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Discovery and Darkness: The Information Deficit in Criminal Disputes

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ARTICLES

Discovery and Darkness

THE INFORMATION DEFICIT IN CRIMINAL DISPUTES

Ion Meyn[†]

INTRODUCTION

Does a defendant have the right to investigate the crime for which he is charged? Courts would say yes, and in fact impose a duty upon defense counsel to investigate.[1] The prevailing scholarship would also say yes, as it presumes a defendant will perform a pretrial investigation that uncovers evidence the State does not.[2] Yet despite these duties and presumptions, a criminal defendant is not structurally assigned an investigatory role in his case.

The typical discovery statute only permits a criminal defendant to view fragments of the State's evidence against him, deeming him a passive recipient of information.[3] In contrast, the

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[1] Williams v. Taylor, 529 U.S. 362, 396 (2000) (holding that a criminal defense attorney has a duty to investigate, which implies that the criminal defense attorney has the power to do so).

[2] *See, e.g.*, Darryl K. Brown, *The Decline of Defense Counsel and the Rise of Accuracy in Criminal Adjudication*, 93 CALIF. L. REV. 1585, 1601 (2005) ("Defense attorneys conduct separate investigations and uncover evidence the government overlooks."); Rodney J. Uphoff, *The Criminal Defense Lawyer as Effective Negotiator: A Systemic Approach*, 2 CLINICAL L. REV. 73, 95-97 (1995) (assuming a defense attorney's first step in effectively negotiating a plea is to perform an investigation).

[3] *See, e.g.*, FED. R. CRIM. P. 16 (delineating what is and is not subject to disclosure); STANDARDS RELATING TO DISCOVERY AND PROCEDURE BEFORE TRIAL pt. 2

State is assigned a central role in conducting a formal investigation and, in fulfilling that duty, exercises powerful police powers to search property, seize evidence, and interrogate witnesses. Granted the discretion to compel information from any source, civil litigants on both sides of the dispute are likewise structurally assigned pretrial roles to assess liability.[4] A criminal defendant, having no discretion to compel pretrial discovery and permitted but a keyhole view of the State's evidence, is the only litigant relegated to darkness. To grant a criminal defendant the discretion and power to conduct an independent inquiry into the incident would be to recast a defendant as having a formal role to play in the criminal investigation.

In recognizing some degree of information disparity, scholars advocate for more resources (adequate staffing and sufficient funds for investigators and experts)[5] and for open-file policies that increase access to prosecutorial files.[6] These reforms would go some distance in mitigating the existing information gap. An open-file policy has the laudatory goal of encouraging a more informed outcome. But affording a better view of a prosecutor's file will rarely permit an alternative view of the crime. The prosecutor's file is populated with police reports narrated by authors who have determined that the defendant is guilty. Further, an open-file policy is not as open as the term suggests. The policy only calls for documents from

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(Advisory Comm. on Pretrial Proceedings, Tentative Draft 1969) [hereinafter ABA STANDARDS] (enumerating limited categories of evidence that prosecutor must disclose); *see also* Jenny Roberts, *Too Little, Too Late: Ineffective Assistance of Counsel, the Duty to Investigate, and Pretrial Discovery in Criminal Cases*, 31 FORDHAM URB. L.J. 1097, 1098 (2004) (noting the disparity between discovery rights afforded to civil and criminal litigants); *infra* note 57 and Figure 3.

[4] *See, e.g.*, FED. R. CIV. P. 26 (requiring initial disclosures); FED. R. CIV. P. 30 (allowing depositions); Fed. R. Civ. P. 33 (allowing use of interrogatories); FED. R. CIV. P. 34 (permitting a party to request production of documents and things from another party); FED. R. CIV. P. 45 (granting broad subpoena power to secure third-party documents and things).

[5] *See, e.g.*, Laurence A. Benner, *The Presumption of Guilt: Systemic Factors that Contribute to Ineffective Assistance of Counsel in California*, 45 CAL. W. L. REV. 263, 277 (2009) ("The most important finding from our study is the discovery that indigent defense providers in many California counties lack the resources necessary to conduct adequate defense investigations."); Brown, *supra* note 2, at 1602 (defense attorney's ability to investigate is limited by budgetary constraints); Máximo Langer, *Rethinking Plea Bargaining: The Practice and Reform of Prosecutorial Adjudication in American Criminal Procedure*, 33 AM. J. CRIM. L. 223, 236 n.42 (2006) (same).

[6] Alafair S. Burke, *Revisiting Prosecutorial Disclosure,* 84 IND. L.J. 481, 514 (2009) (arguing for an open-file policy); *see also* Brown, *supra* note 2, at 1637 (stating open-file discovery is best option); Peter A. Joy, Brady *and Jailhouse Informants: Responding to Injustice*, 57 CASE W. RES. L. REV. 619, 641 (2007) (favoring open-file policy); Langer, *supra* note 5, at 276 (open-file policy may diminish the coercive nature of plea bargaining); Roberts, *supra* note 3, at 1153-55 (concluding open-file discovery is best solution).

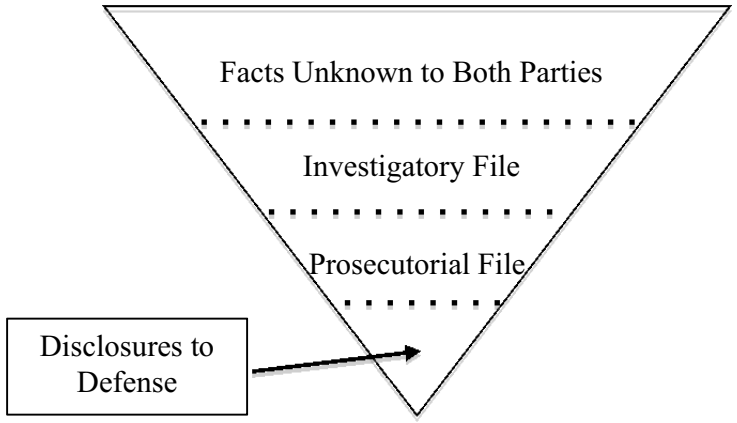
the prosecutorial file, not the larger investigative file where any reports that do not support the State's theory likely reside. More fundamentally, an open-file policy does not alter the *nature* of the discovery disparity. Because the policy does not grant any discretion to compel discovery, it does not assign an investigatory role to a defendant. In merely expanding a defendant's entitlement to discrete categories of information from one source, the State, the policy maintains the status quo. The defendant remains a passive recipient of information.

This article contends that the existing dynamic in criminal cases is inconsistent with the design of the adversarial system and results in a factual deficit that undermines the legitimacy of outcomes. Even assuming a defense attorney is well trained and well resourced, she is structurally precluded from compelling information from witnesses, which hinders her ability to conduct an independent inquiry into the question of who committed the crime, and, if a defendant did commit a crime, the degree of culpability. Only entitled to limited disclosures of the State's evidence, the defense counsel is instead forced to suggest a counter-narrative based largely on documents selected and prepared by the opposing party. Part I of this article explores the difference between an informal investigation, to which a criminal defendant is confined, and that of a formal investigation, from which a criminal defendant is excluded. Part II identifies common formal investigative powers that are extended to civil litigants, and it employs a case study to ascertain what is lost in the absence of formal powers to investigate. Part III surveys potential arguments against assigning to a criminal defendant a central role in the investigation, and responds to these concerns.

I. A STRUCTURAL EXCLUSION FROM THE CRIMINAL INVESTIGATION

Once the State initiates its investigation, some portion of the universe of relevant facts becomes known to the State—these facts make up the State's *investigatory file*. Some smaller subset of these facts is forwarded to the prosecutor, making up the *prosecutorial file*. In the typical jurisdiction, a defendant is only entitled to a limited view of the prosecutorial file—these are statutorily required *disclosures*.

FIGURE ONE: DISCOVERY FROM A CRIMINAL DEFENDANT'S PERSPECTIVE:



The typical criminal discovery statute does not grant a defendant *formal* pretrial investigatory power, defined as the discretion to compel facts from multiple sources. Formal investigatory powers may be expressed in various ways. In civil litigation, these powers take the form of depositions, interrogatories, and document requests. A criminal defendant, however, is rarely afforded such tools. He is instead entitled to discrete categories of opponent-sourced information found in the prosecutorial file. A defendant is rarely authorized to view the entire prosecutorial file or to view any part of the more expansive investigative file. Alternate routes are closed off, as most open-record laws prohibit access to documents that are part of an open investigation.[7] A criminal defendant does not typically have the power to compel information from evidentiary territory uncharted by the State that may provide an alternative theory of liability. Rather, a defendant's statutory role is limited to receiving what is forwarded to him by the prosecutor. In contrast, the State wields

[7] *See, e.g.*, Neer v. State, No. 0-985, 2011 Iowa App. LEXIS 154, at *11-12 (Iowa Ct. App. Feb. 23, 2011); Barros v. Martin, No. 941, 2014 Pa. Commw. Unpub. LEXIS 138, at *16 (Pa. Commw. Ct. Mar. 5, 2014); City of Alamo v. Espinosa, No. 13-99-704, 2001 Tex. App. LEXIS 6132, at *9 (Tex. App. Aug. 31, 2001) (recognizing exemption from the open records law for documents "integral to the criminal investigation and prosecution process"); Nichols v. Bennett, 544 N.W.2d 428, 431 n.4 (Wis. 1996) (same).

extraordinary formal powers in collecting information from any source it deems relevant to the investigation.

These asymmetrical privileges to information create a dynamic unique to criminal law. The prosecutor assesses the particular facts that executive agents forward to her, releases facts she determines a defendant should view,[8] and adjudicates the dispute through a plea offer that is supported by facts she selects.[9] Though a criminal defendant has no structurally assigned role in the investigation, he is subjected to an adversarial process. If the integrity of the adversarial system depends on testing the pretrial conclusion made by the executive in its investigation, the failure to create the conditions for a counter-investigation undermines that integrity. To be clear, no statute prohibits a defendant from engaging in an *informal* investigation. Nothing precludes a defendant (with the exception of pretrial custody) from asking around for names of individuals who might have heard something about the crime, to ask the manager of a gas station for surveillance tapes, or to press a detective for information about who told him what during the course of the investigation. But while there is no prohibition to asking these questions, there is also no right to a response.

A. Informal Investigation: Best When the Stakes are Low and There Are Multiple Sources of Information

A body at rest will remain at rest unless it is subject to an outside force.[10] Information, too, tends to remain undisturbed in the absence of an outside force. The more force applied to a source of information by an investigatory tool, the more is revealed. If statutorily granted tools of investigation backed by subpoena power and the threat of judicial sanction define what information is subject to discovery, statutory power not afforded defines what information tends to remain protected. In remarkably uniform fashion, civil litigants who meet low jurisdictional minimums can

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[8] Bennett L. Gershman, *Preplea Disclosure of Impeachment Evidence*, 65 VAND. L. REV. EN BANC 141, 142 (2012) ("As a former state prosecutor, I recall the issues surrounding preplea disclosures in practice. The give and take of the relatively informal bargaining process typically focused on how much information about the case I was willing to share with defense counsel.").

[9] Gerard E. Lynch, *Our Administrative System of Criminal Justice*, 66 FORDHAM L. REV. 2117, 2120 (1998) ("[F]or most defendants the primary adjudication they receive is, in fact, an administrative decision by a state functionary, the prosecutor.").

[10] This is Newton's first law of motion, the law of inertia. 1 ISAAC NEWTON, THE MATHEMATICAL PRINCIPLES OF NATURAL PHILOSOPHY 19 (Andrew Motte trans., 1729) (1687); *see also* STEVE HOLZNER, PHYSICS FOR DUMMIES, 64-65 (2006).

utilize a powerful array of formal investigatory tools.[11] In criminal law, the State maintains a monopoly over investigative choices[12] and is afforded formal investigatory tools that in some respects eclipse those available to civil litigants.[13] Yet, a criminal defendant, unassigned a formal investigatory role, is left to initiate an investigation by *informal* means.

Anyone has the ability to conduct an informal investigation. It is a method we use daily. By definition, an informal investigation consists of asking a question with the hope of receiving an answer. When we ask a passerby for the time, we almost expect an answer. If we fail in our attempt, we can usually turn to another passerby and obtain the same information. In this scenario, the stakes are typically low. The responding party faces little consequence in providing an answer, maybe annoyance, maybe a fleeting sense of satisfaction for engaging in an act of civility. Any negative repercussions for failing to obtain an answer are mitigated because the requested information is not limited by the source. The asking party can ask any number of individuals for the time of day. In these low-stakes, multiple-source scenarios, the informal method is adequate to satisfy the asking party's objectives.

The informal method's potential limitations begin to emerge as the stakes increase and the sources of information begin to decrease. Take the Cabbage Patch doll shortage in 1982. The hysteria to secure a doll for one's child and bring holiday happiness to the home gained national attention. Other than resorting to bribes or violence, parents had at their disposal only informal powers of investigation to learn whether a store had a doll in stock.[14] If sales associate #1 denied having dolls for sale, a

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[11] *See, e.g.*, rules cited *supra* note 4; *infra* Figure 3. Civil litigants in federal court are entitled to seek discovery of "any nonprivileged matter that is relevant to any party's claim or defense." FED. R. CIV. P. 26. States typically adopt statutes that are similarly broad in scope. *See, e.g.*, CAL. CIV. PROC. CODE § 2017.010 (West 2012) (stating that parties may obtain discovery regarding any relevant, non-privileged matter, that is admissible or "reasonably calculated to lead to the discovery of admissible evidence").

[12] *See* William J. Brennan, Jr., *The Criminal Prosecution: Sporting Event or Quest for Truth? A Progress Report*, 68 WASH. U. L.Q. 1, 15 (1990) (noting the "many and manifest advantages" in investigation "enjoyed by the prosecution"); Langer, *supra* note 5, at 250; Andrew D. Leipold, *How the Pretrial Process Contributes to Wrongful Convictions*, 42 AM. CRIM. L. REV. 1123, 1152 (2005) ("Because it has the burden of proof, the prosecutor collects most of the evidence."); Alexandra Natapoff, *Deregulating Guilt: The Information Culture of the Criminal System*, 30 CARDOZO L. REV. 965, 989-92 (2008) (noting that the investigative sphere of the criminal justice system depends upon "choices made by police and prosecutors," with no role described for the defense).

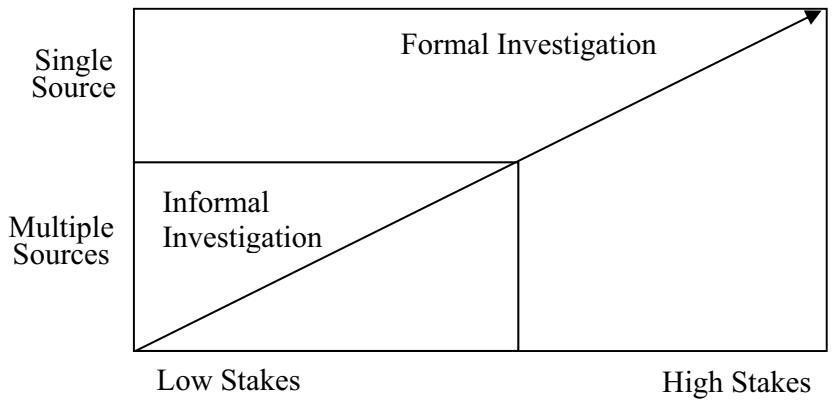
[13] Such powers include a threat of a probation hold and revocation, the power to arrest, the power to search a person or place, the power to seize evidence, and the opportunity to falsely assert that the failure to cooperate will lead to negative consequences.

