

# The Haves of Procedure

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## THE HAVES OF PROCEDURE

ION MEYN\*

### ABSTRACT

*In litigation, “haves” and “have-nots” battle over what procedures should govern. Yet, much greater hostilities have been avoided—a war between the “haves” themselves. “Criminal haves” (prosecutors) and “civil haves” (institutional players) litigate in separate territories and under different sets of rules. This is good, for them, because they have incompatible objectives. This Article contends that protecting the “haves” from each other has profoundly influenced the development of procedure in the United States.*

*The “haves” reap significant benefits in being insulated from each other as they seek rules responsive to their unique preferences. A “criminal have” seeks easy access to the forum and thus prefers a permissive pleading standard. In contrast, a “civil have” seeks to impede a plaintiff from bringing suit and thus prefers a demanding pleading standard. As to discovery, “criminal haves,” possessing actionable facts and seeking to control the pretrial distribution of information, resist discovery and judicial involvement. In contrast, “civil haves” often need information to pursue legal objectives, and thus prefer a formal discovery phase, along with the option of judicial intervention to temper instances of discovery abuse. The procedural divide allows the “haves” to achieve these otherwise incompatible objectives.*

*In the absence of a procedural divide, “criminal haves” and “civil haves” would engage in contestation over what rules govern litiga-*

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*tion. This Article suggests that, should civil and criminal litigants be subject to the same rules, as initially proposed during federal reform in the 1940s, the introduction of litigants into a unified forum would result in a fairer approach to procedure, mitigate existing inequalities, and accomplish some litigation objectives of the “have-nots.”*

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## INTRODUCTION

The schism that occurred between civil and criminal procedure had significant repercussions for the future of litigation in the United States. For centuries, civil and criminal procedure shared a deep parallelism at common law.<sup>1</sup> During federal reform to procedure in the 1930s and 1940s, reformers initially sought to preserve this uniformity.<sup>2</sup> The first draft of the Federal Rules of Criminal Procedure in large part imported the newly instituted civil rules.<sup>3</sup> Behind closed doors, the full Advisory Committee—its membership dominated by prosecutors who recognized the power-flattening potential of the civil rules—rejected this proposal.<sup>4</sup> The Committee instead retained features of common law procedure that preserved prosecutorial advantage.<sup>5</sup> From this fateful moment, procedure governing civil and criminal disputes took divergent paths.<sup>6</sup> This divide effectively insulated “criminal haves” (prosecutors) and “civil haves” (institutional players) from each other’s influence, having a profound influence on the development of criminal and civil procedure in the United States.

Who are the “haves”? Marc Galanter gave the term robust meaning when he proposed a framework to understand how the “haves” use litigation to exert influence over the development of the law.<sup>7</sup> A “have,” compared to a “have-not,” enjoys superior access to resources and to the store of information critical to assessing liability, harm, and mitigation.<sup>8</sup> A “have” gains expertise within the constellation of rules that govern its world.<sup>9</sup> A “have” tends to be a repeat player, gaining familiarity with the forum for resolving disputes and cultivating relationships with decision makers and

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1. Ion Meyn, *Why Civil and Criminal Procedure Are So Different: A Forgotten History*, 86 *FORDHAM L. REV.* 697, 701 (2017).

2. *See id.* at 698.

3. *Id.*

4. *See id.* at 698-99.

5. *See id.* at 699.

6. *See id.*

7. Marc Galanter, *Why the “Haves” Come Out Ahead: Speculations on the Limits of Legal Change*, 9 *LAW & SOC’Y REV.* 95, 135-36 (1974).

8. *See id.* at 125 fig.3.

9. *See id.* at 98.

elite practitioners.<sup>10</sup> Though “haves” seek to minimize loss and maximize gain in any individual case, they may accept a loss to wait for more favorable conditions before advocating for doctrinal shifts in the law.<sup>11</sup> In contrast, “have-nots” have comparatively little access to information and resources.<sup>12</sup> “Have-nots” have few contacts with a forum; yet, if they are repeat players (such as criminal recidivists), decision makers hold them in low esteem.<sup>13</sup> “Have-nots” have everything to gain or to lose in any single case, as each case is the litigant’s “one shot.”<sup>14</sup> This desperation will often benefit the “have” as the “have-not” goes for broke at an inopportune time, resulting in suboptimal interpretations of the law for subsequent “have-nots” facing similar circumstances.<sup>15</sup>

Writing in the early 1970s, Galanter sought to temper a growing optimism that litigation held redistributive promise as courtroom victories and legislation in the 1960s disrupted the status quo.<sup>16</sup> As litigation was increasingly viewed as a vehicle to achieve social justice,<sup>17</sup> Galanter provided a counter prediction.<sup>18</sup> Absent a sustained political check on their designs, the “haves” would secure interpretations of law responsive to their preferences on account of their superior resources, access to information, and ability to forge a long-term litigation strategy.<sup>19</sup> Galanter predicted the long arc of

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10. See *id.*; see also, e.g., Jessica Silver-Greenberg & Robert Gebeloff, *Arbitration Everywhere, Stacking the Deck of Justice*, N.Y. TIMES (Oct. 31, 2015), <https://www.nytimes.com/2015/11/01/business/dealbook/arbitration-everywhere-stacking-the-deck-of-justice.html> [<https://perma.cc/5ZJA-5DUR>] (reporting on a strategy used by elite attorneys to divert individual consumer claims to private arbitration to prevent class action claims before they could form).

11. Galanter, *supra* note 7, at 98-103. For “civil haves,” this may be an interpretation of law that limits the scope of regulation; for “criminal haves,” this may be an interpretation of law that expands the scope of harmless error or the requirements to prove conspiracy.

12. See *id.* at 135.

13. Cf. *id.* at 117.

14. See *id.* at 100.

15. *Id.* at 110, 117 (“What might be good strategy for an insurance company lawyer or prosecutor—trading off some cases for gains on others—is branded as unethical when done by a criminal defense or personal injury plaintiff lawyer.”).

16. See generally *id.* at 135-36.

17. Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1284 (1976) (recognizing civil litigation is not limited to disputes between private parties, but significantly used to mediate issues of public law).

18. See Galanter, *supra* note 7, at 135-36.

19. See *id.* at 101-02.

litigation would bend to the will of the “have.”<sup>20</sup> Galanter’s theory, however, focuses on the development of the substantive law and is premised on the interests of the “haves” being aligned.<sup>21</sup> But in the world of procedure, the preferences of the “criminal haves” and “civil haves” do not align. In the project to secure procedural preferences, the “haves” are not stronger together. Quite the opposite. They are foes.

Who are the “haves” of litigation? This Article defines the “criminal haves” as state and federal prosecutors that bring cases against indigent criminal defendants (“criminal have-nots”). Though this definition excludes some defendants (such as white-collar defendants) and yet includes a broad swath of cases (from misdemeanors to murders), this definition captures the relationship that influences prosecutors in seeking rules that apply to all criminal cases. In this Article, “civil haves” are artificial persons, such as corporations and government entities, sued by real individuals who allege civil rights, consumer, and tort claims (“civil have-nots”).<sup>22</sup> Although this definition excludes certain relationships (such as “civil haves” suing “civil haves”) and includes different types of disputes (from slip-and-falls to antitrust), the definition seeks to identify the relationship that influences the “civil haves” in determining what procedural rules should apply to all civil cases.

These particular relationships give rise to the general preferences of the “haves.” As the party that always initiates a case, a “criminal have” seeks relaxed pleading standards that permit easy access to the forum.<sup>23</sup> In contrast, “civil haves” seek demanding pleading standards that hinder an individual plaintiff’s ability to bring suit.<sup>24</sup> As to discovery, prosecutors resist formal procedures and seek to exercise unfettered discretion to maximize leverage in achieving

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20. *See id.*

21. *See id.* at 100-03.

22. *See* Marc Galanter, *Planet of the APs: Reflections on the Scale of Law and its Users*, 53 *BUFF. L. REV.* 1369, 1376-77 (2006) (“As more of our encounters and relationships are with APs [artificial persons], an increasing portion of our troubles and disputes are with APs.... [And] an increasing portion of matters ... are conflicts between individuals and organizations.... And other sectors of the civil justice system are devoted mainly to individuals seeking to hold APs to account.”).

23. Ion Meyn, *The Unbearable Lightness of Criminal Procedure*, 42 *AM. J. CRIM. L.* 39, 49, 55-56 (2014).

24. *See id.* at 55.

pretrial objectives.<sup>25</sup> In contrast, “civil haves,” at times in need of information, seek to preserve core features of formal discovery.<sup>26</sup>

Despite the potential clash of these preferences, the “haves” do not meet on the field. As they attempt to shape procedure, they are free from each other’s influence. This is a modern development.<sup>27</sup> Under common law procedure, the “haves” shared deep procedural ties; for example, pleading standards for civil actions were “applicable to an indictment” and “where the criminal law [was] silent as to the form of an indictment,” a litigant looked to “pleading in civil actions.”<sup>28</sup> During the federal reform of procedure in the 1930s and 1940s, as substance was purged from procedure, the potential for a unified forum became possible.<sup>29</sup> Indeed, the initial proposal by reformers was to tie the two sets of rules together.<sup>30</sup> But an alternative vision prevailed, and separate procedural territories emerged.<sup>31</sup> As a result, “civil haves” and “criminal haves” became insulated from each other, governed by different procedural rules.<sup>32</sup>

It is this procedural divide that is the heart of this Article: How has separating the “haves” of litigation influenced the development of procedure? A rich literature provides insights into the development of civil procedure; the historical studies of Stephen Subrin, the political lens of Judith Resnik, and the empirical contributions of Stephen Burbank and Sean Farhang, to name a few.<sup>33</sup> The inquiry into the historical and political hydraulics of rule formation in criminal procedure, however, is comparatively wanting. This Article seeks to reveal how the procedural divide has influenced the development of rules in each forum. This Article contends that the war avoided between the “haves” of civil and criminal litigation has

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25. Ion Meyn, *Discovery and Darkness: The Information Deficit in Criminal Disputes*, 79 BROOK. L. REV. 1091, 1094-95 (2014).

26. *See id.* at 1100-01.

27. *Cf. Meyn, supra* note 1, at 698-99.

28. WILLIAM E. MIKELL, HANDBOOK OF CRIMINAL PROCEDURE 158 (2d ed. 1918).

29. Meyn, *supra* note 1, at 698.

30. *See id.* at 708-09.

31. *Id.* at 712-13.

32. *See id.*

33. STEPHEN B. BURBANK & SEAN FARHANG, RIGHTS AND RETRENCHMENT: THE COUNTERREVOLUTION AGAINST FEDERAL LITIGATION 70-71 (2017); Judith Resnik, *The Domain of Courts*, 137 U. PA. L. REV. 2219, 2224-26 (1989); Stephen N. Subrin, *Fishing Expeditions Allowed: The Historical Background of the 1938 Federal Discovery Rules*, 39 B.C. L. REV. 691, 717-29 (1998).



had a significant impact on the development of procedure. Litigating within separate territories, “civil haves” and “criminal haves” exert conflicting preferences free of interference from each other. Absent moments of political or judicial intervention, the procedural changes in each forum respond to preferences of each set of “haves.” This Article considers how the creation of a unified forum—subject to civil rules as originally proposed—would require “haves” to contend with each other’s competing preferences and pull other decision makers, such as judges, into the crosscurrents.

This Article is also situated within scholarship that confronts the justification for the procedural divide.<sup>34</sup> An underlying question addressed is whether criminal disputes should be subject to the rules of civil procedure. The first draft of Federal Rules of Criminal Procedure, proposed in 1941, answered this question in the affirmative and followed “as closely as possible in organization, in numbering and in substance the Federal Rules of Civil Procedure.”<sup>35</sup> Viewing procedure as transsubstantive, these reformers proposed a rule that tied the meaning of a criminal rule to the corresponding civil rule.<sup>36</sup> The full committee considering this proposal, however, ultimately rejected this unification effort.<sup>37</sup>

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34. Darryl K. Brown, *The Decline of Defense Counsel and the Rise of Accuracy in Criminal Adjudication*, 93 CALIF. L. REV. 1585, 1621-25 (2005) (favoring increased discovery in criminal adjudication); Russell M. Gold, “Clientless” Lawyers, 92 WASH. L. REV. 87, 99-100 (2017) (challenging demarcation between civil and criminal disputes); Russell M. Gold et al., *Civilizing Criminal Settlements*, 97 B.U. L. REV. 1607, 1640-41 (2017) (proposing civil discovery to inform plea bargaining); Meyn, *supra* note 1, at 720-24 (defining nature of disparity between civil and criminal discovery); Meyn, *supra* note 23, at 44-52 (detailing the impact of information disparity at key moments in civil and criminal litigation); Jenny Roberts, *Too Little, Too Late: Ineffective Assistance of Counsel, the Duty to Investigate, and Pretrial Discovery in Criminal Cases*, 31 FORDHAM URB. L.J. 1097, 1108-12 (2004) (linking suboptimal performance of defense counsel to lack of discovery); Issachar Rosen-Zvi & Talia Fisher, *Overcoming Procedural Boundaries*, 94 VA. L. REV. 79, 80-81 (2008) (challenging justifications for the civil and criminal procedural divide). This recent scholarship follows significant contributions since federal procedural reforms. *See generally* Robert L. Fletcher, *Pretrial Discovery in State Criminal Cases*, 12 STAN. L. REV. 293, 319-22 (1960); Abraham S. Goldstein, *The State and the Accused: Balance of Advantage in Criminal Procedure*, 69 YALE L.J. 1149, 1192-98 (1960); Jerome Hall, *Objectives of Federal Criminal Procedural Revision*, 51 YALE L.J. 723, 735-46 (1942).

35. Meyn, *supra* note 1, at 710 (quoting *Hearing Before the Advisory Committee on Rules of Criminal Procedure*, United States Supreme Court 17 (1941)).

36. *Id.* at 713.

37. *Id.* at 726-34 (providing an analysis of why the unification effort was rejected by the full Advisory Committee).

Among criminal procedure scholars and practitioners, the debate has increased in intensity over the justification for the divide. Supporters of the status quo contend that prosecutors in their role as ministers of justice should be trusted to exercise appropriate discretion in managing disputes, and that defendants would abuse formal discovery to delay proceedings, intimidate witnesses, and traumatize victims.<sup>38</sup> Those partial to some degree of procedural unification contend that increased factual contestation in criminal disputes is necessary to obtain legitimate outcomes.<sup>39</sup> For the purposes of this Article, it is sufficient that there is a robust debate over whether this segregation is justified. The focus of this Article is the significance of the division: to consider whether the procedural divide has played a role in influencing the development of procedure, and if so, to what degree.

In Part I, the Article defines a “civil have” and a “criminal have,” and explores how each set of “haves,” on account of their unique relationships to their respective “have-nots,” results in opposing preferences at key procedural stages: pleading and discovery. Part II surveys the development of civil and criminal procedure from the moment the “haves” of litigation were segregated in the early 1940s. This study of historical trends reveals the responsiveness of the resulting procedural regimes to the particular preferences of each set of “haves.” Part III provides a more granular view of how each “have” has shaped the pleading rules, a case study that reveals that, in addition to rulemaking, judicial decisions have responded to the preferences of the “haves.” In Part IV, the Article introduces another influential player in the formation of procedure—courts. This Part explains why courts have long been aligned with the preferences of each set of “haves,” even though the two procedural regimes are so different. This Part also identifies the few instances particular to civil procedure when the alignment between “civil haves” and the courts faltered, exposing dynamics that potentially benefit “have-nots.” With these insights in mind, Part V explores how the unification of procedure would likely result in compromise between the territorial demands of the “haves,” mitigating existing inequalities between “haves” and “have-nots.”

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38. See Meyn, *supra* note 25, at 1127-31.

39. See Roberts, *supra* note 34, at 1120-21, 1154-55.

## I. THE “HAVES” OF LITIGATION AND THEIR PREFERENCES

A “have” operates in opposition to the interests of “have-nots.” This Article defines the “criminal have” as a state or federal prosecutor who brings charges against an indigent defendant (these “criminal have-nots” do not represent all “criminal have-nots,” but as a group make up more than 80 percent of all defendants).<sup>40</sup> The “civil have” is defined as an artificial litigant, such as a corporation or a governmental entity, that defends a case brought by an individual or group of individuals in a civil rights, consumer, or tort case (the “civil have-nots”).<sup>41</sup>

In establishing a working definition, nuances are sacrificed, but intentionally so—after all, the “haves” are forced to iron out nuances and decide what rules will benefit them in *most* cases, even if in a *few* cases such rules are suboptimal.<sup>42</sup> For example, prosecutors in the relatively few white-collar prosecutions may prefer that parties have access to formal discovery, but this preference would entail affording millions of indigent defendants with formal discovery power, a bad bargain for the typical prosecutor.<sup>43</sup> The definition of

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40. Resnik, *supra* note 33, at 2224 (“It is widely recognized that the [prosecutor] ... is the critical ‘repeat player.’”); *see also* CAROLINE WOLF HARLOW, BUREAU OF JUSTICE STATISTICS SPECIAL REPORT: DEFENSE COUNSEL IN CRIMINAL CASES (2000), <https://www.bjs.gov/content/pub/pdf/dccc.pdf> [<https://perma.cc/YYV9-KV37>] (“Over 80% of felony defendants charged with a violent crime in the country’s largest counties ... had publicly financed attorneys.”).

41. Resnik, *supra* note 33, at 2225 (“In practice, civil rights claimants are blacks or women or minorities, and, in civil rights cases ... defendants can only be ... governmental entities or those who work for state and local governments. Although, in some kinds of cases, corporations may be either plaintiffs or defendants, corporations are the defendant employers in Title VII cases. In tort litigation, corporations are more frequently the defendants than the plaintiffs.”).

42. Galanter, *supra* note 7, at 100.

43. A perception prevails that a white-collar defendant is a “have.” Scholarship says otherwise. First, there has been a significant increase in the criminal statutes regulating white-collar transactions. Lucian E. Dervan, *White Collar Overcriminalization: Deterrence, Plea Bargaining, and the Loss of Innocence*, 101 KY. L.J. 723, 728-30 (2013). Second, white-collar defendants are often subject to simultaneous, multiagency investigations. *See* Peter J. Henning, *Defense Discovery in White Collar Criminal Prosecutions*, 15 GA. ST. U. L. REV. 601, 605 (1999). Third, sentences have dramatically increased since the 1980s. Lucian E. Dervan, *Sentencing the Wolf of Wall Street: From Leniency to Uncertainty*, 61 WAYNE L. REV. 91, 107 (2015). Even if white-collar defendants were considered “haves,” such prosecutions make up fewer than 4 percent of federal cases. CYNTHIA BARNETT, FED. BUREAU OF INVESTIGATION, THE MEASUREMENT OF WHITE-COLLAR CRIME USING UNIFORM CRIME REPORTING (UCR) DATA 2

the “criminal have” is in part based on volume; the relationship between a prosecutor and an indigent defendant is the *prevalent* relationship, representing more than 80 percent of all state cases.<sup>44</sup> Individual cases between these parties are, of course, factually varied and different in type. Litigating a misdemeanor may be different than a felony, and a domestic violence case may present different strategic considerations than a robbery prosecution. And the treatment of similar cases will vary by jurisdiction; a drug possession case that results in outpatient treatment in Shelby County, Tennessee,<sup>45</sup> might lead to incarceration in federal court. Recognizing the significance of confounding features presented by federalism, local tradition, and case specifics, the definition attempts to capture the general dynamics that are expected to influence across-the-board preferences of the “criminal haves.”<sup>46</sup>

Regardless of case differences, it is the dynamics of the relationship between the prosecutor and the defendant that drive procedural preferences. With an indigent defendant, the prosecutor typically has in hand the information needed to bring the case to trial.<sup>47</sup> The prosecutor usually has at her disposal criminal codes that provide an array of charging choices, which in turn may provide for mandatory minimums and sentence enhancers.<sup>48</sup> Armed with

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(2002), [https://ucr.fbi.gov/nibrs/nibrs\\_wcc.pdf](https://ucr.fbi.gov/nibrs/nibrs_wcc.pdf) [<https://perma.cc/E873-HWYJ>]. State prosecutions of white-collar crimes are rare. See Peter J. Henning, *Is Deterrence Relevant in Sentencing White-Collar Criminals?*, 61 WAYNE L. REV. 27, 38-39 (2015). And because white-collar defendants often possess the information key to proving any liability, they tend to resist formal discovery, a preference that may explain why white-collar interests are over-represented on the Advisory Committee—as their antagonism to formal discovery is shared by the typical prosecutor. See Meyn, *supra* note 25, at 1131 n.158.

44. See HARLOW, *supra* note 40, at 1, 5.

45. *About Us*, SHELBY COUNTY DRUG CT., <https://drugcourt.shelbycountyttn.gov/content/about-us> [<https://perma.cc/KT77-MLWD>].

