ARTICLES

HOW TO MAKE CRIMINAL TRIALS DISAPPEAR WITHOUT PRETRIAL DISCOVERY

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Introduction

The story of the "vanishing trial" and its replacement by pretrial process ending in settlement is now familiar. Strikingly, few civil or criminal cases are resolved through trials, especially jury trials. From September 2014 to September 2015, only 1.1% of federal civil filings resulted in a trial of any sort and that same year, only 2.6% of federal criminal defendants had charges resolved by trial.[1] Data from many state justice systems show trial rates nearly as low or lower.[2] There is no lack of explanations for this development, but the standard ones—such as the pressure of ever-rising caseloads and the self-interest of key players served by avoiding trials—either tell only part of the story, fail to garner consensus, or do not hold up to careful analysis. Nevertheless, these accounts dominate both judicial and academic writing and accordingly, influence judicial practice, legal doctrines, and scholars' prescriptive agendas.

It is unlikely that there is a single explanation for the contemporary marginalization of trial adjudication, and there is no need for one. But there is a single transformation that *underlies* and is an essential prerequisite for most other explanations, and on its own, it has considerable explanatory power. The transformation is the rise of pretrial evidentiary knowledge. It is better known with respect to civil than to criminal litigation because broad civil discovery rules make the reason for this transformation more apparent. The importance of pretrial evidence gathering to the demise of trials starts with the recognition that "fact finding"—a central purpose of the common law trial—entails two distinct aspects. The first is

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1. Admin. Office of the U.S. Courts, Federal Judicial Caseload Statistics 2015 tbl. C-4 (2015), http://www.uscourts.gov/sites/default/files/c04mar15_0.pdf (civil trials); *id.* at tbl. D-4, http://www.uscourts.gov/sites/default/files/d04mar15_0.pdf (criminal trials). By another measure for the same year that excludes dismissed criminal charges, 97.1% of federal criminal cases ended in guilty pleas, while 2.9% went to trial. U.S. Sentencing Comm'n, Sourcebook of Federal Sentencing Statistics tbl. 10 (2015), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2015/Table10.pdf.

2. *See, e.g.*, Nat'l Ctr. for State Courts, 2015 Criminal Caseloads—Trial Courts, http://www.ncsc.org/Sitecore/Content/Microsites/PopUp/Home/CSP/CSP_Criminal (Of twenty states reporting data on criminal jury trials in general jurisdiction courts, nineteen had jury trial rates below 3%, fourteen had rates below 2%, and six were below 1%. Of twenty-one states reporting data for general jurisdiction courts in 2015, eleven had bench trial rates below 1%, sixteen had rates below 2%, and nineteen had rates below 3%).

investigation: the parties discover facts previously unknown to them (and perhaps to anyone) and collect evidentiary sources to prove those facts. The second task is what we normally mean by *fact-finding* at trial, which is the process of resolving factual disputes by drawing conclusions from the available evidence.

Trials were once important devices for *both* functions, but they are now rarely important for the first. When things are no longer needed for formerly important functions—whether trials, tools, skills, or rituals—they usually pass into marginal status or obsolescence. We once had more trials because we needed them for fact investigation and evidence gathering as well as for resolving factual disputes from available evidence. That is no longer true. Evidence gathering now occurs almost entirely in the pretrial litigation stage.[3] The appearance of evidence at trial that is new to both parties is a rare event.[4] Additionally, eliminating the trial's discovery function undermines its fact-finding function. With a largely complete evidentiary record available to them before trial, parties often see that there are few factual disputes.[5] Hence, they usually settle. Judicial decisions that resolve a case before trial, such as charge dismissals or civil summary judgments, are in this sense the same thing: conclusions about the relevant facts based on pretrial evidence. In short, the few trials that still take place occur largely in the very small subset of cases in which unresolved questions of fact (or questions about how law applies to facts) remain despite the parties' full knowledge of most of the evidence *before trial*.

Reasons for the rise of pretrial evidence gathering are easier to understand in civil than in criminal litigation. With reform of the Federal Rules of Civil Procedure in 1938, civil litigation moved from a model of fact pleading to one of notice pleading, which gave litigants new, powerful tools for pretrial fact investigation.[6] Long before trial and thus *instead* of trial, civil parties could depose opponents and witnesses under oath, compel written answers to questions, and compel access to documents and nearly all other kinds of potentially relevant evidence.[7] John Langbein has convincingly argued that this is a key reason the proportion of civil cases concluded by trial declined from about 20% in the 1930s to less than 2% in the 2000s.[8]

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3. *See infra* Part II.
4. *See infra* Part II; John H. Langbein, *The Disappearance of Civil Trial in the United States*, 122 YALE L.J. 522, 545–48 (2012).
5. *See infra* Part II.
6. *See generally* Stephen B. Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015 (1982). Scholars have argued that there has been some movement back in the direction of fact pleading in recent decades. *See* Richard L. Marcus, *The Revival of Fact Pleading Under the Federal Rules of Civil Procedure*, 86 COLUM. L. REV. 433 (1986); A. Benjamin Spencer, *Plausibility Pleading*, 49 B.C. L. REV. 431 (2008).
7. FED. R. CIV. P. 30–36.
8. Langbein, *supra* note 4, at 524 (for 1930s data, citing Stephen C. Yeazell, *The Misunderstood Consequences of Modern Civil Process*, 1994 WIS. L. REV. 631, 633 n.3 (1994) (reporting the proportion of cases tried in 1936 as 19% and in 1938 as 19.9%)).

The data on criminal trial rates documents a nearly identical story, yet criminal *procedure* has not followed the same path of granting the parties broad pretrial discovery powers. Reform of the Federal Rules of Criminal Procedure in the 1940s rejected the new civil discovery model and, in line with common law tradition, retained a remarkably limited pretrial discovery regime.[9] Unlike the federal civil rules, which prompted state justice systems to adopt similarly broad discovery regimes, the federal criminal rules reaffirmed the longstanding custom that parties have no duties to disclose evidence they possess to each other. In recent decades, a growing number of states have abandoned the federal model and adopted stronger pretrial disclosure rules, although none match the evidence-gathering power of pretrial civil litigation.[10] Only five states, for example, authorize criminal litigants to depose potential witnesses without an exceptional reason.[11] And while many local prosecutors offer "open file" discovery as a matter of policy, few state criminal disclosure rules actually mandate de facto open-file discovery between criminal litigants.[12]

The challenge, then, is to explain how prosecutors and criminal defendants nonetheless obtain enough knowledge of the relevant facts so that they settle nearly all cases through plea bargains. It bears emphasis that this question is distinct from research about the role that evidence plays in prosecutors' charging decisions and the terms on which they agree to plea bargains.[13] The focus, here, is different and is concerned only with cases for which prosecutors have strong enough evidence to convince them to charge. If broad pretrial discovery is the sine qua non of the vanishing civil trial, how do criminal litigants have enough pretrial evidentiary knowledge without such rules to drive criminal trial rates just as low? If they do not, how else do we explain criminal litigation achieving an unprecedentedly high settlement rate?

Part I surveys the prevailing theories for the near-disappearance of trials and defends the twentieth-century rise of broad pretrial discovery as the best explanation and a prerequisite on which other accounts depend. The centrality of discovery presents the puzzle of how criminal litigation matched civil litigation's capacity for pretrial evidence gathering without matching its pretrial discovery rules.

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9. George H. Dession, *The New Rules of Federal Criminal Procedure: II*, 56 YALE L.J. 197, 214–23 (1947); Lester B. Orfield, *The Federal Rules of Criminal Procedure*, 33 CALIF. L. REV. 543, 555–61 (1945).

10. Darryl K. Brown, *Discovery in State Criminal Justice*, *in* 3 REFORMING CRIMINAL JUSTICE: A REPORT OF THE ACADEMY FOR JUSTICE BRIDGING THE GAP BETWEEN SCHOLARSHIP AND REFORM 147 (Erik Luna ed., 2017).

11. *See infra* note 59.

12. *See* Brown, *supra* note 10, at 155.

13. That research is concerned with the role that non-legal factors such as racial bias, and particular forms of evidence such as forensic analysis, play in those decisions. There seems to be little agreement about the answers. Joseph L. Peterson et al., *Effect of Forensic Evidence on Criminal Justice Case Processing*, 58 J. FORENSIC SCI. S78, S79 (2013) ("[T]here is little agreement about the importance of evidence and little knowledge about the importance that various kinds of evidence play in [prosecutors'] decisions.").

Part II surveys the developments that provide much of the solution and now enable criminal litigants to often have as full a picture of the evidence without trial as their civil counterparts. Those developments appear in three realms. One is the executive branch's unique legal authority and institutional capacity to investigate facts before charges are filed and thus before discovery rules apply. Technology has helped make up for the absence of discovery rights by sometimes making evidence available without special legal authority, such as a search warrant or deposition, to gather evidence. The most important sources tend to be now-unexciting forms such as audio-video recordings or phone and transaction records, rather than cutting-edge forensics such as DNA analysis. Finally, reform of the substantive criminal law has adapted to evidence-gathering challenges by redefining offenses in various ways that make them easier to prove, sometimes by tailoring their definition to available forms of evidence.

Part III considers the deficiencies in criminal litigation's pretrial evidence-gathering regime compared to the civil discovery regime and explains how criminal litigation overcame them. Criminal procedure's evidence-gathering tools are unevenly distributed; the state has more pretrial investigative capacity both as a matter of law and practicality than defendants do. As a result, pretrial knowledge of available evidence is more asymmetric between parties in criminal litigation than in civil litigation. This asymmetry should pose a barrier to settlement in some cases and keep the criminal trial rate higher than otherwise, perhaps even as high as it remained, fairly steadily, from the 1920s through the 1980s. But there is considerable evidence to suggest that criminal adjudication has compensated for its informational deficiencies through changes, especially in the last quarter-century, in the law and practice of plea bargaining. I survey a range of evidence that suggests criminal litigation's pretrial evidence-gathering methods are effective enough to generate settlements in roughly 80 to 90% of cases. But to push guilty-plea rates up further—to 97% or more—requires hard-bargaining tactics with severe trial penalties. For several reasons, the prerequisites for such hard bargaining, including prosecutors' willingness to use them, only became widely available in the 1980s.

The final Part, Part IV, notes some of the implications of this contemporary model of criminal adjudication—most importantly the reduction in adversarial scrutiny of evidence that civil litigation—that has replicated in the pretrial process much more successfully than criminal litigation.

I. EXPLANATIONS FOR THE OBSOLESCENCE OF TRIALS

For at least a century, considerable attention has been paid to the relative rarity of trials and the dominance of settlements or other modes of non-trial dispositions. Some explanations for this phenomenon apply in both civil and criminal courts, others are unique to one side of the docket or the other. This Part briefly assesses the most common explanations: rising caseloads; growing preferences for settle-

ment and managerial judging; summary judgment standards; and the expansion of pretrial discovery. All fail to fully explain the criminal trial's decline. Then, Part II subsequently explains how, without analogs to most civil discovery rules, criminal litigation now ordinarily generates a sufficiently full picture of the evidence well ahead of trial to trigger negotiated outcomes in most prosecutions.

A. Explanations for Civil and Criminal Litigation

1. Caseloads and Judicial Resources

Two explanations for the diminishing use of trials occur in assessments of both criminal and civil litigation. The most familiar is that rising caseloads strain the capacity of public courts and make it impossible, as a practical matter, for them to resolve most cases by trial. This explanation has been repeatedly invoked by the Supreme Court as a justification for plea bargaining in criminal cases.[14] However, careful analysis has long undermined this claim in two basic ways. First, many versions of this claim rely on a false dichotomy that either courts and procedural rules facilitate settlement, or justice systems will be overwhelmed by the need to try most cases.[15] But in fact, most cases in both civil and criminal litigation have been resolved without trial for well over a century (and probably much longer), despite very different procedural regimes and judicial approaches to caseload management.[16] Recall that Langbein's study noted that 80% of federal civil litigation was resolved by settlement in the 1930s.[17] The figures are broadly similar for criminal litigation.[18] International comparisons of guilty plea rates reinforce the point. Despite significant differences between criminal procedure regimes, most nations accomplish most criminal judgments through negotiated

14. *E.g.*, Santobello v. New York, 404 U.S. 257, 260 (1971) ("'[P]lea bargaining' is an essential component of the administration of justice." And without it, "the States and the Federal Government would need to multiply by many times the number of judges and court facilities"); *see also* Ludwig v. Massachusetts, 427 U.S. 618, 627–28 n.4 (1976) (The process of bargaining is critical to the interest of the State in efficient criminal procedure); Lafler v. Cooper, 566 U.S. 156, 185 (2012) (Scalia, J., dissenting) ("[W]e accept plea bargaining because many believe that without it . . . our system of criminal justice would grind to a halt."); Bordenkircher v. Hayes, 434 U.S. 357, 372 (1978) (Powell, J., dissenting) ("[P]lea-bargaining process . . . is essential to the functioning of the criminal-justice system.").

15. *Lafler*, 566 U.S. at 185 (Scalia, J., dissenting) ("many believe that without [plea bargaining] . . . our system of criminal justice would grind to a halt"); *Santobello*, 404 U.S. at 260 (without plea bargaining, "States and the Federal Government would need to multiply by many times the number of judges and court facilities").

16. GEORGE FISHER, PLEA BARGAINING'S TRIUMPH: A HISTORY OF PLEA BARGAINING IN AMERICA (2003) (documenting plea bargaining in early 19th century Massachusetts courts); Mary E. Vogel, *The Social Origins of Plea Bargaining: An Approach to the Empirical Study of Discretionary Leniency*, 35 J. L. & SOC'Y 201 (2008). For an earlier generation of plea bargaining studies, see N.Y. STATE CRIME COMM'N, REPORT OF THE CRIME COMMISSION: REPORT OF THE SUB-COMMISSION ON STATISTICS 27–35 (1928); Raymond Moley, *The Vanishing Jury*, 2 S. CAL. L. REV. 97 (1928); Guy A. Thompson, *The Missouri Crime Survey*, 12 A.B.A. J. 626, 629 (1926).

17. Langbein, *supra* note 4, at 524.

18. Moley, *supra* note 16, at 105–10 (from multiple survey sources, reporting guilty plea rates in many U.S. cities of 75% to 85%). For a discussion of this data from this source, as well as others, see *infra* Part III.

pleas or other abbreviated processes.[19] Therefore, the overburdened caseload explanation fails to account for the marginal increase in alternatives to trial over the last several decades, from what seems to have been a de facto baseline in the range of 80% to 85% settlement to rates in the last twenty years of 96% to 98%.

Second, skeptics of the caseload-pressure explanation point out that the rates of trials versus settlements do not vary directly and consistently with caseloads in either criminal or civil litigation. Both civil settlements and negotiated guilty pleas have held steady or increased during periods in which caseloads declined. Moreover, comparisons between local jurisdictions with similar caseloads and judicial resources reveal that some have much lower trial rates than others, which suggests that something other than caseload pressure explains some portion of trial avoidance.[20] The most recent data from state courts confirms earlier conclusions on this point: declining criminal caseloads have not affected trial rates, a few state justice systems vary significantly from the majority by retaining comparatively high rates of trial, and trial rates show no obvious correlation with caseloads and judicial resources.[21]

2. *Changes in Norms, Practices, and Ideology*

The second explanation for fewer trials commonly offered by scholars (but less by courts and practitioners) emphasizes ideological change. In recent decades, the normative status of settlement has risen while that of trials has declined. Resolving

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19. *See generally* JENIA I. TURNER, PLEA BARGAINING ACROSS BORDERS: CRIMINAL PROCEDURE (Hiram E. Chodosh ed., 2009) (descriptions of bargaining Germany, Russian, Bulgaria, China and Japan); WORLD PLEA BARGAINING: CONSENSUAL PROCEDURES AND THE AVOIDANCE OF THE FULL CRIMINAL TRIAL (Stephen C. Thaman ed., 2010) [hereinafter WORLD PLEA BARGAINING] (reports on several nations including Scotland, Netherlands, Denmark, and Norway); Arie Freiberg, *Non-Adversarial Approaches to Criminal Justice*, 16 J. JUD. ADMIN. 205 (2007) (80% of Magistrates' Courts convictions by guilty plea in Australia); Bron McKillop, *What Can We Learn from the French Criminal Justice System?*, 76 AUSTRALIAN L.J. 49, 51–55 (2002) (99% of French criminal cases adjudicated in lower courts with expedited process); Thomas Weigend, *Lay Participation and Consensual Disposition Mechanisms*, 72 INT'L REV. PENAL L. 595 (2001) (describes trend toward plea bargaining or similar non-trial adjudication in many countries); CROWN PROSECUTION SERV., ANNUAL REPORT AND RESOURCE ACCOUNTS 2011–12: ANNEX B—CASEWORK STATISTICS 85 tbl. 7, https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/229077/0048.pdf (showing that in the Crown Courts of England and Wales in 2009–2010, guilty pleas made up 91% of convictions).

20. *See* MALCOLM M. FEELEY, THE PROCESS IS THE PUNISHMENT: HANDLING CASES IN A LOWER CRIMINAL COURT (1979); MILTON HEUMANN, PLEA BARGAINING: THE EXPERIENCES OF PROSECUTORS, JUDGES, AND DEFENSE ATTORNEYS (1978); Albert W. Alschuler, *Implementing the Criminal Defendant's Right to Trial: Alternatives to the Plea Bargaining System*, 50 U. CHI. L. REV. 931 (1983) (rebutting arguments about necessity for plea bargaining); Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. 459, 519 (2004) (summarizing data showing that federal courts formerly resolved more civil cases through trial in periods when they had proportionately fewer judges and resources); Stephen J. Schulhofer, *Is Plea Bargaining Inevitable?*, 97 HARV. L. REV. 1037 (1984) (finding guilty pleas without bargained-for concessions).

21. *See* NAT'L CTR. FOR STATE COURTS, EXAMINING THE WORK OF STATE COURTS: AN OVERVIEW OF 2013 STATE COURT CASELOADS 1, 3 (2013), http://www.courtstatistics.org/~/media/microsites/files/csp/ewsc_csp_2015.ashx (15% decline from 2008–13 in total state court caseloads). For trial rates in state courts during this period, see NAT'L CTR. FOR STATE COURTS, *supra* note 2.

disputes without trial marks a success because negotiated outcomes are assumed to be mutually beneficial.[22] Trials, by contrast, are viewed as costly failures to negotiate a mutually satisfactory scenario. This normative shift correlates with changed institutional practices as well as circumstances.[23] Procedural changes gave judges more discretion, facilitating the widely acknowledged rise in "managerial judging," in which judges took more responsibility for ensuring efficient processing of their caseloads.[24] The shift started in the 1970s and spread to state as well as federal courts.[25] The advent of case management software increased judges' direct, measurable responsibility for managing both civil and criminal caseloads.[26] These "institutional changes flow[ed] from and reinforce changes in judicial ideology," in which judges accepted their expanded roles as "problem solvers and case managers as well as adjudicators."[27]

In criminal litigation, this ideological change took the form of increasingly unreserved acceptance of plea bargaining. In the early 1970s, plea bargaining was still widely viewed with enough suspicion that it was still possible for a National Advisory Commission on Criminal Justice Standards (which included prosecutors among its members) to call for the nationwide abolition of negotiated guilty pleas "as soon as possible."[28] Within a decade, that view had mostly been relegated to academic critics and defense-side partisans.[29] The Supreme Court instead characterized bargaining as a legitimate governmental interest that yielded benefits to both parties and was critical to criminal justice administration, which contributed to the normative acceptance of negotiated guilty pleas.[30] As a result, most criminal

22. *See* United States v. Mezzanatto, 513 U.S. 196, 208 (1995) (praising "mutual settlement" through unregulated plea bargaining); Corbitt v. New Jersey, 439 U.S. 212, 222 (1978) (stating plea bargains are "mutually beneficial"); Brady v. United States, 397 U.S. 742, 752–53 (1970) (stating plea agreements reflect "mutuality of advantage").

23. The predominant causal direction in this correlation is unclear.

24. Galanter, *supra* note 20, at 519–20; Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374 (1982).

25. Galanter, *supra* note 20, at 520; Resnik, *supra* note 24, at 397–99, 438.

26. Nancy J. King & Ronald F. Wright, *The Invisible Revolution in Plea Bargaining: Managerial Judging and Judicial Participation in Negotiations*, 95 TEX. L. REV. 325, 356–64 (2016) (describing the adoption and effects of case management software in state criminal courts); *see* Galanter, *supra* note 20, at 502, 505.

27. Galanter, *supra* note 20, at 519–20.

28. *See* NAT'L ADVISORY COMM'N ON CRIMINAL JUSTICE STANDARDS & GOALS, REPORT ON COURTS 46 (1973) (Standard 3.1, "Abolition of Plea Negotiation," recommends ending negotiated guilty pleas "[a]s soon as possible, but in no event later than 1978," and also recommends that "[a] plea of guilty should not be considered by the court in determining the sentence to be imposed"); *id.* at 48 (noting that reform rather than abolition of plea negotiations was recommended by the President's Commission on Law Enforcement and the Administration of Justice, and by the ABA House of Delegates).

