Brady is the Problem: Wrongful Convictions and the Case for "Open File" Criminal Discovery

By BRIAN GREGORY*

> We now hold that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.
>
> —Justice William O. Douglas, *Brady v. Maryland*[1]

> There is no general constitutional right to discovery in a criminal case, and *Brady* did not create one . . . .
>
> —Justice Byron White, *Weatherford v. Bursey*[2]

Introduction

BRADY V. MARYLAND remains the Supreme Court's strongest articulation of a criminal defendant's constitutional right to evidence of his or her innocence. In this regard, the "*Brady* rule" is widely considered to be our criminal justice system's primary mechanism for protecting the wrongfully accused from conviction, imprisonment, and even execution. In recent years, however, the advent of DNA technology and studies by legal and scientific scholars have shown that wrongful convictions have persisted at an alarming rate since the Court's decision in *Brady*. In fact, in the vast majority of exonerations it is the case that the prosecution, law enforcement personnel, or both possessed undisclosed evidence which would tend to prove the innocence of a particular defendant.

The extent of the problem of wrongful convictions in the American criminal justice system demands radical solutions. The United

* J.D. Candidate, University of San Francisco School of Law, 2012; B.A., University of California at Berkeley, 2004. The author would like to thank Richard A. Leo, whose dedication to the study of wrongful convictions inspired this Article, John P. and Lois Gregory for their invaluable encouragement and support, and Kathleen M. McBride and the rest of the staff of the University of San Francisco Law Review.

1. 373 U.S. 83, 87 (1963).
2. 429 U.S. 545, 559 (1977).

States incarcerates more people, both in total and per capita, than any other country in the world, including Russia and China.[3] In 2008, it was reported that 2.3 million American adults were incarcerated in American prisons and jails—one in every one hundred American adults.[4] In 2009, it was reported that 5.1 million American adults were under some form of correctional supervision, including prisons, jails, probation, parole, and other forms of non-custodial sanctions—one in every thirty-one American adults.[5] In 2007, commentator D. Michael Risinger published the most comprehensive attempt to date to determine an "empirically justified factual wrongful conviction rate."[6] Basing his study on capital rape-murder cases, Risinger determined a conservative estimate of that rate to be 3.3%.[7] If this number is an accurate estimate of the national rate of wrongful conviction, regardless of the nature of the charged crime, it would mean that there are approximately 80,000 wrongfully convicted individuals incarcerated in prisons and jails and 168,300 wrongfully convicted individuals under some form of correctional supervision.

While some have argued that wrongful convictions are actually *more* likely in capital cases, such as those used by Risinger to determine his wrongful conviction rate,[8] a generous reduction of the rate still produces staggering estimates of the number of wrongfully convicted. If Risinger's rate is reduced from 3.3% to 1% to account for the greater likelihood of wrongful conviction in capital cases compared to other crimes, it would still mean that there are approximately 23,000 wrongfully convicted individuals in American prisons and jails and 51,000 wrongfully incarcerated individuals under some form of correctional supervision.

Though these studies do not represent a complete picture of the true extent of the problem of wrongful convictions in the American

3. CHRISTOPHER HARTNEY, NAT'L COUNCIL ON CRIME & DELINQUENCY, U.S. RATES OF INCARCERATION: A GLOBAL PERSPECTIVE (2006), *available at* http://nccd-crc.issuelab.org/sd_clicks/download2/us_rates_of_incarceration_a_global_perspective_focus.

4. PEW CHARITABLE TRUSTS, CTR. ON THE STATES, ONE IN 100: BEHIND BARS IN AMERICA 2008 (2008), *available at* http://www.pewcenteronthestates.org/uploadedFiles/8015PCTS_Prison08_FINAL_2-1-1_FORWEB.pdf.

5. PEW CHARITABLE TRUSTS, CTR. ON THE STATES, ONE IN 31: THE LONG REACH OF AMERICAN CORRECTIONS (2009), *available at* http://www.pewcenteronthestates.org/uploadedFiles/PSPP_1in31_report_FINAL_WEB_3-26-09.pdf [hereinafter ONE IN 31].

6. D. Michael Risinger, *Innocents Convicted: An Empirically Justified Factual Wrongful Conviction Rate*, 97 J. CRIM. L. & CRIMINOLOGY 761, 768 (2007).

7. *Id.* at 768–80.

8. *See* Samuel R. Gross, *The Risks of Death: Why Erroneous Convictions Are Common in Capital Cases*, 44 BUFF. L. REV. 469 (1996).

criminal justice system, they do suggest that wrongful convictions occur far more than anyone believed possible, until relatively recently. Due to the herculean nature of the task of reviewing every conviction in the United States, a truly comprehensive rate of wrongful conviction may never be known. The available data certainly demonstrates one thing, however—the growing tendency of the United States to use criminal prosecution to solve social ills is producing large numbers of wrongful convictions. Even if it is eventually determined that the rate of wrongful convictions is very small in relation to the overall conviction rate, the total number of the wrongfully convicted in the American criminal justice system is likely, at least, in the tens of thousands.

Because of the Supreme Court's decree that "there is no general constitutional right to discovery in a criminal case,"[9] the *Brady* rule remains an innocent defendant's best hope of ensuring that evidence of his or her innocence will come to light and ensure a correct verdict. The available data and above estimates of the rates of wrongful conviction suggest that this hope is misplaced, however, and that the *Brady* rule has failed to protect factually innocent defendants. Instead, the current construction of the *Brady* rule facilitates the suppression of evidence of most causes of wrongful conviction. Further, the illusory protection of the rule legitimizes wrongful convictions and undermines the credibility of the criminal justice system by lulling the public into a false sense of security that prosecutors will turn over all exculpatory evidence, thus obscuring the problem.

The following is an examination of the operation of the *Brady* rule as a safeguard against wrongful conviction in the modern criminal justice system, including the evolution of the *Brady* rule, the cumulative effect of subsequent rulings on the rule's operation, and proposed changes to criminal discovery practice aimed at minimizing wrongful convictions. This examination ultimately reveals that the *Brady* rule offers no meaningful protection of a defendant's constitutional right to due process of law. As currently interpreted by the Supreme Court, the *Brady* rule does not apply to the vast majority of criminal prosecutions, and even when applicable and properly followed, it allows for widespread suppression of exculpatory evidence. Moreover, the absence of meaningful consequences for prosecutorial violations of the current construction of the *Brady* rule renders the remainder of the rule's force moot. The end result is that, contrary to its original purpose, *Brady* actually facilitates the suppression of a

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

number of different types of exculpatory evidence commonly associated with wrongful convictions. Consequently, the *Brady* rule could be said to represent the single greatest cause of wrongful convictions.

While some state and local jurisdictions have adopted rules requiring more extensive prosecutorial disclosure of exculpatory evidence than is called for by the current construction of the *Brady* rule, *Brady* and its progeny are still accepted as the baseline articulation of the extent to which a defendant is constitutionally entitled to exculpatory evidence in a criminal case. To effectively reduce the rate of wrongful convictions, this Comment proposes a comprehensive overhaul of criminal discovery practice. A system of "open file" discovery in criminal cases would go far to remedy the problems with respect to wrongful convictions that have manifested as a result of the modern interpretation of the *Brady* rule.

I. Report—The Evolution of the *Brady* Rule

A. *Brady v. Maryland*

In *Brady v. Maryland*, the Supreme Court held that a prosecutor's duty to disclose exculpatory evidence to the defense was based on a defendant's constitutional right to due process of law.[10] The Court set forth a broad rule requiring the disclosure of all exculpatory evidence in the possession of the prosecution: "We now hold that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution."[11]

Brady is not a case of wrongful conviction, but it is a classic example of prosecutorial suppression of exculpatory evidence.[12] Brady and his accomplice, Boblit, were charged with first-degree murder in connection with a robbery that they committed together.[13] Significantly, the two men were tried separately.[14] In Maryland at the time, first-degree murder in connection with robbery was punishable only by death or life imprisonment.[15] At his trial, Brady admitted his involvement in the crime, asking the jury only that he be spared death and sentenced to life imprisonment on the grounds that it was Boblit who

10. *See* Brady v. Maryland, 373 U.S. 83, 86 (1963).
11. *Id.* at 87.
12. *See id.* at 84–85.
13. *Id.* at 84.
14. *Id.*
15. *Id.* at 85.

did the actual killing.[16] Prior to Brady's trial, his attorney requested that the prosecution disclose all of Boblit's out-of-court statements regarding the crime.[17] The prosecution allowed defense counsel access to every statement but one—the one in which Boblit admitted he did the actual killing.[18] Brady was convicted and sentenced to death in the absence of this crucial piece of exculpatory evidence.[19]

In deciding *Brady*, the Court heavily relied upon its prior decision in *Mooney v. Holohan*,[20] which held that due process barred the prosecution from obtaining a conviction through perjured testimony:

> The principle of *Mooney v. Holohan* is not punishment of society for misdeeds of a prosecutor but avoidance of an unfair trial to the accused. Society wins not only when the guilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly . . . . A prosecution that withholds evidence on demand of an accused which, if made available, would tend to exculpate him or reduce the penalty helps shape a trial that bears heavily on the defendant. That casts the prosecutor in the role of an architect of a proceeding that does not comport with the standards of justice, even though, as in the present case, his action is not "the result of guile," to use the words of the Court of Appeals.[21]

But while the Warren Court's original understanding and articulation of the *Brady* rule promised defendants nearly complete access to exculpatory information, subsequent Court decisions have consistently restricted and narrowed the rule set forth in *Brady* in ways that have fundamentally altered a defendant's due process right to exculpatory evidence. Notably opposing the Court's due process interpretation of a defendant's right to exculpatory information was Justice Byron White, who viewed the Court's emphasis on due process as improper and saw it as "cast[ing] in constitutional form a broad rule of criminal discovery."[22]

B. The *Brady* Rule Since *Brady*

By 1977, the makeup of the Supreme Court had changed, and with it, the Court's approach to a defendant's right to exculpatory evidence. Considering Justice White's objection to the majority rule in *Brady*, it is likely no coincidence that he delivered the opinion of the

16. *Id.* at 84.
17. *Id.*
18. *Id.*
19. *Id.* at 84–85.
20. 294 U.S. 103 (1935) (per curiam).
21. *Brady*, 373 U.S. at 87–88 (quoting Brady v. State, 174 A.2d 167, 169 (Md. 1961)).
22. *Id.* at 92 (separate opinion of White, J.).

