with a habeas appeal despite the procedural default rule); *Herrera v. Collins*, 506 U.S. 390, 400 (1993) (noting that claims of actual innocence based on newly discovered evidence do not give ground to federal habeas relief without an independent constitutional violation because the purpose of federal habeas is to remedy constitutional violations, not factual errors).

<sup>293</sup> Yet, as Roberts cogently points out,

Our system for determining legal guilt, which sets up various processes and protections that must be honored in order to permit a valid declaration of legal guilt, is the primary proxy that we have for factual guilt. For all its imperfections, it is the best that we currently have. Only an all-seeing, all-knowing entity could speak with absolute accuracy and authority on factual guilt, and as mentioned earlier, even she would be

The procedural, substantive, and remedial strictures imposed on the criminal legal process result in a criminal legal system that errs too much on the side of rigidity and inflexibility. Taken in conjunction with the immense power given to prosecutors,<sup>294</sup> judges ultimately have a fairly limited ability to take individual circumstances into consideration, and defense attorneys have relatively few arguments they can reasonably make for judges to consider. Sentencing is the most obvious forum in which a judge can individualize a remedy, yet statutory mandatory minimums, penalty provisions, and other collateral consequences regularly tie judges' hands. Although an expansive conception of equitable remedies does not provide an avenue for judges to circumvent many of these statutory constraints, equitable and "special and equitable" legal remedies could begin to provide the much-needed counterbalance that advocates, scholars, and many communities desire.

We have seen this tension between rigidity and flexibility play out before in the criminal law context and have learned that, ultimately, flexibility is needed. With the implementation of the U.S. Sentencing Guidelines, federal courts were bound by fixed sentencing guideline ranges that operated in tandem with statutory maximums and, increasingly, mandatory minimums. As a result, judges rarely had the ability to impose a sentence outside the applicable guideline range. To a certain degree, this rigid system can be said to resemble the common law at the time equity emerged.

After the Supreme Court's decision in *United States v. Booker*,<sup>295</sup> the Guidelines became advisory rather than mandatory, but they still require courts to start by calculating a sentence using the Guidelines, presume that sentence to be reasonable, and only sentence outside the calculated range with articulated reasons, which are subject to reversal by appellate courts. In other words, judges have some discretion now to view defendants and their situations through a more personalized lens, allowing a version of equity writ large to play a role. But that equity is limited, confined by appellate courts' and the U.S. Sentencing Commission's

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unable to provide a definitive answer regarding certain charges that have an inescapably subjective component.

Roberts, *supra* note 290, at 994–95 (footnotes omitted).

<sup>294</sup> See, e.g., Angela J. Davis, *Arbitrary Justice: The Power of the American Prosecutor* (2007); John F. Pfaff, *Locked In: The True Causes of Mass Incarceration—and How to Achieve Real Reform* (2017).

<sup>295</sup> 543 U.S. 220 (2005).

articulations of how far from the norm a lower court can go and under what circumstances.

Although neither system is perfect, our experience with the federal guideline system should confirm that we need a balancing of consistency and predictability with individualization and flexibility—a bounded equity. The Guidelines came into existence because many felt judges had too much discretion to act according to their own consciences, with little guidance.<sup>296</sup> But the Guidelines in their mandatory form were found to be unconstitutional precisely because they were too unyielding and did not sufficiently allow for the jury to weigh the facts that determined the appropriate sentence.<sup>297</sup> A system that allows for predictability but also individualization and relief from rigid formality comes closest to reaching the right balance. Of course, no system is ideal. No system—not an indeterminate sentencing scheme, an inflexibly applied guideline scheme, nor the combination of the two—has done much to move the needle on the ever-present disproportionate effect of sentencing laws on Black Americans, for example.<sup>298</sup> But equity broadly conceived can play a role in tempering our ever-more-punitive criminal legal system.

Equity is a natural fit for criminal cases. Underlying both criminal law and principles of equity is the common thread of morality. Equitable remedies are intended to mitigate injuries that, in fairness and from a common sense of morality, ought to be rectified, even in the absence of a specific legal provision authorizing such remedial measures. Likewise, one of the distinguishing features of criminal law is the moral condemnation that underlies the use of punishment for people accused of committing crimes.<sup>299</sup> Removing morality from either the application of equity or criminal law would render them each unmoored.

### *B. Fear of the “Chancellor’s Foot” Problem*

The fear of injecting too much flexibility and discretion into criminal legal processes is deep-rooted and stems from concerns that arose in the

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<sup>296</sup> See, e.g., Marvin E. Frankel, *Sentencing Guidelines: A Need for Creative Collaboration*, 101 *Yale L.J.* 2043, 2044 (1992).

<sup>297</sup> *Booker*, 543 U.S. at 236–39, 244.

<sup>298</sup> See, e.g., William Rhodes, Ryan Kling, Jeremy Luallen & Christina Dyous, *Federal Sentencing Disparity: 2005–2012* at 67–68 (Bureau of Just. Stats., Working Paper, WP-2015:01, 2015) (noting that racial disparity in sentencing between Black and White males has increased since *Booker*).

<sup>299</sup> Cortney E. Lollar, *What Is Criminal Restitution?*, 100 *Iowa L. Rev.* 93, 111–22 (2014).



sixteenth and seventeenth centuries within the chancery court system. Although these concerns were triggered by a larger societal shift occurring at that time, unbounded judicial discretion remains a grounded and valid fear even in an era purportedly governed by the rule of law.

The Reformation during the sixteenth and seventeenth centuries began to change equity courts, as the doctrinal shift in viewpoint changed the perception of “conscience.” Certainly, the locus of authority within the church, and therefore within the chancery courts, shifted with the Reformation.<sup>300</sup> But the transformation—from Catholic to Protestant, from an authoritarian view of the church to one based on individual conscience and engagement with scripture—is also visible in the shift from objective conscience to subjective conscience. No longer were specific actions the concern of the chancery, but rather, chancellors considered one’s overall moral condition.<sup>301</sup> Chancery courts engaged in moral judgments of people rather than just their actions in a given situation.<sup>302</sup> Sincerity of intent began to predominate the legal inquiry,<sup>303</sup> and internal dispositions came to matter more than external actions.<sup>304</sup>

With the chancery’s move toward evaluating the morality of a person’s internal conscience, concerns began to arise about the so-called problem of the chancellor’s foot. After all, under Reformation thinking, the most important function of conscience was recognizing the essentially flawed nature of humans and the need for divine grace. The focus on faith moved chancery courts away from the type of objective inquiry with which the previous iteration of equity courts engaged, making the fit between equity and law less compatible than it had been.<sup>305</sup> As Dennis Klinck observes, “if conscience is a matter of the judge’s sincere endeavour to do right . . . , rather than a matter of determining what *is* right according to agreed and predictable criteria, then we can see how conscience, as a juristic principle, might be faulted for being protean.”<sup>306</sup>

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<sup>300</sup> Klinck, *supra* note 40, at 5.

<sup>301</sup> *Id.*

<sup>302</sup> *Id.* at 34.

<sup>303</sup> *Id.* at 33.

<sup>304</sup> *Id.* at 38.

<sup>305</sup> *Id.* at 268 (“If conscience relates, more or less exhaustively, to one’s whole spiritual condition, to whether one is in a state of grace or not, then it fits awkwardly with a concept of law as essentially general, externally-dictated rules.”).

<sup>306</sup> *Id.* at 207.

Thus the seventeenth-century transformation in equity courts allowed for the “relativization of conscience.”<sup>307</sup> While likely liberating from a religious perspective, allowing for a diversity of conscientious belief led to the idea of conscience “being compromised as a legal measure,” as it made space for “the possibility that inconsistent beliefs may be equally conscientious.”<sup>308</sup> Those opposed to equity courts launched a challenge to their existence not unfamiliar to the criticisms of equity that remain today: the common law is a set of rules not “devised . . . at the [d]iscretion of any one [m]an,” whereas equity courts are arbitrary, have unlimited authority, and interfere with “regular law.”<sup>309</sup>

Although the chancery responded in a manner that minimized the concern about unchecked and arbitrary discretion,<sup>310</sup> any push for a return to equity’s roots and the original motivations behind the creation of courts of equity undoubtedly pushes up against a fear of returning to a system in which judges have vast authority with little to no oversight.

This Article argues for a reinvigorated equity, grounded in the principles that initially motivated the creation of equity courts and the objective viewpoint that predominated at its inception, but secular, consistent with the rule of law, and bounded in a manner that avoids the significant concerns regarding unlimited discretion and subjectivity.

Rather than grounding equity in religious morality, this Article draws on the ideas of the scholar Irit Samet, who endorses a view of a shared morality, a common sense of moral duty that transcends cultural backgrounds and contexts. In her recent book on equity, Samet lays out a strong argument for a bounded equity that provides some guidance. According to Samet,

Equity . . . plays the essential role of promoting a legal virtue that is neglected by Common Law’s fixation on the ideal of the [rule of law]. This legal virtue, which I call ‘Accountability Correspondence,’

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<sup>307</sup> Id. at 208.

<sup>308</sup> Id.

<sup>309</sup> Id. at 224.

<sup>310</sup> In order to ensure equity’s survival, the chancery had to effectively respond to these criticisms. The chancery had to “present what it dispensed as being more like *regular* law.” Id. at 225. “[R]egular equity,” in the words of Lord Nottingham, had to “speak as much to order and consistency of process” as common law, which meant that equity needed to follow some rules, both procedural and substantive. Id. at 253. Thus arose a distinction between “regular” or “chancery” equity and a broader conception of equity. “Regular equity,” or “chancery equity” became regulated and ruled, less strictly than the common law initially, *id.* at 253–54, but ultimately, in a manner not so different.

requires that legal liability tallies with the pattern of moral duty in the circumstances to which it applies. . . . [T]his legal virtue is vital for a successful legal system, and . . . by attending to the ethical underpinnings of the parties' rights and duties, [Equity] reintroduces equilibrium between 'Accountability Correspondence' and the [rule of law]. In order to do its job well, Equity must stick to its characteristic use of *ex post*, particularistic, and principle-led methods of adjudication. Moreover, in the areas where Equity is most active, these methods will also serve the underlying goal of the [rule of law] ideal, namely, protecting citizens from the arbitrary wielding of power.<sup>311</sup>

Samet acknowledges the argument that "Equity introduces . . . a highly dangerous dimension of subjectivity, uncertainty, and disrespect for democratic process of law-making,"<sup>312</sup> but counters that, within the bounded scope she proposes, those concerns are minimized.