46. There are always outliers to the typical dynamics. The prosecutor investigating mobster James Bulger attempted to sidestep the Federal Bureau of Investigation due to suspicion that FBI agents had joined Bulger’s racket, which was confirmed when an attempt to work with state police earned a rebuke by the FBI’s top brass. Fox Butterfield, *Ex-Prosecutor Tells of Ties Between F.B.I. and Mob*, N.Y. TIMES (Dec. 6, 2002), <https://www.nytimes.com/2002/12/06/us/ex-prosecutor-tells-of-ties-between-fbi-and-mob.html> [<https://perma.cc/C9PQ-U489>].

47. See Meyn, *supra* note 25, at 1094-95, 1108.

48. Carissa Byrne Hessick & Douglas A. Berman, *Towards a Theory of Mitigation*, 96 B.U. L. REV. 161, 169 (2016) (observing the growth of sentencing systems that provide for severe sanctions, including the Federal Sentencing Guidelines, which “eliminated parole and severely curtailed judicial discretion at sentencing,” as well as “created a sentencing structure

this native power, a prosecutor brings charges against a party who, if represented, is defended by an under-resourced, over-worked, and under-trained defender who does not have access to the prosecutor's file or the procedural power to conduct a formal, independent investigation.<sup>49</sup> It is this relationship that drives the dynamics of the majority of criminal law cases in state and federal courts, and that in turn influences prosecutorial preferences.

The "civil have" must also make hard calls as to what preferences should apply across all cases, at the expense of creating suboptimal conditions in some cases. Like "criminal haves," the "civil haves" look across a varied plain. The same type of claim may be subject to different procedures and choices of law. Party position is more fluid in civil disputes, as individuals sue corporations and governments, corporations and governments sue individuals and each other, and parties have significant discretion to join other parties.<sup>50</sup> Plaintiffs can maximize influence through class actions.<sup>51</sup> Recognizing confounding features again presented by federalism, local tradition, and case specifics, the definition identifies the relationship between

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devoted almost entirely to aggravating defendants' sentences").

49. David A. Sklansky & Stephen C. Yeazell, *Comparative Law Without Leaving Home: What Civil Procedure Can Teach Criminal Procedure, and Vice Versa*, 94 GEO. L.J. 683, 690 (2006) ("[T]he vast majority of criminal defendants are indigent—the figure is over 80% in state felony cases."). A significant number of defendants do not receive representation, or are provided undercompensated counsel. See, e.g., NAT'L RIGHT TO COUNSEL COMM., JUSTICE DENIED: AMERICA'S CONTINUING NEGLECT OF OUR CONSTITUTIONAL RIGHT TO COUNSEL 64 (2009) ("In Mississippi ... [the monetary] cap most likely has a chilling effect on the right to counsel by providing a disincentive for attorneys to perform work beyond the \$1000 level."). For an analysis of what it means to exercise the agency to conduct an independent investigation, see Meyn, *supra* note 25, at 1108-20.

50. See Galanter, *supra* note 22, at 1376-77.

51. Multidistrict litigation also involves consolidation of claims; this growing method of litigation comprises 36 percent of the federal civil caseload. Alison Frankel, *A Handful of Plaintiffs' Lawyers Dominates MDL Litigation. Is That a Problem?*, REUTERS (Apr. 27, 2017, 4:46 PM), <https://www.reuters.com/article/otc-mdl/a-handful-of-plaintiffs-lawyers-dominates-mdl-litigation-is-that-a-problem-idUSKBN17T33G> [<https://perma.cc/BC7F-AVTZ>] (noting that in just over ten years, MDL grew as a proportion of federal litigation from 16 to 36 percent). Players in this arena control their own destiny. Procedures that govern MDL can be custom made, as "discovery ... committees" created by "steering and executive committees" provide guidelines for the exchange of information. See Elizabeth Chamblee Burch & Margaret S. Williams, *Repeat Players in Multidistrict Litigation: The Social Network*, 102 CORNELL L. REV. 1445, 1459 (2017). Judges are scrambling to "fill the void with class-action analogies and equitable powers.... [A]d hoc practices develop, creating unpredictability and variation in key areas such as leadership appointments, compensating lead lawyers ..., and endorsing or enforcing private settlements." *Id.* at 1456-57.

“civil have” and “civil have-nots” that informs across-the-board preferences.

This relationship is between the “civil have” as an artificial litigant (such as a corporation or a governmental entity), defending a case brought by an individual plaintiff in a civil rights, consumer, or tort action.<sup>52</sup> Marc Galanter has observed the socio-legal salience of the artificial entity versus the real person, observing that “an increasing portion of matters taken up by legal institutions are conflicts between individuals and organizations.... And ... sectors of the civil justice system are devoted mainly to individuals seeking to hold [artificial entities] to account.”<sup>53</sup> This relationship often presents a scenario in which the “have” possesses information the “have-not” needs to make the case.<sup>54</sup> The “haves” view litigation between “civil have” to be a necessary part of doing business, but the “haves” view cases brought by individual plaintiffs as counterproductive to business and governmental objectives.<sup>55</sup> The definition in

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52. See Galanter, *supra* note 22, at 1376-77 (noting corporations and government entities were plaintiffs in 73 percent of contract cases, but only 6 percent of tort cases).

53. *Id.*; see also Alexander A. Reinert, *Measuring the Impact of Plausibility Pleading*, 101 VA. L. REV. 2117, 2122 (2015) (analyzing effects of heightened pleading, finding the most important factor was “the institutional status of the plaintiff and defendant. Indeed, this Article suggests that individuals have fared poorly under the plausibility regime, at least when compared to corporate and governmental ... entities”).

54. See Stephen B. Burbank, *Pleading and the Dilemmas of “General Rules,”* 2009 WIS. L. REV. 535, 561. Artificial entities tend to be able to weather higher pleading standards even when they would not be expected to possess the information necessary to prosecute a claim. For example, the Department of Justice (DOJ) Civil Division will conduct a precomplaint investigation with the assistance of the FBI. See, e.g., Brooke Seipel, *Justice Department Opens Civil Rights Investigation into Charlottesville Crash*, HILL (Aug. 12, 2017, 11:48 PM), <https://thehill.com/homenews/administration/346366-justice-department-opens-civil-rights-investigation-into> [<https://perma.cc/8MNN-AMH4>]. In Title VII or SEC matters, government lawsuits typically follow an administrative investigation—where discovery powers are used to assess the merits of the case. *How Investigations Work*, U.S. SEC. & EXCH. COMM’N, <https://www.sec.gov/enforce/how-investigations-work.html> [<https://perma.cc/BN3K-ZEH5>]. Government entities therefore prefer higher pleading standards to ward off civil rights actions against them. See Elizabeth M. Schneider, *The Changing Shape of Federal Civil Pretrial Practice: The Disparate Impact on Civil Rights and Employment Discrimination Cases*, 158 U. PA. L. REV. 517, 532-33 (2010).

55. *Public Hearing on Proposed Amendments to the Federal Rules of Civil Procedure Before the Judicial Conf. Advisory Comm. on Civil Rules*, 113th Cong. 43 (2013), <https://www.uscourts.gov/sites/default/files/civil-rules-public-hearing-transcript-washington-dc.pdf> [<https://perma.cc/79WC-5TVL>] [hereinafter *Hearing on Civil Procedure*] (testimony of Cory Andrews on behalf of the Washington Legal Foundation: “Everyone agrees that discovery-related litigation costs are a competitive drag on the American economy. The

some respects also looks to volume: civil rights, consumer, and tort cases represent a significant portion of the civil docket.<sup>56</sup> Reducing the litigation footprint of these “civil have-nots” continues to be a chief concern, almost existential in nature, of the “civil haves.”

The procedural preferences of the “haves” correspond to the dynamics of these relationships. A “criminal have” seeks relaxed pleading standards that permit easy access to the forum and factually opaque charges.<sup>57</sup> In contrast, “civil haves” seek demanding pleading standards that require factual detail and pose a significant hurdle to any individual plaintiff that seeks access to the forum.<sup>58</sup> As to discovery issues, a prosecutor initiates a case already in possession of actionable facts.<sup>59</sup> Police have already conducted an investigation.<sup>60</sup> Upon filing charges, the prosecutor’s chief function is not to investigate but to secure a conviction.<sup>61</sup> A discovery phase would interfere with these objectives. In contrast, “civil haves” seek to preserve core features of discovery. “Civil haves” need discovery to assess the integrity and value of claims, and they need discovery to develop defenses.<sup>62</sup> “Civil haves” prefer judicial intervention to

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exponential growth in discovery-related litigation, it doesn’t merely deplete the coffers of Fortune-500 companies. Massive litigation costs can decimate small and medium-sized businesses.”).

56. See UNITED STATES COURTS TABLE C-2, U.S. DISTRICT COURTS: CIVIL CASES COMMENCED, BY BASIS OF JURISDICTION AND NATURE OF SUIT, DURING THE 12-MONTH PERIODS ENDING MARCH 31, 2016 AND 2017 (2017), [https://www.uscourts.gov/sites/default/files/data\\_tables/fjcs\\_c2\\_0331.2017.pdf](https://www.uscourts.gov/sites/default/files/data_tables/fjcs_c2_0331.2017.pdf) [<https://perma.cc/3XAT-JB8C>].

57. See Meyn, *supra* note 23, at 56-57.

58. See *id.* at 55-56.

59. AM. BAR ASS’N, CRIMINAL JUSTICE STANDARDS FOR THE PROSECUTION FUNCTION § 3-4.3(a) (4th ed. 2015), [https://www.americanbar.org/groups/criminal\\_justice/standards/ProsecutionFunctionFourthEdition/](https://www.americanbar.org/groups/criminal_justice/standards/ProsecutionFunctionFourthEdition/) [<https://perma.cc/GG54-JAAQ>] (“A prosecutor should seek or file criminal charges only if the prosecutor reasonably believes that the charges are supported by probable cause, [and] that admissible evidence will be sufficient to support conviction beyond a reasonable doubt.”).

60. See *id.* § 3-4.2(c).

61. See *id.* § 3-4.3.

62. Testimony of the “civil haves” consistently reflects a need for discovery. See, e.g., *Hearing on Civil Procedure*, *supra* note 55, at 30-31 (noting multiple exchanges in which “civil haves” reveal the need to take more than ten depositions in cases). “Civil haves” also realize discovery prevents litigation, as it dissuades a percentage of putative plaintiffs from filing a lawsuit. See, e.g., Jeffrey S. Sutton & Derek A. Webb, *Bold and Persistent Reform: The 2015 Amendments to the Federal Rules of Civil Procedure and the 2017 Pilot Projects*, 101 JUDICATURE 12, 14 (2017) (stating that discovery falls hardest on “small litigants” who can be waited out by litigants with “long purses”); *id.* at 15 (small businesses, due to discovery costs, “relinquish just claims simply because they cannot afford to litigate”). Corporations may

check suboptimal behavior of bad actors, as opposed to any significant dilution of discovery rights.<sup>63</sup>

Pleading and discovery rules are not the only areas of concern to the “haves.” “Civil haves,” for example, seek to constrain collective action of plaintiffs<sup>64</sup>—a problem never experienced by “criminal haves,” who always occupy the plaintiff’s position as the moving party. “Criminal haves,” for their part, seek to ensure that constitutional limitations on state power will not interfere with objectives—a problem “civil haves” wish they had, but alas, they are not blessed with inherent police powers.<sup>65</sup> Pleading and discovery issues, however, are not only critical features of pretrial litigation, but are also susceptible to uniform treatment in civil and criminal disputes.<sup>66</sup> Thus, these junctures would be sites of major contestation between “civil haves” and “criminal haves” if forced to litigate in a unified forum. Yet, due to the demarcation, the “civil haves” and the “criminal haves” seek to secure procedural preferences in each other’s absence. Indeed, the development of procedure in these separate forums corresponds to the preferences of each “have.” The civil forum is increasingly characterized by demanding pleading standards, formal discovery, and pretrial judicial engagement.<sup>67</sup> In contrast, the criminal forum increasingly features relaxed pleading standards, the lack of formal discovery, and the absence of judicial engagement.<sup>68</sup> These two regimes are incompatible. They can only exist as separate territories.

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have significant discovery needs. *See, e.g.*, *Qualcomm Inc. v. Broadcom Corp.*, No. 05cv1958-BLM, 2008 WL 66932, at \*8-10 (S.D. Cal. Jan. 7, 2008). Qualcomm’s patent enforcement action against Broadcom might have been successful but for discovery that revealed a nefarious plan by Qualcomm. *See id.* at \*2-5. Qualcomm had engaged in a fraudulent plan that was only discoverable through formal tools of extraction, leading to Broadcom’s successful defense. *See id.* at \*6, \*8-12, \*20.

63. *Cf. id.* at \*9.

64. *See* Kenneth Terrell, *Supreme Court Says Companies Can Ban Class Action Suits*, AARP (May 22, 2018), <https://www.aarp.org/politics-society/government-elections/info-2018/supreme-court-class-action.html> [<https://perma.cc/9FBW-3X3N>].

65. *See* Meyn, *supra* note 1, at 722-23.

66. *See id.* at 708-09.

67. *See supra* notes 58, 62-63 and accompanying text.

68. *See* Meyn, *supra* note 1, at 725; *supra* notes 57, 59-61 and accompanying text.



## II. THE STATE OF CIVIL AND CRIMINAL PROCEDURE

Courts, the legislature, executive officials, and interest groups influence procedural development.<sup>69</sup> Operating within this competitive milieu, the “haves” of litigation are well positioned to advocate for their preferences. They are, relative to “have-nots,” well represented on each Advisory Committee.<sup>70</sup> Advisory Committees propose rule changes and receive comments.<sup>71</sup> Within this structure, the Chief Justice exerts significant influence through his appointment capacity; he determines the committee’s composition.<sup>72</sup> Since the 1970s, sentiments of chief justices have resonated with the preferences of the “haves.”<sup>73</sup> Appointment trends reflect this, as “practitioners on the [civil] committee are now disproportionately corporate defense lawyers,”<sup>74</sup> and prosecutorial interests remain

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69. BURBANK & FARHANG, *supra* note 33, at 70; Resnik, *supra* note 33, at 2219-20; Paul J. Stancil, *Close Enough for Government Work: The Committee Rulemaking Game*, 96 VA. L. REV. 69, 81 (2010); Elizabeth Thornburg, *Cognitive Bias, the “Band of Experts,” and the Anti-Litigation Narrative*, 65 DEPAUL L. REV. 755, 772-84 (2016) (identifying the multiple stakeholders influencing outcomes, including business advocacy groups and media). *See generally* Danya Shocair Reda, *The Cost-and-Delay Narrative in Civil Justice Reform: Its Fallacies and Functions*, 90 OR. L. REV. 1085, 1087, 1090-91 (2012).

70. Civil Advisory Committee: There has been a substantial shift favoring defense practitioner representation versus plaintiff-side counsel. Judges outnumber practicing attorneys and academics, combined. BURBANK & FARHANG, *supra* note 33, at 77-91. Attorneys on the committee are “disproportionately corporate defense lawyers”; those who represent plaintiffs tend to represent classes or individuals in complex litigation. Brooke D. Coleman, *One Percent Procedure*, 91 WASH. L. REV. 1005, 1017-18 (2016). Criminal Advisory Committee: The original membership was predominantly comprised of prosecutors. *See* Meyn, *supra* note 1, at 727-30. Since 1971, judges sit on the majority of the fifteen or so seats, with a seat (sometimes three) reserved for a representative of the DOJ and one seat reserved for a federal defender (since 1988). Coleman, *supra*, at 1017. Roughly two seats are reserved for the private bar; between 2000 and 2015, five of the six of these seats were occupied by the white-collar defense community (which shares preferences in line with DOJ as to discovery issues). *Id.*

71. Stancil argues that the Advisory Committee has the most influence on outcomes. Stancil, *supra* note 69, at 82. He contends this influence is so strong that congressional delegation of rulemaking power to the Advisory Committee permits opportunities for rule changes that deviate, to some degree, from legislative preferences. *Id.* at 97-98.

72. *See* Coleman, *supra* note 70, at 1008.

73. *Cf. id.*

74. *Id.* at 1017-19; *see* BURBANK & FARHANG, *supra* note 33, at 97-98; Dawn M. Chutkow, *The Chief Justice As Executive: Judicial Conference Committee Appointments*, 2 J.L. & CTS. 301, 302-04 (2014); Stancil, *supra* note 69, at 99-100.

disproportionately represented on the criminal committee.<sup>75</sup> The “haves” exert significant influence on the Advisory Committee through public comment and advocacy efforts.<sup>76</sup> The “haves” also exert influence over decisional law, as significant caselaw victories by the “haves” suggest.<sup>77</sup>

In investigating how rules respond to preferences of the “haves,” this Article looks to procedural trends within the federal forum. This analysis also provides insights as to many statewide regimes. Reformers charged with crafting federal rules of civil and criminal procedure anticipated the federal project’s impact on states.<sup>78</sup> As intended, the federal rules significantly influenced the development of procedural codes in over half the states.<sup>79</sup> Professor Jerold Israel observed, as to criminal procedure, that “changes in the federal law of criminal procedure automatically take on a significance that extends far beyond a federal system that in itself handles only a

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75. See BURBANK & FARHANG, *supra* note 33, at 91 (finding Republican judges twice as likely to serve on the committee as Democratic judges).

76. Much of the interest group influence occurs through informal processes and connections. See Coleman, *supra* note 70, at 1020-23. The rulemaking process calls for public comment, and during this period “interest groups are present in force.” Stancil, *supra* note 69, at 100.

77. There have been several notable and recent wins in the civil forum. See, e.g., *Am. Express Co. v. Italian Colors Rest.*, 570 U.S. 228, 238-39 (2013) (immunizing class-action bars in arbitration clauses from legal challenge); *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 366-67 (2011) (imposing a heightened standard for certification of class actions); *Ashcroft v. Iqbal*, 556 U.S. 662, 686 (2009) (imposing a heightened pleading standard in all civil cases).

78. *Hearing Before the Advisory Committee on Rules of Criminal Procedure*, United States Supreme Court 218-19 (1941) (on file with author) [hereinafter *Hearing on Criminal Procedure*] (Reporter James Robinson: “[T]hese rules are just not simply for federal courts alone. We know that about 15 or 20 states have rule-making powers. Many of these ... states are watching this committee to see whether the rules ... will serve as models for them [T]o the extent that we can be specific rather than general we are serving not only the federal rules and the federal courts but the state courts also.”). After federal reform, state bar associations invited committee members in support of adopting the federal rules. See, e.g., Murray Seasongood, *Proposed Federal Rules for Criminal Procedure*, 13 Mo. B.J. 163, 163 (1942) (committee member for the Advisory Committee on the Rules of Criminal Procedure) (address before the Sixty-Second Annual Meeting of the Missouri Bar Association on September 24, 1942). State commentators advocated that federal rules be adopted by states. See, e.g., George H. Cohen, *The New Rules of Federal Criminal Procedure*, 11 TEX. B.J. 213, 213 (1948) (“[The Federal Rules] are so important, simple, and far-reaching that it is believed that many of them will be adopted by various States.”).

79. See Jerold H. Israel, *On Recognizing Variations in State Criminal Procedure*, 15 U. MICH. J.L. REFORM 465, 495-96 (1982).

minute portion of all criminal prosecutions.”<sup>80</sup> In equal measure, federal rules have been influenced by the needs and experiments of statewide actors.<sup>81</sup>

### A. How “Civil Haves” Fare

In 1934, Congress authorized the Supreme Court to create federal civil rules.<sup>82</sup> The Court delegated drafting to an Advisory Committee.<sup>83</sup> The first Advisory Committee was “composed of nine lawyers, five law professors and no sitting judges.”<sup>84</sup> Leading the effort, Charles Clark and Edson Sunderland addressed widespread dissatisfaction with pleading technicalities and trials by ambush that common law procedure provoked.<sup>85</sup> Borrowing from equitable prin-

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80. Jerold Israel, *Federal Criminal Procedure as a Model for the States*, 543 ANNALS 130, 130 (1996).

81. See Scott Dodson, *The Gravitational Force of Federal Law*, 164 U. PA. L. REV. 703, 746 (2016) (“States are ... laboratories of experimentation, allowing a small part of the nation to experiment ... without damaging the whole.” (footnote omitted)). Federal reform of civil procedure was influenced by state experimentation. Stephen N. Subrin, *Federal Rules, Local Rules, and State Rules: Uniformity, Divergence, and Emerging Procedural Patterns*, 137 U. PA. L. REV. 1999, 2016-17 (1989); *Meeting Minutes of the Advisory Committee on the Federal Criminal Procedure Rules*, Washington, D.C., 23 (Aug. 27-28, 1975) (“[T]he consensus of the Committee [is] that alternative methods of charging crime are being successfully employed in many states.”); see also Stephen B. Burbank, *Procedure, Politics and Power: The Role of Congress*, 79 NOTRE DAME L. REV. 1677, 1721-22 (2004) (commenting that the expertise-based federal code is integral to the decision of states to import federal rules).

