

# Discovery

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*Rules of pretrial evidence disclosure vary widely in state criminal justice systems. In all states, discovery is more restricted than it is in civil litigation. In a substantial minority of states, it remains dramatically restricted. That is in part a relic of the common law tradition when it was assumed most cases would be resolved by trial. But trials are now rare; nearly all convictions are the result of a plea bargain. The pretrial stage is the only place in which adversarial process operates and in which parties can evaluate evidence. Most states have adopted broader discovery rules in light of this reality, because disclosure failures have led to wrongful convictions, and because experience shows that risks related to certain disclosures are easily managed. The primary agenda for discovery reform in state criminal justice is to persuade those states that still adhere to outdated disclosure policies to join the majority of their peers and require more evidence to be exchanged between prosecutors and defense attorneys prior to plea bargaining.*

## INTRODUCTION

At common law and in U.S. jurisdictions until the 20th century, no rules obligated prosecutors and criminal defendants to disclose anything to each other before trial. As a formal matter, the rules assumed that criminal litigation was ordinarily a *trial* process, rather than what it has been for well over a century—a pretrial process that is usually resolved by a guilty plea. The traditional notion behind the adversarial trial process is that neither party is obliged to forewarn the other of the witnesses or evidence they would present at trial, or otherwise to assist the opponent's preparation. This model came

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to be criticized as “trial by surprise” (or “by ambush”), a process that treated adjudication more as a secretive “poker game” or competitive “sporting contest” than a well-designed search for truth.<sup>1</sup>

All U.S. criminal justice systems (and those in other common law countries) have moved away from this old model to some degree. All now require the parties to make at least some modest disclosures of certain kinds of evidence before trial. But discovery rules remain remarkably diverse across 50 state jurisdictions and the federal courts. There is nothing close to a standard American model of pretrial criminal discovery. There is, however, a distinct *trend* toward requiring much more pretrial disclosure in criminal litigation. The consistency of this trend, and the seemingly random group of jurisdictions that resist it, suggest that reasons for holding on to narrow-discovery regimes have less to do with the merits and costs of broader regimes and more to do with status-quo bias—the appeal of the familiar—as well as the idiosyncrasies of state politics and reform processes. Arguments for and against broad discovery have barely changed for several decades. But evidence to *settle* those arguments, provided by decades of experience in a large and diverse group of state justice systems, has steadily accumulated.

The most serious arguments against broad discovery relate to risks of witness intimidation, victim privacy, and the need for secrecy in ongoing criminal investigations that involve covert surveillance or undercover operatives. These risks are serious, but they are realistic concerns only for certain kinds of criminal cases, which make up a relatively small part of state criminal dockets. (These risks loom larger for federal court prosecutions.) State criminal justice systems with broad-discovery rules have found ways to manage those risks while also requiring prosecutors to disclose their evidence against a defendant. Largely, they do so by carving out exceptions to disclosure when justified in particular cases. The collective experience of these broad-discovery states decisively undercuts arguments for the traditional model of limited discovery. The narrow-disclosure rules that remain in some states are remnants of an earlier era, one with weaker standards of fairness for how the

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1. See, e.g., *Williams v. Florida*, 399 U.S. 78, 82, 117 n.12 (1970) (citing William J. Brennan, Jr., *The Criminal Prosecution: Sporting Event or Quest for Truth?*, 1963 WASH. U. L.Q. 279) (“The adversary system of trial is hardly an end in itself; it is not yet a poker game in which players enjoy an absolute right always to conceal their cards until played.”); *id.* at 106 (Burger, C.J., concurring) (praising “an enlarged and truly reciprocal pretrial disclosure of evidence” as a “move away from the ‘sporting contest’ idea of criminal justice”). Chief Justice Burger frequently referenced “the evil ‘sporting contest’ theory of criminal justice,” most commonly to criticize recognition of expanded defense rights as contributing to it. See *Batson v. Kentucky*, 476 U.S. 79, 131 (1986) (Burger, C.J., dissenting).

state treats its citizens and one in which policymakers could still pretend that evidence in most cases would eventually be disclosed at trial. Modern notions of fair play are stronger, and vanishingly few criminal cases now go to trial.<sup>2</sup> As a result, adversarial justice systems in most states (as well as in other common law countries such as England and Canada) require parties to disclose some types of evidence—sometimes nearly all of which they are aware—to each other before trial. The rationale is not only to reduce “trial by surprise” but also to enable more accurate and fair resolution of criminal charges without trial. When “plea bargaining ... *is* the criminal justice system,”<sup>3</sup> the adversarial scrutiny of evidence that formerly occurred in public trials must take place instead in the pretrial stage. Unless the defense can assess and “confront” the state’s evidence, judgments resulting from guilty pleas are too likely to turn on something other than evidence and adversarial process. More specifically, they will turn on the judgments of executive branch officials without meaningful checks or balances from either defense attorneys or judges. As a matter of principle and prudence, that is wrong.<sup>4</sup>

While broad-disclosure requirements facilitate the shift of traditional adversarial process to the pretrial stage, narrow-discovery rules have the effect of reinforcing executive-branch power in a justice system in which prosecutors rarely face the scrutiny of defense lawyers, judges, and jurors. Minimal disclosure requirements give prosecutors the power to decide what evidence they will disclose before trial. Combined with their power to pressure defendants to plead guilty, that gives them considerable power to determine how much adversarial scrutiny their evidence will face, and how much the plea-bargain negotiations will be based on parties’ mutual knowledge of the evidence.<sup>5</sup> Many prosecutors routinely share more evidence than the rules require, but these voluntary disclosure practices vary widely according to the preference of the local prosecutor, and they are based not only on prosecutors’ assessments

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2. Reasons for the steady increase in plea bargaining over the last forty years (from a longstanding baseline in which a majority of cases were resolved by guilty pleas) don’t merit attention here, but they include the evolution of rules by courts and legislatures, and tactics by prosecutors, to make plea bargaining more successful and trials easier to avoid.

3. *Missouri v. Frye*, 566 U.S. 133, 144 (2012) (internal quotation marks omitted) (quoting Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 *YALE L.J.* 1909, 1912 (1992)).

4. Even if guilty defendants presumably know the critical facts of whether they “did it,” the government, due to its greater investigative authority and capacity, nearly always knows much more about the evidence than the defense. The U.S. Supreme Court has acknowledged “the State’s inherent information-gathering advantages,” which “suggest that if there is to be any imbalance in discovery rights, it should work in the defendant’s favor.” *Wardius v. Oregon*, 412 U.S. 470, 476 n.9 (1973).

