# Pleading for Justice: Why We Need a More Exacting Federal Criminal Pleading Standard

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*Under the existing system of pleading in the federal courts, criminal indictments are subject to significantly less scrutiny than civil complaints. Unlike complaints, indictments can include strikingly little factual detail and, instead, may rely on conclusory and legalistic allegations. In previous work, I argued that that pleading balance is misguided as a matter of law, without evaluating normative and policy arguments. I observed, however, that if we are to retain a pleading regime that is legally questionable, those arguments should provide robust support for that regime.*

*This Article, accordingly, takes up the question of what the normative and policy considerations say about our existing pleading system, and it concludes that those factors counsel powerfully in favor of raising the criminal pleading standard to at least align with the civil standard. Doing so would generate a host of benefits for criminal defendants and the justice system, including: improving defendants' access to information; reducing informational asymmetry between the parties; giving defendants an effective method of raising merits challenges to prosecutions; promoting greater clarity in the law; preventing overly aggressive, wrong, or capricious prosecutorial positions; protecting against erroneous guilty pleas; clarifying the scope of criminal cases; and helping to correct a problematic disparity between the protections criminal and civil defendants receive. Further, there are few downsides or drawbacks to such a reform. Thus, this Article seeks to show—and to persuade the powers that be—that the time has come for change.*

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## I. INTRODUCTION

Our current federal pleading system, most counterintuitively, subjects criminal indictments to significantly less scrutiny than civil complaints.[1] Under the prevailing interpretation of the Federal Rule of Criminal Procedure governing criminal pleading, Rule 7(c), conclusory indictments that merely parrot the language of a statute are often entirely sufficient. Yet the civil pleading Rule, Federal Rule of Civil Procedure 8(a), has been construed to require particularized factual allegations and to prohibit "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements."[2]

In recent work, I argued that this balance between our civil and criminal pleading standards is misguided as a matter of law.[3] Based on an examination of legal, historical, and archival sources, I concluded that the drafters of Rule 7(c) designed the Rule to be at least as stringent as Rule 8(a) and that the original design should control today.[4]

One of the implications of that, I observed, was that it made policy arguments critical.[5] If we are to retain a legally questionable pleading regime, then that regime should at least be strongly supported by normative and policy considerations.[6] But I suggested that those considerations might well favor *changing* the criminal pleading standard in line with my legal argument.[7]

Nevertheless, to permit a complete analysis of the legal issues, my previous research specifically put aside the question of whether strengthening the criminal pleading standard to at least align with the civil pleading standard is warranted as a normative matter.[8] This Article, therefore, begins where my previous research ended. Considering that unanswered question, however, leads to precisely the same conclusion I suggested in my earlier work: we should raise the criminal pleading standard.[9]

To begin, doing so would generate a host of benefits. First, raising the criminal pleading standard would significantly improve defendants' access to information about the case against them before trial. Second,

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1 *See* Charles Eric Hintz, *A Formulaic Recitation Will Not Do: Why the Federal Rules Demand More Detail in Criminal Pleading*, 125 PENN ST. L. REV. 631, 633–43 (2021).

2 *Id.* at 633 (alteration in original) (citation omitted).

3 *See id.* at 635–36, 692–93.

4 *See id.* at 635–36, 643–80, 692–93.

5 *See id.* at 636, 693.

6 *See id.*

7 *See* Hintz, *supra* note 1, at 636, 693.

8 *See id.* at 636 n.18.

9 *See id.* at 635–36, 692–93.

it would begin to correct the government's substantial informational advantage over criminal defendants. Third, it would create a robust mechanism for defendants to challenge the merits of the prosecution's case. Fourth, it would lead to greater clarity in the criminal law. Fifth, it would prevent prosecutors from adopting overly aggressive, wrong, or capricious positions. Sixth, it would reduce the chance that innocent defendants would plead guilty. Seventh, it would define the scope of the charges and proceedings, thereby guarding against double jeopardy violations. And finally, it would help to eliminate a problematic imbalance between the protections that civil and criminal defendants receive.

In addition, there are few valid concerns or drawbacks to augmenting the criminal pleading standard. Objections could or have been raised, such as that amplifying the criminal pleading standard would: increase the burdens of criminal litigation; be improper because of the difficulty of amending criminal pleadings; require the government to reveal sensitive information; let guilty defendants go free; or be unnecessary to protect criminal defendants. But as explained below, those objections are overblown or otherwise unsound.

As I indicated in my previous work, other commentators have raised or suggested policy-oriented arguments—and good ones—in favor of amplifying the criminal pleading standard.[10] But present scholarship generally discusses the criminal pleading issue in service of broader objectives and/or does not comprehensively examine it. This Article, therefore, is designed to offer a more focused and complete analysis of why the criminal pleading standard should be raised to, at minimum, align with the civil standard as a policy and normative matter. And in performing that analysis, it draws on, synthesizes, and builds upon arguments from the existing literature.

This Article's analysis proceeds in the following way. Part II provides a brief overview of our federal pleading jurisprudence. Part III then describes the benefits of raising the criminal pleading standard. Part IV discusses potential objections to my argument and explains why

[10] *See id.* at 635–36, 693; *see, e.g.*, James M. Burnham, *Why Don't Courts Dismiss Indictments?*, 18 GREEN BAG 2D 347, 348–54, 357–62 (2015); Russell M. Gold, Carissa Byrne Hessick & F. Andrew Hessick, *Civilizing Criminal Settlements*, 97 B.U. L. REV. 1607, 1612–13, 1632–33, 1640–44 (2017); Ion Meyn, *The Unbearable Lightness of Criminal Procedure*, 42 AM. J. CRIM. L. 39, 40–41, 55–57, 87–88 (2014); Robert L. Weinberg, *Applying the Rationale of* Twombly *to Provide Safeguards for the Accused in Federal Criminal Cases*, 7 ADVANCE 45, 49–52 (2013) [hereinafter Weinberg, *Applying* Twombly]; Robert L. Weinberg, Iqbal *for the Accused?*, CHAMPION, July 2010, at 29–32 [hereinafter Weinberg, Iqbal].

they are unavailing. Finally, Part V explores some of the implications of this Article's conclusion.

## II. THE CURRENT STATE OF FEDERAL PLEADING LAW

To permit a fully informed discussion of the criminal pleading standard, it is important to begin by reviewing the current state of federal pleading law. Accordingly, this Part offers a brief overview of criminal and civil pleading under the Federal Rules of Criminal and Civil Procedure.[11]

Federal criminal pleading typically consists of a pleading document called an indictment or information.[12] That document generally sets out the allegations that the prosecution will seek to prove at trial, and under Federal Rule of Criminal Procedure 7(c), it "must be a plain, concise, and definite written statement of the essential facts constituting the offense charged."[13] If the indictment fails to meet the strictures of Rule 7(c), the defendant can seek its dismissal "for 'lack of specificity' under Rule 12(b)(3)(B)(iii) or 'failure to state an offense' under Rule 12(b)(3)(B)(v)," thereby bringing an early end to the case or, at minimum, requiring the prosecution to seek a new indictment that complies with Rule 7(c).[14]

As interpreted, however, Rule 7(c) is not much of a limitation. The Supreme Court has concluded that "[w]hile detailed allegations might well have been required under common-law pleading rules, they surely are not contemplated by Rule 7(c)(1)."[15] And it has repeatedly

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[11] I describe the current state of federal pleading law at some length in my previous work. *See* Hintz, *supra* note 1, at 636–43. Given the topical similarity of this Article, some repetition in setting the stage here is inevitable. But I have endeavored to minimize that and tailor the following discussion as much as possible.

[12] *See id.* at 639–40. "'An indictment is a criminal charge returned to the court by a grand jury,' whereas '[a]n information is a criminal charge prepared by the prosecutor.'" *Id.* at 640 n.43 (alteration in original) (quoting 1 ANDREW D. LEIPOLD, FEDERAL PRACTICE AND PROCEDURE § 121 (4th ed. 2021)). Much of the discussion in this Article relating to indictments is applicable to informations. My focus, however, will primarily be on indictments because indictments are the default charging document, *see, e.g.*, FED. R. CRIM. P. 7(b), they are used in the overwhelming majority of cases, *see infra* note 248 and accompanying text, and informations are only filed if the defendant has agreed to that method of charging (often as part of a guilty plea), *see, e.g.*, FED. R. CRIM. P. 7(b); 1 IAN M. COMISKY, LAWRENCE S. FELD & STEVEN M. HARRIS, TAX FRAUD & EVASION ¶ 5.01[2] & n.17 (2021).

[13] Hintz, *supra* note 1, at 640 (quoting FED. R. CRIM. P. 7(c)(1)).

[14] *Id.* (quoting FED. R. CRIM. P. 12(b)(3)).

[15] *Id.* at 641 (quoting United States v. Resendiz-Ponce, 549 U.S. 102, 110 (2007)).

emphasized that "an indictment parroting the language of a federal criminal statute is often sufficient."[16]

In practice, what that means is that exceedingly vague and legalistic criminal pleadings can withstand Rule 7(c)'s scrutiny and allow prosecutors to bring a case to trial.[17] Take, for example, the following indictment:

> On or about the 13th day of July, 2007, in Shannon County, within the Eastern District of Missouri, the defendant,
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> **KARRIE L. GULER,**
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> knowingly did forcibly assault, resist, oppose, impede, intimidate, and interfere with Teresa McKinney, a Ranger with the National Park Service, while she was engaged in her official duties, in violation of Title 18, United States Code, Section 111.[18]

That indictment essentially just regurgitates the relevant language of 18 U.S.C. § 111, which subjects to criminal liability anyone who "forcibly assaults, resists, opposes, impedes, intimidates, or interferes with any [statutorily designated] person . . . while engaged in . . . official duties."[19] And it includes effectively no detail about the wrongful conduct at issue. It does not, for instance, reveal that the defendant was charged for kicking a park ranger in the chest while being placed in a patrol car after rangers were called to her campsite about a domestic disturbance.[20] Yet this indictment fully satisfies Rule 7(c) anyway.[21] "It is difficult," as one commentator put it, "to imagine a lower standard."[22]

On the civil side, the pleading process is nominally similar to that in criminal cases.[23] It involves an initial pleading document, called a complaint, in which the plaintiff sets out the substance of his claim(s) against the defendant.[24] That document must satisfy Federal Rule of Civil Procedure 8(a), which requires that pleadings contain "a short and

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16 *Resendiz-Ponce*, 549 U.S. at 109; *see* Hamling v. United States, 418 U.S. 87, 117 (1974); United States v. Debrow, 346 U.S. 374, 377–78 (1953).

17 *See* Hintz, *supra* note 1, at 634 & n.6.

18 United States v. Guler, No. 1:07CV130 HEA, 2007 WL 4593504, at *3 (E.D. Mo. Dec. 21, 2007); *see also* Hintz, *supra* note 1, at 634 n.6.

19 18 U.S.C. § 111(a); *see also* Hintz, *supra* note 1, at 634 n.6.

20 *See* United States v. Guler, 295 F. App'x 861, 862 (8th Cir. 2008) (per curiam); *Guler*, 2007 WL 4593504, at *2–4.

21 *See Guler*, 2007 WL 4593504, at *5.

22 Burnham, *supra* note 10, at 356.

23 *See* Hintz, *supra* note 1, at 637, 639–40.

24 *See id.* at 637.

plain statement of the claim showing that the pleader is entitled to relief," or else it is subject to dismissal under Rule 12(b)(6) for "failure to state a claim upon which relief can be granted."[25]

But the prevailing interpretation of Rule 8(a) differs substantially from that of Rule 7(c).[26] Although the Supreme Court originally interpreted Rule 8(a) to be quite lenient, it ultimately replaced that interpretation, in the 2007 and 2009 decisions of *Bell Atlantic Corp. v. Twombly* and *Ashcroft v. Iqbal*, with a much more exacting one.[27] Those opinions made clear that, under Rule 8(a), a complaint must contain "enough facts to state a claim to relief that is plausible on its face" rather than "labels and conclusions," "'naked assertion[s]' devoid of 'further factual enhancement,'" or "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements."[28] Indeed, the Supreme Court emphasized that conclusory allegations are to be essentially disregarded in evaluating the sufficiency of a complaint.[29] And in marked contrast to the criminal pleading standard, courts regularly proclaim that a civil "complaint must do more than merely parrot the contours of a cause of action."[30]

In practice, moreover, courts have applied Rule 8(a) much more strictly than Rule 7(c), requiring a fair amount of factual detail. For example, they have discounted as "conclusory" allegations such as: that the defendants knew about a teacher's sexual assault and harassment of a student before a specified date;[31] that the defendants transferred the plaintiff, who was a prisoner, to another state that did not provide stamps to indigent prisoners to prevent him from communicating;[32] that

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[25] *Id.* (quoting FED. R. CIV. P. 8(a), 12(b)).

[26] *See id.* at 641.

[27] *See id.* at 637–39.

[28] *Id.* at 638–39 (alterations in original) (quoting Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009); Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555, 570 (2007)).

[29] *See* Hintz, *supra* note 1, at 639; *see, e.g.*, Capax Discovery, Inc. v. AEP RSD Invs., LLC, 285 F. Supp. 3d 579, 585–86 (W.D.N.Y. 2018) ("[T]he court discounts legal conclusions or '[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements[.]'" (alterations in original) (citation omitted)).

[30] Hintz, *supra* note 1, at 634 & n.6 (quoting Parker v. Landry, 935 F.3d 9, 13–14 (1st Cir. 2019)); *accord, e.g.*, Perry Cap. LLC v. Mnuchin, 864 F.3d 591, 610 n.9 (D.C. Cir. 2017) ("[W]e are not required to credit a bald legal conclusion that is devoid of factual allegations and that simply parrots the terms of the statute."); Brooks v. Ross, 578 F.3d 574, 581 (7th Cir. 2009) ("We understand the Court in *Iqbal* to be admonishing those plaintiffs who merely parrot the statutory language of the claims that they are pleading (something that anyone could do, regardless of what may be prompting the lawsuit), rather than providing some specific facts to ground those legal claims, that they must do more.").

[31] *See* S.W. v. Clayton Cnty. Pub. Schs., 185 F. Supp. 3d 1366, 1375 (N.D. Ga. 2016).

[32] *See* Gee v. Pacheco, 627 F.3d 1178, 1190–91 (10th Cir. 2010).

the plaintiff, also a prisoner, "was transferred to segregation for filing grievances";[33] that the defendant "bore ill will and spite toward [the plaintiff], and personally communicated that to [him]";[34] that the defendant hired a person "substantially younger" than the plaintiff;[35] and that the defendants released "hazardous chemicals" that caused the plaintiff "to have illnesses" and "interference of thoughts."[36]

In short, the criminal pleading standard under the governing interpretation of Rule 7(c) is quite lax, allowing the parroting of broadly worded statutory language. Yet the civil pleading standard, under the prevailing reading of Rule 8(a), requires much more and is not satisfied unless descriptive factual allegations are provided.

Finally, it is worth noting that this balance in pleading standards is well-established.[37] As this Part indicates, it is supported by decisions of the Supreme Court.[38] Furthermore, lower courts have repeatedly rejected arguments to strengthen the criminal pleading standard.[39] And the Advisory Committee on Criminal Rules—the main rulemaking body for the Federal Rules of Criminal Procedure—rejected a 2016 proposal to align the criminal and civil pleading requirements.[40] Thus, our existing pleading system has received the imprimatur of the primary legal authorities in command of that regime.

## III. THE BENEFITS OF STRENGTHENING THE CRIMINAL PLEADING STANDARD TO AT LEAST ALIGN WITH THE CIVIL STANDARD

Our current pleading system requires essentially nothing of criminal pleadings, and much more of civil ones. Yet despite being well-established, that system cannot be justified on normative or policy grounds. Rather, those considerations suggest powerfully that Rule 7(c) should be altered to demand at least as much factual detail as Rule 8(a).

The primary reason for that conclusion, and the reason I address in this Part, is that doing so would offer significant benefits to defendants and the federal criminal justice system more generally. Specifically, alignment would: (A) significantly improve criminal defendants' access

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[33] Evans v. Guilford Cnty. Det. Ctr., No. 1:13CV499, 2014 WL 4641150, at *4 (M.D.N.C. Sept. 16, 2014).

[34] Hamann v. Carpenter, 937 F.3d 86, 90 (1st Cir. 2019) (second alteration in original).

[35] Cauler v. Lehigh Valley Hosp., Inc., 654 F. App'x 69, 72 (3d Cir. 2016).

[36] Marenco v. Mercy Hous., Case No. 18-cv-03599-LB, 2018 WL 4008405, at *3 (N.D. Cal. Jul. 27, 2018), *adopted*, 2018 WL 4005385, at *1 (Aug. 20, 2018).

[37] *See* Hintz, *supra* note 1, at 634–35, 641–43.

[38] *See id.* at 634, 638–41.

[39] *See id.* at 634, 641–42.

[40] *See id.* at 634–35, 642–43, 642 n.63.

to information about the case against them; (B) help to correct the government's substantial informational advantage; (C) offer defendants a meaningful opportunity to challenge the merits of their case; (D) promote greater clarity in the criminal law; (E) prevent prosecutors from adopting overly aggressive, erroneous, or capricious positions; (F) limit false guilty pleas; (G) define the scope of criminal cases for double jeopardy purposes; and (H) help to eliminate a problematic imbalance between the protections civil and criminal defendants receive. I will discuss each of these benefits in turn.

### A. *Alignment Would Improve Defendants' Access to Information About the Case Against Them*

The first reason why aligning the criminal and civil pleading standards would be normatively beneficial is that criminal defendants presently have limited opportunities to obtain information about the case against them, and strengthening the criminal pleading standard would significantly improve their access to such information.

To start, there is currently no single document that defendants can rely on to provide effective guidance about the substance of the government's claims. The main documents that might serve that purpose are the indictment, the bill of particulars, and the criminal complaint. But none of those actually does so.

Beginning with the indictment, it has little informational value for all the reasons set forth above. In particular, Rule 7(c) permits the government to plead using the language of the statute, meaning that the indictment may consist of only opaque and generalized descriptions of the charges.[41] In other words, the defendant can only rely on a criminal pleading to provide minimal information, such as that the government alleges she violated the terms of a particular statute at some "time and place (in approximate terms)."[42]

Bills of particulars are comparably problematic. Their role is to offer "details of the charges" if the indictment, though legally sufficient, does not provide enough information "to enable a defendant to prepare

[41] *See supra* Part II.

[42] Burnham, *supra* note 10, at 356 (citation omitted); *cf.* Michelle Kallen, *Plausible Screening: A Defense of* Twombly *and* Iqbal*'s Plausibility Pleading*, 14 RICH. J.L. & PUB. INT. 257, 285 (2010) ("While skeletal pleadings give notice to the defendant as to the existence of the suit, they may not provide sufficient detail to allow the defendant to prepare an appropriate response or defense strategy. Without more details in the complaint, the defendant has no way of knowing what is important in the suit and what is not.").

adequately for trial."[43] But as I noted in my previous work on this subject:

> [B]ills of particulars do little in practice. First of all, several decisions have indicated that the test for whether a bill should be granted is quite similar to the test for whether an indictment is sufficient, and others have found bare-bones or nonspecific indictments adequate to render a bill unnecessary. Additionally, a bill of particulars will generally be denied if the defendant had access to information about his case through other means (for example, court filings and hearings, discovery, personal observations), even if those means do not specify the government's allegations or only present information about them indirectly, haphazardly, close to trial, or in a burdensome manner. Moreover, whether to grant a bill is left to the trial court's broad discretion, and a denial will not be overturned unless the defendant can show prejudice and/or surprise as a result.[44]

Even beyond that, courts often indicate that a bill of particulars need not reveal the government's evidence or its theory of criminal liability.[45] So, in short, bills of particulars are an insufficient source of information about the government's claims because they are not obtainable as a matter of right, are subject to standards that are unfavorable to defendants, and even when ordered, may not provide broad insights into the government's case.

