AN ARGUMENT AGAINST OPEN-FILE DISCOVERY IN CRIMINAL CASES

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Under our criminal procedure the accused has every advantage. While the prosecution is held rigidly to the charge, he need not disclose the barest outline of his defense. He is immune from question or comment on his silence; he cannot be convicted when there is the least fair doubt in the minds of any one of the twelve [jurors]. Why in addition he should in advance have the whole evidence against him to pick over at his leisure, and make his defense, fairly or foully, I have never been able to see. . . . Our dangers do not lie in too little tenderness to the accused. Our procedure has been always haunted by the ghost of the innocent man convicted. It is an unreal dream. What we need to fear is the archaic formalism and the watery sentiment that obstructs, delays, and defeats the prosecution of crime.

— Judge Learned Hand, United States v. Garsson, 291 F. 646, 649 (S.D.N.Y. 1923).

Introduction

After more than a year of media hype surrounding accusations of rape against three college athletes at Duke University (dubbed the "Duke Lacrosse Case"[1]), North Carolina Attorney General Roy A. Cooper publicly announced the students' innocence and decried the prosecutor assigned to the case for his "tragic rush to accuse [the students] and a failure to verify serious allegations."[2] The fallout from this unethical prosecution included

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1 *Looking Back at the Duke Lacrosse Case*, Duke Office of News & Commc'ns, http://today.duke.edu/showcase/lacrosseincident (last visited Oct. 15, 2013).

2 Roy Cooper, N.C. Att'y Gen., Press Conference Concluding the Duke Lacrosse Case Investigation (Apr. 11, 2007) (transcript available at http://edition.cnn.com/2007/LAW/04/11/cooper.transcript). Cooper went on to say:

> [I]n this case, with the weight of the state behind him, the Durham district attorney pushed forward unchecked. There were many points in this case where caution would have served justice better than bravado, and in the rush to

the disbarment of "'rogue' prosecutor" Mike Nifong[3] and an onslaught of calls for reform and more oversight in criminal prosecutions.[4] More specifically, many commentators saw this attempted miscarriage of justice as the perfect resurgence for an argument in favor of "open-file discovery."[5]

Open-file discovery is the idea that the prosecution should provide the defense with *everything* in the prosecution's file—including witness statements and the names of witnesses, forensic evidence, and police reports. The defense would have access to this information without regard to the materiality of the evidence or the likelihood that the prosecution would introduce that evidence at trial.[6] The argument for open-file discovery, as reinvigorated by the Duke Lacrosse Case, is, "Had Mr. Nifong been operating under an open-file policy, the Duke Lacrosse Case never would have developed as far as it did." Mr. Nifong had DNA evidence in his possession that conclusively exonerated the accused Duke students.[7] If the defense had complete access to Mr. Nifong's files, the argument goes, they would have discovered the DNA evidence and the case would have ended. Unfortunately, the commentators in favor of open-file discovery failed to focus on the

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> condemn[,] a community and a state . . . lost the ability to see clearly. Regardless of the reasons that this case was pushed forward, the result was wrong. Today[,] we need to learn from this and keep it from happening again to anybody.

Id.

3 Duff Wilson, *Prosecutor Apologizes to Ex-Players*, N.Y. TIMES, Apr. 13, 2007, at A14, *available at* http://query.nytimes.com/gst/fullpage.html?res=9C0DE0DC133FF930A25757C0A9619C8B63 (quoting N.C. Att'y Gen. Roy Cooper); *see also* Lara Setrakian & Chris Francescani, *Former Duke Prosecutor Nifong Disbarred*, ABC NEWS, June 16, 2007, http://abcnews.go.com/TheLaw/story?id=3285862&page=1 ("'We are in unanimous agreement that there is no discipline short of disbarment that would be appropiate [sic] in this case,' said F. Lane Williamson, the [North Carolina Bar disciplinary] committee's chairman. . . . The bar's three-member disciplinary panel . . . found Nifong guilty of fraud, dishonesty, deceit[,] or misrepresentation; of making false statements of material fact before a judge . . . [and] bar investigators, and of lying about withholding exculpatory DNA evidence, among other violations.").

4 *See* R. Michael Cassidy, *The Prosecutor and the Press: Lessons (Not) Learned from the Mike Nifong Debacle*, 71 LAW & CONTEMP. PROBS. 67, 68 (2008); 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, 257 (2008); Abby L. Dennis, Note, *Reining in the Minister of Justice: Prosecutorial Oversight and the Superseder Power*, 57 DUKE L.J. 131, 132–34 (2007).

5 A LexisNexis terms and connectors search for "'open-file discovery' or 'open-file policy'" revealed that roughly half of all law review articles mentioning open-file discovery were published *after* the Duke Lacrosse Case came to an end. (Search performed Jan. 28, 2013.) *See, e.g.*, Alafair S. Burke, *Talking About Prosecutors*, 31 CARDOZO L. REV. 2119, 2126 (2010); Mosteller, *supra* note 4, at 272; *The Phases and Faces of the Duke Lacrosse Controversy: A Conversation*, 19 SETON HALL J. SPORTS & ENT. L. 181, 206–07 (2009) (statements of K.C. Johnson & Angela Davis); Andrew Smith, Note, Brady *Obligations, Criminal Sanctions, and Solutions in a New Era of Scrutiny*, 61 VAND. L. REV. 1935, 1960–64 (2008).

6 *See infra* Section I.A.1.

7 *See* Mosteller, *supra* note 4, at 293–94 (recounting the defense attorneys' procedural steps to enforce discovery requirements upon Mr. Nifong).

genesis of this foiled witch-hunt. The problem in the Duke Lacrosse Case was not the "closedness" of the prosecution's discovery files, but rather a "malicious[ ] conspir[acy] to bring charges . . . against . . . three innocent students."[8] Luckily for these students, Mr. Nifong bit off a little bit more than he could chew, and the defense counsel was able to expose the poorly orchestrated prosecutorial grandstanding and clear the students' names.[9] The case drew a national spotlight, and the defendants could afford private counsel to investigate the prosecutor's claims—not the best situation for a prosecutor attempting to hide evidence.[10]

This Note argues that, for the most part, open-file discovery proponents fail to recognize the added burden that defense counsel would face under a regime in which all items of the prosecution's evidence are available for investigation by the defense.[11] This is particularly true in the eighty to ninety percent of criminal cases where the defendant is indigent, and the court-appointed defense counsel is operating under strict resource constraints.[12]

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8 Second Amended Complaint at 1, Evans v. City of Durham, No. 1:07CV739 (M.D.N.C. Feb. 18, 2010).

9 Robert P. Mosteller, *The Duke Lacrosse Case, Innocence, and False Identifications: A Fundamental Failure to "Do Justice,"* 76 FORDHAM L. REV. 1337, 1361 (2007).

10 *See* Cooper, *supra* note 2 ("The[ ] defendants were able to retain counsel[,] . . . no doubt at a high cost.").

11 *See, e.g.*, THE JUSTICE PROJECT, EXPANDED DISCOVERY IN CRIMINAL CASES: A POLICY REVIEW 4 (2007), *available at* http://pewtrusts.org/uploadedFiles/wwwpewtrustsorg/Reports/Death_penalty_reform/Expanded%20Discovery%20Policy%20Brief.pdf ("The burden of implementing an open-file system should be minimal . . . .").

12 *Representation of Indigent Defendants in Criminal Cases: A Constitutional Crisis in Michigan and Other States?: Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Sec. of the H. Comm. on the Judiciary*, 111th Cong. 84 (2009) [hereinafter *Judiciary Committee Hearing*] (statement of Robin L. Dahlberg, Senior Staff Attorney, American Civil Liberties Union, New York, N.Y.) ("Researchers estimate that between 80 and 90 percent of all of those accused of criminal wrongdoing by state prosecutors must rely upon state indigent defense programs . . . .").

This is in no way meant to be a swipe at the *quality* of work performed by public defenders, but rather a comment on the *amount* of work public defenders are tasked with handling. In a recent study performed by the RAND Corporation, an analysis of indigent defense counsel in Philadelphia murder cases during the period of 1994 to 2005 revealed that public defenders significantly outperformed their private appointed counsel counterparts. State public defenders reduced their indigent defendants' conviction rate by nineteen percent, reduced the likelihood of a life sentence by sixty-two percent, and their defendants received prison sentences that were an average of twenty-four percent shorter. James M. Anderson & Paul Heaton, *How Much Difference Does the Lawyer Make? The Effect of Defense Counsel on Murder Case Outcomes* 15–21 (RAND Corp., Working Paper No. WR-870-NIJ, 2011); *see also* LYNN LANGTON & DONALD FAROLE, JR., U.S. DEP'T OF JUST., NCJ 228229, STATE PUBLIC DEFENDER PROGRAMS, 2007, at 3 (2010) ("[State and county p]ublic defender offices nationwide employed over 15,000 litigating attorneys . . . [to handle] approximately 5.6 million indigent defense cases . . . ."); OFFICE OF JUST. PROGRAMS, U.S. DEP'T OF JUST., NATIONAL SYMPOSIUM ON INDIGENT DEFENSE 2000: REDEFINING LEADERSHIP FOR EQUAL JUSTICE vii (2000) (remarks of Janet Reno, Att'y Gen. of the United States) ("[T]he competent lawyer needs . . . the investigat[ive] tools to go with [his competence], because the search

This Note also argues that advocates of open-file discovery fail to recognize that in the majority of cases involving prosecutorial misconduct, the prosecutor's intentional wrongdoing will be sufficient to overshadow any reasonable amount of diligence performed by defense counsel.[13]

This Note will contend that instituting an open-file discovery policy would only compound the problem of providing adequate representation to defendants. In light of the fact that the overwhelming majority of defendants are represented by publicly funded counsel, this Note will focus on the effects of open-file discovery to indigent defendants. Specifically, it will argue that any attendant benefits received by a single defendant under an open-file discovery regime would be largely outweighed by the costs to defendants as a whole and to the judicial system. This Note will demonstrate that the economic consequences of open-file discovery would be disastrous in the current judicial environment and would serve as nothing more than a shifting of burdens from the prosecution to the defense. The effect of this burden shifting would lead to more overworked public defenders and lower quality representation for indigent defendants. This Note will also demonstrate that in the cases often cited as the hallmark evidence showing a need for open-file discovery—those in which innocent defendants are convicted because the prosecution affirmatively fails to disclose exculpatory evidence—open-file discovery would serve no actual purpose in eliminating the prosecutorial misconduct. This Note will show that open-file discovery would cause more harm than good by creating a situation in which prosecutors could overwhelm defense counsel with evidence, either intentionally or unintentionally, and frustrate defense counsel's ability to locate and synthesize critical evidence.