5. For a discussion of plea bargaining, see Jenia I. Turner, “Plea Bargaining,” in the present Volume.

of threats to witnesses or undercover operations but also on their calculations of tactical advantages to be gained from disclosure or concealment. Broad-discovery rules, by contrast, do more than dictate many of these disclosure decisions; many of them also shift judgments about whether nondisclosure is justified in particular cases from prosecutors to *judges*.<sup>6</sup> Broad-disclosure systems are built on the twin premises now universally accepted for civil litigation. First, when conducted by parties who are well prepared in advance to confront all evidence, trials are more likely to produce accurate judgments than “trial by surprise.” Second, negotiated settlements are better substitutes for trial judgments when both parties have access to the evidentiary record. Negotiated dispositions are more likely to be accurate and fair when the checks and balances of adversarial process can operate in this pretrial stage.<sup>7</sup>

Few defenders of limited discovery any longer justify nondisclosure by arguing for the superior fact-finding virtues of “trial by surprise.” The arguments instead point to a familiar set of concerns from government disclosure—defendants might intimidate witnesses, harass victims, fabricate rebuttal evidence, and frustrate ongoing investigations. In light of the slow but steady march of state criminal justice systems toward broader pretrial disclosure, however, these concerns seem to retain their persuasive power mostly to those who practice in minimal-disclosure regimes and must rely mostly on their speculation about how these risks are managed under broader rules with which they have no experience. That pattern of resistance suggests that status-quo bias, rather than evidence-based policymaking, account for the holdouts against broader discovery laws.

## I. DESCRIPTION OF EXISTING LAW AND POLICY

### A. EVIDENCE CATEGORIES AND CONSTITUTIONAL DISCLOSURE RULES

Criminal disclosure rules distinguish between three categories of evidence: (1) evidence in the government’s possession that prosecutors *do* plan to use at trial—that is, incriminating evidence; (2) government evidence that prosecutors do *not* intend to use at trial, some of which is material and favorable to the

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6. See, e.g., TEX. CODE CRIM. PROC. ANN. art. 39.14(c) (state must inform defense of any non-disclosure, and upon a defense request the judge must determine whether non-disclosure is justified).

7. Chief Justice Burger stressed this point in *Williams v. Florida*, 399 U.S. 78, 105-06 (1970) (Burger, C.J., concurring) (“I see an added benefit to the ‘notice of alibi’ rule in that it will serve important functions by way of disposing of cases without trial in appropriate circumstances—a matter of considerable importance when courts, prosecution offices, and legal aid and defender agencies are vastly overworked.”).

defense, and some of which may seem to have no obvious value to either party; and (3) evidence in possession of the defense.

### 1. Evidence favoring the government's case

The minority of jurisdictions that adhere to narrow-disclosure statutes require little disclosure of the first type, in accord with common law and constitutional traditions. The principle that “there is no general constitutional right to discovery in a criminal case” refers in particular to this kind of evidence—government evidence that suggests the defendant’s guilt.<sup>8</sup> Debates about discovery rules center mostly on this first category—what incriminating (or non-exonerating) evidence the government should give defendants access to before trial.

### 2. Evidence not favoring the government's case

Two types of evidence in the second category—that which is in the government’s possession but that it does not intend to use at trial—are regulated quite differently. First, according to *Brady v. Maryland* and its progeny, constitutional due process requires prosecutors to disclose any evidence that favors the accused, either because it is exculpatory in its own right or because it impeaches the credibility of the government’s evidence.<sup>9</sup> The prosecution has an affirmative duty to search for, obtain, and disclose *Brady* material that is in the possession of police and other agencies working on the government’s behalf.<sup>10</sup> This duty is limited in two respects. In effect, prosecutors need only

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8. *Weatherford v. Bursey*, 429 U.S. 545, 559 (1977); *see also 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. . . .”); *Pennsylvania v. Ritchie*, 480 U.S. 39, 59-60 (1987) (finding that defendant’s right to discovery does not include the unsupervised authority to search through the government’s files); *United States v. Bagley*, 473 U.S. 667, 675 (1985) (“[T]he prosecutor is not required to deliver his entire file to defense counsel, but only to disclose evidence favorable to the accused that, if suppressed, would deprive the defendant of a fair trial.”).

9. *Brady v. Maryland*, 373 U.S. 83, 87 (1963) (stating that “suppression by the prosecution of evidence favorable to an accused . . . violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution”); *Giglio v. United States*, 405 U.S. 150, 154 (1972) (holding that prosecutors must disclose material that tends to impeach the credibility of government witnesses); *United States v. Bagley*, 473 U.S. 667, 682 (1985) (holding that *Brady* evidence is “material” if there is a “reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different,” where a reasonable probability is “a probability sufficient to undermine confidence in the outcome.”); *accord United States v. Agurs*, 427 U.S. 97, 104 (1976) (“[M]aterial *Brady* evidence is that which might have affected the outcome of the trial.”); *Pennsylvania v. Ritchie*, 480 U.S. 39, 59-60 (1987) (prosecutor’s *Brady* obligation continues throughout proceedings). The *Brady* disclosure duty is not excused by prosecutors’ good faith or inadvertence.

10. *Kyles v. Whitley*, 514 U.S. 419, 437-38 (1995).

disclose such evidence if it is “material,” meaning likely to change the trial outcome or sentence.<sup>11</sup> In addition, because *Brady* disclosure is “a right that the Constitution provides as part of its basic ‘fair trial’ guarantee,” the Supreme Court has concluded the Constitution does not require prosecutors to make disclosures *before* trial, nor before the parties enter a plea agreement.<sup>12</sup> Some jurisdictions reiterate the *Brady* disclosure duty in statutes or court orders, and some modestly expand it by requiring prosecutors to turn over not only all “material” evidence but evidence that, for example, “may be favorable” to the defense or that “tends to negate” guilt or “to reduce the punishment.”<sup>13</sup>

The other type of evidence state officials possess—evidence they will not plan to use at trial—is generally of uncertain value. The U.S. Constitution requires only that police and prosecutors not destroy such evidence in “bad faith.”<sup>14</sup> A number of state statutes go further and require prosecutors to alert the defendant to all evidence or persons with knowledge “concerning the offense charged.” As noted below, this duty appears in some of the broadest state discovery laws.

### 3. Defense evidence

The federal Constitution requires no defense disclosures, but it permits statutes that compel defendants to disclose virtually any evidence they possess—save for compelled testimony—as long as “reciprocal” disclosure

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

12. *United States v. Ruiz*, 536 U.S. 622, 628-29 (2002). By comparison, discovery law in the United Kingdom followed a different path. Prosecutors were first required to share their inculpatory trial evidence; disclosure of exculpatory evidence followed later, prompted by wrongful conviction scandals in which officials withheld such evidence.

13. See, e.g., TEX. CODE CRIM. PROC. ANN. art. 39.14(h) (“tends to negate”); IDAHO R. CRIM. P. 16(a) (“would tend to negate”); D. VT. LOCAL R. CRIM. P. 16(a)(2) (“may be favorable”). For a discussion, see Daniel S. McConkie, *Structuring Pre-Plea Discovery*, 107 J. CRIM. L. & CRIMINOLOGY 1 (2017).