82. Subrin, *supra* note 33, at 691-92, 710.

83. Congress delegated rulemaking power in the area of civil procedure through the Rules Enabling Act of 1934. Pub. L. No. 73-415, ch. 651, 48 Stat. 1064; Stancil, *supra* note 69, at 76. In 1934, the Court appointed members of the Advisory Committee on Civil Rules, Order for Appointment of Committee to Draft Unified System of Equity and Law Rules, 295 U.S. 774, 774-75 (1935), and disbanded it in 1956, Order Discharging the Advisory Committee, 352 U.S. 803, 803 (1956). In 1958, Congress created the Judicial Conference, which “established a Standing Committee on Rules of Practice and Procedure and five Advisory Committees, to amend or create the civil, criminal, bankruptcy, appellate, and admiralty rules.” Peter G. McCabe, *Renewal of the Federal Rulemaking Process*, 44 AM. U. L. REV. 1655, 1659 (1995).

84. Subrin, *supra* note 33, at 710. Congress exercises a “negative option”: with the exception of evidentiary privileges, proposed rules become law unless Congress intervenes within seven months. Stancil, *supra* note 69, at 77-78.

85. Subrin, *supra* note 33, at 697-709. Edson Sunderland, who drafted the discovery section, wrote in its absence, “[f]alse and fictitious causes and defenses thrive under a system of concealment and secrecy in the preliminary stages of litigation followed by surprise and confusion at the trial.” *Id.* at 697. Sunderland was not concerned with securing an advantage for a plaintiff or a defendant; he aimed to achieve systemic fairness, and he maintained that only through pretrial discovery could “the true nature of the controversy be satisfactorily

ciples, they crafted rules that gave plaintiffs easy access to court and gave both parties the opportunity to discover facts before the onset of trial.<sup>86</sup> Given the nature of litigation in 1938, the “civil havens” were not yet defense-oriented.<sup>87</sup> Litigation was a more modest affair, the range of legal disputes still constrained by common law’s conservatism; claims remained limited in number and narrow in scope.<sup>88</sup> Professor Howard Wasserman described the litigation du jour as simple diversity cases in “tort, contract, debt, and other business disputes.”<sup>89</sup>

Yet, the design of civil procedure held the potential to transform the nature of litigation. The new rules potentially mitigated the impact of resource disparities.<sup>90</sup> Under relaxed pleading requirements, a plaintiff could find easy access to the forum and use powerful, but inexpensive, discovery tools to extract information.<sup>91</sup>

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ascertained.” *See id.* at 709, 716.

86. Resnik, *supra* note 33, at 2221. The new system was characterized by, “ease of pleading; broad joinder; expansive discovery; greater judicial power and discretion”; and the “disengagement of substance” from procedure. Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909, 923-24 (1987) (footnotes omitted).

87. Howard M. Wasserman, Iqbal, *Procedural Mismatches, and Civil Rights Litigation*, 14 LEWIS & CLARK L. REV. 157, 165 (2010) [hereinafter Wasserman, *Procedural Mismatches*]; Howard Wasserman, *Discovery, Burdens, Risks, and Iqbal*, PRAWFSBLAWG (June 2, 2009, 6:38 AM), <http://prawfsblawg.blogs.com/prawfsblawg/2009/06/page/2/> [<https://perma.cc/XC3H-5RNX>] (“A person or business entity was as likely to be a defendant as a plaintiff.... There is far less interchangeability today—corporations and government are almost always defendants (and repeat defendants at that) who know they will almost exclusively enjoy benefits from a defense-favorable pleading regime.”).

88. *See* Richard A. Epstein, *Bell Atlantic v. Twombly: How Motions to Dismiss Become (Disguised) Summary Judgments*, 25 WASH. U. J.L. & POL’Y 61, 62 (2007).

89. Wasserman, *Procedural Mismatches*, *supra* note 87, at 159.

90. Power-flattening features of civil procedure are best attributed to the integration of equitable principles. Stephen B. Burbank & Sean Farhang, *Litigation Reform: An Institutional Approach*, 162 U. PA. L. REV. 1543, 1583-84 (2014); Resnik, *supra* note 33, at 2221 (noting the difficulty in plumbing the political intent of civil procedure authors); Subrin, *supra* note 81, at 2050 (“[P]rocedural discourse and reform ... have always had a substantial political dimension.”).

91. The responding party generally pays for responding. *Knauf Insulation, LLC v. Johns Manville Corp.*, No. 1:15-cv-00111-WTL-MJD, 2015 WL 7089725, at \*4 (S.D. Ind. Nov. 13, 2015) (“[T]he presumption is that the responding party pays for discovery requests.”); *Rowe Entm’t, Inc. v. William Morris Agency, Inc.*, 205 F.R.D. 421, 429 (S.D.N.Y. 2002). The default rule spares the requesting party from much of the cost: it is less burdensome to ask for information than to track it down. With electronic discovery, cost shifting is more common. CAL. CIV. PROC. § 2031.280(e) (West 2018) (requesting party must pay for the translation of electronic data into a “reasonably usable” form, if necessary); *Zubulake v. UBS Warburg LLC*,

These potential dynamics remained unexpressed, however, and a sense of stability prevailed for thirty years.<sup>92</sup> The stability was anchored in a conservative use of litigation. The true power-flattening potential of the rules would lay in wait.

In the 1960s, new litigation fronts opened as procedural rules facilitated class actions,<sup>93</sup> and new laws gave rise to civil rights, tort, and consumer claims.<sup>94</sup> Congress incentivized private bar enforcement through the provision of attorneys' fees.<sup>95</sup> Based on conclusory allegations, plaintiffs gained entry to court and used discovery tools to extract information to develop claims and refute defenses. "[S]ocial legislation and public-law litigation" introduced a new paradigm of litigation.<sup>96</sup> Litigation was increasingly viewed as a

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217 F.R.D. 309, 318 (S.D.N.Y. 2003) (shifting costs where requested information is not reasonably accessible, among other factors).

92. Jeffrey W. Stempel, *Politics and Sociology in Federal Civil Rulemaking: Errors of Scope*, 52 ALA. L. REV. 529, 542 (2001) (noting that Professor Maurice Rosenberg conducted a survey in 1970 that concluded, "No widespread or profound failings are disclosed in the scope or availability of discovery. The costs of discovery do not appear to be oppressive ... either in relation to ability to pay or to the stakes of litigation. Discovery frequently provides evidence ... not otherwise ... available to ... parties and thereby makes for a fairer trial or settlement." (quoting 6 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 26 (3d ed. 1997))).

93. BURBANK & FARHANG, *supra* note 33, at 72-74 (discussing how class actions were transformed from a backwater procedure into an effective one); *id.* at 77 (noting discovery was broadened during this period); Burbank & Farhang, *supra* note 90, at 1586.

94. *See, e.g.*, Civil Rights Act of 1968, Pub. L. No. 90-284, § 804, 82 Stat. 73 83-84 (providing a private right of action against landlords and brokers for the refusal to sell or rent based on protected classifications); Civil Rights Acts of 1964, Pub. L. No. 88-352, § 703, 78 Stat. 241, 255 (providing a private right of action against employers for discrimination based on protected classifications); *Monroe v. Pape*, 365 U.S. 167, 171, 187 (1961) (interpreting 28 U.S.C § 1983 to provide a private right of action against state officers); Michael J. Klarman, *Rethinking the Civil Rights and Civil Liberties Revolutions*, 82 VA. L. REV. 1, 63-64 (1996) (observing the significant shifts in political approaches to address social problems in the 1960s); Stempel, *supra* note 92, at 540 ("By the 1950s and 1960s, the liberal ethos of the Rules on broad discovery became a central part of American litigation. On other fronts ... the judicial system was also moving in a direction consistent with the 'open courts' ethos of the Rules and a policy of relatively easy access to information." (footnote omitted)); Stephen C. Yeazell, *Unspoken Truths and Misaligned Interests: Political Parties and the Two Cultures of Civil Litigation*, 60 UCLA L. REV. 1752, 1767-69 (2013) (tracing the formation of an organized plaintiff's bar to after World War II); *id.* at 1771 (discussing rule revisions that facilitated class actions).

95. Attorneys' fees provisions, in part, were passed to "mobilize private enforcers." Burbank & Farhang, *supra* note 90, at 1547.

96. Wasserman, *Procedural Mismatches*, *supra* note 87, at 166.

fulcrum to force powerful players to account and agree to new governmental and company policies over the settlement table.<sup>97</sup>

Litigation's promise to achieve social and economic equality, however, encountered a resistance that would reveal the durability of Galanter's underlying premise: in the absence of continuing political intervention, litigation's redistributive potential would be blunted by the interests of the "haves." The political intervention in the 1960s triggered a conservative counteroffensive as "civil haves" began to view procedural preferences through a defense-oriented lens, giving birth to a movement to prevent the individual plaintiff from gaining access to the forum. An ascendant conservative Supreme Court, alarmed at the flood of cases brought by individual plaintiffs, took on a more activist role.<sup>98</sup> The courts and the "civil haves" would join in an effort to reduce the cascade of cases from individual plaintiffs.

The Court took a firmer grip on the reigns of rule-making power.<sup>99</sup> The Chief Justice filled Advisory Committee seats with judges, and for the first time, judges comprised the majority of members, deepening the committee's ideological alignment with the Chief Justice.<sup>100</sup> Justice Burger personally addressed his newly constituted Advisory Committee to express dissatisfaction with the litigation explosion, shedding a veneer of neutrality that marked the approach of prior chief justices.<sup>101</sup> Underscoring a concern over the surge of civil rights claims, Chief Justice Burger organized the

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97. See generally Chayes, *supra* note 17 (recognizing civil litigation is not limited to disputes between private parties, but significantly used to mediate issues of public law).

98. Burbank & Farhang, *supra* note 90, at 1586-89.

99. Jeffrey W. Stempel, *New Paradigm, Normal Science, or Crumbling Construct? Trends in Adjudicatory Procedure and Litigation Reform*, 59 BROOK. L. REV. 659, 664-65 (1993) (explaining that members of the advisory and standing committees are appointed by the Chief Justice, affording "a major but often overlooked role in the formation of litigation policy" with "substantial power to shape the litigation reform agenda through controlling membership on important committees"); Stephen N. Subrin, *On Thinking About a Description of a Country's Civil Procedure*, 7 TUL. J. INT'L & COMP. L. 139, 142 (1999) ("To put events in historical and political perspective, we can look at the change in the composition of the U.S. Supreme Court between 1953 and 1981. In the last decade of this period, the Supreme Court tended to move toward the political 'right.'"). This trend has remained stable since Chief Justice Burger took the reins, passed to Chief Justice Rehnquist, then to Chief Justice Roberts. Cf. BURBANK & FARHANG, *supra* note 33, at 84-85.

100. Membership of the inaugural Advisory Committee of Civil Procedure was "composed of nine lawyers, five law professors and no sitting judges." Subrin, *supra* note 33, at 710.

101. BURBANK & FARHANG, *supra* note 33, at 97-98.

Pound Conference of 1976, which was “the inaugural event of the counterrevolution against ... liberal pleading, broad discovery, and activist courts.”<sup>102</sup> With Justice Burger’s appointment, and the tenure of Justices Rehnquist and Roberts, the committee’s membership of practitioners has skewed towards those with corporate clients.<sup>103</sup> Since then, one hears a drumbeat of defense-oriented rule proposals.<sup>104</sup> The hydraulics behind these changes are complicated. They occur within the Advisory Committees, but also, as Judith Resnik observed, influence has come in the form of “lobbying efforts directed towards legislatures and the public, by well-financed media campaigns, and by support for conferences and meetings to address and describe the ‘litigation crisis.’”<sup>105</sup>

In the 1970s, the concept of “discovery abuse” began to take hold in the American psyche as industry groups lobbied for retrenchment.<sup>106</sup> Though the plaintiff figured as the antagonist in stories of

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102. Stempel, *supra* note 92, at 543; *see also* Subrin, *supra* note 99, at 142 n.15.

103. BURBANK & FARHANG, *supra* note 33, at 80-81 & fig.3.2.

104. *Id.* at 93 fig.3.5.

105. Resnik, *supra* note 33, at 2219-20; *id.* at 2226 (“[T]he politicization of rulemaking has already happened—caused not by the vulnerable of the society but by the powerful.”); *see* Burbank & Farhang, *supra* note 90, at 1550 (“[T]he trans-substantive Federal Rules of Civil Procedure have become a site of struggle and contest by interest groups, legislators, rule-makers, and judges who seek to control the procedural playing field.”); Coleman, *supra* note 70, at 1020-23 (discussing the significance of the Duke Civil Litigation Conference).

106. Subrin, *supra* note 99, at 142 (“In the mid-nineteen seventies, when the country at large and the federal judiciary in particular were turning more conservative, complaints deepened about discovery abuse.”). There has been an increase in interest groups seeking to influence procedure. Stempel, *supra* note 99, at 669 (“[T]he past twenty years have seen increased efforts of the business community and other substantive law interest groups to shape legal change, both substantive and procedural.”). The sustained effort of business advocacy groups is well documented. *See* Thornburg, *supra* note 69, at 773-75 (detailing the concerted effort of corporate interests, in coordination with the Chamber of Commerce and related groups, to publicize, with no empirical evidence, damage done by plaintiffs lawyers, with references to a “litigation ‘explosion,’” “‘skyrocketing’ damage awards,” and “‘runaway’ juries”—rhetoric recycled by “business-funded institutes and Fortune 500 companies”). Justices have been receptive to this message; Justice Powell, before his appointment, wrote a memorandum to the Chamber of Commerce urging action against the growth of individual plaintiff suits. Memorandum from Lewis F. Powell, Jr. to Eugene B. Sydnor, Jr., Chairman, Educ. Comm., U.S. Chamber of Commerce (Aug. 23, 1971), <http://law2.wlu.edu/deptimages/Powell%20Archives/PowellMemorandumTypescript.pdf> [https://perma.cc/48N7-W4VE]. Justice Burger’s convocation at the Pound Conference in 1976 urged similar action. This narrative found expression among officials such as Vice President Dan Quayle, claiming in a speech to the ABA that “discovery is 80 percent of the problem” and has the potential to “disrupt or put on hold a company’s entire research and development program.” Thornburg,

discovery abuse,<sup>107</sup> data revealed the typical case remained “straightforward and less affected by tactical purposes.”<sup>108</sup> In fact, it was the complex cases between “civil haves” that frequently presented conditions ripe for undue requests and disclosures, and too-clever-by-half objections.<sup>109</sup> Discovery permitted inquiry, but also weaponized parties, potentially causing harm regardless of outcome. The call to narrow the scope of discovery, politically aimed at controlling the reckless plaintiff, also served as a pill self-prescribed by the “haves” to check worst impulses.

The fundamental investment of the “haves” in discovery has remained strong. Despite blazing rhetoric railing against discovery’s downsides, actual reforms to discovery have been modest: discretionary tools to extract information remain powerful. In the 1980s, reform to discovery sought to identify levels of discovery that are presumptively reasonable, along with clarifying guidelines for reducing or expanding discovery in any particular case.<sup>110</sup> In the 1990s, the Advisory Committee imposed presumptive limits on depositions and interrogatories: preventing some toxic blooms, these

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*supra* note 69, at 773-74. Yet, empirical data between 1971 and 2010 demonstrated that costs of discovery had been in line with the stakes at issue. Reda, *supra* note 69, at 1089.

107. In 1986, the Insurance Information Institute launched a public relations effort dubbed “We All Pay the Price,” including slogans such as, “The Lawsuit Crisis Is Bad for Babies,” “The Lawsuit Crisis Is Penalizing School Sports,” and “Even the Clergy Can’t Escape the Lawsuit Crisis.” Thornburg, *supra* note 69, at 775 & n.69 (citing to multiple media outlets, including *Newsweek* and *Time Magazine*, that recycled these claims).

108. Wayne D. Brazil, *Views from the Front Lines: Observations by Chicago Lawyers About the System of Civil Discovery*, 1980 AM. B. FOUND. RES. J. 217, 223; *see also* David M. Trubek et al., *The Costs of Ordinary Litigation*, 31 UCLA L. REV. 72, 82, 89-90 (1983) (finding the typical dispute involved approximately thirty hours of attorney time, \$10,000 or less in damages, and involved five discovery efforts). These empirical studies were reaffirmed in 2010, when “elite lawyers, federal judges, and prominent legal scholars gathered at Duke Law School to discuss the future of civil process,” where, many expecting confirmation of discovery abuse, were presented with data from the Federal Judicial Center finding that “the federal civil system is highly effective in most cases ... and that discovery volume and cost is proportional to the amount at stake.” Reda, *supra* note 69, at 1087-89.

109. *See* Brazil, *supra* note 108, at 223; Trubek et al., *supra* note 108, at 82. There is, of course, always the exceptional case of a “have-not” who knows no bounds. *See, e.g.*, *Chudasama v. Mazda Motor Corp.*, 123 F.3d 1353, 1357 (11th Cir. 1997) (in a car accident dispute, plaintiffs’ request for documents contained “121 numbered requests (some containing as many as 11 subparts)” and 635 interrogatories).

110. FED. R. CIV. P. 16, 26(f), 26(b)(1)-(2); Bernadette Bollas Genetin, “*Just a Bit Outside!*”: *Proportionality in Federal Discovery and the Institutional Capacity of the Federal Courts*, 34 REV. LITIG. 655, 668-69 (2015); Stempel, *supra* note 92, at 545-46.



caps could be waived for good cause and had little impact on the typical case, which fell well within these limitations.<sup>111</sup> Indicative of the benefits of formal discovery to “civil havees,” in 1986 the Court permitted a path for a defendant to secure summary judgment against a “have-not” that relied on the use of discovery tools to prove plaintiff could not muster sufficient evidence to proceed to trial.<sup>112</sup>

Another strategy of the “havees” to reduce abuse without diluting the efficacy of discovery tools, was to exclude the individual plaintiff from the forum altogether. Federal reform was founded on twin pillars: easy access to the forum and easy access to information. The “havees” sought to weaken the first pillar.<sup>113</sup> For a half-century, Rule 11, a rule of conduct, laid inert, generating very few published opinions each year.<sup>114</sup> In 1983, Rule 11 was repurposed; it now permitted “civil havees” to challenge a complaint not “well grounded in fact,” an end-run around the lax-requirements of notice pleading.<sup>115</sup>

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111. See Stempel, *supra* note 99, at 677 n.68.

112. *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986) (permitting defendant to point to absence of facts supporting an element of a claim, after sufficient discovery, to show plaintiff cannot prevail as a matter of law).

113. The effort on the procedural front was also being fought on the substantive front. See, e.g., Burbank & Farhang, *supra* note 90, at 1554 (describing efforts to place caps on fee awards and quoting a 1983 memo of Michael Horowitz, General Counsel of the Office of Management and Budget: “Not only the “public interest” movement but, more alarmingly, the entire legal profession is becoming increasingly dependent on fees generated by an open-ended “private Attorney General” role that is authorized under more than 100 statutes, a large portion of which were enacted in the 1970s”).

114. Danielle Kie Hart, *Still Chilling After All These Years: Rule 11 of the Federal Rules of Civil Procedure and Its Impact on Federal Civil Rights Plaintiffs After the 1993 Amendments*, 37 VAL. U. L. REV. 1, 10 n.27 (2002).

115. Jean Maclean Snyder, *The Chill of Rule 11*, 11 LITIG. 16, 16 (1985); Catherine T. Struve, *The Paradox of Delegation: Interpreting the Federal Rules of Civil Procedure*, 150 U. PA. L. REV. 1099, 1143-44 (2002) (citing to examples, including instances of Seventh Circuit judges aggressively interpreting the meaning and scope of Rule 11). Rule 8’s notice pleading standard served as a cornerstone to the commitment to open courts and permitted conclusory allegations under the theory that the merits of a dispute did not depend on the plaintiff’s initial access to facts, especially where the defendant possessed facts necessary to prove liability. See FED. R. CIV. P. 8(a). The new Rule 11, undermining Rule 8, was lauded by the defense community. Joan M. Hall, partner at Jenner & Block and past Chairman of the ABA Section of Litigation, stated, “we perhaps may achieve the objectives stated by the advisory committee—to reduce unnecessary delay and needless expense and to increase efficiency in the administration of justice.” Joan M. Hall, *New Rules Amendments Are Far Reaching*, 69 A.B.A. J. 1640, 1644 (1983). The Legislative Committee of the Colorado Chapter of the American Corporate Counsel Association drafted a civil rule “similar in concept to the new version of Rule 11 of the Federal Rules of Civil Procedure,” intended, one drafter noted, to

The “haves” swung hard. Over the next ten years, Rule 11 generated seven hundred published opinions *each year*.<sup>116</sup> Between 50 to 60 percent of the sanctions were directed towards the plaintiff’s complaint.<sup>117</sup> In some jurisdictions plaintiffs were subject to 80 percent of the sanctions imposed.<sup>118</sup> The reinvigorated Rule fell heavily on plaintiffs suing a defendant who possessed the facts necessary to prove liability.<sup>119</sup> The new rule subjected plaintiffs to sanctions for any approach not “warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law.”<sup>120</sup> Meeting this standard was subject to the predilections of the judge, increasing risks to plaintiffs seeking new theories in the realm of civil rights.<sup>121</sup> The Advisory Committee also proposed a discovery restriction that would land hard on those with modest means—it shifted the discovery cost of responding to the requesting party—but, this proposal was rejected by the Judicial Conference (the membership of which is not appointed by the Chief Justice).<sup>122</sup>

In 2000, the scope of discovery—for decades permitting parties to request information about the subject matter of the dispute—was narrowed to questions concerning “claim[s] or defense[s].”<sup>123</sup> Initially, this change may have only had a moderate consequence;

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“change perceptions as to which causes of action should be brought” and that “lawyers may develop their cases more thoroughly before filing,” and “[c]ases lacking merit which previously were brought in the hope of obtaining a ‘nuisance settlement’ may not be brought.” A. Craig Fleishman, *Teaching Legal Malpractice in the Law Schools*, 13 COLO. LAW. 1203, 1204 (1984).

