

# REFORMING CRIMINAL DISCOVERY: WHY OLD OBJECTIONS MUST YIELD TO NEW REALITIES

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## INTRODUCTION

Some years ago in a Boston community, a group of four to five young men committed two armed robberies.<sup>1</sup> First, the young men robbed and pistol-whipped a man on the street. One shot was fired, which grazed the victim's foot. Then, the young men entered a convenience store, where one of them pointed a gun at the owner and demanded money. The owner resisted, jumped over the counter to confront the young man who was pointing the gun at him, and was shot in the leg when the gun discharged. After the shot was fired, the young men took the cash register, left the store, and escaped by car.

The two victims looked at mug shots at the police station a few days later. Each was reported to have selected the same photograph. Each man identified the person in the photograph as the person who had pointed a gun at him. One identified the person in the photograph as the young man with the gun, who had been dressed in tan. The other victim identified the person in the photograph as the person with the gun, who had been dressed in blue.

Several weeks after the robberies, the police arrested the person in the photograph. The suspect—I'll call him Jay Williams—was arrested at his home. He asked why he was being arrested. When the officers told him he was being arrested for a robbery that had occurred on October 31, he immediately volunteered that he had been at a Halloween party at his home with his mother, wife, child, and other relatives. The officers told him to “[t]ell it to the court.”

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1. The account is based on a case that I participated in as an attorney with the Committee for Public Counsel Services (the public defender organization in Massachusetts) from 1984 to 1992, and represents my recollections and those of trial counsel.

After charges were filed against Mr. Williams, the court appointed defense counsel. Mr. Williams denied participation in the robberies or any knowledge of them and never wavered in his denials. The prosecutor provided defense counsel with a two-page police report, prepared on the date of the incident.<sup>2</sup> The case was scheduled for a probable cause hearing where the victims and police officers testified.<sup>3</sup>

Before the hearing, defense counsel tried to talk to the investigating detectives. One of them let slip information about another suspect or suspects, but refused to answer counsel's follow-up questions. During the probable cause hearing, defense counsel asked the testifying detective about other suspects. The prosecutor objected to the question, on the grounds that it was an ongoing investigation. The court sustained the objection. The convenience store owner testified that he had seen the robbers around the neighborhood before. He also testified that two girls had been in the store right before the robbery, but he could not answer defense counsel's questions about who they were. He, and the other

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2. At the time of Mr. Williams' case, police reports were typically provided to defense counsel at the defendant's first appearance in the district court. This practice has since been codified. *See* MASS. DIST. & MUN. CT. R. CRIM. P. 3(a) (2005). Police reports typically were submitted to the clerk-magistrate in support of an application for a criminal complaint in the district court. *See id.* R. 2. The clerk-magistrates issued complaints, rather than the prosecutor. *See id.* Generally, the police report was the only discovery provided to the defense prior to the probable cause hearing, which was the next scheduled event for serious felonies after the arraignment in district court. This practice has since been codified. *See id.* R. 3(d). Discovery motions were heard in the superior court after grand jury indictment. *See id.* R. 6(a)(1).

3. Massachusetts has two levels of criminal trial courts of record. MASS. GEN. LAWS ch. 211B, § 1 (2005). The district court has jurisdiction over misdemeanors and concurrent felonies, for which there are alternative penalties of either house-of-correction or state prison sentences. *Id.* ch. 211B, § 26. The maximum term of a sentence to the house of correction is two-and-one-half-years. *Id.* ch. 279, § 13. Thus, concurrent felonies may be resolved in the district court or in the superior court. The district court has the discretion whether to retain or decline jurisdiction in concurrent felony cases. *Id.* ch. 218, § 30; *Commonwealth v. Zannino*, 455 N.E.2d 1221 (Mass. 1983). In my experience, most judges deferred to the prosecutor's wishes about whether to resolve the case in district court or in the superior court. The superior court has sole jurisdiction over certain felonies, which carry penalties of imprisonment in the state prison; only the superior court can impose state prison sentences. MASS. GEN. LAWS ch. 279, § 27; *Id.* ch. 218, § 26A. Massachusetts law requires indictment by a grand jury as a prerequisite to imposition of a state prison sentence. *Brown v. Comm'r of Corr.*, 474 N.E.2d 1059 (Mass. 1985). Prosecutors may commence prosecution of serious felonies, such as armed robbery, by filing a complaint in the district court and binding the case over to the grand jury after a probable cause hearing, or by seeking a direct indictment by the grand jury. MASS. R. CRIM. P. 3 (2005). In Mr. Williams' case, the prosecution began in the district court. Formal discovery for cases that are bound over to the grand jury takes place in the superior court, while discovery for cases retained in the district court takes place in the district court. MASS. DIST. & MUN. CT. R. CRIM. P. 3(d) (2005).

victim, identified Mr. Williams in the courtroom as being the robber with the gun.

After hearing the testimony, the court found probable cause and bound over the case for presentment to the grand jury and a subsequent trial in the superior court. Mr. Williams was out on bail, and it took a number of months for a grand jury indictment and an arraignment to be scheduled. During that period, defense counsel happened to cross paths with the detectives and again asked about Mr. Williams' case. This time, one of the detectives mentioned a witness, but again refused to provide any more information.

Defense counsel filed multiple discovery motions with the court, including a specific request for the names and addresses of all eyewitnesses.<sup>4</sup> Defense counsel's discovery requests were allowed by the court, but the prosecutor dragged his heels in answering them. More months passed; defense counsel moved to compel discovery. A new prosecutor took over the case and tried to comply with the discovery orders.

The prosecutor eventually gave defense counsel the requested information, which led to further defense investigation. What defense counsel discovered, many months after the robberies, was that a young woman at a high school near the convenience store had spoken to a school counselor within days of the robberies. She had reported to the counselor that she had seen the robbers going into the store as she was leaving. She recognized them from her school and knew that they had seen her. She was afraid and asked to be transferred to another school. The counselor took her to the principal and vice-principal. The girl gave them names of at least some of the persons she had seen. She did not give Mr. Williams' name. The principal called the police, and conveyed this information to one of the detectives on the case. The detective essentially told the principal that they already had a satisfactory suspect and weren't interested in the information. The detectives never investigated this information, interviewed the girl, checked out the

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4. The governing discovery rules at that time provided for discovery of certain categories of information upon a motion by the defense, and divided discoverable information into categories of "mandatory discovery" and "discretionary discovery." MASS. R. CRIM. P. 14 (1989). Mandatory discovery was limited to: (A) the defendant's written or recorded statements; (B) statements of a person who testified in front of a grand jury; and (C) facts of an "exculpatory nature." *Id.* Upon motion of defense counsel, the court had the discretion to—and in practice generally did—order the prosecutor to provide the names and addresses of the State's witnesses. *Id.* The rule did not specially require disclosure of the names of all percipient witnesses, whether or not the state intended to call them at trial. The discretionary discovery provisions included a catch-all category permitting defense counsel to move for "any material and relevant evidence, documents, [and] statements of persons." *Id.*

people the girl identified, nor found the name of the girl's companion at the store. They did not ask the victims to look at additional photographs that included those of the people the girl had named. They never even made a report memorializing this information. Further, they made no attempt to check out Mr. Williams' alibi, before or after they received this information.

By the time defense counsel learned about these events and interviewed the school officials, they had forgotten a great deal. By that time, it was a different school year. The school officials could not remember who the girl was—she was one of thousands in a large urban high school. They could not remember if she had, in fact, been transferred. They did not know if she said she knew all of the robbers. However, they did remember the three names she had given. Upon further investigation, defense counsel learned that all three of the young men she had named attended the same high school, lived in the neighborhood of the store, and were seventeen or eighteen years old at the time of the robbery. Two were twins. All had prior records for violent offenses.

In contrast, Mr. Williams had never attended that high school, did not live in the neighborhood, and was in his early twenties. There was no evidence that he knew the teenagers the girl had named. His prior record did not include robberies or violence. His alibi witnesses confirmed his whereabouts on the night of the robberies.

Defense counsel filed a motion to dismiss the case on the grounds of a *Brady* violation, alleging that the prosecution had failed to make a timely disclosure of material exculpatory information, despite a specific request, and that the defendant was irreparably prejudiced because the evidence was permanently lost. The court held an evidentiary hearing where the principal, vice-principal, and the detectives testified. There was no dispute about the girl or the information she had offered, or about the detectives' failure to investigate that evidence. Before the judge ruled on the motion to dismiss, the prosecutor told counsel that he would not appeal a dismissal. He said that he did not think Mr. Williams matched the description the victims initially gave of the robber, particularly because Mr. Williams did not have any markings on his face, a feature described by one of the victims.

The trial court called it a close case, but denied the motion to dismiss. Mr. Williams went to trial. The only evidence against him was the two victims' identifications. Mr. Williams' defense counsel could not produce the girl or her companion to identify the young men she saw entering the store at the time of the robbery or to say that Mr. Williams was not among them. Mr. Williams was convicted and sentenced to state prison.

And that's the end. There is no subsequent exoneration in this story. As with many crimes, no physical evidence was collected. Perhaps none ever existed that could have been tested then (or later) by better scientific methods. This was not a high-profile case that might have drawn witnesses to come forward to give new evidence. This was, in many ways, a very ordinary case.

Mr. Williams' case could have played out in several different ways. If we consider the possibility that Mr. Williams was actually innocent, then we must acknowledge that the lack of timely and adequate discovery of relevant evidence might have deprived Mr. Williams of a full and fair opportunity to present evidence that could have undermined the strength of the eyewitness testimony and been affirmative evidence of his innocence. Had his lawyer known of the undisclosed evidence earlier, counsel might well have located the girl and her companion—and those witnesses might have said that Mr. Williams was not one of the perpetrators.

If the undisclosed eyewitness, who said she was familiar with the robbers, had testified that she had seen all of the perpetrators and had identified them by name or as attending her school, which would have excluded Mr. Williams, might the jury have had confidence in her identification? Might the jury have given weight to the differences between Mr. Williams and the suspects named by the girl—differences of age, residence, and school? Might the jury have given greater credence to Mr. Williams' alibi witnesses? Might Mr. Williams have been acquitted?

Another alternative is that the information would never have come to light. Defense counsel stumbled on it through casual conversation with the officers. For reasons described below, this second scenario is more common. If that had been the case, one of two things could have happened. The case could have gone to trial, with the same result—a conviction. The difference is that defense counsel might have believed Mr. Williams to be guilty. And although defense counsel's adherence to his or her duty to zealously represent a client should be constant regardless of counsel's personal assessment of guilt or innocence,<sup>5</sup> many

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5. See MODEL RULES OF PROF'L CONDUCT R. 1.3 cmt. (2004), which provides in part:

A lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer, and take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor. A lawyer must also act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf.

*Id.*; see also ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION AND DEFENSE FUNCTION Standard 4-1.2(b) (3d ed. 1993) ("The basic duty defense counsel

in the criminal justice system admit that defense counsel's view of the guilt or innocence of his or her client often contributes to the level of zeal brought to the representation.<sup>6</sup> This affects the questions counsel asks, the degree to which counsel puts the prosecution to its proof, the investigation counsel conducts, and the arguments counsel makes at sentencing, if the client is convicted.<sup>7</sup>

Finally, if the evidence had not come to light before trial, there is a greater likelihood that the case would have resulted in a plea. Counsel has the obligation to inform a client of his or her options, including a plea.<sup>8</sup> In fulfilling the duty to counsel a client, a lawyer should provide an assessment of the government's case and the possibility of conviction.<sup>9</sup> Certainly, many clients ask, "What are my chances? What do you think will happen if we go to trial?" Without the information that

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owes to the administration of justice and as an officer of the court is to serve as the accused's counselor and advocate with courage and devotion and to render effective, quality representation.").

6. These conclusions are based on my observations of defense attorneys in court and in conversations with prosecutors over twenty years of criminal practice, and on many conversations with other attorneys with criminal defense experience. *See also Frontline: Real Justice, Part I* (PBS television broadcast Nov. 14, 2000), available at <http://www.pbs.org/wgbh/pages/frontline/shows/bostonda> (documenting the experience of defense attorneys representing clients in several district courts in Massachusetts).

7. *Id.*

8. Under Standard 4-6.1 of the *ABA Standards for Criminal Justice: Prosecution Function and Defense Function*:

- a. Whenever the law, nature, and circumstances of the case permit, defense counsel should explore the possibility of an early diversion of the case from the criminal process through the use of other community agencies.
- b. Defense counsel may engage in plea discussions with the prosecutor. Under no circumstances should defense counsel recommend to a defendant acceptance of a plea unless appropriate investigation and study of the case has been completed, including an analysis of controlling law and the evidence likely to be introduced at trial.

ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION AND DEFENSE FUNCTION Standard 4-6 (3d ed. 1993). In addition, Standard 4-6.2 provides that:

- a. Defense counsel should keep the accused advised of developments arising out of plea discussions conducted with the prosecutor.
- b. Defense counsel should promptly communicate and explain to the accused all significant plea proposals made by the prosecutor.

*Id.* Standard 4-6.2.

9. Standard 4-5.1(a) provides: "After informing himself or herself fully on the facts and the law, defense counsel should advise the accused with complete candor concerning all aspects of the case, including a candid estimate of the probable outcome." *Id.* Standard 4-5.1(a).

came to light about the suspects observed by the eyewitness, Mr. Williams' likelihood of conviction was greater. The evidence would have been the victims' identifications versus the testimony of Mr. Williams' friends and family that he was with them at the time of the robberies. Mr. Williams might have decided that he preferred a more certain settlement through a plea, rather than risking a trial with no guarantee as to the disposition, and in light of evidence that defendants often receive higher sentences after trial.<sup>10</sup>

Can we have confidence in the outcome of this case? The jury said that Mr. Williams was guilty, but the scores of exoneration cases in which a defendant's actual innocence has been established beyond dispute have certainly taught us that juries sometimes convict innocent men and women.<sup>11</sup> This Article suggests that, had there been timely access to relevant information in Mr. Williams' case, we would be in a position to have far greater confidence in the outcome.

Mr. Williams' case is one where we cannot say with certainty that the outcome was just, because relevant evidence was ignored by the police, not disclosed to the defense, and not discoverable by the defense through the criminal discovery process.<sup>12</sup> As a result, the jury reached a

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10. Some prosecutors and judges view a defendant's exercise of his or her right to a jury trial as a failure to take responsibility or show remorse, thus legitimizing longer sentences based on their view of the defendant's character. See, e.g., Daniel Givelber, *Punishing Protestations of Innocence: Denying Responsibility and Its Consequences*, 37 AM. CRIM. L. REV. 1363, 1365 (2000).

11. See JIM DWYER ET AL., ACTUAL INNOCENCE: FIVE DAYS TO EXECUTION AND OTHER DISPATCHES FROM THE WRONGFULLY CONVICTED (2000); Stanley Z. Fisher, *Convictions of Innocent Persons in Massachusetts: An Overview*, 12 B.U. PUB. INT. L.J. 1, 1-3 (2002); Samuel R. Gross et al., *Exonerations in the United States: 1989 Through 2003*, 95 J. CRIM. L. & CRIMINOLOGY 523, 524 (2005).

12. Had the evidence been memorialized in a police report, counsel would have been able to obtain a copy of the report. Initial police reports were provided at the defendant's first appearance in the district court. Supplemental police reports were generally provided, and counsel could seek discretionary discovery of material and relevant evidence and documents. MASS. R. CRIM. P. 14 (1989). Rule 14 was amended in 2004 to specifically make mandatory the disclosure of police reports. MASS. R. CRIM. P. 14(a)(1)(A)(vii) (2005). There was no procedural mechanism by which counsel could compel the detectives to answer questions, except during cross-examination at the probable cause hearing, where the prosecutor successfully objected to counsel's attempt to obtain information about the hinted at, but not disclosed, evidence. The discretionary discovery rule permitted disclosure of the names and addresses of prospective witnesses, upon motion by the defendant, but was generally considered to apply to witnesses the state intended to call at trial. MASS. R. CRIM. P. 14(a)(2) (1989). Counsel could also move for discovery of witness statements, but the word "statement" was defined as a writing that was "signed or otherwise adopted or approved" by the writer or a stenographic, electronic, or mechanical recording or a verbatim and contemporaneous transcription of an oral declaration. *Id.* R. 23. The former rule did not include a written record of an oral statement of a witness if it was not a verbatim recitation. *Id.* A broader

verdict without the benefit of all available evidence relevant to Mr. Williams' guilt or innocence.

In addition to the lack of discovery of relevant evidence, Mr. Williams' case also presents other issues that have, long after his conviction, been identified as causes of wrongful convictions, including eyewitness identification error,<sup>13</sup> "tunnel vision"<sup>14</sup> by police and prosecutors, and discounting of defense alibis.<sup>15</sup> The lack of discovery of relevant evidence deprived defense counsel of the opportunity to remedy these other errors.<sup>16</sup>

This Article focuses on the importance of defendants' access to relevant information and on how limits on the discovery of information

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definition of "statement" has been included in the revised pretrial discovery rule, defining a statement subject to pretrial discovery as a writing by a "person having percipient knowledge of relevant facts and which contains such facts," thus eliminating the requirement of formal adoption or approval and encompassing written recordings of oral statements. MASS. R. CRIM. P. 14(d)(1) (2005).

13. Numerous studies of exoneration cases list mistaken eyewitness identification as the leading cause of wrongful convictions. *See, e.g.*, Fisher, *supra* note 11, at 62-63 (revealing that eighteen of thirty-three innocent persons were convicted in Massachusetts due to eyewitness error); Gross et al., *supra* note 11, at 542 (reporting that, of those exonerated from 1989 through 2003, 107 of the 121 (almost 90 percent) defendants convicted of rape and 102 of 205 (about 50 percent) defendants convicted of murder involved at least one misidentification). The criminal justice system has historically relied upon eyewitness identification of a suspect by strangers as sufficient evidence of guilt for a conviction, even in the absence of any other inculpatory evidence. There has been widespread ignorance of the fallibility of eyewitness testimony and various identification procedures. *See* Gary L. Wells & Elizabeth A. Olson, *Eyewitness Testimony*, 54 ANN. REV. PSYCHOL. 277 (2003). For a history of the debate in law and science over eyewitness testimony and the legal system's reliance on such testimony, see JAMES DOYLE, *TRUE WITNESS: COPS, COURTS, SCIENCE AND THE BATTLE AGAINST MISIDENTIFICATION* (2005).

14. *See* Keith A. Findley & Michael S. Scott, *The Multiple Dimensions of Tunnel Vision in Criminal Cases*, 2006 WIS. L. REV. 291. The phenomenon of "tunnel vision"—inadequate investigation and premature focus on a single suspect—certainly played a significant role in Mr. Williams' case.

15. There has been a pervasive assumption by some prosecutors, courts, and juries that defendants will promote false testimony and will fabricate an alibi, while the witnesses for the government are more worthy of belief. Juries have wrongfully convicted defendants based on eyewitness identifications even where the defendant presented numerous alibi witnesses and the prosecution presented little or no other inculpatory evidence. *See, e.g.*, Findley & Scott, *supra* note 14 at 296-304 (describing the cases of Steven Avery and Marvin Anderson; in each case, mistaken identifications corroborated by little or no other inculpatory evidence prevailed over alibi testimony); *see also* Elizabeth A. Olson & Gary L. Wells, *What Makes a Good Alibi? A Proposed Taxonomy*, 28 LAW & HUM. BEHAV. 157 (2004).

16. As one commentator notes, "When defendants lack the practical ability to generate evidence, the government has an easier time meeting its burden." Darryl K. Brown, *The Decline of Defense Counsel and the Rise of Accuracy in Criminal Cases*, 93 CAL. L. REV. 1585, 1607 (2005).

can have a substantial impact on the reliability of outcomes in criminal cases. Limits on access to relevant information can compound other kinds of error because the defendant has little ammunition to refute prevailing and potentially error-producing assumptions and practices.

Part I of this Article examines the impact of the lack of discovery in criminal cases, both in the context of trials and of dispositions by a plea. The Article suggests that broad discovery is necessary to enhance the reliability of fact-finding in both contexts because the evidence relied upon as the factual basis for findings of guilt often has not been critically scrutinized or subjected to challenge. Part II discusses current means by which defendants can obtain discovery. The Article reviews the federal constitutional standards for disclosure of evidence to the defense and concludes that they do not provide sufficient access to information highly relevant to guilt or innocence, both in theory and in practice. The Article examines reasons for resistance to broad discovery in criminal cases and how that resistance is manifested in other potential sources of discovery by the defense, including preliminary hearings, formal discovery rules, and informal discovery. Part III of the Article suggests basic principles that should guide discovery rules, along with suggestions for specific rules that will increase the reliability of outcomes in criminal cases. The Article concludes that restrictions on discovery undermine confidence that determinations of guilt or innocence are reliably made. Finally, the Article suggests a variety of reforms to discovery rules and practices that could result in more reliable determinations of guilt, degree of culpability, and appropriateness of sentence.

#### I. THE NEED FOR DISCOVERY IN CRIMINAL CASES

Limited discovery, or no discovery at all, contributes to both wrongful convictions and unfair sentencing. Too often the criminal justice system forces a defendant to plead guilty or to go to trial without access to information that would allow defense counsel to investigate issues pertaining to guilt, level of culpability, or appropriate punishment.

In many criminal prosecutions, the evidence that serves to commence a prosecution is not subjected to additional scrutiny, challenge, or further investigation before the case is concluded. For a number of reasons, the difference between the evidence relied on by the police to support an arrest, which only needs to meet the low evidentiary threshold of probable cause,<sup>17</sup> and the evidence that serves as the basis for a finding of guilt beyond a reasonable doubt, may be negligible.

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17. See *Gerstein v. Pugh*, 420 U.S. 103, 111 (1975) (“The standard for arrest is probable cause, defined in terms of facts and circumstances ‘sufficient to warrant a

First, charges may be filed without any additional post-arrest investigation by the police or inquiry by the prosecutor.<sup>18</sup> Prosecutors only need to have probable cause to initiate a prosecution.<sup>19</sup> Whether there is any prosecutorial review of the evidence—meaningful or not—before initiation of the prosecution varies widely.<sup>20</sup> In some jurisdictions, like Massachusetts, clerk-magistrates issue complaints in the lower trial court based on oral or written police submissions—generally a police report—and an application for a complaint, generally made out by a police officer.<sup>21</sup> Thus, prosecutors conduct no review of the evidence prior to issuance of the complaint and typically do not make inquiries of, or demands upon, the police for further investigation prior to the defendant's first court appearance.<sup>22</sup> In jurisdictions where

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prudent man in believing that the [suspect] had committed or was committing an offense.”).

18. See H. Richard Uviller, *The Neutral Prosecutor: The Obligation of Dispassion in a Passionate Pursuit*, 68 *FORDHAM L. REV.* 1695, 1697-98 (2000). Uviller, describing the commencement of a prosecution, says:

Following an arrest predicated on probable cause—and often very little more—or a grand jury indictment, the formal charge is lodged. Normally, the charge is the result of the prosecutor's judgment, confirmed (usually *pro forma*) by the grand jury in those jurisdictions that maintain the relic for the ordinary felony case.

*Id.* Uviller notes that twenty-three states and the District of Columbia still use the grand jury for certain felony offenses. *Id.* at 1698 n.5; see also Brown, *supra* note 16, at 1598-99 (2005) (describing factors arising from the adversarial roles of police and prosecutors which diminish accuracy in investigation, and concluding that “the problems of imperfect information can be substantial in routine crime investigation”). Brown points out that “We depend upon trial adjudication (or plea negotiation) to counter those risks but lack any mechanisms to check them earlier in the pretrial process.” *Id.* at 1599.

19. While some prosecutors' offices set a higher standard for issuance of criminal charges, such as likelihood of conviction, they are generally not legally required to do so. See *Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978) (“In our system, so long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion.”). See also MODEL RULES OF PROF'L CONDUCT R. 3.8, which provides: “The prosecutor in a criminal case shall: (a) refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause.”

20. See Uviller, *supra* note 18, at 1702-03. Uviller, a former New York prosecutor describing the commencement of prosecution in most state courts, writes: “But often—particularly where the local police have experience and pride in their detection skills, the investigation that precedes the arrest is a police operation exclusively.” *Id.* at 1703.