14. *Arizona v. Youngblood*, 488 U.S. 51 (1988); *California v. Trombetta*, 467 U.S. 479 (1984).

duties apply to prosecutors.<sup>15</sup> Under statutes or court rules, defendants may have to disclose their intended trial witnesses and affirmative defenses; to submit to mental exams and lineup identification procedures; or to provide blood, handwriting, and other samples for analysis. In short, defendants can be required to do almost anything to assist prosecutors' pretrial evidence preparation short of giving "testimonial" statements compelled by subpoena or post-arrest interrogation.<sup>16</sup> The first statutory disclosure duties mandated these kinds of defense disclosures. States required defendants to give advance notice of intent to use alibi evidence and other defenses as early as the 1920s.<sup>17</sup>

### B. STATUTORY DISCLOSURE RULES

Aside from constitutional duties defined by *Brady*, most disclosure law resides in statutes, procedural rules, and court orders. The critical points of disagreement tend to be the following, all of which are recommended in the most recent ABA standards for criminal discovery:<sup>18</sup>

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15. *Wardius v. Oregon*, 412 U.S. 470, 475-76 (1973) (striking down state requirement that defendants give notice of alibi defense without reciprocal disclosures required from the state, because "in the absence of a strong showing of state interest to the contrary, discovery must be a two-way street."); *id.* at 475:

The state may not insist that trials be run as a "search for truth" so far as defense witnesses are concerned, while maintaining "poker game" secrecy for its own witnesses. It is fundamentally unfair to require a defendant to divulge the details of the defendant's own case while at the same time subjecting him or her to the hazard of surprise concerning refutation of the very pieces of evidence which he or she disclosed to the state.

*See also* *Williams v. Florida*, 399 U.S. 78, 81, 83-86, 117 n.17 (1970) (approving defense disclosure requirement that is "carefully hedged with reciprocal duties requiring state disclosure to the defendant"); *Schmerber v. California*, 384 U.S. 757, 760-65 (1966) (finding that a compelled blood test does not violate privilege against self-incrimination).

16. *See, e.g.,* *Miranda v. Arizona*, 384 U.S. 436 (1966) (statements of defendants in-custody interrogation are admissible only if defendant was informed of rights to remain silent and consult with an attorney); *Massiah v. United States*, 377 U.S. 201 (1964) (government cannot elicit statements from defendants after Sixth Amendment right to trial counsel attaches). Despite limits on compelled, uncounseled testimony, law enforcement nonetheless has steady success eliciting voluntary statements from defendants.

17. Michigan's requirements of notice for alibi and insanity defenses, now codified at MICH. COMP. LAWS §§ 768.20 & 768.20(a), were enacted by statute in 1927. *See* 1927 Mich. Pub. Acts No. 175, ch.8, § 20 (effective Sept. 5, 1927) (cited in Mark A. Esqueda, *Michigan Strives to Balance the Adversarial Process and Seek the Truth With Its New Reciprocal Criminal Discovery Rule*, 74 U. DET. MERCY L. REV. 317, 329 n.80 (1997)).

18. AM. BAR ASS'N, STANDARDS FOR CRIMINAL JUSTICE: DISCOVERY AND TRIAL BY JURY (3d ed. 1996).

1. whether the parties are required to disclose in advance of trial the identities of their non-expert trial witnesses, as well as those witnesses' prior statements, criminal records, and contact information;
2. whether the government must disclose not only its planned trial witnesses but also "all persons ... known to have information concerning the offense charged,"<sup>19</sup> along with those persons' statements, regardless of whether they will be prosecution witnesses;
3. whether additional disclosure extends beyond persons-with-knowledge to all documents and tangible evidence that "pertains" to the case;
4. whether rules specify the government must disclose any relationship with its witnesses, such as pending charges or the terms of cooperation agreements—this information should be disclosed under *Brady/Bagley*, but some states clarify these duties with regard to fraught sources such as jailhouse informants,<sup>20</sup> or to reduce disputes about whether such information is "material";
5. how much information must be disclosed regarding experts' qualifications and the substance of their expected testimony;
6. whether defendants receive codefendant statements regardless of whether they are joined for trial; and
7. which details, if any, regarding investigation sources and personnel involved in evidence-gathering, to facilitate motions to suppress.<sup>21</sup>

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19. FLA. R. CRIM. P. 3.220(b)(1)(A); *see also* ALASKA R. CRIM. P. 16(b)(1)(A)(i); N.J. CT. R. 3:13-3(b)(1)(F).

20. FLA. R. CRIM. P. 3.220(b)(1)(M)(i)-(v) (requiring disclosure of, *inter alia*, "the informant witness's prior history of cooperation, in return for any benefit, as known to the prosecutor"); NEB. REV. STAT. § 29-1912(1)(h)-(k) (criminal history, law enforcement agreements, and prior prosecution testimony of "jailhouse witness").

21. *See e.g.*, ALASKA R. CRIM. P. 16(b)(2); MASS. R. CRIM. P. 14(a)(1)(A)(viii); MD. R. CRIM. P. 4-263(a)(2); FLA. R. CRIM. P. 3.220(b)(A)(I).



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### C. DIFFERENCES IN STATE DISCOVERY RULES

Fifteen states and the federal courts define the narrowest approach.<sup>22</sup> States in this group, which include New York, Utah, and Virginia, generally follow the federal model and have rules or statutes that require very little in the above categories—not even disclosure of witness names before trial.<sup>23</sup> A few of them have laws that go beyond the federal rule on a few points. Georgia’s discovery statute, for example, requires witnesses to be disclosed to counsel only (i.e., not to the defendant) and only if defendants opt in to reciprocal disclosure obligations by requesting disclosures from prosecutors. (Even so, it makes no mention of disclosing witnesses’ criminal histories or cooperation agreements.)

By contrast, at the other end of the spectrum, six states—including some of the largest, such as Florida and New Jersey—have regimes of very broad discovery that include most or all of these requirements, especially notice of intended trial witnesses and information about sources of evidence the state does not intend to use.<sup>24</sup> New Jersey, for example, requires informing defendants about “any persons whom the prosecutor knows to have relevant evidence or information.”<sup>25</sup> North Carolina requires prosecutors to share “any other matter or evidence obtained during the investigation of the offenses alleged to have been committed by the defendant.”<sup>26</sup>

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22. ALA. R. CRIM. P. 16.1–16.5; DEL. SUPER. CT. CRIM. R. 16; D.C. SUPER. CT. CRIM. R. 12.1, 12.2, 16; FED. R. CRIM. P. 16; GA. CODE ANN. §§ 17-16-1 to -10; IOWA R. CRIM. P. 2.14; KAN. STAT. ANN. §§ 22-3212, 22-3218 to -3220; KY. R. CRIM. P. 7.24; LA. CODE CRIM. PROC. ANN. art. 716–729.6; N.Y. CRIM. PROC. LAW §§ 240.60–90, 250.10–40; R.I. SUPER. R. CRIM. P. 12, 16; S.C. R. CRIM. P. 5; S.D. CODIFIED LAWS §§ 23a-9-1, 23a-10-1, 23a-13-1; TENN. R. CRIM. P. 12.1–12.3, 16; UTAH R. CRIM. P. 15, 16; VA. SUP. CT. R. 3A:11; WYO. R. CRIM. P. 12.1–12.3, 16. Subject to some updates, additions, and reclassifications added here, this classification of state discovery laws and the those that follow can be found at WAYNE R. LAFAVE ET AL., 5 CRIMINAL PROCEDURE § 20.2(b) nn.10, 17, 33-36 (4th ed. 2016).