116. See Hart, *supra* note 114, at 10 n.27.

117. Benjamin P. Cooper, Iqbal’s *Retro Revolution*, 46 WAKE FOREST L. REV. 937, 950 (2011).

118. See Lawrence C. Marshall et al., *The Use and Impact of Rule 11*, 86 NW. U. L. REV. 943, 950, 953-54 (1992) (noting a study of 4494 litigators, which found that plaintiff’s side was the target of sanctions in 70.3 percent of cases in which sanctions were imposed).

119. Cooper, *supra* note 117, at 949-50 (sanctions imposed were “disproportionately against plaintiffs”).

120. *Id.* at 946 (quoting FED. R. CIV. P. 11).

121. During the 1980s, for example, the Court curbed efforts to expand the law’s reach in Title VII. See, e.g., Civil Rights Act of 1991, Pub. L. No. 120-166, 105 Stat. 1071 (reinstating more robust disparate impact theory and removing complete defense in a mixed-motive case); *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 652-53 (1989) (limiting an employee’s ability to bring a disparate impact claim); *Price Waterhouse v. Hopkins*, 490 U.S. 228, 246-51 (1989) (permitting a Title VII claim for discrimination based on the failure to conform to stereotypes, but also providing for a defense that could clear defendant of liability despite the existence of such treatment).

122. See BURBANK & FARHANG, *supra* note 33, at 114-15.

123. FED. R. CIV. P. 26(b)(1).

under notice pleading, a plaintiff could arguably raise conclusory claims and ask questions about all of them. In 2009, however, the Court in *Ashcroft v. Iqbal*<sup>124</sup> imposed a heightened pleading standard that resulted in sifting out a significant number of claims at the inception of a lawsuit.<sup>125</sup> The 2000 amendment now revealed its power—a “have-not” was limited to asking about surviving claims.<sup>126</sup> In a string of decisions that furthered the objective of “civil haves” for the early removal of individual plaintiffs from the forum, the Court gave full-throated blessings to arbitration contracts that barred class actions, shutting off the tap of consumer-class litigation and routing the drip of remaining cases to private arbitrations governed by rules drafted by the industries being sued.<sup>127</sup> Relatedly, the Court in the 2011 *Wal-Mart Stores, Inc. v. Dukes*<sup>128</sup> case imposed a heightened requirement to certify class actions,<sup>129</sup> reducing plaintiff-side collective action and resulting in a higher reliance on multidistrict litigation (MDL) that provides a forum subject to its own microclimate.<sup>130</sup>

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124. 556 U.S. 662 (2009).

125. *See id.* at 687. The complaint provided detailed factual assertions and clear notice of each claim, but was found insufficient. *See id.* at 681, 687.

126. *See* FED. R. CIV. P. 26(b)(1).

127. *See* *Am. Express Co. v. Italian Colors Rest.*, 570 U.S. 228, 234 (2013) (upholding mandatory arbitration agreement that banned class actions and rejecting plaintiff’s argument that arbitrating on an individual basis would be irrational given costs of lawsuit and limited potential recovery); *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 351-52 (2011) (finding that the Federal Arbitration Act preempted state law bans on arbitration agreements that waive class actions); David S. Schwartz, *Claim-Suppressing Arbitration: The New Rules*, 87 *IND. L.J.* 239, 244 (2012) (observing that mandatory arbitration in employment and consumer contracts are designed to deny claims, not reroute them); Silver-Greenberg & Gebeloff, *supra* note 10.

128. 564 U.S. 338 (2011).

129. *Id.* at 367. To obtain certification, a plaintiff must satisfy all four requirements under Rule 23(a), and one of three requirements under 23(b). The Court arguably inserted a 23(b) requirement into 23(a) (substituting 23(b)(3) for 23(a)(2)). *Id.* at 368 (Ginsburg, J., dissenting); *see also* Burch & Williams, *supra* note 51, at 1455-56 (discussing how *Wal-Mart* and other decisions make “certification [of class actions] more onerous”).

130. Limiting routes to class actions contributes to a greater reliance on MDL disputes, which are particularly vulnerable to “repeat-player” influence. Coleman, *supra* note 70, at 1011, 1031. MDL, in which hundreds of like cases are transferred to a receiving court that manages common discovery issues, involves “something of a cross between the Wild West, twentieth-century political smoke-filled rooms, and the *Godfather* movies”; an environment in which repeat players excel. Martin H. Redish & Julie M. Karaba, *One Size Doesn’t Fit All: Multidistrict Litigation, Due Process, and the Dangers of Procedural Collectivism*, 95 *B.U. L. REV.* 109, 111 (2015). The receiving MDL judge, who tends to become an expert in a particular

On the discovery front, in 2015, proportionality factors<sup>131</sup> were integrated into the scope of discovery, empowering “judges to make normative decisions about the claims at issue” and to exercise ideological bias under the cover of procedural fairness.<sup>132</sup> The proportionality rule was accompanied by a proposal that further reduced the presumptive ceiling on depositions from ten to five, which encountered fierce resistance from “civil have-nots” and a collective shrug from “civil haves.”<sup>133</sup> The indifference of the “civil haves” revealed their comfort with pretrial judicial intervention and a sense that a court would be receptive to demands of the “civil haves” for any additional discovery.<sup>134</sup> In contrast, “civil have-nots” view the

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type of lawsuit and has exceptional power to shape outcomes, is susceptible to party influence. See Coleman, *supra* note 70, at 1031, 1033-34. The receiving judge chooses the lead plaintiff counsel, which can dilute independence. See *id.* at 1035-36. Empirical studies show a high degree of “repeat players” on both sides of the equation, raising concerns of troubling loyalties between defense and plaintiff lawyers and that the plaintiffs lawyers’ clients are the only “have-nots.” Burch & Williams, *supra* note 51, at 1453-55.

131. Parties had been permitted to access information relevant to the “subject matter involved in the action.” FED. R. CIV. P. 26 Advisory Committee’s notes. The 2000 amendment limited access to information “relevant to any party’s claim or defense.” *Id.* at 26(b)(1); Stempel, *supra* note 99, at 531 (“Most substantively, [the amendment] accrues to the detriment of claimants, particularly those of modest means but also major claimants such as the United States government, while largely benefiting defendants.”). This proposal had its roots in the ABA Litigation Section, Report of the Special Committee for the Study of Discovery Abuse, 92 F.R.D. 137, 157 (1977), inspired by the Pound Conference organized by Chief Justice Burger. *Id.* at 544 n.86.

132. Genetin, *supra* note 110, at 678 (discussing the significance of moving the proportionality language embedded in Civil Rule 26(b)(1) to Civil Rule 26(b)(2)). Genetin’s concerns are highlighted by cases such as *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 954 F.2d 1054, 1058 (5th Cir. 1992), in which the appellate court found the civil rights complaints of plaintiffs to be insignificant compared to the important work done by government actors.

133. *Hearing on Civil Procedure*, *supra* note 55, at 41-42.

134. Conversation between Judge Oliver and David Cohen, head of e-discovery at Reed Smith:

Judge Oliver: ...What is your view about the five deposition limit or proposed limit? Do you think that’s actually enough depositions, that’s all you need in most of your cases?

Mr. Cohen: In most of the cases that my firm handles, they tend to be bigger cases. There tend to be more depositions. Even with the 10-deposition limit, very often there’s more. So I think judges are used to applying discretion.... So I like the idea of that change to start the conversation and get people thinking, but I think most judges when shown good cause are going to grant the extra depositions.

*Id.* Conversation between Judge Oliver and Marc Williams of Nelson Mullins:

Mr. Williams: I believe that five is a good default from which we can start, and

narrowing of what is considered presumptively reasonable as a signal to constrain their requests for additional discovery.<sup>135</sup> Reform in the 1930s created rules that permitted easy access to courts.<sup>136</sup> This commitment to open courts has eroded. Professor Brooke Coleman sums up present circumstances as civil procedure for the “one percent.”<sup>137</sup>

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I can tell you that the 10-deposition limit that we currently have has not been a problem in cases where it's justified to ask for more than that

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I trust the judges that in appropriate cases that they will allow the parties to take more than five if necessary.

*Id.* at 250-51.

135. Conversation between Altom Maglio of a plaintiffs firm in Florida and Judge John Koeltl:

Judge Koeltl: [W]hen you need to take more than 10 depositions, do the parties usually agree or does the judge grant you leave to take more than 10 depositions?

Mr. Maglio: Well, it's certainly seen by the judiciary ... as a yardstick as kind of what's supposed to be done in a typical case. And I have the burden to explain to them that this is not a typical case, that this is much more complex than your usual case and thus more discovery than typically allowed is necessary.

Judge Koeltl: But you do get it. The judges typically give it, right?

Mr. Maglio: But it's a fight. It's a fight. And I in my practice have been successful in getting it when necessary. But quite frankly, with this rule change, I fear that that will not be the case.

*Id.* at 31-32. Testimony of Anna Benvunutti Hoffman of plaintiff-side Neufeld Scheck & Brustin:

Ms. Hoffman: In our serious civil rights cases, we always need to take more than five depositions and routinely more than 10.... It is one thing to give judges discretion to limit discovery, but by creating presumptive limits that we can never meet, our ability to prove civil rights violations is left to the essentially unreviewable mercy of the district judges to grant us an extension in every single case.

....

[B]y changing the rule from 10 depositions to five depositions, you'd be sending a strong signal that you think there's too much discovery.... So I think conscientious judges will take that signal and say, well, we've been allowing too many depositions.

....

The other issue is, to be honest, I mean, we've faced some judges who are—not most, but some judges who are very hostile to our clients.

*Id.* at 110-11, 116-17.

136. See Resnik, *supra* note 33, at 2220-21, 2224-25 (noting that civil rules were written to be neutral; nevertheless, roles played by “haves” and “have-nots” can disrupt intended neutral operation of rules).

137. See Coleman, *supra* note 70, at 1008-09.

*B. How “Criminal Haves” Fare*

The trajectory of civil procedure generally responds to preferences of the “civil haves.”<sup>138</sup> A demanding pleading standard restricts plaintiffs without access to sufficient prelitigation evidence from gaining access to court.<sup>139</sup> Though the scope has been narrowed and presumptive limits have been installed, core discovery tools have been preserved, with broad discretion given to judges to ratchet discovery up or down in any particular case.<sup>140</sup> The path of criminal procedure has taken a starkly different course. Criminal procedure is characterized by relaxed pleading requirements, resistance to judicial intervention, and the rejection of a discovery regime.<sup>141</sup> These key features of criminal procedure reflect a mirror opposite of civil procedure.

Three years after the reform of federal civil procedure, the Court convened a new Advisory Committee to reform criminal procedure.<sup>142</sup> The committee’s reporter, former prosecutor and professor James Robinson, worked for six months with his staff to create the first draft.<sup>143</sup> Turning to civil procedure, the team proposed a draft that tracked its structure and much of its content.<sup>144</sup> Criminal disputes would be largely subject to the federal rules of civil procedure, and interpretations of a civil rule would govern the meaning of any corresponding criminal rule.<sup>145</sup> This proposal was introduced to the full committee.<sup>146</sup> Most committee members had served as

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138. *See id.* at 1008.

139. *See id.* at 1041, 1043-44.

140. *See id.* at 1069-70.

141. *See* Meyn, *supra* note 1, at 725, 734.

142. *See id.* at 707-08.

143. *Id.* at 708.

144. This path enjoyed significant support in legal and political circles. Comment, *Reform in Criminal Procedure*, 50 YALE L.J. 107, 108 & n.8 (1940) (arguing that “the task of reforming civil procedure should be sharply distinguished from the task of improving criminal procedure,” but noting, “[t]his distinction is not usually recognized”). Historically, civil and criminal procedure developed in concert and shared many similar features. *See* Meyn, *supra* note 1, at 701-02. Within the academy, Jerome Hall, a criminal procedure scholar, viewed civil rules to be neutral and well situated to govern criminal disputes. *See* Hall, *supra* note 34, at 739.

145. Proposed Rule 2 tied the meaning of any criminal rule to that of its civil counterpart. Meyn, *supra* note 1, at 713-14.

146. *Id.* at 712.

prosecutors for a significant portion of their careers.<sup>147</sup> Not one identified as a criminal defense attorney.<sup>148</sup>

The full committee did import notice pleading and joinder provisions analogous to the new rules of civil procedure.<sup>149</sup> Consistent with Indiana's Assistant United States Attorney Alexander Campbell's request to reject any rule that might require a prosecutor to "disclose information that might be harmful to ... the government's case,"<sup>150</sup> the committee, however, rejected the imposition of any formal discovery phase.<sup>151</sup> Distributed for public comment, the committee's revised draft received strong support in the prosecutorial community.<sup>152</sup> Adopted by Congress in 1946, prosecutors lauded the federal code, and over half the states imported key provisions of these federal rules, including notice pleading.<sup>153</sup>

These reforms deepened prosecutorial advantage.<sup>154</sup> The new federal rules made it easier for the prosecutor to bring and consolidate charges.<sup>155</sup> By virtue of relaxed pleading requirements and the absence of a discovery phase,<sup>156</sup> a judge had no role. The federal rules ceded pretrial proceedings to the prosecutor, who maintained discretion to withhold or distribute information.<sup>157</sup> This dramatic distribution of procedural power to a nonjudicial executive officer notably occurred before significant revelations of federal due

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147. *Id.* at 728-29.

148. *See generally* *Hearing on Criminal Procedure*, *supra* note 78.

149. *See* Meyn, *supra* note 1, at 715, 734 (finding that the only civil rules adopted were those that favored prosecutorial intentions, such as permitting the issuance of a summons, notice pleading, and joinder).

150. Advisory Committee on Rules of Criminal Procedure, Rules of Criminal Procedure for the District Courts of the United States R. 16 note (Sept. 8, 1941) (on file with author).

151. *See* Meyn, *supra* note 1, at 720-24.

152. *See id.* at 725.

153. *See* 91 CONG. REC. 17 (1945) (letter from Attorney General transmitting the Rules of Criminal Procedure); H.R. DOC. NO. 12, at iii-v (1945). For comments by those advocating for statewide adoption, see, for example, Glenn R. Winters, *A Study of Rules 6, 7, 8, and 9 of the Federal Rules of Criminal Procedure with Particular Respect to Their Suitability for Adoption into State Criminal Procedure*, 25 OR. L. REV. 10, 10 (1945) ("The new Federal Rules of Criminal Procedure ... offer the bright hope that ... they also may exert a beneficial influence upon the local procedure of the forty-eight states.").

154. Goldstein, *supra* note 34, at 1192 ("[The Rules of Criminal Procedure] aggravate[d] the tendencies toward inequality between [the] state and [the] accused."); Meyn, *supra* note 1, at 725-26.

155. *See* Meyn, *supra* note 1, at 725.

156. *See id.* at 725-26.

157. *See id.* at 719-20, 724.

process. At this time, there was no federal right to counsel and no significant restriction on the executive's precomplaint investigative power.<sup>158</sup>

In effect, reformers had carved out separate procedural territory free from any interference of the "civil haves." The new federal rules created conditions for the efficient processing of criminal disputes; after reform, procedural disputes constituted "a small share of criminal litigation."<sup>159</sup> Through the 1950s, little pretrial discovery occurred in federal or state disputes.<sup>160</sup> Professor Robert Fletcher contemporaneously observed, "despite the full development of discovery in civil cases, denial in criminal cases has persisted,"<sup>161</sup> and Professor Kenneth Pye commented that a defendant would "learn little concerning the Government's case unless the [prosecutor] desires to let him have [it]."<sup>162</sup>

Challenges to the status quo, however minor, met fierce resistance.<sup>163</sup> Where a defendant requested a copy of his own confession

158. See *Betts v. Brady*, 316 U.S. 455, 473 (1942) (denying defendant's attempt to extend due process to require a right to counsel in noncapital cases); *Brown v. Mississippi*, 297 U.S. 278 (1936) (excluding physically coerced confessions); *Norris v. Alabama*, 294 U.S. 587 (1935) (requiring fair juries); *Powell v. Alabama*, 287 U.S. 45 (1932) (requiring counsel for indigent defendants in capital cases); Klarman, *supra* note 94, at 62 & n.279 (stating that the few federal constitutional protections were primarily limited to addressing "Jim Crow courts' dispensation of mob-dominated justice to black criminal defendants"); Corinna Barrett Lain, *Countermajoritarian Hero or Zero? Rethinking the Warren Court's Role in the Criminal Procedure Revolution*, 152 U. PA. L. REV. 1361, 1369 (2004) ("As a practical matter ... the only constitutional protections that mattered for the vast majority of criminal defendants [before the 1960s] were those available in state, as opposed to federal, courts.").

159. William J. Stuntz, *Unequal Justice*, 121 HARV. L. REV. 1969, 2003 (2008).

160. See Sheldon Krantz, Comment, *Pretrial Discovery in Criminal Cases: A Necessity for Fair and Impartial Justice*, 42 NEB. L. REV. 127, 144-51 (1963) (few states provided pretrial discovery in criminal disputes). In states wedded to common law procedure, courts found no authority to expand discovery. See, e.g., *Walker v. People*, 248 P.2d 287, 302 (Colo. 1952), *superseded by statute*, Colo. Crim. P. R 16(l)(d)(1), *as recognized in*, *People in Interest of E.G.*, 368 P.3d 946, 951 (Colo. 2016) (en banc) (finding discovery in criminal cases a radical departure from common law); *State v. Dist. Court*, 342 P.2d 1071, 1073 (Mont. 1959) ("It is admitted that under the common law there is no right to have inspection of evidence ... of the prosecution.").

161. Fletcher, *supra* note 34, at 294.

162. A. Kenneth Pye, *Reflections on Proposals for Reform in Federal Criminal Procedure*, 52 GEO. L.J. 675, 682 (1964) ("[A defendant] has no right to inspect the results of scientific examinations.... [H]e is even denied access to his own ... statements.... [A]nd he cannot see FBI reports or witness' statements. He is not entitled to know the names of the witnesses who will be called to testify against [him].") (footnotes omitted).

163. See William J. Brennan, Jr., *The Criminal Prosecution: Sporting Event or Quest for*



under the rule permitting access to documents “obtained from or belonging to” the defendant, the Department of Justice (DOJ) successfully argued that the confession did not qualify because it “was not a pre-existing document.”<sup>164</sup> Resistance was also organized. In *State v. Tune*,<sup>165</sup> where the defendant also asked to view a copy of his confession, twenty of twenty-one counties joined New Jersey’s opposition.<sup>166</sup> Though prosecutors exercised unfettered discretion during Jim Crow conditions and in the absence of counsel, through judicial intervention and due process constraints, the prosecutorial community nevertheless portrayed the system as one that gave “the accused ‘every advantage.’”<sup>167</sup>

In the 1960s, the Court announced a series of due process limitations on the exertion of state power.<sup>168</sup> At the same time,

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*Truth?*, 1963 WASH. U. L.Q. 279, 282 (regarding ideology); *id.* at 284-85, 288 (regarding rigid resistance). Ideology, though, may be secondary to institutional role; it was Marc Galanter’s insight that repeat players seek rules that favor litigation objectives. *See supra* note 11 and accompanying text. As to institutional self-interest, David Louisell, in 1961, asked a prosecutor about the prospect of extending civil discovery to defendants: “Since I am a product of the adversary system, I would do everything possible to limit and restrict what the defense might compel me to disclose.... I’m sure ... I could frustrate all of the supposedly noble purposes of discovery.” David W. Louisell, *The Theory of Criminal Discovery and the Practice of Criminal Law*, 14 VAND. L. REV. 921, 928 (1961).

