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Democracy and Criminal Discovery Reform After
Connick and Garcetti

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ARTICLES

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Janet Moore[†]

INTRODUCTION

The nondisclosure of information beneficial to criminal defendants causes wrongful convictions, wasteful litigation, and uncertainty in criminal adjudications.¹ Prosecutors are required to disclose this information under *Brady v. Maryland*² and related cases,³ criminal discovery rules,⁴ and codes of

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¹ Brandon L. Garrett, *Judging Innocence*, 108 COLUM. L. REV. 55, 96 & tbl.5 (2008); Brandon L. Garrett, *Innocence, Harmless Error, and Federal Wrongful Conviction Law*, 2005 WIS. L. REV. 35, 69-70 & n.173 (documenting cases); Peter A. Joy, *The Relationship Between Prosecutorial Misconduct and Wrongful Convictions: Shaping Remedies for a Broken System*, 2006 WIS. L. REV. 399, 403-04 (citing studies); Emily M. West, *Innocence Project, Court Findings of Prosecutorial Misconduct Claims in Post-Conviction Appeals and Civil Suits Among the First 255 DNA Exoneration Cases 1 & n.1* (2010), available at http://www.innocenceproject.org/docs/Innocence_Project_Prosec_Misconduct.pdf (citing studies); *id.* at 4-11 (sampling cases); N.Y. STATE BAR ASS'N, FINAL REPORT OF THE NEW YORK STATE BAR ASSOCIATION'S TASK FORCE ON WRONGFUL CONVICTIONS 7-9, 19-44 (2009), available at <http://www.nysba.org/Content/ContentFolders/TaskForceonWrongfulConvictions/FinalWrongfulConvictionsReport.pdf>.

² 373 U.S. 83 (1963).

³ See, e.g., *Kyles v. Whitley*, 514 U.S. 419, 421-22 (1995); *United States v. Bagley*, 473 U.S. 667, 679 (1985); *Napue v. Illinois*, 360 U.S. 264, 269-70 (1959); *Berger v. United States*, 295 U.S. 78, 88-89 (1935); *Mooney v. Holohan*, 294 U.S. 103, *reh'g denied*, 294 U.S. 732 (1935).

professional ethics.⁵ But two recent U.S. Supreme Court decisions, *Connick v. Thompson*⁶ and *Garcetti v. Ceballos*,⁷ underscore the weak enforceability of *Brady*-line authorities as mechanisms for criminal discovery reform. The cases also point out the contrasting fairness and efficiency of full open file discovery⁸ as an alternative reform model.

Connick arose after John Thompson spent eighteen years behind bars. For fourteen of those years, Thompson was on twenty-three-hour-a-day solitary confinement in a six-by-nine foot windowless death row cell at Angola Prison.⁹ A few weeks before his scheduled execution, a last-ditch defense investigation revealed what the Louisiana Court of Appeal described as the prosecutors' "intentional hiding of exculpatory evidence."¹⁰ This new information led to Thompson's release.¹¹ He then filed a federal civil rights action.¹² The federal jury awarded him \$14 million in compensation for his wrongful imprisonment.¹³ The

⁴ See, e.g., Stanley Z. Fisher, *The Prosecutor's Ethical Duty to Seek Exculpatory Evidence in Police Hands: Lessons from England*, 68 FORDHAM L. REV. 1379, 1417 & n.206 (2000) (citing discovery rule provisions).

⁵ Of the abundant literature on the inadequacy of disciplinary codes to regulate prosecutorial discovery violations, see Angela J. Davis, *The Legal Profession's Failure to Discipline Unethical Prosecutors*, 36 HOFSTRA L. REV. 275, 282-96 (2008); Bruce A. Green, *Prosecutorial Ethics as Usual*, 2003 U. ILL. L. REV. 1573, 1593-94; Margaret Z. Johns, *Unsupportable and Unjustified: A Critique of Absolute Prosecutorial Immunity*, 80 FORDHAM L. REV. 509, 516-20 (2011); Kevin C. McMunigal, *The (Lack of) Enforcement of Prosecutor Disclosure Rules*, 38 HOFSTRA L. REV. 847, 848-49 (2010); Robert P. Mosteller, *Exculpatory Evidence, Ethics, and the Road to the Disbarment of Mike Nifong: The Critical Importance of Full Open-File Discovery*, 15 GEO. MASON L. REV. 257, 264-85 (2008); Richard A. Rosen, *Disciplinary Sanctions Against Prosecutors for Brady Violations: A Paper Tiger*, 65 N.C. L. REV. 693, 716-31 (1987); Ellen Yaroshevsky, *Wrongful Conviction: It Is Time to Take Prosecutor Discipline Seriously*, 8 D.C. L. REV. 275, 276-77 (2004); Fred C. Zacharias & Bruce A. Green, *The Duty to Avoid Wrongful Convictions: A Thought Experiment in the Regulation of Prosecutors*, 89 B.U. L. REV. 1, 11-13, 58-59 (2009). *But see id.* at 5-11 (arguing that prosecutors "rarely deserve exclusive or primary blame for the conviction of innocent defendants" and urging more nuanced assessment of prosecutor's role); Alafair S. Burke, *Talking About Prosecutors*, 31 CARDOZO L. REV. 2119, 2127-37 (2010) (arguing that the shift away from fault-based rhetoric encourages prosecutorial cooperation with administrative reform).

⁶ 131 S. Ct. 1350 (2011).

⁷ 547 U.S. 410 (2006).

⁸ N.C. GEN. STAT. §§ 15A-903 to -910 (2012); *id.* § 15A-1415(f); see Mosteller, *supra* note 5, at 307-16 (discussing fairness and efficiency enhancements under full open file discovery statutes).

⁹ *Connick*, 131 S. Ct. at 1355; *Thompson v. Connick*, 553 F.3d 836, 842-43, 865 (5th Cir. 2008), *aff'd by divided en banc opinion*, 578 F.3d 293 (5th Cir. 2009), *rev'd*, 131 S. Ct. 1350 (2011).

¹⁰ *State v. Thompson*, 825 So. 2d 552, 557 (La. Ct. App. 2002), *rev. denied*, 829 So. 2d 427 (La. 2002) (reversing order denying Thompson a new trial).

¹¹ *Connick*, 131 S. Ct. at 1355.

¹² *Id.*

¹³ *Id.* at 1355-56.

jury found that Orleans Parish District Attorney Harry Connick had been deliberately indifferent toward the need to train line prosecutors on their *Brady* discovery duties.¹⁴

By a five-to-four vote, the Supreme Court ordered Thompson's award vacated and sharply restricted 42 U.S.C. § 1983 as an avenue for enforcing prosecutors' constitutional disclosure duties.¹⁵ The Court had previously held individual prosecutors immune from personal liability for failing to conduct *Brady* training.¹⁶ *Connick* effectively immunizes municipalities for those failures, eliminating the taxpaying and voting public as a meaningful resource to compensate and deter *Brady* violations. Writing for the dissent, Justice Ginsburg cautioned that "prosecutorial concealment . . . is bound to be repeated unless municipal agencies bear responsibility—made tangible by § 1983 liability."¹⁷

Connick illustrates the subordination of *Brady* enforcement to other interests—here, a concern to limit municipal liability, even when government employees confess to intentional misconduct. *Connick* also highlights a similar subordination of *Brady* enforcement by the same five-member Supreme Court majority in *Garcetti v. Ceballos*.¹⁸ Richard Ceballos's civil rights case was in some respects the mirror image of John Thompson's. Ceballos was not a criminal defendant. He was a Los Angeles prosecutor. He alleged that his supervisors unconstitutionally retaliated against him not for withholding beneficial information from the accused but for bringing such evidence to light.¹⁹ In *Garcetti*, the majority held that the First Amendment provides no protection against such retaliation.²⁰

Connick was promptly condemned for restricting 42 U.S.C. § 1983 as an avenue for enforcing *Brady*.²¹ But scholars

¹⁴ *Id.* at 1356.

¹⁵ *Id.* at 1356, 1366.

¹⁶ *Van de Kamp v. Goldstein*, 555 U.S. 335, 338-39 (2009). For a historical critique of prosecutorial immunity doctrines in the civil rights setting, see Johns, *supra* note 5, at 521-27. On the minimal utility of enforcing personal liability under section 1983, see Myriam E. Gilles, *Breaking the Code of Silence: Rediscovering "Custom" in Section 1983 Municipal Liability*, 80 B.U. L. REV. 17, 29-32 (2000).

¹⁷ *Connick*, 131 S. Ct. at 1370 (Ginsburg, J., dissenting).

¹⁸ See generally *Garcetti v. Ceballos*, 547 U.S. 410 (2006).

¹⁹ *Id.* at 416, 421-22.

²⁰ *Id.* at 426.

²¹ See, e.g., Justice John Paul Stevens, Remarks at Equal Justice Initiative Dinner (May 2, 2011), <http://online.wsj.com/public/resources/documents/stevens.pdf>; Susan A. Bandes, *The Lone Miscreant, the Self-Training Prosecutor, and Other Fictions: A Comment on Connick v. Thompson*, 80 FORDHAM L. REV. 715 (2011); Erwin Chemerinsky, *Head in the Sand on Prosecutorial Misconduct*, NAT'L L.J. (Apr. 25, 2011), <http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202491215314&slreturn=1&hblogin=1>.

have not unpacked *Garcetti*'s full significance on that point. In part, this neglect is understandable. With few exceptions,²² *Garcetti* has been analyzed on its terms, as clarifying First Amendment doctrine regarding government employee speech.²³ Closer analysis reveals a previously unremarked due process shield that should have protected Richard Ceballos from retaliation for *Brady* compliance. At a deeper level, the silence on *Garcetti*'s implications for constitutional criminal discovery is emblematic of the short shrift often accorded to the enforcement of prosecutors' constitutional discovery obligations.

Taken together, the two cases neatly illustrate *Brady*'s weak enforceability. By effectively eliminating municipal liability even when prosecutors deliberately suppress evidence, *Connick* gives a wink-and-nod to nondisclosure.²⁴ By limiting section 1983 protection against retaliation for good faith compliance with discovery duties, *Garcetti* sends a chilling message that prosecutors may be damned if they do disclose beneficial evidence to the defense. By landing this one-two punch against enforceability of *Brady*-line duties, *Connick* and *Garcetti* invite a contrast with full open file discovery statutes as the optimal strategy for increasing the fairness, finality, and efficiency of criminal adjudications.

Among discovery reform statutes, North Carolina's are the most expansive in the nation. They mandate the prosecution's disclosure to the defense of all information obtained in a criminal investigation.²⁵ They require recordation of oral statements²⁶ and impose criminal penalties for willful

²² Margaret Tarkington, *Government Speech and the Publicly Employed Attorney*, 2010 BYU L. REV. 2175, 2178-89 & nn.13, 46-57 (addressing due process disclosure implications of *Garcetti* and responding to Lawrence Rosenthal, *The Emerging First Amendment Law of Managerial Prerogative*, 77 FORDHAM L. REV. 33 (2008)).

²³ See *id.* at 2176 & n.5 (citing scholarly commentary).

²⁴ *Connick*'s wink-and-nod was not undone by the terse majority opinion granting *Brady* relief in the Orleans Parish case of *Smith v. Cain*, 132 S. Ct. 627, 630-31 (2012), nor by the remarkable suggestion during oral argument that the prosecutor consider forfeiting the case. See Lyle Denniston, *Disaster at the Lectern*, SCOTUSBLOG (Nov. 8, 2011, 4:51 PM), <http://www.scotusblog.com/?p=131456>. The governing doctrine invited diverse views on the materiality of the undisclosed evidence, as was demonstrated by Justice Thomas's close analysis of the evidence, *Smith*, 132 S. Ct. at 631-41 (Thomas, J., dissenting), by the state trial judge who rejected Smith's *Brady* claim on the merits after hearing witness testimony over the course of four days, Respondent's Brief at 20, *Smith*, 132 S. Ct. 627 (No. 10-8145), and by the numerous Louisiana appellate judges who voted (apparently unanimously) to deny Smith's petitions for discretionary review, see *id.* and *State v. Smith*, 45 So. 3d 1065 (La. 2010). For discussion of the practical and doctrinal problems that lead to such disparate assessments of *Brady*-line duties, see *infra* Part II.

²⁵ N.C. GEN. STAT. § 15A-903(a)(1)(a) (2012).

²⁶ *Id.* § 15A-903(a)(1)(c).

violations.²⁷ Available empirical evidence shows significant success in the statutes' implementation and expansion, yet full open file discovery remains a rarity in the United States.²⁸ And like the precise due process disclosure duty at issue in *Garcetti*, this cutting-edge development in criminal procedure has received scant scholarly attention.

The silence may result in part from a trend, expressed in Marc Miller and Ronald Wright's *The Black Box*,²⁹ which privileges internal bureaucratic improvement over litigation and legislation as the only effective avenue toward criminal justice reform—at least with respect to prosecutors' discretionary decision making. Full open file discovery reform bolsters skepticism toward that trend. Dogged case investigation and litigation raised the profile of criminal discovery issues for the public, the media, and key legislators. Increased public scrutiny led to hard-fought political compromises in the enactment and amendment of the reform statutes.

Full open file reform vindicates law and politics as effective strategies—complementary to internal agency reform—for increasing transparency and accountability in prosecutorial decision making. Broader attention and closer study, ideally through the full open file statutes' evaluation as a model for uniform legislation, should raise discovery reform to parity with other criminal procedure reforms. Comparable initiatives include improvements in eyewitness identification protocols, in the testing and retention of forensic evidence, and in interrogation methods.³⁰ This article fills an important analytical gap by focusing closely on the litigation and legislation that drove full open file discovery reform, and by proposing that the *Connick-Garcetti* one-two punch against enforcing discovery duties can and should energize nationwide efforts to obtain full open file reform.

²⁷ *Id.* § 15A-903(d).

²⁸ For examples of other relatively broad criminal discovery provisions, see MINN. R. CRIM. P. 9.01 (2010); N.J. COURT R. 3:13-3(a)-(c) (2011).

²⁹ Marc L. Miller & Ronald F. Wright, *The Black Box*, 94 IOWA L. REV. 125, 128-30 (2008).

³⁰ *See, e.g.*, UNIF. ELEC. RECORDATION OF CUSTODIAL INTERROGATIONS ACT (2010), available at <http://www.law.upenn.edu/bll/archives/ulc/erci/2010final.htm>; David Wolitz, *Innocence Commissions and the Future of Post-Conviction Review*, 52 ARIZ. L. REV. 1027, 1046-47 & nn.136-38 (2010) (citing examples of reform legislation in Illinois and Wisconsin); Sub. S.B. 77, 128th Gen. Assemb. (Ohio 2009) (establishing DNA database, requiring recordation of interrogations, and revising eyewitness identification procedures by enacting OHIO REV. CODE ANN. §§ 109.561, 2933.81-83, 2953.56-60 and amending *id.* §§ 109.573, 2901.07, 2953.21, 2953.23, 2953.31, 2953.32, 2953.321, 2953.35, 2953.51, 2953.54, 2953.55, 2953.71-79, 2953.81, 2953.83, 2953.84).

Parts I and II set the stage for in-depth examinations of *Connick* and *Garcetti* as examples of *Brady*'s weak enforceability and for discussion of the litigation and legislation that generated the full open file reform alternative. Part I excavates the roots of due process discovery doctrine to identify core meanings and principles. Part II summarizes intractable doctrinal and practical problems that weaken enforceability of constitutional criminal discovery rights and duties. Part III examines *Connick* and *Garcetti* as recent exemplars of those problems. Part IV contrasts *Connick* and *Garcetti* as examples of the *Brady* regime's complexity and costs with the simplicity and efficiency of full open file discovery. This part surveys reported case law, available legislative history, and observations from some frontline participants as the most readily accessible evidence of full open file discovery's implementation and expansion.

Forthcoming research identifies conditions that enable such reform in some jurisdictions and impede it in others. But the story of full open file discovery reform recasts the core lesson of *Connick* and *Garcetti*. The cases need not reinforce despair of litigation and legislation as strategies for sustainable system improvement. They can introduce a new chapter in a broader reform story. Their holdings underscore *Brady*'s weak enforceability and its intolerable results in wasted lives, tramped liberty, and squandered criminal justice resources. *Connick* and *Garcetti* should motivate broad adoption of full open file discovery statutes as a prerequisite—a necessary, although not sufficient condition—for improving efficiency, fairness, and finality in the resolution of criminal cases.

I. DUE PROCESS DISCLOSURE DUTIES

Brady doctrine requires prosecutors to disclose certain beneficial information to the defense.³¹ It is helpful to excavate the historical roots of these duties, if only to counteract shorthand citations that elide or misstate core principles and holdings of *Brady*-line cases.³² Due process discovery duties are

³¹ *Smith v. Cain*, 132 S. Ct. 627, 630 (2012).

³² *See, e.g., Connick v. Thompson*, 131 S. Ct. 1350, 1378-82 (2011) (Ginsburg, J., dissenting) (citing Orleans Parish prosecutors' admitted ignorance of core *Brady*-line discovery duties); *see also* Cookie Ridolfi, *New Perspectives on Brady and Other Disclosure Obligations: Report of the Working Groups on Best Practices: External Regulation*, 31 CARDOZO L. REV. 1961, 2030 n.83 (2010) (distinguishing *Brady* duties from ethics rules on the basis that the latter require no defense request to trigger disclosure duty); *but see* *United States v. Bagley*, 473 U.S. 667, 682 (1985) (eliminating defense request requirement from due process discovery doctrine). In designing and

grounded in the prosecutorial mandate to speak truth³³ and seek justice.³⁴ The duties encompass two types of evidence. The first tends to reduce the defendant's culpability with respect to guilt or sentencing.³⁵ Examples include witness statements that corroborate an alibi defense.³⁶ The second category comprises impeachment evidence. A deal between a witness and a prosecutor to exchange testimony for leniency on a pending charge, for example, may support an inference that the witness is less credible due to pro-prosecution bias.³⁷

The history of due process discovery doctrine also reveals a handful of principles through which the core meanings of truth-speaking and justice-seeking are to be implemented. For example, there is no mens rea element in a *Brady* claim. Prosecutors must disclose favorable evidence whether or not defense counsel requests it.³⁸ Defendants need not prove prosecutors' acts or omissions were undertaken intentionally or in bad faith.³⁹ Another core principle requires cumulative prejudice review. Courts must assess harm from nondisclosure by reviewing the strength and weakness of all evidence presented by both parties at trial and in postconviction proceedings.⁴⁰

These core principles of *Brady* doctrine began to emerge in 1935, when Thomas Mooney obtained Supreme Court review of his capital murder case.⁴¹ Mooney was a workers' rights activist. He was sentenced to death in 1917 for a San Francisco bombing that killed ten people.⁴² Mooney fought his conviction for eighteen years before the Supreme Court accepted his petition for federal habeas review. In *Mooney v. Holohan*, the Court held—for the first time—that the Fourteenth Amendment's Due Process Clause forbids prosecutors from

implementing training programs for defense counsel, I have often found comparable misunderstanding or misstatement of criminal discovery rights and duties.

³³ *Napue v. Illinois*, 360 U.S. 264, 269-70 (1959).

³⁴ *Berger v. United States*, 295 U.S. 78, 88 (1935).

³⁵ WAYNE R. LAFAYE ET AL., *PRINCIPLES OF CRIMINAL PROCEDURE: POST-INVESTIGATION* 425 (2d ed. 2009).

³⁶ *Id.*

³⁷ For thoughtful analysis of the duty to disclose impeachment evidence, see R. Michael Cassidy, *Plea Bargaining, Discovery, and the Intractable Problem of Impeachment Disclosures*, 64 VAND. L. REV. 1429, 1431 (2011).

³⁸ *United States v. Bagley*, 473 U.S. 667, 682 (1985).

³⁹ *Brady v. Maryland*, 373 U.S. 83, 87 (1963).

⁴⁰ *Kyles v. Whitley*, 514 U.S. 419, 439-40 (1995).

⁴¹ *Mooney v. Holohan*, 294 U.S. 103 (1935) (per curiam).