23. Some federal courts, however, require pretrial disclosure of witnesses as a matter of local court rules, a standing court order, or court orders in specific cases. *See* McConkie, *supra* note 13 (collecting and discussing such local rules and orders). Some state courts may do the same.

24. ALASKA R. CRIM. P. 16; FLA. R. CRIM. P. 3.220; MINN. R. CRIM. P. 9.01–9.05; N.J. CT. R. 3:13-3, 3:13-4; N.C. GEN. STAT. ANN. §§ 15A-902 to 15A-910. Indiana codifies some disclosure rules in state statutes, but most discovery obligations are defined by local court rules, which are generally very broad. *See* IND. CODE ANN. §§ 35-36-2, 35-36-4 (notice of defenses); *id.* § 35-36-11-2 (notice to introduce forensic evidence); *id.* § 35-37-4-3; IND. R. TRIAL PROC. 30 (civil deposition rules apply to criminal cases); IND. VANDERBURGH SUPER. CT. CRIM. R. 2.04 (prosecutor and “law enforcement agencies which are involved in the case shall produce to the defense attorney the entire case file, including a list of all evidence held,” but defense attorney must keep some witness identifying information confidential).

25. N.J. CT. R. 3:13-3(b)(1)(F).

26. N.C. GEN. STAT. ANN. § 15A-903(a)(1)a.

The remaining states can be described as adopting intermediate types of disclosure rules. Seven states require modestly more disclosure than the federal rule; all require at least disclosure of trial witnesses.<sup>27</sup> The rest—the largest group, comprised of nearly half the states—impose still broader disclosure standards, generally including prior statements and criminal records of intended trial witnesses.<sup>28</sup> Among the states with broader discovery, five even allow defendants to take pretrial witness depositions on nearly the same terms that civil litigants do (although sometimes without the defendant present), and others allow depositions upon a somewhat generous standard of good cause, such as a witness’s refusal to grant a voluntary interview.<sup>29</sup>

Beyond these substantive differences, states differ in how exchanges of evidence are administered and how discovery disputes are settled. One division follows from how jurisdictions allocate responsibility for the scope of disclosures between prosecutors and judges. Although parties handle most discovery issues everywhere, generally the states with broad-discovery rules give judges a somewhat greater role. To get an exception to a disclosure obligation, prosecutors in these states often need judicial permission; alternately, they can withhold evidence initially and judges can then review the nondisclosure to confirm it is justified by circumstances such as threats to witness safety.<sup>30</sup> These states also tend to give judges explicit discretionary authority to expand

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27. ARK. R. CRIM. P. 17.1–19.7; ARK. CODE ANN. § 16-89-116; CONN. PRAC. BOOK §§ 40-1 to 40-43; MASS. R. CRIM. P. 14; NEB. REV. STAT. §§ 29-1912 to 29-1927; NEV. REV. STAT. §§ 171.1965, 174.233 to 174.235; PA. R. CRIM. P. 567–573 (witness names disclosed only at discretion of court upon showing by defense); W.VA. R. CRIM. P. 12.1, 12.2, 16.

28. ARIZ. R. CRIM. P. 15.1–15.9; CAL. PENAL CODE §§ 1054.1–1054.9; COLO. R. CRIM. P. 16; HAW. R. PENAL P. 12.1, 16; IDAHO R. CRIM. P. 12.1 & 16; ILL. SUP. CT. R. 412-415; 725 ILL. COMP. STAT. ANN. 5/114-13; ME. R. CRIM. P. 16; MD. R. CRIM. P. 4-262, 4-263; MICH. CT. R. 6.201; MICH. COMP. LAWS ANN. §§ 767.40a, 767.94a, 768.20, 768.21, 768.21b, 768.27a; MISS. URCCC 9.04–.07; MO. R. CRIM. P. 25; MONT. CODE ANN. §§ 46-15-322 to 46-15-329; N.H. R. SUPER. CT. 98, 99-a; N.M. DIST. CT. R. CRIM. P. 5-501, 5-502; N.D. R. CRIM. P. 12.1, 12.2, 16; OHIO R. CRIM. P. 12.1 & 16; OKLA. STAT. ANN. tit. 22, § 22-2002; OR. REV. STAT. §§ 135.815–135.845; TEX. CODE CRIM. PROC. ANN. art. 39.14, 39.15; VT. R. CRIM. P. 12.1, 16; WASH. SUPER. CT. CRIM. R. 4.7; WIS. STAT. ANN. § 971.23.

29. See FLA. R. CRIM. P. 3.220(h)(7); IND. CODE § 35-37-4-3; IND. R. TRIAL PROC. 30; IOWA R. CRIM. P. 2.13(2); MO. SUP. CT. R. CRIM. P. 25.12(c), 25.15; VT. R. CRIM. P. 15; see also ARIZ. R. CRIM. P. 15.3(a) (deposition allowed if testimony is “material” and witness “will not cooperate in granting a personal interview”); ARIZ. R. CRIM. P. 39(b)(8)-(11) (victim’s right to refuse an interview or a deposition with defense, or to have support persons present).

30. See, e.g., TEX. CODE CRIM. PROC. ANN. art. 39.14(c); UTAH R. CRIM. P. 16(b)(9)(A)(3), 16(b)(9)(B) (defense can seek review of prosecution’s redactions of digital media evidence); CAL. PENAL CODE § 1054.7.

discovery requirements.<sup>31</sup> In states with minimal disclosure duties, by contrast, prosecutors alone generally decide whether to disclose more than the minimum the rules require, and defendants usually have no right to seek a judicial order that dictates otherwise. Virginia, a state with very limited disclosure provisions, authorizes judges to “deny, restrict, or defer” discovery but not to expand discovery obligations beyond what the statute provides.<sup>32</sup> But in some narrow-disclosure jurisdictions, judges have some authority to increase disclosure duties, at least as to timing.<sup>33</sup>

Discovery laws vary in other administrative respects as well. Some state statutes require disclosure from prosecutors or both parties even without a party request.<sup>34</sup> More often, disclosure is contingent on the opposing party making a formal request for it.<sup>35</sup> A few states require both that parties file motions for discovery and that courts grant the request.<sup>36</sup> Perhaps the most important difference among these options is that making disclosure contingent upon defense requests creates the possibility that defendants will not receive information from prosecutors because of their attorneys’ negligence or poor judgment.

Details about timing differ as well. Some require prosecution disclosures as soon as an indictment is returned, or as soon as practical after the charge is filed or after a defense request. Some specify a deadline measured in the number of days after a charge is filed or after the defendant’s arraignment. Others set a deadline of 10 to 30 days before trial. This choice matters because early disclosure is necessary for well-informed negotiations about guilty pleas, which is how nearly all cases are resolved. Rules that mandate disclosure only a few days before trial reflect the outdated assumption that the purpose of disclosure is to prepare for trial, which in most cases never happens.

Presumably, these differences have effects on how prosecutors and defense attorneys actually handle criminal cases, but there is an important reason that law-on-the-books is not the same as law-in-practice. In apparently every state, disclosure obligations can be waived by defendants and prosecutors can

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31. See, e.g., UTAH R. CRIM. P. 16(b)(10) (“Upon motion of the defendant showing substantial need ... for additional material or information not otherwise covered by this Rule 16(b), ... the court in its discretion may order the additional material or information to be made available to the defendant.”).

