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DISCOVERY AND DARKNESS: THE INFORMATION DEFICIT IN CRIMINAL DISPUTES

Ion Meyn

DISCOVERY AND DARKNESS: THE INFORMATION DEFICIT IN CRIMINAL DISPUTES

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INTRODUCTION

Scholarship has long recognized a disparity between the discovery rights afforded to civil litigants and those afforded to criminal defendants.[1] A widespread assumption, however, is that a criminal defendant actually has the power to conduct an investigation into the crime.[2] But this assumption is not accurate. A criminal defendant—as opposed to all other civil and criminal litigants—is structurally precluded from conducting a formal investigation. Only entitled to view fragments of the State's evidence against him,[3] a criminal defendant is not authorized to make investigatory choices.[4] In contrast, the State in a criminal matter is imbued with police powers, and civil litigants are authorized to compel

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[1] 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 calls for the expansion of criminal discovery rights started in the 1960's, but that no criminal discovery procedures match the broad discovery possibilities in civil procedure); 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).

[2] *Williams v. Taylor*, 529 U.S. 362, 420 (2000) (holding that a criminal defense attorney has a duty to investigate, which implies that the criminal defense attorney has the power to investigate); Darryl K. Brown, *Criminal Procedure, Justice, Ethics, and Zeal*, 96 MICH. L. REV. 2146, 2147 (1998) (implying that defense attorneys have the power to investigate by recognizing that investigation is often limited by budgetary constraints); Rodney J. Uphoff, *The Criminal Defense Lawyer as Effective Negotiator: A Systemic Approach*, 2 CLINICAL L. REV. 73, 95-97 (1995) (assuming that a defense counsel has the power to conduct an adequate investigation, Uphoff argues a defense attorneys first step in effectively negotiating a plea is to perform an investigation).

[3] *See, e.g.*, FED. R. CRIM. P. 16; AM. BAR. ASS'N, STANDARDS RELATING TO DISCOVERY AND PROCEDURE BEFORE TRIAL: RECOMMENDED BY THE ADVISORY COMMITTEE ON PRETRIAL PROCEEDINGS (approved draft, 1970) (hereinafter ABA STANDARD) (enumerating discrete categories of evidence that each party must disclose to the opposing party); *see also* Roberts, *supra* note 1, at 1122 (surveying criminal procedure statutes and noting that "at one end of the spectrum are jurisdictions that follow the highly restrictive federal rules . . . [a]t the other end are the slightly larger number of jurisdictions following the broad 1970 American Bar Association Standards").

[4] *See, e.g.*, FED. R. CIV. P. 26 (requiring initial disclosures); FED. R. CIV. P. 30 (allowing depositions of any person, including parties); Fed. R. Civ. P. 33 (allowing the use of interrogatories to be served upon parties); 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 request non-parties to produce documents and things).

information from any source.[5] A criminal defendant, permitted a keyhole view of the State's evidence, is the only litigant relegated to darkness.

Although it is assumed that the State initiates a criminal investigation,[6] left unexamined is what role a defendant should play in that investigation. In civil disputes, each litigant is essential to the function of the adversarial process.[7] Yet, subjected to the same adversarial system, criminal defendants are viewed as peripheral.[8] The role presently assigned to a criminal defendant is most akin to that of a defendant in an inquisitorial system. Yet, unlike an inquisitorial system, the investigating agency is not neutral. Rather, and with predictable results, a motivated prosecutor attempts to secure defendant's conviction.[9]

In identifying a discovery disparity, scholars and policymakers have advocated for open-file policies that increase access to prosecutorial files,[10]

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[5] *See, e.g.*, FED. R. CIV. P. 26 (requiring initial disclosures); FED. R. CIV. P. 30 (allowing depositions of any person, including parties); Fed. R. Civ. P. 33 (allowing the use of interrogatories to be served upon parties); 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 request non-parties to produce documents and things).

[6] *See, e.g.*, 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); Máximo Langer, *Rethinking Plea Bargaining: The Practice and Reform of Prosecutorial Adjudication in American Criminal Procedure*, 33 AM. J. CRIM. L. 223, 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).

[7] *See, e.g.*, Hon. H. Lee Sarokin & William E. Zuckermann, *Presumed Innocent? Restrictions on Criminal Discovery in Federal Court Belie this Presumption*, 43 RUTGERS L. REV. 1089, 1091 (1991) ("In civil suits discovery is a two-way street, with each side free to request virtually anything from the other.").

[8] *See, e.g.*, Natapoff, *supra* note 6, at 989-92; Leipold, *supra* note 6, at 1152 (positing that the prosecution "collects most of the evidence" without further discussion).

[9] Brennan, Jr., *supra* note 6, at 2-3 ("The proper guide to discovery practices should not be the likelihood that disclosure in a particular case will save the trouble of a trial."); Langer, *supra* note 6, at 252-3 (stating that "unlike inquisitorial adjudicators who are socialized and tend to perceive themselves as impartial officials who must seek both inculpatory and exculpatory evidence and should impartially adjudicate the case after finishing their investigation . . . [a]merican prosecutors [] have a much more ambivalent self-perception of their role" and concluding, "the prosecutor's de facto adjudicatory decision is final in many cases."); Natapoff, *supra* note 6, at 967 (observing that criminal law practices has shifted from a "traditional evidence-driven inquiry into whether there is proof that a suspect has committed a particular offense, toward a concession-based model focused on whether the suspect has acceded to governmental authority.").

[10] Alafair S. Burke, *Revisiting Prosecutorial Disclosure,* 84 IND. L.J. 481, 514 (2009) (arguing that meeting due process concerns related to discovery issues requires an open-file policy); Peter A. Joy, *Brady and Jailhouse Informants: Responding to Injustice*, 57 CASE W. RES. L. REV. 619, 641 (2007) (advocating for an open-file discovery policy); Langer, *supra* note 6, at 276 (calling for open-file discovery to diminish the coercive nature of plea bargaining in the criminal system); Roberts, *supra* note 1, at 1153-55 (recognizing the lack of investigatory power given to defense counsel, but concluding that open-file discovery is the best solution).

along with calls for more resources.[11] These reforms would go some distance in mitigating existing deprivations. An open-file policy, for example, does have the laudatory goal of encouraging more fact-based, presumably more accurate, outcomes. But the proposal does not correct for structural deprivations: to ensure a more fact-based prosecution, a criminal defendant does not require more disclosures, but instead requires the power to investigate the case in an adversary posture, before trial, as civil litigants do.

To grant a criminal defendant equivalent discovery rights would be to recast the defendant as a key actor in a pretrial investigation. And in the absence of adequate pretrial testing—the existing model—the integrity of the charging document, assessment of liability, and sentence rendered should invite renewed scrutiny. Over fifty 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."[12] Criminal law has been spared of this wisdom.

In sum, the consensus is that the low quality of information informing criminal disputes is caused by resource constraints and limited access to the prosecutorial file. This Article contends that criminal defendants are also structurally precluded from conducting any investigation. Reframing the reason for the disparity has significant implications. Only statutorily entitled to disclosures of the State's evidence, a criminal defendant is forced to rely on the fruits of the opponent's investigation to somehow suggest a counter-narrative. This dynamic is inconsistent with the design of the adversarial system and guarantees a factual deficit that undermines the legitimacy of criminal law outcomes.

Part I of this Article recasts a criminal defendant as an essential party to a criminal investigation. The belief that increased resources and greater access to the prosecutorial file will permit a criminal defendant the opportunity to investigate is challenged. Rather, in the absence of extending a criminal defendant the power to direct a formal investigation, adequate pretrial testing cannot occur. Part II evaluates the various investigative tools that should be extended to a criminal defendant, and utilizes a case study to ascertain how the application of these tools might affect a pretrial investigation. Part III surveys and responds to policy arguments against permitting the participation of criminal defendants in criminal investigations.

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[11] 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 2147 (implying that defense attorneys have the power to investigate by recognizing that investigation is often limited by budgetary constraints); Langer, *supra* note 6, at 252, n.18 (concluding defense counsel's investigation often is constrained by lack of resources).

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

I. DEFENDANTS ARE STRUCTURALLY EXCLUDED FROM PARTICIPATING IN A CRIMINAL INVESTIGATION

Most jurors believe the State has good cause to believe a defendant guilty, and weighing on each juror at trial is the burden that a "not guilty" verdict will let the wrongdoer go free.[13] A defendant must marshal facts sufficient to overcome this bias. Yet, rather than introduce new evidence suggesting an alternate theory of liability, a criminal defendant will typically attempt to undermine the State's evidence.[14] The tendency to attempt to construct a counter-narrative from the fruits of the State's investigation has a structural cause: it is the only information to which a criminal defendant is statutorily entitled.

In remarkably uniform fashion, civil litigants who meet low jurisdictional minimums utilize a powerful array of investigative tools to the extent deemed strategic.[15] In criminal law, the State maintains a monopoly over investigative choices[16] and is afforded investigatory tools that in some respects eclipse those afforded to civil litigants.[17] Yet, a criminal defendant is structurally precluded from formally participating in the investigation. Where civil litigants are granted pretrial discretion to compel information from any source, a criminal defendant views only fragments of information collected by the State.[18] Removed from the investigatory equation, a

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[13] George L. Jurow, *New Data on the Effect of a "Death Qualified" Jury on the Guilt Determination Process*, 84 HARV. L. REV. 567, 593 (1971) ("Many jurors, reasonably or unreasonably, believe that a person who has been arrested, indicted, and has put the government to the expense of trying him, is probably guilty.").

[14] *See* Darryl K. Brown, *The Decline of Defense Counsel and the Rise of Accuracy in Criminal Adjudication*, 93 CAL. L. REV. 1585, 1602-03 (2005) (arguing that the defense attorneys' ability to perform a check on the prosecutions' evidence is too often limited by a lack of resources that prevents defense attorneys from performing meaningful independent investigations).

[15] 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. CODE CIV. PROC. § 2017.010 (parties may obtain discovery regarding any relevant, non-privileged matter, that is admissible or reasonably calculated to lead to discovery of admissible evidence).

[16] *See, e.g.*, Brennan, Jr., *supra* note 6, at 15 (noting the "many and manifest advantages" in investigation enjoyed by the prosecution); Natapoff, *supra* note 6, 989-92 (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); Langer, *supra* note 6, at 250; Leipold, *supra* note 6, at 1152 ("Because it has the burden of proof, the prosecutor collects most of the evidence.").