Court in *Weatherford v. Bursey*.[23] Justice White did not miss the opportunity to bring *Brady* into line with his views regarding a defendant's right to exculpatory evidence via due process: "There is no general constitutional right to discovery in a criminal case, and *Brady* did not create one . . . ."[24] To this end, the Court moved further to restrict criminal discovery, holding that "[i]t does not follow from [*Brady*] . . . that the prosecution must reveal before trial the names of all witnesses who will testify unfavorably."[25]

In *United States v. Bagley*,[26] the Court held that a defendant's constitutional right to exculpatory information under *Brady* is violated "only if the evidence is material in the sense that its suppression undermines confidence in the outcome of the trial."[27] In setting forth this standard of "materiality" with respect to *Brady*, the Court approvingly noted that this was the same standard set forth to determine ineffective assistance of counsel in *Strickland v. Washington*,[28] decided just one year prior.[29]

It is also important to note that the Court in *Bagley* expressly rejected the notion that there is a material difference between "impeachment evidence" and "exculpatory evidence."[30] While the Court's primary purpose in rejecting this distinction was to correct the underlying court of appeals' reasoning that gave priority to impeachment evidence for *Brady* purposes, the lack of a distinction was to later become highly significant after the Court's decision in *United States v. Ruiz*.[31]

In *Kyles v. Whitley*,[32] the Court further heightened the standard of materiality that must be met under *Bagley* to find a violation of a defendant's constitutional right to due process.[33] In addition to basing their analysis on the question of whether a particular piece of suppressed exculpatory evidence might have produced a different outcome at trial, the Court held that this determination "turns on the cumulative effect of all such evidence suppressed by the govern-

23. Weatherford v. Bursey, 429 U.S. 545 (1977).
24. *Id.* at 559.
25. *Id.*
26. 473 U.S. 667 (1985).
27. *Id.* at 678.
28. 466 U.S. 668 (1984).
29. *Bagley*, 473 U.S. at 681–82.
30. *Id.* at 676 ("This Court has rejected any such distinction between impeachment evidence and exculpatory evidence.").
31. 536 U.S. 622 (2002).
32. 514 U.S. 419 (1995).
33. *Id.*

ment."[34] The Court explicitly acknowledged that the definition of materiality articulated in *Bagley* and heightened in *Kyles* "must accordingly be seen as leaving the government with a degree of discretion" and that a "showing that the prosecution knew of an item of favorable evidence unknown to the defense does not amount to a *Brady* violation."[35] The Court also unequivocally put prosecutors in charge of determining when exculpatory evidence rises to a level of materiality wherein failure to disclose would deprive the defendant of a fair trial: "[T]he prosecutor remains responsible for gauging that effect."[36]

In *United States v. Ruiz*, the Court held that "the Constitution does not require the Government to disclose material impeachment evidence prior to entering a plea agreement with a criminal defendant."[37] This holding is especially significant considering the fact that the vast majority of criminal cases are currently resolved by plea bargain in both federal and state courts.[38] While some have argued that the Court's decision in *Ruiz* applies only to "impeachment evidence," the Court previously held in *Bagley* that there is no "such distinction between impeachment evidence and exculpatory evidence [for the purposes of *Brady*]."[39]

Finally, in 2011, the Court decided *Connick v. Thompson.*[40] *Connick* is a civil rights action under 42 U.S.C. § 1983, wherein the plaintiff Thompson alleged that his civil rights were violated due to the prosecution's failure to turn over exculpatory information in his underlying prosecutions for robbery and murder. Thompson won a $14 million jury verdict at the district court level, which the Fifth Circuit Court of Appeals later affirmed.[41] The Supreme Court held that in order to find a prosecutorial agency or municipality civilly liable for violating *Brady*, a plaintiff must show a "pattern of similar constitutional violations," which could establish "deliberate indifference" on the part of the municipality regarding the need to train its attorneys in the nuances of *Brady.*[42] The Court held that Thompson had not shown such

34. *Id.* at 421.

35. *Id.* at 437.

36. *Id.* at 421.

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

38. *See* Missouri v. Frye, No. 10-444, 2012 WL 932020, at *6 (U.S. Mar. 21, 2012) (recognizing that pleas account for nearly 95% of all criminal convictions).

39. United States v. Bagley, 473 U.S. 667, 676 (1985).

40. 131 S. Ct. 1350 (2011).

41. Thompson v. Connick, 578 F.3d 293 (5th Cir. 2009).

42. *Connick*, 131 S. Ct. at 1360.

a pattern and reversed the Court of Appeals, stripping Thompson of his award for damages.

The majority's finding that the facts in the record of *Connick* fail to establish a "pattern" of *Brady* violations, which indicate the necessary "deliberate indifference" on the part of a district attorney required to trigger civil liability under § 1983, significantly raises the bar for finding liability for municipalities and prosecutorial offices that violate *Brady*.

II. Analysis

A. The Cumulative Effect of *Brady* and Its Progeny

1. *Brady* Is Not Applicable to the Vast Majority of Criminal Prosecutions

As discussed above, the Court in *Ruiz* held that "the Constitution does not require the Government to disclose material impeachment evidence prior to entering a plea agreement with a criminal defendant."[43] Prior to the *Ruiz* decision, the Court held in *Bagley* that "[t]his Court has rejected any . . . distinction between impeachment evidence and exculpatory evidence."[44] The validity of this holding was later cited by the dissent in *Connick*.[45]

The combined effect of these holdings is that the *Brady* rule does not apply to any case resolved through a plea bargain. It is widely recognized that the vast majority of cases in federal and state criminal courts end in plea bargain prior to trial. Although this Comment does not attempt a comprehensive national review of plea bargaining rates vis-à-vis the total number of prosecutions nationwide, statistics compiled by the Supreme Court of the United States and the Judicial Council of California ("Judicial Counsel") offer an illustrative glimpse of the pervasiveness of the practice of plea bargaining in the American criminal justice system. According to the Supreme Court, "[n]inety-seven percent of federal convictions and ninety-four percent of state convictions are the result of guilty pleas."[46] According to the Judicial Council, only 3% of all California's criminal cases go to trial.[47]

43. *Ruiz*, 536 U.S. at 633.

44. *Bagley*, 473 U.S. at 676.

45. *Connick*, 131 S. Ct. at 1381 n.16 (Ginsburg, J., dissenting).

46. *See* Missouri v. Frye, No. 10-444, 2012 WL 932020, at *6 (U.S. Mar. 21, 2012) (recognizing that pleas account for nearly 95% of all criminal convictions).

47. KATHLEEN M. RIDOLFI & MAURICE POSSLEY, PREVENTABLE ERROR: A REPORT ON PROSECUTORIAL MISCONDUCT IN CALIFORNIA 1997–2009 at 12 (2010), *available at* http://law.scu.edu/ncip/file/ProsecutorialMisconduct_BookEntire_online version.pdf.

Of the remaining 97%, 70% of all misdemeanor cases and 80% of all felony cases are resolved in a plea bargain.[48] The remaining cases are disposed of via acquittal, dismissal, or transfer.[49] If the statistics of the Judicial Council even remotely reflect the national rate of plea bargaining (and there is no reason to believe they do not), the implications are staggering: prosecutors are under no obligation to disclose exculpatory evidence in the overwhelming majority of criminal prosecutions.

Compounding this problem, especially with respect to wrongful convictions, the Supreme Court ruled in *Bordenkircher v. Hayes* that a prosecutor may legally threaten a defendant who wishes to go to trial with severely harsher penalties in order to induce a guilty plea.[50] In *Bordenkircher*, the Supreme Court observed that "[d]efendants advised by competent counsel and protected by other procedural safeguards are presumptively capable of intelligent choice in response to prosecutorial persuasion, and unlikely to be driven to false self-condemnation."[51] *Bordenkircher* was decided in 1978; *Ruiz* in 2002. *Bordenkircher*'s assumption that defendants are necessarily well-informed in accepting a plea bargain is simply not accurate after the *Ruiz* Court's approval of this type of prosecutorial coercion.

Taken together, *Bagley*, *Bordenkircher*, and *Ruiz* have created a reality in which prosecutors are free to make threats of long prison sentences or even death to induce a guilty plea, while under no obligation to reveal evidence or information which would tend to show the defendant's innocence. These circumstances may lead even wholly innocent defendants to plead guilty in order to avoid the risk of conviction at trial.