32. VA. R. SUP. CT. 3A:11(f).

33. See McConkie, *supra* note 13 (citing examples of federal judge orders that expand on Federal Rule 16 disclosure duties).

34. See, e.g., CAL. PENAL CODE §§ 1054.1 & 1054.3; N.J. CT. R. 3:13-3(a)-(b).

35. See, e.g., TEX. CODE CRIM. PROC. ANN. art. 39.14; FLA. R. CRIM. P. 3.220(a) (requires “notice of discovery”).

36. See, e.g., VA. R. SUP. CT. R. 3A:11.

encourage those waivers. That means, absent trial judges' insistence otherwise, disclosure ultimately is a matter of party negotiation rather than legislative policy. Nonetheless, there is good evidence that state rules make a difference in what is disclosed. Prosecutors in broad-discovery states disclose more than their counterparts in narrow-disclosure states, and those same prosecutors disclose more after their states impose broader disclosure obligations than they did under rules that are more limited.<sup>37</sup>

## II. REVIEW OF TRADITIONAL ARGUMENTS

Since the Federal Rules of Civil Procedure adopted a revolutionary and influential model of broad pretrial discovery in 1938, lawyers and policymakers have debated whether, and to what degree, criminal discovery rules should be reformed in the same direction. The Federal Rules of Criminal Procedure, adopted in 1944, were dramatically narrower than their civil counterparts were, and for decades they influenced rule-makers in state justice systems to stick with similarly minimal duties. As noted above, more than a dozen states still do. But gradually, over decades, most states have departed from that model and expanded their disclosure obligations.

The key issues in debates about criminal discovery reform have been remarkably consistent. The same arguments that justify civil discovery support broader pretrial criminal disclosure as well. Parties will settle more cases when both know the evidence before trial. More importantly, they will negotiate outcomes that are more accurate because both are well informed about the evidence. The consensus is now strong that disclosure improves accuracy.

Several states adopted broader discovery rules in the wake of wrongful convictions that greater disclosure likely would have prevented.<sup>38</sup> Few any longer claim that “trial by surprise” is a plausible way to optimize truth-finding and achieve accurate judgments. And fairness arguments for broad disclosure are even stronger in the criminal than the civil context: the state should not treat

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37. See Jenia I. Turner & Allison Redlich, *Two Models of Pre-Plea Discovery in Criminal Cases: An Empirical Comparison*, 73 WASH. & LEE L. REV. 285 (2016) (survey data finding North Carolina prosecutors disclose more than Virginia prosecutors); TEX. CRIM. DEF. LAW. ASS'N, *THE COST OF COMPLIANCE: A LOOK AT THE FISCAL IMPACT AND PROCESS CHANGES OF THE MICHAEL MORTON ACT* (2015) (reporting differences in disclosure before and after 2014 statutory reform); Jenia I. Turner, *Judicial Participation in Plea Negotiations: A Comparative View*, 54 AM. J. COMP. L. 199, 245, 249, 260 (2006) (describing practices under broad-discovery rules in Florida and Connecticut).

38. Texas is one example. For a description of the wrongful conviction motivating reform there, see Gerald S. Reamey, *The Truth Might Set You Free: How the Michael Morton Act Could Fundamentally Change Texas Criminal Discovery, or Not*, 48 TEX. TECH L. REV. 893 (2016).

trials as a “sporting contest,” nor should it “ambush” unprepared defendants. Disclosure provides some balance in light of the state’s advantages in investigation and evidence-gathering.<sup>39</sup> Advocates point to one other advantage as well. Greater limits on disclosure overall require prosecutors to make difficult judgments about the nature or value of evidence to the defense. Constitutional disclosure duties under *Brady* pose these challenges: prosecutors must sort out evidence that is “exculpatory” or “material”—determining evidentiary value before trial and sometimes without knowledge of other evidence that affects value. That difficulty has played a role in innumerable *Brady* violations, surely in part because the duty calls on prosecutors to think *against* their adversarial role—that is, to think whether an item would help the defense attorney.<sup>40</sup> Broad-discovery rules reduce this problem through two kinds of changes. One is to require prosecutors to disclose all evidence of a certain type—material or not, whether favorable to the defense or the state. The other is to transfer some decisions about disclosure to the *judge*, who does not have the same adversarial bias. Broad-discovery rules often require judges to approve specific nondisclosures based on some special risk such as witness safety. Narrow-discovery regimes leave these judgments in prosecutors’ hands by requiring no disclosures and letting prosecutors share information whenever they choose to voluntarily. Collectively, these arguments have persuaded a majority of state criminal justice systems to expand their pretrial-disclosure requirements.

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39 Two of the most prominent mid-century arguments in favor of broader criminal discovery were made by two of the most influential U.S. jurists of the twentieth century, William Brennan and Roger Traynor. See Brennan, *supra* note 1; Roger J. Traynor, *Ground Lost & Found in Criminal Discovery*, 39 N.Y.U. L. REV. 228 (1964).

40. Prosecutors face challenges even in making judgments about mandatory disclosures. Miriam Baer has insightfully described how decisions to disclose exculpatory evidence can grow more difficult as litigation progresses. A prosecutor who recognizes exculpatory evidence early on will be more willing to disclose it if not dismiss the case in which she has so far invested little. But disclosure judgments become psychologically more challenging as litigation progresses and prosecutors invest more in the case. See Miriam Baer, *Timing Brady*, 115 COLUM. L. REV. 1 (2015); see also John G. Douglass, *Balancing Hearsay and Criminal Discovery*, 68 FORDHAM L. REV. 2097, 2140-41 (2000):

[Voluntary prosecutor disclosures beyond what rules require] tends to work best when it matters least. Prosecutors aiming for guilty pleas have the strongest incentive to disclose in cases where their evidence is most overwhelming. In the weaker cases, the very ones where discovery is most likely to make a difference to the defendant, there is less incentive for a prosecutor to disclose and more reason to play “hard ball” when the rules permit it.

Opponents of broad disclosure for decades have stressed a core set of concerns that also speak to accuracy and, less convincingly, to fairness.<sup>41</sup> They worry that if defendants are told the identities of government witnesses well in advance of trial, some of them (or their fellow gang members) will intimidate, bribe, or harm those witnesses. Even if they do nothing, some witnesses will *feel* intimidated by some defendants' reputations and choose on their own not to cooperate with law enforcement. Additionally, revealing the identities of undercover informants or agents—or disclosing the existence of surveillance recordings—would compromise ongoing investigations and blow the cover of undercover operatives.<sup>42</sup> Some witnesses, especially victims, may have legitimate privacy interests that justify nondisclosure of, say, medical histories. Less realistically, some have speculated that, given forewarning of prosecution evidence, defendants could more effectively fabricate perjury or other false evidence that might unjustly prevent a conviction. Finally, broader disclosure rules raise worries about the greater costs and administrative burdens they put on parties, especially prosecutors' offices. Beyond these concerns, narrow-discovery advocates insist that most prosecutors treat defendants fairly and voluntarily disclose more than statutes require, making broader disclosure mandates unnecessary.