[17] 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.

[18] *See* ABA STANDARD, *supra* note 3 (stating as one of its general principles, "to provide the accused sufficient information to make an informed plea"). The ABA Standard, despite being the template for liberalized criminal discovery, adopts a general principle that suggests adversarial testing is not essential to the pretrial process. *See* Roberts, *supra* note 1, at 1122 (stating that the ABA Standard has influenced roughly a quarter of states adopting the most broadly conceived criminal discovery).

criminal defendant is left to initiate an investigation by informal means, which is inferior in every respect to a formal investigation.

A. Informal Investigation: An Inferior Way to Ask a Question

A body at rest will remain at rest unless it is subject to an outside force. Information, too, tends to remain undiscovered in the absence of an outside force requiring disclosure; conversely, the more "force" behind an investigatory tool, the more that will be revealed by its use. If statutory tools of investigation—backed by subpoena power and the threat of judicial sanction—define what information will be discovered, investigatory power not afforded, by implication, defines what tends to remain protected.

Where the power to conduct a formal investigation is restricted to civil litigants, anyone can conduct an informal investigation. It is a method we use daily. We may inquire into whether, for example, a store has the new toy every child wants for Christmas. If the sales associate says no, the next shipment is not until January, we might ask another associate in an effort to undermine or corroborate the first associate's answer. Only entitled to voluntary compliance, we cannot compel sales receipts or inspect inventory.

The informal method is not efficient. To locate a potential witness, it may take weeks to make contact and visit the residences of, say, her Facebook friends for a lead. A person may know the location of a potential witness but cannot be forced to divulge the address. Even if a witness' location is known—it is not uncommon for a witness to refuse to answer the door or to screen calls—and it may take months to convince the witness to meet and discuss the case.

Neither is the informal method effective. Left to persuade voluntary disclosure,[19] a criminal defense attorney is presented with unique challenges. Police officers who routinely confer with prosecutors often refuse to speak with a defense attorney. Witnesses are reluctant to talk in neighborhoods where the line between being an eyewitness and a suspect is viewed as arbitrary. If a witness does initially cooperate, it is not uncommon for the interview to end when questions approach probative. In contrast, depositions permit unyielding examination, and any obfuscation is on the record, providing opportunities to suggest bias at trial.[20]

One cannot rely on hope to conduct an investigation into a crime. Growling dogs, refusals to open a door, and off-the-record lying leave a criminal defendant with no recourse. A criminal defense attorney thus has no more power to conduct a formal investigation than her neighbors. In contrast to the informal model of discovery that requires massive resources

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[19] Attorneys, unlike law enforcement agents, cannot engage in threats or deception to extract information. *See infra* note 103 and accompanying text.

[20] *See, e.g.*, YOUTUBE, June 20, 2012, Deposition of Dwayne Michael Carter, a.k.a. Lil Wayne, http://www.youtube.com/watch?v=YQsMqRvPzRw (last visited Apr. 23, 2013).

and no small degree of luck to obtain an incomplete understanding of a case, the power to compel a person to appear at a place and time to answer questions under oath is comparatively efficient and effective.

B. The Modern Era: The Advent of the Formal Investigation

In 1938, Congress ushered in the modern era of pretrial fact testing.[21] Prior to this time, plaintiffs were first required to conduct an informal investigation to substantiate the complaint, and only then could petition the court to compel pretrial information.[22] The new rules empowered litigants to conduct a formal investigation, permitting each party to compel testimony and to demand documents from any source.[23]

A formal investigatory tool grants power *to compel any relevant information from any source*, leaving only privileged information protected.[24] The strength of these formal tools may vary, based on the invasiveness of the inquiry permitted (one day versus unlimited time to conduct a deposition), and the duration in which to conduct an investigation (the trial date is set one year out versus two months out). A formal investigatory tool does not of course guarantee consideration of every relevant fact. 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),[25] and to question her (travel, translation, and lodging). These limitations aside, the formal investigative tools permitted by the Federal Rules of Civil Procedure are far superior to informal investigative methods.

C. Adhering to the Pre-Modern World: The Birth of the Disclosure

The criminal law has retained fidelity to the pre-modern conception of discovery—neither party is granted power to compel pretrial information. Yet, the need for procedural reform is most acute in criminal disputes:

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[21] 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 Congress's 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) (providing an analysis of the adoption of the Federal Rules of Civil Procedure).

[22] Beisner, *supra* note 21, 554-55.

[23] 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.").

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

[25] 28 U.S.C. § 1782 (2006).

where the State is constitutionally afforded police powers to conduct a formal investigation, to date, no federal reform extends formal investigatory powers to a criminal defendant.

In 1944, when it was a foreign concept to furnish a criminal defendant with any information, a new federal rule permitted a defendant to inspect those of his things impounded by the government.[26] Where the first major reform in civil procedure granted litigants robust investigative powers, a criminal defendant was merely afforded the right *to inspect what was once his*. Subsequent reforms conferred no formal investigative power, but instead added to a limited laundry list of disclosures. In 1966, a criminal defendant was granted access to his own statement, his grand jury testimony, and to reports of scientific tests—all disclosures.[27] A defendant was also entitled to documents "material" to presenting a defense: sharing some characteristics of an investigatory tool. Intended to "limit the scope of the government's obligation to search its files while meeting the legitimate needs of defendant,"[28] the State retains broad discretion in selecting what information is released.[29]

In addition to statutory rights, the *Brady* doctrine—theoretically ensuring defendant some baseline of information critical to due process—is also a disclosure right. Under *Brady*, a prosecutor must turn over, before trial, material and exculpatory information.[30] 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."[31] This characterization overstates *Brady*. *Brady* does not convey investigative power to a defendant. Courts tend to forgive prosecutorial neglect and favor finality.[32] Prosecutors tend to undervalue evidence that might be exploited by an adversary,[33] and may misapprehend the standard.[34]

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

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

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

[29] Keith A. Findley & Michael S. Scott, *The Multiple Dimensions of Tunnel Vision in Criminal Cases*, 2006 WIS. L. REV. 291, 351. In addition, the analysis in cases finding *Brady* violations underscores these prosecutorial tendencies to diminish the importance of the "material" evidence. *See, e.g.*, *Brady v. Maryland*, 373 U.S. 83, 87 (1963); *Kyles v. Whitley*, 514 U.S. 419, 434 (1995); *Smith v. Cain*, 132 S. Ct. 627, 629-30 (2012). A court's inclination to do the same is exemplified in the Justice Clarence Thomas' dissent in *Smith*. 132 S. Ct. at 640-41 (Thomas, J., dissenting).

[30] *Kyles*, 514 U.S. at 432.

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

[32] *See, e.g.*, *Smith*, 132 S. Ct. 627. A fascinating case that split the Court's conservative wing, it strengthens the *Brady* doctrine by providing a *per se* right to a new trial, but in narrow circumstances. Justice Thomas' dissent reveals how far a judge will go justify the State's failure to turn over evidence.

[33] *See supra* note 29 and accompanying text.

[34] *See, e.g.*, *State of Wisconsin v. Vollbrecht*, Aug. 9, 1989 Tr., (Prosecutor:) "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*

Law enforcement may liberate the prosecutor from any navel-gazing by delivering an investigatory file that excludes evidence inconsistent with a defendant's guilt. Some courts find that *Brady* offers no protection to defendants who reach pretrial resolutions.[35] In operation, *Brady* only protects the few who, without any postconviction discovery rights, somehow find documents hidden in State files.

Thus, where civil litigants are granted statutory power to compel information from any source, under federal rules and constitutional doctrine a criminal defendant is merely entitled to limited disclosures of State's evidence.[36] The federal rule influences a significant number of states.[37] Of equal significance is the ABA Standard, the liberal bookend to the federal model's conservative approach.[38] There is little daylight between the two standards; both provide for limited *prix fixe* menus of State's evidence.

D. Disclosures are Not Investigatory Tools

A formal investigative tool permits a litigant to compel information of her choosing—she decides what source is potentially significant, and what she will ask. A litigant entitled to disclosures, however, has no such

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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." (Emphasis added).

[35] *United States v. Ruiz*, 702 F. Supp. 1066, 1069-70 (S.D.N.Y. 1989) (holding that *Brady* protections do not apply to pretrial pleas); *see also* Robert C. Black, *FIJA: Monkeywrenching the Justice System?*, 66 UMKC L. REV. 11, 24 (1997) (stating that "only 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) (commenting that the percentage of pleas in federal cases ranges from eighty percent to ninety percent); H. Richard Uviller, *The Obligation of Dispassion in a Passionate Pursuit*, 68 FORDHAM L. REV. 1695, 1699 (2000) (finding that trials occur in about ten percent of criminal matters).

[36] These observations are sourced from 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. Of the ten states in the Sampling, six share significant similarities with the federal rule, whereas three are more closely wedded to the slightly more liberal ABA Standard. See also YALE KAMISAR, ET AL., MODERN CRIMINAL PROCEDURE 1200-01 (13th ed. 2012), for a survey of criminal discovery nationwide. In the ten state sampling, no discovery tools are mentioned; rather, the description is of "disclosure based" discovery—prosecutors must, here or there, disclose defendant's statements, codefendant's statements, defendant's criminal record, scientific reports, witness lists, and certain documents and police reports. In this description, there is no sense that the defendant has the statutory power to *investigate*.

[37] 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 n.69 (2011) (remarking, that as to the *Brady*-based language of Fed. R. Crim. P. 16—that the state must turn over evidence "material to the preparation of the defendant's defense"); Roberts, *supra* note 1, at 1122 (stating that about a fourth of the states adopt the federal standard, and another half, to varying degrees, have integrated federal discovery concepts).

[38] ABA STANDARD, *supra* note 3; *see also* Roberts, *supra* note 1, at 1122 (stating that the ABA Standard has influenced roughly a quarter of states adopting the most broadly conceived criminal discovery.)

discretion. Discretion is bound by statute or the opponent. The federal rule that requires the State disclose what is personal to defendant—his criminal history, for example—is *a statutorily-defined* disclosure.[39] A defendant is not permitted to request documents exceeding that constraint; for example, police reports that refer to defendant. The federal rule that requires the State to turn over any document it intends to use at trial is an example of an *opponent-defined* disclosure.[40] By this rule, the prosecutor determines the scope of responsive documents, if any—photos of gunshot wounds, an autopsy report, a crime scene map. In jurisdictions influenced by federal constraints,[41] a defendant has no discretion to obtain exculpatory documents, witness lists, police reports, or names of investigating detectives.[42] Further narrowing the significance of disclosures, a criminal defendant is only authorized to obtain information from one source, the State.[43]

Although civil statutes occasionally provide for disclosures,[44] they are different in purpose. Disclosures granted in criminal law constitute the beginning and end of statutorily permitted discovery.[45] But in civil litigation, mandatory disclosures at the lawsuit's inception "accelerate the exchange of basic information," "focus the discovery that is needed," and "guide further proceedings in the case."[46] In criminal litigation, there is no formal investigation to seed.