Part I will begin with an overview of what open-file discovery entails, including some of the key arguments trumpeted by supporters and some of the counterarguments offered by those opposed to open-file discovery. It will also discuss how open-file discovery relates to constitutional disclosure requirements and the timing issues related to plea bargaining and trial. Part II will analyze the first major hurdle to the implementation of open-file discovery: economic constraints of the criminal justice system, with a particular focus on the prosecution and defense of indigents. The analysis will consider the current economic climate of indigent defense and also the economic feasibility of open-file discovery. Part III will discuss the second major obstacle that an open-file discovery regime would face: the practical consequences of open-file discovery and the actual coincident benefits to defendants. Particular focus will be paid to the inability of open-file discovery to combat prosecutorial malfeasance and the unethical advantages prosecutors can gain by giving defendants open access to the evidence. Finally, the Conclusion

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for the truth is often illusory if you have neither the time nor the tools to supplement your competence.").

13 The exceptions being scenarios similar to the Duke Lacrosse Case, where the prosecution attempts malfeasance while standing in a national spotlight.

will summarize the arguments against open-file discovery and advocate maintaining the current system of limited discovery for criminal defendants.

I. Overview of Open-File Discovery

A. Breadth of Allowable Discovery

Unlike modern discovery in civil trials, criminal discovery is very restricted.[14] There are many reasons to be critical of this dichotomy, the most prevalent of which is the injustice of placing a greater importance on cases involving money than on cases "where the freedom and, sometimes, the life of the defendant are at stake."[15] However, while the prosecution is not required to provide open access to all of its investigative findings, it is required to turn over "material" evidence to the defense—that evidence which is exculpatory in nature (dubbed "*Brady* evidence").[16] The most often cited reasons in support of this restrictive discovery regime in criminal cases are the protection of witnesses and the fact that defendants already have a heavy enough thumb on their side of the scales of justice.[17]

1. Open-File Discovery

The central premise of open-file discovery is that everything the prosecution knows should be revealed to the defendant. Nothing is held back—if the prosecution has a piece of evidence, the defense has access to that same piece.[18] The leading argument for open-file discovery is that the "quest for

14 *Cf.* Ellen Yaroshefsky, *New Orleans Prosecutorial Disclosure in Practice After* Connick v. Thompson, 25 Geo. J. Legal Ethics 913, 939 (2012) (noting the two states that have adopted laws requiring near-open-file discovery: North Carolina and Ohio).

15 The Justice Project, *supra* note 11, at 1.

16 So named for the landmark case of *Brady v. Maryland*, in which the Supreme Court concluded that "the suppression . . . of evidence favorable to an accused . . . violates due process where the evidence is material either to guilt or to punishment." 373 U.S. 83, 87 (1963). Evidence in the hands of the government, even if unknown by the prosecution, must be turned over to the defendant if, and "only if[,] there is a *reasonable probability* that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." United States v. Bagley, 473 U.S. 667, 682 (1985) (Justice Blackmun writing for himself and Justice O'Connor) (emphasis added).

17 *See* Richard G. Singer, Criminal Procedure II: From Bail to Jail 84 (3d ed. 2012). Defendants are given many constitutional protections and the standards of proof required to find guilt are heavily in the defendants' favor. *See infra* notes 32–36 and accompanying text.

18 The defense is provided with everything that the prosecution has found by way of its investigation—police reports, witness statements, witnesses' identities, scientific test results—rather than just a more specific and limited file of constitutionally material information. *See* Avis E. Buchanan, Op-Ed., *Fairer Trials, and Better Justice, for D.C.*, Wash. Post, Oct. 30, 2011, at C7; Joel Cohen & Danielle Alfonzo Walsman, *The* 'Brady *Dump': Problems with 'Open File' Discovery*, N.Y. L.J., Sept. 4, 2009, *available at* http://www.stroock.com/sitecontent.cfm?contentID=58&itemID=829.

truth" outweighs any possible arguments against broader discovery.[19] The legal system is designed to seek out the truth, and "[t]he truth is most likely to emerge when each side seeks to take the other by reason rather than by surprise."[20] Defendants are almost always operating with a significantly smaller budget.[21] Thus, it is unjust to allow the side with more resources to control the disposition of a criminal case merely because a defendant cannot afford to perform independent investigation.[22]

Supporters of open-file discovery also maintain that better-informed defendants will lead to more efficient dispositions of criminal cases.[23] Defendants can make informed decisions about whether to proceed to trial or plead guilty when they know the full weight of the evidence against them.[24] When faced with all of the evidence, more defendants are likely to plead guilty, thus the prosecutor can avoid the time and expense of a trial.[25] The belief is that the moral justifications for permitting defendants access to prosecutors' files, combined with the cost savings for prosecutors, make open-file discovery a "win-win."

2. Limited Discovery

In spite of the compelling justice-based arguments in favor of open-file discovery, opponents offer two main reasons why open-file discovery should not be the law of the land: witness intimidation and fairness. The words "witness intimidation" evoke images of mobsters knocking on the doors of innocent bystanders who happened to be in the wrong place at the wrong time. Many commentators dismiss the risk of witness intimidation by proposing that the prosecution should bear the burden of showing witness safety is an issue, on a case-by-case basis.[26] However, witness intimidation is a very real

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This information is turned over to the defense well in advance of trial so that the defense has time to scrutinize and independently verify the prosecution's evidence. *See* Buchanan, *supra*.

19 William J. Brennan, Jr., *The Criminal Prosecution: Sporting Event or Quest for Truth?*, 1963 WASH. U. L.Q. 279, 279, 287.

20 Roger J. Traynor, *Ground Lost and Found in Criminal Discovery*, 39 N.Y.U. L. REV. 228, 249 (1964).

21 *Id.*

22 *See infra* Section II.A; *see also* WAYNE R. LAFAVE ET AL., 5 CRIMINAL PROCEDURE § 20.1(b) (3d ed. 2007) (noting several arguments and counter-arguments regarding the expansion of discovery).

23 *See, e.g.*, Janet Moore, *Democracy and Criminal Discovery Reform After* Connick *and* Garcetti, 77 BROOK. L. REV. 1329, 1372 (2012) ("[Open-file discovery] reduce[s] the significant costs resulting from alleged and actual error in criminal cases . . . .").

24 *See* Daniel S. Medwed, Brady*'s Bunch of Flaws*, 67 WASH. & LEE L. REV. 1533, 1560 (2010); Smith, *supra* note 5, at 1963.

25 Medwed, *supra* note 24, at 1560.

26 *See, e.g.*, Alafair S. Burke, *Revisiting Prosecutorial Disclosure*, 84 IND. L.J. 481, 516 (2009) (arguing that the prosecution should bear the burden of demonstrating why witnesses' identities and all other evidence should not be automatically disclosed).

thing—and not just in cases involving organized crime.[27] In a study performed by New York's Victim Services Agency and the Vera Institute of Justice, twenty-six percent of the witnesses interviewed had been threatened by defendants, defendants' families, or defendants' friends.[28] The threat to witness safety has not been overlooked by criminal procedure rulemakers. For example, under current federal guidelines, witness identification must be revealed to the defense only *after* the witness has testified.[29] This may do little to dispel witnesses' fears of reprisal, but it will at least prevent some witness tampering prior to testimony. Witnesses play an important role in convictions, and currently prosecutors are able to use their best judgment to decide the appropriate time to reveal witnesses' identities.[30]

The second reason most often cited for limitation of defendants' discovery is that defendants already have enough of an advantage in our *adversarial* system.[31] Defendants have the Fifth Amendment protection from self-incrimination, which allows them to refrain from testifying,[32] and the Fourth Amendment protection from illegal searches.[33] Defendants are also entitled to a presumption of innocence that the prosecution must overcome by prov-

27 *See* David Kocieniewski, *Scared Silent: In Witness Killing, Prosecutors Point to a Gang and a Lawyer*, N.Y. TIMES, Dec. 21, 2007, at A1 ("Yet another key witness in a major drug case ha[s] been shot dead before he could testify in court.").

28 *See* MICHAEL H. GRAHAM, WITNESS INTIMIDATION 4 (1985) (noting also that thirty-nine percent of witnesses were "very much afraid of revenge by defendants"). The study included only witnesses in cases where the crime was reported and an arrest was made—thus, the proportion of actual witness intimidation may in fact be higher due to instances in which the witness did not report the crime out of fear of the defendant. *Id.*

29 *See* Jencks Act, 18 U.S.C. § 3500(a) (2006); *see also* United States v. Anderson, 574 F.2d 1347, 1352 (1978) ("[W]hen alleged *Brady* [evidence] is contained in Jencks Act material, disclosure is generally timely if the government complies with the Jencks Act."); *cf.* Máximo Langer, *Rethinking Plea Bargaining: The Practice and Reform of Prosecutorial Adjudication in American Criminal Procedure*, 33 AM. J. CRIM. L. 223, 275 (2005) (noting that many states have much more lax policies regarding the availability of discovery in general, including witnesses' identities).