Given that most states now operate with disclosure rules that are broad enough to confront these risks, we have plenty of evidence to settle these debates in practical experience in the “laboratories of democracy.” A large majority of states, after all, require at least advance disclosure of trial witnesses and so have experience in assessing and managing risks of witness intimidation or informants' secret identities.

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41. Two of the classic judicial arguments against disclosure to criminal defendants can be found in *United States v. Garsson*, 291 F. 646, 649 (S.D.N.Y. 1923) (arguing against discovery in criminal cases); and *State v. Tune*, 98 A.2d 881 (1953) (justifying limited criminal discovery rules and drawing a dissent from then-state justice William Brennan). More commonly now, opponents of broad discovery are prosecutors and police in jurisdictions without broad discovery, sometimes joined by victims' rights advocates. See, e.g., Michael R. Doucette, *Virginia Prosecutors' Response to Two Models of Pre-Plea Discovery in Criminal Cases: An Empirical Comparison*, 73 WASH. & LEE L. REV. 415 (2016) (Virginia prosecutor); Vincent Stark, *New York Discovery Reform Proposals: A Critical Assessment*, 79 ALBANY L. REV. (forthcoming 2017); John F. Yetter, *Discovery Depositions in Florida Criminal Proceedings: Should They Survive?*, 16 FLA. ST. U. L. REV. 675, 684 (1988-89) (noting prosecutor, police, and victim-advocate opposition to criminal depositions).

42. Another argument, now less commonly invoked, was that the prosecution should not have to disclose much to defendants given that defendants are shielded from being compelled to testify by the privilege against self-incrimination. See Jenny Roberts, *Too Little, Too Late: Ineffective Assistance of Counsel, the Duty to Investigate, and Pretrial Discovery in Criminal Cases*, 31 FORDHAM URBAN L.J. 1097, 1145-52 (2004) (noting and rebutting this argument and others).

### III. ANALYSIS AND ASSESSMENT

#### A. ASSESSING THE RISKS OF BROAD DISCLOSURE

How do states that operate their criminal justice systems with broad pretrial-disclosure requirements deal with the risks to witnesses, victims, and undercover agents? They simply provide targeted exceptions to disclosure obligations for exactly these circumstances. If prosecutors suspect a witness or victim is at risk, or that an informant needs ongoing secrecy, rules provide either that they (a) ask judges for exceptions to disclosure in those cases, or (b) withhold evidence initially and notify defendants or the court of the nondisclosure, after which their decision can be reviewed by the trial judge.<sup>43</sup> In addition, judges in all states have clear authority to issue a broad range of protective orders for witnesses and victims, with respect to privacy as well as security interests.<sup>44</sup> And most state rules specify that certain kinds of sensitive information are non-disclosable, such as witnesses' home addresses, financial information, and identification numbers. Some guard witnesses' and victims' interests also by limiting disclosure of their information to defense *counsel* while barring defendants themselves from access to it.<sup>45</sup>

In ways such as these, states over time have revised the details of their broad-disclosure rules in light of experience. It is telling that not a single state has abandoned broad disclosure in light of their justice system's experience with it. That is surely the best indicator that states that have tested broad disclosure find these safeguards to be effective at minimizing the genuine risks that are present in some cases. But it also bears emphasizing that state courts handle fewer cases with these risks than do federal courts, where prosecutions against organized crime and large-scale drug gangs are concentrated.<sup>46</sup> Most state prosecutions do not arise from the work of undercover agents or long-term surveillance

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43. See, e.g., TEX. CODE CRIM. PROC. ANN. art. 39.14(c).

44. See, e.g., *id.* (limiting disclosure in light of "security and privacy interests of any victim or witness"); FLA. R. CRIM. P. 3.220(1) (court can restrict discovery "to protect a witness from harassment, unnecessary inconvenience, or invasion of privacy"); N.C. GEN. STAT. ANN. § 15A-904(a4) (nondisclosure of victim impact statements); UTAH R. CRIM. P. 16(e) ("reasonable limitations" of "sensitive information" to "protect victims and witnesses from ... undue invasion of privacy").

45. See, e.g., CAL. PENAL CODE § 1054.2; TEX. CODE CRIM. PROC. ANN. art. 39.14(f); IDAHO R. CRIM. P. 16(d)(1)(C).

46. Criminal cases prosecuted in the federal justice system much more often target criminal organizations and involve bigger undercover operations. Those differences support stronger arguments for its long-standing system of severely restricted disclosure, so I leave aside here any discussion of reforms in that unique setting. See generally John C. Jeffries, Jr. & John Gleeson, *The Federalization of Organized Crime: Advantages of Federal Prosecution*, 46 HASTINGS L.J. 1095 (1995).

operations. And while witness harassment is a real concern in some cases, the best evidence suggests that it rarely results *from disclosure*.<sup>47</sup> That is because defendants often have other ways (particularly in domestic-violence cases) of learning victims' and witnesses' identities without any help from the state.

The risk that defendants' fabrication of evidence would increase with advance knowledge of the state's evidence was always a less serious concern. That is partly because withholding disclosure can at best *shorten* defendants' opportunities for such mischief. A state cannot eliminate the issue because defendants watch the government present its trial evidence before they present their own. On top of that, there is little reason to think that defendants have much luck defeating government evidence with their own self-serving testimony, even if they can enlist supporting perjury from family or friends. (Physical evidence or records are hard to fabricate, even with advance notice.) Defendants face inherent credibility challenges even when they tell the truth. Finally, it is worth noting that civil litigants face the same temptations to fabricate and should be more successful at it given their broad-discovery rules, yet that problem has not crippled modern civil litigation.

In sum, the arguments against broad criminal disclosure requirements seem to be definitively settled by the collective experience of the majority of states, which have operated with some version of such rules for many years. Large states such as California, Florida, and New Jersey, where law enforcement agencies confront more than their fair share of violent and well-organized criminal offenders, have long experience under rules that provide for the broadest pretrial disclosure found anywhere in the United States.

The case for limited disclosure is strongest in cases with violent offenders and gang-related criminal activity, especially for serious charges in which the stakes are highest. But these cases are a fairly small portion of state criminal prosecutions.<sup>48</sup> Homicide prosecutions in particular often depend on witness information or testimony, but homicides make up less than 1% of state-court felony caseloads. *All* violent crimes comprise only about a quarter of state felonies.<sup>49</sup> Assault cases, which are roughly 12%, are an important example.<sup>50</sup>

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47. Roberts, *supra* note 42, at 1145-52 (citing a Florida study on witness intimidation).

48. Given the overlap in state and federal crimes and the focus of federal prosecutors on more complex and more serious offenses, many cases that present the greatest problems for broad disclosure are shifted to the federal system, where the limited discovery system is well entrenched. See Miriam Baer, *Some Skepticism about Criminal Discovery Empiricism*, 73 WASH. & LEE L. REV. ONLINE 347, 356-57 (2016); Jeffries & Gleeson, *supra* note 44.