The criminal complaint is likewise of limited utility. Although in theory it could be informative, given that it is used to persuade a magistrate of the existence of probable cause to detain the defendant,[46]

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[43] LEIPOLD, *supra* note 12, § 130.

[44] Hintz, *supra* note 1, at 686 (footnotes omitted); *see also* Robert G. Morvillo, Barry A. Bohrer & Barbara L. Balter, *Motion Denied: Systematic Impediments to White Collar Criminal Defendants' Trial Preparation*, 42 AM. CRIM. L. REV. 157, 173–76 (2005) (describing myriad limitations on and the infrequency with which courts grant bills of particulars).

[45] *See, e.g.*, United States v. Gabriel, 715 F.2d 1447, 1449 (10th Cir. 1983); United States v. Davis, No. 3:20-CR-0575-X, 2021 WL 63345, at *3 (N.D. Tex. Jan. 7, 2021); United States v. Brown, No. 15-4067-3-CR-C-SRB, 2017 WL 11501176, at *2 (W.D. Mo. May 15, 2017); United States v. Nelson, No. CR. 11-40037, 2011 WL 2160471, at *1 (D.S.D. June 1, 2011); United States v. Long, No. 06-CR-2, 2006 WL 689125, at *3 (E.D. Wis. Mar. 17, 2006); United States v. Chrysler, No. 96-CR-134, 1996 WL 377078, at *2 (N.D.N.Y. July 5, 1996); LEIPOLD, *supra* note 12, § 130; Morvillo et al., *supra* note 44, at 173, 175. *But cf.* United States v. Vaughn, 722 F.3d 918, 927 (7th Cir. 2013) ("[A] defendant is not entitled to know all the evidence the government intends to produce [by way of a bill of particulars], but only the theory of the government's case." (first alteration in original) (citation omitted)).

[46] *See* LEIPOLD, *supra* note 12, §§ 41–42; *see also* Jaben v. United States, 381 U.S. 214, 224 (1965); *cf.* Giordenello v. United States, 357 U.S. 480, 487 (1958) ("It does not avail

it suffers from serious limitations. No complaint is necessary at all if an indictment is returned before arrest (or before a complaint is required), since the indictment itself establishes probable cause.[47] And even in cases in which there is a complaint, there is no requirement that the complaint and the indictment ultimately charge the same offense.[48] In other words, defendants cannot rely upon criminal complaints to provide any guidance in many cases and only uncertain guidance in many others.

Of course, there are potential mechanisms for gleaning information about a case other than formal, streamlined documents. In particular, defendants might attempt to use standard pretrial hearings, pretrial motions practice, discovery, and conversations with the government as information-gathering tools. But those mechanisms, like the documents described above, also come up short.

The standard pretrial hearings consist of the initial appearance, the preliminary hearing, and the arraignment. None, however, can be counted on to fully inform defendants.

The initial appearance and preliminary hearing are similar, early-stage proceedings that generally involve a determination of whether there is probable cause to hold and proceed against the defendant.[49] Because those proceedings are used to assess probable cause, they are theoretically capable of providing defendants with information about the government's allegations, similar to the criminal complaint. Also like the complaint, however, no probable cause determination is necessary if an indictment has been returned first, and indeed, prosecutors—who are well aware that early proceedings could "be a useful method for learning about the prosecution's case"—"may decide to obtain an earlier indictment precisely to avoid revealing certain features of [their] case too early in the process."[50] Moreover, if the initial appearance and preliminary hearing are held before an indictment has

the Government to argue that because a warrant of arrest may be issued as of course upon an indictment, this complaint was adequate since its allegations would suffice for an indictment under Federal Rule of Criminal Procedure 7(c)."); United States v. Hill, No. 10-CR-191A, 2012 WL 912948, at *2 (W.D.N.Y. Mar. 16, 2012) (denying a motion for a bill of particulars because "[t]he charges in the Superseding Indictment, along with the 281 page affidavit filed in support of the Criminal Complaint, and the discovery materials provided by the government, clearly inform the defendant of the essential facts of the crimes charged").

47 *See* LEIPOLD, *supra* note 12, § 41.

48 *See id.* § 71; *cf., e.g.*, United States v. Gaskin, 364 F.3d 438, 451 (2d Cir. 2004) (anticipating that an indictment might "plead[] different charges from those in the complaint").

49 *See* LEIPOLD, *supra* note 12, §§ 71, 91.

50 *Id.* § 91; *see also* Meyn, *supra* note 10, at 61 & n.165.

been filed, the specific charges might "change once the case is presented to the grand jury."[51]

To be sure, unlike the preliminary hearing, the initial appearance: is necessary even if an indictment has been returned beforehand;[52] demands that the defendant be informed of "the complaint against [them], and any affidavit filed with it";[53] and requires (or leads to) a determination of pretrial release,[54] which is based on, inter alia, "the nature and circumstances of the offense charged" and "the weight of the evidence against the person."[55] But none of that necessarily makes the initial appearance particularly informative. First of all, the initial appearance is viewed as so informal and administrative that defendants may not even need to have an attorney present.[56] Additionally, in many cases—such as those involving an arrest on indictment—there may be no complaint or affidavits to inform the defendant about.[57] Furthermore, although pretrial release litigation might offer some information, a full hearing focused on pretrial release will only be held where detention is a possibility (rather than just conditional release or release on bond), which only happens in limited circumstances.[58] Even full detention hearings, moreover, are often informal, are not supposed to function as a discovery device, and generally involve a limited

[51] LEIPOLD, *supra* note 12, § 71; *see* Roger A. Fairfax, Jr., *Grand Jury Discretion and Constitutional Design*, 93 CORNELL L. REV. 703, 760 n.317 (2008).

[52] *See* FED. R. CRIM. P. 5(a), 9(c)(3); LEIPOLD, *supra* note 12, § 71 n.18.

[53] FED. R. CRIM. P. 5(d)(1)(A).

[54] *See id.* R. 5(d)(3); 18 U.S.C. § 3142; United States v. Cox, Case No. 1:18-cr-00083-HAB-SLC, 2019 WL 6318407, at *3 & n.1 (N.D. Ind. Nov. 26, 2019); LEIPOLD, *supra* note 12, § 71.

[55] 18 U.S.C. § 3142(g).

[56] *See* United States v. Portillo, 969 F.3d 144, 160–61 (5th Cir. 2020); *see also* LEIPOLD, *supra* note 12, § 91 (describing the initial appearance as "a brief, non-adversarial proceeding that takes place shortly after the arrest").

[57] *See* LEIPOLD, *supra* note 12, § 41; *cf.* United States v. Turner, 365 F. App'x 918, 926 & n.11 (10th Cir. 2010) (indicating, in a case where the defendant was "indicted before his initial appearance," that the district court could use an indictment to satisfy the requirement of informing the defendant of "the complaint against [them], and any affidavit filed with it"); United States v. Houston, Criminal Action No. 3:13-10-DCR, 2013 WL 5595405, at *1 (E.D. Tenn. Oct. 10, 2013) ("[S]ince the defendant was already in federal custody awaiting trial on Count One when the Grand Jury returned the Superseding Indictment which added Count Two, there was no need for a criminal complaint or arrest warrant.").

[58] *See* 18 U.S.C. § 3142(e)–(f). A detention hearing will not be held unless certain crimes are at issue or there is "a serious risk that [the defendant] will flee" or "will obstruct or attempt to obstruct justice, or threaten, injure, or intimidate, or attempt to threaten, injure, or intimidate, a prospective witness or juror." *Id.* § 3142(f).

presentation and assessment of the case.[59] As one scholar has explained:

> [C]ourts tend not to look at the strength of the evidence against a particular defendant in making their detention determinations because of the nature of the detention proceedings: they are usually relatively quick, not governed by the rules of evidence, occur at an early stage in the proceedings when the judge and the parties have incomplete information (it is not uncommon for a defendant to be represented by a "duty" defender or to meet his or her permanent attorney for the first time at or immediately before a detention hearing), and judges are hesitant to turn a detention hearing into a miniature trial on the merits.[60]

Finally, the government does not necessarily need to focus on the strength of its case in pretrial release litigation because other factors are relevant—like the danger posed to the community by release—and for some crimes, the indictment alone creates a presumption that the defendant should be detained.[61] And as a corollary to that point, the government can always avoid sharing information by simply presenting a weaker pretrial release case.[62]

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[59] *See, e.g.*, United States v. Abuhamra, 389 F.3d 309, 321 n.7 (2d Cir. 2004); United States v. Smith, 79 F.3d 1208, 1210 (D.C. Cir. 1996) (per curiam); United States v. Martir, 782 F.2d 1141, 1145 (2d Cir. 1986); United States v. Acevedo-Ramos, 755 F.2d 203, 206 (1st Cir. 1985); United States v. Flanders, Crim. No. 2010-29, 2010 WL 4054442, at *6 (D.V.I. Oct. 15, 2010); United States v. Kelly, Case No. 09-6037-RSR, 2009 WL 10698204, at *1 (S.D. Fla. Feb. 9, 2009).

[60] Carrie Leonetti, *When the Emperor Has No Clothes: A Proposal for Defensive Summary Judgment in Criminal Cases*, 84 S. CAL. L. REV. 661, 664 (2011).

[61] *See* 18 U.S.C. § 3142(e)(3), (g); *see, e.g.*, *Smith*, 79 F.3d at 1210; United States v. Suppa, 799 F.2d 115, 118–20 (3d Cir. 1986); United States v. Boutros, Criminal No. 19-mj-00264, 2019 WL 6877756, at *6 (D.D.C. Dec. 17, 2019); United States v. Scott, Criminal Action No. 18-112-05 (RMC), 2019 WL 2526401, at *2–3 (D.D.C. June 19, 2019); *cf., e.g.*, United States v. Castaneda, Case No. 18-cr-00047-BLF-1, 2018 WL 888744, at *3 (N.D. Cal. Feb. 14, 2018) ("'[T]he weight of the evidence [factor] is the least important, and the statute neither requires nor permits a pretrial determination of guilt.' Evidence of guilt is relevant only in terms of the likelihood that the defendant will fail to appear or will pose a danger to the community." (citations omitted)).

[62] *See, e.g.*, United States v. Hitselberger, 909 F. Supp. 2d 4, 8 (D.D.C. 2012) ("The weight of the evidence against Mr. Hitselberger is difficult to assess at this point, as much of the evidence is classified and has not been produced to the court. . . . The history and the characteristics of Mr. Hitselberger—especially his past conduct—are what is chiefly at issue here."); *cf., e.g.*, *Boutros*, 2019 WL 6877756, at *6 ("Neither the Government nor Defendant addressed the weight of the evidence concerning the underlying criminal complaint, and the Court has no basis to conclude whether the weight of the evidence is strong or weak for those alleged offenses."); United States v. Kiff, 377 F. Supp. 2d 586, 594 (E.D. La. 2005) ("The government does not argue that the weight of evidence against Gilbert supports her detention. The government argues that Gilbert is a flight risk

As for the arraignment, it provides even less information than the other two hearings. The arraignment entails: "(1) ensuring that the defendant has a copy of the indictment or information; (2) reading the indictment or information to the defendant or stating to the defendant the substance of the charge; and then (3) asking the defendant to plead to the indictment or information."[63] In other words, it only necessarily provides the defendant with as much information as the indictment, which need not be much.

Turning to pretrial motions practice, such practice could serve as an effective information-gathering device for defendants by requiring the government to offer comprehensive arguments defending its position and encouraging robust judicial scrutiny and discussion of those arguments.[64] Yet it too fails to reliably offer insights into the merits and substance of the case.

To start, a pretrial motion to dismiss the indictment based on a failure to satisfy the pleading standard need not generate an informative prosecutorial or judicial response, given the low bar for indictment sufficiency. That point is illustrated well by the following account provided in a defendant's unsuccessful argument in the D.C. Circuit challenging his indictment:

> On July 14, 2016, the grand jury returned a one count indictment charging Appellant with Threats against a Federal Law Enforcement Officer, in violation of 18 U. S. C. §115(a)(1)(B). The indictment read:
>
> > On or about June 19, 2014, within the District of Columbia, defendant **JEFF HENRY WILLIAMSON** did threaten to assault and murder a Federal law enforcement officer, that is, Brian Schmitt, a Special Agent with the Federal Bureau of Investigation, with intent to retaliate against such Federal law enforcement officer on account of the performance of his official duties.
>
> On September 3, 2014, Appellant filed a Motion to Suppress Evidence and/or Motion to Dismiss Indictment in [sic] which, among other claims, contended that the indictment was insufficient. . . .
>
> On September 13, 2014, the United States filed an opposition to this motion to dismiss. With respect to Appellant's claim

because after her alleged crimes she traveled to Mississippi, purportedly because of the FBI's investigation.").

63 FED. R. CRIM. P. 10(a).

64 *See, e.g.*, Gold et al., *supra* note 10, at 1632–33, 1641–42.

that the indictment was insufficient, the government merely replied:

> The indictment contained a plain, concise, and definite written statement of the essential facts constituting the offense and complied with Rule 7(c)(1). An indictment is sufficient when it sets forth each element of the crime that it charges, points to the relevant criminal statute, and alleges that on a specific date, the defendant committed that crime.

. . . .

On October 20, 2014, the District Court issued a lengthy [opinion that mostly addressed other issues]. The District Court did however generally address Appellant's claims concerning the sufficiency of the indictment in a section entitled Motion for Bill of Particulars:

> [Stating, after setting out the defendant's arguments:] An indictment is sufficient when it sets forth each element of the crime that it charges, points to the pertinent criminal statute, and alleges that on a specific date the defendant committed the crime.
>
> . . .
>
> The Indictment here is sufficient as it sets forth the elements of the crime, points to the pertinent statute, and alleges that on a specific date Mr. Williamson committed the crime. Further, the Government already has provided full discovery to Mr. Williamson. Mr. Williamson's motions to dismiss the Indictment due to lack of particularity and/or to require the Government to file a bill of particulars are denied.[65]

Other pretrial motions practice likewise can be of little informational value. First of all, as discussed in more detail below, federal criminal procedure does not provide for a summary judgment mechanism, meaning that that source of informative litigation over the merits simply does not exist.[66] Furthermore, although motions for bills of particulars and discovery motions are *about* ensuring that the

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[65] Brief of Appellant at 16–19, United States v. Williamson, 903 F.3d 124 (D.C. Cir. 2018) (No. 15-3018) (citations omitted); *see also Williamson*, 903 F.3d at 130–32 (concluding that the indictment in this case was sufficient).

[66] *See infra* notes 114–117 and accompanying text; *see, e.g.*, Gold et al., *supra* note 10, at 1610, 1635–37, 1640, 1648–50.

defendant possesses certain information, litigation over such motions necessarily focuses on *the information that the defendant has or the propriety of giving the defendant the information she wants*, and thus may not actually provide the defendant with *new* information.[67] Additionally, although evidence suppression or motion in limine litigation can be informative as to the substance of a case where, for instance, the case turns on a key piece of evidence, oftentimes it will not be because the aim of such litigation is to decide cabined questions of the lawfulness of investigative behavior and admissibility, not the merits.[68] And other available pretrial motions simply involve issues that are unlikely to regularly provide useful insights.[69] Finally, regardless of how informative pretrial motions practice *could be*, most pretrial motions will only be filed if the circumstances call for them, and the relevant circumstances will not arise in every case.[70]

Discovery, as with the other sources of information, is similarly not an exceedingly helpful mechanism for learning about the government's claims. As many commentators and even courts have noted, discovery

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[67] *See, e.g.*, United States v. Plotka, 438 F. Supp. 3d 1310, 1318–19 (N.D. Ala. 2020); United States v. Johnson, Criminal No. 20-163, 2020 WL 7065833, at *1–5 (W.D. Pa. Dec. 3, 2020); United States v. Jain, 19-cr-59 (PKC), 2019 WL 6888635, at *1–2 (S.D.N.Y. Dec. 18, 2019); United States v. Sullivan, CRIM. NO. 17-00104 JMS-KJM, 2019 WL 8301178, at *1 (D. Haw. Dec. 2, 2019); United States v. Brooks, 17-CR-171W(Sr), 2018 WL 5722797, at *2 (W.D.N.Y. Nov. 1, 2018); United States v. Cook, No. 3:16cr312, 2018 WL 1744682, at *1–2 (M.D. Pa. Apr. 11, 2018); United States v. Farmer, Case No. 2:15-cr-72, 2017 WL 11470829, at *1–3 (N.D. Ind. Dec. 18, 2017).

[68] *See, e.g.*, United States v. Houk, Case No. 1:18-po-00307-SAB, 2019 WL 4835333, at *1–4 (E.D. Cal. Oct. 1, 2019); United States v. Renzi, No. CR 08-00212-TUC-DCB (BPV), 2010 WL 1962668, at *1–3 (D. Ariz. Apr. 16, 2010), *adopted*, 2010 WL 1962644, at *1 (May 14, 2010); United States v. Fama, No. S1 95 Cr. 840 (RO), 1996 WL 438165, at *1 (S.D.N.Y. Aug. 5, 1996).

[69] *See, e.g.*, FED. R. CRIM. P. 12(b).

[70] *Cf., e.g.*, United States v. Rivera, 68 F.3d 5, 8 (1st Cir. 1995) ("Counsel has a duty not to make . . . frivolous contentions."); Smith v. United States, Nos. 1:07-cr-146-CLC-SKL-4, 1:11-cv-215-CLC-SKL, 2015 WL 164155, at *3 (E.D. Tenn. Jan. 13, 2015) ("The failure of defense counsel to pursue frivolous motions and objections cannot constitute ineffective assistance of counsel."); Hanes v. United States, Nos. 04-CR-0604 W, 09-CV-1473 W, 2010 WL 625336, at *3 (S.D. Cal. Feb. 17, 2010) ("Even assuming that Petitioner asked Mr. Johnson to file the motion to dismiss, it may have been unethical for him to do so. *See ABA Model Rules of Professional Conduct*, Rule 3.1 (West, 2009) ('A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous.')."); United States v. Stepney, No. CR 01-0344, 2002 WL 1460258, at *2 (N.D. Cal. July 1, 2002) ("Well-established rules of ethical conduct require *all* attorneys to exercise their informed professional judgment to refrain from wasting the court's time and prejudicing their clients' interests. . . . The motion filed in this action is one of those clever pieces of mental gymnastics engaged in late in the evening, perhaps after a night cap. . . . The court will not reimburse attorneys out of CJA funds for such useless time.").

in criminal cases is quite limited.[71] For example, criminal "[d]efendants are generally not entitled to depose witnesses before trial," to "require prosecutors to respond to interrogatories or document requests," to "require the [government] to turn over names and contact information of potential witnesses," or to access statements made by prospective government witnesses.[72] The discovery that a defendant does receive, moreover, is largely restricted to: their own statements; their prior record; documents and other items "material to preparing the defense," to be used in the government's case at trial, or belonging to them; and a summary of any expert witness testimony.[73] In addition, criminal discovery simply provides access to evidence, and since any collection of evidence could likely be used to prove any number of theories of liability, discovery only allows a defendant to guess at the substance of the government's allegations. Accordingly, and given that (notwithstanding the limited scope of criminal discovery) the materials obtained in discovery can be quite voluminous and time consuming to examine, defendants may be substantially hindered in using discovery materials to learn about their case.[74]

Finally, although prosecutors and defendants frequently communicate over the course of a case, such as through plea negotiations,[75] those communications too do not reliably and fully

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[71] *See, e.g.*, United States v. Sampson, 898 F.3d 270, 280 (2d Cir. 2018); Gold et al., *supra* note 10, at 1624–25, 1633, 1645; Ion Meyn, *Discovery and Darkness: The Information Deficit in Criminal Disputes*, 79 BROOK. L. REV. 1091, 1103–08 (2014); Weinberg, Iqbal, *supra* note 10, at 31–32.