164. David W. Louisell, *Criminal Discovery: Dilemma Real or Apparent?*, 49 CALIF. L. REV. 56, 72 (1961); *see also* United States v. Murray, 297 F.2d 812, 814, 819-20 (2d Cir. 1962) (upholding the trial court’s ruling that denied the defendant access to transcripts of statements from the IRS).

165. 98 A.2d 881 (N.J. 1953).

166. *See id.* at 882; *see also* Fletcher, *supra* note 34, at 299 (explaining that New Jersey later reversed its stance).

167. Goldstein, *supra* note 34, at 1151; *see also* David Luban, *Are Criminal Defenders Different?*, 91 MICH. L. REV. 1729, 1736 (1993) (noting “the amount of ink spilled over the years by law-and-order conservatives anguished about the excessive rights of the accused”). This narrative of the disadvantaged prosecutor led some courts to further relax pleading requirements for prosecutors. *See* Goldstein, *supra* note 34, at 1152, 1177; *see also* State v. Torrance, 125 A.2d 403, 406-07 (N.J. Super. Ct. App. Div. 1956). During the first third of the twentieth century, apartheid was the “governing system that pervaded half the country, and like any such system it was implicitly and explicitly supported by the Constitution.” Robert M. Cover, *The Origins of Judicial Activism in the Protection of Minorities*, 91 YALE L.J. 1287, 1316 (1982). Until the 1940s, in the South, thousands of black men were sent to slavery and death based on spurious criminal charges. *See* DOUGLAS A. BLACKMON, *SLAVERY BY ANOTHER NAME: THE RE-ENSLAVEMENT OF BLACK PEOPLE IN AMERICA FROM THE CIVIL WAR TO WORLD WAR II* 375-82 (2008); *see also* TO SECURE THESE RIGHTS: THE REPORT OF THE PRESIDENT’S COMMITTEE ON CIVIL RIGHTS, 27-28 (1947), <https://www.trumanlibrary.org/civilrights/srights2.htm> [<https://perma.cc/5PQY-XHZM>] (discussing inequality in the legal system).

168. *See* Lain, *supra* note 158, at 1363-64, 1363 n.13 (discussing the hallmarks of the

*Gideon v. Wainwright*<sup>169</sup> provided indigent defendants the right to counsel.<sup>170</sup> Their ranks reinforced, public defenders pushed for more discovery and made the type of incremental advance one expects in trench warfare.<sup>171</sup> The rules still did not provide for the revelation of the State's witnesses, and did not afford defendants any discretionary discovery power to conduct an independent investigation.<sup>172</sup> Prosecutors would claim *Brady v. Maryland*<sup>173</sup> conferred unique and special treatment to the criminal defendant, but *Brady* was never intended to give defendants a general right of discovery; and legally, *Brady* is a paper tiger.<sup>174</sup> Within the broader social

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Warren Court: *Mapp v. Ohio*, 367 U.S. 643 (1961), which applied the exclusionary rule for Fourth Amendment violation); *see also* *Terry v. Ohio*, 392 U.S. 1, 30-31 (1968) (placing limits on police encounters involving brief detention); *Katz v. United States*, 389 U.S. 347, 353-54, 358-59 (1967) (extending the Fourth Amendment to apply where a person has a reasonable expectation of privacy); *Miranda v. Arizona*, 384 U.S. 436 498-99 (1966) (requiring individuals in custody to be apprised of their right to silence and to counsel)); *Gideon v. Wainwright*, 372 U.S. 335, 343-45 (1963) (providing right to counsel); *Brady v. Maryland*, 373 U.S. 83, 87 (1963) (holding government must disclose material and exculpatory information in its possession before trial); Francis A. Allen, *The Judicial Quest for Penal Justice: The Warren Court and the Criminal Cases*, 1975 U. ILL. L.F. 518, 519 ("In the sixteen years of Chief Justice Warren's tenure, the Supreme Court decided upwards of 600 criminal cases.").

169. 372 U.S. 335 (1963).

170. *Id.* at 344-45.

171. "*Gideon* ... led to the growth of both public defenders' offices and ineffective assistance doctrine." William J. Stuntz, *Local Policing After the Terror*, 111 YALE L.J. 2137, 2192 (2002); *see* Kim Taylor-Thompson, *Individual Actor v. Institutional Player: Alternating Visions of the Public Defender*, 84 GEO. L.J. 2419, 2426 n.33 (1996) (discussing the rapid expansion of public defender system after *Gideon*).

172. Superintended by the Warren Court, new disclosure requirements were largely limited to documents helpful to the government (documents it would use in trial), or documents already known to the defendant; defendants were not entitled to the names or statements of witnesses. *See* FED. R. CRIM. P. 16(a)-(b). The rules still do not "require the parties to disclose witnesses." ROBERT M. CARY ET AL., FEDERAL CRIMINAL DISCOVERY 417 (2011). Views on the significance of changes to the federal rules widely differ. *Compare* Susan R. Klein, *Monitoring the Plea Process*, 51 DUQ. L. REV. 559, 570 (2013) ("The 1966 amendments explicitly permitted discovery in criminal cases and hugely increased the range and scope of pretrial discovery."), and Cary Clennon, *Pre-Trial Discovery of Witness Lists: A Modest Proposal to Improve the Administration of Criminal Justice in the Superior Court of the District of Columbia*, 38 CATH. U. L. REV. 641, 652-53 (1989) (contending that the 1966 reciprocity provision advantaged the State), *with* Meyn, *supra* note 25, at 1094 (disagreeing and observing no amendment has provided discretionary discovery), and Sara Kropf et al., *The 'Chief' Problem with Reciprocal Discovery Under Rule 16*, CHAMPION, Sept.-Oct. 2010, at 20 (arguing that Rule 16 is harmful to defendants).

173. 373 U.S. 83 (1963).

174. *See* Brennan, Jr., *supra* note 163, at 8-9. Though *Brady* has motivated prophylactic disclosures to avoid its violation, compared to civil discovery, *Brady* generates negligible

milieu of changing attitudes in the 1960s, scholarship criticized the criminal and civil procedural divide.<sup>175</sup> In this spirit of reassessment, Florida and Vermont passed legislation affording depositions to criminal defendants.<sup>176</sup> A backlash, however, brewed as the Warren Court's expansion of due process rights and the imposition of new disclosure requirements fueled the narrative of prosecutorial disadvantage. The political upheaval of the 1960s gave rise to buried resentments as dog-whistle politics ignited dark impulses of the electorate.<sup>177</sup>

The 1970s marked a hard return to crime control dogma and a “revolutionary expansion ... in criminal discovery by the prosecution

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litigation. *Brady's* scope is narrow (only information deemed material and exculpatory from the prosecutor's perspective), *id.*, and its efficacy was diluted in *United States v. Ruiz*, 536 U.S. 622 (2002), which held that *Brady* has no application to pleas (which comprise at least 95 percent of all cases), 536 U.S. at 632-63. *Brady* information is not discoverable until the eve of trial, when prosecutorial resistance is at its highest. See Miriam H. Baer, *Timing Brady*, 115 COLUM. L. REV. 1, 35-38 (2015). Prosecutors are apt to claim that less discovery to criminal defendants is justified due to *Brady's* demands and because the prosecutor's burden of proof at trial is high; notably, these due process rights all postdate the creation of the federal rules of criminal procedure. See *supra* note 158 and accompanying text.

175. See Fletcher, *supra* note 34, at 305-07; Goldstein, *supra* note 34, at 1192-93 (advocating for incorporation of civil discovery); Hall, *supra* note 34, at 739; Krantz, *supra* note 160, at 143-44; Louisell, *supra* note 164, at 72 (noting inherent limitations of Rule 16); *id.* at 100-01 (arguing for greater discovery with narrow exceptions); Pye, *supra* note 162, at 688-90; Comment, *Developments in the Law—Discovery*, 74 HARV. L. REV. 940, 1057, 1060 (1961) (recommending exchange of witness lists and depositions); Comment, *Pre-Trial Disclosure in Criminal Cases*, 60 YALE L.J. 626, 640-46 (1951) (recommending adoption of civil discovery). A few judges explicitly recognized disparities between civil and criminal procedure. See, e.g., Roger J. Traynor, *Ground Lost and Found in Criminal Discovery*, 39 N.Y.U. L. REV. 228, 233 (1964) (“There are no procedures analogous to the depositions and interrogatories, requests for admissions, or compulsory medical examinations authorized for civil cases.”).

176. As to Vermont, see 1961 Vt. Act & Resolves 174-76, see also Peter Forbes Langrock, *Vermont—An Experiment in Criminal Discovery*, 53 A.B.A. J. 732, 732 (1967) (describing legislative history of Vermont's discovery statute). As to Florida, which adopted a court-created rule of discovery in 1968, see *In re Fla. Rules of Criminal Procedure*, 211 So. 2d 203, 205 (Fla. 1968).

177. See IAN HANEY LÓPEZ, *DOG WHISTLE POLITICS* 35 (2014) (“Wallace, Goldwater, and Nixon recognized and sought to take advantage of existing bigotry in the voting public, bigotry they did not create but which they stoked, legitimized, and encouraged.”); Lain, *supra* note 158, at 1364 (“[The Warren Court's decisions] fared poorly in major public opinion polls, triggered contrary legislation, and even inspired a backlash ‘law and order’ campaign that helped send Richard Nixon to the White House in 1968.”); Luban, *supra* note 167, at 1750 (“[T]he repeated cry by conservative politicians for ever-more-savage criminal punishments presents a clear case of state-power-maintenance through scapegoating.”).

against the defense.”<sup>178</sup> The Court’s decision in *Williams v. Florida*<sup>179</sup> diluted the perceived breadth of a defendant’s right against self-incrimination, granting “states carte blanche [authority] to develop discovery rules that give the prosecutor an independent right to obtain even potentially incriminating information.”<sup>180</sup> Though prosecutors maintained that defendants should not learn names of state witnesses, prosecutors could learn names of defendants’ witnesses, arguing that absent prosecutorial review, defendants would fabricate evidence.<sup>181</sup> Courts expanded prosecutorial access to defenses and the identity and statements of defense witnesses.<sup>182</sup> Meanwhile, the Burger Court recognized broad exceptions to due process, removing constraints on searches and interrogations, diluting discovery rights, and narrowing avenues of appellate review.<sup>183</sup> The Burger Court facilitated a “transition from a due

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178. Robert P. Mosteller, *Discovery Against the Defense: Tilting the Adversarial Balance*, 74 CALIF. L. REV. 1567, 1569 (1986).

179. 399 U.S. 78 (1970).

180. Mosteller, *supra* note 178, at 1571 (emphasis added); *see also Williams*, 399 U.S. at 82-83 (holding that a statute requiring defendant to inform the prosecutor of an intent to bring an alibi defense does not run afoul of the Fifth Amendment, which is limited to the right not to testify).

181. *See Pye*, *supra* note 162, at 682 (looking to jurisdictions where the prosecution is required to turn over little, but the “defendant is required to reveal the names of all his witnesses”). As to whether a criminal defendant would attempt to encourage perjury, a major source of resistance to ushering in discovery to civil rules was also perjury. Subrin, *supra* note 33, at 715 n.151. Also, criminal defendants do not have a monopoly on perjury; law enforcement officers are repeat offenders. Myron W. Orfield, Jr., *Deterrence, Perjury, and the Heater Factor: An Exclusionary Rule in the Chicago Criminal Courts*, 63 U. COLO. L. REV. 75, 82-83 (1992) (noting studies estimate police commit perjury between 20 and 50 percent of the time that they testify on Fourth Amendment issues); Andrew E. Taslitz, *Slaves No More!: The Implications of the Informed Citizen Ideal for Discovery Before Fourth Amendment Suppression Hearings*, 15 GA. ST. U. L. REV. 709, 761-62 (1999) (documenting widespread examples of police perjury). Another source of widespread perjury benefits the State: informants. *See Alexandra Natapoff, Snitching: The Institutional and Communal Consequences*, 73 U. CIN. L. REV. 645, 664 & n.85 (2004) (noting “numerous horror stories of fabrication and perjury by informants”).

182. Mosteller, *supra* note 178, at 1571 (“[C]ourts have all but written off the [F]ifth [A]mendment as providing any restriction upon discovery of information that the defendant may ultimately want to introduce at trial.”); *id.* at 1579 (“Discovery against the criminal defendant expanded tremendously in many states beginning in the 1970s.... [T]wenty-five states grant the prosecution an *independent* right to receive discovery from the defense of at least one of the following: defenses, witness names, statements of witnesses, reports of experts, or documents and tangible evidence.”).

183. *See Luban*, *supra* note 167, at 1736-40; Charles H. Whitebread, *The Burger Court’s Counter-Revolution in Criminal Procedure: The Recent Criminal Decisions of the United States*

process-oriented criminal justice model to a model that ... placed increasing emphasis on crime control and crime prevention,”<sup>184</sup> placing a “heavy burden ... to demonstrate the unlawfulness” of government conduct.<sup>185</sup> Scholarship critiquing disparities between civil and criminal procedure fell conspicuously quiet.<sup>186</sup>

The conservative, then bipartisan, political commitment to tough-on-crime policies in the 1980s replaced aspirations of rehabilitation with fierce notions of retribution.<sup>187</sup> Although Galanter focused on how actors seek advantage in light of their position, he also credited larger forces at play.<sup>188</sup> As one descends into criminal law, external forces intensify; parties navigate strong currents of racial and class prejudice.<sup>189</sup> Over 80 percent of defendants charged with a felony

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*Supreme Court*, 24 WASHBURN L.J. 471, 471-72 (1985). Although the Court arguably extended *Brady*'s scope as to what constituted “material” evidence, see, for example *Kyles v. Whitley*, 514 U.S. 419, 421 (1995) (extending *Brady* to apply to information material to a colorable defense that the State failed to adequately investigate), and see *Giglio v. United States*, 405 U.S. 150, 153-54 (1972) (holding impeachment evidence, including testimony procured in exchange for a benefit, can be material), the Court also clarified that *Brady* does not apply to the pretrial period in *United States v. Ruiz*, 536 U.S. 622, 625, 632 (2002) (holding *Brady* has no application to plea bargains, which comprise at least 95 percent of all cases).

184. Bennett L. Gershman, *The New Prosecutors*, 53 U. PITT. L. REV. 393, 393 (1992).

185. Whitebread, *supra* note 183, at 471.

186. See Michael L. Beatty, *The Ability to Suppress Exculpatory Evidence: Let's Cut Off the Prosecutor's Hands*, 17 IDAHO L. REV. 237, 238 (1981) (noting reduction in criticism of criminal procedure since the 1960s); Jean Montoya, *A Theory of Compulsory Process Clause Discovery Rights*, 70 IND. L.J. 845, 855 (1995) (“In the early 1960's, several prominent scholars and jurists argued for expanded discovery in criminal litigation.”); Sklansky & Yeazell, *supra* note 49, at 683-84 (announcing in 2006, “[t]his is a plea for comparative work in civil and criminal procedure”). Some voices in the wilderness between 1970 and 2005 addressed the procedural disparity. See, e.g., Luban, *supra* note 167, at 1737-38; Montoya, *supra*, at 856.

187. See BRUCE WESTERN, PUNISHMENT AND INEQUALITY IN AMERICA 58-61 (2006); Avlana K. Eisenberg, *Incarceration Incentives in the Decarceration Era*, 69 VAND. L. REV. 71, 81 (2016) (“The drastic increase in incarceration levels can better be explained by a bipartisan political movement beginning in the 1970s that was characterized by ‘tough on crime’ rhetoric and the ‘war on drugs.’”). The work of criminal law scholars has deepened the understanding of forces that identify and process defendants. See generally MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS 1-9 (2012); Hessick & Berman, *supra* note 48, at 169-70 (“[T]he rehabilitative ideal came under attack in the second half of the twentieth century,” and sentencing policies shifted to aggravating factors and priors).

188. See Galanter, *supra* note 7, at 123-24. A litigant's resources determine much. A rule favoring a “have-not” may be underutilized due to “limited resources for their implementation.” *Id.* at 124.

189. See JAMES BALDWIN, NO NAME IN THE STREET 149 (1972) (“[I]f one really wishes to know how justice is administered ... one does not question the policemen, the lawyers, the

qualify for a public defender,<sup>190</sup> and by 1990, a quarter of all black men would be under correctional supervision.<sup>191</sup> Galanter observed that a repeat player had an opportunity “to develop facilitative informal relations with institutional incumbents.”<sup>192</sup> But repeat contacts can have an opposite effect, salient to criminal matters where law enforcement officers disproportionately sweep up men along racial lines, resulting in stark racial disparities in incarceration and supervision rates.<sup>193</sup> The appearance of repeat criminal defendants reinforces prejudice that fuels a vicious feedback loop.<sup>194</sup> Since the 1980s, officer ranks have grown, investigative tools have become more powerful, and courts have increased officer discretion.<sup>195</sup>

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judges, or the protected members of the middle class. One goes to the unprotected—those, precisely, who need the law’s protection the most!... [A]sk any Mexican, any Puerto Rican, any black man, any poor person ... how they fare in the halls of justice, and then you will know.”)

190. Rodney Uphoff, *Convicting the Innocent: Aberration or Systemic Problem?*, 2006 WIS. L. REV. 739, 748 (finding over 80 percent of those accused of a felony are deemed indigent).

191. Luban, *supra* note 167, at 1750.

192. Galanter, *supra* note 7, at 99.

193. See *Floyd v. City of New York*, 959 F. Supp. 2d 540, 581 (S.D.N.Y. 2013) (noting officers mark “Furtive Movements” for black subjects at a significantly higher rate than white subjects); *Wilson v. Tincum Township*, No. 92-6617, 1993 WL 280205, at \*2-4 (E.D. Pa. July 20, 1993) (certifying class action for officer profiling); Richard A. Leo, *Inside the Interrogation Room*, 86 J. CRIM. L. & CRIMINOLOGY 266, 273 (1996) (noting that in interrogations, “[t]he primary detective was typically white (69%)” and “[t]he typical suspect ... was a young, lower or working class, African-American male”); Dorothy E. Roberts, *Foreword: Race, Vagueness, and the Social Meaning of Order-Maintenance Policing*, 89 J. CRIM. L. & CRIMINOLOGY 775, 818 (1999) (“[T]argeting Blacks for police surveillance results in higher rates of arrests, reinforcing the presumption of Black criminality.”); Stephanie Francis Ward, *Stopping Stop-and-Frisk*, 100 A.B.A. J. 38, 40 (2014) (“[I]n 2011 and 2012 blacks and Hispanics represented 87 percent of all people stopped by New York City police.”); Maura Dolan & John M. Glionna, *CHP Settles Lawsuit Over Claims of Racial Profiling*, L.A. TIMES (Feb. 28, 2003), <https://www.latimes.com/archives/la-xpm-2003-feb-28-me-search28-story.html> [<https://perma.cc/6TYQ-TBFG>] (announcing civil settlement related to the California Highway Patrol pulling over Latinos at three times the rate of whites, and Black drivers at 1.5 times the rate of whites).

194. See Jeffrey J. Rachlinski et al., *Does Unconscious Racial Bias Affect Trial Judges?*, 84 NOTRE DAME L. REV. 1195, 1196 (2009) (noting that sentences for black defendants are 12 percent longer, bail is 25 percent higher, and the risk of receiving the death penalty is also higher than that of white defendants).

195. See Robert García, “*Garbage In, Gospel Out*”: *Criminal Discovery, Computer Reliability, and the Constitution*, 38 UCLA L. REV. 1043, 1055-61 (1991) (identifying powerful new investigative technology); Gershman, *supra* note 184, at 394 (noting that as power to investigate increased, courts limited the application of the exclusionary rule); Tracey Maclin, *The Decline of the Right of Locomotion: The Fourth Amendment of the Streets*, 75 CORNELL L. REV. 1258, 1334 (1990) (noting an increase in the investigative power of police); Dru Stevenson, *Effect of the National Security Paradigm on Criminal Law*, 22 STAN. L. & POL’Y

Sweeping criminal statutes expanded prosecutorial routes to securing a conviction.<sup>196</sup> These circumstances, coupled with increased penalties, have steadily increased a prosecutor's leverage.<sup>197</sup> The confluence of "the prosecutor's investigating, charging, convicting, and sentencing powers," coupled with "the 'inherent inequality' between the prosecutor and the defendant" has, as Bennett Gershman observed, rendered the "adversary system almost obsolete."<sup>198</sup>

Unmindful as to how growing leverage of police and prosecutors might overwhelm any procedural gains, scholars have observed that since the 1970s "proponents of expanded discovery have made remarkable progress," marking an "undeniable trend ... toward more liberal discovery [in criminal matters]."<sup>199</sup> Though it is accurate to observe that rule changes increased "access of both defendants and prosecutors to more documents or other items,"<sup>200</sup> these changes have not disrupted the status quo: the rules do not

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REV. 129, 164 (2011) (noting the growth of the police force relative to the population); Ronald S. Sullivan, Jr., *A License to Search: The Plain Feel Exception Under Minnesota v. Dickerson*, 113 S. Ct. 2130 (1993), 11 HARV. BLACKLETTER L.J. 181, 184-86 (1994) (arguing *Dickerson* provides a script for officers to avoid the exclusionary rule).