As indicated previously, conscience is the cornerstone of equity.<sup>313</sup> Critical to Samet's project is an *objective* view of conscience, a view that mirrors the early chancery courts' approach to conscience. Rather than being an "individual's *subjective* perception of, and personal commitment to, values,"<sup>314</sup> "[t]o qualify as a point of reference for a legal standard, conscience . . . must relate to objective values that can be quoted to other members of the community as reasons for action over and above the special significance they hold for the individual."<sup>315</sup> As such, conscience "only steps in *after* moral deliberation has run its course."<sup>316</sup> The voice of conscience "is an expression of a powerful inclination to abide by what we perceive as our moral duty, even in the face of consequences contrary to our interests."<sup>317</sup>

Underlying Samet's theory is a belief in a universal conception of moral truth. Citing to Jeremy Waldron, Samet acknowledges, "Public law is . . . reliant on the existence and accessibility of shared morality. . . . [A]ppeals to 'shared conscience' . . . are 'a massive act of faith in social morality' and its availability as a source of answers to the

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<sup>311</sup> Samet, *supra* note 41, at 2.

<sup>312</sup> *Id.* at 10.

<sup>313</sup> *Id.* at 11.

<sup>314</sup> *Id.* at 44.

<sup>315</sup> *Id.* at 46.

<sup>316</sup> *Id.* at 49.

<sup>317</sup> *Id.* at 52.

intricate moral questions that defendants, and courts, face.”<sup>318</sup> She points to empirical evidence, particularly from the criminal law context, suggesting that perceptions of morality are broadly shared, and asserts that “in the large majority of cases, there is an answer to the question ‘what my moral duty calls on me to do,’ and this answer is accessible to most people, most of the time.”<sup>319</sup> The existence of situations in which there is a “moral grey area[] where a correct answer is beyond reach or non-existent,” according to Samet, should “be a ‘no go’ zone for Equity.”<sup>320</sup>

Both in criminal law and law more generally, numerous areas exist where a notion of shared morality is baked into the law itself. For example, in the context of the death penalty, the Supreme Court regularly discusses “evolving standards of decency” in its Eighth Amendment jurisprudence. As the Court wrote in *Hall v. Florida*, “[t]he Eighth Amendment is not fastened to the obsolete but may acquire meaning as public opinion becomes enlightened by a humane justice. []To enforce the Constitution’s protection of human dignity, this Court looks to the evolving standards of decency that mark the progress of a maturing society.”<sup>321</sup> Not only does the Court assume a shared sense of morality, but it acknowledges that morality can evolve.<sup>322</sup>

Likewise, some courts discuss “those considerations which ordinarily regulate the conduct of human affairs” in the context of civil negligence claims. Again, in this context, space remains for the evolution and contextualization of that conduct. For example, in a recent California case, the U.S. District Court for the Eastern District of California noted,

Negligence is the omission to do something which a reasonable man, guided by those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and

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<sup>318</sup> *Id.* at 57 (quoting Jeremy Waldron, *Inhuman and Degrading Treatment: The Words Themselves*, 23 *Can. J. L. & Juris.* 269, 284 (2010)).

<sup>319</sup> *Id.* at 58–59.

<sup>320</sup> *Id.* at 61.

<sup>321</sup> 572 U.S. 701, 708 (2014) (citing *Weems v. United States*, 217 U.S. 349, 378 (1910) & *Trop v. Dulles*, 356 U.S. 86, 101 (1958)) (internal quotations omitted).

<sup>322</sup> Of course, many would assert that the Supreme Court has abdicated its moral duty with regard to its Eighth Amendment “evolving standards of decency” jurisprudence. Cf. *United States v. Higgs*, No. 20-927, slip op. at 1–2, 5–8, 10 (U.S. Jan. 12, 2021) (Sotomayor, J., dissenting) (criticizing the Court’s recent decisions not to intervene in cases involving federal exactions, including in a case involving a likely successful Eighth Amendment challenge).

reasonable man would not do; moreover it is not absolute or intrinsic, but always relative to some circumstance of time, place or person.<sup>323</sup>

Certainly, the idea of an objective conscience based in a shared sense of morality is appealing. And Samet's evidence in support of her conclusion that perceptions of morality are widely shared invites some deference. Yet in an era fraught with news headlines and government actions that seem to reveal stark differences in morality throughout the country, the idea of a shared morality can seem far-fetched at best. Our legal history bears out this skepticism, providing evidence that relying on a "shared" morality, even one that is evolving and contextual, can allow for devastating consequences. And most of the time, the morality that prevails tends to be dominated by a viewpoint that is White, male, and privileged.<sup>324</sup> As James Pope observed, "[s]ome once-venerable American customs, for example systematically disadvantaging women and people of color, are currently recognized as negative traditions triggering critical constitutional scrutiny."<sup>325</sup>

One need look no further than two well-known yet deeply disturbing cases from our legal history, *Plessy v. Ferguson*<sup>326</sup> and *Korematsu v. United States*.<sup>327</sup> In *Plessy*, the Court upheld a Louisiana law treating Whites and Blacks as separate but equal. In the Court's view, "[a] statute which implies merely a legal distinction between the white and colored races—a distinction which is founded in the color of the two races, and which must always exist . . . has no tendency to destroy the legal equality of the two races."<sup>328</sup> The Court continued,

[T]he case reduces itself to the question whether the statute of Louisiana is a reasonable regulation, and with respect to this there must necessarily be a large discretion on the part of the legislature. In determining the question of reasonableness it is at liberty to act *with reference to the established usages, customs and traditions of the people, and with a view to the promotion of their comfort, and the*

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<sup>323</sup> *Romar v. Fresno Cmty. Hosp. & Med. Ctr.*, 583 F. Supp. 2d 1179, 1186 (E.D. Cal. 2008) (citing *Richardson v. Kier*, 34 Cal. 63, 75 (1867)).

<sup>324</sup> Cortney E. Lollar, Punitive Compensation, 51 *Tulsa L. Rev.* 99, 112–13 (2015) (discussing empirical evidence that judges still tend to be White, male, older than the average American, and much more educated).

<sup>325</sup> Pope, *supra* note 272, at 1527.

<sup>326</sup> 163 U.S. 537 (1896).

<sup>327</sup> 323 U.S. 214 (1944).

<sup>328</sup> *Plessy*, 163 U.S. at 543.

preservation of the public peace and good order. Gauged by this standard, we cannot say that a law which authorizes or even requires the separation of the two races in public conveyances is unreasonable.<sup>329</sup>

We see again a legal reference to a shared morality which many Whites accepted at the time, but which most Blacks did not. And although the Court's position ultimately evolved, with the Court overruling *Plessy* almost sixty years later,<sup>330</sup> the fact of that evolution is little consolation to the hundreds of thousands of Black Americans in this country who suffered under the yolk of separate but equal.

Similarly, in *Korematsu*, the Court upheld the displacement of Korematsu from his home based on his ethnicity, finding him the "gravest imminent danger to the public safety," despite no evidence of Korematsu's disloyalty to the United States or danger to anyone.<sup>331</sup> Korematsu was one of thousands of citizens of Japanese descent who were relocated to internment camps during World War II based on the purported threat to the United States, a "danger" that was later revealed to have been invented by the U.S. Government.<sup>332</sup> Yet, as the California District Court that vacated Korematsu's conviction forty years later noted, "[w]hether a fuller, more accurate record would have prompted a different decision cannot be determined."<sup>333</sup> In other words, even if the Court had been presented with an accurate depiction of Japanese Americans at the time, the Court might still have authorized the internment, likely out of fear and prejudice. That the morality once used to justify such abhorrence ultimately evolved does not change the horrific consequences for the many Japanese Americans who lived through the internment.

Additionally, what might have seemed appropriate, legally and morally, to those in positions of authority in 1944, whether government officials or Supreme Court justices, certainly was not shared by citizens of Japanese descent and their allies. One group viewed the detention as morally and legally justifiable, whereas the others viewed it as immoral and reprehensible. Ultimately, the unconscionability of the government's and court's actions has come to be accepted, largely without question. As the district judge in 1984 observed, "there are few instances in our judicial

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<sup>329</sup> *Id.* at 550–51 (emphasis added).

<sup>330</sup> *Brown v. Bd. of Educ.*, 347 U.S. 483, 494–95 (1954).

<sup>331</sup> *Korematsu*, 323 U.S. at 216, 218.

<sup>332</sup> *Korematsu v. United States*, 584 F. Supp. 1406, 1416–19 (N.D. Cal. 1984).

<sup>333</sup> *Id.* at 1419.

history when courts have been called upon to undo such profound and publicly acknowledged injustice.”<sup>334</sup> In 1944, however, two vastly different moralities predominated.

Evidence contradicting the idea of a shared morality is not limited to history. More recently, we have seen similar debates playing out in the context of the detention of children at the U.S. border, the separation of families seeking entry into the U.S. as refugees, the travel bans for people seeking to visit the U.S. from particular countries, the wearing of masks to prevent the spread of a pandemic, and the attack on the U.S. Capitol by thousands of people contesting election results. Samet might argue that these are simply not places where there is moral consensus, but “moral grey areas where a correct answer is beyond reach or non-existent.”<sup>335</sup> The tough part of her conclusion is the circumstances that led to *Plessy* and *Korematsu* seem morally clear in hindsight, not only to some but to almost all. It is hard to imagine that some of the government’s current actions will not seem equally morally troubling to most people in the future, if not already.

