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Civilizing Criminal Settlements

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CIVILIZING CRIMINAL SETTLEMENTS

RUSSELL M. GOLD,* CARISSA BYRNE HESSICK**
& F. ANDREW HESSICK***

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Most cases in the American legal system—civil and criminal—are resolved by settlement. Although settlements are the norm in both systems, the two systems facilitate settlements in very different ways. The criminal system promotes settlements by empowering prosecutors to make the price of going to trial and risking conviction intolerably high for defendants. This leverage enables prosecutors to force defendants to enter into plea bargains under terms largely dictated by the prosecutors. By contrast, instead of providing one party with disparate leverage, the civil system facilitates settlement through procedure. Some civil procedures directly encourage settlement, such as rules requiring alternative dispute resolution. Other procedures, such as summary judgment, promote settlement indirectly by requiring information exchanges, providing opportunities for neutral arbiters to express their views of the cases, and simultaneously focusing the parties' attention on the material issues. Consequently, the civil system seeks to push only the "right" cases to settle and produces more informed and more fair settlements.

This Article argues that the criminal system should more closely resemble the civil system in the way that it encourages settlements. It identifies several procedures that should be imported into the criminal system to make settlements less the product of coercion and more the result of informed, voluntary bargaining between the parties. In particular, it contends that the criminal system should heighten pleading standards and take seriously motions to dismiss, adopt more liberal discovery, create motions for summary judgment, and allow judicial involvement in plea negotiation. One or more states have adopted several of these reforms to at least some degree.

Adopting civil-like settlement procedures in the criminal system would tend not only to produce more informed and more fair plea bargains, but would also reduce prosecutors' leverage in plea negotiations. This Article also suggests discouraging prosecutors from demanding that defendants waive these procedures by adopting some form of fee shifting, which is also borrowed from civil practice.

INTRODUCTION

Most cases today are resolved by settlement. Studies suggest that over ninety percent of criminal and civil cases settle before trial.¹ This high rate of settlement is necessary, it is often said, to avoid overwhelming the judicial system.²

¹ Carrie Menkel-Meadow, *For and Against Settlement: Uses and Abuses of the Mandatory Settlement Conference*, 33 UCLA L. REV. 485, 502 (1985); see also David A. Grenardo, *Making Civility Mandatory: Moving from Aspired to Required*, 11 CARDOZO PUB. L. POL'Y & ETHICS J. 239, 275 (2013); Murat C. Mungan & Jonathan Klick, *Identifying Criminals' Risk Preferences*, 91 IND. L.J. 791, 816 (2016).

² *Blackledge v. Allison*, 431 U.S. 63, 71 (1977) (noting that "the guilty plea and the often concomitant plea bargain are important components of this country's criminal justice system" because they "conserve vital and scarce resources"); Stephen Breyer, *Tribute to the Honorable Jack Weinstein*, 97 COLUM. L. REV. 1947, 1949 (1997) (noting the need "to secure

Although settlements are the norm in both the criminal and civil systems, the two systems facilitate settlements in extremely different ways. The criminal system promotes settlements by empowering prosecutors to make the price of going to trial and risking conviction intolerably high for defendants.³ Multiple statutes create different crimes for similar misconduct, and the prosecutor has the power to pick which charges to bring against a defendant.⁴ Moreover, the sentences prescribed for defendants who are convicted after trial are extremely high. These high penalties are, in some instances, legislatively designed to impose the appropriate punishment only when discounted for guilty pleas. Accordingly, a prosecutor seeking to secure a guilty plea may exert significant pressure on a defendant to enter the plea by charging the defendant with an array of crimes with high sentences, and then offering to reduce or dismiss various charges in exchange for a defendant waiving her right to a trial and all of the procedural protections associated with that trial. These advantages give prosecutors the ability virtually to force defendants to enter into plea bargains.

The civil system facilitates settlement in a very different way.⁵ It does not seek to induce settlements by giving the plaintiff the power to recover disproportionate damages upon a jury verdict. With few exceptions, plaintiffs may recover only compensation for their harms. Instead of handing one side a bludgeon, the civil system encourages settlement through various procedures. Some of these procedures, such as rules requiring alternative dispute resolution,

settlements” in civil cases because “the number of claims threatens to overwhelm the judicial system”).

There is significant literature criticizing the move toward settlements in both the criminal and civil systems. *See generally* Albert W. Alschuler, *Implementing the Criminal Defendant's Right to Trial: Alternatives to the Plea Bargaining System*, 50 U. CHI. L. REV. 931 (1983) (criticizing plea bargaining); Owen Fiss, *Against Settlement*, 93 YALE L.J. 1073 (1984) (criticizing civil settlements); Stephen J. Schulhofer, *Plea Bargaining as Disaster*, 101 YALE L.J. 1979 (1992) (criticizing plea bargaining). We do not take up the question of whether settlements are desirable here.

³ *See, e.g.*, Susan R. Klein, *Enhancing the Judicial Role in Criminal Plea and Sentence Bargaining*, 84 TEX. L. REV. 2023, 2037-38 (2006) (describing the “enormous power of federal prosecutors to persuade suspects to accept guilty pleas”); Ronald Wright & Marc Miller, *Honesty and Opacity in Charge Bargains*, 55 STAN. L. REV. 1409, 1415 (2003) (hypothesizing that the large proportion of guilty pleas may be the result of “prosecutorial domination”).

⁴ *See, e.g.*, Gerard E. Lynch, *Our Administrative System of Criminal Justice*, 66 FORDHAM L. REV. 2117, 2136-37 (1998); William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 512-19 (2001).

⁵ In this Article, we limit our discussion to civil suits for damages. Those civil suits are most analogous to criminal cases insofar as damages can be quantified like criminal sentences and both criminal cases and damages cases entitle the parties to a jury. *See* U.S. CONST. amend. VII (recognizing right to jury for damages cases); Note, *The Right to Jury Trial Under Merged Procedures*, 65 HARV. L. REV. 453, 454 (1952) (noting that most states hold jury trials for damages actions).

directly encourage settlement. Others, such as motions for summary judgment and pretrial conferences, facilitate settlement more indirectly. They do so in at least four ways. First, they improve the parties' access to information about their adversaries' case to allow for more informed bargaining. Second, they provide opportunities for the judge or another neutral arbiter to preview her view of the merits to help debias the parties' views of their case. Third, they increase the costs of litigation such that avoiding further procedure saves money for both sides and creates a bargaining range. Fourth, they create moments in which attorneys from both sides simultaneously focus on the case. In addition to facilitating settlements, these procedures help avoid trials by screening out meritless cases, thereby alleviating pressure on defendants to settle the "wrong" cases.

The criminal system does not have similar procedures. Most jurisdictions provide no procedures, such as arbitration or mediation, to encourage or facilitate plea bargaining.⁶ To the contrary, many jurisdictions, including the federal system, bar judicial involvement during plea negotiations.⁷ Nor do criminal systems generally provide for broad exchanges of information or have procedures, such as summary judgment, that help to debias the parties and force them to assess the strength of their case. The criminal system also lacks effective mechanisms to screen out meritless cases prior to trial.

These deficiencies make the criminal system inferior to the civil system in the way that it produces settlements. For one thing, the criminal system fails to facilitate informed settlements. For another, the criminal system regularly forces defendants to settle meritless cases or proceed to trial and risk substantially greater sentences. Rather than facilitating settlements based on the crimes defendants committed and the strength of the evidence against them, the criminal system essentially allows prosecutors to choose the terms of settlement.⁸ Because prosecutors have so much leverage, defendants often find themselves unable to turn down even poor settlement terms and proceed to trial. As a result, the criminal system does not produce optimal outcomes.

The disadvantages that criminal defendants, compared to civil defendants, face at settlement are striking. If a criminal defendant and a civil defendant were to proceed to trial, then the criminal defendant would be far better off than a civil

⁶ Through a combination of rules and informal practices, some state systems have been experimenting to varying degrees with judicial or mediator involvement in the plea bargaining process. See Nancy J. King & Ronald F. Wright, *The Invisible Revolution in Plea Bargaining: Managerial Judging and Judicial Participation in Negotiations*, 95 TEX. L. REV. 325, 337-56 (2016).

⁷ See, e.g., FED. R. CRIM. P. 11(c)(1); see also Rishi Raj Batra, *Judicial Participation in Plea Bargaining: A Dispute Resolution Perspective*, 76 OHIO ST. L.J. 565, 572-79 (2015) (surveying each state's approach).

⁸ See Lynch, *supra* note 4, at 2123, 2135 (describing a prosecutor as a "judge in her own case").

defendant during the trial. She would be entitled to more procedural protections,⁹ and her opponent would have to satisfy a higher burden of proof—proof beyond a reasonable doubt, rather than a preponderance of the evidence.¹⁰ But the opposite is true before trial. Civil defendants have the advantage over criminal defendants in settlement negotiations because they can meaningfully challenge whether the law reaches the conduct alleged, they have access to information about the other parties' evidence, and they can get judges to terminate cases without trial where there is insufficient proof of the plaintiffs' allegations.

Consequently, because most cases settle instead of going to trial, the average criminal defendant finds herself worse off than the average civil defendant. An individual who is accused of a crime and risks prison time is less able to defend herself in our system of settlements than an individual who is accused of a tort and risks having to write a check. This discrepancy is unnecessary and undesirable. The criminal system should be more like the civil system in the way that it induces settlements. Prosecutors should have less leverage in plea negotiations, and the criminal system should instead encourage settlements by adopting procedures from the civil system. Those procedures would make settlements less the product of coercion and more the result of informed, voluntary bargaining between the parties.

Criticizing the manner in which the criminal system obtains settlements is hardly new territory. There is substantial literature condemning plea bargaining.¹¹ Our goal here is not to rehash the arguments from that literature. Rather, we aim to provide a comparative account of how settlement is facilitated in the criminal and civil systems. That account, we believe, allows us to identify a number of features from the civil system that the criminal system could borrow or imitate.

Of course, others have suggested changing one or more aspects of the criminal system in ways that might make the system look more like the civil system.¹² For example, a number of commenters have suggested altering criminal

⁹ The Constitution provides various trial-related protections to criminal defendants, including the right to counsel, the right to confront witnesses, and the right to a speedy and public trial. U.S. CONST. amend. VI.

¹⁰ See *In re Winship*, 397 U.S. 358, 363 (1970).

¹¹ See generally Albert W. Alschuler, *The Changing Plea Bargaining Debate*, 69 CALIF. L. REV. 652 (1981); Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2463 (2004); Schulhofer, *supra* note 2; William J. Stuntz, *Plea Bargaining and Criminal Law's Disappearing Shadow*, 117 HARV. L. REV. 2548 (2004); Ronald F. Wright, *Trial Distortion and the End of Innocence in Federal Criminal Justice*, 154 U. PA. L. REV. 79 (2005).

¹² E.g., James M. Burnham, *Why Don't Courts Dismiss Indictments?*, 18 GREEN BAG 2D 347, 348-49 (2015); Carrie Leonetti, *When the Emperor Has No Clothes: A Proposal for Defensive Summary Judgment in Criminal Cases*, 84 S. CAL. L. REV. 661, 684-85 (2011); John H. Wigmore, *Some Evidence Statutes That Illinois Ought to Have*, 1 ILL. L. REV. 9, 10-11 (1906); Note, *The Preliminary Hearing in California: Adaptive Procedures in a Plea Bargain System of Criminal Justice*, 28 STAN. L. REV. 1207, 1233-45 (1976).

discovery rules to more resemble those of civil discovery.¹³ Our contribution is more conceptual and holistic.¹⁴ By comparing the entire process of negotiated resolution in the criminal and civil systems, we seek to illuminate the dramatically different paths the two systems have taken. We propose fundamental systemic changes to the criminal system that would mimic not only specific features of the civil system, but also the broader pretrial process.

Viewing settlement in these two systems more conceptually can, we believe, help reframe the discussion that has taken place around various specific efforts to reform plea bargaining. Focusing on one specific plea bargaining reform, such as discovery, could ultimately prove successful. But discussions that focus on a particular criminal justice reform are likely to overlook the fact that, while the civil system has greatly improved the ability of defendants to obtain informed and balanced settlements,¹⁵ the criminal system has made almost no progress in this regard. If the criminal system is going to continue as it is now—as a system of pleas rather than as a system of trials—then the fact that the system has not been designed to produce informed and balanced plea bargains is of surpassing importance.

This Article proceeds in three parts. Part I explains how the criminal system facilitates pleas by creating a power disparity between the parties. Part II explains how the civil system facilitates and encourages settlement through procedures. For simplicity, both parts focus predominantly on the federal system because most states generally follow federal procedures. Also, as we note in Part III, some states have been more receptive to adopting civil system procedures in their criminal systems. Part III considers whether and how the criminal system could borrow from the civil system.

This Article identifies four settlement-facilitating procedures from the civil system that the criminal system could and should adopt. First, the criminal

¹³ E.g., Klein, *supra* note 3, at 2028-29; Mary Prosser, *Reforming Criminal Discovery: Why Old Objections Must Yield to New Realities*, 2006 WIS. L. REV. 541, 600-13 (2006).

¹⁴ Only one article has taken a similar comparative and holistic approach. See generally David A. Sklansky & Stephen C. Yeazell, *Comparative Law Without Leaving Home: What Civil Procedure Can Teach Criminal Procedure, and Vice Versa*, 94 GEO. L.J. 683 (2005). That article draws a number of contrasts between the criminal and civil systems, and thus its treatment of plea bargaining is necessarily limited. See *id.* at 696-705 (explaining that both systems resolve the vast majority of cases through settlement, but that the processes are very different because the civil system facilitates private agreement between the parties, whereas the criminal system requires a judge to approve of deals between the lawyers).

¹⁵ Some have argued that civil defendants now have too much pretrial leverage because of the way the Supreme Court has interpreted federal civil procedure. See, e.g., Robert G. Bone, Twombly, *Pleading Rules, and the Regulation of Court Access*, 94 IOWA L. REV. 873, 889 (2009) (“The major impact of *Twombly*—and I believe the reason critics are so concerned—is not so much what it says about the pleading standard, but rather what it says about discovery costs and settlement leverage . . .”). We take no position on this critique, but it suggests that perhaps both systems should move toward each other. For present purposes, we are content to level up the criminal system.

system should heighten its pleading standards to meet the plausibility pleading standard in federal civil procedure and create a meaningful motion to dismiss for failure to charge a crime. As in the civil system, the motion to dismiss would allow the defendant to challenge the validity of the other side's legal theory at an early stage of the process, and it would provide an escape hatch from settlement pressure for legally innocent defendants. That motion would begin to help the parties see their case in the same light, weed out meritless cases, and allow judges a greater opportunity to develop the criminal law.¹⁶

Second, the criminal system should allow defendants (and to some extent prosecutors) to engage in more robust discovery, much like the civil system. Defendants should not have to decide whether to plead guilty without an opportunity to view the government's evidence against them and to meaningfully assess their likelihood of prevailing at trial.

Third, the criminal system should allow defendants to move for summary judgment. Summary judgment would create an opportunity for a factually innocent defendant to ask a court to remove the settlement pressure. The prosecutor would then need to provide evidence showing that a reasonable jury could convict the defendant lest one or all of the charges be thrown out of court.¹⁷

Fourth, the criminal system should allow judges and mediators to help the parties reach plea agreements by offering a neutral view of the case's merits and helping the parties reach common ground.

These four procedures all share the virtues of facilitating information exchanges, focusing party attention on the salient issues, and providing an opportunity for a neutral arbiter to express her views of the case to help debias party assumptions. Some of these procedures—particularly discovery and summary judgment—would add costs. But as the civil system demonstrates, these additional costs themselves have the virtue of encouraging settlement. Trying to avoid these costs pushes *both* parties to want to settle. Moreover, to the extent these costs are too high, the procedures may be modified to limit their expense.

As for feasibility, several of these procedures have been adopted, at least in some form, by one or more states. Several states give judges a role in facilitating plea negotiations. Several states have reformed their discovery systems, providing information to defendants as a matter of course and, in one state, providing for depositions. And several states have adopted what amounts to a summary judgment procedure in certain types of criminal cases.

¹⁶ Developing the criminal law has additional benefits, such as better enabling individuals to conform their conduct to the law and avoiding arbitrary and discriminatory enforcement. These generally desirable goals animate the void-for-vagueness doctrine and the rule of lenity. *See, e.g.*, *Roberts v. U.S. Jaycees*, 468 U.S. 609, 629 (1984); *United States v. Bass*, 404 U.S. 336, 347-48 (1971); *McBoyle v. United States*, 283 U.S. 25, 27 (1931).

¹⁷ As explained more fully below, it may also be appropriate to allow prosecutors to move for summary judgment on certain affirmative defenses. *See infra* text accompanying notes 237-42.

Adopting the procedures we suggest could change the substance of many criminal settlements by tending to make settlements the product of more informed negotiations. But instituting these procedures would not correct all of the deficiencies associated with plea bargaining. Realizing the benefits of these procedures requires that defendants have counsel capable of using these procedures effectively. Moreover, because prosecutors could exercise their leverage to demand that defendants waive these procedures as part of any plea deal, reducing prosecutors' leverage is also necessary to capture the benefits of these procedures. Part III discusses some ways of addressing these issues.

I. PLEA BARGAINING IN THE CRIMINAL SYSTEM

Most disputes in the criminal system settle rather than proceed to trial.¹⁸ Plea bargains are the most common type of criminal settlement.¹⁹ As with other settlements, plea bargains theoretically involve a give and take that benefits both the prosecutor and the defendant.²⁰ A defendant agrees to plead guilty to one or more criminal charges in return for some sort of concession by the prosecutor.²¹ A prosecutor might agree to reduce the charge, a so-called "charge bargain,"²²

¹⁸ See Mungan & Klick, *supra* note 1, at 816 (reporting that over ninety percent of criminal cases settle).

¹⁹ Rachel E. Barkow, *Institutional Design and the Policing of Prosecutors: Lessons from Administrative Law*, 61 STAN. L. REV. 869, 876-77 (2009) ("[A] prosecutor's decision about what charges to bring and what plea to accept amounts to a final adjudication in most criminal cases."). Although they are the most common form of settlement in criminal cases, plea bargains are not the only type of criminal settlement. Federal prosecutors regularly use non-prosecution agreements and deferred prosecution agreements to settle cases against corporate defendants. These are agreements between the government and a defendant over certain concessions, such as fines and future monitoring, in exchange for not prosecuting or deferring prosecution to determine whether the conditions are in fact satisfied over time. See Cindy R. Alexander & Mark A. Cohen, *The Evolution of Corporate Criminal Settlements: An Empirical Perspective on Non-Prosecution, Deferred Prosecution, and Plea Agreements*, 52 AM. CRIM. L. REV. 537, 545 (2015) (explaining differences between non-prosecution agreements and deferred prosecution agreements). Many jurisdictions have institutionalized non-plea settlements in the form of diversion programs, such as programs to secure treatment and avoid conviction of low-level drug offenders. See, e.g., *Alabama v. Shelton*, 535 U.S. 654, 671 (2002) (noting the adoption of these programs in at least twenty-three states).