⁴² Lori A. Ringhand, *Aliens on the Bench: Lessons in Identity, Race and Politics from the First "Modern" Supreme Court Confirmation Hearing to Today*, 2010 MICH. ST. L. REV. 795, 805 & n.56.

obtaining convictions through the knowing use of perjured testimony.⁴³ The constitutional values at issue were fairness and reliability in contests between concentrated government power and the individual.⁴⁴

A few months later, the Court decided *Berger v. United States*.⁴⁵ This mine-run counterfeiting case contains oft-cited descriptions of the prosecution's unique purpose and power and the corresponding primacy of prosecutors' duties to speak truth and seek justice. Under *Berger*, the prosecutor is a minister of government and "servant of the law."⁴⁶ The prosecution's interest "is not that it shall win a case, but that justice shall be done."⁴⁷ The prosecution must ensure that "guilt shall not escape nor innocence suffer."⁴⁸ It is as much the prosecutor's duty "to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one."⁴⁹ This is so, the Court reasoned, because the fact finder in a criminal case reasonably expects the prosecutor to abide by the foregoing high principles. Therefore, evidence and arguments bearing a prosecutor's imprimatur weigh strongly against the defendant.⁵⁰

In a key doctrinal development, the *Berger* Court assessed prejudice cumulatively. *Berger* alleged that the prosecutor in his case had violated his due process rights in several ways. Instead of addressing each allegation piecemeal, the Court held that the prosecutor's misstatements of fact, insinuations of facts not in evidence, and other "pronounced and persistent" misconduct, taken together, rendered the proceedings unfair and required a new trial.⁵¹ *Berger's*

⁴³ *Mooney*, 294 U.S. at 112-13. The Court sent the case back to state court for exhaustion of the new due process claim. *Id.* at 115. Despite pleas on Mooney's behalf from Felix Frankfurter via President Wilson, the California governor refused to order a new trial. Mooney spent four more years in prison. He was released the same week that Frankfurter was appointed to the Supreme Court. Frankfurter's intervention on Mooney's behalf was cited against him during his confirmation hearings through, *inter alia*, a letter from Theodore Roosevelt deriding Frankfurter's "besmirching the reputation of God-fearing, patriotic Americans . . . destroying respect for law and order, and coddling anarchist[s], bomb throwers, and cowards." Ringhand, *supra* note 42, at 805 & n.56 (citing MICHAEL E. PARRISH, FELIX FRANKFURTER AND HIS TIMES: THE REFORM YEARS 99 (1982)).

⁴⁴ *Mooney*, 294 U.S. at 112-15.

⁴⁵ 295 U.S. 78, 78 (1935).

⁴⁶ *Id.* at 88.

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.* at 89; *see* *Dye v. Hofbauer*, 546 U.S. 1, 4 (2005) (*per curiam*) (interpreting *Berger's* holding as sounding in due process).

cumulative-prejudice analysis has remained a core component of constitutional criminal discovery doctrine.⁵²

In addition to *Mooney* and *Berger*, a third major due process discovery case emerged in 1935. That year a Kansas jury convicted Harry Pyle of a terrible series of crimes involving murder, torture, and theft.⁵³ Despite the heinous nature of these offenses,⁵⁴ the Supreme Court's per curiam decision in *Pyle v. Kansas* opened the door to a significant expansion in constitutional criminal discovery rights and duties.⁵⁵

The Court held that Pyle's "inexpertly drawn" but unrefuted pro se habeas petition required a hearing on claims that prosecutors convicted him through the knowing use of perjured testimony.⁵⁶ That holding was consistent with *Mooney*, but the Court went further. Pyle articulated a separate and distinct claim that prosecutors engaged in "the deliberate suppression . . . of evidence favorable to him" beyond the facts relating to the allegedly perjured testimony.⁵⁷ Citing *Mooney*, the Court held that Pyle's claims, if proved, would require his release.⁵⁸

The Court applied the *Pyle* "favorable evidence" rule fifteen years later in another per curiam opinion. In *Alcorta v. Texas*, a capital case, the Court granted a pro se petition for certiorari, stayed execution, and reversed the Texas courts' denials of postconviction relief.⁵⁹ The reason: the prosecutor had suppressed evidence that Alcorta could have used to impeach a key state witness.⁶⁰ *Napue v. Illinois* followed *Alcorta* by imposing a due process duty on the prosecution to correct testimony that is known to be false, even when the evidence is not directly exculpatory and instead can be used to

⁵² See *Kyles v. Whitley*, 514 U.S. 419, 439-40 (1995).

⁵³ *Kansas v. Pyle*, 57 P.2d 93, 96-98 (Kan. 1936).

⁵⁴ The murder victim's brother committed suicide after testifying against Pyle, "apparently because of the aftereffects of the torture" the defendants had inflicted upon him. *Id.* at 98.

⁵⁵ 317 U.S. 213, 216 (1942).

⁵⁶ *Id.* at 215-16.

⁵⁷ *Id.* (emphasis added).

⁵⁸ *Id.* at 216. On remand, the Kansas Supreme Court found no evidence of perjury or suppression of favorable evidence. *Pyle v. Amrine*, 156 P.2d 509, 521 (Kan. 1945). Pyle's son was pardoned in 1959 after his conviction for these crimes. Alvin Dumler, *Mass Murder Happened Before in Southwest Kansas*, HUTCHINSON NEWS (Kan.), Nov. 22, 1959, at 2, available at <http://hutchnews.com/www/clutterpdfs/cluttermurders-day7-othermassmurders.pdf>. But Bedau and Radelet appear mistaken in stating that "Pyle was released." Hugo Adam Bedau & Michael L. Radelet, *Miscarriages of Justice in Potentially Capital Cases*, 40 STAN. L. REV. 21, 153 & n. 791 (1987) (citing *Pyle*, 317 U.S. at 214); see also *Kansas v. Marsh*, 548 U.S. 163, 190-93 (2006) (Scalia, J., concurring) (compiling and discussing criticisms of Bedau-Radelet study).

⁵⁹ 355 U.S. 28, 28-32 (1957) (per curiam).

⁶⁰ *Id.* at 30-32.

challenge the credibility of a prosecution witness.⁶¹ The *Napue* Court reasoned, “A lie is a lie, no matter what its subject, and, if it is in any way relevant to the case, the district attorney has the responsibility and duty to correct what he knows to be false and elicit the truth.”⁶²

*Brady v. Maryland*⁶³ became the eponymous due process discovery case by building on the core meanings developed from *Mooney* and *Pyle* through *Alcorta* and *Napue*.⁶⁴ First, *Brady* clarified prosecutors’ due process duty to disclose evidence favorable to the defense that is “material to guilt or punishment.”⁶⁵ A second key *Brady* holding rendered prosecutors’ good or bad faith regarding nondisclosure irrelevant.⁶⁶ Initial refinements of these two holdings focused on the elusive definition of *materiality*.

Brady arose after the defendant was convicted of murder and sentenced to death.⁶⁷ He later learned that his codefendant had confessed to committing the murder.⁶⁸ The Court held the new evidence *material* to Brady’s defense. But the Court did not order a new trial. Instead, the Court ordered resentencing and gave some hints about the meaning of *materiality* in due process discovery doctrine.⁶⁹ A key fact was Brady’s own confession to complicity in the murder.⁷⁰ The Court reasoned that, in light of Brady’s confession, the undisclosed evidence would have been unlikely to alter the jury’s verdict on Brady’s guilt.⁷¹ In contrast, the Court held, evidence of shared culpability between the codefendants could have affected jurors’ views on Brady’s eligibility for the death sentence.⁷²

⁶¹ 360 U.S. 264, 269-70 (1959).

⁶² *Id.* The prosecutor elicited the same lie on redirect examination. Instead of holding the elicitation of that perjured testimony an independent due process violation under *Mooney*, the Court, instead, took it as proof of prejudice from the due process violation that occurred when the prosecutor suppressed the truth during cross-examination. The prosecutor proved the lie’s significance, the Court held, by deliberately eliciting the same lie on redirect. *Id.*

⁶³ 373 U.S. 83 (1963).

⁶⁴ *Id.* at 87.

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.* at 84.

⁶⁸ *Id.* at 87.

⁶⁹ *Id.* at 87-88.

⁷⁰ *See id.* at 84.

⁷¹ *Id.* at 89.

⁷² *Id.* at 88-91. The state resentenced Brady to life eight years later. *Brady v. Superintendent, Anne Arundel Cnty. Detention Ctr.*, 443 F.2d 1307, 1309-10 (4th Cir. 1971).

After *Brady*, the Court clarified that due process disclosure duties encompass all material impeachment evidence.⁷³ But the Court took another twenty-two years to define the term *material*. In crafting that definition in *United States v. Bagley*,⁷⁴ the Court borrowed from new jurisprudence governing the Sixth Amendment right to effective assistance of counsel. *Bagley* grafted the prejudice definition from the ineffective assistance test onto due process doctrine governing prosecutors' duty to disclose evidence beneficial to the defense.⁷⁵ Therefore, to prove that undisclosed evidence is material, defendants must show "a reasonable probability" of a different result in the case had the undisclosed evidence been available to the defense.⁷⁶ A "reasonable probability [is] a probability sufficient to undermine confidence in the outcome."⁷⁷

A decade passed before the next significant refinement in due process disclosure doctrine. In *Kyles v. Whitley*,⁷⁸ the Court undertook a detailed assessment of the alleged disclosure violations. Such detail was necessary, according to the concurring Justices, because prosecutors serving under Orleans Parish District Attorney Harry Connick, Sr. committed "blatant and repeated violations of a well-settled constitutional obligation" to reveal favorable evidence.⁷⁹ Ordering a new trial,⁸⁰ the Court clarified due process disclosure doctrine in several important ways. First, *Kyles* expanded on the key *Brady* holding that prosecutors' good or bad faith regarding undisclosed evidence is irrelevant.⁸¹ *Kyles* reiterated the longstanding

⁷³ Giglio v. United States, 405 U.S. 150, 154-55 (1972).

⁷⁴ 473 U.S. 667 (1985).

⁷⁵ *Id.* at 682-83 (citing Strickland v. Washington, 466 U.S. 664, 668 (1984)).

⁷⁶ *Id.*

⁷⁷ *Id.* at 682. In another key holding, *Bagley* eliminated the "demand" requirement of *Brady's* due process discovery doctrine, imposing a disclosure duty upon prosecutors even in the absence of any defense request for the information. *Id.*

⁷⁸ 514 U.S. 419 (1995).

⁷⁹ *Id.* at 455 (Stevens, J., concurring). *Kyles's* first trial ended in a hung jury. His second trial began on December 6, 1984 and ended in his conviction and death sentence. Petitioner's Brief at *2, *Kyles v. Whitley*, 514 U.S. 419 (1995) (No. 93-7927) [hereinafter *Kyles Pet. Br.*]. On the same morning that *Kyles's* second trial began, Raymond T. Liuzza, Jr., "son of a prominent New Orleans business executive," was murdered in front of his home. Connick v. Thompson, 131 S. Ct. 1350, 1371 (2011) (Ginsburg, J., dissenting). John Thompson was convicted and sentenced to death for Liuzza's murder. *Id.* at 1374. Thompson's trial, like *Kyles's*, took less than three days, including death-qualification of the jury, the guilt/innocence phase, and the sentencing phase. Compare *Kyles Pet. Br.* at *6 (trial completed December 6-8, 1984), with Petitioner's Brief at 12, *Connick*, 131 S. Ct. 1350 (No. 09-571) (trial completed May 6-8, 1985).

⁸⁰ *Kyles*, 514 U.S. at 421.

⁸¹ *Id.* at 433, 437-38.

principle that prosecutors are responsible for disclosing evidence in their own files as well as evidence held by other prosecutors in the same office.⁸² But *Kyles* also explained that prosecutors must obtain and disclose evidence held by case investigators that is materially beneficial to the defense, whether or not prosecutors know the evidence exists.⁸³

Kyles retained *Berger's* cumulative-prejudice principle.⁸⁴ But *Kyles* also focused closely on the link between the *Brady* due process materiality test and the Sixth Amendment prejudice test for ineffective assistance of counsel under *Strickland v. Washington*.⁸⁵ There are three critical components of this doctrinal link. First, the defendant's burden to prove a "reasonable probability" of a different outcome is less than a preponderance of the evidence.⁸⁶ Putting the familiar preponderance test in the *Brady* context, defendants need not advance the prejudice ball past the fifty-yard line; they do not have to show that it is more likely than not that the cumulative effect of the undisclosed evidence would have led to a different verdict.⁸⁷

Kyles also clarified the distinction between *Brady* materiality and *Strickland* prejudice, on one hand, and the test for sufficiency of the evidence, on the other.⁸⁸ The latter test is governed by *Jackson v. Virginia*.⁸⁹ Under *Jackson*, the defense must prove that no reasonable juror would vote for conviction when the evidence is viewed in a light most favorable to the prosecution.⁹⁰ The *Kyles* Court held that the demanding *Jackson* standard is inappropriately onerous, in the context of prosecutors' due process duties, to ensuring that defendants receive fair trials resulting in verdicts that reliably warrant public (and judicial) confidence.⁹¹ In the constitutional discovery and ineffective assistance settings, therefore, courts must weigh the strength and weakness of all the evidence that is presented by both parties in both the trial and postconviction proceedings.⁹²

⁸² *Id.* at 432-37.

⁸³ *Id.* at 437; see also *Youngblood v. West Virginia*, 547 U.S. 867, 869-70 (2006) (police suppression of exculpatory evidence violates *Brady*).

⁸⁴ *Kyles*, 514 U.S. at 436.

⁸⁵ *Id.* at 437.

⁸⁶ *Id.* at 434-35.

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ 443 U.S. 307, 318-19 (1979).

⁹⁰ *Id.*

⁹¹ *Kyles*, 514 U.S. at 437-38.

⁹² *Id.* at 434-35 & n.8.

Finally, *Kyles* emphasized the significant responsibility that accompanies prosecutors' authority to make discretionary decisions about disclosing *Brady*-line evidence. The Court cautioned that "a prosecutor anxious about tacking too close to the wind will disclose a favorable piece of evidence."⁹³

II. DUE PROCESS TAKES A DIVE

New Orleans prosecutors did not "tack[] too close to the wind"⁹⁴ in John Thompson's case. They sank the ship. The Louisiana Court of Appeal concluded that Orleans Parish prosecutors put Thompson on death row through the "intentional hiding of exculpatory evidence."⁹⁵ That evidence, when unearthed by a determined defense investigator, contributed to dismissal and acquittal on the robbery and murder charges, respectively, that the prosecutors had used to seek Thompson's execution.⁹⁶

Thompson's case is one of many in which nondisclosure of exculpatory evidence imposed unnecessary harm.⁹⁷ Criminal discovery reform is necessary because the constitutional disclosure duties traced in Part I suffer from limited scope and weak enforceability.⁹⁸ Noncompliance and significant system costs are the predictable results. To cite examples from John Thompson's jurisdiction alone, numerous reported *Brady* cases from Harry Connick's tenure as Orleans Parish District Attorney involved prosecutors failing to disclose evidence to the

⁹³ *Id.* at 439. *Kyles* spent more than a decade on Louisiana's death row before the Supreme Court ordered a new trial. *Id.* at 421. After three subsequent trials ended in hung juries, Connick's office dismissed the charges. JED HORNE, *DESIRE STREET: A TRUE STORY OF DEATH AND DELIVERANCE IN NEW ORLEANS* 317-21 (2005). In July 2010, *Kyles* was charged with the first-degree murder and second-degree kidnapping of Crystal St. Pierre, arising from an alleged dispute over the value of a food stamp card. See Alan Powell II, *Curtis Kyles May Have Killed Woman over Food Stamp Card*, *TIMES-PICAYUNE* (July 7, 2010, 4:18 PM), http://www.nola.com/crime/index.ssf/2010/07/curtis_kyles_may_have_killed_w.html; see also *If Kyles Killed . . .*, *JEDHORNE.COM*, <http://jedhorne.com/2010/06/did-kyles-kill/> (last visited July 3, 2011).

⁹⁴ *Kyles*, 514 U.S. at 439.

⁹⁵ *State v. Thompson*, 825 So. 2d 552, 557-58 (La. Ct. App.) (reversing order denying Thompson a new trial), *rev. denied*, 829 So. 2d 427 (La. 2002).

⁹⁶ *Connick v. Thompson*, 131 S. Ct. 1350, 1355 (2011).

⁹⁷ See *supra* note 1; see *infra* note 100.

⁹⁸ There is near unanimity among courts and commentators that enforceability of *Brady*-line disclosure duties has remained problematic from the outset. Johns, *supra* note 5, at 516-21; Daniel Medwed, *Brady's Bunch of Flaws*, 67 WASH. & LEE L. REV. 1533 (2010); Ridolfi, *supra* note 32, at 2030-31 (existing disclosure rules "are not doing enough because they are inadequate and sometimes not enforced at all"); Stephanos Bibas, *Brady v. Maryland: From Adversarial Gamesmanship Toward the Search for Innocence?*, in *CRIMINAL PROCEDURE STORIES* 129 (Carol Steiker ed., 2006). For an expression of judicial frustration with the development of *Brady* doctrine, see *United States v. Oxman*, 740 F.2d 1298, 1309-11 (3d Cir. 1984).

defense for timely use at trial.⁹⁹ Discovery violations required new trials in seventeen of those cases.¹⁰⁰ In the most recent case, *Smith v. Cain*, the Court vacated a quintuple-murder conviction.¹⁰¹

Such statistics, and the associated inefficiencies and unfairness, result from inherent flaws in the governing doctrine and from practical realities confronting those charged with implementation. At the doctrinal level, the first critical weakness is *Brady's* mistaken assumption that prosecutors are as well equipped as defense attorneys to recognize the exculpatory or impeachment value of particular pieces of evidence. Second, *Brady's* built-in materiality prejudice standard requires prosecutors to assess, ex ante, a question that often can be answered only ex post: whether the cumulative

⁹⁹ *Smith v. Cain*, 132 S. Ct. 627, 630-31 (2012); *Kyles v. Whitley*, 514 U.S. 419, 421 (1995); *Mahler v. Kaylo*, 537 F.3d 494, 503 (5th Cir. 2008); *Crawford v. Cain*, 248 F. App'x 500, 504-07 (5th Cir. 2007); *Ward v. Whitley*, 21 F.3d 1355, 1360 (5th Cir. 1994); *Monroe v. Blackburn*, 748 F.2d 958, 959-60 (5th Cir. 1984); *Davis v. Heyd*, 479 F.2d 446, 453 (5th Cir. 1973); *Perez v. Cain*, No. 04-1905, 2008 U.S. Dist. LEXIS 1660, at *59-64 (E.D. La. 2008); *Sholes v. Cain*, No. 06-1831, 2007 U.S. Dist. LEXIS 99960, at *33-34 (E.D. La. 2007); *Joseph v. Whitley*, No. 92-2335, 1992 U.S. Dist. LEXIS 17385, at *5-12 (E.D. La. 1992); *Brown v. Donnelly*, No. 89-4062, 1990 U.S. Dist. LEXIS 13155, at *21-26 (E.D. La. 1990); *State v. Bright*, 875 So. 2d 37, 44 (La. 2004); *State v. Kemp*, 828 So. 2d 540, 546 (La. 2002); *State v. Marshall*, 660 So. 2d 819, 827 (La. 1995); *State v. Knapper*, 579 So. 2d 956, 961 (La. 1991); *State v. Rosiere*, 488 So. 2d 965, 970-71 (La. 1986); *State v. Perkins*, 423 So. 2d 1103, 1107-08 (La. 1982); *State v. Curtis*, 384 So. 2d 396, 397 (La. 1980); *State v. Falkins*, 356 So. 2d 415, 416-19 (La. 1978); *State v. Carney*, 334 So. 2d 415, 419 (La. 1976); *State of LA In the Interest of L.V.*, 66 So. 3d 558, 561-62; (La. Ct. App. 2011); *State v. Jones*, No. 2008-KA-0516, 2009 La. App. Unpub. LEXIS 214, at *24-45 (La. Ct. App. 2009); *State v. Goodwin*, 881 So. 2d 1229, 1235-36 (La. Ct. App. 2004); *State v. Lindsey*, 844 So. 2d 961, 963-70 (La. Ct. App. 2003); *State v. Collins*, 826 So. 2d 598, 611-12 (La. Ct. App. 2002); *State v. Nightengale*, 818 So. 2d 819, 824-25 (La. Ct. App. 2002); *Thompson*, 825 So. 2d at 557-58; *State v. Lee*, 778 So. 2d 656, 667 (La. Ct. App. 2001); *State v. Moore*, 777 So. 2d 600, 605-06 (La. Ct. App. 2000); *State v. Major*, 708 So. 2d 813, 817-18 (La. Ct. App. 1998); *State v. Grubbs*, 644 So. 2d 1105, 1110-11 (La. Ct. App. 1994); *State v. Duncan*, 648 So. 2d 1090, 1099-1100 (La. Ct. App. 1994); *State v. Wolfe*, 630 So. 2d 872, 879-80 (La. Ct. App. 1993); *State v. Dozier*, 553 So. 2d 931, 933 (La. Ct. App. 1989); *State v. Walter*, 514 So. 2d 620, 621-22 (La. Ct. App. 1987).

¹⁰⁰ *Smith*, 132 S. Ct. at 630-31; *Kyles*, 514 U.S. at 421; *Mahler*, 537 F.3d at 503; *Monroe*, 607 F.2d at 152-53; *Davis*, 479 F.2d at 453; *Perez*, 2008 U.S. Dist. LEXIS 1660, at *59-64; *Bright*, 875 So. 2d at 44; *Knapper*, 579 So. 2d at 961; *Rosiere*, 488 So. 2d at 970-71; *Perkins*, 423 So. 2d at 1107-08; *Curtis*, 384 So. 2d at 397; *Falkins*, 356 So. 2d at 416-19; *Carney*, 334 So. 2d at 419; *Lindsey*, 844 So. 2d at 969-70; *Kemp*, 828 So. 2d at 546; *Thompson*, 825 So. 2d at 557-58; *Lee*, 778 So. 2d at 667; In *State v. Parker*, 361 So. 2d 226, 227 (La. 1978), the Court ordered a new trial because it was impossible to reconstruct the record in order to litigate the *Brady* claim on appeal; the defendant then withdrew the appeal.