[14] *See, e.g.*, JAKKS Pacific, *Cabbage Patch Kids Craze!*, YOUTUBE (May 1, 2008), http://www.youtube.com/watch?v=9sOlIvx7Pvs.

motivated parent might seek to undermine or corroborate this answer by questioning sales associate #2. But a parent could not compel production of inventory records and sales receipts or inspect inventory to verify these representations. And the parent would have a difficult time sufficiently testing the personal knowledge of any sales associate. We may not trust the answer we receive in an informal investigation, but such a method does not readily permit the sustained inquiry that is required to gather information, assess critical facts, and test credibility.

The informal method presents unique challenges for a criminal defense attorney. The stakes are high with a felony charge—a defendant's long-term liberty interest is at issue, and any witness to the crime may face negative consequences for furnishing an answer. Sources of information tend to be limited—and may be restricted to one person, as in the case of a sole eyewitness. From the perspective of an experienced defense counsel, the eyewitness may be a potential alternate suspect. In such a scenario, the eyewitness will likely be reluctant, even hostile, to the idea of voluntarily disclosing information to the defendant. Unlike turning to another passerby to ask the time, a defense attorney cannot seek out another source if only one person witnessed the crime. Where the informal method *may* succeed in a single-source, high-stakes scenario, the formal method will provide a better chance of success in a criminal case: either the witness will comply with a pretrial subpoena, or, if a witness refuses, the party seeking information can request appropriate procedural or evidentiary sanctions. If the witness is the opposing party's sole witness, for example, a court might prohibit that witness from being able to testify at trial due to the failure to comply with a pretrial subpoena.

FIGURE TWO: WHERE INFORMAL AND FORMAL POWERS ARE MOST EFFECTIVE:



This is not to say that the informal method lacks value in a criminal investigation. The informal method, for example, avoids a strategic shortcoming inherent in a deposition—the cost of transparency. One must notify the opposing party before taking a deposition, and what the deponent reveals is revealed to the opposing party. A litigant must consider the risk that the opposing party will benefit from the deposition more than he will. (The State does not incur these risks, as it is the only litigant in the common law system privileged to conduct interrogations and secret grand jury hearings without notice.[15]) The use of informal methods to interview a witness, in contrast, occurs in the deep woods—if the opposing party does not hear a tree fall, the tree has not fallen. An attorney is under no pretrial obligation to share harmful revelations with the State. The informal method is also potentially more efficient than the formal method. There is no need to serve a witness or to schedule a deposition, and there are no costs associated with a court reporter's transcript.[16] Interviewing a witness on her own stoop may uncover valuable information. In this setting, she may be more candid, provide unsolicited information, and criticize actions of police that in the presence of a prosecutor she may not express.

Still, witnesses from neighborhoods where the line between being a witness and a suspect is viewed as arbitrary tend to be reluctant to divulge information. Even where a witness initially cooperates, it is not uncommon for her to evade questions as they become more probative and implicitly confrontational. In an informal interview, the litigant is subject to the will of the witness. In a formal investigation, a witness is subject to the will of the asking party, and ultimately, the judicial sanctions that accompany any non-compliance. Depositions permit unyielding examination. Any obfuscation is

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[15] This information is subject to any discovery statute or *Brady*, which, as further discussed *infra*, will result in little daylight for a defendant.

[16] Though not required to do so, civil litigants generally use a stenographer in a deposition, which arguably provides the most accurate record. Stenographers generally charge an hourly rate and then charge the requesting party more per page than a non-requesting party who wants a transcript copy. A legal blog in Minnesota surveyed local transcription services—the commentary to the blog provides color to an otherwise dry survey. Jack Smith, *Do You Know What Your Court Reporter is Charging Your Clients for Depositions?*, MINNESOTA LITIGATOR (Feb. 28, 2012), http://www.minnesota-litigator.com/2012/02/28/court-reporter-charging-clients-depositions/. At 40 pages per hour, an eight-hour deposition using a court reporter might cost a requesting party $1,600 ($40 hourly charge + $4 per deposition page). Other options, however, are available—like a "dirty deposition" in which a party records the deposition and has its own office prepare a transcript, which after review is deemed accurate by party stipulation.

on the record and may demonstrate the witness' bias.[17] Use of formal tools permits a more ordered implementation of an investigative strategy; to move deliberately from peripheral witnesses (to gather background information) to critical witnesses (to expose inconsistencies and challenge credibility). One can attempt the same using informal tools—but in the absence of subpoena power, it is difficult to schedule witness testimony according to any preconceived plan. Use of the formal method to compel documentation and testimony potentially provides a nuanced and comprehensive pretrial understanding of the facts at issue and the motivations of witnesses. This sort of sophisticated approach is difficult to implement with only informal methods, where, despite the high stakes at issue and limited sources of information, growling dogs and refusals to open a door may leave a defendant with no recourse.

In contrast to the informal method that relies on voluntary compliance, the power to compel a person to appear at a place and time to answer questions under oath may be in many circumstances the only feasible way to capture critical pretrial information. Other than the State—which historically has had at its disposal police powers to conduct a formal investigation—the power to compel information from any source was not extended to private litigants until the advent of the modern discovery era.[18] Modern-era reforms afforded formal investigatory tools to civil litigants, but not to criminal defendants.

B. Modern Era: Extending Formal Powers to Private Litigants

In 1938, Congress ushered in the modern era of pretrial fact development and testing in civil litigation.[19] Before this time, plaintiffs were first required to conduct an informal investigation to substantiate the complaint, and only after this burden was met could they petition the court to compel pretrial information.[20] The new rules directly afforded litigants formal

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[17] *See, e.g.*, TMZ, *Lil Wayne Deposition—I Don't Recall!*, YOUTUBE (Sept. 25, 2012), http://www.youtube.com/watch?v=YQsMqRvPzRw.

[18] See *infra* Part I.B.

[19] John H. Beisner, *Discovering A Better Way: The Need for Effective Civil Litigation Reform*, 60 DUKE L.J. 547, 549 (2010) (discussing the expansion of discovery in civil cases since adoption of the Federal Rules of Civil Procedure in 1938); Stephen N. Subrin, *Fishing Expeditions Allowed: The Historical Background of the 1938 Federal Discovery Rules*, 39 B.C. L. REV. 691, 692 (1998) (discussing adoption of the Federal Rules of Civil Procedure).

[20] Beisner, *supra* note 19, 554.

tools of investigation.[21] A formal investigatory tool grants discretion to compel relevant information from any source, protecting only privileged information.[22] Discretion is given directly to the litigant—a court order is not needed to wield the power. Underscoring the significance of these reforms to civil litigation, Martin Redish likened these rights to the gift of fire.[23]

A formal investigatory tool does not guarantee consideration of every relevant fact. A host of privileges protects against the production of information—what one tells his priest during confession may result in penance but not in paying up or doing prison time. The low value of a case may negate the feasibility of a full-throttled formal investigation. Other case-specific circumstances may prevent disclosure. A witness might live in the litigant's zip code—she is easy to find, serve, and depose. But if the witness lives in rural Portugal, it may be prohibitively expensive to find her (third gravel road after apple tree), serve her (one must refer to the Hague Convention on Taking of Evidence Abroad in Civil or Commercial Matters[24]), and to question her (travel, translation, and lodging).[25]

Though the causal basis for this sweeping shift in civil procedure is subject to debate—"exactly *why* this dramatic change was made was never fully clarified by any of the key actors"[26]—there is some agreement that reforms were "premised in some sense on the notion that '[m]utual knowledge of all the relevant facts gathered by both parties is essential to proper litigation.'"[27] There were also aspects of the old civil litigation system that invited reform—plaintiffs who did not have access to facts were somehow expected to allege facts with specificity before gaining access to the courts.[28] Reform lowered the entrance fee (liberalizing pleading requirements) and provided pretrial mechanisms to discover, collect, and test otherwise

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[21] FED. R. CIV. P. 26 advisory committee's note (1937) ("This rule freely authorizes the taking of depositions under the same circumstances and by the same methods whether for the purpose of discovery or for the purpose of obtaining evidence . . . [t]he more common practice in the United States is to take depositions on notice by the party desiring them, without any order from the court, and this has been followed in these rules.").

[22] *See, e.g.*, FED. R. CIV. P. 26(b)(1), 30, 33, 34.

[23] Martin H. Redish, *Pleading, Discovery, and the Federal Rules: Exploring the Foundations of Modern Procedure*, 64 FLA. L. REV. 845, 870 (2012).

[24] Before engaging in civil discovery across international borders, a prudent attorney determines whether this multi-lateral treaty applies and whether the particular request is covered by its guidelines.

[25] 28 U.S.C. § 1782 (2006).

[26] Redish, *supra* note 23, at 847.

[27] *Id.* (citation omitted).

[28] *Id.* at 870-71.

unattainable information. These conditions, however, are not wholly unique to civil plaintiffs. A criminal defendant squares off against an opponent in possession of critical facts necessary to assessing guilt. Nevertheless, criminal procedure reforms have not attempted to counter this systemic imbalance. Commentators have also observed procedure's connection to the intended expression of the substantive law. In improving procedural fairness, civil reforms attempted to "employ procedure as a more effective means of implementing substantive law."[29]

C. Criminal Procedure Reform: The Birth of Disclosure

Federal criminal law has retained fidelity to the *pre-modern* conception of discovery—neither party is statutorily granted discretion to compel the production of pretrial information. Yet the need for reform is arguably most acute in criminal disputes. Creating a dramatic disparity, the State exercises police powers to compel information through non-transparent methods during an unregulated, pre-complaint period. In 1944, when it was a foreign concept for the State to furnish a criminal defendant with any facts, a new federal rule permitted a defendant the post-complaint, pretrial right to inspect any of his things the government had impounded.[30] Where civil procedure reform had already granted robust investigative powers to litigants during this pretrial period, a criminal defendant was merely afforded the right to inspect what was once his. Subsequent federal reforms did not disrupt a criminal defendant's passive-recipient status. Rather, additional reforms resulted in a list of *disclosures*—entitlements to discrete categories of evidence. In 1966, a criminal defendant was granted access to his own statement, his grand jury testimony, and to reports of scientific tests—all disclosures.[31] A defendant was also entitled to documents "material" to presenting a defense—a disclosure intended to "limit the scope of the government's obligation to search its files while meeting the legitimate needs of the defendant."[32]

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[29] *Id.* at 870.

[30] FED. R. CRIM. P. 16 advisory committee's note to 1944 amendment.

[31] FED. R. CRIM. P. 16 advisory committee's note to 1966 amendment.

[32] *Id.* Subsequent reform entitled defendant to the disclosure of anticipated expert opinion testimony. *See* FED. R. CRIM. P. 16 advisory committee's note to 1993 amendment.

Likewise, constitutional rights do not disrupt the passive-recipient status of a criminal defendant. Premised on the idea that access to certain information is essential to due process, the *Brady* right requires a prosecutor to turn over information that is exculpatory (favorable to defendant) and material (consideration of this information would lead to a reasonable likelihood of different outcome).[33] According to one casebook, *Brady's* obligation "to disclose exculpatory evidence overrides any limitations on discovery provided for by a jurisdiction's discovery statutes or rules."[34] This characterization overstates *Brady's* impact—though a constitutional right indeed overrides any statutory provision that impedes its application, *Brady* is a weak taskmaster. *Brady* confers no discretion to a defendant to compel the production of information he believes relevant to the dispute. *Brady* in fact may not provide a defendant with any pretrial discovery rights at all.[35] *Brady* is arguably available to only those who advance to trial, excluding 90% of defendants who resolve the dispute before trial.[36]

In the remaining instances where *Brady* applies, eligible information must satisfy a demanding test. The prosecutor must determine whether any information in the State's possession *favors* a defendant, would be *admissible* at trial, and would have a reasonable likelihood of *changing the outcome*.[37] Under this test, the prosecutor has ample room to undervalue evidence that might otherwise be exploited by a

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[33] Kyles v. Whitley, 514 U.S. 419, 432 (1995); Brady v. Maryland, 373 U.S. 83, 87 (1963).

[34] RUSSELL WEAVER ET AL., CRIMINAL PROCEDURE: CASES, PROBLEMS & EXERCISES 888 (3d ed. 2007).

[35] United States v. Ruiz, 536 U.S. 622, 633 (2002) (holding *Brady* right does not attach until trial). There is a split regarding whether *Ruiz* applies only to impeachment evidence, or to any and all exculpatory evidence. United States v. Conroy, 567 F.3d 174, 179 (5th Cir. 2009) (rejecting argument that "the limitation of the Court's discussion [in *Ruiz*] to impeachment evidence implies that exculpatory evidence is different and must be turned over before entry of a plea"); *cf.* McCann v. Mangialardi, 337 F.3d 782, 788 (7th Cir. 2003) (stating, in dicta, "*Ruiz* indicates a significant distinction between impeachment information and exculpatory evidence of actual innocence. Given this distinction, it is highly likely that the Supreme Court would find a violation of the Due Process Clause if . . . [state] actors have knowledge of a criminal defendant's factual innocence but fail to disclose such information to a defendant before he enters into a guilty plea").

[36] Robert C. Black, *FIJA: Monkeywrenching the Justice System?*, 66 UMKC L. REV. 11, 24 (1997) ("[o]nly about ten percent of felony cases go to trial"); Frank H. Easterbrook, *Plea Bargaining as Compromise*, 101 YALE L.J. 1969, 1978 n.22 (1992) (percentage of pleas in federal cases ranges from "80% to 90%"); H. Richard Uviller, *The Neutral Prosecutor: The Obligation of Dispassion in a Passionate Pursuit*, 68 FORDHAM L. REV. 1695, 1699 n.7 (2000) (finding that trials occur in about ten percent of criminal matters).

[37] *Brady*, 373 U.S. at 87-89,

defendant.[38] She may think that the evidence is favorable but inadmissible. She may believe the evidence admissible, but not likely to change the outcome. A prosecutor may also misapprehend the standard, thinking it narrower than it already is. In a major Wisconsin case, an experienced special prosecutor announced to the circuit court that *Brady* constitutes "evidence that clearly indicates, if you will, the guilt of a third party or absolutely minimizes the guilt of the defendant"[39]—leaving one to wonder what prosecutor would pursue a case against a defendant where evidence established the guilt of a third party.

Brady is also susceptible to being undermined by investigators. Law enforcement may deliver an investigatory file that, unknown to the prosecutor, excludes exculpatory and material evidence. In these circumstances, the prosecutor herself will be unaware of information that should be turned over to the defendant. As to the 10% of those defendants who advance to trial and fall under *Brady's* purview, *Brady* applies to and benefits only the select few who in post-conviction proceedings manage to find a hidden document that the defendant did not know existed. Such efforts are typically thwarted in jurisdictions that protect the State's files from open-record requests during the pendency of a direct appeal. Once a defendant has lost his direct appeal, he is likely permitted access to law enforcement files—but he no longer has any right to counsel. Even if such documents are discovered, courts tend to forgive prosecutorial neglect and favor finality.[40]

Where civil litigants are granted statutory power to compel relevant information from any source, federal rules dictate that a criminal defendant is merely entitled to limited

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[38] Keith A. Findley & Michael S. Scott, *The Multiple Dimensions of Tunnel Vision in Criminal Cases*, 2006 WIS. L. REV. 291, 351 (2006). The analysis in cases finding *Brady* violations underscores these prosecutorial tendencies to diminish the importance of the "material" evidence. *See, e.g.*, Smith v. Cain, 132 S. Ct. 627, 630 (2012); *Kyles*, 514 U.S. at 436-38; *Brady*, 373 U.S. at 88. A court's inclination to do the same is exemplified in the Justice Clarence Thomas' dissent in *Smith*. *Smith*, 132 S. Ct. at 640-41 (Thomas, J., dissenting).