²⁰ E.g., *Bordenkircher v. Hayes*, 434 U.S. 357, 362-63 (1978) (describing "the give-and-take negotiation common in plea bargaining between the prosecution and defense, which arguably possess relatively equal bargaining power" (quoting *Parker v. North Carolina*, 397 U.S. 790, 809 (1970) (Brennan, J., dissenting))).

²¹ See *Santobello v. New York*, 404 U.S. 257, 260 (1971) (defining "plea bargaining" as the "disposition of criminal charges by agreement between the prosecutor and the accused").

²² More specifically, in a charge bargain, the defendant pleads guilty in return for the prosecutor agreeing to (a) drop one or more charges, (b) allow the defendant to plead guilty to a crime that is less serious than the one charged (e.g., manslaughter rather than murder), or (c) forgo bringing other additional or more serious charges in return for a plea to the present

or she might agree to concessions about the sentence in a “sentence bargain.”²³ In exchange, the prosecutor gains the benefit of a conviction without spending resources on a trial.

In theory, a guilty plea should result in the defendant receiving less than the punishment the legislature thought was appropriate for the offense she committed. Instead of receiving the full, appropriate sentence, the defendant would receive her expected sentence: that punishment discounted by the chance of acquittal. For example, if the legislature believed that a particular crime should carry a four-year sentence, a defendant who has a seventy-five percent chance of conviction for that crime should optimally receive a plea bargain that results in a sentence of three years.²⁴ This is not simply the bargain that a rational defendant would accept,²⁵ but it also arguably represents a fair outcome—one that allows the parties to avoid the uncertainty of trial, while at the same time reflecting both the seriousness of the defendant’s crime and the strength (or weakness) of the evidence against her.²⁶

Although this description of plea bargaining might have been accurate at some point, it is not today. Plea bargaining no longer involves a process of give and take designed to achieve optimal outcomes.²⁷ Instead, the criminal system

charges. See Ronald Wright & Marc Miller, *The Screening/Bargaining Tradeoff*, 55 STAN. L. REV. 29, 32 n.10 (2002).

²³ In a sentence bargain, the defendant pleads guilty as charged in return for the prosecutor (a) asking the judge to impose a particular sentence, (b) agreeing not to ask for an aggravated sentence, or (c) agreeing not to oppose the defendant’s request for a more lenient sentence. See Albert W. Alschuler, *The Prosecutor’s Role in Plea Bargaining*, 36 U. CHI. L. REV. 50, 52 (1968); Bibas, *supra* note 11, at 2500.

²⁴ The potential length of sentence and the likelihood of conviction are not the only variables affecting the analysis. The cost of litigation is also relevant. See William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 YALE L.J. 1, 46 n.159 (1997). For example, a prosecutor may be willing to accept a plea for less than the expected sentence to avoid the high cost of litigation. Indigent defendants do not bear their own costs, however, and from their perspective, the desirability of a plea turns on the length of the potential sentence and the likelihood of conviction.

²⁵ That is to say, the rational actor model tells us the defendant would want to accept this bargain because it represents the expected punishment—the “product of the probability of conviction and the anticipated sentence upon conviction at trial.” Jennifer F. Reinganum, *Plea Bargaining and Prosecutorial Discretion*, 78 AM. ECON. REV. 713, 714 (1988). For more on plea bargaining and the rational actor model, see Rebecca Hollander-Blumoff, *Social Psychology, Information Processing, and Plea Bargaining*, 91 MARQ. L. REV. 163, 165 (2007) (describing the “rational actor paradigm in plea bargaining” and explaining why it “may not capture the reality of the negotiation between prosecutor and defense counsel”).

²⁶ See Bibas, *supra* note 11, at 2467 (stating that a plea bargain which took place in “the shadows of trials” would be shaped “by the strength of the evidence and the expected punishment after trial”).

²⁷ The term “optimal” simply means “best,” and so whether one believes a particular outcome is optimal will depend on what one is trying to optimize. We are using the term “optimal” here to refer to the outcome that reflects both the seriousness of the defendant’s

encourages plea bargains by giving prosecutors overwhelming leverage to obtain guilty pleas from defendants. It does so in two ways. First, prosecutors may bring multiple charges under overlapping criminal statutes; and second, many statutes carry severe sentencing consequences that exceed the punishment that even legislatures think is appropriate for defendants who are convicted. These features empower prosecutors to make the consequences of being convicted after trial intolerable for defendants. To avoid those consequences, defendants face intense pressure to accept the plea bargains that prosecutors offer. As a result, prosecutors need not offer optimal bargains. Instead, prosecutors can, in many cases, offer a deal imposing the punishment they think is appropriate, without any discounts to defendants based on their likelihood of conviction.²⁸

Exacerbating defendants' predicament is that the criminal system provides defendants with little access to information to help them estimate during the plea bargaining process their chances of conviction. Most notably, defendants are largely unable to demand evidence relating to the case through discovery, and they do not have any meaningful opportunity to test the legal validity of the prosecutors' claims. Consequently, defendants have little to no information that would enable them to make informed choices about whether to plead guilty or proceed to trial.

These aspects of the criminal system induce not only the guilty to bargain with prosecutors. The lack of procedures regulating plea negotiations means that the criminal system cannot effectively sort the innocent from the guilty during those negotiations. And the extremely high punishments imposed after conviction sometimes lead innocent defendants to plead guilty to avoid the risk of receiving those high sentences.

crime and the strength of the evidence against her. That is to say, the optimal outcome is the outcome that would occur if plea bargains took place in the shadow of trials, *see id.* at 2467, and if the punishments imposed at trial were calibrated to impose the amount of punishment that legislatures and voters deemed appropriate for the crime, rather than a higher punishment meant to deter defendants from proceeding to trial.

We focus in this section on the current state of plea bargaining in the federal courts. The Federal Rules of Criminal Procedure have been quite influential in shaping criminal systems across the country. *See* WAYNE R. LAFAYE ET AL., CRIMINAL PROCEDURE 21 (5th ed. 2009) ("Roughly half of the states have court rules of criminal procedure or statutory codes of criminal procedure that borrow heavily from the Federal Rules [of Criminal Procedure]."). But as we note *infra* in Section III.A, some states have begun to experiment with different settlement procedures.

²⁸ *See* Stuntz, *supra* note 11, at 2549.

A. *Prosecutorial Leverage*

Prosecutors have massive leverage to force defendants to plead guilty rather than proceed to trial.²⁹ This leverage is a product of harsh penalties and overlapping criminal codes. Harsh penalties allow prosecutors to offer sentencing reductions in return for a plea, and overlapping criminal codes allow prosecutors to either drop charges or threaten to bring more serious charges to encourage guilty pleas. Prosecutors have nearly unfettered discretion over charging and bargaining decisions. Defendants have almost no procedural protections during the plea negotiation process, and prevailing law appears to allow prosecutors to demand anything—including the waiver of those few protections defendants do have—in return for a plea bargain. Prosecutors also have very little to lose in a plea negotiation while defendants have much to lose, which further exacerbates the imbalance of bargaining power.

Harsh punishments give prosecutors significant leverage in plea negotiations. Prosecutors are often able to ensure that a defendant will receive a less harsh punishment if she pleads guilty. And the harsher the punishment will be after conviction at trial, the more leverage a prosecutor will have to induce a guilty plea. Of course, that a crime carries a severe punishment does not mean that the criminal statute unduly pressures a defendant to plead guilty. The severe penalty may reflect the legislature's determination that a high punishment for a particular crime is appropriate to promote deterrence or achieve just deserts.

Many criminal laws today, however, prescribe punishments that exceed what even the legislature thinks is necessary to achieve these goals.³⁰ Legislatures have increased the punishment associated with conviction at trial so that prosecutors have leverage to induce guilty pleas.³¹ Indeed, legislatures often enact criminal statutes based on an explicit assumption that the parties will plea bargain. For example, in the recent debates over whether to lessen mandatory minimum sentences for drug offenders, reform opponents argued that it was necessary to maintain current penalties, not because they represented appropriate punishments, but rather so that prosecutors could use those penalties

²⁹ See Susan R. Klein, *Monitoring the Plea Process*, 51 DUQ. L. REV. 559, 577 (2013) (noting that in plea bargaining “the parties do not have nearly equal bargaining power”). For more on how prosecutors’ leverage leads to more guilty pleas, see, e.g., Marc L. Miller, *Domination & Dissatisfaction: Prosecutors as Sentencers*, 56 STAN. L. REV. 1211, 1252-59 (2004); James Vorenberg, *Decent Restraint of Prosecutorial Power*, 94 HARV. L. REV. 1521, 1532-35 (1981); Wright, *supra* note 11, at 129-36.

³⁰ See, e.g., *United States v. Kupa*, 976 F. Supp. 2d 417, 420 (E.D.N.Y. 2013) (“To coerce guilty pleas . . . prosecutors routinely threaten ultra-harsh, enhanced mandatory sentences that *no one*—not even the prosecutors themselves—thinks are appropriate.”); Stuntz, *supra* note 11, at 2554 (hypothesizing that in many cases “the legally authorized sentence is harsher than the sentence prosecutors want to impose”).

³¹ See Gerard E. Lynch, *Screening Versus Plea Bargaining: Exactly What Are We Trading Off?*, 55 STAN. L. REV. 1399, 1401-02 (2003).

as leverage to obtain guilty pleas.³² This is hardly an isolated occurrence. As Professor Rachel Barkow has noted, “Representatives from the Department of Justice and the various United States Attorneys’ Offices often argue before Congress that legislation with inflated or mandatory punishments should be passed or retained because those laws give prosecutors the leverage they need to exact pleas”³³ Consequently, many statutes are calibrated so that the appropriate sentence is imposed on defendants who receive a discount for pleading guilty rather than those who proceed to trial.³⁴ Thus, the severity of the penalty is designed not just to punish the defendant for committing her crime nor to deter others from committing similar crimes but also to deter individuals from exercising their right to a trial.

Prosecutors have broad discretion in charging defendants.³⁵ They can offer to file charges for a lesser offense to induce a plea. They also have the power to offer defendants reduced sentences for guilty pleas. For example, they can move for a reduction contemplated under the sentencing laws, like the reduction in the Federal Sentencing Guidelines for providing substantial assistance to the government.³⁶ They can offer to reduce a defendant’s sentence by agreeing not

³² Senator Chuck Grassley opposed legislation that would have reduced mandatory minimum sentences, in part because prosecutors were not seeking those penalties in all cases. He noted that:

[J]ust under half of all drug courier offenders were subject to mandatory minimum sentences, but under 10 percent were subject to mandatory minimum sentences at the time of their sentencing. There are two main reasons so few of these offenders are actually sentenced to a mandatory minimum. The first is they may fall within the safety valve Congress has enacted to prevent mandatory minimum sentences from applying to low-level, first-time drug offenders or, second, they may have provided substantial assistance to prosecutors in fingering high-level offenders in a drug conspiracy. That is an intended goal of current Federal sentencing policy, to put pressure on defendants to cooperate in exchange for a lower sentence so evidence against more responsible criminals can be attained. As a result, even for drug couriers the average sentence is 39 months. That seems to be an appropriate level.

161 CONG. REC. S955-02, S963 (daily ed. Feb. 12, 2015) [hereinafter Grassley statement] (statement of Sen. Grassley).

³³ Barkow, *supra* note 19, at 880; *see also* Rachel E. Barkow, *Administering Crime*, 52 UCLA L. REV. 715, 728 n.25 (2005) (collecting examples of prosecutors “lobby[ing] for harsher sentences to enhance their position during plea negotiations”).

³⁴ *See* *Lafler v. Cooper*, 566 U.S. 156, 169-70 (2012); Grassley statement, *supra* note 32 (noting that the average sentence being served by drug couriers “seems to be the appropriate level” rather than the higher, statutory mandatory minimum sentence which also applies to drug couriers).

³⁵ *Ball v. United States*, 470 U.S. 856, 859 (1985) (acknowledging “the Government’s broad discretion to conduct criminal prosecutions, including its power to select the charges to be brought in a particular case”).

³⁶ *See* U.S. SENTENCING GUIDELINES MANUAL § 3E1.1 (U.S. SENTENCING COMM’N 2016) (reducing defendants’ sentences for “acceptance of responsibility,” but providing for an additional reduction only “upon motion of the government”); *id.* § 5K1.1 (permitting judges

to alert the judge to evidence that would increase a defendant's sentence.³⁷ Or they can simply enter into a plea agreement that requires a particular sentence or sentencing range in return for a guilty plea.³⁸

This discretion is particularly powerful because criminal codes often include multiple, overlapping statutes criminalizing similar conduct.³⁹ The penalties associated with these overlapping crimes often differ, with some including mandatory minimum sentences and higher potential maximum sentences.⁴⁰

These overlapping laws expand prosecutors' charging discretion.⁴¹ The more statutes that exist, the more choices that a prosecutor has; she can select charges based on the statutory maximum punishment, based on whether there is a mandatory minimum punishment, or based on the collateral consequences triggered by the different statutes.

Overlapping statutes also allow prosecutors to bring multiple charges for the same conduct. This so-called "stacking" of charges can increase the defendant's punishment exposure, depending on the jurisdiction's rules about running sentences consecutively or concurrently.⁴²

Stacked charges also increase the risk that a defendant will be convicted. Every time a prosecutor takes a case to trial, she runs the risk of losing. To the extent that overlapping statutes contain slightly different elements, the prosecutor can reduce the risk that the defendant will be acquitted by bringing more charges.⁴³ Even if the jury decides the prosecutor failed to prove an element of one charge, that element may not be required in each of the stacked

to reduce a defendant's sentence below the Guidelines range "[u]pon motion of the government stating that the defendant has provided substantial assistance in the investigation or prosecution of another person who has committed an offense").

³⁷ See Stuntz, *supra* note 11, at 2559-60; Wright, *supra* note 11, at 148.

³⁸ See FED. R. CRIM. P. 11(c)(1)(C) (contemplating a plea agreement with a particular sentence or sentencing range that "binds the court once the court accepts the plea agreement").

³⁹ See Albert W. Alschuler, *The Trial Judge's Role in Plea Bargaining, Part I*, 76 COLUM. L. REV. 1059, 1145-46 (1976) (describing the New York Penal Code and recounting the views of a government official charged with revising the code); Julie O'Sullivan, *The Federal Criminal "Code" is a Disgrace: Obstruction as a Case Study*, 96 J. CRIM. L. & CRIMINOLOGY 643, 648-49 (2006) (citing evidence of continued growth in the number of overlapping federal crimes).

⁴⁰ See, e.g., Carissa Byrne Hessick, *Vagueness Principles*, 48 ARIZ. ST. L.J. 1137, 1147 (2016) (gathering examples of overlapping federal statutes).

⁴¹ See O'Sullivan, *supra* note 39, at 646 (recognizing "prosecutors' vast discretion in selecting among elastic and redundant code provisions"); Stuntz, *supra* note 11, at 2549, 2560-62 (analogizing modern criminal codes to a menu off of which a prosecutor may order).

⁴² The Double Jeopardy Clause allows multiple convictions and punishments for a single criminal act if each statute of conviction has at least one element that the other statutes do not. See *Blockberger v. United States*, 284 U.S. 299, 304 (1932). Consequently, "double jeopardy doctrine generally permits the government to charge all these violations rather than selecting among them." Stuntz, *supra* note 4, at 507.

⁴³ See Stuntz, *supra* note 4, at 519-20.

charges, and so the defendant may still be found guilty of at least one crime. Of course, a prosecutor would certainly care, for example if a jury acquitted a defendant of murder but convicted on negligent homicide. But many stacked charges will carry similarly harsh penalties, making a conviction on one charge as good as another.

Overlapping criminal statutes with differing punishments give prosecutors various tools in plea negotiations. Prosecutors may offer to drop stacked charges in exchange for a guilty plea or to accept a guilty plea to a lesser charge, or they may threaten to re-indict on more serious charges to induce a plea. Even if the chances of conviction on the more severe charge are low, the potential penalty for that offense may be high enough to make a plea worthwhile.

For example, suppose a legislature believes stealing should carry a five-year sentence. It enacts two criminal statutes: statute A carries a five-year sentence, and statute B carries a thirty-year sentence that prosecutors may use to induce pleas. A prosecutor charges Ann under statute A and offers a five-year deal. If Ann has a twenty percent chance of acquittal, Ann should refuse the deal, because her expected punishment under statute A is only four years. But the prosecutor can force Ann to accept the plea by threatening to re-indict her under statute B if she does not plead guilty. Even if there is only a twenty percent chance that Ann would be convicted under statute B, because statute B carries a thirty-year sentence, she should accept the original plea offer.⁴⁴

This example is not fanciful. Prosecutors routinely use the threat of indictment on more serious charges with a mandatory minimum in order to secure guilty pleas to lesser crimes,⁴⁵ and the Supreme Court held in *Bordenkircher v. Hayes* that the practice is constitutional.⁴⁶ Indeed, one former federal judge lamented that prosecutors charge mandatory minimums under the drug laws based only on whether defendants plead guilty rather than whether they deserve that sentence for their crimes.⁴⁷

Although they are the most common, high sentences and overlapping statutes are not the only bases for prosecutors' advantage in plea negotiations. Prosecutors may also use the threat of other, non-criminal consequences to obtain a plea. For example, a prosecutor may offer a plea bargain that avoids

⁴⁴ That is because Ann faces a twenty percent chance of conviction, making her expected punishment under statute B six years. Loss aversion biases make Ann even more likely to accept this bargain. See Bibas, *supra* note 11, at 2507-12.

⁴⁵ See, e.g., *United States v. Kupa*, 976 F. Supp. 2d 417, 419-20 (E.D.N.Y. 2013) (discussing federal government's consistent use of 21 U.S.C. § 851 to force guilty pleas); U.S. SENTENCING COMM'N, FEDERAL CHILD PORNOGRAPHY OFFENSES 144-67 (2012) (finding that federal prosecutors are employing mandatory minimum sentences in child pornography cases largely—if not entirely—to force guilty pleas).

⁴⁶ 434 U.S. 357, 358-59 (1978) (upholding re-indictment for harsher crime after defendant refused to plead to lesser charge).

⁴⁷ See *Kupa*, 976 F. Supp. 2d at 419-20.

immigration consequences for non-citizens.⁴⁸ Or a prosecutor may threaten to pursue forfeiture or asset seizure if a defendant refuses to plead.⁴⁹ A prosecutor might also threaten to bring charges against a friend or family member to induce a plea.⁵⁰ Moreover, prosecutors may further disadvantage defendants by successfully requesting that they be denied bail, thus leaving the defendants with little ability to prepare their cases, more likely to be convicted, and less willing to demand trials than those who are free before trial.⁵¹

Prosecutors face little external oversight when engaging in these charging and sentencing tactics.⁵² Unless a defendant can show the prosecutor's choices in her case were motivated by race or another protected classification, the prosecutor's charging decisions are insulated from review.⁵³

Nor do defendants have significant procedural rights to protect them in the negotiation process. The Constitution and other laws provide a number of rights for criminal defendants, such as the rights to confront the prosecution's witnesses or to call their own witnesses,⁵⁴ to a determination of guilt by a jury,⁵⁵

⁴⁸ See *Padilla v. Kentucky*, 559 U.S. 356, 366-69 (2010).