¹⁰¹ 132 S. Ct. at 630. By an 8-1 vote, the majority tersely rejected Justice Thomas's conclusion, based on a detailed assessment of the evidence, that the defendant failed to satisfy *Brady's* materiality standard. Instead, the Court emphasized conflicts between the pretrial statements and trial testimony of the lone eyewitness to link the defendant to the murders.

impact of evidence beneficial to the defense would have created a reasonable possibility of a different result if it had been disclosed to the defense in time to be used during the investigation and litigation of the original proceeding.¹⁰²

The two flaws are linked. From some perspectives, *Brady's* materiality test imposes upon prosecutors as much a duty of divination as disclosure.¹⁰³ Cognitive phenomena such as tunnel vision, groupthink, confirmation bias, and avoidance of cognitive dissonance raise additional psychosocial barriers to *Brady* compliance.¹⁰⁴ These pervasive, unconscious patterns of cognition can trump even the best of prosecutorial intentions.

Brady's enforceability took another hit at the doctrinal level when the Supreme Court shrank law enforcement's constitutional duties to investigate and retain exculpatory information. Investigators have no due process duty to investigate information that helps the defense.¹⁰⁵ Although prosecutors are responsible for obtaining *Brady* information from their investigative agents,¹⁰⁶ officers can destroy potentially exculpatory evidence with impunity unless a defendant can

¹⁰² *Kyles*, 514 U.S. at 437 (“[T]he prosecution, which alone can know what is undisclosed, must be assigned the consequent responsibility to gauge the likely net effect of all such evidence and make disclosure when the point of [materiality] is reached.”); *United States v. Agurs*, 427 U.S. 97, 108 (1976) (“[T]he significance of an item of evidence can seldom be predicted accurately until the entire record is complete.”), *overruled on other grounds by* *United States v. Bagley*, 473 U.S. 667, 682 (1985); see *Cassidy*, *supra* note 37, at 1437-45.

¹⁰³ *Kyles*, 514 U.S. at 439 (“[T]he character of a piece of evidence as favorable will often turn on the context of the existing or potential evidentiary record.”).

¹⁰⁴ Mosteller, *supra* note 5, at 309-12; Alafair S. Burke, *Improving Prosecutorial Decision Making: Some Lessons of Cognitive Science*, 47 WM. & MARY L. REV. 1587, 1602-12 (2006); Ronald F. Wright, *New Perspectives on Brady and Other Disclosure Obligations: Report of the Working Group on Best Practices: Systems and Culture*, 31 CARDOZO L. REV. 1961, 1995-2010 (2010).

¹⁰⁵ *Baker v. McCollan*, 443 U.S. 137, 145-46 (1979). Several circuits have distinguished *Baker*. See *Everson v. Leis*, 556 F.3d 484, 498-99 (6th Cir. 2009) (arresting officer must consider both “inculpatory and exculpatory evidence” in determining whether there is probable cause to arrest); *Russo v. City of Bridgeport*, No. 05-4302-CV, 2007 U.S. App. LEXIS 16171, at *23-30 (2d Cir. Feb. 27), *cert. denied*, 552 U.S. 818 (2007) (allowing civil rights claim to proceed under Fourth Amendment where arresting officers detained plaintiff while failing to investigate readily available exculpatory evidence) (collecting cases and correcting *Russo v. City of Bridgeport*, 479 F.3d 196 (2d Cir. 2007)); see also *Fisher*, *supra* note 4, at 1399-1401 (describing police duty to investigate exculpatory evidence under England’s “tough on crime” Criminal Procedure and Investigation Act 1996, ch. 25 (Eng.)).

¹⁰⁶ *Youngblood v. West Virginia*, 547 U.S. 867, 869-70 (2006) (per curiam) (“*Brady* suppression occurs when the government fails to turn over even evidence that is ‘known only to police investigators and not to the prosecutor.’” (quoting *Kyles*, 514 U.S. at 438)). On remand, the West Virginia Supreme Court ordered a new trial over heated dissents. *State v. Youngblood*, 650 S.E.2d 119, 132-33 (W. Va. 2007) (Davis, C.J.); *id.* at 134-36 (Benjamin, J., dissenting); *id.* at 137-40 (Maynard, J., dissenting).

prove bad faith.¹⁰⁷ At a practical level, when law enforcement does obtain and preserve *Brady* evidence, economic realities undercut the enforceability of prosecutors' constitutional disclosure duties. Heavy caseloads create an independent hurdle to compliance, as prosecutors are charged with identifying and disclosing *Brady* material held by all prosecutorial staff and their agents, including law enforcement.¹⁰⁸ Political pressure can be a factor as well. Prosecutorial elections are often dominated by "tough on crime" ideologies, which tend to be unsympathetic toward procedures that help defendants avoid or reduce punishment.¹⁰⁹

Brady's enforceability sustained another blow when the Supreme Court declined to impose a due process duty to disclose impeachment evidence at the plea-bargaining stage, where the overwhelming majority of cases are resolved.¹¹⁰ The Court also held that the right to *Brady* material does not apply in the specialized pretrial setting of the grand jury hearing.¹¹¹ At the postconviction stage, the same five-member majority common to *Connick* and *Garcetti* rejected a claim that due

¹⁰⁷ *Arizona v. Youngblood*, 488 U.S. 51, 57 (1988).

¹⁰⁸ *Youngblood*, 547 U.S. at 869-70. The Supreme Court has not ruled on the question whether law enforcement officers may face civil liability under 42 U.S.C. § 1983 for deliberately suppressing or otherwise failing to disclose *Brady* material. For a canvassing of divided opinions on this issue in the federal courts of appeals, see *Moldowan v. City of Warren*, 578 F.3d 351, 377-81 (6th Cir. 2009), *cert. denied*, 130 S. Ct. 3504 (2010); *id.* at 401-04 (Kethledge, J., dissenting in part); see also *Smith v. Almada*, 640 F.3d 931, 939 (9th Cir. 2011) (explaining that police may face liability under 42 U.S.C. § 1983 (2006)); Jennifer E. Laurin, *Rights Translation and Remedial Disequilibrium in Constitutional Criminal Procedure*, 110 COLUM. L. REV. 1002, 1016-32, 1062-65 (2010) (analyzing *Jean v. Rice*, 945 F.2d 82 (4th Cir. 1991)). For a discussion of "*Brady*" lists, which target law enforcement officers for discipline when they fail to provide prosecutors with exculpatory and impeachment evidence, see *Nazir v. Cnty. of Los Angeles*, No. CV 10-06546 SVW (AGRx), 2011 U.S. Dist. LEXIS 26820 (C.D. Cal. Mar. 2, 2011) (prosecutor's office shielded by Eleventh Amendment immunity from lawsuit by officer fired for nondisclosure of *Brady* evidence); *Walters v. Cnty. of Maricopa*, No. CV 04-1920-PHX-NVW, 2006 U.S. Dist. LEXIS 60272 (D. Ariz. Aug. 22, 2006) (describing "*Brady* list" policy); Christopher N. Osher, *Denver Cops' Credibility Problems Not Always Clear to Defenders, Juries*, DENVER POST (July 10, 2011, 1:00 AM), http://www.denverpost.com/search/ci_18448755#ixzz1Rv2c571u (identifying "one out of every 17 Denver police officers as having discipline issues serious enough that their courtroom testimony may be suspect" and describing debate over effectiveness of procedures for notifying defense lawyers of such issues).

¹⁰⁹ ANGELA J. DAVIS, *ARBITRARY JUSTICE: THE POWER OF THE AMERICAN PROSECUTOR* 166-69 & 232 n.15 (2007) (citing examples); Wright, *supra* note 104, at 1999-2000 (noting potential "good or bad" influences of politics on disclosure decisions); Daniel Medwed, *Emotionally Charged: The Prosecutorial Charging Decision and the Innocence Revolution*, 31 CARDOZO L. REV. 2187, 2201-05 (2010) (describing internal and external pressures on prosecutorial decision making, including relationships with police, victims, and electorate).

¹¹⁰ *United States v. Ruiz*, 536 U.S. 622, 633 (2002).

¹¹¹ *United States v. Williams*, 504 U.S. 36 (1992).

process imposes an independent duty to produce evidence that can prove a defendant's innocence, beyond the duty imposed by state statutes governing access to such evidence.¹¹² As a practical matter, the majority of convicted defendants who are indigent lack access to counsel and other resources needed to investigate and litigate *Brady* claims.¹¹³ Thus, there is "little reason for these violations ever to come to light."¹¹⁴

The majority of postconviction *Brady* claims do not succeed, often because courts hold that undisclosed information was either immaterial¹¹⁵ or available to the defense through a reasonable investigation.¹¹⁶ Habeas jurisprudence combined with the 1996 Antiterrorism and Effective Death Penalty Act heightened procedural hurdles to federal judicial review of state-court *Brady* claims.¹¹⁷ Finally, even before the five-member Supreme Court majority restricted § 1983 liability in *Connick* and

¹¹² Dist. Attorney's Office for the Third Judicial Dist. v. Osborne, 129 S. Ct. 2308, 2319-20 (2009). *But see* Skinner v. Switzer, 131 S. Ct. 1289 (2011) (allowing due process challenge to implementation of Texas DNA testing procedures).

¹¹³ Coleman v. Thompson, 501 U.S. 722, 752 (1991) (no federal constitutional right to counsel in state post-conviction); Bruce Green, *Beyond Training Prosecutors About Their Disclosure Obligations: Can Prosecutors' Offices Learn from Their Lawyers' Mistakes?*, 31 CARDOZO L. REV. 2161, 2175-76 & n.68 (2010) (describing limited access to resources). Some courts have held that, by definition, anything available to the defense through reasonable investigation is not *Brady* evidence. Rector v. Johnson, 120 F.3d 551, 560 (5th Cir. 1997); Barnes v. Thompson, 58 F.3d 971, 975 n.4 (4th Cir. 1995). On the chronic underfunding of defense investigative training and support, see THE CONSTITUTION PROJECT, JUSTICE DENIED: AMERICA'S CONTINUING NEGLECT OF OUR CONSTITUTIONAL RIGHT TO COUNSEL 93-95 (2009); *see also* Robert P. Mosteller, *Protecting the Innocent: Part of the Solution for Inadequate Funding for Defenders, Not a Panacea for Targeting Justice*, 75 MO. L. REV. 931, 959-73 (2010) (critiquing proposals to ration service and absorb defense investigative function into law enforcement, prosecutorial, judicial, and forensic science functions in Darryl K. Brown, *The Decline of Defense Counsel and the Rise of Accuracy in Criminal Adjudication*, 93 CALIF. L. REV. 1585, 1590, 1613-45 (2005), and Darryl K. Brown, *Rationing Criminal Defense Entitlements: An Argument from Institutional Design*, 104 COLUM. L. REV. 801, 801 (2004)).

¹¹⁴ Green, *supra* note 113, at 2175 n.68 (citing, *inter alia*, United States v. Jones, 620 F. Supp. 2d 163, 172 (D. Mass. 2009) (reported cases cannot measure scope of disclosure violations); United States v. Oxman, 740 F.2d 1298, 1310 (3d Cir. 1994) (confessing "the nagging concern that material favorable to the defense may never emerge from secret government files").

¹¹⁵ *See, e.g., supra* notes 99-100 and accompanying text.

¹¹⁶ Rector, 120 F.3d at 560 ("evidence is not 'suppressed' if the defendant either knew, or should have known of the essential facts permitting him to take advantage of any exculpatory evidence" (citing West v. Johnson, 92 F.3d 1385, 1399 (5th Cir. 1996))); Barnes, 58 F.3d at 975 & n.4 ("*Brady* requires that the government disclose only evidence that is not available to the defense from other sources, either directly or through diligent investigation"); United States v. Zackson, 6 F.3d 911, 918 (2d Cir. 1993) ("Evidence is not 'suppressed' if the defendant either knew, or should have known, of the essential facts permitting him to take advantage of any exculpatory evidence." (citations omitted)). Under this analysis, defendants must plead alternative ineffective assistance claims based on failure to investigate.

¹¹⁷ Justin F. Marceau, *Challenging the Habeas Process Rather Than the Result*, 69 WASH. & LEE L. REV. 85, 98-104 (2012).

Garcetti,¹¹⁸ judicially imposed doctrines of absolute and qualified immunity rendered civil rights litigation nearly useless as a mechanism for enforcing due process disclosure duties.¹¹⁹

The foregoing doctrinal and practical limitations seriously weaken the enforceability of prosecutors' due process disclosure duties. The next section focuses closely on the *Connick* and *Garcetti* cases as recent exemplars of the resulting inefficiency, uncertainty, and unfairness in the processing of criminal cases. Part IV contrasts the flawed *Brady* model with the relative simplicity and efficiency of full open file discovery. Highlighting the vitality of law and politics in this cutting-edge reform initiative, Part IV urges that the contrast between the two models should motivate broad enactment of full open file reform across jurisdictions.

III. DUE PROCESS SUBMERGED

Connick and *Garcetti* are linked in their subordination of prosecutors' constitutional discovery duties to other interests, including the protection of municipalities from financial liability for prosecutors' acts and omissions regarding *Brady* material. Analyzing the link between the two cases requires close scrutiny of their distinctive facts, procedural posture, and judicial reasoning. Subsections A and B focus on *Connick v. Thompson*. The more doctrinally complex *Garcetti* case is analyzed in Subsections C through E.

A. *Connick v. Thompson: "Egregious" and "Intentional" Misconduct in Orleans Parish*

John Thompson was twenty-two years old when he and codefendant Kevin Freeman were arrested for the murder of Raymond T. Liuzza, Jr., in New Orleans.¹²⁰ Liuzza was shot to death in early December, 1984, during a robbery outside his home.¹²¹ "Because Liuzza was the son of a prominent executive,

¹¹⁸ See discussion *infra* Part III.

¹¹⁹ *Van de Kamp v. Goldstein*, 555 U.S. 335, 339 (2009) (absolute immunity from personal liability for failure to train on *Brady* duties); *Imbler v. Pachtman*, 424 U.S. 409, 420 (1976).

¹²⁰ *Thompson v. Connick*, 553 F.3d 836, 843, 865 (5th Cir. 2008). Thompson and Freeman were linked to Liuzza's death by Richard Perkins, who approached Liuzza's family after a reward was offered. *Connick v. Thompson*, 131 S. Ct. 1350, 1371 (2011). Perkins alleged that Thompson sold the murder weapon and Liuzza's ring to a man named David Harris. *State v. Thompson*, 516 So. 2d. 349, 351 (La. 1987).

¹²¹ *Thompson*, 516 So. 2d. at 351.

the murder received a lot of attention.”¹²² Three weeks after Liuzza’s murder, the three children of a man named LaGarde fought off a carjacking attempt near the Superdome.¹²³ After Thompson and Freeman were arrested in January for Liuzza’s murder, Thompson’s photo was published in the *Times-Picayune*.¹²⁴ LaGarde showed the photo to his children. They agreed that Thompson was the man who had tried to rob them.¹²⁵

Prosecutors charged Thompson with armed robbery.¹²⁶ Then they switched the order of the murder and robbery trials.¹²⁷ They hoped to use the robbery conviction to keep Thompson off the stand at the murder trial, to impeach him if he testified, and to win a death sentence.¹²⁸ One prosecutor told Thompson at the robbery trial, “I’m going to fry you. You will die in the electric chair.”¹²⁹ With the exception of that specific denouement, the prosecution’s strategy succeeded.

The strategy succeeded in part because Thompson’s lawyers and the jurors in his robbery trial did not know that a patch of bloody cloth exonerated him on that charge. During the investigation of the LaGarde robbery, law enforcement officers seized a blood swatch from the scene.¹³⁰ Prosecutors ordered the blood tested before Thompson’s trial for the LaGarde robbery.¹³¹ The swatch tested type B,¹³² but the prosecution disclosed neither the swatch nor the lab report to the defense. Thompson’s trial lawyer had asked the property technician before trial if there was any blood evidence.¹³³ He was told that “[t]hey didn’t have any.”¹³⁴ On the first day of the robbery trial, assistant prosecutor Gerry Deegan “checked all of the physical evidence in the case out of the police property room.”¹³⁵ The next day Deegan returned everything but the

¹²² *Thompson*, 553 F.3d at 843.

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ *Connick v. Thompson*, 131 S. Ct. 1350, 1374 & n.7 (2011) (Ginsburg, J., dissenting).

¹³⁰ *Id.* at 1356 (majority opinion).

¹³¹ *Id.*

¹³² *Id.* at 1372-73 & n.5 (Ginsburg, J., dissenting).

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ *Id.* at 1356 (majority opinion).

blood swatch.¹³⁶ At the time, Deegan was just out of law school and had worked in Connick's office for less than a year.¹³⁷

During Thompson's murder trial, the prosecution also failed to disclose several pieces of impeachment evidence. First, law enforcement had secretly taped the conversation between the Liuzza family and Richard Perkins, the man who originally incriminated Thompson in the Liuzza murder.¹³⁸ At trial, Perkins denied seeking reward money.¹³⁹ But on the tape, Perkins had said, "I don't mind helping . . . but I would like [you] to help me and, you know, I'll help you."¹⁴⁰ After the family had told Perkins that they wanted to try to help him, he implicated Thompson and Freeman.¹⁴¹ The prosecution also failed to disclose eyewitness testimony describing Liuzza's killer as "six feet tall, with 'close cut hair.'"¹⁴² That description matched Thompson's codefendant, Freeman. In contrast, Thompson was five-feet, eight-inches tall and had a large Afro.¹⁴³ The prosecution also failed to disclose pretrial statements attributed to the codefendant Freeman, the key witness against Thompson, which were materially inconsistent with Freeman's trial testimony.¹⁴⁴ Without the benefit of the foregoing evidence, and facing impeachment with the attempted robbery conviction if he took the stand, Thompson elected not to testify.¹⁴⁵ He was convicted and sentenced to death.¹⁴⁶

Thompson was incarcerated for eighteen years after his arrest in January 1985. He spent fourteen of those years in twenty-three-hour-a-day solitary confinement in a six-by-nine foot windowless death row cell.¹⁴⁷ He faced six different execution dates¹⁴⁸ as his case moved through direct appeal, state postconviction, and federal habeas.¹⁴⁹ A month before his final execution date, a last-ditch investigation in police archives unearthed a microfiche copy of the report documenting that the

¹³⁶ *Id.*

¹³⁷ *Id.* at 1372 n.3 (Ginsburg, J., dissenting).

¹³⁸ *Id.* at 1371.

¹³⁹ *Id.* at 1374.

¹⁴⁰ *Id.* at 1371.

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *Id.* at 1371-72.

¹⁴⁴ *Id.* at 1374.

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ *Id.* at 1355 (majority opinion); *Thompson v. Connick*, 553 F.3d 836, 842, 865 (5th Cir. 2008).

¹⁴⁸ John Thompson, Op-Ed., *The Prosecution Rests, but I Can't*, N.Y. TIMES (Apr. 9, 2011), <http://www.nytimes.com/2011/04/10/opinion/10thompson.html?pagewanted=all>.

¹⁴⁹ *State v. Thompson*, 825 So. 2d 552, 552-53 (La. Ct. App. 2002).

LaGarde robber had type B blood.¹⁵⁰ The defense tested Thompson's blood. It was type O.¹⁵¹ The report proved Thompson innocent of the attempted robbery conviction that had kept him from testifying in his own defense at the murder trial and had helped the prosecution argue for his execution.¹⁵²

After the defense investigator uncovered the blood test results, a former prosecutor named Michael Riehlmann came forward. Riehlmann admitted that, five years earlier, Gerry Deegan had confessed to hiding exculpatory blood evidence in Thompson's robbery case.¹⁵³ Deegan was the recent law graduate who assisted with the prosecution of the robbery case; he confessed to hiding the evidence after learning that he was dying of cancer.¹⁵⁴ Despite Riehlmann's encouragement, Deegan did not come forward.¹⁵⁵ For the next five years, neither did Riehlmann.¹⁵⁶

Based on the blood mismatch, the trial court vacated Thompson's attempted robbery conviction,¹⁵⁷ and Connick's office dismissed that charge.¹⁵⁸ The trial judge in the murder case denied Thompson's request for a new trial but vacated his death sentence.¹⁵⁹ The appellate court ordered a new trial on the murder charge.¹⁶⁰ The court found it unnecessary to rule on Thompson's *Brady* claim but concluded that the prosecution's "egregious" misconduct in the "intentional hiding of exculpatory evidence" caused violations of Thompson's rights to present a defense and testify on his own behalf at the first trial.¹⁶¹ Connick's office retried the murder charge but the codefendant, Freeman, had died in the interim.¹⁶² Without Freeman's live testimony (the jury heard his prior testimony read back)—but with the benefit of the previously withheld evidence and Thompson's testimony—the jury voted to acquit after thirty-five minutes' deliberation.¹⁶³

¹⁵⁰ Connick v. Thompson, 131 S. Ct. 1350, 1356 (2011).

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ *Id.* at 1356 & n.1.

