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A Theory of Compulsory Process Clause Discovery Rights

JEAN MONTOYA*

INTRODUCTION

Anyone who has practiced or studied both civil and criminal litigation in the United States[1] is immediately struck by the relative lack of discovery devices available to the defendant in a criminal prosecution. The sharp divergence does not appear to be supportable and undermines the criminal trial as a truth-seeking device. It does, however, compel rethinking the fact-gathering process in criminal litigation and, in particular, the criminal defendant's role in shaping the evidence at trial.

This Article examines how the Compulsory Process Clause speaks to these issues. Approximately twenty years ago, Professor Peter Westen suggested that we ground discovery rights in the Compulsory Process Clause.[2] His approach, while acknowledged by the United States Supreme Court,[3] has proven too unwieldy for adoption. This Article revisits the important questions raised by Professor Westen's work, makes the argument that the Compulsory Process Clause is the appropriate source of at least certain criminal discovery rights, and develops a new framework for resolving discovery problems in criminal litigation. Part I describes the core rights protected by the Compulsory Process Clause. Part II explores the outer limits of the Clause and in particular, the Supreme Court's interpretation of the Compulsory Process Clause as a check against the prosecution's presentation of the evidence. Part III demonstrates the necessity, but unavailability, of formal discovery devices to effect the "checking" function of the Clause. Part IV argues that realizing the "checking" function of the Compulsory Process Clause necessarily means grounding certain discovery rights in the Clause. Part IV also delineates the appropriate scope of Compulsory Process Clause discovery rights.

The theoretical framework advanced in this Article is important. While Westen advanced a theory which was more sweeping, it would also necessitate a wholesale rewriting of the Supreme Court's criminal discovery jurisprudence; that theory has largely failed. This Article advances a more specific theory and one that is more consonant with case law and weighty policy considerations.

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1. The Author practiced as an Associate in the litigation section of a large commercial law firm in Century City, Los Angeles, and as a Deputy Public Defender for the Los Angeles County Public Defender's Office.

2. Peter Westen, *The Compulsory Process Clause*, 73 MICH. L. REV. 71 (1974).

3. *See, e.g.*, Pennsylvania v. Ritchie, 480 U.S. 39, 55 n.11 (1987).

I. THE CORE OF THE COMPULSORY PROCESS CLAUSE

The Compulsory Process Clause of the Sixth Amendment, applicable to the states through the Due Process Clause of the Fourteenth Amendment,[4] provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have compulsory process for obtaining witnesses in his [or her] favor."[5] At its core, the Compulsory Process Clause not only guarantees the defendant's right to compel witnesses to attend court, but also to elicit their testimony there.[6]

In *Washington v. Texas*, the Supreme Court confronted Texas statutes that disqualified an alleged accomplice from testifying on behalf of the defendant.[7] The Court observed that "[t]he Framers of the Constitution did not intend to commit the futile act of giving to a defendant the right to secure the attendance of witnesses whose testimony he had no right to use."[8] The Court accordingly found a violation of the Compulsory Process Clause when the defendant, charged with a shooting-related homicide, was allowed to subpoena but not present the testimony of the alleged trigger-puller.[9] The Court reached this conclusion despite the fact that laws restricting a defendant's use of accomplice testimony were prevalent at the time the Bill of Rights was ratified.[10] While the Court did not entirely reject a historical analysis of the Compulsory Process Clause, it did endorse the notion that modern criminal procedure should not be governed by "'the dead hand of the common-law rule of 1789.'"[11] Instead, applying a functional analysis, the Court observed that the Framers of the Constitution intended to provide criminal defendants with the "means of obtaining witnesses so that their own evidence, as well as the prosecution's, might be evaluated by the jury."[12]

While the outer limits of the Compulsory Process Clause remain unclear,[13] the Court's recent Confrontation Clause jurisprudence recognizes an additional, distinct role for the Compulsory Process Clause in our adversarial system of criminal justice. The following Part defines that role.

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4. Washington v. Texas, 388 U.S. 14, 17-19 (1967).
5. U.S. CONST. amend. VI.
6. *Washington*, 388 U.S. at 23.
7. *Id.* at 16.
8. *Id.* at 23.
9. *Id.* at 16, 23.
10. *See id.* at 19-21.
11. *Id.* at 22 (quoting Rosen v. United States, 245 U.S. 467, 471 (1918)).
12. *Id.* at 20.
13. *See* Pennsylvania v. Ritchie, 480 U.S. 39, 56 (1987) (declining to decide whether and how the Compulsory Process Clause relates to criminal discovery rights and instead applying a due process analysis).

II. THE "CHECKING" FUNCTION OF THE COMPULSORY PROCESS CLAUSE

The Confrontation Clause, applicable to the states through the Due Process Clause of the Fourteenth Amendment,[14] provides that "[i]n all criminal prosecutions, the accused shall enjoy the right to . . . be confronted with the witnesses against him [or her]."[15] The layperson would reasonably conclude from this language that a criminal defendant is entitled to confront and, perhaps, cross-examine the narrow class of accusers, if not also the broader class of those whose statements incriminate the defendant.[16] Legal scholars reasonably might agree.[17] The Supreme Court, however, has rejected both the narrow and broad interpretations, relying in part on the role that compulsory process plays in our adversarial system.

In *United States v. Inadi*,[18] for instance, the defendant was convicted of conspiring to manufacture and distribute methamphetamine, and other related offenses.[19] Law enforcement authorities had lawfully intercepted and recorded five telephone conversations between various participants in the conspiracy. These taped conversations were played for the jury at trial.[20] The defendant objected to the admission of the taped conversations on hearsay and Confrontation Clause grounds.[21] The trial court concluded, however, that the statements satisfied the requirements of Federal Rule of Evidence 801(d)(2)(E) governing the admission of co-conspirator declarations, that the statements were therefore not hearsay, and that the Confrontation Clause required nothing more.[22]

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14. Pointer v. Texas, 380 U.S. 400, 403 (1965).

15. U.S. CONST. amend. VI.

16. The distinction boils down to this: An accuser might state that the defendant stabbed the victim, while someone who incriminates the defendant might state that the defendant had blood on his shirt at a certain time. The distinction can be analogized to the difference between a confession and an admission.

17. Legal scholars have argued that the Confrontation Clause prohibits the prosecution's use of hearsay evidence in various circumstances. Professor Michael H. Graham has argued that the Confrontation Clause requires the state to produce an available declarant "if the circumstances surrounding the making of the statement indicate that it was accusatory in nature when made." Michael H. Graham, *The Confrontation Clause, the Hearsay Rule, and the Forgetful Witness*, 56 TEX. L. REV. 151, 192 (1978). Professor Kenneth W. Graham, Jr., has argued that where proffered hearsay makes the hearsay declarant the prosecution's "principal witness," the declarant "must be confronted, absent excuse or waiver." Kenneth W. Graham, Jr., *The Right of Confrontation and the Hearsay Rule: Sir Walter Raleigh Loses Another One*, 8 CRIM. L. BULL. 99, 129 (1972). Professor Westen has argued that the prosecution has the burden of producing "the persons whose out-of-court statements it uses against the accused . . . [unless] the out-of-court statement is such that the defendant could not reasonably be expected to wish to examine the declarant in person." Peter Westen, *Confrontation and Compulsory Process: A Unified Theory of Evidence for Criminal Cases*, 91 HARV. L. REV. 567, 616-18 (1978) [hereinafter Westen, *Confrontation and Compulsory Process*]; *see also* Peter Westen, *The Future of Confrontation*, 77 MICH. L. REV. 1185, 1206-07 (1979).

18. 475 U.S. 387 (1986).

19. *Id.* at 388-89.

20. *Id.* at 390.

21. *Id.*

22. *Id.* at 390-91.

The defendant argued that the Confrontation Clause required more, namely, that the prosecution show that the declarant was unavailable to testify before it could offer the out-of-court statements.[23] Although the Court of Appeals for the Third Circuit agreed with the defendant and reversed the conviction,[24] the Supreme Court reversed the judgment of the court of appeals.[25] The Court reasoned that the context in which the out-of-court statements arose imbued them with evidentiary significance that could not be duplicated by in-court testimony; that is, some fact which was present at the time of the declarations and which tended to guarantee perception, memory, narration, or sincerity could not be recreated at trial.[26] It further reasoned that an unavailability rule served little purpose since the defendant could rely on the Compulsory Process Clause to obtain the testimony of the declarants.[27] Indeed, the Court observed more than once that the defendant apparently had made no effort to obtain the live testimony of the declarants.[28]

While the statements in *Inadi* may have been incriminating, they were not accusatory. Because the *Inadi* declarants apparently knew that their conversations could be intercepted by law enforcement authorities and used against them, the conspirators communicated in codes.[29] While the prosecution used the recorded conversations to prove the charged conspiracy, nothing suggested that the declarants intended by their out-of-court statements to accuse the defendant of criminal activity. As the Court described the conversations, they were the statements "of one drug dealer to another in furtherance of an illegal conspiracy,"[30] a circumstance which could not be recreated at trial. Some legal scholars may have hoped that the Supreme Court would limit its holding in *Inadi* and find that the Confrontation Clause requires the prosecution to demonstrate the unavailability of a declarant when the declarant's hearsay statement is accusatory (as opposed to merely incriminating). Any such hope was laid to rest with the Court's decision in *White v. Illinois*.[31]

In *White*, the defendant was charged with sexually assaulting a four-year-old girl.[32] Although the girl was the only witness to the assault, she did not testify at the trial.[33] Instead, the girl's accusatory hearsay statements to her babysitter, her mother, an investigating officer, an emergency room nurse, and the examining physician were admitted to establish the elements of the assault.[34] Despite the defendant's objections to the admission of the girl's statements, the trial court admitted them under the spontaneous declaration

23. *Id.*
24. *Id.* at 391.
25. *Id.*
26. *Id.* at 394-95.
27. *Id.* at 397.
28. *Id.* at 390, 397.
29. *Id.* at 405.
30. *Id.* at 395.
31. 502 U.S. 346 (1992).
32. *Id.* at 349.
33. *Id.* at 350.
34. *Id.* at 349-50.

and medical examination exceptions to the hearsay rule.[35] Although the girl was never declared unavailable,[36] the Court concluded that admission of the girl's accusatory statements under these firmly rooted hearsay exceptions did not violate the Confrontation Clause.[37] As in *Inadi*, the Court dismissed the utility of an unavailability rule, observing that the context of the child's out-of-court statements imbued the child's statements with special evidentiary value that could not be duplicated by in-court testimony.[38] The Court also observed that if the defendant had any interest in obtaining the child's testimony, the Compulsory Process Clause and evidentiary rules permitting a defendant to treat witnesses as hostile would aid the defendant in obtaining the child's testimony.[39]

Inadi and *White* thus proffer the Compulsory Process Clause as a defense check against the prosecution's presentation of the evidence, and in particular, the prosecutorial use of hearsay evidence in lieu of live testimony. It is an inadequate solution to a substantial problem, unless the Compulsory Process Clause also embraces at least certain discovery rights.[40]

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35. *Id.* at 350-51. This Author has argued elsewhere that the application of hearsay exceptions to young children's out-of-court statements often stretches the exceptions beyond recognition and that the statements admitted in *White* prove the point. Jean Montoya, *Something Not So Funny Happened on the Way to Conviction: The Pretrial Interrogation of Child Witnesses*, 35 ARIZ. L. REV. 927, 977-86 (1993).

36. *White*, 502 U.S. at 350.

37. *Id.* at 357. Of course, similar provisions in state constitutions may be interpreted to provide greater protection to citizens and forbid the use of accusatory hearsay statements unless the declarant is first shown to be unavailable. *See* Hansel M. Harlan, Note, White v. Illinois *and the "Hearsay Clause" of the Sixth Amendment*, 54 LA. L. REV. 177, 186 (1993) (predicting defense challenges based on the Due Process Clause and state constitutional provisions). *See generally* Stewart F. Hancock, Jr., *The State Constitution, A Criminal Lawyer's First Line of Defense*, 57 ALB. L. REV. 271 (1993) (discussing state constitutionalism).

38. *See White*, 502 U.S. at 354-55.

39. *Id.* at 355.

40. The lack of discovery rights to effect the "checking" function of the Clause is not the only basis for criticizing *Inadi* and *White*. By minimizing the role of cross-examination by the defense during the prosecution's case-in-chief, *Inadi* and *White* arguably undermine the adversarial nature of criminal proceedings. *Cf.* Peter Miene et al., *Juror Decision Making and the Evaluation of Hearsay Evidence*, 76 MINN. L. REV. 683, 684-85 (1992) (describing the limited value of cross-examination when hearsay evidence rather than eyewitness testimony is presented). Even assuming that complete cross-examination could be achieved by calling the prosecution's hearsay declarant in the defendant's case, "'[o]nly a lawyer without trial experience would suggest that the limited right to impeach one's own witness is the equivalent of that right to immediate cross-examination which has always been regarded as the greatest safeguard of American trial procedure.'" United States v. Inadi, 475 U.S. 387, 410 (1986) (Marshall, J., dissenting) (quoting New York Life Ins. v. Taylor, 147 F.2d 297, 305 (1945)).

Order of proof considerations suggest that the defendant's case may come too late to counter effectively prosecutorial use of hearsay evidence in lieu of live testimony. Indeed, Professor Westen has argued that "the sixth amendment allocates the burden of production between the prosecution and the defense in order to facilitate the defendant's interest in being able to secure and examine witnesses at a time when their incriminating evidence is not yet frozen in the jury's mind." Westen, *Confrontation and Compulsory Process*, *supra* note 17, at 616; *see also* Peter Westen, *Order of Proof: An Accused's Right to Control the Timing and Sequence of Evidence in His Defense*, 66 CAL. L. REV. 935 (1978) (arguing that the order of proof is a matter of constitutional significance). Trial advocacy theorists acknowledge the cognitive phenomenon of belief perseverance, the idea that people resist changing their initial assessments about the probability of an uncertain event. *See* Albert J. Moore, *Trial by Schema: Cognitive Filters in the Courtroom*, 37 UCLA L. REV. 273, 300-03 (1989) (discussing the perseverance effect and other cognitive phenomena in the context of trial advocacy). Although there is empirical evidence that first impressions have less impact in legal settings than in other contexts, JOHN THIBAUT

III. THE LACK OF FORMAL DISCOVERY DEVICES TO EFFECT THE "CHECKING" FUNCTION OF THE CLAUSE

Assuming that *Inadi* and *White* are analytically correct,[41] the cases arguably advance adversariness by allowing both the prosecution and the defense more flexibility in the presentation of their respective cases: The prosecution has the choice of presenting hearsay evidence instead of eyewitness testimony, and the defense may or may not confront the declarant during its case. Nevertheless, given the lack of discovery devices available to the defense, the defendant's choice is no choice at all.

Although *Inadi* and *White* free the prosecution to use hearsay evidence in lieu of live testimony, jurors generally weigh eyewitness testimony more heavily than hearsay evidence in their verdicts.[42] Why then would a prosecutor use hearsay evidence in lieu of live testimony? A prosecutor may not want to inconvenience a witness or may want to shield a vulnerable witness, such as a child witness, from what may be a traumatizing or embarrassing courtroom experience.[43] An advocate's decision to use one form of admissible evidence over another, however, ordinarily will be motivated by various tactical considerations. Prosecutorial reliance on incriminating or accusatory hearsay evidence becomes abusive when the declarant is available but not called by the prosecution to avoid the revelation that the declarant or the declarant's out-of-court statement is unreliable.[44]

& LAURENS WALKER, PROCEDURAL JUSTICE: A PSYCHOLOGICAL ANALYSIS 54-66 (1975) (demonstrating that in a legal setting, recency effects are pervasive); Laurens Walker et al., *Order of Presentation at Trial*, 82 YALE L.J. 216, 222-24 (1972) (same), a theory of belief perseverance suggests that the change in the order of proof worked by *Inadi* and *White* could mean that the jury becomes stubbornly committed to its initial assessment of the prosecution's hearsay evidence. Nevertheless, since the petitioner in *White* fully briefed the order of proof argument, *see* Reply Brief for Petitioner at 13-14, *White* (No. 90-6113), it is clear that whatever the practical significance of order of proof, the Court does not view it as a matter of constitutional significance.

41. All nine Justices in *White* agreed that the case presented no violation of the Confrontation Clause. *See White*, 502 U.S. at 356-57; *id.* at 358 (Thomas, J., concurring).

42. *See, e.g.*, Margaret Bull Kovera et al., *Jurors' Perceptions of Eyewitness and Hearsay Evidence*, 76 MINN. L. REV. 703 (1992) (discussing the findings from an empirical study); Miene et al., *supra* note 40 (same); Richard F. Rakos & Stephan Landsman, *Researching the Hearsay Rule: Emerging Findings, General Issues, and Future Directions*, 76 MINN. L. REV. 655 (1992) (same).

43. For a discussion of formal shielding devices for child witnesses, see Jean Montoya, *On Truth and Shielding in Child Abuse Trials*, 43 HAST. L.J. 1259 (1992).

44. *See* Nancy H. Baughan, White v. Illinois*: The Confrontation Clause and the Supreme Court's Preference for Out-of-Court Statements*, 46 VAND. L. REV. 235, 254 (1993) (observing that the "preference for certain out-of-court statements creates the incentive for prosecutors to introduce the hearsay statements of all potentially hostile [and weak] witnesses," and predicting that "[a]fter *White*, a criminal defendant should expect to face the admission of more hearsay testimony"); Harlan, *supra* note 37, at 186 (predicting prosecutorial abuses). *But see* Anthony C. Porcelli, Note, *Sixth Amendment—Right to Confront One's Accuser When the Victim Does Not Testify*, 83 J. CRIM. L. & CRIMINOLOGY 868, 881 (1993) (conceding that the prosecution could use hearsay evidence when the victim is not particularly credible in person or if there is a risk of the defense impeaching the witness, but arguing, nonetheless, that the Compulsory Process Clause is an adequate check against prosecutorial use and abuse of hearsay evidence).

A. Pretrial Interrogation: Ordinarily a Necessary Precondition to Calling Trial Witnesses

A criminal defendant's exercise of compulsory process as a check on prosecutorial trial tactics assumes the defendant's ability to assess the value in presenting a particular witness at trial. In particular, a criminal defendant's exercise of compulsory process as a check on the prosecution's use and abuse of hearsay evidence in lieu of live testimony assumes the defendant's ability to assess the value in presenting the prosecution's hearsay declarant.[45] Common sense would suggest, and trial advocacy experts agree, that the pretrial interrogation of a potential witness is an essential prerequisite to calling the witness at trial.[46] The courts have also recognized that the necessary assessment will ordinarily involve the pretrial interrogation of potential witnesses.

For example, in *Gregory v. United States*,[47] defense counsel sought the assistance of the motions judge when eyewitnesses to a murder and robbery refused to talk to him unless the prosecutor was present or authorized the interview.[48] "The court ruled: 'I can't direct the Government to permit you to talk to a Government witness.'"[49] On the first day of trial, defense counsel repeated his request for assistance to the trial judge, who concluded that the ruling by the motions judge "'dispose[d] of the matter.'"[50] Undaunted, defense counsel again requested the trial court's assistance when, following

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45. A theory of trial advocacy known as sponsorship theory provides that the party who introduces particular evidence "in effect endorses the significance of that item." ROBERT H. KLONOFF & PAUL L. COLBY, SPONSORSHIP STRATEGY: EVIDENTIARY TACTICS FOR WINNING JURY TRIALS 7-9 (1990). According to this theory, a party will generally be worse off if his attorney, rather than his opponent's attorney, introduces particular evidence. The factfinder evaluating an advocate's biased presentations will discount the value of evidence introduced by the party who stands to gain from it, while increasing the value of evidence introduced by the party harmed by it. *Id.* at 9. Shifting the onus to the defendant to call the prosecution's hearsay declarant means that the costs of sponsoring the witness will be shifted from the prosecution to the defense. No matter how successful the impeachment, even assuming that the defendant's costs are less than usual because the jury knows that the witness is adverse, the defendant stands to be harmed by calling the prosecution's hearsay declarant as a witness. The prosecution's hearsay declarant is likely to say things that harm the defense. If this harm does not occur during the defendant's examination of the declarant, then it is likely to occur during the prosecution's "cross-examination" of the declarant in the middle of the defendant's case. *See* STEVEN LUBET, MODERN TRIAL ADVOCACY: ANALYSIS AND PRACTICE 45 (1993). Accordingly, sponsorship theory generally counsels against impeaching one's own witness. KLONOFF & COLBY, *supra*, at 182. A decision to do so, therefore, must be based on a careful cost-benefit analysis of the hearsay declarant as a defense witness. *See id.* at 236-39.

