

Center on the Administration of Criminal Law's Eleventh Annual Conference

Plea Bargaining: Reforming An (Un)Necessary Evil?

CLE Materials

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**IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

No. 16-40772

United States Court of Appeals
Fifth Circuit

FILED

September 18, 2018

GEORGE ALVAREZ,

Lyle W. Cayce
Clerk

Plaintiff-Appellee,

v.

THE CITY OF BROWNSVILLE,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Texas

Before STEWART, Chief Judge, and JOLLY, JONES, SMITH, WIENER, DENNIS, CLEMENT, OWEN, ELROD, SOUTHWICK, HAYNES, GRAVES, HIGGINSON, COSTA, WILLETT, and HO, Circuit Judges.*

CARL E. STEWART, Chief Judge, joined by JOLLY, JONES, SMITH, WIENER, CLEMENT, OWEN, ELROD, SOUTHWICK, HAYNES, HIGGINSON, WILLETT, and HO, Circuit Judges:**

* Judge Prado was on the court at the time that this en banc case was submitted and argued but did not participate in the consideration of the decision. Judge Duncan, Judge Engelhardt and Judge Oldham joined the court after this case was submitted and did not participate in the decision.

** Judge Haynes and Judge Willett concur in Sections I, II.A., and III., and they would not reach the issue in Section II.B.

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This case was reheard en banc after the Appellee, George Alvarez, had his \$2.3 million judgment reversed and his claims against the City of Brownsville dismissed by a panel of this court. The en banc court has carefully considered two important questions as to the merits of this case: (1) whether the City of Brownsville should have been subjected to municipal liability for Alvarez's claim under *Brady v. Maryland*, 373 U.S. 83 (1963); and (2) whether Alvarez was precluded from asserting his constitutional *Brady* claim for his 42 U.S.C. § 1983 action against the City of Brownsville because he pled guilty. For the reasons set forth below, we REVERSE the district court's judgment, and RENDER judgment in favor of the City of Brownsville. Alvarez's action against the City of Brownsville is DISMISSED with prejudice.

I. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

A. Factual Background

1. The Incident Between Alvarez and Officer Arias at the Jail

On November 27, 2005, Alvarez, a then-seventeen year old ninth grade special education student, was arrested by the Brownsville Police Department and taken to a detention center in Brownsville, Texas on suspicion of public intoxication and burglary of a motor vehicle. After being placed in one of the holding cells, Alvarez attempted to use a telephone located in the cell. Initially, Alvarez was able to place a call but the phone eventually stopped working. Alvarez then banged the phone's handset against the phone's switch hook mounted on the wall, and made an obscene gesture towards a camera. Because Alvarez became somewhat disruptive, officers removed Alvarez from his cell and attempted to transfer him to a padded cell to calm down. To move Alvarez to the padded cell, the officers had to walk him across the jail's central lobby booking area.

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After reaching the booking area, Alvarez engaged in a conversation with a group of officers. Alvarez primarily spoke to Officer Jesus Arias who took the lead in trying to direct Alvarez to the padded cell. As the conversation continued, Alvarez was reluctant to move towards the padded cell and obey Officer Arias's instructions to walk towards the cell. When recalling the conversation with Officer Arias, Alvarez indicated, "I understand I wasn't compliant."

A scuffle between Alvarez and Officer Arias soon ensued. The altercation began when Officer Arias grabbed Alvarez's left arm and maneuvered Alvarez to the ground. Officer Arias then placed Alvarez in a choke hold and eventually a head lock. Officers assisting Officer Arias subdued Alvarez by shackling Alvarez's legs and handcuffing him. Throughout the struggle, Alvarez squirmed and flailed his arms. Alvarez, handcuffed and legs shackled, was then carried and placed in the padded holding cell. All of the events that took place at the jail before, during, and after Alvarez's incident with Officer Arias were captured on video.

2. Investigations Conducted by the Brownsville Police Department

The Brownsville Police Department utilizes separate investigative tracks for internal disciplinary investigations of its officers and alleged crimes committed by detainees at the jail. An internal administrative investigation was conducted to determine if Officer Arias violated the Brownsville Police Department's use of force policy during the altercation with Alvarez. Additionally, a criminal investigation was conducted by the Brownsville Police Department to determine if there was probable cause for recommending that the district attorney's office criminally charge Alvarez for assaulting Officer Arias.

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Generally, the Brownsville Police Department's internal administrative affairs division does not share information with the criminal investigation division. If information is to be shared between the internal administrative affairs division and the criminal investigation division, Police Chief Carlos Garcia is usually the individual who authorizes the exchange. However, Sergeant David Infante, the jail supervisor who downloaded the videos of the incident for the internal administrative investigation of Officer Arias, stated that "if something would have been asked of me by the criminal investigation, I would have submitted it." Police Chief Garcia further added that Sergeant Infante should have provided the videos of the incident to the criminal investigation division if he knew criminal charges were being brought against Alvarez. Commander Roberto Avitia, also a supervisor of Sergeant Infante, similarly stated that Sergeant Infante should have disclosed the videos to the criminal investigation division.

For the internal investigation, Sergeant Infante evaluated the videos and Officer Arias's report of the incident. Four different videos were reviewed: (1) a video of Alvarez in the initial holding cell that he was placed in; (2) a video of the officers at the central command post in the detention center before, during, and after the incident; (3) a video of the altercation between Alvarez and Officer Arias that occurred in the lobby booking area; and (4) a video of Alvarez in the padded cell after he was transported. After conducting the investigation, Sergeant Infante came to the conclusion that Officer Arias used proper force and that no further action should be taken.

Two days after the incident between Alvarez and Officer Arias, on November 29, 2005, Sergeant Infante sent a memorandum to Police Chief Garcia reiterating his recommendation that proper force was used. On December 8, 2005, another supervisor of Sergeant Infante, Commander

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Ramiro Rodriguez, reviewed Sergeant Infante's report and the video recordings, and submitted a report to Police Chief Garcia recommending closure of the internal administrative investigation since Officer Arias's actions were in compliance with Brownsville Police Department regulations.

Even though the reports and recommendations were stamped as received on December 8, 2005 by Police Chief Garcia's office, Police Chief Garcia did not review the reports. The materials for the internal investigation, including the videos, were never passed on to an internal affairs unit for a formal disciplinary investigation of Officer Arias or to the criminal investigation division of the Brownsville Police Department.

The criminal investigation division reviewed the incident after the internal administrative review was conducted. The criminal investigation began on November 27, 2005, with Sergeant Jim Brown preparing and filing an offense report of the incident that occurred between Alvarez and Officer Arias. Sergeant Brown was the patrol supervisor responsible for addressing issues that arose at the jail when the incident occurred.¹ Sergeant Brown's report stated Alvarez allegedly assaulted Officer Arias but did not mention that there were any video recordings of the incident. Criminal investigator Officer Rene Carrejo was subsequently assigned to review Officer Arias's complaint that Alvarez assaulted him by grabbing his throat and his right inner thigh. Officer Carrejo never requested or inquired about the possible existence of a video recording of the incident. Lieutenant Henry Etheridge, the head of the internal affairs division of the Brownsville Police Department at

¹ Although Sergeant Infante was officially the jail supervisor, the supervision responsibilities of the jail passed to Sergeant Brown as one of the patrol supervisors after 5:00 p.m. Because the incident between Alvarez and Officer Arias occurred around 9:00 p.m., when Sergeant Infante was off duty, Sergeant Brown was responsible for supervising the jail at this time.

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the time of the administrative review, opined that the criminal investigation division did not conduct a proper investigation because it failed to collect all evidence. Lieutenant Etheridge further noted that, “[i]f I knew that [the criminal investigation division] wasn’t conducting proper investigations in regards to collecting that video, by all means, I would have taken corrective action to . . . get that video in their hands.”

3. *Alvarez’s Guilty Plea and Imprisonment*

The criminal investigation division subsequently alerted the district attorney’s office of the incident and Alvarez was charged with assault on a public servant, a felony offense in Texas. In January 2006, a grand jury returned an indictment charging Alvarez with the assault. During discovery, Alvarez’s attorney reviewed the prosecution’s case file that did not contain the videos of the incident. In March 2006, Alvarez pled guilty to assault on a public servant. In May 2006, Alvarez was given a suspended sentence of eight years of imprisonment and ten years of community supervision. As a condition of the community supervision, the court imposed “a term of confinement and treatment in a substance abuse felony punishment facility . . . for not less than 90 days or more than 12 months as a condition of probation.” In November 2006, after Alvarez failed to complete the treatment program, the state revoked the suspension of Alvarez’s sentence and remanded Alvarez to prison for the remainder of his eight-year sentence.

4. *The Uncovering of the Video Recordings of the Incident*

Approximately four years after Alvarez began to serve his prison sentence, the videos of Alvarez’s incident with Officer Arias surfaced during discovery for an unrelated § 1983 case. After the discovery of the videos, Alvarez filed an application for a writ of habeas corpus in Texas state court, claiming that the Brownsville Police Department had withheld the videos in

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violation of *Brady*. In October 2010, after the state district court recommended that the writ of habeas corpus be granted and that Alvarez be given a new trial, the Texas Court of Criminal Appeals concluded that Alvarez was “actually innocent” of committing the assault. Alvarez’s assault conviction was then set aside and all charges against Alvarez were later dismissed.

B. Procedural History

Several months after being declared “actually innocent,” in April 2011, Alvarez sued the City of Brownsville, Officer Arias, and other individuals from the Brownsville Police Department, asserting various claims under § 1983, which included nondisclosure of exculpatory evidence in violation of *Brady*. In August 2012, the City of Brownsville, Officer Arias, and the other defendants filed a motion for summary judgment arguing that Alvarez’s claims should be dismissed. Adopting the magistrate judge’s report and recommendation, the district court denied the defendants’ motion for summary judgment as to: (1) the *Brady* claim against the City of Brownsville for nondisclosure of exculpatory evidence; and (2) a fabrication of evidence claim brought against Officer Arias in his individual capacity. The district court granted the defendants’ motion for summary judgment as to all other claims. The fabrication claim against Officer Arias was later dismissed after Alvarez and Officer Arias filed a voluntary stipulation of dismissal.

In January 2014, Alvarez and the City of Brownsville, as the only remaining parties, filed cross motions for summary judgment addressing whether: (1) a Brownsville Police Department policy of nondisclosure existed; (2) the Brownsville Police Department’s failure to disclose the videos constituted a *Brady* violation; and (3) a Brownsville Police Department policy caused the *Brady* violation. The district court subsequently granted Alvarez’s motion for summary judgment concluding that there was a *Brady* violation as

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a matter of law, and Alvarez established “all substantive elements of a § 1983 municipal liability claim against the City of Brownsville.”

The district court held a jury trial to determine whether Alvarez was entitled to monetary damages for the *Brady* violation. Following a two-day jury trial, the jury awarded Alvarez \$2,000,000 in compensatory damages. The parties agreed to attorneys’ fees of \$300,000 and the court entered final judgment in favor of Alvarez for \$2,300,000. The City of Brownsville filed post-trial motions, which were denied by the district court. The City of Brownsville timely appealed.

A panel of this court reversed the \$2,300,000 judgment awarded to Alvarez and dismissed Alvarez’s action against the City of Brownsville. *Alvarez v. City of Brownsville*, 860 F.3d 799, 803 (5th Cir. 2017), *reh’g en banc granted*, 874 F.3d 898 (5th Cir. 2017). The panel opinion held that by entering a guilty plea Alvarez waived the right to assert the *Brady* claim foundational to his § 1983 action. The panel opinion was withdrawn in light of en banc rehearing of this case. After supplemental briefing and oral argument to the en banc court, we reverse the district court and render judgment of dismissal in favor of the City of Brownsville.

II. DISCUSSION

Alvarez’s *Brady* claim should have been dismissed as a matter of law on summary judgment because the City of Brownsville should not have been subjected to municipal liability for Alvarez’s § 1983 claim. This court also declines the invitation to disturb its precedent concerning a defendant’s constitutional right to *Brady* material prior to entering a guilty plea.

A. Municipal Liability

Alvarez argues that the City of Brownsville, through its police department, had an unwritten, customary policy of not disclosing exculpatory

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evidence obtained in the course of internal administrative investigations—a policy that caused Alvarez’s constitutional violation. Alternatively, Alvarez asserts that making Police Chief Garcia the sole decision-maker related to the sharing of information from internal administrative matters created the high possibility of a constitutional violation. Because of Police Chief Garcia’s oversight, Alvarez asserts that the City of Brownsville should be held liable as a municipality. This court is not persuaded by Alvarez’s arguments.

Summary judgment rulings are subject to de novo review. *Aldous v. Darwin Nat’l Assurance Co.*, 851 F.3d 473, 477 (5th Cir. 2017), *vacated in part by* 889 F.3d 798 (5th Cir. 2018). Summary judgment is appropriate “if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a). “A complete failure of proof concerning an essential element of the nonmoving party’s case necessarily renders all other facts immaterial’ and ‘mandates the entry of summary judgment’ for the moving party.” *United States ex rel. Farmer v. City of Houston*, 523 F.3d 333, 337 (5th Cir. 2008) (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 322–23 (1986)). “We resolve factual controversies in favor of the nonmoving party, but only when there is an actual controversy, that is, when both parties have submitted evidence of contradictory facts.” *State Farm Fire & Casualty Co. v. Flowers*, 854 F.3d 842, 844 (5th Cir. 2017) (quoting *Little v. Liquid Air Corp.*, 37 F.3d 1068, 1075 (5th Cir. 1994)).

Three essential elements must be established for a municipality to face § 1983 liability. There must be: (1) a policymaker; (2) an official policy; and (3) a violation of a constitutional right whose “moving force” is the policy or custom. *Piotrowski v. City of Houston*, 237 F.3d 567, 578 (5th Cir. 2001) (citing *Monell v. Dep’t of Soc. Servs.*, 436 U.S. 658, 694 (1978)). An official policy

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“usually exists in the form of written policy statements, ordinances, or regulations, but may also arise in the form of a widespread practice that is so common and well-settled as to constitute a custom that fairly represents municipal policy.” *James v. Harris County*, 577 F.3d 612, 617 (5th Cir. 2009) (quoting *Piotrowski*, 237 F.3d at 579) (quotation marks omitted).

To establish that the City of Brownsville is liable as a municipality, a policy must have been the “moving force” behind Alvarez’s constitutional violation. *See Piotrowski*, 237 F.3d at 580 (quoting *Monell*, 436 U.S. at 694). Stated differently, Alvarez “must show direct causation, i.e., that there was ‘a direct causal link’ between the policy and the violation.” *See James*, 577 F.3d at 617 (quoting *Piotrowski*, 237 F.3d at 580). Additionally, Alvarez must demonstrate that the policy was implemented with “deliberate indifference” to the “known or obvious consequences” that constitutional violations would result. *See Bd. of Cty. Comm’rs of Bryan Cty. v. Brown*, 520 U.S. 397, 407 (1997). To base deliberate indifference on a single incident, “it should have been apparent to the policymaker that a constitutional violation was the highly predictable consequence of a particular policy.” *Burge v. St. Tammany Par.*, 336 F.3d 363, 373 (5th Cir. 2003). The causal link “moving force” requirement and the degree of culpability “deliberate indifference” requirement must not be diluted, for “where a court fails to adhere to rigorous requirements of culpability and causation, municipal liability collapses into respondeat superior liability.” *Snyder v. Trepagnier*, 142 F.3d 791, 796 (5th Cir. 1998) (quoting *Brown*, 520 U.S. at 415).

Assuming that Police Chief Garcia is a policymaker and that the practice of not freely sharing information from the internal administrative investigations with the criminal investigation division constitutes a policy, Alvarez’s theory of liability falls short in two respects: (1) there is not a “direct

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causal link between the policy and the violation,” and (2) there was no “deliberate indifference” shown. *See Valle v. City of Hous.*, 613 F.3d 536, 542 (5th Cir. 2010); *James*, 577 F.3d at 617 (quoting *Piotrowski*, 237 F.3d at 580).

First, there is not “a direct causal link between the policy and the violation.” *See James*, 577 F.3d at 617 (quoting *Piotrowski*, 237 F.3d at 580). When questioned about whether he could turn materials over to the criminal investigation division, Sergeant Infante stated that “if something would have been asked of me by the criminal investigation, I would have submitted it.” Moreover, Police Chief Garcia and Commander Avitia both stated that Sergeant Infante should have disclosed the videos of the incident if he was aware of the criminal investigation against Alvarez. Commander Avitia further stated that “[v]ideos are videos. They should be able to be available to either one of the investigations. . . . They’re available for both investigations.” The criminal investigator, Officer Carrejo, also neglected to request or inquire about any video recordings of the incident despite knowing about the presence of cameras in the jail. Lieutenant Etheridge stated that the criminal investigation division did not conduct a proper investigation because of its failure to collect all of the evidence. Lieutenant Etheridge further noted that, “[i]f I knew that [the criminal investigation division] wasn’t conducting proper investigations in regards to collecting that video, by all means, I would have taken corrective action to . . . get that video in their hands.”

This series of interconnected errors within the Brownsville Police Department that involved individual officers was separate from the general policy of non-disclosure of information from the internal administrative investigations. The general policy of non-disclosure was not a direct cause of Alvarez’s injury. *See Fraire v. City of Arlington*, 957 F.2d 1268, 1281 (5th Cir. 1992) (“To form the basis of liability under § 1983, a municipal policy must be

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affirmatively linked to the constitutional violation and be the moving force behind it.”).

Second, this general policy of non-disclosure was not implemented with “deliberate indifference.” To show deliberate indifference based on a single incident, there must be evidence that shows that it should have been apparent or obvious to the policymaker that a constitutional violation was the “highly predictable consequence” of the particular policy. *See Burge*, 336 F.3d at 373; *Brown v. Bryan County*, 219 F.3d 450, 461 (5th Cir. 2000). While it was established that information from internal administrative investigations is generally not shared, Sergeant Infante, Commander Avitia, Lieutenant Etheridge, and Police Chief Garcia still understood that this policy did not prohibit them from disclosing video recordings. Moreover, if Officer Carrejo requested or inquired about the existence of any videos of the incident, the videos would have been turned over. Because of the understanding throughout the police department that even with the policy that possibly exculpatory evidence such as the videos could be disclosed, it was by no means “apparent” that a constitutional violation was a “highly predictable consequence” of the general policy of non-disclosure. *See Burge*, 336 F.3d at 373. Put another way, it can not be “apparent” that a constitutional violation is a “highly predictable consequence” if no impression is created from the policy that the evidence central to the alleged violation has to be withheld. Accordingly, there was no “deliberate indifference” shown in implementing this policy. *See id.* (citing *Brown*, 219 F.3d at 461).

Even if this court adopts Alvarez’s alternative theory that the “policy” was Police Chief Garcia being vested with the sole authority to review the internal administrative investigation reports, there is no showing that this policy was adopted or implemented with deliberate indifference. When

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advancing this theory, Alvarez lodges two different concepts for how deliberate indifference was shown. First, Alvarez asserts that the policy of allowing Police Chief Garcia to be the sole decision maker relating to the internal investigations was deliberately indifferent because there was no safety net to catch Police Chief Garcia's mistakes. Second, Alvarez avers that Police Chief Garcia implemented this policy with deliberate indifference because he overlooked internal administrative reports, knowing that his error would probably result in the violation of an individual's constitutional rights.

Both of Alvarez's arguments are unavailing. Placing the final decision making authority in the hands of one individual, even if it makes an error more likely, does not by itself establish deliberate indifference. "Deliberate indifference is a degree of culpability beyond mere negligence or even gross negligence; it must amount to an intentional choice, not merely an unintentionally negligent oversight." *James*, 577 F.3d at 617–18 (quoting *Rhyne v. Henderson County*, 973 F.2d 386, 392 (5th Cir. 1992) (quotation marks omitted)). No evidence from the record indicates that Police Chief Garcia's actions should be characterized as anything more than negligent oversight. Moreover, Alvarez points to no case from any circuit that premises § 1983 municipal liability on a policymaker's deliberate indifference to a constitutional right that a circuit court has expressly held does not exist—e.g., the defendant's right to be presented with *Brady* material before entering a guilty plea. No deliberate indifference was shown to establish municipal liability under this alternative theory proposed by Alvarez.

In conclusion, the City of Brownsville should not have been liable as a matter of law for Alvarez's § 1983 action.

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B. Extension of the *Brady* right to the Plea Bargaining Process

Alvarez additionally argued to the en banc court that his guilty plea did not preclude him from asserting a viable *Brady* claim for his § 1983 action. Prior to this court granting Alvarez’s petition for rehearing en banc, settled precedent in this circuit held that there was no constitutional right to *Brady* material prior to a guilty plea. *See United States v. Conroy*, 567 F.3d 174, 178–79 (5th Cir. 2009) (citing *Matthew v. Johnson*, 201 F.3d 353, 361–62 (5th Cir. 2000)). Alvarez argues that under *Brady* the videos of the incident between him and Officer Arias constituted exculpatory evidence that he was constitutionally entitled to before the entry of his guilty plea. *See* 373 U.S. at 87. This court declines the invitation to uproot its precedent.

In *United States v. Ruiz*, the Supreme Court held that “the Constitution does not require the Government to disclose material impeachment evidence prior to entering a plea agreement with a criminal defendant.” 536 U.S. 622, 633 (2002). The Supreme Court stated that impeachment information was not “critical information of which the defendant must always be aware prior to pleading guilty.” *Id.* at 630. The Supreme Court, however, did not explicitly address whether the withholding of exculpatory evidence during the pretrial plea bargaining process would violate a defendant’s constitutional rights. *See id.* at 630–33.

In *Conroy*, this court addressed the scope of a defendant’s constitutional entitlement to *Brady* material before he enters a guilty plea. 567 F.3d at 179. Unequivocally, the court rejected the defendant’s argument that *Ruiz* states that impeachment and exculpatory evidence should be treated differently, and that exculpatory evidence must be turned over before the entry of a guilty plea. *Id.* This court stated, “*Ruiz* never makes such a distinction nor can this proposition be implied from its discussion. Accordingly, we conclude that [the

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defendant’s] guilty plea precludes her from claiming that the government’s failure to disclose . . . was a *Brady* violation.” *Id.*

The First, Second, and Fourth Circuits also seem to have doubts about a defendant’s constitutional entitlement to exculpatory *Brady* material before entering a guilty plea. In *United States v. Mathur*, the First Circuit explained that, “[t]he animating principle of *Brady* is the avoidance of an unfair trial. It is, therefore, universally acknowledged that the right memorialized in *Brady* is a trial right.” 624 F.3d 498, 506–07 (1st Cir. 2010) (internal citation omitted). Extending *Brady* to pretrial plea negotiations was characterized as “new ground,” a “novel approach,” and an “unprecedented expansion of *Brady*.” *Id.* at 507. The First Circuit noted that “*Ruiz* teaches that *Brady* does not protect against the possible prejudice that may ensue from the loss of an opportunity to plea-bargain with complete knowledge of all relevant facts.” *Id.* “[W]hen a defendant chooses to admit his guilt, *Brady* concerns subside.” *Id.* (“The *Brady* rule’s focus on protecting the integrity of trials suggests that where no trial is to occur, there may be no constitutional violation.” (quoting *Matthew*, 201 F.3d at 361)).

Additionally, the Second Circuit in *Friedman v. Rehal* stated the “Supreme Court has consistently treated exculpatory and impeachment evidence in the same way for the purpose of defining the obligation of a prosecutor to provide *Brady* material prior to trial, and the reasoning underlying *Ruiz* could support a similar ruling for a prosecutor’s obligations prior to a guilty plea.” 618 F.3d 142, 154 (2d Cir. 2010) (internal citation omitted).

Likewise, the Fourth Circuit in *United States v. Moussaoui* emphasized that “[t]he *Brady* right . . . is a *trial* right” that “exists to preserve the fairness of a trial verdict and to minimize the chance that an innocent person would be

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found guilty.” 591 F.3d 263, 285 (4th Cir. 2010) (emphasis in original). The Fourth Circuit went on citing the Fifth Circuit’s *Matthew* and *Orman* opinions, stating “[w]hen a defendant pleads guilty, those concerns are almost completely eliminated because his guilt is admitted.” *Id.* (citing *Orman v. Cain*, 228 F.3d 616, 617 (5th Cir. 2000); *Matthew*, 201 F.3d at 361). After acknowledging the circuit split for whether the *Brady* right extended to the guilty plea context, the Fourth Circuit did not decide the issue. *Id.* at 286.

The Seventh, Ninth, and Tenth Circuits, however, recognized the possible distinction noted by the Supreme Court in *Ruiz* between impeachment and exculpatory evidence in the guilty plea context. In *McCann v. Mangialardi*, the Seventh Circuit stated that “*Ruiz* indicates a significant distinction between impeachment information and exculpatory evidence of actual innocence.” 337 F.3d 782, 788 (7th Cir. 2003). The Seventh Circuit went on to say, “[g]iven this distinction, it is highly likely that the Supreme Court would find a violation of the Due Process Clause if prosecutors or other relevant government actors have knowledge of a criminal defendant’s factual innocence but fail to disclose such information to a defendant before he enters into a guilty plea.” *Id.* In the next line, the court explained that “[w]e need not resolve this question” because the plaintiff did not present evidence that the defendant was aware of the potential exculpatory evidence. *Id.*

In *United States v. Ohiri*, the defendant contended that the government committed *Brady* violations by failing to disclose exculpatory evidence prior to his decision to plead guilty. 133 F. App’x 555, 556 (10th Cir. 2005) (unpublished). The Tenth Circuit explained that the “government should have disclosed all known exculpatory information at least by that point in the proceedings” prior to the defendant’s guilty plea entered on the first day of jury selection. *Id.* at 562. Notably, “the unusual circumstances presented” by the

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defendant's acceptance of an "eleventh-hour plea agreement" on the day the defendant was set to go to trial was highlighted in the court's reasoning. *See Ohiri*, 133 F. App'x at 562. The Tenth Circuit emphasized that, unlike *Ruiz*, the evidence the prosecution withheld from the defendant was alleged to be exculpatory and not just impeachment evidence. *Id.* The court concluded by stating that "the Supreme Court [in *Ruiz*] did not imply that the government may avoid the consequence of a *Brady* violation if the defendant accepts an eleventh-hour plea agreement while ignorant of withheld exculpatory evidence in the government's possession." *Id.*

Similarly, the Ninth Circuit alluded to possibly allowing a defendant to assert a *Brady* violation after pleading guilty. *See Smith v. Baldwin*, 510 F.3d 1127, 1148 (9th Cir. 2007) (en banc). When the Ninth Circuit referred to the defendant's ability to assert a *Brady* violation after pleading guilty, the court cited to a case predating *Ruiz* for the proposition that the defendant could still assert a viable *Brady* claim even though he pled guilty. *See id.* (citing *Sanchez v. United States*, 50 F.3d 1148, 1454 (9th Cir. 1995)).

In sum, case law from the Supreme Court, this circuit, and other circuits does not affirmatively establish that a constitutional violation occurs when *Brady* material is not shared during the plea bargaining process. The en banc court will not disturb this circuit's settled precedent and abstains from expanding the *Brady* right to the pretrial plea bargaining context for Alvarez.

III. CONCLUSION

For the foregoing reasons, we REVERSE the district court's judgment, and RENDER judgment in favor of the City of Brownsville. Alvarez's action against the City of Brownsville is DISMISSED with prejudice.

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EDITH H. JONES, Circuit Judge, joined by SMITH and HO, Circuit Judges, concurring:

I am pleased to join Chief Judge Stewart’s opinion for the court, with which I fully agree. The genesis of this case is, however, troubling, and worth noting. It is an unsavory vehicle in which to be discussing significant theories of law.

How Alvarez¹ obtained his habeas relief in the state appellate court, using his then-attorney Lucio, who later became a co-defendant in a federal RICO and bribery prosecution against then-Cameron County DA Villalobos, is more than suspicious. The state courts were presented a redacted video of the encounter between Alvarez and Officer Arias, which omitted a crucial 30+ seconds leading up to their tussle. In that period of time, it was evident that Alvarez was arguing with and resisting the officers’ instructions to move from one cell into another. Unredacted, the video portrays a much more complex picture of events than the “self defense” theory propounded by attorney Lucio. Lucio also offered the supporting testimony of Alvarez’s former attorney, de la Fuente, an unindicted co-conspirator in the bribery case. In the state habeas court, the DA’s office, oddly, never questioned the video, immediately agreed to a new trial, and apparently offered an agreed set of findings and conclusions. That court granted only a new trial. When Lucio appealed to the state appellate court on his “actual innocence” theory—which is supportable only if one sees no more than the redacted video—the DA filed no response. After the appellate court remanded, the DA quickly dismissed charges. One may

¹ I have no knowledge whether Alvarez had any information about the attorneys’ deeds in his case.

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surmise, as Gilbert & Sullivan wrote in *Trial by Jury*, Alvarez's release "was managed by a job, and a good job too."

For present purposes, the point is that without having been "exonerated" by the state courts, Alvarez could not pursue his very novel Section 1983 claim against the City. *See Heck v. Humphrey*, 512 U.S. 477, 486-87, 114 S. Ct. 2364, 2372 (1994). Alvarez's damage suit proceeded contemporaneously in federal court with the RICO/bribery charges against the former DA and his attorney cohorts. Indeed, the judge originally assigned to Alvarez's case had to recuse when he became responsible for the criminal case. In the bribery prosecution, Alvarez's habeas case was mentioned indirectly. The City's attorneys attempted repeatedly to challenge the redacted video in Alvarez's civil suit, but the federal court ignored their efforts. Why? I do not understand the district court's unwillingness to explore whether Alvarez's case was founded on doctored evidence. If doctored evidence tainted Alvarez's habeas case, the federal court would have had to consider ethical action against certain attorneys. On the other hand, it would not have had to opine on unusual issues concerning municipal liability and the ramifications of the *Brady* doctrine.

Allegations of doctored evidence here may have been misplaced, but surely they were not frivolous. Because factual integrity is the gateway to litigating a claim in court, Fed. R. Civ. P. 11, integrity in the fact-finding process must be maintained vigilantly. No defendant, including the City, should be persecuted by means of litigation with a false foundation. It's unfortunate if that is what happened here.

I urge our colleagues at the district court level to be more attuned to non-frivolous complaints of potentially unethical behavior.

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STEPHEN HIGGINSON, Circuit Judge, joined by JOLLY, JONES, WIENER and OWEN, Circuit Judges, concurring:

Criminal discovery rules and practices vary. In federal criminal cases, discovery practices are responsive to local court and professionalism requirements, notably the United States Attorney’s Manual;¹ the rulemaking process—itsself dynamic and receptive to change urged by criminal justice participants—notably Fed. R. Crim. P. 16 (Discovery and Inspection); legislative initiatives, notably the Jencks Act, 18 U.S.C. 3500; and, judicial decisions elaborating the due process imperative for fundamental fairness, notably *Brady v. Maryland*, 373 U.S. 83 (1963).

I write in agreement with the majority that we should not stretch the last by constitutionalizing *Brady* forward in time from a fair trial right (“existing *Brady*”) to a pre-plea right (“new *Brady*”), as well as to observe that the Who, What and When components of any new disclosure obligation be described with clarity to prosecutors, defense counsel and trial judges.

Who owes new Brady disclosure (after what, if any, search)? Existing *Brady* law imposes constructive knowledge on the government, *see, e.g., Kyles v. Whitley*, 514 U.S. 419, 437 (1995) (“[T]he individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government’s behalf in the case, including the police.”). If an earlier-in-time, new *Brady* right is recognized, the orbit of government responsibility must be drawn. Guilty plea agreements which offer benefits to defendants are vitally important to

¹ *See e.g.* U.S.A.M. 9-5.001(D) (Timing of disclosure); *id.* 9-5.001(D)(1) (“Exculpatory information must be disclosed reasonably promptly after it is discovered.”); *id.* 9-11.233 (“It is the policy of the Department of Justice, however, that when a prosecutor conducting a grand jury inquiry is personally aware of substantial evidence that directly negates the guilt of a subject of the investigation, the prosecutor must present or otherwise disclose such evidence to the grand jury before seeking an indictment against such a person.”).

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accused persons yet remain a matter of executive discretion. Those plea agreement offers may well be withheld if a *Brady* imputation rule applies to prosecutors when a matter is still being investigated with disparate law enforcement involvement, especially when law enforcement is responding to reactive crimes and arrests. Or plea agreement offers may come only with a waiver of any such new *Brady* right. Cf. *United States v. Sylvester*, 583 F.3d 285, 293-294 (5th Cir. 2009) (allowing case-in-chief plea statement waivers). Or they may come slowly, after coordinated due diligence review of investigative materials, regardless of whether a defendant seeks to avoid pretrial detention and the possibility of superseding charges by accepting responsibility and pleading guilty quickly.

What must be disclosed? The answer seems to be *Brady* minus *Ruiz*, yet that would revive difficult distinctions between exculpatory and impeachment evidence which bedeviled earlier due process caselaw. See *United States v. Bagley*, 473 U.S. 667, 676 (1985).

When must disclosure occur? The constitution does not prevent accused persons from acknowledging responsibility and guilt, yet any new *Brady* rule likely would require prosecutors to collect and review existing evidence first, perhaps, as noted, seeking pretrial detention during that time, as well as, thereafter, superseding with additional charges if more, not less, incriminating evidence is found. Depending on the timing of any new *Brady* rule, especially one triggered by a defendant's stated intention to plead guilty, courts may need to anticipate pretrial detention requests against defendants who seek to plead guilty as well as requests for in camera submissions or protective orders to safeguard victims and witnesses.

Fairness and truth-finding are imperatives. *Berger v. United States*, 295 U.S. 78, 88 (1935). For that reason, it is worthwhile to emphasize that the

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constitution *already protects against prosecutors* who use false evidence to obtain a conviction. *Napue v. Illinois*, 360 U.S. 264, 269 (1959); *Giglio v. United States*, 405 U.S. 150 (1972); *cf. Ferrara v. United States*, 456 F.3d 278, 291-297 (1st Cir. 2006) (nondisclosure “so outrageous that it constituted impermissible prosecutorial misconduct sufficient to ground the petitioner's claim that his guilty plea was involuntary”).²

And the constitution *already protects against ineffective assistance of counsel*, which occurs regardless of the attractiveness of a plea offer if counsel, in the best position to have ascertained innocence, fails to “investigate[] the law and circumstances” relating to a defendant’s guilty plea. *See United States v. Juarez*, 672 F.3d 381, 390 (5th Cir. 2012); *Hill v. Lockhart*, 474 U.S. 52, 59 (1985).

Finally, the constitution already assures further protection against the miscarriage of justice of an innocent pleading guilty by requiring that *judges* engage in extended, direct colloquy with *defendants* who seek to confirm their guilt under oath. *Boykin v. Alabama*, 395 U.S. 238 (1969); Fed. R. Crim. P. 11(b)(1). Judges must confirm that a factual basis supports every guilty plea. *See* Fed. R. Crim. P. 11(b)(3); *cf. United States v. Gobert*, 139 F.3d 436, 439-441

² Furthermore, existing Brady is a continuing duty, *United States v. Cessa*, 861 F.3d 121, 134 n.8 (5th Cir. 2017) (“*Brady* obligations are continuing throughout trial, and are neither dependent on a request from the defendant nor the form of the *Brady* material.”), and extends to sentencing, *Brady v. Maryland*, 373 U.S. 83, 87-88 (1963), thus may be violated if a prosecutor withholds evidence which contradicts a presentence report offense narrative the government relies on. As with a proffer of a factual basis at arraignment, endorsement of a presentence report will occur during the period when defendants may seek to withdraw their guilty pleas and any existing *Brady* obligation and disclosure triggered by use of a factual basis or presentence report may well qualify as a “fair and just reason for requesting withdrawal.” Fed. R. Crim. P. 11(d).

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(5th Cir. 1998) (finding clear error in acceptance of guilty plea without adequate factual basis).³

³ Indeed, judges frequently ask defendants to confirm their guilt in their own words. This may be particularly advisable when defendants and the government submit plea agreements with especially favorable terms for court acceptance. Fed. R. Crim. P. 11(c)(2)-(5).

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JAMES C. HO, Circuit Judge, joined by E. GRADY JOLLY, EDITH H. JONES, JERRY E. SMITH, EDITH BROWN CLEMENT, and PRISCILLA R. OWEN, Circuit Judges, concurring:

A number of circuits are openly flirting with, if not embracing outright, a novel alteration of the constitutional doctrine first announced in *Brady v. Maryland*, 373 U.S. 83 (1963). *See, e.g., Smith v. Baldwin*, 510 F.3d 1127, 1148 (9th Cir. 2007) (en banc) (citing *Sanchez v. United States*, 50 F.3d 1448, 1454 (9th Cir. 1995)); *United States v. Ohiri*, 133 F. App'x 555, 562 (10th Cir. 2005) (unpublished); *McCann v. Mangialardi*, 337 F.3d 782, 788 (7th Cir. 2003).

Under *Brady*, the defendant has the right to review exculpatory material from the prosecution team in order to prepare for trial. Under the proposed new rule, the prosecution team is now required to disclose such material, even if the accused does not want it, and instead seeks to plead guilty—and if the accused does not receive the material, he can later nullify the plea agreement.

The proposed rule is foreclosed by circuit precedent. And Chief Judge Stewart's en banc majority opinion expressly declines any invitation to overrule our precedent. I am pleased to join his excellent opinion.

I write separately to make two points about precedent. First, there was no justification for the district court to ignore our circuit precedent. Second, our circuit precedent was correctly decided. Indeed, it is compelled by established principles of constitutional law: *Brady* announced a right to exculpatory evidence as part of the right to a fair trial. Pleading guilty waives the right to a trial, and inherent in that waiver is the waiver of subsidiary trial rights such as *Brady*. The district court contradicted these established principles when it extended *Brady* to the plea bargaining stage and treated it not as a right of the accused, but as a requirement defendants cannot waive.

I concur in the reversal of the district court.

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I.

If the constitutional theory urged by George Alvarez and his amici had been an open question in this circuit, the district court could have attempted to justify its judgment on either the text or original understanding of the Constitution or on a faithful application of analogous Supreme Court or circuit precedent.

But that is not this case. To the contrary, the district court awarded a \$2.3 million judgment based on a constitutional theory that our previous rulings expressly foreclose. *See United States v. Conroy*, 567 F.3d 174, 178–79 (5th Cir. 2009) (per curiam) (citing *Matthew v. Johnson*, 201 F.3d 353, 361–62 (5th Cir. 2000)). What’s more, the district court did not even cite—let alone distinguish—our prior precedents.

In describing the judicial power established in Article III of the Constitution, Federalist 78 observes that, “[t]o avoid an arbitrary discretion in the courts, it is indispensable that they should be bound down by strict rules and precedents, which serve to define and point out their duty in every particular case that comes before them.” THE FEDERALIST NO. 78 (Alexander Hamilton).

Consistent with these foundational constitutional principles, it is long established that district courts are bound to follow circuit precedent unless it directly conflicts with Supreme Court precedent. *See, e.g., Campbell v. Sonat Offshore Drilling, Inc.*, 979 F.2d 1115, 1121 n.8 (5th Cir. 1992) (“It has been long established that a legally indistinguishable decision of this court must be followed by other panels of this court and district courts unless overruled en banc or by the United States Supreme Court.”).

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In the event of such a conflict, Supreme Court precedent of course plainly controls. But there is no such conflict here: The Supreme Court has *never* held that *Brady* establishes an unwaivable right at the plea bargaining phase.

To the contrary, the Supreme Court has held precisely the opposite in the context of two different categories of *Brady* material. *See United States v. Ruiz*, 536 U.S. 622 (2002). First, prosecutors need not disclose exculpatory impeachment evidence at the plea bargaining stage, as Chief Justice Stewart explains. *See Op.* at 14–17 (citing *Ruiz*, 536 U.S. at 630–33). Moreover, prosecutors need not disclose exculpatory evidence concerning any potential affirmative defense at the plea bargaining stage. *See Ruiz*, 536 U.S. at 633 (“We do not believe the Constitution here requires provision” of “information the Government has regarding any ‘affirmative defense’” “prior to plea bargaining”); *see also id.* (Thomas, J., concurring) (“I agree with the Court that the Constitution does not require the Government to disclose either affirmative defense information or impeachment information relating to informants or other witnesses before entering into a binding plea agreement with a criminal defendant.”).

Neither Alvarez nor his amici have explained why one rule should apply to exculpatory evidence concerning the prima facie elements of a criminal case, and a different rule should apply to exculpatory evidence concerning affirmative defenses. Certainly nothing in the text or original understanding of the Constitution supports such a distinction. And most importantly, no Supreme Court decision has ever so held (tellingly, the district court does not

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even cite, let alone rely on, *Ruiz*). So there was no basis for the district court to ignore binding circuit precedent.¹

II.

What’s more, our circuit precedent is correct: *Brady* is a trial right—and it is a right that the accused waives if he agrees to a plea bargain.

For his part, Alvarez argues that we should extend *Brady* from the trial stage to the plea bargaining stage—and that we should treat *Brady* as a requirement that a defendant cannot waive. As his brief contends, courts should not only extend *Brady* to the plea bargaining phase, but also refuse to credit any waiver of *Brady* rights, on the ground that any such “waiver cannot be deemed ‘intelligent and voluntary’ [because it was] ‘entered without knowledge of material information withheld by the prosecution.’” Supplemental Brief for Appellee at 36 (quoting *Sanchez v. United States*, 50 F.3d 1448, 1453 (9th Cir. 1995)).

He errs on both counts. What’s more, converting *Brady* from a right to a requirement would diminish, rather than enhance, its value to the accused.

A.

First, it is well established that *Brady* is a *trial* right. It is a right to exculpatory evidence that is part and parcel of the constitutional right to a fair trial under the Due Process Clause.

¹ Alvarez relies heavily on Supreme Court decisions that extend the requirement of effective assistance of counsel to the plea bargaining stage. See, e.g., *Lafler v. Cooper*, 566 U.S. 156, 162–63 (2012); *Missouri v. Frye*, 566 U.S. 134, 140 (2012); *Padilla v. Kentucky*, 559 U.S. 356, 364–66 (2010). But none of those cases purport to question or undermine the Court’s earlier decision in *Ruiz* declining to extend *Brady* to the plea bargaining phase. If there is conceptual tension in extending the effective assistance of counsel requirement to the plea bargaining stage, but not *Brady*, it has not troubled the Supreme Court.

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The Supreme Court has repeatedly characterized the *Brady* right as necessary to ensure a fair trial—characterizations that contradict the suggestion that disclosure is additionally required to ensure the constitutionality of pre-trial proceedings. In *United States v. Agurs*, 427 U.S. 97 (1976), for example, the Court observed that “the prosecutor will not have violated his constitutional duty of disclosure unless his omission is of sufficient significance to result in the denial of the defendant’s right to a fair trial.” *Id.* at 108. *See also, e.g., Ruiz*, 536 U.S. at 628 (describing *Brady* as “a right that the Constitution provides as part of its basic ‘fair trial’ guarantee”) (citing U.S. CONST. amend. V, VI; *Brady*, 373 U.S. at 87); *United States v. Bagley*, 473 U.S. 667, 675 (1985) (“The *Brady* rule is based on the requirement of due process. . . . [A prosecutor must] disclose evidence favorable to the accused that, if suppressed, would deprive the defendant of a fair trial.”); *Weatherford v. Bursey*, 429 U.S. 545, 559 (1977) (“[U]nder *Brady* . . . the prosecution has the ‘duty under the due process clause to insure that “criminal trials are fair” by disclosing evidence favorable to the defendant upon request.’”) (citation omitted).

The entire purpose of plea bargains, of course, is to avoid the need for trial altogether. Extending *Brady* to the plea bargaining phase thus contradicts the established understanding of *Brady* as a trial right. As Justice Thomas observed in *Ruiz*: “The principle supporting *Brady* was ‘avoidance of an unfair trial to the accused.’ That concern is not implicated at the plea stage.” *Ruiz*, 536 U.S. at 634 (Thomas, J., concurring) (citation omitted).

B.

The proposed new rule also misunderstands the basic nature of plea bargains. Plea bargains, by their very definition, involve the waiver of a number of fundamental rights.

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First and foremost, plea bargains waive the right to trial itself. What's more, inherent in the waiver of trial is a waiver of all rights attendant to a fair trial—such as the Fifth Amendment right against self-incrimination, the Sixth Amendment rights to a trial before a jury, to confront one's accusers, and to obtain compulsory process, and the right to disclosure of exculpatory evidence under *Brady*. See, e.g., *Florida v. Nixon*, 543 U.S. 175, 187 (2004) (“By entering a guilty plea, a defendant waives constitutional rights that inhere in a criminal trial, including the right to trial by jury, the protection against self-incrimination, and the right to confront one's accusers.”) (citing *Boykin v. Alabama*, 395 U.S. 238, 243 (1969)); *Godinez v. Moran*, 509 U.S. 389, 397 n.7 (1993) (same); *Winters v. Cook*, 489 F.2d 174, 179 (5th Cir. 1973) (en banc) (“[P]ersonal fundamental rights include the right to plead guilty (which of course encompasses the waiver of numerous rights), the right to waive trial by jury, the right to waive appellate review and the right to testify personally.”) (citing *Developments in the Law—Federal Habeas Corpus*, 83 HARV. L. REV. 1038, 1011 n. 102 (1970)).

The point is simply this: The Constitution enumerates a series of rights of the accused—but the defendant may waive those rights, for example, in exchange for leniency in a plea agreement. There is no reason to treat *Brady* any differently. To the contrary, to regard *Brady*, not as a right that the accused can waive, but as a requirement that prosecutors must obey, would be incongruous with our approach to other similar constitutional doctrines.

No one would claim, for example, that plea bargaining itself is unconstitutional—even though it inherently involves the right to trial under the Sixth Amendment. See, e.g., *Brady v. United States*, 397 U.S. 742, 748 (1970) (“[T]he plea is more than an admission of past conduct; it is the defendant's consent that judgment of conviction may be entered without a

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trial—a waiver of his right to trial before a jury or a judge.”); *Adams v. United States ex rel. McCann*, 317 U.S. 269, 276 (1942) (“It hardly occurred to the framers of the original Constitution and of the Bill of Rights that an accused, acting in obedience to the dictates of self-interest or the promptings of conscience, should be prevented from surrendering his liberty by admitting his guilt.”).

It is likewise well established that the accused has the right to waive the right to jury trial in favor of a bench trial. *See, e.g., Adams*, 317 U.S. at 278 (“[S]ince trial by jury confers burdens as well as benefits, an accused should be permitted to forego its privileges when his competent judgment counsels him that his interests are safer in the keeping of the judge than of the jury.”). *See also generally* Erwin N. Griswold, *The Historical Development of Waiver of Jury Trial in Criminal Cases*, 20 VA. L. REV. 655 (1934) (collecting materials).

Similarly, no one here argues that the accused has an unwaivable Sixth Amendment right to confront one’s accusers or to have compulsory process to secure favorable witnesses, prior to agreeing to a plea bargain. Indeed, such an argument would effectively invalidate numerous codes of criminal procedure that generally do not permit pre-trial depositions absent special circumstances. *See, e.g.,* Tex. Code Crim. Proc. § 39.02; La. Code Crim. Proc. art. 716; Miss. R. Crim. Proc. 17.5. Otherwise, in every rape or sexual abuse case, for example, the victim would be required to endure a deposition by the accused, even where the accused is willing to plead guilty and forgo trial.

Neither Alvarez nor his amici offer any principled distinction as to why—among these various trial rights, all waivable upon a plea bargain—*Brady* should be treated any differently.

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C.

To convert *Brady* from a right to a requirement would not only defy established principles of constitutional law. It would also diminish the value of those fundamental rights to the accused.

Rights are most valuable when individuals have the choice not to invoke them, depending on the circumstances. An old legend tells how the King of Siam would bestow sacred white elephants upon his political rivals. As gifts from the king, the elephants could not be rejected. Yet the sacred pachyderms, which could not be sold or used for work, would inevitably eat their owners out of house and home—driving them into bankruptcy, and leaving them far worse off than before they received the “gift.”

Forcing unwaivable “rights” upon the accused can have a similar effect. We empower the accused when we allow them to waive their rights. From the defendant’s perspective, the way to maximize the value of a right is to give him the option to waive it, just in case (as is often the case) he can exchange it for something else that is even more valuable to him. As the Supreme Court once put it: “When the administration of the criminal law in the federal courts is hedged about as it is by the Constitutional safeguards for the protection of an accused, *to deny him in the exercise of his free choice the right to dispense with some of these safeguards . . . is to imprison a man in his privileges and call it the Constitution.*” *Adams*, 317 U.S. at 280 (emphasis added).

The power to waive trial rights provides the accused with a significant bargaining chip in plea negotiations. Prosecutors lack the resources to take every case to trial. So prosecutors have a natural incentive to offer plea deals with lower penalties than what the accused might receive from a trial. “Plea bargaining flows from ‘the mutuality of advantage’ to defendants and prosecutors, each with his own reasons for wanting to avoid trial.”

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Bordenkircher v. Hayes, 434 U.S. 357, 363 (1978). And the flip side is also true: giving prosecutors “a reduced incentive to bargain” will accrue “to the detriment of the many defendants for whom plea bargaining offers the only hope for ameliorating the consequences to them of a serious criminal charge.” *Blackledge v. Perry*, 417 U.S. 21, 37 (1974) (Rehnquist, J., dissenting).

These principles apply to *Brady*. A defendant who agrees to waive his *Brady* right relieves the prosecution team of the substantial burdens associated with identifying, assembling, and disclosing the range of exculpatory materials required under *Brady*—as explained further in Judge Higginson’s thoughtful concurrence. Converting the *Brady* right into a prosecutorial requirement would substantially upset this balance, by giving defendants less to offer the prosecution during the negotiations. Prosecutors may be less likely to offer deals at all, if they are forced to expend significant resources regardless of whether the case is pled or proceeds to trial. Or they might offer inferior plea deals, in the form of longer sentences. Either result is a materially worse outcome for the accused.

* * *

There are times when it is necessary to upset circuit precedent—for example, in direct response to squarely conflicting Supreme Court precedent, or (where the Supreme Court has not yet ruled) to better align our precedents with the text and original understanding of the Constitution or the plain language of United States statutes. But that is not this case.

To the contrary, the alteration of our circuit’s *Brady* precedents urged by Alvarez and his amici would violate established legal principles and even diminish the value of *Brady* to the accused. If there is a case to be made for such reform, it must be accomplished through one of the mechanisms established by our Founders, such as Article V of the Constitution, or through

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the proper exercise of legislative powers vested in Congress and in the several states. *Cf. Brady*, 373 U.S. at 92 (separate opinion of White, J.) (“I would leave this task, at least for now, to the rulemaking or legislative process after full consideration by legislators, bench, and bar.”).

I concur in the reversal of the district court.²

² I also agree with the majority’s reliance on *Monell*. And I recognize that *Monell* alone is enough to reverse the judgment of the district court—we did not have to undertake the additional effort of addressing *Brady* in order to decide this appeal. But our Court granted rehearing en banc to reach the *Brady* question—and it is a question our dissenting colleagues address as well—so accordingly, I examine the *Brady* issue presented here.

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JAMES L. DENNIS, Circuit Judge, dissenting:

I respectfully dissent from the majority opinion because, in my view, the en banc court should have recognized the federal constitutional right of a defendant to exculpatory evidence at the plea-bargaining stage, essentially for the reasons described in Judge Costa's dissent. I also join Part 1 of Judge Graves's dissent, in which he explains how the City's policy of nondisclosure of exculpatory evidence caused a violation of Alvarez's right to the exculpatory video that ultimately exonerated him, prior to entering his guilty plea.

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JAMES E. GRAVES, JR., Circuit Judge, joined by COSTA, Circuit Judge, dissenting¹:

I write separately to: (1) dissent from the majority’s moving force analysis; (2) dissent from the majority’s deliberate indifference analysis; and (3) address Brownsville’s egregiously inadequate training policies.

1. Non-disclosure policy was moving force for non-disclosure.

The majority states that the Brownsville Police Department’s (“BPD”) failure to disclose the video evidence was the result of a “series of interconnected errors” by individual officers that was “separate from” official BPD policy. I respectfully disagree.

“[T]here can be no municipal liability unless [an official policy] is the moving force behind the constitutional violation.” *James v. Harris Cty.*, 577 F.3d 612, 617 (5th Cir. 2009). “In other words, a plaintiff must show direct causation, i.e., that there was ‘a direct causal link’ between the policy and the violation.” *Id.* (quoting *Piotrowski v. Hous.*, 237 F.3d 567, 578 (5th Cir. 2001)). Whether a sufficient causal link exists is a question of fact. *See Jett v. Dall. Indp. Sch. Dist.*, 491 U.S. 701, 737 (1989); *Kirkpatrick v. Washoe*, 843 F.3d 784, 797 (9th Cir. 2016); *James*, 577 F.3d at 618; *Bielevicz v. Dubinon*, 915 F.2d 845, 851 (3d Cir. 1990).

Here, as part of the internal affairs division (“IAD”) investigation, Officer Arias created a use of force report and submitted it up his chain of command to Sgt. Infante and Commander Rodriguez. Infante and Rodriguez then reviewed the report, and the video evidence, and submitted their own individual reports to Chief Garcia. Garcia never reviewed the file, and none of the officers disclosed the videos outside of the IAD.

¹ Judge Dennis joins part 1.

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Meanwhile, Officer Carrejo, the criminal investigations division (“CID”) officer assigned to submit the case file to the District Attorney, obtained the IAD incident reports from the jail. Carrejo then submitted those reports to the District Attorney without conducting additional evidentiary investigation because there was no “evidence form” in the records alerting him that relevant evidence existed.

According to the majority, these actions were a “series of interconnected” errors by the officers involved. With respect, record evidence shows that the officers committed no errors at all under BPD policies.

CID investigators are responsible for providing criminal case files to the District Attorney’s office. To start that process, they collect documents, such as incident reports, from a “cubbyhole” at the jail designated for the CID case prep team. They then conduct evidentiary follow-up as needed, based largely on “evidence forms” that fellow officers attach to the files provided to CID. Without an evidence form in the file, CID investigators would be unaware that follow-up is necessary.

BPD has a policy, however, that IAD officers do not proactively disclose evidence, including *Brady* evidence, to CID investigators. Instead, IAD officers pass all *Brady* evidence up their chain of command to Chief Garcia, who has sole responsibility to ensure that any *Brady* evidence is properly disclosed. Because these officers do not disclose evidence, there is no “evidence form” generated for the CID case file.

Thus, contrary to the majority’s view, the officers committed no “interconnected errors” in conducting their investigation. The IAD officers faithfully passed the evidence up the chain of command to Chief Garcia without disclosing the evidence to CID. In turn, the CID officer, unaware that relevant evidence existed, conducted no evidentiary follow-up and simply

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passed the file to the District Attorney's office. This was not error, it was how the system was designed to work.

Moreover, while the majority characterizes Garcia's failure to review the file as nothing "more than negligent oversight," the record paints a different picture. Indeed, Garcia did not review nine out of thirteen known use of force cases. Even when Garcia did review such files, it may be "several weeks, even up to a month or more . . . after the criminal case had been submitted to the [D]istrict [A]ttorney's office." Garcia's failure to review the instant case was entirely in line with BPD practice.

I therefore respectfully dissent from the majority's conclusion that Alvarez has not established that the non-disclosure policy was the moving force behind the alleged violation. BPD's policy of not disclosing exculpatory evidence to CID investigators was the direct cause of BPD's failure to disclose the video evidence to the District Attorney and the defense.

2. Non-disclosure policy implemented with deliberate indifference.

The majority next concludes that BPD could not have implemented the non-disclosure policy with deliberate indifference because there was an "understanding throughout the police department" that IAD officers could disclose exculpatory evidence. With respect, that conclusion is not supported by the record evidence.

Though BPD officers did claim that they "should," "could," and "would" have disclosed the video evidence to the CID if asked to do so, the overwhelming weight of the evidence is that officers understood that IAD evidence was simply not shared with CID as a matter of policy.

For instance, officers were trained to consider IAD and CID as separate investigative tracts that operate independently. As a result, there was a

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widespread belief among IAD officers that they had no duty to confirm that CID had exculpatory evidence. Instead, IAD officers simply passed evidence up their chain of command without disclosure to, or even consideration of, any parallel CID investigation. That understanding was based on “in-service training.”

In contrast, there is no evidence to support the officers’ claims that IAD officers would, could, or should freely disclose evidence to the CID. Quite the opposite is true, as no BPD policy, commanding officer, or training, informed IAD officers that they could, or even should, do so.

Compounding this problem, BPD provided CID investigators with no training on how to conduct their investigations. Instead, CID officers act purely pursuant to on-the-job experience. For Carrejo, that “mostly consists of getting ahold of victims or witnesses and get[ting] whatever information is needed for the file.” Carrejo expects fellow officers to “book” relevant evidence in order to generate an “evidence report,”² so that Carrejo can then “follow up with that evidence.” There is no indication in the record that Carrejo received any training, or even instruction, to pursue the robust evidentiary investigation that Brownsville, and the majority, claims he should have done. There is likewise no evidence at all that CID investigators ever asked IAD for evidence.

I respectfully dissent from the majority’s conclusion that there was an “understanding throughout the police department” that IAD officers could disclose exculpatory evidence. The weight of the evidence states otherwise.

I also disagree with the majority opinion’s conclusion that a deliberate indifference theory of municipal liability was not viable because at the time we

² These evidence reports were among the many topics on which BPD failed to train its CID officers.

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had not recognized a pre-plea right to *Brady* material. The City never made this “clearly established” argument in the district court or in our court. By adopting it sua sponte, the court repeats the mistake we recently made in *Hernandez v. Mesa*, 785 F.3d 117 (5th Cir. 2015) (en banc). We held that a border patrol agent was entitled to qualified immunity for shooting a Mexican national because the law was not clearly established that the Fifth Amendment applied to a foreign citizen injured outside the United States. *Id.* at 121. The Supreme Court reversed, explaining that the agent did not know at the time of the shooting whether the victim was a U.S. citizen. 137 S. Ct. 2003, 2007 (2017). The same is true for the similar deliberate indifference inquiry here. When he failed to disclose the exculpatory video, Police Chief Garcia did not know that Alvarez was pleading guilty. Even more than in *Mesa*, he could not have known as that fact did not yet exist (that is, the plea decision had not yet been made). But Garcia knew that the way to comply with the *Brady* obligation that has long existed for cases that go to trial is to notify the criminal investigations division of exculpatory material in the IA file so it becomes part of the prosecutor’s file later disclosed to the defense. There was not one procedure for transferring exculpatory evidence from the IAD side to the investigations side for “trial” cases and a separate procedure for “plea” cases. Because that transfer of the video to the investigations division did not happen, Garcia was deliberately indifferent to the long recognized *Brady* right for cases that get tried.

It is true that some caselaw suggests that deliberate indifference liability applies only when the indifference is to a clearly established right. The idea, the same rationale for qualified immunity, is that liability should attach based on an individual’s conduct only if there is a knowing violation of constitutional law. That culpability exists here because Garcia was deliberately indifferent

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to his constitutional obligation to turn over exculpatory evidence for a case that, like any other, could have resulted in a trial with the long recognized *Brady* right. Once that deliberate indifference to a clear constitutional right is established, it is just a matter of causation to show that the deliberate indifference to ensuring the criminal file contained exculpatory material led to Alvarez's constitutional injury that Judge Costa's opinion recognizes.

The defect in the majority opinion on this point can be seen by imagining this same case but with Alvarez having gone to trial on the criminal charge. Under the majority opinion's analysis, Garcia could avoid liability by saying "well, when I failed to give the video to the criminal investigators, I thought he was probably going to plead. And it is not clearly established that I have to turn over exculpatory evidence when defendants plead." That defense should not immunize the City from liability because Garcia did not know how the criminal case would be resolved when he failed to disclose the video to the investigative side. Thus, (1) Garcia was deliberately indifferent to the clear-as-can-be *Brady* rights that defendants going to trial have, and (2) Garcia's deliberate indifference caused the violation of Alvarez's right to pre-plea *Brady* materials.

3. BPD training policy was constitutionally deficient.

Though the majority does not address Alvarez's claim that Brownsville failed to adequately train its officers on *Brady* rights, I do so because BPD's training policy, or rather complete lack thereof, is so deficient that it clearly exhibits deliberate indifference to the constitutional rights of those that come into contact with BPD officers.

"[T]he inadequacy of police training may serve as the basis for § 1983 liability only where the failure to train amounts to deliberate indifference to the rights of persons with whom the police come into contact." *Canton v.*

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Harris, 489 U.S. 378, 388 (1989). “[I]t may happen that in light of the duties assigned to specific officers or employees the need for more or different training is so obvious, and the inadequacy so likely to result in the violation of constitutional rights, that the policymakers of the city can reasonably be said to have been deliberately indifferent to the need.” *Id.* at 390.

As Chief Garcia acknowledged, it is foreseeable that BPD officers will encounter use of force incidents and, as a result, have to decide what evidence to disclose in their reports. Garcia further acknowledged that officers will choose what evidence to disclose “based on the type of training they receive.” Despite this foreseeability, BPD had “no policy” of providing training on *Brady*. Indeed, Chief Garcia could not even state whether any of his officers had *ever* touched on *Brady* at any time. At best, Garcia claimed only that BPD officers had “[m]aybe” covered *Brady* in non-BPD trainings - in some cases up to 30 years in the past.

Unsurprisingly, BPD officers suffer from widespread ignorance on *Brady* rights. Chief Garcia candidly admitted that “it would not surprise” him to learn that his officers did not know what *Brady* obligations are. Nor should it. Officer Arias did not know what “exculpatory” meant, and Officer Carrejo, the CID officer assigned to provide evidence to the District Attorney, was likewise “not familiar.”

That such a complete failure to train on *Brady* rights is “likely to result in the violation of constitutional rights” is “obvious,” *see Canton*, 489 U.S. at 390, because “in the absence of training, there is no way for novice officers to obtain the legal knowledge they require.” *Connick v. Thompson*, 563 U.S. 51, 64 (2011). Naturally, the resulting “[w]idespread officer ignorance on the proper handling of exculpatory materials would have the ‘highly predictable

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consequence’ of due process violations.” *See Gregory v. Louisville*, 444 F.3d 725, 753 (6th Cir. 2006).

Brownsville’s complete lack of training on *Brady* rights evidences “deliberate indifference to the [constitutional] rights of persons with whom the police come into contact.” *See Canton*, 489 U.S. at 388; *see also Gregory*, 444 F.3d at 753-54.

CONCLUSION

The district court thought the evidence showing municipal liability was so strong that it granted summary judgment on that issue in favor of the plaintiff. The majority opinion does a 180-degree turn and holds there is no municipal liability as a matter of law. For the reasons I have discussed, at a minimum, there are factual disputes that a jury should resolve on municipal liability. I respectfully dissent.

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GREGG COSTA, Circuit Judge, joined by GRAVES, Circuit Judge, dissenting:

Let this sink in: If George Alvarez had been convicted of a federal crime in this circuit, he would have served his full 10-year sentence despite eventually discovering that the government failed to disclose an exculpatory video. That is because we are the only federal court of appeals that has held that a defendant who pleads guilty is not entitled to evidence that might exonerate him. Fortunately for Alvarez, and for those who believe that “justice suffers when any accused is treated unfairly,” *Brady v. Maryland*, 373 U.S. 83, 87 (1963), he was convicted of a state offense.¹ For almost forty years, Texas has interpreted the federal *Brady* right to require the government to provide exculpatory information “to defendants who plead guilty as well as to those who plead not guilty.” *Ex parte Lewis*, 587 S.W. 2d 697, 701 (Tex. Crim. App. 1979); *see also Ex parte Johnson*, 2009 WL 1396807, at *1 (Tex. Crim. App. May 20, 2009) (vacating a guilty plea because of a *Brady* violation). Texas is not alone. The highest courts of other states that have considered this question agree that defendants have a federal due process right to exculpatory evidence before they plead guilty. *See Buffey v. Ballard*, 782 S.E.2d 204, 218 (W. Va. 2015); *State v. Huebler*, 275 P.3d 91, 96–97 (Nev. 2012); *Hyman v. State*, 723 S.E.2d 375, 380 (S.C. 2012); *Medel v. State*, 184 P.3d 1226, 1235 (Utah 2008). Because we now have “for the most part a system of pleas, not a system of trials,” *Lafler v. Cooper*, 566 U.S. 156, 170 (2012), today’s opinion reaffirming our outlier position means that the vast majority of defendants in this circuit

¹ In its amicus brief, the Department of Justice points to the grant of habeas relief in Alvarez’s case as an example of the “existing remedies . . . typically available to defendants who admit their guilt but later claim actual innocence” that makes a *Brady* right unnecessary for such defendants. U.S. Br. 13. This ignores that federal habeas law, whether reviewing state or federal convictions, would not provide that relief because it does not recognize a freestanding innocence claim. *Herrera v. Collins*, 506 U.S. 390, 400 (1999).

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will not have a right to relief if it comes to light after their conviction that the government suppressed exculpatory evidence.

The origins of the *Brady* right support Texas courts' longstanding view that it requires pre-plea disclosure of exculpatory evidence. The seminal Supreme Court case describes the right as a due process requirement for a prosecutor, upon request, to disclose information favorable to the accused that "is material either to guilt or to punishment." *Brady*, 373 U.S. at 87. Although the more common framing of the right is the first characterization that relates to "innocence or guilt," *Brady* itself was a case about punishment as the suppressed confession only resulted in a new sentencing trial. *Id.* at 90–91. It is notable that the right has from its inception applied to the sentencing phase of a proceeding that is vitally important but "does not concern the defendant's guilt or innocence." *Lafler*, 566 U.S. at 165. Because a plea hearing is all about a defendant's guilt or innocence, it more strongly implicates *Brady*'s "overriding concern with the justice of the finding of guilt." *United States v. Bagley*, 473 U.S. 667, 678 (1985) (quoting *United States v. Agurs*, 427 U.S. 97, 112 (1976)). It certainly does so more directly than does a suppression hearing where the focus is on whether the government unlawfully obtained evidence, see *United States v. Bowie*, 198 F.3d 905, 912 (D.C. Cir. 1999), yet we have recognized the *Brady* right extends to suppression motions. *Smith v. Black*, 904 F.2d 950, 965–66 (1990), *vacated on other grounds*, 503 U.S. 930 (1992). And the *Brady* rule seeks "to ensure that a miscarriage of justice does not occur," *Bagley*, 473 U.S. at 675, a risk that we know exists not just for trial convictions but also for guilty pleas, see *Brady v. United States*, 397 U.S. 742, 758 (1970) (recognizing that plea agreements are "no more foolproof than full trials"); Stephanos Bibas, *Plea Bargaining's Role in Wrongful Convictions*, in EXAMINING WRONGFUL CONVICTIONS 157–62 (2014) (discussing the incentives,

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structural constraints, and psychological influences that can lead to innocent defendants pleading guilty); *infra* p. 16.

Digging deeper into the roots of *Brady* further supports its application to requests for exculpatory evidence before pleading. The 1963 decision relied on earlier Supreme Court cases recognizing a due process violation when the government knowingly used false testimony to secure a conviction. *See* 373 U.S. at 86–87 (citing *Mooney v. Holohan*, 294 U.S. 103, 112 (1935) (per curiam); *Napue v. Illinois*, 360 U.S. 264, 269 (1959)). At a plea hearing, the government must provide a factual basis for the defendant’s guilt to support the conviction. *See* FED. R. CRIM. P. 11(b)(3); *cf. Brady v. United States*, 397 U.S. at 758 (explaining that a court’s ability to determine “that there is nothing to question the accuracy and reliability of the defendants’ admissions” provides an important safeguard against problems with plea agreements). Just as failure to provide exculpatory information at a trial subverts the jury’s ability to determine guilt, so too does failure to provide that information in connection with a plea prevent the judge from properly assessing whether there is a factual basis to support a conviction. Failing to disclose exculpatory evidence in reciting the essential facts of the case thus is at odds with the government’s constitutional duty to tell the truth in court.

Indeed, as a general matter due process rights are usually not limited to trials, but may apply in various types of proceedings at which the government seeks to deprive someone of life, liberty, or property. Other due process rights apply at plea hearings, most fundamentally the requirement that a plea be knowing and voluntary.² *McCarthy v. United States*, 394 U.S. 459, 466 (1969).

² Some courts have taken the view that a failure to disclose exculpatory evidence renders the plea unknowing and involuntary. *Sanchez v. United States*, 50 F.3d 1448, 1453 (9th Cir. 1995); *cf. United States v. Fisher*, 711 F.3d 460 (4th Cir. 2013).

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But also others like the government's obligation to fulfill its promises in a plea agreement. *Santobello v. New York*, 404 U.S. 257, 262 (1971). Looking even more broadly to the Fifth Amendment as a whole, none of its rights apply solely in trials. Protections against self-incrimination, takings, double jeopardy, and being charged without a grand jury indictment guard against arbitrary government action that can occur in a variety of contexts outside of trial. Although Fifth Amendment rights may appear to lack the unifying theme that is evident for the conscience and expression-protecting First Amendment, the trial-focused Sixth and Seventh Amendments (first criminal then civil); or the punishment-focused Eighth, one scholar has noted that most rights in the Fifth Amendment cover the period between the investigative phase addressed in the Fourth Amendment and the trial phase addressed in the Sixth. BURT NEUBORNE, *MADISON'S MUSIC: ON READING THE FIRST AMENDMENT* 26–27 (2015). The Amendment's focus on pretrial criminal proceedings rather than trials thus further supports requiring the disclosure of exculpatory evidence in the plea hearing.

So what is the basis for limiting a due process right like *Brady* to the context of a full-blown trial even though a plea hearing involves its core concern about whether the courts are fulfilling their truth-finding function? The most basic argument against applying *Brady* to pleas is that by pleading guilty the defendant implicitly waives a right to obtain evidence that might undermine his admission of guilt.³ Put more bluntly, if a defendant is saying he is guilty, isn't that the end of the issue? But the same argument could be

³ This is different than the question whether a defendant could affirmatively waive his *Brady* rights in pleading guilty. This case does not present that question as Alvarez requested full discovery from the defendant and never waived the *Brady* right that Texas courts afford all defendants.

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made and was for ineffective assistance of counsel claims asserted by those who pleaded guilty. If a defendant admitted guilt, how could he later complain that with better lawyering he might have been acquitted? Indeed, the right to effective assistance of counsel was sometimes framed, as *Brady* has sometimes been, only as a fair trial right. *Strickland v. Washington*, 466 U.S. 668, 686 (1984) (explaining that “in giving meaning to the requirement” of effective assistance, “we must take its purpose—to ensure a fair trial—as the guide”); *see also United States v. Cronin*, 466 U.S. 648, 658 (1984) (“[T]he right to the effective assistance of counsel is recognized not for its own sake, but because of the effect it has on the ability of the accused to receive a fair trial.”); *see also* Michael Nasser Petegorsky, *Plea Bargaining in the Dark*, 81 FORDHAM L. REV. 3599, 3631 (2013) (“[L]ike *Brady*, the right to effective assistance was traditionally considered purely a trial right.”). Yet the Supreme Court has long recognized that a defendant can undo a guilty plea by showing that ineffective assistance caused him to make that decision rather than proceed to trial. *Hill v. Lockhart*, 474 U.S. 52, 56–57 (1985). The Court’s rejection of the view “that a knowing and voluntary plea supersedes error by defense counsel,” *Missouri v. Frye*, 566 U.S. 134, 141 (2012), reflects a realistic view of modern plea bargaining, which is influenced by a variety of structural and psychological forces in addition to traditional notions of risk assessment. *See* Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2463, 2507–10 (2004). A defendant may even plead guilty while maintaining his innocence. *North Carolina v. Alford*, 400 U.S. 25 (1970). As the Supreme Court has rejected the plea=waiver argument in the context of ineffective assistance

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claims, it is hard to see how it has much force in the *Brady* context.⁴ *Lafler*, 566 U.S. at 164.

Another argument against applying *Brady* to pleas is that its materiality inquiry is often framed in terms of the impact the exculpatory information would have had on the trial. See *Matthew v. Johnson*, 201 F.3d 353, 361–62 (5th Cir. 2000).⁵ But the materiality standard sometimes refers more broadly to the effect on a “proceeding.” *Bagley*, 473 U.S. at 682 (“[E]vidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.”). That makes sense as *Brady* itself was a case about undisclosed evidence that required a new sentencing hearing but not a new trial. 373 U.S. at 90–91. And looking to ineffective assistance case law is again instructive. *Strickland*’s prejudice requirement developed in tandem with the *Brady* materiality standard. In *Bagley*, the Court recognized it had “relied on and reformulated” the test for materiality from *Brady* cases (the *Augers* test) in *Strickland*. 473 U.S. at 681–82. It then decided the same refined standard should apply in *Brady* cases, concluding “the *Strickland* formulation” was “sufficiently flexible to cover [all] cases of prosecutorial failure to disclose evidence favorable to the accused: [t]he evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.” *Id.* at 682. And as I have already noted, the Supreme Court recently rejected the argument that attorney errors “before

⁴ Indeed, *United States v. Ruiz*, 536 U.S. 622 (2002), which will be discussed in more depth later, did not use a waiver rationale in rejecting a right to impeachment evidence before a plea.

⁵ It is worth noting that *Matthew* did not review de novo the question of *Brady*’s application to pleas. It was a habeas case so the holding was only that *Teague v. Lane*, 489 U.S. 288 (1989), barred recognizing the right on collateral review. 201 F.3d at 369-70.

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trial . . . are not cognizable under the Sixth Amendment unless they affect the fairness of the trial itself.” *Lafler*, 566 U.S. at 164–65. It concluded “the right to adequate assistance of counsel cannot be defined or enforced without taking account of the central role plea bargaining plays in securing convictions.” *Id.* at 170. The materiality standard thus does not pose a problem because it is already applied in ineffective assistance cases to assess whether the absence of attorney error would have changed the plea decision. *Armstrong v. Scott*, 37 F.3d 202, 206 (5th Cir. 1994); *see also Huebler*, 275 P.3d at 203 (applying to a defendant who pleaded a *Brady* materiality standard asking “whether there is a reasonable probability that but for the failure to disclose the *Brady* material, the defendant would have refused to plead and would have gone to trial”). It would be anomalous if the *Strickland* right that is found in the trial-focused Sixth Amendment applied to pleas but the due process *Brady* right did not.

The Department of Justice opposes a pre-plea *Brady* right in part because of its belief that such a rule “would impose serious costs on the criminal justice system” by making pleas less efficient. DOJ Amicus Brief 15. That concern is puzzling because, as it acknowledges, its own policy requires federal prosecutors to turn over exculpatory evidence “reasonably promptly after it is discovered.” UNITED STATES ATTORNEY’S MANUAL (USAM) § 9-5.001(D)(1).⁶ Court rules in 20 federal judicial districts, including Local

⁶ The U.S. Attorneys’ Manual distinguishes between exculpatory and impeachment evidence. As mentioned above, the former must be disclosed “promptly after it is discovered.” USAM § 9-5.001(D)(1). The latter must be disclosed “at a reasonable time before trial to allow the trial to proceed efficiently.” *Id.* § 9-5.001(D)(2). That later in time disclosure of impeachment evidence may be further delayed if the benefits of pretrial disclosure are outweighed by “other significant interests—such as witness security or national security.” *Id.* The exception for early disclosure of exculpatory information is narrower, limited to “classified or otherwise sensitive national security material.” *Id.* § 9-5.001(D)(1). This confirms that the costs of disclosing impeachment evidence pre-plea are greater than the

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Criminal Rule 16 in the Western District of Texas which usually vies with the Southern District of Texas for the largest number of federal prosecutions each year, impose a more definite early disclosure requirement: *Brady* material must be disclosed within two weeks of arraignment, which in almost every case will be before a plea is entered. FEDERAL JUDICIAL CENTER, *BRADY V. MARYLAND* IN THE UNITED STATES DISTRICT COURTS: RULES, ORDERS, AND POLICIES 16 (2007) (table listing 20 districts that require *Brady* disclosures within two weeks of arraignment or when the defendant enters a “not guilty plea”). And ethical rules in a number of states, including all three that make up this circuit, require the same of prosecutors. TEX. DISCIPLINARY R. PROF’L CONDUCT § 3.09(d) (1989); LA. R. PROF’L CONDUCT § 3.08(d) (2004); MISS. R. PROF’L CONDUCT § 3.08(d) (all based on Rule 3.8 of the American Bar Association’s Rules of Professional Conduct).⁷ Indeed, DOJ cites its policy and the ethical rules as reasons why applying *Brady* to pleas is unnecessary. But if these policies and rules of professional responsibility are resulting in early disclosure of exculpatory evidence, wouldn’t that impose the same costs that a corresponding *Brady* right would? The source of the disclosure obligation shouldn’t change the cost of compliance. What is different is that a constitutional obligation provides the defendant with a remedy when a prosecutor fails to comply due to either negligence or malice. A violation of DOJ, court, or ethical rules would not have helped Alvarez when he learned

costs of disclosing exculpatory information, a factor that distinguishes the Supreme Court’s *Ruiz* decision from the question we confront. *See infra* p. 10–11.

⁷ MODEL RULES OF PROF’L CONDUCT R. 3.8(D) (2012) (requiring prosecutors to “make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense”); ABA COMM. ON ETHICS AND PROF’L RESPONSIBILITY, Formal Op. 09-454 (2009) (clarifying that disclosure must be made pre-plea to satisfy “significant purpose” of assisting defendants in making intelligent plea-bargaining decisions).

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about the undisclosed video. *See* USAM § 1-1.100 (explaining that the U.S. Attorney’s Manual does not create any rights enforceable in court).

But we do not have to guess whether requiring pre-plea disclosure of exculpatory evidence as a constitutional matter would inhibit plea bargaining. We can look to experience, as a number of jurisdictions have such a rule. *See Lafler*, 566 U.S. at 164, 172 (discounting administrability and “floodgate” concerns about applying ineffective-assistance-of-counsel claims to the rejection of plea agreements because a number of circuits had already done so “without demonstrated difficulties or systemic disruptions”); *cf.* Jeffrey S. Sutton, 51 IMPERFECT SOLUTIONS: STATES AND THE MAKING OF AMERICAN CONSTITUTIONAL LAW 2 (observing that when state courts have recognized a right under state constitutions, their experience can influence administrability concerns with recognizing a corresponding right under federal law). Since 1979, Texas state courts have read the Due Process Clause to require disclosure of exculpatory evidence to defendants who plead guilty. A number of other states read *Brady* the same way. *See Buffey v. Ballard*, 782 S.E.2d 204, 216 (W. Va. 2015); *State v. Huebler*, 275 P.3d 91, 96–97 (Nev. 2012); *Hyman v. State*, 723 S.E.2d 375, 380 (S.C. 2012); *Medel v. State*, 184 P.3d 1226, 1235 (Utah 2008); *State v. Gardner*, 885 P.2d 1144, 1149 (Idaho Ct. App. 1994). Some federal circuits have also applied *Brady* to plea cases either before or after the Supreme Court’s decision in *Ruiz*. *See Campbell v. Marshall*, 769 F.2d 314, 324 (6th Cir. 1985); *White v. United States*, 858 F.2d 416, 422 (8th Cir. 1988); *Sanchez v. United States*, 50 F.3d 1448, 1453 (9th Cir. 1995); *United States v. Avellino*, 136 F.3d 249, 255 (2d Cir. 1998); *United States v. Ohiri*, 133 F. App’x 555, 560–61 (10th Cir. 2005). Yet these decisions have not impeded ever-rising rates of pleas. In recent years, roughly 97% of federal convictions were the result of a plea. *Lafler*, 566 U.S. at 170. 94.6% of Texas cases were

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resolved via plea in 2016. OFFICE OF COURT ADMIN., ANNUAL STATISTICAL REPORT OF THE TEXAS JUDICIARY: FY 2016 at Detail-10 (2016); available at <http://bit.ly/2mcF9vp>. In terms of the trend, recent decades have seen a 10-25% increase in the percentage of convictions obtained through pleas. *Compare Lafler*, 566 U.S. at 170 (reporting that “ninety-four percent of state convictions are the result of guilty pleas”), *with Brady v. United States*, 397 U.S. 742, 752 n.10 (1970) (estimating that between 75 and 85% of all felony convictions were pleas). The rise of the plea is seemingly inexorable and there is no reason to believe that a pre-plea *Brady* rise gets in its way.

There is one other problem with DOJ’s concerns about the workability of a pre-plea *Brady* requirement. From the beginning, the *Brady* right has covered information that might be favorable to a defendant at sentencing. So as the government conceded at oral argument, a plea does not excuse its obligation to disclose any evidence in the prosecution’s file that might mitigate the defendant’s sentence. This means it is not a matter of whether exculpatory information is produced but when—either before the plea or after the plea but before sentencing. *See* USAM § 9-5.001(D)(3) (requiring the production of “[e]xculpatory and impeachment information that casts doubt upon proof of an aggravating factor at sentencing” when the presentence investigation begins). Because at some point in a federal prosecution “the government would have to search the files of all members of the prosecution team for potentially exculpatory material,” DOJ Br. 16, there is little added burden of requiring that production at an earlier point in the case.

For all these reasons, there is little evidence suggesting that our court’s following the *Brady* rule that many other jurisdictions already apply would

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create any meaningful obstacle to plea bargaining.⁸ But even if it did, query whether a system in which 97% of defendants plead guilty is already placing too great a premium on the need for speedy pleas at the expense of the truth-finding function of the courts. *See* BIBAS, *Plea Bargaining's Role in Wrongful Convictions*, at 157 (critiquing modern plea bargaining because it “put[s] efficiency ahead of accuracy”).

That leaves *United States v. Ruiz*, 536 U.S. 622 (2002). It held the government is not required to disclose “impeachment information relating to any informants or other witnesses” prior to entering a plea agreement. *Id.* at 625. *Ruiz* did not present the question of exculpatory evidence because the government agreed in the plea agreement to turn over “any [known] information establishing the factual innocence of the defendant.”⁹ *Id.* at 625; *see also id.* at 629 (“We must decide whether the Constitution requires that preguilty plea disclosure of impeachment information.”). Indeed, in conducting a due process balancing test to determine whether there was a right to pre-plea impeachment evidence, the Court explained that the agreement to give *Ruiz* exculpatory evidence “diminish[ed]” the risk that “in the absence of impeachment information, innocent individuals, accused of crimes, w[ould] plead guilty.” *Id.* at 631. If *Brady* does not apply as a categorical matter to defendants who plead guilty, saying just that in *Ruiz* would have resulted in a much simpler and shorter opinion. That was the approach of Justice Thomas’s

⁸ A pre-plea *Brady* right might also apply on when the defendant requests discovery, which would further mitigate any costs on the system. Alvarez made that request.

⁹ Notably, the federal government asked the Court to decide the broader question of whether defendants who plead have a right to exculpatory information. Brief for the United States, *United State v. Ruiz*, at I (“Questions Presented: 1. Whether before pleading guilty, a criminal defendant has a constitutional right to obtain material exculpatory information, including impeachment information, from the prosecution.”). But the Court did not accept that invitation.

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one-paragraph concurring opinion that no other justice joined. *See id.* at 633–34 (Thomas, J., concurring).

Instead the Court applied the balancing test. On the benefit side of that equation, it explained that impeachment evidence has value in terms of the “*fairness of a trial*” but not to whether a plea was knowing and intelligent. *Id.* at 629. Impeachment evidence is not “critical information,” it further explained, as its relevance may become clear only in the context of a trial. *Id.* at 630. Until trial, for example, a defendant may not know if the government will call the witness who has the credibility problems. The less direct connection of impeachment evidence to the ultimate “guilt or innocence” question is reflected in the fact that it took nearly a decade for the Supreme Court to confirm that *Brady* included an obligation to disclose even at trial “evidence affecting [witness] credibility.” *Giglio v. United States*, 405 U.S. 150, 154 (1972). Exculpatory evidence—that which goes directly to the “factual innocence of the defendant,” *Ruiz*, 536 U.S. at 631, and is valuable on its face without requiring independent knowledge of the prosecutor’s trial strategy—has much greater value as *Ruiz* recognizes when it observes that its disclosure meant there was not much additional benefit to be gained from also disclosing impeachment evidence before a plea. *Id.* at 631. Production of exculpatory evidence provides a greater safeguard against innocent defendants pleading guilty, both because it informs innocent defendants they have a substantial chance of showing their innocence at trial as opposed to just casting doubt on government witnesses and because prosecutors required to provide such evidence lose the incentive to push for guilty pleas to obscure weak cases. *See Huebler*, 275 P.3d at 97–98 (“While the value of impeachment information may depend on innumerable variables that primarily come into play at trial and therefore arguably make it less than critical information in entering a guilty

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plea, the same cannot be said of exculpatory information, which is special not just in relation to the fairness of a trial but also in relation to whether a guilty plea is valid and accurate.”).

That latter point recognizes a serious risk of requiring *Brady* disclosures only when a case is tried: it incentivizes prosecutors to offer favorable pleas in cases with exculpatory evidence. That is already the type of case in which a prosecutor’s desire for a plea agreement is strongest. Bibas, *Plea Bargaining in the Shadow of Trial*, *supra*, at 2473 (explaining that self-interest leads prosecutors to “make irresistible offers in weak cases”). Without a *Brady* requirement, there is an additional benefit from pleading out a weak case: the plea prevents the defendant from being able to undo the conviction if he later discovers that the government possessed exculpatory evidence. *Sanchez*, 50 F.3d at 1435 (“[I]f a defendant may not raise a *Brady* claim after a guilty plea, prosecutors may be tempted to deliberately withhold exculpatory information as part of an attempt to elicit guilty pleas.”); *see also United States v. Fisher*, 711 F.3d 460, 469 (4th Cir. 2013); *United States v. Nelson*, 979 F. Supp. 2d 123, 130 (D.D.C. 2013). This is on top of the interest prosecutors already have to resolve their weakest cases with a plea agreement.

The cost side of the *Ruiz* balancing inquiry is also less favorable to the government when it comes to exculpatory evidence. The primary problem the Court saw with pre-plea disclosure of *Giglio* evidence was requiring the government to identify the witnesses it would call at a trial that would never happen because of the plea. This interfered with the rules governing disclosure of witnesses, posed risks of revealing the identities of informants and undercover agents, and eliminated some of the time savings that pleas typically bring by avoiding trial prep. *Ruiz*, 536 at 631–32. Indeed, prosecutors often do not even learn about credibility problems with

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witnesses—by running criminal background checks for example—until they have come up with their witness list. In contrast, prosecutors generally are aware of any evidence they possess that suggests a defendant’s innocence by the time they enter into plea negotiations if not earlier when they bring charges.

The final proof that *Ruiz* did not decide the question of pre-plea disclosure of exculpatory evidence—and that the result might be different for this category—are the cases that have come after it. Soon after *Ruiz*, the Seventh Circuit predicted that “it is highly likely that the Supreme Court would find a violation of the Due Process Clause if prosecutors or other relevant government actors have knowledge of a criminal defendant’s factual innocence but fail to disclose such information to a defendant before he enters into a guilty plea.” *McCann v. Mangialardi*, 337 F.3d 782, 788 (7th Cir. 2003). It recognized that “*Ruiz* indicates a significant distinction between impeachment information and exculpatory evidence of actual innocence,” though the Seventh Circuit did not ultimately decide the question because there was insufficient evidence that the government suppressed the evidence in that case. *Id.* at 787. The Tenth Circuit, again noting a critical distinction between exculpatory evidence and the impeachment evidence in *Ruiz*, did decide the question in favor of a right of pleading defendants to exculpatory evidence. *See United States v. Ohiri*, 133 F. App’x 555, 562 (10th Cir. 2005). So have a number of federal district courts. *Nelson*, 979 F. Supp. 2d at 130 (“[I]n light of the balance of circuit court precedent and the purpose of *Brady*, Nelson can assert his *Brady* claim to argue that his guilty plea was not knowing and voluntary”); *United States v. Danzi*, 726 F. Supp. 2d 120, 128 (D. Conn. 2010) (declining “the Government’s invitation to hold that *Ruiz* applies to exculpatory as well as impeachment material”); *Ollins v. O’Brien*, 2005 WL

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730987, *11 (N.D. Ill. 2005) (“[T]he Court finds the *Ruiz* distinction . . . persuasive and holds that due process requires the disclosure of information of factual innocence during the plea bargaining process.”). To be sure, other courts of appeals, while recognizing that *Ruiz* did not decide the question, have read it as casting doubt on the existence of a pre-plea right even to exculpatory evidence though none has done as we have and actually rejected that right. *Friedman v. Rehal*, 618 F.3d 142, 154 (2d Cir. 2010) (explaining that “*Ruiz* did not expressly abrogate [its prior caselaw] as applied to all *Brady* material” but noting it creates uncertainty about whether exculpatory material needed to be produced pre-plea); *United States v. Moussaoui*, 591 F.3d 263, 285 (4th Cir. 2010), *as amended* (Feb. 9, 2010)¹⁰; *cf. United States v. Mathur*, 624 F.3d 498, 507 (1st Cir. 2010) (emphasizing *Brady* is a trial right and observing “[t]he *Ruiz* Court evinced a reluctance to extend a *Brady*-like right to the realm of pretrial plea negotiations” in a case when a defendant went to trial but argued that if he had been provided exculpatory material before trial he would have pleaded guilty).

And we should not make the common mistake of treating federal decisions as the universe of caselaw on this issue. Our state court peers also interpret the federal Constitution. Four state supreme courts have held since *Ruiz* that the federal *Brady* right applies to exculpatory evidence at the plea phase, and the Texas Court of Criminal Appeals has reaffirmed its long ago adoption of that view. *Buffey*, 782 S.E.2d at 216 (“[T]he better-reasoned authority supports the conclusion that a defendant is constitutionally entitled

¹⁰ In a more recent decision the Fourth Circuit allowed a defendant to vacate a guilty plea when he later learned that law enforcement had lied in applying for a search warrant that led to evidence of guilt. *Fisher*, 711 F.3d at 460. It did so not on *Brady* grounds, but on the ground that the suppression of that information made the plea unknowing. *Id.* at 471.

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to exculpatory evidence during the plea negotiation stage.”); *Hyman*, 723 S.E.2d at 380 (noting that an applicant can challenge the “voluntary nature of a guilty plea” by asserting a *Brady* violation); *Huebler*, 275 P.3d at 96–97 (concluding that “the due-process calculus also weighs in favor of the added safeguard of requiring the State to disclose material exculpatory information before the defendant enters a guilty plea”); *Medel*, 184 P.3d at 1235 (providing the requirements for a guilty plea to be rendered involuntary based on a *Brady* violation); *Johnson*, 2009 WL 1396807, at *1; (vacating a guilty plea because of a *Brady* violation); *id.* at *1–*2 (Cochran, J. concurring) (explaining that “*Ruiz*, by its terms, applies only to material *impeachment* evidence”); *see also State v. Kenner*, 900 So. 2d 948, 952–53 (La. App. 4 Cir. 2005), *reversed on other grounds*, 917 So. 2d 1081 (La. 2005). No state high court has ruled the other way. *See* WAYNE LAFAYE, ET AL. 5 CRIM. PROC. § 21.3(c) (4th ed. 2015) (noting that “certainly the better view” is of those courts that require *Brady* disclosure of exculpatory evidence to defendants who plead).

The facts from one of those state court cases highlights the stakes of this issue and the dynamics that can lead an innocent person to plead guilty. Joseph Buffey was 19 when he was arrested for three breaking-and-entering offenses of businesses. *Buffey*, 782 S.E.2d at 207. The week before his arrest, an intruder had robbed and brutally raped an 83-year-old woman in the same town. *Id.* at 206. During an interrogation that lasted nine hours, Buffey at first repeatedly denied that he committed the robbery and sexual assault. *Id.* at 207. Hours into the questioning, and past 3:00 in the morning, he told the officers he had broken into “[t]his old lady’s house” but said he could not recall any assault. *Id.* When the officers later told him he should be able to recall more details, Buffey recanted saying “You really want to know the truth? . . . I didn’t do it.” *Id.* He explained that he had only confessed to breaking into the

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house because an officer was “breathing down my neck” and “I couldn’t tell you what went on in there.” *Id.*

After Buffey was charged with the rape, the state forensic lab tested DNA from the victim’s rape kit. *Id.* at 208. It issued a report stating that “assuming there are only two contributors (including [Mrs. L]), Joseph Buffey is excluded as the donor of the seminal fluid identified [from the rape kit] cuttings.” *Id.* (brackets in original). Although Buffey’s counsel had filed a motion for production of all materials related to the assault, the prosecutor never disclosed the forensic report. *Id.*

Having made at least a partial confession to the crimes, Buffey accepted a time-limited offer to plea to the robbery and sexual assault counts in exchange for the state dropping the three charges for burglary of a business. *Id.* at 209. The court accepted Buffey’s plea six weeks after the lab determined that the DNA was not his. *Id.* at 208–09. The court sentenced Buffey to a total term of 70-100 years in prison. *Id.* at 209.

After Buffey had spent eight years in prison, a court granted his request for DNA testing in a habeas motion. *Id.* at 210. The results exonerated Buffey, and he also learned that the government knew of similar results in 2002 before the court accepted his plea. *Id.* Because the state supreme court acknowledged a right to exculpatory evidence even for defendants who pleaded guilty, Buffey did not have to spend the rest of his life in prison. *Id.* at 221. And a DNA match was finally made to the person who had committed the rape, someone with a history of sexual violence living a few blocks from the victim who was not arrested in 2002 because Buffey had been wrongfully convicted. *Id.* at 210.

This “double injustice”—because it resulted in “convicting the innocent and freeing the guilty,” Amicus Br. for National Association of Criminal Defense Lawyers 13—is not an isolated event. An amicus brief from a group

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of former federal and state prosecutors notes that the National Registry of Exonerations has identified 73 Americans who pleaded guilty to murder or manslaughter but were later exonerated. See NATIONAL REGISTRY OF EXONERATIONS, available at www.law.umich.edu/special/exoneration/Pages/detaillist.aspx (searching for “P,” pleas, and those offenses lists 54 exonerations for defendants who pleaded guilty to murder and 19 for manslaughter). And more than 10% of the 353 Americans whom the Innocence Project has helped exonerate through DNA evidence pleaded guilty. THE INNOCENCE PROJECT, *DNA Exonerations in the United States*, available at www.innocenceproject.org/dna-exonerations-in-the-united-states (noting that 40 of 358 exonerees pled guilty). Scholars believe false guilty pleas are even more common for less serious offenses when the cost-benefit analysis makes a plea that results in a minor sentence enticing. John H. Blume & Rebecca K. Helm, *The Unexonerated: Factually Innocent Defendants Who Plead Guilty*, 100 CORNELL L. REV. 157, 173 (2014); see also Bibas, *Plea Bargaining Outside the Shadow of Trial*, *supra*, at 2495 (explaining that “[p]rosecutorial bluffing is likely to work particularly well against innocent defendants, who are on average more risk averse than guilty defendants”); Samuel R. Gross & Barbara O’Brien, *Frequency and Predictors of False Conviction: Why We Know So Little and New Data on Capital Cases*, 5 J. EMPIRICAL LEGAL STUD. 927, 930 (2008) (“[I]t is entirely possible that most wrongful convictions . . . are based on negotiated guilty pleas to comparatively light charges.”). Alvarez is an example. He elected to plead guilty and accept a suspended sentence of eight years with ten years probation rather than risk a trial where he faced mandatory prison time if convicted. Of course, because he violated the terms of probation he ended up going to prison, only to be saved from serving a full sentence when the video was discovered.

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Judicial opinions often extol liberty. As well they should when applying a Constitution that begins with a promise to “secure the Blessings of Liberty to ourselves and our Posterity” and prohibits both federal and state governments from depriving a person of that liberty without due process of law. U.S. CONST. Preamble, amends. V, XIV. It is difficult to think of greater deprivations of that liberty than the government’s allowing someone to be held in prison without telling him that there is evidence that might exonerate him. That tragic situation offends the “twofold aim” of our justice system, “which is that guilt shall not escape or innocence suffer.” *Berger v. United States*, 295 U.S. 78, 88 (1935). Due process requires more than we afford the accused today.

ARTICLES

SEPARATION OF POWERS AND THE CRIMINAL LAW

Rachel E. Barkow*

Scholars have written volumes about the separation of powers, but they have focused on the administrative state and have wholly ignored the criminal state. Judges, too, have failed to distinguish criminal from administrative matters. So, the conventional wisdom has been that whatever theory works for the administrative state should work for anything else, including criminal matters. Because most scholars and judges have supported a flexible or functional approach to separation of powers in the regulatory sphere, they have failed to see a problem with the functional approach in criminal cases. Indeed, the Supreme Court has been even more permissive of the blending of powers in the criminal context than it has in cases involving nonpenal laws.

This Article shows why the existing functional approach to separation of powers in criminal matters cannot be squared with constitutional theory or sound institutional design. It explains that there are crucial differences between administrative and criminal matters when it comes to the separation of powers. Maintaining the separation of powers in criminal matters has strong roots in the Constitution's text and structure. Moreover, unlike the administrative law context, where agencies must adhere to the structural and procedural protections of the Administrative Procedure Act and their decisions are subject to judicial review and political oversight, the government faces almost no institutional checks when it proceeds in criminal matters. The only safeguards come from the

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individual rights provisions of the Constitution, but those act as poor safeguards against structural abuses and inequities. The current arrangement therefore takes the worst possible approach to separation of powers in the criminal context. The protection provided by the separation of powers is weakened, but nothing takes its place. As a result, the potential for government abuse is, perversely, greater in criminal proceedings than in regulatory matters. This Article therefore advocates more stringent enforcement of the separation of powers in criminal cases, where it is most needed. This approach would lead to different outcomes in the Court's major separation of powers cases dealing with criminal matters and would result in a rethinking of its acceptance of unreviewable prosecutorial discretion over charging and plea bargaining.

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INTRODUCTION

It is a familiar premise that the Constitution separates legislative, executive, and judicial power to prevent tyranny and protect liberty.¹ By preventing any one branch from accumulating too much authority, the separation of powers aims “not to promote efficiency but to preclude the

1. As James Madison declared in the Federalist Papers, “The accumulation of all powers legislative, executive and judiciary in the same hands, whether of one, a few or many, and whether hereditary, self appointed, or elective, may justly be pronounced the very definition of tyranny.” THE FEDERALIST NO. 47, at 324 (James Madison) (J. Cooke ed., 1961).

exercise of arbitrary power.”² The price of separation is that it makes it more difficult for the federal government to act—whether for good or bad purposes.³

The rise of the administrative state put a spotlight on this cost of the separation of powers. New Dealers in favor of a more efficient and active federal government argued for a relaxation of the division of powers to allow agencies to combine government functions in order to address social and economic ills.⁴ Instead of relying on separated powers as the primary means of protection against government abuse, they proposed other checks on state power. For example, the Administrative Procedure Act (APA) requirements of notice and comment,⁵ of separation between law enforcers and adjudicators,⁶ and of judicial review⁷ were designed to perform the same functions as the Constitution’s separation of powers safeguards, but without hamstringing the government’s ability to respond rapidly to the nation’s problems.

The Supreme Court has accepted this compromise for administrative agencies. While the Court has rejected some institutional arrangements that strayed too far from the constitutional separation of powers,⁸ it has allowed considerable blending of executive, judicial, and legislative power in regulatory agencies.⁹ At the same time, the Court has taken an expansive reading of the

2. *Myers v. United States*, 272 U.S. 52, 293 (1926) (Brandeis, J., dissenting). Burt Neuborne colorfully puts it this way:

[T]he principle of “negative separation” views government power as a bomb so potent that no single organ can be trusted with the formula. . . . Negative separation argues that the functions of government be carefully labeled and rigorously parceled out to distinct governmental bodies as a prophylactic against threats to individual liberty.

Burt Neuborne, *Judicial Review and Separation of Powers in France and the United States*, 57 N.Y.U. L. REV. 363, 372 (1982).

3. See GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787*, at 604 (2d ed. 1998) (observing that the separation of powers “was designed to provide for the safety and ease of the people, since ‘there will be more obstructions interposed’ against errors and frauds in government”) (quoting John Dickinson); Philip B. Kurland, *The Rise and Fall of the “Doctrine” of Separation of Powers*, 85 MICH. L. REV. 592, 601 (1986) (“[T]he underlying, if unstated, premise of all theories of separation seems to have been a minimalist government.”).

4. As James Landis observed,

when government concerns itself with the stability of an industry it is only intelligent realism for it to follow the industrial rather than the political analogue. It vests the necessary powers with the administrative authority it creates, not too greatly concerned with the extent to which such action does violence to the traditional tripartite theory of government organization.

JAMES M. LANDIS, *THE ADMINISTRATIVE PROCESS* 11-12 (1938).

5. 5 U.S.C. § 553 (2006).

6. §§ 554, 556-557.

7. § 706.

8. See *infra* text accompanying notes 27-34.

9. See, e.g., *Commodity Futures Trading Comm’n v. Schor*, 478 U.S. 833 (1986) (allowing agency adjudication of state law counterclaims); *Humphrey’s Ex’r v. United States*, 295 U.S. 602, 627-28 (1935) (approving of the FTC’s “quasi-legislative” and “quasi-judicial” powers, in addition to its executive powers); *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 409 (1928) (allowing legislative delegations as long as there is an

APA to check government abuse.¹⁰

Scholars have filled volumes analyzing the relationship between the separation of powers and the administrative state.¹¹ Some have argued that the Court's allowance of blending promotes good government and accords with the Constitution.¹² Others have claimed that the existing administrative state flouts the basic structure of the Constitution and that the Court has been too permissive of government schemes that combine powers.¹³

What has been completely overlooked in both the scholarly literature and the Supreme Court's decisions is what the separation of powers requires when the government proceeds in a criminal action. Criminal cases could be viewed in one of three ways. One approach would be to treat separation of powers questions in criminal cases no differently than they are treated in administrative law cases. Just as in the administrative law context, some blending of powers would be permitted to allow the federal government to respond more readily to criminal matters. At the same time, and again following the administrative law model, other checks should take the place of the constitutional separation of powers to ensure that the government does not abuse its power.

A second alternative would be to distinguish criminal matters from administrative ones. Because state power is at its apex in the criminal context and the consequences of abuse are so high—an individual could lose his or her liberty or even life—this view would require strict adherence to separation of

intelligible principle for the delegatee to follow).

10. See, e.g., *Motor Vehicle Mfrs. Ass'n, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 40-42 (1983) (providing hard-look review of agency rules); *Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951) (requiring that agency findings be supported by substantial evidence); see also *Morgan v. United States*, 298 U.S. 468 (1936) (requiring agency decisionmaker to consider evidence presented).

11. For a small sampling of this vast literature, see DAVID SCHOENBROD, *POWER WITHOUT RESPONSIBILITY: HOW CONGRESS ABUSES THE PEOPLE THROUGH DELEGATION* (1993); Peter H. Aranson et al., *A Theory of Legislative Delegation*, 68 CORNELL L. REV. 1 (1982); Steven G. Calabresi & Joan L. Larsen, *One Person, One Office: Separation of Powers or Separation of Personnel?*, 79 CORNELL L. REV. 1045 (1994); Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245 (2001); Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1 (1994); John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 COLUM. L. REV. 612 (1996); Peter H. Schuck, *Delegation and Democracy: Comments on David Schoenbrod*, 20 CARDOZO L. REV. 775 (1999); Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573 (1984).

12. See, e.g., Harold H. Bruff, *Presidential Powers and Administrative Rulemaking*, 88 YALE L.J. 451 (1979); Lessig & Sunstein, *supra* note 11; Strauss, *supra* note 11.

13. See generally Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power To Execute the Laws*, 104 YALE L.J. 541 (1994); Stephen L. Carter, *Constitutional Improprieties: Reflections on Mistretta, Morrison, and Administrative Government*, 57 U. CHI. L. REV. 357 (1990); Stephen L. Carter, *The Independent Counsel Mess*, 102 HARV. L. REV. 105 (1988); Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231 (1994); Lee S. Liberman, *Morrison v. Olson: A Formalistic Perspective on Why the Court Was Wrong*, 38 AM. U. L. REV. 313 (1989).

powers to make sure that the state acts appropriately against an individual. Under this approach, then, the need for government flexibility and expediency may justify blending when the government proceeds civilly but not when it proceeds in a criminal action.

Current law follows a third way. Criminal cases are not distinguished from administrative law cases, so the separation of powers is often relaxed to allow a blending of powers when the government claims it is necessary in the name of expediency.¹⁴ Indeed, the Court has been even more permissive in the criminal context than it has in cases involving nonpenal laws.¹⁵ But unlike the administrative law context, where agencies must adhere to the structural and process protections of the APA and their decisions are subject to judicial review, the government faces almost no institutional checks when it proceeds in criminal matters. The only safeguards come from the individual rights provisions of the Constitution, but those checks act as poor safeguards against *structural* abuses and inequities.

The current arrangement therefore takes the worst possible approach to separation of powers in the criminal law. The protection provided by the separation of powers is relaxed, but nothing takes its place. As a result, the potential for government abuse is, ironically, higher in the criminal context than in other regulatory spheres.

This perverse state of affairs has been overlooked in the literature because scholars have failed to treat criminal law as a separate category for analysis. Instead, questions involving the oversight of the administrative and regulatory state have tended to dominate the discussion of separation of powers.¹⁶ So, the conventional wisdom has been that whatever theory works for the administrative state should work for anything else, too. And because most scholars have supported a flexible or functional approach that allows the concentration of different powers in one actor in the regulatory sphere, they have failed to see a problem with that same approach when it is applied to criminal matters.¹⁷

This Article breaks from that tradition and argues that the existing approach to separation of powers in criminal matters cannot be squared with constitutional theory or sound institutional design. Although the administrative

14. See *infra* Part I.

15. See *id.*

16. Indeed, because administrative state questions have been the prototype, most scholars have addressed the question of separation of powers as a critical inquiry for administrative law. Thus, constitutional separation of powers is standard fare in administrative law textbooks and classes.

17. See, e.g., Stephanie A.J. Dangel, *Is Prosecution a Core Executive Function?* Morrison v. Olson and the Framers' Intent, 99 YALE L.J. 1069 (1990); Neal Devins, *Congressional Factfinding and the Scope of Judicial Review, A Preliminary Analysis*, 50 DUKE L.J. 1169 (2001); Lessig & Sunstein, *supra* note 11; William V. Luneburg, *Civic Republicanism, The First Amendment, and Executive Branch Policymaking*, 43 ADMIN. L. REV. 367 (1991).

state has structural and process protections that can justify some flexibility in the separation of powers, those checks are absent in the criminal context. And in their absence, it is critically important to maintain a strict division of powers.

The Article proceeds in three parts. Part I explores the Supreme Court's treatment of separation of powers claims, with particular emphasis on the criminal cases. As Part I explains, the Court does not employ a stricter test of separation of powers for criminal law cases than it does for administrative law cases. Just the opposite, the Court has allowed a greater relaxation of the separation of powers in its criminal cases.

Part II critiques the existing approach to separation of powers. As Part II explains, there are two key arguments for being more vigilant in protecting the separation of powers when the state proceeds in a criminal action. First, as a matter of traditional constitutional interpretation, a strict separation of powers in criminal law matters has a stronger textual and historical pedigree than in other contexts. The Constitution explicitly confronts the dangers of an abusive state in the context of criminal proceedings in several textual provisions that reflect a strict division of authority among the three branches and that give each branch a strong check on the others in criminal proceedings.¹⁸ Indeed, convictions require all three branches of government to agree, as well as the approval of a jury. In contrast, most other questions of separation of powers arise in administrative law contexts that the Constitution does not explicitly address.¹⁹ Similarly, while the Framers did not confront the question of how to divide and balance government functions in light of the rapid expansion during the Industrial Revolution and the rise of the administrative state—the foundational premise for most functional theories of separation of powers that allow a blending of functions to create a more efficient government—they did have experience with the state's use and abuse of the criminal laws. Indeed, questions of state criminal power occupy a great deal of the Constitution's structure precisely because concentrated power in criminal matters was a danger of which the Framers were well aware. They feared the tyranny of majorities that would seek to oppress opponents through the use of criminal laws. They therefore established a constitutional structure that separates power among the branches and gives the judiciary (judges and juries) a particularly strong role in enforcing that separation. The individual rights protection provided by the separation of powers²⁰ has no greater purchase than in cases

18. See, e.g., *infra* Part II.A.

19. See JERRY L. MASHAW, GREED, CHAOS, AND GOVERNANCE: USING PUBLIC CHOICE TO IMPROVE PUBLIC LAW 107 (1997) (discussing the separation of powers challenges posed by the administrative agency); Jody Freeman, *The Private Role in Public Governance*, 75 N.Y.U. L. REV. 543, 545 (2000) (noting that “[a]gencies can claim . . . only a dubious constitutional lineage” because “the framers made no explicit provision for them, but instead divided power among the legislative and judicial branches and a unitary executive”); Strauss, *supra* note 11, at 604 (stating that “the actual text of the Constitution says little about the structure of the federal government beneath the apex”).

20. As G. Edward White has observed, “The general justification for judicial

involving criminal defendants, for those were precisely the instances of abuse at the forefront of the minds of the Framing generation. So while there are strong arguments for accommodating the Constitution to changing circumstances in the case of unanticipated administrative law questions, those arguments are not as strong when it comes to matters of criminal law.

The second reason for maintaining a strict separation of powers when the federal government uses its criminal power, as Part II explains, rests on functional concerns. The state poses no greater threat to individual liberty than when it proceeds in a criminal action. Those proceedings, after all, are the means by which the state assumes the power to remove liberty and even life. Yet there are currently almost no institutional checks on federal criminal power. First, federal prosecutors face no restrictions on their powers that are comparable to the complex code of conduct and organizational design established by the APA. The federal agency responsible for setting federal sentences, the United States Sentencing Commission, likewise differs from virtually all other agencies because its rules cannot be challenged as arbitrary and capricious under the APA. In addition, the political controls over governmental crime policy are not as balanced as they are in the regulatory sphere. Those accused of crimes are among the most politically anemic groups in the legislative process. Criminal defendants do not coalesce into an organized group, and those individuals and organizations that represent their interests tend to be disorganized and weak political forces. In contrast, powerful interests often lobby for more punitive laws. The executive branch in particular has an incentive to push for tough laws to encourage plea bargaining and cooperation. The politics of crime definition and sentencing are therefore far more lopsided than the politics associated with the administrative state, where it is more common to have groups on both sides of the issue that act to check government abuse of power.²¹ Thus, in the very area in which state power is most threatening—where it can lock away someone for years and impose the stigma of criminal punishment—institutional protections are currently at their weakest. While the numerous trial protections for criminal defendants aim to protect the interests of individuals, Part II explains why those rights-based protections do little to control the systemic abuse that the separation of powers regulates.

In light of these fundamental differences between criminal and administrative matters, Part III advocates a stricter test for policing separation

monitoring in separation of powers cases . . . is to prevent the evils of tyranny and arbitrariness associated with unconstrained invasions of individual liberty by government.” G. EDWARD WHITE, *THE CONSTITUTION AND THE NEW DEAL* 96-97 (2000). For an excellent discussion of how the separation of powers aims to serve individual liberty, see Rebecca L. Brown, *Separated Powers and Ordered Liberty*, 139 U. PA. L. REV. 1513 (1991).

21. See Rachel E. Barkow, *Administering Crime*, 52 UCLA L. REV. 715, 723-30 (2005) (comparing interest-group dynamics of criminal sentencing with other regulatory contexts).

of powers claims in criminal cases than the functional analysis currently employed by the Court. In the literature on separation of powers, this is typically referred to as a “formalist” approach to separation of powers, where legislative, executive, and judicial powers are to be separated and novel arrangements that allow a blending of functions or a weakening of one branch’s power are disallowed. This is typically contrasted with the “functional” approach, which allows a case-by-case inquiry to see if the particular relaxation of separation of powers in a given case will result in an inappropriate aggrandizement of one branch’s power over another.

The view advanced here is not formalism for the sake of formalism, however. Rather, as Part III explains, the argument for strict enforcement of the separation of powers in criminal matters is grounded in functional reasons.²² The problem with an approach to separation of powers that looks at the facts and circumstances of each case is that the long-term and systemic effects caused by blurring the lines of authority in criminal cases might not be immediately apparent, whereas the government’s need for a more streamlined process is obvious, particularly to judges who directly bear the burden of more cases on their criminal docket. And, because they retain oversight of criminal trials, judges might not think structural protections are necessary. Moreover, because courts analyze separation of powers questions in regulatory contexts where efficiency arguments often trump other claims, that general attitude has spillover effects in criminal cases. Courts have become accustomed to blending arrangements and overlook the key differences between administrative and criminal matters described in Part II. Thus, a bright-line rule that disallows blending in criminal matters makes the most sense to ensure that the separation of powers and the liberty interests it protects are not undervalued.

Part III concludes with an overview of how this approach to separation of powers would change the existing view of criminal law. First, it would lead to different outcomes in the Court’s criminal cases that raise separation of powers questions. It would disallow the independent counsel, and it would demonstrate the constitutional danger of having mandatory sentencing laws and guidelines applied by judges instead of juries. Second, greater enforcement of the separation of powers would call into question those laws and practices that undermine the judiciary’s role in the separation of powers. Most significantly for day-to-day criminal justice practice, greater respect for the separation of powers would require a rethinking of the current approach to prosecutorial discretion over charging and plea decisions. Although a full analysis of the separation of powers problems posed by prosecutorial discretion and plea bargaining is beyond the scope of this Article, Part III explains the fundamental difficulty that this situation presents. Specifically, under current law,

22. As Bill Eskridge observes, “you can have a functionalist argument for a formalist punch line.” William N. Eskridge, Jr., *Relationships Between Formalism and Functionalism in Separation of Powers Cases*, 22 HARV. J.L. & PUB. POL’Y 21, 26 (1998).

prosecutors are allowed to put a price on the defendant's exercise of the judicial check, which is a key element in the separation of powers, as Part II explains. Trials come at a high cost for individual defendants—prosecutors threaten longer sentences—and most individual defendants (even some who are innocent) are unwilling to take the chance of losing at trial. As a result, there is a systemic failing in which prosecutors make the key decisions in criminal matters without a judicial check and without any of the structural and procedural protections that govern other executive agencies.²³ It is precisely this kind of unchecked power that the separation of powers is designed to guard against. Finally, Part III concludes with some observations of how more stringent enforcement of separation of powers would serve the interests of federalism.

I. THE CURRENT APPROACH TO SEPARATION OF POWERS

The Supreme Court approaches separation of powers questions with little regard for the substantive contexts in which they arise. Instead, separation of powers cases can be categorized by the methodology that the Court employs to decide the case. Formalism and functionalism are shorthand labels for the two main interpretive strategies employed by the Court in its separation of powers cases.²⁴

The formalist approach to separation of powers is characterized by the use of bright-line rules designed to keep each branch within its sphere of power.²⁵ Under this rationale, legislative power must rest with the legislative branch, executive power with the executive branch, and judicial power with the judicial branch. This methodology therefore requires the Court to characterize what type of power is at issue and to ensure that the power is being exercised by the correct branch of government and in compliance with any constitutional requirements for that type of power. If a governmental arrangement fails this test, it will not be upheld, even if it is an efficient or convenient solution to a public policy problem.²⁶

The Court's decision in *Chadha* provides an illustration of formalist analysis. The law at issue in *Chadha* allowed one House of Congress to veto an agency decision that would allow a deportable alien to remain in the United

23. See Gerard E. Lynch, *Our Administrative System of Criminal Justice*, 66 FORDHAM L. REV. 2117, 2120 (1998) (“[F]or most defendants the primary adjudication they receive is, in fact, an administrative decision by a state functionary, the prosecutor, who acts essentially in an inquisitorial mode.”).

24. Of course, these terms can have many meanings. For a description of “formalism” and “functionalism” as those terms are used in the context of separation of powers, see generally Peter L. Strauss, *Formal and Functional Approaches to Separation-of-Powers Questions—A Foolish Inconsistency?*, 72 CORNELL L. REV. 488 (1987).

25. See Eskridge, *supra* note 22, at 21; Strauss, *supra* note 24, at 489.

26. See, e.g., *INS v. Chadha*, 462 U.S. 919, 959 (1983) (“[T]he Framers ranked other values higher than efficiency.”).

States. The Court first concluded that the veto power constituted legislative power because it “had the purpose and effect of altering legal rights, duties, and relations of persons.”²⁷ The Court then reasoned that, because the Constitution requires legislative power to be exercised according to the bicameralism and presentment requirements of Article I,²⁸ the one-House veto was unconstitutional.²⁹

The Court used the same formalist methodology in several other cases. In *Bowsher*, the Court considered legislation that vested power in the Comptroller General to alter the federal budget in order to meet deficit-reduction quotas.³⁰ The Court determined that the law was unconstitutional because the Comptroller General was exercising executive power but was deemed to be an agent of Congress due to the fact that the position was subject to legislative removal.³¹ The alleged benefits the legislation would bring in terms of a balanced budget were irrelevant to the Court’s formalist analysis. The Court was no more sympathetic to these efficiency claims when they arose in the context of legislation that gave the President the power to exercise a line-item veto over spending and tax benefits, as the Court in *Clinton v. New York* once again applied a formalist analysis.³² The Court similarly used a formalist analysis in concluding that a review board composed of members of Congress that had veto power over a local airport authority violated the separation of powers.³³ In that case, the Court reiterated that if a law violates the separation of powers, it does not matter that the law may nonetheless promote a “workable government.”³⁴

27. *Id.* at 952.

28. U.S. CONST. art I, §§ 1, 7.

29. Justice Powell’s concurrence followed formalist reasoning to a different conclusion. He determined that the one-House veto exercised in *Chadha* was an exercise of judicial power, and as such it could not be exercised by Congress. *Chadha*, 462 U.S. at 960 (Powell, J., concurring).

30. *Bowsher v. Synar*, 478 U.S. 714 (1986).

31. *Id.* at 733-34.

32. 524 U.S. 417, 438 (1998) (concluding that the President’s cancellation power under the law amounted to the power to repeal the law, which the Court held must conform to the procedures in Article I). As Justice Kennedy observed in his concurring opinion, “[t]he Constitution’s structure requires a stability which transcends the convenience of the moment.” *Id.* at 449 (Kennedy, J., concurring). The Court’s leading formalist, Justice Scalia, dissented because he believed that the Line Item Veto Act did comply with the procedures of Article I and that the President’s power to cancel items raised a delegation question, not an Article I question. *Id.* at 463-64 (Scalia, J., concurring in part and dissenting in part). Justice Scalia thought the delegation doctrine was flexible enough to permit the President’s authority under the Act. *Id.* at 472-73.

33. *Metro. Wash. Airports Auth. v. Citizens for Abatement of Aircraft Noise, Inc.*, 501 U.S. 252 (1991). In classic formalist analysis, the Court reasoned that if the Board’s power was executive, “the Constitution does not permit an agent of Congress to exercise it.” *Id.* at 276. And if the Board’s veto power was deemed legislative, “Congress must exercise it in conformity with the bicameralism and presentment requirements of Art. I, § 7.” *Id.*

34. *Id.* (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952))

The Court's acceptance of modern administrative agencies poses the greatest challenge to the formalist approach to separation of powers. It is hard to square, for example, the Court's acceptance of agency rulemaking pursuant to a broad statutory delegation³⁵ with the pronouncement in *Chadha* that all legislative power must go through the procedures in Article I.³⁶ Agency rulemaking "alter[s] the legal rights, duties, and relations of persons,"³⁷ but it does not need to pass both houses of Congress and obtain the President's approval. And because agencies exercise judicial and executive power as well,³⁸ they combine all three types of power in one actor³⁹—the very danger the separation of powers aims to avoid. The Court has shown no indication that it intends to overthrow the administrative state, so it has sidestepped the agency challenge to the separation of powers even in cases employing formalist analysis. For example, it distinguished agency rulemaking from the legislative veto in *Chadha* by noting that agency rulemaking is merely "quasi-legislative" and is limited by the statute from which the agency derives its authority.⁴⁰ To take another example, in *Northern Pipeline Construction Co.*, a case in which a plurality of the Court limited agency adjudication over private rights of action, the Court was nevertheless careful to recognize that agency adjudication of public rights remained permissible.⁴¹ Thus, when formalist analysis is

(Jackson, J., concurring)). In addition to these cases, a plurality of the Court also embraced formalist reasoning to strike down the Bankruptcy Reform Act's broad grant of jurisdiction to non-Article III judges. See *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982). But a majority of the Court ultimately rejected the approach of *Northern Pipeline* in *Commodity Futures Trading Commission v. Schor*, 478 U.S. 833 (1986). *Myers v. United States*, 272 U.S. 52 (1926), which struck down a congressional restriction on the President's power to remove a postmaster because he was an executive official, is another example of formalism, but it was dramatically limited by three functionalist decisions: *Humphrey's Executor v. United States*, 295 U.S. 602 (1935), *Wiener v. United States*, 357 U.S. 349 (1958), and *Morrison v. Olson*, 487 U.S. 654 (1988).

35. See, e.g., *Am. Trucking Ass'n v. United States*, 344 U.S. 298, 310-13 (1953).

36. Justice White observed in *Chadha* that the majority's conclusion "that all legislative-type action must be enacted through the lawmaking process ignores that legislative authority is routinely delegated to the Executive Branch, to the independent regulatory agencies, and to private individuals and groups." *INS v. Chadha*, 462 U.S. 919, 984 (1983) (White, J., dissenting).

37. *Id.* at 952.

38. See, e.g., *Crowell v. Benson*, 285 U.S. 22, 50-51 (1932) (allowing agency adjudication).

39. See Strauss, *supra* note 24, at 492 (noting that agencies "exercise[] all three of the governmental functions the Constitution so carefully allocates among Congress, President, and Court").

40. *Chadha*, 462 U.S. at 953 n.16 (distinguishing legislative veto from agency rulemaking because the latter is "quasi-legislative"). The quasi-legislative language comes from *Humphrey's Executor*, 295 U.S. at 628, which refers to the powers of the Federal Trade Commission as "quasi legislative or quasi judicial."

41. *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 67-70 (1982) (distinguishing prior cases upholding agency adjudications as involving public rights and then rejecting bankruptcy law that vested authority in non-Article III tribunal to decide

employed, the Court distinguishes prototypical federal administrative agencies without acknowledging that these agencies would fail under the same reasoning.

In further recognition and acceptance of the administrative state, the Court does not always employ a formalist methodology in its separation of powers cases. Instead, the Court will engage in a functional analysis that allows some mixing of power among the branches so long as one branch does not aggrandize its power at the expense of another⁴² or otherwise impede a branch from performing its core responsibilities.⁴³ The Court's opinion in *Schor* provides an example of this methodology. *Schor* involved a separation of powers challenge to the Commodity Exchange Act, which allowed the Commodity Future Trading Commission to adjudicate customer claims that a broker had violated the terms of the Act and broker counterclaims (including claims under state law) arising out of the same transaction.⁴⁴ The Supreme Court rejected the formalist argument that jurisdiction over state law claims was judicial power that had to be exercised by an Article III court. The Court "declined to adopt formalistic and unbending rules" because "[a]lthough such rules might lend a greater degree of coherence to this area of the law, they might also unduly constrict Congress' ability to take needed and innovative action pursuant to its Article I powers."⁴⁵ Instead, the Court adopted a balancing test, in which it weighed a number of factors to determine "the practical effect that the congressional action will have on the constitutionally assigned role of the federal judiciary."⁴⁶ The Court upheld the legislation at issue in *Schor* because it concluded that the agency's jurisdiction over the counterclaims did not impermissibly intrude on the power of Article III courts.

adjudications involving private rights). *Commodity Future Trading Commission v. Schor*, 478 U.S. 833 (1986), later expanded the scope of agency adjudication to include some private rights.

42. *Schor*, 478 U.S. at 856 ("[T]his case raises no question of the aggrandizement of congressional power at the expense of a coordinate branch.").

43. *Mistretta v. United States*, 488 U.S. 361, 382 (1989) (noting that the Court will strike down laws that "either accrete to a single Branch powers more appropriately diffused among separate Branches or that undermine the authority and independence of one or another coordinate Branch"). Functionalists interpret the Constitution's vesting clauses as speaking only to the heads of each branch—Congress, the President, and the Supreme Court—and granting flexibility in Congress to vest other governmental actors with combined powers as long as the result does not interfere with the core functions of Congress, the President, or the Supreme Court. *See, e.g.*, Strauss, *supra* note 24, at 510-14.

44. 478 U.S. at 836-37.

45. *Id.* at 851.

46. *Id.* As the majority noted:

Among the factors upon which we have focused are the extent to which the "essential attributes of judicial power" are reserved to Article III courts, and, conversely, the extent to which the non-Article III forum exercises the range of jurisdiction and powers normally vested only in Article III courts, the origins and importance of the right to be adjudicated, and the concerns that drove Congress to depart from the requirements of Article III.

Id. (citations omitted).

Although the actual application of the functional test is context-specific, the test itself is invoked as if it applies to all settings.⁴⁷ When the Court uses a formalist approach in a separation of powers case, it similarly does not claim that it is employing formalism because a particular context or setting demands it. Instead, the Court simply employs that type of reasoning with little or no explanation.⁴⁸ The Court thus uses the methodologies interchangeably and does not claim to alter its approach depending on the substantive context.

Although the Court has not stated that a particular approach to separation of powers makes sense in the context of criminal cases, in the few cases in which such claims have come up,⁴⁹ the Court rejected formalist arguments and employed a functional analysis. Part I.A will discuss in more detail the Court's

47. In addition to *Schor*, the Court has applied a functional analysis in a case involving the United States Sentencing Commission, the independent counsel statute, and even the treatment of those labeled "enemy combatants." See *infra* Part I.A; see also *Nixon v. Adm'r of Gen. Servs.*, 433 U.S. 425, 443 (1977) (rejecting a separation of powers challenge to law vesting custody of presidential papers in the Administrator of General Services after analyzing "the extent to which [the law] prevents the Executive Branch from accomplishing its constitutionally assigned functions").

48. That is not to say that the Court has not provided arguments in support of the use of formalism as a general matter. See, e.g., *INS v. Chadha*, 462 U.S. 919, 959 (1983) ("[W]e have not yet found a better way to preserve freedom than by making the exercise of power subject to the carefully crafted restraints spelled out in the Constitution."). Scholars have been more expansive in their functional reasons for taking a formalist approach. See, e.g., MARTIN H. REDISH, *THE CONSTITUTION AS POLITICAL STRUCTURE* 100-02 (1995) (criticizing a functional approach because it "inherently guts the prophylactic nature of the separation-of-powers protections" and offering pragmatic reasons for formalism as a better alternative); Larry Alexander, "With Me, It's All er Nuthin'": *Formalism in Law and Morality*, 66 U. CHI. L. REV. 530, 534-36 (1999) (arguing that formalism "solves the problems of coordination, expertise, and efficiency" and reduces error and decisionmaking costs); Thomas W. Merrill, *Toward a Principled Interpretation of the Commerce Clause*, 22 HARV. J.L. & PUB. POL'Y 31, 31 (1998) (endorsing formalism for functionalist reasons). Rick Pildes "suspect[s] that formalists of all stripes, including the classical legal formalists, have always defended formalism, surely at the level of ultimate justification, in terms of purported desirable consequences." Richard H. Pildes, *Forms of Formalism*, 66 U. CHI. L. REV. 607, 612-13 (1999).

49. More often than not, separation of powers questions are not raised at all in criminal law cases, even among the lower courts. Instead, when constitutional issues arise in criminal matters, they tend to be grounded in protections emanating from the Bill of Rights. This is likely an outgrowth of the Warren Court's jurisprudential reforms in criminal procedure. Even as the Court has become more conservative, it has continued to regulate criminal procedure by taking a rights-based approach, so claims are couched in those terms. In turn, constitutional criminal law scholarship is also dominated by a rights-based focus. Bill Stuntz has been the most persuasive voice arguing against the doctrine and the scholarship. He argues that the Court's procedural rights cases have been counterproductive and urges the Court to turn its attention instead to substantive review of criminal laws and sentences under the Eighth and the Fourteenth Amendments. See William J. Stuntz, *The Political Constitution of Criminal Justice*, 119 HARV. L. REV. 780, 818-46 (2006); William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 YALE L.J. 1, 3-6 (1997). Although this Article looks to constitutional structure instead of substantive review, I share Stuntz's view that the rights-based focus of constitutional law is incomplete.

methodology in the major criminal law cases raising separation of powers claims, and Part I.B will consider why the Court employed a functional analysis in all of the criminal cases while applying a formalist methodology in most of its civil regulatory cases.

A. *The Separation of Powers in Criminal Cases*

Of the Supreme Court's major separation of powers cases, two involved criminal proceedings.⁵⁰ This Part will discuss both of those cases, *Morrison v. Olsen*⁵¹ and *Mistretta v. United States*,⁵² and also a recent case, *Hamdi v. Rumsfeld*,⁵³ which touched on related issues. In each of these cases, the Court has employed a flexible analysis to allow great blending of government power.

1. *The independent counsel*

In the wake of Watergate, Congress passed the Ethics in Government Act of 1978, which authorized the appointment of an impartial, independent counsel to investigate and prosecute criminal conduct by high-ranking government officials.⁵⁴ Pursuant to the Act, if the Attorney General received information that was "sufficient to constitute grounds to investigate" whether a person covered by the Act committed a federal crime, the Attorney General had to conduct a preliminary investigation.⁵⁵ The Attorney General was then obligated to apply to a special court, known as the Special Division, for the appointment of an independent counsel unless the Attorney General's investigation yielded "no reasonable grounds to believe that further investigation or prosecution is warranted."⁵⁶ The Act also gave congressional committee members the authority to "request in writing that the Attorney General apply for the appointment of an independent counsel."⁵⁷ Although the

50. Although *United States v. Nixon*, 418 U.S. 683 (1974), involved a presidential challenge to a subpoena issued as part of a criminal case, the separation of powers claim in that case rested on the scope of the executive privilege more than it rested on the relationship among branches. The Court's discussion of separation of powers was also quite brief. See *id.* at 706-07 (concluding that the President's claimed absolute privilege "as against a subpoena essential to enforcement of criminal statutes on no more than a generalized claim of the public interest in confidentiality of nonmilitary and nondiplomatic discussions would upset the constitutional balance of 'a workable government' and gravely impair the role of the courts under Art. III").

51. 487 U.S. 654 (1988).

52. 488 U.S. 361 (1989).

53. 542 U.S. 507 (2004).

54. Pub. L. No. 95-521, 92 Stat. 1867 (1978) (codified as amended at 28 U.S.C. §§ 591-599 (2006)).

55. 28 U.S.C. § 592(c)(2) (2006).

56. § 592(b)(1).

57. § 592(g)(1).

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Attorney General was not obligated under the Act to file an application upon receiving such a request, the Attorney General was required to respond to the committee members' request within a specified time limit.⁵⁸

Once appointed, the independent counsel remained in office until he or she completed the investigation or prosecution⁵⁹ unless the Attorney General could show that the counsel should be removed for "good cause, physical or mental disability . . . or any other condition that substantially impairs the performance of such independent counsel's duties."⁶⁰ Although the good cause provision limited the executive branch's control over the independent counsel, the Act employed other mechanisms to create accountability for the independent counsel's actions. Congressional committees were given jurisdiction to oversee the conduct of the independent counsel,⁶¹ and the counsel was required to inform the House of Representative of "substantial and credible information . . . that may constitute grounds for impeachment."⁶²

If the Court employed the same formalist methodology it used in *Bowsher*, it would have found the independent counsel law unconstitutional. Because investigating and prosecuting crimes are executive powers,⁶³ Congress's

58. § 592(g)(2).

59. The statute gave the Special Division the authority to find that the office of the independent counsel should be terminated if "the investigation of all matters within the prosecutorial jurisdiction of such independent counsel . . . have been completed or so substantially completed that it would be appropriate for the Department of Justice to complete such investigations and prosecutions." § 596(b)(2).

60. § 596(a)(1).

61. § 595(a)(1).

62. § 595(c).

63. There is some debate in the literature over the history of federal prosecution and whether it was an exclusive province of the executive branch. For example, some scholars point out that at the time of the Framing and for some time thereafter, state and private prosecutors initiated prosecutions, and prosecutors were often associated with the judicial branch. See, e.g., William B. Gwyn, *The Indeterminacy of the Separation of Powers and the Federal Courts*, 57 GEO. WASH. L. REV. 474, 502 (1989) (arguing that the history suggests that prosecution should be seen as both executive and judicial in nature); Joan E. Jacoby, *The American Prosecutor in Historical Context*, 39 PROSECUTOR 28, 30 (2005) (arguing that early prosecutors were "minor figure[s]" and "primarily judicial and only quasi-executive"); Harold J. Krent, *Addressing the Constitutionality of the Independent Counsel Statute: Executive Control over Criminal Law Enforcement: Some Lessons from History*, 38 AM. U. L. REV. 275, 286-96 (1989) (describing the role of private and state prosecutors). Saikrishna B. Prakash disputes this historical claim and argues that the historical evidence shows that the President retained control over federal prosecutions. Saikrishna B. Prakash, *The Chief Prosecutor*, 73 GEO. WASH. L. REV. 521, 546-65 (2005); see also Krent, *supra*, at 296 (discussing evidence that nonfederal prosecutors could start prosecutions, but noting that federal prosecutors retained the discretion to drop the cases). Regardless of the historical background, the Supreme Court in *Morrison* conceded that prosecution was an executive power. *Morrison v. Olson*, 487 U.S. 654, 691 (1988). Moreover, as discussed *infra* Part II.A, it is critical to maintain separation between judicial and executive power because the judiciary supplies a critical check on prosecutions. See also Jacoby, *supra*, at 32 (noting that, by the Civil War, the public "began to recognize and ask for a clear and distinct separation between the duties and powers of the prosecutor and those of the courts"); Prakash, *supra*, at

restriction of the President's removal authority would be unlawful under formalist reasoning. Indeed, that was the governing precedent at the time of *Morrison*. Under the Court's decisions in *Myers*⁶⁴ and *Humphrey's Executor*,⁶⁵ Congress could not place restrictions on the President's power to remove purely executive officials. The Court, however, rejected this approach and *relaxed* the separation of powers standard in the context of a criminal case. It essentially overruled the test established by *Myers* and *Humphrey's Executor*⁶⁶ and distinguished *Bowsher* as involving an attempt by Congress to aggrandize its own power by gaining a role in removing an executive official.⁶⁷ The Court opted instead for a balancing test that asked "whether the removal restrictions are of such a nature that they impede the President's ability to perform his constitutional duty."⁶⁸ Applying that test, the Court "simply [did] not see how the President's need to control the exercise of [the independent counsel's] discretion is so central to the functioning of the Executive Branch as to require as a matter of constitutional law that the counsel be terminable at will by the President."⁶⁹

Justice Scalia alone dissented, largely on formalist grounds. He said the Act was unconstitutional because criminal prosecutions and investigations constituted the exercise of purely executive power, and the Act deprived the President "of exclusive control over the exercise of that power."⁷⁰ He rejected the Court's view that it was up to the Court to decide "how much of the purely executive powers of government must be within the full control of the President."⁷¹

But Justice Scalia also offered some functional reasons for his formalist conclusion. He believed that the threshold for requiring appointment of an independent counsel was inappropriately low. In his view, it would be a rare case in which there were no reasonable grounds to believe further investigation would be warranted, particularly if members of Congress assembled facts in

569 ("To regard prosecution as part of the judicial power in any way, shape, or form, is to nullify one of the Constitution's central features—its judicial safeguard against prosecutorial overreach.").

64. *Myers v. United States*, 272 U.S. 52 (1926).

65. *Humphrey's Ex'r v. United States*, 295 U.S. 602, 631-32 (1935).

66. Elizabeth Magill argues that, although *Morrison* created "an important change in the doctrine," in some sense the outcome was already accepted by *Humphrey's Executor* because independent agencies often perform some purely executive functions. Thus, Professor Magill contends that "*Morrison* admitted what had been true in practice." M. Elizabeth Magill, *The Rehnquist Court: The Revolution that Wasn't*, 99 Nw. U. L. REV. 47, 52 (2004). It remains noteworthy that the Court chose a criminal case as the setting in which to abandon the stated test, even if the standard itself was somewhat fictional.

67. *Morrison*, 487 U.S. at 686.

68. *Id.* at 691.

69. *Id.* at 691-92.

70. *Id.* at 705 (Scalia, J., dissenting).

71. *Id.* at 709.

favor of further investigation.⁷² The Act created further undue political pressure for the appointment of an independent counsel because of the Act's provisions for congressional oversight.⁷³ "[H]ow easy it is," he observed, "for one of the President's political foes outside of Congress . . . simply to trigger a debilitating criminal investigation of the Chief Executive under this law."⁷⁴ Without executive accountability, the Act removed the political check against prosecutorial abuse.⁷⁵ It also removed institutional checks against prosecutorial abuse, such as having a prosecutor with the perspective of other cases and targets to ensure that the laws are fairly applied.⁷⁶ Justice Scalia also offered a functional reason for rejecting functional tests for separation of powers claims as a general matter. He argued that the Court's balancing test was not a justiciable standard and that it lacked predictability.⁷⁷

The Court dismissed the functional arguments raised by Justice Scalia, presumably because they may have seemed too remote and looked like nothing more than guesses about how bad political actors might use this new tool. In contrast, the value of the independent counsel statute was readily apparent—the statute was designed to make prosecuting corrupt government officials easier and to eliminate conflicts of interest. Weighing the removal of corrupt government officials against vague notions of political abuse may have made it seem like an easy case to most members of the Court.

2. The Sentencing Commission

In *Mistretta v. United States*,⁷⁸ the Court faced the question of whether Congress could delegate the authority to establish sentencing laws to an independent commission ostensibly housed in the judicial branch and containing federal judges as members.⁷⁹ The Court saw no trouble with the

72. *Id.* at 702.

73. *Id.* ("The context of this statute is acrid with the smell of threatened impeachment.").

74. *Id.* at 713.

75. *Id.* at 728.

76. Justice Scalia quoted from an amicus brief filed by former Attorneys General who noted that the "institutional environment of the Independent Counsel" is worrisome—"specifically, her isolation from the Executive Branch and the internal checks and balances it supplies." *Id.* at 731 (quoting Brief for Edward H. Levi, Griffin B. Bell, and William French Smith as *Amici Curiae* 11). The brief listed the dangers of "too narrow a focus, of the loss of perspective, of preoccupation with the pursuit of one alleged suspect to the exclusion of other interests." *Id.* (quoting Brief for Edward H. Levi, Griffin B. Bell, and William French Smith as *Amici Curiae* 11). For a discussion of how escalation theory would have predicted that the independent counsel law would create incentives for prosecutors to continue on failing courses of action, see Jerry Ross, *Avoiding Captain Ahab's: Lessons from the Office of the Independent Counsel*, 35 ADMIN. & SOC. 334 (2003).

77. *Morrison*, 487 U.S. at 711-12, 733 (Scalia, J., dissenting).

78. 488 U.S. 361 (1989).

79. Although Congress labeled the Sentencing Commission a judicial branch agency,

delegation, emphasizing that delegation jurisprudence “has been driven by a practical understanding that in our increasingly complex society, replete with ever changing and more technical problems, Congress simply cannot do its job absent an ability to delegate power under broad general directives.”⁸⁰ It was, in the Court’s view, “especially appropriate” that Congress delegated the “intricate, labor-intensive task” of establishing guidelines to the Commission.⁸¹ Nor was the Court troubled by the fact that an agency placed in the judicial branch would engage in “significantly political” activity.⁸² The Court emphasized that its “separation-of-powers analysis does not turn on the labeling of an activity” but instead focuses on the “practical consequences” of the government scheme at issue.⁸³ Thus, it did not matter to the Court that a judicial branch agency would be exercising rulemaking power.⁸⁴

Justice Scalia again provided the lone dissent. Although he agreed with the majority that the Act provided an intelligible principle for purposes of the delegation doctrine, he objected to the delegation of lawmaking authority to an agency “created by Congress to exercise no governmental power other than the making of laws.”⁸⁵ He relied on formalist reasoning, arguing that while agencies could engage in rulemaking as an incidental power to their enforcement responsibilities and courts could do so as part of their judicial functions, allowing an agency solely to pass rules would cross the constitutional line because there is no pretense that such an agency is doing anything other than exercising legislative power. He reasoned that the Court accepted the delegation of lawmaking power because it “inheres in most executive or judicial action,” not because Congress is permitted to assign its responsibilities to someone else.⁸⁶ Because the Sentencing Commission had no other responsibilities that altered legal rights other than making rules, Justice Scalia thought it amounted to a “junior-varsity Congress” that did not fit anywhere within the three-branch structure of the Constitution.⁸⁷

Aside from another attack on the Court’s use of balancing tests,⁸⁸ Justice Scalia did not offer much in the way of functional arguments. And the parties’ briefs likewise fell short on instrumental analysis. Faced with abstract notions of separated powers for the sake of separated powers, it is perhaps not

its relationship to the judiciary is tenuous. Although judges serve as members, the agency is not under the control of a judicial body nor does it decide cases or controversies.

80. *Mistretta*, 488 U.S. at 372.

81. *Id.* at 379.

82. *Id.* at 393.

83. *Id.*

84. The Court also rejected the petitioner’s claim that the Act’s requirement that judges serve on the Commission compromised the integrity of the judiciary. *See id.* at 397-404.

85. *Id.* at 413 (Scalia, J., dissenting).

86. *Id.* at 417.

87. *Id.* at 427.

88. *Id.* at 426-27.

surprising that most members of the Court sided with the government's claimed need for a commission to remedy the "shameful" disparity and uncertainty that plagued the federal system's prior sentencing scheme.⁸⁹

3. *Enemy combatants*

The case of *Hamdi v. Rumsfeld* required the Court to decide what process is due to an American citizen who is captured on a foreign battlefield and who has been detained by the government as an enemy combatant.⁹⁰ It is not, strictly speaking, a criminal case because the government was asserting its war powers, not its criminal powers. But if the Court held that the President lacked the authority to label a citizen an enemy combatant and to detain Hamdi on that basis, the executive branch would have had to use its criminal powers or Congress would have had to suspend the writ of habeas corpus to detain him. Thus, the case explored the line between the President's authority during wartime and the Constitution's criminal protections, as well as the scope of executive and judicial power to determine that line. In particular, it raised the question of whether executive power includes the power to determine whether an individual is an enemy combatant. It therefore raised some of the same separation of powers issues that arise in traditional administrative and criminal law cases.

The government alleged that Hamdi was affiliated with the Taliban in Afghanistan and that his Taliban unit surrendered in a zone of active combat.⁹¹ Because the United States was engaged in armed conflict with the Taliban, the government argued that individuals associated with them "were and continue to be enemy combatants" who could be lawfully detained by the President

89. *Id.* at 366 (quoting legislative history of the Sentencing Reform Act).

90. 542 U.S. 507 (2004). The government defined an enemy combatant as an individual who was "part of or supporting forces hostile to the United States or coalition partners in Afghanistan and who engaged in an armed conflict against the United States there." *Id.* at 516 (internal quotations omitted).

Hamdi also raised the question of whether Congress gave the President the authority to detain citizen enemy combatants pursuant to the Authorization for Use of Military Force (AUMF), 115 Stat. 224 (2001), or whether the detention violated 18 U.S.C. § 4001 (2006), which provides that "[n]o citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress." The plurality concluded that the AUMF gave the President the necessary authority to detain Hamdi. *Hamdi*, 542 U.S. at 517-18. Justice Thomas, in dissent, concluded that the President had detention authority as part of his war powers. *Id.* at 579 (Thomas, J., dissenting). Justice Souter, in an opinion joined by Justice Ginsburg, disagreed that the detention was authorized under the AUMF and concluded that the detention was forbidden by § 4001(a). *Id.* at 554-54 (Souter, J., concurring in part, dissenting in part, and concurring in the judgment). Justice Scalia, joined by Justice Stevens, concluded that the detention was unlawful because the AUMF did not suspend the writ of habeas corpus. *Id.* at 574-75 (Scalia, J., dissenting).

91. *Id.* at 512-14.

pursuant to his war powers.⁹² The government contended that separation of powers principles prevented federal courts from inquiring further into Hamdi's status as long as the government provided "some evidence" that he was an enemy combatant.⁹³

A majority of a fractured Court rejected the government's "some evidence" standard,⁹⁴ though the Court was still highly deferential to the government. Applying the *Mathews v. Eldridge*⁹⁵ balancing test from the administrative law context,⁹⁶ a majority of the Court concluded that a citizen-detainee was entitled to "notice of the factual basis of his classification, and a fair opportunity to rebut the Government's factual assertions before a neutral decisionmaker."⁹⁷ A plurality of the Court cautioned, however, that "the exigencies of the circumstances may demand that, aside from these core elements, enemy combatant proceedings may be tailored to alleviate their uncommon potential to burden the Executive at a time of ongoing military conflict."⁹⁸ The plurality then noted that it would be acceptable for the government to use hearsay evidence or to adopt a presumption in favor of the government's evidence.⁹⁹ The plurality also noted "the possibility that the standards we have articulated could be met by an appropriately authorized and properly constituted military tribunal."¹⁰⁰ Thus, a majority of the Court—the plurality plus Justice Thomas—placed heavy weight on the government's claimed need for a streamlined process as against Hamdi's liberty interest.

Justice Scalia again employed a formalist analysis. In a dissent joined by Justice Stevens, Justice Scalia noted that "freedom from indefinite imprisonment at the will of the Executive" formed the core liberty interest

92. *Id.* at 513.