29. For a leading academic critic, see Alschuler, *supra* note 20, at 932.

30. A subset of plea bargaining practices, especially in federal courts, have drawn renewed judicial criticism for the extremely coercive terms prosecutors are able to create through their charging discretion and control of mandatory-minimum sentences. *See, e.g.*, United States v. Kupa, 976 F. Supp. 2d 417, 420–31 (E.D.N.Y. 2013); United States v. Young, 960 F. Supp. 2d 881, 882, 888 (N.D. Iowa 2013); Frank H. Easterbrook, *Plea Bargaining Is a Shadow Market*, 51 DUQ. L. REV. 551, 554 & n.11 (2013); *cf.* HUMAN RIGHTS WATCH, AN OFFER YOU CAN'T REFUSE: HOW US FEDERAL PROSECUTORS FORCE DRUG DEFENDANTS TO PLEAD GUILTY (2013),

cases end with guilty pleas and most civil cases settle because of wide agreement among lawyers and judges that those are the desirable modes of resolution.

Courts' embrace of alternative dispute resolution ("ADR") also fits within the narrative of an ideological shift. The rough analog in criminal litigation of diverting civil cases to ADR programs are drug courts and other "problem-solving" courts.[31] Courts have embraced and institutionalized these programs as alternatives to both trials and ordinary, party-driven settlements.[32] ADR also responds in part to perceptions of growing trial complexity and expense, although concerns in the civil and criminal realms are somewhat different. The frequent complaint in criminal litigation is that jury trials have become slower and costlier with the expansion of trial rights.[33] Complaints on the civil side highlight growing factual and legal complexity for some causes of action.[34]

Civil ADR and criminal-court equivalents displace some trials for these reasons, but scholars tend to think these programs play only a small role in the decline of the trial, at least in the percentage of trials, as opposed to the absolute number of them.[35] For instance, both civil and criminal ADR programs are not distributed evenly.[36] They are used in some jurisdictions more than others, and are available only for certain kinds of cases.[37] Yet, the decline in trial rates has been more widespread, so these shifts do not tell the whole story.[38]

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https://www.hrw.org/sites/default/files/reports/us1213_ForUpload_0_0_0.pdf (documenting coercive plea-bargaining tactics). Thus, Justice Scalia's claim that "until today [plea bargaining] has been regarded as a necessary evil," *Lafler v. Cooper*, 566 U.S. 156, 185 (2012) (Scalia, J. Dissenting), was anachronistic by 2012, belied by the Court's forty-year body of doctrine encouraging and praising plea bargaining.

31. *See* WEST HUDDLESTON & DOUGLAS B. MARLOWE, NAT'L DRUG COURT INST., PAINTING THE CURRENT PICTURE: A NATIONAL REPORT ON DRUG COURTS AND OTHER PROBLEM-SOLVING COURT PROGRAMS IN THE UNITED STATES 1, 37 (2011), https://www.ndci.org/sites/default/files/nadcp/PCP%20Report%20FINAL.PDF (2,459 drug courts and 1,189 other problem-solving courts in the U.S. in 2008).

32. *See generally id.*

33. For examples of extended trial rights, see Batson v. Kentucky, 476 U.S. 79 (1986) (holding that the Equal Protection Clause prohibits use of peremptory strikes based on race); Edmonson v. Leesville Concrete Co., 500 U.S. 614 (1991) (extending *Batson* to civil cases); see also Langbein, *supra* note 4, at 555 (discussing complexity in civil cases). For criticism of criminal trial costs, see William J. Stuntz, *Unequal Justice*, 121 HARV. L. REV. 1969, 2034–35 (2008).

34. *See* Galanter, *supra* note 20, at 517–18; Langbein, *supra* note 4, at 555–61 (describing growth in complex civil litigation, which triggered need for the Federal Judicial Center's *Manual for Complex Litigation*).

35. *See* Galanter, *supra* note 20, at 492–95, 508–10, 514–17.

36. *See id.* at 515.

37. *See* Thomas J. Stipanowich, *ADR and the "Vanishing Trial": The Growth and Impact of "Alternative Dispute Resolution,"* 1 J. EMPIRICAL LEGAL STUD. 843, 849–50 (2004). For information on drug courts, see RYAN S. KING & JILL PASQUARELLA, SENTENCING PROJECT, DRUG COURTS: A REVIEW OF THE EVIDENCE (2009); *Courts: Drug Courts*, NAT'L INST. JUST. (2017), https://www.nij.gov/topics/courts/drug-courts/Pages/welcome.aspx; U.S. DEP'T OF JUSTICE, DRUG COURTS (2017), https://www.ncjrs.gov/pdffiles1/nij/238527.pdf.

38. *See* Galanter, *supra* note 20, at 517 (noting ADR is prevalent only in some localities and works only for some types of civil litigation, yet the trial decline is across the board).

3. Changes in Summary Judgment Law

Especially in the wake of a trio of 1986 U.S. Supreme Court decisions,[39] rule changes that made civil summary judgments more likely have been much-discussed contributors in the demise of civil trials.[40] There is some evidence for this inference, but easier summary judgment standards do not explain much of the reduction trials, especially on the criminal side. For one, the contribution of summary judgment to the shrinking civil trial rate is fairly marginal. In recent years, summary judgment motions were filed in about 17% to 19% of federal civil cases; they were granted (in whole or in part) roughly a third of the time, but those summary judgment orders terminate only 4% or 5% of all civil cases.[41] In lieu of summary judgment, some of those cases likely would have settled instead of going to trial, making the summary judgment effect on trial rates more modest than those figures otherwise suggest. Moreover, criminal processes have never had a direct analogue to summary judgment.[42] Summary judgment against a defendant would contravene the jury trial right. But even summary judgment against the prosecution is impossible as a practical matter because criminal procedure lacks broad pretrial discovery. Civil summary judgment depends upon civil procedure's broad discovery regime.[43] Without pretrial discovery, defendants have no evidentiary record on which to argue that the prosecution has presented no genuine issue of material fact.[44] At most, then, summary judgment changes explain part of the *civil* trial's decline.

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39. The 1986 "summary judgment trilogy" is comprised of *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986), *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986), and *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986).

40. *See* Gillian K. Hadfield, *Where Have All the Trials Gone? Settlements, Nontrial Adjudications, and Statistical Artifacts in the Changing Disposition of Federal Civil Cases*, 1 J. EMPIRICAL LEGAL STUD. 705, 705 (2004) (concluding that electronic docketing data leads to the conclusion "that vanishing trials have been replaced not by settlements but by nontrial adjudication"); Martin H. Redish, *Summary Judgment and the Vanishing Trial: Implications of the Litigation Matrix*, 57 STAN. L. REV. 1329, 1330 (2005) ("Changes in the law of summary judgment quite probably explain at least a large part of the dramatic reduction in federal trials.").

41. *See* D. Brock Hornby, *Summary Judgment Without Illusions*, 13 GREEN BAG 2D 273, 276 (2010) (noting summary judgment terminates about 4% of federal civil cases but arguing "[i]t is unlikely that a significant number of cases where summary judgment is granted would proceed to trial if summary judgment were denied"); Memorandum from Joe Cecil & George Cort on Report on Summary Judgment Practice Across Districts with Variations in Local Rules to Judge Michael Baylson 8 tbl. 3, 11 tbl. 6, 17 tbl. 12 (Aug. 13, 2008) (based on 276,120 federal civil cases in 2006).

42. The closest analog may be Federal Rule of Criminal Procedure 12(b)(3)(B), which permits judges to dismiss charges for "failure to state an offense." It is rarely used. *See* 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, 349–51 (2015).

43. FED. R. CIV. P. 56(c)(1)(A) ("party asserting that a fact cannot be . . . must support the assertion by . . . citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations . . . , admissions, interrogatory answers, or other materials . . . .").

44. Judges can dismiss criminal charges for failure to state an offense on the face of the pleading. *See* FED. R. CRIM. P. 12(b)(3)(B)(v); *see also* Burnham, *supra* note 42. Judges can, however, enter a judgment for a defendant once the government presents trial evidence (even before the close of the evidence). *See* Foo Fung v. United

In sum, caseload pressures, growing preferences for settlement, and summary judgment standards explain part of the decline in trials. But the impact of each of these factors depends on the parties' capacity to create a sufficient evidentiary record *before* trial. Judges need a record for summary judgment decisions and barring some failure such as coercion, poor judgment, or counsel incompetence, civil and criminal parties alike should seek and agree to settlements only when they have sufficient knowledge of the facts and sources of proof.[45] As the next section describes, innovations that enabled parties to gather most evidence well before trial explain the relentless success of alternatives to trials. The story of those innovations is much clearer, and more directly grounded in discovery law, for civil than for criminal litigation.

B. The Rise of Pretrial Discovery

Rules granting civil or criminal litigants specific tools for gathering evidence before trial were minimal at common law and in statutory law until the mid-twentieth century.[46] Civil litigation had long required "fact pleading"—factual specificity in complaints asserting causes of action. But the law gave plaintiffs no special authority to uncover those facts.[47] They could, of course, investigate facts and gather evidence in the ways any private actor can regardless of litigation, but they had no authority to compel disclosure from opposing parties or to examine non-consenting witnesses under oath. The legal system's means to compel evidence were centered on the trial process.[48] Given this paucity of pretrial discovery, some witnesses revealed what they knew for the first time in their trial testimony. One or even both parties might not know what a witness knew until then.[49]

The watershed change occurred in 1938 with the adoption of the Federal Rules of Civil Procedure, which instituted the now-familiar model of "notice" pleading and paired that with powerful new mechanisms for parties to investigate facts and gather evidence before trial.[50] Most state civil justice systems eventually adopted

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States, 369 U.S. 141 (1962). Summary judgment against defendants never developed on the understanding that the constitutional right to a criminal jury trial applies even if there is "no genuine issue of material fact." Nor were policymakers likely to authorize it against the prosecution, if only because the traditional paucity of pretrial disclosure provided an insufficient evidentiary record for judges to make such judgments.

45. More precisely, how much factual knowledge is sufficient is likely determined in light of the cost of getting more knowledge, when those costs include higher litigation expenses or foregone opportunities to settle on more favorable terms.

46. Modern discovery powers for parties began with the 1938 adoption of the federal rules of civil procedure. *See* Langbein, *supra* note 4, at 542–48.

47. *See* Burbank, *supra* note 6, at 1142; Langbein, *supra* note 4, at 525, 543.

48. *See generally* Langbein, *supra* note 4.

49. In the pre-modern era, courts relied on the jury trial not merely to present evidence to the jury, but to produce evidence.

50. *See* Burbank, *supra* note 6, at 1067; Langbein, *supra* note 4, at 542–43.

this model or something close to it.[51] As intended, this new procedural regime moved most fact investigation to the pretrial discovery stage. As John Langbein has persuasively described in detail, that undercut the need for trials as a means to produce evidence and simultaneously facilitated settlement.[52] Pretrial civil discovery replaced the trial's evidence-gathering function, and in doing so, diminished the need for trial in the vast majority of cases, at least in the eyes of the parties.[53] Once the parties had common access to a relatively complete and reliable account of what the evidence would be at trial, they were able to reach settlements in an even greater proportion of cases.[54] The same evidentiary record allows judges to dispose of an additional portion of cases (or at least some claims) through summary judgment.[55] In short, pretrial process took over the trial's function of fact investigation and evidence production. Then, either the parties, by agreement or the judge by decree, are typically able to handle fact *finding* based on the pretrial record.

However, Langbein's explanation for the disappearance of the civil trial raises a puzzle for criminal litigation. We know that both the criminal and civil justice systems end up at the same place, with only a tiny percentage of cases resolved by trial and the vast majority resolved by party-negotiated settlements. But for pretrial discovery reform, the critical causal development that Langbein identifies, the evolutions of civil and criminal adjudication are nothing alike.

The Federal Rules of Criminal Procedure, reformed eight years after their civil counterparts in 1946,[56] contained none of the discovery devices adopted into the civil rules. In the seventy years since rules in the federal system and in many states have expanded only modestly. For example, in the federal system and some states, prosecutors and criminal defendants are not obligated to even disclose most witness names before trial[57] and federal prosecutors may withhold trial witnesses' prior statements until after they testify.[58] Most states still follow the federal model and allow depositions only when the court concludes that exceptional circumstances make them necessary to preserve testimony.[59] Interrogatories in criminal litigation are virtually non-existent. Beyond that, the Constitution requires all

51. For a survey of state procedural rules that assesses the federal rules' influence, see John B. Oakley & Arthur F. Coon, *The Federal Rules in State Courts: A Survey of State Court Systems of Civil Procedure*, 61 WASH. L. REV. 1367 (1986).

52. *See generally* Langbein, *supra* note 4.

53. *See* FED. R. CIV. P. 26–37.

54. Langbein, *supra* note 4, at 548.

55. Langbein, *supra* note 4, at 566–69.

56. The first Federal Rules of Criminal Procedure were adopted by order of the Court on December 26, 1944, for procedures up to verdict, and on February 8, 1946, for procedures after verdict. The full set took effect on March 21, 1946.

57. FED. R. CRIM. P. 16; ALA. R. CRIM. P. 16.1–.5; LA. CODE CRIM. PROC. ART. 716–29.7 (West 2017); N.Y. CRIM. PROC. LAW §§ 240.60–.90, 250.10–.40 (Lexis 2017); UTAH R. CRIM. P. 16.

58. 18 U.S.C. § 3500 (2012); *see* FED. R. CRIM. P. 26.2.

59. *See, e.g.*, FED. R. CRIM. P. 15; ALASKA R. CRIM. P. 15; UTAH R. CRIM. P. 14(a)(8).

prosecutors to disclose exculpatory evidence by the time of (but not before) trial,[60] and all jurisdictions now mandate pretrial access to physical evidence, the disclosure of scientific analysis, and notice about expert witnesses and special defenses such as alibi and insanity.[61]

Against this tradition of exceedingly limited criminal discovery, however, a subset of states has led a slow, uneven trend toward broader pretrial discovery in criminal litigation. A growing number of states now require pretrial notice of trial witnesses' identities.[62] A smaller number also require prosecutors to share the names of all people with relevant knowledge about the case, even if the government does not intend to offer their testimony at trial.[63] Five states even authorize depositions for witnesses in criminal cases nearly on par with civil litigation,[64] while a few more permit depositions with greater limits or for certain witnesses, such as those the opposing party intends to call at trial or persons will not agree to an informal interview.[65] Aside from this small number of state jurisdictions, however, discovery in criminal litigation remains a shadow of civil discovery and hardly seems a precipitating cause of the near-disappearance of criminal trials.

In light of all that, what changes explain the marginalization of jury trials to one or two percent of criminal convictions across U.S. jurisdictions? There seems to be considerable room for variation in the details of adjudication systems that avoid trials. But a critical prerequisite seems to be the means to compile a relatively full account of the evidence without trial. Compiling evidence is achieved differently in the criminal context than it is in civil litigation. In criminal practice, very little of the capacity to gather evidence derives from the pretrial discovery rules. Much more of it derives from modern technology and from legal rules outside of the discovery context that enable law enforcement agents to search for and seize evidence, and to a lesser degree legal authority for private actors to gather evidence. In what follows, I will argue that pretrial evidence gathering improved in criminal litigation more by technological change and by the expansion of law

60. *See* Brady v. Maryland, 373 U.S. 83 (1963); United States v. Ruiz, 536 U.S. 622 (2002) (holding that right to disclosure of *Brady* evidence does not apply until trial).

61. *See* 5 WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE §§ 20.2(a)–(e) (4th ed. 2016).

62. *See, e.g.*, ARK. R. CRIM. P. 17.1–19.7; CONN. SUP. CT. R. CRIM. P. §§ 40-1 to -43 (also known as, the "Connecticut Practice Book"); MASS. R. CRIM. P. 14; NEB. REV. STAT. §§ 29-1912 to -1927 (2012); NEV. REV. STAT. §§ 171.1965, 174.233–.235 (2016); PA. R. CRIM. P. 567–73 (stating in Rule 573(B)(2) that, during pre-trial discovery, eyewitness names should be disclosed only at discretion of court upon showing by defense); W. VA. R. CRIM. P. 12.1–.2, 16.

63. *See, e.g.*, FLA. R. CRIM. P. 3.220; N.J. CT. R. 3:13-3; N.C. GEN. STAT. §§ 15A-902 to -910 (2017).

64. *See* FLA. R. CRIM. P. 3.220(h); IND. CODE § 35-37-4-3 (2016); IND. R. TRIAL P. 30; IOWA R. CRIM. P. 2.13; MO. SUP. CT. R. CRIM. P. 25.12, .15; VT. R. CRIM. P. 15. Each state allows depositions for most potential witnesses, with minor exceptions or restrictions.

65. *See, e.g.*, ARIZ. R. CRIM. P. 15.3(a)(2) (permitting depositions of witnesses who will not agree to an interview); IOWA R. CRIM. P. 2.13 (allowing defendants to depose witnesses listed by the state, subject to exceptions); N.D. CRIM. P. R. 15(a) ("At any time after the defendant has appeared, any party may take testimony of any person by deposition," but "after the time set by the court only with leave of court"). For an overview of state criminal discovery rules, see Brown, *supra* note 10.

enforcement infrastructure—or more bluntly, state power—than by rules that expanded pretrial capacity to investigate facts. These forces are the alternative in the criminal process to civil litigation's expansive formal regime of pretrial investigation.

II. THE GROWTH OF PRETRIAL EVIDENCE WITHOUT PRETRIAL DISCOVERY RULES

How do the parties in criminal litigation have sufficient pretrial knowledge of facts and evidence to achieve high settlement rates if discovery rules have not changed? What accounts for the plunging criminal trial rate? Part of the answer is that it is misleading to focus on "discovery" rules alone to describe the scope of criminal evidence-gathering authority. *Discovery* describes two kinds of evidence-gathering entitlements. One kind is inter-party information disclosures: parties have rights to demand evidence that their opponents possess and have duties to disclose evidence in their own possession. The other type is authority to find new evidence: to investigate facts and uncover sources of proof that neither party yet knows about. Civil discovery includes strong entitlements of both kinds.[66] Civil parties can, for example, "depose any person, including a party, without leave of court"[67] and use subpoena power to compel deponents' attendance as well as their production of documents or other evidence.[68] Criminal litigants rarely have that evidence-generating tool. Criminal discovery rules overwhelmingly are inter-party *disclosure* rules. In other words, they are confined to information already known by the party.[69] But the label *discovery* is confined to evidence-gathering entitlements of either type that arise *once a complaint has been filed*. Before filing a civil complaint, private plaintiffs have no special investigative authority (although regulatory agencies with civil enforcement powers do).[70] But law enforcement agencies have considerable powers to investigate and gather information long before criminal charges are filed. This Part examines how executive officials have "discovery" powers through the grand jury and police investigations, and those powers have grown more effective with technological advances and crime definitions that are deliberately attuned to easily acquired sources of evidence.

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66. For examples of civil disclosure rules, see FED. R. CIV. P. 26, 33, 34, 36.

67. FED. R. CIV. P. 31.

68. *See* FED. R. CIV. P. 30; *see also* FED. R. CIV. P. 31 (authorizing oral or written depositions).

69. More precisely, disclosure covers information a party reasonably could know because it has possession of or access to information. This is particularly relevant with regard to information that police agencies possess but have not handed over to prosecutors. Prosecutors have an obligation to seek out certain kinds of information that police have gathered and disclose it to defendants. *See* Kyles v. Whitley, 514 U.S. 419 (1995) (regarding exculpatory *Brady* material in police possession).

70. On civil procedure's model of notice pleading, plaintiffs should not need to demonstrate much factual basis for the complaint. To some controversy, recent U.S. Supreme Court decisions reinterpreted Federal Rule of Civil Procedure 8(a) to require greater factual support in complaints and consequently made it easier for courts to dismiss complaints before discovery pursuant to Rule 12(b). *See* Ashcroft v. Iqbal, 556 U.S. 662 (2009); Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007).