¹⁵⁴ *Id.*

¹⁵⁵ *Id.* at 1374-75 (Ginsburg, J., dissenting).

¹⁵⁶ *Id.*

¹⁵⁷ State v. Thompson, 825 So. 2d 552, 553 (La. Ct. App. 2002).

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ *Id.* at 557-58.

¹⁶¹ *Id.* at 557.

¹⁶² Connick v. Thompson, 131 S. Ct. 1350, 1375-76 (2011) (Ginsburg, J., dissenting).

¹⁶³ *Id.*

B. *Deliberate Indifference*

The jury in Thompson's federal civil rights case found that the admitted *Brady* violation resulted from deliberate indifference to prosecutors' obvious need for training on their due process disclosure duties.¹⁶⁴ Writing for the five-member majority, Justice Thomas limited the scope of the *Brady* violation at issue to nondisclosure of the lab report, which Connick conceded was a violation of Thompson's due process rights.¹⁶⁵ The Court then held that Thompson had failed to meet his burden to prove deliberate indifference because he showed neither that there was a pattern of prior violations that should have notified defendants of the need for training nor that the need for training was otherwise obvious.¹⁶⁶ On the latter point, the majority concluded that municipalities that might otherwise face liability for failure to train prosecutors on their due process discovery duties could reasonably rely on law schools, bar exams, continuing legal education programs, and professional disciplinary procedures to fill the breach.¹⁶⁷

In dissent, Justice Ginsburg found ample record evidence to support the jury's finding of deliberate indifference, including multiple *Brady* violations by "no fewer than five prosecutors" who, "year upon year," withheld evidence "vital to [Thompson's] defense."¹⁶⁸ The dissenters also disagreed that Connick justifiably relied on law schools and other institutions

¹⁶⁴ *Id.* at 1376.

¹⁶⁵ *Id.* at 1357 & n.3 (majority opinion).

¹⁶⁶ *Id.* at 1358-66 (citing *Canton v. Harris*, 489 U.S. 378 (1989); *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658 (1978)). The majority did not cite the unanimous 2009 decision in *Van de Kamp v. Goldstein* to apply absolute immunity to petitioners despite being urged to do so. Petitioner's Brief on the Merits at 18, *Connick*, 131 S. Ct. 1350 (No. 09-571); Amicus Curiae Brief of the Orleans Parish Assistant District Attorneys in Support of Petitioners at 7-8, *Connick*, 131 S. Ct. 1350 (No. 09-571); Brief of Amicus National District Attorneys Association at 16, *Connick*, 131 S. Ct. 1350 (No. 09-571). *Van de Kamp* granted absolute immunity to prosecutors sued in their individual capacities for damages caused by their failure to sufficiently train and supervise their deputy district attorneys in preventing the nondisclosure of material impeachment evidence. *Van de Kamp v. Goldstein*, 555 U.S. 335, 339 (2009). On remand, the plaintiff settled for monetary damages from the city of Long Beach, *Goldstein v. City of Long Beach*, CV 04-9692, 2010 U.S. Dist. LEXIS 111195 (C.D. Cal. Aug. 13, 2010), after the District Court expressed "little doubt that Plaintiff w[ould] succeed in proving" that the withheld evidence satisfied *Brady* and sketched the likely jury instructions regarding the prosecutors' violations of their due process disclosure duties. *Id.* at *8-11.

¹⁶⁷ *Connick*, 131 S. Ct. at 1361-63.

¹⁶⁸ *Id.* at 1374-75, 1383 (Ginsburg, J., dissenting). Justices Scalia and Alito joined in a concurring opinion taking issue with Justice Ginsburg's analysis. *Id.* at 1366-70 (Scalia & Alito, JJ., concurring).

to fulfill the training requirements necessary to prevent due process disclosure violations in his office.¹⁶⁹

Several aspects of the majority opinion elide core meanings of due process discovery doctrine. Greater fidelity to prosecutors' truth-speaking and justice-seeking duties might have reinforced the doctrinal stability that encourages compliance with those duties.¹⁷⁰ Examples include the majority's cabining of its analysis to what it defined as a "single *Brady* violation" that occurred when one or more prosecutors failed to turn over the lab report.¹⁷¹ Another is the conclusion that prior reversals of Orleans Parish convictions for *Brady* violations were irrelevant to the jury's finding of deliberate indifference because "[n]one of those cases involved failure to disclose blood evidence, a crime lab report, or physical or scientific evidence of any kind."¹⁷² Yet another is the empirical support (or absence thereof) in the majority's assessment of whether the need for prosecutorial training was obvious.¹⁷³ Also noteworthy is the *sotto voce* questioning in the majority opinion, rendered overt in the concurrence, of whether Orleans Parish prosecutors violated *Brady* by failing to disclose the lab report since they did not know Thompson's blood type.¹⁷⁴ These aspects of the majority opinion typify the diminution of core due process meanings that might influence adjudication of substantive constitutional criminal procedure claims, create uncertainty in the law, and reduce its deterrent effect.¹⁷⁵ This discussion focuses on the first and last points identified above.

1. *Canton*-izing Cumulative Review

Cabining the misconduct in John Thompson's case to the conceded nondisclosure of the lab report is inconsistent with the core due process principle that *Brady* materiality

¹⁶⁹ *Id.* at 1380-81, 1385-86 & nn.21-22 (Ginsburg, J., dissenting).

¹⁷⁰ *See* Laurin, *supra* note 108, at 1058-72.

¹⁷¹ *Connick*, 131 S. Ct. at 1357-60.

¹⁷² *Id.* at 1360. At least two other Orleans Parish defendants sought *Brady* relief after prosecutors failed to disclose lab reports documenting test results on biological samples; in both cases, courts held the undisclosed evidence to fail *Brady*'s materiality test. *Joseph v. Whitley*, No. 92-2335, 1992 U.S. Dist. LEXIS 17385, at *5-12 (E.D. La. 1992); *State v. Walter*, 675 So. 2d 831, 833-35 (La. Ct. App. 1996).

¹⁷³ *See supra* note 21.

¹⁷⁴ *Compare Connick*, 131 S. Ct. at 1357 & n.3 (majority opinion), *with id.* at 1369-70 (Scalia & Alito, JJ., concurring).

¹⁷⁵ *See* Laurin, *supra* note 108, at 1059-61.

must be assessed cumulatively.¹⁷⁶ The majority subordinated that principle in favor of a 42 U.S.C. § 1983 remedial rule pulled from dicta in *Canton v. Harris*.¹⁷⁷ To fit *Canton*'s Procrustean bed, the *Connick* majority trimmed Orleans Parish prosecutors' acts and omissions down to a "single *Brady* violation" or a "single-incident."¹⁷⁸

In considering the majority's subordination of the cumulative materiality principle, it is important to acknowledge that no court ever expressly ruled that *Connick*'s office violated *Brady* in Thompson's case. But the state Court of Appeal concluded that the prosecutors committed "egregious" misconduct through the "intentional hiding of exculpatory evidence."¹⁷⁹ That court also concluded that the "intentional hiding of exculpatory evidence" caused the violations of Thompson's right to testify and present a defense, which in turn required a new trial on the murder charge.¹⁸⁰ These tightly linked state court findings and conclusions comprise the essential elements of a *Brady* violation: Orleans Parish prosecutors failed to disclose evidence materially beneficial to the defense. The absence of an express judicial ruling on Thompson's *Brady* claims should not have weighed against him in the subsequent civil rights litigation. And the state courts' granting relief on alternate grounds certainly did not warrant subordination of cumulative prejudice analysis to *Canton*'s single-incident calculus.

Similarly, *Connick*'s admitting that his office violated *Brady* by failing to disclose the lab report did not support the majority's elision of cumulative materiality. Both the content and the context of the admission make the point clear. *Connick* testified before the jury in Thompson's civil rights case that he knew the lab report was *Brady* material.¹⁸¹ More specifically, he testified that he knew nondisclosure of the report was illegal because in a prior case he "got indicted by the U.S. Attorney" for failing to disclose a lab report to the defense.¹⁸²

¹⁷⁶ *Kyles v. Whitley*, 514 U.S. 419, 436 (1995); see also *Connick*, 131 S. Ct. at 1377 & n.11 (Ginsburg, J., dissenting) (citing *Kyles*, 514 U.S. at 421) (jury not limited to nondisclosure of lab report).

¹⁷⁷ *Connick*, 131 S. Ct. at 1359-69 (majority opinion) (discussing *Canton v. Harris*, 489 U.S. 378, 390-91 (1989)).

¹⁷⁸ *Id.* at 1356, 1361.

¹⁷⁹ *Louisiana v. Thompson*, 825 So. 2d 552, 557 (La. Ct. App. 2002).

¹⁸⁰ *Id.*

¹⁸¹ *Connick*, 131 S. Ct. at 1380 n.13 (Ginsburg, J., dissenting).

¹⁸² *Id.* ("[A] prosecutor must disclose a crime lab report to the defense, even if the prosecutor does not know the defendant's blood type: 'Under the law it qualifies as *Brady* material. Under Louisiana law we must turn that over. Under *Brady* we must

Connick's sworn admission grounds a reasonable inference, apparently reached by the federal jury, that he had ample notice of the need to train his line prosecutors on *Brady* compliance. Connick's admission on the lab report expressly references a prior *Brady* allegation directly on point in Thompson's civil rights case. The admission weighs in favor of incorporating the core cumulative prejudice principle into the section 1983 analysis and weighs against the majority's subordinating that principle to *Canton*'s single-incident doctrine.

2. See No Evil: Incorporating a Subjective Knowledge Element into *Brady* Analysis

Connick's admission regarding the lab report took an even stronger turn on appeal of the civil rights verdict. There, the defendants argued that "the blood evidence was obviously exculpatory" and that nondisclosure was "a clear violation of the law."¹⁸³ Once again, the state Court of Appeal's reasoning seems significant. Even setting aside the rather abundant impeachment evidence that prosecutors failed to disclose¹⁸⁴ in addition to the conceded nondisclosure of the lab report, the record also contains the state Court of Appeal's conclusion that prosecutors *intentionally* hid exculpatory evidence.¹⁸⁵ It is not clear that prosecutors *intentionally* withheld the lab report.¹⁸⁶ But Deegan admitted to deliberately hiding exculpatory evidence; he took the physical evidence out of police custody and returned everything but the blood swatch.¹⁸⁷ Applying cumulative materiality analysis, the swatch had exculpatory value independent of the lab report, and the prosecution had a duty to disclose it regardless of the existence of any lab report.

turn that over.""). In 1989, Connick pleaded not guilty to federal conspiracy charges for giving documents to another defendant who, Connick contended, needed them to defend himself on bookmaking charges. *New Orleans Official Denies Aiding Gambler*, N.Y. TIMES, Dec. 22, 1989, at B6, available at <http://www.nytimes.com/1989/12/22/us/new-orleans-official-denies-aiding-gambler.html>.

¹⁸³ *Connick*, 553 F.3d 836, 857 (5th Cir. 2008); see also *Connick*, 131 S. Ct. at 1372 & n.4 (Ginsburg, J., dissenting) ("[A]ny reasonable prosecutor would have recognized blood evidence as *Brady* material . . . [accordingly,] 'the proper response' was 'obvious to all.'"). The court of appeals rejected this "obvious violation" defense not because it disagreed with the statement but because while Connick conceded his *Brady* duty to turn over the blood evidence, his line prosecutors did not. *Connick*, 553 F.3d at 857.

¹⁸⁴ See *supra* notes 138-44 and accompanying text.

¹⁸⁵ *Thompson*, 825 So. 2d at 557.

¹⁸⁶ *Connick*, 131 S. Ct. at 1356 (lead prosecutor denied seeing the report).

¹⁸⁷ *Id.*

This is so because the swatch, on its own, would have alerted the defense to the need to check Thompson's blood type.¹⁸⁸

On this point, and of the remaining highlighted aspects of the majority and concurring opinions, perhaps the most powerful evidence of *Brady's* anemic enforceability is the conclusion of Justices Scalia and Alito regarding the lab report. Their concurring opinion reasoned that the failure to disclose the lab report revealing the blood type of the LaGarde robber was probably not a *Brady* violation because prosecutors did not know John Thompson's blood type.¹⁸⁹ Notably, the opening lines of the relatively terse majority opinion also emphasized the absence of proof that prosecutors tested Thompson's blood or "knew what his blood type was."¹⁹⁰ Justices Scalia and Alito went further. They denied awareness of any Supreme Court case law supporting what they described as the dissent's "*sub silentio* expansion of the substantive law of *Brady*" to encompass a duty to reveal "untested" evidence that could exonerate a defendant.¹⁹¹

To be fair, the concurrence tweaked the dissent for citing no case in which a *Brady* violation rests solely on a withheld lab report.¹⁹² Nevertheless, the fact that two United States Supreme Court Justices could view the lab report documenting the robber's blood type as comprising untested evidence underscores the many profound problems undermining *Brady* enforceability. Similarly revealing is the concurring Justices' citation of *Arizona v. Youngblood*¹⁹³ to support their not-very-silentio circumscription of prosecutors' constitutional disclosure duties to evidence that they subjectively know to be exculpatory. As the concurrence acknowledged, subjective knowledge is irrelevant to *Brady* analysis.¹⁹⁴

¹⁸⁸ See also *id.* at 1373 & n.5 (Ginsburg, J., dissenting) (noting that at the federal trial, the jury was told of the parties' stipulation that the prosecution did not inform the defense "of the existence of the blood evidence, that the evidence had been tested, [or] that a blood type was determined definitively from the swatch" (emphasis added)).

¹⁸⁹ *Id.* at 1369 (Scalia & Alito, JJ., concurring).

¹⁹⁰ *Id.* at 1356 (majority opinion).

¹⁹¹ *Id.* at 1369 (Scalia & Alito, JJ., concurring).

¹⁹² *Id.* But see *Joseph v. Whitley*, No. 92-2335, 1992 U.S. Dist. LEXIS 17385, at *5-12 (E.D. La. 1992) (Orleans Parish prosecutors failed to disclose blood samples and test results; undisclosed evidence held not to meet *Brady's* materiality test.); *State v. Walter*, 675 So. 2d 831, 833-35 (La. Ct. App. 1996) (no abuse of discretion in denial of new trial after Orleans Parish prosecutors failed to disclose a lab report in time for the defense to investigate and use the information at trial).

¹⁹³ 488 U.S. 51 (1988).

¹⁹⁴ *Connick*, 131 S. Ct. at 1369.

In fact, prosecutors' disclosure duties were not squarely at issue in *Youngblood*. The case did not involve prosecutors' deliberate suppression of biological evidence or nondisclosure of potentially exculpatory lab reports. The problem in *Youngblood* was the inability to test the biological evidence at issue (semen samples) because one set of samples was too small and investigators failed to preserve another sample for testing.¹⁹⁵ The Court's chief concern in *Youngblood* was to avoid burdening the nation's myriad law enforcement offices by imposing a due process duty to preserve potentially exculpatory evidence in all cases.¹⁹⁶

The citation of *Youngblood* by the *Connick* concurrence is a transitive error. A forensic sample that cannot be tested, like the semen in *Youngblood*, is distinguishable from the tested blood swatch in John Thompson's case. The blood swatch tests yielded dispositive results. Those results were recorded in a lab report. The lab report revealed what the defense, with minimal investigation, could establish to be wholly exculpatory evidence.

That type of tested forensic evidence and forensic report defines materiality under *Brady*. This is so in part because the full value of exculpatory evidence can only be determined ex post, in the context of an adequate defense opportunity to investigate and litigate its meaning at trial. Those opportunities were denied to both *Youngblood* and Thompson. But unlike *Youngblood*, Thompson's only impediment to investigating and litigating the exculpatory value of the retained, tested evidence was the prosecution's failure to disclose it.

The concurrence failed to mention another reason that *Youngblood* supports rather than refutes Thompson's position: *Youngblood* was innocent. Like Thompson, he was imprisoned for years before evidence of his wrongful convictions led to his release.¹⁹⁷ In *Youngblood*'s case, it took fifteen years before advances in DNA technology allowed testing on the remnants of the biological evidence.¹⁹⁸ Those tests led authorities to

¹⁹⁵ 488 U.S. at 53-54 (discussing trial court's denial of state's motion to test defendant's blood and saliva because semen sample was inadequate for valid comparison); cf. *State v. Youngblood*, 734 P.2d 592, 595-96 (Ariz. Ct. App. 1986), *rev'd*, 488 U.S. 51 (1988) ("This is not a case where the samples were available for defendant's examination."). *But see State v. Youngblood*, 844 P.2d 1152, 1154 (Ariz. 1993) (semen sample "was available to the defendant at trial and the defendant chose not to perform tests of his own").

¹⁹⁶ *Youngblood*, 488 U.S. at 58.

¹⁹⁷ Norman C. Bay, *Old Blood, Bad Blood, and Youngblood: Due Process, Lost Evidence, and the Limits of Bad Faith*, 86 WASH. U. L. REV. 241, 243-44 nn.5-7 (2008).

¹⁹⁸ *Id.*

identify and convict the child sex offender who had kidnapped and sodomized the ten-year-old victim.¹⁹⁹ The silence of the *Connick* concurrence on the full story of *Youngblood* tracks the corresponding subordination by both the majority and the concurring opinions of the prosecutors' core due process duties, developed from *Mooney* through *Kyles*, to speak truth and seek justice. The strained reasoning in those opinions with respect to the blood swatch, the lab report, and the undisclosed impeachment evidence significantly weakens *Brady* enforceability. The majority's wink-and-nod to due process disclosure violations highlights the same majority's elision of constitutional discovery duties in *Garcetti*.

C. *Garcetti v. Ceballos: Riding the Rims to the Junkyard Gate*

According to the defense attorneys for Michael Cuskey and Randy Longoria, the events that culminated in the U.S. Supreme Court's decision in *Garcetti v. Ceballos* arose because Sheriff's deputies in Pomona County, California lacked sufficient evidence to arrest Cuskey and Longoria for running a chop shop.²⁰⁰ After his arrest, Cuskey threw fuel on the fire by suing the Sheriff's department.²⁰¹ On this theory, when deputies spotted a stripped-down, stolen truck near Cuskey's junkyard,²⁰² they saw a chance to link the truck to the defendants. They asked their supervisor, Detective Wall, to obtain a warrant to search the junkyard.²⁰³ Based on the deputies' statements, Wall swore out an affidavit describing "tire tracks which appeared to match the tread pattern" of the stolen truck leading to "the end of a long driveway" and the fence that marked Cuskey's property line.²⁰⁴

The magistrate issued the warrant. The deputies searched the property. They found no evidence to support their chop shop suspicions.²⁰⁵ But while the warrant focused on stolen vehicle parts, the deputies brought along a drug dog that sniffed out a small amount of methamphetamine.²⁰⁶ The

¹⁹⁹ *Id.*

²⁰⁰ Joint App'x Vol. II at 346, *Garcetti v. Ceballos*, 547 U.S. 410 (2006) (No. 04-473), 2005 WL 1620384.

²⁰¹ *Id.* at 238.

²⁰² *Id.* at 257 (where court asked whether the property was a "junkyard," one deputy demurred, "every man, it's his castle," but agreed "there were car parts on that property, there were birds, there were animals, there were refrigerators . . . all kinds of stuff," including what "looked like an alligator . . .").

²⁰³ Joint App'x Vol. I at 28, *Garcetti*, 547 U.S. 410 (No. 04-473), 2005 WL 1620385.

²⁰⁴ Joint App'x Vol. III at 497, *Garcetti*, 547 U.S. 410 (No. 04-473), 2005 WL 1620386.

²⁰⁵ *Id.* at 498.

²⁰⁶ *Id.*

deputies also seized some firearms.²⁰⁷ Cuskey, Longoria, and a third defendant named Ojala were charged with felony drug and weapon possession offenses.²⁰⁸ Ojala pleaded guilty and began serving a one-year jail sentence.²⁰⁹

Meanwhile, the lawyers for Cuskey and Longoria investigated the allegations in the search warrant. Based on that investigation, they alleged that the deputies had lied to obtain the affidavit. The junkyard was not at the end of a long driveway but on a road that was the length of a football field.²¹⁰ The road was thirty- to forty-feet wide, “equal to if not greater than a standard residential street.”²¹¹ At least nine other residences faced onto the same road; all of those homeowners had to use the road to enter and exit their properties.²¹² The road was made of asphalt, gravel, and dirt. There was “absolutely no way” tire-tread patterns could lead from the truck to Cuskey’s junkyard fence.²¹³ In the one spot where tread marks appeared, it was “almost impossible” to tell from which of the ten properties they originated.²¹⁴

The defense lawyers filed a motion to traverse the warrant.²¹⁵ If granted, the motion would have required dismissal of the charges.²¹⁶ The defense lawyers gave their investigative materials to Richard Ceballos. As supervising prosecutor, Ceballos had authority to dismiss the case.²¹⁷ Ceballos investigated the defense allegations and consulted with supervisors and colleagues.²¹⁸ All the prosecutors agreed “there was a problem with the warrant.”²¹⁹

Ceballos then talked with Detective Wall, the officer who had sworn out the affidavit supporting the warrant.²²⁰ Ceballos confronted Wall with the defense allegations that the tire tread marks running from the truck to Cuskey’s gate were “a figment of the deputy’s imagination, that they had lied, that

²⁰⁷ *Id.*

²⁰⁸ *Id.* at 406.