⁴⁹ This leverage appears to be particularly effective in cases involving organizational defendants. See, e.g., Robert G. Morvillo & Barry A. Bohrer, *Checking the Balance: Prosecutorial Power in an Age of Expansive Legislation*, 32 AM. CRIM. L. REV. 137, 141 (1995); Vincent Ostrom, *Courts and Collectivities*, 1990 BYU L. REV. 857, 869.

⁵⁰ *United States v. Keeter*, 130 F.3d 297, 300 (7th Cir. 1997).

⁵¹ Paul Heaton, Sandra Mayson & Megan Stevenson, *The Downstream Consequences of Misdemeanor Pretrial Detention*, 69 STAN. L. REV. 711, 747, 771 (2017) (reporting that misdemeanor defendants who are detained pretrial are more likely to be convicted and more likely to receive sentences of jail time; seventeen percent of the detained misdemeanor defendants "who pleaded guilty would not have been convicted at all had they been released pretrial"; and thus detained defendants "have essentially accumulated credits toward a final sentence of jail as a result of their detention and are therefore more likely to accede to and receive sentences of imprisonment"); Ric Simmons, *Private Criminal Justice*, 42 WAKE FOREST L. REV. 911, 984-85 (2007) (reporting that being incarcerated before trial increases the likelihood of conviction by thirty-five percent).

⁵² See, e.g., *United States v. Batchelder*, 442 U.S. 114, 123-24 (1979) ("[W]hen an act violates more than one criminal statute, the Government may prosecute under either so long as it does not discriminate against any class of defendants. Whether to prosecute and what charge to file or bring before a grand jury are decisions that generally rest in the prosecutor's discretion." (citations omitted)); Barkow, *supra* note 19, at 871 ("[Prosecutors] have the authority to take away liberty, yet they are often the final judges in their own cases."). We refer here to external regulation rather than accountability measures within the prosecutor's office. See Kay L. Levine & Ronald F. Wright, *Prosecution in 3-D*, 102 J. CRIM. L. & CRIMINOLOGY 1119, 1123, 1137, 1147, 1152 (2012) (discussing the impact of organizational structure on prosecutors' behavior).

⁵³ See *Bordenkircher v. Hayes*, 434 U.S. 357, 364-65 (1978); *Oyler v. Boles*, 368 U.S. 448, 456 (1962).

⁵⁴ U.S. CONST. amend. VI.

⁵⁵ *Id.*

and to the evidentiary standard of proof beyond a reasonable doubt.⁵⁶ These rights all act as checks on the prosecutor's ability to obtain convictions. But these rights do not attach until later in the criminal process, after plea negotiations have concluded. At the time of plea negotiations, defendants do not have the benefit of those rights to limit the power of the prosecutor. And because trial penalties are so harsh, defendants cannot meaningfully threaten to invoke their procedural rights at trial in most cases.⁵⁷

The few protections a defendant does enjoy in plea bargaining are not particularly robust. A defendant is entitled to an attorney⁵⁸ and to effective assistance from that attorney during the negotiation process.⁵⁹ But not much is required to satisfy that standard. Defense attorneys must "communicate formal offers from the prosecution to accept a plea on terms and conditions that may be favorable to the accused."⁶⁰ Defense attorneys also must correctly advise their clients of the immigration consequences of a guilty plea.⁶¹ But beyond requiring attorneys to convey information to their clients, courts have signaled that they have little interest in reviewing the sufficiency of counsel's assistance in the plea negotiation process.⁶² And many have argued that defense attorneys, especially appointed ones, are too overworked to provide substantial assistance.⁶³

⁵⁶ *In re Winship*, 397 U.S. 358, 361 (1970) ("The requirement that guilt of a criminal charge be established by proof beyond a reasonable doubt dates at least from our early years as a Nation.").

⁵⁷ Although defendants would have these procedural rights if they were to proceed to trial, they waive these rights when they enter into a guilty plea. Judges who accept guilty pleas must ensure that those pleas are supported by a factual basis and that the defendant's waiver of her right to trial is voluntary and knowing. *See* FED. R. CRIM. P. 11. Some have criticized that review as inadequate. *See* Brandon L. Garrett, *Structural Reform Prosecution*, 93 VA. L. REV. 853, 906 (2007) ("Federal courts are more involved in reviewing plea bargains than charging decisions, but judges still remain highly deferential.").

⁵⁸ *See* *Moore v. Michigan*, 355 U.S. 155, 161-62 (1957).

⁵⁹ *See* *Missouri v. Frye*, 566 U.S. 134, 144 (2012); *Hill v. Lockhart*, 474 U.S. 52, 57 (1985).

⁶⁰ *Frye*, 566 U.S. at 145.

⁶¹ *See* *Padilla v. Kentucky*, 559 U.S. 356, 369 (2010).

⁶² *See, e.g., Frye*, 566 U.S. at 145 ("Bargaining is, by its nature, defined to a substantial degree by personal style. The alternative courses and tactics in negotiation are so individual that it may be neither prudent nor practicable to try to elaborate or define detailed standards for the proper discharge of defense counsel's participation in the process."). *But see* Josh Bowers, *Two Rights to Counsel*, 70 WASH. & LEE L. REV. 1133, 1165 (2013) ("The Court's unmistakable tenor is that the defense attorney is now compelled to bargain aggressively, and the Court is committed to aggressively regulating counsel's efforts.").

⁶³ *See, e.g., Simmons, supra* note 51, at 984 n.302 (stating that court-appointed defense attorneys "are famously overworked" and that their representation of poor clients suffers as a result).

The law also imposes few limits on the content of plea bargains. Courts view the plea negotiation process as a contractual agreement between the parties.⁶⁴ Because there are few limits on what terms may be in a contract, there are few limits on the terms of plea bargains.⁶⁵ Consequently, prosecutors use their leverage to demand that defendants waive not only their right to a trial, but also their rights to various pretrial rights, such as the right to discovery or to seek suppression of evidence.⁶⁶ Prosecutors may even demand that defendants waive their right to effective assistance of counsel in the plea negotiations themselves.⁶⁷

Prosecutors' leverage in plea bargaining is compounded by the fact that prosecutors have much less at stake than defendants.⁶⁸ For the prosecutor, the only thing at stake is whether she secures a conviction—whether she wins or loses. She gains no other benefit from a win nor suffers any other ill consequences from a loss.⁶⁹ For defendants, the stakes are much higher. While a win at trial will mean that she can avoid both a conviction and criminal

⁶⁴ United States v. Bownes, 405 F.3d 634, 637 (7th Cir. 2005); *see also* Wright, *supra* note 11, at 94.

⁶⁵ There are a few differences between ordinary contracts and plea bargains. For example, one cannot agree to be sentenced in excess of the statutory maximum, though one can agree to overpay under an ordinary contract. *See Bownes*, 405 F.3d at 637 (explaining that a defendant can challenge a sentence in excess of the statutory maximum sentence even if the defendant waived her appeal rights in a plea agreement).

⁶⁶ Susan R. Klein, Aleza S. Remis & Donna Lee Elm, *Waiving the Criminal Justice System: An Empirical and Constitutional Analysis*, 52 AM. CRIM. L. REV. 73, 92 (2015) (reporting that “a significant number of prosecutors seek waivers of all statutory and constitutional claims regardless of whether such violations occurred pre-trial, during the entry of a guilty plea, at the sentencing hearing, or thereafter”).

⁶⁷ *See id.* at 88-92 (noting that state and federal prosecutors have begun to request these waivers and examining how courts have treated ineffective assistance of counsel waivers in plea agreements). The Department of Justice recently instructed federal prosecutors not to include broad effective assistance of counsel waivers in their plea agreements. *See* Memorandum from James M. Cole, Deputy Attorney Gen., U.S. Dep't of Justice, to All Fed. Prosecutors, on Department Policy on Waivers of Claims of Ineffective Assistance of Counsel (Oct. 14, 2014), <https://www.justice.gov/file/70111/download> [<https://perma.cc/WLR3-9LFK>]. In giving the instruction, the Department insisted that such waivers are “both legal and ethical.” *Id.*

⁶⁸ *See generally* Daniel Epps, *Adversarial Asymmetry in the Criminal Process*, 91 N.Y.U. L. REV. 762 (2016) (observing that criminal defendants have every incentive to pursue the best outcome—specifically, the least amount of punishment—but prosecutors are, on average, not similarly adversarial).

⁶⁹ By this, we mean only that prosecutors suffer no direct consequences from the judgments in prosecutions. A win or loss can have indirect effects on a prosecutor's reputation or career. *See, e.g.*, Carrie Leonetti, *When the Emperor Has No Clothes III: Personnel Policies and Conflicts of Interest in Prosecutors' Offices*, 22 CORNELL J.L. & PUB. POL'Y 53, 74-82 (2012) (discussing the “career stake” for prosecutors and the incentive to maximize convictions).

punishment, a loss can be devastating. In addition to direct punishment such as imprisonment, criminal convictions often carry significant collateral consequences.⁷⁰ Risk averse defendants who wish to minimize harsh penalties or collateral consequences may be eager to plead guilty to a lesser offense or for a reduced sentence.⁷¹

B. *The Defendant's Information Deficit*

Defendants have to decide whether to plead guilty with little information about their prospects of being convicted at trial. That is because a defendant has limited ability to learn the contours of the prosecutor's case and to test that case before trial.⁷²

Access to information is key to a defendant's decision whether to enter into a plea deal. A defendant should plead guilty if the deal requires her to serve no more than her expected punishment—that is, the punishment she would receive at trial, discounted by the chance of acquittal.⁷³ But making a reasonable assessment of her likelihood of conviction depends on the defendant having information about the government's legal theory and the evidence to prove that theory.

Defendants often do not have access to that information when they enter into plea negotiations. Defendants generally do not have any right to discovery for purposes of plea bargaining.⁷⁴ Although prosecutors have a constitutional duty to disclose exculpatory evidence,⁷⁵ they must do so only before trial, well after

⁷⁰ See, e.g., *Padilla v. Kentucky*, 559 U.S. 356, 369 (2010) (discussing deportation as a potential collateral consequence of conviction).

⁷¹ Competition can ameliorate unequal bargaining power. See Stewart J. Schwab, *Predicting the Future of Employment Law: Reflecting or Refracting Market Forces?*, 76 *IND. L.J.* 29, 47 (2001). But prosecutors do not face competition in their respective jurisdictions. A defendant charged in Alabama cannot go to Louisiana for a better deal.

⁷² See Ion Meyn, *Discovery and Darkness: The Information Deficit in Criminal Disputes*, 79 *BROOK. L. REV.* 1091, 1094-95 (2014).

⁷³ See *supra* note 24 and accompanying text.

⁷⁴ See *United States v. Ruiz*, 536 U.S. 622, 633 (2002); *Weatherford v. Bursey*, 429 U.S. 545, 559 (1977). *Ruiz* and *Weatherford* held that defendants are not entitled to discovery of inculpatory evidence, impeachment evidence, or evidence supporting possible affirmative defenses. The Supreme Court has not addressed whether a defendant is entitled to exculpatory information for plea negotiations. See R. Michael Cassidy, *Plea Bargaining, Discovery, and the Intractable Problem of Impeachment Disclosures*, 64 *VAND. L. REV.* 1429, 1444-45 (2011). Some circuits have held that a defendant has no right to discovery of exculpatory information in the plea bargaining context, see *id.* at 1444 n.67 (collecting cases), while other circuits have held the opposite, see *id.* at 1445 n.68 (collecting cases).

⁷⁵ See *Strickler v. Greene*, 527 U.S. 263, 281-82 (1999) (noting that evidence must be disclosed to the defendant when it is favorable "either because it is exculpatory, or because it is impeaching"); *Brady v. Maryland*, 373 U.S. 83, 87 (1963).

most plea negotiations have concluded.⁷⁶ Defendants also often cannot conduct their own fact investigations before deciding whether to plea because of time limits on plea offers.⁷⁷ Defendants are, therefore, forced to negotiate without information that could be critical to their bargaining position.

Dragging out negotiations until the eve of trial does not substantially improve the prospects for gaining more information. Discovery in criminal cases is limited. Defendants are generally not entitled to depose witnesses before trial.⁷⁸ Nor can they require prosecutors to respond to interrogatories or document requests.⁷⁹ Defendants also cannot force the prosecutor to test potentially exculpatory forensic evidence prior to trial,⁸⁰ or to disclose forensic tests that were inconclusive.⁸¹

The lack of access to evidence often inhibits defendants from forming an accurate, independent assessment of their likelihood of conviction to inform their bargaining positions. Instead, defendants may be forced to rely on the prosecutors' estimates of the likelihood of conviction.⁸² And it is hardly in the

⁷⁶ Miriam H. Baer, *Timing Brady*, 115 COLUM. L. REV. 1, 6 (2015) (noting that *Brady*'s disclosure obligations are triggered after plea bargaining occurs). Further, whether evidence is material and exculpatory is left to the judgment of the prosecutor, who might be biased against disclosure and who might lack sufficient information to judge whether the information is indeed exculpatory or material. See Cassidy, *supra* note 74, at 1439-41.

⁷⁷ Erin Murphy, *The Mismatch Between Twenty-First-Century Forensic Evidence and Our Antiquated Criminal Justice System*, 87 S. CAL. L. REV. 633, 662-63 (2014). Many defendants also face resource constraints. See *id.* at 650.

⁷⁸ In most jurisdictions, depositions in criminal cases are reserved for exceptional circumstances in order to preserve a witness's testimony for trial. *E.g.*, FED. R. CRIM. P. 15(a). But a few states allow defendants accused of felonies to conduct depositions as a matter of course. See *infra* note 86 and accompanying text.

⁷⁹ Federal Rule of Criminal Procedure 16 requires very limited disclosures by the government upon request. FED. R. CRIM. P. 16(a)(1) (listing the information that is subject to disclosure). But the disclosures are likely to be of limited assistance to defendants, especially defendants who are charged with white collar or regulatory crimes. See, *e.g.*, Pamela H. Bucy, *The Poor Fit of Traditional Evidentiary Doctrine and Sophisticated Crime: An Empirical Analysis of Health Care Fraud Prosecutions*, 63 FORDHAM L. REV. 383, 402 (1994).

⁸⁰ See, *e.g.*, *People v. Gill*, 965 N.Y.S.2d 329, 331-32 (N.Y. Crim. Ct. 2013).

⁸¹ Inconclusive results are not exculpatory, thus they do not fall within the *Brady* disclosure rule. As a result, it appears that inconclusive results are often not disclosed. See Rachel E. Barkow, *Prosecutorial Administration: Prosecutor Bias and the Department of Justice*, 99 VA. L. REV. 271, 298 (2013) ("A review of the forensic lab in North Carolina revealed that lab analysts routinely failed to disclose inconclusive or negative tests for the presence of blood; indeed, failing to turn over inconclusive results was the explicit policy of the lab contained in its operating manual.").

⁸² Prosecutors provide those estimates in so-called "reverse proffer" sessions, in which they provide defendants and/or their attorneys "a detailed summary of the documentary and testimonial evidence against the [defendant]." Mary Patrice Brown & Stevan E. Bunnell, *Negotiating Justice: Prosecutorial Perspectives on Federal Plea Bargaining in the District of Columbia*, 43 AM. CRIM. L. REV. 1063, 1066 (2006).

prosecutor's interest to give an objective assessment on that issue. To the contrary, the prosecutor has an incentive to present information that causes a defendant to overestimate the likelihood of conviction and thus to agree to a less favorable plea deal.

A few jurisdictions have developed broader discovery rules and require disclosures early enough that they might matter in the plea bargaining process.⁸³ For example, some states have adopted so-called open-file discovery policies that require the disclosure of all documents in the prosecutor's possession.⁸⁴ Most states, however, do not require disclosure of oral statements or documents in the possession of the police, as opposed to the prosecutor.⁸⁵ Others allow defendants charged with felonies to conduct depositions.⁸⁶ But these jurisdictions are the exception rather than the rule.

In addition to having limited ability to gather factual material through discovery, defendants have limited ability to learn the government's legal theory of the case before deciding whether to enter into a plea bargain. Charging instruments need not articulate the prosecutors' legal theories or the facts that they intend to prove to establish guilt.⁸⁷ In the federal system, for example, an indictment is sufficient if it sets forth the elements of the offense "in the words of the statute itself"⁸⁸ and then states the approximate time and place that the defendant allegedly violated that statute.⁸⁹ Thus, courts have affirmed the

⁸³ North Carolina, Minnesota, and New Jersey have relatively broad criminal discovery rules, which are sometimes referred to as "open-file discovery." N.C. GEN. STAT. § 15A-903(a)(1)(a) (2012); MINN. R. CRIM. P. 9.01; N.J. CT. R. 3:13-3(a)-(c).

⁸⁴ Jenia I. Turner & Allison D. Redlich, *Two Models of Pre-Plea Discovery in Criminal Cases: An Empirical Comparison*, 73 WASH. & LEE L. REV. 285, 288-89, 288 n.5 (2016).

⁸⁵ *Id.* at 303-04. For this reason, some have criticized these procedures as inadequate. Baer, *supra* note 76, at 49-57; Cassidy, *supra* note 74, at 1477-78. Notably, not all states have limited their open-file discovery in this fashion. For a description of the liberal discovery required in North Carolina, see *infra* text accompanying notes 224-27.

⁸⁶ See, e.g., MO. REV. STAT. § 545.400 (2010); FLA. R. CRIM. P. 3.220(h); VT. R. CRIM. P. 15; see also Prosser, *supra* note 13, at 607-12 (identifying those states that permit defendants to take depositions in criminal cases and describing the various limitations imposed in different jurisdictions).

⁸⁷ Although a defendant can file a motion to dismiss the indictment as insufficient, FED. R. CRIM. P. 12(b)(3)(B)(v), rulings on those motions usually provide little more information about the government's case because they note simply that the pleading standard is satisfied. See Burnham, *supra* note 12, at 356 ("The circuit and district courts have '... consistently upheld indictments that do little more than [] track the language of the statute charged and state the time and place (in approximate terms) of the alleged crime.'" (alteration in original)).

⁸⁸ *Hamling v. United States*, 418 U.S. 87, 117 (1974).

⁸⁹ The Supreme Court has also stated that the language of the statute "must be accompanied with such a statement of the facts and circumstances as will inform the accused of the specific offence, coming under the general description, with which he is charged." *Hamling*, 418 U.S. at 117-18 (quoting *United States v. Hess*, 124 U.S. 483, 487 (1888)). But the prevailing view appears to be that "an indictment that tracks the statutory language

sufficiency of an indictment for an antitrust violation which alleges simply that on such and such day in such and such place, X intentionally conspired with Y to maintain a monopoly in restraint of trade.⁹⁰ And they have also upheld the sufficiency of indictments for attempted crimes that do not identify the overt act that the prosecutor will have to prove at trial.⁹¹

These information deficits may harm innocent defendants more than guilty ones. Guilty defendants often know what crime they have committed, and they accordingly may be able to guess what evidence the prosecutor has to prove their guilt.⁹² But innocent defendants have not committed a crime, and they likely have no independent knowledge about the evidence the prosecutor has against them or the prosecutor's theory. Even though many prosecutors would likely share at least some inculpatory evidence to convince the defendant to plead guilty, lack of discovery means that innocent defendants cannot balance that inculpatory information with any possible exculpatory information.⁹³ Moreover, if a prosecutor places a time limit on a plea deal, then the innocent defendant and her attorney may not have an opportunity to conduct an independent investigation to uncover potential exculpatory information.