A. Grand Jury Investigations as Discovery

Under federal criminal procedure rules, prosecutors possess deposition power beyond the limited authority granted to both parties as part of "discovery and inspection."[71] Through the grand jury, prosecutors can subpoena individuals and compel production of records or physical evidence without first showing cause.[72] By granting witnesses immunity from criminal liability, federal prosecutors can even compel testimony from those who otherwise could assert a privilege against self-incrimination.[73] Unlike civil deposition power, this grand jury power applies only before criminal charges are filed. Under the narrow discovery parameters of Federal Rule of Criminal Procedure 16 (and many analogous state rules), neither prosecutors nor defendants have civil litigants' power to depose witnesses during the post-indictment discovery phase.[74] Federal courts insist that subpoenas—issued under Rule 17[75]—are "carefully circumscribed" so as not to serve as "an effectively unlimited tool for discovery and investigation."[76]

Through the grand jury, then, the government has a powerful means to gather evidence without trial and outside the powers granted in "discovery and inspection" rules. But this power is asymmetric; the defense has no equivalent power, and in many jurisdictions, post-charging disclosure rules do not grant defendants access to this evidence before trial.[77] These limits reflect the trial-oriented conceptual framework of the criminal pretrial process. The limits on discovery obligations, on pretrial depositions, and on related constitutional disclosure rules[78] all implicitly look to the trial for its older function—described by Langbein—as

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71. *See* FED. R. CRIM. P. 16.

72. United States v. R. Enters., Inc., 498 U.S. 292, 297 (1991) (noting that a grand jury "is an investigatory body charged with the responsibility of determining whether or not a crime has been committed," so it can "inquire into all information that might possibly bear on its investigation until it has identified an offense" or concluded that none occurred); *see* U.S. CONST. amend. V (first sentence of the Amendment is referred to as the "Grand Jury Clause"); FED. R. CRIM. P. 6 (enumerating the grand jury powers). The same power exists in some state criminal justice systems, although many states have abolished grand juries and most use them infrequently for investigations. *See* SARA SUN BEALE ET AL., GRAND JURY LAW AND PRACTICE § 1:5 (2d ed. 2016) (overview of state grand jury laws).

73. 18 U.S.C. §§ 6002–03 (2012).

74. *See* FED. R. CRIM. P. 16.

75. FED. R. CRIM. P. 17 (authorizing subpoenas for grand jury and trial witnesses).

76. United States v. Leaver, 358 F. Supp. 2d 273, 276 (S.D.N.Y. 2005) (denying prosecutor's request for subpoena to obtain evidence to support its motion for reconsideration after indictment had been dismissed and concluding subpoena power is "carefully circumscribed" to expedite only grand jury investigations or trials only). However, prosecutors, under the guise of seeking a superseding indictment, may continue after the initial indictment to subpoena witnesses before a grand jury. LAFAVE ET AL., *supra* note 61, § 8.8(f) (describing means by which grand juries can be used for post-indictment discovery, including for superseding indictment).

77. *See* 18 U.S.C. § 3500 (2012) (Jencks Act); FED. R. CRIM. P. 26.2. State rules vary widely on this point. Some states follow the federal model, *see, e.g.*, VA. R. SUP. CT. 3A:11, while others require pretrial disclosure of statements by prosecution trial witnesses, *see* FLA. R. CRIM. P. 3.220.

78. In addition to the prohibition on issuing Rule 17 subpoenas for discovery purposes, Rule 15 authorizes depositions only in "exceptional circumstances" in order to "preserve testimony for trial" from a witness likely not to appear at trial. FED. R. CRIM. P. 15(a).

the primary *evidence-generating* event.[79] Once charges are filed, the criminal process still looks to *the trial* as a mechanism to compel production of evidence.[80] The federal rules, and the large number of state systems with similar rules, still reject the contemporary model of civil procedure that shifts evidence production to the pretrial discovery stage. The grand jury nonetheless is one way to gather evidence before litigation formally begins and facilitates pretrial settlement. But grand juries are not used to investigate most crimes.[81] Pretrial evidence-gathering power mostly lies elsewhere.

B. Law Enforcement Evidence-Gathering Powers

Beyond grand jury subpoenas and witness testimony, the government's most familiar substitute for civil discovery rights takes the form of police investigations. Police have investigative authority not possessed by private parties, and their capacity for exercising it has steadily grown.

1. Public Power to Investigate and Gather Evidence

The primary source of pretrial evidence is familiar and, like the grand jury, one-sided. Law enforcement officials have special authority to search for and seize evidence of crime, and to arrest and interrogate suspects and material witnesses.[82] Most of the prosecution's pretrial fact investigation and evidence gathering is done by police. Police investigative powers arise from a body of law even further removed from pretrial discovery rules than grand juries, which at least are defined in the same of criminal procedure rules.[83] Fourth Amendment doctrine limits government powers to search and seize evidence and suspects but allows legislatures and the executive branch-wide leeway to develop investigative powers within those boundaries.[84] A large body of statutory law authorizes a wide array of investigative tactics and defines criteria for search and arrest warrants.[85] Governments also create and fund a variety of law enforcement agencies to exercise

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79. See *Leaver*, 358 F. Supp. 2d at 276.

80. For example, Rule 16 requires no disclosure of most witnesses before trial, and Rule 26.2 allows withholding trial witnesses' prior statements from defendants until after the witnesses testify at trial. FED. R. CRIM. P. 16, 26.2; *see also* United States v. Ruiz, 536 U.S. 622 (2002) (describing defendant's right to disclosure of exculpatory and impeachment evidence under *Brady* as a trial, not pretrial, right).

81. Many states no longer use grand juries to charge some or all offenses. *See* BEALE ET AL, *supra* note 72, §§ 1:5–1:9; *see also* FED. R. CRIM. P. 7 (providing for charges by information instead of indictment).

82. For the rule on the detention of material witnesses, see 18 U.S.C. § 3144 (2012).

83. *See* FED. R. CRIM. P. 6, 16.

84. U.S. CONST. amend. IV.

85. *See, e.g.*, 18 U.S.C. §§ 2516–2518 (2012) (authorizations for interception and use of wire, oral, or electronic communications); 18 U.S.C. §§ 3121–23 (2012) (grounds for and authorization to install "pen register" or a "trap and trace" device on phones); FED. R. CRIM. P. 4 (requirements for arrest warrant); FED. R. CRIM. P. 41 (grounds for and authority to issue search warrant). For an example of regulatory agencies' fact-investigation authority, see 42 U.S.C. § 7414 (2012) (Environmental Protection Agency authority under Clean Air Act to require recordkeeping, inspect and monitor regulated entities, and enter regulated properties).

search and seizure powers, supported by ever-growing infrastructure from surveillance technology to crime labs.[86]

Law enforcement agents surveil suspects and suspicious activities, gather crime scene evidence, interview witnesses, conduct forensic analysis, interrogate suspects, and cull information from phone records, surveillance video, car license plates, and much else.[87] Ordinary search and seizure authority targeted at criminal activity is more restricted than the grand jury subpoena power. With exceptions, most searches and seizures require that officials have a warrant or probable cause to suspect criminal conduct; grand jury subpoenas do not.[88] On the other hand, the line between the pre- and post-charging stages matters much less for police investigations. Search and seizure powers remain largely the same in both stages, save that suspects have a right to counsel for post-arrest interrogation and after being charged.[89] The basic point here is no surprise: in addition to grand juries, public law enforcement's special investigative capacities are a primary reason that criminal litigation has become so effective at pretrial evidence gathering outside of procedures provided by discovery rules and before charges are filed.

2. *Expansion of State Investigative Capacity*

Still, the story is not quite as obvious as it seems. While their legal parameters have changed somewhat over time, the basic authority of grand juries and law enforcement to search and seize goes back more than two centuries; changes in the scope of that authority is not enough to explain why pretrial evidence gathering improved over time and helped to push up the rate of plea-based settlements. But

86. *See infra* notes 93–96.

87. *See infra* Part II.C and sources cited therein.

88. *See* FED. R. CRIM. P. 6 (no mention of probable cause of warrant required for grand jury); FED. R. CRIM. P. 17 (no mention of probable cause or warrant required for subpoena); *see also* FED. R. CRIM. P. 41(d)(1) ("After receiving an affidavit or other information, a magistrate . . . must issue the warrant if there is probable cause to search for and seize a person or property or to install and use a tracking device."); United States v. R. Enters., 498 U.S. 292, 297 (1991) (grand jury can issue subpoenas to investigate "merely on suspicion that the law is being violated, or even just because it wants assurance that it is not") (quoting United States v. Morton Salt Co., 338 U.S. 632, 642–43 (1950)); United States v. Dionisio, 410 U.S. 1, 8–18 (1973) (holding grand jury subpoenas are not required to meet probable cause standard). Numerous exceptions exist to the probable cause and warrant requirements for searches. *See generally* LAFAVE ET AL., *supra* note 61, §§ 3.1–3.9. But much evidence gathering can be done without such authorization, such as interviewing witnesses, inspecting public spaces, surveilling private property, and reviewing privately owned records, recordings, or data if owners grant consent. On surveillance of private property that does not constitute a "search," such as visual surveillance of a home, see California v. Ciraolo, 476 U.S. 207, 213 (1986) (aerial surveillance of private yard) and Dow Chemical Co. v. United States, 476 U.S. 227, 234–39 (1986) (aerial observation of commercial facility by regulatory agency).

89. Miranda v. Arizona, 384 U.S. 436 (1966) (holding the Fifth and Fourteenth Amendments require warning a suspect in police custody of right to counsel and silence before the government can interrogate or elicit statements); Massiah v. United States, 377 U.S. 201 (1964) (holding once the Sixth Amendment right to counsel attaches, government agents cannot elicit statements from defendant without his consent). Another context in which the right to counsel affects police evidence-gathering efforts is eyewitness identification procedures. *See* United States v. Wade, 388 U.S. 218 (1967) (noting after charging, defendants have a right to have counsel attend identification line-ups conducted by police); Gilbert v. California, 388 U.S. 263 (1967) (same).

legal authority is only part of the story. Capacity to exercise that power has expanded much more as new options, such as wiretap surveillance, became available. More importantly, over time, governments expanded the overall size and scope of law enforcement infrastructure.[90]

A summary account of the long history of policing will suffice here. Police forces as we know them did not exist until the mid-nineteenth century. In the colonial period and the early decades of the republic, American jurisdictions followed the English model; what passed for policing consisted mostly of untrained night watchmen. The first U.S. police departments arose in Boston, New York, and Philadelphia in the 1830s and 1840s (after London established the first in 1828). Police initially focused on crime prevention, rather than crime detection and investigation. It was not until the turn of the twentieth century, in the era of professionalization, that police were trained in specialized investigative skills.[91] In the same era, the first forensic sciences arose, growing out of two broader, interrelated developments. One was advancement in scientific knowledge, and faith in science.[92] The other was the steadily increasing consensus, growing throughout the nineteenth century, that the state has an affirmative obligation to safeguard citizens against an expanding range of security interests that threaten public safety, health, and social order.[93]

The per capita number of law enforcement personnel has grown steadily, along with resources and infrastructure that expand evidence-gathering capabilities.[94]

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90. *See infra* note 94.

91. *See generally* WILLIAM J. BOPP & DONALD O. SCHULTZ, A SHORT HISTORY OF AMERICAN LAW ENFORCEMENT (1972); CLIVE EMSLEY, THE ENGLISH POLICE: A POLITICAL AND SOCIAL HISTORY (1991); HARLAN HAHN & JUDSON L. JEFFERIES, URBAN AMERICA AND ITS POLICE: FROM THE POSTCOLONIAL ERA THROUGH THE TURBULENT 1960S (2003); DAVID R. JOHNSON, AMERICAN LAW ENFORCEMENT: A HISTORY (1981); JOSEPH F. KING, THE DEVELOPMENT OF MODERN POLICE HISTORY IN THE UNITED KINGDOM AND THE UNITED STATES, 19 CRIMINOLOGY STUDIES (2004); LEONARD A. STEVERSON, POLICING IN AMERICA: A REFERENCE HANDBOOK (2008). Police professionalization was part of a much broader trend across many occupations, which began to professionalize in the late nineteenth century by developing competency standards, codes of ethics and best practices, professional associations, and the like. For the story of federal prosecutors' professionalization in this era, see Jed Handelsman Shugerman, *The Creation of the Department of Justice: Professionalization Without Civil Rights or Civil Service*, 66 STAN. L. REV. 121 (2014).

92. On the history of forensic sciences, see DEBORAH BLUM, THE POISONER'S HANDBOOK: MURDER AND THE BIRTH OF FORENSIC MEDICINE IN JAZZ AGE NEW YORK (2010); SIMON A. COLE, SUSPECT IDENTITIES: A HISTORY OF FINGERPRINTING AND CRIMINAL IDENTIFICATION (2001); Jennifer L. Mnookin, *Scripting Expertise: The History of Handwriting Identification Evidence and the Judicial Construction of Reliability*, 87 VA. L. REV. 1723 (2001).

93. On professionalization, see Shugerman, *supra* note 91, at 135–40 (describing professionalization of the entire legal profession in the late 19th century). On the security state, see DARRYL K. BROWN, FREE MARKET CRIMINAL JUSTICE: HOW DEMOCRACY AND LAISSEZ FAIRE UNDERMINE THE RULE OF LAW 175–99 (2016); Lucia Zedner, *Liquid Security: Managing the Market for Crime Control*, 6 CRIMINOLOGY & CRIM. JUST. 267 (2006); Lucia Zedner, *Security, the State, and the Citizen: The Changing Architecture of Crime Control*, 13 NEW CRIM. L. REV. 379 (2010).

94. DUREN BANKS ET AL., NATIONAL SOURCES OF LAW ENFORCEMENT EMPLOYMENT DATA 2 tbl.1, 3 tbl.2, 4 tbl.3, 5 tbl.4 (2016) (data on growth in law enforcement officers per capita by jurisdiction and officer status); BRIAN A. REAVES, U.S. DEP'T OF JUSTICE, LOCAL POLICE DEPARTMENTS, 2013: PERSONNEL, POLICIES, AND PRACTICES (2015) (data on growth in full-time employees in local police departments 1987–2013); BRIAN A. REAVES, U.S. DEP'T OF

Obvious examples include crime labs;[95] vehicle and body cameras; outstanding-warrant databases; DNA and fingerprint databases (along with software to identify matches increasingly quickly); "StingRay" cell phone surveillance and tracking devices;[96] and many others. Evidence gathering has improved in lower-tech ways as well. Agencies are more likely to use best practices in preserving and collecting crime scene evidence, and to follow research-backed protocols that improve the accuracy of eyewitness identification of suspects, although progress in these areas and others is far from uniform across U.S. localities.[97] Likewise, there is a gradual trend toward more effective interrogation and interview tactics by police that are more likely to produce accurate information and less likely to elicit false confessions.[98]

All of this suggests that greater resources, technology, knowledge, and training have enabled law enforcement to gather more and better criminal evidence without significant expansion of the longstanding bounds of their investigative authority. Collectively, these developments play the dominant role in the availability of pretrial criminal evidence without broad discovery rules and without trials.

The important distinction between law enforcement investigation and civil discovery investigation, however, is that the former is one-sided: one party is responsible for most of the evidence gathering. Justifications for the state's lopsided advantage in this respect go beyond the fact that the government has the burden of proof because that is also true of civil plaintiffs. Civil procedure implicitly rests on an assumption that most plaintiffs start with at least some information about their cases, which minimizes the need for special investigative powers before filing a complaint. For instance, all victims of contract breaches know the nature of their injury and who caused it; that is true for many—though far

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JUSTICE, LAW ENFORCEMENT MANAGEMENT AND ADMINISTRATIVE STATISTICS, 1990: DATA FOR INDIVIDUAL STATE AND LOCAL AGENCIES WITH 100 OR MORE OFFICERS 1–11 tbl.1a (1992) (data by locality on number of law enforcement officers, demonstrating an increase from 1986 to 1990).

95. MATTHEW R. DUROSE ET AL., U.S. DEP'T OF JUSTICE, CENSUS OF PUBLICLY FUNDED FORENSIC CRIME LABORATORIES, 2009 (2012) (discussing the 411 publicly funded crime laboratories in 2009).

96. Stingray is the brand name of widely used technology for intercepting, gathering information from, and denying service to cell phones, sometimes described as an "IMSI-catcher" (International Mobile Subscriber Identity). An increasing number of federal, state, and local law enforcement agencies possess the technology. *See generally Stingray Tracking Devices: Who's Got Them?*, ACLU, https://www.aclu.org/issues/privacy-technology/surveillance-technologies/stingray-tracking-devices-whos-got-them?redirect=map/stingray-tracking-devices-whos-got-them (last visited Feb. 10, 2018).

97. *See, e.g.*, Deborah Davis et al., *Disputed Interrogation Techniques in America: True and False Confessions and the Estimation and Valuation of Type I and II Errors*, *in* CONTROVERSIES IN INNOCENCE CASES IN AMERICA 57–71 (Sarah Lucy Cooper ed., 2014); Brandon L. Garrett, *Eyewitness Identifications and Police Practices: A Virginia Case Study*, 2 VA. J. CRIM. L. 1 (2014).

98. For an account of recent improvements, see Robert Kolker, *A Severed Head, Two Cops, and the Radical Future of Interrogation*, WIRED (May 24, 2016, 6:40 AM), https://www.wired.com/2016/05/how-to-interrogate-suspects/. For critical accounts of harsh and ineffective practices past and present, see RICHARD A. LEO, POLICE INTERROGATION AND AMERICAN JUSTICE (2009) and Anne M. Coughlin, *Interrogation Stories*, 95 VA. L. REV. 1599 (2009).

from all—tort victims as well. (When it is not, civil litigation does not work.)[99] Roughly the same was true for much of criminal law in an earlier era when most crimes were traditional property and personal-injury offenses, and the odds of identifying a wrongdoer were better in a town a few thousand than in a city of millions.[100] But that is not the case for contemporary criminal law, which now includes many inchoate crimes, crimes of planning and preparation, and prohibitions of consensual transactions.[101] For these crimes, no victim exists to report an injury, and no one with knowledge is inclined to report the conduct. Finally, it seems safe to assume that criminal offenders more uniformly than civil wrongdoers make great efforts to conceal evidence of their wrongful conduct.[102] In short, there are good justifications for the state—which now has sole responsibility for criminal law enforcement and bears high expectations that the state will control crime—to have greater (and earlier) investigative powers than those allotted to private civil plaintiffs.[103] At the same time, unless it is offset by interparty disclosure obligations or some other mechanism, the party imbalance in pretrial evidence collection is likely to reduce the prospects for negotiated settlements. It is harder to convince a party without good information about what the trial evidence

99. When plaintiffs do not know the nature of his or her injury, civil litigation does not work. To be sure, some claims, especially in tort, go unvindicated because potential plaintiffs do not realize another caused their loss or injury; they may not even notice certain kinds of financial loss or know that an *illness* is an *injury*. Or, as in the case of victims of unidentified hit-and-run drivers, they may not know *who* caused it. These are consequences of limits on private investigations before civil litigation commences. On the other hand, much *public* civil litigation mirrors criminal law's structure—officials enforcing civil and regulatory law often must proactively search for violations and harms. Public authorities charged with these tasks typically *do* have additional investigative powers beyond civil discovery tools. Reporting requirements of regulated industries to regulatory agencies are one such means of information-gathering. Another is the "civil investigative demand" that state attorneys general and the U.S. Department of Justice can issue, which may require individuals and firms to comply with interrogatories and depositions. *See, e.g.*, 18 U.S.C. § 1968 (2012); In re GlaxoSmithKline PLC, 699 N.W.2d 749, 752 (Minn. 2005) ("Civil Investigative Demand . . . is a discovery tool provided by statute to aid the state in the investigation of suspected violations of Minnesota laws.").

100. The first U.S. Census, in 1790, reported only five U.S. cities with populations over 10,000 people. *See POP Culture: 1790*, U.S. CENSUS BUREAU, https://www.census.gov/history/www/through_the_decades/fast_facts/1790_fast_facts.html (last visited Feb. 10, 2018). Hence, private prosecutors played a bigger role. ALLEN STEINBERG, THE TRANSFORMATION OF CRIMINAL JUSTICE: PHILADELPHIA, 1800–1880 24–69, 152–57 (1989) (describing private prosecutions in Philadelphia until creation of elected district attorney's office in 1852).

101. For overviews, see ANDREW ASHWORTH & LUCIA ZEDNER, PREVENTIVE JUSTICE (2014); PREVENTION AND THE LIMITS OF CRIMINAL LAW (Andrew Ashworth et al. eds., 2013). Consensual-transaction crimes, of course, include drug sales. *See, e.g.*, 21 U.S.C. § 841(a) (2016).

102. Some civil wrongdoers do so as well (consider the long success concealing financial frauds such as Bernard Madoff's), and partly for that reason, regulatory agencies' authority to investigate civil wrongdoing has vastly greater than it once was.

103. Moreover, law enforcement agencies have search and seizure powers for reasons other than gathering criminal evidence and arresting perpetrators. Authority for "administrative" searches serve a range of public order and safety goals through activities such as license checks, customs inspections, or surveillance to gather national security intelligence. *See, e.g.*, United States v. Beras, 183 F.3d 22, 25–26 (1st Cir. 1999) (discussing "border search exception" in Fourth Amendment doctrine); LAFAVE ET AL., *supra* note 61, § 3.9 (administrative searches); *id.* §§ 4.5–.8 (network surveillance).

would be to settle on unfavorable terms—that is, with regard to criminal defendants, to plead guilty.