²⁰⁹ *Id.* at 496.

²¹⁰ *Id.* at 499.

²¹¹ *Id.*

²¹² *Id.*

²¹³ *Id.*

²¹⁴ *Id.* at 500.

²¹⁵ Joint App’x Vol. I, *supra* note 203, at 48; *see* CAL. PENAL CODE § 1539 (1985) (providing for hearing on motion controverting facts in warrant).

²¹⁶ Joint App’x Vol. I, *supra* note 203, at 48.

²¹⁷ *Id.*

²¹⁸ *Id.*

²¹⁹ *Id.* at 39.

²²⁰ *Id.* at 37.

they had made up the fact that they had seen these tire tracks.”²²¹ Ceballos later told Wall that the charges would likely be dismissed because of the affidavit’s “grossly inaccurate” description of the road.²²²

Wall then made a crucial admission. He told Ceballos that he had spoken to the deputies.²²³ He said that the affidavit should be “modified.”²²⁴ He wanted to change “tire tracks” to “‘tire gouges,’ caused by the rims of the stolen truck scraping along the roadway.”²²⁵ Ceballos asked when the officers decided to modify the affidavit. Wall did not answer.²²⁶ Ceballos wrote a memorandum recommending dismissal of the charges based on the misrepresentations and omissions in the affidavit.²²⁷ He cited *Franks v. Delaware* in support.²²⁸

Franks allows Fourth Amendment challenges to the veracity of affiants’ statements supporting warrants.²²⁹ The *Franks* Court reasoned that probable cause “would be reduced to a nullity” if an officer could use false evidence to obtain a warrant and “remain confident that the ploy” could never be exposed through the adversarial process.²³⁰ Given the magistrate’s constitutional duties, the Court concluded, “it would be an unthinkable imposition upon his authority if a warrant affidavit, revealed after the fact to contain a

²²¹ *Id.*

²²² Joint App’x Vol. III, *supra* note 204, at 502.

²²³ *Id.* at 503.

²²⁴ *Id.*

²²⁵ *Id.*

²²⁶ *Id.* The issue arose a few months after the Rampart investigation revealed large-scale corruption, including perjury, evidence planting, drug dealing, violent crimes, and other misconduct by the Los Angeles police department’s anti-gang unit. Erwin Chemerinsky, *An Independent Analysis of the Los Angeles Police Department’s Board of Inquiry Report on the Rampart Scandal*, 34 LOY. L.A. L. REV. 545, 547-53 (as revised 2005). As the district court put it in ruling on Ceballos’s subsequent civil rights claim:

[T]he code word “Rampart” says it all—there can be no doubt that, in Southern California, police misconduct is a matter of great political and social concern to the community. In recent years, various local law enforcement agencies have been severely criticized for what many believe to be serious misconduct on the part of police officers.

Ceballos v. Garcetti, No. CV 00-11106 AHM (AJWx), 2002 U.S. Dist. LEXIS 28039, at *15 (C.D. Cal. Jan. 30, 2002).

²²⁷ Joint App’x Vol. III, *supra* note 204, at 503 (citing *Franks v. Delaware*, 438 U.S. 154 (1978)).

²²⁸ *Id.*

²²⁹ *Franks*, 438 U.S. at 156.

²³⁰ *Id.* at 168.

deliberately or recklessly false statement, were to stand beyond impeachment.”²³¹

Franks challenges are equivalent to perjury allegations against law enforcement officers. Such challenges seldom succeed.²³² In the rare cases in which *Franks* relief is granted, however, it is based on the type of prevarication documented in Ceballos’s memorandum.²³³ Ceballos’s supervisor was concerned enough about the affidavit’s veracity that he authorized the release of the third defendant, who was already serving time on his guilty plea.²³⁴ But the supervisor also asked Ceballos to revise the memo. He wanted to give the Sheriff’s department a less accusatory explanation for dismissing the charges.²³⁵

Although Ceballos edited the memo as requested, the deputies still accused him of acting like a defense lawyer. They worried that dismissal might give Cuskey grounds for another lawsuit.²³⁶ Ceballos’s supervisor decided against dismissing the charges. He chose instead to leave any decision on the *Franks* allegations to the “black robe” presiding over the suppression hearing.²³⁷

Before the *Franks* hearing, but after consulting with his supervisors, Ceballos gave a redacted version of his memo to

²³¹ *Id.* at 165. Further research is needed to trace the extent to which a concern to protect the court’s integrity connects doctrines underlying *Brady*, *Franks*, and “fraud on the court” analyses. For a definition of the latter allegation, see, for example, *Herring v. United States*, 424 F.3d 384, 386-87 (3d Cir. 2005) (defining “demanding” burden of proving fraud on the court by “clear, unequivocal and convincing evidence” of intentional and successful deception of the court through “the most egregious conduct” by an officer of the court).

²³² See generally Kami Chavis Simmons, *Cooperative Federalism and Police Reform: Using Congressional Spending Power to Promote Police Accountability*, 62 ALA. L. REV. 351, 363-65, 367 & nn.44-58 & 70 (2011) (describing causes and consequences of law enforcement perjury, or “testilying”).

²³³ *United States v. Whitley*, 249 F.3d 614, 624 (7th Cir. 2001) (remanding case to determine if search warrant was deficient when officers altered versions of events and facts did not match description); *United States v. Reinholz*, 245 F.3d 765, 774-75 (8th Cir. 2001) (approving trial court’s refusal to “bolster” affidavit with new and different information beneficial to the prosecution); *United States v. DeLeon*, 979 F.2d 761 (9th Cir. 1992) (remanding case due to material omissions in affidavit).

²³⁴ Joint App’x Vol. I, *supra* note 203, at 42-44.

²³⁵ *Id.* at 113-18.

²³⁶ *Id.* at 49.

²³⁷ *Id.* at 117-18. Another supervisor reviewed the affidavit and the results of Ceballos’s investigation. He agreed that the affidavit contained “obvious material misrepresentations and omissions per *Franks v. Delaware*.” Joint App’x Vol. III, *supra* note 204, at 411-12. After the meeting, Ceballos confronted his supervisor about “kowtowing to the sheriff’s department, of ignoring the fact that these deputy sheriffs had lied, and of setting aside his obligations simply to appease the sheriff’s captain and lieutenant.” Joint App’x Vol. I, *supra* note 203, at 23.

the defense.²³⁸ He also insisted that he would have to testify for the defense if subpoenaed.²³⁹ His immediate supervisor warned that if he kept “thinking . . . [and] talking like that” he would get “in trouble.”²⁴⁰ Ceballos interpreted this warning as an attempt to dissuade him from testifying and as a threat to retaliate if he did so.²⁴¹ He received the defense subpoena and decided that “regardless of the consequences” he was going to “tell the truth” at the suppression hearing.²⁴²

Ceballos was not allowed to testify to his own conclusions about the deputies’ veracity. But he did testify that the deputies wanted to change the affidavit.²⁴³ Although the affidavit specifically stated that the deputies had followed “tire tracks matching the tread pattern” of the stolen truck, the deputies testified differently at the hearing. There, they described tracing a “scratch” or “indentation” made by a tire rim from the stolen truck to Cuskey’s gate.

Ceballos knew the presiding judge as “a good judge for prosecutors.”²⁴⁴ The judge recited the affidavit’s “specific” description of each of the truck’s four tires.²⁴⁵ The judge was unmoved by the affidavit’s failure to mention any flat tire or rim.²⁴⁶ He was similarly unmoved by disparities between the deputies’ descriptions of the flat tire.²⁴⁷ He credited the deputies’ testimony and denied the defense motion.²⁴⁸

Shortly thereafter, Ceballos was demoted.²⁴⁹ He also was taken off a murder case and offered “freeway therapy” (a different job with a long commute).²⁵⁰ He exhausted the available grievance process and filed his civil rights action.²⁵¹ He urged that his conduct was required by *Brady v. Maryland* and that his supervisors’ retaliation violated the First Amendment and the Due Process clause of the Fourteenth Amendment.²⁵²

²³⁸ Joint App’x Vol. I, *supra* note 203, at 56.

²³⁹ *Id.* at 57.

²⁴⁰ *Id.*

²⁴¹ *Id.* at 58.

²⁴² *Id.* at 58-59.

²⁴³ Joint App’x Vol. II, *supra* note 200, at 297-308.

²⁴⁴ Joint App’x Vol. I, *supra* note 203, at 60.

²⁴⁵ Joint App’x Vol. II, *supra* note 200, at 349 (“emergency tires . . . on the right front and left rear . . . a white spoke type wheel with a Sonic brand . . . on the left front . . . a Firestone . . . on the right rear”).

²⁴⁶ *Id.* at 348-49.

²⁴⁷ *Id.*

²⁴⁸ *Id.*

²⁴⁹ Joint App’x Vol. I, *supra* note 203, at 12-13.

²⁵⁰ *Id.* at 13.

²⁵¹ *Garcetti v. Ceballos*, 547 U.S. 410, 415 (2006).

²⁵² Joint App’x Vol. I, *supra* note 203, at 139-40.

D. Brady Duties in the Pretrial Context

With the core meanings of *Brady*-line duties firmly rooted in the mandate to speak truth and seek justice, Ceballos's constitutional duty to speak out as he did might seem obvious. Contrary to the Supreme Court majority opinion, Ceballos did not write his memorandum because "he did not receive a satisfactory explanation for the perceived inaccuracies" in the affidavit.²⁵³ His independent investigation of the defense allegations confirmed that the affidavit could not be true. He confronted the lead detective and was told the sworn affidavit should be "modified."²⁵⁴ Ceballos was not alone in concluding that this admission supported the perjury allegation and that he had a duty to turn the information over to the defense.²⁵⁵

The first set of federal judges to consider the issue agreed that Ceballos had a duty to inform his supervisors about what he had learned. The district court judge cited *Brady* to hold that when Ceballos wrote his memorandum, "he was complying with his (and the government's) duties under the due process clause of the Fifth and Fourteenth Amendments not to introduce or rely on evidence known to be false."²⁵⁶ On appeal, two Ninth Circuit judges concluded that, taking the evidence in a light most favorable to Ceballos, his memorandum comprised "[g]ood-faith statements made in pursuit of [the] obligation" imposed upon prosecutors by their "duty to disclose information favorable to an accused, including information relating to a witness's veracity and integrity."²⁵⁷ The concurring judge also viewed the memorandum as performing "the basic communicative duty *Brady* imposes on 'the prosecution.' . . . Ceballos was simply 'doing what he was supposed to do' as a deputy district attorney carrying out non-discretionary quintessentially 'prosecutorial functions.'"²⁵⁸

The district court and Ninth Circuit drew upon the parties' pleadings and summary judgment arguments. But if

²⁵³ *Garcetti*, 547 U.S. at 414.

²⁵⁴ Joint App'x Vol. III, *supra* note 204, at 503.

²⁵⁵ *Id.* at 411-12 (memorandum of Deputy District Attorney Michael Grosbard, concluding that *Franks* required disclosure of investigators' "obvious material misrepresentations and omissions"); *Kyles v. Whitely*, 514 U.S. 419, 439 (1995) ("[A] prosecutor anxious about tacking too close to the wind will disclose a favorable piece of evidence.").

²⁵⁶ *Ceballos v. Garcetti*, No. CV 00-11106 AHM (AJWx), 2002 U.S. Dist. LEXIS 28039, at *18 (C.D. Cal. Jan. 30, 2002).

²⁵⁷ *Ceballos v. Garcetti*, 361 F.3d 1168, 1179 (9th Cir. 2004).

²⁵⁸ *Id.* at 1189 & n.3 (O'Scannlain, J., concurring in the judgment).

(as it appears) the lawyers and judges were relying on the four corners of the Supreme Court's *Brady*-line jurisprudence as the basis for Ceballos's constitutional disclosure duty, they were overreaching. From *Mooney* through *Kyles*, the Supreme Court has consistently emphasized that constitutional criminal discovery duties and rights protect interests in a fair *trial*.²⁵⁹ None of the Supreme Court's *Brady*-line cases impose a constitutional disclosure duty upon prosecutors in the pretrial setting.

To the contrary, by the time Ceballos wrote his memorandum, the Court had held that prosecutors have no duty to disclose exculpatory evidence before a defendant is indicted, at least in the specialized setting of the grand jury hearing.²⁶⁰ In dicta in *United States v. Agurs*, the Court also had indicated that there was no pretrial disclosure duty by stating that prosecutors could reveal *Brady* information "during the course of a trial."²⁶¹ The federal courts of appeals have generally agreed that prosecutors can wait until quite late in the game to comply with constitutionally mandated disclosure duties—even after defense cross-examination of a prosecution witness.²⁶²

The litigants and the courts in Ceballos's case were silent on the significance of this doctrinal problem in applying *Brady* to the disclosures prompted by Cuskey's motion to traverse. On one hand, such silence may not have been wholly inappropriate. Ceballos had evidence indicating that law enforcement officers committed perjury. There were two opportunities for that evidence to have any meaningful effect: the memorandum recommending dismissal and, absent dismissal, the *Franks* hearing on the motion to traverse the warrant. On those facts, the core constitutional meaning of due process disclosure duties—speaking truth, seeking justice, disclosing material exculpatory and impeachment evidence—could have trumped the absence of any binding Supreme Court precedent on the need for pretrial disclosure.

On the other hand, the silence of the litigants and courts on the unsettled timing-of-disclosure doctrine may indicate inattention. A few weeks before the district court ruled

²⁵⁹ *United States v. Agurs*, 427 U.S. 97, 107-08 (1976).

²⁶⁰ *United States v. Williams*, 504 U.S. 36, 47 (1992).

²⁶¹ 427 U.S. at 107.

²⁶² *United States v. Starusko*, 729 F.2d 256, 262 (3d Cir. 1984) (quoting *United States v. Higgs*, 713 F.2d 39, 44 (1983)); *see also* *United States v. Burke*, 571 F.3d 1048, 1053-56 (10th Cir. 2009) (collecting cases, requiring proof of prejudice from belated disclosure).

on the summary judgment motions in Ceballos's case, the Supreme Court granted certiorari in another Ninth Circuit case, *United States v. Ruiz*.²⁶³ That case raised the question whether *Brady* requires disclosure of impeachment evidence during plea bargaining.²⁶⁴ A few months later, and nearly two years before the Ninth Circuit ruled in Ceballos's case, a unanimous Court held that no such duty exists.²⁶⁵ Since *Ruiz* arguably had implications for prosecutors' pretrial disclosure duties beyond the plea bargaining context—potentially weakening Ceballos's civil rights claim—one would reasonably expect to see some evidence that those implications were considered, had the litigants or judges done so.

This deepening silence raises the question whether *any* federal constitutional precedent imposed a specific disclosure obligation on Ceballos, in addition to his core due process duties to speak truth and seek justice, in the context of a pretrial *Franks* hearing. Although no court or commentator has discussed this question, the answer is yes.

In 1993—after the Supreme Court held that no disclosure duty applied in the grand jury setting, but long before Cuskey's defense lawyer challenged Detective Wall's affidavit—the Ninth Circuit became the only jurisdiction in the country to impose *Brady*-line disclosure duties on prosecutors in the latter, pretrial setting of a motion to traverse.²⁶⁶ In *United States v. Barton*, the defendant argued that his *Brady* rights were violated when law enforcement officers let his marijuana plants rot in their evidence locker.²⁶⁷ Detectives had seized the marijuana pursuant to a warrant.²⁶⁸ They obtained the warrant by swearing in an affidavit that they had smelled marijuana at Barton's house.²⁶⁹ Barton challenged the truth of

²⁶³ 534 U.S. 1074 (2002) (granting certiorari Jan. 4, 2002).

²⁶⁴ 536 U.S. 622, 625 (2002).

²⁶⁵ *Id.* at 630-33. Specifically, the *Ruiz* Court held that due process does not bar requirements that defendants waive their rights to impeachment evidence as a condition of accepting a plea bargain; such a waiver does not render the plea involuntary. *Id.* at 630, 633.

²⁶⁶ *United States v. Barton*, 995 F.2d 931, 935 (9th Cir. 1993); *cf.* *Mays v. City of Dayton*, 134 F.3d 809, 816 (6th Cir. 1998) (where a *Franks* challenge alleges omission of disputed facts from warrant affidavit, defendants must make "a strong preliminary showing that the affiant *with an intention to mislead* excluded critical information from the affidavit, and the omission is critical to the finding of probable cause"). *But see* *United States v. Stott*, 245 F.3d 890, 902-03 & n.9 (7th Cir. 2001) (applying plain error analysis and finding no clear rule that *Brady* applies to suppression hearings; collecting cases).

²⁶⁷ 995 F.2d at 932.

²⁶⁸ *Id.*

²⁶⁹ *Id.*

that statement. He argued that only marijuana plants with glandular trichomes emit any odor.²⁷⁰ Had his plants been preserved, he urged, he could have impeached the detectives with evidence that his plants had no glandular trichomes and were therefore odorless.²⁷¹

The Ninth Circuit affirmed the denial of Barton's suppression motion.²⁷² The panel reasoned that Barton failed to prove officers destroyed the plants in bad faith. But to reach that issue, the court first extended *Brady* protections to the pretrial setting of a *Franks* hearing.²⁷³ The panel concluded that, by violating due process discovery duties (in *Barton*, through destruction of material impeachment evidence), an agent of the prosecution "could feel secure that false allegations in his or her affidavit for a search warrant could not be challenged . . . [and] effectively deprive a criminal defendant of his Fourth Amendment right to challenge the validity of a search warrant."²⁷⁴

Excavating the due process disclosure rights and duties in Ceballos's case leads to a previously unremarked and precise core constitutional meaning. At least in jurisdictions within the Ninth Circuit, prosecutors must seek justice, speak truth, and disclose material exculpatory and impeachment evidence—including when defendants challenge the veracity of affidavits supporting search warrants.²⁷⁵

E. Discovery Duties Diminished

The Supreme Court's five-member majority held that Ceballos had no First Amendment protection against retaliation for writing the memorandum recommending dismissal of the charges against Cuskey and Longoria because he conceded that such activity was part of his official duties as a government

²⁷⁰ *Id.* at 933.

²⁷¹ *Id.*

²⁷² *Id.* at 936.

²⁷³ *Id.* at 934-35 (citing *Franks v. Delaware*, 438 U.S. 154, 156, 168 (1978)).

²⁷⁴ *Id.* at 935.

²⁷⁵ See *United States v. Welton*, No. CR 09-00153, 2009 U.S. Dist. LEXIS 71509, at *27 & n.33 (C.D. Cal. Aug. 1, 2009) (stating that *Barton* remains "law of the circuit" post-*Ruiz*; collecting cases on imposition of *Brady*-line duties pretrial), *aff'd on other grounds*, 438 F. App'x 555, 556 (9th Cir. 2011); *State v. Lewis*, No. 31684, 2006 Ida. App. LEXIS 19, at *10, *14-15 (Feb. 13, 2006) (applying *Barton* to reverse grant of motion to suppress due to lack of proof that officer destroyed exculpatory audiotape in bad faith), *aff'd*, 156 P.3d 565, 569 (Idaho 2007).

employee.²⁷⁶ I will not recanvass the abundant commentary²⁷⁷ on what even the apparently lone scholarly supporter of *Garcetti* concedes to be the opinion's undertheorized treatment of First Amendment workplace rights for government employees.²⁷⁸ The majority's reasoning is formalistic and syllogistic. Ceballos recorded the *Brady* information in a charge disposition memorandum. Ceballos conceded that it was part of his job duties to produce charge disposition memoranda. The First Amendment does not protect communications that are part of a government employee's job duties. Therefore, the First Amendment did not protect Ceballos from retaliation for writing his memorandum.

Concerns about federalism, separation of powers, and administrative efficiency played a strong role in *Garcetti*'s outcome. Those concerns rise to a peak in federal civil rights actions seeking oversight of local criminal justice systems. *Garcetti* also is part of a long and more particular trend toward concentration of power in, and deference to, the prosecution function as an administrative entity. Granting the effect of those concerns in *Garcetti*, the case carries important implications for prosecutors' constitutional discovery duties—which, in the view of all of the lower federal court judges, required Ceballos to act as he did. The California Prosecutors Association and the Association of Deputy District Attorneys of

²⁷⁶ *Garcetti v. Ceballos*, 547 U.S. 410, 421-24 (2006). The Court did not address issues of qualified immunity. It would appear that the disclosure duty in the context of Cuskey's *Franks* hearing was "clearly established" for purposes of section 1983 qualified immunity analysis under *Barton. Wilson v. Layne*, 526 U.S. 603, 617 (1999) (to establish defendant duty, plaintiffs may cite "controlling authority in their jurisdiction at the time of the incident which clearly established the rule on which they seek to rely"); *Harlow v. Fitzgerald*, 457 U.S. 800, 818 n.32 (1982) (declining to determine "the circumstances under which 'the state of the law' should be 'evaluated by reference to the opinions of this Court, of the Courts of Appeals, or of the local District Court'" (quoting *Procunier v. Navarette*, 434 U.S. 555, 565 (1978) (reviewing federal district court and court of appeals decisions to determine whether the right at issue was "clearly established"))); *Francis v. Coughlin*, 891 F.2d 43, 46 (2d Cir. 1989) ("[T]he court must determine whether the decisional law of the Supreme Court or the appropriate circuit court has clearly established the right in question."); see also Karen M. Blum, *The Qualified Immunity Defense: What's "Clearly Established" and What's Not*, 24 *TOURO L. REV.* 501, 515 (2008) ("controlling authority from the jurisdiction—that circuit's court of appeals or the highest court of the state in which the case was sitting" may show law is "clearly established" for qualified immunity purposes).