93. *Id.* at 527. The government clarified that the "some evidence" standard did not allow the court to weigh evidence, but merely to see if there was any evidence in the record to support the government's conclusion. *Id.*

94. *Id.* at 535-36 ("reject[ing] the Government's assertion that separation of powers principles mandate a heavily circumscribed role for the courts" and noting that the "some evidence" test is "inadequate"); *id.* at 553-54 (Souter, J., concurring in part, dissenting in part, and concurring in the judgment) (agreeing with plurality that Hamdi deserved notice, the opportunity on remand to offer evidence that he is not an enemy combatant, and the right to counsel).

95. 424 U.S. 319 (1976).

96. The Court employed the *Mathews* test on its own, as the parties did not couch their arguments in those terms. *Hamdi*, 542 U.S. at 574 n.5 (Thomas, J., dissenting) (observing that the parties did not "cite *Mathews* even once").

97. *Id.* at 533; *id.* at 553-54 (Souter, J., concurring in part, dissenting in part, and concurring in the judgment).

98. *Id.* at 533.

99. *Id.* at 533-34.

100. *Id.* at 538. Justice Souter made clear that he did not agree with the plurality's resolution of these issues. *Id.* at 553-54 (Souter, J., concurring in part, dissenting in part, and concurring in the judgment).

protected by the separation of powers.¹⁰¹ Because “[c]itizens aiding the enemy have been treated [historically] as traitors subject to the criminal process,” in Justice Scalia’s view it was “unthinkable that the Executive could render otherwise criminal grounds for detention noncriminal merely by disclaiming an intent to prosecute, or by asserting that it was incapacitating dangerous offenders rather than punishing wrongdoing.”¹⁰² After looking at the Constitution’s text, the history of habeas, and writings from the founding generation, he concluded that the government had only one of two options if it wanted to detain Hamdi: either charge him with a crime or, if the exigencies of war required it, suspend the writ of habeas corpus.¹⁰³ Justice Scalia concluded by criticizing the plurality’s willingness to craft a different solution in the face of its conclusion that the government’s existing procedures were inadequate. He said the plurality’s approach reflects a “Mr. Fix It Mentality” that puts the unelected Court in the business of deciding what works best instead of “decree[ing] the consequences, as far as individual rights are concerned, of the other two branches’ actions and omissions.”¹⁰⁴

Here, too, it seems relatively clear what animated the rest of the Court to reject Justice Scalia’s formalist argument. The Court did not want to put the government to the choice of suspending the writ or pursuing criminal charges because the Court thought more flexibility was necessary for the government to respond to the threat of terrorism. This was particularly true when the individual being detained was captured on a battlefield, a situation in which the Court must have thought the risk of innocence was likely to be low and the government need for expediency particularly high.¹⁰⁵ A bright-line rule would not allow the same flexibility to adjust to the facts; by adopting a functional approach that balances the interests at stake, the Court allowed itself room to adjust the outcomes based on factual variations it deemed significant.

B. Criminal and Administrative Law Cases Compared

Although the Court has not decided many criminal law cases raising separation of powers claims, it has followed the same pattern: the Court has

101. *Id.* at 554-55 (Scalia, J., dissenting).

102. *Id.* at 559 (Scalia, J., dissenting).

103. *Id.* at 554, 562-70 (Scalia, J., dissenting).

104. *Id.* at 577-78 (Scalia, J., dissenting).

105. In contrast, a majority of the Court seems to reach a different conclusion when faced with an alleged enemy combatant who is an American citizen captured in the United States. In *Rumsfeld v. Padilla*, where the alleged “enemy combatant” was an American citizen taken into custody at O’Hare Airport, four Justices made clear that they would not allow the executive to proceed in the same way. 542 U.S. 426, 454-55 (2004) (Stevens, J., dissenting, joined by Justices Souter, Ginsburg, and Breyer). Those votes, coupled with Justice Scalia’s in *Hamdi*, 542 U.S. at 554 (Scalia, J., dissenting), seem to make five votes in favor of Padilla’s argument that the executive cannot detain a citizen captured in the United States on the claim that he is an enemy combatant.

been highly receptive to functional arguments about the need for government flexibility. This contrasts with the Court's treatment of separation of powers arguments raised outside the criminal law context. Although occasional cases, like *Schor*, employed functional analysis, most other cases used formalist reasoning.¹⁰⁶

Given the paucity of separation of powers cases generally and of criminal cases raising such issues in particular, it is unwise to draw any firm conclusions from the patterns in the Court's cases. But the Court's rejection of formalist arguments in each of the criminal cases when it has employed that methodology frequently in administrative law cases at least merits further exploration. After all, one might expect the pattern to be just the opposite. Because the threat to liberty when the state proceeds criminally is greater than when it proceeds civilly, one might think the Court would be particularly vigilant about enforcing the separation of powers when cases involve criminal matters.¹⁰⁷ What explains the opposite result, where the Court embraces functionalism more readily in criminal cases?

The explanation does not seem to rest on the Court's belief that criminal cases somehow deserve less protection.¹⁰⁸ In none of the Court's criminal cases did the Court indicate that separation of powers concerns were less pressing or that they were otherwise addressed by other means. And it would be difficult to imagine a line of reasoning that would lead the Court to believe that criminal proceedings deserve less protection than civil proceedings.

A more likely explanation for the differential pattern is that the Court simply failed to view *Morrison*, *Mistretta*, or *Hamdi* as criminal cases in the classic sense. *Morrison* was not about run-of-the-mill prosecutions but rather those involving crimes by government officials.¹⁰⁹ *Mistretta* was not about rules of criminal liability, but about sentencing,¹¹⁰ and the Sentencing Commission on the surface seemed to mirror traditional regulatory agencies. *Hamdi*, too, was unique because it was about the executive's power to respond

106. See *supra* notes 27-34.

107. That is, if the purpose of separation of powers is, as Rebecca Brown has argued, to protect individual due process interests, there is a greater need for enforcement in the context of criminal actions. See Brown, *supra* note 20, at 1516 (stating that "government action that jeopardizes government process poses a concomitant danger to individual rights and that the potential for such danger should be a significant factor in separation-of-powers analysis").

108. That would, in fact, be contrary to the Court's demand for greater procedures in criminal cases than in other contexts. Compare *Goldberg v. Kelly*, 397 U.S. 254, 270-71 (1970) (not requiring the state to provide counsel in welfare termination proceedings), with *Gideon v. Wainwright*, 372 U.S. 355 (1963) (requiring the appointment of counsel in criminal proceedings). See generally KENNETH CULP DAVIS, DISCRETIONARY JUSTICE 211-12 (1969) (arguing that there is a greater need for a judicial check over prosecutors than of other administrative or executive functions).

109. *Morrison v. Olson*, 487 U.S. 654 (1988).

110. *Mistretta v. United States*, 488 U.S. 361, 395 (1989).

to terrorism.¹¹¹ Each case, at least on the surface, seemed to be much more about the scope of executive and agency power than about criminal power.

Thus, the Court seemingly viewed these cases through the lens of the administrative state and its need for efficiency and flexibility.¹¹² Indeed, the opinions themselves suggest as much. In upholding the independent counsel law, for example, the Court drew an explicit comparison to “various federal agencies whose officers are covered by ‘good cause’ removal restrictions” and noted that they “exercise civil enforcement powers that are analogous to the prosecutorial powers.”¹¹³ Although *Hamdi* was a case about executive power in wartime, it is telling that the Court employed the due process paradigm from an administrative law case, *Mathews v. Eldridge*,¹¹⁴ which was designed to take into account government claims for efficiency.

The Court’s failure to focus on the criminal aspects of these cases suggests that the Court did not view them as distinguishable from other cases involving executive power. If true, that would mean there is no clean split between administrative cases on the one hand and criminal cases on the other but just different treatment of different administrative law cases.

Because the purpose of this Article is to challenge the view that criminal and administrative law cases are indistinguishable for separation of powers purposes, Part II will explore the critical distinctions between these two areas. Once the differences between criminal and administrative power are explored, it will become clear that the Court’s core separation of powers jurisprudence is almost completely backwards: a functional analysis that allows greater blending of powers is most troublesome in the context of criminal matters.

II. CRIME IS DIFFERENT

Perhaps because the Court does not divide its separation of powers decisions along substantive lines,¹¹⁵ scholars likewise have failed to

111. *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004).

112. It is also interesting that Justice Breyer, perhaps the foremost defender of the administrative state on the Court, tends to treat questions of criminal law structure and design like all other agency questions and tends to side with views that give the executive branch much flexibility. See, e.g., *United States v. Booker*, 543 U.S. 220 (2005) (Breyer, J., delivering the opinion of the Court in part and dissenting in part); *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004) (Breyer, J., joining the majority); *Blakely v. Washington*, 542 U.S. 296, 328 (2004) (Breyer, J., dissenting); *Harris v. United States*, 536 U.S. 545, 569 (2002) (Breyer, J., concurring in part and concurring in the judgment); *Apprendi v. New Jersey*, 530 U.S. 466, 555 (2000) (Breyer, J., dissenting).

Parts II.C and III.A, *infra*, explore the reasons why the Court as a whole has been so receptive to government claims for flexibility in criminal cases.

113. *Morrison*, 487 U.S. at 692 n.31.

114. 424 U.S. 319 (1976).

115. Indeed, as many scholars have noted, the Court does not divide its cases along any discernible lines. Instead, the Court proceeds on an ad hoc basis. See Brown, *supra* note 20, at 1517-18 & n.10 (citing those who criticize the lack of coherence in separation of

disaggregate separation of powers questions based on subject matter.¹¹⁶ The unfortunate result is that the existing doctrine and literature neglect important differences between criminal matters and civil regulatory actions. This Part will explore these key distinctions to show the particular importance of separation of powers protections in criminal matters.

Part II.A begins by exploring how the exercise of government criminal power rests on a different constitutional foundation than administrative power. The argument for strict separation of powers when the state uses its criminal powers has strong support in the Constitution's text, structure, and history. Part II.B provides functional reasons for greater enforcement of separated powers in the criminal context. The agencies and individuals responsible for enforcing criminal laws are not subject to the same structural and institutional protections that exist in the typical regulatory context. The APA does not apply, and there is weak political oversight of government overreaching. Part II.C rebuts the view that the individual rights protections in the Bill of Rights provide an adequate replacement for the separation of powers.

A. Constitutional Foundations

The case for what might be called criminal law exceptionalism starts with the text and structure of the Constitution itself. One of the animating features of the Constitution is its preoccupation with the regulation of the government's criminal powers. Even before the adoption of the Bill of Rights, the Constitution provided protection for the rights of those accused of crimes through its structural provisions.

"The Framers were well acquainted with the danger of subjecting the determination of the rights of one person to the 'tyranny of shifting majorities,'"¹¹⁷ and they were particularly focused on the dangers of legislative encroachment on the judicial power over crime. Because the state could potentially go after any citizen in a criminal proceeding, the normal course of politics should act as a threshold check on the passage of laws that criminalize

powers jurisprudence).

116. For example, scholars critical of the formalist approach do not differentiate among categories and instead assume that a functional analysis is appropriate for all types of cases. Similarly, scholars who support a formalist approach reject all of the functional cases, not just a subset. See Brown, *supra* note 20, at 1522 ("Most writers in the field have proceeded by selecting the interpretive theory they consider superior [as between formalism and functionalism], then evaluating each of the Court's separation-of-powers decisions against the template of that theory."). An exception seems to be foreign affairs, which is often treated as a separate category for purposes of separation of powers and constitutional analysis more generally. See, e.g., LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 4-2, at 634; Laurence H. Tribe, *Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation*, 108 HARV. L. REV. 1221, 1249 (1995).

117. INS v. Chadha, 462 U.S. 919, 961 (1983) (Powell, J., concurring in the judgment).

too much ordinary conduct.¹¹⁸ But that protection will not work if political actors can single out the conduct of disfavored minority groups and criminalize their conduct specifically.

The Framers recognized that risk—and concomitantly, the temptation for the legislature to engage in such behavior—and thus Article I establishes express limits on the legislative exercise of judicial power. First, it prohibits bills of attainder, which would allow Congress to identify those specific individuals affected by any given piece of legislation before passing it.¹¹⁹ As the Court noted in *United States v. Brown*, “the Bill of Attainder Clause was intended not as a narrow, technical . . . prohibition, but rather as an implementation of the separation of powers, a general safeguard against legislative exercise of the judicial function, or more simply—trial by legislature.”¹²⁰ The legislature lacks the impartiality of the judiciary, and if the legislature had the power to single out individuals, it “might [be tempted] to act as a judge in its own cause.”¹²¹ Second, Article I also aims to prevent the legislature’s ability to target individuals for criminal punishment through the prohibition on ex post facto laws.¹²² Alexander Hamilton observed that “[t]he creation of crimes after the commission of the fact . . . and the practice of arbitrary imprisonments, have been, in all ages, the favorite and most formidable instruments of tyranny.”¹²³ The prohibition against ex post facto laws is therefore “one aspect of the broader constitutional protection against arbitrary changes in the law.”¹²⁴ Third, Article I limits Congress’s authority to suspend the writ of habeas corpus, which is a key protection for individuals

118. William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 547-48 (2001).

119. U.S. CONST. art. I, § 9, cl. 3; *id.* § 10, cl. 1; see *Chadha*, 462 U.S. at 962 (Powell, J., concurring in the judgment) (observing that the prohibition on bills of attainder reflects the Framers’ “concern that a legislature should not be able unilaterally to impose a substantial deprivation on one person”); *Cummings v. Missouri*, 71 U.S. 277, 323 (1866) (observing that “[a] bill of attainder is a legislative act which inflicts punishment without a judicial trial” and noting that “[t]hese bills are generally directed against individuals by name; but they may be directed against a whole class”).

120. 381 U.S. 437, 442 (1965).

121. Paul R. Verkuil, *Separation of Powers, the Rule of Law and the Idea of Independence*, 30 WM. & MARY L. REV. 301, 309 (1989).

122. As the Court has explained, the prohibition on ex post facto laws “restricts governmental power by restraining arbitrary and potentially vindictive legislation.” *Weaver v. Graham*, 450 U.S. 24, 29 (1981) (citations omitted); see also *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 390 (1798) (calling the Ex Post Facto Clause an “additional bulwark in favour of the personal security of the subject”). This prohibition “upholds the separation of powers by confining the legislature to penal decisions with prospective effect and the judiciary and executive to applications of existing penal law.” *Weaver*, 450 U.S. at 29 n.10.

123. THE FEDERALIST NO. 84, at 511-12 (Alexander Hamilton) (J. Cooke ed., 1961). Indeed, this was so important that the original Constitution prohibited not only Congress, but the states, from passing ex post facto laws and bills of attainder. U.S. CONST. art. I, § 10, cl. 1 (“No state shall . . . pass any . . . Bill of Attainder, ex post facto Law . . .”).

124. *Lynce v. Mathis*, 519 U.S. 433, 440 (1997).

against unlawful detention.¹²⁵

Article I expressly addresses legislative interference with the judicial function, but what if the legislature works with the executive to single out disfavored minorities for prosecution?¹²⁶ That is, suppose the laws are generally applicable, but they are enforced only against unpopular groups or political enemies of the party in power.¹²⁷ The prohibition on bills of attainder will not suffice because the law itself does not target anyone specifically. And ex post facto prohibitions will not serve as a check if the laws are forward-looking. Yet the dangers would be the same as the ones that the ex post facto and bill of attainder provisions are designed to combat.

The separation of powers recognizes and addresses this threat of discriminatory enforcement. It requires not only that the executive and legislative branches agree to criminalize conduct but also includes the judiciary as a key check on the political branches.¹²⁸ Before a person can be convicted, he or she is entitled to judicial process. Federal judges, with life tenure and salary protections, have the independence that enables them to check both the legislature and the executive and to assure fair and impartial decisionmaking in a given case.¹²⁹ Judges are therefore tasked with enforcing provisions like the Bill of Attainder Clause and the Ex Post Facto Clause to prevent the legislature and the executive from obtaining judicial power.¹³⁰ Justice Scalia has argued

125. U.S. CONST. art. I, § 9, cl. 2 (“The privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.”). Alexander Hamilton praised the writ of habeas in the Federalist Papers because it checks “the practice of arbitrary imprisonments.” THE FEDERALIST NO. 84, at 444 (Alexander Hamilton) (J. Cooke ed., 1961).

126. Montesquieu warned against combining executive and legislative powers because the executive in that instance would not be able to check the legislature and it would increase the likelihood of tyrannical law execution. BARON DE MONTESQUIEU, *THE SPIRIT OF THE LAWS* 70 (Frank Neuman ed., Encyclopedia Britannica 1952) (1748). But it does not take a formal alliance for this to occur. As Daryl Levinson points out, the executive and legislative branches often ally with one another because they are members of a common party. Daryl J. Levinson, *Empire-Building Government in Constitutional Law*, 118 HARV. L. REV. 915, 952-58 (2005).

127. M. Elizabeth Magill, *The Real Separation in Separation of Powers Law*, 86 VA. L. REV. 1127, 1193 (2000) (“[D]ecisions by prosecutors about how to enforce a statute are indistinguishable from lawmaking. That is, given that the range of permissible enforcement actions under criminal laws (and many other laws) is extremely broad, it is the prosecutors’ pattern of decisions that shape the meaning of law, not the underlying statute itself.”).

128. Prakash, *supra* note 63, at 568 (“Americans viewed judging, in part, as a check on the executive’s law enforcement.”).

129. “The Framers also understood that a principal benefit of the separation of judicial power from the legislative and executive powers would be the protection of individual litigants from decisionmakers susceptible to majoritarian pressures.” *Commodity Future Trading Comm’n v. Schor*, 478 U.S. 833, 860 (1986) (Brennan, J., dissenting); *see also* Neuborne, *supra* note 2, at 399 (noting that separation of powers “calls for an independent particularizer with power to resolve disagreements over the meaning of the preexisting general rule and to ascertain the precise facts of the particular case”).

130. As Philip Kurland notes, the “judiciary was at the cornerstone of the concept of a

that the “most significant role[]” for judges is “to protect the individual criminal defendant against the occasional excesses of th[e] popular will, and to preserve the checks and balances within our constitutional system that are precisely designed to inhibit swift and complete accomplishment of that popular will.”¹³¹

Even these protections were inadequate to the Framers, however. Although Article III judges are relatively more independent than Congress and the executive branch, they are still part of the government. Because separation of powers is concerned, among other things, with conflicts of interest,¹³² judges were not deemed sufficient protection against the possibility of state abuse in criminal cases because of their potential partiality toward the government.¹³³ The Constitution therefore provides in Article III—the Article establishing the judicial role in government—that the trial of all crimes must be by jury. The jury’s unreviewable power to acquit gives it the ability to check both the legislative and executive branches.¹³⁴ And because federal juries must be unanimous, all representative members of the community must agree before political actors can impose criminal punishment.¹³⁵ The jury, then, is a key component of the separation of powers in the criminal law.¹³⁶

Other constitutional provisions reflect a similar concern with the danger to liberty associated with the criminal process.¹³⁷ Although the executive branch can sometimes pose a threat to liberty, it can also act as a check on the other

‘limited constitution’ for which separation of powers was to be a guarantee.” Kurland, *supra* note 3, at 599; *see also* N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 58 (1982) (“The Federal Judiciary was therefore designed by the Framers to stand independent of the Executive and Legislature—to maintain the checks and balances of the constitutional structure, and also to guarantee that the process of adjudication itself remained impartial.”).

131. Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1180 (1989).

132. Verkuil, *supra* note 121, at 304-07 (describing the historical roots of the conflict-of-interest concerns motivating the separation of powers and noting that “the notion that no man can be a judge in his own cause was among the earliest expressions of the rule of law in Anglo-American jurisprudence”).

133. Rachel E. Barkow, *Recharging the Jury: The Criminal Jury’s Constitutional Role in an Era of Mandatory Sentencing*, 152 U. PA. L. REV. 33, 49-50, 56-58 (2003).

134. *See id.* at 48-51 (explaining how this checking function operates); *see also id.* at 63-64 (“Injecting the jury into the affairs of the judiciary and giving it a nullification power that the judge does not possess gives the people a greater say on how criminal laws are applied. . . . Not only does this curb the authority of the judges themselves, but it also provides a check on the legislature and executive, which both serve broader constituencies that may not have the same interests as the jury drawn from the community.”).

135. Kim Taylor-Thompson, *Empty Votes in Jury Deliberations*, 113 HARV. L. REV. 1261, 1271-72 (2000).

136. Barkow, *supra* note 133, at 64-65 (“The criminal jury provides yet an additional check—one from outside the government itself.”).

137. The Constitution’s concern is with the deprivation of individual liberty, not the granting of privileges to individuals. *INS v. Chadha*, 462 U.S. 919, 966 n.9 (1983) (“When Congress grants particular individuals relief or benefits under its spending power, the danger of oppressive action that the separation of powers was designed to avoid is not implicated.”).

branches. Thus, Article II vests the President with the power to grant pardons for all federal offenses except in cases of impeachment.¹³⁸ As the Supreme Court has explained, this power “exists to afford relief from undue harshness or evident mistake in the operation or enforcement of the criminal law.”¹³⁹

The Framers’ concern with expansive state criminal powers became even more evident with the adoption of the Bill of Rights. Four of the first ten Amendments deal explicitly with criminal process. The Fourth Amendment regulates the state’s policing and investigative powers.¹⁴⁰ The Fifth Amendment acts as a check on the state’s executive powers by providing for the right to a grand jury and prohibiting the state from prosecuting individuals twice for the same offense.¹⁴¹ And, of course, the Fifth Amendment’s Due Process Clause¹⁴² (and later, the Fourteenth Amendment’s Due Process Clause¹⁴³) ensures that the government follows proper process before depriving an individual of life, liberty, or property. The Sixth Amendment reiterates the centrality of the jury’s role in adjudicating criminal cases, making clear that the jury will be drawn from the community in which a crime occurs.¹⁴⁴ In addition, the Sixth Amendment provides a host of additional rights to defendants: the right to a speedy and public trial, the right to notice of criminal charges, the right to confrontation, and the right to assistance of counsel.¹⁴⁵ And the Eighth Amendment regulates the government’s legislative judgments by putting a cap on punishment.¹⁴⁶ There is thus abundant constitutional regulation of all aspects of the government’s criminal power, from investigation to prosecution, from adjudication to the legislation defining punishment. These powers are strictly defined and divided, just as they are in Articles I, II, and III.

Akhil Amar argues that the Bill of Rights protections were not originally conceived as a litany of rights but as structural limits to protect local majorities from national power.¹⁴⁷ At the heart of this scheme, according to Amar, is the jury. Thus, many of these protections were designed to preserve the power of the jury in a criminal trial to act as a kind of local government check on corrupt or abusive national power.¹⁴⁸ Regardless of whether Amar is correct in the

138. U.S. CONST. art. II, § 2, cl. 1.

139. *Ex parte Grossman*, 267 U.S. 87, 120-21 (1925).

140. U.S. CONST. amend. IV.

141. U.S. CONST. amend. V.

142. *Id.*

143. U.S. CONST. amend. XIV.

144. U.S. CONST. amend. VI.

145. *Id.*

146. U.S. CONST. amend. VIII.

147. AKHIL AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* (1998). For example, the Fourth and Eighth Amendments, in Amar’s view, were designed to place limits on state power in those instances in which the jury could not provide a check. That is, because courts issue arrest warrants, set bail, and sentence without juries, additional protections were needed. *Id.* at 87.

148. For the Framers, the worry was overreaching by the national government. The

totality of his analysis, there is no denying his claim that the Bill of Rights contains structural protections that serve to protect rights.¹⁴⁹

When it comes to criminal justice, then, the separation of powers is divined not just from the fact that Articles I, II, and III separate legislative, executive, and judicial power. Rather, there are many additional textual indications that the separation of functions is critically important when the federal government uses its criminal powers. Under the scheme established by the Constitution, each branch must agree before criminal power can be exercised against an individual. Congress must criminalize the conduct,¹⁵⁰ the executive must decide to prosecute,¹⁵¹ and the judiciary (judges and juries) must agree to convict.

This scheme provides ample evidence that the potential growth and abuse of federal criminal power was anticipated by the Framers¹⁵² and that they intended to place limits on it through the separation of powers. Put another way, the Constitution's provisions addressing crime and the separation of powers reflect the fact that the Framers weighed the need for federal government efficiency against the potential for abuse and came out heavily in favor of limiting federal government power over crime. And, of course, one of their preferred methods for limiting government power was the separation of that power into strict categories.

It could be argued, however, that the *extent* of federal criminal law expansion, like the extent of the growth of the administrative state, was unexpected. In fact, federal criminal jurisdiction expanded alongside the

Fourteenth Amendment expands the protections to cover state abuse of power as well and to place more emphasis on the rights-protecting function of the amendments.

149. See Roderick M. Hills, *Back to the Future? How the Bill of Rights Might Be About Structure After All*, 93 NW. U. L. REV. 977, 996 (1999) (reviewing AMAR, *supra* note 147) ("[R]ights depend on a set of complex institutions for their defense and definition and without these institutions rights became mere 'parchment barriers.'" (citing JACK N. RAKOVE, *DECLARING RIGHTS: A BRIEF HISTORY WITH DOCUMENTS* 22-23 (1998))).

150. The Court long ago rejected the judiciary's power to recognize a federal common law of crimes. *United States v. Hudson & Goodwin*, 11 U.S. (7 Cranch) 32, 34 (1812) ("The legislative authority of the Union must first make an act a crime, affix a punishment to it, and declare the Court that shall have jurisdiction of the offence."); see also *United States v. Coolidge*, 14 U.S. (1 Wheat.) 415 (1816) (reaffirming *Hudson & Goodwin*).

151. The executive must also refrain from exercising the pardon power.

152. Further support for the notion of limited federal jurisdiction over crime can be gleaned from the fact that the Constitution vested the federal government with relatively little express jurisdiction over crime. See U.S. CONST. art. I, § 8 (giving Congress the power to punish counterfeiting, piracies, and offenses committed on federal territory); *id.* § 8, cls. 6, 10, 17; *id.* art. III, § 3, cl. 1 (defining treason and granting Congress the power to set the punishment for treason). Today, Congress relies on the Commerce Clause as its jurisdictional authority for most federal crimes. Whether Congress's view of its authority under the Commerce Clause is consistent with the Constitution has, of course, been subject to renewed debate in the past decade. See *Gonzales v. Raich*, 125 S. Ct. 2195 (2005); *United States v. Lopez*, 514 U.S. 549 (1995).

growth of the administrative state.¹⁵³ The first major increase in federal criminal legislation occurred after the Civil War as Congress passed criminal statutes covering mail fraud and various crimes dealing with interstate commerce.¹⁵⁴ The passage of the Eighteenth Amendment and Prohibition led to another increase in federal criminal jurisdiction,¹⁵⁵ and the number of federal cases spiked as well. The average annual number of criminal cases terminated in federal court went from approximately 26,500 in 1920 to almost 96,000 in 1932.¹⁵⁶ After Prohibition, the number of criminal cases declined from its peak, but the annual average in the late 1930s and early 1940s still hovered roughly around 40,000 federal criminal cases.¹⁵⁷ That is due, in part, to the fact that even after the Eighteenth Amendment was repealed, federal criminal jurisdiction did not retreat. The New Deal-era Congress did not just expand federal administrative power; it passed a host of new federal criminal laws that covered everything from bank robbery to firearms to criminal penalties for the commission of regulatory offenses.¹⁵⁸ The number of federal cases dropped a small amount in the period from the late 1940s through the 1960s,¹⁵⁹ but just as the administrative state experienced a resurgence in the late 1960s and 1970s,¹⁶⁰ federal criminal law also expanded, as Congress turned its attention to drugs, violence, and organized crime.¹⁶¹ The paths of federal criminal and regulatory law have diverged since the 1980s. There has been a strong push for deregulatory reforms and cost-benefit analysis on the civil side,¹⁶² but federal

153. Sara Sun Beale, *Federalizing Crime: Assessing the Impact on the Federal Courts*, 543 ANNALS AM. ACAD. POL. & SOC. SCI. 39, 42 (1996) ("As the scope of federal regulatory activities expanded, the scope of federal criminal laws extended as well.").

154. *Id.* at 41. In the period from 1871 to 1879, the average number of annual criminal cases terminated in federal court was just under 7000. Ronald F. Wright, *Trial Distortion and the End of Innocence in Federal Criminal Justice*, 154 U. PA. L. REV. 79, 89 tbl.1 (2005). Around this same time, the first cases of plea bargaining began to appear in appellate reports. Jason Mazzone, *The Waiver Paradox*, 97 NW. U. L. REV. 801, 852 (2003).

155. Beale, *supra* note 153, at 41.

156. Wright, *supra* note 154, at 89.

157. *Id.* at 89 tbl.89; Ronald F. Wright, *Federal Criminal Workload, Guilty Pleas, and Acquittals: Statistical Background* (2005), <http://ssrn.com/abstract=809124>.

158. Beale, *supra* note 153, at 41-42. This same time period witnessed the Court's acceptance of waivers of jury trials for bench trials. See *Patton v. United States*, 281 U.S. 276 (1930).

159. Wright, *supra* note 154, at 89 tbl.1. Ronald Wright attributes the decline in the number of defendants in the late 1940s and 1950s in part to the decline in the number of immigration cases. *Id.* at 90.

160. CASS R. SUNSTEIN, *AFTER THE RIGHTS REVOLUTION* 24-31 (1990).

161. Beale, *supra* note 153, at 42-43; see also Gerald G. Ashdown, *Federalism, Federalization, and the Politics of Crime*, 98 W. VA. L. REV. 789, 792-93 (1996) (noting that, in the two-and-a-half decades since 1971, "[f]ederal criminal jurisdiction thus became virtually limitless"). The average annual number of cases terminated in federal court went from just under 33,000 in the 1960s to just under 47,000 in the 1970s. Wright, *supra* note 154, at 89 tbl.1. This also coincided with the Court's acceptance of plea bargaining in 1971. See *infra* note 298 and accompanying text.

162. See Exec. Order No. 12,866, 58 C.F.R. 51735 (1983), as amended by Exec. Order

criminal jurisdiction continues to expand at a feverish pace.¹⁶³ In the 1990s, the number of criminal cases terminated in federal court increased to roughly 60,000, and the annual average from 2000 to 2002 was more than 76,000 criminal cases terminated in federal court.¹⁶⁴

If this federal criminal law expansion reflects the needs of a growing nation and the inadequacy of the states, perhaps the same arguments in favor of greater flexibility that have prevailed in the context of the administrative state should apply in the context of greater federal criminal law powers as well.¹⁶⁵ Perhaps the federal government should be allowed not merely to pass more substantive criminal laws, but also to use some of the same institutional tools that it uses in the context of the administrative state, including agencies that blend powers and more streamlined procedures.

One reason to hesitate before reaching this conclusion is that the presence of more federal criminal legislation may not reflect a greater need for federal action. First, federal criminal jurisdiction remains quite small as compared to state jurisdiction over crime.¹⁶⁶ Thus, unlike the administrative sphere, where federal regulatory authority often dominates the field in areas like environmental law and securities regulation,¹⁶⁷ states still bear most of the responsibility for the regulation of crime. Second, although the number of substantive federal offenses and prosecutions has increased, the number of federal enforcement officers remains relatively small. Many federal criminal laws are largely symbolic gestures that win members of Congress political points but result in few practical changes because they are not enforced. It is thus not always clear that a federal criminal law fills a void left by the states. On the contrary, federal law often duplicates state law without any showing

13,258, 67 C.F.R. 9385 (2002).

163. See TASK FORCE ON FEDERALIZATION OF CRIMINAL LAW, AM. BAR ASS'N, THE FEDERALIZATION OF CRIMINAL LAW 7 & n.9 (1998) (noting that "[m]ore than 40% of the federal [criminal] provisions enacted since the Civil War have been enacted since 1970" and that "more than a quarter of the federal criminal provisions enacted since the Civil War have been enacted within a sixteen year period since 1980").

164. Wright, *supra* note 154, at 89 tbl.1.

165. Cf. Strauss, *supra* note 11, at 582 (arguing that "the size alone of contemporary American administrative government" was unanticipated by the Framers and puts a strain on the formalist view of separation of powers).

166. In 2000, less than seven percent of felony convictions were in federal court. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS—2002, at 421 tbl.5.22, 477 tbl.5.44. Almost ninety-nine percent of violent crime prosecutions occur in state court. *Id.* at 416 tbl.5.17, 447 tbl.5.44.

167. Strauss, *supra* note 24, at 492-93 (noting "[v]irtually every part of the government Congress has created—the Department of Agriculture as well as the Securities and Exchange Commission—exercises *all three* of the governmental functions" and arguing that the use of such agencies "is unavoidable given Congress's need to delegate at some level the making of policy for a complex and interdependent economy, and the equal incapacity (and undesirability) of the courts to resolve all matters appropriately characterized as involving 'adjudication'").

that federal intervention is necessary.¹⁶⁸

But even if it could be shown that, as in the context of the administrative state, there has developed over time a greater need for the federal government to take an active role on crime, it still does not necessarily follow that separation of powers restrictions should be relaxed when it comes to crime. That is because there are critical functional differences between the two settings, which are explored in the next Part.

B. *Functional Differences*

The greatest historical development when it comes to the separation of powers is, as previously noted, the rise of the administrative state. That development provides the main rationale for adopting a functional approach to separation of powers questions.¹⁶⁹ In response to the Depression and a government structure that seemingly failed to prevent it, reformers increasingly turned to expert agencies that would combine functions and address important social and economic problems. James Landis, one of the leading architects of the New Deal, explained that the government, like a business, needed to operate efficiently and that no business operated under the confines of anything like a separation of powers requirement.¹⁷⁰ On the contrary, successful managers combined functions for increased efficiency, and Landis and his fellow reformers wanted government to follow the same model to deal with the complexity of society after the Industrial Revolution.¹⁷¹ They reasoned that the Framers could not have anticipated the problems of modern government and would not have intended the separation of powers to straitjacket the government into failure. The underlying idea is that an active, unimpeded government can produce beneficial results for society, so the government structure should be built around the agency concept and allow it to flourish.

The Court ultimately accepted these arguments and has long allowed administrative agencies to flout the separation of powers by combining

168. See Rachel E. Barkow, *Our Federal System of Sentencing*, 58 STAN. L. REV. 119, 122-23 (2005).

169. Justice White, the leading separation of powers functionalist on the Court, explicitly linked the administrative state and the need for a flexible approach. See, e.g., *INS v. Chadha*, 462 U.S. 919, 999 (1983) (White, J., dissenting) (noting that a flexible approach to separation of powers is necessary to have an effective government and noting that the “Court, recognizing that modern government must address a formidable agenda of complex policy issues, countenanced the delegation of extensive legislative authority to Executive and independent agencies” (citations omitted)); *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 113 (1982) (White, J., dissenting) (arguing that it is “too late” to turn to the original intent of Article III given the development of Article I courts and administrative agencies).

170. LANDIS, *supra* note 4, at 11-12.

171. *Id.* at 24 (discussing need for efficiency).

executive, legislative, and judicial powers.¹⁷² The acceptance of the administrative state is the ultimate example of a functional approach to separation of powers. But, as has been repeatedly emphasized by courts and commentators in justifying the acceptance of administrative agencies, regulatory agencies do not operate unchecked.¹⁷³ Many structural, procedural, and political safeguards exist to keep them from abusing power. Indeed, the courts' acceptance of the administrative state and its blending of powers was conditioned on the availability of judicial review and these institutional checks.¹⁷⁴ As this Part explains, these critical protections are lacking in the criminal arena.

1. *Lack of structural and procedural safeguards*

Although administrative agencies combine powers under one roof, they do not operate unchecked. On the contrary, their policy decisions are subject to judicial review and a host of procedural and structural requirements in the

172. See, e.g., *Bowsher v. Synar*, 478 U.S. 714, 761 (1986) (White, J., dissenting) (“[W]ith the advent and triumph of the administrative state and the accompanying multiplication of the tasks undertaken by the Federal Government, the Court has been virtually compelled to recognize that Congress may reasonably deem it ‘necessary and proper’ to vest some among the broad new array of governmental functions in officers who are free from the partisanship that may be expected of agents wholly dependent upon the President.”); Freeman, *supra* note 19, at 545 (“The combination of executive, legislative, and adjudicative functions in administrative agencies appears to violate the separation of powers principles embodied in the Constitution.”); Strauss, *supra* note 11, at 579 (noting the challenge agencies’ combined functions pose for a formalist analysis).

173. Indeed, many novel government arrangements raising separation of powers concerns are themselves often developed to serve as checks on agency power. For example, the legislative veto ultimately found unconstitutional in *Chadha* was designed to check agency power. *Chadha*, 462 U.S. at 968-69 (“The legislative veto developed initially in response to the problems of reorganizing the sprawling Government structure created in response to the Depression . . . [and] offered the means by which Congress could confer additional authority while preserving its own constitutional role.”).

174. WHITE, *supra* note 20, at 94-127 (2000) (explaining how the availability of judicial review was critical to the acceptance of administrative agencies). For example, G. Edward White notes that William Howard Taft observed in 1921 that “judicial review of the actions of administrative agencies could be anticipated as an ongoing feature of the new field.” *Id.* at 100. He also observes that, throughout the 1920s and 1930s, “in each case the eventual creation of a new agency was accompanied by a procedure for judicial review of its decisions that afforded the agencies substantive discretion but allowed due process challenges to its decisionmaking processes.” *Id.* at 102. And, of course, the APA made judicial review a statutory right and imposed additional structural and procedural checks. See also LOUIS L. JAFFE, *JUDICIAL CONTROL OF ADMINISTRATIVE ACTION* 320 (1965) (“The availability of judicial review is the necessary condition, psychologically if not logically, of a system of administrative power which purports to be legitimate, or legally valid.”); Rebecca L. Brown, *Caging the Wolf: Seeking a Constitutional Home for the Independent Counsel*, 83 MINN. L. REV. 1269, 1277 (1999) (noting that “the existence of judicial review of an independent agency’s exercise of delegated power has always been critical to its legitimacy”).

APA.

Agencies conducting formal adjudications must obey various structural rules designed to ensure impartiality. The individual at the agency who presides at the hearing must be impartial¹⁷⁵ and must be separated from individuals at the agency who perform investigative and prosecutorial functions.¹⁷⁶ Administrative law judges (ALJs) also cannot be removed by the agency for which they adjudicate, but instead can be removed only after notice and hearing by the Merit Systems Protection Board.¹⁷⁷ ALJs and anyone else at the agency involved in the decisionmaking process are prohibited from having ex parte communications related to the merits of the proceeding,¹⁷⁸ and the agency's decision must be based on the evidence in the record.¹⁷⁹ The APA also imposes various process requirements, including notice to interested parties, an opportunity for interested parties to submit evidence and arguments, and a chance for interested parties to submit proposed findings and to make exceptions to tentative agency decisions.¹⁸⁰ In all formal proceedings—rulemakings and adjudications—the agency must issue a decision on the record with a statement of its findings and conclusions.¹⁸¹

When agencies proceed through informal rulemaking instead of formal rulemaking or formal adjudication, they must issue a notice of their proposed rules and give the public an opportunity to comment.¹⁸² As in formal proceedings, the agency's decision must be based on the facts in the record, and the agency must disclose the evidence on which it relied in reaching a decision.¹⁸³ The agency must consider the comments received and explain why it rejected arguments made in the comments.¹⁸⁴

All agency proceedings—formal or informal, rulemaking or adjudication—

175. 5 U.S.C. § 556(b) (2006).

176. § 554(d); *see also* Brown, *supra* note 20, at 1557 (noting that the separation of executive and judicial functions in agencies has been necessary to “compensate for departures from the structural constitutional norms”); Verkuil, *supra* note 121, at 316 (noting that the APA’s “separation of functions and the use of administrative law judges has done much to allay due process concerns in that setting”). Agency heads, however, are exempt from the structural separation requirement. 5 U.S.C. § 554(d)(2)(C) (2006).

177. § 7521; *see also* §§ 3105, 5372 (establishing that administrative law judges “may not perform duties inconsistent with their duties and responsibilities as administrative law judges” and providing salary protections, respectively).

178. § 557(d)(1).

179. § 556(d), (e); § 557(c). Formal rulemakings, like formal adjudications, must also be based on the evidence in the record.

180. § 554(b), (c); § 557(c).

181. § 557(c).

182. § 553(c).

183. *See* Nova Scotia Food Prods. Corp. v. United States, 568 F.2d 240 (2d Cir. 1977) (holding that if an agency relies on scientific data it must make that material available on the record).

184. *Motor Vehicle Mfrs. Ass’n. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983).

are subject to extensive judicial review. Decisions made in even the most informal of adjudications are subject to judicial oversight to ensure that the agency's action is not arbitrary and capricious.¹⁸⁵ Agencies must give reasons if they change course from case to case, and there must be support for the agency's decision in the administrative record. If there is evidence in the record that undermines the agency's position or if a party or commenter raises a serious objection to the agency's proposal, the agency must offer reasons why those arguments do not hold sway. Thus, unlike the judicial rubber-stamping associated with rational basis review, courts take a "hard look" at the agency's explanation to provide a check against arbitrary implementation.¹⁸⁶

Oversight laws—such as the Freedom of Information Act (FOIA)¹⁸⁷ and the Federal Advisory Committee Act (FACA)¹⁸⁸—grant the public additional access to information about the agency decisionmaking process, which provides further protection against arbitrary agency action or agency decisions based on improper influences. And, to the extent that the Office of Management and Budget reviews agency rules under executive orders¹⁸⁹ for consistency across agencies,¹⁹⁰ this provides an additional check on agency policies.

This oversight regime of judicial review and structural constraints has been crucial to the Court's acceptance of broad delegations of legislative and judicial power to executive agencies.¹⁹¹ As Rebecca Brown has noted, it is precisely

185. 5 U.S.C. § 706(2)(A) (2006). The substantial evidence test for formal proceedings serves the same function. See *Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951).

186. *Motor Vehicle Manufacturers Ass'n.*, 463 U.S. at 40-42; *Citizens To Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971).

187. 5 U.S.C. § 552 (2006) (mandating the release of government records).

188. 5 U.S.C. app. § 2 (imposing open meeting requirements on advisory committees and requiring additional disclosures).

189. See, e.g., Exec. Order 12,291, 46 Fed. Reg. 13,193 (1981); Exec. Order 12,866, 58 Fed. Reg. 51,735 (1993).

190. Richard Revesz and Nicholas Bagley point out that the harmonizing function of OMB has been minimal. Nicholas Bagley & Richard L. Revesz, *OMB and the Centralized Review of Regulation 2* (N.Y.U. L. & Econ. Res. Paper No. 05-16, 2005) (draft on file with author).

191. See *supra* notes 173-74; *Clinton v. New York*, 524 U.S. 417, 489 (1998) (Breyer, J., dissenting) (noting the importance of judicial review and agency rulemaking to the Court's acceptance of broad delegation because they "diminish[] the risk that the agency will use the breadth of a grant of authority as a cloak for unreasonable or unfair implementation") (citations omitted); *McGautha v. California*, 402 U.S. 183, 278-79 (1971) (Brennan, J., dissenting) (explaining that delegations of rulemaking and adjudicatory authority "have invariably provided substantial protections to insure against arbitrary action and to guarantee that underlying questions of policy are considered and resolved" and noting the "importance of administrative or judicial review in providing a check on the exercise of arbitrary power") (citations omitted). Scholars embracing a functional approach to separation of powers have also relied on these checks to justify their position. See, e.g., Strauss, *supra* note 11, at 577 (noting that "a web of other controls—judicial review and legislative and executive oversight . . . give reasonable assurance against systemic lawlessness").

because agencies combine all three types of government power that these other measures are necessary to protect individual rights.¹⁹²

Notably, these protections do not apply to the actions of key governmental officials and agencies exercising criminal power, particularly prosecutors. Although Kenneth Culp Davis argued almost four decades ago that the discretion exercised by police officers and prosecutors should be subject to the same procedural and structural checks as other administrative officials,¹⁹³ his calls for reform were not heeded. Political actors did not impose police regulation modeled along the lines of the APA,¹⁹⁴ though that failure might be explained in part by the fact that the Supreme Court's Fourth and Fifth Amendment decisions imposed constitutional regulation on the police that might have made administrative regulation appear unnecessary.¹⁹⁵ But even if Court decisions explain the lack of administrative oversight mechanisms on the police, it cannot explain the continued lack of oversight for prosecutors.

Because of the operation of a broad federal criminal code and prosecutors' leverage over plea bargaining,¹⁹⁶ the only process—judicial or otherwise—that most defendants receive comes from prosecutors. In the course of reaching a negotiated disposition, “the prosecutor acts as the administrative decision-

192. Brown, *supra* note 20, at 1555 (“[T]o avoid an unconstitutional delegation of legislative power to an administrative agency, Congress ‘must enjoin upon the agency a certain course of procedure and certain rules of decision in the performance of its function.’”) (citing *Wichita R.R. & Light Co. v. Pub. Utils. Comm’n*, 260 U.S. 48, 59 (1922)).

193. See DAVIS, *supra* note 108, at 80-96, 188-214; see also Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 55 MINN. L. REV. 349, 380 (1974) (arguing for more rulemaking by the police); Malcolm M. Feeley, *Two Models of the Criminal Justice System: An Organizational Perspective*, 7 LAW & SOC’Y REV. 407, 423 (1973) (arguing that “the system of criminal justice is a highly formalized and defined set of rules, norms, and goals, but also an organization which possesses no corresponding set of incentives and sanctions which act to systematically enforce them” and suggesting “a solution requiring more bureaucracy, not less”). Even before Davis, Sanford Kadish argued for oversight of the discretion exercised by officials in the administration of criminal law because the administration of criminal law “is not *sui generis*, but another administrative agency which requires its own administrative law.” Sanford H. Kadish, *Legal Norm and Discretion in the Police and Sentencing Processes*, 75 HARV. L. REV. 904, 931 (1962).

194. Scholars from Jerome Hall to Jerome Skolnick have highlighted the problems associated with police discretion. For an overview of this scholarship and a discussion of how theories of democracy and accountability intersect with policing, see David Alan Sklansky, *Police and Democracy*, 103 MICH. L. REV. 1699, 1736-41 (2005).

195. See Stuntz, *supra* note 49, at 17 (noting that the Court’s Fourth and Fifth Amendment decisions “do not just set outer boundaries for police conduct” but instead “constitutional criminal procedure occupies the field”).

196. Lynch, *supra* note 23, at 2136-37 (“So long as our criminal codes contain too many prohibitions, the contents of which are left to be defined by their implementation, or which cover conduct that is clearly not intended to be punished in every instance, or which provide for the punishment of those who act without wrongful intent, prosecutors must exercise judgment about which of the many cases that are technically covered by the criminal law are really worthy of criminal punishment.”).

maker who determines, in the first instance, whether an accused will be subject to social sanction, and if so, how much punishment will be imposed.”¹⁹⁷ Despite the significance of prosecutorial power, prosecutors operate with little oversight or regulation.¹⁹⁸ The same prosecutor who investigates a case can make the final determination about what plea to accept. There is therefore no structural separation of adjudicative and executive power, and defendants have no right to a formal process or internal appeal within the agency. In addition, in the course of bargaining with a defendant over charges, the prosecutor can engage in *ex parte* contacts with the police and investigators, and the defendant need not be given access to the information on which the prosecutor relies—that is, the prosecutor’s evidence of the defendant’s guilt.¹⁹⁹

The Supreme Court is of the view that a prosecutor’s charging and plea bargaining decisions are largely off limits from judicial review.²⁰⁰ “In the ordinary case, ‘so long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion.’”²⁰¹ Prosecutors cannot base their decisions on “an unjustifiable standard such as race, religion, or other arbitrary classification,”²⁰² but the Supreme Court has “taken great pains to explain that the standard [for showing discriminatory prosecution] is a demanding one.”²⁰³ Prosecutors enjoy a “presumption of regularity,” and “in the absence of clear evidence to the contrary, courts presume that they have properly discharged their official duties.”²⁰⁴ Indeed, for a defendant to obtain discovery on a discrimination claim, much less prevail on the claim itself, he or she must show that the government failed to prosecute similarly situated defendants.²⁰⁵ The Court has emphasized that there is a “‘background presumption’ that the showing necessary to obtain discovery should itself be a significant barrier to the litigation of insubstantial claims.”²⁰⁶ Given the secrecy with which prosecutors’ offices operate, it should come as no surprise that these claims rarely succeed.

197. *Id.* at 2135.

198. *Id.* at 2124 (“Because our governing ideology does not admit that prosecutors adjudicate guilt and set punishments, the procedures by which they do so are neither formally regulated nor invariably followed.”).

199. *Id.* at 2128-29.

200. *Wayte v. United States*, 470 U.S. 598, 608 (1985) (noting that courts are “properly hesitant to examine the decision whether to prosecute”).

201. *United States v. Armstrong*, 517 U.S. 456, 464 (1996) (quoting *Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978)).

202. *Id.* at 464. Vindictive prosecutions are also impermissible. *Blackledge v. Perry*, 417 U.S. 21, 27 (1974).

203. *Armstrong*, 517 U.S. at 463.

204. *Id.* at 464 (citation omitted).

205. *Id.* at 458.

206. *Id.* at 463-64.

Furthermore, while judges oversee prosecutors to make sure that pleas are knowing and voluntary²⁰⁷ and have a factual basis,²⁰⁸ their inquiries are cursory.²⁰⁹ Judge Gerard Lynch aptly describes the judicial part of this process as follows:

In a substantial number of cases, the judicial “process” consists of the simultaneous filing of a criminal charge by a prosecutor (often by means of a prosecutor’s “information” rather than an indictment, with the defendant waiving the submission of the evidence and charge to a grand jury) and admission of guilt by the defendant. The charging document may be quite skeletal, the defendant’s account of his guilty actions brief, and the judicial inquiry concerned more with whether the defendant is of sound mind and understands the consequences of what he is doing than with the accuracy of the facts to which he is attesting.²¹⁰

Thus, instead of being subject to the hard-look review that other agencies face when they seek to impose fines or penalties or to require action of some kind, prosecutors enjoy a presumption of regularity and face only a cursory judicial inquiry of their discretionary decisions to enter plea agreements.²¹¹

207. *Hill v. Lockhart*, 474 U.S. 52, 56 (1985) (noting that the “longstanding test for determining the validity of a guilty plea is ‘whether the plea represents a voluntary and intelligent choice’”) (citations omitted).

208. FED. R. CRIM. P. 11(a)(1).

209. See Lynch, *supra* note 23, at 2122; see also Wright, *supra* note 154, at 82 (describing the “knowing and voluntary” standard as “anemic, since the facts supporting guilty pleas can be remarkably thin, and many ‘knowing’ and ‘voluntary’ guilty pleas are nevertheless coercive and unjust”).

210. Lynch, *supra* note 23, at 2122. As Lynch further notes, judges in this system typically lack sufficient information to make an informed decision about the defendant’s guilt, and the federal rules do not require that a judge determine that the defendant is guilty, “let alone guilty beyond a reasonable doubt.” *Id.* at 2212 & n.5 (citing FED. R. CRIM. P. 11(f)).

211. To be sure, civil regulatory agencies can also engage in something akin to plea bargaining in some limited contexts, for example, by placing conditions on the issuance of a license or by agreeing to a lesser fine or penalty for an enforcement violation if the regulated entity makes certain concessions. Lars Noah, *Administrative Arm-Twisting in the Shadow of Congressional Delegations of Authority*, 1997 WIS. L. REV. 873, 876. But because the circumstances in which agencies can proceed this way are limited, the agency is checked by the vast majority of instances in which it must proceed in a rulemaking or adjudication subject to arbitrary and capricious review. That is, the agency will almost invariably have announced its policies in many rulemakings or adjudications, which will act as a check on its attempts to engage in so-called arm-twisting behavior with regulated entities. Prosecutors do not have the same check because they do not have to announce their policies in any proceeding governed by court review. Even in the limited cases that go to trial, prosecutors’ policies are not challenged. The jury either acquits or convicts on the facts. There is thus no judicial review of how the prosecutor’s office proceeds as a general matter.

In addition, unlike plea bargaining, agency “bargaining” is further limited by the fact that the regulated entity, if it chooses not to accept the agency’s enforcement offer or licensing conditions, can proceed through the regular agency process and then challenge that outcome in court. The agency is often capped in terms of what it can threaten—a license denial is the worst that it can do in a licensing proceeding, for example. Even in the enforcement context, agencies do not have the same wealth of enforcement provisions from

Moreover, though a defendant has the right to reject a plea and take his or her case to trial,²¹² that option fails to police structural abuses of power.²¹³ Indeed, a defendant takes a big gamble in exercising even this limited power of review, because if the defendant is found guilty, he or she is typically subject to harsher punishment.

Without judicial oversight to speak of or any internal constraints, the potential for arbitrary enforcement is high.²¹⁴ Prosecutors need not treat similar cases similarly for purposes of plea bargaining, and they need not explain why they agreed to reach a deal with one defendant but refused to do so with another defendant guilty of the same crime. Indeed, because prosecutors need not make the terms of their plea bargains available to the public through publication and because prosecutorial law enforcement is largely exempt from open government laws like FOIA,²¹⁵ a defendant might not even know that another similarly situated defendant received a particular deal.²¹⁶ Nor may

which to choose that prosecutors have. The options stemming from regulatory violations are more limited than the options available in the federal criminal code. Consequently, agency discretion is also limited. Furthermore, even if an agency does have broad discretion to threaten a greater fine if a regulated entity opts to challenge its alleged wrongdoing, the regulated entity is likely to have more resources and political power than a criminal defendant to make sure that agency enforcement is not abusive. *See Noah, supra*, at 921 (observing that regulated entities are more sophisticated and noting that the stakes are lower in regulatory proceedings); *see also infra* Part II.B.2 (discussing political process differences between civil regulation and crime). And because the agency's imposition of fines and enforcement practices will be a matter of public record, it will be easier for a regulated entity to make a decision about whether to accept the agency's offer and to challenge arbitrary enforcement practices in court.

212. Lynch, *supra* note 23, at 2135 (noting that in plea bargaining, "the formal adversarial jury trial serves as a kind of judicial review, in which a defendant who is not content with the administrative adjudication by the prosecutor has a right to de novo review of the decision in another forum").

213. *See infra* Part II.C, III.D.

214. *Cf. INS v. Chadha*, 462 U.S. 919, 966 (1983) (Powell, J., concurring) (concluding that the problem with the legislative veto is that "Congress is not subject to any internal constraints that prevent it from arbitrarily depriving [Chadha] of the right to remain in this country" and "[u]nlike the judiciary or an administrative agency, Congress is not bound by established substantive rules" "[n]or is it subject to the procedural safeguards . . . that are present when a court or an agency adjudicates individual rights") (citations omitted). For an insightful discussion of how the Court's formalist opinions protect against arbitrary behavior, see Lisa Schultz Bressman, *Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State*, 78 N.Y.U. L. REV. 461, 519-23, 525-27 (2003) (explaining how the formalist approach taken in *Chadha*, *Bowsher*, and *Clinton v. City of New York* (the line-item veto case) can be justified as a means for preventing arbitrary action).

215. 5 U.S.C. § 552b(c)(5) (2006) (exempting information "involv[ing] accusing any person of a crime"); § 552b(c)(7) (exempting "investigatory records compiled for law enforcement purposes" but noting that the exemption only applies under certain circumstances, such as if release of the information would interfere with the proceedings, would disclose investigative techniques or procedures, or would deprive a person of a right to an impartial adjudication).

216. Lynch, *supra* note 23, at 2132 ("[U]nlike the opinions of courts, [prosecutorial plea] decisions are not published, permitting discriminatory advantage to defendants

defendants be aware that a prosecutor is diverging from office policy. Judge Lynch notes that prosecutors' offices will often change their enforcement policies and likens these shifts to an administrative agency's decision to issue a new set of regulations.²¹⁷ But unlike an administrative agency's policies, the prosecutor's policies are not openly disclosed to the public and are not subject to arbitrary and capricious review for reasoned consistency.²¹⁸

Nor is the lack of structural oversight in the federal criminal process limited to prosecutors. Even when Congress created the United States Sentencing Commission, a federal criminal agency modeled in crucial respects after traditional administrative agencies, it failed to subject the Commission to key APA requirements. While the Sentencing Reform Act requires that the Sentencing Commission's rulemaking proceedings comply with the notice and comment requirements of the APA,²¹⁹ the rules themselves are not subject to judicial review to make sure that they are not arbitrary and capricious.²²⁰

There is, then, a sharp incongruity between the treatment of discretion in the administrative context and the criminal context. The Court accepted the constitutionality of the administrative state against the backdrop of structural and procedural protections that protect against the dangers of combining powers under one roof and of allowing one branch of government to exercise disproportionate authority. Because those protections are lacking in the context of criminal matters, the same arguments in favor of flexibility do not apply.

2. Lack of political safeguards

The structural and procedural checks supplied by the APA are not the only mechanisms for checking government abuse that are absent in the criminal context. Political oversight mechanisms provide a key check on administrative agencies, but they do not work as effectively when it comes to criminal enforcement.²²¹

When the government regulates noncriminal as opposed to criminal conduct, many interested groups have the incentives and the power to police the government's policies. Typically, public interest and consumer groups seek more regulation while corporations and industry groups advocate less

represented by 'insider' counsel who are well informed about local prosecutorial practice, and leaving the precise 'holdings' of prior cases subject to reinterpretation, shifting memory, and policy change.").

217. *Id.* at 2141.

218. See Norman Abrams, *Internal Policy: Guiding the Exercise of Prosecutorial Discretion*, 19 UCLA L. REV. 1, 25 (1971) (noting that the general practice of prosecutors is not to publish their policies).

219. 28 U.S.C. § 994(x) (2006).

220. Barkow, *supra* note 21, at 761.

221. Cf. *Clinton v. New York*, 524 U.S. 417, 490 (1998) (Breyer, J., dissenting) (accepting broad delegation to the President under the Line Item Veto Act because the President is an elected official subject to oversight by the voters).

regulation. The targets of regulation are often the more powerful force, as they have the incentives and the means to fight government interference and to get procedural and substantive protections through the normal course of politics.²²² Regulated entities can make credible threats that they will obtain favorable legislation that overrules the agency or that they will challenge the agency in time-consuming court proceedings. This gives them leverage with the agency that acts as a check on government overreaching.²²³ Thus, in the typical regulatory context, groups line up on both sides of the issue, and, if anything, there are more powerful forces operating to check too much government intervention.

The political process is more skewed when it comes to crime, particularly federal legislation aimed at substantive crime definition and sentencing.²²⁴ Neither criminal defendants nor judges—the two main targets of criminal punishment legislation—have much sway in the political process. Those who have not been caught committing a crime are rarely going to self-identify in order to lobby for lesser punishments or more narrow crime definitions.²²⁵ And individuals already convicted of a crime are perhaps the weakest of all groups in the political arena. By virtue of their conviction, criminals often lose the right to vote, and they are a weak lobbying force even when they retain that

222. See Bagley & Revesz, *supra* note 190, at 24-25 (citing studies that show regulated industries typically spend more money and file more comments than their public-interest counterparts); Barkow, *supra* note 21, at 723-24 (describing the typical interest-group scenario); Steven P. Croley, *Theories of Regulation: Incorporating the Administrative Process*, 98 COLUM. L. REV. 1, 126-41 (1998) (citing studies that show regulated parties have greater access to agencies than public-interest groups).

223. Some argue that regulated interests have too much power over agencies and that mechanisms should be put in place to combat agency capture, such as more stringent judicial review. Einer R. Elhauge, *Does Interest Group Theory Justify More Intrusive Judicial Review?*, 101 YALE L.J. 31, 44-46 (1991) (discussing scholarship advocating more review as a check on agency capture and interest-group influence). *But see id.* at 66-68, 84 (arguing that interest-group theory does not justify more intrusive judicial review because of a lack of independent normative standards for evaluating the influence of interest groups and because the litigation process is no less defective than the political process). Whether regulated interests have too much power is beyond the scope of this Article. The argument here is simply that the political process is more balanced outside the criminal sphere than within it.

224. I have explored the politics of sentencing in greater detail in Barkow, *supra* note 21, at 723-35; Rachel E. Barkow, *Federalism and the Politics of Sentencing*, 105 COLUM. L. REV. 1276 (2005). Ronald Wright has explained that the interest-group dynamics vary depending on whether the government is regulating substantive criminal law, policing, adjudication of criminal cases, or punishment. Ronald F. Wright, *Parity of Resources for Defense Counsel and the Reach of Public Choice Theory*, 90 IOWA L. REV. 219, 255-56 (2004). In particular, he asserts that the process is more balanced when it comes to legislation addressing adjudication. *Id.* at 259-60.

225. Individuals and corporations engaged in legal enterprises who anticipate the danger that their conduct might be seen as crossing the line over to criminality are the ones most likely to pay attention to crime definition and sanctions to protect themselves. Thus, the political process is likely to be most balanced when it comes to regulatory and white-collar crimes.

right.²²⁶ And while their families and communities have an interest in advocating on their behalf, these groups currently lack political power.²²⁷ Judges, the objects of legislation aimed at curbing sentencing discretion, are more effective lobbyists than criminal defendants, but they have been largely unsuccessful in stopping legislation that has limited their discretion.²²⁸

While the targets of regulation are weak, proponents of more expansive criminal laws are not.²²⁹ Prosecutors have an incentive to request broader criminal laws and longer, mandatory sentences because those laws make it easier for them to obtain defendants' cooperation in plea bargaining.²³⁰ Groups with a stake in the expansion of prisons—including rural communities, corrections officer unions, and private prison companies—are powerful forces in favor of longer sentences. Victims' rights groups similarly endorse longer sentences and more expansive criminal laws.²³¹ The public is also generally supportive of harsher criminal laws and is easily mobilized by politicians or interest groups to get behind "tough on crime" initiatives.²³²

Because the targets of regulation are weak and the voices in favor of broader laws and longer punishments are powerful, the political system is biased in favor of more severe punishments. There are few forces that can counter the government when it overreaches on crime. As Jeremy Bentham observed, "legislators and men in general are naturally inclined" in that direction because "antipathy, or a want of compassion for individuals who are

226. As Harold Krent notes, criminal offenders are not only weak because of their status as convicted individuals, but also because they tend to be "poor and disproportionately comprised of minorities," which further weakens the group's political clout. Harold J. Krent, *Should Bouie Be Buoyed?: Judicial Retroactive Lawmaking and the Ex Post Facto Clause*, 3 ROGER WILLIAMS U. L. REV. 35, 85-86 (1997).

227. Barkow, *supra* note 21, at 725-27 (explaining that those advocating for criminal defendants have little power now but that circumstances may eventually change).

228. Federal judges have lobbied for sentencing and substantive criminal law reforms largely through the Judicial Conference. See Judith Resnik, *The Programmatic Judiciary: Lobbying, Judging, and Invalidating the Violence Against Women Act*, 74 S. CAL. L. REV. 269, 281-83 (2000) (describing Judicial Conference reform efforts on sentencing and criminal justice policy). While those efforts yielded some success in the first half of the twentieth century, *id.* at 281-82 (describing judicial influence over the 1950 Federal Youth Corrections Act), judges have had little success in recent decades curbing congressional efforts to limit their discretion through mandatory minimum sentences and more stringent Federal Sentencing Guidelines. See *id.* at 283 ("Between the late 1950s and the 1990s, the Judicial Conference had many times opposed legislation that, despite its commentary, became law."); see also Barkow, *supra* note 21, at 724-25 (noting that judges do not engage in concerted lobbying in the same way as traditional regulated entities).

229. As Bill Stuntz points out, because "it is much cheaper for interest groups to lobby for criminal legislation than against it," the usual political dynamic—"where legislation is easier to block than to generate"—is inverted. William J. Stuntz, *Reply: Criminal Law's Pathology*, 101 MICH. L. REV. 828, 836 (2002).

230. Barkow, *supra* note 21, at 728 & n.25 (giving examples of prosecutor lobbying).

231. *Id.* at 729.

232. *Id.* at 729-30.

represented as dangerous and vile, pushes them onward to an undue severity.”²³³ Bentham therefore advocated that “[i]t is on this side [towards severity], therefore, that we should take the most precautions, as on this side there has been shown the greatest disposition to err.”²³⁴

The scheme of separated powers is designed to do just that.²³⁵ The Constitution makes it difficult for the state to act in criminal cases against individuals and members of groups disfavored by the majority.²³⁶ All three branches must agree to allow a criminal conviction, and the judiciary plays a particularly significant role because of its relative insulation from the political imbalance described above.

The impediments to action provided by the separation of powers check state abuse and preserve the interests of individuals and local and political minorities. This argument for separation of powers is therefore the classic representation-reinforcing theory for judicial review. Thus, arguments for dismantling this scheme on the basis of efficiency grounds—that the state is hamstrung in its ability to proceed in criminal cases—disrupt the very core of why we have separation of powers in the first place. The inefficiency associated with the separation of powers serves a valuable function, and, in the context of criminal law, no other mechanism provides a substitute.

C. Individual Rights Protections Are Insufficient

The separation of powers is not the only means by which the Constitution protects the interests of criminal defendants. The Bill of Rights, as noted, provides additional protections to prevent the political process from targeting individuals. It is important to consider whether the protections offered in the Bill of Rights render the importance of separation of powers protections less significant in criminal matters. Put another way, if the individual rights protections serve the same function as the various procedural and structural protections of the APA and check the political process failures, then perhaps there would not be the same need for greater enforcement of the separation of

233. JEREMY BENTHAM, PRINCIPLES OF PENAL LAW, pt. II, bk. 1, ch. 6 in THE WORKS OF JEREMY BENTHAM 401 (John Bowring ed., 1843) (1962).

234. *Id.* Schumpeter also argued that the content of criminal laws should not be left purely to politics because crime “is a complex phenomenon” that leads to “fits of vindictiveness and . . . sentimentality” and where “[p]opular slogans about it are almost invariably wrong.” JOSEPH A. SCHUMPETER, CAPITALISM, SOCIALISM AND DEMOCRACY 292 (Harper Perennial 1976) (1942).

235. For example, scholars such as Harold Krent and Dan Kahan have noted that this rationale best explains the prohibition on ex post facto laws. Dan M. Kahan, *Some Realism About Retroactive Criminal Lawmaking*, 3 ROGER WILLIAMS U. L. REV. 95, 112-17 (1997); Krent, *supra* note 226, at 88-92.

236. “[T]he processes embedded in the structure of our institutions [should] be respected whenever the government seeks to act in derogation of values which are vulnerable to majoritarian overreaching.” Neuborne, *supra* note 2, at 437-38.

powers in the criminal arena.

Indeed, the view that the Bill of Rights acts as a sufficient check may explain the general lack of separation of powers arguments in criminal cases and the Court's relaxed treatment of them when they do arise. Most constitutional challenges in criminal cases are based on the rights protections in the Fourth, Fifth, Sixth, and Eighth Amendments. Because the Supreme Court was receptive to many of these claims in the 1960s and early 1970s,²³⁷ litigants grew reliant on arguments couched in these terms. This tradition of regulating criminal process through rights has continued even as the Court has grown more conservative. It is quite possible that the Court's oversight of the criminal process through rights protections is one of the reasons why it was not concerned in *Mistretta* and *Morrison* with the novel governmental arrangements being used in criminal matters. Perhaps the Court's willingness to allow a melding of powers reflected the Court's confidence that it retained enough judicial oversight through the rights provisions to correct egregious misalignments of power in any given case.²³⁸ In administrative law contexts where the Court applied a formalist separation of powers analysis, in contrast, the courts did not have the ability to oversee the procedures in the same way.²³⁹

If this does, in fact, explain the Court's reluctance to police separation of powers in criminal cases, the Court has a false sense of security. "It would be a grave mistake . . . to think a Bill of Rights in Madison's scheme [at the Founding] or in sound constitutional theory now renders separation of powers of lesser importance."²⁴⁰ The rights-based procedural measures are valuable, but they are incomplete protections against government overreaching in criminal matters. Although the rights protections police government abuse of power to an extent, they do not guard against the same structural abuses as the separation of powers.²⁴¹

The separation of powers acts as a direct check against the accumulation of

237. See, e.g., *Miranda v. Arizona*, 384 U.S. 436 (1966) (requiring police to warn suspects of their right to counsel and their right to remain silent); *Mapp v. Ohio*, 367 U.S. 643 (1961) (applying the Fourth Amendment exclusionary rule to the states).

238. Interestingly, the measures required in *Hamdi* were designed to give the courts some degree of oversight over the process. *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004).

239. For example, the Court may have rejected the budget reforms in *Bowsher* and the line-item veto in *Clinton* because the budget process is largely immune from judicial review. *Clinton v. New York*, 524 U.S. 417, 490 (1998) (Scalia, J., concurring in part and dissenting in part); *Bowsher v. Synar*, 478 U.S. 714, 761 (1986) (White, J., dissenting). And in one of the other cases in which the Court employed a functional analysis, the continuing role of judicial review was critical to the Court's decision. *Commodity Future Trading Comm'n v. Schor*, 478 U.S. 833, 860 (1986) (allowing agencies to adjudicate private rights claims).

240. *Clinton*, 524 U.S. at 450 (Kennedy, J., concurring).

241. Akhil Amar, the leading proponent of the view that the Bill of Rights protects the same structural values as the original Constitution, does not argue that the Bill of Rights renders the original constitutional protections irrelevant. Rather, he argues that they are designed to complement those protections. See Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1132 (1991).

too much power in one branch and against the evasion of the process required of that branch, something that individual rights protections do not guard against.²⁴² For example, if the legislature were permitted to adjudicate criminal matters, none of the protections that apply to Article III courts would apply, nor would the legislature be subject to the rules of judicial process. The legislature is designed to pass general rules, not to decide matters affecting the liberty of individuals.²⁴³ Thus, if Congress were allowed to have judicial powers, the protections associated with judicial process could be bypassed. Similarly, if the executive branch were permitted not merely to bring enforcement actions but to adjudicate them as well, the judiciary and all of its processes would be rendered a nullity.²⁴⁴

That is, in fact, what has happened. With the rise of plea bargaining, trials are anomalies, not the norm. And the current individual rights approach to plea bargaining has done nothing to prevent the executive's accumulation of judicial power. A court merely asks whether a plea in a given case is knowing and voluntary. For most defendants, the deal offered by the government will likely be in their interests, so they are accepting the plea knowingly and voluntarily. While an individual defendant might find it in his or her interest to waive a constitutional right to get a better deal, plea bargaining is not in defendants' interests as a group.²⁴⁵ It curtails the ability of the judicial branch to check abuses in the political process, and once plea bargaining is deemed acceptable and becomes the normal mode of case disposition, it encourages Congress to draft its criminal laws and sentences with plea bargaining in mind.²⁴⁶ That is, it

242. "[L]iberty demands limits on the ability of any one branch to influence basic political decisions." *Clinton*, 524 U.S. at 450-51 (Kennedy, J., concurring).

243. That is why "Montesquieu emphasized the importance of judicial procedures, even when costly or cumbersome, as a protection for the individual from this type of harm—as a guarantor of 'liberty.'" Brown, *supra* note 20, at 1536.

244. To be sure, to the extent the Court interprets individual rights protections to require the adjudication by the right constitutional actor, it will be serving the same interests as the separation of powers. So, for example, if the Court insists that the defendants must have a jury trial, that will have the effect of precluding the legislature or executive from usurping the judicial function. But not all individual rights protections work in this way, and the danger is that Congress or the executive will find ways around trial protections by evading trial itself.

245. As Richard Epstein has pointed out, this logic explains the unconstitutional conditions doctrine. Although an individual might find it in his or her interest to waive a constitutional right, the danger is that as a group, they are worse off. Because of structural concerns of monopoly government power, collective action problems, and externalities, the unconstitutional conditions doctrine does not allow most rights to be the subject of bargains. Richard A. Epstein, *Unconstitutional Conditions, State Power, and the Limits of Consent*, 102 HARV. L. REV. 4 (1988). This doctrine has not been applied to criminal trial rights, see *infra* Part III.D, so the structural dangers that the unconstitutional conditions doctrine polices are prevalent.

246. Assuming that criminal justice expenditures will be relatively constant in a regime with or without plea bargaining, plea bargaining frees up resources that would otherwise be spent on trial process and allows these resources to be used for incarceration

makes sense for Congress to draft criminal statutes broadly and with high mandatory penalties to give prosecutors the leverage they need to induce guilty pleas.²⁴⁷ Indeed, plea bargaining pressures even innocent defendants to plead guilty to avoid the risk of high statutory sentences. And those who do take their case to trial and lose receive longer sentences than even Congress or the prosecutor might think appropriate, because the longer sentences exist on the books largely for bargaining purposes.²⁴⁸ This often results in individuals who accept a plea bargain receiving shorter sentences than other individuals who are less morally culpable but take a chance and go to trial.²⁴⁹ Plea bargaining therefore fails to serve the interests of the public, as it tends to undermine the legitimacy and accuracy of the criminal justice system.²⁵⁰

The individual rights perspective misses these structural concerns and cannot bear the weight of policing the inequalities that the separation of powers is designed to address.²⁵¹ Without other institutional or political checks to fill the void, the criminal process is susceptible to abuses associated with unchecked power unless careful attention is paid to the constitutional protections provided by the separation of powers.

III. ENFORCING SEPARATION OF POWERS IN CRIMINAL MATTERS

To conclude that criminal law matters merit greater separation of powers protection than administrative law matters still does not answer the question of how best to enforce those protections.²⁵² Should the courts employ an analysis

instead. Conversely, the elimination of plea bargaining would require the shortening of sentences to shift funds currently spent on incarceration to the trial process. Stephen J. Schulhofer, *Plea Bargaining as Disaster*, 101 YALE L.J. 1979, 1993 (1992). At the state level, budget issues are complicated by the fact that law enforcement is funded largely through local budgets while the states themselves fund the prisons. But at the federal level, Congress is the funding source for all criminal justice expenditures.

247. See Barkow, *supra* note 21, at 728 n.25 (citing examples of Department of Justice requests for more stringent sentences because it would make defendants more likely to cooperate with prosecutors); see also Stuntz, *supra* note 118, at 529-31.

248. See Barkow, *supra* note 21, at 728.

249. See, e.g., Douglas A. Berman, *Federal Judge Bemoans 90-Year Minimum Sentence*, Aug. 24, 2005, http://sentencing.typepad.com/sentencing_law_and_policy/2005/week34/index.html (noting that Judge Thomas McAvoy lamented the ninety-year sentence meted out to a bank robbery getaway driver while another participant who threatened bank employees with a handgun received no more than forty-three years because of a guilty plea).

250. Schulhofer, *supra* note 246, at 1985 (noting that the conviction of innocents imposes "serious negative externalities" on the public); *id.* at 2001 (arguing that there is a "social interest in not punishing defendants who are factually innocent . . . even if individual defendants would prefer to have that option").

251. The argument here is not that the procedural rights must therefore be eliminated. Rather, the point is that they alone cannot protect the interests of defendants and the overall functioning of the criminal justice system.

252. See Adrian Vermeule, *The Judicial Power in the State (and Federal) Courts*, 2000 SUP. CT. REV. 357, 364 (pointing out that "the disagreement between formalists and

along the lines of *Chadha* or *Bowsher*, in which the Court uses a bright-line rule approach that requires each branch to exercise only a certain type of power and to follow all of the constitutional procedures associated with the exercise of that power? Or should a more flexible analysis be employed, albeit with a thumb on the scale for maintaining strict separation in criminal matters, which would allow more blending of powers than the formalist approach?²⁵³

Although either of these approaches would be an improvement over the current functional methodology that has allowed much relaxation in the criminal sphere, there are reasons to believe that the bright-line rule variant of formalism,²⁵⁴ employed in many of the Court's separation of powers cases, is the better option. In determining what type of power is being exercised and what checks the Constitution requires, the Court could continue to use conventional methods of interpretation, which would allow the Court to consider text, history, precedent, and evolved practices.²⁵⁵

The remainder of this Part will defend this approach to separation of powers in criminal cases.²⁵⁶ Part III.A discusses the merits of maintaining a strict division of powers instead of employing a flexible balancing test in criminal matters. Because the application of this approach is best understood through concrete settings, Part III.B will explain how this approach would change the outcome in *Morrison*, and Part III.C will explore the relationship between separation of powers and federal sentencing practices.²⁵⁷ Part III.D

functionalists is not about constitutional meaning, but rather about a choice between alternative decision-making strategies").

253. "Functional analysis . . . favors complex arrangements that blend the powers of the branches, which formalism is likely to condemn." Harold H. Bruff, *Independent Counsel and the Constitution*, 24 WILLAMETTE L. REV. 539, 546 (1988).

254. For a helpful typology of forms of formalism, see generally Pildes, *supra* note 48.

255. Being a formalist does not mean being an originalist. See Merrill, *supra* note 48, at 32 (distinguishing between formalism that is linked with originalism and what he calls a "'conventionalist' approach to constitutional interpretation" that "draw[s] upon a variety of sources that our legal community regards as authoritative" including text, history, precedent, and evolved practices).

But the evolved practices should be viewed with caution to the extent that they resulted from the Court's laissez-faire attitude to separation of powers in the criminal context without concern for proper checks. That is, because many practices in criminal law developed because the Court accepted innovations in the criminal sphere on the assumption that they mirrored administrative law developments, special attention must be paid to ensure that the protections that exist in the administrative context are present in criminal prosecutions. If sufficient protections have not evolved to check those practices, the Court should not permit them to continue until safeguards are in place.

256. The Article takes no position on the proper approach to separation of powers questions outside the criminal law context. It is therefore a variant of what my colleague Burt Neuborne has called a "limited" theory of separation of powers—it identifies an area of "fundamental values" that "trigger[s] strict separation of powers review." Neuborne, *supra* note 2, at 368.

257. The outcome in *Hamdi* would change as well. But because *Hamdi* does not involve a classic criminal law issue in the same way that *Morrison* does, it is less helpful for purposes of illustrating how formalism operates in criminal law. Thus, I have omitted further

will then explore how this analysis would apply to prosecutorial discretion. Finally, Part III.E discusses the relationship between formalism and federalism.

A. *The Case for Greater Enforcement*

Although scholars have long touted the general benefits associated with bright-line formalism, such as its predictability and reduced decision costs,²⁵⁸ the argument for formalism advocated here rests on more specific grounds. Because the judiciary (judges and juries alike) serves as the critical safety valve against the political abuse of the criminal process, the separation of powers threat in this context will likely result from subtle shifts in authority that have the result of stripping the judiciary of some of its authority.

One might think that this is therefore an area in which the judiciary will be particularly sensitive to the dangers of separation of powers because it will protect its own interests with vigilance.²⁵⁹ But this has not been borne out by the case law. It has been in those cases where judicial power has been lessened that the Court has been least protective of the separation of powers. In *Schor*, the Court accepted agency adjudication of private law claims even though they had traditionally rested with Article III courts.²⁶⁰ Similarly, in *Mistretta*, the

discussion of *Hamdi*.

258. See, e.g., Alexander, *supra* note 48, at 534-36. Of course, the debate over bright-line rules versus flexible standards is much broader than the scope of this Article. For a general overview, see Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557 (1992); Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685 (1976); Scalia, *supra* note 131; Kathleen M. Sullivan, *The Supreme Court, 1991 Term—Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22 (1992). This Article takes no position on this larger debate because the argument for formalism presented here rests on a set of virtues unique to the context of criminal law.

259. Adrian Vermeule noticed precisely this dynamic in examining state cases with separation of powers claims involving “freestanding claims of judicial power.” The state courts employed a functional analysis that, in Vermeule’s description, overvalued judicial power and prerogatives. Vermeule, *supra* note 252, at 357, 360-61, 390. Vermeule distinguishes the claims he analyzed from those involving “specific constitutional provisions that protect or regulate the judiciary’s authority and jurisdiction,” such as the right of jury trial. *Id.* at 357 n.1. Because some of the separation of powers arguments in criminal cases discussed here rest on the jury requirement in the Sixth Amendment and Article III, see *infra* Part III.C, they fall outside the scope of Vermeule’s argument. Additionally, there is little empirical or theoretical reason for believing that, even in the context of more generalized judicial power claims, the same move toward increased power identified by Vermeule in the state cases would apply in federal criminal cases. While Vermeule is right to point out that the “judiciary has better information about, and greater solicitude for, its own interests than about competing social interests,” Vermeule, *supra* note 252, at 402, that fact is likely to mean that the judiciary will pay more attention to the effect criminal cases have on the functioning of the judicial system and less attention to how a system of plea bargaining and prosecutorial sentencing power acts systematically to disadvantage criminal defendants.

260. Indeed, the Court expressly mentioned in *Schor* that “bright-line rules cannot effectively be employed to yield broad principles applicable in all Article III inquiries.” *Commodity Future Trading Comm’n v. Schor*, 478 U.S. 833, 857 (1986).

Court permitted a sentencing scheme that shifted power from the judiciary to the executive branch and the legislature.²⁶¹ As Peter Strauss has noted, “an observer might conclude that the Court seems much more clearly committed to functionalism in examining its own place in the constitutional scheme than in dealing with issues concerning the other two heads of government.”²⁶² Strauss posits two possible explanations for this trend. Either the Court is “appropriate[ly] modest[] in declaring constitutional principles that might appear to enshrine the Court’s own place, or it may reflect self-interested relief at being freed of the need to decide matters of routine in litigation-rich times.”²⁶³

Given the Court’s general lack of modesty when it comes to deciding constitutional questions and the ever-expansive view it takes of its own power,²⁶⁴ it would seem that the more likely cause is the Court’s receptivity to claims that a proposed change in government will yield efficiency gains for the judiciary. This is particularly true if the judiciary retains some residual authority over the subject matter through appellate oversight. Thus, in *Schor*, the Court relinquished authority to agencies to adjudicate state private law claims in the first instance because the judiciary could review the agencies’ decisions.²⁶⁵ Similarly, in *Mistretta*, although trial judges would lose a great deal of sentencing discretion, appellate judges gained the authority to review trial judge departure decisions.²⁶⁶ The Court’s decision in *Morrison* also supports this hypothesis. In *Morrison*, it appeared that the judiciary’s power increased vis-à-vis the executive, for the judges of the Special Division obtained authority to appoint a prosecutor.²⁶⁷ If the Court were being “modest,” presumably it would find this transfer of power disconcerting. That it did not suggests that the Court saw this apparent enlargement of authority acceptable, particularly given that it would not increase the workload of the courts. And if the scheme posed a threat to an individual criminal defendant, the courts retained oversight through their role in criminal trials.

The argument for formalism, then, essentially boils down to distrust that judges will be able to give sufficient weight to the long-term, systemic interests the separation of powers protects when faced with a reasonable claim of

261. Indeed, the Court itself observed that “the power of the Judicial Branch is, if anything, somewhat diminished by the Act.” *Mistretta v. United States*, 488 U.S. 361, 395 (1989).

262. Strauss, *supra* note 24, at 515.

263. *Id.*

264. See Rachel E. Barkow, *More Supreme than Court? The Fall of the Political Question Doctrine and the Rise of Judicial Supremacy*, 102 COLUM. L. REV. 237, 300-19 (2002) (discussing the Court’s expansion of its own powers and the increasing lack of deference it gives the judgments of political actors).

265. *Schor*, 478 U.S. at 858-59.

266. *Mistretta*, 488 U.S. at 417-18.

267. *Morrison v. Olson*, 487 U.S. 654 (1989); see also *supra* Part I.A.1.

governmental need for flexibility in the criminal context.²⁶⁸ This is, of course, a common justification for formalist analysis.²⁶⁹ But it has special purchase in the area of criminal law, where resource pressures on the courts and the judicial system make claims of convenience particularly attractive to judges²⁷⁰ and where the dangers of relaxing the separation of powers may seem remote because judges retain oversight over individual rights in the form of criminal trials. The federal court system is notoriously overburdened with criminal cases,²⁷¹ so any proposal that streamlines the criminal process and results in less criminal work for the judiciary is bound to have at least some appeal. And the extensive protections of the Bill of Rights mean that defendants still receive judicial oversight. On the surface, then, it might be difficult for judges to see why that oversight is insufficient and why some relaxation of the separation of powers is not sensible.²⁷²

The judiciary's lack of perspective is particularly likely at this historical moment, when judges have become desensitized to a criminal justice system in which prosecutors exercise extensive judicial power.²⁷³ Moreover, because courts typically analyze separation of powers questions in regulatory contexts, courts have become accustomed to blending arrangements as a general matter and neglect the key differences between administrative and criminal matters described in Part II. Thus, even a functional test with bite is likely, at this point in time, to yield the same underprotection of the judiciary's role in criminal proceedings.

268. See FREDERICK SCHAUER, *PLAYING BY THE RULES* 149-55, 158 (1991).

269. See *Schor*, 478 U.S. at 863 (Brennan, J., dissenting) (criticizing the Court's functional approach because it "requires that the legislative interest in convenience and efficiency be weighed against the competing interest in judicial independence" and thus "pits an interest the benefits of which are immediate, concrete, and easily understood against one, the benefits of which are almost entirely prophylactic, and thus often seem remote and not worth the cost in any single case"); Strauss, *supra* note 24, at 508 (describing the formalist worry that "[t]he balance between concrete gains in efficiency and convenience promised by legislative assignments of matters to agency decision, and the more remote and theoretical benefits of separation of powers, will never appear to favor the latter in any particular case").

270. See, e.g., Jackie Gardina, *Compromising Liberty: A Structural Critique of the Sentencing Guidelines*, 38 U. MICH. J.L. REFORM 345, 373 (2005) (noting that the "federal judiciary is as addicted to plea bargaining as the Department of Justice").

271. See Kathleen F. Brickey, *Crime Control and the Commerce Clause: Life After Lopez*, 46 CASE W. RES. L. REV. 801, 840 (1996) (citing Chief Justice Rehnquist's year-end reports on the judiciary, the Federal Courts Study Committee, the Judicial Conference, and the Judicial Conference's Committee on Long Range Planning as all expressing concern with the burden criminal cases place on the federal courts).

272. Functionalism is criticized as a general matter because it "calls for a prediction that cannot accurately be made." M. Elizabeth Magill, *The Real Separation in Separation of Powers Law*, 86 VA. L. REV. 1127, 1145 (2000). These concerns are exacerbated in the criminal context for the reasons stated above.

273. Vermeule, *supra* note 252, at 391 ("Judges, like other people, become habituated to and invested in the tasks, activities, and procedures they customarily and repetitively perform.").

There is no denying that a formalist approach has shortcomings of its own. In particular, it might lead to the rejection of useful and productive government arrangements.²⁷⁴ These same costs have been recognized—and accepted—even in the context of the administrative state, an area in which efficiency claims have had great sway.²⁷⁵ Although the Court accepted the New Dealers' proposals for a more streamlined government, it did not allow efficiency values to trump all others. The procedural and structural safeguards of the APA often impede government action.²⁷⁶ And, of course, whenever the Court interprets the separation of powers to prevent a particular government action, that serves as an obstacle to more streamlined government.²⁷⁷

Another potential shortcoming of a formalist approach to separation of powers is the opposite one: it might not prove to be that effective. If the Court strikes down a particular practice, Congress and the executive branch will likely seek to achieve the same goals through different—though perhaps more costly or less effective—means.²⁷⁸ While undoubtedly courts may accept some concentration of power even under a formalist analysis, more stringent review should make a difference in at least some cases where the constitutional deficiency is too great to ignore, as Parts III.B, III.C, and III.D will explore.²⁷⁹

274. Brown, *supra* note 20, at 1526 (stating that formalism “tends to straitjacket the government’s ability to respond to new needs in creative ways”); Strauss, *supra* note 11, at 620 (noting that a functional inquiry has the advantage of “toler[ating] periodic changes in relative political effectiveness as between President and Congress, Congress and Court, Nation and States”).

275. Indeed, as Sanford Kadish pointed out, “the common demand [in the early 1940s] for freedom of the administrator to get on with his job free of the harassment of legal imperatives is the same demand made today by those who administer the new penology.” Kadish, *supra* note 193, at 930-31.

276. Thomas O. McGarity, *The Courts and the Ossification of Rulemaking: A Response to Professor Seidenfeld*, 75 TEX. L. REV. 525, 528 (1997) (arguing that judicial and political review mechanisms have caused the agency “rulemaking process to ‘ossify’ to a disturbing degree”); Thomas O. McGarity, *Some Thoughts on “Deossifying” the Rulemaking Process*, 41 DUKE L.J. 1385, 1385-86 (1992) (noting that rulemaking has become burdensome because of judicial oversight).

277. As the Court observed in *Chadha*, “[w]ith all the obvious flaws of delay [and] untidiness . . . , we have not yet found a better way to preserve freedom than by making the exercise of power subject to the carefully crafted restraints spelled out in the Constitution.” *INS v. Chadha*, 462 U.S. 919, 959 (1983); see also *id.* at 944 (“Convenience and efficiency are not the primary objectives—or the hallmarks—of democratic government . . .”).

278. Michael A. Fitts, *The Foibles of Formalism: Applying a Political “Transaction Cost” Analysis to Separation of Powers*, 47 CASE W. RES. L. REV. 1643, 1648 (1997) (arguing that political actors can get around formal requirements through informal means). By way of comparison, Congress responded to *Chadha* by using alternative measures of control of the executive, including its power to conduct oversight hearings and its authority over appropriations. *Id.* at 1652.

279. Einer Elhauge has pointed out that interest-group dynamics that exist in the political process are likely to replicate themselves in the judicial process. Elhauge, *supra* note 223, at 70-71. This would suggest that the imbalance that disfavors defendants in the legislative process would repeat itself in the judicial process as well. While an imbalance of power between the government and defendants is a cause for concern in the judicial branch

And because this review will make government action more costly or time-consuming—at the very least, the government needs to make an extra effort to work around the Court’s decision—that, too, should deter some concentration of power. And, again, this criticism applies in the administrative context as well, where there is a similar risk that the government will find a way around the process to achieve the same ends.

If these costs and shortcomings of formalism have been deemed acceptable in important cases in the realm of administrative law—where the values of convenience and efficiency hold even more sway than in the criminal context—they should also be accepted when it comes to criminal justice. At least in the absence of other protections, the costs associated with separation of powers enforcement are the price of keeping government abuse in check and ensuring that no one is labeled a criminal without adequate process and the agreement of all the relevant constitutional actors.

B. The Independent Counsel

The Court’s decision in *Morrison*, as noted, was the product of a functional analysis that permitted government flexibility. If the Court had employed a formalist methodology in that case, required a strict division of powers, and protected each branch’s sphere of authority, the outcome and analysis would have changed.

In *Morrison*, the more obvious formalist objection to the regime was the one raised by Justice Scalia in dissent, namely that once prosecutorial power was deemed executive, Congress could not impose restrictions on the President’s power of removal. But there is another objection to the independent counsel regime that also goes to the core of the separation of powers and the criminal law. In the criminal context, as noted, the Constitution requires that each branch must exercise independent judgment to convict. The Ethics in Government Act, however, allowed Congress to impose pressure on the

as well, there are reasons to believe the imbalance will not be as great in the judicial sphere. First, defendants are entitled to counsel as a constitutional right in the litigation process, whereas there is no guarantee of representation in the political process. While the prosecution will likely still maintain a resource advantage, it will not be as pronounced an advantage as exists in the legislative sphere.

Second, the judicial process focuses judges on the facts of concrete cases instead of abstract notions of crime, which corrects some of the informational shortcomings and cognitive biases that exist in the political process. See Barkow, *supra* note 133, at 61-62 (describing the differences that result from viewing criminal law as a legislative matter as opposed to viewing it in the context of a concrete case).

Third, federal judges do not face the same political pressures because they have life tenure and salary protections, so they have a degree of insulation from political pressure to be “tough on crime.” This is not to say that political pressure will not exist—it certainly will through, for example, the appointment process. But that is a more indirect form of pressure, in which criminal justice policy will be one of many factors that will affect a judge’s selection.

executive branch to bring an indictment and limited prosecutorial discretion not to bring charges.²⁸⁰ The Act imposed reporting requirements on prosecutors and set up a scheme where it would be difficult, if not impossible, for the Attorney General not to appoint an independent counsel once Congress established evidence showing hints of criminal activity.²⁸¹ And once appointed, the independent counsel retained the final decision over whether to bring charges.²⁸²

Thus, although a criminal conviction usually requires affirmative approval by all branches of government, the independent counsel law diluted the prosecutor's freedom not to bring charges.²⁸³ It instead gave Congress more tools to exert political pressure on prosecutors to bring charges in particular cases. This shift in power, in turn, eliminated one of the Constitution's protections of individual liberty. A formalist analysis could therefore strike the law either based on Justice Scalia's argument that those exercising executive power must be subject to removal by the President or based on the claim that the law stripped the prosecutor of his or her discretion not to bring charges and gave Congress too much oversight of that decision.²⁸⁴

C. Sentencing

A formalist approach to separation of powers would also change the result in *Mistretta* and the analysis in the Court's recent cases addressing the relationship between juries and mandatory sentencing laws.²⁸⁵

Justice Scalia's formalist analysis in *Mistretta* uncovered one deficiency with the Sentencing Commission—namely the fact that the Sentencing Commission possessed legislative power outright and not as an incident to

280. Ethics in Government Act of 1978, Pub. L. No. 95-521, 92 Stat. 1824 (codified as amended at scattered sections of 2, 5 & 28 U.S.C.)

281. 28 U.S.C. § 592 (2006).

282. § 594.

283. *Heckler v. Chaney*, 470 U.S. 821, 832 (1985) (noting that decision not to indict "has long been regarded as the special province of the Executive Branch").

284. Note that functionalism with a thumb on the scale for the interests of defendants probably would not have changed the outcome. This is evidenced by the fact that even Rebecca Brown, who explicitly considered whether the independent counsel law threatened the interests of individuals, concluded that the law should survive a separation of powers challenge. Brown, *supra* note 20, at 1559.

285. A focus on separation of powers and legislative interference with the judicial function should also govern the constitutional analysis of recent congressional efforts to limit the discretion of judges and to exercise greater oversight of their decisions. *See, e.g.*, Prosecutorial Remedies and Other Tools To End the Exploitation of Children Today (PROTECT) Act of 2003, Pub. L. No. 108-21, 117 Stat. 650 (limiting downward departures and requiring that the names of judges who issue departures be reported to the House and Senate Judiciary Committees); Defending America's Most Vulnerable: Safe Access to Drug Treatment and Child Protection Act of 2005, H.R. 1528, 109th Cong. (2005) (proposing the elimination of most downward departures).

some other executive or judicial function. But, again, there was another separation of powers shortcoming with the Sentencing Reform Act that could have been uncovered if the Court strictly policed the authority of each constitutional actor. As I have explained in greater detail elsewhere, the Sentencing Reform Act operated to transfer significant discretionary power from the judicial branch, and particularly the jury, to the executive branch and to Congress.²⁸⁶ The Sentencing Guidelines established under the Sentencing Reform Act, like other mandatory sentencing laws, dictate a given punishment on the basis of particular fact-findings. These laws operate no differently from general criminal laws. They define facts that yield punishment.

The Constitution has a carefully calibrated scheme dictating how laws that impose criminal punishment are to operate. Specifically, under the Constitution, juries must apply those laws because juries act as a critical check against government overreaching. With their power to nullify, juries have the discretion to check overbroad laws and ensure that the laws are properly applied to a given set of facts.²⁸⁷ The jury provides a critical check on the legislature and the executive that judges cannot replicate in the context of mandatory sentencing laws.²⁸⁸ But unlike other mandatory criminal laws that impose punishment, the Guidelines were to be applied by judges, not juries, and judges were not given discretion to check those laws. The Guidelines therefore take constitutional power away from the judiciary, thereby increasing the power of Congress and the executive.²⁸⁹

While the Supreme Court has recently identified the threat to the jury posed by the Sentencing Guidelines in *United States v. Booker*,²⁹⁰ its failure to focus on the separation of powers and the structural check provided by the jury led it to miss the real problem with the Guidelines and other mandatory

286. Barkow, *supra* note 133, at 84-102; see also Brown, *supra* note 20, at 1560 (arguing that the Act “placed the bulk of sentencing decisionmaking in the hands of the prosecutor through a combination of the charging choices available and the mandatory sentencing laws,” having the effect of “consolidating in the Executive Branch the power both to prosecute and to sentence”).

287. Barkow, *supra* note 133, at 50-65, 77-84 (describing the constitutional and historical basis for the jury’s checking function).

288. While the Supreme Court has allowed judges to apply laws that allow for discretionary sentencing, the same separation of powers threat is not raised by those laws because judges have the requisite discretion to check the executive and legislative branches. *Id.* at 70-74. Mandatory laws, in contrast, can be checked only by the nullification power of the jury. *Id.* at 85-86; see also Bruce A. Antkowiak, *The Ascent of an Ancient Palladium: The Resurgent Importance of Trial by Jury and the Coming Revolution in Pennsylvania Sentencing*, 13 WIDENER L.J. 11, 24 (2003) (arguing that judges are incapable of checking state abuse in the context of crime and punishment because the court’s role is “largely ministerial, relating facts to elements, and without imposing any further judgment as to the necessity of such finding”).

289. For a fuller description of the constitutional defects of these laws, see Barkow, *supra* note 133, at 84-102.

290. 543 U.S. 220 (2005).

sentencing laws that require judges to find facts which increase a defendant's sentence.²⁹¹ Instead, the Court analyzed these laws as interfering only with the defendant's individual rights.²⁹² This led the Court to overlook completely the constitutional problems with mandatory minimum sentences²⁹³ and to produce a line of cases that lacks much in the way of coherence or analysis.²⁹⁴ If the Court had instead viewed the relationship between the jury and the Sentencing Guidelines through the lens of the separation of powers, it would have seen that the danger of mandatory sentencing laws is that they allow the expansion of legislative and executive power without a sufficient judicial check. That is, the Court would have seen that the key problem with these laws is their *mandatory* nature, not whether they set a floor or ceiling on punishment. Thus, under an analysis that looked to the criminal jury's role in the separation of powers, the Court would reject not only those laws that require judges (not juries) to increase a defendant's maximum sentence but also those laws that require judges (not juries) to set a minimum sentence.²⁹⁵

291. *Blakely v. Washington*, 542 U.S. 296 (2004); *Apprendi v. New Jersey*, 530 U.S. 466 (2000).

292. *See, e.g., Apprendi*, 530 U.S. at 476 (noting that the case turned on the Sixth and Fourteenth Amendments). In *Patton v. United States*, 281 U.S. 276, 296 (1930), the Court determined that the right to trial by jury was a right of the accused and not part of the structure of government. But the Court has also recognized the public interest in a jury trial, so it does not allow a defendant to waive a jury without the consent of the prosecutor and the judge. *Id.* at 312; *see also Singer v. United States*, 380 U.S. 24, 37-38 (1965).

293. *See Harris v. United States*, 536 U.S. 545 (2002) (allowing judges to find facts that trigger mandatory minimum sentences); *see also Booker*, 543 U.S. at 237. Four of the Justices (Justices Stevens, Souter, Thomas, and Ginsburg) who found the Sentencing Guidelines unconstitutional in *Booker* would also require juries to find facts that trigger mandatory minimum sentences. Justice Scalia was the fifth vote to strike down the Guidelines in *Booker*, but he has upheld mandatory minimum laws applied by judges without writing an opinion explaining why a law imposing a mandatory minimum is different from a law that raises the statutory maximum.

294. For a critique of the Court's approach, *see Barkow, supra* note 133, at 38-44; Rachel E. Barkow, *The Devil You Know: Federal Sentencing After Blakely*, 16 FED. SENT'G REP. 312, 312-13 (2004).

295. As it stands now, the only check on state power when laws mandate minimum sentences is the political process itself. Under the Court's current approach, for example, a legislature could make selling crack cocaine a crime punishable by up to life in prison. The jury would have to find that the defendant did, in fact, sell crack cocaine. But then the legislature could pass additional laws that set the defendant's sentencing floor. It could, for example, pass a law that provides that, if a judge finds by a preponderance of the evidence that an individual uses or carries a gun while dealing crack, he gets a mandatory minimum sentence of sixty years. The potential for state abuse here should be apparent. Who gets charged with this law will be entirely at the discretion of prosecutors. And as long as there is enough evidence to pass the preponderance standard, the judge must give this mandatory sentence. No judicial actor has the discretion to ignore the law in a given case if justice would require it. Indeed, the jury check is so anemic that the jury could acquit the defendant of possessing a gun but the defendant would still be subject to the mandatory minimum sentence so long as the jury convicted him on the crack charge and the judge made the requisite finding about the gun.

There is, of course, no guarantee that any separation of powers analysis would unearth all the relevant objections, and the fact that the formalist dissents in *Morrison* and *Mistretta* did not highlight all of the failings of the respective laws at issue shows that a formalist, bright-line approach is far from a perfect theory. The Court is likely to miss deficiencies even using that methodology. But even an incomplete formalist analysis is more likely to correct government overreaching than a functional analysis. After all, even without seeing all the consequences to the separation of powers arising from the laws at issue in *Morrison* and *Mistretta*, the approach taken by the dissent would have addressed those concerns because the dissent struck down the laws at issue. And that is in a very real sense the point of formalism. It errs on the side of caution and prevents even those dangers that might not be foreseen. Without other checks serving the same purpose in the context of crime, that extra protection is worth the cost of letting some innovations slip away.

D. Prosecutorial Discretion and Plea Bargaining

Government innovations such as those at issue in *Morrison* and *Mistretta* pose a noticeable challenge to the separation of powers because of their structural novelty. Though perhaps not as obvious, the virtually unreviewable exercise of prosecutorial discretion over charging and bargaining also stands in sharp tension with the separation of powers. Though a full analysis of the implications and possible resolution of the issue requires separate study, merely highlighting the issues demonstrates that important questions about prosecutorial discretion and plea bargaining have been unasked and unanswered by the Court's criminal law jurisprudence because of an inattention to structural separation of powers concerns.

The Court allows prosecutors almost unlimited discretion to make charging decisions.²⁹⁶ And, although plea bargaining existed as an underground and unapproved practice for most of the nation's history,²⁹⁷ the Supreme Court explicitly acknowledged and accepted plea bargaining as legitimate in

To be sure, even if the jury were to apply these laws, the check is imperfect because the jury is not told of the mandatory sentence. Whether a prohibition on the defendant's ability to instruct the jury on a mandatory sentence also violates the separation of powers and jury guarantee is beyond the scope of this Article. But for an argument along those lines, see Kristen K. Sauer, Note, *Informed Conviction: Instructing the Jury About Mandatory Sentencing Consequences*, 95 COLUM. L. REV. 1232, 1249 (1995).

296. See *Wayte v. United States*, 470 U.S. 598, 607 (1985) (acknowledging the prosecutor's discretion to decide what charges to bring).

297. For excellent historical overviews of plea bargaining, see GEORGE FISHER, *PLEA BARGAINING'S TRIUMPH* (2003); Albert W. Alschuler, *Plea Bargaining and Its History*, 79 COLUM. L. REV. 1 (1979); Lawrence M. Friedman, *Plea Bargaining in Historical Perspective*, 13 LAW & SOC'Y REV. 247 (1979); John H. Langbein, *Understanding the Short History of Plea Bargaining*, 13 LAW & SOC'Y REV. 261 (1979).

Santobello v. New York in 1971.²⁹⁸ The Court approved plea bargaining largely on the grounds of convenience.²⁹⁹ The Court reasoned that plea bargaining had become “an essential component of the administration of justice” and noted that “[i]f every criminal charge were subjected to a full-scale trial, the States and the Federal Government would need to multiply by many times the number of judges and court facilities.”³⁰⁰ To avoid burdening the system, the Court stated that plea bargaining should be “encouraged.”³⁰¹ The Court later acknowledged “that, by tolerating and encouraging the negotiation of pleas, this Court has necessarily accepted as constitutionally legitimate the simple reality that the prosecutor’s interest at the bargaining table is to persuade the defendant to forgo his right to plead not guilty.”³⁰²

Thus, in a departure from its unconstitutional conditions jurisprudence,³⁰³

298. 404 U.S. 257 (1971); *see also* *Blackledge v. Allison*, 431 U.S. 63, 76 (1977) (noting that “[f]or decades [plea bargaining] was a sub rosa process shrouded in secrecy and deliberately concealed by participating defendants, defense lawyers, prosecutors, and even judges” and that it “was not until [the Court’s] decision in *Santobello* . . . that lingering doubts about the legitimacy of the practice were finally dispelled”). The Court foreshadowed *Santobello* in *Brady v. United States*, 397 U.S. 742 (1970), in which the Court rejected the claim that it violates the Fifth Amendment for a prosecutor “to influence or encourage a guilty plea by opportunity or promise of leniency and that a guilty plea is coerced and invalid if influenced by the fear of a possibly higher penalty for the crime charged if a conviction is obtained after the State is put to its proof.” *Id.* at 750.

299. In other cases, the Court has highlighted other benefits of plea bargaining, but they also boil down to convenience claims. According to the Court, defendants get the benefit of less pretrial incarceration, a speedier disposition, avoidance of the uncertainty of the trial outcome, and “a prompt start in realizing whatever potential there may be for rehabilitation.” *Blackledge*, 431 U.S. at 71. “The public is protected from the risks posed by those charged with criminal offenses who are at large on bail while awaiting completion of criminal proceedings.” *Id.*

300. *Santobello*, 404 U.S. at 260; *see also id.* at 264 (Douglas, J., concurring) (noting that plea bargains “serve an important role in the disposition of today’s heavy calendars”).

301. *Id.* at 260.

302. *Corbett v. New Jersey*, 439 U.S. 212, 221 (1978) (quoting *Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978)). This is codified in the Sentencing Guidelines, which allow up to a three-level deduction for defendants who plead guilty, U.S. SENTENCING GUIDELINES MANUAL § 3E1.1(b) (2004), and up to a four-level deduction for defendants who plead in fast-track jurisdictions, *id.* § 5K3.1.

303. The Supreme Court has rejected government attempts to condition the receipt of other government benefits on the relinquishment of constitutional rights on the theory that [i]t would be a palpable incongruity to strike down an act of state legislation which, by words of express divestment, seeks to strip the citizen of rights guaranteed by the federal Constitution, but to uphold an act by which the same result is accomplished under the guise of a surrender of a right in exchange for a valuable privilege which the state threatens otherwise to withhold.

Frost & Frost Trucking Co. v. R.R. Comm’n, 271 U.S. 583, 593 (1926). For insightful discussions of how the waiver of criminal trial rights has been treated differently from the waiver of other constitutional rights, see Loftus E. Becker, Jr., *Plea Bargaining and the Supreme Court*, 21 LOY. L.A. L. REV. 757, 776-94, 829-32 (1988) (noting that plea bargaining is treated sui generis by the Court and is inconsistent with the treatment of compelled confessions and conditions on other constitutional rights); Mazzone, *supra* note

the Court allows prosecutors to condition sentencing or charging deals on the waiver of constitutional trial rights.³⁰⁴ Prosecutors can obtain plea agreements by threatening criminal defendants with longer sentences or additional charges if they exercise their right to trial.³⁰⁵ The plea must be knowing and voluntary, so courts review pleas to check that they are not the result of threats of force or promises or threats that are outside the plea agreement itself.³⁰⁶ But otherwise, prosecutors are free to condition significant sentence and charge reductions on the waiver of judicial process as long as there is a factual basis for the plea.³⁰⁷ For example, the Supreme Court concluded that it was lawful for a prosecutor to offer to recommend a five-year sentence if a defendant pleaded guilty but to threaten to bring charges subjecting the defendant to a mandatory life sentence if he did not.³⁰⁸

154, at 804-45 (explaining that there is a general presumption against the government's ability to condition benefits on the waiver of constitutional rights other than criminal process rights, where the presumption is that those rights are subject to bargaining). For a sampling of unconstitutional conditions cases, see, for example, *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987) (disallowing the conditioning of building permits on the granting of an easement to the public); *Elrod v. Burns*, 427 U.S. 347 (1976) (rejecting as unconstitutional the discharge of state employees on the basis of party affiliation); *Shapiro v. Thompson*, 394 U.S. 618 (1969) (holding unconstitutional the conditioning of welfare benefits on a residency requirement).

304. *United States v. Mezzanatto*, 513 U.S. 196, 201 (1995) (noting that defendants can waive in plea agreements, among other things, a double jeopardy defense, the privilege against self-incrimination, the right to a jury trial, and the right to confrontation). Under "ancient doctrine . . . the accused could waive nothing." *Patton v. United States*, 281 U.S. 276, 307 (1930) (internal quotations and citation omitted). According to the Court, this "ancient doctrine" was based on the fear that innocent defendants might be convicted because of process deficiencies. *Id.* While the Court concluded in *Patton* that the fears were no longer justified in light of trial protections, a system that is dominated by plea bargaining runs the same risk of innocent defendants pleading guilty. See Wright, *supra* note 154, at 84 (observing that acquittal rates have dropped over the last thirty years as guilty pleas have increased).

305. The Court has also accepted statutory schemes where a defendant faces a greater penalty after a jury trial. See *Brady v. United States*, 397 U.S. 742 (1970) (holding that a defendant's plea was not involuntary where a defendant avoided the risk of the death penalty under the statute by pleading guilty and avoiding a jury trial).

306. FED. R. CRIM. P. 11(b)(2). The judge also sees if there is a factual basis for the plea. *Id.* 11(b)(3); see also *Miller v. Angliker*, 848 F.2d 1312, 1320 (2d Cir. 1988) (noting that a plea is valid "if it is not the product of actual or threatened physical harm, mental coercion overbearing the defendant's will, or the defendant's sheer inability to weigh his options rationally").

307. Defendants in federal court who waive their right to a jury trial receive, on average, a 300% reduction in their sentence. Gardina, *supra* note 270, at 348.

308. *Bordenkircher v. Hayes*, 434 U.S. 357, 358 (1978). The Court reasoned that "in the 'give-and-take' of plea bargaining, there is no . . . element of punishment or retaliation so long as the accused is free to accept or reject the prosecution's offer." *Id.* at 363. This varies from the Court's treatment of increased sentences following a conviction after a retrial. In that context, a judge can give a longer sentence after a new trial only based upon "objective information concerning identifiable conduct on the part of the defendant occurring after the time of the original sentencing proceeding." *Chaffin v. Stynchcombe*, 412 U.S. 17, 25 (1973)

Many scholars have criticized plea bargaining on a number of grounds,³⁰⁹ but they have largely ignored the separation of powers analysis. The dangers of plea bargaining come into full relief when approached in this manner. Prosecutors use the judicial process—the very means of checking the prosecutor and Congress—as the key bargaining chip in negotiations. In the classic plea bargaining scenario, if a defendant elects to go to trial, he or she faces a longer sentence and more charges. If the prosecutor charged a defendant \$20,000 for going to trial but there was no charge if the defendant pleaded guilty, it would seem obvious that the bargain was unconstitutional. Yet when prosecutors put a different—in some cases, far more costly—price on going to trial, it is currently considered acceptable.

With this bargaining chip in hand, it is not surprising that almost all convictions are the result of pleas.³¹⁰ Defendants who do not want to risk facing more charges and longer sentences by exercising their trial rights instead opt to argue the merits of their cases before prosecutors, who decide the charges of which defendants are guilty.³¹¹ As Ronald Wright and Marc Miller

(internal quotations and citations omitted). The Court adopted this latter rule so that defendants would not be deterred from raising their rights on appeal because of fear of retaliation. *Id.*

309. See, e.g., John H. Langbein, *Torture and Plea Bargaining*, 46 U. CHI. L. REV. 3, 12-19 (comparing plea bargaining to medieval European torture); *id.* at 12 (noting that the “sentencing differential is what makes plea bargaining coercive”); Schulhofer, *supra* note 246, at 1985-91 (highlighting numerous flaws with plea bargaining, including the conflicts of interest of counsel and the pressure it puts on innocent defendants to plead, which causes negative externalities on society). Other scholars defend plea bargaining on the basis that individuals—even those who are innocent of the charges against them—should have the right to waive trial and get a discounted sentence. See Frank H. Easterbrook, *Plea Bargaining as Compromise*, 101 YALE L.J. 1969, 1978 (1992) (arguing that plea bargaining is efficient and based on defendant’s autonomy); Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 YALE L.J. 1909, 1968 (1992) (arguing that plea bargaining should be treated like other contractual arrangements and regulated accordingly).

One scholar who has noted the separation of powers concerns is Donald Dripps, who recently observed that

the actual practice of plea bargaining poses a still worse separation-of-powers problem. For if the prosecutor dominates plea bargaining, and plea bargaining simply is the criminal justice process, the real trial is the one, quite informal and necessarily based mostly on hearsay, at which the prosecutor decides what charges to file and what plea to accept.

Donald A. Dripps, *Overcriminalization, Discretion, Waiver: A Survey of Possible Exit Strategies*, 109 PENN. ST. L. REV. 1155, 1159 (2005). For an analysis of the jury’s role in the system of separated powers, see Barkow, *supra* note 133, at 46-65. See also Gardina, *supra* note 270, at 386-88.

310. In 2003, 95.7% of cases in the federal system were settled by guilty pleas. U.S. SENTENCING COMM’N, 2003 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS fig.C (2004), <http://www.ussc.gov/ANNRPT/2003/Fig-c.PDF> (last visited Jan. 22, 2006).

311. Gerard E. Lynch, *Screening Versus Plea Bargaining: Exactly What Are We Trading Off?*, 55 STAN. L. REV. 1399, 1403-04 (2003) (“Most plea negotiations, in fact, are primarily discussions of the merits of the case, in which defense attorneys point out legal, evidentiary, or practical weaknesses in the prosecutor’s case, or mitigating circumstances that merit mercy . . . [made] to a prosecutor, who assesses their factual accuracy and likely persuasiveness to a hypothetical judge or jury, and then decides the charge of which the

observe, “[w]e now have not only an administrative criminal justice system, but one so dominant that trials take place in the shadow of guilty pleas.”³¹² It is an administrative system where the prosecutor combines both executive and judicial power—posing the very danger the Framers tried to prevent.³¹³

If there were institutional and procedural checks on the prosecutor as there are for other administrative actors, perhaps this would not be so troubling.³¹⁴ But as Part II explained, these protections are absent in the plea bargaining context. The prosecutor acts with discretion that is almost unmatched anywhere in law. The closest analog to the prosecutor’s vast discretion is an agency’s decision not to bring an enforcement action,³¹⁵ which enjoys a presumption against judicial review and has itself been criticized for allowing arbitrary behavior.³¹⁶ But an agency’s decision not to enforce is akin to a prosecutor’s decision not to bring charges.³¹⁷ The constitutional system of criminal justice

defendant should be adjudged guilty.”); *The Supreme Court 1969 Term*, 84 HARV. L. REV. 30, 151 (1970) (discussing plea bargaining and noting that there are “few safeguards” in this process, as “[t]he prosecutor’s job does not require him to be assured of guilt beyond a reasonable doubt”).

312. Ronald Wright & Marc Miller, *Honesty and Opacity in Charge Bargains*, 55 STAN. L. REV. 1409, 1415 (2003).

313. THE FEDERALIST NO. 47, at 326 (James Madison) (J. Cooke ed., 1961) (“Were [the power of judging] joined to the executive power, the judge might behave with all the violence of an oppressor.”) (internal quotations omitted); THE FEDERALIST NO. 78, at 523 (Alexander Hamilton) (J. Cooke ed., 1961) (“[L]iberty . . . would have everything to fear from [the judiciary’s] union with either of the other departments.”). As a plurality of the Court recently noted in *Hamdi*, “[t]hat even purportedly fair adjudicators ‘are disqualified by their interest in the controversy to be decided is, of course, the general rule.’” *Hamdi v. Rumsfeld*, 542 U.S. 507, 538 (2004) (citing *Tumey v. Ohio*, 273 U.S. 510, 522 (1927)); see also *id.* at 545 (“In a government of separated powers, deciding finally on what is a reasonable degree of guaranteed liberty whether in peace or war (or some condition in between) is not well entrusted to the Executive Branch of Government, whose particular responsibility is to maintain security.”) (Souter, J., concurring in part, dissenting in part, and concurring in the judgment).

314. Judge Lynch notes that imposing formal administrative law rules on prosecutors’ offices “would vastly increase the complexity and expense of the prosecutorial agency.” Lynch, *supra* note 23, at 2145. He therefore proposes some modest changes to the current process, namely greater discovery rights for defendants and the right of a defendant to present his or her case to a supervising prosecutor. *Id.* at 2147-49. While these changes would be an improvement over the current process and are well worth further inquiry, it is not clear why a more complete range of administrative law rules should not apply to prosecutors. Additional processes always require some costs. The real question is whether the benefits outweigh the costs, and there is no reason for believing that the calculus is different for prosecutors than for any other agency. On the contrary, because of the liberty interests at stake in criminal proceedings, one would think the price of additional process is well worth it. I am exploring these topics in a companion article.

315. See, e.g., *Heckler v. Chaney*, 470 U.S. 821 (1985).

316. See, e.g., Lisa Schultz Bressman, *Judicial Review of Agency Inaction: An Arbitrariness Approach*, 79 N.Y.U. L. REV. 1657 (2004); Cass R. Sunstein, *Reviewing Agency Inaction After Heckler v. Chaney*, 52 U. CHI. L. REV. 653 (1985).

317. “[F]ederal courts have traditionally and, to our knowledge, uniformly refrained from overturning, at the instance of a private person, discretionary decisions of federal

protects the discretionary judgments of all key actors *not* to proceed criminally. That is why the executive has discretionary pardon and charging power, why the legislature has the freedom not to criminalize conduct, and the jury has the unreviewable power to acquit. Put another way, the law distinguishes between the imposition of punishment and the withholding of punishment. What is different between criminal and civil law is that a prosecutor's decision to bring charges—to affirmatively seek punishment—faces little oversight, whereas affirmative agency action in the civil context to impose fines or mandate a particular action is subject to extensive oversight. In the absence of the institutional and political protections that apply to other agencies, there is a risk of abuse of discretion and arbitrary and capricious behavior in criminal matters.

The real question in cases where defendants plead guilty, then, should not be whether the plea of any individual defendant is voluntary or knowing, but whether there is a sufficient check on prosecutors' use of the bargaining power. If the Court focused on the structural relationship among branches instead of on individual defendants, it would see that there is currently no check at all. Prosecutors have almost unbridled discretion to make or not make these deals in any given case. But this is the kind of unbridled discretionary power that the separation of powers is supposed to prevent.³¹⁸ If prosecutors can put a higher price on judicial oversight, the state can selectively target groups and individuals for prosecution in a manner that avoids *both* political and judicial oversight.³¹⁹ The political process will not work because the vast majority of people will be unaffected and will not mobilize to fight against the practice. And the judicial process will not work if the only question in a given case is whether the individual defendant before the Court made the deal knowingly and voluntarily.³²⁰ The Framers recognized dangers such as this and required a strong judicial role in criminal cases to prevent it. A system where upwards of ninety-five percent of all convictions result from pleas and where prosecutors make all the key judgments does not fit comfortably with the separation of powers.³²¹

prosecuting authorities not to prosecute persons regarding whom a complaint of criminal conduct is made." *Inmates of Attica Corr. Facility v. Rockefeller*, 477 F.2d 375, 379 (2d Cir. 1973).

318. "When it comes to law execution, the genius of the separation of powers is that, typically, two branches must independently conclude that some party has violated the law before anyone is punished. The benefit is clearly absent when the executive and judiciary are one and the same." Prakash, *supra* note 63, at 545 n.147.

319. Cf. Adrian Vermeule, *Veil of Ignorance Rules in Constitutional Law*, 111 YALE L.J. 399, 426-27 (2001) (pointing out that selective enforcement of the laws by the executive branch poses the same threat that the Ex Post Facto Clause is designed to prevent when it is done through legislative action).

320. Unless, of course, "voluntary" is given more bite and forms the basis for the analysis suggested here.

321. The threat prosecutors pose to individual liberty would be magnified even further if one were to give the Department of Justice *Chevron* deference to its interpretations of criminal law. See Dan M. Kahan, *Is Chevron Relevant to Federal Criminal Law*, 110 HARV.

A full analysis of what the separation of powers requires of plea bargaining and prosecutorial discretion is beyond the scope of this Article, for it raises many difficult and complicated questions. How do you define plea bargaining in a manner that distinguishes it from the prosecutor's ability to choose from among a range of charges? How much of a price, if any, can a prosecutor place on going to trial without violating the checking role that the judiciary is designed to play in the separation of powers? Can the legislature, consistent with the separation of powers, offer a sentencing discount for pleas or the acceptance of responsibility? Can judges exercise discretion to give sentencing breaks to those who plead guilty? If one gets past these questions of scope, there is then the issue of whether plea bargaining, however defined, should be prohibited outright or whether other checks serve the separation of powers interests. For example, if plea bargaining is, to some extent, inevitable, perhaps institutional or structural checks akin to those in the APA would better serve the separation of powers concerns.³²²

The point of this Article is not to answer these questions but to shift the focus to them. For too long the emphasis has been on whether plea bargaining interferes with individual rights. But the structural concerns are just as great and merit close attention. Plea bargaining causes a systemic imbalance of power by allowing prosecutors to bypass the check of the judicial process. A focus on structure is necessary to identify the scope of the problem and to identify the appropriate solution.

E. Formalism and Federalism

There is a significant limit to the separation of powers argument advanced here that deserves mention: it applies only to the federal government. It is a matter of state, not federal, constitutional law whether the same infirmities exist in a state system.³²³ So, to the extent that similar structural abuses exist at the state level, this argument might not address them. While the states themselves have also shown a commitment to the separation of powers,³²⁴ the arguments

L. REV. 469, 496 (1996) (arguing that "Chevronizing" federal criminal law would "transfer lawmaking authority from the judiciary to the executive" and would "reallocate it within the executive branch itself"). This would erode the judicial role still further, and it would expand prosecutorial power without creating any checks on its exercise.

322. As noted, *supra* note 314, I am pursuing these questions in a separate article.

323. See *Dreyer v. Illinois*, 187 U.S. 71, 84 (1902) ("Whether the legislative, executive, and judicial powers of a state shall be kept altogether distinct and separate, or whether persons or collections of persons belonging to one department may, in respect to some matters, exert powers which, strictly speaking, pertain to another department of government, is for the determination of the state."); Jim Rossi, *Institutional Design and the Lingering Legacy of Antifederalist Separation of Powers Ideals in the States*, 52 VAND. L. REV. 1167, 1188 (1999) ("[T]he U.S. Constitution fails to dictate a specific form of separation of powers for state governments.").

324. See Rossi, *supra* note 323, at 1190-91 (noting that the "[s]eparation of powers is a bedrock principle to the constitutions of each of the fifty states" and that "[t]he

for using a bright-line approach to the separation of powers might not apply at the state level.³²⁵

Although that is a limit to the claim here, it is also a potential advantage. As noted above, strict enforcement of the separation of powers will limit the ability of the government to experiment with novel institutional arrangements to address increasing caseloads and other perceived problems with the criminal justice system. Because this strict enforcement scheme does not necessarily apply to the states, it leaves them free, within their own constitutional limits, to experiment with these mechanisms. They can thus serve as the laboratories of experimentation that Justice Brandeis heralded.³²⁶

At the same time, strict enforcement of the separation of powers should help to limit the expansion of federal criminal law. Maintaining a division among the branches and requiring compliance with the Constitution's procedures for each branch makes federal criminal procedure more costly than a streamlined process that allows shortcuts. For example, a system dominated by jury trials is undoubtedly more costly than a system dominated by plea bargaining with mandatory sentencing laws applied by judges. Limiting the use of mandatory sentencing guidelines and plea bargaining will therefore impose greater costs on the federal government when it seeks to proceed in a criminal action.

Consequently, if the federal government must internalize the costs of constitutional procedures, it might be less likely to enforce federal criminal laws. It is a common criticism that there are too many federal criminal laws.³²⁷ Although the modern politics of crime make it unlikely that Congress will stop passing federal criminal laws or will eliminate some of those already in existence, increasing the cost of processing a criminal case should change enforcement practices. If federal prosecution becomes more costly, it would create incentives for prosecutors to be more selective in the use of federal resources.³²⁸ The current system of plea bargaining makes federal criminal enforcement relatively cheap—at least relative to jury trials—so prosecutors need not pay as much attention to resource allocation and need not focus on those instances when federal involvement in criminal matters is most

overwhelming majority of modern state constitutions contain a strict separation of powers clause”).

325. See *id.* at 1218-22 (noting similarities and differences in state and federal interpretive approaches).

326. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

327. Barkow, *supra* note 133, at 104-05; see also Ashdown, *supra* note 161, at 802 (criticizing the fact that many of the more than 3000 federal crimes cover conduct prosecutable under state law).

328. Although it is also possible that Congress and prosecutors will try to save resources in other ways—such as by streamlining the trial process, see Scott & Stuntz, *supra* note 309, at 1950 (arguing that abolition of plea bargaining would lead to a truncated trial process)—Article III and the Bill of Rights will set outer limits on what can be done.

advantageous. If federal enforcement of criminal laws becomes more expensive through stricter adherence to the separation of powers, executive branch officials and prosecutors should pay more attention to how federal resources should be used.

One need look no further than the states to see how limited resources can help foster a more reasoned approach to criminal justice issues. Because the states have more limited budgets than the federal government and cannot carry deficits, they pay more attention to the soundness of their criminal justice policies.³²⁹ Making federal criminal power more costly should have, at least to some extent, a similar effect. To be sure, the political value of a symbolic gesture might lead Congress to continue to pass more federal laws in the face of some high-profile local crime or to enact laws with harsher punishments to appear tough. But making federal intervention more costly should lead prosecutors to prioritize those areas where federal involvement fills a gap left by the states and where interested groups will specifically target the federal government for assistance. There should be fewer resources left over for intervention in areas that the states already address.

Enforcing separation of powers could therefore serve federalism values³³⁰ without requiring the kind of intrusive substantive review that takes place when the Court enforces federalism through the Commerce Clause. Put another way, increased costs are in a very real sense the point of separation of powers.³³¹ Federal criminal law enforcement should be expensive enough that the government has to think about where and when to use it. If it comes cheaply, it will be used too often, and the political process will be unable to stop it. One need look no further than the current incarceration rates for evidence of this phenomenon. As plea bargaining has increased, so have the incarceration rates. It seems to be more than a coincidence that this rate correlates with a plea bargaining process that combines the efficiency of the administrative model with none of the checks.

And while enforcing the separation of powers may make federal criminal power more costly, it does not make it impossible. It simply places a greater emphasis on prioritization. Moreover, if the federal government is sufficiently concerned that the system the Framers established has become too dangerous

329. See generally Barkow, *supra* note 224.

330. This argument has parallels to Brad Clark's claim that the separation of powers, by making it more difficult to enact federal laws, serves the values of federalism. Bradford R. Clark, *Separation of Powers as a Safeguard of Federalism*, 79 TEX. L. REV. 1321, 1324, 1339-41 (2001). The Constitution imposes certain costs on federal criminal enforcement through the separation of powers and the judicial process that protect not only the interests of individuals but the values of federalism as well. For arguments in favor of limited federal jurisdiction over crime, see Barkow, *supra* note 168, at 103-06.

331. Note that the costs of constitutional rights have been accepted outside the area of criminal process rights, where the unconstitutional conditions doctrine does not allow arguments of efficiency and convenience to trump the interests of the constitutional rights in question. Mazzone, *supra* note 154, at 849.

and too costly, then it could fix it by amending the Constitution to allow plea bargains, bench trials, or some other streamlined system. But the Framers had the foresight to set the default rules to protect minority interests that could be subject to abuse by political majorities.³³² At the very least, we should have to think long and hard before we abolish that system in the name of convenience.³³³

CONCLUSION

The Supreme Court's separation of powers jurisprudence has been criticized on any number of grounds. But what has been overlooked is its blanket approach to these questions without attention to the differences in substantive categories. Crime, in particular, raises concerns distinct from those present in matters associated with the oversight of the administrative state. The government does not face the same structural, institutional, and political checks when it proceeds criminally as when it proceeds in a civil regulatory action, so the Constitution's separation of powers takes on greater significance in the criminal context because it provides the only effective check on systemic government overreaching.

Unfortunately, the Supreme Court and scholars have overlooked the importance of separation of powers in the criminal context. The result has been a flexible approach to governmental blending of powers that has allowed innovations like the independent counsel law and the Sentencing Guidelines, as well as a pervasive system of plea bargaining in which prosecutors operate virtually unchecked. Without strong enforcement of the separation of powers or other institutional checks to take its place, the government thus faces far less oversight when it proceeds in a criminal matter than in a regulatory one.

Greater enforcement of the Constitution's separation of powers would prevent this perverse state of affairs. It would require Congress and the executive branch to internalize the costs of the Constitution's judicial protections in making their decisions, thus replacing the current system in which they are free to pressure defendants to forego judicial process. It would

332. The separation of powers works in this regard like a strong canon of construction. It forces political actors to overcome a large hurdle before dismantling the existing rights-protecting framework.

333. It could be argued that a middle ground is possible that would allow some plea bargaining as long as there is sufficient oversight by the judiciary. *See, e.g.*, Scott & Stuntz, *supra* note 309, at 1930-31, 1959-60 (arguing for more intense judicial scrutiny of plea bargaining outcomes). Just as the administrative state satisfies the separation of powers analysis with its various mechanisms for judicial and political oversight, plea bargaining could also coexist with the Constitution's requirements as long as it was sufficiently regulated. It is beyond the scope of this Article to determine what arrangements might suffice for that purpose, though that is certainly an avenue worth pursuing and one that I am considering in another paper. For present purposes, what is clear is that the unregulated system of plea bargaining that exists today cannot be squared with the separation of powers.

restore the checking function of judges and juries and would require that all the key players—Congress, the executive, judges, and juries—agree before an individual is convicted of a federal offense. At the same time, greater enforcement of the separation of powers would still give Congress the freedom to adapt and adjust substantive criminal laws and sentences as it sees fit.³³⁴ In addition, the approach to the separation of powers advocated here has the virtue of having proven itself to be a viable methodology. The Court has already enforced a strict division of power in many administrative contexts other than crime. There is all the more reason to use it in the criminal context, where the stakes are higher and the potential for abuse is so much greater.

334. Congress's power is subject, of course, to constitutional limits, such as the Eighth Amendment and jurisdictional requirements.

ARTICLE

THE HIDDEN LAW OF PLEA BARGAINING

Andrew Manuel Crespo*

The American criminal justice system is a system of pleas. Few who know it well think it is working. And yet, identifying plausible strategies for law reform proves challenging, given the widely held scholarly assumption that plea bargaining operates “beyond the shadow of the law.” That assumption holds true with respect to substantive and constitutional criminal law—the two most studied bodies of law in the criminal justice system—neither of which significantly regulates prosecutorial power. The assumption is misguided, however, insofar as it fails to account for a third body of law—the subconstitutional law of criminal procedure—that regulates and often establishes the very mechanisms by which prosecutorial plea bargaining power is both generated and deployed.

These hidden regulatory levers are neither theoretical nor abstract. Rather, they exist in strikingly varied forms across our pluralist criminal justice system. This Article excavates these unexamined legal frameworks, conceptualizes their regulatory potential, highlights their heterogeneity across jurisdictions, and exposes the institutional actors most frequently responsible for their content. In so doing, it opens up not only new scholarly terrain but also new potential pathways to criminal justice reform.

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INTRODUCTION

Plea bargaining, we are told, is lawless. It “evolved in the unregulated interstices of our criminal justice system.”¹ And it continues to be driven not by law but by power—the vast, unregulated power of prosecutors.² As plea bargaining scholars have long recounted, prosecutors’ ability to threaten inflated sentences, combined with their power to trade those sentences away for pleas of guilt, allows them to control “who goes to prison and for how long.”³ As for law, it has abandoned, on this account, its most basic function: channeling prosecutorial power through regulatory constraints.⁴ Substantive criminal law, after all, now penalizes so much conduct, so severely, and so

1. Kenneth Kipnis, *Criminal Justice and the Negotiated Plea*, 86 *Ethics* 93, 95 (1976); see also William Ortman, *Probable Cause Revisited*, 68 *Stan. L. Rev.* 511, 516 (2016) (“American criminal justice backed into plea bargaining, and formal law has long been ambivalent about it.”).

2. See David Alan Sklansky, *The Nature and Function of Prosecutorial Power*, 106 *J. Crim. L. & Criminology* 473, 480–81 (2016) (“The starting point for virtually every discussion of prosecutors in the United States is their . . . ‘almost limitless discretion’ and ‘virtually absolute power.’” (first quoting Erik Luna & Marianne Wade, *Prosecutors as Judges*, 67 *Wash. & Lee L. Rev.* 1413, 1414–15 (2010); then quoting Marc L. Miller, *Domination and Dissatisfaction: Prosecutors as Sentencers*, 56 *Stan. L. Rev.* 1211, 1252 (2004))).

3. William J. Stuntz, *Plea Bargaining and Criminal Law’s Disappearing Shadow*, 117 *Harv. L. Rev.* 2548, 2549 (2004) [hereinafter Stuntz, *Shadow*]; see also *infra* Part I.

4. Cf. Kenneth Culp Davis, *Discretionary Justice: A Preliminary Inquiry* 50–51 (1969) (asserting that “[t]he goal of the rule of law” should be “to distinguish between necessary discretionary power and unnecessary discretionary power,” “to find effective ways to control” the former, and to “cut back” on the latter); Sklansky, *supra* note 2, at 489 (“[T]he more discretion that prosecutors have, the greater will be the concern, generally speaking, about the power they exercise and vice versa.”).

many times over that it serves simply to delegate power to prosecutors, transforming them into administrators of an “unwritten criminal ‘law’ that consists only of [their own] discretionary decisions” to charge certain offenses or to offer certain deals.⁵ Meanwhile, the constitutional law of criminal procedure that is ostensibly designed to regulate state power imposes virtually no constraints on prosecutors’ plea bargaining practices at all.⁶ Thus, the conventional account: Plea bargaining operates “outside the law’s shadow,”⁷ governed instead only by brute prosecutorial power that is exercised in ways “not usually written down anywhere,” let alone “governed by formal legal standards.”⁸

Against this received wisdom, this Article offers a different account. Plea bargaining, it contends, appears lawless only if by “law” one refers to those two familiar legal pillars of the American criminal justice system—substantive and constitutional criminal law—that together consume academic discussions, in classrooms and in legal scholarship alike.⁹ Beyond those twin pillars, however, lies a third, unseen but essential body of law that has long been obscured by some of criminal justice scholarship’s most familiar blind spots: It is a creature primarily of state law (not federal law), of court rules and statutes (not constitutional doctrine), and of procedures often seen as relevant only to a bygone era of trial-based litigation (not to the system of pleas that has replaced it).¹⁰ And yet, as

5. William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 Mich. L. Rev. 505, 579–80 (2001) [hereinafter Stuntz, *Politics*].

6. See *infra* Parts II–IV; see also Adriaan Lanni & Carol Steiker, *A Thematic Approach to Teaching Criminal Adjudication*, 60 St. Louis U. L.J. 463, 469 (2016) (“In a world of guilty pleas, the prosecutor’s determinations of what to charge and what bargain to offer are the ball game, yet the case law regulates this process only minimally.”); cf. Andrew Manuel Crespo, *Systemic Facts: Toward Institutional Awareness in Criminal Courts*, 129 Harv. L. Rev. 2049, 2054–56 (2016) [hereinafter Crespo, *Systemic Facts*] (discussing the “regulatory jurisprudence” of constitutional criminal law).

7. Stuntz, *Shadow*, *supra* note 3, at 2558.

8. Gerard E. Lynch, *Our Administrative System of Criminal Justice*, 66 Fordham L. Rev. 2117, 2123 (1998) [hereinafter Lynch, *Administrative System*].

9. See, e.g., Stephanos Bibas, *The Real-World Shift in Criminal Procedure*, 93 J. Crim. L. & Criminology 789, 790 (2003) [hereinafter Bibas, *Real-World Shift*] (book review) (“[A] focus on Supreme Court doctrine continues to rule criminal procedure, in both scholarly articles and casebooks.”); see also *infra* Parts II–IV (discussing legal scholarship’s consistent focus on constitutional modes of regulating plea bargaining). As for constitutional law’s hold on law school pedagogy, see, for example, Lanni & Steiker, *supra* note 6, at 464 (describing the “conventional approach” used at “most schools” to teach criminal procedure through a pair of courses focused “on the constitutional constraints on police practices and . . . the constitutional doctrines that structure the adjudicative process”); Ben Trachtenberg, *Choosing a Criminal Procedure Casebook: On Lesser Evils and Free Books*, 60 St. Louis U. L.J. 543, 544–45 (2016) (explaining that while “the Federal Rules of Civil Procedure guide the syllabus” in civil procedure courses, “the primary law undergirding a criminal procedure syllabus . . . consists of court opinions interpreting the brief constitutional provisions at issue”).

10. Cf. Sheri Lynn Johnson, *Batson Ethics for Prosecutors and Trial Court Judges*, 73 Chi.-Kent L. Rev. 475, 477 (1998) (“As has been observed many times, academics tend to focus on appellate courts and cases, perhaps because appellate opinions are so much more

this Article will show, it is this subconstitutional state law of criminal procedure—the hidden law of plea bargaining—that time and again establishes the mechanisms and legal frameworks through which prosecutorial plea bargaining power is generated and deployed.

Take, for example, charge bargaining, the primary mechanism by which prosecutors control defendants' sentencing exposure, and with it the so-called trial penalties defendants face if they dare refuse a prosecutor's invitation to plead guilty. Long criticized as an illicit form of coercion, charge bargaining presents a conundrum under the traditional scholarly account: Given the breadth and depth of substantive criminal law, charge bargaining is routinely diagnosed as a major driver of plea bargaining's pathology;¹¹ but given prosecutors' constitutional authority—indeed, their responsibility—to select the charges a defendant will face, it is also seen as an inevitable feature of criminal law's administration.¹² If one looks beyond substantive and constitutional criminal law, however, charge bargaining's power dynamics become far more complex, for the essential particulars of the practice—ranging from the number of charges the prosecutor can file, to their severity, to their relationship to the defendant's sentencing exposure, to the ease with which they can be traded away—all directly impact just how much leverage the prosecutor truly has. And crucially, those particulars are in turn dictated by the subconstitutional procedural law of the states—an interlocking set of legal frameworks that comprises the law of joinder and severance, the law of preclusion, the law of cumulative sentencing, the law of pretrial charge review, the law of dismissal and amendment, and the law of lesser offenses.¹³

accessible than the doings of trial courts, and perhaps because, increasingly, tenure-track academics have little or no personal experience in the trial courts.”); Ronald Wright & Marc Miller, *The Screening/Bargaining Tradeoff*, 55 *Stan. L. Rev.* 29, 117 (2002) (criticizing “the legal academy’s . . . ignorance of the wondrous variation in state and local systems”); *id.* at 55 (asserting that criminal procedure scholars lack “their traditional window on the law” when “issues are not framed in constitutional terms”).

11. See *infra* Part I (unpacking the trial-penalty theory of plea bargaining). For a prominent judicial critique of charge bargaining, see *United States v. Kupa*, 976 F. Supp. 2d 417, 431–60 (E.D.N.Y. 2013). For prominent scholarly critiques, see, for example, Rachel E. Barkow, *Separation of Powers and the Criminal Law*, 58 *Stan. L. Rev.* 989, 1047–50 (2006) [hereinafter Barkow, *Separation of Powers*]; Stuntz, *Politics*, *supra* note 5, at 519–23. But see Frank H. Easterbrook, *Plea Bargaining as Compromise*, 101 *Yale L.J.* 1969, 1969–72 (1992).

12. See *infra* notes 39, 106 and accompanying text.

13. See *infra* Parts II–IV. The term “subconstitutional” in this Article refers to bodies of law (like those just listed) that lie below federal constitutional law in the hierarchy of legal authorities. Three clarifying points, however, are in order: First, from a regulatory perspective, the frameworks examined in this Article often impose constraints above the so-called constitutional floor and are thus in a sense “supraconstitutional.” Second, the regulatory constraints described here could be imposed by federal constitutional law; they are not, in other words, *inherently* subconstitutional. But as the following discussion will show, while federal constitutional law could impose such constraints, it consistently has not—and shows little signs of changing course. See *infra* Parts II–IV. There is thus a need for scholars and reformers to look beyond federal constitutional law to alternative frameworks. See *infra*

Almost entirely unexamined in existing plea bargaining literature, these hidden legal frameworks address issues that every system of criminal justice administration simply must resolve as it determines, for example, how many charges can be filed in a given case, or whether the sentences associated with those charges will run concurrently or consecutively. And yet, the answers to these inescapable questions, while necessarily shaping prosecutorial power, are neither hardwired nor predetermined. Rather, the choice of *which* procedural regime to adopt—from a range of potential options—inherently, if often implicitly, presents an important policy choice about *how* prosecutorial plea bargaining power ought to be structured.¹⁴

As Professor Kenneth Culp Davis explained half a century ago, that core question poses one of the central challenges of governmental administration: Too much discretionary power, and “justice may suffer from arbitrariness or inequality”; too little, and “justice may suffer from insufficient individualizing.”¹⁵ In a pluralist criminal justice system such as ours, no fixed formula can prescribe exactly the right amount of prosecutorial power for every jurisdiction, as no two communities confront the same challenges when balancing their citizens’ competing rights to liberty and security.¹⁶ And yet, as Davis observed—and as a growing chorus of academics, activists, and politicians from both parties now agree—too often our criminal justice system gets that balance wrong, tolerating an unacceptable excess of prosecutorial power, and with it an unacceptable excess of incarceration, doled out in troublingly unequal ways.¹⁷

section V.B; cf. Andrew Manuel Crespo, *Regaining Perspective: Constitutional Criminal Adjudication in the U.S. Supreme Court*, 100 Minn. L. Rev. 1985, 1986–88 (2016) [hereinafter Crespo, *Regaining Perspective*] (discussing “institutional vexations” that may “stymie the Supreme Court’s ability to engage properly and fairly with . . . questions of criminal justice”). Finally, the state procedural law examined here occasionally arises from *state* constitutional law. As a descriptive matter, however, this occurs only infrequently, which means that plea bargaining’s hidden procedural law is by and large “subconstitutional” in both the federal and state meanings of the term. See *infra* Appendix (listing sources of state procedural law); cf. *infra* note 242 (discussing the role of state constitutional law in further detail).

14. The regulatory nature of procedural law is well recognized, and sometimes colorfully captured. See *Wisconsin v. Constantineau*, 400 U.S. 433, 436 (1971) (“[I]t is procedure that marks much of the difference between rule by law and rule by fiat.”); Regulatory Reform Act: Hearing on H.R. 2327 Before the Subcomm. on Admin. Law & Governmental Relations of the H. Comm. on the Judiciary, 98th Cong. 312 (1983) (statement of Rep. John D. Dingell, Chairman, H. Comm. on Energy & Commerce) (“I’ll let you write the substance . . . and you let me write the procedure, and I’ll screw you every time.”); see also William J. Stuntz, *Privacy’s Problem and the Law of Criminal Procedure*, 93 Mich. L. Rev. 1016, 1020 (1995) (“[A]ll procedural rules have substantive effects. . . . [I]t is useful to see how criminal procedure casts its substantive shadow, and how the size and shape of that shadow depends on the interests the law chooses to protect.”).

15. Davis, *supra* note 4, at 52.

16. See *infra* note 210 and accompanying text.

17. See Davis, *supra* note 4, at 52 (“Americans unquestionably err much more often by making discretion too broad than by making it too narrow”); see also John F. Pfaff,

As recognition of these systemic failings turns criminal justice reform into the rallying cry of a generation, the need to understand the regulatory levers hidden within subconstitutional procedural law—and to recognize which institutional actors are responsible for crafting these regulatory regimes—grows only more significant.¹⁸ For in a system of pleas such as ours, in which nearly every sentence of incarceration arises from a plea of guilt, criminal justice reform and plea bargaining reform are of necessity

Locked In 6 (2017) [hereinafter Pfaff, Locked In] (“The primary driver of incarceration is increased prosecutorial toughness when it comes to charging people . . .”); Sklansky, *supra* note 2, at 481, 489 (“The concentration of power in the hands of prosecutors has been called the ‘overriding evil’ of American criminal justice . . .” (quoting Donald A. Dripps, *Reinventing Plea Bargaining*, in *The Future of Criminal Law* 55, 60 (Michelle Madden Dempsey et al. eds., 2014))). For a sampling of academic criticism of plea bargaining’s systemic and individual injustices, see Rachel E. Barkow, *Institutional Design and the Policing of Prosecutors: Lessons from Administrative Law*, 61 *Stan. L. Rev.* 869, 883–84 (2009) [hereinafter Barkow, *Institutional Design*] (“The consolidation of adjudicative and enforcement power in a single prosecutor is also troubling because it creates an opportunity for that actor’s prejudices and biases to dictate outcomes. . . . Indeed, researchers have found that, even after controlling for legally relevant factors, race and gender affect charging and sentencing decisions.” (footnote omitted)); Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 *Harv. L. Rev.* 2463, 2468 (2004) [hereinafter Bibas, *Outside the Shadow*] (arguing that “plea bargaining . . . bases sentences in part on wealth, sex, age, education, intelligence, and confidence”); Tracey L. Meares, *Rewards for Good Behavior: Influencing Prosecutorial Discretion and Conduct with Financial Incentives*, 64 *Fordham L. Rev.* 851, 878 (1995) (“[T]he prosecutor’s one-sided control of plea bargaining impacts poorer defendants to a greater extent than it impacts wealthier defendants.”); Sonja B. Starr & M. Marit Rehani, *Mandatory Sentencing and Racial Disparity: Assessing the Role of Prosecutors and the Effects of Booker*, 123 *Yale L.J.* 2, 27–31 (2013) (describing racially disparate charging practices); Crystal S. Yang, *Free at Last? Judicial Discretion and Racial Disparities in Federal Sentencing*, 44 *J. Legal Stud.* 75, 78 (2015) (same); see also Meares, *supra*, at 875 (describing “the tendency of some prosecutors to exert the most pressure on defendants in weak cases”); Wright & Miller, *supra* note 10, at 94 (noting the “urgent” and “substantial problem” of plea bargains ensnaring “the innocent defendant”).