[39] *See* Brief for Defendant-Respondent at 7-8, State v. Vollbrecht, 820 N.W.2d 443 (Wis. Ct. App. 2012) (No. 2011AP425) ("The case law makes it very clear that the defense is entitled to exculpatory evidence, and there's a fairly high standard for what that means. It's evidence that clearly indicates, if you will, the guilt of a third party or absolutely minimizes the guilt of the defendant. We don't see that sort of evidence in our files." (internal quotation marks omitted)).

[40] *See, e.g.*, *Smith*, 132 S. Ct. at 630-31. *Smith* split the Court's conservative wing and strengthened the *Brady* doctrine by providing a *per se* right to a new trial in narrow circumstances. *Id.* Justice Thomas' dissent reveals how far a judge will go to give the State a pass for its failure to turn over evidence. *Id.* at 640 (Thomas, J., dissenting).

disclosures of State's evidence.[41] The federal rules influence a significant number of states.[42] Of equal influence is the ABA Standard, the alleged liberal bookend to the federal model's conservative approach.[43] Unlike the federal rules, the ABA Standard provides for the pretrial disclosure of the prosecutor's witness list.[44] More importantly, the ABA Standard requires that disclosures occur immediately, establishing a dynamic that emphasizes the disclosures' relationship to informing a plea.[45] In contrast, the federal disclosures are predominantly oriented toward trial preparation, despite trials' rare occurrence. In the end, however, there is little daylight between the two standards—the ABA Standard does not change the nature of the discovery disparity. Both standards envision the defendant as a passive recipient of information and provide for *prix fixe* menus of State's evidence—limited *disclosures* from one party, the State, to its opponent, the defendant.[46] The ABA Standard does not extend any discretion to a defendant to compel information from multiple sources. The ABA Standard explicitly rejects the idea that the prosecutor should be required to turn over information relevant to the investigation, observing that the

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[41] These observations are drawn from the Federal Rules of Criminal Procedure, the ABA's standard, and a sampling of civil and criminal procedures adopted by the federal government, as well as ten states that account for more than half of the nation's population and are geographically diverse: Alabama, California, Florida, Illinois, New York, Ohio, Pennsylvania, Texas, Virginia, and Wisconsin. *See infra* Figure 3. Of the ten states in the sampling, six share significant similarities with the federal rule, whereas three are more closely wedded to the ABA Standard. *See* YALE KAMISAR ET AL., MODERN CRIMINAL PROCEDURE: CASES, COMMENTS, AND QUESTIONS 1200-01 (13th ed. 2012) (surveying criminal discovery nationwide).

[42] CHARLES H. WHITEBREAD & CHRISTOPHER SLOBOGIN, CRIMINAL PROCEDURE: AN ANALYSIS OF CASES AND CONCEPTS 671 (5th ed. 2008) (discussing the adoption of Rule 16 of the Federal Rules of Criminal Procedure and "the proliferation of similar rules at the state level"); Lissa Griffin, *Pretrial Proceedings for Innocent People: Reforming* Brady, 56 N.Y.L. SCH. L. REV. 969, 980-81 n.69 (2011) (remarking that as to the *Brady*-based language of Fed. R. Crim. P. 16, the state must turn over evidence "material to the preparation of the [defendant's] defense"); Roberts, *supra* note 3, at 1122 (stating that almost a fourth of the states adopt the federal standard).

[43] ABA STANDARDS, *supra* note 3; *see also* Roberts, *supra* note 3, at 1122 (noting that the ABA standard has influenced roughly a quarter of states).

[44] ABA STANDARDS, *supra* note 3, at §§ 2.1(a)(i), (iii) (providing for disclosure of witness lists and for "those portions of grand jury minutes containing testimony of the accused and relevant testimony of persons whom the prosecuting attorney intends to call as witnesses at the hearing or trial" respectively). Given the infrequent use of the grand jury, this latter requirement would have little practical effect. Even if it did apply, the prosecutor would be able to make strategic adjustments that would minimize any disclosures required under this standard.

[45] *Id.* at § 5.1(a)(i–iii) (identifying three particular pretrial stages relevant to discovery obligations); *id.* at § 5.3(a)(ii) (providing for judicial hearing to ensure compliance with discovery obligations during initial exploratory stage).

[46] The most meaningful differences are that under the ABA standard the prosecution must turn over a witness list, and the timing of disclosures. *Id.* at § 2.1(a)(1).

relevancy standard "seems too far outside the mainstream of current American practice and expression."[47] Yet, the relevancy standard has governed the exchange of discovery in civil litigation since 1938.

D. Disclosures versus Formal Powers of Investigation

A formal investigatory tool permits a litigant the discretion to compel the production of information—she decides what source is potentially significant and what information she will seek. In order to refuse to comply with a formal request for information a responding party must persuade a court that the requested information has no potential to lead to admissible evidence.[48] Refusals to at least partially comply with a request are accordingly rare. A responding party will invariably make objections, but these in operation serve to protect against any subsequent allegation that the response is not adequate. Objections tend to be long-winded—comments like "hopelessly overbroad," "unapologetically vague and ambiguous," "truly burdensome," "mocks rules of grammar," or "a crushing blow for humanity" might, for example, all appear in one exuberant sentence. Through this noise, the sought after document or witness is typically produced.

A litigant only entitled to disclosures, however, has no discretion to make an independent inquiry into the universe of facts that might inform liability. A statute or opponent binds that discretion. A *statutorily defined* disclosure might require the State to turn over to defendant any statement he made to police.[49] The defendant cannot exceed that particular statutory constraint and request statements made by others that reference the defendant. An *opponent-defined* disclosure might require the prosecutor to turn over any document she intends to use at trial.[50] Discretion sits with the prosecutor; she may elect to turn over nothing. And if she plans to use documents at trial, they will favor the State, like photos of wounds. In jurisdictions influenced by federal

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[47] *Id.* at § 2.1(d) (exculpatory material).

[48] *See, e.g.,* FED. R. CIV. P. 26(b)(1) ("Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense—including the existence, description, nature, custody, condition, and location of any documents or other tangible things and the identity and location of persons who know of any discoverable matter.").

[49] *See, e.g.*, FED. R. CRIM. P. 16(a)(1)(A), (B), (D).

[50] *See, e.g.*, FED. R. CRIM. P. 16(a)(1)(E)(ii).

constraints,[51] pretrial disclosures are so limited that a defendant has no discretion to obtain witness lists, police reports, or names of investigating detectives.[52] Further narrowing the significance of disclosures, a defendant is only authorized to obtain information from one source, the State.[53]

Disclosures granted in criminal law typically constitute the beginning and end of statutorily permitted discovery.[54] In contrast, civil procedure statutes that provide for disclosures serve a different purpose.[55] In federal court, the mandatory disclosures civil litigants make at the lawsuit's inception are intended to "accelerate the exchange of basic information," "focus the discovery that is needed," and "guide further proceedings in the case."[56] Though scholarship has recognized a discovery disparity between civil and criminal litigants,[57] what is most significant is the disparity's nature—a criminal defendant is a passive recipient of information whereas a civil litigant exercises discretion to compel information from multiple sources. Based on a sampling of jurisdictions, the following table underscores how a criminal defendant depends on disclosures from one party, the State. In contrast, though

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[51] *See, e.g.*, FED. R. CRIM. P. 16(a); *see also* ALA. R. CRIM. P. 16.1; ILL. SUP. CT. R. 412(a); N.Y. CRIM. PROC. LAW § 240.20 (McKinney 2013); PA. R. CRIM. P. 573(B); TEX. CODE CRIM. PROC. ANN. art. 39.14(a) (West 2009); VA. SUP. CT. R. 3A:11(b).

[52] California, Illinois, and Ohio are states in the sampling that require the State to turn over the witness list. CAL. PENAL CODE § 1054.1(a) (West 2013); ILL. SUP. CT. R. 412(a)(i); OHIO R. CRIM. P. 16(I). California and Ohio provide for disclosure of exculpatory information. CAL. PENAL CODE § 1054.1(e) (West 2013); OHIO R. CRIM. P. 16(B)(5). Florida and Ohio require disclosure of all police reports and Florida requires disclosure of contact information of witnesses and the interviewing detectives. FLA. R. CRIM. P. 3.220(b)(1)(A)-(B); OHIO R. CRIM. P. 16(B)(1).

[53] FED. R. CRIM. P. 16(a); *see also* ALA. R. CRIM. P. 16.1; CAL. PENAL CODE § 1054; FLA. R. CRIM. P. 3.220; ILL. SUP. CT. RULE 412; N.Y. CRIM. PROC. LAW § 240.20; OHIO R. CRIM. P. 16; PA. R. CRIM. P. 573; TEX. CODE CRIM. PROC. ANN. art. § 39.14.

[54] *See infra* Figure 3. Typically, jurisdictions in the sample only provide for disclosures at the request of defendant. The vast majority of discovery available to the criminal defendant is not mandatory, but only occurs via request.

[55] *See infra* Figure 3; FED. R. CIV. P. 26(a)(1)(A)(i) (requiring disclosure of individuals likely to have information and certain documents); ILL. SUP. CT. R. 213(f) (requiring disclosure of witness information if requested); N.Y. C.P.L.R. 3101(d) (McKinney 2012) (requiring disclosure, if requested, of information pertaining to expert witnesses); PA. R. CIV. P. 4003.4 (allowing discovery of statements from parties, non-parties, and witnesses that pertain to the action); TEX. R. CIV. P. 194.1-.2 (providing wide range of disclosure, including names of those with relevant information).

[56] FED. R. CIV. P. 26 advisory committee's note to 1993 amendment.

[57] Robert L. Fletcher, *Pretrial Discovery in State Criminal Cases*, 12 STAN. L. REV. 293, 294 (1960) (noting "a long and deeply imbedded practice designed to keep the defendant in the dark as long as possible"); Jean Montoya, *A Theory of Compulsory Process Clause Discovery Rights*, 70 IND. L.J. 845, 855-56 (1995) (noting that no criminal discovery procedures match the broad discovery possibilities in civil procedure); Roberts, *supra* note 3, at 1098 (noting disparity between discovery rights afforded to civil and criminal litigants).

civil litigants sometimes are provided disclosures to seed investigations, they are as a matter of course permitted discretion to compel information from any source.[58]

FIGURE THREE[59]:
DISCOVERY MECHANISMS: CIVIL LITIGANT

	Fed	AL	CA	FL	IL	NY	OH	PA	TX	VA	WI
Disclosures	X				/	/		/	/		
Interrogatories	X	X	X	X	X	X	X	X	X	X	X
Depositions	X	X	X	X	X	X	X	X	X	X	X
Documents from Parties	X	X	X	X	X	X	X	X	X	X	X
Documents from Non-Parties	X	X	X	X	X	X	X	X	X	X	X

DISCOVERY MECHANISMS: CRIMINAL DEFENDANTS

	Fed	AL	CA	FL	IL	NY	OH	PA	TX	VA	WI
Disclosures	/	/	/	X	/	/	/	/	/	/	/
Interrogatories				/							
Depositions				X							
Documents from Parties	/	/	/		/	/	/	/	/	/	/
Documents from Non-Parties			/	/						/	

Not afforded any formal investigatory powers, a criminal defendant is not assigned an investigatory role. The typical statute permits him to passively receive pretrial evidence from one source. Collected and summarized by his

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[58] *See infra* Figure 3.

[59] (X - Broad Discovery Right) (/ - Limited Discovery Right). There is no bright line test in determining what discovery rights afforded are "broad" versus "limited." It is a comparative analysis.

opponent, this evidence is weighted against him. A defendant may conduct an informal investigation, but this method is not well suited for the high-stakes, limited-source scenario that tends to define criminal cases. As the sole party assigned an investigatory role, the State uses formal powers to develop facts and establish the narrative. What law enforcement turns over to the prosecutor is typically a subset of the investigative file. And what a prosecutor turns over to a defendant is a subset of the prosecutorial file.[60] This limited disclosure will constitute "the facts of the case" for a defendant who is unable to extract further information through informal means.[61] The conditions that triggered reform to civil procedure are thus present in criminal law; a criminal defendant is situated against a motivated opponent who controls the facts. Without the formal power to develop a counter-narrative, a criminal defendant is consequently subject to an adversary who controls all aspects of pretrial litigation.[62]

II. WHAT IS LOST FOR CRIMINAL DEFENDANTS

Although the formal investigatory tools exercised by civil litigants may not be tailored to the criminal law, an exploration of what it means to have such tools—depositions, document requests, interrogatories—reveals what is lost in their absence.

A. Formal Investigatory Tool: Depositions

All 50 states authorize civil litigants to depose witnesses.[63] By this power, an attorney may compel any person to appear and answer questions under oath. Questions are not constrained by rules of evidence that apply at trial. By design, depositions permit inquiry into inadmissible hearsay ("you heard Joey say that Frank hated the victim?"), other acts ("you heard that the Frank had been convicted for battery six months

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[60] *See supra* Figure 1.

[61] *See supra* Part I (noting that disclosures only provide limited access to the State's, and only the State's, evidence).

[62] Langer, *supra* note 5, at 250 (stating in many cases the prosecutor, in control of the evidence, successfully plays the role of sole adjudicator in plea negotiations); Lynch, *supra* note 9, at 2120; Natapoff, *supra* note 12, at 968 (stating "the investigative sphere is the most powerful adjudicative arena, in which police and prosecutorial decisions about information and potential liability determine the circumstances under which individuals must confront the coercive powers of the state").

[63] Rhonda Wasserman, *The Subpoena Power,* Pennoyer*'s Last Vestige*, 74 MINN. L. REV. 37, 150 (1989).

before the crime?"), and character evidence ("is Frank easily provoked to violence?"); all are ingredients to an effective investigation.[64] In some jurisdictions there are no time limits to the deposition. Even if limited by time, a deposition frees an attorney from the pressure of eliciting in-court testimony from a sophisticated and recalcitrant witness.[65] The cost of witness prevarication is shifted from the questioning party to the witness and opposing party. Absent are the theatrics that tend to undermine the legitimacy of trial. In trial, a witness can play dumb and take a long time to refresh his recollection or understand the meaning of a simple passage. This tactic interrupts tempo. The trier of fact's interest wanes during periods of silence. In a deposition, such tactics are mere antics—the requesting party will note on the record the inordinate time the witness is taking to answer questions and, if necessary, will seek sanctions and secure permission to extend time to finish the deposition. The deposition is designed to collect a broad understanding of motives and facts that define a dispute. In operation, a deponent will be compelled to answer most questions. Any objection to a question that does not invoke a privilege typically accomplishes little—the witness must eventually answer.[66] An attorney may attempt to suspend a deposition because the asking party is badgering the witness or going beyond the scope of permissible questions. But hell hath no looks of annoyance like a judge drawn into a petty discovery dispute. The civil deposition power is permissive in theory and unrestrained in fact.[67] This liberal application of the

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[64] David Young, *A New Theory of Relativity: The Triumph of the Irrelevant at Depositions*, 36 UWLA L. REV. 56, 59 (2005) ("[T]he concept of relevance is still the primary focus at depositions in determining the permissible scope of discovery.").

[65] Florida, New York, Ohio, Pennsylvania, and Wisconsin statutes place no time limits on depositions. *See supra* Figure 3; *see also* FLA. R. CIV. P. 1.310; N.Y. C.P.L.R. 3106 (McKinney 2013); OHIO R. CIV. P. 30; PA. R. CIV. P. 4007.1; WIS. STAT. ANN. § 804.05 (West 2010). Federal Rules, Alabama, California, Illinois, Texas, and Virginia place time limits on depositions. FED. R. CIV. P. 30 (seven hours); ALA. R. CIV. P. 30 committee comments to Aug. 1, 2004 amendment (five hours per day); CAL. CIV. PROC. CODE § 2025.290 (West 2013) (seven hours); ILL. SUP. CT. R. 206(d) (three hours); TEX. R. CIV. P. 199.5(c) (six hours, though case and corresponding discovery level may demand a longer period of time); VA SUP. CT. R. 4:5(b)(3) (allowing court discretion to set time limitation).