²⁷⁷ See Tarkington, *supra* note 22, at 2176 & n.5 (citing scholarly commentary).

²⁷⁸ Rosenthal, *supra* note 22, at 38. Rosenthal contends that *Garcetti* adopted "much the same position" that he argued successfully in *Gonzalez v. City of Chicago*, 239 F.3d 939 (7th Cir. 2001). Rosenthal, *supra* note 22, at 33 n.1. But see Elizabeth Dale, *Employee Speech and Management Rights: A Counterintuitive Reading of Garcetti v. Ceballos*, 29 *BERKELEY J. EMP. & LAB. L.* 175, 194 & nn.133-36 (2008) (arguing for a more limited reading of *Gonzalez* and *Garcetti*).

Los Angeles County urged the same position as *amici* before the Supreme Court. They begged the Court to protect prosecutors' good-faith compliance with due process discovery duties.²⁷⁹ Yet the Justices gave the issue little attention. With few exceptions,²⁸⁰ scholars have followed suit.

Justice Kennedy's majority opinion in *Garcetti* never referred directly to prosecutors' constitutional discovery duties. A single citation to *Brady v. Maryland* was sandwiched between the opinion's penultimate closing lines.²⁸¹ Those lines referenced "safeguards in the form of . . . constitutional obligations apart from the First Amendment" and an assurance that such "imperatives . . . protect employees and provide checks on supervisors who would order unlawful or otherwise inappropriate actions."²⁸² The majority opinion was silent on Ceballos's claim that it was precisely this imperative that required him to act as he did, and yet failed to protect him from alleged retaliation—an allegation that, like all other aspects of his complaint, had to be construed with every inference in his favor at the summary judgment stage.²⁸³

Justice Stevens's short dissenting opinion made no mention of prosecutors' due process disclosure duties.²⁸⁴ Justice Souter's dissenting opinion, in which Justices Stevens and Ginsburg joined, attributed to Ceballos the constitutionally protected "interest of any citizen in speaking out against a rogue law enforcement officer."²⁸⁵ But these dissenters also viewed the interest at stake as that of a First Amendment right exercised by a government employee. Therefore, Ceballos's free speech interest had to be balanced against a set of powerful competing interests.²⁸⁶ These dissenters would have weighed Ceballos's interest in his favor only if his comments addressed "official dishonesty, deliberately unconstitutional action, other serious wrongdoing, or threats to health and safety."²⁸⁷

But Justice Souter's dissent went further. That opinion defined Ceballos's official duties as a prosecutor in a way that

²⁷⁹ Brief of Ass'n of Deputy Dist. Attorneys & Cal. Prosecutors Ass'n as Amici Curiae in Support of Respondent, *Garcetti v. Ceballos*, 547 U.S. 410 (2006) (No. 04-473).

²⁸⁰ Tarkington, *supra* note 22, at 2178 & n.13 (responding to Rosenthal, *supra* note 22, at 56-57).

²⁸¹ *Ceballos*, 547 U.S. at 425.

²⁸² *Id.* at 425-46.

²⁸³ *Id.* at 442 & n.13 (Souter, J., dissenting) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986)).

²⁸⁴ *Id.* at 426-27 (Stevens, J., dissenting).

²⁸⁵ *Id.* at 431 (Souter, J., dissenting).

²⁸⁶ *Id.* at 419-20 (majority opinion).

²⁸⁷ *Id.* at 435 (Souter, J., dissenting).

could entail something more than the First Amendment interest of “any citizen.” Ceballos’s job was “to enforce the law by constitutional action” and “to exercise the county government’s prosecutorial power by acting honestly, competently, and constitutionally.”²⁸⁸ Justice Souter’s dissent also cited Ceballos’s allegation that *Brady* required him to disclose the memorandum to the defense as exculpatory evidence.²⁸⁹ Finally, this opinion noted, Ceballos’s “claim relating to [his own] truthful testimony in court must surely be analyzed independently [of the other aspects of his claim] to protect the integrity of the judicial process.”²⁹⁰ These statements marked a path toward relief for Ceballos on remand.²⁹¹

Justice Souter’s opinion offered no substantive analysis of the constitutional doctrine that allegedly compelled Ceballos to ensure, among other things, that the judge considering Cuskey’s motion to traverse heard “truthful testimony.” In the lone opinion viewing Ceballos’s due process disclosure duties as dispositive, Justice Breyer’s dissent added little doctrinal analysis to Justice Souter’s. He would have held that Ceballos had a protectable First Amendment interest because, as a general matter, Ceballos was engaged in “professional speech—the speech of a lawyer,” and because, as a prosecutor, he had more specific speech obligations imposed by the *Brady* doctrine.²⁹² In Justice Breyer’s view, those twin circumstances vested a First Amendment interest in Ceballos’s production of the memorandum because they simultaneously increased the need to protect the speech at issue, reduced government interests in controlling the speech, and lowered the risk of inefficiencies and overreaching that might occur through judicial trenching on managerial authority in the government workplace.²⁹³

²⁸⁸ *Id.* at 437.

²⁸⁹ *Id.* at 442.

²⁹⁰ *Id.* at 444. Justice Souter’s opinion stated that Ceballos’s testimony at the motion hearing “stopped short of his own conclusions” that the deputies lied. *Id.* at 442. This was so because the judge sustained the prosecution’s objections to that testimony. Joint App’x Vol. III, *supra* note 204, at 298-303.

²⁹¹ The case settled shortly after the Supreme Court remanded the case. *Ceballos v. Garcetti*, No. CV 00-11106 AHM (AJWx), 2002 U.S. Dist. LEXIS 28039 (C.D. Cal. Jan. 30, 2002). Orly Lobel reported that, although the terms of the agreement are not public, “the settlement may have been very favorable for Ceballos.” Orly Lobel, *Citizenship, Organizational Citizenship, and the Laws of Overlapping Obligations*, 97 CALIF. L. REV. 433, 454 & n.125 (2009).

²⁹² *Garcetti*, 547 U.S. at 446-47 (Breyer, J., dissenting).

²⁹³ *Id.*

With respect to the professional speech prong of Justice Breyer's test, Margaret Tarkington has supplied much of the doctrinal analysis missing from his cursory dissenting opinion.²⁹⁴ Tarkington also is one of the few scholars to discuss the facts and law that gave rise to Ceballos's disclosure duties. Her work points to the core piece of *Brady* evidence in the case: Ceballos's two conversations with "the police affiant for the warrant" mentioned in the majority opinion.²⁹⁵

Those conversations comprised Ceballos's confrontation of Detective Wall with evidence that the affidavit contained falsehoods as well as Wall's subsequent admission about needing to change the affidavit.²⁹⁶ That evidence had both exculpatory and impeachment value. First, it tended to show that the truck could not be traced to Cuskey's junkyard. Second, it cast doubt on the investigating officers' veracity. Because the evidence called key components of the state's case into question, Ceballos's investigation and Wall's admission constituted *Brady* material, inaccessible to the defense unless the prosecution complied with the constitutional duty to turn it over.²⁹⁷ Unsurprisingly, Ceballos, his supervisors, the federal District Court judge, three Circuit Court judges, and Justice Breyer all agreed on this point.²⁹⁸ The puzzle remains: why was

²⁹⁴ Tarkington, *supra* note 22. For California authorities governing Ceballos's conduct, see *People v. Davis*, 309 P.2d 1, 9 (Cal. 1957) (in reference to defense attorney speech, stating that "counsel may not offer testimony of a witness which he knows to be untrue" since "[t]o do so may constitute subornation of perjury"); CAL. BUS. & PROF. CODE § 6068(d) (2011) (attorneys have duty to employ "those means only as are consistent with truth, and never to seek to mislead the judge or any judicial officer by an artifice or false statement of fact or law").

²⁹⁵ Tarkington, *supra* note 22, at 2178 & n.13 ("Ceballos, a member of the prosecution, talked twice with the police affiant for the warrant" (citing *Garcetti*, 547 U.S. at 414 (majority opinion))).

²⁹⁶ See *supra* notes 220-28 and accompanying text.

²⁹⁷ Without accounting for the impeachment value of the officers' admissions or the opinions of Ceballos's supervisors, the lower court judges, and Justice Breyer that Ceballos had a constitutional disclosure duty, Professor Rosenthal reached the opposite conclusion. See Rosenthal, *supra* note 22, at 56-57. An experienced prosecutor and admitted advocate for the "managerial prerogatives" vindicated in *Garcetti*, *id.* at 33, Rosenthal is alone among commentators in acknowledging the relevance of *Franks v. Delaware* to the case. *Id.* at 40 & n.11. He also acknowledged prosecutors' duties to obtain and disclose *Brady* evidence held by law enforcement, *id.* at 56 & n.72, and concluded that prosecutors must be protected against retaliation for good-faith compliance with *Brady*-line disclosure duties. *Id.* at 67-68. He might concede that, regardless of the outcome at the motion hearing, the impeachment value of Wall's admission supported a good-faith belief in the prosecutors' constitutional duty to disclose it, and agree to the improbability that the officers would have volunteered that evidence to the defense lawyers who had publicly accused them of misleading or lying to a magistrate.

²⁹⁸ On the correlation of duties and rights, see generally, *Osborn v. Bank of United States*, 22 U.S. 738 (1824) ("It is not unusual for a legislative act to involve

this duty given such short shrift by the Justices and the majority of commentators?

To be sure, the plaintiff's pleadings and argument did not point the Court toward Ceballos's disclosure duty under *Barton*.²⁹⁹ But it is hardly satisfactory to blame the relatively thin summary judgment record for the almost complete silence on the core due process principles implicated by the alleged facts. The case was argued twice. The Court had the benefit of several amicus briefs. Nor does it seem likely that the Justices gave Ceballos's due process duties short shrift because the trial judge, in denying the *Franks* motion, effectively ruled that he had no duty to reveal evidence of police perjury.³⁰⁰ *Brady* materiality is determined ex post by estimating the cumulative value that withheld evidence would have had if the defense had been able to use it. The rejection of a *Brady* claim does not reach back to eliminate a prosecutor's duty to reveal potentially exculpatory evidence in time for the defense to incorporate it into the case investigation and litigation. To the contrary, *Brady* requires disclosure, even in close cases, to prevent prosecutors from "tacking too close to the wind" and infecting criminal adjudications with unfairness and unreliability.³⁰¹ Ceballos's commitment to protecting the integrity of the judicial process appears to have been in good faith; he was willing to sacrifice his career for it.

Nor does it solve the puzzle to insist that the case is really about government employee speech under the First Amendment and not about due process discovery duties. On that point, it is noteworthy that the *Garcetti* majority did not adopt the view of the District Court and the Court of Appeals' concurring opinion³⁰² that Ceballos had no protectable interest in his communication precisely *because* his speech was required

consequences which are not expressed. An officer, for example, is ordered to arrest an individual. It is not necessary, nor is it usual, to say that he shall not be punished for obeying this order. His security is implied in the order itself. . . . [T]he judicial power is the instrument employed by the government in administering this security."); *Brewer v. Hoxie Sch. Dist.* No. 46, 238 F.2d 91, 100 (8th Cir. 1956) (granting injunction restraining anti-desegregationists' interference with plaintiff school board directors' attempts to comply with *Brown v. Board of Education*, 347 U.S. 483 (1954)); *id.* ("[T]he existence of a Constitutional duty also presupposes a correlative right in the person upon whom the duty is imposed to be free from direct interference with its performance.").

²⁹⁹ At oral argument, plaintiff's counsel urged that government employees have a First Amendment right to speak on any topic that is newsworthy. Transcript of Oral Argument at 48-50, *Garcetti*, 547 U.S. 410 (No. 04-473) [hereinafter 2005 Transcript].

³⁰⁰ *But see* Rosenthal, *supra* note 22, at 45.

³⁰¹ *Kyles v. Whitley*, 514 U.S. 419, 439 (1995).

³⁰² *See supra* notes 256-58 and accompanying text.

by due process disclosure doctrine. That logic, like the Supreme Court majority's, was syllogistic—but more sweeping.

On the reasoning of the lower courts, Ceballos had no First Amendment protection against retaliation for performing his job duties. Those duties included notifying his superiors of the *Brady* information in Cuskey's case. Therefore, Ceballos had no First Amendment protection against retaliation for communicating *Brady* information to his superiors. This reading of Ceballos's due process disclosure duties submerges them within First Amendment doctrine. In turn, constitutional protection against retaliation for prosecutors who comply in good faith with *Brady*-line obligations sinks out of sight.

But the Supreme Court majority did not ride that wake (at least not to its most extreme conclusion) despite being urged to do so at oral argument.³⁰³ Instead, the majority focused exclusively on the form, not the content, of Ceballos's memorandum. For the majority, it was the act of writing such memoranda, more than the content, that erased Ceballos's free speech rights.³⁰⁴ With respect to the content of the memorandum, the majority threw due process disclosure duties what turns out to be, on closer analysis, a slender lifeline. The majority cited *Brady* not as the basis for submerging due process protections under First Amendment doctrine, but as exemplifying constitutional "safeguards" and "imperatives" that "protect employees and provide checks on supervisors who would order unlawful or otherwise inappropriate actions."³⁰⁵ Those lines trace back to exchanges during oral argument hinting that Ceballos had his own due process interest at stake.³⁰⁶

One interpretation of the majority opinion is that prosecutors' truth-telling and justice-seeking duties are so fundamental to the proper functioning of justice systems that they comprise bedrock due process components warranting protection independent of the First Amendment. The majority's implicit retention of independent due process protections on the facts alleged indicates that, even under a First Amendment-dominant analysis, Ceballos's federal constitutional obligation to speak might have changed the outcome in the case had the litigants focused closely on the core due process principles at issue and their precise applications to the facts of the case

³⁰³ 2005 Transcript, *supra* note 299, at 19-20.

³⁰⁴ *Garcetti v. Ceballos*, 547 U.S. 410, 425-26 (2006).

³⁰⁵ *Id.*

³⁰⁶ 2005 Transcript, *supra* note 299, at 22-24.

under *Franks* and *Barton*. As discussed above, it is possible that the failure to undertake this analysis resulted from inattention. It is also possible that, had Ceballos's constitutional duties been fully fleshed out, a majority might nevertheless have subordinated those duties to internal management interests. The Court might have declined to identify a due process right to be free from retaliation for complying with *Brady* in the context of internal agency communication. The Court might have held that a federal appellate court decision such as *Barton* does not clearly establish a right or duty for purposes of a claim filed under 42 U.S.C. § 1983.

But assuming that the due process lifeline traced here has some strength, focusing on core meanings in the context of the specific constitutional rights and duties implicated in *Garcetti* might have pulled Ceballos's claim safely ashore. The claim could have rested directly in due process or undergone the more complex move from due process through the First and Fourth Amendments and back again. In either case, the due process analysis would dominate. But certainly for Richard Ceballos, *Barton* reinforced the core *Brady* duties to disclose Detective Wall's statement. The duty triggered a corresponding right to disclose the information without retaliation.³⁰⁷ Indeed, as even Ceballos's supervisors acknowledged, the entire office shared the same disclosure duty.³⁰⁸ Any remaining adjudicative work would comprise fact-based determinations to be resolved on remand, including the credibility of defense denials that any retaliation occurred.

IV. FULL OPEN FILE DISCOVERY AS A MODEL FOR REFORM

A. *Opening the Black Box: Law, Politics, and Bureaucracy in the Regulation of Prosecutorial Decision Making*

The Supreme Court acknowledged more than a decade ago that open file discovery can “increase the efficiency and the fairness of the criminal process.”³⁰⁹ The same concerns animate *Brady*-line requirements for prosecutors and investigative

³⁰⁷ See *supra* note 298.

³⁰⁸ See *supra* note 255.

³⁰⁹ *Strickler v. Greene*, 527 U.S. 263, 283 n.23 (1999); see also Jennifer Blasser, *Prosecutorial Disclosure Obligations and Practices*, 31 CARDOZO L. REV. 1962, 1968 (2010) (citing general agreement among symposium attendees that justice is best served when defense counsel has information “useful” for case assessment, investigation, and trial as well as for client communication).

agencies to disclose information beneficial to the defense.³¹⁰ Providing defendants with information obtained through government's superior investigative resources levels the playing field. Fact finders make better decisions when adversaries present their strongest admissible evidence in the most compelling manner. The finality of reliable verdicts increases public confidence in the transparency and accountability of adjudicatory systems. Finality and reliability also reduce the significant costs resulting from alleged and actual error in criminal cases—costs borne by defendants, crime victims and survivors, their families, and the taxpayers who support prosecutors, public defenders, courts, and prisons.³¹¹

Implementation and expansion of full open file criminal discovery provides an effective model for vindicating the foregoing interests. The statutes are short and simple. Prosecutors must provide the complete investigative files, including any material obtained by law enforcement, to the defense before trial.³¹² A *file* includes investigators' notes, all oral statements (which are required to be recorded), and any other information obtained during the investigation.³¹³ Oral statements need not be signed or adopted by potential witnesses to fall under the discovery requirement.³¹⁴ Work product privileges are narrowed to "protect the prosecuting attorney's mental processes while allowing the defendant access to factual information collected by the state."³¹⁵ Reciprocal discovery of specified material by the defense to the prosecution is mandated.³¹⁶ Ex parte motions to restrict disclosure are allowed where necessary to prevent any "substantial risk to any person" of harm, intimidation, or even "unnecessary annoyance or embarrassment."³¹⁷ Willful violation of the statute is punishable as a felony.³¹⁸

³¹⁰ See *supra* notes 1-5 and accompanying text.

³¹¹ For data on prison costs alone, see, for example, *Justice Reinvestment: Facts and Trends*, JUSTICE REINVESTMENT, http://justicereinvestment.org/facts_and_trends (last visited Jan. 27, 2012).

³¹² N.C. GEN. STAT. § 15A-903 (2012).

³¹³ *Id.* § 15A-903(a)(1). Particularly as modified by the 2011 amendments, the unique combination of provisions in the North Carolina statutes qualify that state's reform as "full" open file discovery. Mosteller, *supra* note 5, at 263.

³¹⁴ *State v. Shannon*, 642 S.E.2d 516, 523 (N.C. Ct. App.), *review granted*, 649 S.E.2d 893 (N.C.), *petition withdrawn*, 654 S.E.2d 246 (N.C. 2007).

³¹⁵ *Shannon*, 642 S.E.2d at 525 (interpreting N.C. GEN. STAT. § 15A-904 and quoting JOHN RUBIN, N.C. INST. OF GOV'T, ADMINISTRATION OF JUSTICE 8 (2006)).

³¹⁶ N.C. GEN. STAT. §§ 15A-905 to -906 (2012).

³¹⁷ *Id.* § 15A-908.

³¹⁸ *Id.* § 15A-903(d).

The readily available empirical evidence—including case law, legislative history, and observations of some key stakeholders—demonstrates that full open file discovery reform can succeed. The history of full open file reform also illustrates that litigation and legislation are viable strategies for regulating prosecutors’ discretionary decision making.³¹⁹ That evidence is significant because full open file reform can help prevent debacles like John Thompson’s convictions and incarceration, protect prosecutors like Richard Ceballos from retaliation for complying with disclosure duties, and increase the fairness, finality, and efficiency of criminal litigation.³²⁰

Yet despite the number and magnitude of restrictions inhibiting enforcement of *Brady*-line duties; despite the documented link between disclosure violations and wrongful convictions;³²¹ despite the Supreme Court’s implicit acknowledgement that resources are wasted in litigating pretrial discovery motions and postconviction *Brady* claims;³²² and despite the unfairness and uncertainty that the *Brady* regime creates for defendants, victims, and their families, full open file discovery remains a rarity in the United States. Reform on this front lags even as years of dogged litigation and media attention spur cures—including passage of model uniform statutes—for the mistaken eyewitness identifications, false confessions, and flawed forensic analysis that also contribute to unfair, unreliable, and inefficient outcomes in criminal cases.³²³

Full open file discovery reform also has received little scholarly attention.³²⁴ Commentators have generally followed the courts in deferring to prosecutors, and any internal administrative changes they may choose to make in governing their own discretionary decision making, as the optimal prophylaxis against improper nondisclosure and its attendant costs. In its strongest recent iteration, this trend expressly despairs of litigation and legislation as effective avenues for criminal justice reform, at least with respect to the prosecutorial function. Miller and Wright’s *Black Box*³²⁵ is

³¹⁹ See Mosteller, *supra* note 5, at 306-16.