49. BRIAN A. REAVES, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, FELONY DEFENDANTS IN LARGE URBAN COUNTIES, 2009—STATISTICAL TABLES 2-3 & tbl. 1 (2013).

50. *Id.* at 2.



By definition, they involve both injured victims and violent defendants, and most assault prosecutions depend on evidence from victims and (less often) other witnesses. But most defendants and victims in assault cases have pre-existing relationships.<sup>51</sup> The same is true in rape cases, which constitute about 1% of felonies.<sup>52</sup> These victims can benefit from protective orders, safe houses for victims, and other security assistance, but limiting disclosure of victims' identities (as opposed to their addresses or locations) usually serves little purpose. When it occasionally does, special exceptions permit nondisclosure.

Victims' interests are a central concern of criminal process,<sup>53</sup> but many prosecutions involve no direct victims at all, and most felony charges are for nonviolent offenses. Based on data from the 75 most populous counties, drug crimes are the single largest felony-offense category in state courts and account for roughly a third of defendants.<sup>54</sup> State-court drug offenses rarely involve victims, or even civilian witnesses who could be at risk of harm. The key testimony typically comes from law enforcement officers or their informants.<sup>55</sup> Law enforcement officers are less vulnerable to intimidation, and—as noted—all disclosure rules limit disclosures about informants; many also restrict police officers' personal information such as home addresses. Most drug prosecutions are based on police surveillance, police-managed undercover buys, or other sting operations. Prosecutors are most likely to charge in such cases when they have police witnesses, audio/video recordings, and “pre-recorded buy money” from the sting.<sup>56</sup> Pretrial-disclosure rules always accommodate the central concern in this context of confidentiality for still-active undercover agents or surveillance devices. In light of this, state criminal dockets are well-suited for

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51. See JOSEPH PETERSON ET AL., NAT'L INST. OF JUSTICE, THE ROLE AND IMPACT OF FORENSIC EVIDENCE IN THE CRIMINAL JUSTICE PROCESS 42-54 (2010), <https://www.ncjrs.gov/pdffiles1/nij/grants/231977.pdf> (study of 859 assault cases in Los Angeles and four Indiana cities). The same study found that, out of 400 homicide cases, 15.8% had eyewitness reports from *victims* who spoke to police before they died. *Id.* at 74-76.

52. *Id.* at 90-91 & tbl. 17 (in a study of 602 rape cases in Los Angeles and four Indiana cities, finding defendant was a stranger to the victim in 21.1% of cases, a friend/acquaintance in 42.7%, and a family member in 36.2%).

53. See generally Paul G. Cassell, “Crime Victims’ Rights,” in the present Volume.

54. REAVES, *supra* note 49, tbl. 4.1. The next largest category—roughly three in ten felony charges—is property offenses, with burglary the most common. *Id.*

55. For a discussion of informants, see Daniel Richman, “Informants and Cooperators,” in Volume 2 of the present Report.

56. Besiki L. Kutateladze et al., *Does Evidence Really Matter? An Exploratory Analysis of The Role of Evidence in Plea Bargaining in Felony Drug Cases*, 39 LAW & HUM. BEHAV. 431, 433 (2015) (analyzing data from over 1,000 New York County drug cases, finding “prosecutors made more punitive charge [bargain] offers when they had audio/video evidence,” among other types of evidence).

discovery rules in which disclosure is the general rule and nondisclosure the exception. Narrow-discovery rules do it the other way around: nondisclosure of most information is the rule, with prosecutors free to grant exceptions and disclose more when they choose.

On top of these practical considerations, limited pretrial-discovery obligations are in tension with prevailing rules of professional ethics and best-practice standards. Somewhat beyond the constitutional standard, one of the *ABA Model Rules of Professional Conduct* requires that a prosecutor “make timely disclosure to the defense of all evidence or information ... 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.”<sup>57</sup> The *ABA Criminal Justice Standards* advise that prior to a plea agreement, “the prosecutor should disclose to the defense a factual basis sufficient to support the charges in the proposed agreement, and information currently known to the prosecutor that tends to negate guilt, mitigates the offense or is likely to reduce punishment.”<sup>58</sup> They “should not, because of the pendency of plea negotiations, delay any discovery disclosures required to be made to the defense under applicable law or rules.”<sup>59</sup> Relatedly, “[u]nder 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 ... the evidence likely to be introduced at trial.”<sup>60</sup>

#### *B. CONCLUSION: EXPLAINING RESISTANCE TO BROAD DISCLOSURE*

What, then, accounts for the differences that remain among state justice systems? It is puzzling that relatively similar states operate under very different discovery regimes. For example, North Dakota’s rules are broader than South Dakota’s, and North Carolina’s are much broader than those in neighboring Virginia or South Carolina. The steady march of states toward adopting broader discovery rules, together with the patchwork of recalcitrant states that still resist these reforms, suggest an answer. Whether a state sticks with a narrow-discovery system does not turn on unique state conditions that make broad discovery

57. AM. BAR ASS’N, MODEL RULES OF PROF’L CONDUCT R. 3.8(d) (1983).

58. AM. BAR ASS’N, CRIMINAL JUSTICE STANDARDS FOR THE PROSECUTION FUNCTION standard 3-5.6(f) (4th ed. 2015).

59. AM. BAR ASS’N, CRIMINAL JUSTICE STANDARDS—PLEAS OF GUILTY standard 3-5.6(f) (3d ed. 1999).

60. AM. BAR ASS’N, CRIMINAL JUSTICE STANDARDS FOR THE DEFENSE FUNCTION standard 4-6.1(b) (4th ed. 2015); *see also* STATE BAR OF TEX., PERFORMANCE GUIDELINES FOR NON-CAPITAL CRIMINAL DEFENSE REPRESENTATION guideline 6.1(A) (2011), *reprinted in* 74 TEX. BAR J. 616, 626 (July 2011).

unworkable. Instead, it is a product of entrenched local customs and professional culture, which reinforce a bias for the status quo. In many places, that probably combines with policymaking procedures that make reform easy to hinder.<sup>61</sup>

## RECOMMENDATIONS

For nearly half the states—those with the most limited disclosure obligations that mimic or barely exceed the federal rules—the agenda is straightforward. A half-dozen states have operated under the broadest models for pretrial discovery for decades, and a majority have years of experience with notably more-expansive rules than the minority retain. Broad rules, and the safeguards that accompany them, have been tested in a variety of contexts including both large and small metropolitan areas, and high- as well as lower-crime jurisdictions. The evidence is in. Broader discovery—far beyond the federal model—is feasible for all state justice systems.

### A. SUBSTANTIVE RECOMMENDATIONS

At a minimum, states that currently retain the most limited statutes should reform their disclosure statutes to require:

1. disclosure of the witnesses who provide relevant evidence for the state and who the prosecution would call if the case went to trial, along with the witnesses' relevant prior statements, their criminal records and other information affecting their credibility, and a means for defense counsel to contact or interview those witnesses;
2. defense access to all medical examinations or expert forensic analysis related to the case in the state's possession, even if the prosecution does not intend to use the information at trial;
3. copies of police reports and other relevant reports or resources from investigators, such as body-cam and dash-cam footage;
4. disclosure—modestly beyond the constitutional requirements—of all evidence in the possession of law enforcement agencies that might be favorable to the defense (so that prosecutors do not have to struggle with decisions about what information could be “material” to the defense); and
5. disclosure of codefendants' statements even if they will be tried separately from the defendant.

