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VIA FIRST CLASS MAIL

The Honorable Donald W. Molloy
Chair, Advisory Committee on Criminal Rules
United States District Court
Russell E. Smith Federal Building
201 East Broadway Street, Room 360
Missoula, MT 59802

Re: Proposed Amendment to Federal Criminal Rule 12(b)(3)(B)(v)

Dear Judge Molloy:

I am an attorney in private practice in Washington, D.C., and am writing solely on my own behalf to propose an alteration to Federal Rule of Criminal Procedure 12(b)(3)(B)(v)—governing dismissal of an indictment for failure to state an offense—to clarify that the standard for dismissal of a criminal indictment is meant to be consistent with the standard for dismissal of a civil complaint under Federal Rule of Civil Procedure 12(b)(6). In support of this suggestion, I have enclosed a short law review article that provides a detailed analysis of the criminal and civil rules for dismissal, as well as the seemingly mistaken differential in how the two rules are construed. For your convenience, I have included five bound reprints, as well as one copy on letter paper.

The current Criminal Rule 12(b)(3)(B)(v) is phrased in language almost identical to the language in Civil Rule 12(b)(6). The former provides for dismissal of an indictment for “failure to state an offense,” while the latter provides for dismissal of a complaint for “failure to state a claim upon which relief can be granted.” But despite the textual similarity of these rules, courts have adopted wildly different constructions of them. In the criminal context, courts virtually never dismiss indictments—no matter how legally unsound or adventurous the Government’s legal theory—while courts routinely dismiss complaints that stretch the law beyond its limits. As the Department of Justice’s Criminal Resource Manual explains, under current law “indictments that, when read in their entirety, inform the defendant of all elements of the offense

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are generally sufficient, even if lacking the factual circumstances of the crime charged.”¹ The standard in the civil context is much higher, with courts requiring dismissal of any complaint that “does not make out a cognizable legal theory or does not allege sufficient facts to support a cognizable legal theory.”²

As my enclosed article explains, this unexplained distinction has broad consequences for the soundness and fairness of the criminal justice system. In the civil context, complex legal issues are generally resolved through motions to dismiss and appellate opinions reviewing district court orders granting the same. In the criminal arena, by contrast, virtually all litigation over the legal soundness of prosecutorial theories occurs after a lengthy, expensive trial that has consumed immense judicial resources—a point at which, as Judge Kozinski has explained, “the judicial instinct” is “to preserve the jury’s verdict.”³ That puts pressure on courts to endorse creative theories of criminality that would likely meet greater skepticism if considered in the context of pleadings-based dismissals before such a tremendous investment of time and energy. And that, in turn, contributes to the increasingly serious problem of “overcriminalization and excessive punishment in the U.S. Code.”⁴

I therefore strongly encourage the Committee to consider altering Criminal Rule 12(b)(3)(B)(v) to make clear that it holds criminal indictments to the same legal standard for dismissal to which Civil Rule 12(b)(6) currently holds civil complaints. This change could be accomplished through a textual alteration to Criminal Rule 12(b)(3)(B)(v) to make it mirror its civil counterpart even more closely—such as by expanding the phrase “failure to state an offense” to say “failure to state an offense upon which a conviction can be obtained.” Or it could be done by simply publishing a Committee Note to the current Criminal Rule which explains that the Criminal Rule’s text intentionally mirrors its Civil Rule analogue, thus clarifying that the Criminal Rule imposes the same pleading requirements on indictments that the Civil Rule imposes on complaints. For the reasons I give in the attached article, I believe such an amendment would result in a more fair, just, and lawful criminal justice system.

Please let me know if you would like to discuss my proposal further, or if there is any other information I can provide to be useful to the Committee. I sincerely appreciate your consideration of this suggestion.

¹ Criminal Resource Manual § 221, available at <http://goo.gl/4KBxey>.

² *Chubb Custom Ins. Co. v. Space Sys./Loral, Inc.*, 710 F.3d 946, 956 (9th Cir. 2013).

³ Panel on Evidence Disclosure in Criminal Cases, National Association of Criminal Defense Lawyers (Nov. 17, 2014) (written transcript at 42:54), available at <http://goo.gl/xorkO0>.