Of course, prosecutors also often suffer from information deficiencies. They do not have automatic access to all the information held by the defendant about whether she committed the crime (such as a confession).⁹⁴ These deficiencies are problematic because prosecutors need full and accurate information when deciding what sort of plea bargain to offer. But prosecutors are in a better

defining an offense is usually sufficient." *Indictments*, 34 GEO. L.J. ANN. REV. CRIM. PROC. 245, 261 (2005); see also Benjamin E. Rosenberg, *The Analysis of Defective Indictments After United States v. Cotton*, 41 CRIM. L. BULL. 463, 465 (2005) (observing that "Rule 7(c)(1) . . . is typically satisfied if the indictment tracks the language of the allegedly violated statute"). The Supreme Court has said that "there are crimes that must be charged with greater specificity." *United States v. Resendiz-Ponce*, 549 U.S. 102, 109 (2007). But the category of crimes that must be charged "with greater specificity" does not appear to be particularly large. See *United States v. Stringer*, 730 F.3d 120, 126-27 (2d Cir. 2013) (identifying only two types of crimes in this "less-common category": crimes involving falsity, which must specify "what statements are alleged to be false, and in what respect they are false"; and crimes involving controlled substances, which must specify "the type of controlled substance").

⁹⁰ See, e.g., *United States v. Giordano*, 261 F.3d 1134, 1138 (11th Cir. 2001) (upholding indictment that merely repeated legal requirements).

⁹¹ See *Resendiz-Ponce*, 549 U.S. at 107 (upholding an indictment that simply alleged the defendant "attempted to enter the United States").

⁹² See Stephanos Bibas, *Regulating the Plea-Bargaining Market: From Caveat Emptor to Consumer Protection*, 99 CALIF. L. REV. 1117, 1133-35 (2011).

⁹³ Although some exculpatory information could theoretically be gained through a defense attorney's investigation, budgetary constraints make that unrealistic. See Irene Oritseweyinmi Joe, *Systematizing Public Defender Rationing*, 93 DENV. L. REV. 389, 393-94, 394 n.22 (2016).

⁹⁴ See *Miranda v. Arizona*, 384 U.S. 436, 460 (1966) (recognizing the right to remain silent).

position than defendants to obtain information and cure these deficiencies. They can use investigative tools, like search warrants and grand jury subpoenas, to obtain information from defendants and from third parties. Those tools are not available to defendants. In addition, some defendants actively seek to provide information to prosecutors during the negotiation phase in the hopes of convincing the prosecutor to treat them more leniently.⁹⁵

Prosecutors' leverage and defendants' lack of information, coupled with the lack of procedural protections in the plea bargaining process, result in a system in which criminal cases settle, and those settlements often are on terms that are unfavorable to defendants. Because criminal penalties have shifted to ensure that plea-based sentences embody what legislatures deem appropriately severe, defendants are not receiving a "discount" in exchange for waiving their right to trial. Put differently, prosecutors often need not accept a plea bargain for anything less than the charges or the punishment that they want.⁹⁶

The lopsided advantages prosecutors enjoy during plea bargaining do not affect only guilty defendants. Innocent defendants likewise plead guilty because they are unwilling to face the distorted punishments associated with conviction after trial.⁹⁷ The criminal system does not screen out meritless cases prior to trial. Legally innocent defendants do not have an opportunity to challenge a prosecutor's legal theory.⁹⁸ And factually innocent defendants must wait for the prosecution to rest at trial to challenge the sufficiency of the state's evidence.⁹⁹

II. THE CIVIL SETTLEMENT SYSTEM

Settlements are common in civil suits. But these settlements are not due to one party having massive leverage over the other. Instead, the civil system steers parties toward settlement, by and large, through a system of procedures mediated by judges.¹⁰⁰ Civil judges play a role in resolving merits-related disputes in cases

⁹⁵ This often occurs during a so-called "proffer" session. For more on how such sessions operate, see generally DEFENDING CORPORATIONS AND INDIVIDUALS IN GOVERNMENT INVESTIGATIONS § 5:18 (Daniel J. Fetterman & Mark P. Goodman eds., 2014).

⁹⁶ Stuntz, *supra* note 11, at 2549.

⁹⁷ See Albert W. Alschuler, *Straining at Gnats and Swallowing Camels: The Selective Morality of Professor Bibas*, 88 CORNELL L. REV. 1412, 1413 (2003) ("The defendant, if rational and self-interested himself, ordinarily will accept the prosecutor's offer whether he is guilty or innocent and whatever the strength of the evidence against him.").

⁹⁸ A defendant can file a motion to dismiss the indictment as insufficient. See FED. R. CRIM. P. 12(b)(3)(B)(v). But "the courts have gutted this rule and district courts deny these motions as a matter of course." Burnham, *supra* note 12, at 349.

⁹⁹ See FED. R. CRIM. P. 29(a) (stating that a defendant can move for a judgment of acquittal after the government rests).

¹⁰⁰ See Brooke D. Coleman, *The Efficiency Norm*, 56 B.C. L. REV. 1777, 1778-79 (2015) (explaining that the presumption in modern civil rulemaking is of resolution by non-trial

well before trial, and the parties are entitled to substantial discovery of their adversaries' evidence.

A. *The Absence of Leverage*

The parties in damages suits have relatively similar stakes. Unlike in criminal cases, the parties in civil cases are not seeking to protect different types of interests. Instead, the interest at stake for both parties involves money. Plaintiffs are seeking to obtain money from defendants, and defendants are seeking to keep money from plaintiffs.¹⁰¹

Moreover, unlike criminal laws, substantive civil laws do not give plaintiffs leverage to force settlements by authorizing excessive damages. The primary theory underlying tort law is that a plaintiff is entitled to damages to compensate her for her losses.¹⁰² Civil laws generally do not authorize plaintiffs to obtain damages in excess of the amount necessary to compensate them merely to force defendants to settle for the appropriate amount.¹⁰³ To be sure, there are exceptions. Some civil laws authorize punitive damages or damage multipliers.¹⁰⁴ But laws authorizing those non-compensatory damages are rare, reserved for especially egregious misconduct or conduct that frequently goes undetected.¹⁰⁵ And in contrast to the recent tendency to increase criminal

adjudication rather than through a trial). Very little scholarship has examined comparisons between the two systems in this context. *See* Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374, 432 (1982) (discussing desire for fast, early settlements but stating that the criminal system limits judicial participation in negotiation); Sklansky & Yeazell, *supra* note 14, at 697-701 (drawing comparisons across several axes, including negotiated resolution and discovery); *see also* Russell M. Gold, "*Clientless*" *Prosecutors*, 51 GA. L. REV. (forthcoming 2017) (manuscript at 8-15) (on file with authors) (exploring comparisons in judicial involvement between class action settlement and criminal plea negotiation).

¹⁰¹ Thus, the law does not grant a stronger bargaining position to either by imposing different stakes on the parties—although one party may have a stronger position simply because she values a dollar less than the other. *See* STEVEN SHAVELL, *FOUNDATIONS OF ECONOMIC ANALYSIS OF LAW* 648 (2004).

¹⁰² *Miller v. Robertson*, 266 U.S. 243, 257 (1924).

¹⁰³ DAN B. DOBBS, *LAW OF REMEDIES* § 3.1, at 210 (2d ed. 1993) (noting that plaintiffs "should not recover any windfall"); *id.* § 1.1, at 3 ("The damage remedy is a money remedy aimed at making good the plaintiff's losses.").

¹⁰⁴ *See, e.g.*, 15 U.S.C. § 15(a) (2012) (authorizing treble damages for antitrust violations); CAL. CIV. CODE § 3294 (West 2017) (authorizing punitive damages).

¹⁰⁵ *See* *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 493 (2008) (stating that courts limit punitive damages to cases where the defendant's conduct is "outrageous" (quoting 4 RESTATEMENT (SECOND) OF TORTS § 908(2) (1977))). Awards of punitive damages under those laws "are rare" as well. Jason M. Solomon, *The Political Puzzle of the Civil Jury*, 61 EMORY L.J. 1331, 1382 (2012).

punishments,¹⁰⁶ the trend has been to limit damages that exceed compensation.¹⁰⁷

Nor does stacking torts result in more damages. If a defendant commits multiple torts in causing an injury, the plaintiff may recover only once for that injury.¹⁰⁸ Thus, if a plaintiff loses a hand to a tool negligently designed and manufactured by a defendant, she may recover only once for her lost hand, even though she has separate actions for negligent design and negligent manufacture.

Nor, for the most part, do substantive civil laws prescribe minimum awards comparable to mandatory minimums. A plaintiff is entitled only to the losses she can prove. Again, there are exceptions. Some statutes prescribe minimum statutory damages,¹⁰⁹ but these statutes are few and far between.

This is not to say that plaintiffs have no leverage over defendants to force settlements that disadvantage defendants.¹¹⁰ Plaintiffs may bring low-merit suits in the hopes of forcing a defendant to settle to avoid discovery costs.¹¹¹ Defendants settle those suits not to avoid the risk of paying large damages after a verdict, but instead to avoid the cost of litigation.¹¹² The civil system has

¹⁰⁶ See Erik Luna, *Prosecutorial Decriminalization*, 102 J. CRIM. L. & CRIMINOLOGY 785, 794 (2012).

¹⁰⁷ See, e.g., *Exxon Shipping Co.*, 554 U.S. at 495-96 (discussing state-imposed statutory and constitutional limits on punitive damages). Trebling or otherwise increasing damages to account for non-detection is meant to create optimal deterrence by forcing violators to completely internalize their externalities; the idea is to make each potential violator see the estimated cost of a violation (discounted for likelihood of unenforcement) equal to the social cost of the violation. See SHAVELL, *supra* note 101, at 483-84 (explaining that the theory behind high sanctions is “to reflect the likelihood of escaping liability”).

¹⁰⁸ See, e.g., 47 AM. JUR. 2D *Judgments* § 808.

¹⁰⁹ See, e.g., 15 U.S.C. § 1681n(a) (providing for at least \$100 for willful violations of the Fair Credit Reporting Act).

¹¹⁰ Of course, a defendant facing a meritorious suit for massive damages may feel compelled to settle to avoid financial ruin. But in that situation, the plaintiff’s leverage derives not from a law advantaging the plaintiff, but from the fact that the defendant caused extensive harm. Accordingly, holding other variables constant, the settlement should reflect the actual expected value for the defendant. And many laws reduce defendants’ exposure to massive liability. Examples include limits on non-economic damages, see DOUGLAS LAYCOCK, *MODERN AMERICAN REMEDIES: CASES AND MATERIALS* 116-19 (3d ed. 2000) (discussing the economic harm rule), and on consequential damages for breach of contract, see Melvin Aron Eisenberg, *The Principle of Hadley v. Baxendale*, 80 CALIF. L. REV. 563, 612 (1992) (describing limits on consequential damages for breach of contract as a “liability-limiting device[]”).

¹¹¹ Joshua D. Fulop, Note, *Agency Costs and the Strike Suit: Reducing Frivolous Litigation Through Empowerment of Shareholders*, 7 J. BUS. & SEC. L. 213, 215 (2007) (discussing “strike suits” brought to obtain settlements); see also *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 741 (1975) (expressing concern that liberal discovery gives plaintiffs “an *in terrorem* increment of the settlement value”).

¹¹² Fulop, *supra* note 111, at 215 (explaining that strike suits “take advantage of the great disparity in litigation costs between plaintiff and defendant”).

adopted a variety of procedures to reduce plaintiffs' leverage in these suits, such as requiring heightened pleading standards for complaints,¹¹³ limiting discovery,¹¹⁴ authorizing cost shifting,¹¹⁵ and authorizing judicial intervention to prevent abusive discovery requests.¹¹⁶ In other words, the civil system not only fails to rely on asymmetrical leverage to encourage settlement, but it also actively seeks to minimize such leverage.

B. *Civil Procedures*

There are several procedural devices that facilitate civil settlements. Those procedures seek to steer settlement values to track the merits of a case, at least to some extent. They include motions to dismiss, pretrial conferences, discovery, and summary judgment. These devices promote settlement in relatively similar ways. They (1) improve access to information about the adversary's case to allow for more informed bargaining; (2) provide opportunities for the judge or another neutral arbiter to preview her view of the merits; (3) increase the cost of litigation, thereby incentivizing settlements; and (4) create a moment where attorneys from both sides simultaneously focus on the case. Some of these devices also seek to weed out meritless cases to eliminate the pressure on defendants to settle just to avoid costs of protracted litigation. In addition to these procedures, judges in civil cases assume the role of managers who involve themselves from the early phases of litigation. Judges are expected to actively manage their dockets to steer cases toward settlement or some other form of dismissal short of trial.¹¹⁷

¹¹³ See *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 554-57 (2007) (creating heightened pleading standards in federal actions); Arthur R. Miller, *Simplified Pleading, Meaningful Days in Court, and Trials on the Merits: Reflections on the Deformation of Federal Procedure*, 88 N.Y.U. L. REV. 286, 360 (2013) (explaining that concerns about frivolous litigation, extortionate settlements to avoid discovery, and other litigation costs animated the Supreme Court's ruling in *Twombly*).

¹¹⁴ See, e.g., UTAH R. CIV. P. 26(c)(5) (limiting number of depositions in particular cases).

¹¹⁵ See FED. R. CIV. P. 26(b)(2)(B) (authorizing cost shifting for discovery of electronic information); *CBT Flint Partners, LLC v. Return Path, Inc.*, 737 F.3d 1320, 1337-38 (Fed. Cir. 2013) (listing other cost-shifting provisions).

¹¹⁶ FED. R. CIV. P. 26(b)(2), (c) (allowing courts to limit discovery or issue protective orders).

¹¹⁷ Civil Justice Reform Act of 1990, Pub. L. No. 101-650, § 102(5), 104 Stat. 5089 (stating that to reduce cost and delay of litigation, judicial officers should become involved early and engage in regular communication during the pretrial process); FED. R. CIV. P. 16(a)(5) (empowering courts to order pretrial conferences to facilitate settlement); see also Resnik, *supra* note 100, at 404 (listing reasons for judges to initiate pretrial management, including "speed[ing] settlement").

For simplicity, in describing how the civil system uses procedures to encourage settlement, this Section focuses largely on procedures in the federal system. Most states generally have comparable procedures.¹¹⁸

1. Motions to Dismiss

Defendants can move to dismiss a complaint for a number of reasons, including that the plaintiffs' allegations fail to state a claim upon which relief may be granted.¹¹⁹ To survive a motion to dismiss for failure to state a claim, the complaint must allege facts establishing that the plaintiffs are entitled to relief. Different jurisdictions implement this requirement in different ways. Some states require only notice pleading,¹²⁰ while others require more stringent fact pleading.¹²¹ Still other states and the federal system have adopted an intermediate approach.¹²² Complaints must provide specific facts establishing an entitlement to relief.¹²³ These allegations cannot be merely "conceivable" but must be "plausible."¹²⁴

All of these standards are more demanding than that imposed on indictments.¹²⁵ Even in relatively liberal notice pleading systems, the complaint cannot simply allege the elements of the action but must provide "facts upon which [the] claim for relief is founded."¹²⁶

These higher standards result in complaints containing more information about the plaintiffs' case. That information can help defendants form their settlement positions.¹²⁷ Moreover, the resolution of such a motion requires the

¹¹⁸ See John B. Oakley & Arthur F. Coon, *The Federal Rules in State Courts: A Survey of State Court Systems of Civil Procedure*, 61 WASH. L. REV. 1367, 1427 (1986) (noting that twenty-three states follow the federal rules exactly, and others do so in large part).

¹¹⁹ FED. R. CIV. P. 12(b)(6).

¹²⁰ See, e.g., *Fox v. Johnson*, 777 S.E.2d 314, 324 (N.C. Ct. App. 2015) (reaffirming notice pleading standard); *Webb v. Nashville Area Habitat for Humanity, Inc.*, 346 S.W.3d 422, 427 (Tenn. 2011) (same).

¹²¹ See, e.g., *Custer v. Wal-Mart Stores E. I, LP*, 492 S.W.3d 212, 215 (Mo. Ct. App. 2016) ("Missouri is a 'fact pleading' state . . .").

¹²² See, e.g., *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007); *Data Key Partners v. Permira Advisers LLC*, 849 N.W.2d 693, 701 (Wis. 2014) (following *Twombly*).

¹²³ *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (stating that a complaint cannot contain only "a formulaic recitation of the elements of a cause of action" or "'naked assertion[s]' devoid of 'further factual enhancement'" (quoting *Twombly*, 550 U.S. at 555, 557)).

¹²⁴ *Id.*

¹²⁵ See *supra* notes 88-90 and accompanying text (discussing the low standard for indictments).

¹²⁶ E.g., *Webb v. Nashville Area Habitat for Humanity, Inc.*, 346 S.W.3d 422, 427 (Tenn. 2011) (quoting *Smith v. Lincoln Brass Works, Inc.*, 712 S.W.2d 470, 471 (Tenn. 1986)).

¹²⁷ Other bases for motions to dismiss—such as lack of personal jurisdiction or subject matter jurisdiction—may also provide some information about the strength of the plaintiff's claim. See Geoffrey P. Miller, *Preliminary Judgments*, 2010 U. ILL. L. REV. 165, 188-89 (discussing the merit components of these jurisdictional questions).

judge to opine on the case's merits. The judge will assess both whether, in her view, the allegations are plausible¹²⁸ and whether the allegations establish a legal basis for relief. This assessment can affect settlement by giving the parties a realistic, neutral assessment of their case from an early stage. It may help offset excessive optimism and cut through potential agency costs between lawyers and their clients.¹²⁹ It also may help create a bargaining range by bringing the parties' expected values closer together.¹³⁰ If the court grants the motion, the order may explain why the claim is not plausible, substantially impairing the plaintiffs' settlement leverage even if—as is typical—the plaintiffs are granted leave to amend their complaint.

If the court denies the motion, however, the plaintiffs garner a “settlement premium” because the court has found that their allegations are plausible.¹³¹ Such a finding (and the discovery it unlocks) provides an incentive for the defendants to settle.¹³²

Indeed, the motion to dismiss is one of several moments at which the parties must articulate their evidence and positions and at which they expect to receive input from the judge about the strength of their positions. Each of those moments sparks settlement discussions and helps facilitate the flow of information.¹³³

2. Liberal Discovery

Unlike the criminal system, the civil system provides for liberal discovery.¹³⁴ Parties must disclose the names and addresses of potential witnesses, and they must identify other evidence related to the case.¹³⁵ Parties also may broadly

¹²⁸ See *id.* at 189-91 (arguing that the plausibility assessment reveals judgments on the merits of the case).

¹²⁹ See *id.* at 168, 170-71.