18. On the growing momentum in favor of criminal justice reform, see generally *Solutions: American Leaders Speak Out on Criminal Justice* (Inimai Chettiar & Michael Waldman eds., 2015) (collecting critiques of American overcriminalization from leading politicians, including presidential candidates from both parties); see also Amna A. Akbar, *Toward a Radical Imagination of Law*, 93 *N.Y.U. L. Rev.* (forthcoming 2018) (manuscript at 17–30), http://papers.ssrn.com/abstract_id=3061917 (on file with the *Columbia Law Review*) (describing reforms proposed by the Movement for Black Lives). But see Ames C. Grawert & Natasha Camhi, Brennan Ctr. for Justice, *Criminal Justice in President Trump’s First 100 Days 1* (2017), http://www.brennancenter.org/sites/default/files/analysis/Criminal_Justice_in_President_Trumps_First_100_Days.pdf [<http://perma.cc/MB4R-SM2S>] (describing how the Trump Administration’s criminal justice policy “directly contradicts the emerging consensus among conservatives, progressives, law enforcement, and researchers” and threatens to “set back the national trans-partisan movement to end mass incarceration”). For a thoughtful account of how the so-called “bipartisan consensus” favoring reform masks important ideological divisions, see Benjamin Levin, *The Consensus Myth in Criminal Justice Reform*, 117 *Mich. L. Rev.* (forthcoming 2018) (manuscript at 1–5), http://papers.ssrn.com/abstract_id=3135053 (on file with the *Columbia Law Review*).

one and the same.¹⁹ The central goal of this Article is thus to draw this hidden law of plea bargaining into the open, subjecting it for the first time to sustained scholarly analysis.²⁰

That analysis proceeds here in five Parts. Part I begins by deconstructing charge bargaining, the central and most criticized mechanism of prosecutorial power, into its three constituent components, which this Article terms *piling on*, *overreaching*, and *sliding down*. Those components, in turn, form the organizing framework for the three Parts that follow, Parts II, III, and IV, which are the Article's core and which together offer its two initial contributions: First, they excavate the complex and interlocking set of procedural levers that serve as charge bargaining's hidden regulatory framework, analyzing how each lever can be deployed to either facilitate or restrict prosecutorial power, depending on how its

19. See *Lafler v. Cooper*, 566 U.S. 156, 170 (2012) (“[N]inety-four percent of state convictions are the result of guilty pleas.”).

20. No scholar to date has offered a systematic account of how the various elements of subconstitutional procedural law come together to construct a regulatory framework for plea bargaining power. Indeed, only a small handful of academics recognize the potential significance such law might hold for plea bargaining at all. The most extensive account is Professors Russell Gold, Carissa Hessick, and Andrew Hessick's recent comparative analysis of how provisions in the Federal Rules of Criminal Procedure and the Federal Rules of Civil Procedure might impact settlement practices in federal court. See Russell M. Gold, Carissa Byrne Hessick & F. Andrew Hessick, *Civilizing Criminal Settlements*, 97 B.U. L. Rev. 1607, 1639–52 (2017). Professor (now Judge) Stephanos Bibas has also examined how subconstitutional procedural rules might impact plea bargaining, albeit in an essay that (by his own account) trains on a discrete set of “relatively small-bore” reforms. See Stephanos Bibas, *Regulating the Plea-Bargaining Market: From Caveat Emptor to Consumer Protection*, 99 Calif. L. Rev. 1117, 1153–59 (2011) (urging, inter alia, rules requiring plea agreements to be written down, with key terms in boldface type). Finally, Professor Máximo Langer has offered a theoretical account of plea bargaining coercion that he pairs with a discussion of certain constitutional and subconstitutional doctrines. See Máximo Langer, *Rethinking Plea Bargaining: The Practice and Reform of Prosecutorial Adjudication in American Criminal Procedure*, 33 Am. J. Crim. L. 223, 270–72 (2006).

In excavating the hidden regulatory levers discussed here, this project joins longstanding scholarly efforts “to identify crucial points in criminal procedure and the criminal justice system that reformers should look at” as they strive to improve how that system operates. *Id.* at 225, 268; see also Ronald F. Wright, *Trial Distortion and the End of Innocence in Federal Criminal Justice*, 154 U. Pa. L. Rev. 79, 82 (2005) [hereinafter Wright, *Distortion*] (urging “a regulatory strategy” to reform plea bargaining, “[b]ecause no one will abolish plea bargains entirely”). See generally Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 Mich. L. Rev. 34, 42–43, 55–56 (1992) (promoting “practical” legal scholarship” that analyzes how “complex, existing legal regime[s]” work in order to help “legislators and other policymakers . . . [work toward] law reform”). Existing reform proposals, however, tend to track the scholarship's narrow focus on substantive and constitutional criminal law—either by proposing reforms internal to those doctrinal arenas, see *infra* notes 57–58, 71, 85, or by abandoning formal law reform altogether and urging instead various modes of prosecutorial self-regulation. See, e.g., Barkow, *Institutional Design*, *supra* note 17, at 896–98; Lynch, *Administrative System*, *supra* note 8, at 2143; Meares, *supra* note 17, at 873; Wright & Miller, *supra* note 10, at 55–58. For a critique of reform agendas focused solely on law enforcement self-regulation, see Crespo, *Systemic Facts*, *supra* note 6, at 2059–65.

accompanying procedural law is structured. Second, by surveying the variety of procedural frameworks employed across the states, the Article exposes the surprising degree of procedural—and thus regulatory—heterogeneity currently in place, and thereby destabilizes assumptions about where the boundaries of feasible reform might lie.²¹

With those expanded horizons of potential reform in mind, Part V reflects on the underlying practical and political forces of the current plea bargaining regime, offering three final contributions: First, it provides a concrete example of what a coordinated suite of subconstitutional procedural reforms might look like. Second, it lays the foundation for future empirical analyses of how these various procedural levers might interact with broader sociolegal forces to impact plea bargaining practices on the ground. Finally, it casts the underlying political economy of plea bargaining in a new light, exposing a previously hidden but ultimately central set of lawmakers: state courts, acting here not in their familiar capacity as adjudicators deciding cases but rather in a fundamentally distinct and ultimately surprising role—as quasi-legislatures, responsible for crafting the heretofore hidden law that governs our criminal justice system of pleas.

I. THE HIDDEN LAW OF CHARGE BARGAINING

The ability to control a defendant's sentencing exposure by manipulating the charges against him—that is to say, the ability to charge bargain—is widely recognized by scholars as “the core of prosecutorial power in the United States.”²² The practice itself is simple enough to

21. This Article intentionally foregrounds subconstitutional state law, to the exclusion of subconstitutional federal law, in an effort to guard against the distorting gravitational pull that federal law routinely exerts on criminal justice scholarship. See Wright & Miller, *supra* note 10, at 117 (criticizing “the legal academy’s . . . obsessive focus on federal law”); cf. Meares, *supra* note 17, at 853 n.4 (“[T]he relevant case law of the federal system is simply more accessible for analysis . . .”). As Professor Bibas writes, a “shift” in focus “from federal to state law broadens criminal procedure scholarship” by encouraging “[s]cholars and students [to] pay more attention to [how] the variety of state procedures . . . may serve different local needs.” Bibas, *Real-World Shift*, *supra* note 9, at 803. That said, because subconstitutional procedural law serves a regulatory role in the federal system as well, federal law is reported as a fifty-first exemplar in this Article’s Appendix, *infra*.

22. Sklansky, *supra* note 2, at 484–87 (describing scholarly consensus defining the core of prosecutorial power as “the ability to coerce guilty pleas,” which “depends, in turn, on an ability to threaten outcomes . . . [and to] agree to forego charges”). Charge bargaining is not, however, the only mechanism of prosecutorial power, nor the only mechanism structured by subconstitutional procedural law. Prosecutors, for example, can also exercise leverage in plea negotiations by offering to recommend specific sentences in exchange for pleas of guilt, a process known as sentence bargaining. Sentence bargaining is generally seen as less problematic than charge bargaining insofar as it retains a meaningful role for judges. See, e.g., Bibas, *Outside the Shadow*, *supra* note 17, at 2534 (“[C]lear sentence bargains are preferable to opaque charge bargains.”); Meares, *supra* note 17, at 888 (“Limiting charge bargaining necessarily limits the prosecutor’s power because the only tool left to manipulate is a tool over which she must share her power with judges.”); Wright & Miller,

describe: A criminal defendant's sentencing exposure is a function of his likelihood of conviction and his likely sentence if convicted. Those two factors, in turn, are heavily influenced by the charges he faces, which define the possible grounds for conviction, the maximum potential sentence, and frequently the minimum sentence as well.²³ A charge bargain is thus simply an agreement to replace a higher charge with a lower one in exchange for the defendant's promise to plead guilty, which guarantees the prosecutor a conviction without the expense of trial.²⁴

Yet while such an exchange may sound like an actual bargain, with each party gaining, to quote the Supreme Court, a "mutuality of advantage" from the deal,²⁵ most knowledgeable observers describe it as something else: a fundamentally coercive practice (occasionally analogized to torture) that produces involuntary pleas, sometimes to crimes the defendant did not commit.²⁶ The core problem is twofold. First, while defendants always

supra note 10, at 111–12 ("Sentence bargains do less harm than charge bargains because sentencing decisions necessarily involve many actors." (emphasis omitted)). For extensions of this Article's insights to sentence bargaining and other mechanisms of prosecutorial power, see *infra* note 198.

23. See Bibas, *Outside the Shadow*, supra note 17, at 2487 (observing that both sentencing guidelines and mandatory minimum "penalties turn on the severity of the offense" of conviction); see also *id.* (observing that "many state systems have replaced indeterminate sentencing with sentencing guidelines and have adopted mandatory minimum sentences by statute"). Because this Article takes charge bargaining and the attendant manipulation of trial penalties as its point of departure, it focuses on cases in which large sentencing differentials are at issue—namely, felony cases. In some instances, misdemeanor prosecutions raise similar dynamics, particularly when serious collateral consequences such as deportation, loss of government housing, or sex offender registration are at stake. See generally Paul T. Crane, *Charging on the Margin*, 57 Wm. & Mary L. Rev. 775 (2016) (examining how prosecutors may strategically leverage the collateral consequences associated with misdemeanor offenses). For a discussion of the extralegal forces that may drive outcomes in misdemeanor cases, see *infra* notes 212–213 and accompanying text.

24. Notably, when it comes to avoiding the expenses of litigation, the government routinely bears the vast majority of those costs, given that most defendants are indigent and thus entitled to representation at government expense. See *Gideon v. Wainwright*, 372 U.S. 335, 343–45 (1963); Thomas H. Cohen, *Who Is Better at Defending Criminals? Does Type of Defense Attorney Matter in Terms of Producing Favorable Case Outcomes*, 25 *Crim. Just. Pol'y Rev.* 29, 35 (2014) (reporting defendant indigency rates of 80% in felony cases). But cf. Laura I. Appleman, *Nickel and Dimed into Incarceration: Cash-Register Justice in the Criminal System*, 57 B.C. L. Rev. 1483, 1485 (2016) (describing "bail fees, translation fees, indigent representation fees, dismissal fees" and other costs paid by indigent defendants).

25. *Bordenkircher v. Hayes*, 434 U.S. 357, 363 (1978) (internal quotation marks omitted) (quoting *Brady v. United States*, 397 U.S. 742, 752 (1970)).

26. See, e.g., Langer, supra note 20, at 246–47 (describing "coercive" prosecutorial leverage, "involuntary" guilty pleas, and "unilateral adjudication" by prosecutors as "common phenomenon[a] in the American criminal justice system"); Lynch, *Administrative System*, supra note 8, at 2132 (noting that while defense attorneys "may implicitly threaten a trial" there is in truth no actual "exchange of values based on relative bargaining strength," because prosecutors have "virtually unilateral power to inflict pain on the defendant"); Meares, supra note 17, at 863–66 (rejecting "the Supreme Court's characterization of plea bargaining as 'the mutuality of advantage' by 'give-and-take'" between parties given that "the prosecutor is able to control the dynamics of plea bargaining" by "controlling the defendant's exposure

want to minimize their potential sentences, prosecutors rarely want to maximize them, hoping instead to obtain only their *preferred* sentence, in the most efficient way possible.²⁷ This asymmetry allows prosecutors to trade away “extra” years of incarceration that the defendant desperately wants to avoid but that the prosecutor doesn’t particularly value. As for the second problem: This free leverage is typically overwhelming, because most criminal codes authorize sentences much higher than what a typical prosecutor—or a typical person, for that matter—would actually want to see imposed in a given case.²⁸ Thus, by threatening a seriously inflated set of charges and then offering to replace it with the charges that she truly desires, the prosecutor is able to control the defendant’s incentive to plead guilty, and with it the outcome of any subsequent “negotiation.”²⁹ In the

to punishment”). For torture analogies, see Donald A. Dripps, *Guilt, Innocence, and Due Process of Plea Bargaining*, 57 Wm. & Mary L. Rev. 1343, 1343–45 (2016); John H. Langbein, *Torture and Plea Bargaining*, 46 U. Chi. L. Rev. 3, 3 (1978). On plea bargaining’s innocence problem, see *supra* note 17 and *infra* notes 34, 99.

27. See Sklansky, *supra* note 2, at 488 (“The broad consensus among scholars is that prosecutors today are able to bargain for the results they want without giving up much that is important to them, because the outcomes they can credibly threaten under modern sentencing statutes are extraordinarily harsh.”); Stuntz, *Shadow*, *supra* note 3, at 2553–54 (“[E]xtra months in prison are not like marginal dollars in civil cases. Once the defendant’s sentence has reached the level the prosecutor prefers . . . adding more time offers no benefit to the prosecutor.”); *id.* at 2549 (analogizing “criminal law and the law of sentencing” to “items on a menu from which the prosecutor may order as she wishes,” with “no incentive to order the biggest meal possible” but rather simply the incentive “to get whatever meal she wants”); cf. Albert W. Alschuler, *The Prosecutor’s Role in Plea Bargaining*, 36 U. Chi. L. Rev. 50, 95 (1968) [hereinafter Alschuler, *The Prosecutor’s Role*] (describing a charge bargain as akin to a prosecutor offering a defendant “the sleeves from his vest”). When a prosecutor does try to maximize incarceration—such as in prosecutions for very serious offenses—her plea bargaining leverage diminishes, and with it the rate of plea bargaining itself. Cf. Lauren M. Ouziel, *Legitimacy and Federal Criminal Enforcement Power*, 123 Yale L.J. 2236, 2255 (2014) (observing that “[h]omicide offenses have one of the lower guilty plea rates” while also carrying “the highest statutory and Guidelines penalties”).

28. See Sanford H. Kadish et al., *Criminal Law and Its Processes* 1180 (10th ed. 2017) (“Criminal statutes now commonly permit (or purport to require) draconian punishments that no one expects to be imposed in the typical case.”); Barkow, *Institutional Design*, *supra* note 17, at 880–81 (“[Legislators] . . . routinely pass[] laws with punishments greater than the facts of the offense would demand to allow prosecutors to use the excessive punishments as bargaining chips . . . to obtain . . . the more appropriate sentence via a plea instead of a trial.”); Adriaan Lanni, *The Future of Community Justice*, 40 Harv. C.R.-C.L. L. Rev. 359, 388 (2005) (“[W]hen given detailed descriptions of specific cases, studies show that [survey] respondents often suggest sentences that are more lenient than the mandatory minimum in their jurisdiction.”); see also Barkow, *Separation of Powers*, *supra* note 11, at 1034 (“[T]hose who do take their case to trial and lose [in such a system] receive longer sentences than even Congress or the prosecutor might think appropriate, because the longer sentences exist on the books largely for bargaining purposes.”). For a striking example of extreme sentencing leverage, consider *Bordenkircher v. Hayes*, a case in which a defendant accused of writing a bad check for \$88.30 received a mandatory life sentence after rejecting a plea deal carrying a sentence of five years. 434 U.S. at 358–59.

29. See, e.g., Meares, *supra* note 17, at 861 (“[P]rosecutorial discretion . . . allows the prosecutor to manipulate the charging decision to control the defendant’s decision to plead guilty or go to trial.”).

aggregate, prosecutors so empowered can obtain more convictions, with longer sentences, at lower costs—all preconditions for mass incarceration.³⁰

In practice, charge manipulation involves three interrelated moves. First, the prosecutor can inflate the quantity of charges the defendant faces, by *piling on* overlapping, largely duplicative offenses—increasing with each new charge the defendant’s potential sentence, his risk of conviction, and the “sticker shock” of intimidation that accompanies a hefty charging instrument.³¹ Second, the prosecutor can achieve similar effects by inflating the substance of the charges themselves, *overreaching* beyond what the

30. See Albert W. Alschuler, *Lafler and Frye: Two Small Band-Aids for a Festering Wound*, 51 Duq. L. Rev. 673, 705 (2013) (“By lowering the price of imposing criminal punishment, plea bargaining gave America more of it.”); John F. Pfaff, *The Micro and Macro Causes of Prison Growth*, 28 Ga. St. U. L. Rev. 1239, 1254 (2012) (“Prison growth has been driven by admissions, and at least since the early 1990s admissions have been driven by prosecutorial filing decisions.”); see also William J. Stuntz, *The Collapse of American Criminal Justice* 258 (2011) (observing that unchecked plea bargaining leverage “allow[s] the government to do two things that, in combination, [are otherwise] hard to pull off: raise the guilty plea rate and raise average sentences, *at the same time*”). For other factors contributing to mass incarceration, see *infra* notes 212–213 and accompanying text.

31. “Piling on” is also sometimes known as “charge-stacking,” Stuntz, *Politics*, *supra* note 5, at 594, “horizontal overcharging,” Meares, *supra* note 17, at 868 (citing Alschuler, *The Prosecutor’s Role*, *supra* note 27, at 85–88), or “redundant charging,” Michael L. Seigel & Christopher Slobogin, *Prosecuting Martha: Federal Prosecutorial Power and the Need for a Law of Counts*, 109 Penn St. L. Rev. 1107, 1121 (2005). On the connection between charge-stacking and increased sentence exposure, see *infra* section II.C (discussing cumulative sentencing). On the connection between charge-stacking and increased risk of conviction, see Edith Greene & Elizabeth F. Loftus, *When Crimes Are Joined at Trial*, 9 Law & Hum. Behav. 193, 194 (1985) (discussing an experiment capturing a “halo” effect that causes jurors to view a defendant more negatively when he is charged with multiple offenses); Andrew D. Leipold, *How the Pretrial Process Contributes to Wrongful Convictions*, 42 Am. Crim. L. Rev. 1123, 1143 (2005) (observing that in some instances “[a] defendant who is guilty of one charge but innocent of another may find it difficult” to defend successfully against both at once); Andrew D. Leipold & Hossein A. Abbasi, *The Impact of Joinder and Severance on Federal Criminal Cases: An Empirical Study*, 59 Vand. L. Rev. 349, 355 (2006) (“[T]he more counts in the indictment, the quicker the jury may be to assume that the accused must be guilty of *something*.”); Seigel & Slobogin, *supra*, at 1125–26 (noting that multiple charges increase the odds of a “horse-trade” or a “compromise verdict of guilty”). On the connection between charge-stacking and defendant intimidation, see Bibas, *Outside the Shadow*, *supra* note 17, at 2518–19 (discussing the psychological anchoring effect that renders defendants initially charged with very high offenses “more likely to think that they are getting good deals when they are offered lower sentences”); Seigel & Slobogin, *supra*, at 1126 (“[M]ultiple charges intimidate defendants.”). Finally, note that charge-stacking may also prompt less-than-scrupulous defense attorneys to “tell their clients that their superior negotiating skills forced the prosecutor to ‘drop some charges,’ even if the dropped charges would not actually ‘amount to a shorter sentence.’” Seigel & Slobogin, *supra*, at 1127 (“Prosecutors are surely aware of this dynamic, and may use redundant charging to take advantage.”); cf. Eve Brensike Primus, *Culture as a Structural Problem in Indigent Defense*, 100 Minn. L. Rev. 1769, 1769 (2016) (observing that “too many lawyers appointed to represent poor criminal defendants do not perform their intended role in the system, because they have been conditioned not to fight for their clients”).

law, the evidence, or the equities of the case support.³² Finally, after deploying these tactics to “jack up the threat value of trial,”³³ the prosecutor can capitalize on the ensuing leverage by *sliding down* from her initial threat to the lower set of charges that she actually prefers. Indeed, it is the difference between the threat and the subsequent offer that constitutes the prosecutor’s power: The larger the differential, the more likely the defendant is to plead guilty—whether he is in fact guilty or not.³⁴

To make these three moves more concrete, consider a straightforward example, to which we will return throughout the discussion to follow: Imagine a defendant suspected of approaching someone on a street corner at night, of pointing a gun at that person, of ordering them to move a few steps to the left (out from under a streetlamp), and, finally, of taking their wallet and running off with it. To any lay observer, the crime alleged here is straightforward: armed robbery. And yet, in practice, a prosecutor could and routinely would commence a prosecution against such a defendant by *piling on* a host of additional charges, including (to list just some examples) aggravated assault, theft, threats, possession of a weapon, and using a firearm during a crime of violence.³⁵ Moreover, given the defendant’s alleged command to move out from under the streetlamp, the prosecutor might also *overreach*, tacking on the far more serious but questionably applicable charge of kidnapping for good

32. Cf. Meares, *supra* note 17, at 865 n.47, 868 (citing Alschuler, *The Prosecutor’s Role*, *supra* note 27, at 85–88) (using the term “vertical overcharging”).

33. Stuntz, *Politics*, *supra* note 5, at 594.

34. See Langer, *supra* note 20, at 229 (summarizing scholarship finding prosecutors can create a “sentence differential [that] leaves defendants with no rational choice but to plead guilty,” simply “by offering a sentence substantially lower than the one expected at trial”); Wright, *Distortion*, *supra* note 20, at 109 (“The difference between the predicted sentence after a trial conviction and the predicted sentence after a guilty plea could become so large that some defendants would not accurately weigh their options and would not dare go to trial, even with a strong defense.”); Hans Zeisel, *The Offer that Cannot Be Refused*, in *The Criminal Justice System* 558, 559–60 (Franklin E. Zimring & Richard S. Frase eds., 1980) (“[T]he greater the difference between the offered sentence and the sentence expected after conviction at trial, the more defendants will plead guilty and avoid trial.”); see also Oren Gazal-Ayal, *Partial Ban on Plea Bargains*, 27 *Cardozo L. Rev.* 2295, 2304 (2006) (“[P]rosecutors can extract a guilty plea in almost any case, regardless of the real culpability of the defendant . . . [because even] innocent defendants are willing to accept minor punishment in return for avoiding the risk of a much harsher trial result.”); *id.* (“Only very rarely is the highest acceptable sentence [to] a defendant zero . . .”). Of course, as the Supreme Court has recently observed, the dynamic works in the opposite direction as well: The smaller the differential, the more likely the defendant will be to insist on his right to trial. See *Lee v. United States*, 137 S. Ct. 1958, 1966–67 (2017) (“[When] the respective consequences of a conviction after trial and by plea . . . are . . . similarly dire, even the smallest chance of success at trial may look attractive. For example, a defendant with no realistic defense to a charge carrying a 20-year sentence may nevertheless choose trial, if the prosecution’s plea offer is 18 years.”).

35. Cf. *infra* Part II (describing charge piling).

measure.³⁶ Finally, bringing her leverage to bear, the prosecutor would then offer to *slide down* from these inflated charges to the charge that she—and she alone—deems appropriate, based on her personal assessment of the evidence and of the defendant’s culpability: Plead guilty to a single count of armed robbery, she tells the defendant—or, even more enticingly, to misdemeanor counts of theft and possession of a weapon—and everything else will go away.³⁷

As plea bargaining scholars consistently recognize, prosecutorial charging discretion exercised in this fashion “translates into power in the plea bargaining context.”³⁸ And yet this is also the point at which plea bargaining scholarship starts to run out, for it frequently assumes that such power is an intractable feature of criminal justice administration in a system that does not (and arguably cannot) tell prosecutors what charges to file in a given case.³⁹ The true scope of prosecutors’ charge-bargaining power, however, is contingent on much more than just the decision of what charges to file, turning instead on a broader set of procedural questions: With respect to piling on, *how many charges* can a prosecutor threaten and *how much* will each additional charge increase the defendant’s sentencing exposure? With respect to overreaching, *what standards* must be satisfied before substantively inflated charges can proceed beyond the filing stage, and *how will those standards be enforced*? With respect to sliding down, *what restrictions, if any*, will be placed on the prosecutor’s ability to replace one set of charges with another?

Too often, these essential questions go overlooked—perhaps because their answers are found not in the familiar constitutional law of criminal procedure but rather in its unexamined counterpart: the subconstitutional procedural law of the states. The following three Parts excavate and analyze that unexamined body of law, mapping for each of the three charge-bargaining components just described the mechanisms by which prosecutors exercise their authority and the procedural law through which

36. Cf. *infra* section III.B and note 148 (discussing legal overreach and the law of kidnapping).

37. To be sure, the defendant who accepts the deal is better off than he would be had he gone to trial and lost. But so long as the sentence associated with the inflated charges is one that *no one actually wants him to serve*, see *supra* notes 26–29, then his supposed “deal” isn’t really much of a bargain. See Gerard E. Lynch, Screening Versus Plea Bargaining: Exactly What Are We Trading Off?, 55 *Stan. L. Rev.* 1399, 1402–04 (2003) (doubting whether defendants are “the beneficiaries of ‘bargains’” in the conventional sense of the word). And of course, in pleading guilty, the defendant loses any chance of being acquitted.

38. Meares, *supra* note 17, at 863.

39. *Id.* at 863–66 (asserting that “prosecutorial discretion at the charging stage undeniably . . . allows the prosecutor to control, essentially unilaterally, the defendant’s ability to plead guilty in most cases,” and describing such power as both “vast” and “well-entrenched”); see also *infra* note 170 and accompanying text. But cf. Rebecca Roiphe, The Duty to Charge in Police Use of Excessive Force Cases, 65 *Clev. St. L. Rev.* 503, 508–09 (2017) (noting that a few “states provide some mechanism for [private] citizens to initiate charges with approval of a court”).

that authority is structured. The following table gives an overview of the discussion to come.

TABLE 1: OVERVIEW OF CHARGE-BARGAINING COMPONENTS, IMPLEMENTING MECHANISMS, AND REGULATORY FRAMEWORKS

Part	Charge-Bargaining Component	Implementing Mechanism	Regulatory Framework ("The Law of . . .")
II.	Piling On	Charge Piling	Joinder and Severance
		Case Piling	Preclusion
		Sentence Piling	Cumulative Sentencing
III.	Overreaching	Factual Overreaching	Pretrial Evidentiary Review
		Legal Overreaching	Summary Dismissal and Bills of Particulars
		Equitable Overreaching	Equitable Dismissal
IV.	Sliding Down	Charge Sliding	Amendment and Dismissal
		Verdict Sliding	Lesser Offenses

II. PILING ON

While prosecutors likely pile charges on top of each other in the majority of cases that they file, their ability to do so is not some inherent feature of their authority.⁴⁰ Rather, the ability to pile on charges is simply the ability to join multiple charges together in a single case—an ability that the law of joinder, together with its fellow traveler, the law of severance, both establishes and defines. And while joinder and severance determine how many charges can be stacked on top of each other, a prosecutor's leverage is also affected by the number of piles (that is, the number of separate prosecutions) she can threaten, and by each pile's potential "weight," as measured in years in prison—two issues governed by the law of preclusion and the law of cumulative sentencing. This Part examines these interlocking procedural frameworks in turn.

A. *Charge Piling: The Law of Joinder and Severance*

The law of joinder answers the most basic question that any analysis of prosecutorial charge piling must resolve: How many charges can a prosecutor pile on in a single case? To our hypothetical armed robbery defendant, the question is significant: Will he face potentially dozens of

40. Cf. Leipold & Abbasi, *supra* note 31, at 351 ("[M]ore than half of all federal defendants are charged with multiple counts . . .").

criminal charges arising from that one alleged crime?⁴¹ Might *other* alleged robberies, including some in which the evidence against him is quite weak, be added to the pile?⁴² Might entirely unrelated accusations (say, of drug possession) be thrown onto the pile as well?⁴³

Rarely examined in courses or scholarship concerning criminal procedure, the law of joinder answers each of these questions—in different ways across jurisdictions.⁴⁴ And in so doing it offers a diverse range of regulatory models, each of which can be arrayed along a spectrum, from

41. See *supra* text accompanying note 35 (offering a list of potential charges); see also Andy Grimm, Shomari Legghette Formally Indicted for Cmdr. Paul Bauer's Murder, *Chi. Sun Times* (Mar. 9, 2018), <http://chicago.suntimes.com/chicago-politics/shomari-legghette-formally-indicted-for-cmdr-paul-bauers-murder> [<http://perma.cc/CL9M-S68S>] (describing a case in which a defendant accused of a single homicidal act was charged with “more than two dozen counts of murder, as well as a combined 32 additional counts of armed violence and related weapons charges—a total of 56 counts in all”); *id.* (describing this charging practice as “not uncommon”).

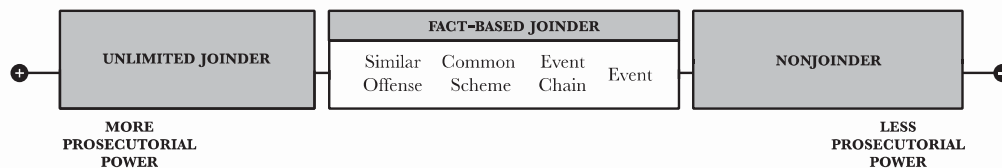
42. Cf. Leipold, *supra* note 31, at 1143 (describing the difficulty of defending against multiple accusations that implicate different underlying evidence and potentially different defense strategies).

43. See *infra* notes 47–48 and accompanying text (discussing similar-offense and unlimited joinder).

44. Many criminal procedure courses do not discuss joinder at all, see, e.g., Lanni & Steiker, *supra* note 6, at 473–79 (providing a model syllabus), and casebooks give the topic short shrift as well, discussing it only briefly and with near-exclusive focus on the potential trial consequences of federal joinder rules, see, e.g., Ronald Jay Allen et al., *Comprehensive Criminal Procedure* 1168–83 (4th ed. 2016); Joshua Dressler & George C. Thomas III, *Criminal Procedure: Principles, Policies and Perspectives* 912–19 (4th ed. 2010); Yale Kamisar et al., *Advanced Criminal Procedure: Cases, Comments and Questions* 1062–89 (14th ed. 2015). As for scholarship, the treatment described as “[t]he best analysis of joinder and severance” is now forty years old and focuses on the trial consequences of joining together multiple defendants, not the plea bargaining consequences of joining multiple charges. See Leipold & Abbasi, *supra* note 31, at 351 n.2 (discussing Robert O. Dawson, Joint Trials of Defendants in Criminal Cases: An Analysis of Efficiencies and Prejudices, 77 *Mich. L. Rev.* 1379 (1979)). Other works in the field include a trio of short student notes of similarly dated vintage, see Samuel A. Baron, Note, A Look at the Tennessee Multiple Offender and the Joinder and Severance of Criminal Offenses for Trial, 7 *Memphis St. U. L. Rev.* 457 (1977); James Farrin, Note, Rethinking Criminal Joinder: An Analysis of the Empirical Research and Its Implications for Justice, 52 *Law & Contemp. Prob.* 325 (1989); Note, Joint and Single Trials Under Rules 8 and 14 of the Federal Rules of Criminal Procedure, 74 *Yale L.J.* 553 (1965), and a handful of articles assessing joinder in terms of its potential trial consequences, see Kenneth S. Bordens & Irwin A. Horowitz, Joinder of Criminal Offenses: A Review of the Legal and Psychological Literature, 9 *Law & Hum. Behav.* 338, 343–49 (1985); Leipold, *supra* note 31, at 1142–47; Leipold & Abbasi, *supra* note 31, at 355–56. Meanwhile, some now-dated treatments from beyond legal scholarship misdescribe joinder as an issue affecting only a “limited number of cases” and involving only a “rudimentary” legal framework. Standards for Criminal Justice: Joinder & Severance, ch. 13, intro. note at 13.4 (Am. Bar Ass’n 1980) (asserting that the law of joinder “often consist[s] of no more than a consignment of [the issue] to the unguided and largely unreviewable discretion of the trial judge”).

those that maximize prosecutorial charge-piling power to those that restrict or even eliminate it.⁴⁵

FIGURE 1: CONCEPTUAL FRAMEWORKS FOR THE LAW OF JOINDER



In this schematic, regulatory constraints on prosecutorial power increase as the models proceed from left to right, such that procedural regimes maximizing prosecutorial power appear on the left while regimes minimizing such power appear on the right. Thus, at one pole of the spectrum (the leftmost above), an unlimited-joinder regime affords prosecutors maximal authority to charge in one case any and all offenses allegedly committed by the same defendant. Conversely, at the opposite pole, a nonjoinder regime would permit only a single charge per case, thereby eliminating charge piling altogether and ultimately forcing prosecutors to make a significant choice: Either forgo additional charges or pursue them in a resource-intensive string of separate prosecutions.⁴⁶ Finally, in between these poles, a series of fact-based joinder regimes can be arrayed along a subsidiary spectrum, with each model tying prosecutors' joinder authority to the relationship between the charges themselves. Thus, joinder might be permitted: (a) most broadly, for all offenses that pertain to a similar type of crime (for example, all crimes of violence or all property crimes allegedly committed by the same defendant, even if committed miles and years apart and sharing no factual connection);⁴⁷ (b) more narrowly, for offenses that are part of a common plan or scheme (for example, a conspiracy to commit a series of robberies); (c) more narrowly still, for offenses that are part of the same chain of events (for example, a string of robberies allegedly committed over the span of an hour); or (d) most narrowly, for offenses that arise from a single factual incident (for example, a single robbery).⁴⁸

45. The conceptual schematics offered throughout this Article are largely inductive heuristic devices, derived from the actual procedural regimes employed across the states. As such, they present and conceptualize a diverse array of regulatory models, without purporting to capture every possible model imaginable.

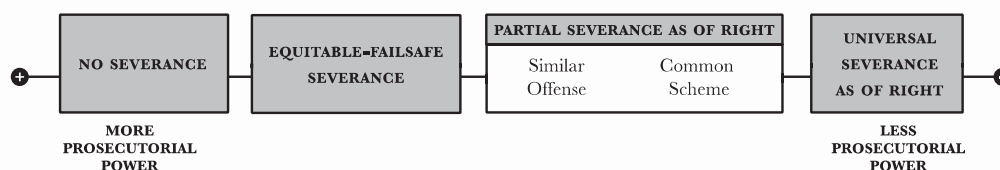
46. See *infra* section II.B (discussing serial prosecutions in detail).

47. Cf. Baron, *supra* note 44, at 458 (describing similar-offense joinder as sometimes permitting joinder of all “crimes involving the taking of property [or all] crimes of violence against another person”); Joinder & Severance, 44 Geo. L.J. Ann. Rev. Crim. Proc. 361–62 n.984 (2015) (citing cases defining the scope of a “similar” offense).

48. Cf. Standards for Criminal Justice: Joinder and Severance, *supra* note 44, § 13-1.2 & cmt., § 13-1.3 & cmt., § 13-2.1 & cmt. (describing various joinder models).

Regardless which of these regimes one ultimately adopts, the choice itself clearly impacts just how high a prosecutor's pile of charges can grow—or whether there can be a pile at all. Prosecutors' charge-stacking authority, however, can also be affected by the closely related law of severance, which can mitigate prosecutors' joinder authority by granting judges or defendants some power to divide up the prosecutor's chosen pile.⁴⁹ And here, too, different procedural regimes can fall along a spectrum based on how much they facilitate or restrict prosecutorial power.

FIGURE 2: CONCEPTUAL FRAMEWORKS FOR THE LAW OF SEVERANCE



At one pole of this spectrum (again, the leftmost above) there is simply no severance mechanism at all, and thus no restraint on charge stacking beyond that afforded by the underlying joinder regime. Alternatively, moving one spectrum position to the right, judges might be granted some reservoir of equitable authority to shrink a prosecutor's initial pile of charges, either according to their discretion or pursuant to some harm-balancing analysis—an approach that will constrain prosecutorial authority to whatever extent judges use their authority to do so.⁵⁰ Finally,

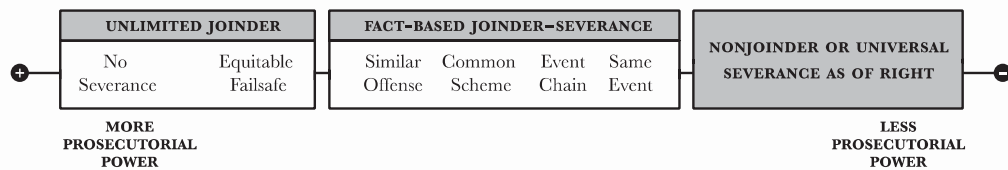
49. Note that the power to sever charges differs from the power to enforce the extant joinder rules. In the latter circumstance, the defendant can assert “misjoinder” to break up the charges. See generally Joinder & Severance, *supra* note 47, at 372–78. Severance, by contrast, allows the defendant or the judge to divide charges that are joinable under the applicable joinder regime.

50. See *infra* section V.B (discussing the relationship between prosecutorial constraint and judicial discretion); cf. Leipold & Abbasi, *supra* note 31, at 361 (suggesting that courts are “miserly in granting severance”); *id.* at 361 n.55 (“[D]efendants generally have not fared very well under rules and statutes which permit them to obtain a severance of offenses only upon proof of prejudice.” (alteration in original) (internal quotation marks omitted) (quoting 4 Wayne R. LaFare et al., *Criminal Procedure* § 17.1(f), at 602 (2d ed. 1999))). Equitable-failsafe regimes come in different stripes. As the discussion in the text suggests, one approach is to grant broad discretion to the judge. See, e.g., *Zafiro v. United States*, 506 U.S. 534, 541 (1993) (holding that the federal severance rule “leaves the determination . . . to the sound discretion of the district courts”). Another is to require some sort of balancing inquiry that weighs the prejudice of joinder and of severance to the respective parties, see, e.g., Mo. Sup. Ct. R. 24.07 (authorizing severance if “[a] party makes a particularized showing of substantial prejudice”), or that weighs potential prejudice to the defendant against competing values, such as judicial economy, see, e.g., *State v. Bythrow*, 790 P.2d 154, 156 (Wash. 1990). It is also possible to fold rule-like corollaries into an equitable-failsafe regime, deeming severance presumptively warranted, for example, if “evidence of one crime [would be]

severance-based restrictions can offer their greatest check on prosecutorial power by affording defendants themselves a right to sever charges, either in the form of a partial veto that entitles them to sever charges that are too attenuated, or in the form of an absolute right to divide the prosecutor's pile as they see fit.

Given the close functional relationship between joinder and severance, it is ultimately the interaction between these two bodies of law that defines the full scope of prosecutorial charge-piling power: The breadth of prosecutorial joinder power, *as constrained by* judges' or defendants' severance power, is the key variable of interest. Thus, a third and final conceptual schematic blends the two doctrinal frameworks together.

FIGURE 3: CONCEPTUAL FRAMEWORKS FOR
JOINDER AND SEVERANCE COMBINED



Here, the spectrum's leftmost pole is home to an unlimited joinder rule that is constrained, if at all, by only an equitable-severance failsafe, without any corresponding severance as of right for defendants. The spectrum then progresses through a range of fact-based joinder-severance permutations, each of which could be composed of a joinder rule paired (or not) with a partially offsetting severance-as-of-right rule.⁵¹ Finally, at the spectrum's rightmost pole, prosecutorial power reaches its nadir in the form of either a nonjoinder regime or a universal-severance-as-of-right regime, either of which produces a similar functional result: a world in which no defendant can ever be forced to confront one charge piled on top of another.⁵²

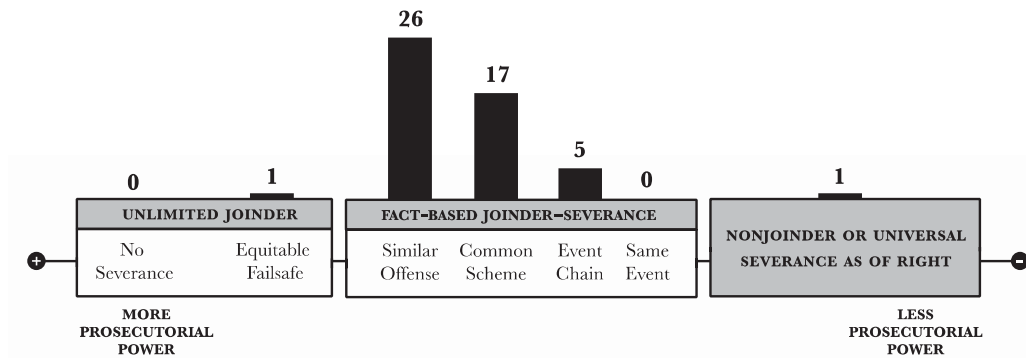
inadmissible" at the trial for the other. *Drew v. United States*, 331 F.2d 85, 89 (D.C. Cir. 1964) (applying a rebuttable presumption in favor of severance in such circumstances).

51. These models could also be supplemented (or not) by a form of equitable severance. To see how different permutations of joinder and severance-as-of-right rules could give rise to functionally equivalent joinder-severance regimes, consider a prosecutor who can join A and B, and can also join C subject to the defendant's veto. Such a prosecutor has the same effective power as a prosecutor who can join only A and B but who is not subject to a severance veto, or a prosecutor who can join A, B, C, and D subject to a veto of C and D.

52. The key conceptual difference between a nonjoinder regime, in which prosecutors simply cannot file more than one charge, and a universal-severance-as-of-right regime, in which the defendant can separate any charges joined together, is that the defendant's veto power under the latter model could itself potentially be traded away in the bargaining process. See *infra* note 211 (discussing "procedure bargaining"). Additionally, a defendant's request for severance might be deemed a waiver of any subsequent attempt to block serial

Though presented thus far as conceptual abstractions, the procedural regimes suggested above—and throughout the Article to follow—are in fact derived from procedural frameworks currently employed across the fifty states. That state-by-state diversity is captured in the chart below, which reports the results of a comprehensive survey that identifies each state’s joinder regime and severance regime and assesses their interaction to produce each state’s composite joinder–severance classification.

FIGURE 4: VARIABILITY ACROSS STATES IN THE LAW OF JOINDER–SEVERANCE⁵³



As this summary makes clear, the range of existing joinder–severance regimes essentially spans the waterfront, from the maximal to the minimal poles of prosecutorial power. To be sure, most states fall toward the broader end of the spectrum, with twenty-six permitting joinder even for factually unrelated offenses, so long as those offenses are similar in kind.⁵⁴ And yet, reformers hoping for greater restraints on prosecutorial power will be encouraged to discover a broad severance-as-of-right regime alive and well in the wild, so to speak, over at the spectrum’s far right end.⁵⁵

prosecutions. See *infra* section II.B; cf. *Currier v. Virginia*, 138 S. Ct. 355, 355 (2017) (granting certiorari to consider whether a defendant can invoke the issue-preclusive protection of the Double Jeopardy Clause if he previously consented to the severance of multiple charges into separate prosecutions).

53. For sources, see *infra* Appendix at Table A.

54. Cf. *supra* note 47 (discussing the definitional scope of “similar” in this context).

55. See Tex. Penal Code § 3.04(a) (2017) (“Whenever two or more offenses have been consolidated or joined . . . the defendant shall have a right to a severance of the offenses.”). Notably, while Texas initially embraced a truly universal-severance-as-of-right regime when it first adopted its current framework, see 1973 Tex. Gen. Laws 883, 891, it has since added a series of enumerated exceptions that deny the right for specific crimes related to drunk driving, gang-related offenses, sexual assault, and crimes against vulnerable persons, see 1997 Tex. Gen. Laws 2252; 2005 Tex. Gen. Laws 1429–30 (codified at Tex. Penal Code §§ 3.03(b), 3.04(a)); see also Tex. Penal Code § 3.04(b) (providing that if the defendant exercises severance as of right he forfeits the potentially otherwise applicable guarantee of concurrent

Indeed, that particular specimen (Texas) takes an approach to joinder and severance not unlike a reform proposal advanced by Professors Michael Seigel and Christopher Slobogin, who have urged courts to constrain “the power of the prosecution to charge multiple, overlapping, and redundant crimes” by barring prosecutors from filing more than one charge for any given criminal event.⁵⁶ And yet, while Seigel and Slobogin understand well the relationship between joinder and prosecutorial power, their essay also exemplifies a lacuna that often afflicts plea bargaining scholarship: They do not examine the procedural frameworks actually employed on the ground, and as a result propose a reform agenda grounded primarily in constitutional law—in this case, a proposal to peg a nonjoinder rule to either “the due process clause” or “separation of powers.”⁵⁷

Seigel and Slobogin are not alone in looking to constitutional remedies for constraints on prosecutors’ charge-piling power.⁵⁸ But law reform dependent on constitutional law in this arena, by its proponents’ own admission, faces a steep uphill battle, given the Supreme Court’s steadfast

sentencing set forth in Tex. Penal Code § 3.03); cf. *infra* section II.C (discussing concurrent sentencing).

Looking beyond Texas, a nonjoinder regime was in place in Arkansas up until 2005. See Ark. Code Ann. § 16-85-404 (1987) (“An indictment . . . must charge but one . . . offense . . .”), repealed by Arkansas Criminal Code Revision Commission’s Bill, Act 1994, § 503, 2005 Ark. Acts 6932, 7459–61; see also Ark. Code Ann. § 16-85-404 (1987) (enumerating offense-based exceptions). Oklahoma has flirted with nonjoinder as well. Compare Okla. Stat. Ann. tit. 22, § 404 (West 2016), and *Kramer v. State*, 257 P.2d 521, 523 (Okla. Crim. App. 1953) (stating that consolidating multiple charges for a single trial “is not approved” and should be permitted “only in exceptional circumstances where the defendant requests it”), with *Sanders v. State*, 612 P.2d 1363, 1366 (Okla. Crim. App. 1980) (“[J]oinder . . . lies within the discretion of the trial court.”), and *Dodson v. State*, 562 P.2d 916, 923 (Okla. Crim. App. 1977) (Brett, J., concurring specially) (“[T]here is no doubt . . . that it was the intention of the legislature to authorize . . . the joinder for trial of two or more indictments or informations, or both.”).

56. Seigel & Slobogin, *supra* note 31, at 1128. Texas restricts prosecutorial charge piling through a severance-as-of-right framework as opposed to the essentially nonjoinder-based “law of counts” that Seigel and Slobogin propose, *id.*, and its regime contains some exceptions that make it somewhat less robust than theirs. See *supra* note 55 (describing exceptions to the Texas regime).

57. Seigel & Slobogin, *supra* note 31, at 1128–29. Seigel and Slobogin also briefly acknowledge the possibility that courts might prompt such reform through their general “common law power,” *id.*, though they do not engage the mechanism through which courts primarily construct subconstitutional law: rulemaking, see *infra* Part V.B. Aside from courts, Seigel and Slobogin also briefly—and skeptically—raise the possibility that Congress might reform the law of joinder. Seigel & Slobogin, *supra* note 31, at 1128–29. However, like many criminal procedure scholars, they focus on the federal system, and thus do not engage the robust and diverse law of joinder operating at the state level.

58. See, e.g., Stuntz, *Politics*, *supra* note 5, at 594 (asserting that courts should address prosecutorial overcharging by “reconfigur[ing] double jeopardy law . . . to limit [prosecutors’] power to pile on separate offenses”).

refusal to entertain any such doctrinal revisions.⁵⁹ Law reform aimed at charge stacking, however, need not—and ought not—focus exclusively on that one constitutional lever, because joinder and severance are not primarily creatures of constitutional law. Rather, as the analysis here shows, the size of the pile of charges that a prosecutor can threaten in any given case is both established and defined by the subconstitutional law of joinder and severance, a heretofore hidden law of plea bargaining constructed in the first instance—and in various different ways—by each of the fifty states.

B. *Case Piling: The Law of Serial Prosecutions*

If a state deploys its law of joinder and severance to restrict prosecutors' charge-piling power, what might follow? One possibility is that prosecutors will employ a hydraulic counter-response, threatening defendants with a string of separate prosecutions that charges separately what the joinder regime prohibits charging all together. Recall our hypothetical armed robbery defendant. In a permissive-joinder regime, he might be charged not only with armed robbery but also with aggravated assault, theft, threats, unlawful possession of a weapon, brandishing a firearm, and so on and so forth, until one criminal episode yields potentially dozens of charges. If, however, the extant joinder regime permits only one charge per case, the prosecutor might instead threaten to file a seemingly endless string of separate prosecutions—an approach that may actually leave the defendant worse off, as his aggregate risk of conviction rises with each new case added to the string.

Defendants confronting such a case-piling tactic have two principal protections, one practical, the other grounded in its own body of procedural law. The practical protection stems from the fact that prosecutions are costly affairs—and that defendants have only one body to jail. Given these realities, a string of prosecutions will unfold in one of two ways. Either the defendant will be convicted in the first case, after which the prosecutor will have little incentive to continue pursuing the others; or he won't be convicted in the first case, at which point the prosecutor will have to decide whether to invest precious resources in a second trial, after having just received a public signal that at least some of her charges are weak. And because defendants, aided by counsel, can perceive this dynamic *ex ante*, the prosecutor's initial threat to file multiple cases may ring hollow, as

59. See *id.* at 594–96 (acknowledging that “the legal case is not . . . strong” (emphasis omitted)). The closest that constitutional law comes to addressing charge stacking is the modest restriction it imposes against multiple punishments, a prohibition enforced only on the back end at sentencing, not at the front end where a potentially unlimited stack of charges can maximize prosecutorial leverage *ex ante*. Even that back-end protection, moreover, is quite limited, as explained *infra* section II.C.

the defendant will know that the prosecutor could very well lack the resources to follow through.⁶⁰

But protections grounded in resource constraints can be fickle, as prosecutors' resources and their decisions about how to allocate them can vary from office to office, or from case to case.⁶¹ The ability to threaten a series of separate prosecutions, however, is also constrained by law—specifically, by the law of preclusion, which determines whether a prosecutor's decision to file one case will block her from filing some subsequent set of cases against the same defendant. Typically analyzed through only the narrow constitutional lens of the Double Jeopardy Clause,⁶² the law of preclusion in fact entails a broader, largely unexamined, subconstitutional framework, which addresses two related regulatory questions: First, when will one case be deemed to preclude another? And second, will the law of preclusion, combined with the law of joinder, force prosecutors to winnow down the charges otherwise available to them under the substantive criminal law of the jurisdiction?

As to the first of these issues, note that the initial prosecution's preclusive effect is inversely related to the prosecutor's power to bring later charges: The broader the preclusive shadow, the shorter the string of potential cases. And once again, the scope of that preclusive effect hinges on

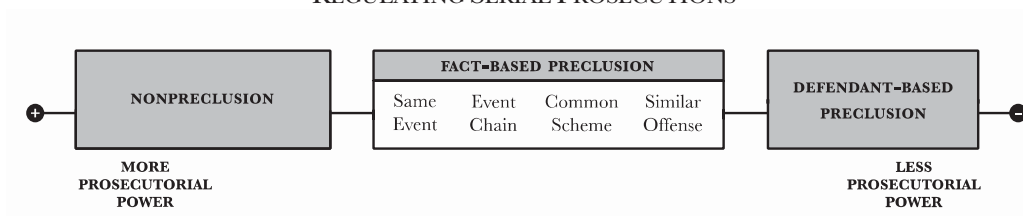
60. Cf. *United States v. Dixon*, 509 U.S. 688, 710–11 n.15 (1993) (observing that the “press of other demands upon prosecutorial and judicial resources” will reduce prosecutors’ incentives to pursue “repeated prosecutions of a single offender”); Elizabeth T. Lear, *Contemplating the Successive Prosecution Phenomenon in the Federal System*, 85 J. Crim. L. & Criminology 625, 648 (1995) (“[Prosecutors] juggle impressive caseloads. Every duplicative prosecution means that they must ignore, abandon, or downgrade another case.”); Leipold & Abbasi, *supra* note 31, at 393 (“There will be times when the prosecutor has enough evidence to bring an additional charge [against the defendant] . . . but because of resource constraints will *only* do so if the new charge . . . can be joined with others.”); Seigel & Slobogin, *supra* note 31, at 1122–23 (noting “[m]ost prosecutors would not want” to pursue “several different trials” against a defendant “simply because of efficiency concerns”).

61. Of course, more often than not, prosecutorial resource constraints are substantial, which is why joinder and severance regimes are imbued with regulatory effect in the first place: Together these procedural levers can reduce the cost of prosecuting multiple charges by permitting the prosecutor to bundle them together, or they can increase those costs by requiring separate, resource-intensive prosecutions for each. As Professors Richard Bierschbach and Stephanos Bibas observe, such resource constraints can be “a feature, not a bug” of criminal justice administration, insofar as they impose restraints on prosecution and in turn restraints on (over) incarceration. Richard A. Bierschbach & Stephanos Bibas, *Rationing Criminal Justice*, 116 Mich. L. Rev. 187, 233 (2017); see also Stephanos Bibas, *Sacrificing Quantity for Quality: Better Focusing Prosecutors’ Scarce Resources*, 106 Nw. U. L. Rev. Colloquy 138, 139 (2011), http://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=1061&context=nulr_online (on file with the *Columbia Law Review*) (“In a world of overcriminalization, limited budgets are not all bad. The silver lining is that . . . [r]esource constraints and scarcity can force prosecutors to rank priorities, mitigating in practice the problem of overcriminalization on the books.”); cf. *infra* text accompanying notes 209–210 (discussing inevitable criminal justice tradeoffs).

62. See *infra* note 71.

which procedural rule is adopted, from a range of possible models falling along a familiar spectrum.

FIGURE 5: CONCEPTUAL APPROACHES TO
REGULATING SERIAL PROSECUTIONS

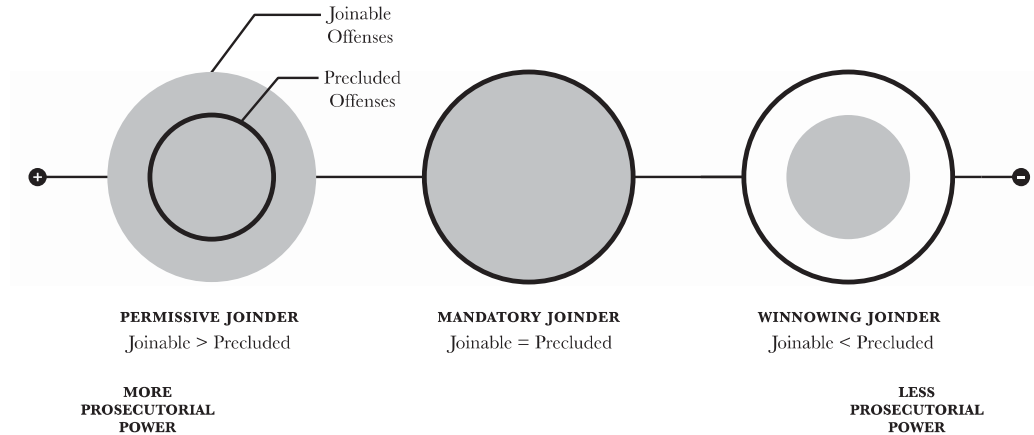


At one pole of that spectrum (the leftmost above), a prosecutor unconstrained by the law of preclusion can pursue as many separate cases against a defendant as she likes, stopping only when the marginal value of additional bites at the apple ceases, in her estimation, to be worth her time and effort. Alternatively, at the opposite pole, an initial prosecution for any offense could be deemed to bar further prosecutions of the same defendant for any and all offenses known to the prosecutor when her first case is filed—a “deck-clearing” rule that would effectively eliminate threats of serial prosecution altogether.⁶³ And between these poles, an initial prosecution’s preclusive effect could turn on the relationship between its underlying facts and the facts of the other cases in the proposed string, with broader or narrower factual relationships creating a secondary spectrum of regulatory approaches.

The law of preclusion thus mirrors the law of joinder: Fact-based regulatory models fall between more absolute extremes, albeit arrayed here in inverse order, given that broad joinder authority enhances prosecutorial power while a broad preclusive shadow restricts it. Crucially, however, the relationship *between* these two bodies of law also impacts prosecutorial power, as it determines when, if ever, a prosecutor must winnow down the menu of charging options available to her under the substantive law of the jurisdiction. To appreciate this dynamic, note that a given jurisdiction’s definition of joinable offenses can have one of three relationships to the jurisdiction’s law of preclusion: The set of joinable offenses can be broader than, coterminous with, or narrower than the set of precluded offenses—three options that in turn produce a trio of regulatory models, as captured below.

63. A broader variation might preclude any offenses the prosecutor *should* have known about at the time of filing, whether she actually did know about them or not. Cf. W. Va. R. Crim. P. 8(a)(2) (applying a (less sweeping) mandatory joinder rule whenever “two or more offenses are known or should have been known by the exercise of due diligence to the attorney for the state at the time of the commencement of the prosecution”).

FIGURE 6: THE RELATIONSHIP BETWEEN THE
LAWS OF JOINDER AND PRECLUSION



In the first of these models (on the left), the universe of joinable offenses is broader than the universe of precluded offenses, which makes joinder permissive: The prosecutor has the option to stack charges together into one large pile or to spread them out into a series of separate piles, without fear of one pile precluding the next.⁶⁴ In the second model, by contrast, joinder and preclusion are coterminous, which makes joinder mandatory: Any offense that can be joined must be joined, or it will be lost to the preclusive shadow of the initial prosecution; but offenses that are not joinable are not subject to preclusion. A prosecutor who wants to save charges from preclusion therefore can—and must—include all joinable charges in her first (and only) bite at the apple.⁶⁵ Finally, in the third model, the universe of joinable offenses is narrower than the preclusive shadow cast by the case in which those offenses are filed. Here, the prosecutor must select at the outset which charges to pursue in that first

64. Taking our running example, a permissive regime might give a prosecutor a choice between filing an indictment charging theft, assault, and possession of a weapon all together or instead filing a series of indictments charging those offenses separately. Note, however, that a permissive-joinder regime may still require the prosecutor to join *some* offenses together in her initial prosecution in order to avoid having those offenses precluded. For example, a state may require prosecutors to join together all charges from the same event but permit prosecutors to choose whether or not to join charges from a common scheme. Here, the regime is “permissive” insofar as the universe of charges that prosecutors are permitted to join is broader than the universe of charges that they must join. In short, the wider the band of joinable-but-not-preclusive offenses, the broader the prosecutor’s discretion will be—up to the theoretical maximum in which joinder is unlimited but preclusion is nonexistent.

65. Continuing the example, our hypothetical prosecutor in this regime must charge together all of the robbery offenses that are joinable under the applicable rule, as any that she omits will be precluded; but anything she cannot join in that case (under the applicable joinder rule) she will be free to pursue in another.

case and which to forever surrender to the law of preclusion—that is, she must winnow down her charges and focus from the outset on her priorities.⁶⁶

To appreciate the practical significance of these different regimes, consider our hypothetical armed robbery defendant—only now imagine him to be a young man also suspected of engaging, on a separate occasion, in teenage prostitution, under circumstances that depict him (sympathetically) as poor, homeless, and the victim of sexual abuse.⁶⁷ A prosecutor attempting to maximize her plea bargaining leverage over such a defendant may want to file two separate piles of charges against him—one for the robbery-related charges and one for the prostitution-related charges. But she may *not* want to threaten a single omnibus prosecution that combines all these charges together, as she may prefer to insulate the less-sympathetic case from the more-sympathetic one or to hold one in reserve as a looming threat if the first case falters. Moreover, if the two cases involve entirely different witnesses and evidence, litigating them together would be transparently more costly than trying to get a conviction in one of them first. As a result, any added charge-piling leverage associated with an omnibus indictment might be mitigated by the fact that a defendant who senses the prosecutor's resource constraints could see through her threat to prosecute the robbery and the prostitution offenses at the same time.

Note, however, that the prosecutor's calculus might change substantially if the robbery defendant's other suspected crime were not prostitution but rather murder: Now the prosecutor may affirmatively want to pursue an omnibus prosecution (if the law of joinder so permits) on the theory that her odds of conviction are highest if all of the defendant's alleged misdeeds are put before a single jury.⁶⁸ In short, a prosecutor's approach to charge piling and case piling is contextually contingent. Sometimes she will want to pile up charges; sometimes she will want to pile up cases; and sometimes she will want to employ a nuanced blend of both tactics. Her ability to pursue any of these approaches, however, depends on the underlying procedural law. A permissive-joinder regime affords her maximum flexibility to choose between or to blend charge-piling and case-piling approaches as she sees fit, whereas a mandatory-joinder regime narrows that flexibility, forcing a prosecutor who prefers to avoid an omnibus prosecution to choose which charges to pursue and which to

66. Here, our hypothetical prosecutor might be required (by a nonjoinder rule) to pick only one of the robbery-related charges, while at the same time being blocked (by a same-event preclusion rule) from filing any *other* robbery-related charges in a separate case.

67. Cf. Juan David Romero, *Why Do We Treat Child Sex-Trafficking Victims Like Criminals?*, New Republic (Dec. 4, 2014), <http://newrepublic.com/article/120418/underage-sex-trafficking-victims-are-treated-criminals-us> [<http://perma.cc/9JSC-UJTX>] (“Across much of America, underage sex trafficking victims are treated as criminals rather than victims . . .”).

68. But cf. *supra* note 50 (discussing *Drew v. United States*, 331 F.2d 85, 90 (D.C. Cir. 1964)).

forgo.⁶⁹ And a winnowing joinder regime goes a step further, forcing that choice even if the prosecutor actually wants to file the omnibus prosecution—because omnibus prosecutions will generally be prohibited as a matter of law.⁷⁰

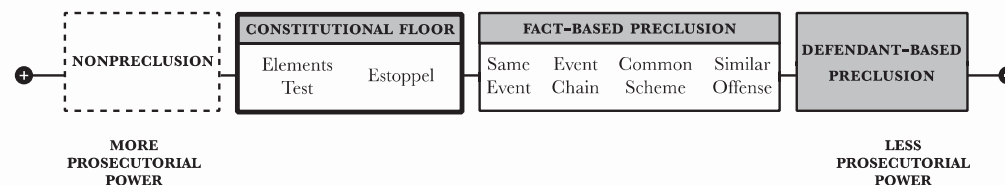
In the face of these multifaceted and intersecting regulatory dynamics, scholarly analysis of serial prosecutions tends to focus on a much narrower question: What does the Double Jeopardy Clause of the federal Constitution prohibit and permit?⁷¹ The limited regulatory significance of that constitutional framework, however, is captured by marking where it falls on our conceptual schematic—reproduced below with the constitutional floor inserted in bold.

69. Mandatory joinder occupies the middle position on the regulatory spectrum because it does not impose any meaningful constraints in the many cases in which the prosecutor's incentive is to engage in maximal charge stacking. Indeed, mandatory joinder promotes charge stacking, insofar as it imposes the procedural penalty of preclusion for any charges omitted from the pile. If, however, one assumes that the natural incentives to engage in charge stacking are already sufficient to cause prosecutors to use that tactic as frequently and as robustly as they deem beneficial, then the marginal impact of a mandatory-joinder regime is its imposition of a regulatory constraint in those (rare) cases in which the prosecutor, for strategic or resource-related reasons, prefers to avoid a sprawling omnibus prosecution (as in the robbery-prostitution example above). In these scenarios, prosecutors may indeed stack charges in whichever way is most beneficial to them, but with the added cost that any charges they exclude will be lost to them forever.

70. Note that a winnowing joinder regime might ban only some subset of omnibus prosecutions; it will not necessarily eliminate charge piling altogether if the underlying joinder rule is broader than nonjoinder. For example, if the underlying joinder regime draws its line of joinable offenses at offenses committed during the same factual episode, while the preclusion regime bars subsequent prosecution for any similar offenses, it is conceivable that our hypothetical prosecutor would have to choose between the robbery charges and the prostitution charges—but she would still be able to pile on multiple charges within whichever case she elected. (This example assumes that robbery and prostitution, two financially motivated crimes, would be deemed “similar offenses.” Cf. *supra* note 47 (discussing definitions of “similar offense”).)

71. On the scholarly focus on double jeopardy doctrine, to the exclusion of subconstitutional regulation, see Lear, *supra* note 60, at 626–27 (criticizing the literature's focus on “constitutional definitions and purposes”). But cf. Daniel C. Richman, *Bargaining About Future Jeopardy*, 49 Vand. L. Rev. 1181, 1183–84 (1996) (recognizing “that constitutional doctrine may not be the chief determinant of a defendant's rights” in this arena given institutional constraints); Ryan C. Schotter, Note, *State v. Gonzales*: Reinvigorating Criminal Joinder in New Mexico, 44 N.M. L. Rev. 467, 468 (2014) (proposing subconstitutional reform). As for pedagogical priorities, a survey of casebooks is revealing. See, e.g., Allen et al., *supra* note 44, at 1168–83, 1549–1613 (devoting sixteen pages to the subconstitutional law of joinder and severance, and sixty-five pages to the constitutional law of serial prosecutions); Dressler & Thomas, *supra* note 44, at 912–18, 1308–53 (devoting seven pages to subconstitutional joinder and severance, and forty-six to the constitutional law of serial prosecutions); Kamisar et al., *supra* note 44, at 1062–68, 1089, 1068–87, 1369–403 (devoting eight pages to subconstitutional joinder and severance, and fifty-five to the constitutional law of serial prosecutions).

FIGURE 7: CONCEPTUAL AND CONSTITUTIONAL APPROACHES
TO REGULATING SERIAL PROSECUTIONS



As the updated schematic shows, the Double Jeopardy Clause is indeed more restrictive than a pure nonpreclusion regime, insofar as it prohibits serial prosecutions in at least some circumstances. Those circumstances, however, are few and far between: The Clause's primary implementing doctrine, the same-elements test, bars serial prosecutions only if *all* of the elements in *all* of the charges of a proposed second prosecution contain, or are contained within, the elements of a prior offense from the same factual episode for which the defendant was already acquitted or convicted—a test rarely satisfied in a world where criminal codes are full of only partially overlapping offenses.⁷² Our hypothetical armed robbery defendant, for example, could likely be prosecuted at least five separate times under this test, as theft, aggravated assault, threats, unlawful possession of a weapon, and brandishing a firearm each typically contains an element that the others do not. And while the same-elements test is supplemented in cases of prior acquittal by the collateral estoppel test, that added layer of protection bars subsequent prosecutions only if a conviction in the second case would require a jury to accept facts that the first jury *definitively* rejected—a thin reed that “will not often be available,” given that multi-element offenses and general jury verdicts often make it too difficult “to determine with precision” just how the first “jury has decided any particular issue.”⁷³

72. See *Brown v. Ohio*, 432 U.S. 161, 166 (1977); *Blockburger v. United States*, 284 U.S. 299, 304 (1932); see also *United States v. Perez*, 22 U.S. (9 Wheat.) 579, 580 (1824); cf. Stuntz, *Politics*, supra note 5, at 507, 531 (criticizing “[l]ax double jeopardy doctrine” along these lines).

73. 5 Wayne R. LaFare et al., *Criminal Procedure* § 17.4(a), at 64 (4th ed. 2015) (internal quotation marks omitted) (quoting Walter V. Schaefer, *Unresolved Issues in the Law of Double Jeopardy: Waller and Ashe*, 58 Calif. L. Rev. 391, 394 (1970)); see also *Ashe v. Swenson*, 397 U.S. 436, 443 (1970) (establishing the collateral estoppel test). By way of example: If our hypothetical armed robbery defendant argued at trial that the prosecutor failed to prove beyond a reasonable doubt that anything of value was actually taken from the victim, or that the perpetrator was armed, or that he was in fact the perpetrator, then the collateral estoppel test would offer him no protection against serial prosecutions even if he is acquitted in his first case, because the words “not guilty” will not reveal which argument swayed the jury.

Legal scholars assessing this constitutional landscape routinely criticize it for offering only the weakest of protections.⁷⁴ And in so doing, they tend to do what criminal procedure scholars do best: propose a better constitutional law. Indeed, much of the scholarly debate centers on whether the Supreme Court should move the current constitutional floor a notch or two to the right on the spectrum, embracing a same-event or same-chain-of-events model as the new rule.⁷⁵ Notably, however, the Supreme Court has considered precisely such proposals, going so far as to briefly adopt a same-event test in *Grady v. Corbin*,⁷⁶ only to soundly reject it a mere three years later in *United States v. Dixon*,⁷⁷ which overruled *Grady*, restored the current baseline, and emphasized the extent to which the Court had “consistently rejected” efforts to instantiate broader constitutional protections.⁷⁸

Thus, perhaps even more so than with joinder and severance, a constitutionally grounded reform agenda in this arena seems certain to face all but insurmountable doctrinal resistance. And yet, here as before, the constitutional floor is hardly the entire, or even the most significant, component of the governing regulatory framework. For once again, prosecutors’ power to threaten serial prosecutions is regulated in various ways by the subconstitutional procedural law of the states.

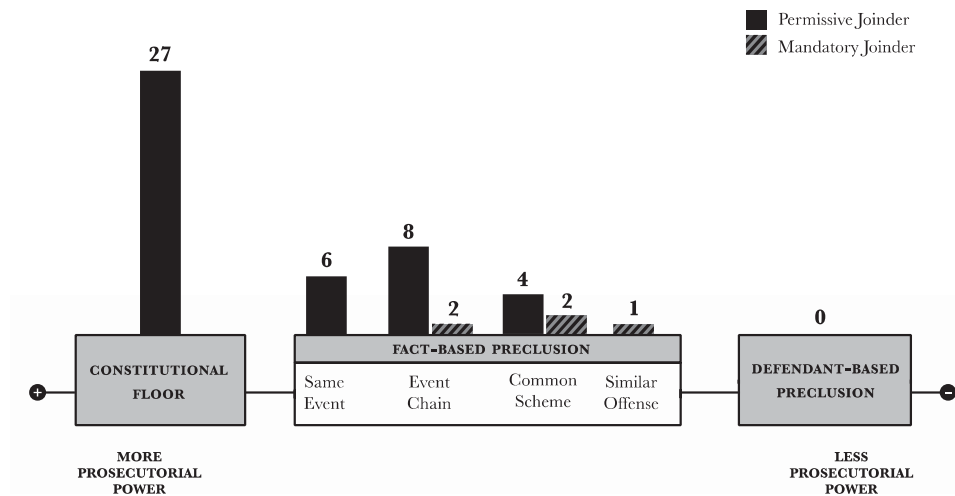
74. See, e.g., Richman, *supra* note 71, at 1188 n.23 (“[Double jeopardy doctrine] has long been attacked as ‘inadequate to provide meaningful protection against multiple prosecutions.’” (quoting George C. Thomas III, *The Prohibition of Successive Prosecutions for the Same Offense: In Search of a Definition*, 71 Iowa L. Rev. 323, 370 (1986))).

75. See Lear, *supra* note 60, at 626–27 (noting the long-standing scholarly debate on the “relative merits of a conduct-based compulsory joinder rule . . . centered on the meaning of the ‘same offence’ language of the Double Jeopardy Clause” (footnote omitted)).

76. 495 U.S. 508, 521 (1990).

77. 509 U.S. 688, 711–12 (1993).

78. *Id.* at 709 n.14 (noting the repeated but unsuccessful efforts on the part of Justice Brennan to adopt a “same-transaction” test akin to a chain-of-events test (citing *Brown v. Ohio*, 432 U.S. 161, 170 (1977) (Brennan, J., concurring))); see also *Ash*, 397 U.S. at 449 (Brennan, J., concurring).

FIGURE 8: VARIABILITY ACROSS STATES IN THE LAW OF PRECLUSION⁷⁹

As the chart above reflects, a slight majority of states (twenty-seven) stick to the Double Jeopardy Clause's constitutional baseline. The remainder, however, deploy their subconstitutional procedural law to constrain case piling in various additional ways. Of these, six embrace the same-event approach that the Supreme Court rejected in *Dixon*; ten embrace the broader chain-of-events approach favored by Justice Brennan but never adopted by his colleagues;⁸⁰ six more preclude all charges encompassed within the same plan or scheme charged in a prior case; and one state (New Mexico) goes so far as to employ a mandatory similar-offense rule, under which all offenses of the same general nature must be brought together in a single omnibus prosecution, even when such an approach could seriously hinder the prosecutor's case.⁸¹ Moreover, of the

79. For sources, see *infra* Appendix at Table A.

80. See sources cited *supra* note 78 (offering Justice Brennan's approach); cf. *infra* note † (p. 1391) (discussing the hazy definitional line between "event" and "event-chain" models).

81. See N.M. R. 5-203(A) ("Two or more offenses shall be joined . . . if the offenses . . . are of the same or similar character, even if not part of a single scheme or plan . . ."); *State v. Gallegos*, 152 P.3d 828, 833 (N.M. 2007) ("[W]e exercised our supervisory powers in 1979 to change the rule regarding joinder of offenses from permissive to mandatory."); see also *id.* at 833–34 (holding that "pursuant to the requirements of Rule 5-203(A), the State appropriately and necessarily charged . . . offenses related to" two separate victims in one case, even though "the evidence pertaining to each victim would not have been cross-admissible" at separate trials). Notably, while this regime forces the prosecutor to choose between pursuing a potentially unwieldy omnibus prosecution or winnowing her charges down *ex ante*, if she elects the omnibus route, a modified severance-as-of-right rule provides the defendant a second, additional layer of protection by affording him the option to sever out charges that are (in his estimation) too factually disconnected from one another to defend against at once. See *id.* at 834–42; cf. Leipold, *supra* note 31, at 1143 (discussing challenges of simultaneously

twenty-three states that impose regulations above the constitutional floor, one-fifth do so through mandatory-joinder regimes that constrain prosecutors' ability to toggle between charge-piling and case-piling tactics.

Finally, while no state currently employs the maximally restrictive "deck-clearing" rule, one state (Montana) came very close, adopting a statute that by its plain terms treated one prosecution as precluding another involving the same defendant even with respect to "*unrelated offenses*," so long as the precluded charges were "consummated prior to the original charge" and were "known to the prosecutor" at the time she brought the initial case.⁸² Initially applied pursuant to its expansive terms by trial courts in the state, that statute was eventually narrowed by the state supreme court—but only via a countertextual statutory interpretation that drew repeated dissents from two justices, each of whom would have embraced the broad "same-defendant" rule embodied in the statutory text.⁸³

While that broadest of approaches was narrowly rejected in Montana, the very fact that it was captured in the text of a statutory amendment enacted by the legislature and repeatedly endorsed by multiple state supreme court justices—combined with the range of less extreme but still significant regulatory approaches adopted by New Mexico and twenty-one other states—simply underscores the central point: Far more than constitutional doctrine implementing the Double Jeopardy Clause, it is the subconstitutional law of preclusion that regulates prosecutors' ability to pile cases on top of each other.

C. *Sentence Piling: The Law of Cumulative Punishment*

In addition to regulating the size and the number of charging piles that a prosecutor can threaten *ex ante*, procedural law also holds the potential to constrain prosecutorial power on the back end, by defining the circumstances under which multiple charges will yield multiple cumulative sentences or will instead collapse into a single concurrent sentence for

defending against factually disparate charges); *supra* note 50 (discussing equitable severance and the cross-admissibility-of-evidence rule).

82. See *State v. Berger*, 856 P.2d 552, 553 (Mont. 1993) (emphasis added) (quoting Mont. Code Ann. § 46-11-503 (2017)). Notably, because the preclusion rule embodied in the statutory text was broader than the state's joinder rule, it established a *de jure* winnowing regime in which prosecutors in some cases would be forced to prioritize among the various potential offenses available to them, only a subset of which could legally be filed in the sole prosecution permitted by law. Cf. Mont. Code Ann. § 46-11-404 (adopting similar-offense joinder). The statutory text, however, did contain a "consummated prior" provision, quoted above, that distinguishes it from a true "deck-clearing" rule. Under that provision, a prosecutor could avoid preclusion by proceeding chronologically through the potential cases, such that a defendant suspected of, say, shoplifting one day and aggravated assault the next could force the prosecutor to either pursue the less significant case first or else to abandon it altogether.

83. See *Berger*, 856 P.2d at 555 (Triewiler, J., dissenting, joined by Hunt, J.) (criticizing the majority for holding "that the Legislature did not mean to say what it clearly did say"); see also *State v. Waldrup*, 872 P.2d 772, 775 (Mont. 1994) (Triewiler, J., dissenting, joined by Hunt, J.).

the most serious charge in the pile. The issue here is arithmetic: If the respective sentences for theft, armed robbery, and using a firearm during a crime of violence are two, three, and five years, will our hypothetical armed robbery defendant face a potential five-year term (if the sentences are served all together) or a potential ten-year term (if they are served back-to-back)?

As the example shows, limiting the ability to pile on sentences eliminates much of the leverage associated with piling on charges.⁸⁴ Scholars hoping to effectuate such limitations often advocate reforms grounded in familiar constitutional provisions—in this case in the Double Jeopardy Clause, the Eighth Amendment, and the Due Process Clause.⁸⁵ But here as before, the constitutional pathways are shut. Longstanding double jeopardy doctrine, for example, makes clear that the Clause does not prohibit cumulative punishments at all but rather offers only a watered-down version of the same-elements test, which operates here as only a default presumption that states are free to ignore—in those rare instances when it applies.⁸⁶ As for the Eighth Amendment, courts have consistently held “that separate sentences must be considered separately for proportionality review purposes,” thus omitting cumulative sentences from the

84. Cf. Richard L. Lippke, *The Ethics of Plea Bargaining* 34 (2011) (“One way to neutralize the trial penalties that strategic overcharging threatens is to limit the potential sentencing impact of conviction on multiple charges.”); Stuntz, *Politics*, *supra* note 5, at 595 n.313 (“[T]he key issue is not what charges the defendant faces, but what consequences flow from those charges. Limit the power to increase the defendant’s sentence, and the manipulation of charges will cease to be attractive.”). Note that a rule requiring concurrent sentences will not eliminate all of the tactical benefits that charge-stacking affords, as a hefty indictment can still increase the likelihood of conviction and can also have psychological effects on the defendant. See *supra* note 31. And indeed, scholars have noted the “tendency of prosecutors to pad indictments with as many counts as they can derive from the available facts—even when sentences will be concurrent.” Richman, *supra* note 71, at 1195.

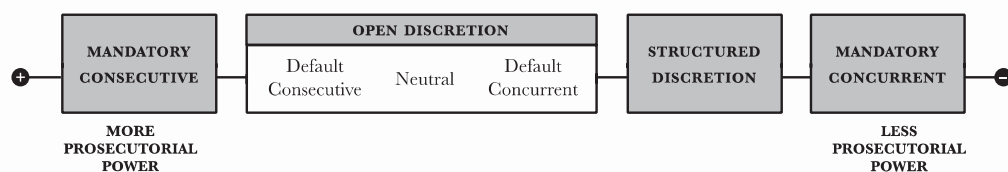
85. See, e.g., Jacqueline E. Ross, *Damned Under Many Headings: The Problem of Multiple Punishment*, 29 *Am. J. Crim. L.* 245, 322 (2002) (“Double Jeopardy jurisprudence, if refashioned, could guide trial courts and legislatures in thinking about how to coordinate penalties.”); George C. Thomas III, *A Blameworthy Act Approach to the Double Jeopardy Same Offense Problem*, 83 *Calif. L. Rev.* 1027, 1070 (1995) (proposing to “subject” cumulative punishment “to the limits of the Eighth Amendment”); see also Nancy J. King, *Portioning Punishment: Constitutional Limits on Successive and Excessive Penalties*, 144 *U. Pa. L. Rev.* 101, 104–05 (1995) (proposing “several modifications to existing Fifth and Eighth Amendment doctrine” to help existing constitutional frameworks “operate in tandem to regulate the totality of punishment”). Indeed, even those inclined to view sentencing law through a subconstitutional lens give subconstitutional law on cumulative sentencing short shrift. See, e.g., Nora V. Demleitner et al., *Sentencing Law and Policy* 236–43 (2004).

86. See *Missouri v. Hunter*, 459 U.S. 359, 368–69 (1983) (holding that the same-elements test that on rare occasion bars serial prosecutions “is not a constitutional rule” in the cumulative sentencing context, such that “a legislature [may] specifically authorize[] cumulative punishment under two statutes” that would be the “same offence” under *Blockburger v. United States*, 284 U.S. 299 (1932)); Seigel & Slobogin, *supra* note 31, at 1123 (“[T]he Supreme Court has been . . . very clear . . . that legislative intent alone determines the scope of the ‘same offense’ analysis for determining when cumulative punishments may be imposed . . .”).

constitutional analysis altogether.⁸⁷ And the Due Process Clause is unlikely to offer protection where these more textually specific clauses do not.⁸⁸ Thus, as clear-eyed scholars urging constitutional reform readily acknowledge, their proposals rest on “weak doctrinal pedigree” and would ultimately require a “radical . . . change in constitutional law.”⁸⁹

Not so, however, for subconstitutional law, which is home to the legal frameworks that actually establish each state’s cumulative-sentencing regime in the first instance. To appreciate how such frameworks might constrain prosecutorial power, consider four basic models that capture the various regulatory options available.

FIGURE 9: CONCEPTUAL APPROACHES TO REGULATING
MULTIPLE-OFFENSE SENTENCING



87. *Close v. People*, 48 P.3d 528, 539 (Colo. 2002); see also *id.* (observing that “several lower federal courts have similarly held that for purposes of proportionality review each sentence imposed must be considered separately” (citing *Pearson v. Ramos*, 237 F.3d 881 (7th Cir. 2001); *United States v. Aiello*, 864 F.2d 257 (2d Cir. 1988); *United States v. Schell*, 692 F.2d 672 (10th Cir. 1982))). The Supreme Court has shown little inclination to read the Eighth Amendment as protecting against lengthy sentences more generally and has shown an ongoing disinclination to impose constitutional restraints on consecutive sentences in particular. See *Ewing v. California*, 538 U.S. 11, 17–18, 30–31 (2003) (upholding a twenty-five-year sentence for theft of three golf clubs under a three-strikes law); *Harmelin v. Michigan*, 501 U.S. 957, 961, 994–95 (1991) (upholding a mandatory life sentence for drug possession); *Carol S. Steiker & Jordan M. Steiker, Courting Death* 307–08 (2017) (“In the aftermath of these decisions . . . there seemed to be little remaining hope that any sentences of incarceration would be deemed disproportionate under the Eighth Amendment.”); see also *Oregon v. Ice*, 555 U.S. 160, 169–70 (2009) (exempting consecutive sentences from the holding of *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000)).

88. See *Medina v. California*, 505 U.S. 437, 443 (1992) (holding that, “[i]n the field of criminal law . . . ‘the Due Process Clause has limited operation’” because “[t]he Bill of Rights speaks in explicit terms to many aspects of criminal procedure” (quoting *Dowling v. United States*, 493 U.S. 342, 352 (1990))); *Graham v. Connor*, 490 U.S. 386, 395 (1989) (holding that when an “[a]mendment provides an explicit textual source of constitutional protection . . . that Amendment, not the more generalized notion of ‘substantive due process,’ must be the guide for analyzing [constitutional] claims”).

89. Stuntz, *Politics*, *supra* note 5, at 594–96 (“There is . . . no line of cases that lays the doctrinal foundation for constitutionalizing judges’ opportunity to show mercy to those defendants who, in the judges’ eyes, deserve it.”); *id.* at 600 (promoting a constitutional reform agenda that “sounds radical” because “in some ways it is”); see also King, *supra* note 85, at 153–54, 184 (acknowledging that the “Eighth Amendment is [currently] of little use as a limit on disproportionate punishment that results from cumulative penalties” but arguing that “[a] more inclusive grouping formula is needed”).

The most empowering model for prosecutors (the leftmost above) simply requires consecutive sentences as a matter of law, thus guaranteeing that every additional charge a prosecutor files will produce a longer sentence if the defendant is convicted.⁹⁰ Alternatively, at the opposite pole, the law can mandate concurrent sentences, thereby eliminating prosecutors' ability to increase defendants' sentencing exposure unilaterally.⁹¹ And between these poles, various discretionary approaches could check sentence piling without extinguishing cumulative sentences entirely. Thus, under an open-discretion model, judges would be allowed to sentence consecutively or concurrently as they see fit—perhaps nudged toward one option or the other by default rules favoring consecutive or concurrent sentences.⁹² In such a regime, the judge could check the prosecutors' charge stacking on the back end, but—importantly—only to a degree: Because sentencing does not take place until after plea negotiations are over, a defendant assessing a prosecutor's pile of charges *ex ante* won't know whether the judge is going to whittle the pile down with a concurrent sentence after the deal is struck—an uncertainty that safeguards prosecutors' leverage even in a discretionary regime.⁹³ That uncertainty can be alleviated, however, by a final model, in which codified factors structure judges' discretion, thus clarifying in advance those cases in which concurrent sentences are most likely and in which charge piling will therefore be least effective.⁹⁴

90. Cf. Meares, *supra* note 17, at 888 (noting that prosecutorial control over charges translates into control over “punishment if the sentences for the various charges are imposed consecutively rather than concurrently”). A variant on mandatory-consecutive sentencing could require the court to impose “additional punishment” for each additional charge of conviction, “but in progressively diminishing amounts.” Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises upon Which They Rest*, 17 *Hofstra L. Rev.* 1, 25–28 (1988).

91. As noted *supra* note 84, a mandatory-concurrent regime would not eliminate all of the tactical advantages that charge piling affords.

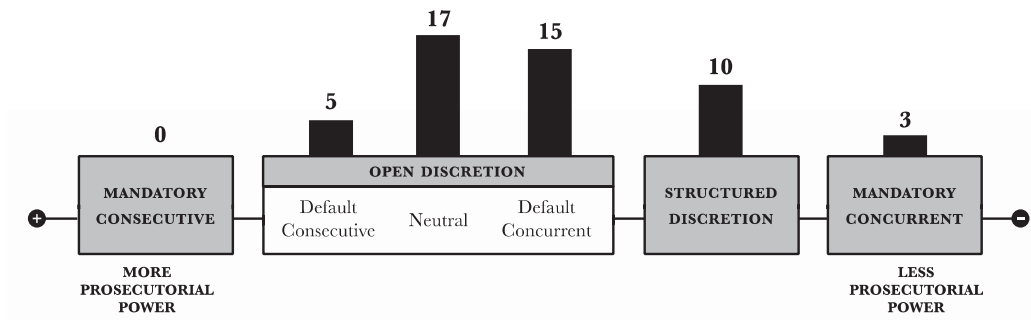
92. On the power of default rules and nudges, see generally Richard H. Thaler & Cass R. Sunstein, *Nudge: Improving Decisions About Health, Wealth & Happiness* 1–102 (2009).

93. Cf. Stuntz, *Politics*, *supra* note 5, at 519–20 (“By threatening [multiple] charges, prosecutors can, even in discretionary sentencing systems, significantly raise the defendant’s maximum sentence, and often raise the minimum sentence as well. The higher threatened sentence can then be used as a bargaining chip, an inducement to plead guilty.”). To be sure, in individual cases, defendants might be able to glean *ex ante* signals about how a judge might sentence, particularly if they know who the sentencing judge will be and know that judge’s reputation. Alternatively, in the absence of strong reputational indicators, the subconstitutional procedural law might permit a judge to tell the defendant how she intends to sentence before the plea deal is finalized—or it might prohibit such communications. See *infra* note 198 (discussing judicial participation in plea bargaining). Assuming reliable signals of judges’ intentions are available, a discretionary regime will constrain prosecutorial power precisely to the extent that judges use their discretion to do so. Cf. *supra* note 51 (discussing a similar dynamic with equitable severance); *infra* section V.B (discussing judicial checks on prosecutorial power more generally).

94. Note that a structured approach is not inexorably more constraining than an open-ended approach: Because a multifactor test will, by definition, not require concurrent sentences in all cases, it will necessarily be less constraining than a fully discretionary test exercised

With these four ideal types in mind, consider now the various approaches to cumulative sentencing actually employed across the states, beginning with each state's generic sentencing framework—that is to say, the framework that applies in the absence of some more specific statute carving out an exception.

FIGURE 10: VARIABILITY ACROSS STATES IN THE LAW OF CUMULATIVE SENTENCING⁹⁵

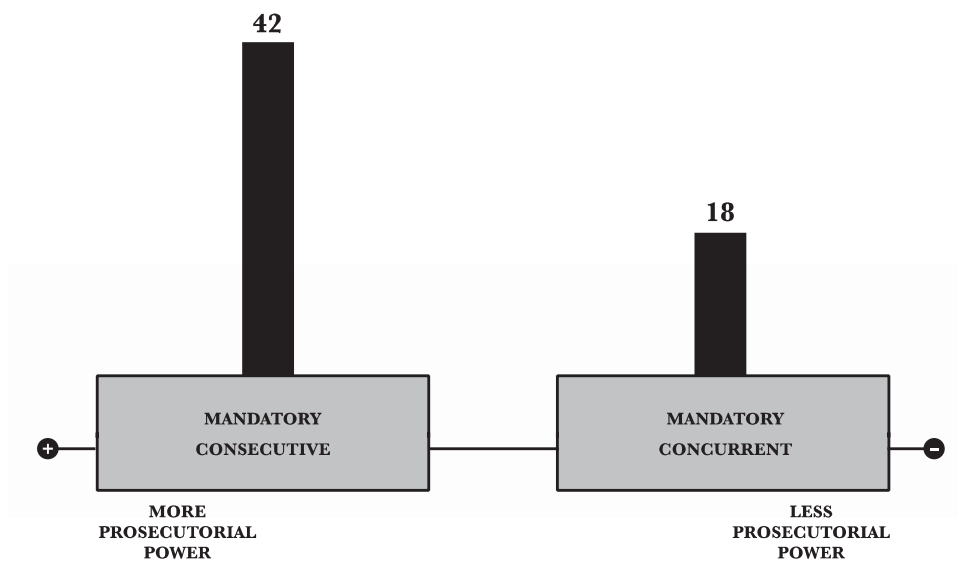


As the chart above shows, the vast majority of states (thirty-seven) employ an open-ended discretionary regime, either in a neutral fashion (as in seventeen states) or with default rules nudging toward consecutive sentencing (in five states) or toward concurrent sentencing (in fifteen states). Thirteen states, however, depart from this open-ended discretionary model. Ten of those offer a list of factors that clarify in advance when concurrent and consecutive sentences should be imposed. And an additional three (Colorado, Michigan, and Texas) go so far as to require concurrent sentences as a matter of law.

These generic frameworks, however, tell only part of the story, for virtually every state supplements its generic regime with one or more subsidiary provisions that carve out exceptions to the general rule, typically by imposing one or more mandatory rules in specific circumstances.

by a judge who always opts for concurrent sentences. Moreover, the constraint associated with a multifactor approach depends on what the factors are.

95. For sources, see *infra* Appendix at Table B.

FIGURE 11: THE SUBSIDIARY LAW OF CUMULATIVE SENTENCING⁹⁶

Thus, forty-two states require consecutive sentences in some specified subset of cases—for example, when certain crimes are at issue or when the defendant is a recidivist who committed a second offense while under supervision for a prior one. At the same time, eighteen states require concurrent sentences in certain circumstances—usually by imposing a cap on the aggregate length of consecutive sentences (and thus requiring concurrent sentences once that cap is reached).⁹⁷

In short, given variability in both the baseline sentencing frameworks and the ways in which exceptions to those baselines can be crafted, there are as many different ways of building a cumulative-sentencing regime as there are states themselves. And within that wide range, the regimes actually employed on the ground run the gamut, with states enacting mandatory-consecutive regimes, mandatory-concurrent regimes, and a range of discretionary models in between. Considering the dearth of

96. For sources, see *infra* Appendix at Table B.

97. Most frequently, this approach is employed when the convictions at issue are misdemeanors. See *infra* Appendix at Table B. Concurrent sentencing mandates can also be implemented via merger rules, that is, rules that permit imposition of a conviction on only a subset of charged offenses. Such merger rules typically either reaffirm or expand upon the constitutional presumption against imposing multiple sentences for offenses with the same elements. See *supra* note 86 and accompanying text (discussing the constitutional presumption); see, e.g., Ga. Code. Ann. § 16-1-7(a) (2011) (providing that a defendant “may not . . . be convicted of more than one crime if . . . [o]ne crime is included in the other; or . . . [if] crimes differ only in that one is defined to prohibit a designated kind of conduct generally and the other to prohibit a specific instance of such conduct”); see also *id.* § 16-1-6 (defining an “included” offense in broader terms than the same-elements test).

constitutional regulation in this arena, it is these varied legal frameworks—not some hoped-for constitutional rule—that define the scope of prosecutors’ power to pile on cumulative sentences.

III. OVERREACHING

Beyond inflating the size, number, or weight of the piles of charges that a defendant could face, a prosecutor can also inflate the individual charges themselves, in one of three ways: First, she can overreach beyond the facts of the case, filing charges that are unlikely to satisfy the burden of proof at trial. Second, she can overreach on the law, filing charges that rest on aggressive interpretations of the statutes or precedents defining criminal liability. Finally, she can overreach beyond the equities of the case, filing charges that are simply too severe, even if the facts and the law could technically support a conviction.

In each instance, the prosecutor trades on the defendant’s fear that a jury might go along with the inflated charges—fear that the prosecutor can exacerbate through even greater overreaching, and that the defendant can extinguish only by pleading guilty to some lower offense. Therein, however, lies the rub, for if the defendant pleads guilty there will not be any adjudication on the merits, and one of the main checks against overreaching will disappear. Regulating overreach thus requires interposing some other check, beyond a trial, on the factual, legal, and equitable merit of the charges. And by determining whether those checks will exist and the form they might take, the subconstitutional law of criminal procedure regulates another significant component of prosecutors’ plea bargaining power.

A. *Factual Overreaching: The Law of Pretrial Evidentiary Review*

To make factual overreaching concrete, consider once again our hypothetical armed robbery defendant, only imagine now that the sole witness against him is a blind convicted drug dealer with an axe to grind against the defendant. A defense attorney reading that sentence will rightly conclude that the prosecutor has a weak case, with significant—but, importantly, still uncertain—odds of ending in an acquittal.⁹⁸ If, however, the prosecutor believes her witness, or has some other reason to pursue

98. The uncertainty arises from the fact that the jury could believe the witness—who might in fact be telling the truth. Indeed, as defendants and their attorneys know well, the risk of conviction in even the weakest-seeming case is almost always too high to dismiss out of hand, given the consequences at stake. Cf. Geoffrey A. Campbell, *In the Shoes of the Wrongly Accused*, A.B.A. J., June 1995, at 32, 32 (reporting that nearly one-third of defendants lack confidence that “a jury would reach a fair verdict if they were accused of a crime they did not commit”); Alanna Durkin Richer & Curt Anderson, *Trial or Deal? Some Driven to Plead Guilty, Later Exonerated*, Associated Press (Nov. 15, 2016), <http://apnews.com/24cfa961d3444be49901496fdcaa3fda> [<http://perma.cc/H9K2-GH2Z>] (reporting roughly 1,600 exonerations of individuals wrongly convicted at trial).

criminal charges against the defendant, she is free to prosecute him—and to exercise whatever attendant leverage she can to induce him to plead guilty, the weakness of her case notwithstanding.⁹⁹

Under traditional conceptions of the criminal justice system, the primary protection against such overreaching is the defendant's constitutional right to a trial, the "basic purpose" of which "is the determination of truth."¹⁰⁰ Indeed, much of criminal procedure's constitutional edifice is designed to ensure the robustness of that protective device: The defendant enjoys a constitutional right to competent representation at government expense, a constitutional right to present and cross-examine witnesses, and, perhaps most notably, a constitutional right not to be convicted unless the prosecutor convinces a jury that he is guilty beyond a reasonable doubt—that is to say, convinces a jury that she has *not* overreached.¹⁰¹ All of those protections, however, disappear if the prosecutor successfully induces the defendant to waive his trial and plead guilty. Indeed, avoiding those costly procedural checks is often the prosecutor's prime objective.¹⁰² And in the

99. Prosecutors, of course, hardly ever set out to convict innocent defendants and in fact often will not proceed if they are not personally confident of the defendant's guilt. Cf. *Berger v. United States*, 295 U.S. 78, 88 (1935) ("[The government's interest] in a criminal prosecution is not that it shall win a case, but that justice shall be done."). However, as numerous scholars observe, "various pressures on prosecutors . . . can cause them to act in ways that subvert justice, [either] intentionally or, as is more often the case, unintentionally." Keith A. Findley & Michael S. Scott, *The Multiple Dimensions of Tunnel Vision in Criminal Cases*, 2006 *Wis. L. Rev.* 291, 295 (summarizing "[c]onsiderable literature" recounting such pressures and arguing that "the problem is more pervasive than even that literature suggests"). Perhaps most notably, prosecutors can suffer from "tunnel vision" that blinds them to the weaknesses in their cases, convincing them of a defendant's guilt even when a more detached observer might harbor serious doubts. See *id.* at 292–95; see also Daniel S. Medwed, *Emotionally Charged: The Prosecutorial Charging Decision and the Innocence Revolution*, 31 *Cardozo L. Rev.* 2187, 2201–05 (2010) (describing how prosecutorial tunnel vision can produce false convictions). Moreover, prosecutors sometimes have an incentive to pursue charges that they know are weak, perhaps to induce the defendant to cooperate with another investigation or to punish him for suspected misconduct that, for various reasons, is simply too difficult to prove in court. Cf. *United States v. Kupa*, 976 F. Supp. 2d 417, 420 (E.D.N.Y. 2013) ("[T]o coerce cooperation . . . prosecutors routinely threaten ultra-harsh, enhanced mandatory sentences that *no one*—not even the prosecutors themselves—thinks are appropriate."); *United States v. Dossie*, 851 F. Supp. 2d 478, 487–88 (E.D.N.Y. 2012) (discussing cooperation agreements); Daniel C. Richman & William J. Stuntz, *Al Capone's Revenge: An Essay on the Political Economy of Pretextual Prosecution*, 105 *Colum. L. Rev.* 583, 588–99 (2005) (discussing the dynamics that produce pretextual prosecutions).

100. *Tehan v. United States ex rel. Shott*, 382 U.S. 406, 416 (1966); see also *Duncan v. Louisiana*, 391 U.S. 145, 149 (1968) (establishing the right to a jury trial).

101. See *Crawford v. Washington*, 541 U.S. 36, 59 (2004) (describing the right to cross-examine witnesses); *Strickland v. Washington*, 466 U.S. 668, 669 (1984) (establishing the right to effective counsel); *Davis v. Alaska*, 415 U.S. 308, 315–18 (1974) (describing the right to present evidence); *In re Winship*, 397 U.S. 358, 364 (1970) (requiring proof of guilt beyond a reasonable doubt); *Gideon v. Wainwright*, 372 U.S. 335, 335 (1963) (establishing the right to appointed counsel for indigent defendants).

102. Cf. Frank H. Easterbrook, *Criminal Procedure as a Market System*, 12 *J. Legal Stud.* 289, 295–96 (1983) (modeling prosecutors as individuals who "attempt[] to obtain the maximum deterrence from [their] available resources").

course of building pressure to induce such a plea, she will often have a serious “temptation to file more serious charges than the evidence can support,”¹⁰³ a tactic that when combined with the charge piling discussed in Part II has rendered criminal trials all but extinct.¹⁰⁴

In this trial-free world, any procedural check on factual overreaching must come not from juries but rather from the only other neutral actors at hand: judges, exercising some form of pretrial judicial review.¹⁰⁵ And yet, the mechanisms of such review go almost entirely unexamined in criminal procedure literature, which often assumes that pretrial judicial review of prosecutors’ charging decisions either does not or cannot exist.¹⁰⁶ That assumption is accurate as far as constitutional law goes, given

103. Wright & Miller, *supra* note 10, at 85; see also Meares, *supra* note 17, at 869 (“By charging the defendant with the most serious offenses [available], the prosecutor can push up the trial penalty and limit, as a consequence, the defendant’s ability to waive his right to trial . . . voluntarily.”); *id.* at 865 (describing how prosecutors exploit the gap “between the quantity and quality of evidence necessary to support a legitimate charge and the quantity and quality of evidence needed to prove that the defendant committed the charged offense”). To be sure, if the prosecutor aims too high, she could overplay her hand and thereby risk an acquittal, which would undermine her charge-bargaining leverage. Such a risk, however, is substantially mitigated if the prosecutor enjoys wide latitude to “fall back” from an overplayed hand to a less aggressive one—a dynamic discussed *infra* Part IV (examining “sliding down”).

104. See *infra* Table 2 (p. 1375) (reporting statewide trial rates ranging from 1.5% to 5.5%).

105. “Judge” here is meant broadly to include magistrates and commissioners. While one might also imagine grand juries as a check on prosecutorial overreach, the grand jury’s “reputed ability to protect [against] unfounded prosecution” has long been discredited, to the point that “few scholars or practitioners take its screening function seriously today.” Peter Arenella, *Reforming the Federal Grand Jury and the State Preliminary Hearing to Prevent Conviction Without Adjudication*, 78 Mich. L. Rev. 463, 474 (1980); see also Ortman, *supra* note 1, at 516 n.16 (“A substantial body of scholarship identifies reasons . . . why grand juries have been rendered irrelevant in modern criminal justice.”). But cf. Ric Simmons, *Re-Examining the Grand Jury: Is There Room for Democracy in the Criminal Justice System?*, 82 B.U. L. Rev. 1, 37–39 (2002) (defending grand juries).

106. See, e.g., Carrie Leonetti, *When the Emperor Has No Clothes: A Proposal for Defensive Summary Judgment in Criminal Cases*, 84 S. Cal. L. Rev. 661, 691 (2011) (calling the “lack[] [of] an official remedy for courts to employ when the prosecution charges an offense that it has no chance of proving” one of the “primary problems with the current system”); Wright & Miller, *supra* note 10, at 112–13 (noting the scholarly view that “separation of powers” principles tend to render “limits on charging . . . impossible for other institutions to enforce,” and arguing that “controlling charge bargains depends on prosecutors to regulate themselves in an area where other institutions traditionally take no action”); see also Ortman, *supra* note 1, at 513 (observing that “criminal procedure literature has paid surprisingly little attention to” the “[c]harging standards [that] are essential elements of criminal justice systems”). The most significant discussion of pretrial charge review in the literature to date is Professor William Ortman’s article urging abandonment of the probable cause standard employed by federal grand juries. See *id.* at 519–40, 568. Ortman, however, limits his analysis to the grand jury “charging standard itself” as it is employed in federal courts, bracketing both “the institutional mechanism[s] for enforcing” that standard, *id.* at 516 n.16, and also other modes of pretrial screening beyond the grand jury process, see *id.* at 546 n.201. Apart from Ortman’s work, the most substantial treatment of pretrial judicial screening in criminal cases is an article written nearly four decades ago that also focuses heavily on grand juries and federal processes. See Arenella, *supra* note 105, at 481–96. For a sampling of other early work, see

longstanding precedent holding that there is no constitutional right to pretrial judicial review of the evidence supporting “the formal accusation [filed] by the district attorney.”¹⁰⁷ Pretrial evidentiary review, however, is in fact a commonplace of the American criminal process—and it is executed in strikingly different ways across jurisdictions, albeit always through mechanisms established by subconstitutional procedural law.

To unpack this complex set of legal frameworks, it is helpful to identify at the outset three core questions that this body of law resolves: First, will the factual basis of the prosecutor’s charges be tested via an adversarial evidentiary hearing?¹⁰⁸ Second, in the absence of such a hearing, will the evidence supporting the charges be exposed to any other form of judicial review? Finally, if there is an evidentiary hearing, how robust will it be in probing the factual allegations?

As these questions indicate, pretrial evidentiary hearings are the lynchpin of this regulatory regime, for they offer a potentially powerful check on prosecutorial overreach: cross-examination of the prosecutor’s witnesses.¹⁰⁹ In order to appreciate the range of different procedural models governing these hearings, however, it is important to recognize up front a curious feature of this particular landscape: Oftentimes, the prosecutor herself can decide whether to subject herself to such a hearing or whether instead to bypass it altogether. The historical origins of this bypass authority are tied to the grand jury, the idea being that if that putatively neutral and independent body reviews the factual allegations at hand and returns an indictment, further review by a judge would be

4 LaFave et al., *supra* note 73, § 14.1(a), at 309 n.6 (citing sources and observing that, “[u]nfortunately, all of [them] are somewhat dated”).

107. *Lem Woon v. Oregon*, 229 U.S. 586, 590 (1913); see also *Barkow*, Separation of Powers, *supra* note 11, at 1044 (“The Court allows prosecutors almost unlimited discretion to make charging decisions.”); cf. *Armstrong v. United States*, 517 U.S. 456, 464 (1996) (calling the decision to file a criminal charge “a ‘special province’ of the Executive” that “courts presume” . . . “rests entirely in [the prosecutor’s] discretion.” (first quoting *Heckler v. Chaney*, 470 U.S. 821, 832 (1985); then quoting *United States v. Chem. Found., Inc.*, 272 U.S. 1, 14–15 (1926); and then quoting *Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978))). The closest constitutional law comes to requiring a form of pretrial judicial review is its requirement that a judge review the facts underlying a defendant’s warrantless arrest—a form of review directed at police officers, not prosecutors, and that does not bar prosecutors from filing charges even if a judge deems the associated arrest invalid. See *Gerstein v. Pugh*, 420 U.S. 103, 113–14, 116–19 (1975).

108. The hearing is often called a “preliminary hearing,” but other names include “the ‘probable cause’ hearing, the ‘commitment hearing,’ the ‘examining trial,’ and the ‘bindover’ hearing.” 4 LaFave et al., *supra* note 73, § 14.1(a), at 307–08.

109. While the robustness of the hearing can vary in important ways, see *infra* text accompanying notes 133–144, “[a]ll jurisdictions” that have preliminary hearings “grant the defense a right to cross-examine those witnesses presented by the prosecution.” 4 LaFave et al., *supra* note 73, § 14.4(c), at 392; see also *Coleman v. Alabama*, 399 U.S. 1, 9–10 (1970) (guaranteeing the right to counsel at a preliminary hearing, if the hearing exists); cf. *California v. Green*, 399 U.S. 149, 158 (1970) (describing cross-examination as “the ‘greatest legal engine ever invented for the discovery of truth.’” (quoting 5 J. Wigmore, *Evidence* 1367 (3d ed. 1940))).

superfluous.¹¹⁰ Of course, in the modern era, grand juries are widely understood to return indictments whenever a prosecutor asks them to, which means that the (anachronistic) power to bypass a preliminary hearing simply by obtaining an indictment is now a power that for all practical purposes is enjoyed by the prosecutor herself.¹¹¹

Note, however, that while grand juries impose virtually no substantive constraints on prosecutors' charging decisions, the process of assembling the grand jury and presenting witnesses to it does take time and energy.¹¹² Thus, if the time frame within which that process must unfold is relatively short, if the number of cases in need of processing is high, and if prosecutorial resources are low, an indictment-bypass rule will constrain prosecutors to a degree: They will be forced to choose which cases to send to the grand jury and which to (reluctantly) allow forward to a preliminary hearing.¹¹³ Crucially, however, some jurisdictions detach the prosecutor's power to bypass a preliminary hearing from its historical moorings altogether, allowing her to exercise that power not just by filing an indictment but by filing an information as well—that is to say, by writing her chosen charges

110. See, e.g., *Sciortino v. Zampano*, 385 F.2d 132, 133 (2d Cir. 1967) (“[T]he return of an indictment . . . establishes probable cause [and] eliminates the need for a preliminary examination . . . [which] would be an empty ritual . . .”).

111. On the rubber-stamp nature of grand juries, see *supra* note 105; see also Editorial, *Do We Need Grand Juries?*, *NY Times* (Feb. 18, 1985), <http://www.nytimes.com/1985/02/18/opinion/do-we-need-grand-juries.html> (on file with the *Columbia Law Review*) (attributing to Judge Sol Wachtler the aphorism that a grand jury “would indict a ham sandwich”). Indeed, far from imposing a substantive check on prosecutors' charging authority, grand juries often afford prosecutors important “investigative advantages,” such as pretrial subpoena power. 3 LaFave et al., *supra* note 73, § 8.3, at 23. For an example of anachronistically path-dependent reasoning offered in support of indictment-bypass authority, see *Kaley v. United States*, 134 S. Ct. 1090, 1097–98 (2014) (citing the “historic commitment of our criminal justice system” as reason to reaffirm the principle that the “grand jury gets to say—without any review, oversight, or second-guessing—whether probable cause exists to think that a person committed a crime”).

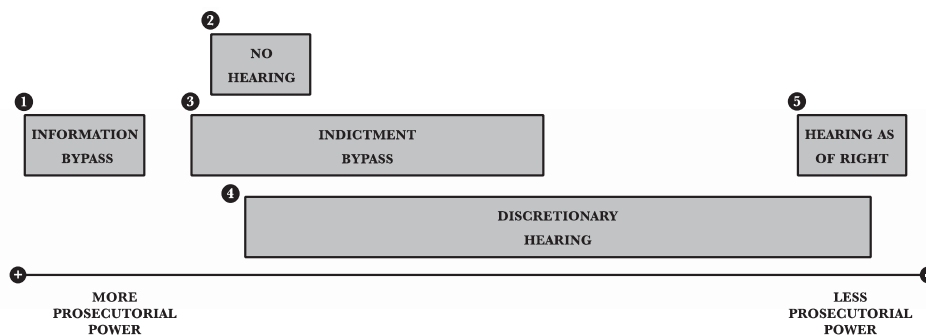
112. See *Crane*, *supra* note 23, at 803–04 (noting that even if “grand juries rarely decline to indict, the grand jury requirement still imposes meaningful costs . . . related to prosecutor time and grand jury time”).

113. Notably, the time frame within which an indictment must be returned in order to trigger a bypass is itself decided by the subconstitutional procedural law, with timelines ranging between two and sixty days after a defendant's arrest (depending in part on whether the defendant is detained prior to trial). Compare *Ariz. R. Crim. P. 5.1(a)* (requiring a preliminary hearing “no later than 10 days after the defendant's initial appearance if the defendant is in custody, or no later than 20 days after the defendant's initial appearance if the defendant is not in custody”), with *Haw. R. Penal P. 5(c)(3)* (mandating preliminary hearings within two days for defendants in custody, and thirty days for defendants not in custody), and *N.M. R. 6-202* (mandating preliminary hearings within ten days for defendants in custody, and sixty days for defendants not in custody). Moreover, if “prosecutors intend to bypass but cannot obtain an indictment with sufficient promptness, they may” in some jurisdictions “obtain continuances . . . [of] the preliminary hearing” to buy more time. 4 LaFave et al., *supra* note 73, § 14.2(c), at 338.

down on a piece of paper and signing her name.¹¹⁴ Here, because the prosecutor can easily and unilaterally preempt the hearing, it will only ever take place in those rare cases in which she wants it to.¹¹⁵

Taking indictment bypass and information bypass together, we can now identify five basic procedural models governing the availability of pretrial evidentiary hearings, which once again can be arrayed along a spectrum.

FIGURE 12: THE LAW OF PRELIMINARY-HEARING BYPASS



Note that the x axis of our otherwise-familiar spectrum is expanded vertically here in order to accommodate the fact that some of these models overlap with one another when it comes to the degree to which they constrain prosecutorial power.¹¹⁶ That overlap is minimized at the extremes: At one pole (the leftmost above), the information-bypass model

114. In about one-third of states (and the federal system), felony charges must be filed by indictment, which means that the grand jury process is essentially mandatory. See 4 LaFave et al., *supra* note 73, § 15.1(d), at 468 (listing eighteen indictment states); *id.* § 15.1(e), at 478 (noting four states that require indictments only in the most serious cases). However, in roughly two-thirds of the states, prosecutors have the option to file formal charges by either indictment or by information—and almost always choose the latter route, which is far less resource-intensive. See *id.* § 14.2(d), at 341; see also *id.* § 15.1(g), at 491–93 (listing states where charging by information is an option and noting that while practice “varies tremendously” across localities, “the grand jury is not part of the standard practice” in “a vast majority” of those states); Crane, *supra* note 23, at 804 (“[I]f an office has thousands of ham sandwiches to process, the more that can be charged by information the better.”).

115. See 4 LaFave et al., *supra* note 73, § 14.2(c), at 338–39 (listing “special circumstances” that might render a preliminary hearing “desirable from the prosecutor’s perspective,” including “the need to [preserve] the testimony of a witness” whom the prosecutor expects to be unavailable or unreliable at trial). Alternatively, a prosecutor might on rare occasion opt for a preliminary hearing in order to demonstrate the strength of her case to a defendant whom she believes is refusing a plea deal due to irrational overconfidence. Cf. *State v. Blanchard*, 786 So. 2d 701, 706 (La. 2001) (observing that “offering [the defendant] a preview” of particularly strong evidence against him may have the “inevitable . . . and permissible” effect of exerting “pressure on [him] to reconsider his decision to stand trial”).

116. There is, in other words, no y axis in this figure and thus no significance to the models’ relative vertical placement.

just described maximizes prosecutorial power by giving prosecutors the ability to control whether a preliminary hearing will take place, and to exercise that control with no more effort than the stroke of a pen. At the opposite pole, by contrast, the defendant has an absolute right to a preliminary hearing, meaning there will be one if he wants it.¹¹⁷

As for the more complicated models in the middle of the schematic, the easiest to plot is one in which preliminary hearings simply do not exist—a model that strongly favors prosecutors, who typically want to avoid adversarial testing of their evidence prior to trial. Indeed, compared to an information-bypass model, the no-hearing model disadvantages prosecutors only in those rare cases in which they might actually want the hearing to take place.¹¹⁸

By contrast, the indictment-bypass model is harder to plot, because (as noted above) the constraint it imposes on prosecutors depends on their resource capacity: If the prosecutor can speed her cases through the grand jury, an indictment-bypass model will be almost as favorable to her as an information-bypass model, as it will give her control over whether the hearing takes place while imposing only a modest administrative burden. But if resources are tight, the indictment-bypass model will start to impose genuine constraint, forcing the prosecutor to submit to preliminary hearings in at least some cases when she would rather not.¹¹⁹

Finally, the last model in the schematic gives judges discretion to hold preliminary hearings regardless of whether an indictment or information is filed. Like the indictment-bypass model, this model spreads across much of the spectrum, because some judges may opt to hold hearings as a matter of course while others may rarely hold them at all.¹²⁰

With these different models of prosecutorial bypass now in place, our conceptual schematic is almost complete. The one remaining layer of complexity stems from the fact that, in some jurisdictions, judges can employ a less robust form of evidentiary review in place of or in addition to a preliminary hearing: Instead of examining live witness testimony, the judge might be empowered to review only documentary evidence submitted by the prosecutor in support of her charges—a form of “papers review”

117. But cf. *infra* note 211 (discussing the possibility that the defendant will waive his right to such a hearing in exchange for plea bargaining concessions).

118. See *supra* note 115.

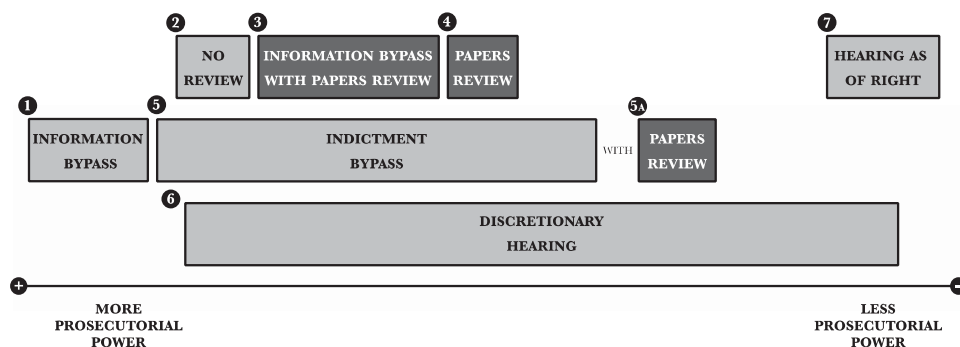
119. In practice, these resource constraints (combined with the varying time frames within which indictment-bypass must be completed, see *supra* note 113) yield different uses of the indictment-bypass device across jurisdictions. See 4 LaFare et al., *supra* note 73, § 14.2(c), at 338–39 (observing that bypass authority is used “regularly,” but nonetheless to different extents across jurisdictions where it exists); cf. *id.* (observing that “the ready availability of an indicting grand jury leads to more frequent use of the bypass procedure”); *id.* § 14.2(b), at 334–35 (noting that indictment-bypass authority has “largely . . . eliminate[d] preliminary hearings in the federal courts”).

120. Cf. *infra* section V.B (discussing judicial incentives vis-à-vis prosecutorial oversight).

that could examine, for example, written statements or grand jury testimony from some selection of witnesses.¹²¹

Generally speaking, this paper's review presents a binary proposition: It exists, or it doesn't.¹²² And by incorporating it into the schematic above, we gain three additional procedural models that, when combined with the initial five, fill in the conceptual map of pretrial evidentiary review. These new models are highlighted in dark gray in the updated schematic below.

FIGURE 13: CONCEPTUAL FRAMEWORKS GOVERNING
PRETRIAL EVIDENTIARY CHARGE REVIEW



The first new model, marked in the third numbered position above, supplements the otherwise-maximally-empowering information-bypass regime with papers review, thus ensuring at least some degree of judicial review

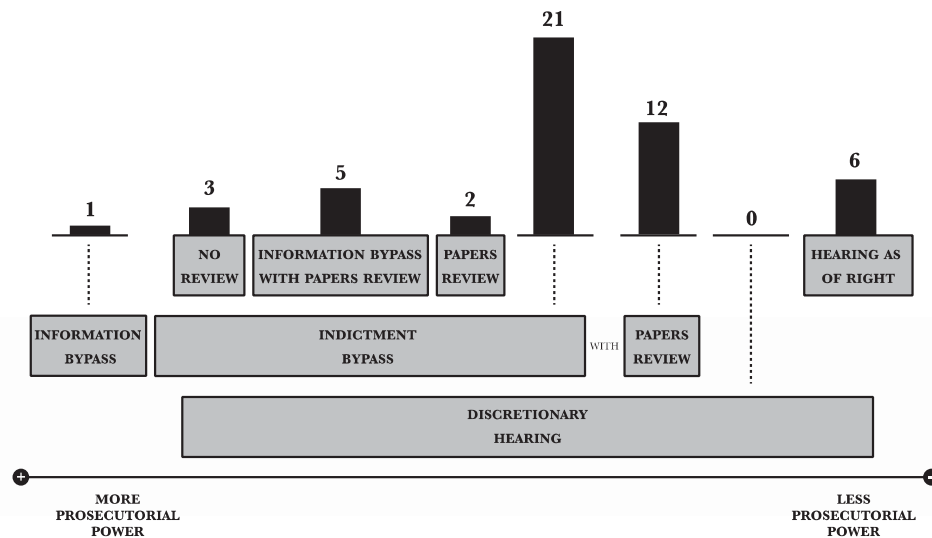
121. To the extent that a preliminary hearing can sometimes resemble a “mini-trial,” see 4 LaFave et al., *supra* note 73, § 14.3(b), at 368–70, papers review might be analogized to a motion for summary judgment, see *id.* § 14.2(d), at 344–46. The analogy, though, has its limits: Because pretrial discovery in the criminal system is often anemic, with defendants enjoying minimal access to basic document production, let alone depositions or interrogatories, the “papers” being reviewed will often be thin—and a far cry from the reams of evidence underlying many civil summary judgment motions. Cf. Ben Grunwald, *The Fragile Promise of Open-File Discovery*, 49 Conn. L. Rev. 771, 779–81 (2017) (recounting the “well-known” “limitations of the traditional approach to discovery” in criminal cases). That said, papers review will generally be more robust than the constitutionally required review of the defendant’s arrest affidavit, which occurs within forty-eight hours of the defendant’s arrest at a time when he may not even have an attorney and when the prosecutor herself may not know much beyond what is in the initial police report. See *County of Riverside v. McLaughlin*, 500 U.S. 44, 56–57 (1991) (requiring *Gerstein* review “within 48 hours of arrest,” absent “a bona fide emergency or other extraordinary circumstance”); see also 3 LaFave et al., *supra* note 73, § 11.2(b), at 702–04 (observing that *Rothgery v. Gillespie County*, 554 U.S. 191 (2008), “strongly suggest[s]” that the right to counsel does not apply at a *Gerstein* hearing); cf. *supra* note 107 (distinguishing *Gerstein* review from pretrial charge review).

122. In truth, the treatment of papers review as a binary proposition oversimplifies matters, as the manner of executing such review can and does vary—most notably with respect to whether or not the review is *ex parte*. For the sake of simplicity, however, the conceptual schematic above elides these nuances, leaving them to the intrepid reader of footnotes and appendices. See *infra* notes 126–127; *infra* Appendix at Table C (citing sources).

in all cases. Close on that model's heels is a regime in which papers review stands alone as the sole mode of pretrial evidentiary review—a model identical to its predecessor save for the fact that it denies prosecutors the option of a preliminary hearing if they want one.¹²³ And finally, the third new model layers papers review onto the indictment-bypass regime, authorizing judges to review the grand jury record to ensure indictments are factually supported.¹²⁴

Notably, nearly all of these eight models are represented among the procedural frameworks actually employed across the states.

FIGURE 14: VARIABILITY ACROSS STATES IN
THE LAW OF PRETRIAL JUDICIAL CHARGE REVIEW¹²⁵



Thus, as the chart above reflects, the majority of states (thirty-three) employ an indictment-bypass regime—although more than one third of those (twelve) supplement that prosecutor-friendly regime with papers review of the grand jury record, thereby guaranteeing a judicial check even when prosecutors have the resources to evade preliminary hearings via the grand jury process.¹²⁶ In an additional five states, however, the

123. See *supra* note 115.

124. See generally Sara Sun Beale et al., *Grand Jury Law and Practice* § 9:26 (2d ed. 2016) (discussing judicial review of the grand jury record).

125. For sources, see *infra* Appendix at Table C.

126. The robustness of this supplemental layer of papers review varies: Some states narrowly permit dismissal of an indictment only if the record shows it was supported by zero evidence. See, e.g., *State v. Burkhart*, 615 S.W.2d 565, 568 (Mo. Ct. App. 1981); *Sheriff v. Miley*, 663 P.2d 343, 344 (Nev. 1983); *State v. Turner*, 150 S.E.2d 406, 410–11 (N.C. 1966). Others allow

prosecutor can bypass such a hearing regardless of her resource constraints, simply by filing an information—although here too each of these states employs a form of papers review as a backstop.¹²⁷ Another two states rely on papers review as their sole method of oversight,¹²⁸ while three more deny evidentiary review of prosecutors' charges at all,¹²⁹ and one (Delaware) goes to the far extreme of granting prosecutors full and unchecked control over the preliminary-hearing process via an information-bypass rule.¹³⁰

dismissal only if the entirety of the evidence before the grand jury was illegally obtained. See, e.g., Ala. R. Crim. P. 12.8(f)(2). Yet others are more stringent in their review, calling for dismissal if the evidence submitted to the grand jury would not "warrant a conviction" at trial. Alaska R. Crim. P. 6(q); *Nelson v. State*, 628 P.2d 884, 889 (Alaska 1981).

127. The extent of papers review in these states varies. In one, the court reviews the information *ex parte* before it is filed to determine, based on a digest summarizing the prosecutor's anticipated evidence, whether information submitted "would warrant a conviction by the trial jury." Iowa Ct. R. 2.5(4). Two others conduct similar review on the defendant's motion after the information is filed. See Fla. R. Crim. P. 3.190(c)(4) (requiring dismissal when "the undisputed facts do not establish a *prima facie* case of guilt"); *State v. Paredes*, 191 So. 3d 936, 939–40 (Fla. Dist. Ct. App. 2016) (equating the *prima facie* standard to evidence sufficient to survive a motion for summary judgment in a civil case); see also *State v. Knapstad*, 729 P.2d 48, 51–55 (Wash. 1986) (adopting the Florida approach). Additionally, two of these states grant the defendant a right to call witnesses to supplement the papers-review hearing, while limiting the prosecution to its documentary evidence absent leave from the court to supplement that record. See Haw. Rev. Stat. Ann. § 806-87 (LexisNexis 2016); 12 R.I. Gen. Laws § 12-12-1.8 (2002). By contrast, two other states deem the review satisfied so long as the prosecutor certifies that there are disputed factual questions at issue in the case. See Fla. R. Crim. P. 3.190(c)(4), (d); *Knapstad*, 729 P.2d at 54.

128. One of these states affords a limited right to a preliminary hearing but only in extreme cases carrying a sentence of death or life in prison. See Conn. Gen. Stat. Ann. § 54-46a(a) (West Supp. 2017). Additionally, while rules in these states may technically permit a defendant to supplement papers review through a corresponding evidentiary hearing, such hearings appear to be exceptionally rare. See Vt. R. Crim. P. 12(d)(2) ("The court may determine the motion without hearing as long as both the state and defense have been provided an opportunity to submit affidavits, depositions, or other sworn admissible evidence in written or recorded form."); *id.* reporter's note to 2008 amendment (noting that the rule was "amended to eliminate the necessity of having to schedule a formal hearing on defendant's motion" and to encourage instead disposition "on the pleadings and written submissions"); see also *State v. Florence*, 239 N.W.2d 892, 900 (Minn. 1976) (noting that "the presiding judge will [typically] make the critical determination based on all the information contained in the files and records" and that it will be "the rare case where the defendant supports his . . . motion by the production of witnesses"). Accordingly, these states are distinguished from those that have regularly functioning preliminary hearings insulated from prosecutorial bypass by judicial discretion (that is, from model six in Figure 13).

129. In each of these states, the Fourth Amendment's required *Gerstein* review of the facts underlying the defendant's arrest is the only form of pretrial judicial review provided. See Ark. R. Crim. P. 8.3(c) (requiring only "an informal, non-adversary hearing" at the defendant's initial appearance to determine "whether there is probable cause for detaining the arrested person pending further proceedings"); see also Arkansas Criminal Code Revision Commission's Bill, Act 1994, § 502, 2005 Ark. Acts 6932, 7450–59 (repealing preexisting preliminary-examination provisions of state law); Ind. Code §§ 35-33-7-1 to -2 (2017) (affording only *Gerstein*-style review); Me. R. Crim. P. 4A (requiring judicial review only of a sworn affidavit and only "when a defendant arrested without a warrant for any crime is not released from custody within 48 hours," but also permitting the defendant to submit oral evidence undermining probable cause).

130. See *infra* note 290; Appendix at Table C (p. 1404).

Finally, at the far other end of the spectrum, one state has flirted with but ultimately rejected a discretionary model in which judges can hold hearings even if an indictment or information has been filed,¹³¹ and an additional six have gone so far as to guarantee defendants a right to a preliminary hearing as a matter of course.¹³²

As this survey of state-by-state approaches makes clear, the structures of pretrial evidentiary review are exceptionally diverse, with preliminary hearings guaranteed in some states, nonexistent in others, and subject to varying modes of prosecutorial bypass in the rest. Note, however, that

131. Maryland has a statute expressly providing for a discretionary approach. See Md. Code Ann., Crim. Proc. § 4-103(2) (LexisNexis 2008) (“If the defendant is charged by grand jury indictment, the right of a defendant to a preliminary hearing is not absolute but the court may allow the defendant to have a preliminary hearing.”). But a contrary court rule creates an indictment-bypass regime, and the state supreme court has held that the rule takes precedence. See Md. R. 4-221(c)(1) (“A preliminary hearing may not be held if before the hearing . . . [a]n indictment is filed”); *Marshall v. State*, 420 A.2d 1266, 1269 (Md. Ct. Spec. App. 1980) (“[T]here . . . exists a conflict between the statute and the rule. As the rule was adopted subsequent to the enactment of the statutory provision, the rule prevails.” (citations omitted)), rev’d on other grounds, 434 A.2d 555 (Md. 1981). For discussion of the curious-but-common supremacy of court-made rules over legislative statutes, see *infra* section V.B and note 241.

132. See Neb. Rev. Stat. § 29-1607 (2016); Okla. Stat. tit. 22, § 524 (West 2003); Wis. Stat. §§ 970.02, 971.02 (2018); N.D. R. Crim. P. 5(c); Pa. R. Crim. P. 540; Tenn. R. Crim. P. 5(e)(1), (4); see also *infra* Appendix at Table C. Three of these states layer papers review on top of that guarantee, thus adopting a belt-and-suspenders approach that arises from procedural peculiarities unique to each jurisdiction: In Pennsylvania, a defendant has a right to a preliminary hearing whether prosecuted by information or by indictment, except that a prosecutor can get permission from the state’s Supreme Court to indict a defendant without a preliminary hearing “in cases in which witness intimidation has occurred, is occurring, or is likely to occur.” Pa. R. Crim. P. 556.2 cmt.; see also Pa. R. Crim. P. 556. If, however, such a process is used, the defendant can then challenge any resulting indictment on the papers. See Pa. R. Crim. P. 556.4(B)(1)(b). In Nebraska, an indictment technically preempts a preliminary hearing. But a grand jury can only be summoned into being by a petition signed “by not less than ten percent of the registered voters of the county who cast votes for the office of Governor in such county at the most recent general election,” Neb. Rev. Stat. § 29-1401(3) (2016), a process so rare and cumbersome that preliminary hearings are effectively guaranteed. Cf. *id.* § 29-1607 (providing that “[n]o information shall be filed against any person for any offense until such person shall have had a preliminary examination”). In the rare event, however, that a grand jury is summoned and issues an indictment, that indictment is subject to dismissal if a court concludes that “the grand jury finding of probable cause is not supported by the record.” *Id.* § 29-1418(3). Finally, in Oklahoma, the defendant has a right to a preliminary hearing, Okla. Stat. tit. 22, § 524 (West 2003), and is further entitled to move to dismiss his case “for insufficient evidence . . . *after preliminary hearing*” if he can “establish beyond the face of the indictment or information that there is insufficient evidence to prove any one of the necessary elements of the offense for which [he] is charged,” *State v. Delso*, 298 P.3d 1192, 1193–94 (Okla. Crim. App. 2013) (emphasis added) (citing Okla. Stat. tit. 22, § 504.1(A)).

Note that Virginia guarantees preliminary hearings by statute, see Va. Code Ann. § 19.2-218 (2015) (“No person who is arrested on a charge of felony shall be denied a preliminary hearing”), but has narrowed that guarantee substantially, interpreting the statute to permit indictment bypass if the defendant was “indicted for charges distinct from those on which he was arrested but which arose out of the same course of events.” *Seibert v. Commonwealth*, 467 S.E.2d 838, 840 (Va. Ct. App. 1996). Virginia is thus not included among the six hearing-as-of-right states.

even when such a hearing takes place, the regulatory constraint it imposes on prosecutorial power depends on a final tier of the governing procedural framework, which determines how robustly the hearing will probe the allegations underlying the prosecution's case. Specifically, procedural law determines the robustness of a given preliminary hearing in at least three important ways.

1. *Standard of Review*. — First, procedural law defines the standard of review employed at the hearing and thus sets the evidentiary threshold that the prosecutor must satisfy. The higher the standard, the more demanding the review—at least in theory.¹³³ States vary, however, in the standards they write into their subconstitutional procedural law: The majority borrow the probable cause standard from the Fourth Amendment, but others demand a “greater assurance of guilt” by requiring “evidence at the preliminary hearing that would warrant a reasonable jury in finding each of the elements of the offense” at a subsequent trial.¹³⁴

2. *Nature of Evidence*. — Second, there is the question of how the prosecutor will go about satisfying her burden, and more specifically, which witnesses she will be required to put forward. From the defendant's perspective, the hearing will be most robust if the prosecutor must produce the principal witnesses upon whom she intends to rely at trial. In many states, however, the prosecutor can satisfy her burden of proof at the hearing entirely through hearsay testimony.¹³⁵ In such a regime, a single police

133. Cf. Ortman, *supra* note 1, at 514 (“Strict charging standards are attractive to criminal justice policymakers for whom . . . prosecutorial constraint [is] important.”). But cf. C.M.A. McCauliff, *Burdens of Proof: Degrees of Belief, Quanta of Evidence, or Constitutional Guarantees?*, 35 Vand. L. Rev. 1293, 1327 & tbl.3 (1982) (reporting that judges, when surveyed, pegged probable cause at between a 10% and a 90% likelihood that a given allegation is true, with most answers clustered between 30% and 60%); Christopher Slobogin, *Let's Not Bury Terry: A Call for Rejuvenation of the Proportionality Principle*, 72 St. John's L. Rev. 1053, 1082 (1998) (“[P]robable cause . . . is the standard with which we are most familiar—except that we don't really know what it means.”).

134. *Stewart v. Abraham*, 275 F.3d 220, 229–30 (3d Cir. 2001) (examining Pennsylvania state law and concluding that the “‘*prima facie* case’ standard” employed at preliminary hearings in that state is “intended to require different and greater assurance of guilt” than the more typical “probable cause” standard”); see also 4 LaFave et al., *supra* note 73, § 14.3(a), at 356 (observing that the “dominant formulation of th[e] standard” applied at the hearing “directs the magistrate to determine whether ‘there is probable cause to believe that an offense has been committed and that the defendant committed it’” (quoting Alaska R. Crim. P. 5.1 and other states’ identically worded provisions)). With respect to papers review, at least one state goes so far as to require evidence that, if “taken in the light most favorable to the State,” would “tend to show [the] defendant committed the offense, *beyond a reasonable doubt*.” *State v. Millette*, 795 A.2d 1182, 1183 (Vt. 2002) (emphasis added).

135. See Cal. Penal Code § 872(b) (2018); Del. Super. Ct. R. Crim. P. 5.1(a); Ga. Code Ann. § 24-1-2(d)(1) (2013); Ill. R. Evid. 1101(b)(3); Ky. R. Crim. P. 3.14(2); Md. R. 5-101(b)(7); Mont. R. Evid. 101(c)(3); Neb. Rev. Stat. § 27-1101(4)(b) (2016); N.H. R. Crim. P. 6(a)(4); N.J. R. Evid. 101(a)(2)(D) & cmt.; N.D. R. Crim. P. 5.1; 12 R.I. Gen. Laws § 12-12-1.9 (2002); S.C. R. Evid. 1101(d)(3); Wash. R. Evid. 1101(c)(3); Wis. Stat. § 970.038 (2018); Wyo. R. Evid. 1101(b)(3); see also Fed. R. Evid. 1101(d)(3); cf. 4 LaFave et al.,

officer can simply take the stand and summarize the most inculpatory portions of the case file, thus shielding potentially weak witnesses from cross-examination and perhaps sanitizing their accounts in the process. Under this approach, our hypothetical armed robbery defendant's attorney, for example, might find herself cross-examining an officer who testifies simply that "a gentleman saw the defendant commit the robbery" and who conspicuously omits the fact that the gentleman in question is blind, a convicted felon, and biased against the defendant.¹³⁶ Other states, however, take steps to restrict such obfuscation: Some give judges discretion to accept or reject hearsay at the hearing;¹³⁷ others permit hearsay only in narrowly limited circumstances;¹³⁸ and others ban it altogether.¹³⁹ Indeed, some states go so far as to give the defendant himself

supra note 73, § 14.4(b), at 383 (suggesting that "perhaps a majority" of states "start from the premise that the rules of evidence do not apply to the preliminary hearing").

136. Note, moreover, that due to the lack of pretrial discovery and insufficient investigative budgets in many jurisdictions, the defense attorney may have no idea about the witness's deficiencies if the witness does not testify at the preliminary hearing. See Donald J. Farole, Jr. & Lynn Langton, U.S. Dep't of Justice, Bureau of Justice Statistics, *County-Based and Local Public Defender Offices*, 2007, at 1 (2010), <http://www.bjs.gov/content/pub/pdf/clpdo07.pdf> [<http://perma.cc/AB98-CB7G>] (reporting that "40% of all county-based public defender offices had no investigators on staff"); Grunwald, *supra* note 121, at 779–80 (describing discovery rules).

137. See, e.g., Iowa Ct. R. 2.2(4)(b) (permitting hearsay if the judge finds there to be "a substantial basis for believing the source of the hearsay [is] credible and for believing that there is a factual basis for the information furnished"); La. Code Evid. Ann. art. 1101(B)(4) (2017) ("[T]he court may consider evidence that would otherwise be barred by the hearsay rule."); Or. Rev. Stat. § 135.173 (2015) (prohibiting hearsay unless the judge "determines that it would impose an unreasonable hardship on one of the parties or on a witness to require that the primary source of the evidence be produced at the hearing").

138. See, e.g., Idaho R. Crim. P. 5.1(b) ("Hearsay . . . may be admitted to show the following: (1) the existence or nonexistence of business or medical facts and records, (2) judgments and convictions of courts, (3) ownership of real or personal property, and (4) reports of scientific examinations of evidence by state or federal agencies . . ."); Kan. Stat. Ann. § 22-2902(3) (2007) ("When the victim . . . is a child less than 13 years of age, the finding of probable cause . . . may be based upon hearsay evidence in whole or in part presented at the preliminary examination by means of statements made by [the] child . . . on a videotape recording or by other means."); Nev. Rev. Stat. § 171.196(6) (2015) (permitting "[h]earsay evidence . . . at a preliminary examination . . . only if the defendant is charged with one or more of [certain enumerated] offenses").

139. See, e.g., Ohio Rev. Code Ann. § 2937.11(A)(3) (West 2006) ("The hearing shall be conducted under the rules of evidence prevailing in criminal trials generally."); S.D. Codified Laws § 23A-46 (2018) (stating that "[t]he rules of evidence shall apply" at the preliminary hearing); Tex. Code Crim. Proc. art. 16.07 (2017) ("The same rules of evidence shall apply to and govern a trial before an examining court that apply to and govern a final trial."); Va. Code Ann. § 19.2-183(B) (2015) ("At the hearing the judge shall . . . hear testimony . . . in accordance with the rules of evidence applicable to criminal trials . . ."); *Myers v. Commonwealth*, 298 N.E.2d 819, 824 n.6 (Mass. 1973) ("[T]he rules of evidence at the preliminary hearing should in general be the same rules that are applicable at the criminal trial."); cf. Alaska R. Crim. P. 5.1(d) ("At the preliminary examination, the admissibility of evidence other than written reports of experts shall be governed by the Alaska Rules of Evidence.").

a right to call the prosecutor's witnesses to the stand in order to question them directly.¹⁴⁰

3. *Consequences of Overreaching.* — Finally, and perhaps most importantly, procedural law determines the consequences that follow if the judge finds at the end of the hearing that the prosecutor's charges fail to pass muster. In many jurisdictions those consequences are almost nonexistent, as the prosecutor is free simply to refile the rejected charges, perhaps before a more amenable judge—an approach that leaves her free to overreach again and again, until her charges stick or she gives up.¹⁴¹ By contrast, some states require a prosecutor to seek the court's permission before refiling charges that have been rejected,¹⁴² while others go so far as to ban such refiling altogether unless the prosecutor can show that she has obtained new evidence that she either did not or could not have obtained the first time around.¹⁴³

140. See, e.g., *Ex parte Lankford*, 20 So. 3d 843, 844–46 (Ala. Crim. App. 2009) (per curiam) (holding that the defendant has a right to subpoena “the alleged victim” to testify at a preliminary hearing); *Wyrick v. Dist. Court of Mayes Cty.*, 839 P.2d 1376, 1377 (Okla. Crim. App. 1992). Notably, jurisdictions also vary on the extent to which defendants are permitted to present any evidence at a preliminary hearing at all. Compare, e.g., Haw. R. Penal P. 5(c)(4) (“The prosecution and the defendant may introduce evidence and produce witnesses, who shall be subject to cross-examination.”), with Del. Ct. Com. Pleas Crim. R. 5.1 (“The defendant . . . may, subject to reasonable limitations imposed by the Court, introduce evidence in defendant's behalf”), N.Y. Crim. Proc. Law § 180.60(7) (McKinney 2007) (“Upon request of the defendant, the court may, as a matter of discretion, permit him to call and examine other witnesses or to produce other evidence in his behalf.”), and Md. R. 4-221(d) (“The defendant is entitled to cross-examine witnesses but not to present evidence.”).

141. See Ala. R. Crim. P. 5.4(d); Alaska R. Crim. P. 5.1(h); Ariz. R. Crim. P. 5.4(b)–(d) & cmt.; Del. Super. Ct. R. Crim. P. 5.1(b); Fla. R. Crim. P. 3.133(b)(5); Iowa Ct. R. 2.2(4)(e); La. Code Crim. Proc. Ann. art. 386 (2017); Md. R. 4-221(e); Miss. R. Crim. P. 6.2(g); Mont. Code Ann. § 46-10-203(2) (2017); N.H. R. Crim. P. 6(a)(6); N.M. R. 6-202(D)(1); N.C. Gen. Stat. § 15A-612(b) (2017); Ohio R. Crim. P. 5(B)(5); Okla. Stat. Ann. tit. 22, § 501 (West 2003); S.C. R. Crim. P. 2(c); S.D. Codified Laws § 23A-4-7; Tenn. R. Crim. P. 5.1(c); Utah R. Crim. P. 7(i)(3); Vt. R. Crim. P. 5(c); W. Va. R. Crim. P. 5.1(b); Wyo. R. Crim. P. 5.1(c); *State v. Rubek*, 371 N.W.2d 115, 117 (Neb. 1985); *State v. Farrad*, 753 A.2d 648, 660 (N.J. 2000); *Herrington v. Commonwealth*, 781 S.E.2d 561, 563 (Va. 2016); see also Fed. R. Crim. P. 5.1(f). Some states do not permit dismissal even upon an adverse judicial finding, requiring only that the defendant be released from pretrial custody (though not from other restraints on his liberty). See, e.g., N.J. Ct. R. 3:4-3. As for forum shopping, note that states may (but often do not) prohibit the tactic by requiring that any “subsequent preliminary examination must be held before the same judicial officer.” Mich. R. Crim. P. 6.110(F).

142. See, e.g., Nev. Rev. Stat. § 173.035 (2015) (“If . . . upon the preliminary examination the accused has been discharged . . . the district attorney may, upon affidavit of any person who has knowledge of the commission of [the] offense, and . . . by leave of the court first had, file an[other] information . . .”); Wash. R. Cts. Limited Jurisdiction 3.2.1(g)(5) (“If a preliminary hearing on the felony complaint is held and the court finds that probable cause does not exist, the charge shall be dismissed, and may be refiled only if a motion to set aside the finding is granted by the superior court.”).

143. See, e.g., Cal. Penal Code §§ 871, 1387(a)(1) (2018) (permitting refiling if “substantial new evidence has been discovered by the prosecution which would not have been known through the exercise of due diligence at, or prior to” the preliminary hearing dismissal); Mich. R. Crim. P. 6.110(F) (requiring “the prosecutor [to] present additional evidence to

In sum, if one were to focus solely on the lack of constitutionally grounded regulation in this arena it would be easy to conclude that the job of assessing the facts underlying an alleged criminal offense falls, to quote the Supreme Court, within “a ‘special province’ of the Executive,” such that the prosecutor’s charging decisions must rest inevitably and “entirely in [her] discretion.”¹⁴⁴ In truth, however, a prosecutor’s ability to inflate the factual allegations against the defendant—and to thereby generate outsized plea bargaining leverage—depends on the subconstitutional procedural law of the state in which the prosecution occurs. Some states provide no pretrial evidentiary review at all, others guarantee something approximating a minitrial, and a full assortment of alternatives fall in between.

B. *Legal Overreaching: The Law of Summary Dismissal and Bills of Particulars*

Unlike factual overreach, legal overreach arises relatively infrequently in criminal prosecutions, for a simple reason: In most jurisdictions, the well-settled substantive criminal law defines liability so expansively that it covers most alleged criminal misconduct many times over, relieving prosecutors of any need to stretch for legally applicable charges.¹⁴⁵ Still, legal overreaching is not a phantom menace,¹⁴⁶ and when it occurs it can offer prosecutors substantial leverage. Consider, for example, our hypothetical armed robbery defendant, who when we first encountered him was facing not only a pile of robbery-like charges (theft, assault, brandishing a firearm) but also a far more serious charge of kidnapping—premised solely on the allegation that, in the course of the robbery, he told the victim to move a few steps to the left, out from under a streetlamp.¹⁴⁷ Putting aside for the moment the factual question of whether the defendant ever issued

support the charge” at a subsequent preliminary hearing on refiled charges); 12 R.I. Gen. Laws § 12-12-1.10 (2002) (barring refiling absent “a finding [by the court] of mistake, inadvertence, surprise, excusable neglect, the discovery of new evidence which by due diligence could not have been discovered at the time the hearing on probable cause was held, or any other reason justifying the relief”); Wis. Stat. § 970.04 (2018) (“If a preliminary examination has been had and the defendant has been discharged, the district attorney may file another complaint if the district attorney has or discovers additional evidence.”).

144. *United States v. Armstrong*, 517 U.S. 456, 464 (1996) (first quoting *Heckler v. Chaney*, 470 U.S. 821, 832 (1985); then quoting *Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978)).