30 For a discussion of the importance of prosecutors having discretion as to when witnesses' identities should be revealed, see *Panel Discussion: Criminal Discovery in Practice*, 15 GA. ST. U. L. REV. 781, 804 (1999) ("[P]rosecutors . . . have many interests that must be balanced; one of which clearly is the constitutional rights of the accused. That is acknowledged. But protection of witnesses and protection of the community are also important." (statement of Art Leach, Assistant U.S. Attorney)).

31 *See* Martin Marcus, *Above the Fray or into the Breach: The Judge's Role in New York's Adversarial System of Criminal Justice*, 57 BROOK. L. REV. 1193, 1193 (1992) ("The adversarial model . . . assumes that justice is best served by giving the prosecutor and defense counsel primary responsibility for the development and presentation of their own cases.").

32 U.S. CONST. amend. V; *see* Griffin v. California, 380 U.S. 609, 615 (1965) (holding that a defendant's Fifth Amendment rights are violated when a prosecutor or judge makes comments to the jury suggesting that a defendant's refusal to testify is indicative of guilt).

33 U.S. CONST. amend. IV; *see* Nardone v. United States, 308 U.S. 338, 341 (1939) (explaining that any "fruit" (evidence) obtained by way of a "poisonous tree" (illegal search) is also excludable); Weeks v. United States, 232 U.S. 383, 398 (1914) (holding that evidence obtained during an illegal search was excludable).

ing guilt beyond a reasonable doubt.[34] Further, if a defendant were entitled to a copy of the prosecution's playbook, the defendant could more readily tailor his defense to combat the prosecution (e.g., defendant perjury[35]). With broader, more detailed discovery, defendants could more easily concoct detailed alibis to effectively manufacture reasonable doubt.[36] All in all, "[B]roader discovery tilts the balance of advantage, which already favors the defendant . . . , too far . . . to the benefit of the defendant."[37]

34 *See, e.g.*, Potter v. United States, 155 U.S. 438, 448 (1894) ("[T]he burden of proof is on the government, and the defendant is entitled to the benefit of a reasonable doubt.").

35 *See* Darryl K. Brown, *The Decline of Defense Counsel and the Rise of Accuracy in Criminal Adjudication*, 93 CAL. L. REV. 1585, 1622 (2005). Defendants need only create a reasonable doubt of their guilt. Having full access to the prosecution's evidence and witnesses expands a defendant's opportunity to prepare testimony that raises such reasonable doubt. This is especially true in trials lasting only one day, where defense counsel does not have an overnight recess to prepare the defendant in accordance with what the prosecutor has already revealed during trial. *See* Jenny Roberts, *Too Little, Too Late: Ineffective Assistance of Counsel, the Duty to Investigate, and Pretrial Discovery in Criminal Cases*, 31 FORDHAM URB. L.J. 1097, 1151 (2004). Professor Brown also notes that, "A fairness argument . . . justifies limits: expansive discovery cannot be fully reciprocal because defendants cannot be compelled to reveal self-incriminating evidence." Brown, *supra*, at 1622 n.133.

36 *See* Mosteller, *supra* note 4, at 272–73.

37 *Id.* at 273. There is another balance-tilting consideration worth noting: the stigma of being a victim. Consider the situation of a prosecution for rape. According to the Department of Justice, only forty-nine percent of all rapes are reported to the police. JENNIFER L. TRUMAN & MICHAEL PLANTY, U.S. DEP'T OF JUST., NCJ 239437, CRIMINAL VICTIMIZATION, 2011, at 8 (2012) (analyzing crimes that took place in 2010). Of the reasons for not reporting rape, some of the most common answers include "[s]hame, embarrassment, . . . *desire to keep the assault a private matter*[, and h]umiliation." NAT'L INST. OF JUST., *Reporting of Sexual Violence Incidents*, http://www.nij.gov/topics/crime/rape-sexual-violence/rape-notification.htm#note4 (last visited Oct. 22, 2013) (emphasis added). If rape victims are unwilling to report their assaults under conditions in which the police report and medical examination are available only to the parties fighting for the victims' vindication (e.g., the prosecution and police), it is only intuitive that they will be less likely to report the crimes when the details of these files are openly available to the defendant, his counsel, and any other parties the defendant wishes to consult.

Also consider victims' reluctance to report their assaults in situations where the prosecutor is not the party determining materiality of impeaching evidence from a victim's past. For example, under an open-file policy, the prosecution has no discretion in deciding whether to disclose that a victim was sexually assaulted by a relative thirty years before the rape occurred. *See* R. Michael Cassidy, *Plea Bargaining, Discovery, and the Intractable Problem of Impeachment Disclosures*, 64 VAND. L. REV. 1429, 1474 (2011); *see also* MCCORMICK ON EVIDENCE § 193 (Kenneth S. Broun et al. eds., 6th ed. 2006) ("The statutes and cases are divided . . . [as to the admissibility of] prior accusations of rape . . . ."). This evidence may be material to the credibility of the witness's testimony, but it may just be used as defendant's muckraking to forestall a victim's willingness to testify. Outside of an open-file regime, this impeaching evidence would only have to be disclosed as *Brady* evidence if it were material to the outcome of the proceeding.

B. The Spirit of Brady

A central theme underlying arguments in favor of open-file discovery is that it comports with the ethos of *Brady* rather than just the black letter law. *Brady*'s aim was to protect defendants from government actors[38] seeking to conceal evidence that either exculpates the defendant or casts doubt on the honesty and accuracy of a witness's testimony.[39] Unfortunately for the champions of open-file discovery, *Brady* and its legacy have led not to a world of expanded discovery rights, but to a world that continues to rely on the prosecution's judgment in determining what evidence is "material" and therefore constitutionally required to be shared with the defense. As advocates of open-file discovery are quick to point out, there are inherent problems with this model.

A key difficulty with this framework is that the prosecution must determine if evidence is going to be material *prospectively*, but after-the-fact evaluations for possible *Brady* violations are performed *retrospectively*.[40] A *Brady* violation does not occur merely because the prosecutor did not disclose some piece of evidence favorable to the defendant's case. Withheld evidence is material only if it renders the outcome of the trial unreliable.[41] The *Brady* inquiry also requires "a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different."[42] This outcome-determinative test is far easier to apply retrospectively by courts than it is for prosecutors to apply before knowing how a trial will unfold—though many courts' reluctance to find *Brady* violations suggests that courts are sympathetic to the difficulties a prosecutor faces in deciding materiality *ex ante*.[43] The inherent flaws in allowing the prosecutor to deter-

38 This includes not just the prosecutor, but also the police.

39 *See generally* Brady v. Maryland, 373 U.S. 83 (1963) (holding that due process is violated when the prosecution withholds evidence favorable to the accused and that evidence is material to either guilt or punishment); Giglio v. United States, 405 U.S. 150 (1972) (holding that the prosecution's failure to inform the defense about a deal made with a witness was a violation of due process).

40 Cassidy, *supra* note 37, at 1436.

41 *See* Kyles v. Whitley, 514 U.S. 419, 435 (1995) (stating that undisclosed evidence is material if it "could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict").

42 United States v. Bagley, 473 U.S. 667, 682 (1985) (Justice Blackmun writing for himself and Justice O'Connor). *But see News Release: Prosecutors' Ethical Duty to Reveal Information Favorable to Defense is Broader than Constitution Demands*, AM. BAR ASS'N, (Aug. 20, 2009), *available at* http://apps.americanbar.org/abanet/media/release/news_release.cfm?releaseid=752 (noting that "while the Constitution only requires [prosecutors] to reveal 'material' information, or evidence . . . they view as likely to lead to acquittal[,] Rule 3.8(d) [of the American Bar Association Model Rules of Professional Conduct] requires prosecutors to share [a much broader array of] information").

43 Stephanos Bibas, Brady v. Maryland*: From Adversarial Gamesmanship Toward the Search for Innocence?*, *in* CRIMINAL PROCEDURE STORIES, 129, 143–44 (Carol S. Steiker ed., 2006).

This difficulty for prosecutors is compounded even more by the cognitive biases inherent in human beings. Prosecutors' decisions may be skewed by an overconfidence bias—the tendency for people to believe they will fare better than others in particular situations

mine materiality lead many commentators to believe the "spirit" of *Brady* is better served by giving defendants unfettered access to the prosecution's files.

However, as obvious as the flaws of *Brady* are, they do not exist in a bubble. That is, the problems inherent in the *Brady* model's disclosure of only *material* exculpatory information are not discrete from the rest of the criminal justice system. The alternative—for purposes of this Note, open-file discovery—would cure some of the defects of the *Brady* model. Nevertheless, open-file discovery would also result in an untenable model that would actually work to harm those defendants most in need of protection from the judicial system—indigents.

II. THE FIRST HURDLE: ECONOMIC CONSTRAINTS OF CRIMINAL PROSECUTIONS

A. Current Economic Costs of Criminal Cases

1. Criminal Defense

The current state of indigent defense in America is bleak. As Representative Bobby Scott, then Chairman of the House of Representatives Subcommittee on Crime, Terrorism, and Homeland Security, put it: "[I]ndigent defense [is] . . . in a chronic state of crisis."[44] It is no secret that representing indigent defendants is hard work with low pay. The median starting salary for public defenders was $45,700 in 2010.[45] The reward for this modest salary[46] is a workload of approximately 154% of the maximum public defender workload recommended by the Department of Justice.[47]

(e.g., car accidents happen to other people)—or self-serving bias—the tendency for people to see information as supportive of their viewpoints. *See* Russell B. Korobkin & Thomas S. Ulen, *Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics*, 88 CAL. L. REV. 1051, 1091–95 (2000). Additionally, outsiders, like judges making a retrospective analysis, may be affected by hindsight bias—the tendency of people to overestimate the likelihood that they would have correctly predicted an outcome, because they are already aware of the actual outcome that occurred. *Id.* at 1095–96.