21. See MASS. DIST. & MUN. CT. R. CRIM. P. 2 (2005).

22. Based on my experience in the Massachusetts criminal courts, a defendant arrested for a new offense was typically arraigned in the district court the same day the criminal complaint was issued.

prosecutors draft the charging document, evaluation of the evidence and the opportunity to request further investigation prior to the charging decision varies widely and depends on a number of factors. These factors include: the nature of the case, the perceived mission of the office, the perspective of the prosecutor's office and of the individual prosecutor regarding his or her role, the experience of the prosecutor drafting the complaint, the availability of resources, and the relationship between the prosecutors and the police.<sup>23</sup>

Similarly, the amount of post-commencement investigation undertaken by law enforcement or requested by the prosecutor varies widely. In many jurisdictions, particularly for less serious crimes, the evidence supporting the initiation of the prosecution serves as the basis for disposition of the case.<sup>24</sup> The police move on to other arrests, and the prosecutor acts on the information initially received from the police.<sup>25</sup>

Counsel's view of his or her job plays an important role in whether additional evidence will be requested or come to light at the initiation of

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23. In my experience in Massachusetts, these factors generated wide differences among prosecutors in the same office, among branch offices of the Boston District Attorney (Boston is comprised of numerous smaller communities, each with its own court and corresponding branch office of the District Attorney), and among district attorney's offices of neighboring counties. See Uviller, *supra* note 18, at 1703. While arguing that a prosecutor should be skeptical of and curious about the case, and that even the case that appears the most certain deserves further investigation, Uviller admits: "Looking back on my own courtroom days, I now realize that I was weakest in this essential characteristic of the best of the breed; in a word, my gullibility and compassion dulled my suspicion and lulled my doubts." *Id.*

24. In my experience in the lower trial courts in Massachusetts, many cases were resolved at the pretrial hearing, which was the next court event after the arraignment. MASS. DIST. & MUN. CT. R. CRIM. P. 3(c) (2005). While the parties were supposed to engage in a pretrial conference prior to the pretrial hearing to discuss discovery or engage in plea negotiations, the conference was far more likely to occur after the docket was initially called on the date of the pretrial hearing. Typically, the prosecutor had no more information on the pretrial hearing date than he or she had at the arraignment, and investigating or arresting officers were not generally available to provide additional information. Because most cases were resolved by a plea, the evidence underlying the plea was generally the same as that which commenced the prosecution.

25. In a suburban jurisdiction near Milwaukee, Wisconsin, prosecutors typically provide a pretrial offer at the initial appearance to persons who have been summoned on misdemeanor charges. For other commonly recurring cases, an effort is made to also give an offer in custody cases based on warrantless arrests. Interview with Ben Kempinen, Assoc. Clinical Professor, Dir. of Prosecution Program, Univ. of Wis. Law Sch., in Madison, Wis. (Feb. 3, 2006). Although this practice may contribute to the efficient resolution of the cases, it appears not to allow for skepticism about the underlying evidence or for defense information to play any part in the prosecutor's assessment of the case.

either party.<sup>26</sup> Institutional support for obtaining additional evidence or for closer scrutiny of the evidence underlying the arrest, by either the prosecutor or defense counsel, is often lacking. The underfunding and understaffing of indigent defense systems, for example, places substantial pressure on counsel for indigent defendants<sup>27</sup> to do what they can with what they have available.<sup>28</sup> Prosecutors in busy offices are

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26. See Uviller, *supra* note 18 at 1699-1700.

Young Assistants think of themselves primarily as advocates. The case they make, or (more likely) inherit from a law enforcement unit, is cast immediately as a trial scenario. It is refined and amplified . . . in preparation for exposure to a jury. In this posture, of course, the Assistant cares a good deal more for supplementary information that fortifies the case against the defendant than new data that call his thesis into question. What is shared with the defense is shared reluctantly and only because of the law's stern injunction, and what is received from the defense is taken with suspicion and the assumption that, insofar as it contradicts the prosecution version, counsel is likely to be disingenuous, misinformed, or naïve.

*Id.* (footnotes omitted).

27. A majority of criminal defendants are indigent and are thus represented by publicly funded attorneys through either public defender systems, appointed attorneys, or contract attorneys. See Bureau of Justice Statistics, U.S. Dep't of Justice, Indigent Defense Statistics, <http://www.ojp.usdoj.gov/bjs/id.htm> (last visited Mar. 28, 2006) (reporting that these attorneys represented about 66 percent of felony defendants in federal prosecutions in 1998 and 82 percent of felony defendants in the seventy-five most populous counties in 1996).

28. See Rodney J. Uphoff, *Criminal Discovery in Oklahoma: A Call for Legislative Action*, 46 OKLA. L. REV. 381, 402 ("High caseloads, inadequate resources, or financial disincentives do limit the zeal of some defense lawyers."). Jurisdictions that set flat rates for cases provide little incentive for pretrial discovery because counsel will not be paid for the time spent on discovery and will have every incentive to dispose of the case quickly. Mississippi, for example, caps reimbursement in noncapital felony cases at \$1,000, at \$2,000 for capital cases, and at \$200 for cases that are not appealed or that do not originate in a court of record. MISS. CODE ANN. § 99-15-17 (West 1999). For additional studies and accounts of the limited resources provided for indigent defense, see Richard A. Rosen, *Innocence and Death*, 82 N.C. L. REV. 61, n.24 (2003); Brown, *supra* note 16, at 1626 & nn.60-63, 148. Brown asserts that conscious underfunding of indigent defense is likely to continue and that the Supreme Court's standards for ineffective assistance of counsel minimally regulate the quality of counsel, including the quality of counsel's investigation. Brown, *supra* note 16, at 1602-03. A *New York Times* article gave the following account of a case in Mississippi:

Diana Brown met her court-appointed lawyer for the first time on the day she pleaded guilty to several serious crimes five years ago. They spent five minutes together and have not spoken since.

"You are guilty, lady," the lawyer, Thomas Pearson, told Ms. Brown, according to her sworn statement, as he met with her and nine other defendants as a group, rattling off the charges against them.

He told her she was facing 60 years in prison for assault, drunken driving and leaving the scene of an accident, and should accept a deal for 10

likewise handed stacks of files to process. Both prosecutors and defense counsel are frequently pushed toward resolving a case at the earliest opportunity.<sup>29</sup> While efficiency in resolving pending cases has benefits for both the accused and the State, the process frequently ignores whether the disposition of a case accurately reflects the accused's degree of culpability or the deservedness of the penalty.

We have, in too many places, a system that forces a defendant to plead guilty or to go to trial without access to information that bears on guilt or innocence, level of culpability, and the appropriate sentence if he or she is guilty of something. Insufficient discovery contributes to both wrongful convictions and unfair sentencing.<sup>30</sup>

#### A. *The Prevalence of Guilty Pleas*

Because most cases do not go to trial, most defendants will never "tell it to the judge" (as the detectives in Mr. Williams' case told him to do when he protested his innocence upon arrest), or to a jury. Studies show that defendants plead guilty in up to 95 percent of criminal cases.<sup>31</sup>

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years, court papers say. He gave her five minutes to decide. Offered no other defense, she took the deal.

Adam Liptak, *County Says It's Too Poor to Defend the Poor*, N.Y. TIMES, Apr. 15, 2003, at A1; see also Jane Fritsch & David Rohde, *For the Poor, a Lawyer with 1,600 Clients*, N.Y. TIMES, Apr. 9, 2001, at A1; Jane Fritsch & David Rohde, *Lawyers Often Fail New York's Poor*, N.Y. TIMES, Apr. 8, 2001, at A1; Richard P. Jones, *State Public Defender Picks a Fight*, MILWAUKEE J. SENTINEL, Apr. 23, 2001, at 3B (reporting that, in Wisconsin, public defenders working felony cases handle roughly 185 cases a year, and those with misdemeanors each handle up to 550 cases a year). Some indigent defenders openly admit to employing triage to manage their case load. Interview with Jim Cooley, Clinical Assoc. Professor and Legal Defense Project Attorney, Univ. of Wis. Law Sch., in Madison, Wis. (Apr. 10, 2006) (regarding the perspective of some indigent defenders with high caseloads in Wisconsin).

29. See Uviller, *supra* note 18, at 1714 ("[D]ocket economy is an ongoing imperative . . .").

30. See Brown, *supra* note 16, at 1596 ("[T]he risk of inaccuracy affects the guilty as well, because even guilty defendants can be inaccurately charged, adjudicated, and punished."). Brown points out that liability and sentencing frequently turn on "fine-grained factual understandings." *Id.*

31. A U.S. Department of Justice study of dispositions of felony cases filed in the country's seventy-five largest counties during May 2002 reported that 95 percent of the convictions occurring within a year of arrest were obtained through a guilty plea. Bureau of Justice Statistics, U.S. Dep't of Justice, Criminal Case Processing Statistics, <http://www.ojp.usdoj.gov/bjs/cases.htm> (last visited Mar. 28, 2006); see Uviller, *supra* note 18, at 1699 ("A crudely calculated number that many commentators take as an honest estimate is 80% to 90% dispositions by guilty plea.").

The majority of cases resolved in the criminal justice system are misdemeanors.<sup>32</sup> Those sentenced to serve time for misdemeanors generally serve sentences of less than one year; the same is true for the large number of persons whose probations for misdemeanor convictions are revoked.<sup>33</sup> While the sentences imposed following a felony conviction run the gamut from probation to life in prison, many felons spend less than five years in prison.<sup>34</sup> For this large portion of the population of convicted persons, the lengthy postconviction proceedings or fortuitous circumstances that sometimes reveal previously undisclosed evidence are less common.<sup>35</sup> These are the cases that receive less attention from the beginning, where quick pleas preceded by little or no investigation are the norm, and where the consequences of the conviction are often not appreciated until the sentence or period of supervision is over.<sup>36</sup> Counsel and the courts tend to resolve these cases quickly, without disclosure of evidence beyond what was available at the commencement of the prosecution, and without requests for additional

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32. NAT'L CENTER FOR STATE COURTS, EXAMINING THE WORK OF STATE COURTS: CRIMINAL (2003), [http://www.ncsconline.org/d\\_research/csp/2003\\_Files/2003\\_Criminal.pdf](http://www.ncsconline.org/d_research/csp/2003_Files/2003_Criminal.pdf) (reporting that a survey of incoming criminal cases in 21 states in 2003 found a ratio of three misdemeanor cases for each felony case).

33. Typically, legislatures cap the maximum sentence for a misdemeanor at one year or less. *See, e.g.*, WIS. STAT. § 939.51 (2005-2006) (setting out maximum penalties for different classifications of misdemeanors, ranging from thirty days to nine months); *cf.* WIS. STAT. § 939.52 (2005-2006) (setting out maximum penalties for different classifications of felonies, ranging from three-and-one-half years to life imprisonment); *see also* WIS. STAT. § 973.05(2)(b) (2005-2006) (providing that sentences to the state prison may not be for less than one year of confinement).

34. Gross, *supra* note 11, at 535; *see also* U.S. Dep't of Justice, Criminal Sentencing Statistics, <http://www.ojp.usdoj.gov/bjs/sent.htm> (last visited Apr. 24, 2006) (reporting an average sentence length of seven months for the 28 percent of defendants convicted of a felony in state courts and sentenced to jail in 2002). For the 43 percent of those sentenced for felonies who received state prison sentences, the average length of a state prison sentence was four-and-one-half years, and the average time spent in state prison was roughly half of the sentence. *Id.*

35. In *Kyles v. Whitley*, it took multiple state court and federal habeas proceedings before all of the exculpatory evidence was discovered by the defense. 514 U.S. at 419, 428-31 (1995).

36. Convictions for even minor offenses can have significant collateral consequences, including: deportation or the denial of naturalization; ineligibility for certain employment and other licenses; federal funding for college; increased penalties for future convictions as a repeat offender. *See, e.g.*, WIS. STAT. § 939.62 (2005-2006). The Wisconsin repeat offender statute allows penalties for misdemeanors to increase to two years in the state prison if the defendant had three prior misdemeanor convictions within the preceding five years. WIS. STAT. § 939.51 (2005-2006). Prior to February 1, 2003, the penalty could be increased to three years. WIS. STAT. § 939.62 (2001-2002).

information by the defense.<sup>37</sup> In many quarters, it matters less that a conviction rests on reliable fact-finding than that a resolution is achieved.<sup>38</sup> Whether attention is paid to reliable fact determinations depends on the nature of the charge, the quality of the investigation leading to the charge, the relationship between the police and the prosecutor, and the culture in the police and prosecution offices.<sup>39</sup>

We are a nation of pleas and plea bargaining, and virtually everyone has signed on to this practice, including the Supreme Court.<sup>40</sup> Indeed, the trend is toward more dispositions by plea and fewer by trial.<sup>41</sup>

37. Defendants who are in custody until their cases are resolved have additional pressures to resolve their cases quickly as a means to end their imprisonment. Prosecutors, lawyers, and defendants know that what the defendants have to offer as a resolution is a guilty plea. See, e.g., GERARD RAINVILLE & BRIAN A. REEVES, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, FELONY DEFENDANTS IN LARGE URBAN COUNTIES, 2000 (2003), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/fdluc00.pdf> (reporting that defendants held in custody were likely to resolve their cases in less time than those not in custody, and that the median time from arrest until adjudication was 105 days for those not in custody and forty days for defendants in custody); Jeffrey A. Kruse, *Substantive Equal Protection Analysis Under State v. Russell and the Potential Impact on the Criminal Justice System*, 50 WASH. & LEE L. REV. 1791, 1824 (1993) (stating that the probability of conviction increases drastically when a defendant remains in custody awaiting trial).

38. Douglas L. Colbert, Ray Paternoster & Shawn Bushway, *Do Attorneys Really Matter? The Empirical and Legal Case for the Right of Counsel at Bail*, 23 CARDOZO L. REV. 1719, 1719-20 (2002) (reporting that many defendants awaiting trial in the county jail do not get counsel appointed until weeks after their initial appearance; and reporting that, at their next appearance, cases are either dismissed or the defendants plead out for time served).

39. See, e.g., Uviller, *supra* note 18; see also Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2463 (2004).

40. *Corbitt v. New Jersey*, 439 U.S. 212, 218-21 (1978).

[T]here is no *per se* rule against encouraging guilty pleas. We have squarely held that a State may encourage a guilty plea by offering substantial benefits in return for the plea. . . . Relying upon and quoting from *Chaffin v. Stynchcombe*, 412 U.S. 17 (1973), we also said, "While confronting a defendant with the risk of more severe punishment clearly may have a 'discouraging effect on the defendant's assertion of his trial rights, the imposition of these difficult choices [is] an inevitable'—and permissible—'attribute of any legitimate system which tolerates and encourages the negotiation of pleas.' It follows that, by tolerating and encouraging the negotiation of pleas, this Court has necessarily accepted as constitutionally legitimate the simple reality that the prosecutor's interest at the bargaining table is to persuade the defendant to forgo his right to plead not guilty."

*Id.* (quoting *Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978) (citations omitted)).

In *United States v. Ruiz*, Justice Breyer, writing for a unanimous Court in holding that prosecutors do not have a constitutional obligation to provide impeachment evidence during plea bargaining, said that imposing such a requirement on the government before a guilty plea "could seriously interfere with the Government's interest in securing those

There are many reasons why plea bargaining may be appropriate in any given case, as well as on a systemic level. A discussion of the reasons for guilty pleas and an examination of their value are beyond the scope of this Article.<sup>42</sup> What is clear, however, is that in 95 percent of criminal cases, evidence is not evaluated by a jury, witnesses are not subjected to cross-examination, and the prosecution is not put to its proof. Because the evidence available at the time of many pleas is the evidence that the prosecution has chosen to disclose, prosecutors end up being the fact-finders, rather than juries.<sup>43</sup>

Many may take comfort from the widespread disposition of cases by pleas, asserting that it not only conserves resources, but it also validates the underlying prosecutions.<sup>44</sup> The notion that pleas validate the

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guilty pleas that are factually justified, desired by defendants, and help to secure the efficient administration of justice.” 536 U.S. 622, 631 (2002); *see also* Blackledge v. Allison, 431 U.S. 63, 71 (1977) (“[T]he guilty plea and the often concomitant plea bargain are important components of this country’s criminal justice system.”).

41. *See* Brian J. Ostrom et al., *Examining Trial Trends in State Courts: 1976-2002*, 1 J. EMPIRICAL LEGAL STUD. 755, 761-66 (2004). Highlights of the report are available at the website of the National Center for State Courts (NCSC), <http://www.ncsconline.org>. The Court Statistics Project at the NCSC compiled data from twenty-three states (representing 58 percent of the nation’s 2002 population) on dispositions of criminal cases over the twenty-seven year period. Ostrom et al., *supra*, at 756, 758-59 tbl.2. The data from these states during this period showed a population increase of 38 percent, a 127 percent increase in the number of criminal dispositions, a 15 percent decrease in the number of jury trials, and a 10 percent decrease in the number of bench trials. *Id.* at 761, 763-64. The percentage of criminal dispositions by jury trial decreased from 3.4 percent in 1976 to 1.2 percent in 2002. *Id.* Similarly, the percentage of dispositions by bench trial decreased from 5 percent in 1976 to 2 percent in 2002. *Id.* Data from thirteen states (representing 40 percent of the population) regarding dispositions of felony cases showed an increase of 46 percent in the population and of 124 percent in felony dispositions, and a decrease of 6 percent in jury trials and a decrease of 36 percent in bench trials. *Id.* at 764-65. As a percentage of felony dispositions, jury trials decreased from 5.2 percent in 1976 to 2.2 percent in 2002, while the percentage of bench trials decreased from 3.72 percent in 1976 to 1 percent in 2002. *Id.* Researchers have also documented a decline in civil jury trials over the past several decades. *See, e.g.*, Valerie P. Hans & Stephanie Albertson, *Empirical Research and Civil Jury Reform*, 78 NOTRE DAME L. REV. 1497 (2003) (citing to several studies documenting a relative decline in number of civil trials, including a collaborative report by the NCSC and the Bureau of Justice Statistics showing a decline of 10 percent in the number of civil jury trials held between 1992 and 1996 in the seventy-five most populous counties in the United States); *see also* Mark Galanter & Mia Cahill, “*Most Cases Settle*”: *Judicial Promotion and Regulation of Settlements*, 46 STAN. L. REV. 1339 (1994) (examining factors contributing to settlements and the nature and frequency of judicial involvement in settlements). In most civil cases, the parties have widespread access to evidence known to the opposing party.

42. *See* Bibas, *supra* note 39; Givelber, *supra* note 10.

43. *See* Brown, *supra* note 16, at 1592-98.

44. *See* Uviller, *supra* note 18.

prosecution of cases that result in pleas rests on the assumption that people plead guilty because they are, in fact, guilty and that a guilty plea reflects culpability.

In contrast to this assumption, we have good reason to question the accuracy of the factual bases for pleas in many cases.<sup>45</sup> While many defense lawyers know that some of their clients who are innocent plead guilty,<sup>46</sup> the DNA exoneration cases have provided incontrovertible proof that this does happen. Among the scores of exonerees are persons who pleaded guilty and were later proven innocent. For example, Christopher Ochoa pleaded guilty to murder to avoid the death penalty and spent more than a dozen years in prison before DNA testing led to his exoneration.<sup>47</sup> In a study of exonerations from 1989 to 2003, researchers found that 6 percent of exonerees had pleaded guilty, noting that many cases that resolve by plea do not result in post-plea investigations or litigation that could lead to exoneration.<sup>48</sup>

The incidence of guilty pleas by innocent men and women is not limited to defendants facing the most extreme penalties in the most

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45. See George Fisher, *Plea Bargaining's Triumph*, 109 YALE L.J. 857, 1061 (2000).

46. See, e.g., Abbe Smith, *Defending the Innocent*, 32 CONN. L. REV. 485, 494 & nn.56-58 (2000) (describing examples of innocent defendants who pleaded guilty). Arguably, it is rare that counsel can know with absolute certainty that his or her client is factually innocent, and counsel's belief in the innocence of a client who pleads guilty rests on counsel's assessment of the evidence and the client's credibility. However, sometimes factual innocence is clear. For example, a former client contacted me when I was a public defender to request assistance in a criminal case in Boston. The client had pleaded guilty to possession of cocaine in the bench session of the district court. At that time, Massachusetts had a de novo system for district court criminal cases. MASS. DIST. CT. SUPP. R. CRIM. P. 2, 7 (1989). The case could first be determined in a bench trial or by plea, and the defendant could appeal to a jury session of the district court for an entirely new adjudication. *Id.* The client recounted that he had been stopped and searched by police, who found a white powdery substance on his person. Although the client knew the substance was flour from his daughter's school art project, he pleaded guilty because his counsel assured him he would receive a sentence to run concurrent with another sentence. The plea was entered before the drug analysis was reported. When the judge imposed a consecutive sentence, the client appealed to the jury session. Subsequently, the drug analysis established that the substance was not cocaine.

47. Keith A. Findley & John Pray, *Lessons from the Innocent*, 47 WIS. ACAD. REV. 13 (2001).

48. See Gross, *supra* note 11, at 535-36.

Exonerations are the end products of a lot of work, usually over a long period. . . . [N]obody, it seems, seriously pursues exonerations for defendants who are falsely convicted of shoplifting, misdemeanor assault, drug possession, or routine felonies . . . and sentenced to probation, a \$2,000 fine, or even six months in the county jail or eighteen months in state prison.

*Id.*

serious cases. For example, of the thirty-nine people wrongly convicted of drug offenses in Tulia, Texas, thirty-one pleaded guilty.<sup>49</sup> The only evidence against the Tulia defendants was the testimony of one narcotics officer, who was later discovered to have entirely fabricated the evidence that led to the arrests.<sup>50</sup> This revelation resulted in their pardons, although by the time they were pardoned, most of the defendants had already served their sentences.<sup>51</sup>

We also have good reason to examine how the limits on discovery may play a part in innocent defendants pleading guilty. If discovery of evidence comes late, or not at all, it follows that the reliability of the evidence that served to commence the prosecution often does not matter. What matters is the deal. Armed with only the police report<sup>52</sup> or the complaint,<sup>53</sup> each side brings to the negotiation some notion of what it

49. *See id.* at 536.

50. *Id.* at 534.

51. *Id.* at 536.

52. When, or if, the defendant obtains a copy of the police report(s) prepared in connection with the case depends upon the nature of the charged offense, the jurisdiction in which the defendant is charged, and the personal practices of the prosecuting attorney. Some jurisdictions require production of the police report as a matter of course and early in the prosecution. *See* MASS. DIST. & MUN. CT. R. CRIM. P. 3(a) (2005) (requiring the police report to be made available to defense counsel at first appearance on a new arrest). Elsewhere, police reports may be provided after discovery motions are heard. *See, e.g.*, KY. R. CRIM. P. 7.24 (2005) (providing that the court has the discretion to allow pretrial discovery of police reports upon motion of the defendant). Some jurisdictions only allow discovery of police reports at trial. *See, e.g.*, ALASKA STAT. § 12.45.050 (2004) (limiting discovery of any “statement or report in the possession of the state which was made by a prosecution witness . . . to an agent of the state . . . until the witness has testified on direct examination at the preliminary hearing, or in the trial”); KAN. CRIM. PROC. CODE ANN. § 22-3212 (West 2006) (providing that the discovery statute “does not authorize the discovery or inspection of reports, memoranda or other internal government documents made by officers in connection with the investigation or prosecution of the case, or of statements made by state witnesses or prospective state witnesses, other than the defendant”); *Id.* § 22-3213 (providing that “no statement or report in the possession of the prosecution which was made by a state witness or prospective state witness . . . shall be the subject of subpoena, discovery, or inspection until said witness has testified on direct examination at the preliminary hearing or in the trial of the case”); 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) (“[D]iscovery that is as central as police reports containing statements of trial witnesses is mandated only after the jury is sworn.”).

53. The formal requirements for the contents of complaints also vary widely, as does the information they impart. In Massachusetts, the complaint need only track the statutory language of the offense. MASS. R. CRIM. P. 4(a) (2005) (“An indictment and a complaint shall contain a caption as provided by law, together with a plain, concise description of the act which constitutes the crime or an appropriate legal term descriptive thereof.”). In contrast, complaints in Wisconsin must state probable cause. Section 968.01 of the Wisconsin Statutes provides, in part, “The complaint is a written statement

can live with. Deals are often struck in a matter of minutes, in courthouse hallways, on the first court date following an arraignment or even at the first appearance, without any additional discovery of the state's case or investigation on behalf of the accused.<sup>54</sup> Defendants seek or accept deals to get out of jail, to avoid greater imprisonment, or to get on with their lives.<sup>55</sup> Their lawyers are often not in a position to offer a different version of the evidence.<sup>56</sup> The prosecutor is dominant in the plea process; the prosecutor selects the charges, controls the evidence, and ultimately disposes of the case.<sup>57</sup> The court generally plays no role

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of the essential facts constituting the offense charged. . . . [It] shall be made upon oath before a district attorney or judge as provided in this chapter." Wis. Stat. § 968.01(2) (2005-2006); see also *State ex rel. Cullen v. Ceci*, 45 Wis. 2d 432, 443, 173 N.W.2d 175, 179 (1970) ("The face of the complaint and any affidavits annexed thereto must recite probable cause for defendant's detention."); *State v. Hoffman*, 106 Wis. 2d 185, 197, 316 N.W.2d 143, 151 (Ct. App. 1982) ("A criminal complaint is a self-contained charge which must set forth facts that are sufficient, in themselves or together with reasonable inferences to which they give rise, to allow a reasonable person to conclude that a crime was probably committed and that the defendant is probably culpable.").

54. See *Brown*, *supra* note 16, at 1604 ("[U]nderfunded defenders prefer quick pleas."). *Brown* also notes that restraints on police and prosecutorial resources can be detrimental to the defendant because cost-cutting measures impair the quality of the evidence gathering and the qualifications of investigators. *Id.*

55. See *Gross*, *supra* note 11, at 536 ("It is well known, for example, that many defendants who can't afford bail plead guilty in return for short sentences, often probation and credit for time served, rather than stay in jail for months and then go to trial and risk much more severe punishment if convicted."). For a portrait of cases in a busy urban court, see *Frontline: Real Justice, Part I* (PBS television broadcast Nov. 14, 2000), available at <http://www.pbs.org/wgbh/pages/frontline/shows/bostonda>. One segment shows a meeting between a defendant charged with trespass and his lawyer. *Id.* The discussion focuses on the lawyer's assertion that the defendant will be released from custody if he pleads guilty. *Id.* Nowhere does the lawyer address the defendant's claim that he did not, in fact, "trespass." See *Brown*, *supra* note 16, at 1626.