[66] Although the Federal Rules of Civil Procedure dictate that "[t]he examination and cross-examination of a deponent proceed as they would at trial under the Federal Rules of Evidence," there are distinctions between trial practice and depositions. FED. R. CIV. P. 30(c)(1). Objections during depositions can be made and noted, but the deponent must respond unless the objection relates to the need to preserve a privilege or enforce a court order. FED. R. CIV. P. 30(c)(2).

[67] FED. R. CIV. P. 37(a)(5)(A) (a person subject to a successful motion to compel disclosure faces the prospect of paying the "movant's reasonable expenses

deposition power is not a given. A deposition, like any investigatory tool, may be tailored to address concerns particular to any type of dispute.

Four states extend deposition power to criminal defendants in a manner approaching equivalence to the civil deposition: Vermont, Missouri, Indiana, and Florida.[68] These states permit parties to depose broad categories of individuals, police officers and victims included.[69] In New Mexico, parties may issue a pretrial subpoena and take a recorded statement[70]—an affordable "dirty deposition" subject to wide use, more cost-effective than a traditional deposition, and a tool that demonstrates how innovations to formal investigatory tools might respond to concerns particular to the criminal justice system.[71] Even in states that nominally allow depositions to criminal defendants, some require a defendant to make the formidable showing that the witness is "material and necessary."[72] In more restrictive jurisdictions, a defendant may only petition the court to take a deposition to preserve testimony—like that of a key witness on her deathbed.[73] The

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incurred in making the motion, including attorney's fees"); W. R. Grace & Co. v. Pullman, Inc., 74 F.R.D. 80, 84 (W.D. Okla. 1977) ("The harm caused by being required to take additional depositions of a witness who fails to answer a question based on an improperly asserted objection far exceeds the mere inconvenience of a witness having to answer a question which may not be admissible at the trial of the action."); Banco Nacional De Credito Ejidal v. Bank of Am. N.T. & S.A., 11 F.R.D. 497, 499 (N.D. Cal. 1951) ("Basically the propriety of probing any matter within the knowledge of deponent is dependent upon relevancy—and relevancy, especially at the pre-trial stage, is very liberally construed.").

[68] FLA. R. CRIM. P. 3.220(h); IND. CODE § 35-37-4-3 (2013); MO. SUP. CT. R. 25.12 (allowing a defendant to take the deposition of any person); MO SUP. CT. R. 25.15 (allowing prosecuting attorney to obtain deposition of any person); VT. R. CRIM. P. Rule 15.

[69] FLA. R. CRIM P. 3.220(h); IND. CODE § 35-37-4-3; MO. SUP. CT. R. 25.12; MO. SUP. CT. R. 25.15; VT. R. CRIM. P. 15.

[70] N.M. STAT. ANN. § 5-503 (West 2013) (allowing statements from any person and depositions by agreement of parties or by court order to prevent injustice).

[71] Interview with Katherine Judson, Innocence Project Litigation Fellow, in Madison, Wis. (Oct. 23, 2012) ("Dirty deposition" is the *nom de guerre* assigned by author); *see also*, Rule 5-503 of New Mexico District Court Rules of Criminal Procedure ("Any person, other than the defendant, with information which is subject to discovery shall give a statement. A party may obtain the statement of the person by serving a written 'notice of statement' upon the person to be examined and upon each party not less than five (5) days before the date scheduled for the statement. The notice shall state the time and place for taking of the statement.").

[72] *See, e.g.*, MONT. CODE ANN. § 46-15-201 (West 2013) (stating a deposition of a prospective witness may be taken if the witness will be unable to attend trial or the witness "is unwilling to provide relevant information to a requesting party and the witness's testimony is material and necessary in order to prevent a failure of justice").

[73] ALA. R. CRIM. P. RULE 16.6; ALASKA R. CRIM. PROC. 15; ARK. CODE ANN. § 16-44-202 (West 2013); COLO. CRIM. P. 15; CONN. GEN. STAT. ANN. § 54-86 (West 2013); DEL. SUPER. CT. CRIM. R. 15; GA. CODE ANN. § 24-13-130 (2013); HAW. R. PENAL P. 15; IDAHO CRIM. R. 15; ILL. SUP. CT. R. 414; KY. R. CRIM. P. 7.10; ME. R. CRIM. P. 15;

federal statute is one of these jurisdictions, providing that a "party may move that a prospective witness be deposed *in order to preserve testimony for trial*. The court may grant the motion because of exceptional circumstances and in the interest of justice."[74] In these jurisdictions, the deposition is explicitly not intended to be a pretrial discovery tool but is instead oriented toward the trial moment. Remaining jurisdictions deny deposition power by omission (the lack of any provision granting defendant the right to request one).[75]

B. Formal Investigatory Tool: Production of Documents

Civil litigants have the pretrial power to request the production of documents from the opposing party[76] that are relevant to any claim or defense.[77] A responding party must make a "reasonable effort to assure that the client has provided all responsive information and documents available to him . . . ."[78] Federal criminal procedure, too, purports to make documents and objects "subject to disclosure."[79] These procedures, however, have very different DNA. Federal criminal procedure does not afford a defendant any discretion to compel documents of a defendant's choosing, but rather designates distinct categories of documents subject to disclosure. The first category requires the State turn over documents it intends to use "in its case-in-chief at trial"[80]—any documents revealed by this disclosure will favor the State's case. The second category requires the disclosure of any item that was "obtained from or belongs to the defendant," a tell-me-what-I-already-know disclosure.[81] The last category provides that the

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MD. CODE ANN. CRIM. PROC. § 4-261 (West 2013); MASS. R. CRIM. P. 35; NEV. REV. STAT. ANN. § 174.175 (West 2012); N.J. STAT. ANN. R. § 3:13-2 (West 2013); N.Y. CRIM. PROC. LAW § 660.20 (McKinney 2013); N.C. GEN. STAT. ANN. § 8-74 (West 2013); OHIO R. CRIM. P. 15; OKLA. ST. ANN. tit. 22, § 762 (West 2013); PA. R. CRIM. P. 500; R.I. SUPER. CT. R. CRIM. P. 15; S.C. CODE ANN. § 22-3-940 (2013); S.D. CODIFIED LAWS § 23A-12-1 (2013); TENN. R. CRIM. P. 15; UTAH R. CRIM. P. 14; WASH. SUPER. CT. CRIM. R. 4.6; W. VA. R. CRIM. P. 15; WIS. STAT. ANN. § 967.04 (West 2013); WYO. R. CRIM. P. 15.

[74] FED. R. CRIM. P. 15(a)(1) (emphasis added).

[75] Criminal procedure statutes in Louisiana and Virginia do not address depositions.

[76] *See e.g.*, FED. R. CIV. P. 34; ALA. R. CIV. P. 34(a); CAL. CIV. PROC. CODE § 2031.010 (West 2013);FLA. R. CIV. P. 1.350(a); ILL. SUP. CT. R. 214; N.Y. C.P.L.R. 3120 (McKinney 2013); OHIO R. CIV. P. 34(A); PA. R. CIV. P. 4009.1; TEX. R. CIV. P. 196.1(a); VA. SUP. CT. R. 4:9(a); WIS. STAT. ANN. § 804.09 (West 2013).

[77] FED. R. CIV. P. 26(b); *see also* FED. R. CIV. P. 34.

[78] FED. R. CIV. P. 26 advisory committee's notes to 1983 Amendment.

[79] FED. R. CRIM. P. 16(a)(1).

[80] FED. R. CRIM. P. 16(a)(1)(E)(ii).

[81] FED. R. CRIM. P. 16(a)(1)(E)(iii).

State must turn over items "*material* to preparing the defense."[82] Some courts maintain the *Brady* standard does not govern this provision[83] whereas others look to *Brady* for guidance.[84] The debate underscores the cautious nature of the provision's language. In determining what is "material" to the defense, the State is prone to undervalue evidence helpful to the defendant.[85] These three categories permitting limited disclosures from a single source fall well short of the formal power and discretion to request documents that are extended to civil litigants.

Providing more robust disclosure rights for a criminal defendant than either the federal or ABA standards, Florida is again an outlier. Florida requires that, upon request, a prosecutor turn over all investigative reports.[86] Florida's statute does, however, protect notes of investigators from disclosure.[87] Yet these notes provide an unedited version of what later is altered or omitted in the resultant police report. The potential significance of an agent's notes is underscored in the United States Supreme Court's *Smith v. Cain* decision.[88] Eyewitness Larry Boatner implicated Defendant Smith in a New Orleans shooting. Boatner testified that gunmen entered his friend's home and began shooting.[89] At trial, Boatner identified Smith as a shooter. After trial, the defense learned of a *detective's notes* that stated "Boatner 'could not . . . supply a description of the perpetrators other then [sic] they were black males.'"[90] This case demonstrates how the non-transparent method employed by the State provides an opportunity for

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[82] FED. R. CRIM. P. 16(a)(1)(E)(i).

[83] *See supra* notes 33-38, for a discussion of *Brady*. The *Brady* right only applies to admissible evidence; it does not provide for any right to investigate, but rather is animated by the much narrower concept of due process. Brady v. Maryland, 373 U.S. 83, 87 (1963). Under *Brady*, the "materiality" standard is rigorous; a document is only material if it has a reasonable probability of changing the outcome. Kyles v. Whitley, 514 U.S. 419, 435 (1995).

[84] ROBERT M. CARY ET AL., FEDERAL CRIMINAL DISCOVERY 95 (2011) ("Courts sometimes equate the Rule 16(a)(1)(E) materiality standard with the *Brady* rule, which also has a materiality component. Other courts have disagreed, and rightly so.") (footnotes omitted).

[85] *See supra* Part I.C. (discussing *Brady* and issues surrounding the exculpatory and material standard); *see also* Findley & Scott, *supra* note 38, at 351 ("*Brady* demands too much of prosecutors when it simultaneously asks them to act as advocates charged with prosecuting a defendant and as neutral observers responsible for assessing the value of evidence from the defendant's perspective.").

[86] FLA. R. CRIM. P. § 3.220(b)(1).

[87] FLA. R. CRIM. P. § 3.220(b)(1)(B).

[88] 132 S. Ct. 627, 630 (2012).

[89] *Id.* at 629-30.

[90] *Id.* at 629. The State also failed to disclose Boatner's statement that he "'could not ID anyone because [he] couldn't see faces' and 'would not know them if [he] saw them.'" *Id.* at 630.

abuse of power—the detective should not have omitted such evidence from the police report. These notes in the *Smith* case would not be discoverable under Florida's statute. Without statutory protection, a defendant must rely on *Brady*. But the *Brady* right only attaches once a defendant advances to trial. For the 90% of criminal defendants who enter pleas, the State would potentially be given impunity for its officers engaging in such behavior.

Civil litigants are authorized to subpoena documents from non-parties for the purpose of conducting a pretrial investigation.[91] A criminal defendant may not typically use a third-party subpoena (subpoena *duces tecum*) as a pretrial investigatory tool.[92] Rather, the subpoena *duces tecum* in criminal disputes is usually limited to expediting any trial or evidentiary hearing by requiring the disclosure of documents close in time to the upcoming hearing.[93] Even then, the standard for its use is typically stringent. Under federal law, a criminal defendant must in a court proceeding demonstrate: (1) each item sought is likely admissible, (2) "not otherwise procurable through due diligence prior to trial," (3) that defendant would be unable to "properly prepare for trial without such [pre-trial] production and

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[91] The Federal Rules of Civil Procedure as well as each state in Fig. 3 allow for civil litigants to obtain documents and things from both parties and nonparties. FED. R. CIV. P. 34, 45(c); ALA. R. CIV. P. 34(a), 45(a)(3); CAL. CIV. PROC. CODE §§ 2031.020(b), 2020.410, 2025.280(b) (West 2013); FLA. R. CIV. P. 1.350(b), 1.351(a), 1.410(c); ILL. SUP. CT. R. 214; N.Y. C.P.L.R. 3120, 3111; OHIO R. CIV. P. 34(A)-(C), 45(A)(1)(b)(iii)-(vi); PA. R. CIV. P. 4009.1, 4009.12(a)(1)-(2), 4009.21(a), 4009.23(a); TEX. R. CIV. P. 196.1(a), 196.2(a), 205.1(c)-(d), 205.3(a); VA. SUP. CT. R. 4:9(a)-(b), 4:9A(a)-(b); WIS. STAT. § 804.09(1)-(3); 805.07(2)(a) (2013).

[92] In jurisdictions surveyed in Figure 3, a federal criminal defendant, as well as a criminal defendant in Alabama, Ohio, Illinois, New York, Pennsylvania, Wisconsin, and Texas may *not* use the subpoena *duces tecum* to conduct a pretrial investigation. *See, e.g.*, FED. R. CRIM. P. 17(c)(1) (under *Bowman Dairy Co. v. United States*, 341 U.S. 214, 220 (1951), the subpoena *duces tecum's* purpose "was not intended to provide an additional means of discovery. Its chief innovation was to expedite the trial by providing a time and place *before* trial for the inspection of the subpoenaed materials"); ALA. R. CRIM. P. 17.3 (stating in statute's commentary that "[t]his rule is not intended to be a discovery device"); OHIO R. CRIM. P. 17(c) (according to *In re Subpoena Duces Tecum Served Upon Attorney Potts*, 796 N.E.2d 915, 918 (Ohio 2003), use of the subpoena *duces tecum* is restricted to the trial moment—and any effort to use it in advance of trial requires a showing that the requested document(s) will be admissible); PA. R. CRIM. P. 107 (comments stating that subpoena only used for hearings or trial); People v. Hart, 552 N.E.2d 1, 2 (Ill. App. Ct. 1990) (defendant may not use subpoena *duces tecum* as a discovery tool); People v. Magliore, 679 N.Y.S.2d 267, 270 (N.Y. Crim. Ct. 1998) (purpose of subpoena *duces tecum* is limited to compelling "specific documents that are relevant and material to facts at issue in a pending judicial proceeding"); Cruz v. State, 838 S.W.2d 682, 686 (Tex. App. 1992) (consistent with federal rule); State v. Schaefer, 746 N.W.2d 457, 461 (Wis. 2008) (holding a defendant may not use subpoena *duces tecum* as a discovery tool).

[93] United States v. Nixon, 418 U.S. 683, 699-700 (1974).

inspection," and (4) that the request "is made in good faith."[94] A criminal defendant in more liberal jurisdictions will still encounter significant hurdles, like requirements that a subpoena *duces tecum* require a court hearing in which defendant must demonstrate a material need for the requested documents.[95]

C. Formal Investigatory Tool: Interrogatories

Interrogatories—written questions to secure investigative leads—are valuable at a dispute's inception; a party can require the opponent to list facts in support of the opponent's allegations, along with the identity of individuals with information and documents that provide the basis for those assertions.[96] Responses must "represent the collective knowledge of the opponent."[97] Granted to civil litigants,[98] interrogatories are not extended to either the prosecution or the defense in jurisdictions influenced by federal and ABA standards. Florida again distinguishes itself; the equivalent of a "form interrogatory" (a list of judicially or legislatively authorized questions that in civil litigation may be propounded and are not subject to any objection) is embedded in its statute. Florida requires the prosecutor to disclose "a list of the names and addresses of all persons known to the prosecutor to have information that may be relevant to any offense charged or any defense thereto, or to any similar fact evidence to be presented at trial,"[99] an evidentiary category that captures

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[94] *Id.*

[95] In jurisdictions surveyed in Figure 3, to use a subpoena *duces tecum* in Virginia and Florida, court intervention is required and a "materiality" standard must generally be satisfied. FLA. R. CRIM. P. § 3.220(f) ("[o]n a showing of materiality, the court may require such other discovery to the parties as justice may require"); VA. SUP. CT. R. 3A:12(b) (requiring that requesting party include an affidavit "that the requested writings or objects are material to the proceedings," and in *Commonwealth v. Faulkner*, 82 Va. Cir. 417, 422-23 (Va. Cir. Ct. 2011), the court stated that subpoena *duces tecum's* use for limited discovery is permissible); Millaud v. Superior Court, 227 Cal. Rptr. 222, 224 (Cal. Ct. App. 1986) (stating that "the lack of specific statutory authority for the procedure is not conclusive" and that the court has "an inherent power 'to develop rules of procedure aimed at facilitating the administration of criminal justice and promoting the orderly ascertainment of the truth'").