196. See Darryl K. Brown, *Democracy and Decriminalization*, 86 TEX. L. REV. 223, 227 (2007) ("Studies of the federal code document its dramatic growth in the last four decades, and every state code has expanded as well." (footnote omitted)); Gershman, *supra* note 184, at 406 ("To supplement the prosecutor's already considerable arsenal, Congress over the past twenty years has passed legislation providing prosecutors with more potent laws than ever before.").

197. See John G. Douglass, *Balancing Hearsay and Criminal Discovery*, 68 FORDHAM L. REV. 2097, 2137-42 (2000) (noting that courts permit hearsay presented by the prosecutor at a rate higher than other litigants); Gershman, *supra* note 184, at 407 (stating that mandatory minimums give "prosecutors greater leverage than ever to compel plea bargaining, force cooperation, and effectively determine the length of sentences"); Máximo Langer, *Rethinking Plea Bargaining: The Practice and Reform of Prosecutorial Adjudication in American Criminal Procedure*, 33 AM. J. CRIM. L. 223, 225 (2006) ("[P]rosecutors have become some of the main de facto adjudicators of U.S. criminal procedure.").

198. Gershman, *supra* note 184, at 395. These circumstances permit prosecutors to engage in coercive tactics to secure pleas. See Langer, *supra* note 197, at 225, 246-47.

199. 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, 251 (1987) ("For example ... the defendant has a right to pretrial discovery of his or her confessions and convictions, as well as reports of scientific analyses of physical evidence." (footnotes omitted)). Yet, "the prosecution ... enjoys significantly better access than the average criminal defendant to crime laboratories to conduct appropriate scientific testing." Montoya, *supra* note 186, at 860.

200. Melissa L. Jampol, *Goodbye to the Defense of Selective Prosecution*, 87 J. CRIM. L. & CRIMINOLOGY 932, 938 (1997).

provide the discretionary power to extract information that is afforded by civil discovery.<sup>201</sup> Though rule changes provide for additional disclosures within limited categories, prosecutors have successfully narrowed their scope.<sup>202</sup> Despite the massive changes to civil procedure since the 1940s, criminal procedure has remained relatively static, permitting the prosecutor easy entrance into the forum and preserving the prosecutor's pretrial discretion to maintain control over the pretrial distribution of information.<sup>203</sup> More than anything, the perception that criminal discovery has expanded reveals the internalization and acceptance of the civil and criminal procedural divide.<sup>204</sup>

### C. Diverging Trajectories

Since the 1970s, the civil forum is characterized by heightened pleading requirements, a commitment to a formal discovery phase, and pretrial judicial intervention.<sup>205</sup> The criminal forum, in contrast,

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201. See Meyn, *supra* note 25, at 1094 (distinguishing the discretionary power of civil litigants, as opposed to the limited disclosures to which criminal defendants are entitled); Jeffrey E. Stone & Corey B. Rubenstein, *Criminal Discovery: Leveling the Playing Field*, 23 LITIG. 45, 45 (1997) (stating that under Rule 16 of the federal rules, a defendant is entitled to: "(1) any statement your client was foolish enough to make ... (2) his criminal record ... (3) documents or physical exhibits to be used by the government at trial; (4) reports of examinations or tests; and (5) expert witness summaries. State prosecutors often have similar discovery obligations under provisions of state law").

202. See Imwinkelried, *supra* note 199, at 253 n.44 (noting that the requirement that the prosecutor disclose defendant's criminal record is construed "very strictly" to exclude uncharged conduct the State planned to use against the defendant, citing cases from the 1980s); Ellen S. Podgor, *Criminal Discovery of Jencks Witness Statements: Timing Makes a Difference*, 15 GA. ST. U. L. REV. 651, 657 (1999) (observing the narrow interpretation courts give to the requirement of prosecutors to turn over statements of witnesses after testifying—one court even finding that an FBI report of the witness's statement did not have to be turned over). When disclosure is required at trial, some courts hold that a defendant is only permitted to read the statement before cross-examination. *Id.* at 668, 688-89 (noting that some prosecutor offices have policies that are at variance with the strict requirements of the Jencks Act, and disclose witness statements on the eve of trial).

203. See Meyn, *supra* note 23, at 40-41.

204. See generally Paul Butler, *The System Is Working the Way It Is Supposed to: The Limits of Criminal Justice Reform*, 104 GEO. L.J. 1419, 1475-78 (2016) (providing a lens to understand how the racially targeted imposition of violence and incarceration is not inconsistent, but consistent with the sanction of law and design of criminal justice).

205. See *supra* text accompanying notes 58, 62-63.



features relaxed pleading standards, the absence of discovery, and little judicial intervention.<sup>206</sup>

The influence that “haves” bring to bear on the rulemaking process, and to leverage political influence, is well documented.<sup>207</sup> But the judicial alignment with the “haves” also reveals the Court’s impressive Article III power, to accomplish by interpretation what it cannot through the rulemaking process.<sup>208</sup> The receptivity of an ideologically aligned Court to establish doctrine responsive to the preferences of the “haves” is displayed in the development of pleading standards, as the Court departs from plain language to create favorable conditions for each “have.” Most fundamentally, it is the procedural divide that permits the creation of two incompatible standards that cater to the preferences of the “haves.”

### III. HOW THE PROCEDURAL DIVIDE MAKES POSSIBLE CONTRADICTORY RULES: A CASE STUDY

In the absence of a unified forum that would require one interpretation of a rule that governs all litigants, the procedural divide permits courts to provide contradictory interpretations of similar rules. This phenomenon is starkly revealed in the interpretation of pleading standards. Though the “civil have” seeks a heightened pleading standard, the rule calls for a forgiving one.<sup>209</sup> And where the “criminal have” seeks a relaxed standard, the language of the rule requires a more demanding path.<sup>210</sup> Yet, courts have interpreted the rules to command the opposite of their language. The more demanding criminal rule now requires less of a prosecutor

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206. See *supra* text accompanying notes 57, 59-61.

207. See BURBANK & FARHANG, *supra* note 33, at 67-70; Coleman, *supra* note 70, at 1018-23.

208. See BURBANK & FARHANG, *supra* note 33, at 130; Karen Nelson Moore, *The Supreme Court’s Role in Interpreting the Federal Rules of Civil Procedure*, 44 HASTINGS L.J. 1039, 1093 (1993) (contending that the Court’s unique rule-making authority, with the imprimatur of Congress, affords courts “a more activist role in the interpretative stage”).

209. See FED. R. CIV. P. 8(a)(2) (stating that plaintiffs must provide “a short and plain statement of the claim showing that the pleader is entitled to relief”).

210. See FED. R. CRIM. P. 7(c)(1) (stating that the indictment must “be a plain, concise, and definite written statement of the essential facts constituting the offense charged.... For each count, the indictment ... must give the official or customary citation of the statute”).

than the more relaxed civil rule. The relaxed civil rule now requires more of a civil plaintiff than does the more demanding criminal rule.

Civil Rule 8 requires a plaintiff to file a “short and plain statement of the claim showing that the pleader is entitled to relief.”<sup>211</sup> Rule 8’s architect, Charles Clark, signaled a forgiving interpretation of the rule’s demand in *Dioguardi v. Durning*,<sup>212</sup> he permitted the plaintiff access to court after divining a claim from almost indecipherable language.<sup>213</sup> In 1957, the Court in *Conley v. Gibson*<sup>214</sup> fortified Rule 8’s open court promise, stating that a complaint would be presumed sufficient unless, “it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.”<sup>215</sup> In 2005, Judge Easterbrook observed that under Rule 8’s language, “[p]laintiffs need not plead facts; they need not plead law.”<sup>216</sup> “Civil havens” attempted to ratchet up requirements in certain types of cases, or to seek the reversal of *Conley* altogether.

These efforts were rewarded in 2007, when the Court retired *Conley* in *Bell Atlantic Corp. v. Twombly*.<sup>217</sup> *Twombly* prepared the way for *Ashcroft v. Iqbal*, which reinterpreted Rule 8 and imposed a heightened pleading standard in all civil cases.<sup>218</sup> Where Judge Easterbrook thought a plaintiff need not plead facts, *Iqbal* interpreted Rule 8 to require specific factual allegations, the absence of which would lead to automatic dismissal.<sup>219</sup> Meeting this standard

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211. FED. R. CIV. P. 8(a)(2).

212. 139 F.2d 774 (2d Cir. 1944).

213. *See id.* at 774.

214. 355 U.S. 41 (1957).

215. *Id.* at 45-46. Buried in the decision is an instruction, negative in construction, that plaintiff articulate some level of factual specificity in making an allegation. *See id.*

216. *Doe v. Smith*, 429 F.3d 706, 708 (7th Cir. 2005).

217. 550 U.S. 544, 562-63 (2007).

218. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678, 684 (2009). Some courts and commentators surmised that *Twombly* was limited to antitrust disputes. *See Kendall v. Visa U.S.A., Inc.*, 518 F.3d 1042, 1047 n.5 (9th Cir. 2008) (“At least for the purposes of adequate pleading in antitrust cases, the Court specifically abrogated the usual ‘notice pleading’ rule, found in ... *Conley*.”); Scott Dodson, *Pleading Standards After Bell Atlantic Corp. v. Twombly*, 93 VA. L. REV. 135, 137 (2007) (observing *Twombly* is “perhaps unremarkable from an antitrust perspective”); Einer Elhauge, *Twombly-The New Supreme Court Antitrust Conspiracy Case*, VOLOKH CONSPIRACY (May 21, 2007, 6:15 PM), [http://volokh.com/archives/archive\\_2007\\_05\\_20-2007\\_05\\_26](http://volokh.com/archives/archive_2007_05_20-2007_05_26) [<https://perma.cc/FY7Y-ENBP>] (noting *Twombly* was “quite insignificant” as it merely ratified what was common practice in lower courts).

219. *Ashcroft*, 556 U.S. at 678 (“Threadbare recitals of the elements of a cause of action,

has proven difficult for certain classes of plaintiffs.<sup>220</sup> Cases such as *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*<sup>221</sup> show why. There, officers conducted a raid on the plaintiffs' home that, however fruitless, resulted in the point-blank shooting of plaintiffs' dogs.<sup>222</sup> Plaintiffs alleged that the sheriff failed to adequately train the officers.<sup>223</sup> Under *Conley*, the complaint was adequate: plaintiffs would be granted access to the forum and permitted to conduct discovery in an attempt to prove their claim.<sup>224</sup>

But under *Iqbal*, plaintiffs' complaint would fail, as plaintiffs did not possess the information (potentially in the sheriff's possession) needed to make specific factual allegations.<sup>225</sup> Beyond factual specificity, *Iqbal* still requires more; even if factual allegations are sufficiently specific, plaintiff must make out a "plausible" claim—a significant departure from *Conley*'s requirement to prove the claim was possible.<sup>226</sup> *Iqbal* instructs a judge to rely on her experience and common sense in determining plausibility, inviting judicial bias to inform whether a case remains on the docket.<sup>227</sup> Justice Souter, the author of *Twombly*, wrote a stunned dissent in *Iqbal*.<sup>228</sup> A major shift had occurred.

Under *Conley*, the message to lower courts was clear: unless a plaintiff pled herself out of court, let her in.<sup>229</sup> In *Dioguardi*, the

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supported by mere conclusory statements, do not suffice.... [W]e 'are not bound to accept as true a legal conclusion.'" (quoting *Twombly*, 550 U.S. at 555)).

220. See Reinert, *supra* note 53, at 2145.

221. 507 U.S. 163 (1993).

222. *Id.* at 165. This Supreme Court decision is frequently cited in casebooks. See, e.g., SARAH E. RICKS & EVELYN M. TENENBAUM CURRENT ISSUES IN CONSTITUTIONAL LITIGATION 489 (2d ed. 2015). For a disturbing view of judicial callousness, see *Leatherman v. Tarrant Cty. Narcotics Intelligence & Coordination Unit*, 954 F.2d 1054, 1058 (5th Cir. 1992) (lower court belittling the plaintiffs' loss).

223. See *Leatherman*, 507 U.S. at 163.

224. See *id.* at 164, 168.

225. See *Leatherman*, 954 F.2d at 1058 (noting that the lower court's application of a heightened standard led to the dismissal of the plaintiff's claim against the municipality for being too conclusory).

226. See *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009) ("[O]nly a complaint that states a plausible claim for relief survives a motion to dismiss.... [Plausibility is] a context-specific task that requires the reviewing court to draw on its judicial experience and common sense.").

227. *Cf. id.*

228. *Id.* at 688, 699 (Souter, J., dissenting) (stating that the majority misapplied *Twombly* and seeing "no principled basis for the majority's disregard of the allegations linking [the defendants] to their subordinates' discrimination").

229. *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957).

court reinstated a vague, almost impenetrable pro se complaint against a powerful defendant, the United States.<sup>230</sup> In *Conley*, the Court reinstated conclusory allegations of black employees against a powerful defendant, a railroad union.<sup>231</sup> But the Court in *Twombly* did the opposite; it *reversed* a lower court and *dismissed* a detailed, legally clear and cohesive complaint against powerful defendants, telecommunication giants.<sup>232</sup> In *Iqbal*, the Court *reversed* a lower court and *dismissed* a detailed, legally clear and cohesive complaint against powerful actors, the FBI director and the Attorney General.<sup>233</sup> The new message was clear: the failure to dismiss a complaint will receive close review and the prospect of reversal.

*Iqbal* received praise from the “civil haves.”<sup>234</sup> Lawyers for Civil Justice, a “partnership of leading corporate counsel and defense bar practitioners,”<sup>235</sup> applauded the decision, opining that *Iqbal* responds to “the great injustice done to defendants who in reality have violated no legal right of the plaintiff, by permitting a plaintiff’s unilateral, conclusory, and unsupported assertion of liability to serve as a form of ‘Open, Sesame’ to impose the enormous and expensive burdens of almost unlimited discovery on defendant.”<sup>236</sup>

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230. See *Dioguardi v. Durning*, 139 F.2d 774, 774-76 (2d Cir. 1944).

231. See *Conley*, 355 U.S. at 42, 45-48.

232. See *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). The complaint, alleging that telecommunication companies agreed to anticompetitive behavior, was brought by Milberg Weiss partners Michael Buchman (formerly in the New York Attorney General’s Office, Antitrust Bureau) and J. Douglas Richards (formerly Deputy General Counsel of the Commodity Futures Trading Commission). See *Twombly v. Bell Atl. Corp.*, 313 F. Supp. 2d 174, 175 (S.D.N.Y. 2003). Defendants hired teams from Kirkland & Ellis, Mayer Brown, Wilmer Cutler, and Pillsbury Winthrop. See *id.* at 174-76.

233. See *Iqbal*, 556 U.S. at 666, 687. Plaintiff was represented by Cardozo Law Professor Alex Reinert, at the time an associate with Koob & Magoolaghan, and by Haeyoung Yoon, Director of Strategic Partnerships at the National Employment Law Project, at the time an associate at the Urban Justice Center. See *id.* at 665; Nina Bernstein, *Top Officials Told to Testify in Muslims’ Suit*, N.Y. TIMES (Sept. 29, 2005), <https://www.nytimes.com/2005/09/29/nyregion/top-officials-told-to-testify-in-muslims-suit.html> [<https://perma.cc/P9AW-KZBZ>].

234. See Adam Liptak, *Supreme Court Appointment Could Reshape American Life*, N.Y. TIMES (Feb. 18, 2016), <https://www.nytimes.com/2016/02/19/us/politics/scalias-death-offers-best-chance-in-a-generation-to-reshape-supreme-court.html> [<https://perma.cc/BX47-HXTZ>] (noting the Roberts Court made “several decisions that pleased business groups” including “*Ashcroft v. Iqbal*, which made it easier for trial judges to dismiss cases at the earliest stages of a litigation”).

235. *About Us*, LAW. FOR CIV. JUST., <http://www.lfcj.com/about-us.html> [<https://perma.cc/R9ZV-UTB8>].

236. Alfred W. Cortese, Jr., *Iqbal and Twombly: Sensible Interpretations of the Pleading*

Arnold & Porter's Co-Chair of the Product Liability Group observed that, "the defen[s]e bar has a potentially potent ally in the *Twombly/Iqbal* pleading standard" in lower courts.<sup>237</sup> In a July 2009 "Client Alert," the Proskauer firm wrote, "[c]learly, *Iqbal* is welcomed news to employers who under the prior *Conley* motion to dismiss standard, had few options, but to answer 'generally-pleaded' complaints."<sup>238</sup> A *Law360* feature of a rising star at Kirkland & Ellis described the antitrust attorney's ability to use "the heightened pleading standards of the U.S. Supreme Court[']s decisions in *Twombly* and *Iqbal* to shoot down undersupported conspiracy claims."<sup>239</sup>

Soon after *Iqbal* was decided, legislation was proposed to restore the *Conley* standard.<sup>240</sup> The Chamber of Commerce immediately called for the proposed law's successful defeat,<sup>241</sup> a call echoed by

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*Rules*, CORP. COUNS. BUS. J. (July 5, 2010, 1:00 PM), <https://www.metrocorpocounsel.com/articles/12752/iqbal-and-twombly-sensible-interpretations-pleading-rules> [<https://perma.cc/GG4C-NE88>].

237. Anand Agneshwar & Paige Sharpe, *Twombly/Iqbal Prove Potent in Products Cases*, INT'L L. OFF. ARNOLD & PORTER KAYE SCHOLER (July 19, 2012), <https://www.internationallawoffice.com/Newsletters/Product-Regulation-Liability/USA/Arnold-Porter-LLP/Twombly-Iqbal-prove-potent-in-products-cases> [<https://perma.cc/TRT8-P8GK>]; see also Galanter, *supra* note 22, at 1380 ("The provision of legal services to [natural persons] and [artificial persons] is performed by different lawyers .... [T]he upper strata of the bar consist mostly of large firms whose members are recruited mainly from elite schools and who serve organizational clients; the lower strata practice as individuals or small firms, are drawn from less prestigious schools, and service individual clients.... Much ... variation within the profession ... is accounted for by ... 'the distinction between lawyers who represent large organizations ... and those who represent individuals.'" (quoting JOHN H. HEINZ & EDWARD O LAUMANN, CHICAGO LAWYERS: THE SOCIAL STRUCTURE OF THE BAR 319 (1982))).

238. *Ashcroft v. Iqbal—The U.S. Supreme Court Articulates a New Pleading Standard for All Federal Civil Litigation Cases*, CLIENT ALERT, L. & WORKPLACE: PROSKAUER ROSE LLP (July 2009), [https://www.martindale.com/litigation-law/article-Proskauer-Rose-LLP\\_768000.htm](https://www.martindale.com/litigation-law/article-Proskauer-Rose-LLP_768000.htm) [<https://perma.cc/G95W-P8P9>]. Jones Day Partner, Mark Herrmann, argued at a University of Pennsylvania debate: "*Twombly* and *Iqbal* are right on the law. The rules should require 'plausible' allegations. Why should implausible litigation be allowed?" Mark Herrmann & James M. Beck, *Plausible Denial: Should Congress Overrule Twombly and Iqbal?*, 158 U. PA. L. REV. PENNUMBRA 141, 146 (2009).

239. Dietrich Knauth, *Rising Star: Kirkland's Daniel Laytin*, LAW360 (Mar. 22, 2013, 1:25 PM), <https://www.law360.com/articles/425815/rising-star-kirkland-s-daniel-laytin> [<https://perma.cc/VR83-CKZL>]. The attorney's client list included Blue Cross, Navistar, Motorola, General Motors, and Baxter. See *Daniel E. Laytin, P.C.-Partner*, KIRKLAND & ELLIS LLP, <https://www.kirkland.com/sitecontent.cfm?contentID=220&itemID=7924> [<https://perma.cc/63BG-MWKN>].

240. Notice Pleading Restoration Act of 2009, S. 1504, 111th Cong. §2 (2009).

241. *Multi-Industry Letter Opposing S.1504, the "Notice Pleading Restoration Act of 2009"*,

corporate law firms.<sup>242</sup> These arguments in favor of *Iqbal* conflate a plaintiff's vague claim with a frivolous one.<sup>243</sup> A plaintiff may not possess facts necessary to bring a claim, however meritorious, at the inception of a lawsuit.<sup>244</sup> Since the Congressional threat to restore *Conley* has dissolved and *Iqbal* has remained good law, there has been a statistically significant rise in the immediate dismissal of civil rights cases.<sup>245</sup>

The plain language of Criminal Rule 7 is more demanding than Civil Rule 8.<sup>246</sup> As Judge Easterbrook observed,<sup>247</sup> Civil Rule 8's

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U.S. CHAMBER OF COMMERCE (Nov. 30, 2009, 7:00 PM), <https://www.uschamber.com/letter/multi-industry-letter-opposing-s-1504-notice-pleading-restoration-act-2009> [<https://perma.cc/Q8BG-K3HV>] (“The proposed legislation is intended to overrule [*Iqbal* and *Twombly*]... Proponents ... contend that *Iqbal* and *Twombly* worked a dramatic change in pleading rules to the detriment of plaintiffs. [In fact] [d]ozens of lower court decisions preceding *Iqbal* and *Twombly* have refused to sustain complaints containing only ‘bald assertions,’ ‘unsupported conclusions,’ or ‘legal conclusions,’ and they have refused to draw ‘unwarranted inferences’ from a complaint’s allegations.”).