⁴ *Yates v. United States*, 135 S. Ct. 1074, 1100 (2015) (Kagan, J. dissenting).

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Very truly yours,



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WHY DON'T COURTS DISMISS INDICTMENTS?

A SIMPLE SUGGESTION FOR MAKING
FEDERAL CRIMINAL LAW A LITTLE LESS LAWLESS

James M. Burnham

MANY LAWYERS ARE FAMILIAR with the problem of overbroad, vague federal criminal laws that ensnare unwary defendants and perplex the lawyers who defend them. It is a recurring theme in academic literature and it featured prominently in Justice Kagan's recent dissent in *Yates v. United States*, where she described "the real issue" in the case as being "overcriminalization and excessive punishment in the U.S. Code."¹ Practitioners of all ideological stripes recognize the problem, with the National Association of Criminal Defense Lawyers and the Heritage Foundation decrying it with equal urgency.² Scholars have

James M. Burnham is an associate in the Washington, DC office of Jones Day. He speaks here on behalf of nobody but himself.

¹ *Yates v. United States*, 135 S. Ct. 1074, 1100 (2015) (Kagan, J. dissenting); see also, e.g., Paul Larkin, *Regulation, Prohibition, and Overcriminalization: The Proper and Improper Uses of the Criminal Law*, 42 Hofstra L. Rev. 745 (2014); Glenn Reynolds, *Ham Sandwich Nation: Due Process When Everything is a Crime*, 113 Colum. L. Rev. Sidebar 102 (July 8, 2013).

² See Criminal Defense Issues, *Overcriminalization*, National Association of Criminal

proposed numerous solutions, mostly variations on Professor William Stuntz's observation that the "last, and probably best, solution is to increase judicial power over criminal law."³ Professor Stuntz and many who agree with him often jump directly to the Constitution as the solution to this problem, specifically the Due Process Clause and an emphasis on fair notice as a way to narrow vaguely worded statutes.

That is a good idea, but it overlooks a tool for combating overcriminalization that is, perhaps, simpler and more readily available than the heavy artillery of constitutional law – making it easier for criminal defendants to secure a legal ruling before trial on whether their alleged conduct actually constitutes a federal crime. Implementing this basic reform would require nothing more than applying the Federal Rules of Criminal Procedure, which already contain provisions for dismissing indictments that are materially identical to the familiar 12(b)(6) standard and the rules for dismissing civil complaints. Yet the same federal judges who routinely dismiss complaints for failure to state a claim virtually never dismiss indictments for failure to state an offense. The judiciary's collective failure to apply the dismissal standard in criminal proceedings that is a staple of civil practice plays a central role in the ever-expanding, vague nature of federal criminal law because it largely eliminates the possibility of purely legal judicial opinions construing criminal statutes in the context of a discrete set of assumed facts, and because it leaves appellate courts to articulate the boundaries of criminal law in post-trial appeals where rejecting the government's legal theory means overturning a jury verdict and erasing weeks or months of judicial effort.

Courts should eliminate this anomalous difference between criminal and civil procedure. There is no good reason why federal prosecutors cannot abide by the same pleading standards as civil

Defense Lawyers (criticizing overcriminalization and gathering anti-overcriminalization scholarship), available at www.nacdl.org/overcrim/ (last checked June 29, 2015); *Overcriminalization*, The Heritage Foundation (same), available at www.heritage.org/issues/legal/overcriminalization (last checked June 29, 2015).

³ William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 Mich. L. Rev. 505, 508 (2001).

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plaintiffs. That is what the rules already provide. And holding prosecutors to that reasonable standard would go a long way toward making federal criminal law a little less lawless.

I.

Unlike civil cases, which generally involve substantial motions to dismiss – and, should those fail, motions for summary judgment – the typical criminal prosecution does not prompt legal rulings on the scope of the underlying criminal law until the trial is basically over. Most federal criminal cases begin with a grand jury returning an indictment at the behest of a federal prosecutor. Grand juries operate without the participation of defense counsel and without any meaningful judicial supervision. Their job is to assess facts, not law. And because prosecutors instruct grand juries on the law, returning an indictment has nothing to do with the legal soundness of any given prosecutorial theory. There is thus no independent oversight of the government's legal theory at the first stage in the case.