46. According to Professor Tanford, "Interviewing is useful not only for discovering facts, but also for learning something about the people involved in the case. Knowing how witnesses appear and how they react to questioning is essential for preparing their direct examination." J. ALEXANDER TANFORD, THE TRIAL PROCESS: LAW, TACTICS AND ETHICS 241 (2d ed. 1993). To the extent one is calling an adverse witness, a pretrial interview (or comparable opportunity to observe or inquire) is nonetheless critical to determining whether the witness "can give evidence favorable to your theory of the case or inconsistent with his earlier statements." THOMAS A. MAUET, FUNDAMENTALS OF TRIAL TECHNIQUES 15 (2d ed. 1988) (discussing cross-examination preparation).

47. 369 F.2d 185 (D.C. Cir. 1966), *cert. denied*, 396 U.S. 865 (1969).

48. *Id.* at 187.

49. *Id.* (quoting the motions judge).

50. *Id.* (quoting the trial judge).

the prosecutor's opening statement, it became apparent that the Government would not call several witnesses on its list of trial witnesses.[51] This time, however, defense counsel, "[a]pparently thinking that if the Government had no use for these witnesses he might," sought the trial court's assistance in interviewing these particular witnesses.[52] The trial court judge responded, "'There is nothing I can do about it.'"[53]

The Court of Appeals for the District of Columbia Circuit reversed the conviction which followed a jury trial.[54] Although the court accepted the prosecutor's statement that "he did not instruct the witnesses not to talk to defense counsel," but did advise the witnesses "not to talk to anyone unless he, the prosecutor, were present," the court concluded that the prosecutor's advice to the eyewitnesses "denied appellant a fair trial."[55] In reaching its conclusion, the court stated: "Witnesses, particularly eye witnesses, to a crime are the property of neither the prosecution nor the defense. Both sides have an equal right, and should have an equal opportunity, to interview them."[56] More importantly, the court observed:

> [T]here was unquestionably a suppression of the means by which the defense could obtain evidence. The defense could not know what the eye witnesses to the events in suit were to testify to or how firm they were in their testimony unless defense counsel was provided a fair opportunity for interview. . . . [T]he prosecutor's advice to these eyewitnesses frustrated that effort.[57]

Although the *Gregory* court never referred to the Compulsory Process Clause, the court implicitly recognized that a criminal defendant's exercise of his or her right to have compulsory process for obtaining favorable witnesses depended on the ability of defense counsel to interview the witnesses and assess their helpfulness to the defense. In *Taylor v. Illinois*,[58] the Supreme Court explicitly discussed the Compulsory Process Clause and made a similar observation.

In *Taylor*, the defendant failed to identify a trial witness in response to a pretrial discovery request. Although defense counsel apparently visited the witness at his home the week before the trial began,[59] and counsel did amend his discovery response to add two other names on the first day of trial,[60] counsel did not amend his discovery response to add the witness in question

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51. *Id.*
52. *Id.*
53. *Id.* (quoting the trial judge).
54. *Id.* at 192.
55. *Id.* at 188, 189.
56. *Id.* at 188.
57. *Id.* at 189. Similarly, in *Webb v. Texas*, the trial judge so intimidated a defense witness with admonitions about perjury that the witness refused to testify and was excused by the court. 409 U.S. 95, 95-96 (1972). While the judge never formally ruled that the witness' testimony was inadmissible, as a practical matter the judge's conduct deprived the accused of the benefit of exculpatory testimony. *Id.* at 98. Prosecution tactics can have the same practical impact.
58. 484 U.S. 400 (1988).
59. *Id.* at 405.
60. *Id.* at 403.

until the second day of trial.[61] Therefore, the trial judge refused to allow the witness to testify for the defense.[62] Although the defendant asserted on appeal that the Compulsory Process Clause required the trial court to receive the witness' testimony in any event,[63] the Supreme Court concluded that the trial court's sanction was "not absolutely prohibited by the Compulsory Process Clause" and that there was "no constitutional error on the specific facts of this case."[64]

The Supreme Court reasoned that, as a practical matter, the Compulsory Process Clause differed from other rights protected by the Sixth Amendment because "its availability is dependent entirely on the defendant's initiative,"[65] and "[t]he very nature of the right requires that its effective use be preceded by deliberate planning and affirmative conduct."[66] The Court went on to note that "[r]outine preparation involves location and interrogation of potential witnesses and the serving of subpoenas on those whose testimony will be offered at trial."[67] In other words, requiring the defense to provide a list of the witnesses it intends to call at trial as a prerequisite for allowing their testimony would not unduly infringe on the defendant's right to compulsory process in light of all the steps, including pretrial interviewing, the defense necessarily takes in deciding to call a witness.[68]

While the Supreme Court thus acknowledged that the pretrial interrogation of a potential witness is ordinarily essential to calling the witness at trial, current criminal procedure and discovery schemes typically do not provide the

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61. *Id.*

62. *Id.* at 401-02.

63. *Id.* at 406.

64. *Id.* at 402. *But see* Alfredo Garcia, *The Compulsory Process Clause and the "Sporting Theory of Justice": The Supreme Court Evens the Score*, 28 DUQ. L. REV. 619 (1990) (identifying a double standard in the Court's jurisprudence applying exclusionary rules).

65. *Taylor*, 484 U.S. at 410.

66. *Id.*

67. *Id.* at 415-16. The Court's reasoning in *Taylor* seemingly contradicts its earlier opinion in United States v. Valenzuela-Bernal, 458 U.S. 858 (1982). In *Valenzuela-Bernal*, the Court held that even though the Government deported two eyewitnesses, there was no violation of the defendant's due process or compulsory process rights unless the defendant could show that the deported aliens' testimony would have been both material and favorable. The defendant complained that the eyewitnesses were deported before he could interview them and determine what favorable information they possessed. *Id.* at 870. The Court, nevertheless, required "some plausible explanation of the assistance [the defendant] would have received from the testimony of the deported witnesses." *Id.* at 871.

While the Court's holding in *Valenzuela-Bernal* suggests that interviewing a witness is not integral to exercising the compulsory process right, this aspect of *Valenzuela-Bernal* is contrary to *Taylor* and should be limited to *Valenzuela-Bernal*'s facts. *Valenzuela-Bernal* emphasized the Government's role in enforcing immigration laws. *Id.* at 863-66. It also explicitly distinguished deported witnesses from witnesses present in the United States. *Id.* at 873 n.9. Most importantly, however, the case emphasized that the defendant was admittedly present and in the company of the aliens throughout the commission of the crime. *Id.* at 861, 871. The Court distinguished the case from others in which it would be "unreasonable" to require an explanation of the relevance of missing testimony. *Id.* at 871 n.8. Notably, Justice O'Connor, concurring in the judgment, made a point of saying that "the defendant's express right in the Sixth Amendment to compel the testimony of 'witnesses in his favor,' requires recognition of the importance, both to the individual defendant and to the integrity of the criminal justice system, of permitting the defendant the opportunity to interview eyewitnesses to the alleged crime." *Id.* at 876 (O'Connor, J., concurring).

68. *Taylor*, 484 U.S. at 416.

necessary tools. Broad hearsay exceptions may be applicable at the preliminary hearing,[69] or in a grand jury proceeding.[70] Even when eyewitness testimony is presented to the grand jury, the defense, which is excluded from the grand jury room, may be entitled only to receive the transcripts for those witnesses who actually testify at trial.[71] When grand jury testimony is available to the defendant, it will not have been tested by defense cross-examination. Furthermore, in criminal cases there is typically no right to depose a witness for discovery purposes,[72] and the declarant, especially a

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69. For instance, in California, the finding of probable cause at a preliminary hearing "may be based in whole or in part upon the sworn testimony of a law enforcement officer relating the statements of declarants made out of court offered for the truth of the matter asserted." CAL. PENAL CODE ANN. § 872(b) (West Supp. 1994) (held to be constitutional in Whitman v. Superior Court, 820 P.2d 262 (Cal. 1991)). The admissibility of hearsay evidence in California preliminary hearings is particularly troublesome in light of the fact that, although the defense can call a hearsay declarant as a witness, People v. Erwin, 25 Cal. Rptr. 2d 348 (Cal. Ct. App. 1993), "[u]pon the request of the prosecuting attorney, the magistrate shall require an offer of proof from the defense as to the testimony expected from the witness." CAL. PENAL CODE ANN. § 866(a) (West Supp. 1994). The problem is that the defense may not have enough information at this stage of the proceedings to make the necessary offer of proof. *See* Laura Berend, *Proposition 115 Preliminary Hearings: Sacrificing Reliability on the Altar of Expediency?*, 23 PAC. L.J. 1131 (1992) (describing how the new preliminary hearing procedures obstruct truth-finding in criminal litigation). Indeed,

> [t]he magistrate shall not permit the testimony of any defense witness unless the offer of proof discloses to the satisfaction of the magistrate, in his or her sound discretion, that the testimony of that witness, if believed, would be reasonably likely to establish an affirmative defense, negate an element of a crime charged, or impeach the testimony of a prosecution witness or the statement of a declarant testified to by a prosecution witness. . . . [But t]he examination shall not be used for purposes of discovery.

CAL. PENAL CODE ANN. § 866(a)-(b) (West Supp. 1994); *see also* Abraham S. Goldstein, *The State and the Accused: Balance of Advantage in Criminal Procedure*, 69 YALE L.J. 1149, 1166-69, 1183 (1960) (discussing the uselessness of the preliminary hearing as a discovery device).

70. WAYNE R. LAFAVE & JEROLD H. ISRAEL, CRIMINAL PROCEDURE § 15.5(a), at 707-10 (2d ed. 1992) (discussing Costello v. United States, 350 U.S. 359 (1956), which rejected the argument that indictments based on hearsay are invalid).

71. Jencks Act, 18 U.S.C. § 3500 (1988). *But see* CAL. PENAL CODE ANN. § 870 (West Supp. 1994) (imposing no such restriction).

72. A minority of jurisdictions do, however, provide for discovery depositions in criminal cases. *See, e.g.*, ARIZ. CONST. art. II, § 2.1 (giving crime victims, but not other witnesses, the right to refuse a defense interview); ARIZ. R. CRIM. P. 15.3(a)(2) ("[T]he court may in its discretion order the examination of any person," upon a showing that "the person's testimony is material to the case or necessary adequately to prepare a defense or investigate the offense, that the person was not a witness at the preliminary hearing, . . . and that the person will not cooperate in granting a personal interview."); FLA. R. CRIM. P. 3.220(b)(1)(A), 3.220(h)(1) (allowing the defendant to depose as of right, within designated limits); IND. CODE § 35-37-4-3 (1993) (allowing the defendant to depose as of right); IOWA CODE ANN. § 813.2 (West 1994); IOWA R. CRIM. P. 12(1) (providing that the state may object and the court may disallow the deposition when the witness is a foundation witness or has been adequately examined at the preliminary hearing); MONT. CODE ANN. § 46-15-201(1)(c) (1993) (allowing a deposition "if it appears that a prospective witness . . . is unwilling to provide relevant information to a requesting party and the witness' testimony is material and necessary"); NEB. REV. STAT. § 29-1917 (1989 & Supp. 1993) (allowing a deposition in the court's discretion); N.H. REV. STAT. ANN. § 517:13(II) (Supp. 1993) (allowing a deposition in the court's discretion; the court is to consider, among other things, the availability of other opportunities to discover the information sought by the deposition); N.M. DIST. CT. R. CRIM. P. 5-503(A) (compelling witness statements when witnesses are uncooperative); N.D. R. CRIM. P. 15(a) (allowing defendant to depose as of right); TEX. CODE CRIM. PROC. ANN. art. 39.02 (West 1979) (allowing deposition upon application stating the facts necessary to constitute a good reason for taking the same); VT. R. CRIM. P. 15(a) (allowing deposition as of right); WASH. SUPER. CT. CRIM. R. 4.6 (allowing a defendant to depose when a material witness refuses to discuss the case with either counsel).

victim, could very well refuse to discuss the matter with the defense.[73] It is therefore quite conceivable that the prosecution could present accusatory or incriminating hearsay evidence at trial and that the defense would have little or no information about the declarant's firsthand account or story-telling abilities.[74] Under the circumstances, a defendant would be unable to make an informed decision about whether to call the prosecution's hearsay declarant.

B. The Limits on Defense Pretrial Discovery

Of course, one way to check the prosecution's trial tactics and keep the factfinding process honest would be to expand defense access to information pretrial.[75] As Professor Gershman has observed: "That there exists a close nexus between limited discovery in criminal cases and enhanced opportunities for prosecutorial suppression of evidence is self-evident. The power to control evidence is the power to conceal it."[76] Nevertheless, defense pretrial discovery in criminal cases remains relatively limited.

In the early 1960's, several prominent scholars and jurists argued for expanded discovery in criminal litigation.[77] Though some contended that

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73. The victims' rights movement is a phenomenon of the 1980's and 1990's. State constitutional amendments recognizing victims' rights have been passed in several states. *See, e.g.*, ARIZ. CONST. art. II, § 2.1; CAL. CONST. art. I, § 28; COLO. CONST. art. II, § 16(a); FLA. CONST. art. I, § 16(b); ILL. CONST. art. I, § 8.1; KAN. CONST. art. 15, § 15; MICH. CONST. art. I, § 24; MO. CONST. art. I, § 32; N.J. CONST. art. I, § 22; R.I. CONST. art. I, § 23; TEX. CONST. art. I, § 30; WASH. CONST. art. I, § 35. Among other things, this movement has sought to limit the defense's access to prosecution witnesses. *See* Berend, *supra* note 69, at 1142 (discussing the admissibility of hearsay in California preliminary hearings); John F. Yetter, *Discovery Depositions in Florida Criminal Proceedings: Should They Survive?*, 16 FLA. ST. U. L. REV. 675 (1988) (documenting the role of victims' rights advocates in the effort to abolish discovery depositions in Florida); Stellisa Scott, Note, *Beyond the Victims' Bill of Rights: The Shield Becomes a Sword*, 36 ARIZ. L. REV. 249 (1994) (discussing the victim's constitutional right in Arizona to refuse an interview, deposition, or other discovery request by the defense and the corresponding enabling legislation which requires the defense to initiate any contact with the victim through the prosecutor's office). Professor Yetter has observed that, at least in Florida, such efforts have been motivated more by the desire to avoid the "inherent unpleasantness of being deposed than on any demonstrated abuse." Yetter, *supra*, at 692.

74. The petitioner in *White* mentioned only in passing that the defense often has had no opportunity to interrogate the complaining witness prior to trial. Reply Brief for Petitioner at 16, White v. Illinois, 502 U.S. 346 (No. 90-6113). The thrust of the petitioner's argument was that the prosecution should be required to present "all, not just part, of the relevant evidence." *Id.* After *Inadi* and *White*, however, it is clear that the Court discerns no problem of constitutional significance in the prosecution choosing to present hearsay evidence in lieu of live testimony.

75. Bennett L. Gershman, *The New Prosecutors*, 53 U. PITT. L. REV. 393, 449-53 (1992); *see also* STEPHAN LANDSMAN, THE ADVERSARY SYSTEM: A DESCRIPTION AND DEFENSE 5 (1984) (observing that "adversarial rules of procedure help to ensure the fairness of the contest by affording each litigant an equal opportunity to make the best possible case" and that "[t]he primary mechanism for ensuring equality is pretrial discovery"); Goldstein, *supra* note 69, at 1199 (describing criminal procedure and its lack of criminal defense discovery opportunities as "relieving police and prosecutor . . . of the pressures necessary to maintain their actions at the optimum level of responsibility"); H. Lee Sarokin & William E. Zuckerman, *Presumed Innocent? Restrictions on Criminal Discovery in Federal Court Belie This Presumption*, 43 RUTGERS L. REV. 1089, 1095 (1991) (arguing that "discovery restriction[s] can curtail the adversarial system rather than preserve it").

76. Gershman, *supra* note 75, at 451.

77. *See, e.g.*, William J. Brennan, Jr., *The Criminal Prosecution: Sporting Event or Quest for Truth?*, 1963 WASH. U. L.Q. 279 (advocating expanded criminal discovery); Robert L. Fletcher, *Pretrial*

discovery opportunities in criminal litigation should be patterned after the opportunities available in civil litigation,[78] none attempted to ground discovery rights in the Constitution. Although some limited criminal discovery advances were subsequently made,[79] in no jurisdiction did the extent of criminal discovery even approach that of civil discovery.[80] Indeed, while depositions are a central feature of civil discovery schemes, only a few jurisdictions provide for discovery[81] (as opposed to perpetuation)[82] depositions in criminal cases.[83]

Discovery in State Criminal Cases, 12 STAN. L. REV. 293 (1960) (advocating cautious development of criminal discovery); Goldstein, *supra* note 69, at 1192-93 (advocating broad criminal discovery); David W. Louisell, *The Theory of Criminal Discovery and the Practice of Criminal Law*, 14 VAND. L. REV. 921 (1961) (advocating broad criminal discovery, but drawing a line between ordinary crime and organized crime); Roger J. Traynor, *Ground Lost and Found in Criminal Discovery*, 39 N.Y.U. L. REV. 228 (1964) (advocating broad criminal discovery).

78. *See* Goldstein, *supra* note 69, at 1192-93 (advocating the incorporation of the Federal Rules of Civil Procedure into the Federal Rules of Criminal Procedure, and emphasizing the importance of an opportunity to depose witnesses); David W. Louisell, *Criminal Discovery: Dilemma Real or Apparent?*, 49 CAL. L. REV. 56, 100 (1961) (advocating for discovery in criminal cases as full-fledged as that which characterizes civil litigation in the federal courts, except in cases involving organized crime); *Developments in the Law—Discovery*, 74 HARV. L. REV. 940, 1057 (1961) (suggesting a mutual exchange of witness lists coupled with a mutual opportunity to depose witnesses of either side in criminal litigation); *Pre-Trial Disclosure in Criminal Cases*, 60 YALE L.J. 626, 640-46 (1951) (recommending the adaptation of various civil discovery devices, including the examination of witnesses before trial, to criminal litigation).

79. *See* MICHAEL H. GRAHAM, WITNESS INTIMIDATION 37-56 (1985) (tracing the history of Rule 16 of the Federal Rules of Criminal Procedure); *see also* William J. Brennan, Jr., *The Criminal Prosecution: Sporting Event or Quest for Truth? A Progress Report*, 68 WASH. U. L.Q. 1, 11 (1990) (describing the advances as "important" but "spotty").

80. In 1961, Professor Louisell observed that criminal discovery "lags far behind" civil discovery, "at least in terms of the five chief formal techniques of civil discovery," namely: oral and written depositions of parties and witnesses, interrogatories to adverse parties, motions for inspection and copying, physical and mental examinations, and demands for admissions. Louisell, *supra* note 77, at 923. In 1995, the observation largely remains true but for the opportunity to inspect and copy tangible evidence. *See infra* note 257 and accompanying text.

81. *See supra* note 72 and accompanying text.

82. Perpetuation depositions are allowed to preserve the testimony of witnesses who may be unavailable for trial. *See, e.g.*, ALA. CODE § 12-21-260(a) (1986); ALASKA STAT. § 12.30.050 (1990); ARIZ. R. CRIM. P. 15.3(a)(1); ARK. CODE ANN. § 16-44-201 (Michie 1994); CAL. PENAL CODE ANN. § 1336(a) (West Supp. 1994); COLO. R. CRIM. P. 15(a); CONN. GEN. STAT. ANN. § 54-86 (West 1994); DEL. SUPER. CT. CRIM. R. 15(a); D.C. SUPER. CT. R. CRIM. P. 15(a); FLA. R. CRIM. P. 3.190(j); GA. CODE ANN. § 24-10-130 (Supp. 1994); HAW. R. PENAL P. 15(a); IDAHO CRIM. R. 15(a); ILL. SUP. CT. R. 414(a); IND. CODE § 35-37-4-3; IOWA CODE ANN. § 813.2, IOWA R. CRIM. P. 12(2); KAN. STAT. ANN. § 22-3211 (1988); KY. R. CRIM. P. 7.10; ME. R. CRIM. P. 15(a); MD. CRIM. CAUSES R. 4-261(b); MASS. R. CRIM. P. 35(a); MINN. R. CRIM. P. 21.01, 21.06; MO. ANN. STAT. § 545.380 (Vernon 1987); MONT. CODE ANN. § 46-15-201(1)(a)-(b) (1993); NEB. REV. STAT. § 29-1904 (1989); NEV. REV. STAT. ANN. § 174.175 (Michie 1992); N.H. REV. STAT. ANN. § 517:13(II)(a) (Supp. 1994); N.J. R. CRIM. PRAC. 3:13-2(a); N.M. DIST. CT. R. CRIM. P. 5-503(B); N.Y. CRIM. PROC. LAW § 660.20 (McKinney 1984); N.C. GEN. STAT. § 8-74 (1986); N.D. R. CRIM. P. 15(a)(3); OHIO R. CRIM. P. 15(A); OKLA. STAT. ANN. tit. 22, § 762 (West 1992 & Supp. 1995); R.I. SUPER. CT. R. CRIM. P. 15(a); S.C. CODE ANN. § 22-3-940 (Law. Co-op. 1989); S.D. CODIFIED LAWS ANN. § 23A-12-1 (1988); TENN. R. CRIM. P. 15(a); TEX. CODE CRIM. PROC. ANN. art. 39.02 (West 1979); UTAH R. CRIM. P. 14(h); WASH. SUPER. CT. CRIM. R. 4.6; W. VA. R. CRIM. P. 15(a); WIS. STAT. ANN. § 967.04(1) (West 1985 & Supp. 1995); WYO. R. CRIM. P. 15(a); *see also* FED. R. CRIM. P. 15(a).