145. See Robert H. Jackson, *The Federal Prosecutor*, 24 J. Am. Judicature Soc’y 18, 19 (1940) (“With the law books filled with a great assortment of crimes, a prosecutor stands a fair chance of finding at least a technical violation of some act on the part of almost anyone.”); cf. James M. Burnham, *Why Don’t Courts Dismiss Indictments? A Simple Suggestion for Making Federal Criminal Law a Little Less Lawless*, 18 Green Bag 2d 347, 358 (2015) (“[T]here is not much gray about what constitutes bank robbery or drug possession.”).

146. Cf. Burnham, *supra* note 145, at 358 & n.30 (citing examples illustrating that “for many areas of federal criminal law” in particular, “the government has a long track record of pursuing aggressive, questionable legal theories”).

147. See *supra* text accompanying note 36.

such a command (or committed the robbery), the prosecutor's ability to threaten him with a hefty kidnapping charge depends on the answer to a straightforward question of law: Does this brief alleged restraint of the victim's freedom of movement constitute a kidnapping?

That legal question could well be unresolved in the particular jurisdiction at hand.¹⁴⁸ And if it is, uncertainty over how courts will resolve the issue creates a now-familiar opportunity for charge bargaining and manipulation: To eliminate the risk of a lengthy kidnapping sentence, the defendant might jump at the chance to plead guilty to a lesser offense—including, perhaps, to armed robbery, the charge the prosecutor likely preferred all along.¹⁴⁹ To the extent that undue leverage arising from such uncertainty causes concern, a potential regulatory solution should by now be familiar as well: Resolve the uncertainty up front, by permitting the judge to rule on the legal issue before plea negotiations are over—that is to say, at some point before trial.¹⁵⁰

Here again, the constitutional law of criminal procedure falls short, insofar as it guarantees defendants judicial review of the prosecutor's legal theory of the case only if the defendant takes the case to trial, by which point any hope of checking legal overreach in the *plea negotiation* process is lost.¹⁵¹ But where constitutional law falls short, subconstitutional law fills the gap, in this instance through a little-studied procedural device known as a motion for summary dismissal.¹⁵² As James Tierney explains in a

148. Cf. Melanie A. Prince, Comment, Two Crimes for the Price of One: The Problem with Kidnapping Statutes in Tennessee and Beyond, 76 Tenn. L. Rev. 789, 789–90 (2009) (observing that “statutes and case law in several jurisdictions” across the country “could allow prosecution of criminal defendants for both kidnapping and the underlying offense” if the conduct involved “any asportation, however slight” or “even simple” or temporary detention); id. at 789 (“As a result, criminal defendants could face two convictions for essentially one action, and the severe sentences that were originally intended to punish ransom-kidnappers would be applied to those guilty of a lesser crime.”).

149. Cf. Gold et al., *supra* note 20, at 1642 (“Criminal laws often have unclear boundaries. This lack of clarity allows prosecutors to push more aggressive legal theories.”). For other discussions of uncertainty yielding prosecutorial leverage, see *supra* notes 92–94 and accompanying text (discussing discretionary sentencing); *supra* notes 98–104 and accompanying text (discussing the inherent uncertainty of jury verdicts).

150. Cf. *supra* text accompanying note 94 (discussing structured sentencing discretion as a mode of clarifying uncertainty); *supra* section III.A (discussing pretrial evidentiary review in similar terms).

151. See *Jackson v. Virginia*, 443 U.S. 307, 314, 319–20 (1979) (guaranteeing judicial review to ensure “that every element of the crime has been established”). While *Jackson* requires judges to review the evidence adduced at trial and thus creates a limited check on factual overreaching, the deferential nature of that factual inquiry renders the precedent perhaps more significant as a check on legal overreaching, as it logically requires judges to resolve any ambiguity in a charged crime's legal definition before resolving whether that definition is satisfied by the facts at hand. See, e.g., *Carrington v. Commonwealth*, 721 S.E.2d 815, 817–18 (Va. Ct. App. 2012) (interpreting boundaries of statutory elements in the context of *Jackson* review).

152. See James Fallows Tierney, Comment, Summary Dismissals, 77 U. Chi. L. Rev. 1841, 1841–42, 1849–50 (2010) (describing “the near-total scholarly silence” concerning summary dismissals).

comment offering the most extensive analysis of this device, a motion for summary dismissal in a criminal case mirrors the civil system's more familiar motion to dismiss for failure to state a claim.¹⁵³ As such, the device forces the government to "prove its case as a matter of law" at the outset of the proceedings and thereby allows the defendant to "expedite resolution of legal questions that would otherwise be litigated" at trial.¹⁵⁴ In other words, summary dismissals move the judicial review guaranteed by the Constitution up to a point in the proceedings when such review could actually be useful.¹⁵⁵

Notably, in contrast to the many other thickets of subconstitutional law examined in this Article, the procedural landscape here is mercifully straightforward, as motions for summary dismissal are "specifically recognized in the statutes or court rules of every state" in the country—that is to say, in each state's subconstitutional procedural law.¹⁵⁶ That consistency, however, tells only half the story, for the difficulty defendants typically face when pushing back against legal overreach is not finding a procedural device through which to mount their challenge but rather pinning the prosecutor to a specific legal theory of liability in the first place. Criminal charging instruments, after all, are much sparser than civil complaints, often alleging little more than the time and place of the offense.¹⁵⁷ And while pretrial evidentiary hearings can help determine whether the prosecutor has any factual basis to file a charge, they rarely examine every potential charge the eventual trial could entail, nor do they typically bind the prosecutor to the factual narrative adduced at the hearing.¹⁵⁸ The precise

153. Tierney, *supra* note 152. Tierney's thorough analysis focuses exclusively on the Federal Rules of Criminal Procedure, as does the article that was, at the time Tierney wrote, "the only other scholarly treatment of this issue." *Id.* at 1841–42 & n.9 (citing James M. Shellow & Susan W. Brenner, *Speaking Motions: Recognition of Summary Judgment in Federal Criminal Procedure*, 107 F.R.D. 139 (1985)). For more recent treatments, also focusing solely on the federal rules, see Burnham, *supra* note 145, at 348–49; Gold et al., *supra* note 20, at 1641–42.

154. Tierney, *supra* note 152, at 1841, 1849.

155. Cf. Gold et al., *supra* note 20, at 1642 (arguing that increasing the usage of motions for summary dismissal "would provide an opportunity for defendants to test the validity of the prosecutors' legal theories").

156. 5 LaFave et al., *supra* note 73, § 19.3(a), at 286. But cf. 4 *id.* § 15.5(a), at 631–35 (describing the somewhat-more-varied summary-dismissal rules in the federal system); Tierney, *supra* note 152, at 1845, 1853–54 (noting that while most federal courts agree that "a district judge can hear the motion, resolve the legal question, and dismiss if the government has no case to prove," the Eighth Circuit does not allow for summary dismissals (citing *United States v. Nabors*, 45 F.3d 238 (8th Cir. 1995))).

157. Cf. Gold et al., *supra* note 20, at 1640–41 (contrasting criminal "[c]harging instruments [that] generally do not need to allege specific facts" to the heightened pleading standards in federal civil cases (citing *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009))); *infra* Appendix at Table D (discussing charging standards).

158. Cf. 4 LaFave et al., *supra* note 73, § 14.1(c), at 317 (noting "that there [can] be some inconsistency between [witnesses'] trial testimony and their previous statements [at a preliminary hearing]"); Frank W. Miller, *Prosecution: The Decision to Charge a Suspect with a Crime* 67–68 (Frank J. Remington ed., 1970) (observing that prosecutors "normally follow a policy of revealing

factual predicate for the charges, in other words, is often hazy, which gives prosecutors leeway to obfuscate pretrial litigation of the criminal law's boundaries. Our hypothetical prosecutor, for example, may not be willing to stipulate that her kidnapping charge rests exclusively on the defendant's alleged "streetlamp command," either because she doesn't know for sure what her witnesses will say at trial and wants to keep her options open or because she recognizes that her legal theory is novel and wants to insulate it and the leverage it affords from pretrial adjudication.

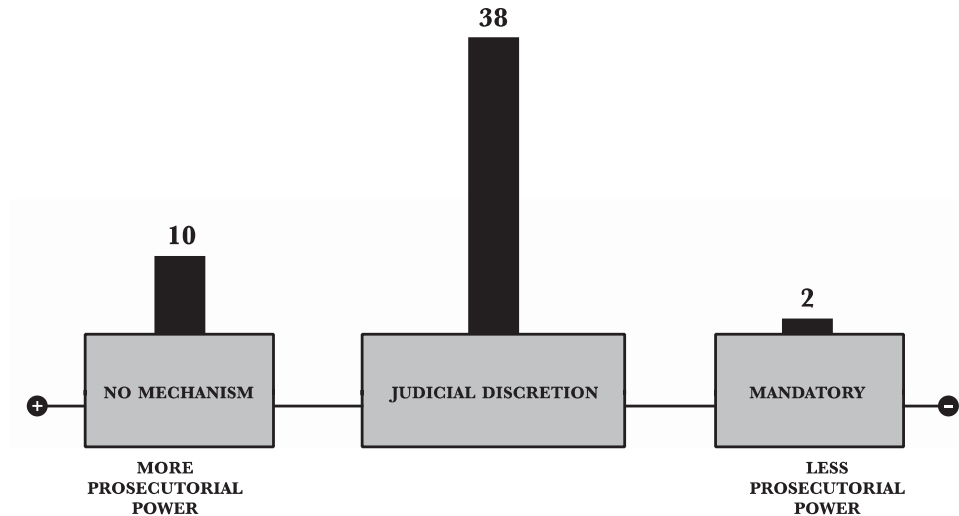
In other words, effective constraints on legal overreach often require some regulatory mechanism to force prosecutors to specify their legal theory early on—which subconstitutional procedural law affords by way of a motion for a bill of particulars. If granted, such a motion compels the prosecutor to answer questions posed by the defense "concerning the events cited in the charge" and treats those answers as binding with respect to "the government's case at trial."¹⁵⁹ To see the impact of such a device in practice, note the dilemma our hypothetical prosecutor faces if she must identify with specificity the *actus reus* of her kidnapping charge: She can either acknowledge that the defendant's streetlamp command is indeed the crux of the charge (and face the ensuing legal challenge head on), or she can commit herself to a factual predicate that sits more comfortably within the kidnapping statute (and run the risk that the evidence she can actually produce at trial may not support that newly refined allegation).

This choice, however, will be forced only if the governing procedural law requires the prosecutor to issue a bill of particulars—and here again, states vary in their approaches.

no more evidence than is necessary to obtain a bindover" of the case from the preliminary hearing to the formal charging stage).

159. 5 LaFare et al., *supra* note 73, § 19.4(a), at 358–59.

FIGURE 15: VARIABILITY ACROSS STATES IN
THE LAW OF BILLS OF PARTICULARS¹⁶⁰



As the chart above shows, most states grant judges discretion to call for a bill of particulars, with the exercises of such discretion potentially extending “from one extreme to the other.”¹⁶¹ Of course, regulatory constraints grounded in discretion will turn on how judges use that discretion.¹⁶² But as the chart above reflects, states can also adopt more categorical approaches, which some do—in both directions. Specifically, ten states have eliminated the bill of particulars altogether, leaving prosecutors free either to stipulate to facts that support pretrial adjudication of legal issues or to evade such review until trial.¹⁶³ But two other states (New York and Ohio) give defendants the right to demand a bill of particulars that “specifically [states] the nature of the offense charge[d]” and “the conduct of the defendant alleged to constitute the offense.”¹⁶⁴ In

160. For sources, see *infra* Appendix at Table D.

161. *United States v. Callahan*, 18 F.R.D. 486, 489 (W.D. Wash. 1955); see also 5 LaFave et al., *supra* note 73, § 19.4(b), at 367.

162. Cf. *supra* text accompanying notes 50–51 (discussing equitable-failsafe severance); *supra* text accompanying notes 90–92 (discussing discretionary sentencing); *supra* text accompanying note 120 (discussing discretionary preliminary hearings).

163. See *infra* Appendix at Table D. Prosecutors may sometimes want to facilitate a pretrial legal ruling on their theory of a case in order to confirm its validity prior to committing resources to a trial, a route they may be particularly likely to pursue if the case at hand is intended as a test vehicle for a novel legal theory. Cf. Crespo, *Regaining Perspective*, *supra* note 13, at 2032–33 (discussing prosecutors’ incentives to pursue favorable appellate precedent).

164. Ohio R. Crim. P. 7(E) (requiring the prosecuting attorney to “furnish the defendant” with such information “[w]hen the defendant makes a written request”); see also N.Y. Crim. Proc. Law § 200.95 (McKinney 2007) (stating that “[u]pon a timely request for a bill of particulars by a defendant against whom an indictment is pending, the prosecutor shall”

these states, as the discussion above makes clear, the subconstitutional procedural law of summary dismissal and bills of particulars creates a genuine mechanism for checking legal overreach.

C. *Equitable Overreaching: The Law of Equitable Dismissal*

For critics of American plea bargaining, the problem of equitable overreach captures perhaps the core concern with plea bargaining more generally: Defendants are sometimes threatened with charges that are simply more serious than their alleged conduct seems to deserve.¹⁶⁵ Take our hypothetical defendant: Even if one accepts that his alleged conduct technically meets the legal elements of a kidnapping, one might appropriately ask whether threatening him with such a charge—and with the decades of imprisonment it could entail—is fair, just, and equitable under the circumstances.¹⁶⁶ As Professor Josh Bowers explains, a prosecutor tasked with deciding what charges to bring and what plea deals to offer cannot escape the exercise of equitable judgment, which is both “necessary and desirable” in a world where criminal codes are too expansive and too severe to permit prosecuting every alleged wrongdoer to the hilt.¹⁶⁷ The concern, in other words, is not that prosecutors’ equitable discretion exists, but rather that it so often seems to be exercised without regard to identified or identifiable standards, and that it operates seemingly free of external constraint—with observably problematic results.¹⁶⁸

As Bowers notes, an obvious corrective to this problem would be to “apportion equitable decisionmaking power” between prosecutors and some other actor, an intervention that could be accomplished easily enough by allowing judges to review the basic fairness of prosecutors’ charging decisions.¹⁶⁹ And yet, while judicial oversight is an accepted staple of checks

file one stating “the substance of [the] defendant’s conduct encompassed by the charge which the people intend to prove at trial on their direct case”).

165. See *supra* notes 28, 37 and accompanying text.

166. Indeed, one might ask the same question with respect to the sentences typically meted out for armed robbery. Cf. Pfaff, *Locked In*, *supra* note 17, at 185–202 (stressing the need to reevaluate societal approaches to punishing violent crime).

167. Josh Bowers, *Legal Guilt, Normative Innocence, and the Equitable Decision Not to Prosecute*, 110 *Colum. L. Rev.* 1655, 1664 (2010) [hereinafter Bowers, *Normative Innocence*]; see also Davis, *supra* note 4, at 25 (“All governments in history have been governments of laws and of men. Rules alone, untempered by discretion, cannot cope with the complexities of modern government and of modern justice.”); Langer, *supra* note 20, at 242 (“In [the current] political and institutional context, . . . prosecutors may not merely rely on the fact that the legislature has passed a crime to justify their charging decisions. They also have to make a normative decision on whether the conduct in question is worth prosecuting . . .”).

168. See *supra* notes 15–17, 26–30 and accompanying text.

169. Bowers, *Normative Innocence*, *supra* note 167, at 1680. Professor Bowers proposes a different institutional response, urging the creation of “a lay body—analogue to the grand jury—that would presume evidentiary sufficiency and would, instead, address only normative questions of whether charges equitably ought to be filed.” *Id.* at 1725; see also Josh Bowers,

and balances in other settings, the suggestion that judges might review prosecutors' equitable discretion will strike students of the criminal justice system as curious—perhaps even blasphemous. After all, the constitutional law of criminal procedure treats “the power to prosecute” as “one of the core powers of the Executive Branch,” and accordingly sees “the decision whether or not to prosecute, and what charge to file or bring” as lying “entirely in [prosecutors'] discretion.”¹⁷⁰

But while this division of institutional responsibilities is dictated by Supreme Court doctrine, it is not a command of natural law—nor does it bind the states, which are free to assign their courts and their prosecutors shared responsibility when it comes to ensuring that criminal charges are not only factually and legally viable, but also fair and just.¹⁷¹ And indeed, one-third of the states have done just that, enacting through their subconstitutional law a set of procedural mechanisms that authorize courts to dismiss charges prior to trial purely on equitable grounds. Only recently examined in the scholarly literature, these procedural devices exist in one of two forms.¹⁷² The first, adopted in Hawaii, Maine, New Jersey, and Pennsylvania, tracks a proposal first laid out in the Model Penal Code, which contains a “De Minimis Infractions” provision under which judges can “dismiss a prosecution” before trial if they find “that the defendant’s conduct” was “too trivial to warrant the condemnation of conviction.”¹⁷³

The Normative Case for Normative Grand Juries, 47 Wake Forest L. Rev. 319, 320–21 (2012). But see *supra* note 105 (citing and discussing extensive literature on the shortcomings of grand jury review).

170. *United States v. Armstrong*, 517 U.S. 456, 464, 467 (1996) (quoting *Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978)); see also *Inmates of Attica Corr. Facility v. Rockefeller*, 477 F.2d 375, 379–80 (2d Cir. 1973); *United States v. Cox*, 342 F.2d 167, 171 (5th Cir. 1965) (“It follows, as an incident of the constitutional separation of powers, that the courts are not to interfere with the free exercise of the discretionary powers of the attorneys of the United States in their control over criminal prosecutions.”); cf. Bowers, *Normative Innocence*, *supra* note 167, at 1686 (“In the charging context, courts and scholars take it as something of an article of faith that the prosecutor should enjoy principal—or even exclusive—authority.”); *id.* at 1659 (asserting that “prosecutors enjoy almost unbridled equitable discretion”); Meares, *supra* note 17, at 862 (“So long as the prosecutor has probable cause to believe that the accused committed an offense, the prosecutor is entitled to bring the charge [and will] rarely [be] second-guessed by the courts.”).

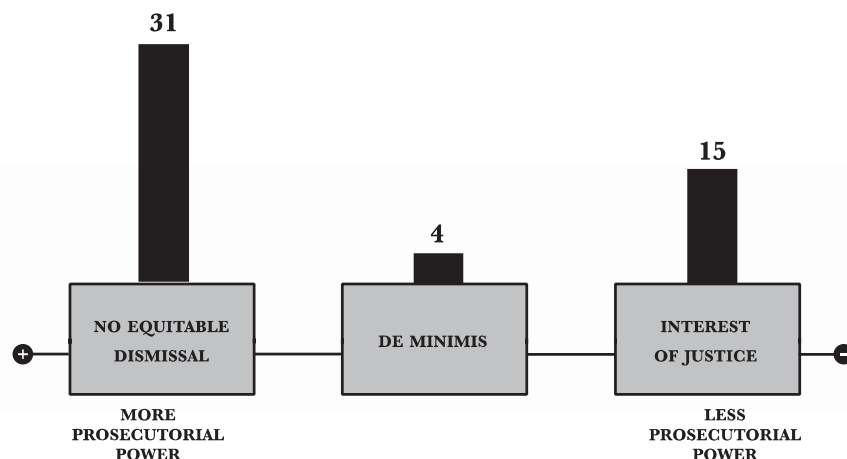
171. Cf. *Dreyer v. Illinois*, 187 U.S. 71, 84 (1902) (“Whether the legislative, executive and judicial powers of a State shall be kept altogether distinct and separate, or whether persons . . . belonging to one department may, in respect to some matters, exert powers which, strictly speaking, pertain to another department of government, is for the determination of the State.”).

172. See Anna Roberts, *Dismissals as Justice*, 69 Ala. L. Rev. 327, 330 (2017) (offering the first detailed scholarly treatment of a topic previously suffering from longstanding “neglect on the part of scholars”).

173. Model Penal Code § 2.12 (Am. Law Inst. 1962); see also Haw. Rev. Stat. Ann. § 702-236 (LexisNexis 2016); Me. Rev. Stat. Ann. tit. 17-A, § 12 (2006); N.J. Stat. Ann. § 2C:2-11 (West 2015); 18 Pa. Stat. and Cons. Stat. Ann. § 312 (West 2015). The Model Penal Code also asks courts to consider whether the alleged conduct “was within a customary license or tolerance” or “presents such other extenuations that it cannot reasonably be regarded as envisaged by the legislature in forbidding the offense,” and makes dismissal mandatory if

Meanwhile, the second approach—adopted in fifteen states—seemingly goes even further, empowering judges to dismiss charges whenever they conclude “that such dismissal will serve the ends of justice.”¹⁷⁴

FIGURE 16: VARIABILITY ACROSS STATES IN
THE LAW OF EQUITABLE DISMISSAL ¹⁷⁵



As Professor Anna Roberts observes in her recent examination of this topic, these equitable dismissal provisions offer “an important set of

any of the three statutory prongs are satisfied. Model Penal Code § 2.12. With the exception of Pennsylvania, however, all of the adopting states have converted the provision to a discretionary one. See Stanislaw Pomorski, *On Multiculturalism, Concepts of Crime, and the “De Minimis” Defense*, 1997 *BYU L. Rev.* 51, 82–83. Moreover, some of the states adopting the provision have further narrowed it through judicial construction to exclude certain enumerated categories of offenses (for example, felonies). See Roberts, *supra* note 172, at 356–60.

174. E.g., Idaho Crim. R. 48(a)(2) (“The court . . . may dismiss a criminal action . . . if the court concludes that dismissal will serve the ends of justice and the effective administration of the court’s business.”); see also Roberts, *supra* note 172, at 332–33 & n.21 (citing Alaska R. Crim. P. 43(c); Ariz. R. Crim. P. 16.6(b) (abrogated Aug. 31, 2017); Cal. Penal Code § 1385(a) (2018); Conn. Gen. Stat. § 54-56 (West 2009); Idaho Code § 19-3504 (2017); Idaho Crim. R. 48(a)(2); Iowa Ct. R. 2.33(1); Minn. Stat. Ann. § 631.21 (West 2009); Mont. Code. Ann. § 46-13-401(1) (West 2015); N.Y. Crim. Proc. Law §§ 170.40, 210.40 (McKinney 2007); Ohio R. Crim. P. 48(B); Okla. Stat. Ann. tit. 22, § 815 (West 2003); Or. Rev. Stat. § 135.755 (2003); Utah R. Crim. P. 25(a); Vt. R. Crim. P. 48(b)(2); Wash. R. Crim. P. 8.3). In some states, this authority has been structured by appellate decisions that prescribe certain factors to guide trial courts’ discretion. See *State v. Sauve*, 666 A.2d 1164, 1167–68 (Vt. 1995) (surveying jurisdictions and listing factors employed in three other states). But in others, the authority exists as an essentially open-ended warrant to keep prosecutors’ equitable overreach in check. Cf. 4 LaFave et al., *supra* note 73, § 13.2(c), at 151–52 (“While some states have construed such a provision to mean that the court may dismiss a prosecution only upon a showing of arbitrary action or government misconduct, elsewhere the trial court’s authority has not been so limited . . .” (footnotes omitted)).

175. For sources, see *supra* notes 172–174.

tools” that judges can use to act as “a check on the executive.”¹⁷⁶ Plea bargaining scholars have long advocated precisely such an intervention, which one-third of the states already provide through their subconstitutional procedural law.

IV. SLIDING DOWN

Up to this point we have examined how procedural law regulates prosecutors’ ability to maximize their charge-bargaining leverage through various modes of piling on and overreaching. In order for the prosecutor to capitalize on that leverage, however, she needs to be able to replace her inflated charges with some lower set of charges that can be offered to the defendant as an inducement to plead guilty: It is the differential between the threat and the offer that creates the leverage.¹⁷⁷ Indeed, if the prosecutor’s ability to slide between charges is restricted, she may be reluctant to pile on or overreach in the first place, out of fear that she will incur backlash from the jury. After all, jurors have unreviewable and plenary power to acquit, which means they can reject not just charges that they think are factually unsupported but also charges that they deem too severe—whether because they disagree with the governing substantive law or with the prosecutor’s decision about what charges to file.¹⁷⁸ A jury, in other words, can reject a prosecutor’s charges precisely because they are factually, legally, equitably, or numerically inflated, which means that a prosecutor who abuses such tactics runs the risk of an overplayed hand.

The prosecutor can mitigate or eliminate that risk, however, if she can easily replace her overplayed hand with a less audacious one. This is not a novel idea. On the contrary, plea bargaining scholars have long

176. Roberts, *supra* note 172, at 330. Of course, how judges use the discretion these devices afford is an important part of the equation. See *supra* text accompanying notes 50, 94, 120; *infra* section V.B.

177. See Gazal-Ayal, *supra* note 34, at 2298–99 (observing that a prosecutor “can assure a conviction” in “almost every case, even a very weak one . . . by offering the defendant a substantial discount”); see also *supra* note 34.

178. See, e.g., Jeffrey Abramson, *Two Ideals of Jury Deliberation*, 1998 U. Chi. Legal F. 125, 145–50 (discussing alternative normative conceptions of jury nullification); see also Jack B. Weinstein, *Considering Jury “Nullification”: When May and Should a Jury Reject the Law to Do Justice*, 30 Am. Crim. L. Rev. 239, 240 (1993) (offering one federal trial judge’s view that “[n]ullification is but one legitimate result in an appropriate constitutional process,” such that “[w]hen juries refuse to convict on the basis of what they think are unjust laws, they are performing their duty as jurors”). Notably, the extent to which a jury is made aware of its unqualified power to acquit is a function of the subconstitutional procedural law relating to instructions on this issue, which once again varies across jurisdictions: Most tell juries only of their power to reject charges that are factually unsupported, but others alert juries to their broader power of acquittal. Compare *State v. Ragland*, 519 A.2d 1361, 1372 (N.J. 1986) (capturing the majority view that “[j]ury nullification is an unfortunate but unavoidable power [that] should not be advertised”), with *Hebron v. State*, 627 A.2d 1029, 1036 (Md. 1993) (holding that a state constitutional provision declaring that “the Jury shall be the Judges of Law” means that jurors have the authority to “resolv[e] conflicting interpretations of the law of the crime and [to] determin[e] whether that law should be applied in dubious factual situations”).

noted that restricting a prosecutor's ability to *reduce* a defendant's sentencing exposure can make it more "costly to choose unrealistically high charges" at the outset of the negotiations.¹⁷⁹ In the absence of such restrictions, the prosecutor is free to file inflated charges without fear of overshooting the mark, because she knows that she will have the flexibility to slide down incrementally from her opening salvo to whatever lesser set of charges ultimately prompts the defendant to cave.¹⁸⁰ But if the prosecutor's initial charges somehow become "stickier," she will be forced to screen away excessively inflated charges up front. Otherwise, she runs the risk that the defendant will call her bluff and thereby make her choose between abandoning those charges altogether or instead pressing ahead with a resource-intensive trial on charges the jury could well reject.¹⁸¹ By determining just how sticky those initial charges will be, the subconstitutional procedural law of amendment, dismissal, and lesser offenses regulates this final component of charge-bargaining power.

A. *Charge Sliding: The Law of Amendment and Dismissal*

Scholars who aim to curb charge bargaining through restrictions on sliding down tend to propose one of two interventions. The first, offered by Professors Ronald Wright and Marc Miller, calls for a self-imposed ban on charge bargaining: Head prosecutors, they say, should simply prohibit their subordinates from changing charges once they have been filed.¹⁸² The merits of this proposal aside, however, it is hard to call it "regulation" of prosecutorial power, as the proposal depends entirely on the voluntary

179. Wright & Miller, *supra* note 10, at 86; see also Oren Bar-Gill & Oren Gazal Ayal, *Plea Bargains Only for the Guilty*, 49 J.L. & Econ. 353, 357–58 (2006) (offering a formal model); Russell D. Covey, *Fixed Justice: Reforming Plea Bargaining with Plea-Based Ceilings*, 82 Tul. L. Rev. 1237, 1243–56 (2008) (noting that limits on sliding down "reduce prosecutorial incentives to overcharge criminal defendants by eliminating the bargaining leverage that can be obtained through strategic overcharging"); Gazal-Ayal, *supra* note 34, at 2313–16; James Vorenberg, *Decent Restraint of Prosecutorial Power*, 94 Harv. L. Rev. 1521, 1560–61 (1981) (suggesting that implementing a "prescribed sentencing concession of ten or twenty percent of the sentence received for a guilty plea" would "avoid much of the injustice of giving prosecutors heavy leverage to discourage even those who have a good defense from exercising their right to trial"). Most of these authors focus on how such restrictions could curb factual overreach, but as stated in the text, the same logic applies to piling on, legal overreach, and equitable overreach, insofar as a jury could react negatively to each tactic.

180. Cf. Gazal-Ayal, *supra* note 34, at 2307 (observing that when the ability to slide down is "unlimited," the underlying "strength" of the initial charges "becomes less important to the prosecution," which is incentivized to file even "weak" charges in order to generate leverage).

181. See Gazal-Ayal, *supra* note 34, at 2300; see also Covey, *supra* note 179, at 1245 (noting that restrictions on charge reductions "directly impact prosecutorial screening practices, creating strong incentives to dismiss weak [charges] rather than try them"); Wright & Miller, *supra* note 10, at 44 ("More careful selection of cases would make it possible to stick with the initial charges, even in front of a judge or jury.").

182. See Wright & Miller, *supra* note 10, at 46, 49 (advocating a "ban on charge reductions" under which "the prosecutor spends resources up front in assessing the case, and then lives with the consequences" of her initial charging decision "through final adjudication").

compliance of the regulated actors (the prosecutors).¹⁸³ By contrast, the second proposal, advanced by Professors Oren Gazal-Ayal and Russell Covey, calls for judges to limit prosecutors' leverage by limiting the differentials between the sentences that judges themselves impose in cases resolved by trial and in cases resolved by plea.¹⁸⁴ But while this approach admirably leans on judicial oversight to cabin prosecutorial power, it ultimately does little, as Gazal-Ayal acknowledges, to guard against the chief concern—charge bargaining—because prosecutors would still be able to manipulate the defendant's sentencing exposure by manipulating the underlying offenses.¹⁸⁵

Charge sliding, however, can instead be regulated directly. Indeed, much as the ability to combine charges together is a direct function of the law of joinder, the prosecutor's ability to trade charges for guilty pleas is a direct function of the law of amendment and dismissal, which together determine when and whether one set of charges can be replaced with another—a necessary component of any bargain.¹⁸⁶ Specifically, procedural law can regulate charge sliding in four basic ways.

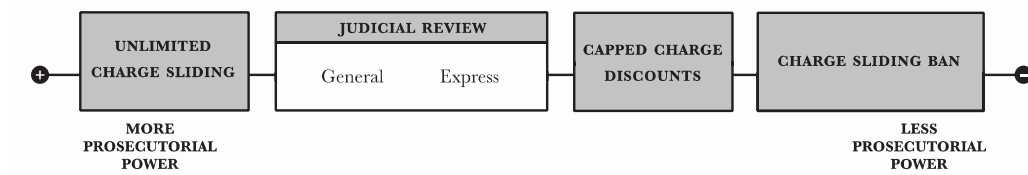
183. See *id.* at 32 (proposing intervention dependent on “internal enforcement mechanisms”). On the dangers of relying exclusively on prosecutorial self-regulation, see, for example, Davis, *supra* note 4, at 211–12 (“The reasons for a judicial check of prosecutors' discretion are stronger than for such a check of other administrative discretion that is now traditionally reviewable [by courts]. Important interests are at stake. Abuses are common. The questions involved are appropriate for judicial determination. And much injustice could be corrected.” (emphasis omitted)); see also Crespo, *Systemic Facts*, *supra* note 6, at 2059–65 (discussing the institutional advantages of courts with respect to systemic regulation of law enforcement actors).

184. See Covey, *supra* note 179, at 1269 (proposing a regime that “guarantee[s] defendants that they will not receive a sentence following a trial conviction that is more severe than any plea offer made to them, adjusted upward by [an] appropriate fixed discount”); Gazal-Ayal, *supra* note 34, at 2313 (proposing that courts “reject [a] plea bargain whenever the suggested sentence is significantly lower than the [anticipated] post-trial sentence”).

185. See Gazal-Ayal, *supra* note 34, at 2340 (acknowledging that “[c]harge bargains present a significant concern” for the proposed reform); see also Bar-Gill & Gazal Ayal, *supra* note 179, at 360 (observing that the screening effect associated with imposing restrictions on sentence recommendations “would disappear if the sentence could be manipulated through charge bargaining”); Bibas, *Outside the Shadow*, *supra* note 17, at 2536 (“As long as prosecutors can manipulate baseline charges, trying to cap discounts is hopeless.”). Covey contends that his proposed plea ceilings (which cap increases in post-trial sentences as opposed to decreases in post-plea sentences) would be “harder for prosecutors to evade through charge . . . bargaining,” Covey, *supra* note 179, at 1273, but his argument seems to require the absence or blanket invalidation of mandatory minimums. See *id.* at 1276 n.176.

186. “Amendment” refers to replacing one charge with another, whereas “dismissal” (sometimes called “*nolle prosequi*”) refers to eliminating a charge without offering a replacement.

FIGURE 17: CONCEPTUAL APPROACHES TO THE LAW OF CHARGE AMENDMENT AND DISMISSAL



In the least restrictive of these models (the leftmost above), the prosecutor's ability to swap or reduce her charges is simply unlimited, affording her maximal charge-sliding flexibility. At the other end of the spectrum, by contrast, amendments and dismissals of charges are simply prohibited once the charges are filed—an approach that would essentially prohibit charge bargaining altogether, much as Wright and Miller propose.¹⁸⁷ Between these poles, however, two intermediate models cabin charge sliding without eliminating it. The first gives judges discretion to reject proposed changes to the charging instrument, either by requiring judicial approval for amendment and dismissal in general or by expressly authorizing judges to reject plea agreements that entail charge reductions the judge deems inappropriate.¹⁸⁸ Alternatively, rather than relying solely on individual judges' discretion, the procedural regime could instead place firm caps on charge sliding by permitting amendment only if the initially charged offense is replaced by one only modestly less severe.¹⁸⁹

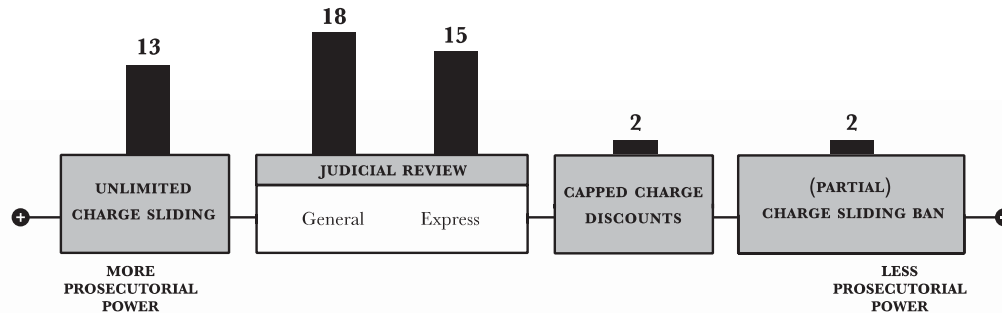
And once again, states resolve this procedural issue in different ways.

187. See Wright & Miller, *supra* note 10, at 49. But cf. *infra* note 211 (discussing “precharge bargaining”).

188. The latter option can serve as a nudge to judges, insofar as it attaches the power to oversee charge dismissals and amendments to the practice of charge bargaining itself. See, e.g., Fed. R. Crim. P. 11(c) (“[A] plea agreement may specify that an attorney for the government will . . . not bring, or will move to dismiss, other charges [T]he court may accept the agreement, reject it, or defer a decision until the court has reviewed the presentence report.”); see also *United States v. Walker*, No. 2:17-CR-00010, 2017 WL 2766452, at *1 (S.D.W. Va. June 26, 2017) (holding that in applying Rule 11, “[i]t is the court’s function to prevent the transfer of criminal adjudications from the public arena to the prosecutor’s office”); *id.* (rejecting a plea agreement that would have slid down from an indictment charging five counts of drug distribution and one count of being a felon in possession of a firearm to “a single count of possession with intent to distribute”).

189. The approach here is similar to Gazal-Ayal’s proposed cap on sentence discounts, see *supra* note 184, with the key difference that it regulates charge reductions directly.

FIGURE 18: VARIABILITY ACROSS STATES IN
THE LAW OF AMENDMENT AND DISMISSAL¹⁹⁰



Thus, while thirteen states afford prosecutors the full range of flexibility in charge sliding, the majority (thirty-three) require judicial approval before charges can be amended or dismissed—with fifteen of those expressly granting judges the authority to reject charge bargains that they deem inappropriate. Four other states, however, impose additional restraints: New York has essentially enacted a charge-bargaining variant of Gazal-Ayal’s proposal, barring prosecutors from dismissing charges unless they replace them with charges from a proximate tier of offense,¹⁹¹ while Michigan has adopted a similar regime for certain drug offenses.¹⁹² Meanwhile, California and Nevada impose bans on charge sliding for certain classes of offenses.¹⁹³ In each of these states, procedural law enacts regulatory constraints that scholars hoping to restrict charge sliding have proposed doing less directly.

B. *Verdict Sliding: The Law of Lesser Offenses*

Finally, while the law of amendment and dismissal can regulate charge sliding directly, the law of lesser offenses can do so indirectly, by removing some of prosecutors’ incentives to inflate charges at the outset of the case. To appreciate how this body of law might influence plea bargaining

190. For sources, see *infra* Appendix at Table E.

191. See, e.g., N.Y. Crim. Proc. Law § 220.10(5)(a)(iii) (McKinney 2007) (“Where the indictment charges one of the class B felonies . . . any plea of guilty . . . must be or must include at least a plea of guilty of a class D felony.”); *id.* § 220.10(5)(a)–(d) (prescribing additional tier requirements). Note that the New York model applies only to indictments, creating an opportunity for prosecutors to evade the restriction by engaging in charge bargaining before formal charges are filed. For further discussion of “precharge bargaining,” see *infra* note 211.

192. See *infra* note 338 (describing the Michigan regime).

193. Notably, because these bans apply only in certain cases, the regimes are more restrictive than New York’s capped regime in those instances when the ban applies, but less restrictive in those when it does not. See Cal. Penal Code § 1192.7 (2018) (banning plea bargaining for serious offenses and certain defendants); Nev. Rev. Stat. §§ 484C.430, 484C.440, 484C.470 (2015) (banning bargaining for DUI-related offenses).

dynamics, imagine (for the sake of simplicity) that our hypothetical armed robbery defendant is charged with only a single, inflated count of kidnapping. Assume, moreover, that if the case were to go to trial, the jury would recognize the kidnapping charge for the overreach that it is—but would be comfortable convicting the defendant on some less serious offense (for example, robbery). If kidnapping is the only charge on the table, the jury will be in a bind: It can choose to punish the prosecutor's overreach with an acquittal, or, reluctant to let someone whom it believes to be an armed robber go free, it can hold its nose and convict the defendant of kidnapping. By contrast, if at the end of the trial the jury is given the option to convict the defendant of robbery as a lesser offense (even though the only charge initially filed was kidnapping), then the pressure will be off: It can and presumably will slide down to the robbery verdict.

Here, however, is the wrinkle: When the prosecutor and the defendant face each other across the bargaining table—well in advance of any trial—neither will be in a good position to predict how a future jury might resolve the dilemma just described. For not only will they have no idea who the jurors are, they will also have only a dim sense of how the evidence will unfold in the heat of trial and of how the jury will react to it. Given this *ex ante* ambiguity, fixed rules either requiring the jury to consider lesser offenses or prohibiting them from doing so will be unlikely to have much effect on plea bargaining dynamics—because neither party will know whose ox will be gored in the end. Similarly, a rule that affords each party the right to put a lesser offense before the jury will not have much impact either, as both parties' willingness to risk going to trial will be increased by the knowledge that if he or she wants the jury to have access to the “soft-landing” of a lesser-offense verdict, that option will be available.¹⁹⁴ In other words, so long as juries are not systematically likely to break one way or the other when faced with the dilemma of inflated charges, symmetrical rules governing the availability of lesser-offense instructions will in most cases be a wash.¹⁹⁵

194. Cf. Catherine L. Carpenter, *The All-or-Nothing Doctrine in Criminal Cases: Independent Trial Strategy or Gamesmanship Gone Awry?*, 26 *Am. J. Crim. L.* 257, 277 (1999) (“Originally designed as a tool to aid the prosecution[,] . . . [lesser-offense instructions were] quickly recognized as a valuable aid for the defendant [insofar as they] afforded the jury a less drastic alternative than the choice between conviction of the offense charged or acquittal.”).

195. The subconstitutional law of lesser offenses is thick with different fixed *ex ante* rules that resolve issues ranging from what counts as a “lesser offense” in the first place, to the amount of evidence that must support such a charge before it can be put to the jury, to what order the jurors must follow when considering the various charges at hand, to whether or not the jury must be unanimous in its verdict. See *id.* at 265–72 (discussing different approaches to defining “lesser offense” and different evidentiary standards for issuing lesser-offense instructions); see also 6 LaFare et al., *supra* note 73, § 24.8(e), at 637–48 (same); cf. *Blueford v. Arkansas*, 566 U.S. 599, 619–20 (2012) (Sotomayor, J., dissenting) (discussing the indeterminate beneficiaries of acquittal-first rules). Taken together, these features of the subconstitutional law can substantially impact how easy or hard it will be for a jury to slide down from an overplayed hand in the context of any given case. But

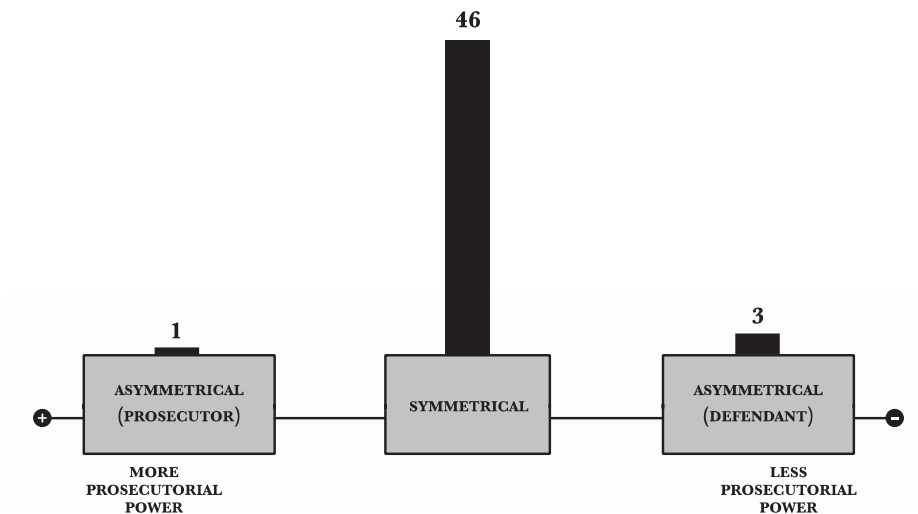
Asymmetrical rules, by contrast, can have a very different effect. For if the prosecutor knows at the outset that come the end of trial she *alone* will get to decide whether the jury is instructed on lesser offenses, then she will have every incentive to overcharge at the beginning of the case: She can choose her charges confident in the knowledge that the jury will have access to a “soft-landing” verdict only if she wants it to—and that it will face an all-or-nothing choice if she deems that to be most advantageous. Conversely, if the law lets the defendant unilaterally decide whether to give the jury a lesser-offense instruction, then the prosecutor will know up front that she will always confront the worst-case scenario at the end of the trial: She will be denied a soft landing whenever her adversary thinks she needs it, but he will be able to benefit from his own soft landing if he thinks that is in his best interest.

Given these dynamics, the law of lesser offenses can impact plea bargaining dynamics in three basic ways.

because the desirability of such sliding down will be hard for each party to predict (and thus to optimize) *ex ante*, it is difficult to assess the regulatory shadow that these rules might cast on the bargaining table in the typical case.

For a crisp illustration of this point, consider a recent procedural debate in Oregon, where, according to the *Wall Street Journal*, the Oregon District Attorney's Association promoted “a state constitutional amendment that could make it harder for [prosecutors] to win convictions.” Jacob Gershman, Oregon Prosecutors Push to Make Some Convictions Harder to Win, *Wall St. J.* (Jan. 12, 2018), <http://www.wsj.com/articles/oregon-prosecutors-push-to-make-some-convictions-harder-to-win-1515797099> (on file with the *Columbia Law Review*). In truth, the proposed amendment was more complicated than that description suggests, as the amendment would have repealed an existing “constitutional provision that makes it possible for criminal defendants to be found guilty or acquitted” by a nonunanimous jury. *Id.* In other words, the proposed amendment would have repealed a procedural rule that “helps to avoid a hung jury” and that thus “contributes to more cases being resolved *in both directions*,” including—in some hard-to-predict number of cases—by conviction. *Id.* (emphasis added) (internal quotation marks omitted) (quoting Josh Marquis, Clatsop County District Attorney). Given the ambiguous *ex ante* effects of the current rule (and of the proposed change), it is not surprising that “support for a repeal [wasn't] unanimous,” even “[a]mong Oregon's local prosecutors.” *Id.* Indeed, a spokesperson for the Oregon Criminal Defense Lawyers Association initially supported the proposed change, predicting that a move to do “away with non-unanimous juries would have gained widespread support from an array of stakeholders.” Katie Shepherd, Oregon District Attorneys Drop Plan to Scrap Non-Unanimous Jury Verdicts, *Willamette Week* (Jan. 30, 2018), <http://www.wweek.com/news/courts/2018/01/30/oregon-district-attorneys-drop-plan-to-scrap-non-unanimous-jury-verdicts> [<http://perma.cc/6M7J-39YW>]. In the end, however, the prosecutors tied their unanimous-jury proposal to a separate proposed reform that would have clearly benefited prosecutors over defendants: They pushed to repeal another state constitutional provision that currently affords “defendants the right to choose a bench trial in front of a judge over a jury trial *without the prosecution's consent*.” *Id.* (emphasis added). Once the symmetrical reform regarding jury unanimity was yoked to an asymmetrical reform uniquely benefiting prosecutors (insofar as it sought to repeal an asymmetrical existing rule uniquely benefiting defendants), “law professors, criminal justice reform advocates, and the Oregon Criminal Defense Lawyers Association” pulled their support, which in turn prompted the prosecutors to abandon both efforts. *Id.*

FIGURE 19: VARIABILITY ACROSS STATES IN THE
LAW OF PARTY CONTROL OVER LESSER-OFFENSE OPTION¹⁹⁶



Specifically, as the preceding discussion sets out, asymmetrical rules—occupying here the poles of the spectrum above—can afford the prosecutor (on the left) or the defendant (on the right) the ability to enter plea negotiations confident that, come the end of trial, she or he will have an advantage when it comes to determining the choice architecture for the jury’s deliberations. And in fact, a handful of states embrace asymmetrical rules in this domain: Texas makes it easier for prosecutors to obtain lesser-offense instructions while Colorado, New Jersey, and Utah give defendants greater control over how juries will evaluate the charges against them.¹⁹⁷ In these four states, this procedural asymmetry casts its shadow back

196. For sources, see *infra* note 197.

197. For Texas’s prosecution-favoring rule, see *Grey v. State*, 298 S.W.3d 644, 645 (Tex. Crim. App. 2009) (holding that when the defendant requests a lesser-offense instruction, “some evidence must exist in the record that would permit a jury rationally to find that . . . he is guilty *only* of the lesser offense” but that the prosecutor is not similarly restricted (emphasis added) (internal quotation marks omitted) (quoting *Rousseau v. State*, 855 S.W.2d 666, 673 (Tex. Crim. App. 1993))). For defendant-favoring rules, see *People v. Skinner*, 825 P.2d 1045, 1047 (Colo. App. 1991) (“[A] lesser non-included offense instruction may be given only if the defendant requests it or consents to it.”); *State v. Thomas*, 900 A.2d 797, 804 (N.J. 2006) (restricting “prosecution requests for included offense jury charges solely to those offenses that are lesser-included offenses within the meaning of [a specified statute],” while “[i]n contrast” permitting the defendant to obtain an instruction on any lesser charge for which “the evidence provides a rational basis”); *State v. Baker*, 671 P.2d 152, 156–58 (Utah 1983) (instructing that defense-requested lesser-offense instructions should be given whenever the evidence provides a rational basis for a verdict on the offense, while limiting prosecution-requested instructions to those with elements subsumed in the original charge). In addition to the asymmetrical rule favoring defendants in Colorado set out in *Skinner*, Colorado also has a statute that allows the

onto the plea bargaining table and thereby indirectly restricts or enhances—that is to say, regulates—prosecutorial power.

V. THE HYDRAULICS AND THE POLITICS OF REFORM

To this point, this Article has mapped a series of regulatory levers that reside within a long-overlooked body of subconstitutional law, demonstrating for each not only its potential to facilitate or restrict prosecutorial power but also its heterogeneous deployment across jurisdictions.¹⁹⁸ That

defendant to ask the court to make the prosecutor choose which charge to send to the jury whenever multiple charges “are supported by identical evidence.” Colo. Rev. Stat. § 18-1-408(3) (2017). Beyond these three states, Arizona gives defendants an asymmetrical right to force an all-or-none strategy in capital cases. See *State v. Rodriguez*, 921 P.2d 643, 652 (Ariz. 1996) (“If [the defendant] objects, the instruction should not be given.”); *State v. Krone*, 897 P.2d 621, 625 (Ariz. 1995) (“A defendant should not have a lesser included instruction forced upon him.”). But cf. *State v. Gipson*, 277 P.3d 189, 190–91 (Ariz. 2012) (rejecting such a right for noncapital defendants).

198. As explained *supra* note 22, this Article uses charge bargaining as its primary lens because charge bargaining is widely seen as the central instrument of prosecutorial power. Other such mechanisms exist, however, and the ways in which they are regulated by subconstitutional procedural law is ripe for future study. Two examples of such mechanisms include:

(1) *Sentence bargaining*, whereby the prosecutor negotiates with the defendant over the sentence that she will recommend to the judge if the defendant pleads guilty. While the judge’s involvement generally renders this practice less prone to abuse than charge bargaining, prosecutors can still obtain undue leverage when engaging in sentence bargaining by exploiting defendants’ uncertainty about judges’ future sentencing decisions. See, e.g., Bibas, *Outside the Shadow*, *supra* note 17, at 2533 (discussing challenges facing defendants when trying to anticipate how judges will sentence). Prosecutors may also exploit judges’ comparative lack of access to facts about the underlying criminal conduct, which can cause judges to defer too much to prosecutors’ sentencing recommendations. See, e.g., Berthoff v. United States, 140 F. Supp. 2d 50, 61–67 (D. Mass. 2001) (discussing challenges facing judges in imposing a sentence following a guilty plea). Subconstitutional procedural law, however, can help on both fronts. With respect to defendants’ uncertainty, procedural law might authorize judges to give defendants clarity by allowing judges to declare up front (that is, before plea negotiations conclude) the sentence they are likely to impose; alternatively, procedural law could permit the parties to submit an agreed-upon sentence to the judge for approval, an approach that would offer both clarity and judicial oversight at the same time. And in fact, states already experiment with both approaches. See Wright & Miller, *supra* note 10, at 89 (“To give defendants more complete and reliable information, a growing number of states encourage rather than forbid judicial involvement in plea discussions.”); see also Idaho R. Crim. P. 11(f)(3) (“If the court accepts the plea agreement, . . . it will be bound by the terms of the plea agreement in the final disposition of the case.”). As for undue judicial deference to prosecutorial sentencing recommendations, procedural law might require that detailed presentence reports be prepared by judicial personnel, see, e.g., Mich. Ct. R. 6.425, while perhaps also limiting—or even eliminating—the prosecutor’s ability to recommend a specific sentence, cf. Ariz. R. Crim. P. 26.10; Ind. Code §§ 35-38-1-3, -11 (2017); Me. R. Crim. P. 32(a)(2); Nev. Rev. Stat. § 176.015 (2015). For examples of how asymmetrical sentence-recommendation rules might operate in practice, see Bibas, *Outside the Shadow*, *supra* note 17, at 2518 (noting that “[i]n about one-third of all federal districts, federal prosecutors follow a policy of not recommending specific sentences for cooperating defendants”); Wright & Miller, *supra* note 10, at 80 (describing a practice in New Orleans whereby “most of the judges declared that they discourage prosecutors from expressing any opinion at all about the proper sentence”).

heterogeneity, in turn, suggests a genuine opportunity for regulatory experimentation, and with it the potential for reform. And yet, as the discussion also shows, assessing the practical impact these levers might hold is complicated, particularly if they are thrown haphazardly or in isolation—for as Professor Bowers observes, “[p]lea bargaining has something of a hydraulic quality” to it that affords it “a remarkable resistance to change.”¹⁹⁹ Predicting the ultimate impact of law reform in this arena thus requires not only excavating and mapping plea bargaining’s hidden law—the project undertaken thus far—but also situating that newly excavated regulatory framework within its surrounding sociolegal dynamics, and analyzing their interrelation.

That is a research agenda capacious beyond one article’s ability to satisfy. It is an agenda, however, that this project both invites and begins to equip scholars to undertake. The goal in this Part is thus to identify a core set of questions and hypotheses for future investigation. The first of these questions concerns the familiar relationship between law’s form and its function, asking how scholars might best draw on the insights offered here to better assess the impact that procedural reforms might have on plea bargaining practices on the ground. The second question then turns to plea bargaining’s political economy, asking which institutional actors are most empowered to promote or prevent these reforms, and how their motivations might factor into the analysis.

(2) As I have noted in prior work, another mechanism of prosecutorial power arises from the fact that prosecutors, as repeat players, often care about obtaining favorable legal precedents more than defendants do, and are thus in a position to engage in *claim bargaining*. See Crespo, *Regaining Perspective*, supra note 13, at 2030–38. A claim bargain occurs when prosecutors deploy their charge- or sentence-bargaining leverage not to secure a guilty plea but rather to get the defendant to forfeit a potentially viable legal claim—a power prosecutors can use to shape the underlying substantive and constitutional landscapes themselves. See id. at 2030–35. The prosecutor’s ability to deploy this leverage, however, depends in part on whether the defendant has any opportunity under the governing procedural law to separate the litigation of any such legal issues from negotiations over his factual guilt or innocence. See id. at 2033–34. And on that score, procedural law varies. For example, in some states suppression motions must be entertained in the course of the defendant’s preliminary hearing, while in others they are deferred until trial—by which point a plea agreement may require the defendant to waive the issue. Compare, e.g., 725 Ill. Comp. Stat. Ann. 5/109-3(e) (West 2006) (allowing for resolution of suppression issues at any preliminary hearing), Mich. Ct. R. 6.110(D)(2) (same), and Tenn. R. Crim. P. 5.1(a)(1) (same), with, e.g., Md. Rule 4-221 (“[E]vidence may not be excluded [at a preliminary hearing] on the ground that it was acquired by unlawful means.”). Similarly, the law governing conditional plea agreements can determine whether the defendant will have a chance to acknowledge his factual culpability (and thus plead guilty) while simultaneously preserving his opportunity to challenge and appeal potentially dispositive legal issues. See Crespo, *Regaining Perspective*, supra note 13, at 2037–42 (discussing ways to regulate “claim bargaining” by amending conditional-plea rules and appeal-waiver rules); cf. *Class v. United States*, 138 S. Ct. 798, 803–805 (2018) (establishing a default rule against reading a guilty plea as an appellate waiver of certain legal claims).

199. Josh Bowers, Response, *The Unusual Man in the Usual Place*, 157 U. Pa. L. Rev. PENumbra 260, 269 n.39 (2009), <http://www.pennlawreview.com/responses/index.php?id=72> (on file with the *Columbia Law Review*).

A. *The Hydraulics of Reform: Assessing Hidden Law's Potential Impact*

When it comes to assessing the potential impact of procedurally grounded reforms, it is useful to consider potential hydraulic counterpressures that are both internal and external to the legal apparatus itself.

1. *Internal Hydraulics: The Importance of Coordinated Regulatory Frameworks.* — With respect to counterpressures internal to law, the discussion above has identified multiple instances in which efforts to clamp down on one prosecutorial tactic (by reconfiguring one particular legal lever) could simply divert prosecutors to some other tactic that the law regulates less stringently.²⁰⁰ Of course, plea bargaining is not unique in this respect: Regulated actors routinely seek to evade their constraints by exploiting potential cracks in the regulatory regime, an endemic feature of regulation that simply underscores the need to avoid such cracks in the first place—by constructing a coordinated and up-to-date regulatory apparatus.

Fortunately for plea bargaining reformists, the analysis in the preceding Parts helps identify precisely such a coordinated set of reforms, insofar as it highlights how different procedural levers interact with one another and offers real-world examples of cutting-edge procedures already in place across the states. Drawing on that analysis, the following three hypothetical rules offer an example of a holistic regulatory approach that would constrain prosecutorial power by pulling on each of the various procedural levers discussed thus far:

Rule 1—Joinder, Preclusion, and Sentencing: For any given criminal event, episode, or scheme, the prosecution may file only one case against each defendant and, in that case, may charge only one offense, unless the prosecution alleges that the defendant caused serious bodily injury to more than one person, in which case the prosecution may join together one charge per each alleged victim.²⁰¹ In the event multiple charges yield multiple convictions in a single case, the associated penalties shall be served concurrently, unless the court orders otherwise.²⁰²

Rule 2—Screening and Dismissal: The defendant shall have a right to a preliminary hearing at which the prosecutor must demonstrate

200. See, e.g., *supra* notes 60–61 and accompanying text (discussing the hydraulic interrelationship of joinder and preclusion); *supra* note 84 and accompanying text (discussing the interrelationship of joinder and cumulative sentencing); *supra* notes 156–159 and accompanying text (discussing the interrelationship of factual and legal overreaching).

201. See *supra* sections II.A–.B; cf. Ark. Code Ann. § 16-85-404 (1987) (establishing a rule of nonjoinder, with an exception when “[t]he homicide of several persons [is allegedly] committed by the same person”), repealed by Arkansas Criminal Code Revision Commission’s Bill, Act 1994, § 503, 2005 Ark. Acts 6932, 7459–61; N.C. Gen. Stat. § 15A-926 (2017) (common-scheme preclusion); Tex. Penal Code § 3.04 (2017) (universal severance).

202. See *supra* section II.C; cf. Mo. Sup. Ct. R. 29.09 (default concurrent sentences).

via evidence admissible at trial that the charges filed are supported by probable cause.²⁰³ The court shall dismiss any charges that are unsupported by the evidence adduced at such hearing or that fail to state an offense as a matter of law.²⁰⁴ The court shall also have the authority to dismiss charges when the interests of justice otherwise so require.²⁰⁵ In the event of dismissal, no charges arising from the same alleged criminal event, episode, or scheme may subsequently be filed against the defendant, unless supported by newly discovered evidence that was not previously available to the prosecution.²⁰⁶

Rule 3—Amendment and Lesser Offenses: Prior to trial, charges may be amended or dismissed only by leave of court, and only when the proposed new charges carry sentencing consequences proportionate to the original charges.²⁰⁷ Once trial has commenced, the jury will not be instructed with respect to any charges other than those in the charging instrument, unless the defendant so requests.²⁰⁸

By yoking together a one-charge-per-crime rule, a robust set of screening mechanisms, and judicially managed restrictions on downward bargaining, this hypothetical suite of reforms would dampen prosecutors' plea bargaining leverage across multiple fronts, ultimately making prosecution (and with it imprisonment) a more costly affair. That is an unsurprising feature of a reform agenda that hopes to counter mass incarceration.²⁰⁹ And yet, the potentially deterrent or incapacitative upsides of incarceration will be diminished by these reforms as well. Reasonable minds thus can and should disagree about whether the particular reforms suggested above or others like them go too far—or not far enough.²¹⁰

203. See supra section III.A; cf. Tenn. R. Crim. P. 5(e)(4) (hearing as of right).

204. See supra sections III.A–B.

205. See supra section III.C; cf. Vt. R. Crim. P. 48(b)(2) (equitable dismissal).

206. See supra section III.A.3; cf. R.I. R. Crim. P. 5(c) (no refiling absent new evidence).

207. See supra section IV.A; cf. Ark. R. Crim. P. 25.3 (express charge-bargaining review); N.Y. Crim. Proc. Law § 220.10(5)(a)(iii) (McKinney 2014) (capped charge discounts).

208. See supra section IV.B; cf. *State v. Krone*, 897 P.2d 621, 625 (Ariz. 1995) (affording defendant the asymmetric option to obtain a lesser-offense instruction in capital cases); *McConnell v. State*, 110 N.W. 666, 667 (Neb. 1906) (affording defendant a similar option in all cases), overruled by *State v. Pribil*, 395 N.W.2d 543, 549 (Neb. 1986).

209. See supra notes 17–18 and accompanying text (discussing critiques of American incarceration rates).

210. Compare Randall Kennedy, *Race, Crime, and the Law* 305–06 (1st ed. 1997) (cautioning against criminal justice policies that are “inattentive to the aspirations, frustrations, and fears of law-abiding people compelled by circumstances to live in close proximity to [criminality, including] . . . [that] sector of the black law-abiding population that desires *more* rather than *less* prosecution and punishment for all types of crime”), with Allegra M. McLeod, *Prison Abolition and Grounded Justice*, 62 UCLA L. Rev. 1156, 1161 (2015) (offering a “sustained discussion of . . . a ‘prison abolitionist framework’ [that is] oriented toward substituting a constellation of other regulatory and social projects for criminal law enforcement”). Cf.

Indeed, that is the core normative question latent within plea bargaining's hidden regulatory framework that this project aims to surface, albeit not to resolve. But regardless of how policymakers ultimately strike that balance, the hypothetical rules set out above demonstrate that, simply as a matter of regulatory design, a holistic approach to plea bargaining reform—grounded in subconstitutional procedural law—is conceptually within reach.²¹¹

Herbert L. Packer, *The Limits of the Criminal Sanction* 153 (1968) (discussing inherent tension between liberty and security in the administration of criminal justice). One might expect the ideal answer to this policy question (or the range of acceptable answers) to vary from one locality to the next, given the often-sharp variation in empirical realities, political challenges, and normative approaches at play in criminal justice systems across the country. On the importance of both disaggregation and localism in criminal justice administration, see, for example, Lanni, *supra* note 28, at 387–90; Sara Mayeux, *The Idea of “the Criminal Justice System,”* *Am. J. Crim. L.* (forthcoming 2018) (manuscript at 6–9), <http://papers.ssrn.com/abstract=3050263> (on file with the *Columbia Law Review*); William J. Stuntz, *Unequal Justice*, 121 *Harv. L. Rev.* 1969, 1974 (2008).

211. For a discussion of the identity and the potential motivations of the policymakers responsible for this body of law, see *infra* section V.B. As for prosecutorial evasion of procedural restraints, two additional points merit further discussion:

First, there is the concern that prosecutors will bargain around the enhanced procedures themselves. Reforms creating a robust preliminary hearing, for example, might arguably be undercut if intrepid prosecutors use their charge-bargaining leverage to force defendants to waive the hearing itself. Cf. 4 LaFave et al., *supra* note 73, § 14.2(e), at 349 (noting “a prosecution practice of offering significant concessions to defendants who waive their preliminary hearings”); Gazal-Ayal, *supra* note 34, at 2331 (“Prosecutors can, and often do, condition exceedingly lenient bargains on a waiver of preliminary hearing or grand jury indictment.”). On closer inspection, however, such “procedure bargaining” emerges not so much as regulatory evasion but rather as regulation in action, because enhanced procedural protections ought to raise the “price” that prosecutors must pay for a guilty plea in the first place. Thus, a prosecutor who wants to shield her complaining witness from adversarial pretrial cross-examination will have to offer a defendant a markedly more favorable plea deal (with less prison time) in a jurisdiction where the defendant has a procedural right to force the complainant to testify at a preliminary hearing than in a jurisdiction where a police officer can supply all of the relevant evidence via hearsay—or in which preliminary hearings simply don't exist at all. Cf. *supra* section III.A.2 (discussing application of hearsay rules to preliminary hearings). Plea bargains, in other words, take place in the shadow of the procedural law, with each procedural lever constituting a stick in the defendant's bundle of rights that he can use as his own form of leverage to counterbalance the prosecutor's leverage at the bargaining table. Cf. Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 *Yale L.J.* 950, 966–73 (1979) (articulating a model of bargaining in which “legal rules . . . give[] each [party] certain bargaining chips”); John Rappaport, *Unbundling Criminal Trial Rights*, 82 *U. Chi. L. Rev.* 181, 181–82 (2015) (suggesting defendants might benefit from being able to “unbundle” their jury trial rights and trade them piecemeal . . . to reduce their sentencing exposure”).

More fundamentally, the prosecutor's ability to engage in procedure bargaining is itself determined by subconstitutional procedural law, which determines in the first instance which procedural rights are waivable, and thus negotiable. Cf. *State v. Ethington*, 592 P.2d 768, 769–70 (Ariz. 1979) (deeming the right to appeal nonnegotiable). That question, moreover, must be resolved one way or the other for virtually every regulatory lever discussed in this Article, which raises the possibility that certain forms of procedure bargaining might simply be banned outright. How such a ban might ultimately impact the underlying market for pleas will be context dependent, driven in part by prosecutorial resources. The implications—and the wisdom—of such a ban is thus open to debate. Cf. Crespo, *Regaining*

2. *External Hydraulics: The Importance of Studying Procedural Law's Potential Regulatory Impact.* — There remains, however, a separate question: To what extent might hydraulic forces external to law stymie even a carefully calibrated set of regulatory interventions? Few scholars of American criminal justice doubt that such extralegal forces—ranging from resource imbalances between prosecutors and defendants, to informal institutional norms and practices, to the complex power dynamics associated with race, gender, and class—produce sometimes-sizable gaps between the criminal law codified on the books and the criminal law implemented on the ground.²¹² The persistent challenge is sorting out

Perspective, *supra* note 13, at 2039 (proposing a procedural rule that would render certain constitutional claims nonwaivable); Rappaport, *supra*, at 196 (arguing against such inalienability, while acknowledging that “[s]ocial harms may . . . justify restraints on the alienation of [some procedural] rights”). The key point here, however, is that this policy debate is one for subconstitutional procedural law to resolve.

Second, apart from procedure bargaining, there is a related question about whether prosecutors might seek to evade procedural constraints by moving plea bargaining earlier in time, before the judicial process and its accompanying regulatory framework gets into gear. Cf. Gazal-Ayal, *supra* note 34, at 2342 (“The concern that prosecutors would find ways to continue to charge bargain on the sly always exists whether the practice is totally prohibited or only restricted and subjected to courts’ review.”); Wright & Miller, *supra* note 10, at 47 n.60 (“Any effort to ban or limit plea bargains must account for the possibility of precharge bargaining.”). Notably, however, this concern is considerably more pronounced in the federal system, in which plea bargaining can occur during the lengthy investigation periods that precede the commencement of formal proceedings. In state courts, by contrast, the vast majority of criminal cases are initiated by an arrest and thus come into contact with the formal judicial system either in conjunction with or soon after the prosecutor’s first engagement with the case. See *supra* note 107 (describing *Gerstein* hearings). Moreover, plea bargaining cannot occur until the defendant has an attorney. See *Padilla v. Kentucky*, 559 U.S. 356, 373–74 (2010) (holding that the “negotiation of a plea bargain is a critical phase of litigation for purposes of the Sixth Amendment right to effective assistance of counsel”). And because the vast majority of state court defendants are indigent, their attorneys are often appointed through the court system itself, which further confines the plea bargaining process to a point in time after the judicial process—and its attendant regulatory procedures—kicks into gear. Thus, the practical window within which precharge bargaining and any associated regulatory evasion might occur is substantially shorter in state court than in the federal system.

212. See, e.g., Issa Kohler-Hausmann, *Jumping Bunnies and Legal Rules: The Organizational Sociologist and the Legal Scholar Should Be Friends*, in *The New Criminal Justice Thinking* 246, 246 (Sharon Dolovich & Alexandra Natapoff eds., 2017) (“[T]he fact that law in action does not match law on the books is as predictable as the fact that a windup jumping bunny toy will jump after being wound up.”); Alexandra Natapoff, *The Penal Pyramid*, in *The New Criminal Justice Thinking*, *supra*, at 71, 71–73, 76, 88 (theorizing a “penal pyramid” in which the “explanatory power” of legal rules “ebbs and flows” vis-à-vis extralegal forces); *id.* at 72–73 (arguing that formal law “govern[s] practices and outcomes” in “the world of federal offenses, serious cases, and well-resourced defendants,” but may “hardly matter at all” in the resolution of “petty” misdemeanors, which “number in the thousands”). On the significance of resource imbalances between prosecutors and defense attorneys, see, for example, Crespo, *Regaining Perspective*, *supra* note 13, at 2019–20 (discussing the indigent-defense crisis); see also Bibas, *Outside the Shadow*, *supra* note 17, at 2539–40 (discussing consequences for plea bargaining). But cf. Natapoff, *supra*, at 75 (observing that “in some jurisdictions an elite public defense bar provides stellar representation to the very

how the formal law that creates and potentially regulates prosecutors' charge-bargaining leverage interacts with these broader forces to impact plea bargaining practices on the ground.²¹³

In a criminal justice system as atomized as ours, there can be no single answer to that question—only a plethora of very specific ones, each tied to the particular sociolegal facts of the jurisdiction at hand.²¹⁴ Surfacing the formal legal variation among those jurisdictions, however, is an important first step in examining how institutional actors within each one “make sense” of the governing legal rules and “decide what they mean in particular action settings.”²¹⁵ Indeed, to the quantitative empiricist, the discussion in the preceding Parts may offer some early grist for a study of the consequences that one should expect to follow from pulling one or another of the regulatory levers uncovered here, as each lever is essentially an independent variable of interest, paired with a hypothesis about how it ought to impact plea bargaining power and

poorest black defendants”). On the significance of informal norms and practices, see, for example, Mona Lynch, *Hard Bargains: The Coercive Power of Drug Laws in Federal Court* 2–8 (2016) [hereinafter Lynch, *Hard Bargains*]. As for race, class, and gender dynamics, the literature is simply too massive to cite.

213. As Professor Alexandra Natapoff observes, criminal procedure scholars may sometimes appear “to talk past each other,” insofar as “[s]ome work focuses on the rules” codified in formal legal texts, while other work focuses on “the power dynamics” driving criminal law’s administration. Natapoff, *supra* note 212, at 74. This project aims to straddle those two conversations: It joins those scholars who see plea bargaining’s pathology as arising from an overly broad substantive criminal law and an overly permissive constitutional law of criminal procedure, see *supra* notes 5–6, 27–30; it urges a broader conception of the legal frameworks that influence plea bargaining; and it ultimately aims to expand the field of potential law reform. In other words, while this Article raises the question of *which* law matters, it proceeds from a shared scholarly premise that law does indeed matter in this domain. But it also acknowledges the limitations of a law-centric account, particularly when it comes to state court adjudication of felony cases—the central focus of this Article—which Natapoff aptly describes as the criminal justice system’s “murky middle,” where a “combination of legal rules and social facts [together] generate outcomes that cannot be fully explained by either alone.” Natapoff, *supra* note 212, at 73. In short, the analysis here proceeds from the premise, articulated by Professor Issa Kohler-Hausmann, that “legal rules make out a set of formal directives outlining how things ought to operate, who has which powers, and what activities are authorized under what conditions,” which legal actors “must then operationalize . . . in order to do their work.” Kohler-Hausmann, *supra* note 212, at 252. In so doing, the project sets the stage for further study of how these newly uncovered legal frameworks “influence organizational and institutional dynamics within their respective fields of operation.” *Id.* at 260.

214. Cf. Mayeux, *supra* note 210 (manuscript at 3) (writing against “the premise that there is, in fact, some ‘system’” to be found amidst American criminal law’s “tens of thousands of functionally related though formally distinct entities of an almost impossibly wide-ranging set of sizes, scales, aims, and types”).

215. Kohler-Hausmann, *supra* note 212, at 266–67 (observing that an integrated view of the explanatory power held by both formal law and extralegal forces “generates a set of research questions about how legal rules are fundamentally always interpolated into the course of ongoing activity”).

criminal justice outcomes.²¹⁶ Consider, in this vein, the following two matrices, which collect some of the key variables that one might hope to explore:

TABLE 2: COMPOSITE PROCEDURAL LEVERS OF
INDIVIDUAL STATES, RANKED BY PLEA RATES²¹⁷

INDEPENDENT VARIABLES						DEPENDENT VARIABLES		
State	Piling On			Overreaching	Sliding Down	Plea Rate	Dismissal Rate	Trial Rate
	Joinder-Severance	Preclusion	Cumulative Sentencing	Pretrial Evidentiary Review	Amendment			
NY						86.9%	6.7%	4.1%
MO						83.9%	10.8%	1.5%
AZ						81.8%	15.8%	2.4%
CA						80.9%	16.7%	2.3%
KS						80.1%	14.4%	2.8%
TX						77.2%	20.4%	2.4%
IN						77.0%	17.9%	2.1%
VT						76.6%	20.4%	1.6%
FL						76.3%	8.3%	1.9%
AK						75.4%	20.5%	3.6%
WI						74.7%	19.7%	2.6%
NM						73.8%	23.9%	1.8%
PA (Phila.)						68.3%	14.2%	14.3%
NC						66.9%	31.5%	1.7%
HI						66.3%	15.0%	5.5%
KY						62.3%	33.7%	4.0%
IL						61.7%	33.8%	4.6%
TN						55.7%	39.3%	1.8%

Broadly Restrictive Regimes (Black); Nonrestrictive Regimes (White); Intermediate Regimes (Gray).

216. To be sure, myriad confounding variables are also at play. See *infra* note 222 and accompanying text. And accessing criminal justice data presents its own challenges. See Crespo, *Systemic Facts*, *supra* note 6, at 2108–10 (discussing the lack of data transparency in many criminal justice systems).

217. For sources, see *infra* Appendix.

TABLE 3: COMPOSITE PROCEDURAL LEVERS,
RANKED BY FELONY PLEAS PER 100 CRIMES²¹⁸

State	INDEPENDENT VARIABLES					DEPENDENT VARIABLES		
	Piling On			Overreaching	Sliding Down	Felony Pleas per 100 Crimes	Plea Rate	Dismissal Rate
	Joinder–Severance	Preclusion	Cumulative Sentencing	Pretrial Evidentiary Review	Amendment			
NC*						31	66.9%	31.5%
IN						27	77.0%	17.9%
NM						21	73.8%	23.9%
FL						20	76.3%	8.3%
MO						19	83.9%	10.8%
VT						18	76.6%	20.4%
AK						18	75.4%	20.5%
WI						18	74.7%	19.7%
CA						17	80.9%	16.7%
KY*						17	62.3%	33.7%
TN*						17	55.7%	39.3%
TX						16	77.2%	20.4%
AZ						15	81.8%	15.8%
KS						15	80.1%	14.4%
IL*						15	61.7%	33.8%
PA (Phila.)						14	68.3%	14.2%
NY						10	86.9%	6.7%
HI*						4	66.3%	15.0%

Broadly Restrictive Regimes (Black); Nonrestrictive Regimes (White); Intermediate Regimes (Gray). Asterisks in Table 3 mark the states with the five lowest plea rates in Table 2.

Taken together, these tables capture a promising degree of variability with respect to the essential data points of interest. Specifically, the left-hand portion of each table captures the key independent variables, showcasing genuine variability with respect to each state's *overarching* regulatory regime. It does so by presenting a composite sketch of each state's procedural law, with the various columns corresponding to the main

218. For sources, see *infra* Appendix.

procedural levers discussed throughout this Article.²¹⁹ If a state employs a nonrestrictive approach to regulating prosecutorial power with respect to that lever, the corresponding cell is shaded white; if it employs a broadly restrictive approach, the corresponding cell is shaded black; and if it employs one of the many intermediate regulatory approaches, the relevant cell is shaded gray.²²⁰ Thus, examining the tables row by row, one can readily distinguish between those states that have “gaps” in their regulatory structures (that is to say, white cells), those that do not have any such gaps, and those that employ cutting edge regulatory models (that is to say, black cells) with respect to one or more procedural levers. As for the dependent variables, each table reports an outcome variable of particular interest: In Table 2, the states are organized in descending order according to the percentage of felony cases in which prosecutors are able to secure guilty pleas, while in Table 3 they are ranked according to the number of felony guilty pleas prosecutors obtain per every one hundred reported crimes.²²¹

To be clear, these matrices simply collect some of the data that one would need to have on hand to begin examining the impact that specific procedural reforms might have on plea bargaining practices. Neither supports even preliminary correlational conclusions, given the lack of data concerning—among other things—the number of prosecutors employed in each jurisdiction, their budgetary constraints, the caseloads and budgetary constraints of defense attorneys, the types of crimes being prosecuted within each jurisdiction, and the magnitude of penalties

219. For ease of reference, the tables focus on the main levers discussed in Parts II–IV, though they could easily be expanded to include the full array. Note also that both tables are limited to states in which reliable plea bargaining data are available. For sources, see *infra* Appendix at Table F.

220. More specifically, in the joinder–severance column, the black cell (Texas) represents nonjoinder, whereas white cells represent similar-offense joinder (the second-least-restrictive regulatory model). See *supra* section II.A; *infra* Appendix at Table A. In the preclusion column, the black cell (New Mexico) represents mandatory similar-offense joinder, whereas white cells represent the constitutional floor. See *supra* section II.B; *infra* Appendix at Table A. In the cumulative-sentencing column, the black cell (Texas, again) represents mandatory concurrent sentencing, whereas the remaining gray cells employ various discretionary regimes. See *supra* section II.C; *infra* Appendix at Table B. In the pretrial-evidentiary-review column, black cells represent states with hearings as of right, whereas the white cell (Indiana) represents a no-review state. See *supra* section III.A; *infra* Appendix at Table C. Finally, in the amendment column, the black cell (New York) represents a capped-amendment model, whereas the white cells represent unlimited amendment. See *supra* section IV.A; *infra* Appendix at Table E; see also *supra* note 193 (discussing California’s partial-ban regime, which is coded here as an intermediate regime); *infra* note 332 (same).

221. The number of crimes per state is drawn from the FBI’s Uniform Crime Reports and reflects the combination of “violent crime” and “property crimes” reported in 2013. The plea, dismissal, and trial data for each state also come from 2013. For sources, see *infra* Appendix at Table F.

authorized by each state's substantive law.²²² And yet, the matrices suggest some of the promise of the research agenda that this Article invites. For one thing, they highlight a striking degree of variability with respect to both the independent and dependent variables: States differ not only in how they deploy individual procedural levers (as detailed in Parts II–IV above) but also with respect to their overarching regulatory approaches. Notably, some states (like Tennessee and Pennsylvania) employ more aggressive regulatory approaches across the board. At the same time, felony plea rates also vary considerably across states, with that variability driven by differences not in the rates of trials (which are fairly constant) but rather in the rates of dismissals—just as one would expect if procedural regulation is in fact driving resource-constrained prosecutors to screen their cases more aggressively.²²³ Moreover, while correlational inferences are undeniably premature, the charts suggest at least the facial plausibility of a causal relationship between plea bargaining's subconstitutional procedural law and plea bargaining practices on the ground: Those states with the fewest “gaps” in their regulatory regimes and with the most aggressive regulatory models (that is, the fewest white cells and

222. Beyond these shortfalls, it is also important to note that the matrices do not offer a direct apples-to-apples comparison with respect to the dependent variables, as the plea rates are drawn from each state's annual judicial performance reports, which do not use standardized units or frameworks for reporting their case-processing data. Perhaps most notably, diversionary agreements are not consistently reported in the same category across states; moreover, at least two states—Hawaii and Florida—report greater than ten percent of their felony cases as not being resolved by plea, trial, or dismissal. See *infra* Appendix at Table F (listing underlying sources and figures). Finally, as discussed in Parts II–IV, there is also considerable internal variability within even commonly coded procedural mechanisms, such that, for example, not all states with “indictment-bypass” regimes or “partially consecutive” sentencing regimes have truly comparable regulatory frameworks. See *supra* notes 112–113, 133–143 and accompanying text.

223. The variability in plea rates reported here may be surprising to those readers familiar with the commonly repeated, but ultimately incorrect, assertion that “[r]oughly 95% of felony cases in the federal and state courts are resolved by guilty pleas.” *Class v. United States*, 138 S. Ct. 798, 807 (2018) (Alito, J., dissenting). The problem with this statement is that it fails to account for the significant number of cases resolved by dismissal. Thus, while it is true that approximately “[n]inety-seven percent of federal *convictions* and ninety-four percent of state *convictions* are the result of guilty pleas,” *Lafler v. Cooper*, 566 U.S. 156, 170 (2012) (emphasis added), only 89% of federal *cases* are resolved by guilty pleas, with the remainder resolved primarily by dismissals, as occurs in 8% of cases (as compared to the 3% of cases resolved by trial). See U.S. Courts, Federal Judicial Caseload Statistics 2017 Tables, tbl.D-4, http://www.uscourts.gov/sites/default/files/data_tables/fjcs_d4_0331.2017.pdf [<http://perma.cc/8QM4-27GC>] (last visited Mar. 14, 2018). As for state courts, the data reported in Table 2 above show that plea bargaining rates and dismissal rates are quite variable, with plea rates ranging from 56% to 87% and dismissal rates ranging from 7% to 39%. See *supra* Table 2 (p. 1375). Of course, as noted in the text, omitting dismissals from any discussion of plea bargaining statistics substantially distorts the resulting account of how the criminal justice system is functioning: In a resource-constrained world, prosecutorial dismissals are a primary mechanism by which potentially beneficial case screening may take place, while judicial dismissals may be a sign of effective judicial oversight in action. See *supra* notes 60–61, 181 and accompanying text (discussing the relationship between procedural regulation, resource constraints, and prosecutorial screening of cases); *supra* Part III (discussing judicial screening and dismissals).

the most black cells) also seem to be those in which prosecutors have a comparatively harder time converting either cases or potential cases into pleas of guilt.²²⁴

In sum, juxtaposing the legal frameworks uncovered here with data about criminal justice outcomes across jurisdictions surfaces important questions about how subconstitutional procedural law impacts the administration of criminal justice. More importantly, it shows that answers to those questions are potentially within reach, particularly if scholars employ quantitative and qualitative analyses to study how these rules are incorporated into systemic plea bargaining practices on the ground.²²⁵ Indeed, such a scholarly agenda holds the potential not only to enhance our understanding of a heretofore underappreciated regulatory framework but also to identify the rules within that framework that reformers should most “hope to change if we wish to change the outcomes produced by those rules.”²²⁶

B. *The Politics of Reform: Plea Bargaining’s Hidden Lawmakers*

Plea bargaining’s hidden law, of course, did not write itself, which raises a final question that goes to the heart of plea bargaining’s underlying political economy: Who are the institutional actors—the lawmakers—most empowered to either facilitate or frustrate reforms in this arena, and what might be their motivations?

Here, too, this project offers an opportunity to revisit—and potentially to challenge—some of the dominant scholarly thinking about how our system of pleas is governed, including perhaps most notably the account so elegantly offered by the late Professor Bill Stuntz in *The Pathological Politics of Criminal Law*.²²⁷ On Stuntz’s telling, prosecutors and legislators are driven by natural institutional incentives into a pathological alliance that leads to ever-increasing criminalization and incarceration. Prosecutors, Stuntz tells us, want to convict criminals in the most efficient manner

224. The four states without white-cell gaps are Illinois, Pennsylvania, Tennessee, and Vermont. Of these, three are in the bottom third of states when ranked by plea rates, with plea rates ranging from 55.7% (Tennessee) to 68.3% (Philadelphia, Pennsylvania). Similarly, the six states with one or more cutting-edge black cells are New Mexico, New York, Pennsylvania, Tennessee, Texas, and Wisconsin. And all six are in the bottom half of states when ranked by either plea rate or pleas per crime.

225. For a powerful example of qualitative analysis in this domain, see Professor Mona Lynch’s recent comparative ethnography of plea bargaining practices in three different federal trial courts, Lynch, *Hard Bargains*, *supra* note 212. As for quantitative analyses, it bears noting that temporal variation may be particularly illuminating insofar as changes in plea rates (or the lack thereof) immediately surrounding changes to specific procedural levers could help isolate causal inferences. Cf. *supra* notes 55–56 (recounting Arkansas’s repeal of its nonjoinder rule in 2005, Texas’s adoption of such a rule in 1973, and Texas’s subsequent narrowing of that rule in 1997).

226. Kohler-Hausmann, *supra* note 212, at 267.

227. Stuntz, *Politics*, *supra* note 5.

possible.²²⁸ They therefore seek from legislators legal tools—such as expansive criminal codes—that will maximize their power and thereby make their jobs easier.²²⁹ And legislators, for their part, always oblige, because they know that they can be blamed only for withholding such tools—not for the prosecutors’ potential abuse of them down the road.²³⁰ Hence we are left with an overbroad, overly punitive, and strikingly redundant substantive criminal law, which functions, according to Stuntz, as little more than a massive reallocation of power to prosecutors—to detrimental systemic effect.²³¹

One might fairly expect Stuntz’s analysis of plea bargaining’s political economy to carry over to the previously hidden legal frameworks excavated here. After all, if legislators are institutionally predisposed to enact substantive criminal laws that maximize prosecutorial power, why would they turn around and enact procedural constraints that cabin the very power they have just conferred? Conversely, to take the reformer’s perspective, if the political conditions for reform are ripe, why focus on the technocratic procedural mechanisms detailed here, rather than simply pressing for decriminalization and less punitive statutory sentences?²³²

This project reveals a surprising answer to these important questions: The institutions responsible for crafting these two bodies of law are often different. For while substantive criminal law is indeed authored by legislatures, the procedural law uncovered here is most frequently authored by judges—acting not in their familiar capacity as adjudicators deciding cases, but rather in a largely unacknowledged, quasi-legislative role, as drafters of their states’ Rules of Criminal Procedure.²³³

To appreciate the extent to which this unique and underappreciated lawmaking modality dominates plea bargaining’s hidden legal landscape, return for a moment to our very first subconstitutional lever: the law of joinder–severance. Only now notice not only how that law is substantively arrayed but also from whence it comes.

228. *Id.* at 533–34.

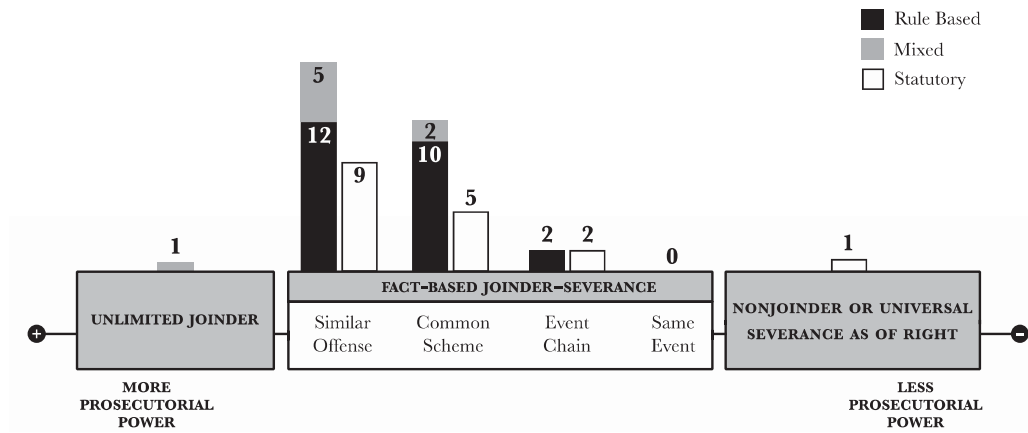
229. *Id.* at 537–38.

230. *Id.* at 537, 547–49.

231. *Id.* at 507–12; see also Barkow, *Institutional Design*, *supra* note 17, at 874–75; Barkow, *Separation of Powers*, *supra* note 11, at 1044–50.

232. There may sometimes be tactical advantages to pursuing procedural reforms over substantive ones, particularly if procedurally grounded reforms are less salient and thus less likely to provoke a “soft on crime” backlash. Note, however, that while such an answer sounds in what Stuntz would call criminal law’s “surface politics,” which may well be changing, it is ultimately unresponsive to what Stuntz calls the “deep politics” of institutional incentives, summarized in the text. See Stuntz, *Politics*, *supra* note 5, at 510–11; cf. *supra* note 18 (discussing politics of reform).

233. Cf. Crespo, *Systemic Facts*, *supra* note 6, at 2069, 2115 (urging “a conceptualization of criminal courts that is broad enough” to see the ways in which they function as multifaceted “institutions of government,” tasked with administering core aspects of the American criminal justice system through practices—and through powers—beyond those that one might traditionally call “judicial”).

FIGURE 20: THE LAW OF JOINDER AND SEVERANCE AS A LAW OF RULES²³⁴

In this revised version of our familiar chart, each substantive silo is further subdivided to show the institutional source of the legal frameworks at issue. Thus, states that construct their joinder–severance regimes through legislative enactments are depicted in white, states with exclusively rule-based regimes are depicted in black, and the small handful of states with mixed frameworks are depicted in gray.²³⁵ As the chart makes clear, court-made rules are a major component—indeed, the single largest component—of this body of law. And that pattern repeats itself with respect to most of the subconstitutional procedural levers outlined in this Article, as evidenced by the following tabular summary, which uses the same black and gray shading to depict procedural mechanisms authored wholly or partially by courts.

234. For a detailed census, see *infra* Appendix at Table A (classifying each state's joinder and severance provisions by lawmaking modality).

235. One state (South Carolina) constructs its joinder–severance regime entirely through its judicial case law and is thus not reflected in the figure. See *id.* Three additional states (Georgia, Kansas, and Oklahoma) are classified in the figure as statutory states even though portions of their substantive joinder–severance frameworks derive from judicial case law in the first instance. See *id.* In Table 4, *infra* (p. 1382–83), states that construct portions of their procedural regimes through judicial case law are reflected with an asterisk. As for those states classified as mixed, this category captures states in which rules of procedure and statutory provisions either combine or overlap to construct the governing joinder–severance regime.

TABLE 4: LAWMAKING MODALITY OF
SUBCONSTITUTIONAL PROCEDURAL LAW

STATE	Piling On		Overreaching	Sliding Down
	Joinder–Severance and Preclusion ²³⁶	Cumulative Sentencing ²³⁷	Pretrial Evidentiary Review ²³⁸	Amendment and Dismissal ²³⁹
AL		†		
AK			*	
AZ				
AR				
CA	*			
CO				
CT				
DE			*	
FL				*
GA	*		*	
HI			*	
ID			*	
IL			*	*
IN		*		
IA				
KS	*			
KY				
LA				
ME			*	
MD		†	*	
MA		†	*	
MI		*	*	
MN		†		
MS			*	
MO			*	
MT				
NE				
NV			*	

236. For sources, see *infra* Appendix at Table A.237. For sources, see *infra* Appendix at Table B.238. For sources, see *infra* Appendix at Table C.239. For sources, see *infra* Appendix at Table E.

NH		*	*	*
NJ		*	*	
NM		*		*
NY				
NC			*	
ND				
OH		*†		
OK	*			
OR		†	*	
PA				
RI		†		
SC	*	*	*	*
SD			*	
TN				
TX			*	
UT		†		
VT				
VA				
WA		†	*	
WV			*	
WI				*
WY			*	
FED		†	*	

Exclusively Judicial (Black); Exclusively Legislative (White); Combination (Gray). Cells marked with an asterisk represent regimes established at least in part via judicial case law, while cells marked with a dagger represent regimes established at least in part via sentencing commissions, which are treated here as judicial bodies.²⁴⁰ All other black and gray cells represent judicial lawmaking effectuated exclusively through rules of procedure.

Indeed, the power that state courts wield over plea bargaining's hidden regulatory framework is even more dramatic than this visual depiction suggests. For courts are not only the *primary* source of plea bargaining's quasi-legislative framework; in the majority of states, they are also the *supreme* legislative actor, empowered—quite unlike their federal counterparts—with authority to repeal or override legislatively enacted

240. While state sentencing commissions can be difficult to classify, all of the commissions referenced in the Table are (with one exception) connected to their corresponding state judiciaries to at least some degree, whether by formal structure or by membership. The exception is the Oregon Criminal Justice Commission, which is separate from its state's judiciary in both structure and membership and which is therefore not treated as a judicial body in the coding above. See Or. Rev. Stat. § 137.654 (2017).

statutes simply by promulgating a countervailing rule of procedure.²⁴¹ That is to say, the familiar legal hierarchy is upended when it comes to state

241. In twenty-three states, judicial rulemaking authority is either exclusive or supreme in the procedural domain. For an accounting of the relevant state authorities, ordered alphabetically by state, see *State ex rel. Collins v. Seidel*, 691 P.2d 678, 682 (Ariz. 1984) (“[W]hen a conflict arises . . . we must draw the line. The legislature cannot repeal the Rules of . . . Procedure made pursuant to the [court’s constitutional] power.”); *J.T. v. O’Rourke ex rel. Tenth Judicial Dist.*, 651 P.2d 407, 411 (Colo. 1982) (“[I]n cases of conflict, the court’s procedural rule would necessarily control [over] a procedural statute.”); *In re Samantha C.*, 847 A.2d 883, 900 (Conn. 2004) (“[T]he general assembly lacks the power to enact rules governing procedure that is exclusively within the power of the courts.”); Del. Code tit. 11, § 5122 (2018) (“Any inconsistency or conflict between any rule of court . . . and any . . . statute of this State, dealing with practice and procedure in criminal actions in the Superior Court, shall be resolved in favor of such rule of court.”); *State v. Currington*, 700 P.2d 942, 944 (Idaho 1985) (“[W]here conflict exists between statutory criminal provisions and the Idaho Criminal Rules in matters of procedure, the rules will prevail.”); *People v. Jackson*, 371 N.E.2d 602, 603 (Ill. 1977) (invalidating a statute that “encroache[d] upon the rule-making power of th[e] court”); *In re Pub. Law No. 305 & Pub. Law No. 309 of Indiana Acts of 1975*, 334 N.E.2d 659, 662 (Ind. 1975) (“The procedural rules and the cases decided by the courts take precedence over any statute enacted concerning a procedural matter.”); *State v. Mitchell*, 672 P.2d 1, 9 (Kan. 1983) (“[W]hen court rules and a statute conflict . . . the court’s constitutional mandate [to enact rules of procedure] must prevail.”); Ky. Rev. Stat. Ann. § 447.154 (LexisNexis 2010) (“No . . . statute shall be construed . . . to limit in any manner the power of the Court of Justice to make rules governing practice and procedure in the courts.”); *Eaton v. State*, 302 A.2d 588, 592 (Me. 1973) (“[T]here can be no doubt of [the Supreme Judicial Court’s] power to override any procedural statutes that might be in conflict with [its] rules”); *CAF Inv. Co. v. Saginaw Twp.*, 262 N.W.2d 863, 865 (Mich. 1972) (“Statutory rules of practice not in conflict with the court rules are effective until superseded by those rules.”); *State v. Johnson*, 514 N.W.2d 551, 553–54 (Minn. 1994) (“[T]he legislature ‘has no constitutional authority . . . to . . . enact statutes that will govern over court rules [of procedure] already in place.’” (alteration in original) (quoting Maynard E. Pirsig & Randall M. Tietjen, *Court Procedure and the Separation of Powers in Minnesota*, 15 Wm. Mitchell L. Rev. 141, 182 (1989))); *Trull v. State*, 811 So. 2d 243, 247 (Miss. Ct. App. 2000) (“[A]ny statute that conflicts with a rule established by the court is void.” (citing *State v. Blenden*, 748 So. 2d 77, 88–89 (Miss. 1999))); *Lindauer v. Allen*, 456 P.2d 851, 854 (Nev. 1969) (holding that when court rules and statutes conflict, the rule “must prevail”); *State v. Leonardis*, 375 A.2d 607, 614 (N.J. 1977) (interpreting the state constitution “to give the Court exclusive and plenary power over rules which are procedural in nature”); *Sw. Cmty. Health Servs. v. Smith*, 755 P.2d 40, 42 (N.M. 1988) (“[A]ny conflict between court rules and statutes that relate to procedure are today resolved by this Court in favor of the rules.”); N.D. Cent. Code § 27-02-09 (2016) (“[A]ll statutes relating to pleading, practice, and procedure in civil or criminal actions . . . have force and effect . . . unless and until amended or otherwise altered by rules promulgated by the supreme court.”); Ohio Const. art. IV, § 5(b) (“All laws in conflict with [court-issued] rules [of procedure] shall be of no further force or effect after such rules have taken effect.”); Pa. Const. art. V, § 10(c) (“All laws shall be suspended to the extent that they are inconsistent with [court-issued] rules [of procedure]”); 8 R.I. Gen. Laws § 8-6-2(a) (2012) (“[Court-issued] rules, when effective, shall supersede any statutory regulation in conflict therewith.”); Wash. Rev. Code § 2.04.200 (2017) (deeming “all laws in conflict” with “the rules of courts” to lack “force or effect”); *State ex rel. Quelch v. Daugherty*, 306 S.E.2d 233, 235 (W. Va. 1983) (“Legislative enactments which are not compatible with those prescribed by the judiciary or with its goals are unconstitutional violations of the separation of powers.”); *White v. Fisher*, 689 P.2d 102, 106 (Wyo. 1984) (“Matters dealing with procedure . . . are entirely within the province of this court[.] . . . [which

procedural law: Court-made rules trump legislature-enacted statutes more often than not. And as a result, the procedural frameworks that most directly regulate prosecutorial plea bargaining power reside not primarily in statutory codes, nor in the so-called “constitutional code of criminal procedure” drafted by the United States Supreme Court, but rather in an interlocking set of legal texts identical in form, substance, and function to legislation—save for the fact that they are enacted by state courts.²⁴²

has] constitutional authority . . . to issue rules of practice and procedure [that] . . . have stature in the hierarchy of law comparable to that of statutes enacted by the legislature.”).

In four additional states (Alaska, Arkansas, Florida, and Utah), judicial rulemaking authority supersedes ordinary statutes, but may be overruled by a two-thirds supermajority in the legislature. See *Leege v. Martin*, 379 P.2d 447, 450 (Alaska 1963) (“A two-thirds vote of . . . each house . . . is required . . . to change rules of practice and procedure[,] . . . a limitation [designed] to prevent . . . too easy intervention by the legislature . . . [into the] courts['] . . . primary authority and responsibility for regulating [the courts'] own affairs.”); Ark. Const. amend. 80, § 9 (“Any rules promulgated by the Supreme Court . . . may be annulled or amended . . . by a two-thirds (2/3) vote of the membership of each house of the General Assembly.”); *Johnson v. State*, 336 So. 2d 93, 95 (Fla. 1976) (“[R]ules of practice and procedure . . . may be repealed by a general law enacted by a two-thirds vote of the Legislature, [but] the power to initiate them rests in this Court.”); Utah Const. art. VIII, § 4 (“The Legislature may amend the Rules of Procedure . . . adopted by the Supreme Court upon a vote of two-thirds of all members of both houses . . .”).

Finally, in three additional states (Alabama, Maryland, and South Dakota), the legislature and the judiciary have co-equal lawmaking power, such that each can supersede or amend the other’s enactments. See Charles W. Gamble & Robert H. Fowlkes, *Comprehensive Principles Governing the Interaction Between the Alabama Rules of Evidence and Alabama Statutory Rules of Evidence: The Need for Judicial Initiative and Legislative Deference When Both Branches of Government Hold Constitutional Power to Adopt Rules of Evidence*, 56 Ala. L. Rev. 937, 956 (2005); *Hauver v. Dorsey*, 180 A.2d 475, 476 (Md. 1962) (“The Rules of this Court, of course, have the force of law, replacing inconsistent legislative provisions, subject only to the power of the Legislature to provide otherwise.”); *Smith v. State*, 248 A.2d 913, 914 n.1 (Md. Ct. Spec. App. 1969) (“[T]he rule prevails since it was adopted subsequent to the statute.”); *In re Amendment of S.D.C.L. 23A-20-26, Rule 97-40* (S.D. Mar. 17, 1997), <http://ujs.sd.gov/uploads/sc/rules/97-40.pdf> [<http://perma.cc/96JZ-6Q3M>] (amending a statute by court order).

For a now-somewhat-dated survey of state court rulemaking authority, see Donna J. Pugh, *Judicial Rulemaking: A Compendium* (1984).

242. Cf. Henry J. Friendly, *The Bill of Rights as a Code of Criminal Procedure*, 53 Calif. L. Rev. 929, 953–54 (1965) (criticizing the Supreme Court for “applying the Bill of Rights” as if it “were a detailed code of criminal procedure”). Notably, even in states that do not afford their judiciaries legislative supremacy with respect to the promulgation of procedural rules, state courts can influence the procedural frameworks analyzed in this Article through their authority to interpret their respective state constitutions. See, e.g., William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 Harv. L. Rev. 489, 500 (1977) (urging state courts to experiment with alternatives to federal Supreme Court precedent “even where the state and federal constitutions are similarly or identically phrased”); Goodwin Liu, *State Constitutions and the Protection of Individual Rights: A Reappraisal*, 92 N.Y.U. L. Rev. 1307, 1315 (2017) (“[S]tate courts, as the ultimate arbiters of state law, have the prerogative and duty to interpret their state constitutions *independently*.”). And yet, while such constitutional authority undoubtedly exists and is occasionally utilized to depart from the U.S. Supreme Court’s procedural baselines, state constitutional law is likely to be a more modest regulatory tool than the

And that, in turn, brings us back to Stuntz and the political economy of reform. For Stuntz's tale of an unholy alliance between prosecutors and legislators is not without its imagined heroes. "[J]udges . . . alone," he writes, "are likely to opt for narrower liability rules rather than broader ones," for they "are much more likely than legislators or prosecutors to take the interests of defendants into account."²⁴³ Indeed, it is his faith

subconstitutional procedural law examined here, because much like federal constitutional law it operates under a perceived "countermajoritarian burden" that tends to "push[] toward judicial deference to political decisions" made by legislatures and executives. Paul W. Kahn, *State Constitutionalism and the Problems of Fairness*, 30 Val. U. L. Rev. 459, 471 (1996). By contrast, when state courts regulate through their rulemaking authority, they are not interpreting some preexisting constitutional text—they are *authoring* the governing law in the first instance. Subconstitutional procedural law thus offers courts an opportunity to craft regulatory frameworks in a manner that is both more straightforward and less fraught than is true of state constitutional law—a lawmaking modality that, perhaps for these reasons, tends to be used only sparingly. See James A. Gardner, *The Failed Discourse of State Constitutionalism*, 90 Mich. L. Rev. 761, 781 (1992) (recounting "a general unwillingness among state supreme courts to engage in any kind of analysis of the state constitution at all").

243. Stuntz, *Politics*, *supra* note 5, at 510, 541; see also Barkow, *Institutional Design*, *supra* note 17, at 908 ("[G]reater judicial involvement would be the ideal corrective measure because it would interject a truly independent actor . . . less biased than a fellow prosecutor."); Bibas, *Outside the Shadow*, *supra* note 17, at 2542 (urging reforms "to give judges a more active role in reviewing plea bargaining"). See generally Crespo, *Systemic Facts*, *supra* note 6, at 2060 (recounting courts' "comparative institutional advantages . . . in the criminal justice arena").

Plea bargaining scholars sometimes suggest that judges are unlikely to champion plea bargaining reform because (the argument goes) declining plea rates will put increased pressure on judicial resources. See, e.g., Barkow, *Institutional Design*, *supra* note 17, at 908 ("[I]t is precisely because of a heavy workload that judges have been complicit in the development of plea bargaining in the first place."); Lynch, *Administrative System*, *supra* note 8, at 2142 ("The existing system . . . has arisen because the traditional adversarial model has become too expensive, contentious, and inefficient to be restored, at least given present . . . judicial resources."); Wright & Miller, *supra* note 10, at 39–40 ("The judge, facing major caseload pressures, has little incentive to inquire behind the parties' agreement. Indeed, sentencing judges tend to validate and encourage bargains . . ."). This account of judicial incentives, however, is in some tension with the understanding of resource constraints advanced by Professors Bibas and Beirsbach, discussed *supra* notes 60–61. On that account, decreased plea rates are unlikely to produce more trials, for the simple reason that water cannot be had from a stone: Trial courts and prosecutors already stretched to capacity simply do not have the bandwidth to increase trial rates. Rather, to the extent that procedural reforms make plea bargains harder to obtain, any increased docket pressure is likely to be relieved through more prosecutorial dismissals and declinations—a potentially salutary outcome insofar as mass incarceration is concerned and an outcome that judges concerned solely with their own resource expenditures may well view agnostically. More fundamentally, the notion that judges will automatically resist procedural changes that increase the amount of time they spend presiding over trials rests on a potentially flawed assumption about how judges think—namely, that they would prefer to spend their days as a "rubber stamp" for "plea decisions," Barkow, *Institutional Design*, *supra* note 17, at 872, rather than as the person in charge of a courtroom. See LaDoris H. Cordell, *The Joy of Judging*, 43 Harv. C.R.-C.L. L. Rev. 639, 643 (2008) (describing presiding over even simple trials as "the joy of judging"); cf. John R. Brown, *In Memoriam: Judge J. Skelly Wright*, 57 Geo. Wash. L. Rev. 1029, 1029 (1989) ("[T]he system

in judges that leads Stuntz to offer the prescription encountered throughout this Article: Criminal law, he says, should “be constitutionalized, with much more lawmaking power assigned to courts.”²⁴⁴

Judges on this telling are not merely heroes. They are heroes on the horizon—inclined to save the day, but denied the “constitutional warrant” to do so.²⁴⁵ By refocusing our view on *subconstitutional* law’s regulatory potential, however, this Article also reframes our understanding of the role that judges might play in plea bargaining’s political economy, for it reveals the extent to which state court judges *already* enjoy ample authority to regulate prosecutorial power. Indeed, they are frequently the primary and supreme enactors of the procedural codes through which such regulation takes place. And that realization, in turn, poses a test for Stuntz’s heroic account—because only one of two things can be true: Either the judges didn’t know that they already had this power, or they didn’t care.

The former possibility could well be true. After all, the nature of hidden law is that its significance can go unnoticed, even to those for whom it is most proximate. Indeed, the labor required to excavate these rules and to reconstitute them into a more clearly visible legal framework simply demonstrates how easily their regulatory upshot could go unnoticed, particularly if judges think of these rules primarily as governing what remains of our trial-based system of adjudication.²⁴⁶ But of course, if judges have by and large been unaware of the significance these provisions

demand[s] someone to be in charge, and what more appropriate party to take charge than the trial judge?”).

244. Stuntz, *Politics*, *supra* note 5, at 579.

245. *Id.* at 588; see also *id.* at 510 (contending that courts are inclined, but unable, to “separate [the] natural allies,” that is, prosecutors and legislators); *id.* at 588 (“Any increase in judicial power over criminal law means an increase in constitutional power over criminal law.”); *id.* at 600 (“In order to have better criminal law, we need . . . some lawmaker other than legislatures or prosecutors. The most plausible lawmakers are the courts. The most plausible vehicle is the federal constitution.”). There is an irony, of course, in the fact that the Supreme Court—the authoring institution of the constitutional criminal procedure against which Stuntz writes—is itself composed of judges. But as a tribunal of only nine, its approach to criminal justice issues is far more subject to the historical contingency of its membership than can be said in the aggregate of the many thousands of lower state court judges. *Cf.* Crespo, *Regaining Perspective*, *supra* note 13, at 1990–95 (discussing potential biases of Supreme Court justices).

246. The rules, after all, are not called the Rules of Plea Bargaining Procedure. *Cf.* Stephanos Bibas, *Designing Plea Bargaining from the Ground Up: Accuracy and Fairness Without Trials as Backstops*, 57 *Wm. & Mary L. Rev.* 1055, 1059 (2016) (“This plea-bargaining system was not planned, but jury-rigged. It grew up below the radar [Accordingly, the few legal] safeguards that exist [within it] are largely designed to ensure the centrality of jury trials.”); Ortman, *supra* note 1, at 516 (suggesting that “perhaps policymakers never reexamined the fit between charging standards and the plea bargaining regime,” such “that probable cause’s survival is nothing more (or less) than path dependency”); Roberts, *supra* note 172, at 330 (suggesting that equitable dismissal rules may be unfamiliar to academics and practitioners alike). Alternatively, judges might not be aware of how differently these rules are structured across jurisdictions—and thus may not appreciate the full scope of their regulatory potential.

hold, then any efforts to focus attention on these subconstitutional procedural levers should have the salutary effect of putting Stuntz's heroic vision to the test, prompting judges to consider corrective reforms that he mistakenly thought only constitutional authority could afford.

Or the alternative possibility could hold: Perhaps these levers will be brought to courts' attention and nothing will change. In that event, one might wonder whether judges, unlike academics, were aware of these regulatory tools all along—and simply not using them. Such a response would suggest that scholarly skeptics of Stuntz's heroic judicial account may have the better angle on the problem: Far from being the heroes on the horizon, our judges may be complicit enablers of plea bargaining's current pathology.²⁴⁷

Ultimately then, this Article might be seen not only as calling for further study of procedural law's potential practical effects but also as something of an experiment in its own right: By putting to rest the illusion, perhaps shared by judges themselves, that judges lack the tools to regulate prosecutorial power, it creates an opportunity to observe whether and how judges put these newly uncovered tools to use. Time, as they say, will tell.

CONCLUSION

Our criminal justice system is a system of pleas. Few who know it well think that it is working. For decades, some of the leading scholarly voices pressing for reform have operated under the assumption that plea bargaining operates “beyond the shadow of the law,” given the minimal role that substantive and constitutional criminal law play in regulating prosecutorial power. But this Article has shown that assumption to be misguided: Prosecutorial plea bargaining power may operate beyond the shadow of the law we know well, but it is comprehensively and inextricably intertwined with a separate, heretofore hidden body of law that not only regulates numerous aspects of plea bargaining's dynamics but in fact establishes

247. For examples of such skeptical accounts, see Benjamin Levin, *Values and Assumptions in Criminal Adjudication*, 129 Harv. L. Rev. Forum 379, 383 (2016), http://harvardlawreview.org/wp-content/uploads/2016/06/vol129_B-Levin.pdf [<http://perma.cc/ZR6Y-63RH>] (arguing that “normative preferences or priors [are] to blame for courts' shortcomings”); *id.* at 385 n.35 (citing Gregory L. Acquaviva & John D. Castiglione, *Judicial Diversity on State Supreme Courts*, 39 Seton Hall L. Rev. 1203, 1235 tbl.10 (2009), for the proposition “that judges with prosecutorial experience tend to outnumber those with criminal defense experience”); see also Meares, *supra* note 17, at 862 n.36 (noting federal judges “rarely will exercise the power” they enjoy under existing procedural rules to oversee charge-sliding amendments); cf. Crespo, *Systemic Facts*, *supra* note 6, at 2112–14 (observing that procedural tools designed to “facilitate systemic judicial review” “cannot replace the exercise of careful judgment when it comes to the core normative questions at the heart of the criminal justice system” or “force judges to abandon any preexisting views they might hold”). If the core problem is in fact lack of judicial will to improve systemic pathologies, the solution may be “to change the manner in which such judges are selected, or the judges selected through that process.” Crespo, *Systemic Facts*, *supra* note 6, at 2114.

the mechanisms of such power in the first instance. Far from some abstract or theoretical set of legal constructs, these procedural regimes exist in various different forms across our pluralist criminal justice system, which is peppered with examples highlighting the extent to which law reform is both possible and, in some instances, already underway. Whether reform centered on these newly excavated legal levers will actually help ameliorate plea bargaining's current pathologies is an open question, the answer to which is dependent in no small part on the willingness and ability of scholars, reformists, and policymakers alike to see what is before them—a hidden law of plea bargaining, awaiting their attention.

APPENDIX**

The tables that follow capture the subconstitutional (and in some instances the constitutional) procedural law of the states with respect to the various procedural levers discussed in this Article.²⁴⁸ The applicable law of the federal system is also reported at the end of each table for comparison.²⁴⁹ Together, the surveys offer a grounded account of the procedural heterogeneity employed across the country—a snapshot of plea bargaining’s hidden regulatory levers as they stood at the time the surveys generating this information were conducted. The tables do not, however, offer a comprehensive or fully nuanced almanac of the hundreds of procedural doctrines at issue. State law on these topics is complex, variable, and susceptible to change over time. Readers seeking more detailed portraits of any given state should therefore treat the wide-angle account offered here as an initial point of entry to further inquiry, not a final stop.

Throughout the tables that follow, legal authorities constituting the corresponding procedural law within each state are reported first, with the authorities organized into columns based on their lawmaking modality (that is to say, by whether they are court-made rules, legislature-enacted statutes, etc.). Each state’s procedural lever is then assigned a substantive code that taxonomizes the procedural landscape at issue. An overview of these codes is provided in an introductory note accompanying each table.

As a general rule, the surveys that produced these tables focused on the sources of authority that originated the procedural rules at issue; supplemental case law interpreting such provisions was examined for clarity as needed and is occasionally discussed in the notes that follow, but the survey of interpretive case law within each state was not exhaustive.

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248. Cf. *supra* note 242 (discussing state constitutional law).

249. Cf. *supra* note 21 (discussing federal law).

TABLE A: THE LAW OF JOINDER, SEVERANCE, AND PRECLUSION[†]

State	SOURCE OF AUTHORITY			PROCEDURAL REGIME				
	Court Rule	Statute	Case Law	Joinder	Severance	Joinder–Severance Composite	Scope of Preclusion	Mandatory vs. Permissive Joinder
AL	Ala. R. Crim. P. 13.3 (joinder); id. 13.4 (severance)	Ala. Code § 15-8-52 (LexisNexis 2015) (joinder)		Similar Offense	Equitable Failsafe	Similar Offense	Constitutional Floor	Permissive
AK	Alaska R. Crim. P. 8 (joinder); id. 14 (severance)			Similar Offense	Equitable Failsafe	Similar Offense	Constitutional Floor	Permissive
AZ	Ariz. R. Crim. P. 13.3 (joinder); id. 13.4 (severance)			Similar Offense	Similar Offense AOR	Common Scheme*	Constitutional Floor	Permissive
AR	Ark. R. Crim. P. 21.1 (joinder); id. 22.2 (severance); id. 21.3 (preclusion)			Similar Offense	Similar Offense AOR	Common Scheme*	Event Chain	Permissive
CA		Cal. Penal Code § 954 (2018) (joinder–severance)	Kellett v. Superior Court of Sacramento Cty., 409 P.2d 206, 210 (Cal. 1966) (preclusion)	Similar Offense	Equitable Failsafe	Similar Offense	Event Chain	Permissive

[†] This table supports Figures 4 and 8, *supra* (pp. 1321, 1331). The joinder column reports the outer limit of joinable offenses for each state. The severance column reports whether that joinder authority is constrained solely by an equitable failsafe or whether the state instead grants defendants a form of severance as of right (AOR). When severance as of right is available, the severance column reports the narrowest relationship among joined charges for which that right exists. Thus, “Similar Offense AOR” refers to a regime in which the defendant enjoys a right to sever any charges that are joined only by virtue of the fact that they are similar offenses or that lack even that nexus to one another; a defendant in such a regime has no right to sever offenses joined by virtue of their enjoying a closer factual nexus (for example, by virtue of their being part of the same event, the same chain of events, or a common scheme). The composite joinder–severance column describes the prosecutor’s joinder authority as constrained by the defendant’s right to sever if such a right exists—that is to say, it reports the scope of joinder authority that is not subject to a defendant’s severance veto. This column will match the joinder column in states with only equitable-failsafe severance; states in which severance as of right constrains joinder are marked in the composite column with an asterisk for ease of reference. Turning to preclusion, the penultimate column reports the scope of the “preclusive shadow” associated with an initial prosecution in the state. When the scope of preclusion matches the baseline provided by the federal Constitution’s Double Jeopardy Clause, the state is coded as adhering to the “constitutional floor,” which it may do either by expressly embracing the federal doctrine as a matter of state constitutional or subconstitutional law, or by leaving federal constitutional law to operate as the exclusive constraint. Finally, the last column describes the relationship between the state’s law of preclusion and its corresponding joinder–severance framework, a relationship that yields either mandatory- or permissive-joinder regimes. Note that, throughout this table, the line between “Same Event” and “Event Chain” models navigates ambiguous terrain, as states take varying and often hazy approaches to defining what constitutes a factual “event.” The decision to assign one of these codes over the other may thus at times suggest a degree of clarity not actually present in the underlying law of the jurisdiction.

CO	Colo. R. Crim. P. 8(a)(2) (joinder); id. 14 (severance); id. 8(a) (preclusion)	Colo. Rev. Stat. § 18-1-408(4) (2017) (severance); id. § 18-1-408(2) (preclusion)		Similar Offense	Equitable Failsafe	Similar Offense	Event Chain	Permissive
CT	Conn. R. Super. Ct. § 36-21 (joinder); id. § 41-18 (severance)	Conn. Gen. Stat. Ann. § 54-57 (West 2009) (joinder)		Unlimited	Equitable Failsafe	Unlimited/Similar Offense ²⁵⁰	Constitutional Floor	Permissive
DE	Del. Super. Ct. R. Crim. P. 8 (joinder); id. 14 (severance)			Similar Offense	Equitable Failsafe	Similar Offense	Constitutional Floor	Permissive
FL	Fla. R. Crim. P. 3.150(a) (joinder); id. 3.152 (severance); id. 3.151(c) (preclusion)			Event Chain	Equitable Failsafe	Event Chain	Event Chain	Mandatory
GA		Ga. Code Ann. § 16-1-7 (2011) (joinder–severance, preclusion)	Dingler v. State, 211 S.E.2d 752, 753 (Ga. 1975) (joinder)	Similar Offense	Similar Offense AOR	Common Scheme*	Event Chain ²⁵¹	Permissive
HI	Haw. R. Penal P. 8(a) (joinder); id. 14 (severance)	Haw. Rev. Stat. Ann. § 806-22 (LexisNexis 2016) (joinder); id. § 701-109(3) (severance)		Similar Offense	Equitable Failsafe	Similar Offense	Same Event ²⁵²	Permissive

250. The text of the cited statute limits joinder to “offenses of the same character.” Conn. Gen. Stat. Ann. § 54-57. The text of the first cited rule, however, establishes an unlimited-joinder regime: “Two or more offenses may be charged in the same information in a separate count for each offense for any defendant.” Conn. R. Super. Ct. § 36-21. According to the state supreme court, language like this that “omits reference to the requirement that the offenses joined be of the ‘same character’” creates an “extremely broad provision” under which determining “whether the offenses are of the ‘same character’ is no longer essential.” *State v. King*, 445 A.2d 901, 904 (Conn. 1982). Moreover, the court has made clear that if the rule and the statute conflict, the rule prevails. See *id.* (“[T]he general assembly lacks the power to enact rules governing procedure Therefore, we will measure the trial court’s decision on the motion for joinder against the [rule].”). For these reasons, Connecticut is classified as an unlimited-joinder regime in Figure 4, *supra* (p. 1321). It bears noting, however, that case law in the jurisdiction appears to have focused primarily on the relationship between the cited joinder statute and a separate joinder rule, which “governs the joinder of multiple informations for trial,” *State v. Payne*, 34 A.3d 370, 379 (Conn. 2012) (citing Conn. R. Super. Ct. § 41-19), rather than the rule cited here, which pertains to the number of charges that “may be charged in the same information,” Conn. R. Super. Ct. § 36-21. Indeed, in an opinion that does not mention Rule 36-21 at all, the state supreme court has held that the joinder statute “governs the circumstances under which [prosecutors] may join multiple charges in a single information,” and thus limits such power to offenses “of the ‘same character.’” *Payne*, 34 A.3d at 379–80 (quoting Conn. Gen. Stat. Ann. § 54-57). Suffice to say, however one might reconcile Connecticut’s various joinder provisions, the state embraces either an “extremely broad” unlimited-joinder regime, *King*, 445 A.2d at 904, or a slightly narrower similar-offense regime.

251. See *State v. Pruiett*, 751 S.E.2d 579, 582 (Ga. Ct. App. 2013) (interpreting “same conduct” in the preclusion statute as synonymous with “same transaction”).

252. See *State v. Keliiheleua*, 95 P.3d 605, 612 (Haw. 2004) (interpreting the statutory phrase “same episode” to refer to charges “so closely related in time, place and circumstances that a complete account of one charge cannot be related without referring to details of the other charge” (quoting *State v. Servantes*, 804 P.2d 1347, 1349 (Haw. 1991))).

ID	Idaho Crim. R. 8(a) (joinder); id. 14 (severance)	Idaho Code § 19-1432 (2017) (joinder)		Common Scheme ²⁵³	Equitable Failsafe	Common Scheme	Constitutional Floor	Permissive
IL		725 Ill. Comp. Stat. Ann. 5/111-4 (West 2006) (joinder); id. 5/114-8 (severance); 720 Ill. Comp. Stat. Ann. 5/3-3 (West 2016) (preclusion)		Event Chain	Equitable Failsafe	Event Chain	Same Event	Permissive
IN		Ind. Code § 35-34-1-9 (2017) (joinder); id. § 35-34-1-11 (severance); id. § 35-34-1-10 (preclusion); id. § 35-41-4-4 (preclusion)		Similar Offense	Similar Offense AOR	Common Scheme*	Common Scheme ²⁵⁴	Mandatory
IA	Iowa Ct. R. 2.6 (joinder–severance)			Common Scheme	Equitable Failsafe	Common Scheme	Constitutional Floor	Permissive
KS		Kan. Stat. Ann. § 22-3202 (2007) (joinder)	State v. Shaffer, 624 P.2d 440, 443 (Kan. 1981) (severance)	Similar Offense	Equitable Failsafe	Similar Offense	Constitutional Floor	Permissive
KY	Ky. R. Crim. P. 6.18 (joinder); id. 8.31 (severance)			Similar Offense	Equitable Failsafe	Similar Offense	Constitutional Floor	Permissive
LA		La. Code Crim. Proc. Ann. art. 493 (2017) (joinder); id. art. 495.1 (severance)		Similar Offense	Equitable Failsafe	Similar Offense	Constitutional Floor	Permissive
ME	Me. R. Unified Crim. P. 8 (joinder–severance)	Me. Rev. Stat. Ann. tit. 17-A, § 14 (2006) (preclusion)		Similar Offense	Equitable Failsafe	Similar Offense	Event Chain	Permissive
MD	Md. R. 4-203 (joinder); id. 4-253 (severance)			Similar Offense	Equitable Failsafe	Similar Offense	Constitutional Floor	Permissive
MA	Mass. R. Crim. P. 9 (joinder–severance)			Common Scheme	Equitable Failsafe	Common Scheme	Constitutional Floor	Permissive
MI	Mich. Ct. R. 6.120(a) (joinder); id. 6.120(b)–(c) (severance)			Unlimited	Similar Offense AOR	Common Scheme*	Constitutional Floor	Permissive

253. The statute allows for more permissive joinder than the rule, but *State v. Currington* indicates that when a rule and statute conflict on a procedural matter, the rule prevails. 700 P.2d 942, 944 (Idaho 1985).

254. The preclusion statute bars successive prosecutions “for an offense with which the defendant should have been charged in the former prosecution.” Ind. Code § 35-41-4-4. “The Indiana Supreme Court has held that the words ‘should have been charged’ . . . must be read in conjunction with Indiana’s joinder statute . . .” *Hahn v. State*, 67 N.E.3d 1071, 1082 (Ind. Ct. App. 2016). Accordingly, a prosecutor who attempts “to bring multiple prosecutions for a series of acts” that “are part of a single scheme or plan” does so “at [her] own peril,” as she may be barred from pursuing any second or subsequent prosecutions by the preclusion statute. *Id.* (internal quotation marks omitted) (quoting *Williams v. State*, 762 N.E.2d 1216, 1219 (Ind. 2002)); see also *id.* at 1082–83 (“To determine whether contemporaneous crimes are part of a single scheme or plan, we examine ‘whether they are connected by a distinctive nature, have a common *modus operandi*, and a common motive.’” (internal quotation marks omitted) (quoting *Williams*, 762 N.E.2d at 1220)).

MN	Minn. R. Crim. P. 17.03 (joinder-severance)	Minn. Stat. § 609.035 (2017) (preclusion)		Unlimited	Common Scheme AOR ²⁵⁵	Event Chain*	Same Event ²⁵⁶	Permissive
MS	Miss. R. Crim. P. 14.2 (joinder); id. 14.3 (severance)	Miss. Code Ann. § 99-7-2 (2015) (joinder)		Common Scheme	Equitable Failsafe	Common Scheme	Constitutional Floor	Permissive
MO	Mo. Sup. Ct. R. 23.05 (joinder); id. 24.07 (severance)	Mo. Rev. Stat. § 545.140 (2017) (joinder)		Similar Offense	Equitable Failsafe	Similar Offense	Constitutional Floor	Permissive
MT		Mont. Code Ann. § 46-11-404 (2017) (joinder); id. § 46-13-211 (severance); id. § 46-11-503 (preclusion)		Similar Offense	Equitable Failsafe	Similar Offense	Common Scheme ²⁵⁷	Permissive
NE		Neb. Rev. Stat. § 29-2002 (2016) (joinder-severance)		Similar Offense	Equitable Failsafe	Similar Offense	Constitutional Floor	Permissive
NV		Nev. Rev. Stat. § 173.115 (2015) (joinder); id. § 174.165 (severance)		Common Scheme	Equitable Failsafe	Common Scheme	Constitutional Floor	Permissive
NH	N.H. R. Crim. P. 20 (joinder-severance, preclusion)			Common Scheme ²⁵⁸	Equitable Failsafe	Common Scheme	Event Chain	Permissive
NJ	N.J. Ct. R. 3:7-6 (joinder); id. 3:15-2 (severance); id. 3:15-1 (preclusion)	N.J. Stat. Ann. § 2C:1-8 (West 2015) (preclusion)		Similar Offense	Equitable Failsafe	Similar Offense	Common Scheme ²⁵⁹	Permissive
NM	N.M. R. 5-203; 6-306; 7-306 (joinder-severance); id. 5-203 (preclusion)			Similar Offense	Equitable Failsafe	Similar Offense	Similar Offense	Mandatory

255. See *State v. Profit*, 591 N.W.2d 451, 458–60 (Minn. 1999) (interpreting the right to sever “charges [that] are not related” to apply when the offenses are “not part of a single behavioral incident or course of conduct”).

256. See *State v. Bakken*, 883 N.W.2d 264, 270 (Minn. 2016) (interpreting statutory-preclusion language to apply to offenses arising from “a single behavioral incident,” defined by “whether ‘the offenses occurred at substantially the same time and place,’ and . . . ‘[were] motivated by an effort to obtain a single criminal objective’” (first quoting *State v. Jones*, 848 N.W.2d 528, 533 (Minn. 2014); then quoting *State v. Bauer*, 792 N.W.2d 825, 828 (Minn. 2011))).

257. See *State v. Hocevar*, 7 P.3d 329, 351–52 (Mont. 2000) (interpreting statutory preclusion of offenses arising from the “same transaction” to apply broadly to any offenses sharing a common “criminal objective” (citing Mont. Code Ann. § 46–1–202(23))).

258. New Hampshire’s joinder rule directly incorporates an equitable failsafe more typically provided by the law of severance. See N.H. R. Crim. P. 20(a)(2) (permitting prosecutors to “move for joinder” while providing that the “judge shall join the charges . . . unless [she] determines that joinder is not in the best interests of justice”). As to the scope of the joinder rule, the state permits offenses to be charged together when they are part of the same “criminal episode,” part of a “common scheme,” or are otherwise “logically and factually connected in a manner that does not solely demonstrate that the accused has a propensity to engage in criminal conduct.” Id. 20(a)(1)(C).

259. See *State v. Williams*, 799 A.2d 470, 476 (N.J. 2002) (interpreting statutory preclusion of charges arising from the “same episode” to apply “even when the defendant’s actions occurred over several months and at different locations, [if] the events were connected as part of a larger scheme”).

NY		NY Crim. Proc. Law § 200.20 (McKinney 2007) (joinder–severance); NY Crim. Proc. Law § 40.40 (McKinney 2016) (preclusion)		Similar Offense	Equitable Failsafe ²⁶⁰	Similar Offense	Common Scheme ²⁶¹	Permissive
NC		N.C. Gen. Stat. § 15A-926 (2017) (joinder, preclusion); id. § 15A-927 (severance)		Common Scheme	Equitable Failsafe	Common Scheme	Common Scheme	Mandatory
ND	N.D. R. Crim. P. 8 (joinder); id. 14 (severance)			Similar Offense	Equitable Failsafe	Similar Offense	Constitutional Floor	Permissive
OH	Ohio R. Crim. P. 8 (joinder); id. 14 (severance)	Ohio Rev. Code Ann. § 2941.04 (West 2006) (joinder–severance)		Similar Offense	Equitable Failsafe	Similar Offense	Constitutional Floor	Permissive
OK		Okla. Stat. Ann. tit. 22, § 439 (West 2003) (severance)	Glass v. State, 701 P.2d 765, 768 (Okla. 1985) (joinder)	Event Chain	Equitable Failsafe	Event Chain	Constitutional Floor	Permissive
OR		Or. Rev. Stat. § 132.560 (2015) (joinder–severance); id. § 131.505 (preclusion); id. § 131.515 (preclusion)		Similar Offense	Equitable Failsafe	Similar Offense	Same Event	Permissive
PA	Pa. R. Crim. P. 563, 582 (joinder); id. 583 (severance)	18 Pa. Stat. and Cons. Stat. Ann. § 110 (West 2015) (preclusion)		Common Scheme ²⁶²	Equitable Failsafe	Common Scheme	Event Chain	Permissive
RI	R.I. Super. Ct. R. Crim. P. 8(a) (joinder); id. 14 (severance)			Similar Offense	Equitable Failsafe	Similar Offense	Constitutional Floor	Permissive
SC			State v. Simmons, 573 S.E.2d 856, 860–61 (S.C. Ct. App. 2002) (joinder–severance)	Event Chain	Equitable Failsafe	Event Chain	Constitutional Floor	Permissive
SD		S.D. Codified Laws § 23A-6-23 (2016) (joinder); id. § 23A-11-2 (severance)		Similar Offense	Equitable Failsafe	Similar Offense	Constitutional Floor	Permissive
TN	Tenn. R. Crim. P. 8 (joinder, preclusion); id. 14 (severance)			Similar Offense	Similar Offense AOR	Common Scheme*	Same Event ²⁶³	Permissive

260. New York’s equitable failsafe exists only when charges are joined as similar offenses.

261. Cf. NY Crim. Proc. Law § 40.20(2) (enumerating exceptions to the preclusion rule).

262. See *Commonwealth v. Larkins*, 449 A.2d 42, 44–45 (Pa. 1982) (interpreting Pennsylvania law to permit joinder of offenses occurring over a three-week period because each showed evidence of a common scheme).

263. See *State v. Johnson*, 342 S.W.3d 468, 475 (Tenn. 2011) (interpreting the rule precluding offenses arising from “same criminal episode” as a prior prosecution as covering offenses that “occur simultaneously or in close sequence and . . . in the same place or in closely situated places” such that “proof of one offense necessarily involves proof of the others”).

TX		Tex. Penal Code § 3.02 (2017) (joinder); id. § 3.04 (severance); Tex. Code Crim. Proc. art. 21.24 (2017) (joinder)		Similar Offense ²⁶⁴	Universal AOR ²⁶⁵	Nonjoinder*	Constitutional Floor	Permissive
UT		Utah Code Ann. § 77-8a-1 (LexisNexis 2012) (joinder-severance); id. § 76-1-402 to -403 (preclusion)		Common Scheme	Equitable Failsafe	Common Scheme	Same Event	Permissive
VT	Vt. R. Crim. P. 8 (joinder); id. 14 (severance); id. 13 (preclusion)			Similar Offense	Similar Offense AOR	Common Scheme*	Event Chain	Permissive
VA	Va. Sup. Ct. R. 3A:6 (joinder); id. 3A:10 (severance)			Common Scheme	Equitable Failsafe	Common Scheme	Constitutional Floor	Permissive
WA	Wash. Super. Ct. Crim. R. 4.3 (joinder); id. 4.4 (severance); id. 4.3.1 (preclusion)			Similar Offense	Equitable Failsafe	Similar Offense	Event Chain ²⁶⁶	Permissive
WV	W. Va. R. Crim. P. 8 (joinder); id. 14 (severance); id. 8 (preclusion)			Similar Offense	Equitable Failsafe	Similar Offense	Common Scheme	Permissive
WI		Wis. Stat. § 971.12 (2018) (joinder-severance)		Similar Offense	Equitable Failsafe	Similar Offense	Constitutional Floor	Permissive
WY	Wyo. R. Crim. P. 8 (joinder); id. 14 (severance)			Similar Offense	Equitable Failsafe	Similar Offense	Constitutional Floor	Permissive
FED	Fed. R. Crim. P. 8(a) (joinder); id. 14 (severance)			Similar Offense	Equitable Failsafe	Similar Offense	Constitutional Floor	Permissive

264. While Tex. Penal Code § 3.02 limits joinder to charges arising out of the same “criminal episode,” Tex. Penal Code § 3.01 defines “criminal episode” as “the commission of two or more offenses . . . [1] pursuant to the same transaction or pursuant to two or more transactions that are connected or constitute a common scheme or plan; or . . . [2] the repeated commission of the same or similar offenses.”

265. Cf. Tex. Penal Code § 3.03(b) (enumerating exceptions to the defendant’s right to sever); supra note 55 (discussing exceptions to Texas’s severance rule and its requirement that a defendant choose between whether to invoke the state’s severance rule or its concurrent-sentencing rule).

266. See *State v. Lee*, 939 P.2d 1223, 1226 (Wash. 1997) (en banc) (interpreting rule language precluding offenses arising from the “same conduct” as covering “offenses based upon the . . . same series of physical acts,” even if those acts “span a period of time and involve more than one place” (quoting Wash. Super. Ct. Crim. R. 4.3)).

TABLE B: THE LAW OF CUMULATIVE SENTENCING[‡]

State	SOURCE OF AUTHORITY				PROCEDURAL REGIME	
	Court Rule	Statute	Case Law	Sentencing Guidelines	Primary Sentencing Regime	Subsidiary Sentencing Regime
AL	Ala. R. Crim. P. 26.12	Ala. Code § 14-4-9 (LexisNexis 2015)		Presumptive and Voluntary Sentencing Standards Manual 26 (Ala. Sentencing Comm'n 2016) ²⁶⁷	Open-Ended Discretion (Default Consecutive)	Partially Mandatory Concurrent ²⁶⁸
AK		Alaska Stat. § 12.55.127 (2016)			Open-Ended Discretion	Partially Mandatory Consecutive
AZ	Ariz. R. Crim. P. 26.13	Ariz. Rev. Stat. Ann. §§ 13-708, 13-711, 13-1212, 13-1304, 13-2503 (2010)			Open-Ended Discretion (Default Consecutive)	Partially Mandatory Consecutive
AR		Ark. Code Ann. § 5-4-403 (2013)			Open-Ended Discretion (Default Concurrent)	Partially Mandatory Concurrent
CA	Cal. R. Ct. 4.406, 4.425	Cal. Penal Code §§ 667.6(d), 669, 1170.1, 1170.12, 1202.2 (2018)			Structured Discretion	Both ²⁶⁹

[‡] This table supports Figures 10 and 11, *supra* (pp. 1336, 1337). The “primary sentencing regime” column describes the generic framework governing cumulative sentencing within the state—that is to say, the sentencing regime that operates in the absence of specific provisions creating carve-outs to that generic approach. For a description of the substantive codes used to classify these generic frameworks, see *supra* notes 90–94 and accompanying text. Most states employ carve-out exceptions to their generic sentencing regimes. Accordingly, the “subsidiary sentencing regime” column reports whether carve-outs within the state impose mandatory consecutive sentences, mandatory concurrent sentences, or a combination of mandatory consecutive sentences in some instances and mandatory concurrent sentences in others (coded as “both”). In the rare instance in which a state does not employ carve-outs to its general regime, the cell in the subsidiary column is coded “n/a.” The subconstitutional law of merger, discussed *supra* note 97, is not surveyed here.

267. Presumptive and Voluntary Sentencing Standards Manual 26 (Ala. Sentencing Comm’n 2016), http://sentencingcommission.alacourt.gov/SentStandards/PresumptiveManual_2016.pdf [<http://perma.cc/97CH-9YG5>].

268. While the cited rule and statutory provisions create a default-consecutive sentencing regime, the Alabama sentencing guidelines impose a mandatory-concurrent regime. See *id.* at 26 (“The total or aggregate sentence for the sentencing event cannot exceed the sentence selected for the most serious offense.”); *id.* at 23 (“A sentencing event includes all convictions sentenced at the same time, whether included as counts in one case or in *multiple* cases . . .”). The guidelines, however, are “presumptive sentencing recommendations for non-violent offenses and voluntary sentencing recommendations for violent offenses,” *id.* at 16, and thus formally constrain the discretion otherwise granted by rule and statute in only a subset of cases. Cf. Ala. Code § 12-25-34.2(b) (LexisNexis 2012) (requiring adherence to presumptive sentences in the absence of aggravating or mitigating factors); Presumptive and Voluntary Sentencing Standards Manual, *supra* note 267, at 29–30.

269. California imposes a partial cap on consecutive sentences that effectively mandates partially concurrent sentences when the cap applies. See Cal. Penal Code § 1170.1 (limiting length of “subordinate” consecutive terms); *id.* § 1170.12(a)(1) (stating exception).

CO		Colo. Rev. Stat. §§ 18-1-408, 18-1.3-406, 18-3-402(5), 18-8-209, 18-8-212, 18-12-108 (2017)			Mandatory Concurrent	Partially Mandatory Consecutive
CT		Conn. Gen. Stat. Ann. §§ 53-396, 53a-37, 53a-59b (West 2012)			Open-Ended Discretion	Partially Mandatory Consecutive
DE		Del. Code Ann. tit. 11, § 3901 (2018)			Open-Ended Discretion ²⁷⁰	Partially Mandatory Consecutive
FL	Fla. R. Crim. P. 3.701(d)(2)–(3)	Fla. Stat. §§ 784.048, 921.16, 944.40, 944.48 (2017)			Open-Ended Discretion (Default Concurrent) ²⁷¹	Partially Mandatory Consecutive
GA		Ga. Code Ann. § 17-10-10 (2013); Ga. Code Ann. § 16-11-106 (2011)			Open-Ended Discretion (Default Concurrent)	Partially Mandatory Consecutive
HI		Haw. Rev. Stat. Ann. §§ 706-606, 706-668.5, 712-1240.5 (LexisNexis 2016)			Structured Discretion	Partially Mandatory Consecutive
ID		Idaho Code §§ 18-308, 18-915, 18-2505(1) (2017)			Open-Ended Discretion	Partially Mandatory Consecutive
IL		730 Ill. Comp. Stat. Ann. 5/5-8-4 (West 2007)			Open-Ended Discretion (Default Concurrent) ²⁷²	Both
IN		Ind. Code § 35-50-1-2(c)–(f) (2017)	Owens v. State, 916 N.E.2d 913, 917 (Ind. Ct. App. 2009)		Structured Discretion ²⁷³	Both
IA	Iowa Ct. R. 2.23	Iowa Code §§ 901.8, 908.10 (2018).			Open-Ended Discretion	Partially Mandatory Consecutive
KS		Kan. Stat. Ann. §§ 21-6606, 21-6819 (2016).			Open-Ended Discretion (Default Concurrent)	Both
KY	Ky. R. Crim. P. 11.04	Ky. Rev. Stat. Ann. §§ 532.110, 533.060 (LexisNexis 2014)			Open-Ended Discretion (Default Concurrent)	Both

270. From 1976 through 2014, Delaware had a mandatory-consecutive regime. See *Fountain v. State*, 139 A.3d 837, 840 (Del. 2016) (“In 1976, the Delaware legislature eliminated concurrent sentencing entirely . . .”); *id.* at 840–41 (discussing the 2014 statute that “restore[d] judicial discretion to permit the imposition of either concurrent or consecutive sentences” (emphasis omitted) (internal quotation marks omitted) (quoting H.B. 312 synopsis, 147th Gen. Assemb., Reg. Sess. (Del. 2014), <http://legis.delaware.gov/BillDetail?LegislationId=22829> [<http://perma.cc/MUK7896V>])).

271. Florida employs a default-concurrent regime for offenses charged in a single case and a default-consecutive regime for offenses charged in separate cases. See Fla. Stat. § 921.16.

272. The generic sentencing regime requires that “sentences shall run concurrently,” unless the sentencing judge determines “that consecutive sentences are required to protect the public” due to “the nature and circumstances of the offense and the history and character of the defendant.” 730 Ill. Comp. Stat. Ann. 5/5-8-4(a)–(c).

273. See *Sanquetti v. State*, 727 N.E.2d 437, 442 (Ind. 2000) (“Aggravating circumstances may include, but are not limited to, any of several statutorily enumerated factors.” (citing Ind. Code § 35-38-1-7.1)).

LA		La. Code Crim. Proc. Ann. art. 883 (2008)			Open-Ended Discretion (Default Concurrent) ²⁷⁴	n/a
ME	Me. R. Unified Crim. P. 35(d)	Me. Rev. Stat. Ann. tit. 17-A, § 1256 (2006)			Structured Discretion	Both
MD	Md. R. 4-351	Md. Code Ann., Corr. Servs. §§ 7-403, 9-201 (LexisNexis 2017); Md. Code Ann., Crim. Law §§ 4-204, 4-306, 5-608.1, 9-407 (LexisNexis 2017)		Md. Sentencing Guidelines Manual Ch. 9 (Md. State Comm'n on Criminal Sentencing Policy 2017) ²⁷⁵	Open-Ended Discretion (Default Concurrent) ²⁷⁶	Partially Mandatory Consecutive
MA		Mass. Ann. Laws ch. 90, § 24V (LexisNexis 2012)		Advisory Sentencing Guidelines 44–47 (Mass. Sentencing Comm'n 2017) ²⁷⁷	Open-Ended Discretion	Partially Mandatory Consecutive
MI		Mich. Comp. Laws Ann. § 768.7b (West 2000)	People v. Leal, 248 N.W.2d 252, 253 (Mich. Ct. App. 1976)		Mandatory Concurrent	Partially Mandatory Consecutive
MN		Minn. Stat. §§ 609.035(b)–(c), 609.15, 609.485, 609.2232 (2017)		Minn. Sentencing Guidelines and Commentary § 2F (Minn. Sentencing Guidelines Comm'n 2017) ²⁷⁸	Open-Ended Discretion (Default Concurrent)	Both
MS	Miss. R. Crim. P. 26.7	Miss. Code Ann. §§ 97-3-101, 97-44-19, 99-19-21 (2014)			Open-Ended Discretion (Default Concurrent)	Partially Mandatory Consecutive
MO	Mo. Sup. Ct. R. 29.09	Mo. Rev. Stat. § 558.026 (2012)			Open-Ended Discretion (Default Concurrent)	Partially Mandatory Consecutive
MT		Mont. Code Ann. §§ 46-18-221, 46-18-401, 46-18-502 (2017)			Open-Ended Discretion (Default Consecutive)	Partially Mandatory Consecutive
NE		Neb. Rev. Stat. §§ 28-105, 28-932, 28-1205, 29-2204 (2016)			Open-Ended Discretion	Partially Mandatory Consecutive
NV		Nev. Rev. Stat. §§ 176.035, 193.165 (2015)			Open-Ended Discretion (Default Concurrent)	Partially Mandatory Consecutive

274. Louisiana employs a default-concurrent regime for offenses based on the same transaction and a default-consecutive regime for offenses based on different transactions.

275. Md. Sentencing Guidelines Manual Ch. 9 (Md. State Comm'n on Criminal Sentencing Policy 2017), <http://www.msccsp.org/Files/Guidelines/MSGM/guidelinesmanual.pdf> [<http://perma.cc/J4FP-SP6R>].

276. While the Maryland Sentencing Guidelines impose a mandatory-concurrent regime, the guidelines themselves “are voluntary sentencing guidelines that a court need not follow.” Md. Code Ann., Crim. Proc. § 6-211 (LexisNexis 2016). Accordingly, this state has been coded as a “default-concurrent” regime.

277. Advisory Sentencing Guidelines 44–45 (Mass. Sentencing Comm'n 2017), <http://www.mass.gov/files/documents/2018/02/01/Advisory%20Sentencing%20Guidelines%2020180119.pdf> [<http://perma.cc/S3GS-WN4W>].

278. Minn. Sentencing Guidelines and Commentary § 2F (Minn. Sentencing Guidelines Comm'n 2017), <http://mn.gov/msgc-stat/documents/2017Guidelines/2017Guidelines.pdf> [<http://perma.cc/V8UX-DB2U>].