Based on a sampling of jurisdictions, the following tables underscore how a criminal defendant depends on disclosures from the State, whereas civil litigants are sometimes provided disclosures to seed

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

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

[41] *See, e.g.*, FED. R. CRIM. P. 16(a); *see also* ALA. R. CRIM. P. 16.1; ILL. S. CT. R. 412(a); N.Y. CLS § 240.20; PA. R. CRIM. P. 573(B) TEX. CODE CRIM. P. 39.14(a); VA. SUP. CT. R. 3A:11(b).

[42] California, Illinois, and Ohio are states in the sampling that require the State to turn over the witness list. CAL. PEN. CODE § 1054.1(a); ILL. SUP. CT. R. 412(a)(i); OHIO R. CRIM. P. 16(I). California and Ohio provide for disclosure of exculpatory information. CAL. PEN. CODE § 1054.1(e); OHIO R. CRIM. P. 16(B)(5). Florida and Ohio provide for all police reports, Florida requires the 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).

[43] FED. R. CRIM. P. 16(a); *see, e.g.*, ALA. R. CRIM. P. 16.1; CAL. PEN. CODE § 1054; FLA. R. CRIM. P. 3.220; ILL. SUP. CT. RULE 412; N.Y. CRIM. PRO. L. § 240.20; OHIO CRIM. R 16; PA. R. CRIM. P. 573; TEX. CODE CRIM. PROC. ART. § 39.14.

[44] *See infra* Figure 1; FED. R. CIV. P. 26(a)(1) (requiring disclosure of individuals likely to have information and certain documents); ILL. SUP. CT. R. 213(f) (requiring disclosure of witness information if requested); NY CPLR § 3101(d) (requiring disclosure, if requested, of information pertaining to expert witnesses); PA. R.C.P. NO. 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 that upon request a party may obtain contact information for all parties, the opposing party's legal theory, damage calculations, and information relating to those who may have information, including experts).

[45] *See infra* Figure 1. Typically, jurisdictions in the states sampled only provide for disclosures at the request of defendant. Therefore, the vast majority of discovery available to the criminal defendant is not mandatory, but only occurs via request.

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

investigations, and are, as a matter of course, permitted the power to compel information from any source:

Fig. 1

Discovery Mechanisms: Civil Litigants											
	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										/	X

Key:[47]
X - Broad Discovery Right
/ - Limited Discovery Right

[47] There is no bright line test in determining what discovery rights afforded is "broad" versus "limited." It is a comparative analysis. For example, under federal criminal procedure, a defendant is entitled to inspect his own statement, items material to presenting a defense, exhibits that the government intends to use at trial, reports of scientific reports, and a summary of expert witnesses. FED. R. CRIM. P. 16(a). Under civil law, the disclosures are not only mandatory at the inception the lawsuit, but they are much broader: they require disclosure of the contact information of any person with discoverable information, including a description of their

A criminal defendant is thus relegated to receive evidence weighted against him, he has no power to conduct a formal investigation, and he must construct a counter-narrative from facts that the State will use against him. And yet, additional structural impediments still further diminish the significance of information to which a criminal defendant is entitled.

Disclosure rights in criminal law tend to be trial-centric.[48] Whereas civil discovery rules are designed to fuel a broad pretrial investigation,[49] disclosures owed to a criminal defendant tend to be anchored in the trial event. A criminal defendant is, for example, entitled to his statement if the State intends to use it *at trial*, or to documents the State intends to use *at trial*.[50] By design, these provisions are not intended to further pretrial investigations; they are instead wedded to an event that only 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."[51]

In some jurisdictions, a criminal defendant must seek judicial approval to secure disclosures—as opposed to a civil litigant who directs investigations free from judicial intervention. In Texas[52] and Virginia,[53] limited disclosures are only granted through court order. These jurisdictions add a layer of resistance, especially for a defendant facing a disciple of Judge Learned Hand, who wrote:

> Under our criminal procedure the accused has every advantage.[54] While the prosecution is held rigidly to the charge, he need not disclose the barest outline of his defense. He is immune from question or comment on his silence; he cannot be convicted when there is the least fair doubt in the minds of any one of the twelve. Why in addition he should in advance have the whole evidence[55] against him to pick over at his leisure, and make his defense, fairly or foully, I have never been able to see . . . . Our dangers do not lie in too little tenderness to the accused. What we need to fear is the archaic formalism and the watery sentiment that obstructs, delays, and defeats the prosecution of crime.[56]

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potential relevance, along with a copy of all documents that the disclosing party may use to support its claims. FED. R. CIV. P. 26(a)(1)(A).

[48] Langer, *supra* note 6, at 275 (stating that federal criminal procedure in particular establishes "a mainly trial-centric approach to discovery rules").

[49] *See, e.g.*, FED. R. CRIM. P. 26(a).

[50] FED. R. CRIM. P. 16.

[51] WIS. STAT. § 971.23(1)(a)-(h) (requiring that certain disclosures be made at a "reasonable time before trial").

[52] TEX. CODE CRIM. PROC. ANN. ART. § 39.14(a)-(b).

[53] VA. S. CT. R. 3A:11.

[54] Judge Hand provides no citation for this assertion.

[55] Judge Hand's characterization of the "whole evidence" succinctly captures the sentiment, challenged by this Article, that a criminal defendant has no role to play in an investigation.

[56] *United States v. Garsson*, 291 Fed. 646, 649 (S.D.N.Y. 1923).

E. Criminal Defendants Have Been Excluded from Participation in Criminal Investigations; They Should Be Considered Essential

The State initiates and completes a criminal investigation. What facts law enforcement collects makes up the *investigative file*.[57] The investigative file may memorialize leads dropped or ignored by law enforcement. What is turned over to the prosecutor constitutes the *prosecutorial file*, which may be a subset of the investigative file. What the prosecutor turns over to defendant, a subset of the prosecutorial file, constitutes the pretrial facts of the case.[58] Much of the debate focuses on whether a criminal defendant should have more access to the prosecutorial file.[59] Lost in this analysis is whether a criminal defendant should be permitted to go beyond the State's prosecutorial file, to go beyond the investigative file, and to conduct an independent investigation. Treated as if subject to an inquisitorial system, a defendant nevertheless remains situated against a motivated opponent that controls the collection and distribution of facts.[60]

Resistance to a criminal defendant gaining access to facts is considerable. In 1974, an effort to provide for the pretrial disclosure of the State's *proposed witness list* in federal disputes was vigorously opposed. According to the United States Department of Justice, doing so 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."[61] Although there is scant empirical guidance on the issue, some state jurisdictions have since permitted defendants access to witness lists—one would expect any uptick in intimidation to have led to the repeal

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[57] *See, e.g.*, Langer, *supra* note 6, at 250; Natapoff, *supra* note 6, at 989-92 (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).

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

[59] Joy, *supra* note 10, 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 the information in the prosecutor's possession.").

[60] Langer, *supra* note 6, at 252-3 (stating that "unlike inquisitorial adjudicators who are socialized and tend to perceive themselves as impartial officials who must seek both inculpatory and exculpatory evidence and should impartially adjudicate the case after finishing their investigation . . . [a]merican prosecutors [] have a much more ambivalent self perception of their role" and concluding, "the prosecutor's de facto adjudicatory decision is final in many cases."); Natapoff, *supra* note 6, at 967 (observing that criminal law practices has shifted from a "traditional evidence-driven inquiry into whether there is proof that a suspect has committed a particular offense, toward a concession-based model focused on whether the suspect has acceded to governmental authority.").

[61] Brennan, Jr., *supra* note 6, at 6 (quoting H.R. Rep. No. 247, 94th Cong. 1st Sess. 41, reprinted in 1975 U.S. Code Cong. & Admin. News 674, 712).

of such disclosures, yet these provisions remain on the books.[62] 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."[63] Beyond protective orders issuing in appropriate cases, there are existing deterrents to witness intimidation. Pretrial custody reduces a defendant's ability to communicate with the outside world, and most communications are monitored. A jailhouse call revealing any attempt to intimidate a witness may potentially be used against a defendant as affirmative evidence of guilt.[64] Under federal law, anyone who assists in an attempt to dissuade a witness from testifying faces twenty years of prison.[65]

Left unexplored by *status quo* proponents is the fact that a criminal defendant is powerless to counter *state-initiated* efforts to incentivize testimony or to dissuade witnesses from offering exculpatory information. Officers may actively suppress potentially exculpatory evidence—telling a potential alibi witness, "we will tell your track coach you are lying to an officer and you will lose your scholarship."[66] Without power to compel pretrial answers from the officers, the witness, and those who may have observed the exchange, a defense attorney cannot overcome the damage. Officers may, however unintentionally, facilitate false testimony through incentive or threat[67]—we will put you in jail unless you take the stand.[68] Jailhouse snitch evidence, which contributed to fifteen percent of

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

[63] Brennan, Jr., *supra* note 6, at 14.

[64] *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.").

[65] 18 U.S.C. § 1512(b) (2006).

[66] 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 starting a non-profit to assist inner-city kids, confirmed that these threats were made by detectives.

[67] *See* C. RONALD HUFF ET AL., CONVICTED BUT INNOCENT 71 (1996) ("Police and prosecutorial improprieties take on several different forms: [including] making threats against potential witnesses for the accused.").