2. Even When Prosecutors Comply With *Brady*, the Current Formulation of the *Brady* Rule Allows Prosecutors to Legally Suppress Exculpatory Evidence

Even when prosecutors are in full compliance with the *Brady* rule, the current construction of the rule allows for the *legal* suppression of exculpatory evidence. In particular, the Supreme Court's rulings in *Kyles v. Whitley* and *United States v. Bagley* have made *Brady* an ineffective protection of due process even when followed properly. In defining the meaning of the term "material" as used in the central holding

48. *Id.*
49. *Id.*
50. Bordenkircher v. Hayes, 434 U.S. 357 (1978).
51. *Id.* at 363.

of *Brady v. Maryland*, the Supreme Court has raised the standard of exactly how "exculpatory" a piece of evidence must be to warrant disclosure to the defense: failure to disclose must "deprive the defendant of a fair trial."[52]

This articulation of "materiality" is notable as it conflicts with the facts of *Brady* itself. In articulating a defendant's due process right to exculpatory evidence in *Brady*, the Court did not find that but for the prosecution's suppression of exculpatory evidence, there would have been a different outcome at Brady's trial. Rather, the *Brady* Court reversed the trial court's decision with respect to the *sentencing* phase of the proceeding.[53] The underlying verdict of the guilt phase of the trial was left untouched. These facts imply that prosecutorial suppression of exculpatory evidence is a violation of a defendant's due process rights, even in the event that it would not necessarily produce a different outcome at the guilt stage of a trial. As such, the Court's ruling in *Bagley* stands in direct contradiction with the original holding of *Brady*, which demanded that the prosecution disclose *all* exculpatory evidence "material either to guilt or punishment."[54]

In *Kyles*, the Court affirmed *Bagley* and added that materiality for the purposes of *Brady* should be based on the cumulative effect of all exculpatory evidence and that the prosecutor alone shall determine materiality. The *Kyles* Court explicitly condoned the suppression of exculpatory evidence in holding that a "showing that the prosecution knew of an item of favorable evidence unknown to the defense does not amount to a *Brady* violation."[55] Compounding this, the Court held that this determination of materiality to be made by prosecutors and reviewing appellate judges must consider "the cumulative effect of [exculpatory] evidence suppressed by the government."[56] While on the surface it may appear that this holding strengthens *Brady* in that it demands that prosecutors take a comprehensive look at all the available information in a case to determine materiality, it also deemphasizes the importance of any one piece of evidence for the purposes of the *Brady* rule.

By carving out space within the *Brady* rule for the *legal* suppression of exculpatory evidence, the Court has struck a severe blow to the central meaning of *Brady*'s due process protection. Under its current

52. United States v. Bagley, 473 U.S. 667, 675 (1985).
53. *See* Brady v. Maryland, 373 U.S. 83 (1963).
54. *Id.* at 87.
55. Kyles v. Whitley, 514 U.S. 419, 437 (1995).
56. *Id.* at 421.

construction, the *Brady* rule makes a prosecutor the sole arbiter of what evidence should be disclosed to a defendant. Although an appellate judge may review this determination after a conviction, defendants are by that point already being subjected to the consequences of conviction. Essentially, this leaves prosecutors free to act as discovery referees in criminal cases, with no other party—usually including the judge—reviewing their work to determine whether or not they accurately determine the materiality of any exculpatory evidence. The current *Brady* rule ignores the reality that the significance of a piece of evidence obtained in the course of an investigation is largely in the eye of the beholder. A piece of evidence which may not appear to be significant to one investigator may have great significance to someone with a different perspective on a case.

In addition, the current rule forces prosecutors and appellate judges to engage in speculation, before trial and on appeal respectively, as to whether disclosure of a piece of evidence would "deprive the defendant of a fair trial."[57] It is realistically impossible for a prosecutor to accurately predict the reaction of a jury to every piece of evidence one hundred percent of the time, just as it is entirely impossible for a judge to look back on every trial and surmise the potential impact of each piece of suppressed evidence with perfect accuracy. While prosecutors and judges are generally endowed with above-average intelligence, wisdom, and extensive legal training, prescience is generally not required to obtain either office. Under *Bagley* and *Kyles*, the legality of suppression of exculpatory evidence turns not on the tendency of the evidence to exculpate the defendant, but instead on the subjective interpretations of imperfect human beings asked to perform a task of which no human is capable of performing in every case. As a result, there are bound to be cases in which legally suppressed evidence would have impacted the outcome of a trial but for the incorrect judgment of a prosecutor or appellate judge.

Bagley and *Kyles* also alter the original meaning of "materiality" as articulated in *Brady* in that, instead of materiality being determined in the sole context of whether the evidence is "favorable to an accused," such evidence must now be weighed for the purposes of materiality *in relation to the rest of the government's case*. Essentially, to determine materiality, the prosecutor must examine whether he or she has a strong enough case to win at trial in spite of any exculpatory evidence. Viewed in this light, the *Brady* rule adds nothing to the prosecutor's

57. *Bagley*, 473 U.S. at 675.

determination of the materiality of exculpatory evidence. In fact, one can safely assume that if the cumulative effect of all exculpatory evidence in a given case rises to the level of materiality articulated in *Bagley* and *Kyles*, there would be no prosecution in the first place.

3. Lack of Meaningful Enforcement Has Rendered the *Brady* Rule Moot

The Supreme Court does not "assume that prosecutors will always make correct *Brady* decisions."[58] In fact, in *Connick v. Thompson*, Justice Scalia admitted that "*Brady* mistakes are inevitable."[59] Unfortunately for defendants who happen to be innocent of the crimes with which they are charged, the lack of meaningful enforcement of the *Brady* rule by the courts, coupled with the near total absence of corresponding repercussions for prosecutors who violate *Brady*, renders the rule itself moot.

a. State Bar Discipline

In *Connick v. Thompson*, Justice Thomas, writing for the majority, noted: "An attorney who violates his or her ethical obligations is subject to professional discipline, including sanctions, suspension, and disbarment."[60] While this assertion may be true in theory, it does not bear out in reality. According to the Northern California Innocence Project ("NCIP"), discipline of prosecutors by the State Bar of California is virtually non-existent.[61] NCIP reports that between 1997 and 2009, there were 4741 public disciplinary actions reported in the *California State Bar Journal*.[62] Only six of those actions involved a prosecutor in a criminal case.[63] In that same time period, there were 707 cases in which prosecutorial misconduct was expressly found by a reviewing court.[64] If these numbers bear out, it would mean that prosecutors are disciplined in less than 1% of the cases where prosecutorial misconduct is discovered. The actual percentage rate of cases of state bar discipline for *Brady* violations is probably lower than 1% since, by their very nature, *Brady violations can go undetected altogether.*

58. Connick v. Thompson, 131 S. Ct. 1350, 1364 (2011).
59. *Id.* at 1367 (Scalia, J., dissenting).
60. *Id.* at 1362–63 (majority opinion).
61. *See* RIDOLFI & POSSLEY, *supra* note 47.
62. *Id.* at 16.
63. *Id.*
64. *Id.*

In 1999, Ken Armstrong and Maurice Possley of the *Chicago Tribune* published the findings of their study of wrongful convictions caused by *Brady* violations for the period between 1963 and 1999.[65] Despite finding 381 wrongful homicide convictions alone during that period, Armstrong and Possley could not find even one prosecutor who had been disbarred for violating *Brady* in *any* type of criminal case.[66]

b. Lack of Civil or Criminal Liability for Individual Prosecutors

Beyond state bar discipline, individual prosecutors are also insulated from civil liability when they violate *Brady*. The Supreme Court held in *Imbler v. Pachtman* that "a prosecutor enjoys absolute immunity from [civil] suits for damages when he acts within the scope of his prosecutorial duties," and noted that "this immunity does leave the genuinely wronged defendant without civil redress against a prosecutor whose malicious or dishonest action deprives him of liberty."[67] *Imbler* also explicitly held that absolute immunity to civil liability for prosecutors extends to 42 U.S.C. § 1983 actions.[68]

Prosecutors also have little to fear in the way of criminal repercussions for violating *Brady*. Commentator Sara Gurwitch has noted that "[w]hile state penal laws contemplate the prosecution of prosecutors who violate Brady, they are so infrequently enforced that the possibility of prosecution barely warrants a mention."[69] In her survey of criminal prosecutions of prosecutors for *Brady* violations, Gurwitch was able to locate only two instances of such actions, one in 2007 and one in 1981.[70] Even in those cases, the criminal sanctions imposed were nominal: a $500 fine in one case, and a 24-hour term of incarceration in the other.[71]

In Armstrong and Possley's study of wrongful convictions, none of the prosecutors involved in the 381 wrongful homicide convictions they discovered were criminally prosecuted.[72] The only examples of

65. Ken Armstrong & Maurice Possley, *The Verdict: Dishonor*, CHI. TRIB., Jan. 10, 1999, at C1.

66. *Id.*

67. Imbler v. Pachtman, 424 U.S. 409, 420, 427 (1976).

68. *Id.* at 427.

69. Sara Gurwitch, *When Self-Policing Does Not Work: A Proposal for Policing Prosecutors in Their Obligation to Provide Exculpatory Evidence to the Defense*, 50 SANTA CLARA L. REV. 303, 318 (2010).

70. *Id.* at 303, 319 nn.73 & 75.

71. *Id.* at 303, 318, 319 n.75.