[72] Gold et al., *supra* note 10, at 1625; Meyn, *supra* note 10, at 80; *see* FED. R. CRIM. P. 15(a)(1), 16(a); *see also* Weinberg, Iqbal, *supra* note 10, at 31–32.

[73] FED. R. CRIM. P. 16(a)(1). Relatedly, defendants have the constitutional right under *Brady v. Maryland* and its progeny to the disclosure of material, exculpatory evidence. But that right is essentially encompassed by the discovery provisions of the Criminal Rules. *See, e.g.*, United States v. Muniz-Jaquez, 718 F.3d 1180, 1183 (9th Cir. 2013) ("Rule 16 is . . . broader than *Brady*."); United States v. Lujan, 530 F. Supp. 2d 1224, 1256 (D.N.M. 2008) ("Because Rule 16 requires disclosure of items material to preparing the defense, the rule encompasses disclosure of *Brady* materials."). And the sharing of *Brady* evidence may not be required until the eve of trial, or even until trial itself. *See, e.g.*, McNeill v. Bagley, 10 F.4th 588, 600 (6th Cir. 2021); United States v. Moreno, 727 F.3d 255, 262 (3d Cir. 2013); Gold et al., *supra* note 10, at 1645–46; Ion Meyn, *The Haves of Procedure*, 60 WM. & MARY L. REV. 1765, 1798 n.174 (2019).

[74] *See, e.g.*, Drew Findling, *Unable to Bear the Weight of the 'Document Dump': A Heavy Burden on Individuals and an Increasing Threat to Due Process*, CHAMPION, Sept./Oct. 2018, at 5; Morvillo et al., *supra* note 44, at 175; *see also* United States v. Plotka, 438 F. Supp. 3d 1310, 1319 n.6 (N.D. Ala. 2020) ("Dr. Plotka responds that discovery is so voluminous—including over 28,000 documents and over 90,000 text messages—that it does 'nothing to narrow the issues for trial in this case or to put the defense on notice of the charge.'" (citation omitted)).

[75] *See, e.g.*, Gold et al., *supra* note 10, at 1627; Daniel S. McConkie, *Structuring Pre-Plea Criminal Discovery*, 107 J. CRIM. L. & CRIMINOLOGY 1, 8–9, 19 (2017).

inform defendants about the government's allegations. To start, "the prosecutor has an incentive to present information that causes a defendant to overestimate the likelihood of conviction."[76] Thus, the government is likely to share information in a manner that does not paint a wholly accurate picture of its case and provable allegations. The uncertainty is further amplified by the fact that the prosecution can "indict[] a defendant on higher or different charges prior to trial after plea negotiations fail."[77] And of course, any disclosures that occur through informal communications are necessarily discretionary and hence cannot be counted upon in any given case.[78]

In short, criminal defendants are strikingly limited in their ability to understand the government's claims against them prior to trial.[79] Indeed, the Advisory Committee on Criminal Rules itself has acknowledged this, with a judicial member observing "that with indictments stated in broad general terms and very limited pretrial discovery [there are] occasional cases in which defense counsel at the pretrial conference says that he or she still does not know what the defendant is being accused of."[80] Aligning the criminal pleading standard with the civil standard, however, would do much to correct that problem.[81] Doing so would require that criminal pleadings contain at least "sufficient factual matter . . . to 'state a claim to relief that is plausible on its face.'"[82] That, in turn, would mean that defendants would receive a fact-bound description of what they are accused of detailed enough to provide them with "fair notice of what the . . . claim is and the grounds upon which it rests."[83] Additionally, it would mean

[76] Gold et al., *supra* note 10, at 1625–27; *accord* McConkie, *supra* note 75, at 19.

[77] United States v. Solis, CR 13-3895 MCA, 2015 WL 13651227, at *4–6 (D.N.M. Mar. 26, 2015), *adopted*, 2015 WL 13651231, at *3 (Dec. 23, 2015); *see also* Bordenkircher v. Hayes, 434 U.S. 357, 358, 365 (1978) (concluding that there is no due process violation "when a state prosecutor carries out a threat made during plea negotiations to reindict the accused on more serious charges if he does not plead guilty to the offense with which he was originally charged").

[78] *See* McConkie, *supra* note 75, at 4.

[79] *See, e.g.*, Gold et al., *supra* note 10, at 1624–27.

[80] *Minutes, Advisory Committee on Criminal Rules*, U.S. CTS. 20 (Apr. 18, 2016), https://www.uscourts.gov/sites/default/files/2016-04-18-minutes_-_criminal_rules_meeting_final_0.pdf.

[81] *See, e.g.*, Gold et al., *supra* note 10, at 1641–42; Weinberg, Iqbal, *supra* note 10, at 31–32; *cf.* Kallen, *supra* note 42, at 285 ("Requiring complaints to contain more facts also provides better notice to the defendants as to which claim they may have to defend against.").

[82] Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (citation omitted); *see supra* Part II.

[83] Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007) (citation omitted); *see also* GeorgiaCarry.Org, Inc. v. Georgia, 687 F.3d 1244, 1254 (11th Cir. 2012) ("To survive a motion to dismiss, a plaintiff must 'plead factual matter that, if taken as true, states a

that defendants would receive that description in a clear and straightforward format: a single, centralized, synthesized, written document.[84] And they would receive it in every case, since an indictment (or information) must be produced and given to the defendant in all felony prosecutions.[85] Moreover, under a raised pleading standard, other sources of information would become more illuminating. For instance, pretrial motion to dismiss litigation would become more informative because the government and the court would be more likely to engage meaningfully with the merits of the case.[86] Likewise, the informational value of discovery would increase because defendants could better organize and understand the evidence they receive.[87]

B. *Alignment Would Reduce Informational Asymmetry*

The second reason why aligning the civil and criminal pleading standards would be valuable is that it would reduce the government's extraordinary informational advantage over defendants.

As just explained, criminal defendants have restricted means of learning about the case against them.[88] Accordingly, it may be difficult for them to know precisely what points to disprove, what law to research, what evidence to seek out, what witnesses to interview, and what portions of discovery are important and warrant further investigation.[89] And even if a defendant can ferret out the substance of the government's claims and determine how to proceed, she will likely

claim' that is plausible on its face. This necessarily requires that a plaintiff include factual allegations for each essential element of his or her claim." (citation omitted)). The description would also accurately reflect the government's case, given that, as discussed more below, indictments are supposed to encompass only charges presented to a grand jury and the government's case at trial cannot deviate substantially from the indictment. *See infra* notes 92, 180 and accompanying text; *infra* Section III.E.

84 *Cf.* Burnham, *supra* note 10, at 350 ("Complex trial records do not, of course, present legal issues with the same clarity and concision as criminal charging documents (or civil complaints).").

85 *See* FED. R. CRIM. P. 7(a)–(b), 10(a).

86 *See* Gold et al., *supra* note 10, at 1632–33, 1641–42, 1649–50; *cf.* E. Farish Percy, *The Fraudulent Joinder Prevention Act of 2016: Moving the Law in the Wrong Direction*, 62 VILL. L. REV. 213, 232–33 (2017) (explaining that critics of *Twombly* and *Iqbal* have argued that defendants "would likely benefit [from the new pleading standard] by gleaning helpful information from the plaintiffs' responses to the motions to dismiss").

87 *Cf.* Morvillo et al., *supra* note 44, at 175 ("[E]ven if the information sought is available to the defendant through Rule 16 discovery, often times it is buried deep in a voluminous document production, and the defendant's search for the information is arduous and expensive.").

88 *See supra* Section III.A.

89 *Cf., e.g.*, Kallen, *supra* note 42, at 285 ("Without more details in the complaint, the defendant has no way of knowing what is important in the suit and what is not.").

still be constrained from an informational perspective, given that: any time and resources expended in learning about the government's case will necessarily limit the time and resources available to investigate and craft a defense; criminal discovery is limited; defendants do not have robust investigatory powers or easy access to investigators; and defendants may well be detained before trial.[90]

The government, however, is in a substantially different position. Even before criminal proceedings begin, it has access to a range of "pre-indictment tools like search warrants and grand jury subpoenas," as well as a full-time, professional investigatory corps backed by the force of law.[91] Because of that—and other reasons, such as that a defendant can generally only be convicted based on claims that have been presented to a grand jury[92]—the government necessarily goes into criminal proceedings with significant knowledge of the case, its allegations, and its proof.[93] Indeed, the government is usually expected and encouraged to be fairly close to trial-ready by the time it files charges.[94] And of course, the government is never detained.[95]

Consequently, the government is at a serious informational advantage over criminal defendants. Moreover, and as a result, it can use its pretrial period to perfect and hone its case against the accused,

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[90] *See, e.g.*, Gold et al., *supra* note 10, at 1621, 1625–28; Paul Heaton, Sandra Mayson & Megan Stevenson, *The Downstream Consequences of Misdemeanor Pretrial Detention*, 69 STAN. L. REV. 711, 714 (2017); Meyn, *supra* note 71, at 1105–14; Meyn, *supra* note 10, at 53–54, 80, 86–87; Morvillo et al., *supra* note 44, at 175; *see supra* notes 71–74 and accompanying text.

[91] Burnham, *supra* note 10, at 361; *see, e.g.*, Gold et al., *supra* note 10, at 1628; Meyn, *supra* note 71, at 1096 & n.13, 1123–24, 1126; Meyn, *supra* note 10, at 49, 56, 86; Weinberg, Iqbal, *supra* note 10, at 31.

[92] *See, e.g.*, United States v. Resendiz-Ponce, 549 U.S. 102, 109–10 (2007); Russell v. United States, 369 U.S. 749, 770 (1962); United States v. Dove, 884 F.3d 138, 149 (2d Cir. 2018); United States v. Vosburgh, 602 F.3d 512, 531–32 (3d Cir. 2010); United States v. Du Bo, 186 F.3d 1177, 1179–80 (9th Cir. 1999); Weinberg, Iqbal, *supra* note 10, at 30.

[93] *See, e.g.*, United States v. Hansen, 428 F. Supp. 3d 1200, 1202 (D. Utah 2019); Burnham, *supra* note 10, at 360–61; Meyn, *supra* note 73, at 1778, 1819.

[94] *See, e.g.*, United States v. Lovasco, 431 U.S. 783, 791–96 (1977); United States v. Brown, 959 F.2d 63, 65–66 (6th Cir. 1992); Burnham, *supra* note 10, at 360–61 & n.39; Meyn, *supra* note 10, at 79; *cf., e.g.*, United States v. Gouveia, 467 U.S. 180, 192 n.7 (1984) ("We have of course rejected the arguments that prosecutors are constitutionally obligated to file charges against a suspect as soon as they have probable cause but before they believe that they can establish guilt beyond a reasonable doubt, and that prosecutors must file charges as soon as they marshal enough evidence to prove guilt beyond a reasonable doubt but before their investigations are complete." (citation omitted)).

[95] *Cf.* Meyn, *supra* note 71, at 1126 (acknowledging "the deep asymmetry between an empowered State and a frequently detained defendant" presently reflected "in the rules of criminal procedure").

whereas "[a] criminal defendant . . . will always have to play 'catch-up' to the prosecutor's pre-complaint head start."[96]

Aligning the civil and criminal pleading standards, however, would begin to resolve that asymmetry and its consequences. As explained above, it would provide defendants with substantially better information about the case against them. And because criminal pleadings are necessarily filed early in the proceedings, raising the pleading standard would give defendants access to that information at the outset of the case. Hence, they would be much more informed and would not have to play as much "catch-up."

### C. *Alignment Would Allow Challenges to the Case on the Merits*

The third reason why aligning the criminal and civil pleading standards would be valuable is that it would give defendants an opportunity to challenge the merits of the case against them, which the federal system presently limits markedly.[97]

Before trial, there is essentially no robust mechanism for challenging the merits of the prosecution's case.[98] There are pretrial proceedings that assess probable cause, such as the initial appearance and preliminary hearing. But "[p]robable cause . . . is not a high bar,"[99] and it may even permit mistakes of law and fact.[100] Further, as noted above, the charges can change after the initial appearance and preliminary hearing, and a probable cause determination is not even necessary if an indictment is returned first.[101]

The grand jury, likewise, does not serve as a meaningful check on the prosecution or vehicle for challenging it. To start, the grand jury's standard for returning an indictment is probable cause, which, again, is

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[96] Meyn, *supra* note 10, at 85.

[97] *See, e.g.*, Burnham, *supra* note 10, at 349, 358; Gold et al., *supra* note 10, at 1610–11, 1613, 1628, 1642; Weinberg, *Applying* Twombly, *supra* note 10, at 50–52.

[98] *See, e.g.*, Burnham, *supra* note 10, at 349; Gold et al., *supra* note 10, at 1610–11, 1613, 1628, 1642; Michael P. Kelly & Ruth E. Mandelbaum, *Are the Yates Memorandum and the Federal Judiciary's Concerns About Over-Criminalization Destined to Collide?*, 53 AM. CRIM. L. REV. 899, 933 (2016); Weinberg, *Applying* Twombly, *supra* note 10, at 50–52.

[99] Kaley v. United States, 571 U.S. 320, 338 (2014); Meyn, *supra* note 10, at 61–62; *see also, e.g.*, United States v. Baker, 514 F. Supp. 3d 1369, 1375–76 (N.D. Fla. 2021); United States v. Rathbun, Criminal No. 20-mj-3061-KAR, 2020 WL 2104790, at *1 (D. Mass. May 1, 2020); United States v. Bowie, No. 1:14–MJ–0189PAS, 2014 WL 4542974, at *1 (D.R.I. Sept. 12, 2014); United States v. Perez, 17 F. Supp. 3d 586, 595–96 (S.D. Tex. 2014).

[100] *See, e.g.*, Heien v. North Carolina, 574 U.S. 54, 62–63 (2014); United States v. Hanel, 993 F.3d 540, 543 (8th Cir. 2021); United States v. Diaz, 854 F.3d 197, 203 (2d Cir. 2017); Olsen v. City of Henderson, 648 F. App'x 628, 631 (9th Cir. 2016).

[101] *See supra* notes 50–51 and accompanying text.

quite light.[102] In addition, courts have said that grand juries need not be instructed on the applicable substantive law at all or that it is sufficient to merely read the relevant statute to the grand jury[103]—even though grand jurors need not have any legal training[104]—and if instructions on the substantive law are given, it is the prosecutor who gives them.[105] Furthermore, neither the defense nor the judge is permitted to take part in grand jury proceedings, meaning that the government need not face counterarguments, objections, or judicial skepticism and scrutiny.[106] What is more, raising challenges based on the grand jury proceedings is nearly impossible. A grand jury finding that the evidence is sufficient to show probable cause is unreviewable,[107] and courts commonly hold that challenges to grand jury instructions are improper, cannot prevail if the indictment is facially valid, or must meet a high bar to succeed.[108] And even if the law permitted broader challenges, stringent grand jury secrecy requirements make it exceedingly difficult for defendants to even determine what happened in the grand jury room.[109]

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[102] *See Kaley*, 571 U.S. at 338; United States v. R. Enters., Inc., 498 U.S. 292, 297–98 (1991); *supra* note 99 and accompanying text.

[103] *See, e.g.*, United States v. Lopez-Lopez, 282 F.3d 1, 9 (1st Cir. 2002); United States v. Zangger, 848 F.2d 923, 925 (8th Cir. 1988); United States v. Kenny, 645 F.2d 1323, 1347 (9th Cir. 1981); United States v. Klein, 16-cr-442 (JMA), 2017 WL 1316999, at *14 (E.D.N.Y. Feb. 10, 2017); United States v. Smith, 105 F. Supp. 3d 255, 260 (W.D.N.Y. 2015); United States v. Mix, Criminal Action No. 12-171, 2013 WL 2458846, at *5 (E.D. La. June 6, 2013); United States v. Pavlenko, No. 11-20279-CR, 2012 WL 1060157, at *1 (S.D. Fla. Mar. 28, 2012); United States v. Schmitz, CRIMINAL NO. 08-P-14-NE, 2008 WL 11340277, at *4 (N.D. Ala. May 20, 2008).

[104] *See* LEIPOLD, *supra* note 12, § 102 ("In general under the Jury Selection and Service Act, any U.S. citizen age 18 or older who has resided in the judicial district for one year is eligible to serve unless they are unable to speak, read, write, or understand English, are infirm, or have been convicted of or currently face a felony charge.").

[105] *See, e.g.*, *Lopez-Lopez*, 282 F.3d at 9; *Smith*, 105 F. Supp. 3d at 260–61; Burnham, *supra* note 10, at 349.

[106] *See* FED. R. CRIM. P. 6(d); Burnham, *supra* note 10, at 349; *see also Kaley*, 571 U.S. at 338–39; Meyn, *supra* note 73, at 1819.

[107] *See, e.g.*, *Kaley*, 571 U.S. at 328; United States v. Williams, 504 U.S. 36, 53–55 (1992); Leonetti, *supra* note 60, at 679.

[108] *See, e.g.*, United States v. Larrazolo, 869 F.2d 1354, 1359 (9th Cir. 1989); United States v. Acherman, CRIMINAL NO. 15-10046-LTS, 2015 WL 6126811, at *2 (D. Mass. Oct. 16, 2015); *Mix*, 2013 WL 2458846, at *5–8; United States v. Stevens, 771 F. Supp. 2d 556, 567–68 (D. Md. 2011); United States v. Nacchio, Criminal Case No. 05-cr-00545-EWN, 2006 WL 8439745, at *4–7 (D. Colo. Aug. 25, 2006).

[109] *See, e.g.*, FED. R. CRIM. P. 6(e); *Smith*, 105 F. Supp. 3d at 260–64; LEIPOLD, *supra* note 12, §§ 106, 108, 113; Meyn, *supra* note 73, at 1819 n.312; *see also* United States v. Thomas, Criminal Action No. 17-194 (RDM), 2019 WL 4095569, at *7 n.4 (D.D.C. Aug. 29, 2019) (concluding that the standard for disclosure "is that of particularized need," and observing that "[c]riminal defendants . . . have only rare[ly] satisfied this test" (second alteration in original) (citations omitted) (internal quotation marks omitted)).