NH		N.H. Rev. Stat. Ann. §§ 263:94, 597:14-b, 642:8, 642:9, 651:2, 651:3 (2014)	Duquette v. Warden, 919 A.2d 767, 770–73 (N.H. 2007)		Open-Ended Discretion ²⁷⁹	Partially Mandatory Consecutive
NJ		N.J. Stat. Ann. §§ 2C:11-5.2(d), 2C:12-1.1, 2C:12-13, 2C:13-1, 2C:44-5 (West 2015)	State v. Miller, 13 A.3d 873, 884 (N.J. 2011)		Structured Discretion	Both
NM		N.M. Stat. Ann. § 31-18-21 (LexisNexis 2000)	State v. Lopez, 661 P.2d 890, 891 (N.M. Ct. App. 1983)		Open-Ended Discretion	Partially Mandatory Consecutive
NY		N.Y. Penal Law §§ 70.25, 70.30 (McKinney 2009)			Open-Ended Discretion (Default Concurrent)	Both
NC		N.C. Gen. Stat. §§ 14-7.12, 14-7.41(b), 15A-1340.15, 15A-1340.16E, 15A-1354(a), 15A-1354(b)(1) (2017)			Open-Ended Discretion (Default Concurrent)	Both
ND		N.D. Cent. Code § 12.1-32-11 (2012)			Open-Ended Discretion (Default Concurrent)	Partially Mandatory Concurrent
OH		Ohio Rev. Code Ann. §§ 2929.14 (C)(4), 2929.41 (West Supp. 2017)	State v. Comer, 793 N.E.2d 473, 477 (Ohio 2003)	Felony Sentencing Quick Reference Guide 4 (Ohio Criminal Sentencing Comm’n 2015) ²⁸⁰	Structured Discretion ²⁸¹	Both
OK		Okla. Stat. Ann. tit. 22, § 976 (1951)			Open-Ended Discretion	n/a
OR		Or. Rev. Stat. §§ 137.121, 137.123, 137.370 (2015)		Or. Admin. R. 213-012-0020 (2018)	Structured Discretion ²⁸²	Both

279. As noted in the cited opinion, New Hampshire had a statute in place until 1975 that required “all sentences to run concurrently except those of persons convicted of a felony either during imprisonment or an escape from imprisonment.” *Duquette*, 919 A.2d at 771–73 (holding that in repealing that statute, the legislature restored “the common law authority of judges to impose consecutive sentences”).

280. Felony Sentencing Quick Reference Guide 4 (Ohio Criminal Sentencing Comm’n 2015), <http://www.supremecourt.ohio.gov/Boards/Sentencing/resources/summaries/felonyQuickRef.pdf> [<http://perma.cc/7BYE-TN3S>].

281. Ohio requires that “a prison term, jail term, or sentence of imprisonment shall be served concurrently,” Ohio Rev. Code Ann. §2929.41(A), unless “the court finds that . . . consecutive service is necessary to protect the public from future crime or to punish the offender” after considering a series of enumerated factors, *id.* §2929.14(C)(4).

282. Oregon permits consecutive sentences to be imposed if certain statutory criteria are satisfied. See Or. Rev. Stat. § 137.123(5). If imposed, consecutive sentences are also subject to a cap that functions as a partial-concurrent-sentencing rule. See *id.* §137.121 (“[T]he maximum consecutive sentences which may be imposed . . . shall be as provided by rules of the Oregon Criminal Justice Commission.”); Or. Admin. R. 213-012-0020 (setting cap).

PA	Pa. R. Crim. P. 705	18 Pa. Stat. and Cons. Stat. Ann. § 3502 (West 2013); 42 Pa. Stat. and Cons. Stat. Ann. §§ 9711.1, 9721, 9765 (West 2013); 75 Pa. Stat. and Cons. Stat. Ann. § 3735 (West 2013)			Open-Ended Discretion	Both
RI		11 R.I. Gen. Laws § 11-47-3.2 (Supp. 2016); 11 R.I. Gen. Laws § 11-25-2 (2002); 12 id. § 12-19-5		1 R.I. Ct. R. Ann., Super. Ct. Sentencing Benchmarks: Using the Benchmarks § 7, at 684 (Lexis 2017)	Open-Ended Discretion	Partially Mandatory Consecutive
SC		S.C. Code Ann. § 16-15-395 (2015)	State v. Barton, 481 S.E.2d 439, 444 (S.C. Ct. App. 1997)		Open-Ended Discretion	Partially Mandatory Consecutive
SD		S.D. Codified Laws § 22-6-6.1 (2006)			Open-Ended Discretion ²⁸³	n/a
TN	Tenn. R. Crim. P. 32	Tenn. Code Ann. §§ 40-20-111, 40-35-115 (2014)			Structured Discretion	Partially Mandatory Consecutive
TX		Tex. Penal Code § 3.03 (2017); Tex. Code Crim. Proc. art. 42.08 (2017)			Mandatory Concurrent	Both
UT		Utah Code Ann. §§ 58-37-8, 76-3-401 (LexisNexis 2016)		Adult Sentencing & Release Guidelines 20 (Utah Sentencing Comm'n 2017) ²⁸⁴	Structured Discretion	Both
VT		Vt. Stat. Ann. tit. 13, §§ 1028, 1501, 5409, 7032 (2009)			Open-Ended Discretion	Partially Mandatory Consecutive
VA		Va. Code Ann. § 19.2-308 (2015); Va. Code Ann. §§ 18.2-53.1, 18.2-255.2, 18.2-308.1 (2014)			Open-Ended Discretion (Default Consecutive)	Partially Mandatory Consecutive

283. Sentences are by default consecutive if the defendant commits a crime while incarcerated. S.D. Codified Laws § 23A-27-36.1.

284. Adult Sentencing & Release Guidelines 20 (Utah Sentencing Comm'n 2017), <http://justice.utah.gov/Sentencing/Guidelines/Adult/2017%20Adult%20Sentencing%20and%20Release%20Guidelines.pdf> [<http://perma.cc/JMR8-2QX6>]. The Utah Sentencing Guidelines impose a unique hybrid regime that is simultaneously mandatory consecutive and mandatory concurrent. Specifically, “[i]f multiple convictions are ordered to run concurrently, the guidelines add 10% of the recommended length of stay of the shorter sentence to the full recommended length of the longer sentence.” *Id.* At the same time, “[i]f multiple convictions are ordered to run consecutively, the guidelines add 40% of the recommended length of stay of the shorter sentence to the full recommended length of the longer sentence.” *Id.* As the guidelines further explain, this means that a judge considering imposing two sentences at once, one for 84 months the other for 20, can either sentence the defendant to a “concurrent” term of 86 months or a “consecutive” term of 92 months. *Id.* Judges in Utah “are encouraged to sentence within the guidelines.” *Id.* at 12.

WA		Wash. Rev. Code §§ 9.92.080(2), 9.94A.535, 9.94A.589 (2017)		Washington State Adult Sentencing Guidelines Manual 30–32 (Wash. State Caseload Forecast Council 2016) ²⁸⁵	Structured Discretion	Partially Mandatory Consecutive
WV		W. Va. Code Ann. §§ 61-2-10b(f), 61- 11-21, 62-8-2(c) (LexisNexis 2014)			Open-Ended Discretion (Default Consecutive)	Partially Mandatory Consecutive
WI		Wis. Stat. §§ 973.10, 973.15 (2018)			Open-Ended Discretion	n/a
WY	Wyo. R. Crim. P. 32				Open-Ended Discretion	n/a
FED		18 U.S.C. §§ 924(c), 1028A, 2250, 3553(a), 3584 (2012)		U.S. Sentencing Guidelines Manual § 3D1.1–.5 (U.S. Sentencing Comm’n 2016) ²⁸⁶	Structured Discretion	Both

285. Washington State Adult Sentencing Guidelines Manual 30–32 (Wash. State Caseload Forecast Council 2016), http://www.dcwagov/PublicationSentencing/SentencingManual/Adult_Sentencing_Manual_2016.pdf [<http://perma.cc/V5ZW-8EHW>].

286. U.S. Sentencing Guidelines Manual § 3D1.1–.5 (U.S. Sentencing Comm’n 2016), <http://www.ussc.gov/sites/default/files/pdf/guidelines-manual/2016/GLMFull.pdf> [<http://perma.cc/8MDY-J87B>].

TABLE C: THE LAW OF PRETRIAL EVIDENTIARY REVIEW[§]

State	SOURCE OF AUTHORITY				PROCEDURAL REGIME
	Court Rule	Statute	Constitution	Case Law	
AL	Ala. R. Crim. P. 5.1(a) (hearing, bypass); id. 12.8 (papers review)	Ala. Code § 15-11-1 (LexisNexis 2015) (hearing, bypass)			Indictment Bypass with Papers Review
AK	Alaska R. Crim. P. 5(e) (bypass)			Nelson v. State, 628 P.2d 884, 890 (Alaska 1981) (papers review)	Indictment Bypass with Papers Review
AZ	Ariz. R. Crim. P. 5.1 & cmt. (bypass); id. 12.9(a) (papers review) ²⁸⁷	Ariz. Rev. Stat. Ann. § 13-3951 (2010) (hearing)	Ariz. Const. art. 2, § 30 (hearing)		Indictment Bypass
AR	Ark. R. Crim. P. 8.3(c) (hearing)	Ark. Code Ann. § 16-85-302 (2005) (hearing); id. §16-85-302 (bypass); id. § 16-85-706 (papers review) ²⁸⁸			No Review
CA		Cal. Penal Code § 859b (2018) (hearing); id. § 738 (bypass, papers review); id. §§ 939.71, 939.6(b), 995 (papers review)	Cal. Const. art. 1, §§ 14–14.1 (hearing, bypass)		Indictment Bypass with Papers Review
CO	Colo. R. Crim. P. 5(a) (4) (hearing); id. 7(c) (bypass)	Colo. Rev. Stat. § 16-5-301 (2017) (hearing, bypass); id. §§ 16-5-204(k), 16-5-205 (papers review)			Indictment Bypass with Papers Review

[§] This table supports Figure 14, *supra* (p. 1346). The law of pretrial evidentiary review is the most complicated body of procedural law addressed in this Article. In a number of states, a conglomeration of rules, statutes, constitutional provisions, and judicial opinions all come together to construct the governing regime. Accordingly, the table reports in its rightmost column the substantive code for each state's procedural framework, as those codes are described in section II.A. See *supra* text accompanying notes 109–124. The supporting authorities are then organized by lawmaking modality, with parenthetical codes describing which component of the regime the corresponding authority establishes. Provisions that pertain to the existence or nonexistence of a preliminary hearing are coded “hearing”; provisions that pertain to the existence or nonexistence of papers review are coded “papers review”; provisions that pertain to the existence or nonexistence of hearing bypass (that is, indictment bypass or information bypass) are coded “bypass.” Where a state authorizes both indictment bypass and information bypass, it is coded as the latter. See *supra* text accompanying notes 114–117 (explaining why prosecutors will generally elect to use information-bypass authority if it is available to them).

287. Rule 12.9(a) permits a defendant to “fil[e] a motion for a new finding of probable cause . . . [if] the defendant was denied a substantial procedural right.” Ariz. R. Crim. P. 12.9(a). However, if “a duly constituted grand jury returns an indictment valid on its face and a challenge is made to the kind of evidence considered by the grand jury in making its decision, [then] Rule 12.9(a) does not apply.” *State v. Superior Court*, 577 P.2d 743, 745 (Ariz. Ct. App. 1978) (citation omitted).

288. See also *Ware v. State*, 75 S.W.3d 165, 170 (Ark. 2002) (“Lack of probable cause is not a statutory ground for a motion to set aside an indictment or, by implication, to quash an information.”).

CT	Conn. Super. Ct. R. § 41-8(5) (papers review)	Conn. Gen. Stat. Ann. § 54-46a(a) (West 2017) (hearing); id. § 54-56 (papers review)	Conn. Const. art. I, § 8 (hearing)		Papers Review ²⁸⁹
DE	Del. Super. Ct. R. Crim. P. 5 (hearing, bypass)	Del. Code Ann. tit. 11, § 5308 (2018) (hearing)		Ellegood v. State, 782 A.2d 263, 2001 WL 770264, at *2 (Del. June 28, 2001) (unpublished table decision) (papers review) ²⁹⁰	Information Bypass
FL	Fla. R. Crim. P. 3.133(b) (hearing, bypass); id. 3.190(c)(4) (papers review) ²⁹¹				Information Bypass with Papers Review
GA	Ga. Super. Ct. Unif. R. 26.1–2; Ga. Magis. Ct. Unif. R. 25 (hearing, bypass)	Ga. Code Ann. § 17-7-23 (2013) (hearing)		State v. Middlebrooks, 222 S.E.2d 343, 345–46 (Ga. 1976) (bypass); Fitzgerald v. State, 304 S.E.2d 114, 116 (Ga. Ct. App. 1983) (papers review)	Indictment Bypass
HI	Haw. R. Penal P. 5(c) (hearing, bypass)	Haw. Rev. Stat. Ann. §§ 806-85 to -87 (LexisNexis 2016) (papers review)	Haw. Const. art. I, § 10 (hearing, bypass)	State v. Ontai, 929 P.2d 69, 76 (Haw. 1996) (papers review)	Indictment Bypass with Papers Review
ID	Idaho Crim. R. 5.1(a) (hearing, bypass)	Idaho Code §§ 19-804, 19-1308 (2017) (hearing) ²⁹²		State v. Brandstetter, 908 P.2d 578, 580 (Idaho Ct. App. 1995) (papers review)	Indictment Bypass with Papers Review
IL		725 Ill. Comp. Stat. Ann. 5/109-3.1(b), 5/111-2 (West 2006) (hearing, bypass)	Ill. Const. art. I, § 7 (hearing, bypass)	People v. Bragg, 467 N.E.2d 1004, 1008 (Ill. App. Ct. 1984) (papers review)	Indictment Bypass ²⁹³

289. Preliminary hearings are authorized only in cases in which the defendant is accused of a “crime punishable by death, life imprisonment without the possibility of release or life imprisonment.” Conn. Gen. Stat. Ann. § 54-46a; cf. *State v. Rollinson*, 526 A.2d 1283, 1286 (Conn. 1987) (explaining the “statute was enacted to implement the provisions of article XVII of the amendments to the Connecticut constitution, which substituted a probable cause hearing for the grand jury indictment formerly required before a person could be held to answer for a crime punishable by death or life imprisonment”). Papers review is available outside of the relatively narrow class of cases in which a preliminary hearing exists.

290. The cited case establishes that papers review is not available for an indictment. Delaware similarly does not appear to have any provision affording papers review for an information. Both an indictment and an information can bypass a preliminary hearing. See Del. Super. Ct. R. Crim. P. 5(d).

291. While papers review is available as a means to challenge an information, Florida courts may “never inquire into the character of the evidence that influenced a grand jury in finding [an] indictment.” *State v. Schroeder*, 112 So. 2d 257, 260 (Fla. 1959) (emphasis omitted) (quoting *Richardson v. State*, 130 So. 718, 720 (Fla. 1930)).

292. Idaho affords defendants a form of papers review of the preliminary hearing itself, insofar as it permits them to “challenge the sufficiency of evidence educed at the preliminary examination” by seeking review before a district court judge. Idaho Code § 19-815A.

293. A statutory provision permits an indictment to be challenged on the narrow ground that it “is based solely upon the testimony of an incompetent witness.” 725 Ill. Comp. Stat. Ann. 5/114-1(a)(9). However, case law makes clear that, notwithstanding that narrow form of papers review, “[a] defendant may not challenge an indictment on the grounds that it is not supported by adequate evidence.” *Bragg*, 467 N.E.2d at 1008.

IN		Ind. Code §§ 35-33-7-1, 35-33-7-2 (2017) (hearing); id. §35-34-1-4 (papers review)			No Review ²⁹⁴
IA	Iowa Ct. R. 2.2(4) (hearing, bypass); id. 2.5(4) (papers review)				Information Bypass with Papers Review
KS		Kan. Stat. Ann. § 22-2902(1) (2007) (hearing, bypass)			Indictment Bypass ²⁹⁵
KY	Ky. R. Crim. P. 3.07 (hearing, bypass); id. 5.10 (papers review)				Indictment Bypass
LA		La. Code Crim. Proc. Ann. art. 292, 296 (2003) (hearing, bypass); id. art. 532 (papers review)	La. Const. art. I, § 14 (hearing, bypass)		Indictment Bypass
ME				State v. Rizzo, 704 A.2d 339, 342 (Me. 1997) (papers review)	No Review ²⁹⁶
MD	Md. R. 4-221(c) (1) (hearing, bypass)	Md. Code Ann., Crim. Proc. §§ 4-102, 4-103(c) (1) (LexisNexis 2008) (hearing, bypass)		State v. Taylor, 810 A.2d 964, 981 (Md. 2002) (papers review)	Indictment Bypass ²⁹⁷
MA	Mass. R. Crim. P. 3(e)–(f) (hearing, bypass); id. 4(c) & cmt. (papers review)	Mass. Ann. Laws ch. 276, § 38 (LexisNexis 2010) (hearing); id. ch. 263, § 4A (bypass)		Commonwealth v. Capone, 659 N.E.2d 1196, 1198–99 (Mass. App. Ct. 1996) (papers review)	Indictment Bypass with Papers Review
MI	Mich. R. Crim. P. 6.110, 6.112(B) (hearing, bypass)	Mich. Comp. Laws Ann. § 766.1 (West 2000) (hearing)		People v. Auto. Serv. Councils of Mich., Inc., No. 492, 1980 WL 4690, at *20 (Mich. Dist. Sept. 5, 1980), aff'd, 333 N.W.2d 352 (Mich. Ct. App. 1983) (papers review)	Indictment Bypass with Papers Review ²⁹⁸
MN	Minn. R. Crim. P. 11.04 & cmt.; id. 18.06 (papers review)				Papers Review ²⁹⁹
MS	Miss. R. Crim. P. 6.1(a) (1) (hearing, bypass)			State v. Matthews, 218 So. 2d 743, 744 (Miss. 1969) (papers review)	Indictment Bypass

294. See also *Schutz v. State*, 413 N.E.2d 913, 916 (Ind. 1981) (“We have long held that an indictment or information may not be questioned on the ground of insufficient evidence. The sufficiency of the evidence is decided at trial.”).

295. Note that in misdemeanor cases, “a prosecution may be begun by filing an information . . . only after the judge has determined from the information . . . or from other evidence that there is probable cause to believe both that a crime has been committed and that the defendant has committed it.” Kan. Stat. Ann. § 22-2303(1).

296. Maine repealed its statutory provisions providing for preliminary hearings in 1965. See Act Effective Dec. 1, 1965, 1965 Me. Laws 455.

297. A Maryland statute purports to allow a preliminary hearing to be held at the court’s discretion, see Md. Code Ann., Crim. Proc. § 4-103(c)(2), but a countervailing rule does not allow such discretion and takes priority. See *Marshall v. State*, 420 A.2d 1266, 1269 (Md. Ct. Spec. App. 1980), rev’d on other grounds, 434 A.2d 555 (Md. 1981).

298. See also Mich. Comp. Laws Ann. § 767.42 (“An information shall not be filed against any person for a felony until such person has had a preliminary examination therefor . . .”).

299. See *State v. Florence*, 239 N.W.2d 892, 902 (Minn. 1976) (discussing papers review); *State v. Eibensteiner*, 690 N.W.2d 140, 150–52 (Minn. Ct. App. 2004) (same).

MO	Mo. Sup. Ct. R. 22.09 (hearing)	Mo. Rev. Stat. § 544.250 (2017) (hearing)	Mo. Const. art. I, § 17 (hearing)	State v. Green, 305 S.W.2d 863, 868 (Mo. 1957) (bypass); State v. Burkhart, 615 S.W.2d 565, 568 (Mo. Ct. App. 1981) (papers review)	Indictment Bypass
MT		Mont. Code. Ann. § 46-10-105 (2017) (hearing, bypass); id. §§ 46-11-201, 46-11-203 (papers review)	Mont. Const. art. 2, § 20 (hearing)		Information Bypass with Papers Review ³⁰⁰
NE		Neb. Rev. Stat. §§ 29-504, 29-1607 (2016) (hearing, bypass); id. § 29-1418 (grand jury papers review)			Hearing as of Right with Papers Review ³⁰¹
NV		Nev. Rev. Stat. §§ 171.186, 171.202 (2015) (hearing)		Cairns v. Sheriff, 508 P.2d 1015, 1017 (Nev. 1973) (bypass); Sheriff v. Miley, 663 P.2d 343, 344 (Nev. 1983) (papers review)	Indictment Bypass with Papers Review ³⁰²
NH	N.H. R. Crim. P. 6(a) (hearing, bypass)	N.H. Rev. Stat. Ann. § 592-B:7 (2015) (hearing, bypass)		State v. Williams, 708 A.2d 55, 57 (N.H. 1998) (papers review)	Indictment Bypass
NJ	N.J. Ct. R. 3:4-3(a) (hearing, bypass)		N.J. Const. art. I, ¶ 8 (hearing, bypass)	State v. Hogan, 676 A.2d 533, 543 (N.J. 1996) (papers review)	Indictment Bypass
NM	N.M. R. 6-202(a), (f) (hearing, bypass)	N.M. Stat. Ann. § 31-6-11 (A) (LexisNexis 2000) (papers review)	N.M. Const. art. II, § 14 (hearing, bypass)		Indictment Bypass
NY		N.Y. Crim. Proc. Law § 180.10(2) (McKinney 2007) (hearing, bypass); id. §§ 210.20(b), 210.30 (papers review)	N.Y. Const. art. 1, § 6 (hearing)		Indictment Bypass with Papers Review
NC		N.C. Gen. Stat. § 15A-606 (2017) (hearing); id. § 15A-955 (papers review)		State v. Lester, 240 S.E.2d 391, 395 (1978) (bypass)	Indictment Bypass

300. Montana also permits bypass by indictment. See Mont. Code. Ann. 46-11-101.

301. See *supra* note 132 (discussing Nebraska provisions in detail); see also Neb. Rev. Stat. § 29-1607 (“No information shall be filed against any person for any offense until such person shall have had a preliminary examination therefor . . .”).

302. See also Nev. Rev. Stat. § 173.035(1) (providing that “[a]n information may be filed against any person for any offense when the person . . . [h]as had a preliminary examination”).

ND	N.D. R. Crim. P. 5(c) (hearing)				Hearing as of Right ³⁰³
OH	Ohio R. Crim. P. 5(A)(4), (B)(1) (hearing, bypass); id. 12(c)(2), 48 cmt. (papers review)	Ohio Rev. Code Ann. § 2937.02 (West 2006) (hearing); id. § 2937.04 (papers review)			Indictment Bypass
OK		Okla. Stat. Ann. tit. 22, §§ 253, 258, 524 (West 2003) (hearing, bypass); id. § 504.1 (papers review)	Okla. Const. art. II, § 17 (hearing)		Hearing as of Right with Papers Review ³⁰⁴
OR		Or. Rev. Stat. § 135.070(2) (2015) (hearing); id. § 135.510 (papers review)	Or. Const. art. VII (amended), § 5 (hearing)	State v. Marsh, 888 P.2d 580, 582 (Or. Ct. App. 1995) (bypass)	Indictment Bypass
PA	Pa. R. Crim. P. 540(F)(2), 541 (hearing); id. 556, 556.2 & cmt. (bypass); id. 556.4(b)(1)(B) (papers review)				Hearing as of Right with Papers Review ³⁰⁵

303. The North Dakota Supreme Court has suggested that, “[i]n effect, a preliminary examination is in lieu of the grand jury proceedings and indictment,” language that suggests an indictment-bypass regime. *Dickinson Newspapers, Inc. v. Jorgensen*, 338 N.W.2d 72, 75 (N.D. 1983). The same opinion, however, states that “[t]he provisions for preliminary examination (hearing) . . . contained in Rules 5(c) and 5.1 of the North Dakota Rules of Criminal Procedure . . . basically provide that a person charged with a felony has a right to a preliminary examination” *Id.* Additional authority supports the hearing-as-of-right classification. See N.D. R. Crim. P. 5(c) (“If the offense charged is a felony, the defendant has the right to a preliminary hearing.”); Nick Thornton, *What Happens in a Criminal Case?*, Fremstad Law (Nov. 26, 2014), [http://www.fremstadlaw.com/criminal-case/\[http://perma.cc/2HDK-74NW\]](http://www.fremstadlaw.com/criminal-case/[http://perma.cc/2HDK-74NW]) (“In a felony case, the defendant has the right to a preliminary hearing.”). But cf. *State v. Nordquist*, 309 N.W.2d 109, 116 (N.D. 1981) (conducting papers review of an indictment without mention of a preliminary hearing).

304. See *Stone v. Hope*, 488 P.2d 616, 618–19 (Okla. Crim. App. 1971) (“Under our criminal procedure after the filing of an Information . . . the accused is entitled to a preliminary examination Prosecution by Indictment likewise entitles [the] accused to a preliminary hearing.”); see also *State v. Delso*, 298 P.3d 1192, 1193–94 (Okla. Crim. App. 2013) (“[A] defendant [can] file a motion to quash for insufficient evidence in felony cases after preliminary hearing [if he can] establish . . . that there is insufficient evidence to prove any one of the necessary elements of the offense for which the defendant is charged.” (citing Okla. Stat. tit. 22, § 504.1(A))).

305. See *supra* note 132 (discussing narrow exceptions to hearing as of right and supplemental papers review). In addition to the exceptions noted earlier, “the court may grant leave to the Commonwealth to file an information with the court without a preliminary hearing when the district attorney certifies that a preliminary hearing cannot be held for good cause shown.” *Commonwealth v. Cassidy*, 620 A.2d 9, 11 (Pa. Super. Ct. 1993); see also Pa. R. Crim. P. 565.

RI	R.I. Dist. Ct. R. Crim. P. 5(c) (hearing); R.I. Super. Ct. R. Crim. P. 9.1 (papers review)	12 R.I. Gen. Laws § 12-10-5 (2002) (hearing); id. § 12-12-1.7 (papers review)			Information Bypass with Papers Review ³⁰⁶
SC	S.C. R. Crim. P. 2(a)–(b) (hearing, bypass)	S.C. Code Ann. § 17-23-160 (2014) (hearing); id. § 22-5-320 (2007) (hearing)		State v. Williams, 210 S.E.2d 298, 301 (S.C. 1974) (papers review)	Indictment Bypass
SD	S.D. R. Crim. P. 5(c) (hearing)	S.D. Codified Laws § 23A-4-3 (2016) (hearing, bypass)		State v. Carothers, 724 N.W.2d 610, 616 (S.D. 2006) (papers review)	Indictment Bypass
TN	Tenn. R. Crim. P. 5(e) (hearing, bypass)				Hearing as of Right
TX		Tex. Code Crim. Proc. art. 16.01 (2017) (hearing, bypass)		DeLeon v. State, 758 S.W.2d 621, 623 (Tex. Ct. App. 1988) (bypass); Dean v. State, 749 S.W.2d 80, 81 (Tex. Crim. App. 1988) (en banc) (papers review)	Indictment Bypass ³⁰⁷
UT	Utah R. Crim. P. 7(e) (hearing, bypass)		Utah Const. art. 1, § 13 (hearing, bypass)		Indictment Bypass with Papers Review ³⁰⁸
VT	Vt. R. Crim. P. 5(c) (hearing, bypass); id. 12(d) & reporter's note to 2008 amendment (papers review)				Indictment Bypass with Papers Review

306. The rule and statutory provisions cited indicate that a preliminary hearing is available only when a defendant is facing a criminal complaint in the district court, not when the defendant is facing an information, which prosecutors are free to file as the initial charging document. It would appear from this framework that preliminary hearings exist at the prosecutor's option, as in a typical information-bypass regime, and thus rarely occur. And indeed, an overview of the Rhode Island criminal process published by the state's judiciary makes no reference to preliminary hearings (though it does reference bail hearings for defendants held without bail). See Criminal Case Process, R.I. Judiciary, <http://www.courts.ri.gov/Courts/SuperiorCourt/PDF/CriminalCaseProcess.pdf> [<http://perma.cc/ZZ69-J666>] (last visited April 4, 2018). A defendant may, however, move to dismiss an information, in which case the court "is required to examine the information and any attached exhibits to determine whether the state has satisfied its burden to establish probable cause." *State v. Fritz*, 801 A.2d 679, 682 (R.I. 2002) (citing *State v. Aponte*, 649 A.2d 219, 222 (R.I. 1994) (per curiam)).

307. While the statutory text suggests that the defendant "shall have the right to an examining trial before indictment," Tex. Code Crim. Proc. art. 16.01, Texas courts have consistently held that "[t]he return of an indictment terminates the right to an examining trial." *DeLeon*, 758 S.W.2d at 623.

308. Utah's indictment-bypass system is unusual: Before a case can be presented to a grand jury, a panel of five judges must first review the evidence; it is those judges who then authorize the case to proceed to a grand jury. See Utah Code Ann. § 77-10a-2(2)(a) (LexisNexis 2012) ("If the panel finds good cause to believe a grand jury is necessary, the panel shall make its findings in writing and may order a grand jury to be summoned."). If a grand jury is then empanelled and returns an indictment, the indictment bypasses a preliminary hearing. Thus, Utah allows what is essentially an ex parte preliminary hearing (before the panel of five judges) to bypass a more traditional preliminary hearing—and in so doing affords a more robust check on the indictment process than the somewhat imprecise "papers review" code in the table reflects. Cf. id. § 77-10a-2(1)(c) (noting that "[h]earsay evidence may be presented at the [five-judge] hearings only under the same provisions and limitations that apply to preliminary hearings"). Alternatively, if the prosecutor does not want to go before the five-judge panel, she may instead file charges via information, in which case the defendant will have a right to a preliminary hearing. See Utah Const. art. 1, §13.

VA		Va. Code Ann. §§ 19.2-183, 19.2-218 (2015) (hearing, bypass)			Indictment Bypass ³⁰⁹
WA	Wash. Crim. R. Cts. Limited Jurisdiction 3.2.1(g) (hearing, bypass)			State v. Knapstad, 729 P.2d 48, 51 (Wash. 1986) (papers review)	Information Bypass with Papers Review
WV	W. Va. R. Crim. P. 5(c), 7 (hearing, bypass)	W. Va. Code Ann. § 62-1-8 (LexisNexis 2014) (hearing)		State v. Davis, 782 S.E.2d 423, 428 (W. Va. 2015) (bypass); Barker v. Fox, 238 S.E.2d 235, 236 (W. Va. 1977) (papers review)	Indictment Bypass ³¹⁰
WI		Wis. Stat. §§ 968.06, 970.02(1)(c), 971.02(1) (2018) (hearing, bypass)			Hearing as of Right
WY	Wyo. R. Crim. P. 5.1(a) (hearing, bypass)	Wyo. Stat. Ann. § 7-8-105 (2017) (hearing, bypass)		Hennigan v. State, 746 P.2d 360, 371 (Wyo. 1987) (papers review)	Indictment Bypass
FED	Fed. R. Crim. P. 5.1 (hearing, bypass)			Costello v. United States, 350 U.S. 359, 363 (1956) (papers review)	Indictment Bypass

309. See *Seibert v. Commonwealth*, 467 S.E.2d 838, 840 (Va. Ct. App. 1996) (carving out a significant exception to statutory text that would otherwise seem to grant preliminary hearings as of right); see also *supra* note 132.

310. While the governing rule suggests that the defendant has “the right to a preliminary examination,” W. Va. R. Crim. P. 5(c), the West Virginia Supreme Court has made clear that “a preliminary hearing is not required if the state elects to proceed directly to a grand jury without arresting the accused, or if the accused is arrested but indicted before the date set for the preliminary examination.” *Davis*, 782 S.E.2d at 428. The Rule also states “that the preliminary examination shall not be held . . . if an information against the defendant is filed in circuit court before the date set for the preliminary examination.” W. Va. R. Crim. P. 5(c). However, a “felony offense may be prosecuted by information [only] if the indictment is waived” by the defendant, W. Va. R. Crim. P. 7(a), which renders West Virginia an indictment-bypass regime.

TABLE D: THE LAW OF BILLS OF PARTICULARS^{||}

State	SOURCE OF AUTHORITY			PROCEDURAL REGIME
	Court Rule	Statute	Case Law	
AL	Ala. R. Crim. P. 13.2(e)			Discretionary ³¹¹
AK	Alaska R. Crim. P. 7(f)			Discretionary
AZ			State v. Schwartz, 484 P.2d 1060, 1062 (Ariz. Ct. App. 1971)	Discretionary
AR		Ark. Code Ann. §§ 16-85-301, 16-85-403(a)(2) (2005)		Discretionary ³¹²
CA			People v. Thorn, 33 P.2d 5, 15 (Cal. Dist. Ct. App. 1934)	Not Available ³¹³
CO	Colo. R. Crim. P. 7(g)			Discretionary ³¹⁴

^{||} This table supports Figure 15, *supra* (p. 1356), and collects authorities governing bills of particulars across the states. The focus here is on whether the defendant has either the opportunity or the right to obtain a judicial order requiring the prosecutor to provide a *specific* statement of the factual basis underlying the charges. “Specific” here is intended to refer to information that goes beyond the time or location of the offense and to capture instead factual detail sufficient to permit the defendant to mount a legal challenge to a concrete factual theory of the case. See *supra* text accompanying notes 156–164 (discussing the connection between factual specificity, legal overreach, and motions for summary dismissal). Where the defendant is entitled to such a statement, the state is coded as “mandatory.” Alternatively, the “discretionary” code is applied to those states in which the trial court has discretion to order the prosecutor to produce such a statement—either because the governing law is stated in expressly discretionary terms (for example, “the court may order”) or because it employs an open-ended standard that is essentially discretionary in application. Cf. 5 LaFave et al., *supra* note 73, § 19.4(b), at 361 (“In several states, statutory provisions make issuance of particulars mandatory, but that obligation tends to be tied to broadly stated standards that give the trial judge considerable leeway.” (footnote omitted)). Finally, a number of states have abolished bills of particulars altogether. Note, however, that the factual specificity potentially afforded by a bill of particulars can also be guaranteed in other ways, including by a requirement that the charging document itself state the allegations with factual specificity. Cf. Nance v. State, 918 S.W.2d 114, 124 (Ark. 1996) (“[W]here the information is definite in specifying the offense being charged, as in this case, the charge itself constitutes a bill of particulars.”). Accordingly, the “not available” code is applied here only to those states in which the bill of particulars does not exist and in which the corresponding charging rules also do not require factual specificity (as defined above).

311. “A defendant is not entitled to a bill of particulars under Alabama law.” McCrary v. State, 398 So. 2d 752, 756 (Ala. Crim. App. 1981); see also Jones v. State, 34 So. 236, 238 (Ala. 1903). However, commentary to the rule cited above provides “that for good cause shown the defendant can compel the state to submit additional details of the offense not required to be set out in the body of the indictment.” Ala. R. Crim. P. 13.2 cmt. As the Rule Committee further explains, “it is contemplated that motions for more definite statement will not be routinely made or granted” given “the ‘good cause’ requirement.” *Id.*

312. The governing statute provides that, “Upon request of the defendant, the state shall file a bill of particulars setting out the act or acts upon which it relies for conviction.” Ark. Code Ann. § 16-85-403(a)(2). However, case law indicates that “[t]he trial court, using discretion, can grant or deny the request.” Burnett v. State, 697 S.W.2d 95, 99 (Ark. 1985), overruled on other grounds by Midgett v. State, 729 S.W.2d 410 (Ark. 1987).

313. See also Cal. Penal Code § 952 (2018) (permitting charges to be filed without factual specificity).

314. While the governing rule uses expressly discretionary language, case law indicates that a bill of particulars is mandatory in certain limited cases. See *People v. Dist. Court for the*

CT	Conn. R. Super. Ct. §§ 41-20 to -22			Discretionary
DE	Del. Super. Ct. R. Crim. P. 7(f)			Discretionary
FL	Fla. R. Crim. P. 3.140(n)			Discretionary ³¹⁵
GA			Freeman v. State, 392 S.E.2d 330, 332 (Ga. Ct. App. 1990)	Not Available ³¹⁶
HI	Haw. R. Penal P. 7(g)	Haw. Rev. Stat. Ann. § 806-47 (LexisNexis 2016)		Discretionary
ID			State v. Holcomb, 912 P.2d 664, 669 (Idaho Ct. App. 1995)	Discretionary ³¹⁷
IL		725 Ill. Comp. Stat. Ann. 5/111-6 (West 2006)		Discretionary
IN			Sherrick v. State, 79 N.E. 193, 194 (Ind. 1906)	Not Available ³¹⁸
IA	Iowa Ct. R. 2.11(5)			Discretionary
KS		Kan. Stat. Ann. § 22-3201(f) (2007)		Discretionary
KY	Ky. R. Crim. P. 6.22			Discretionary
LA		La. Code Crim. Proc. Ann. art. 484 (2017)		Discretionary
ME	Me. R. Unified Crim. P. 16(d)(1)			Discretionary
MD	Md. R. 4-241			Discretionary
MA	Mass. R. Crim. P. 13(b)			Discretionary

Second Judicial Dist., 603 P.2d 127, 128 (Colo. 1979) (en banc) (“An order for a bill of particulars normally rests within the sound discretion of the trial judge. Where the crime of theft is charged in the words of the statute, however, such an order is mandatory upon the defendant’s request.” (citations omitted)).

315. Florida is a good example of a state that combines a putatively mandatory issuance requirement with an open-ended standard, thereby producing a de facto discretionary regime. Compare Fla. R. Crim. P. 3.140(n) (“The court, on motion, *shall* order the prosecuting attorney to furnish a statement of particulars when the indictment or information on which the defendant is to be tried fails to inform the defendant of the particulars of the offense *sufficiently to enable the defendant to prepare a defense*.” (emphasis added)), with Saldana v. State, 980 So. 2d 1220, 1222 (Fla. Dist. Ct. App. 2008) (“We . . . conclude that the trial court did not abuse its discretion in denying [the defendant’s] motion for a statement of particulars . . .”), and Peel v. State, 154 So. 2d 910, 912 (Fla. Dist. Ct. App. 1963) (“[A] bill of particulars is never required in a criminal case in Florida except in exceptional cases where the denial of same constitutes an abuse of judicial discretion.”).

316. See also Ga. Code Ann. § 17-7-54 (2013) (permitting charges to be filed without factual specificity).

317. In the cited case, the court “[a]ssum[ed], without deciding,” that “orders for bills of particulars are still permissible” under the common law even though “there is no provision for bills of particulars in the Idaho Criminal Rules.” *Holcomb*, 912 P.2d at 669.

318. In the cited case, the Indiana Supreme Court made clear that “there is no recognition of a motion for a bill of particulars” under the state’s law, but went on to suggest “that, under the certainty required in criminal pleading in this state, whenever a trial judge finds it necessary to the administration of justice to grant a bill of particulars, he has found an ample reason for quashing the indictment for uncertainty.” *Sherrick*, 79 N.E. at 194. This language suggests that a robust factual-specificity requirement at the charging stage may at one point in time have offset the state’s nonrecognition of bills of particulars. The current charging statute, however, does not require any factual specificity. See Ind. Code. § 35-34-1-2(a), (e) (2017).

MI	Mich. R. Crim. P. 6.112(E)			Discretionary
MN	Minn. R. Crim. P. 17.02(4)			Not Available ³¹⁹
MS			Tapper v. State, 47 So. 3d 95, 108 (Miss. 2010)	Not Available ³²⁰
MO	Mo. R. Crim. P. 23.04			Discretionary
MT			Fitzpatrick v. State, 638 P.2d 1002, 1025 (Mont. 1981)	Not Available ³²¹
NE		Neb. Rev. Stat. § 29-1808 (2016)	State v. Case, 553 N.W.2d 173, 179–80 (Neb. Ct. App. 1996)	Discretionary ³²²
NV				Not Available ³²³
NH			State v. Voorhees, 632 A.2d 825, 826 (N.H. 1993)	Discretionary
NJ	N.J. R. Crim. P. 3:7-5		State v. Davis, 70 A.2d 761, 762 (N.J. Super. Ct. App. Div. 1950)	Discretionary
NM	N.M. R. 5-205(C)			Discretionary
NY		N.Y. Crim. Proc. Law § 200.95(1) (McKinney 2007)		Mandatory
NC		N.C. Gen. Stat. § 15A-925 (2018)		Discretionary
ND	N.D. R. Crim. P. 7(f)			Discretionary
OH	Ohio R. Crim. P. 7(E)	Ohio Rev. Code Ann. § 2941.07 (West 2006)		Mandatory
OK	Okla. Stat. Ann. tit. 22, §§ 409, 504, 512 (West 2003)			Not Available ³²⁴
OR			State v. House, 489 P.2d 381, 382–83 (Or. 1971)	Not Available
PA	Pa. R. Crim. P. 572			Discretionary

319. The Minnesota Supreme Court amended Rule 17.02 in 2008 so as to eliminate bills of particulars. See Order, Promulgation of Amendments to the Minnesota Rules of Criminal Procedure, No. C1-84-2137, at 7 (Minn. 2008), <http://www.mncourts.gov/mncourtsgov/media/AdministrativeFileArchive/Criminal%20Procedure%20Rules%20ADMI10-8049%20formerly%20C1-84-2137/2008-05-19-Order-Crim-Proc-Amendments.pdf> [http://perma.cc/2AH9-KFG3] (“The bill of particulars is abolished.”).

320. See also *Smallwood v. State*, 584 So. 2d 733, 738 (Miss. 1991) (permitting charges to be filed without factual specificity).

321. See also Mont. Code Ann. § 46-11-401(1) (2017) (permitting charges to be filed without factual specificity).

322. While Nebraska does not recognize a motion for a bill of particulars, it permits a motion to quash a charging instrument that lacks factual specificity. See Neb. Rev. Stat. § 29-1808; *Case*, 553 N.W.2d at 180 (“To the extent that [the defendant’s] motion for bill of particulars was an effort to . . . challenge the certainty and particularity of the information for the preparation of his defense, a motion to quash is the proper method of attack.”).

323. Nevada does not appear to have any provision or case law providing for bills of particulars and permits charges to be filed without factual specificity. See Nev. Rev. Stat. § 173.075 (2015); *Volosin v. State*, No. 72184, 2017 WL 6547445, at *1 (Nev. Ct. App. Dec. 15, 2017).

324. Oklahoma permits charges to be filed without factual specificity and does not appear to provide any vehicle by which a defendant might compel such specificity from the prosecution after charges are filed.

RI	R.I. Super. Ct. R. Crim. P. 7(f)		State v. Gregson, 113 A.3d 393, 397 (R.I. 2015)	Discretionary ³²⁵
SC			State v. Wells, 161 S.E. 177, 181 (S.C. 1931)	Not Available ³²⁶
SD			State v. Anderson, 546 N.W.2d 395, 400 n.8 (S.D. 1996)	Discretionary
TN	Tenn. R. Crim. P. 7(c)			Discretionary
TX			Noel v. State, 769 S.W.2d 366, 368 (Tex. Ct. App. 1989)	Discretionary ³²⁷
UT	Utah R. Crim. P. 4(c), 4A(d)	Utah Code Ann. § 77-14-1 (LexisNexis 2017)	State v. Allen, 839 P.2d 291, 298 (Utah 1992)	Discretionary
VT			State v. Bridgman, 49 Vt. 202, 206 (1876)	Discretionary ³²⁸
VA		Va. Code Ann. § 19.2-230 (2015)		Discretionary ³²⁹
WA	Wash. Super. Ct. Crim. R. 2.1(c)			Discretionary
WV	W. Va. R. Crim. P. 7(f)	W. Va. Code Ann. § 62-1B-1 (LexisNexis 2014)		Discretionary
WI			State ex rel. Drew v. Shaughnessy, 249 N.W. 522, 527 (Wis. 1933)	Discretionary
WY	Wyo. R. Crim. P. 3(b), (f)			Discretionary
FED	Fed. R. Crim. P. 7(c)(1), (f)			Discretionary

325. The governing rule states that “the court shall direct the filing of a bill of particulars” upon the defendant’s request. R.I. Super. Ct. R. Crim. P. 7(f). But the state supreme court has held that “the granting of a bill of particulars in any civil or criminal proceeding is within the discretion of the justice who hears the motion” and has expressly upheld a trial court’s denial of a motion for such a bill when a defendant attempted to force the prosecutor to choose between two competing theories of liability. *Gregson*, 113 A.3d at 397 (internal quotation marks omitted) (quoting *Union Mortg. Co. v. Rocheleau*, 154 A. 658, 660 (R.I. 1931)).

326. See also S.C. Code Ann. § 17-19-20 (2014) (permitting charges to be filed without factual specificity).

327. Texas does not use the term “bill of particulars” but does recognize a common law right to request additional factual specificity. See *Noel*, 769 S.W.2d at 368 (“[W]here the language concerning the defendant’s conduct is so vague or indefinite as to deny the defendant effective notice of the act he allegedly committed, the motion seeking more information should be granted.”).

328. See also *State v. Sears*, 296 A.2d 218, 219 (Vt. 1972) (“A bill of particulars was sought by the respondent when charged, and duly furnished.”).

329. A separate statutory provision states in seemingly mandatory language that the “court shall, upon motion of the defendant, direct the Commonwealth to file a bill of particulars pursuant to § 19.2-230.” Va. Code Ann. § 19.2-266.2. But the state supreme court has held that so long as “an indictment . . . give[s] the accused ‘notice of the nature and character of the offense charged so he can make his defense’ . . . a bill of particulars is not required.” *Strickler v. Commonwealth*, 404 S.E.2d 227, 233 (Va. 1991) (quoting *Wilder v. Commonwealth*, 225 S.E.2d 411, 413 (Va. 1976)).

TABLE E: THE LAW OF AMENDMENT AND DISMISSAL[#]

State	SOURCE OF AUTHORITY			PROCEDURAL REGIME
	Court Rule	Statute	Case Law	
AL		Ala. Code § 15-8-130 (LexisNexis 2015)		General Discretion ³³⁰
AK	Alaska R. Crim. P. 43(a)			Unlimited ³³¹
AZ	Ariz. R. Crim. P. 16.4(a)			General Discretion
AR	Ark. R. Crim. P. 25.3(b)			Express Review
CA		Cal. Penal Code §§ 999f(b)– (c), 1192.7(a), 1385(a) (2018)		Partial Ban (General Discretion) ³³²
CO	Colo. R. Crim. P. 11(f)(5)			Express Review

[#] This table supports Figure 18, *supra* (p. 1364) and reports the law of amendment and dismissal. As noted *supra* note 186, the difference between amendment and dismissal is slight insofar as prosecutorial charge-sliding is concerned: The former refers to replacing one charge with a lesser one, whereas the latter refers to eliminating the charge altogether. Both maneuvers are charge reductions—dismissal simply reduces the charge to zero. In most instances, the law of dismissal will be the more significant regulatory lever. For one thing, whenever the law of joinder–severance affords the prosecutor sufficient leeway to stack up a large pile of charges, she will be able to generate the most leverage by filing the maximal number of charges possible and then trading them away (that is, dismissing them) piecemeal in exchange for the defendant’s plea. In such a world, the law of amendment will play only an ancillary role. By contrast, if the law of joinder–severance restricts the prosecutor (for example, by authorizing only one charge per case), then the law of amendment may be somewhat more significant, as a prosecutor hoping to slide from one charge to another may need to replace her initial charge with a new one (that is, amend it). But even here, the prosecutor may be able to accomplish the same end by dismissing the first charge and filing a new one that supports the plea deal. In short, as between the law of amendment and the law of dismissal, the latter matters more for purposes of the discussion here. For the sake of simplicity, the substantive codes in this table thus taxonomize the law of dismissal, leaving occasional discussion of the law of amendment to footnotes. Two additional notes of clarification: First, where a state employs an express dismissal rule—that is, a rule authorizing judges to reject charge dismissals in the course of reviewing a proposed plea agreement—the table classifies the state based on that provision, given its direct connection to charge-sliding. Finally, if a state employs either a partial ban on plea bargaining or capped charge discounts in some set of cases, the table employs the codes “partial ban” and “capped,” followed by a parenthetical code describing the dismissal regime that exists in cases not affected by the ban or the cap.

330. In addition to the cited discretionary dismissal rule, Alabama bars amendment when an “additional or different offense is charged,” Ala. R. Crim. P. 13.5(a), which the state courts interpret strictly to bar amendment whenever the elements of the new offense are not included within the original offense, see *Fleming v. State*, 814 So. 2d 310, 311 (Ala. Crim. App. 2001).

331. In addition to the cited unlimited-dismissal rule, Alaska bars amendment when an “additional or different offense is charged,” Alaska R. Crim. P. 7(e), but does not appear to have definitively construed the meaning of the phrase. Cf. *McGahan v. State*, 606 P.2d 396, 397 n.3 (Alaska 1980) (declining to “express . . . [an] opinion on whether the amendment charged a different offense”).

332. California bans plea bargaining for specific offenses, including violent sex crimes and driving under the influence, and for certain defendants, including career offenders. Aside from its partial bans, California permits dismissal under general judicial review, Cal. Penal Code § 1385(a), and unlimited amendment before the defendant pleads, *id.* § 1009.

CT	Conn. R. Super. Ct. §§ 36-17, 39-29			Unlimited
DE	Del. Super. Ct. R. Crim. P. 48			Unlimited ³³³
FL			Barnett v. Antonacci, 122 So. 3d 400, 406 (Fla. Dist. Ct. App. 2013)	Unlimited
GA		Ga. Code Ann. § 17-8-3 (2013)		General Discretion
HI	Haw. R. Penal P. 7(f), 48(a)	Haw. Rev. Stat. Ann. § 806-56 (LexisNexis 2016)		General Discretion
ID	Idaho Crim. R. 11(f)			Express Review
IL			People v. Gill, 886 N.E.2d 1043, 1047 (Ill. App. Ct. 2008)	General Discretion
IN		Ind. Code §§ 35-34-1-5(c)–(d), -13(a) (2017)		Unlimited
IA	Iowa Ct. R. 2.33(1)			General Discretion ³³⁴
KS		Kan. Stat. Ann. § 22-3015(b)(2) (2016 Supp.)		Express Review
KY	Ky. R. Crim. P. 9.64			General Discretion ³³⁵
LA		La. Code Crim. Proc. Ann. art. 691 (2003)		Unlimited
ME	Me. R. Unified Crim. P. 48(a)			Unlimited
MD	Md. R. 4-247(a)			Unlimited ³³⁶
MA	Mass. R. Crim. P. 12(b)(5), (c)(5)			Express Review ³³⁷

333. Aside from its unlimited dismissal rule, Delaware permits amendment subject to judicial review unless an “additional or different offense is charged,” Del. Super. Ct. R. Crim. P. 7(e), a phrase the state supreme court appears to interpret so as to permit amendment only to a lesser-included offense of the initial charge, see Commissioner Report & Recommendation at *4, *State v. Matos*, No. 1003000386, 2015 WL 739954 (Del. Super. Ct. Feb. 19, 2015) (“Under the circumstances of this case, the defendant had adequate notice of the underlying facts of the charge, there were no new elements of the offense added, the amendment was a less serious lesser-included offense of the original charge, and no additional or different offense was being charged.”), *aff’d*, 124 A.3d 1016 (Del. 2015); *State v. Grossberg*, No. 9611007818, 1998 WL 278391, at *1 (Del. Super. Ct. Apr. 13, 1998).

334. See also Iowa Ct. R. 2.10(2) (permitting a court to reject a plea agreement “if the agreement is conditioned upon concurrence of the court in the charging or sentencing concession made”).

335. The cited rule affords judges discretion to approve or reject charge dismissals without expressly inviting them to use that authority to review charge bargains; case law in the state does, however, make the invitation explicit. See *Hoskins v. Maricle*, 150 S.W.3d 1, 24 (Ky. 2004) (“A ‘charge bargain,’ which dismisses or amends one or more charges in exchange for a guilty plea to the reduced charges . . . can be approved or rejected in the discretion of the trial court . . .”). In addition to the discretionary dismissal rule, the state permits amendment subject to judicial approval so long as “no additional or different offense is charged.” Ky. R. Crim. P. 6.16; cf. *Crouch v. Commonwealth*, 323 S.W.3d 668, 672 (Ky. 2010) (“[C]hanging the charge . . . from the felony offense of theft of identity to the misdemeanor charge of giving a false name to a peace officer would have resulted in . . . an entirely different offense.”).

336. See also Md. R. 4-243(a)(1)(F), (c) (permitting parties to “submit a plea agreement proposing a particular sentence, disposition, or other judicial action to a judge for consideration” and approval).

337. See also *Commonwealth v. Gendraw*, 774 N.E.2d 167, 174 (Mass. App. Ct. 2002) (“A judge is afforded wide discretion in determining whether to accept a guilty plea.”).

MI		Mich. Comp. Laws Ann. § 333.7415 (West 2012)		Capped Charge Discounts (General Discretion) ³³⁸
MN	Minn. R. Crim. P. 30.01	Minn. Stat. § 631.21 (2017)		General Discretion
MS	Miss. R. Crim. P. 14.6(a)	Miss. Code Ann. § 99-15-53 (2015)		General Discretion
MO	Mo. Sup. Ct. R. 24.02(d)–(e)			Express Review
MT		Mont. Code Ann. § 46-12-211 (2017)		Express Review
NE		Neb. Rev. Stat. § 29-1606 (2016)		General Discretion ³³⁹
NV		Nev. Rev. Stat. §§ 174.085, 212.189, 484C.430, 484C.440, 484C.470 (2015)		Partial Ban (General Discretion) ³⁴⁰
NH			State ex rel. Bokowsky v. Rudman, 274 A.2d 785, 786 (N.H. 1971)	Unlimited
NJ	N.J. Ct. R. 3:25-1			General Discretion
NM			State v. Sweat, 433 P.2d 229, 230 (N.M. Ct. App. 1967)	Unlimited
NY		N.Y. Crim. Proc. Law § 220.10(5) (McKinney 2004)		Capped Charge Discounts ³⁴¹
NC		N.C. Gen. Stat. § 15A-931 (2017)		Unlimited
ND	N.D. R. Crim. P. 11(c) (3)			Express Review
OH	Ohio R. Crim. P. 48(A)	Ohio Rev. Code Ann. § 2941.33 (West 2006)		General Discretion
OK		Okla. Stat. Ann. tit. 22, §§ 815–816 (West 2003)		General Discretion
OR		Or. Rev. Stat. § 135.755 (2015)		General Discretion ³⁴²
PA	Pa. R. Crim. P. 585(A), 586	42 Pa. Stat. and Cons. Stat. Ann. § 8932 (West 2017)		General Discretion
RI	R.I. Super. Ct. R. Crim. P. 48(a)			Unlimited
SC			State v. Ridge, 236 S.E.2d 401, 402 (S.C. 1977)	Unlimited

338. Michigan imposes a limited capped regime for defendants charged with serious drug offenses. See Mich. Comp. Laws Ann. § 333.7415. Under that capped regime, a defendant charged with one of the specified offenses may not have his charges reduced at all prior to arraignment, *id.* § 333.7415(1), and after arraignment may plead guilty only to a charge from specific proximate tiers of offenses, *id.* § 333.7415(2). Outside of this capped regime, courts have general discretion to approve or reject charge dismissals. *Id.* § 767.29.

339. See also *State v. Sanchell*, 216 N.W.2d 504, 508 (Neb. 1974) (holding that Neb. Rev. Stat. § 29-1606 “requires court approval [for a plea agreement] to be binding”).

340. Nevada bans plea bargaining for DUI-related offenses, see Nev. Rev. Stat. §§ 484C.430, 484C.440, 484C.470, and for unlawful acts relating to human excrement or bodily fluid, see *id.* § 212.189. Aside from its partial bans, Nevada permits dismissal of an indictment or information following the defendant’s arrest only subject to general judicial discretion. See *id.* § 174.085(5), (7).

341. Aside from its capped charge-sliding rule, New York permits dismissal of charges only subject to judicial review. N.Y. Crim. Proc. Law § 210.40(3) (McKinney 2007).

342. See also Or. Rev. Stat. § 135.432(2) (“If a tentative plea agreement has been reached which contemplates . . . charge or sentence concessions . . . the trial judge, upon request of the parties, may . . . advise the district attorney and defense counsel whether the trial judge will concur in the proposed disposition . . .”).

SD		S.D. Codified Laws §§ 23A-7-8, -9 (2018)		Express Review
TN	Tenn. R. Crim. P. 11(c)(3)			Express Review
TX		Tex. Code Crim. Proc. art. 32.02 (2017)		General Discretion
UT	Utah R. Crim. P. 11(h)(1)			Express Review
VT	Vt. R. Crim. P. 11(e)(2)	Vt. Stat. Ann. tit. 13, § 6565 (2009)		Express Review
VA	Va. Sup. Ct. R. 3A:8(c)			Express Review
WA	Wash. Super. Ct. Crim. R. 8.3(a)			General Discretion
WV	W. Va. R. Crim. P. 11(e)(2)			Express Review
WI			State v. Kenyon, 270 N.W.2d 160, 164 (Wis. 1978)	General Discretion ³⁴³
WY	Wyo. R. Crim. P. 11(e)(2)			Express Review
FED	Fed. R. Crim. P. 11(c)(3)			Express Review

343. See also Wis. Stat. § 967.055(2) (2018) (expressly encouraging charge-bargain review in drunk-driving cases).

TABLE F: STATE PLEA AND PROSECUTION RATES^{††}

State	Felony Dispositions	Felony Guilty Pleas	Felony Trials	Felony Dismissals	Crimes Reported ^{‡‡}
AK	6,284 ³⁴⁵	4,738 (75.4%) (18)	227 ³⁴⁶ (3.6%)	1,289 ³⁴⁷ (20.5%)	25,920 (737,259)
AZ	47,127 ³⁴⁸	38,540 ³⁴⁹ (81.8%) (15)	1,147 ³⁵⁰ (2.4%)	7,440 (15.8%)	250,870 (6,634,997)
CA	241,238 ³⁵¹	195,389 ³⁵² (80.9%) (17)	5,525 ³⁵³ (2.3%)	40,324 ³⁵⁴ (16.7%)	1,173,646 (38,431,393)
FL	185,986 ³⁵⁵	141,839 ³⁵⁶ (76.3%) (20)	3,681 ³⁵⁷ (1.9%)	15,401 ³⁵⁸ (8.3%)	699,163 (19,600,311)
HI ³⁵⁹	2,753 ³⁶⁰	1,824 ³⁶¹ (66.3%) (4)	151 ³⁶² (5.5%)	413 ³⁶³ (15.0%)	48,851 (1,408,987)
IL	82,464 ³⁶⁴	50,851 ³⁶⁵ (61.7%) (15)	3,754 ³⁶⁶ (4.6%)	27,859 ³⁶⁷ (33.8%)	348,004 (12,890,552)
IN ³⁶⁸	75,245 ³⁶⁹	57,950 ³⁷⁰ (77.0%) (27)	1,573 ³⁷¹ (2.1%)	13,465 ³⁷² (17.9%)	211,099 (6,570,713)
KS	18,239 ³⁷³	14,618 ³⁷⁴ (80.1%) (15)	511 ³⁷⁵ (2.8%)	2,624 ³⁷⁶ (14.4%)	95,632 (2,895,801)
KY	31,377 ³⁷⁷	19,534 ³⁷⁸ (62.3%) (17)	1,260 ³⁷⁹ (4.0%)	10,583 ³⁸⁰ (33.7%)	113,728 (4,399,583)
MO ³⁸¹	49,499 ³⁸²	41,555 ³⁸³ (83.9%) (19)	741 ³⁸⁴ (1.5%)	5,322 ³⁸⁵ (10.8%)	215,871 (6,044,917)
NM ³⁸⁶	25,781 ³⁸⁷	19,016 ³⁸⁸ (73.8%) (21)	472 ³⁸⁹ (1.8%)	6,178 ³⁹⁰ (23.9%)	91,948 (2,086,895)
NY	50,140 ³⁹¹	43,584 ³⁹² (86.9%) (10)	2,045 ³⁹³ (4.1%)	3,336 ³⁹⁴ (6.7%)	436,166 (19,695,680)
NC	156,991 ³⁹⁵	104,980 ³⁹⁶ (66.9%) (31)	2,615 ³⁹⁷ (1.7%)	49,396 ³⁹⁸ (31.5%)	339,218 (9,848,917)
PA ³⁹⁹ (Phila.)	15,548 ⁴⁰⁰	10,619 ⁴⁰¹ (68.3%) (14)	2,231 ⁴⁰² (14.3%)	2,202 (14.2%)	74,850 ⁴⁰³ (1,538,957) ⁴⁰⁴
TN ⁴⁰⁵	76,433 ⁴⁰⁶	42,601 ⁴⁰⁷ (55.7%) (17)	1,381 ⁴⁰⁸ (1.8%)	30,058 ⁴⁰⁹ (39.3%)	245,746 (6,497,269)
TX	201,013 ⁴¹⁰	155,203 ⁴¹¹ (77.2%) (16)	4,773 ⁴¹² (2.4%)	41,037 ⁴¹³ (20.4%)	971,046 (26,505,637)
VT ⁴¹⁴	3,370 ⁴¹⁵	2,582 ⁴¹⁶ (76.6%) (18)	54 ⁴¹⁷ (1.6%)	687 (20.4%)	14,657 (626,855)
WI	34,728 ⁴¹⁸	25,969 ⁴¹⁹ (74.7%) (18)	912 ⁴²⁰ (2.6%)	6,835 ⁴²¹ (19.7%)	141,812 (5,742,953)

^{††} This table supports Tables 2 and 3, *supra* (pp. 1375, 1376), and text accompanying *supra* notes 214–219, by reporting statistics about felony-case dispositions for eighteen states in which such data are readily and reliably available. See *supra* note 222 and accompanying text (discussing data and limitations). Data for each state roughly correspond to the year 2013, with variation based on local fiscal-year definitions and reporting practices. For sources, see the notes accompanying each state. Percentages reported in parentheses describe each column's total as a proportion of the total number of felony dispositions. For the guilty-plea column, the number of guilty pleas per 100 crimes is provided parenthetically below the percentage of cases disposed by plea.

344. Crime report data come from the Federal Bureau of Investigation's Uniform Crime Reports for 2013 and includes all violent crime and property crime. See FBI, State-by-State and National Crime Estimates by Year(s), Unif. Crime Reporting Statistics, <http://www.ucrdatatool.gov/Search/Crime/State/StatebyState.cfm> [<http://perma.cc/6TNE-Q9C2>] (last modified Jan. 26, 2017). For the report produced by the data tool, see <http://perma.cc/SH73-CFFH> (last visited Mar. 6, 2018). Each state's population, as reported by that same source, is provided parenthetically below the total number of reported crimes.

345. See Alaska Court System, Annual Report FY 2013, at 91 tbl.4.10 (2014), <http://public.courts.alaska.gov/web/admin/docs/fy13.pdf> [<http://perma.cc/B2DE-394L>].

346. Of these, 7 were bench trials (6 convictions, 1 acquittal) and 220 were jury trials (182 convictions, 38 acquittals). *Id.*

347. *Id.*

348. Ariz. Courts, Superior Court Case Activity: Fiscal Year 2013, Narrative Summary 5, <http://www.azcourts.gov/Portals/39/2013DR/SuperiorCourt.pdf> [<http://perma.cc/PTA7-HXCP>] (last visited Mar. 5, 2018).

349. This figure is not directly reported in the source, but is calculated by subtracting trials and dismissals from total dispositions. See *id.* at 3, 5. Additionally, the source does report the total number of individuals sentenced (39,563). See *id.* at 5. From that number one can subtract the difference between the reported trials and the reported acquittals to obtain the number of trial convictions—which can then be subtracted from the number of people sentenced (that is, convicted) in order to yield the number of non-trial convictions (that is, guilty pleas). This calculation also produces a plea tally of 38,540. That is to say, 39,563 reported people sentenced – [(1,147 reported trials) – (124 reported acquittals)] = 38,540 guilty pleas. See *id.* at 3, 5 (reporting trials and acquittals).

350. This figure reports the total number of trials for all criminal cases, not just felony cases. However, felony cases account for 95.6% of all reported criminal cases (47,667 out of 49,872). See *id.* at 4. Of the reported trials, 135 were bench trials and 1,012 were jury trials. *Id.* at 3. Acquittals accounted for 124 of the total number of trials. *Id.* at 5.

351. See Judicial Council of Cal., 2014 Court Statistics Report, Statewide Caseload Trends 2002–2003 Through 2012–2013, at 75 (2014), <http://www.courts.ca.gov/documents/2014-Court-Statistics-Report.pdf> [<http://perma.cc/VY9C-VU2Z>].

352. See *id.* at 116 tbl.8a.

353. This figure combines the number of felony cases resolved by jury trial (4,925) and by bench trial (600). See *id.* at 81.

354. This figure combines the number of cases disposed “other” than by plea of guilt before a preliminary hearing (28,291) and after a preliminary hearing (12,033). *Id.* at 116 tbl.8a. The source describes these categories as including “dismissals and transfers.” *Id.* at 117.

355. Fla. Office of the State Courts Admin'r, Circuit Criminal Statistics, Florida's Trial Courts Statistical Reference Guide FY 2012–13, at 3-15 (2014), <http://www.flcourts.org/core/fileparse.php/250/urlt/reference-guide-1213-circuit-crim.pdf> [<http://perma.cc/7AXD-JGL3>].

356. This figure omits two sizable disposition categories reported by the state: transferred cases (9,808) and “other,” a category containing 15,249 dispositions that combines together “defendants placed on deferred prosecution or other pretrial diversion or

probation programs . . . , defendants declared mentally or physically unable to stand trial, cases disposed upon estreatment of a bond, cases that are nolle prosequi . . . for administrative reasons, or similar matters.” *Id.* at 3-20. Note that this category includes some cases that approximate guilty pleas (for example, deferred prosecution and diversion agreements) and others that approximate dismissals (for example, cases that end in nolle prosequi for administrative reasons). See *id.*

357. Of the total number of trials, 3,361 were to a jury, of which 2,197 ended in a verdict of guilt, 899 ended in either acquittal or dismissal, and 265 ended in a plea. *Id.* The remaining 320 cases were resolved by bench trial, of which 67 ended in conviction, 50 ended in acquittal or dismissal, and 203 ended in a plea. *Id.*

358. *Id.*

359. See The Judiciary of the State of Hawai‘i, 2013 Annual Report: Statistical Supplement 9 tbl.7 (2014), http://www.courts.state.hi.us/docs/news_and_reports_docs/Statistical_Supp_2013.pdf [<http://perma.cc/8W48-S34A>]. To best approximate felony dispositions, the figures in this row exclude the following categories of offense tabulated in the report: “Driving Under the Influence,” “Liquor Laws,” “Disorderly Conduct,” “Traffic Offenses,” and the miscellaneous category captioned “All Other Offenses (Except Traffic).” See *id.*

360. See *id.*

361. This figure reports cases terminated with “no trial held,” a category exclusive of trials and dismissals. See *id.*

362. This figure includes 54 non-jury trials and 97 jury trials. See *id.*

363. See *id.* at 14 tbl.12.

364. See Admin. Office of the Ill. Courts, Annual Report of the Illinois Courts: Statistical Summary—2013, at 59, http://www.illinoiscourts.gov/SupremeCourt/AnnualReport/2013/StatsSumm/2013_Statistical_Summary.pdf [<http://perma.cc/EM47-XDS2>] (last visited Mar. 6, 2018).

365. *Id.*

366. This figure combines the reported number of cases in which the defendant was convicted by a jury (658), acquitted by a jury (250), convicted at a bench trial (1,662), and acquitted at a bench trial (1,184). *Id.*

367. This figure is reported as the “remaining balance” after trials and guilty pleas are removed, a category that “includes such dispositions as transfers to inactive/fugitive warrant calendar, extradition proceedings, and dismissed on motion of state.” *Id.*

368. See generally 2 Ind. Judicial Service Report: 2013 Caseload Statistics (2014), <http://www.in.gov/judiciary/iocs/files/rpts-ijs-2013-judicial-v2-statistics.pdf> [<http://perma.cc/D7TQ-BBU4>]. The figures reported here are based on all felony codes. See *id.* at 10 (listing codes).

369. See *id.* at 170.

370. This figure combines the number of cases resolved by guilty plea (56,009) and the number of cases resolved by diversion (1,941). See *id.* at 411, 427; see also *id.* at 6 (applying a diversion code “[i]f a prosecutor and defendant agree to defer prosecution or for the defendant to enter a diversion program”).

371. This figure combines the number of cases resolved by jury trial (1,011) and the number of cases resolved by bench trial (562). See *id.* at 283, 314.

372. This figure reports dismissals, see *id.* at 378, which the report defines as “cases which are dismissed either by the court on its own motion (Indiana Trial Rule 41(E)), upon the motion of a party, or upon an agreed entry as the result of settlement between the parties,” *id.* at 6. It omits an additional 1,310 cases described as “bench dispositions,” see *id.* at 346, which the report defines as “[c]ases that are disposed by final judicial determination of an issue, but where no witnesses are sworn and no evidence is introduced,” including “hearings on . . . dispositive motions,” *id.* at 6.

373. Annual Report of the Courts of Kansas: Fiscal Year 2013, Summary of Felony Caseload for the State 1 (2013), <http://web.kscourts.org/stats/13/2013%20Felony%20Caseload%20Summary.pdf> [<http://perma.cc/N5E5-P67E>].

374. This figure reports the combination of guilty pleas (13,778) and diversionary agreements (840). See *id.*

375. This figure reports the combination of jury trials (414) and bench trials (97). Of all trials, 369 ended in verdicts of guilt, 118 ended in acquittals, 3 ended in pleas after the commencement of trial, and 21 ended in mistrials. See *id.*

376. *Id.*

377. Admin. Office of the Courts, Report: Statewide Statistics 2, in Annual Report 2013 (2015), http://courts.ky.gov/resources/publicationsresources/Publications/KCOJ_AnnualReport_2013.pdf [<http://perma.cc/FW54-LP42>].

378. This figure reports the number of felony convictions produced without a trial. *Id.*

379. This figure reports the combination of bench trials (1), jury trials (204), and “mixed trial types” (1,055). *Id.* Of these, the bench trial did not result in conviction, 110 of the jury trials resulted in conviction, and 912 of the mixed trials resulted in conviction. *Id.*

380. This figure reports the number of felony cases resolved without a trial (30,117) minus the number of felony convictions produced without a trial (19,534). *Id.*

381. See Missouri Judicial Report Supplement: Fiscal Year 2013, at 180 tbl.50, 182 tbl.51, <http://www.courts.mo.gov/file.jsp?id=68905> [<http://perma.cc/VC8H-EZNE>] [hereinafter Missouri Judicial Report Supplement 2013] (last visited Mar. 6, 2018). Table 50 reports cases resolved in the circuit court. Table 51 reports cases resolved in the associate division of the circuit court, where associate judges conduct preliminary hearings. See *id.* at 320 (providing definitions); see also Circuit Court Judges and Commissioners, Missouri Courts, <http://www.courts.mo.gov/page.jsp?id=1754> (on file with the *Columbia Law Review*) (last visited Mar. 10, 2018) (“In felony criminal cases, the associate circuit judge conducts a preliminary hearing to determine whether there is probable cause to find that a felony has been committed and that the defendant committed it. If probable cause is found, the defendant is ‘bound over’ for trial in the circuit court.”).

382. This figure reports the total number of felony cases disposed in the circuit courts (44,754) plus the number of cases disposed by plea in the associate division (4,745). See Missouri Judicial Report Supplement 2013, *supra* note 381, at 181 tbl.50, 183 tbl.51. The figure does not report cases dismissed in the associate division for the reason stated *infra* note 385.

383. This figure reports the combination of felony cases disposed by plea in the circuit courts (36,810) and felony cases disposed by plea in the associate division (4,745). See *id.*

384. This figure reports the combination of jury trials (499) and bench trials (242). See *id.* at 181 tbl.50.

385. This figure reports the combination of cases dismissed by the prosecutor (5,171) and by the court (151). See *id.* It does not include an additional 9,338 cases dismissed in the associate division, some of which may have been refiled via indictment. See *id.* at 183 tbl.51; see also *State v. Thomas*, 529 S.W.2d 379, 382 (Mo. 1975) (“If the magistrate discharges the accused after the preliminary examination, the prosecuting attorney is without authority to file an information for the offense, but the discharge . . . does not bar a prosecution of the alleged offense by indictment.” (internal quotation marks omitted) (quoting 21 Am. Jur. 2d Criminal Law § 450 (1965))); cf. *supra* section II.A.3 (describing refile after preliminary-hearing dismissal).

386. See Admin. Office of the Courts, N.M. Judiciary, Statistical Addendum to the 2013 Annual Report 17, 67, http://www2.nmcourts.gov/newface/annualrp/ar2013/FY2013_Statistical_Addendum.pdf [<http://perma.cc/9J8E-LQ7V>] (last visited Mar. 6, 2018) (reporting case dispositions in the general-jurisdiction district courts and the limited-

jurisdiction magistrate courts, the latter of which conducts preliminary hearings in felony cases and is empowered to accept guilty pleas at those proceedings).

387. This figure reports the number of felony cases disposed in the district courts, across the following reported felony categories: crimes against property (7,563), crimes against persons (6,814), drug offenses (5,705), driving while intoxicated (1,367), homicide (139), public safety offenses (842), sexual offenses (634), domestic violence (452), and three categories labeled “habitual offender” (2), “first degree” (55), and “miscellaneous” (852). See *id.* at 17. The figure also includes the number of felony guilty pleas entered in the magistrate courts (1,356). See *id.* at 67.

388. This figure reports the combination of felony guilty pleas entered in the district courts for the categories listed *supra* note 387 (7,675), see *id.* at 17, along with the felony guilty pleas entered in the magistrate courts (1,356), see *id.* at 67. It also includes 9,985 felony cases disposed in the district court via “post judgment activity,” on the assumption that these dispositions (accounting for roughly 38% of all felony dispositions) encompass a form of diversion. See *id.* at 17.

389. This figure reports the combination of jury trials (446) and bench trials (26). See *id.*

390. This figure reports the combination of cases “dismissed before trial” in the district court (1,968) and cases “dismissed by prosecution” in the district court (4,210). See *id.* at 17. It omits cases dismissed in the magistrate court at or before a preliminary hearing, as such cases could potentially be refiled in the district court notwithstanding such dismissal. See N.M. Mag. Ct. R. Crim. P. 6-202(D)(1) (“If, upon completion of the examination, the court finds that there is no probable cause to believe that the defendant has committed a felony offense, the court shall dismiss without prejudice . . .”); cf. *supra* section II.A.3 (describing the refiling of charges after dismissal at a preliminary hearing).

391. N.Y. Unified Court Sys., Annual Report 2013, at 24 tbl.5, http://www.nycourts.gov/reports/annual/pdfs/UCS_AnnualReport_2013.pdf [<http://perma.cc/83WV-YBUQ>] (last visited Mar. 6, 2018).

392. *Id.*

393. This figure reports a combination of jury convictions (1,214), jury acquittals (460), and nonjury verdicts (371). See *id.*

394. *Id.*

395. See N.C. Judicial Branch, Statistical Operational Report: Trial Courts, July 1, 2012–June 30, 2013, at 3, 7, http://www.nccourts.org/Citizens/SRPlanning/Documents/2012-13_trial_courts_statistical_and_operational_report.pdf [<http://perma.cc/W574-LXUE>] (last visited Mar. 6, 2018). This figure reports the total number of felony-case dispositions in superior court (123,542), see *id.* at 3, and the number of felony-case dispositions in district court (33,449) exclusive of preliminary hearing dispositions, see *id.* at 7.

396. This figure reports the combination of felony guilty pleas (71,260) and felony deferred prosecution dismissals (776) in the superior courts, see *id.* at 5, as well as felony guilty pleas (31,055) and felony deferred prosecution dismissals (1,889) in the district courts, see *id.* at 7.

397. This figure reports the combination of superior court jury trials (2,110), see *id.* at 5, and district court trials (505), see *id.* at 7. Of the superior court trials, 1,486 ended in conviction, 556 ended in acquittal, and 68 ended in guilty pleas before verdict. *Id.* at 5. Of the district court trials, 446 ended in conviction and 59 ended in acquittal. *Id.* at 7.

398. This figure reports the combination of superior court dismissals “with leave” (1,655), dismissals “without leave” (37,900), and dispositions categorized as “other” (9,841). *Id.* at 5 (noting that the “other” disposition category “includes speedy trial dismissals”). On the distinction between dismissals with and without leave, see N.C. Gen. Stat. §§ 15A-931, -932 (2017).

399. See Kim. E. Nieves et al., Admin. Office of Pa. Courts, 2013 Caseload Statistics of the Unified Judicial System of Pennsylvania 14–15 [hereinafter Pennsylvania 2013 Caseload

Statistics], <http://www.pacourts.us/assets/files/setting-768/file-3597.pdf?cb=581dc8> [http://perma.cc/RZW8-F77K] (last visited Mar. 6, 2018). This source does not distinguish between felonies and misdemeanors when reporting statewide disposition statistics. See *id.* at 11. Accordingly, the figures in the table pertain exclusively to the Court of Common Pleas in Philadelphia, in which 93.9% of the cases filed are felony cases. See *id.* at 13. Philadelphia is also home to the Philadelphia Municipal Court, a nonjury forum that is authorized to hear all misdemeanor cases and (with the parties' consent) all felony cases with maximum potential sentences below five years. See Pa. R. Crim. P. 1001. Unfortunately, disposition data for the Municipal Court similarly fail to distinguish between felony and misdemeanor cases. See Pennsylvania 2013 Caseload Statistics, *supra*, at 164. Taking both felony and misdemeanor cases together (and excluding cases held for a jury trial in the Court of Common Pleas) the Philadelphia Municipal Court disposed of 39,218 cases, of which 5,812 (14.8%) were resolved by guilty plea; 7,347 (18.7%) were resolved by diversion; 14,378 (36.7%) were withdrawn or dismissed; and 8,967 (22.9%) were resolved by bench trial. *Id.* As for cases resolved in the Court of Common Pleas outside of Philadelphia, taking felony and misdemeanor cases together, these courts disposed of 164,373 cases, of which 110,955 (67.5%) were resolved by guilty plea; 34,229 (20.8%) were resolved by diversion; 3,549 (2.2%) were resolved by trial; and 8,398 (5.1%) were dismissed. *Id.* at 11.

400. *Id.* at 12.

401. This figure reports the combination of guilty pleas (10,252) and cases resolved by diversion agreements (367). *Id.* at 14.

402. This figure reports the combination of jury trials (657), *id.* at 15, and nonjury trials (1,574), *id.* at 14.

403. This figure pertains to Philadelphia only. See Table 8: Pennsylvania, 2012, FBI: Unif. Crime Reporting, <http://ucr.fbi.gov/crime-in-the-u.s/2012/crime-in-the-u.s.-2012/tables/8tabledataecpdf/table-8-state-cuts/table-8-pennsylvania> [http://perma.cc/8543-QC22] (last visited Mar. 5, 2018).

404. This figure pertains to Philadelphia only. See *id.*

405. See Annual Report of the Tennessee Judiciary Fiscal Year 2013–2014: Statistics 33, 40, 52, 63, 71, 78, 85, 97, 107, 118, 125, 137, 150, 157, 169, 179, 189, 196, 206, 215, 225, 236, 247, 258, 270, 280, 290, 300, 310, 319, 329, http://www.tsc.state.tn.us/sites/default/files/docs/annual_report_fy2014.pdf [http://perma.cc/35FY-E9DM] (last visited Mar. 6, 2018) (reporting disposition data by district). In an attempt to approximate felony case-disposition data, the table reports the following classes of offense: assault, burglary/theft, drugs, homicide, kidnapping, robbery, and sexual offense. The source does not provide direct statewide statistics at the disposition level. Accordingly, the figures presented here are derived from offense-specific disposition data reported for each of the thirty-one districts. A spreadsheet reporting the underlying arithmetic is available at <https://columbialawreview.org/wp-content/uploads/2018/05/Tennessee-2013-final.xlsx>, [hereinafter Tennessee Data Analysis].

406. Tennessee Data Analysis, *supra* note 405.

407. This figure reports the combination of guilty pleas (38,198) and diversion (4,403). *Id.*

408. This figure reports the combination of acquittals (358) and convictions after trial (1,023). *Id.*

409. *Id.*

410. See Office of Court Admin., Annual Statistical Report for the Texas Judiciary: Fiscal Year 2013, at 44 (2014), http://www.txcourts.gov/media/467863/2013-Annual-Report9_26_14.pdf [http://perma.cc/9DAE-A5GK]. This figure reports the combination of felony guilty pleas (105,946), dismissals (41,037), deferred adjudications (49,257), and trials (4,773); it excludes dispositions on “motions to revoke” and dispositions categorized as “all other dispositions.” *Id.*

411. This figure reports the combination of guilty pleas (105,946) and deferred adjudications (49,257). See *id.*

412. This figure reports the combination of jury convictions (2,263), jury acquittals (562), bench-trial convictions (1,666), and bench-trial acquittals (282). See *id.*

413. See *id.*

414. See Vt. Judiciary, Annual Statistical Report for FY 2014, at Appendix I, http://www.vermontjudiciary.org/sites/default/files/documents/VT_Judiciary_Annual_Report_-_FY14_-_Appendix_1_-_State.pdf [<http://perma.cc/MCZ9-Q6QX>] (last visited Mar. 7, 2018). The figures in this row report data from fiscal year 2013.

415. *Id.* at 1.

416. *Id.*

417. This figure reports the combination of bench trials (3) and jury trials (51). *Id.*

418. Wis. Court Sys., Felony Disposition Summary by Disposing Court Official, Statewide Report (2014), <http://www.wicourts.gov/publications/statistics/circuit/docs/felonystate13.pdf> [<http://perma.cc/E8YS-XP5R>].

419. *Id.*

420. This figure reports the combination of jury trials (851) and bench trials (61). *Id.*

421. *Id.*

Kopf: Judge Goodwin's Magnificent But Clearly Erroneous Opinion On Rejecting Plea Agreements

Judge Joseph R. Goodwin is a highly regarded and long serving United States District Judge in the Southern District of West Virginia.^[i] He has written an [opinion](#)^[ii] rejecting a plea agreement that deserves to be read by federal prosecutors and federal CDLs alike, no matter where they practice. It sets forth a thoughtful schema for rejecting regular plea agreements, not just [Rule 11\(c\)\(1\)\(C\)](#) plea agreements. With sincere respect, the good judge is quite wrong.

Charles Walker is a very small-time drug dealer. He was charged in a six count indictment. Four counts related to the distribution of heroin. Two counts related to the distribution of fentanyl and one count charged that Walker was a felon in possession of a firearm.

There were seven controlled buys resulting in small quantities of drugs. According to Judge Goodwin, Walker sold a total of 0.729 grams of heroin, 0.071 grams of fentanyl, and 0.17 grams of a furanyl fentanyl during these buys. After these controlled buys, an arrest warrant and a search warrant were executed. According to the judge, the agents searched the defendant incident to arrest and discovered an additional 9.7 grams of marijuana, 2.081 grams of powder cocaine, and 0.845 grams of a heroin and fentanyl mixture.^[iii]

The agents then executed a search warrant and recovered a set of digital scales, one bag of a white substance, one box with a suspected methamphetamine pipe, one bag of suspected marijuana, five boxes of 45 caliber ammunition, two pistols, miscellaneous medical items containing the defendant's name, and a cell phone used during the controlled buys.

Walker agreed to enter a guilty plea to a one count information charging him with possession with intent to distribute a quantity of heroin on July 14, 2016, in violation of [21 U.S.C. § 841\(a\)\(1\) & \(b\)\(1\)\(C\)](#). That exposed him to a maximum of 20 years in prison, but there was no statutory minimum. The plea agreement was negotiated by an Assistant United States Attorney and an Assistant Federal Public Defender.

The plea agreement, which is publicly available on CM/ECF (the federal judiciary's case management and electronic case filing system), stipulated that the following facts, among others, were true:

On or about July 14, 2016, officers with the Metropolitan Drug Enforcement Network Team (MDENT), executed a valid arrest warrant for Mr. Walker near the intersection of 2nd Avenue and Russell Street in Charleston, Kanawha County, West Virginia, which is in the Southern District of West Virginia. Through a search conducted incident to that arrest, an MDENT officer found in Mr. Walker's pockets approximately 1.02 grams of heroin, a Schedule I controlled substance, approximately 3.2 grams of cocaine, a Schedule II controlled substance, and two bags containing a total of approximately 9.7 grams of marijuana, a Schedule I controlled substance. Mr. Walker stipulates that he intended to distribute the heroin found in the July 14, 2016, search incident to arrest.

Mr. Walker further stipulates and agrees that the total amount of controlled substances fairly attributable to him is greater than 5 KG but less than 10 KG of marijuana equivalency.

The parties agreed that Walker's base offense level was 12. There was no agreement on criminal history. The parties also agreed that the government was free to urge a two-level bump for a gun under USSG § 2D1.1(b)(1) and a two-level bump for violence under USSG § 2D1.1(b)(2).[\[iv\]](#)

Importantly, Walker agreed to cooperate with the government. Equally important, the parties agreed that Walker could not wiggle out of the plea agreement because he did not like the way the judge ultimately calculated the Guideline range:

The United States and Mr. Walker acknowledge and understand that the Court and the Probation Office are not bound by the parties' calculation of the United States Sentencing Guidelines set forth above and that the parties shall not have the right to withdraw from the plea agreement due to a disagreement with the Court's calculation of the appropriate guideline range.

The plea agreement further boxed Walker into a corner. That is, Walker could not get out of the plea agreement even if the judge found the facts to be different from those agreed upon by the parties. Still further, Walker waived appeal "so long as that sentence of imprisonment, fine or term of supervised release is below or within the Sentencing Guideline range corresponding to offense level 16, regardless of his Criminal History Category." Even if the judge went above offense level 16, the parties agreed that the judge was free to do so and Walker was left to appealing the sentence—and, I should add, with an extremely low likelihood of success.

The plea agreement specifically provided that: "The matter of sentencing is within the sole discretion of the Court. The United States has made no representations or promises as to a specific sentence. The United States reserves the right to: (a) Inform the Probation Office and the Court of all relevant facts and conduct"

In short, it is my view that this was not a plea agreement that bound the judge under Rule 11(c)(1)(C). If the judge thought it appropriate, he could have hit Walker with the statutory maximum sentence of 20 years.

The judge took Walker's plea and deferred acceptance of the plea agreement. After reading the presentence report[\[v\]](#), the judge rejected the plea agreement in a thoughtful and extremely well-written and well-researched 27-page, heavily footnoted, opinion.

Greatly condensed and summarized, the judge recounted: (1) Walker's stunning criminal history (although I think it likely because of the age of many of the prior convictions, and the maximum score limitation for certain relatively minor crimes, that Walker's criminal history score was IV); (2) the fact that Walker warned his customers that other customers of his had overdosed; (3) the fact that the use of heroin and other opiates had risen to epidemic levels in West Virginia with the concomitant reality of a mounting death toll; (4) the fact that federal judges are not overworked so plea bargains are not necessary for the sake of judges; (5) that there is an inverse relationship between the increased number of federal prosecutors and each individual prosecutor's caseload, thus suggesting that federal prosecutors do not need to plea bargain to handle their docket; (6) that the resolution of criminal charges by plea bargaining has replaced resolution by jury trial and that criminal jury trials in West Virginia (and throughout the nation) are few and far between; and (7) that jury trials provide an important public educational function.

Judge Goodwin then proposed a framework for evaluating whether plea bargains should be accepted by federal judges. He proposed four inquiries. I do not want to summarize the judge's analytics for fear that I will misrepresent him. It is better that I quote him (absent the footnotes) so I am entirely fair and so you, the reader, can evaluate the judge's reasoning on your own. ("Fair and balanced" don't you know!)

The judge wrote:

First, a court should consider the cultural context surrounding the subject criminal conduct. Here, that cultural context is a rural state deeply wounded by and suffering from a plague of heroin and opioid addiction.

Second, the court should weigh the public's interest in participating in the adjudication of the criminal conduct charged by the indictment. The criminal jury trial is "fundamental to the American scheme of justice" and effectively promotes a motivated and educated populace that respects the law, holds faith in the judicial system, and is deterred from participating in crime. Jury trials serve the people's right to be informed as to what occurs in their courts and reinforce the fact that the law comes from the people. Here, the public has a high interest in the adjudication of heroin and opioid crimes such as these because of the severity of the crisis occurring in our state. Education about and deterrence of heroin and opioid crimes is of paramount importance at this time.

Third, the court should consider whether "community catharsis can occur" without the transparency of a public jury trial. "Much like the lid of a tea kettle releases steam, jury trials in criminal cases allow peaceful expression of community outrage at arbitrary government or vicious criminal acts." The crimes alleged in Mr. Walker's indictment involve heroin and other opioids and are "vicious criminal acts."

Fourth, the court should examine the plea agreement and, in light of the presentence report, determine whether the apparent motivation is to advance justice or, more probably, to expediently avoid trial. Here, the agreement trades a grand jury indictment charging three counts of distributing heroin, two counts of distributing fentanyl, and one count of being a felon in possession of a firearm for an information charging one count of distributing heroin. The principal motivation appears to be convenience.

Walker, Slip Op. at pp. 24-25.

I have several objections to the judge's decision. I will catalogue them in no particular order and briefly.

Initially, the judge's decision is impractical. Since the judge was not bound under Rule 11(c)(1)(C), he could have hit Walker with up to a 20-year sentence. Of course, the relevant conduct rules would have allowed the judge to consider the facts of the other counts in doing so even though Walker did not enter a guilty plea to those counts. Thus, the "truth in sentencing" function would have been satisfied.

Moreover, the grouping rules under the Guidelines would likely not push the Guideline range much higher than what was stipulated even if Walker had been convicted of the six counts. Still further, given the relatively small total quantities, imposing consecutive sentences, had Walker been found guilty of the six counts of the indictment, might well be deemed substantively unreasonable on appeal even if the judge thought more than 20 years was warranted. Judge Goodwin demonstrated that he is

fully able to write a 27-page opinion rejecting the plea agreement, so he is obviously fully capable of writing a 27-page opinion justifying a significant upward departure or variance. After all, Walker's guilty plea gave the judge 20 years to play with. In short, there was no practical need to reject the plea agreement even if the judge wanted to make Walker's case an object lesson.

Still further, the government got a cooperation agreement out of Walker. The judge gives short shrift to that benefit. Weighing the costs and benefits to the government (and thus the public) in making deals with offenders is generally the province of the Executive and not the judiciary. Judge Goodwin encroached too far into the Executive's prerogative when he proposed making it a standard procedure to question the prosecutor's *bona fides* in making non-binding plea deals.^[vi]

Additionally, and equally important, the judge's decision will raise havoc with CDLs. Pray tell what is a zealous criminal defense lawyer to make of the judge's opinion? Just exactly what is a CDL to tell a defendant about his or her options given the judge's four-part test? At the very least, Judge Goodwin's opinion is so open ended that I cannot conceive how a CDL could reasonably explain the risks and rewards of trying the case, cooperating with the government or even pleading guilty without a plea agreement to some but not all the charges in the indictment thus attempting to force the government to dismiss the remaining charges or make the effort to try the other counts.^[vii]

Next, and without meaning to be overly snarky, give me a break, please, on the public educational function of criminal jury trials.^[viii] If that function is truly satisfied by trials (and I doubt it, especially for very low-level drug dealers like Walker), that same function can be satisfied by a sentencing hearing where all the facts are laid out for the public to know and understand, especially when you have a skilled writer like Judge Goodwin who can explain, in accessible language, what is at stake.^[ix]

Finally, Judge Goodwin has an evident nostalgia for jury trials. That sentiment is floating around among many other federal district judges of his vintage and mine. Guess what? It is our job to make jury trials available; it is not our job to shove them down the throats of those who don't want them.

In summary, Judge Goodwin wrote a magnificent opinion.^[x] It is, however, manifestly wrong.

Richard G. Kopf
Senior United States District Judge (Nebraska)

^[i] The *Almanac of the Federal Judiciary* (that judges like me deny reading) provides a glowing description of Judge Goodwin, including the notation that he leans slightly toward the criminal defense side. The *Almanac* is not publicly available because it is marketed to lawyers for a substantial fee. By sampling lawyers who practice before the particular judge, the *Almanac* is intended to give lawyers who are unfamiliar with the judge insights into such things as the judge's legal and trial skills, his or her temperament, and his or her leanings in criminal cases generally and at sentencing specifically.

^[ii] *US v. Walker*, 2:17-cr-00010 (S.D. W.Va., June 26, 2017).

^[iii] The drug facts recited in the plea agreement are slightly different. Those facts are set forth in my description of the plea agreement.

^[iv] See [here](#) for the 2016 Manual (click on Chapter 2).

^[v] It is not available on CM/ECF.

[vi] There may be something else at play here that is equally concerning. In the indictment the government did not charge a § 924(c) count that would have imposed a consecutive sentence of least five years for the gun. That may have disturbed the judge, but if so, it is not evident from his opinion.

[vii] I know of no authority that would prohibit a defendant from pleading straight up to one or more counts but not all counts. I doubt that Judge Goodwin would have the authority to reject such a plea. While the government would have to make a decision about whether to try the rest of the case, it could decide “to hell with it.” It wouldn’t even have to ask the judge for permission to dismiss the remainder of the indictment. It could simply let the speedy trial clock run out. It is true, however, that this would take genitalia of steel for both the CDL and the prosecutor.

[viii] “My twenty-two years of imposing long prison sentences for drug crimes persuades me that the effect of law enforcement on the supply side of the illegal drug market is insufficient to solve the heroin and opioid crisis at hand. I also see scant evidence that prohibition is preventing the growth of the demand side of the drug market. Nevertheless, policy reform, coordinated education efforts, and expansion of treatment programs are not within my bailiwick. I may only enforce the laws of illicit drug prohibition. . . . [But] [t]he law is the law, and I am satisfied that enforcing the law through public adjudications focuses attention on the heroin and opioid crisis. . . .”

Walker, Slip. Op. at pp. 26-27.

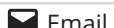
[ix] To protect cooperators while they are in prison, some courts like mine (with the 8th heaviest criminal caseload in the nation on a per-judge basis) have developed methods to conceal cooperation language while still making plea agreements and transcripts of plea hearings available to the public. The Bureau of Prisons is also assisting with such efforts. For obvious reasons, I will not provide further details. Suffice it to state that, with encouragement and approval from the highest levels of the judiciary’s governance structure, a balance between the rights of the public and the press and the safety of cooperators has been struck.

[x] I tip my hat to Professor Doug Berman. See [here](#).

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This entry was posted in Uncategorized on July 12, 2017 [<https://blog.simplejustice.us/2017/07/12/kopf-judge-goodwins-magnificent-but-clearly-erroneous-opinion-on-rejecting-plea-agreements/>] by Hon. Richard G. Kopf.

4 thoughts on “Kopf: Judge Goodwin’s Magnificent But Clearly Erroneous Opinion On Rejecting Plea Agreements”

PseudonymousKid

July 12, 2017 at 11:59 am

Judge Kopf,

Judge Goodwin’s “magnificent” deserves your magnificent, heavily footnoted retort. As always, thanks.

This nostalgia for jury trials seems to be fairly widespread. Don't you think there is something lost in exchanging the trial for these sort of deals? They don't make movies after plea-bargaining and negotiation, after all. On that, there aren't movies about arbitration, either. Can't we think of the filmmakers?

Maybe I daydream about Clarence Darrow too much. Ever see *Compulsion*? Great flick.

Best,
PseudoKid

John Barleycorn
July 12, 2017 at 1:42 pm

And I daydream about why the esteemed one can not exit his back deck, to retrieve cocktails and not stumble on the wood pile, when he chooses to. Or at the very least not sandwich his guests between columnists from that newspaper he reads everyday.

What's up with that anyway?

Gee-whiz... it's nearly as disgraceful an equivalency- round- about as pretending it doesn't matter from which corner one should open their Swansons frozen dinner. Even Ivanka knows you should peel the hot foil from the upper left corner to the lower right corner so you don't accidentally knock your champagne flute into your water glass!

He probably does it as some sort of misplaced bully rage left over from his childhood.

When will he get over it already and realize no one reads that newspaper he reads everyday. No reason to show that newspaper up. Just get on with it already! *The Bully Is Dead!!!*

The time has come for him to trick out his back deck with a sound system and some decent lighting and let the party begin.

Jeez..., hosts these days, I'll tell ya! Can they not take prideful, nearly silent, pleasure from playing fire lord in-between getting smashed and handing out the drinks all night anymore?

Richard Kopf
July 12, 2017 at 1:17 pm

PseudonymousKid,

No, I haven't seen *Compulsion*, but just now I looked it up—Orson Welles, Dean Stockwell and other talented folks.

Two wealthy law-school students go on trial for murder. "You know why we did it? Because we damn well felt like it."

I'm hooked. If the old woman lets me (her father, two brothers and one sister were or are lawyers—she finds them boring), I will be watching *Compulsion* this weekend if I can find on Netflix. Thanks for the wonderful tip.

As for the paucity of trials, do I think something is lost? Frankly, not much.

A good friend of mine is a New York City lawyer with an important firm. When we clerked together, she came to the humorous conclusion one night over drinks that jury trials were inherently unconstitutional. She said that no sane system would be designed to pick people off the streets at random to decide important stuff like money or death. That made sense to me.

All the best.

RGK

Pingback: [Judge Godwin's Big Table In The Well | Simple Justice](#)

Comments are closed.



PRESS RELEASE

New York State
Unified Court System

Hon. Lawrence K. Marks
Chief Administrative Judge

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Date: November 8, 2017

Chief Judge DiFiore Announces Implementation of New Measure Aimed at Enhancing the Delivery of Justice in Criminal Cases

New York – To help prevent wrongful convictions and enhance the delivery of justice in criminal matters, Chief Judge Janet DiFiore today announced the adoption of new rules that will require judges presiding over criminal trials to issue an order notifying and reminding prosecutors and defense attorneys appearing before them of their professional responsibilities. While numerous state and federal judges have individually issued such orders, the New York State court system is the nation's first jurisdiction to implement such a measure on a statewide level.

Trial court judges in applicable cases will issue an order to the prosecutor responsible for the case to timely disclose exculpatory evidence favorable to the accused – called Brady material (referring to the landmark U.S. Supreme Court decision *Brady v. Maryland*, that in criminal cases prosecutors must disclose all evidence that could be materially favorable to the defense) – as required by the federal and state constitutions, statutory and ethical rules.

This order makes specific reference to the types of material that could be required to be disclosed, including information that impeaches the credibility of witnesses, exculpates or reduces the degree of the defense, or mitigates the degree of the defendant's culpability or punishment.

Additionally, trial judges in criminal cases will be required to issue a directive focusing on the defense counsel's obligations to provide constitutionally effective representation in the case, such as keeping the client informed about the case, providing reasonable advice regarding

any plea offers, and performing a reasonable investigation of both the facts and law pertinent to the case. A copy of such order will be given to the defendant in the case.

While the professional responsibilities of prosecutors and defense attorneys are regulated by law, the new order, which does not in any way change existing law, provides a mechanism by which to educate inexperienced prosecutors and defense attorneys – and remind experienced ones – about their constitutional and ethical duties.

Both directives are modeled on the recommendations of the New York State Justice Task Force, among the first permanent task forces to address wrongful convictions and whose work has generated significant reforms.

Recently, the Justice Task Force concluded an extensive study, producing a report centered on serious concerns that undermine the fairness and reliability of the criminal justice process, namely Brady violations by prosecutors and ineffective representation by defense attorneys. In its report, the task force offered a series of recommendations to address these issues. Foremost was a call for judges in criminal cases to have a greater oversight role, including that judges in applicable criminal cases issue standing orders informing the prosecution and defense of their respective obligations.

As noted by the Justice Task Force in its report, an order directed to the prosecution “would create a culture of disclosure, educate inexperienced prosecutors, serve as a reminder for more experienced prosecutors regarding their disclosure obligations, and ensure that judges have an ability to enforce compliance with disclosure requirements.” While permitting a court to impose sanctions or take other appropriate action for deliberate violations, the order’s primary goal is preventative. In proposing a directive aimed at defense counsel, the task force’s objective was to devise a useful, detailed reminder to defense attorneys regarding their most fundamental duties to provide constitutionally effective legal representation in the case.

The Justice Task Force drafted model directives for the courts to use, with these proposals submitted for public comment this past spring. Following the comment period, Chief Administrative Judge Lawrence K. Marks, with the approval and consent of Chief Judge DiFiore and the Administrative Board of the Courts, issued an Administrative Order, amending the uniform rules for courts exercising criminal jurisdiction to require judges in applicable criminal actions to issue an order notifying both the prosecution and defense of their legal and ethical obligations. The order is to be issued at the early stages of the case. While the Chief Judge’s Administrative Order does not mandate the issuance of any specific directive, a model order has been approved for use.

“This newly adopted measure will go a long way to help prevent and remedy systemic errors that contribute to wrongful convictions, acting as a consistent reminder to prosecutors and

defense attorneys of their respective – and critically important – roles in the fair administration of justice. I commend the Justice Task Force for its thoughtful recommendations pertaining to attorney responsibility in criminal cases, including the proposed directives, and for its steadfast commitment to due process and the eradication of wrongful convictions of the innocent in New York State,” said Chief Judge DiFiore, who in her former role as Westchester County District Attorney served as a Justice Task Force co-chair.

“The statewide application of these directives will serve to promote the quality of justice in New York, increasing judges’ ability to ensure that prosecutors and criminal defense attorneys appearing before them have a clear, thorough understanding of their legal and ethical obligations. Along with the Justice Task Force, whose outstanding efforts have led us to this historic point, I am appreciative to all those who provided valuable input on the proposed orders during the public comment period,” said Chief Administrative Judge Marks.

Copies of the Administrative Order and approved model order, along with the New York Justice Task Force’s Report on Attorney Responsibility in Criminal Cases, are attached.

#



New York State Justice Task Force

Report on Attorney Responsibility in Criminal Cases

February 2017

A component of attorney responsibility is attorney discipline, which has been addressed in New York State in various capacities by a number of different entities in recent years. In 2009, for example, the New York State Bar Association's Task Force on Wrongful Convictions published a report that addressed one component of attorney discipline in the criminal context: prosecutorial misconduct.¹ Most recently, former Chief Judge Lippman created the Commission on Statewide Attorney Discipline, which conducted a comprehensive review of New York's attorney disciplinary system. The Commission issued a report in September 2015 offering recommendations to enhance the efficiency and effectiveness of the attorney discipline process.²

Though the topic of attorney discipline has been studied, the Task Force recognized that there continues to be a dearth of statistics and raw data on the prevalence of attorney misconduct in the criminal context and on the potential contribution of such misconduct to wrongful convictions.³ Nonetheless, the Task Force discussed the fact that there may be a public perception that attorney misconduct—particularly prosecutorial misconduct—is, in fact, a significant contributor to wrongful convictions.

Beginning in October 2015, the Task Force hosted presentations from academics, representatives of the Appellate Division of the Supreme Court, and representatives of the Commission on Statewide Attorney Discipline on the subject of attorney responsibility and discipline in the criminal context. In December 2015, the Task Force created a subcommittee to examine the issue in greater depth. The subcommittee discussed a number of possible reforms, taking into account existing reports on attorney misconduct, including the Commission's September 2015 report, proposed legislation, and proposals from the Legal Aid Society, the Innocence Project, the District Attorneys' Association of the State of New York ("DAASNY"), individual New York State judges, and various other entities and individuals. The subcommittee also reviewed case law, news articles, and commentary for additional context on the issue.

After four full Task Force meetings,⁴ six subcommittee meetings,⁵ and a number of additional meetings of a smaller subgroup, the 21 voting members of the Task Force achieved consensus on the majority of the recommendations considered, in many cases reaching

¹ New York State Commission on Statewide Attorney Discipline, "Enhancing Fairness and Consistency[,] Fostering Efficiency and Transparency," September 2015, available at <https://www.nycourts.gov/attorneys/discipline/> (hereinafter, "Commission on Statewide Attorney Discipline Report").

² As a result of those recommendations, the four Departments of the New York State Supreme Court, Appellate Division, adopted new, uniform, statewide rules to govern New York's attorney disciplinary process, which provide for a harmonized approach to the investigation, adjudication, and post-proceeding administration of attorney disciplinary matters. See Part 1240 of the Rules of the Appellate Division (22 NYCRR Part 1240) (effective July 2016).

³ While the Commission on Statewide Attorney Discipline did not focus specifically on criminal matters, it did briefly address the issue of "prosecutorial misconduct," including the possibility of having a separate disciplinary mechanism specifically dedicated to such matters. See Commission on Statewide Attorney Discipline Report, at 75. Ultimately, the Commission recommended that judicial determinations of prosecutorial misconduct be promptly referred to disciplinary committees and that each Department should track and record such matters "with a view toward generating annual statistical reports." *Id.* The Commission also noted that a distinction should be made between good-faith error and any "unethical or malicious" behavior. *Id.*

⁴ The Task Force meetings occurred on October 19, 2015, November 13, 2015, October 21, 2016, and November 4, 2016.

⁵ The subcommittee meetings occurred on December 14, 2015, January 28, 2016, April 7, 2016, June 13, 2016, June 21, 2016, and July 16, 2016.

unanimous or near-unanimous agreement. The diverse perspectives and relevant backgrounds of the subgroup, subcommittee, and Task Force members proved critical to these recommendations.

As discussed in greater detail below, and as enumerated at Appendix A, the Task Force agreed on a series of recommendations concerning: (1) use of the term “misconduct,” (2) reporting of attorney “misconduct,” (3) the grievance process, (4) data collection and statistics, (5) the role of the judiciary in making referrals for disciplinary review, and (6) training. In addition, the Task Force recognized that prosecutorial error in the *Brady* context, as well as failure of defense counsel to adhere to their professional obligations, has the potential to contribute to incidents of wrongful convictions. After a great deal of discussion, the Task Force agreed to the groundbreaking recommendation that all New York State trial court judges should issue an order at the outset of criminal cases regarding the obligation of prosecutors to make timely disclosures of information favorable to the defense as required by *Brady v Maryland*, 373 US 83 (1963), *Giglio v United States*, 405 US 150 (1972), *People v Geaslen*, 54 NY2d 510 (1981), and their progeny under the United States and New York State constitutions, and under Rule 3.8(b) of the New York Rules of Professional Conduct. The Task Force similarly recommended that all New York State trial court judges issue an order directing criminal defense counsel to comply with the defendant’s statutory notice obligations and help ensure constitutionally effective representation.

Recommendations Relating to Attorney Responsibility in Criminal Cases

I. Use of the Term Misconduct

At the outset, the Task Force spent significant time discussing its view that the terms “misconduct” and, in particular, “prosecutorial misconduct,” are too often used without sufficient regard to their meaning and connotations. The overbroad use of the term “misconduct” can create the perception that any time an error is made, regardless of whether that error was intentional or a mistake made in good faith, there has been malfeasance. Accordingly, the Task Force recommended that when discussing attorney misconduct, courts, the press, and academics be conscious of the distinction between good-faith error and intentional wrongdoing. In particular, the Task Force recommended that the terms “prosecutorial misconduct” and “defense counsel misconduct” be reserved for instances where a prosecutor or defense attorney engages in conduct—including a pattern or practice of behavior—that violates a law, ethical rule, or standard, either with the intent to do so or with a conscious disregard of doing so, and where there is no good-faith reason for having done so. In a similar vein, trial and appellate courts, wherever possible, should distinguish between good-faith error and prosecutorial or defense counsel misconduct in written opinions and provide clear guidance regarding the specific attorney conduct that has been deemed improper, in order to enable practitioners to avoid such conduct in the future.

II. Encouraging Reporting of Attorney Misconduct

The Task Force identified an apparent perception in the literature and in the media that misconduct—particularly by prosecutors—is underreported. In order to address this perception, the Task Force discussed ways to encourage both practitioners and judges to report potential misconduct with greater frequency, and ultimately, made recommendations to achieve that end.

Currently, New York State Rule of Professional Conduct 8.3(a) only requires a lawyer to report misconduct where that lawyer “knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer’s honesty, trustworthiness or fitness as a lawyer. . . .” (emphasis added). The Task Force discussed that many attorneys use this standard as a threshold, only reporting potential misconduct if they firmly “know” that there has been a violation. This has the potential to result in underreporting, as it is difficult to “know” for certain that a violation has occurred. Instead of basing the decision regarding whether to report solely on Rule 8.3(a), the Task Force recommended that lawyers (including District Attorneys’ offices and institutional defense providers) and judges be encouraged to report misconduct, regardless of whether it is required, in situations where a lawyer or judge knows or is aware of a high probability based on credible evidence that another lawyer has engaged in misconduct.

Further, to the extent that they have not already done so, it is recommended that District Attorneys’ offices and institutional defense providers develop clear, written internal procedures regarding how allegations of error and misconduct against lawyers on their respective staffs will be processed and reviewed. Moreover, these institutions should develop such procedures explaining how corrective actions (whether individual or office-wide), if appropriate, will be implemented. The Task Force also recommended that District Attorneys’ offices and institutional defense providers maintain internal procedures regarding when to refer or report misconduct (whether that of their own lawyers or other lawyers) to the appropriate disciplinary authorities. District Attorneys’ offices and institutional defense providers also are encouraged to make these written procedures publicly available.

Finally, the Task Force believes that it is important that members of the public understand the role of Grievance Committees and how to report misconduct. The Task Force therefore recommended that Grievance Committees disseminate information to the public explaining their function and practice, and the procedures for filing a complaint.

III. Grievance Process

A question that has been the subject of much discussion and study, including by the Commission on Statewide Attorney Discipline, is whether there should be a separate body (either within or apart from the established Grievance Committees) specifically designated to consider allegations of prosecutorial or defense counsel misconduct. Proponents of a separate body argue that investigating potential misconduct in the criminal context requires specialized knowledge

that the current Grievance Committees lack. However, others believe that a separate body is unnecessary and that it would be more efficient and achievable to make improvements within the already-established grievance process. The Task Force ultimately agreed with the latter view, determining that the existing Grievance Committees should take certain steps to ensure that they are equipped to handle criminal justice matters.⁶

In particular, the Task Force recommended that Grievance Committees include active practitioners from both the prosecution and defense bars who have substantial experience and expertise in the criminal justice system. Moreover, all Grievance Committee members should be provided with specialized training on the standards relating to criminal matters. It is also important that investigations be undertaken where a finding of attorney misconduct has been made in a court decision. Such findings may include prosecutorial misconduct or ineffective assistance of counsel. Accordingly, to the extent that they are not currently doing so, the Grievance Committees should proactively review available court decisions where such a finding has been made. Additional dedicated funding and staff should be allocated to undertake this effort as needed.

IV. Data Collection and Statistics

As indicated, there currently is a public perception that misconduct (particularly prosecutorial misconduct) is prevalent in the criminal justice system and that responsible attorneys are not being appropriately disciplined. However, there is a dearth of statistics in support of such propositions. Recognizing the work already being done by the Office of Court Administration and the Grievance Committees to collect data and statistics about attorney discipline generally, the Task Force made recommendations regarding data collection in the criminal context that would fit within and improve upon the existing framework.

First, it is important that the data collected by the Office of Court Administration and Grievance Committees include details that allow prosecutors, defense lawyers, and the public to better understand the nature of the matters being reported and whether there are discernable trends that should be addressed through training or otherwise. This data should include the type (e.g., prosecutorial or defense counsel misconduct), nature (e.g., discovery-related), and number of complaints received and reviewed, and resulting determination, if any. Data should be aggregated and analyzed, and statistics should be published.

Further, the Grievance Committees should publish annual reports that aggregate data about the number of grievances filed against prosecutors and criminal defense attorneys and the outcomes of those allegations. These reports should provide information about the types of allegations that have been substantiated and should include recommendations, where appropriate, for new or additional training, supervision, or practices based on the Grievance Committees' review of these matters.

⁶ See *supra* note 2.

The Task Force also discussed how to ensure that District Attorneys' offices and institutional defense providers are made aware when someone on their staff has been referred to the Grievance Committee for potential misconduct. In considering this issue, Task Force members determined that it was important to distinguish between requiring notification of an allegation (which may be frivolous or unsubstantiated) and requiring notification of actual Grievance Committee investigations. To this end, the Task Force recommended that, to the extent that they do not already do so, District Attorneys' offices and institutional defense providers require staff to notify their supervisors when they become aware that a Grievance Committee has commenced an investigation into their conduct. Staff should also notify their supervisors when they become aware that a Grievance Committee has made a determination following an investigation.

V. Role of Judiciary in Making Referrals

As discussed, the Task Force focused on the perception that attorney misconduct is underreported. Recognizing that the judiciary can play an important role in the referral of prosecutors or criminal defense lawyers for disciplinary review, the Task Force recommended that judges receive training on the standards and processes for referring attorneys for disciplinary review. Further, judges should be encouraged to promptly refer to the appropriate Grievance Committee all matters in which a judicial finding of prosecutorial or criminal defense counsel misconduct has been made.

VI. Training

The Task Force concluded that education and training are fundamental to achieving compliance with applicable rules and standards. To the extent that they do not already do so, prosecutors and institutional defense provider attorneys should receive training, both at the outset of employment and periodically thereafter, with respect to their ethical and other obligations. The content of these training programs should be updated as needed to reflect recent case law, ethical opinions, new technology and research, as well as to address any areas of needed improvement identified by internal supervision, courts, or the Grievance Committees. The New York Prosecutors Training Institute ("NYPTI") should receive and review any report issued by the Grievance Committees and incorporate the recommendations into NYPTI's various educational programs and statewide bulletins. Furthermore, solo practitioners should be given the opportunity to receive similar training through free Continuing Legal Education ("CLE") courses.

District Attorneys' offices and institutional defense providers should also work together to foster a culture of openness, transparency, and shared learning. They should meet on a regular basis to discuss issues and concerns regarding the Rules of Professional Conduct, best practices on difficult practice points, lessons learned from internal and external allegations/investigations,

and when referrals should be made. In addition, offices should be encouraged to share their internal protocols with each other.

Finally, the Grievance Committees should meet periodically with representatives of the local prosecution and the criminal defense bar to provide an overview of the types of allegations they are receiving and alert these representatives to areas of law or practice where additional training or supervision is needed.

VII. Order Regarding Disclosure Obligations for Prosecutors

Building from its recommendations regarding education and training, the Task Force also considered whether it would be helpful for trial courts to issue a standing order in criminal cases regarding the prosecution's obligation to make timely disclosures of favorable information to the defense pursuant to federal and state constitutional and ethical rules. As noted, *Brady* violations can lead to wrongful convictions. The Task Force has discussed this link between *Brady* violations and wrongful convictions in the past, including in its July 2014 Report on Recommendations Regarding Criminal Discovery Reform. That report noted that additional recommendations relating to *Brady*, including with respect to the training of prosecutors, should be considered.

To this end, Task Force members generally agreed that a form document issued by trial courts regarding prosecutors' disclosure obligations would serve as a useful educational tool; however, there was significant debate regarding whether such document should be framed as an order or instead as a notice or reminder. Proponents of an order contended that an order would create a culture of disclosure, educate inexperienced prosecutors, serve as a reminder for more experienced prosecutors regarding their disclosure obligations, and ensure that judges have an ability to enforce compliance with disclosure requirements. Proponents of a notice or reminder (rather than an order) expressed concern that adopting an order had the potential to criminalize disclosure mistakes by prosecutors and undermine the existing attorney disciplinary structure.

Ultimately, the Task Force recommended that courts issue an order directing the prosecuting authority to disclose all covered materials and that such order should be directed to the District Attorney and the Assistant responsible for the case. The order should be issued by trial courts upon defendant's demand at arraignment on an indictment, prosecutor's information, information, or simplified information (or, where either the People or counsel for the defendant is not present at the arraignment, at the next scheduled court date with counsel present).

The Task Force drafted a model order for use by trial courts, attached hereto as Appendix B. This model contains certain key features that the Task Force agreed are necessary to ensure both that the order serves an educational purpose and that it encourages a culture of compliance, as intended. Its key provisions include the following:

- The order references three broad categories of information favorable to the defense (exculpatory, impeaching, and affecting suppression). It cites to the prosecutor's constitutional obligations under *Brady v Maryland*, 373 US 83 (1963), *Giglio v United States*, 405 US 150 (1972), *People v. Geaslen*, 54 NY2d 510 (1981), and their progeny under the United States and New York State constitutions, and to the prosecutor's ethical obligations under Rule 3.8(b) of the New York State Rules of Professional Conduct.
- There is a specific reference to certain types of materials or information that could be required to be disclosed, including: (1) relevant benefits, promises, or inducements to a witness in connection with the witness's testimony or other cooperation in the case (which may come from law enforcement officials, law enforcement victims services agencies, or the prosecutor); (2) prior inconsistent statements and uncharged criminal conduct and convictions; and (3) a witness's mental or physical illness or substance abuse.
- With respect to the timing of disclosure, the order states that the prosecutor is obligated to timely disclose information in accordance with the United States and New York State constitutions, as well as CPL article 240. However, in order to encourage early disclosure and provide some guidance as to reasonableness in this area, the order contains a statement that disclosure is presumptively timely if the prosecutor shall have completed it no later than 30 days before commencement of a trial in a felony case and 15 days before commencement of a trial in a misdemeanor case.
- Finally, in furtherance of the intent that this order serve an educational purpose and not be construed as a means of sanctioning prosecutors for good-faith error, the order contains a statement that only willful and deliberate conduct will constitute a violation of the order or permit personal sanctions against a prosecutor.⁷

VIII. Order Regarding Obligations for Defense Attorneys

The Task Force also recognized that the failure of defense counsel to adhere to their professional obligations (such as the duty to provide effective assistance of counsel) can contribute to wrongful convictions. As a result, the Task Force recommended that courts adopt an order to be issued by the trial court on every criminal case, directing defense counsel to comply with the defendant's statutory notice obligations and seeking to ensure constitutionally

⁷ There was lengthy discussion regarding whether the order should incorporate a materiality threshold, whereby either the prosecuting authority would be required to disclose only material information favorable to the defendant or only failures to disclose material information would permit sanctions. Ultimately, the Task Force determined that materiality should not be referenced in the order, but provided that only willful and deliberate conduct will constitute a violation of the order or permit personal sanctions against a prosecutor.

effective representation. This order should be directed to the firm or institutional defender (and also to the individual attorney responsible for the case at a firm or institutional defender). For non-institutional providers, it should be directed to the individual defense counsel. The defendant should be provided with a copy of the order. A model order recommended by the Task Force is attached hereto as Appendix C.

Appendix A

Summary of Recommendations Regarding Attorney Responsibility in Criminal Cases

I. Use of the Term Misconduct

1. Courts, the press, and academics should be encouraged to be conscious of the distinction between good-faith error and intentional wrongdoing when discussing misconduct.
2. The terms “prosecutorial misconduct” or “defense counsel misconduct” should be reserved for instances where a prosecutor or defense attorney engages in conduct, including a pattern or practice of behavior, that violates a law, ethical rule, or standard, either with the intent to do so or with a conscious disregard of the same, and there is no good-faith reason for having done so.
3. Trial and appellate courts should be encouraged to, wherever possible, distinguish between good-faith error and prosecutorial or defense counsel misconduct in written opinions and to provide clear guidance regarding the specific attorney conduct that has been deemed improper to enable practitioners to avoid such conduct in the future.

II. Encourage Reporting of Attorney Misconduct

1. Lawyers (including District Attorneys’ offices and institutional defense providers) and judges should be encouraged to report misconduct, regardless of whether it is required, in situations where a lawyer or judge knows or is aware of a high probability based on credible evidence that another lawyer has engaged in misconduct.
2. Grievance Committees should disseminate information to the public about what they do and how to file a complaint.
3. To the extent that they do not already do so, District Attorneys’ offices and institutional defense providers should (i) develop clear written internal procedures regarding how allegations of error and misconduct against internal lawyers will be processed and reviewed, and (ii) based on their review finding, take corrective actions, if appropriate, both on an individual and office-wide level.
 - a. District Attorneys’ offices and institutional defense providers should develop internal procedures regarding how allegations of error and misconduct against external lawyers will be processed and reviewed.
 - b. District Attorneys’ offices and institutional defense providers should develop internal procedures regarding when to refer/report misconduct of internal or external lawyers to the appropriate disciplinary authorities.
 - c. District Attorneys’ offices and institutional defense providers should be encouraged to make public finalized internal written procedures.

III. Grievance Process

1. The Grievance Committees should include active practitioners from both the prosecution and defense bars who have substantial experience and expertise in the criminal justice system to address allegations of attorney misconduct filed against prosecutors and defense attorneys.
2. Although no change should be made to the existing Grievance Committee structure, specialized training should be provided to existing Grievance Committee members on the standards relating to criminal matters.
3. To the extent that it does not already do so, the entity tasked with addressing grievances in criminal matters should proactively review available court decisions where a finding of attorney misconduct is made. As necessary, additional, dedicated funding and staff should be allocated to undertake this effort.

IV. Data Collection and Statistics

1. The Office of Court Administration and the Grievance Committees should collect, aggregate, analyze, and publish statistics regarding attorney misconduct regarding the type (e.g., prosecutorial or defense counsel misconduct), nature (e.g., discovery-related), and number of complaints received and reviewed and the resulting determination, if any.
 - a. The Grievance Committees should publish annual reports that aggregate data about the number of grievances filed against prosecutors and defense attorneys and the outcomes of those allegations. These reports should provide information about the types of allegations that have been substantiated, and these reports should include recommendations, where appropriate, for new or additional training, supervision, or practices based on the Grievance Committees' review of these matters.
 - b. To the extent that they do not already do so, District Attorneys' offices and institutional defense providers should require staff to notify their supervisors whenever they become aware that a Grievance Committee has commenced an investigation about them.
 - c. To the extent that they do not already do so, District Attorneys' offices and institutional defense providers should require staff to notify their supervisors whenever they become aware that a Grievance Committee has made a determination following an investigation about them.

V. Role of Judiciary in Making Referrals

1. Judges should receive training on the standards and processes for referring attorneys for disciplinary review.

2. Trial and appellate court judges should promptly refer to the appropriate Grievance Committee all matters in which a judicial finding of prosecutorial or defense counsel misconduct has been made.

VI. Training

1. Prosecutors should receive training, both at the outset of employment and periodically throughout their tenure, in criminal law and procedure, ethical obligations, and all areas of professional practice. The content of these training programs should be updated as needed to reflect recent case law, ethical opinions, new technology and research, as well as to address any areas of needed improvement identified by internal supervision, courts, or the Grievance Committees. The NYPTI should receive and review any report issued by the Grievance Committees and incorporate the recommendations into NYPTI's various educational programs and statewide bulletins.
2. Institutional defense provider attorneys should receive training, both at the outset of employment and periodically throughout their tenure, in criminal law and procedure, ethical obligations, and all areas of professional practice. The content of these training programs should be updated as needed to reflect recent case law, ethical opinions, new technology and research, as well as to address any areas of needed improvement identified by internal supervision, courts, or the Grievance Committees. Solo practitioners should be given the opportunity to receive similar training through free CLE courses.
3. Prosecutors' offices and institutional defense providers should meet with one another on a regular basis to discuss issues and concerns regarding the Rules of Professional Conduct, best practices on difficult practice points, lessons learned from internal and external allegations/investigations, and when referrals should be made. Offices should be encouraged to share their internal protocols with one another to foster openness and transparency.
4. Grievance Committees should meet periodically with representatives of the local prosecution and the defense bar to provide an overview of the types of allegations they are receiving and alert these attorneys to areas of law or practice where additional training or supervision is needed.

VII. Order Regarding Disclosure Obligations for Prosecutors

1. Courts should adopt a form document to be issued by trial courts in criminal cases regarding certain disclosure obligations of the prosecuting authority and to provide recommended language for that document.
2. The scope of the document should be explained through reference to three categories of information favorable to the defense (exculpatory, impeaching and affecting suppression) and by citing obligations under *Brady v Maryland*, 373 US 83 (1963), *Giglio v United States*, 405 US 150 (1972), *People v Geaslen*, 54 NY2d 510 (1981), and their progeny under United States and New York State constitutions, and obligations under Rule 3.8(b) of the New York State Rules of Professional Conduct.

3. The document should be phrased as an order, which should direct the prosecuting authority to disclose all covered materials.
4. The order should be directed at the District Attorney and the Assistant responsible for the case.
5. The order should not contain any reference to materiality.
6. The order should explain that disclosure of benefits, promises, or inducements to a witness in connection with the witness's testimony or other cooperation in the case could be required.
7. The order should include specific references to certain types of materials or information that could be required to be disclosed, including:
 - a. that relevant benefits, promises, or inducements may come from law enforcement officials, law enforcement victims services agencies, or the prosecutor;
 - b. prior inconsistent statements and uncharged criminal conduct and convictions; and
 - c. a witness's mental or physical illness or substance abuse.
8. The order should include that the prosecutor's duty to disclose information that is favorable solely because it tends to impeach a witness's credibility applies only with respect to a testifying witness.
9. The order should provide that the prosecutor is obligated to timely disclose information in accordance with the United States and New York State constitutional standards, as well as CPL article 240, and the order should provide that disclosure is presumptively timely if the prosecutor shall have completed it no later than 30 days before commencement of a trial in a felony case and 15 days before commencement of a trial in a misdemeanor case.
10. The order should provide that only willful and deliberate conduct will constitute a violation of the order or be eligible for personal sanctions against a prosecutor.

VIII. Order Regarding Obligations for Defense Attorneys

1. Courts should adopt a form document, issued by trial courts in criminal cases, regarding the defense counsel's obligation to comply with defendant's statutory notice obligations and to help ensure constitutionally effective representation and to provide language for such a document.
2. The document should be phrased as an order, which should direct the defense counsel to comply with defendant's statutory notice obligations and to help ensure constitutionally effective representation.

3. The order should be directed to the firm or institutional defender and the individual defense counsel, as well as the individual attorney responsible for the case at a firm or institutional defender.
4. The defendant should be provided with a copy of such order.

Appendix B

Model Order Directed to the Prosecution

At arraignment on an indictment, prosecutor's information, information, or simplified information, the court shall issue a written order as described below. Where either the People or counsel for the defendant is not present at the arraignment, the court shall issue the order at the next scheduled court date with counsel present. As a condition for issuance of the order, counsel for the defendant shall provide the prosecutor with a written demand as specified under CPL 240.10(1) and 240.20, unless the prosecution waives the need for a demand.

The order shall include the following information:

The court hereby orders the District Attorney and the Assistant responsible for the case, or, if the matter is not being prosecuted by the District Attorney, the prosecuting agency and its assigned representative, to make timely disclosures of information favorable to the defense as required by *Brady v Maryland*, 373 US 83 (1963), *Giglio v United States*, 405 US 150 (1972), *People v Geaslen*, 54 NY2d 510 (1981), and their progeny under the United States and New York State constitutions, and by Rule 3.8(b) of the New York State Rules of Professional Conduct, as described hereafter.

- The District Attorney and the Assistant responsible for the case have a duty to learn of such favorable information that is known to others acting on the government's behalf in the case, including the police, and should therefore confer with investigative and prosecutorial personnel who acted in this case and review their and their agencies' files directly related to the prosecution or investigation of this case.
- Favorable information could include, but is not limited to:
 - a) Information that impeaches the credibility of a testifying prosecution witness, including (i) benefits, promises, or inducements, express or tacit, made to a witness by a law enforcement official or law enforcement victim services agency in connection with giving testimony or cooperating in the case; (ii) a witness's prior inconsistent statements, written or oral; (iii) a witness's prior convictions and uncharged criminal conduct; (iv) information that tends to show that a witness has a motive to lie to inculcate the defendant, or a bias against the defendant or in favor of the complainant or the prosecution; and (v) information that tends to show impairment of a witness's ability to perceive, recall, or recount relevant events, including impairment resulting from mental or physical illness or substance abuse.
 - b) Information that tends to exculpate, reduce the degree of an offense, or support a potential defense to a charged offense.
 - c) Information that tends to mitigate the degree of the defendant's culpability as to a charged offense, or to mitigate punishment.

- d) Information that tends to undermine evidence of the defendant's identity as a perpetrator of a charged crime, such as a non-identification of the defendant by a witness to a charged crime or an identification or other evidence implicating another person in a manner that tends to cast doubt on the defendant's guilt.
 - e) Information that could affect in the defendant's favor the ultimate decision on a suppression motion.
- Favorable information shall be disclosed whether or not it is recorded in tangible form, and irrespective of whether the prosecutor credits the information.
- Favorable information must be timely disclosed in accordance with the United States and New York State constitutional standards, as well as CPL article 240. Disclosures are presumptively "timely" if they are completed no later than 30 days before commencement of trial in a felony case and 15 days before commencement of trial in a misdemeanor case. Records of a judgment of conviction or a pending criminal action ordinarily are discoverable within the time frame provided in CPL 240.44 or 240.45(1). Disclosures that pertain to a suppression hearing are presumptively "timely" if they are made no later than 15 days before the scheduled hearing date. The prosecutor is reminded that the obligation to disclose is a continuing one.
- A protective order may be issued for good cause, and CPL 240.50 shall be deemed to apply, with respect to disclosures required under this order. The prosecutor may request a ruling from the court on the need for disclosure.
- Only willful and deliberate conduct will constitute a violation of this order or be eligible to result in personal sanctions against a prosecutor.

Appendix C

Model Order Directed to Defense Counsel (with a copy to criminal defendants)

At arraignment on an indictment, prosecutor's information, information, or simplified information, the court shall issue a written order calling attention to certain professional obligations of counsel for the defendant during the representation. Where the People or counsel for the defendant is not present at the arraignment, the court shall issue the order at the next scheduled court date with counsel present. The order should include the following information:

- Defense counsel has the obligation to:
 - a) Confer with the client about the case and keep the client informed about all significant developments in the case;
 - b) Timely communicate to the client any and all guilty plea offers, and provide reasonable advice about the advantages and disadvantages of such guilty plea offers and about the potential sentencing ranges that would apply in the case;
 - c) When applicable based upon the client's immigration status, ensure that the client receives competent advice regarding the immigration consequences in the case as required under *Padilla v Kentucky*, 559 US 356 (2010);
 - d) Perform a reasonable investigation of both the facts and the law pertinent to the case (including as applicable, e.g., visiting the scene, interviewing witnesses, subpoenaing pertinent materials, consulting experts, inspecting exhibits, reviewing all discovery materials obtained from the prosecution, researching legal issues, etc.), or, if appropriate, make a reasonable professional judgment not to investigate a particular matter;
 - e) Comply with the requirements of the New York State Rules of Professional Conduct regarding conflicts of interest, and when appropriate, timely notify the court of a possible conflict so that an inquiry may be undertaken or a ruling made;
 - f) Possess or acquire a reasonable knowledge and familiarity with criminal procedural and evidentiary law to ensure constitutionally effective representation in the case; and
 - g) When the statutory requirements necessary to trigger notice from the defense are met (e.g., a demand, intent to introduce the evidence, etc.), comply with the statutory notice obligations for the defense as specified in CPL 250.10, 250.20, and 250.30.

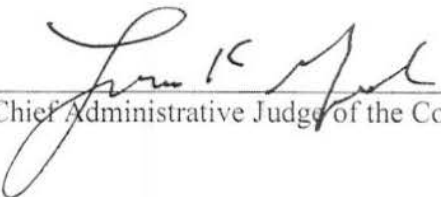
ADMINISTRATIVE ORDER OF THE
CHIEF ADMINISTRATIVE JUDGE OF THE COURTS

Pursuant to the authority vested in me, and upon consultation with and agreement of the Administrative Board of the Courts, I hereby amend the uniform rules for courts exercising criminal jurisdiction (22 NYCRR Part 200) by adding sections 200.16 and 200.27 as follows, effective January 1, 2018:

* * *

200.16/200.27: Issuance of Order Confirming Disclosure and Notice Obligations

In all criminal actions on an indictment, prosecutor's information, information, or simplified information, where counsel for the defendant has provided the prosecutor with a written demand as specified under CPL 240.10(1) and 240.20, or where the prosecution has waived such demand, the court shall issue an order to prosecution and defense counsel that, inter alia, (1) confirms the prosecutor's disclosure obligations pursuant to *Brady v. Maryland*, 373 U.S. 83 (1963), *Giglio v. United States*, 405 U.S. 150 (1972), *People v. Geaslen*, 54 N.Y.2d 510 (1981), and their progeny; and (2) confirms defense counsel's professional obligation to provide effective assistance of counsel and meet defendant's statutory notice obligations. The order shall be issued on the first scheduled court date, following demand, where both the prosecutor and defense counsel are present. The Chief Administrator of the Courts shall promulgate a model order for this purpose that the court may use as it deems appropriate.



Chief Administrative Judge of the Courts

Dated: November 6, 2017

AO 291/17

STATE OF NEW YORK, _____ COURT
COUNTY OF _____: CRIMINAL TERM, PART ____

-----X
PEOPLE OF THE STATE OF NEW YORK,

-against-

_____, Defendant.

Case No. _____

Order to Counsel in
Criminal Cases

-----X
_____, J.

The court, pursuant to an Administrative Order of the Chief Administrative Judge and at the recommendation of the New York State Justice Task Force and in furtherance of the fair administration of justice, issues this order as both a reminder and a directive that counsel uphold their constitutional, statutory and ethical responsibilities in the above-captioned proceedings.

To the Prosecutor:

The District Attorney and the Assistant responsible for the case, or, if the matter is not being prosecuted by the District Attorney, the prosecuting agency and its assigned representative, is directed to make timely disclosures of information favorable to the defense as required by *Brady v Maryland*, 373 US 83 (1963), *Giglio v United States*, 405 US 150 (1972), *People v Geaslen*, 54 NY2d 510 (1981), and their progeny under the United States and New York State constitutions, and by Rule 3.8(b) of the New York State Rules of Professional Conduct, as described hereafter.

- The District Attorney and the Assistant responsible for the case have a duty to learn of such favorable information that is known to others acting on the government's behalf in the case, including the police, and should therefore confer with investigative and prosecutorial personnel who acted in this case and review their and their agencies' files directly related to the prosecution or investigation of this case.
- Favorable information could include, but is not limited to:
 - a) Information that impeaches the credibility of a testifying prosecution witness, including (i) benefits, promises, or inducements, express or tacit, made to a witness by a law enforcement official or law enforcement victim services agency in connection with giving testimony or cooperating in the case; (ii) a witness's prior inconsistent statements, written or oral; (iii) a witness's prior convictions and uncharged criminal conduct; (iv) information that tends to show that a witness has a motive to lie to inculcate the defendant, or a bias against the defendant or in favor of the complainant or the prosecution; and (v) information that tends to show impairment of a witness's ability to perceive, recall, or recount relevant events, including impairment resulting from mental or physical illness or substance abuse.
 - b) Information that tends to exculpate, reduce the degree of an offense, or support a potential defense to a charged offense.

- c) Information that tends to mitigate the degree of the defendant's culpability as to a charged offense, or to mitigate punishment.
- d) Information that tends to undermine evidence of the defendant's identity as a perpetrator of a charged crime, such as a non-identification of the defendant by a witness to a charged crime or an identification or other evidence implicating another person in a manner that tends to cast doubt on the defendant's guilt.
- e) Information that could affect in the defendant's favor the ultimate decision on a suppression motion.

- Favorable information shall be disclosed whether or not it is recorded in tangible form, and irrespective of whether the prosecutor credits the information.

- Favorable information must be timely disclosed in accordance with the United States and New York State constitutional standards, as well as CPL article 240. Disclosures are presumptively "timely" if they are completed no later than 30 days before commencement of trial in a felony case and 15 days before commencement of trial in a misdemeanor case. Records of a judgment of conviction or a pending criminal action ordinarily are discoverable within the time frame provided in CPL 240.44 or 240.45(1). Disclosures that pertain to a suppression hearing are presumptively "timely" if they are made no later than 15 days before the scheduled hearing date. The prosecutor is reminded that the obligation to disclose is a continuing one. Prosecutors should strive to determine if favorable information exists. Nothing herein shall be understood to diminish a prosecutor's obligation to disclose exculpatory information as soon as reasonably possible.

- A protective order may be issued for good cause, and CPL 240.50 shall be deemed to apply, with respect to disclosures required under this order. The prosecutor may request a ruling from the court on the need for disclosure.

- Only willful and deliberate conduct will constitute a violation of this order or be eligible to result in personal sanctions against a prosecutor.

To Defense Counsel:

Defense counsel, having filed a notice of appearance in the above captioned case, is obligated under both the New York State and the United States Constitution to provide effective representation of defendant. Although the following list is not meant to be exhaustive, counsel shall remain cognizant of the obligation to:

- a) Confer with the client about the case and keep the client informed about all significant developments in the case;
- b) Timely communicate to the client any and all guilty plea offers, and provide reasonable advice about the advantages and disadvantages of such guilty plea offers and about the potential sentencing ranges that would apply in the case;

- c) When applicable based upon the client's immigration status, ensure that the client receives competent advice regarding the immigration consequences in the case as required under *Padilla v Kentucky*, 559 US 356 (2010);
- d) Perform a reasonable investigation of both the facts and the law pertinent to the case (including as applicable, e.g., visiting the scene, interviewing witnesses, subpoenaing pertinent materials, consulting experts, inspecting exhibits, reviewing all discovery materials obtained from the prosecution, researching legal issues, etc.), or, if appropriate, make a reasonable professional judgment not to investigate a particular matter;
- e) Comply with the requirements of the New York State Rules of Professional Conduct regarding conflicts of interest, and when appropriate, timely notify the court of a possible conflict so that an inquiry may be undertaken or a ruling made;
- f) Possess or acquire a reasonable knowledge and familiarity with criminal procedural and evidentiary law to ensure constitutionally effective representation in the case; and
- g) When the statutory requirements necessary to trigger notice from the defense are met (e.g., a demand, intent to introduce the evidence, etc.), comply with the statutory notice obligations for the defense as specified in CPL 250.10, 250.20, and 250.30.

So ordered.

Judge or Justice

Dated:

NYSBA

Task Force on Criminal Discovery Final Report

**For the Consideration of the
House of Delegates
December 1, 2014**

Opinions expressed are those of the Section/Committee/Task Force preparing this report and do not represent those of the New York State Bar Association unless and until they have been adopted by its House of Delegates or Executive Committee



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New York State Bar Association, Task Force on Criminal Discovery

Criminal Discovery Reform in New York State

REPORT AND PROPOSALS

Introduction

For forty years, reports and legislative proposals by experts and practitioners have urged New York State to reform its outdated and unfair criminal discovery rules. This Task Force seeks to break the logjams that have stalled these necessary changes.

We believe that five key measures can solve this protracted impasse, and finally restore New York's criminal justice system to a sound position within the national mainstream. The balanced framework for modernizing the discovery rules that we propose would result in a far more fair and reliable, yet fully workable, system. It would permit adequate case investigations, allow prompt and properly informed decisions on guilty pleas, lead to more orderly trials, and would minimize the risk of wrongful convictions. It would also provide the tools needed for courts, prosecutors, and defense lawyers to protect the witnesses upon whom the system depends and to whom it must afford security.

The first section of this report describes why large-scale reform of New York State's criminal discovery rules is needed. Section II sets forth the Task Force's specific recommendations for such changes. Section III contains additional recommendations for rectifying persistent problems involving inadequate disclosure of evidence and information favorable to the defendant (so-called "*Brady*" information) that have been widely noted, including by this Bar Association's Task Force on Wrongful Convictions. Section IV addresses issues regarding flow of information and discoverable materials from law enforcement agencies to prosecutors' offices. Finally, a minority of the Task Force has submitted a response to recommendations in our report, and the Task Force majority provides its reply to these dissenting views.

I. The Need for Criminal Discovery Reform

Calls for modernizing New York State’s highly restrictive criminal discovery system have been raised by other panels and groups for decades, but so far to no avail.¹ The current discovery rules are set forth in Criminal Procedure Law article 240, which was last significantly revised in 1979.

This Task Force agrees that overhauling criminal discovery in New York is urgently needed and long overdue. Currently people accused of crimes in this State are denied access to critical materials that are necessary for them to make informed decisions about their cases, to undertake proper investigations, to intelligently assess plea offers, to secure and use exculpatory evidence, and to adequately prepare for trial before the last minute. The prosecution is similarly denied adequate and timely discovery from the defense.

Dozens of other States have employed systems of broad access to both parties’ evidence at an early stage of criminal cases for many years. Such discovery rules are used in large and small States, States with large rural areas, States with huge urban concentrations, and States, like New York, with a combination of both. Broad discovery is provided to defendants in major cities such as Los Angeles, Chicago, Philadelphia, Miami, Detroit, Boston, Phoenix, Charlotte, Denver, Seattle, San Diego and Newark. New Jersey enacted expedited and liberalized criminal discovery in 1973; Florida did so in 1968. No State that has enacted more open discovery rules has later gone back to

¹ See “Report of the Advisory Committee on Criminal Law and Procedure to the Chief Administrative Judge of the Courts of the State of New York” (2014), pp. 19-23 (discovery reform proposal renewed annually since 1994); The Legal Aid Society of New York City, “Criminal Discovery Reform in New York: A Proposal to Repeal CPL Article 240 and to Enact a New CPL Article 245” (2009); Commission on the Future of Indigent Defense Services, “Final Report to the Chief Judge of the State of New York” (2006), p. 24; The Spangenberg Group, “Status of Indigent Defense In New York: A Study for Chief Judge Kaye’s Commission on the Future of Indigent Defense Services” (2006), pp. 77-83, 146-48; New York County Lawyers’ Association, “Discovery in New York Criminal Courts: Survey Report and Recommendations” (2006); Report to the New York State Assembly Codes Committee, “Criminal Discovery in New York State: Current Practice and Proposals for Change” (1991); Judicial Conference Report on CPL, “Memorandum and Proposed Statute Re Discovery: Opening Up Criminal Discovery in New York,” 1974 Session Laws of New York, pp. 1873-76; see also *People v. Copicotto*, 50 N.Y.2d 222, 226 (1980) (“the trial of a criminal charge should not be a sporting event where each side remains ignorant of facts in the hands of the adversary until events unfold at trial”); ABA Standards for Criminal Justice: Discovery, Standard 11-1.1 (3d ed. 1996); The Constitution Project, “Justice Denied: America’s Continuing Neglect of Our Constitutional Right to Counsel” (2009), pp. 77-79, 207; The Justice Project, “Expanded Discovery in Criminal Cases: A Policy Review” (2007); Mary Prosser, “Reforming Criminal Discovery: Why Old Objections Must Yield to New Realities,” 2006 Wis. L. Rev. 541 (2006); Jenny Roberts, “Too Little, Too Late: Ineffective Assistance of Counsel, the Duty to Investigate, and Pretrial Discovery in Criminal Cases,” 31 Fordham Urb. L. J. 1097 (2004); Editorial, “Rampant Prosecutorial Misconduct,” *NEW YORK TIMES* (Jan. 4, 2014); Editorial, “Justice and Open Files,” *NEW YORK TIMES* (Feb. 26, 2012).

impose restrictive ones.² Most recently, Texas (2014) and North Carolina (2004) enacted open discovery statutes, and Ohio (2010) made its fairly broad discovery rules even more broad.

New York is so far outside the mainstream on this crucial issue that a leading treatise places it among the fourteen States that provide defendants in criminal cases with the *least* discovery in the nation: “Alabama, Georgia, Iowa, Kansas, Kentucky, Louisiana, *New York*, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Virginia, and Wyoming.”³ (As noted, Texas should now be removed from the list of “bottom fourteen” States.) This list actually *understates* New York’s restrictiveness on discovery, as several of these States have other procedures that result in the defense receiving crucial information, such as providing lists of witnesses’ names and addresses.⁴

New York’s restrictive discovery rules stand in stark contrast to its liberal discovery in civil proceedings. This State has long embraced the rationale of early and open discovery in civil matters, insisting that surprise is undesirable in litigation and that both parties should be entitled to know and develop all the relevant facts.⁵ Yet in criminal cases, where liberty is at stake, Criminal Procedure Law article 240 systematically blocks defendants, some of them innocent or over-charged, from

² Milton Lee, “Criminal Discovery: What Truth Do We Seek?,” 4 U.D.C. L. Rev. 7, 19 (1998); *see also* Janet Moore, “Democracy and Criminal Discovery Reform After *Connick* and *Garcetti*,” 77 Brook. L. Rev. 1329, 1380-84 (2012).

³ 5 Wayne R. LaFare et al., Criminal Procedure §20.2(b), n.31 (3d ed. updated Dec. 2012). In May 2013, Texas enacted a new criminal discovery statute that requires disclosure by the State of, *inter alia*, “any offense reports, any designated documents, papers, written or recorded statements of the defendant or a witness, including witness statements of law enforcement officers . . . or any designated . . . tangible things not otherwise privileged that constitute or contain evidence material to any matter involved in the action. . . .” and “any exculpatory, impeachment, or mitigating document, item, or information . . .,” beginning “as soon as practicable after receiving a timely request. . . .” *See* Tex. Crim. Pro. Art. 39.14(a), (h) (effective January 1, 2014).

⁴ In particular, among these “bottom fourteen” States, ten of them – unlike New York – have procedures that result in disclosure of witness information. Rhode Island requires the prosecution to disclose the names and addresses of all its intended trial witnesses. Georgia requires the prosecution to provide defense counsel with a confidential list of the addresses and telephone numbers of its intended trial witnesses. Iowa requires the prosecution to give notice of the name, occupation and testimony of each witness. In Kansas, the indictment or information must list the names of all “known” witnesses; and in Kentucky, South Dakota, Tennessee and Texas, it must list the names of all testifying grand jury witnesses. In Alabama and Virginia, the defendant has a right to a preliminary hearing at which the witnesses testify in the defendant’s presence. *See* Ala. Code §§15-11-1, 15-11-6; Ga. Super. Ct. R. 30.3; Ga. Code Ann. §§17-16-3, 17-16-21; Ia. R. 2.4(6); Kan. Stat. Ann. §22-3201(g); Ky. R. Crim. P. 6.08; R.I. R.Super.Ct. R.C.R.P. Rule 16(a)(7); S.D. C.L. §23A-5-18; Tenn. Code Ann. §40-13-107; Tex. Crim. Pro. Art. 20.20; Va. Code Ann. §19.2-183; *see also* Va. Code Ann. §19.2-228. This issue is discussed further below in Section II-A.

⁵ CPLR §3101(a) (requiring “full disclosure” of all non-privileged information in civil cases in New York State); *Allen v. Crowell-Collier Pub. Co.*, 21 N.Y.2d 403, 406 (1968) (in civil cases, discovery must be given “of any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity”); *see generally Hickman v. Taylor*, 329 U.S. 495, 507 (1947) (“Mutual knowledge of all the relevant facts gathered by both parties is essential to proper litigation”).

investigating, making informed decisions about plea offers, and formulating proper strategies prior to the start of the trial.