56. See *Bibas*, *supra* note 39, for an extensive analysis of factors contributing to plea bargaining, including information deficits. *Bibas*, a former federal prosecutor, notes that "[t]he result of inadequate discovery is that the parties bargain blindfolded." *Id.* at 2495.

57. See *Brown*, *supra* note 16, at 1610-11.

[Plea]-bargaining requires waiver of trial procedures designed to promote accuracy, such as use of a neutral fact-finder and confrontation of evidence. It allows the parties to shape procedure while the judge . . . passively concedes any interest in accuracy. . . . They rely on the prosecutor's oral recitation of what the evidence would show, sometimes supplemented by a defense team that has previously agreed with the prosecutor on the main component of the story. . . . What replaces jury trials as the check on the executive branch is not judicial scrutiny of evidence, but defendant's consent.

*Id.* *Brown* notes that "fact-finding" is now the province of prosecutors, rather than judges. *Id.* at 1632-42; see also Am. Coll. of Trial Lawyers, *Proposed Codification of*

in negotiating the terms of a plea agreement and is more likely to adopt the recommendation of the prosecutor than that of the defense counsel.<sup>58</sup>

In short, decisions to plead guilty rest in part on defense counsel's assessment of available evidence.<sup>59</sup> If counsel's access to evidence is limited, their assessment of the evidence may be flawed, and the outcome at odds with the truth. In the federal system and some states, if the defense is not aware of evidence that tends to diminish the degree of guilt or the offense level under the applicable sentencing guidelines, the punishment upon conviction can be far greater than it would have been if the favorable information had been known.<sup>60</sup> While Mr. Williams' decision to go to trial was not the norm, his lack of access to relevant information was not unusual.

## II. SOURCES OF DISCOVERY IN CRIMINAL CASES

### A. *Constitutional Standards for Discovery*

There is no general constitutional right to discovery in criminal cases.<sup>61</sup> As a matter of federal constitutional law, prosecutors are not required to provide the defendant with the names of prosecution witnesses before trial,<sup>62</sup> nor must they disclose to the defense all police investigatory work.<sup>63</sup> The United States Supreme Court has made it

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*Disclosure of Favorable Information Under Federal Rules of Criminal Procedure 11 and 16*, 41 AM. CRIM. L. REV. 93, 111 (2004).

58. See Uviller, *supra* note 18, at 1715. Uviller describes how guilty pleas evolved from a "matter between the confessing defendant and the judgmental court" to a system of increasing deference to the judgment of the prosecutor so that the "prosecutor gradually displaced the court as the arbiter of a just resolution." *Id.* Prosecutors have the power to adjust the charges and "the recommendation of the prosecutor usually becomes the disposition of the court." *Id.* at 1715 n.47.

59. See Brown, *supra* note 16, at 1626-27 (noting that our criminal justice system highly values "party autonomy" and "conflict resolution over accuracy"). Brown argues for "mandatory, nonwaivable procedural components that maximize the odds of accurate outcomes," including mandatory "adversarial scrutiny of evidentiary files." *Id.*

60. Givelber, *supra* note 10, at 1372-76.

61. *United States v. Ruiz*, 536 U.S. 622, 629 (2002); *Weatherford v. Bursey*, 429 U.S. 545, 559 (1977); *Wardius v. Oregon*, 412 U.S. 470, 474 (1973) ("[T]he Due Process Clause has little to say regarding the amount of discovery which the parties must be afforded . . .").

62. *Weatherford*, 429 U.S. at 559.

63. *Moore v. Illinois*, 408 U.S. 786, 795 (1972); see *United States v. Agurs*, 427 U.S. 97, 109 (1976) ("[Prosecutors] are under no duty to report sua sponte to the

clear that broad discovery of information known to the prosecutor is not constitutionally required.<sup>64</sup>

However, the Supreme Court has also recognized an exception to this rule for exculpatory evidence. In *Brady v. Maryland*, the Court announced that prosecutors have a duty to ensure that “criminal trials are fair” by providing the defense with “evidence favorable to an accused...where the evidence is material either to guilt or to punishment.”<sup>65</sup> Prior to *Brady*, the Court had held that the knowing use of perjured testimony by the prosecution violated the Due Process Clause of the Fourteenth Amendment.<sup>66</sup> *Brady* held that suppression of favorable evidence violates due process, regardless of the good faith or bad faith of the prosecutor.<sup>67</sup> Nine years later, in *Giglio v. United States*, the Court made clear that the prosecutor’s obligation to disclose exculpatory evidence includes evidence impeaching the credibility of prosecution witnesses.<sup>68</sup> The Court’s subsequent decisions in *United States v. Agurs*,<sup>69</sup> *United States v. Bagley*,<sup>70</sup> and *Kyles v. Whitley*,<sup>71</sup>

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defendant all that they learn about the case and about their witnesses.” (quoting Chief Justice Traynor of the California Supreme Court in *In re Imbler*, 387 P.2d 6, 14 (1963)).

64. *Agurs*, 427 U.S. at 109.

65. 373 U.S. 83, 87 (1963).

66. *Mooney v. Holohan*, 294 U.S. 103, 112-13 (1935); *see also Pyle v. Kansas*, 317 U.S. 213, 215-16 (1942) (raising the possibility that suppression of favorable evidence might in itself be a due process violation). *Pyle* involved both the knowing use of perjured testimony and suppression of favorable evidence by the prosecutor. *Pyle*, 317 U.S. at 215-16.

67. *Brady*, 373 U.S. at 87. *Brady* had admitted participation in a felony murder but claimed that his accomplice had strangled the victim during the course of a robbery and that therefore he should not have received a sentence of death. *Id.* *Brady*’s trial lawyer had asked the prosecutor for copies of the accomplice’s statement, but the prosecutor never provided the accomplice’s statement admitting that he, not *Brady*, had been the strangler. *Id.*

68. 405 U.S. 150, 154-55 (1972). In *Giglio*, the Supreme Court found a due process violation where the prosecutor did not solicit false testimony but did not disclose that he knew it to be false. *See id.* at 150-55.

69. 427 U.S. 97. The *Agurs* Court identified three types of situations in which evidence known to the prosecution and unknown to the defense comes to light after trial and stated that different standards of materiality would apply to each situation. *Id.* at 103. First, where a prosecutor knowingly uses perjured testimony or knows that testimony against the defendant is false, non-disclosure of such testimony is error subject to a harmless-error review. *See id.* at 103-04. Second, where the defense makes no *Brady* request and the prosecutor fails to disclose evidence favorable to the defendant, as occurred in *Agurs*, a prosecutor’s failure to disclose evidence is constitutional error if the evidence, evaluated in the “context of the entire record,” creates a “reasonable doubt that did not otherwise exist.” *Id.* at 112. The third situation is where the defendant makes a specific *Brady* request and the prosecutor does not disclose the requested evidence. *Id.* at 104. While the Court did not precisely define the standard of materiality for this third situation, the Court suggested that the standard might be more lenient to the defendant

among others, elaborated on the definition of materiality, what the prosecutor is held responsible for knowing,<sup>72</sup> and whether defense counsel has to make a request for exculpatory evidence in order to trigger the prosecutor's duty to disclose.<sup>73</sup>

The definition of "materiality" that has evolved is whether the "favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict."<sup>74</sup> The standard for materiality—that is, when favorable evidence is "material" and thus must be disclosed by the prosecutor—is problematic for several reasons.

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than the situation in which no *Brady* request, or only a general *Brady* request, is made. *See id.* at 106-07.

70. 473 U.S. 667, 682 (1985) ("[Undisclosed evidence is material] only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome."). The Court abandoned the three categories of undisclosed evidence described in *Agurs* and adopted a standard of materiality that it deemed "sufficiently flexible to cover the 'no request,' 'general request,' and 'specific request' cases of prosecutorial failure to disclose evidence favorable to the accused." *Id.* In *Bagley*, the defense made a specific pretrial request for promises made to any government witness and for information establishing the reliability of certain government witnesses. *Id.* at 669-70. The government not only failed to disclose any "deals, promises or inducements" to the witnesses, but also provided the defense with affidavits from the witnesses that concluded with the assertion that the statement was made freely and voluntarily without any threats, rewards, or promises. *Id.* at 670. After trial, the defense obtained through a Freedom of Information Act request evidence of a contract between the government and the witnesses that provided for payment to the witnesses for assistance to the government in gathering evidence and testifying in court. *Id.* at 671. The *Bagley* Court reversed the judgment of the court of appeals; it vacated the conviction and remanded the case to the court of appeals to apply the new standard of materiality it enunciated. *Id.* at 684; *see also* Richard A. Rosen, *Disciplinary Sanctions Against Prosecutors for Brady Violations: A Paper Tiger*, 65 N.C. L. REV. 693, 708 (1987). Rosen argues that applying the stricter materiality test to both the "specific request" and the "no" or "general request" cases "has further undermined the deterrent potential of the due process requirements" because a prosecutor cannot legitimately justify failing to turn over specifically requested information on the grounds that he or she did not realize the significance of the evidence and failure to disclose evidence in those circumstances "raises a strong inference of deliberate misconduct." *Id.*

71. 514 U.S. 419, 435 (1995).

72. *Id.* at 437. In *Kyles*, the Court held that the prosecutor is charged with knowledge of exculpatory evidence known to the police as well as to other attorneys in the prosecutor's office, and thus the individual prosecutor has the "duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police." *Id.*

73. In *Bagley*, the Court held that the prosecutor's duty to disclose does not depend upon whether the defense has made a specific request for evidence, a general *Brady* request, or no request at all. 473 U.S. at 682.

74. *Kyles*, 514 U.S. at 435.

First, the definition of materiality is quite narrow. The Supreme Court in *Bagley* held that “evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceedings would have been different.”<sup>75</sup> Thus, the defendant must meet a high standard of establishing prejudice to win a reversal based on a prosecutorial failure to disclose: the defendant must establish both that evidence was suppressed and that it was favorable.<sup>76</sup> The defendant will not meet the materiality standard if he or she can only show that there is a reasonable *possibility* of a different outcome had the favorable evidence been disclosed.<sup>77</sup>

Ultimately, the Supreme Court has defined a standard for disclosure that has not lived up to *Brady*’s ideal that “[s]ociety wins not only when the guilty are convicted but when criminal trials are fair.”<sup>78</sup> The Court has repeatedly emphasized the limited nature of the *Brady* rule<sup>79</sup> and the undesirability of expanding *Brady* to a constitutional mandate for broader discovery by the defense.<sup>80</sup> In doing so, the Court has focused on the adversarial nature of the relationship between competing attorneys as a mainstay of the criminal justice system, rather than on the question of the reliability of outcomes in criminal cases and whether greater disclosure of evidence would enhance fairness of the system and

75. 473 U.S. at 682.

76. *See id.*

77. In *Strickler v. Greene*, the defendant did not win a reversal of his conviction or death sentence even though the Court found that favorable evidence had been suppressed, because the defendant had established a reasonable possibility of a different outcome, not a reasonable probability. 527 U.S. 263, 291, 296 (1999).

78. 373 U.S. 83, 87 (1963); *see* Hon. Lee Sarokin & William E. Zuckerman, *Presumed Innocent? Restrictions on Criminal Discovery in Federal Court Belie This Presumption*, 43 RUTGERS L. REV. 1089, 1107 (1991).

The call for a constitutional right of discovery is compatible with the holding in *Brady* but has been seriously undercut by recent Supreme Court and federal circuit court decisions. . . . Beginning with *Bagley*, that outlook [that the possibility that the Court would recognize a right of open discovery was within sight] began to change, and now the pro-discovery position appears to have little chance of acceptance in the Court’s foreseeable future.

*Id.*; *see also* Barbara Allen Babcock, *Fair Play: Evidence Favorable to an Accused and Effective Assistance of Counsel*, 34 STAN. L. REV. 1133, 1163 (1982) (“*Agurs* closed the breach in the adversary system opened by *Brady*.”).

79. *See, e.g., Bagley*, 473 U.S. at 675 n.6 (“By requiring the prosecutor to assist the defense in making its case, the *Brady* rule represents a limited departure from a pure adversary model.”).

80. *See, e.g., id.* at 675 n.7 (stating that such an expansion “would entirely alter the character and balance of our present systems of criminal justice” and that finding error whenever a prosecutor fails to disclose evidence, “no matter how insignificant, would impose an impossible burden on the prosecutor and would undermine the interest in the finality of judgments”).

confidence in the outcome. The exculpatory evidence exception, based on due process fair-trial guarantees, carves out only narrow categories of required disclosures by the prosecutor. The Court continues to place full control over the disclosure of evidence, from a constitutional perspective, in the hands of the prosecutor.<sup>81</sup>

What exculpatory evidence consists of; what “material” means; under what circumstances exculpatory evidence must be disclosed—by whom—and when it must be disclosed; have been the subject of much confusion, revision, and debate among courts,<sup>82</sup> lawyers, and academics.<sup>83</sup> Perhaps most importantly, the daily decisions in thousands of criminal cases regarding what evidence will be made available to a defendant, and at what point in the prosecution, too often rest on the individual judgments of prosecutors, rather than on clearly understood and consistently applied principles of law.

The value of the undisclosed evidence to the defense is not always obvious in a post-trial review. An appellate court, without the benefit of knowing what the defense counsel knew, whether the undisclosed evidence could have corroborated other evidence available to the defense, or why defense counsel pursued certain strategies, has to

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81. See *Kyles*, 514 U.S. at 437 (“[T]he prosecution, which alone can know what is undisclosed, must be assigned the consequent responsibility to gauge the likely net effect of all such evidence and make disclosure when the point of ‘reasonable probability’ is reached.”).

82. See, e.g., *Brown v. Chaney*, 469 U.S. 1090 (1984). There, three members of the Court dissented from the denial of certiorari in a capital case, where the court of appeals had vacated the defendant’s death sentence on the grounds that the prosecutor had withheld exculpatory evidence. *Id.* at 1090 (Burger, J., dissenting). The dissenters believed the case presented an opportunity to address conflicts in the courts concerning the distinction between a specific and a general request for exculpatory evidence and also how to determine whether undisclosed information was material to the sentencing decision. *Id.* at 1098; see also *Bagley*, 473 U.S. at 695-96 (Marshall, J., dissenting) (asserting that the duty to disclose material favorable evidence requires the prosecutor to “turn over to the defendant, all information known to the government that might reasonably be considered favorable to the defendant’s case”); *Giglio v. United States*, 405 U.S. 150, 154 (1972) (noting that a reversal is not automatically required whenever “a combing of the prosecutors’ files after the trial has disclosed evidence possibly useful to the defense but not likely to have changed the verdict”).

83. See Michael Avery, *Paying for Silence: The Liability of Police Officers Under Section 1983 for Suppressing Exculpatory Evidence*, 13 TEMP. POL. & CIV. RTS. L. REV. 1, 17-18 (2003) (pointing out that the Court has failed to specify whether it is procedural or substantive due process that imposes a duty to disclose upon the prosecutor and discussing the consequences of this distinction on whether there is a civil cause of action for pretrial failures to disclose). Avery also points out that the Court has not answered the question of whether police officers have a constitutional obligation to disclose exculpatory evidence to the prosecutor. *Id.* at 29.

speculate about how defense counsel might have made use of the undisclosed evidence.<sup>84</sup>

Second, the Court has said that a prosecutor, prior to trial, should use the appellate review standard in deciding whether he or she is constitutionally required to disclose favorable evidence to the defense—that is, after analyzing the entire case, would the evidence likely make a difference in the outcome.<sup>85</sup> Thus, prosecutors know that the Court does not require them to have an open file policy, or even to share “all useful information.”<sup>86</sup> Rather than encouraging prosecutors to err on the side of disclosure, as the Court suggested would happen,<sup>87</sup> the materiality standard that has evolved since *Brady* provides the opposite incentive.<sup>88</sup> A prosecutor who recognizes the value of evidence favorable to a defendant can gamble that, even if the evidence comes to light after trial, the defendant’s conviction will be affirmed because the defendant will not be able to meet the high standard of materiality.<sup>89</sup> The result-

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84. Appellate courts reach their decisions on the records developed in the lower courts, which often do not include information known to defense counsel from clients or other sources because the information was not presented in the lower court. Without knowledge of suppressed information, counsel might have decided against pursuing strategies that would have been more convincing had they known of the suppressed evidence. Justice Marshall made this point in his dissent in *McCleskey v. Zant*, a federal habeas case. Referring to a lengthy statement by a key prosecution witness that came to light years after the defendant was tried, and addressing the majority’s refusal to allow a successive habeas petition, Marshall said:

[T]he importance of the statement lay much less in what the statement said than in its simple *existence*. Without the statement, McCleskey’s counsel had nothing more than his client’s testimony to back up counsel’s own suspicion of a possible *Massiah* violation; given the state officials’ adamant denials of any arrangement [with the state’s witness], and given the habeas court’s rejection of the *Massiah* claim, counsel quite reasonably concluded that raising this claim in McCleskey’s first habeas petition would be futile. All this changed once counsel finally obtained the statement, for at that point, there was credible, independent corroboration of counsel’s suspicion. This additional evidence not only gave counsel the reasonable expectation of success that had previously been lacking, but also gave him a basis for conducting further investigation into the underlying claim.”

499 U.S. 467, 526-27 (1991) (Marshall, J., dissenting).

85. *Bagley*, 473 U.S. at 682.

86. *United States v. Ruiz*, 536 U.S. 622, 629 (2002).

87. *United States v. Agurs*, 427 U.S. 97, 108 (1976) (“Because we are dealing with an inevitably imprecise standard, and because the significance of an item of evidence can seldom be predicted accurately until the entire record is complete, the prudent prosecutor will resolve doubtful questions in favor of disclosure.”).

88. *See Bagley*, 473 U.S. at 675-76 (“[T]he prosecutor will not have violated his constitutional duty of disclosure unless his omission is of sufficient significance to result in the denial of the defendant’s right to a fair trial.”).

89. *See, e.g., Strickler v. Greene*, 527 U.S. 263 (1999).

oriented definition of materiality focuses on what a prosecutor has to do to avoid reversal instead of focusing on what a prosecutor should do to ensure a reliable result.

Third, the Court has failed to articulate when disclosure of favorable evidence must be made during the course of a prosecution, which implicitly encourages delay in disclosure by a reluctant prosecutor and increases the likelihood that convictions will rest on less than a full consideration of relevant facts.<sup>90</sup> However, the Court has identified two stages in the criminal process at which the prosecutor is not required to disclose evidence favorable to the accused. In *United States v. Williams*,<sup>91</sup> the Court held that the Tenth Circuit Court of Appeals had exceeded its authority in promulgating a rule that required prosecutors to present the grand jury with any substantial exculpatory evidence in their possession.<sup>92</sup> While Congress could make such a rule, the Court held that the Constitution does not require it.<sup>93</sup>

Even more significant was the Court's decision in *United States v. Ruiz*,<sup>94</sup> where the Court held that the prosecutor is not required to disclose material impeachment evidence to the defendant prior to entering into a plea agreement.<sup>95</sup> The Court found that it was constitutionally permissible to condition a plea agreement on a waiver of receipt of such evidence prior to a plea.<sup>96</sup> The decision in *Ruiz* leaves unanswered the question whether a prosecutor must disclose evidence of actual innocence prior to a plea.<sup>97</sup>

Evidence that is favorable to the accused and known by, or available to, the prosecution is not disclosed for a host of reasons. Sometimes nondisclosure is in bad faith—that is, under circumstances in which it is clear that the evidence could make a difference in the guilt or sentencing phase of a trial.<sup>98</sup> Bad faith nondisclosures continue decades

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90. See *supra* text at 113-15 and accompanying notes 31-41, concerning the infrequency of trials and the widespread disposition of cases by guilty plea.

91. 504 U.S. 36 (1992).

92. See *id.* at 45. Grand jury indictments must be founded on probable cause, not on evidence that satisfies the grand jurors beyond a reasonable doubt. *Id.* at 69.

93. See *id.* at 55.

94. 536 U.S. 622 (2002).

95. *Id.* at 633.

96. See *id.*

97. See *id.*

98. See Rosen, *supra* note 70, at 700-03, for examples of suppression of *Brady* material; see also Richard A. Rosen, *Innocence and Death*, 82 N.C. L. REV. 61, 82-84 nn.80 & 83 (2003) (describing cases of prosecutorial suppression of evidence coming to light after the defendants spent many years in prison). *Kyles v. Whitley* is such an example. 514 U.S. 419 (1995). Kyles' first trial for murder ended in a hung jury and his second trial in conviction and a death sentence. *Id.* at 421. Following denial of direct

after *Brady*.<sup>99</sup> Some prosecutors remain willing to take their chances that the information will never come to light or, if unearthed, will result in no significant penalty to the prosecution.<sup>100</sup>

Prosecutors may fail to disclose exculpatory evidence because the prosecutor has taken a narrow view of the meaning of exculpatory or simply does not know what it means.<sup>101</sup> Few jurisdictions have provided

appeal, Kyles sought state collateral review. *Id.* at 422. An evidentiary hearing and investigation by defense counsel revealed that numerous items of favorable evidence had not been disclosed to the defense despite pretrial motions requesting disclosure of all exculpatory and impeachment evidence. *Id.* Prosecutors had reported to the defense that there was no exculpatory evidence “of any nature.” *Id.* at 428. Included in the evidence that police and prosecutors had failed to disclose were contemporaneous eyewitness statements, inconsistent statements by an informant who led police to the defendant, and computer printouts of license plates of cars at the location of the murder, which did not include the defendant’s car. *Id.* at 428-29. Kyles lost in the state court proceedings, was denied relief in federal habeas corpus proceedings, and eventually obtained review of his claims in the Supreme Court. *Id.* at 421. The Court held that the suppressed evidence would have undermined eyewitness identifications and the credibility of prosecution witnesses and would have revealed substantial deficiencies in the police investigation of the crime. *Id.* at 421-22. After the case was remanded for a new trial, Kyles was brought to trial three more times; each trial ended in a hung jury. Pamela Coyle, *Tried and Tried Again*, A.B.A. J., Apr. 1998, at 38, 39. Fourteen years after his conviction, prosecutors decided not to seek a sixth trial and dismissed the murder charge. See Jed Horne, *DESIRE STREET: A TRUE STORY OF DEATH AND DELIVERANCE IN NEW ORLEANS* (Farrar, Straus and Giroux, 2005); Pamela Coyle, *Tried and Tried Again*, ABA Journal, Apr. 1988.

99. See, e.g., *Harrington v. State*, 659 N.W.2d 509, 522-25 (Iowa 2003); CENTER FOR PUBLIC INTEGRITY, *HARMFUL ERROR: INVESTIGATING AMERICA’S LOCAL PROSECUTORS* 45-47 & app. at 108-09 (2003).

100. See, e.g., Robert R. Riggs, *Investigation, Discovery, and Disclosure in Criminal Cases*, 52 DRAKE L. REV. 739, 791 (2004).

[The] aspirant goals [of a prosecutor to serve justice and not merely seek convictions] are often treated as musings and are simply not adhered to in practice. The pressure to maintain a high conviction rate for political purposes is the driving force in most, if not all, prosecution offices. In cases of reversals, it is politically more desirable to blame courts for retrials than to accept responsibility for nondisclosure.

*Id.*

101. See, e.g., *Comm. on Prof’l Ethics and Conduct v. Ramey*, 512 N.W.2d 569 (Iowa 1994). At issue in *Ramey* was whether the prosecutor should be disciplined for failing to disclose exculpatory evidence. *Id.* Despite the trial court’s allowance of the defense motion for all exculpatory evidence, the prosecutor failed to inform the defense about a police report and an interview of a witness who claimed a person other than the defendant had committed the theft in issue. *Id.* at 570. The prosecutor’s defense to the bar proceedings was that the information was nonmaterial under the *Brady* standard. *Id.* at 572. In concluding that the information was material and should have been disclosed to the defense, the Iowa Supreme Court stated, “The duty to disclose exculpatory evidence cannot be ignored because of a prosecutor’s private belief that it is beside the point.” *Id.* at 572. The Bar Association’s suspension of the prosecutor’s license to practice law for violating a state disciplinary rule, upheld by the Iowa Supreme Court, is

a clear definition of exculpatory evidence, by rule or by court decision, to assist a prosecutor in making disclosure decisions.<sup>102</sup> The federal district court in Massachusetts and the Massachusetts Supreme Court are exceptions.<sup>103</sup>

Many prosecutors are young and inexperienced, perhaps in their first job after law school.<sup>104</sup> If there is no working definition of exculpatory evidence in their jurisdiction, or no training in their offices as to what to disclose and how to make those decisions, they may well not appreciate what exculpatory evidence is or recognize it when they learn of it. Trying to predict the effect of the evidence on the outcome of a trial is fraught with the possibility of error.

This problem is compounded by the fact that prosecutors cannot always know what the value of evidence might be to the defense.<sup>105</sup> They may have no experience in thinking strategically from a defense point of view and they may lack knowledge about how the evidence in question could corroborate the defendant's version of events. As Justice Marshall pointed out in his dissent in *Agurs*, "even a conscientious

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a rare example of formal disciplinary sanctions being imposed for suppression of exculpatory evidence.