242. Other firms joined in opposition. See John H. Beisner et al., *Pending Bills in House and Senate Seek to Loosen Federal Court Pleading Standards*, SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP (Dec. 11, 2009), <https://www.martindale.com/matter/asr-863724.Pending.pdf> [<https://perma.cc/B575-BJY5>] (“The bills are being pushed strongly by the plaintiffs’ bar as a reaction to two recent U.S. Supreme Court decisions [*Twombly* and *Iqbal*].... These decisions confirmed that plaintiffs cannot proceed ... if all they have to offer are ‘[t]hreadbare recitals’ and ‘conclusory statements.’”).

243. A heightened pleading standard has little impact on institutional players that possess the information necessary to bring a lawsuit. In a breach of contract claim, for example, institutional players on both sides of the equation possess actionable facts.

244. The “civil haves” argue that heightened pleading deters strike suits (baseless lawsuits that threaten the prospect of high discovery costs to force settlement). See Sander Bak & Jennie Woltz, *Iqbal Decision Having Significant Impact on Pleading Standards in Federal Courts*, MILBANK, TWEED, HADLEY & MCCLOY LLP (Aug. 25, 2009), [https://www.milbank.com/images/content/7/9/791/082509\\_Bell\\_Atlantic\\_v\\_Twombly.pdf](https://www.milbank.com/images/content/7/9/791/082509_Bell_Atlantic_v_Twombly.pdf) [<https://perma.cc/698B-KB28>]. Yet, Richard Marcus argued it is just as likely that a heightened standard *weeds out* meritorious claims. See Richard L. Marcus, *The Revival of Fact Pleading Under the Federal Rules of Civil Procedure*, 86 COLUM. L. REV. 433, 457-58, 484 (1986) (observing that having little information has little correlation to having a meritorious claim, and “increasing the discretion of the trial judges to dismiss cases because they sense misuse of the litigation system ... could undermine the substantive law just as fully as failure to dismiss meritless suits”).

245. See Reinert, *supra* note 53, at 2145.

246. See FED. R. CIV. P. 8(a)(2) (plaintiff must provide “a short and plain statement of the claim showing that the pleader is entitled to relief”); FED. R. CRIM. P. 7(c)(1) (prosecutor must provide “a plain, concise, and definite written statement of the essential facts constituting the offense charged.... For each count, the indictment ... must give the official or customary citation of the statute.”).

247. *Doe v. Smith*, 429 F.3d 706, 708 (7th Cir. 2005).

language does not require a recitation of facts,<sup>248</sup> yet the language of Criminal Rule 7 does so explicitly.<sup>249</sup> A prosecutor must provide “a plain, concise, and definite written statement of the *essential facts* constituting the offense charged.”<sup>250</sup> *Iqbal*’s requirement that a civil party plead specific factual allegations<sup>251</sup> seems to reflect the language of the criminal rule, not the civil rule. In criminal cases, however, courts will find sufficient a prosecutor’s threadbare recitation of the elements of a claim, an approach deemed insufficient by *Iqbal* and *Twombly*.<sup>252</sup> On the eve of *Twombly*, the Court considered the sufficiency of the following pleading:

On or about June 1, 2003, JUAN RESENDIZ-PONCE, an alien, knowingly and intentionally attempted to enter the United States of America at or near San Luis in the District of Arizona, after having been previously denied admission, excluded, deported, and removed from the United States at or near Nogales, Arizona, on or about October 15, 2002, and not having obtained the express consent of the Secretary of the Department of Homeland Security to reapply for admission.<sup>253</sup>

Though Criminal Rule 7 required “essential facts,”<sup>254</sup> the Court found the indictment adequate, as “parroting the language of a federal criminal statute is often sufficient.”<sup>255</sup> That same year, in *Twombly*, the Court held that Civil Rule 8 does not permit “a formulaic recitation of the elements” of a statute.<sup>256</sup>

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248. FED. R. CIV. P. 8(a)(2).

249. FED. R. CRIM. P. 7(c)(1).

250. *Id.* (emphasis added).

251. *Ashcroft v. Iqbal*, 556 U.S. 662, 677-78 (2009).

252. *See, e.g., State v. Wallace*, 517 S.E.2d 20, 22 (W.Va. 1999) (holding the indictment, “That on or about the 9th day of March, 1998, in the County of Tyler, State of West Virginia, Rebekah Leah Wallace, committed the felony offense of ‘Burglary’ by breaking and entering, in the nighttime, a dwelling house belonging to Donna Lee Miller, with intent to commit a crime therein, in violation of West Virginia Code Section 61-3-11(a), as amended, against the peace and dignity of the State” provided defendant with sufficient notice of the claim). The West Virginia Rules of Criminal Procedure are modeled after the Federal Rules of Criminal Procedure. *See* W.VA. R. CRIM. P. 7(c)(1).

253. *United States v. Resendiz-Ponce*, 549 U.S. 102, 105 (2007).

254. FED. R. CRIM. P. 7(c)(1).

255. *Resendiz-Ponce*, 549 U.S. at 109.

256. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007).

*Twombly* was a conspiracy case;<sup>257</sup> the separate and unequal procedural treatment is put in sharp relief when one compares civil and criminal conspiracy cases. In criminal law, before federal reform, the Court held that pleading conspiracy should be subject to *less* exacting rigor than the underlying substantive offense.<sup>258</sup> After reform, Criminal Rule 7 governed all claims and required a recitation of “essential facts.”<sup>259</sup> Courts, however, explained away the term “essential facts” by creating a new term, “evidentiary details.”<sup>260</sup> The term “essential facts” would only mean a “defendant’s constitutional right to know the offense with which he is charged,” as opposed to “the evidentiary details by which the government plans to establish his guilt.”<sup>261</sup>

After *Twombly* required specific factual allegations to bring a *civil conspiracy* claim,<sup>262</sup> courts assessing the sufficiency of *criminal conspiracy* ignored the hypocrisy.<sup>263</sup> In a post-*Twombly* criminal conspiracy case, the Second Circuit stated that “[w]hen ... an indictment ... state[s] the elements of the offense ... th[e] court has repeatedly refused ... to dismiss ... charges for lack of specificity.”<sup>264</sup> In *United States v. Crouse*,<sup>265</sup> the court did not dismiss a complaint that offered threadbare recitals of the elements, holding that the prosecutor was not required to describe what agreements were made.<sup>266</sup> In *United States v. Singleton*,<sup>267</sup> prosecutors were not required to meet any threshold of factual specificity, but only needed to plead, “the *existence* of a drug conspiracy” and “the operative time

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257. *Id.* at 548.

258. “It is well settled that in an indictment for conspiring to commit an offense ... it is not necessary ... to state such object with the detail which would be required in an indictment for committing the substantive offense.” *Wong Tai v. United States*, 273 U.S. 77, 81 (1927).

259. FED. R. CRIM. P. 7(c)(1).

260. *See United States v. Gordon*, 780 F.2d 1165, 1172 (5th Cir. 1986).

261. *Id.*

262. *Twombly*, 550 U.S. at 556.

263. Robert L. Weinberg, *Applying the Rationale of Twombly to Provide Safeguards for the Accused in Federal Criminal Cases*, 7 *ADVANCE* 45 (2013).

264. *United States v. Bout*, 731 F.3d 233, 241 (2d Cir. 2013) (quoting *United States v. Stringer*, 730 F.3d 120, 124-25 (2d Cir. 2013)).

265. 227 F.R.D. 36 (N.D.N.Y. 2005).

266. *See id.* at 41.

267. 588 F.3d 497 (7th Cir. 2009).



of the conspiracy,” satisfied by alleging an eight-year span, “1995 through March 2003.”<sup>268</sup>

In contrast, *Twombly* required plaintiffs to provide specific factual allegations of any civil conspiracy that, in addition, made out a plausible claim.<sup>269</sup> Civil complaints alleging conspiracy have been routinely dismissed for being too conclusory. For example, in *Xtreme Power Plan Trust v. Schindler*,<sup>270</sup> the court stated, “circumstances of conspiracy [must] be plead[ed] with specificity.”<sup>271</sup> Similarly, the court in *Atlantic International Movers, LLC v. Ocean World Lines, Inc.*,<sup>272</sup> stated that “[p]laintiff’s complaint largely fails to attribute specific actions to any of the parties and makes no specific allegations supporting the existence of an agreement between them.”<sup>273</sup>

Courts have interpreted the civil and criminal pleading rules to depart, in opposite directions, from their plain language; the resulting doctrine aligns with the preference of each “have.”<sup>274</sup> Subject to a more forgiving rule, a civil plaintiff must show more than a prosecutor. Subject to a more demanding rule, a prosecutor must show less than a plaintiff. This result would be rendered impossible if the “haves” operated in the same forum, under the same rule. The consequences are significant. Wielding the power to incarcerate, prosecutors may reveal little to defendants as they find easy access to the forum. Plaintiffs, alleging more, are nevertheless routinely turned away at the gate, even if they have meritorious claims.

#### IV. WHAT HAPPENS WHEN “HAVES” HAVE IT OUT

What might happen if “civil haves” and “criminal haves” litigated in the same procedural arena? Would courts readily raise the entrance fee for plaintiffs if doing so made it harder for a prosecutor to initiate a case? Would a civil rights plaintiff benefit from a

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268. *Id.* at 499-500 (emphasis added).

269. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007).

270. 563 B.R. 614 (Bankr. W.D. Tex. 2016).

271. *Id.* at 647.

272. 914 F. Supp. 2d 267 (E.D.N.Y. 2012).

273. *Id.* at 280 (emphasis added).

274. To reach contradictory results, a judge focuses on the plaintiff’s pleading obligations, not on whether the defendant has adequate notice. In the criminal context, a judge focuses on whether the defendant has adequate notice, not on the prosecutor’s pleading obligations.

prosecutor's desire for easy access to the forum? What if "civil haves" and "criminal haves" sat on the same Advisory Committee, lobbied against each other in Congress, and pushed for competing interpretations of the same rule in the courts? What happens when a "have" competes with another "have"? What compromises might be hammered out? Would "have-nots" receive collateral benefits from these contestations? The questions are not entirely speculative. There are examples of "haves" in conflict over procedure. During the rulemaking process of the civil rules, courts have, on a few occasions, made proposals that contravene the preferences of the "civil haves."<sup>275</sup>

Courts have generally been aligned with preferences of the "haves." Since 1970, judges have sat in the majority of Advisory Committees, and comprised the majority of committee members.<sup>276</sup> The Chief Justice appoints these judges.<sup>277</sup> This arrangement permits the Chief Justice to exert influence over the direction of procedural reform.<sup>278</sup> The Court's power to promulgate is amplified by its power to interpret those same rules.<sup>279</sup> Since the 1970s, the Chief Justice has signaled alignment with the preferences of the "haves." As to the "civil haves," Justice Burger began to rely more heavily on selecting judges appointed by Republican presidents and corporate practitioners and "intensified a partisan slant in the appointment of judges, and a pro-corporate slant in the appointment of practitioners, that continued under Chief Justices Rehnquist and Roberts."<sup>280</sup> Proposals by "civil haves" seek efficiency or proportionality, which align with the interests of courts to reduce delay.<sup>281</sup>

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275. See, e.g., Eric K. Yamamoto & Joseph L. Dwight IV, Comment, *Procedural Politics and Federal Rule 26: Opting-out of "Mandatory" Disclosure*, 16 U. HAW. L. REV. 167, 168-70 (1994).

276. Coleman, *supra* note 70, at 1017 (referring to civil committees). This is a significant shift because membership of the inaugural civil committee had no judges, see Subrin, *supra* note 33, at 710, and just a few judges sat on the criminal committee, see Meyn, *supra* note 1, at 727-29.

277. Stancil, *supra* note 69, at 99 (noting that the Chief Justice appoints members for the Standing Committee and the Advisory Committees).

278. See Coleman, *supra* note 70, at 1064. Appointments to the Civil Advisory Committee ideologically favored conservative ideologies, which is correlated to probusiness, antiplaintiff bias. BURBANK & FARHANG, *supra* note 33, at 77-91.

279. See *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 360-61 (2011).

280. BURBANK & FARHANG, *supra* note 33, at 66-67.

281. Burbank & Farhang, *supra* note 90, at 1587 ("[P]erception that the institutional interests of the judiciary—in particular, the interest in active judicial management of a

Dismissing individual plaintiffs early is consistent with a court's docket-clearing interests. The preference of the "civil haves" to regulate discovery by expanding judicial discretion empowers courts to reduce delay in any particular case. As to "criminal haves," the absence of a discovery period relieves the judicial docket. Increasing pleading requirements would only invite court involvement and further cause delay; thus, the status quo, however different in each forum, is typically preferable to both courts and the respective "haves."

The interests of the courts and the "civil haves," however, at times diverged. In what was perceived as a threat to the legislature's deference to judicial autonomy and authority to promulgate procedure, Congress in 1990 imposed reporting measures on courts through the passage of the Civil Justice Reform Act (CJRA).<sup>282</sup> To placate Congress and avoid further erosion of judicial self-rule, judges on the Advisory Committee proposed a docket-clearing measure: mandatory initial disclosures.<sup>283</sup> The rule required parties to turn over information relevant to the dispute at the inception of litigation.<sup>284</sup> This proposal was intended to reduce disputes over what information should be produced, shortening the average time

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burgeoning docket—were no longer in sync with the interests of practicing lawyers, coupled with the desire to control the agenda of litigation reform, likely played an important role in the decision by the Chief Justice of the United States.”).

282. Reda, *supra* note 69, at 1095 & n.35 (noting the absence of any empirical evidence in the congressional record showing the incidence of “cost and delay”).

283.

[The] Advisory Committee and Judicial Conference faced a threat of usurpation of their rulemaking authority by Congress .... Judge William Bertlesman encapsulated the concern, stating that “the incentive to get [the mandatory disclosure rule amendment] started ... [was] the passage of the Biden Bill, when it looked as though the Judiciary was going to lose control of itself.”

Yamamoto & Dwight IV, *supra* note 275, at 197; *see also* Stephen B. Burbank & Sean Farhang, *Federal Court Rulemaking and Litigation Reform: An Institutional Approach*, 15 NEV. L.J. 1559, 1589 (2015) (arguing that the amendments reflected the rulemakers’ “desire to reclaim procedural lawmaking leadership”).

284. FED. R. CIV. P. 26(a)(1) (“Except to the extent otherwise stipulated or directed by order or local rule, a party shall, without awaiting a discovery request, provide to other parties: (A) [information regarding] each individual likely to have discoverable information relevant to disputed facts alleged with particularity in the pleadings, identifying the subjects of the information; (B) a copy [or description] of all documents, data compilations, and tangible things in the possession, custody, or control of the party that are relevant to disputed facts alleged with particularity in the pleadings.”).

horizon of a case.<sup>285</sup> The rule was unpopular with the “civil haves.”<sup>286</sup> With this proposal, initiating a lawsuit with conclusory allegations would entitle the plaintiff to an immediate dump of the “civil haves” dirty laundry.<sup>287</sup> Frontloading discovery costs also raised the prospect of an uptick in strike suits (forcing the defendant to pay on a frivolous complaint to avoid incurring discovery costs that exceeded settlement value).<sup>288</sup> To appease the clamor of resistance from lower courts, a revised rule permitted jurisdictions to opt out.<sup>289</sup>

In this chapter of “haves” versus “have-nots,” the “civil haves” lost ground to the “have-nots,” who, by way of filing a claim, however conclusory, were entitled to information potentially harmful to the “civil haves.” In 2000, courts and the “civil haves” reached a détente on initial disclosures.<sup>290</sup> The context had changed. Congress had

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285. *Minutes, Hearing Before the Advisory Comm. on Civil R.*, 2 (1990), [https://www.uscourts.gov/sites/default/files/fr\\_import/CV11-1990-min.pdf](https://www.uscourts.gov/sites/default/files/fr_import/CV11-1990-min.pdf) [<https://perma.cc/TSM4-MDDV>] (“Magistrate Judge Brazil noted that one purpose to be kept in mind is that disclosure should assist expeditious settlement.”).

286. Burbank, *supra* note 81, at 1723 (noting that proposals were “predicated in part on an institutional desire to regain ‘leadership’ from Congress”); Stancil, *supra* note 69, at 104 (during public comment for the proposed 1991 rule, seventy-six witnesses testified against the rule, and the committee received over two hundred written statements of opposition); *id.* at 105 (noting that a revised 1992 proposal attracted one hundred comments, 95 percent negative); see also Stephen B. Burbank, *Ignorance and Procedural Law Reform: A Call for a Moratorium*, 59 BROOK. L. REV. 841, 842 (1993) (explaining that it was difficult “not to sense a crisis in federal procedural reform when the Chief Justice’s letter transmitting the 1993 amendments ... disclaimed any implication ‘that the Court itself would have proposed these amendments in the form submitted’”); John C. Koski, *Mandatory Disclosure: The New Rule That’s Meant to Simplify Litigation Could Do Just the Opposite*, 80 A.B.A. J. 85, 85-87 (1994).

287. Relatedly, a plaintiff alleging multiple unsubstantiated claims would nevertheless trigger the obligation of the defendant to make disclosures, leading to inefficient and burdensome outcomes for “haves.” See, e.g., *Minutes, Hearing Before the Advisory Comm. on Civ. R.*, *supra* note 285, at 2.

288. Despite obvious benefits of the rule, some “have-nots” complained for the sake of complaining. See Virginia E. Hench, *Mandatory Disclosure and Equal Access to Justice: The 1993 Federal Discovery Rules Amendments and the Just, Speedy and Inexpensive Determination of Every Action*, 67 TEMP. L. REV. 179, 199-201 (1994).

289. While the committee thought initial disclosures would make case management easier for judges, some thought the rule unnecessarily interfered with judicial discretion to referee appropriate discovery. *Minutes, Hearing Before the Advisory Comm. on Civ. R.*, *supra* note 285, at 2.

290. Morgan Cloud, *The 2000 Amendments to the Federal Discovery Rules and the Future of Adversarial Pretrial Litigation*, 74 TEMP. L. REV. 27, 46 (2001) (observing that the new rule relieves attorneys from disclosing “the proverbial ‘smoking gun’”). The change was well received by the defense bar. See, e.g., Gregory P. Joseph, *The 2000 Amendments to the Federal*

backed down. The diluted rule was now mandatory in all jurisdictions, but it was limited in scope: “civil have” were only required to turn over documents helpful to their case, reducing cost and strategic harm.<sup>291</sup> In that scenario, the “haves” had reached a compromise—this time at the expense of the “have-nots.”

With no prompt from Congress, in 2013 courts attempted to reduce case delay by empowering judges to narrow the scope of discovery in any particular case. “Have-nots” fought a multifront attack: the proposal created proportionality guidelines permitting courts to expand or decrease the scope of discovery in any particular case, but also sought to further limit the number of depositions that were presumptively reasonable in a case—from ten to five depositions.<sup>292</sup> The “civil have” advocated for the proportionality guidelines.<sup>293</sup> As to lowering the boom on depositions, the “civil have” expressed indifference.<sup>294</sup> On one hand, corporate firms in litigation regularly sought more than ten depositions.<sup>295</sup> On the other hand, whether the presumptive limit was ten or five, “civil have” were confident a judge would permit as many depositions as the “haves” needed.<sup>296</sup> The “civil have-nots” resisted; they thought lowering the presumptive limit telegraphed to courts that taking any more than five depositions should be disfavored.<sup>297</sup> For the “have-nots,” the exercise of judicial discretion was something to be feared; asking for more depositions was not a given, but a fight.<sup>298</sup> Due to the “civil have” indifference on the issue, the “have-nots” were able to persuade the Advisory Committee to maintain the higher presumptive limit.<sup>299</sup> In this instance, the Advisory Committee, with

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*Rules of Civil Procedure & Evidence: A Preliminary Analysis*, JOSEPH HAGE AARSONSON LLC, <http://www.jha.com/us/articles/viewarticle.php?9> [<https://perma.cc/GX3N-GPKD>].

291. Under the 2000 rule, parties had to disclose only information “the disclosing party may use to support its claims or defenses.” FED. R. CIV. P. 26(a)(1)(A)(i).