The criminal rules permit a defendant to move to dismiss an indictment for “failure to state an offense,”⁴ but as I'll explain shortly, the courts have gutted this rule and district courts deny these motions as a matter of course. Nor does the criminal law contain any mechanism akin to summary judgment. A defendant thus cannot meaningfully challenge the government's legal theory until the close of the government's case at trial – when the defendant can move to dismiss the charges for insufficient evidence by arguing that the government has proven conduct which is not actually criminal. But the Double Jeopardy Clause bars the government from appealing a mid-trial dismissal for insufficient evidence,⁵ and district courts are un-

⁴ Fed. R. Crim. P. 12(b)(3)(B)(v).

⁵ See *United States v. Scott*, 437 U.S. 82, 97 (1978) (“Where the court, before the jury returns a verdict, enters a judgment of acquittal pursuant to Fed. Rule Crim. Proc. 29, appeal will be barred [] when ‘it is plain that the District Court . . . evaluated the Government's evidence and determined that it was legally insufficient to sustain a conviction.’” (quotation omitted)).

derstandably reluctant to render non-appealable legal rulings. So this, too, practically never happens. (Although even when it does, the defendant has already undergone months of motions practice and the bulk of an extraordinarily stressful criminal trial that has consumed immense governmental resources and, for defendants of means, likely depleted the defendant's bank account.)

At that point, the defendant presents his or her affirmative case, the government presents its rebuttal case, and it is time for the district court to instruct the jury. This is typically the first time the district court meaningfully engages with the government's legal theory and any limitations the law might impose. But here, even if the district court is skeptical of the government's legal theory, all the court does is craft instructions that attempt to accurately explain the law. The court then gives those instructions to the jury and hopes that the twelve jurors can figure it all out.

Should the jury convict, the defendant can once again request dismissal of the charges for insufficient evidence. Dismissals in this posture – while still exceedingly rare – are somewhat more common because the government can ask the Court of Appeals to reinstate the jury's verdict. But the standard for such a dismissal is high. The district court must conclude on the basis of an extensive trial transcript that no reasonable juror could have convicted the defendant beyond a reasonable doubt under a proper understanding of federal law.⁶ Complex trial records do not, of course, present legal issues with the same clarity and concision as criminal charging documents (or civil complaints).

Only after all this has happened, along with the criminal sentencing required for a final judgment, do appellate courts typically get a look at the underlying criminal statute and the government's theory about what that statute means. This is an extremely cumbersome posture in which to review pure legal questions. Rather than read a

⁶ *United States v. Gagliardi*, 506 F.3d 140, 149 (2d Cir. 2007) (“A defendant challenging the sufficiency of trial evidence bears a heavy burden, and the reviewing court must view the evidence presented in the light most favorable to the government and draw all reasonable inferences in the government's favor.” (quotations omitted)).

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single document collecting the allegations and then reach a legal ruling, the appellate court must consider the trial record as a whole and must find itself unable to cobble together enough evidence for any reasonable juror to find criminality.

II.

The lack of any effective mechanism to decide legal questions early in criminal prosecutions is a serious problem that plays a central role in the seemingly never-ending expansion of federal criminal law. It is, for one thing, one of the reasons criminal laws are so vague and ill-defined. When courts review motions to dismiss or motions for summary judgment, they are able to issue legal rulings on the basis of a discrete set of assumed or undisputed facts. By limiting the universe of facts, such motions make it relatively easy for appellate judges to feel confident that they understand the factual predicate for the legal rule they are adopting. They can thus focus entirely on articulating a clear and dispositive legal rule.

When appellate courts are reviewing a lengthy trial record, by contrast, it requires clearing away substantially more underbrush to divine the clear principle separating legality from criminality. The court must referee fights about what the evidence showed, who said what, and what inferences the evidence supports. Resolving these disputes about multi-thousand-page records is a daunting task. It is also a heavily factual task – rather than a legal one – which takes place against a standard of review in which the defendant “bears a heavy burden.”⁷ The combination of scouring a lengthy record to determine whether anything would permit a rational juror to find a crime and surmounting the demanding legal standard facing convicted defendants likely creates a general attitude in the judiciary that sufficiency challenges are far-fetched claims that a small amount of evidence and a plausible legal theory will invariably defeat. In other words, as Judge Kozinski has noted in a different context, “all of the momentum of the process is to uphold the conviction.”⁸

⁷ *United States v. Gagliardi*, 506 F.3d 140, 149 (2d Cir. 2007).