102. Criminal discovery rules in many jurisdictions provide that the prosecutor shall disclose "exculpatory evidence" without further elaboration. *See, e.g.*, WIS. STAT. § 971.23(1)(h) (2005-2006). Courts often decide whether something is exculpatory on a case-by-case basis, without attempting to provide a more comprehensive definition of "exculpatory."

103. *See Commonwealth v. Ellison*, 379 N.E.2d 560, 571 (Mass. 1978).

We observe here that material may be within *Brady* although it is not absolutely destructive of the Commonwealth's case or highly demonstrative of the defendant's innocence. The *Brady* obligation comprehends evidence which provides some significant aid to the defendant's case, whether it furnishes corroboration of the defendant's story, calls into question a material, although not indispensable, element of the prosecution's version of the events, or challenges the credibility of a key prosecution witness.

*Id.*; *see also infra* at note 259 (discussing the discovery rules in the Massachusetts federal district court).

104. During more than twenty years of criminal practice in the Boston area, most of the assistant district attorneys I met in the juvenile and district courts were working at their first job after law school. The prosecutor in charge of the Williams case through the probable cause hearing was in this category. *See* DEBORAH L. RHODE & DAVID LUBAN, LEGAL ETHICS 295 (3d ed. 2001) ("Many prosecutors are relatively young, inexperienced, and ambitious, which makes them particularly vulnerable to adversarial pressures.").

105. Prosecutors, as well as judges and defense counsel, have recognized the difficulty of applying the Court's materiality standard to specific evidence. For example, in *Kyles v. Whitley*, the State urged the Court to adopt a higher standard of materiality because "the *Bagley* standard 'makes it difficult . . . to know' from the 'perspective [of the prosecutor at] trial . . . exactly what might become important later on.'" 514 U.S. 419, 509 (1994).

prosecutor will fail to appreciate the significance of some items of information.”<sup>106</sup>

Sometimes prosecutors do not disclose evidence because they are not aware of it, for example because the police have not shared the information they have and the prosecutor has not made any inquiries of them.<sup>107</sup> They may not be aware of, or local practice may not enforce, the directive set out in *Kyles v. Whitley* that a “prosecutor has a duty to learn of any favorable evidence known to the others acting on the government’s behalf in the case, including the police.”<sup>108</sup>

This may or may not be what happened in Mr. Williams’ case. Based on defense counsel’s questions about other suspects, the prosecutor had notice that some other relevant evidence existed. Whether the prosecutor asked about it and ignored it, asked about it and passed it on to the next prosecutor, or never followed-up and never knew more is unknown. If counsel had not tried to get informal discovery from the police, it is unlikely that the evidence about the eyewitness would ever have come to light.

It is hard to measure how often nondisclosure happens, but many believe it is commonplace and that eventual discovery of nondisclosed evidence is the exception, rather than the rule.<sup>109</sup> The constitutional standards for disclosure of exculpatory evidence have provided insufficient guidance and too little incentive for police and prosecutors to disclose evidence.<sup>110</sup>

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106. 427 U.S. 97, 117 (1976) (Marshall, J., dissenting).

107. See Fisher, *supra* note 11. Fisher identifies cases in which the police did not disclose exculpatory evidence to the prosecutors. *Id.* at 66; see also Avery, *supra* note 83, at 2-3. Avery recounts the story of George Jones, convicted of the rape and murder of a twelve-year-old girl. *Id.* Detectives maintained two sets of files: regular files and “street files,” and placed exculpatory reports (including a report about the failure of the eyewitness to identify the defendant) in their street file, which was never disclosed to the prosecutor. *Id.* at 2. In addition, a lab technician failed to include in his report that the physical evidence did not match Jones. *Id.* at 3.

108. 514 U.S. 419, 437 (1995).

109. See *supra* Part I.A for a discussion of the prevalence of guilty pleas in the criminal justice system. Given the relatively smaller penalties imposed in most cases, the volume of cases, and the lack of notoriety of most offenses, discovery of suppressed evidence is not likely to occur. See Rosen, *supra* note 70, at 702-03 & n.50 (“In addition to the reported cases, a large number of cases undoubtedly occur in which the suppression or falsification is never discovered. . . . [T]he occasions when defendants do find out about suppressed or falsified evidence usually result from fortuitous circumstances.”).

110. See, e.g., *Murvin v. Jennings*, 259 F. Supp. 2d 180 (D. Conn. 2003). In *Murvin*, portions of a police report containing a statement by the perpetrator of a robbery that recanted his accusation against the defendant were not given to the prosecutor or to the defendant. *Id.* at 185. The court, denying a motion for summary judgment in a civil suit under 42 U.S.C. § 1983, held that “the Town cannot avoid liability as a matter of law

In addition, the sanctions for nondisclosure have been inconsistent and largely ineffective, even when the favorable evidence comes to light.<sup>111</sup> Few prosecutors are personally sanctioned for suppressing favorable evidence,<sup>112</sup> and relatively few convictions are reversed on this

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merely because it does not have a policy, custom or practice that governs the transmittal of exculpatory material to prosecuting officials.” *Id.* at 187.

111. Criminal sanctions are virtually non-existent. A survey of 381 homicide cases reversed because of prosecutorial misconduct between 1963 and 1999 found that not a single prosecutor had been convicted or publicly sanctioned by bar disciplinary authorities. Ken Armstrong & Maurice Possley, *Trial & Error; How Prosecutors Sacrifice Justice to Win; The Verdict: Dishonor*, CHI. TRIB., Jan. 10, 1999, § 1, at 1 [hereinafter Armstrong & Possley, *The Verdict: Dishonor*]. Two were disciplined by their offices, and many were later either promoted within their office or appointed to the bench. *Id.*; see also Ken Armstrong & Maurice Possley, *Trial & Error; How Prosecutors Sacrifice Justice to Win; Break Rules, Be Promoted*, CHI. TRIB., Jan. 14, 1999, § 1, at 1. Armstrong & Possley reported the story of three former Illinois prosecutors who were scheduled to go to trial on charges that they had framed a man who had spent ten years on death row before he was acquitted at his third trial. Armstrong & Possley, *The Verdict: Dishonor, supra*. Their convictions would have been the first felony convictions for such misconduct in the country. *Id.* The reporters found two instances of misdemeanor convictions of prosecutors for such misconduct, both of which resulted in a fine. *Id.*; see also Dan Weikel, *When the Prosecutor Is Guilty*, L.A. TIMES, May 13, 1994, at A1 (reporting that out of fifteen California prosecutors whom courts found guilty of serious misconduct between 1980 and 1994, only one had been the subject of discipline); Bill Moushey, *Out of Control: Legal Rules Have Changed, Allowing Federal Agents, Prosecutors to Bypass Basic Rights*, PITT. POST-GAZETTE, Nov. 22, 1998, at A1 (reporting on a two-year investigation in which “[t]he *Post-Gazette* probe found numerous cases where prosecutors withheld evidence, where witnesses were caught in lies, where judges overturned the sentences, and little disciplinary action was taken by the Justice Department”).

112. Prosecutors enjoy immunity from civil actions for damages arising out of the suppression of exculpatory evidence, including claims for constitutional violations under 42 U.S.C. § 1983 (1994). See *Imbler v. Pachtman*, 424 U.S. 409, 431 (1976) (holding that the prosecution had immunity from a civil suit for damages under § 1983); see also Avery, *supra* note 83, at 6; Margaret Z. Johns, *Reconsidering Absolute Prosecutorial Immunity*, 2005 BYU L. REV. 53; Rosen, *supra* note 70, at 703 n.56. Rosen reports that he could find no cases in which a prosecutor had been held in contempt for a *Brady* violation and only one case in which a prosecutor was criminally convicted for suppressing exculpatory evidence. Rosen, *supra* note 70, at 703 n.56, 726-28. In addition, sanctions by state disciplinary boards are rare, even though the disciplinary rules typically specify a broader duty to disclose favorable evidence than the Supreme Court has. The *Model Rules of Professional Conduct* require the prosecutor to:

make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal.

MODEL RULES OF PROF'L CONDUCT R. 3.8(d).

basis.<sup>113</sup> In short, there is too much gray, too little guidance, and too few incentives for disclosure of evidence favorable to a defendant to give us confidence that the constitutional exculpatory evidence standard ensures that such evidence makes its way to the defendant and is available for consideration by the fact-finder.<sup>114</sup>

The evolution of the exculpatory evidence doctrine has drawn considerable attention since *Brady*. In the past forty years, many commentators have advanced proposals for expanding the prosecutor's obligations to disclose exculpatory evidence and for enforcing those obligations.<sup>115</sup> Others have concluded that the problem is intractable and that a better remedy for suppression of exculpatory evidence lies elsewhere, such as with more consistent provision of effective representation for defendants.<sup>116</sup>

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113. See Fisher, *supra* note 11. Fisher's examination of convictions of innocent persons in Massachusetts from 1806 to 2002 identified police or prosecutorial suppression of exculpatory evidence as a causal factor in twelve of the thirty-three wrongful convictions, second only to eyewitness error (eighteen of thirty-three). *Id.* at 63. In the case of Donnell Johnson, convicted as a juvenile of murdering a nine-year-old boy, police suppressed a police report corroborating the defense claim that the victim was shot by a member of a gang, in retaliation for an earlier shooting, and not by Johnson. *Id.* at 17. Before newly discovered evidence led to a motion by the prosecutor for a new trial and a *nolle prosequi* of the case, the Massachusetts Supreme Judicial Court upheld the denial of an earlier defense motion for a new trial based on claims of police and prosecutorial misconduct, including suppression of the police report. *Id.* at 17-18. The court found that Johnson had not been prejudiced by the misconduct, in light of the strong eyewitness testimony. *Id.* at 17. The appeal is reported at *Commonwealth v. Kent K.*, 696 N.E.2d 511, 513-18 (Mass. 1998).

114. Studies of the exoneration cases have shown that suppression of evidence was a major contributing factor to a significant number of those wrongful convictions. See Fisher, *supra* note 11, at 63; see also Gross, *supra* note 11, at 532-33, 542-43; DWYER ET AL., *supra* note 11, at 246, 265.

115. See, e.g., Rosen, *supra* note 70, at 735-38. Rosen proposes adding a bad-faith standard to the *Brady* doctrine as a deterrent, similar to the Fourth Amendment exclusionary rule. *Id.* at 737. He also proposes changes to the lawyer disciplinary process, including shifting the burden of bar complaints from being initiated solely by individuals to a system requiring the office of bar counsel to review reported opinions and initiate disciplinary investigations when suppression of evidence is suggested. *Id.* at 733-37. In addition, he urges courts and bar disciplinary bodies to impose serious discipline for "*Brady*-type misconduct." *Id.* at 696; see also Janet C. Hoeffel, *Prosecutorial Discretion at the Core: The Good Prosecutor Meets Brady*, 109 PENN. ST. L. REV. 1133, 1149, 1151 (2005) (evaluating remedies for the "enormously intractable problem" of having a criminal justice system that "encourages adversarial zeal in its prosecutors to the tune of withholding evidence").

116. See Babcock, *supra* note 78, at 1174. Writing in 1982, Babcock asserted that "our dedication to the drama and symbolism of the adversary system has prevented" our system of justice from assuring "that all favorable evidence is presented by following out the logic of *Brady*, i.e., by expanding the duty of the prosecutor." *Id.* Given this conclusion, Babcock argued for more public defenders, better support services for them,

The debate about a prosecutor's obligation to provide exculpatory evidence to the defense has too often provided a narrow focus to the subject of discovery in criminal cases. In litigation over the discovery of exculpatory evidence, opposing counsel and the courts get mired in questions about technical legal abstractions and about their adversarial roles, and rarely consider larger questions of purpose.<sup>117</sup> By centering the inquiry on whether to expand the reach of the *Brady* doctrine or to ensure that it is consistently followed, we lose sight of the broader question of whether prosecutors, courts, and legislatures provide assurances that cases are resolved as a result of reliable fact-finding. Instead of focusing primarily on the limited exceptions the *Brady* doctrine affords, and whether particular kinds of evidence fall within those exceptions, we should examine whether there are adequate mechanisms relating to access to information that further the goal of reliable fact-finding.

### B. *Additional Means to Gain Access to Information*

As a result of the limited access to information required by constitutional doctrine,<sup>118</sup> the right to discovery in criminal cases is largely in the hands of legislatures, who have enacted a variety of discovery rules or statutes. This section highlights opportunities for discovery of information known to the prosecution and its agents.

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and a broader commitment by the private bar to pro bono criminal work. *Id.*; see also Brown, *supra* note 16, at 1590. Writing twenty years after Babcock, Brown asserts that underfunding of indigent defense is conscious, institutionalized, and unlikely to change. *Id.* at 1590-92. Thus, he concludes, defense lawyers do not provide a reliability-ensuring check on the executive. *Id.*

117. In my experience in the criminal courts, I have found that even the most competent and zealous defense attorneys tend not to reframe discovery debates in terms of truth-seeking. Instead, they try to fit what they are requesting into the limited frame of materiality (or for discovery of other kinds of evidence, into the specific wording of a particular discovery rule). Prosecutors resist disclosure with arguments ranging from accusations that the defendant is going on an illegitimate fishing expedition, to claims that they do not know of anything exculpatory (and therefore have no obligation to make further inquiries of their witnesses), and that providing discovery would be burdensome to the prosecutor. The arguments often focus on what the lawyers might be required to do, rather than on whether disclosure could serve to enhance the reliability of the outcome. See discussion, *infra* at pp. 582-86, regarding the assumptions underlying the resistance to discovery.

118. The Court has consistently employed the due process analysis of the *Brady* line of cases in analyzing pretrial discovery issues. In *Pennsylvania v. Ritchie*, the Court held that the Confrontation Clause of the Sixth Amendment did not afford a basis for pretrial discovery claims. 480 U.S. 39, 55 (1987).

## 1. PRELIMINARY HEARINGS

Although preliminary hearings can provide some discovery of the state's evidence, they are not a reliable and widespread means of discovery. Most states provide for a preliminary hearing<sup>119</sup> in some cases. The purpose of a preliminary hearing is to determine if there is enough evidence to continue the prosecution.<sup>120</sup> Preliminary hearings can be useful screening mechanisms, as the Supreme Court noted in *Coleman v. Alabama*,<sup>121</sup> where the Court said, "Plainly the guiding hand of counsel at the preliminary hearing is essential to protect the indigent accused against an erroneous or improper prosecution."<sup>122</sup> The Court pointed to the possibility of exposing fatal weaknesses in the State's case that could result in dismissal, and the development of impeachment material.<sup>123</sup> Finally, the Court noted "trained counsel can more effectively discover the case the State has against his client and make possible the preparation of a proper defense."<sup>124</sup>

Although the Court has outlined the potential utility of preliminary hearings, in practice there are significant limits on the usefulness of preliminary hearings as a mechanism to obtain significant discovery. A

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119. By preliminary hearing, I mean an evidentiary hearing where the prosecutor produces evidence, generally through witnesses, to establish probable cause to continue the case. Generally, defense counsel can cross-examine the prosecution witnesses or produce defense witnesses on issues relating to probable cause. *Coleman v. Alabama*, 399 U.S. 1 (1970). In some jurisdictions, like Massachusetts, this hearing is referred to as a probable cause hearing. MASS. R. CRIM. P. 3(f) (2005). This kind of hearing is distinct from the kind of non-adversarial probable cause hearing required by *Gerstein v. Pugh*, 420 U.S. 103 (1975) and *County of Riverside v. McLaughlin*, 500 U.S. 44 (1991). In *Gerstein*, the Supreme Court held that while the State must provide a "fair and reliable determination of probable cause as a condition for any significant pretrial restraint of liberty, and this determination must be made by a judicial officer either before or promptly after arrest," such a hearing need not have adversarial safeguards such as counsel. 420 U.S. at 123-25. The Court distinguished the nonadversarial probable cause hearing before a magistrate from the kind of "full preliminary hearing . . . used . . . to determine whether the evidence justifies going to trial under an information or presenting the case to a grand jury." *Id.* at 119 (citing *Coleman v. Alabama*, 399 U.S. 1 (1970)). "The standard of proof required of the prosecution is usually referred to as 'probable cause,' but in some jurisdictions it may approach a prima facie case of guilt." *Id.* "The importance of the issue to both the State and the accused [at a full preliminary hearing] justifies the presentation of witnesses and full exploration of their testimony on cross-examination." *Id.* at 120. The Court stated that, in contrast, this kind of hearing was not necessary "for the probable cause determination required by the Fourth Amendment." *Id.*

120. See, e.g., WIS. STAT. § 970.03(1) (2005-2006).

121. 399 U.S. 1. In *Coleman*, the issue was whether the defendant was entitled to representation of counsel at a preliminary hearing. *Id.* at 3.

122. *Id.* at 9.

123. *Id.*

124. *Id.*

number of jurisdictions do not provide for a preliminary evidentiary hearing.<sup>125</sup> The opportunity for a preliminary hearing, if it exists, is generally restricted to felony cases.<sup>126</sup> In some states, a preliminary hearing is guaranteed to a defendant, though he or she may waive it.<sup>127</sup> In others, a prosecutor may avoid a preliminary hearing by securing an indictment before the hearing takes place.<sup>128</sup>

If the local law provides for a preliminary hearing, the trend has been to limit the scope of the hearing to a determination of whether there is probable cause to believe that the defendant has committed a felony offense.<sup>129</sup> Generally, there is no discovery prior to the preliminary

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125. States that do not have preliminary hearings include Vermont, New Jersey, and Minnesota. See NAT'L CTR. FOR STATE COURTS, STATE COURT STRUCTURE CHARTS (2003), available at [http://www.ncsconline.org/D\\_Research/csp/2003\\_Files/2003\\_SCCS\\_Charts1.pdf](http://www.ncsconline.org/D_Research/csp/2003_Files/2003_SCCS_Charts1.pdf).

126. See, e.g., WIS. STAT. § 970.03(1) (2005-2006) (providing for a preliminary hearing "for the purpose of determining if there is probable cause to believe a felony has been committed by the defendant"); MASS. R. CRIM. P. 3(f) (2005) (providing that the defendant, charged with a "bind-over" felony or with a felony for which the district court has declined jurisdiction, has a right to a probable cause hearing, unless an indictment has been returned); MD. CODE ANN., CRIM. PROC. § 4-103 (West 2006) (affording the defendant an absolute right to a preliminary hearing if charged with a felony other than a felony within the jurisdiction of the district court); N.D. R. CRIM. P. 5(c)(1) (2006); CONN. GEN. STAT. § 54-46a(a) (2006) (providing for preliminary examinations for defendants charged with felonies punishable by life imprisonment or death); see also Uphoff, *supra* note 28, at 392 (noting that there is no right to a preliminary hearing in Oklahoma for misdemeanor cases).

127. See, e.g., CAL. PENAL CODE § 859b (West 2006) (providing that both the state and the defendant have a right to a preliminary hearing in felony cases, and that a preliminary hearing is held unless both waive this right); see also ARIZ. R. CRIM. P. 5.1(b) (2006) (requiring a defendant to have the consent of counsel in order to waive his or her right to a preliminary hearing); N.D. R. CRIM. P. 5(c)(1) ("If the offense charged is a felony, the defendant has the right to a preliminary examination. The defendant may waive the right to preliminary examination at the initial appearance if assisted by counsel.").

128. MASS. R. CRIM. P. 3(f). In Arizona, the state constitution affords a right to a preliminary hearing in all felony cases except those commenced by a grand jury indictment. ARIZ. CONST. art. 2, § 30.

129. See, e.g., ARIZ. R. CRIM. P. 5.3(a) (2006) (providing that the governing magistrate "shall admit only such evidence as is material to the question of whether probable cause exists to hold the defendant for trial"). The magistrate makes a finding as to whether there is probable cause after the prosecution has produced its witnesses and the defendant has cross-examined them. *Id.* The defendant may make an offer of proof as to potential defense witnesses, but the magistrate may deny the defense the opportunity to produce witnesses if he or she determines that the proffered testimony would not rebut the finding of probable cause. *Id.*; see also *State v. Moats*, 156 Wis. 2d 74, 83, 457 N.W.2d 299, 303 (1990) ("The preliminary examination is intended to be a summary proceeding used to determine if there is probable cause to believe a felony has been committed and probably committed by the defendant."). *But see Myers v. Commonwealth*, 298 N.E.2d 819, 824 (Mass. 1973) (holding that the standard for bind-

hearing, thus reducing the opportunities for using the hearing for discovery purposes.<sup>130</sup> The State need not produce all of its witnesses<sup>131</sup> or reveal the identities of those witnesses it does not intend to produce. The scope of examination of witnesses generally is limited. In some jurisdictions, counsel cannot raise issues of credibility of the witnesses.<sup>132</sup> Questioning for the purpose of discovery is generally not allowed.<sup>133</sup> Indeed, in some jurisdictions it is expressly forbidden.<sup>134</sup>

In some jurisdictions, hearsay testimony may be introduced at preliminary hearings, thus further reducing defense discovery of

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over at the probable cause hearing is greater than probable cause to arrest and akin to the directed verdict standard of whether there is enough evidence to submit the case to a jury); Uphoff, *supra* note 28, at 382-83 (asserting that defense counsel can obtain a significant preview of the State's case at a preliminary hearing and citing to *Beard v. Ramey*, 456 P.2d 587, 589 (Okla. Crim. App. 1969), where the court recognized discovery as a legitimate goal of a preliminary hearing and affirmed the right of a defendant to discover evidence at the hearing).

130. See Uphoff, *supra* note 28, at 392 (describing the lack of discovery before preliminary hearings in Oklahoma); *supra* notes 2-4 (describing the practice in Massachusetts).

131. See *Moats*, 156 Wis. 2d at 79-80, 457 N.W.2d at 302 (affirming the finding of probable cause based solely on defendant's unconstitutionally obtained confession).

132. See ARIZ. R. CRIM. P. 5.3(a) cmt. (2006) (providing that a defendant cannot call witnesses for discovery purposes); see also *State v. Knudson*, 51 Wis. 2d 270, 281, 187 N.W.2d 321, 327 (1971) (holding that the defendant is not entitled to call witnesses for the purpose of discovery or to challenge the credibility of the state's witnesses). *But see Myers*, 298 N.E.2d at 825 ("The primary function of the probable cause hearing of screening out 'an erroneous or improper prosecution' can only be effectuated by an adversary hearing where the defendant is given a meaningful opportunity to challenge the credibility of the prosecution's witnesses and to raise any affirmative defenses he may have." (quoting *Coleman*, 399 U.S. at 9)).

133. See, e.g., *State v. Dunn*, 121 Wis. 2d 389, 397, 359 N.W.2d 151, 154-55 (1984) ("[T]he court cannot delve into the credibility of a witness. . . . [C]redence or credibility is a matter that is properly left for the trier of fact. . . . There is a point where attacks on credibility become discovery. That point is crossed when one delves into general trustworthiness. . . ."). See also Laura Berend, *Less Reliable Preliminary Hearings and Plea Bargains in Criminal Cases in California: Discovery Before and After Proposition 115*, 48 AM. U. L. REV. 465, 508-09 (1998) (describing how California's Proposition 115 expressly prohibited using preliminary hearings for discovery).

134. In many places, the right of the defense to present evidence is also limited. See, e.g., CONN. GEN. STAT. § 54-46 (2006) (defendant cannot present evidence at preliminary hearing unless the court determines that the evidence would be sufficient to rebut the finding of probable cause).

information from witnesses,<sup>135</sup> while in other jurisdictions, the rules of evidence apply.<sup>136</sup>

Thus, even where a defendant has a right to a preliminary hearing, it has become so meaningless in some jurisdictions that the defendant typically waives the right in exchange for some benefit, such as obtaining a police report, or a reduction in bail.<sup>137</sup> In other jurisdictions, prosecutors rush to get a direct indictment from a grand jury before a preliminary hearing can take place.<sup>138</sup>

## 2. FORMAL DISCOVERY MECHANISMS

Apart from the preliminary hearing, most states have discovery statutes or rules of criminal procedure setting out what information the prosecution must disclose, and under what circumstances. Debates about the appropriate breadth of the discovery to be provided by these rules have been ongoing for decades.<sup>139</sup> Some states have embraced broad discovery;<sup>140</sup> other states, and Congress, have chosen to maintain far

135. See, e.g., MISS. UNIF. R. CIR. & COUNTY CT. PRACTICE 6.04 (2005) (providing, in part, that “[a] finding of probable cause may be based on hearsay evidence,” and that “[o]bjections to evidence on the ground that it was acquired by unlawful means are not properly made at the preliminary hearing.”).

136. See, e.g., *Moats*, 156 Wis. 2d at 84, 457 N.W.2d at 304 (holding that the Wisconsin rules of evidence apply to preliminary hearings).

137. Interview with Michele Lavigne, Clinical Professor, Dir. of Pub. Defender Program, Univ. of Wis. Law Sch., in Madison, Wis. (Jan. 2006). Lavigne, a former Wisconsin public defender, supervises law student interns in public defender offices across the state.