[96] Edward L. Miner & Adrian P. Schoone, *The Effective Use of Written Interrogatories*, 60 MARQ. L. REV. 29, 30 (1976) ("Interrogatories are often preferable to depositions for identifying such things as witnesses, documents, the dates and substance of transactions and conversations.").

[97] *Id.* at 29.

[98] *See, e.g.*, FED. R. CIV. P. 33; ALA. R. CIV. P. 33; CAL. CIV. PROC. CODE § 2030.030 (West 2007); FLA. R. CIV. P. 1.340(a); ILL. SUP. CT. R. 213; N.Y. C.P.L.R. 3130 (McKinney 2013); OHIO R. CIV. P. 33; PA. R. CIV. P. 4005(a); TEX. R. CIV. P. 197; VA. SUP. CT. R. 4:8(a); WIS. STAT. § 804.08 (2013).

[99] FLA. R. CRIM. P. 3.220(b)(1)(A).

eyewitnesses, alibi witnesses, investigating officers, and witnesses the prosecutor does not intend to call.[100]

D. In the Neighborhood: What it Would Mean to Have Formal Investigatory Tools

How would having access to the formal investigatory tools available to a civil litigator—interrogatories, document requests, depositions—impact a criminal case? Would doing so reduce false positives, increase accuracy in outcomes, gain efficiencies, or improve conceptions of procedural justice and prosecutorial integrity? A recent case involving the homicide of Rodolfo Jimenez in Racine, Wisconsin provides a starting point to examine these questions.[101] Shawn Milton was tried for shooting Jimenez. Milton's trial, which took only two days, resulted in a guilty verdict and life imprisonment. At trial, Milton's defense counsel did not call a single witness. In a well-resourced post-conviction inquiry that resulted in a new trial, the appellate team discovered information that under typical rules of criminal procedure would have remained undisclosed. The appellate team, for example, secured the State's investigative file through open-record requests, a method unavailable before trial. Every piece of information discovered in the post-conviction inquiry would have been subject to pretrial production had Milton had the investigatory tools available to civil litigants.

At 10 PM on January 16, 2006, Rodolfo Jimenez was gunned down in the street. From an apartment window, an eyewitness observed two individuals facing Jimenez run south. No weapon or bullet casings were found. Two years later an individual told police he had heard that seven individuals were involved in the Jimenez shooting. He named, among others, Milton. Canvassing the neighborhood generated more heat than light—individuals who did not witness the crime nonetheless implicated various people. Because typical discovery statutes provide for little discovery, these complexities and contradictions typically remain unknown to the defense after a prosecutor presents charges in such a case.

One of the young men implicated was Matthew Roth. Police questioning of Roth resulted in a detailed written statement. According to his statement, Roth approached "a

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[100] *Id.*

[101] An actual case, names of individuals have been changed, as well as dates and other identifying details. A redacted copy of the appellant's brief is on file with the author and the *Brooklyn Law Review*.

Mexican" for a cigarette and said, "Dame un cigarillo." Jimenez responded, "Fuck you, get a job." Roth heard a gunshot. Jimenez doubled over. Roth looked back to see a gun in Milton's hand. After signing the statement on every page—a tactic to aid the prosecutor at trial (for impeachment purposes, a prosecutor will make it clear to a jury that the witness signed each and every page)[102]—Roth was released from custody.

The State filed charges against Milton. Milton sat in custody for seven months. A criminal defense attorney would typically receive little pretrial information during this time. But, a civil litigator wielding formal investigatory powers would immediately serve interrogatories (accompanied by a request for documents):[103]

1. State all facts that support allegations in the Complaint, describing documents and providing contact information of individuals who have information supporting these facts.

2. Provide contact information of suspects and of those implicated in the shooting, describing documents that reference these individuals.

3. Provide a description of all items collected in the investigation, along with all forensic documents.

4. Provide contact information of all individuals interviewed by law enforcement in the investigation, describing all related documents.

From this first formal investigatory act, the civil litigator would learn of Roth's written statement implicating Milton. In any jurisdiction following the federal rules, a prosecutor would not turn this statement over until after Roth testified at trial.[104] The civil litigator's initial round of discovery would also reveal that Roth implicated Milton only after police subjected Roth to a 10-hour interrogation in the middle of the night. A civil litigator would file additional discovery requests

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[102] In the Milton trial, Roth started to change his story—the prosecutor blew up every page of his statement and surrounded Roth with a life-sized version of his statement.

[103] These interrogatories are compressed and do not follow the traditional format.

[104] In the Milton case, the prosecutor did turn this statement over to the defense before being obligated to do so; the prosecutor was only required to turn it over a few weeks before trial. WIS. STAT. ANN. §§ 971.23(1), 971.23(1)(e) (West 2011). Under federal law, the prosecutor would not have to turn this statement over until after Roth testified at trial. 18 U.S.C. § 3500 (2012).

(discovery begets discovery), and, as the massive post-conviction investigative file illustrates, such efforts likely would have uncovered the following before trial:

1. Reports indicating detectives picked up Roth and told him he was a suspect for Jimenez's murder.

2. Reports that at the beginning of the 10-hour interrogation, Roth denied any knowledge of the shooting.

3. Reports that during the 10-hour interrogation, officers falsely suggested to Roth that Milton had implicated Roth in the shooting. Reports indicate that only after hearing this falsehood did Roth implicate Milton.

4. Reports that on the same block, just six weeks before the Jimenez shooting, Roth shot at an unarmed man. The man barely escaped (Roth shot out the victim's back window; a bullet had lodged in the front passenger seat). Roth was not prosecuted—perhaps, as a civil litigator might have learned, because Roth's sister was a Racine police officer.

5. Reports that Roth was found in possession of a large cache of ammunition and a handgun before and after the Jimenez shooting.

In the typical jurisdiction, these documents would not be subject to pretrial disclosure—in post-conviction proceedings in the Jimenez case, for example, the prosecutor argued he had no obligation to turn over reports of Roth's prior shooting.

To guide deposition choices, a civil litigator will use a key document like Roth's written statement. A civil litigator would attempt to undermine or confirm the statement's representations by deposing detectives who interrogated Roth, any person mentioned in the statement, and Roth. According to Roth's statement, Dante Randall cut Roth's hair on Randall's front porch on the day of the shooting. But meteorological data indicated it was 23 degrees below freezing that day, and the house described by Roth on Green Street turned out to have an open porch—hostile conditions for a haircut.

By informal investigative means, it took the appellate team three months to persuade Roth's alleged barber, Randall, to meet at Burger King. He entertained questions for 20

minutes—an insufficient amount of time in an inappropriate venue to discuss police reports, neighborhood history, any criminal history, and a homicide. In a pretrial context, having the fortune to secure a critical witness' momentary attention does not qualify as a discovery plan. Randall's reluctance to meet would likely be more acute at a pretrial stage, given the warranted fear in neighborhoods like his that knowledge about a crime makes one a suspect. But a civil litigator, compelling Randall's attendance, would have found that Randall did not cut white people's hair (Roth is white) and would not cut hair on an open porch in winter. At a deposition, the civil litigator would learn that Randall was not even certain that he lived on Green Street in January of 2006. This uncertainty was significant. Roth had stated that after Randall gave him a haircut, Roth walked to the rear garage of Randall's Green Street home and observed Milton with the same revolver he observed in Milton's hand at the shooting. The State argued that this fact showed Milton had the opportunity to shoot Jimenez. But if Randall had not lived on Green Street, then Roth's recollection of events was mistaken or a work of fiction.

A civil attorney would issue subpoenas to compel production of documents from third parties. Criminal defendants typically do not have this pretrial investigatory power.[105] Formal discovery tools available to a civil attorney would have required the Green Street home's owner to search boxes in her attic—her receipts indicated Randall had moved out in September 2005, *four months before the shooting*. A civil attorney would compel the utility company to release information—she would learn that in September, Randall's bill had been transferred to a house on Lakeside Avenue. A subpoena to the Lakeside Avenue owner for his rental records would have confirmed Randall's move. A visual inspection of the Lakeside home indicated that it did not have a front porch or a rear garage. Roth had manufactured a significant fact.

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[105] In jurisdictions surveyed in Figure 3, a federal criminal defendant, as well as a criminal defendant in Alabama, Ohio, Illinois, New York, Pennsylvania, Wisconsin, and Texas may *not* use the subpoena *duces tecum* to conduct a pretrial investigation. *See* FED. R. CIV. P. 34, 45(c); ALA. R. CIV. P. 34(a), 45(a)(3); CAL. CIV. PROC. CODE §§ 2031.020(b), 2020.410, 2025.280(b) (West 2013); FLA. R. CIV. P. 1.350(b), 1.351(a), 1.410(c); ILL. SUP. CT. R. 214; N.Y. C.P.L.R. 3120, 3111; OHIO R. CIV. P. 34(A)-(C), 45(A)(1)(b)(iii)-(vi); PA. R. CIV. P. 4009.1, 4009.12(a)(1)-(2), 4009.21(a), 4009.23(a); TEX. R. CIV. P. 196.1(a), 196.2(a), 205.1(c)-(d), 205.3(a); VA. SUP. CT. R. 4:9(a)-(b), 4:9A(a)-(b); WIS. STAT. § 804.09(1)-(3); 805.07(2)(a) (2013); United States v. Nixon, 418 U.S. 683, 699-700 (1974).

The surface was scratched. A civil attorney, however, would go further than merely undermining the credibility of the State's key witness; she would use formal investigatory powers in search of an alternative theory of liability. To establish a link between the two shooting incidents, she would depose eyewitnesses to the shooting Roth had committed just weeks before the Jimenez incident. She would discover that Roth needed little provocation to unleash a stream of bullets—that Roth emerged from the alley and shot into the victim's car because the victim verbally defended his girlfriend against insults hurled by Roth's friends.

A civil attorney would also depose Antonio Hernandez, who was mentioned in police reports but never questioned by police. Under informal investigatory methods, it took the appellate team months to arrange a meeting. Hernandez's reluctance to cooperate was attributable in part to his status as a confidential informant. If he turned against the State, the State could deem him a liar and reinstate drug charges against him. In providing any information exculpatory to Milton, Hernandez faced the prospect of losing his union job and going to prison. A civil attorney, however, would be entitled to compel Hernandez's attendance and testimony—and would learn that, on the night of the shooting, Roth had confessed to killing Jimenez.[106]

After a yearlong investigation, Milton's appellate team presented 10 witnesses and 50 exhibits in an eight-day evidentiary hearing. Confronted with new facts, Roth claimed his right against self-incrimination and refused to answer. Moved by a cohesive narrative that suggested that Roth, and not Milton, was the perpetrator, the court granted Milton a new trial. Months later Milton pled no contest to greatly reduced charges that capped incarceration at five years. He walked free on a "time-served" sentence. Had Milton been afforded pretrial power to compel documents and testimony, information developed by the appellate team's investigation would have emerged *before* trial, not *after* Milton's conviction. On the one hand, greater resources (and time) helped compensate for the absence of any formal investigatory tools. On the other hand, more resources did not compensate for the absence of the formal power to compel information. Key witnesses undermined the appellate investigation through

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[106] When the prosecutor heard about Hernandez's statement, he deemed Hernandez a liar, and stated his value as a confidential informant (CI) was now worthless.

their refusal or reluctance to cooperate. The Jimenez post-conviction investigation suggests: (1) that the power to compel pretrial attendance and testimony, along with documents that should be subject to scrutiny, would be significantly more efficient than conducting an informal investigation, (2) that the appellate team would have found critical information with the aid of formal investigatory powers, and (3) that the idea that the defense has nothing to offer as a party to the investigation overestimates the likelihood that the State got the case right.

III. RESPONSES TO ARGUMENTS AGAINST FORMAL DISCOVERY

The resistance to granting a criminal defendant the power to investigate has deep roots. In 1960, Professor Robert Fletcher wrote:

> Historically, discovery was unavailable in either civil or criminal cases, and, despite the full development of discovery in civil cases, denial in criminal cases has persisted. Even as recently as 1927, Mr. Justice Cardozo, then Chief Judge of the New York Court of Appeals, could see only the faint beginnings of a doctrine which would allow discovery in a criminal case. To achieve the degree of liberality that recent cases show, the courts have had to overcome the inertial force of a long and deeply imbedded practice designed to keep the defendant in the dark as long as possible.[107]

If the hand that rocks the cradle forms our world-view, then the law school experience establishes lasting impressions of what information is sufficient to resolve litigation in a civil or criminal law forum. Civil procedure casebooks provide a comprehensive treatment of formal discovery rights available to litigants. One casebook dedicates 60 pages to the subject.[108] But in criminal procedure casebooks there is little discussion of discovery challenges faced by a defendant. One textbook states a criminal defendant's "discovery provisions uniformly are broader than prosecution discovery provisions"[109] as if to suggest he is somehow entitled to more information than the prosecutor, who sits at the helm of a massive law enforcement apparatus. With few exceptions,[110] casebooks are silent on the discovery disparity between criminal and civil litigants. If

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[107] Fletcher, *supra* note 57, at 294.

[108] ALLAN IDES & CHRISTOPHER N. MAY, CIVIL PROCEDURE: CASES AND PROBLEMS 608-68 (3d ed. 2009).

[109] KAMISAR ET AL., *supra* note 41, at 1201.

[110] JOSHUA DRESSLER & GEORGE C. THOMAS III, CRIMINAL PROCEDURE: PRINCIPLES, POLICIES AND PERSPECTIVES 880 (4th ed. 2010).

casebooks are intended to inform a student about the legal world as it is, not pointing out the discovery disparity is a failure to do exactly that. Yet, criminal casebooks miss this opportunity to educate law students about the nature of this disparity and whether it has a legitimate justification.

This insularity between disciplines continues into practice. There is little cross-pollination between criminal and civil practitioners.[111] On the rare occasion civil practitioners step into the criminal arena they "tend to be stunned and often outraged by their inability to depose government witnesses or even to file interrogatories or requests for admissions."[112] A colleague teaching criminal procedure recently broke with this tradition of segregation. Knowing students had taken a semester of civil procedure, he introduced a hypothetical complaint and asked students how they would investigate if they represented the criminal defendant. Hands went up and depositions were scheduled, interrogatories drafted, requests for documents propounded. My colleague let fall the hammer: Padawans, you have none of these formal discovery tools available to you and your anticipated investigation has just been rendered impossible.[113] Confronted by the inequity from an advocate's point of view, a sense of injustice emerged.[114]

To remedy the informational asymmetry in criminal law, scholarship tends to focus on giving a defendant more access to the prosecutorial file.[115] But this solution merely expands the disclosure of State-authored reports. In a study funded by the Pew Foundation, the Justice Institute proposed:

> Mandatory and open-file discovery, in which prosecutors make their entire case file available to the defense and disclose particular items at required times, leads to a more efficient criminal justice system that better protects against wrongful imprisonment and renders more reliable convictions.[116]

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[111] David A. Sklansky & Stephen C. Yeazell, *Comparative Law Without Leaving Home: What Civil Procedure Can Teach Criminal Procedure, and Vice Versa*, 94 GEORGETOWN L.J. 683, 684 (2006).