¹³⁰ J. Maria Glover, *The Federal Rules of Civil Settlement*, 87 N.Y.U. L. REV. 1713, 1756-59 (2012) (arguing that information from pleadings facilitates merits-based settlement).

¹³¹ Edward Brunet, *The Efficiency of Summary Judgment*, 43 LOY. U. CHI. L.J. 689, 692-93 (2012) (discussing the increase in settlement value after a summary judgment motion is denied); see also Glover, *supra* note 130, at 1731; William L. Reynolds, *The Proper Forum for a Suit: Transnational Forum Non Conveniens and Counter-Suit Injunctions in the Federal Courts*, 70 TEX. L. REV. 1663, 1690 n.185 (1992) (noting that the ruling on a motion to dismiss for failure to state a claim “can have an enormous impact on the conduct of the litigation (including its settlement value)”).

¹³² See, e.g., Benjamin Sunshine & Víctor Abel Pereyra, *Access-to-Justice v. Efficiency: An Empirical Study of Settlement Rates After Twombly & Iqbal*, 2015 U. ILL. L. REV. 357, 382-83; see also Brunet, *supra* note 131, at 692-93 (describing the premium that plaintiffs gain if a motion to dismiss is denied).

¹³³ See Miller, *supra* note 127, at 180.

¹³⁴ See Klein, *supra* note 3, at 2044.

¹³⁵ See FED. R. CIV. P. 26(a)(1)-(3).

depose witnesses,¹³⁶ request documents,¹³⁷ pose interrogatories,¹³⁸ and conduct physical examinations.¹³⁹

Liberal discovery helps the parties make informed decisions about whether to settle their cases and for what amounts.¹⁴⁰ The availability of information eliminates much of the informational asymmetries between the parties. It accordingly helps settlement values hew more to a case's merit rather than tracking the parties' respective litigation resources.¹⁴¹ Civil procedure scholars have identified "an inverse relationship between the breadth of discovery and the frequency of trials."¹⁴² As they explain, when "the parties learn the crucial facts of the case before trial, they can assess its prospects, worth, and how best to dispose of it."¹⁴³ Thus, the more the parties can gain a realistic and informed view of their respective positions, the more likely settlement becomes. Further, liberal discovery may facilitate informed settlement by allowing the parties to work from the same body of potential evidence. Working from the same body of evidence may lead them to evaluate the case's merit similarly.¹⁴⁴

¹³⁶ FED. R. CIV. P. 28.

¹³⁷ FED. R. CIV. P. 34.

¹³⁸ FED. R. CIV. P. 33.

¹³⁹ FED. R. CIV. P. 35.

¹⁴⁰ See, e.g., Robert D. Cooter & Daniel L. Rubinfeld, *An Economic Model of Legal Discovery*, 23 J. LEGAL STUD. 435, 439 (1994) ("The first purpose of discovery is to increase the probability of settlement."); Maurice Rosenberg, *Federal Rules of Civil Procedure in Action: Assessing Their Impact*, 137 U. PA. L. REV. 2197, 2198 (1989) ("Open discovery would promote settlements; with both sides obliged to turn over all their important cards, secrets would disappear and realistic negotiations would occur."); see also *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 34 (1984) ("Liberal discovery is provided for the sole purpose of assisting in the preparation and trial, or the settlement, of litigated disputes.").

¹⁴¹ See, e.g., Cooter & Rubinfeld, *supra* note 140, at 439 ("[I]ncreas[ing] the probability of settlement . . . is achieved by enabling the parties in a dispute to pool information so as to predict the outcomes of a trial more accurately."); Rosenberg, *supra* note 140, at 2198.

¹⁴² David Luban, *Settlements and the Erosion of the Public Realm*, 83 GEO. L.J. 2619, 2648 (1995); see also Stephen C. Yeazell, *The Misunderstood Consequences of Modern Civil Process*, 1994 WIS. L. REV. 631, 677 (discussing the relationship between curtailed discovery and an increased rate of trials).

¹⁴³ Luban, *supra* note 142, at 2647-48.

¹⁴⁴ To be sure, greater information does not necessarily lead to the parties' views of a case converging because optimism biases may cause both sides to view new information in the light most favorable to them. See Christine Jolls, *Behavioral Law and Economics*, in *BEHAVIORAL ECONOMICS AND ITS APPLICATIONS* 115, 123 (Peter Diamond & Hannu Vartiainen eds., 2007) (discussing how optimism bias makes "individuals believe that their own probability of facing a bad outcome is lower than it actually is"); Bert I. Huang, *Trial by Preview*, 113 COLUM. L. REV. 1323, 1329 (2013) (discussing how behavioral economics theories have shown that information sharing can backfire when each side thinks its case is stronger after information is exchanged).

Liberal discovery also promotes settlement because discovery is expensive.¹⁴⁵ Settlement allows each side to avoid these costs. As noted above, settlements are not ideal when they are the product of efforts to avoid litigation costs in frivolous suits.¹⁴⁶ But in suits in which discovery costs are more evenly distributed, efforts to avoid the costs of discovery may help produce fair settlements.¹⁴⁷

Liberal discovery rules indirectly promote settlement as well by authorizing judicial intervention to resolve discovery disputes.¹⁴⁸ Those rulings may result in the court giving a preliminary view of the case. For example, ruling on whether a discovery request is “relevant to any party’s claim or defense and proportional to the needs of the case”¹⁴⁹ requires the court to consider the parties’ arguments and what evidence may support those arguments.¹⁵⁰ Consequently, these rulings may result in the court offering some limited view on the merits of the case.¹⁵¹

3. Summary Judgment

A party is entitled to summary judgment when, viewing all the evidence in the light most favorable to the other side, the moving party is entitled to judgment.¹⁵²

Summary judgment can be a powerful settlement driver.¹⁵³ Most notably, summary judgment requires the parties—particularly the party opposing summary judgment—to lay out an evidentiary record demonstrating that a trial is necessary.¹⁵⁴ This process serves as a “dress rehearsal” for trial, at least for

¹⁴⁵ Jonathan T. Molot, *How Changes in the Legal Profession Reflect Changes in Civil Procedure*, 84 VA. L. REV. 955, 959-60 (1998).

¹⁴⁶ *See, e.g.*, *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 741 (1975) (expressing concern that liberal discovery gives plaintiffs “an *in terrorem* increment of the settlement value”).

¹⁴⁷ Robert D. Cooter & Daniel L. Rubinfeld, *Reforming the New Discovery Rules*, 84 GEO. L.J. 61, 81 (1995) (arguing that “equalizing discovery costs . . . [would] promote fairness in the settlement process”).

¹⁴⁸ Coleman, *supra* note 100, at 1807-08; Resnik, *supra* note 100, at 378-79.

¹⁴⁹ FED. R. CIV. P. 26(b)(1).

¹⁵⁰ Resnik, *supra* note 100, at 393 (explaining that “judges must immerse themselves in the factual details of the case” to rule on discovery issues); *see also* FED. R. CIV. P. 26(b)(1) (listing factual considerations for the court to analyze).

¹⁵¹ *See* Resnik, *supra* note 100, at 378-79.

¹⁵² *See* FED. R. CIV. P. 56(a).

¹⁵³ *See, e.g.*, Arthur R. Miller, *The Pretrial Rush to Judgment: Are the “Litigation Explosion,” “Liability Crisis,” and Efficiency Clichés Eroding Our Day in Court and Jury Trial Commitments?*, 78 N.Y.U. L. REV. 982, 984 (2003).

¹⁵⁴ *See* FED. R. CIV. P. 56(a); *Celotex Corp. v. Catrett*, 477 U.S. 317, 321-23 (1986) (explaining that the movant need not provide evidence negating the non-movant’s claims but that a non-movant plaintiff must submit evidence demonstrating every element essential to her case).

plaintiffs.¹⁵⁵ Plaintiffs are required not just to list evidence, but also to marshal the evidence into legal argument.¹⁵⁶ This process may help the parties see the case in the same light and thus allow their expected outcomes to converge.¹⁵⁷

Summary judgment also affords the judge an opportunity to convey her views on a case's merits based on an established evidentiary record.¹⁵⁸ A court must decide whether "a fair-minded jury" could find in favor of the non-moving party on the evidence presented.¹⁵⁹ That standard requires a judge to state her views of the possible outcome of the case given the evidence.¹⁶⁰

That opportunity for the parties to hear the judge's view of the merits after analyzing the evidentiary record makes summary judgment a powerful force for settlement.¹⁶¹ As Professor Bert Huang puts it, "[n]othing quite cures overoptimism like a judge remarking, on the eve of trial, that in her view the case is a loser."¹⁶² Summary judgment previews not only the evidence, but also

¹⁵⁵ D. Theodore Rave, Note, *Questioning the Efficiency of Summary Judgment*, 81 N.Y.U. L. REV. 875, 894 (2006).

¹⁵⁶ Brunet, *supra* note 131, at 691 (stating that "[s]ummary judgment produces valuable fact clarification" because "[t]he nonmovant is essentially forced to identify facts in the record that demonstrate issues of fact that need to be tried").

¹⁵⁷ See, e.g., Rave, *supra* note 155, at 894 ("In some ways, the post-Trilogy summary judgment motion can serve as an information-forcing device that may facilitate settlement.").

¹⁵⁸ See *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 266 (1986) (Brennan, J., dissenting) (arguing that the majority opinion provides an instruction for judges to "weigh evidence much as a juror would"); see also Samuel Issacharoff & George Loewenstein, *Second Thoughts About Summary Judgment*, 100 YALE L.J. 73, 89 (1990) ("[S]ummary judgment . . . has been transformed into a mechanism to assess plaintiff's likelihood of prevailing at trial."); Rave, *supra* note 155, at 894 (arguing that the Supreme Court has "sanctioned judicial evaluation of facts at the summary judgment stage").

¹⁵⁹ *Anderson*, 477 U.S. at 252.

¹⁶⁰ *Id.* at 266 (Brennan, J., dissenting).

¹⁶¹ See Jonathan T. Molot, *An Old Judicial Role for a New Litigation Era*, 113 YALE L.J. 27, 44 (2003) ("By forcing parties to focus on the merits of their positions, and by educating parties regarding a suit's likely value, summary judgment opinions can serve some of the same purposes as the settlement conference."); Rave, *supra* note 155, at 894 ("What is perhaps even more valuable is that summary judgment gives the parties a neutral evaluation of the claim by an impartial decisionmaker reviewing a substantial factual record.").

To be clear, summary judgment is the latest point at which civil parties will hear the judge's view of the merits. In cases involving preliminary injunctions, the parties will hear the judge's initial view of the merits at an even earlier stage. See, e.g., *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008) (requiring courts to find likelihood of success on the merits to issue a preliminary injunction); Jean O. Lanjouw & Josh Lerner, *Tilting the Table? The Use of Preliminary Injunctions*, 44 J.L. & ECON. 573, 587 (2001) (explaining that a "preliminary injunction hearing may be a relatively cheap way to obtain information about how a court would rule in an eventual trial," thus facilitating settlement).

¹⁶² Huang, *supra* note 144, at 1341-42.

how the audience may react to that evidence.¹⁶³ Even without an explicit statement about the case's merit, denial of summary judgment implicitly signals to the parties that the judge who will conduct a trial thinks the case has some merit.¹⁶⁴

The cost of summary judgment also promotes settlement. Summary judgment briefing is expensive and labor intensive, especially for the party who bears the burden of persuasion (ordinarily the plaintiff). The plaintiff must marshal all of her evidence to demonstrate to the court that she can prove her claim to a jury.¹⁶⁵ As with other procedures, avoiding those costs provides an incentive to settle.¹⁶⁶

Summary judgment may also promote settlement by eliminating weak claims from a case.¹⁶⁷ Doing so reduces the number of potential points of disagreement and allows the parties' negotiations to focus on fewer issues.¹⁶⁸

4. Alternative Dispute Resolution Rules

The civil system also provides alternative dispute resolution ("ADR") mechanisms to encourage settlement. For example, federal law directs district courts to encourage the parties to consider ADR,¹⁶⁹ and many courts mandate ADR in their local rules, standing orders, or general orders.¹⁷⁰ ADR facilitates settlement in a few different ways. Arbitration or mediation, and the briefing that precede them, require the parties to articulate their positions and supporting evidence to the other side, and they also require all parties to focus their attention on the case at the same time. ADR also tries to bring more input about the merits from a neutral actor early in the process, which can help the parties steer toward settlement.¹⁷¹

¹⁶³ See *id.* at 1326.

¹⁶⁴ See Brunet, *supra* note 131, at 692; Rave, *supra* note 155, at 894-95.

¹⁶⁵ See, e.g., Schaffer v. Weast, 546 U.S. 49, 57 (2005) ("[P]laintiffs bear the burden of persuasion regarding the essential aspects of their claims.").

¹⁶⁶ See, e.g., Issacharoff & Loewenstein, *supra* note 158, at 101 ("The major incentive for settlement of legal claims is the prospect of expenses associated with litigation.").

¹⁶⁷ See FED. R. CIV. P. 56(a).

¹⁶⁸ See EDWARD BRUNET, MARTIN H. REDISH & MICHAEL A. REITER, SUMMARY JUDGMENT: FEDERAL LAW AND PRACTICE 38-39 (2d ed. 2000).

¹⁶⁹ 28 U.S.C. § 652(a) (2012) (providing that "each district court shall, by local rule adopted under section 2071(a), require that litigants in all civil cases consider the use of an alternative dispute resolution process at an appropriate stage in the litigation" and "shall provide litigants in all civil cases with at least one alternative dispute resolution process").

¹⁷⁰ For a list of the sources of the ADR requirements in each United States District Court including mandatory mediation rules, see Michael P. Dickey, *ADR Gone Wild: Is It Time for a Federal Mediation Exclusionary Rule?*, 25 OHIO ST. J. ON DISP. RESOL. 713, 770-78 (2010).

¹⁷¹ See Mordehai (Moti) Mironi, *Mediation v. Case Settlement: The Unsettling Relations Between Courts and Mediation—A Case Study*, 19 HARV. NEGOT. L. REV. 173, 187 (2014) (stating that the purpose of mediation is to encourage parties "to participate and cooperate in the search for creative solutions and decision making").

5. Pretrial Conferences and Orders

A final category of procedures that promote settlement includes pretrial conferences and orders. Soon after the pleadings are filed, the parties must confer to consider “the possibilities for promptly settling or resolving the case.”¹⁷² Following this meeting, the parties must attend the first of several pretrial conferences with the judge to discuss how the litigation should proceed.¹⁷³ The federal rules explicitly state that one purpose of these conferences is to allow the court to take steps to facilitate “settling the case,” such as by encouraging the parties to proceed to ADR.¹⁷⁴

Following these conferences, courts must issue orders relating to scheduling¹⁷⁵ and other ministerial aspects of the case, such as the scope of discovery.¹⁷⁶ Through these orders, a judge may directly encourage settlement by indirectly revealing her views of the case.¹⁷⁷ Moreover, by forcing the parties to adhere to a schedule and the administrative plans established by the judge, these orders often prompt quicker and more efficient settlements than if the parties were left to their own devices.¹⁷⁸

6. Other Rules

There are a few other procedures that do not fit neatly into a litigation timeline that are designed to facilitate settlement. For example, Federal Rule of Civil Procedure 68 prohibits the shifting of costs to a party if she obtains a less favorable judgment than the settlement offer she previously rejected.¹⁷⁹ The

¹⁷² FED. R. CIV. P. 26(f)(1), (f)(2).

¹⁷³ See FED. R. CIV. P. 16(c); see also FED. R. CIV. P. 16(e) (authorizing later conferences).

¹⁷⁴ FED. R. CIV. P. 16(c)(2)(I).

¹⁷⁵ FED. R. CIV. P. 16(b)(1).

¹⁷⁶ See, e.g., FED. R. CIV. P. 16(b)(3).

¹⁷⁷ See Eric D. Green, *Re-Examining Mediator and Judicial Roles in Large, Complex Litigation: Lessons from Microsoft and Other Megacases*, 86 B.U. L. REV. 1171, 1182-83 (2006).

¹⁷⁸ See FED. R. CIV. P. 16 advisory committee’s note to 1983 amendment (“Empirical studies reveal that when a trial judge intervenes personally at an early stage to assume judicial control over a case and to schedule dates for completion by the parties of the principal pretrial steps, the case is disposed of by settlement or trial more efficiently and with less cost and delay than when the parties are left to their own devices.”). Federal law also directs federal courts to create general management plans to reduce expense, 28 U.S.C. § 471 (2012), by, inter alia, authorizing judges “to refer appropriate cases to alternative dispute resolution,” *id.* § 473(a)(6). See also Linda S. Mullenix, *The Counter-Reformation in Procedural Justice*, 77 MINN. L. REV. 375, 378 n.12 (1992) (collecting examples of district court advisory groups steering cases toward ADR programs in these expense and delay reduction plans).

¹⁷⁹ See FED. R. CIV. P. 68(d); see also Stephen McG. Bundy, *The Policy in Favor of Settlement in an Adversary System*, 44 HASTINGS L.J. 1, 3 (1992) (recognizing the purpose of Rule 68 as promoting settlement).

Federal Rules of Evidence also help facilitate settlement by declaring evidence of settlement negotiations largely inadmissible.¹⁸⁰

III. LESSONS FROM THE CIVIL SYSTEM

Although both the criminal and civil systems encourage settlements, they do so in different ways. We believe that the criminal system should look more like the civil system.

In the criminal system, the main mechanism for encouraging pleas is to give prosecutors overwhelming leverage that often results in plea deals that are disadvantageous to defendants. By contrast, the civil system promotes settlement through various procedural mechanisms that encourage information sharing, focus party attention, screen out meritless claims, impose costs on all parties, and invite the involvement of neutral parties.¹⁸¹ The approach of the civil system encourages settlements that are more likely to result in optimal outcomes than the approach of the criminal system. The civil parties are more informed, settlement tends to be the product of choice instead of coercion, the likely trial outcome heavily influences settlement outcomes, and trial outcomes are designed to compensate plaintiffs, rather than to deter trials.

The criminal system could be improved by borrowing some of the civil system's procedures.¹⁸² Adopting those procedures would presumably have analogous effects in criminal cases as in civil cases, making settlements with optimal outcomes more likely. Criminal settlements would be more likely to reflect both the seriousness of the defendant's crime and the strength of the evidence against her, rather than simply the preferences of the prosecutor.¹⁸³

Of course, adopting civil-like procedures to facilitate settlement in the criminal system may not accomplish much if prosecutors continue to have outsized leverage. With that leverage, prosecutors could demand that defendants waive any new procedure as part of a plea agreement and threaten to bring harsher charges if the defendant does not agree.¹⁸⁴ The civil system avoids the ability to demand these sorts of waivers, in part, by avoiding uneven playing fields between the parties in the substantive law. For example, the civil system limits defendants' exposure at trial based on what is necessary to compensate

¹⁸⁰ See FED. R. EVID. 408; see also Samuel R. Gross & Kent D. Syverud, *Don't Try: Civil Jury Verdicts in A System Geared to Settlement*, 44 UCLA L. REV. 1, 2 n.3 (1996) (citing Federal Rule of Evidence 408 as evidence of a system geared toward settlement). This rule applies in both the civil and criminal contexts. See Sklansky & Yeazell, *supra* note 14, at 728-33 (explaining that Federal Rules of Evidence apply to both civil and criminal contexts).