⁸ Panel on Evidence Disclosure in Criminal Cases, National Association of Criminal

When appellate judges review a motion to dismiss, by contrast, their energy is focused on the contested legal rule, with a *de novo* standard of review that is neutral between the parties. That posture likely leads appellate judges to view motion-to-dismiss appeals as more plausible challenges where either side could easily prevail.

This dynamic also puts pressure on appellate courts to endorse creative legal theories advanced by zealous prosecutors. Because district courts essentially never dismiss criminal cases on the pleadings, appellate courts are stuck reviewing dispositive legal questions after a lengthy, expensive judicial process culminating in a resource-intensive trial and sentencing. Unlike appeals from a dismissed complaint or a grant of summary judgment, reversing in a criminal case usually means overturning a jury verdict and nullifying a trial. Needless to say, judges in that position are strongly predisposed to affirm.⁹ And that gives appellate courts another reason to endorse whatever expansion of law the government successfully pressed in the court below, or to at least avoid vacating the conviction using an avoidance doctrine (like “harmless error”) that would not be available in the motion to dismiss context.

It also tempts appellate courts to hide behind an especially troubling form of what Judge Posner calls “deference to lower-level decision makers.”¹⁰ Because practically every criminal appeal follows a conviction, the government invariably urges the appellate court to

Defense Lawyers (Nov. 17, 2014) (written transcript at 42:54), available at www.c-span.org/video/?322781-1/discussion-fair-disclosure-criminal-trials.

⁹ To again quote Judge Kozinski:

You have then had an expensive trial, you spent judicial time, you have taken 12 or 14 people from the community depending on how large the jury panel is and kept them there for days and sometimes weeks on end, and they have come up with a judgment that this person is guilty. And all of the incentives we have in our system, all of the rules that we have before conviction that presumes innocence, gives rise to the defense, all those things are reversed. The inertia is the judicial instinct to preserve the jury’s verdict

Id.

¹⁰ Richard A. Posner, *Reflections on Judging*, at p. 86 (Harvard College Press 2013).

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respect the jury's unanimous verdict. Appellate courts sometimes accept the invitation, even when the defendant's objections are purely legal and plainly substantial.¹¹ That is disturbing for numerous reasons, including the fact that district courts are emphatic in telling jurors that they are not permitted to question the legal soundness of the judge's instructions or deviate from the law as the judge explains it.¹² Appellate courts that adopt this approach are thus effectively deferring to laypeople on legal judgments that those laypeople are not even permitted, let alone qualified, to make. In a very real sense, this dynamic permits the jury to pass the buck to the courts to decide the law (we didn't want to convict him but the law required it!), while the courts pass the buck back to the jury to decide guilt (we wouldn't have convicted him but the jury's verdict deserves respect!). The end result is an illegal and unjust outcome for which nobody claims responsibility.

Related to that temptation is the difficulty some appellate judges may have in blessing conduct that they find distasteful as being non-criminal. It is one thing to say that certain conduct is non-criminal when considering the question *ex ante* in the abstract context of assumed allegations. It is entirely different to make that judgment in the messy context of proven facts and a unanimous verdict. When reviewing a lengthy record documenting a criminal defendant's alleged misdeeds, it is surely more psychologically difficult to say that the proven, repugnant conduct is not criminal, however flawed the underlying legal theory.

¹¹ For example, in rejecting legal challenges to the government's conviction in the case of former Alabama Governor Don Siegelman, the Eleventh Circuit began by discussing "the 'sword and buckler' of a jury verdict" and by extolling "the virtue of our jury system" as being "that it most often gets it right," *United States v. Siegelman*, 640 F.3d 1159, 1164 (11th Cir. 2011) – a point that elides the legal question of precisely *what* the system is getting "right." It is no defense of the current regime to say that it excels at accurately convicting defendants of conduct that is not illegal.