[68] *See, e.g.*, A. G. Sulzberger, *Facing Misconduct Claims, Brooklyn Prosecutor Agrees to Free Man Held 15 Years*, N.Y. TIMES (June 8, 2010), www.nytimes.com/2010/06/09/nyregion/09vecchione.html. In this case, Jabbar Collins was exonerated of murder in June 2010 after fifteen years in prison; one of the three main witnesses in the prosecution's initial case testified that the prosecutor "repeatedly threatened to hit him and said that '[i]f you don't testify, you're going to be in jail a long time.'" *Id.* The witness was jailed for a week before he eventually agreed to testify. *Id.* See also Colin Moynihan, *Cleared of One '95 Murder, 3 Men Have Conviction Vacated in a 2nd*, N.Y. TIMES (Jan. 23, 2013), www.nytimes.com/2013/01/24/nyregion/convictions-of-three-in-1995-murder-of-denise-raymond-overturned.html?ref=falsearrestsconvictionsandimprisonments, in which a witness recanted her testimony, saying it was delivered under duress from law enforcement. She also stated that she feared retaliation from law enforcement should she not testify. 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.

documented exonerations, is state-incentivized testimony.[69] A lying snitch has much to gain by testifying against his cellmate and may attempt to intimidate a potential witness who knows about the fabrication. In addition, some forms of non-state-initiated obstructionism can benefit the State—for example, a witness with exculpatory information may refuse to speak with the defense. Providing investigative power to both parties helps ensure neither a defendant nor the State benefits from circumstances that prevent accurate outcomes.

Criminal defendants have no power to check a law enforcement officer playing loose with the facts. A former San Francisco Police Commissioner recently stated:

> One of the dirty little not-so-secret secrets of the criminal justice system is undercover narcotics officers intentionally lying under oath. It is a perversion of the American justice system that strikes directly at the rule of law. Yet it is the routine way of doing business in courtrooms everywhere in America.[70]

Bronx Assistant District Attorney Jeannette Rucker, conceding "it had become apparent that the police were arresting people even when there was convincing evidence that they were innocent," found that officers had provided "false written statements" to justify the arrests.[71] Despite these anecdotal concerns over officers falsifying reports and testimony, a criminal defendant has no power to depose these officers or to demand documents relating to the testimony.

The monopolistic, adversarial power of the State remains unchecked by any counter-investigation. Yet, it is a defendant who is in the position to do exactly that. Some voice concern that providing such power will permit a criminal defendant to misuse resources to delay or interfere with the investigation.[72] The potentiality that a liable party would attempt to derail an investigation is not unique to criminal law: civil defendants, too, face sometimes overwhelming liability that provides an environment for obfuscation[73]—a defendant executive tells an underling "say one word and

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[69] Brandon L. Garrett, *Judging Innocence*, 108 COLUM. L. REV. 55, 76 Figure 2 (2008).

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

[71] *Id.*

[72] Brennan, Jr., *supra* note 6, at 6 (detailing arguments made by Chief Justice Vanderbilt of the New Jersey Supreme Court against liberal discovery for criminal defendants).

[73] 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) for a discussion of legislative and judicial protections available to whistleblowers in the United States.

you'll be out of a job."[74] But these potentialities do not result in calls to preclude a liable civil defendant from testing plaintiff's theories. Civil procedure provides for checks on dilatory practice, including the imposition of protective orders and judicial sanction.[75] Although certain judicial sanctions available in civil law might be precluded by due process concerns unique to a criminal defendant, deceptive schemes—for example, an effort to manufacture an alibi—are vulnerable to contradictions, can backfire, and, in the criminal law, carry the threat of being charged with a felony for obstruction.

One rationale for the discovery deprivations visited on criminal defendants is the assumption that they are "presumed guilty." This rationale is particular to a criminal defendant; one does not find any concerns in the literature over letting a civil defendant who is likely liable—Exxon in the Puget Sound oil spill litigation—test the validity of plaintiff's case. Though a criminal defendant is constitutionally presumed innocent, precluding a defendant from conducting an investigation undermines this status. Regardless, the proper functioning of the adversarial system does not depend on whether the defendant is actually liable or not. Irrespective of whether a defendant is innocent, guilty, or something in between, a defendant is motivated to challenge the State's theory of liability.

What an adversarial system demands is undermined by these deficiencies in criminal procedure that do not provide an adequate check on the opposing party's control of the facts. The only litigant with formal powers of investigation, the State develops the facts and establishes its narrative of what occurred. A criminal defendant is not afforded tools to develop a counter-narrative based on facts the State has filtered out, left unexplored, or failed to discover. A criminal defendant is subject to an adversarial system that does not allow for adversarial testing.[76]

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[74] *See* 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?ref=whistleblowers. 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.* Statutes like Title VII's retaliation provisions are meant to prevent such results. *See* 42 U.S.C. § 2000e-3(a) (2006).

[75] 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;" and in response, striking from the statute 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).

[76] Langer, *supra* note 6, at 250 (stating that in many cases the prosecutor, in control of the evidence, successfully plays the role of sole adjudicator in plea negotiations); Natapoff, *supra* note 6, at 968 (stating that "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.").

F. Open-file Reform—A "Solution" Subject to Prevailing Constraints

In a study funded by the Pew Foundation, the Justice Institute proposed the following:

> 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.[77]

This proposal does not correct for the inherent advantages handed to the State in collecting facts that favor its own position. Expanding a defendant's access to the State's file—to provide for more disclosures—remains anchored in the pre-modern discovery era. An open-file policy is misleading, too, in name: far from being "open," the policy provides some degree of access to the prosecutorial file, but no access to the investigatory file.[78] Providing a criminal defendant with a single investigatory tool—the right, for example, to compel receipt of relevant[79] documents—would exceed the value of any open-file policy. With the power to request documents, a litigant not only would gain access to information in the prosecutorial file, but all responsive documents the law enforcement agency neglected to forward to the prosecutor.

Reviewing an "open" file does not permit a defendant to question what is disclosed. Police officers not only narrate witness interviews, but also rehearse this narrative with the prosecutor to cement its existence. Defense counsel is precluded from disrupting this script with alternative theories of interpretation.[80] Given that ninety percent of criminal defendants plead guilty,[81] the State is able to represent the strength of its case against a defendant without having to subject its narrative to scrutiny, an inequity built into criminal procedure.

Open-file policies are an incremental step in the right direction and would at least prevent "documents for due process" deals. Under the principle that deprivations beget additional deprivations, some prosecutors

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

[78] *See supra* Part I.E.

[79] *See supra* Part I.C (explaining the limited nature of a discovery right that permits access to only "material" documents).

[80] In addition, a defense attorney who wishes to call a State's witness or hearsay declarant to testify is dissuaded by his inability to conduct a prior interview with the witness, which could expose the attorney to allegations of ineffective assistance of counsel. Montoya, *supra* note 1, at 862.

[81] *See supra* note 35 and accompanying text.

offer a defendant the chance to view the prosecutorial file in exchange for waiving, for example, the preliminary hearing. These sort of arrangements underscore the need for comprehensive reform—a defendant should not have to bargain away significant rights in exchange for gaining access to facts that are in any case weighted against him. Rather, a defendant should be granted access to the prosecutorial and investigative files, in addition to invasive tools that permit a formal investigation into the State's case.

II. WHAT IS LOST FOR CRIMINAL DEFENDANTS

A close evaluation of what it means to not have investigative tools—depositions, document requests, interrogatories—reveals what is lost, and what might be gained, by their use.

A. Investigative Tool No. 1: Depositions

The fifty states grant civil litigants power to depose witnesses.[82] By this extraordinary power, an attorney compels any person to appear and answer questions under oath. Any objection not invoking privilege typically serves only to cause delay—the witness must still answer.[83] What is asked is not governed by what a jury can hear; depositions delve into hearsay, other acts, and character evidence, all ingredients to an effective investigation.[84] An attorney might attempt to suspend a deposition, but hell hath no fury like a judge drawn into a petty discovery dispute. In practice, an attorney is left to fluster opposing counsel by way of derision or dark art. Time limits, in many jurisdictions, do not exist.[85] The deposition power, permissive in theory is unrestrained in fact.

Only three states extend deposition power to criminal defendants in a manner approaching equivalence to the civil deposition—Vermont,

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[82] Surveys, Depositions and Interrogatories, 0020 SURVEYS 3 (2012).

[83] Although Federal Rules of Civil Procedure dictate that "[t]he examination of deponents 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). For example, in contrast to trial practice, 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).

[84] David Young, *A New Theory of Relativity: The Triumph of the Irrelevant 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.").

[85] In the Sampling, the Florida, New York, Ohio, Pennsylvania, and Wisconsin statutes place no time limits on depositions. *See* FLA. R. CIV. P. 1.310; N.Y. C.P.L.R. § 3106; OHIO CIV. R. 30; PA. R.C.R. NO. 4007.1; WIS. STAT. § 804.05. The Federal Rules of Civil Procedure, Alabama, California, Illinois, Texas, and Virginia all place time limits on deposition practice. FED. R. CIV. P. 30 (limiting deposition of individuals to seven hours); ARCP 30 (allowing witness to limit to five hours per day); CAL. CODE CIV. P. § 2025.290 (limiting depositions to seven hours) (effective Jan. 1, 2013); ILL. SUP. CT. R. 206(d) (limiting depositions to no more than three hours); TRCP 199.5(c) (in general, providing a limit of six hours, however, the type of case and the 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).

Missouri, and Florida.[86] These states permit parties to depose broad categories of individuals—police officers and victims included.[87] In New Mexico, parties may subpoena witnesses to take a recorded statement[88]—an affordable "dirty deposition" subject to wide use.[89] Remaining states deny depositions to a criminal defendant. Where a civil attorney is granted virtually unrestrained use of subpoena power, in these states a criminal defense attorney must seek judicial permission and make a showing that the witness is "material and necessary." Such showings are formidable; a prosecutor will claim defendant is engaging in a fishing expedition. In even more restrictive jurisdictions, a litigant may only petition the court to take a deposition to preserve testimony[90]—for example, a key witness is on her deathbed. A few jurisdictions deny deposition power by omission.[91]

Like a criminal defendant, the State does not have deposition power in criminal disputes.[92] It would be erroneous to conclude, however, that all is fair where players are similarly deprived. Denying investigative opportunities to both parties does not improve the quality of facts that inform a dispute. And the parties are not similarly situated.[93] The State directs its agents to exercise police powers to investigate a crime.[94] Cloaked in state authority, agents have impressive investigatory tools—the power to arrest,[95] search a person or place,[96] seize evidence, interrogate, falsely assert that the failure to cooperate will lead to negative

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[86] FLA. R. CRIM. P. 3.220(h); 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); V.R.C.P. Rule 15.

[87] FLA. R. CRIM P. 3.220(h); MO. SUP. CT. R. 25.12; MO. SUP. CT. R. 25.15; V.R.CR. P. Rule 15.