C. *Technology and Evidence-Gathering Tactics*

Beyond law enforcement's legal authority and institutional capacity to investigate, the government's pretrial fact-gathering has improved through both technological advances and development of specific investigative tactics, both of which often yield strong, reliable sources of evidence.

1. *High-tech Evidentiary Sources*

One additional set of developments, arising from general technological advances, deserve some credit for improving quality of pretrial criminal evidence in the absence of broad discovery rules. Some of this has already been noted. The scientific advances behind the best forensic analysis now performed by crimes labs and other experts are responsible for a wealth of evidence that was once altogether unavailable. DNA analyses, along with (somewhat less reliable) fingerprint analyses, are the highest profile examples. More prosaic technology provides cheap, accurate estimations of blood-alcohol content from breath samples. That technology is now ubiquitous and provides largely dispositive evidence of intoxication for drunk-driving and other offenses.[104] The same goes for drug-identification analysis that makes up the bulk of state crime labs' work and is crucial proof in drug-related offenses, which constitute nearly a third of state and federal felony cases.[105] Likewise pen registers, wiretaps, and other surveillance of phone communications provide prosecutors with strong, critical evidence in some (especially federal) cases.[106] Such evidence was impossible before the advent of wire communications, and digital communication and surveillance technologies. The same goes for GPS tracking devices, thermal imaging, aerial drone surveillance, location estimations from cellphone data, and other forms of technology that provide the law enforcement with strong evidence that was inconceivable in earlier eras, but is now ordinarily in hand well before charging, and thus long

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104. FORENSIC SCIENCE: A MULTIDISCIPLINARY APPROACH 32 (Evgeny Katz & Jan Halámek eds., 2016) (discussing the forensic technique, IR spectroscopy, used to detect and quantify alcohol in breath); WILLIAM J. TILSTONE ET AL., FORENSIC SCIENCE: AN ENCYCLOPEDIA OF HISTORY, METHODS, AND TECHNIQUES 25–26, 75 (2006) (describing the history of Breathalyzer's invention in the 1950s and the test's reliability).

105. *See* MARK MOTIVANS, U.S. DEP'T OF JUSTICE, FEDERAL JUSTICE STATISTICS, 2012 - STATISTICAL TABLES 16 tbl. 4.1 (2015) (demonstrating drug offenses were the most serious offense charged in 31.1% of cases against federal criminal defendants in 2011-12); BRIAN A. REAVES, U.S. DEP'T OF JUSTICE, FELONY DEFENDANTS IN LARGE URBAN COUNTIES, 2009 - STATISTICAL TABLES 3 tbl. 1 (2013) (showing drug offenses constitute 32.6% of felonies in 2009 in state courts in the 75 largest U.S. counties).

106. *See* Admin. Office U.S. Courts, *Wiretap Report 2015*, U.S. COURTS, http://www.uscourts.gov/statistics-reports/wiretap-report-2015 (last updated Dec. 31, 2015) (containing wiretap applications, approvals, and denials for 2015); *see also* LAFAVE ET AL., *supra* note 61, § 4.6 (describing Wiretap Act).

before trial.[107]

Aside from technology that is harnessed for new police investigation tools such as thermal imagers or audio surveillance, technology integrated into ordinary private activities now generates a wealth of data—much of it described as "big data"—that, in the eyes of law enforcement, amount to vast troves of potential evidence.[108] Credit card users can be tracked by their transactions.[109] Cars increasingly record and map drivers' travels with GPS technology.[110] Phone calls, texts, emails, and website visits can be traced, tracked or retrieved. Because they can be easily copied and stored in different places, digital photos are harder to destroy than film-based images. Social media users create detailed digital records of their lives.[111] All sorts of personal information—current and past addresses and employers, family history, income data, and much more—are easily searchable on the web. Endless information is in the proprietary possession of media, technology and advertising firms; credit agencies; health care providers and insurers; employers; and other private entities.[112] Much of this data is freely available; much more

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107. *See, e.g.*, Andrew Guthrie Ferguson, *Big Data and Predictive Reasonable Suspicion*, 163 U. PA. L. REV. 327 (2015); Orin S. Kerr, *Digital Evidence and the New Criminal Procedure*, 105 COLUM. L. REV. 279 (2005); Neil M. Richards, *The Dangers of Surveillance*, 126 HARV. L. REV. 1934 (2013); *Community Control over Police Surveillance: Technology 101*, ACLU, https://www.aclu.org/report/community-control-over-police-surveillance-technology-101 (last visited Feb. 10, 2018) (describing several technologies used by law enforcement agencies including String Rays, license plate readers, biometric surveillance, electronic highway toll readers, through-wall radar, and social media data mining); JAY STANLEY & CATHERINE CRUMP, ACLU, PROTECTING PRIVACY FROM AERIAL SURVEILLANCE: RECOMMENDATIONS FOR GOVERNMENT USE OF DRONE AIRCRAFT (2011), https://www.aclu.org/files/assets/protectingprivacyfromaerialsurveillance.pdf.

108. For definitions and an overview of "big data" particularly as it relates to law enforcement, see Ferguson, *supra* note 107, at 352–73.

109. For examples of law enforcement use of such evidence, see United States v. Bodouva, 16-CR-214 (VEC), 2016 WL 7351634, at *1 (S.D.N.Y. Dec. 16, 2016) ("The Government established that Bodouva used the misappropriated monies for personal purposes by tracing money from the Company's accounts to payment of Bodouva's personal credit cards, golf club memberships for her and members of her family, [and] her parents' vacation homes . . . ."); Jones v. State, 212 So.3d 321, 328 (Fla. 2017) ("The detectives tracked the use of Mrs. James's stolen credit card from Bartlett, south down I–55 through Mississippi, across north Florida along I–10, and then south down I–95 . . . ."); NAT'L COMM'N ON TERRORIST ATTACKS UPON THE U.S., THE 9/11 COMMISSION REPORT 168, 389 (2004).

110. *See, e.g.*, Ned Potter, *Privacy Battles: OnStar Says GM May Record Car's Use, Even if You Cancel Service*, ABC NEWS (Sept. 26, 2011), https://abcnews.go.com/Technology/onstar-gm-privacy-terms-company-record-car-information/story?id=14581571.

111. For an example of prosecutors introducing social media evidence, see Parker v. State, 85 A.3d 682 (Del. 2014).

112. *See, e.g.*, Associated Press, *To Combat Fraud, Visa Wants to Track Your Smartphone*, L.A. TIMES (Feb. 13, 2015, 1:17 PM), https://beta.latimes.com/business/la-fi-visa-security-20150213-story.html; Noam Cohen, *It's Tracking Your Every Move, and You May Not Even Know*, N.Y. TIMES (Mar. 26, 2011), https://www.nytimes.com/2011/03/26/business/media/26privacy.html (noting phone companies records document numbers called, call times, and even ones location when calls are made); David Cole, *Is Privacy Obsolete?*, NATION (Mar. 23, 2015); https://www.thenation.com/article/privacy-20-surveillance-digital-age/; Charles Duhigg, *How Companies Learn Your Secrets*, N.Y. TIMES MAG. (Feb. 16, 2012), https://www.nytimes.com/2012/02/19/magazine/shopping-habits.html (discussing how companies like Target use "predictive analytics" to learn about consumer's shopping habits); Eric Lichtblau, *Police Are Using Phone Tracking as a Routine Tool*, N.Y. TIMES (Mar. 31, 2012), https://www.nytimes.com/2012/04/01/us/police-tracking-of-cellphones-raises-privacy-fears.html (describing how

is for sale; still more is accessible to law enforcement officials through subpoenas, search warrants and other legal tools.[113]

The scholarly literature on issues related to ever-growing stores of digital data is large and growing. Much of it focuses on implications either for privacy, national security, or for investigating—primarily *discovering*—wrongdoing or wrongdoers. For example, non-public or social-media data might provide police with information on whom to target and then with legal grounds to conduct searches.[114] But information culled from databases also contributes to the next stage of criminal process that follows apprehension of suspects, it strengthens pretrial evidentiary files.[115] Law enforcement has greater resources and authority to collect evidence from various databases. But to a lesser extent, defendants (and civil parties) can sometimes draw valuable information from them as well.[116] In the digital age, there is not only more information in the world available to be collected (much of it time-stamped), but also information about individuals' actions, locations, preferences, and plans, is available well before trial and can be admissible evidence.[117]

Still, one should not overemphasize the contribution of these tools. Police use of database information is growing but is still relatively modest.[118] DNA analysis still plays a role in only a small portion of cases, even serious felonies.[119] Police submit

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smartphones act as GPS trackers to record one's locations and movements). On information gathered from web search activity, see Chloe Albanesius, *Facebook: Tracking Your Web Activity Even After You Log Out?*, PC MAG. (Sept. 26, 2011, 11:59 AM), https://www.pcmag.com/article2/0,2817,2393564,00.asp; Robert Epstein, *Google's Gotcha*, U.S. NEWS & WORLD REP. (May 10, 2013, 12:15 PM), https://www.usnews.com/opinion/articles/2013/05/10/15-ways-google-monitors-you. For more information, see Kerr, *supra* note 107 and Richards, *supra* note 107.

113. The FBI can also get private data such as phone records, emails, and credit histories through National Security Letters. *See* 15 U.S.C. §§ 1681–81x (2012) (Fair Credit Reporting Act—sections 1681u-81v authorize access to personal employment and credit history information); 18 U.S.C. § 2709 (2012) (authorizing access to telephone and email data); Richards, *supra* note 107, at 1942–43.

114. *See* Ferguson, *supra* note 107 (discussing implications of big data for police search authority under Fourth Amendment doctrine); Richards, *supra* note 107 (discussing harms from privacy-invading surveillance technologies and practices).

115. *See* Ferguson, *supra* note 107; Richards, *supra* note 107.

116. *See, e.g.*, CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, 5 FEDERAL EVIDENCE § 9:9 (4th ed. 2017) (discussing authentication of email, social media, web pages, text messages, instant messaging, electronic signatures); Laura E. Diss, Note, *Whether You "Like" It or Not: The Inclusion of Social Media Evidence in Sexual Harassment Cases and How Courts Can Effectively Control It*, 54 B.C. L. REV. 1841 (2013); *see also* Sherry D. Sanders, Note, *Privacy is Dead: The Birth of Social Media Background Checks*, 39 S.U. L. REV. 243 (2012).

117. *See* MUELLER & KIRKPATRICK, *supra* note 116; Parker v. State, 85 A.3d 682, 684–88 (Del. 2014) (allowing Facebook posts as evidence).

118. *See* Ferguson, *supra* note 107, at 350–51 (describing police use of big data in terms of its near-future potential).

119. Erin Murphy, *The Mismatch Between Twenty-First-Century Forensic Evidence and Our Antiquated Criminal Justice System,* 87 S. CAL. L. REV. 633, 643 (2014) (noting "studies have shown that very little [DNA] evidence is tested when it is most needed: during pretrial bargaining and discovery phases") (citing JOSEPH PETERSON ET AL., THE ROLE AND IMPACT OF FORENSIC EVIDENCE IN THE CRIMINAL JUSTICE PROCESS 8 (2010), https://www.ncjrs.gov/pdffiles1/nij/grants/231977.pdf).

evidence to crime laboratories in less than one in five cases, and labs analyze evidence for less than one in ten.[120] Wiretaps play a role in an even smaller portion of cases that end in conviction, especially in state courts where the vast majority of prosecutions occur.[121] The same is likely true for GPS tracking, thermal imaging, and cellphone location analysis.[122]

2. Low-tech Evidentiary Sources

Longer standing, less dazzling technological advances also make substantial contributions that affect a large share of cases. For decades, investigators have been able to spray the organic compound Luminol at crime scenes to reveal otherwise invisible traces of blood.[123] Public and private security cameras, as well as surveillance cameras, often provide useful video footage.[124] One large study found prosecutors treated video recordings as especially strong evidence in drug prosecutions.[125] For traffic offenses, radar devices measure vehicle speeds, and the Breathalyzer or similar devices have been used to measure blood alcohol levels

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120. Murphy, *supra* note 119, at 642; *see* Peterson et al., *supra* note 13, at S87–89 (finding forensic evidence was utilized in only a minority of cases (except for homicide), and that physical evidence was not analyzed in most cases in a large dataset of five serious types of offenses); Ira Sommers & Deborah Baskin, *The Influence of Forensic Evidence on the Case Outcomes of Rape Incidents*, 32 JUST. SYS. J. 314, 322–25 & tbl. 3 (2011) (finding in study of 381 rape cases that forensic evidence was collected in 59.6% of cases but submitted for lab analysis in only 41.7% and examined by labs in only 22.3%); *id.* at 325 (noting the existence of forensic evidence was unrelated to conviction rates); *id.* at 331 (charging decisions usually precede forensic evidence analysis and concluding "case outcomes for rape are not driven by forensic evidence variables" and that "forensic evidence is auxiliary, occasional, and non-determinative for the majority of rape cases"); TOM MCEWEN, THE ROLE AND IMPACT OF FORENSIC EVIDENCE IN THE CRIMINAL JUSTICE SYSTEM: FINAL REPORT 48 (2010), https://www.ncjrs.gov/pdffiles1/nij/grants/236474.pdf (reporting low rates of forensic evidence collection, submission, and analysis).

121. *See* ADMIN. OFFICE U.S. COURTS, *supra* note 106, at tbl. 1 (listing reported wiretap authorizations by state courts, which are far less common in nearly all states than federal approvals); *id.* (federal wiretaps contributed to 29% of arrests and 19% of federal convictions in 2015).

122. As a rough confirmation of this assumption, note that only 600 criminal court decisions in Westlaw's combined "All States" and "All Federal" databases used the phrases "thermal image" or "thermal imaging" between 1990 and August 2017. (Westlaw search conducted Aug. 13, 2017; search term "thermal imag!"). For context, the federal courts had 97,513 criminal case filings in 2009 alone. *See* MARK MOTIVANS, U.S. DEP'T OF JUSTICE, FEDERAL JUSTICE STATISTICS 2009 - STATISTICAL TABLES 16 tbl. 4.1 (last revised Jan. 26, 2012). State courts collectively had many times that number. *See* CYNTHIA G. LEE & ROBERT C. LAFOUNTAIN, NAT'L CTR. FOR STATE COURTS, 12(1) CASELOAD HIGHLIGHTS: EXAMINING THE WORK OF STATE COURTS (2005), https://cdm16501.contentdm.oclc.org/digital/collection/ctadmin/id/665 (reporting caseload numbers for selected localities).

123. *See Luminol (Blood)*, MINN. DEP'T PUB. SAFETY, https://dps.mn.gov/divisions/bca/bca-divisions/forensic-science/Pages/forensic-programs-crime-scene-luminol.aspx (last visited Feb. 11, 2018).

124. For an example, see Beth Schwartzapfel, *Undiscovered*, MARSHALL PROJECT (Aug. 7, 2017, 10:00 AM), https://www.themarshallproject.org/2017/08/07/undiscovered?ref=hp-1-100#.Xy7BfVy1F.

125. Besiki L. Kutateladze et al., *Does Evidence Really Matter? An Exploratory Analysis of the Role of Evidence in Plea Bargaining in Felony Drug Cases*, 39 LAW & HUM. BEHAV. 431, 431, 433 (2015) (finding, after reviewing data from over 1,000 New York County drug cases, that "prosecutors made more punitive charge [bargain] offers when they had audio/video evidence" among other types of evidence, and interviews of prosecutors demonstrated that "audio or video recordings of an offense and eyewitness identifications are viewed . . . as the strongest types of evidence in drug offenses").

since the 1950s.[126] When properly used, these low-tech evidentiary sources provide nearly incontrovertible evidence.

Motor vehicles, a century-old technology, strengthened pretrial evidentiary records in several ways. The rise of automobiles led to the creation of myriad traffic offenses, which now make up the bulk of misdemeanor and limited-jurisdiction court dockets.[127] Those cases rarely go to trial, in large part because the outcome is usually clear without it. Evidence often consists of a police officer's eyewitness account, supplemented by speed measurements, traffic camera footage, blood-alcohol analysis, an injured victim, or damaged car.[128] Motor vehicles triggered the expansion of police forces capable of institutionalizing traffic patrols.[129] Over time, police enforcement tactics such as radar "speed traps" and traffic-stop checkpoints to inspect for intoxicated drivers or other violations evolved in ways that not only detect and interdict violations but also to improve that quality of evidence that enforcement generates.[130] Speed radar guns and breath-analysis both detect violations and produce strong admissible evidence of speeding and recent alcohol consumption.

The point extends to other, more serious offenses as well, because automobiles have made many non-traffic crimes easier to solve (as well as to commit). Prolix traffic codes give police a basis to stop virtually any vehicle.[131] Given that Fourth Amendment doctrine permits pretextual traffic stops, police can use those stops to investigate non-traffic crimes, notably drug transportation.[132] Police have broader legal authority to search automobiles than they do in homes, businesses, or other contexts.[133] Moreover, cars are especially easy to identify. To be useful they must

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126. BARRON H. LERNER, ONE FOR THE ROAD: DRUNK DRIVING SINCE 1900 48–50 (2011) (describing Breathalyzer's invention in 1954 by Robert F. Borkenstein).

127. *See* Alexandra Natapoff, *Misdemeanor Decriminalization*, 68 VAND. L. REV. 1055, 1072–73 (2015) (noting that a single traffic offense, "driving with suspended license," constitutes one-third of misdemeanor offenses in some jurisdictions); JOANNE I. MOORE & DAVID K. CHAPMAN, WASH. STATE OFFICE OF PUB. DEF., DRIVING WHILE LICENSE SUSPENDED 3RD DEGREE: SURVEY OF COURTS OF LIMITED JURISDICTION (2008), https://www.opd.wa.gov/documents/0056-2008_DWLS3Survey.pdf.

128. Tana McCoy et al., *An Examination of the Influence of Strength of Evidence Variables in the Prosecution's Decision to Dismiss Driving While Intoxicated Cases*, 37 AM. J. CRIM. JUST. 562 (2012) (finding breath analysis evidence of blood alcohol concentration strongly predicted decisions to prosecute or dismiss driving-while-intoxicated cases).

129. *See* AUGUST VOLLMER, THE POLICE AND MODERN SOCIETY 119–47 (1936); ROBERT C. WADMAN & WILLIAM THOMAS ALLISON, TO PROTECT AND TO SERVE: A HISTORY OF POLICE IN AMERICA 133–39 (2004).

130. *See* Mich. Dep't. of State Police v. Sitz, 496 U.S. 444 (1990) (affirming constitutionality of random police checkpoints on public road to look for intoxicated drivers).

131. David A. Sklansky, *Traffic Stops, Minority Motorists, and the Future of the Fourth Amendment*, 1997 SUP. CT. REV. 271, 273, 298–99 (1997).

132. Whren v. United States 517 U.S. 806 (1996) (holding no Fourth Amendment violation for pretextual traffic stops). *But see* Rodriguez v. United States, 135 S. Ct. 1609 (2015) (holding without a warrant, police may not extend a traffic stop to wait for arrival of a drug-sniffing dog).

133. For an overview of searches of persons, premises, vehicles, and personal property, see LAFAVE ET AL., *supra* note 61, at §§ 3.6–3.9; *see also* Sarah A. Seo, *The New Public*, 125 YALE L.J. 1616 (2016) (providing a historical account of the role vehicles played in development of Fourth Amendment doctrine).

utilize public roadways, and both vehicle identification numbers and license plates, linked to owner identities, are compiled in easily accessible databases. Increasingly, vehicles are monitored by automated license plate recognition systems.[134] Collectively, these evidentiary sources strengthened pretrial evidence of many offenses and consequently reduced the need for trial to uncover evidence or resolve factual uncertainty.

3. *Improved Evidence-Development Tactics*

Evidence gathering in traffic enforcement is one example of a broader phenomenon: even without cutting-edge technology, law enforcement agencies have devised investigative practices to generate better evidence. The use of police "sting" operations, which only have been widely used in the United States since the 1970s,[135] are designed specifically to improve evidence gathering as well as suspect apprehension. Police can control, monitor and often record much of the illicit interaction, and the undercover officer typically makes a credible prosecution witness.[136] Beyond surveillance audio and video, police stings of cash-transaction crimes such as drug sales often use documented "buy money," which puts traceable evidence in the hands of suspects that police retrieve upon arrest.[137] Equivalent techniques extend to other crimes, including online offenses such as enticement of minors and distribution of child pornography or other contraband.[138] Additionally, in multiple-suspect contexts, police and prosecutors (especially in the federal system) increasingly use incentives to convince one member in a group

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134. *See, e.g.*, Nathan Tempey, *The NYPD Is Tracking Drivers Across the Country Using License Plate Readers*, GOTHAMIST (Jan. 26, 2016, 3:18 PM), http://gothamist.com/2016/01/26/license_plate_readers_nypd.php.