72. Armstrong & Possley, *supra* note 65.

such prosecutions found by Armstrong and Possley involved two attorneys involved in a rape case and a robbery case, respectively.[73] Both prosecutors received $500 fines.[74]

c. Lack of Civil Liability for Prosecutorial Agencies and Municipalities

It is further clear that the threat of civil liability for government agencies and municipalities does not act as a deterrent to *Brady* violations. As breathtakingly illuminated by the Supreme Court's decision in *Connick v. Thompson*, it is possible to sue government agencies and municipalities for *Brady* violations, but the standard for proving liability has been set so high as to be nearly impossible to meet.[75]

Black's Law Dictionary defines the term "pattern" as "[a] mode of behavior or series of acts that are recognizably consistent."[76] Viewed in this light, it is surprising that the Court in *Connick* failed to see a pattern in the facts of the case as represented in the record. In fact, the record reveals that incidents of *Brady* violations at the Orleans Parish District Attorney's Office ("OPDAO") "were neither isolated nor atypical."[77] It is undisputed in *Connick* that the prosecutor, in violation of *Brady*, suppressed blood evidence which eventually conclusively exonerated Thompson.[78] Eventually, it was revealed that a total of ten separate pieces of exculpatory evidence were improperly suppressed by OPDAO.[79] This suppression took place over a period of nearly twenty years, of which Thompson spent eighteen in prison—fourteen of those years on death row—and came within one month of execution.[80] That period of time included multiple trials and appeals. "[N]o fewer than five" prosecutors at OPDAO either knew about or were directly involved in the suppression of exculpatory evidence.[81] Further, in the ten years prior to Thompson's initial trial, "Louisiana courts had overturned [at least] four convictions because of *Brady* violations by prosecutors" at OPDAO, and the jury at Thomson's retrial "heard testimony that [OPDAO] had one of the worst *Brady* records in

73. *Id.*
74. *Id.*
75. *See supra* Part I.B.
76. BLACK'S LAW DICTIONARY 1242 (9th ed. 2009).
77. Connick v. Thompson, 131 S. Ct. 1350, 1370 (2011) (Ginsburg, J., dissenting).
78. *Id.* at 1371 (majority opinion).
79. *Id.* at 1376 (Ginsburg, J., dissenting) ("Thompson's defense was bolstered by . . . ten exhibits the prosecution had not disclosed when Thompson was first tried.").
80. *Id.* at 1370; *id.* at 1355 (majority opinion).
81. *Id.* at 1384 (Ginsburg, J., dissenting).

the country."[82] OPDAO's abysmal record on *Brady* prompted Orleans Parish Judge Calvin Johnson to send a letter to Connick, warning that he would take the extraordinary step of reporting Connick's Assistant District Attorneys to the state bar disciplinary board if they did not improve in observing the *Brady* rule.[83] Further, the Supreme Court had, by the time of *Connick*, already issued another landmark decision regarding the *Brady* rule on another case out of the same office, while headed by the same district attorney.[84]

In addition to all this, there is strong evidence in the record that the critical blood evidence which exonerated Thompson was intentionally suppressed in bad faith. The dissent notes that "Deegan, the assistant prosecutor in [Thompson's] trial, learned he was terminally ill. Soon thereafter, Deegan confessed to his friend Michael Riehlman [another OPDAO assistant prosecutor] that he had suppressed blood evidence in [Thompson's] case." Justice Scalia, joined by Justice Alito, and writing separately for the purpose of attacking the dissent, cites Deegan's bad faith in an attempt to shield OPDAO from liability: "The withholding of evidence in [this] case was almost certainly caused not by a failure to give prosecutors specific training, but by miscreant prosecutor Gerry Deegan's willful suppression of evidence he believed to be exculpatory, in an effort to railroad Thompson."[85] Although the Supreme Court did not hold OPDAO liable for what happened to Thompson, six of the nine justices found that bad faith was involved in the suppression of evidence that led to his wrongful conviction.

If the facts of *Connick* do not establish a pattern showing deliberate indifference to *Brady* violations, one must wonder if there ever can be a scenario of systemic prosecutorial misconduct egregious enough to trigger municipal liability.

d. Ineffectiveness of Elections

The fact that most district attorneys are publically elected is also ineffective as a means of ensuring that the *Brady* rule is observed. There are numerous high-profile cases of district attorneys who, either through incompetence or bad faith, obtained wrongful convictions through *Brady* violations and were re-elected after the defendant

82. *Id.* at 1360 (majority opinion); *id.* at 1384 (Ginsburg, J., dissenting).
83. Armstrong & Possley, *supra* note 65.
84. Kyles v. Whitley, 514 U.S. 419 (1995).
85. *Connick*, 131 S. Ct. at 1368 (Scalia, J., concurring).

was exonerated and the prosecutor's mistake or malfeasance had come to light.

Harry Connick, Sr., former Orleans Parish District Attorney (and father of famed jazz singer Harry Connick, Jr.), owns the distinction of heading an office with such a poor record on violating *Brady* that the Supreme Court issued two landmark decisions related to *Brady* on cases that came out of his office during his tenure.[86] In trial testimony during *Connick v. Thompson*, Connick admitted that "there were at least four published opinions reversing convictions secured during his tenure [as district attorney] based on *Brady* violations, and he recognized that judges' disagreements with his prosecutors' *Brady* violations are not limited to published opinions."[87] During Connick's tenure as district attorney, his office obtained thirty-six capital convictions. In nine of those convictions, courts found that evidence had been improperly suppressed in violation of *Brady*.[88] Five of those nine defendants have since been exonerated.[89] Connick held the office of Orleans Parish District Attorney from 1974 to 2003. According to the Louisiana Secretary of State, Connick was reelected four times, many of those reelections occurring after numerous reversals and exonerations, even in capital cases.[90]

Bill Peterson, district attorney for Pontotoc County, Oklahoma, notoriously secured the wrongful convictions of Ron Williamson and Dennis Fritz through several forms of prosecutorial misconduct, including at least one *Brady* violation.[91] Williamson himself came within five days of execution.[92] In reversing Williamson's murder conviction, the United States District Court for the Eastern District of Oklahoma found that Peterson violated *Brady* by suppressing a video recording of a polygraph examination in which Williamson denied involvement in the murder.[93] As a result, Williamson's counsel was unable to counter several prosecution witnesses of suspect backgrounds and motives who claimed Williamson had confessed his participation in the murder.

86. *Kyles*, 514 U.S. 419; *Connick*, 131 S. Ct. 1350.

87. Brief of the Innocence Network as Amicus Curiae in Support of Respondent at 24, Connick v. Thompson, 131 S. Ct. 1350 (2011) (No. 09-571), 2010 WL 3232485 at *24.

88. *Id.* at 25.

89. *Id.*

90. Telephone Conversation with Anonymous, Records Dep't, Office of the La. Sec'y of State (Apr. 28, 2011).

91. Williamson v. Reynolds, 904 F. Supp. 1529, 1563–66 (E.D. Okla. 1995).

92. *Know the Cases: Ron Williamson*, INNOCENCE PROJECT, http://www.innocenceproject.org/Content/Ron_Williamson.php (last visited Apr. 28, 2011) [hereinafter *Ron Williamson*].

93. *Williamson*, 904 F. Supp. at 1563–64.

Peterson's transgressions compelled Judge Frank H. Seay to comment: "God help us, if ever in this country we turn our heads while people who have not had fair trials are executed. That almost happened in this case."[94] DNA evidence eventually exonerated Williamson.[95] In the subsequent civil suit in which Peterson was a named defendant, the court denied Peterson's motion for summary judgment, noting:

> [T]he circumstantial evidence indicates a concerted pattern by the various investigators and Peterson to deprive Plaintiffs of one or more of their constitutional rights. The repeated omission of exculpatory evidence by investigators while including inculpatory evidence, inclusion of debatably fabricated evidence, failure to follow obvious and apparent leads which implicated other individuals, and the use of questionable forensic conclusions suggests that the involved Defendants were acting deliberately toward the specific end result prosecution of Williamson and Fritz without regard to the warning signs along the way that their end result was unjust and not supported by the facts of their investigation.[96]

Peterson is believed to have adopted similar tactics to obtain at least three other murder convictions, including that of Williamson's alleged accomplice Fritz, who was also exonerated. All of this was brought into the national spotlight when Peterson became the subject of two non-fiction books, one of them written by famed novelist John Grisham.[97] Williamson and Fritz were exonerated on April 15, 1999. Peterson was last reelected in 2006, before retiring in 2008.[98]

Kern County, California District Attorney Ed Jagels was spotlighted in the 2008 film *Witch Hunt* for his prosecution of twenty-six individuals on child molestation charges in the 1980s.[99] In these trials, Jagels alleged that the accused variously drank blood, hung children from hooks, and forced children to have sexual intercourse with their parents.[100] The only evidence against any of the exonerated consisted

94. *Id.* at 1577.

95. *Ron Williamson*, *supra* note 92.

96. Order on Defendant William N. Peterson's Motion for Summary Judgment at 23, Fritz v. City of Ada, No. CIV-00-194-D (E.D. Okla. Feb. 7, 2002); *see also* JOHN GRISHAM, THE INNOCENT MAN 342 (Doubleday 2006).

97. *See* GRISHAM, *supra* note 96; ROBERT MAYER, THE DREAMS OF ADA 414–15 (1987).

98. Leo Kelley, *Thomsen Throws Hat in District 25 Ring*, ADA NEWS (May 16, 2006), http://theadanews.com/local/x212571555/Thomsen-throws-hat-in-District-25-ring; Brenda Tollett, *Peterson to Retire as DA*, ADA NEWS (Nov. 5, 2007), http://theadanews.com/x212596671/Peterson-to-retire-as-DA.