Of course, Criminal Rule 12 provides a mechanism for dismissing the indictment based on a merits challenge, but that mechanism is largely toothless. Because a conclusory indictment that contains few details is legally sufficient, a motion to dismiss will rarely capture any defects in the prosecution's case or theory of wrongdoing.[110] To put it more concretely, if an indictment alleging—in broad, statutory language—that the defendant "knowingly did forcibly assault, resist, oppose, impede, intimidate, and interfere with [a specific] Ranger with the National Park Service, while she was engaged in her official duties" is sufficient, a motion to dismiss will never reach the question of whether the government could establish a violation of the statute by proving that the defendant kicked a ranger in the chest while being placed in a patrol car.[111] And the availability of bills of particulars does not solve that issue. Although the law is unsettled, several courts have concluded that a bill of particulars cannot be used to seek dismissal of an otherwise valid indictment,[112] and in any event, bills of particulars are challenging to obtain.[113]

Now, on the civil side, summary judgment allows courts to enter judgment as to all or some of a case if, looking beyond the pleadings to the evidence, there is "no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law."[114] But the Federal Rules of Criminal Procedure establish no summary judgment mechanism, and courts routinely hold that criminal defendants cannot use a motion to dismiss in place of that mechanism to terminate charges

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110 *See, e.g.*, Burnham, *supra* note 10, at 349, 358; Gold et al., *supra* note 10, at 1628 & n.98, 1640–43; Kelly & Mandelbaum, *supra* note 98, at 933; Meyn, *supra* note 10, at 55–57; Weinberg, Iqbal, *supra* note 10, at 32.

111 *See supra* notes 17–22 and accompanying text; *cf., e.g.*, United States v. Critzer, 951 F.2d 306, 307–08 (11th Cir. 1992) (per curiam) (reversing a district court dismissal of an indictment based on facts provided by the government where the indictment itself was sufficient); United States v. Godwin-Painter, Case No. CR415-100, 2015 WL 13735432, at *1, *4–5 (S.D. Ga. Aug. 18, 2015) (refusing to address, at the motion to dismiss stage, whether a more specific telling of the defendant's alleged conduct established a violation of the applicable statute because the broadly worded indictment was sufficient), *adopted*, 2015 WL 5838501, at *2–3 (Oct. 6, 2015); United States v. Autry, CRIMINAL ACTION NO. 1:18-cr-349-MLB-CMS, 2019 WL 8757215, at *2–3 (N.D. Ga. Dec. 20, 2019) (similar), *adopted*, 2020 WL 1026707, at *1–3 (Mar. 3, 2020).

112 *See, e.g.*, United States v. Brantley, 461 F. App'x 849, 852 (11th Cir. 2012) (per curiam); United States v. Nagi, 254 F. Supp. 3d 548, 564 (W.D.N.Y. 2017); United States v. Eichman, 756 F. Supp. 143, 146 (S.D.N.Y. 1991); United States v. Rubbish Removal, Inc., 602 F. Supp. 595, 597 (N.D.N.Y 1984); *see also* United States v. Jones, 542 F.2d 661, 665–66 (6th Cir. 1976); United States v. Gen. Dynamics Corp., 644 F. Supp. 1497, 1499 (C.D. Cal. 1986), *rev'd on other grounds*, 828 F.3d 1356 (9th Cir. 1987); United States v. Mirabile, 369 F. Supp. 1108, 1110 (W.D. Mo. 1974).

113 *See supra* notes 43–45 and accompanying text.

114 FED. R. CIV. P. 56(a) & advisory committee's note to 1963 amendment.

on the ground of insufficient evidence—i.e., based on any legal or factual assessment of the government's case that looks to its actual proof.[115] There is an exception to that rule, as courts may permit summary dismissals where the government agrees to proffer all of its evidence, the facts are undisputed, or the parties have stipulated to the relevant facts.[116] That exception, however, is narrow.[117]

To be sure, trial and post-trial procedure offers defendants numerous opportunities to challenge the merits. There is the trial decision itself, litigation over jury instructions, motions for a judgment of acquittal or new trial, and appeal.[118] Yet there are serious risks and costs to going to trial, including enhanced penalties;[119] prosecutors have a tremendous informational and power advantage that generates additional pressure to forego trial;[120] and nearly all federal criminal defendants plead guilty.[121] Defendants who plead guilty, moreover, are typically prohibited from appealing their convictions because a guilty plea operates as "a waiver of all nonjurisdictional" challenges,[122] and in addition, plea agreements commonly demand the waiver of appellate

115 *See, e.g.*, United States v. Sampson, 898 F.3d 270, 279–80 (2d Cir. 2018); Burnham, *supra* note 10, at 349; Gold et al., *supra* note 10, at 1610; Leonetti, *supra* note 60, at 668–69; Meyn, *supra* note 10, at 61; Weinberg, *Applying* Twombly, *supra* note 10, at 52; James Fallows Tierney, Comment, *Summary Dismissals*, 77 U. CHI. L. REV. 1841, 1841–42, 1850, 1853 (2010).

116 *See, e.g.*, *Sampson*, 898 F.3d at 282; United States v. Todd, 446 F.3d 1062, 1068 (10th Cir. 2006); United States v. Yakou, 428 F.3d 241, 247 (D.C. Cir. 2005); Tierney, *supra* note 115, at 1841–42.

117 *See, e.g.*, *Sampson*, 898 F.3d at 282; United States v. Huet, 665 F.3d 588, 598 n.9 (3d Cir. 2012); *Todd*, 446 F.3d at 1068. In fact, not every court recognizes such an exception. *See Huet*, 665 F.3d at 598 n.9; *Yakou*, 428 F.3d at 247; United States v. Salman, 378 F.3d 1266, 1267–69, 1268 n.5 (11th Cir. 2004) (per curiam).

118 *See, e.g.*, FED. R. CRIM. P. 29–30, 33; Burnham, *supra* note 10, at 349; Gold et al., *supra* note 10, at 1628; Kelly & Mandelbaum, *supra* note 98, at 933.

119 *See infra* Section III.F.

120 *See supra* Section III.B; *infra* Section III.F.

121 *See, e.g.*, United States v. Rivas-Estrada, 906 F.3d 346, 347 (5th Cir. 2018); U.S. SENT'G COMM'N, 2019 ANNUAL REPORT AND SOURCEBOOK OF FEDERAL SENTENCING STATISTICS 56 (2020), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2019/2019-Annual-Report-and-Sourcebook.pdf; Gold et al., *supra* note 10, at 1608; Peter A. Joy & Rodney J. Uphoff, *Sentencing Reform: Fixing Root Problems*, 87 UMKC L. REV. 97, 97 (2018).

122 FED. R. CRIM. P. 11(a) advisory committee's note to 1983 amendment.

rights.[123] That all means that most defendants are effectively barred from challenging the merits entirely.[124]

Aligning the civil and criminal pleading standards, however, would mitigate that problem substantially. As explained previously, doing so would require indictments to be at least factually detailed enough to meet the *Twombly-Iqbal* pleading standard. And if indictments were sufficiently detailed to meet that standard, that would allow courts, on a motion to dismiss, to consider whether the facts as the government believes them to be amount to a federal crime. Thus, defendants could mount a robust challenge to the merits of the prosecution's case—before and without having to go to trial.[125]

What is more, bolstering the criminal pleading standard could allow motions to dismiss to perform an analogous role to summary judgment on the civil side, even without the formal creation of such a mechanism for criminal proceedings. As noted above, the government has access to significant pre-indictment investigative resources, should usually be nearly ready for trial by the time it files charges, and can generally only charge a defendant based on allegations actually presented to a grand jury; and as explained in more detail below, the government's proof at trial cannot meaningfully differ from the allegations in the indictment.[126] In other words, indictments can and must be based on actual evidence, meaning that, under a heightened pleading standard, the government's allegations would necessarily reflect the facts in evidence. Consequently, a motion to dismiss, despite nominally only analyzing the government's pleading, could effectively come quite close to assessing its proof, similar to summary judgment.

Finally, by giving defendants the chance to contest their case before trial, raising the criminal pleading standard would also generate greater opportunities to challenge their case on appeal. Although guilty pleas generally waive appellate rights, Criminal Rule 11(a)(2) authorizes *conditional pleas*, through which defendants can reserve "the right to have an appellate court review an adverse determination of a specified pretrial motion."[127] Presently, there is little reason for defendants to use

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123 *See, e.g.*, Kevin Bennardo, *Post-Sentencing Appellate Waivers*, 48 U. MICH. J.L. REFORM 347, 348–49 (2015); Leanna C. Minix, Note, *Examining Rule 11(b)(1)(n) Error: Guilty Pleas, Appellate Waiver, and* Dominguez Benitez, 74 WASH. & LEE L. REV. 551, 553 & n.7 (2017).

124 *Cf., e.g.*, Burnham, *supra* note 10, at 349–50; Gold et al., *supra* note 10, at 1608–13, 1621–24, 1628, 1642; Kelly & Mandelbaum, *supra* note 98, at 933.

125 *See, e.g.*, Burnham, *supra* note 10, at 356–59; Gold et al., *supra* note 10, at 1612–13, 1641–42.

126 *See supra* Section III.B; *infra* Section III.E.

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

that provision to raise appellate merits challenges. But with a more robust dismissal mechanism, defendants who choose not to take their case to trial would have much greater motivation to invoke Rule 11(a)(2) to preserve such challenges.[128]

D. *Alignment Would Promote Greater Clarity in the Criminal Law*

The fourth benefit of aligning the civil and criminal pleading standards is that doing so would promote more clarity in the criminal law.

As just explained, defendants' first truly meaningful opportunity to challenge the case against them is at trial, very few defendants ultimately go to trial, and those defendants who do not go to trial are generally unable to appeal.[129] Moreover—and likely relatedly—there are relatively few criminal appeals and nearly half of criminal appeals do not challenge the conviction; according to the U.S. Sentencing Commission, in 2019, approximately 6,793 cases were appealed out of 75,108 convictions, and 47.6 percent of those appeals contested the sentence alone.[130] And as discussed in greater detail below, there are strict limits on re-prosecution or appeal by the government if the defendant prevails—even erroneously—at trial.[131] Accordingly, the federal courts, at both the trial and appellate levels, are quite limited in their ability to opine on, give tangible meaning to, and offer clarifying guidance about the substantive criminal law.[132]

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[128] Rule 11(a)(2) requires that the government and court consent to a conditional plea. *See id.* But a defendant with an arguably strong case might push forcefully for a conditional plea as part of plea negotiations, and the government and court might well accede to such a plea if the defendant agreed not to go to trial to preserve their challenge. *Cf. id.* R. 11(a) advisory committee's note to 1983 amendment (explaining that Rule 11(a)(2) was added because "a defendant who has lost one or more pretrial motions will often go through an entire trial simply to preserve the pretrial issues for later appellate review," thereby "wast[ing] . . . prosecutorial and judicial resources, and caus[ing] delay in the trial of other cases"). Courts, moreover, may be inclined to approve conditional pleas involving motions to dismiss based on the pleading standard because appellate review would not require a trial record. *Cf. id.* ("The requirement of approval by the court is most appropriate, as it ensures, for example, that the defendant is not allowed to take an appeal on a matter which can only be fully developed by proceeding to trial."); Burnham, *supra* note 10, at 351 (explaining that motions to dismiss are based on "a discrete set of assumed or undisputed facts" and do not require appellate courts to "review[] a lengthy trial record").

[129] *See supra* Section III.C.

[130] *See* U.S. SENT'G COMM'N, *supra* note 121, at 42, 176–77.

[131] *See infra* notes 276–278 and accompanying text.

[132] *See, e.g.*, Burnham, *supra* note 10, at 347–51; Gold et al., *supra* note 10, at 1613, 1642–43; *cf.* Alexis v. Barr, 960 F.3d 722, 728–29 (5th Cir. 2020) ("[A] majority of criminal cases are resolved without a written judicial decision or by plea bargain. *See Missouri v. Frye*, 566 U.S. 134, 143, 132 S.Ct. 1399, 182 L.Ed.2d 379 (2012) (noting that

Raising the criminal pleading standard would do much to correct that problem and produce greater clarity in the law. As noted above, it would enable criminal defendants to mount challenges before both district and appellate courts that they otherwise would never raise.[133] Furthermore, a heightened pleading standard would likely cause the government to lose cases at the motion to dismiss stage that it otherwise would have lost at trial; that, in turn, would expand the government's ability to appeal and/or proceed with the litigation because the government *can* appeal a pretrial decision that the charging document is defective, and such a decision *does not* bar re-prosecution.[134] Thus, a heightened pleading standard would create more opportunities for litigation, thereby giving district and appellate courts a greater ability to clarify the law by issuing more decisions resolving its difficult questions.[135]

### E. *Alignment Would Prevent Overly Aggressive, Wrong, or Capricious Prosecutorial Positions*

A fifth reason why aligning the civil and criminal pleading standards would be a favorable policy decision is that it would limit prosecutors in their ability to advance overly aggressive or wrong arguments or to shift their stances at will.

As noted above, the federal system offers few checks on the merits of the prosecution's case. There are minimal checks prior to trial, and

'97 percent of federal convictions and 94 percent of state convictions are the result of guilty pleas'). Guilty pleas do not result in a reported decision from state court, which means that citable state decisions are only available in a very small percentage of prosecutions that result in both a trial and appeal."); Kallen, *supra* note 42, at 285 ("In a world where most cases end in settlement, there is little opportunity for appellate judges to review cases.").

133 *See supra* Section III.C.

134 *See, e.g.*, 18 U.S.C. § 3731; Martinez v. Illinois, 572 U.S. 833, 834 (2014) (per curiam); United States v. Sampson, 898 F.3d 270, 283 n.11 (2d Cir. 2018); United States v. Bobo, 419 F.3d 1264, 1267–68 (11th Cir. 2005); United States v. Slough, 679 F. Supp. 2d 55, 58 (D.D.C. 2010); Tierney, *supra* note 115, at 1842, 1850–52, 1862–63.

135 *See, e.g.*, Gold et al., *supra* note 10, at 1613, 1642–43; *cf.* Kallen, *supra* note 42, at 285 ("A pleading standard that imposes stricter requirements of complaints will most likely result in a greater number of successful motions to dismiss. This approach, in turn, will give appellate judges the opportunity to review dismissed cases that, under the previous system, would likely have resulted in settlement and never afforded judicial review on appeal."). Raising the pleading standard would also benefit legal clarity because motions to dismiss challenging the sufficiency of an indictment generally raise only pure questions of law that present issues clearly and are subject to largely plenary review—in contrast to questions that involve complex factual or evidentiary issues or that may receive greater deference. *See, e.g.*, United States v. Masha, 990 F.3d 436, 442–43 (5th Cir. 2021); Burnham, *supra* note 10, at 350–53, 359; Gold et al., *supra* note 10, at 1643.

the trial and post-trial checks are only available in the very rare cases in which defendants refuse to yield to the pressures to plead guilty.[136] And there are limited avenues for courts to clearly define the substantive criminal law.[137] Consequently, the government may be permitted to take overbroad or erroneous legal positions with little judicial or defense scrutiny.[138]

Relatedly, federal criminal procedure offers little protection against the prosecution "continually revis[ing]" its claims and thereby surprising or confusing defendants.[139] In theory, that should not be the case. The indictment requirement is supposed to ensure that the defendant is prosecuted on the basis of the allegations and charges actually presented to the grand jury and to prevent the prosecution from being "free to roam at large—to shift its theory of criminality so as to take advantage of each passing vicissitude of the trial and appeal."[140] Indeed, courts hold that "[o]nce a grand jury indicts a defendant, the 'charges may not be broadened through amendment except by the grand jury itself'"—or else an improper "constructive amendment" occurs; and "the evidence offered at trial [cannot] prove[] facts materially different from those alleged in the indictment"—or else an impermissible "variance" occurs.[141]

In practice, however, the government is not cabined by what it presents to the grand jury or by the indictment itself, and that is largely because conclusory indictments are permissible.[142] First of all, many courts reason that they should look to the *indictment* rather than grand

136 *See supra* Section III.C.

137 *See supra* Section III.D.

138 *See, e.g.*, Burnham, *supra* note 10, at 356–59; Gold et al., *supra* note 10, at 1643; Kelly & Mandelbaum, *supra* note 98, at 933; Weinberg, Iqbal, *supra* note 10, at 32; Tierney, *supra* note 115, at 1863.

139 Burnham, *supra* note 10, at 361.

140 Russell v. United States, 369 U.S. 749, 767–70 (1962).

141 United States v. Banki, 685 F.3d 99, 118–19 (2d Cir. 2012) (citations omitted); *see also* United States v. Farish, 535 F.3d 815, 822 (8th Cir. 2008) ("The basic difference between a constructive amendment and a variance is this: a constructive amendment changes the charge, while the evidence remains the same; a variance changes the evidence, while the charge remains the same." (citation omitted)).

142 *See, e.g.*, United States v. Hansen, 428 F. Supp. 3d 1200, 1202 (D. Utah 2019); Burnham, *supra* note 10, at 361; *see also* Weinberg, Iqbal, *supra* note 10, at 30 ("Since one can discern what facts the grand jury must have considered and found only from the factual findings pleaded in the indictment, an indictment that pleads 'conclusions of law,' rather than specific factual allegations underlying these legal conclusions, should be subject to dismissal under the *Russell* and *Iqbal-Twombly* line of authority because such an indictment would not 'assure that any conviction [by verdict of the petit jury] would arise out of the theory of guilt presented to the grand jury.'" (alteration in original) (citation omitted)).

jury transcripts—even assuming those could be obtained[143]—to determine whether there has been a constructive amendment or variance.[144] Additionally, numerous courts have stated that "[w]here a generally framed indictment encompasses the specific legal theory or evidence used at trial, there is no constructive amendment";[145] in other words, it is difficult to implicitly broaden an already broadly worded indictment. Furthermore, if an indictment is conclusory, it will not allege any facts that might differ from the trial evidence, even if the trial evidence differs from the evidence presented to the grand jury,[146] and the Supreme Court has held that a "variance between the broad allegations in the indictment and the narrower proof at trial [does not violate a defendant's] right to have had a grand jury screen any alleged offenses upon which he might be convicted at trial."[147] What is more, courts and the Advisory Committee on Criminal Rules have gone so far as to say that the government could make an indictment *more conclusory* to *avoid* constructive amendment or variance challenges.[148] And on a variance claim, a defendant must demonstrate prejudice to prevail,

143 *See supra* note 109 and accompanying text.

144 *See, e.g.*, United States v. Mann, 701 F.3d 274, 308 (8th Cir. 2012); United States v. Daly, 125 F.3d 845, at *1 (2d Cir. 1997) (unpublished table decision); United States v. Hilliard, 17 CR 35 (VB), 2018 WL 8996338, at *2 (S.D.N.Y. May 18, 2018), *aff'd sub nom.* United States v. Drayton, 796 F. App'x 24, 26–27 (2d Cir. 2019); United States v. Mangano, 16-CR-540 (JMA), 2018 WL 851860, at *16 (E.D.N.Y. Feb. 9, 2018); United States v. Wynn, Cr. No. 8:10-cr-1026-GRA, 2011 WL 2682124, at *3 (D.S.C. July 11, 2011); United States v. Harris, Criminal No. 05-0023-WS, 2008 WL 2519868, at *2 (S.D. Ala. June 20, 2008). *But see* United States v. Teman, 465 F. Supp. 3d 277, 300 (S.D.N.Y. 2020) ("The extent to which a court . . . may look beyond the language of the indictment to consider the content of the grand jury proceedings [in considering a constructive amendment claim] is unclear." (citation omitted)).