44 *Judiciary Committee Hearing*, *supra* note 12, at 1 (internal quotation marks omitted). Representative Scott went on to say that "indigent defense . . . needs more funding . . . [to offset] excessive and questioned caseloads[,] . . . lack of proper training[,] . . . lack of independence by defense [counsel,] and ultimately . . . wrongful conviction[s]." *Id.* at 2.

45 *Some Associate Salaries Retreat from Their High but Remain Far Ahead of Salaries for Public Service Attorneys*, NAT'L ASS'N FOR LAW PLACEMENT, INC. (Sept. 9, 2010) [hereinafter NALP PRESS RELEASE], *available at* http://www.nalp.org/assoc_pi_sal2010; *see* Tucker Carrington, *Counseling Conscience*, 10 OHIO ST. J. CRIM. L. 191, 195 (2012) (discussing the "laughably low figure" indigent defenders are paid for their services).

46 Modest as compared to both their prosecutorial counterparts (median starting salary of $50,000) and private-sector attorneys (median starting salary of $115,000). NALP PRESS RELEASE, *supra* note 45, at 1.

47 Of the twenty-two states employing statewide public defender systems (4,321 total public defenders), public defender offices had a median rate of sixty-seven percent of the recommended minimum number of public defenders for their associated caseloads.

One of the largest contributing factors to the overworked, stressful environment of public defenders' offices is the amount of funding allocated to indigent defense. Compared to the $5.8 billion[48] operating budget of their prosecutorial adversaries, state indigent defense offices received only $2.33 billion[49] in funding for the year 2007.[50] Adjusting the prosecutors' budget for the time spent on non-indigent defendants, the math still paints a picture in which the prosecution has an overwhelming monetary advantage—$4.64 billion,[51] or roughly twice the public defenders' budget.

2. Criminal Prosecution

The aspect of criminal prosecution most relevant to this discussion is the time constraints prosecutors face, which ultimately lead to more bargained-for guilty pleas. Much of the budgetary strain on the criminal justice system is due to the "societal pressure to be tough on crime without a commitment to provid[ing] the required resources to do so consistent with justice."[52] It is no surprise that prosecutors facing this "societal pressure" obtain roughly ninety-five percent of all convictions by way of guilty pleas.[53] Through guilty pleas, prosecutors are able to procure just results—convictions—without having to expend the time and money resources required by a trial.[54] Guilty pleas are such a pervasive and necessary part of the American criminal justice system that a thirty-three percent decrease in the number of defendants convicted by way of guilty pleas would cause a 300% increase in the number of

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LANGTON & FAROLE, *supra* note 12, at 12–13. Of the twenty-eight states employing locality-funded public defender systems (10,705 total public defenders), public defender offices had a median rate of sixty-four percent of the recommended minimum number of public defenders for their associated caseloads. DONALD J. FAROLE, JR. & LYNN LANGTON, U.S. DEP'T OF JUST., NCJ 231175, COUNTY-BASED AND LOCAL PUBLIC DEFENDER OFFICES, 2007, at 3, 10 (2010).

48 STEVEN W. PERRY & DUREN BANKS, U.S. DEP'T OF JUST., NCJ 234211, PROSECUTORS IN STATE COURTS, 2007 – STATISTICAL TABLES, at 1 (2011).

49 LANGTON & FAROLE, *supra* note 12, at 1 ($830 million for state public defender systems); FAROLE & LANGTON, *supra* note 47, at 1 ($1.5 billion for county-based and local public defender systems).

50 Most recent data available as of the writing of this Note. The amounts comprise the total budgets available to the respective offices—including support staff, investigators, and attorneys.

51 This figure was computed assuming prosecutors' offices spend the same portion of resources on a case, irrespective of the type of counsel representing the defendant (e.g., public defender, as compared to private counsel). This figure is also computed under the conservative assumption that eighty percent of defendants are indigent. *See supra* note 12 and accompanying text.

52 Jonathan A. Rapping, *Who's Guarding the Henhouse? How the American Prosecutor Came to Devour Those He Is Sworn to Protect*, 51 WASHBURN L.J. 513, 518 (2012).

53 *See* 2 JOSHUA DRESSLER & ALAN C. MICHAELS, UNDERSTANDING CRIMINAL PROCEDURE: ADJUDICATION 176 (4th ed. 2006).

54 *Id.*

criminal trials.[55] Since criminal trials consume far more prosecutorial resources than do guilty pleas,[56] replacing guilty pleas with criminal trials would require either a decrease in the number of (presumably)[57] guilty defendants brought to answer for their crimes or an enormous increase in

55 *See* Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 YALE L.J. 1909, 1932 (1992) ("[O]ne can safely make . . . basic assumptions about the effects of abolishing plea bargaining[, including that] the number of trials would increase sharply. [About] ninety percent of cases now lead to [guilty] pleas; if even one-third of those . . . [went to trial it would] quadruple the number of criminal trials."). Note that the percentage of criminal cases ending in guilty pleas has increased from ninety percent to ninety-five percent since 1992, so the quadrupling factor would be even higher using today's guilty plea rates, assuming a constant number of criminal cases. *See also* Missouri v. Frye, 132 S. Ct. 1399, 1407 (2012) ("[Plea bargaining] *is* the criminal justice system." (quoting Scott & Stuntz, *supra*, at 1912)).

56 This does not even consider the heightened resource constraints caused by the more in-depth police investigations necessary to solidify a conviction as opposed to a bargained-for punishment where prosecutors do not need beyond-a-reasonable-doubt-level evidence. Nor does it consider the judicial resources required to conduct four times the number of trials—quadruply the jury costs, the time devoted to the actual trial, the time needed to dispose of additional motions, etc. *But see* Medwed, *supra* note 24, at 1560 ("Defendants who are fully aware of the strength of the case against them might express greater willingness to accept plea bargains than those who lack such insight.").

57 *See* ALAN M. DERSHOWITZ, THE BEST DEFENSE, at xxi–xxii (1982) (proposing that there are thirteen rules of the "justice game," the first of which is "[a]lmost all criminal defendants are, in fact, guilty").

A recent analysis of both empirical data and case law has poked holes in the popular fear that many innocent defendants plead guilty to avoid the risk of the enormous punishments that are often handed down after convictions at trial. *See* Avishalom Tor et al., *Fairness and the Willingness to Accept Plea Bargain Offers*, 7 J. EMPIRICAL LEGAL STUD. 97, 97 (2010). The study supports the claim that innocent defendants are significantly less likely to plead guilty than are factually guilty defendants. *Id.* Due to perceptions of unfairness in accepting a punishment that does not fit the crime (e.g., where no crime was actually committed), innocents (and even defendants who are unsure of their guilt or innocence) are systematically less likely to accept plea bargains even though the risk of conviction is statistically great and the anticipated punishment if convicted at trial is significantly greater than the bargained-for punishment. Consider the infamous Tulia drug scandal in which the first six defendants implicated all pled not guilty despite having seen the defendants before them receive sentences of 12 to 434 years in prison from convictions at trial based on almost identical evidence. All six defendants were offered heavily discounted sentences in exchange for a guilty plea. The sixth defendant "who received a 20-year sentence [despite seeing] five previous defendants convicted based on the same testimony . . . still refused a five-year plea offer because of his innocence." *Id.* at 97, 99 n.4, 100.

There are obvious limitations to the conclusions reached by this article due to the fact that it is virtually impossible to truly establish any defendant's guilt or innocence with complete certainty, and it is equally as impossible to determine the "acquittal probabilities" of real trials. *Id.* at 114. However, the arguments made, based in behavioral economics ideas, are well-supported by the data presented and the examples discussed. *Id.* at 99–100 (noting that of the "hundreds of exonerations from the last two decades . . . merely 6 percent of the exonerates . . . [were] defendants who pled guilty," compared to the "more than 90 percent [rate of] guilty pleas of felony convictions generally"); *see also* Oren Gazal-Ayal & Avishalom Tor, *The Innocence Effect*, 62 DUKE L.J. 339, 347–48 (2012) ("[The] guilty [are]

the prosecution's budget.[58] Much like the unanswered call for increased indigent defense funding, it is unlikely the prosecution's budget would increase sufficiently.[59] If something were to cause prosecutors to be less dependent on guilty pleas, the likely result would be a decrease in the number of guilty defendants who are punished for their wrongdoings—prosecutors and the police would have to concentrate their limited resources on thoroughly investigating and trying a fewer number of criminals.

B. Economic Costs Under Open-File Discovery

The pillar argument by proponents of open-file discovery is, unlike in criminal cases where the stakes of litigation are infinitely higher, the American discovery rules for civil cases allow for near complete revelation of the opponent's evidence.[60] A defendant in a civil case can discover every card his opponent holds, drastically dwarfing what the defendant has access to in a criminal case.[61] The schism in discovery rules between the civil and criminal courts seems wrong given the comparative importance of the subject matter of litigation.

However, this argument-in-chief ignores one of the key differences between civil and criminal defendants—all civil defendants are represented by retained counsel, whereas eighty to ninety percent of criminal defendants are represented by public defenders with highly limited resources.[62] Combing through all of the information included in the prosecution's file can be a very time consuming process, even absent gamesmanship on the part of the

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the main beneficiaries of large plea discounts . . . [because] innocents . . . disproportionately go to trial.").

58 *See, e.g.*, Scott & Stuntz, *supra* note 55, at 1932 ("The total number of convictions would fall [if plea bargaining rates were diminished], probably substantially . . . [and it] would raise the average cost of prosecution . . . .").