138. In some jurisdictions, a grand jury indictment supersedes the right to a preliminary hearing. See, e.g., MD. CODE ANN., CRIM. PROC. § 4-103 (West 2006) (“If the defendant is charged by grand jury indictment, the right of a defendant to a preliminary hearing is not absolute but the court may allow the defendant to have a preliminary hearing”); MASS. R. CRIM. P. 3(f) (2005). From 1984 to 2003, I observed a trend among Boston-area prosecutors away from proceeding with a preliminary hearing in serious cases and toward “direct” indictments by the grand jury. If Mr. Williams were charged today, it is far less likely that his counsel would have any enforceable means to question prosecution witnesses prior to trial. See also Roberts, *supra* note 52, at 1124-25 (noting that in New York prosecutors generally use the grand jury process rather than preliminary hearings).

139. See, e.g. William J. Brennan, Jr., *Criminal Prosecution: Sporting Event or Quest for Truth?*, 1963 WASH. U. L.Q. 279 [hereinafter Brennan, *Criminal Prosecution*]; William J. Brennan, Jr., *Criminal Prosecution: Sporting Event or Quest for Truth? A Progress Report*, 68 WASH. U. L.Q. 1 (1990) [hereinafter Brennan, *Progress Report*]. Over a span of forty years, Justice Brennan, among many others, called for expanded discovery in criminal cases.

140. More recent examples of the move toward broadening discovery exist in Arizona, Massachusetts, and North Carolina. See N.C. GEN. STAT. 15A-902 (2004); ARIZ. R. CRIM. P. 15.1 (2005); MASS. R. CRIM. P. 14 (2005).

more restrictive rules.<sup>141</sup> At least one state moved to broad discovery and then back to limited defense access to evidence.<sup>142</sup> Most jurisdictions have moved toward allowing discovery from the defense.<sup>143</sup> As a result, there are wide variations across jurisdictions as to the nature of evidence the defense can obtain prior to trial, how and when it may be obtained, under what circumstances, and at what cost to the defendant.<sup>144</sup>

Rules governing access to evidence as fundamental as the names of the prosecution witnesses and the prior statements made by those witnesses illustrate this wide variation in discovery. Almost half of the states allow pretrial discovery of the identities of prosecution witnesses and their prior statements.<sup>145</sup> In contrast, in most federal courts and in the most restrictive states, the defendant cannot compel the prosecution to disclose the names of its witnesses and their statements prior to trial.<sup>146</sup> Instead, the accused may have to wait until the jury is sworn

141. See *infra* notes 147-48 (describing New York and federal discovery rules).

142. See Berend, *supra* note 133 (describing the scope of criminal discovery in California before and after Proposition 115).

143. See Robert P. Mosteller, *Discovery Against the Defense: Tilting the Adversarial Balance*, 74 CAL. L. REV. 1567, 1579 nn.34-54 (1986) (listing states with reciprocal discovery statutes).

144. See Roberts, *supra* note 52. Roberts characterizes the array of discovery schemes across jurisdictions as:

[One third] hav[ing] relatively broad discovery rules or statutes, modeled on American Bar Association Standards . . . [and] about a dozen states follow[ing] the highly restrictive federal rule, which is premised in part on the idea that a defendant should not be entitled to witness names or statements for pretrial investigation, but rather only for cross-examination purposes should the case ever get to that stage.

*Id.* at 1099.

145. See Brown, *supra* note 16, at 1623 (noting that the policy underlying these requirements is “based on the conclusions that the truth-facilitating—and perhaps settlement-facilitating—function of broader discovery outweighs witness-safety concerns”).

146. In federal criminal cases, discovery is governed largely by Rule 16 of the Federal Rules of Criminal Procedure, which provides that upon request, the government must disclose: (a) statements by the defendant, (b) the defendant’s prior record, (c) certain documents and tangible objects, and (d) certain reports of physical and mental examinations and of scientific tests and experiments. FED. R. CRIM. P. 16. Thus, the prosecution is not required to provide a list of its witnesses prior to trial. The only kind of witness statement the prosecution must disclose is a written summary of any expert testimony that the government intends to use during its case-in-chief at trial. *Id.*

Rule 16(a)(2) specifically exempts from disclosure by the government:

reports, memoranda, or other internal government documents made by an attorney for the government or other government agent in connection with investigating or prosecuting the case. Nor does this rule authorize the discovery or inspection of statements made by prospective government witnesses except as provided in 18 U.S.C. § 3500.

before learning the identities of the prosecution witnesses.<sup>147</sup> If the accused is, in fact, innocent, he or she cannot provide the names of accusers or adverse witnesses, and thus counsel cannot investigate the veracity or accuracy of witness accounts. Similarly, rules that do not allow discovery of the prior statements of government witnesses until after the direct examination of those witnesses curtail the ability of counsel to conduct an investigation based on the contents of the statements, and to effectively impeach the witnesses with inconsistencies.<sup>148</sup>

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FED. R. CRIM. P. 16(a)(2). 18 U.S.C. § 3500(a) (2000), also known as the Jencks Act, governs the discovery of witness statements in federal cases and provides:

In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a Government witness or prospective Government witness (other than the defendant) shall be the subject of subpoena, discovery, or inspection until said witness has testified on direct examination in the trial of the case.

18 U.S.C. § 3500(a) (2000); *see also* Roberts, *supra* note 52, at 1134 (noting that attempts to change the rules to allow the defense to request pretrial disclosure of witnesses in federal cases have been rejected); *Id.* at 1123, n 126. In New York, what is available through formal discovery in many cases is not useful to the defense because no evidence exists of the kind made available through formal discovery mechanisms; further, the defense is not entitled to see the statements of prosecution witnesses until they have testified on direct examination. *Id.* at 1131-33. Alaska, Colorado, Alabama, Kansas, Kentucky, Mississippi, and Texas, among others, have similar rules that do not require pretrial disclosure of the names of government witnesses or their statements. *See* ALASKA STAT. § 12.45.050 (1996); COLO. R. CRIM. P. 16 (2005); ALA. R. CRIM. P. 16.1 (2005); KAN. STAT. ANN. § 22-3213 (1973 & Supp. 1997); KY. R. CRIM. P. 7.24 (2005); MISS. CODE. ANN. § 99-27-45 (2004); TEX. CODE CRIM. PROC. ANN. art. 39.02 (Vernon 1979 & Supp. 1998). In these jurisdictions, witness statements become available for impeachment—assuming counsel can make effective use of them at this stage—but not for investigation. Virginia does not require disclosure of witness statements even during trial. VA. S. CT. R. 3A:11 (2005).

147. *See, e.g.*, N.Y. CRIM. PROC. LAW § 240.45 (McKinney 2004).

148. Every lawyer knows that preparation is key to effective representation, whether in confronting the prosecution's case at trial or in making sound strategic decisions prior to trial. Delaying disclosure of evidence to the defense until the time of trial impairs the rights of the defendant to effective representation and to present a defense even when he or she has the most gifted and experienced lawyer. *See* Sarokin & Zuckerman, *supra* note 78, at 1099. Referring to the Jencks Act, the authors write:

The effect of the statute on defendants is profound. It provides federal prosecutors with a powerful tool with which to prevent pretrial disclosure of virtually all evidence to be offered by government witnesses. . . . In order to conduct an effective cross-examination, counsel must be able to investigate the content of the testimony and the background of the witness.

*Id.*; Riggs, *supra* note 100, at 753 (“Cross-examining a witness on very short notice can be unnerving at best and can wreak havoc on defense counsel’s trial strategy”); *see also* State v. Eads, 166 N.W. 2d 766, 771 (Iowa 1969).

A majority of jurisdictions have also adopted provisions for discovery of information from the defense, commonly referred to as reciprocal discovery.<sup>149</sup> Increasingly, courts and legislatures have required more disclosure by the defense.<sup>150</sup> In some jurisdictions, a defense request for discovery triggers a right of the prosecution to discover information from the defense.<sup>151</sup> If the rules allow discovery by the prosecution, they must also allow discovery by the defense.<sup>152</sup> In *Wardius v. Oregon*, the Court held that the rules that required the defendant to disclose an intention to rely on an alibi without requiring the prosecutor to provide discovery to the defense were “fundamentally unfair.”<sup>153</sup> The defendant may face the choice of seeking no formal discovery or of seeking discovery, knowing that he or she will have to reveal matters that disclose defense strategy and evidence to the prosecution.<sup>154</sup>

Other jurisdictions permit the prosecutor to seek discovery from the defense even in the absence of defense requests for discovery from the prosecution.<sup>155</sup> Some critics of the expansion of reciprocal discovery

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149. While the Supreme Court has held that discovery by the defense is not constitutionally mandated, apart from material exculpatory evidence, it has imposed some requirements on discovery rules promulgated by legislatures. *Wardius v. Oregon*, 412 U.S. 470, 472 (1973).

150. See *Brown*, *supra* note 16, at 1639 (“[B]road discovery statutes have gained legislative support by requiring defense disclosures.”).

151. See, e.g., FED. R. CRIM. P. 16(b) (regarding disclosure obligations of the defense). Similarly, in some states a defense request for formal discovery allows the prosecution to seek reciprocal discovery. See, e.g., IOWA R. CRIM. P. 2.14 (3) (providing that if the court allows defense discovery motions under Rule 2.14(2)(b)(1) or 2.14(b)(2), the court, upon motion by the prosecution, may allow the prosecution to inspect documents, tangible objects, reports of examinations, and tests). If the defense conducts depositions of state witness, the state may depose defense witnesses. *Id.* R. 2.13 (3). In other states, after the defendant has received discovery from the prosecution, the prosecution is *automatically* entitled to certain discovery from the defense. See, e.g., MASS. R. CRIM. P. 14 (a)(1)(B) (2005).

152. *Wardius*, 412 U.S. at 479.

153. *Id.* at 476 (“It is fundamentally unfair to require a defendant to divulge the details of his own case while at the same time subjecting him to the hazard of surprise concerning refutation of the very pieces of evidence which he disclosed to the State.”). Nonetheless, the Court generally endorsed the notion that “[t]he growth of such [reciprocal] discovery devices is a salutary development which, by increasing the evidence available to both parties, enhances the fairness of the adversary system.” *Id.* at 474.

154. Courts have upheld discovery rules requiring defense disclosures even if they require the defense to disclose strategy prior to trial or give the prosecution access to possibly incriminating evidence known only to the defense. See, e.g., *Commonwealth v. Durham*, 843 N.E.2d 1035, 1045-58 (Mass. 2006).

155. Arizona has increasingly moved to broad discovery for both the defense and the prosecution. ARIZ. R. CRIM. P. 15.2 (2006) (allowing extensive discovery of the

complain that the increased mandates for defense disclosures have not been accompanied by a corresponding increase in the amount of information the prosecutor must disclose to the defense.<sup>156</sup> In addition, some reciprocal discovery obligations raise the due process concerns the Court addressed in *Wardius*.<sup>157</sup>

In general, the rules for discovery in criminal cases where liberty, or even life, is at stake stand in stark contrast to rules governing civil cases.<sup>158</sup> In civil cases, parties typically can obtain discovery regarding “any matter, not privileged, that is relevant to the claim or defense of any party,”<sup>159</sup> through a variety of discovery mechanisms.<sup>160</sup> The underlying rationale for the broad discovery provided for in these rules for civil cases is that knowledge of all the relevant facts is essential to proper litigation and surprise is undesirable.<sup>161</sup>

If Mr. Williams had been identified as the driver of a car who had been in an accident and caused \$10,000 of damage, he could have filed interrogatories and requests for admissions from the opposing party.<sup>162</sup> In addition, Mr. Williams’ counsel could have conducted depositions of

defense case, and not conditioning discovery by the prosecution upon prior defense requests for discovery).

156. See, e.g., Uphoff, *supra* note 28, at 385. Uphoff’s article assesses the impact of the Oklahoma Court of Criminal Appeals decision in *Allen v. District Court*, 803 P.2d 1164 (Okla. Crim. App. 1990), in which the court set out new procedures governing pretrial discovery in criminal cases in Oklahoma. *Id.* at 385-87. Uphoff characterizes the new procedures as “creat[ing] radically new disclosure obligations for defense counsel while at the same time only minimally expanding the prosecutor’s duty to disclose information about the State’s case.” *Id.* at 385.

157. 412 U.S. at 472; see Howard Dimmig, *Deposition Reform: Is the Cure Worse Than the Problem?*, 71 FLA. BAR. J. 52 (1997) (pointing out a lack of reciprocity in Florida discovery rules that allows the prosecution to depose all defense witnesses, while requiring the defense to obtain permission from the court to depose certain categories of prosecution witnesses, and arguing that the lack of reciprocity raises constitutional problems under *Wardius v. Oregon*); FLA. R. CRIM. P. 3.220(h)(1)(A) (2005).

158. See Sarokin & Zuckerman, *supra* note 78, at 1089 (noting the “astonishing anomaly” of “unrestricted discovery” in federal civil cases in contrast to the “severely limited” discovery in federal criminal cases).

159. FED. R. CIV. P. 26(b)(1). Many states have modeled their civil rules on Rule 26(b). See, e.g., WIS. STAT. § 804.01(2)(a) (2005-2006).

160. For example, FED. R. CIV. P. 26(a)(5) provides:

(5) Methods to Discover Additional Matter. Parties may obtain discovery by one or more of the following methods: depositions upon oral examination or written questions; written interrogatories; production of documents or things or permission to enter upon land or other property under Rule 34 or 45(a)(1)(C), for inspection and other purposes; physical and mental examinations; and requests for admission.

161. *Hickman v. Taylor*, 329 U.S. 495, 507 (1947).

162. See FED. R. CIV. P. 26.

opposing witnesses.<sup>163</sup> Through these discovery devices, Mr. Williams would have been entitled to obtain the names and addresses of any persons who had knowledge of the events. He would not have been restricted to the opposing party's selection of evidence to advance their claim or to rebut Mr. Williams' defense. He could have discovered both written police reports and information that had not been reduced to writing. He would have had several ways to compel witnesses to disclose what they knew or claimed to know, and he could have followed up with further investigation of the information he discovered. Indeed, Mr. Williams might not have had to utilize all of these discovery devices at all because the opposing party would have known that all relevant evidence was discoverable and would also have known that failure to comply with discovery would subject the opponent to a range of sanctions, including dismissal.<sup>164</sup> Thus, for example, the opposing party might have disclosed the names of eyewitnesses voluntarily. In many jurisdictions, the opposing party would have been required to disclose this kind of information as a matter of course, before any formal discovery demand was made.<sup>165</sup> But because Mr. Williams was involved in a criminal case, he had none of these rights.

In contrast to the embrace of a wide scope of discovery, a variety of means to discover evidence, and specific sanctions for nondisclosures in civil cases, there has been considerable resistance to broad discovery in criminal cases, expressed both by courts and in rule-making quarters.<sup>166</sup>

A dominant perspective that informs this resistance and the overall limitations on discovery in criminal cases is an unspoken presumption of guilt of the defendant.<sup>167</sup> This presumption is perhaps most notably

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163. *Id.*

164. *See id.* R. 37 (outlining methods for compelling disclosure and a range of sanctions for failing to comply with discovery requests and orders, including imposition of attorney fees; a finding of contempt; preclusion of evidence, witnesses, claims, or defenses; and dismissal of the action).

165. *See id.* R. 26.

166. *See supra* note 119 (regarding objections raised by prosecutors).

167. *See, e.g.,* Sarokin & Zuckerman, *supra* note 78; Uviller, *supra* note 18, at 1698. Describing the attitude of the prosecutor during the pretrial stage in the traditional model of criminal justice in the United States, Uviller relates:

And in this old-fashioned paradigm, the prosecutor does not share his discoveries with defense counsel, who would be a fool if she did not react to such advance intelligence by devising evasions and rehearsing counter-thrusts. If the defendant has any colorable defense, let him develop it on his own. For his response to the evidence adduced against him, he can wait for phase three, the trial. After all, that's what a trial is for: to display in neat and persuasive array the case against the defendant.

expressed by Judge Learned Hand in *United States v. Garsson*: “Our procedure has been always haunted by the ghost of the innocent man convicted. It is an unreal dream.”<sup>168</sup> Referring to the discretion of the court to grant discovery, Judge Hand said: “[the Court’s right to grant discovery] is said to lie in discretion, and perhaps it does, but no judge of this court has granted it, and I hope none ever will. Under our criminal procedure the accused has every advantage.”<sup>169</sup>

While those who object to broad discovery rarely openly acknowledge that they presume that the accused are guilty, the reasons that have been advanced for denying, delaying, or limiting discovery clearly reflect that presumption.<sup>170</sup> One justification that has been advanced is that the defendant will intimidate witnesses or tamper with evidence if he or she knows what witnesses the government will call or what other evidence the government will rely upon.<sup>171</sup> Under this view, the defendant will alter the testimony of defense witnesses to accommodate information revealed by the government.<sup>172</sup>

This assumes that the defendant is guilty and will commit further crimes to win at any costs.<sup>173</sup> Further, this view assumes the bad faith solely of the criminal defendant. It does not acknowledge that the police and prosecutors exercise considerable power to influence witnesses by

*Id.* at 1698; *see also* Roberts, *supra* note 52, at 1102 (“The assumption that the defendant has enough information about the case to allow for investigation flies in the face of the constitutional right to a presumption of innocence.”).

168. 291 F. 646, 649 (S.D.N.Y. 1923).

169. *Id.*

170. *See supra* note 168.

171. It is this view that underlies the limits on pretrial access to the identities of prosecution witnesses, discussed at *supra* notes 137-39. *See* Brennan, *Progress Report*, *supra* note 139, at 13 (describing how concerns about witness intimidation have “proved a major obstacle to discovery of witness lists [and have] stood in the way of pretrial disclosure of witness statements”); *see also* Sarokin & Zuckerman, *supra* note 78, at 1089. Opponents of pretrial discovery of witness lists present accounts of witness intimidation. In contrast, proponents of broader discovery point out that instances of witness intimidation are rare, do not justify such an overarching restriction, and can be addressed with provisions for protective orders. *See, e.g.*, Sarokin & Zuckerman, *supra* note 78, at 1090 (arguing that “[t]he burden should be placed upon the government to demonstrate that the risks of tampering, intimidation, or perjury exist”); Brown, *supra* note 16, at 1622 (“[C]oncerns such as witness safety and investigatory confidentiality are real . . . [but] are not strong in most cases, especially those in state courts.”).

172. *See* Sarokin & Zuckerman, *supra* note 78, at 1089-90; *see also* State v. Eads, 166 N.W.2d 766, 769 (Iowa 1969) (discussing the traditional objections to criminal discovery).

173. *See* Sarokin & Zuckerman, *supra* note 78, at 1091; *see also* Roberts, *supra* note 52, at 1151.

threats or rewards for particular testimony<sup>174</sup> and that sometimes they have knowingly presented perjured testimony to secure a conviction.<sup>175</sup>

A second objection to broad discovery is that it would undermine the adversary system in criminal cases.<sup>176</sup> In *Bagley*, the Supreme Court endorsed the model of the adversary system as the “primary means by which truth is uncovered” and characterized the *Brady* rule as a “limited departure” from that model.<sup>177</sup> Some argue that discovery in criminal cases should differ from that in civil cases, where the rules allow the parties to have broad and equal access to the other party’s evidence, because the criminal defendant has special advantages over the prosecution, including a Fifth Amendment privilege.<sup>178</sup> The defendant should not be further advantaged, the argument goes, by having access to prosecution evidence. This view ignores the greater investigatory resources of the prosecutor. In addition, this argument has been undermined by the proliferation of reciprocal discovery provisions in many jurisdictions, which require a defendant to disclose certain defenses and defense evidence well in advance of trial<sup>179</sup> and, in some

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174. See, e.g., *United States v. Bagley*, 473 U.S. 667 (1985) (finding that the government did not disclose contracts with prosecution witnesses to pay them for information, despite defense request for evidence of promises, rewards, and inducements); *Napue v. Illinois*, 360 U.S. 264, 265 (1959) (reversing a conviction where the prosecutor failed to correct the prosecution witness’ testimony that he had not been promised any consideration in exchange for his testimony, when in fact the prosecutor had promised to seek a reduction of the witness’ sentence).

175. See, e.g., *Mooney v. Holohan*, 294 U.S. 103, 106-07 (1935).

176. See Sarokin & Zuckerman, *supra* note 78, at 1090-91; see also Brown, *supra* note 16, at 1609 (“Adversarial processes let parties control evidence production because the goal is for the parties to settle their dispute, not for the state to determine truth. . . . A legal process aimed at maximizing the goal of dispute resolution . . . cannot simultaneously aspire to maximize accurate fact-finding.”) Brown’s comments highlight the tension between “fairness” and “reliability” and the special importance of this distinction in criminal cases. Courts and commentators often equate “fairness” with “justice.” Discussions of exculpatory evidence and the prosecutor’s or defendant’s right to discovery too often center on justice for opposing counsel as opposed to the reliability of the outcome.

177. 473 U.S. at 675 n.6. Writing five years after *Agurs*, Babcock contrasts the Courts’ responses to cases involving perjury by prosecution witnesses with those in which the prosecutor has suppressed exculpatory evidence: “*Agurs*’ central message to appellate courts emerged as: . . . . [S]top reversing criminal convictions where the prosecution team has merely failed to give unearned aide to the defense team. Reverse only when the prosecutor has played the game unfairly.” Babcock, *supra* note 78, at 1152.

178. See, e.g., Roberts, *supra* note 52, at 1098; see also Sarokin & Zuckerman, *supra* note 78 at 1091.

179. Often, the issue of balance between adversaries in the criminal justice system has been addressed in the context of providing prosecution access to defense evidence. In *Williams v. Florida*, the Supreme Court sanctioned a state rule of criminal

jurisdictions, without equal disclosure from the prosecution.<sup>180</sup> Finally, the view that the defendant is advantaged by procedural protections ignores the fact that if the defendant is innocent, what he or she fails to disclose as a result of these procedural rights does not impair the government's access to relevant evidence of guilt.

Third, an implicit assumption is that the defendant does not need to be given all relevant information to prepare a defense because he or she was there, and therefore already knows the facts.<sup>181</sup> This view clearly ignores the possibility that the defendant is innocent.

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procedure that required the defendant to give the prosecution advance notice of an alibi and the names of alibi witnesses as a prerequisite to presenting alibi witnesses. 399 U.S. 78 (1970). The Court held that the Fifth Amendment did not entitle the defendant "as a matter of constitutional right to await the end of the State's case before announcing the nature of his defense, any more than it entitles him to await the jury's verdict on the State's case-in-chief before deciding whether or not to take the stand himself." *Id.* at 85. Reciprocal discovery rules have proliferated since *Williams*. In addition to an alibi defense, in some jurisdictions the defendant may be required to disclose other defenses prior to trial. *See, e.g.*, MASS. R. CRIM. P. 14(b)(2)-(3) (2005) (providing that a defendant must disclose an intention to rely on defense of lack of criminal responsibility or a defense based upon a license, claim of authority or ownership, or exemption); ARIZ. R. CRIM. P. 15.2(b) (2006).

[T]he defendant shall provide a written notice to the prosecutor specifying all defenses as to which the defendant intends to introduce evidence at trial, including, but not limited to, alibi, insanity, self-defense, defense of others, entrapment, impotency, marriage, insufficiency of a prior conviction, mistaken identity, and good character. The notice shall specify for each listed defense the persons, including the defendant, whom the defendant intends to call as witnesses at trial in support of each listed defense. It may be signed by either the defendant or defendant's counsel, and shall be filed with the court.

*Id.*

Courts have also approved the practice of requiring to defendant to provide the prosecutor with pretrial access to impeachment evidence. In *United States v. Nobles*, the Supreme Court approved a trial court's order that the defense disclose statements made by prosecution witnesses to a defense investigator. 422 U.S. 225, 241 (1975). The Court rejected the defense argument that disclosure violated the defendant's Sixth Amendment Rights. *Id.* The Court also made clear that the Fifth Amendment does not preclude discovery of information gathered on behalf of the defendant, holding: "We thus conclude that the Fifth Amendment Privilege . . . does not extend to the testimony or statements of third parties called at trial." *Id.* at 233-34 (internal citation omitted).

180. *See* discussion *supra* pp. 580-83 (regarding reciprocal discovery schemes).

181. For an example of this kind of assumption, see *McCleskey v. Zant*, 499 U.S. 467 (1991). *McCleskey* was a federal habeas case in which the Court considered a successive habeas petition. *Id.* at 470. One of McCleskey's claims in his second federal habeas petition was a *Massiah* claim, which he had not raised in his first habeas petition. *Id.* McCleskey argued that this failure should be excused because the prosecution had withheld a lengthy statement of a jailhouse witness regarding an alleged confession by McCleskey and the statement served as support for the *Massiah* claim based upon an agreement between the witness and the government. *Id.* at 470-71, 497. At trial, McCleskey denied making the inculpatory statements, while the witness testified

These historical views continue to inform criminal discovery rules and practice even in jurisdictions that have endorsed broader discovery. Most discovery schemes have the following common elements. First, the defense must ask for discovery.<sup>182</sup> Second, the information that the prosecution may be required to produce is defined in terms of narrow categories.<sup>183</sup> Third, the information to be disclosed within these categories may be further limited to what the prosecution intends to use at trial, rather than all the evidence known to the prosecution or its agents. Fourth, the timing for disclosure to the defense is often vague, leaving to the prosecutor the power to decide what “prior to trial” means in a given case. Fifth, the rules require disclosure of “exculpatory evidence” with little, if any, definition of what that is.<sup>184</sup>

Typically, there are many gaps in the coverage of these rules, which provide cover for prosecutors who do not wish to disclose evidence or make inquiries of the police or other witnesses. The rules, in fact, provide incentives for the police not to reduce information to writing or to make inquiries of witnesses.<sup>185</sup> Often, the rules do not make clear what the respective obligations of counsel are—for example, how continuing disclosure obligations are to be enforced,<sup>186</sup> whether rebuttal witnesses or other impeachment evidence must be disclosed, and if so, at

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McCleskey had confessed. *Id.* at 470, 500. While acknowledging that the prosecutor had withheld the statement, despite specific postconviction discovery requests—and the prosecutor had affirmatively informed defense there was no agreement with the witness—the Court asserted that McCleskey had knowledge of the contents of the statement: “[B]ecause McCleskey participated in the conversations reported by [the witness], he knew everything in the document . . . [and] had at least constructive knowledge all along of the facts he now claims to have learned only from the 21-page document.” *Id.* at 498-500.