83. *See* Brennan, *supra* note 79, at 12-13 (arguing that the general prohibition on taking discovery depositions is due for reconsideration).

Nevertheless, broad criminal discovery makes at least as much sense as broad civil discovery.[84] As Justice Brennan observed: "By aiding effective trial preparation, [criminal] discovery helps develop a full account of the relevant facts, helps detect and expose attempts to falsify evidence, and prevents factors such as surprise from influencing the outcome at the expense of the merits of the case."[85] This is the same rationale that supports extensive civil discovery schemes.[86]

This being the case, why did civil litigation take a different course than criminal litigation? The answer very likely has something to do with political expediency. Criminal defendants, who are disproportionately members of racial minorities,[87] are not society's power brokers and have never been an influential interest group.[88] Notably, the push for criminal discovery rights in the early 1960's arose during the Kennedy administration's war on organized crime,[89] during which the perceived need was to facilitate

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84. *See* Sarokin & Zuckerman, *supra* note 75, at 1089 (describing the unrestricted discovery in civil cases and the severely restricted discovery in criminal matters as an "astonishing anomaly" given the relative interests—property versus liberty—at stake).

85. Taylor v. Illinois, 484 U.S. 400, 425 (1988) (Brennan, J., dissenting); *see also* Randolph N. Jonakait, *Making the Law of Factual Determinations Matter More*, 25 LOY. L.A. L. REV. 673 (1992) (arguing that more than the application of evidentiary rules is needed to improve the accuracy of factual determinations at trial).

86. *See* Hickman v. Taylor, 329 U.S. 495, 501 (1947) (describing the purposes served by civil discovery); *Developments in the Law—Discovery*, *supra* note 78, at 944-46 (discussing the goals of civil discovery).

87. For instance, while African-Americans comprised 12.1% and Caucasians 80.3% of the country's 1990 population, U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 1993 No. 18, at 18 (113th ed.), African-Americans comprised 29% and Caucasians 69% of all 1991 arrestees. U.S. DEP'T OF JUSTICE, FED. BUREAU OF INVESTIGATION, UNIFORM CRIME REPORTS FOR THE UNITED STATES 1991, at 231. Indeed, in 1991, African-Americans comprised 44% of the population's violent crime arrestees (Caucasians comprised 53.6%) and 31.3% of the population's property crime arrestees (Caucasians comprised 66.4%). *Id.* The 1990 statistics for federal cases similarly indicate that African-Americans comprised 29.4% and Caucasians 66.1% of convicted offenders for all offenses combined. U.S. DEP'T OF JUSTICE, COMPENDIUM OF FEDERAL JUSTICE STATISTICS, 1990, at 33 (1993); *see also* Michael Tonry, *Racial Disproportion in US Prisons*, 34 BRIT. J. CRIMINOLOGY 97, 102 (Special Issue, 1994) ("The better comparison is between racially disaggregated incarceration rates measured as the number of confined persons of a racial group per 100,000 population of that group. By that measure, black incarceration rates are six to seven times higher than white incarceration rates.").

88. *See* Michael Tonry, *Race and the War on Drugs*, 1994 U. CHI. LEGAL F. 25, 75 ("Common law and street criminals do not vote very much and do not evoke much sympathy from those who do vote. They are also disproportionately members of ethnic and racial minorities."). Justice Brennan made a similar point when he remarked:

> Who are our criminal defendants? Are they people having relatives with resources capable of helping in their defense? By and large, the so-called "white collar" criminal probably does have the resources and friends to aid him in his defense. Justice is indeed well served when prosecution and defense are fairly evenly matched. But is this the situation for the vast majority of our "blue collar" defendants? Judges know that the largest percentage of these people are indigent.

Brennan, *supra* note 77, at 285.

89. The Kennedy administration's war on organized crime has been described as ranking "at the top of the nation's domestic priorities" until well into 1963 when it was displaced by civil rights. VICTOR S. NAVASKY, KENNEDY JUSTICE 51 (1971). As Attorney General of the United States during the Kennedy administration, Robert F. Kennedy led an aggressive war on organized crime. *Id.* at 44-64. In 1960, just prior to becoming Attorney General, he wrote a book, *The Enemy Within*, documenting his three years investigating labor racketeering as chief counsel for the Senate Select Committee on Improper Activities in the Labor or Management Field. *See* ROBERT F. KENNEDY, THE ENEMY WITHIN

prosecutions, not defenses.[90] Some commentators have recently argued that further development of criminal discovery is a task for the legislature,[91] but there is little reason to believe that politicians today are any more interested in statutorily expanding discovery opportunities for criminal defendants than they were in the 1960's. Voters have identified crime as their chief concern (significantly, even above the economy in a time of recession), when the crime rate actually appears to be down.[92] Legislators do not want to appear "soft" on crime or criminal defendants.[93] Recognizing the legislative resistance to the expansion of criminal discovery, recent scholarship has recommended more specific, and modest, statutory reforms.[94]

The chief (and perhaps less jaded) arguments of old, advanced in opposition to expanding criminal defense discovery, invoke the words of Judge Learned Hand. In *United States v. Garsson*,[95] Judge Hand rejected the defendants' request to inspect the grand jury's minutes.[96] He acknowledged the "scraps of evidence accessible" to the defense in building a case to quash the indictments,[97] but reasoned, in an oft-quoted passage:

> Under our criminal procedure the accused has every advantage. While the prosecution is held rigidly to the charge, he need not disclose the barest

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(1960). Ironically, as Attorney General, Robert F. Kennedy well knew the value of discovering information to his war efforts. He encouraged information sharing by the Government's various intelligence agencies and urged Congress to pass wiretapping legislation. NAVASKY, *supra*, at 49, 50, 55, 60, 61, 72, 74.

90. *See* Louisell, *supra* note 77, at 932-36 (arguing that pretrial discovery by defendants of organized, professional, and conspiratorial crime should be handled differently than pretrial discovery by the typical criminal defendant); Louisell, *supra* note 78, at 98-101 (emphasizing the same distinction). Today's gangs, although not formally organized crime, evoke some of the same concerns.

91. *See* Sarokin & Zuckerman, *supra* note 75, at 1108.

92. *Compare* James P. Sweeney, *State Violent Crime Down in '93*, SAN DIEGO UNION-TRIB. (Afternoon Edition), Jan. 12, 1994, at A3 ("The annual crime data showed that property crimes dropped 3.7 percent, and violent crimes, 4.1 percent.") *with* Gerry Braun, *Crime Now State's No. 1 Concern*, SAN DIEGO UNION-TRIB. (Afternoon Edition), Nov. 24, 1993, at A4 (reporting that a survey of 1003 Californians found that "crime and law enforcement . . . had 78 percent of the state extremely concerned. Next were the economy, the spread of AIDS and the condition of public schools, which each had 74 percent extremely concerned.").

93. Despite the divergence between crime statistics and public opinion polls, the political leadership appears to be following the lead of the general, and perhaps uninformed, citizenry. *See* Dana Wilkie, *Anti-Crime Sentiment Has Candidates Vying for Title of 'Toughest'*, SAN DIEGO UNION-TRIB. (Afternoon Edition), May 20, 1994, at A1; Dana Wilkie, *Senate OKs Tough '3 Strikes'*, SAN DIEGO UNION-TRIB. (Afternoon Edition), Mar. 4, 1994, at A19.

94. *See, e.g.*, Linda S. Eads, *Adjudication by Ambush: Federal Prosecutors' Use of Nonscientific Experts in a System of Limited Criminal Discovery*, 67 N.C. L. REV. 577 (1989) (recommending expanded discovery opportunities when a prosecution involves expert testimony); Paul C. Giannelli, *Criminal Discovery, Scientific Evidence, and DNA*, 44 VAND. L. REV. 791 (1991) (recommending expanded discovery opportunities when a prosecution involves scientific evidence); Edward J. Imwinkelried, *The Worst Surprise of All: No Right to Pretrial Discovery of the Prosecution's Uncharged Misconduct Evidence*, 56 FORDHAM L. REV. 247 (1987) (recommending expanded discovery opportunities when a prosecution involves uncharged misconduct evidence). Some specific recommendations to expand criminal discovery have been influential in effecting limited, statutory reform. *See, e.g.*, FED. R. EVID. 404(b) (requiring the prosecution to notify the defense of the prosecution's intention to proffer uncharged misconduct evidence).

95. 291 F. 646 (S.D.N.Y. 1923).

96. *Id.* at 649.

97. *Id.*

> outline of his defense. He is immune from question or comment on his silence; he cannot be convicted when there is the least fair doubt in the minds of any one of the twelve. Why in addition he should in advance have the whole evidence against him to pick over at his leisure, and make his defense, fairly or foully, I have never been able to see.[98]

In *State v. Tune*,[99] another prominent authority for the case against expanding criminal discovery, New Jersey Supreme Court Chief Justice Vanderbilt, also cited the lack of reciprocity and the defendant's right against self-incrimination as reasons for denying the defendant access to witness statements and his own confession in a murder prosecution.[100]

One could counter these fairness arguments by appealing to higher moral ground. After all, "questions of relative 'advantage'" seem like petty concerns in comparison to the goals of truth-seeking and justice.[101] Nevertheless, "justice" arguments are unnecessary because the state suffers no discernible disadvantage in criminal litigation.[102] The reality is that, although the one-way street argument retains some validity, modern criminal discovery schemes overwhelmingly include reciprocal discovery provisions,[103] and many require the defendant to disclose certain defenses to the prosecution.[104] Moreover,

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98. *Id.*

99. 98 A.2d 881 (N.J. 1953).

100. *Id.* at 884-85.

101. *See Developments in the Law—Discovery*, *supra* note 78, at 1062 (raising the justice versus conviction argument); *see also Pre-Trial Disclosure in Criminal Cases*, *supra* note 78, at 635 (making the justice versus conviction argument).

102. *See* Goldstein, *supra* note 69, at 1152-92 (demonstrating that the advantage lies decidedly with the prosecution).

103. *See, e.g.*, ALA. R. CRIM. P. 16.2; ARIZ. R. CRIM. P. 15.2; ARK. CODE ANN. § 16-89-116(c) (Michie 1987); CAL. PENAL CODE ANN. § 1054.3 (West Supp. 1994); COLO. R. CRIM. P. 16, pt. II; DEL. SUPER. CT. CRIM. R. 16(b); FLA. R. CRIM. P. 3.220(d); IDAHO CODE § 19-1309(3) (1987); IDAHO CRIM. R. 16(c); ILL. SUP. CT. R. 413; IOWA CODE ANN. § 813.2; IOWA R. CRIM. P. 13(3); KAN. STAT. ANN. § 22-3212(c) (1988 & Supp. 1993); KY. R. CRIM. P. 7.24(3); LA. CODE CRIM. PROC. ANN. arts. 724-25 (West 1981); ME. R. CRIM. P. 16A(a)(1)-(2); MD. CRIM. CAUSES R. 4-263(d); MASS. R. CRIM. P. 14(a)(3); MINN. R. CRIM. P. 9.02; MONT. CODE ANN. § 46-15-323 (1993); NEB. REV. STAT. § 29-1916 (1989); NEV. REV. STAT. ANN. § 174.255 (Michie 1992); N.J. R. CRIM. PRAC. 3:13-3(b); N.M. DIST. CT. R. CRIM. P. 5-502; N.Y. CRIM. PROC. LAW §§ 240.30, 240.40(2) (McKinney 1994); N.C. GEN. STAT. § 15A-905 (1988); N.D. R. CRIM. P. 16(b); OHIO R. CRIM. P. 16(C); OR. REV. STAT. § 135.835 (1990); PA. R. CRIM. P. 305(C); S.C. R. CRIM. P. 5(b); S.D. CODIFIED LAWS ANN. §§ 23A-13-12 (Rule 16(b)(1)(A)), 23A-13-13 (1988); TENN. R. CRIM. P. 16(b); VT. R. CRIM. P. 16.1; VA. SUP. CT. R. 3A:11(c); WASH. SUPER. CT. CRIM. R. 4.7(b); W. VA. R. CRIM. P. 16(b); WIS. STAT. ANN. § 971.23(3)-(5) (West 1985 & Supp. 1994); WYO. R. CRIM. P. 16(b); *see also* FED. R. CRIM. P. 16(b).

104. *See, e.g.*, ALASKA STAT. § 12.47.010(b) (1990) (insanity); ARIZ. R. CRIM. P. 15.2(b) (various defenses); ARK. CODE ANN. § 5-2-304(a) (Michie 1993) (mental disease or defect); COLO. REV. STAT. ANN. § 16-7-102 (West 1990 & Supp. 1994) (alibi); CONN. SUPER. CT. CRIM. R. §§ 758 (mental disease or defect), 763 (alibi); DEL. SUPER. CT. R. CRIM. P. 12.2(a) (insanity); D.C. SUPER. CT. R. CRIM. P. 12.1 (alibi), 12.2 (insanity); FLA. R. CRIM. P. 3.200 (alibi); GA. UNIF. SUPER. CT. R. 31.1 (insanity or mental illness); IDAHO CODE § 19-519 (1987) (alibi); ILL. SUP. CT. R. 413(d) ("any" defenses); IND. CODE §§ 35-36-2-1 (insanity), 35-36-4-1 (alibi); IOWA CODE ANN. § 813.2 (West 1994); IOWA R. CRIM. P. 10(11)(a) (alibi), (b) (insanity and diminished responsibility), (c) (intoxication, entrapment, and self-defense); KAN. STAT. ANN. § 22-3218 (1988) (alibi); KY. REV. STAT. ANN. § 504.070(1) (Michie/Bobbs-Merrill 1990) (mental illness or insanity); LA. CODE CRIM. PROC. ANN. arts. 726 (defense based on mental condition), 727 (alibi) (West 1981); ME. R. CRIM. P. 16A(a)(3) (alibi); MD. CRIM. CAUSES R. 4-263(d)(3) (alibi); MASS. R. CRIM. P. 14(b)(1) (alibi), (b)(2) (mental disease or defect), (b)(3) (other defenses); MICH. COMP. LAWS ANN. §§ 768.20 (alibi), 768.20a (insanity) (West 1982 & Supp. 1994); MINN. R. CRIM. P. 9.02 subd. (1)(3)(a) ("any" defense); MO. SUP. CT. R. CRIM. P. 25.05A(4) (mental

law enforcement officers who investigate crimes and question arrestees before defense counsel is appointed routinely obtain incriminating statements from criminal defendants, despite *Miranda* warnings.[105] The prosecution also enjoys significantly better access than the average criminal defendant to crime laboratories to conduct appropriate scientific testing.[106] Therefore, whatever the state of the law and police science when Judge Hand and Chief Justice Vanderbilt were writing, their observations about the one-sidedness of criminal discovery are simply no longer accurate.[107]

Chief Justice Vanderbilt gave other reasons for divergent civil and criminal discovery schemes: He suggested that criminal defendants who knew the whole of the evidence against them would "procure perjured testimony in order to set up a false defense" and bribe or intimidate the witnesses against them.[108] Justice Brennan, dissenting in *Tune*, retorted that the experience in civil cases allowing liberal discovery, and the experience in England and Canada where the criminal defendant enjoys broad discovery opportunities, did not support Justice Vanderbilt's predictions.[109] Five years later, citing

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disease or defect); MONT. CODE ANN. § 46-15-323(2) (good character, alibi, compulsion, entrapment, justifiable use of force, or mistaken identity), (3) (mental disease or defect) (1993); NEB. REV. STAT. § 29-1927 (Supp. 1994) (alibi), § 29-2203 (1989) (insanity); NEV. REV. STAT. ANN. § 174.087 (Michie 1992) (alibi); N.H. SUPER. CT. R. 100 (alibi); N.J. R. CRIM. PRAC. 3:11-1 (alibi), 3:12 (insanity), 3:12A (various defenses); N.M. DIST. CT. R. CRIM. P. 5-508 (alibi); N.Y. CRIM. PROC. LAW § 340.30 (McKinney 1993-1994) (mental disease or defect, alibi); N.C. GEN. STAT. § 15A-959 (1988) (insanity); N.D. R. CRIM. P. 12.1(a) (alibi); OHIO REV. CODE ANN. § 2945.58 (Baldwin 1992) (alibi); OKLA. STAT. ANN. tit. 22, §§ 585 (alibi), 1176(A) (West 1986 & Supp. 1993-1994) (mental illness or insanity); OR. REV. STAT. § 135.455 (1990) (alibi); PA. R. CRIM. P. 305(C)(1)(a) (alibi), (b) (insanity or mental infirmity); R.I. SUPER. CT. R. CRIM. P. 12(c) (insanity); S.C. R. CRIM. P. 5(e) (alibi), (f) (insanity or guilty but mentally ill); S.D. CODIFIED LAWS ANN. § 23A-9-1 (Rule 12.1(a)) (1988) (alibi); TENN. R. CRIM. P. 12.1 (alibi), 12.2 (insanity or mental condition); TEX. CODE CRIM. PROC. ANN. art. 46.03 (West 1979 & Supp. 1995) (insanity); UTAH R. CRIM. P. 16(c) (alibi or insanity); VT. R. CRIM. P. 12.1(a) (alibi, insanity, or mental condition); VA. SUP. CT. R. 3A:11(c)(2) (alibi), (3) (insanity); WASH. SUPER. CT. R. 4.7(b)(2)(xii)-(xiv) (the defendant may be ordered to state the general nature of the defense and whether or not he or she will rely on alibi or insanity); W. VA. R. CRIM. P. 12.1 (alibi), 12.2 (insanity or mental condition); WIS. STAT. ANN. § 971.23(8) (West 1985) (alibi); WYO. R. CRIM. P. 12 (alibi); *see also* FED. R. CRIM. P. 12.2 (notice of defense based on mental condition).

105. *See* William J. Stuntz, *Lawyers, Deception, and Evidence Gathering*, 79 VA. L. REV. 1903, 1924 (1993) (arguing that certain doctrines and practices appropriately facilitate maximum evidence gathering by the police, unimpeded by defense counsel, at the start of criminal cases); *see also* Brennan, *supra* note 77, at 292 (dismissing the fairness argument given the widespread pretrial interrogation of criminal defendants by the police); Fletcher, *supra* note 77, at 312 (dismissing the argument that allowing broad discovery is unfair to the state, especially given the common pretrial interrogation of the defendant and others by the police).

106. Professors Paul C. Giannelli and Edward J. Imwinkelried have observed that 80% of the more than 300 crime laboratories in this country are under state control, 1 PAUL C. GIANNELLI & EDWARD J. IMWINKELRIED, SCIENTIFIC EVIDENCE § 3-1, at 74 (2d ed. 1993), and that most of these laboratories (57%) will examine only evidence that has been submitted by law enforcement officials. 1 *Id.* § 4-1, at 110.

107. Chief Justice Vanderbilt's argument would also appear to be disingenuous given that the defendant in the case allegedly signed a fourteen-page confession. State v. Tune, 98 A.2d 881, 883 (N.J. 1953). The confession was apparently obtained from the defendant between the hours of 12:20 a.m. and 5:00 a.m. on August 24, 1952, two days after the alleged murder, while the defendant was in custody and without counsel. *Id.* at 895 (Brennan, J., dissenting).

108. *Tune*, 98 A.2d at 884.