¹² *United States v. Wunder*, 919 F.2d 34, 36 (6th Cir. 1990) ("The province of the court in a jury trial is to decide issues of law, instruct the jury on the law, and let the jury decide the facts.").

Finally, by leaving challenges to prosecutorial legal theories for the end of the case, the current system gives basically unreviewable power to federal prosecutors to subject targeted individuals to full-blown criminal trials. The Supreme Court has recognized the “potential expense” to civil defendants when legally flawed complaints are sustained,¹³ but the costs are astronomically higher in the criminal context. Individuals who are indicted on incorrect legal theories are innocent people. Dragging those innocent people through a lengthy and traumatic criminal trial imposes significant legal expenses, incalculable emotional hardship, and severe reputational injury, in addition to making substantial demands on the judiciary. In cases where the government has overreached on the law, these expenditures are unwarranted and wasteful. Courts ought to have a realistic mechanism for saying so at the outset.

III.

Given this system’s evident unfairness, it is perhaps unsurprising that it is not what the Federal Rules of Criminal Procedure actually provide. To the contrary, all signs indicate that the criminal rules for dismissing indictments were intended to be interpreted compatibly with the civil rules for dismissing complaints. The criminal rule governing indictments requires that indictments contain “a plain, concise, and definite written statement of the essential facts constituting the offense charged.”¹⁴ That language is very similar to the civil rule on complaints: “A pleading that states a claim for relief must contain . . . a short and plain statement of the claim showing that the pleader is entitled to relief.”¹⁵ The rules providing for dismissal of indictments and complaints are similarly synched, with the criminal rule providing that indictments can be dismissed for “failure to state an offense,”¹⁶ while the civil rule provides that complaints can be dismissed for “failure to state a claim upon which relief can

¹³ *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 559 (2007).

¹⁴ Fed. R. Crim. P. 7(c)(1).

¹⁵ Fed. R. Civ. P. 8(a)(2).

¹⁶ Fed. R. Crim. P. 12(b)(3)(B)(v).

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be granted.”¹⁷ Nothing in the advisory notes suggests that these criminal rules are supposed to be less potent than their civil counterparts.

Despite the textual and structural similarity between the two sets of rules, the courts have given them very different constructions. In the civil context, the Supreme Court has insisted on meaningful pleading standards that keep legally unsound civil litigation from wasting everyone's time. This is true on two fronts – testing whether a plaintiff's legal theory is sound and testing whether a plaintiff's factual allegations are plausible. As courts have explained, “[d]ismissal is proper when the complaint does not make out a cognizable legal theory or does not allege sufficient facts to support a cognizable legal theory.”¹⁸ Courts thus routinely dismiss complaints when the facts alleged – however troubling or sinister they sound – do not “contain either direct or inferential allegations respecting all the material elements to sustain recovery under some viable legal theory.”¹⁹ In other words, the allegations must add up to a cognizable cause of action. If they don't, the court dismisses the complaint.

And on the factual plausibility front, the Supreme Court has held that complaints must be dismissed if their factual allegations do not tell a plausible story of liability under recognized legal standards. Civil Rule 8 “demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation.”²⁰ A “pleading that offers labels and conclusions or a formulaic recitation of the elements of a cause of action will not do,” nor “does a complaint suffice if it tenders naked assertion[s] devoid of further factual enhancement.”²¹ Civil complaints must “contain sufficient factual matter” to plausibly permit “the reasonable inference that the defendant is liable for the misconduct alleged.”²² This standard requires district courts to read and digest the

¹⁷ Fed. R. Civ. P. 12(b)(6).

¹⁸ *Chubb Custom Ins. Co. v. Space Sys./Loral, Inc.*, 710 F.3d 946, 956 (9th Cir. 2013).

¹⁹ *League of United Latin Am. Citizens v. Bredesen*, 500 F.3d 523, 527 (6th Cir. 2007).

²⁰ *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

²¹ *Id.* (quotations omitted).