182. In Massachusetts, access to police reports has been an exception to this rule for a long time, but the defense has had to make a motion to obtain other kinds of evidence. *See supra* note 2. Recently Massachusetts and some other jurisdictions have amended their discovery rules to provide for automatic disclosure of some evidence by the prosecution. *See* MASS. R. CRIM. P. 14 (a)(1)(A) (2005) (providing that no motion is required to obtain mandatory discovery and providing examples of discoverable material); *see also* ARIZ. R. CRIM. P. 15.1 (2006) (providing that “the prosecutor shall make available to the defendant” a range of types of evidence, with specific timetables for disclosure spelled out in the rule).

183. Section 971.23(1) of the Wisconsin Statutes is representative of the rules in many jurisdictions and establishes the prosecutor’s disclosure obligations. WIS. STAT. § 971.23(1) (2005-2006).

184. *Id.*

185. The rules typically emphasize written evidence. *See supra* note 12 for an example of a rule regarding access to statements of witnesses.

186. *See* Uphoff, *supra* note 28, at 394.

what time.<sup>187</sup> In many jurisdictions, counsel may make motions for additional information that does not fall within one of the listed categories, but often has to make a threshold showing with some particularity as to why he or she believes there is information to be disclosed.<sup>188</sup> Of course, if counsel does not know what information exists, it will be difficult to make the requisite showing.

At the time of Mr. Williams' trial, Massachusetts had similar rules to those discussed above.<sup>189</sup> While counsel argued that the information qualified as *Brady* material that should have been disclosed, others might argue that it was not necessarily exculpatory.<sup>190</sup> The lost witness may or

187. *See id.* Rules that require a defendant to disclose a statement of a witness that the defendant "intends to use at trial" can be ambiguous because counsel may not be able to predict the witness' testimony prior to trial and thus be able to determine if counsel will introduce impeachment evidence derived from the witness' statement.

188. *See, e.g.*, KY. R. CRIM. P. 7.24(2) (2005).

On motion of a defendant the court may order the attorney for the Commonwealth to permit the defendant to inspect and copy or photograph books, papers, documents or tangible objects, . . . that are in the possession, custody or control of the Commonwealth, upon a showing that the items sought may be material to the preparation of the defense and that the request is reasonable.

*Id.*

189. The governing discovery rule provided for mandatory discovery for the defendant, upon motion, of:

(A) any written or recorded statements made by the defendant within the possession, custody or control of the prosecutor; or (B) the written or recorded statements of a person who has testified before a grand jury; or (C) any facts of an exculpatory nature within the possession, custody or control of the prosecutor.

MASS R. CRIM. P. 14(a)(1) (1989). The defendant could also seek discretionary discovery, such that the defendant would be

permitted to discover, inspect, and copy any materials and relevant evidence, documents, statements or persons, or reports of physical or mental examinations of any person or of scientific tests or experiments, within the possession, custody, or control of the prosecutor or persons under his direction and control. The judge may also order the production by the Commonwealth of the names and addresses of prospective witnesses and the production . . . by the probation department of the record of prior convictions of any such witness.

MASS R. CRIM. P. 14 (a)(1)(2) (1989).

190. Mr. Williams' case was unusual because the nondisclosed information was discovered before trial, although at a point when counsel could not make full use of it. Counsel argued that the case should have been dismissed because the prosecutor's failure to disclose material, exculpatory evidence, despite a specific request for this kind of evidence, could not be cured because the evidence was permanently lost and the defendant was irreparably prejudiced. Even without formal discovery motions, if the prosecutor knew about the information, he or she would have been obligated to disclose it

may not have provided the names of all of the robbers. The lost witness may or may not have recognized all of the robbers, to the exclusion of Williams. The lost witness might have identified Williams as one of the group. Whether something is exculpatory often depends on who is making the determination. Because, by definition, defense counsel is unaware of the undisclosed evidence, there is no opportunity for an open debate, and thus no opportunity for a court determination about whether the undisclosed evidence constitutes “exculpatory evidence.”

The other statutory discovery provisions in place at the time of Mr. Williams’ case did not cover the information that was not disclosed.<sup>191</sup> The girl was not a witness the government intended to call, nor were there any written or recorded statements that she gave or adopted as her statement. Thus, apart from the issue of whether the evidence was exculpatory, the prosecutor would not have violated his statutory discovery obligations by failing to disclose this evidence.

In cases such as Mr. Williams’, the discovery rules in most jurisdictions would not have required disclosure of the information that could have resulted in an acquittal. In fact, Mr. Williams had more discovery than that permitted in many jurisdictions. He knew the names of the witnesses and obtained the police reports<sup>192</sup> containing information from the witnesses well in advance of trial. At the preliminary hearing, his counsel had an opportunity to cross-examine the witnesses about their identifications of Mr. Williams.<sup>193</sup> Still, if we consider that Mr. Williams was innocent, we must conclude that the discovery system failed.

The narrow framing of disclosure obligations provides fodder for debate between the parties, which in turn diverts attention from the goal

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if it was “exculpatory.” See discussion *supra* pp. 563-72 for problems with the materiality standard and its application.

191. Most of the categories of discoverable evidence were not useful to him: the case did not involve physical evidence, expert evidence, scientific tests or experiments, or statements by Mr. Williams or a codefendant.

192. The police report in Mr. Williams’ case was typical of those prepared in Massachusetts at that time. It consisted of two pages, contained a summary of interviews with the victims, and initial descriptions of the perpetrators of the robberies. The amount of information contained in a police report varies among jurisdictions and in part depends on the amount of investigation undertaken in the case.

193. Without the opportunity for an evidentiary hearing, such as a preliminary hearing, examination of an identification witness will not occur until trial. In those jurisdictions that allow hearsay testimony in preliminary hearings, Mr. Williams might have obtained information about the identifications from a testifying officer and not from the witnesses themselves. For the reasons discussed *supra* pp. 574-78 and *infra* p. 609, many defendants do not have an opportunity to question witnesses before trial.

of trying to achieve reliable outcomes.<sup>194</sup> Judges, with less familiarity with the facts than either party, worry about taking up valuable court time on discovery matters and fail to consider the institutional imbalance in the control over information, or even if they do consider it, they fail to find any issue with that imbalance.<sup>195</sup>

### 3. UNDERMINING OF ETHICAL DUTIES

The system of discovery implicates the ethical duties of both defense counsel and prosecutors. Under the ethical rules, a lawyer's duty to a client includes a duty to perform some investigation.<sup>196</sup> Most jurisdictions have rules of professional conduct that require counsel to be "competent" and define competence to include a requirement that counsel inquire into and analyze the facts of the case as well as the legal principles involved.<sup>197</sup> Limiting access to discovery in criminal cases undermines the ethical obligations of defense counsel, as well as the right of a defendant to effective representation.<sup>198</sup>

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194. During my practice in the Massachusetts criminal courts from 1981 to 2003, I frequently observed prosecutors who raised a host of objections to discovery motions. *See supra* note 117. For another example of a court allowing a prosecutor to avoid disclosure, see *State v. Eads*, 166 N.W. 2d 766, 774 (Iowa 1969) (accepting the prosecution's characterization of requests for pretrial disclosure of witness statements as "'mere fishing expeditions,' 'attempts to rifle the prosecutor's file,' [and] 'requests for the State's work product'"). While many jurisdictions now have rules that require disclosure of a wider array of evidence, objections along these same lines are still made when counsel requests information that does not fall squarely within one of the specified categories.

195. *See Rosen, supra* note 70, at 694 n.2 (describing prosecutors' greater access to evidence and superior resources, including early access to crime scenes, assistance of law enforcement and technical personnel, cooperation of citizens, and pretrial investigative forums such as grand juries); *see also* Uviller, *supra* note 18, at 1696 (describing what he views as different components of the prosecutor's role in prosecuting a case: the adjudicative, investigatory, and adversary). Uviller contrasts his notions of what a prosecutor should do to ensure reliability of the evidence ("thorough investigation by a detached and dedicated investigator is the best assurance of a conclusion that comports with historical truth") with the perspective of many of the judges he knows, who "do not seem to share [his] misgivings, being, by and large, thoroughly content that the adversary process delivers a close approximation of the truth in most cases." Uviller, *supra* note 18, at 1701 n.15.

196. *See* MODEL RULES OF PROF'L CONDUCT R. 1.1 cmt. 5 (2003).

197. *See, e.g., id.* ("Competent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem, and use of methods and procedures meeting the standards of competent practitioners.").

198. *See Roberts, supra* note 52, at 1100. Roberts examines the impact that discovery rules have on effective representation of counsel. *Id.* at 1124-39. She urges adoption of a Sixth Amendment analysis of discovery rules to provide greater constitutional protections, rather than the due process analysis the Supreme Court has

In several capital cases beginning in 2000, the Supreme Court addressed counsel's duty to investigate in criminal cases.<sup>199</sup> Beginning with *Williams v. Taylor*,<sup>200</sup> and followed by *Wiggins v. Smith*<sup>201</sup> and *Rompilla v. Beard*,<sup>202</sup> the Supreme Court reversed death sentences in each case because counsel's failure to adequately investigate amounted to ineffective assistance of counsel. In analyzing the ineffective assistance of counsel claims in *Wiggins* and *Rompilla*, the Court held that counsel's performance should be judged by prevailing professional norms and cited to prevailing ethical standards.<sup>203</sup> For example, in *Rompilla*, the Court referred to the following provision of the American Bar Association *Standards for Criminal Justice*:

It is the duty of the lawyer to conduct a prompt investigation of the circumstances of the case and to explore all avenues leading to facts relevant to the merits of the case and the penalty in the event of conviction. The investigation should always include efforts to secure information in the possession of the prosecution and law enforcement authorities. The duty to investigate exists regardless of the accused's admissions or

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historically used in discovery cases. *Id.* at 1140-45. Roberts argues that lawyers cannot provide effective representation when restrictive discovery rules result in insufficient information to allow investigation by defense counsel. *Id.* at 1100.

199. Until these cases, the Supreme Court had defined counsel's duty to investigate as part of a defendant's Sixth Amendment right to effective assistance of counsel less stringently than the duty to investigate outlined in most rules of professional conduct. See Roberts, *supra* note 52, at 1110-11. Roberts argues that *Williams* and *Wiggins* open up the possibility of expanding discovery under a Sixth Amendment effective assistance analysis, noting that the duty to investigate defined in these cases is "substantially more demanding" than the duty to investigate outlined in *Strickland v. Washington*, 466 U.S. 668, 691 (1984). Roberts points out that "*Williams v. Taylor* was the first Supreme Court decision to find ineffective assistance of counsel under the two-prong *Strickland* standard, and it did so based on a failure to undertake reasonable investigation." *Id.* at 1110. Roberts concludes that the difference in outcome between the two factually similar cases of *Strickland* and *Wiggins* is the Court's "reliance on prevailing professional norms governing investigation. . . . The level of specificity of, and reliance upon, the professional standards gives *Wiggins* much more force than *Strickland* with respect to the constitutional duty to investigate." *Id.* at 1114-16. In turn, Roberts argues, the professional standards regarding counsel's duty to investigate have become more demanding because of increased national awareness of the possibility of wrongful convictions. *Id.* at 1117-20.

200. 529 U.S. 362 (2000).

201. 539 U.S. 510 (2003).

202. 125 S. Ct. 2456 (2005).

203. *Wiggins*, 539 U.S. at 524 (citing to the ABA *Standards for Criminal Justice*); *Rompilla*, 124 S. Ct. at 2465-66 (citing to the ABA *Standards for Criminal Justice* and the ABA *Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases*).

statements to the lawyer of facts constituting guilt or the accused's stated desire to plead guilty.<sup>204</sup>

In *Rompilla*, the Court found that even where the defendant and his family members had suggested that no mitigating evidence was available, counsel was nonetheless "bound to make reasonable efforts to obtain and review material that counsel knows the prosecution will probably rely on as evidence of aggravation" at the trial's sentencing phase.<sup>205</sup>

While these cases dealt with investigation of evidence for the sentencing phase of capital cases, the principles underlying defense counsel's duty to investigate should be similar in noncapital cases. In all criminal cases, defense counsel's duty to investigate the facts, as well as the law, requires more of defense counsel than just relying on the complaint and whatever discovery the prosecution provides. Requiring defense counsel to adhere to "prevailing professional norms" has little meaning if the rules of the system militate against acquiring facts. If the state-sanctioned discovery rules leave control over knowledge of relevant facts in the hands of the prosecution and pose roadblocks to a full factual inquiry, defense counsel's duty to investigate is an empty requirement in many cases. If discovery by the defense is delayed, counsel cannot conduct the "prompt investigation" mandated by the ethical rules. If counsel does not have the means to conduct an adequate investigation, counsel's ability to adequately prepare for trial or disposition by a plea is compromised.<sup>206</sup> It would be anomalous to impose a duty to investigate, on one hand, and on the other to make a real investigation impossible to conduct.<sup>207</sup>

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204. 125 S. Ct. at 2466 (citing to the *ABA Standards for Criminal Justice*). The Court's requirement that counsel adhere to prevailing professional norms in the context of analyzing the effectiveness of counsel stands in contrast to its analyses of the prosecutorial duty to disclose exculpatory evidence. See *Kyles v. Whitley*, 514 U.S. 419, 437 (1995). In the latter case, the Court noted that its standard for disclosure required less from the prosecutor than the professional rules require. ("[T]he rule in *Bagley* requires less of the prosecution than the *ABA Standards for Criminal Justice*, which call generally for prosecutorial disclosures of any evidence tending to exculpate or mitigate."). *Id.* at 437.

205. 124 S. Ct. at 2460.

206. See Berend, *supra* note 133, at 507-09 (discussing the impact of substantial reductions in pretrial discovery in criminal cases in California as a result of Proposition 115).

207. See MODEL RULES OF PROF'L CONDUCT R. 1.1 cmt. 5 (2003); see also Roberts, *supra* note 52, at 1140 (arguing that barriers to investigation posed by state discovery rules may preclude effective assistance of counsel).

Similarly, incomplete knowledge of relevant facts, both inculpatory and exculpatory, implicates counsel's duties as an advisor.<sup>208</sup> Imagine a person's reaction to a lawyer counseling his client in a divorce case about the issue of a property settlement:

*Your husband has made an offer, which he says is a generous offer. It would be nice to know what assets he has, but we can't force him to disclose his assets and you have always let him handle the finances. If we go to trial, we might learn that he's offering more than the law requires or that the judge would award you, or we might find out he's been holding out on us and you would be better off going to trial. Of course, I can't guarantee we'll actually be able to prove he has more than he claims. What do you want to do?*<sup>209</sup>

Discovery schemes also influence how prosecutors meet their ethical obligations. Many have commented on the conflict between the roles a prosecutor plays—between the prosecutor as an advocate in the adversary system and the prosecutor as a minister of justice.<sup>210</sup> What we require a prosecutor to do with respect to discovery influences how that conflict is resolved.

A scheme of discovery in criminal cases that sends the message that full or even broad discovery is not required, and, when sought, can be legitimately and successfully resisted, emphasizes the role of the prosecutor as an advocate in the adversary system.<sup>211</sup> Minimal disclosure obligations, and a framework that requires the defense to initiate requests for information as a prerequisite to disclosure, set up resistance to disclosure by framing the defense as an adversary.<sup>212</sup>

Current discovery schemes contribute to a mindset that undermines a prosecutor's duty to do justice, if justice includes correspondence of facts to the disposition of a case. Knowing that information about the

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208. See *supra* note 9.

209. The example is admittedly unrealistic because of the discovery mandated in civil actions. Generally, laws governing divorce actions impose an affirmative duty on both parties to file financial statements under oath, thus recognizing the importance of full knowledge of financial facts to a fair adjudication of financial issues by trial or by settlement. See, e.g., WIS. STAT. §767.27(1) (2005-2006) ("In any action affecting the family, the court shall require each party to furnish . . . full disclosure of all assets . . .").

210. See Peter Joy, *The Relationship Between Prosecutorial Misconduct and Wrongful Convictions: Shaping Remedies for a Broken System*, 2006 WIS. L. REV. 399; Bruce A. Green, *Why Should Prosecutors "Seek Justice?"*, 26 FORDHAM URB. L.J. 607, 608 (1999).

211. See Uviller, *supra* note 18, at 1698-1700.

212. *Id.*

case will not necessarily be revealed to, or questioned by, the defense or the fact-finder makes it less likely that the prosecutor will make an ongoing inquiry about the reliability of the evidence.<sup>213</sup> In addition, it makes it less likely that additional evidence will be discovered through defense investigation that could bear on the appropriateness of the charge or the determination of guilt and punishment.

#### 4. INFORMAL DISCOVERY

Some prosecutors nonetheless afford greater access to information than the rules require. The federal rules for discovery in criminal cases are among the most restrictive, yet surveys of federal prosecutors have shown that a significant percentage of them report having an “open file” policy.<sup>214</sup> Similarly, state and county prosecutors in numerous jurisdictions have some sort of open file policy in practice.<sup>215</sup> Definitions of open file policies vary; typically the policy is not reduced to writing.<sup>216</sup> Currently, few, if any, jurisdictions have mandatory open file policies.<sup>217</sup> Whether a particular defendant will be the beneficiary of an open file policy may depend on the particular prosecutor, the relationship between defense counsel and the prosecutor, the identity of the defendant, and the nature of the case.

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213. *Id.* at 1701-02.

214. *See* Sarokin & Zuckerman, *supra* note 78, at 1107 (“[M]any prosecutors choose to open their files to opposing counsel.”).

215. *See, e.g.*, Uphoff, *supra* note 28, at 383 (“[D]efense lawyers who were fortunate enough to receive police reports gained perhaps the best access to the State’s case. Such access, however, was not required by law but depended on the fairness and generosity of individual prosecutors.”); David Luban, *Are Criminal Defenders Different?*, 91 MICH. L. REV. 1729, 1738 (1993) (“Though some prosecutors maintain an “open file” policy, granting defenders access to the prosecution’s case files, this is purely a policy choice on the prosecutor’s part, not a legal right of defendants.”); *see also* Ben Kempinen, Univ. of Wisc. Law Sch., Law and Contemporary Problems: The Prosecution Function 209 (2006) (on file with author). Wisconsin law students working as interns in state prosecutors’ offices surveyed those offices regarding open file policies. *Id.* Each office surveyed said they had an “open file” policy, but rarely was the policy reduced to writing and offices varied in how they defined “open file.” *Id.* The survey reports:

(1) informal practices dominated how lawyers conducted discovery; (2) most of the information disclosed was inculpatory rather than exculpatory; (3) trust borne of long-term continuing relations substantially affected how much was shared; (4) the initial police reports were almost always shared; and (5) there were many working exceptions to the stated “open file” policy.

*Id.*

216. *See* Kempinen, *supra* note 215, at 209.

217. *See* Tamar L. Graham, *Death by Ambush: A Plea for Discovery of Evidence in Mitigation*, 17 CAP. DEF. J. 321, 342 n.170 (2005).

Of course, defense counsel may seek additional information from witnesses if he or she knows who they are and if they are willing to respond to defense inquiries.<sup>218</sup> Such endeavors, however, are not a reliable and consistent source of information. While they may enhance discovery in some cases, they are not an adequate substitute for institutionalized mechanisms for broad discovery.

### III. REMEDIES

#### A. General Principles

If we were to envision the purpose of discovery as maximizing the reliability of outcomes in criminal cases—including determinations of guilt or innocence, degree of culpability, and appropriate sentence—then we would fashion a discovery system different from the prevailing system in most jurisdictions. Although these “reliability maximizing” discovery rules would vary from jurisdiction to jurisdiction,<sup>219</sup> they

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218. See discussion *infra* pp. 605-607 (regarding the lack of reliable means to compel witnesses to cooperate with defense counsel).

219. See Brennan, *Progress Report*, *supra* note 139, at 2-3 (asserting that “the proper guide to discovery practices should not be the likelihood that disclosure in a particular case will save the trouble of a trial, . . . but the degree to which discovery will enhance the reliability of factfinding”). In deciding how to meet the goal of reliability, each jurisdiction should be evaluated holistically. Undoubtedly, no one system would best achieve this goal in every jurisdiction. Any jurisdiction that undertakes this task should obtain comprehensive input from all of the stakeholders and gather information about actual practices in order to understand what the impediments are to access to relevant information through discovery. In some jurisdictions, extensive analyses of the strengths and weaknesses of the jurisdiction’s discovery rules have been undertaken, which could serve as a starting point for review. See, e.g., Uphoff, *supra* note 28, (regarding rules and practice in Oklahoma); Riggs, *supra* note 100 (describing rules and practice in Iowa); Roberts, *supra* note 52 (describing discovery in New York). Reform is more likely to be effective if it builds on existing practices that allow for pretrial access to information. Reforms wholly alien to existing customs and practices are less likely to be embraced by the parties who will determine their success or failure. See Uphoff, *supra* note 28, at 399 (“Without significantly reworking or adding to the *Allen* procedures, *Allen*’s incomplete framework provides too much opportunity for gamesmanship and ambush.” (referring to the procedures outlined by the Oklahoma Court of Criminal Appeals in *Allen v. District Court*, 803 P.2d 1164 (Okla. Crim. App. 1990))). Corollary attributes of a particular jurisdiction’s criminal justice system must be examined to ascertain their impact on the process of pretrial discovery. For example, underfunded indigent defense systems exacerbate problems of defense access to relevant evidence because the lawyers may have insufficient resources to pursue discovery. Similarly, attention must be paid to reforming evidence gathering and evaluation by prosecutors’ offices and investigative agencies. Examination of these issues is beyond the scope of this Article.

would nevertheless all be based upon the following underlying principles.

First, we should devise rules that reflect the presumption of innocence.<sup>220</sup> The discovery process should reflect a healthy skepticism about the evidence that initiates prosecution and should acknowledge that we cannot have certainty about its reliability at the outset.<sup>221</sup>

To this end, we should start with the presumption that all relevant evidence known to the police and prosecution should be discoverable and therefore subject to scrutiny and potential challenge. As a matter of principle, it is hard to argue that everything relevant to a criminal investigation should be in the sole control of the prosecutor and his or her agents. The scope of what is discoverable by the defense should be comparable to the scope of discovery in civil cases and should include both inculpatory and exculpatory evidence.<sup>222</sup> Rather than requiring the defense to demonstrate that the information should be disclosed, the prosecution should have the burden of showing why certain information should not be disclosed—for example, because of statutory privilege, the work product doctrine,<sup>223</sup> or articulable evidence that disclosure at that time could place a witness at risk of harm. Provisions for allowing protective orders, when warranted in a specific case, could address these kinds of concerns.<sup>224</sup>

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220. See discussion *supra* pp. 582-86 (regarding the pervasiveness of the presumption of guilt in the discovery process).

221. See Findley & Scott, *supra* note 14. In addition to changes in the discovery system, there are many possible reforms in the operation of the executive branch that could provide greater assurances that the evidence relied upon for a prosecution is reliable. Exploration of those additional reforms is beyond the scope of this Article. See, e.g., *id.*; Brown, *supra* note 16. In addition to those reforms suggested by these authors, we should consider providing training for prosecutors (as well as indigent defenders) specifically on their discovery obligations. Some public defender's and prosecutor's offices provide training for their new lawyers and ongoing training on substantive issues. The Committee for Public Counsel Services (CPCS), the public defender agency in Massachusetts, provides substantial training for new lawyers as well as on-going training on substantive law. Interview with Chris Dearborn, former CPCS Staff Attorney, Essex County Office (Sept. 2005). CPCS attorneys also participate in continuing legal education programs in criminal law that are available to private counsel who take indigent appointments. *Id.*

222. Knowledge of allegedly inculpatory evidence, and the opportunity to investigate that evidence, can be just as critical to preventing a wrongful conviction as is knowledge of exculpatory evidence. For example, an honest eyewitness can be the source of inculpatory evidence, yet investigation of the witness' claims can reveal that the witness is mistaken in his or her identification.