135. *See* Robert H. Langworthy, *Do Stings Control Crime? An Evaluation of a Police Fencing Operation*, 6 JUST. Q. 27 (1989); *see also* GRAEME R. NEWMAN & KELLY SOCIA, CTR. FOR PROBLEM-ORIENTED POLICING, PROBLEM ORIENTED GUIDES FOR POLICE RESPONSE GUIDES SERIES GUIDE NO. 6: STING OPERATIONS 3 (2007), http://www.popcenter.org/Responses/pdfs/sting_operations.pdf (defining a sting operation as: "an opportunity or enticement to commit a crime, either created or exploited by police"; "a targeted likely offender or group of offenders"; "an undercover or hidden police officer or surrogate, or some form of deception"; and "a 'gotcha' climax when the operation ends with arrests").

136. *See* Bruce Hay, *Sting Operations, Undercover Agents, and Entrapment*, 70 MO. L. REV. 387, 393 (2005) (describing stings' "informational functions" and noting "[i]n some cases, the police suspect a given individual of unlawful activity but lack sufficient evidence to prove it. A sting is then set up so that the target can commit the offense in conditions where evidence is easy to get").

137. *See* Kutateladze et al., *supra* note 125 at 431 (finding in drug cases, New York County prosecutors offered more punitive plea bargain terms when they had "prerecorded buy money used by an undercover officer in a buy-and-bust operation" as well video evidence or an eyewitness).

138. Jamie Satterfield, *FBI Tactic in National Child Porn Sting Under Attack*, USA TODAY (Sept. 5, 2016, 7:15 PM), https://www.usatoday.com/story/news/nation-now/2016/09/05/fbi-tactic-child-porn-sting-under-attack/89892954/; Jacob Sullum, *The FBI Distributes Child Pornography to Catch People Who Look at It*, REASON: HIT AND RUN BLOG (Aug. 31, 2016, 8:33 AM), https://reason.com/blog/2016/08/31/the-fbi-distributes-child-pornography-to.

to cooperate with law enforcement in exchange for leniency or other rewards.[139]

In sum, through a wide array of investigation tactics, technological developments, and expansive public powers to search and compel information, the quality of pretrial evidentiary knowledge has vastly improved for prosecutors, even as criminal discovery rules remain restrictive in many jurisdictions. Furthermore, if prosecutors elect to share their evidence with the defense, the quality of pretrial evidence records is sufficient in a large majority of cases to convince defendants to forego trial and negotiate a resolution, usually in the form of a guilty plea.

D. Changes in the Definition of Crimes and the Nature of Crimes

Settlements in both civil and criminal cases require not only pretrial evidence that generates rough agreement on the facts, but it also requires clear law that governs those facts.[140] A small portion of criminal statutes leave a degree of uncertainty in application,[141] but a majority of statutes provide a clear standard for most cases.[142] Overall, offense definitions have been gaining clarity in recent decades thanks to a well-noted trend of creating or revising offenses so that they are easier to prove.[143] Part of that trend involves criminal law adapting to evidentiary sources and challenges, rather than the other way around.

William Stuntz explained this tendency as a response to two bodies of constitutional doctrine—criminal procedure and vagueness—that emerged in the 1960s.[144] Legislatures can respond to restrictions on police investigation power by criminalizing more conduct (especially petty conduct), which gives police more bases to stop and search for those offenses, thereby giving functionally greater discretion. The vagueness doctrine may cut back police discretion by eliminating indefinite offenses such as "vagrancy," but it does not stop legislatures from giving back

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139. For a particularly strong policy to encourage offenders to provide evidence, see ANTITRUST DIV., U.S. DEP'T OF JUSTICE, CORPORATE LENIENCY POLICY (Aug. 10, 1993), https://www.justice.gov/sites/default/files/atr/legacy/2007/08/14/0091.pdf.

140. The well-known Priest-Klein hypothesis posits that civil cases usually settle when the relevant law is clear and are more likely to go to trial when it is not. George L. Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J. LEGAL STUD. 1, 15–17 (1984). Most of Priest and Klein's analysis takes for granted that civil parties know the facts of the case without trial, but they note that parties might disagree or be uncertain about facts, which undermines certainty in predictions about the legal outcome. *Id.* at 8–9.

141. Classic examples include the federal mail fraud and racketeering statutes. *See* 18 U.S.C. § 1341 (2012) (fraud); *id.* §§ 1961–1963 (R.I.C.O.). Uncertainty can also arise from novel applications of relatively clear statutes. *See* Yates v. United States, 135 S. Ct. 1074 (2015) (finding fish are not "tangible objects" under the Sarbanes-Oxley Act, 18 U.S.C. § 1519); Bond v. United States, 134 S. Ct. 2077, 2080 (2014) (holding chemical weapons statute, 18 U.S.C. § 229(1)(a), does not apply to conduct of defendant who tried to poison her husband's mistress).

142. *See, e.g.*, 8 U.S.C. § 1326(a) (2012); 18 U.S.C. § 922(g) (2012); 21 U.S.C. § 841(a) (2012).

143. *See* William J. Stuntz, *O.J. Simpson, Bill Clinton, and the Transsubstantive Fourth Amendment,* 114 HARV. L. REV. 842, 855 (2001) (describing the ease of drafting, and growth of, broad-but-specific offense definitions).

144. *See* William J. Stuntz, *Substance, Process, and the Civil-Criminal Line*, 7 J. CONTEMP. LEGAL ISSUES 1, 6, 14–18 (1996).

much of that discretion by enacting definite statutes that target common, innocuous conduct.[145] Others have explained the trend in broader terms[146] as one toward more prohibitions characterized variously as "non-consummate," "non-constitutive," "pre-crime," or "risked-based" offenses.[147] All these terms describe criminalization of conduct that is generally harmless in itself, but which is taken to be early-stage preparation that increases the risk of eventual harmful wrongdoing. Such offenses enable earlier law enforcement intervention with the aim of preventing rather than responding to crime.[148] These offenses are the state's response to increasing societal demands that it ensure greater degrees of security against an ever-widening range of risks.[149] Or, in an alternate view, they reflect states' ambition to exercise greater control over a broader range of conduct and groups.[150]

Key examples are offenses of possession and preparation. Mere *possession* of a weapon or illicit drug is harmless in itself, and much weapon possession is constitutionally protected.[151] The targeted harm follows from eventual *use* of the drug or weapon. Possession is, or may be, preparatory conduct for eventual harm-causing conduct.[152] In the U.S., frequently enforced firearms offenses turn on the possessor's *status*, notably as convicted felons.[153] Felon status operates as an easy-to-prove proxy for the much more difficult, preventative determination of persons more likely to use firearms wrongfully. Other preparation-type offenses, such as crimes of possessing burglary tools or drug paraphernalia, follow the same logic.[154] All allow law enforcement intervention at a much earlier stage than is possible under the law of criminal attempts, which has also been reformed since the 1960s (prodded by the Model Penal Code) to define liability at an earlier stage

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145. Stuntz, *supra* note 143; Stuntz, *supra* note 144, at 6, 10–11, 14–18 (providing examples of laws criminalizing building code violations and riding a bicycle without a bell). Andrew Ashworth developed similar observations in the context of English criminal law. *See generally* Andrew Ashworth, *The Unfairness of Risk-Based Possession Offences*, 5 CRIM. L. & PHIL. 237 (2011). For the classic vagrancy statute struck down on vagueness grounds, see Papachristou v. City of Jacksonville, 405 U.S. 156 (1972).

146. *See* Ashworth, *supra* note 145 (discussing English criminal law).

147. *See generally* Douglas N. Husak, *The Nature and Justifiability of Nonconsummate Offenses*, 37 ARIZ. L. REV. 151 (1995); A.P. Simester & Andrew Von Hirsch, *Remote Harms and Non-constitutive Crimes*, 28 CRIM. JUST. ETHICS 89 (2009); Lucia Zedner, *Pre-crime and Post-criminology?*, 11 THEORETICAL CRIMINOLOGY 261 (2007).

148. For a discussion of this trend on both sides of the Atlantic, see ASHWORTH & ZEDNER, *supra* note 101; PREVENTION AND THE LIMITS OF THE CRIMINAL LAW, *supra* note 101.

149. *See generally* LUCIA ZEDNER, SECURITY (2009).

150. *See generally* ASHWORTH & ZEDNER, *supra* note 101.

151. *See* McDonald v. City of Chicago, 561 U.S. 742 (2010) (defining Second Amendment limits on firearms regulations); District of Columbia v. Heller, 554 U.S. 570 (2008) (same).

152. *See, e.g.*, VA. CODE ANN. § 18.2-94 (2017) ("Possession of burglarious tools"); *see generally* Markus Dirk Dubber, *Policing Possession: The War on Crime and the End of Criminal Law,* 91 J. CRIM. L. & CRIMINOLOGY 829 (2001).

153. *See* 18 U.S.C. § 922(g) (2012).

154. For examples of such statutes, see VA. CODE ANN. § 18.2-94 ("burglarious tools"); WASH. REV. CODE ANN. § 69.50.102 (West 2017) (drug paraphernalia).

of preparatory conduct than the common law did.[155] The same approach to defining crimes is characteristic of offenses involving inchoate conduct, such as conspiracy defined to require no proof of conduct beyond an agreement, providing "material support" to designated terrorist organizations, or "structuring" bank deposits in amounts that evade bank-reporting requirements.[156]

Along with this trend of making crimes easier to prove is the revision of offense definitions to eliminate elements that sometimes can be challenging to prove, especially mens rea. A key federal firearm offense punishes possession of an unregistered weapon without proof of knowledge as to unregistered status or the registration requirement.[157] Florida's legislature eliminated any requirement that prosecutors prove that an offender who is charged with possessing illicit drug *knew* that he possessed the drug.[158] Despite the influence of the Model Penal Code ("MPC") on other points, U.S. jurisdictions (and England) still reject the MPC requirement that the prosecution prove mens rea for every offense element and instead maintain innumerable offenses that demand mental-state proof for only a core element and impose strict liability on others that aggravate liability.[159]

Beyond mental state requirements, other offenses have been expanded and made easier to prove by different means. For instance, the federal false-statements offense punishes any false statement to any federal official or agency, no matter how harmless or immaterial.[160] Drug or weapon possession can be proven more easily, and possession defined more expansively, through doctrines of "constructive" possession that impose liability for contraband stored near an offender when evidence suggests he was not an incidental bystander.[161]

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155. *See* MODEL PENAL CODE § 5.01 (AM. LAW INST. 1985) (defining attempt as a "substantial step" toward completion); *see also* MODEL PENAL CODE & COMMENTARIES § 5.01 cmts. 1–9, at 298–364 (AM. LAW INST., Official Draft and Revised Comments 1980) (describing difference from common law).

156. *See* 18 U.S.C. § 2339A (2012) (material support offense); 21 U.S.C. § 846 (2012) (conspiracy); 31 U.S.C. § 5324 (2012) (prohibiting structuring transactions to evade reporting requirements); D.C. CODE § 48–1103(a)(1) (2017–2018) (possession of drug paraphernalia); VA. CODE ANN. § 18.2-94 (burglary tools).

157. *See also* 26 U.S.C. § 5861 (2012) (felony for possession of certain unregistered firearms); United States v. Freed, 401 U.S. 601 (1971) (possession of hand grenades). *But see* Staples v. United States, 511 U.S. 600 (1994) (interpreting 26 U.S.C. § 5861 to require proof that defendant knew the firearm was an automatic weapon but not that it was unregistered).

158. *See* FLA. STAT. ANN. § 893.101 (West 2018) (stating proof of possession raises an inference of knowing possession, which defendants bear the burden of rebutting); *id.* § 893.13; State v. Adkins, 96 So.3d 412, 422–23 (Fla. 2012) (affirming statutes' constitutionality).

159. On the Model Penal Code approach, see MODEL PENAL CODE § 2.02(1), (3)–(4). For an analysis of state codes that adopted many MPC features but reject its mandate that culpability proof attach to every element, see Darryl K. Brown, *Criminal Law Reform and the Persistence of Strict Liability*, 62 DUKE L.J. 285 (2012).

160. 18 U.S.C. § 1001 (2012); Brogan v. United States, 522 U.S. 398, 400–06 (1998) (holding § 1001 prohibits making false statements of any kind).

161. *See, e.g.*, United States v. Elliott, 634 F. App'x. 798, 799–800 (D.C. Cir. 2015) (finding sufficient proof of constructive possession of firearm when it was stored in apartment of which defendant was sole occupant and also which contained evidence of drug trade); Smith v. United States, 899 A.2d 119, 121 (D.C. 2006) (finding sufficient proof that defendant possessed weapon stored in glove compartment of car in which he sat when evidence supports inference he had "power over" it).

A little-noted aspect of these legislative efforts to ease evidentiary hurdles is to define offenses in terms of the kinds of evidence that are easy to acquire and that simplify proof burdens. Driving-while-intoxicated ("DWI") and speeding statutes are good examples. The risk-creating conduct that DWI offenses prohibit is operating a vehicle while "under the influence" of intoxicants "to a degree which impairs" ability to drive safely.[162] Proving "impaired driving ability" could be a challenge, but the offense is now everywhere defined in terms of a proxy for behavioral impairment that is easy to prove and hard to refute: specific levels of blood-alcohol content as measured by ubiquitous breath- or blood-test analysis.[163] Likewise, speeding statutes define speed limits and additionally declare that results from standard laser or radar equipment constitute prima facie evidence of vehicle speed.[164] For a variety of more serious federal and state offenses, statutes specify what kind of evidence presumptively proves offense elements.[165] Courts have contributed as well by establishing generous evidentiary standards, such as affirming that drug possession may be proven solely on results of urinalysis.[166] In sum, various changes in criminal law have made it easier, in many cases, for parties to recognize from pretrial evidentiary sources that little factual or legal dispute remains for trial.

E. The Significance of Pretrial Evidence on Criminal Dockets

Finally, a difference in the nature of criminal and civil cases sheds further light on why criminal evidence gathering is able to substitute for civil discovery as a means to achieve negotiated settlements and avoid trials. Pretrial knowledge of the evidence changes the kinds of cases that make up the criminal docket. Both civil plaintiffs and prosecutors have good reasons not to file complaints supported by only weak evidence (although some number of frivolous or weak claims nonetheless appear).[167] But most civil plaintiffs—think of those in contracts cases, or

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162. *See* VA. CODE ANN. § 18.2-266 (2017).

163. *See, e.g.*, *id.* (prohibiting motor vehicle operation by anyone with "a blood alcohol concentration of 0.08 percent or more by weight by volume or 0.08 grams or more per 210 liters of breath as indicated by a chemical test administered as provided in this article").

164. *Id.* § 46.2-882 ("The speed of any motor vehicle may be determined by the use of (i) a laser speed determination device, (ii) radar . . . [or specified microcomputer devices]. The results of such determinations shall be accepted as prima facie evidence of the speed of such motor vehicle in any court or legal proceeding where the speed of the motor vehicle is at issue."); *id.* § 46.2-878.3 (presupposing precise proof of vehicle speeds by setting fines at "$6 per mile-per-hour in excess of posted speed limits").

165. *See, e.g.*, 18 U.S.C. § 1466(b) ("The offering for sale of or to transfer, at one time, two or more copies of any obscene publication, or two or more of any obscene article, or a combined total of five or more such publications and articles, shall create a rebuttable presumption that the person so offering them is 'engaged in the business' as defined in this subsection."). For other examples, see 9A FEDERAL PROCEDURE: LAWYER'S EDITION, §§ 22:1527–28 (Gary A. Hughes et al. eds., 2015).

166. *See, e.g.*, State v. Schroeder, 674 N.W.2d 827 (S.D. 2004) (urinalysis evidence).

167. *See* David A. Hyman & Charles Silver, *Medical Malpractice Litigation and Tort Reform: It's the Incentives, Stupid*, 59 VAND. L. REV. 1085, 1100–04 (2006) (explaining reasons for the small portion of weak medical malpractice claims and the procedural mechanisms that address them). On the criminal side, the best

individuals injured by tortious conduct—have little choice in *which* case they initiate. They might have some leeway among potential theories of liability and about what evidence they can develop (depending, for example, on their investigative resources), but they cannot choose a wholly different case.[168] Prosecutors can. They have unlimited charging discretion as a formal matter, and considerable discretion in practice, to select which cases to prosecute. They screen cases from police based on the strength of pretrial evidence, along with other factors, such as enforcement priorities.[169] And both police and prosecutors can adjust enforcement priorities and investigative efforts with an eye toward those that yield the strongest pretrial evidentiary records.[170] That is why clearance rates can be low (many crimes can be hard to solve) but plea rates can be high.[171] Unsolved crimes are never charged, and the same is generally true for crimes for which law enforcement has only weak evidence. But guilty pleas occur only within the subset of offenses that prosecutors have determined are supported by at least fairly strong evidence.[172]

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accounts of prosecutors pursuing weak cases are in the wrongful conviction literature. *See* BRANDON L. GARRETT, CONVICTING THE INNOCENT: WHERE CRIMINAL PROSECUTIONS GO WRONG (2011); BRYAN STEVENSON, JUST MERCY: A STORY OF JUSTICE AND REDEMPTION (2014) (describing weak evidence that nonetheless led to the wrongful conviction of Walter McMillian).

168. Exceptions include civil litigation motivated primarily by interest groups' ambitions for social or political change. Public interest or industry-affiliated groups that frequently instigate such litigation often can select among different potential plaintiffs with factually different cases. For accounts of interest groups strategically identifying civil plaintiffs or criminal defendants, see Stephanie Mencimer, *The Supreme Court Just Rejected These 4 People's Attempt to Blow Up Obamacare*, MOTHER JONES (June 25, 2015, 2:21 PM), https://www.motherjones.com/politics/2015/06/obamacare-supreme-court-king-burwell/# (discussing plaintiffs in *King v. Burwell*); David Oshinsky, *Strange Justice*, N.Y. TIMES (Mar. 16, 2012), https://www.nytimes.com/2012/03/18/books/review/the-story-of-lawrence-v-texas-by-dale-carpenter.html (reviewing DALE CARPENTER, FLAGRANT CONDUCT: THE STORY OF LAWRENCE v. TEXAS (2012)).

169. Josh Bowers, *Legal Guilt, Normative Innocence, and the Equitable Decision Not to Prosecute*, 110 COLUM. L. REV. 1655, 1703 (2010) (discussing prosecutors' charging considerations); Peterson et al., *supra* note 13, at S78–79 (discussing uncertainty about reasons for charging decisions).

170. *See* William J. Stuntz, *Race, Class and Drugs*, 98 COLUM. L. REV. 1795, 1820–21 (1998) (describing police preferences for cheaper, easier enforcement strategies).

171. For example, only about 5% of burglars are caught and charged, but most charged burglaries end with guilty pleas. *See* JOSEPH PETERSON ET AL., NAT'L INST. JUSTICE, THE ROLE AND IMPACT OF FORENSIC EVIDENCE IN THE CRIMINAL JUSTICE PROCESS 60–73 (2010), https://www.ncjrs.gov/pdffiles1/nij/grants/231977.pdf. "The clearance rate is the proportion of crimes in a jurisdiction for which the police report an arrest." Charles Wellford & James Cronin, *Clearing Up Homicide Clearance Rates*, 243 NAT'L INST. JUST. J. 3 (2000), https://www.ncjrs.gov/pdffiles1/jr000243b.pdf.

172. If prosecutors rigorously screen cases and charged only those for which they had very strong evidence, merely disclosing their evidence, rather than offering sentence concessions, should be enough to convince many defendants to plead guilty. *See* Ronald Wright & Marc Miller, *The Screening/Bargaining Tradeoff*, 55 STAN. L. REV. 29 (2002) (describing New Orleans prosecutor's rigorous screening policy as a strategy to avoid plea bargains). Inferences from data on federal immigration offenses support this view. Prosecutors filed charges in 99% of case referrals for illegal entry and reentry offenses, and it took on average only twenty-one days to decide evidence was strong enough to do so. Still, 96.8% ended in guilty pleas. That suggests most cases came to prosecutors with strong evidence of guilt. *See* MARK MOTIVANS, U.S. DEP'T OF JUSTICE, IMMIGRATION OFFENDERS IN THE FEDERAL JUSTICE SYSTEM, 2010 18–20 & tbl. 4, 29 tbl. 9 (revised Oct. 22, 2013) https://www.bjs.gov/content/pub/pdf/iofjs10.pdf.