²² *Id.*

allegations in a complaint, unpack the complainant's assertions, and determine whether the plaintiff's story is plausible: "Where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged – but it has not show[n] – that the pleader is entitled to relief."²³

Criminal practice is very different. The lower courts have adopted an extremely low standard for sustaining an indictment, holding that "[a]n indictment is sufficient if it states each of the essential elements of the offense."²⁴ Indictments "need only provide some means of pinning down the specific conduct at issue," and "in determining whether an indictment provides sufficient information to enable the preparation of a defense, the presence or absence of any particular fact need not be dispositive of the issue."²⁵ The circuit and district courts have thus "consistently upheld indictments that do little more than [] track the language of the statute charged and state the time and place (in approximate terms) of the alleged crime."²⁶ Or as the Department of Justice's Criminal Resource Manual puts it, "indictments that, when read in their entirety, inform the defendant of all elements of the offense are generally sufficient, even if lacking the factual circumstances of the crime charged."²⁷

It is difficult to imagine a lower standard than merely tracking the language of the statute, noting the venue, and providing an approximate time period for the alleged offense. That standard means courts do not review or consider the legal adequacy of the factual allegations, *i.e.*, whether factual allegations of A, B, and C actually amount to a federal crime. It also means that courts do not consider the completeness or plausibility of the government's allegations, *i.e.*, whether factual allegations A, B, and C tell a plausible account that constitutes the charged crime. On both fronts, the bar is much

²³ *Id.* at 679.

²⁴ *United States v. Lockhart*, 382 F.3d 447 (4th Cir. 2004).

²⁵ *United States v. Fassnacht*, 332 F.3d 440, 445 (7th Cir. 2003).

²⁶ *United States v. Walsh*, 194 F.3d 37, 44 (2d Cir. 1999).

²⁷ Criminal Resource Manual § 221, available at www.justice.gov/usao/eousa/foia_reading_room/usam/title9/crm00221.htm.

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lower than in the civil arena. And consistent with these divergent standards, the lower courts virtually never dismiss criminal indictments for failure to state an offense, while they routinely dismiss civil complaints for failure to state a claim.

IV.

Fortunately, fixing this problem is not much harder than identifying it: Courts should simply begin interpreting the federal criminal rules in accordance with their text, and in harmony with their civil counterparts. Realigning the criminal rules in this direction accords with the few Supreme Court cases to address the issue. The leading Supreme Court decision on challenging indictments makes clear that indictments must include enough detail to factually state a criminal act. The Court explained that indictments must “fairly inform[] a defendant of the charge against which he must defend” and “must be accompanied with such a statement of the facts and circumstances as will inform the accused of the specific offence, coming under the general description, with which he is charged.”²⁸ Nothing in that decision precludes applying the 12(b)(6) standards to criminal indictments, either in testing the soundness of the government’s legal theory or in assessing the plausibility of its factual allegations.

A.

For the government’s legal theory, the Supreme Court’s leading decision requires the government to allege “a statement of the facts and circumstances.” The lower courts could and should construe that passage as imposing the familiar requirement that civil plaintiffs must meet. That is, the courts should require prosecutors to make “allegations respecting all the material elements to sustain recovery under some viable legal theory.”²⁹

There is no good reason for protecting civil defendants (for whom money is at stake) from defending against legally flawed claims, while leaving criminal defendants (for whom life and liberty is at

²⁸ *Hamling v. United States*, 418 U.S. 87, 117-18 (1974).

²⁹ *League of United Latin Am. Citizens v. Bredesen*, 500 F.3d 523, 527 (6th Cir. 2007).

stake) to fight it out before a jury despite a legally unsound prosecutorial theory. Most indictments will not involve novel applications of vague criminal statutes, such that this shift would not affect the bulk of indictments; there is not much gray about what constitutes bank robbery or drug possession. But for many areas of federal criminal law, the government has a long track record of pursuing aggressive, questionable legal theories that would present large targets for motions to dismiss.³⁰ Yet because such motions are essentially unavailable, criminal defendants are dragged through jury trials only to see their convictions eventually overturned for lack of a sound legal basis.