[88] NM R DIST CT RCRP Rule 5-503 (allowing statements from any person and depositions by agreement of parties or by court order to prevent injustice).

[89] Interview with Katherine Judson, Innocence Project Litigation Fellow, in Madison, Wis. (Oct. 23, 2012). "Dirty deposition" is the author's assessment of the investigatory tool.

[90] ALA. R. CRIM. P. RULE 16.6; ALASKA R. CRIM. PROC. 15; A.C.A § 16-44-202; COLO. CRIM. P. 15; CT ST § 54-86; DEL. SUPER. CT. CRIM. R. 15; O.C.G.A. § 24-13-130; HAW. R. PENAL P. RULE 15; I.C.R. RULE 15; ILL. SUP. CT. R. 414; KY. R. CRIM. RULE 7.10; ME. R. CRIM. P. 15; MD. RULE 4-261; ALM R. CRIM. P. RULE 35; MONT. CODE ANNO., § 46-15-201; NEV. REV. STAT. ANN. § 174.175; N.J. COURT RULES, R. 3:13-2; NY CLS CPL § 660.20; N.C. GEN. STAT. § 8-74; OHIO CRIM. R. 15; 22 OKLA. ST. § 762; PA. R. CRIM. P. RULE 500; R.I. SUPER. R. CRIM. P. RULE 15; S.C. CODE ANN. § 22-3-940; S.D. CODIFIED LAWS § 23A-12-1; TENN. R. CRIM. P. 15; UTAH R. CRIM. P. 14; WASH. CRR 4.6; W. VA. R. CRIM. P. 15; WIS. STAT. § 967.04; WYO. R. CRIM. P. 15.

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

[92] The State in civil disputes has the power to depose, as all parties do. *See supra* note 82 and accompanying text.

[93] Montoya, *supra* note 1, at 862 ("Professor Stanley Fisher has documented a pro-prosecution bias in police investigation and reporting.").

[94] *Id.* at 862 ("Today's defense counsel must meet the prosecutor's particularly formidable and unprecedented arsenal of fact-gathering methods, including the use of an organized police fore to marshal the evidence prior to trial.").

[95] See WILLIAM E. RINGEL, SEARCHES AND SEIZURES ARRESTS AND CONFESSIONS § 23:9 (2012) for a discussion of the police and other state officials who are given statutory authority to perform arrests.

[96] This power is of course limited by the Fourth Amendment, which protects against unreasonable searches by government agents. U.S. CONST. AMEND. IV.

consequences,[97] and in some instances threaten a probation hold and revocation to prison.[98] In some jurisdictions, prosecutors convene a grand jury.[99] None of these mechanisms are available to a defense attorney.

The power to interrogate exemplifies how the State, by way of its constitutional powers, is able to conduct a formal investigation in the absence of a deposition. Unlike an attorney taking a deposition, an officer can repeat a question, forcefully, and explicitly express an opinion that defendant is guilty, a powerful tactic. Where depositions tend to take place in a pleasant enough room, interrogations occur in cinderblock cells. In a deposition, the witness typically has counsel; in an interrogation the witness sits alone, answering to one or more officers. Officers engage in threats,[100] falsely suggest others are implicating the suspect,[101] or even manufacture a non-existent case against a suspect to obtain information;[102] in contrast, attorneys are ethically barred from engaging in deception, and would not do so on the record.[103] Police officers not only question the subject, but also

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[97] A common threat mentioned by woman witnesses in poor neighborhoods is that, if the witness does not cooperate, she will lose her children to social services.

[98] Police officers often work with probation and parole agents to place holds on individuals who are currently under supervision to facilitate the 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*, 89 Wis. 2d 70, 78-79, 277 N.W.2d 849 (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).

[99] 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, 538 (1884). As of 2010, approximately half of the states were using grand juries. American Bar Association, *FAQs About Grand Jury System*, (March 24, 2010), www.abanow.org/2010/03/faqs-about-the-grand-jury-system/.

[100] *See, e.g.*, BRANDON L. GARRETT, CONVICTING THE INNOCENT 39 (2011) (noting a case in which seventeen-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.'").

[101] *See, e.g.*, David K. Shipler, *Why Do Innocent People Confess?*, Opinion, N.Y. TIMES (Feb. 23, 2012), http://www.nytimes.com/2012/02/26/opinion/sunday/why-do-innocent-people-confess.html?pagewanted=all (noting a case in which seventeen-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").

[102] *See, e.g.*, GARRETT, *supra* note 100, 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*, INNOCENCE PROJECT, www.innocenceproject.org/Content/David_Vasquez.php.

[103] 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 (governing truthfulness in statements to others); MODEL RULES OF PROF'L CONDUCT R. 8.4(c) (prohibiting deceitful behavior); MODEL RULES OF PROF'L CONDUCT R. 3.5, cmt. 5 ("The duty to

interpret the response.[104] More than once a civil litigator, convinced she has crushed the witness' credibility, realizes upon review of the transcript that the deponent's answer proves much less. That "morning after" disappointment does not occur for detectives; instead, the officer, authoring the resulting police report, typically retains rights over the narrative.[105]

Although interrogations are not compelled, the refusal to answer to authority is rare, even after arrest.[106] There are no significant time restraints, and the interrogation is conducted at any time, often in the middle of the night. The subject is cut off from the rest of the world. The prosecutor typically determines if and when this report is released to the opposing party. As a result, the State has at its disposal a "shadow deposition" that provides narrative advantages to a civil deposition and, untested by an adversary, overstates the State's case during the entirety of pretrial proceedings.[107]

B. Investigative Tool No. 2: To Force the Production of Documents and Things

Civil litigants are granted the pretrial power to request the production and inspection of documents and things from the opposing party.[108] This broad power entitles parties to obtain things relevant to any party's claim or defense.[109] The responding party must make a "reasonable effort to assure that the client has provided all the information and documents available to him that are responsive."[110] As opposed to criminal litigants,[111] civil litigants have the power to obtain documents from anyone, not just an opposing party.[112]

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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 (indicating that the rule governing candor to the tribunal includes conduct during a deposition).

[104] 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).

[105] As of 2010, seventeen 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).

[106] Only twenty-two percent 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).

[107] *See supra* note 35 and accompanying text.

[108] *See e.g.,* ALA. R. CIV. P. 34(a); CAL. CODE CIV. PROC. § 2031.010; FED. R. CIV. P. 34; FLA. R. CIV. P. 1.350(a); ILL. S.C.R. 214; N.Y. C.P.L.R. 3120; OHIO CIV. R. 34(A) PA. R.C.P. NO. 4009.1; TEX. R. CIV. P. 196.1(a); VA. SUP. CT. R. 4:9(a); WIS. STAT. § 804.09

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

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

[111] Criminal litigants do not typically have any power to compel documents from third parties. These observations are sourced on a sampling of civil and criminal procedures. *See supra* note 36 and accompanying text. A few jurisdictions allowed for a limited right to request certain documents via the subpoena duces tecum. *See, e.g.*, FED. R. CRIM. P. 17(c)(1); ALA. R. CRIM. P. 17.3; OHIO CRIM. R. 17(C); VA. SUP. CT. R. 3A:12(b). However, the right to such a subpoena is limited in several important ways. For example, the subpoena duces tecum generally requires

Although federal criminal procedure designates "documents and objects" that are "subject to disclosure,"[113] the rule grants no power to direct the course of the investigation. Rather, it designates three categories of disclosures, all sourced from the State. The first category requires the State turn over documents it intends to use "in its case-in-chief at trial."[114] Any disclosure will favor the State's case. The second category requires disclosure of any item that was "obtained from or belongs to the defendant;"[115] a tell-me-what-I-already-know right. The last category—that the State must turn over items "*material* to preparing the defense"[116]—is most accurately characterized as a disclosure. Some courts maintain the *Brady* standard does not govern this provision,[117] while other courts look to *Brady* for guidance;[118] the debate only underscores the cautious nature of the statute's language. Not debated is that the State determines what is material to the defense and is prone to undervalue evidence helpful to the defense.[119] These three categories permitting limited disclosures from a single source fall well short of rights 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, the prosecutor turn over all investigative

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court intervention, such that production cannot be compelled directly from the third party. *See, e.g.*, FED. R. CRIM. P. 17(c)(1) ("The *court* may direct the witness to produce the designated items in court before trial or before they are to be offered in evidence.") (emphasis added). Additionally, other requirements may limit what can be requested; for example, Virginia requires that the requesting party include an affidavit "that the requested writings or objects are material to the proceedings." VA. SUP. CT. R. 3A:12(b).

[112] The Federal Rules of Civil Procedure as well as each state in the sampling allow for civil litigants to obtain documents and things from both parties and nonparties. ALA. R. CIV. P. RULES 34(a), 45(a)(3); CAL. CODE CIV. P. §§ 2031.020(b), 2020.410, 2025.280(b); FED. R. CIV. P. 34, 45(c); FLA. R. CIV. P. 1.350(b), 1.351(a), 1.410(c); ILL. S.C.R. 214; N.Y. C.P.L.R. 3120, 3111; OHIO CIV. R. 34(A)-(C), 45(A)(1)(b)(iii)-(vi); PA. R.C.P. NO. 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).

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

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

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

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

[117] *See supra* notes 30-35, for a discussion of the *Brady* doctrine. 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, 434 (1995). To be cognizable under *Brady*, the withheld item must affect the outcome of a dispute—a concept foreign to the investigative phase.

[118] ROBERT M. CARY, ET. AL., FEDERAL CRIMINAL DISCOVERY, 96 (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.").

[119] Findley & Scott, *supra* note 29, 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.").

reports.[120] Limitations still distinguish Florida from civil counterparts; for example, excluded from production are notes of investigators.[121] The potential significance of this disclosure is made clear in the United States Supreme Court decision in *Smith v. Cain*.[122] There, one witness, Larry Boatner, implicated Defendant Smith in a New Orleans shooting. Boatner testified he was at a friend's house when gunmen entered the home, demanded money and drugs, and began shooting.[123] 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."[124] These notes would not be discoverable under Florida's document disclosure provision.

Without access to documents relevant to the dispute, a party is precluded from testing key facts; without deposition power, the few documents that are disclosed are not adequately examined. That criminal defendants are also deprived of interrogatories heightens the cumulative effect of this disparity.