145 *Banki*, 685 F.3d at 118 (alteration in original) (citation omitted) (internal quotation marks omitted); *accord, e.g.*, United States v. Ellis, 121 F.3d 908, 923–24 (4th Cir. 1997); United States v. Weissman, 899 F.2d 1111, 1115 (11th Cir. 1990); *Teman*, 465 F. Supp. 3d at 295; United States v. Narang, 1:16-cr-43 (LMB), 2019 WL 3949308, at *14 n.25 (E.D. Va. Aug. 21, 2019); United States v. Apodaca, 287 F. Supp. 3d 21, 48 (D.D.C. 2017); United States v. Luong, No. CR. 99-433WBS GGH, 2009 WL 1393406, at *8 (N.D. Cal. May 15, 2009), *aff'd in relevant part*, 610 F. App'x 598, 600 (9th Cir. 2015).

146 *See Hansen*, 428 F. Supp. 3d at 1202.

147 United States v. Miller, 471 U.S. 130, 137–38, 145 (1985); *accord* United States v. Weinstock, 153 F.3d 272, 279 (6th Cir. 1998).

148 *See Weissman*, 899 F.2d at 1115 ("The government in styling the indictment could have used the general language of the statute to refer to the enterprise in which appellants allegedly were involved. Indeed, following this opinion, the government may well summon another grand jury and reindict appellants for conspiring to violate RICO in collusion with a more generally described enterprise."); U.S. CTS., *supra* note 80, at 20–21 ("Prosecutors have an incentive to [employ conclusory indictments] in order to avoid post trial claims of some variance between the allegations in the indictment and the proof.").

which will likely not be shown so long as they received notice of the variance before trial.[149]

Aligning the civil and criminal pleading standards would plainly address those issues. First of all, it would prevent the government from adopting aggressive or faulty legal theories by expanding opportunities for challenging the government's case and generating greater clarity about what the law means.[150] Additionally, by requiring that the indictment contain factual allegations, alignment would ensure that indictments could no longer be framed generally so as to obscure prosecutors shifting away from what they presented to the grand jury.[151] In other words, the government's position would be nailed down at the indictment stage, and if prosecutors tried to vary from it, they would open the door to successful constructive amendment or variance challenges.[152]

### F. *Alignment Would Protect Against False Guilty Pleas*

The sixth reason why aligning the civil and criminal pleading standards would be beneficial is that it would reduce the likelihood that defendants would plead guilty in cases where they are not actually so.

As a matter of fairness and accuracy, a defendant *should* only plead guilty if she has actually committed the crime for which she is charged. That ideal, however, is tempered significantly by the reality of incentives. It is well-established that defendants typically receive enhanced punishment if they go to trial,[153] and studies have shown that

149 *See, e.g.*, *Banki*, 685 F.3d at 119.

150 *See, e.g.*, Burnham, *supra* note 10, at 358–59; Gold et al., *supra* note 10, at 1643; Kelly & Mandelbaum, *supra* note 98, at 933; Weinberg, Iqbal, *supra* note 10, at 32; *supra* Sections III.C–III.D.

151 *See Hansen*, 428 F. Supp. 3d at 1202; Burnham, *supra* note 10, at 361; *cf.* Kyle R. Williams, Note, *Plausible Pleading in Patent Suits: Predicting the Effects of the Abrogation of Form 18*, 22 MICH. TELECOMM. & TECH. L. REV. 317, 339 (2016) ("[T]ougher pleading requirements will force plaintiffs to crystalize their theory of infringement early on in the litigation, reducing expenses for both plaintiffs and defendants.").

152 To be sure, the government would not be completely pigeonholed by the indictment. Again, a successful variance challenge requires the defendant to show prejudice, and courts have often indicated that the rules binding prosecutors to the terms of the indictment are flexible. *See, e.g.*, United States v. Lee, 833 F.3d 56, 70–71 (2d Cir. 2016); United States v. Dubon-Otero, 292 F.3d 1, 5–6 (1st Cir. 2002). But prosecutors would be substantially more limited under a heightened pleading regime.

153 *See, e.g.*, NAT'L ASS'N OF CRIM. DEF. LAWS., THE TRIAL PENALTY: THE SIXTH AMENDMENT RIGHT TO TRIAL ON THE VERGE OF EXTINCTION AND HOW TO SAVE IT 5 (2018), https://www.nacdl.org/getattachment/95b7f0f5-90df-4f9f-9115-520b3f58036a/the-trial-penalty-the-sixth-amendment-right-to-trial-on-the-verge-of-extinction-and-how-to-save-it.pdf; Gold et al., *supra* note 10, at 1609, 1620, 1628; Joy & Uphoff, *supra* note 121, at 101; Weinberg, Iqbal, *supra* note 10, at 31; Ronald F. Wright, *Trial Distortion and the End of Innocence in Federal Criminal Justice*, 154 U. PA. L. REV. 79, 85–86 (2005).

defendants—regardless of guilt—may be willing to plead guilty to avoid such a consequence.[154]

Even still, a defendant should only "plead guilty if the [plea] 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."[155] And one would think that the chance of an innocent defendant being acquitted would be high. As we have seen, however, "a defendant has limited ability to learn the contours of the prosecutor's case," and that is especially so prior to deciding on a plea offer.[156] Compounding that, as discussed above, the criminal law may be unclear and prosecutors may be able to shift their theories as proceedings unfold.[157] Thus, defendants are left unable to fully evaluate their "chance of acquittal"—which may even be artificially deflated by the foregoing circumstances—when deciding whether to plead guilty.[158] Moreover, prosecutors have broad authority to influence the ultimate punishment a defendant will receive by way of plea versus by way of trial.[159] Consequently, because one half of the plea bargaining analysis is in the hands of prosecutors—who often successfully impose more stringent penalties for going to trial—and the other half cannot be rationally evaluated and may even be actively depressed, "[r]isk averse defendants"—even innocent ones—"who wish to minimize harsh penalties or collateral consequences may be eager to plead guilty to a lesser offense or for a reduced sentence."[160]

That penalty-incentive problem, furthermore, is actually worse for innocent defendants than for guilty ones. Guilty defendants may not know the strength of the government's case or precisely what the government is alleging, but at least they "often know what crime they have committed, and they accordingly may be able to guess what evidence the prosecutor has to prove their guilt."[161] "But innocent defendants have not committed a crime, and they likely have no

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154 *See, e.g.*, NAT'L ASS'N OF CRIM. DEF. LAWS., *supra* note 153, at 6; John H. Blume & Rebecca K. Helm, *The Unexonerated: Factually Innocent Defendants Who Plead Guilty*, 100 CORNELL L. REV. 157, 170 (2014); Lucian E. Dervan & Vanessa A. Edkins, *The Innocent Defendant's Dilemma: An Innovative Empirical Study of Plea Bargaining's Innocence Problem*, 103 J. CRIM. L. & CRIMINOLOGY 1, 48 (2013); Wright, *supra* note 153, at 85–86.

155 Gold et al., *supra* note 10, at 1624.

156 *Id.* at 1624–28; *see also supra* Section III.A.

157 *See supra* Sections III.D–III.E.

158 Gold et al., *supra* note 10, at 1624–28; *accord* Tierney, *supra* note 115, at 1864; *see also supra* Sections III.A–III.B, III.E.

159 *See, e.g.*, Blume & Helm, *supra* note 154, at 170; Gold et al., *supra* note 10, at 1609, 1616–24; Joy & Uphoff, *supra* note 121, at 101–05.

160 Gold et al., *supra* note 10, at 1616–28.

161 *Id.* at 1627.

independent knowledge about the evidence the prosecutor has against them or the prosecutor's theory."[162] Hence, they are less able than guilty defendants to determine whether it is worth it to risk going to trial, and more likely to have an artificially dampened probability of acquittal.[163] What is more, innocent defendants "are on average more risk averse than guilty defendants,"[164] meaning that they may be even more likely to plead guilty in the face of heavy pressure to do so.

In addition, going to trial could lead to other substantial costs. As one article has explained:

> 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 immigration consequences for non-citizens. Or a prosecutor may threaten to pursue forfeiture or asset seizure if a defendant refuses to plead. A prosecutor might also threaten to bring charges against a friend or family member to induce a plea. 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.[165]

Beyond that, even apart from prosecutorial pressure, criminal trials can "impose[] significant legal expenses, incalculable emotional hardship, and severe reputational injury."[166] And those costs can extend beyond the trial, regardless of outcome. The defendant generally must pay his own legal expenses, even if he wins;[167] hearing government witnesses—who may be friends, family, or colleagues—testify and (potentially) experiencing cross-examination may be psychologically damaging regardless of the result; and defendants who prevail at trial may suffer reputation-eviscerating allegations that "they did it but there wasn't quite enough evidence to convince the jury beyond a reasonable

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162 *Id.*

163 *See id.*

164 Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2463, 2495 (2004).

165 Gold et al., *supra* note 10, at 1620–21 (footnotes omitted).

166 Burnham, *supra* note 10, at 354; *accord, e.g.*, Fairfax, *supra* note 51, at 728; Laurie L. Levenson, *Peeking Behind the Plea Bargaining Process:* Missouri v. Frye *&* Lafler v. Cooper, 46 LOY. L.A. L. REV. 457, 464 (2013); Kelly & Mandelbaum, *supra* note 98, at 932–33.

167 *See, e.g.*, United States v. Wade, 255 F.3d 833, 835–36 (D.C. Cir. 2001).

doubt."[168] Those costs are yet another thumb on the scale in favor of pleading guilty.

All of that is amplified by the fact that, as explained above, defendants have little opportunity to challenge the merits of the case against them before trial.[169] Accordingly, many defendants who might have a valid challenge to raise will never do so out of fear of what might happen at trial.[170] In other words, there is little to prevent prosecutors from bringing charges on questionable grounds, and innocent defendants may well decide to plead guilty to those charges without protest.[171]

Aligning the civil and criminal pleading standards would go a long way to fixing this issue and reducing the chance that an innocent defendant would plead guilty. Again, it would provide defendants—especially innocent ones—with substantially more information about the case against them, and it would do so early on.[172] Hence, defendants would have greater capacity to determine their chance of acquittal and make informed decisions about whether to go to trial.[173] Additionally, by clarifying the law and giving defendants a greater ability to prepare for and avoid surprise at trial, a heightened pleading standard would raise the chance of acquittal—again, especially for innocent defendants.[174] Furthermore, it would ensure that defendants would not have to accept the costs and risks of going to trial to contest their charges.[175] And that, in turn, would mean that "[p]rosecutors 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."[176]

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168 *Cf.* Cynthia L. Randall, Comment, *Acquittals in Jeopardy: Criminal Collateral Estoppel and the Use of Acquitted Act Evidence*, 141 U. PA. L. REV. 283, 315–16 (1992) ("Common sense suggests that many acquittals would not stand if they had to be justified under a preponderance of the evidence standard.").

169 *See supra* Section III.C.

170 *See, e.g.*, Gold et al., *supra* note 10, at 1610; Kelly & Mandelbaum, *supra* note 98, at 932–33; Weinberg, Iqbal, *supra* note 10, at 31; Wright, *supra* note 153, at 85–86.

171 *See, e.g.*, Burnham, *supra* note 10, at 358; Gold et al., *supra* note 10, at 1642; Kelly & Mandelbaum, *supra* note 98, at 932–33.

172 *See supra* Section III.A.

173 *See, e.g.*, Gold et al., *supra* note 10, at 1640–41.

174 *See supra* Sections III.A–III.B, III.E.

175 *See supra* Section III.C.

176 Gold et al., *supra* note 10, at 1643.

G. *Alignment Would Clarify the Scope of Criminal Cases*

Aligning the civil and criminal pleading standards would also be valuable because it would clarify the scope of the charges and the case, which is often uncertain under existing law, and thereby ensure that defendants receive meaningful double jeopardy protections.

"The Double Jeopardy Clause 'protects against a second prosecution for the same offense after acquittal'" or conviction, as well as "against multiple punishments for the same offense."[177] In assessing whether the Clause has been violated, the primary sources courts consider are the indictment and the record of the relevant proceeding.[178]

Between those two sources, the indictment should be the most helpful. Indeed, one of the key purposes of an indictment is to protect against double jeopardy.[179] More practically, however, an indictment is a single document that lays out the substance of the case and the government's allegations, organized by charge. And its contents must accurately reflect the case and offenses at issue because, if they did not, that would constitute a constructive amendment or variance.[180]

But, as we have seen, indictments can be incredibly vague and provide little detail about the charges and the acts encompassed by them.[181] Thus, the parties can be required to rely on the record, which contains a (potentially voluminous and poorly organized) hodgepodge of documents, transcripts, and other materials.[182] Furthermore, because records consists of a range of materials covering a variety of issues that have not been distilled into a single narrative description, they are necessarily more ambiguous than indictments and hence more amenable to interpretation.[183] Moreover, that ambiguity is amplified by the fact that our minimal indictment system restricts what counts as a constructive amendment or variance and thereby broadens the materials that might appear in a record.[184] And minimalistic indictments cannot effectively be used to shed light on the record

177 Brown v. Ohio, 432 U.S. 161, 165 (1977) (citation omitted).

178 *See, e.g.*, Class v. United States, 138 S. Ct. 798, 804 (2018); United States v. Votrobek, 847 F.3d 1335, 1340 (11th Cir. 2017); United States v. Washington, 653 F.3d 1251, 1261 (10th Cir. 2011); United States v. Olmeda, 461 F.3d 271, 282 (2d Cir. 2006).

179 *See, e.g.*, Russell v. United States, 369 U.S. 749, 763–64 (1962); United States v. Thomas, 367 F.3d 194, 197 n.1 (4th Cir. 2004).

180 *See supra* Section III.E.

181 *See supra* Part II.

182 *Cf.* Burnham, *supra* note 10, at 351 (explaining the difficulty of deciding appeals on complex records).

183 *Cf. id.* (same).

184 *See supra* Section III.E.

documents and their proper interpretation. All of that makes the protections bestowed upon defendants by the Double Jeopardy Clause uncertain, and it makes invoking those protections a burdensome and time-consuming exercise.

Aligning the civil and criminal pleading standards would rectify that issue, however. First of all, it would make the indictment useful for resolving double jeopardy questions by ensuring that the document actually describes the particular facts of each crime charged. That, in turn, would mean that parties would rarely need to wade into the record. And in cases where examining the record became necessary, the record materials would likely be more limited because aligning the pleading standards would give teeth to constructive amendment and variance restrictions. Additionally, a more detailed indictment would offer greater insights into the proper meaning of the record and thereby help to clear up record ambiguity. In short, aligning the pleading standards would ensure that the scope of each case is clear and that defendants could meaningfully depend upon their double jeopardy rights.

### H. *Alignment Would Help to Correct the Imbalance Between the Protections Civil & Criminal Defendants Receive*

Finally, aligning the civil and criminal pleading standards would help to correct a seriously unfair and problematic imbalance between the protections defendants receive in civil and criminal cases.

It is widely accepted, as a general proposition, that criminal defendants should receive greater protections than civil ones.[185] That is so largely because, unlike civil cases, criminal cases always place the defendant's life or liberty at risk—meaning that the stakes are necessarily higher in criminal litigation.[186] But, under prevailing law,

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[185] *See, e.g.*, State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 416–17 (2003); INS v. Lopez-Mendoza, 468 U.S. 1032, 1038 (1984); Fazaga v. FBI, 965 F.3d 1015, 1053 n.31 (9th Cir. 2020); *In re* Crim. Investigation of Doe, Criminal No. 08-10215-RGS, 2008 WL 3274429, at *1 (D. Mass. Aug. 7, 2008); Patterson v. Warner, 371 F. Supp. 1362, 1365 (S.D. W. Va. 1972); Burnham, *supra* note 10, at 357–58; Robert F. Cochran, Jr., *"How Do You Plead, Guilty or Not Guilty?": Does the Plea Inquiry Violate the Defendant's Right to Silence?*, 26 CARDOZO L. REV. 1409, 1453 (2005); Gold et al., *supra* note 10, at 1610–11, 1644; David Kwok, *Is Vagueness Choking the White-Collar Statute?*, 53 GA. L. REV. 495, 511–12 (2019); Meyn, *supra* note 71, at 1132–33; Weinberg, *Applying* Twombly, *supra* note 10, at 51; Weinberg, Iqbal, *supra* note 10, at 31.

[186] *See, e.g.*, *Patterson*, 371 F. Supp. at 1365; Burnham, *supra* note 10, at 357–58; Cochran, *supra* note 185, at 1453; Gold et al., *supra* note 10, at 1610–11, 1644; Meyn, *supra* note 71, at 1132–33; Weinberg, *Applying* Twombly, *supra* note 10, at 51; Weinberg, Iqbal, *supra* note 10, at 31.

civil defendants are much more protected on the points laid out above, given the higher civil pleading standard and other reasons.[187]

First, unlike criminal defendants, civil defendants possess robust mechanisms for ascertaining information about the case against them and are not at an informational disadvantage vis-à-vis their adversary.[188] For example, civil plaintiffs must include meaningful factual allegations in their pleadings rather than mere conclusory assertions. Thus, civil defendants automatically receive a clear description of the case against them in a single streamlined document right from the outset, litigation over the pleadings is informative about the claims at issue, and the role of evidence in the case is intuitive.[189] In addition, civil discovery is powerful.[190] In contrast to criminal discovery, civil discovery requires parties to "disclose the names and addresses of potential witnesses" and allows them to "broadly depose witnesses, request documents, pose interrogatories, and conduct physical examinations."[191] Furthermore, civil defendants, unlike their criminal counterparts, can move for summary judgment, which "requires the parties . . . to lay out an evidentiary record demonstrating that a trial is necessary" and "also to marshal the evidence into legal argument."[192] Finally, unlike the government in a prosecution,[193] civil plaintiffs are not expected to come into a case with near-exhaustive knowledge of the relevant facts and do not have access to government investigatory tools—which can dwarf those they do possess—meaning that they do not automatically come into the case with an informational head start.[194]

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187 *See, e.g.*, Gold et al., *supra* note 10, at 1610–11.

188 *See, e.g.*, *id.* at 1609–14; Meyn, *supra* note 71, at 1091–92; Meyn, *supra* note 10, at 46–47.

189 *See, e.g.*, Gold et al., *supra* note 10, at 1632–33; *supra* Part II.

190 *See, e.g.*, United States v. Sampson, 898 F.3d 270, 280 (2d Cir. 2018); Gold et al., *supra* note 10, at 1633–35; Meyn, *supra* note 71, at 1095–96, 1106–15; Meyn, *supra* note 73, at 1802–03; Weinberg, Iqbal, *supra* note 10, at 31–32.

191 Gold et al., *supra* note 10, at 1633–34 (footnotes omitted); *accord, e.g.*, Weinberg, Iqbal, *supra* note 10, at 31–32; *see supra* note 72 and accompanying text. The available interrogatories include "contention interrogatories," which "seek to clarify the basis for or scope of an adversary's legal claims." Starcher v. Corr. Med. Sys., Inc., 144 F.3d 418, 421 n.2 (6th Cir. 1998).