³²⁰ *Id.*

³²¹ See *supra* note 1.

³²² Strickler v. Greene, 527 U.S. 263, 283 n.23 (1999).

³²³ See *supra* note 30.

³²⁴ Exceptions include Mosteller, *supra* note 5. Other scholars recommending open file reform include Alafair S. Burke, *Revisiting Prosecutorial Disclosure*, 84 IND. L.J. 481 (2009); Medwed, *supra* note 98, at 1557-66 (noting benefits and risks); and Richard Rosen, *Reflections on Innocence*, 2006 WIS. L. REV. 237, 271-73.

³²⁵ Miller & Wright, *supra* note 29.

exemplary. Miller and Wright argue that development of internal data collection protocols is the best, if not the only mechanism for regulating prosecutorial discretion.³²⁶ They cite Orleans Parish District Attorney Harry Connick, Sr. as an example of such internal reform.³²⁷

The citation carries a Niebuhrian irony.³²⁸ On one hand, the Black Box embodies the opacity of discretionary decision making by the most powerful players in criminal justice systems.³²⁹ Miller and Wright cogently argue that data collection, assessment, and reporting can open this Black Box and bring greater transparency and accountability to charging decisions, including the identification and correction of any intentional or unconscious racial bias.³³⁰ But bureaucratic reform is no panacea. For example, Daniel Richman cautions that Connick's charge-screening reform was, on closer analysis, "more like a case study in institutional disarray."³³¹ And Pamela Metzger reveals that, even pre-Katrina, Orleans Parish defendants were jailed without counsel for weeks under local rules and policies while Connick's office decided whether and how to charge them.³³²

³²⁶ *Id.* at 128-30.

³²⁷ *Id.* (citing Ronald Wright & Marc Miller, *The Screening/Bargaining Tradeoff*, 55 STAN. L. REV. 29, 30-36 (2002)); *id.* at 186-87 (anticipating opportunities for increasing "external" transparency through internal agency data collection and assessment).

³²⁸ REINHOLD NEIBUHR, *THE IRONY OF AMERICAN HISTORY* (1958); Wright & Miller, *supra* note 29, at 59 ("New Orleans would probably not appear at the top of most lists of progressive criminal justice systems.").

³²⁹ *Morrison v. Olson*, 487 U.S. 654, 727 (1988) (Scalia, J., dissenting) ("Only someone who has worked in the field of law enforcement can fully appreciate the vast power and the immense discretion that are placed in the hands of a prosecutor with respect to the objects of his investigation."); Erik J. Luna & Marianne Wade, *Prosecutorial Power: A Transnational Symposium: Prosecutors as Judges*, 67 WASH. & LEE L. REV. 1413, 1415 (2010) ("In many (if not most) American jurisdictions, the prosecutor is the criminal justice system. For all intents and purposes, he makes the law, enforces it against particular individuals, and adjudicates their guilt and resulting sentences."); Stephanos Bibas, *Prosecutorial Regulation Versus Prosecutorial Accountability*, 157 U. PA. L. REV. 959, 960 (2009) ("No government official in America has as much unreviewable power and discretion as the prosecutor."); William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 509 (2001) ("[L]aw enforcers, not the law, determine who goes to prison and for how long."); *see generally* DAVIS, *supra* note 109.

³³⁰ Miller & Wright, *supra* note 29, at 155, 193-95; *see also* Janet Moore, *Causes, Consequences, and Cures of Racial and Ethnic Disproportionality in Conviction and Incarceration Rates*, 3 FREEDOM CTR. J. 35 (2011) (introducing and moderating panel discussion with Wayne McKenzie, founding Director of the Prosecution & Racial Justice Program at the Vera Institute of Justice).

³³¹ Daniel Richman, *Institutional Coordination and Sentencing Reform*, 84 TEX. L. REV. 2055, 2057 (2006).

³³² Louisiana's pretrial procedural rules and local public defender policies contributed to the problem. Pamela R. Metzger, *Doing Katrina Time*, 81 TUL. L. REV. 1175, 1177-79 (2007).

Moreover, it was during Connick's nearly thirty-year tenure as District Attorney of Orleans Parish that John Thompson became one of several prisoners, including other death row inmates, whose cases were tainted by *Brady* violations. Until Thompson's case was decided, *Kyles v. Whitley*³³³ was the leading national exemplar of *Brady* violations. This was due in part to the sheer scope of the "blatant and repeated" due process discovery violations by prosecutors in Connick's office.³³⁴ More recently, the Court held that the latest *Brady* violation from Orleans Parish required a new trial on quintuple-murder charges for a due process violation that at least one Justice considered so egregious as to warrant asking the prosecutor during oral argument whether she had considered forfeiting the case.³³⁵

To be clear, Miller and Wright offer no imprimatur for Connick's leadership beyond the commitment to data collection for charge-screening purposes.³³⁶ They do argue, however, that Orleans Parish exemplifies, with respect to the exercise of prosecutorial discretion, how "internal regulation can deliver even more than advocates of external regulation could hope to achieve."³³⁷ Legislators and judges, they explain, "have never answered the calls" for reform, "and the political dynamics of American criminal justice make it very unlikely that they will do so in the future."³³⁸

At first glance, the Supreme Court's constriction of 42 U.S.C. § 1983 as a mechanism for enforcing prosecutorial disclosure duties in *Connick v. Thompson* and *Garcetti v. Ceballos* would seem to support this thesis. Nor are Miller and Wright alone in promoting a "physician, heal thyself" strategy for reform of discretionary prosecutorial decision making. Stephanos Bibas agrees that interbranch regulation and professional disciplinary oversight comprise a generally "ineffectual" check on prosecutorial power and joins those who

³³³ 514 U.S. 419 (1995).

³³⁴ *Id.* at 455 (Stevens, J., concurring); see *supra* notes 98-100 and accompanying text.

³³⁵ See *supra* note 24.

³³⁶ Miller & Wright, *supra* note 29, at 129-33.

³³⁷ *Id.* at 128-29.

³³⁸ *Id.* at 165-66 & nn.104-07 (citing "dynamics of prosecutor elections"); see also William J. Stuntz, *Unequal Justice*, 121 HARV. L. REV. 1969 (2008); William J. Stuntz, *The Political Constitution of Criminal Justice*, 119 HARV. L. REV. 780 (2006); Donald A. Dripps, *Criminal Procedure, Footnote Four, and the Theory of Public Choice; Or, Why Don't Legislatures Give a Damn About the Rights of the Accused?*, 44 SYRACUSE L. REV. 1079, 1089-92 (1993).

offer managerial blueprints for internal agency reform.³³⁹ A recent gathering of scholars and practitioners on criminal discovery reform also focused on prosecutors' internal policy development as the optimal solution for the improper nondisclosure of information beneficial to the defense.³⁴⁰ For example, a working group charged with assessing disclosure processes assumed that "prosecutors will disclose appropriate information to the defense" and left the issue of nondisclosure "as a matter for discussion by other Working Groups."³⁴¹ The "Systems and Culture" group could not even reach consensus on training prosecutors to disclose "favorable" as opposed to "material" evidence.³⁴²

The reticence of courts and scholars vis-à-vis external regulation of prosecutorial disclosure duties is unsurprising. Federalism and separation of powers concerns inhibit external oversight of criminal justice systems. And as a general statement of realpolitik it is certainly true, as the late William Stuntz and many others have noted, that the disproportionate impact of crime and criminal justice processes on low-income people and people of color is simultaneously a cause and a consequence of these systems' resistance to reform through the traditional avenues of litigation and legislation.³⁴³

Deference to prosecutorial agencies with respect to the vindication of defense discovery rights is also consistent with the unprecedented concentration of unchecked power in the prosecutorial function.³⁴⁴ From *Brady's* inception onward,

³³⁹ Bibas, *supra* note 329, at 978.

³⁴⁰ Ellen Yaroshevsky, *Foreword: New Perspectives on Brady and Other Disclosure Obligations: What Really Works?*, 31 CARDOZO L. REV. 1943, 1953-59 (2010) (summarizing reports); see also Wright, *supra* note 104, at 1995-2010; Ronald F. Wright & Marc L. Miller, *The Worldwide Accountability Deficit for Prosecutors*, 67 WASH. & LEE L. REV. 1587 (2010) (comparing U.S. and civil law systems).

³⁴¹ Keith A. Findley, *New Perspectives on Brady and Other Disclosure Obligations: Report of the Working Group on Best Practices: The Disclosure Process*, 31 CARDOZO L. REV. 1972 (2010).

³⁴² Wright, *supra* note 104, at 1998.

³⁴³ See MICHELLE ALEXANDER, *THE NEW JIM CROW* (2010); AFTER THE WAR ON CRIME: RACE, DEMOCRACY, AND A NEW RECONSTRUCTION (Mary Louise Frampton, Ian Haney Lopez, & Jonathan Simon eds., 2008); JONATHAN SIMON, *GOVERNING THROUGH CRIME: HOW THE WAR ON CRIME TRANSFORMED AMERICAN DEMOCRACY AND CREATED A CULTURE OF FEAR* (2007); James Forman, Jr., *Acknowledging Race in a "Post-Racial" Era: The Black Poor, Black Elites, and America's Prisons*, 32 CARDOZO L. REV. 791 (2011) (noting need to disaggregate race and class effects); Stuntz, *Unequal Justice*, *supra* note 338 (attributing disproportionalities in part to decline in local democracy); Michael Tonry & Matthew Melewski, *The Malign Effects of Drug and Crime Control Policies on Black Americans*, 37 CRIME & JUST. 1, 7-40 (2008) (compiling data, testing explanations, and proposing provision of racial impact statements to accompany criminal legislation).

³⁴⁴ See *supra* note 329.

constitutional doctrine has prioritized deference to prosecutorial discretion over enforceability. Case after case underscores the weakness of *Brady*-line authorities as enforceable mechanisms for criminal discovery reform and the prevention of wrongful convictions. In this context, *Connick* and *Garcetti* comprise the most recent illustration of the doctrinal subordination of prosecutorial disclosure duties, the related due process and fair trial rights of defendants, and the broader interests of criminal justice stakeholders in convictions and sentences that are worthy of confidence.

B. The Birth of Reform and the Presumptuousness of Despair

Connick and *Garcetti* could be taken as more evidence (if any were needed) justifying despair of litigation and legislation as effective strategies for criminal justice reform, particularly in the context of prosecutors' discovery duties. That despair might deepen in light of the stalled progress on federal legislation designed to restore some of the protections taken from government employees by *Garcetti*.³⁴⁵ The ironic death of that legislation by the secret vote of a single senator³⁴⁶ might seem to undercut the thesis that law and politics remain vibrant and quintessentially democratic avenues toward criminal justice reform.

But unpacking the *Connick-Garcetti* interplay should encourage reformers, despite losses on the litigation and legislation fronts, to recover subordinated core meanings of relevant rights and duties and to seek new avenues for their vindication.³⁴⁷ I view the cases as holding this potential, perhaps because capital litigation taught me that despair is nearly always presumptuous. Certainly *Connick* and *Garcetti* illustrate *Brady*'s complexity and weak enforceability. But the cases also highlight the contrasting fairness, finality, and efficiency that can be obtained through full open file discovery

³⁴⁵ The Whistleblower Protection Enhancement Act of 2010, S. 372, 111th Cong. (2010) passed unanimously by the House and Senate only to be derailed by a single anonymous "hold" vote. Tom Devine, Op-Ed., *Who Killed the Whistle-blower Bill*, L.A. TIMES (Jan. 10, 2011), <http://articles.latimes.com/2011/jan/10/opinion/la-oe-devine-whistleblower-20110110>; Lobel, *supra* note 291, at 454-55 & nn.133-35 (discussing threatened veto of Whistleblower Protection Enhancement Act, H.R. 985, 110th Cong. (2007)); see also Orly Lobel, *Lawyering Loyalties: Speech Rights and Duties Within Twenty-First-Century New Governance*, 77 FORDHAM L. REV. 1245, 1256-57 (2009) (quoting Ceballos's 2006 testimony before Congress).

³⁴⁶ Devine, *supra* note 345.

³⁴⁷ Cf. JULES LOBEL, SUCCESS WITHOUT VICTORY: LOST LEGAL BATTLES AND THE LONG ROAD TO JUSTICE IN AMERICA 1-10 (2003).

reform. Moreover, it was precisely the type of dogged investigation and litigation that led to the *Connick* and *Garcetti* rulings—and discontent inspired by similar examples of the *Brady* model’s failures—that motivated full open file reform. In this broader view, the *Connick-Garcetti* duo may open a new chapter in the reform story. To appreciate that possibility, one must consider the irony surrounding the advent of full open file discovery statutes.

Full open file discovery had its genesis in the “tough on crime” movement of the late 1990s and the specific desire to speed the pace of capital postconviction litigation and executions.³⁴⁸ Like states across the country, North Carolina was modeling new legislation on the federal Antiterrorism and Effective Death Penalty Act.³⁴⁹ During legislative hearings on the issue in 1996, members of the defense bar cited Robert McDowell’s capital case as an example of the increased efficiency that full open file discovery could bring to capital litigation.³⁵⁰

McDowell, a black man, was convicted of capital murder by a North Carolina jury in 1979.³⁵¹ After his appeal was denied,³⁵² his lawyers learned that the prosecution had failed to disclose evidence at trial that indicated, among other things, that the assailant was white.³⁵³ The dogged investigation and litigation of McDowell’s *Brady* claim included multiple rounds of petitions for review to the United States Supreme Court.³⁵⁴ In 1990, after eleven years of court proceedings,³⁵⁵ McDowell

³⁴⁸ Mosteller, *supra* note 5, at 262-64.

³⁴⁹ Email communications with Staples Hughes, N.C. Appellate Defender; Malcolm “Tye” Hunter, Dir., Ctr. for Death Penalty Litig., Durham, N.C.; and Robert Mosteller (on file with the author). I served as an Assistant Appellate Defender under the leadership of Hunter and Hughes, respectively, between 1998 and 2005.

³⁵⁰ *Id.*

³⁵¹ State v. McDowell, 271 S.E.2d 286, 289 (N.C. 1981).

³⁵² *Id.*

³⁵³ McDowell v. Dixon, 858 F.2d 945, 947 (4th Cir. 1988).

³⁵⁴ Dixon v. McDowell, 489 U.S. 1033 (1989); McDowell v. North Carolina, 451 U.S. 1012 (1981); McDowell v. North Carolina, 450 U.S. 1025 (1981).

³⁵⁵ Upon discovering the *Brady* information, postconviction counsel filed a motion seeking a new trial. After a hearing, the trial judge granted the motion. State v. McDowell, 310 S.E.2d 301, 303-05 (N.C. 1984). The state Supreme Court reversed. *Id.* at 303. On federal habeas, the United States Court of Appeals for the Fourth Circuit ordered relief on that claim. *Dixon*, 858 F.2d at 951. Although McDowell’s case appears to be missing from a 2006 assessment of Fourth Circuit habeas decisions, he is among a small minority of petitioners to prevail in a Circuit whose rates of habeas relief are “significantly lower than in any other circuit.” Sheri Lynn Johnson, *Wishing Petitioners to Death: Factual Misrepresentations in Fourth Circuit Capital Cases*, 91 CORNELL L. REV. 1105, 1150-51 & nn.373-79 (2006).

received a new trial and a conviction on the lesser, noncapital charge of second-degree murder.³⁵⁶

Thus, full open file discovery reform began as a political compromise inspired by protracted litigation over due process disclosure duties. A coalition (or at least a collection) of odd bedfellows designed full open file reform in part to reduce the wasted resources and uncertainty created in cases like Robert McDowell's by nondisclosure of *Brady* evidence to the defense. The new open file statute "changed the landscape" of capital postconviction litigation.³⁵⁷ As discussed below, the state courts rejected the few challenges that prosecutors raised in the early phases of implementation. Instead, the legislature addressed prosecutors' concerns by amending the statutes. And the general trajectory of the amendments has been toward expanding and strengthening open file rights and duties.

C. *Full Open File Reform in Action: Case Law, Legislative History, and a View from the Trenches*

The state Supreme Court issued the first significant interpretation of the 1996 full open file discovery statute within two years of enactment. The state had sought to restrict the law's scope by labeling the bulk of the prosecution's file "work product."³⁵⁸ The Court applied the law's plain language and rejected the state's argument.³⁵⁹ Then compliance with the 1996 statute revealed *Brady* violations in a series of capital cases. The state courts vacated judgments in ten of those cases.³⁶⁰ That litigation focused attention on noncompliance with *Brady* discovery duties and the resulting burdens on courts, victims'

³⁵⁶ McDowell received a life sentence. *Persons Removed from Death Row Since North Carolina's Death Penalty Was Reinstated in 1977*, N.C. DEP'T OF PUB. SAFETY, <http://www.doc.state.nc.us/dop/deathpenalty/removed.htm> (last visited Apr. 1, 2012).

³⁵⁷ Mosteller, *supra* note 5, at 263.

³⁵⁸ *Id.* at 263 & n.17 (citing *State v. Bates*, 497 S.E.2d 276, 280 (N.C. 1998)).

³⁵⁹ *Bates*, 497 S.E.2d at 280-82.

³⁶⁰ Mosteller, *supra* note 5, at 261 & n.11 (citing cases). *Brady* claims led to new trials in these cases only after significant expenditure of time and resources on direct appeal, during which the office of the state Attorney General represented the prosecution. *See, e.g.*, *State v. Gell*, 524 S.E.2d 332 (N.C. 2000) (new trial awarded on post-conviction Motion for Appropriate Relief, Bertie County Superior Court Docket No. 95 CRS 1884, Dec. 9, 2002); *State v. Hamilton*, 519 S.E.2d 514 (N.C. 1999) (same, Richmond County Superior Court Docket No. 95 CRS 1670, Apr. 23, 2003); *State v. Hoffman*, 505 S.E.2d 80 (N.C. 1998) (same, Union County Superior Court Docket No. 95 CRS 15695, Apr. 30, 2004); *State v. Bishop*, 472 S.E.2d 842 (N.C. 1996) (same, Guilford County Superior Court Docket Nos. 93 CRS 20410-20423, Jan. 10, 2000); *State v. Womble*, 473 S.E.2d 291 (N.C. 1996) (same, Columbus County Superior Court Docket Nos. 93 CRS 1992-1993).

families, taxpayers, defendants, and public confidence in the criminal justice system.

By this point, about half of the state prosecutors had implemented some form of open file discovery.³⁶¹ Subsequent media coverage and public pressure led to the first major expansion of the 1996 full open file statute in 2004.³⁶² That amendment created the broadest criminal discovery rights and duties in the nation.³⁶³ As discussed below, subsequent amendments in 2007 and 2011 continued the trajectory toward increasingly expansive and enforceable discovery duties.

The 2004 statute extended discovery duties beyond the postconviction phase, requiring the prosecution in all felony cases to provide the defense, before trial, with “the complete files of all law enforcement and prosecutorial agencies involved in the investigation . . . or prosecution” of the case.³⁶⁴ *File* was defined expansively as well, to include all statements by defendants, codefendants, and witnesses, all investigative notes, all test or examination results, and “any other matter or evidence obtained during the investigation” of the case.³⁶⁵ Crucially, the statute mandated that “[o]ral statements shall be in written or recorded form”³⁶⁶ and shielded prosecutors’ interview notes from disclosure as work product only “to the extent they contain the opinions, theories, strategies or conclusions” of the prosecutor or other legal staff.³⁶⁷ Another provision allowed both prosecution and defense to move *ex parte* for protective orders to prevent disclosures that create “a substantial risk to any person of physical harm, intimidation, bribery, economic reprisals, or unnecessary annoyance or embarrassment.”³⁶⁸

In April 2007, the state’s intermediate court of appeals interpreted the crucial provision requiring recordation and disclosure of all oral statements. As was the case with the 1996

³⁶¹ Telephone Interview with Kimberly Overton, Chief Resource Prosecutor, N.C. Conference of District Attorneys (Aug. 17, 2011).

³⁶² Mosteller, *supra* note 5, at 264-76. Discontent over the perceived mildness of sanctions for nondisclosure also led to expanded duties under the governing disciplinary rules. *Id.*

³⁶³ *Id.* at 274-76.

³⁶⁴ N.C. GEN. STAT. § 15A-903(a)(1) (2004).

³⁶⁵ *Id.*

³⁶⁶ *Id.*

³⁶⁷ *Id.* § 15A-904(a).

³⁶⁸ *Id.* § 15A-908(a). The new provision for *ex parte* protective orders required notice to opposing counsel of the order’s existence, but “without disclosure of the subject matter.” *Id.* A subsequent amendment requires any “affidavits or statements” supporting such an *ex parte* order to be sealed for appellate review. N.C. GEN. STAT. § 15A-908(b) (2012).

discovery statute, the Court again held that the legislature meant what it said: “The plain, unambiguous meaning of this requirement is that ‘statements’ need not be signed or adopted before being subject to discovery.”³⁶⁹ The panel majority also rejected the state’s objection that the requirement to reveal all recorded witness statements trenched too far upon work product privileges. The Court held that the amendment adequately protects prosecutors’ “mental processes while allowing the defendants access to factual information collected by the state.”³⁷⁰

Like the state courts, the legislature also rejected an attempt by prosecutors to expand the work-product privilege in the discovery reform statutes.³⁷¹ But prosecutors did obtain amendments addressing other concerns. At the prosecutors’ request, protections were added to shield personal identifying information and, more specifically, to protect identities of confidential informants.³⁷² The legislature also eased requirements for recording witness statements to prevent redundancies.³⁷³

Other amendments responded to a DNA laboratory’s failure to reveal exculpatory information in the Duke lacrosse

³⁶⁹ State v. Shannon, 642 S.E.2d 516, 523 (N.C. Ct. App. 2007).