223. See, e.g., FLA. R. CRIM. P. 3.220(g) (2005) (exempting work product from disclosure).

224. There are many examples of provisions for protective orders in existing discovery rules, including in the rules for discovery depositions and civil procedure. See,

Second, we should require the prosecutor to go on record that he or she has exercised due diligence in complying with his or her discovery obligations. Some jurisdictions require that counsel certify compliance with discovery rules and orders.<sup>225</sup> The certification could include verification that the prosecutor has made inquiries of the State's witnesses and of law enforcement personnel about the subject matter of the discovery.<sup>226</sup> While certification would not rectify instances of deliberate, corrupt nondisclosure, it would enhance accountability. This requirement would make clear to the prosecutor that he or she is responsible for information in the possession of the assisting law enforcement agencies, not just for what is in his or her files.<sup>227</sup>

There are numerous benefits to requiring the prosecutor to certify to the court that he or she has reviewed the files, conferred with witnesses with relevant knowledge, and disclosed to the defense all relevant information from those sources. The prosecutor is less likely to misunderstand disclosure obligations, overlook evidence, or delay its disclosure.<sup>228</sup> In places where criminal cases are handled by different prosecutors at different times, certification could serve to make *someone* in the prosecutor's office accountable.<sup>229</sup> In addition, requiring a

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*e.g.*, *id.* R. 3.220(e) (restricting disclosure where the court finds that there is "a substantial risk to any person of physical harm, intimidation, bribery, economic reprisals, or unnecessary annoyance or embarrassment resulting from the disclosure, that outweighs any usefulness of the disclosure to either party"); FED. R. CIV. P. 26(c).

225. *See, e.g.*, MASS. R. CRIM. P. 14(a)(3) (2005) (requiring both parties to file a written certificate of compliance with the court, excluding expert reports).

226. *See* Am. Coll. of Trial Lawyers, *supra* note 57, at 111. The authors' proposed amendment to FED. R. CRIM. P. 16 would require prosecutors to file a written disclosure of evidence favorable to a defendant, and certify that:

- a) the government attorney has exercised due diligence in locating all information favorable to the defendant within the files or knowledge of the government;
- b) the government has disclosed and provided to the defendant all such information; and
- (c) the government acknowledges its continuing obligation, until final judgment is entered, to: i) disclose such information; and ii) to furnish any additional information favorable to the defendant immediately upon such information becoming known.

*Id.*

227. *See* *Kyles v. Whitley*, 514 U.S. 419 (1995).

228. *See* Am. Coll. of Trial Lawyers, *supra* note 57, at 118 (describing the value of certifications by the prosecutor as "ensur[ing] a clear record of what was and was not disclosed, thus avoiding unnecessary post-trial and post-sentencing litigation about what may have been orally communicated" and "convey[ing] to the government attorney the importance of accuracy, consultation and prompt disclosure").

229. In my experience in the Massachusetts courts, it was not uncommon for prosecutors to take over a case from another prosecutor on short notice. Sometimes the shuffling of cases among prosecutors was institutionalized, particularly in the district court: one prosecutor handled the arraignment, another the pretrial conference, and yet

prosecutor to personally and publicly provide assurances that he or she has fulfilled his or her discovery responsibilities can provide some incentive for the prosecutor to take a second look at the evidence and thus can serve to reveal unfounded prosecutions prior to trial or a plea. Certifications by counsel could also reduce the incidence of the last-minute disclosure of inculpatory evidence, such as an unrecorded statement of the defendant. In addition, if certifications are taken seriously by the court, they could provide a basis for relief from a midtrial surprise from a state witness.

Discovery rules should specify mechanisms for enforcement of the prosecutor's discovery obligations and a range of sanctions for violation of the discovery rules. For example, the local rules in the federal district court in Massachusetts provide that "failure to comply with the obligations set forth in the rules may result in dismissal or default or other sanctions."<sup>230</sup> Possible sanctions could include personal sanctions, such as fines, against a prosecutor who fails to comply with discovery requirements.<sup>231</sup> Of course, sanctions—particularly those that impair the prosecution's ability to prosecute the case—provide prosecutors with incentives to comply only if they are actually imposed by a court.<sup>232</sup> Thus, the willingness of judges to use sanctions to enforce the prosecution's discovery obligations is a critical component of any discovery system.

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another the trial. While these practices are to some extent an understandable accommodation to heavy case loads, it is also true that the frequent transfer of cases tended to dilute the sense of personal responsibility a prosecutor had for a given case. Information gathered by one prosecutor (for example, from a police officer present in court) was not necessarily recorded in the file or otherwise conveyed to the next prosecutor. As a result, the information was less likely to be disclosed to defense counsel. Even if it was discussed, its casual transmission did not provide assurances that it was reliable or complete and often disagreements arose as to what had been said and by whom.

230. D. MASS. LOCAL R. 1.3 (2006).

231. See Uphoff, *supra* note 28, at 407 ("Giving the trial judge the ability to impose a financial sanction directly against the offending lawyer greatly increases the likelihood that appropriate discovery will be provided.").

232. Courts have upheld extreme sanctions against the defense for violating discovery rules. See, e.g., *Taylor v. Illinois*, 484 U.S. 400 (1988) (upholding the trial court's preclusion of a defense witness as a sanction for late disclosure of the identity of the witness, stating that the accused is bound by the actions of defense counsel). If the Court is willing to find that late disclosure of discovery can outweigh the defendant's right to present a defense, similar sanctions should be considered for prosecutors for similar conduct.

Third, discovery rules should provide for early defense access to information.<sup>233</sup> Every good investigator knows the importance of early investigation because witnesses can disappear, memories fade, and physical evidence is likely to be lost or destroyed. The greater the delay in providing information to the accused, the less likely that further investigation will reveal evidence that bears on the reliability of the state's case. Mr. Williams' case is an example of how delay in disclosure can result in the loss of highly relevant evidence. Late access to impeachment evidence, such as prior statements of witnesses, similarly diminishes the likelihood that the fact finder will be in a position to make reliable determinations of guilt or innocence. In addition, imposing early disclosure requirements can help change the mindset of some police and prosecutors that last-minute disclosures of inculpatory evidence are legitimate in criminal prosecutions.<sup>234</sup>

Police reports should be made available to defense counsel at the defendant's first court appearance, as some jurisdictions currently require.<sup>235</sup> Those reports are readily available to the prosecution from

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233. See Uphoff, *supra* note 28, at 397 (“[D]iscovery procedures must, above all, facilitate the prompt and fair resolution of cases and ensure quick and easy access to information with as little need for judicial intervention as possible.”).

234. See Fisher, *supra* note 11. Fisher tells the story of Marvin Mitchell, who spent eight years in prison for rape before DNA tests led to his freedom. *Id.* at 20. Shortly before trial, police officers produced an oral statement of the defendant in which he allegedly had admitted, on the day of his arrest, to wearing pink pants on the day of the rape. *Id.* at 66 n.292. The victim had described the perpetrator as wearing pinkish pants. *Id.* at 20, 67. The trial court allowed the police to testify to this alleged admission, despite its “suspicious eleventh-hour” disclosure and its absence from any police reports about the case. *Id.* at 67. Many experienced defense counsel can recount more than one instance of the surprise inculpatory evidence that comes out at trial. In a case in which I was counsel in Boston, the prosecutor agreed before trial to a diversion that would not result in a conviction. The underlying police report did not provide strong evidence of guilt. On the date set for trial of the codefendants, one of the police witnesses discussed my client with one of my colleagues and told her that he and his fellow officers would have “filled in the gaps” had my client gone to trial.

235. See, e.g., MASS. DIST. & MUN. CT. R. CRIM. P. 2, 3 (2005); ARIZ. R. CRIM. P. 15.1(a) (2006) (requiring disclosure in felony cases of the following reports within the possession of the attorney filing the charge, at the time of filing: original and supplemental law enforcement reports, reports of scientific tests and experiments, and reports of experts). Disclosure must be made at the earlier of the arraignment or the preliminary hearing. ARIZ. R. CRIM. P. 15.1(a) The Comments to the rule note that the amendment to 15.1(a) “recognizes the defense attorney’s need for basic information early in the process in order to meaningfully confer with the client and make appropriate strategic decisions. The former rule . . . did not require disclosure until after arraignment had occurred.” *Id.* R. 15.1(a) cmt. In contrast, the federal rules and the rules of some states specifically exempt police reports from discovery by the defense. See, e.g., FED. R. CRIM. P. 16(a)(2) (making clear that the rule governing discovery of prosecution evidence does not “authorize the inspection of reports, memoranda, or other internal government

the outset because they generally serve as the basis for the initiation of the prosecution.<sup>236</sup> Access to police reports should not be conditioned on waiver of some other avenue of discovery, such as the preliminary hearing. Supplemental police reports should be provided to counsel as they are created. Early disclosure of investigative reports, including police reports and witness statements, would facilitate prompt investigation by counsel.

Discovery should also be provided before the time for entering a plea.<sup>237</sup> This would afford defense counsel the greatest opportunity for additional investigation of the facts, at a time when investigation is likely to be the most valuable. Because most cases resolve by a plea, rules that require disclosure only within a specific time before trial do not provide for timely access to evidence highly relevant to the plea and sentencing. There should also be mechanisms for counsel to seek further discovery. Finally, the rules should require that discovery should be completed before a trial date is set.<sup>238</sup>

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documents made by . . . any other government agent in connection with investigating or prosecuting the case”).

236. See discussion *supra* pp. 549-52; see also Am. Coll. of Trial Lawyers, *supra* note 57, at 117 (making a similar argument for early disclosure of information favorable to the defendant). The authors note that in federal prosecutions the government has far more time to investigate its cases, and far more investigative resources. Am. Coll. of Trial Lawyers, *supra* note 57, at 117. Thus, by the time of indictment, “the government has concluded most of its investigation and is in a position to disclose any information known to be exculpatory or mitigating for the defendant.” *Id.*

237. See, e.g., MASS. DIST. & MUN. CT. R. CRIM. P. 3(c) (2005) (setting out the prosecutor’s obligations to disclose information prior to a plea deadline and sanctions for failure to do so); ARIZ. R. CRIM. P. 15.8 (2006) (requiring prosecutors to fulfill their extensive discovery obligations under ARIZ. R. CRIM. P. 15.1 at least 30 days prior to a plea deadline). Rule 15.8 further provides that if the prosecutor fails to do so,

the court, upon motion of the defendant, shall consider the impact of the failure to provide such disclosure on the defendant’s decision to accept or reject a plea offer. If the court determines that the prosecutor’s failure to provide such disclosure materially impacted the defendant’s decision, and the prosecutor declines to reinstate the lapsed plea offer, the presumptive minimum sanction shall be preclusion from admission at trial of any evidence not disclosed at least 30 days prior to the deadline.

*Id.* There have been calls for adopting a similar provision in the federal rules, particular in light of the Court’s decision in *United States v. Ruiz*, 536 U.S. 622 (2002). See Am. Coll. of Trial Lawyers, *supra* note 57, at 120 (proposing an amendment that would require disclosure of favorable information fourteen days prior to a plea).

238. Rules in some jurisdictions currently require that discovery be provided “within a reasonable time before trial.” See, e.g., WIS. STAT. § 971.31(1) (2005-2006). This leaves too much discretion in the hands of the prosecution as to the timing of the disclosures. In addition, it may deprive defense counsel of the opportunity to make effective use of the information, to conduct further investigation based on the information, or to seek additional information through further discovery. Once a trial

B. *Specific Provisions for Discoverable Evidence*

With these basic principles in mind, it is possible to suggest specific discovery rules that will further them. As a starting point, we should consider making an open file policy mandatory.<sup>239</sup> A policy that requires prosecutors to provide the defense with all unprivileged information<sup>240</sup> known to the prosecution or persons acting on behalf of the prosecution would serve to equalize the disclosure of information among all defendants.<sup>241</sup> Further, it would avoid the debates over, and possible erroneous judgment calls about whether particular information falls within the definition of material exculpatory evidence or some legislatively created discovery category.<sup>242</sup> It would remove much of the uncertainty inherent in the discretionary disclosure decisions prosecutors now have to make.

Some argue that an open file policy is a low-cost step in the right direction, but that it does not go far enough because revealing the contents of a prosecutor's file does not provide information that is not

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date is set, courts typically are reluctant to grant continuances to counsel. In contrast, other jurisdictions require completion of discovery before a trial date is set. *See, e.g.*, MASS. R. CRIM. P. 11(c) (2005) (providing for a discovery compliance date if discovery was not completed by the time of the pretrial hearing, and allowing for the selection of a trial date once compliance is completed). Specific recognition that discovery should be completed before a trial is scheduled would alleviate the burden on defense counsel to justify the need for more time to prepare.

239. *See, e.g.*, Victor Bass, Comment, *Brady v. Maryland and the Prosecutor's Duty to Disclose*, 40 U. CHI. L. REV. 112, 113 (1972) ("The prosecutor's entire file should, except in special cases, be open to defense inspection."); Uphoff, *supra* note 28, at 404-05 (proposing enactment of legislation mandating an open-file policy in Oklahoma as the most cost-effective step the legislature could take); *see also* THE CONSTITUTION PROJECT, MANDATORY JUSTICE: EIGHTEEN REFORMS TO THE DEATH PENALTY 47 (2001), available at <http://constitutionproject.org/pdf/MandatoryJustice/pdf> (advocating for a prophylactic open file policy); Roberts, *supra* note 52, at 1104 (same); Graham *supra* note 217, at 342 (same).

240. For example, the prosecutor's work product could be exempt, pursuant to a clear definition of what is and is not work product. *See, e.g.*, *Commonwealth v. Bing Sial Liang*, 747 N.E.2d. 112, 140 (Mass. 2001) (holding that a victim witness advocate's notes of complainant interview were protected as work product except for "witness statements" contained in the notes).

241. *See* Sarokin & Zuckerman, *supra* note 78, at 1107 (noting that "the fact that many prosecutors choose to open their files to opposing counsel raises the additional issue of equal protection").

242. *See* discussion *supra* pp. 563-72 (regarding the problems inherent in vesting in the prosecutor the power to determine what constitutes exculpatory evidence that must be disclosed); *see also* Am. Coll. of Trial Lawyers, *supra* note 57, at 115 ("Without a clear definition of what constitutes *Brady* material, prosecutors have exercised a hodgepodge of judgments about the nature and extent of favorable information to be disclosed to defendants.").

recorded in some fashion and delivered or otherwise conveyed to the prosecution.<sup>243</sup> Indeed, an open file policy might encourage some to not reduce their knowledge to writing.<sup>244</sup> In Mr. Williams' case, an open file policy would not have revealed the eyewitness evidence, which was in the possession of the police but not written down, and not in the prosecutor's file.

Second, an alternative or additional approach, and one that is already used in some jurisdictions, is to make disclosure of some information mandatory by the prosecution and not dependent upon a motion by the defense.<sup>245</sup> This approach has numerous advantages. First, provisions of discovery would be more uniform and not dependent on the identity of the counsel or the resources of the defendant.<sup>246</sup> Defendants with less zealous or overburdened and minimally compensated appointed counsel would be at less of a disadvantage in contrast to defendants who have counsel with greater resources or

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243. See Am. Coll. of Trial Lawyers, *supra* note 57, at 118. ("Open file cases do not cure *Brady-Giglio* problems. In particular, they do not compel prosecutors to either consult with law enforcement agents about the nature or existence of information favorable to the accused, or to disclose in writing favorable evidence that has not been memorialized."); see also Graham, *supra* note 217, at 342-43 (pointing out inadequacies of open file policies in the context of prosecution evidence at the sentencing phase of capital cases).

244. See Roberts, *supra* note 52, at 1154 n.262 ("[E]ven under a rule of open file discovery the ability to adequately investigate would turn in part on the extent to which the prosecution exercised diligence and good faith in seeking out information early in the case, and in turning over information as it is acquired.").

245. See, e.g., MASS. R. CRIM. P. 14(a)(1)(A) (2005) (making mandatory discovery automatic).

246. See Uphoff, *supra* note 28, at 402. Uphoff examines discovery procedures in a jurisdiction where indigent defendants are largely represented by private contract attorneys. *Id.* He concludes that "because the contract system being used creates an economic disincentive for those lawyers to hire investigators, it is questionable that the overall quality and zeal of indigent defense representation has been significantly improved under the Indigent Defense System." *Id.* at 402 n.110. In this context, Uphoff writes that "the more formalized criminal discovery becomes the less likely it will be utilized effectively by counsel representing the indigent or near-indigent defendant. Making discovery more difficult or more expensive to obtain increases the gap in the quality of representation provided wealthy and indigent defendants." *Id.* at 400; see also Brown, *supra* note 16, at 1624. Brown describes the advantages of broad discovery, particularly where defense attorneys are constrained by limited resources, and argues that broader discovery should improve both the quantity and quality of evidence available to the defense because it provides the opportunity for "adversarial double-checking of the state's case" that is lacking where there are both limited resources for the defense and restrictive discovery. *Id.*

zeal.<sup>247</sup> Second, automatic mandatory discovery would eliminate obstacles to obtaining information that can operate to deny timely discovery to the defense, such as busy dockets and limited time to prepare for trial.<sup>248</sup> Third, it would reduce the amount of time the parties, the court, and the defendant need to spend on discovery matters, leaving the court to resolve issues that are in dispute.<sup>249</sup>

Improved discovery schemes should also provide that the defense receive discovery from the prosecution before being required to disclose information to the prosecution.<sup>250</sup> The prosecution has investigative advantages from the outset. In addition to having superior resources, the prosecution has already conducted an investigation before the charges were filed. Requiring the defendant to disclose evidence at the same time as the prosecution implicitly assumes that the defendant has comparable knowledge about what evidence he or she will present. Such a rule ignores the possibility that the defense needs to first investigate the state's evidence to know how to defend against the charges. If the defendant is innocent, he or she does not know what the state purports to know. Until the defendant has the opportunity to evaluate the state's evidence and to conduct investigation based on that evidence, he or she

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247. See Uphoff, *supra* note 28, at 407 (“[T]he simple step of mandating that a prosecutor’s file be open should improve the performance of some defense lawyers . . .”).

248. Cf. Uphoff, *supra* note 28, at 389 (describing the practice in a particular county in Oklahoma). As Uphoff writes,

In view of the fact that trials in Cleveland County are set three to four weeks after the sounding docket [referring to the first court date after the defendant’s initial appearance], defendants have little time to obtain their discovery order, receive the requested discovery, respond to the prosecution’s motion for discovery and finalize trial preparation—all at least ten days before trial or risk serious sanctions for noncompliance.

*Id.*; see also Roberts, *supra* note 52, at 1134 (describing how in New York the defendant receives discovery at a pretrial hearing that takes place shortly before trial).

249. Massachusetts, for example, recently amended its criminal discovery rules to require mandatory disclosure of: all exculpatory evidence; the written or recorded statements of a defendant and any codefendant; the substance of oral statements of a defendant and any codefendant; grand jury testimony of witnesses; names, addresses and dates of birth of prospective witnesses (the probation department is to provide the criminal record of the defendant and the witnesses); names and addresses of police witnesses; intended expert opinion evidence (other than for criminal responsibility), including the identity of experts, the experts’ current resumes, and a list of publications and reports; police reports, photographs, tangible objects, exhibits, results of scientific tests and experiments, and statements of witnesses to be called at trial; a summary of identification procedures and statements of or made in the presence of identifying witnesses; and information regarding any promises, inducements, and rewards made to any witness. MASS. R. CRIM. P. 14(a)(1)(A) (2005).

250. See, e.g., MASS. R. CRIM. P. 14(a)(1)(B).

cannot make informed decisions about what he or she will present as a defense—and thus what reciprocal discovery should be provided to the prosecution.

Third, discovery rules should articulate the obligations of the prosecutor in clear terms. Specific articulation of disclosure obligations makes nondisclosure based on ignorance less likely and provides greater guidance to prosecutors as to what is required of them.<sup>251</sup> To begin with, discovery rules should specifically set out the responsibility of prosecutors to disclose information in their possession, custody, and control, and make clear what being in the custody, control, or possession of the prosecution means.<sup>252</sup> Rules governing specific content of evidence to be disclosed should specify that the enumerated categories are not an exhaustive list. Discovery rules should make clear that a prosecutor has an affirmative duty to inquire of any person acting on the prosecutor's behalf as to the existence of any favorable information or information that is otherwise required to be disclosed.<sup>253</sup> This would incorporate the holding of *Kyles v. Whitley*<sup>254</sup> and reduce the incidence of “don't ask, don't tell practices” that encourage willful ignorance of relevant evidence.

The prosecutor's responsibility to inform the defense about what other persons know should not be limited to “information favorable to

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251. See Am. Coll. of Trial Lawyers, *supra* note 57, at 101. In support of their proposal to codify *Brady v. Maryland*, the authors write:

Codification . . . will help federal prosecutors and law enforcement officers to better understand the disclosure responsibility, instill far greater confidence that this constitutional obligation is being uniformly satisfied, and, above all, work to ensure that wrongful convictions and unlawful sentences do not occur. Because the prosecutor alone can know what is undisclosed, he is faced with serious and potentially conflicting responsibilities: to decide whether information is exculpatory, and, if so, whether and when it should be disclosed to the accused. A rule of criminal procedure would provide welcome guidance in carrying out these responsibilities, and would thereby help to ensure fair trials and sentencing.

*Id.*

252. See, e.g., MASS. R. CRIM. P. 14(a)(1)(A); see also Am. Coll. of Trial Lawyers, *supra* note 57, at 111 (proposing an amendment to FED R. CRIM. P. 16 that would require disclosure of information favorable to the defendant that “is known to the attorneys for the government or to any government agent(s), law enforcement officers or others who have acted as investigators from any federal, state or local agencies who have participated in either the investigation or prosecution of the events underlying the crimes charged”).

253. See MO. R. CRIM. P. 25.03(C) (2006) (imposing an obligation on the prosecutor to make efforts to obtain information from other government personnel); see also MASS. R. CRIM. P. 14(a)(1)(E) (describing the obligation of a prosecutor regarding physical evidence not in his or her possession, custody, or control).

254. 514 U.S. 419 (1995).

the accused,” nor to narrow categories of information. For example, the rules should specifically require the prosecution to disclose the names and addresses of any persons known by the State to have knowledge about the case, whether or not the prosecution intends to use such persons to testify.<sup>255</sup> It should also be made clear that the police have the obligation to inform the prosecutor of such information. Had this been required in Massachusetts at the time of Mr. Williams’ case, it is likely that defense counsel would have learned of the existence of the eyewitnesses at a point when they could have been located.

The rules should also define the obligations of the prosecutor to obtain information from, or about, witnesses other than law enforcement officers, including information bearing on their credibility.<sup>256</sup> The prosecution generally is far more likely to have the means to obtain information from their own laywitnesses, particularly information that has either not been reduced to writing or that does not fall within specific categories of information to be disclosed.<sup>257</sup>

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255. *See* *Richie v. Beasley*, 837 P.2d 479, 480 (Okla. Crim. App. 1992). New Jersey discovery rules explicitly require the prosecutor to disclose “all persons whom the prosecutor knows to have relevant evidence or information.” N.J. Ct. R. 3:13-3(c)(6); *see also* FLA. R. CRIM. P. 3.220(b)(1)(A) (2005) (providing that if the defendant elects to participate in discovery, the prosecution, within fifteen days of service of a notice of discovery, shall provide to the defense a list of names and addresses of all persons known to the prosecution 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).

256. Certain kinds of impeachment evidence are readily within the knowledge, possession, custody, or control of the prosecutor or his or her agents. For example, prosecutors are, or should be, aware of any inducements made to witnesses for their testimony, including those made by law enforcement, and of the prior criminal records of those witnesses. Rules in some jurisdictions specifically require disclosure of these types of impeachment evidence. *See, e.g.*, MASS. R. CRIM. P. 14(a)(1)(A)(ix), (requiring disclosure of rewards, promises, and inducements); MASS. R. CRIM. P. 14(a)(1)(A)(iv) & (D) (requiring mandatory disclosure to the defendant of the names, addresses and dates of birth of prospective witnesses—other than law enforcement—and requiring the probation department to provide the defense with the criminal record of the defendant and of all witnesses so identified by the prosecution).

257. Discovery rules generally do not address whether the prosecutors’ discovery obligations extend to information they could obtain from prosecution witnesses but that is not already within their knowledge or possession. Information that does not fall within typical discovery categories and thus is unlikely to come to light without inquiry from the prosecutor includes evidence bearing on the witness’ credibility, including the witness’ ability to perceive, recall, or remember, and any physical or mental health impairments. Prosecutors generally have greater access to their witnesses and greater powers of persuasion to elicit information from those witnesses than do defense attorneys. In two decades of criminal practice in Massachusetts, I engaged in or witnessed debates about whether the prosecutor should affirmatively ask lay witnesses (as well as police officers) for relevant information not already known to the prosecutor. Limiting discovery obligations to what prosecutors already know encourages them to

In light of the long-term confusion among many people regarding the meaning of “exculpatory evidence,” improved discovery rules should provide a specific and broadly conceived definition of “exculpatory evidence” that must be disclosed to the defense.<sup>258</sup> It is possible to define “exculpatory evidence” in a way that is clear and useful to all parties. For example, the federal district court in Boston, Massachusetts has adopted local rules for discovery in criminal cases that provide comprehensive elaborations on what the prosecution must provide to the defense as “tending to negate guilt or mitigate punishment.”<sup>259</sup>

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limit their inquiries to evidence that supports their cases. Arizona criminal discovery rules take a limited step in the direction of requiring the prosecution to inquire about matters not within its possession or control. The comments to ARIZ. R. CRIM. P. 15.1(f), outlining the duties of prosecutors to obtain information, note that while prosecutors are not generally required to obtain information from victims or other lay witnesses, the court has the authority to “order the prosecutor to obtain and disclose information and materials covered by Rule 15.1(a) that is not within the possession and control of the state if “(1)the state has better access to the information; (2) the defense shows that it has made a good faith effort to obtain the information without success; and (3) the information has been specifically requested by the defense.”