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61. See Turner & Redlich, *supra* note 37 (comparison of Virginia and North Carolina disclosure practices).

All these disclosures should be accompanied by the standard limitations: judges should have the power to grant (or review) prosecution exceptions to disclosure for active informants, ongoing investigations, and the redaction from police reports and other sources of private information about victims or witnesses. As an alternative for some of this sensitive information, such as victim/witness contact information, disclosure can be limited to defense attorneys while barred to defendants themselves. Notice that this list leaves off additional disclosures that several states have long required: state disclosure of non-witnesses who have relevant information, and notice about which law enforcement personnel were involved in evidence seizures.

### B. ADMINISTRATIVE RECOMMENDATIONS

Beyond these substantive reforms, three administrative ones are important:

1. The timing of disclosure should be early in the process, so that both parties are well-informed during plea negotiations. Disclosure should be set soon after charges are filed (and, following New Jersey's model, should accompany a *pre-charge* offer of a plea bargain), rather than measured backward from the scheduled date for a trial that, in all likelihood, will never occur. Early disclosure fits with the criminal justice system we really have—one in which 90% or more of convictions come by guilty pleas, and jury trials are rare. Early disclosure makes it possible for the adversarial system to work in the pretrial stage, where adjudication now nearly always occurs.
2. Disclosure should be straightforwardly required by statute, rather than contingent on one party requesting disclosure from the other, or on a judicial order to disclose in each case.
3. Following the practice in Texas, attorneys on both sides should be required to confirm that they have made their required disclosures, either in a signed writing or by oral affirmation on the record in court. That duty not only prompts lawyers to double-check that they have met their obligations but also provides a basis for judicial or bar-imposed sanctions against those who fail to.

One additional administrative practice is critically important, but it is not easily codified in a statute; it depends instead on judicial vigilance. Some leeway for the parties to negotiate waivers of disclosure obligations are a practical necessity. But disclosure statutes could be rendered meaningless if prosecutors routinely insist that defendants forgo much or all of the information for which the rules provide, and if defense attorneys, whether by lack or diligence or as concession to prosecutorial pressure, too often agree to broad waivers. The

evidence from broad-discovery jurisdictions such as North Carolina suggests that, once expansive rules are in place and attorneys on both sides see that the obligations are feasible,<sup>62</sup> the professional culture adjusts to new “default” practices of broader disclosures. But judges can play a crucial role in reinforcing a custom of broad discovery, by issuing standing orders that specify disclosure duties or by requiring both attorneys during guilty-plea hearings to describe and justify substantial discovery waivers.<sup>63</sup>

### C. DEFENSE DISCLOSURES

Again, all of these practices have been well-tested in many states. But for them to win adoption in the holdout states, it is fair (and likewise well-tested) for expanded government disclosure obligations to be accompanied by additional disclosure requirements for the defense as well. Nearly all states already require defendants to give advance notice of any expert evidence and of witnesses they will use for certain defenses (such as alibi, self-defense, and insanity), and also to cooperate in “giving evidence” through means such as blood tests or participation in identification lineups. It is a minimal and fair burden to require also that the defense reciprocate by providing the names and statement summaries of their intended trial witnesses.

### D. PRACTICAL SUPPORT

To ensure that broad-disclosure rules succeed without unduly burdening or confusing busy attorneys, all states would be well-served by following the example of Texas and other jurisdictions that provide for ongoing training of prosecutors (and defense attorneys) about disclosure rules, especially when they adopt new reforms.<sup>64</sup> Finally, state policymakers should consider another way to ease the cost and administrative burdens of disclosures, especially given that evidence sources are steadily increasing—especially in the form of digital information such as dash-cam, body-cam, and surveillance videos, as

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62. See Turner & Redlich, *supra* note 37. On the other hand, some Texas prosecutors initially sought to minimize their disclosures by seeking defense waivers in the first year after the state’s new discovery law took effect. TEX. APPELESEED & TEX. DEF. SERV., TOWARDS MORE TRANSPARENT JUSTICE: THE MICHAEL MORTON ACT’S FIRST YEAR 31-35 (2015).

63. At the insistence of prosecutors, waivers of discovery and many other rights have become increasingly common in federal prosecutions. See generally Susan R. Klein, Aleza S. Remis & Donna Lee Elm, *Waiving the Criminal Justice System: An Empirical and Constitutional Analysis*, 52 AM. CRIM. L. REV. 73 (2015). On the other hand, some federal judges have used their authority to issue standing order or enact local court rules to require broader or earlier disclosure. See McConkie, *supra* note 13.

64. See TOWARDS MORE TRANSPARENT JUSTICE, *supra* note 62, at 21-25 (describing training programs after discovery reform).

well as forensic analysis of cell-phone databases and other digital archives.<sup>65</sup> These developments are a boon for accuracy and accountability in criminal justice, but they add to practical challenges, particularly for prosecutors. Many local prosecution agencies lack the technical capacity for electronic case management and evidence storage enjoyed by their counterparts in better-funded localities and now commonly used in civil litigation and private law firms.<sup>66</sup> States could greatly assist their local prosecution offices, both in general and with respect specifically to sharing evidence, by assisting those offices (and local courthouses) in acquiring the technology for electronic case management, document filing, and evidence disclosure.

### SUMMARY OF RECOMMENDATIONS

1. State law should require prosecutors to disclose names, prior statements, and other key information about their intended trial witnesses.
2. The defense should have access to all of the prosecution's expert reports and forensic analysis related to the case, as well as copies of police reports and other investigation resources such as police camera videos.
3. Prosecutors should give defendants *all* evidence from law enforcement agencies that might be favorable to the defense, rather than trying to decide which evidence will be "material" for the defense; they should also disclose codefendants' statements even if they will be tried separately from the defendant.
4. Disclosure should occur early in the process, soon after charges are filed, and statutes should mandate it for both parties, rather than making one party's disclosure contingent on what the other does.
5. Attorneys on both sides should have to affirm personally that they have fulfilled all their disclosure duties.
6. Judges must be vigilant in preventing attorneys from developing a local custom of agreeing to waive disclosure duties.

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65. For a discussion of digital surveillance, see Christopher Slobogin, "Policing, Databases, and Surveillance," in Volume 2 of the present Report. For a discussion of forensic evidence, see Erin Murphy, "Forensic Evidence," in the present Volume.

66. See *THE COST OF COMPLIANCE*, *supra* note 37 (describing electronically stored evidence and difficulties local prosecutor offices in Texas that lack electronic evidence or case-management capacity).

7. Defendants should continue to disclose expert testimony and analysis that they will rely on at trial and to cooperate with the state's evidence discovery by participating in blood tests, ID lineups, and the like.
8. States should ensure that prosecutors are continually trained on their disclosure obligations, and should assist their prosecutor offices with the resources they need to handle growing volumes of digitally stored evidence such as surveillance video.