Studies of state prosecutors' decision-making, based on examinations of large numbers of pre-charge evidentiary records, support this inference about charge screening. A study of more than a thousand New York City felony drug cases, for example found that witnesses in those cases are—unsurprisingly—nearly always law enforcement agents.[173] Further, most drug charges resulted from police surveillance operations, from police-managed undercover buys, or from other kinds of police-organized sting operations.[174] Prosecutors are most likely to charge cases they receive from police when the key evidence includes police witnesses, audio/video recordings, currency recovered after arrest, and "prerecorded buy money" used in the sting.[175] All that evidence, of course, is in government hands early; therefore, it is easy to evaluate before charging if prosecutors have sufficient time and resources to do it.[176] Trials are rare because the pretrial evidence is usually strong and clear. That is due both to investigation tactics and technology that yield strong evidence and to prosecutors screening out most weak cases that lack such evidence. Empirical studies of drug prosecutions in other jurisdictions confirm this: insufficient evidence is overwhelmingly the reason prosecutors screen out drug cases forwarded from police.[177] Drug offenses are the largest category of crimes on the typical state court criminal docket; in approximately a third of felony cases in state courts, a drug crime is the primary offense.[178]

The kinds of cases in which evidence is usually hardest to gather before trial are still those in which it is hardest to gather evidence *at all*: homicides and rape offenses. Both crimes have comparatively high rates of trial, although trial rates are still low—well under 20% in federal courts.[179] Still, most cases avoid trial because the prosecution has a convincing body of evidence before trial.[180]

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173. Kutateladze et al., *supra* note 125, at 434–37.

174. *Id.*

175. *Id.* at 431, 433 (based on data from over 1,000 New York County drug cases, finding "prosecutors made more punitive charge [bargain] offers when they had audio/video evidence," among other types of evidence).

176. Accounts of prosecutors not closely examining evidence in their possession until well after charging. *See, e.g.*, Schwartzapfel, *supra* note 124 (describing video evidence in case of Aaron Cedres); *see also* Bowers, *supra* note 169 (discussing why prosecutors do not always make individualized charging decisions).

177. BRUCE FREDERICK & DON STEMEN, VERA INST. OF JUSTICE, THE ANATOMY OF DISCRETION: AN ANALYSIS OF PROSECUTORIAL DECISION MAKING 7–9 & figs. 2–3, 21 (2012), https://www.ncjrs.gov/pdffiles1/nij/grants/240334.pdf (study based on analyses via automated case management data in unnamed large county of 4,890 felony drug cases involving 12,224 charges).

178. REAVES, *supra* note 105, at 2–3 & tbl. 1 ("Drug defendants (33%) represented the largest category of felony defendants" based on data from state courts in the 75 most populous counties). *But see* WASH. STATE COURTS, SUPERIOR COURT 2015 ANNUAL REPORT: ANNUAL CASELOAD REPORT 36–39, 53–54 (2015) (drug offenses were 25.7% of felonies filed in superior courts in 2015, and 30.4% of felony convictions). Property offenses constitute the next-largest category, accounting for roughly 30% of state felony dockets. *Compare* REAVES, *supra* 105, at 2–3 & tbl. 1, *with* WASH. STATE COURTS, *supra*, at 54 ("theft/burglary" offenses were 28.6% of felony convictions).

179. In federal courts in 2008–2009, 3.2% of all cases went to trial, but trials occurred in 14.9% of sexual assault cases and 16% of murder cases. *See* MOTIVANS, *supra* note 122, at 18 tbl. 4.2.

180. In rape prosecutions, the victims—who often have a preexisting relationship with the defendants—are usually the most important evidentiary source. The same goes for assault cases, which comprise about 12% of

Additionally, these relatively difficult prosecutions make up a small fraction of state and federal criminal caseloads, each amounts to 1% or less of all felony charges.[181] On the other hand, charges for offenses that are much more likely to have strong evidence that is fully available before trial are much more common. Drug and weapon offenses, which are based on seized contraband and police testimony, comprise more than one-third of state felony cases.[182] In federal courts, they amount to about 40% of the docket.[183] Federal drug cases are typically more complex, but the complexity is counteracted by law enforcement's investigative tactics. Further, prosecutors are adept at convincing a gang or conspiracy member to cooperate, which adds insider testimony to seized contraband, cash, surveillance recordings and other evidence.[184] Immigration offenses, which comprised 27% of federal filings in 2012, are another large part of the caseload for which evidence is easy to gather once a suspect is apprehended.[185]

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state felonies. *See* PETERSON ET AL., *supra* note 171, at 42–49 (finding through a study of 859 assault cases in Los Angeles and four Indiana cities that an eyewitness report, which are usually from the victims, was "an important predictor of arrest," as was whether the defendant was previously known to the victim); *id.* at 5, 90–106 (concluding based on a study of 602 rape cases, that victim reports about suspect, and preexisting relationship with defendants, increased odds of prosecution, and finding defendant was a stranger to the victim in 21.1% of cases; a friend/acquaintance in 42.7%; and an intimate/family member in 36.2%); *cf.* Sommers & Baskin, *supra* note 120 (finding through a study of 381 rape cases that forensic evidence to be less important than whether suspect was apprehended quickly and victim got immediate medical attention).

181. *Cf.* Sommers & Baskin, *supra* note 120 (data for federal courts); REAVES, *supra* note 105, at 2–3 & tbl. 1 (data for state courts in 75 largest urban counties). All violent crimes total about one-fourth of state felony prosecutions, and about half of those are assault charges. *Id. But see* WASH. STATE COURTS, *supra* note 178, at 37 (violent crime—homicide, sex crimes, robbery, assault—constitute 21.9% of total crimes filed and 25.4% of total felonies filed). The odds of a guilty plea to robbery charges roughly double when there is physical evidence, but it plays little role in burglary and homicide, where witnesses are more important. *See* PETERSON ET AL., *supra* note 171, at 4–10.

182. REAVES, *supra* note 105, at 2–4 & tbls. 1–2; *see* FREDERICK & STEMEN, *supra* note 177 (focus group study found prosecutors viewed evidence to be stronger in drug and gun cases compared to other offense types, largely due to presence of physical evidence).

183. *See* MOTIVANS, *supra* note 122, at 16 tbl. 4.1.

184. One measure of this is the number of defendants whom federal prosecutors certify as having provided "substantial assistance" to law enforcement in other cases. *See* U.S. SENTENCING COMM'N, THE USE OF FEDERAL RULE OF CRIMINAL PROCEDURE 35(B) 8 (2016), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2016/Rule35b.pdf (noting more than 11% of defendants in years 2010–2014 received sentence discounts for substantial assistance); Linda Drazga Maxfield & John H. Kramer, *Substantial Assistance: An Empirical Yardstick Gauging Equity in Current Federal Policy and Practice*, 11 FED. SENT'G REP. 6, 7 (1998) (19% of federal sentences received reductions based on substantial assistance in 1994 through 1996).

185. MOTIVANS, *supra* note 105 (immigration offenses were 27.2% of cases between October 2011 and September 2012). In 2010, prosecutors charged 99% of case referrals for illegal entry and reentry offenses and took only twenty-one days on average to do so; 96.8% ended in guilty pleas. That suggests most cases came to prosecutors with strong evidentiary files. *See* MOTIVANS, *supra* note 172, at 18–20 & tbl. 4, 29 & tbl. 9. Charges for illegal entry require only proof of nationality and entry into the United States on false documents or by means other than an official entry point. 8 U.S.C. § 1325 (2012). Illegal reentry calls for proof of prior exclusion and reentry without expression permission, evidence for which is in the government's possession. *Id.* § 1326; *see also* 18 U.S.C. § 1546 (2012) (document fraud).

At the other end of the offense spectrum, misdemeanors in many states make up a large majority of state criminal prosecutions.[186] Among the states that treat ordinary traffic offenses as petty crimes, they can make up roughly half of misdemeanors.[187] Prosecutor screening is often less rigorous in the misdemeanor realm, leading either to high rates of dismissals after charging or, worse, to some innocent defendants pleading guilty as the best way to minimize burdens such as pretrial detention.[188] Nonetheless, for some frequently charged offenses, there is often little evidentiary uncertainty, due to either how the offenses are defined (making blood-alcohol analysis or radar speed measurements definitive) or how they are enforced, such as when the key witness is a police officer. In sum, charging and dismissal selection contributes to the overall evidentiary strength of cases on criminal dockets.

III. SETTLING CRIMINAL CASES UNDER ASYMMETRICAL DISCOVERY RULES

All of these developments discussed in Part II account for the criminal justice system's ability to have relatively complete knowledge of most evidence well before trial despite the absence of broad, reciprocal discovery rules. This does much to explain how criminal litigation has matched the high settlement rates of civil litigation without a comparable discovery regime. Whether through better evidence gathering, advantageous offense definitions, or rigorous charge screening, the government is able to know the evidence in their criminal cases without (and well before) trial. Evidence gathering by law enforcement is criminal procedure's primary substitute for broad civil discovery regime, and it has improved through technology and better investigative tactics. This is not to say that pretrial compilations of criminal evidence are always complete, nor that lawyers carefully assess what evidence is available. But at a broad level of generality, trials are no more necessary for generating evidence in criminal cases than they are in civil ones. On the other hand, there is one important difference between criminal evidence-gathering and civil discovery: it is one-sided. The government has much greater evidence-gathering authority, and criminal discovery rules in the federal system and many states do not require prosecutors to

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186. Alexandra Natapoff, *Misdemeanors*, 85 S. CAL. L. REV. 1313, 1320–27 (2012) (summarizing sources on reporting that misdemeanors are a large majority of criminal cases in most if not all jurisdictions, but noting weaknesses in data collection on misdemeanors); *see also* Issa Kohler-Hausmann, *Managerial Justice and Mass Misdemeanors*, 66 STAN. L. REV. 611, 629–30 & fig.1 (2014) (reporting misdemeanor arrests have far exceeded felony arrests in New York City since the mid-1990s, but often lower than or nearly equal to felony arrests in the years 1980-1995).

187. *See, e.g.*, WASH. STATE COURTS, COURTS OF LIMITED JURISDICTION 2015 ANNUAL REPORT: ANNUAL CASELOAD REPORT 17 (2015) (in the limited-jurisdiction courts that process nearly all misdemeanors, half were traffic offenses and 12.8% were intoxicated-driving charges).

188. For evidence of the scale of ill-founded misdemeanor charges, see Kohler-Hausmann, *supra* note 186. On reasons for wrongful guilty pleas to misdemeanors, see Josh Bowers, *Punishing the Innocent*, 156 U. PA. L. REV. 1117 (2008).

disclose much its evidence to the defense before trial.[189] Criminal disclosure obligations thus do not give the parties equal access to evidence possessed by their opponents. That can be detrimental to public interests in accurate adjudication, and in theory, it should reduce the likelihood that the parties will negotiate settlements in lieu of trial.

A. *Loss of Adversarial Scrutiny of Evidence*

The differences in the pretrial evidence discovery regimes of criminal and civil litigation lead to different forms of non-trial adjudication. Civil litigation's expansive, co-equal discovery gives the parties knowledge of virtually all available evidence without trial. Settlement means that evidence is generally not public nor scrutinized closely by judges. Yet this is a model of non-trial adjudication that nonetheless subjects evidence to adversarial scrutiny as much as it would be at trial.[190] Settlement-oriented litigation based on broad discovery retains a crucial feature of adversarial adjudication: the parties produce a reliable factual record by generating, sharing, and critically evaluating evidence. That, in turn, serves the public interest in the reliability of evidence and court-approved settlements.

The same is not true in the criminal pretrial process. Law enforcement gathers most evidence. That in itself is not problematic; prosecutors, like civil plaintiffs, bear the burden of proof and generally must do more evidence gathering than defendants.[191] But in criminal proceedings, this asymmetry in evidence gathering is joined by limited disclosure rules that give defendants limited access to known evidence before trial.[192] Key evidence can be withheld until trial, and the closest analogs to civil depositions—prosecutor examinations of grand jury witnesses—

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189. *See supra* Part I.B.

190. Witness depositions, for example, closely approximate trial testimony, and evidence rules recognize that they can be reliable substitutes. *See* FED. R. EVID. 804(b).

191. Even so, defendants' limited investigative resources and authority can sometimes cause critical gaps in evidence. *See, e.g.*, Paul C. Giannelli, Ake v. Oklahoma: *The Right to Expert Assistance in a Post-*Daubert, *Post-DNA World*, 89 CORNELL L. REV. 1305, 1313–26, 1365–68 (2004) (detailing "the failure to fully implement the right to expert assistance" and concluding "the scope of the right to expert assistance [remains] undefined"); Jack B. Weinstein, *Science, and the Challenges of Expert Testimony in the Courtroom*, 77 OR. L. REV. 1005, 1008 (1998) ("The fact that one side may lack adequate resources with which to fully develop its case is a constant problem."); Jay A. Zollinger, Comment, *Defense Access to State-Funded DNA Experts: Considerations of Due Process*, 85 CALIF. L. REV. 1803 (1997) (arguing *Ake* right to "basic tools of an adequate defense" may include resources to challenge forensic analysis or eyewitness identification).

Indigent defendants have a limited entitlement to public funding for private investigators or expert assistance. Ake v. Oklahoma, 470 U.S. 68, 74 (1985) (holding due process right to fundamental fairness includes expert assistance of psychiatrist for the defense if sanity is "likely to be a significant factor at trial"); *id.* at 77 (noting fundamental fairness requires defendants to have access to the "basic tools of an adequate defense"). *But see* Caldwell v. Mississippi, 472 U.S. 320, 323 n.1 (1985) (finding no due process violation in trial court denying defendant access to fingerprint and ballistics experts).

192. Disclosure is broader and more symmetrical in some jurisdictions than others because a significant number of states have expanded their criminal discovery rules far beyond the narrow model of federal courts. *See, e.g.*, ALASKA R. CRIM. P. 16; FLA. R. CRIM. P. 3.220; MINN. R. CRIM. P. 9.01 to .05; N.J. CT. R. 3:13-3 to -4; N.C. GEN. STAT. §§ 15A-902 to -910 (2017).

are ex parte.[193] Since trials are rare, that reduces the degree of reciprocal, adversarial testing of evidence that occurs without trial in criminal cases.[194]

To the degree that evidence remains known to only one party, pretrial criminal adjudication is missing two of the core components of the adversarial trial: a neutral factfinder and an adversarial evidence examination.[195] The reduced scope of competitive evidence scrutiny by adversarial parties undermines the prospect that negotiated pleas rest on accurate assessments of available evidence.

The realities of practice both aggravate and mitigate this problem. On the one hand, many prosecutors often voluntarily grant defendants access to most or all evidence in their possession, and the government's evidentiary file is often sufficiently comprehensive to give the parties a clear picture of what can be proven.[196] In those cases, and in the absence of a large "trial penalty"[197] that distorts defendants' decision making, plea bargaining looks like an informal and equally reliable version of civil litigation. On the other hand, because disclosure is

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By contrast, for jurisdictions with the most limited disclosure requirements, see FED. R. CRIM. P. 16; ALA. R. CRIM. P. 16.1–.5; DEL. SUPER. CT. R. CRIM. P. 16; D.C. SUPER. CT. R. CRIM. P 12.1–.2, 16; GA. CODE ANN. §§ 17-16-1 to -10 (2017); IOWA R. CRIM. P. 2.14; KAN. STAT. ANN. §§ 22-3212, -3218 to -3219 (2007); KY. R. CRIM. P. 7.24; LA. CODE CRIM. PROC. art. 716–29.6 (2017); N.Y. CRIM. PROC. LAW §§ 240.60–.90, 250.10–.40 (Lexis 2017); R.I. SUPER. R. CRIM. P. 12, 16; S.C. R. CRIM. P. 5; S.D. CODIFIED LAWS §§ 23a-9-1, -10-3, -13-1 (2017); TENN. R. CRIM. P. 12.1–.3, 16; UTAH R. CRIM. P. 15–16; VA. R. SUP. CT. 3A:11; WYO. R. CRIM. P. 12.1–.3, 16.

193. *See, e.g.*, FED. R. CRIM. P. 6 (grand jury procedures). Five states provide criminal litigants with power to take witness depositions on terms comparable to civil parties. *See* FLA. R. CRIM. P. 3.220(h); IND. CODE § 35-37-4-3 (2016); IOWA R. CRIM. P. 2.13; MO. ANN. STAT. §§ 545.390–.400 (2016); MO. R. SUP. CT. R. 25.12, .15; VT. R. CRIM. P. 15. The constitutional right for defendants to have counsel at post-indictment identification proceedings adds a component of adversarial process to that evidence-gathering practice. *See* Moore v. Illinois, 434 U.S. 220, 231 (1977); Kirby v. Illinois, 406 U.S. 682, 689 (1972). In many jurisdictions, defendants have a right to preliminary hearing on directly filed charges, which can have the ancillary effect of providing defendants some discovery in the form of sworn witness examinations. *See, e.g.*, FED. R. CRIM. P. 5.1.

194. The prosecutor's *Brady* duty to disclose exculpatory and impeachment evidence favorable to the defense does not apply until trial. *See* United States v. Ruiz, 536 U.S. 622, 629 (2002) (describing defendant's right to disclosure of *Brady* evidence as a trial right, not a pretrial right). Statutory disclosure duties in many jurisdictions also limit disclosure of some kinds of important evidence, including trial witness identities and prior statements, to trial. *See, e.g.*, 18 U.S.C. § 3500 (Jencks Act) (prosecution witness statements not required to be disclosed until after witness's direct examination testimony at trial); FED. R. CRIM. P. 16 (no duty to disclose names of non-expert witnesses before trial); ALA. R. CRIM. P. 16 (same); N.Y. CRIM. PROC. art. 240 (same); VA. R. SUP. CT. 3A:11 (same). The *Brady* duty to disclose exculpatory evidence, for example, as well as statutory rules in the federal system and some states regarding trial witnesses' names and prior statements, do not attach in the pretrial stage, when disclosures would inform settlement negotiations. Other rules undercut required disclosures further by allowing defendants to waive them and encouraging prosecutors to push defendants for those waivers. *Ruiz*, 536 U.S. at 629–31 (holding *Brady* disclosure is a "trial-related" right that is not constitutionally required before trial, and approving waiver of Brady disclosure in guilty plea agreements).

195. Paul C. Giannelli, *Criminal Discovery, Scientific Evidence, and DNA*, 44 VAND. L. REV. 791, 800–03 (1991) (noting prosecutors do not consistently provide defendants with pretrial access to forensic evidence).

196. Jenia I. Turner & Allison D. Redlich, *Two Models of Pre-Plea Discovery in Criminal Cases: An Empirical Comparison*, 73 WASH. & LEE L. REV. 285, 294 (2016) (noting survey results in which most Virginia prosecutors report providing pretrial discovery voluntarily).

197. For a discussion of "trial penalty," see 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 (2015).

a matter of prosecutorial discretion, it does not always happen. Some prosecutors strongly resist broad disclosure as a matter of policy, and some disclose less when their evidence is weakest; precisely those cases in which adversarial scrutiny is an important safeguard.[198] Moreover, plea negotiations sometimes occur "when the parties' knowledge of their own and each other's cases is likely to be fragmentary," either because lawyers do not yet have access to all the evidence or they have not carefully reviewed it.[199]

Given these weaknesses, criminal procedure's version of non-trial adjudication is less reliable than in civil litigation. It lacks the adversarial input that can identify failures to pursue some sources, or an opponent's questionable interpretation of or excessive confidence in other sources, such as jailhouse snitches and forensic analysis.[200] It would, therefore, seem less likely to achieve civil litigation's extremely high settlement rate.

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198. Giannelli, *supra* note 195, at 800–03 (discussing differences in prosecutor discretion about giving defendants pretrial evidence access); Albert W. Alschuler, *The Prosecutor's Role in Plea Bargaining*, 36 U. CHI. L. REV. 50, 58–65 (1968); Michael R. Doucette, *Virginia Prosecutors' Response to Two Models of Pre-Plea Discovery in Criminal Cases: An Empirical Comparison*, 73 WASH. & LEE L. REV. ONLINE 415, 425, 428 (2016) (defending prosecution policies not to disclose witnesses and other evidence before trial); John G. Douglass, *Balancing Hearsay and Criminal Discovery*, 68 FORDHAM L. REV. 2097, 2140–41 (2000) ("In the weaker cases, the very ones where discovery is most likely to make a difference to the defendant, there is less incentive for a prosecutor to disclose and more reason to play 'hard ball' when the rules permit it."); Vincent Stark, *New York Discovery Reform Proposals: A Critical Assessment*, 79 ALB. L. REV. 1265 (2016) (New York prosecutor's defense of non-disclosure).

199. TASK FORCE ON THE ADMIN. OF JUSTICE, PRESIDENT'S COMM'N ON LAW ENF'T & ADMIN. OF JUSTICE, TASK FORCE REPORT: THE COURTS 11 (1967) [hereinafter TASK FORCE REPORT] ("Presentence reports and other investigations into the background of the offender usually are made after conviction and are unavailable at the plea bargain stage. Thus the prosecutor's decision is usually made without the benefit of information regarding the circumstances of the offense, the background and character of the defendant, and other factors necessary for sound dispositional decisions.").