59 *See* Greg Bluestein, *State Budget Cuts Clog Criminal Justice System*, MSNBC (Oct. 26, 2011, 2:12 PM) http://www.msnbc.msn.com/id/45049812/ns/us_news-crime_and_courts/t/state-budget-cuts-clog-criminal-justice-system/ ("Deep budget cuts to courts, public defenders, district attorney's [sic] and attorney general offices are testing the criminal justice system across the country."); RONALD JAY ALLEN ET AL., CRIMINAL PROCEDURE: ADJUDICATION AND RIGHT TO COUNSEL 1165 (2011) ("In jurisdictions with both high crime rates and strapped budgets—two characteristics shared by most American cities—plea rates are higher still."); *see also infra* note 69.

60 *See, e.g.*, Brian Gregory, Comment, Brady *Is the Problem: Wrongful Convictions and the Case for "Open File" Criminal Discovery*, 46 U.S.F. L. REV. 819, 846 (2012) ("Given the respective liberty interests at stake for civil and criminal defendants . . . it makes sense that criminal defendants be afforded discovery rights that meet or exceed those afforded civil defendants . . . ."); *see also* Mosteller, *supra* note 4, at 272 ("Criminal discovery has lagged behind civil discovery . . . [despite the fact that] the stakes are often higher than in civil cases . . . .").

61 *See* Buchanan, *supra* note 18; *see also* FED. R. CIV. P. 26–37 (outlining the federal court rules related to discovery in civil cases).

62 *See supra* note 12 and accompanying text.

prosecution.[63] Assuming no prosecutorial malice, in many cases, full open-file discovery gives defense counsel access to mountains of evidence.[64] Rather than simply allowing the prosecutor to act as the gatekeeper who determines what information is *Brady* evidence, material to the defendant's guilt, open-file discovery places an *even greater* workload on the public defenders presently operating at a 154% utilization rate.[65] In a world where an ethical prosecutor is not actively attempting to hide exculpatory evidence,[66] it may be in the defendant's best interest to allow the prosecutor's office—with double the resources[67] and the discretion to drop criminal charges[68]—to make the assessment of what evidence materially undermines the likelihood of the defendant's guilt. The only scenario where this increased workload would not disfavor defendants is one in which there is a *dramatic* increase in the funding of indigent defense—a highly unlikely event.[69] But even increased funding might not be truly effective. As one scholar noted, "Even with improved funding, serious failings by counsel would continue, as occurs today . . . with retained counsel and in jurisdictions where adequate funding is provided."[70]

The argument for open-file discovery also ignores the necessary increase in the prosecution's resources. Under current constitutional law, due process requires that *Brady* evidence be disclosed *for trial*. Pretrial guilty pleas do not implicate this constitutional right—materially favorable evidence does

63 *See infra* Section III.B; Cohen & Walsman, *supra* note 18, at 1 ("These days, where document productions . . . consist of hundreds of thousands—sometimes millions—of pages, a lawyer's needle-in-a-haystack gamesmanship may succeed.").

64 *See infra* notes 118–23.

65 *See supra* note 47 and accompanying text.

66 Indeed, one would like to believe an ethical prosecutor would not even pursue a case in which exculpatory evidence is so material as to undermine the confidence in a potential guilty verdict. *See* MODEL RULES OF PROF'L CONDUCT R. 3.8 cmt. 1 (2003) ("A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice, that guilt is decided upon the basis of sufficient evidence, and that special precautions are taken to prevent . . . the conviction of innocent persons."). *But see* MODEL RULES OF PROF'L CONDUCT R. 3.8(a) (2003) (requiring only a low threshold of evidence for prosecution by stating "[t]he prosecutor . . . shall . . . refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause"); *infra* Part III.

67 *See supra* note 51 and accompanying text.

68 *See* Tor et al., *supra* note 57, at 100 ("[P]rosecutors can alter the charges and facts of the indictment with virtually no judicial review . . . .").

69 *See* Nathan Koppel, *Public Defenders Stretched Thin by State Cuts*, WALL ST. J. (Apr. 14, 2011), http://online.wsj.com/article/SB10001424052748704530204576232812464584064.html ("Many states are seeking spending cuts on public defenders, including some by as much as 10% to 15% [while public defenders are still taking more clients.]"); *see also* Bluestein, *supra* note 59 ("[H]undreds of millions of dollars in criminal justice funding . . . have been cut amid the economic downturn, hampering the ability of authorities to investigate and prosecute cases.").

70 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, 977 (2010).

not have to be revealed to defendants during plea negotiations.[71] The Constitution guarantees a fair trial, but it "does not require the prosecutor to share all useful information with the defendant."[72] While most defendants would find it highly useful to see all of the prosecution's evidence at the plea bargaining stage, "[t]here is no general constitutional right to discovery in a criminal *case*," only in a criminal *trial*.[73] If however, prosecutors were to adopt an open-file discovery policy that comports with the oft-mentioned desire that the prosecution's files be accessible by the defense *prior* to entering a guilty plea,[74] "it could lead the [prosecution] . . . to abandon its heavy reliance upon plea bargaining in a vast number . . . of . . . criminal cases."[75] Prosecutors use incentives—like lowering the severity of charges or recommending shorter sentences to the judge—to buy guilty pleas from defendants so the limited prosecutorial resources can be focused on cases where trials are necessary. In refusing to extend the right to obtain *Brady* evidence in pretrial proceedings, the Supreme Court specifically noted that one of the prosecution's main motives in seeking guilty pleas is to reduce the resources used for trial preparation.[76] Defendants, the Court reasoned, would be less likely to waive their constitutional trial right and plead guilty if they could see a more complete picture of the prosecution's evidence.[77]

Prosecutors like guilty pleas for the resource savings—both time and money.[78] If prosecutors lost such savings, the key incentive to bargain for guilty pleas would be gone, and the number of guilty pleas would naturally go down. As noted above, a not-farfetched thirty-three percent decrease in the number of guilty pleas would cause a 300% increase in the number of "formal, elaborate, and expensive" trials.[79] Four times as many trials means four times as many hours spent by prosecutors preparing and trying the

71 United States v. Ruiz, 536 U.S. 622, 629 (2002); *see also id.* at 633 ("[T]he need for this information is . . . related to the *fairness* of a *trial* . . . [not] the *voluntariness* of the *plea* . . . ." (second and fourth emphasis added)).

72 *Id.* at 629 (citing Weatherford v. Bursey, 429 U.S. 545, 559 (1977)).

73 *Weatherford*, 429 U.S. at 559 (emphasis added).

74 *See, e.g.*, Gregory, *supra* note 60, at 847; Medwed, *supra* note 24, at 1560.

75 *Ruiz*, 536 U.S. at 632.

76 *Id.* ("It could require the Government to devote substantially more resources to trial preparation prior to plea bargaining, thereby depriving the plea-bargaining process of its main resource-saving advantages."); *see also* Lafler v. Cooper, 132 S. Ct. 1376, 1397 (2012) (Scalia, J., dissenting) ("[W]e accept plea bargaining because many believe that without it our long and expensive process of criminal trial could not sustain the burden imposed on it, and our system of criminal justice would grind to a halt.").

77 *Ruiz*, 536 U.S. at 631–32 ("[A] constitutional obligation to provide impeachment information during plea bargaining . . . could seriously interfere with the [prosecution's] interest in securing those guilty pleas that are . . . desired by defendants . . . and help to secure the efficient administration of justice.").

78 *See* George Fisher, *Plea Bargaining's Triumph*, 109 YALE L.J. 857, 865 (1999) ("[P]rosecutors . . . plea bargain[ ] to ease their crushing workloads . . . .").

79 *See supra* note 55 and accompanying text; *see also* ALLEN ET AL., *supra* note 59, at 1165.

cases.[80] Prosecutors would likely be forced to "cut corners" in order to offset the greater time commitments, causing new reasons to question the reliability of convictions.[81]

Some commentators have also argued that, overall, open-file discovery would lighten the burden on the judicial system because the costs associated with appeals for *Brady* violations would be greatly reduced by giving defendants access to all of the prosecutors' evidence.[82] However, while opening all of the prosecution's files to the defense might have the effect of minimizing the number of *Brady* violations, it would likely result in an increase in the number of post-conviction appeals for ineffective assistance of counsel—*Strickland* claims.[83] *Strickland* claims are the means by which defendants challenge their attorney's performance during the criminal investigation and trial.[84] These post-conviction appeals for ineffective assistance of counsel require the defendant to show *both* that his counsel's performance did not "fall[ ] within the wide range of reasonable professional assistance" *and* that his "counsel's performance [was] prejudicial" to the defendant.[85] Defense attorneys would be far more likely to render ineffective assistance by missing a piece of critical evidence if they had access to all of the prosecution's files. Instead of looking at only the evidence received from the prosecution under *Brady* obligations, defense counsel would have to look for favorable evidence in all of the prosecution's files. Rather than collaterally attacking convictions

80 It also means four times as many hours spent by police investigating the cases. And four times as many hours spent by judges and their staff preparing for and trying cases. And four times as many juries that must be convened, inconvenienced, and compensated. And four times as many hours spent preparing and trying cases by an already overworked defense counsel.