³⁷⁰ *Id.* at 525 n.2 (quoting John Rubin, N.C. Inst. of Gov’t, *Administration of Justice*, BULL. 2004/06, at 8); State v. Hardy, 235 S.E.2d 828, 841 (N.C. 1977) (“Only roughly and broadly speaking can a statement of a witness that is reduced verbatim to a writing or a recording by an attorney be considered work product, if at all Such a statement is not work product in the same sense that an attorney’s impressions, opinions, and conclusions or his legal theories and strategies are work product.”).

³⁷¹ The General Assembly rejected a 2007 amendment that would have reduced prosecutors’ duty to disclose interview notes. Compare N.C.S.B. 1009, 2007 Gen. Assemb. (N.C. Mar. 21, 2007), available at <http://www.ncga.state.nc.us/Sessions/2007/Bills/Senate/PDF/S1009v1.pdf>, with Act of Aug. 19, 2007, § 15A-904(a), 2007 N.C. Sess. Laws 377 § 2, available at <http://www.ncga.state.nc.us/Sessions/2007/Bills/Senate/PDF/S1009v4.pdf>. The legislature also rejected a 2011 amendment to limit prosecutors’ disclosure duties to their own files as opposed to all investigative materials held by all agencies involved in the case. Compare N.C.H.B. 408, 2011 Gen. Assemb. (N.C. Mar. 21, 2011), available at <http://www.ncga.state.nc.us/Sessions/2011/Bills/House/PDF/H408v1.pdf>, with N.C. GEN. STAT. § 15A-903(a)(1) (2012).

³⁷² § 15A-904(a)(1)-(2), 2007 N.C. Sess. Laws 377 § 2. These protections were later expanded to include specific categories of confidential informants and victim impact statements. N.C. GEN. STAT. § 15A-904(a3)-(a4) (2012).

³⁷³ § 15A-903(a)(1), 2007 N.C. Sess. Laws 377 § 1. The amendment eliminated the recordation requirement when prosecutors interview a witness without a third party present unless the witness says something “significantly new or different” from prior recorded statements. *Id.* The *Shannon* dissent had noted the inefficiencies resulting from the previous double-recordation requirement. 642 S.E.2d at 524, 526 (McCullough, J., dissenting in part). After obtaining agreement on the 2007 amendments, the state dropped its appeal of the *Shannon* majority’s decision. State v. Shannon, 654 S.E.2d 246 (N.C. 2007).

cases³⁷⁴ and to new concerns raised by both prosecutors and defense lawyers. Prosecutors protested that unwarranted disciplinary charges were being filed against them when other agencies hindered compliance by failing to give prosecutors the information they needed to satisfy their discovery duties.³⁷⁵ In response, the legislature redefined the term *prosecutorial agencies* to accommodate prosecutors' limited ability to sanction nondisclosure by investigators. But the amendments also expanded the statutes' scope. *Agencies* was redefined to include "any public or private entity that obtains information on behalf of a law enforcement agency or prosecutor's office in connection with the investigation . . . or prosecution" of a case.³⁷⁶ The legislature also clarified that all testing data must be disclosed, "including, but not limited to, preliminary tests or screening results and bench notes."³⁷⁷

In addition, these recent amendments tightened the mandate for disclosure by law enforcement or other investigative agencies of the complete investigative file to the prosecution.³⁷⁸ The legislature added criminal penalties for willful noncompliance with disclosure duties by investigative agencies.³⁷⁹ Finally, the revised statutes require that a prosecutor's "reasonably diligent inquiry" to comply with disclosure duties triggers a presumption that he or she acted in good faith.³⁸⁰ The Governor signed these amendments into law on June 23, 2011.³⁸¹

The well-known Duke lacrosse case demonstrates that full open file discovery is a prerequisite—a necessary, if not a sufficient, condition—for preventing *Brady* violations as well as the wasteful litigation and wrongful prosecutions and

³⁷⁴ See Mosteller, *supra* note 5, at 285-306.

³⁷⁵ See N.C. H.B. 408, *Bill Tracking Report*, 2011 Bill Tracking N.C. H.B. 408, [hereinafter H.B. 408 Bill Tracking Report] (bill "avoids frivolous claims of professional misconduct against prosecutors"); see also Telephone Interview with Brad Bannon, N.C. Advocates for Justice (June 27, 2011); Telephone Interviews with Professors Jim Drennan, Jeff Welty, and Jessica Smith, N.C. Sch. of Gov't (July 27, 2011; July 31, 2011; and Aug. 1, 2011, respectively); Telephone Interview with Kimberly Overton, *supra* note 361.

³⁷⁶ Act of June 23, 2011, § 15A-903(a)(1)(c), 2011 N.C. Sess. Laws 250, § 1, available at <http://www.ncga.state.nc.us/Sessions/2011/Bills/House/PDF/H408v5.pdf>.

³⁷⁷ N.C. GEN. STAT. § 15A-903(a)(1)(a) (2012).

³⁷⁸ Compare Act of July 5, 2007, § 15A-903(c), 2007 N.C. Sess. Laws 183, § 1, available at <http://www.ncga.state.nc.us/Sessions/2007/Bills/House/PDF/H786v5.pdf> (requiring disclosure upon request by the State), with N.C. GEN. STAT. § 903(c) (mandating timely disclosure without request).

³⁷⁹ N.C. GEN. STAT. § 15A-903(d).

³⁸⁰ *Id.* § 15A-910(c)-(d).

³⁸¹ H.B. 408 Bill Tracking Report, *supra* note 375.

convictions that can ensue.³⁸² Additional evidence of full open file discovery's success includes the rarity of court challenges or other significant litigation arising from the statutes in the reported cases; the judiciary's plain-language resolution of those claims; and the legislature's accommodation of prosecutors' concerns as they arise while maintaining and strengthening full open file rights and duties.

Observations from those involved with training and implementation indicate that after initial resistance, primarily from some of the more experienced prosecutors and law enforcement officers, full open file reform is finding increasingly broad acceptance.³⁸³ Under the statutes, responsibility for identifying materially beneficial information is where it belongs—with defense counsel. Full open file discovery appears to be increasing the speed and fairness of plea bargaining.³⁸⁴ An initial surge in pretrial protective orders subsided with amendments shielding victims and witnesses from inappropriate exposure or interference.³⁸⁵ Some jurisdictions have seen increased pretrial discovery hearings, mainly in high-level cases, as the parties document good-faith efforts to comply with their statutory duties.³⁸⁶ Issues regarding appropriate sanctions for discovery violations by both sides are being resolved through the normal course of trial rulings and appellate review.³⁸⁷

On the other hand, logistical problems with discovery production have been significant, particularly in major cases with deep investigative histories. Some of these concerns are being addressed through training on best practices and through development of an electronic compliance program.³⁸⁸ This Discovery Automated System, when fully operational, will be used by investigative agencies, prosecutors, and defenders, respectively, to record, organize, and receive information. Every action in a case will be recorded, and date-stamped. Such

³⁸² Mosteller, *supra* note 5, at 276-309.

³⁸³ Telephone Interviews with Brad Bannon and Professors Jim Drennan, Jeff Welty, and Jessica Smith, *supra* note 375; Telephone Interview with Kimberly Overton, *supra* note 361.

³⁸⁴ See sources cited *supra* note 383.

³⁸⁵ See sources cited *supra* note 383.

³⁸⁶ See sources cited *supra* note 383.

³⁸⁷ JESSICA SMITH, CRIMINAL CASE COMPENDIUM 25-27 (University of North Carolina Institute of Government, Aug. 2, 2011) (collecting cases), available at <http://www.sog.unc.edu/sites/www.sog.unc.edu/files/Criminal%20Case%20Compendium%20November%202008%20to%20present.pdf>.

³⁸⁸ See sources cited *supra* note 383.

recording will include any redactions or edits made to any of the information contained in the file.³⁸⁹

Certainly there remain key sticking points for successful implementation of full open file reform. Thousands of new and experienced investigators must be trained. These front-line justice system personnel range from law enforcement officers to employees in the state Department of Social Services. Nor will it suffice merely to train these key stakeholders on the scope and meaning of full open file rights and duties. Investigators also must have adequate resources to comply with recording and reporting requirements. Finally, as Daniel Medwed, R. Michael Cassidy, and other scholars have noted, full open file discovery is not a cure-all.³⁹⁰ The recent removal of Durham, North Carolina District Attorney Tracy Cline from office was due in part to discovery violations that underscore the recalcitrance of some agency cultures, and of corresponding enforceability problems, related to prosecutors' discovery duties.³⁹¹ Nevertheless, when compliance can be enforced through criminal penalties, and when robust opportunities for defense investigation and litigation at the trial, appellate, and postconviction stages create a meaningful opportunity to prevent or promptly detect and correct discovery violations, the full open file model is the best option for improving efficiency, reliability, and fairness in criminal adjudications.

D. *Research and Reform Opportunities for the Future*

Although much work remains to be done to improve compliance with criminal discovery obligations, the readily available empirical evidence highlights significant steps toward successful implementation of full open file discovery as a reform model. The history of full open file reform also demonstrates the

³⁸⁹ See sources cited *supra* note 383.

³⁹⁰ Cassidy, *supra* note 37, at 1477; Medwed, *supra* note 98, at 1557-66.

³⁹¹ Cline replaced Michael Nifong, the prosecutor in the Duke lacrosse cases. J. Andrew Curliss, *Judge Takes Cline to Task*, NEWSOBSERVER.COM (Nov. 15, 2011, 4:08 AM), <http://www.newsobserver.com/2011/11/15/1645167/judge-takes-cline-to-task.html>. Cline's subsequent suspension and removal were triggered under a seldom-used state statute, N.C. GEN. STAT. § 7A-66 (2011). J. Andrew Curliss, *Cline Inquiry Hangs on "Elastic" Law*, NEWSOBSERVER.COM (Feb. 12, 2012, 3:38 AM), <http://www.newsobserver.com/2012/02/12/1847876/cline-inquiry-hangs-on-elastic.html>; *Group Claims Durham DA Unfairly Removed From Office*, NEWSRECORD.COM (Mar. 21, 2012), http://www.news-record.com/content/2012/03/21/article/group_claims_durham_da_unfairly_removed_from_off ice; see also *In re Hudson*, 600 S.E.2d 25, 27-28 (N.C. 2004) (affirming order dismissing removal petition and sanctioning party moving for prosecutor's removal); *In re Spivey*, 480 S.E.2d 693, 701 (N.C. 1997) (rejecting prosecutor's challenge to statute based on state constitutional separation of powers grounds).

continued vitality of litigation and legislation as necessary complements to internal agency reform in the context of discretionary prosecutorial decision making. Additional research should test for any influence of full open file discovery reform on plea and conviction rates and pretrial or postconviction litigation over discovery issues. Further research should also identify the conditions that foster such reform in some jurisdictions and impede it in others. With respect to North Carolina's expansion of full open file discovery from capital postconviction cases to all felonies, Professor Mosteller summarizes the accomplishment in half-a-dozen words: "The adversaries hammered out a deal."³⁹²

That statement raises interesting questions. What conditions enabled the defense function, whose efficacy is often strongly discounted,³⁹³ to come to the negotiating table as a meaningful adversary to the prosecution? How might those conditions be duplicated in other jurisdictions? To what extent did the adversaries channel the interests of the disproportionately low income and minority individuals who bear the brunt of crime and criminal proceedings, but who, according to popular wisdom, are excluded from meaningful participation in the development of criminal justice policy?³⁹⁴ What conditions enable those same individuals to ask their own policy questions, build their own coalitions and advocate for their own solutions to what are too often perceived as "criminal injustice systems"?³⁹⁵

Answering such questions could help move justice systems more quickly toward greater fairness and finality in criminal adjudications. With respect to the most recent set of full open file amendments, key negotiators for the prosecution and the defense concur that two skills were essential to successful resolution of the issues. First, the negotiators were able to defuse emotions inherent in the highly adversarial prosecutor-defender relationship.³⁹⁶ Second, they were able to listen closely to opposing views to detect and address the core concerns being brought to the table.³⁹⁷ Combining those

³⁹² Mosteller, *supra* note 5, at 272 & n.76.

³⁹³ See generally CONSTITUTION PROJECT, *supra* note 113.

³⁹⁴ See *supra* note 343 and accompanying text.

³⁹⁵ Judge Weinstein captured the reality behind this epithet with passionate precision in *United States v. Bannister*, 786 F. Supp. 2d 617, 660 (E.D.N.Y. 2011).

³⁹⁶ Telephone Interviews with Brad Bannon and Professors Jim Drennan, Jeff Welty, and Jessica Smith, *supra* note 375; Telephone Interview with Kimberly Overton, *supra* note 361.

³⁹⁷ *Id.*

capacities allowed negotiators to tailor solutions to the specific problems at issue, and to build trust essential to the resolution of future problems.³⁹⁸ As I have discussed in a different doctrinal context, such capacities are central to the exercise of moral imagination within a discourse model of political ethics.³⁹⁹ Ideally, they will be brought to bear at the national level, through exploration of the full open file statutes as a model for a uniform criminal discovery code encompassing misdemeanors as well as felonies.⁴⁰⁰

In the absence of such conditions, other “carrot-and-stick” options might be considered. The “stick” component could emulate federal legislation adopted after the Rampart police misconduct scandal exploded in Los Angeles. In response, Congress enacted 42 U.S.C. § 14141, which opened the door for Department of Justice oversight of local police reform efforts initiated through litigation.⁴⁰¹ Ironically, it was in the context of public outrage over the Rampart scandal that Richard Ceballos felt bound to report evidence of officer perjury in the Cuskey and Longoria cases.⁴⁰² Similar outrage over injustices and inefficiencies caused by *Brady*’s weak enforceability might lead to comparable legislation, oversight, and reform in the arena of prosecutorial disclosure duties. Reform advocates also might seek to tie the receipt of federal and other grant funding to the achievement of benchmarks in progress toward full open file reform. The “carrot” approach to reform has some track record of success in the context of policing, and might translate well in bringing appropriate levels of transparency and accountability to discretionary prosecutorial decision making.⁴⁰³

³⁹⁸ *Id.*

³⁹⁹ See generally Janet Moore, *Covenant and Feminist Reconstructions of Subjectivity Within Theories of Justice*, 55 LAW & CONTEMP. PROBS. 159 (1992).

⁴⁰⁰ See *supra* note 30.

⁴⁰¹ Chemerinsky, *supra* note 226, at 589-97; Kami Chavis Simmons, *The Politics of Policing: Ensuring Stakeholder Collaboration in the Federal Reform of Local Law Enforcement Agencies*, 98 J. CRIM. L. & CRIMINOLOGY 489, 507-11 (2008).

⁴⁰² See *supra* notes 225-27 and accompanying text.

⁴⁰³ MALCOLM M. FEELEY & AUSTIN D. SARAT, THE POLICY DILEMMA: FEDERAL CRIME POLICY AND THE LAW ENFORCEMENT ASSISTANCE ADMINISTRATION, 1968-78, at 4 (1980) (noting that legislation that created LEAA adopted a block grant approach, in which fighting crime would remain a state and local function, and federal government’s primary role would be to provide revenues and ideas allowing states to develop programs for their own use); NANCY E. MARION, A HISTORY OF FEDERAL CRIME CONTROL INITIATIVES, 1960-93, at 56-58 (1994) (noting LEAA’s block grant design was supported by Republicans and Southern Democrats in Congress, who felt that federal government should not involve itself directly in local police efforts); Paul Hoffman, *The Feds, Lies, and Videotape: The Need for an Effective Federal Role in Controlling Police Abuse in Urban America*, 66 S. CAL. L. REV. 1453, 1530-31 nn.296-97 (1993) (urging conditional grants of federal funds to curb police misconduct).

CONCLUSION

The implementation and expansion of full open file discovery provides two object lessons. First, the model's successes to date offer lessons for jurisdictions seeking greater fairness, finality, and efficiency in criminal case outcomes. Second, full open file reform demonstrates the continued vitality of law and politics as effective and quintessentially democratic tools for opening the black boxes that nest throughout the nation's criminal justice systems. *Connick* and *Garcetti* can introduce an important new chapter in this reform process. The cases simultaneously underscore the weak enforceability of prosecutors' due process disclosure duties and highlight the benefits of the full open file discovery model.

The core question animating this work is a search for sustainable production of the conditions that allow jurisdictions to pursue, through the traditional clash of law and politics as necessary complements to internal agency reform, significant "smart on crime" improvements such as full open file discovery. For example, Miller and Wright correctly stress the critical role of internal data gathering and assessment in identifying and correcting race effects on prosecutorial decision making.⁴⁰⁴ Yet it was zealous litigation and aggressive, grassroots-to-grassroots political advocacy that led to enactment of the nation's first Racial Justice Act, allowing death row inmates to challenge death sentences based on statistical evidence of unconscious racial bias in charging, sentencing, and jury selection.⁴⁰⁵ Litigation and policy advocacy also has motivated key indigent defense reforms, including the creation of politically independent oversight bodies with the authority to promulgate and enforce standards for attorney qualification, training, and

⁴⁰⁴ Miller & Wright, *supra* note 29, at 195.

⁴⁰⁵ North Carolina Racial Justice Act, N.C. GEN. STAT. §§ 15A-2010 to -2012 (2012). On April 20, 2012, Judge Gregory Weeks ordered relief in the first case litigated under the Racial Justice Act. *State v. Robinson*, No. 91-CrS-23143 (N.C. Super. Ct. Apr. 20, 2012). Two months later the legislature overrode a gubernatorial veto and repealed significant provisions of the Act. An Act to Amend Death Penalty Procedure, 2012 N.C. Sess. Laws 136, §§ 2-9, (codified as amended at N.C. GEN. STAT. §§ 15A-2004(b), 15A-2011 to -2012. For an analysis of the legal and political history that led to the Racial Justice Act, see generally Seth Kotch & Robert P. Mosteller, *The Racial Justice Act and the Long Struggle with Race and the Death Penalty in North Carolina*, 88 N.C. L. REV. 2031 (2010); for analysis of the statutes' application, see Robert P. Mosteller, *Responding to McCleskey and the Defects of Batson: North Carolina Racial Justice Act Addresses the Systemic Pattern of Race Based Peremptory Challenges in Death Sentences*, 10 OHIO ST. J. CRIM. L. (forthcoming 2012).

performance.⁴⁰⁶ In a like vein, crises in state and local budgets have led legislatures to accompany new criminal justice statutes with fiscal note and racial impact assessment requirements. Such benchmarks can help check the massive and virtually unregulated investment of increasingly scarce tax dollars⁴⁰⁷ in what too often becomes a rapidly-spinning set of revolving doors into and out of local, state, and national criminal justice systems.⁴⁰⁸

The complementary nature of bureaucracy, law, and politics warrants more scholarly analysis at these and other pivot points in the discretionary decision making that drives criminal justice systems. Legal scholars can enrich the analysis through interdisciplinary cooperation with specialists in criminology, sociology, political science, public health, and social work. Inter-institutional partnerships between the legal academy and government, nonprofit agencies, and foundations may yield more effective, sustainable system improvements.

Such engaged scholarship may also offer an antidote for despair over the possibility of truly democratic criminal justice reform. This is the political black box that can tempt scholars to privilege internal administrative reform over law and politics in the quest for criminal justice reform. Engaged scholarship may be able to empower the disproportionately low-income and minority members of our communities—those whose lives most often intersect with criminal justice systems, but who seldom have an effective voice in shaping policy and procedure—to pose their own research questions, formulate their own reform proposals, and create their own policy advocacy coalitions. Their voices are crucial to sustaining the quest for greater transparency and accountability in criminal justice decision making.

⁴⁰⁶ See, e.g., MONT. CODE ANN. § 47-1-102 (2005); Bruce A. Green, *Criminal Neglect: Indigent Defense from a Legal Ethics Perspective*, 52 EMORY L.J. 1169, 1183 & n.65 (2003) (citing Montana litigation).

⁴⁰⁷ See STEVE AOS ET AL., WASH. STATE INST. FOR PUB. POL'Y, EVIDENCE-BASED PUBLIC POLICY OPTIONS TO REDUCE FUTURE PRISON CONSTRUCTION, CRIMINAL JUSTICE COSTS, AND CRIME RATES (2006); Catherine London, *Racial Impact Statements: A Proactive Approach to Addressing Racial Disparities in Prison Populations*, 29 LAW & INEQ. 211, 231-33 & nn.178-91 (2011) (describing effects of fiscal and racial impact note requirements).

⁴⁰⁸ See generally Alexander, *supra* note 343.