¹⁸¹ See discussion *supra* Section II.B.

¹⁸² Practical and constitutional limitations prevent wholesale adoption of these civil mechanisms. See *infra* notes 293-94 and accompanying text.

¹⁸³ See *supra* note 24 and accompanying text.

¹⁸⁴ See *supra* note 66 and accompanying text.

plaintiffs and adopts various procedural mechanisms to ensure that plaintiffs do not have too much leverage against defendants.¹⁸⁵

There are several ways to eliminate the prosecutor's ability to force pleas in criminal cases. One is to even the stakes between prosecutors and defendants by exposing prosecutors to punishment for losses. Another is to reduce the penalties for violations of criminal laws. But the former change is obviously undesirable and the latter is politically unrealistic.¹⁸⁶

We offer a compromise solution. We propose (a) that some of the settlement-facilitating procedures from the civil system be imported and adapted to the criminal system, and (b) that some modest changes be adopted to reduce the overwhelming leverage prosecutors currently possess to obtain settlements.

A. *Adopting Civil Procedures*

The criminal system could facilitate more informed plea bargaining by imposing a heightened pleading standard, expanding discovery, creating meaningful motions to dismiss criminal charges and motions for summary judgment, and increasing judicial involvement in criminal cases or otherwise requiring the parties to engage in some form of ADR. As they do in civil cases, these four procedures would facilitate information exchanges, focus party attention on the salient issues, and provide an opportunity for a neutral arbiter to express her views of the case.

One might wonder whether these procedural changes are any more likely to be adopted than the first-best solution of changing the scope of criminal law. There are two reasons to think so. First, several states have already implemented one or more of these proposals to varying degrees.¹⁸⁷ Second, these changes could come about through rulemaking, which is more politically feasible than legislation.¹⁸⁸

1. Heightened Pleading Standards and Motions to Dismiss

As noted earlier, the criminal system imposes extremely low pleading standards for formally asserting charges against a defendant.¹⁸⁹ Charging

¹⁸⁵ See *supra* Section II.A (discussing the absence of leverage in the civil system).

¹⁸⁶ Stuntz, *supra* note 4, at 530 (describing legislative incentives to increase criminalization).

¹⁸⁷ See *infra* text accompanying notes 220-27, 246-48, and 254-58.

¹⁸⁸ See Kenneth E. Johnson, Comment, *Limiting the Legislative Veto: Chadha v. Immigration & Naturalization Service*, 81 COLUM. L. REV. 1721, 1732 (1981) (discussing the lower political pressure on agencies than on legislatures).

¹⁸⁹ On their face, the federal civil and criminal rules appear fairly similar. Compare FED. R. CRIM. P. 12(b)(3)(B)(v) ("failure to state an offense"), with FED. R. CIV. P. 12(b)(6) ("failure to state a claim upon which relief can be granted"). Such similarities are not altogether surprising considering that the first draft of the criminal rules worked from the existing civil rules. See Ion Meyn, *Towards a Unified Code of Procedure: Two Steps Forward, Three Steps Back* (2017) (unpublished manuscript) (on file with authors) (documenting

instruments generally do not need to allege specific facts to justify the charges. They may simply track the language of the statute.¹⁹⁰ The pleading requirement for federal civil litigants imposes a much higher burden.¹⁹¹ A complaint must set forth particular factual allegations with respect to each material element of the claim,¹⁹² and those allegations must be plausible.¹⁹³

Just as it does in civil cases, adopting this heightened pleading standard in the criminal system could lead to more informed settlements. A defendant would face less uncertainty in bargaining if the prosecutor were required to provide more factual details in the indictment. Likewise, a defendant would gain more information about the prosecutor's legal theory. Currently, prosecutors need not precisely spell out their legal theories in charging documents; they may simply allege that the defendant violated the relevant criminal law. Defendants thus may not even know the government's legal theory until trial. Requiring prosecutors to provide more factual details necessarily reveals the prosecutor's theory of the case, which could refine a defendant's assessment of her likelihood of conviction.

Of course, heightened pleading standards, standing alone, are unlikely to change the settlement dynamic in the criminal system. That dynamic will change only if judges are as willing to dismiss criminal charges as they are willing to dismiss civil complaints. Currently, although judges have the authority to dismiss an indictment for failure to state a crime, they almost never do so. They regularly allow ambiguous indictments to stand.¹⁹⁴ And they often fail to evaluate the legal validity of prosecutors' charging decisions.¹⁹⁵

history of criminal rules of procedure). In their implementation, however, these rules diverge widely. *See* Burnham, *supra* note 12, at 349.

¹⁹⁰ *See supra* notes 88-90 and accompanying text.

¹⁹¹ *See, e.g.,* Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009); Thompson v. City of New York, 23 N.Y.S.3d 839, 858 (Sup. Ct. 2015) (“[T]he wholesale failure to allege facts of the offending conduct alleged[] [is] insufficient to state a claim . . .”). Not all states follow *Iqbal*. Some continue to require that complaints provide only bare notice of the claim. *See, e.g.,* *In re Butt*, 495 S.W.3d 455, 462 (Tex. App. 2016) (applying fair notice pleading standard). When alleging fraud or mistake, the federal rules require an even higher pleading standard. *See* FED. R. CIV. P. 9(b) (“In alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake.”).

¹⁹² *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 562 (2007) (requiring “allegations respecting all the material elements to sustain recovery under some viable legal theory” (emphasis omitted) (quoting *Carriers, Inc. v. Ford Motor Co.*, 745 F.2d 1101, 1106 (7th Cir. 1984))).

¹⁹³ *Iqbal*, 556 U.S. at 678.

¹⁹⁴ *See* Burnham, *supra* note 12, at 356 (citing decisions upholding indictments on the ground that they track statutory language).

¹⁹⁵ For example, the Supreme Court recently reversed a criminal conviction for fraud because the government's theory of the case swept broader than the statutory language. *See* *McDonnell v. United States*, 136 S. Ct. 2355, 2375 (2016). The defendant made this precise argument to the trial court in a motion to dismiss the indictment. Memorandum in Support of

More judicial willingness to dismiss criminal charges will change the settlement dynamic in two significant respects. First, because motions to dismiss would have more teeth, defendants would file more of these motions. These motions would force the lawyers on both sides to articulate their own theories of the case earlier in the proceeding.¹⁹⁶ These motions would also lead to courts providing more information to the parties about their view of the case. In ruling on motions to dismiss, courts would no longer be asked to determine only whether the charges adequately tracked the statutory language. Instead, courts would have to make some assessment of the merits of the allegations, giving the parties at least some basic glimpse of how the judge views the case.¹⁹⁷

Second, motions to dismiss would provide an opportunity for defendants to test the validity of the prosecutors' legal theories. Criminal laws often have unclear boundaries. This lack of clarity allows prosecutors to push more aggressive legal theories. For example, prosecutors may argue that playing a practical joke with slightly caustic chemicals constitutes illegal use of a chemical weapon instead of merely battery.¹⁹⁸ Even when courts ultimately reject those theories, defendants have no real opportunity to challenge them before trial because judges are unwilling to take motions to dismiss indictments seriously. Many defendants consequently plead to avoid the risk, however small, of a huge penalty after trial.¹⁹⁹

The ability to challenge legal theories would also tend to clarify the law for future cases, which would facilitate future plea bargaining. Criminal laws remain unclear because the criminal system does not provide a good mechanism for courts to clarify the law. Defendants have three opportunities to challenge prosecutors' legal theories, but none of them work well. The first is the current motion to dismiss the indictment. That motion often fails to clarify the law

Defendant Robert F. McDonnell's Motion #10—Motion to Dismiss Counts 1-11 of the Indictment at 5-28, *United States v. McDonnell*, No. 3:14-cr-00012 (E.D. Va. filed Mar. 25, 2014), ECF No. 106. But, rather than considering its merits, the trial court dismissed the argument in less than a paragraph, stating simply that “the Fourth Circuit has held that conduct analogous to that alleged . . . [in] the Indictment can, as a matter of law, ‘fall under the umbrella of [] ‘official acts’” and that “[w]hether Defendants’ conduct in fact constituted ‘the corruption of official positions through misuse of influence in governmental decision-making’ is a question for the jury based on the evidence adduced at trial.” Order Denying Motion to Dismiss, *United States v. McDonnell*, No. 3:14-cr-00012 (E.D. Va. ordered May 20, 2014), ECF No. 175 (alteration in original) (quoting *United States v. Jefferson*, 674 F.3d 332, 358 (4th Cir. 2012); *United States v. Carson*, 464 F.2d 424, 434 (2d Cir. 1972)).

¹⁹⁶ See King & Wright, *supra* note 6, at 338 (explaining that early criminal settlement conferences prompted prosecutors to make offers earlier than they otherwise might and parties to evaluate their cases earlier).

¹⁹⁷ Cf. *supra* notes 126-28 and accompanying text (describing the consequence of judges opining on a case's merit in the resolution of these motions in civil cases).

¹⁹⁸ Cf. *Bond v. United States*, 134 S. Ct. 2077, 2083 (2014) (discussing woman charged with chemical weapons offense for exposing rival to caustic powder).

¹⁹⁹ See *supra* notes 27-28 and accompanying text.

because simply quoting the language of the statute is sufficient to maintain the criminal charges. The second is a motion to dismiss at the close of the government's case based on the insufficiency of the evidence. Courts regularly defer ruling on those motions because the Double Jeopardy Clause precludes retrial if the court erroneously dismisses the case.²⁰⁰ The third, a motion to dismiss after the jury has returned a guilty verdict,²⁰¹ is also a poor vehicle to clarify the law. The evidence introduced at trial may support conviction under multiple legal theories, and a reviewing court need not consider other theories so long as the conviction is valid under one. Moreover, as doctrines such as the harmless error doctrine demonstrate, courts regularly exhibit a strong preference for leaving jury verdicts intact.²⁰² Accordingly, instead of spelling out exactly the contours of a legal rule in reviewing a conviction, a judge may say simply that the evidence supports a conviction under the prevailing vague standard.²⁰³

Adopting the civil system's framework for motions to dismiss and a heightened pleading standard would largely avoid these problems. Unlike with the current criminal pleading standard, a heightened standard would lead courts to address the precise legal theories underlying the indictment when ruling on motions to dismiss. Moreover, unlike with motions for acquittal, these motions to dismiss would not involve factual determinations or parsing disputed evidence. In ruling on motions to dismiss, judges focus solely on the legal theory given a set of alleged facts assumed to be true.²⁰⁴ Accordingly, the judge is likely to more precisely identify the relevant legal rule.

Creating a meaningful opportunity for defendants to challenge the government's allegations without having to face the threat of massive trial penalties would also shift settlement dynamics. Prosecutors would be less likely to file charges in cases in which the prosecutor has a shaky legal theory or tells a vague or implausible story about the defendant's actions. They would be less likely to file charges because of the increased likelihood that the defendant would prevail on a motion to dismiss.²⁰⁵ And in those marginal cases in which the prosecutor did file, prosecutors would likely be more willing to settle on favorable terms to avoid dismissal.²⁰⁶ At the same time, if a charge survives a

²⁰⁰ See Burnham, *supra* note 12, at 349-50.

²⁰¹ See, e.g., FED. R. CRIM. P. 29(c).

²⁰² See *Sullivan v. Louisiana*, 508 U.S. 275, 279 (1993) (stating that harmless error doctrine allows jury verdicts to be upheld despite errors that could not have reasonably affected the verdict).

²⁰³ See Burnham, *supra* note 12, at 351-52.

²⁰⁴ See, e.g., *Fitzgerald v. Barnstable Sch. Comm.*, 555 U.S. 246, 249 (2009) ("Because this case comes to us on a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), we assume the truth of the facts as alleged in [plaintiffs'] complaint.").

²⁰⁵ Wright & Miller, *supra* note 22, at 34 (arguing that prosecutors would bring fewer charges if they carefully assessed the likelihood of conviction).

²⁰⁶ To be sure, plea bargaining often occurs before an indictment or information is obtained. See generally Brandon K. Breslow, *Signs of Life in the Supreme Court's Uncharted*

motion to dismiss, the prosecutor would acquire a motion to dismiss premium and, with it, greater leverage in bargaining—now earned through some form of merits assessment—because a court has validated the prosecutor’s theory of the case.

Setting the pleading standard in criminal cases at least as high as the standard in civil cases also makes normative sense. The primary function these pleading requirements serve is to screen out complaints that are not legally viable or that lack sufficient detail to determine their legal viability so that defendants are not forced to settle them at a disadvantage.²⁰⁷ Defendants in criminal cases have at least as strong of an interest in screening out weak or meritless charges against them as civil defendants. After all, criminal charges threaten the defendants’ liberty instead of just their finances.²⁰⁸

The principal objection to imposing a heightened pleading requirement in the civil system is that plaintiffs who have suffered a cognizable injury may not know the precise facts underlying the tort and should be allowed to proceed to discovery to learn those facts.²⁰⁹ That objection is weaker in criminal cases. Prosecutors have various investigative tools at their disposal that civil litigants lack, such as grand jury subpoenas and warrants, to gain information before they bring charges.²¹⁰

Territory: Why the Right to Effective Assistance of Counsel Should Attach to Pre-Indictment Plea Bargaining, FED. LAW., Oct./Nov. 2015, at 35. Still, that bargaining occurs in the shadow of the law. If the law prescribed a heightened pleading standard, defendants would have more leverage in plea bargaining because the prosecutor would face a greater risk that whatever indictment she obtains may be insufficient.

²⁰⁷ See, e.g., Adam N. Steinman, *The Pleading Problem*, 62 STAN. L. REV. 1293, 1300 (2009) (“[T]he relationship between pleading standards and discovery costs . . . drives so much of the contemporary debate.”); William H. J. Hubbard, *A Fresh Look at Plausibility Pleading* 24 (Coase-Sandor Inst. for Law & Econ., Working Paper No. 663, 2015), http://chicagounbound.uchicago.edu/law_and_economics/743 [https://perma.cc/S3ZF-GXZX] (focusing on the relationship between pleading and settlement). The changes to the civil system in class actions provide an analogy. Corporate civil defendants were thought to face too much pressure to settle meritless cases if a class action were certified, so the advisory committee created a release valve to obtain further review of the class certification decision in some cases. See FED. R. CIV. P. 23(f) advisory committee’s note to 1998 amendment.

²⁰⁸ One of the drafters of the original Federal Rules of Criminal Procedure agreed. See *Hearing Before the Advisory Comm. on Rules of Criminal Procedure*, United States Supreme Court, D.C., 77th Cong. 219 (1941) (noting the greater interest of criminal defendants).

²⁰⁹ See Jessica Erickson, *Heightened Procedure*, 102 IOWA L. REV. 61, 88 (2016) (“[H]eighted pleading requirements [should apply only] if plaintiffs with meritorious claims will have access to the information necessary to plead their claim.”).

²¹⁰ Ion Meyn, *The Unbearable Lightness of Criminal Procedure*, 42 AM. J. CRIM. L. 39, 56 (2014) (discussing the disparity between prosecutors’ investigative apparatuses and pleading standards).

2. Liberal Discovery

Adopting more liberal discovery rules could also facilitate and improve plea bargaining. The current lack of broad discovery rules in criminal cases hinders the parties' ability to negotiate, and it can prevent parties from reaching informed settlements.²¹¹ Because they do not know the evidence against them, defendants cannot form precise estimates about the outcome of a case. Defendants may enter into a suboptimal deal because they misperceive the adverse evidence's strength.²¹² Or they may refuse to enter into good deals based on undue optimism about the strength of their own case.²¹³

Uninformed plea bargains may also have system-wide effects. Prosecutors and defendants undoubtedly agree to punishments for particular offenses based in part on past agreements for the same offense. Distortions in agreements struck today are incorporated into agreements made tomorrow. Moreover, because warrants, subpoenas, and superior resources give the government better access to information than most defendants, these distortions are likely to skew against defendants in the aggregate.

Broad discovery in criminal cases of non-privileged evidence relevant to a charge or defense would result in more informed settlements. Better information improves settlement prospects in criminal cases by reducing both the prosecutors' and defendants' uncertainty. And more informed settlements reduce the system-wide distortions in plea bargains.

Of course, settlement negotiations may occur before discovery commences. But pre-discovery negotiations would be conducted against the backdrop assumption that broad discovery will begin absent a deal. Parties who are concerned about the uncertainties in negotiation therefore are in a better position to demand more information or to refuse an offer and proceed to discovery.

One might argue that broader discovery is unnecessary because prosecutors already regularly provide defendants with evidence of their guilt to induce pleas. This is true for inculpatory evidence.²¹⁴ But prosecutors less frequently hand over exculpatory evidence or evidence that does not affirmatively support the government's case, such as an inconclusive forensics test. And prosecutors have

²¹¹ Lucian Arye Bebchuk, *Litigation and Settlement Under Imperfect Information*, 15 RAND J. ECON. 404, 409, 413-14 (1984) (noting that, theoretically, informational asymmetry results in parties failing to settle and that discovery reduces informational asymmetry).

²¹² Cf. Kalyan Chatterjee & William Samuelson, *Bargaining Under Incomplete Information*, 31 OPERATIONS RES. 835, 836 (1983) ("Bargaining under uncertainty will, in general, fail to be Pareto efficient."); William Samuelson, *Bargaining Under Asymmetric Information*, 52 ECONOMETRICA 995, 1004-05 (1984) (concluding that the parties in a bilateral monopoly bargaining game may fail to reach mutually beneficial agreements when information is asymmetrically distributed).

²¹³ See J.J. Prescott & Kathryn E. Spier, *A Comprehensive Theory of Civil Settlement*, 91 N.Y.U. L. REV. 59, 78 (2016).

²¹⁴ See Frank H. Easterbrook, *Plea Bargaining Is a Shadow Market*, 51 DUQ. L. REV. 551, 555 (2013) ("Many prosecutors open their files, seeing it as a way to induce pleas.").

no obligation under *Brady v. Maryland*²¹⁵ to hand over exculpatory evidence until just before trial, by which time a defendant may have already entered into a disadvantageous plea deal.²¹⁶

Broader discovery would obviously benefit defendants. But it would also benefit prosecutors, though the benefits would be less significant. Prosecutors already have powerful discovery tools, such as search warrants and grand jury subpoenas, through which they can gather information. Moreover, defendants regularly proffer inculpatory evidence in the plea bargaining process in the hopes of obtaining leniency from prosecutors in their charging decisions or from judges at sentencing. There would also be more limits on prosecutorial discovery simply because defendants would be more likely to assert privileges. Most obviously, the Fifth Amendment privilege against self-incrimination may provide a basis for defendants to refuse to respond to some discovery requests.²¹⁷ Defendants faced with more discovery requests would also more likely be in a position to assert other privileges, such as the priest-penitent or spousal privileges.²¹⁸ Still, discovery would provide the prosecutor with another tool to learn about potential defense witnesses and other evidence.²¹⁹

Recent experiments in several states with so-called open-file discovery confirm that more liberal discovery is feasible in the criminal system.²²⁰ Several state systems require more disclosure of factually exculpatory evidence to defendants earlier in the plea negotiation process.²²¹ And many defendants appear to be taking advantage of their new discovery rights rather than waiving

²¹⁵ 373 U.S. 83, 87 (1963) (holding that “the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution”).