Another concern with embracing the idea of a shared morality arises with moral panics. In the context of criminal laws, moral panics are well-documented.<sup>336</sup> According to Susan Bandes, a moral panic is “a widespread, hostile, volatile overreaction to a perceived threat to societal well-being. It is [an] institutionalized hysteria: the product of the interlocking acts of many institutions and forces . . . [that] form a sort of echo chamber—continually reinforcing one another and increasing the decibel level exponentially.”<sup>337</sup> Examples abound, dating back to the Salem witch trials. Highlighting one particularly notable period, criminologist Michael Tonry observed that

during the period 1985–95, there was an almost unending series of moral panics about crime problems: . . . the outbreak of the “crack cocaine epidemic,” which . . . led to passage of the federal Anti-Drug

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<sup>334</sup> *Id.* at 1413.

<sup>335</sup> Samet, *supra* note 41, at 61.

<sup>336</sup> See, e.g., Susan A. Bandes, *The Lessons of Capturing the Friedmans: Moral Panic, Institutional Denial and Due Process*, 3 *Law, Culture & Humans* 293, 295–97 (2007); Michael Tonry, *Rethinking Unthinkable Punishment Policies in America*, 46 *UCLA L. Rev.* 1751, 1781–86 (1999); Stuart Hall, Chas Critcher, Tony Jefferson, John Clarke & Brian Roberts, *Policing the Crisis: Mugging, the State, and Law and Order* 3–28 (1978); Stanley Cohen, *Folk Devils & Moral Panics: The Creation of the Mods and Rockers* (Routledge Classics 2011) (1972).

<sup>337</sup> Bandes, *supra* note 336, at 294 (footnotes omitted).

Abuse Act of 1986, the 100-to-1 policy, and mandatory minimum sentences of unprecedented length for drug crimes; the panics precipitated by the deaths of Megan Kanka and Polly Klaas, leading to federal legislation and major changes in sex-offender legislation throughout the country; and the generalized fear of stranger violence . . . leading to unremitting concern for toughness embodied in movements to abolish parole, greatly increase sentence lengths, establish truth in sentencing, and require life sentences without possibility of parole for third-strike offenders.<sup>338</sup>

The consequence is a “political climate in which few politicians have dared risk being seen as soft on drugs or crime,”<sup>339</sup> for fear of being voted out of office. Legislators then pass punitive laws that feed off of community fear, outrage, anger, and disgust, emotions that are “amplified by ubiquitous national mass media,” leaving “many voters predisposed to respond emotionally to [these] dramatic and drastic proposed solutions to what sometimes seem insuperable problems.”<sup>340</sup>

One would expect, or at least hope, that the legal system would “be immune to such hysteria, and indeed, should act as a rational and calming force.”<sup>341</sup> Certainly moral panics, by their very definition, are “incompatible with deliberative justice.”<sup>342</sup> Yet, as Bandes points out, “[a]ll too often . . . the creation of a moral panic depends on the complicity and active participation of the legal system.”<sup>343</sup> Police officers can “become prisoners of their own initial hunches,” and make quick and intuitive decisions that “propel a rush to judgment if not properly channeled.”<sup>344</sup> Some prosecutors seem unable to distance themselves from the predictable human emotions of fear, outrage, anger, and disgust, which thereby can impede and distort the progress of a prosecution, and lead a prosecutor to presume guilt from the accusation.<sup>345</sup> Factfinders—both judges and juries—are subject to these same emotions, which can “quickly translate into a desire to attack and to punish.”<sup>346</sup>

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<sup>338</sup> Tonry, *supra* note 336, at 1787 (footnotes omitted).

<sup>339</sup> *Id.* at 1787–88.

<sup>340</sup> *Id.* at 1788.

<sup>341</sup> Bandes, *supra* note 336, at 294.

<sup>342</sup> *Id.* at 301.

<sup>343</sup> *Id.* at 294.

<sup>344</sup> *Id.* at 310 (quoting Scott Turow, *Ultimate Punishment: A Lawyer's Reflections on Dealing with the Death Penalty* 34 (2003)).

<sup>345</sup> *Id.* at 309–10, 312.

<sup>346</sup> *Id.* at 313–14.



Moral panics can be useful mechanisms for highlighting how culturally contingent notions of criminal justice and deviance can be.<sup>347</sup> Although moral panics may reflect a shared morality, during the experience of the moral panic, “[m]any people come to believe different things from what they would believe at other times . . . . The hitherto unthinkable became not only thinkable but acceptable.”<sup>348</sup> “[O]n reflection and with the passage of time,” policymakers, participants in the criminal legal system, and sometimes even community members come to understand that historical conditions and social pressures have led them to adopt policies that were “cruel and unnecessary.”<sup>349</sup> After all, moral panics are typically only understood in retrospect, offering after-the-fact “lessons about how justice is derailed.”<sup>350</sup>

Although these not insignificant concerns about a shared morality may lead to skepticism about grounding any proposed expansion of equitable remedies in such a concept, especially given that shared morality can lead to actions society later realizes were unconscionable, the fact of moral panics only highlights the need for equity all the more. When legislators pass laws and implement long-term policies grounded in a short-term community moral panic, the criminal system needs something in place to counter the understanding the community ultimately comes to have about the wrongfulness of a defendant’s conduct and the appropriateness of a particular sentence. That said, the skepticism regarding a shared morality should cause us significant pause, especially when it comes to foundational beliefs regarding people marginalized based on race, ethnicity, gender, sexuality, ability, financial resources, or by nature of their involvement with the criminal legal system.

The proposal here is a novel but modest one, relying on existing equitable and “special and equitable” legal remedies that can provide a safety valve for the inevitable morality shifts that occur. In other words, this Article is not proposing a wholesale creation of new remedies from which judges can fashion whatever result they might want, so long as it is grounded in some notion of a shared morality. Rather, using existing equitable and equitable-like legal remedies, courts can exercise “a gentle and lenient cast of mind” aimed toward the best result in a wider variety of cases—by encouraging greater use of the remedies, granting requests

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<sup>347</sup> *Id.* at 296.

<sup>348</sup> Tonry, *supra* note 336, at 1753.

<sup>349</sup> *Id.* at 1756.

<sup>350</sup> Bandes, *supra* note 336, at 296, 315–16.

for these remedies more often, and eliminating judicially-constructed restraints that limit their application.

Within the confines of the bounded equity that is proposed here, less space exists for the more damaging aspects of morality to come into play. That is not to say that there is no danger of racial bias or prejudice coming into play—that reality is ever-present, not only in the criminal legal system. However, when the prescriptive nature of the type of equity at issue is paired with a constant vigilance regarding the influence of extraneous factors, such as race, sexuality, ability, ethnicity, or criminal history, the need to ground equity in a shared morality becomes less crucial. To the extent judges need to revert to an objective notion of conscience to reach a just result, a shared morality can create a backstop to some of the problematic aspects that arise whenever morality is at play.<sup>351</sup> Consequently, having a safety valve bounded by existing remedies and grounded in a shared morality is critical.

### III. EQUITABLE REMEDIES RE-ENVISIONED

With these barriers to equity's expansion addressed, this Article proposes that courts employ equitable and "special and equitable" legal remedies more extensively in a manner aimed at alleviating some of the inequities in the criminal legal system. Looking back at equity's original intention, this Article encourages courts to think more broadly in addressing the issues that arise in criminal cases and utilize equity-like legal remedies with greater regularity and an expansive view.

Equity's continued presence in this country remains largely limited to the remedial field.<sup>352</sup> This circumscription of equity's scope strengthens an argument to incorporate it more forcefully into our current system. Nothing substantive or procedural must change in order to strengthen the remedies available to a party subjected to a troubling wielding of "arbitrary state power"<sup>353</sup> that can manifest within the criminal legal system.

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<sup>351</sup> In the criminal legal system, morality will almost always be at play because the criminal law is anchored in morality; it is a "functional mechanism that helps set and then illuminate the boundaries of acceptable behavior." Tonry, *supra* note 336, at 1764.

<sup>352</sup> Samet, *supra* note 41, at 6 ("[A] clear division between Equity and Common Law in the US is mostly restricted to the area of remedies . . ."). This is distinct from England and Wales, where equity affects large areas of substantive private law. *Id.*

<sup>353</sup> *Id.* at 16–17.

*A. Writs of Mandamus*

Drawing on the equitable and “special and equitable” legal remedies discussed earlier, this Section provides some concrete ideas about how these remedies might evolve to more effectively operate as a check in the criminal legal system.

*1. Writ of Mandamus to Request Expungement of Criminal Record*

Individuals seeking to expunge their criminal records from public availability have attempted to use the writ of mandamus to do so, but with little success. Undoubtedly, part of this lack of success may be due to the fact that many of those seeking these writs have what might appear to be frivolous claims. Yet even those with quite valid claims seem to have little luck using the writ of mandamus to obtain the relief sought.

A federal jury convicted Clarence Briscoe Bey of distributing more than 500 grams of cocaine in 2003.<sup>354</sup> Four years later, Congress passed the Second Chance Act,<sup>355</sup> which allows one to be released into a community corrections center six months earlier than previously permitted.<sup>356</sup> Bey sought expungement of his juvenile record so that he might be eligible for release from prison sooner.<sup>357</sup> Bey had a juvenile conviction for obstructing passage of the U.S. mail.<sup>358</sup> According to Bey’s petition, the U.S. Probation Office set aside the conviction in 1970, more than thirty years earlier.<sup>359</sup> Despite acquittal on other charges in his juvenile case, Bey’s record continued to reflect a violent conviction, which prohibited him from being eligible for the Second Chance Act.<sup>360</sup>

Construing Bey’s claim as a request for an equitable remedy, and citing to Third Circuit precedent, the district court denied the relief Bey sought: “[D]istrict courts do ‘not have the jurisdiction to expunge a criminal record, even when ending in an acquittal,’ solely on the basis of equitable grounds.”<sup>361</sup> When expungement is not sought under statute, rule of court,

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<sup>354</sup> *Bey v. United States*, Crim. No. 03-18-1, 2009 WL 1033655, at \*1 (D. Del. Apr. 16, 2009).