192 Gold et al., *supra* note 10, at 1635–36; *see supra* notes 66, 114–117 and accompanying text.

193 *See supra* Section III.B.

194 *See, e.g.*, Schwake v. Ariz. Bd. of Regents, 967 F.3d 940, 949 (9th Cir. 2020); Ash v. Anderson Merchrs., LLC, 799 F.3d 957, 961 (8th Cir. 2015); Pruell v. Caritas Christi, 678 F.3d 10, 15 (1st Cir. 2012); Burnham, *supra* note 10, at 360–61; Gold et al., *supra* note 10, at 1644; Meyn, *supra* note 71, at 1095–96, 1123–26; Weinberg, *Applying* Twombly, *supra* note 10, at 51; Weinberg, Iqbal, *supra* note 10, at 31; *see also* Johns v. Eastman

Civil defendants are in a more favorable informational position, moreover, even though criminal defendants have at least as much, if not a much greater, need for information and informational parity—even beyond the higher stakes involved in criminal cases. First of all, unlike civil defendants,[195] criminal defendants are always presumed innocent, meaning that they "should be presumed ignorant of the facts on which the charges are based."[196] In addition, civil defendants are not likely to be restricted in developing their case by pretrial detention.[197] Further, despite the powerful non-pleading-stage mechanisms civil defendants possess for learning about the case against them, the Supreme Court in *Twombly* emphasized that a more stringent civil pleading standard was necessary because, inter alia, "[w]ithout some factual allegation in the complaint, it is hard to see how a claimant could satisfy the requirement of providing not only 'fair notice' of the nature of the claim, but also 'grounds' on which the claim rests," and "conclusory allegations" provide a defendant with "little idea where to begin."[198] That reasoning would seem at least equally applicable to criminal cases, particularly given that—unlike in civil cases—the Constitution commands that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation."[199] Lastly, the law is more accepting of erroneous judgments against civil defendants than against criminal ones.[200] But the lack of information and informational

Chem. Co., 248 F. Supp. 3d 765, 771 (S.D. W. Va. 2017) (explaining that even under Federal Rule of Civil Procedure 9(b), which sets the pleading standard for issues like fraud and is more stringent than Rule 8(a), "a plaintiff is not required to 'know every detail before he or she could plead'" (citation omitted)).

195 *See, e.g.*, Claiborne v. Blauser, 934 F.3d 885, 895 (9th Cir. 2019); United States v. Ruedlinger, 976 F. Supp. 976, 1005 (D. Kan. 1997); J. Harvie Wilkinson III, *The Presumption of Civil Innocence*, 104 VA. L. REV. 589, 589, 611–12 (2018).

196 LEIPOLD, *supra* note 12, § 130; *accord* Fontana v. United States, 262 F. 283, 286 (8th Cir. 1919) ("When one is indicted for a serious offense, the presumption is that he is innocent thereof, and consequently that he is ignorant of the facts on which the pleader founds his charges, and it is a fundamental rule that the sufficiency of an indictment must be tested on the presumption that the defendant is innocent of it and has no knowledge of the facts charged against him in the pleading.").

197 *See, e.g.*, Meyn, *supra* note 10, at 53–54, 62–63.

198 Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 n.3, 565 n.10 (2007).

199 U.S. CONST. amend. VI; *see also* United States v. Hansen, 428 F. Supp. 3d 1200, 1202 (D. Utah 2019); Burnham, *supra* note 10, at 361–62; Weinberg, *Applying* Twombly, *supra* note 10, at 49.

200 *See, e.g.*, *In re* Winship, 397 U.S. 358, 371–72 (1970) (Harlan, J., concurring) ("In a civil suit between two private parties for money damages, for example, we view it as no more serious in general for there to be an erroneous verdict in the defendant's favor than for there to be an erroneous verdict in the plaintiff's favor. . . . In a criminal case, on the other hand, we do not view the social disutility of convicting an innocent man as equivalent to the disutility of acquitting someone who is guilty.").

parity in criminal cases makes erroneous criminal convictions more likely by hindering defendants in mounting a defense and by encouraging innocent defendants to plead guilty.[201]

Second, unlike criminal defendants, civil defendants have several opportunities to meaningfully contest the case against them before trial. For instance, given the *Twombly-Iqbal* pleading standard, motions to dismiss allow civil defendants to mount vigorous legal challenges at the very outset.[202] Further, civil defendants can move for summary judgment after a motion to dismiss has failed to terminate a legally or factually insufficient case.[203]

Again, that is true even though—beyond the stakes involved—criminal defendants have at least as much need to challenge the case against them before trial as civil ones. In the civil setting, allegations of fraud must meet an even more stringent pleading standard than that imposed by *Twombly* and *Iqbal* "because of the potential stigmatic injury that comes with alleging fraud and the concomitant desire to ensure that such fraught allegations are not lightly leveled,"[204] and to "compel[] the plaintiff to provide enough detail to enable the defendant to riposte swiftly and effectively if the claim is groundless."[205] Yet the stigmatic cloud of a criminal accusation casts a considerably darker shadow than a mere civil fraud claim.[206] Furthermore, criminal defendants may be detained before trial, unlike most civil defendants,[207] so permitting early challenges in criminal cases is critical to prevent unwarranted confinement. Finally, the Supreme Court imposed the *Twombly-Iqbal* civil pleading standard in part to avoid undue pressure on defendants to settle weak cases due to the burdens of litigation and discovery.[208]

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201 *See supra* Sections III.A–III.B, III.F.

202 *See, e.g.*, Burnham, *supra* note 10, at 355–58; Gold et al., *supra* note 10, at 1632–33; Meyn, *supra* note 10, at 55–56; *supra* Part II, Section III.C. A civil defendant can also move for judgment on the pleadings, *see* FED. R. CIV. P. 12(c), although that is largely equivalent to the motion to dismiss, *see, e.g.*, Ruppe v. Knox Cnty. Bd. of Educ., 993 F. Supp. 2d 807, 809 (E.D. Tenn. 2014).

203 *See, e.g.*, United States v. Sampson, 898 F.3d 270, 279 (2d Cir. 2018); Burnham, *supra* note 10, at 349; Gold et al., *supra* note 10, at 1635–36; Weinberg, *Applying* Twombly, *supra* note 10, at 52.

204 Cincinnati Life Ins. Co. v. Beyrer, 722 F.3d 939, 948 (7th Cir. 2013) (citation omitted).

205 United States *ex rel*. Presser v. Acacia Mental Health Clinic, LLC, 836 F.3d 770, 776 (7th Cir. 2016) (citations omitted).

206 Of course, criminal proceedings can involve allegations of fraud too. *See* Meyn, *supra* note 10, at 56. As it stands, however, even those allegations are subject only to Rule 7(c)'s minimal requirements. *See id.*

207 *See, e.g.*, *id.* at 53, 62–63.

208 *See, e.g.*, Bell Atl. Corp. v. Twombly, 550 U.S. 544, 557–58 (2007); Weinberg, *Applying* Twombly, *supra* note 10, at 51; Weinberg, Iqbal, *supra* note 10, at 31.

But as suggested above and explained more shortly, there is at least as much pressure to "settle" weak criminal cases.[209]

Third, civil defendants are better protected against lack of legal clarity and overly aggressive, wrong, or capricious positions than criminal defendants. As explained above, given the minimal criminal pleading standard, criminal defendants have little protection in that regard.[210] The higher pleading standard and multiple opportunities to raise dispositive merits challenges in civil cases, however, necessarily allow courts to issue clarifying opinions on the law,[211] eliminate unwarranted legal positions, and require plaintiffs to "commit to a relatively specific set of factual allegations at the outset and then attempt to prove it."[212] That is so, moreover, even though greater legal clarity is generally required in the criminal context,[213] and a lack of such clarity, or unjustified or fickle prosecutorial positions, could easily lead to unwarranted convictions—which, as just noted, are more problematic than erroneous civil judgments.[214]

Fourth, civil defendants are much better protected from erroneous settlements than criminal defendants. As explained above, civil defendants have access to substantial case information, are not at an informational disadvantage, and have multiple opportunities to challenge the case against them—unlike criminal defendants.[215] And although the costs of civil litigation and trial can be significant and therefore encourage settlement, the costs and risks of going to trial for a criminal defendant are necessarily greater. Not only must they bear

209 *See supra* Section III.F; *infra* notes 215–216 and accompanying text.

210 *See supra* Sections III.D–III.E.

211 *See, e.g.*, Burnham, *supra* note 10, at 348–49; Gold et al., *supra* note 10, at 1613, 1642–43; Kallen, *supra* note 42, at 285. There are also no restrictions on appeals by the complaining party in civil cases. *See* Uzair Kayani, *Law Done Backwards: The Tightening of Civil and Loosening of Criminal Protections*, 42 NOVA L. REV. 179, 200 (2018).

212 Burnham, *supra* note 10, at 355–59, 361; *see, e.g.*, Gold et al., *supra* note 10, at 1642–43; Kelly & Mandelbaum, *supra* note 98, at 933; Weinberg, Iqbal, *supra* note 10, at 32; Williams, *supra* note 151, at 339.

213 *Cf., e.g.*, Oberwetter v. Hilliard, 639 F.3d 545, 549 (D.C. Cir. 2011) ("In the criminal context, courts have traditionally required greater clarity in draftsmanship than in civil contexts, commensurate with the bedrock principle that in a free country citizens who are potentially subject to criminal sanctions should have clear notice of the behavior that may cause sanctions to be visited upon them." (citation omitted)); United States v. Murray, 928 F.2d 1242, 1246 (1st Cir. 1991) ("We are mindful of the constraints placed on the interpretation and application of criminal statutes, and we recognize that '[i]n the criminal context, courts have traditionally required greater clarity in draftsmanship than in civil contexts. . . .' Furthermore, to avoid the imposition of penalties not intended by Congress, the courts have applied the doctrine of lenity when there is serious doubt as to the reach of a criminal statute." (alteration in original) (citation omitted)).

214 *See supra* note 200 and accompanying text.

215 *See supra* notes 188–194, 202–203 and accompanying text.

the standard financial and other burdens of litigation, but also: they are risking enhancement of criminal penalties; they may be detained; and prosecutors can amplify criminal sentences more readily than plaintiffs can amplify civil judgments.[216]

Yet again, however, protections against erroneous settlements are much more necessary in criminal litigation. Civil settlements are different in kind than criminal settlements, even aside from the obvious difference in magnitude between civil remedies and criminal punishment. Civil settlements often do not involve admissions of, and are generally not viewed as establishing, wrongdoing or liability.[217] Yet criminal settlements typically *do* involve the admission of guilt and conclusively establish criminal liability.[218] Hence, the very idea of an "erroneous" civil settlement is questionable because settlements often adjudicate nothing about the merits of a claim and can simply reflect an economic calculation;[219] but a guilty plea can certainly be factually incorrect. Moreover, by requiring an admission of guilt and of participation in behavior that society deems so reprehensible as to be criminal, criminal settlements demand much more of defendants than civil settlements.

Fifth, civil defendants can more easily clarify the scope of the proceedings than criminal defendants. For example, under Civil Rule 15(b)(2), "A party may move—at any time, even after judgment—to amend the pleadings to conform them to the evidence and to raise an unpleaded issue."[220] But there is no similar Criminal Rule.[221] And of

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216 *See, e.g.*, Gold et al., *supra* note 10, at 1609–10, 1616–24, 1629–30; Meyn, *supra* note 10, at 53–54, 62–63; *supra* Section III.F.

217 *See, e.g.*, FED. R. EVID. 408(a) & advisory committee's notes; Benjamin v. Brachman, 246 F. App'x 905, 926 (6th Cir. 2007); Reynolds v. Roberts, 202 F.3d 1303, 1315 (11th Cir. 2000); Budget Cinema, Inc., v. Watertower Assocs., 81 F.3d 729, 731–32 (7th Cir. 1996); Carro v. Barra, Case No. 16-10479, 2018 WL 11357929, at *4, 8 (E.D. Mich. Apr. 3, 2018); Miller v. City of Harvey, No. 13 C 9257, 2015 WL 5144476, at *4 (N.D. Ill. Aug. 31, 2015); Morris v. City of New York, No. 12-CV-3959, 2013 WL 5781672, at *11 (E.D.N.Y. Oct. 28, 2013); Patrick Collins, Inc. v. John Does 1–9, No. 12-CV-3161, 2012 WL 4321718, at *5 (C.D. Ill. Sept. 18, 2012); *In re* Austrian & German Bank Holocaust Litig., 80 F. Supp. 2d 164, 180 (S.D.N.Y. 2000); David M. Uhlmann, *The Pendulum Swings: Reconsidering Corporate Criminal Prosecution*, 49 U.C. DAVIS L. REV. 1235, 1257 (2016).

218 *See, e.g.*, FED. R. EVID. 410 & advisory committee's notes; Brady v. United States, 397 U.S. 742, 748 (1970); United States v. Miselis, 972 F.3d 518, 526 (4th Cir. 2020); United States v. Zhou, 838 F.3d 1007, 1013 (9th Cir. 2016); Uhlmann, *supra* note 217, at 1257.

219 *See, e.g.*, *Budget Cinema*, 81 F.3d at 732 ("[A] settlement offer, rather than being evidence of the objective reasonableness of a lawsuit, is as here frequently an economic decision about the comparative costs of proceeding with litigation.").

220 FED. R. CIV. P. 15(b)(2).

221 *See, e.g.*, FED. R. CRIM. P. 7(e) ("Unless an additional or different offense is charged or a substantial right of the defendant is prejudiced, the court may permit an

course, the higher civil pleading standard itself ensures that civil pleadings will often be more informative about the scope of the case than criminal ones. Yet again, however, criminal defendants have a much greater need for clarity. In civil cases, clarity regarding the scope of the case is necessary primarily for preclusion purposes; in criminal cases, clarity is necessary to vindicate the constitutional protection against double jeopardy.

In short, civil defendants receive far greater protections than criminal ones on a host of fronts. Moreover, they do so even though criminal defendants have as much or an even greater need for those protections, and notwithstanding the general view that criminal cases require greater safeguards. That, in turn, raises serious fairness questions. Indeed, as one court pointedly observed, "The 'proverbial visitor from Mars' might well conclude from th[e] dichotomy [between the civil and criminal pleading standards] that our justice system has a greater concern with protecting the interests of civil defendants than criminal defendants."[222] And other courts have raised similar points.[223]

Raising the criminal pleading standard to at least align with the civil standard, however, would help to address these issues. Again, it would provide criminal defendants with better information about the case against them, lead to more informational parity between the parties, provide defendants with an opportunity to challenge the government's position before trial, increase clarity in the criminal law, impede overly aggressive, wrong, or capricious positions, reduce the likelihood of erroneous guilty pleas, and clarify the scope of the proceedings.[224] Thus, although there may still be ways in which civil defendants remain more protected, altering the pleading standard would make a major impact.

information to be amended at any time *before the verdict or finding*." (emphasis added)); *cf.* United States v. Sutton, 157 F.2d 661, 665 (5th Cir. 1946) ("The appellant has been convicted, but of what no one can say with certainty. . . . If it were permissible to amend the pleadings in criminal prosecutions after verdict, as may be done in civil cases, we might be able to patch up this information so as to state an offense; but there is no such rule in criminal procedure, and none is likely to be so long as the Sixth Amendment stands." (footnote omitted)).

222 United States v. Novak, Case No. 13 CR 312, 2014 WL 2937062, at *3 (N.D. Ill. June 30, 2014) (citation omitted).

223 *See, e.g.*, United States v. Hansen, 428 F. Supp. 3d 1200, 1201–03 (D. Utah 2019); United States v. Bibbs, No. 15 CR 578, 2016 WL 4701441, at *3 (N.D. Ill. Sept. 8, 2016).

224 *See supra* Sections III.A–III.G.

## IV. WHY POTENTIAL OBJECTIONS ARE UNAVAILING

Of course, benefits are not the only factor to consider in assessing the normative and policy value of a change to the criminal pleading standard. Rather, the benefits must be weighed against any valid concerns or drawbacks. But those are negligible in this case. Although there are conceivable objections to aligning the civil and criminal pleading standards—for instance, that alignment would: (A) make criminal litigation more burdensome; (B) be improper because criminal pleadings cannot be easily amended; (C) require prosecutors to reveal sensitive information; (D) let guilty defendants go free; or (E) be unnecessary to protect criminal defendants—none of those objections ultimately holds water.

### A. *Alignment Would Increase the Burdens of Criminal Litigation*

The first potential objection to raising the criminal pleading standard to at least align with the civil pleading standard is that doing so would make criminal litigation more burdensome. In fact, in its rejection of the 2016 proposal to change the criminal pleading standard, the Advisory Committee on Criminal Rules raised this very argument, asserting that "the proposal would invite in criminal cases the kind of costly, repetitive, and lengthy pretrial motions practice that now occurs in some kinds of civil cases, including big financial cases, antitrust cases, and securities class actions."[225] That objection, however, is overblown.

First of all, an increased pleading standard would not significantly encumber the government. Although it would require prosecutors to draft more detailed pleadings and respond to more motions to dismiss, that should not be unduly challenging or time consuming.[226] Those obligations would simply require the government to state the allegations on which the charges are based and argue for its theory of illegality, which the government should have at the ready given that it is expected and equipped to be largely prepared for trial at the time it files charges.[227] Also, prosecutors are salaried employees of the federal government.[228] Accordingly, asking that they expend some extra time and effort would not tax the government in the same way as private

225 U.S. CTS., *supra* note 80, at 21; *accord* William Ortman, *Second-Best Criminal Justice*, 96 WASH. U. L. REV. 1061, 1100–01 (2019).

226 *See* Gold et al., *supra* note 10, at 1658.

227 *See* Burnham, *supra* note 10, at 360–61; *supra* notes 91–94 and accompanying text.

228 *See* Offs. of the U.S. Att'ys, *Administratively Determined Pay Plan Charts*, U.S. DEP'T OF JUST., https://www.justice.gov/usao/career-center/salary-information/administratively-determined-pay-plan-charts (last updated Jan. 11, 2021).

parties, who often must pay lawyers by the hour.[229] Additionally, although prosecutors are usually racing against the clock imposed by the Speedy Trial Act—which demands that trial begin by the later of "seventy days from the filing date (and making public) of the information or indictment, or from the date the defendant has appeared before a judicial officer of the court in which such charge is pending"[230]—the clock is paused for any "delay resulting from any pretrial motion, from the filing of the motion through the conclusion of the hearing on, or other prompt disposition of, such motion,"[231] or any "delay reasonably attributable to any period, not to exceed thirty days, during which any proceeding concerning the defendant is actually under advisement by the court."[232] Thus, responding to additional pretrial motions to dismiss would not take up the government's valuable and limited Speedy Trial Act time, and indeed the government could receive *extra* case-preparation time as a result.

Furthermore, a heightened pleading standard would not lead to excessive or overly burdensome litigation in many cases. Much of the time, the facts in criminal cases will be simple and easily expressed, and the government's theory of criminality will be banal.[233] In such cases, so long as the facts are stated, there would be little reason to raise a motion to dismiss and even less reason why the government could not quickly and decisively prevail.