Unless the judiciary's budget dramatically increases—think more courthouses and staff, not just more judges—the increase in trials will cause an even greater backlog of defendants. *See* Bluestein, *supra* note 59 ("[S]tate budget cuts . . . have led to layoffs of 40 percent of the [San Francisco] court[s'] work force and the closing of 25 of 63 courtrooms."). The most recent available data show the average time between arrest and conviction for state court felony defendants who *entered guilty pleas* was 125 days. MATTHEW R. DUROSE & PATRICK A. LANGAN, U.S. DEP'T OF JUST., NCJ 198822, STATE COURT SENTENCING OF CONVICTED FELONS, 2000 STATISTICAL TABLES 53 (2003). The average time increases to 210 days when the defendant *opts for trial*. *Id.* at 52. A serious increase from the current five percent of criminal convictions obtained by way of trial would no doubt cause that 210 day mark to balloon drastically—possibly to the point of constitutional significance. *See supra* text accompanying note 53; *see also* Bluestein, *supra* note 59 ("Some of the lapses [from overworked judicial systems] are testing speedy-trial rules, in some cases resulting in dismissals that otherwise are hard to win.").

81 Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2464, 2476 (2004) ("[P]rosecutors can still find less visible ways to save time and effort by, for example, inadequately investigating or preparing witnesses.").

82 *See, e.g.*, THE JUSTICE PROJECT, *supra* note 11, at 1 ("[E]xpanded criminal discovery laws . . . [create] fewer reversals and retrials, and . . . enhance judicial efficiency.").

83 Strickland v. Washington, 466 U.S. 668, 687 (1984) (establishing a two-part test for ineffective assistance of counsel).

84 *Id.* at 675.

85 *Id.* at 689–92.

on a claim that the government concealed material, exculpatory evidence—in which the convicted defendant must show that the government was in possession of the evidence and that the concealment of the evidence undermined confidence in the outcome of the trial[86]—the collateral attack would now require a showing that the defense counsel's assistance was ineffective because he or she neglected to discover one piece of critical evidence among the potentially large number of files provided by the prosecution.[87] While it is probably true that the number of *Brady* violation claims would be reduced if the prosecution were not concealing *any* evidence, the decrease in *Brady* claims would likely be completely offset by the increase in *Strickland* claims.[88] The defendant would then face the difficult task of establishing that his counsel was ineffective, either because counsel performed insufficient investigation or because counsel did not utilize the exculpatory evidence in the prosecutor's open file.[89] The defendant would also have to establish that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."[90] The transition from *Brady* claims to *Strickland* claims has little effect because both "require[ ] materiality [and] use[ ] much the same legal standard and ha[ve] the same effect."[91]

86 *See supra* note 16 and accompanying text.

87 *See* Rompilla v. Beard, 545 U.S. 374, 390–93 (2005) (holding that defense counsel rendered ineffective assistance by failing to fully investigate all resources made available by the government, including the defendant's prior-conviction records, prison records, juvenile court records, and school records).

88 Both *Brady* claims and *Strickland* claims require the defendant to become aware of material exculpatory evidence after the trial, before they can pursue a post-conviction remedy. Any decrease in one would create an increase in the other, effectively creating a zero-sum outcome in the total number of post-conviction appeals.

89 *Rompilla*, 545 U.S. at 390 (citing *Strickland*, 466 U.S. at 694).

90 *Id.* (quoting *Strickland*, 466 U.S. at 694).

91 Mosteller, *supra* note 70, at 978–79. *Strickland* claims have proven to be very difficult to win. Many states believe that a trial record is too incomplete to adequately allow direct appeals for ineffective assistance of counsel, requiring collateral challenges to defense counsel's effectiveness. *See* YALE KAMISAR ET AL., MODERN CRIMINAL PROCEDURE 135 (13th ed. 2012). Petitioners collaterally challenging their counsels' effectiveness through *habeas corpus* or *coram nobis* proceedings have no constitutional right to appointed counsel, adding to the difficulty of winning a *Strickland* claim. Carrington, *supra* note 45, at 194. Likely proceeding *pro se*, the petitioner has to establish *both prongs* of a *Strickland* challenge—deficient performance and prejudice. *See supra* note 83 and accompanying text. This is no easy feat, with many seemingly "obvious" deficient performances being found constitutionally adequate. *See, e.g.*, Burnett v. Collins, 982 F.2d 922, 930 (5th Cir. 1993) (counsel drank alcohol before and during trial); Romero v. Lynaugh, 884 F.2d 871, 872 (5th Cir. 1989) (counsel presented no mitigating evidence); Berry v. King, 765 F.2d 451, 454–55 (5th Cir. 1985) (counsel's drug use was not sufficient to establish ineffective assistance); Ortiz v. Artuz, 113 F. Supp. 2d 327, 341 (E.D.N.Y. 2000) (counsel slept during trial); Jackson v. State, 290 S.W.3d 574, 585–87 (Ark. 2009) (counsel slept during *voir dire*); Bell v. State, 879 So. 2d 423, 442 (Miss. 2004) (counsel did not make an opening statement); Smith v. State, 765 N.E.2d 578, 585–88 (Ind. 2002) (inexperienced counsel neglected to object to inadmissible evidence on seven occasions). Even where defendants

The increased workload on public defenders under an open-file discovery regime is another factor that would drive up the number of *Strickland* claims.[92] An increase in the amount of time required to pore over the evidence in a particular case would mean more work for each attorney. Looking at the effectiveness of defense counsel, from a plain English meaning of effectiveness as opposed to a constitutional meaning, how effective can overburdened attorneys be? In a study of New York City public defenders in the 1980s, public defenders spoke with witnesses in only twenty-one percent of homicide cases and four percent of non-homicide felony cases.[93] Modern studies suggest the prevailing practices today are little improved.[94] Practi-

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may have been prejudiced by counsels' deficient performance, some defense attorneys would rather avoid the stigma of a *Strickland* claim than see their clients' constitutional rights protected. *See* Carrington, *supra* note 45, at 195–96 ("In several instances I have observed the client, after his complaints are dismissed [by the trial court], placed under oath at his lawyer's request and asked to affirm the court's finding of his lawyer's competence in order to preclude a later claim of ineffectiveness of counsel.").

The one bright spot for criminal defendants is that unlike *Brady* rights, which pertain only to *trials*, the Supreme Court recently held that there is a constitutional right to effective assistance of counsel at the *plea bargaining* stage. *See supra* notes 71–73 and accompanying text; Missouri v. Frye, 132 S. Ct. 1399, 1408 (2012) (holding that counsel's assistance was ineffective when counsel did not inform the defendant of plea offers from the prosecution); Lafler v. Cooper, 132 S. Ct. 1376, 1391 (2012) (holding that counsel's deficient performance during plea negotiations prejudiced the defendant when counsel advised the defendant to not accept a plea deal and the defendant was ultimately convicted at trial).

92 *See supra* notes 64–70 and accompanying text.

93 *See* Michael McConville & Chester L. Mirsky, *Criminal Defense of the Poor in New York City*, 15 N.Y.U. REV. L. & SOC. CHANGE 581, 762–67 (1987) (explaining how the filing of written motions occurred in only twenty-six percent of homicide cases and eleven percent of non-homicide felony cases, and visiting the crime scene occurred in only twelve percent of homicides and four percent of non-homicides); *see also* Carrington, *supra* note 45, at 195 (discussing indigent defenders' deficient investigation and stating, "No one will ever know . . . whether the lawyer bothered to go to the crime scene . . . . Most courts would not approve the fee [for the time spent investigating], anyway. But understanding the scene and speaking to witnesses prior to the hearing is critical.").

94 *See* Sanjay K. Chhablani, *Chronically Stricken: A Continuing Legacy of Ineffective Assistance of Counsel*, 28 ST. LOUIS U. PUB. L. REV. 351, 352 (2008) ("Accounts from across the country speak to pervasive inadequate representation . . . at all phases of criminal proceedings[:] [f]ailure[s] to investigate[,] . . . engage in pre-trial work[,] . . . present evidence[,] [and] . . . challenge unconstitutional, illegal[,] or improper conduct. These anecdotal reports have been corroborated year after year by reports and studies documenting the crisis in indigent defense programs."); *see also* Benjamin H. Barton & Stephanos Bibas, *Triaging Appointed-Counsel Funding and Pro Se Access to Justice*, 160 U. PA. L. REV. 967, 975–76 (2012) (discussing "'meet 'em and plead 'em'" defense lawyers, who "manage their crushing workloads . . . [by] pressing their clients to plead guilty immediately[,] before doing any investigation" (quoting STANDING COMM. ON LEGAL AID & INDIGENT DEFENDANTS, AM. BAR ASS'N, *GIDEON*'S BROKEN PROMISE 16 (2004)); *id.* (recounting "numerous examples of representation so minimal that it amounted to no more than a hurried conversation with the accused moments before entry of a guilty plea and sentencing"); Vivian O. Berger, *The Supreme Court and Defense Counsel: Old Roads, New Paths—A Dead End?*, 86 COLUM. L. REV. 9, 61 (1986) (noting that "crushing caseloads . . . promote lackluster performance by discour-

cally speaking, if public defenders can find the resources to interview witnesses in only about one-fifth of the *homicide* cases, where the defendant is facing very dire straits, it is highly unlikely that public defenders will have the resources to comb through much larger discovery files under an open-file discovery regime.[95]

Open-file discovery would increase the workload for prosecutors, public defenders, and the judiciary. Increased workloads without an increased workforce would result in less time allocated to each defendant at every step of the criminal prosecution. The only way to offset the increased workload would be to increase the budgets of every department of the judicial branch—an outcome highly unlikely to happen in the near future.[96]

III. The Second Hurdle: Realistic Ramifications of Open-File Discovery

Open-file discovery would not work as a cure-all, as many supporters believe.[97] Expanded discovery for defendants would have negative consequences—especially in situations where prosecutors act unethically. First, open-file discovery would do nothing to alleviate the biggest threat to defendants—prosecutors and police who affirmatively act to withhold exonerating evidence from defendants. Even if all of the prosecution's files are available to a defendant, a prosecutor seeking to hide evidence could still take affirmative steps to conceal pieces of favorable information. Second, open-file discovery would provide additional tools to prosecutors seeking to obstruct a defendant's counsel. Open-file discovery paves the way for new types of prosecutorial gamesmanship in which prosecutors can use mandatory information disclosure to gain additional advantages over defendants. Worse yet, open-file discovery may lead prosecutors acting with the best of intentions to unwittingly burden defendants' counsel with too much information.[98]

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aging careful investigation and mak[e] . . . guilty plea[s] an attractive option [for] counsel"); Jane Fritsch & David Rohde, *Lawyers Often Fail New York's Poor*, N.Y. Times, Apr. 8, 2001, at A1, *available at* http://www.nytimes.com/2001/04/08/nyregion/lawyers-often-fail-new-york-s-poor.html?pagewanted=all&src=pm ("New York City offers representation to the poor that routinely falls short of even the minimum standards recommended by legal experts.").