[112] *Id.* at 714-15.

[113] A padawan is a young Jedi in training. *Padawan*, WOOKIEEPEDIA: THE STAR WARS WIKI, http://starwars.wikia.com/Padawan (last visited Feb. 21, 2014).

[114] Interview with Byron Lichstein, Associate Clinical Professor, University of Wisconsin Law School, in Madison, Wis. (Nov. 15, 2012) (notes on file with author).

[115] Joy, *supra* note 6, at 641 ("The surest way to meet and exceed *Brady* disclosure obligations is to adopt an 'open file' discovery policy-essentially making available to the defense all of the information in the prosecutor's possession.").

[116] THE JUSTICE PROJECT, EXPANDED DISCOVERY IN CRIMINAL CASES: A POLICY REVIEW 2 (2007), www.pewtrusts.org/uploadedFiles/wwwpewtrustsorg/Reports/Death_penalty_reform/Expanded%20discovery%20policy%20brief.pdf.

This proposal does not correct for the State's immense power to collect facts that favor its own position. Expanding a defendant's access to the State's file remains a solution anchored in the pre-modern discovery era—that the defendant should be a passive recipient of information as opposed to having an essential, formal role in the investigation of the case.

The term "open-file policy" is misleading. The policy provides only a vague degree of access to the prosecutorial file and no access to the police department's investigatory file.[117] Providing a criminal defendant with a single investigatory tool—the right to compel documents—would exceed the value of any open-file policy. Use of the tool would override the common law rule that investigatory files are protected from disclosure and provide access to prosecutorial and police files. Given that a defendant might seek documents about witnesses and incidents law enforcement did not consider, use of the tool would potentially educate the prosecutor about reports her own detectives failed to consider.

An open-file policy does not authorize a defendant to question any information the State discloses.[118] Given that 90% of criminal defendants plead guilty, an open-file policy does not prevent the State from representing the strength of its case based on a narrative that is free from adequate scrutiny.[119] Yet, despite the slight narrowing of the information gap that would be accomplished by an open-file policy, resistance to its implementation continues. To go beyond an open-file policy and to grant a criminal defendant formal investigatory power meets fiercer resistance. Would the power give defendant an unfair advantage? What would he do with such power? Would he subvert the truth and harass or threaten witnesses? Would he waste resources that are better used to control crime?

A. A Concern that a Defendant Will Have an Unfair Advantage

In criminal law disputes, neither party has use of those particular formal investigatory tools that civil litigants wield—

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[117] *See supra* Figure 1.

[118] A defense attorney who wishes to call a witness to testify may be dissuaded by his inability to conduct a prior interview. To unintentionally elicit information harmful to the defendant can expose the attorney to allegations of ineffective assistance of counsel. Montoya, *supra* note 57, at 862.

[119] *See supra* note 36 (regarding percentage of criminal defendants who plea versus advance to trial).

depositions, requests for documents, and interrogatories. If neither party has access to these formal tools, how can one party claim unfair treatment? And if both parties have equal status, then wouldn't giving one party more power constitute an unfair advantage? As a preliminary matter, denying investigative opportunities to both parties does not improve the quality of facts that inform a dispute. As to fairness, it is not necessarily secured by ensuring that all parties are similarly deprived or empowered. Parties to a criminal dispute are not in any case similarly situated—"[t]oday's defense counsel must meet the prosecutor's particularly formidable and unprecedented arsenal of fact-gathering methods, including the use of an organized police force to marshal the evidence prior to trial."[120] Nor are parties to a criminal dispute similarly deprived—the State in fact exercises its own brand of formal investigatory powers. To treat parties the same during the pretrial period is to leave the criminal defendant at a distinct disadvantage.

Unlike a criminal defendant, the State conducts a formal investigation through the exercise of police powers. Cloaked in state authority, agents have the formal power to arrest,[121] search a person or place,[122] seize evidence, interrogate potential suspects, and, in some instances, threaten dire consequences to ensure cooperation of potential witnesses—such as a probation hold and revocation to prison[123] or the loss of custody of one's child.[124] In some jurisdictions, prosecutors convene a grand jury, a proceeding that in many respects

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[120] Montoya, *supra* note 57, at 870, 862 ("Professor Stanley Fisher has documented a pro-prosecution bias in police investigation and reporting.").

[121] See WILLIAM E. RINGEL, SEARCHES AND SEIZURES, ARRESTS AND CONFESSIONS § 23:9 (2013) for a discussion of the police and other state officials who are given statutory authority to perform arrests.

[122] This power is limited by the Fourth Amendment, which protects against unreasonable searches by government agents. U.S. CONST. amend. IV.

[123] Officers often work with probation agents to place holds on probationers to facilitate investigation of a crime. *See* Howard P. Schneiderman, *Conflicting Perspectives from the Bench and the Field on Probationer Home Searches*—Griffin v. Wisconsin *Reconsidered*, 1989 WIS. L. REV. 607, 615; *see also* Wagner v. State, 277 N.W.2d 849, 853-54 (Wis. 1979) (holding that a probation hold of approximately twenty-eight hours to investigate Wagner's potential involvement in a serious crime was not inappropriately long).

[124] A common threat women experience in poor neighborhoods is that the failure to cooperate will result in the loss of their children. This sort of pressure can also be used against a defendant. Regina Kelly was caught up in "a big drug sweep based on the word of a confidential informant who later would be proven unreliable." Because Kelly was being held in jail, and there was no one to care for her kids, she pled guilty, receiving 10 years of probation. Those who advanced to trial sat for months—those cases were thrown out for lack of any reliable evidence. *The Plea: Erma Fay Stewart and Regina Kelly*, PBS FRONTLINE (June 17, 2004), http://www.pbs.org/wgbh/pages/frontline/shows/plea/four/stewart.html.

resembles a civil litigant's pretrial deposition power.[125] None of these formal investigatory mechanisms are available to a criminal defendant.

The State's formal discovery tools are in some instances more robust than tools afforded to civil litigants. A civil litigant may have the power to inspect documents of her opponent at a mutually reasonable location, but she does not have the State's power to conduct a physical search of a person's premises and seize property. And though the State does not have the power to depose witnesses, prosecutors have the power to convene a grand jury, which extends pretrial subpoena power to a prosecutor in order to compel testimony and conduct a secret investigation.

The State also has the authority to conduct a pretrial interrogation, which is similar to and potentially more powerful than a deposition. Unlike an attorney taking a deposition, an officer is permitted to repeat a question forcefully and express an opinion that the defendant is guilty, a powerful tactic. (Use of this tactic, however favorable to the State's position, may lack integrity—approximately 25% of DNA exonerations arose out of cases in which the defendant falsely confessed to the crime.[126]) Depositions tend to take place in a pleasant enough room while interrogations take place in cinderblock cells. Attendance at a deposition is compelled by the threat of judicial sanction for failure to comply with a subpoena. Participating in an interrogation is compelled by the request of a law enforcement officer or through arrest. The refusal to answer to authority is rare even after arrest, which unlike a subpoena requires no notice to any opposing counsel.[127]

In a deposition, the witness typically has counsel. In an interrogation, the witness is typically alone and answering to one or more officers. In an interrogation, there are no significant time restraints. An interrogation may be conducted in multiple rounds by different interrogators at any time—often in

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[125] The Fifth Amendment provides that "[n]o person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury." U.S. CONST. amend. V. There is no requirement, however, that states employ the use of a grand jury. Hurtado v. California, 110 U.S. 516, 534 (1884). Most states have procedures to convene grand juries, and about a third require grand jury indictments for felonies. U.S. DEPT. OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, NCJ 212351, STATE COURT ORGANIZATION 2004 215-17 (Aug. 2006), http://cdm16501.contentdm.oclc.org/cdm/ref/collection/juries/id/180.

[126] *DNA Exonerations Nationwide*, INNOCENCE PROJECT http://www.innocenceproject.org/Content/DNA_Exonerations_Nationwide.php.

[127] Only 22% of those placed in custody invoke their *Miranda* rights and refuse to speak to police during an interrogation. Richard A. Leo, *The Impact of* Miranda *Revisited*, 86 J. CRIM. L. & CRIMINOLOGY 621, 653 (1996).

the middle of the night—and may potentially transpire throughout a long duration of custody.[128] The subject is isolated from his support system. Officers may threaten the witness/suspect,[129] falsely suggest others are implicating him,[130] or manufacture a non-existent case against him to obtain information.[131] In contrast, civil attorneys taking a deposition are ethically barred from engaging in deception and deterred from doing so. Opposing counsel is not only present, but interactions are transcribed. Any ethical violation would be on the record and could lead to a disciplinary review that the opposing party may be happy to set into motion.[132]

A key advantage to the interrogation is the resulting report. State agents interpret a witness's responses and summarize the interview.[133] After a deposition, a civil litigator may believe he neutralized a witness. A later review of the transcript, however, might suggest his line of questioning proved something less or

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[128] In *State v. Masch*, Milwaukee Case No. 2003CF004581, defendant was held in custody over a period of 58 hours and subject to four separate interrogations conducted by four different pairs of officers that totaled approximately 14 hours. The final pair of interrogators, two experienced homicide detectives, were called in by special request to break the defendant.

[129] *See, e.g.*, BRANDON L. GARRETT, CONVICTING THE INNOCENT: WHERE CRIMINAL PROSECUTORS GO WRONG 39 (2011) (noting a case in which 17-year-old Paula Gray, who was borderline mentally impaired, inculpated herself and four other innocent people in a double murder. "Gray testified that she was asked, 'Did they emphasize what would happen if you did not tell this story?' and answered, 'That they would kill me.'").

[130] *See, e.g.*, David K. Shipler, Op-Ed., *Why Do Innocent People Confess?*, N.Y. TIMES, Feb. 23, 2012, *available at* http://www.nytimes.com/2012/02/26/opinion/sunday/why-do-innocent-people-confess.html?pagewanted=all (noting a case in which 17-year old Martin Tankleff discovered his mother murdered and his father barely alive; he was told, falsely, by the detective interrogating him that his father awoke from his coma and said "Marty, you did it").

[131] *See, e.g.*, Garrett, *supra* note 129, at 22-23. David Vasquez, for example, was told by police that his fingerprints were found at the scene of a murder and eventually confessed. *Id.* at 22. He was exonerated after the real perpetrator was found; he had served four years in prison by that time. *Know the Cases: David Vasquez*, INNOCENCE PROJECT, www.innocenceproject.org/Content/David_Vasquez.php.

[132] Since the purpose of an interrogation, generally, is to cause the subject to confess, police often use "persuasive techniques comprising trickery, deceit and psychological manipulation." Gisli H. Gudjonsson, *The Psychology of Interrogations and Confessions*, *in* INVESTIGATIVE INTERVIEWING: RIGHTS, RESEARCH, REGULATION 123, 124 (Tom Williamson ed., 2006). In contrast, several of the Model Rules of Professional Conduct would be implicated if an attorney engaged in deception during a deposition. *See* MODEL RULES OF PROF'L CONDUCT R. 4.1 (2011) (governing truthfulness in statements to others); MODEL RULES OF PROF'L CONDUCT R. 8.4(c) (2011) (prohibiting deceitful behavior); MODEL RULES OF PROF'L CONDUCT R. 3.5 cmt. 5 (2011) ("The duty to refrain from disruptive conduct applies to any proceeding of a tribunal, including a deposition."); MODEL RULES OF PROF'L CONDUCT R. 3.3 cmt. 1 (2011) (indicating that the rule governing candor to the tribunal includes conduct during a deposition).

[133] Police fabrication of reports is a significant problem, since police reports are often "dispositive in a case resolved through plea bargaining." Christopher Slobogin, *Testilying: Police Perjury and What to Do About It*, 67 U. COLO. L. REV. 1037, 1044 (1996).

nothing at all. This "morning after" disappointment does not occur for detectives who obtain an inculpatory statement or author the resulting summary of their efforts. The State and its agents almost always retain rights over the narrative.[134] The interrogation in these ways serves as a "shadow deposition" that potentially provides the State an investigatory tool with greater advantages than a formal deposition.

The view that the parties to a criminal dispute are equally situated is as erroneous as it is pervasive. Ignoring the deep asymmetry between an empowered State and a frequently detained defendant, the misapplied concept—to equate equal treatment with fairness—is embedded in the rules of criminal procedure. The Federal Rules of Criminal Procedure, for example, adopt the concept of "reciprocity."[135] Only after a criminal defendant requests certain information from the State may the prosecutor then request the same category of information from defendant—a statutory expression of "I'll show you mine if you show me yours." If, for example, a criminal defendant requests documents that the prosecutor plans to use at trial, only then may the prosecutor request the same disclosure from the defendant.[136] This concept of reciprocal exchange suggests equal burden and measure, masking the deep disparity that exists between the parties.

The state apparatus brings to bear impressive formal investigatory powers. A criminal defendant must sip from the cup of his opponent. Affording formal investigatory tools to a defendant would begin to correct for this existing imbalance yet leave intact the State's inherent investigatory and trial advantages. The State would still conduct a formal, unregulated pre-complaint investigation. The State's officers would still summarize their own interviews. The State would still control a police force that has the qualified right to search and seize, to engage in deception and threats to secure information, and to employ suggestive lineup procedures that target a suspect. The State would still have at its disposal detectives to authoritatively

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[134] As of 2010, 17 states and the District of Columbia required recording of suspect confessions under certain circumstances. *See* Alan M. Gershel, *A Review of the Law in Jurisdictions Requiring Electronic Recording of Custodial Interrogations*, 16 RICH. J.L. & TECH. 9 (2010).

[135] FED. R. CRIM. P. 16 advisory committee's notes to 1974 amendment ("The House version of the bill provides that the government's discovery is reciprocal. If the defendant requires and receives certain items from the government, then the government is entitled to get similar items from the defendant. . . . The Conference adopts the House provisions.").

[136] FED. R. CRIM. P. 16(b)(1)(A)(ii).

explain the course of the investigation to a jury, providing a theatrical display of self-validation. And the State would still pull from its stable of law enforcement experts to testify about the results a scientifically untested but quite persuasive analysis.[137]

B. A Concern That a Defendant Will Threaten Witnesses

In 1974, an effort to require pretrial disclosure of the State's witnesses in federal criminal disputes met vigorous opposition. The United States Department of Justice reported that allowing this disclosure would be "dangerous and frightening in that government witnesses and their families will even be more exposed than they are now to threats, pressures, and physical harm."[138] There is little empirical guidance on the issue. Since 1974, some state jurisdictions have permitted a criminal defendant access to witness lists—one would expect that any significant uptick in witness intimidation would have led to a repeal of this policy. Yet these provisions remain on the books.[139] Justice William Brennan, observing that particular circumstances might warrant concern, opined "the proper response . . . cannot be to prevent discovery altogether; it is rather to regulate discovery in those cases in which it is thought that witness intimidation is a real possibility."[140] Beyond the issuance of protective orders in cases where there is reason to believe that a particular witness is in danger, there are sufficient existing deterrents to prevent witness intimidation. Pretrial custody reduces a defendant's ability to communicate with the outside world. Communications from the jail are monitored. A jailhouse call revealing an attempt to intimidate a witness may be used against a defendant as affirmative evidence of guilt.[141] Under federal law, anyone who attempts to dissuade a witness from testifying faces 20 years in prison.[142]

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[137] NATIONAL RESEARCH COUNSEL, STRENGTHENING FORENSIC SCIENCE IN THE UNITED STATES—A PATH FORWARD 22 (2009) ("Some forensic science disciplines are supported by little rigorous systematic research to validate the discipline's basic premises and techniques."); *id.* at 42 ("The fact is that many forensic tests—such as those used to infer the source of toolmarks or bite marks—have never been exposed to stringent scientific scrutiny.").