99. WITCH HUNT (KTF Films 2008).

100. Garance Burke, *Crusading Calif. D.A. Retires, Leaves Painful Wake*, SEATTLE TIMES (Nov. 14, 2009), http://seattletimes.nwsource.com/html/nationworld/2010275768_apuscrusadingprosecutor.html.

of testimony by the alleged child victims.[101] Pursuant to a request for records related to an appeal by one of the accused, a box containing evidence of the unreliability of the alleged victims accounts, including evidence of improper coaching of the victims' testimony, was turned over to defense attorneys.[102] Since their convictions, twenty-five of those defendants have been exonerated.[103] Two of those convicted by Jagels were ultimately acquitted of fifty-two separate charges of child molestation.[104] Jagels has summed up his approach to the possibility of his office prosecuting the innocent by stating: "Innocent people may have been accused . . . but what I really fear is that perfectly legitimate convictions have been overturned."[105] Jagels was reelected six times until his retirement in 2010.[106]

Tulare County, California District Attorney Phillip Cline was an assistant district attorney when he served as lead trial counsel in the 1986 prosecution of Mark Sodersten for murder. Sodersten was convicted and sentenced to life without parole, plus seven years. There was no physical evidence linking Sodersten to the murder. Instead, Cline wholly relied upon the testimony of two witnesses—a four year-old girl and an adult who was high on PCP while he observed the events that he testified to—which on appeal was found to be significantly undermined by several audiotapes of prior interviews which were suppressed in violation of *Brady*.[107] Sodersten maintained his innocence after conviction, serving twenty years in prison before dying while incarcerated in 2006. The investigation and trial were riddled with such flagrant police and prosecutorial misconduct that in 2007, California's Fifth District Court of Appeal granted Sodersten's petition for a writ of habeas corpus despite the fact that the petitioner was already dead, noting:

> This case calls to account the American system of justice. For that system to have credibility we must respond. As we shall explain, what happened in this case has such an impact upon the integrity and fairness that are the cornerstones of our criminal justice system, that continued public confidence in that system requires us to address the validity of petitioner's conviction despite the fact we can no longer provide a remedy for petitioner himself. To dis-

101. Stoll v. Cnty. of Kern, No. 1:1:05-CV-01059 OWW SMS, 2007 WL 2815032 (E.D. Cal. Sept. 25, 2007).

102. WITCH HUNT, *supra* note 99.

103. Burke, *supra* note 100.

104. *Id.*

105. *Id.*

106. *Id.*

107. *In re* Sodersten, 53 Cal. Rptr. 3d 572, 586–99, 621–24 (Ct. App. 2007).

> charge this writ as moot would be a disservice to the legitimate public expectation that judges will enforce justice. It would be a disservice to justice. Most of all, it would be a disservice to petitioner, who maintained his innocence despite a system that failed him. We will not perpetuate that failure and let silence endorse that result.[108]

Cline was appointed District Attorney of Tulare County in 1992. He was reelected in 1994, and has been reelected four more times since then, his latest victory occurring in 2010. He still holds that position at the time of this writing.[109]

These are but a few examples of elected district attorneys who have not been voted out of office in the wake of flagrant and/or repeated *Brady* violations. The reasons why voters have continued to support these district attorneys and others like them are unclear. Whatever their rationale, one can infer that voters have largely not seen fit to make this type of prosecutorial misconduct a determinative issue in elections, even as high-profile exonerations have become more frequent and drawn increasing media attention.

4. The Bottom Line on *Brady*

Because *Brady* is not applicable to cases ending in plea bargain, it does not apply to the vast majority of criminal prosecutions in the United States. Even when applicable, prosecutorial compliance with *Brady* has been rendered essentially moot by the high standard a defendant is compelled to meet in order to obtain a reversal and the near complete lack of discipline of prosecutors who violate *Brady*. As a result, prosecutorial compliance with *Brady* has been rendered effectively voluntary. As such, the protections *Brady* appears to offer criminal defendants against wrongful conviction are hollow and meaningless.

B. The *Brady* Rule is the Primary Cause of Wrongful Convictions

Although the Supreme Court has held that *Brady* does not require a prosecutor to "deliver his entire file to defense counsel,"[110] the persistence and pervasiveness of wrongful convictions within the criminal justice system demand such reforms. As discussed *supra*, the current construction of the *Brady* rule is ineffective in preventing prosecutorial suppression of exculpatory evidence, especially with re-

108. *Id.* at 577.

109. OFF. TULARE COUNTY DISTRICT ATT'Y, http://www.da-tulareco.org/ (last visited Feb. 25, 2012).

110. United States v. Bagley, 473 U.S. 667, 675 (1985).

spect to wrongful convictions. As discussed *infra*, the criminal justice system's continued adherence to *Brady* could be said to be the primary cause of wrongful convictions.

In order to determine the impact of the *Brady* rule on wrongful convictions, the nature of wrongful convictions themselves must first be considered. In an abstract sense, one can assume that where a wrongful conviction exists, there must exist some evidence of that person's innocence, whether or not it is ever discovered by anyone associated with the case. One way or the other, that evidence is necessarily somewhere in the world. Due to many factors—chief among them the relative allocation of resources of prosecutors and law enforcement versus the resources of public defenders and appointed defense counsel—the people most likely to discover such evidence are police and prosecutors charged with doing the majority of the investigative work on any given criminal case. Where wrongful convictions have occurred, it is usually the case that police and prosecutors had knowledge or possession of such evidence during the prosecution of the case, whether or not they realized it at the time.

Most of the scholarship that has sought to determine how wrongful convictions occur has attempted to identify categorized "causes" of wrongful conviction in the form of particular recurring acts, incidents, or phenomena.[111] These causes include but are not limited to: false or coerced confessions, police and prosecutorial "tunnel vision," false or mistaken eyewitness testimony, perjured testimony, "snitch" testimony, and flawed or false forensic evidence. The suppression of exculpatory evidence is generally considered to be its own "cause" of wrongful convictions for the purposes of categorization, but that view overlooks the fact that where each of these other causes of wrongful conviction occur, police and prosecutors almost always have within their knowledge or possession information suggesting the existence of one of these causes.[112] It is arguable that such evidence could undermine other inculpatory evidence and could potentially sway a jury to a different outcome at trial. Thus, evidence which tends to show the presence of one of the known causes of wrongful convictions could be considered "material" under *Brady* and would require disclosure. Even if one does not agree that such evidence is material under any construal of *Brady* itself, the fact of the matter is that the current construction of the *Brady* rule does not necessarily require disclosure of these

111. *See* Hugo Adam Bedau & Michael L. Radelet, *Miscarriages of Justice in Potentially Capital Cases*, 40 STAN. L. REV. 21 (1987).

112. *See id.*

categories of evidence that have been shown to lead to wrongful convictions. This problem is exacerbated by the problems of the applicability and enforcement of *Brady* discussed *supra*. Were prosecutors subjected to more stringent criminal discovery standards in criminal cases, it is likely that the presence of one of these causes could be detected and remedied before a wrongful conviction occurs. Viewed in this light, the criminal justice system's continued adherence to *Brady* could be said to be the primary cause of wrongful convictions.

Hypothetically, it may be the case that, in the instance of a defendant who is factually guilty, evidence of the existence of one of the causes of wrongful conviction is not indicative of innocence. In the case of a factually innocent defendant, however, such evidence is necessarily indicative of the innocence of the defendant. In the real world, it may be impossible to know with certainty whether a defendant is actually guilty or innocent prior to or during an investigation, and one could argue that disclosure of all such evidence would likely make prosecutions needlessly difficult and allow guilty defendants to go free. The growing trend of state and local jurisdictions which have voluntarily adopted open discovery practices belies this concern, however. Further, the extent of the problem of wrongful convictions suggests that the current rules under which this type of exculpatory evidence is disclosed do not adequately address the problem. While there is no definitive list of the "causes" of wrongful conviction, the most commonly cited "causes" are addressed in turn below.

1. Mistaken or False Eyewitness Identification

Although estimates vary regarding the percentages of wrongful convictions which can be attributed to each "cause" of wrongful convictions listed here, it is generally acknowledged that eyewitness misidentification is associated with more wrongful convictions than any other "cause."[113] One study of murder and rape exonerations from 1989 through 2003 found that eyewitness misidentification was involved in 50% of murder exonerations and 88% of rape exonerations.[114] A study by the Justice Project found that eyewitness

113. JUSTICE PROJECT, EYEWITNESS IDENTIFICATION: A POLICY REVIEW 2 (2007), *available at* http://www.psychology.iastate.edu/~glwells/The_Justice%20Project_Eyewitness_Identification_%20A_Policy_Review.pdf [hereinafter EYEWITNESS IDENTIFICATION].

114. Samuel R. Gross et al., *Exonerations in the United States 1989 Through 2003*, 95 J. CRIM. L. & CRIMINOLOGY 523, 544 (2005).

misidentification was involved in 75% of all post-conviction DNA exonerations in the United States.[115]

Mistaken or false eyewitness identification of a defendant in a criminal investigation usually results from unreliable procedures in administering live suspect lineups and photo arrays.[116] Although the United States Department of Justice and the Justice Project have both set forth procedural recommendations for increasing the reliability of traditional eyewitness identification techniques, those reforms have not been consistently implemented by the myriad law enforcement agencies in the United States.[117]

Where photo spreads of suspects or lineups of live suspects are presented to witnesses in a flawed manner, evidence of those flaws will be known to the police, if not the prosecution also. Police and prosecutors are in the best position to know of or have in their possession evidence of the inaccuracy of the eyewitness identification of the defendant, whether that flaw is rooted in the witness' perception or in the procedures used by the police in obtaining the identification. That evidence is by definition exculpatory. Because so many wrongful convictions since *Brady* have involved eyewitness misidentification where such information was not disclosed, the claim that the current construction of the *Brady* rule is the primary cause of wrongful convictions is justified by the numbers associated with eyewitness misidentification alone.