109. *Id.* at 894-95 (Brennan, J., dissenting). Professor Louisell described the English "preliminary hearing-deposition procedure" as the "quintessence of discovery." Louisell, *supra* note 78, at 64. For a description of the English procedure, see *id.* at 64-67.

the lack of empirical evidence in support of Chief Justice Vanderbilt's reasoning, the New Jersey Supreme Court in *State v. Johnson*[110] disavowed *Tune*, at least with respect to a defendant's opportunity to see his or her own confession.[111]

Some might argue that witness intimidation is a genuine concern. Relying on studies from the 1970's, Professor Michael Graham has concluded that witness intimidation is a "pervasive problem."[112] He has observed that it is a more serious problem in federal than in state prosecutions, primarily because of the relative frequency with which organized crime is prosecuted in federal courts.[113] Professor Graham, however, can hardly link witness intimidation to the availability or expansion of formal defense discovery in criminal cases. For example, in addition to the organized crime context, Professor Graham has identified domestic violence cases as involving "[a] great deal of witness intimidation."[114] However, in the latter context, the defendant presumably well knows who the government's witnesses are. As commentators have observed, guilty defendants will have significant personal knowledge of the government's case and its witnesses despite minimal discovery opportunities; it is the innocent defendant who is at a loss to prepare a defense when discovery is limited.[115] To the extent that witness intimidation is a problem attributable to formal defense discovery, state legislatures appropriately include provisions for protective orders in their criminal discovery schemes.[116]

The expansion of criminal discovery therefore not only makes good sense, it also furthers important policy interests articulated by the Supreme Court:

> "We have elected to employ an adversary system of criminal justice in which the parties contest all issues before a court of law. The need to

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110. 145 A.2d 313 (N.J. 1958).

111. *Id.* at 316-17.

112. GRAHAM, *supra* note 79, at 4.

113. *Id.* at 5, 52, 56.

114. *Id.* at 5.

115. *Developments in the Law—Discovery*, *supra* note 78, at 1057 (favoring expanded discovery despite the risks); *Pre-Trial Disclosure in Criminal Cases*, *supra* note 78, at 639 (observing that the advantages of disclosure outweigh potential abuses).

116. *See, e.g.*, ALA. R. CRIM. P. 16.4; ARIZ. R. CRIM. P. 15.5; ARK. CODE ANN. § 16-89-116(e) (Michie 1987); CAL. PENAL CODE ANN. § 1054.2 (West Supp. 1994) (prohibiting attorneys from disclosing a victim or witness's address or telephone number to the defendant); COLO. R. CRIM. P. 16(d)(2); CONN. GEN. STAT. ANN. § 54-86d to -86e (West 1994) (restricting the disclosure of a sexual assault victim's address or telephone number); DEL. SUPER. CT. CRIM. R. 16(d)(1); FLA. R. CRIM. P. 3.220(b)(2), (e); IDAHO CODE § 19-1309(5) (1987); IDAHO CRIM. R. 16(k); ILL. SUP. CT. R. 412(i); IOWA CODE ANN. § 813.2 (West 1994); IOWA R. CRIM. P. 13(6)(a); KAN. STAT. ANN. § 22-3212(e) (1988 & Supp. 1993); KY. R. CRIM. P. 7.24(6); LA. CODE CRIM. PROC. ANN. art. 729.1(B) (West 1981); ME. R. CRIM. P. 16(b)(6); MD. CRIM. CAUSES R. 4-263(i); MASS. R. CRIM. P. 14(a)(6); MINN. R. CRIM. P. 9.01, subd. 3(2); MONT. CODE ANN. § 46-15-328 (1993); NEB. REV. STAT. § 29-1912(2)(e), (4) (1989); NEV. REV. STAT. ANN. § 174.275 (Michie 1992); N.J. R. CRIM. PRAC. 3:13-3(d); N.M. DIST. CT. R. CRIM. P. 5-501(E); N.Y. CRIM. PROC. LAW § 240.50 (McKinney 1993); N.C. GEN. STAT. § 15A-908 (1988); N.D. R. CRIM. P. 16(d)(1); OHIO R. CRIM. P. 16(E)(1); OR. REV. STAT. § 135.873 (1990); PA. R. CRIM. P. 305(F); S.C. R. CRIM. P. 5(d)(1); S.D. CODIFIED LAWS ANN. § 23A-13-16 (1988); TENN. R. CRIM. P. 16(d)(1); UTAH R. CRIM. P. 16(f); VT. R. CRIM. P. 16.2(d); VA. SUP. CT. R. 3A:11(f); WASH. SUPER. CT. CRIM. R. 4.7(h)(4); W. VA. R. CRIM. P. 16(d)(1); WIS. STAT. ANN. § 971.23(6) (West 1985 & Supp. 1994); WYO. R. CRIM. P. 16(d)(1); *see also* FED. R. CRIM. P. 16(d)(1).

> develop all relevant facts in the adversary system is both fundamental and comprehensive. The ends of criminal justice would be defeated if judgments were to be founded on a partial or speculative presentation of the facts. . . ."[117]

The Supreme Court thus recognized that both the adversary system and trial as a truth-seeking device are the prominent concerns in its discovery jurisprudence. Justice Brennan had earlier identified the relevant tension in the title of his important article on criminal discovery rights, *The Criminal Prosecution: Sporting Event or Quest for Truth?*[118] It is not an either/or proposition; a principled answer will be premised on the concept of adversarial contest as the means to the truth about disputed past events. Making that contest meaningful is the key.

C. Bridging the Gap

The adversarial contest in criminal litigation may not be meaningful. *Inadi* and *White* proffer the Compulsory Process Clause as a check against the prosecution's presentation of the evidence, and in particular, the prosecutor's use and abuse of hearsay evidence in lieu of live testimony. Nevertheless, a criminal defendant's exercise of compulsory process for obtaining favorable witnesses should obviously be preceded by the interrogation of the witnesses. Indeed, a lawyer could be guilty of ineffective assistance of counsel if the lawyer called the prosecution's hearsay declarant, or anyone else as a witness, without first having interviewed or otherwise interrogated the witness, either personally or through an investigator.[119] Yet, the necessary discovery tools are lacking. The upshot is that, unless criminal discovery expands in significant ways, there is a gap between the asserted "checking" function of the Clause and the ability to effect that function.

The court in *Gregory* was willing to reverse the conviction because the "prosecutor's advice to the[] eye witnesses frustrated [defense] . . . effort[s]" to interview the witnesses.[120] But what if witnesses refuse to talk to either

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117. Taylor v. Illinois, 484 U.S. 400, 408-09 (1988) (quoting United States v. Nixon, 418 U.S. 683, 709 (1974)).

118. *See* Brennan, *supra* note 77.

119. *See* Strickland v. Washington, 466 U.S. 668 (1984) (holding that the defendant was not denied the effective assistance of counsel, but recognizing that counsel has a duty to make reasonable investigations or to make a reasonable decision not to investigate; counsel, among other things, failed to meet with the defendant's wife and mother before the defendant's capital sentencing hearing); Ewing v. Williams, 596 F.2d 391 (9th Cir. 1979) (remanding for a showing of prejudice, but accepting the district court's finding that counsel failed to perform a number of duties that may be reasonably expected of competent counsel; counsel, among other things, failed to conduct a pretrial interview of the government's key witness or to interview any potential defense witnesses); People v. Shaw, 674 P.2d 759 (Cal. 1984) (holding that a defense attorney's tactical decisions must be informed by adequate investigation and that counsel's omissions—failing to interview witnesses in support of defendant's alibi defense and mistaken identity claim—deprived the defendant of the effective assistance of counsel); People v. Bess, 200 Cal. Rptr. 773 (Cal. Ct. App. 1984) (holding that defense counsel's failure to interview eyewitnesses to the robbery constituted ineffective assistance of counsel).

120. Gregory v. United States, 369 F.2d 185, 189 (D.C. Cir. 1966), *cert. denied*, 396 U.S. 865 (1969). Indeed, several state criminal discovery statutes include provisions prohibiting parties and their

side or refuse to talk to the defense of their own accord and not because of something that the prosecutor has told them?[121] The necessity and desirability of witness interrogation is no less, but there is a dearth of statutory provisions to facilitate their pretrial interrogation by the defense. Perhaps the Compulsory Process Clause can bridge this gap between the "checking" function of the Clause and its effectuation.

IV. GROUNDING CERTAIN DISCOVERY RIGHTS IN THE COMPULSORY PROCESS CLAUSE

Professor Robert N. Clinton, author of a seminal article on the criminal defendant's right to present a defense, has described the history of the Sixth Amendment as "vague," noting the "remarkably limited" reports of the congressional debates.[122] Professor Westen has similarly pointed to a "paucity of debate regarding the substance of the right of compulsory process."[123] However, at least one early historian of the Clause, Joseph Story, made the following observation regarding the right guaranteed by the Compulsory Process Clause:

> The common suggestion has been, that in capital cases no man could, or rather ought, to be convicted, unless upon evidence so conclusive and satisfactory, as to be above contradiction or doubt. But who can say, whether it be in any case so high, until all the proofs in favour, as well as against, the party have been heard? Witnesses for the government may swear falsely, and directly to the matter in charge; and, until opposing testimony is heard, there may not be the slightest ground to doubt its truth; and yet, when such is heard, it may be incontestible, that it is wholly unworthy of belief.[124]

Story thus recognized that an important function of the Clause was to check the prosecution's presentation of the evidence (the very purpose recognized

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agents from impeding the free flow of information from witnesses (except the defendant) to the opposition. *See, e.g.*, COLO. R. CRIM. P. 16, pt. III(a); FLA. R. CRIM. P. 3.220(i); ILL. SUP. CT. R. 415; MINN. R. CRIM. P. 9.03, subd. 1; MONT. CODE ANN. § 46-15-330 (1993); VT. R. CRIM. P. 16.2(a); WASH. SUPER. CT. CRIM. R. 4.7(h)(1).

121. Professor Louisell observed that "[t]he accused . . . is generally disadvantaged relative to the state in respect of the approachability of witnesses." Louisell, *supra* note 78, at 87 (discussing the psychology of the investigative process). He further observed:

> Likely the reason that one does not hear proposals to allow the state to take discovery depositions of witnesses other than [the] defendant is that realistically there is no need of such depositions because the informal availability of witnesses to the state's interrogation is generally satisfactory. And the state's capacity to question the defendant, with the aim of procuring confession, normally makes all but irrelevant defendant's non-amenability to deposition.

Id. at 89-90; *see also* Goldstein, *supra* note 69, at 1191-92 (describing the advantages enjoyed by the prosecution in witness interrogation).

122. Robert N. Clinton, *The Right to Present a Defense: An Emergent Constitutional Guarantee in Criminal Trials*, 9 IND. L. REV. 711, 728 (1976).

123. Westen, *supra* note 2, at 98. For an excellent description of the history of the Clause, such as it is, see *id.* at 95-101.

124. JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1786, at 664 (1833).

in *Inadi* and *White*). Moreover, Story recognized that such was necessary to effect truth-finding at trial.

At issue here is whether the Clause embraces discovery rights to effect the "checking" function. Professor Clinton rejected the notion that a right to defend, including discovery rights, should be grounded in the Compulsory Process Clause.[125] He argued that reliance on the express guarantees of the Sixth Amendment "often strained beyond recognition the language" of its clauses.[126] Indeed, taking issue with even the Supreme Court's application of the Compulsory Process Clause in *Washington v. Texas*,[127] Professor Clinton wrote that "a good argument can be made that the sixth amendment was designed to do simply what it says—to grant the subpoena power to the accused which he lacked at common law."[128] Instead, he proposed grounding a right to defend in the "open-ended, flexible contours of the due process clause."[129] As will be demonstrated below, however, limited discovery rights are appropriately grounded in the Compulsory Process Clause.

A. The Compulsory Process Clause: Text and Context

The Compulsory Process Clause guarantees the defendant "compulsory process for obtaining witnesses *in his [or her] favor*," but what does it mean for witnesses to be "in the defendant's favor?" The opinion in *White* discusses coupling the Compulsory Process Clause with evidentiary rules permitting litigants to treat witnesses as hostile (that is, rules allowing the use of leading questions with uncooperative witnesses). But how is it that the defendant must rely on evidentiary rules permitting the treatment of a witness as *hostile* in order to exercise the defendant's constitutional right to obtain witnesses *in his [or her] favor*? It would appear to be a contradiction in terms. Professor Westen has argued that impeaching evidence, like exculpatory evidence, is a witness in the defendant's favor.[130] It certainly makes sense that any evidence that advances the defendant's position, be it evidence establishing an affirmative defense or a failure of proof-type defense (such as evidence attacking the credibility of the state's star witness), is evidence in the

125. Clinton, *supra* note 122, at 793 & n.386 (1976).

126. *Id.* at 756.

127. 388 U.S. 14 (1967); *see also supra* text accompanying notes 6-12.

128. Clinton, *supra* note 122, at 767. The Court, however, explicitly rejected this argument in Taylor v. Illinois, 484 U.S. 400, 406-09 (1988). *See also* STORY, *supra* note 124, §§ 1786-1787, at 663-66 (suggesting that the adoption of the Compulsory Process Clause was, in part, meant to counter the common law practice of allowing the defendant to call witnesses but not allowing defense witnesses to be sworn).

129. Clinton, *supra* note 122, at 783.

130. *See* Westen, *supra* note 2, at 121-26; *see also* Peter Westen, *Compulsory Process II*, 74 MICH. L. REV. 191, 232 (1975). *Brady v. Maryland* and its progeny, delineating the prosecution's duty, pursuant to due process, to disclose material evidence favorable to the defense, have similarly equated impeachment and exculpatory evidence. *See, e.g.*, *Brady*, 373 U.S. 83 (1963); United States v. Bagley, 473 U.S. 667, 676 (1985) ("In *Brady* and *Agurs*, the prosecutor failed to disclose exculpatory evidence. In the present case, the prosecutor failed to disclose evidence that the defense might have used to impeach the Government's witnesses by showing bias or interest. Impeachment evidence, however, as well as exculpatory evidence, falls within the *Brady* rule.").

defendant's favor.[131] Moreover, "[b]y its very terms, the compulsory process clause assumes that a defendant may wish to call witnesses who will appear on his [or her] behalf only if compelled by the court."[132] Accordingly, *prosecution witnesses* are not beyond the reach of the Clause.

Nevertheless, who are these "*witnesses*?" The question is an important one because the answer could dictate the scope of rights protected by the Clause. For instance, if the term "witnesses" in the Compulsory Process Clause were limited to those who testify at trial, then *Washington v. Texas* could approach the outer limits of the Clause.[133] If the term included all those with relevant, personal knowledge, however, then the Clause might very well embrace discovery opportunities.

Justice Scalia discussed the meaning of the term in the context of the Confrontation Clause of the Sixth Amendment.[134] He identified two possible definitions: "(a) one 'who knows or sees any thing; one personally present' or (b) 'one who gives testimony' or who 'testifies,' *i.e.*, '[i]n *judicial proceedings*, [one who] make[s] a solemn declaration under oath, for the purpose of establishing or making proof of some fact to a court.'"[135] Justice Scalia rejected the former definition as inconsistent with the surrounding language in the Confrontation Clause, "witnesses *against him*."[136] He concluded that the term "witnesses," thus contextualized, "obviously refers to those who give testimony against the defendant at trial."[137]

His textual analysis,[138] though scientific in tone, is nevertheless unconvincing. Justice Scalia's point is that the Clause does not *"expressly"* exclude hearsay evidence; rather, the Clause governs testimony admitted in court (that is, the Clause ensures the defendant the opportunity to confront those who actually testify in court for the prosecution).[139] No doubt, the Clause

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131. Similarly, in *Chambers v. Mississippi*, the defendant called McDonald to the stand. 410 U.S. 284, 291 (1973). McDonald had apparently confessed to the killing with which the defendant was charged and subsequently recanted. *Id.* The trial court denied the defendant's motion to cross-examine McDonald on the basis of a Mississippi common-law rule that a party may not impeach his own witness. *Id.* at 295. On appeal, the Supreme Court considered the defendant's right of confrontation:

> The availability of the right to confront and to cross-examine those who give damaging testimony against the accused has never been held to depend on whether the witness was initially put on the stand by the accused or by the State. We reject the notion that a right of such substance in the criminal process may be governed by that technicality or by any narrow and unrealistic definition of the word "against."

Id. at 297-98.

132. Westen, *supra* note 130, at 232.

133. *See supra* notes 6-12 and accompanying text.

134. Maryland v. Craig, 497 U.S. 836, 860 (1990) (Scalia, J., dissenting).

135. *Id.* at 864 (emphasis in original) (quoting 2 NOAH WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1828)).

136. *Id.* at 864-65 (emphasis in original).

137. *Id.* at 865.

138. For a discussion of Justice Scalia's textualism, see George Kannar, *The Constitutional Catechism of Antonin Scalia*, 99 YALE L.J. 1297 (1990), and Bryan H. Wildenthal, *The Right of Confrontation, Justice Scalia, and the Power and Limits of Textualism*, 48 WASH. & LEE L. REV. 1323 (1991). For a more general discussion of textualism and other methods of constitutional argument, see PHILIP BOBBITT, CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION (1982).

139. *Craig*, 497 U.S. at 865.

governs the taking of evidence at trial. But the term "witnesses," thus contextualized, could just as well refer to those hearsay declarants whose statements are offered "against the defendant" at trial.[140] Indeed, a majority of the Supreme Court has consistently assumed that when the prosecution offers hearsay evidence at trial, "hearsay declarants are 'witnesses against' a defendant within the meaning of the Clause."[141]

Since the term "witnesses" in the Confrontation Clause includes those whose out-of-court statements are offered in court by the prosecution, the term embraces more than those who actually come to court and testify. If the term "witnesses" in the Compulsory Process Clause were similarly understood,[142] the term could be interpreted to embrace not only those who are ultimately subpoenaed for trial, but all those who have relevant, personal knowledge about the case, whether or not they are ultimately subpoenaed, implicating certain discovery rights. Even if one were to credit Justice Scalia's textual argument, the language of the Confrontation Clause could be read as being limited to those who actually testify, and the Compulsory Process Clause as contemplating some discovery rights, since the Compulsory Process Clause talks about "*obtaining* witnesses."[143]

For instance, in *Pennsylvania v. Ritchie*,[144] the Supreme Court found no Confrontation Clause violation when the defendant in a child abuse case was denied access to the confidential file of a protective services agency but was able to cross-examine all the witnesses "fully."[145] A plurality reasoned that the rights embodied in the Sixth Amendment Confrontation Clause were trial rights.[146] The Court accordingly held that the right to cross-examine a witness "does not include the power to require the pretrial disclosure of any and all information that might be useful in contradicting unfavorable testimony."[147] If the Compulsory Process Clause were similarly limited as a trial right, the right to secure the attendance and testimony of witnesses

140. For a discussion of how various legal scholars have interpreted the term "witnesses" in the Confrontation Clause, see Laird C. Kirkpatrick, *Confrontation and Hearsay: Exemptions from the Constitutional Unavailability Requirement*, 70 MINN. L. REV. 665, 677-82 (1986).

141. White v. Illinois, 502 U.S. 346, 359 (1992) (Thomas, J., concurring). Evidence codes also treat hearsay declarants in roughly the same fashion as live opposing witnesses. *See, e.g.*, FED. R. EVID. 806 (providing for the impeachment of hearsay declarants).

142. When a drafter uses the same term in another part of the same document, we ordinarily presume that he or she meant it in the same sense. This maxim of interpretation carries special weight here, since the clauses are close to one another in the same constitutional amendment. *See* Randolph N. Jonakait, *Foreword: Notes for a Consistent and Meaningful Sixth Amendment*, 82 J. CRIM. L. & CRIMINOLOGY 713, 737 (1992) (arguing that "[i]f compulsory process and confrontation are read as part of one Sixth Amendment, it can hardly make sense for 'witnesses' to have one meaning for confrontation and a different one for compulsory process").

143. U.S. CONST. amend. VI (emphasis added).

144. 480 U.S. 39 (1987) (plurality opinion).

145. *Id.* at 54.

146. *Id.* at 52. The Court's position did not go unchallenged. *See id.* at 61-66 (Blackmun, J., concurring) (rejecting the plurality's conclusion that the Confrontation Clause protects only a defendant's trial rights and has no relevance to pretrial discovery); *id.* at 66-72 (Brennan, J., dissenting) (same).

147. *Ritchie*, 480 U.S. at 53.

would not include a right to compel the pretrial (or extra-trial)[148] production of persons and tangible objects that might be necessary to mount the adversarial contest anticipated by the Sixth Amendment. Nevertheless, *Ritchie*, which also addressed the scope of the Compulsory Process Clause, notably did not suggest that the Clause embodied only trial rights.[149]

The scope of the Confrontation Clause does not dictate the scope of the Compulsory Process Clause.[150] In *Ritchie*, the Court asserted that a defendant's right to substantive cross-examination of the prosecution's witnesses did not "transform the Confrontation Clause into a constitutionally compelled rule of pretrial discovery."[151] Some may argue that the right to compel the attendance of "witnesses in the defendant's favor" and to elicit their testimony at trial similarly does not transform the Compulsory Process Clause into a constitutionally compelled rule of pretrial discovery. But while the defendant can, however imperfectly and unadvisedly, confront and cross-examine witnesses without pretrial discovery, the defendant cannot call a witness "in his favor" without some pretrial discovery indicating that the witness is a witness "in the defendant's favor." While the concept of a witness "in the defendant's favor" is broadly construed,[152] it is still a fundamental aspect of the Compulsory Process Clause right.[153]

The right to obtain witnesses in one's favor as a check against the prosecution's presentation of the evidence must include the right to assess whether the testimony will be favorable.[154] It is inconceivable that the Supreme Court has proffered to the criminal defendant the right of securing the attendance of the prosecution's hearsay declarants at trial, and even receiving their testimony there, without giving the concomitant right to determine what the hearsay declarants will say before they take the stand. The

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148. By "extra-trial," this Article refers to the possibility of discovery opportunities arising after trial has begun, but separate and apart from the trial itself.