Moreover, there are ways that a pleading standard change could decrease the burdens of litigation and increase efficiency. As I have explained, a defendant's first real opportunity to challenge the merits of the case against them is at trial.[234] Therefore, although many defendants plead guilty, the government must prepare for a full dress trial every time a defendant decides to mount even a narrow defense on the merits.[235] Raising the criminal pleading standard, then, would mean

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229 *See, e.g.*, John Bronsteen, *Against Summary Judgment*, 75 GEO. WASH. L. REV. 522, 533–34 (2007) ("Like surgery, litigation costs a lot because it can be done only by professional specialists who charge high fees. Parties pay lawyers hundreds of dollars per hour, so litigation costs depend primarily on how many hours the parties' lawyers must devote to the case." (footnote omitted)).

230 18 U.S.C. § 3161(c)(1).

231 *Id.* § 3161(h)(1)(D).

232 *Id.* § 3161(h)(1)(H).

233 *See* Burnham, *supra* note 10, at 358 ("Most indictments will not involve novel applications of vague criminal statutes, such that this shift would not affect the bulk of indictments; there is not much gray about what constitutes bank robbery or drug possession.").

234 *See supra* Section III.C.

235 *See, e.g.*, Burnham, *supra* note 10, at 358; Gold et al., *supra* note 10, at 1610, 1658; Tierney, *supra* note 115, at 1860–61; *see also supra* note 128.

that defendants who plan to contest their charges could do so without forcing the government to engage in burdensome trial preparation; defendants who win at the motion to dismiss stage may never go to trial, and those who lose might well concede their guilt without a trial.[236] In addition, defendants commonly enter plea discussions with little information, and although that often benefits prosecutors, it could potentially lead to protracted and disputed negotiations.[237] Raising the pleading standard to require meaningful information-sharing and to create a robust motion to dismiss stage would make all parties more informed about the likelihood of conviction and thereby potentially streamline plea negotiations.[238]

Of course, raising the pleading standard and thereby facilitating more pretrial litigation in criminal cases could burden the defendant. Filing a pretrial motion, as just noted, pauses the Speedy Trial Act clock, hence limiting that protection and prolonging the case. If the defendant were detained, moreover, a motion to dismiss would extend their pretrial incarceration. Additionally, the more litigation in a criminal case, the more expensive and resource-intensive it will be to defend.[239] But it is generally *the defendant's choice* to take on those burdens in exchange for the possibility of dismissal (or of learning information about the prosecution's case).[240] And given those burdens, defendants would likely be disinclined to file motions where a successful result is

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236 *See, e.g.*, Gold et al., *supra* note 10, at 1632–33, 1643–44, 1658; Tierney, *supra* note 115, at 1860–61, 1864–65.

237 *See, e.g.*, Bibas, *supra* note 164, at 2495; Gold et al., *supra* note 10, at 1632–33, 1643–44.

238 *See, e.g.*, Bibas, *supra* note 164, at 2495; Gold et al., *supra* note 10, at 1632–33, 1643–44; Tierney, *supra* note 115, at 1864–65. Many of the points applicable to the government would pertain to courts as well. *See supra* notes 228–229, 233–236 and accompanying text; *see also Judicial Salary Plan Pay Rates*, U.S. CTS., https://www.uscourts.gov/careers/compensation/judiciary-salary-plan-pay-rates (last updated Jan. 4, 2021).

239 *See, e.g.*, Bronsteen, *supra* note 229, at 533–35; Gold et al., *supra* note 10, at 1656–57.

240 *Cf., e.g.*, United States v. Muresanu, 951 F.3d 833, 839 (7th Cir. 2020) ("[A]n objection to a defective indictment may be waived."); United States v. Sperrazza, 804 F.3d 1113, 1118–19 (11th Cir. 2015) (similar); *see also* FED. R. CRIM. P. 12(b)(3) advisory committee's note to 2014 amendment ("Rule 12(b)(3)(B) has also been amended to remove language that allowed the court at any time while the case is pending to hear a claim that the 'indictment or information fails . . . to state an offense.' . . . The Supreme Court [has] abandoned any jurisdictional justification for the exception . . . ."). *But see* United States v. Leonard, 4 F.4th 1134, 1142 (11th Cir. 2021) (explaining that, in rare circumstances, an indictment defect can affect jurisdiction); United States v. Moore, 954 F.3d 1322, 1334, 1336 (11th Cir. 2020) (making a similar point and explaining that "a court can raise [jurisdiction] *sua sponte* at any time").

improbable, meaning that the increase in litigation wrought by a heightened pleading standard would be limited.[241]

### B. *Alignment Is Inappropriate Because Amending Criminal Pleadings Is Difficult*

The second objection, which is related to the first, involves the ease of amending civil and criminal pleadings. In general, amending a civil complaint is easy. Under Civil Rule 15, pleadings can be amended once as a matter of course during a twenty-one-day window early in the case, and thereafter "with the opposing party's written consent or the court's leave," the latter of which should be "freely give[n] . . . when justice so requires."[242] But indictments generally cannot be amended unless they are resubmitted to the grand jury.[243] Thus, one could argue that a heightened pleading standard is acceptable in the civil context because amendment is not challenging, but such a standard is not feasible in the criminal context because amendment there is more difficult.

That objection, however, also falls short. First of all, government attorneys—by their own assertion—are highly competent,[244] and they should have little difficulty writing a sufficiently detailed indictment under a heightened pleading standard.[245] Consequently, a heightened pleading standard would more likely lead to litigation over the substance of the case—whether the defendant's conduct as alleged supports criminal liability—than to litigation over whether the government has included enough facts in the indictment. And where the defendant has not committed a crime, amending the indictment would often be a futile exercise.

Additionally, in cases where an amendment could allow the government to maintain a prosecution, the burden of losing a motion to dismiss would not be excessive—even if resubmission to the grand jury would be somewhat more onerous than simply amending a civil complaint. Resubmission would not affect any Speedy Trial Act

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241 For indigent defendants, the choice to engage in additional litigation would not impose financial costs. *See, e.g.*, Gold et al., *supra* note 10, at 1656–57. But their appointed attorneys, who may well be "overworked and underfunded" and are motivated to be efficient in "spending time and resources on representing them," are likely to make careful judgments about which motions are worthwhile to file. *Id.*

242 FED. R. CIV. P. 15(a)(1)–(2).

243 *See* Russell v. United States, 369 U.S. 749, 770 (1962); *see also* United States v. Slough, 679 F. Supp. 2d 55, 58 (D.D.C. 2010).

244 *See, e.g.*, U.S. Att'y's Off. W.D.N.C., *Careers: Opportunities for Assistant United States Attorneys*, U.S. DEP'T OF JUST., https://www.justice.gov/usao-wdnc/careers (last updated Nov. 17, 2021) ("Assistant United States Attorneys are some of the best and the brightest lawyers in the nation.").

245 *See supra* notes 91–94 and accompanying text.

deadlines because a dismissal at the defendant's behest restarts the clock.[246] Furthermore, in cases where the government has just failed to allege enough facts, resubmission would merely require submitting a more detailed description of what the grand jury already found and asking it to accept that description. In other cases, such as where the government must meet a new element or an existing element in a different way, resubmission would necessitate obtaining whatever evidence was missing and presenting that evidence under a correctly formulated indictment—but much would likely remain the same. And of course, the common refrain is that "an effective prosecutor could convince a grand jury to 'indict a ham sandwich.'"[247] Moreover, there would be no need for resubmission at all in the roughly 20 percent of felony cases that are charged by information rather than indictment.[248]

Thus, a higher criminal pleading standard would not impose a terrible burden on the government based on the difficulty of amending indictments. Raising the pleading standard would largely just facilitate litigation that would not lead to resubmission, and to the extent it did otherwise, the resulting consequences would be fairly minimal.

### C. *Alignment Would Require the Revelation of Sensitive Information*

A third objection is that raising the criminal pleading standard might require the government to reveal sensitive information. The Advisory Committee raised this argument too, with one member asserting, "The Department of Justice is reluctant to provide a high level of specificity in the charging documents that might reveal intelligence

246 *See, e.g.*, 18 U.S.C. § 3161(d)(1); United States v. Barraza-Lopez, 659 F.3d 1216, 1218–21 (9th Cir. 2011).

247 United States v. Kubini, 19 F. Supp. 3d 579, 617 n.25 (W.D. Pa. 2014) (citation omitted); *accord, e.g.*, United States v. Navarro-Vargas, 408 F.3d 1184, 1195 (9th Cir. 2005) (en banc); *see also* Tyson v. Trigg, 50 F.3d 436, 441 (7th Cir. 1995) ("Instances in which grand juries refuse to return indictments at the request of the prosecutor are almost as rare as hen's teeth."). Therefore, even if, for example, the original grand jury's term ended before the dismissal of the indictment, *see* FED. R. CRIM. P. 6(g) (setting a grand jury term at eighteen months, with a possible six-month extension), it should usually not be too significant a hurdle for the prosecutor to present their case anew to a successor grand jury (especially since materials from one grand jury can be shared with successor grand juries, *see id.* R. 6(e)(3)(C)).

248 *See* FED. R. CRIM. P. 7(e); *FY 2010 - 2018 Defendants Charged in Criminal Cases*, BUREAU OF JUST. STAT., https://www.bjs.gov/fjsrc/var.cfm?ttype=trends&agency=AOUSC&db_type=CrimCtCases&saf=IN.

means and methods."[249] And that argument could easily extend to other information, such as investigatory sources and witnesses.[250]

To be sure, too high a pleading standard, such as one that required naming witnesses, identifying sources, or revealing methods of obtaining evidence might warrant such concerns. But *Twombly* and *Iqbal* do not establish such a standard. Indeed, it is well-established that those decisions do not require plaintiffs to "plead evidence," as in describe how the factual allegations will be proved.[251] Rather, they only necessitate alleging *the facts as the complaining party asserts them to be*. As the Fourth Circuit has explained:

> *Iqbal* and *Twombly* do not require a plaintiff to prove his case in the complaint. The requirement of nonconclusory factual detail at the pleading stage is tempered by the recognition that a plaintiff may only have so much information at his disposal at the outset. A "complaint need not 'make a case' against a defendant or '*forecast evidence* sufficient to *prove* an element' of the claim. It need only '*allege facts* sufficient to *state* elements' of the claim."[252]

In short, no amplification of the criminal pleading system comparable to the *Twombly-Iqbal* standard would require the government to reveal how it developed its factual allegations.[253]

Furthermore, the level of detail *Twombly* and *Iqbal* anticipate is not so significant that those decisions (or something similar), applied to the criminal context, would often lead to indirectly revealing sensitive

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249 U.S. CTS., *supra* note 80, at 21.

250 *Cf.* Gold et al., *supra* note 10, at 1647–48 (discussing the concern that a defendant could use discovery tools "to tamper with witnesses and interfere with investigations"); Meyn, *supra* note 71, at 1127 (similar); Meyn, *supra* note 10, at 86 (noting potential "concerns about the release of highly sensitive information" in revamping criminal procedure); Morvillo et al., *supra* note 44, at 176 (observing the existence of "judicial attitudes that it is risky to give the defendant too much information").

251 *See, e.g.*, Robertson v. Sea Pines Real Est. Cos., 679 F.3d 278, 291 (4th Cir. 2012); Peñalbert–Rosa v. Fortuño-Burset, 631 F.3d 592, 595 (1st Cir. 2011); *In re* Ins. Brokerage Antitrust Litig., 618 F.3d 300, 325 n.25 (3d Cir. 2010); Read v. Corning Inc., 371 F. Supp. 3d 87, 92 (W.D.N.Y. 2019); Brown v. Collections Bureau of Am., Ltd., 183 F. Supp. 3d 1004, 1006 (N.D. Cal. 2016).

252 *Robertson*, 679 F.3d at 291 (citation omitted).

253 Indeed, it is worth noting that, even under the stricter "code pleading" system that Civil Rule 8(a) repudiated, pleading evidence was unnecessary. *See, e.g.*, CHARLES E. CLARK, CLARK ON CODE PLEADING 225 (2d ed. 1947); JOHN NORTON POMEROY, CODE REMEDIES: REMEDIES AND REMEDIAL RIGHTS BY THE CIVIL ACTION ACCORDING TO THE REFORMED AMERICAN PROCEDURE – A TREATISE ADAPTED TO USE IN ALL THE STATES AND TERRITORIES WHERE THAT SYSTEM PREVAILS § 420 (5th ed. 1929); Edward A. Hartnett, *Taming* Twombly, *Even After* Iqbal, 158 U. PA. L. REV. 473, 486 (2010); Hintz, *supra* note 1, at 647–48, 668, 676; Fleming James, Jr., *The Objective and Function of the Complaint: Common Law—Codes—Federal Rules*, 14 VAND. L. REV. 899, 912 (1961).

information about witnesses, investigative methods, or the like. The Supreme Court has expressly said that *Twombly* and *Iqbal* "do[] not require 'detailed factual allegations.'"[254] And courts regularly assert that those decisions do not demand especially much.[255] Rather, they only require complaints to "answer the basic questions: who, did what, to whom (or with whom), where, and when"—without relying on "formulaic recitations and 'conclusory statement[s]'"—to such a degree that the claim is "plausible."[256] In other words, all raising the pleading standard would do is require narrative detail about the alleged crime rather than purely conclusory statements, and government attorneys could certainly provide that without giving away too much.[257]

Finally, there are mechanisms available to the government for avoiding the harms of revealing sensitive information. First of all, Criminal Rule 6(e)(4) gives district courts broad discretion to seal an indictment "until the defendant is in custody or has been released pending trial," when doing so "is in the public interest or serves a legitimate law-enforcement purpose."[258] Further, threatening or intimidating witnesses is itself a federal crime.[259] Moreover, defendants who are not detained pretrial are always released subject to the

254 Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (citation omitted).

255 *See, e.g.*, Agredano v. State Farm Lloyds, 975 F.3d 504, 506 (5th Cir. 2020); Rodríguez-Reyes v. Molina-Rodríguez, 711 F.3d 49, 56 (1st Cir. 2013).

256 United Brotherhood of Carpenters & Joiners of Am. v. Bldg. & Constr. Trades Dep't, 770 F.3d 834, 842 (9th Cir. 2014) (alteration in original) (citations omitted); *accord* Johnson v. Am. Towers, LLC, 781 F.3d 693, 709 (4th Cir. 2015) (citation omitted). In fact, *Twombly* and *Iqbal* may not even require that much. *See* United States *ex rel.* Presser v. Acacia Mental Health Clinic, LLC, 836 F.3d 770, 776 (7th Cir. 2016) ("Under Rule 8, a plaintiff only needs to 'give enough details about the subject-matter of the case to present a story that holds together.' Alternatively, under Rule 9(b), a plaintiff 'alleging fraud or mistake . . . must state with particularity the circumstances constituting fraud or mistake.' A plaintiff ordinarily must describe the 'who, what, when, where, and how' of the fraud—'the first paragraph of any newspaper story.'" (citations omitted)).

257 Some decisions have suggested that conclusory allegations would not be insufficient if the method of discovery of the asserted facts were alleged. *See, e.g.*, Marenco v. Mercy Hous., Case No. 18-cv-03599-LB, 2018 WL 4008405, at *3 (N.D. Cal. July 27, 2018), *adopted*, 2018 WL 4005385, at *1 (Aug. 20, 2018); Fields v. Tex. Dep't of State Health Servs., CIVIL ACTION NO. 4:16-CV-607-ALM-CAN, 2017 WL 9287010, at *4 (E.D. Tex. Sept. 13, 2017), *adopted*, 2017 WL 4684003, at *9 (Oct. 9, 2017); Cranford v. Ahlin, No. 1:11-cv-01199-GBC, 2012 WL 3912762, at *3 (E.D. Cal. Sept. 7, 2012). To the extent these decisions suggest that Rule 8(a) *requires* revealing a factual assertion's method of discovery, they are out of alignment with the prevailing standards set forth above. And to the extent they simply indicate that revealing the method of discovery is *one way* of making allegations less speculative or conclusory, such a rule, in the criminal context, would not require the government to reveal sensitive information.

258 United States v. Ellis, 622 F.3d 784, 792 & n.3 (7th Cir. 2010) (quoting FED. R. CRIM. P. 6(e)(4)).

259 *See* 18 U.S.C. § 1512; Meyn, *supra* note 71, at 1127.

condition that they "not commit a Federal, State, or local crime during the period of release," and they may be released subject to the condition that they "avoid all contact with an alleged victim of the crime and with a potential witness who may testify concerning the offense."[260] Those conditions, in turn, are punishable by "a revocation of release, an order of detention, and a prosecution for contempt of court," and in addition, crimes committed while on release themselves receive a significant sentencing enhancement.[261] Additionally, one of the key factors courts must consider in deciding whether (and under what conditions) to release a defendant pending trial is "the nature and seriousness of the danger to any person or the community that would be posed by the person's release,"[262] and threatening or intimidating witnesses counsels significantly in favor of detention.[263] And pretrial detention, of course, reduces defendants' ability to intimidate witnesses by physically restricting their movement and limiting their "ability to communicate with the outside world."[264] Also, witnesses may be directly protected by a range of mechanisms, from protective orders to the Witness Security Program.[265] Lastly, the government can seek to limit public access to the charging document if the limitation is narrowly tailored to serve a compelling government interest.[266] Protecting secret information or witnesses may well fall into that category.[267]

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260 18 U.S.C. § 3142(b)–(c).

261 *Id.* §§ 3142, 3147–48(a).

262 *Id.* § 3142(g)(4).

263 *See, e.g.*, United States v. Leon, 766 F.2d 77, 81–82 (2d Cir. 1985); United States v. Perez-Valentin, No. CRIM. 04-133(SEC), 2004 WL 725361, at *1 (D.P.R. Mar. 26, 2004).

264 Meyn, *supra* note 71, at 1127.

265 *See, e.g.*, 18 U.S.C. § 1514(b); U.S. DEP'T OF JUST., JUSTICE MANUAL § 9-21.000 (2020), https://www.justice.gov/jm/jm-9-21000-witness-security#9-21.0101; Gold et al., *supra* note 10, at 1648; Meyn, *supra* note 71, at 1127.

266 *See, e.g.*, United States v. Konrad, Criminal Action No. 11-15, 2011 WL 1549494, at *5 (E.D. Pa. Apr. 19, 2011).

267 *See, e.g.*, Snepp v. United States, 444 U.S. 507, 509 n.3 (1980); United States v. Index Newspapers LLC, 766 F.3d 1072, 1090 (9th Cir. 2014); United States v. Moussaoui, 65 F. App'x 881, 887 (4th Cir. 2003); United States v. Cousins, 858 F. Supp. 2d 614, 618 (E.D. Va. 2012); United States v. Medunjanin, 10 CR 19 1 (RJD), 2012 WL 13186383, at *1 n.2 (E.D.N.Y. Feb. 22, 2012); United States v. Suppressed, Nos. 4:08MJ1195 TIA, 4:08MJ1196 TIA, 4:08MJ1197 TIA, 4:08MJ1204 TIA, 2010 WL 4962885, at *4–5 (E.D. Mo. Oct. 22, 2010), *adopted*, 2010 WL 4962876, at *3–4 (Dec. 1, 2010); United States v. Ketner, 566 F. Supp. 2d 568, 586 (W.D. Tex. 2008); Mary Jo White, Symposium, *Secrecy and the Criminal Justice System*, 9 J.L. & POL'Y 15, 18 (2000).