2. False or Coerced Confessions

Typically, false confessions are the product of police interrogation. With respect to police practices, an "interrogation" can be differentiated from an "interview" based on the respective goals of the procedures.[118] "[P]olice are trained to interview" those who they believe to be innocent, such as witnesses and victims.[119] Only those suspected of being guilty are subject to "interrogation."[120]

As shown by Richard A. Leo in his book *Police Interrogation and American Justice*, the presumption of guilt on the part of the police in the interrogation process often leads to intense pressure on suspects

115. EYEWITNESS IDENTIFICATION, *supra* note 113.

116. *See generally id.*

117. *Id.*; U.S. DEP'T OF JUSTICE, TECHNICAL WORKING GRP. FOR EYEWITNESS EVIDENCE, EYEWITNESS EVIDENCE: A GUIDE FOR LAW ENFORCEMENT (1999), *available at* www.ncjrs.gov/pdffiles1/nij/178240.pdf.

118. RICHARD A. LEO, POLICE INTERROGATION AND AMERICAN JUSTICE 21–22 (2008).

119. *Id.* at 22.

120. *Id.* at 21–22.

to confess to crimes.[121] As noted by Leo, "modern methods of psychological interrogation have been designed to break down a suspect's denials of guilt by persuading him that he has no meaningful choice under the circumstances but to comply with detectives, and that contrary to all appearances, logic, and common sense, he is better off by confessing."[122] The tactics used to implement this strategy vary, but have historically included lying to suspects, extended periods of confinement with no promise of release, and even torture.[123]

Whether or not these pressures rise to the level of coercion, such pressures can result in false confessions. False confessions seldom completely match the other facts and physical evidence of an investigation. Still, there are many well-documented cases of the failure of police and prosecutors heed to these disparities.[124] The result is that a false confession can be used as powerful evidence against the accused, often outweighing even physical evidence of a defendant's innocence in the eyes of a jury.

In their book *The Wrong Guys*, Tom Wells and Richard A. Leo outline the story of the "Norfolk Four," four men who falsely confessed to a brutal rape-murder they had nothing to do with and who were each found not to be the source of the true perpetrator's DNA before trial or guilty plea.[125] Rather than consider the innocence of the defendants, each negative DNA test prompted police and prosecutors to change their theory of the case to conclude that all were involved and that the biological evidence at the scene must have come from another accomplice who had not yet been apprehended.[126] This constantly evolving theory eventually led to the arrest of eight suspects, ending only when a DNA match was found.[127] The four confessors were all convicted or pled guilty, the false confessions being the only evidence implicating them in the crime.[128]

The prosecutors in the Norfolk Four case were aware of the reputation of the lead detective on the case for employing harsh tactics in

121. *Id.*

122. *Id.* at 25.

123. *See id.*; *see also* Monica Davey & Emma Graves Fitzsimmons, *Officer Accused of Torture Is Guilty of Perjury*, N.Y. TIMES, June 29, 2010, at A20.

124. *See generally* TOM WELLS & RICHARD A. LEO, THE WRONG GUYS: MURDER, FALSE CONFESSIONS, AND THE NORFOLK FOUR (2008); GRISHAM, *supra* note 96; THE THIN BLUE LINE (American Playhouse et al. 1988).

125. WELLS & LEO, *supra* note 124.

126. *Id.*

127. *Id.*

128. *Id.*

conducting interrogations.[129] They were also aware of the fact that the confessions were inconsistent in relation to one another, inconsistent in relation to the physical evidence, and internally inconsistent (often changing as police interrogators fed the suspects information).[130] The prosecutors were also aware that seven innocent suspects took polygraph tests denying their involvement, and all seven were told by police interrogators that they had failed.[131] At least three of these suspects either passed the tests or the results were inconclusive.[132]

When a confession is involved in a criminal investigation, a careful examination of the circumstances under which the confession was obtained, as well as the extent to which the confession is consistent with other facts and evidence in the case, is necessary to determine the validity of the confession.[133] Such a determination is impossible to make without access to all the information known to the prosecution in a given case. The exonerations of the Norfolk Four and Ron Williamson illustrate this point. When all such information did become known to appellate attorneys and others, the basis of validity of the confessions was destroyed and the convictions reversed. Had this process occurred earlier, the defendants would likely have been spared the ordeal of years of wrongful imprisonment. Even if it were the case that there were no documentary evidence of the unreliability of the confessions given in these cases, however, police and prosecutors in these cases were fully aware of the means employed to obtain the confessions and the inconsistency of the confessions with the facts and other evidence. That knowledge, if communicated to defense counsel, constitutes exculpatory evidence.

3. Perjured Testimony and "Snitch" Testimony

The Supreme Court has held that prosecutors may not use testimony they know to be perjured to obtain a conviction.[134] To do so would be a violation of even the current construction of the *Brady* rule. However, the use of informants in providing inculpatory testimony for the prosecution (commonly known as "snitch" testimony) frequently blurs the line between knowingly perjured testimony and testimony which is simply unreliable.

129. *Id.*
130. *Id.*
131. *Id.* at 23, 67, 105, 148, 159, 161, 177.
132. *Id.* at 23, 67, 105.
133. *See generally* Richard A. Leo et al., *Bringing Reliability Back In: False Confessions and Legal Safeguards in the Twenty-First Century*, 2006 WIS. L. REV. 479.
134. *See* Mooney v. Holohan, 294 U.S. 103, 112 (1935) (per curiam).

Government informants, including inmates and non-incarcerated informants, often have severely suspect or personal motives for testifying in criminal prosecutions. These motivations can range from lenient treatment in a prosecution targeting them to actual monetary payment.[135] In any case of snitch testimony, the government is necessarily in possession, or at least aware of, any offers made to the informant intended to procure their testimony. Any information suggesting that an informant received any kind of reward from the prosecution or other government agency in return for their testimony is inherently exculpatory as it casts doubt on the motivation of the witness in so testifying.

The fact that prosecutors are more likely than any other figure involved in a criminal prosecution to know how the informant came to know the information forming the basis of his or her testimony is important as well. Informants often claim that a defendant confessed guilt to the crime of which they are accused.[136] Informants are also sometimes purposely placed by prosecutors and law enforcement in close proximity to defendants who are incarcerated in the hopes of gaining information.[137] This was the case in the examples of both Ron Williamson and the Norfolk Four, respectively.

Such information would tend to cast doubt on the testimony of informant witnesses and as such can be considered exculpatory evidence. Yet, because most of the circumstances of informant testimony do not directly point to the innocence of the defendant, most of the information regarding those circumstances is generally not turned over to defense counsel. The result can be devastating to a wrongfully accused defendant. Informant witnesses who would otherwise be regarded with no credibility (especially if already incarcerated for another crime) are given credibility in the eyes of the jury simply by the fact that the prosecution presents such testimony and the court allows it. This is the case whether or not the prosecution discloses an informant's conviction history and any offers made in exchange for testimony as required by law.

135. *See* ALEXANDRA NATAPOFF, SNITCHING: CRIMINAL INFORMANTS AND THE EROSION OF AMERICAN JUSTICE 27–29 (2009).

136. *See, e.g.*, *id.*; *see* GRISHAM, *supra* note 96, at 164–66, 203; JUSTICE PROJECT, JAILHOUSE SNITCH TESTIMONY: A POLICY REVIEW (2007).

137. *See* WELLS & LEO, *supra* note 124, at 96–97, 166.

4. Flawed Forensic Evidence

In 2009, the National Research Council of the National Academies published a review of the state of forensic science in the United States.[138] Of particular note among the Council's findings were that there are no national standards for the collection, analysis, and handling of forensic evidence, and that DNA evidence is the only method of forensic science that "has been rigorously shown to have the capacity to consistently, and with a high degree of certainty, demonstrate a connection between evidence and a specific or individual source."[139]

The last several decades have witnessed a revolution in the types of forensic science which are accepted as being sufficiently credible as to warrant submission as evidence in a criminal trial. While DNA has come to be known as the gold standard, other forms of forensic science, such as forensic hair analysis, while once accepted as reliable, have now been generally discredited by the scientific community.[140] Some of these methods, such as bullet lead analysis, were developed exclusively by law enforcement agencies and not by the greater scientific community.[141] In addition, forensics laboratories generally work directly under the supervision of law enforcement agencies in the jurisdiction in which they are located, drawing the objectivity of their findings into question.[142] All of these problems are exacerbated by the Supreme Court's decision in *Daubert v. Merrell Dow Pharmaceuticals, Inc.* in which the Court held that trial judges may accept expert testimony on scientific evidence that is not generally accepted by the scientific community.[143]

The end result of all these issues related to forensic evidence is that courts have frequently admitted dubious forensic evidence in criminal cases and have allowed such evidence to be presented in a way as to overstate the reliability and accuracy of those findings. Information casting doubt on the reliability of forensic evidence presented in a case is by definition exculpatory. If such information exists, it is necessarily in the possession of prosecution and law enforcement offi-

138. NAT'L RESEARCH COUNCIL OF THE NAT'L ACADEMIES, STRENGTHENING FORENSIC SCIENCE IN THE UNITED STATES: A PATH FORWARD (2009) [hereinafter NAT'L RESEARCH COUNCIL].