149. *See infra* notes 209-16 and accompanying text.

150. Although Professor Westen has argued that "these two provisions—much like a physical object and its own mirror image—are both the converse of one another and yet substantially identical," Westen, *Confrontation and Compulsory Process*, *supra* note 17, at 569, he has also observed that "[c]ompulsory process . . . is more than a trial right. It gives the defendant the right to discover the existence of witnesses in his favor." Westen, *supra* note 2, at 183-84. Although I disagree with Professor Westen about the appropriate scope of Compulsory Process Clause discovery rights, *see infra* note 203, I agree and argue below that the Compulsory Process Clause is more than a "trial right" in the narrow, *Ritchie* sense of the phrase.

151. *Ritchie*, 480 U.S. at 52.

152. *See supra* notes 130-132 and accompanying text.

153. *See* United States v. Valenzuela-Bernal, 458 U.S. 858, 867-73 (1982); *see also* United States v. Minh The Tran, 16 F.3d 897, 905-06 (8th Cir. 1994) (affirming the defendant's conviction despite the trial court's refusal to grant a continuance to secure the presence of alibi witnesses); Virgin Islands v. Mills, 956 F.2d 443 (3rd Cir. 1992) (reversing the defendant's conviction because the trial court did not allow testimony of a witness who originally was held in contempt but later was willing to testify that the defendant was not the man whom he had observed near the crime scene); United States v. North, 910 F.2d 843, 889-92 (D.C. Cir.) (finding no reversible error in the trial court's quashing of a subpoena to former President Ronald Reagan), *modified on other grounds*, 920 F.2d 940 (1990), *cert. denied*, 500 U.S. 941 (1991).

154. Professor Westen has observed that "[b]ecause compulsory process is designed to enable the accused to present a defense, he must have time to prepare that defense. To achieve its purpose at trial, it must be available before trial." Westen, *supra* note 2, at 104-05.

Court has acknowledged the absurdity of granting the accused the hollow right of calling witnesses whom they could not put on the stand.[155] It is equally absurd to guarantee the accused the compulsory process right without also guaranteeing any opportunity to determine in advance whether the testimony will be favorable. The defense must be able to interview *and* call *and* examine the witnesses. Accordingly, in *United States v. Valenzuela-Bernal*,[156] the Court acknowledged that the Compulsory Process Clause appropriately embraced a right to pretrial discovery when it would otherwise be "unreasonable to require [the defendant] to explain the relevance of . . . missing testimony."[157]

In *Powell v. Alabama*,[158] discussing the right to counsel,[159] the Court interpreted the right as requiring counsel not only at trial, but before trial:

> [F]rom the time of [the defendants'] arraignment until the beginning of [the defendants'] trial, when consultation, thoroughgoing investigation and preparation [a]re vitally important, the defendants did not have the aid of counsel in any real sense, although they were as much entitled to such aid during that period *as at the trial itself*.[160]

Describing the right to counsel without the right to counsel's pretrial assistance as "vain,"[161] the Court specifically reasoned that defense counsel could not hope to be effective at trial without pretrial preparation.

As with the right to counsel, the right to compulsory process, understood as the right to check the prosecution's presentation of the evidence and to present a defense at trial, is meaningless unless the defense has access to and can assess at least certain evidence pretrial (or extra-trial). Accordingly, the Court not only recognized the importance of a pretrial right of production grounded, at least in part, in the Compulsory Process Clause, but actually upheld such an order in *United States v. Nixon*.[162]

In *Nixon*, a unanimous Court[163] upheld an order of the district court requiring President Nixon to produce tapes of his personal conversations with the Watergate defendants for in camera inspection by the court.[164] The Court observed that the right to the production of the tapes derived in part from the

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155. *See supra* text accompanying note 8.

156. 458 U.S. 858 (1982).

157. *Id.* at 871 n.8 (citing United States v. Burr, 25 F. Cas. 187 (C.C.D. Va. 1807) (No. 14,694)). For a fuller discussion of *Valenzuela-Bernal*, see *supra* note 67.

158. 287 U.S. 45 (1932) (holding that the Sixth Amendment right to counsel was violated since counsel were appointed on the eve of trial with no opportunity to investigate the case).

159. The Sixth Amendment Right to Counsel Clause in pertinent part reads: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his [or her] defence." U.S. CONST. amend. VI. *Powell*, a pre-incorporation era case, clarified the right to counsel, but invoked the Due Process Clause of the Fourteenth Amendment, not the Sixth Amendment Right to Counsel Clause. *Id.* For an excellent historical analysis of incorporation, see DAVID J. BODENHAMER, FAIR TRIAL: RIGHTS OF THE ACCUSED IN AMERICAN HISTORY 92-128 (1992).

160. *Powell*, 287 U.S. at 57 (emphasis added).

161. *Id.* at 59 (citing Commonwealth v. O'Keefe, 148 A. 73, 74 (Pa. 1929)).

162. 418 U.S. 683 (1974).

163. Justice Rehnquist did not participate in the decision. *Id.* at 716.

164. *Id.* at 714.

defendants' right of compulsory process.[165] Moreover, although the Court described the Sixth Amendment as conferring certain rights to "every defendant *in a criminal trial*,"[166] *Nixon* involved a subpoena for production "*before* trial."[167] The Court observed that the subpoenaed materials were not otherwise available to the special prosecutor and their "examination and processing" could not await trial.[168]

In *Nixon*,[169] the Supreme Court relied on *United States v. Burr*.[170] In *Burr*, the defendant was charged with treason and accused of planning to precipitate war with Spain and establish a separate government in the western states by force.[171] In an 1807 address to Congress, President Thomas Jefferson identified the defendant as the mastermind of this plot, and in so doing referred to a certain letter sent to him by General James Wilkinson.[172] The defendant sought the letter pretrial.[173] The court rejected the Government's argument that Burr's motion for a subpoena duces tecum was premature because the Sixth Amendment rights were trial rights.[174] Instead, the court held that a defendant's right of compulsory process attaches as soon as the defendant has an interest in preparing his defense, and that in Burr's case, this occurred upon his arrest.[175] In ordering President Jefferson to produce the letter for the trial court's inspection, the court in *Burr*, as in *Nixon*, derived a pretrial production right from the Compulsory Process Clause.[176] *Burr* is particularly relevant because it represents a "contemporary construction of the clause by the preeminent constitutional jurist of the time,"[177] Chief Justice John Marshall.

Thus, significant authority exists to show that the Compulsory Process Clause includes at least certain discovery rights, and contextualizing the Compulsory Process Clause within the Sixth Amendment only supports this notion. Indeed, *Powell v. Alabama* is an important authority in this area not only because it recognizes Sixth Amendment rights as sometimes being more than trial rights,[178] but also because it clarifies the right to counsel, one of the Sixth Amendment rights.[179] The Court observed that the Framers

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165. *See id.* at 711. Strangely, in *Nixon* the Court relied on the Sixth Amendment even though the prosecution, and not the defendants, sought the pretrial production of the tapes.

166. *Id.* (emphasis added).

167. *Id.* at 702 (emphasis in original).

168. *Id.*

169. *See id.* at 702, 707, 708, 713, 714-15.

170. 25 F. Cas. 30 (C.C.D. Va. 1807) (No. 14,692d).

171. FRANCIS F. BEIRNE, SHOUT TREASON: THE TRIAL OF AARON BURR 19, 174-75 (1959).

172. *See id.* at 25-26. If Aaron Burr was the mastermind of the plot, General Wilkinson was, at least originally, a co-conspirator. *Id.* at 21, 36-38, 253. Wilkinson ultimately betrayed Burr by sending letters to President Jefferson exposing the plot. *Id.* at 112.

173. *Id.* at 93. In the letter which was the subject of the subpoena duces tecum, Wilkinson falsely professed ignorance of the plot's details. *Id.* at 112-13.

174. *Burr*, 25 F. Cas. at 32-33.

175. *Id.* at 33.

176. *See id.*

177. Westen, *supra* note 2, at 102.

178. *See supra* notes 158-62 and accompanying text.

179. *Powell*, 287 U.S. 45, 52 (1932).

envisioned defense counsel as concerned not only with matters of law, but with matters of fact,[180] and it acknowledged defense counsel's "vitally important" role in fact investigation.[181] The Court's observation about defense counsel's role remains poignant. As Professor Fletcher has observed: "The most imaginative formulation of legal points and intensive research is utterly useless in trial if the creative thinking and research have been directed to a misconceived range of evidentiary detail."[182] Accordingly, it is well-settled that the right to counsel embraces the right to have the assistance of counsel for purposes of developing the evidence.[183]

Defense counsel's role in fact-gathering is particularly important and more difficult today than it was when the Bill of Rights was ratified. In *United States v. Wade*,[184] which involved the defendant's right to counsel at a pretrial, post-indictment, live lineup, the Supreme Court noted that "[w]hen the Bill of Rights was adopted, there were no organized police forces as we know them today. The accused confronted the prosecutor and the witnesses against him, and the evidence was marshalled, largely at the trial itself."[185]

Today's defense counsel must meet the prosecutor's particularly formidable and unprecedented arsenal of fact-gathering methods, including the use of an organized police force to marshal the evidence prior to trial. Moreover, it cannot be seriously argued that defense counsel's task is any less onerous because an organized police force investigates the charges. Professor Stanley Fisher has documented a pro-prosecution bias in police investigation and reporting.[186] He has observed that despite "formal departmental policies requiring 'complete' investigations and reports of 'all relevant facts,' many, if not most, police follow 'working rules' that prefer minimal investigations and reports limited to inculpatory facts."[187] Professor Fisher's research included an examination of police training materials and concluded:

> [N]one of the training materials addresses the importance of investigating, recording, or reporting exculpatory facts to avoid punishment of a possibly innocent arrestee. On the contrary, the materials reflect a psychological set in which the arrestee's guilt is presumed, and the only use of notes and reports in the criminal process is to ensure conviction.[188]

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180. *Id.* at 60-65 (reviewing the history of the right to counsel in colonial America); *see also* 2 ZEPHANIAH SWIFT, A SYSTEM OF THE LAWS OF THE STATE OF CONNECTICUT 399 (Arno Press 1972) (1796) (emphasizing the importance of defense counsel's fact investigation to truth-seeking at trial).

181. *Powell*, 287 U.S. at 57.

182. Fletcher, *supra* note 77, at 305.

183. *See* AMERICAN BAR ASS'N, ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION AND DEFENSE FUNCTION 181 (3d ed. 1993) [hereinafter ABA STANDARDS FOR CRIMINAL JUSTICE].

184. 388 U.S. 218 (1967).

185. *Id.* at 224 (citing Note, *An Historical Argument for the Right to Counsel During Police Interrogation*, 73 YALE L.J. 1000, 1040-42 (1964), and Richard Jaeger, Comment, *The Right to Counsel During Police Interrogation*, 53 CAL. L. REV. 337, 347-48 (1965) (both discussing the pretrial interrogation of criminal defendants by the police, for the proposition that organized police forces post-date the Bill of Rights)); *see also* BODENHAMER, *supra* note 159, at 84 (tracing the development of a professional police force to the 1920's).

186. *See generally* Stanley Z. Fisher, *"Just the Facts, Ma'am": Lying and the Omission of Exculpatory Evidence in Police Reports*, 28 NEW ENG. L. REV. 1 (1993).

187. *Id.* at 18.

188. *Id.* at 30.

Professor Fisher also concluded, rather cynically, that "if the police do not conduct an objective, neutral, and thorough investigation, no one [apparently including defense counsel] will."[189] He therefore recommended several remedies for the failure of police to report exculpatory evidence.[190]

Whether or not one agrees with Professor Fisher's conclusion that charges are inadequately investigated by all the players in a criminal prosecution, it is apparent from his research that today's defense counsel faces significant challenges in the effort to gather evidence and mount a defense. *Wade* implicitly acknowledged that with the advent of the modern police force, defense counsel's role had to evolve to meet the changed circumstances of modern fact investigation. It is also apparent that the defendant's right to obtain witnesses in his or her favor must work in tandem with this modern right to counsel.[191]

B. Westen's Unwieldy Approach to Compulsory Process Clause Discovery Rights

Although the Supreme Court has interpreted the Compulsory Process Clause as embracing discovery rights and the right to counsel as assuring defendants' counsel for purposes of fact investigation, it has dismissed the notion of a general constitutional right to discovery in criminal cases, and instead has applied a due process analysis on a case by case basis.[192] In *Brady v. Maryland*,[193] one of the seminal cases on the subject, the Court held that due process required the government to reveal material evidence in its possession favoring the accused.[194] In *Brady*, the prosecution in a murder trial violated the defendant's due process rights when it failed to produce a co-participant's confession that he had strangled the victim in the perpetration of a robbery.[195] The Court reasoned that a failure to reveal exculpatory evidence "casts the prosecutor in the role of an architect of a proceeding that does not comport with standards of justice."[196] The Court insisted that the

189. *Id.* at 57. Although Professor Fisher insinuates that defense counsel will not conduct thorough investigations, the empirical evidence suggests otherwise. *See* E. Allan Lind et al., *Discovery and Presentation of Evidence in Adversary and Nonadversary Proceedings*, 71 MICH. L. REV. 1129, 1141, 1143 (1973) (providing empirical evidence that partisan advocacy results in a more thorough investigation on behalf of the underdog litigant). Perhaps his point is that defense counsel may not have the resources to conduct the sort of thorough investigation that a case merits. But this point argues only for "insuring that adequate resources be made available to all litigants." THIBAUT & WALKER, *supra* note 40, at 119. The empirical evidence certainly supports the conclusion that prosecutors presented with evidence favoring conviction (such as that which might be gathered by the police) are unlikely to pursue further investigation. *See* Lind et al., *supra*, at 1141.

190. Fisher, *supra* note 186, at 40-54 (discussing tort remedies, equitable relief, and administrative reform).

191. Although Joseph Story did not connect the right to counsel with fact investigation as Zephaniah Swift did, *see supra* note 180 and accompanying text, Story did recognize that the rights to compulsory process and counsel worked in tandem. *See* STORY, *supra* note 124, § 1786, at 662-63.

192. Weatherford v. Bursey, 429 U.S. 545, 559 (1977).

193. 373 U.S. 83 (1963).

194. *Id.* at 87.

195. *Id.* at 84.

196. *Id.* at 88.

guiding principle in its decision was fairness to the accused;[197] the characterization of the prosecutor's failure to disclose as either negligent or willful was irrelevant.[198] If there was a reasonable probability that disclosure of the government's information would have changed the result, the conviction had to be reversed.[199]

In the wake of *United States v. Nixon*,[200] Professor Westen predicted that the Court would turn to the Compulsory Process Clause to resolve a broad spectrum of discovery problems, including the *Brady* problem (when the prosecutor fails to disclose evidence favorable to the accused and material to guilt or punishment),[201] and the type of discovery problems raised by this Article (the problem of interviewing recalcitrant witnesses[202] and the problem of the prosecutor using hearsay evidence in lieu of live testimony).[203] Although *Nixon* renewed the *Burr* understanding of the Compulsory Process Clause, time has not borne out Professor Westen's prediction that the Court would turn to the Clause to resolve even *Brady*-type discovery problems. His prediction failed because he offered no coherent, workable theory for the application of the Compulsory Process Clause to the assortment of discovery problems. Instead, he advanced only the broadest notion that the Compulsory Process Clause served to protect the defendant from being "deprived of information that may refute the state's case or affirmatively prove the case in his favor,"[204] a notion which would prove to be too

197. *Id.* at 87.

198. *See id.*

199. *See* United States v. Bagley, 473 U.S. 667, 682 (1985) (clarifying *Brady*'s materiality requirement).

200. 418 U.S. 683 (1974).

201. Westen, *supra* note 2, at 121-26.

202. *Id.* at 128-29.

203. Westen, *Confrontation and Compulsory Process*, *supra* note 17, at 624. Professor Westen argued that the State should be constitutionally required to give the defendant advance notice of the intent to use hearsay evidence in lieu of live testimony. *Id.* A notice requirement would be a major advance in criminal procedure. However, many jurisdictions, including the federal courts, do not even require the prosecution to provide a list of the witnesses that it intends to call at trial. *See, e.g.*, United States v. Holland, 884 F.2d 354, 357 (8th Cir. 1989) (holding that Rule 16 does not require disclosure of prospective witnesses, including experts); United States v. Taylor, 707 F. Supp. 696, 702-03 (S.D.N.Y. 1989) (ruling that a witness list is not discoverable). Indeed, in 1974, Congress rejected a proposed rule to require discovery of witness lists. LAFAVE & ISRAEL, *supra* note 70, § 20.3(h), at 852; *see also* GRAHAM, *supra* note 79, at 35-56 (recounting the history of efforts to require the prosecution to furnish the defense with the names, addresses, and statements of the government's trial witnesses, and identifying a split of sentiment between commentators, drafters of model statutes, and state legislatures on the one hand, and Congress on the other, over such requirements); Brennan, *supra* note 79, at 6 (describing the Justice Department's opposition to providing witness lists). Also, there is certainly no requirement that the prosecution provide a list of the hearsay evidence that it will offer at trial.

As argued below, when incriminating or accusatory hearsay will be tendered by the prosecution in lieu of the declarant's live testimony, the defendant should not only receive advance notice, but the admission of such prosecution evidence should be predicated on the defense's opportunity to interview or depose the declarant. *See infra* notes 244-48 and accompanying text. This argument is not based on any general notion that the defendant is being deprived of information that may refute the State's case or affirmatively prove the case in his favor, but rather because the declarant possesses material, personal knowledge of the events in issue, and there is no other way to assess the declarant's value as a defense witness at trial and effect the "checking" function of the Compulsory Process Clause.

204. Westen, *supra* note 2, at 175 (applying the Compulsory Process Clause to yet another discovery problem: the "lost evidence" cases).

sweeping and unwieldy for the Court to adopt. Indeed, as recently as 1987, in *Pennsylvania v. Ritchie*,[205] the Court declined to apply the Compulsory Process Clause to a discovery dispute.[206] The Court relied instead on the Due Process Clause, and noted that in any event the Compulsory Process Clause offered the defendant no greater rights than the Due Process Clause under the circumstances.[207]

Although Professor Westen has argued that the Supreme Court has relied on due process in resolving discovery disputes when compulsory process would have served better, there is good reason to treat some discovery disputes as due process problems and to classify others as compulsory process problems. Rather than rewrite the Court's discovery jurisprudence, as Professor Westen's view would require, this Article uses the Court's criminal discovery decisions as authoritative statements of constitutional policy and attempts to rationalize and reconcile them. The analysis offers a framework that is more consonant with the Court's precedents to date and delineates a less diffuse right to pretrial discovery under the Compulsory Process Clause.[208]

C. A New, More Limited Approach to Compulsory Process Clause Discovery Rights

Is there a principled distinction between *Nixon* and *Burr*, recognizing the applicability of the Compulsory Process Clause to pretrial discovery questions, and the *Brady-Ritchie* line of cases, applying the Due Process Clause? Yes, and that distinction ultimately turns on maintaining the adversarial nature of the proceedings.

In *Ritchie*, the Supreme Court of Pennsylvania concluded that the trial court had violated both the Confrontation Clause and the Compulsory Process Clause by refusing to order disclosure of the state's protective services file to the defense.[209] The Supreme Court granted certiorari and found that neither clause had been violated.[210] It found no violation of the Compulsory Process Clause because the contours of compulsory process are "unsettled" and due process provided a "clear framework."[211] Citing *Brady*, the Court concluded that due process required the trial court to review the file for information that was favorable to the accused and material to guilt or punishment.[212]

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205. 480 U.S. 39 (1987).

206. *See id.* at 56.

207. *Id.*

208. Professor Louisell, who was at the forefront of the debate on expanding criminal discovery, observed that "in the area of criminal discovery as elsewhere, we must struggle for norms that are objectively identifiable, observable, and reasonable." Louisell, *supra* note 78, at 98. This Article attempts to do just that.

209. *Ritchie*, 480 U.S. at 46.