²¹⁶ See Baer, *supra* note 76, at 49-57. The degree of the defendant’s informational disadvantage can be seen by the practice of some prosecutors to demand that defendants bargain away procedural rights in exchange for information. See *supra* note 66 and accompanying text. For example, prosecutors have conditioned plea agreements on the defendant waiving her right to challenge the plea. See *supra* note 66. Defendants would be willing to bargain away those rights for information only if they perceived that knowing the information would be important.

²¹⁷ See U.S. CONST. amend. V.

²¹⁸ See, e.g., FED. R. CIV. P. 26(b) (prohibiting discovery of privileged material).

²¹⁹ One could argue for greater asymmetry in discovery because prosecutors and defendants are not similarly situated in criminal cases. A prosecution is a decision to assert the state’s power to punish the defendant. Concern about the misuse of the state’s punishment power against those who do not deserve punishment underlies many procedural protections in the law. See, e.g., *In re Winship*, 397 U.S. 358, 364 (1970) (imposing reasonable doubt requirement to avoid improper punishment). Thus, *Brady* requires prosecutors to disclose exculpatory evidence before trial as a matter of due process, but defendants have no similar obligation for inculpatory evidence.

²²⁰ See Turner & Redlich, *supra* note 84, at 302-06, 400 (surveying various approaches to criminal discovery in the states).

²²¹ See *id.* at 295-96, 329-46.

them.²²² Moreover, some states have expanded their discovery even further in ways that more resemble civil discovery. For example, Florida, North Dakota, and a few other states allow defendants charged with felonies to take depositions.²²³ North Carolina provides another example. It requires broad-reaching open-file discovery. It does not simply require prosecutors to disclose the materials in their files;²²⁴ it also makes prosecutors responsible for providing information in the files of law enforcement, even if prosecutors have never seen or possessed the information.²²⁵ North Carolina also requires that oral statements be recorded or written and disclosed to defendants.²²⁶ Although these experiments are the exception rather than the rule,²²⁷ they demonstrate the feasibility of adopting broader discovery in criminal cases.

The traditional objection to broader discovery in criminal cases is that granting defendants access to prosecutors' evidence gives defendants an opportunity to tamper with witnesses and interfere with investigations.²²⁸ These concerns are real, but they should not be overstated. Many investigations are completed before charges are filed and thus before discovery would commence.²²⁹ As to witness tampering, a defendant who is willing to tamper with witnesses to avoid a long sentence after a jury conviction may be willing to enter a plea to a shorter sentence rather than risk the punishment that would result from tampering. Further, more than ninety percent of cases are resolved by guilty plea.²³⁰ Pleas obviate the need for witness testimony. Discovery rules accordingly should not be designed around securing that testimony at trial. Instead, the law should fashion discovery rules based on the understanding that

²²² See *id.* at 351-52 (recounting that defendants in Virginia and North Carolina often did not waive open-file discovery).

²²³ See FLA. R. CRIM. P. 3.220(h) ("At any time after the filing of the charging document any party may take the deposition upon oral examination of any person authorized by this rule."); N.D. R. CRIM. P. 15(a) ("At any time after the defendant has appeared, any party may take testimony of any person by deposition . . ."); Prosser, *supra* note 13, at 608-09 (discussing which states allow depositions and under what circumstances).

²²⁴ This limitation on criminal discovery in other states has drawn criticism. See *supra* note 85 (collecting sources). North Carolina appears to have answered these criticisms.

²²⁵ Robert P. Mosteller, *Exculpatory Evidence, Ethics, and the Road to the Disbarment of Mike Nifong: The Critical Importance of Full Open-File Discovery*, 15 GEO. MASON L. REV. 257, 275 (2008).

²²⁶ *Id.*

²²⁷ The majority of states have not adopted open-file discovery, see Turner & Redlich, *supra* note 84, at 302-06 (finding that only seventeen states have adopted the open-file model), and recent efforts to adopt open-file discovery in the federal system failed with the rejection of the Fairness in Disclosure of Evidence Act of 2012, S. 2197, 112th Cong., 158 CONG. REC. 1685.

²²⁸ See, e.g., *United States v. Ruiz*, 536 U.S. 622, 631-32 (2002); Mosteller, *supra* note 225, at 273-74; Turner & Redlich, *supra* note 84, at 400.

²²⁹ See *Iowa v. Eads*, 166 N.W.2d 766, 771 (Iowa 1969).

²³⁰ See *supra* note 1.

the vast majority of cases will be resolved by a plea bargain. Moreover, given that many (if not most) defendants will not tamper with witnesses, it makes more sense to limit discovery only for those defendants who courts conclude present a serious risk of interfering with the criminal process than to prohibit defendant discovery altogether. When there is particular reason for concern, prosecutors could move for a protective order permitting them to resist disclosure or move to quash a deposition subpoena.²³¹

One might also object that the discovery process may be unfair to vulnerable victims or witnesses, such as the victims in rape cases. Those witnesses and victims already face the emotional turmoil of having to tell their stories at trial, and allowing them to be deposed would force them to experience that trauma twice in the criminal process. These are fair concerns. But similar problems already arise in civil cases, and courts handle them through protective orders and other measures.²³² Courts could employ similar orders when needed in criminal cases. For example, defense attorneys might be required to submit questions *ex ante* to a magistrate, who would approve the questions or possibly even ask the questions.²³³

3. Summary Judgment

Creating motions for summary judgment in criminal cases would have similar effects as motions to dismiss would have on plea bargaining. Recall that in the civil system, summary judgment is appropriate when “a fair-minded jury” could not find in favor of the plaintiff on the evidence presented.²³⁴

The criminal system could largely adopt this mechanism. A defendant could move for summary judgment, which would require the government to demonstrate with evidence that a reasonable jury could find beyond a reasonable doubt that the defendant satisfied every element of the crime.²³⁵ Likewise, one

²³¹ Courts might be overly deferential in granting government motions for a protective order, but requiring the prosecutor to undertake the effort to file a motion at least means that a general rule of broader discovery would not always be undercut.

²³² See, e.g., Andrea A. Curcio, *Rule 412 Laid Bare: A Procedural Rule that Cannot Adequately Protect Sexual Harassment Plaintiffs from Embarrassing Exposure*, 67 U. CIN. L. REV. 125, 175 (1998) (stating that courts have used Federal Rule of Civil Procedure 26(c) “to limit discovery of sensitive and personal information in sexual harassment cases”).

²³³ This is not to say that the standard for when discovery should be barred should be the same in the two contexts. The point is that courts could take a similar approach in these criminal cases.

²³⁴ *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986).

²³⁵ See *Celotex Corp. v. Catrett*, 477 U.S. 317, 321-23 (1986); *Anderson*, 477 U.S. at 252; Miller, *supra* note 153, at 1042-43 (“[I]t requires the nonmovant with the ultimate burden of persuasion to come forth with the evidence he or she intends to use at trial or risk the action being terminated under Rule 56 and not reaching the jury.”).

could allow defendants to move for partial summary judgment on one charge when the government has filed several charges.²³⁶

Prosecutors could move for summary judgment as well, but there would be constitutional limits on those motions.²³⁷ A prosecutor would not be able to move for summary judgment on the issue whether the defendant committed the crime, because a defendant has the right to a jury trial under the Sixth Amendment.²³⁸ Although courts have allowed motions for summary judgment in the civil system despite the Seventh Amendment guarantee to a jury in civil cases,²³⁹ they have been much more protective of the Sixth Amendment right to a jury than of the Seventh Amendment right.²⁴⁰ But the Sixth Amendment is not as protective for issues other than whether the defendant committed the offense,²⁴¹ such as whether the defendant is entitled to an affirmative defense.²⁴² Prosecutors could be permitted to move for summary judgment on those issues.

As with strengthening motions to dismiss, creating motions for summary judgment in criminal cases would alter the dynamics in plea negotiations. The ability to file the motion would increase a defendant's leverage by giving her an opportunity to challenge the prosecutor's case. But the denial of such a motion would increase the prosecutor's leverage because it would indicate the judge's belief that a reasonable jury could convict the defendant.

Allowing motions for summary judgment should result in more informed plea negotiations and, in turn, help facilitate guilty pleas. Like a motion to dismiss, a motion for summary judgment would force the prosecutor to articulate and justify her legal theory, and it would provide opportunities for the courts to

²³⁶ See FED. R. CIV. P. 56(a) (allowing partial summary judgment).

²³⁷ That summary judgment motions would benefit defendants more than plaintiffs is consistent with the civil system. Civil plaintiffs have the legal right to move for summary judgment, but where the case does not turn on pure questions of law their chances at summary judgment are quite slim. That is because it is difficult for the party bearing the burden of proof to show that no reasonable jury could find that they have failed to meet their burden of proof. See *Celotex*, 477 U.S. at 321-23.

²³⁸ *Alleyne v. United States*, 133 S. Ct. 2151, 2156 (2013) (stating that the Sixth Amendment right "requires that each element of a crime be proved to the jury beyond a reasonable doubt").

²³⁹ See Suja A. Thomas, *Why Summary Judgment Is Unconstitutional*, 93 VA. L. REV. 139, 160-63 (2007).

²⁴⁰ For example, the Sixth Amendment right has been incorporated against the states on the ground that it is fundamental, see *Duncan v. Louisiana*, 391 U.S. 145, 150 (1968), while the Seventh Amendment right has not, see *Gasperini v. Ctr. for Humanities, Inc.*, 518 U.S. 415, 418 (1996).

²⁴¹ See *Alleyne*, 133 S. Ct. at 2156.

²⁴² See *United States v. Roberts*, 763 F.3d 947, 950 (8th Cir. 2014) (concluding that the right to a jury does not extend to affirmative defenses); cf. *Patterson v. New York*, 432 U.S. 197, 207-08 (1977) (holding that, although the Due Process Clause requires prosecutors to prove all elements beyond a reasonable doubt, that requirement does not extend to affirmative defenses).

clarify the criminal law. But, more than a motion to dismiss, prosecutors would have to reveal their evidence to demonstrate how that evidence could support a conviction. As explained above with respect to pleading,²⁴³ increasing the defendant's understanding of the government's case and legal theory helps facilitate settlement. Moreover, requiring the parties to articulate and support their legal theories can help debias their decision-making and help them disregard evidence that is irrelevant to the merits, but that nevertheless may be prejudicial.²⁴⁴

Summary judgment in criminal cases would help facilitate settlement just as it does on the civil side. It would provide the court an opportunity to weigh in on the merits of the case—this time based on an actual evidentiary record—which may help the parties' views of their case converge and thus facilitate settlement. The expense of briefing would encourage prosecutors to settle and avoid the hassle of summary judgment motions. So too would it provide a moment where both sides simultaneously focus on the case.

Of course, motions for summary judgment also would not remove all uncertainties. Even if the prosecutor provided enough evidence to resist summary judgment, defendants would still not know the probability of a jury convicting based on that evidence. But the motion would go a long way towards reducing uncertainty and would give the defendant an otherwise unavailable opportunity to challenge a prosecutor's case as factually insufficient.

Although a summary judgment motion might seem to be a radical innovation in the criminal system, recent reforms in some states have led to the adoption of procedures that mimic summary judgment to a limited degree. In particular, some states have adopted procedures that permit criminal defendants claiming self-defense,²⁴⁵ or related claims,²⁴⁶ to obtain dismissal of criminal charges before trial based on judicial evaluation of the evidence. Those states instruct trial courts to conduct pretrial hearings and dismiss charges if the defendant can establish by a preponderance of the evidence that her use of force was

²⁴³ See *supra* notes 196-97 and accompanying text (discussing the impacts of allowing a motion for summary judgment in criminal cases).

²⁴⁴ Cf. Oren Bar-Gill & Barry Friedman, *Taking Warrants Seriously*, 106 NW. U. L. REV. 1609, 1641-47 (2012) (justifying the warrant requirement based on social science literature demonstrating that articulating reasons debiases police decision-making).

²⁴⁵ See *People v. Malczewski*, 744 P.2d 62, 65 (Colo. 1987); *Dennis v. State*, 51 So. 3d 456, 462-63 (Fla. 2010); *Bunn v. State*, 667 S.E.2d 605, 608 (Ga. 2008); *State v. Duncan*, 709 S.E.2d 662, 663-65 (S.C. 2011). Kentucky also requires pretrial hearings and dismissal of charges, but the trial court must only determine "whether probable cause exists to conclude that a defendant's use of force was unlawful." *Rodgers v. Commonwealth*, 285 S.W.3d 740, 754 (Ky. 2009).

²⁴⁶ Some states include defense of property or defense of habitation. See, e.g., COLO. REV. STAT. § 18-1-704.5(3) (2016) (defense of habitation); GA. CODE ANN. §§ 16-3-23, 16-3-24 (2016) (including defense of habitation, defense of real property other than habitation, and defense of personal property).

justified.²⁴⁷ These so-called immunity hearings are conducted so that defendants need not bear the expense of trial when the evidence indicates a conviction would be inappropriate.²⁴⁸

Creating motions for summary judgment also makes normative sense. It is hard to see why the government should have a lower hurdle to clear in exposing a defendant to criminal charges than for a private litigant to expose a defendant to civil claims. A trial is just as unnecessary in a criminal case that the prosecutor should not reasonably win as it is in a civil case in which the evidence rationally supports only one outcome. Summary judgment avoids trial costs for the defendant and the risk that a jury might erroneously convict.²⁴⁹ Given that the justice system was originally designed to tolerate more defense-friendly errors in the criminal system than the civil system,²⁵⁰ the criminal system should provide defendants at least the same advantages associated with summary judgment as provided to civil defendants.

4. Judicial Involvement and ADR

As in civil cases, courts could become more involved by conducting pretrial conferences and issuing pretrial orders in criminal cases. Judges could employ these devices with an eye towards encouraging settlement. As in the civil system, these procedures would also facilitate settlement indirectly by forcing the parties to come together to exchange information about their positions and by allowing the judge to reveal her preliminary views of the case.²⁵¹

Other forms of ADR, such as mediation, could also be used to help facilitate settlement. Just as in the civil system, ADR would help prosecutors and defendants identify grounds of overlap to facilitate compromise.²⁵² And just as in the civil system, court rules could mandate that the parties engage in some form of ADR.²⁵³ Bringing a neutral arbiter into the bargaining process could help with the leverage disparity that currently exists in the criminal system.

Some states have experimented with various forms of judicial involvement and other non-judicial dispute resolution programs.²⁵⁴ Florida and Connecticut, for example, authorize judges to participate in plea negotiations to help the

²⁴⁷ See *supra* note 245.

²⁴⁸ See, e.g., *People v. Guenther*, 740 P.2d 971, 976 (Colo. 1987).

²⁴⁹ Cf. Alexander A. Reinert, *Measuring the Impact of Plausibility Pleading*, 101 VA. L. REV. 2117, 2122 (2015) (“[T]his Article provides data showing that dismissals of employment discrimination and civil rights cases have risen significantly in the wake of *Iqbal*.”). Of course, many defendants are indigent and entitled to appointed counsel, and thus they may not personally bear the litigation costs associated with trial.

²⁵⁰ See *supra* text accompanying note 9 (discussing a defendant’s trial rights).

²⁵¹ See *supra* notes 151-53 and accompanying text.

²⁵² See *supra* notes 129-31 and accompanying text.

²⁵³ See *supra* notes 129-31 and accompanying text.

²⁵⁴ See *Batra*, *supra* note 7, at 578 (“[T]here are many states that allow participation by a judge during the plea process, and often encourage the practice for various reasons.”).

parties reach an agreement.²⁵⁵ In some counties, settlement conferences are routine.²⁵⁶ Other states separate cases into different tracks, and some of those tracks steer toward settlement by directing cases to judges who are particularly good at helping parties resolve their differences.²⁵⁷ Some Maryland courts have “resolution conferences” staffed by former judges now serving as mediators.²⁵⁸

Allowing judges to encourage plea bargains or participate in plea negotiations presents some risk that judges may be seen as coercing defendants into pleading guilty or may be perceived as no longer being neutral.²⁵⁹ But procedures could be adopted to counter those risks. Requiring judges to conduct the discussions in public and to create a written record could mitigate perceptions of coercion.²⁶⁰ To avoid claims that participation in plea negotiations impairs a judge’s neutrality, cases could be reassigned to new judges for trial.²⁶¹

B. *Giving the Procedures Traction*

Although these procedural mechanisms may facilitate plea bargaining, many defendants may not be able to enjoy the full benefits of the procedures without other changes. For example, if public defenders remain underfunded as compared to prosecutors, then their ability to file motions to dismiss, conduct effective discovery, and file for summary judgment will be hampered.²⁶²

Prosecutorial leverage also presents a huge hurdle to defendants taking advantage of these procedures. That is because prosecutors could use their leverage to demand that a defendant waive these procedures.²⁶³ Prosecutorial leverage will persist unless legislatures reduce penalties for violations of

²⁵⁵ See, e.g., *Connecticut v. Niblack*, 596 A.2d 407, 412 (Conn. 1991); *Wilson v. Florida*, 845 So. 2d 142, 146-47 (Fla. 2003); Jennifer Marquis, *State of Connecticut v. D’Antonio: An Analysis of Judicial Participation in the Plea Bargain Process*, 25 QUINNIPIAC L. REV. 455, 455-56 (2006) (“The Connecticut rule provides that a judge may in fact participate in plea negotiations, provided that if the negotiations prove futile, a different judge must preside over the ensuing trial.”).

²⁵⁶ King & Wright, *supra* note 6, at 338 (finding that criminal settlement conferences were routine in at least some counties in eight of the ten states studied).

²⁵⁷ See *id.* at 343-44.

²⁵⁸ *Id.* at 346.

²⁵⁹ See FED. R. CRIM. P. 11 advisory committee’s note to 1974 amendment.

²⁶⁰ See Batra, *supra* note 7, at 582-83 (describing concerns about judicial overreach); *id.* at 589-92 (advocating written record of hearing to permit ex post review); Jocelyn Simonson, *The Criminal Court Audience in a Post-Trial World*, 127 HARV. L. REV. 2173, 2197-202 (2014) (explaining importance of open courtrooms for non-trial proceedings).

²⁶¹ See King & Wright, *supra* note 6, at 343-47 (identifying states that follow this model).

²⁶² See generally Ronald F. Wright, *Parity of Resources for Defense Counsel and the Reach of Public Choice Theory*, 90 IOWA L. REV. 219 (2004) (arguing for resource parity between prosecution and defense).

²⁶³ See *supra* note 66 and accompanying text; see also Turner & Redlich, *supra* note 84, at 347 (noting prevalence of discovery waivers in New York prosecutions).

criminal laws, eliminate mandatory minimum penalties, and make criminal statutes narrower and shallower.²⁶⁴ But that is politically unlikely.²⁶⁵

That prosecutorial leverage cannot be eliminated entirely, however, does not mean that the leverage cannot be reduced in some respects. This Section explains the extent to which the procedures we propose reduce prosecutorial leverage. It then proposes that the criminal system adopt another civil mechanism: fee shifting. Allowing some form of fee shifting would decrease prosecutorial leverage by creating a risk of negative consequences if the defendant prevails. Fee shifting has the additional benefit of providing more funding for public defenders, who are chronically underfunded.