139. *Id.* at 6–7.

140. *Id.* at 155–61.

141. *See 60 Minutes: Evidence of Injustice*, CBSNEWS (Feb. 11, 2009), http://www.cbsnews.com/stories/2007/11/16/60minutes/main3512453.shtml.

142. NAT'L RESEARCH COUNCIL, *supra* note 138, at 183–91.

143. Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579 (1993).

cials who process such evidence and have full and complete knowledge of the methods and practices used in promulgating it.

5. Police and Prosecutorial "Tunnel Vision"

Even the absence of evidence or information can sometimes be indicative of a defendant's factual innocence. When police and prosecutors focus on one suspect early in an investigation, for example, and do not pursue other leads or suspects, such an absence is valuable information to defense counsel. In the case of a wrongful conviction involving tunnel vision, exculpatory evidence would only be present in the form of an *absence* of evidence of police and prosecutorial investigation of other suspects and other theories of a crime. Commentators on wrongful convictions refer to these processes as "tunnel vision" and "confirmation bias."[144]

Richard A. Leo describes tunnel vision as "the tendency to 'focus on a suspect, select and filter the evidence that will "build a case" for conviction, while ignoring or suppressing evidence that points away from guilt.'"[145] This process is rooted in confirmation bias, the psychological tendency of all human beings to "seek out and interpret evidence in ways that support existing beliefs, perceptions, and expectations, and to avoid or reject evidence that does not."[146]

Because determining whether prosecutorial "tunnel vision" exists involves proving a negative, there is no way to determine whether it is a factor in an investigation without full knowledge of the information available to the police and prosecution in a given case. In order to show that leads were not followed or simply ignored, for example, one would necessarily need access to all the information gathered by investigating authorities. Since evidence having to do with other suspects could easily not meet the standard set forth in *Kyles v. Whitley* because it does not bear directly on the defendant, such information would not have to be disclosed to defense counsel. As a result, it is generally impossible for such a determination to be made by defense counsel under the current construction of *Brady*. Yet, if tunnel vision could be proven based on documentary evidence, or if it is in the knowledge of the police or prosecution that their investigation prematurely focused

144. LEO, *supra* note 118, at 263–64.

145. *Id.* at 263 (quoting Dianne L. Martin, *Lessons About Justice from the "Laboratory" of Wrongful Convictions: Tunnel Vision, the Construction of Guilt and Informer Evidence*, 70 UMKC L. REV. 847, 847–64 (2002)).

146. *Id.* at 263–64.

on one suspect to the detriment of other leads or suspects, that information or knowledge would, by definition, be exculpatory.

C. "Open File" Discovery

While "open file" discovery may seem like a radical departure from tradition with respect to American criminal procedure, its basic tenets are hardly new or revolutionary in American law. The Federal Rules of Civil Procedure, for example, endow civil defendants with extensive discovery rights limited mainly by the attorney-client and work product privileges of the plaintiff.[147] Given the respective liberty interests at stake for civil and criminal defendants (and the *Brady* rule's ineffectiveness in preventing wrongful convictions), it makes sense that criminal defendants be afforded discovery rights that meet or exceed those afforded civil defendants whose personal liberty is not at risk in litigation. Of course, the Federal Rules of Civil Procedure do not perfectly address all of the special concerns and interests unique to criminal practice. However, state and local jurisdictions that have instituted some form of open file discovery have demonstrated that civil-style discovery can be effectively and safely adapted to meet the needs of criminal practice.

Criminal discovery practices across the United States are consistent only in their inconsistency. The amount of discovery information a defendant in a criminal case is afforded varies from one jurisdiction to the next. While Supreme Court jurisprudence on the issue (including *Brady*) sets the minimum for what must be provided to a defendant as required by the Constitution, some state and local authorities such as state legislatures and individual district attorneys have seen fit to adopt more stringent rules of prosecutorial disclosure in response to many of the issues discussed here. Still, these decisions by state and local authorities are voluntary and may be revoked at any time. Further, the voluntary nature of such disclosure policies provides no guarantee to defendants that prosecutors have disclosed everything since there is no independent, disciplinary authority enforcing such policies.

Further, the federal constitutional requirements of criminal discovery, the Federal Rules of Criminal Procedure, and most state codes of criminal procedure lag behind even the non-binding American Bar Association Model Rules of Professional Conduct with respect to the

147. *See* FED. R. CIV. P. 26–37 (encompassing discovery rules in general); FED R. CIV. P. 26(b)(3) (protecting work-product).

amount of disclosure required of prosecutors. ABA Model Rule 3.8(d) requires that prosecutors:

> [M]ake timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal . . . .[148]

The ABA Model Rules also impose requirements on prosecutors to remedy a conviction later learned to have been obtained wrongfully or in error through direct action.[149]

1. Proposed General Procedures[150]

a. Baseline Rule

> The prosecution in a criminal case shall be required to disclose, to the defense and to the court, all non-privileged evidence and information related to a criminal case (whether inculpatory, exculpatory, or neutral), in a timely fashion prior to any trial or guilty plea. This rule shall extend to all evidence and information in the actual or constructive possession of any law enforcement agency involved in investigating the case. This requirement shall be ongoing throughout the duration of a case.

A broad policy of disclosure in criminal cases is the central component of open file discovery. It is particularly important that this disclosure requirement be applicable prior to the entering of a guilty plea due to the high volume of cases that never go to trial and the Supreme Court-sanctioned practices of plea bargaining as set forth in *Bordenkircher v. Hayes*.[151]

The State of Ohio, for example, recently issued sweeping reforms to its criminal discovery rules at the urging of the Ohio Innocence

148. MODEL RULES OF PROF'L CONDUCT R. 3.8(d) (2002).

149. MODEL RULES OF PROF'L CONDUCT R. 3.8(g)–(h) (2010).

150. While the following proposals represent only the most basic principles of an open-file discovery system, the Justice Project's "Model Bill for Expanded Discovery In Criminal Cases" is an excellent comprehensive example of what such a system of discovery rules would look like and is largely drawn from the American Bar Association's *Standards for Criminal Justice: Discovery and Trial by Jury* Standard 11 and North Carolina General Statutes sections 15A-905, 15A-911 to 15A-915. JUSTICE PROJECT, EXPANDED DISCOVERY IN CRIMINAL CASES: A POLICY REVIEW 27 n.84 (2007), *available at* http://www.pewtrusts.org/uploadedFiles/wwwpewtrustsorg/Reports/Death_penalty_reform/Expanded%20discovery%20policy%20brief.pdf [hereinafter EXPANDED DISCOVERY]; *see* AM. BAR ASS'N, ABA STANDARDS FOR CRIMINAL JUSTICE: DISCOVERY AND TRIAL BY JURY, Standard 11 (3d ed. 1996); N.C. GEN. STAT. §§ 15A-905, 15A-911 to -915 (2004).

151. 434 U.S. 357 (1978).

Project.[152] Prior to the adoption of the new rules, Ohio prosecutors were not even required to turn over police reports or witness statements prior to trial.[153] While Ohio's new rules do not require total disclosure of all information known to the prosecution, they do require disclosure of a large amount of material beyond that which is "favorable to the defendant and material to guilt or punishment."[154] It is important to note that this policy decision by the Ohio legislature was driven by concern over wrongful convictions.[155] To that end, the reforms also mandate that police employ "double-blind" procedures when asking eyewitnesses to identify suspects and require that confessions be videotaped in cases of serious crimes.[156] Ohio is the most recent example of a state moving toward more open criminal discovery practices, but there are others. North Carolina is noteworthy as having fully adopted open-file discovery in 2004. Florida, Colorado, New Jersey, and Arizona have also adopted some aspects of broadened criminal discovery practices.[157] While each system varies in the means and degrees of disclosure, each goes beyond what is required by the Constitution as currently interpreted by the Supreme Court. Still, such policies have not been implemented consistently throughout the United States. As a result, the fairness of a criminal proceeding may depend in large part on where the crime occurred.

b. Protective Orders

> On a determination of good cause by the court, any party may be granted a protective order covering information, exhibits, or witnesses where security, confidentiality, or the safety of a witness is a concern prior to trial or guilty plea.

In criminal cases, prosecutors may have valid concerns over security, safety, and confidentiality. A witness who risks retaliation for testifying against a defendant or the jeopardization of another criminal investigation are just two examples. As such, the open file discovery requirements of disclosure may allow for the limited and temporary suppression of evidence on a determination of good cause by the court. Protective orders are a time-honored and effective tool for protecting sensitive information in both criminal and civil litigation. The

152. Janice Morse, *Ohio's New Criminal Court Rules Kick In*, CINCINNATI ENQUIRER, July 1, 2010.

153. *Id.*

154. OHIO CRIM. R. 16(B)(5).

155. Morse, *supra* note 152.

156. *Id. See generally* EYEWITNESS IDENTIFICATION, *supra* note 113.

157. EXPANDED DISCOVERY, *supra* note 150.

ABA Model Rules and states that have moved toward open file discovery generally allow this procedure to be used to protect such information.[158]

The most important benefit of a rule where information related to a case can only be legally suppressed pursuant to a protective order is that it makes the judge, not the prosecutor, the arbiter of what evidence is fit for disclosure. Under the current construction of the *Brady* rule, the prosecutor is generally left to determine what evidence meets the *Brady* standard of materiality requiring disclosure. As discussed below, prosecutors are ill-equipped due to their roles as partisan advocates to objectively make such a determination.

c. Depositions

> Both the prosecution and the defense, upon request, are entitled to conduct sworn depositions of any witness including any law enforcement personnel involved in the investigation of a case. This rule excludes the defendant, defense attorneys and staff, and any witness who is a valid claimant of a recognized privilege. Prosecution attorneys and staff may only be subject to deposition upon a judicial finding of a bad faith violation of the disclosure requirements of these rules.