The government's recent misadventures with the limits of insider trading law provide an illustrative example. For instance, in one insider-trading prosecution, the district court denied the defendant's motion to dismiss the indictment, citing the low standard the government must meet.³¹ Yet in the very next breath, the court held that "the sufficiency of the Indictment is an issue separate and apart from whether the Court will charge" the disputed element of

³⁰ Examples abound, including: (1) the government's claim that an individual transmitted online threats by posting violent raps on his Facebook page regardless of whether he was trying to threaten anyone, *see Elonis v. United States*, Case No. 13-983, Slip op. at 7 (June 1, 2015); (2) the government's accusation that a commercial fisherman violated the "anti-shredding" provision of Sarbanes-Oxley by throwing allegedly undersized grouper overboard to evade a civil fishing infraction, *Yates v. United States*, 135 S. Ct. 1074, 1079-81 (2015); and (3) the government's insistence that a Philadelphia woman violated the Chemical Weapons Convention Implementation Act – which implemented the Convention on the Prohibition of the Development, Production, Stockpiling, and Use of Chemical Weapons and on Their Destruction – by putting chemicals on her neighbor's doorknob as part of an acrimonious love triangle involving the woman's husband, *see Bond v. United States*, 134 S. Ct. 2077, 2085 (2014). Each of these facially dubious legal theories not only reached a jury, but survived post-verdict review in the federal appellate courts.

³¹ *See Order, United States v. Rajarengan Rajaratnam*, Case No. 13-cr-211, Dkt. 49, at p. 7 (S.D.N.Y. April 18, 2014) ("The Indictment tracks the language of the relevant statutes . . . , provides sufficient particulars to apprise defendant of the charges against him and avoid double jeopardy problems, and adequately alleges the essential elements of tippee liability . . .").

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the crimes to the jury.³² The court eventually dismissed the charges against the defendant mid-trial for failure to satisfy that disputed element.³³ Had the court dismissed the indictment on this basis – rather than sustain it based on conclusory assertions that would never fly in the civil context – the court could have saved the parties and the judiciary the time, effort, and expense of a criminal trial.³⁴ And there is no telling how many criminal defendants have lost close legal disputes with the government that appellate courts would have decided differently if they were reviewing dismissed indictments rather than post-trial criminal convictions.

The refusal of district courts to meaningfully test prosecutors' pleadings also enables the government to take a case to trial on the theory that X establishes a crime, while freeing the appellate court to affirm despite concluding that the government actually needs to prove X+1 to establish a crime. The appellate court can avoid overturning the trial and jury verdict by simply finding enough evidence in the record for a rational juror to find X+1, while brushing aside any discrepancies in the jury instructions as harmless error. Were the appeal focused on the pleadings, by contrast, the appellate court would have to squarely decide whether the government's allegation of X established a criminal offense.³⁵

³² *Id.*

³³ See, e.g., Nate Raymond, *Two Counts Tossed in Rajaratnam Brother's Insider Trading Trial*, Reuters (July 2, 2014), available at goo.gl/EMVA2a.

³⁴ Other examples abound, such as the much-maligned prosecution of former presidential candidate John Edwards for supposed campaign-finance crimes. There, the district court acknowledged "some concerns with the prosecution's definition of 'for the purposes of influencing an election,'" but nonetheless refused to dismiss the indictment. James Hill, *Judge Denies John Edwards' Dismissal Motions*, ABC News (Oct. 27, 2011), available at goo.gl/39qL4w. The parties thus had to undergo a lengthy, costly trial built atop a seriously questionable legal theory about whether the charged conduct actually constituted a federal crime.

³⁵ For that same reason, courts could and should grant Motions for a Bill of Particulars under Federal Rule of Criminal Procedure 7(f) in order to flesh out the government's legal theory pretrial. Such orders require the government to detail its allegations with greater specificity, rather than permitting the government to rest on vague allegations and invocations of the statutory elements. By requiring more

B.