1. Leverage under the Proposed Procedures

The procedures we have proposed could, to some extent, reduce prosecutorial leverage. For example, motions to dismiss would reduce prosecutors' leverage by giving defendants a stronger way to challenge charges based on shaky legal theories and by requiring prosecutors to provide more detail in the charging instrument. Likewise, motions for summary judgment would reduce prosecutors' leverage by requiring prosecutors to preview the evidence they intend to introduce at trial and by allowing defendants to challenge charges based on thin evidence.

Moreover, as discussed below, the procedures we identify would create costs that prosecutors would bear more than defendants. The greater costs on prosecutors would give defendants more leverage in bargaining.

To be sure, the increased costs would increase prosecutors' incentives to demand waiver of those procedures. So long as the procedures are waivable, prosecutors will likely seek waivers of those procedures as part of the plea bargain.²⁶⁶ But at least some defendants will refuse to waive the procedures. For example, a defendant who is legally innocent may refuse to agree to a prosecutor's demand that she waive her motion to dismiss because she has a good chance of prevailing on such a motion. Indeed, in at least some open-file-discovery jurisdictions, prosecutors do not regularly demand waivers.²⁶⁷

Moreover, the increased costs would reduce prosecutors' leverage to insist on plea deals that require defendants to waive *all* of their pretrial procedural rights. That is because prosecutors will have to incur the costs associated with all of the pretrial procedures, including those that particular defendants would have been

²⁶⁴ See *supra* Section I.A (describing these attributes as sources of prosecutorial leverage).

²⁶⁵ Legislators have little incentive to change these laws because to do so is politically unpopular. See Stuntz, *supra* note 4, at 530-32 (explaining legislators' institutional incentives to provide prosecutors as many tools as possible).

²⁶⁶ As noted above, prosecutors often require the waiver of many procedural rights, not only the right to a jury trial, as part of a plea bargain. See *supra* note 66 and accompanying text.

²⁶⁷ See Turner & Redlich, *supra* note 84, at 351 (finding that discovery waivers are infrequent in North Carolina and Virginia).

willing to bargain away.²⁶⁸ Imagine, for example, a defendant who wants to file a motion to dismiss but who would be willing to plead guilty if she lost that motion. If the prosecutor makes a plea bargain contingent on the defendant waiving all of her pretrial rights, then the defendant has incentives to seek extensive discovery and employ every other procedural device available that would increase the prosecutor's burden.²⁶⁹ Accordingly, prosecutors would likely be more cautious in demanding waiver of all pretrial procedures.

To address the concern that prosecutors would use their leverage to force defendants to waive these new procedures, these procedures could simply be made unwaivable. Texas, for example, elected to make its discovery rules unwaivable in criminal cases.²⁷⁰ That approach limits prosecutors' ability to demand waivers of these procedures. But it still would likely not prevent all waivers. Prosecutors and defendants could work together to avoid these limits on waivers by negotiating before charges have been filed.²⁷¹ That black market could be contained by prohibiting the entry of pleas unless the procedures have been followed, but even then the parties could likely work around such restrictions.²⁷² Moreover, making procedures unwaivable may have drawbacks. Defendants would no longer have the chip of waiving these procedures in negotiations with prosecutors. To be sure, losing that chip may not matter much if defendants already lack bargaining power, but to the extent that prosecutors would be willing to give any reduction for a waiver, defendants may find more value in waiving the procedures than in following them.

2. Fee Shifting

Although the proposed procedures would reduce prosecutorial leverage, standing alone, they will not substantially alter the current imbalance of power. Even with the proposed procedures, defendants would continue to face harsh consequences for losing at trial, while prosecutors still would not. As a consequence, defendants' incentives to plead guilty remain much stronger than prosecutors' incentives to offer an attractive plea bargain.

²⁶⁸ Cf. Gregory M. Gilchrist, *Trial Bargaining*, 101 IOWA L. REV. 609, 614 (2016) (conceptualizing plea bargaining as "an array of individual waivers: a waiver of the right to a jury, a waiver of the right to confront witnesses, a waiver of the right to hold the prosecution to its burden of proof, [and] a waiver of the right to compel witnesses").

²⁶⁹ This is especially so for indigent defendants. Defendants who are paying for representation may wish to avoid discovery and summary judgment so that they need not pay the attorneys' fees and other costs associated with those procedures.

²⁷⁰ See TEX. CODE CRIM. PROC. ANN. art. 39.14(n) (West 2017) ("This article does not prohibit the parties from agreeing to discovery and documentation requirements equal to or greater than those required under this article.").

²⁷¹ See Turner & Redlich, *supra* note 84, at 348-49 (discussing evidence that at least some prosecutors have sought to circumvent the limitation on waiver of discovery in Texas).

²⁷² For example, a defendant might tacitly agree not to file substantial discovery requests in exchange for lower charges.

To help address the continuing leverage disparity, the criminal system could borrow another mechanism from the civil system—namely some form of fee shifting. Although in most civil suits the parties must pay their own attorneys' fees, some statutes require losing parties to pay attorneys' fees to prevailing parties. Some of those statutes limit fees to cases in which the court finds the defendant's action to have been frivolous or unreasonable;²⁷³ others create a presumption of an award of fees to victorious plaintiffs.²⁷⁴ And some statutes shift fees to prevailing defendants.²⁷⁵

One can imagine a fee-shifting scheme for criminal prosecutions in which acquitted defendants may obtain fees from the prosecutors' offices. The difficulty would be in establishing the precise circumstances in which fees should be awarded. Allowing all acquitted defendants to obtain fees may over-deter prosecutions. But a criminal fee-shifting statute might create only a presumption of a fee award, or it might authorize recovery only if the prosecution was unreasonable or otherwise without foundation.

Allowing the collection of attorneys' fees would have the added benefit of providing more funding for public defenders, who are notoriously underfunded.²⁷⁶ Increased funding for public defenders' offices may make prosecutors' work more difficult in future cases. Thus, an arrangement in which prosecutorial overreach yields increased funding to public defenders' offices creates a good incentive structure for prosecutors.

Another permutation would be analogous to civil procedure's rule regarding offers of judgment. Recall that Federal Rule of Civil Procedure 68 creates partial fee shifting from plaintiffs to defendants if plaintiffs refuse a settlement offer in an amount greater than or equal to the judgment the plaintiff ultimately obtains.²⁷⁷ In such a scenario, the plaintiff must pay costs that the defendant accrued after making that offer. Analogously, if a defendant indicates that she would be willing to accept a sentence that is greater than or equal to the sentence the prosecutor ultimately secures, the prosecutor's office could be responsible

²⁷³ See *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 421 (1978).

²⁷⁴ See *Newman v. Piggie Park Enters., Inc.*, 390 U.S. 400, 401 (1968) (stating that plaintiffs are ordinarily entitled to fees under a Title II action unless there are special circumstances that would render the award of fees unjust).

²⁷⁵ E.g., CAL. CIV. CODE § 3344 (West 2017).

²⁷⁶ To be sure, fee-shifting statutes may discourage bargains to some degree. Parties may be more willing to bear the costs of going to trial because of the possibility of recovering those costs under the fee-shifting statute. See William M. Landes, *An Economic Analysis of the Courts*, in *ESSAYS IN THE ECONOMICS OF CRIME AND PUNISHMENT* 164, 172 (Gary S. Becker & William M. Landes eds., 1974). But the effect would be small in the criminal system. Although some defendants base their litigation strategy on costs, most do not, either because they do not bear their own costs, see MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 85 (rev. ed. 2012) ("80 percent of defendants are indigent.") or because they figure any cost is worth avoiding a conviction.

²⁷⁷ See *supra* note 179 and accompanying text.

for fees in the interim. The most likely scenario of a defendant being willing to accept an offer of a sentence greater than what the court ultimately imposes is if the defendant is acquitted on one or more serious charges but convicted of a lesser charge. Fee shifting in that instance would create at least some incentive for prosecutors not to overcharge.

Our point is not to provide the precise details of a fee-shifting scheme but instead to illustrate that a fee-shifting scheme could result in prosecutors internalizing some form of risk in prosecution.²⁷⁸

This proposal is, of course, far from the only way of leveling the playing field. Another option is to change the rule that allows prosecutors to re-indict a defendant on more serious charges if she refuses to plead.²⁷⁹ A further option is to increase judicial discretion at sentencing to reduce the prosecutor's ability to threaten the certainty of higher punishment upon conviction.²⁸⁰ These options face their own obstacles, such as persuading the Supreme Court to reinterpret the Due Process Clause. But they are worth considering in contemplating how to improve plea bargaining.

C. *Considering Costs*

Implementing the procedures we have suggested would increase the costs of prosecuting criminal cases. This is especially true for liberal discovery and motions for summary judgment. In the civil system, increasing costs is one of the virtues associated with these settlement-facilitating procedures. Imposing costly procedures provides both sides with an incentive to settle to avoid incurring these costs.²⁸¹

The costs of these new procedures in criminal cases would have a similar effect, at least in cases involving defendants who pay for their representation. Non-indigent defendants and prosecutors would have an incentive to settle to avoid these costs. But the effects would be different for indigent defendants. Indigent defendants are entitled to legal representation in felony cases, and the state pays the defendant's litigation costs, at least initially.²⁸² As a result, indigent defendants do not have similar incentives to settle to avoid these costs. But increased costs would still have some effect on whether indigent defendants settle. Although individual indigent defendants do not have an incentive to avoid litigation costs, their attorneys do have an incentive to settle to avoid spending

²⁷⁸ We realize, of course, that because the prosecutor's goal is not to obtain money, nor is the defendant's goal to keep it, fee shifting does not help equalize exposure quite as effectively as in the civil system.

²⁷⁹ In other words, overturn *Bordenkircher v. Hayes*, 434 U.S. 357 (1978).

²⁸⁰ This would require either the repeal of statutory mandatory minimums or a new constitutional theory that mandatory minimums are unconstitutional.

²⁸¹ *Cf.*, e.g., Issacharoff & Loewenstein, *supra* note 158, at 101 (arguing that avoiding costs promotes civil settlement).

²⁸² Notably, many states impose some costs of indigent defense on the indigent defendants after trial. See generally Beth A. Colgan, *Paying for Gideon*, 99 IOWA L. REV. 1929 (2014).

time and resources on representing them. Attorneys who represent indigent defendants are notoriously overworked and underfunded.²⁸³ These attorneys may impart some indirect pressure on their clients to settle to avoid increased time costs.

Indeed, because they usually have fewer resources than retained counsel, attorneys for indigents may be more eager to settle than retained counsel to avoid these new procedures. Consequently, prosecutors might more readily bring charges against indigent defendants than those with retained counsel. That is troubling, but incentives to charge based on a defendant's socio-economic status already exist. Wealthy defendants already have the ability to bury prosecutors with motions and other papers, and increasing the procedures those defendants have may make prosecutors more hesitant to pursue charges against those defendants.²⁸⁴

Increasing costs may also have public safety ramifications that are ordinarily not present in the civil system. Because prosecutorial budgets are fixed in the short term,²⁸⁵ increasing the cost of each prosecution may lead prosecutors to prioritize cases that can be tried more inexpensively. The costs and the difficulty for prosecutors in clearing each procedural hurdle will vary across different types of cases. For the mine-run of drug cases that start with a "buy and bust," the legal theories are simple and the facts are straightforward. The additional procedures are unlikely to impose substantially more costs. But the costs would be much higher in cases with more complicated legal theories and factual records.

Increasing costs may also lead to a decrease in the overall number of prosecutions brought. The result is to leave more criminals on the street to offend again and to reduce the deterrent force of the law. Thus, providing procedures to encourage better, fairer plea bargaining may have the unintended consequence of increasing crime.

It is debatable whether these risks outweigh the value that these procedures would have of producing more informed plea deals. And even if they do, these

²⁸³ See Martin Guggenheim, *The People's Right to a Well-Funded Indigent Defender System*, 36 N.Y.U. REV. L. & SOC. CHANGE 395, 404 (2012).

²⁸⁴ Data on this question is lacking. See, e.g., Erica J. Hashimoto, *Class Matters*, 101 J. CRIM. L. & CRIMINOLOGY 31, 33 (2011) (discussing the lack of data about whether the poor are charged more often for drug crimes).

²⁸⁵ We leave aside for simplicity's sake that forfeiture allows prosecutors' offices to aggrandize their budgets. See Eric Blumenson & Eva Nilsen, *Policing for Profit: The Drug War's Hidden Economic Agenda*, 65 U. CHI. L. REV. 32, 56 (1998) ("The most intuitively obvious problem presented by the forfeiture and equitable sharing laws is the conflict of interest created when law enforcement agencies are authorized to keep the assets they seize. It takes no special sophistication to recognize that this incentive constitutes a compelling invitation to police departments to stray from legitimate law enforcement goals in order to maximize funding for their operations."); Russell M. Gold, "Clientless" Lawyers, 92 WASH. L. REV. 87, 108-10 (2017) (explaining that forfeiture proceeds may skew prosecutors' incentives).

risks do not mean that the criminal system should not adopt the procedures. Instead, these settlement-facilitating procedures should be implemented in a way that minimizes the risks while preserving their value. For example, because plea negotiations are designed to resolve a case based on a prediction of how the jury would rule, one might limit discovery to evidence that the other side actually intends to introduce at trial, as opposed to any evidence that is relevant to the crime or a defense. Or one might require defendants seeking discovery to identify the particular issues on which they seek discovery and why discovery on those issues is important. Or one might initially limit discovery to the most serious charges. Or one might limit the discovery tools that the parties may use. For example, one might tie the number and length of depositions the parties may take to the severity of the penalty she faces; so a defendant facing up to twenty years of imprisonment may take more and longer depositions than a defendant facing only one year.²⁸⁶ And truncated procedures might be especially appropriate for misdemeanors.

Importantly, not all of these procedures would be necessary in every case, and they are not all equally costly. Broad discovery would substantially increase litigation costs as the parties spend time and money locating, reviewing, and producing discoverable evidence and then spend more time and money sifting through the evidence that is produced.²⁸⁷ By contrast, requiring indictments to contain more information to survive motions to dismiss would impose substantially smaller costs. If a motion to dismiss is granted and the prosecutor cannot amend the allegations to obtain a different outcome, the later and more expensive procedures like discovery and summary judgment would be unnecessary. Prosecutors would have to spend more time writing charging documents, and defendants may be more likely to bring motions to dismiss. But the costs at that early stage would not be so significant.

A final point worth noting is that the costs created by these procedures will reduce coerced pleas. The law regularly imposes procedural costs to protect individuals from coercion. For example, the Supreme Court's decision in *Brady* to require prosecutors to sift through and disclose exculpatory information before trial rests on the conclusion that protecting defendants from unfair punishment is worth the cost of that process.²⁸⁸ More generally, the right to procedures under the Due Process Clause rests on the principle that, although those procedures can be expensive, the costs are worth the protections that those procedures afford against the misuse of government power.²⁸⁹ Implementing the

²⁸⁶ Cf. FED. R. CIV. P. 26(b)(1) (incorporating proportionality into the general rule on scope of discovery); UTAH R. CIV. P. 26(c)(5) (tying number of depositions to amount at stake in case).

²⁸⁷ Turner & Redlich, *supra* note 84, at 361 (reviewing prosecutor complaints of burden in open-file states).

²⁸⁸ See Alafair S. Burke, *Revisiting Prosecutorial Disclosure*, 84 IND. L.J. 481, 509 (2009) (arguing that the cost of complying with *Brady* is lower than the cost of *Brady* violations).

²⁸⁹ See *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

procedures we have suggested would extend these sorts of protections to defendants earlier in the process so that they can enjoy a fairer process in plea bargaining. And because the criminal justice system is now essentially a system of plea bargaining,²⁹⁰ refusing to incur these costs is essentially a refusal to protect individuals from the misuse of government power.

CONCLUSION

Plea bargaining should not be driven by unequal bargaining power. Instead of encouraging defendants to plead guilty simply by giving prosecutors massive leverage, the criminal system should adopt procedures from the civil system. Civil procedures promote settlement by helping the parties form more accurate assessments of their positions and find common ground between them.

In making this argument, we recognize that the procedures used in civil cases are not ideal for achieving informed settlements.²⁹¹ In part that is because the procedures exist to achieve other goals, such as preparing the case for trial and preserving a role for the jury.²⁹² But these procedures have proven to be effective and they certainly are better than the procedures in criminal cases. Moreover, adopting these civil procedures is much more practically feasible than creating a new set of procedures for criminal cases from scratch. Practitioners, legislators, and judges are already familiar with civil procedures, and thus they could easily follow them in criminal cases as well.

We also do not mean to say that the criminal system should adopt wholesale all of the procedures from the civil system. There are many procedural features of the civil system—such as the burden of persuasion²⁹³ and the particularized pleading requirements for defendants²⁹⁴—that should not be imported into the criminal system. The few procedures we propose adopting all have the virtues of not undermining a defendant's rights, while at the same time increasing the likelihood that criminal settlements will be fairer and more informed.

One might argue that adopting procedures to facilitate criminal settlements risks hampering the development of criminal law through judicial decisions and jury verdicts. Indeed, this is a common critique of settlement in the civil

²⁹⁰ See *supra* note 1 and accompanying text.

²⁹¹ See Glover, *supra* note 130, at 1737-49 (criticizing civil rules for distorting settlements).

²⁹² See *id.* at 1738 (arguing that civil rules hamper settlement by leaving factual disputes for the jury).

²⁹³ As the Supreme Court has explained, “a person accused of a crime . . . would be at a severe disadvantage, a disadvantage amounting to a lack of fundamental fairness, if he could be adjudged guilty and imprisoned for years on the strength of the same evidence as would suffice in a civil case.” *In re Winship*, 397 U.S. 358, 363 (1970) (quoting *W. v. Family Court*, 247 N.E.2d 253, 259 (N.Y. 1969)).

²⁹⁴ In civil cases, defendants are required to answer the claims asserted in the complaint by asserting a defense to each claim and by admitting or denying the allegations. See FED. R. Civ. P. 8(b).

system.²⁹⁵ But most criminal cases already settle. Adopting the procedures we identify would likely not increase the rate of settlement, given that the rate of civil settlements is comparable to the rate of criminal settlements. More important, adopting these procedures increases the likelihood cases that do not settle produce judicial opinions that clarify criminal law.

²⁹⁵ See, e.g., Fiss, *supra* note 2, at 1085-87 (arguing that the purpose of adjudication is not merely private dispute resolution and that settlement brings only peace for the parties and not necessarily justice in a broader sense); Judith Resnik, *Whose Judgment? Vacating Judgments, Preferences for Settlement, and the Role of Adjudication at the Close of the Twentieth Century*, 41 UCLA L. REV. 1471, 1476 (1994) (arguing that procedural developments that promote settlement undermine the information-generating and law-development benefits of litigation to third parties).