95 There is no indication that defense counsel met with *all* of the witnesses in the cases in which defenders did speak with witnesses—only that at least *a* witness was interviewed.

96 *See supra* notes 69–70 and accompanying text.

97 *See supra* note 4 and accompanying text.

98 During a panel discussion at Georgia State University, former Assistant United States Attorney Art Leach offered an insider perspective on open-file discovery and how it can sometimes lead to an unintentional, bad result:

> I would submit to you that . . . open-file discovery is the lazy approach to handling discovery. . . . [A]s counsel for the Government, . . . you'll be unaware of many details that appear in what you are presenting for discovery. . . . By the time the prosecutor realizes the problems that exist, it's probably going to be too late [and the defendant will have already pled guilty].

A. *Prosecutorial Malfeasance: The Michael Evans and Paul Terry Example*

In an ideal world, each and every defendant would have an attorney who could devote the time and effort necessary for a vigorous defense. Setting aside the financial limitations of this public defender utopia, there is another major obstruction to the viability of open-file discovery as a solution to inadequate indigent defense: no realistic amount of time and effort could outweigh the endeavors of a malevolent prosecutor. Assuming that the resources for indigent defense were dramatically increased to a sufficient level of funding, defense counsel would still likely be unable to discover exculpatory evidence that the prosecution has taken affirmative steps to conceal.[99]

Consider, for example, the case of Michael Evans and Paul Terry.[100] Mr. Evans and Mr. Terry were convicted of raping and murdering a nine-year-old girl, serving twenty-seven years in prison before ultimately being exonerated with the help of DNA evidence.[101] During discovery in Mr. Evans's and Mr. Terry's *civil* suits for their false imprisonment,[102] the prosecution's star witness, Judith Januszewski, revealed that during the criminal investigation police officers used improper interrogation techniques to coerce her into testifying to a story that would wrongfully convict Mr. Evans and Mr. Terry.[103] When Mrs. Januszewski's husband was deposed for the civil trial, he brought to light concerns he had made known to police and prosecutors about the reliability of his wife's testimony during the criminal trial.[104] Mr. Januszewski also disclosed that during the criminal trial he accompanied his wife to the courthouse to "rais[e] his reservations about her credibility to the prosecutors," but when he arrived at the courthouse he was "detained by . . . police officers in a holding room until the end of the day."[105] This impeaching evidence was not disclosed to the defense at the time of criminal trial and did not come to light until after Mr. Evans and Mr. Terry had been exonerated by DNA evidence.[106]

Panel Discussion: Criminal Discovery in Practice, *supra* note 30, at 805. *See* Burke, *supra* note 26, at 488 (arguing that "even virtuous prosecutors trying to do justice can err in their good-faith attempts [to meet their ethical and constitutional disclosure requirements]").

99 The increase in funding would have to be very large to meet not only the current underfunding of indigent defense, but also the increased funding that would be necessary to handle the larger workload associated with open-file discovery.

100 Evans v. City of Chicago, No. 04 C 3570, 2006 U.S. Dist. LEXIS 9831, at *11, *18 (N.D. Ill. Jan. 6, 2006).

101 *Id.* at *2, *20–21; *see Know the Cases: Browse Profiles: Michael Evans*, INNOCENCE PROJECT, http://www.innocenceproject.org/Content/Michael_Evans.php (last visited Oct. 15, 2013); *Know the Cases: Browse Profiles: Paul Terry*, INNOCENCE PROJECT, http://www.innocenceproject.org/Content/Paul_Terry.php (last visited Oct. 15, 2013).

102 *Evans*, 2006 U.S. Dist. LEXIS 9831, at *55.

103 *Id.* at *31 ("[P]olice officers questioning her allegedly suggested various names to her as being the persons she claimed to have seen.").

104 *Id.* at *30–32.

105 *Id.* at *32.

106 *Id.*

While this example of prosecutorial and police misconduct is unsettling, it is not supportive of a call for open-file discovery like some proponents have claimed.[107] In this case, and many other similar cases, the closedness of the prosecution's files was not the reason for the wrongful conviction.[108] Mrs. Januszewski was readily available for cross-examination during the criminal trial, at which time her treatment during the police interrogation could have been revealed. Presumably, neither the illegal conditions of Mrs. Januszewski's interrogation, nor Mr. Januszewski's detainment were documented in any tangible files that could have been discovered by the criminal defense counsel. Even if the events had been documented and if this case had been subject to an open-file discovery policy, it is not a far stretch to believe that a prosecution willing to hide obvious *Brady* evidence would take an affirmative step to withhold that evidence from inclusion in the discoverable files.[109] Had Mr. Evans and Mr. Terry been prosecuted under an open-file policy, their battle may have been even more frustrated by the belief that all possibly discoverable evidence—and therefore all exculpatory evidence—had been provided to them.[110]

Prosecutorial misconduct is "very difficult" to uncover, and when it is discovered, it is usually found "by chance."[111] As one commentator queried while discussing high-profile, nationally-known cases in which there was prosecutorial misconduct:

> [D]iscoveries [of misconduct are] often by happenstance. If misconduct of the extreme proportions present in these cases—cases that all received a high level of public scrutiny because of their sensational nature—could go undetected, what is the actual quantity and scope of overzealous misuse of power in the thousands of other cases [that] are prosecuted each year, most of which do not receive comparable scrutiny . . . ?[112]

If the prosecution has the desire to conceal evidence from the defense, no level of openness will be sufficient to prevent this from happening.[113] "Rare are the instances of misconduct that are not violations of rules that

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107 *See, e.g.*, The Justice Project, *supra* note 11, at 13–15 ("In the end, both men failed to receive fair and just trials because prosecutors did not give the defense access to exculpatory information that would have cast doubt on the testimony of the single eyewitness.").

108 *See generally* Adam M. Gershowitz, *Prosecutorial Shaming: Naming Attorneys to Reduce Prosecutorial Misconduct*, 42 U.C. Davis L. Rev. 1059 (2009) (citing several examples of prosecutorial misconduct).

109 *See, e.g.*, Connick v. Thompson, 131 S. Ct. 1350, 1357 (2011) (explaining how prosecutors did not disclose lab tests determining the blood type found on evidence collected at a crime scene, in spite of an office policy requiring that all "crime lab reports and other scientific evidence [be turned] over to the defense").

110 *See infra* Section III.B.

111 Michael D. Cicchini, *Prosecutorial Misconduct at Trial: A New Perspective Rooted in Confrontation Clause Jurisprudence*, 37 Seton Hall L. Rev. 335, 339 n.21 (2006).

112 Kenneth Rosenthal, *Prosecutor Misconduct, Convictions, and Double Jeopardy: Case Studies in an Emerging Jurisprudence*, 71 Temp. L. Rev. 887, 959–60 (1998) (footnote omitted).

113 *See* Burke, *supra* note 26, at 489 ("[Prosecutors] are their own watchers. If they intentionally suppress evidence that might jeopardize a conviction, they can do so in the

every legal professional . . . is charged with knowing."[114] Having an open-file policy may just make concealing evidence easier to accomplish by creating strategic weapons not available to prosecutors working under limited discovery regimes.[115]

B. Open-File Discovery as a Prosecutorial Weapon

There are several examples of ways prosecutors have used the guise of an open-file policy to make defendants believe they have all of the applicable evidence. Prosecutors have used open-file discovery as a gesture of good faith to lull defendants into a belief that a motion for disclosure of *Brady* evidence would be fruitless and therefore a waste of defense counsels' resources.[116] Further, in situations where there is *Brady* evidence that has not been reduced to writing—for example, a witness's uncertainty or infirmity, or where a police officer working on the investigation mentions something to the prosecutor while passing in the hallway—an open file would produce nothing but a defense counselor who believes that he has all exculpatory evidence and that he need not delve deeper into an investigation or independently question witnesses.[117]

There have been other instances of prosecutorial gamesmanship—even in situations where the prosecution has maintained a truly open-file discovery policy, under which nothing is concealed, including *Brady* evidence. In one such case, an overwhelming mountain of evidence was put at the disposal of the defense, with nary a clue where to begin its search.[118] The court in that case held that *Brady* merely requires disclosure of material evidence to the

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comfort of knowing there is little chance the evidence will ever come to light . . . ." (footnote omitted)).

114 State v. Breit, 930 P.2d 792, 803 (N.M. 1996).

115 *See infra* Section III.B.

116 *See, e.g.*, Strickler v. Greene, 527 U.S. 263, 276 (1999) (providing an example of when defense counsel neglected to file a pretrial motion for discovery of possible exculpatory evidence because an open-file policy gave defendant access to all of the evidence in the prosecutor's files—except the *Brady* evidence). Similarly, North Carolina had a state law mandating open-file discovery, yet Mr. Nifong "slipped up" and did not disclose the "critical exculpatory evidence"—evidence found only because of the resources of the defendants and the high profile nature of the Duke Lacrosse Case. Bennett L. Gershman, *Litigating* Brady v. Maryland*: Games Prosecutors Play*, 57 CASE W. RES. L. REV. 531, 546 (2006); *see also supra* notes 1–10 and accompanying text.