258. See Am. Coll. of Trial Lawyers, *supra* note 57, at 111. The authors propose amendments to Rule 16 of the Federal Rules of Criminal Procedure that would provide some definition of what favorable information should be disclosed to the defense, as well as when and by what means such information should be disclosed. *Id.* Similarly, their proposal for amendment to Rule 11 would mandate disclosure of such evidence prior to the entry of a guilty plea. *Id.* at 120. The proposals were designed to “ensure the timely, fair, and consistent application of *Brady v. Maryland.*” *Id.* at 122. Some states have moved in this direction. See, e.g., MASS. R. CRIM. P. 14(a)(1)(A)(iv), (a)(1)(A)(ix) & (a)(1)(D).

259. D. MASS. LOCAL R. 116.2. Rule 116.2 broadly defines exculpatory evidence as including, but not being limited to “all information that is material and favorable to the accused” because it “casts doubt” on the defendant’s guilt of an essential element of the offense or on the admissibility, credibility, or accuracy of evidence to be offered in the government’s case-in-chief, or diminishes “the degree of the defendant’s culpability or the defendant’s Offense Level under the United States Sentencing Guidelines.” *Id.* Within the specified time frames, the government must provide the following regarding witnesses or evidence it intends to offer in its case-in-chief: information as to whether “any promise, reward, or inducement has been given to any witness” and a copy of any such evidence reduced to writing; the criminal record of witnesses and a written description of any pending criminal cases against those witnesses; a written description “of the failure of any percipient witness identified by name to make a positive identification of a defendant”; “any information that tends to cast doubt” on the credibility or accuracy of any witness or evidence; inconsistent statements of a witness regarding the “alleged criminal conduct of the defendant”; “information reflecting bias or prejudice” of a witness; information “known to the government of any mental or physical impairment of any witness whom the government anticipates calling in its case-in-chief, that may cast doubt on the ability of that witness to testify accurately or truthfully”; and a written description of prior acts of the witness that might be admissible. *Id.* The rule requires disclosure of exculpatory rebuttal evidence by the end of the defense case. *Id.*

Finally, there should be mechanisms for allowing inquiry into information that has not been reduced to writing, as well as for facilitating more in-depth discovery of matters reduced to writing. In most jurisdictions, witnesses, including police officers, do not have to talk to defense counsel or a defense investigator.<sup>260</sup> In practice, they may be actively encouraged not to do so, though this is regarded as unlawful and unethical.<sup>261</sup> If the evidence, here the nonwritten information, that counsel seeks in investigating the case cannot be compelled, and if it does not fit into the categories subject to discovery under the particular discovery rules of the jurisdiction, the defendant cannot discover the evidence. In Mr. Williams' case, his lawyer had no way to compel answers from the officers about other suspects or other witnesses.<sup>262</sup> Because the officers did not make a written record of any of the information they had learned about the eyewitnesses, the undisclosed information arguably did not fall into any of the narrowly defined discovery categories requiring disclosure, unless the information was exculpatory and therefore required to be disclosed under *Brady*.

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260. See MASS. GEN. LAWS ch. 258B, § 3(m) (granting to victims the right to be informed of the right "to submit to or decline an interview by defense counsel or anyone acting on the defendant's behalf, except when responding to lawful process, and, if the victim or witness decides to submit to an interview, the right to impose reasonable conditions on the conduct of the interview").

261. See, e.g., *Commonwealth v. Balliro*, 209 N.E.2d 308 (Mass. 1965). In *Balliro*, the prosecutor held several people in custody as material witnesses, instructed the jail to deny any access to the witnesses, and denied defense requests to interview the witnesses. *Id.* at 310. The trial court denied defense counsel's motion for access to the witnesses for the purpose of interviewing them. *Id.* Finding the denial of the defense motion to be in error and violative of the state constitutional guarantee of the right to present a defense, the Supreme Judicial Court held that "[w]itnesses belong neither to the Commonwealth nor to the defense. They are not partisans and should be available to both parties in the preparation of their cases." *Id.* at 315. In some jurisdictions, the discovery rules specifically prohibit counsel from preventing their witnesses from speaking to opposing counsel or their investigators. See, e.g., VT. R. CRIM. P. 16.2(a) (2004). Professional rules of conduct have similar provisions. See, e.g., ABA STANDARDS FOR CRIMINAL JUSTICE: DISCOVERY AND TRIAL BY JURY Standard 11-6.3 (3d ed. 1996).

262. The only mechanisms for compelling the officers to disclose further information were the cross-examination of the officers at the probable cause hearing (where the prosecutor successfully objected to this line of inquiry) and through discovery motions specifically asking for information about specified topics (such as the names of any eyewitnesses). Due to the piecemeal and time-consuming nature of the motion process, counsel did not obtain more details about the undisclosed information until it was too late to locate the witnesses. In addition, in most cases counsel would not have the benefit of the fortuitous hints of additional information that the officers casually dropped to counsel, and thus would not be aware of the need for insisting on such discovery.

If information is not reduced to writing, even an open file policy or mandatory discovery rules will likely not result in disclosure. In the past, preliminary or probable cause hearings provided some access in those jurisdictions that recognized discovery as a legitimate purpose of the hearing.<sup>263</sup> Even then, those hearings did not reveal all sources of relevant evidence because the prosecution was not required to present all of its witnesses and thus was able to select what evidence could be subject to discovery. The opportunity for a preliminary hearing that allows significant discovery of the state's case has become increasingly rare. In addition, preliminary hearings often occur at the beginning of a prosecution and before other information, like the names of all witnesses, is available.<sup>264</sup> Thus, defense counsel will not necessarily know what to further investigate.

One potential mechanism for gaining access to such information would be the use of depositions in criminal cases. Depositions of witnesses provide a mechanism for discovering information that is not recorded, not voluntarily disclosed, and not covered by the discovery rules.<sup>265</sup> Depositions allow questioning of prosecution and defense witnesses,<sup>266</sup> other than the defendant,<sup>267</sup> for the specific purpose of

263. See Uphoff, *supra* note 28, at 382-83 ("In felony cases, the preliminary hearing also could be used to gain a fairly detailed look at much of the State's case.").

264. See *supra* notes 133-36 for a discussion of preliminary hearings.

265. More than forty years ago, Justice Brennan argued that defense lawyers need the authority to take discovery depositions to offset trial advantages of the prosecution. Brennan, *supra* note 139.

266. See VT. R. CRIM. P. 15(a) ("A defendant or the state, at any time after the filing of the indictment or information charging a felony . . . may take the deposition of a witness . . ."); N.D. R. CRIM. P. RULE 15(a) ("[A]ny party may take the testimony of any person by deposition . . ."). Missouri allows a defendant "in any criminal case pending in any court" to "obtain the deposition of any person on oral examination or written questions," while permitting the state to conduct oral depositions of any person. MO. R. CRIM. P. 25.12(a), 25.15. In Texas, depositions are available to the defendant only. TEX. CODE CRIM. PROC. ANN. art. 39.02 (Vernon 2005). Iowa differentiates between depositions by the defense and depositions by the State. "A defendant in a criminal case may depose all witnesses listed by the state on the indictment or information or notice of additional witnesses . . ." IOWA R. CRIM. P. 2.13(1). The State may object to the deposition on the grounds that "the witness (a) is a foundation witness or (b) has been adequately examined on preliminary hearing." *Id.* In ruling on the State's objection, the court is to determine "whether discovery of the witness is necessary in the interest of justice." *Id.* Prior to a defense deposition, the defendant must file a written list of witnesses the defense expects to call at trial, and the state can depose the witnesses listed by the defense. IOWA R. CRIM. P. 2.13(3). The rule does not provide a basis for defense objections to deposing defense witnesses.

267. See, e.g., VT. R. CRIM. P. 15(d)(1) (2004) ("[I]n no event shall a deposition be taken of a party defendant without his consent . . ."); N.D. R. CRIM. P. 15(a)(1) (2006) ("The defendant may not be deposed unless the defendant consents and the defendant's lawyer . . . is present or the defendant waived the lawyer's presence."); N.H. REV. STAT.

discovering information. Several states currently allow discovery depositions in criminal cases, including Iowa, Missouri, New Hampshire, Florida, North Dakota, Vermont, Texas, and Arizona (in limited circumstances).<sup>268</sup> In some of these states, depositions are permitted only in felony cases;<sup>269</sup> others either allow depositions in “any criminal case”<sup>270</sup> or in both felony and more serious misdemeanor cases.<sup>271</sup> Depositions in these states supplement other forms of discovery.<sup>272</sup>

In some of these jurisdictions, discovery depositions are a matter of right; counsel is not required to obtain prior court authorization. In

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ANN. § 517:13(II) (2005). (“The court in its discretion may permit either party to take the deposition of any witness, except the defendant, in any criminal case . . .”).

268. IOWA R. CRIM. P. 2.13; MO. R. CRIM. P. 25.12; N.H. REV. STAT. ANN. § 517:13 (2005); FLA. R. CRIM. P. 3.220(h) (2006); N.D. R. CRIM. P. 15; VT. R. CRIM. P. 15; TEX. CODE CRIM. PROC. ANN. art. 39.02 (Vernon 2005); ARIZ. R. CRIM. P. 15.3 (requiring the party requesting permission to take a deposition to show that the proposed deponent’s testimony is material or necessary to prepare a defense, that the deponent did not testify at a preliminary hearing, and that he or she will not cooperate in granting a personal interview).

269. See VT. R. CRIM. P. 15(a). While Vermont used to permit depositions in misdemeanor cases as of right, the current rule permits depositions in misdemeanor cases only by agreement of the parties or after court approval for good cause. VT. R. CRIM. P. 15(e)(4) (stating that in evaluating whether good cause has been shown, the court “may consider, among other things, the consequences to the defendant, the importance of the witness’s testimony, the complexity of the issues involved, the complexity of the witness’s expected testimony (e.g., experts) and any other opportunities available to the defendant to discover the information sought by the deposition”).

270. See MO. R. CRIM. P. 25.12(a), 25.15(a), 25.01; IOWA R. CRIM. P. 2.13(1). North Dakota and Texas do not limit depositions to only felony cases, although Texas requires prior court approval for any deposition. See N.D. R. CRIM. P. 15(a); TEX. CODE CRIM. PROC. ANN. art. 39.02. In practice, it is likely that depositions in misdemeanor cases are less common in jurisdictions requiring prior court approval for any deposition.

271. See, e.g., NEB. REV. STAT. ANN. § 29-1917(1) (LexisNexis 2005) (permitting depositions for felonies and Class W misdemeanors); FLA. R. CRIM. P. 3.220(h)(1)(D) (prohibiting depositions in misdemeanor and traffic cases “when all other discovery provided by this rule has been complied with unless good cause can be shown”).

272. The discovery rules in these states are consistent with rules in many other jurisdictions. If anything, these states’ discovery rules tend toward liberal discovery. Thus, depositions are not a substitute for other means of discovery. Depositions need not be used in every case to obtain adequate discovery because other avenues of discovery may be sufficient. Some of these jurisdictions specifically combine discovery of prior witness statements with the taking of the deposition. See, e.g., VT. R. CRIM. P. 15(d)(1) (“The state shall make available to the defendant or his counsel for examination and use at the taking of the deposition any relevant written or recorded statement of the witness being deposed which is in the possession or control of the state and to which the defendant would be entitled at trial.”); ARIZ. R. CRIM. P. 15.3(d) (stating that where a discovery deposition is allowed, “[a]ny statement of the witness being deposed which is in the possession of any party shall be made available for examination and use at the taking of the deposition to any party who would be entitled to it at trial.”).

North Dakota, for example, the rules provide that at any time after the defendant has appeared, any party may take the testimony of any person by deposition, except the defendant, unless he or she and defense counsel consent.<sup>273</sup> In others, such as Texas, Nebraska, and New Hampshire, the defendant must make a showing of the need for the deposition.<sup>274</sup> Florida and Vermont allow depositions of certain kinds of witnesses as of right and of other kinds of witnesses only upon agreement of the parties or with court approval.<sup>275</sup> Iowa allows, as of right, the depositions of prosecution witnesses listed on charging documents or witness lists and of witnesses the defense intends to call at trial, but requires court approval for depositions of any other person.<sup>276</sup> Most

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273. N.D. R. CRIM. P. 15(a).

274. In Texas, a defendant is entitled to depose a witness only after a successful application for a judicial determination of “good reason” for the deposition. TEX. CODE CRIM. PROC. ANN. art. 39.02 (Vernon 2005). In Nebraska, the prosecutor or the defendant may request the court to allow a deposition “of any person other than the defendant who may be a witness in the trial of the offense.” NEB. REV. STAT. ANN. § 29-1917(1) (LexisNexis 2005). The court may order a deposition “when it finds the testimony of the witness: (a) May be material or relevant to the issue to be determined at the trial of the offense; or (b) May be of assistance to the parties in the preparation of their respective cases.” *Id.* In New Hampshire, either party has the right to depose the other party’s expert witnesses, but must seek prior court approval for depositions of any other kind of witness. N.H. REV. STAT. ANN. § 517:13(II) & (III) (2005). In the latter case, the court must find by a preponderance of the evidence that the deposition is necessary “to ensure a fair trial, avoid surprise or for other good cause shown. In determining the necessity, the court shall consider the complexity of the issues involved, other opportunities or information available to discover the information sought by deposition, and any other special or exceptional circumstances . . . .” *Id.* § 517:13(II)(b).

275. Depositions of the following witnesses do not require prior court approval in Florida: eyewitnesses, alibi and alibi rebuttal witnesses, investigating officers, *Brady* witnesses, child hearsay witnesses, certain expert witnesses, and persons who were present when a statement was taken from or made by the defendant or a codefendant. Prior court approval of a deposition is required for prosecution witnesses whom the State does not intend to call at trial and whose involvement is set forth in a written report, as well as other witnesses who do not fall in the first category. FLA. R. CRIM. P. 3.220(h)(1)(A). In Vermont, a party is entitled to depose the witness without agreement of the other party or leave of the court, with some exceptions. Law enforcement officers cannot be deposed without agreement of the parties or approval of the court for “good cause shown” if they: (a) performed only a “ministerial function” or will not be called to testify; (b) their involvement in the case is “fully set out in a police report or other statement prepared by the law enforcement officer and furnished to the defense”; and (c) the officer has been made available “for a recorded in-person or telephonic interview.” VT. R. CRIM. P. 15(e)(3). Court approval or the agreement of the parties, the victim, and the proposed deponent is also required for depositions of medical and social service agency workers who provided aid to the victim “subsequent to the initial interview . . . by law enforcement officers, who have not participated in the criminal investigation, and who will not testify at trial or other hearing . . . .” *Id.* R. 15(g).

276. See IOWA R. CRIM. P. 2.13(2) (allowing either the defendant or the state to apply for court permission to depose a “prospective witness not included in rule 2.13(1)

criminal deposition rules provide that the parties may agree to a deposition, notwithstanding the other provisions regulating depositions.<sup>277</sup>

The scope of the questioning permitted during criminal depositions is typically quite broad. In some states, the permissible range of questioning is comparable to what is allowed in civil depositions.<sup>278</sup> For example, the scope of the questioning allowed in criminal depositions in Missouri is defined as “any question reasonably calculated to lead to the discovery of admissible evidence.”<sup>279</sup>

Deposition schemes have taken two different approaches in addressing whether the defendant may be present during depositions of state witnesses. The first approach is to treat the presence of the defendant as the exception, rather than the rule. In Vermont, Missouri, and Florida, for example, a defendant must obtain the consent of the State or approval of the court upon a showing of good cause before he or she can be physically present at a deposition of a prosecution witness.<sup>280</sup>

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or 2.13(3), for use at trial” and for the production of documentary evidence at the deposition, if there are “special circumstances” and the deposition is in the “interests of justice”). Special circumstances may be found only from “a showing of necessity arising from either . . . (1) The information sought by way of deposition cannot adequately be obtained by a bill of particulars or voluntary statements. (2) Other just cause necessitating the taking of the deposition.” *Id.* R. 2.13(2)(a).

277. *See, e.g.*, VT. R. CRIM. P. 15(1) (providing that depositions by agreement are not precluded by any of the other provisions of the deposition rule).

278. *See, e.g.*, FLA. R. CRIM. P. 3.220(h)(1).

[T]he scope of the examination, and the issuance of a subpoena (except a subpoena duces tecum) for deposition by an attorney of record in the action, shall be the same as that provided in the Florida Rules of Civil Procedure. Any deposition taken pursuant to this rule may be used by any party for the purpose of contradicting or impeaching the testimony of the deponent as a witness.

*Id.*; *see also* VT. R. CRIM. P. 15(d)(1). While the Vermont rule provides that “the scope and manner of examination and cross-examination shall be such as would be allowed in the trial itself,” the comments to the rule point out that there are no restrictions that the deposition be for use at trial, and assert that the rule provides a broad test of relevance that recognizes the discovery purposes of the rule. *Id.* R. 15(d)(1) cmt.

279. MO. ANN. STAT. 56.01(b)(1) (West 2006).

280. VT. R. CRIM. P. 15 (b); MO. R. CRIM. P. 25.12 (2006) (allowing the defense to move the court to order the physical presence of the defendant based upon a showing of good cause). Under the Missouri rule, the court should consider:

(1) The need for the physical presence of the defendant to obtain effective discovery; (2) The effect of the defendant's presence on the witness, if any; and (3) Any available use of screening or alternative methods of taping or recording that would allow the defendant limited observation of the witness and the ability to confer with counsel.

MO. R. CRIM. P. 25.12; *see also* FLA. R. CRIM. P. 3.220 (h)(7).

The Vermont rule provides that good cause is shown if the deposition is likely to be used as substantive evidence at trial.<sup>281</sup> In other situations, the court should weigh the defendant's need to be present to assist counsel against the potential trauma to the deponent.<sup>282</sup>

The other approach is to allow the defendant to be present unless there are special circumstances.<sup>283</sup> To address concerns about potentially vulnerable witnesses, such as in cases involving children or allegations of domestic violence, the rules for the taking of such depositions may impose additional limitations.<sup>284</sup> Generally, there are also generally provisions for seeking protective orders from the court in instances where the deponent can show that the deposition would embarrass, harass, or harm the deponent or would cause "undue burden or expense."<sup>285</sup>

Allowing depositions in criminal cases would address some of the deficits of open file policies and of even the most liberal discovery rules. First, depositions provide an important opportunity to question investigating officers directly<sup>286</sup> and to learn about their investigations. Investigating officers cannot readily avoid disclosure of relevant

281. VT. R. CRIM. P. 15(b).

282. See VT. R. CRIM. P. 15 cmt.

283. See, e.g., N.D. R. CRIM. P. 15(f)(1).

284. See, e.g., VT. R. CRIM. P. 15(f)(1) (allowing for the presence of an attorney for any deponent and also a victim advocate for a victim of an alleged crime); *Id.* R. 15(f)(2) (requiring agreement as to time, place, manner, and scope of deposition for a person under sixteen years old or for any victim of specified crimes, including sexual assault.); N.H. REV. STAT. ANN. § 517.13 (2005) (prohibiting discovery depositions of victim or witness under sixteen years old at time of the deposition); NEB. REV. STAT. ANN. § 29-1926(1)(a) (allowing deposition of child victim or child witness in a felony case upon a showing of compelling need; the deposition ordinarily is in lieu of courtroom testimony by the child); IOWA R. CRIM. P. 2.13(2)(b) (allowing for a deposition of a child victim or child witness for use at trial and special physical arrangements for the deposition); FLA. R. CRIM. P. 3.220 (h)(1) (creating a presumption of videotaping depositions for children under sixteen).

285. See, e.g., N.D. R. CRIM. P., Rule 15(4).

[U]pon motion of a party or of the deponent and upon a showing that the taking of the deposition does or will unreasonably annoy, embarrass, or oppress, or cause undue burden or expense to, the deponent or a party, the court . . . may order that the deposition not be taken or continued or may limit the scope and manner of its taking.

*Id.*

286. Police officers are subject to being deposed. The Florida deposition rule specially provides for their cooperation in a deposition. "[L]aw enforcement officers shall appear for deposition without subpoena upon written notice of taking deposition. . . . Law enforcement officers who fail to appear for deposition after being served are subject to contempt proceedings." FLA. R. CRIM. P. 3.220(h)(5).

evidence in a deposition.<sup>287</sup> Depositions would provide the best opportunity for the defense to learn about evidence pointing to another suspect, as in Mr. Williams' case.<sup>288</sup> In Mr. Williams' case, a deposition of the investigating officers would have revealed the existence of the eyewitnesses, the means to locate them, and the content of their observations.<sup>289</sup> Thus, counsel could have obtained this important information at a time when the eyewitnesses could have been located.

Second, depositions provide an opportunity to discover evidence that is not known to the police or to the prosecution, but that may be highly relevant to the case against the defendant. For example, a witness may have more information than he or she initially conveyed to police investigators, or may reveal bias, fabrication, or honest mistakes upon further questioning. Because reevaluation of the evidence or further investigation by the state is often quite limited after the initiation of the prosecution, depositions provide an opportunity for the prosecution, as well as the defense, to learn more about the state's case. Previously undetected or unobserved weaknesses in the prosecution's proof may come to light. If the state finds that it cannot have confidence in its witnesses, for example, the prosecutor may decide to terminate the prosecution, amend the charges to more accurately correspond to the evidence, or revise its plea offer.

Objections to criminal depositions are primarily those of cost and abuse of witnesses.<sup>290</sup> Additional arguments include that they are not constitutionally required and not necessary because discovery is otherwise sufficiently available.<sup>291</sup> Often, however, little factual basis is provided for such objections. More importantly, these arguments ignore the significant truth-seeking value of criminal depositions. If accuracy is a goal of the criminal justice system, these costs are justified.

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287. See, e.g., Brown, *supra* note 16, at 1623 n.139.

288. Evidence pointing to other suspects may be withheld for any number of reasons, including deliberately suppressing evidence that undermines the case against the defendant and discarding relevant evidence because of tunnel vision. See, e.g., Findley & Scott, *supra* note 14, at 299-304 (describing the case of Steven Avery and how law enforcement in the prosecuting jurisdiction failed to investigate, and failed to reveal to the defense, the evidence a neighboring police department possessed concerning a different suspect, who was determined more than fifteen years later to be the actual perpetrator).

289. While it is always possible that the officers, like other witnesses, may be untruthful in a deposition, the fact that they are under oath and on record makes continuing efforts to withhold information less likely.

290. See, e.g., John F. Yetter, *Discovery Depositions in Florida Criminal Proceedings: Should They Survive?*, 16 FLA. ST. U. L. REV. 675, 675 (1988).

291. See, e.g., *id.* at 685.

The burden is not as heavy as some critics suggest. For example, Florida has had criminal depositions for forty years.<sup>292</sup> During those years, various reviews of the deposition rules have been undertaken, the most recent by a commission created by the Florida Supreme Court and comprised of representatives from the law enforcement community, prosecutors, public and private criminal defense counsel, victims' rights organizations, and the judiciary.<sup>293</sup> The Criminal Discovery Commission submitted its report in 1989.<sup>294</sup> As a member of the Commission reported, "The Commission's primary finding was that although discovery depositions are 'not required as a matter of right under the federal or state constitutions, [they] make a unique and significant contribution to a fair and economically efficient determination of factual issues in the criminal process.'"<sup>295</sup> Criminal discovery depositions, the Commission concluded, "should be retained as part of Florida's Criminal Justice process and should not be abolished or significantly curtailed."<sup>296</sup>

#### CONCLUSION

The more we learn about the incidence of wrongful convictions, the less it makes sense to deprive a defendant of access to relevant evidence. We can no longer justify a lopsided, state-sanctioned criminal justice system that allows the prosecution to control access to evidence relevant to innocence, degree of guilt, and appropriate punishment. We know that the traditional assumptions about the adversary system—that the parties are essentially balanced in power and that the truth will emerge in the contest between them—are simply not true in a significant number of cases.

If formal and informal discovery mechanisms operate based on the assumption that the defense should have access to all of the relevant evidence, we are more likely to achieve reliable results in criminal cases. Rather than providing incentives for gamesmanship, a system of full criminal discovery enhances the ability of the prosecutor to "do justice" and of defense counsel to fulfill his or her ethical duty to investigate, as is essential to effective representation. Undoubtedly, not every discovery mechanism suggested in this Article needs to be utilized in every case. The point is, however, that the accused—perhaps an innocent man or woman—should have a choice. He or she must have the means to

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292. *Id.* at 680-81.

293. *Id.* at 676.

294. *Id.* at 695.

295. *Id.* (alteration in original).

296. *Id.*

discover, scrutinize, and investigate the evidence the state relies upon to say that he or she is guilty beyond a reasonable doubt. Some steps toward full discovery can be readily taken, with little increased financial burden on existing institutions. The reforms suggested in this Article, including criminal depositions, have been undertaken in some jurisdictions. They are achievable. If there is a commitment to make them work, these reforms would enhance our confidence in the accuracy of outcomes of criminal cases.