On the second strain of pleadings-based challenges – factual plausibility – the Supreme Court’s dismissing-the-indictment decisions do not preclude courts from importing *Twombly* and *Iqbal* into the criminal sphere. To be sure, the Supreme Court’s leading dismissing-the-indictment decision noted that the Court’s “prior cases indicate that an indictment is sufficient if it, first, contains the elements of the offense charged and fairly informs a defendant of the charge against which he must defend, and, second, enables him to plead an acquittal or conviction in bar of future prosecutions for the same offense.”³⁶ But there was plenty of similar precedent in the civil arena before *Twombly*. Before *Twombly*, the Supreme Court had consistently held that “the Federal Rules of Civil Procedure do not require a claimant to set out in detail the facts upon which he bases his claim.”³⁷ The *Twombly* Court had no trouble re-conceptualizing those earlier statements as requiring “more than labels and conclusions, and a formulaic recitation of the elements of a cause of action.”³⁸ From the perspective of precedent, the federal criminal rules are equally ripe for refinement.

And if anything, heightened factual pleading standards make more sense in the criminal arena than they do in civil cases. The civil litigation model is that plaintiffs file lawsuits based partly on knowledge about what happened and based partly on supposition about what happened. Civil defendants typically possess the relevant evidence, which will not be exposed until the plaintiff engages in civil discovery, only after which can the plaintiffs (they hope) prove that their allegations are true. On day one, civil plaintiffs thus have a relatively limited ability to make detailed allegations.

In criminal cases, by contrast, the government is supposed to have enough evidence to convict the defendant on the day it files

detailed allegations, courts can more easily determine whether the government’s factual theory actually amounts to a federal crime.

³⁶ *Hamling*, 418 U.S. at 117.

³⁷ *Conley v. Gibson*, 355 U.S. 41, 47 (1957).

³⁸ 550 U.S. 544, 555 (2007).

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charges.³⁹ The government conducts discovery through pre-indictment tools like search warrants and grand jury subpoenas – not through post-complaint interrogatories, requests for production, or depositions. The government is thus making its allegations after its discovery process is over, which means it is far more capable than a civil plaintiff of proffering detailed allegations that satisfy the civil 12(b)(6) standard. And for that same reason, the government would be able to survive civil-style motions to dismiss in the vast majority of criminal cases.

Moreover, when the government proceeds on the basis of a scant indictment, it preserves factual flexibility it can use to unfairly trap the defendant in different ways throughout the trial. Because criminal pleading requirements are so minimal, short indictments enable prosecutors to continually revise their factual theory to respond to new developments, perceived juror reactions, unexpected testimony, etc.⁴⁰ That forces criminal defendants to rebut ever-shifting accusations, making criminal cases much more difficult to defend than their civil counterparts, where plaintiffs must commit to a relatively specific set of factual allegations at the outset and then attempt to prove it.

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Finally, the constitutional rules governing criminal proceedings support interpreting the criminal rules on indictments even more strictly against the government than the courts interpret the civil rules on complaints against plaintiffs. Federal Criminal Rule 7(c)'s

³⁹ This expectation is implicit in the Speedy Trial Act, which gives charged defendants the right to demand trial within seventy days of being “charged in an information or indictment with the commission of an offense.” 18 U.S.C. § 3161(c)(1). That tight potential timeframe gives the government little room for additional evidence gathering.

⁴⁰ As one prominent criminal practitioner, Abbe David Lowell, put it in an appellate brief: “It was as if the indictment was the government’s accordion, contracting at trial to allow the government to obtain a conviction, and then expanding at sentencing to inflict the greatest punishment on Mr. Minor.” Ellen Podgor, *Paul Minor’s Appellate Brief*, White Collar Crime Prof Blog (July 6, 2008), available at lawprofessors.typepad.com/whitecollarcrime_blog/2008/07/paul-minors-app.html (last checked June 29, 2015).

requirement that the indictment contain a “plain, concise and definite written statement of the essential facts constituting the offense charged” reflects three different constitutional protections: (1) it helps protect the Sixth Amendment right “to be informed of the nature and cause of the accusation;” (2) it is a mechanism for preventing someone from being subject to double jeopardy under the Fifth Amendment; and (3) it reflects the Fifth Amendment protection against prosecution for crimes based on evidence not presented to the grand jury. If anything, the criminal rules should thus be more strict than the civil rules, not more lenient.

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The problem of overcriminalization is serious and pathological. Solving it will take much more than rethinking motions to dismiss indictments. But the Federal Rules of Criminal Procedure already provide one meaningful mechanism to begin correcting the problem. The courts simply need to start using it.

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