<sup>355</sup> The Second Chance Act of 2007, 18 U.S.C. §§ 3621, 3624.

<sup>356</sup> *Bey*, 2009 WL 1033655, at \*3 n.1.

<sup>357</sup> *Id.* at \*3.

<sup>358</sup> *Id.* Although Bey’s juvenile charges included attempted robbery, assault on a mail carrier, and obstructing passage of the U.S. mail, he asserted the obstructing passage charge was the only count of conviction. *Id.*

<sup>359</sup> *Id.*

<sup>360</sup> *Id.*

<sup>361</sup> *Id.* (quoting *United States v. Dunegan*, 251 F.3d 477, 480 (3d Cir. 2001)).

or the Constitution, ancillary jurisdiction<sup>362</sup> is quite limited, according to the Third Circuit.<sup>363</sup> In the context of expungements, according to the court, ancillary jurisdiction “is limited to expunging the record of an unlawful arrest or conviction, or to correcting a clerical error.”<sup>364</sup>

Although other circuits have reached similar conclusions,<sup>365</sup> some circuits and several district courts have come to the opposite result. Noting that no federal statute provides for the expungement of an arrest record, the U.S. Court of Appeals for the Second Circuit found that expungement *does* lie within the equitable jurisdiction of a federal district court.<sup>366</sup> Relief should be granted, according to the court, only in “extreme circumstances,” upon the “delicate balancing of the equities between the right of privacy of the individual and the right of law enforcement officials to perform their necessary duties.”<sup>367</sup>

In this context, the balancing is between the government’s need to maintain arrest records, which serves the “important function of promoting effective law enforcement,” and the “well documented” harm to citizens of maintaining those records.<sup>368</sup> Observing “that an arrest record alone can create serious adverse consequences for those who have been arrested in the past, notwithstanding the ultimate disposition of the case,” the court explicitly commented on the “[o]pportunities for schooling, employment, or professional licenses” that “may be restricted or nonexistent as a consequence of the mere fact of an arrest, even if followed by acquittal or complete exoneration of the charges

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<sup>362</sup> As the court noted:

A federal court invokes ancillary jurisdiction as an incident to a matter where it has acquired jurisdiction of a case in its entirety and, as an incident to the disposition of the primary matter properly before it. It may resolve other related matters which it could not consider were they independently presented. Thus, ancillary jurisdiction permits a court to only dispose of matters related to the original case before it. The doctrine of ancillary jurisdiction does not give district courts the authority to reopen a closed case whenever a related matter subsequently arises. The Supreme Court in recent years has held that ancillary jurisdiction is much more limited.

*Dunegan*, 251 F.3d at 478–79 (internal citations omitted).

<sup>363</sup> *Id.* at 479–80.

<sup>364</sup> *Id.* at 480 (quotations omitted).

<sup>365</sup> See, e.g., *United States v. Sumner*, 226 F.3d 1005, 1010–11 (9th Cir. 2000). But see *United States v. Smith*, 940 F.2d 395 (9th Cir. 1991) (listing cases where the Ninth Circuit recognized equitable power of the court to grant expungements in rare cases).

<sup>366</sup> *United States v. Schnitzer*, 567 F.2d 536, 539 (2d Cir. 1977).

<sup>367</sup> *Id.* (quotations omitted).

<sup>368</sup> *Id.*

involved.”<sup>369</sup> On balance, “courts must be cognizant that the power to expunge ‘is a narrow one, and should not be routinely used whenever a criminal prosecution ends in an acquittal, but should be reserved for the unusual or extreme case.’”<sup>370</sup>

Despite conceiving of expungement as subject to equitable jurisdiction, the Second Circuit ultimately did not grant the requested relief, settling on a similar conclusion as other circuits.<sup>371</sup> Drawing on precedent from other circuit and district courts, the court carved out examples of situations in which equitable relief might be warranted, including instances of mass arrest when determinations of probable cause were virtually impossible,<sup>372</sup> where the purpose of the arrest was to harass a civil rights worker,<sup>373</sup> where the police misused the record to the detriment of the defendant,<sup>374</sup> or where the arrest was proper but based on a statute later declared unconstitutional.<sup>375</sup> In other words, under current precedent, a writ of mandamus rarely will be the mechanism used to expunge the average conviction,<sup>376</sup> only those that have become invalidated.<sup>377</sup> The Fourth, Eighth, Tenth, and D.C. Circuits have held similarly.<sup>378</sup> The Eighth Circuit has gone a step further, concluding that “a district court does not have subject matter jurisdiction over a motion to expunge that is based *solely* on equitable considerations.”<sup>379</sup>

In 1984, after the Second Circuit issued this opinion, Congress passed a federal expungement statute, but its scope remains incredibly limited: the expungement provision is only at play if (1) a person admits to a simple possession drug offense, (2) has no prior conviction, and (3) is under the age of twenty-one at the time of the offense.<sup>380</sup> When read in conjunction with the opinions of the five circuit courts mentioned above,

<sup>369</sup> *Id.* (quotations omitted).

<sup>370</sup> *Id.* (quoting *United States v. Linn*, 513 F.2d 925, 927 (10th Cir. 1975), cert. denied, 423 U.S. 836 (1975)).

<sup>371</sup> *Id.* at 540.

<sup>372</sup> *Id.* (citing *Sullivan v. Murphy*, 478 F.2d 938, 968–71 (D.C. Cir. 1973)).

<sup>373</sup> *Id.* (citing *United States v. McLeod*, 385 F.2d 734, 737–38 (5th Cir. 1967)).

<sup>374</sup> *Id.* (citing *Wheeler v. Goodman*, 306 F. Supp. 58, 66 (W.D.N.C. 1969)).

<sup>375</sup> *Id.* (citing *Kowall v. United States*, 53 F.R.D. 211, 212 (W.D. Mich. 1971)).

<sup>376</sup> *Id.* at 539.

<sup>377</sup> *United States v. Pinto*, 1 F.3d 1069, 1070 (10th Cir. 1993).

<sup>378</sup> *Id.*; see also *Geary v. United States*, 901 F.2d 679, 679–80 (8th Cir. 1990) (holding that a federal court may only exercise its inherent equitable power to expunge in cases of extraordinary circumstances); *Allen v. Webster*, 742 F.2d 153, 154–55 (4th Cir. 1984) (same); *Menard v. Saxbe*, 498 F.2d 1017, 1023–25 (D.C. Cir. 1974) (same).

<sup>379</sup> *United States v. Meyer*, 439 F.3d 855, 859 (8th Cir. 2006) (emphasis added).

<sup>380</sup> 18 U.S.C. § 3607; 21 U.S.C. § 844.

the conclusion is plain that expungement of a criminal record in the federal court system is extraordinarily rare. Only occasionally do federal courts grant writs of mandamus to expunge a person's criminal record—state or federal convictions,<sup>381</sup> and the federal statutory scheme provides little additional relief.<sup>382</sup>

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<sup>381</sup> See, e.g., *United States v. Travers*, 514 F.2d 1171, 1175, 1179 (2d Cir. 1974) (granting expungement of a federal conviction after the Supreme Court rejected the statutory interpretation under which the conviction was affirmed; the court concluded that the defendant's actions simply were not illegal). This author was unable to find any state cases where a court granted a writ of mandamus to expunge a criminal record.

<sup>382</sup> Interestingly, that was not always the case. In 1950 Congress passed the Federal Youth Corrections Act, which allowed eighteen- to twenty-six-year-olds to set aside their convictions if the court released them early from probation. As Margaret Colgate Love wrote in *Starting Over with a Clean Slate: In Praise of a Forgotten Section of the Model Penal Code*, 30 *Fordham Urb. L.J.* 1705, 1709 & n.15, 1710 (2003):

[T]he basic idea was to have a court grant relief that would be more complete than a pardon, and more respectable than an automatic or administrative restoration of rights. The purpose of judicial expungement or set-aside was to both encourage and reward rehabilitation, by restoring social status as well as legal rights." *Id.* at 1710. The statute was repealed in 1984.

*Id.* at 1716.

In 1962, the National Council on Crime and Delinquency ("NCCD") proposed a model statute that would give the court statutory authority to "annul" convictions. *Id.* at 1710. The intended effect was to restore a person's civil rights and allow them to state that they had not been convicted when filling out applications. *Id.* The NCCD proposal also would have required employers and licensing boards to ask applicants: "Have you ever been arrested for or convicted of a crime which has not been annulled by a court?" *Id.* (footnote omitted).

That same year, a provision of the American Law Institute's Model Penal Code ("MPC") empowered the sentencing court, "after an offender had fully satisfied the sentence, to enter an order relieving 'any disqualification or disability imposed by law because of the conviction.' After an additional period of good behavior, the court could issue an order 'vacating' the judgment of conviction." *Id.* at 1711 (citing MPC § 306.6) (footnotes omitted). According to Love, the MPC provision "intended to accomplish the maximum by way of legal and social restoration for rehabilitated ex-offenders. But it was specifically not intended to remove the conviction from the records, or indulge the fiction that the conviction had somehow never taken place." *Id.* at 1712 (footnotes omitted).