292. See *supra* notes 133-34 and accompanying text.

293. See *Hearing on Civil Procedure*, *supra* note 55, at 13-14.

294. See *id.* at 55.

295. See *id.* at 31.

296. See *id.* at 41-42; see also Letter from Stuart F. Delery, Assistant Attorney Gen. to The Honorable David G. Campbell, Advisory Comm. Chair, and The Honorable John G. Koeltl 14 (Jan. 28, 2014), [http://www.lfcj.com/uploads/3/8/0/5/38050985/frcp\\_doj\\_1.28.14.pdf](http://www.lfcj.com/uploads/3/8/0/5/38050985/frcp_doj_1.28.14.pdf) [<https://perma.cc/325U-CFDF>] [hereinafter Letter from Delery].

297. See *Hearing on Civil Procedure*, *supra* note 55, at 116.

298. See Letter from Delery, *supra* note 296, at 14.

299. See *id.* at 2.

a judicial majority, respected the interests of the “have-nots” in the absence of pushback from the “haves.”

The contestation between courts and the “civil haves” are instructive. Compromise may require time; the battle over the scope of initial disclosures took seven years to resolve. The “civil haves” improved their position over that time and, though the “civil have-nots” received diminishing returns, they still emerged as a beneficiary over the battle between the “haves.” Where the “have” is indifferent, the voices of the “have-nots” may carry the day; stalemates between competing “haves” may reveal opportunities for “have-nots” to gain ground. Depending on the particular issue at stake, contestation between “haves” can potentially result in collateral benefits for “have-nots.” Structurally, a new dynamic emerges: in the absence of a procedural divide, courts would have to mediate between competing preferences of “the haves.” Stakeholders would be drawn into crosscurrents. Would a court close a door on plaintiffs if doing so closed the door on prosecutors? What would the Advisory Committee do when “civil haves” oppose “criminal haves” over discovery matters? Resulting compromises would raise the prospect of accommodations that provide some procedural benefits to the “have-nots.”

#### V. IF THE “HAVES” SHOULD COMPETE IN A UNIFIED FORUM

Subject to civil procedure, if all litigants were governed by the same rules, what compromises might be expected?<sup>300</sup> As to pleading under Civil Rule 8, prosecutors would be expected to resist *Iqbal*'s requirements and push judicial interpretation toward a more permissive standard. Heightened pleading requirements would add labor to an understaffed environment,<sup>301</sup> invite searching judicial review, and reduce prosecutorial control over the pretrial narrative.<sup>302</sup> Some might question whether a prosecutor would resist

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300. The first proposed rules of criminal procedure by the Advisory Committee were largely based on the rules of *civil* procedure. See Meyn, *supra* note 1, at 713. If prosecutors had engaged with the civil rules earlier, they would have had more influence in its development.

301. See Adam M. Gershowitz & Laura R. Killinger, *The State (Never) Rests: How Excessive Prosecutorial Caseloads Harm Criminal Defendants*, 105 NW. U. L. REV. 261, 266 (2011).

302. See Richard S. Frase, *Comparative Criminal Justice As a Guide to American Law Reform: How Do the French Do It, How Can We Find Out, and Why Should We Care?*, 78

*Iqbal's* requirements too much; after all, at the time of filing, prosecutors have sufficient evidence in hand to convict, making compliance with *Iqbal* possible, and information required by *Iqbal* would eventually be subject to disclosure at any preliminary hearing.<sup>303</sup>

These arguments would need to contend with existing prosecutorial resistance to any imposition of a heightened pleading. *Iqbal* would, in any case, increase prosecutorial labor. Under *Iqbal*, a complaint takes longer to prepare; as it is, “far too few prosecutors are tasked with handling far too many cases.”<sup>304</sup> The higher standard would incentivize the filing of motions to dismiss.<sup>305</sup> In the face of prosecutorial resistance to *Iqbal*, the “civil haves” would likely be forced to give up ground, resulting in a less-onerous pleading standard that makes it easier for “civil have-nots” to file, for example, civil rights claims. Prosecutors would also chafe at the prospect of Rule 11 sanctions for the failure to conduct a reasonable pre-complaint inquiry, especially if the standard applied to prosecutors reflects prevailing ethical standards.<sup>306</sup> Any subsequent language diluting the scope and efficacy of Rule 11 would reduce risks

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CALIF. L. REV. 539, 669 (1990) (noting the investigation and presentation of trial evidence “are completely controlled by the police and prosecution”); Gershman, *supra* note 184, at 451 (“[T]here exists a close nexus between limited discovery ... and enhanced opportunities for prosecutorial suppression of evidence.”).

303. A Bill of Particulars entitles defendants to what the pleading standard requires. Louisell, *supra* note 164, at 68; Traynor, *supra* note 175, at 233 (“[B]ills are seldom granted.”); see also *United States v. Crouse*, 227 F.R.D. 36, 41 (N.D.N.Y. 2005) (explaining why, despite vague assertions of the indictment, a bill of particulars is not actionable).

304. Gershowitz & Killinger, *supra* note 301, at 266. In Brooklyn, defendants are arraigned between 9:00 AM and 12:00 AM; twenty Assistant District Attorneys (ADAs) work the complaint room in a 6:00 PM to 2:00 AM shift, where one ADA can typically process ten misdemeanor complaints or three felony complaints. Interview with Jeanine Anderson, Former Brooklyn Assistant District Attorney (Aug. 2017). In the First Amended Complaint in *Iqbal*, twenty-four pages were dedicated to factual allegations that described the basis for the claims. First Amended Complaint and Jury Demand, *Ashcroft v. Iqbal*, 556 U.S. 662 (2009) (No. 04 CV 1809 (JG)(JA)). This effort was not sufficient as to named defendants. See *Iqbal*, 556 U.S. at 683.

305. Preliminary hearings do not occur in federal felonies. FED. R. CRIM. P. 5.1(a)(3). In state proceedings, cases may settle before prelim or the prelim may be waived. *Id.* at 5.1(a)(1). The preliminary hearing and its “probable cause” requirement, *id.* at 5.1(e), is arguably less demanding than the *Iqbal* “plausibility” standard.

306. AM. BAR ASS'N, *supra* note 59, at § 3-4.3(a) (“A prosecutor should ... file criminal charges only if the prosecutor reasonably believes ... that admissible evidence will be sufficient to support conviction.”).

to “civil have-nots” in incurring sanctions for bringing lawsuits that pushed factual and legal boundaries.<sup>307</sup>

“Criminal haves” would resist the imposition of formal discovery. Most information that permits a prosecutor to bring charges has been collected before filing charges.<sup>308</sup> Prosecutors have little use for depositions, document requests, interrogatories, and initial disclosures.<sup>309</sup> Resistance to depositions runs deep; doing little to supplement a prosecutor’s existing arsenal, they provide little strategic value.<sup>310</sup> The State already collects information through witnesses who voluntarily cooperate, comply with authority, or respond to threats.<sup>311</sup> If need be, a prosecutor can convene a grand jury, described as a “deposition procedure for the prosecution without the embarrassing presence of defendant or his counsel.”<sup>312</sup> The prosecutor typically initiates a case with an asymmetrical advantage. A

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307. FED. R. CIV. P. 11(b)(2)-(3) (attorneys must certify that “claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law” and that “the factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery” or face potential sanctions).

308. *See supra* note 306.

309. *See infra* note 310.

310. Prosecutorial antipathy towards depositions is longstanding. “I can’t think of a single instance ... as United States Attorney where the government or the defendant has been hurt by his inability to take depositions,” remarked Harry Blanton in 1943, “I believe I be-speak the attitude of all the prosecutors, that they are strongly opposed to the adoption of [depositions].” 2 DRAFTING HISTORY OF THE FEDERAL RULES OF CRIMINAL PROCEDURE 122 (Madeleine J. Wilken & Nicholas Triffin eds., 1991) (recording remarks by Henry Blanton, United States Attorney for the Eastern District of Missouri, at the Judicial Conference for the Eighth Circuit in 1943, responding to proposed Rule 18). During first efforts to expand discovery in the 1960s, David Louisell observed that “prosecutors generally evidence strong antipathy to [depositions] ... made clear by attendance at almost any of their formal meetings.” Louisell, *supra* note 163, at 928.

311. *See* Illya D. Lichtenberg, Voluntary Consent or Obedience to Authority: An Inquiry into the “Consensual” Police-Citizen Encounter 90 (Oct. 1999) (unpublished Ph.D. dissertation, Rutgers University) (explaining that as to studies of traffic stop searches, “[w]hat people perceived they would do ... is very different from what people actually do when confronted with an asymmetrical authority relationship”); *see also* Alisa M. Smith et al., *Testing Judicial Assumptions of the “Consensual” Encounter: An Experimental Study*, 14 FLA. COASTAL L. REV. 285, 290 (2013) (“Social-psychological research ... unequivocally demonstrates that reasonable people comply with authority figures.”).

312. Goldstein, *supra* note 34, at 1191. Under federal procedure, grand jury proceedings are secret, accessible only to the prosecutor, with few exceptions. *United States v. Proctor & Gamble Co.*, 356 U.S. 677, 682 (1958); *see also* FED. R. CRIM. P. 6(e)(2)(B).



deposition threatens this imbalance of power, permitting defendants to explore counternarratives, develop potential impeachment evidence, and infill a record subject to the gaze of postconviction counsel. The right to silence immunizes the defendant from any deposition.<sup>313</sup> Though the deposition does little to improve the State's position in a case, the "civil haves" routinely rely on more than ten depositions per case,<sup>314</sup> and would accordingly resist prosecutorial efforts to dilute deposition rules. Though "civil haves" are unopposed to lowering presumptive limits (which prosecutors would support), "civil haves" view depositions as necessary.<sup>315</sup> Civil and criminal "have-nots" would find shelter under the buffer provided by "civil haves." Courts would likely ally with prosecutors in the call for lower presumptive caps and more informal discovery procedures. Yet, some of these changes would potentially confer benefits to the "have-nots," as informal procedures (such as jettisoning the need for a court reporter) tend to favor underresourced litigants by making the procedure more accessible.<sup>316</sup>

Prosecutors would resist other discovery tools as well. Where criminal defendants typically have little to offer in the way of documents, prosecutors are comparatively document-rich, and it is easier to request than to respond to information.<sup>317</sup> Document requests and interrogatories threaten caseload backlogs, placing pressure on the prosecutor to make more favorable plea offers to avoid the cost of responding. As prosecutors seek out judicial allies in the effort to dilute these tools, "civil haves" would be expected to resist any erosion of core attributes of these tools. "Civil haves" would support efforts of "criminal haves" to put an end to initial disclosures, which in particular disrupt prosecutorial discretion to

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313. If the Fifth Amendment was interpreted to permit compulsion of *pretrial* testimony, the value of a deposition, for the prosecutor, would appreciably increase. Akhil Reed Amar & Renée B. Lettow, *Fifth Amendment First Principles: The Self-Incrimination Clause*, 93 MICH. L. REV. 857, 898-99 (1995).

314. See *Hearing on Civil Procedure*, *supra* note 55, at 31.

315. See *id.* at 30-31.

316. See Meyn, *supra* note 25, at 1096. Procedures in New Mexico adopt informal procedures for taking depositions that incur less cost than the typical civil deposition. See *id.* at 1110.

317. "It is almost invariably cheaper to ask for materials than to produce them." SAMUEL ISSACHAROFF, CIVIL PROCEDURE 45 (3d ed. 2012).

distribute pretrial information.<sup>318</sup> Yet, courts insist on initial disclosures to reduce case delay. In addition, prosecutorial resistance itself would experience some fractures, given an emerging openness within the prosecutorial community to institute open-file policies that mimic key features of the initial disclosure rules.<sup>319</sup>

In sum, the imposition of a formal discovery phase would not appreciably enhance power already possessed by the “criminal haves”; yet, it would significantly enhance the ability of “criminal have-nots” to extract information, investigate defenses, and delay prosecution to provide leverage in plea negotiations.<sup>320</sup> “Criminal haves” would be expected to make some inroads on restricting discovery. Prosecutors would seek favorable interpretations of civil rules that contemplate limitations based on proportionality factors. For example, as to the civil rule that parties must consider “the importance of the issues at stake,”<sup>321</sup> prosecutors would likely seek bright-line rulings that curtail discovery in certain classes of cases such as misdemeanors.<sup>322</sup> This tiered approach might give rise to cross-pollination; a limitation on discovery in misdemeanors might translate to a ceiling on discovery in civil cases with low damages. Despite the expected efforts of prosecutors (sometimes in conjunction with courts) to dilute formal discovery, “civil haves” (sometimes

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318. William J. Brennan, Jr., *The Criminal Prosecution: Sporting Event or Quest for Truth?* *A Progress Report*, 68 WASH. U. L.Q. 1, 2 (1990) (noting that a prosecutor can be expected to share very little where “the defendant might benefit most from [information], that is, where the government’s case is weak”).

319. It remains to be seen whether open-file policies are indicative of a new openness to expanded discovery or, rather, will serve to deflect the increasing calls for formal discovery.

320. The imposition of formal discovery would make the ineffective assistance of counsel (IAC) standard more demanding. *See* Roberts, *supra* note 34, at 1121-22. A defense attorney would need to provide a strategic reason for any decision not to request discovery; thus, counsel would be incentivized to file discovery. Discovery would also afford the defendant the opportunity to depose a victim, making retraumatization possible. A prosecutor may offer a better plea deal to avoid such a scenario.

321. FED. R. CIV. P. 26(b)(1).

322. Florida restricts depositions to categories of witnesses and generally prohibits depositions in misdemeanors. FLA. R. CRIM. P. 3.220(h)(1)(D) (“No deposition shall be taken in ... a misdemeanor or a criminal traffic offense ... unless good cause can be shown.... [T]he court should consider the consequences to the defendant, the complexity of the issues involved, the complexity of the witness’ testimony ... and the other opportunities available to the defendant to discover the information sought by deposition.”); *see also* Paul W. Grimm, *Are We Insane? The Quest for Proportionality in the Discovery Rules of the Federal Rules of Civil Procedure*, 36 REV. LITIG. 117, 130 (2017).

in conjunction with courts) would seek to maintain core characteristics of formal discovery. “Civil have-nots” would find shelter in areas deemed critical by the “civil haves.” Where “civil haves” identified acceptable areas to narrow the scope of discovery, they would find strong allies in prosecutors. Yet, any changes that mitigated costs or injected a degree of informality potentially would benefit “haves” and “have-nots” alike.

There is, with any regime change, the prospect of unintended consequences. Within a unified forum, segregation might persist informally. Judges might facilitate two systems under the same code: one system responsive to the “civil haves” who seek judicial intervention and the other responsive to “criminal haves” who seek a pretrial vacuum. The introduction of formal discovery may push the initial review of the integrity of criminal charges to a newly emboldened, but overwhelmed, public defender. Not all of these questions are theoretical. Existing criminal jurisdictions experimenting with civil procedure concepts will provide opportunities for insight as to how civil rules might be absorbed in criminal cases and how doing so might impact “have-nots.”

Contestation and compromise might do more than reshape existing civil rules. Prosecutorial defiance to civil rules might dissipate over time due to the entrenchment of new norms as incoming prosecutors, who never practiced under a different regime, replace the old guard. A unified forum also has the potential to change perceptions about litigants. A feedback loop exists between the content of a rule and how parties subject to that rule are perceived—a constitutive theory of law.<sup>323</sup> The qualitative work of Jenia Turner and Allison Redlich reveals such a connection between procedure and perception.<sup>324</sup> In Virginia, which limits disclosures, approximately 50 percent of the prosecutors thought early release of information to a defendant would result in witness intimidation; in North Carolina, which provides for an open-file policy, approximately 10 percent of prosecutors shared such fears.<sup>325</sup> The proce-

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323. Julie A. Nice, *Equal Protection's Antinomies and the Promise of a Co-constitutive Approach*, 85 CORNELL L. REV. 1392, 1413 (2000).

324. See Jenia I. Turner & Allison D. Redlich, *Two Models of Pre-Plea Discovery in Criminal Cases: An Empirical Comparison*, 73 WASH. & LEE L. REV. 285, 286 (2016).

325. See *id.* at 359.

dures in these jurisdictions correlate with perceptions held by defendants.

In the civil forum, *Twombly* and *Iqbal* feed the narrative of the frivolous plaintiff,<sup>326</sup> whereas *Conley* assumed a more dignified plaintiff.<sup>327</sup> In the criminal forum, denying discovery tools to a criminal defendant reinforces the perception of dangerousness and lawlessness; furnishing the defendant with discovery and agency goes some distance to restore the innocence presumption. Contestation and compromise would also influence the act of judging; any predisposition to craft a rule supporting a “have” would risk undermining the interests of another “have.” The segregation of procedure has also led to the segregation of state court rotations; a more robust and fluid rotation in a unified forum would reduce aspects of capture by one set of “haves.” The impact of a unified forum would be profound; similarly, the procedural divide has had deep consequences to the development of procedure in the United States.

#### CONCLUSION

The status quo of procedural segregation permits each “have” to fight a one-front battle against each respective “have-not.” This segregation has had a profound influence on the development of procedure in the United States. The arrangement has dampened contestation in the forging of rules and has permitted inequalities between the “haves” and “have-nots” of each forum to persist or grow. On the civil side, close studies of rulemaking since the 1970s have documented a steady erosion of the commitment to open courts and open discovery.<sup>328</sup> Individual plaintiffs bringing civil rights and consumer claims now face growing procedural hurdles to access the judicial forum. On the criminal side, procedure is marked by information asymmetries between the prosecutor and the indigent criminal defendant.<sup>329</sup> The procedural disparities that afford prosecutors unfettered discretion facilitates high-volume processing within the criminal system. The criminal justice system is increasingly

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326. See *supra* notes 243-44 and accompanying text.

327. See *supra* notes 215, 224 and accompanying text.

328. Coleman, *supra* note 70, at 1014, 1018-19.

329. See *supra* notes 308-12 and accompanying text.

framed as one of design, and current, unsustainable conditions have triggered a reassessment.<sup>330</sup> Within this reassessment, there is a renewed focus on procedural fairness, and despite the persistent narrative of prosecutorial disadvantage, some jurisdictions are integrating civil discovery rules into their criminal codes through judicial and legislative means<sup>331</sup> as emerging scholarship challenges the civil and criminal procedural divide.<sup>332</sup>

Moving towards a unified procedure may go some way in putting an end to the procedural protectionism granted to both “civil haves” and “criminal haves.” Operating under a single forum, the opposing objectives of prosecutors and “civil haves” would likely engender compromise and pull the most extreme procedural practices toward a more neutral center. All litigants would likely encounter a reorientation. The prosecutor would likely experience an increase in pre-trial transparency and judicial scrutiny of assertions and claims. The criminal defendant would likely experience a more active role in developing and exchanging pretrial information.<sup>333</sup> The institutional player on the civil side, likely finding some success in efforts to narrow the scope of discovery, would also see the litigation spigot loosened, increasing the inflow of individual plaintiffs. Facing a tightening regime of discovery practice, individual civil plaintiffs

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330. See ALEXANDER, *supra* note 187, at 13 (framing mass incarceration as a permutation of Jim Crow); Butler, *supra* note 204, 1475-78 (reframing the response to the criminal justice system crisis in terms of a “Third Reconstruction”); Alexandra Natapoff, *Misdemeanors*, 85 S. CAL. L. REV. 1313, 1368 (2012) (“[C]riminal process starts to look increasingly ad hoc, a practice of social control in search of a justification.”).

331. Darryl K. Brown, *Discovery in State Criminal Justice*, in III REFORMING CRIMINAL JUSTICE 147, 148 (Erik Luna ed., 2017) (observing a “distinct trend toward requiring much more pretrial disclosure in criminal litigation”); Daniel S. McConkie, *The Local Rules Revolution in Criminal Discovery*, 39 CARDOZO L. REV. 59, 102-03 (2017) (finding courts are crafting local rules to import civil procedure concepts into criminal disputes); Turner & Redlich, *supra* note 324, at 289 (“[A] recent trend has been in the direction of earlier and broader discovery.”).

332. See Brown, *supra* note 34, at 1625 (favoring integration of civil discovery tools into criminal adjudication); Gold, *supra* note 34, at 123 (challenging demarcations between civil and criminal disputes); Gold et al., *supra* note 34, at 1639-40 (proposing integration of civil discovery to inform plea bargaining); Meyn, *supra* note 25, 1095-96; Meyn, *supra* note 23, at 83; Roberts, *supra* note 34, at 1100 (linking the low standard for IAC to lack of discovery in criminal cases); Rosen-Zvi & Fisher, *supra* note 34, at 121 (challenging the justifications for the civil and criminal procedural divide).

333. Goldstein, *supra* note 34, at 1192 (“The sum of the matter is that the defendant is not an effective participant in the pretrial criminal process.”).

would at least find an easier path to litigate. Within a unified procedural forum, one would expect renewed and significant engagements over core pleading and discovery issues. Most likely, the “have-nots” would benefit from the emerging détente.