The feasibility and effectiveness of broad and early discovery in criminal cases have been well tested and clearly established. Open discovery helps innocent or over-charged defendants fairly prepare for trial. It also encourages guilty people to plead guilty earlier in the proceedings by showing them the evidence against them. When the defense lawyer is given the discovery materials promptly, he or she can then advise the defendant concerning the strength of the case and, when appropriate, demonstrate with tangible proof that accepting a plea is the person's best option.⁶

Expedited discovery is also beneficial as it causes prosecutors to review their own evidence at a much earlier stage of the case. This results in more appropriate and better-informed plea offers. If prosecution is found unmerited or the highest charges are deemed unfounded, the result will be quicker dismissal or reduction, resulting in more justice and cost savings.

Basic information in a criminal case that is routinely disclosed in every State with modern discovery rules is not discoverable at all in New York, or is turned over too late for the defense to use it to investigate and prepare. New York does not require that all non-privileged police reports regarding the investigation of the case be provided to the defense. It does not require that witnesses' names and contact information be disclosed prior to trial.⁷ Even the most important type of discovery for a criminal defendant, the written and recorded statements of the prosecution's

⁶ The relationship between early criminal discovery and timing of guilty pleas has not been the subject of rigorous studies, perhaps because most large States long ago adopted broad discovery. But prosecutors in jurisdictions that provide early and extensive pre-trial discovery have often reported that they have "no doubt" that it leads to more guilty pleas, since as one of them commented: "a defense attorney can better convince the [defendant] to take a plea. . . . [Discovery] avoids the concern that the DA is selling the defendant a bill of goods." On the administrative costs, prosecutors have made comments such as: "we hire a few people at minimum wage to copy all files (except for attorney work-product). Copies are put in a central depository and public defenders just come by a window and pick the material up." See Report to the New York State Assembly Codes Committee, "Criminal Discovery in New York State: Current Practice and Proposals for Change" (1991), pp. 79-82; accord The Justice Project, "Expanded Discovery in Criminal Cases: A Policy Review" (2007), p. 20 (quoting a North Carolina District Attorney regarding that State's adoption in 2004 of open discovery: "[Open discovery] is more likely to generate guilty pleas. If you have good evidence, the lawyer tells the client to plead guilty"); Janet Moore, "Democracy and Criminal Discovery Reform After *Connick* and *Garcetti*," 77 Brook. L. Rev. 1329, 1383 & n.384 (2012) (summarizing interviews with North Carolina practitioners, including the Chief Resource Prosecutor of the North Carolina Conference of District Attorneys, by stating: "Full open file discovery appears to be increasing the speed and fairness of plea bargaining").

⁷ See, e.g., *People v. Emiliano*, 81 A.D.3d 436, 438 (1st Dept. 2011).

witnesses (so-called “Rosario material”), does not need to be divulged until after the jury has already been selected and sworn at a trial.⁸

By that point, guilty plea offers have been rejected based upon mere guesswork about the possible evidence; and it is usually impossible to undertake useful investigations of the new information during trial. Defense lawyers are expected to have the skills of legal superheroes, who can suddenly review and react to a stack of paperwork, evaluate often surprising and previously unknown facts, and develop or alter trial strategies on the spot while jurors sit watching and with the client’s life in the balance. Surprise evidence like this can readily produce unreliable verdicts and wrongful convictions. Yet New York institutionalizes this unacceptable approach of “trial by ambush.”

New York’s discovery statute does not even direct prosecutors to disclose all known information and evidence that potentially shows the defendant is innocent or that supports a defense. Instead, it simply tells them without elaboration to follow constitutional requirements.⁹ Some prosecutors interpret this to mean that they need disclose only the limited category of “materially” exculpatory evidence – that is, just that exculpatory evidence which, in the prosecutor’s own opinion, would create a “reasonable probability” that the result of the proceeding would be different or “undermine confidence” in a conviction.¹⁰ This standard is inadequate because often prosecutors do not know the defense’s theory of the case at the time decisions about disclosure are made, so they may have little basis for making accurate “materiality” assessments. The discovery statutes in many other States reject this antiquated approach, which jeopardizes fair trials and reliable verdicts. They specifically require prosecutors to disclose *all* known exculpatory or mitigating information, without speculation as to whether it would be “material” to a jury’s finding of guilt.¹¹

⁸ CPL §240.45(1)(a).

⁹ CPL §240.20(1)(h).

¹⁰ See *Kyles v. Whitley*, 514 U.S. 419, 434 (1995); *United States v. Coppa*, 267 F.3d 132, 135 (2d Cir. 2001); *People v. Fuentes*, 12 N.Y.3d 259, 260 (2009); *People v. Vilardi*, 76 N.Y.2d 67, 77 (1990).

¹¹ See, e.g., Ariz. R.Crim.P. 15.1(b)(8); Cal. Penal Code §1054.1(e); Colo. R.Crim.P. 16 Part I (a)(2); Ill. S. Ct. R. 412 (c); Mass. R.Crim.P. 14(a)(1)(A)(iii); Md. R. 4-263(d)(5), (d)(6); Mich. CR 6.201(B)(1); Minn. R.Crim.P. 9.01 Subd. 1 (6); Tex. Crim. Pro. Art. 39.14(h); Wash. C.R.R. 4.7(a)(3); see also New York State Rules of Professional Conduct, Rule 3.8(b) (“Special Responsibilities of Prosecutors and Other Government Lawyers”); ABA Formal Opinion 09-454 (“Prosecutor’s Duty to Disclose Evidence and Information Favorable to the Defense”); ABA Resolution 105D (adopted by the ABA House of Delegates, August 8-9, 2011) (urging federal, state, territorial and

In some counties of New York State, the District Attorneys have abandoned article 240 on their own. They voluntarily offer defendants forms of “open file” discovery early in the case. Significantly, a survey conducted by the New York County Lawyers’ Association found that “those boroughs [of New York City] with more liberal disclosure report the most universal satisfaction with the process *regardless of position within the system*.”¹² These District Attorneys have also jettisoned article 240’s inefficient and needless requirement that both parties file written “demands” to obtain routine discovery. They make discovery automatic, recognizing that few litigants will ever have a sound reason to forgo discovery. Eliminating this formulaic paperwork has saved defense lawyers, prosecutors, and the courts in these counties pointless burdens. But while these are salutary developments, the resulting unequal treatment of defendants statewide – where the quality of discovery and thus the fairness of the process depends on the arbitrary distinction of which county the offense allegedly occurred in – is troubling and undermines the idea of uniform application of the laws upon which public respect for fair law is based.

The Legislature last enacted major revisions to the discovery rules over thirty years ago, in 1979. Yet the criminal justice system has been transformed in several ways during that period, with major implications for discovery. Most fundamentally, criminal practice has been transformed from a “system of trials” into a “system of pleas” in recent decades, as the United States Supreme Court recently recognized when expanding criminal defendants’ rights to competent representation in the plea process. Plea negotiations have by now supplanted trials as “the critical point” in most cases.¹³ The exact boundaries of the Court’s decisions have not yet been fully established, but the transformation they recognized has obvious implications on discovery since defense lawyers are obligated to fulfill “the critical obligation of counsel to advise the client of ‘the advantages and disadvantages of a plea agreement.’”¹⁴ Giving meaningful advice about “advantages and

tribal governments to adopt disclosure rules for favorable information as described in ABA Formal Opinion 09-454, with detailed accompanying report).

¹² New York County Lawyers’ Association, “Discovery in New York Criminal Courts: Survey Report and Recommendations” (2006), p. 2 (emphasis added); *see also* The Spangenberg Group, “Status of Indigent Defense In New York: A Study for Chief Judge Kaye’s Commission on the Future of Indigent Defense Services” (2006), pp. 77-83, 146-48.

¹³ *Lafler v. Cooper*, 132 S. Ct. 1376, 1388 (2012); *Missouri v. Frye*, 132 S.Ct. 1399, 1407 (2012) (“plea bargaining . . . is not some adjunct to the criminal justice system; it is the criminal justice system”) (emphasis in original).

¹⁴ *Padilla v. Kentucky*, 559 U.S. 356, 130 S.Ct. 1473, 1484 (2010); *accord Lafler v. Cooper*, 132 S. Ct. 1376, 1388 (2012) (“Ninety-seven percent of federal convictions and ninety-four percent of state convictions are the result of

disadvantages” of a plea offer normally presupposes, as a practical matter, that the lawyer actually has information about the witnesses and evidence that will be presented at trial. But article 240 does not guarantee the defense access to facts that facilitate proper advice. The “critical” decision that the vast majority of New York defendants must make devolves into a bare mathematical calculation involving potential sentence risks, with the defense lawyer able to say little more than that, in her past experience, the evidence at trial sometimes turns out to be strong and sometimes turns out to be weak.

The need for modernizing the discovery rules is also evident because other options for obtaining discovery have been virtually eliminated since 1979. Preliminary hearings at which some prosecution witnesses testified were commonplace in felony cases decades ago, and those hearings provided extensive discovery. Yet today preliminary hearings are all but extinct in most parts of the State. Defense subpoenas for items or documents possessed by police and prosecutors were routinely issued and complied with in past decades. But for at least the last dozen years, restrictions imposed by appellate courts have virtually ended that alternative discovery option.¹⁵ Only a legislative solution, therefore, can rectify the current crisis in New York criminal discovery.

While early and broad discovery would have enormous benefits, providing access to the prosecution’s evidence also could present increased opportunities for misuse of disclosed information. Finding the proper balance between affording timely disclosure of witness information – yet maintaining procedures that are adequate to protect witnesses as needed – is the persistent snag that has held back criminal discovery reform in New York for many years. The Task Force believes that this problem can be resolved.

II. The Task Force’s General Recommendations for Criminal Discovery Reform

Large-scale changes to Criminal Procedure Law article 240 are needed to make criminal discovery practice more fair and efficient, and to return New York State’s criminal justice system to

guilty pleas. . . . [T]he right to adequate assistance of counsel cannot be defined or enforced without taking account of the central role plea bargaining plays. . . .”).

¹⁵ *Matter of Constantine v. Leto*, 77 N.Y.2d 975, 976 (1991), *aff’d*, 157 A.D.2d 376, 378 (3rd Dept. 1990); *People v. Bagley*, 279 A.D.2d 426 (1st Dept. 2001).

the mainstream nationally. The Task Force suggests that the Legislature enact five key changes in particular:

(1.) The defense should receive the early disclosure of witness information that is provided in other States. But several special procedures that go beyond those used in other States should also be enacted to assist courts, prosecutors, and defense lawyers in the shared goal of ensuring safety for witnesses. As a further counterpart of discovery reform, the penalties for the offenses of tampering with a witness and intimidating a victim or witness should be significantly enhanced.

(2.) The discovery available to defendants should include additional types of material and information, including: police reports; increased disclosure of evidence and information favorable to the defense; intended exhibits; greater disclosure of expert opinion evidence; witnesses' criminal history information; timely notice of potentially suppressible property; and search warrant information.

(3.) The defendant's obligations to provide reciprocal discovery for the prosecution should be considerably expanded.

(4.) The prosecution's disclosures should occur in a multi-stage time frame that prosecutors actually can meet.

(5.) For rule violations and lapses that inevitably will occur in any discovery process despite the parties' reasonable efforts to comply, courts should not penalize prosecutors or defense lawyers with "sanctions" but should simply "remedy" violations when they are significantly prejudicial.

The Task Force further recommends adoption of several other measures that would facilitate the goals of, and improve compliance with, the discovery statute. These proposals include: allowing discretionary discovery by court order; requiring "certificates of compliance" to be filed by lawyers (albeit ones that do not in themselves present a basis for litigation or for penalizing litigants); disclosure before trial of defendants' uncharged misconduct to be offered as substantive evidence; and certain changes to subpoena law and to the statutes concerning pre-trial notice of some kinds of suppressible evidence. On the other hand, the Task Force does *not* presently recommend that any statutory obligation to provide discovery prior to pleas of guilty be adopted. We now turn to explaining each of these recommendations.

A. Discovery of Witness Information – But With Several Special Procedures to Help Ensure Safety of Witnesses

1. *Witness Information Should Be Discoverable*

The several dozen States with modern criminal discovery rules have recognized that it is critical that both parties receive enough information through discovery to locate witnesses as necessary (barring circumstances that justify a protective order). This means exchanging their names and addresses.¹⁶ Many other States also have rules that require the prosecution to disclose names or addresses of witnesses on the indictment or otherwise.¹⁷ The Task Force agrees with this nationwide consensus. But we recommend that, in the alternative to disclosing a person’s address, the prosecution should be permitted to provide “adequate alternative contact information.” Moreover, only the business addresses, not the home addresses, of police officers, governmental officials, and expert witnesses should be discoverable.

This uniform modern discovery practice derives from the bedrock legal principle that witnesses “belong” to neither party. A fundamental rule in this country is that both sides in the case

¹⁶ See Alaska R.Crim.P. 16(b)(1)(A)(i); Ariz.R.Crim.P. 15.1(b)(1); Ark.R.Crim.P. 17.1(a)(i); Cal.Pen. Code §1054.1(a); Colo.Crim.P.R. 16, Part I (a)(1)(VII); Conn.R.Super.Ct.Crim. §40-13(a); Fla.R.Crim.P. 3.220(b)(1)(A); Hawaii R. Penal P. 16(b)(1)(i); Idaho R.Crim.P. 16(b)(6); Ill. Sup.Ct.R. 412(a)(i); Me.R.Crim.P. 16(b)(2)(C); Md.R. 4-263(d)(3), 4-262(d)(2)(B); Mass.R.Crim.P. 14(a)(1)(A)(iv); Mich.Ct.R. 6.201(A)(1); Minn.R.Crim.P. 9.01 Subd. 1, (1)(a); Miss.U.R.C.C.C. 9.04(A)(1); Mo.R.Crim.P. 25.03(A)(1); Mont. Code Ann. §46-15-322(1)(a); Neb.Rev.Stat. §29-1912(1)(d); Nev. Rev. Stat. Ann. §174.275; N.H.R.Super.Ct. 98(C)(1) (names not addresses); N.J.Crim.R. 3:13-3(c)(6); N.M.Dist.Ct.R.Crim.P. 5-501(A)(5); N.C.Gen.Stat. Ann. §15A-904(a)(a2); N.D.R.Crim.P. 16(f)(1)(A); Ohio R.Crim.P. 16(I); Okla.Stat. Ann. tit. 22, §32-2002(A)(1)(a); Or.Rev.Stat. §135.815(1)(a); Pa.R.Crim.P. 573(B)(2)(a)(i); R.I. R.Super.Ct.R.C.R.P. Rule 16(a)(7); Vt.R.Crim.P. 16(a)(2)(E); Wash.Super.Ct.Crim.R. 4.7(a)(1)(i); W.Va.R.Crim.P. 16(a)(1)(F); Wi.Stat. Ann. §971.23(1)(d).

¹⁷ See, e.g., Ga. Super. Ct. R. 30.3 (“the district attorney shall furnish to defense counsel as an officer of the court, in confidence, the addresses and telephone numbers of the state’s witnesses to the extent such are within the knowledge of the district attorney”); Ga. Code Ann. §§17-16-3, 17-16-21 (“list of witnesses” prior to arraignment); Ind. Code Ann. §35-34-1-2(c) (“An indictment or information shall have stated upon it the names of all the material witnesses”); Ia. R. 2.4(6) (indictment includes “notice in writing stating the name and occupation of the witness upon whose testimony the indictment is found, and a full and fair statement of the witness’ testimony. . . . The clerk of the court must, on demand made, furnish the defendant or his or her counsel a copy thereof”); Kan. Stat. Ann. §22-3201(g) (“the prosecuting attorney shall endorse the names of all witnesses known to the prosecuting attorney upon the complaint, information and indictment. . . . [I]n no event shall identification of a witness be delayed beyond arraignment without further order of the court after hearing and an opportunity of the defendant to be heard”); Ky. R. Crim. P. 6.08 (indictment lists “names of all the witnesses who were examined”); S.D. C.L. §23A-5-18 (indictment contains “names of only those witnesses examined before the grand jury”); Tenn. Code Ann. §40-13-107 (indictment lists “names of the witnesses”); Tex. Crim. Pro. Art. 20.20 (indictment lists “names of the witnesses upon whose testimony the [indictment] was found”); Utah R. Crim. P. 4 (j) (indictment or information lists “names of witnesses” on whose evidence it was based and prosecutor shall upon request furnish “names of other witnesses”); Va. Code Ann. §19.2-228 (“name and address of the complaining witness” in misdemeanor cases); see also Ala. Code §§15-11-1, 15-11-6 (right to preliminary hearing at which complainant and witnesses testify in the defendant’s presence); Va. Code Ann. §19.2-183 (similar).

have an equal right, and should have an equal opportunity, to interview willing witnesses and to learn as much about the case as they can while acting in a professional and ethical manner. As the United States Supreme Court has stated, “[t]he traditional counterbalance in the American adversary system” for prosecutors’ pre-trial interviews with and access to witnesses “arises from the equal ability of defense counsel to seek and interview witnesses himself.” New York State court decisions have, likewise, consistently adhered to the seminal rule that witnesses are to be equally shared by the parties.¹⁸

Furthermore, the New York Court of Appeals recently ruled that prosecutors and police have no affirmative duty whatsoever to investigate witnesses or to seek any exculpatory evidence. Those duties fall wholly on the defense lawyer.¹⁹ That the Court has placed this pivotal function squarely and exclusively on defense lawyers further confirms that New York’s criminal discovery statute should now be modified in a way that enables them to fulfill it.

Early disclosure of witnesses’ contact information is often essential for the defense lawyer or investigator who needs to undertake an intelligent investigation of the charges; to evaluate and develop available defenses; and to provide the defendant with informed advice concerning the advisability of pleading guilty. All experienced investigators know that conducting an early investigation – when witnesses are still available, their memories are fresh, and physical evidence has not yet been lost or destroyed – is critically important for finding and preserving any exculpatory evidence and for learning the vital details.

New York has long recognized, for example, that *prosecutors* have a legitimate and crucial need for prompt discovery of adequate information to investigate the defendant’s “alibi defense” witnesses. Defendants are required, therefore, to timely turn over “the names, the residential

¹⁸ *United States v. Ash*, 413 U.S. 300, 318 (1973); accord *United States v. Carrigan*, 804 F.2d 599, 603 (10th Cir.1986); *United States v. Black*, 767 F.2d 1334, 1337 (9th Cir. 1985); *United States v. Long*, 449 F.2d 288, 295 (8th Cir. 1971); *Gregory v. United States*, 369 F.2d 185, 188 (D.C. Cir. 1966); *Schulz v. Marshall*, 528 F. Supp. 2d 77, 98 (E.D.N.Y. 2007), *aff’d*, 345 Fed.Appx. 627 (2d Cir. 2009); *People v. Greene*, 153 A.D.2d 439, 448 (2d Dept. 1990) (“a witness is not the property of either party”) (citation omitted); *People v. Eanes*, 43 A.D.2d 744 (2d Dept. 1973); *People v. DeVecchio*, 17 Misc.3d 1114(A), 2 (Sup. Ct., Kings Co. 2007); *People v. Marino*, 87 Misc.2d 542, 543 (Co. Ct., Monroe Co. 1976); see also *Strickland v. Washington*, 466 U.S. 668, 691 (1984); *People v. Townsley*, 20 N.Y.3d 294, 300 (2012) (“a lawyer’s interviewing a witness in the hope of getting favorable testimony . . . is not in the least improper. It is what good lawyers do”).

¹⁹ See *People v. Hayes*, 17 N.Y.3d 46, 52 (2011) (“[we] decline to impose an affirmative obligation upon the police to obtain exculpatory information for criminal defendants”).

addresses, the places of employment and the addresses thereof of every [] alibi witness.”²⁰ When the defense serves alibi notice, prosecutors quickly dispatch investigators or police to conduct face-to-face interviews with these potential witnesses. It is equally important for both parties to exchange sufficient information to find and investigate *other* types of witnesses as well.

Frequently the defense lawyer has no way to investigate meaningfully without receiving such information from the prosecution. Defense practitioners have found that, in many cases, the defendant is incapable of providing any investigable information or viable leads to locate witnesses.²¹ Further, merely disclosing witnesses’ *names* during discovery is inadequate, because many names are too common to be useful in finding and investigating a person. Instead, an address (not necessarily the home address) is needed. The alibi notice statute recognizes and solves this problem by requiring disclosure of both home addresses and workplace addresses.

Disclosure of witness information also substantially expedites the resolution of many cases in which a defendant is willing to enter a guilty plea, but hesitates to do so because he or she hopes or does not believe that a complainant or other key witness will testify. When these defendants see from the discovery materials that there actually is a specific witness who is going to testify – or hear from the defense lawyer or investigator what the witness has told them, and how the jury will likely react to the person’s demeanor – generally they are far less reluctant to actually enter the guilty plea. Earlier guilty pleas unclog the courts and save taxpayers money.

In contrast, when defense lawyers are deprived of such discovery, they are regularly unable to give meaningful and informed advice concerning plea offers. Without the means to investigate or evaluate the witnesses, their advice is often reduced to a mathematical calculation of risks (“You’re facing 5 years’ prison – I can’t tell you anything more about the evidence. Do you want the plea?”). Trust between court-appointed counsel and defendants is severely eroded, and the court system is beset by recurring delays when defendants request new lawyers.

Another key point is that, regardless of whether the prosecutor reveals witness names, defense lawyers have the ethical and constitutional obligation to *try* to investigate the prosecution’s

²⁰ CPL §250.20(1).

²¹ See Jenny Roberts, “Too Little, Too Late: Ineffective Assistance of Counsel, the Duty to Investigate, and Pretrial Discovery in Criminal Cases,” 31 Fordham Urb. L. J. 1097, 1102-03 (2004).

witnesses.²² Determined defense lawyers quite often can find a witness. But given the drastically limited resources available to the court-appointed counsel who handle the majority of criminal matters, and the enormous time, expense and “shoe leather” needed to canvass a neighborhood, success in such investigations is possible only in a few cases and often depends on chance factors. The result is a wasteful system in which the same government pays one party in the system to hide information that it possesses, while simultaneously paying the other party to waste its scarce resources trying to uncover the very same facts. Most disturbingly, discovery becomes a matter of luck, not of right – and defense lawyers must use guesswork to try to decide which cases merit the extra effort to find basic information.

Requiring the prosecution to disclose its prospective witnesses – subject to special procedures that allow withholding or restricting of this discovery when appropriate, such as those we recommend below in Section II-A-2 – actually will *improve* witness safety in many cases, by bringing the information into the open and placing strict limitations on disclosure. Opponents of discovery of witnesses ignore that currently defense lawyers have the duty to attempt to identify witnesses and investigate them, and frequently get results – and that usually it is easiest to find witnesses in the most violent and notorious offenses such as homicides and shootings. But because these investigations happen off-the-record, under the current discovery system nothing regulates the exchange of information between the defense lawyer and the defendant. Absent a legal directive, the attorney has no ethical right to withhold information from her clients simply because she has a “bad feeling” about it. Indeed, without disclosure, sometimes the only resources defense counsel has to locate witnesses is the defendant, and the defendant’s friends, and it becomes necessary to disclose whatever information defense counsel has to these individuals in order to attempt to contact witnesses. Thus, one of the great advantages for prosecutors of the proposed discovery rules is that, by obtaining a protective order, the prosecutor can place limits on the defense lawyer’s disclosure of information to the defendant in situations where it is inappropriate. In the absence of this change in

²² See *Rompilla v. Beard*, 545 U.S. 374, 387 (2005) (“It is the duty of the lawyer to conduct a prompt investigation of the circumstances of the case and to explore all avenues leading to facts relevant to the merits”) (quoting the ABA Standards for Criminal Justice); *Strickland v. Washington*, 466 U.S. 668, 690-91 (1984); *People v. Oliveras*, 21 N.Y.3d 339, 346-48 (2013); *People v. Bennett*, 29 N.Y.2d 462, 466 (1972) (“the defendant’s right to representation does entitle him to have counsel conduct appropriate investigations, both factual and legal, to determine if matters of defense can be developed, and to allow himself enough time for reflection and preparation for trial”); *People v. Green*, 37 A.D.3d 615 (2d Dept. 2007); *People v. Fogle*, 307 A.D.2d 299, 301 (2d Dept. 2003).

New York law, such limitations would not be available where defense counsel is obtaining the information independently.

“Appendix A” of this report includes a sampling of ten cases that illustrate ways in which enacting a statutory requirement to disclose witness information is vital to improving the reliability, fairness, and efficiency of New York’s criminal justice system. The troubling question that the examples discussed in this Appendix raise is: *in how many other cases was this kind of crucial information never found?* The record of wrongful convictions in New York State makes this especially distressing.

As long ago as 1991 a detailed report submitted to the New York State Assembly Codes Committee surveyed nationwide discovery practices and determined that, “[o]f the ten largest cities, New York City is the only one located in a state that does not provide for pre-trial disclosure of witness lists.” This report also found that the discovery rules in comparable States did not result in a general problem of witness intimidation, and that not only defense lawyers but also prosecutors strongly approved of the discovery practices and found them to be efficient and fair.²³ The Task Force has discerned no valid basis on which to conclude that the same types of discovery rules for witness information that have worked for decades in comparable States such as California, Florida, Illinois, Massachusetts, Michigan, New Jersey, Ohio and Pennsylvania would not also be practicable in New York – especially if the extra procedures that we recommend as a counterpart to discovery reform are adopted.

Of the more than thirty States with modern discovery rules, only a handful give the prosecution any way to restrict disclosure of witnesses’ addresses (but *not* their names) other than by obtaining a protective order from the court that allows non-disclosure. In California, prosecutors must disclose witnesses’ names, but discovery of addresses and telephone numbers is restricted to only the defense lawyer and defense personnel (and not to the defendant or anyone else) unless the court orders otherwise. In Maryland, prosecutors must disclose witnesses’ names, but in felony cases their addresses and telephone numbers may be withheld until trial upon request unless the

²³ Report to the New York State Assembly Codes Committee, “Criminal Discovery in New York State: Current Practice and Proposals for Change” (1991), p. 15; *accord* Cary Clennon, “Pre-Trial Discovery of Witness Lists: A Modest Proposal to Improve the Administration of Criminal Justice in the Superior Court of the District of Columbia,” 38 Cath. U. L. Rev. 641, 662 (1989) (“The most serious objection to disclosure of witness lists is the prospect of widespread witness tampering. . . . Practitioners from jurisdictions with broad discovery, both local and federal, have downplayed its occurrence”).

court orders disclosure. In Michigan, prosecutors must disclose witnesses' names, but their addresses may be withheld when the witness is made available for a pre-trial interview. In Ohio, prosecutors have the option to designate any material as "counsel only," or to certify to the court that material is not being disclosed based upon "reasonable, articulable grounds" to believe disclosure will compromise safety or subject a person to harm, or that interests of justice require non-disclosure, and then, upon motion of the defendant, the court must hold a hearing to review the prosecutor's decisions with participation by defense counsel.²⁴

It is currently standard practice in most parts of New York State – including in four of the five boroughs of New York City – for prosecutors to include the name of the complaining witness in the complaint (except in unusual circumstances), even though the law does not require them to do so. In other New York counties, however, it is the routine practice for the prosecution to withhold even that rudimentary fact until trial, especially in felony cases. The defendant is told in the complaint and the indictment merely that an anonymous "person known to the District Attorney's Office" or "known to the Grand Jury" has accused him of the crimes. Defendants have no way, in practice, to learn the identity of their accusers, let alone to investigate and intelligently assess the case, until trial is underway. Appellate courts have determined that there is ordinarily no right to pre-trial disclosure of the identity of one's accuser.²⁵

When defendants in one county receive the names of their accusers in the complaint – while those in other counties are told only that an anonymous "person known to the District Attorney's Office" has accused them of crimes – it creates a public perception that there is not equal justice in this State, and that the system cannot be trusted. The general practice of most District Attorneys in New York State to disclose complainants' names early in the vast majority of cases also renders suspect the protestations that a discovery obligation that includes witness information would result in widespread new interference with witnesses and dissuade their cooperation.

²⁴ Cal.Pen. Code §1054.2; Md.R. 11-205; Mich.Ct.R. 6.201(A)(1); Ohio R.Crim.P. 16(C),(D),(F). In Ohio, West Virginia and Wisconsin, prosecutors also have the option to memorialize a witness's testimony at a deposition or a hearing, at which the defense may cross-examine the witness, prior to disclosure of his or her name and address, and the record of that testimony is admissible if the witness later becomes unavailable through no fault of the state. Ohio R.Crim.P. 16(G); W.Va.R.Crim.P. 16(a)(1)(F); Wi.Stat.Ann. §971.23(6).

²⁵ *People v. Miller*, 106 A.D.2d 787, 788 (3rd Dept. 1984) ("There is neither a constitutional nor statutory obligation mandating the pretrial disclosure of the identity of a prosecution witness"); *accord People v. Lynch*, 23 N.Y.2d 262, 271-72 (1968); *People v. Emiliano*, 81 A.D.3d 436, 438 (1st Dept. 2011); *People v. Estrada*, 1 A.D.3d 928, 929 (4th Dept. 2003); *People v. Izquierdo*, 292 A.D.2d 247, 248 (1st Dept. 2002); *cf. People v. Andre W.*, 44 N.Y.2d 179, 185-86 (1978).

As for the specific standard that should be employed, the Task Force recommends that the prosecution be required to disclose names and addresses, or adequate alternative contact information (if known), for all persons who the prosecutor knows have evidence or information relevant to any offense charged or to a potential defense – not merely for “intended” witnesses. Only business addresses of police and governmental officials and expert witnesses would be disclosed. Such a formulation of the discovery requirement is recommended by the American Bar Association’s model discovery provisions and is used in States such as New Jersey, Florida and Minnesota.²⁶ It recognizes that prosecutors should not refrain from also disclosing information about known potential *defense* witnesses. It will thus minimize possible “gamesmanship” during the discovery process, and help to avoid constitutional violations since it requires disclosure of potentially exculpatory witnesses. It also avoids the difficulty that prosecutors may have in determining accurately at an early stage in the case which individuals actually will be called to testify at trial (although it does ask that prosecutors endeavor to specify which people they are intending to call at trial, to the extent practicable).²⁷

2. Five Special Procedures for Witness Safety Also Should Be Enacted

While other States rely solely on the court’s issuance of a protective order when the prosecution wishes to withhold a witness’s name or address, the Task Force believes that several additional tools should be available in New York to assist in ensuring safety of witnesses as needed. Five measures designed to help protect witnesses should be enacted.

(i.) *A Broad and Flexible Standard for Protective Orders, and a Procedure for Expedited Review of Rulings on Certain Protective Order Applications:* The statutory definition of good cause for a protective order should be revised to explicitly highlight factors such as dangers arising from gang affiliations. This would make it even more clear that the standard is designed to give judges robust and flexible leeway to issue orders letting the prosecution withhold information, whenever any other factors outweigh its usefulness. The statute should allow any kind of discoverable item or

²⁶ N.J. CT. R. 3:13-3(c)(6); Fla. R. C.P. 3.220(b)(1)(A); Minn. R.Crim.P. 9.01 Subd. 1 (1)(b); Alaska RCP 16 (b)(1)(A)(i); ABA Standards for Criminal Justice: Discovery, Standard 11-2.1(a)(ii) (3d ed. 1996); see also N.C. Gen. Stat. §15A-903(a)(1)(a); Vt.R.Crim.P. 16(a)(1).

²⁷ Sample statutory language defining the standard for disclosure of civilian witnesses’ names and contact information could be as follows: “The prosecution shall disclose: . . . The names of, and addresses or adequate alternative contact information for, all persons other than law enforcement personnel whom the prosecutor knows to have evidence or information relevant to any offense charged or to a potential defense thereto, including a designation by the prosecutor as to which of those persons may be called as witnesses.”

information to be withheld, or permit its disclosure to be delayed, based upon an *ex parte* showing at any point (as under current Criminal Procedure Law §240.50[1]).²⁸

The provision for protective orders should also specify that it is permissible for the court in appropriate cases to restrict disclosure of physical copies of discovery documents to only the lawyer, not to the defendant or others, provided the defendant is given access to inspect (not obtain copies of) redacted versions of such documents. This procedure is used in certain States when a protective order is issued (albeit it is not explicitly described in their discovery statutes). Flagging it in the statute will address prosecutors' oft-stated concerns that occasionally physical copies of discovery materials are improperly posted or circulated by defendants in an effort to intimidate witnesses.²⁹

The Task Force also recommends that an expedited and streamlined review procedure for certain protective order applications be enacted. It should allow either party to present arguments before a single appellate justice, under flexible procedures to be set by the appellate court, in situations where either the lower court denies a protective order and the prosecutor believes that a witness's safety could be jeopardized, or the lower court grants a protective order and the defense believes that the information is critical and there is an inadequate basis for withholding it from defense counsel. This sort of expedited review would be an important "safety valve" in the system to ensure appropriate rulings. Moreover, the provision could be carefully crafted to minimize its

²⁸ Sample statutory language defining "good cause" for issuance of a protective order could be as follows: "Good cause under this section may include constitutional rights or limitations; danger to the integrity of physical evidence; a substantial risk of physical harm, intimidation, economic reprisal, bribery or unjustified annoyance or embarrassment to any person; a substantial risk of an adverse effect upon the legitimate needs of law enforcement, including the protection of the confidentiality of informants; danger to any person stemming from factors such as a defendant's gang affiliation, prior history of interfering with witnesses, or threats or intimidating actions directed at potential witnesses; or other similar factors that also outweigh the usefulness of the discovery."

²⁹ Sample statutory language regarding the availability of a protective order could be as follows: "Upon a showing of good cause by either party, the court may at any time order that discovery or inspection of any kind of material or information under this article be denied, restricted, conditioned or deferred, or make such other order as is appropriate. The court may impose as a condition on discovery to a defendant that the material or information to be discovered be available only to counsel for the defendant; or, alternatively, that counsel for the defendant, and persons employed by the attorney or appointed by the court to assist in the investigation or preparation of a defendant's case, may not disclose physical copies of the discoverable documents to a defendant or to anyone else, provided that the prosecution affords the defendant access to inspect redacted copies of the discoverable documents at a supervised location that provides regular and reasonable hours for such access, such as a prosecutor's office, police station, facility of detention, or court. The court may permit a party seeking or opposing a protective order under this section, or another affected person, to submit papers or testify on the record *ex parte* or *in camera*. Any such papers and a transcript of such testimony may be sealed and shall constitute a part of the record on appeal. This section does not alter the allocation of the burden of proof with regard to matters at issue, including privilege."

burden on the limited resources of appellate courts, including by requiring the party seeking review to certify that the contested issue is substantial and that diligent efforts at negotiated resolution have failed, and by allowing each appellate court to establish the mode and procedure for its review proceedings (*e.g.*, a court could permit telephone conferences with the appellate justice when appropriate, an informal hearing outside the courtroom, etc.).³⁰

In addition, the protective orders provision should explicitly state that violation of a protective order in the discovery process is a basis for prosecution for criminal contempt in the second degree under Penal Law §215.50. Making clear that criminal prosecution is a consequence for any such violations will deter misconduct, reducing still further the chance that a lawyer or defense personnel would be willing to improperly breach a court order.³¹

(ii.) *Witness Interview As Alternative*: Beyond letting the prosecutor seek a protective order for any item or information at any point, the discovery statute also should give the prosecution an alternative option for withholding a witness's address and contact information even without applying for a protective order. If the prosecutor makes the person available to only counsel for the defendant for a timely interview, disclosure of the person's contact information to the defense should not be required.

³⁰ Sample statutory language for the expedited review procedure could be as follows: “(i) A party that has unsuccessfully sought, or unsuccessfully opposed the granting of, a protective order under this section relating to non-disclosure or delayed disclosure of the name of and/or address or contact information for and/or statements of a person may obtain expedited review of that ruling by an individual justice of the intermediate appellate court to which an appeal from a judgment of conviction in the case would be taken. (ii) Such review shall be sought within two business days of the adverse or partially adverse ruling, by order to show cause filed with the intermediate appellate court. The order to show cause shall in addition be timely served on the lower court and on the opposing party, and shall be accompanied by a sworn affirmation stating in good faith (a) that the ruling affects substantial interests, and (b) that diligent efforts to reach an accommodation of the underlying discovery dispute with opposing counsel failed or that no accommodation was feasible; except that service on the opposing party, and a statement regarding efforts to reach an accommodation, are unnecessary where the opposing party was not made aware of the application for a protective order and good cause exists for omitting service of the order to show cause on the opposing party. The lower court's order subject to review shall be stayed until the appellate justice renders decision. (iii) The assignment of the individual appellate justice, and the mode of and procedure for the review, are determined by rules of the individual appellate courts. The appellate justice may consider any relevant and reliable information bearing on the issue, and may dispense with written briefs other than supporting and opposing materials previously submitted to the lower court. The appellate justice may dispense with the issuance of a written opinion in rendering his or her decision, and when practicable shall render decision expeditiously. Such review and decision shall not affect the right of a defendant, in a subsequent appeal from a judgment of conviction, to claim as error the ruling reviewed.”

³¹ Sample statutory language making clear that violation of a protective order in the discovery process is a basis for criminal prosecution could be as follows: “Any protective order issued under this article is a mandate of the court for purposes of the offense of criminal contempt in subdivision three of section 215.50 of the penal law.”

Notably, the Task Force believes that face-to-face interviews between defense counsel and the witness are preferable to telephone interviews, since phone interviews often are more perfunctory and it is harder for the lawyer to evaluate the witness's demeanor and to have a useful discussion over the phone. Prosecutors and police are not limited to only phone interviews, and the lawyers for both parties ordinarily should have the chance to meet the witnesses given that witnesses "belong" to neither side. But in situations where arranging an in-person interview with defense counsel is not reasonably practicable, or the witness declines to participate in an in-person interview with counsel, a telephone interview should be an acceptable alternative. The statute should direct law enforcement personnel not to encourage a witness, either expressly or implicitly, to decline an in-person interview.³²

(iii.) *Confidential List of Addresses As Alternative*: In cases involving a violent felony charge, the discovery statute should give the prosecution a further alternative option to withhold witnesses' addresses or contact information even without applying for a protective order. The prosecutor should be able to separately disclose a confidential list containing addresses or adequate alternative contact information for the witnesses that would be available only to defense counsel and named defense personnel, who would be prohibited from disclosing it to the defendant or anyone else. In addition, prosecutors should be entitled to make disclosure of this information contingent upon the defendant's personal consent in advance to the use of the attorney-only confidentiality procedure, after on-the-record warnings by the court against the offenses of witness tampering and intimidating a victim or witness. If the defendant opts not to agree to use of this procedure, then no contact information would have to be disclosed to the defense at all.

For the prosecution, the main advantage of this "confidential document" procedure is that the prosecutor would not have to make any particularized showing of good cause in violent felony cases to obtain a protective order that restricts disclosure of addresses. (But, of course, a prosecutor

³² Sample statutory language for the alternative "witness interview" option could be as follows: "Within the prosecutor's discretion, the address, telephone number or similar contact information for any person whose name is disclosed pursuant to this section may be withheld, and redacted from other discovery materials, without need for a motion for a protective order, if the prosecutor makes the person available to counsel for the defendant for an in-person interview within the time period specified for Phase One discovery. In lieu of an in-person interview, a telephone interview may be used where arranging an in-person interview is not reasonably practicable or the person declines to participate in an in-person interview; but law enforcement personnel shall not expressly or implicitly encourage a person to decline to participate in an in-person interview. This subdivision does not create any right for the defendant personally to attend or to participate in such an interview."

always would be free to move for a protective order that authorized even more extensive or complete withholding of names or addresses, or of any other information.)

For the defense, this approach recognizes that the defendant himself – in contrast to the defense lawyer or investigator – does not in general need to learn witnesses’ addresses (unlike their names, which often are essential to comprehending and discussing a case). In contrast, the defense lawyer in many cases is unable to investigate or to develop defenses until he or she is provided with addresses or contact information for finding and/or investigating the witnesses. Having the court elicit the defendant’s own advanced consent on the record also could help to reduce problems for defense lawyers, who may not want to be put in the awkward position of having to withhold information from their own clients. By making the defendant agree to the attorney-only confidentiality procedure beforehand, the defendant would not then misunderstand this restriction as having originated from his or her own lawyer. A lawyer who prefers not to have the responsibility of knowing witness information, and having to keep it confidential, also could waive the right to receive the information.

Finally, the statute should include an affirmative mandate requiring defense lawyers to notify the court or the prosecutor expeditiously if they learn about any intentional or unintentional breach of the confidentiality procedure that is attributable to a lawyer for any defendant, an employee of a defense lawyer, or a court-appointed investigator. This would ensure prompt steps to remedy a known breach and to maintain witness security. And the statute should explicitly state that violation of the confidentiality procedure is a basis for prosecution for criminal contempt in the second degree under Penal Law §215.50.³³

³³ Sample statutory language for the alternative “confidential list” option could be as follows: “(i) Where the defendant is charged with a violent felony offense, within the prosecutor’s discretion the address, telephone number or similar contact information for any person whose name is disclosed pursuant to this section may be withheld, and redacted from other discovery materials, without need for a motion for a protective order; except that a list of the addresses or adequate alternative contact information for persons whose information has been withheld or redacted shall be separately provided to counsel for the defendant in a document clearly marked as confidential, unless a protective order is issued by the court for good cause shown. In addition discovery of this information may be conditioned on the defendant’s personal consent, given in open court in the presence of the court at arraignment or at another time, to the use of the confidentiality procedure set forth in this subdivision. The court shall specifically caution the defendant, in the colloquy about use of this procedure, concerning the offenses of tampering with a witness and intimidating a victim or witness in article 215 of the penal law. Nothing in this subdivision precludes the court from issuing a different protective order for good cause shown.

“(ii) When the confidentiality procedure set forth in this subdivision is used, the following requirements apply: (a) *Dissemination Prohibited*: Except as provided in the next subsection, counsel for the defendant may not disclose or permit to be disclosed to a defendant or to anyone else the list described in this subdivision or its contents, unless

(iv.) *Exception for Confidential Informants and Undercover Personnel*: The discovery statute should provide that the prosecution may, without having to apply for a protective order, withhold both the names and the contact information of all confidential informants and all undercover law enforcement personnel. But ordinarily the defense should be notified that such information was not disclosed, to avoid potentially misleading the defendant and defense counsel regarding the nature of the case (unless the court rules otherwise for good cause).³⁴

(v.) *Enhanced Penalties for Witness Interference*: If it enacts early and broad discovery rules, the Legislature should also enact additional penalties and/or offenses to deter defendants and others from misusing information provided through the discovery process. The Task Force believes the available penalties for such offenses must be quite significant, so that they actually function as a deterrent against misconduct by defendants who already are charged with serious crimes. Currently the various offenses involving tampering with a witness, and intimidating a victim or witness, are set forth in Penal Law article 215 and range from a Class A misdemeanor to a Class B felony (*i.e.*, for inflicting serious physical injury). The crimes of tampering with a witness in the third degree in Penal Law §215.11 and intimidating a victim or witness in the third degree in Penal Law §215.15

specifically permitted to do so by the court for good cause shown or unless the prosecutor gives written consent. The court may allow a party seeking or opposing such permission, or another affected person, to submit papers or testify on the record *ex parte* or *in camera*. Any such papers and a transcript of such testimony may be sealed and shall constitute a part of the record on appeal. The obligation to maintain confidentiality described in this subdivision is a mandate of the court for purposes of the offense of criminal contempt in subdivision three of section 215.50 of the penal law. (b) *Defense Personnel*: Notwithstanding the previous subsection, counsel for the defendant may disclose or permit to be disclosed the listed contact information for a potential witness to persons employed by the attorney or to persons appointed by the court to assist in the investigation or preparation of a defendant's case if that disclosure is required for that preparation. Persons provided this information by the attorney shall be informed by the attorney that further dissemination of the information, except as provided by this subdivision, is prohibited. Within the prosecutor's discretion, discovery of the listed contact information may be conditioned on service of a written statement by counsel for the defendant of the names of any employees who may be provided information pursuant to this subsection, and describing any known prior connections between those employees and all defendants in the case. (c) *Pro Se Defendant*: If the defendant is acting as his or her own attorney, in lieu of use of the confidentiality procedure set forth in this subdivision, the court shall consider any arguments of the defendant relating to a need for contact information for a potential witness, and any countervailing arguments of the prosecution or another affected person. Where such arguments are made, the court shall then order as to each such potential witness, as appropriate, that adequate contact information either be provided or be withheld, or provide for contact with the potential witness only through persons appointed by the court to assist in the investigation or preparation of the defendant's case, or impose any other reasonable restrictions on disclosure. (d) *Duty to Report Breach*: If counsel for the defendant learns about any intentional or unintentional breach of the confidentiality procedure set forth in this section that was attributable to conduct of a lawyer for any defendant in the case, or conduct of a person employed by a lawyer in the case or appointed by the court, he or she shall expeditiously notify the court or the prosecutor."

³⁴ Sample statutory language for the "confidential informant/undercover personnel" exception could be as follows: "Information under this section relating to a confidential informant or undercover personnel may be withheld, and redacted from discovery materials, without need for a motion for a protective order; but the defendant shall be notified in writing that such information has not been disclosed, unless the court rules otherwise for good cause shown."

could be elevated from Class E felonies to Class D felonies; and the crimes of tampering with a witness in the second degree in Penal Law §215.12 and intimidating a victim or witness in the second degree in Penal Law §215.16 could be elevated from Class D felonies to Class C felonies. (The much more rare first-degree offenses are already Class B felonies punishable by 25 years' imprisonment.)

B. Discovery From the Prosecution of Additional Types of Information

The Task Force recommends that the rules for discovery from the prosecution should provide for certain additional disclosures. (The recommended time frames for disclosure of each of these specific kinds of items or information should vary, as described below in Section II-D.) These include:

(1.) *Police Reports*: Police reports are a primary source of information for the defendant about a criminal case. They permit the defense lawyer to conduct an intelligent investigation; to plan an appropriate trial strategy; and to confirm the strength of the prosecution's evidence to a defendant considering a guilty plea. Other large States with big cities comparable to New York have required their early disclosure for many years unless the prosecution seeks a protective order. These States include Florida, Massachusetts, Michigan, New Jersey, North Carolina, and Ohio.³⁵

By contrast, many police reports do not have to be disclosed at all under current New York law. Those police reports that are discoverable because they contain written statements by testifying witnesses may be withheld until the trial is underway, which is too late for their use in consideration of plea offers and is normally too late for the defense to investigate information they contain.³⁶ Notably, the Task Force believes that a pragmatic distinction legitimately can be drawn with regard to the time frame for disclosure of these reports, between electronically stored police reports (which are more readily accessible to prosecutors earlier in the case) and other less "formal" police documents such as police memo book notes or vouchers (which are harder to obtain and thus should be discoverable much later). This is described below in Section II-D.

³⁵ Fla. R. C.P. 3.220(b)(1)(B); Mass. R.Crim.P. 14(a)(1)(A)(vii); Mich. CR 6.201(B)(2); N.J. CT. R. 3:13-3(c)(8); N.C. Gen. Stat. §§15A-903(a)(1), (a)(3)(c); Ohio R.Crim.P. 16(B)(6).

³⁶ See CPL §240.45(1)(a).

(2.) *Favorable Evidence and Information*: Timely disclosure by the prosecution of evidence and information that is favorable to the defendant is important. It gives the defense an opportunity to perform intelligent investigations that can develop exculpatory leads and preserve exculpatory evidence, and it enables the defense to incorporate exculpatory evidence into its theory of the case at trial. This reduces the possibility that innocent people will be convicted.

Nevertheless, currently the standards for prosecutors to apply when disclosing favorable evidence and information are wholly unformulated in the discovery statute. It simply directs them to turn over “[a]nything required to be disclosed . . . pursuant to the constitution of this state or of the United States.”³⁷ This lack of specific directives gives litigants and courts no guidance about these critical obligations. The omission has likely contributed to the recurring serious problems of suppression or belated disclosure of exculpatory information by some prosecutors in New York State that have persisted for years, as documented by this Bar Association’s Task Force on Wrongful Convictions.³⁸ The specific disclosure requirements should be plainly set forth in the statute.

The discovery statutes in several other States, for example, require prosecutors to disclose all known exculpatory evidence and information early in the case.³⁹ That standard is designed to make clear that prosecutors making disclosure decisions in the pre-trial context should not apply a so-called “materiality” analysis to restrict discovery of favorable information, but should instead simply turn over all favorable information. The Task Force concurs that the “materiality” limitation that is part of constitutional “*Brady*” law is an appellate standard, which is entirely unsuitable in the pre-trial context.⁴⁰ New York’s discovery statute should explicitly reject any “materiality” limitation on “*Brady*” disclosure.

³⁷ See CPL §240.20(1)(h).

³⁸ New York State Bar Association, “Final Report of the New York State Bar Association’s Task Force on Wrongful Convictions” (2009), pp. 19-44.

³⁹ See, e.g., Ariz. R.Crim.P. 15.1(b)(8); Cal. Penal Code §1054.1(e); Colo. R.Crim.P. 16 Part I (a)(2); Ill. S. Ct. R. 412 (c); Mass. R.Crim.P. 14(a)(1)(A)(iii); Md. R. 4-263(d)(5), (d)(6); Mich. CR 6.201(B)(1); Minn. R.Crim.P. 9.01 Subd. 1 (6); Tex. Crim. Pro. Art. 39.14(h); see also New York State Rules of Professional Conduct, Rule 3.8(b) (“Special Responsibilities of Prosecutors and Other Government Lawyers”); ABA Standards for Criminal Justice: Prosecution Function, Standard 3-3.11(a) (3d ed. 1993); ABA Standards for Criminal Justice: Discovery, Standard 11-2.1(a)(viii) (3d ed. 1996).

⁴⁰ Specifically, to obtain a reversal of a conviction on appeal based on a *Brady* violation, the defendant must show that the favorable information withheld by the prosecutor was “material” – meaning it was significant enough to “undermine confidence” in the conviction or create a “reasonable probability” that the result of the proceeding would be

Beyond providing better guidance about the scope of the disclosure obligation and clarifying that a “materiality” threshold does not apply in the pre-trial context, another key benefit of incorporating the duty to disclose favorable evidence into the discovery statute is that it will cause prosecutors to speak with police officers to *learn about* the existence of favorable information – which often is not written down in police reports or otherwise memorialized, and thus can be hard for prosecutors to uncover – considerably earlier in the case. This will result in more prompt disclosures of *Brady* material to the defense, and give the defense a better opportunity to investigate and use that favorable information.

Many prosecutors wait to contact all of the government agents who acted in the investigation to ascertain whether they know of any favorable evidence (whether or not it was written down) until close to the time of a trial or even during the trial. Often this results in untimely disclosure of *Brady* information, or even the failure to disclose *Brady* information when a case is resolved without a trial. By incorporating into the discovery statute an obligation to turn over, by a specified date, any favorable information known to all of the police officers who acted the case – and requiring the prosecutor to certify in writing by that date that reasonable efforts were made to comply with this obligation (as described below in Section II-F-2) – recurring problems of untimely disclosure and non-disclosure of *Brady* materials can be greatly reduced.

There should be no concern that linking disclosure of favorable evidence and information to a statutory time frame may result in *delaying* disclosure of *Brady* material in some situations, because the statute would specify that if a prosecutor learns about any favorable information prior to the statutory disclosure date he or she must turn it over promptly rather than waiting until the end of the statutory period. In addition, this discovery obligation (like all others) would be subject to a

different had it been turned over. See *People v. Fuentes*, 12 N.Y.3d 259, 260 (2009); accord *Strickler v. Greene*, 527 U.S. 263, 296 (1999). That analysis is appropriate in the appellate context, since the key question on appeal is whether the defendant’s conviction must be reversed because the failure to disclose the favorable evidence prejudiced the outcome. By contrast, the key question in the pre-trial period should not be whether the defendant would be able to demonstrate prejudice in the event of a conviction. It should simply be whether the information is favorable, and, thus, the process would be more fair and reliable if there is disclosure. “Materiality” analysis also is unsuitable in the pre-trial context because the prosecutor frequently does not know the nature or full contents of the defense theory of the case at that stage. Hence, he or she may be unable to make accurate judgments about the “materiality” of various kinds of information. For these and other reasons, screening for “materiality” is unjustified before trial. See generally *United States v. Olsen*, 704 F.3d 1172, 1183 n.3 (9th Cir. 2013); *United States v. Price*, 566 F.3d 900, 913 n.14 (9th Cir. 2009); *United States v. Acosta*, 357 F. Supp. 2d 1228, 1239-40 (D.Nev. 2005); *United States v. Safavian*, 233 F.R.D. 12, 16 (D.D.C. 2005); *United States v. Sudikoff*, 36 F. Supp. 2d 1196, 1198-99 (C.D.Cal. 1999); see also *People v. Vilardi*, 76 N.Y.2d 67, 77-78 (1990).

continuing duty to disclose any additional information learned later in the case. And the mandate would be achievable in practice by prosecutors, especially since nothing in it would prevent a prosecutor from delegating the task of making affirmative inquiries of all police officers who acted in the case – which is constitutionally required, in any event⁴¹ – to a lead case agent or in another reasonable way.

As for the specific standard that should be enacted, the Task Force recommends that the discovery statute require the prosecution to disclose all known evidence and information that tends to exculpate the defendant, to mitigate the level of the defendant’s culpability, to support a potential defense, or to mitigate punishment.

Disclosure of information that tends to impeach a prosecution witness’s credibility also should be required.⁴² But if the Task Force’s recommendation about a two-stage time frame for the prosecution’s discovery is adopted (as discussed below in Section II-D), it would be appropriate for the statute to differentiate between the obligations to disclose impeachment information at the two phases of discovery. At the earlier stage, it should require more limited disclosure of impeachment facts known to the prosecutor at that time that would “significantly” impugn the credibility of an “important” prosecution witness, informant or evidence; whereas at the later stage, it should require disclosure of *all* impeachment facts known to prosecutors and police acting in the case that tend to impugn the credibility of any prosecution witness, informant or evidence.

Employing two separate time frames for disclosure is needed to take into account the constitutional rule that the prosecution must turn over not only favorable information personally known to the prosecutor, but also favorable information known to police officers and other members of the law enforcement team acting in the case.⁴³ Given this broad disclosure duty, it would be impracticable to expect prosecutors with heavy case loads to contact all of the police officers – and to identify all of the plethora of possible impeachment information that could exist in a given case – within days of arraignment. Prosecutors should, instead, have a broader time frame to

⁴¹ See *Kyles v. Whitley*, 514 U.S. 419, 437-38 (1995); *People v. Wright*, 86 N.Y.2d 591, 598 (1995).

⁴² See *People v. Steadman*, 82 N.Y.2d 1, 7 (1993) (“The prosecutor’s duty is not lessened because *Brady* material may affect only the credibility of a government witness”); accord *Smith v. Cain*, 132 S.Ct. 627, 630 (2012); *United States v. Bagley*, 473 U.S. 667, 676 (1985); *Giglio v. United States*, 405 U.S. 150, 154 (1972); *People v. Bond*, 95 N.Y.2d 840, 842-43 (2000); *People v. Waters*, 35 Misc.3d 855, 858-61 (Sup. Ct., Bronx Co. 2012).

⁴³ See *Kyles v. Whitley*, 514 U.S. 419, 437-38 (1995); *People v. Wright*, 86 N.Y.2d 591, 598 (1995).

make their affirmative so-called “Kyles inquiries” of police officers and to identify and disclose less significant types of impeachment facts.⁴⁴

There are several critical advantages for the criminal justice system if an obligation is placed on prosecutors to speak with police about favorable information and review the evidence for impeachment facts at an earlier stage of the case than is required under current law. The defense should receive a timely opportunity to investigate, develop, and make use of any favorable information in preparing its theory of the case for trial. Equally important, more prompt review by the prosecutor of the evidence – and, thus, of the relative strengths and weaknesses of the case – often will result in more appropriate and better informed guilty plea offers, and, when criminal prosecution is found unmerited (or the initially designated highest charges are deemed unfounded), it will cause a more expeditious dismissal or reduction of charges.⁴⁵ Justice will be better served.

While prosecutors should be given a reasonable time to speak with police witnesses and to identify all of the possible impeachment information in the case, the Task Force’s understanding of the constitutional *Brady* obligation is that prosecutors must turn over known exculpatory evidence *promptly upon its receipt* by the prosecutor.⁴⁶ The discovery statute must harmonize this constitutional requirement of prompt disclosure of exculpatory evidence with the two-stage framework for disclosures that we believe should be used. To this end, the statutory provision should include a specific directive that, where a prosecutor learns about exculpatory evidence after the initial stage of discovery but prior to the second stage of discovery, she should disclose it to the defense expeditiously and should not wait to do so until the later statutory discovery deadline. Put

⁴⁴ Notably, the Task Force believes that affording prosecutors a few months to provide discovery of these particular categories of favorable information will, nevertheless, typically result in *earlier* disclosures than presently occur for this information in most parts of New York. That is so for two main reasons: first, many prosecutors currently wait to speak to all of the officers regarding their knowledge of any favorable information until closer to the date of a trial; and, second, federal constitutional decisions have not required prosecutors to turn over ordinary impeachment information to the defense at the time of a guilty plea or well in advance of trial. See *United States v. Ruiz*, 536 U.S. 622, 629-31 (2002); *United States v. Coppa*, 267 F.3d 132, 142 (2d Cir. 2001); see also *People v. Cortijo*, 70 N.Y.2d 868, 870 (1987); cf. *Leka v. Portuondo*, 257 F.3d 89, 99-103 (2d Cir. 2001).

⁴⁵ See Mary Prosser, “Reforming Criminal Discovery: Why Old Objections Must Yield to New Realities,” 2006 Wis. L. Rev. 541, 550-53 (2006).

⁴⁶ See, e.g., *People v. Santorelli*, 95 N.Y.2d 412, 421 (2000) (noting a requirement to “promptly disclose any such material evidence to the defendant”); *People v. Jackson*, 168 Misc.2d 182, 185-86 (Sup. Ct., Bronx Co. 1995) (“the prosecutor should disclose [*Brady* material] at the earliest possible moment”); see generally *Leka v. Portuondo*, 257 F.3d 89, 99-103 (2d Cir. 2001).

differently, prosecutors should have adequate time in which to ask police about favorable information – but upon learning it, they should provide it promptly to the defense.

Further, the statutory provision for disclosure of favorable information should specifically require the prosecution to disclose facts that provide a basis for a motion to suppress evidence on constitutional grounds.⁴⁷ And it should specify that all of these obligations apply whether or not the evidence or information would be “admissible” at trial or is recorded in tangible form.⁴⁸ These provisions not only would give courts and litigants better guidance regarding the disclosure obligations in this vital area, but they would also help to achieve *Brady*’s underlying goals by making the adversarial system more fair and reliable.⁴⁹ That said, it is important to note that such statutory rules would not, of course, supersede any of *Brady*’s constitutional requirements (which are discussed below in Section III). All constitutional disclosure obligations would have to be complied with – and be separately reviewed – whether or not the statutory framework is satisfied.

(3.) *Intended Exhibits*: There is currently no obligation under article 240 for either party to provide discovery before trial of all the exhibits it plans to introduce. The Task Force believes that both parties should make available to the other side items of tangible property that they “intend to introduce” on their cases in chief. Such a discovery rule exists under the criminal discovery rules in federal cases.⁵⁰ The prosecution, however, should have the option to condition discovery of its exhibits on a timely demand to produce them made by the defense. Confirming in advance that the

⁴⁷ See *People v. Williams*, 7 N.Y.3d 15, 19 (2006); *People v. Geaslen*, 54 N.Y.2d 510, 515-16 (1981); *People v. McCutcheon*, 96 A.D.3d 580 (1st Dept. 2012); *People v. White*, 200 A.D.2d 351, 352-53 (1st Dept. 1994).

⁴⁸ See *United States v. Rodriguez*, 496 F.3d 221, 226 & n.4 (2d Cir. 2007); *United States v. Gil*, 297 F.3d 93, 104 (2d Cir. 2002); see, e.g., *People v. Bond*, 95 N.Y.2d 840, 842 (2000); *People v. Baxley*, 84 N.Y.2d 208, 213 (1994); *People v. Steadman*, 82 N.Y.2d 1, 7-8 (1993).

⁴⁹ Sample statutory language for the “favorable evidence and information” provision (*i.e.*, as it would apply in “Phase One” of the prosecution’s discovery) could be as follows: “The prosecution shall disclose: . . . When it is known to the prosecution (not solely known to police or another law enforcement agency), all evidence and information, whether or not admissible or recorded in tangible form, that tends to (i) exculpate the defendant; (ii) mitigate the defendant’s culpability as to a charged offense; (iii) support a potential defense to a charged offense; (iv) provide a basis for a motion to suppress evidence on constitutional grounds; (v) significantly impugn the credibility of an important prosecution witness, informant or evidence; or (vi) mitigate punishment.” As described in the text, in “Phase Two” of the prosecution’s discovery, a more broad standard for disclosure of impeachment facts should apply; and the obligation also would cover such evidence and information that was solely known to police at the time of “Phase One” discovery. Moreover, to comport with constitutional requirements regarding timing of disclosures, and to ensure fairness to the defendant, the provision should also include a directive that: “The prosecution shall disclose evidence or information under this subsection expeditiously upon its receipt by the prosecutor, notwithstanding the otherwise-applicable time periods for disclosure in this article.”

⁵⁰ Fed. R.Crim.P 16 (a)(1)(E)(ii).

defense has a genuine interest in access to all of the exhibits is appropriate, before a prosecutor should have to expend sometimes substantial efforts to identify and assemble them. Because it may not be practicable for the parties to identify all of their exhibits until close to the time of trial, however, the Task Force believes that this discovery provision should explicitly make the time frame for disclosure more flexible without need for the parties to routinely seek court orders.⁵¹

(4.) *Expert Opinion Evidence*: The Task Force believes that both parties' disclosure obligations regarding expert opinion evidence should be much broader than under current New York law.⁵² Both parties should be required to disclose: (1.) the name, business address, current curriculum vitae, and a list of publications of each intended expert witness; (2.) all written reports by the expert that pertain to the case; and (3.) if no report is prepared, a written summary of the subject matter of the intended testimony, the expert's opinions and conclusions, and the basis for such opinions and conclusions. Such a rule would be similar to that in effect in civil cases in New York.⁵³

Because consulting an expert and obtaining a report or written summary of prospective testimony normally takes considerable time, the Task Force believes that this discovery provision should make the time frames for these disclosures more flexible, without need for the parties to seek court orders. Automatic leeway in the timing for expert disclosures should, however, extend only to sixty days before a scheduled trial date (for the prosecution's intended experts) or thirty days before a scheduled trial date (for the defendant's intended experts) – with the caveat that, where the prosecution first decides to call an expert after receiving the defense's discovery, the court must adjust a scheduled trial date (if necessary) to ensure the prosecution has sufficient time to disclose

⁵¹ Sample statutory language for the "intended exhibits" provision could be as follows: "The prosecution shall disclose: . . . All tangible property that the prosecution intends to introduce in its case-in-chief at trial or a pre-trial hearing. Discovery of items under this subsection may be conditioned on service of a demand to produce made by the defendant, if in its initial discovery package the prosecution timely served notice on the defendant that a demand to produce items under this subsection would have to be served on the prosecution within thirty days of that notice. If in the exercise of reasonable diligence the prosecutor has not formed an intention within the time period specified in this section that an item under this subsection will be introduced at trial or a pre-trial hearing, that period shall be stayed without need for a motion for a court order; but the disclosure shall be made as soon as practicable and subject to the continuing duty to disclose."

⁵² See CPL §§240.20(1)(c), 240.30(1)(a).

⁵³ CPLR §3101(d); see also Fed. R.Crim.P 16 (a)(1)(G), (b)(1)(C).

its “responsive” expert materials and the defense has sufficient time to prepare and respond to those materials.⁵⁴

(5.) *Witnesses’ Criminal History Information*: Prosecutors have an obligation to disclose information regarding their witnesses’ criminal histories under article 240, but that obligation applies only if a witness’s criminal record actually is known by the prosecutor to exist. The prosecutor has no obligation affirmatively to run criminal record searches.⁵⁵ Further, there is no statutory obligation to provide criminal history information for co-defendants. A recurring problem for many defense lawyers is that they lack access to a database for obtaining this critical information. Yet presenting facts about a witness’s prior criminal record to the jury is essential to the truth-finding function of trials. Knowing the full criminal history of the defendant and all co-defendants is also essential to proper representation, but sometimes this information is not timely provided to the defense in some parts of the State.⁵⁶

The Task Force believes that the defense should be provided with complete criminal history information for the prosecution’s intended civilian witnesses, and for defendants and co-defendants. (Providing such information is unnecessary for expert witnesses and law enforcement personnel.) Moreover, it is important that this information be disclosed in a timely manner before trial, so that

⁵⁴ Sample statutory language for the “expert opinion evidence” provision could be as follows: “The prosecution shall disclose: . . . Expert opinion evidence, including the name, business address, current curriculum vitae, and a list of publications of each expert witness whom the prosecutor intends to call as a witness at trial or a pre-trial hearing, and all reports prepared by the expert that pertain to the case, or if no report is prepared, a written statement of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion. This subsection does not alter or in any way affect the procedures, obligations or rights set forth in [Criminal Procedure Law] section 250.10. If in the exercise of reasonable diligence this information is unavailable for disclosure within the time period specified in this section, that period shall be stayed without need for a motion for a court order; except that the disclosure shall be made as soon as practicable and not later than sixty calendar days before a scheduled trial date, unless a different court order is obtained. Where the prosecution’s expert witness is being called in response to disclosure of an expert witness by the defendant, the court shall alter a scheduled trial date, if necessary, to allow the prosecution thirty days to make the disclosure and the defense thirty days to prepare and respond to the new materials.” (A similar discovery provision for expert opinion evidence should apply to the defense, but since the defense’s discovery should follow that provided by the prosecution, its expert witness disclosures would need to occur no later than thirty days before a scheduled trial date rather than sixty days before that date.)

⁵⁵ CPL §§240.44(2), 240.45(1)(b).

⁵⁶ Cf. CPL §§160.40(2), 530.20(2)(b)(ii).

the lawyer has a reasonable opportunity to gather related documents and information from underlying public court files, and to investigate the witnesses and prepare.⁵⁷

(6.) *List of Potentially Suppressible Property*: The discovery statute should provide enough information for the defense lawyer to file informed and timely suppression motions. While under current law the prosecution must give notice within fifteen days of arraignment of any statements made by the defendant to a public servant and of any identification procedures involving the defendant, there is no equivalent requirement that the prosecutor provide prompt notice of potentially suppressible tangible property.⁵⁸ Consequently, defense lawyers often do not have the necessary information to seek all of the suppression hearings to which a defendant may be entitled. For instance, the defendant may not have seen the police recover certain property, especially if it was not taken from his or her person and the prosecution will be relying on a theory of “constructive” possession.

The Task Force believes that the prosecution should, therefore, be required to specify early in the case all of the potentially suppressible physical evidence that it contends the defendant physically or constructively possessed, or that it contends the defendant possessed but “abandoned” prior to the arrest (*i.e.*, since decisional law has established that whether there was an intentional and voluntary “abandonment” may need to be resolved at a hearing).⁵⁹ This information will facilitate efficient motion practice.⁶⁰ Relatedly, the Legislature should also amend Criminal Procedure Law §255.20(1) – which sets a limitation for the defense to file motions within 45 days of arraignment – to provide an alternative, in situations where the list of suppressible property

⁵⁷ Sample statutory language for the “criminal history information” provision could be as follows: “The prosecution shall disclose: . . . The results of complete criminal history record checks for all defendants and all persons designated as potential prosecution witnesses, other than those witnesses who are experts or law enforcement officers.”

⁵⁸ CPL §710.30.

⁵⁹ See, *e.g.*, *People v. Ramirez-Portoreal*, 88 N.Y.2d 99, 108-10 (1996); *People v. Howard*, 50 N.Y.2d 583, 593 (1980); *People v. Crawford*, 89 A.D.3d 422, 424 (1st Dept. 2011); *People v. Smalls*, 83 A.D.3d 1103, 1104 (2d Dept. 2011); see generally CPL §710.60.

⁶⁰ Sample statutory language for the “list of suppressible property” provision could be as follows: “The prosecution shall disclose: . . . A list of all tangible objects obtained from, or allegedly possessed by, the defendant or a co-defendant. The list shall include a designation by the prosecutor as to which objects were physically or constructively possessed by the defendant and were recovered during a search or seizure by a public servant or an agent thereof, and which tangible objects were recovered by a public servant or an agent thereof after allegedly being abandoned by the defendant. If the prosecution intends to prove the defendant’s possession of any tangible objects by means of a statutory presumption of possession, it shall designate that intention as to each such object. If reasonably practicable, it shall also designate the location from which each tangible object was recovered.”

(and/or search warrants) is not timely provided. In that circumstance, the defense should be entitled to file its motions within 45 days, *or within 30 days of the date that the prosecution provided these discovery materials*.

(7.) *Search Warrants*: No provision in article 240 explicitly requires the prosecution to disclose search warrants. This omission impedes orderly litigation of defense motions to controvert a search warrant and to suppress evidence. It needlessly burdens courts with repeated applications for disclosure, which have resulted in a patchwork of rulings that generally have ordered disclosure of the warrant documents.⁶¹ The defendant may not be aware that a search warrant was executed at all or that evidence was obtained in a search. The defense lawyer cannot assess the possible grounds to litigate whether the warrant requirements set forth in Criminal Procedure Law article 690 were properly obeyed, and whether the search was constitutional, without inspecting the warrant and warrant application. In short, as with eavesdropping warrants, the defense should have timely access to search warrants and related documents (subject, like any other discoverable item, to a protective order where appropriate).⁶² The discoverable items should include the warrant, warrant application, supporting affidavits, and the police inventory of all property seized under the warrant.⁶³ This will ensure efficient and informed pre-trial litigation.⁶⁴

C. Expanded Reciprocal Discovery From the Defense

As in other States that have modernized their criminal discovery rules, defendants in New York State should provide the prosecution with considerably greater and earlier discovery than under current New York law. Like the current reciprocal discovery rule in Criminal Procedure Law §240.30, however, expanded discovery from the defense should be limited to witnesses and items

⁶¹ See, e.g., *People v. Chahine*, 150 Misc.2d 242, 243 (Crim. Ct., N.Y. Co. 1991); *People v. Velez*, 147 Misc.2d 865, 866 (Sup. Ct., N.Y. Co. 1990); *People v. Seychel*, 136 Misc.2d 310, 313-14 (Sup. Ct., N.Y. Co. 1987); *People v. Brown*, 104 Misc.2d 157, 163 (Crim. Ct., Queens Co. 1980); see also *People v. Beniquez*, 215 A.D.2d 678, 678 (2d Dept. 1995); *People v. Pimental*, 182 A.D.2d 80, 84 (2d Dept. 1992); cf. *People v. Castillo*, 80 N.Y.2d 578, 586-87 (1992); *People v. Peterson*, 266 A.D.2d 480 (2d Dept. 1999).

⁶² Compare CPL §700.70 (requiring timely notice and disclosure of copies of an eavesdropping warrant and accompanying application documents).

⁶³ See CPL §690.50(4).

⁶⁴ Sample statutory language for the “search warrants” provision could be as follows: “The prosecution shall disclose: . . . Whether a search warrant has been executed and all documents relating thereto, including but not limited to the warrant, the warrant application, supporting affidavits, a police inventory of all property seized under the warrant, and a transcript of all testimony or other oral communications offered in support of the warrant application.”

that the defense “intends to introduce” at trial. If the defense lawyer learns of *incriminating* witnesses or evidence, it would raise serious constitutional problems for the discovery statute to mandate disclosure of such information. It is also appropriate to require the prosecution to complete its initial discovery before the defense must produce its reciprocal discovery. The defense needs time to review and synthesize the discovery materials, and to undertake investigations to ascertain which evidence and witnesses it intends to introduce at trial, before providing its own discovery. The prosecution will have already had the time it needed to build a case against the defendant, before bringing the criminal charges.

The Task Force recommends that the following materials and information should be discoverable from the defense: (1.) names, known aliases, addresses, and dates of birth of intended defense witnesses other than the defendant; (2.) written and recorded statements of intended defense witnesses other than the defendant; (3.) intended exhibits; (4.) tapes and electronic recordings intended to be introduced; (5.) reports and documents concerning physical or mental examinations, or scientific tests or experiments, intended to be introduced or that were made by an intended defense witness other than the defendant; (6.) intended expert opinion evidence; and (7.) a summary of any rewards, promises, and inducements made to intended defense witnesses.

D. Discovery From the Prosecution Should Occur in Two Stages

There is a broad consensus nationwide that the principal benefits of criminal discovery reform hinge on requiring disclosures early in the case. But meaningful discovery reform also requires that the obligations actually be achievable by prosecutors and police. To ensure that the expanded discovery obligations are feasible, the Task Force recommends that the prosecution’s discovery be provided in two stages, and then the defense should provide its reciprocal discovery.

Specifically, in “Phase One” of the prosecution’s discovery, key items that are actually possessed by or readily accessible to prosecutors (such as electronically stored police reports) should be discoverable within a short period after the defendant’s arraignment on the indictment or misdemeanor information. In “Phase Two” of the prosecution’s discovery, other items – like transcripts of Grand Jury witnesses’ testimony, exhibits, and less “formal” police reports such as police memo book notes or vouchers, which may be harder for a prosecutor to obtain and may not be in electronic form – should be discoverable a few months after the defendant’s arraignment.

Upon completing discovery, the prosecutor should then file a “certificate of compliance” that indicates that, after exercising reasonable diligence, all known discoverable items have been disclosed. This document will trigger a thirty day period for the defendant to provide reciprocal discovery. (As described below in Section II-F-2, a certificate of compliance filed in good faith should not in itself constitute any ground for litigation or for “penalizing” a prosecutor in any way, and the statute should make that clear.)⁶⁵

The Task Force makes the following more specific suggestions regarding *when* discovery could occur from each party, and *what items* could be disclosed at each stage. These recommendations are intended to be illustrative and are not “set in stone.” Other specific periods, or contents for discovery at each stage, could be deemed more appropriate. Moreover, two points should be reiterated: (i.) either party should be entitled to move at any time for an order that alters the time frame or contents of discovery for good cause; and (ii.) untimely disclosure of an item by either party, despite reasonable good faith efforts to comply with discovery, should result in a “remedy” at trial only if the party entitled to disclosure shows that it suffered “significant prejudice.”

As an appropriate time frame for discovery, the Task Force suggests that: (1.) the prosecution would provide its “Phase One” discovery packet *15 days after arraignment*; (2.) the prosecution would provide its “Phase Two” discovery packet *90 days after arraignment* – and then the prosecutor would file and serve a “certificate of compliance”; (3.) the defense would provide its reciprocal discovery packet *30 days after the prosecution’s “certificate of compliance”* – and then the defense lawyer would file and serve a “certificate of compliance.” If the prosecutor was engaged in an ongoing trial or did not report to work due to a vacation or similar reason during one or more days of the “Phase One” discovery period, he or she would also automatically receive *an additional*

⁶⁵ Sample statutory language to illustrate the two separate discovery phases – here, with respect to disclosure of witnesses’ written and recorded statements – could be as follows. *Phase One*: “The prosecution shall disclose: . . . When they are in the possession of the prosecution (not solely in the possession of police or another law enforcement agency), all statements, written or recorded or summarized in any writing or recording, made by persons who have evidence or information relevant to any offense charged or to a potential defense thereto. Statements solely in the possession of police or another law enforcement agency at the time of Phase One discovery are discoverable under a corresponding subsection in Phase Two discovery.” *Phase Two*: “The prosecution shall disclose: . . . All statements, written or recorded or summarized in any writing or recording, made by persons who have evidence or information relevant to any offense charged or to a potential defense thereto, including those that were solely in the possession of police or another law enforcement agency at the time of Phase One discovery. Statements previously disclosed in Phase One discovery need not be disclosed again.”

7 days to complete “Phase One” discovery. A one-week extension of the period for “Phase One” discovery is appropriate in such situations because prosecutors may need to catch up on discovery obligations for multiple cases after a trial or an absence from the office, and they should be given adequate time to do so without having to make rote applications for extensions.

Our reasons for recommending a relatively short time period such as fifteen days after arraignment for “Phase One” discovery are that receiving basic discovery early in the case is extremely important for viable investigations by the defense, for giving informed advice about plea offers, and for orderly submission of motions to suppress evidence. Here, a period of fifteen days would be achievable in practice because (as discussed further below) this obligation would include only items and information that the prosecutor actually has in his or her possession at that point in the case (not things solely possessed by police) and electronically accessible police reports (but not other police documents). It would also include a list of the potentially suppressible tangible property, and of the defendants’ statements made to law enforcement (most of which are already routinely “noticed” to the defense within fifteen days under Criminal Procedure Law §710.30).

Other States currently employ a ten or fifteen day period for more extensive discovery from the prosecution than this.⁶⁶ Moreover, the fifteen-day period would start from the date of the defendant’s arraignment on an indictment or a “converted” misdemeanor information – not from the initial court appearance after the arrest. In many or most cases, that means it would not begin until several days, and typically several weeks or several months, after the arrest.⁶⁷ Further, as noted, prosecutors who are on trial or absent from the office during one or more days of the fifteen-day

⁶⁶ See, e.g., Fla. R. C.P. 3.220(b)(1) (within 15 days of demand); Hawaii R. Penal P. 16(e)(1) (within 10 days of arraignment); Mo.R.Crim.P. 25.02 (within 10 days of demand); N.J. CT. R. 3:13-3(b)(1) (within 7 days of unsealing of indictment); N.M.Dist.Ct.R.Crim.P. 5-501(A) (within 10 days of arraignment); see also Ariz. R.Crim.P. 15.1(c) (30 days after arraignment); Colo. R.Crim.P. 16 Part I (b)(1) (21 days after first appearance); Md. R. 4-263(h) (within 30 days after first appearance); Mich. CR 6.201(F) (within 21 days of demand); N.H. R. C.P. 12(b)(1)(B)(i) (within 30 days of not guilty plea); R.I. R.Super.Ct. R.C.R.P. Rule 16(f) (within 30 days of arraignment); Tex. Crim. Pro. Art. 39.14(a) (as soon as practicable after receiving a timely request).

⁶⁷ There are frequently two separate “arraignments” in a criminal case in New York State, and discovery is provided after the later of them. The first arraignment is the defendant’s initial appearance in local criminal court, when he or she often is charged only in a complaint. The second arraignment occurs at a subsequent court appearance, after the prosecution has filed an indictment or, in misdemeanor cases, a legally sufficient accusatory instrument (such as an information). Thus, there would be no across-the-board mandate that prosecutors must provide discovery within “fifteen days” of the inception of the case. In many or most cases (and nearly always when there are considerable discovery materials), the “arraignment” that triggers the fifteen-day period for initial discovery would not occur until several days or even months after the arrest. An often-substantial period between the arrest and the arraignment may, therefore, in effect be added to the fifteen days.

period would automatically get a one-week extension; the court would have authority to further alter the time periods for discovery as needed; and a remedy at trial for any untimely disclosure would be available only for a showing of “significant prejudice.”

Our recommendation that “Phase Two” discovery occur within ninety days after arraignment is intended, first, to give the prosecution reasonable time to communicate with police and obtain the discoverable materials; and, second, to give considerable time to negotiate with the defense regarding the possibility of a guilty plea that would spare having to assemble and provide the full discovery.

In addition, the discovery statute should include three other specialized provisions that would give prosecutors further leeway automatically to delay discovery, without having to seek permission from the court. *First*, where the prosecution’s discoverable materials are exceptionally voluminous, the statute should provide that its time periods for discovery may be automatically deferred by up to an additional forty-five days without need for making a motion. *Second*, when limited availability of transcription resources makes transcripts of Grand Jury witnesses’ testimony unavailable for disclosure within the specified time period, the statute should allow the time period for discovery of those transcripts to be automatically deferred by up to an additional forty-five days without need for making a motion. But because prompt review of Grand Jury minutes by the court is desirable, the statute should direct the prosecution to disclose such minutes expeditiously upon their receipt rather than waiting to do so until the statutory discovery deadline. *Third*, as described above in Section II-B-4, the time periods for disclosure of both parties’ expert opinion evidence should be flexible without need for making motions, because frequently it is impossible to consult with experts and to obtain reports within ninety days of the arraignment.

As an appropriate list of materials and information that could be discoverable at each of the three stages, the Task Force makes the following proposal (but, again, this is simply an illustrative list):

(1.) *Prosecution’s “Phase One” Discovery:*

- (a.) Electronically stored police reports (*i.e.*, this provision does *not* include less formal police documents that are not available electronically – they would not be discoverable until “Phase Two” discovery).

- (b.) Other written or recorded witness statements, if they are actually possessed by the prosecution fifteen days after arraignment (*i.e.*, this provision does *not* include written or recorded statements that are possessed solely by police or another law enforcement agency at the time of “Phase One” discovery – they would not be discoverable until “Phase Two” discovery).
- (c.) Names and addresses or adequate contact information for all persons whom the prosecutor knows to have evidence or information relevant to an offense charged or to a potential defense, with a designation if feasible as to which of them may be called as witnesses. Only business addresses should be disclosed for police or other officials and experts. (As described above in Section II-A-2, addresses and contact information may be withheld and redacted from discovery materials without need for making a motion, if either [i.] the prosecutor arranges a timely interview between the witness and the defense lawyer; [ii.] the prosecutor uses the attorney-only confidentiality procedure in a violent felony case; or [iii.] the person is a confidential informant or undercover law enforcement personnel).
- (d.) Statements made by the defendant or a co-defendant to a public servant engaged in law enforcement activity other than during the offense.
- (e.) A list of tangible objects obtained from, or allegedly possessed by, the defendant or a co-defendant (as described above in Section II-B-6).
- (f.) Information about search warrants (as described above in Section II-B-7).
- (g.) Favorable evidence and information, if it is actually known to the prosecution fifteen days after arraignment (*i.e.*, this provision does *not* include favorable evidence or information that is known solely to police or another law enforcement agency at the time of “Phase One” discovery – such information would not have to be obtained by the prosecution until “Phase Two” discovery, albeit it should be subject to a duty to promptly disclose it upon receipt by the prosecutor, as described above in Section II-B-2).
- (h.) The approximate date, time and place of the offenses charged and of the defendant’s arrest.

(2.) *Prosecution’s “Phase Two” Discovery:*

- (a.) Transcripts of Grand Jury witnesses’ testimony (subject to an automatic time-frame adjustment if there are limited transcription resources, but also to a duty to promptly submit the minutes to the court for review upon receipt by the prosecutor, as described above).
- (b.) Additional police reports, including those not electronically stored.
- (c.) Additional written or recorded witness statements, including those that were possessed solely by police or another law enforcement agency at the time of “Phase One” discovery.
- (d.) Intended exhibits (subject to the prosecution’s option to require a “demand” for them, and to an automatic time-frame adjustment where the prosecutor has not formed an

intent to introduce specific items at the time of “Phase Two” discovery, as described above in Section II-B-3).

- (e.) Tapes and electronic recordings intended to be introduced.
- (f.) Photographs and drawings.
- (g.) Reports and documents concerning physical or mental examinations, or scientific tests or experiments.
- (h.) Additional favorable evidence and information, including that known solely to police or another law enforcement agency at the time of “Phase One” discovery.
- (i.) A summary of any rewards, promises, and inducements made to witnesses.
- (j.) The results of complete criminal history record checks for intended witnesses (and for defendants and co-defendants, if not provided previously).
- (k.) Known pending criminal charges against intended witnesses.
- (l.) Expert witness evidence (as described above in Section II-B-4).

The Task Force’s suggestions of an appropriate list of materials and information that could be discoverable from the defendant as reciprocal discovery are described above in Section II-C.

E. Statutory Provision for “Remedies” (Not “Sanctions”) for Non-Compliance

Technical violations of discovery obligations are inevitable in any court system. In large part, this is because prosecutors and police work for separate agencies and have manifold responsibilities that do not always permit them to efficiently communicate and cooperate for purposes of providing discovery materials.

The Task Force recommends that, with respect to the potential *consequences* of violations during the discovery process, the statute employ the term “remedy” – not “sanction.” This terminology properly recognizes that the purpose of these rules is simply to try to ensure that the parties receive as much discovery as is feasible, as early as possible (consistent with witness safety). It is not to “penalize” prosecutors or police for inevitable lapses during the process, despite their reasonably diligent efforts to comply in good faith. (Of course, by advising that the term “remedy” be used in the discovery statute, we do not suggest that courts or professional disciplinary bodies should not, when appropriate, impose “sanctions” directly against prosecutors or other lawyers who are found to have acted unethically – such as by intentionally violating the *Brady* obligation or a court’s discovery orders – as discussed below in Section III.)

Specifically, when discoverable material is lost or destroyed, the statute should instruct courts to provide a “remedy” at trial that is proportionate to how the missing item reasonably might have been helpful. When discoverable material is disclosed belatedly, the statute should instruct courts to provide a “remedy” at trial if the party entitled to disclosure is able to show that it was “significantly prejudiced.” (To provide a disincentive against a rare unscrupulous litigant who might attempt to delay providing discovery well beyond the statutory time frames on the rationale that the opposing party could not likely show “significant prejudice,” the statute should also contain another limited option. In that unusual situation, the court should have discretion to impose an appropriate remedy if the untimely disclosure resulted from a lack of reasonably diligent efforts to comply with discovery and the party entitled to disclosure showed “some prejudice.”) Settled case law holding that “preclusion” of evidence and “dismissal” of charges are sanctions that a court may not employ unless the prejudice cannot be rectified by any lesser remedy would, of course, still apply.⁶⁸

Currently Criminal Procedure Law §240.70(1) gives judges broad leeway to provide a sanction/remedy, but it provides little insight about the applicable analysis for gauging *when* a remedy is appropriate and *what* the remedy should be. The proposed rules for granting a remedy described here simply reflect the analysis set forth in current case law.⁶⁹ But specifying them in the discovery statute would provide clearer guidance for litigants and courts than does article 240. These are forgiving standards (especially in the context of untimely disclosures), which are designed to rectify harm and not to create a windfall for mere mishaps. They should allay any concerns about the potential impact of the Task Force’s proposals.⁷⁰

⁶⁸ See, e.g., *People v. Jenkins*, 98 N.Y.2d 280, 284 (2002) (“Preclusion of evidence is a severe sanction, not to be employed unless any potential prejudice arising from the failure to disclose cannot be cured by a lesser sanction”); *People v. Kelly*, 62 N.Y.2d 516, 521 (1984) (“as a general matter the drastic remedy of dismissal should not be invoked where less severe measures can rectify the harm done by the loss of evidence”).

⁶⁹ See, e.g., *People v. Joseph*, 86 N.Y.2d 565, 570-72 (1995); *People v. Banch*, 80 N.Y.2d 610, 616 (1992); *People v. Goins*, 73 N.Y.2d 989, 991 (1989); *People v. Perez*, 65 N.Y.2d 154, 159 (1985).

⁷⁰ Sample statutory language for the “remedy for discovery violations” provision could be as follows: “(i) When material or information is discoverable under this article but is disclosed belatedly, the court shall impose an appropriate remedy if the party entitled to disclosure shows that it was significantly prejudiced. If the untimely disclosure occurred because the party responsible failed to make reasonably diligent efforts to comply with this article, the court has discretion to impose an appropriate remedy if the party entitled to disclosure shows some prejudice. In either situation the party entitled to disclosure shall be given reasonable time to prepare and respond to the new material. (ii) When material or information is discoverable under this article but cannot be disclosed because it has been lost or destroyed, the court shall impose an appropriate remedy if the party entitled to disclosure shows that the lost or destroyed material may have contained some information relevant to a contested issue. The appropriate remedy is that which is proportionate to the potential ways in which the lost or destroyed material reasonably could have been helpful to the party entitled to disclosure.”

F. Additional Measures to Help Facilitate the Goals of Discovery

The Task Force recommends that certain other measures should also be enacted to further the underlying goals of criminal discovery reform and help facilitate compliance with the discovery rules. These include:

(1.) *Discovery By Court Order*: There should be a “catch-all”-type provision that would permit the court, within its discretion and based upon an appropriate showing of need, to grant discovery of important evidence that is not otherwise discoverable. The availability of such discretionary discovery orders should be limited to situations where the defendant not only establishes that he or she cannot (without undue hardship) obtain substantially equivalent evidence by other means, but also that the evidence sought is reasonably likely to be material. Such procedures are used in States such as Arizona, Colorado, Florida, Massachusetts, and others.⁷¹ By contrast, discovery in New York currently is strictly limited to items listed in the statute and to constitutionally required disclosures.⁷² Situations where resort to this provision would be needed presumably would be rare. But judges should have the authority and flexibility to permit discovery of items needed for a complete investigation or a fair trial.⁷³ There should also be a provision authorizing an expedited order that requires preservation and non-spoliation of evidence.⁷⁴

⁷¹ See, e.g., Ariz. R.Crim.P. 15.1(g); Colo. R.Crim.P. 16 Part I (d)(1); Fla. R. C.P. 3.220(f); Ill. S. Ct. R. 412(h); Mass. R.Crim.P. 14(a)(2); Minn.R.Crim.P. 9.01 Subd. 2; Mo. Sup. Ct. R. 25.04(A); Pa. R.Crim.P. 573 (B)(2)(a)(iv); Wash. C.R.R. 4.7(e)(1).

⁷² See, e.g., *People v. Colavito*, 87 N.Y.2d 423, 427 (1996); *Matter of Pittari v. Pirro*, 258 A.D.2d 202, 207 (2d Dept. 1999).

⁷³ Sample statutory language for the “discovery by order of the court” provision could be as follows: “The court in its discretion may, upon a showing by the defendant that the request is reasonable and that the defendant is unable without undue hardship to obtain the substantial equivalent by other means, order the prosecution, or any individual, agency or other entity subject to the jurisdiction of the court, to make available for disclosure to the defendant any material or information which potentially relates to the subject matter of the case and is reasonably likely to be material. A motion under this subdivision must be on notice to any person or entity affected by the order. The court may, upon request of any person or entity affected by the order, vacate or modify the order if compliance would be unreasonable or will create significant hardship. The court may permit a party seeking or opposing a discretionary order of discovery under this subdivision, or another affected person or entity, to submit papers or testify on the record ex parte or in camera. Any such papers and a transcript of such testimony may be sealed and shall constitute a part of the record on appeal.”

⁷⁴ Sample statutory language for the “order to preserve evidence” provision could be as follows: “At any time, a party may move for a court order to any individual, agency or other entity in possession, custody or control of items which relate to the subject matter of the case or are otherwise relevant, requiring that such items be preserved for a specified period of time. The court shall hear and rule upon such motions expeditiously. The court may modify or vacate such an order upon a showing that preservation of particular evidence will create significant hardship, on condition that the probative value of that evidence is preserved by a specified alternative means.”

Furthermore, currently the New York discovery statute does not include any mechanism for a defense lawyer to obtain prompt access to inspect, photograph, measure, or diagram a private or otherwise restricted crime scene connected to the case. Yet it is basic to constitutionally effective representation that the defense lawyer have visited the crime scene, so as to properly cross-examine and to ensure that the jury will adequately assess any limitations in the witnesses' contentions.⁷⁵ A reasonable investigation sometimes may require seeing a private location before it is cleaned, and before possibly probative features bearing on the circumstances of the crime or the defense are altered and lost. In such situations, the defense should not be limited solely to the photographs taken by the police, especially because there may be aspects of the offense or the location that are known only to the defendant and were not photographed. Normally police investigators would have already completed their evidence collection at the scene before the defendant is charged.

Nevertheless, due to the lack of explicit authority in the discovery statute for granting such access, appellate courts have ruled that trial judges lack the authority to issue orders that permit it.⁷⁶ The Task Force believes that a defense lawyer should be able to move for an expedited order directing an individual or entity in possession of a crime scene or other location that relates to the subject matter of the case or is otherwise relevant to allow counsel prompt and reasonable access to inspect, photograph, or measure the location (supervised by law enforcement, as the court requires), at a time when its condition remains unchanged. A similar option is available in civil cases.⁷⁷ But

⁷⁵ See, e.g., *Williams v. Washington*, 59 F.3d 673, 680-81 (7th Cir. 1995); *Thomas v. Kuhlman*, 255 F. Supp. 2d 99, 101 (E.D.N.Y. 2003); *People v. Donovan*, 184 A.D.2d 654, 655 (2d Dept. 1992); *People v. Armstrong*, NYLJ 11/16/95, p. 30, col. 5 (Sup. Ct., Queens Co. 1995), *aff'd*, 249 A.D.2d 317 (2d Dept. 1998); see generally *Strickland v. Washington*, 466 U.S. 668, 691 (1984); *People v. Oliveras*, 21 N.Y.3d 339, 346-48 (2013); *People v. Droz*, 39 N.Y.2d 457, 462 (1976).

⁷⁶ See, e.g., *Matter of Brown v. Appelman*, 241 A.D.2d 279, 281-84 (2d Dept. 1998); *Matter of Pirro v. LaCava*, 230 A.D.2d 909, 910 (2d Dept. 1996); *Matter of Kaplan v. Tomei*, 224 A.D.2d 530 (2d Dept. 1996); *People v. Kyriazas*, 2002 WL 31972172, *1 (Sup. Ct., Westchester Co. 2002) ("This Court, quite frankly, is at a loss to find a logical reason why defendant . . . should be denied the limited relief requested. . . ."); cf. *People v. Davis*, 169 Misc.2d 977, 979-82 (Co. Ct., West. Co. 1996); *People v. Legrande*, 182 Misc.2d 375, 377-78 (Co. Ct., Sullivan Co. 1999); *People v. Nicholas*, 157 Misc.2d 947, 948 (Sup. Ct., Bronx Co. 1993); *State in Interest of A.B.*, 99 A.3d 782 (NJ 2014) (access to inspect victim's home); *Henshaw v. Commonwealth*, 451 S.E.2d 415, 419 (Va. App. 1994) (access to inspect the crime scene implicates fundamental fairness); *State v. Lee*, 461 N.W.2d 245, 246-47 (Minn. App. 1990).

⁷⁷ CPLR §3120(1)(ii) ("After commencement of an action, any party may serve on any other party a notice or on any other person a subpoena . . . to permit entry upon designated land or other property . . . for the purpose of inspecting, measuring . . . [or] photographing . . . the property").

any affected party should be entitled to apply to the court for modification or vacatur of such orders, as needed.⁷⁸

(2.) *Certificates of Compliance*: The Task Force recommends that both the prosecutor and the defense lawyer be required to file a “certificate of compliance” upon completion of their discovery obligations. This certificate would simply state that, after exercising due diligence and making reasonable inquiries, the lawyer has disclosed all “known” materials that are subject to discovery, and list the items provided. When additional items are found and turned over later in the case, the lawyer would then file a supplemental certificate of compliance. The prosecutor’s certificate will also serve as the triggering date for the defense’s thirty day period to provide its reciprocal discovery, as described above in Section II-D.

This procedure has been used in Massachusetts.⁷⁹ It is simply designed to help foster compliance and personal responsibility by lawyers in the discovery process, and to create a reviewable record of disclosures and thereby reduce discovery litigation. The statute should explicitly direct, therefore, that no adverse consequence to the prosecution or the prosecutor, or to the defendant or the defense lawyer, may result from the filing of a certificate in good faith. The purpose of these certificates is to formalize responsibilities, avert disputes, and document stages in the case – it is emphatically not to spawn litigation, or to threaten penalties against or demean any lawyers acting in good faith – and the statute should make that clear.⁸⁰

⁷⁸ Sample statutory language for the “court ordered access to premises” provision could be as follows: “At any time, the defendant may move for a court order to any individual, agency or other entity in possession, custody or control of a crime scene or other premises that relates to the subject matter of the case or is otherwise relevant, requiring that counsel for the defendant be granted prompt and reasonable access to inspect, photograph or measure that crime scene or those premises, and that the condition of the crime scene or premises remain unchanged in the interim. The court shall hear and rule upon such motions expeditiously. The court may modify or vacate such an order upon a showing that granting access to a particular crime scene or premises will create significant hardship, on condition that the probative value of that location is preserved by a specified alternative means.”

⁷⁹ Mass. R.Crim.P. 14(a)(3).

⁸⁰ Sample statutory language for the “certificate of compliance” provision could be as follows: “When the prosecution has provided the discovery required in ‘Phase One’ and ‘Phase Two’ of discovery, except for any items or information that are the subject of a protective order, it shall serve upon the defendant and file with the court a certificate of compliance. The certificate shall state that, after exercising due diligence and making reasonable inquiries to ascertain the existence of material and information subject to discovery, the prosecutor has disclosed and made available all known material and information subject to discovery. It shall also identify the items provided. If additional discovery is subsequently provided prior to trial, a supplemental certificate shall be served upon the defendant and filed with the court identifying the additional material and information provided. No adverse consequence to the prosecution or the prosecutor shall result from the filing of a certificate of compliance in good faith; but the court may grant a remedy for a discovery violation as provided in this article.” (A corresponding provision would describe defense counsel’s certificate of compliance.)

(3.) *Discretionary Court Procedures to Facilitate Compliance*: The Task Force does *not* recommend that pre-trial “discovery conferences” be mandatory in New York State, as such a requirement in every case would unnecessarily strain resources. Nevertheless, it would be beneficial for the discovery statute to highlight that judges have the option within their discretion to require such conferences – or to require that the attorneys for all parties must confer to attempt to resolve any discovery dispute before seeking a ruling from the court – or to establish other reasonable procedures to facilitate compliance with the rules.⁸¹

(4.) *Disclosure of Defendant’s Uncharged Misconduct*: The Task Force recommends that the prosecution be required to disclose all specific instances of the defendant’s prior uncharged misconduct or criminal acts that the prosecutor intends to introduce at trial as substantive evidence (so-called “*Molineux*” material) or for impeachment if the defendant elects to testify (so-called “*Sandoval*” material).⁸² This disclosure should occur on a different timetable than the other kinds of discovery, such as fifteen days before a scheduled trial date, because often a prosecutor will not know until he or she has begun to prepare for trial which specific bad acts of the defendant will be offered as substantive or impeachment evidence.

Under current New York law, there is no statutory requirement to disclose misconduct and prior criminal acts that will be offered on the prosecution’s case-in-chief; and such information that will be offered as impeachment evidence need be disclosed only at the time of the trial.⁸³ Providing several days of advance notice to the defense would eliminate unfair surprise and afford defense counsel adequate time to investigate, research, and prepare.⁸⁴

⁸¹ Sample statutory language for the “court ordered procedures to facilitate compliance” provision could be as follows: “To facilitate compliance with this article, and to reduce or streamline litigation of any disputes about discovery, the court in its discretion may issue an order (i) requiring that the prosecutor and counsel for the defendant diligently confer to attempt to reach an accommodation as to any dispute concerning discovery prior to seeking a ruling from the court; (ii) requiring a discovery compliance conference at a specified time prior to trial between the prosecutor, counsel for all defendants, and the court or its staff; (iii) requiring the prosecution to file an additional certificate of compliance that states that the prosecutor and/or an appropriate named agent has made reasonable inquiries of all police officers and other persons who have participated in investigating or evaluating the case about the existence of any favorable evidence or information, including such evidence or information that was not reduced to writing or otherwise memorialized or preserved as evidence, and has disclosed any such information to the defendant; and/or (iv) requiring other measures or proceedings designed to carry into effect the goals of this article.”

⁸² See *People v. Sandoval*, 34 N.Y.2d 371 (1974); *People v. Molineux*, 168 N.Y. 264 (1901).

⁸³ See CPL §240.43; *People v. Ventimiglia*, 52 N.Y.2d 350 (1981); compare Ariz. R.Crim.P. 15.1(b)(7); ABA Standards for Criminal Justice: Discovery, Standard 11-2.1(a)(vi) (3d ed. 1996).

⁸⁴ Sample statutory language for this “disclosure of prior misconduct or criminal acts” provision could be as follows: “Not later than fifteen calendar days before a scheduled trial date, the prosecution shall disclose to the

(5.) *Two Changes to Subpoena Law*: Because they also relate to the defense’s ability to obtain pre-trial access to information relevant to investigating and evaluating cases, the Task Force recommends that two particular statutory changes should be made to notable aspects of current subpoena law.

(i.) Appellate courts have in recent years strictly limited the defense’s use of subpoenas that may be served on third parties under Criminal Procedure Law §610.20(3), by requiring the defense lawyer to make a showing – when a subpoena is challenged – that the subpoenaed items are reasonably likely to be “relevant and *exculpatory*,” not merely that they are reasonably likely to be “relevant and *material*.”⁸⁵ In practice, it is often impossible for the defense to make such a showing, even where the items are plainly important for evaluating the strength of the case or for assessing the viability of a potential defense. For example, the defense should be allowed to subpoena and review surveillance footage from a third party business, even if that footage is reasonably likely to be incriminating and counsel is unable to demonstrate in advance a likelihood that it would be “exculpatory.”

Just as prosecutors regularly use Grand Jury subpoenas to investigate potentially “material” evidence without knowing in advance whether it will be inculpatory or exculpatory, the defense should be entitled to use subpoenas to investigate potentially “material” evidence without having to show in advance that the item is likely to be exculpatory. But to be clear, the Task Force is not suggesting the alteration of *other* related aspects of current subpoena law. For instance, a defense subpoena would still have to be a demand for production of specific items, not merely an effort to

defendant a list of all misconduct and criminal acts of the defendant not charged in the indictment, superior court information, prosecutor’s information, information, or simplified information, which the prosecution intends to use at trial for purposes of (i) impeaching the credibility of the defendant, or (ii) as substantive proof of any material issue in the case. In addition the prosecution shall designate whether it intends to use each listed act for impeachment and/or as substantive proof.”

⁸⁵ See, e.g., *People v. Ricketts*, 38 A.D.3d 291, 292 (1st Dept. 2007) (“Defendant did not establish a ‘factual predicate which would make it reasonably likely that documentary information will bear relevant and exculpatory evidence’”); accord *People v. Kozlowski*, 11 N.Y.3d 223, 241-43 (2008); *Matter of Constantine v. Leto*, 77 N.Y.2d 975, 976 (1991), *aff’d*, 157 A.D.2d 376, 378 (3rd Dept. 1990); *People v. Bagley*, 279 A.D.2d 426, 427 (1st Dept. 2001); compare *Hynes v. Moskowitz*, 44 N.Y.2d 383, 393 (1978) (“the issuer must show that the items sought to be subpoenaed have some relevancy and *materiality*”) (emphasis added).

ascertain the existence of evidence; and courts would still retain the authority to quash an improperly overbroad or unreasonably burdensome subpoena.⁸⁶

(ii.) The second particular change to subpoena law that the Task Force recommends is streamlining the inefficient and burdensome requirements of Criminal Procedure Law §610.20(3), which incorporates Civil Practice Law and Rules §2307 for defense subpoenas served on governmental agencies. These provisions currently require the defense attorney to give both the governmental agency and the prosecution “at least one day’s notice” that the defense intends to issue such a subpoena. If the court agrees to indorse the subpoena, the defense attorney must then re-serve the subpoena on both the governmental agency and the prosecution, “at least twenty-four hours before the time fixed for the production of such records.”⁸⁷

This multi-step service process is unnecessarily burdensome: there is no reason the defense attorney should have to serve the same subpoena on the same two agencies on consecutive days. Not only does that involve unnecessary legwork and paperwork, but it also fails to provide the subpoenaed agency with adequate time in which to consider and prepare any response, and/or to provide the subpoenaed materials. Another recurring problem is that the footage from government-operated surveillance cameras, which may be key evidence in a criminal case, is frequently automatically deleted within short periods (such as seven days). If the multi-step process required by the statute – of serving notice, litigating for issuance of the subpoena if it is contested, and re-

⁸⁶ See, e.g., *Matter of Terry D.*, 81 N.Y.2d 1042, 1044 (1993); *Matter of Constantine v. Leto*, 77 N.Y.2d 975, 976 (1991), *aff’d*, 157 A.D.2d 376, 378 (3rd Dept. 1990); *People v. Ricketts*, 38 A.D.3d 291, 292 (1st Dept. 2007).

⁸⁷ Criminal Procedure Law §610.20(3) provides: “An attorney for a defendant in a criminal action or proceeding, as an officer of a criminal court, may issue a subpoena of such court, subscribed by himself, for the attendance in such court of any witness whom the defendant is entitled to call in such action or proceeding. An attorney for a defendant may not issue a subpoena duces tecum of the court directed to any department, bureau or agency of the state or of a political subdivision thereof, or to any officer or representative thereof. Such a subpoena duces tecum may be issued in behalf of a defendant upon order of a court pursuant to the rules applicable to civil cases as provided in section twenty-three hundred seven of the civil practice law and rules.”

In turn, Civil Practice Law and Rules §2307 provides (in relevant part): “A subpoena duces tecum to be served upon a library, or a department or bureau of a municipal corporation or of the state, or an officer thereof, requiring the production of any books, papers or other things, shall be issued by a justice of the supreme court in the district in which the book, paper or other thing is located or by a judge of the court in which an action for which it is required is triable. Unless the court orders otherwise, a motion for such subpoena shall be made on at least one day’s notice to the library, department, bureau or officer having custody of the book, document or other thing and the adverse party. Such subpoena must be served upon such library, or such department or bureau of such municipal corporation or of the state or an officer having custody of the book, document or other thing and the adverse party at least twenty-four hours before the time fixed for the production of such records unless in the case of an emergency the court shall by order dispense with such notice otherwise required. . . .”

serving the subpoena – is not initiated right away and promptly concluded, such evidence may be permanently lost.

A better approach would be to dispense with the requirement of providing one day’s advanced notice, but to extend the period for the agency’s compliance with a court-indorsed subpoena to three days. That would provide the agency with more reasonable time to consider the subpoena, and to move to quash if appropriate or to provide the materials. And it would eliminate the inefficient and costly run-around of serving the same document on multiple parties on consecutive days. This change could be achieved by eliminating the third sentence of §610.20(3) (which currently states: “Such a subpoena duces tecum may be issued in behalf of a defendant upon order of a court pursuant to the rules applicable to civil cases as provided in [CPLR §2307]”), and modifying and supplementing the second sentence of the same subsection to state: “An attorney for a defendant may not issue a subpoena duces tecum of the court directed to any department, bureau or agency of the state or of a political subdivision thereof, or to any officer or representative thereof, *unless the subpoena is indorsed by the court and provides at least three days for the production of the requested materials. In the case of an emergency, the court may by order dispense with the three-day production period.*”

Notably, this modification also would dispense with the requirement that the defense must notify the “adverse party” (the prosecution) in advance about its intended subpoenas. This is appropriate for two main reasons. First, the original purpose of CPLR §2307 and its predecessor provisions in the Civil Practice Act and the Code of Civil Procedure was simply to prevent governmental agencies from having to produce original documents “when a copy thereof will answer the requirement of the litigants.” The idea was that the notice period would give the parties the opportunity to agree to stipulate to the use of copies, rather than originals. Where one party refused to stipulate, the judge would issue a subpoena for the production of the originals, but could impose costs on the refusing party.⁸⁸ Those concerns are essentially moot now in the era of photocopies and electronically stored information.

Second, requiring the defense to give the prosecution advanced notice of its subpoenas – without any comparable requirement on the part of the prosecutor – is unbalanced and gives

⁸⁸ *Friedeberg v. Haffen*, 162 A.D. 79, 80 (1st Dept. 1914); *see also* Connors, Practice Commentaries, McKinney’s Cons. Laws of NY, Book 7B, CPLR §2307:2.

prosecutors the unfair advantage of being able to monitor the defense's investigations, which inhibits full defense investigations in practice. It also arguably runs afoul of the constitutional due process requirement of reciprocity in notice rules.⁸⁹ Of course, if materials the defense obtains by subpoena come within the discovery law, they will be disclosed to the prosecution by that means prior to trial.

The Legislature previously recognized these concerns when it passed a bill in 1995 that would have amended §2307 to eliminate the requirement in both civil and criminal cases of a motion and court order for a subpoena duces tecum to a government agency. But then-Governor Pataki vetoed that bill on the grounds that it would result in a significant increase in the number of improper subpoenas served and unreasonable burdens on State agencies.⁹⁰ Those concerns would not be presented by the statutory change we suggest here, since the subpoenaed agency would receive a full three-day period in which to move to contest any improper or unreasonably burdensome subpoena prior to complying with it, and the court also would have the initial opportunity to decline to approve any subpoena it deemed inappropriate.

In sum, this change to subpoena law would further the underlying goals of discovery reform. It would enable more efficient and complete investigations by the defense, without waste of scarce investigatory resources. It would help to ensure that perishable surveillance footage from government-operated cameras is not inadvertently erased. And, if discovery provisions like those this Task Force recommends are enacted, the prosecution would still timely be provided with the materials subpoenaed by the defense that it intends to introduce at trial.

(6.) *Four Changes to Pre-Trial Notice Statute (CPL §710.30)*: Important discovery provisions in Criminal Procedure Law section 710.30 supplement those of article 240. Section 710.30 obliges the prosecution to give notice of certain types of evidence that, in particular cases, may have been obtained by the authorities. This Task Force believes that amendments to section 710.30 would, if enacted as a whole, further the interest of justice, even if not all of the other changes suggested in this report should be adopted.

⁸⁹ See generally *Wardius v. Oregon*, 412 U.S. 470, 475 (1973) (“It is fundamentally unfair to require a defendant to divulge the details of his own case while at the same time subjecting him to the hazard of surprise concerning refutation of the very pieces of evidence which he disclosed to the State”).

⁹⁰ See S.3804/Volker; 1995 Executive Veto Message for S.3804/Volker.

(i.) *Remedy for a Violation of the 15-Day Notice Rule*: Section 710.30 governs what notice the prosecution must give of its intent to introduce (a) evidence of statements made by the defendant, and (b) identification evidence by a witness who has made a prior identification of the defendant. The notice facilitates the prompt filing of motions to suppress evidence. Failure to provide timely notice requires preclusion of the relevant evidence.

As originally drafted, section 710.30(2) simply required that the prosecution give statement and identification notice before trial. Even after trial began, the court could accept late notice, and admit the statement or identification evidence, for “good cause shown.” Given how late in the day such notice would be, the Court of Appeals understandably interpreted the “good cause” language very strictly, such that for practical purposes virtually no cause would be “good” enough to justify mid-trial notice. In particular, it was no excuse for mid-trial notice that the police did not tell the prosecutor about the evidence until after trial began.⁹¹

In 1976 the Legislature amended section 710.30 to require provision of statement and identification notice in felony cases within 15 days after the Supreme Court arraignment on the indictment.⁹² The “good cause” language remained unchanged, so the prosecution still could hope to use the evidence if notice was late for good cause. The Court of Appeals was asked to relax its strict interpretation of the “good cause” rule in post-amendment cases in light of the fact that notice served a short time after the 15-day deadline would not cause prejudice in the way that mid-trial notice did in prior cases. But the Court decided that, as the “good cause” language remained the same, the same type of near-impossible showing would still have to be made before late notice could be excused.⁹³ Thus it is the law that notice coming after the 15th day requires preclusion of statement and identification evidence, even if the prosecutor did not learn of the evidence in that period and even if the defense has not been harmed in the slightest by the delay.

We propose that the “good cause” language be amended to avoid draconian sanctions for technical errors of no significance. In other areas, this Task Force endorses the view that sanctions

⁹¹ See *People v. Spruill*, 47 N.Y.2d 869, 870-71 (1979).

⁹² In misdemeanor cases, the courts generally consider that the 15-day period runs from the arraignment on the information. See, e.g., *People v. Alcindor*, 157 Misc.2d 725 (Crim. Ct., Kings Co. 1993); *People v. Haines*, 139 Misc.2d 762 (Crim. Ct., Queens Co. 1988); see also *People v. Littlejohn*, 184 A.D.2d 790 (2d Dept. 1992); *People v. Penasso*, 142 A.D.2d 691, 693 (2d Dept. 1988).

⁹³ See *People v. O’Doherty*, 70 N.Y.2d 479 (1987); *People v. McMullin*, 70 N.Y.2d 855 (1987).

for prosecution discovery violations should be tailored solely to cure any prejudice suffered by the defense. Here, however, there remains a special need for notice well before trial – without it, the defense cannot intelligently and efficiently make its pretrial suppression motions. Additional benefits of maintaining the requirement to provide notice early in the case are that it greatly assists defendants in intelligently evaluating guilty plea offers, and serves as an effective check against an unscrupulous witness who might otherwise “remember” or “tailor” new statements as a case develops in the pre-trial period or even during trial.

The Task Force therefore proposes that evidence should be precluded for failure to give notice as required by section 710.30 if, and only if, the prosecutor failed to act with due diligence. We believe that the burden of showing that preclusion is unwarranted for late notice based on reasonable diligence should be placed on the prosecution to ensure that a meaningful incentive exists for routinely providing early notice and thus for avoiding gamesmanship and delay.

(ii.) *The Defendant’s Need to Choose Between Preclusion and Suppression Claims*: Section 710.30 requires that evidence be precluded on account of deficient notice unless, despite the deficiency, the defendant moved to suppress and that motion was denied on the merits. The provision makes sense when the defense knows about the evidence, does not see fit to take issue with an inconsequential delay in or specificity in notice, and chooses instead to press the merits of the suppression claim.

But the Court of Appeals complicated matters for defense attorneys. When a defense application for preclusion is made, the trial court may of course deny the application on a finding that notice was not late or otherwise deficient. That happened in a case of a defendant named Kirkland, and the defendant then moved to suppress the evidence on the merits. After a full hearing, the motion was denied. On appeal the defendant argued that the initial preclusion ruling was incorrect. The Appellate Division agreed, and reversed. The Court of Appeals reinstated the conviction. It found that the defendant had waived his preclusion claim because, despite arguably receiving inadequate notice, he nonetheless moved to suppress the evidence and that motion was denied.⁹⁴

⁹⁴ See *People v. Kirkland*, 89 N.Y.2d 903, 904-05 (1996).

This *Kirkland* rule forces a defense attorney with an arguably sound preclusion argument and an arguably sound suppression argument to choose between them, and we find this arbitrary. In most circumstances a defendant who fails to obtain relief on one ground can make an argument in the alternative without forfeiting appellate review of his initial claim. The *Kirkland* rule compels an unjustified “Sophie’s choice.”

We propose that Section 710.30 be amended to reflect that a defendant may litigate the merits of a suppression claim without thereby waiving a notice preclusion claim that has been denied.

(iii.) *Specification of Prior Identification Procedures*: Section 710.30(1)(b) provides that when identification testimony will be heard at trial from a witness who has previously identified the defendant, the People must provide notice specifying the evidence intended to be “offered” at trial. It sometimes happens that identification procedures occur which will not be discussed at trial. For example, under current law, where a witness picks the defendant out of a photo array and then a lineup, the jury will learn only about the lineup – and if an in-court identification is made, about that identification as well. Under the language of the statute, the People need not give the defendant notice before trial about the photo array, evidence of which cannot be “offered” at trial.⁹⁵

Information about identification procedures may be quite relevant to the defense strategy at the suppression stage, as well as at trial, even if the prosecution cannot place the results of those proceedings before the jury. Indeed, unfairness in an identification proceeding that will not be addressed on the prosecution’s direct case at trial could be the very basis for a motion to suppress the identification evidence that the prosecution does intend to present, since obviously an improperly suggestive photo identification – like other improper identifications procedures – can “taint” any later identification.⁹⁶ The only good reason not to require that the prosecution provide information about all identification procedures is that adding any burdens to the prosecutor’s notice obligations, while we remain in the world of extremely inflexible remedies for notice error, risks compounding unfairness to the prosecution.

⁹⁵ See *People v. Grajales*, 8 N.Y.3d 361 (2007).

⁹⁶ See, e.g., *People v. Delamota*, 18 N.Y.3d 107, 119 (2011); *People v. Gee*, 99 N.Y.2d 158, 163 (2002).

We propose that, when the prosecution intends to introduce identification testimony at trial, the prosecutor be obliged to give notice of all identification proceedings in which the witness participated, including photographic identifications.

(iv.) *Appeals from Preclusion Orders*: Interlocutory appeals are rare in New York criminal cases. But an appeal by the prosecution is permitted when a trial court suppresses evidence pursuant to Criminal Procedure Law article 710. To restrict the numbers of appeals, the law obliges the People to stipulate that if their appeal is unsuccessful, the case will be dismissed.⁹⁷

Preclusion orders have the same effect as suppression orders, as to the same evidence. Logic would dictate that they be appealable in the same way that suppression orders are appealable. But the Court of Appeals has decided that the current Criminal Procedure Law provisions authorizing People's appeals apply only to merits suppression orders, and do not apply when evidence is precluded for untimely or inadequate notice.⁹⁸

We recommend that Criminal Procedure Law section 450.20 be amended to permit appeals from preclusion orders. The new provision should, like section 450.20(8), require a statement by the prosecution that the case will not go forward if the appeal is unsuccessful.

(v.) *Notice About Physical Evidence*: Criminal Procedure Law section 710.30 requires notice only as to statements and identification testimony. Physical property seized by the police is not subject to this notice rule, perhaps on the theory that the defendant will know what physical property was taken from him. But a defendant (and his attorney) often will not know what was recovered in a search conducted pursuant to a warrant, possibly while the defendant was absent. Nor will the defendant necessarily be aware of what was recovered in a search of his car, which might be conducted long after the defendant was removed from that car, or in the search of a companion or of premises remote from the time or place of the arrest but allegedly within the defendant's "dominion and control." Nor will the defendant necessarily be aware of evidence recovered as the "fruits" of searches of which he has knowledge. Likewise, the defendant often does not know that common items taken from him by the police, such as money or phones taken after arrest for safekeeping, will be used by the prosecution at trial. Provisions in article 240 address the discovery of physical evidence, but if the 15 day notice rule is eased, there is no reason not to include in

⁹⁷ See CPL §450.50.

⁹⁸ See *People v. Laing*, 79 N.Y.2d 166 (1992).

section 710.30 notice of physical evidence recovered from the defendant, or from a place as to which he arguably has standing.

G. Discovery Should Be Automatic (But “Demands” Also Could Be Retained)

Currently the discovery statute requires both parties to serve written “demands” to initiate the discovery process.⁹⁹ The Task Force recommends that both parties’ discovery obligations instead be automatic. Eliminating the “demand” rule would spare defense lawyers, prosecutors, and the court system needless burdens of formulaic paperwork. Notably, District Attorneys in New York State who voluntarily offer the defense forms of “open file” discovery also have abandoned article 240’s “demand” system for routine discovery, recognizing that most litigants in a case that has not been resolved by that stage of the proceedings will want to obtain discovery.¹⁰⁰

H. The Task Force Does Not Recommend Pre-Guilty Plea Discovery Rules

The Task Force does not at the present time recommend that a statutory obligation to turn over discovery to defendants prior to pleas of guilty be adopted in New York State. Such a provision would present concerns for the efficient administration of criminal justice, and could deprive the plea bargaining process of one of its principal advantages – saving resources. Prosecutors should be encouraged, however, to voluntarily provide such discovery where the law does not otherwise require it to be turned over. In addition, the Task Force strongly recommends that new measures be adopted to ensure that *Brady* information is disclosed earlier in the process than currently occurs in most parts of the State (and before formal discovery deadlines, if need be), so that both parties can evaluate it when making critically important decisions about guilty pleas.¹⁰¹

⁹⁹ See CPL §§240.10(1), 240.20, 240.30, 240.80.

¹⁰⁰ Were it deemed worthwhile as a means to spare prosecutors having to copy materials for some defendants who do not actually want discovery, the Task Force also believes that it would be an acceptable alternative approach for the discovery statute to require each party to serve a *simple and concise* written demand on the opposing party to trigger discovery obligations.

¹⁰¹ See *United States v. Coppa*, 267 F.3d 132, 135 (2d Cir. 2001) (“*Brady* material must be disclosed in time for its effective use at trial . . . or at a plea proceeding”); *People v. Delarosa*, 48 A.D.3d 1098, 1099 (4th Dept. 2008); *People v. Carter*, 258 A.D.2d 409, 411-12 (1st Dept. 1999); cf. *United States v. Ruiz*, 536 U.S. 622, 629-31 (2002); see generally *Lafler v. Cooper*, 132 S.Ct. 1376, 1384 (2012).

III. Additional Recommendations for Rectifying Problems With Inadequate Disclosure of Favorable Evidence and Information

Beginning with *Brady v. Maryland*, 373 U.S. 83 (1963), the decisions of the Supreme Court of the United States require that law enforcement officers and prosecutors deliver to the defense information and evidence that tends to be favorable to the accused or impeaches a prosecution witness. Delivery should be made to the defense as soon as practicable after the prosecutor learns of the information. The constitutional requirement that the turnovers take place at the earliest time and continue throughout the proceeding has often been violated. Steps to reduce such violations deserve urgent attention and are the subject of this section of our report.

A. Constitutional Underpinnings of *Brady v. Maryland*

Brady v. Maryland, 373 U.S. 83 (1963), establishes the federal constitutional obligation of prosecutors to disclose information that tends to be favorable to the accused. That includes exculpatory information, information that might reduce the defendant's punishment after conviction, and information that impeaches prosecution witnesses.¹⁰² Now simply called "*Brady*," the rule's purpose is to protect the due process right to a fair trial and to prevent wrongful convictions and inappropriate sentences.

Criminal defense attorneys, prosecutors, and judges appreciate that *Brady* protection is essential to achieving justice in criminal cases. Nonetheless, "*Brady* violations have reached epidemic proportions in recent years, and the federal and state reporters bear testament to this unsettling trend."¹⁰³

¹⁰² *Giglio v. United States*, 405 U.S. 150, 153-54 (1972); *People v. Baxley*, 84 N.Y.2d 208, 213 (1994).

¹⁰³ *United States v. Olsen*, 737 F.3d 625, 631 (9th Cir. 2013) (Kozinski, CJ., dissenting) (citing *Smith v. Cain*, 132 S. Ct. 627 (2012); *United States v. Sedaghaty*, 728 F.3d 885 (9th Cir. 2013); *Aguilar v. Woodford*, 725 F.3d 970 (9th Cir. 2013); *United States v. Kohring*, 637 F.3d 895 (9th Cir. 2010); *Simmons v. Beard*, 590 F.3d 223 (3rd Cir. 2009); *Douglas v. Workman*, 560 F.3d 1156 (10th Cir. 2009); *Harris v. Lafler*, 553 F.3d 1028 (6th Cir. 2009); *United States v. Zomber*, 299 F. Appx. 130 (3rd Cir. 2008); *United States v. Triumph Capital Grp., Inc.*, 544 F.3d 149 (2d Cir. 2008); *United States v. Aviles-Colon*, 536 F.3d 1 (1st Cir. 2008); *Horton v. Mayle*, 408 F.3d 570 (9th Cir. 2004); *United States v. Sipe*, 388 F.3d 471 (5th Cir. 2004); *Monroe v. Angelone*, 323 F.3d 286 (4th Cir. 2003); *United States v. Lyons*, 352 F. Supp. 2d 1231 (M.D. Fla. 2004); *Watkins v. Miller*, 92 F. Supp. 2d 824 (S.D. Ind. 2000); *United States v. Dollar*, 25 F. Supp. 2d 1320 (N.D. Ala. 1998); *People v. Uribe*, 76 Cal. Rptr. 3d 829 (Cal. Ct. App. 2008); *Miller v. United States*, 14 A.3d 1094 (D.C. 2011); *Deren v. State*, 15 So.3d 723 (Fla. Dist. Ct. App. 2009); *Walker v. Johnson*, 646 S.E.2d 44 (Ga. 2007); *Aguilera v. State*, 807 N.W.2d 249 (Iowa 2011); *DeSimone v. State*, 803 N.W.2d 97 (Iowa 2011); *Commonwealth v. Bussell*, 226 S.W.3d 96 (Ky. 2007); *State ex rel. Engel v. Dormire*, 304 S.W.3d 120 (Mo. 2010); *Duley v. State*, 304 S.W.3d 158 (Mo. Ct. App. 2009); *People v. Garrett*, 106 A.D.3d 929 (2d Dept. 2013); *Pena v. State*, 353 S.W.3d 797 (Tex. Crim. App. 2011); *In re Stenson*, 276 P.3d 286 (Wash. 2012); *State v. Youngblood*, 650 S.E.2d

New York *Brady* violations occur at all phases of the criminal justice process and are often not discovered until after conviction. Unfortunately, this is not just a New York problem; it is a national problem, as noted in the dissent in *United States v. Olsen*, 737 F.3d 625, 631 (9th Cir. 2013) (Kozinski, C.J., dissenting).

The recurrence of *Brady* violations is a compelling reason for this Task Force to advocate for reform of the New York State discovery statutes. If all discovery materials and information, favorable and non-favorable to the defense, are turned over to the defense at the early stages of a case, most *Brady* materials would automatically be disclosed. Of course, a state statutory discovery procedure does not supersede the constitutional rules for *Brady* turnover, but liberalized discovery would help to greatly reduce *Brady* errors. Broad, expedient statutory discovery will prevent or reduce *Brady* violations by removing difficult decision-making for law enforcement and prosecutors who have the sole responsibility of providing *Brady* material to the defense.

New York state law is as significant as federal law in articulating the protections guaranteed by *Brady*. The decisions of both court systems agree that *Brady* places on the prosecutor a one-sided obligation to turn over information that is favorable to the accused. This unilateral obligation applies to information in the prosecutor's possession, and the prosecution is also charged with having knowledge of information if it is in the possession, constructive or actual, of a law enforcement agent working on the case. Further, *Brady* and its progeny have determined that the prosecutor is required affirmatively to learn about the existence of any favorable information known to any law enforcement agency or personnel in the case.¹⁰⁴ This is a heavy obligation when we think of the scope of the information law enforcement agents and prosecutors may possess in a given case (*i.e.*, police reports, medical reports, psychological records, forensic reports, biological evidence, ballistic evidence, firearms, knives, clothing, letters, financial records, identification evidence, witness statements, defendant and co-defendant statements, etc.).

Brady information is considered so essential to achieving justice that case law makes it unnecessary for the defense to request it. Rather, the defense is entitled to such information without

119 (W.Va. 2007)); *see also* Editorial, "Rampant Prosecutorial Misconduct," *NEW YORK TIMES* (Jan. 4, 2014); Editorial, "Justice and Open Files," *NEW YORK TIMES* (Feb. 26, 2012).

¹⁰⁴ *Kyles v. Whitley*, 514 U.S. 419, 437-38 (1995); *People v. Wright*, 86 N.Y.2d 591, 598 (1995).

motions or demands.¹⁰⁵ In New York, when the defense does actually request a type of *Brady* material, but the information is not forthcoming, the standard for showing prejudice is reduced.¹⁰⁶

B. Examples of *Brady* Material

Some of the kinds of information that may constitute *Brady* material in particular situations are listed below. The list is by no means complete, but it lends support to the proposition that identifying *Brady* material requires careful evaluation in each criminal case of the information in the possession of law enforcement and that enacting broad and early discovery would reduce *Brady* violations.

(1.) *Exculpatory Evidence*: Exculpatory evidence includes not only information directly rebutting the prosecution's affirmative case, but also other information in the possession of law enforcement which may tend to exculpate the defendant. In this paragraph, however, we use the term to refer to evidence displaying or suggesting a weakness in the prosecution case. Such evidence may be verbal, written or recorded, or demonstrative and may include, but is not limited to: photographs (including photographs of the crime scene, the victim/witness/defendant); forensic evidence (including fingernail clippings, hair samples, blood samples, and DNA samples, with test results, positive or negative); scientific, medical and psychiatric reports (including conclusions and laboratory notes); ballistics evidence; evidence of intoxication of the victim/witness/defendant; videotapes or surveillance footage; emails; text messages; voice recordings or exemplars; financial reports; clothing and personal belongings of the witness, victim or defendant worn at the time of the crime or some other relevant time; identification evidence (photo arrays, show-ups and line-ups including positive identifications of other suspects, non-identifications and misidentifications); etc.¹⁰⁷

¹⁰⁵ *United States v. Bagley*, 473 U.S. 667 (1985); *United States v. Agurs*, 427 U.S. 97 (1972); *Strickler v. Greene*, 527 U.S. 263, 281 (1999).

¹⁰⁶ *People v. Vilardi*, 76 N.Y.2d 67 (1990).

¹⁰⁷ See, e.g., *United States v. Rodriguez*, 496 F.3d 221, 222-26 (2nd Cir. 2007) (non-memorialized oral statements were discoverable under *Brady*); *People v. Sinha*, 84 A.D.3d 35 (1st Dept. 2011), *aff'd*, 19 N.Y.3d 932 (2012) (e-mail); *People v. Bozella*, 25 Misc.3d 1215 (Sup. Ct., Dutchess Co. 2009) (oral statement to police); *People v. Maldonado*, 36 Misc.3d 1224(A) (Co. Ct., Sullivan Co. 2012) (mistrial granted after court learned that several items not turned over); see also *People v. Bryce*, 88 N.Y.2d 124, 128 (1996) (deceased's skull was potentially *Brady* material).

(2.) *Information Supporting a Legal Defense*: Information supporting a legal defense also presents itself in many forms. In any form, it should be turned over to the defendant.¹⁰⁸ Legal defenses include, but are not limited to, the following: self-defense, agency, alibi, entrapment, misidentification, and insanity. Such information, in whatever form, is considered exculpatory and favorable to the defense.

(3.) *Benefits and Promises to the Victim or Witness in Exchange for Testimony or Cooperation*: Prosecutors and law enforcement officers must inform the defense of “benefits” and “promises” provided to or made to the witness or his associates, family, or others with significance to him by the prosecution, police or other individuals with a vested interest in the outcome of the case. Benefits and promises may include, but are not limited to: gifts, payments, vacations, jobs, any item of monetary value, a promise not to harm the witness or relatives of the witness, bribes, relocation expenses, immunity from prosecution and “deals” in other criminal cases, etc. With such information, the defense attorney may seek to impeach the victim or witness by showing bias towards the prosecution, and a willingness to be less than truthful due to the influence of the benefit or promise.¹⁰⁹

¹⁰⁸ See, e.g., *Cone v. Bell*, 556 U.S. 449, 470 n.16 (2009) (“evidence consistent with” the defendant’s assertion that he was suffering from chronic amphetamine psychosis during the crime); *Youngblood v. West Virginia*, 547 U.S. 867, 868-70 (2006) (“graphically explicit note that both squarely contradicted the state’s account of the incidents and directly supported [the] consensual-sex defense”); *DiSimone v. Phillips*, 461 F.3d 181, 195 (2d Cir. 2006) (“the evidence supported a potential defense theory that, whatever DiSimone’s involvement in the fight, he was not the cause of Balancio’s death”); *Leka v. Portuondo*, 257 F.3d 89 (2d Cir. 2001) (non-testifying eyewitness described events that that conflicted with version of eyewitnesses); *People v. Rivera*, 138 A.D.2d 169, 175 (1st Dept.1988) (“the denial of the psychiatric records to the defendant constituted the withholding of *Brady* material. Those records were crucial as to who was the ‘initial aggressor’ and as to whether defendant could retreat ‘with complete safety as to himself and others’ in relation to the defense of justification”) ; *People v. Barreras*, 92 A.D.2d 871 (2d Dept. 1983) (witness would have contradicted testimony that property was obtained from defendant); *People v. Hairston*, 30 Misc.3d 1206 (Westchester Co. Ct. 2011) (evidence of justification suppressed, CPL §440.10 motion granted); *People v. Gilman*, 28 Misc.3d 1217 (Sup. Ct., N.Y. Co. 2009) (some counts to be retried because of *Brady* violation); *People v. Davis*, 27 Misc.3d 1226 (Sup. Ct., Bronx Co. 2010) (claimed loss of evidence supporting a defense; hearing granted); see also *People v. Geaslen*, 54 N.Y.2d 510, 516 (1981) (evidence that “could affect” a suppression ruling); *People v. McCutcheon*, 96 A.D.3d 580 (1st Dept. 2012) (same).

¹⁰⁹ See, e.g., *People v. Colon*, 13 N.Y.3d 343 (2009) (promise to witness not revealed); *People v. Steadman*, 82 N.Y.2d 1, 6-8 (1993) (promise made to witness’s attorney by another prosecutor); *People v. Novoa*, 70 N.Y.2d 490, 496-97 (1987) (“contingent and insignificant” statement that, were prosecutor asked, she would say witness cooperated); *People v. Cwikla*, 46 N.Y.2d 434, 438-42 (1979) (correspondence with Parole Board); *People v. Carusso*, 94 A.D.3d 529 (1st Dept. 2012) (*Brady* violation, but cured); *People v. Jackson*, 29 A.D.3d 328 (1st Dept. 2006) (impeachment material treated as newly discovered evidence rather than *Brady* material); *People v. Mickel*, 274 A.D.2d 325, 325-26 (1st Dept. 2000) (“Once any understanding has been reached between the prosecutor and a witness, it is for the jury to determine how much value to assign it”) ; *Lopez v. Miller*, 915 F. Supp. 2d 373 (E.D.N.Y. 2013) (confused information about promise to a witness results in vacatur of conviction); see also *People v. Bermudez*, 25 Misc.3d 1226 (Sup. Ct., N.Y. Co. 2008).

(4.) *Evidence Suggesting Bias, Interest, Hostility, and Motive to Lie or Fabricate*: The defense should be provided with information that may tend to show an unrelated bias or hostility toward the defendant, or interest of the witness, as these emotions may cause the witness to lie about the evidence or to fabricate or exaggerate unfavorable evidence against the defendant.¹¹⁰

(5.) *Criminal Record and Prior Bad Acts of the Victim and/or Witness*: The criminal record and prior bad acts of the victim and other prosecution witnesses must be turned over to the defense. With such information, the defense may attempt to show a lack of moral integrity and thus, a lack of credibility on the part of the victim/witness.¹¹¹

(6.) *Recantations and Inconsistent Prior Statements of a Victim/Witness, Which May be Verbal, Written or Recorded*: With this information, the defense may attempt to show that the victim/witness is uncertain, inaccurate, not worthy of belief or lying.¹¹²

¹¹⁰ See, e.g., *Banks v. Dretke*, 540 U.S. 668, 691, 701 (2004) (paid informant status); *United States v. Bagley*, 473 U.S. 667, 683 (1985) (contingent possibility of a reward); *People v. Baxley*, 84 N.Y.2d 208, 213 (1994) (claim that witness “had been induced to falsely accuse defendant” by another person); *People v. Wright*, 86 N.Y.2d 591, 596-97 (1995) (“status as a police informant”); *People v. Sinha*, 84 A.D.3d 35, 40-41 (1st Dept. 2011) (witness’s belief that defendant had caused him to be charged with violating probation), *aff’d*, 19 N.Y.3d 932 (2012); *People v. Wallert*, 98 A.D.2d 47, 49-50 (1st Dept. 1983) (civil suit for damages); *People v. Velez*, 118 A.D.2d 116, 118-20 (1st Dept. 1986) (statement of belief that defendant previously robbed witness’s wife).

¹¹¹ See, e.g., *People v. Williams*, 7 N.Y.3d 15, 19 (2006) (perjury investigation of police witness); *People v. Sinha*, 84 A.D.3d 35, 40-41 (1st Dept. 2011) (prior uncharged misconduct), *aff’d*, 19 N.Y.3d 932 (2012); *People v. Monroe*, 17 A.D.3d 863, 864 (3d Dept. 2005) (complainant’s prior arguments with attendant at another gas station); *People v. Pressley*, 234 A.D.2d 954, 955 (4th Dept. 1996), *aff’d*, 91 N.Y.2d 825, 827 (1997); *People v. Suh*, 27 Misc.3d 143(A) (App. Term, 9th & 10th Jud. Dists. 2010).

¹¹² See, e.g., *Smith v. Cain*, 132 S.Ct. 627, 630 (2012) (detective’s notes of witness interview); *Strickler v. Greene*, 527 U.S. 419 (1999) (detective’s summary and notes of witness interviews); *Kyles v. Whitley*, 514 U.S. 419 (1995) (inconsistent statements by eyewitnesses and by police informant); *United States v. Triumph Capital Group, Inc.*, 544 F.3d 149, 162-63 (2d Cir. 2008) (agent’s notes of proffer meeting with witness’s attorney); *United States v. Rodriguez*, 496 F.3d 221, 228 (2d Cir. 2007) (oral statements during proffer interview); *Boyette v. Lefevre*, 246 F.3d 76, 91 (2d Cir. 2001) (statements suggesting complainant was less certain shortly after incident); *People v. Bond*, 95 N.Y.2d 840, 842-43 (2000) (initial oral statement to police that witness did not see anything); *People v. Leibovits*, 94 A.D.3d 1146 (2d Dept. 2012) (delayed disclosure of statement); *People v. Frantz*, 57 A.D.3d 692, 693 (2d Dept. 2008) (statements that witness did not see defendant with weapon and that it was dark); *People v. Williams*, 50 A.D.3d 1177, 1180 (3rd Dept. 2008) (officer’s notes that witness had previously reported seeing another object); *People v. Gantt*, 13 A.D.3d 204, 205 (1st Dept. 2004) (prior testimony implying witness may not have been at scene); *People v. Waters*, 35 Misc. 3d 855 (Sup. Ct., Bronx Co. 2012) (failure to disclose that witness changed his testimony); see also *NEW YORK TIMES* (May 25, 2012 at A25 col.1); *NEW YORK TIMES* (October 10, 2012 at 20, col.1).

C. Application of the *Brady* Obligation

The prosecutor must exercise due diligence to learn of exculpatory or impeaching information held by or known to those law enforcement officials or agencies working on the case. However, *Brady* does not generally require the prosecutor to conduct searches for information not in the possession of the law enforcement officials or other agencies investigating the case.¹¹³

The *Brady* obligation requires the prosecutor to preserve favorable or impeaching information in his or her possession and to provide the defense with access to the information.¹¹⁴ The obligation is continuing and prompt. Further, the prosecutor must turn over the information that is favorable to the defendant even if the prosecutor believes it to be unreliable or false.¹¹⁵ Importantly, a prosecutor's failure to deliver *Brady* information need not be intentional or involve bad faith. Any failure to deliver favorable or impeaching information is a violation, although perhaps not requiring a remedy at trial or on appeal for some independent reason.¹¹⁶

¹¹³ *Kyles v. Whitley*, 514 U.S. 419 (1995); *People v. Santorelli*, 95 N.Y.2d 412, 421 (2000); cf. *Hollman v. Wilson*, 158 F.3d 177, 181 (3d Cir. 1998) (“government failure to turn over an easily turned rock is essentially as offensive as one based on government non-disclosure”); *People v. DaGata*, 86 N.Y.2d 40, 44-45 (1995); *People v. Novoa*, 70 N.Y.2d 490, 498 (1987); *People v. Rutter*, 202 A.D.2d 123, 131 (1st Dept. 1994).

¹¹⁴ *People v. Hayes*, 17 N.Y.3d 46 (2011); *People v. Cortijo*, 70 N.Y.2d 868, 870 (1987); *People v. Waters*, 35 Misc.3d 855, 862 (Sup. Ct., Bronx Co. 2012); *People v. Davis*, 27 Misc. 3d 1226 (Sup. Ct., Bronx. Co. 2010) (claimed loss of evidence supporting a defense; hearing granted).

¹¹⁵ See, e.g., *People v. Baxley*, 84 N.Y.2d 208, 213-14 (1994) (“nondisclosure cannot be excused merely because the trial prosecutor genuinely disbelieved [the *Brady* information]”); *DiSimone v. Phillips*, 461 F.3d 181, 195 (2d Cir. 2006) (“if there were questions about the reliability of the exculpatory information, it was the prerogative of the defendant and his counsel – and not of the prosecution – to exercise judgment in determining whether the defendant should make use of it To allow otherwise would be to appoint the fox as henhouse guard”); *Zanders v. United States*, 999 A.2d 149, 164 (D.C. 2010) (“It is not for the prosecutor to decide not to disclose information that is on its face exculpatory based on an assessment of how that evidence might be explained away or discredited at trial, or ultimately rejected by the fact finder”); *People v. Lantigua*, 228 A.D.2d 213, 220 (1st Dept. 1996); *People v. Robinson*, 133 A.D.2d 859, 860 (2d Dept. 1987); see also *People v. Behling*, 26 N.Y.2d 651, 652 (1978) (“Nor is the impropriety made the less because the prosecutor may have believed the [witness’s] recantation to be false and a maneuver either to avoid giving testimony or to avoid being thought disloyal to the defendant”); see generally *Kyles v. Whitley*, 514 U.S. 419, 440 (1995) (resolving doubtful questions in favor of disclosure “will tend to preserve the criminal trial, as distinct from the prosecutor’s private deliberations, as the chosen forum for ascertaining the truth about criminal accusations”); *Brady v. Maryland*, 313 U.S. 83, 88 (1963) (observing that a prosecutor who withholds evidence that tends to exculpate the defendant casts himself “in the role of an architect of a proceeding that does not comport with standards of justice”).

¹¹⁶ See, e.g., *United States v. Coppa*, 267 F.3d 132, 135-50 (2d Cir. 2001) (it is not “error” for a prosecutor to fail to disclose non-material but favorable information before trial, which suggests to prosecutors that they should disclose favorable but non-material information even if doing so is not constitutionally required); *United States v. Price*, 566 F.3d 900, 913 n.14 (9th Cir. 2009); *United States v. Acosta*, 357 F. Supp. 2d 1228, 1233-40 (D. Nev. 2005) *United States v. Sudikoff*, 36 F. Supp. 2d 1196, 1198-99 (C.D. Cal. 1999); see generally *Kyles v. Whitley*, 514 U.S. 419, 437-38 (1995); *People v. Vilardi*, 76 N.Y.2d 67, 77-78 (1990).

D. Consequences of *Brady* Violations

Notwithstanding the due process-based obligation imposed by *Brady*, there regularly appear in New York instances of *Brady* violations. Such violations include the failure to turn over exculpatory or impeaching information, late delivery of *Brady* information, and the loss of *Brady* material. These violations have serious consequences for defendants who may be wrongfully convicted, and for victims whose cases may be dismissed or retried. Despite these serious consequences on both sides of the criminal justice system, the prosecutor who mistakenly, negligently, or intentionally violates *Brady* does not generally face significant personal consequences.

The occurrence of *Brady* violations in New York, especially those involving the prosecutor's failure to disclose impeachment material, presents the fundamental question of what can be done to enhance adherence to *Brady* so that errors are avoided, and trials are conducted with all of the defendants' due process rights intact. This question requires a serious evaluation of our criminal justice procedures as they relate to the prosecutors' duty to provide the defense with *Brady* material. When the prosecutor turns over *Brady* material just prior to trial and after pretrial hearings have been completed, the defense might request additional pretrial hearings, or additional time to investigate the information. The trial judge may grant such requests, which can prevent harm to the accused and provide for a fair trial.¹¹⁷ If the trial has begun when the *Brady* material is delivered or if the information is lost or destroyed, the court should take steps to prevent harm to the defense. The defense may seek a trial remedy including a mistrial; an adjournment for investigation, research, or the assistance of an expert; an appropriate curative instruction; a limit on or preclusion of evidence; and an opportunity to call additional witnesses to testify and to recall witnesses for further testimony.

There are several procedures for preventing *Brady* violations and responding to those committed. But emphasis must be placed on an early and complete turnover of *Brady* material so that the accused can be afforded a fair trial.

¹¹⁷ See, e.g., *People v. Whitehead*, 84 A.D.3d 1128 (2d Dept. 2011) (*Brady* violation minimized by further cross examination); *People v. Sinha*, 84 A.D.3d 35 (1st Dept. 2011) *aff'd*, 19 N.Y.3d 932 (2012); *People v. Williams*, 50 A.D.3d 1177 (3d Dept. 2008); *People v. Jackson*, 264 A.D.3d 683, 684 (1st Dept. 1999).

E. Causes of and Remedies for *Brady* Violations

As discussed above, *Brady* violations include the failure to turn over exculpatory or impeaching information, late delivery of *Brady* information, or the loss or contamination of *Brady* material. The relevant case law, as well as information gathered by the Task Force from prosecutors, defense counsel and judges, suggest that *Brady* violations can be placed in three categories with identifiable causes: (1.) unintentional violations caused by poor understanding of what constitutes *Brady* material; (2.) negligent violations when the prosecutor understands what constitutes *Brady* material, but through oversight or carelessness neglects to turn it over; and (3.) intentional violations caused by inappropriately competitive prosecutors or other law enforcement officers who believe that a conviction in a criminal case justifies a refusal to turn over *Brady* material. The Task Force will address these causes of *Brady* violations and recommend ways to remedy these violations.

(1.) *The “Materiality” Language in Brady Decisions Causes Confusion:* “*Brady* material” is defined by the courts in various ways. While the courts offer up the definitions to help us understand the scope of *Brady*, the variety of definitions can confuse rather than clarify the meaning of “*Brady* material.” This confusion seems to be one of the reasons why well-intentioned law enforcement officers and prosecutors fail to turn over *Brady* materials.