210. See *supra* notes 144-47 and accompanying text regarding the Supreme Court's rejection of the defendant's Confrontation Clause claim.

211. *Ritchie*, 480 U.S. at 56.

212. *Id.* at 57. The Court further observed that "'[e]vidence is material only if there is a reasonable probability that, . . . [if] disclosed to the defense, the result of the proceeding would [be] different.'" *Id.* (quoting United States v. Bagley, 473 U.S. 667, 682 (1985)).

Interestingly, in declining to apply the Compulsory Process Clause, the Court acknowledged the analysis of Chief Justice Marshall in *Burr* as the "first and most celebrated analysis" of the Clause;[213] it recognized Professor Westen's "excellent" summary of the *Burr* case and its implications for compulsory process;[214] and it described *Washington v. Texas* as establishing the "minimum" rights protected by the Clause.[215] These acknowledgments suggest that the Court would be receptive to grounding at least some discovery rights in the Compulsory Process Clause. The Court, however, also observed, rather cryptically, that it had "never squarely held that the Compulsory Process Clause guarantee[d] the right to discover the *identity* of witnesses, or to require the government to produce exculpatory evidence,"[216] the precise information sought by the defendant in *Ritchie*.

What sort of discovery rights might be grounded in the Compulsory Process Clause? In *Ritchie*, as in *Brady*, the defendant sought material prepared by the State, the product of the State's investigatory work. In *Ritchie*, the defendant sought access to the file of the protective services agency investigating his daughter's alleged abuse. In *Brady*, the defendant sought the extrajudicial statements of his partner in crime, Boblit, who apparently had made several statements to the police. In sharp contrast, both the tape recorded conversations sought in *Nixon* and the letter sought in *Burr* were raw evidence, not the product of a formal government investigation, but the product of the very circumstances in issue. *Nixon* involved tapes of President Nixon's personal conversations with the Watergate defendants, and *Burr* involved General Wilkinson's self-serving letter to President Thomas Jefferson. Neither was the fruit of a government criminal investigation.[217]

This important distinction suggests that the Compulsory Process Clause appropriately governs a criminal defendant's access to the raw evidence, but not to the product of the government's fact-gathering efforts.[218] It would follow that the raw evidence collected by the prosecution would also be subject to disclosure, since the prosecution's collection of the evidence would not transform its nature. Thus, the relevant statements of witnesses, made and recorded separate and apart from a government criminal investigation, like the

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213. *Id.* at 55.

214. *Id.* at 55 n.11.

215. *Id.* at 56 n.13.

216. *Id.* at 56 (emphasis in original). The *Ritchie* Court cited *Nixon* using a "[b]ut cf." signal, a signal indicating contradiction. *See* THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION 23 (15th ed. 1991).

217. *Valenzuela-Bernal*, which also acknowledged that the Compulsory Process Clause may require pretrial discovery, similarly addressed the defense interrogation of eyewitnesses to the alleged crime and not the defense discovery of any government-generated witness statements. *See* discussion *supra* at note 67.

218. Although the notion of raw evidence set forth here is derived from the Court's criminal discovery and Compulsory Process Clause jurisprudence, distinguishing it from the product of a formal government investigation brings to mind the attorney work-product doctrine and similarly reflects an adversarial ideology. *See* Hickman v. Taylor, 329 U.S. 495, 510-11 (1947) (discussing the purpose of the work-product doctrine); *see also* Sherman L. Cohn, *The Work-Product Doctrine: Protection, Not Privilege*, 71 GEO. L.J. 917, 943 (1983). Nevertheless, there are important differences between the theory of Compulsory Process Clause discovery rights advanced here and the work-product doctrine. The former creates discovery opportunities which otherwise would not exist. The work-product doctrine is a restriction upon existing discovery opportunities. *Id.* at 922 (discussing FED. R. CIV. P. 26(b)(3)).

tape-recorded conversations in *Nixon* and the letter in *Burr*, would be subject to a Compulsory Process Clause analysis. The same would be true for eyewitnesses with relevant, personal knowledge, such as incriminating or accusatory hearsay declarants, and real evidence, such as hair fibers and blood samples. However, witness statements given to or recorded by a government agent, like the confession in *Brady*, or the State's analysis of real evidence, like the reports of its forensic experts, would be subject to a due process analysis.

Drawing a line here makes sense. The Supreme Court has recognized the constitutionalization of an adversary system,[219] and that the Framers equipped the defendant with the various weapons of warfare: counsel, confrontation, and compulsory process.[220] To be sure, the playing field was not meant to be level. The burden of proof was meant to lie decisively on the shoulders of the prosecution.[221] Even so, the Framers empowered the defense and equipped the defendant for battle.[222] The defendant could choose to do nothing and simply point to the prosecution's failure of proof,[223] but the defendant retained the choice and in that lay some measure of power.

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219. Nevertheless, scholars disagree over the historical significance of the Sixth Amendment rights. *Compare* Jonakait, *supra* note 142, at 738-43 (examining the English common-law trial and arguing that rights to counsel, confrontation, and compulsory process evolved not to balance an adversary, but "as a check on the authority of judges to control the information that the jury can consider") *with* Clinton, *supra* note 122, at 720 (observing that "[t]he turn of the eighteenth century saw a rapid expansion of defendants' rights and a rapid movement toward a trial mechanism more evenly balanced between the Crown and the accused"); *see also* LANDSMAN, *supra* note 75, at 47-48 (defending the constitutional status of adversarial procedure).

220. *See* Taylor v. Illinois, 484 U.S. 400, 408-10 (1988).

221. Although the formulaic burden of proof "beyond a reasonable doubt" does not appear to have crystallized until as late as 1798, "[t]he 'demand for a higher degree of persuasion in criminal cases was recurrently expressed from ancient times.'" *In re* Winship, 397 U.S. 358, 361 (1970) (quoting CHARLES T. MCCORMICK, EVIDENCE § 321, at 681-82 (1954)).

222. *See* LANDSMAN, *supra* note 75, at 26-28 (noting that in the 18th and 19th centuries, the emphasis in criminal procedure evolved from one of protecting the defendant by placing a heavy burden on the state to one of allowing the defendant to take a more active part in the proceedings). Bodenhamer has observed the revolutionary legacy that "[c]learly, something was happening to expand previous conceptions of rights of the accused." BODENHAMER, *supra* note 159, at 39. He describes the right to counsel as "a striking example of how far the founders were willing to advance indivdual [sic] rights," since in "[b]oth Great Britain and the colonies a person charged with a felony had no right at common law to the advice or representation of counsel." *Id.* at 39-40. Professor Heller has similarly argued that although the right to compulsory process was not known at English common law and was a relatively new creature of English statutory law, the Framers saw fit to include it in the Bill of Rights. FRANCIS H. HELLER, THE SIXTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES 106-07 (1951).

223. As Justice Black observed:

> The defendant, under our Constitution, need not do anything at all to defend himself . . . . Rather he has an absolute, unqualified right to compel the State to investigate its own case, find its own witnesses, prove its own facts, and convince the jury through its own resources. Throughout the process the defendant has a fundamental right to remain silent, in effect challenging the State at every point to: "Prove it!"

Williams v. Florida, 399 U.S. 78, 112 (1970) (Black, J., concurring in part and dissenting in part). Professor Goldstein, however, has rejected the notion that criminal defendants have a meaningful option to remain passive in a prosecution. Instead, he has observed that "[i]ncreased reliance upon the trial as the principal device for protecting the accused makes it imperative that the defense come to trial as well equipped as the prosecution to raise 'doubt in the minds of any one of the twelve' men [or women] in the jury box." Goldstein, *supra* note 69, at 1172 (quoting United States v. Garsson, 291 F. 646, 649 (S.D.N.Y. 1923)).

Indeed, the Court's criminal discovery jurisprudence reveals two "seemingly incompatible" objectives: adversarial proceedings and justice (as opposed to convictions).[224] The Court has observed that "[t]he 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."[225] However, the Court has also commented that adversarial proceedings are instrumental to truth-seeking at trial. This idea is captured in *United States v. Cronic*:[226] "'The very premise of our adversary system of criminal justice is that partisan advocacy on both sides of a case will best promote the ultimate objective that the guilty be convicted and the innocent go free.'"[227] Accordingly, the Court disfavors incursions into the adversariness of proceedings unless a failure to allow the incursion will result in a miscarriage of justice, à la *Brady*. The Court has repeatedly rejected the idea that the prosecution, as the defendant's adversary, must disclose its files to the defense,[228] but requires disclosure when there is a reasonable probability that the revelation of the information would change the result of the proceeding,[229] undermining truth-seeking at

224. United States v. Bagley, 473 U.S. 667, 696 (1985) (Marshall, J., dissenting).

225. *Williams*, 399 U.S. at 82 (approving a statutory notice-of-alibi provision requiring the defense to provide specific pretrial discovery to the prosecution). Nevertheless, the Court's strongest statements about the trial not being a sporting contest come in the context of interpreting the constitutionality of statutes requiring pretrial defense disclosures, and the strongest statements about the centrality of adversariness come in the context of constitutional challenges to a prosecutor's failure to make pretrial disclosures. *Cf. Bagley*, 473 U.S. at 675 n.6 (disapproving of the prosecutor's failure to disclose evidence that could have been used to impeach the government's witnesses, but describing *Brady* as a "*limited* departure from a pure adversary model") (emphasis added). Indeed, it appears too easy for the Court to hide behind the diverging analyses it applies to what the Constitution allows (state laws compelling reciprocal discovery) and what it requires (an obligation to disclose prosecution files in only limited circumstances), but a pro-prosecution bias does appear.

226. 466 U.S. 648 (1984) (discussing the Sixth Amendment right to the effective assistance of counsel).

227. *Id.* at 655 (quoting Herring v. New York, 422 U.S. 853, 862 (1975)). At issue is the "psychology of decision making." GEOFFREY C. HAZARD, JR., ETHICS IN THE PRACTICE OF LAW 121 (1978). Professor Hazard observes that a theory of adversarial adjudication is based in part on the idea that "it is better to have conflicting preliminary hypotheses and supporting proofs presented by the parties so that the judge's mind can be kept open until all the evidence is at hand." *Id.*; *see also* Lon L. Fuller, *The Adversary System*, *in* TALKS ON AMERICAN LAW 44 (Harold J. Berman ed., 2d ed. 1971) (similarly observing that "'[a]n adversary presentation seems the only effective means for combating th[e] human tendency to judge too swiftly'") (quoting an ABA committee). Indeed, there is empirical evidence that an adversary presentation counteracts decision-maker bias. *See* THIBAUT & WALKER, *supra* note 40, at 41-52; John Thibaut et al., Comment, *Adversary Presentation and Bias in Legal Decisionmaking*, 86 HARV. L. REV. 386, 391-401 (1972); *see also* Lind et al., *supra* note 189, at 1140-43 (providing empirical evidence that partisan advocacy results in more thorough investigation for the underdog litigant).

228. Pennsylvania v. Ritchie, 480 U.S. 39, 59 (1987) ("A defendant's right to discover exculpatory evidence does not include the unsupervised authority to search through the Commonwealth's files."); United States v. Agurs, 427 U.S. 97, 111 (1976) (rejecting the idea that "the prosecutor has a constitutional duty routinely to deliver his entire file to defense counsel"); Moore v. Illinois, 408 U.S. 786, 795 (1972) (noting that there is "no constitutional requirement that the prosecution make a complete and detailed accounting to the defense of all police investigatory work on a case"). Furthermore, Congress agrees. Thus, in *Palermo v. United States*, the Court described the legislature's concern for adversarial proceedings and independent preparation as undergirding the enactment of the Jencks Act, legislation which limits a defendant's access to recorded witness statements. 360 U.S. 343, 350 (1959).

229. *Ritchie*, 480 U.S. at 57 (citing United States v. Bagley, 473 U.S. 667, 682 (1985)).

trial. Moreover, while the Court has upheld statutory requirements that the defense disclose certain information prior to trial, it has sustained such statutes only to the extent that the prosecution had a concomitant obligation to disclose; that is, only to the extent that the balanced adversariness of the proceedings was maintained by reciprocal discovery obligations.[230]

Given this notion of defense empowerment in the framework of an adversary system, it makes sense that the Compulsory Process Clause would entitle the defendant to obtain the raw evidence, but not the product of the prosecution's investigative efforts. Writing before the availability of the principal cases discussed here, and without suggesting a constitutional basis for his argument, Professor Fletcher made the following similar observation:

> [W]e must assume that there is merit in our adversary system—that the truth in the adjudication of disputes, civil or criminal, will best appear if we leave fact gathering to the litigants themselves. Following this assumption, we ought logically to give both sides an equal opportunity to reach the raw material and to let each make of it what he can.[231]

When the defense seeks the product of the prosecution's investigative efforts, however, the Court appropriately applies a distinct analysis, emphasizing the prosecution's limited constitutional obligation to deliver this sort of information. While criminal defendants could only stand to gain from access to these materials (as the State's investigatory resources far exceed those of most criminal defendants),[232] the Framers did not structure a system in which the defendant would be dependent upon the prosecution for defense evidence. Instead, the Framers gave defendants the affirmative right to obtain the raw evidence for purposes of mounting a defense; they armed an adversary.

Discovery claims based on the Compulsory Process Clause are not appropriately based on a theory that the prosecution has the information and therefore the defense should as well (a fairness argument limited to the requirements of the Due Process Clause). In *Washington v. Texas*,[233] the Court's decision did not turn, as concurring Justice Harlan proposed, on the fact that the Texas statutes allowed the prosecution to call the defendant's alleged accomplice as a witness while the defendant could not (a fairness argument),[234] but instead turned on the defendant's distinct and independent right of compulsory process to obtain witnesses in his or her favor (the

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230. *Compare* Williams v. Florida, 399 U.S. 78 (1970) (upholding a notice-of-alibi rule with a reciprocity provision) *with* Wardius v. Oregon, 412 U.S. 470 (1973) (holding that a notice-of-alibi rule without a reciprocity provision violates the Due Process Clause).

231. Fletcher, *supra* note 77, at 305. Justice Traynor similarly observed that the notion of the adversary system as a truth-seeking device "is hardly realistic unless the evidence is accessible in advance to the adversaries so that each can prepare accordingly in the light of such evidence." Traynor, *supra* note 77, at 228.

232. *See Wardius*, 412 U.S. at 475 n.9.

233. 388 U.S. 14 (1967); *see also supra* notes 6-12 and accompanying text (describing the Court's decision).

234. *Washington*, 388 U.S. at 24-25 (Harlan, J., concurring). *But see* Welsh S. White, *Evidentiary Privileges and the Defendant's Constitutional Right to Introduce Evidence*, 80 J. CRIM. L. & CRIMINOLOGY 377, 392-93, 401-04 (1989) (suggesting that "evenhandedness" is fundamental to a Compulsory Process Clause analysis).

defendant-as-adversary model) and the State's arbitrary denial of that right.[235] Discovery claims based on the Compulsory Process Clause are, therefore, appropriately based on a theory that the defendant-as-adversary seeks to marshal and evaluate the raw evidence in order to check the prosecution's presentation of the evidence and counter the charges.

Identifying the distinct objectives of the Clauses is important. In a subgroup of the so-called "access to evidence" cases, more appropriately called the "lost evidence" cases, the Court has applied a due process analysis to cases involving raw evidence.[236] Even when the Court has applied both the Due Process Clause and the Compulsory Process Clause, the Court's Compulsory Process Clause analysis has "borrowed" heavily from the Court's due process jurisprudence,[237] including *Brady* and its progeny.[238] The problem is that, rather than develop its Compulsory Process Clause jurisprudence, the Court has applied due process standards that fail to acknowledge the particular interests at stake. In the lost evidence cases, the Court is concerned about prosecutions being dismissed because of lost evidence, the value of which is uncertain,[239] and has responded by focusing on the fairness of the proceedings.[240] The Compulsory Process Clause is only secondarily concerned about fairness, however. The Clause is primarily concerned about effecting the defendant-as-adversary model by protecting the defendant's interest in presenting "witnesses in his [or her] favor." It may be that a prosecution in which the defendant was unable to test lost physical evidence was *fair* because the prosecution did not use the lost evidence against the defendant,[241] or because the defendant was able to cross-examine the State's witness who did test the evidence.[242] But the Compulsory Process Clause allows the defendant to present "witnesses in [the defendant's] favor," even when fundamental fairness may not require it. Accordingly, it is important not to confuse the purpose of the specific Sixth Amendment clause with the more amorphous rights protected by the Due Process Clause.[243] As the following sections demonstrate, using the correct framework can make a difference.

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235. *Washington*, 388 U.S. at 22-23.

236. *See, e.g.*, Arizona v. Youngblood, 488 U.S. 51 (1988) (state failed to preserve semen samples); California v. Trombetta, 467 U.S. 479 (1984) (state failed to preserve breath sample); United States v. Valenzuela-Bernal, 458 U.S. 858 (1982) (government deported eyewitnesses).

237. *Valenzuela-Bernal*, 458 U.S. at 872.

238. *Id.* at 868-69.

239. *See, e.g.*, *Youngblood*, 488 U.S. at 57-58; *Trombetta*, 467 U.S. at 486.

240. *See Trombetta*, 467 U.S. at 485.

241. *See Youngblood*, 488 U.S. at 56.

242. *See Trombetta*, 467 U.S. at 490.

243. Professor Jonakait similarly has argued that the Court has confused the purpose of evidence law, which is to ensure the reliability of the proceedings, with the true but displaced purpose of the Confrontation Clause, which is to work in conjunction with the other Sixth Amendment rights to constitutionalize adversary proceedings. Randolph N. Jonakait, *Restoring the Confrontation Clause to the Sixth Amendment*, 35 UCLA L. REV. 557, 581-86 (1988).

D. The Utility of the New Approach in Resolving Criminal Discovery Problems

The Supreme Court's recent Confrontation Clause jurisprudence recognizes a distinct role for the Compulsory Process Clause in the adversary system of criminal justice. It suggests that the Compulsory Process Clause functions as a check against the prosecutor's use and abuse of evidence at trial. Nevertheless, the "checking" function of the Compulsory Process Clause cannot hope to be realized unless the Clause guarantees at least some opportunities for discovery. Grounding the discovery of raw evidence in the Compulsory Process Clause is supported by the Court's criminal discovery jurisprudence. Defense discovery of the raw evidence makes checking the prosecution's presentation of the evidence realizable.

1. The *Inadi/White* Problem

Inadi and *White* assigned the defendant the onus of calling as witnesses declarants of incriminating and accusatory prosecution hearsay, respectively.[244] While the Compulsory Process Clause enables the defendant to obtain witnesses who are in the broadest sense "in the defendant's favor,"[245] counsel cannot call such a declarant as a "witness in the defendant's favor" unless counsel can intelligently anticipate the declarant's testimony.[246] When no opportunity for an interview or confrontation with the prosecution's hearsay declarant has occurred pretrial or will occur during trial, the purpose of the Compulsory Process Clause as a check against the prosecution's presentation of the evidence cannot be achieved without pretrial (or extra-trial) discovery. Accordingly, the Compulsory Process Clause would prohibit the admission of the prosecution's hearsay evidence unless the hearsay declarant voluntarily submitted to a defense interview or deposition.[247]

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244. *See supra* part II.

245. *See supra* text accompanying notes 130-32.

246. *See supra* text accompanying notes 151-62.

247. Some courts have rejected the idea of grounding a right to depose a recalcitrant witness in the Compulsory Process Clause. *See, e.g.*, State v. Lampp, 155 So. 2d 10 (Fla. Dist. Ct. App. 1963), *appeal dismissed*, 166 So. 2d 891 (Fla. 1964); *see also* Cruz v. State, 737 S.W.2d 74 (Tex. Ct. App. 1987) (finding no abuse of discretion in the trial court's refusal to order the victim's deposition pursuant to statute). But these cases have not involved the prosecution's (proposed) use of incriminating or accusatory hearsay evidence at trial in lieu of live testimony and the defendant's inability to check the prosecution's presentation of the evidence by interviewing or deposing the hearsay declarant. Instead, in these cases, the prosecution presumably presents the witness' live testimony, and the defense is able to check the prosecution's presentation of the evidence by testing the witness' story on cross-examination at trial.