The House Committee on the Judiciary undertook another sentencing reform bill that included provisions unreasonably restricting eligibility for public benefits and employment based on a federal conviction, extending the Youth Corrections Act to all first-time offenders so that all those records would be sealed for most purposes and the individual could deny the conviction. *Id.* at 1715–16. "The goal of the legislation was to restore the convicted person to the same position as before the conviction." *Id.* at 1716 (quotations omitted). This bill was ultimately defeated by the competing Senate bill, the Sentencing Reform Act of 1984. *Id.*

The number of collateral consequences that attach to an arrest and conviction is staggering.<sup>383</sup> One in four adults has a criminal record.<sup>384</sup> Since the time the Second Circuit issued its opinion on expungement, legislatures have continued to expand the breadth of legal disabilities to which those who have such a record are subject. Among the most common consequences of an arrest and/or conviction are: the loss of the right to vote, serve on a jury, or hold office; lack of eligibility for most public benefits, including the possibility of living in public housing or obtaining a driver's license; limitations on employment opportunities, including preclusion from applying for certain jobs and ineligibility for certain professional licenses; impact on relationships, including the interactions one is permitted to have with one's child; the debilitating financial obligations imposed by most courts as part of the criminal legal process; deportation or the inability to naturalize; and the lifelong stigma associated with having a criminal conviction.<sup>385</sup> In short, "[t]he collateral consequences of criminal proceedings inflict damage on a breadth and scale too shocking for most lawyers and policy makers to accept."<sup>386</sup>

Given the impact a criminal arrest record or conviction can have, and the relative lack of legislative action at the federal and state levels to alleviate these consequences, courts could and should make expanded use of the "special and equitable" option provided by a writ of mandamus. In circumstances where the arrest was unlawful, an acquittal is returned, the conviction is set aside or pardoned, or the statutory or other criteria for expungement were met but a prosecutor's office or judiciary is unresponsive to the filings, courts should invoke equity's concern for conscience and issue a writ of mandamus to grant the expungement.

## *2. Writ of Mandamus by Private Citizen to Compel Prosecution*

Occasionally, private citizens have attempted to use the writ of mandamus to compel prosecutors to pursue criminal charges against

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<sup>383</sup> Gabriel J. Chin, *Collateral Consequences and Criminal Justice: Future Policy and Constitutional Directions*, 102 Marq. L. Rev. 233, 234–35 (2018); Michael Pinard, *An Integrated Perspective on the Collateral Consequences of Criminal Convictions and Reentry Issues Faced by Formerly Incarcerated Individuals*, 86 B.U. L. Rev. 623, 627 (2006).

<sup>384</sup> Sandra G. Mayson, *Collateral Consequences and the Preventive State*, 91 Notre Dame L. Rev. 301, 302 (2015).

<sup>385</sup> Chin, *supra* note 383, at 235; Lollar, *supra* note 299, at 123–30; Wayne A. Logan, *Informal Collateral Consequences*, 88 Wash. L. Rev. 1103, 1104–09 (2013).

<sup>386</sup> J. McGregor Smyth, Jr., *From Arrest to Reintegration: A Model for Mitigating Collateral Consequences of Criminal Proceedings*, *Crim. Just.*, Fall 2009, at 42, 42.

someone. The most public example of this occurred after twelve-year-old Tamir Rice died at the hands of police officers in Cleveland, Ohio in November 2014. These writs are rarely, if ever, successful, for reasons discussed below. However, they might be worth renewed consideration in special contexts, such as in police shootings.<sup>387</sup>

In the case of Tamir Rice's death, citizens of Cleveland presented notarized affidavits to a municipal court judge<sup>388</sup> in accordance with a state law that permits citizens "having knowledge of the facts" to "file an affidavit charging the offense committed with a reviewing official for the purpose of" seeking an arrest or prosecution to determine "if a complaint should be filed by the prosecuting attorney."<sup>389</sup> The citizen complaint alleged that two officers, Timothy Loehmann and Frank Garmback, murdered Tamir.<sup>390</sup> Two days later, the municipal court judge found probable cause to issue warrants for both officers' arrest—charges of murder against Officer Loehmann and charges of negligent homicide and dereliction of duty against Officer Garmback—but the judge styled his order as "advisory" and declined to actually issue the warrants.<sup>391</sup>

Under Ohio law, a magistrate who finds probable cause, "unless he has reason to believe that [the affidavit] was not filed in good faith, or the claim is not meritorious, shall forthwith issue a warrant for the arrest of the person charged in the affidavit."<sup>392</sup> Alternately, "he shall forthwith refer the matter to the prosecuting attorney or other attorney charged by law with prosecution for investigation prior to the issuance of warrant."<sup>393</sup> The citizens filed a writ of mandamus to require the municipal judge to issue the warrants.<sup>394</sup>

The appellate court dismissed the motion for a writ of mandamus, finding that appellants had an adequate remedy available at law: a direct

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<sup>387</sup> The need for such writs would likely be minimized if the legal system were to adopt I. Bennett Capers's recommendations for returning some prosecutorial authority to the people. I. Bennett Capers, *Against Prosecutors*, 105 *Cornell L. Rev.* 1561 (2020).

<sup>388</sup> *Petition for Peremptory Writ of Mandamus (In the First Instance) at 2, State ex rel. Vernon v. Adrine*, No. 103149 (Ohio Ct. App. 2015), <https://www.scribd.com/document/269046322/Writ-of-Mandamus-Peremptory-in-Tamir-Rice-case> [<https://perma.cc/LS58-QVZH>].

<sup>389</sup> Ohio Rev. Code Ann. § 2935.09(D) (LexisNexis 2006).

<sup>390</sup> *Petition for Peremptory Writ*, *supra* note 388, at 2–3.

<sup>391</sup> *Id.* at 3.

<sup>392</sup> Ohio Rev. Code Ann. § 2935.10(A) (LexisNexis 1973).

<sup>393</sup> *Id.*

<sup>394</sup> *State ex rel. Vernon v. Adrine*, No. 103149, 2015 WL 4389579, at \*1 (Ohio Ct. App. 2015).



appeal.<sup>395</sup> However, one judge dissented, finding in a brief opinion that a writ was appropriate and should have been granted.<sup>396</sup>

The dissenting judge's perspective is a rare one. In both state and federal cases, writs of mandamus to require a prosecutor, or occasionally a magistrate, to pursue criminal charges against someone run up against the broad scope of prosecutorial discretion and the constitutional separation of powers doctrine. One of the leading cases in this area, *Inmates of Attica Correctional Facility v. Rockefeller*,<sup>397</sup> addresses the issues raised by writs of mandamus aimed at requiring prosecutors to act.

*Inmates of Attica* arose out of arguably the most substantial prison riot in this country's history in Attica, New York. In an effort to obtain better living conditions and political rights, approximately 1,200 of Attica's 2,200 inmates rioted in 1971, taking control of the prison and holding forty-two staff hostage. Inmates and prison authorities negotiated over a four-day period, with authorities ultimately agreeing to twenty-eight of the inmates' demands.<sup>398</sup> Prison authorities would not agree to grant immunity to the inmates who seized the prison, however. Ultimately, New York Governor Nelson Rockefeller ordered state police to take back the prison, which the officers did. Over the course of the uprising, forty-three people were killed—thirty-two inmates and eleven prison staff, most at the hands of law enforcement.<sup>399</sup> Thirty-seven inmates were indicted for crimes stemming from the uprising; no staff or police officers were.<sup>400</sup>

Several inmates and parents of inmates sought a writ of mandamus against state officials, demanding that the state of New York submit a plan for an impartial and independent investigation and prosecute unknown state actors, and demanding that the U.S. Attorney for the district

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<sup>395</sup> Id. at \*3.

<sup>396</sup> Id. at \*4 (Laster Mays, J., dissenting).

<sup>397</sup> 477 F.2d 375 (2d Cir. 1973).

<sup>398</sup> Heather Ann Thompson, *Blood in the Water: The Attica Prison Uprising of 1971 and Its Legacy* 153–54, 170 (2016) (citations omitted).

<sup>399</sup> Jeff Z. Klein, *Niagara Frontier Heritage Project, Heritage Moments: The Attica Prison Uprising – 43 Dead and a Four-Decade Cover-Up*, NPR (Sept. 10, 2018), <https://news.wbfo.org/post/heritage-moments-attica-prison-uprising-43-dead-and-four-decade-cover> [<https://perma.cc/TL3L-M94T>]. The eleven included prison guards and civilian workers. Id. Although one prison guard and three of those incarcerated appear to have been killed prior to state police entering the prison, id., the remainder of the deaths were at the hands of state police. Thompson, *supra* note 398, at 230–31, 238–39.

<sup>400</sup> *Inmates of Attica*, 477 F.2d at 378.

investigate, arrest, and prosecute the same state officers for committing federal offenses.<sup>401</sup>

In an oft quoted opinion, the Second Circuit observed that, due to the separation of powers doctrine, “ordinarily the courts are ‘not to direct or influence the exercise of discretion of the officer or agency in the making of the decision.’”<sup>402</sup> Rather, “federal courts have traditionally and, to our knowledge, uniformly refrained from overturning, at the instance of a private person, discretionary decisions of federal prosecuting authorities not to prosecute persons regarding whom a complaint of criminal conduct is made.”<sup>403</sup> This is true, the court noted,

even in cases such as the present one where, according to the allegations of the complaint . . . serious questions are raised as to the protection of the civil rights and physical security of a definable class of victims of crime and as to the fair administration of the criminal justice system.<sup>404</sup>

The court continued,

Although as a member of the bar, the attorney for the United States is an officer of the court, he is nevertheless an executive official of the Government, and it is as an officer of the executive department that he exercises a discretion as to whether or not there shall be a prosecution in a particular case. It follows, as an incident of the constitutional separation of powers, that the courts are not to interfere with the free exercise of the discretionary powers of the attorneys of the United States in their control over criminal prosecutions.<sup>405</sup>

Wishing to avoid placing courts “in the undesirable and injudicious posture of becoming ‘superprosecutors,’” the court steered clear of permitting “interference with the normal operations of criminal investigations . . . based solely upon allegations of criminal conduct . . .”<sup>406</sup> After all, the court inquired, what exactly would the judiciary’s role be?<sup>407</sup> “On balance,” the court concluded, “we believe that

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<sup>401</sup> Id. at 377.

<sup>402</sup> Id. at 379 (quoting *United States ex rel. Schonbrun v. Commanding Officer*, 403 F.2d 371, 374 (2d Cir. 1968)).

<sup>403</sup> Id.

<sup>404</sup> Id.

<sup>405</sup> Id. at 379–80 (citing *United States v. Cox*, 342 F.2d 167, 171 (5th Cir. 1965)).