While the Court’s decision in *Brady* describes the information within the rule as that which is “favorable to the accused” or “would tend to exculpate” the accused (*see also Giglio v. United States*, 405 U.S. 150 (1972)), *Brady* decisions have also included the term “material evidence.” The term “material” comes into play when courts have ruled that exculpatory information must be “material to either guilt or punishment” for a defendant to receive post-trial relief from a *Brady* violation. The Task Force believes that, notwithstanding the need for a standard of “materiality” for post-trial review in *Brady* violation cases, “materiality” under *Brady* is a standard applicable only after conviction and should not be applied before.¹¹⁸

In *United States v. Bagley*, 473 U.S. 667 (1985), the Court said that evidence is “material” if there is a “reasonable probability” that had the information been disclosed to the defense “the result

¹¹⁸ Compare *United States v. Coppa*, 267 F.3d 132 (2d Cir. 2001) with *United States v. Price*, 566 F.3d 900, 913 n.14 (9th Cir. 2009); *United States v. Acosta*, 357 F. Supp. 2d 1228, 1233-40 (D. Nev. 2005) *United States v. Sudikoff*, 36 F. Supp. 2d 1196, 1198-99 (C.D. Cal. 1999); *see also People v. Vilardi*, 76 N.Y.2d 67, 77-78 (1990).

of the proceeding would have been different.” *See also Vilardi*, 76 N.Y.2d 67 (1990) (“reasonable possibility the result would have been different”). Later in *Kyles*, 514 U.S. 419 (1995), the Court determined that the failure to disclose need not have prevented an acquittal, if it led to a verdict that is not “worthy of confidence.”

Forecasting before trial the possibility that the disclosure of information might not change the verdict is difficult for any criminal justice practitioner. Such analysis is better left to the appellate court that benefits from a retrospective view of the evidence, and has no place in a pretrial decision whether to disclose evidence favorable to the defense. The prosecutor does not have the perspective of the defense attorney. Without an understanding of the defense perspective, prosecutors may not be able to recognize the full significance of “favorable” or “exculpatory” information. Defenses like agency, self defense, entrapment, and lack of specific intent rest on information that, standing on its own, can either support the prosecutor’s position or a defense raised by the accused. Indeed, even trial judges will require defense attorneys to explain their defense strategies when deciding to allow lines of questioning to continue, or to permit the introduction of defense evidence when its relevance or exculpatory value is not obvious.

(2.) *Proposed Remedies for Unintentional Brady Violations* □ *Training and Use of a Discovery/Brady Checklist*. (i.) *Training*: The Task Force suggests that a well-developed *Brady* training program can greatly reduce unintentional *Brady* violations. *Brady* training should be given not just to prosecutors, but also to other law enforcement officials and to forensic laboratory officials, who are required to advise prosecutors when there is evidence known to them that is favorable to the defense. *Brady* training should also be given to defense counsel and judges (*see* NY Rules of Professional Conduct, Rule 5.1 (b)(1), (c)). Such training should include regular, in-depth study of case law describing *Brady* principles and their application to numerous case scenarios. This training should include an explanation of *Brady* material from the defense perspective.

The Task Force recommends that *Brady* training include in its curriculum the following topics, among others: (1.) standards for disclosure of impeachment and exculpatory information; (2.) scenarios illustrating when a lack of incriminating results from scientific testing or identification procedures is evidence favorable to the defendant; (3.) scenarios illustrating when inadmissible information is discoverable; (4.) standards governing when names and contact information for witnesses is discoverable; (5.) scenarios illustrating that oral and non-memorialized

favorable information is discoverable; (6.) timing of disclosures; (7.) delegation of *Kyles* inquiries by the ADA to an agent/police officer; (8.) scenarios illustrating the types of information the prosecutor believes is false or unreliable, but is still favorable to the defendant; (9.) scenarios illustrating situations when the ADA thinks there is an explanation for the information that “reconciles” the information to the prosecution’s theory, but the information is nonetheless discoverable; (10.) scenarios illustrating when information that could affect a suppression ruling is discoverable; and (11.) the standards for *in camera* review of possible *Brady* information.

This Task Force has attempted to determine whether *Brady* training in New York State is effective or sufficient. The Task Force could not obtain enough information to make such a determination. However, one District Attorney’s Office referred to the use of a twenty page handbook by the District Attorneys Association of the State of New York entitled “The Right Thing: Ethical Guidelines for Prosecutors” (the “handbook”).

The section of the handbook that is dedicated to the *Brady* obligation (pages 14-15) is far too abbreviated and inadequate by itself. For example, the handbook limits *Brady* material to “information directly related to the crime,” and it does not discuss circumstances unrelated to the crime that would negatively affect the credibility of a prosecution witness. The handbook states that *Brady* is satisfied when the defense has been given a meaningful opportunity to use allegedly exculpatory information to cross examine the People’s witnesses or as evidence during his case. The handbook would be more instructive if it detailed how the defense actually uses *Brady* material. For example, prosecutors should be informed that before the defense decides to use the information for cross examination, the defense may need to investigate, research, engage an expert witness, issue subpoenas, or take other steps fully to utilize *Brady* material. Prosecutors should be instructed that the defense must have the opportunity to integrate the *Brady* information with the defense strategy. With such instructions, and instructions on the other matters discussed above, prosecutors and law enforcement officers might identify *Brady* information more quickly and turn it over at an earlier stage of the case. Lastly, there is no mention in the handbook of law enforcement’s obligation to safeguard *Brady* material by preventing its loss, destruction, or contamination, which is so important at the earliest stages of a case.

The introduction to the handbook states that the information in it is to be added to or supplemented by other teachings and principles. The Task Force agrees with this caveat, as the

handbook does not provide sufficient analysis or an adequate description of *Brady* material for the reader to determine what constitutes *Brady* material and how to comply with the *Brady* obligation. Additionally, the District Attorneys Association of the State of New York recommends that a joint effort be undertaken by the defense and the prosecution to prepare a teaching document to be used by all participants in the criminal justice system. The Task Force agrees with this suggestion, which underscores the proposition that prosecutors should learn how to analyze evidence from the perspective of a defense attorney.

(ii.) *Sample Discovery/Brady Checklist*: In an effort to provide a training and practice tool for prosecutors, the Task Force has prepared a sample checklist of discovery and *Brady* information. It is a comprehensive list of various documents, evidence forms, reports and other information which, in the context of a specific case, may constitute discovery and *Brady* material. This checklist is attached as “Appendix B” of this Report.¹¹⁹ It is intended to provide a guide for prosecutors, law enforcement officers, defense attorneys and judges as to what information may constitute discovery and *Brady* material. The checklist may not identify every item that constitutes discovery or *Brady* material, but the Task Force believes that the checklist, or one like it, would help prosecutors and other members of the criminal justice system to identify *Brady* material and disclose it.

(3.) *Proposed Remedies for Negligent Brady Violations – Judicial Intervention and Procedural Enhancements*: “Negligent” *Brady* violations usually occur when the prosecutor, recognizing that he or she has *Brady* material in his or her possession or that it is in the possession of law enforcement, negligently fails to turn it over, at least in timely fashion. Perhaps the prosecutor meant to, but forgot. This may occur when prosecutors have heavy caseloads or insufficient support staff to assist in the preparation of case files.

The unintentionally delayed turnover of *Brady* material to the defense can result in inadequate disclosure, and thus a *Brady* violation. *Brady* information should be turned over to the defense when the prosecution learns of the existence of such information. At the least, the defense must receive the information in sufficient time to investigate, prepare, and integrate the information

¹¹⁹ The checklist includes types of documents used in various prosecution offices and law enforcement jurisdictions of this State. It could be modified to include those documents used within each particular jurisdiction or locality. It would be preferable for the State to adopt uniform criminal justice documents, as previously recommended by this Task Force.

into the defense case. The negligently late turnover of *Brady* material can occur when prosecutors delay the review of law enforcement files until shortly before the time of trial. A prosecutor can incorrectly estimate the amount of time needed by the defense to prepare and make use of the information revealed by the *Brady* turnover. The defense may need scientists, doctors, or computer experts, among others, to identify and develop the usefulness of the information. This is especially true for biological testing and computer examinations, which can take weeks or months to complete. When delayed turnover of *Brady* material occurs, the defense may have to request an adjournment of a trial in order to review the *Brady* material fully. Yet, despite the need for additional preparation time, judges are often reluctant to delay a trial, especially if a jury is involved.

In light of the various ways *Brady* violations affect the proper disposition of cases, the Task Force has evaluated the possibility of requiring judicial involvement in pretrial discovery procedures related to *Brady* turnover. Interest has developed in stricter application of Section 200.12 of the New York Uniform Rules for Courts Exercising Criminal Jurisdiction. Rule 200.12 directs that:

As soon as practicable after the assignment of an action to an individual assignment judge, the assigned judge shall conduct a preliminary conference. The matters to be considered at such conference shall include establishment of a timetable for completion of discovery. . . . At the conclusion of the conference the directions by the court to the parties. . . shall be placed on the record or incorporated in a written court order. In the discretion of the court, failure of a party to comply with these directions shall result in the imposition of such sanctions as are authorized by law. The court may direct the holding of additional preliminary conferences as may be needed.

The Task Force recommends that this rule be used to construct and enhance *Brady* turnover procedures. The Task Force suggests that the date for the first conference be after, but very close to, the first court appearance on the felony indictment or misdemeanor information so that the turnover date is independent of the hearing and trial date and the defense, as well as the prosecutor, can begin preparation either for trial or plea negotiation. At the conference, the prosecution would inform the defense and the court as to the status of discovery matters; what, if any, *Brady* material has been turned over; *Brady* material that the prosecution intends to turn over and what inquiries about possible *Brady* information the prosecutor has made of others acting in the case; and what non-law

enforcement government agency records (social welfare agencies, child welfare agencies) are in the possession of law enforcement agents.¹²⁰

The Task Force recommends that the sample Discovery/*Brady* Checklist, or one like it, be integrated into court procedures to help identify discovery and *Brady* information, and that it be used to create a record of what information has been turned over to the defense. A certificate should be created showing the information that has been turned over, and that certificate should be made part of the record. During the conference, judges should inquire whether the prosecutor has acted with due diligence to find *Brady* material in the possession of other agencies or individuals who have acted in the case.

(4.) *Proposed Remedies for Intentional Brady Violations – Enforcing the Rules of Professional Responsibility:* Criminal justice studies have demonstrated that some prosecutors knowingly fail to hand over *Brady* material. These studies attribute the intentional disregard of *Brady* to office culture and a failure by prosecution supervisors to create an attitude of respect for the rule.¹²¹ In such prosecutors’ offices, obtaining a conviction becomes a paramount goal with the result that *Brady* may be disregarded if the information threatens the success of the prosecution.¹²²

It is here that the difference between a “remedy” and a “sanction” is significant. Earlier portions of this report speak of the importance of correcting the adverse consequences of a failure timely to deliver discovery by providing a remedy. The remedy is directed at avoiding prejudice from an error, not at punishment of a particular person. A sanction is, however, intended to punish

¹²⁰ The Task Force recognizes that criminal cases are processed differently in different counties, within different courts in the same county, and even within different court parts in the same court. In many courts the “individual assignment system” is not used, and very large numbers of cases are calendared in “up front” or “calendar” parts until they are ready to be sent to another court part for hearings or trial. In such “up front” parts, the caseload may not permit the court to hold discovery conferences close to the first appearance on the accusatory instrument underlying trial jurisdiction. The Task Force nonetheless believes that, even in such court parts, it is critical for the discovery conference to be held *well before* the expected date of hearings and trial.

¹²¹ See, e.g., Yaroshevsky & Green, “Prosecutors’ Ethics in Context: Influences on Prosecutorial Disclosure,” in *Lawyers in Practice: Ethical Decision Making in Context* 269 (Levin & Mather, ed., 2012).

¹²² As Chief Judge Kozinski observed in his dissent in *United States v. Olsen*, 737 F.3d 625, 630 (9th Cir. 2013): “A robust and rigorously enforced *Brady* rule is imperative because all the incentives prosecutors confront encourage them not to discover or disclose exculpatory evidence.”

an individual for improper conduct that is a knowing and intentional violation of the right to a fair trial. Sanctions, like remedies, have a place in the legal system, depending on the circumstances.¹²³

The New York State Rules of Professional Conduct contain one relevant provision that applies specifically to prosecutors, and others that apply to all attorneys, including prosecutors. Rule 3.8, entitled Special Responsibilities of Prosecutors and Other Government Lawyers, provides:

(b) A prosecutor or other government lawyer in criminal litigation shall make timely disclosure to counsel for the defendant or to a defendant who has no counsel of the existence of evidence or information known to the prosecutor or other government lawyer that tends to negate the guilt of the accused, mitigate the degree of the offense, or reduce the sentence, except when relieved of this responsibility by a protective order of a tribunal.

This provision expands the predecessor ethical requirement by including not just evidence, but information.¹²⁴ An intentional *Brady* violation is likely to fall within Rule 3.8 as well as other rules governing attorney conduct. Alleged violations of these rules are evaluated and determined by the attorney grievance committees of the Appellate Divisions. But the disciplinary rules and procedures have rarely been used to address *Brady* violations.

Other rules define the conduct expected of a lawyer. A lawyer cannot knowingly make a false statement (Rule 3.3), and cannot suppress evidence that he/she has an obligation to reveal (Rule 3.4).

The Task Force surveyed Department Disciplinary Committees in all Departments and Judicial Districts, seeking any information they could provide concerning disciplinary actions or complaints based on *Brady* violations. All of the responding Committee Counsel indicated that, due to confidentiality restrictions, their answers were limited to unspecific and generic information, without statistics. The Task Force learned that complaints based upon *Brady* violations are unusual.

¹²³ See *United States v. Olsen*, 737 F.3d 625, 630 (9th Cir. 2013) (“Professional discipline is rare, and violations seldom give rise to liability for money damages. See, e.g., *Connick v. Thompson*, 131 S. Ct. 1350, 1366 [2011]. Criminal liability for causing an innocent man to lose decades of his life behind bars is practically unheard of. See, e.g., Nathan Koppel, ‘Texas Ex-Prosecutor Gets Brief Jail Time for Misconduct,’ *Wall St. J.*, Nov. 9–10, 2013, at A5 [reporting that Texas settled civil and criminal misconduct charges against former prosecutor Ken Anderson, whose suppression of evidence in a murder trial resulted in the defendant spending 25 years in prison, in exchange for Anderson ‘forfeit[ing] his law license, [] serv[ing] up to 10 days in jail, pay[ing] a \$500 fine and perform[ing] 500 hours of community service’]”).

¹²⁴ Notably, the Rule does not exactly mirror the *Brady* requirements because the prosecutor is subject to sanction only if the conduct failing to disclose the information is “knowing.” The Task Force believes that under certain circumstances negligent *Brady* violations should be sanctioned under the Rules of Professional Conduct.

For the most part they have been made by defendants after convictions, and when the complaints were investigated they were determined to be unfounded. *Brady* complaints by attorneys and judges are rare. No public action taken by a Grievance Committee after a *Brady* violation was reported. One caution citation from about 15 years ago was remembered.

Each Appellate Division has a procedure for examining alleged violations of the Rules, and subsequent judicial procedures for monitoring alleged misconduct by members of the bar. The Task Force recommends that lawyers and judges apply the rules of professional responsibility described above when there is a factual basis for reporting or finding a *Brady* violation. The historical absence of proceedings that begin in Grievance Committees is without explanation and is puzzling. The recurrence of *Brady* issues, with no apparent attention by the public and the judiciary, needs to be changed so that *Brady* violations will be reduced.

That there appear to be no records or reports of proceedings resulting from *Brady* violations is startling. The absence of such records leads to the conclusion that there have been no proceedings, or at most a few, to determine if prosecutorial misconduct of this nature actually occurred. Better record keeping of the occurrence of possible *Brady* violations, and of the consequence of any resulting proceedings, is essential to discourage continuing violations. The information should, in fact, be available from already existing reporting requirements, transcripts of court proceedings, and the personal knowledge of the participants to the events of the underlying criminal actions. The Task Force recommends that the New York State Bar Association undertake a project to track instances of asserted or apparent *Brady* violations and record the results of the examinations of the incidents.

F. *Brady* and Guilty Pleas

Brady material can have a critical impact on the decision to plead guilty. Locating and gathering *Brady* information very early in cases where pleas are discussed must be examined. Considering that the overwhelming majority of cases are resolved by plea, the Task Force has considered the *Brady* obligation in the context of the right to counsel and the plea process.

In *United States v. Avellino*, 136 F.3d 249 (2d Cir. 1998), the Court wrote of *Brady* turnover in the plea context:

The government's obligation to make such [*Brady*] disclosures is pertinent not only to an accused's preparation for trial but also to his determination of whether or not to plead guilty. The defendant is entitled to make that decision with full awareness of favorable material evidence known to the government. See, e.g., *Tate v. Wood*, 963 F.2d 20, 24-25 (2d Cir. 1992). Although a guilty plea is generally considered valid so long as the plea was intelligent and voluntary, see, e.g., *Brady v. United States*, 397 U.S. 742, 748 (1970); *Boykin v. Alabama*, 395 U.S. 238, 242, 89 S. Ct. 1709, 1711-12, 23 L.Ed.2d 274 (1969), the validity of the plea must be reassessed if it resulted from “impermissible conduct by state agents,” *Brady v. United States*, 397 U.S. at 757. Impermissible conduct includes *Brady* violations. See, e.g., *Miller v. Angliker*, 848 F.2d 1312, 1320-23 (2d Cir.), cert. denied, 488 U.S. 890, 109 S. Ct. 224, 102 L.Ed.2d 214 (1988). Thus, we have noted that where prosecutors have withheld favorable material evidence “even a guilty plea that was ‘knowing’ and ‘intelligent’ may be vulnerable to challenge.” *Id.* at 1320 (holding that *Brady* violation invalidated agreement to plead not guilty by reason of insanity); see *Tate v. Wood*, 963 F.2d at 24-25 (remanding for evidentiary hearing with respect to effect of nondisclosure on agreement to plead guilty).

Decisions such as this suggest that changes are needed in the manner in which plea negotiations are currently conducted.¹²⁵ Notably, New York cases are divided on the application of *Brady* to plea cases. *Brady* rights are not waived and turnover is required for plea discussions in the Third Department and the Fourth Department.¹²⁶ But apparently *Brady* turnover is waived by a plea in the Second Department.¹²⁷

The Task Force has considered that defense counsel often advise clients to enter guilty pleas before discovery and *Brady* materials are turned over, and additionally that prosecutors sometimes place a condition on the plea offer indicating that it must be accepted within a certain time period before discovery and *Brady* are turned over. After further study on this issue, it may eventually be determined that engaging in pleas discussions, especially final negotiations, before the defense has discovery and *Brady* material is not appropriate. At this time, the Task Force recommends that prosecutors’ offices not place a time limit on plea offers unless the prosecutor has already proved discovery to the defense and made *Brady* disclosures.

The Task Force acknowledges the importance of plea negotiations for defendants, prosecutors, and the criminal justice system generally. One more reason that we advocate for

¹²⁵ See also *Missouri v. Frye*, 132 S.Ct. 1399, 1407 (2012); *Lafler v. Cooper*, 132 S.Ct. 1376 (2012).

¹²⁶ *People v. DeLaRosa*, 48 A.D.3d 1098 (4th Dept. 2008); *People v. Ortiz*, 127 A.D.2d 305 (3d Dept. 1987).

¹²⁷ *People v. Day*, 150 A.D.2d 595 (2d Dept. 1989); *People v. Philips*, 30 A.D.2d 621 (2d Dept. 2006); see generally *People v. Bernard*, 163 Misc.2d 176 (Sup. Ct., N.Y. Co. 1994).

significant reform of the New York discovery statutes is that a broad, expedient discovery statute would inevitably reduce *Brady* violations and lead to more informed and appropriate guilty pleas.

G. Summary of *Brady* Recommendations by the Task Force

(1.) *Training*: The Task Force recommends enhanced training of prosecutors, law enforcement agents, defense counsel, and judges as to what constitutes *Brady* material, and as to available remedies and sanctions for violations of *Brady*. Such training should include lectures and case scenario discussions illustrating how to review evidence from the defense perspective, in order to assist the parties in better understanding what might constitute *Brady* material. The Task Force recommends using the Discovery/*Brady* checklist to train practitioners as to what might be *Brady* material (*i.e.*, what documents might exist and what information might be favorable to the defense for impeachment and exculpation). The checklist may be used to keep a record of what documents have been given to the defense. A copy of the checklist should be in each prosecution case file. The checklist should also be used by trial judges conducting pre-trial discovery/*Brady* conferences. The multi-functional use of the checklist will assist in reducing *Brady* violations.

(2.) *Early Judicial Involvement*: The Task Force recommends early judicial involvement in the turnover process for discovery and *Brady* materials. Our recommendation includes an early court conference with the parties under Rule 200.12 to determine what needs to be turned over, a turnover schedule, and the creation of status reports stating what information has been turned over to the defense. Compliance with discovery rules and *Brady* should be memorialized by a signed certification.

(3.) *Turnover Prior to Guilty Pleas*: The Task Force understands that requiring the turnover of discovery and *Brady* material before a plea offer is communicated and resolved is the ideal practice for protecting defendants' rights. However, this requirement is currently impractical. Nevertheless, the Task Force recommends that the New York discovery statute be revised to allow for broad and expedient turnover of discovery and *Brady* materials. In particular, the Task Force suggests that turnover of *Brady* material should occur before a plea offer is withdrawn.

(4.) *Tracking Brady Violations*: The Task Force recommends that the New York State Bar Association track cases involving allegations of *Brady* violations and the resolution of such cases.

Developing a database for this information will help members of the bar identify further steps that need to be taken to eradicate these problems.

(5.) *State-wide Procedures*: The Task Force recommends the establishment of state-wide procedures for monitoring the enforcement of the Rules of Professional Responsibility where *Brady* violations are alleged.

(6.) *Disciplinary Procedures for Intentional Brady Violations*: The Task Force recommends establishing and implementing internal and external disciplinary procedures for prosecutors and law enforcement officers who intentionally fail to turn over *Brady* material.

IV. Recommendations Regarding the Flow of Information Between Police and Prosecutors

In preparing this report, the subcommittee members met with law enforcement personnel and district attorneys to review the current state of information transfer between law enforcement agencies and prosecutors' offices, and to identify existing (and future) impediments to the flow of information between them.

An analysis of this subject must begin with the understanding that there are hundreds of federal, state, and local law enforcement agencies in New York, each with its own forms and procedures for recording and preserving relevant information about an investigation. New York police agencies range from those that employ thousands of officers and support staff, to smaller offices that employ part-time police officers and no support staff. Although there was consensus among subcommittee members that the current procedures governing the transfer of information between police agencies and prosecutors are acceptable, there was an acknowledgement that the relationship between police agencies and prosecutors' offices could be improved by addressing existing inefficiencies in the flow of information. Should New York State modify its laws to expand the scope of information provided during discovery, and require that this information be provided earlier in the process, it is likely that a number of police agencies will struggle to comply with the new obligations.

The issues surrounding current impediments to the flow of information between police agencies and prosecutors (as well as possible future impediments should the discovery statutes be modified) are related to the lack of police department training, an absence of standard operating procedures or general orders for the sharing of information, insufficient staffing and resources

within agencies, limited technology possessed by agencies, and the proliferation of electronic devices that generate possible discovery (*e.g.*, cellular telephones, mobile data terminals).

A. Current Information Transfer Between “Upstate” Police Agencies and Prosecutor Offices

In discussions with “upstate” prosecutors, it became clear that the common practice of district attorneys and their assistants is to work with the “lead investigator” (or officer) assigned to the case when seeking relevant case information. Normally, in a case involving a single police agency, the lead investigator (since he is an employee of the police agency) is able to determine what documents have been generated and provide them to the prosecutor assigned to the case. The practice of the assigned prosecutor obtaining relevant case information from the lead investigator works in the majority of cases because a significant number of prosecutions in New York involve only a single police agency.

This procedure becomes problematic, however, where there are multiple agencies involved in an investigation. In these cases the lead investigator is not always familiar with the documents generated by the other agencies, and must rely upon those agencies to provide promptly all documents requested by the prosecutor. Furthermore, as there is no system in place to track information that is generated by each police agency involved in a particular case, the prosecutor must rely upon the lead investigator to obtain all documentation relevant to the case.

Due to the nature of police work, documentation provided by the lead investigator to the prosecutor is often provided “piecemeal” – as a report or other document is provided to the investigator, it is then provided to the prosecutor. Additionally, police agencies normally have a senior officer review reports prior to filing. For larger police agencies, this may take several days. For smaller police agencies, the review by a senior officer and the completion of the “final” report may take weeks. This results in incomplete reports being provided to the prosecutor (and sometimes the defense). Under the current discovery scheme, this is sometimes problematic. Should a new discovery statute require quicker disclosure, it is likely that smaller police agencies will have difficulty complying.

Additionally, few police agencies itemize or log the documents that are generated and/or provided to the prosecutor. Very few police agencies have the technological resources to be

“paperless”: to prepare all documents using a computer, and transfer them to the prosecutor by electronic means. Most upstate police agencies still generate a number of documents by hand, and transfer those documents to the prosecutor either by mail, or by scanning the documents and emailing them to the prosecutor.

As a result, in “upstate” practice, the prosecutor requests, often immediately before trial, that the lead investigator provide his file to the prosecutor so that the prosecutor may personally review the file to determine whether all documents have been provided. This is obviously inefficient, as it requires the prosecutor to manually compare the documents received by the prosecutor with those contained in the file. Furthermore, in cases where multiple police agencies are involved, the prosecutor cannot determine with certainty that he has received all relevant information from each police agency.

B. Current Information Transfer Between NYPD and NYC Prosecutor Offices

In discussions with New York City prosecutors and police officers as well the Commissioner and Deputy Commissioner for Information Technology at the New York City Police Department (NYPD), it became clear that, despite significant efforts and progress made in the flow of information, the NYPD and NYC prosecutors face challenges similar to those found in smaller “upstate” police agencies. Due to the size of the NYPD and its numerous internal divisions, prosecutors will often find themselves working with multiple units within the NYPD. For example, during the course of a long term investigation it would not be uncommon for a prosecutor to work with the Patrol Borough, the Narcotics Division, the Detective Bureau and other units within the NYPD. This poses a challenge for the lead investigator and the prosecutor in their efforts to gather all the documentation relevant to a case.

The NYPD has developed an automated case management system for many of the reports produced by units or bureaus in the department. As this system is improved upon, the flow of information between police and prosecutors will be expedited. At this time, however, the automated case information system does not extend to the entire department, only certain divisions. In addition, there are discoverable documents that are not being scanned into the system (*e.g.*, patrol officer memo books). As a result, like their colleagues working with smaller police agencies, prosecutors in NYC request the complete case file from the lead investigator, but will still often

receive documents piecemeal and have to expend time and resources to ensure that all the relevant paperwork is located in advance of trial.

Members of the Information Technology Division of the NYPD (“IT”) also raised an issue that may be specific to the NYPD. They noted that NYPD officers are asked to provide information to the individual District Attorneys’ Offices in formats that are particularized to the specific office. For example, when preparing the complaint and writing up a new case, an individual District Attorney’s office may require the NYPD to provide information for a specific form that is different from the form used by another NYC prosecutor’s office in a case involving identical charges. The NYPD IT supervisors felt that were the NYC prosecutors’ offices to coordinate and develop a common set of required forms, NYPD personnel could save time and effort.

C. Lack of Police Agency Training or Standard Operating Procedures

Another concern raised by the prosecutors was a perception that not all police agencies have adequate training and general orders on what documents and written materials must be disclosed to the prosecution. Furthermore, prosecutors may not be aware of all the documents generated by police agencies that may be relevant to the case and potentially “discoverable.” For example, a police agency may prepare a “use of force” report for internal purposes that may contain a narrative of the events that lead to criminal charges. This report may not be provided to the prosecutor by the police agency and it may not be specifically requested by the prosecutor who might not be aware of its existence. Most prosecutors deal with a number of police agencies, each with their own internal forms and procedures, and it is difficult for prosecutors to know what should be produced in each criminal case.

One way to address the challenge that prosecutors face, when seeking to identify and collect the wide variety of police reports and forms used by different law enforcement agencies, would be to develop a common set of electronic police forms that could be used by agencies statewide. The New York State Division of Criminal Justice Services (DCJS) would be in the best position to explore the feasibility of creating such a common set of police forms.

The proliferation of electronic devices used by law enforcement personnel is also adding a new challenge to prompt disclosure of discovery by police agencies. Text messages or photographs on cellphones or electronic communication from mobile data or terminals may not be consistently

preserved or disclosed to prosecutors' offices. This is likely due to a lack of training on what is "discoverable" under New York law, and an absence of established protocols within police agencies for the preservation of electronic communications and media.

To address these issues prosecutors take a "give me everything you have" position in requesting information from police agencies. However, prosecutors at times may find (sometimes during a trial) that not all "discoverable" information has been provided by the police agency. Rarely is this due to a refusal by a police agency to provide requested information. Instead, it is more likely due to an individual police officer's misunderstanding about what documents need to be produced in a given case. For example, all police officers are not necessarily attuned to the fact that scratch notes written on the back of a form or on whatever paper is handy during a street encounter may contain important *Rosario* material. Indeed, a refrain sometimes heard by prosecutors who inquire of police officers why notes or a report was not produced is, "I didn't know you wanted that."

D. Lack of Sufficient Support Staff

Police agencies often lack the support staff necessary to provide discoverable documents quickly to prosecutors' offices. For instance, there are small, part-time police agencies in upstate counties that have very limited staffing, and are not staffed 24 hours per day, seven days per week. Lack of staffing is also an issue with some district attorney offices. Smaller offices normally employ part-time assistant district attorneys who do not have the time to obtain and disclose discoverable documents. As an example, in Wayne County prosecutors are unable to obtain discovery (with some exceptions) from smaller police agencies in misdemeanor/violation cases and instead rely upon whatever documents are contained in the court file (which may be only the charging document).

Limited staffing, however, is not only an issue with smaller police agencies. Larger agencies also suffer from a lack of support staff, which often requires that police officers (instead of support staff) waste valuable time copying documents so that they may be provided to prosecutors in a timely manner. Also, prosecutor offices often do not have the staffing to make copies of discoverable documents for the defense. As a result, assistant district attorneys are often required to make any copies that must be provided to the defense.

E. Recommendations

If the discovery statutes are changed to require increased and expedited discovery, police agencies and prosecutor offices will need to: (1.) enhance training of police officers and improve procedures to ensure that all information generated by a police agency is preserved and provided to prosecutors promptly when requested; (2.) increase support staffing to allow prompt disclosure of discoverable documents; (3.) develop and implement greater technological tools to enhance the flow of information between police agencies and prosecutors; (4.) encourage DCJS to explore developing a common set of electronic police forms that could be used by law enforcement agencies statewide; and (5.) ensure that as new technology is adopted by police agencies, efforts are made to determine what information kept or generated by the new technology is “discoverable” and that procedures are put in place to preserve and promptly disclose same to the prosecutor.

As discussed earlier, typically the primary cause of a police agency’s failure to provide necessary documents to a prosecutor is the lack of appropriate training, and insufficient operating procedures, designed to ensure that police agencies comply with prosecutors’ requests for information. Each police agency must have internal procedures in place to ensure that officers are appropriately trained on how to memorialize and preserve relevant information, and procedures that ensure that this information is promptly provided to the prosecution.

Prosecutors must also be proactive in determining what forms are commonly used by each police agency in their jurisdiction so that they may determine independently which documents need to be produced in a given case. Furthermore, prosecutors must work with police agencies to develop police operating procedures to ensure that relevant information is preserved and provided to prosecutors upon demand.

Although some states impose a statutory obligation on police agencies to provide a “complete file” to the prosecutor upon request, a similar requirement in New York would not resolve the above issues. As noted, the failure of an individual officer or police agency to provide requested information is rarely due to recalcitrance. Instead such failures are overwhelmingly due to a lack of understanding of what information needs to be provided to the prosecutor. The phrase “complete file” is ambiguous, and ignores the fact that relevant information about a particular criminal case may be contained in any number of physical or electronic locations. There is rarely a

single “case file” where all information generated by police agencies (or law enforcement laboratories) is stored.

Additionally, the lack of staffing and/or resources of smaller police agencies must be acknowledged when discussing possible revisions to the discovery statutes. A significant number of police departments in New York do not have the technology necessary to efficiently memorialize information obtained in the course of an investigation and transfer that information to a prosecutor upon demand. A number of these departments still rely upon handwritten documents which are photocopied and delivered to the court and prosecuting agency.

Smaller police departments rarely have support staff able to quickly obtain and deliver documents requested by a prosecutor. Even larger departments often struggle to comply quickly with prosecutors’ demands for relevant case information due to a lack of support staff, funding or limited technology.

As local police departments are primarily funded by localities with limited budgets, it is recommended that any legislation revising the discovery statutes also implement a grant program that would provide needed resources for police departments to improve technology designed to comply with discovery obligations. Similar to the justice court assistance grants that were made available to local justice courts, these grants would be used by local police agencies to implement technology designed to efficiently memorialize relevant case information and provide same to local prosecutor offices.

CONCLUSION

In the 35 years since Criminal Procedure Law article 240 was last significantly revised, New York has fallen from its frequent status as a trendsetter to being among the five or ten States with the most restrictive criminal discovery rules.

The main consequences of the current system of unduly narrow and belated discovery are: (1.) guilty pleas are needlessly delayed for months in many cases; (2.) guilty pleas often are otherwise entered based on mere guesswork, rather than informed decision-making; (3.) adversarial testing is crippled by the defense’s inability to investigate, to find and develop possibly exculpatory evidence, and to carefully prepare the defense theory and incorporate belatedly disclosed materials into the case; and (4.) the court system is burdened by delays and sloppy litigation practices mainly

attributable to both parties being forced to operate “in the dark” until hearings and trials are actually underway.

Each of these chronic problems can be largely rectified by open and early discovery. This Task Force hopes that the balanced and workable framework for discovery practice that we have envisioned in this report will be an important step in the process of bringing that about, and returning New York’s criminal justice system to the mainstream nationally on this critical issue.

RESPONSE TO MAJORITY’S REPORT

Submitted by Steven M. Goldstein, Kristy L. Sprague, and Itamar J. Yeger

I. Introduction

We write, respectfully, to express our disagreement with the most significant of the recommendations under consideration by this Task Force, and our dismay at the inadequacy of the process employed in reaching them.

To be clear: every member of this Task Force recognizes the importance of discovery in criminal cases, and the need to examine and recommend changes to the law where appropriate. We are united in a desire to ensure fair trials and just outcomes, and cognizant of the importance of our discovery statutes in that regard. We are confident that there are areas in which those statutes could be amended to provide more and earlier information to the defense without compromising other compelling interests. But the need to provide information to the defense must always be balanced against the need to protect civilian witnesses from harm, to encourage them to step forward with truthful testimony, and to safeguard the integrity of judicial proceedings. And reform proposals must be weighed against their practical impact on a system with scarce resources. In our view, this Task Force has not struck the appropriate balance in either respect.

The changes embodied in the Task Force report would represent a radical restructuring of New York’s discovery statute. At their core is a provision compelling prosecutors to reveal the identities of civilian witnesses and anyone else known to have “relevant” information, as well as where and how to find them, at the earliest stage of a criminal case. The proposed restructuring would have enormous consequences for the criminal justice system, with a potentially devastating impact on our ability to secure the cooperation of civilian witnesses and ensure their safety, and significant costs in time and resources. It is a proposal that should not be endorsed by this Task Force without a thorough, probing, and unbiased evaluation of both those potential costs and its putative benefits. We regret to say that such an evaluation has not taken place. It is our judgment that many of the recommended changes should therefore be rejected.

We emphasize at the outset that we support a number of Task Force recommendations. We believe, for example, that there are persuasive reasons to support some of the proposals for providing additional discovery under Criminal Procedure Law (CPL) §240.20, as we will delineate

later in this report. Likewise, we concur in many of the suggested amendments to CPL §710.30. We also agree with all of the proposals intended to enhance the flow of information between prosecutors and other law enforcement agencies, and some of the proposals regarding *Brady* material.

We understand, too, that there are reasons to re-evaluate those provisions of our current laws under which witness statements need not be provided to the defense until a hearing or trial has commenced. We believe it may be possible to provide for somewhat earlier disclosure of these statements without compromising other compelling interests. The Task Force recommendations are extreme, however, both with respect to the timing of disclosure and the nature and scope of the information that would be revealed. And the arguments advanced to support those recommendations fail to distinguish between the need to safeguard a defendant's trial confrontation rights and other considerations that do not touch on constitutionally protected interests.

New York's current laws provide for discovery to take place in phases. At an early stage of the criminal proceedings, prosecutors are required to provide the defendant with a Bill of Particulars that essentially outlines the who, what, when, where, and how of his alleged criminal conduct.¹²⁸ In addition, the prosecution is required to disclose and make available for inspection, photographing, copying, or testing, the evidence, property and information outlined in CPL §240.20.¹²⁹ Absent earlier, voluntary disclosure of this material, which occurs regularly, these disclosures are generally made within 15 days of a defense request or demand, which can be served on the prosecutor as early as the arraignment on the relevant accusatory instrument. These rules provide the defense with the information necessary to make pre-trial motions, a significant amount of information about the charged offenses and the evidence that may be introduced to prove them, and any evidence required to be disclosed under the Constitution.

Our existing laws do not, however, compel disclosure of witnesses' statements (commonly referred to as "*Rosario* material") or of information that may reveal their identities until the

¹²⁸ CPL §200.95(1)(a).

¹²⁹ In addition to these discovery provisions, CPL §710.30 requires the People to provide, within 15 days of arraignment, notice of their intention to introduce evidence of statements made by the defendant to a public servant, as well as identification evidence to be made by a witness who previously identified the defendant, and to specify the evidence to be offered.

commencement of a hearing or trial in which those witnesses will testify.¹³⁰ It is that information which has historically raised the greatest concerns about ensuring witness cooperation and safety, and the integrity of criminal proceedings. Notably, the information disclosed about witnesses, even during their own testimony, does not now include addresses or contact information of any kind. Yet it is this very sort of personal information the Task Force proposes to disclose 15 days after arraignment. Indeed, the Task Force goes much further, to require the disclosure of such information not only about witnesses who will offer testimony, but about “all persons” whom the prosecutor knows to have “relevant” evidence or information.

Whatever ultimate conclusion one reaches about the need for changes to New York’s current discovery laws, it is only fair to assume that in drafting these laws our legislators attempted to strike an appropriate balance. They sought to protect the rights of those accused of crimes, while being mindful of the need to protect witnesses’ safety and privacy, to discourage tampering, and to encourage cooperation. These concerns are reflected in other sections of the Criminal Procedure Law as well. For example, New York State laws related to the grand jury require secrecy, and criminalize the unlawful disclosure of grand jury proceedings or materials. The New York Court of Appeals has specifically observed that the policy reasons for grand jury secrecy include the need to “assure prospective witnesses that their testimony will be kept secret so that they will be willing to testify freely,” as well as the need to prevent “subornation of perjury and tampering with witnesses at the trial to be held as a result of any indictment the grand jury returns.”¹³¹

The Task Force correctly notes that New York’s discovery rules have not been significantly amended since 1979, and that “reform” has been considered and rejected on a number of occasions in the past. The argument is made that these facts demonstrate that “reform” is overdue and militate in favor of “modernization.” But a dispassionate observer confronted with the same facts could well draw the opposite conclusion – that the endurance of New York’s statutory scheme is evidence both that it has served its purposes well, and that changes involve a host of difficult issues. In fact, those

¹³⁰ CPL §§240.44 and 240.45 require the prosecution to give to the defense any prior written or recorded statements of a witness who testifies for the prosecution at a hearing or a trial, as well as the witness’s record of conviction and any pending criminal actions against him. At trial, the statutory obligation to turn over witness statements and criminal history information arises before opening statements. At pretrial hearings, the obligation arises after the witness has completed direct testimony.

¹³¹ *People v. Di Napoli*, 27 N.Y.2d 229, 235 (1970).

issues are difficult enough that the many intelligent and experienced people who have examined them previously have never yet agreed on solutions.

It is worth noting that this failure to agree on appropriate amendments does not bespeak a legislature that is insensitive to the rights of criminal defendants, or a state that has, as the Task Force asserts, institutionalized “trial by ambush.”¹³² On the contrary, when it comes to the protections its laws afford to defendants, New York is among the most progressive jurisdictions in the country. That holds true at all stages of a criminal proceeding, from the investigative and charging phase through and including post-conviction proceedings. And it is true of all kinds of protections – procedural, constitutional, and substantive.¹³³

It seems clear that, in the context of this history and the state’s other laws, the fact that our legislature has not seen fit to amend our discovery statutes is not due to an obdurate reluctance to “modernize,” as the Task Force suggests. Rather, it reflects a legislative recognition that a misguided reform scheme can strike at the heart of the criminal justice system, by compromising not only people’s safety, but their willingness to help prevent and solve crimes, and to tell the truth in court.

All of these facts highlight the need to approach this area with the utmost caution. That is particularly so since the risks inherent in broader discovery – the potential threats to witness safety and willingness to cooperate – have become ever more difficult to manage in the digital age and the world of social media. It has become possible to identify and locate people based on the most minimal information, to publicize their involvement in a case to the entire world, to disseminate

¹³² Report NYSBA Task Force on Criminal Discovery (“NYSBA Report”), p. 5.

¹³³ One would never imagine this to be the case judging from the tone and tenor of the Task Force report. In contrast to New York, 43 states and the federal system allow longer than 144 hours for probable cause determinations regarding felony defendants in custody; 32 states and the federal system allow hearsay or partial hearsay at probable cause hearings or grand jury proceedings; 49 states and the federal system do not provide automatic transactional immunity to witnesses in the grand jury; in 42 states and the federal system the right to counsel attaches only at arraignment, co-extensive with the Sixth Amendment; 33 states and the federal system do not allow challenges to the evidentiary sufficiency of an indictment; 31 states and the federal system require the prosecution’s consent for a non-jury trial; 37 states and the federal system have time limits for post-conviction relief motions; 27 states allow for a state prosecution following a federal prosecution where jeopardy attaches, as does the federal system following a state prosecution; 46 states and the federal system adhere to the *Strickland* rule for ineffective assistance of counsel; 43 states and the federal system adhere to the *Bagley* materiality standard in deciding *Brady* cases; 32 states and the federal system have no accomplice corroboration requirement; and New York is the only jurisdiction in the country, state or federal, that does not permit evidence of photographic identifications at trial, in effect requiring that convictions be supported by corporeal identifications.

their photographs, addresses, personal information, cooperation agreements, police statements, and grand jury testimony, and to pressure and harass them, all by tapping on a keyboard.

Against this historical and technological backdrop, recommendations for reform that would expose witness information earlier or in more detail should be evaluated with more care than ever. Yet it is in this very area that the Task Force proposes the most sweeping of changes.

II. Summary of the Proposals Calling for Expanded and Early Discovery

At the heart of the Task Force report are proposals that would jettison the existing discovery framework. They would provide both for a significant expansion of the information to be disclosed, and for much earlier disclosure of information that is personal and sensitive. They would reveal the identities of witnesses and others with “relevant information” – a term of undefined breadth – as well as their address or contact information. And they would do so long before any court proceeding at which testimony is to be offered.

Specifically, the proposal calls for “Phase One” discovery to take place 15 days after arraignment on an indictment or a converted misdemeanor information, and “Phase Two” discovery to take place within 90 days of arraignment.¹³⁴ At the 15-day mark, “Phase One” discovery would include, among other things, electronically stored police reports,¹³⁵ written or recorded witness statements possessed by the prosecution, names and addresses or adequate contact information for all persons whom the prosecutor knows to have evidence or information relevant to an offense charged or to a potential defense, and both search warrants and the affidavits supporting their issuance. Name and address information would be accompanied by a designation as to which of those named “may” be called as witnesses. At the 90-day mark, “Phase Two” discovery would

¹³⁴ The Task Force report recommends a different timetable for materials relating to expert witnesses, which will not be dealt with here.

¹³⁵ The distinction made between police reports that are “electronically stored” and other reports rests on the erroneous assumption that such reports are more readily accessible. Unless a police department has an automated case management system, where electronic case reports are stored under a common case number, the fact that reports are electronically stored does not make them easier to collect. Very few police departments in the state have such a system.

include grand jury transcripts, all additional police reports, all additional written or recorded witness statements, and a variety of other items.¹³⁶

III. The Proposed Mechanisms to Protect Witnesses Are Inadequate

The Task Force recognizes that its proposed disclosures of witness information create serious concerns and significant risks.¹³⁷ We are, after all, contemplating the wholesale disclosure of information about a significantly expanded pool of people at very early stages of the prosecution. The Task Force seeks to assuage those concerns and ameliorate those risks through various procedural mechanisms – protective orders, “lawyer only” disclosures, the substitution of a “voluntary” interview by the defense for the disclosure of contact information, special provisions for informants and undercovers, and enhanced penalties for witness interference.¹³⁸ But the Task Force misapprehends the nature, seriousness, and impact of the problems its proposals would create. And at the end of the day, its procedural mechanisms are wholly inadequate to address them.

(a.) *Protective Orders*: The notion that protective orders can adequately safeguard witnesses rests on the assumption that prosecutors and judges can accurately predict which defendants are likely to intimidate, threaten, harm, or kill the witnesses against them. It is no exaggeration to say that under the Task Force proposal, people’s lives would depend on the accuracy of those forecasts.

Common sense and history teach us that we have no such predictive power. The type of defendant who might threaten or harm a witness, and the type of charge that might inspire such behavior, cannot be readily predicted or categorized. In addition, under this Task Force proposal, disclosure of witness information would take place in the earliest stages of the case. That is when the prosecution is least likely to have developed information about a defendant’s background and

¹³⁶ These items include a summary of any rewards, promises, or inducements made to witnesses, the criminal histories of witnesses (or enough information for the defense to obtain their criminal histories), and known pending charges against witnesses. Some of these items – criminal histories, for example – would reveal not only the identities of witnesses, but a significant amount of information about where and how to find both them, and, in all likelihood, their family members.

¹³⁷ For the sake of economy, we use the term “witness” to encompass the expanded category of “persons” with “evidence or information relevant to an offense charged or to a potential defense,” as described in the Task Force proposal.

¹³⁸ More specifically, the Task Force would allow for protective orders based on a “broad and flexible” standard (though requiring a showing of “substantial risk” with respect to various possible harms); permit “lawyer only” disclosures of address or contact information in Violent Felony cases under specified circumstances; allow location and contact information to be withheld provided a witness agrees to be interviewed by a defense attorney; permit the prosecution to withhold the identities of informants and undercovers, while generally requiring that their involvement in a case be disclosed; and create enhanced penalties for witness interference.

associations that would enable even a preliminary assessment of risk. In fact, that kind of information is often not developed at all.

The pitfalls of the proposed approach are illustrated in cases involving defendants with gang affiliations, a category correctly singled out by the Task Force as being particularly likely to pose a threat to witnesses. Witness intimidation is endemic in gang prosecutions, both in New York and the rest of the country.¹³⁹ This should not be surprising. By definition, gang prosecutions involve defendants who have a mutual sense of loyalty or a common financial interest with other lawbreakers, and a communal self-interest in deterring and punishing cooperation with law enforcement. Even if a particular defendant is incarcerated, his involvement in a gang means that he has associates on the outside who can help ensure that no one will testify against him. Indeed, in recognition of this reality, the Task Force proposes that the standards for protective orders highlight gang affiliations as a factor supporting their issuance.

But the existence of a mechanism for securing protective orders provides only the illusion of adequate protection even in this narrow category of case, in which orders are likely to be most easily secured. The reason is simple. Extra vigilance in gang cases requires in the first instance that the prosecution know about a particular defendant's gang membership, to say nothing of requiring persuasive supporting evidence. Such knowledge may exist when an individual is charged in a conspiracy, or is arrested wearing gang insignia, or has known criminal associations. There are, however, many kinds of gangs, from the organized narcotics crew to the loose association of high school hooligans, and gang members commit many kinds of crimes that do not of themselves signify gang membership. They are as likely as not to be arrested alone, since their crimes need not

¹³⁹ "Witness intimidation has become so pervasive that it is ruining the public's faith in the criminal justice system to protect them," according to Judge John Glynn of Baltimore City Circuit Court, as reported in a N.Y. Times article. That article also reported that a witness to a gang shooting in Boston found copies of his grand jury testimony taped to all the doors in the housing project where he lived. Fox Butterfield, *Guns and Jeers Used by Gangs to Buy Silence*, N.Y. TIMES (Jan. 16, 2005). In New Jersey, dozens of "murder cases have been undone over the past five years after witnesses were killed, disappeared before trial or changed their stories." David Kocieniewski, *With Witnesses at Risk, Murder Suspects Go Free*, N.Y. TIMES (March 1, 2007). Senator Charles Schumer recently pointed to the gang culture of intimidating witnesses in the capital region and other urban areas across New York State, making it tougher to ensure witness safety and resulting in credible witnesses remaining quiet. Colleen Siuzdak, *Schumer Pushes for Harsher Witness Intimidation Penalty*, LEGISLATIVE GAZETTE (Oct. 1, 2012). According to Kamala Harris, California Attorney General, the data suggests a troubling increase in witness intimidation compared to a decade ago, and prosecutors across the country believe that witness intimidation is the single biggest hurdle facing any successful gang prosecution. *Testimony before the Committee on the Judiciary United States House of Representatives* (April 2007) (at the time of her testimony, Kamala Harris was serving as District Attorney in San Francisco).

involve accomplices. There is simply no assurance that even a hard-core gang member will be identified as such at any point during a prosecution. And that identification is least likely to have occurred during the early stages of a case, when this Task Force would insist that the identities of witnesses be revealed.

More broadly, it is important to realize that in the average criminal case the prosecutor's focus is not on learning all there is to know about the defendant; it is, at least until the sentencing phase, on learning all there is to know about his involvement in the particular crime of which he stands accused. The notion that protective orders can ever be a reliable bulwark against witness intimidation rests on a faulty premise about the scope of the prosecution's knowledge. It is unrealistic to assume that a prosecutor will necessarily learn about factors which might support the issuance of a protective order, whatever the reality of a defendant's life and associations might be.

Aside from that, the notion that witness intimidation – even murder – is exclusively or even principally the province of gang members is simply false. By definition, gang members have criminal associates who may be willing to help them intimidate a witness. But defendants who are not gang members may also have associates – friends, family members, acquaintances, fellow inmates, or simply people they can pay – willing to threaten, cajole, bribe, or do bodily harm to a witness to help make a charge go away. And no one can distinguish those defendants who have such associates from those who do not.

It would, moreover, be a mistake to think that such behavior is confined to individuals charged with violent crimes, or who have a violent history. All kinds of criminals, facing all kinds of charges, have plotted to intimidate or kill witnesses against them, and even to kill judges.

Indeed, perhaps the most notorious witness murder in the history of New York City was ordered by a white collar defendant incarcerated on federal fraud charges in the Metropolitan Correctional Center. Fearful that his female bookkeeper would provide evidence against him, 47 year-old businessman Irwin Margolies hired a hitman to kill her. On April 12, 1982, the hitman carried out the contract, murdering not only the bookkeeper, but three CBS employees who intervened in her abduction in a futile effort to help her.¹⁴⁰ Similarly, it was not a gang member but

¹⁴⁰ This crime, which became known as the “CBS murders,” resulted in the convictions of both Irwin Margolies and Donald Nash, the contract killer whom he hired. *People v. Irwin Margolies*, Ind. No. 4442/1983 (Sup. Ct. N.Y. Co. 1983); *People v. Donald Nash*, Ind. No. 7474/82 (Sup. Ct. N.Y. Co. 1982).

a stockbroker, Stuart Winkler, who, in December 2000, was convicted of conspiring to kill the Manhattan Supreme Court justice presiding over his case.¹⁴¹ More recently, in January of 2012, another Manhattan defendant, age 40, pled guilty in a plot to kill a witness who had testified against him in his 2010 trial. The charges on which he had been tried and convicted involved mortgage fraud.¹⁴²

These examples are undoubtedly just the tip of the iceberg. Were this Task Force to speak with prosecutors in this state and elsewhere, there is little doubt it would find many more examples of “improbable defendants” who tampered with witnesses in one way or another. Even those examples would reflect only the limited instances in which such tampering had come to light.

(b.) *Enhanced Penalties for Witness Interference*: The Task Force proposal to increase penalties for various forms of witness interference, while welcome, is not going to solve the problems inevitably created by the early and expanded disclosure of witness information. Successful prosecutions for witness intimidation are rare precisely because of the difficulties in proof that they involve.¹⁴³ By definition, if a defendant succeeds in intimidating or bribing a witness, the prosecution is unlikely to be told about it. The witness may recant, or he may claim mistake or a failure of memory. He may simply disappear, or become “unavailable,” failing to appear on critical court dates or taking a long “vacation” in an unknown location. All prosecutors have dealt with such situations, and all prosecutors know that the last thing the fearful witness will do is point the finger at the very defendant who has succeeded in inducing him not to point the finger in the first place. As a practical matter, almost always, the ability to prosecute a defendant under a tampering statute ceases to exist whenever the defendant achieves his goal.

Undoubtedly the hope embodied in the Task Force proposal is that an enhanced penalty structure will deter defendants from undertaking efforts at intimidation, or worse. We share that hope, but it is a thin reed to lean on. Particularly in more serious cases, defendants simply have too much incentive to try to make the charges against them disappear, and too little reason to believe

¹⁴¹ *People v. Stuart Winkler*, Ind. No. 4914/2000 (Sup. Ct. N.Y. Co. 2000).

¹⁴² *People v. Aaron Hand*, Ind. No. 4807/2011 (Sup. Ct. N.Y. Co. 2011).

¹⁴³ While there are seven separate New York Penal Law criminal offenses that can be charged relating to witness intimidation (Tampering with a Witness in the First, Second, Third, and Fourth Degree and Intimidating a Victim or Witness in the First, Second, and Third Degree), in 2012 the cumulative number of top count charges brought for those offenses was 53. *New York State Processing Report*, Division of Criminal Justice Services (May 2013).

they will be caught if they do so. Moreover, if a defendant already faces a substantial sentence, the slim possibility that he will be charged and face additional time is unlikely to have much effect. This means that in the very cases in which defendants have the most obvious reasons to tamper with witnesses, enhanced penalties are least likely to provide effective deterrence.

(c.) *Confidential Lists as an Alternative*: The “confidential list” protective mechanism proposed by the Task Force is equally problematic. The Task Force would allow for disclosures of witness address and contact information on a “lawyer only” basis, but it would do so only in that narrow class of crimes the Penal Law designates as Violent Felonies. The option would be unavailable in other felony cases, even where the charged crime in fact entailed violence,¹⁴⁴ and even where the defendant has a violent history. That limitation aside, the superficial logic behind singling these crimes out suffers from the same problems of prediction outlined above. In addition, the provision would create difficult issues for the lawyer/client relationship, and thorny problems of compliance and enforcement.¹⁴⁵

More fundamentally, even the limited protection afforded by this option would extend only to address and contact information, and not to the identities or statements of witnesses; that information would still be disclosed, even to Violent Felons, at the earliest stage of a case. The witnesses who are most at risk are undoubtedly those whom the defendant knows – particularly those from his own area – and he does not need a roadmap to find them. It is folly to presume that strangers cannot be located as well, especially given the abundance of information available online, and the many leads often provided by witness statements. To claim that a witness’s address is “protected” simply because it is not spelled out is to rely on a fiction.

(d.) *Witness Interview as an Alternative*: The “witness interview alternative” proposed by the Task Force is frankly bizarre. The Task Force report suggests that an exception may be made to the requirement that address or contact information be provided when a witness, at the prosecution’s request, consents to be interviewed by the defense attorney. Should the witness decline an interview, the prosecution would be compelled to hand his information over.

¹⁴⁴ Crimes of violence that are not designated as such under the Penal Law include Robbery in the Third Degree and Assault in the Third Degree. Narcotics trafficking felonies are also an example of offenses that are not listed as Violent Felonies, but frequently are associated with violence, or threats of violence, as well as witness intimidation.

¹⁴⁵ Philadelphia’s experience in this regard is instructive. According to Ronald Eisenberg, Deputy District Attorney in the Philadelphia District Attorney’s Office, prosecutors there have begun to watermark papers handed over on a “lawyer only” basis in order to hold lawyers accountable when the papers end up in the hands of the defendant.

The problems inherent in this proposal are obvious: the provision would in effect coerce “consent”; it would destroy trust between the prosecutor and the witness; and it would have the perverse effect of revealing the contact information of precisely those witnesses who have expressed the greatest reluctance to deal with the defense. In addition, like the “confidential list” proposal, this alternative would require the disclosure of a witness’s identity and statements to the defendant himself, even if the witness submitted to an interview. It would therefore provide no meaningful protection.

The details of this particular recommendation highlight a critical and pervasive flaw in the approach the Task Force has taken when examining discovery issues. While its analysis places heavy emphasis on the rights and protections to be accorded the accused, the rights of victims and witnesses are treated as inconsequential. The Task Force does not appear troubled by the notion that a citizen who becomes a crime victim or witness should thereby forfeit his right to control his personal information, and should be forced to undergo unwanted and potentially dangerous intrusions. Yet the unfairness of this idea seems obvious, particularly since the roles of victim and witness are thrust upon people who would assuredly not seek them out. It is not too much to say that under the Task Force proposals victims will be “re-victimized,” and witnesses penalized, for becoming part of events they wish had never happened in the first place.

IV. The Task Force Has Given No Consideration to the Effect Its Proposals Will Have on Witness Cooperation or to the Impact the Internet and Social Media Have Had on Witness Safety and Privacy

Apart from the limitations of these protective mechanisms, they are all irrelevant to another aspect of the problem of witness intimidation – which is, that it is not only defendants who pressure and intimidate witnesses. Pressure and intimidation can come in many forms, and from many sources; indeed, some forms of pressure may not be attributable to the defendant himself. They result from the mere fact that a person has been identified as a witness, and the reaction of his peers, family members, neighborhood, or larger community to the knowledge that he is helping law enforcement. Today’s “snitches get stitches” culture is powerful, widespread, and growing. It has evolved from an underground street code to a social norm, creating communities and subcultures in which cooperation has consequences for a witness which range from ostracism to far worse. Quite

naturally, the fears this culture engenders strongly discourage potential witnesses from stepping forward.¹⁴⁶

The Task Force gives no consideration at all to this concern, which could well be the most significant problem its proposal will create. The issue is not just the certainty that some, or even many, witnesses who come forward may be intimidated or imperiled; it is that many witnesses will not come forward at all under a system in which their identities and contact information will be disclosed long before any courtroom testimony is to be given. If that proves to be the case, as it likely will, it is not only ongoing prosecutions that will be affected; it is society's ability to solve crimes in the first place.

The most powerful tool a prosecutor has is not the subpoena or the material witness order. It is the ability to explain to a witness that grand jury proceedings are secret, and that no one will know of his cooperation unless and until there is a trial. Indeed in all kinds of cases, witnesses are reassured by the prospect that disclosure will at least be delayed, and by the hope that their cooperation may never come to light. Often it is only that prospect that elicits the truth. This does not reflect anything underhanded or nefarious; it reflects human nature and the pressures and risks that exist in the real world.

Even under current law, which permits such assurances, it would be hard to overstate the difficulty of securing witness cooperation, particularly in those neighborhoods hardest hit by violent crime, and especially in homicide and shooting cases. This may seem paradoxical, but of course it is not: despite their desperate desire for safer neighborhoods, the residents of such communities know first-hand what intimidation and violence look like, and they fear for themselves and their families.

¹⁴⁶ According to the National Center for Victim of Crimes 2007 study, *Snitches Get Stitches* (a study aimed at gathering data about factors that influence youths' decisions to cooperate in the criminal justice process and the extent and nature of intimidation in their communities), fears of being labeled a snitch "whether or not they are related to an actual threat of harm, are real and prevent a good deal of potential reporting to and cooperation with police at the investigation stage of criminal cases." Julie Whitman and Robert Davis, *Snitches Get Stitches: Youth, Gangs, and Witness Intimidation in Massachusetts*, National Center for Crime Victims (Washington D.C., 2007). In New Jersey, law enforcement has struggled to successfully prosecute homicide cases "as the state's murder rate has climbed and the problem of witness intimidation has spread." David Kocieniewski, *In Prosecution of Gang, A Chilling Adversary: The Code of the Streets*, N.Y. TIMES (Sept. 9, 2007). As far back as 1990, a Bronx study by the Victim Service Agency, based on complaint room interviews with 226 victims of a broad range of crimes, found that between 36% and 41% had been threatened and that those victims were three times more likely to decide to drop charges. Robert Davis, Barbara Smith and Madeline Henley, *Victim Witness Intimidation in Bronx Courts*, Victims Service Agency (New York, June 1990).

Such concerns, real or perceived, are not limited to those living in high crime neighborhoods, or testifying in cases that involve violent crimes or defendants with violent histories. Prospective civilian witnesses are hardly reassured by a prosecutor's statement that the non-violent nature of a crime or the absence of violence in a defendant's background suggest that their safety is unlikely to be jeopardized. They are rarely comforted by the "low odds" that harm will come to them. And they are not likely to find solace in the sort of "special procedures" the Task Force suggests. Rightly or wrongly, truthful witnesses believe they are providing information about a criminal, and are often of the understandable and well-founded belief that it is impossible to predict what a criminal or his friends or family members may do.

Under the Task Force's scheme, it is hard to imagine that anyone from any neighborhood, testifying in any case, would feel secure in stepping forward as a witness. It is fair to predict that the average person would be deeply uncomfortable with the notion that a defendant, or even the defendant's attorney, will know who he is early in the criminal proceedings, or where he, and perhaps his loved ones, live. It is not a stretch to think that many individuals will simply opt for silence.

The impact of this reality will be multiplied many times over by the proposal that disclosure be required, not only of information about civilians who will actually testify, but about a broad and ill-defined category of "persons" with evidence or information "relevant" to an offense charged or to a defense that may be asserted. Many law enforcement operations are initiated based upon civilian complaints about criminal activity. The complaints come from all sorts of people, from grandmothers who sit at the window watching their courtyards to store owners who tell the police what they see on the corner. It is likely that in some areas, this sort of cooperation with the police will simply shut down. Concerned citizens will quickly realize that if they report drug dealing in front of the local school, they will ultimately be identified, regardless of the specifics of their observations or their knowledge of a particular defendant.

The panoply of issues relating to witnesses has been rendered infinitely more complex by the ubiquity of the Internet. Astoundingly, the Task Force report contains not a single reference to the Internet or its potential impact on discovery issues, although the complications posed by the digital age are readily apparent. For example, it is obviously far easier to find people today than it has ever been, and it is possible to do so based on very little information. Just a name can be enough

to lead to a home address, along with other personal and professional information. This makes witnesses more vulnerable during the pendency of a case, and also makes it much more difficult to relocate them successfully should that be necessary.

Witnesses are also vulnerable to harassment and intimidation of a whole new type – through Facebook¹⁴⁷ and Instagram¹⁴⁸ postings, Twitter, and e-mail.¹⁴⁹ And of course, the fact that a witness is cooperating can now be posted on the web, along with photographs, personal information, and documentary proof such as police reports and grand jury minutes.¹⁵⁰ These developments make it impossible for some witnesses ever to feel – or for that matter ever to be – completely secure.

In fact, the Internet has spawned a virtual cottage industry devoted to deterring cooperation with law enforcement and punishing those who transgress. The Exhibit attached to this response contains a sampling of webpages that illustrate the role the Internet is playing in creating a pervasive “code of silence” in many communities throughout the country. Notably, as the Exhibit reveals, intimidation-by-computer makes liberal use of precisely the sorts of discovery materials this Task Force would require the prosecution to turn over in the early stages of a case.

In sum, the Task Force’s notion that witnesses can be adequately protected under the measures it proposes does not withstand scrutiny. We cannot reliably predict which defendants pose a threat. An enhanced penalty structure will not adequately deter those who do. And the confidential list and witness interview procedures advanced as solutions are unworkable and provide no real protection. More than that, we must recognize that once a witness’s identity has been revealed, there is a significant possibility that he will experience pressure and intimidation from sources other than

¹⁴⁷ On February 3, 2013, Philadelphia District Attorney Seth Williams, asked Facebook CEO Mark Zuckerberg to remove potentially life threatening posts intimidating witnesses. The posts included the actual statement of a witness who had testified, along with the caption “rat.” Philadelphia’s Assistant Director of Victims Services, Leland Kent, described these posts as multiplying witnesses’ “fear factor exponentially.” Alex Wigglesworth, *Philly D.A. Asks Facebook CEO Mark Zuckerberg to Take Down Witness Intimidation Posts*, PHILADELPHIA METRO (Feb. 4, 2013).

¹⁴⁸ An Instagram account in Philadelphia posting pictures, police statements and the testimony of more than 30 witnesses is discussed later in the report.

¹⁴⁹ In Maryville, Maryland, Twitter and Facebook were used to post online threats against a rape victim and her family members who, unable to withstand the harassment, moved to another town. Dugan Arnett, *Nightmare in Maryville: Teens’ Sexual Encounter Ignites a Firestorm Against Family*, THE KANSAS CITY STAR (Oct. 24, 2013).

¹⁵⁰ In Erie County, a defendant was recently convicted of Intimidating a Witness in the Third Degree for having posted on Facebook the grand jury testimony and witness statements that he had obtained from his defense attorney during discovery. The defendant was incarcerated and awaiting trial on drug charges when he sent the materials to his girlfriend to post on Facebook. James Staas, *Man Convicted of Witness Intimidation after Grand Jury Testimony is Posted on Facebook*, THE BUFFALO NEWS (Oct. 30, 2013).

the defendant. Even if that pressure does not rise to the level of violence – indeed, even if it is never explicit – it can deter truthful cooperation and profoundly affect a witness’s life.

It is our view that the Task Force recommendations with respect to the disclosure of witness information would exact a significant human toll, and have a negative impact on the effectiveness and integrity of the criminal justice system. These considerations have not been adequately explored in the Task Force’s work, or appropriately weighed in reaching its conclusions.

V. The Task Force Cannot Rely on the Discovery Rules of Other States to Support its Proposals, Without Having Examined the Present-Day Experiences of Those States or the Broader Procedural Framework in which other States’ Discovery Rules Exist

The Task Force repeatedly asserts that the experience of other jurisdictions with more expansive discovery rules proves that its proposals are workable. It notes that, “Dozens of other States have employed systems of broad access to both parties’ evidence at an early stage of criminal cases for many years,” and that none have gone back to impose more restrictive rules.¹⁵¹ Its report is replete with references to specific discovery provisions which exist elsewhere, including provisions for the early discovery of witnesses’ names, addresses, and contact information, and claims that they have “worked for decades.”¹⁵² And it concludes that, “There is broad consensus nationwide that the principal benefits of criminal discovery reform hinge on requiring disclosures early in the case.”¹⁵³

Of course, if the mere endurance of a statutory scheme proved how well it works, the Task Force would be forced to concede that New York’s own laws are more than adequate. But longevity is not enough, and we emphatically agree that a study of discovery laws in other jurisdictions would be worthwhile. In fact, such a study, objectively and thoroughly undertaken, is fundamental to evaluating the costs and benefits of proposals as sweeping as those advanced here. The difficulty is that no such study has been conducted by the Task Force.

The significance of conducting a thorough and objective study was recognized from the time this Task Force was created. When we began our work, consideration was given to the formation of a subcommittee devoted exclusively to examining criminal discovery practices and procedures in

¹⁵¹ NYSBA Report, pp. 2-3.

¹⁵² NYSBA Report, p. 13.

¹⁵³ NYSBA Report, p. 31.

other states. That might have allowed for a careful evaluation of the systems and experiences the Task Force relies on.¹⁵⁴ It was also noted in a Task Force meeting that selected statutes cited with approval would be provided to us, so that we could dig deeply into their impact and implementation. Neither of these things occurred. Most critically, the subcommittee that drafted the proposals for expanded discovery appears not to have conducted any careful present-day study of its own, or to have explored the broader procedural contexts in which alternative discovery schemes exist.

We observe also that the Task Force ignores federal discovery law, an omission that highlights its selective approach. The federal system has discovery rules almost identical to the laws of New York State. As the largest jurisdiction in the country, encompassing nearly twice as many districts as there are states, that system merits careful study, particularly in a document that purports to rely on a “broad consensus nationwide.” It is thus troubling that the Task Force gives federal discovery procedures no attention at all.

The consequence is that the Task Force relies entirely on selectively cited and outdated reports, containing sweeping and questionable generalizations. The Task Force cites, for example, a report submitted to the New York State Assembly Codes Task Force in 1991.¹⁵⁵ That report concluded that discovery rules in other states did not result in a general problem of witness intimidation, and that even prosecutors approved of them. But we are given no way to evaluate the report; we know nothing of its authorship, its possible bias, or its methodology. Indeed we know with certainty only three things about it: its broad conclusion; that it is twenty-three years old; and that it failed to persuade the New York State legislature to adopt its recommendations.

The citations to two other documents are no more persuasive. One is to a law review article dating from 1989.¹⁵⁶ As far as we know, that article may have provided the basis for the 1991 report to the Assembly, in effect creating an echo chamber. The second is to a 2006 report by the New York County Lawyers’ Association, evaluating relatively liberal discovery programs instituted by

¹⁵⁴ The proposed list of subcommittees at the first meeting of the Task Force included one that would study “Criminal Discovery Practice and Procedures in Other States.” The reason for the decision not to form this subcommittee was never clear; however, concerns about the then-contemplated timetable for issuing this report seemed to have been a consideration. Clearly, time constraints do not justify making recommendations based on unexamined assumptions.

¹⁵⁵ NYSBA Report, p. 13.

¹⁵⁶ NYSBA Report, p. 13 (fn 23).

some of the District Attorneys in New York City. This eight-year-old study examined only misdemeanor cases and voluntary programs that involved far more limited discovery and were unevenly implemented.¹⁵⁷ No one can seriously argue that its conclusions, either about the results of those programs or the District Attorneys' own views of them, reflect anything meaningful about the proposals at issue here. Notably, none of the District Attorneys referenced were invited to share their views on the proposals under consideration by this Task Force.

It is difficult to believe that there is not more current, relevant literature available, particularly given the nationwide concern about witness intimidation and its obvious link to the disclosure of witnesses' identities. Yet none is referenced in the Task Force report.

In any event, a reliable evaluation of other states' statutes plainly requires far more than the citation of a few old reports. It requires some systematic effort to interview prosecutors, law enforcement personnel, and defense attorneys. It should include victims' representatives as well, since victims are stakeholders in the criminal justice system, and their concerns are not always obvious.¹⁵⁸ Time-consuming as this effort might be, it is impossible to assess the potential impact of the changes proposed by this Task Force without taking at least some steps in that direction. The Task Force has taken none.

Indeed, there is concrete reason to believe that the experiences of other states reflect a reality quite different from what the Task Force describes. For example, the Philadelphia prosecutor's office operates in a state system that mandates broad discovery and has, for some thirty-five years, required preliminary hearings at which victims and witnesses must testify in open court. That office has reported to us that these rules have contributed to widespread problems of witness intimidation, recantation, and failure to appear, as well as spiraling relocation costs.¹⁵⁹ In February 2014,

¹⁵⁷ NYSBA Report, p. 6.

¹⁵⁸ For example, victims of financial fraud may be particularly sensitive to public disclosure, which can cause embarrassment and compound their victimization. Such disclosure can also compromise their financial security, since "fraudsters" are known to target those individuals whom they perceive as most vulnerable to their schemes. Carolyn Bell and Caroline Heck Miller, *Discovery and the Crime Victims' Rights Act*, United States Attorney Bulletin, Vol. 6, # 5, p. 54 (Sept. 2012).

¹⁵⁹ This information has been provided by Ronald Eisenberg, Deputy District Attorney in the Philadelphia District Attorney's Office.

Philadelphia authorities reported having filed more than 2000 witness intimidation charges since 2011, as part of an effort to address the city's pervasive "no-snitching subculture."¹⁶⁰

These are not simply the complaints of disgruntled prosecutors in a single city. In fact, problems like those plaguing Philadelphia proved so widespread and acute that charging procedures employed statewide were recently altered. In June of 2012, a unanimous Pennsylvania Supreme Court adopted a policy allowing charges in selected crimes to be filed through grand jury proceedings conducted in secret. Ironically, that particular reform was inspired in part by the example of New York.¹⁶¹ Philadelphia prosecutors express the wish that the grand jury were more broadly available, as witnesses prove more comfortable and forthcoming in an environment in which their identities are protected.¹⁶²

A simple Google search – "witness intimidation Philadelphia" – reveals a trove of news accounts and public record information about the problems described by the District Attorney's Office.¹⁶³ Recent reports indicate that such problems not only exist, but are being exacerbated by social media. On November 9, 2013, the Philadelphia Inquirer reported that an anonymous social media account had been identifying witnesses to crimes across the city. The account, "rats215" (Philadelphia's area code is 215), used the photo-sharing website Instagram to post pictures, police statements, and testimony of more than thirty witnesses, with the stated intention of trying to "expose rats."¹⁶⁴

¹⁶⁰ Larry Miller, *Four Arrested for Witness Intimidation*, PHILLYTRIB.COM (Feb. 27, 2014); Kelly Bayliss, *Four Charged in Witness Intimidation Shooting*, NBCPHILADELPHIA.COM (Feb. 26, 2014).

¹⁶¹ Deputy District Attorney Eisenberg reports that several prosecutors travelled to New York with a state Supreme Court justice to study our grand jury system.

¹⁶² See footnote 159.

¹⁶³ A 2009 Philadelphia Inquirer series portrayed criminal courts plagued by rampant witness fear, exacting a heavy toll in no-show witnesses, recanted testimony and collapsed cases. Circulating witness statements was reported to have become a common tactic, aimed at striking fear in witnesses. And prosecutors were struggling to keep police reports and other "discovery" material out of the hands of defendants. Nancy Phillips, Craig R. McCoy and Dylan Purcell, *Witnesses Fear Reprisals, and Cases Crumble*, PHILADELPHIA INQUIRER (Dec. 14, 2009). These problems have led to "a host of new procedures" as the state looks to overhaul a "system that, according to its critics, failed at its core function of trying cases on their merits." Craig R. McCoy, *To Fight "No Snitch," Philly Using Indictment Testimony in Secret*, PHILADELPHIA INQUIRER (Feb. 17, 2013).

¹⁶⁴ According to the report, the account had nearly 7,900 followers. Among the comments posted was one saying, "Post some new rats. I needa put a hit out on them." Aubrey Whelan and Mike Newall, *Police Probe Website Targeting Crime Witnesses*, PHILADELPHIA INQUIRER (Nov. 9, 2013).

Google searches of the same type for New Jersey and Newark yield similarly alarming reports of widespread intimidation and violence against witnesses, with disastrous results for the justice system. In a 2007 series examining the problem of witness intimidation in New Jersey, entitled *Scared Silent*, the New York Times reported that the threats and dangers to civilian witnesses were so grave that the governor had directed police agencies in the state to use civilian witnesses sparingly. The series further reported that prosecutors have “grown weary of a familiar sequence of events: shortly after they provide defense lawyers with copies of a witness’s statement, as they are required by law to do, the threats, warnings and outright attacks begin.”¹⁶⁵

No such published information has been noted by the Task Force in its discussion of other states, despite its ready availability. This omission is particularly striking since both Pennsylvania and New Jersey are among those states listed as having discovery rules for witness information that have “worked for decades,”¹⁶⁶ and Philadelphia and Newark are specifically named as well.¹⁶⁷

These examples suggest that the Task Force has not made the most basic effort to verify that the results of the old studies it relies on – whatever their original validity – have stood the test of time. They show how critical it is to conduct a far more systematic and probing inquiry into the experiences of other states than has been done to date. We do not suggest that every state would report experiences like those of Pennsylvania and New Jersey, but they very well might. It is imperative that we find out.¹⁶⁸

It is important to note also that a meaningful evaluation of other states’ laws would require information not only about the experiences of practitioners, but also about the way their systems work. Discovery statutes, after all, exist within a broader framework of procedures and protections. Without knowing anything about that broader framework, there is no reliable way to assess whether a procedure that seems to work well in one jurisdiction would work equally well in another.

¹⁶⁵ David Kocieniewski, *In Witness Killing, Prosecutors Point to a Lawyer*, N.Y. TIMES (Dec. 21, 2007). The articles by David Kocieniewski in this N.Y. TIMES series should be required reading for any task force or committee examining changes to New York’s discovery laws. *Keeping Witnesses off the Stand to Keep Them Safe*, (Nov. 19, 2007); *So Many Crimes and Reasons to Not Cooperate*, (Dec. 30, 2007); *With Witnesses at Risk, Murder Suspects Go Free*, (March 1, 2007); *Few Choices in Shielding of Witnesses*, (Oct. 28, 2007); *A Little Girl Shot, and a Crowd That Didn’t See*, (July 9, 2007).

¹⁶⁶ NYSBA Report, p. 13.

¹⁶⁷ NYSBA Report, p. 2.

¹⁶⁸ We note that, in preparing this response, we undertook no broad examination of other jurisdictions, which would have been beyond our mandate and our practical capacities.

In New York, for example, we often have a very short window of time in which to present a case to the Grand Jury, and we require non-hearsay testimony to secure an indictment. As a consequence, it is not enough for victims and witnesses to be interviewed by police officers, who may then testify to what has been reported. The witnesses themselves must appear in the prosecutor's office, often within days of a crime, at a time when the emotional impact of their experience is very strong and there has been no opportunity to foster a trusting relationship. Typically, their questions center on issues related to their own safety: will the defendant be present? Will he or his lawyer know that I testified? Will they know where to find me? And so on. Under current law, the answer to such questions is no, and that answer is frequently fundamental to securing their Grand Jury testimony.

New York is almost unique in these procedural requirements, which might well affect the impact of expanded discovery rules. They illustrate the obvious – that a reliable comparison with other states requires at least some basic understanding of a broader legal context.

In effect, the Task Force asks that we take it on faith that the discovery schemes employed in other states “work.” The significance of this fact cannot be overstated: unsupported claims about the experiences of other states are the only rebuttal the Task Force offers to the concerns we have raised in this response. No sensible parent hears the words, “Everyone is doing it,” without asking probing questions. Such questions have not been asked here, and until they are, we should not endorse these proposals.

VI. The Task Force Should Not Look to Civil Discovery as a Model When Considering Changes to Criminal Discovery

In both its “Stated Purpose,” set forth in writing in September of 2012, and in its ultimate report, the Task Force observes that the discovery rules governing civil and criminal litigation differ markedly. It notes that litigants in civil proceedings operate under a framework that gives both sides far broader and earlier access to witnesses and other information. The Task Force seems to take it as a given that the civil rules are inherently superior, and should provide a model for criminal discovery reform. But that assumption ignores the obvious: civil and criminal proceedings differ in fundamental ways, and the differences between the rules that govern discovery in the two systems embody a sensible recognition of that fact. Aside from that, the Task Force presents no evidence that civil discovery rules function well, even within the civil framework itself.

The fundamental differences between the civil and criminal systems are apparent and are not difficult to summarize. Clearly, the kind of even-handed reciprocity possible in civil litigation is out of the question in criminal matters, because of the legal privileges and protections afforded to criminal defendants. As a consequence, the attempt to model criminal discovery on civil rules results in a quite one-sided expansion of disclosure obligations. Moreover, the plaintiff in a civil suit is most often pursuing a private interest, as is the defendant; unlike prosecutors, neither one is expected, much less required, to seek justice in some broader sense.¹⁶⁹ By the same token, neither party has the same duties or ethical constraints as a prosecutor, whose very mission is defined in terms of his ultimate responsibility to the public, and who has *Brady* obligations with no parallel in the civil system. Likewise, the civil defendant is not shielded from baseless allegations by procedural safeguards like those embedded in the accusatory phase of our criminal justice system, or protected at trial by the reasonable doubt standard which is essential to due process.¹⁷⁰ And neither party to a civil suit has been found, based on legally sufficient evidence and to a standard of reasonable cause, to have committed a crime. Most importantly, civil litigation does not raise the same concerns about witness cooperation, intimidation, and potential violence. For that reason, broad civil discovery does not imperil society's core ability to enforce its laws and keep its citizens safe.

Each of these fundamental differences has implications for both the necessity and the wisdom of various possible discovery reforms. It is incumbent upon this Task Force to recognize them forthrightly, and to analyze their implications fairly and objectively. In the absence of that analysis, the bald assertion that the principles underlying civil discovery can somehow be imported into the criminal system is utterly unpersuasive.

By the same token, the Task Force seems to take it as a given that civil discovery “works” – that is, that the rules which govern discovery in the civil system serve the interests of the parties, of witnesses, of the courts, and of society, at least in the civil context. It is hard to understand what that assumption is based on; there seems to have been no investigation of the issue. In any event, it is almost certainly not true. Indeed, according to one recent scholarly analysis, “Since its inception in

¹⁶⁹ *United States v. Berger*, 295 US 78, 88 (1935).

¹⁷⁰ Notably, in discussing the reasonable doubt standard, the New York Court of Appeals explicitly referenced civil discovery, observing that the higher standard of proof was essential in a criminal trial for many reasons, including the fact that it, “compensates for lack of discovery proceedings and disclosure devices traditionally available to ordinary civil litigants.” *Matter of Samuel W.*, 24 N.Y.2d 196, 205 (1969).

1938, pretrial discovery has been one of the most divisive and nettlesome issues in civil litigation in the United States. Discovery was designed to prevent trials by ambush and to ensure just adjudications. But it has fallen well short of these laudable goals. Instead, the pretrial discovery process is broadly viewed as dysfunctional, with litigants utilizing discovery excessively and abusively.”¹⁷¹

It is our view, in sum, that the comparison of civil and criminal discovery rules offered by the Task Force fails as an argument in favor of its proposals. It fails because the two systems are not comparable, and because there is scant evidence that the civil rules are working well even within the civil system itself.

VII. The Task Force Has Not Considered the Substantial Practical Difficulties and Considerable Costs of its Proposals

We have discussed at length the Task Force’s failure adequately to investigate, analyze, or weigh the implications of its recommendations for victims and witnesses, and by extension, for the integrity of the justice system. We believe there has been a similar failure to address the practical difficulties its proposals would create, and their costs.

This omission is hard to understand. The Task Force proposes a vast expansion and acceleration of discovery in every criminal prosecution in the state, both misdemeanors and felonies – more than one million cases a year.¹⁷² That its proposals would entail considerable costs in time, money, and scarce resources could not be more apparent. Notably, those costs would affect not only police and prosecutorial agencies, but the judiciary as well.

¹⁷¹ John H. Beisner, *Discovering a Better Way: The Need for Effective Civil Litigation Reform* DUKE LJ 60:547 at 549-550 (2010). The analysis goes on: “Plaintiffs’ attorneys routinely burden defendants with costly discovery requests and engage in open-ended ‘fishing expeditions’ in the hope of coercing a quick settlement. As a result, discovery frequently becomes the focus of litigation, rather than a mere step in the adjudication process. By some estimates, discovery costs now comprise between 50 and 90 percent of the total litigation costs in a case. Discovery abuse also represents one of the principal causes of delay and congestion in the judicial system. These problems have led to perennial calls for discovery reform and have resulted in amendments to the Federal Rules of Civil Procedure (Federal Rules) in 1980, 1983, 1993, 2000, and 2006. Anxiety over abusive discovery practices has also led many federal and state courts to experiment with local reforms, but such efforts have been largely unsuccessful.” [Citations omitted.]

¹⁷² According to the NEW YORK STATE UNIFIED COURT SYSTEM 2011 ANNUAL REPORT, there were 4,055,065 cases filed statewide in trial courts, of which 41 percent (more than 1.6 million) were criminal filings.

The proposed reforms raise a host of issues that will require judicial scrutiny, resolution, or intervention. Some of these issues arise from the ill-defined and overbroad terminology used to describe the prosecution’s obligations. There is a troubling definitional haziness surrounding crucial aspects of the proposal, as well as the potential for unintended overreaching.

For example, what does it mean to require that the prosecution disclose the names of “all persons whom the prosecutor knows to have evidence or information relevant to an offense charged or to a potential defense,” as provided in connection with Phase One discovery? In a drug case, does this include the civilian who made a confidential complaint about drug dealing in his complex, regardless of the specifics or sources of his knowledge? In a robbery case, does it include the victim’s neighbor, with whom she spoke about the trauma she suffered? Does it include every member of the Police Department, from clerical personnel to the Commissioner, who acquired some knowledge related to a particular case?

More simply, what constitutes a “police report?” Does the term refer only to formal documents, such as the Complaint Report and the typewritten reports created by detectives – known in the N.Y.P.D. as DD-5’s? Does it include such items as memo book entries, handwritten notes, funding requests, and broad summaries based on generalized and unsourced information? Is the term so broad as to encompass internal memoranda that would expose police investigative techniques, such as how undercovers are utilized or surveillance is conducted?

Terms like these will spawn litigation not only as practitioners seek judicial guidance to make sense of them, but down the road, when questions of compliance must be resolved. Indeed, when it comes to compliance issues, the courts will be faced with additional definitional riddles, like the difference between “some” prejudice and “significant” prejudice,¹⁷³ the distinction between “significantly impugn” and “tend to impugn,”¹⁷⁴ and the meaning of “reasonable diligence”¹⁷⁵ or an “important witness.”¹⁷⁶ Similar issues are occasionally litigated now, but given the vast expansion of the prosecution’s discovery obligations, and the uncertainties surrounding their precise contours, the number of litigable discovery issues is sure to skyrocket. Each such issue will require some form

¹⁷³ NYSBA Report, p. 37.

¹⁷⁴ NYSBA Report, p. 24.

¹⁷⁵ NYSBA Report, p. 47.

¹⁷⁶ NYSBA Report, p. 24.

of proceeding by the court, frequently necessitating a factual inquiry into the surrounding circumstances and a judgment about the appropriate remedy.

There are a myriad other ways in which judicial resources will be sorely taxed. Prosecutors will be compelled to request protective orders in connection with a much larger universe of cases and for many more witnesses and documents. This follows from the proposed timetable, the drastically expanded scope of witness information and police reports required to be provided, and the sweeping pool of “persons” likely to be affected. Likewise, “lawyer only” disclosures will undoubtedly create difficult legal, procedural, and enforcement problems. All such issues can and will spawn litigation, and require factual inquiries that can be searching and difficult. They will strain the resources of the courts, as well as of police departments and prosecutors.

We anticipate that the extra burdens borne by the judiciary will be significant. But the burdens on the scarce resources of prosecutor’s offices and police departments will be far greater. It may sound like a simple matter to acquire the various materials required to be disclosed within the short time frames provided for in the Task Force recommendations, but it is not. Practical difficulties arise in connection with all manner of seemingly simple tasks, from contacting a police officer who works steady midnights, to compiling an accurate list of everything “allegedly possessed by” a defendant or co-defendant, to identifying an Emergency Medical Technician who transported a defendant or victim to the hospital.

Some of the tasks required are, even on their face, not simple at all. It is unthinkable that the prosecution would turn over the name and contact information of a witness without first interviewing him and alerting him to the impending disclosure. Even in a straightforward shoplifting case, a security guard may have made an apprehension witnessed by a half-dozen sales personnel, all of whom would have to be contacted and notified of the law’s impact on them.

Witnesses whose interviews now focus on obtaining a complete and accurate account of events will require far more time and attention, to facilitate the kind of meaningful interaction necessary before such disclosures are made. Fears, privacy concerns, and a heightened reluctance to become involved will have to be addressed. Safety issues will have to be explored. Certain witnesses must be cultivated over a prolonged period of time, particularly in violent crime and gang cases, in order to develop the trust essential to securing their full cooperation. Such witnesses will instead have to be interviewed intensively in the earliest stages of the case, in the hopes of

overcoming their reluctance in a drastically compressed time frame. People whose identity might, under current law, never become known, or who would not be compromised until a trial was in the offing, may have to be relocated. The expense to the state could be considerable – though far less than the costs inflicted upon witnesses uprooted from their homes.

These new necessities will be burdensome and costly at every level of the system. In local criminal courts, where prosecutors carry caseloads in the hundreds,¹⁷⁷ compliance with the mandates proposed by the Task Force may not be possible at all.

The full costs of the Task Force proposals cannot be understood without acknowledging the practical implications of one obvious fact: the overwhelming majority of criminal cases are not resolved by trials, but by pleas of guilty. Because of that, the proposals would require that significant time and resources be expended doing work which, under current law, is often not required.

Every conscientious prosecutor learns the critical evidence in his case at its inception. But because most cases result in guilty pleas, the more intensive preparation of the average case may not take place until it seems likely that there will actually be a trial. Indeed, precisely because of the costs to the state, it is commonplace for plea offers to be withdrawn at the point where intensive trial preparation begins. That fact is an accepted part of criminal practice, and is hardly considered unreasonable; on the contrary, its legitimacy has been recognized by the United State Supreme Court.¹⁷⁸ Yet the Task Force proposal would alter the landscape to require that much of what is now accomplished during “trial preparation” take place far earlier. And if a defendant ultimately pleads guilty, significant resources will have been consumed accomplishing tasks which would not be necessary under our current procedures.

The Task Force report suggests that the burdens imposed by the reform package may be mitigated by a likely increase in or acceleration of guilty pleas. This hypothesis is conjectural, as the

¹⁷⁷ For example, Assistant District Attorneys in Rockland County can carry between 400 and 700 misdemeanors cases along with a felony caseload.

¹⁷⁸ In *United States v. Ruiz*, a unanimous Supreme Court rejected the argument that there exists a constitutional obligation to provide impeachment information during the plea bargaining process, noting that such a requirement “...could seriously interfere with the Government’s interest in securing those guilty pleas that are factually justified, desired by defendants, and help to secure the efficient administration of justice.” The Court went on to note that such a principle “...could require the Government to devote substantially more resources to trial preparation prior to plea bargaining, thereby depriving the plea bargaining process of its main resource-saving advantages.” *United States v. Ruiz*, 536 U.S. 622, 631-632 (2002).

report offers no empirical evidence to support it. It is more likely that the proposed changes will delay pleas as many defendants wait for discovery deadlines to make a decision. Moreover, no one should doubt that there will be defendants who, despite an intention to plead guilty, will run out the discovery clock in order to “out” the witnesses against them, just as no one should doubt that the exposure of witnesses’ identities will lead to more tampering and intimidation. In fact, there is good reason to believe that the number of guilty pleas will fall as witnesses refuse or cease to cooperate, offer false recantations, or disappear.

VIII. The Task Force Fails to Distinguish Between the Need to Safeguard a Defendant’s Trial Confrontation Rights and Other Discovery Considerations That Do Not Touch on Constitutionally Protected Interests

The Task Force argues that the preponderance of guilty pleas militates in favor of the kind of expanded and accelerated discovery for which it advocates. It contends that without such discovery, counsel is hamstrung in offering plea advice. This highlights a critical weakness in the Task Force report – that it conflates a number of considerations which do not have the same weight, legitimacy, or support in the law, and ascribes the same value to all of them.

While defendants have constitutional rights to confrontation at trial and effective assistance of counsel, those rights have never been held to require the disclosure of non-exculpatory information prior to trial, much less prior to a plea. Indeed, there is no constitutional right to discovery.¹⁷⁹ Of course, we recognize the importance of providing the defense with information, such as witness statements, in time to review it carefully and prepare intelligently for its use at trial. We recognize as well that this sort of careful and intelligent work requires some time, and can be difficult when information is turned over only once a proceeding is underway. But those factors are quite different from the notion that defendants are entitled to broad discovery in time to make strategic decisions about whether to plead guilty.

The Task Force glides past the obvious fact that a defendant himself knows whether he committed the crime of which he is accused. He does not need police paperwork, witness statements or contact information at the earliest stage of the proceedings to decide whether he is factually guilty. What the defendant may not know is the strength of the prosecution’s case, and therefore

¹⁷⁹ *Weatherford v. Bursey*, 429 U.S. 545, 559 (1977); *Miller v. Schwartz*, 72 N.Y.2d 869, 870 (1988).

how likely it is that he can “beat” the charges despite his guilt. That, however, is a very different issue. It implicates his ability to make a tactical decision regarding whether to plead guilty, rather than his ability to defend himself fairly at trial. It is a consideration that undoubtedly has far less societal support and is entitled to much less weight.

The Task Force has not distinguished between these very different types of considerations. It needs to do so, because they carry different implications for the timing and nature of various disclosures. As we noted at the outset, we believe that it is possible to provide for disclosure of witness statements and other information before the actual commencement of a hearing or trial, to allow the defense a better opportunity to prepare. But we believe that such disclosures should not be mandatory until much later in the process – generally when it is clear that there is actually going to be a hearing or trial, rather than a guilty plea – and that any proposal for such disclosures requires a balancing of interests very different from what is embodied in the Task Force report.

IX. The *Brady* Proposals

We agree with the Task Force *Brady* recommendations regarding training, the impracticalities of pre-plea discovery, and judicial involvement in the discovery process.¹⁸⁰ We do not, however, endorse its recommendations for tracking, evaluating, and implementing internal and external disciplinary procedures for *Brady* violations. While we share the objectives that lie behind these recommendations, the Task Force has provided few, if any, specifics regarding the proposed procedures. Thus, the report leaves too many unanswered questions as to how the proposals would be implemented.

We also express our concern that in considering the timing of disclosures, the Task Force report recognizes no distinction between exculpatory information as described in *Brady v. Maryland* (“*Brady* information”), and impeachment information as described in *Giglio v. United States* (“*Giglio* information”). *Brady* and *Giglio* information must both be disclosed, at a minimum, in time to afford the defense a meaningful opportunity to use the information at the relevant proceeding.¹⁸¹ *Brady* information should be disclosed, at least presumptively, as soon as practicable after the information and its significance become known to the prosecution. But the very nature of

¹⁸⁰ Our objection to requiring certificates of compliance, however, is noted below.

¹⁸¹ *United States v. Rodriguez*, 496 F3d 221 (2d Cir 2007).

Giglio information dictates a different timetable for its effective use in impeaching witnesses at testimonial proceedings, and the interest served by its early disclosure must be balanced against other significant interests. Those interests include the security of witnesses and confidential informants, as well as possible harm to ongoing investigations. It is firmly established that the need to protect such interests may justify postponed disclosure, and the distinction between *Brady* and *Giglio* information with regard to the timing of disclosures is well recognized.¹⁸² This distinction should be acknowledged in any balanced discussion of the issues before us.

We have concerns as well about the recommendation of a new statutory standard for *Brady* and *Giglio* disclosures that would eliminate the materiality requirement. Those joining in this response recognize and share the concerns the Task Force expresses about the difficulties of assessing the materiality of information before trial. We certainly believe that prosecutors must take a broad view of materiality, resolving questions in favor of disclosing potentially exculpatory or impeaching information. But the statutory change proposed by the Task Force raises problems that the report overlooks.

For example, the Task Force proposal requires that the prosecution turn over, within 90 days of arraignment, all information that “tends to impugn” the credibility of any prosecution witness, informant or evidence.¹⁸³ The proposed rule would treat *Giglio* information like *Brady* information, by encompassing information known to either the prosecution or the police. And it would apply without regard to materiality.¹⁸⁴

As the Court of Appeals has stated in the *Rosario* context, omissions, contrasts, and contradictions that may discredit a witness are not as readily apparent even to a judge as they are to

¹⁸² *United States v. Ruiz*, 536 US 622 (2002) (holding that a defendant has no federal right to the disclosure of *Giglio* information prior to entering a valid guilty plea and recognizing that pre-plea disclosure could expose witnesses to intimidation or harm, disrupt ongoing investigations and require the prosecution to devote substantially more resources to pre-plea trial preparation); *United States v. Frank*, 11 F. Supp. 2d 323, 323, (S.D.N.Y. 1998) (“The issue of when *Giglio* material should be disclosed, however, must be analyzed separately [from exculpatory information].”); *United States v. Dames*, 380 F. Supp. 2d 27, 272-73 (S.D.N.Y. 2005).

¹⁸³ If information known to the prosecution “significantly” impugns the credibility of an “important” witness, informant or evidence, the proposal requires disclosure within 15 days of arraignment.

¹⁸⁴ The Task Force cites to the NEW YORK STATE RULES OF PROFESSIONAL CONDUCT, Rule 3.8(b), as an example of a rule that requires disclosure of exculpatory information without regard to materiality. What the report fails to mention is that Rule 3.8(b) does not apply to impeachment information and does not hold the prosecutor responsible for information that is only in the possession of the police.

single-minded counsel for the accused.¹⁸⁵ The same, of course, holds true for a prosecutor, particularly since defense theories and evidence that might shed light on the potential utility of seemingly irrelevant information are not subject to discovery or revealed to a prosecutor before trial. This fact, adduced in support of the materiality proposal, actually highlights its pitfalls.

Has the prosecutor who turned over a witness statement as *Rosario* material shortly before trial committed a statutory “*Brady*” violation under the proposed new statute if a defense attorney can imagine some way, not perceived by the prosecutor, in which that statement “tends to impeach” a witness? Will the prosecutor then be subject to sanction or reported under the proposed violation tracking system, even if the utility of the statement on cross-examination is not impaired by the timing of the disclosure? To guard against a statutory violation and its associated repercussions, a prudent prosecutor would effectively have to engage in something close to open file discovery. For this reason, the statutory elimination of materiality would not simply be a mechanism to ensure that a prosecutor fulfills his constitutional obligations; it would in effect create a very broad, general discovery obligation tied to accelerated deadlines. And it would create such an obligation regardless of whether the other proposals made by this Task Force were enacted or rejected.

In other words, the proposed statutory standard threatens to subsume the larger discovery framework, of which it should be one component. The broad analysis of the potential costs and benefits of expanding and accelerating mandatory discovery is the mission in which this Task Force is engaged. The prospect that rules which require broad and early discovery may prevent unintentional *Brady/Giglio* violations is one factor to consider. That possibility must, however, be carefully balanced against the host of other considerations which we have detailed in this submission. We should not circumvent that analysis by statutorily eliminating the materiality standard. As the Task Force appropriately recommends, effective training and thoughtful monitoring are critical to reducing *Brady/Giglio* violations. Erecting a statutory disclosure standard that is difficult for prosecutors to meet without compromising other compelling interests is not the answer.

¹⁸⁵ *People v. Rosario*, 9 N.Y.2d 286, 290 (1961).

X. Additional Areas of Concern

There are additional Task Force recommendations that we do not support. While the primary focus of this report is on those proposals that will have the greatest impact on civilian cooperation and safety, we do not believe these other recommendations received the time and careful study they merit. To illustrate, we highlight some of these proposals and briefly address our concerns below.

Access to crime scenes and other “relevant” premises. The Task Force proposes that defendants be given court-ordered access to crime scenes and other “relevant” premises, with the right to “inspect, photograph, and measure” them, and a directive that their condition remain unchanged until such inspection takes place.

It is unclear how wide-ranging and intrusive an “inspection” might be. Putting that troubling issue aside, the proposal would plainly have a significant adverse impact on a whole range of individuals and institutions – on victims, witnesses, and other private citizens when crimes are committed in their homes or businesses, on people whose homes or businesses are somehow deemed “relevant,” on the general public when a crime has occurred on public property, and on a host of other institutions whose premises might fall within the statute’s broad ambit. It would deny people access to or use of their homes, businesses, or other premises well beyond the time required for a police investigation; it would violate the privacy of those forced to open their homes for inspection; and it would undoubtedly cause significant emotional distress, particularly to victims and witnesses. On a practical level, the proposal would require that substantial police resources be devoted to preserving crime scenes even after the completion of the necessary processing.

This proposal is a particularly striking example of the insensitivity to victims and witnesses which we believe pervades the Task Force report, and which we have noted previously. Were it to be enacted, victims who have been burglarized, robbed, raped, or otherwise violated in their homes or workplaces would lose control of their own property. They would be compelled to allow entry and inspection on behalf of the very person believed, based on legally sufficient evidence, to have committed the crime against them. While the victims would be entitled to be heard – an imposition in and of itself – their objections to this invasion of their property rights and disruption of their lives would not be controlling.

The right to enter people’s private spaces without their consent is one granted to our government only under limited circumstances, because we recognize the extraordinary intrusion it

represents. The Task Force proposal would grant that right to defendants by virtue of the fact that they have been accused of crimes, arguing that doing so will enhance fairness. The Task Force fails to make the case that this consideration outweighs the proposal's extraordinary impact on the interests of victims, witnesses, and other private citizens. What is most telling is that those interests are simply not mentioned. There could be no clearer example of the imbalance reflected in the report as a whole.

“Catch all” discovery. Discovery rules enacted by the legislature after careful study should govern all aspects of discovery. A “catch all” provision allowing discovery beyond what is contained in such carefully crafted legislation, and leaving it to the discretion of individual judges, would circumvent and undercut the legislative process. It would also introduce an unevenness from judge to judge that our system should not countenance.

Certificates of compliance. The Task Force states that its proposal to require Certificates of Compliance is designed to create a record, and to help “foster compliance” and “personal responsibility” by lawyers. Statutes are not an appropriate vehicle to foster personal responsibility. The Task Force already envisions judges taking a greater role in the discovery process. Monitoring compliance and ensuring that adequate records are made is a traditional role for a judge. The Task Force states “emphatically” that the purpose of its proposed requirement is not to spawn litigation. This is unrealistic. It will inevitably spawn litigation, and there is no valid reason for its adoption.

Requiring discovery to be automatic. As noted earlier, the Task Force proposals call for sweeping changes that, if adopted by the legislature, will have a profound impact on law enforcement and prosecutorial resources. Eliminating demands will exacerbate these challenges. Under the current statute, a defendant has up to 30 days from arraignment to file a demand, the prosecutor has 15 days to respond, and the materials that must be provided to the defense are more limited than those that the Task Force proposals would require. Prosecutors with heavy caseloads may be assigned multiple cases on any given day. For them, even now, a requirement that discovery be initiated through demands is critical to their ability to manage their caseloads, since demands in some cases may not come at all, and demands in others are spread over a 30-day period. The demand requirement will become still more important if discovery obligations are expanded.

Subpoena law. The Task Force recommends eliminating the requirement that prosecutors be served with defense subpoenas directed to governmental agencies. The report suggests that the one-

day notice to the prosecutor that is now required can lead to evidence being permanently lost. It is hard to imagine that such a minimal delay is a significant concern. What is significant, however, is that a government agency may not be aware that subpoenaed reports in its possession contain information that may compromise a civilian witness's safety or privacy, or reveal an ongoing investigation. The prosecution must be made aware of the intended service of the subpoena to ensure that such concerns are brought to the attention of the issuing court and the government agency.

XI. Appropriate Areas for Legislative Change

There are persuasive reasons to consider some changes to our discovery laws. While we have expressed our grave concerns with the central proposals made by this Task Force, as well as the process by which it has come to its findings and recommendations, we support a number of the Task Force proposals.

(a.) *Reforms to CPL §710.30:* We agree with all the recommendations proposed by the Task Force with regard to amending CPL §710.30, with one important caveat. We note that the initial recommendation of the subcommittee that examined this area was that, in the case of a notice violation, the law should impose “remedies” for harm actually done and not “sanctions” on the prosecution. Subsequently, the recommendation was changed so that a violation would result in preclusion if the prosecutor failed to act with “due diligence.”

We object to the newly proposed standard. Preclusion of evidence, with its negative impact on the fact finder's ability to determine the truth, should be the ultimate sanction, reserved for constitutional violations and intended to deter gross misconduct.

Related to this issue is the fact that the proposed changes to CPL §710.30 add two new areas of discovery under that section – physical evidence and photo arrays. We had no objection to adding these areas under the earlier proposal, but the specter of seeing more probative evidence precluded from use without consideration of harm and alternative remedies – in effect suppressed – because of a discovery error should be disturbing to all members of this Task Force. If the Task Force proposes preclusion as the sanction for a failure to exercise due diligence in providing 710.30 notice, we oppose adding any new discovery obligations to that section.

(b.) *Additional Discovery under CPL §240.20*: We agree, in principle,¹⁸⁶ with the Task Force that the following proposed areas are appropriate for additional discovery under CPL §240.20:

1. Tangible property that the People intend to introduce in its case in chief.
2. Expert opinion evidence.
3. Tangible property that was in the possession or believed to be in the possession or control of the defendant during the alleged commission of the crime (see CPL §710.30 discussion).
4. Search warrants and related documents (subject to redactions at the discretion of the prosecutor).
5. Photo array information (see CPL §710.30 discussion).

(c.) *Witness Criminal History Information*: The Task Force correctly points out that while CPL §240.45 requires the prosecutor to make available the known criminal history information of the prosecution witnesses, it does not require the prosecutor to run a criminal record search on its civilian witnesses. We support a recommendation that the prosecutor be required to do so¹⁸⁷ and to provide that history to the defendant, along with the histories of the defendant and any co-defendant, in accordance with the provisions of CPL §240.45.

(d.) *Improving the Flow of Information between Law Enforcement and Prosecutors*: We agree with all of the Task Force recommendations for improving the flow of information between law enforcement agencies and prosecutors.

(e.) *Earlier Production of Rosario Material*: Perhaps the best example of an area in which change could be considered involves *Rosario* material. As noted previously, current rules call for providing *Rosario* material to the defense, at pretrial hearings, after the witness has completed direct testimony, and at trial, before opening statements. While prosecutors often turn this material over sooner, this Task Force might well have focused its efforts on finding ways to provide for somewhat earlier *Rosario* disclosure, prior to hearing and trial, had it been more cognizant of the need to balance defense discovery objectives with the other compelling interests outlined in this report. Described below are two areas that merit consideration.

¹⁸⁶ While we agree in principle that these are areas where additional discovery is reasonable, more time would be required to examine the sample statutory language and specifics of the recommendations set forth in the Task Force proposal.

¹⁸⁷ The prosecution would be required to check for a criminal record using the name and date of birth of the witness, but we would object to any proposal that would require the fingerprinting of prosecution witnesses.

In the federal system, the *Rosario* equivalent is known as Jencks or 3500 material. The federal discovery rules call for disclosure of that material after the direct examination of the witness, which is later than what is called for under New York's discovery laws. In the federal system, however, prosecutors routinely turn over 3500 material earlier than the statute requires, and judges are often directly involved in facilitating that process. In contrast, state court judges have traditionally taken a more passive role in such matters. As the Task Force recommended in the *Brady* context, there is room for a greater judicial role in this area.

The Uniform Rules of Criminal Court, specifically Rule 200.12, already contemplate conferences to discuss matters such as discovery, motions, and trial dates, a tool that is rarely used. Rule 200.12 also permits the court to schedule additional conferences. Consideration should be given to requiring that judges order pre-trial conferences when motion practice has been concluded, decisions rendered, and the possibility of a plea bargain fully explored, since at that point they can fix a date for hearing and trial. At that conference, the court can set a date for the production of *Rosario* material, taking into account any concerns raised by either party. In our view, the date should be no more than 10 days before trial except in cases of unusual complexity and involving voluminous *Rosario* material.¹⁸⁸

There may be other opportunities to allow discovery of *Rosario* material to take place even earlier, in contexts that would not involve compromising civilian cooperation and safety. For example, a substantial percentage of criminal cases, like street-level narcotics "buy and bust" and "observation sale" cases, involve only police witnesses. Early disclosure of the *Rosario* material of police witnesses in these cases – specifically those who testified in the grand jury and are likely to be hearing or trial witnesses – may be possible without substantial countervailing costs. This

¹⁸⁸ When this suggestion was raised at a Task Force meeting, it was never properly explored, ostensibly because, in contrast to the federal system, trial dates are rarely "certain" in state court. This was hardly a reason not to discuss the idea fully. Judges should certainly take into account the likelihood of a plea bargain and the prospective readiness of the parties in determining the timing of *Rosario* disclosures. Even so, there would no doubt be instances where *Rosario* was turned over in advance of a trial date that was subsequently adjourned. That said, at least this proposal involves a point relatively late in the criminal proceeding, when the prosecution is in a far better position to assess such concerns as witness safety than at the inception of a case. A proposal along these lines must also permit the prosecution to redact *Rosario* material in advance of trial provided the defendant is given the opportunity, upon motion, to challenge any redactions. In determining the appropriateness of any redactions, upon a defense challenge, the court should consider those factors outlined in CPL §240.50 as well as any expressed concerns of a witness regarding the disclosure of information that might reveal his identity prior to trial.

unexamined possibility represents another potential reform that should have been explored by this Task Force.

XII. Conclusion

The New York State Bar Association Discovery Task Force was formed in order to examine and consider changes to the state's discovery laws. That endeavor requires a careful and delicate balancing of conflicting interests. But since its very formation, the Task Force has seemed singularly focused on the objective of mandating the earliest and broadest possible disclosure of information from the prosecution to the defense. Some of its members appeared convinced that the radical restructuring such a mandate entails should be our goal before undertaking the objective investigation and analysis essential to arrive at that conclusion. In fact, as we argue above, that investigation and analysis have never been properly conducted.

As we have explained, we believe that the Task Force has not adequately considered the practical impact of its proposals, which would exact a potentially unsustainable toll in money and resources. That failure is serious. But what is most troubling is its failure to weigh appropriately the effect its proposals would have on those caught up in the criminal justice system as victims, witnesses, or "persons with relevant evidence or information." As one court has noted, "The government chooses to be a litigant in each case it prosecutes, and the defendant is permissibly forced into that role upon a showing of probable cause. But individuals covered by the Crime Victims' Rights Act have done nothing that warrants intrusion into their lives...."¹⁸⁹ The same may be said of the much broader range of private citizens whose privacy, safety, and peace of mind would be deeply affected by the proposals this Task Force has put forth.

Ultimately, of course, to the extent that our discovery laws discourage citizens from cooperating in the investigation and prosecution of crime, they will compromise the ability of our courts to ensure justice, and the safety of us all. For that reason, it is critical to strike the appropriate balance between the valid concerns of the defense and the myriad other considerations we have detailed above. We believe strongly that the proposals advanced by this Task Force fail to do so. Accordingly, we respectfully submit this response.

¹⁸⁹ *United States v. Turner*, 367 F. Supp. 2d 319, 328 (E.D.N.Y. 2005).

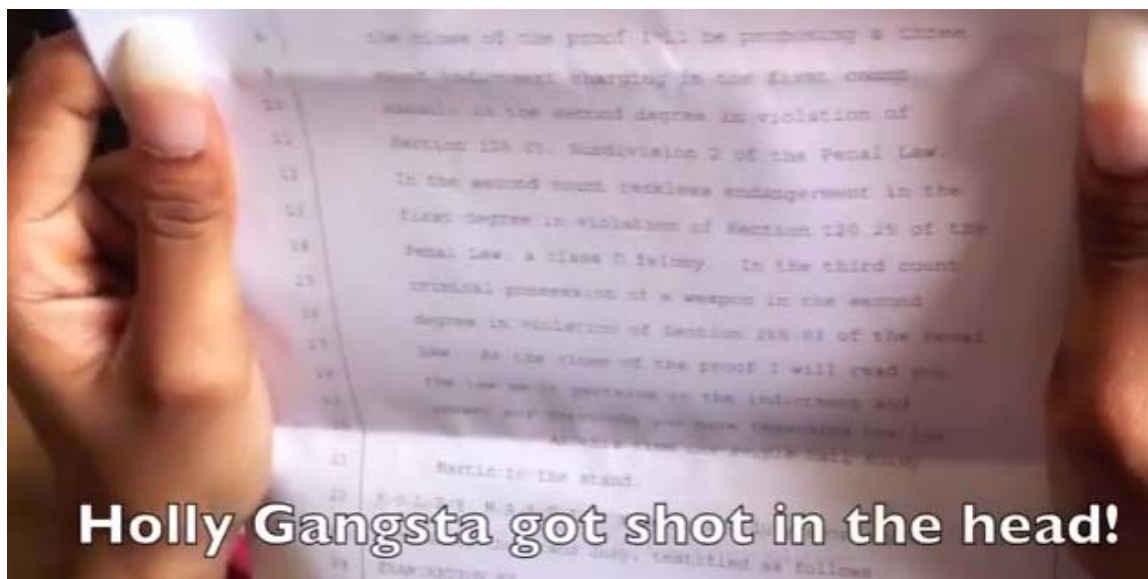
Exhibit for Response to Majority's Report

The following sampling of webpages illustrates the impact of the Internet on the issues under consideration by this Task Force. The Internet and social media have made it possible to identify witnesses worldwide, to disseminate their personal information, to threaten and intimidate them, to use criminal discovery material as proof of their cooperation, and to discourage others from cooperating. And they are increasingly being used for that purpose.

1. **[“Keep it gutta presents...Holly Gangsta Grand jury minutes \(official paper work\) part 1”](http://www.youtube.com/watch?v=t8972Z4ZTrk)**

<http://www.youtube.com/watch?v=t8972Z4ZTrk>

YouTube video in which Grand Jury minutes are read out loud by the older brother and female friend of the defendant. The video then posts a caption claiming that the Grand Jury witness “got shot in the head!” This video has 1,500 views on YouTube.



2. “Snitches R Us”

<https://www.facebook.com/pages/Snitches-R-Us/495882637108713>

Facebook group dedicated to exposing “snitches” by posting their photos and personal information. The group also posts threatening status updates, and warnings related to “snitching” like those pictured below.



3. **“ricky kelly aka r-kelly of louisville,ky snitching in court on his partners "derek,big mark"tarc" n”**

<http://www.youtube.com/watch?v=Ys6CGBTgcJY> (Part 1)

XIII. **“ricky kelly aka r-kelly snitching PART2, PART 3-4 is coming of him snitching on lil fred n jimmy jay”**

http://www.youtube.com/watch?v=DUMD24_jcvA (Part 2)

A two-part YouTube video series of a confidential informant testifying in a narcotics-related trial. These two videos combined have over 20,500 views.



4. **“Snitches get stiches”**

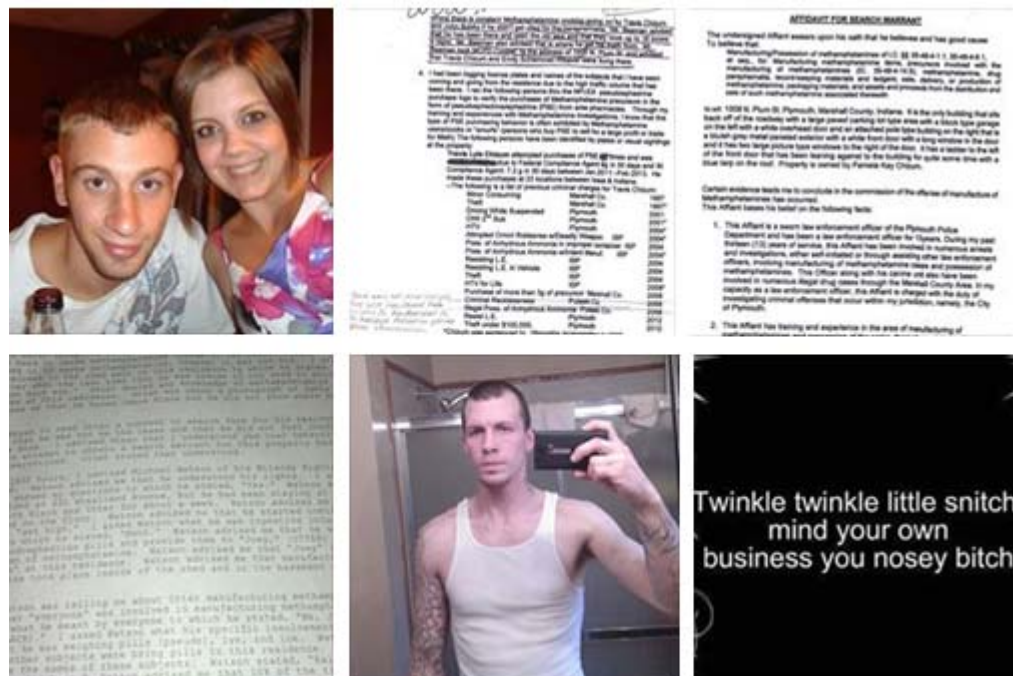
<https://www.facebook.com/Snitches-get-stiches/129851527059369>

Facebook group that posts photos of “snitches” and “rats,” along with “status updates.”



5. **“Indiana Snitch Watch”**
<https://www.facebook.com/indianasnitchwatch>

Facebook group dedicated to informing its members of the identities of “snitches” by posting their photos and court/police document images.





6. “snitches get beat up”
<http://www.youtube.com/watch?v=4JWSUxwB86k>

YouTube video of a teenage boy getting jumped at school by two classmates for being a “snitch.” The video has almost 2,700 views.



71littlefield 1 year ago
 if he snitched then thats what he gets...

7. **[“HORRIBLE! Gang Of Violent Hoodlums Brutally Confront Thug For Snitching”](http://www.youtube.com/watch?v=E2IWNW9BDc4)**
<http://www.youtube.com/watch?v=E2IWNW9BDc4>

YouTube video depicting young male being beaten up for “snitching.” This video has over 1,300 views.



8. **[“Informant Tracking”](http://earthfirstjournal.org/newswire/informant-tracking/)**
<http://earthfirstjournal.org/newswire/informant-tracking/>

Keeps you up-to-date on the “whereabouts and status of informants and ‘snitches’ who are cooperating with, or working for, the State in effort to monitor and/or repress ecological resistance movements.” We have highlighted below the type of detailed personal information websites like this disseminate.

Currently Walking Free:

Justin Clayton Samuel (DOB: Dec. 31, 1978) of Snohomish, Washington; Height: 6' 0". Weight: ~165 lbs. Hair: brown. Eyes: hazel. Race: white

Informant Status: Testified against Peter Young in charges related to cutting fences and liberating mink from a series of fur farms in October 1997.

He was sentenced to two years in federal prison plus a year supervised release and ordered to pay \$364,106 in restitution in exchange for his cooperation.

Current Information: He was released on 11-28-2001. As of 2010, he had gone into the computer security field, working for Firefox, and was a PhD student at UC Berkeley. His school department profile: www.eecs.berkeley.edu/~jsamuel His twitter: <http://twitter.com/#!/jstnsm1>

Currently Serving Time:

Briana Waters (DOB: ~1975), formerly of Oakland, California

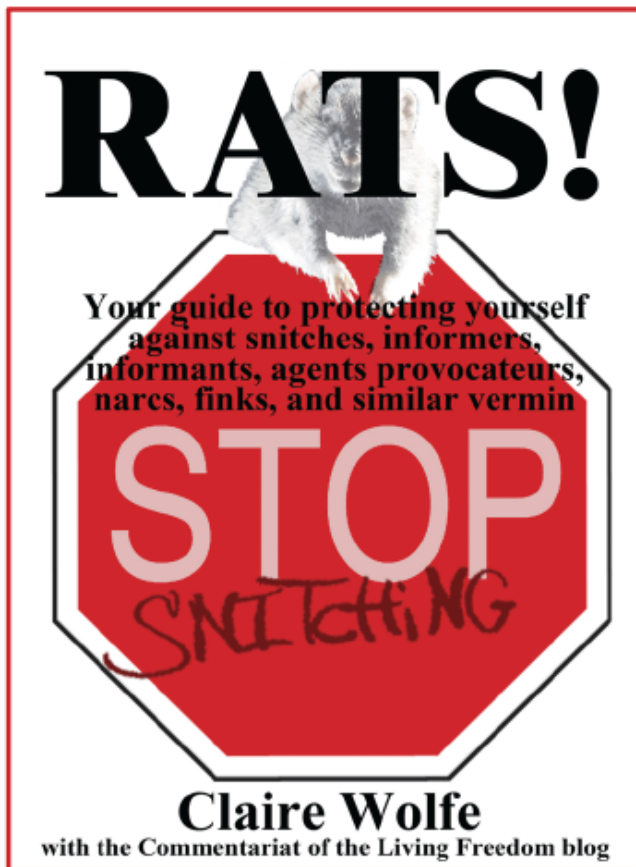
Informant status: Sadly, this former non-cooperating ELF prisoner, took a cooperating plea deal in the prosecution of two 2001 ELF acts of arson. She had been released earlier this year after a mistrial and is expected to testify against former boyfriend Justin Solondz, who was captured as a fugitive in China, is now in US custody for alleged ELF activity.

Current Information: She has a young daughter and was working as a violin teacher prior to arrest. As of December 2012, she is in a halfway house in Sacramento, CA scheduled for release on 06-27-2013.



9. **“RATS! STOP SNITCHING: Your guide to protecting yourself against snitches, informers, informants, agents, provocateurs, narc, finks, and similar vermin”**
<http://rats-nosnitch.com/rats.pdf>

A 71-page guide discussing how to recognize and avoid “snitches,” what to do when you uncover a “snitch,” and what happens when you get busted by a “snitch.”



How do YOU treat an exposed snitch?

Spread the word. Use social networks both online and in the real world to notify others that the person is an informant. Be as factual and give as much evidence as possible. (There is even a website that contains a national database of known rats, but since it's a paid membership site, we're not recommending it here. Do a [Startpage.com](http://www.startpage.com) or

10. “Uncle Murda - Please Don't Snitch”

http://www.youtube.com/watch?v=pLbupqP7A_8

YouTube rap music video about “snitching.” This video has over 110,000 views and discusses the consequences of “snitching.”

Lyric examples:

“Talkin’ to the po’ po’. I’m a pop him in his head, tell him that’s a no no”.

“Know if they snitchin’, not just you, your whole family gon’ get it”



11. **“Get That Snitch”**

<http://www.youtube.com/watch?v=SFxxWQTjhnk>

YouTube rap music video about “snitching.” This video has almost 214,000 views and discusses the consequences of “snitching.”

Lyric examples:

“you wanna tell tell, midnight you’ll be swimming with the seashells”

“Get that snitch, get the strap, don’t give a fu*k, pop pop pop”

“Boom boom boom boom let a snitch know” (with gunshots in the background)



12. **“SnitchWire”**

<http://snitchwire.blogspot.com/>

This blog exists for the purpose of “investigating and objectively reporting on the existence and actions of known informants, infiltrators, rats, snitches, and provocateurs.”



13. “Who’s a Rat?”

<http://www.whosarat.com/>

The “largest online database” revealing information on more than 5,500 informants and undercover law enforcement agents, as well as court documents of plea deals that informants received (membership needed).



rats of the **week**



Kevin Novosel
Kansas City
Kansas, USA.
[+ View Profile](#)



jason sykes
watonga
oklahoma, USA.
[+ View Profile](#)



GAYLE KORUM
BEAVERTON
OREGON, USA.
[+ View Profile](#)

- [+ VISIT OUR STORE](#)
- [+ REFER A LAWYER](#)
- [+ AFFILIATES](#)
- [+ LINK TO US](#)
- [+ LATEST NEWS](#)
- [+ TOP SECRET DOCUMENTS](#)
- [+ MAKE A DONATION](#)
- [+ IMPORTANT CASE LAW](#)
- [+ MEMBERS LOGIN](#)
- [+ FEEDBACK](#)
- [+ MESSAGE BOARD](#)
- [+ LEGAL INFORMATION](#)

Total Profiles - 5690
Informant - 5213
Agent Profiles - 477

MAJORITY’S REPLY TO THE TASK FORCE DISSENTERS

The “response” to this Task Force’s report raises apocalyptic predictions of the collapse of the criminal justice system, victims and witnesses no longer reporting crimes, and blood flowing in the streets – all if New York simply joins the national mainstream and adopts criminal discovery rules like those used in most other States.

Yet the response offers no explanation for why, if expanded discovery is really so unworkable and dangerous, conservative States such as Texas (2014) and North Carolina (2004) have recently decided to enact broad discovery systems; why Ohio, which already had fairly broad discovery, recently made its procedures even more broad (2010); or why, if giving discovery of witnesses removes what the dissenters call prosecutors’ “most powerful tool,”¹⁹⁰ legislatures around the country are not scrambling to repeal their statutes (to date, none have).

Likewise, the response fails to explain how, if broad discovery is too administratively burdensome and jeopardizes “society’s ability to solve crimes in the first place,”¹⁹¹ some of the largest counties in this State, such as Kings County (Brooklyn), have managed to voluntarily turn over “open file” discovery for decades.

The dissenters simply cannot avoid the inescapable fact that, far from being “extreme,”¹⁹² the Task Force’s recommendations are time-tested and represent the mainstream of State criminal practice in the nation. Furthermore, the Task Force’s proposals are balanced and cautious, since they go beyond other States with measures to ensure the reforms would be achievable (including a calibrated, two-stage discovery time frame) and provide a range of options for prosecutors and courts to protect witnesses as necessary (including several flexible alternative procedures that a prosecutor may choose to employ that are not part of most States’ discovery statutes).¹⁹³

¹⁹⁰ Response, section IV, p. 87 (commenting that: “The most powerful tool a prosecutor has is . . . the ability to explain to a witness that grand jury proceedings are secret, and that no one will know of his cooperation unless and until there is a trial”).

¹⁹¹ Response, section IV, p. 87; section VII, pp. 98-100.

¹⁹² Response, section I, p. 77.

¹⁹³ See Task Force Report, II-D, pp. 31-36; II-A-2, pp. 15-21.

Given the commonplace nature of the Task Force’s major recommendations, it is not surprising that the dissenters couch many of their objections in the form of a call for further “study” and claim the Task Force did not adequately examine the issues.¹⁹⁴ The well-known quip about lawyers attacking the *process* when they cannot convincingly argue the *merits* applies to the response’s efforts. But the dissenters’ claims regarding both the process and the substance of our report are wrong. We will now address them.

(1.) *The Task Force’s Process Was Thorough:* The Task Force Subcommittee that drafted our statutory reform recommendations constantly took into consideration the views of leading practitioners from other States, both during its meetings and outside of them. (We respectfully note that, of the three authors of the response, the one who served on that principal Task Force Subcommittee failed to attend some of its key meetings; thus, he may be unaware of the range and contents of our deliberations.) Subcommittee members have been among the leaders of the current debate over discovery reform in New York State. They have widely participated in forums on the subject for years, and have heard presentations and testimony from experts and practitioners from around the country.

In particular, the Subcommittee considered and relied on statements made by several prominent out-of-state District Attorneys, who strongly denied that there are unmanageable witness safety problems as a result of broad discovery and confirmed that they do in fact have the tools to protect witnesses. These sources included the District Attorney of Suffolk County, Massachusetts (Boston), who explained to an audience of New York criminal law practitioners on September 21, 2012, that his prosecutors are able to safeguard witnesses and that their broad discovery system works; the elected District Attorneys from jurisdictions including Dallas, Milwaukee, St. Paul and Dayton, who each told an audience in New York City, on November 15, 2009, that they had the means to successfully protect witnesses and supported early and liberal discovery; and many other out-of-state practitioners, including judges, prosecutors, and defense lawyers who practice in both State and Federal courts.¹⁹⁵

¹⁹⁴ Response, section I, p. 76; section V, pp. 90-95; section XII, p. 110.

¹⁹⁵ For instance, a Wisconsin State Public Defender who described in detail that State’s procedures for issuance and implementation of protective orders was the source for the Task Force’s recommendation regarding a procedure for restricting disclosure of *physical copies* of discovery materials to the defendant in appropriate cases, when the defendant is afforded reasonable access to inspect (not obtain copies of) redacted versions at a supervised location such as a prosecutor’s office, police station, facility of detention or court.

Likewise, the Task Force examined the discovery rules used in every State and in the Federal system, as well as the one-directional history of legislatures broadening and accelerating discovery nationwide. Task Force members also looked at the surrounding context of States' criminal procedure laws beyond just discovery statutes; that is how we learned, for example, that disclosure of witnesses' names and addresses is even more common than we had previously believed, since in many States this requirement is contained in other parts of their procedure codes, outside of the discovery articles.¹⁹⁶ We saw no reason to discuss the discovery rules used in the Federal courts as part of our report,¹⁹⁷ simply because that restrictive system closely resembles New York's current regime which we believe is fundamentally flawed.

The response also wrongly claims that the Task Force failed in its promise to provide members with "selected statutes cited with approval . . . so that we could dig deeply into their impact and implementation."¹⁹⁸ The Task Force Subcommittee that drafted our statutory reform recommendations did, in fact, have access to a 206-page compendium of other States' discovery rules, which was made available to each of its participants from the outset (in fact, prior to the Subcommittee's first meeting).¹⁹⁹ In any event, every State's discovery statute is readily available online, so there was never an impediment to reviewing them.

While this State Public Defender described that the procedure is used in appropriate cases in Wisconsin as a matter of practice, the Task Force has recommended that the option be highlighted as part of the protective order provision in New York's discovery statute. See NYSBA Report, section II-A-2-i, p. 16 & n.29.

¹⁹⁶ See Task Force Report, II-A-1, pp. 9-10 & n.17.

¹⁹⁷ See Response, section V, p. 91 (commenting that: "The federal system has discovery rules almost identical to the laws of New York State. . . . It is thus troubling that the Task Force gives federal discovery procedures no attention at all").

¹⁹⁸ Response, section V, p. 91.

¹⁹⁹ See "Some Materials Criminal Discovery Practice and Procedures in Other States: Assembled for NYSBA's Task Force on Criminal Discovery", dated October 17, 2012 (202 pages, including: [i.] Prof. Wayne R. LaFave's overview of nationwide discovery rules, excerpted from his treatise *Criminal Procedure* [Nov. 2011]; [ii.] the full criminal discovery statutes, and summarizes of their highlights, of Massachusetts, Arizona, California, Colorado, Florida, Illinois, Michigan, Minnesota, New Jersey, North Carolina, Pennsylvania; [iii.] the American Bar Association's discovery standards; [iv.] the National Prosecution Standards for discovery; and [v.] the 2010 version of The Legal Aid Society's discovery reform proposal). Notably, the drafter of the Response who served on that Subcommittee made no request for them at the time. The dissenters' complaint is, instead, raised a year-and-a-half later simply to cast doubt on recommendations they dislike.

The response further protests that it is “difficult to believe” that there is not more “current, relevant literature available” on the effects of expanding criminal discovery.²⁰⁰ But surely the dissenters themselves would have found and mentioned such studies, if they existed. We think they do not.²⁰¹ A likely explanation is that, since all large States have already adopted broad discovery systems (except New York and Virginia), it is no longer perceived in the academic and professional communities as a subject needing further study, especially since most of these States adopted their discovery rules decades ago. There is certainly no literature advocating a counter-movement towards more limited discovery.

Within the past decade, the legislatures in North Carolina, Ohio, and Texas each closely examined criminal discovery reform and broadened their discovery systems. Evidently they were satisfied with the track record of experience with open discovery in other States. As Governor Rick Perry of Texas declared when signing into law that State’s expanded criminal discovery rules in 2013: “Texas is a law-and-order state, and with that tradition comes a responsibility to make our judicial process as transparent and open as possible. [The new discovery bill] helps serve that cause, making our system fairer and helping prevent wrongful convictions and penalties harsher than what is warranted by the facts.”²⁰² This Task Force urges New York’s legislators to follow course, and to also enact these well-established and highly beneficial reforms.

(2.) *The Warnings of “Devastating” Results Are Baseless:* The response would have us believe that where discovery is broadened, chaos ensues.²⁰³ The dissenters paint a bleak

²⁰⁰ Response, section V, p. 92.

²⁰¹ See, e.g., Janet Moore, “Democracy and Criminal Discovery Reform After *Connick* and *Garcetti*,” 77 Brook. L. Rev. 1329, 1373 (2012) (“Full open file discovery reform also has received little scholarly attention”); cf. *id.* at 1383 (providing additional anecdotal support for open file discovery based on the author’s interviews with North Carolina practitioners, including the Chief Resource Prosecutor of the North Carolina Conference of District Attorneys, and summarizing them as follows: “Observations from those involved with training and implementation indicate that after initial resistance, primarily from some of the more experienced prosecutors and law enforcement officers, full open file reform is finding increasingly broad acceptance”).

²⁰² Press Release, Office of Governor Rick Perry, “Gov. Perry Signs Senate Bill 1611, The Michael Morton Act,” 5/16/13 (available at: <http://governor.state.tx.us/news/press-release/18521/>); see also Chuck Lindell, “Perry signs Morton Act into Law,” *AUSTIN AMERICAN-STATESMAN*, 5/16/13.

²⁰³ See, e.g., Response, section I, p. 76 (“a potentially devastating impact on our ability to secure the cooperation of civilian witnesses and ensure their safety”); section IV, p. 87 (“it is not only ongoing prosecutions that will be affected; it is society’s ability to solve crimes in the first place”); section IV, p. 88 (“Under the Task Force’s scheme, it is hard to imagine that anyone from any neighborhood, testifying in any

picture of jurisdictions with broad discovery descending into turmoil, and they quote some alarming newspaper articles on crime problems in selected areas.²⁰⁴ But even in the areas they focus on, the picture they present is misleading.

For instance, one would never guess from the dissenters' response that in the broad-discovery State of New Jersey, violent crime actually decreased by 9% from 2003 to 2007 (*i.e.*, the year of the articles they cite), then decreased again by 9% from 2008 to 2012; and overall crime decreased by 20% in the same ten-year period.²⁰⁵ Nor would one guess that in the broad-discovery State of Pennsylvania, violent crime decreased by 10% from 2007 to 2012 (the last year for which detailed statistics are available as of this writing).²⁰⁶ In North Carolina, which passed the broadest "open file" criminal discovery statute in the nation in 2004, there was a 17.6% drop in overall crime from 2004 to 2012, and a 19.7% drop in violent crime.²⁰⁷ The response's warnings of a "devastating" impact on crime control if a State provides greater discovery are simply not borne out.²⁰⁸

Interestingly, neither the many newspaper articles cited in the response (including the series the dissenters describe as "required reading"), nor the National Center for Victims of Crimes study upon which they rely, calls for rolling back or repealing any criminal discovery statutes.²⁰⁹ They instead highlight that the problems of witness cooperation have complex roots, including in historically poor police-community relations.²¹⁰

Likewise, an exhaustive 2013 report on witness intimidation in Philadelphia by Pennsylvania's Joint State Government Commission actually urged prosecutors to provide

case, would feel secure in stepping forward as a witness"); section XII, p. 110 ("they will compromise the ability of our courts to ensure justice, and the safety of us all").

²⁰⁴ See Response, section V, pp. 92-94.

²⁰⁵ See <http://www.njsp.org/info/stats.html> (2012 Uniform Crime Report, p. 16; and 2007 Uniform Crime Report, p. 16).

²⁰⁶ See <http://www.paucrs.pa.gov/UCR/Reporting/Annual/AnnualSumArrestUI.asp>; and <http://www.paucrs.pa.gov/UCR/Reporting/Annual/AnnualFrames.asp?year=2012> (under "Violent Crimes" and "Five-Year % Change").

²⁰⁷ See <http://www.ncdoj.gov/crime/view-crime-statistics.aspx> ("2012 Crime Statistics" and "2004 Crime Statistics").

²⁰⁸ Response, section I, p. 76.

²⁰⁹ See Response, section IV, p. 87-90; section V, pp. 93-94 & n.165.

²¹⁰ See http://www.nytimes.com/2007/12/30/nyregion/30witness.html?pagewanted=all&_r=0, cited in Response, section V, p. 94, n.165.

discovery *even earlier* than they currently do. Not a single member of the Commission (in either the majority or the dissenting statements) found fault with the State’s discovery statutes or advocated changing the discovery rules in any way. Quite simply, the claims that early and broad discovery is to blame for problems with intimidation of witnesses in Philadelphia have been authoritatively rejected.²¹¹

Similarly, the “Exhibit” that the dissenters have assembled quotes from several webpages that supposedly document a “growing” anti-snitching culture.²¹² But these webpages actually support the Task Force’s conclusion that problems of witness intimidation are mostly related to gangs (albeit some of the lyrics quoted in the Exhibit actually were written by comedy writer Mikis Michaelides, not by real gang members).²¹³ The Exhibit examples, moreover, focus on criminal defendants who have entered cooperation agreements, and include writings by fringe political groups such as environmental activists engaging in industrial sabotage. These situations are troublesome, but concentrated in particular types of cases where the need for protective orders is obvious and their issuance would be routine. The Task Force’s recommendations make protective orders to limit or withhold discovery in gang, confidential informant, and other appropriate cases readily obtainable.²¹⁴

The Task Force has agreed, throughout our Report, that concerns about witness safety are vitally important. We discuss the topic at greater length than any other. We call for the enactment of alternative procedures well beyond those used in other States that would give courts, prosecutors, and defense lawyers various choices and tools to help “to protect the witnesses upon whom the system depends and to whom it must afford security.”²¹⁵ As for the

²¹¹ See Joint State Government Commission, “Report of the Advisory Committee on the Criminal Justice System in Philadelphia” (January 2013), p. 13 (the report’s sole recommendation involving discovery states: “To the extent possible, the District Attorney should provide electronic discovery to defense counsel as early as possible to aid in an appropriate resolution of each case. Providing a copy of the police (PARS) report in advance of arraignment will also aid in the efficient and appropriate resolution of cases”). Report available at: <http://jsg.legis.state.pa.us/resources/documents/ftp/publications/2013-290-SR%20344%20Report%20-%20Final.pdf>.

²¹² Response, section IV, p. 86.

²¹³ Response, Exhibit p. 119 (#11).

²¹⁴ See Task Force Report, II-A-2, pp. 15-20.

²¹⁵ See Task Force Report, Introduction, p. 1; II-A, pp. 9-20.

response’s denunciation that “[t]he Task Force has given no consideration to the effect its proposal will have on witness cooperation”²¹⁶ – that claim is simply wrong, since these issues plainly occupied the bulk of the Task Force’s deliberations.

(3.) *The Dissenters Fundamentally Oppose Meaningful Discovery Reform*: Perhaps the most striking feature of the response is its categorical insistence that discovery of written or recorded witness statements (“*Rosario* material”) should only occur after “the possibility of a plea bargain [has been] fully explored” and in any event “no more than 10 days before trial” (with the exact time to be determined by the judge).²¹⁷

The dissenters explain that only such a minor change in New York’s current discovery rules for witness statements is needed, because it is an “obvious fact that a defendant himself knows whether he committed the crime of which he is accused” and so he “does not need police paperwork, witness statements or contact information at the earliest stage of the proceedings to decide whether he is factually guilty.”²¹⁸ In their view, the only rationale for providing early discovery would be to help the defendant gauge “the strength of the prosecution’s case, and therefore how likely it is that he can ‘beat’ the charges despite his factual guilt.”²¹⁹

This stance is embarrassingly simplistic. For one thing, the dissenters seem oblivious to the plight of innocent or overcharged defendants – who must conduct early investigations if they hope to secure exculpatory evidence and witnesses, and who must make rational decisions about plea offers given what are often enormous sentencing ranges. The dissenters seem equally oblivious to the Supreme Court’s recent reminder that the system has been transformed in recent decades from “a system of trials” into a “system of pleas,” and the Court’s insistence that defense lawyers have “the critical obligation . . . to advise the client of

²¹⁶ Response, section IV, p. 86.

²¹⁷ Response, section XI-e, p. 108; section VIII, p. 102. The only qualifications the dissenters acknowledge with respect to their “10 days before trial” when “a plea bargain has been fully explored” counterproposal are: (1.) “cases of unusual complexity and involving voluminous *Rosario* material,” and (2.) their uncertain remark that it “may be possible without substantial countervailing costs” to provide earlier disclosure in “street-level narcotics ‘buy and bust’ and ‘observation sale’ cases [that] involve only police witnesses.” See Response, section XI-e, pp. 108-109.

²¹⁸ Response, section VIII, p. 101-102.

²¹⁹ Response, section VIII, pp. 101-102.

‘the advantages and disadvantages of a plea agreement.’”²²⁰ As we have explained in our report, without discovery defense lawyers are frequently unable to give any informed advice about the advantages and disadvantages of a plea, beyond warnings about sentencing ranges.²²¹

The dissenters’ reasoning becomes most confused when they try to distinguish between “trial confrontation rights” and “other discovery considerations that do not touch on constitutionally protected interests.”²²² Numerous decisions have held that the constitutional right to the assistance of counsel includes not only the lawyer’s duty to give meaningful plea advice, but also the duty “to conduct a prompt investigation of the circumstances of the case and to explore all avenues leading to facts relevant to the merits.”²²³ Without access to any written and recorded witness statements, how can defense lawyers possibly satisfy these constitutional duties and how can innocent or overcharged defendants receive justice?²²⁴

The dissenters’ naïve assumption that defendants “know” when they are guilty, and that early discovery of witness statements would merely let defendants “beat” convictions, also overlooks the vast category of cases where assessing “guilt” is unclear and where

²²⁰ See *Padilla v. Kentucky*, 559 U.S. 356, 370 (2010) (stressing “the critical obligation of counsel to advise the client of ‘the advantages and disadvantages of a plea agreement’”); *Lafler v. Cooper*, 132 S. Ct. 1376, 1388 (2012) (“the right to adequate assistance of counsel cannot be defined or enforced without taking account of the central role plea bargaining plays. . . .”); *Missouri v. Frye*, 132 S.Ct. 1399, 1407 (2012) (“plea bargaining . . . is not some adjunct to the criminal justice system; it is the criminal justice system”) (emphasis in original).

²²¹ See Task Force Report, II-A-1, pp. 9-11.

²²² Response, section VIII, pp. 101-102; section I, p. 77.

²²³ *Rompilla v. Beard*, 545 U.S. 374, 387 (2005); accord, e.g., *Strickland v. Washington*, 466 U.S. 668, 691 (1984) (“counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary”); *People v. Oliveras*, 21 N.Y.3d 339, 348 (2013) (“Trial counsel did not fully investigate the case and did not collect the type of information that a lawyer would need in order to determine the best course of action for his or her client”); *People v. Bennett*, 29 N.Y.2d 462, 466 (1972) (“the defendant’s right to representation does entitle him to have counsel conduct appropriate investigations, both factual and legal, to determine if matters of defense can be developed”).

²²⁴ What the dissenters do not seem to appreciate is that, while the “Rosario rule” itself is not a constitutional right, it makes the constitutional right of confrontation meaningful. See *People v. Rosario*, 9 N.Y.2d 286, 289 (1961) (creating this rule based on “a right sense of justice”). In the same way, while improving pre-plea discovery is not itself a constitutional command, it would result in improved fairness and reliability and make the constitutional right to assistance of counsel meaningful both in terms of (1.) the duty to investigate the case, and (2.) “the critical obligation of counsel to advise the client of ‘the advantages and disadvantages of a plea.’” See *Padilla v. Kentucky*, 559 U.S. 356, 370 (2010); *Strickland v. Washington*, 466 U.S. 668, 691 (1984). Since all these discovery rules further constitutional interests, the distinction the dissenters insist on is without legal basis.

providing informed legal advice requires evaluating what witnesses have said. Why should a defendant who is charged with participating in a confusing fight and honestly believes that he acted in “self-defense” (a nuanced and complicated legal issue) have to make a final decision about pleading guilty with no awareness of what other witness would say about the incident? Why should a defendant who may have an “agency” defense to a drug sale charge have to decide whether this complicated defense is viable without knowing any of the evidence? What should a defendant who was so intoxicated that he honestly cannot remember much of what happened do about a plea offer, when he may or may not be guilty but does not know? What advice can a defense lawyer give a client whose serious mental impairments make it difficult for the lawyer to assess the validity of information her own client has provided, without knowing what other witnesses have said? And most importantly of all, what about the defendant who is completely innocent of any crime, who faces stiff penalties after trial but is being offered a non-jail sentence that would keep him at liberty – yet nonetheless mark him as a “convict” for the rest of his life?

These situations arise daily in our criminal justice system. The dissenters’ inability to appreciate these routine complexities causes them to perceive no legitimate need for requiring early discovery as part of evaluating plea offers and investigating criminal charges. We do.

(4.) *Other Arguments in the Response*: The response repeatedly characterizes the current discovery statute, Article 240, as the result of a careful legislative “balance” undertaken in 1979 and supposedly designed to endure.²²⁵ The dissenters ignore the key fact that this legislation was described, by its drafters and by the Governor who signed it into law, as simply a starting point for future reforms which hopefully would broaden discovery even further one day – not as the last word on discovery in New York.²²⁶

²²⁵ Response, section I, pp. 78-79.

²²⁶ Specifically, then-Governor Carey proclaimed upon signing the bill into law (echoing a nearly identical statement in the bill’s Sponsor’s Memorandum): “It is hoped that prosecutors and defense counsel, encouraged by the enactment of these bills, will experiment with even broader discovery on a voluntary basis and that further discovery legislation may be developed in the near future.” See Governor’s Mem. approving L.1979, ch. 412, 1979 McKinney’s Session Laws of N.Y., at 1801; accord Sponsor’s Memorandum, p. 4 (Bill Jacket, L.1979, ch. 412).

Other arguments in the response are self-contradictory or illogical. For instance, the dissenters protest against our proposal for a “catch-all” provision that would give judges discretion to order discovery of a potentially significant item not otherwise covered by the statute, claiming that this would “circumvent and undercut the legislative process.”²²⁷ How a legislature’s own enactment of a statute that gives discretion to judges would “undercut” the legislative process is puzzling. Legislatures frequently leave specific questions to judges, who are in a position to appreciate particular facts in a case. Indeed, the dissenters elsewhere suggest that the legislature should vest judges with discretion in the timing for turning over *Rosario* material (albeit for the dissenters, such discretion ought to be available only after “the possibility of a plea bargain [has been] fully explored”).²²⁸

Likewise, the response proclaims that letting judges make discretionary decisions about granting discovery “would also introduce an unevenness from judge to judge that our system should not countenance.”²²⁹ This reflects feigned ignorance of how the criminal justice system actually operates in this State – since “unevenness” is one of its hallmarks, especially with regard to discovery. Article 240 originally was enacted with the hope “that prosecutors and defense counsel, encouraged by the enactment of these bills, will experiment with even broader discovery on a voluntary basis.”²³⁰ In the intervening years, many District Attorneys and individual prosecutors have taken up that call to provide voluntary discovery, but others have not. Thus, the typical defendant in Brooklyn receives virtually all of the police paperwork within a fairly short time of arraignment, whereas a defendant across the East River in Manhattan, who may be housed in the same jail with the Brooklyn defendant, does not receive any of it until the trial has begun. The dissenters care little about this manifestly unfair “unevenness” from county to county across the State (and even from prosecutor to prosecutor within a single county) – evidently because *prosecutors* are allowed to make these particular decisions.