[138] Brennan, Jr., *supra* note 12, at 6 (quoting Justice Department testimony before Congress) (footnotes omitted).

[139] *See, e.g.*, CAL. PENAL CODE § 1054.1(a) (West 2013); ILL. SUP. CT. R. 412(a)(i); OHIO R. CRIM. P. 16(I).

[140] Brennan, Jr., *supra* note 12, at 14.

[141] *See, e.g.*, *United States v. Miller*, 276 F.3d 370, 373 (7th Cir. 2002) ("Evidence that the defendant threatened a potential witness or a person cooperating with a government investigation is relevant to show the defendant's consciousness of guilt.").

[142] 18 U.S.C. § 1512(b) (2012).

In permitting a defendant deposition power, there is concern over subjecting a victim or witness to a defendant's presence at a deposition "without the security provided by the courtroom setting."[143] A criminal defendant's presence at a deposition, however, is not constitutionally required.[144] In those jurisdictions that permit depositions in criminal cases, "only defense counsel need be present . . . ."[145] For example, Missouri provides a default rule that a criminal defendant "shall not be physically present at a discovery deposition except by agreement of the parties or upon court order for good cause shown."[146] Florida provides protections for "sensitive witnesses."[147] A related argument is that a victim of domestic violence or sexual assault might be deterred from cooperating. She would face the anxiety of being subjected to hours of deposition testimony that, by design, allows for questioning that exceeds what could be explored at trial. Precautions would mitigate these concerns: ensuring that the defendant is not present, limiting the time to depose the victim, making certain subjects, like past sexual history, off limits, and restricting the distribution of testimony to attorneys.

Left unexplored by those concerned about witness intimidation is the fact that a criminal defendant is powerless to counter *state-initiated* efforts to intimidate witnesses. State-initiated threats can be serious in nature and effective.[148] In 2010, after 15 years of prison, Jabbar Collins was exonerated of

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143 KAMISAR ET AL., *supra* note 41, at 1206.

144 The right to confront witnesses against the defendant only ripens at trial. *See* Sarah A. Stauffer & Sean D. Corey, *Sixth Amendment at Trial*, 87 GEO. L.J. 1641, 1647-48 (1999). In Florida, a defendant is not allowed to be present at a deposition absent court approval or stipulation by the parties. FLA. R. CRIM. P. 3.220(h)(7). The Florida Supreme Court concluded a discovery deposition does not provide for meaningful cross-examination of the deponent because a discovery deposition is not a device designed to gather testimony for later use at trial. State v. Lopez, 974 So. 2d 340, 347 (Fla. 2008).

145 KAMISAR ET AL., *supra* note 41, at 1206.

146 MO. SUP. CT. R. 25.12(c).

147 FLA. R. CRIM. P. 3.220(h)(4) (providing, "[d]epositions of children under the age of 16 shall be videotaped unless otherwise ordered by the court. The court may order the videotaping of a deposition or the taking of a deposition of a witness with fragile emotional strength to be in the presence of the trial judge or a special magistrate").

148 *See, e.g.*, A. G. Sulzberger, *Facing Misconduct Claims, Brooklyn Prosecutor Agrees to Free Man Held 15 Years*, N.Y. TIMES, June 9, 2010, at A18 (discussing exoneration of Jabbar Collins); *see also* Colin Moynihan, *Cleared in One '95 Killing, 3 Seek Reversal in Another*, N.Y. TIMES, Jan. 2, 2013, http://www.nytimes.com/2013/01/03/nyregion/three-still-jailed-for-95-killing-seek-a-second-reversal.html (same witness stated that she "feared retaliation from law enforcement" should she not testify); Colin Moynihan, *Cleared of One '95 Murder, 3 Men Have Conviction Vacated in a 2nd*, N.Y. TIMES, Jan. 23, 2013, http://www.nytimes.com/2013/01/24/nyregion/convictions-of-three-in-1995-murder-of-denise-raymond-overturned.html (witness recanted her testimony, saying it was delivered under duress from law enforcement).

murder after a key State witness testified in a post-conviction proceeding that the prosecutor had threatened to hit him and incarcerate him for any failure to testify in accordance with the State's theory.[149] The witness was jailed for a week before he eventually agreed to testify falsely for the State.[150] The State may also engage in threats to suppress potentially exculpatory evidence—"[p]olice and prosecutorial improprieties take on several different forms: [including] making threats against potential witnesses for the accused."[151] In a Milwaukee homicide case, a potential alibi witness told police that, at the time of the shooting across town, he thought the defendant had arrived at the witness's residence. Officers threatened to tell the witness's track coach that the witness was lying in a homicide investigation and warned that he would lose his scholarship.[152] Without the power to compel pretrial answers from officers, witnesses, and those who may have observed the exchange, a defendant cannot overcome the threat's effectiveness.

State witnesses are not the only individuals subject to intimidation. A witness with exculpatory or inculpatory information may refuse to come forward because he fears retribution from an alternate suspect or the State. The potentiality of witness retaliation is real, but the source of that retaliation may be State agents, a State witness, or an alternate suspect. Both parties should have sufficient powers to expose incidents of intimidation. The State has that power through the use of its police force and witness protection programs; a defendant does not.

C. A Concern That a Defendant Will Misuse Formal Powers

A perennial concern over providing formal investigatory power to a criminal defendant is that he will misuse it to delay the State's case.[153] The predicate conditions to committing

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[149] Sulzberger, *supra* note 148, at A18.

[150] *Id.*

[151] *See* C. RONALD HUFF ET AL., CONVICTED BUT INNOCENT: WRONGFUL CONVICTION AND PUBLIC POLICY 71 (1996).

[152] This example is based on an investigation conducted by the Wisconsin Innocence Project. Interviewed five years after the event, the young man, now working at a bank and running a non-profit to assist inner-city kids, confirmed detectives made these threats. Information on file with author.

[153] Brennan, Jr., *supra* note 12, at 6 (detailing arguments made by Chief Justice Vanderbilt of the New Jersey Supreme Court against liberal discovery for criminal defendants); Brown, *supra* note 2, at 1590 ("defense counsel's commitment is not to accuracy; it is to his or her clients, many of whom want inaccuracy to mask their

discovery abuse, however, are typically absent from criminal law. Discovery abuse in civil litigation is associated with document-heavy cases in which well-resourced opponents engage in dilatory practices by propounding unnecessary discovery requests or dumping truckloads of marginally responsive documents on opposing counsel.[154] Other than in white-collar disputes (which represent a very small fraction of criminal cases), these tactics would not typically be available to a criminal defendant—the vast majority of criminal defendants are indigent. Any attempt by a defense attorney to unnecessarily subpoena law enforcement officers would reach the ears of the prosecutor and court. That an overworked public defender would have the time, interest, or resources to engage in discovery abuse is unlikely.

The concern that a criminal defendant would only use discovery rights to subvert the process is likely grounded in the presumption that the State generally "gets it right"—that the criminal defendant is guilty. But this resistance to affording a presumptively liable party with investigatory power appears to be reserved for a criminal defendant. There is no movement to deprive a civil defendant of formal powers where the defendant is most certainly liable—Exxon in the Puget Sound oil spill litigation, for example.[155] Rather, we leave it to a civil defendant, however liable, to use its sometimes impressive resources (resources a criminal defendant might never possess) to protect its interests. In this sense, the potentiality that a liable party would be motivated to interfere with an investigation is not unique to criminal law. A civil defendant may face overwhelming liability that leads to damage control

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guilt"). It should be noted that Brown nevertheless proposes more robust discovery, advocating for an open-file policy. *Id.* at 1637-38.

[154] *See, e.g.*, Kawamata Farms v. United Agri Prods., 948 P.2d 1055, 1090-91 (Haw. 1997) ("The record shows that DuPont engaged in a pattern of discovery abuse by, among other things, violating the circuit court's discovery orders, 'dumping' forty boxes of documents pursuant to one of the Plaintiffs' interrogatory requests, and intentionally withholding information and documents that DuPont should have produced during discovery. This inexcusable behavior by DuPont is very disturbing."); *Class Action* starring Gene Hackman and Mary Mastrantonio. CLASS ACTION (20th Century Fox 1991).

[155] Exxon's big boat spilled ll million gallons of oil into a pristine bay. Exxon argued it was free from liability, but was found to be "worse than negligent but less than malicious." The Supreme Court, however, did agree with Exxon that maritime common law principles applied, reducing a $2.5 billion punitive award. Under maritime law punitive damages should not exceed a 1:1 ratio with compensatory damages ($507 million). *See* David Savage, *Justices Slash Exxon Valdez Verdict*, L.A. TIMES, June 26, 2008, http://articles.latimes.com/2008/jun/26/nation/na-valdez26.

behaviors, from destroying documents[156] to making examples of employees who breach conceptions of loyalty.[157] But these potentialities do not result in calls to preclude a civil defendant from testing plaintiff's theories.

At the same time, should formal investigatory powers be extended to criminal defendants, some defense attorneys *would* inevitably engage in delay or subterfuge. Civil procedure provides for checks on dilatory practice, including the imposition of protective orders and judicial sanctions.[158] In Florida, where formal investigatory rights are extended to the criminal defendant, due process does not preclude a court from sanctioning him for violating discovery rules, including the power to prohibit him from calling a witness or introducing documentary evidence.[159]

On the other hand, the concern that a criminal defendant will use discovery tools to subvert the truth ignores the possibility that law enforcement will use police powers to subvert the truth. The lack of formal investigatory power renders a criminal defendant particularly vulnerable to a law enforcement officer who falsifies witness testimony in police reports. A former San Francisco Police Commissioner recently

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[156] Charles R. Nesson, *Incentives to Spoilate Evidence in Civil Litigation: The Need for Vigorous Judicial Action*, 13 CARDOZO L. REV. 793, 793 (1991) ("[O]ne half of litigators believe that 'unfair and inadequate disclosure of material information prior to trial [is] a "regular or frequent" problem . . . [and] 69% of surveyed antitrust attorneys [have] encountered unethical practices,' in including, most commonly, destruction of evidence.").

[157] Whistleblower statutes—those statutes that protect people who expose wrongdoing by either incentivizing their decision to speak or protecting them from retaliation—reflect policymakers' attention to this problem in the civil sphere. *See generally* Elletta Sangrey Callahan & Terry Morehead Dworkin, *The State of State Whistleblower Protection*, 38 AM. BUS. L.J. 99 (2000) (discussing legislative and judicial protections available to whistleblowers in the United States); *see also* Paul Sullivan, *The Price Whistle-Blowers Pay for Secrets*, N.Y. TIMES, Sept. 21, 2012, http://www.nytimes.com/2012/09/22/your-money/for-whistle-blowers-consider-the-risks-wealth-matters.html?pagewanted=all ("If you look at the field of whistle-blowers, you see a high degree of bankruptcies. You may find yourself unemployable. Home foreclosures, divorce, suicide and depression all go with this territory.") A spokesman for Taxpayers Against Fraud stated that, for whistleblowers, "[t]here is a 100 percent chance that you will be unemployed—the question is, Will you be forever unemployable? . . . The other 100 percent factor is the person who fired you, the person who designed and implemented the fraud, won't be fired. He'll probably be promoted again." *Id.* (internal quotation marks omitted). Statutes like Title VII's retaliation provisions are meant to prevent such results. *See* 42 U.S.C. § 2000e-3(a) (2006).

[158] FED. R. CIV. P. 26 advisory committee's note to 1983 amendment ("Excessive discovery and evasion or resistance to reasonable discovery requests pose significant problems."). In response, the Advisory Committee struck the language stating "the frequency of use of the various discovery methods was not to be limited" with the intent that parties, when appropriate, would file a protective order. *Id.* (internal quotations omitted).

[159] FLA. R. CRIM. P. 3.220(n).

complained of the incidence of narcotics officers falsifying evidence.[160] In another instance, Bronx Assistant District Attorney Jeannette Rucker determined that "it had become apparent that the police were arresting people even when there was convincing evidence that they were innocent," and found that officers had provided "false written statements" to justify the arrests.[161] Despite such concerns, a criminal defendant has no formal power to depose officers or the witnesses subject to State incentives, threats, or police falsification.

Not all civil litigants are angels and not all civil disputes are just about money. Like in the criminal law, civil cases can be of great significance.[162] At issue might be a critical question about whether a health condition is covered by insurance, whether a bay fouled by oil will be restored, or whether minority students should be subjected to a segregated school system. We provide all potentially serious civil wrongdoers—whose decisions have led to discrimination, bankruptcies, injury, death, and environmental degradation—robust pretrial power to potentially undermine the truth. There is little reason that a criminal defendant, presumed innocent, should not be privileged to sit among such company. We might reframe the issue: irrespective of whether a criminal defendant is innocent, guilty, or ultimately something in between, he is motivated to challenge the State's theory of liability. The fact that a criminal defendant faces significant consequences best positions him to check mistakes made by his opponent.

In the end, it is not the significance of the issues that distinguishes a criminal defendant from his fellow tortfeasors. Rather, the distinguishing characteristic is the unique burden

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[160] Michelle Alexander, Op-Ed, *Why Police Lie Under Oath*, N.Y. TIMES, Feb. 3, 2013, at SR4.

[161] *Id.*

[162] Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1281 (1976); Linda S. Mullenix, *Resolving Mass Tort Litigation: The New Private Law Dispute Paradigm*, 33 VAL. U. L. REV. 413, 415 (1999) (stating that the "aggregative private dispute resolution paradigm resembles nothing so much as private legislation with wide-reaching effects, carrying the imprimatur of judicial oversight and approval, but frequently accompanied by troubling questions about fairness, adequate representation, and the subtle merger of legislative, administrative, and judicial functions"); *see also* Roscoe Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, 40 AM. L. REV. 729, 730 (1906) (read by Roscoe before the American Bar Association in St. Paul, Minnesota on August 29, 1906) ("The rules which define those invisible boundaries within which each may act without conflict with the activities of his fellows in a busy and crowded world, upon which investor, promoter, buyer, seller, employer and employee must rely consciously or subconsciously in their every-day transactions, are conditions precedent of modern social and industrial organization.").

borne by the criminal defendant. He faces severe punishment—the loss of liberty and damage to reputation, inhumane conditions of prison, and the assured lack of opportunities following release. All of these concerns underscore the importance of providing the criminal defendant with formal investigatory tools to defend himself. Added to this is the desire that a criminal defendant be able to defend himself in accordance with the "categorical *ex ante* judgment that society would prefer to let a guilty person go free rather than send an innocent person to prison."[163]

And a criminal defendant may in fact be innocent. To deprive a criminal defendant of formal investigatory power underestimates how difficult it may be for a factually innocent defendant to secure an acquittal. An innocent defendant likely has no idea who committed the crime. Alibis tend to be hard to prove. An alibi may be unsophisticated and, when tested by a talented prosecutor, appear suspect. A crime may occur at night (it often does) and an alibi that asserts the defendant went to sleep could not confirm he did not slip out. The theory that the State's high burden of proof will set an innocent defendant free[164] is a weak insurance policy against an erroneous eyewitness account, for example, which is highly resilient to cross-examination.[165] In some cases, only affirmative evidence demonstrating that an alternate suspect likely committed the crime is sufficient to overcome the State's case. To demonstrate innocence in such circumstances, the defense attorney cannot rely on the State's evidence but must instead conduct an independent inquiry that leads to a different result.