Depositions are universally used in civil litigation to bring the facts of a case out prior to trial and to determine how witnesses will testify at trial. Because they are conducted under oath, depositions also provide a way to prevent witnesses from changing their testimony and committing perjury at trial. Depositions are especially important with respect to wrongful convictions because they would allow defense counsel to elicit exculpatory information, which may only exist in the knowledge of relevant law enforcement personnel, such as flaws in forensic science or eyewitness identification procedures.

Florida's system of criminal discovery is notable for allowing the defense in criminal cases to conduct depositions of witnesses and law enforcement personnel for over forty years.[159] Florida's rule is also unique in that it allows the prosecution to conduct depositions of defense witnesses as well,[160] as does Colorado.[161]

158. MODEL RULES OF PROF'L CONDUCT R. 3.8(d)(g) (2010); OHIO CRIM. R. 16(D).

159. EXPANDED DISCOVERY, *supra* note 150, at 15–16.

160. *Id.* at 16.

161. *Id.*

2. Enforcement

For any system of criminal discovery to be effective, stringent methods of enforcement must be put in place and strictly adhered to. As discussed above, the lack of meaningful enforcement of the *Brady* rule is as much a part of the problem of the current construction of the rule as the inapplicability of the rule in plea bargain cases and the high standard the defendant must meet for reversal of conviction after trial. The problem with the current regime of enforcement of the *Brady* rule is not that mechanisms of enforcement do not exist—the problem is that those mechanisms are either generally ineffective or not effectively employed. In contrast, attorneys in civil cases who are found to have wrongfully suppressed discoverable materials are frequently subject to severe sanctions, including referral to a state bar association and possibly disbarment.[162]

Given the enormous power and discretion entrusted to prosecutors in the American criminal justice system, the harshest measures of enforcement possible should be used to punish prosecutorial discovery violations made in bad faith. Where a prosecutor intentionally suppresses evidence of the innocence of a defendant—as was likely the case in *Connick v. Thompson*[163]—that action represents a gross perversion of the responsibilities and trust placed in the prosecuting attorney by the courts and the public. Further, the consequences of such misconduct are so serious (years of imprisonment or even death) that harsh remedies are justified. Although the courts have occasionally relied on criminal contempt charges to sanction attorneys who violate *Brady* in bad faith, the rarity of such action and the nominal punishments typically imposed have hardly served as a deterrent to such behavior. Effective deterrence of the prosecutorial suppression of exculpatory evidence in bad faith likely requires the drafting of new statutes which reflect the seriousness of such behavior. These statutes should include penalties that reflect the actual harm done to a defendant through the offending prosecutor's willful action—including lengthy prison sentences. Beyond criminal penalties, bad faith suppression of exculpatory evidence should also result in automatic disbarment and disqualification of the prosecutor from the protection of absolute immunity from any civil suit filed by an exonerated defendant.

162. *See* Qualcomm, Inc. v. Broadcom Corp., 548 F.3d 1004 (Fed. Cir. 2008).

163. *See* Connick v. Thompson, 131 S. Ct. 1350, 1368 (2011) (Scalia, J., concurring).

Even in cases where bad faith is not present, however, the severity of potential harm to innocent defendants requires that failure to comply with discovery rules be treated seriously. While the suppression of discoverable material may not be the result of willful misconduct, under the policy reforms proposed above, the prosecution would have a duty to take measures to ensure that all information relevant to a given case information is disclosed. At the trial level, judges should not hesitate to issue a continuance or declare a mistrial in the event of suppression that is the result of a good faith mistake or error. In particularly egregious cases, judicial sanctions and/or referral of the offending attorney to the relevant state bar authority should be standard procedure. At the appellate level, the "deprivation of a fair trial" standard articulated in *Kyles* and *Bagley* should be thrown out, and a retrial granted in any case where the prosecution can be shown to have committed any sort of significant discovery violation at trial. In addition, appellate courts should be empowered to appoint special prosecutors to probe a finding of bad faith suppression on the part of the prosecution.

Finally, Congress should pass legislation overruling *Connick v. Thompson* and mandate civil liability on a theory of gross negligence for prosecutorial agencies, municipalities, and state governments tolerant of a culture of discovery violations resulting in wrongful convictions. This measure would reflect the need for accountability at the organizational level and offer the accused some way to recover from the state for the actions of its employees in wrongfully punishing an individual for a crime he or she did not commit.

3. Policy Considerations

In *United States v. Berger*, the Supreme Court outlined the role prosecutors are expected to play in the criminal justice system:

> The [prosecutor] is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor - indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his 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.[164]

This quote demonstrates that prosecutors are asked to perform not one, but two roles in the American system of criminal justice: partisan advocate for conviction and objective "minister of justice."[165] The eloquent words of Justice Sutherland quoted above fail to recognize that the prosecutor's dual role contains an incurable conflict of interest. While prosecutors are expected to act as objective ministers of justice ensuring that justice is doled out in a fair manner, they are also expected to act as partisan advocates whose job performance and careers are often judged exclusively on their ability to convict defendants. Compounding this problem, the current construction of the *Brady* rule and its corresponding lack of penalties for violations provide no incentive for prosecutors to perform the objective "minister of justice" function with respect to exculpatory evidence.

Open file discovery largely removes prosecutors from this inherently conflicted dual role and allows them to act almost exclusively as partisan advocates for the state—free to make the case for conviction on a level playing field with a defendant who is fully informed of the evidence in the case. While prosecutors would still have wide discretion as ministers of justice in deciding which cases to prosecute, prosecutors would not be asked to act as impartial discovery referees in a dispute in which they have a vested personal interest. In short, *Berger* and *Brady* ask prosecutors to carry out an impossible task. Open file discovery removes this burden.

Beyond freeing prosecutors from *Berger*'s dual role, open file discovery would also likely result in a substantial reduction in costs, both social and financial. It would greatly increase the efficiency of the courts and the penological system, both of which are already strapped for resources. By enhancing the truth-finding function of the courts and ensuring early disclosure of inculpatory evidence, open file discovery would do much to induce guilty defendants to plead guilty, thus avoiding the drain on resources associated with unnecessary trials. Open file discovery would also result in financial savings by keeping innocent individuals out of prisons, jails, and other forms of correctional supervision, all of which are publicly financed. In 2009, for example, one national survey estimated that the average cost of incarcerating a prisoner for one year to be $29,000.[166] As illustrated by

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

165. MODEL RULES OF PROF'L CONDUCT R. 3.8 cmt. 1 (2002).

166. ONE IN 31, *supra* note 5, at 12. R

the estimates of the number of individuals wrongfully convicted in the United States above, these costs are hardly nominal.

Wrongful convictions also result in substantial social costs that the use of open file discovery would greatly reduce. The impact of being wrongfully convicted often results in effects on the life of the wrongfully convicted individual, which can never be fully remedied. These effects range from physical and mental trauma resulting from imprisonment, adverse effects on an individual's career, family life and financial well-being, as well as the social stigma of being perceived as a criminal even after exoneration. Open file discovery also has the added benefit of minimizing the chance that the true perpetrator of a crime for which someone else has been punished will remain free to commit further crimes.

Finally, open file discovery would strengthen public confidence in the criminal justice system and the legitimacy of its results. It is assumed by most that if an accused is innocent of a crime, that innocence will be established and the accused set free. Under the current construction of *Brady*, that is all too often not the case. Wrongful convictions occur with shocking regularity and can occur even when the prosecution has definitive evidence of the defendant's innocence.[167] Wrongful convictions adversely affect the perception of legitimacy and fairness of the criminal justice system in the eyes of the public, and through it, the government itself. Open file discovery would strengthen public confidence in the criminal justice system and the legitimacy of its results.

Conclusion

> When innocence itself is brought to the bar and condemned, especially to die . . . [t]hen, the subject will exclaim, "Whether I behave well or ill is of no account; for virtue itself is no security." And if such an idea as that takes hold in the mind of the subject, that would be the end of all security whatsoever.[168]
>
> —John Adams, *Rex v. Wemms*

The *Brady* rule has been tested as a means of ensuring the fairness of trials and preventing wrongful convictions for nearly fifty years. All of the available data suggests that it has failed to accomplish those goals. Given the scale of this failure and the massive costs—both social

167. *See Connick*, 131 S. Ct. 1350.

168. JAMES M. DOYLE, TRUE WITNESS: COPS, COURTS, SCIENCE, AND THE BATTLE AGAINST MISIDENTIFICATION 203 (2005) (quoting JOHN ADAMS, *Argument for the Defense in* Rex v. Wemms (1770), *in* 3 LEGAL PAPERS OF JOHN ADAMS 242 (L. Kinvin Wroth & Hiller B. Zobel eds., 1965)).

and financial—associated with it, Congress, state legislatures, and the courts should undertake extensive reforms of criminal discovery practice. An open file criminal discovery policy based on civil discovery practice would reflect the magnitude of the interests at stake in criminal proceedings for both the defendant and society at large, and do much to minimize the significant costs associated with *Brady*'s failure to protect the innocent.