200. Forensic analysis raises a special concern. Studies suggest much potential scientific evidence is not fully developed in the pretrial stage. *See* Brandon L. Garrett & Gregory Mitchell, *Forensics and Fallibility: Comparing the Views of Lawyers and Jurors*, 119 W. VA. L. REV. 621, 623, 626–27 (2016). Moreover, lawyers and legal process are not well-suited for detecting errors in scientific or technical analyses, much of which is produced by labs within law enforcement agencies that have far-from-perfect records of producing accurate results. *See* Pamela R. Metzger, *Cheating the Constitution*, 59 VAND. L. REV. 475, 484, 491–96 (2006) (noting few crime labs are independent of law enforcement agencies and without a subpoena do not share forensic analysis—or share no more than a conclusory "certificate of analysis"—with the defense); Murphy, *supra* note 119, at 658–59 ("Assessing the reliability of 2G evidence requires a more structural, systemic approach to oversight," rather than traditional courtroom confrontation, because "cross-examination almost always misses the problems with 2G evidence"; "when it comes to 2G proof, the adjudicative system cannot truly safeguard evidentiary integrity while maintaining such a narrow, case-specific view of disclosure and examination"); Andrea Roth, *Trial by Machine*, 104 GEO. L.J. 1245 (2016).

Even in trial, forensic analysis likely does not receive adequate scrutiny because, as Erin Murphy has described, trial process is poorly suited for assessing the integrity of much contemporary forensic analysis. *See* Murphy, *supra* note 119, at 658–69; *see also* COMM. ON IDENTIFYING THE NEEDS OF THE FORENSIC SCIS. CMTY. ET AL., STRENGTHENING FORENSIC SCIENCE IN THE UNITED STATES: A PATH FORWARD 12 (2009) (noting lawyers "generally lack the scientific expertise necessary to comprehend and evaluate forensic evidence in an informed manner"). In the *pretrial* process, in which parties have no right to examine opposing experts and the reliability of their analysis, scrutiny is still weaker.

B. Asymmetric Discovery and Guilty Plea Rates

In theory, restricting criminal defendants' access to pretrial evidence possessed by the government should reduce rates of negotiated dispositions. Defendants with less knowledge of the prosecution's case should be less inclined to think they can confidently predict the trial outcome, and thus less likely to conclude a negotiated plea is their best option. To be sure, many guilty defendants have independent knowledge of the critical facts and may know of evidentiary sources for those facts.[201] But there are many crimes for which guilty defendants may not know they are guilty.[202] In any case, there is no reason to think defendants' private knowledge always matches knowledge of the prosecution's evidence. Despite all this, the difference in the parties' access to pretrial evidence has not reduced negotiated dispositions. Rates of guilty pleas have climbed over time and remain strikingly in sync with civil settlement rates; civil and criminal trial rates are both in the low single digits.[203] Why has that occurred? Why have guilty plea rates climbed in the last quarter-century in jurisdictions such as the federal courts that did not adopt broader discovery rules? Why do defendants enter plea agreements without assessing all the government's evidence? The answer lies in criminal procedure rules that offset the hurdles to negotiated settlements created by criminal litigation's unequal tools for evidence gathering and much weaker interparty disclosure rules.

C. Coercion in Place of Evidence Disclosure

As a preliminary point, it bears emphasizing that the real issue is one of marginal settlement rates. In both civil and criminal litigation, roughly eight out of ten cases are resolved without trial regardless of the scope of pretrial discovery rules. About 80% of civil cases settled in the late 1930s, right before and after Federal Rules of Civil Procedure were adopted.[204] Likewise, the portion of convictions achieved by guilty pleas mostly fluctuated between 70% to 85% from 1908 (the first year for which guilty plea data is available) to 1992.[205] Data for state

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201. Defendants know, for example, whether they confessed to police, and whether they were arrested at the crime scene in possession of incriminating evidence.

202. For example, accomplices and conspiracy members may not recognize that their acts of assistance make them liable for others' crimes. There can also be legitimate disputes about any number of issues—constructive possession, the reasonableness of a perceived threat, whether acts amount to force, harassment, unnecessarily obstructing others, reckless endangerment, membership in a mob, or disorderly conduct. For examples of such elements, see VA. CODE ANN. §§ 18.2-38 to -42.1 (2017) (offenses by members of "mob"); *id.* § 18.2-60.3 (stalking offense); *id.* §§ 18.2-512 to -514 (racketeering offense); Pinkerton v. United States, 328 U.S. 640, 645–47 (1946) (holding conspiracy members can be liable for crimes committed solely by other conspiracy members).

203. *See infra* note 209 and accompanying discussion.

204. Langbein, *supra* note 4, at 524.

205. *See* Ronald F. Wright, *Trial Distortion and the End of Innocence in Federal Criminal Justice*, 154 U. PA. L. REV. 79, app. 1 2–4 (2005) (analyzing data primarily from the Administrative Office of the U.S. Courts and

courts are less comprehensive and shows somewhat more variation, but it tells the same basic story. The first surveys of plea bargaining of state and local jurisdictions, conducted in the 1920s, found that guilty pleas accounted for 85% of felony convictions in Chicago, 78% in Detroit, 76% in Denver, 81% in Los Angeles, 74% in Pittsburgh, and 84% in St. Louis.[206] Studies of several states in the 1960s found guilty plea rates in the same range.[207]

Then, in the last quarter-century, things changed. Federal guilty plea rates rose to 90% of convictions in 1995.[208] In the previous eighty-five years, they had reached that level only twice, yet since 1995 the rate has never again dropped below that mark; rather, the federal guilty plea rate rose steadily and then settled around 96%–97% since 2005.[209] State court data for this period is again less comprehensive, but what data there is confirms the same general trend.[210] To restate the issue more precisely: how did criminal adjudication match civil litigation's record of reducing trial rates from 20% to 3% without adopting the

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appendix can be found online at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=809124). In a few outlier years, plea rates dropped as low as 67% or (during Prohibition) rose as high as 91%. In only 20 of the 84 years from 1908 to 1991 did the guilty plea rate exceed 85% of adjudicated cases. *Id.*

206. *See* Moley, *supra* note 16, at 105–10. For other surveys from the era, see Thompson, *supra* note 16; N.Y. STATE CRIME COMM'N, *supra* note 16. For an overview and an analysis of these sources, see Albert W. Alschuler, *Plea Bargaining and Its History*, 79 COLUM. L. REV. 1 (1979).

207. *See* TASK FORCE REPORT, *supra* note 199, at 9 (containing 1964–1965 data from 9 states and the District of Columbia and finding the portion of convictions achieved by guilty pleas ranged from 66% to 95%). Studies of Connecticut courts in the 1970s found plea bargain rates approaching 90%. *See* FEELEY, *supra* note 20, at 244–77; HEUMANN, *supra* note 20, at 27–31; Milton Heumann, *A Note on Plea Bargaining and Case Pressure*, 9 LAW & SOC'Y REV. 515, 517–24 (1975).

It is worth noting that a few states and localities at times had much lower guilty plea rates due to deliberate policies prohibiting plea bargaining and, in some cases, encouraging bench trials over jury trials. *See* Alschuler, *supra* note 20, at 943–44, 1024–43 (describing studies in El Paso, Philadelphia, and Pittsburgh that found low guilty plea rates because bargaining was banned or judges gave no discounts for pleas); Wright & Miller, *supra* note 172 (describing New Orleans prosecutor's no-plea-bargaining policy); *cf.* Thomas Uhlman & N. Darlene Walker, *"He Takes Some of My Time; I Take Some of His": An Analysis of Judicial Sentencing Patterns in Jury Cases*, 14 LAW & SOC'Y REV. 323 (1980) (finding Philadelphia judges gave no sentence discount for guilty pleas in 1968–1972 study).

208. *See* Wright, *supra* note 205, at app. 1 4.

209. *See id.* (data through 2002). In U.S. federal courts in the years 2007–2011, guilty plea rates increased from 95.8% to 96.9% of all convictions; the percentage of convictions following trial declined from 4.2% to 3.1%. U.S. SENTENCING COMM'N, 2011 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS fig. C, https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2011/FigureC_0.pdf. Guilty plea rates within each of the twelve federal circuits showed little variation, ranging from 93.6% to 98.3% in 2011. *Id.* at tbl. 10, https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2011/Table10_0.pdf. For 2009 federal data, see MOTIVANS, *supra* note 122, at 18–19 tbl. 4.2.

210. In 2000, data from twenty-two states showed 3% of state criminal cases were resolved by either bench or jury trial, the remainder by guilty pleas, dismissals or other disposition. *See* EXAMINING THE WORK OF STATE COURTS, 2001: A NATIONAL PERSPECTIVE FROM THE COURT STATISTICS PROJECT 63 (Brian J. Ostrom et al., eds. 2001), https://www.ncjrs.gov/pdffiles1/Digitization/195881NCJRS.pdf [hereinafter EXAMINING WORK OF STATE COURTS]. Hawaii had the highest trial rate at 12.8%; Vermont's rate of 0.9% was lowest. *Id.*; *see also* HON. GREGORY E. MIZE ET AL., THE STATE-OF-THE-STATES SURVEY OF JURY IMPROVEMENT EFFORTS: A COMPENDIUM REPORT 7 (2007), http://www.ncsc-jurystudies.org//media/Microsites/Files/CJS/SOS/SOSCompendiumFinal.ashx (reporting similar, more recent data, although in different terms, for example, trials per 100,000 population).

broad discovery regime responsible for the civil trial decline? Law enforcement investigation powers along with technology fill in for missing evidence-gathering tools in the discovery rules. But nothing in the criminal context makes up for civil disclosure rules that provide parties with symmetrical access to the available evidence.

The most likely explanation lies in the rules that govern plea bargaining practice, combined with the criminal laws and sentencing laws about which parties bargain. Plea bargaining tactics effectively substitute for broad discovery as the means to facilitate settlements. In the 1970s and 1980s, the U.S. Supreme Court created the constitutional law of plea bargaining.[211] That body of doctrine has two critical features. One is that the Constitution puts no restraints on prosecutors' discretion about what charges to file, add, or drop in the course of plea negotiations. Thus, prosecutors are free to charge offense *A*, offer a plea bargain in which the prosecutor endorses sentence *Y*, and, if the defendant declines, add charge *B*, which could make the post-trial sentence double or triple *Y*.[212] The second feature of this doctrine reinforces the first: the Constitution provides no basis for judges to review the fairness either of prosecutors' bargaining tactics or the substantive terms of plea bargains.[213] No state constitutional law differs meaningfully from the federal law, and in no U.S. jurisdiction has sub-constitutional law stepped in to regulate plea negotiation practice significantly.

Equally important is the background against which this discretionary practice operates. Expansive state and federal criminal codes give prosecutors a multitude of charging possibilities with which to define defendants' distinct plea and trial options.[214] But more important is the increased control that Congress and state legislatures gave prosecutors over sentencing in the 1970s and 1980s. This occurred in two ways: (1) through limits on judicial sentencing discretion as

211. The Court's seminal plea-bargaining decisions began with *Brady v. United States*, 397 U.S. 742 (1970). *See* McMann v. Richardson, 397 U.S. 759 (1970) (affirming validity of guilty pleas by three defendants to lesser charges than they would have faced at trial); Boykin v. Alabama, 395 U.S. 238, 242 (1969) (establishing the voluntariness standard for guilty pleas); *see also* Santobello v. New York, 404 U.S. 257 (1971) (plea agreements require "fairness in securing agreement"; Court's first use of the term "plea bargain"); Mabry v. Johnson, 467 U.S. 504, 507–09 (1984) (limiting *Santobello's* "fairness" requirement).

212. *See* Bordenkircher v. Hayes, 434 U.S. 357, 363–64 (1978) (approving prosecutor's decision to add charge carrying life sentence after defendant declined a plea offer carrying a five-year sentence); *see also Mabry*, 467 U.S. at 507–09 (Constitution does not require prosecutor to abide by original plea bargain offer after defendant accepts it but before court accepts defendant's plea); United States v. Goodwin, 457 U.S. 368 (1982) (declining to create a presumption of constitutional vindictiveness in prosecutor's decision to felony charge after defendant declines to plead guilty to a misdemeanor). For comparison, a U.K. House of Lords decision recognized the possibility that a sufficiently large trial penalty could be unlawful. *See* McKinnon v United States [2008] UKHL 59 (appeal taken from Eng.) (considering extradition of suspect to the U.S. and describing federal prosecutors' discount for guilty plea of 50%–70% below a post-trial sentence as "very marked" but concluding the "discount would have to be very substantially more generous . . . before it constituted unlawful pressure").

213. For a more detailed account, see BROWN, *supra* note 93, at 91–111.

214. *See* Lucian E. Dervan, *Overcriminalization 2.0: The Symbiotic Relationship Between Plea Bargaining and Overcriminalization*, 7 J. L. ECON. & POL'Y 645 (2011).

legislatures adopted determinate sentencing guidelines and added more mandatory-minimum sentences for specific offenses, and (2) through statutes that gave prosecutors rather than judges exclusive control over whether mandatory sentence adjustments would apply.[215] Often, this shift in control was intended to allow prosecutors to reserve the most severe sanctions for the most culpable offenders, on the premise that they usually have better information than judges do before trial about the relevant facts for those distinctions.[216] Over time, however, prosecutors recognized that the power to dictate enhanced post-trial sentences through charging decisions gave them enormous leverage in convincing defendants to plead guilty.[217] Judicial opinions increasingly (and impotently) lament these tactics. As one federal district judge (and former federal prosecutor) candidly described it:

> To coerce guilty pleas, . . . prosecutors routinely threaten ultra-harsh, enhanced mandatory sentences that *no one*—not even the prosecutors themselves—thinks are appropriate. And to demonstrate to defendants generally that those threats are sincere, prosecutors insist on the imposition of the unjust punishments when the threatened defendants refuse to plead guilty.[218]

Because this practice is legal, it does not violate legal standards of coercion or involuntariness.[219] Describing plea bargaining as coercive is a normative criticism. It refers to "use of prosecutorial power to invoke . . . a mandatory sentencing provision that would result in a sentence that exceeds fair punishment . . . in order to procure a plea of guilty," because it makes "the risk of going to trial so great that

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215. *See, e.g.*, 21 U.S.C. § 851 (2012); United States v. Kupa, 976 F. Supp. 2d 417, 419 (E.D.N.Y. 2013) (describing enactment of § 851 in 1970). On state sentencing reforms in the 1970s and 1980s, *see* Kevin R. Reitz, *The Disassembly and Reassembly of U.S. Sentencing Practices*, *in* SENTENCING AND SANCTIONS IN WESTERN COUNTRIES 222, 225–26 (Michael Tonry & Richard S. Frase eds., 2001).

216. *Kupa*, 976 F. Supp. 2d at 419–20.

217. *See* H. Mitchell Caldwell, *Coercive Plea Bargaining: The Unrecognized Scourge of the Justice System*, 61 CATH. U. L. REV. 63, 72–74 (2011); Hon. Alex Kozinski, *Criminal Law 2.0*, 44 GEO. L.J. ANN. REV. CRIM. PROC. iii, xi–xii (2015).

218. *Kupa*, 976 F. Supp. 2d at 420 (Gleeson, J.); *see also* Wright, *supra* note 205, at 109 (concluding federal defendants plead guilty because of large trial penalties).

Kupa provides perhaps the best, most detailed description of how federal prosecutors' practice changed over time to use control over sentence-enhancement statutes has bargaining chips, and how that practice departs from congressional intent for statutes that shifted sentencing control to prosecutors. *See* 976 F. Supp. 2d at 419–22. But numerous federal courts have documented, and sometimes criticized, such bargaining practices. *See, e.g.*, Gilbert v. United States, 640 F.3d 1293, 1298 (11th Cir. 2011) ("[T]he non-application of [the prior felony information] obviously was part of [the] plea agreement."); United States v. Shaw, 426 F. App'x 810, 812 (11th Cir. 2011) (noting prosecutor informed the defendant that, "if [he] went forward with the suppression hearing, [the prosecutor] would file the § 851 notice seeking the mandatory-minimum life sentence"); United States v. Espinal, 634 F.3d 655, 659 (2d Cir. 2011) (noting the government advised the defendant that "if he did not plead guilty by September 15, it would file a prior felony information," which would increase the minimum sentence from ten to twenty years); United States v. Young, 960 F. Supp. 2d 881, 889 (N.D. Iowa 2013) (noting prosecutors' use of sentencing enhancements are "whimsical and arbitrary").

219. United States v. Mezzanatto, 513 U.S. 196, 210 (1995); *see also* Boykin v. Alabama, 395 U.S. 238, 242 (1969) (voluntariness standard for guilty pleas).

rational defendants" will "voluntarily plead guilty."[220]

These plea bargaining practices, and the legal context in which they have thrived, undermine the standard account of why parties reach settlement agreements. They also undermine the legitimacy, and to some extent confidence in the accuracy, of plea agreements. In the standard account, complicating details aside, a defendant accepts a plea bargain when its terms promise a better outcome than that which would follow a trial conviction, discounted by the probability of conviction at trial.[221] To make that choice, defendants must know that the government's evidence is strong enough—and the law clear enough—to make conviction at trial highly likely.[222] Given that prosecutors screen out most of the weak cases,[223] that should describe a large share of cases. An analogous point is true in civil litigation, given that litigation costs discourage plaintiffs from filing especially weak cases, and dismissal of complaints eliminate some weak claims that are filed.[224] When defendants can recognize that prosecutors' evidence is somewhat weaker, prosecutors can offer more generous plea-bargain terms to offset the defendant's better odds at trial.[225]

If broad discovery facilitates settlements, then limits on defendants' pretrial access to government evidence should impede this process because defendants

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220. *Kupa*, 976 F. Supp. 2d at 420 n.9. The same is true of the term "trial penalty." *See also* Gerard E. Lynch, *Screening Versus Plea Bargaining: Exactly What Are We Trading Off?*, 55 STAN. L. REV. 1399, 1401 (2003) ("In a system where ninety percent or more of cases end in a negotiated disposition, it is unclear why the 'discounted' punishment . . . should not rather be considered the norm. Where . . . almost everyone buys the item at a 'discounted' price, no one really gets a 'bargain,' and the product's real price is what is actually charged in the marketplace.").

221. For classic versions of this account (including complicating details), see Frank H. Easterbrook, *Criminal Procedure as a Market System*, 12 J. LEGAL STUD. 289, 311–17, app. 331–32 (1983); Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 YALE L.J. 1909, 1937–40, 1961 (1992). One complication can be a defendant's unusually high-risk aversion, which leads to accepting a less favorable bargain than the calculus suggests (or less favorable than a defendant with average risk aversion would). *See infra* note 228 and accompanying discussion. High risk aversion might arise from something other than a distinctive personality disposition. It might be circumstance-specific. That is the concern in "wired" or "linked" plea bargains, in which one defendant's plea bargain is contingent on another defendant also pleading guilty or providing other cooperation. A defendant might be highly averse to declining the plea offer when it triggers bad consequences for a spouse or other family member. For examples, see United States v. Pollard, 959 F.2d 1011, 1021–22 (D.C. Cir. 1992) (rejecting defendant's challenge that his guilty plea was coerced because prosecutor's made leniency for his wife contingent on his plea and affirming "plea wiring does not violate the Constitution"); People v Fiumefreddo, 626 N.E.2d 646, 651–52 (N.Y. 1993) (affirming linked pleas between father and daughter).

222. Other considerations can prompt defendants to plead guilty as well, particularly to misdemeanor charges, such as the burdens of pretrial detention. *See* Bowers, *supra* note 169, at 1705–09.

223. Screening out weak or unfounded charges seems to be less rigorous for misdemeanors in some places. *See id.* at 1703–04; Kohler-Hausmann, *supra* note 186, at 643–70.

224. Recent U.S. Supreme Court decisions have made civil complaints easier to dismiss if they lack sufficient factual support. *See* Ashcroft v. Iqbal, 556 U.S. 662 (2009) (interpreting Federal Rule of Civil Procedure 8(a) to require complaints have greater factual support to survive pre-discovery dismissal under Rule 12(b)); Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007) (same for antitrust cases).

225. *See* Easterbrook, *supra* note 221, at 311–17; Scott & Stuntz, *supra* note 221, at 1937–40.

cannot accurately assess the odds of trial outcomes.[226] But a countervailing consideration is the prosecutor's ability to manipulate the difference between charges and sentences for a plea agreement and those for trial, "vastly increasing the risk of a life-shattering sentence in case of conviction."[227] By leveraging defendants' aversion to that risk, increasing the difference between plea and trial outcomes increases the incentive for defendants to plead guilty, even when they lack knowledge of the evidence against them, or when they have a clear sense that their odds at trial are favorable.[228]

Courts, lawyers, scholars, and government commissions have long recognized that presenting a defendant with an option for a guilty plea in exchange for a lesser sentence than he would receive after trial creates the prospect that innocent defendants could choose, quite *rationally*, to plead guilty.[229] Whatever the scale of that risk, increasing inducements to plead surely have their intended effect, which is to convince *more* defendants to plead guilty.[230] Increasing the substance and frequency of those inducements is the most likely mechanism—rather than broad discovery—by which criminal adjudication has achieved the bulk of its gains in guilty plea rates over the past three decades, with the result that criminal trials are as rare as civil trials despite criminal procedure's thin discovery regime.