Some criminal discovery statutes specifically provide for witness depositions when the witness is uncooperative. *See, e.g.*, ARIZ. R. CRIM. P. 15.3(a)(2) (deposition available upon a showing "that the person's testimony is material to the case or necessary adequately to prepare a defense or investigate the offense, that the person was not a witness at the preliminary hearing, and that the person will not cooperate in granting a personal interview"); MONT. CODE ANN. § 46-15-201(1)(c) (deposition available "if it appears that a prospective witness . . . is unwilling to provide relevant information to a requesting party"); N.M. DIST. CT. R. CRIM. P. 5-503(A) (compelling witness statements when witnesses are uncooperative); *see also* N.H. REV. STAT. ANN. § 517:13(II) (deposition available at the court's

This resolution of the *Inadi/White* problem not only effects the "checking" function of the Compulsory Process Clause, but is appropriately deferential to our adversary system of criminal justice by recognizing a distinction between Compulsory Process Clause and Due Process Clause discovery rights. Since the declarant's statements are incriminating or accusatory, the declarant's knowledge is necessarily relevant and material. Moreover, the defendant's pursuit of the hearsay declarant's knowledge takes nothing from the prosecution, since neither party owns the witness.[248] The adversarial nature of the proceedings is, however, promoted and truth-seeking at trial is furthered, since the defense can check the prosecutorial use and abuse of hearsay evidence in lieu of live testimony by accessing the raw evidence—that is, the hearsay declarant's personal knowledge.

2. The Right to Test and Retest Tangible Objects

The notion of the Compulsory Process Clause as arming an adversary for a truth-seeking battle and providing the defense with certain pretrial (or extra-trial) discovery opportunities to check the prosecution's presentation of the evidence at trial has implications beyond the context in which the prosecutor uses incriminating or accusatory hearsay evidence in lieu of eyewitness testimony. The Compulsory Process Clause, thus understood, would include a defense right to test tangible evidence, even when that evidence has been previously analyzed by prosecution experts.[249] While the scientific analysis of real evidence in criminal litigation may have been unforeseeable by the Framers, this sort of evidence has emerged as the mainstay of criminal litigation.[250] Indeed, it is well settled that a defense attorney's duty to investigate includes seeking the scientific testing of tangible objects.[251] To the extent that the Compulsory Process Clause embraces the right to obtain the raw evidence as a means of checking the prosecution's presentation of the evidence at trial and to present a defense, it also embraces the right to analyze tangible objects and present an analysis of the real evidence to the jury.

Undoubtedly, tangible objects are embraced by the term "witnesses" in the Compulsory Process Clause. In *Washington v. Texas*, the Court identified the essence of the Compulsory Process Clause as "the right to present a defense,

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discretion, having considered, among other things, the availability of other opportunities to discover the information sought by the deposition). In any event, the Compulsory Process Clause would not give the defendant a right to depose the hearsay declarant but would disallow the prosecution's hearsay evidence without a defense interview or deposition.

248. *See* Gregory v. United States, 369 F.2d 185, 188 (D.C. Cir. 1966), *cert. denied*, 396 U.S. 865 (1969).

249. Professor Giannelli has argued for statutory reform allowing for this sort of discovery. *See* Giannelli, *supra* note 94, at 816-19; *see also* Louisell, *supra* note 77, at 936 (recognizing the need for expanded defense discovery when scientific evidence is at issue).

250. *See* Giannelli, *supra* note 94, at 792-93 (discussing the prominent role of physical evidence and scientific proof in criminal cases); *see also* Traynor, *supra* note 77, at 249 (recognizing the "advantage of scientific aids" in modern prosecutions).

251. ABA STANDARDS FOR CRIMINAL JUSTICE, *supra* note 183, § 4-4.1 commentary at 182.

the right to present the defendant's version of the facts,"[252] and there would appear to be no good reason to limit that right to people-witnesses. In *Burr*, the Government argued that the "process" due under the Sixth Amendment extended only to "witnesses" for the defense, and not to their papers,[253] but Marshall rejected the "literal distinction" as "too much attenuated to be countenanced in the tribunals of a just and humane nation."[254] Instead, he construed the Clause in light of its purpose—to enable the defendant to present evidence—and concluded that it must include papers.[255]

Scientific testing of relevant, tangible objects can be critical in demonstrating the defendant's innocence.[256] Nevertheless, while most state criminal discovery statutes allow the defendant to *inspect* tangible evidence in the government's possession,[257] and the right to test this evidence has been

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252. *Washington*, 388 U.S. 14, 19 (1967).

253. United States v. Burr, 25 F. Cas. 30, 34-35 (C.C.D. Va. 1807) (No. 14692d).

254. *Id.* at 35.

255. *Id.*

256. In a recent Maryland case, a man who had endured two criminal trials, and nine years in state prison (two of which were on death row), was released when DNA analysis of the semen found on the rape victim's underwear eliminated the possibility that this man had raped the child-victim. Speculation followed that many more of the wrongly convicted would turn to DNA analysis of real evidence to demonstrate their innocence. The wrongly charged would certainly want to do the same.

257. *See, e.g.*, ALA. R. CRIM. P. 16.1(c); ARIZ. R. CRIM. P. 15.1(a)(4) ("[a] *list* of . . . tangible objects which the prosecutor will use at trial or which were obtained from or purportedly belong to the defendant") (emphasis added); ARK. CODE ANN. § 16-89-116(b) (Michie 1987); CAL. PENAL CODE ANN. § 1054.1(c) (West Supp. 1994); COLO. R. CRIM. P. 16, pt. I(a)(1)(IV); CONN. GEN. STAT. ANN. § 54-86a (West 1985 & West 1994); DEL. SUPER. CT. CRIM. R. 16(a)(1)(C); FLA. R. CRIM. P. 3.220(b)(F),(K) (the prosecuting attorney "shall disclose to defense counsel . . . any tangible . . . objects that the prosecuting attorney intends to use in the hearing or trial or which were obtained from or belong to the accused; . . . that the prosecuting attorney intends to use in the hearing or trial and that were not obtained from or that did not belong to the accused"); IDAHO CODE § 19-1309(2) (1987); IDAHO CRIM. R. 16(b)(4); ILL. SUP. CT. R. 412(a)(v) ("which the prosecuting attorney intends to use in the hearing or trial or which were obtained from or belong to the accused"); IOWA CODE ANN. § 813.2; IOWA R. CRIM. P. 13(2)(b)(1); KAN. STAT. ANN. § 22-3212(b) (Supp. 1993); KY. R. CRIM. P. 7.24(2); LA. CODE CRIM. PROC. ANN. art. 718 (West 1981); ME. R. CRIM. P. 16(b)(2)(A); MD. R. CRIM. CAUSES 4-263(b)(5) ("that the State intends to use at the hearing or trial"); MASS. R. CRIM. P. 14(a)(2); MINN. R. CRIM. P. 9.01 subd. 1(3); MONT. CODE. ANN. § 46-15-322(1)(d) (1993) ("that the prosecutor may use at trial or that were obtained from or purportedly belong to the defendant"); NEB. REV. STAT. § 29-1912(1)(f) (1989) ("which could be used as evidence by the prosecuting authority"); NEV. REV. STAT. ANN. § 174.245 (Michie 1992); N.H. DIST. & MUN. CT. R. 2.10(2) ("a *list* of any tangible objects . . . obtained from or belonging to the defendant") (emphasis added); N.J. R. CRIM. PRAC. 3:13-3(a)(1), (6); N.M. DIST. CT. R. CRIM. P. 5-501(A)(3); N.Y. CRIM. PROC. LAW § 240.40(1)(a) (McKinney 1993); N.C. GEN. STAT. § 15A-903(d) (1988); N.D. R. CRIM. P. 16(a)(1)(C); OHIO R. CRIM. P. 16(B)(1)(c); OR. REV. STAT. § 135.815(4)(a)-(b) (Supp. 1994) ("[w]hich the district attorney intends to offer in evidence at the trial; or [w]hich were obtained from or belong to the defendant"); PA. R. CRIM. P. 305(B)(1)(f); R.I. SUPER. CT. R. CRIM. P. 16(4) ("which are intended for use by the State as evidence at the trial or were obtained from or belong to the defendant"); S.C. R. CRIM. P. 5(a)(1)(C); S.D. CODIFIED LAWS ANN. § 23A-13-3 (1988); TENN. R. CRIM. P. 16(a)(1)(C); TEX. CODE CRIM. PROC. ANN. art. 39.14 (West 1979); VT. R. CRIM. P. 16(a)(2)(D); VA. SUP. CT. R. 3A:11(b)(2); WASH. SUPER. CT. CRIM. R. 4.7(a)(1)(v) ("which the prosecuting attorney intends to use in the hearing or trial or which were obtained from or belonged to the defendant"); W. VA. R. CRIM. P. 16(a)(1)(C); WIS. STAT. ANN. § 971.23(4) (West 1985); WYO. R. CRIM. P. 16(a)(C); *see also* FED. R. CRIM. P. 16(a)(1)(C).

implied from discovery rules permitting *inspection*,[258] very few statutes expressly allow the defendant to scientifically *test* tangible evidence.[259]

Criminal defendants cannot and should not rely on state testing of tangible objects. The Arkansas Supreme Court recently held that a trial court exceeded its authority when, at the behest of defendants charged with rape, it ordered the prosecutor to send the defendants' blood, semen, and saliva samples for DNA testing.[260] The court observed that the prosecutor's failure to submit the defendants' samples for DNA testing did not violate the defendants' federal due process rights because the prosecutor was under no constitutional obligation to use any particular investigatory tool.[261] While that may be so, the Framers intended to arm the defendant as an adversary rather than leave it to the prosecutor alone to develop the evidence.[262] An affirmative right, grounded in the Compulsory Process Clause, to test the raw evidence and thereby check the prosecution's presentation of the evidence would support a trial court's order for the funding necessary so that *the defendants* could test the samples.[263]

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258. *See, e.g.*, United States v. Vaughn, 736 F.2d 665, 666 (11th Cir. 1984) (observing that the defendants "could have obtained their own analysis of the samples," but apparently did not), *cert. denied*, 490 U.S. 1065 (1989); United States v. Gaultney, 606 F.2d 540, 545-46 (5th Cir. 1979) (observing that "[i]n cases involving a controlled substance, courts have held a concomitant part of the examination or inspection to be the right of the accused to have an independent chemical analysis performed on the seized substance," but that the defendants failed to avail themselves of the opportunity), *modified*, 615 F.2d 642 (5th Cir. 1980), *rev'd on other grounds sub nom.* Steagald v. United States, 451 U.S. 204 (1981); United States v. Sullivan, 578 F.2d 121, 124 (5th Cir. 1978) (observing that the right of inspection "includes the right to have an expert examine the narcotics before trial," but that defense counsel failed to do so); James v. Commonwealth, 482 S.W.2d 92, 94 (Ky. Ct. App. 1972) (reversing the conviction in part because the court failed to provide the defendant with an opportunity to have the narcotics inspected and tested by the defendant's chemist); State v. Migliore, 260 So. 2d 682, 689 (La. 1972) (reversing the trial court's denial of the defendant's motion to test what were allegedly cocaine and LSD substances); State v. Cloutier, 302 A.2d 84, 89 (Me. 1973) (finding no abuse of discretion in the trial court's refusal to order the release of a sample for independent analysis since an insufficient quantity of the alleged drug remained to permit adequate and accurate testing or to preserve its evidentiary use at trial); State v. Gaddis, 530 S.W.2d 64, 69-70 (Tenn. 1975) (vacating and remanding a conviction for possession of a controlled substance where the trial court denied the defendant's motion for a sample of the alleged controlled substance in order to have it independently tested).

259. *See, e.g.*, ALA. R. CRIM. P. 16.1(c) ("the prosecutor shall . . . permit the defendant to analyze, inspect, and copy"); FLA. R. CRIM. P. 3.220(b)(1)(F), (K); ILL. SUP. CT. R. 412(a), (e); IOWA R. CRIM. P. 13(2)(b)(1); LA. CODE CRIM. PROC. ANN. art. 718 (West 1981); ME. R. CRIM. P. 16(b)(1); NEB. REV. STAT. § 29-1913(1) (1989); WIS. STAT. ANN. § 971.23(5) (West 1985 & Supp. 1994).

260. State v. Pulaski County Circuit Court, 872 S.W.2d 414 (Ark. 1994).

261. *Id.* at 415 (citing Arizona v. Youngblood, 488 U.S. 51 (1988)).

262. *Cf. id.* (noting that "a defendant cannot rely upon the State's discovery as a substitute for his or her own investigation").

263. *Ake v. Oklahoma* recognized the state's obligation to provide an indigent defendant with access to competent expert assistance and set forth general guidelines for determining when such state aid was required. 470 U.S. 68, 77 (1985). Nevertheless, trial courts are in desperate need of more specific standards to govern their authorization of funds for defense investigation purposes. *See* Cade v. State, No. 92-142, 1994 Fla. App. LEXIS 3273, at *2 (Fla. Dist. Ct. App. 1994) (finding no abuse of discretion in the trial court's failure to authorize funds for the appointment of a DNA expert, despite the fact that the testimony of the state's DNA expert was "crucial to the state's case").

Even when the state does test the tangible evidence, the defendant should be entitled to independent testing. As the Supreme Court of Tennessee observed in *State v. Gaddis*:[264]

> It is no answer to say that the State's toxicologist, or other official, will make a competent and accurate analysis and make the result available to the defendant. This imputes to these examiners an aura of official infallibility inconsistent with the processes of the adversary system . . . . We reject this approach.[265]

In a separate case in which the defendant sought access to the alleged murder weapon and bullet for purposes of having the items examined and tested by a ballistics expert of his own choosing, the court described the issue as "not one of discovery but rather the defendant's right to the means necessary to conduct his defense."[266] These cases intimate that defense testing minimizes the possibility that falsified and otherwise erroneous results will go unchallenged.[267]

While most courts find that a denial of the right to retest is a violation of fundamental fairness,[268] recent cases do exist that refuse to recognize a

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264. 530 S.W.2d 64 (Tenn. 1975) (vacating a conviction for possession of marijuana and remanding the case to the trial court to allow for independent testing by the defense).

265. *Id.* at 68; *see also* Warren v. State, 288 So. 2d 826, 830 (Ala. 1973) ("[I]t is no answer to the question that the State's expert witness is a skillful scientist and a creditable witness.").

266. Barnard v. Henderson, 514 F.2d 744, 746 (5th Cir. 1975).

267. A matter of scandalous proportions proves the point. It was recently discovered that Fred Zain, a state forensic expert, falsified lab work in hundreds of cases in West Virginia and, after relocating to Texas. *See* Andrew Schneider, *Forensic Lies May Have Jailed Hundreds*, SAN DIEGO UNION-TRIB. (Afternoon Edition), Apr. 18, 1994, at A1. An investigation by West Virginia authorities revealed the following acts of misconduct on the part of Zain:

> "(1) overstating the strength of results; (2) overstating the frequency of genetic matches on individual pieces of evidence; (3) misreporting the frequency of genetic matches on multiple pieces of evidence; (4) reporting that multiple items had been tested, when only a single item had been tested; (5) reporting inconclusive results as conclusive; . . . (8) failing to report conflicting results; (9) failing to conduct or to report conducting additional testing to resolve conflicting results; (10) implying a match with a suspect when testing supported only a match with the victim; and (11) reporting scientifically impossible or improbable results."

In re West Virginia State Police Crime Lab., 438 S.E.2d 501, 503 (W. Va. 1993) (quoting an investigative report). Zain was later described as being "completely pro-prosecution . . . obsessed by being a hero to these guys [prosecutors] and other cops." Schneider, *supra*, at A15.

Of course, a bigger problem than the systematic falsification of lab results is the problem of inadvertent errors. Indeed, West Virginia authorities investigating Zain's misconduct noted several basic deficiencies in the operating procedures of the state crime lab:

> "(1) no written documentation of testing methodology; (2) no written quality assurance program; (3) no written internal or external auditing procedures; (4) no routine proficiency testing of laboratory technicians; (5) no technical review of work product; (6) no written documentation of instrument maintenance and calibration; (7) no written testing procedures manual; (8) failure to follow generally-accepted scientific testing standards with respect to certain tests; (9) inadequate record-keeping; and (10) failure to conduct collateral testing."

In re West Virginia State Police Crime Lab., 438 S.E.2d at 504 (quoting an investigative report). One or more of these deficiencies could readily contribute to incorrect findings from lab testing. For a discussion of the reasons for and prevalence of incorrect findings from scientific testing by state laboratories, see Paul C. Giannelli, *The Admissibility of Laboratory Reports in Criminal Trials: The Reliability of Scientific Proof*, 49 OHIO ST. L.J. 671, 681-82, 688-92 (1988); *see also* 1 GIANNELLI & IMWINKELRIED, *supra* note 106, § 3-4, at 86 (noting the fallibility of state crime labs).

268. Barnard v. Henderson, 514 F.2d 744, 746 (5th Cir. 1975) (stating that "[f]undamental fairness is violated when a criminal defendant . . . is denied the opportunity to have an expert of his choosing

defendant's right to retest and point instead to a defendant's ability to cross-examine the prosecution's expert.[269] The scenario is all too reminiscent of the defendant who is unable to test the declarant of prosecution hearsay evidence, but is able to cross-examine the witness reporting the declarant's out-of-court statement. In both cases the defendant is unable to access and assess the raw evidence.

A Compulsory Process Clause analysis better addresses the specific interests at stake: adversariness and truth-seeking. The defendant's analysis of the tangible raw evidence takes nothing from the prosecution and actually promotes the adversarial nature of the proceedings. Even if the tangible evidence is in the prosecution's possession, the prosecution does not create or own (in the *Gregory* sense) the tangible evidence.[270] Rather, the defendant-as-adversary seeks only an independent assessment of the raw evidence as a check against the prosecution's presentation of the evidence.[271] Defense testing also advances truth-seeking at trial because it indirectly insures the honesty and reliability of state testing.

3. The Right to Obtain Psychological or Physical Examination of a Complainant or Witness

The Compulsory Process Clause, understood as a check against the prosecution's presentation of the evidence and as embodying limited discovery rights to effect that "checking" function, would also include a defendant's

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. . . examine a piece of critical evidence whose nature is subject to varying expert opinion"); *accord* White v. Maggio, 556 F.2d 1352, 1357 (5th Cir. 1977) (holding that denying the defendant access to tangible evidence violates fundamental fairness when the evidence is both "critical" to conviction and subject to varying expert opinion); Warren v. State, 288 So. 2d 826, 830 (Ala. 1973) ("Impartiality and fairness require that the defendant be aided by all available processes of the court, when invoked, to enable him to test and question the authenticity of the State's evidence against him."); State v. Hanson, 278 N.W.2d 198, 201 (S.D. 1979) ("The due process clauses require that the defendant have access to the evidence as an aid to his defense . . . .").

269. *See, e.g.*, Frias v. State, 547 N.E.2d 809, 813 (Ind. 1989) (reasoning that the defendant had the opportunity to cross-examine the state's expert, had access to the state's laboratory reports, and made no objection as to the accuracy or integrity of the State's testing procedures), *cert. denied*, 495 U.S. 921 (1990); People v. Borney, 313 N.W.2d 329, 332 (Mich. Ct. App. 1981) (reasoning that the defendant's rights were "adequately protected by cross-examination" of the prosecution's expert); People v. Anderson, 276 N.W.2d 924, 926 (Mich. Ct. App. 1979) (reasoning that the defendant's rights were adequately protected because defense counsel was allowed unrestricted cross examination of the prosecution's expert witness); People v. Bell, 253 N.W.2d 726, 729 (Mich. Ct. App. 1977) (finding no reversible error where the defendant was afforded full cross examination of the prosecution's expert witness); *see also* State v. Faraone, 425 A.2d 523, 525 (R.I. 1981) (reasoning that the defense stipulated to the state expert's trial testimony).

270. *See* Gregory v. United States, 369 F.2d 185, 188 (D.C. Cir. 1966), *cert. denied*, 396 U.S. 865 (1969).