D. *Alignment Would Let the Guilty Go Free*

A fourth potential objection—largely drawn from concerns related to heightened pleading requirements in civil cases—is that raising the pleading standard could lead to the dismissal of meritorious cases and therefore let factually guilty defendants go free.[268] Indeed, one might contend that not only would a higher pleading standard make proceeding to trial more difficult, but also it could give more teeth to constructive amendment and variance challenges.[269] Yet this objection too is unpersuasive.

Much of the criticism on this point on the civil side involves the concern that plaintiffs do not possess enough information to meet the *Twombly-Iqbal* pleading standard until they engage in discovery, which they cannot do until *after meeting that standard*.[270] That is not a problem for prosecutors, however, who have substantial pre-pleading investigatory powers and should be close to trial-ready at the pleading stage.[271]

Others fault *Twombly* and *Iqbal* in civil cases because they give judges too little guidance and too much discretion.[272] But that also is less of a concern in the criminal context. Discretion should only matter when the factual allegations are at the margin of the pleading standard, but government attorneys should have little difficulty going beyond the margin. And questions about the prosecution's legal theory leave no room for discretion.[273]

Further, although a heightened pleading standard would increase the "bite" of constructive amendment and variance challenges, that would not allow the guilty to go free. To start, it should not be hard for

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[268] *Cf., e.g.*, Anne E. Ralph, *Not the Same Old Story: Using Narrative Theory to Understand and Overcome the Plausibility Pleading Standard*, 26 YALE J.L. & HUMANS. 1, 21 (2014) (describing plaintiff access-to-justice critiques of heightened pleading in civil cases); Percy, *supra* note 86, at 233 (same).

[269] *See supra* Section III.E.

[270] *See, e.g.*, Jonah B. Gelbach, *Material Facts in the Debate over* Twombly *and* Iqbal, 68 STAN. L. REV. 369, 372 (2016); Gold et al., *supra* note 10, at 1644; Weinberg, *Applying* Twombly, *supra* note 10, at 51; Weinberg, Iqbal, *supra* note 10, at 30–31.

[271] *See, e.g.*, United States v. Hansen, 428 F. Supp. 3d 1200, 1202 (D. Utah 2019); Burnham, *supra* note 10, at 360–61; Gold et al., *supra* note 10, at 1644; Meyn, *supra* note 10, at 56; Weinberg, *Applying* Twombly, *supra* note 10, at 51; Weinberg, Iqbal, *supra* note 10, at 30–31; *supra* notes 91–94 and accompanying text.

[272] *See, e.g.*, Raymond H. Brescia, *The* Iqbal *Effect: The Impact of New Pleading Standards in Employment and Housing Discrimination Litigation*, 100 KY. L.J. 235, 256–57 (2011–12).

[273] *Cf., e.g.*, Highmark Inc. v. Allcare Health Mgmt. Sys., Inc., 572 U.S. 559, 563 (2014) ("Traditionally, decisions on 'questions of law' are 'reviewable *de novo*.'" (citation omitted)).

prosecutors to comply with the constructive amendment and variance rules under such a pleading standard. The boundaries of the case would be narrower, but those boundaries would also be clearer—and established by the government itself based on the indictment it drafted and the evidence it presented to the grand jury. Thus, prosecutors should be fully capable of navigating those boundaries at trial. Additionally, and in any event, a successful challenge on constructive amendment or variance grounds generally does not bar retrial.[274] Hence, such a challenge would not prevent bringing the guilty to justice.

Finally, there is one significant way in which raising the pleading standard would reduce the likelihood that guilty defendants would go free. Currently, the first real chance for a defendant to contest the case against them is at trial.[275] If, at that stage, the jury or court concludes that the prosecution's evidence does not support criminal liability, then the government would lose, either by way of jury verdict or motion for a judgment of acquittal.[276] In such a circumstance, the government is generally not permitted to prosecute the defendant again for the charged offense or even appeal the adverse decision (if there is no guilty verdict that can be reinstated),[277] even if the decision is erroneous and even if the government *could have proved its case* under the jury or court's understanding of the law. Moreover, re-prosecution is also prohibited if the defendant successfully appeals a conviction on sufficiency of the evidence grounds.[278]

As mentioned above, however, a decision that the charging document is defective does not bar re-prosecution, and the government can appeal such a decision.[279] Accordingly, if the court believes that the government's facts, as alleged, are insufficient to support a conviction, the court could dismiss the indictment well before trial, and the government could either reindict in line with the court's understanding of the law or clarify the law by seeking an appeal. Because the prosecution would then be proceeding with a more defined understanding of what must be proved, a finding of evidentiary

274 *See, e.g.*, United States v. Miller, 891 F.3d 1220, 1238 (10th Cir. 2018); United States v. Szpyt, 785 F.3d 31, 36 (1st Cir. 2015).

275 *See supra* Section III.C.

276 *See* FED. R. CRIM. P. 29.

277 *See, e.g.*, United States v. Stanton, 501 F.3d 1093, 1098 (9th Cir. 2007); United States v. Shelley, 405 F.3d 1195, 1199–1200 (11th Cir. 2005); United States v. Alvarez, 351 F.3d 126, 129–30 (4th Cir. 2003); Burnham, *supra* note 10, at 349–50; Tierney, *supra* note 115, at 1842, 1862–63.

278 *See, e.g.*, United States v. Bobo, 419 F.3d 1264, 1268 (11th Cir. 2005).

279 *See supra* note 134 and accompanying text.

insufficiency despite factual guilt would be less likely, and the probability of conviction would increase.[280]

E. *Alignment Is Unnecessary*

A final objection to raising the criminal pleading standard—albeit one that questions the *benefits* of such a change instead of raising an affirmative *concern*—is that doing so is unnecessary in light of all the other protections criminal defendants possess.[281] After all, the *Twombly-Iqbal* pleading standard reflects the need to protect defendants from the burdens of civil discovery, but "the filing of a criminal indictment . . . does not provide the government with the broad discovery powers granted by the federal civil rules," and "the limited discovery rights granted by the federal criminal rules belong primarily to the defendant, not to the government."[282] Further, unlike civil defendants, criminal defendants are protected by the grand jury[283] and the reasonable doubt standard,[284] and "if a defendant has serious apprehension about his ability to prepare a defense in light of the charges against him, he can seek a bill of particulars."[285]

That objection, however, is as unavailing as the others. Although civil discovery is much more onerous than criminal discovery, which generally involves limited disclosures to the defendant, the foregoing discussion makes clear that there are *other reasons* to impose a heightened pleading standard in the criminal context apart from avoiding the burdens of discovery. Moreover, neither the grand jury, nor the reasonable doubt standard, nor the bill of particulars is sufficient to obviate the need for a heightened pleading standard. As explained above, the grand jury is not much of a protection.[286] In

280 *Cf., e.g.*, Tierney, *supra* note 115, at 1841–42, 1862–63.

281 *See, e.g.*, United States v. Vaughn, 722 F.3d 918, 926 (7th Cir. 2013); United States v. Bundy, Case No. 2:16-cr-00046-PAL-GMN, 2017 WL 387204, at *6 (D. Nev. Jan. 11, 2017), *adopted*, 2018 WL 523352, at *1 (Jan. 23, 2018); United States v. Coley, Case No. CR415-187, 2016 WL 743432, at *3 (S.D. Ga. Feb. 23, 2016), *adopted*, 2016 WL 1032876, at *1 (Mar. 14, 2016); United States v. Castillo Madrigal, 12-cr-62-bbc-04, 2013 WL 12099089, at *2 (W.D. Wis. Jan. 28, 2013), *adopted*, 2013 WL 12099088, at *1 (Feb. 21, 2013); *cf.* Meyn, *supra* note 71, at 1135–36 (discussing the concern that defendants already possess enough rights in the context of arguing for expanded defense discovery tools).

282 *Coley*, 2016 WL 743432, at *3.

283 *See Bundy*, 2017 WL 387204, at *6; *Coley*, 2016 WL 743432, at *3; *Castillo Madrigal*, 2013 WL 12099089, at *2.

284 *See Coley*, 2016 WL 743432, at *3.

285 *Vaughn*, 722 F.3d at 926.

286 *See supra* notes 102–109 and accompanying text; *see also Castillo Madrigal*, 2013 WL 12099089, at *2 ("True, cynics view federal grand juries as rubber stamps for the prosecution.").

addition, the reasonable doubt standard is only as useful as the opportunity to challenge the case at trial or any other trial right; it is primarily helpful just to those few defendants who decline to plead guilty and bear the costs and risks occasioned by that choice.[287] Finally, although a defendant can obtain a bill of particulars, that mechanism, as we have seen, is not especially impactful.[288] And civil defendants have access to a very similar mechanism—the motion for a more definite statement—yet also have the benefit of *Twombly* and *Iqbal*.[289]

Overall, raising the criminal pleading standard is far from unnecessary. The reasons for doing so may differ somewhat from the reasons for raising the civil pleading standard, but those reasons are no less potent. And criminal defendants are not so otherwise protected that raising the criminal pleading standard would be superfluous.

## V. IMPLICATIONS

The foregoing analysis demonstrates that policy and normative considerations counsel strongly in favor of raising the criminal pleading standard to at least align with the civil pleading standard. And while that conclusion is significant in its own right, several implications are important and worth noting.

First, this Article's conclusion confirms that the prevailing balance between our civil and criminal pleading standards is deeply misguided and should be rethought. As explained above, my previous research reveals that that balance is questionable as a matter of law, meaning that, if we are to retain it, it should at least be strongly supported by normative arguments. The fact that it is not so supported—and indeed, that the normative considerations cut in the other direction—make plain the error of our existing pleading regime and the powerful need for change.

Second, it demonstrates a need for change at a time when there is broad popular support for criminal justice reform. Past years have seen strong and bipartisan support for such reform,[290] and the recent

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[287] *See* Gold et al., *supra* note 10, at 1611–12, 1621–22; *supra* notes 118–121 and accompanying text; *supra* Section III.F.

[288] *See supra* notes 43–45 and accompanying text.

[289] *See* Hintz, *supra* note 1, at 686–87.

[290] *See, e.g.*, THE BROOKINGS-AEI WORKING GRP. ON CRIM. JUST. REFORM, A BETTER PATH FORWARD FOR CRIMINAL JUSTICE 4–5 (2021), https://www.brookings.edu/wp-content/uploads/2021/04/Better-Path-Forward_Brookings-AEI-report.pdf; Lauren M. Ouziel, *Democracy, Bureaucracy, and Criminal Justice Reform*, 61 B.C. L. REV. 523, 525–26, 551–52 (2020); Courtney Black, Note, *Mental-Health Courts: Expanding the Model in an Era of Criminal Justice Reform*, 63 WASH. U. J.L. & POL'Y 299, 301–02 (2020); Colleen Long & Hannah Fingerhut, *AP-NORC Poll: Nearly All in US Back Criminal Justice Reform*,

heartbreaking and prominent killings of members of the Black community by law enforcement have justifiably amplified calls for change.[291] What is more, the public's interest in reform is not limited to particular changes, but rather extends broadly to many aspects of the justice system.[292] In addition, the Biden administration has adopted wide-ranging goals for criminal justice reform,[293] and Congress has made bipartisan efforts to implement federal measures for improving the system.[294] Thus, if there is a time when amending the criminal

ASSOCIATED PRESS (June 23, 2020), https://apnews.com/article/police-us-news-ap-top-news-politics-kevin-richardson-ffaa4bc564afcf4a90b02f455d8fdf03.

[291] *See, e.g.*, THE BROOKINGS-AEI WORKING GRP. ON CRIM. JUST. REFORM, *supra* note 290, at 5; Tal Axelrod, *Lawmakers Call for Action on First Anniversary of Breonna Taylor's Death*, THE HILL (Mar. 13, 2021, 2:05 PM), https://thehill.com/homenews/house/543074-lawmakers-call-for-action-on-first-anniversary-of-breonna-taylors-death?rl=1; Mark Berman & Tom Jackman, *After a Summer of Protest, Americans Voted for Policing and Criminal Justice Changes*, WASH. POST (Nov. 14, 2020), https://www.washingtonpost.com/national/criminal-justice-election/2020/11/13/20186380-25d6-11eb-8672-c281c7a2c96e_story.html.

[292] *See, e.g.*, PEW RSCH. CTR., MAJORITY OF PUBLIC FAVORS GIVING CIVILIANS THE POWER TO SUE POLICE OFFICERS FOR MISCONDUCT 1–2, 4, 9–11, 15 (2020), https://www.pewresearch.org/politics/2020/07/09/majority-of-public-favors-giving-civilians-the-power-to-sue-police-officers-for-misconduct/; Paul Heaton, *Enhanced Public Defense Improves Pretrial Outcomes and Reduces Racial Disparities*, 96 IND. L.J. 701, 706 (2021); Chris Jackson, *As Public Safety Tops the Agenda, Americans Want Both Order and Justice*, IPSOS (July 8, 2021), https://www.ipsos.com/en-us/news-polls/usa-today-crime-and-safety-2021; Dawn Milam & Sean McElwee, *Poll: Voters Support Broad Reforms to Scope of Police Work and Accountability After Chauvin Verdict*, THE APPEAL (Apr. 28, 2021), https://theappeal.org/the-lab/polling-memos/voters-support-broad-reforms-to-scope-of-police-work-and-accountability-after-chauvin-verdict/; Press Release, Senate Comm. on Judiciary, Poll Shows Americans Overwhelmingly Support Prison, Sentencing Reforms (Aug. 23, 2018), https://www.judiciary.senate.gov/press/rep/releases/poll-shows-americans-overwhelmingly-support-prison-sentencing-reforms.

[293] *See, e.g.*, *The Biden Plan for Strengthening America's Commitment to Justice*, JOEBIDEN.COM, https://joebiden.com/justice/ (last visited Dec. 13, 2021); Claudia Lauer, *Prosecutors Push Biden to Prioritize Criminal Justice Reform*, ASSOCIATED PRESS (Aug. 17, 2021), https://apnews.com/article/joe-biden-health-coronavirus-pandemic-police-reform-1b9023c795343c7b1c11b14263f0737d; Michael Crowley, *Biden's Budget Steps Up Spending for Criminal Justice Reform*, BRENNAN CTR. FOR JUST. (June 25, 2021), https://www.brennancenter.org/our-work/analysis-opinion/bidens-budget-steps-spending-criminal-justice-reform.

[294] *See, e.g.*, Marianne Levine, *As Police Reform Talks Sputter, Bipartisan Criminal Justice Bills Advance*, POLITICO (July 1, 2021, 4:30 AM), https://www.politico.com/news/2021/07/01/democrats-eager-replicate-trump-achievement-497276; Walter Pavlo, *New Bill Aims to Upgrade Camera Systems in Federal Prison for More Accountability*, FORBES (Oct. 21, 2021), https://www.forbes.com/sites/walterpavlo/2021/10/21/federal-prisons-are-about-to-have-more-cameras/?sh=7cba1f07fe67; Press Release, Senate Comm. on Judiciary, Senate Judiciary Committee Advances Two Bipartisan Durbin, Grassley Criminal Justice Bills (June 10, 2021), https://www.judiciary.senate.gov/press/dem/releases/senate-judiciary-committee-advances-two-bipartisan-durbin-grassley-criminal-justice-bills; *Criminal Justice Reform*, ABA (Oct.

pleading standard might receive public and political support, it is now, and this Article's conclusion could help to spark enthusiasm for such a change.

Third, this Article's conclusion may help to persuade the primary authorities in control of the Federal Rules of Procedure to effect reform—despite the entrenched nature of the current pleading regime. The Judicial Conference of the United States, which oversees the Advisory Committees on the Federal Rules and ultimately proposes Rule changes to the Supreme Court, necessarily considers policy arguments.[295] The Conference "is the national *policy-making* body for the federal courts,"[296] and it is supposed to consider changes to the Rules based on the policy-oriented factors of "promot[ing] simplicity in procedure, fairness in administration, the just determination of litigation, and the elimination of unjustifiable expense and delay."[297] Indeed, in rejecting the 2016 proposal to amend the criminal pleading standard, the Advisory Committee on Criminal Rules expressly relied on policy arguments (albeit ones that have been refuted here).[298] Moreover, the federal courts, whether rightly or wrongly, actively invoke such arguments in interpreting, and even reinterpreting, the Federal Rules. In *Twombly*, for instance, the Supreme Court—despite acknowledging that altering the Federal Rules "can only be accomplished by the process of amending the Federal Rules, and not by judicial interpretation"[299]—relied heavily on practical considerations regarding the costs of discovery in amplifying Rule 8(a)'s pleading requirements and reversing half a century of pleading precedent.[300] Thus, the conclusion that normative considerations offer compelling support for changing the pleading standard could (and should) convince the relevant authorities to take action. That is especially so given the

27, 2021), https://www.americanbar.org/advocacy/governmental_legislative_work/publications/washingtonletter/october-2021-wl/cjreform-1021wl/.

295 *See* 28 U.S.C. § 331; *How the Rulemaking Process Works*, U.S. CTS., https://www.uscourts.gov/rules-policies/about-rulemaking-process/how-rulemaking-process-works (last visited Dec. 13, 2021).

296 *Governance & the Judicial Conference*, U.S. CTS., https://www.uscourts.gov/about-federal-courts/governance-judicial-conference (emphasis added) (last visited Dec. 13, 2021).

297 28 U.S.C. § 331.

298 *See* U.S. CTS., *supra* note 80, at 19–21.

299 Bell Atl. Corp. v. Twombly, 550 U.S. 544, 569 n.14 (2007) (citation omitted) (internal quotation marks omitted).

300 *See, e.g.*, *id.* at 559; Joseph A. Seiner, *Plausibility Beyond the Complaint*, 53 WM. & MARY L. REV. 987, 1004 (2012); Weinberg, *Applying* Twombly, *supra* note 10, at 50; Weinberg, Iqbal, *supra* note 10, at 31.

widespread interest in reform and the fact that our pleading balance is questionable as a matter of law *and* policy.

Lastly, and more generally, the conclusion that policy considerations favor changing the criminal pleading standard reflects, in line with a growing body of research, the fact that the justice system is often far less protective of criminal defendants than civil ones.[301] That balance of protections would be quite troubling at any time, but it is unfathomable in an era so attentive to the criminal justice system. And although raising the criminal pleading standard to at least align with the civil standard is one easy and potent way to start addressing that issue, it is far from the only one.[302] Accordingly, this Article's conclusion offers support for eliminating imbalances in criminal and civil justice that favor civil defendants, and for answering society's calls for reform, at least in part, with proposals drawn from the civil litigation sphere.

## VI. CONCLUSION

Under the existing federal pleading regime, conclusory pleadings are forbidden in civil cases, but they are welcomed and encouraged in criminal cases. As this Article shows, however, normative and policy considerations teach that the time has come for change. Raising the criminal pleading standard to at least align with the civil standard would generate a host of important benefits for criminal defendants and our criminal justice system, and there would be few, if any, downsides. And given that the balance in our pleading standards is also questionable as a matter of law, there is little reason to keep things as they are.

301 *See, e.g.*, Gold et al., *supra* note 10, at 1608–14; Meyn, *supra* note 10, at 39–41.

302 *See, e.g.*, Gold et al., *supra* note 10, at 1608–14, 1640–56; Leonetti, *supra* note 60, at 668–69; Meyn, *supra* note 71, at 1092–93; Morvillo et al., *supra* note 44, at 173–76; Ortman, *supra* note 225, at 1099–1102.