<sup>406</sup> Id. at 380.

<sup>407</sup> Id. The court went on:

substitution of a court's decision to compel prosecution for the U.S. Attorney's decision not to prosecute, even upon an abuse of discretion standard of review and even if limited to directing that a prosecution be undertaken in good faith . . . would be unwise."<sup>408</sup> The court reached a similar decision with regard to compelling state investigations and prosecutions.<sup>409</sup>

In every state and federal case reviewed by this author, courts refused to issue a writ of mandamus to compel a prosecution, often noting that mandamus does not permit the court to compel a discretionary duty, and reminding the petitioner that the decision whether to prosecute rests exclusively with the prosecutor in the executive branch.<sup>410</sup> In other words, prosecutors have sole discretion to determine who to charge. In states such as Ohio, where a private citizen can file an affidavit and motion requesting prosecution, courts remain clear that such a filing does not mandate prosecution, unless the failure to do so constitutes an abuse of discretion,<sup>411</sup> such as when a prosecutor determines that a valid allegation lacks probable cause.<sup>412</sup> A search for instances in which an Ohio court found a prosecutor to have abused discretion was unavailing.<sup>413</sup> In short,

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At what point would the prosecutor be entitled to call a halt to further investigation as unlikely to be productive? What evidentiary standard would be used to decide whether prosecution should be compelled? How much judgment would the United States Attorney be allowed? Would he be permitted to limit himself to a strong "test" case rather than pursue weaker cases? What collateral factors would be permissible bases for a decision not to prosecute, e.g., the pendency of another criminal proceeding elsewhere against the same parties? What sort of review should be available in cases like the present one where the conduct complained of allegedly violates state as well as federal laws?

Id.

<sup>408</sup> Id. at 380–81 (internal citations omitted).

<sup>409</sup> Id. at 382.

<sup>410</sup> See, e.g., *Sanders-El v. Commonwealth*, No. 2010-CA-001964-MR, 2011 WL 2935854, at \*1–2 (Ky. Ct. App. July 22, 2011); *Konya v. Dist. Att'y of Northampton Cnty.*, 669 A.2d 890, 892–93 (Pa. 1995); *Bartlett v. Caldwell*, 452 S.E.2d 744, 744 (Ga. 1995); *Otero v. U.S. Att'y Gen.*, 832 F.2d 141, 141 (11th Cir. 1987) (per curiam); *Powell v. Katzenbach*, 359 F.2d 234, 234 (D.C. Cir. 1965) (per curiam).

<sup>411</sup> *State ex rel. Capron v. Dattilio*, 50 N.E.3d 551, 553 (Ohio 2016); *State ex rel. Evans v. Columbus Dept. of Law*, 699 N.E.2d 60, 61 (Ohio 1998) (per curiam).

<sup>412</sup> Cf. *Capron*, 50 N.E.3d at 553.

<sup>413</sup> Under Ohio's law, a judge does not abuse her discretion if she refers the case to the prosecutor's office for further investigation; such a referral discharges the judge's duty under the statute. See, e.g., *State ex rel. Brown v. Nusbaum*, 95 N.E.3d 365, 367–68 (Ohio 2017); *State ex rel. Strothers v. Turner*, 680 N.E.2d 1238, 1239 (Ohio 1997) (per curiam).

writs of mandamus to compel prosecutions are, under current state and federal precedent, unlikely to be successful.<sup>414</sup>

In the average run-of-the-mill case, perhaps this is the right decision, although this Article remains agnostic on that point. But in a number of scenarios, writs of mandamus seem like they could operate as an appropriate and necessary check on prosecutorial power. Several examples come to mind: the case of the separate prosecution of two defendants for the same crime and on the same legal theory in different cases;<sup>415</sup> police-involved shootings, when evidence shows a heightened level of scrutiny is warranted; or even in a decision not to grant a diversionary sentence when the circumstances clearly suggest one is warranted. In light of decades of experience under our current punitive criminal legal regime, exceptions to the standard rule against courts reviewing decisions whether to prosecute seem in order and can easily be carved out in exceptional situations such as the troubling ones mentioned here. Principles of equity dictate that in certain scenarios, allowing for an exception to the general rule would be the only “right” outcome.

### 3. *Writ of Mandamus to Fund Right to Counsel*

As discussed previously,<sup>416</sup> despite Supreme Court precedent indicating that a person charged with a crime has the right to counsel of their choice, this right has not been found to apply to those who are indigent. However, this is an area ripe for Supreme Court and state court change, and thus a perfect area for judges to grant writs of mandamus.

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<sup>414</sup> Relatedly, courts almost always deny writs of mandamus when the defendant has cooperated in a criminal case after sentencing and seeks to have the court require the government to recommend a reduction in sentence for providing “substantial assistance” under Rule 35(b). See, e.g., *United States v. Mells*, 481 F. App’x 563, 564–66 (11th Cir. 2012) (per curiam); *United States v. Duncan*, 280 F. App’x 901, 903–04 (11th Cir. 2008) (per curiam); *United States v. Tadlock*, 346 F. App’x 977, 978 (4th Cir. 2009) (per curiam); *United States v. Murray*, 437 F. App’x 103, 105 (3d Cir. 2011) (per curiam).

<sup>415</sup> See, e.g., *United States v. Frye*, 489 F.3d 201, 214 (5th Cir. 2007). But see *Smith v. Goose*, 205 F.3d 1045, 1051 (8th Cir. 2000) (finding violation of due process when state prosecuted two different defendants on factually contradictory theories); *Thompson v. Calderon*, 120 F.3d 1045, 1050–51 (9th Cir. 1997) (en banc) (noting that “a serious question exists as to whether [the defendant] was deprived of due process of law by the prosecutor’s presentation of flagrantly inconsistent theories . . . to the two juries that separately heard” the two co-defendants’ cases), rev’d on other grounds, 523 U.S. 538 (1998).

<sup>416</sup> See *supra* Subsection I.C.1.b.

In a 2006 case, *United States v. Gonzalez-Lopez*,<sup>417</sup> Justice Scalia's majority opinion shifted the ground on the right to counsel of one's choice,<sup>418</sup> opening the door for the Supreme Court to revisit the issue. According to the *Gonzalez-Lopez* Court, the purpose of the rights set forth in the Sixth Amendment, including the right to counsel, is to ensure a fair trial.<sup>419</sup> Yet, according to the Court, "it does not follow that the rights can be disregarded so long as the trial is, on the whole, fair."<sup>420</sup> Rather, "[t]he right to select counsel of one's choice . . . has never been derived from the Sixth Amendment's purpose of ensuring a fair trial. It has been regarded as the root meaning of the constitutional guarantee."<sup>421</sup> The Sixth Amendment commands "not that a trial be fair, but that a particular guarantee of fairness be provided—to wit, that the accused be defended by the counsel he believes to be the best."<sup>422</sup> Thus

[d]eprivation of the right is "complete" when the defendant is erroneously prevented from being represented by the lawyer he wants, regardless of the quality of representation he received. To argue otherwise is to confuse the right to counsel of choice—which is the right to a particular lawyer regardless of comparative effectiveness—with the right to effective counsel—which imposes a baseline requirement of competence on whatever lawyer is chosen or appointed.<sup>423</sup>

In spite of such lofty language, the opinion did not extend this right to those who require the court to appoint counsel due to an inability to pay for their own.<sup>424</sup> As Justice Scalia observed, "[w]e have recognized a trial court's wide latitude in balancing the right to counsel of choice against the needs of fairness . . . and against the demands of its calendar . . ."<sup>425</sup>

The common arguments against extending such a fundamental right<sup>426</sup> include "judges know best whom to appoint" and thus are best able to

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<sup>417</sup> 548 U.S. 140 (2006).

<sup>418</sup> Janet C. Hoeffel, *Toward a More Robust Right to Counsel of Choice*, 44 *San Diego L. Rev.* 525, 545–47 (2007).

<sup>419</sup> *Gonzalez-Lopez*, 548 U.S. at 145.

<sup>420</sup> *Id.*

<sup>421</sup> *Id.* at 147–48 (footnotes omitted).

<sup>422</sup> *Id.* at 146.

<sup>423</sup> *Id.* at 148.

<sup>424</sup> *Id.* at 151.

<sup>425</sup> *Id.* at 152 (citations omitted).

<sup>426</sup> Justice Scalia wrote:

We have little trouble concluding that erroneous deprivation of the right to counsel of choice, 'with consequences that are necessarily unquantifiable and indeterminate,

protect uninformed defendants from making a poor selection; those charged “lack sufficient information to make informed choices”; appointment of counsel should be distributed evenly among those eligible to take appointments; the best or most popular lawyers will be overwhelmed with cases whereas other lawyers will get few; and judicial efficiency requires that the court choose counsel, in order to avoid delay in the proceedings.<sup>427</sup> Yet, as Professor Norm Lefstein articulated,

None of these arguments is especially compelling, especially if lawyers providing criminal defense are qualified to do so and their representation is monitored. . . . That the courts know whom best to appoint . . . is not only condescending of defendants but ignores, like the rest of the arguments, that persons of wealth charged with a crime are in exactly the same position when they need to hire an attorney. Moreover, if some of the attorneys providing defense services are not qualified, the solution should be to exclude them from providing representation, not to deny defendants the right to select counsel of their choice. . . . [I]n a market system of client choice the less effective lawyers should have fewer clients.<sup>428</sup>

He continues by noting that attorneys, including sought-after ones, ethically may not accept more clients than they can “competently represent.”<sup>429</sup>

England provides a counter-example from which to draw. Under the English Access to Justice Act, individuals facing charges or charged with a crime have the right to select their own lawyers.<sup>430</sup> A duty solicitor is available to anyone who desires one, without regard to income, but

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unquestionably qualifies as ‘structural error.’ Different attorneys will pursue different strategies with regard to investigation and discovery, development of the theory of defense, selection of the jury, presentation of the witnesses, and style of witness examination and jury argument. And the choice of attorney will affect whether and on what terms the defendant cooperates with the prosecution, plea bargains, or decides instead to go to trial. In light of these myriad aspects of representation, the erroneous denial of counsel bears directly on the ‘framework within which the trial proceeds,’—or indeed on whether it proceeds at all.