271. While the majority of the statutory provisions allow for the inspection of tangible objects *which may be material to the preparation of the defense,* some provisions, as indicated by the above parentheticals, are limited to *items which the prosecuting attorney intends to use at trial. See supra* note 257. Under the proffered interpretation of the Compulsory Process Clause, the defense would be entitled to inspect and test tangible objects falling into either category, at least insofar as these tangible objects qualify as raw evidence. Otherwise, the prosecution would enjoy the exclusive possession of raw evidence, thereby undermining the adversary process.

right to obtain a psychological or physical examination of a complainant or witness whose mental or physical condition is placed in issue by the prosecutor.[272] For instance, although sexual assault prosecutions are not the only context in which a complainant's psychological or physical condition may be in issue, these cases frequently include prosecution evidence that the alleged victim suffers from post-traumatic stress disorder ("PTSD").[273] This evidence is typically conveyed in the form of opinion testimony from a psychologist or psychiatrist who has interviewed the alleged victim and reached the opinion that the alleged victim's psychological symptoms and behavior are consistent with that of someone suffering from PTSD.[274] Since sexual assault cases often hinge on the relative credibility of the defendant and the alleged victim, PTSD evidence, which bolsters the alleged victim's credibility, can be particularly devastating for the defendant.[275]

A criminal defendant would understandably want to challenge opinion testimony that the alleged victim was suffering from PTSD. The problem that

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272. *Cf. Pre-Trial Disclosure in Criminal Cases*, *supra* note 78, at 644-45 (not relying on the Compulsory Process Clause, but proposing rules of discovery procedure in criminal cases, including a rule providing for the physical or mental examination of individuals whose condition is in issue). Of course, when the mental or physical condition of a party is in issue in civil litigation, the psychological or physical examination of the party is routinely available. *See, e.g.*, ALA. R. CIV. P. 35(a); ARIZ. R. CIV. P. 35(a); ARK. R. CIV. P. 35(a); CAL. CIV. PROC. CODE ANN. § 2032(a) (West Supp. 1994); COLO. R. CIV. P. 35(a); CONN. SUPER. CT. CIV. R. § 229; DEL. SUPER. CT. CIV. R. 35(a); D.C. SUPER. CT. R. CIV. P. 35(a); FLA. R. CIV. P. 1.280(a); GA. CODE ANN. § 9-11-35 (1993); HAW. R. CIV. P. 35(a); IDAHO R. CIV. P. 35(a); ILL. SUP. CT. R. 215; IND. R. TRIAL P. 35(A); IOWA R. CIV. P. 132; KAN. STAT. ANN. § 60-235(a) (1983); KY. R. CIV. P. 35.01; LA. CODE CIV. PROC. ANN. art. 1464 (West Supp. 1994); ME. R. CIV. P. 35(a); MD. CIR. CT. R. CIV. P. 2-423; MASS. R. CIV. P. 35(a); MICH. R. CIV. P. 2.311(A); MINN. R. CIV. P. 35.01; MO. ANN. STAT. § 510.040 (Vernon 1952); MONT. R. CIV. P. 35(a); NEV. R. CIV. P. 35(a); N.H. SUPER. CT. R. 35(a); N.J. R. CIV. PRAC. 4:19; N.M. DIST. CT. R. CIV. P. 1-035(A); N.Y. CIV. PRAC. L. & R. 3121 (McKinney 1991); N.C. R. CIV. P. 35(a); OHIO R. CIV. P. 35(A); OKLA. STAT. ANN. tit. 12, § 3235 (West 1993); OR. R. CIV. P. 44(A); PA. R. CIV. P. 4010(a); R.I. R. CIV. P. 35(a); S.C. R. CIV. P. 35(a); S.D. CODIFIED LAWS ANN. § 15-6-35(a) (1984); TENN. R. CIV. P. 35.01; TEX. R. CIV. P. CODE ANN. 167(1)(a) (West 1994); UTAH R. CIV. P. 35(a); VT. R. CIV. P. 35(a); VA. R. CIV. P. 35(a); WASH. SUPER. CT. CIV. R. 35(a); W. VA. R. CIV. P. 35(a); WIS. STAT. ANN. § 804.10(1) (West 1994); WYO. R. CIV. P. 35(a); *see also* FED. R. CIV. P. 35(a).

273. *See, e.g.*, People v. Wheeler, 602 N.E.2d 826 (Ill. 1992); State v. Maday, 507 N.W.2d 365 (Wis. Ct. App. 1993).

274. *Wheeler*, 602 N.E.2d at 829; *Maday*, 507 N.W.2d at 368.

275. *See Wheeler*, 602 N.E.2d at 833 (declining to find harmless error where PTSD evidence was improperly admitted). Some courts have held PTSD evidence inadmissible. *See, e.g.*, Commonwealth v. Dunkle, 602 A.2d 830 (Pa. 1992) (holding syndrome evidence inadmissible for any purpose). Other courts circumscribe its admissibility. *See, e.g.*, People v. Bledsoe, 681 P.2d 291 (Cal. 1984) (acknowledging the admissibility of syndrome evidence to explain the actions of alleged victims, but not to show that the crime occurred); State v. Saldana, 324 N.W.2d 227 (Minn. 1982) (finding reversible error in allowing expert testimony concerning typical symptoms and behavior of rape victims and opinion evidence that the complainant was a rape victim); State v. Michaels, 625 A.2d 489 (N.J. Super. Ct. App. Div. 1993) (acknowledging the admissibility of syndrome evidence to explain the actions of alleged victims, but not to show that the crime occurred), *aff'd*, 642 A.2d 1372 (N.J. 1994); People v. Taylor, 552 N.E.2d 131 (N.Y. 1990) (concluding that syndrome evidence is inadmissible when it "inescapably bears solely on proving" that a crime occurred); State v. Hall, 412 S.E.2d 883 (N.C. 1992) (acknowledging the admissibility of syndrome evidence to explain the actions of alleged victims, but not to show that the crime occurred). Other courts freely admit syndrome evidence. *See, e.g.*, State v. Delaney, 417 S.E.2d 903, 908 n.3 (W. Va. 1992) (affirming the admissibility of expert testimony that a child complainant mirrors the psychological and behavioral traits of a child sexual abuse victim and that the child has been sexually abused).

arises for defendants is that the raw evidence may be inaccessible; that is, the alleged victim may not want to submit voluntarily to an examination by a defense expert.[276] The problem for the trial court is whether to allow the prosecution to present opinion testimony based on an examination of the alleged victim under these circumstances.[277] Some courts have concluded

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276. The psychological or physical examination of a complainant or witness is a variation of subjecting tangible objects to testing. *See supra* part IV.D.2. The prosecution's trial use of expert opinion based on an examination of the complainant or witness triggers the need for comparable defense testing.

277. Some courts recognize the discretionary power of trial courts to order the alleged victim's examination by a defense expert. *See, e.g.*, State v. Rhone, 566 So. 2d 1367 (Fla. Dist. Ct. App. 1990) (upholding the trial court's order for a psychological examination of the victim by the defense where the state planned to use evidence of the battered woman's syndrome to prove that the victim lacked the capacity to consent to sexual intercourse); State v. Doremus, 514 N.W.2d 649 (Neb. Ct. App. 1994) (holding that the defendant was entitled to an independent psychological evaluation of the alleged sexual assault victim where the state had the mentally retarded complainant evaluated and planned to offer expert testimony that the complainant was incapable of consent); State v. D.R.H., 604 A.2d 89, 95 (N.J. 1992) (holding that a trial court has the discretion to order a physical examination of the complainant and setting forth the appropriate balancing test); State v. Ramos, 553 A.2d 1059 (R.I. 1989) (recognizing the trial court's discretionary power to order a physical examination of the complainant in a criminal trial, but finding no abuse of discretion in denying the defendant's request for an independent gynecological examination); *Delaney*, 417 S.E.2d 903 (holding that a trial court has the discretion to order both psychological and physical examinations and setting forth the appropriate balancing test); *Maday*, 507 N.W.2d 365 (holding that a trial court has the discretion to order a psychological examination of the complainant and setting forth a balancing test); *see also* Judith Greenberg, Note, *Compulsory Psychological Examination in Sexual Offense Cases: Invasion of Privacy or Defendant's Right?* 58 FORDHAM L. REV. 1257 (1990) (arguing that courts generally do have the discretion to order a psychological examination of the complaining witness). *But see* State v. Gabrielson, 464 N.W.2d 434 (Iowa 1990) (holding that trial courts have no authority to order sexual abuse victims to undergo psychiatric examinations); *see also* Troy A. Eid, Comment, *A Fourth Amendment Approach to Compulsory Physical Examinations of Sex Offense Victims*, 57 U. CHI. L. REV. 873 (1990) (acknowledging that the prosecution's medical evidence can be a powerful tool of persuasion and that juries would understandably give greater credence to an examining physician, but arguing that a physical examination of the complainant by a defense expert is not required by the Due Process Clause and should be prohibited by the Fourth Amendment guarantee against unreasonable searches). In some jurisdictions, however, this power has been circumscribed by legislation prohibiting courts from making such orders, at least in sexual assault prosecutions. *See, e.g.*, ARIZ. REV. STAT. ANN. § 13-4065 (1989) (prohibiting courts from ordering mental examinations of victims or witnesses of designated offenses for purposes of assessing credibility); CAL. PENAL CODE ANN. § 1112 (West Supp. 1994) (prohibiting courts from ordering mental examinations of victims or witnesses of sexual offenses for purposes of assessing their credibility); IDAHO CODE § 19-3025 (Michie Supp. 1994) (prohibiting courts from ordering mental examinations of victims or witnesses *of any offense* for purposes of assessing credibility); ILL. ANN. STAT. ch. 725, para. 115-7.1 (Smith-Hurd 1993) (prohibiting courts from ordering mental examinations of victims or witnesses of sexual offenses). In *People v. Wheeler*, questionable examinations were ordered to explore the alleged victim's general competency and credibility. 602 N.E.2d 826, 831 (Ill. 1992); *see also* State v. Camejo, 641 So. 2d 109 (Fla. Dist. Ct. App. 1994) (quashing an order requiring the complainant in a sexual assault prosecution to undergo a psychological evaluation). In contrast, this section discusses when a psychological or physical examination is specially indicated, such as when the prosecution builds its case upon the psychological or physical condition of the complainant or witness. *Cf. id.* (acknowledging that the state's intention to use expert psychological testimony may establish the requisite compelling need for a court-ordered, defense examination of the complainant).

This Article assumes that it would be inappropriate to compel such examinations by imposing sanctions, such as a fine or incarceration, on an unwilling complainant or witness. Nevertheless, the more extreme sanction of entirely dismissing a prosecution has generally not been upheld by the appellate courts. *See* People v. Nokes, 228 Cal. Rptr. 119, 120 (Cal. Ct. App. 1986) (reversing a judgment of dismissal); State v. Diamond, 553 So. 2d 1185, 1192 (Fla. Dist. Ct. App. 1988) (quashing an order enjoining prosecution unless and until the complainants first submitted to a physical examination); *D.R.H.*, 604 A.2d at 98 (reversing the dismissal of an indictment).

that allowing the prosecution to present opinion testimony based on an examination of the alleged victim does not violate the defendant's due process rights, even though the defense is unable to have the alleged victim examined by its own expert.[278] These courts reason that there is no unfairness to the defense since both the prosecution and the defense are at the mercy of the alleged victim to obtain the examination, and the alleged victim voluntarily submitted to the prosecution's request for such an examination.[279] Other courts have concluded that there is a violation of due process when the prosecution proffers the testimony of an examining expert but the defense cannot.[280] These courts accordingly prohibit the prosecution from presenting the opinion testimony of an expert based on an examination of the alleged victim unless the defendant is afforded an opportunity to have the alleged victim examined by a defense expert.[281]

While the latter courts reach the correct result, they take the incorrect doctrinal road to get there, and other courts understandably refuse to follow. There is no violation of due process in the *Brady* sense because the state does not control or possess what the defendant wants: access to the alleged victim.[282] There is, however, a Compulsory Process Clause problem. When

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278. In *Gilpin v. McCormick*, for instance, the defendant sought to compel psychiatric examinations of the complaining witnesses for purposes of demonstrating an absence of rape trauma syndrome ("RTS"). 921 F.2d 928, 930 (9th Cir. 1990). The defendant argued that since the state may examine sexual abuse victims for purposes of determining the presence of RTS and presenting evidence of its existence, the defense must have this same privilege. *Id.* at 931. On this appeal, the defendant framed his complaint as a denial of due process and a denial of his right of confrontation. *Id.* at 929. The Ninth Circuit rejected both arguments. *Id.* at 932.

279. *Id.* at 931.

280. In *People v. Wheeler*, for instance, the defendant learned that the State intended to introduce expert testimony that the victim suffered from RTS and sought a compelled mental examination of the victim by the defendant's expert. 602 N.E.2d 826, 828 (Ill. 1992). The trial court denied the defendant's motion. *Id.* On appeal, the defendant argued that, under the Compulsory Process Clause of the Sixth Amendment and the Due Process Clause of the Fourteenth Amendment, his expert should have been permitted to examine the alleged victim. *Id.* at 830. In ruling that the prosecution should not be able to present opinion testimony based on the examination of the alleged victim when the defendant could not present comparable opinion testimony, the Supreme Court of Illinois cited United States v. Nixon, 418 U.S. 683 (1974), for the proposition that "[o]ur system of criminal justice requires a complete presentation of the facts." *Wheeler*, 602 N.E.2d at 832. Nevertheless, the court also cited Pennsylvania v. Ritchie, 480 U.S. 39 (1987), for the proposition that "the compulsory process clause offers no greater protection than that afforded by the due process clause." *Wheeler*, 602 N.E.2d at 830. Accordingly, the court based its decision on the Due Process Clause. *Id.*; *see also* State v. Maday, 507 N.W.2d 365 (Wis. Ct. App. 1993) (applying the Due Process Clause and reaching the same conclusion as *Wheeler*).

281. *Wheeler*, 602 N.E.2d at 833; *see also* State v. Horn, 446 S.E.2d 52, 54 (N.C. 1994) (citing the defendant's right to present a defense and holding that the trial court "*may* deny the admission of the State's proffered psychological evidence demonstrating the alleged victim's mentally deficient status") (emphasis added).

282. For instance, in *People v. Webb*, a murder prosecution in which a death sentence was imposed, the defendant sought the psychiatric records of the prosecution's star witness. 862 P.2d 779, 792 (Cal. 1993), *cert. denied*, 115 S. Ct. 123 (1994). The defendant argued that, assuming the psychiatric records showed that the witness suffered from "delusions" or other mental disorders affecting her competence or credibility as a witness, the defendant's right to "fairly cross-examine her under the due process and confrontation clauses of the federal Constitution would prevail over any state law privilege or privacy interest" of the witness in the records. *Id.* at 792-93. The prosecutor seemed to agree. *Id.* at 793. The California Supreme Court, however, applying Pennsylvania v. Ritchie, 480 U.S. 39 (1987), questioned whether the "records stemming from [the witness'] voluntary treatment by private and county therapists

the prosecution presents expert opinion testimony based on an examination of the alleged victim, but the defendant cannot present his own comparable evidence, the prosecution's evidence is insulated from the testing anticipated by the Compulsory Process Clause. Courts therefore appropriately exclude prosecution evidence based on an examination of the alleged victim when the defense is precluded from making a comparable examination. Moreover, the Compulsory Process Clause, and not the Due Process Clause, is the appropriate basis for this result precisely because the government is not in possession of the information sought by the defendant: The defendant does not seek the reports of the state experts (à la *Brady/Ritchie*), but an examination of the alleged victim by a defense expert (à la *Nixon/Burr*). Truth-seeking is served because the defendant is able to check the prosecution's presentation of the evidence.

V. CONCLUSION

In 1961, Professor Louisell asked, "Will criminal discovery remain the perpetual adolescent of the adversary system?"[283] In 1995, criminal discovery continues to lag well behind its civil counterpart in aiding the quest for truth at trial. Perhaps recognizing the "checking" function of the Compulsory Process Clause and grounding at least certain discovery rights in the Clause to effect that function will hasten criminal discovery's maturity.

Distinguishing a right to discover the raw evidence (grounded in the Compulsory Process Clause) from a right to discover information produced by government investigative efforts (grounded in the Due Process Clause) advances our adversary system of criminal justice. It eliminates the apprehension that the prosecution will be investigating the case for the defendant by empowering the defense to do its own investigation.

Not only are such discovery rights theoretically sound, but they are of practical significance to the litigation. First, grounding certain discovery rights in the Compulsory Process Clause would not supplant but would supplement

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[could] be deemed 'in the possession' of the 'government' in the manner assumed by *Ritchie*." *Webb*, 862 P.2d at 794. The court deemed it "likely that [the] defendant has no constitutional right to examine the records," since "[t]he records were not generated or obtained by the People in the course of a criminal investigation, and the People have had no greater access to them than [the] defendant." *Id.*; *see also* Bartlett v. Hamwi, 626 So. 2d 1040 (Fla. Dist. Ct. App. 1993) (holding that the circumstances did not justify a court order authorizing the taking of hair samples from a witness, by reasoning, in part, that the case did not involve the prosecution's failure to produce evidence in existence or the destruction of previously existing evidence); People v. Nicholas, 157 Misc. 2d 947 (N.Y. Sup. Ct. 1993) (finding that the defendant inappropriately relied on Brady v. Maryland, 373 U.S. 83 (1963), to inspect and photograph the crime scene—the apartment he formerly shared with his estranged wife, the complainant—since the premises were not under state control, but that the right to compulsory process raised a colorable claim); Eid, *supra* note 277, at 879 (arguing that the Due Process Clause is inapplicable to defense requests to have an independent physical examination of the complainant, since "the prosecution cannot disclose what it does not have," and "the prosecution does not possess the complainant's vagina or rectum" and therefore "cannot 'disclose' them to the defendant's experts").

283. Louisell, *supra* note 78, at 60.

the discovery opportunities guaranteed by the Due Process Clause.[284] Secondly, a heightened standard of review would apply. A due process analysis (à la *Brady*) asks whether there is a reasonable probability that disclosure of the evidence would have affected the outcome at trial, but this due process standard is concerned with effecting fairness and justice when the ordinary adversarial process does not suffice to bring about these ends.[285] Moreover, the evidence at issue is certain (*e.g.*, the co-participant's confession in *Brady*); the reviewing court is therefore able to examine the record of the entire trial to determine the effect of its exclusion. A Compulsory Process Clause analysis would be concerned with effecting adversariness, the very essence of our criminal justice system, and appropriately would require a showing that the trial court's error was at least harmless beyond a reasonable doubt.[286] With a Compulsory Process Clause violation of the type described here (*e.g.*, admitting accusatory or incriminating hearsay evidence in lieu of live testimony when the defendant has been unable to obtain pretrial access to an available hearsay declarant, or admitting expert opinion testimony based on scientific testing of some tangible object when the defendant has been unable to conduct independent testing), one is concerned not with the exclusion of certain evidence, but with the inability to access and assess the raw evidence for purposes of checking the prosecution's presentation of the evidence and mounting a defense. The reviewing court can only speculate as to what information might have been uncovered, let alone how hamstringing the defense might have affected the trial. It therefore will be appropriate in many instances to remand the case to allow the defendant to depose the witness or test the tangible object to determine whether a retrial is warranted.

If the notion of grounding certain discovery rights in the Compulsory Process Clause should fail, recognizing the importance of "checking" the prosecution's presentation of the evidence to truth-seeking at trial—and distinguishing the discovery of raw evidence from the product of the government's investigative efforts—provides a sound theoretical framework for statutory reform or trial court decisions regarding discovery in criminal

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284. Of course, like Confrontation Clause rights, Compulsory Process Clause discovery rights would not be absolute. For instance, it would not make sense to disallow a prosecution expert's opinion of forcible trauma based on a physical examination of an alleged rape victim if the passage of time would render a later defense examination irrelevant. Rape often does not result in permanent physical injury. *See* People v. Nokes, 228 Cal. Rptr. 119, 126 (Cal. Ct. App. 1986); State v. Delaney, 417 S.E.2d 903, 907-08 (W. Va. 1992).

285. *See supra* notes 224-230 and accompanying text.

286. In *Arizona v. Fulminante*, the Supreme Court distinguished "trial errors," which lend themselves to quantitative assessment in the context of other evidence, from "structural defects," which defy a harmless error analysis and require automatic reversal. 499 U.S. 279, 306-10 (1991). For a discussion of the history and uncertain parameters of harmless error and automatic reversal as applied to constitutional violations, see LAFAVE & ISRAEL, *supra* note 70, § 27.6(c)-(e), at 1166-75. In any event, a harmless error analysis would afford defendants more protection than *Brady's* reasonable probability test. *See id.* §27.6(d), at 1168 (observing that "the presence of the requisite 'reasonable probability' necessarily establishes the reasonable doubt required for a new trial under [the harmless error standard]"); Daniel J. Meltzer, *Harmless Error and Constitutional Remedies*, 61 U. CHI. L. REV. 1, 3 (1994) (observing that a reasonable probability test is "a standard far less protective of defendants than that of [the] *Chapman* [harmless error standard]").

cases. Legislatures and trial courts should step into the gap created by the Supreme Court's Confrontation Clause jurisprudence and allow defendants to depose recalcitrant hearsay declarants when the prosecution chooses to present incriminating or accusatory hearsay evidence in lieu of live testimony at trial. They should further allow defendants to test and retest real evidence and otherwise provide for defense testing of the raw evidence. In the alternative, the prosecution should be prohibited from presenting raw evidence in distilled forms (that is, accusatory or incriminating hearsay evidence or expert opinion) unless the defense has been able to access and assess the raw evidence. A sound "fact-determination process" requires this.[287]

287. *See generally* Jonakait, *supra* note 85 (discussing the importance of more accurate and complete evidence to truth-finding at trial, even when the Constitution and the existing rules of evidence do not seem to require it).