For that conclusion to be convincing, draconian trial penalties need not characterize most cases. Regardless of the formal discovery rules, most civil parties settle, and most criminal defendants plead guilty. A majority of defendants do so in exchange for only a modest advantage, or even none at all.[231] Hard-

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226. *Cf.* United States v. Ruiz, 536 U.S. 622, 629–33 (2002) (holding prosecutors can condition plea bargain offers on defendant's waiver of constitutional rights to evidence disclosure).

227. Kozinski, *supra* note 217, at xi.

228. *See* Easterbrook, *supra* note 221, at 313–15; Scott & Stuntz, *supra* note 221, at 1948–49 (arguing "a risk averse innocent defendant may be *more* likely to take the deal than a guilty one because for the innocent, bearing the risk of the higher post-trial sentence is more costly"); Stephen J. Schulhofer, *Criminal Justice Discretion as a Regulatory System*, 17 J. LEGAL STUD. 43, 80 n.97 (1988) (arguing risk aversion is a reason to abolish plea bargaining).

229. *See* ANDREW ASHWORTH, SENTENCING AND CRIMINAL JUSTICE 179–80 (5th ed. 2010); GARRETT, *supra* note 167, at 150–53 (describing confirmed cases of factually innocent defendants who pled guilty); TASK FORCE REPORT, *supra* note 199, at 10 (observing, in 1967, "[t]here is always the danger that a defendant who would be found not guilty if he insisted on his right to trial will be induced to plead guilty"); Kozinski, *supra* note 217, at xi–xii; Jed. S. Rakoff, *Why Innocent People Plead Guilty*, N.Y. REV. BOOKS (Nov. 20, 2014), https://www.nybooks.com/articles/2014/11/20/why-innocent-people-plead-guilty/?printpage=true; *accord* SENTENCING ADVISORY COUNCIL, SENTENCE INDICATION AND SPECIFIED SENTENCE DISCOUNTS: FINAL REPORT AND RECOMMENDATIONS 25 (2007), https://www.sentencingcouncil.vic.gov.au/sites/default/files/publication-documents/Sentence%20Indication%20and%20Specified%20Sentence%20Discounts%20Final%20Report.pdf (reporting concerns in Australia about guilty plea terms that could induce innocent defendants to plead guilty).

230. United States v. Kupa, 976 F. Supp. 2d 417, 443–47 (E.D.N.Y. 2013) (citing several examples of prosecutors' admissions on this point).

231. *See* Alschuler, *supra* note 20, at 943–44, 1024–43 (describing studies in El Paso, Philadelphia, and Pittsburgh that found low guilty plea rates because bargaining was banned or judges gave no discounts for pleas); Wright & Miller, *supra* note 172, at 60–66, 68 (estimating 65% of prosecutions in New Orleans were resolved through guilty pleas to charged offenses without plea bargaining and describing New Orleans prosecutor's

bargaining tactics with severe trial penalties—on the scale of *Bordenkircher* (five years versus life) or the federal bargaining practices that judges increasingly criticize—occur routinely, although almost certainly in only a small percentage of cases.[232] We might infer, somewhat speculatively, they are necessary to induce pleas only in 10% to 20% of prosecutions. That is the difference between the historical baseline rate of guilty pleas, roughly 75% to 85%, and the 95% to 97% rate in federal courts and many states in the last twenty-five years.[233]

While this account does not imply that plea-bargain terms in most cases have grown more severe, it does imply that sharper, more coercive bargaining tactics have become somewhat more common in recent decades. No studies directly confirm that change, but a number of developments strongly support the inference.

One is the adoption of determinate sentencing laws in many jurisdictions, after nearly a century in which judges had wide discretion to define sentences. In federal courts, the federal sentencing guidelines took effect (originally as mandatory guidelines) in 1987.[234] Almost simultaneously, Congress added new mandatory minimum sentences to a number of significant criminal offenses.[235] About twenty states also adopted their own sentencing guidelines over roughly a decade, beginning with Minnesota in 1980.[236] Many also abolished parole in the same

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no-plea-bargaining policy); *cf.* Uhlman & Walker, *supra* note 207 (finding, 1968–1972 study, that Philadelphia judges gave no sentence discount for guilty pleas); Schulhofer, *supra* note 20, at 1061–62 (reporting, in a study of Philadelphia courts, some defendants pled guilty without promise of a more lenient outcome). Schulhofer's study documents one of the few jurisdictions—Philadelphia—in which a majority of criminal cases were resolved by trial rather than plea, primarily because the local justice system encouraged short bench trials over guilty pleas or jury trials. *Id.* at 1086–87, 1096.

232. Direct data on this point is thin. On a rigorous study of federal trial penalties that notes similar studies, see HUMAN RIGHTS WATCH, *supra* note 30 (documenting numerous federal guilty pleas entered in response to the prospect of dramatically higher post-trial sentences); Kim, *supra* note 197 (analysis concluding defendants in federal courts receive sentences 64% longer after trial compared to sentences following from guilty pleas, and criticizing methodology of studies that find smaller "trial penalties"); 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, 968–70, 992 (2005) (analyzing sentencing in five states from 1997–2004 and finding trial penalties vary from 13% to 461% in Washington state).

233. MOTIVANS, *supra* note 105, at 17 tbl. 4.2 (97.4% of convictions by guilty pleas from October 2011 to September 2012); *Sourcebook of Criminal Justice Statistics Online Table 5.22.2010: Criminal Defendants Disposed of in U.S. District Courts*, ALB., https://www.albany.edu/sourcebook/pdf/t5222010.pdf (last visited Feb. 12, 2018) (containing data on federal criminal cases from 1945 to 2010 and showing 85% to 88% of convictions were achieved by guilty pleas in 1945–1990, which gradual rose to 97.5% in 2010). State court data is scarcer and varied. In 2001, data from 22 states showed 3% of criminal cases were resolved by trial, the remainder by guilty pleas, dismissals or other disposition. Trial rates varied from 12.8% in Hawaii to 0.9% in Vermont. *See* EXAMINING THE WORK OF STATE COURTS, *supra* note 210.

234. *See* United States v. Booker, 543 U.S. 220 (2005) (holding that mandatory federal sentencing guidelines violate the Sixth Amendment and effectively transforming the guidelines into advisory rules).

235. *See* Sentencing Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1987 (codified in scattered sections of 18 U.S.C. and 28 U.S.C.); *see also* Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207 (creating mandatory minimums for federal drug offenses); *This Issue in Brief*, FED. PROB., Dec. 1991, at 1 ("Years from now, 1987—the year sentencing guidelines went into effect—will be remembered as a milestone in Federal criminal justice.").

236. Reitz, *supra* note 215, at 225–26.

period, and virtually all added mandatory sentencing laws.[237] Some of these tools—especially mandatory sentences—had long existed. The plea bargain in *Bordenkircher* occurred in 1973, and the mandatory sentence provision in 18 U.S.C. § 851—amended in 1970 to give prosecutors control over it—dated to the 1950s.[238] By the late 1980s, prosecutors had many more tools with which to set more severe post-trial penalties, control the bases of sentencing leniency, and make the consequences of the choice between a plea deal and trial more certain, because the uncertainty by judicial sentencing discretion (and parole) was greatly reduced.[239]

Second, within a few years, many prosecutors (especially in the federal system) became much more comfortable with—and increasingly explicit about—using these charging and sentencing provisions as explicit leverage to induce guilty pleas. Until at least the 1970s, mainstream views offered by government commissions were still critical of bargaining and even aspired to its abolition.[240] Reasons for this shift in practice norms are hard to pinpoint, but the shift itself is well documented in court decisions, prosecution policies, and attorney correspondence.[241] Further evidence comes from increased judicial criticism of prosecution tactics that began to appear in the 2000s; some of the sharpest came from judges

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237. *See generally* NEAL B. KAUDER & BRIAN J. OSTROM, NAT'L CTR. FOR STATE COURTS, STATE SENTENCING GUIDELINES: PROFILES AND CONTINUUM (2008), https://www.ncsc.org//media/microsites/files/csi/state_sentencing_guidelines.ashx (overview of all state sentencing guidelines); Reitz, *supra* note 215, at 224–29 (changes in parole and mandatory sentences). For a brief summary of key state and federal mandatory sentencing laws since 1973, see *Mandatory Sentences: How We Got Here*, VERA INST., https://storage.googleapis.com/vera-web-assets/downloads/Publications/playbook-for-change-states-reconsider-mandatory-sentences/legacy_downloads/mandatory-sentences-policy-timeline.pdf (last visited Feb. 12, 2018).

238. Hayes v. Cowan, 547 F.2d 42, 43 (6th Cir. 1976), *rev'd sub nom.* Bordenkircher v. Hayes, 434 U.S. 357 (1978) (noting Hayes as indicted on January 8, 1973, for forgery of a $88.30 check); United States v. Kupa, 976 F. Supp. 2d 417, 421–27 (E.D.N.Y. 2013) (describing history of § 851 and predecessor statutes).

239. *See, e.g.*, Wright, *supra* note 205, at 84–86, 116–17, 147–48 (finding federal districts in which prosecutors most often utilized authority to give deep sentence discounts for "acceptance of responsibility" and "substantial assistance" under sentencing guidelines had higher rates of guilty pleas and lower rates of acquittals, and concluding this practice probably led innocent defendants to plead guilty).

240. *See* NAT'L ADVISORY COMM'N ON CRIMINAL JUSTICE STANDARDS & GOALS, *supra* note 28 ("As soon as possible, but in no event later than 1978, negotiations between prosecutors and defendants . . . concerning concessions to be made in return for guilty pleas should be prohibited."); TASK FORCE REPORT, *supra* note 199, at 7–13 (plea bargain criticisms); *see also* Hon. Ralph Adam Fine, *Plea Bargaining: An Unnecessary Evil*, 70 MARQ. L. REV. 615, 616 (1987) (state court trial judge urging prohibition on plea bargains, and noting local jurisdictions that banned bargaining). Scholarly criticism of plea bargaining has continued well beyond the 1970s.

241. For example, former federal prosecutor Judge Gleeson of the United States District Court for the Eastern District of New York discussed and criticized the change in prosecutorial tactics. *See Kupa*, 976 F. Supp. 2d at 437–50 (citing judicial opinions, prosecutor correspondence, and court transcripts confirming this practice); United States v. Dossie, 851 F. Supp. 2d 478, 484–88 (E.D.N.Y. 2012) (citing prosecutor statements in transcripts and prosecution policies); *see also* U.S. SENTENCING COMM'N, SOURCEBOOK OF FEDERAL SENTENCING STATISTICS tbl.30 (2010) (reporting that sentence discounts in exchange for cooperation with prosecutors are often 50% to 100% below the minimum guideline range).

who were formerly prosecutors themselves.[242] Scholarly criticism at the same time (some also from former prosecutors) made many of the same points.[243]

Finally, a comparison of American and English plea bargaining reinforces the point. Across common law jurisdictions worldwide, guilty pleas account for the vast majority of criminal convictions.[244] England and Wales are no exception. In a recent year, guilty pleas produced 91% of all convictions in Crown Courts (which handle the equivalent of serious felonies in the U.S.); the rate for felonies in U.S. federal courts the same year was 96.7%.[245] The English rate is only modestly lower and the two systems differ in various ways, but one distinction is notable: the sentencing laws for England and Wales restrict the discount for guilty pleas to no more than 30% below the sentence that would follow a trial conviction.[246] Moreover, prosecutors' manipulation of charges to induce guilty pleas is strictly limited by the CODE FOR CROWN PROSECUTORS, the provisions of which (unlike U.S. prosecution policies) are legally enforceable.[247] Other differences between the two

242. For a collection of federal decisions criticizing prosecution plea bargaining practices, see *Kupa*, 976 F. Supp. 2d at 437–42 (calling prosecutors' "[a]buse of [p]ower . . . [w]idespread and [l]ongstanding" and asserting "[j]udicial frustration with . . . [such abuse] is as widespread and as longstanding as the practice itself"); *see also* United States v. Young, 960 F. Supp. 2d 881, 889 (N.D. Iowa 2013) (criticizing prosecutors' use of sentence enhancements as "whimsical and arbitrary"); United States v. Angelos, 345 F. Supp. 2d 1227, 1239–40, 1261 (D. Utah 2004) (Cassell, J., former federal prosecutor) (criticizing prosecutors' charging defendant with three counts under 18 U.S.C. § 924(c), which required the court to impose a 55-year sentence on a 24-year-old defendant for carrying a gun during marijuana deals, and calling for executive clemency).

243. Frank O. Bowman, III, *Mr. Madison Meets a Time Machine: The Political Science of Federal Sentencing Reform*, 58 STAN. L. REV. 235, 252 (2005) (Bowman, a former federal prosecutor, observing that use of severe sentences as leverage is so widely accepted that "[t]o an increasing degree, the Department [of Justice] has come to justify its requests for tougher sentencing rules, not on the ground that offenders actually deserve the higher sentences, but simply because the threat of the higher sentence provides a greater inducement for defendant cooperation"); Paul G. Cassell, *Too Severe?: A Defense of the Federal Sentencing Guidelines (and a Critique of Federal Mandatory Minimums)*, 56 STAN. L. REV. 1017 (2004); Erik Luna & Paul G. Cassell, *Mandatory Minimalism*, 32 CARDOZO L. REV. 1, 8–28 (2010) (describing recent history of mandatory minimum sentences).

244. *See* Freiberg, *supra* note 19, at 205–22 (80% guilty plea rate in Australian Magistrates' Courts); WORLD PLEA BARGAINING, *supra* note 19 (collecting reports on plea bargaining or equivalent practices in many countries including Scotland).

245. *See* CROWN PROSECUTION SERV., *supra* note 19. For federal data from October 2008 to September 2009, see MOTIVANS, *supra* note 122, at 18–19 tbl. 4.2. For state court data reporting plea rates close to the federal rate, see EXAMINING WORK OF STATE COURTS, *supra* note 210; MIZE, *supra* note 210.

246. On English sentencing discounts, see Criminal Justice Act 2003, c. 44 §§ 144, 172 (Eng.); SENTENCING GUIDELINES COUNCIL, REDUCTION IN SENTENCE FOR A GUILTY PLEA: DEFINITIVE GUIDELINE (rev. 2007); ANDREW ASHWORTH & MIKE REDMAYNE, THE CRIMINAL PROCESS 220–22, 291–314 (4th ed. 2010) (describing limits on sentencing discounts for guilty pleas and on prosecutorial charging including judicial review); BROWN, *supra* note 93, at 25–41 (comparing English and U.S. law and practice); Julian V. Roberts & Ben Bradford, *Sentence Reductions for a Guilty Plea in England and Wales: Exploring New Empirical Trends*, 12 J. EMPIRICAL LEGAL STUD. 187, 196–208 (2015) (finding sentence discounts for guilty pleas in English courts to be more modest than earlier studies and that judges generally comply with sentencing guidelines for discounts).

247. On charging, see CROWN PROSECUTION SERV., CODE FOR CROWN PROSECUTORS § 6.3 (2013) ("Prosecutors should never go ahead with more charges than are necessary just to encourage a defendant to plead guilty to a few."); *see also id.* §§ 4.4–.9 & 5.9 (requirement that charges have a "realistic prospect" of conviction); Nick Vamos, *Please Don't Call It "Plea-Bargaining"*, 2009 CRIM. L. REV. 617, 622 (stating the CPS Code's "strict, enforceable" rules on charging "forbid[] a prosecutor from using . . . [the charging] decision as a bargaining

systems might complicate the comparison. But this seems also to suggest that the hard-bargaining tactics employed in U.S. courts are critical to driving up criminal guilty plea rates several percentage points. In doing so, they compensate for the absence of broad discovery practice as a force in reducing the criminal trial rate to the frequency of civil trials.

In sum, there are strong indications that coercive plea-bargaining practices compensate for the limitations of criminal discovery practices as the mechanism by which criminal litigation is able to match civil litigation's extremely low rates of trial. But bargaining may do more than substitute for discovery; it may also marginally displace it. Even if contemporary criminal investigation is able to generate strong evidence of crimes without trials, prosecutors need not reserve hard-bargaining tactics only for the small portion of cases in which broad disclosure would lead to negotiated settlements. The mere availability of hard bargaining as an alternative to evidence disclosure can tempt prosecutors to rely on that tactic—rather than disclosure and further evidence-gathering—as the path to settlement. The downsides of broad disclosure, which prosecutors often invoke, provide reasons to rely on the hard-bargaining option. Disclosure may increase costs and inconvenience in some cases.[248] It sometimes causes witnesses distress. In a small portion of criminal cases (but a larger share of federal ones), disclosing identities can endanger witnesses, reveal the identity of undercover informants, and compromise the efficacy of ongoing surveillance.[249] Jurisdictions with broad discovery have safeguards to accommodate these concerns, but the greater risk might be simply the temptation of substituting harsh terms for disclosure as a plea-inducing device. When prosecutors are confident in their own determination that their evidence proves guilt, some will be less willing to incur the inefficiency of broad disclosure in order to ensure adversarial evidence assessments on route to a guilty plea. That very calculus lies behind federal "fast track" plea bargain policies approved in *United States v. Ruiz*, as well as the Court's reasons for approving it.[250]

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tool"). English prosecutors also have broader pretrial disclosure duties than do U.S. federal prosecutors. *See* Criminal Justice Act 2003, §§ 32–40; Criminal Procedure and Investigations Act 1996, c.25 §§ 1–21 (Eng.); BRANDO MATTEO FIORI, DISCLOSURE OF INFORMATION IN CRIMINAL PROCEEDINGS: A COMPARATIVE ANALYSIS OF NATIONAL AND INTERNATIONAL CRIMINAL PROCEDURALSYSTEMS AND HUMAN RIGHTS LAW 19–39 (2015) (overview of English discovery law).

248. United States v. Ruiz, 536 U.S. 622, 633 (2002) (speculating the "added burden" of mandating government disclosures "well in advance of trial . . . can be serious"). *But see* R. v. Stinchcombe [1991] 3 S.C.R. 326 (Can.) (finding "compelling evidence that much time would be saved and therefore delays reduced" by mandatory pretrial disclosure).

249. *Ruiz*, 536 U.S. at 632; Doucette, *supra* note 198, at 425, 429; John F. Yetter, *Discovery Depositions in Florida Criminal Proceedings: Should They Survive?*, 16 FLA. ST. U. L. REV. 675, 684 (1988) (noting prosecutor, police, and victim-advocate opposition to criminal depositions).

250. 536 U.S. at 632.

CONCLUSION

When parties can uncover and confront all relevant evidence without trial, trials are rarely necessary. Broad discovery rules provide an alternative to trial for those evidence-gathering and evidence-scrutinizing functions, so civil procedure's post-1938 discovery rules provide the best explanation for the demise of civil trials. But the same explanation does not explain the equivalent decline of criminal trials. Law enforcement's evidence-gathering authority, supplemented by technological advances and adjustments in crime definitions, largely account for how criminal process is able to generate evidence without using the trial as an instrument to do so. But the decision of many states to follow the federal system in retaining minimal discovery rules leaves criminal litigation's pretrial evidentiary process asymmetrical in both its investigative and adversarial-evaluation aspects. The availability and expansion of coercive plea bargaining tactics has evolved into a compensatory mechanism for the absence of broad, reciprocal discovery—an alternative means for increasing negotiated, non-trial dispositions. Yet it achieves this without assuring the opportunity for pretrial adversarial engagement over evidence that civil litigation replicates in the pretrial stage. And it does this through coercive pressure that undermines the prospect of accurate judgments and sentences proportionate to wrongdoing.

For some portion of the criminal docket at least, there are legitimate reasons for not transplanting civil discovery practices into criminal procedure. Civil discovery can be costly and time-consuming, and disclosure can occasionally endanger some government witnesses. But broad discovery practices in a few U.S. states and in other nations suggest those concerns can be accommodated. Likely a larger reason for the predominant forms of criminal discovery rules is that the federal rules and constitutional criminal procedure both still assume adjudication is still a trial process. The federal rules do not require pretrial disclosure of witness names and statements (and much less) on the assumption that defendants will confront those witnesses at trial. Prosecutors' constitutional duty to disclose exculpatory evidence is a component of the right to a fair trial, so disclosure is not required before trial.[251] Disclosure rules have not adjusted to the contemporary reality that trials are rare. As a result, the contemporary criminal process has had to rely on the coercive forms of plea bargaining to achieve its high guilty-plea rates and nearly match civil litigation's success at marginalizing the trial.

251. *Id.* at 631–33.