Id. at 150 (citations omitted).

<sup>427</sup> Norman Lefstein, In Search of *Gideon*’s Promise: Lessons from England and the Need for Federal Help, 55 *Hastings L.J.* 835, 917 (2004).

<sup>428</sup> Id. at 918.

<sup>429</sup> Id. at 919.

<sup>430</sup> Id. at 863, 886.

defendants remain free to select their own counsel if they prefer.<sup>431</sup> Even with such a system, some attorneys are retained.<sup>432</sup> Under England's system, "in order to be paid by the government for criminal [defense work], a solicitor must be 'licensed,' i.e., the solicitor must meet quality standards, sign a contract . . . and agree to various audits."<sup>433</sup> But defendants remain able to select whatever solicitor they prefer, assuming that person is licensed through the state.<sup>434</sup>

Many lawyers in England identify this ability to select one's lawyer as one of its system's strengths.<sup>435</sup> As Leftsein summarizes, "The advantages include an attorney-client relationship of trust and confidence and a strong incentive for solicitors to provide the best possible representation since 'repeat business' is essential for lawyers practicing criminal [law]."<sup>436</sup> Empirical evidence confirms that the attorney-client relationship benefits when clients are free to select their own counsel.<sup>437</sup> Electing counsel of one's choice enhances trust between the attorney and client,<sup>438</sup> promotes individual autonomy—a core value identified in other Supreme Court right to counsel cases,<sup>439</sup> and promotes the principles of "fairness and integrity" of the criminal legal process.<sup>440</sup>

Although this author might support a change to the appointment of counsel system to bring it more in line with England's system, quite obviously writs of mandamus are not the appropriate mechanism to challenge our current system of assigning counsel. However, indigent defendants seeking to either retain or obtain counsel of their choice should be able to employ a writ of mandamus to maintain or obtain that counsel if they make that request of the trial court in a timely fashion and the trial court denies that request. This would further both the dignitary goal of allowing a person charged with a crime the choice in representation, and, in a system that is well-run, might even enhance the quality of representation available. The Supreme Court already has articulated the

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<sup>431</sup> *Id.* at 863.

<sup>432</sup> Compare *id.* at 868 ("[T]here is little retained criminal defense work in England.") with Hoeffel, *supra* note 418, at 545 ("[O]nly . . . ten percent of criminal defendants . . . retain counsel . . .").

<sup>433</sup> Lefstein, *supra* note 427, at 893.

<sup>434</sup> *Id.*

<sup>435</sup> *Id.* at 915.

<sup>436</sup> *Id.*

<sup>437</sup> *Id.*

<sup>438</sup> Hoeffel, *supra* note 418, at 540–42.

<sup>439</sup> *Id.* at 543–44.

<sup>440</sup> *Id.* at 544–45.

increased weight that must be given to the right to counsel choice when balancing it against government interests.<sup>441</sup> Equity tips the scales in favor of granting someone without means the ability to have the lawyer she wants by her side in a criminal case, with the full resources of the government bearing down on her. Someone without financial resources should not be treated differently than someone with resources when it comes to fundamental rights. Granting that person's writ of mandamus fits within the principles and framework triggering equity's protections here.

#### 4. *Writ of Mandamus to Compel Production of Police Files*

In an earlier section, this Article uncovered the difficulty in obtaining police personnel files, even when critical to the defense case. Rachel Moran has astutely captured the dynamic:

In [many] all-too-common scenarios, the defendant will have virtually no chance of winning at trial unless the defendant can cast doubt on the credibility of the police officer witness. Nonetheless—despite the fact that the phenomenon of police officers lying at trial is so well documented that it has its own euphemism, “testilying”—the law imposes tremendous obstacles to defense counsel obtaining and utilizing evidence about the officer that would cast doubt on the officer's credibility. Such evidence could come in the form of records showing that the police officer has previously lied in other cases, has a history of using excessive force on civilians, or charges defendants with resisting arrest at a far higher rate than other officers in the department. The legal obstacles to defense counsel obtaining such information manifest themselves in both the absence of records . . . and the inability of defense counsel to access and use the records that are deemed confidential in the majority of jurisdictions.<sup>442</sup>

If states amended their laws to permit access to police personnel records upon a good faith showing, writs of mandamus would remain an excellent, but hopefully rarely used, equitable-like vehicle for obtaining those records from recalcitrant police departments. If a police officer has abused the rights of a person charged with a crime, conscience dictates that in fairness and out of a sense of justice, the police officer should not

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<sup>441</sup> Id. at 548; *United States v. Gonzalez-Lopez*, 548 U.S. 140, 146–48 (2006).

<sup>442</sup> Moran, *supra* note 121, at 1341–42.



be allowed to act as a credible witness when evidence exists of her lack of credibility. Requiring the disclosure of records reveals a sensitivity to all the particulars of the situation at hand and making sure the right result is obtained.

### *5. A Check on Government-Requested Writs of Mandamus*

In most every criminal context in which writs of mandamus are sought, the writ is defined by its scarcity, consistent with the initial envisioning of the writ. Yet, as we saw earlier, when the government seeks a writ of mandamus—to prevent prosecutors from complying with a lower court's discovery order in a case where racially discriminatory charging practices were alleged,<sup>443</sup> to challenge what the government disclaims as an unauthorized sentence,<sup>444</sup> or to prevent a trial judge in a bench trial from considering a claim of selective or vindictive prosecution as a substantive defense to the merits of the government's underlying prosecution,<sup>445</sup> for example—the writs seem to be granted at a prolific rate.

Although this Article's aim is to encourage greater use of writs of mandamus, given the few checks on prosecutorial discretion present in the criminal legal system, limiting the number of writs of mandamus granted to the government could play a significant equitable function here. If prosecutors are, in essence, abusing their rights by finding a workaround that allows them to skirt the constitutional prohibition on government appeals, as a matter of political fairness and moral sensibility, granting fewer of these writs makes sense. Certainly, in egregious scenarios, a statutorily-based remedy to curtail a court from overstepping its bounds would be reasonable. But the regularity with which these writs are granted and the factual scenarios in which they are obtained suggest that appellate courts are simply deferring to prosecutors when they allege that a court has ruled too often in favor of the defense. This is not what the writ was intended to do. The conscionable and equitable result, then, is to deny the writ in many cases.

### *B. Writs of Coram Nobis*

In the previous discussion of writs of coram nobis, the remedy available to convicted defendants who are no longer in custody but whose

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<sup>443</sup> *In re United States*, 397 F.3d 274, 286–87 (5th Cir. 2005).

<sup>444</sup> *District of Columbia v. Fitzgerald*, 953 A.2d 288, 291–92 (D.C. 2008).

<sup>445</sup> *United States v. Choi*, 818 F. Supp. 2d 79, 82 (D.D.C. 2011).

cases involve “grave injustices,” the limitations of using the writ became evident. As indicated, seven federal circuits have read into the writ a “civil disabilities” requirement with a threshold showing of harm.<sup>446</sup> In order to be eligible for the writ, a petitioner must show that they are actually suffering from the ongoing collateral consequences of their conviction<sup>447</sup> other than a financial penalty, reputational injury, stigma of a criminal conviction, or difficulty obtaining work or licensure.<sup>448</sup>

The limitations placed on the writ by these circuits must be alleviated. The continuing impact of collateral consequences, even after one has completed their sentence, cannot be overestimated.<sup>449</sup> To deny that the multitude of legal disabilities placed on a person after a criminal conviction continue after the termination of the criminal sentence borders on the absurd. Undoubtedly the financial penalties, reputational injury, stigma of a criminal conviction, difficulty obtaining work or licensure for particular employment, and numerous other civil disabilities remain for years, if not indefinitely. The seven circuits that have adopted the myopic “civil disabilities” test should overrule the cases establishing that requirement, and reject the idea that the very tangible harms experienced by those with a criminal record are “purely speculative harms or harms that occurred completely in the past,” and no “more than incidental.”<sup>450</sup> Federal courts should follow the Ninth Circuit’s more realistic approach to writs of coram nobis and find a “presumption that collateral consequences flow from any criminal conviction.”<sup>451</sup>

### C. Writs of *Audita Querela*

*Audita querela* is often an effective remedy for petitioners convicted at the state level, and, if federal courts are willing to apply it, it could be quite an effective remedy at the federal level as well. As one court has noted, the writ of *audita querela* is “available in the federal criminal

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<sup>446</sup> Wolitz, *supra* note 163, at 1292–99.

<sup>447</sup> *United States v. Keane*, 852 F.2d 199, 203 (7th Cir. 1988) (requiring the petitioner to “demonstrate that the judgment of conviction produces lingering civil disabilities (collateral consequences)”).

<sup>448</sup> *Id.* at 203; *United States v. Bush*, 888 F.2d 1145, 1148–50 (7th Cir. 1989).

<sup>449</sup> See *supra* Subsection I.C.2.

<sup>450</sup> *United States v. Craig*, 907 F.2d 653, 658 (7th Cir. 1990).

<sup>451</sup> *Hirabayashi v. United States*, 828 F.2d 591, 605–06 (9th Cir. 1987) (citing *Sibron v. United States*, 392 U.S. 40, 55–57 (1968)).

context to fill gaps in the current systems of postconviction relief.”<sup>452</sup> At least one federal court has used the writ to change the sentence of a defendant that was “an extreme disparity” when compared with his compatriots and, according to the court, “grossly disproportionate to the offense.”<sup>453</sup> Likewise, the judge granted relief based on a view that “[r]e-sentencing is necessary to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct.”<sup>454</sup>

Because *Booker* was not retroactive and “announced a new rule of constitutional law that was unforeseeable” at the time of numerous sentencing hearings, this writ could provide relief in cases of sentencing disparities.<sup>455</sup> At least one commentator has suggested that the writ of *audita querela* could fill other gaps in the current statutory post-conviction framework, particularly the limit on retroactive application of new constitutional laws articulated in *Teague v. Lane*.<sup>456</sup> However, to succeed with any of these claims, a petitioner would have to show evidence that she was “uniquely impacted by” the subsequent change in law, or that there are “equities that distinguish them from other defendants sentenced” under the previous scheme.<sup>457</sup> Although this is a high bar, the writ is only intended to apply in exceptional cases, and in a case where this type of relief seems appropriate, a judge should have the option to use it.