C. Investigative Tool No. 3: Interrogatories

Interrogatories—written questions to secure investigative leads—are valuable at a dispute's inception; one can require the other side to list facts in support of the party's allegations, along with names of individuals with information and documents that provide the basis for those assertions.[125] Information requested is not subject to the knowledge of a particular person; rather, answers "represent the collective knowledge of the opponent."[126] Granted to civil litigants,[127] interrogatories are not extended to criminal litigants in jurisdictions influenced by federal and ABA standards. Florida, again, distinguishes itself; the equivalent of a "form interrogatory" is embedded in the statute, requiring the State 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,"[128] a designation that applies to eyewitnesses, alibi witnesses, investigating officers, and witnesses the State

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[120] FLA. R. CRIM. P. § 3.220(b)(1).

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

[122] 132 S. Ct. 627, 630 (2012).

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

[124] *Id.* 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.

[125] Edward Miner & Adrian 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.").

[126] *Id.*

[127] *See,* e.g., ALA. R. CIV. P. 33; CAL. CODE CIV. PROC. § 2030.030; FED. R. CIV. P. 33; FLA. R. CIV. P. 1.340(a); ILL. S.C.R. 213; N.Y. C.P.L.R. 3130; OHIO CIV. R. 33; PA. R.C.P. NO. 4005(a); TEX. R. CIV. P. 197; VA. SUP. CT. R. 4:8(a); WIS. STAT. § 804.08.

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

does not intend to call.[129]

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

How would these tools—interrogatories, document requests, depositions—impact the ability of a criminal defendant to conduct an investigation? Without knowing whether providing a criminal defendant formal power to investigate will reduce false positives or increase false negatives, are there other values—accuracy in the outcome, efficiencies to be gained, conceptions of procedural justice, considerations of prosecutorial integrity—that recommend such systemic change? A recent case involving the shooting of Rodolfo Jimenez in Racine, Wisconsin provides an anecdotal starting point to examine these questions.[130] DeShawn Milton was tried and convicted for shooting Jimenez to death. Milton's trial took two days. Defense counsel did not call any witnesses. The jury found Milton guilty of first-degree homicide. At sentencing, Milton proclaimed his innocence. Milton was sentenced to life in prison.

A well-resourced postconviction inquiry resulted in obtaining information that, under typical rules of criminal procedure, would have remained hidden from a defense attorney's view. In contrast, every piece of information that informed the postconviction inquiry, which resulted in the conviction being vacated, would have been subject to disclosure using investigatory tools available to civil litigants.

On January 15, 2006 at10 pm, twenty year-old Rodolfo Jimenez was gunned down on the street. From an apartment window, an eyewitness observed two males facing Jimenez. She heard multiple shots. The shooter and his companion ran westbound before disappearing up an alley. Next to the victim, police found a cigarette and hat. On Jimenez's rear driveway, police recovered a wristwatch belonging to Manny Diaz. Diaz asked for his wristwatch back. He said it tended to fall off; police returned it. Testing of the cigarette found near the shooter resulted in no matches to the DNA database. Leaving the investigation dormant, detectives had made an investigative choice: they would not attempt to inquire further into Diaz's potential involvement, despite a suspect alibi. According to Diaz, who lived on the same street as Jimenez, at the time of the crime he was driving around the neighborhood and had picked up some girl, her name forgotten.

Two years later, Marcus House, in custody on an unrelated matter, told authorities that, five months earlier, he heard from an inmate that seven individuals were in an alley when DeShawn Milton and Martine Perez shot Jimenez. When detectives questioned Perez, he told police he heard Milton and Matt Roth shot Jimenez. At this point, investigators were presented

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[129] *Id*.

[130] Inspired by an actual case, names of individuals involved have been changed, as well as dates and other identifying details.

with a new cast of characters and conflicting stories. For example, Marcus House described a crime that involved seven people; eyewitness only saw two males. House said the shooting was in an alley; the crime occurred on a street.

This initial state of affairs reflects the potential messiness of an investigation. By the time a prosecutor presents charges, however, the confusion will have been washed out of the story. The initial complexities and contradictions, memorialized in police reports, will typically remain unknown to the defense; these reports regarding Diaz and House would not be subject to disclosure, for example, under federal rules.

When detectives questioned Roth—the individual implicated by Perez—Roth made a ten-page statement: Roth asked "a Mexican" for a cigarette—*Dame un cigarillo, por favor*. Jimenez responded, "Fuck you, get a job." Roth heard a gunshot, saw Jimenez double over, and looked back to see a gun in Milton's outstretched hand. After signing the statement on every page—a tactic to aid the prosecutor in trial—Roth walked out of the station. The State filed charges against Milton. For the next seven months, Milton sat in custody. During this time, under criminal procedure, Milton's attorney would receive very little information about the case and would have no power to conduct a formal investigation. A civil litigator, in contrast, would immediately serve interrogatories:[131]

1. State all facts that support the allegations in the Complaint, providing a description of documents and contact information of individuals who have information supporting these facts.
2. Provide contact information of any individuals who implicated someone other than defendant in the shooting, along with a description of all documents that relate to any of these individuals.
3. Provide a description of all items of physical evidence collected in the investigation of the shooting, along with a description of all relevant documents, including forensic documents.
4. Provide contact information of all individuals interviewed by law enforcement in the investigation of the shooting, and describe all relevant documents.

The civil litigator would also file an accompanying request calling for the production of documents described in these interrogatories.

Due to a postconviction effort that expended massive resources in conducting an informal investigation, the resulting record reveals some facts that would have been disclosed in a response to these interrogatories, including Roth's statement. A civil litigator would then propound a second round of interrogatories, calling for all facts that corroborate the veracity of

[131] This sample set of interrogatories is compressed, and does not follow the traditional format.

Roth's statement. After receiving foundational information from the State, a civil litigator would propound document requests on the State and third parties, and then issue subpoenas to depose individuals thought to be worthy of the attorney's time. A civil litigator would have received at least the following information in response to these efforts:

1. Roth's written statement implicating Milton in the shooting;
2. Police reports indicating detectives picked up Roth as a suspect for Jimenez's murder, that Roth first denied any knowledge of the Jimenez shooting, and that detectives then suggested, falsely, that Milton had implicated Roth in the shooting;
3. Evidence that Roth's interrogation lasted over ten hours;
4. Police reports indicating that Roth had shot at and almost killed an individual six weeks before the Jimenez shooting, one block away;
5. Police reports that Roth was found in possession of a handgun before and after the Jimenez shooting.

None of these documents would arguably be subject to pretrial disclosure under federal criminal procedure. In postconviction proceedings, the prosecutor argued these records, with the exception of Roth's statement, were not material or even relevant; the court found otherwise.

In civil litigation, a litigator commonly uses a key document to guide deposition choices. The Jimenez case had one such a document: Roth's statement. A civil litigator would depose detectives who interrogated Roth and who assisted in drafting Roth's statement, any person mentioned in Roth's statement, and of course Roth. According to Roth's statement, on the day of the shooting—January 16, winter in Wisconsin—Dante Randall cut Roth's hair on the front porch. The appellate team examined meteorological data; the wind chill was 23 degrees below freezing. Had Roth received a haircut outside? The appellate team inspected the house on Green Street that Roth had described. The porch was open.

Lacking subpoena power, it took the appellate team three months to persuade Dante Randall to meet at Burger King. In a *pretrial* context, this on-a-wing-and-a-prayer approach is problematic. Hoping to interview a critical witness is not a "discovery plan" that assists in assessing a plea or in testing potential trial theories. Randall was reticent to meet, a reluctance likely more acute at a pretrial stage, given the prevailing fear in urban communities that police will potentially implicate anyone with information. And having thirty minutes to supplicate and attempt to elicit voluntary disclosures is inferior to having a day, in a deposition, to compel answers.

Randall did share some information: he didn't cut white people's hair and would not cut anyone's hair on an open porch in winter. Randall also remarked he wasn't sure he lived on Green Street in January of 2006. This was potentially significant: Roth alleged that, after Randall gave him a

haircut, Roth walked to the rear garage and observed Milton with a revolver—the same gun Roth saw later that night in Milton's outstretched hand, pointed at Jimenez. The State argued this fact showed Milton had the means to shoot Jimenez. But if Randall hadn't lived on Green Street, Roth was mistaken or, worse, had engaged in treacherous fiction.

A civil attorney, at this juncture, would issue subpoenas to third parties to compel the production of documents, including information from landlords and utilities. Criminal defendants typically do not have this pretrial power; but the winds of fortune again favored the appellate team, which persuaded the owner of the Green Street house to go up to her attic and look through shoeboxes. She found receipts: Randall had moved out in September of 2005, *four months before the shooting*. The utility company unexpectedly complied with a request for billing records in the absence of a subpoena; Randall's bill had been transferred to a house on Lakeside Drive in September 2005.[132] Rental receipts from the Lakeside Drive owner confirmed Randall's September move. The Lakeside home did not have a front porch or rear garage. Roth had been lying.

The surface was scratched. Despite expending significant resources, key witnesses refused to cooperate, including Roth, the detectives who interrogated Roth, and others mentioned by Roth. Carlos Caballero, for example, was allegedly with Milton when Roth first saw Milton with the murder weapon—would Caballero corroborate or undermine Roth's statement? A criminal defense attorney, having no power to investigate, would have no way to verify, one way or another. A civil attorney would have deposed each and every one of these witnesses.

The appellate team did find something else. Police reports that would not have been disclosed under federal criminal procedure referenced Antonio Hernandez a number of times; but police never questioned him. It took three months to persuade a friend of Hernandez to arrange a meeting. Part of Hernandez's reluctance; he was a confidential informant for the State. If he turned against the State, the State could deem him a liar and reinstate drug charges against him; thus, Hernandez, by volunteering information, faced the prospect of losing his union job and going to prison. Hernandez sat staring down at the table. After a long period of silence, he lifted his head and told the appellate team that Roth had, on the night of the shooting, confessed to killing Jimenez.[133]

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[132] Criminal defendants rarely have the power to serve a subpoena *duces tecum* (civil litigants do). *See supra* notes 111-112 and accompanying text.

[133] The prosecutor's position on the matter, incidentally, was that the witness was lying, and therefore any information provided to the State by this confidential informant (CI) was worthless. The prosecutor believed he was under a duty to cut this CI loose—meaning that the CI would no longer be immunized from pending charges. An alternative viewpoint, never considered by the State or any court: to deem Hernandez a liar and implicitly threaten prosecution because his anticipated testimony happened to favor defendant's case constitutes obstruction of evidence in a homicide investigation, a felony.