D. A Concern that Trial is the Proper Forum for Testing the Case

Providing criminal defendants with formal investigatory tools might make the pretrial period more adversarial, and there is a concern that doing so would waste resources during a period in which most criminal defendants voluntarily admit

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[163] Redish, *supra* note 23, at 855 (citing 4 WILLIAM BLACKSTONE, COMMENTARIES 358; Alexander Volokh, *Guilty Men*, 146 U. PA. L. REV. 173, 174–77 (1997)).

[164] Leipold, *supra* note 12, at 1152 ("Because it has the burden of proof, the prosecutor collects most of the evidence.").

[165] Brown, *supra* note 2, at 1602 ("Once an eyewitness's memory has been affected by suggestive identification procedures, it is hard to undo the damage.").

guilt.[166] There is a significant body of scholarship, however, that challenges the assumption that all pleas are voluntary.[167] And for those criminal defendants who are overcharged or innocent, the lack of formal discovery tools leaves a criminal defendant ill-prepared by the time he advances to trial.

Trial provides an inappropriate forum to conduct an investigation of the case. By the time a jury is impaneled, litigants should not be exploring alternative theories of liability. Pretrial motions have been decided. Litigants have determined what narrative they want to convey. Any absence of a trial strategy at this juncture would constitute deficient performance—a trial strategy to "figure out what to do after we investigate at trial" is *per se* deficient.[168] Even if a defendant attempted to conduct an investigation at trial, the rules of evidence would inhibit the effort; hearsay, inadmissible at trial, is essential to establishing investigative leads.[169] Cross-examination is designed to cement, not uncover, a narrative. Trial does not provide the optimum forum to refresh a witness' recollection, a process that can result in long periods of silence as a witness reviews documents. Trial is in part a public spectacle, roles have already been assigned, the script finalized. If a defendant has not adequately investigated the incident by the eve of trial, it is too late for defendant. He will lose.

And trial is not where disputes are predominantly resolved.[170] As to the few disputes that advance to trial, the quality of facts informing strategy and witness selection is inextricably tied to the quality of the pretrial investigation. A pretrial investigation also protects the record. It is not uncommon for a witness to miss a trial appearance due to unstable living arrangements, mental health and substance abuse issues, or

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[166] Gershman, *supra* note 8, at 145 ("[W]hereas a fair trial involves a forced settlement of a factual dispute in a fair adversarial contest before a judge and jury, a fair plea typically does not involve a factual dispute.").

[167] Langer, *supra* note 5, at 276 (suggesting more discovery rights like open-file policies to counteract the conditions that lead to coerced pleas).

[168] *See, e.g.*, Silva v. Woodford, 279 F.3d 825, 846 (9th Cir. 2002) ("[A]n attorney's performance is not immunized from Sixth Amendment challenges simply by attaching to it the label of 'trial strategy.' Rather, '[c]ertain defense strategies may be so ill-chosen that they may render counsel's overall representation constitutionally defective.'") (citing *United States v. Tucker,* 716 F.2d 576, 586 (9th Cir. 1983)).

[169] *See, e.g.*, FED. R. EVID. 802-04. The hearsay rule alone precludes conducting an adequate investigation—the question, "who told you that?" being central to any investigation. In addition, the "other acts rule" precludes inquiring about what the witness has done, and his knowledge of what others have done, in the past. *See* FED. R. EVID. 404.

[170] Whereas 90 percent of criminal disputes resolve in a plea deal, only 10 percent of criminal litigants advance to trial. *See supra* note 36 and accompanying text.

trouble with the law. A formal investigatory tool like the deposition provides an insurance policy against no-shows. Unlike the one-shot opportunity presented at trial, a party has time to make pretrial attempts to secure a witness' attendance at a deposition. If a witness fails to appear for trial, any recorded or written prior statement will typically constitute inadmissible hearsay. A deposition, however, ensures that in these circumstances admissible portions of the witness's transcript will be admitted at trial under the "former testimony" exception to the hearsay rule.[171] A jury should consider what all critical witnesses have to say. Substantive deliberation should not be undermined by the unavailability of a witness on the day of trial.

E. A Concern That Defendant Already Has Enough Rights

A criminal defendant has constitutional protections designed to check abuses by a police force that is otherwise authorized to search, seize, arrest, interrogate, lie, and threaten serious consequences for non-cooperation. These constitutional rights are defensive in nature. They grant no affirmative power to a defendant to develop evidence (with the notable exception of the Sixth Amendment right to counsel). They also do little to check the intentions of the state apparatus. Deference typically afforded to an officer's account of conditions on the ground and the exceptions to the warrant requirement render the suppression of evidence rare.[172] Individuals tend to cooperate in custodial interrogations despite a right to remain silent.[173] Regarding constitutional efforts to prevent police coercion, in jurisdictions that do not require officers to record the interrogation the judge weighs the credibility of a criminal defendant who allegedly confessed to criminal activity against the credibility of officers.

Because these constitutional protections are defensive in nature, they do not provide a criminal defendant any affirmative right to engage in fact-finding. Yet some might find it particularly unfair to give the criminal defendant a right to compel information from the State's witnesses when the

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[171] FED. R. EVID. 804(b)(1).

[172] Craig D. Uchida & Timothy S. Bynum, *Search Warrants, Motions to Suppress and "Lost Cases:" The Effects of the Exclusionary Rule in Seven Jurisdictions*, 81 J. CRIM. L. & CRIMINOLOGY 1034, 1044-45 (1991) (citing to a 1979 study of almost 3,000 cases conducted by the General Accounting Office that found successful motions to suppress were made in 1.3% of the prosecuted cases).

[173] Leo, *supra* note 127, at 653 (finding that only 22% of those placed in custody invoke their *Miranda* rights and refuse to speak to police during an interrogation).

defendant can elect to invoke the Fifth Amendment.[174] This argument does not acknowledge that the existing informational asymmetry between the parties would persist even if formal discovery powers were only extended to a criminal defendant. A criminal defendant will never match the State's exercise of police powers through a sophisticated police force.

The concern also overstates the Fifth Amendment's limitation on the State's power. It is common for civil litigants to be foreclosed from making inquiries into privileged information, however probative that evidence might be. In a shareholder suit, a plaintiff can expect to be prevented from inquiring into an executive board meeting held in the presence of the board's attorney. Yet, these privileges do not ultimately inhibit broad and intrusive inquiry into the opposing party's theory of the case. Likewise, that the State may be foreclosed from deposing a defendant would not preclude the State from compelling testimony from a defendant's friends, family, alibi, former employers, landlords, and anyone else with relevant information.[175] And the State may not be the only party hindered by the Fifth Amendment. The constitutional protection would also pose a challenge to a defendant pursuing an alternate perpetrator defense, as an alternate suspect deposed by defense counsel is also privileged to claim a right to silence.

F. A Concern That Formal Discovery Would Be Too Costly

One concern over extending formal discovery is "that depositions are very costly, and with the state footing the bill for indigent defendants, there is no financial sacrifice that would provide a restraint against appointed counsel conducting unnecessary depositions."[176] Providing deposition power, however, will not relieve public defenders of a relentless caseload.[177] In Wisconsin, for example, a public defender must meet an annual quota of 200 points—receiving a half-point for a misdemeanor,

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[174] See *United States v. Garsson*, 291 F. 646, 649 (S.D.N.Y. 1923), for Judge Learned Hand's position against expanding discovery to a criminal defendant.

[175] Florida's approach to discovery depositions in criminal proceedings provide an example of how discovery depositions can be used in the criminal justice system without running afoul of the confrontation clause. FLA. R. CRIM. P. 3.220(h)(1)(A)-(D) (allowing both the defendant and the prosecution to depose certain categories of witnesses).

[176] KAMISAR ET AL., *supra* note 41, at 1206.

[177] Peter A. Joy, *Ensuring the Ethical Representation of Clients in the Face of Excessive Caseloads*, 75 MO. L. REV. 771, 777 (2010) ("Most commentators and bar leaders agree that the major factors contributing to poor quality of defense services are excessive caseloads, lack of funds for expert witnesses and investigators, and extremely low pay rates for court-assigned lawyers and contract defense services.").

and upwards of 20 points for a homicide.[178] An entry-level public defender must dispose of 400 cases in one year to meet her minimum. Those litigating on the felony calendar and predominantly taking Class A felony cases "reduce" their workload to two or three homicide cases a month. Wisconsin public defenders actually fare better than public defenders of other jurisdictions where "felony caseloads of 500, 600, and 800 or more are common."[179] Caseload realities effectively provide a built-in deterrent to a deposition's overuse.

In serious criminal cases, the stakes are high and the sources of information tend to be limited. In the absence of interrogatories to seed the investigation and subpoena power to compel production of testimony and documents, conducting an informal investigation may prove not only less effective, but more costly than conducting a formal investigation. To the extent that instances of discovery abuse surface, judicial intervention provides a moderating role, and subsequent reform efforts in the civil forum have sought to increase cooperative behavior in exchanging information.[180] Operationally, the complexity of a dispute tends to govern the use of discovery. Even where litigants have an arsenal of discovery tools at their disposal, simple disputes—the majority of civil cases, in fact—are resolved in the absence of discovery.[181] In Florida, the legislature considered this concern and has codified that "[n]o deposition shall be taken in a case in which the defendant is charged only with a misdemeanor . . . unless good cause can be shown to the trial court."[182] A party in New Mexico may subpoena a witness, record the interview, and direct an assistant to prepare a transcript to which the opposing party typically stipulates, a measure that greatly reduces costs associated with securing a

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[178] Interview with Michele LaVigne, Clinical Professor of Law, Univ. of Wis. Law Sch., in Madison, Wis. (Jan. 23, 2012) (notes on file with author).

[179] *Five Problems Facing Public Defense on the 40th Anniversary of* Gideon v. Wainwright, NATIONAL LEGAL AID & DEFENDER ASSOCIATION, http://www.nlada.org/Defender/Defender_Gideon/Defender_Gideon_5_Problems (last visited Feb. 26, 2014).

[180] FED. R. CRIM. P. 26 advisory committee's notes to 1993 amendment (requiring mandatory disclosures, the "purpose of the revision is to accelerate the exchange of basic information about the case and to eliminate the paper work involved in requesting such information, and the rule should be applied in a manner to achieve those objectives").

[181] David M. Trubeck et al., *The Cost of Ordinary Litigation*, 31 UCLA L. REV. 72, 89-90 (1983) ("Our data [analyzing civil litigation trends] suggest[s] that relatively little discovery occurs in the ordinary lawsuit. We found no evidence of discovery in over half our cases. Rarely did the records reveal more than five separate discovery events.").

[182] FLA. R. CRIM. P. 3.220(h)(1)(D).

court reporter in a deposition.[183] Formal discovery tools are subject to customization. Properly configured, they are potentially more effective and efficient than the informal discovery methods currently available to the criminal defendant.

CONCLUSION

Rules that govern the exchange of information ultimately reflect the quality of information society agrees to afford litigants. A limited grant of discovery power would suggest an unwillingness to disrupt daily life to resolve a dispute. A small claims court, for example, does not permit litigants to depose witnesses to determine the exact value of damage done to a personal printer.[184] In contrast, invasive discovery tools are permitted in disputes deemed significant. In civil disputes, litigants are afforded investigatory tools that disrupt the lives of others. In this light, a criminal defendant has more in common with a small claims litigant.

Precluding a criminal litigant from engaging in formal investigation means that the quality of facts informing resolutions is, relative to civil law outcomes, inferior. Entitled to only discrete information, negotiations in criminal disputes are based on allegations in the complaint, evidence favorable to the State, and the raw power to threaten sobering penalties in exchange for reduced punishment. One cannot imagine a civil dispute in which a defendant's settlement position is informed by allegations in the complaint and documents selected by a plaintiff. Yet, most criminal defendants are entitled to just that,[185] facilitating complaint-based outcomes that credit prosecutorial hunches.

These pretrial deficiencies—affecting 90% of defendants[186]—are not cured by trial. The information that informs a criminal trial, relative to civil trials, is also inferior. The overwhelming source of information originates from the State's file—sources of potentially exculpatory evidence remain unexplored and witnesses who have not been deposed are freer to prevaricate. The Supreme Court acknowledged in *Kyles v.*

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[183] Interview with Katherine Judson, Innocence Project Litigation Fellow, in Madison, Wis. (Oct. 23, 2012) (notes on file with author).

[184] Small claims courts are characterized by the "lack of opportunity to conduct discovery." Bruce Zucker & Monica Her, *The People's Court Examined: A Legal and Empirical Analysis of the Small Claims Court System*, 37 U.S.F. L. REV. 315, 347 (2003).

[185] *See supra* Part I.C.

[186] *See supra* note 36 and accompanying text.

Whitley[187] that it is a legitimate defense to argue to the jury that the State's investigation was flawed. But a defendant cannot discern the existence of this defense without the ability to conduct an independent investigation to show what law enforcement missed.

Civil discovery rules are designed to fuel a broad *pretrial* investigation, one that uncovers and tests the credibility of evidence before trial.[188] The orientation of criminal discovery rules toward the trial moment further diminishes a defendant's pretrial access to information.[189] These disclosure provisions are wedded to an event that rarely occurs. Some jurisdictions are trial-centric *in toto*; Wisconsin does not require any disclosure of State's evidence until "a reasonable time before trial."[190]

A criminal defendant is not entitled to play an essential role in the investigation of his case. His right to be informed is in every respect inferior to all other parties in the common law system.[191] In 1974, when changes were made to federal criminal procedure to ensure that pretrial disclosure was mandatory upon request, it was done because:

> broad discovery contributes to the fair and efficient administration of criminal justice by providing the defendant with enough information to make an informed decision as to plea; by minimizing the undesirable effect of surprise at the trial; and by otherwise contributing to an accurate determination of the issue of guilt or innocence.[192]

This was the Advisory Board's "Mission Accomplished" moment—the finish line is a long way off.

The criminal defendant's role in an investigation should be reevaluated. Currently, he is a passive recipient of information. Statutorily, he is afforded no role in the investigation of his own case. Greater access to the prosecutorial file and more resources would go some way to mitigate existing deprivations. But in light of the State's formal power to investigate, the failure to provide a criminal defendant formal investigatory tools leaves potentially

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[187] 514 U.S. 419, 445 (1995) (observing that disclosure of the informant's statements would have given the defense grounds to attack "the thoroughness and even the good faith of the investigation").

[188] *See, e.g.*, FED. R. CIV. P. 26(a).

[189] Langer, *supra* note 5, at 275 (stating that federal criminal procedure in particular "establish[es] a mainly trial-centric approach to discovery rules").

[190] WIS. STAT. ANN. § 971.23(1) (West 2013) (requiring that certain disclosures be made at a "reasonable time before trial").

[191] Susan R. Klein, *Enhancing the Judicial Role in Criminal Plea and Sentence Bargaining*, 84 TEX. L. REV. 2023, 2044-45 (2006) (describing the "gulf between criminal and civil discovery").

[192] FED. R. CRIM. P. 16 advisory committee's note to 1974 amendment.

unsubstantiated narratives untested. Compared to the major disputes resolved in civil litigation that are informed by multiple sources and careful examination of witnesses and documents, the criminal system remains shielded from the light of adversarial testing. Over 50 years ago, the United States Supreme Court stated, "[m]utual knowledge of all the relevant facts *gathered by both parties* is essential to proper litigation."[193] Criminal law has been spared of this wisdom.

[193] Hickman v. Taylor, 329 U.S. 495, 507 (1947) (emphasis added).