²²⁷ Response, section X, p. 106.

²²⁸ Response, section XI, pp. 108-109 (advocating that pre-trial conferences should be held after motion practice has concluded and the possibility of plea bargaining has been fully explored, at which “the court can set a date for the production of *Rosario* material, taking into account any concerns raised by either party”).

²²⁹ Response, section X, p. 106.

²³⁰ See Governor’s Mem. approving L.1979, ch. 412, 1979 McKinney’s Session Laws of N.Y., at 1801.

The response claims that the administrative costs of expanding discovery would be virtually insurmountable and would practically bankrupt prosecutors' offices (and, indeed, "where prosecutors carry caseloads in the hundreds, compliance with the mandates proposed by the Task Force may not be possible at all").²³¹ But yet again, the dissenters ignore that many District Attorneys Offices in this State are already doing it successfully today under "Discovery By Stipulation" agreements. Similarly, many other States currently have statutes that provide for broad discovery very early in the case.²³²

The dissenters pretend not to comprehend the function of protective orders and related procedures to ensure safety of witnesses proposed by the Task Force. Our recommendation sets forth extremely broad grounds for issuance of such orders, which would effectively suspend discovery where likely dangers to witnesses exist. Yet the dissenters not only dismiss these as "inadequate," but then write most of their response as though the provisions would never be employed.²³³ For instance, one of the most dramatic passages in the response describes a need to relocate victims "in violent crime and gang cases" because, under a statute such as the Task Force proposes, these witnesses' identities would have to be disclosed early in the case. "The expense to the state could be considerable," the dissenters write, "though far less than the costs inflicted upon witnesses uprooted from their homes."²³⁴ But it is hard to imagine that the prosecution would invest resources in relocating a witness due to discovery obligations, without first seeking a protective order – and under the flexible and lenient standards proposed by the Task Force, the granting of such an order would be virtually assured. Moreover, if somehow the

²³¹ Response, section VII, pp. 100-101.

²³² See, e.g., Fla. R. C.P. 3.220(b)(1) (within 15 days of demand); Hawaii R. Penal P. 16(e)(1) (within 10 days of arraignment); Mo.R.Crim.P. 25.02 (within 10 days of demand); N.J. CT. R. 3:13-3(b)(1) (within 7 days of unsealing of indictment); N.M.Dist.Ct.R.Crim.P. 5-501(A) (within 10 days of arraignment); see also Ariz. R.Crim.P. 15.1(c) (30 days after arraignment); Colo. R.Crim.P. 16 Part I (b)(1) (21 days after first appearance); Md. R. 4-263(h) (within 30 days after first appearance); Mich. CR 6.201(F) (within 21 days of demand); N.H. R. C.P. 12(b)(1)(B)(i) (within 30 days of not guilty plea); R.I. R.Super.Ct. R.C.R.P. Rule 16(f) (within 30 days of arraignment).

²³³ Response, section III, pp. 81-84; section IV, pp. 87-89; section VII, pp. 99-100

²³⁴ Response, section VII, p. 100.

application were denied, the prosecution could, under another of our proposals, obtain expedited review of that decision by an appellate judge.²³⁵

The dissenters' objections are based on the proposition that prosecutors and judges, in considering when to apply for or to grant a protective order, are wholly unable to make any viable predictions or to gauge the risks to witnesses in any kind of case.²³⁶ But prosecutors and judges around the country are able to make these often easy, and occasionally difficult, decisions and still provide fair and timely discovery to defendants. Practitioners in other States also describe that, very commonly, defense lawyers do not contest the prosecutor's redactions since they realize that seeking a contrary ruling from the judge would be futile. The protective order process is far more efficient and predictable than the dissenters assert.²³⁷

The response paints a picture of prosecutors hopelessly confused and uncertain about the discovery obligations we recommend. In particular, they complain that certain "terminology" recommended by the Task Force would be too problematic for prosecutors and courts to interpret (such as the terms "police reports," "relevant" witnesses, or "reasonable diligence").²³⁸ Yet the standards we have recommended are based on existing statutory provisions *currently being used* in States such as Florida, Minnesota and New Jersey, and are also recommended by the American Bar Association. We believe New York's prosecutors and judges would be no less competent in interpreting them than prosecutors and judges in these other States.²³⁹

Furthermore, our proposals do not impose draconian penalties on prosecutors for errors in compliance, or any penalties at all in most instances. The Task Force has emphasized that, with respect to the consequences of discovery violations, remedies provided by courts should be based on forgiving standards designed to rectify actual harm. A prosecutor who has acted in good faith and with reasonable diligence will, therefore, face no

²³⁵ See Task Force Report, II-A-2-i, pp. 15-19.

²³⁶ See, e.g., Response, section III-a, pp. 81-84.

²³⁷ Response, section VII, p. 99.

²³⁸ Response, section VII, pp. 98-99.

²³⁹ See Task Force Report, II-A-1, p. 15.

consequences for a mere mishap during the discovery process.²⁴⁰ The crisis the response predicts has not happened elsewhere, and will not happen here.

The underlying thread is simply opposition to any meaningful discovery reform. The response fails even to acknowledge that much of its distress comes from lessening of the huge tactical advantage for prosecutors gained through the current restrictive discovery system. It does not seem to recognize the plight of defendants, or the significant problem of wrongful convictions which this Bar Association's Task Force on Wrongful Convictions described in a prior report.²⁴¹ Perhaps most revealing is the adamant refusal even to consider *Brady* reform, aside from increased training.²⁴² Despite claims that certain of the mildest reforms the Task Force proposes would be acceptable,²⁴³ the dissenters oppose any true discovery reform that will enable defense lawyers to investigate cases, give informed advice on pleas, and properly prepare for trials.

The response is based on a flawed premise that New York State is somehow exceptional, and that reforms that have worked for decades in the rest of the country would not succeed here. But these reforms are badly needed and long overdue in New York. They would not only help to avoid wrongful convictions, but would enhance the fairness and reliability of our criminal justice system. We strongly urge adoption of the recommendations in our report.

²⁴⁰ See Task Force Report, II-E, pp. 36-37.

²⁴¹ See New York State Bar Association, "Final Report of the New York State Bar Association's Task Force on Wrongful Convictions" (2009), pp. 19-44; see also http://www.innocenceproject.org/Content/Lessons_Not_Learned_New_York_Leads_in_the_Number_of_Wrongful_Convictions_but_Lags_in_Reforms_That_Can_Prevent_Them.php ("Only two other states in the nation, Texas and Illinois, have seen more convictions overturned by DNA evidence [than New York]").

²⁴² Response, section IX, pp. 102-103.

²⁴³ Response, section XI, pp. 107-109.

APPENDIX A OF REPORT AND PROPOSALS

A Small Sample of Cases that Illustrate Why Discovery of Witnesses is Vital to Improving the Reliability, Fairness, and Efficiency of New York State's Criminal Justice System:

Examples:

- (1.) In a murder trial, the eyewitness testified that he saw the murder in the company of his girlfriend. The 18-b defense lawyer was not given the witness's name before trial, thus precluding any investigation, including of the girlfriend. Defendant was convicted. In post-conviction proceedings, Legal Aid tracked down the witness's girlfriend, who emphatically contradicted the witness's story about seeing a murder.

The court ultimately vacated the conviction, after the defendant had spent eight years in prison. The State had to pay \$2.4 million for the wrongful conviction.

- (2.) In an assault case charged as a violent felony, the prosecutor refused to give contact information for a person whose name was redacted in a Sprint report. However, because a phone number was inadvertently not redacted, the defense was able to speak to the witness. He gave an exculpatory and mitigating account of defendant's role in the assault incident.

When defense counsel confronted the prosecutor with this evidence, the case was disposed of as a disorderly conduct violation, rather than a violent felony.

- (3.) The four-day trial in a felony identity theft case began on Wednesday afternoon. The defense received the name and address of a witness for the first time on that day. Because the trial had not finished before the weekend, there was time for the defense to track down the witness on Saturday and Sunday. The witness testified for the defense on Monday, and clearly exculpated defendant. The jury acquitted the next day.

Had this trial started on a Monday and thus concluded by Friday, there would have been no opportunity to find and interview the exculpatory witness. Being able to

present the testimony of exculpatory witnesses to the jury should happen as a matter of right in New York State, not of luck.

- (4.) In a first-degree assault and attempted robbery case, the identity of the 911 caller was not disclosed until the eve of trial. No judge would order disclosure before trial. Counsel contacted the caller and interviewed her over the telephone. Her testimony was exculpatory. The defendant was acquitted.

The defendant was incarcerated for more than 20 months before disclosure of the name of the exculpatory witness.

- (5.) Two years after speaking to a witness of an alleged assault, the ADA gave the defense his contact information. The defense called the witness at trial. He was an accountant and a neutral witness, whose objective account of what he had observed contradicted the complainant and her two family members about the altercation near a coffee cart. The judge acquitted the defendant.

The defendant had had to come to court 17 times over the two-year life of the case. Because of an order of protection during the case, he had to give up his livelihood, the coffee cart, when the complainant installed her cart at the same location.

- (6.) In a robbery case, the prosecutor refused to disclose the complaining witness's name until trial started. This prevented the defense from getting court files from his 1998 conviction for gun possession. The witness gave a sanitized version of this incident at trial, claiming that he had merely failed to register an otherwise legal hunting rifle, and that there was no ammunition in his apartment.

Two months after trial, the court records of the witness's prior case finally arrived. They revealed that he had actually possessed multiple weapons, including a handgun, ammunition, a bulletproof vest, and a police badge and other police identification that did not belong to him. The jury thus had been given a false version of important information directly bearing on the key witness's credibility, which the defense could not contradict.

- (7.) Defendant was accused of attempted rape. The complainant alleged that she did not know him, but was attacked by a stranger. The defendant firmly claimed from the outset that he was being set up by drug dealers. Defense counsel happened to learn the complainant's name from a court document – an unusual occurrence. With the name, counsel was able to subpoena phone records that showed that a third party had been calling both the complainant and defendant hundreds of times around the time of the reported rape, and revealed other connections between them.

This process of subpoenaing phone records took months. After the prosecutor received this information, she dismissed the case – but it was two years after the alleged incident. This case is reminiscent of a recent appellate decision, in which the Fourth Department ordered a retrial because of “newly discovered” evidence in the form of phone records that contradicted the complainant's accusations.²⁴⁴ The evidence was “newly discovered” only because the prosecution had frustrated defense efforts to gain the records, by delaying disclosure of the complainant's records and other information until trial.

Examples of How Prosecutors' Withholding of Witnesses' Names Until the “Eve of Trial” Regularly Leads to Conflict-of-Interest Problems and Enormous Inefficiencies:

- (1.) In a kidnapping case, a jury was selected and only then did the prosecutor turn over the witnesses' prior statements and their identity. The information revealed that a witness was cooperating with the prosecution in order to benefit himself on another matter, and that the witness was represented on that cooperation agreement by the same organization as defense counsel. New counsel was assigned to inform the defendant of the conflict, and after being advised he was unwilling to waive it. A mistrial was declared after defense counsel had been working on the case for a year and had completely prepared the trial. The defendant was incarcerated for the entire time.
- (2.) During a first-degree assault trial, a prosecution witness stopped as he entered the courtroom and greeted the defense attorney. The attorney realized that he had

²⁴⁴ See *People v. Madison*, 106 A.D.3d 1490, 1493-94 (4th Dept. 2013).

represented the witness on a drug sale the year before. When informed of the conflict, the court had to declare a mistrial and relieve defense counsel.

- (3.) On the eve of a statutory rape trial, defense counsel was removed from the case due to a conflict because it was only then that he learned the name and school of the complaining witness. The complainant was a minor who was being taught by the trial attorney's wife. The defendant already had been in jail for 5 months by that point.

APPENDIX B OF REPORT AND PROPOSALS

Sample Discovery/Brady Checklist

This checklist includes types of evidence that may exist in a criminal case. Such evidence may constitute “discovery” or “Brady” material. The prosecutor must turn over “discovery” and “Brady” materials to the defendant in compliance with all state and federal law.

Defendant name: _____ Date: _____

Docket No. _____

Indictment No. _____

ADA: _____
(Name) (Phone Number)

(Address)

I. POLICE REPORTS

- ____ Arrest Report
- ____ Prisoner Movement Slip
- ____ Property Voucher #'s of Recovered Property/Evidence ____, ____, ____,
- ____ Property Voucher Sheet
- ____ Memo Book Entries
- ____ Police Complaint Report
- ____ Omniform System Arrest Report
- ____ Fingerprint Response Summary
- ____ Detective follow-ups (DD-5 in NYC) #1 ____, #2 ____, #3 ____,
- ____ Detective/Police Officer Typed Report of (defendant/witness statement)
- ____ Detective/Police Officer Written notes of (defendant/witness statement)
- ____ Defendant Injury/Medical Records (**if in the possession of law enforcement**)
- ____ Crime Scene Reports
- ____ Vehicle Accident Report
- ____ Tape Recordings and Transcripts
- ____ Defendant's Statement (written, video-taped, recorded, transcript)
- ____ Photo Array Report
- ____ Line-up Report
- ____ Show-up Report
- ____ Other _____

a. PHOTOGRAPHS

- ___ Photo(s) taken on ___(date), by (name of photographer) of _____
- ___ Photo arrays
- ___ Line-up photos
- ___ Crime Scene photos
- ___ Other _____
- ___ Photos of: _____
- ___ Photos of: _____
- ___ Photos of: _____

b. DIAGRAMS

- ___ Diagram(s) made on (date), by (name of creator) of _____
- ___ Diagram of: _____
- ___ Diagram of: _____
- ___ Diagram of: _____

c. RECORDINGS

- ___ Recording of 911 call made on (date) of _____
- ___ Sprint sheet of 911 call made on (date) of _____
- ___ Tape recordings (defendant, victim, witness)
- ___ Tape or Video recording of defendant while in custody
- ___ Any report of conversation between the arrestee and law enforcement personnel prior to the commencement of video or audio recording.
- ___ Wire tap reports, transcripts, recordings (defendant, victim, witness)

II. DISTRICT ATTORNEY DOCUMENTS

a. Complaint Room

- ___ DA Notes from witnesses interviewed
- ___ DA Write-Up Typed Notes
- ___ DA Written Notes from witnesses interviewed
- ___ Copy of DA Folder Write-up

b. Grand Jury

- ___ Grand Jury minutes of each victim/witness (including expert witnesses)
- ___ Grand jury minutes of defendant

c. Prior Testimony/Prior Discovery Material

___ Prior relevant testimony of Victim/Witness from prior proceedings (grand jury, Family Court, Civil Court, Federal Court, Administrative Proceedings, etc, **if in the possession of the prosecution and/or law enforcement**)

___ Prior relevant discovery material from prior proceedings (grand jury, Family Court, Civil Court, Federal Court, Administrative Proceedings, etc., **if in the possession of the prosecution and /or law enforcement**)

III. FORENSIC/LABORATORY REPORTS

- ___ Ballistics
- ___ Narcotics
- ___ Rape Kit (Serology, DNA, etc.)
- ___ Toxicology
- ___ Breathalyzer
- ___ Blood
- ___ DNA
- ___ Voice Exemplars and Reports
- ___ Hand Writing Exemplars Reports
- ___ Bench notes of lab technician/analyst prior to final version
- ___ Other: _____

a. MEDICAL REPORTS (If in the possession of the prosecution and/or law enforcement)

- ___ Victim/Witness hospital records
- ___ Defendant hospital records
- ___ Emergency Medical Technician records of Victim/Witness
- ___ Emergency Medical Technician records of Defendant
- ___ Psychiatric records of Victim/Witness
- ___ Psychiatric records of Defendant
- ___ Dental records of Victim/Witness
- ___ Dental records of Defendant
- ___ Other: _____

b. MEDICAL EXAMINER REPORTS

- ___ Medical Examiner report (autopsy)/diagrams
- ___ Medical Examiner Written drafts

___ Medical Examiner Photographs/Videos/Audio Recordings of comments as autopsy is conducted

___ Other: _____

IV. VICTIM/WITNESS INFORMATION

___ Written/verbal statements

___ Financial documents, certified documents, audit reports, accounting documents, etc.

___ Photos of _____

___ E-mails, text messages, correspondence to/from _____

___ Vision, Memory, Physical or Mental Impairment Evidence (**if in the possession of the prosecution and/or law enforcement**)

___ Records obtained from agencies **not under** the direction or control of the prosecution and/or law enforcement

___ Other: _____

V. PHYSICAL EVIDENCE REVIEW (Make available for review/testing by the defense)

___ Knife

___ Firearm (ballistics evidence)

___ Weapon of any type

___ Clothing

___ Stolen Property

___ Vehicle (automobile, boat, motorcycle, etc.)

___ Narcotics

___ Specimens/samples (serology, blood, DNA, etc.)

___ Documents (financial, correspondence, receipts of purchase, travel documents, hard copies, soft copies, electronic or digital, etc.)

___ Other: _____

VI. EXPERT WITNESS

___ Bio or Resume of Expert

___ Expert Witness Report or Opinion

VII. POSSIBLE BRADY MATERIAL

(If in the possession of law enforcement and/or the prosecutor's office)

☐ Evidence supporting defendant's defense (self-defense, agency, entrapment, mis-identification, non-identification, alibi, defendant's false inculpatory statement, etc.)
☐ Victim/Witness Services: (i.e., financial benefits, relocation assistance, etc.)
☐ Cooperation Agreement(s) between witness and law enforcement or prosecutor
☐ Offer of leniency in exchange for testimony or cooperation
☐ Inconsistent statements by victim/witness (verbal, written, recorded)
☐ Prior inconsistent testimony of victim/witness (grand jury, hearings, trials, Family Court, Federal Court, Civil Court, Administrative Proceedings, etc.)
☐ Recantation of victim/witness (partial or full: verbal, written, and recorded)
☐ Misidentification or non-identification of defendant by victim/witness (show-up, photo array, line-up)
☐ Impeachment information of victim/witness (criminal record, bad acts, previous dishonesty, intoxication, drug use, mental deficiency, impaired vision, impaired memory, bribery or threat to testify falsely, any motivation to testify falsely)
☐ Destruction, corruption or falsification of evidence (by victim, witness, law enforcement, prosecutor)
☐ Mix-up of evidence or reports (evidence from unrelated case, i.e., narcotics, serology, toxicology, medical, forensic, ballistics, weapons, DNA, photos, etc.)
☐ Other: _____

Defense Attorney: _____
 (Print Name Above) (Address + Phone Number)

 (Signature) (Date)

I affirm that I have received copies of the above-mentioned documents and have duly acknowledged such receipt.

DEFENSE COPY

***Please return signed copy to the address listed above.

Plea Bargaining

Jenia I. Turner¹

Plea bargaining dominates the criminal process in the United States today, yet it remains highly controversial. Supporters defend it on the grounds that it expedites cases, reduces processing costs, and helps authorities obtain cooperation from defendants. But critics contend that it can generate arbitrary sentencing disparities, obscure the true facts, and even lead innocent defendants to plead guilty. Lack of transparency and limited judicial involvement frustrate attempts to correct flaws in the process. As policymakers and legislators prepare to tackle reform of sentencing laws and prosecutorial discretion, they should also consider reforms to plea bargaining that would make the practice fairer, more transparent, and more honest.

I. Introduction

As the Supreme Court recently acknowledged, the U.S. “criminal justice today is for the most part a system of pleas, not a system of trials.”² More than 95% of convictions in the federal and state systems are the product of negotiated guilty pleas.³ This means that roughly every two seconds during typical work hours, a person pleads guilty.⁴ It also means that in some jurisdictions, individual prosecutors may practice for months without trying a case.⁵

Courts, policymakers and scholars for the most part view plea bargaining as an inevitable feature of our criminal process. The general assumption is that without guilty pleas, the criminal justice system would grind to a “screeching halt.”⁶ Even if the system could afford to provide

¹ Amy Abboud Ware Centennial Professor in Criminal Law, SMU Dedman School of Law. I thank the participants in the ASU Law School Academy of Justice panel on plea bargaining for their very helpful comments and Teresa Poonsuwan for excellent research assistance.

² *Lafler v. Cooper*, 132 S. Ct. 1376, 1388 (2012).

³ BUREAU OF JUSTICE STATISTICS, FEDERAL JUSTICE STATISTICS 2012, STATISTICAL TABLES tbl. 4.2 (97% of federal convictions disposed of via guilty plea). For state statistics, see BUREAU OF JUSTICE STATISTICS, STATE COURT SENTENCING OF CONVICTED FELONS, 2004 - STATISTICAL TABLES tbl. 4.1 (95% of state convictions obtained through a guilty plea); NATIONAL CENTER FOR STATE COURTS, COURT STATISTICS PROJECT DATAVIEWER, at <http://www.courtstatistics.org/Criminal.aspx> (showing that for most states, jury trials amounted to only about 1-2% of criminal dispositions).

⁴ Joseph A. Colquitt, *Ad Hoc Plea Bargaining*, 75 TUL. L. REV. 695, 696 (2001).

⁵ Don Stemen et al., *Plea Bargaining in Wisconsin: Prosecutor Effects on Charge Reductions Outcomes* 9 (2015) (manuscript on file with author) (noting that “there are many prosecutors with no trials over the study period, [2009-2013]).

⁶ Eileen Nimm, *Plea Bargains Crucial to Efficient Court System*, July 6, 2016, APG Media Wisconsin, http://www.apg-wi.com/plea-bargains-crucial-to-efficient-court-system/article_c73f2715-fbb7-5c89-953f-b135b0aa257d.html (citing Wisconsin prosecutor); see also *Santobello v. New York*, 404 U.S. 257, 260-61 (1971); J. Harvie Wilkinson III, *In Defense of American Criminal Justice*, 67 VAND. L. REV. 1099, 1138-44 (2014) (discussing various benefits of plea bargaining, including its efficiency). But see DARRYL K. BROWN, *FREE MARKET CRIMINAL JUSTICE* 104-05, 154-55 (2016); Albert W. Alschuler, *Lafler and Frye: Two Small Band-Aids for a Festering Wound*, 51 DUQ. L. REV. 673, 705 (2013); Mary E. Vogel, *The Negotiated Guilty Plea: Vacancies as an Alternative to the Caseload Pressure Explanation*, 21 J. MATH. SOCIOLOGY 241, 241 (1996) (noting that “the claim

more contested trials than it currently does, many believe that plea bargaining helps allocate resources more sensibly—away from trials of clear-cut cases and toward more valuable programs, such as probation, parole, and reentry.⁷

Another stated advantage of plea bargaining is that it helps the prosecution to obtain cooperation in complex cases. Informants are often indispensable to uncovering the operation of organized crime, for example, and plea discounts can be critical to obtaining their cooperation.⁸ Plea bargaining has also been defended for sparing reluctant and vulnerable witnesses the ordeal of testifying and for providing victims with closure more quickly than trials do.⁹ Some courts and commentators have also stated that guilty pleas can facilitate the rehabilitation of defendants by encouraging them to accept responsibility and by leading to the swifter imposition of punishment.¹⁰

These perceived advantages of plea bargaining have made it an increasingly popular feature of criminal justice reform around the world. Countries as diverse as France, Germany, India, Japan, Nigeria, Russia, and South Africa have adopted some form of negotiated justice.¹¹ Even international criminal courts, dealing with the gravest crimes against humanity, have relied on plea bargaining to dispose of cases.¹²

But while plea bargaining continues to spread globally, its use remains highly controversial. Perhaps the greatest concern is that, at least as currently practiced in the United States, plea bargaining can be so coercive as to lead some innocent people to plead guilty.¹³ Broad prosecutorial discretion to set high plea discounts, combined with harsh baseline sentences, places significant pressure on defendants to take a plea. Data from the National Registry of Exonerations (NRE) support these concerns: as of January 2017, roughly 17% of

that crowded courts induce plea bargaining as part of an effort by prosecutors, judges and attorneys to move cases more rapidly has been called increasingly into question. . . .”).

⁷ See, e.g., Welsh S. White, *A Proposal for Reform of the Plea Bargaining Process*, 119 U. PA. L. REV. 439, 440-41 (1971) (quoting Arnold Enker, *Perspectives on Plea Bargaining*, in PRESIDENT’S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: THE COURTS 108, 112 (1967)).

⁸ See, e.g., ALEXANDRA NATAPOFF, *SNITCHING: CRIMINAL INFORMANTS AND THE EROSION OF AMERICAN JUSTICE* 31 (2009); Daniel C. Richman, *Cooperating Defendants: The Costs and Benefits of Purchasing Information from Scoundrels*, 8 FED. SENT’G REP. 292, 293 (1996).

⁹ Wilkinson, *supra* note 6, at 1142.

¹⁰ E.g., *Brady v. United States*, 397 U.S. 742, 753 (1970); Wilkinson, *supra* note 6, at 1142.

¹¹ See, e.g., JENIA IONTCHEVA TURNER, *PLEA BARGAINING ACROSS BORDERS* 1 (2009); *Critics Hit Japan’s New Plea-Bargaining System, Say It Opens Door to False Testimony*, Japan Times, May 29, 2016, at <http://www.japantimes.co.jp/news/2016/05/29/national/crime-legal/critics-hit-japans-new-plea-bargaining-system-say-opens-door-false-testimony/#.WHL38FMrKM8>.

¹² TURNER, *supra* note 11, at 213; *Malian Jihadi To Plead Guilty in ICC Cultural Destruction Trial*, THE GUARDIAN (May 24, 2016), at <http://www.theguardian.com/law/2016/may/24/malian-jihadi-to-plead-guilty-forgiveness-icc-cultural-destruction-trial>.

¹³ See, e.g., Lucian E. Dervan, *The Injustice of the Plea-Bargain System*, WALL ST. J., Dec. 3, 2015, at <https://www.wsj.com/articles/the-injustice-of-the-plea-bargain-system-1449188034>; Tim Lynch, *Americans are bargaining away their innocence*, Wash. Post, Jan. 20, 2016, https://www.washingtonpost.com/news/in-theory/wp/2016/01/20/americans-are-bargaining-away-their-innocence/?utm_term=.e5b3744dfddb.

recorded exonerations (343 out of 1,956) in the NRE were the product of guilty pleas.¹⁴ As discussed below, many more false guilty pleas likely remain unreported.

Apart from its potential to coerce innocent defendants to plead guilty, the current practice of plea bargaining in the U.S. is criticized for conflicting with the search for truth. Even if defendants are guilty of *some* offense, incomplete investigations, inadequate disclosure, limited adversarial testing, perfunctory judicial oversight, and sizeable plea discounts can lead defendants to plead guilty to crimes different from the ones they committed. Some of the same factors can also produce sentences that are disproportionately lenient or disproportionately harsh. They also allow the negotiation of plea bargains that vary based on arbitrary factors such as race, “wealth, sex, age, education, intelligence, and confidence.”¹⁵

Plea bargaining is further criticized for reducing the fairness and legitimacy of the criminal justice system. When defendants plead guilty, they waive most procedural protections associated with a trial and opt for a non-transparent process with limited judicial review and little to no adversarial testing. The opacity of plea bargaining impairs the legitimacy of the process in the eyes of not only defendants, but also victims and the general public.¹⁶ Public attitudes toward plea bargaining are overwhelmingly negative, in large part because of the lack of transparency and the perception that it is allowing guilty defendants to get away with unduly lenient punishment.¹⁷

So far, courts and legislatures have taken a largely hands-off approach to plea bargaining, imposing few constraints on its operation.¹⁸ To address the serious concerns about the fairness and accuracy of the process, judges and policymakers ought to consider more comprehensive regulation. As subsequent sections discuss, regulation may range from small fixes, such as requiring that plea agreements be reduced to writing and placed on the record, to more significant reform, such as mandating broader pre-plea disclosure, more thorough judicial scrutiny of guilty pleas, and limits on plea discounts. Even more ambitiously, broader criminal justice reform—aimed at narrowing the scope of criminal codes, increasing judicial sentencing discretion, and providing better funding for prosecutors and defense attorneys alike—is also important for ensuring that plea bargaining functions in a fair manner.

II. Plea Bargaining Law and Policy

¹⁴ National Registry of Exonerations, Jan. 4, 2017, at <http://www.law.umich.edu/special/exoneration/Pages/detailist.aspx>.

¹⁵ Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2464, 2468 (2004); *see also* Albert W. Alschuler, *The Trial Judge’s Role in Plea Bargaining* (pt. 1), 76 COLUM. L. REV. 1059, 1125-26 (1976) (noting that plea bargaining is influenced by “a defense attorney’s charm, by past favors that he had rendered, by the extent of his friendship with prosecutors or trial judges, by the race, wealth or bail status of the defendant, by the unusual weight that a particular judge might choose to give to a defendant’s choice of plea, by a prosecutor’s mood or his desire to finish work early on an especially busy day, by the publicity that a case had generated, or by any of a number of other factors, irrelevant to the goals of the criminal process. . . .”).

¹⁶ *See, e.g.*, Gregory M. Gilchrist, *Plea Bargains, Convictions and Legitimacy*, 48 AM. CRIM. L. REV. 143 (2011).

¹⁷ Sergio Herzog, *Plea Bargaining Practices: Less Covert, More Public Support?*, 50 CRIME & DELINQUENCY 590, 590-92 (2004).

¹⁸ *See, e.g.*, BROWN, *supra* note 6, at 91.

Despite its central place in criminal law practice, plea bargaining remains remarkably lightly regulated. The Supreme Court has imposed limited constraints grounded in the Due Process Clause, the privilege against self-incrimination, and the Sixth Amendment right to counsel.¹⁹ Statutes and rules provide additional regulation, but it, too, remains minimal.

In *Brady v. United States*, the Supreme Court held that because a guilty plea is a waiver of the right to trial, the Due Process Clause requires that the plea be voluntary and knowing.²⁰ But in both *Brady* and subsequent decisions, the Court interpreted each of these terms narrowly.

The Court held that the threat of a significantly more severe penalty (even the death penalty) upon conviction is not so coercive as to invalidate a guilty plea.²¹ Indeed, few governmental actions short of physical coercion would render a guilty plea involuntary.²² For example, neither threats to bring more serious charges against the defendant nor threats to charge family members have been held to constitute impermissible coercion, as long as the prosecutor has probable cause to support the charges.²³

The requirement that a guilty plea be informed is also not particularly demanding. Judges must confirm that the defendant understands the essential elements of the crime to which he is pleading guilty.²⁴ In most jurisdictions, rules of procedure and statutes further require judges to inform defendants of the direct consequences of a guilty plea²⁵ and of rights waived by pleading guilty.²⁶ However, a guilty plea may be informed even when the prosecution fails to disclose evidence favorable to the defense.²⁷ Likewise, judges need only give minimal notice of the meaning of the right to counsel before defendants waive that right at a plea hearing.²⁸

¹⁹ For arguments that the Supreme Court should impose more stringent constitutional limits, see Russell D. Covey, *Plea Bargaining After Lafler and Frye*, 51 DUQ. L. REV. 595, 597, 599-600 (2013); Richard L. Lippke, *Plea Bargaining in the Shadow of the Constitution*, 51 DUQ. L. REV. 709, 722-23 (2013).

²⁰ *Brady v. United States*, 397 U.S. 742, 748 (1970).

²¹ *Id.* at 755.

²² *E.g.*, *Corbitt v. New Jersey*, 439 U.S. 212, 218-26 (1978); *U.S. v. Carpenter*, 25 Fed. Appx. 337, 343-44 (6th Cir. 2001) (guilty plea was not involuntary even though it was part of a “package deal” under which the prosecution would refrain from seeking the death penalty only if both the defendant and his codefendant brother, agreed to plead guilty); *Miles v. Dorsey*, 61 F.3d 1459, 1468 (10th Cir. 1995). Certain rules and case law, however, presume that judicial participation in plea negotiations renders a subsequent guilty plea involuntary. *E.g.*, *State v. Bouie*, 817 So. 2d 48, 53-54 (La. 2002); FED. R. CRIM. PROC. R. 11 (e)(1).

²³ *Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978); *United States v. Pollard*, 959 F.2d 1011, 1021-22 (D.C. Cir. 1992).

²⁴ *Henderson v. Morgan*, 426 U.S. 637, 652-53 (1976).

²⁵ *E.g.*, *United States v. Rivera-Maldonado*, 560 F.3d 16, 22 (1st Cir. 2009); *Jamison v. Klem*, 544 F.3d 266, 276-277 (3d Cir. 2008); Wayne R. LaFave et al., 5 CRIM. PROC. § 21.4(d) n. 116 (4th ed. 2016).

²⁶ LaFave et al., *supra* note 25, § 21.4(e) n. 190. Some courts have held that a warning of the rights waived is required in order for the plea to be informed. *See id.* n. 194; *cf.* *Boykin v. Alabama*, 395 U.S. 238, 242 (1969) (requiring a record of a knowing and voluntary waiver of rights inherent in guilty plea).

²⁷ *Ruiz v. United States*, 536 U.S. 622, 623 (2002) (holding that a guilty plea may be informed even when the prosecution has failed to disclose evidence that serves to impeach the credibility of prosecution witnesses). *Ruiz* concluded that the government is not constitutionally required to disclose impeachment evidence before a guilty plea, but it did not squarely resolve whether the government must disclose factually exculpatory evidence. *Id.* at 628. Circuit courts have split on this question. *Compare, e.g.*, *Orman v. Cain*, 228 F.3d 616, 617 (5th Cir. 2000) (holding that a prosecutor need not disclose exculpatory evidence when a defendant waives a trial and pleads guilty), *with, e.g.*, *McCann v. Mangialardi*, 337 F.3d 782, 787-88 (7th Cir. 2003) (suggesting that, if a prosecutor fails to disclose factually exculpatory evidence before a defendant enters a guilty plea, this would likely violate the Due Process

And while federal and state criminal procedure rules generally require guilty pleas to be based on facts, the factual basis standard remains quite vague.²⁹ As a result, judges rarely go beyond reviewing the indictment and then confirming that the facts alleged comport with the defendant's brief statement at the plea colloquy.³⁰ Given this rather perfunctory factual inquiry, parties remain free to engage in fact bargaining and frequently do so.³¹ The Court has also allowed judges to accept guilty pleas even when defendants profess their innocence, as long as sufficient factual basis independently supports the conviction.³²

Courts have also failed to regulate the practice of charge bargaining in any meaningful way. They have interpreted separation of powers principles to prevent judges from interfering with prosecutors' decisions to reduce or dismiss charges.³³ Because decisions about charges have profound effects on sentencing (particularly in systems with mandatory minimums, recidivist enhancements, or sentencing guidelines),³⁴ prosecutors can typically induce guilty pleas by offering favorable charging concessions to defendants.

The Supreme Court has also done little to ensure the transparency and reviewability of negotiated judgments. It has allowed the parties to waive the right to appeal—a practice that is now routine—and it has not required agreements to be reduced to writing or otherwise placed on the record.³⁵ Victims have no right to take part in the negotiations and in some jurisdictions are

Clause); see also *Buffey v. Ballard*, 2015 WL 7103326, at *11 (W. Va. Nov. 10, 2015) (reviewing federal and state decisions on this question and concluding “that a defendant is constitutionally entitled to exculpatory evidence during the plea negotiation stage”).

²⁸ *Iowa v. Tovar*, 541 U.S. 77, 80 (2004) (holding that the court must inform the defendant “of the nature of the charges against him, of his right to be counseled regarding his plea, and of the range of allowable punishments attendant upon the entry of a guilty plea” but does not need to “(1) advise the defendant that ‘waiving the assistance of counsel in deciding whether to plead guilty [entails] the risk that a viable defense will be overlooked’; and (2) ‘admonis[h]’ the defendant ‘that by waiving his right to an attorney he will lose the opportunity to obtain an independent opinion on whether, under the facts and applicable law, it is wise to plead guilty’”).

²⁹ *LaFave et al.*, *supra* note 25, § 21.4(f).

³⁰ Jenia Iontcheva Turner, *Judicial Participation in Plea Negotiations: A Comparative View*, 54 AM. J. COMP. L. 199, 212-23 (2006); Molly Treadway Johnson & Scott A. Gilbert, *The U.S. Sentencing Guidelines: Results of the Federal Judicial Center's 1996 Survey*, Fed. Jud. Center 10 (1997), at <http://www2.fjc.gov/sites/default/files/2012/gssurvey.pdf> (reporting that 25% of judges stated that they have never “go[ne] behind” a plea agreement and rule[d] against a prosecutor's recommendation that tends to lower a sentence by either stipulating facts or recommending the application, or nonapplication, of specific offense characteristics” and that of the 75% who do “go behind plea agreements,” only about 8% do so “somewhat or very frequently”).

³¹ Turner, *supra* note 30, at 212-23.

³² *North Carolina v. Alford*, 400 U.S. 25, 38 (1970) (equivocal guilty pleas are acceptable when there is strong factual evidence supporting guilt); but cf. U.S. ATTORNEYS' MANUAL § 9-16.015 (instructing federal prosecutors not to consent to Alford pleas “except in the most unusual of circumstances” and only after supervisory approval).

³³ See, e.g., *Inmates of Attica Correctional Facility v. Rockefeller*, 477 F.2d 375, 379-81 (2d Cir. 1973); *United States v. Giannattasio*, 979 F.2d 98, 100 (7th Cir. 1992). Cf. Darryl K. Brown, *Judicial Power to Regulate Plea Bargaining*, 57 WM. & MARY L. REV. 1225, 1231 (2016) (critiquing this jurisprudence as “inconsistent with the history of criminal justice administration in many states”).

³⁴ See, e.g., Ronald F. Wright & Rodney L. Engen, *The Effects of Depth and Distance in a Criminal Code on Charging, Sentencing, and Prosecutor Power*, 84 N.C. L. REV. 1935, 1977 (2006) (finding that “charge bargaining over the offense seriousness is one of the central ways that cases are resolved” and that “these charge reductions have substantial effects on the severity of sentences imposed”).

³⁵ See, e.g., *United States v. Toth*, 668 F.3d 374, 378 (2012); *Keller v. United States*, 657 F.3d 675, 681 (7th Cir. 2011); see also Nancy King & Michael O'Neill, *Appeal Waivers and the Future of Sentencing Policy*, 55 DUKE L. J.

not even consulted about the possibility of resolving the case through a plea bargain.³⁶ Plea negotiations thus remain opaque and largely immune from review in most U.S. jurisdictions.³⁷

While otherwise taking a *laissez-faire* approach to plea bargaining, the Court has been more active in regulating defendants' rights to effective assistance of counsel at the guilty plea stage.³⁸ The Court has held that defense counsel must advise defendants of certain significant consequences of pleading guilty, such as the possibility of deportation.³⁹ It has also affirmed that counsel must relay to clients any plea offers made by prosecutors and must competently advise clients of the legal advantages and disadvantages of accepting an offer.⁴⁰ But the court has yet to clarify the duties of defense counsel in preparation for and during plea negotiations, and it has not attempted to directly regulate prosecutorial conduct in the process.

III. Plea Bargaining Critiques

While a few commentators have defended plea bargaining on the grounds of its efficiency and ostensible benefits to the parties involved,⁴¹ most have been critical of the practice. In the 1980s, some called for outright abolition of plea bargaining.⁴² At this point, perhaps in recognition of the entrenched position of plea bargaining in the United States, scholarship has shifted focus toward correcting the worst excesses of the practice.⁴³ Empirical research has also attempted to identify more systematically areas in need of reform. Scholars' concerns fall into three principal categories: 1) the risk of coercion; 2) the risk of inaccuracy; and 3) insufficient procedural protections.

A. Coercion

209, 212 (2005) ("In nearly two-thirds of the cases settled by plea agreement in our sample, the defendant waived his right to review.").

³⁶ LaFave et al., *supra* note 25, at § 21.3(f) ("Provisions on prosecutor/victim consultation ... exist in about two-thirds of the states as well as on the federal level" and "a substantial minority of the states appear to authorize a victim to appear at [plea hearings] and to be heard on the matter.").

³⁷ A few states have begun enacting rules requiring that plea offers be placed on the record. See *Missouri v. Frye*, 132 S. Ct. 1399, 1409 (2012) (discussing Arizona and New Jersey rules requiring that plea offers be placed on the record).

³⁸ *Padilla v. Kentucky*, 559 U.S. 356 (2010); *Lafler v. Cooper*, 132 S. Ct. 1376, 1380-1381 (2012); *Missouri v. Frye*, 132 S. Ct. 1399, 1402 (2012).

³⁹ *Padilla*, 559 U.S. 356.

⁴⁰ *Lafler*, 132 S. Ct. 1376; *Frye*, 132 S. Ct. at 1402 ("As a general rule, defense counsel has the duty to communicate formal prosecution offers to accept a plea on terms and conditions that may be favorable to the accused.").

⁴¹ See, e.g., Frank H. Easterbrook, *Plea Bargaining as Compromise*, 101 YALE L.J. 1969 (1992); Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 YALE L. J. 1909, 1914-15, 1968 (1992); Wilkinson, *supra* note 6; Jacqueline E. Ross, *The Entrenched Position of Plea Bargaining in United States Legal Practice*, 54 AM. J. COMP. L. 717, 730 (2006) (offering a qualified defense of plea bargaining on the grounds of its "value in inducing defendants to cooperate in investigations of other suspects").

⁴² See, e.g., Albert W. Alschuler, *Implementing the Defendant's Right to Trial: Alternatives to the Plea Bargaining System*, 50 U. CHI. L. REV. 931, 1048 (1983); Stephen J. Schulhofer, *Plea Bargaining As Disaster*, 101 YALE L.J. 1979, 2003-08 (1992).

⁴³ Alschuler, *supra* note 6, at 706-07 ("[T]he time for a crusade to prohibit plea bargaining has passed. Instead, the time may have come for criminal justice scholars to abandon the search for ways to make the criminal justice system fair and principled. Their principal mission today should be to make it less awful. Improving the plea bargaining process should be one of their goals.").

Much has been written about the concern that excessive plea discounts may coerce defendants to plead guilty and unduly penalize those who choose to go to trial.⁴⁴ This risk is particularly serious when steep discounts are combined with harsh baseline sentences.⁴⁵ Together, these two features may induce even defendants with good odds of prevailing at trial to accept a plea bargain.

Since the 1980s, mandatory sentencing laws, sentencing guidelines, and the abolition of parole have led to a sharp rise in sentence length in most states and the federal system.⁴⁶ Just as sentences have grown longer, rewards for pleading guilty have also increased.⁴⁷ Some of these rewards are expressly granted by rules or statutes, such as reductions for accepting responsibility or cooperating with the prosecution. Others are offered indirectly, by giving prosecutors broad discretion to reduce charges to defendants who agree to plead guilty.⁴⁸

Empirical studies suggest that innocent defendants are at the greatest risk of pleading guilty in four situations: 1) when there is a significant differential between the negotiated sentence and the sentence expected upon conviction after trial;⁴⁹ 2) when the plea offer is to

⁴⁴ See, e.g., Alschuler, *supra* note 6, at 678-81; Russell Covey, *Fixed Justice: Reforming Plea Bargaining With Plea-Based Ceilings*, 82 TUL. L. REV. 1237, 1245 (2008); Oren Gazal-Ayal, *Partial Ban on Plea Bargains*, 27 CARDOZO L. REV. 2295, 2346 (2006); Maximo Langer, *Rethinking Plea Bargaining: The Practice and Reform of Prosecutorial Adjudication in American Criminal Procedure*, 33 AM. J. CRIM. L. 223, 224-28 (2006); John H. Langbein, *Torture and Plea Bargaining*, 46 U. CHI. L. REV. 3, 12 (1978); Candace McCoy, *Plea Bargaining as Coercion: The Trial Penalty and Plea Bargaining Reform*, 49 CRIM. L.Q. 67, 87-90 (2005); Ronald Wright, *Trial Distortion and the End of Innocence in Federal Criminal Justice*, 154 U. PA. L. REV. 79, 109 (2005).

⁴⁵ See, e.g., Ross, *supra* note 40, at 718.

⁴⁶ Turner, *supra* note 30, at 205. Even after the Federal Sentencing Guidelines became merely advisory, judges continue to follow the Guidelines in a large majority of cases. Paul J. Hofer, *Has Booker Restored Balance? A Look at Data on Plea Bargaining and Sentencing*, 23 FED. SENT'G. REP. 326, 328-29 (2011). This leaves prosecutors with significant power to set the plea discount through charging decisions and motions for substantial assistance departures.

⁴⁷ Andrew Chongseh Kim, *Underestimating the Trial Penalty: An Empirical Analysis of the Federal Trial Penalty and Critique of the Abrams Study*, 84 MISS. L.J. 1195, 1202 (2015) (finding that “federal defendants convicted at trial receive sentences that are sixty-four percent longer than similar defendants who plead guilty, excluding the effects of charge and fact bargaining.”); Nancy J. King et al., *When Process Affects Punishment: Differences in Sentences After Guilty Plea, Bench Trial, and Jury Trial In Five Guidelines States*, 105 COLUM. L. REV. 959, 973-75, 992 (2005) (studying sentencing practices in five states and finding trial penalties ranging from 13 to 461 percent); McCoy, *supra* note, at 90 (finding an average trial penalty of 44.5 months in state felony cases); HUMAN RIGHTS WATCH, AN OFFER YOU CAN’T REFUSE: HOW US FEDERAL PROSECUTORS FORCE DRUG DEFENDANTS TO PLEAD GUILTY 102 (2013) (finding that average federal drug sentences in cases that went to trial were three times harsher than average sentences in cases that were resolved by a plea).

⁴⁸ See, e.g., Wright & Engen, *supra* note 34, at 1948-50.

⁴⁹ E.g., Wright, *supra* note 44, at 84-86; 116-17; 147-48 (reviewing the increase of guilty plea rates and the decrease of acquittals in the federal system since the rise of mandatory sentencing and concluding that deep discounts for “acceptance of responsibility” and “substantial assistance” may have led defendants in the federal system to abandon meritorious trial defenses and plead guilty). 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, 36 (2013) (in an experiment involving college students accused of cheating, finding that “well over half of the innocent study participants... were willing to falsely admit guilt in return for a reduced punishment”). Studies relying on self-reports by convicted offenders also offer qualified support for the proposition that the threat of harsher punishment after trial might induce some innocent defendants to plead guilty. Kenneth S. Bordens & John Basset, *The Plea Bargaining Process From the Defendant’s Perspective: A Field Investigation*, 6 BASIC & APPLIED SOC. PSYCH. 93, 109 (1985) (finding that convicted defendants had accepted plea bargains primarily in order to

probation, while the expected sentence post-trial entails imprisonment;⁵⁰ 3) when the plea offer is to imprisonment, while capital punishment is a possibility after trial; and 4) when the defendant is detained, and a guilty plea results in release for time served.⁵¹

For example, the most recent data reported by the National Registry of Exonerations show that roughly 17% of recorded exonerations (343/1,956) were the product of guilty pleas.⁵² The NRE identified large plea discounts as a key factor driving false guilty pleas.⁵³ Other analyses of plea-based exonerations have similarly found that innocent defendants plead guilty to avoid the risk of harsher punishment after trial.⁵⁴

Certain types of plea discounts appear to be especially coercive. The plea discount that Brady claimed had induced him to plead guilty—the threat of receiving the death penalty if convicted after trial—is an important example. A recent study of capital charging and sentencing decisions in Georgia in the period between 1993 and 2000 found “strong evidence that the threat of the death penalty ha[d] a robust causal effect on the likelihood of a plea agreement.”⁵⁵ The threat of the death penalty was found to increase the probability of a guilty plea by roughly 20-25% points.⁵⁶ While the study did not reach any conclusions about the effects of the death penalty threat on *innocent* defendants, other studies have documented cases in which innocents have pleaded guilty to avoid the death penalty.⁵⁷ As the NRE noted, “[e]xcluding drug cases, most guilty-plea exonerations are for homicide or sexual assault, two categories that account for 70% of all known exonerations.”⁵⁸ Among the homicide exonerees, almost three-fourths were

minimize punishment); Allison D. Redlich et. al., *Self-Reported False Confessions and False Guilty Pleas Among Offenders with Mental Illness*, 34 LAW & HUM. BEHAV. 79, 88 (2010) (finding that 37% of offenders with mental illness reported having tendered a false guilty plea at some point in their life, and nearly two-thirds of them stated that they did so to secure release from jail or a shorter sentence).

⁵⁰ For example, a 1984 mock bargaining experiment involving college students found that in certain circumstances, particularly when conviction was seen as highly likely and probation was offered upon a guilty plea, “innocent” study subjects would accept a plea bargain “in order to cut their losses.” Kenneth S. Bordens, *The Effects of Likelihood of Conviction, Threatened Punishment, and Assumed Role on Mock Plea Bargaining Decisions*, 5 BASIC & APPLIED SOC. PSYCH. 59, 71 (1984).

⁵¹ After reviewing real cases of exonerees who had pleaded guilty, John Blume and Rebecca Helm identified a similar set of factors contributing to false guilty pleas. See John H. Blume & Rebecca K. Helm, *The Unexonerated: Factually Innocent Defendants Who Plead Guilty*, 100 CORNELL L. REV. 157 (2014).

⁵² National Registry of Exonerations, Jan. 4, 2017, at

<http://www.law.umich.edu/special/exoneration/Pages/detailist.aspx>. Of these exonerations based on guilty pleas, 50.1% (172/343) were for drug offenses, and most of these came from one county—Harris County, where they were uncovered as a result of the work of the Harris County D.A.’s Office Conviction Integrity Unit. *Id.*; National Registry of Exonerations, *Innocents Who Plead Guilty*, Nov. 24, 2015, at <http://www.law.umich.edu/special/exoneration/Documents/NRE.Guilty.Plea.Article1.pdf> [hereinafter *Innocents Who Plead Guilty*]. For a discussion of some of the reasons why exoneration data might underrepresent the prevalence of false guilty pleas, see Dervan & Edkins, *supra* note, at 21-22.

⁵³ *Innocents Who Plead Guilty*, *supra* note 52; see also Blume & Helm, *supra* note 51, at 180.

⁵⁴ Russell Covey, *Police Misconduct As A Cause of Wrongful Convictions*, 90 WASH. U.L. REV. 1133, 1173 (2013) (examining the mass exonerations in the Rampart case in California and the Tulia case in Texas and finding that, in those two cases involving police misconduct, innocent defendants pleaded guilty at a rate of 77%).

⁵⁵ Sherod Thaxton, *Leveraging Death*, 103 J. CRIM. L. & CRIMINOLOGY 475, 475 (2013).

⁵⁶ *Id.* at 475.

⁵⁷ Samuel R. Gross et al., *Exonerations in the United States 1989 Through 2003*, 95 J. CRIM. L. & CRIMINOLOGY 523, 544-46 (2005); *Innocents Who Plead Guilty*, *supra* note 52.

⁵⁸ *Innocents Who Plead Guilty*, *supra* note 52, at 2.

convicted of homicide, and “[i]t appears that the great majority [pleaded guilty] to avoid the risk of execution. All but 2 were prosecuted in death penalty states, and 70% had falsely confessed (31/44)”⁵⁹

On the other side of the punishment spectrum, a plea offer of time served for detained defendants has also been found to lead innocent defendants to plead guilty. Misdemeanor defendants are frequently detained for the simple reason that they cannot afford to post bail, and they are commonly offered plea deals to “time served.”⁶⁰ They are then subject to significant economic and familial pressures to plead guilty in order to be released from jail. A recent empirical study found that misdemeanor detainees “plead guilty at a 25% higher rate than similarly situated releasees.”⁶¹ The authors concluded that “[m]isdemeanor pretrial detention . . . seems especially likely to induce guilty pleas, including wrongful ones.”⁶²

B. Inaccuracy

Apart from coercive plea discounts, several other plea bargaining features heighten the risk of inaccurate and unjust outcomes: 1) limited time and resources for investigations, especially by the defense; 2) principal-agent problems on both the defense and prosecution sides; and 3) insufficient judicial review. These flaws increase the risk that defendants may plead guilty to inaccurate charges or receive punishment that is undeservedly lenient or undeservedly harsh.

In theory, if the prosecution attempts to pressure a defendant into a guilty plea despite weak evidence of guilt, the defense attorney could advise the client to reject the plea offer. In practice, counsel is frequently unable to do so because of overwhelming caseloads, cuts in indigent defense funding, and rules that limit defense investigations.⁶³ Defense attorneys lack search and subpoena powers or authority to depose witnesses.⁶⁴ Pre-plea discovery is also limited; for example, prosecutors are not constitutionally required to disclose impeachment evidence, which could greatly help the defense uncover flaws in the government’s case.⁶⁵ Some courts have even held that prosecutors need not disclose factually exculpatory evidence before a guilty plea.⁶⁶ While state rules may mandate more robust disclosure, such mandates often apply before trial, but not before a plea.

Various incentives for the defendant to plead guilty as early as possible further discourage thorough defense investigation.⁶⁷ Charging and sentencing concessions are frequently

⁵⁹ *Id.* at 3; *see also* Blume & Helm, *supra* note 51, at 180 (identifying the threat of the death penalty as a factor in pushing innocent defendants to plead guilty).

⁶⁰ Paul S. Heaton et al., *The Downstream Consequences of Misdemeanor Pretrial Detention*, 69 STAN. L. REV. *2 (forthcoming 2017); Alexandra Natapoff, *Misdemeanors*, 85 S. CAL. L. REV. 1313, 1322 (2012).

⁶¹ Heaton et al., *supra* note, at *21.

⁶² *Id.* at *2; Natapoff, *supra* note 60, at 1347.

⁶³ Darryl K. Brown, *The Decline of Defense Counsel and the Rise of Accuracy in Criminal Adjudication*, 93 CAL. L. REV. 1585, 1590 (2005).

⁶⁴ *See id.* at 1601. *But see* FLA. R. CRIM. P. 3.220(a)(1)(ii) (providing for pretrial depositions by the defense).

⁶⁵ *United States v. Ruiz*, 536 U.S. 622, 623 (2002).

⁶⁶ *Orman v. Cain*, 228 F.3d 616, 617 (5th Cir. 2000); *Walton v. State*, 165 So. 3d 516, 525 (Miss. Ct. App. 2015).

⁶⁷ U.S. ATTORNEYS’ MANUAL § 9-27.420 (prosecutors “should make clear to defense counsel at an early stage in the proceedings that, if there are to be any plea discussions, they must be concluded prior to a certain date, and *well in advance* of the trial date) (emphasis added).

predicated on timely “acceptance of responsibility.”⁶⁸ When defendants are presented with “exploding offers,” defense attorneys are left with scant opportunity to investigate the case.⁶⁹

Agency problems also affect prosecutors’ and defense attorneys’ actions in plea negotiations. When defense attorneys carry heavy caseloads or are paid flat fees, they have an incentive to settle cases quickly even when their clients might prefer to test the case at trial or when a more thorough investigation might uncover viable defenses or mitigating factors.⁷⁰ On the flip side, prosecutors dealing with high caseloads may negotiate overly generous plea bargains to dispose of a case more swiftly.⁷¹ This risk is heightened because victims have little to no input into prosecutorial decisions during plea bargaining.

In theory, judges could provide a neutral check on the parties and ensure that bargaining decisions are consistent with the facts of the case. But in reality, the law provides judges few tools to do so, and judges rarely make use of the powers they do have to check plea bargains. As discussed earlier, the factual basis inquiry remains rather perfunctory, and fact bargaining is common.⁷² Furthermore, in many jurisdictions, judges are prohibited from participating in or commenting on the plea negotiations.⁷³ Yet it is precisely during the negotiations that judges are likely to have the greatest impact on the fairness and accuracy of the outcome. Once the parties have arrived at a deal, they have little incentive to reveal anything that might disturb the agreement. The judge’s inquiry into the facts at the plea hearing is therefore unlikely to unearth discrepancies that place the deal in jeopardy.

As a result, plea bargains often fail to fully reflect the facts of the case. Negotiated charges may allege a crime that is more serious, less serious, or simply quite different from the actual conduct of the defendant. Similarly, because of the lack of publicity and adequate judicial checks on plea bargaining, a defendant who pleads guilty may get a sentence that does not accurately reflect his guilt. For example, a defendant may receive a harsher sentence than deserved, based on arbitrary factors such as race, gender, age, wealth, or the relationship between defense counsel and the prosecutor.⁷⁴ Conversely, a defendant may get a sentence that is undeservedly mild if a prosecutor is too overworked or if the factors mentioned above bias prosecutors in favor of leniency.⁷⁵ In the rush to dispose of the case, without adequate judicial

⁶⁸ *E.g.*, U.S. SENTENCING GUIDELINES MANUAL §§ 3E.1.1 cmt., app. 1; 6B1.2 cmt.

⁶⁹ Tina M. Zottoli et. al., *Plea Discounts, Time Pressures, and False-Guilty Pleas in Youth and Adults Who Pleaded Guilty to Felonies in New York City*, 22 PSYCHOL. PUB. POL’Y & L. 250, 251 (2016) (“Anecdotal data abound to suggest that prosecutors (and sometime judges) attach very stringent time constraints on defendants, such that defense attorneys have little to no time to vet evidence or investigate cases.”).

⁷⁰ Alschuler, *supra* note 6, at 682; Bibas, *supra* note 15, at 2477.

⁷¹ Albert W. Alschuler, *The Prosecutor’s Role in Plea Bargaining*, 36 U. CHI. L. REV. 50, 51 (1968); Bibas, *supra* note 15, at 2474.

⁷² *See supra* note 31 and accompanying text.

⁷³ *E.g.*, *State v. Bouie*, 817 So. 2d 48, 53-54 (La. 2002); FED. R. CRIM. PROC. R. 11 (e)(1); Turner, *supra* note 30, at 202 & n.6 (listing jurisdictions).

⁷⁴ *See supra* note 15 and accompanying text; Besiki Luka Kutateladze et al., *Opening Pandora’s Box: How Does Defendant Race Influence Plea Bargaining?* JUSTICE Q. 398, 420 (2016); Cassia Spohn & Robert Fornango, *U.S. Attorneys and Substantial Assistance Departures: Testing for Interprosecutor Disparity*, 47 CRIMINOLOGY 813, 835-36 (2009).

⁷⁵ *E.g.*, Nancy J. King, *Judicial Oversight of Negotiated Sentences in A World of Bargained Punishment*, 58 STAN. L. REV. 293, 297 (2005); Turner, *supra* note 30, at 259.

scrutiny or publicity, the parties can settle for bargains that depart from the “shadow of trial” and from the truth.⁷⁶

C. Inadequate Procedural Safeguards

Another failing of plea bargaining is its opaqueness. The parties negotiate the disposition in private, typically without the participation of a neutral third party or direct input from victims. Plea bargains are rarely written or recorded in any fashion. The lack of record and transparency hinders accountability for flaws in the process or the outcome. It also taints the process in the eyes of the public and the victim.⁷⁷ Public rates of disapproval of plea bargaining are strikingly high, at least in part because of the covert nature of the practice.⁷⁸ The lack of a clear record also makes empirical research into plea bargaining difficult and frustrates scholars who aim to offer data-based analysis.⁷⁹

In addition to lacking transparency, plea bargains increasingly require defendants to waive important procedural rights that are designed to ensure fair and accurate outcomes. Inherent in a guilty plea are waivers of the right to remain silent, the right to confront witnesses, the right to a public trial, and the right to a jury trial. Increasingly, however, as part of plea negotiations, prosecutors regularly demand waivers of critical additional rights. These include rights to appeal the validity of the plea and associated sentence,⁸⁰ to discovery (including discovery of exculpatory evidence),⁸¹ to post-conviction DNA testing,⁸² to have a pre-sentence investigation and report prepared,⁸³ and to challenge ineffective counsel.⁸⁴ These types of waivers insulate plea bargains from judicial review, thus allowing prosecutorial overreaching and other procedural failures and factual inaccuracies to remain unchecked.⁸⁵ They are also arguably

⁷⁶ See, e.g., RICHARD LIPKE, *ETHICS OF PLEA BARGAINING* ch. 9 (2011).

⁷⁷ Bibas, *supra* note 15, at 2547; Michael M. O’Hear, *Plea Bargaining and Procedural Justice*, 42 GA. L. REV. 407, 444-46 (2008).

⁷⁸ Herzog, *supra* note, at 591.

⁷⁹ Brian D. Johnson et al., *Sociolegal Approaches to the Study of Guilty Pleas and Prosecution*, 12 ANN. REV. L. & SOC. SCI. 481-82 (2016). A notable example of a state statute requiring a record, for purposes of maintaining statistics, of the sentencing and charging concessions made in exchange for a guilty plea is KY. REV. STAT. § 27A.420.

⁸⁰ Paul J. Hofer, *Has Booker Restored Balance? A Look at Data on Plea Bargaining and Sentencing*, 23 FED. SENT’G. REP. 326, 327-28 (2011); Nancy King & Michael O’Neill, *Appeal Waivers and the Future of Sentencing Policy*, 55 DUKE L. J. 209, 212 (2005) (finding that “in nearly two-thirds of the cases settled by plea agreement [in the federal system], the defendants waived their rights to review”).

⁸¹ Hofer, *supra* note, at 327-28; Susan R. Klein et al., *Waiving the Criminal Justice System: An Empirical and Constitutional Analysis*, 52 AM. CRIM. L. REV. 73, 77 (2015).

⁸² Klein et al., *supra* note 81, at 83.

⁸³ Hofer, *supra* note, at 327-28 (In districts with “fast-track programs... defendants, in order to avoid excessive punishments, are required to waive their rights to indictment, to discovery of the evidence against them, to have a pre-sentence investigation and report prepared, to argue for a reduced sentence before the judge, and to appeal a mistaken sentence.”).

⁸⁴ Klein et al., *supra* note 81, at 88.

⁸⁵ As one court explained about negotiated waivers of the right to appeal the sentence:

The condition sought to be imposed by the government is inherently unfair; ... it will undermine the error correcting function of the courts of appeals in sentencing; it will create a sentencing regime where courts of appeals will never have the opportunity to review an illegal or unconstitutional sentence, or a sentence that has no basis in fact, unless those sentencing errors work to the disadvantage of the government. . . . A defendant cannot knowingly, intelligently and voluntarily give up the right to appeal a sentence that has not

uninformed, as most defendants cannot adequately predict and understand some of the claims they are waiving.⁸⁶ While some people defend such waivers on the grounds that defendants should have the freedom to exchange their rights for shorter sentences, such arguments underestimate the long-term damage to the integrity of the system that widespread waivers of critical rights can inflict.

IV. Reform Proposals

The increasing number of exonerations of people who pleaded guilty has revived interest in proposals to reform plea bargaining. These range from complete abolition to discrete doctrinal fixes.⁸⁷

A. Reducing Coercion

One set of proposals aims to reduce the coerciveness of plea bargaining by limiting the size of plea discounts. Proposals include setting a fixed plea discount (e.g., one-third of the anticipated post-trial sentence), enacting caps on plea discounts (e.g., no more than one-third of the anticipated post-trial sentence), setting a limit on the “trial penalty” that courts might impose, or giving courts the power to review whether plea discounts are proportionate to the expected post-trial sentence.⁸⁸ Such limits exist—and appear to work fairly successfully—in foreign jurisdictions that have adopted forms of plea bargaining.⁸⁹ But they are typically embedded in legal regimes that give judges broader sentencing discretion and greater authority to amend

yet been imposed and about which the defendant has no knowledge as to what will occur at the time of sentencing.

United States v. Raynor, 989 F. Supp. 43, 49 (D.D.C. 1997); see also Klein et al., *supra* note 81, at 114 (“[Waivers of ineffective assistance claims] remove the ‘only remaining ‘checks’ in our system of plea-agreement justice. If the defendant is allowed to give up this right at the plea stage, there is little cushion left to protect her against unwise tactical decisions, prosecutorial misconduct or overzealousness, or waiver of important other rights.”).

⁸⁶ Klein et al., *supra* note 81, at 107-08; Ellen S. Podgor, Pleading Blindly, 80 Miss. L.J. 1633, 1641 (2011) (noting ethical and legal concerns with discovery waivers).

⁸⁷ For a sampling of recent reform proposals by policy organizations, judges and legislators, see Fair Trials, Communique, A Fair Deal: Negotiation Justice, at <https://www.fairtrials.org/wp-content/uploads/Final-Washington-Plea-Bargain-roundtable-communique.pdf>; Ted Cruz, *Reduce Federal Crimes and Give Judges Flexibility*, Brennan Center for Justice, Apr. 27, 2015; Jed S. Rakoff, *Why Innocent People Plead Guilty*, N.Y. REV. BOOKS (Nov. 20, 2014), <http://www.nybooks.com/articles/archives/2014/nov/20/why-innocent-people-plead-guilty/>; *American Prosecutors Have Too Much Power: Hand Some of It to Judges*, ECONOMIST, Oct. 4, 2014.

⁸⁸ Oren Gazal-Ayal, *Partial Ban on Plea Bargains*, 27 CARDOZO L. REV. 2295, 2313-17 (2006); McCoy, *supra* note, at 103; see also Covey, *supra* note 19, at 622 (proposing limits on the trial penalty rather than on the plea proposed by the prosecutor).

⁸⁹ See Sentencing Guidelines Council, *Reduction in Sentence for a Guilty Plea: Definitive Guideline Revised* (2007) (setting a recommended sentence reduction of one-third when a guilty plea is entered at the earliest reasonable opportunity and less if entered later); Julian V. Roberts & Ben Bradford, *Sentence Reductions for a Guilty Plea in England and Wales: Exploring New Empirical Trends*, 12 J. EMP. LEG. STUD. 187, 196 (2015) (finding that “almost all cases where a plea was entered attracted reductions of one-third or less”); Turner, *supra* note 30, at 235 (discussing how German courts are required to ensure that post-plea as well as post-trial sentences remain proportionate to the offense committed and how plea discounts tend not to exceed one-third of the anticipated post-trial sentence); ITALIAN CODE CRIM. PROC. art. 444, *cited in* William T. Pizzi & Mariangela Montagna, *The Battle to Establish an Adversarial Trial System in Italy*, 25 MICH. J. INT’L L. 429, 466 (2004) (setting the plea discount to one-third of the maximum sentence to be imposed post-trial).

charges.⁹⁰ By contrast, U.S. jurisdictions that have to impose limits on plea discounts have been less successful because prosecutors have been able to circumvent such limits through their charging decisions.⁹¹ To ensure that plea discount limits are effective, therefore, legislators must adopt them alongside more comprehensive reform of the criminal justice system, which would include restoring judicial discretion over sentencing and limiting prosecutorial discretion in charging decisions.

Some have also argued that to reduce coerciveness in plea bargaining, courts and legislators should reject the Supreme Court's hands-off approach to prosecutorial threats to overcharge defendants who refuse a plea offer. Instead, rules could require prosecutors to provide justification for adding charges later in the process and perhaps require new evidence for such additions.⁹² In a number of states, courts acting "in the interests of justice" may be able to dismiss charges that were added by prosecutors solely to induce a plea bargain.⁹³ As an alternative, some scholars have called on prosecutors' offices to develop protocols that require line prosecutors to "refrain from pressure tactics like exploding offers and charging threats."⁹⁴

B. Improving Accuracy

Other reform proposals have focused on enhancing the accuracy of plea bargains. One critical step toward ensuring well-informed plea bargains would be a requirement of broad pre-plea discovery.⁹⁵ A number of states have already adopted liberal discovery rules, and more are likely to follow suit in the near future.⁹⁶ If enacted with due care to protect witness safety,

⁹⁰ See, e.g., BROWN, *supra* note, at 108 (observing that English constraints on prosecutorial discretion "are less rigorous, but still somewhat greater than in the United States"); Giulio Illuminati, *The Accusatorial Process from the Italian Point of View*, 35 N.C. J. INT'L L. & COM. REG. 297, 318 (2010) (arguing that although Italy has introduced a form of plea bargaining, "the principle of compulsory prosecution prevents a real out-of-court settlement between the defendant and the prosecution. Compulsory prosecution requires, in all cases, an evaluation on the merits by a judge and a monitoring on the content of the agreement, in accordance with the legality principle."); Turner, *supra* note 30, at 219-20, 225-32 (describing the extensive involvement in plea negotiations by German judges for the purpose of controlling prosecutorial discretion and ensuring a proportionate sentence and an accurate outcome).

⁹¹ See, e.g., Josh Bowers, *The Unusual Man in the Usual Place*, 157 U. PA. L. REV. PENNUMBRA 260, 274 (2009) (noting that although a New York statute, N.Y. CRIM. PROC. LAW § 220.10, imposed caps on the size of post-indictment charge bargains, the parties would evade the limits by entering into pre-indictment plea agreements); Markus Dirk Dubber, *American Plea Bargains, German Lay Judges, and the Crisis of Criminal Procedure*, 49 STAN. L. REV. 547, 601 (1997) ("As the experience with the federal sentencing guidelines makes clear, merely introducing a moderate and standard plea discount, without simultaneously controlling the prosecutorial charging decision, does little to constrain prosecutorial bargaining power or to prevent rampant charge and fact bargaining.").

⁹² BROWN, *supra* note, at 102 (discussing pre-*Bordenkircher* cases that constrained prosecutorial charging threats).

⁹³ E.g., Cal. Penal Code § 1385(a) (2013); Valena E. Beety, *Judicial Dismissal in the Interest of Justice*, 80 Mo. L. REV. 629, 647 (2015) (discussing state statutes that provide for judicial dismissal of charges in the interest of justice).

⁹⁴ O'Hear, *supra* note 77, at 431; see also *United States v. Kupa*, 976 F. Supp. 2d 417, 422 (E.D.N.Y. 2013) ("The Attorney General needs to expressly prohibit the use of prior felony informations to coerce defendants into pleading guilty or to punish those who refuse to do so.").

⁹⁵ See, e.g., Turner & Redlich, *Two Models of Pre-Plea Discovery in Criminal Cases: An Empirical Comparison*, 73 WASH & LEE L. REV. 285 (2016) (discussing scholarship advocating for broader pre-plea discovery).

⁹⁶ For a list of key features of state and federal discovery rules, see *id.* Appendix B.

discovery reform would come at little cost, while making an important contribution to the accuracy of plea bargains.⁹⁷

At the same time, for broad discovery to provide its intended benefits, it must be accompanied by provisions for well-funded defense.⁹⁸ Defense attorneys must have the time and resources to review, analyze and further investigate facts disclosed by the prosecution.

Judicial oversight of plea bargains can also increase the truthfulness of the process. This could be accomplished by involving judges in the negotiations⁹⁹ or by demanding a more thorough inquiry into the factual basis of the guilty plea.¹⁰⁰

Most states already require judges to ensure that guilty pleas are factually based.¹⁰¹ At a minimum, reform aimed at ensuring accurate guilty pleas must include this basic rule;¹⁰² preferably, the rule would also delineate how searching the inquiry should be. In the United States, perhaps the most robust factual basis inquiry occurs in the military justice system; it can serve as a model for states wishing to provide greater judicial oversight over the guilty plea process.¹⁰³ Military judges must engage the accused in a “dialogue in which the military judge poses questions about the offense and the accused provides answers that describe his personal understanding of the criminality of his or her conduct.”¹⁰⁴ The dialogue is supposed to entail a genuine effort to elicit the true facts, and judges are not supposed to ask leading questions that produce simple “yes” and “no” responses.¹⁰⁵ Judges may also reject the guilty plea if the evidence adduced at the hearing is inconsistent.¹⁰⁶

Another way to enhance the accuracy of plea bargains would be to allow judges to participate in the negotiations. Judicial participation provides a neutral assessment of the facts at

⁹⁷ *Id.* at 352-72 (reporting the views of North Carolina prosecutors and defense attorneys on the advantages and disadvantages of open-file discovery in their state).

⁹⁸ See, e.g., Ben Grunwald, *The Fragile Promise of Open File Discovery*, 49 CONN. L. REV. *1, *5 (forthcoming).

⁹⁹ Alschuler, *supra* note 15, at 1060; Turner, *supra* note 30; Rakoff, *supra* note 87; *American Prosecutors Have Too Much Power*, *supra* note 87.

¹⁰⁰ E.g., BROWN, *supra* note 6, at 110; Susan R. Klein, *Monitoring the Plea Process*, 51 DUQ. L. REV. 559 (2013).

¹⁰¹ LaFave et al., *supra* note 25, § 21.4 nn. 205-06.

¹⁰² Supreme Court of Ohio, Public Comment, 2016 Rules of Practice and Procedure Proposed Amendments, at <http://www.supremecourtohio.gov/ruleamendments/documents/Public%20Comment--2016%20Rules%20of%20Practice%20and%20Procedure%20proposed%20amendments.pdf> (proposing the adoption of a factual basis requirement for guilty pleas in Ohio).

¹⁰³ Continental European systems also typically require the court, as part of its duty to investigate the truth, to conduct a searching inquiry into the facts underlying a plea agreement or guilty plea. E.g., Stephen C. Thaman, *A Typology of Consensual Criminal Procedures: An Historical and Comparative Perspective on the Theory and Practice of Avoiding the Full Criminal Trial*, in WORLD PLEA BARGAINING 297, 368 (Stephen C. Thaman ed., 2010).

¹⁰⁴ *United States v. Hartman*, 69 M.J. 467, 469 (C.A.A.F. 2011).

¹⁰⁵ *United States v. Negron*, 60 M.J. 136, 143 (C.A.A.F. 2004), *aff'd*, (C.A.A.F. Feb. 21, 2007) (“We have repeatedly advised against and cautioned judges regarding the use of conclusions and leading questions that merely extract from an accused “yes” and “no” responses during the providency inquiry.”).

¹⁰⁶ E.g., *United States v. Pinero*, 60 M.J. 31, 34 (C.A.A.F. 2004); Manual for Courts Martial App. 8 (2012) (“The military judge should be alert to discrepancies in the accused’s description or between the accused’s description and any stipulation. If the accused’s discussion or other information discloses a possible defense, the military judge must inquire into the matter, and may not accept the plea if a possible defense exists. The military judge should explain to the accused the elements of a defense when the accused’s description raises the possibility of one.”).

a point when such assessment can still make a difference; it minimizes the risks of coercion by prosecutors; and it provides the parties with early certainty about the sentencing outcome of a plea bargained case. Such involvement also entails some risks—undermining the perceived neutrality of the judge or pressuring the parties to settle in order to expedite dispositions.¹⁰⁷ But states can adopt procedural safeguards that address these problems—for example, by requiring, as Connecticut and Maryland do, that a different judge preside over a trial should the plea negotiations falter.¹⁰⁸ Interviews with practitioners in states that permit judicial participation in plea negotiation suggest that, on the whole, judicial involvement tends to produce more informed and fairer plea bargains.¹⁰⁹ Experimental studies and public surveys further suggest that involving judges in the process is likely to enhance public perceptions of the legitimacy of plea bargaining.¹¹⁰

Finally, prosecutors’ offices can take measures to improve the accuracy of plea bargaining. Specifically, chief prosecutors can adopt internal guidelines that prohibit plea bargaining in so-called “half-baked cases.”¹¹¹ Instead of bargaining away cases with weak evidence, prosecutors could be encouraged to either screen out such cases or bring them to trial. It is precisely in cases with weak evidence that defendants are most likely to be innocent and yet prosecutors are most likely to grant enormous plea discounts to induce a plea. To reduce the risk of wrongful convictions, prosecutors could refrain from bargaining in such cases.

C. Enhancing Transparency and Fairness

Other proposed reforms of plea bargaining focus on increasing transparency and procedural fairness. One such proposal would require that plea agreements be written and placed on the record. The written agreements would contain a clear statement of the key expected sentencing and collateral consequences. A few jurisdictions have already adopted such rules.¹¹² They aim to protect defendants from uninformed guilty pleas and from basing the decision to plead guilty “upon certain promises made by the prosecutor where the judge has in fact not

¹⁰⁷ Nancy J. King & Ronald F. Wright, *The Invisible Revolution in Plea Bargaining: Managerial Judging and Judicial Participation in Negotiations*, 95 TEX. L. REV. 325, 359-64 (2016) (noting that concern about managing cases more efficiently is a key factor motivating judicial participation in plea negotiations); Turner, *supra* note 30, at 202-04 (discussing concerns about judicial participation in plea negotiations).

¹⁰⁸ MD. R. 4-243(c)(5) (“If the defendant withdraws the plea and pleads not guilty, then upon the objection of the defendant or the State made at that time, the judge to whom the agreement was presented may not preside at a subsequent court trial of the defendant on any charges involved in the rejected plea agreement.”); *State v. D’Antonio*, 830 A.2d 1187, 1194 (Conn. App. Ct. 2003).

¹⁰⁹ King & Wright, *supra* note 107, at 364-81; Turner, *supra* note, at 252-56.

¹¹⁰ Herzog, *supra* note, at 593, 606 (discussing surveys of Canadian citizens and experimental study involving Israeli citizens).

¹¹¹ See, e.g., RICHARD LIPPKE, *ETHICS OF PLEA BARGAINING* ch. 8 (2011) (arguing that “officials committed to principled prosecution would be reluctant to engage in half-loaf plea bargaining [i.e., plea bargaining to obtain conviction in cases with weak evidence]”); Welsh, *supra* note 7, at 442-43 (discussing such policies in the Philadelphia D.A.’s Office, but noting that actual practice differed somewhat from office policy); Ronald Wright & Marc Miller, *The Screening/Bargaining Tradeoff*, 55 STAN. L. REV. 29, 117 (2002) (holding up as an example the New Orleans D.A.’s Office, which relied on internal prosecutorial guidelines to get prosecutors to screen out, rather than bargain away weak cases).

¹¹² See, e.g., IND. CODE ANN. § 35-35-3-3 (West 2016) (providing that plea agreements in felony cases must be in writing to be accepted by the court); MD. R. 4-243(d); N.J. CT. R. 3:9-1(b) (2012) (“Any plea offer to be made by the prosecutor shall be in writing and forwarded to the defendant’s attorney.”).

accepted the state's recommendation."¹¹³ While seemingly adding an onerous layer of documentation, such requirements can also "help prevent the possibility of disputes concerning the specific terms of a plea bargain" and prevent spurious claims of ineffective assistance of counsel.¹¹⁴ Furthermore, they provide a measure of transparency that protects the interests of victims and the public in understanding the terms of the bargain.

To strengthen the fairness of plea bargaining, courts and legislatures can also impose limits on permissible waivers. These include limits or outright bans on waivers of the right to appeal the plea and accompanying sentence, waivers of ineffective assistance of counsel claims, waivers of post-conviction DNA testing, and waivers of discovery rights.¹¹⁵ Such waivers are becoming more widespread in the federal system, but are less common and in some instances expressly prohibited in state systems, as violations of public policy or of professional responsibility rules.¹¹⁶

Finally, commentators have proposed alternatives to current forms of plea bargaining that expedite proceedings, but at a lesser cost to procedural fairness. Some have suggested that bench trials (possibly with simplified rules of procedure) would be a fairer, yet sufficiently expeditious and cost-effective alternative to plea bargaining.¹¹⁷ Others have gone further, proposing that the parties negotiate away certain trial procedures but still retain the basic form of a trial as a substitute for plea bargaining.¹¹⁸ One commentator has proposed a plea jury, which would examine the validity of a guilty plea to ensure that it is voluntary, knowing, and factually based.¹¹⁹ These alternatives have been criticized by some for not offering the same demanding process that trials do.¹²⁰ But in a system where trials are the rare exception, abbreviated bench

¹¹³ Davis v. State, 418 N.E.2d 256, 260 (Ind. App. 3d Dist. 1981).

¹¹⁴ Missouri v. Frye, 132 S. Ct. 1399, 1408-09 (2012); 16A IND. PRAC., CRIMINAL PROCEDURE--TRIAL § 13.3; see also Joel Mallard, Comment, *Putting Plea Bargaining on the Record*, 162 U. PA. L. REV. 683, 685 (2014); Stephanie Stern, Note, *Regulating the New Gold Standard of Criminal Justice: Confronting the Lack of Record-Keeping in the American Criminal Justice System*, 52 HARV. J. LEGIS. 245, 250-51 (2015). The German Constitutional Court has held that courts must record the existence, substance, and outcome of any plea negotiations and must not allow the negotiations of appeals waivers transparency in plea bargaining. Thomas Weigend & Jenia I. Turner, *The Constitutionality of Negotiated Criminal Judgments in Germany*, 15 GERMAN L.J. 81 (2014).

¹¹⁵ E.g., Klein et al., *supra* note 81, at 94, 114; Fair Trials, *supra* note 87.

¹¹⁶ See, e.g., People v. Stevenson, 231 N.W.2d 476, 477 (Mich. Ct. App. 1975) (holding that negotiated waivers of the right to appeal are against public policy); Ala. State Bar Office of Gen. Counsel, Op. 02, at 1, 4 (2011), at <https://www.alabar.org/assets/uploads/2014/08/2011-02.pdf> (opining that prosecutors and defense attorneys seeking to negotiate waivers of ineffective assistance claims would violate the state's rules of professional responsibility); see also Klein, *supra* note 100, at 582-83; Turner & Redlich, *supra* note, at 346-52 (finding that waivers of discovery rights are rarely negotiated in Virginia and North Carolina).

¹¹⁷ Alschuler, *supra* note 42, at 1033 ("Since bench trials can be completed in a matter of minutes, they serve substantially the same purpose as guilty pleas."); Stephen J. Schulhofer, *Is Plea Bargaining Inevitable?*, 97 HARV. L. REV. 1037, 1037 (1984) ("[B]ench trials can be ... genuine adversary proceedings in which defendants retain many of the constitutional protections that plea bargaining sacrifices.").

¹¹⁸ Gregory Gilchrist, *Trial Bargaining*, 101 IOWA L. REV. 609, 621 (2016) ("Trials could be streamlined through various waivers, while maintaining the legitimizing effect of jury verdicts.").

¹¹⁹ Laura I. Appleman, *The Plea Jury*, 85 INDIANA L. J. 731, 733 (2010) (arguing that a plea jury would return the community to its traditional role in deciding guilt and punishment in criminal cases, would enhance the procedural rights of defendants, strengthen the inquiry into the factual basis of the plea, add transparency to the process, and reduce prosecutorial power in plea bargaining).

¹²⁰ E.g., Scott & Stuntz, *supra* note, at 1950.

trials and jury plea hearings can be defended as superior alternatives to the norm of procedurally deficient plea bargains.

V. Recommendations

Most of the above proposals address distinct problematic aspects of plea bargaining. They ought to be considered for adoption not in isolation, but as part of a comprehensive package that aims to ensure that plea bargaining produces just and accurate outcomes.

1. Require Written Plea Agreements

Perhaps the easiest plea bargaining reform for legislators to undertake is requiring that plea agreements be placed in writing and entered into the record. As noted earlier, several jurisdictions have already adopted such requirements. They help ensure that defendants receive notice of the terms of the agreement, allow for a more informed judicial review of the plea, and make the process more transparent to the public.

The California Judicial Council has created a plea form that lists a number of direct and collateral consequences that might follow a guilty plea and invites the parties to identify which of these consequences apply to their case. It also outlines rights that the defendant is waiving by pleading guilty and provides space for the parties to list other terms of the agreement. This form can serve as a blueprint for other jurisdictions.¹²¹

With respect to placing plea agreements on the record, the Maryland rule offers a good model: “All proceedings pursuant to this Rule, including the defendant’s pleading, advice by the court, and inquiry into the voluntariness of the plea or a plea agreement shall be on the record. If the parties stipulate to the court that disclosure of the plea agreement or any of its terms would cause a substantial risk to any person of physical harm, intimidation, bribery, economic reprisal, or unnecessary annoyance or embarrassment, the court may order that the record be sealed subject to terms it deems appropriate.”¹²² In cases where cooperating defendants might frequently be subject to retaliation (e.g., organized crime cases), the recording requirement may be modified or even eliminated. The federal system is currently studying options for balancing these interests in cases where the safety of cooperating witnesses might be compromised.¹²³

2. Prohibit Waivers of Critical Rights

Courts or legislatures should prohibit the parties from negotiating waivers of several key rights that help protect the fairness and accuracy of plea bargains—the right to appeal the

¹²¹ See California Courts, Plea Form, With Explanations and Waiver of Rights-Felony, *at* <http://www.courts.ca.gov/documents/cr101.pdf>.

¹²² Md. R. 4-243(d); *see also* State v. Poole, 583 A.2d 265 (Md. Ct. App. 1991) (holding that while the rule does not require that bench conferences relating to plea agreement be recorded, judges should make record of pertinent discussion and decisions reached or at least summarize essential parts of the agreement).

¹²³ Advisory Committee on Criminal Rules, Cooperator Subcommittee Report (Sept. 19, 2016), at 245, 250-51, 310-12, http://www.uscourts.gov/sites/default/files/2016-09-criminal-agenda_book_0.pdf (endorsing federal court rules that require, among else, that any discussion of presence or absence of cooperation be included in a sealed supplement to plea agreements).

validity of the guilty plea and the accompanying sentence, the right to discovery, the right to subsequent DNA testing, and the right to effective assistance. Some jurisdictions already restrict or prohibit such waivers, but there is a troubling increase in the waivers negotiated in other systems, especially the federal. These waivers undermine critical protections against uninformed and unfair plea bargains. To restore a measure of due process in plea bargaining, it is critical to prohibit their use by statute, case law or ethical rules.¹²⁴ At the very least, prosecutor's offices ought to restrict the negotiation of such waivers except in special circumstances requiring supervisory approval.

3. Provide Broad Pre-Plea Discovery and Ensure that Defense Attorneys Have the Time and Resources to Review It

To ensure that innocent defendants do not plead guilty and to improve the fairness of plea bargains, legislatures should also adopt broad pre-plea discovery.¹²⁵ Specifically, discovery rules should be amended to require prosecutors to disclose to the defense, before a guilty plea, at a minimum, the following types of evidence: 1) impeachment and exculpatory evidence, without regard to its materiality; 2) witness names and statements, redacted as necessary to protect witnesses from risk of harm; and 3) police reports, again redacted as needed to protect the safety of witnesses. A number of states have already adopted such rules;¹²⁶ some, like North Carolina and Texas, have gone even further and adopted open-file pre-plea discovery.¹²⁷ The evidence so far suggests that broad discovery can be implemented at a reasonable cost and without undue hardship to witnesses. It is the first step toward ensuring that parties are negotiating fair, well-informed, and factually based plea bargains and that innocent defendants are not coerced into pleading guilty.

For open-file discovery to have its intended positive effects, defense counsel must have the time and resources to review and investigate the facts revealed through discovery.¹²⁸ Open-

¹²⁴ See, e.g., *People v. Ventura*, 139 A.D.2d 196, 203 (N.Y.A.D. 2d Dept. 1988) (holding that “the public policy of this State requires that before the People can condition a plea to the defendant’s waiver of his right to appellate review, it must advance some legitimate State interest.”); Klein et al., *supra* note 81, at 95-106 (discussing state ethical rules that have been interpreted to bar negotiated waivers of ineffective assistance of counsel claims); R.C.M. 705(c)(1)(B) (“A term or condition in a pretrial agreement shall not be enforced if it deprives the accused of ... the complete and effective exercise of post-trial and appellate rights.”).

¹²⁵ Ted Cruz, *Reduce Federal Crimes and Give Judges Flexibility*, Brennan Center for Justice, Apr. 27, 2015 (“Congress should pass legislation that requires the government — whether constitutionally required or not — to disclose material exculpatory evidence before the accused enters into any plea agreement. This reform will reduce the risk of false guilty pleas by helping ensure that the accused is better informed before sealing his or her fate.”).

¹²⁶ See, e.g., ARIZ. R. CRIM. P. 15.1 (requiring the prosecutor to make available to the defendant all reports regarding relevant information within the prosecutor’s control); COLO. R. CRIM. P. 16 (same); N.J. CT. R. 3:13-3 (requiring the prosecutor to put together a discovery packet or allow defendant to inspect, copy, and photograph relevant information); OHIO R. CRIM. P. 16 (allowing a defendant access to relevant case materials subject to few limitations).

¹²⁷ N.C. GEN. STAT. ANN. § 15A-903 (West 2015) (allowing a defendant to make a motion entitling her to receive “the complete files of all law enforcement agencies, investigatory agencies, and prosecutor’s offices involved in the investigation”); TEX. CODE CRIM. PROC. ANN. art. 39.14 (West 2015) (allowing defendants upon request access to all relevant information).

¹²⁸ E.g., Ted Cruz, *Reduce Federal Crimes and Give Judges Flexibility*, Brennan Center for Justice, Apr. 27, 2015 (“Mitigating the coercive effect of the plea-bargaining process will require empowering the defense. And one way to do that is to reduce the informational asymmetry between prosecutors and defense counsel. Plea offers are often

file discovery therefore must be coupled with reforms that ensure adequate funding of criminal defense.¹²⁹ Legislators, courts, and prosecutors' offices should also strictly limit or entirely prohibit "exploding" offers. Such offers prevent defendants and their counsel from adequately evaluating the evidence disclosed and conducting further investigations if needed, before making a decision whether to plead guilty or proceed to trial. Therefore, states may require (as Louisiana has done) that guilty pleas be accepted only after a certain period has passed since arrest¹³⁰ or (as in Texas) that prosecutors make discovery available to the defense before a court can accept a guilty plea.¹³¹ Prosecutors' offices could also consider adopting internal protocols that discourage "exploding offers."¹³²

4. Strengthen Judicial Oversight of Plea Bargains and Guilty Pleas

Judicial participation in plea negotiations allows a neutral party to assess the terms of the plea bargain and the facts of the case at a point in the proceeding when such oversight can make a real difference. A number of states permit such participation, and recent qualitative studies suggest that it is perceived to provide greater certainty, fairness, and much-needed oversight of the plea bargaining process. The risk of judicial coercion can be minimized through procedures that allow a different judge to preside over trial when plea bargaining falls apart.¹³³ Legislators should therefore expressly permit judicial participation in plea negotiations, but require judicial recusal if a case proceeds to trial after negotiations fail.

At a minimum, legislators should demand that judges conduct a more searching inquiry into the facts underlying the guilty plea and accompanying agreement. Judges should not rely merely on factual stipulations or summaries of the evidence presented by the prosecution, but should question the defendant and review any available materials to ensure that the conviction and the proposed plea agreement reflect the true facts of the case. Military courts—as well as courts in continental European systems that have adopted plea bargaining—engage in more thorough vetting of the facts before accepting guilty pleas, and they can offer helpful guidance for civilian U.S. jurisdictions.¹³⁴

5. Adopt Limits on Plea Discounts

Courts and legislatures should also limit the charging and sentencing concessions that prosecutors can offer in exchange for a guilty plea. Enormous discounts heighten the risk of innocent persons pleading guilty and may produce unjust sentencing disparities. Legislatures can address this problem by limiting plea discounts to no more than a third of the expected post-trial sentence; alternatively or in addition, courts can use any sentencing discretion they have to reduce discounts that are more than 30-35%.¹³⁵ In many U.S. jurisdictions today, prosecutors can

foisted upon the accused before the defense has had enough time to investigate the facts, and the longer the investigation takes, the less generous the plea off may become.”).

¹²⁹ Eve Brensike Primus, *Defense Counsel and Public Defense*, Academy for Justice Report (2017).

¹³⁰ LA. CODE CRIM. PROC. ANN. art. 559 (banning felony guilty pleas within 48 hours of arrest).

¹³¹ TEX. CODE CRIM. PROC. ANN. art. 39.14 (West 2015).

¹³² O’Hear, *supra* note 77, at 431.

¹³³ See *supra* note 108.

¹³⁴ See *supra* notes 104-106.

¹³⁵ See *supra* note 89.

circumvent plea discount caps through their charging decisions. But the experience of foreign systems like England and Germany suggests that such limits can be effective if coupled with broader judicial discretion to scrutinize charges and impose proportionate sentences. For that reason, policymakers should consider this proposal in tandem with ideas for comprehensive reform of the criminal justice system. Excising overlapping criminal statutes—a stated goal of reformers—would constrain prosecutorial discretion to evade plea discount limits through charge bargains. Reducing sentencing severity and restoring judicial discretion over sentencing can also help courts ensure that plea discounts remain reasonable. Finally, chief prosecutors themselves can also take the initiative and adopt internal regulations that limit the size of plea discounts line prosecutors can offer.

The proposals above offer a range of practical solutions that can help make plea bargaining fairer, more transparent, and more honest. Given the central place of plea bargaining in our criminal justice system, any serious reform of the process ought to consider them.

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United States District Court, S.D. West Virginia,
Charleston Division.

UNITED STATES of America, Plaintiff,
v.
Charles York WALKER, Jr., Defendant.

CRIMINAL ACTION NO. 2:17-cr-00010

|
Signed 06/26/2017

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MEMORANDUM OPINION AND ORDER

JOSEPH R. GOODWIN, UNITED STATES
DISTRICT JUDGE

I. INTRODUCTION

*1 The court must decide whether, under [Rule 11 of the Federal Rules of Criminal Procedure](#), to accept or reject the plea agreement between the defendant, Mr. Charles York Walker, and the government. While [Rule 11](#) gives defendants and prosecutors the ability to enter into plea agreements, it also obligates judges to accept or reject those agreements.¹ [Rule 11](#) is silent on what the court should or may consider in its decision.

It is the court's function to prevent the transfer of criminal adjudications from the public arena to the prosecutor's office for the purpose of expediency at the price of confidence in and effectiveness of the criminal justice system. The community of the Southern District of West Virginia must not be systemically excluded from its proper place in this participatory democracy, especially with regard to the heroin and opioid crisis. Because I **FIND** that

the plea agreement proffered in this case is not in the public interest, I **REJECT** it.

II. BACKGROUND

a. Factual Background

On September 13, 2016, the grand jury in the Southern District of West Virginia returned an indictment against the defendant in case number 2:16-cr-174-1.² The indictment charged the defendant with three counts of distributing a quantity of heroin in violation of [21 U.S.C. § 841\(a\)\(1\)](#); two counts of distributing a quantity of fentanyl in violation of [21 U.S.C. § 841\(a\)\(1\)](#); and one count of being a felon in possession of a firearm in violation of [18 U.S.C. §§ 922\(g\)\(1\)](#) and [924\(a\)\(2\)](#).³ The charged conduct occurred between April 14, 2016, and July 14, 2016.⁴

The defendant and the government later entered into a plea agreement. The defendant agreed to plead guilty to a separate, single-count information, and the government agreed to move this court to dismiss the grand jury indictment.⁵ On January 23, 2017, the single-count information was filed against the defendant in case number 2:17-cr-10. The information charged Mr. Walker with a single count of possession with intent to distribute a quantity of heroin on July 14, 2016, in violation of [21 U.S.C. § 841\(a\)\(1\)](#).⁶ On January 26, 2017, the defendant pled guilty to that information.⁷ Although I accepted the defendant's guilty plea, I deferred acceptance of the parties' plea agreement until I reviewed the presentence investigation report.⁸ I have done so.

During the presentence investigation, a number of troubling facts regarding Mr. Walker's criminal history and the criminal conduct at issue emerged. First, Mr. Walker is intimately familiar with the criminal justice system. At age thirteen, Mr. Walker broke into an apartment and stole jewelry, a radio, and a Nintendo gaming set. Although he was charged with aggravated burglary and theft, Mr. Walker was ultimately convicted of burglary and sentenced to twelve months probation.

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From ages fourteen to seventeen, Mr. Walker was convicted of six more theft-related crimes. As an adult, Mr. Walker has been convicted eighteen additional times. His convictions include: possession of a controlled substance, carrying a concealed weapon without a permit, wanton endangerment, possession of cocaine base with intent to distribute, possession of crack cocaine, felon in possession of a firearm, disorderly conduct, three no operator's license convictions, reckless operation of a vehicle, speeding, seatbelt violation, three driving under suspension convictions, and driving under the influence. Mr. Walker also has eight pending charges, one of which is a domestic battery charge. Additionally, forty-seven other charges against Mr. Walker since the time he was thirteen were either dismissed, dropped, or have an unknown disposition. Despite his very lengthy criminal history, courts and prosecutors have repeatedly given him leniency. In the twenty years since Mr. Walker turned eighteen, he served approximately 7.8 years in prison, most of which was the five-year sentence imposed for a single drug conviction in 1998.

*2 For most of his life, Mr. Walker has been involved with illicit drugs. He began using marijuana at age twelve, cocaine at age thirteen, alcohol at age twenty, PCP at age twenty-six, pills such as [Subutex](#), [Roxicodone](#), and [Xanax](#) around age twenty-six, and heroin at age thirty. He admitted that he continued to use marijuana, cocaine, alcohol, pills, and heroin through the time of his arrest for this matter. Additionally, there is evidence to suggest that Mr. Walker mixed violence and threats of violence with his criminal drug and firearm activity. Cory Corns, an individual interviewed by the Metropolitan Drug Enforcement Network Team ("MDENT"), stated that Mr. Walker accused him of stealing heroin and money, and pistol-whipped him and his seventeen-year-old roommate. William Ennis, Cory Corns's roommate, also stated that he had been pistol-whipped by Mr. Walker.

In addition to Mr. Walker's voluminous criminal history, the particular facts of this case trouble me. Beginning on April 12, 2016, confidential informants ("CIs") working with MDENT conducted seven controlled buys from the defendant over the course of several months. During each of the controlled buys, the CIs purchased heroin, fentanyl, or a mixture of the two drugs. In total, Mr. Walker

sold 0.729 grams of heroin, 0.071 grams of [fentanyl](#), and 0.17 grams of a furanyl fentanyl and heroin mixture to the CIs. On July 12, 2016, during the last controlled buy, Mr. Walker told the CI that some of Mr. Walker's other purchasers had recently overdosed and warned the CI to use cautiously. It appears Mr. Walker was engaged in a continuing drug dealing enterprise. Based on the controlled buys, MDENT agents obtained an arrest warrant for the defendant and a search warrant for the apartment from which the defendant sold heroin on July 12, 2016.

On July 14, 2016, MDENT agents executed the warrants. The agents arrested the defendant as he entered a vehicle. The agents searched the defendant incident to arrest and discovered 9.7 grams of marijuana, 2.081 grams of powder cocaine, and 0.845 grams of a heroin and fentanyl mixture. The agents then executed the search warrant and recovered a set of digital scales, one bag of a white substance, one Newport box with a suspected methamphetamine pipe, one bag of suspected marijuana, five boxes of 0.45 caliber ammunition, two pistols, miscellaneous medical items containing the defendant's name, and the cell phone used during the controlled buys.

b. Rule 11 of the Federal Rules of Criminal Procedure

[Rule 11 of the Federal Rules of Criminal Procedure](#) grants a district judge the power to accept or reject a plea agreement.⁹ The court enjoys "broad discretion ... when choosing to accept or reject plea agreements"¹⁰ and "is not obligated to accept any recommendation or bargain reached by the parties."¹¹ The Advisory Committee Notes to [Rule 11](#) expressly state: "The plea agreement procedure does not attempt to define criteria for the acceptance or rejection of a plea agreement. Such a decision is left to the discretion of the individual trial judge."¹² Other than granting the court broad discretion to accept or reject a plea agreement, [Rule 11](#) provides no further guidance for the court.

c. Cultural Context

*3 The plea agreement proffered by the parties in this case was made in the context of a clear, present, and deadly

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heroin and opioid crisis in this community. West Virginia is ground zero.

i. The Heroin & Opioid Crisis

The heroin and opioid crisis is a [cancer](#) that has grown and metastasized in the body politic of the United States. Heroin and opioids are different from other addictive substances.¹³ The principal difference lies in the fact that recreational use is too often deadly. The questionable level of potency in each dose of heroin frequently causes overdose.¹⁴ All too often news stories emerge of “bad batches” that cause a deluge of fatal overdoses.¹⁵ Furthermore, users develop a tolerance over time and, as a result, seek out the highest potency possible without regard to the related risk of death. The Centers for Disease Control and Prevention (“CDC”) found that between 2012 and 2014, heroin caused the most overdose deaths of any drug.¹⁶

Heroin use has increased across the United States in all genders, in most age groups, and in all income levels.¹⁷ “Some of the greatest increases [have] occurred in demographic groups with historically low rates of heroin use: women, the privately insured, and people with higher incomes.”¹⁸ It is estimated that 580 people initiate heroin use each day.¹⁹ This rapid increase in heroin use has had deadly consequences. Between 2002 and 2013, the rate of heroin-related overdose deaths per 100,000 people increased 286%.²⁰ The number of drug overdoses involving heroin tripled from 2010 to 2014.²¹ In 2015, heroin caused 12,989 deaths.²² Heroin arrests by the Drug Enforcement Administration (“DEA”) increased at the fastest annual average rate from 2002 to 2014.²³

*4 In addition to heroin, there is a surge in the popularity of [fentanyl](#) and other powerful synthetic opioids.²⁴ The DEA estimates that “[a]bout two milligrams of fentanyl—about what comes out with a single jiggle of a salt shaker—is considered lethal.”²⁵ [Fentanyl](#) and synthetic opioids are particularly dangerous because they can be—and often are—mixed with other drugs without the

consumer's knowledge.²⁶ The national overdose death rate from synthetic opioids increased 72.2% from 2014 to 2015.²⁷ Illegally made [fentanyl](#) is likely the driving force of this increase.²⁸ According to the National Forensic Laboratory Information System, state and local labs reported 942 [fentanyl](#) submissions from law enforcement in 2013 and 3,344 [fentanyl](#) submissions in 2014.²⁹ From 2013 to 2014, the CDC reported significant increases in overdose deaths involving [fentanyl](#) in several states.³⁰

*5 More dangerous opioids are being developed in order to meet growing demand. An example is furanyl [fentanyl](#), a synthetic designer opioid, commonly referred to as “China White.”³¹ Furanyl [fentanyl](#) can be up to 100 times more potent than heroin.³² Its effects last longer, and an overdose is more difficult to treat than one caused by heroin alone.³³ Traditional [naloxone](#) treatment is often not enough.³⁴ Laboratory analysis confirmed furanyl [fentanyl](#) in Mr. Walker's July 12, 2016 controlled buy.

Another synthetic opioid on the rise is carfentanil, a drug lawfully used to sedate elephants and other large animals.³⁵ It is an even more potent version of [fentanyl](#) often used to “lace” heroin.³⁶ Carfentanil is 10,000 times more potent than [morphine](#).³⁷ Because of carfentanil's tremendous potency, it poses a tremendous risk to users and first responders who inadvertently come into contact with the drug in the course of their duties.³⁸

The heroin and opioid epidemic is one of the great public health problems of our time. The CDC found that opioids, primarily prescription pain relievers and heroin, are the chief drugs associated with overdose deaths.³⁹ In 2015, the most recent year for which data is available, opioids were involved in 33,091 deaths,⁴⁰ which is more than 63% of all drug overdose deaths.⁴¹ On average, ninety-one Americans die from an opioid overdose every day.⁴² Preliminary numbers for 2016 suggest that overdose deaths are growing at a rate comparable to the rate of H.I.V.-related deaths at the height of the H.I.V. epidemic.⁴³

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*6 In a November 2016 report, the DEA referred to opioid prescription drugs, heroin, and fentanyl as the most significant drug-related threats to the United States.⁴⁴ Indeed, opioid overdoses have quadrupled nationally since 1999.⁴⁵ According to the CDC, the significant increase in overdose death rates is attributable to synthetic opioids such as heroin and fentanyl.⁴⁶

These drugs are far more dangerous and far more available for abuse. Opioids are in the medicine cabinets of homes all over America and are available at every hospital and doctor's office. With the rise of prescription opioid abuse,⁴⁷ heroin, which up until recently had been a tiny fraction of the illicit drug trade, came roaring back.⁴⁸ The return of that pale horse⁴⁹ may prove to be the event horizon of drug abuse and addiction.

ii. West Virginia's Epidemic

West Virginia has the highest rate of fatal drug overdoses in the nation—and that rate continues to rise.⁵⁰ This past year, 86% of overdose deaths involved at least one opioid.⁵¹ From 2001 to 2016, the number of people in the state who died from a drug overdose increased 400%.⁵² Our state's fatal drug overdose rate was 41.5 per 100,000 people in 2015,⁵³ far above the national average of 16.3 per 100,000 people.⁵⁴ The West Virginia Health Statistics Center released information that showed that at least 844 people in the state died of drug overdoses in 2016,⁵⁵ an increase of 16.9% from 2015 to 2016.⁵⁶

*7 The rate of drug overdose deaths involving synthetic opioids in West Virginia increased 76.4% from 2014 to 2015.⁵⁷ In just the last three years, fentanyl use has increased tenfold in West Virginia.⁵⁸ The vast majority of patients at the Addiction Program at West Virginia University Hospitals are treated for heroin.⁵⁹ Along with Massachusetts, New Hampshire, Ohio, and Rhode Island, West Virginia experienced the largest absolute rate change in death from synthetic opioids.⁶⁰

The Southern District of West Virginia has been hit especially hard. Last August, twenty-six people overdosed during a four-hour span in Huntington.⁶¹ National press reporters quote local health officials as estimating that one in four Huntington residents abuses heroin or some other opioid,⁶² meaning that approximately 12,000 people are dealing with opioid addiction⁶³ in a town of 50,000 people.⁶⁴ In April, a pregnant mother in Charleston overdosed at ten o'clock on a Wednesday morning, killing both herself and her unborn baby.⁶⁵ No one is immune from the epidemic.

West Virginia leads the nation in the incidence of babies born exposed to drugs⁶⁶ and has the highest rate of babies born dependent on opioids.⁶⁷ In Huntington, for example, one in ten babies born at the hospital suffers withdrawal from substances such as heroin, opiates, cocaine, or alcohol.⁶⁸ That is about fifteen times the national average.⁶⁹

The heroin and opioid crisis in our state implicates the general welfare in a preeminent way. Public safety is the purpose of the criminal justice system. The seriousness of this crisis in West Virginia convinces me that I should carefully scrutinize plea agreements that bargain away multi-count grand jury indictments. Grand jurors are members of our community who have, under their oaths, investigated, and determined that there is probable cause that certain crimes have been committed by the defendant named in the indictment.

d. Plea Agreements

Before discussing the plea agreement in this case, I will briefly look at the history of the practice of plea bargaining in the federal courts.

Up until the nineteenth century, plea bargaining was not a regular or visible part of the criminal justice system.⁷⁰ Prior to the Civil War, the general judicial practice was to discourage guilty pleas.⁷¹ The proffered explanation for the emergence of plea bargaining was a rising crime rate, limitations of local law enforcement resources, and busy dockets.⁷² Since 1908, the first year that federal

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court statistics are available, the rate of guilty pleas has continued to rise.⁷³ However, it was not until 1971 that the Supreme Court legitimized plea bargaining in *Santobello v. New York*.⁷⁴

*8 The national implementation of the mandatory United States Sentencing Guidelines in 1989 encouraged the plea bargaining process by shifting a large portion of sentencing decision-making, historically reserved for the judge, to the prosecutor.⁷⁵ Prosecutors could use adjustments⁷⁶ and departures⁷⁷ as incentives to persuade defendants to accept plea agreements.⁷⁸

Proponents of plea bargaining have long relied on “practical reasons” as justifications for the practice.⁷⁹ Prominent among these advantages are assertions of cost effectiveness, efficiency, certainty, and reduction in the burden on the court system.⁸⁰ The most commonly cited justifications are docket pressure and overburdened prosecutors and judges.⁸¹ I am juberous of these assertions. As I detail herein, although widely accepted, the “overburdened” justification for plea bargaining is empirically unsupported.⁸² I agree with Judge Jennifer Walker Elrod, Circuit Judge for the United States Court of Appeals for the Fifth Circuit, who has stated: “[W]e must strive to correct any public misconception that the courts are overworked and backlogged.... [W]hen the myth of backlogged courts is raised as a reason for forsaking the jury, we must correct them.”⁸³

III. DISCUSSION

The United States Constitution makes plain that the United States is a participatory democracy. This is a government of the people and by the people. Each of the three branches of government depend upon and require the active participation of the people in the exercise of power.⁸⁴

*9 The exigencies of a changing world have required acceptance of processes that are more streamlined than those contemplated by our Founding Fathers.⁸⁵ Plea

bargaining is one such process that we have come to embrace. Plea bargaining eliminates the jury and conflates the judge's and prosecutor's roles, creating an administrative system of criminal justice.⁸⁶ A species of trial does indeed occur, but it occurs in “the shadow of guilty pleas” rather than in open court.⁸⁷

Without question, resolution of criminal charges by plea bargaining has replaced resolution by jury trial.⁸⁸ I concede that plea bargaining is an efficient and convenient system and that public participation in government is inherently inconvenient. Governance by decree is expedient. However, the Founding Fathers intended the wheels of justice to grind slowly and exceedingly fine in order to discern the truth.⁸⁹

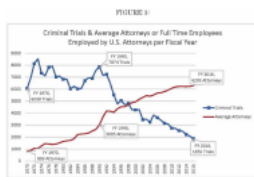
In 1908, about 50% of all federal criminal convictions were obtained by a guilty plea.⁹⁰ By 1916, the rate had risen to 72%, and by 1925, guilty pleas represented nearly 90% of all convictions.⁹¹ In 1993, the rate of guilty pleas was 88.5%.⁹² That number increased to 97.1% in 2015 with a criminal trial rate of only 2.9%.⁹³ Data provided by the Administrative Office of the United States Courts (“AO”) further confirms that the number of criminal defendants terminated by trial has decreased significantly since 1970.⁹⁴ In fiscal year (“FY”) 1973, the judiciary completed 8,529 criminal trials, but in FY 2016, the judiciary completed 1,859 criminal trials.⁹⁵

*10 In the Southern District of West Virginia, there have been only eighteen criminal trials since January 2013. There have only been five criminal opioid trials in this district during that time. From 2014 to 2017, there were less than 250 individual drug sentences handed down by all of the judges of this court. The last heroin case in this district tried to verdict was in 2014.⁹⁶

For at least the past forty-six years, the primary justification for plea bargaining has been that the constitutional process of requiring trial by jury in every case overburdens the courts and overworks the prosecutors.⁹⁷ I believe these justifications, and others, diminish the right of the people to participate in the administration of the criminal justice system to a near

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vanishing point. We now resolve almost every criminal case by a process that is no longer justified by the circumstances making it acceptable in the first place. The courts are no longer overburdened. Federal prosecutors are no longer overworked. To illustrate, despite the decline in criminal trials, the number of federal prosecutors has steadily increased since 1970.⁹⁸ According to the Annual Statistical Reports (“ASRs”) published by the Executive Office for United States Attorneys, between FY 1970 and FY 2010, the average number of federal prosecutors increased more than sevenfold—from 809 in 1970 to 6,075 in 2010.⁹⁹ In FY 2016, the number of federal prosecutors had grown to 6,293.¹⁰⁰



Given the inverse relationship between trials and federal prosecutors, there has been a steady decrease in the average number of criminal trials handled per federal prosecutor.¹⁰¹ In FY 1973, each federal prosecutor handled over eight criminal trials on average. By FY 2016, the average number of criminal trials handled by each federal prosecutor plummeted to 0.29 trials.



***11** It is no surprise that the judiciary has also experienced a decreased criminal trial load.¹⁰² Like federal prosecutors, the number of authorized Article III district court judgeships rose from 394 in 1970 to 663 in 2015.¹⁰³ Accordingly, the number of criminal trials handled per district judgeship dropped from over twenty-one per year in 1973 to fewer than three per year in

2016.¹⁰⁴ Thus, like federal prosecutors, district court judges are not overburdened by trials.

Because the most common justifications for plea bargaining no longer have any substantial heft, the counterweight of the people's general interest in observing and participating in their government requires close consideration of a proffered plea bargain in every case.

I conclude that courts should reject a plea agreement upon finding that the plea agreement is not in the public interest.¹⁰⁵ There is no justice in bargaining against the people's interest.

***12** First, a court should consider the cultural context surrounding the subject criminal conduct. Here, that cultural context is a rural state deeply wounded by and suffering from a plague of heroin and opioid addiction.¹⁰⁶

Second, the court should weigh the public's interest in participating in the adjudication of the criminal conduct charged by the indictment. The criminal jury trial is “fundamental to the American scheme of justice”¹⁰⁷ and effectively promotes a motivated and educated populace that respects the law, holds faith in the judicial system, and is deterred from participating in crime.¹⁰⁸ Jury trials serve the people's right to be informed as to what occurs in their courts and reinforce the fact that the law comes from the people.¹⁰⁹ Here, the public has a high interest in the adjudication of heroin and opioid crimes such as these because of the severity of the crisis occurring in our state. Education about and deterrence of heroin and opioid crimes is of paramount importance at this time.

Third, the court should consider whether “community catharsis can occur” without the transparency of a public jury trial.¹¹⁰ “Much like the lid of a tea kettle releases steam, jury trials in criminal cases allow peaceful expression of community outrage at arbitrary government or vicious criminal acts.”¹¹¹ The crimes alleged in Mr. Walker's indictment involve heroin and other opioids and are “vicious criminal acts.”

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Fourth, the court should examine the plea agreement and, in light of the presentence report, determine whether the apparent motivation is to advance justice or, more probably, to expediently avoid trial. Here, the agreement trades a grand jury indictment charging three counts of distributing heroin, two counts of distributing fentanyl, and one count of being a felon in possession of a firearm for an information charging one count of distributing heroin. The principal motivation appears to be convenience.

*13 Upon full consideration of each of these factors, I **FIND** that the plea agreement is not in the public interest, and I **REJECT** the plea agreement.

IV. CONCLUSION

My twenty-two years of imposing long prison sentences for drug crimes persuades me that the effect of law enforcement on the supply side of the illegal drug market is insufficient to solve the heroin and opioid crisis at hand. I also see scant evidence that prohibition is preventing the growth of the demand side of the drug market. Nevertheless, policy reform, coordinated education efforts, and expansion of treatment programs are not within my bailiwick. I may only enforce the laws of illicit drug prohibition.

The law is the law, and I am satisfied that enforcing the law through public adjudications focuses attention on the heroin and opioid crisis. The jury trial reveals the dark details of drug distribution and abuse to the community in a way that a plea bargained guilty plea cannot. A jury trial tells a story. The jury members listening to the evidence come away with personally

impactful information about the deadly and desperate heroin and opioid crisis existing in their community.¹¹² They are educated in the process of performing their civic duty and are likely to communicate their experience in the courtroom to family members and friends.¹¹³ Moreover, the attendant media attention that a jury trial occasions communicates to the community that such conduct is unlawful and that the law is upheld and enforced.¹¹⁴ The communication of a threat of severe punishment acts as an effective deterrent.¹¹⁵ As with other criminalized conduct, the shame of a public conviction and prison sentence specifically deters the sentenced convict from committing the crime again—at least for so long as he is imprisoned.¹¹⁶

*14 Over time, jury verdicts involving the distribution of heroin and opioids reinforce condemnation of the conduct by the public at large. In turn, respect for the law propagates.¹¹⁷ This respect for the law may eventually reduce such criminal conduct.

The secrecy surrounding plea bargains in heroin and opioid cases frequently undermines respect for the law and deterrence of crime. The bright light of the jury trial deters crime, enhances respect for the law, educates the public, and reinforces their sense of safety much more than a contract entered into in the shadows of a private meeting in the prosecutor's office.

For the reasons stated, I **REJECT** the plea agreement.

All Citations

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Footnotes

- 1 Fed. R. Crim. P. 11.
- 2 See Indictment, No. 2:16-cr-174-1 [ECF No. 18].
- 3 *Id.*
- 4 *Id.*
- 5 Plea Agreement, No. 2:17-cr-10 [ECF No. 9].
- 6 Information, No. 2:17-cr-10 [ECF No. 1].
- 7 Written Plea, No. 2:17-cr-10 [ECF No. 8].

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- 8 Tr. Proceedings 24:3–4, No. 2:17-cr-10 [ECF No. 11].
- 9 Fed. R. Crim. P. 11(c). Congress, by virtue of the Rules Enabling Act and adoption of the Federal Rules of Criminal Procedure, has sanctioned the judge's power to accept or reject a plea agreement. See 28 U.S.C. § 2072; see also 1 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2 (4th ed. 2017) ("Congress ... always retains the authority to approve, disapprove, or modify any proposed new rules or rule changes.").
- 10  *In re Morgan*, 506 F.3d 705, 708 (9th Cir. 2007).
- 11 *United States v. Dixon*, 504 F.2d 69, 72 (3rd Cir. 1974).
- 12 Fed. R. Crim. P. 11 advisory committee's note to 1974 amendments.
- 13 I recognize that heroin is a kind of opioid. For clarity, I will reference heroin and opioids separately.
- 14 See *infra* note 26; see also Audrey Redford, *Still Searching for the Tzutzu Flower: Cautions Against Extending the Federal Analogue Act of 1986*, 27 U. Fla. J.L. & Pub. Pol'y 111, 119 (2016) (stating some heroin overdoses occur because the varying presence of fentanyl renders users unaware of the drug's true potency).
- 15 See, e.g., Steve Birr, "Bad Batch" of Heroin Sparks Five Overdoses in Four Hours, The Daily Caller News Found (Dec. 28, 2016, 3:08 PM), <http://dailycaller.com/2016/12/28/bad-batch-of-heroin-sparks-five-overdoses-in-four-hours/>; Carolyn Blackburne, "Bad Batch" of Heroin is Causing Record Amount of Overdoses in Washington County, <http://www.your4state.com/news/news/bad-batch-of-heroin-is-causing-record-amount-of-overdoses-in-washington-county> (last visited June 23, 2017). Jeremy Gerner et al., *74 Overdoses in 72 Hours-Laced Heroin May Be to Blame*, Chi. Trib. (Oct. 2, 2015, 10:11 PM), <http://www.chicagotribune.com/news/local/breaking/ct-heroin-overdoses-met-20151002-story.html>.
- 16 See Margaret Warner et al., *Drugs Most Frequently Involved in Drug Overdose Deaths: United States, 2010-2014*, 65 Nat'l Vital Stats. Reps., no. 10, Dec. 20, 2016, at 1, 4, <https://www.cdc.gov/nchs/data/nvsr/nvsr65/nvsr6510.pdf>.
- 17 *Today's Heroin Epidemic*, Ctrs. For Disease Control & Prevention, <https://www.cdc.gov/vitalsigns/heroin/index.html> (last updated July 7, 2015).
- 18 *Id.*
- 19 U.S. Dep't of Health and Human Servs., *The Opioid Epidemic: By the Numbers* 1 (2016), <https://www.hhs.gov/sites/default/files/Factsheet-opioids-061516.pdf>.
- 20 *Today's Heroin Epidemic*, *supra* note 17.
- 21 *Drug Overdose Deaths Hit Record Numbers in 2014*, Ctrs. for Disease Control & Prevention, <https://www.cdc.gov/media/releases/2015/p1218-drug-overdose.html> (last updated Dec. 18, 2015).
- 22 *Understanding the Epidemic*, Ctrs. For Disease Control & Prevention, <https://www.cdc.gov/drugoverdose/epidemic/index.html> (select "Heroin Use" tab) (last updated Dec. 16, 2016).
- 23 Mark Motivans, U.S. Dep't of Justice, *Federal Justice Statistics, 2013–2014* 9 (2017), <https://www.bjs.gov/content/pub/pdf/fjs1314.pdf>.
- 24 Fentanyl is an extremely powerful synthetic opioid. It was originally introduced as an intravenous anesthetic in the 1960s. U.S. Dep't of Justice & Drug Enf't Admin. Diversion Control Div., *Fentanyl* (2016), http://www.deadiversion.usdoj.gov/drug_chem_info/fentanyl.pdf. Today, those with otherwise untreatable pain, such as terminal cancer patients, use fentanyl for pain management. *Id.* Fentanyl is 100 times more potent than morphine as an analgesic. *Id.*; see also David Armstrong, "Truly Terrifying": Chinese Suppliers Flood US and Canada with Deadly Fentanyl, STAT News (Apr. 5, 2016), <https://www.statnews.com/2016/04/05/fentanyl-traced-to-china/>. For opioid dependent individuals, fentanyl can serve as a direct substitute for heroin. U.S. Dep't of Justice & Drug Enf't Admin. Diversion Control Div., *supra*. However, because it is much more potent than heroin, fentanyl is a very dangerous replacement. *Id.* Fentanyl's use results in frequent overdoses, which can cause respiratory depression and death. *Id.* Additionally, because fentanyl can be absorbed through the skin in some forms, fentanyl can be deadly if touched. *Id.*; see also FENTANYL: Incapacitating Agent, Ctrs. For Disease Control & Prevention, https://www.cdc.gov/niosh/ersbdb/EmergencyResponseCard_2975_0022.html (last updated May 19, 2017) (detailing necessary skin protection for handling fentanyl).
- The DEA released a safety video to law enforcement agencies nationwide warning officers not to touch suspected fentanyl and not to test it in the field. The Justice Dep't, *Roll Call Video Warns About Dangers of Fentanyl Exposure*, YouTube (June 7, 2017), <https://www.youtube.com/watch?v=8MLsrleGLSw>. The DEA made the video in response to an incident

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where two police officers in New Jersey nearly died after accidentally inhaling a whiff of fentanyl while bagging it for evidence. *Id.*

25 Lynh Bui & Peter Hermann, *Elephant Tranquilizer is the Latest Lethal Addition to the Heroin Epidemic*, Wash. Post (Apr. 26, 2017), http://wapo.st/2qcJqP1?tid=ss_tw&utm_term=.e179c3d288ca; see also *DEA Issues Carfentanil Warning to Police and Public*, U.S. Drug Enforcement Admin. (Sept. 22, 2016), <https://www.dea.gov/divisions/hq/2016/hq092216.shtml> (noting that fentanyl can “be lethal at the 2-milligram range, depending on route of administration and other factors” and that “[t]he dosage of fentanyl is a microgram, one millionth of a gram—similar to just a few granules of table salt”).

26 *Understanding the Epidemic*, *supra* note 22 (select “Heroin Use” tab); see *DEA Issues Carfentanil Warning to Police and Public*, *supra* note 25 (“Fentanyl, a synthetic opiate painkiller, is being mixed with heroin to increase its potency, but dealers and buyers may not know exactly what they are selling or ingesting. Many users underestimate the potency of fentanyl.”).

Drug dealers may sell fentanyl pills disguised as other painkillers because prescription drugs fetch a higher price on the street, even though they are less potent than fentanyl. Armstrong, *supra* note 24.

Nine people died in Florida from taking counterfeit Xanax pills containing fentanyl. David Armstrong, *Dope Sick*, STAT News (Aug. 2, 2016), <https://www.statnews.com/feature/opioid-crisis/dope-sick/>. Authorities believe fentanyl pills made to resemble the painkiller hydrocodone caused a wave of overdoses last year in the Sacramento, California area that claimed nine lives. Press Release, Sacramento Cty. Dep’t of Health & Human Servs., Update on Opioid-Related Overdoses (Mar. 30, 2016), <http://www.dhhs.saccounty.net/Pages/NR-Update-on-Opioid-Related-Overdoses.aspx>. Twelve people in the area died in another outbreak just a month later after taking counterfeit Norco pills that contained fentanyl. Press Release, Sacramento Cty. Dep’t of Health & Human Servs., Update on Opioid-Related Overdoses (May 4, 2016), [http://www.dhhs.saccounty.net/Pages/NR-Update-on-opioid-related-overdoses-\(May-4,-2016\).aspx](http://www.dhhs.saccounty.net/Pages/NR-Update-on-opioid-related-overdoses-(May-4,-2016).aspx).

27 *Synthetic Opioid Data*, Ctrs. for Disease Control & Prevention, <https://www.cdc.gov/drugoverdose/data/fentanyl.html> (select “Synthetic Opioids Data” tab) (last updated Dec. 16, 2016); see also Rose A. Rudd et al., *Increases in Drug and Opioid-Involved Overdose Deaths—United States, 2010–2015*, 65 *Morbidity & Mortality Wkly. Rep.* 1445, 1446 (2016).

28 R. Matthew Gladden, *Fentanyl Law Enforcement Submissions and Increases in Synthetic Opioid-Involved Overdose Deaths—27 States, 2013–2014*, 65 *Morbidity & Mortality Wkly. Rep.* 837, 840 (2016) (“Given the strong correlation between increases in fentanyl submissions (primarily driven by [illegally manufactured fentanyl]) ... and increases in synthetic opioid ... deaths (primarily fentanyl deaths), and uncorrelated stable fentanyl prescription rates, it is hypothesized that [illegally manufactured fentanyl] is driving the increases in fentanyl deaths. Findings from DEA state, and CDC investigations documenting the role of [illegally manufactured fentanyl] in the observed increases in fentanyl deaths further support this hypothesis.”). The rate at which physicians prescribe fentanyl, however, has not increased. Rudd et al., *supra* note 27.

29 *DEA Issues Nationwide Alert on Fentanyl as Threat to Health and Public Safety*, U.S. Drug Enforcement Admin. (Mar. 18, 2015), <https://www.dea.gov/divisions/hq/2015/hq031815.shtml>.

30 *Increases in Fentanyl Drug Confiscations and Fentanyl-Related Overdose Fatalities*, Ctrs. for Disease Control & Prevention (Oct. 26, 2015 8:15 AM), <http://emergency.cdc.gov/han/han00384.asp> (noting that fentanyl-related overdose deaths rose from 92 to 514 in Ohio, 58 to 185 in Maryland, and 185 to 397 in Florida).

31 Annamarya Scaccia, *“China White”: What You Need to Know About Heroin-Like Drug*, Rolling Stone (Apr. 3, 2017), <http://www.rollingstone.com/culture/china-white-what-you-need-to-know-about-heroin-like-drug-w474670>. It is often a mixture of fentanyl, cocaine, and residual heroin. Dealers who try to manufacture fentanyl at home often end up with furanyl fentanyl due to contamination during the synthesis process. *Id.*

32 *Id.*

33 *Id.*

34 *Id.*

35 Andrew Joseph, *26 Overdoses in Just Hours: Inside a Community on the Front Lines of the Opioid Epidemic*, STAT News (Aug. 22, 2016), <https://www.statnews.com/2016/08/22/heroin-huntington-west-virginia-overdoses/>.

According to Melvin Patterson, a spokesperson for the DEA, all of the zookeepers and veterinarians in the United States combined need only about eighteen grams—the weight of eighteen sugar packets—per year. Bui & Hermann, *supra* note 25.

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- 36 *DEA Issues Carfentanil Warning to Police and Public*, *supra* note 25.
- 37 Wendy Holdren, *Although Overdose Deaths Up, WV Health Officer Cautiously Optimistic About Future*, The Register-Herald (Mar. 7, 2017), http://www.register-herald.com/news/although-overdose-deaths-up-wv-health-officer-cautiously-optimistic-about/article_eb38b7df-09b3-52ac-b3a0-4811c2347f62.html.
- 38 Sheryl Krieg, *Carfentanil a New Worry for First-Responders*, Emergency Mgmt. (May 11, 2017), <http://www.govtech.com/em/disaster/Carfentanil-New-Worry-for-First-Responders.html>.
- 39 Rudd, et al., *supra* note 27, at 1445–46.
- 40 *Drug Overdose Death Data*, Ctrs. for Disease Control & Prevention, <https://www.cdc.gov/drugoverdose/data/statedeaths.html> (last updated Dec. 16, 2016). To put this in perspective, 58,220 U.S. service members died in the Vietnam conflict. *Stat. Info. About Casualties of the Vietnam War*, Nat'l Archives, <https://www.archives.gov/research/military/vietnam-war/casualty-statistics.html> (last accessed June 26, 2017). This means that every two years we are losing more Americans to opioid overdose deaths than we did in the entire time fighting in Vietnam.
- 41 Rudd, et al., *supra* note 27, at 1445–46.
- 42 *Understanding the Epidemic*, *supra* note 22 (select “Record Overdose Deaths” tab).
- 43 Robert Anderson, the CDC's Chief of Mortality Statistics Branch, stated that the trend is similar to the H.I.V. epidemic death rates during the late 1980s and early 1990s. Haeyoun Park & Matthew Bloch, *How the Epidemic of Drug Overdose Deaths Ripples Across America*, N.Y. Times (Jan. 19, 2016), <https://www.nytimes.com/interactive/2016/01/07/us/drug-overdose-deaths-in-the-us.html>.
- 44 Rudd, et al., *supra* note 27, at 1450.
- 45 This statistic includes all overdoses, not only those that resulted in death. *Drug Overdose Death Data*, *supra* note 40.
- 46 Rudd, et al., *supra* note 27.
- 47 The CDC estimates that approximately three out of four new heroin addicts in the United States started by abusing prescription opioids. *Heroin Overdose Data*, Ctrs. for Disease Control & Prevention, <https://www.cdc.gov/drugoverdose/data/heroin.html> (select “Heroin Data” tab) (last updated Jan. 26, 2017).
- 48 According to the CDC, opioids are responsible for the majority of drug overdose deaths today. *Understanding the Epidemic*, *supra* note 22 (select “Record Overdose Deaths” tab).
- 49 See *Revelation* 6:8 (King James) (“And I looked, and behold a pale horse: and his name that sat on him was Death, and Hell followed with him. And power was given unto them over the fourth part of the earth, to kill with sword, and with hunger, and with death, and with the beasts of the earth.”). Heroin is occasionally called “horse” or “white horse.” See *Heroin*, Nat'l Inst. on Drug Abuse, <https://www.drugabuse.gov/drugs-abuse/heroin> (last updated May 2016).
- 50 Joseph, *supra* note 35; Beth Vorhees, *Drug Treatment and Addiction Solutions Next Story for Pulitzer Prize Winning Reporter*, W. Va. Morning (Apr. 12, 2017), <http://wvpublic.org/post/drug-treatment-and-addiction-solutions-next-story-pulitzer-prize-winning-reporter#stream/0>.
- 51 *Overdose Deaths Continue to Rise in State*, TriStateUpdate (Mar. 22, 2017), <http://www.tristateupdate.com/story/34692964/overdose-deaths-continue-to-rise-in-state>.
- 52 *Id.*
- 53 *Drug Overdose Death Data*, *supra* note 40.
- 54 Rudd, et al., *supra* note 27, at 1445.
- 55 Eric Eyre, *WV Drug OD Deaths Soared Above 840 in 2016*, Charleston Gazette-Mail (Mar. 22, 2017), <http://www.wvgazettemail.com/news/20170322/wv-drug-od-deaths-soared-above-840-in-2016>.
- 56 *Drug Overdose Death Data*, *supra* note 40.
- 57 *Synthetic Opioid Data*, Ctrs. for Disease Control & Prevention, <https://www.cdc.gov/drugoverdose/data/fentanyl.html> (last updated Dec. 16, 2016).
- 58 Vorhees, *supra* note 50.
- 59 David Gutman, *How Did WV Come to Lead the Nation in Overdoses?*, Charleston Gazette-Mail (Oct. 17, 2015), <http://www.wvgazettemail.com/article/20151017/GZ01/151019539>.
- 60 Rudd, et al., *supra* note 27.
- 61 Joseph, *supra* note 35.

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- 62 Wayne Drash & Max Blau, *In America's Drug Death Capital: How Heroin is Scarring the Next Generation*, CNN (Sept. 16, 2016), <http://www.cnn.com/2016/09/16/health/huntington-heroin/>.
- 63 *Id.*
- 64 Tom Bateman, et al., *The Heroin-Ravaged City Fighting Back*, BBC (May 3, 2016), <http://www.bbc.com/news/av/world-us-canada-39343289/the-heroin-ravaged-city-fighting-back>.
- 65 Joseph Fitzwater, *Pregnant Mother and Baby Die After Charleston Heroin Overdose*, TriStateUpdate (Apr. 26, 2017), <http://www.tristateupdate.com/story/35259779/pregnant-mother-and-baby-die-after-charleston-heroin-overdose>.
- 66 Holdren, *supra* note 37.
- 67 Joseph, *supra* note 35.
- 68 Drash & Blau, *supra* note 62.
- 69 *Id.*
- 70 See generally Albert W. Alschuler, *Plea Bargaining and Its History*, 79 Colum. L. Rev. 1 (1979). Before the nineteenth century, other types of bargaining practices existed such as “compounding.” Compounding was the practice of paying the victim of a crime in exchange for the agreement not to prosecute. *Id.* at 5. It was not until after 1865 that plea bargaining made its way into appellate court reports. *Id.* at 19.
- 71 See *id.* at 5–12 (explaining why guilty pleas were generally discouraged).
- 72 *Id.* at 17.
- 73 See *infra* pp. 18–23 (offering a more detailed statistical analysis of the rise of plea bargaining).
- 74 See  *Santobello v. New York*, 404 U.S. 257, 260–61 (1971).
- 75 See  *Mistretta v. United States*, 488 U.S. 361, 412 (1989); Ronald F. Wright, *Trial Distortion and the End of Innocence in Federal Criminal Justice*, 154 U. Pa. L. Rev. 79, 129–132 (2005) (“The federal guidelines changed more than the size and certainty of the trial penalty: they also changed who controls the penalty. Whereas the judge and the prosecutor once competed for control over the rewards for pleading guilty, the sentencing guidelines, operating in a high volume system, shifted more of this control away from the judge and toward the prosecutor.”).
- 76 See, e.g.,  U.S. Sentencing Guidelines Manual § 3E1.1 (U.S. Sentencing Comm’n 2016) (outlining the acceptance of responsibility adjustment).
- 77 See, e.g., *id.* at § 5K1.1 (outlining the substantial assistance to authorities departure).
- 78 Wright, *supra* note 75, at 138–39 (“Patterns of outcomes in the districts reveal some of the particular sentencing laws that have contributed most clearly to the drop in acquittals over the last decade. Departures from the sentencing guidelines based on a defendant’s ‘substantial assistance’ made a measurable difference. The same was true of the three-level ‘super acceptance of responsibility’ discount. Where these methods—largely controlled by prosecutors—were used most commonly, they contributed to an environment in the district that convinced defendants to plead guilty and to opt out of trials that might have ended in acquittals. More generally, the prosecutor’s willingness to decrease the offense level under the guidelines resulted in more guilty pleas and fewer acquittals.”).
- 79 *How Courts Work*, A.B.A., http://www.americanbar.org/groups/public_education/resources/law_related_education_network/how_courts_work/pleabargaining.html (last visited June 26, 2017).
- 80 *Id.*
- 81 See, e.g., William J. Stuntz, *Plea Bargaining and Criminal Law’s Disappearing Shadow*, 117 Harv. L. Rev. 2548, 2555–56 (2004).
- 82 See *infra* pp. 18–23.
- 83 Hon. Jennifer Walker Elrod, *W(h)ither the Jury? The Diminishing Role of the Jury Trial in Our Legal System*, 68 Wash. & Lee L. Rev. 3, 22 (2011).
- 84 See Jackie Gardina, *Compromising Liberty: A Structural Critique of the Sentencing Guidelines*, 38 U. Mich. J.L. Reform 345, 381 (2005) (“Creating a voice for the people in the Judicial Branch was also entirely consistent with the Framers’ attempts to create a government for the people and by the people. The Framers created a structure in which the Executive and Legislative Branches represented the people and were accountable to them. Given the Framers’ desire to create a system in which the people dominated the political landscape, it would be odd if they excluded the people from the Judicial Branch—the only unelected branch, and the branch that had the ultimate say in ‘what the law is.’”).

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- 85 See Darryl K. Brown, *The Perverse Effects of Efficiency in Criminal Process*, 100 Va. L. Rev. 183, 211–213 (2014) (discussing how the “pervasive adoption of adjudication strategies in service of efficiency, especially plea bargaining, helps to redefine the norms that inform both ideas of adjudication’s purposes and, more broadly, those that influence the state’s policies of criminal law enforcement”) (“The jury has long been explained and defended with reference to its constitutive role in democratic governance and the political value of lay participation (including the benefit of jury service to jurors themselves as citizens), in addition to consequentialist functions such as a check on government power. The Supreme Court has been quite explicit about the criminal jury’s non-utilitarian normative roles, including its presumed disposition to rest verdicts as much on moral assessments as on logic, formal proof, and ‘any linear scheme of reasoning.’ ... These long-established accounts of juries and the nature of judgments implicitly embrace a reality that efficiency-dominated accounts of adjudication ignore: Adjudication plays a constitutive role in substantive justice.”).
- 86 Rachel Barkow, *Separation of Powers and the Criminal Law*, 58 Stan. L. Rev. 989, 1048 (2006).
- 87 Ronald Wright & Marc Miller, *Honesty and Opacity in Charge Bargains*, 55 Stan. L. Rev. 1409, 1415 (2003).
- 88 See *infra* notes 90–95 and accompanying text; see also *infra* Figure 1.
- 89 Trial by jury is one of the mechanisms of justice ensuring that the wheels grind slowly and finely.
If we fail to purposefully guard and defend the jury, we risk losing one of America’s greatest traditions and protectors of our liberty—the indispensable barrier between the liberties of the people and the prerogatives of the government. We should always remember that inconveniences suffered by the jury trial pale in comparison to the lamentable loss of freedom and justice that would accompany the elimination of this institution.
Elrod, *supra* note 83, at 22.
- 90 Alschuler, *supra* note 70, at 27.
- 91 *Id.*
- 92 U.S. Sentencing Comm’n, *Sourcebook of Federal Sentencing Statistics* 20 (1997), <http://www.ussc.gov/research/sourcebook/archive/sourcebook-1997> (showing guilty plea and trial data in Figure C for fiscal years 2012–2015).
- 93 U.S. Sentencing Comm’n, *Sourcebook of Federal Sentencing Statistics* S-23 (2016), <http://www.ussc.gov/research/sourcebook-2016> (showing guilty plea and trial data in Figure C for fiscal years 2012–2015).
- 94 See *infra* Figures 1, 2, & 3. The AO data is derived from tables in the AO Judicial Business reports and from the internal NewSTATS system. The data excludes petty offense cases heard before Magistrate Judges and includes a small number of petty offense cases heard before Article III Judges. From 1970 to 1991, the data uses a fiscal year ending on June 30; from 1992 to 2016, the data uses a fiscal year ending on September 30. The data represents individual defendants tried rather than “cases” tried; many cases include multiple defendants tried at different times. The data covers only criminal trials, not civil trials.
- 95 See *supra* note 94.
- 96 Statistics for the Southern District of West Virginia were calculated using internal data provided by the Clerk’s Office.
- 97 In 1971, the Supreme Court encouraged the use of plea bargaining, where “[p]roperly administered,” in order to promote judicial economy.  *Santobello v. New York*, 404 U.S. 257, 260 (1971). The Court noted, “[i]f every criminal charge were subjected to a full-scale trial, the States and the Federal Government would need to multiply by many times the number of judges and court facilities.” *Id.*
- 98 See *infra* Figure 1.
- 99 Exec. Office for U.S. Attorneys, U.S. Dep’t of Justice, *Annual Statistical Report: Fiscal Year 2010* (2010), <https://www.justice.gov/usao/resources/annual-statistical-reports>; Exec. Office for U.S. Attorneys, U.S. Dep’t of Justice, *Annual Statistical Report: Fiscal Year 1970*–7, chart 14, tbl.6 (1970), <https://www.justice.gov/usao/resources/annual-statistical-reports>.
- 100 Including reimbursable attorneys. See U.S. Dep’t of Justice, *FY 2017 Budget and Performance Summary*, <https://www.justice.gov/about/fy-2017-budget-and-performance-summary> (select link for “U.S. Attorneys (USA)”) (last updated Aug. 29, 2016). I use the FY 2017 budget request data, which shows the positions authorized plus reimbursable full time employees in the FY 2016 enacted budget, because the ASRs do not currently show staffing levels past 2010.
- 101 See *infra* Figure 2. Figure 2 shows the average number of criminal trials per attorney employed by the U.S. Attorneys per fiscal year between 1970 and 2016. The AO trial data, ASR staffing data, and budget request staffing data were used to create Figure 2.

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- 102 See *supra* Figure 3. Figure 3 shows the average number of criminal trials per authorized Article III district judgeship between 1970 and 2016. The AO trial data and an AO report on authorized judgeships were used to create Figure 3. See Admin. Office of the U.S. Courts., *Authorized Judgeships 1–8* (2016), <http://www.uscourts.gov/file/document/all-authorized-judgeships-1789-present>.
- 103 These numbers exclude district judgeships for U.S. territories and temporary authorizations. See Admin. Office of the U.S. Courts., *supra* note 102.
- 104 See *supra* Figure 3. This data does not account for the increasing number of magistrate judges and senior district judges. See Admin. Office of the U.S. Courts., *Judicial Facts and Figures Table 1.1* (Sept. 30, 2015), <http://www.uscourts.gov/statistics/table/11/judicial-facts-and-figures/2015/09/30>; Admin. Office of the U.S. Courts., *supra* note 102. Were I to include these additional judges, the number of criminal trials per judge would be even lower.
- 105 Several circuit courts have approved consideration of the public interest in accepting or rejecting a plea agreement. The Ninth Circuit has stated, “a district court properly exercises its discretion when it rejects a plea agreement calling for a sentence the court believes is too lenient or otherwise not in the public interest in light of the factual circumstances specific to the case.”  *In re Morgan*, 506 F.3d 705, 712 (9th Cir. 2007) (internal quotations omitted). The Tenth Circuit has stated, “[w]hile ‘[t]he procedures of Rule 11 are largely for the protection of criminal defendants ... Rule 11 also contemplates the rejection of a negotiated plea when the district court believes that bargain is too lenient, or otherwise not in the public interest.’”  *United States v. Carrigan*, 778 F.2d 1454, 1462 (10th Cir. 1985) (quoting  *United States v. Miller*, 722 F.2d 562, 563 (9th Cir. 1983)). The Fifth Circuit has commented, “[i]f the court did not have discretion to refuse a plea bargain because the agreement is against the public interest in giving the defendant unduly favorable terms, [Rule 11(e)(2) allowing deferral of acceptance to sentencing] would be largely unnecessary.”  *United States v. Bean*, 564 F.2d 700, 704 (5th Cir. 1977). The First Circuit has stated as a reason why the court must have discretion whether or not to accept a plea “that a conviction affects more than the court and the defendant; the public is involved.” *United States v. Bednarski*, 445 F.2d 364, 366 (1st Cir. 1971).
- 106 See *supra* Section II.c.
- 107  *Duncan v. Louisiana*, 391 U.S. 145, 149 (1930).
- 108 See Eang Ngov, *Judicial Nullification of Juries: Use of Acquitted Conduct at Sentencing*, 76 Tenn. L. Rev. 235, 301 (2009); Robert Lloyd Raskopf, *A First Amendment Right of Access to a Juror's Identity: Toward a Fuller Understanding of the Jury's Deliberative Process*, 17 Pepp. L. Rev. 357, 360 (1990). See generally George C. Harris, *The Communitarian Function of the Criminal Jury Trial and the Rights of the Accused*, 74 Neb. L. Rev. 804, 806–10 (1995).
- 109 The Supreme Court recognized in *Gannett Co. v. DePasquale*, that “the public has the right to be informed as to what occurs in its courts.... ‘The suggestion that there are limits upon the public's right to know what goes on in the courts causes ... deep concern.’”  443 U.S. 368, 413 (1979) (Blackmun, J., concurring in part and dissenting in part) (quoting  *Estes v. Texas*, 381 U.S. 532, 541, 614–15 (1965)).
- 110  *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 571 (1980) (“The crucial prophylactic aspects of the administration of justice cannot function in the dark; no community catharsis can occur if justice is done in a corner [or] in any covert manner.”).
- 111  *United States v. Lewis*, 638 F. Supp. 573, 580 (W.D. Mich. 1986) (holding that community input through a jury trial is not an overriding or compelling governmental interest to burden the defendant's free exercise of religion).
- 112 See Harris, *supra* note 108, at 107–08 (defining the communitarian function of the jury trial as “1) a vehicle for direct community participation in the criminal justice system; 2) a means by which the community is educated regarding the criminal justice system; and 3) a ritual by which the faith of the community in the administration of justice is maintained”).
- 113 See *id.* at 106–10.
- 114 See  *Richmond Newspapers*, 448 U.S. at 572–73 (“Instead of acquiring information about trials by firsthand observation or by word of mouth from those who attended, people now acquire it chiefly through the print and electronic media. In a sense, this validates the media claim of functioning as surrogates for the public.”). Judge Richard Posner, Circuit Judge for the United States Court of Appeals for the Seventh Circuit, the leading authority on deterrence theory, says that “[l]aw

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must ... be public.... A threat that is not communicated cannot deter.” Richard A. Posner, *Economic Analysis of Law* 318 (9th ed. 2014). It is clear to me that “consequences that are unknown to potential offenders cannot affect their behavior.” Anthony N. Doob & Cheryl Marie Webster, *Sentence Severity and Crime: Accepting the Null Hypothesis*, 30 *Crime & Just.* 143, 190 (2003).

115 In fact, compared to the criminal code, a public trial serves as a more effective deterrent to criminal behavior because it better transfers knowledge of legal sanctions to the citizenry. See Dru Stevenson, *Toward A New Theory of Notice and Deterrence*, 26 *Cardozo L. Rev.* 1535, 1540–41 (2005) (discussing how the language of the criminal code is inadequate to cure the “information gap” and how violent crime rates decreased noticeably in jurisdictions following well publicized executions); see *also supra* note 114.

116 See Laura I. Appleman, *The Lost Meaning of the Jury Trial Right*, 84 *Ind. L.J.* 397, 404 (2009) (discussing  *Blakely v. Washington*, 542 U.S. 296 (2004), and noting that “*Blakely* contended the liberal, democratic decision making vested in the jury’s determination of blameworthiness relied on the community’s role in linking punishment to the crime committed, so that the offender would feel more responsibility for her actions”); see *also*  *Blakely*, 542 U.S. at 309.

117 See  *Richmond Newspapers*, 448 U.S. at 570–72 (recognizing that a public trial has “significant community therapeutic value” because transparency reaffirms the public’s perception of stability and security, and that openness of criminal trials increases respect for the law by educating the public about the criminal justice system).

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