After a yearlong postconviction investigation, the appellate team presented ten witnesses and fifty exhibits in an eight-day evidentiary hearing. When confronted with new facts, Roth refused to answer questions, claiming his Fifth Amendment right against self-incrimination. Moved by a cohesive narrative that suggested Roth, not Milton, was the likely perpetrator, the court granted Milton a new trial.

Had Milton had the power to compel documents and pretrial testimony, information developed by the appellate team's massive investigation that spanned a year would have emerged *before* trial, not *after* Milton's conviction. Very few criminal defendants had the resources of Milton's appellate team. Greater resources help to mitigate the effect of the discovery deprivations visited on a defendant; yet, more resources do not compensate for the absence of the pretrial power to compel information. The Jimenez postconviction 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 much more information with the aid of formal investigative powers, and (3) the idea that the defense has nothing to offer as a party to the investigation is of a mythical origin.

III. RESPONDING TO THOSE IN FAVOR OF DARKNESS

The resistance to granting a criminal defendant the power to investigate has deep roots; in an article published 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.[134]

The arguments against providing criminal defendants continue to have adherents; but, in light of increasing efforts to reform criminal procedure, these arguments against change should be subject to renewed scrutiny.

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[134] Robert L. Fletcher, *Pretrial Discovery in State Criminal Cases*, 12 STAN. L. REV. 293, 294 (1960).

A. Trial is Not a Substitute for a Strong Pretrial Investigation

Some *status quo* proponents assert that pretrial investigation is unnecessary because a trial provides an adequate forum for adversarial testing.[135] Most cases, however, settle; trial is a rare event.[136] The quality of facts informing trials strategy and witness selection depends on the quality of the pretrial investigation. A trial is not an investigatory tool. By the time a jury is impaneled, litigants are not exploring alternative theories of liability. Pretrial motions have been decided. Litigants have determined what they plan to establish. Any absence of a trial strategy at this juncture would suggest deficient performance.[137] Structurally, rules of evidence inhibit broad explorations of second-hand knowledge; hearsay, inadmissible at trial, is essential to establishing investigative leads.[138] Open-ended questions, standard fare in depositions, would undermine effective cross-examination at trial.

Live testimony does not cure the lack of deposition power. Trial is a public spectacle. In the Jimenez case, postconviction counsel called a detective to testify; he arrived in sneakers and a ratty tee. Detectives called by the State arrived in tailored suits. Detectives often serve as apostles of the prosecutor. A prosecutor can prepare a detective for testimony; this opportunity is all but foreclosed to defense counsel. Trial is not the optimum forum to test memory. Questioned by the defense, while jurors listen to the tick of the clock, it is not uncommon for an officer to slowly review a report before asking defense attorney to ask the question again. These long stretches of silence break the flow of questioning and risk loss of juror interest. A deposition allows for the hard work of refreshing witness recollection. Any stalling by the witness prolongs the inquiry; there are no fringe benefits. Trial is meant to be a public performance; its nature prevents it from being an adequate platform for factual inquiry.

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[135] Bennett L. Gershman, *Preplea Disclosure of Impeachment Evidence*, 65 VAND. L. REV. EN BANC 141, 154 (2012) (expressing satisfaction with the current availability of discovery to the criminal defendant in regard to the plea process).

[136] Ninety-percent of criminal disputes resolve in a plea deal, whereas only ten percent of criminal litigants advance to trial. *See supra* note 35 and accompanying text.

[137] *See, e.g.*, *Silva v. Woodford*, 279 F.3d 825, 846 (9th Cir. 2000) ("[A]n attorney's performance is not immunized from Sixth Amendment challenges simply by attaching to it the label of 'trial strategy.' Rather, 'certain 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)).

[138] *See, e.g.*, FED. R. EVID. 802-804. 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.

B. Plea Bargaining is Not a Substitute for Investigation

Civil and criminal trials share similarities: the same rules of evidence govern and they are similarly scripted in form and substance.[139] Pretrial periods, however, follow a different script. If in civil litigation the fact-finding process starts immediately and is aligned with the adversarial testing process,[140] scholars like Professor Bennett L. Gershman portray the pre-plea period in criminal law as a period *freed* from adversarial testing:

> The fairness of a trial contemplates a defendant in possession of sufficient information to be able to challenge the prosecution's case. The fairness of a plea typically hinges not on the amount of information a defendant possesses, but rather on whether the plea is made voluntarily with the assistance of competent counsel to protect the defendant's interests . . . whereas 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, is not considered an adversarial proceeding, and involves the functional equivalent of a stipulated set of facts*.[141]

This reasoning implies that it is enough, at the plea stage, for a defendant to be informed by his own conscience. This conclusion ignores what defendant cannot: the facts alleged by the prosecutor, unopposed, will result in punishment, regardless of a defendant's innocence. Eighty percent of criminal defendants are indigent;[142] opposing the awesome power of State, and facing the prospect of banishment, ill repute, and total isolation, a criminal defendant will, regardless of guilt, consider mitigating the imposition of a maximum penalty.[143] And despite a focus on a defendant's

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[139] David A. Sklansky & Stephen C. Yeazell, *Comparative Law Without Leaving Home: What Civil Procedure Can Teach Criminal Procedure, and Vice Versa*, 94 GEO. L. J. 683, 684-85 (2006) (recognizing that while civil procedure and criminal procedure are quite different they share enough common ground to allow for meaningful comparison).

[140] See advisory committee's notes to Fed. R. Civ. P. 26, for a discussion about the purpose of amendments in 1993, which were to "accelerate the exchange of basic information about the case and to eliminate the paper work involved in requesting such information."

[141] Gershman, *supra* note 135, at 144-45 (emphasis added).

[142] Sklansky & Yeazell, *supra* note 139, at 690 ("[T]he vast majority of criminal defendants are indigent – the figure is over 80% in state felony cases.") (citing CAROLINE WOLF HARLOW, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS SPECIAL REPORT: DEFENSE COUNSEL IN CRIMINAL CASES 1 (2000); STEVEN K. SMITH & CAROL J. DEFRANCES, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS SELECTED FINDINGS: INDIGENT DEFENSE 1, 4 (1996)).

[143] Langer, *supra* note 6, 229 (stating that "scholars have argued that prosecutors have the power to impose their decision in a case on the defendant by offering a sentence substantially

conscience, Gershman's view cannot avoid the significance of a defendant having access to information during this phase:

> As a former state prosecutor, I recall the issues surrounding pre-plea 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* and, of course, the amount of punishment I would be willing to recommend to the sentencing judge if the defendant accepted my offer.[144]

In this analysis, stipulated facts are those a prosecutor deems pertinent to negotiation.[145] This begs the question: if knowing facts is not incompatible with an act of conscience, what is the argument against knowing more facts? And given the constitutional requirement that there be a factual basis for any plea, adversarial testing would presumably improve that basis.

The plea colloquy, which ensures a criminal defendant accepts guilt knowingly and voluntarily and that the evidence against him can be articulated, is not a feature of civil litigation. This constitutional check on prosecutorial authority suggests that criminal courts, as opposed to civil courts, scrutinize the record before accepting the plea, theoretically mitigating concerns about defendant's exclusion from any pretrial investigation. After all, in civil disputes settlement is reached privately, liability is rarely admitted, and the case is dismissed in the absence of judicial oversight.[146] This view suggests that civil disputes are subject to less judicial oversight, whereas criminal disputes have built-in safeguards.[147]

But in operation, judicial scrutiny of the factual record at summary judgment,[148] and the civil court's determination of what claims survive, is much more searching than a criminal court's review of the factual record in a plea hearing. In criminal courts the representations of the prosecutor, or even a reference to the charging document, untested by any pretrial adversarial process, satisfy a court's inquiry into the factual integrity of the record. In this respect, the differences between the two systems only serve

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lower than the one expected at trial. They argue that this sentence differential leaves defendants with no rational choice but to plead guilty, and this lack of choice makes guilty pleas involuntary.").

[144] Gershman, *supra* note 135, at 144-45 (emphasis added).

[145] Stipulated facts in civil litigation would typically occur after adversarial testing leads both parties to the same interpretation of certain facts and circumstances.

[146] Matthew B. Tenney, *When Does a Party Prevail?: A Proposed "Third-Circuit-Plus" Test for Judicial Imprimatur*, 2005 B.Y.U.L. REV. 429, 437.

[147] *Brady v. United States*, 397 U.S. 742, 748 (1970).

[148] *See, e.g.*, FED. R. CIV. P. 56(a); *see also* Carrie Leonetti, *When the Emperor Has No Clothes: A Proposal for Defensive Summary Judgment in Criminal Cases,* 84 S. CAL. L. REV. 661, 668-69 (2011).

to highlight the significance of the pretrial factual disparity, compounded by any lack of meaningful judicial review in criminal prosecutions.

Unlike criminal defendants, civil litigants and their lawyers conduct depositions and collect information to evaluate the strength or weaknesses of the opposing party's claims, and whether facts thought to support or undermine liability are susceptible to an alternative explanation. For unarticulated reasons, some view criminal liability as an on-off switch—a person is either guilty or innocent. Yet, sentencing takes into consideration a whole host of factors to determine the level of punishment. In a felony-murder case, defendant is liable for murder, but how do we assess liability of the person who lent the killer his car? Civil litigation folds "punishment" into the question of "liability"—because, in operation, they are inseparable.

Liability in civil law is not viewed as an on-off switch, and factors that motivate settlement will differ from case to case. Civil pretrial discovery is aimed at assessing the level of responsibility, and assessing how much defendant should pay. This is no different than the criminal law pretrial process. They are more similar than they are different—the critical difference being that criminal defendants are precluded from knowing critical facts, have no way to formally test the State's untested facts, and must face the prospect of punishment in a state of total darkness.

C. Constitutional Rights Should Not Be Used Against A Defendant

If depositions were permitted in criminal investigations, the State would arguably be precluded from deposing defendants. Some argue it would be unfair to give parties investigatory tools when the State would be precluded from their use.[149] This argument overstates the limitation on the State, and fails to contend with the fact that civil litigants daily deal with this dynamic. Civil litigants are foreclosed from making inquiries into privileged information, however probative—for example, in a shareholder lawsuit, a plaintiff can expect to be prevented from inquiring into what was discussed at an executive board meeting held in the presence of the board's attorney. These privileges do not inhibit, ultimately, broad and intrusive inquiry into the opposing party's theory of the case. Likewise, the fact that the State may be foreclosed from deposing a defendant would not foreclose the State from compelling responses from all of a defendant's friends, family, alibi witnesses, former employers, landlords, and anyone with relevant information.[150]

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[149] See *United States v. Garsson*, 291 Fed. 646, 649 (S.D.N.Y. 1923), for Judge Learned Hand's view on expanding criminal discovery.