Federal courts should be encouraged to consider this remedy in the applicable circumstances, when it “may mitigate a judgment’s collateral consequences . . . for equitable reasons, regardless of the presence of a legal defect in the original proceeding.”<sup>458</sup> Courts should also consider this remedy when “it would be contrary to justice to allow [a judgment] to be enforced, because of matters arising subsequent to the rendition

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<sup>452</sup> *Kessack v. United States*, No. C05-1828Z, 2008 WL 189679, at \*2 (W.D. Wash. 2008) (internal quotations omitted).

<sup>453</sup> *Id.* at \*5.

<sup>454</sup> *Id.* (internal quotations omitted).

<sup>455</sup> *Id.* at \*6.

<sup>456</sup> *Fountain*, *supra* note 221, at 241–45; *Teague v. Lane*, 489 U.S. 288, 310 (1989) (“Unless they fall within an exception to the general rule, new constitutional rules of criminal procedure will not be applicable to those cases which have become final before the new rules are announced.”).

<sup>457</sup> *Fountain*, *supra* note 221, at 239 (quoting *Carrington v. United States*, 503 F.3d 888, 893 (9th Cir. 2007)).

<sup>458</sup> *Ejelonu v. I.N.S.*, 355 F.3d 539, 548 (6th Cir. 2004); *Fountain*, *supra* note 221, at 239.

thereof,”<sup>459</sup> including subsequent legislation affecting the collateral consequences of a conviction.

One particularly salient opportunity for courts to employ writs of *audita querela* arises in the context of the current pandemic. Writs of *audita querela* appear to be an ideal remedial mechanism to request release from incarceration post-conviction due to the presence of COVID-19 in the prison or jail where one is serving a sentence. As of the end of October 2020, more than 1,245 prisoners had died of coronavirus-related causes, and prisons nationwide reported more than 147,100 cases within their walls.<sup>460</sup> More than 107,537 prison staff have tested positive for the virus, and at least 196 have died.<sup>461</sup> Prisons and jails are particularly conducive to the rampant spread of the virus. Both are generally crowded, with shared, often small spaces for eating, sleeping, and bathing.<sup>462</sup> Many inmates lack access to soap, sanitizer, and other materials that could help keep transmission numbers lower.<sup>463</sup> One recent report found a 72-year-old man bartering soup packets for underwear that had been made into a face mask.<sup>464</sup>

Many of those serving a post-conviction sentence of incarceration, particularly those serving sentences for less significant crimes or crimes with shorter authorized penalties, could make a colorable, even strong, showing that “it would be contrary to justice” to allow their criminal judgment to be enforced due to “matters arising subsequent to the rendition thereof,”<sup>465</sup> namely the unexpected presence and predictable spread of the virus within the walls of the institution where they are being detained. Although one would have to show they were “uniquely impacted by” the virus, or that there are “equities that distinguish them

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<sup>459</sup> *Villafranco v. United States*, No. Civ. 05-CV-368, 2006 WL 1049114, at \*2 (D. Utah Apr. 18, 2006) (quoting *Oliver v. City of Shattuck ex rel. Versluis*, 157 F.2d 150, 153 (10th Cir. 1946)).

<sup>460</sup> A State-by-State Look at Coronavirus in Prisons, Marshall Project (updated Nov. 12, 2020), <https://www.themarshallproject.org/2020/05/01/a-state-by-state-look-at-coronavirus-in-prisons> [<https://perma.cc/YRN2-NPXR>].

<sup>461</sup> *Id.*

<sup>462</sup> Brie Williams et al., *Correctional Facilities in the Shadow of COVID-19: Unique Challenges and Proposed Solutions*, Health Affs. Blog (Mar. 26, 2020), <https://www.healthaffairs.org/doi/10.1377/hblog20200324.784502/full/> [<https://perma.cc/H6FV-TNT5>].

<sup>463</sup> *Id.*

<sup>464</sup> Kelly Davis, *Coronavirus in Jails and Prisons*, Appeal (July 30, 2020), <https://theappeal.org/coronavirus-in-jails-and-prisons-36/> [<https://perma.cc/E6AP-Q2XR>].

<sup>465</sup> *Villafranco v. United States*, No. Civ. 05-CV-368, 2006 WL 1049114, at \*2 (D. Utah 2006) (quoting *Oliver v. City of Shattuck ex rel. Versluis*, 157 F.2d 150, 153 (10th Cir. 1946)).

from other defendants sentenced,” many people serving criminal sentences have unique health conditions that would make them particularly susceptible to the virus. In fact, almost anyone with an underlying health condition serving a sentence short of death, in the federal system or in states that have not limited the remedy’s application, could and should request release due to the extraordinary and unpredicted consequences of COVID-19 for individuals with those conditions, so long as the virus’s arrival arose “subsequent to” the entry of the final sentencing order. Being exposed to a potentially lethal virus solely because of a judgment imposing a period of incarceration seems to be exactly the kind of situation in which enforcing the sentence would be “contrary to justice” and the principles of equity should be invoked.

#### CONCLUSION

In an era with the odds so overwhelmingly stacked against criminal defendants, attorneys should be encouraged to raise equitable remedies and equitable-like legal remedies to address some of the entrenched issues in criminal cases. The vision for a broader conception of criminal equity involves a jurisprudential shift when a judge finds herself without an adequate solution in traditional legal remedies. Our modern conception of equity references a bounded and reified system of responses to a problem legal rules are inadequate to remedy. But equity did not begin as this static of a concept. Initially, equity’s scope was broader and more flexible. This Article advocates for a return to equity’s roots, for a re-envisioning of equitable remedies in a manner consistent with equity’s initial purpose and manifestation, yet adapted to fit our modern, secular legal structure and ensure compliance with the rule of law.

Limiting a judge’s options to those imposed by narrow and restrictive laws means conceding to be confined by a system that is stacked against the person charged. Certainly, other avenues of seeking to change the parameters of the existing system are available and worth pursuing.<sup>466</sup>

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<sup>466</sup> Numerous thoughtful and consequential proposals abound, including discussions about abolishing prisons, see, e.g., Allegra M. McLeod, *Prison Abolition and Grounded Justice*, 62 *UCLA L. Rev.* 1156 (2015); Ruth Wilson Gilmore, *Golden Gulag: Prisons, Surplus, Crisis, and Opposition in Globalizing California* (2007); Angela Y. Davis, *Are Prisons Obsolete?* (2003); defunding the police and putting that funding into other resources, such as housing and education, see, e.g., Keeanga-Yamahtta Taylor, *How Do We Change America?*, *New Yorker* (June 8, 2020), [https://www.newyorker.com/news/our-columnists/how-do-we-change-america?itm\\_content=footer-recirc](https://www.newyorker.com/news/our-columnists/how-do-we-change-america?itm_content=footer-recirc) [<https://perma.cc/J6GB-2PWC>]; Amna A. Akbar,

Systemic change is necessary, but it can take time.<sup>467</sup> In the meantime, equitable arguments already exist and courts, including the Supreme Court, have relied on equitable principles to grant defendants relief. Parties and courts should be taking full advantage of these existing mechanisms to try and seek a fair and just result.

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How Defund and Disband Became the Demands, N.Y. Rev. Books (June 15, 2020), <https://www.nybooks.com/daily/2020/06/15/how-defund-and-disband-became-the-demands/> [<https://perma.cc/UZ2P-B82Q>]; investing in restorative justice programs, see, e.g., Danielle Sered, *Until We Reckon: Violence, Mass Incarceration, and a Road to Repair* (2019); and democratizing criminal justice processes, see, e.g., K. Sabeel Rahman & Jocelyn Simonson, *The Institutional Design of Community Control*, 108 *Calif. L. Rev.* 679 (2020); Jocelyn Simonson, *The Place of “The People” in Criminal Procedure*, 119 *Colum. L. Rev.* 249 (2019); Amna A. Akbar, *Toward a Radical Imagination of Law*, 93 *N.Y.U. L. Rev.* 405 (2018); Janet Moore, Marla Sandys & Raj Jayadev, *Make Them Hear You: Participatory Defense and the Struggle for Criminal Justice Reform*, 78 *Alb. L. Rev.* 1281 (2014/2015).

<sup>467</sup> Despite the typically slow pace of change, sometimes an event triggers unusually rapid systemic change. The killing of George Floyd by a police officer in Minneapolis appears to have been one of those triggers. Since his death on May 25, 2020, numerous states have initiated police conduct and criminal procedure reforms that typically occur after years of work. See, e.g., Weihua Li & Humera Lodhi, *The States Taking on Police Reform After the Death of George Floyd*, *FiveThirtyEight & Marshall Project* (June 18, 2020, 3:00 PM), <https://fivethirtyeight.com/features/which-states-are-taking-on-police-reform-after-george-floyd/> [<https://perma.cc/DT4D-T55V>]; Orion Rummier, *The Major Police Reforms Enacted Since George Floyd’s Death*, *Axios* (updated Oct. 1, 2020), <https://www.axios.com/police-reform-george-floyd-protest-2150b2dd-a6dc-4a0c-a1fb-62c2e999a03a.html> [<https://perma.cc/4NTE-QYL3>]. Perhaps, then, systemic changes are on the horizon, making the need for the proposals in Part III of this Article less essential. Yet even in a world of reduced funding for police and less incarceration, equitable remedies play an important role in seeking and obtaining justice.