[150] 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)(A)-(D) (allowing both the defendant and the prosecution to depose certain categories of witnesses).

And although the criminal defendant has unique constitutional protections that likely preclude the taking of defendant's deposition, the State would, regardless of discovery reform, retain certain structural advantages over defendant—having at its disposal a police force armed with inherent authority to arrest, interrogate, search, and seize.[151] In contrast, constitutional protections afforded to defendants do little to check the State's investigative power; for example, individuals tend to cooperate in custodial interrogations, despite the constitutional right to remain silent.[152] From the defendant's perspective, these constitutional rights—like the right to remain silent—provide no affirmative right to engage in fact-finding.

D. Reassessing the Parade of Horribles that Will Occur if We Grant Investigatory Rights to Criminal Litigants

One criminal law casebook, addressing the question of whether criminal procedure should permit depositions, provides a litany of concerns that provide insight into the opposition to expanding investigatory powers to criminal defendants:

> Why have so few states been willing to adopt the discovery deposition, a mainstay of civil discovery? Most of the reasons offered related to administrative difficulties. It is noted, for example, that civil discovery depositions are used in conjunction with interrogatories, which allow the parties to discover from each other the names of all persons thought to have relevant information. In the criminal discovery process, many jurisdictions do not even require reciprocal pretrial disclosure of witness lists . . . .[153]

This rationale suggests that one deprivation (no interrogatories in criminal law) should necessitate another (without interrogatories, how can one know who to depose?). The depth of the disparity should only reinforce the need for comprehensive remedies.

The casebook continues, "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."[154] The assertion does not explain how conducting a formal investigation will relieve public defenders of a relentless caseload.[155] In Wisconsin, for example, a public defender must

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[151] *See supra* notes 98-99 and accompanying text.
[152] *See supra* note 106 and accompanying text.
[153] KAMISAR, ET AL., *supra* note 36, at 1206.
[154] *Id.*
[155] 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

meet a quota of 200 points—receiving a half-point for a misdemeanor, and upwards of twenty points for a homicide.[156] An entry-level public defender, to meet her minimum, must dispose of 400 cases in one year. Those litigating on the felony calendar and predominantly taking Class A felony cases "reduces" the load to two or three homicide cases a month. That such taxed attorneys will have time to abuse the deposition power is belied by caseload realities.

These concerns over discovery abuse are reminiscent of arguments to undermine the reform movement that transformed civil procedure.[157] To the extent that instances of discovery abuse surface, judicial intervention provides a moderating role and subsequent reform efforts have sought to remedy instances of dilatory practice.[158] 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, less complicated disputes—the majority of civil cases, in fact—are resolved in the absence of discovery.[159] In Florida, the legislature has considered this concern, providing that, "No 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."[160] Controlling costs, in New Mexico a party may subpoena a witness, record the interview, and direct an assistant to prepare a transcript—to which the opposing party typically stipulates.[161]

The casebook continues:

> The traditional civil deposition procedure, which allows the party to be in attendance, is seen as providing further administrative difficulties—forcing the victim/witness to be confronted (without the security provided by the courtroom setting) by a person he or she may fear, requiring, for defendant's attendance, the temporary release of the defendant who is being held in custody . . .[162]

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caseloads, lack of funds for expert witnesses and investigators, and extremely low pay rates for court-assigned lawyers and contract defense services.").

[156] Interview with Michele LaVigne, Clinical Professor of Law, University of Wisconsin Law School, in Madison, Wis. (Jan. 23, 2012).

[157] Subrin, *supra* note 21, at 692 (writing that one Senator worried: "You bring a suit against a man, without any ground whatever--the president of some important company, the president of a utilities company or a bank or something. You take his deposition, have the reporters present, and grill him in the most unfair way, intimating that he is a burglar or murderer, or this, that, and the other. He has no redress, and the next morning the papers have a whole lot of front-page stuff. The case never goes any further. That is all that was intended.").

[158] FED. R. CRIM. P. advisory committee's notes to1993 amendment.

[159] David Trubeck et al., *The Cost of Ordinary Litigation*, 31 UCLA L. REV. 72, 89-90 (1983) ("Our data [analyzing civil litigation trends] suggests 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.").

[160] FLA. R. CRIM. P. 3.220(h)(1)(D) (2012).

[161] Interview with Katherine Judson, Innocence Project Litigation Fellow, in Madison, Wis. (Oct. 23, 2012).

[162] KAMISAR, ET AL., *supra* note 36, at 1206.

There is no *requirement* that a defendant show up to a civil deposition[163]—and it is a rare occurrence. A criminal defendant's presence at a deposition is not constitutionally compelled.[164] Even the casebook acknowledges that "deposition jurisdictions" provide that "only defense counsel need be present at the deposition."[165] Missouri, for example, 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."[166] Florida provides protections for "sensitive witnesses."[167] A related argument is that a victim of domestic violence or sexual assault might be deterred from complying with a deposition to be subjected to hours of painful testimony. Precautions would mitigate these concerns: ensuring that the defendant is not present, limiting the time to depose the victim, and restricting the resulting testimony's distribution to only attorneys. These types of precautionary measures would also be appropriate where witness retaliation is a concern.

E. The Criminal Law Arena Should Not Remain Separate and Unequal

If the hand that rocks the cradle forms our world-view, casebooks provide insight into the law school origins that establish initial expectations of what information is sufficient to resolve a civil versus a criminal dispute. Civil procedure casebooks provide students with a comprehensive treatment of formal discovery rights available to litigants—one casebook dedicates sixty pages to the subject.[168] One casebook opined that for criminal defendants "discovery provisions uniformly are broader than prosecution discovery provisions,"[169] suggesting to students that a criminal defendant is entitled to more information than the prosecutor. There is, with few

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[163] *See, e.g.*, FED. R. CIV. P. 30.

[164] 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 (1999). In Florida, a defendant is not allowed to be present at the taking of a discovery deposition without court approval. FLA. R. CIV. P. 3.220(h)(7). This led the Florida Supreme Court to clarify the use of testimony from a discovery deposition at trial in terms of the requirements of the confrontation clause. The court found that, generally speaking, a discovery deposition does not provide for meaningful cross-examination of the deponent especially since 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).

[165] KAMISAR, ET AL., *supra* note 36, at 1206.

[166] MO. SUP. CT. R. 25.12(c).

[167] FLA. R. CRIM. P. 3.220(h)(4) (2012) (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.").

[168] ALLAN IDES & CHRISTOPHER N. MAY, CIVIL PROCEDURE CASES AND PROBLEMS 608-668 (3d ed 2009).

[169] KAMISAR, ET AL., *supra* note 36, at 1201.

exceptions,[170] a de facto omertà on a comparative approach to discovery rights afforded to civil and criminal litigants in these casebooks.

This insularity between disciplines continues into practice—there is little cross-pollination between criminal and civil practitioners.[171] Although civil litigators rarely step into the criminal arena, when they do, they "tend to be stunned and often outraged by their inability to depose government witnesses or even to file interrogatories or requests for admissions."[172] A colleague teaching Criminal Procedure recently broke with the tradition of segregation; knowing students had a semester of Civil Procedure, he introduced a hypothetical criminal complaint, and asked students how they would investigate the case. As hands went up, depositions of witnesses were scheduled, interrogatories drafted, requests for documents propounded. Then my colleague let fall the hammer: young Padawans,[173] you have none of these discovery tools available to you and your investigation has just been rendered virtually impossible. When confronted by the inequity from an advocate's point of view, a sense of injustice emerged.[174]

V. 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.[175] In contrast, invasive discovery tools are permitted in disputes deemed significant; in civil disputes, litigants are afforded investigative tools that disrupt lives of others. A criminal defendant, in this respect, has more in common with a small claims litigant.

Precluding a criminal litigant from a formal investigation means 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 would only be entitled to plaintiff's complaint and documents

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

[171] Sklansky & Yeazell, *supra* note 139, at 684.

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

[173] A Jedi in training, who is typically, unlike a law student, assigned to only one Jedi master.

[174] Interview with Byron Lichstein, Associate Clinical Professor, University of Wisconsin Law School , Interim Director, Frank J. Remington Center, Director, Wisconsin Innocence Project, in Madison, (Nov. 15, 2012).

[175] 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).

selected by plaintiffs. Yet, most criminal defendants are entitled to just that,[176] facilitating complaint-based outcomes that credit prosecutorial hunches.

These pretrial deficiencies—affecting ninety percent of defendants[177]—are not cured by trial. The information that informs trial, relative to civil trials, is, too, 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. Whitley* 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.

We have, as a society, determined a criminal defendant is not entitled to investigate his case, and that his right to be informed is in every respect inferior to those rights afforded to all other parties.[178] 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.[179]

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

As to the Jimenez case, critical questions will remain unanswered. Was Manny Diaz the shooter? Why did detectives return Diaz's wristwatch that was found in the victim's driveway, and why didn't they continue to investigate the sufficiency of Diaz's shaky alibi? Jimenez was a drug dealer, had Diaz, a neighbor, shot Jimenez to take over drug territory? Was the State wrong to believe Roth was telling the truth? Was the appellate team wrong to point the finger at Roth? Perhaps Roth's statement was a fictional act of desperation to avoid liability? Unfortunately, Diaz and his associates, along with the detectives, refused to be interviewed by the defense team. With the State having already decided on a theory of the case, these questions are impossible to answer in the absence of the power to compel

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

[177] *See supra* note 35 and accompanying text.

[178] 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").

[179] FED. R. CRIM. P. 16 advisory committee's note to 1974 Amendment.

pretrial information. If and when the law grants a criminal defendant the power to depose, propound inventories, and request documents, it will be too late for those like Milton who claim to be innocent, know nothing about the crime, and are thrust into darkness as the State decides their fate.

It is time for a criminal defendant's role in an investigation to be reevaluated. Certainly, greater access to the prosecutorial file and more resources mitigate deprivations. But it is unjust to structurally preclude a criminal defendant from investigating the case against him. A limited view into the State's file is far from sufficient. 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 discovery.