117 *See* Cassidy, *supra* note 37, at 1439, 1477–78. *But see* State v. Kaiser, 486 N.W.2d 384, 386–87 (Minn. 1992) (finding reversible error where prosecutor neglected to disclose a witness's doubts that had casually been mentioned to the prosecutor).

118 United States v. Causey, 356 F. Supp. 2d 681, 684, 686–87 (S.D. Tex. 2005) ("The plain language of Rule 16 [of the Federal Rules of Criminal Procedure] does not require the government to specify from among the . . . [eighty million pages of] discovery documents produced to defendants which documents it considers material to the defense . . . ."); *see* United States v. Mmahat, 106 F.3d 89, 94 (5th Cir. 1997) ("[T]he government conceded that it had been aware of [the two pages of exculpatory evidence] but argued that it had met its *Brady* obligation by disclosing them in the 500,000-page cache [given to the defense]. . . . We agree.").

defense, not a roadmap of the disclosed material.[119] Some courts have imposed limitations on the use of this "*Brady* Dump"—concealment of exculpatory evidence within mountains of irrelevant material—but they are not exactly strict limitations.[120] For example, the Fifth Circuit has noted that "evidence that the government 'padded' an open file with pointless or superfluous information . . . might raise serious *Brady* issues."[121] While this limitation might appear to disparage bad faith gamesmanship by the prosecution, it is really just a paper tiger. The burden to show bad faith is on the defendant,[122] and it would likely require someone in the prosecutor's office to blow the whistle on the *Brady* Dump tactic.[123]

Even in states where open-file discovery is the law of the land, some judges have been reluctant to read discovery statutes to their full breadth.[124] For example, North Carolina law requires the State to "[m]ake available to the defendant the complete files of all *law enforcement* and *prosecutorial agencies* involved in the investigation of the crimes committed or the prosecution of the defendant."[125] This broad language would appear to provide the defendant unfettered access to every piece of evidence at the prosecutor's disposal. However, in a case upholding a conviction for statutory rape, a North Carolina appellate court read the discovery statute to exclude valuable notes taken during the criminal investigation by the State Department of Social Services ("DSS").[126] In reaching its conclusion, the court found no support for the contention that DSS is a prosecutorial agency, even though DSS employees performed independent investigations of the alleged child abuse, referred the matter to the police, and were present during police interviews with the victim.[127] Shortly before this decision, the North Caro-

119 *See Causey*, 356 F. Supp. 2d at 693–94 (finding no *Brady* violation even though it would take the defense "15 years to review every page" assuming "100 attorneys working 12 hours a day" and spending only "30 seconds reviewing each of the[ ] 80 million pages . . . [and that t]o establish a *Brady* violation the defendants must show that the information allegedly withheld from them was not available through due diligence").

120 *See* Cohen & Walsman, *supra* note 18, at 2.

121 United States v. Skilling, 554 F.3d 529, 577 (5th Cir. 2009).

122 *Id.* at 568; *see also id.* at 577 ("[C]onsidering . . . the equal access . . . to the open file . . . and the absence of evidence that the government used the open file . . . *in bad faith*, we hold that the government's use of the open file did not violate *Brady*." (emphasis added)).

123 *See* Cohen & Walsman, *supra* note 18, at 2 ("[I]t would take a miracle—or, more likely, a whistleblower out of the prosecutor's office (also, likely a miracle)—for an aggrieved defendant to prove such intent.").

124 *See, e.g.*, State v. Pendleton, 622 S.E.2d 708, 709–10 (N.C. Ct. App. 2005).

125 *Pendleton*, 622 S.E.2d at 709 (quoting N.C. GEN. STAT. § 15A-903(a)(1) (2003) (emphasis added)). Note that since the holding of this case, the North Carolina legislature has amended the statute to include the files of "investigatory agencies," arguably overruling this case. N.C. GEN. STAT. ANN. § 15A-903(a)(1) (West 2011). An investigatory agency is any "public or private entity that obtains information on behalf of a law enforcement agency or prosecutor's office." N.C. GEN. STAT. ANN. § 15A-903(a)(1)(b1) (West 2011).

126 *Pendleton*, 622 S.E.2d at 709. The notes included names of possible witnesses. *Id.*

127 *Id.* at 709–10.

lina State Legislature had completely revamped the state's discovery laws in an effort to "requir[e] automatic disclosure of *all* nonprivileged information in the prosecution's entire file."[128] Despite the underlying purpose of the legislature—complete open-file discovery—the court read the law literally, essentially treating the legislative disclosure requirements as both a floor and a ceiling.

Broadening the level of discovery available to criminal defendants would create many unintended side effects. In addition to the good—a more fair trial where the defendant has a complete picture of the evidence—open-file discovery comes with much of the bad. Prosecutors acting in bad faith would not be deterred by an open-file policy and may even be able to use expanded discovery to further their malevolent conduct. Whether the prosecution intentionally over-discloses information to the defense counsel or does so unintentionally, public defenders could find themselves looking for a needle in a haystack. Even where states have taken steps to enact expanded discovery statutes, courts have been reluctant to see the wisdom of completely opening the floodgates. Though judges are not elected to represent the people, they are on the frontlines of criminal discovery and have a much more informed position than do legislators. This may be a scenario where deference to the courts is a good idea.

CONCLUSION

The system is not perfect. Not all prosecutors live up to the high ethical standards expected of them, and occasionally, as a result, defendants are convicted of crimes they did not commit. But on the whole, prosecutors properly exercise the will of the people they have been elected to represent and serve.[129] Prosecutors like those in the Duke Lacrosse Case and the Michael Evans and Paul Terry case are the rare outliers—and changes to the breadth of discovery would have little to no impact on these exceptional occurrences.[130] When *Brady* violations do occur, insiders have indicated that it is "more omission than commission."[131] Prosecutors, while they do have greater resources than do indigent defense counsel, are still overworked.[132]

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128 Ellen Yaroshefsky, *Prosecutorial Disclosure Obligations*, 62 HASTINGS L.J. 1321, 1331, 1331 n.45 (2011) (emphasis added); *see* S.B. No. 52, 2004 Gen. Assemb., Sess. 2003 (N.C. 2004).

129 Forty-seven of the fifty states' chief prosecutors are elected officials. CAROL J. DEFRANCES, U.S. DEP'T OF JUST., NCJ 193441, PROSECUTORS IN STATE COURTS, 2001, at 11 (2002).

130 In fact, cases like this are *very* rare. Over the forty-year period from 1961–2001, there were only 270 instances where convictions were overturned or a new trial was ordered because of undisclosed evidence. Richard A. Serrano, *Withheld Evidence Can Give Convicts New Life*, L.A. TIMES (May 29, 2001), http://articles.latimes.com/2001/may/29/news/mn-3771.

131 *Panel Discussion: Criminal Discovery in Practice*, *supra* note 30, at 810.

132 *See supra* notes 48–51 and accompanying text.

When prosecutors neglect to turn over *Brady* evidence to the defense, it is oftentimes because they "just don't know" that the material is in their files.[133]

The traditional arguments for and against open-file discovery hold true. The stakes of a criminal trial—sometimes life in prison, or even death—greatly outweigh the stakes of a civil trial. In a perfect world, criminal defendants would have access to all of the evidence against them, and they would receive stellar, thorough representation. The "quest for truth" is the crux of the American legal system,[134] and that truth is most easily found when all parties have complete information. Further, the threat of innocent defendants pleading guilty because they do not know the weight of the prosecutor's evidence seems to be overstated. However, the threats posed by open-file discovery cannot be easily cured. Defendants who know the identity of witnesses will be able to disrupt the judicial process with intimidation and threats. Just knowing that defendants will know their witnesses' identities long before trial might cause witnesses to be less willing to step forward in criminal investigations. Additionally, defendants already have many procedural advantages in adversarial criminal trials. Opening prosecutors' files would put defendants in an even more advantageous position.

Apart from the traditional arguments made in the open-file discovery debate, the practical effects of increased discovery rights would actually serve to harm the majority of defendants. Open-file discovery may alleviate some of the risk of *Brady* violations, but the costs to the legal system—including costs to defendants—would outweigh the benefits. The budgetary constraints on indigent defense representation do not allow for an increased workload. Opening prosecutors' files would create problems of inadequate representation among public defenders. Not only would this result in more *Strickland* claims, but it might also cause more injustice by forcing prosecutors and police departments to be overly diligent before pursuing a criminal conviction. This is not to say diligence is a bad thing, but rather that the prosecution would be unable to devote the resources required to thoroughly investigate every crime truly worthy of pursuit. Prosecutors would lose their main incentive to plea bargain and the judiciary would face an increased workload.

In addition to the economic infeasibility of open-file discovery, the real threat to defendants—prosecutorial malfeasance—would be unaffected by increased discovery. Prosecutors intent on concealing evidence from defendants would be unabated by open-file discovery. Evidence that is never reduced to writing, or some other tangible form, cannot be in a prosecutor's file to discover. Even if evidence is in written form, a prosecutor acting with bad intentions could exclude that piece of evidence from the "complete open file" given to the defense counsel. Open-file discovery would also present more subtle ways for prosecutors to frustrate defense counsel—specifically by misleading defense counsel into incorrectly thinking that the

133 *Panel Discussion: Criminal Discovery in Practice*, *supra* note 30, at 812.

134 Brennan, *supra* note 19, at 279.

prosecutor has turned over all of the evidence or by overwhelming defense counsel with superfluous information.

Rather than rely on the already overworked public defender system to shoulder the responsibility of discovering material exculpatory evidence, the better allocation of the duty is to keep the status quo and charge the prosecution with the obligation to turn over *Brady* evidence. Simply put, "[a]n attorney appointed to represent a capital defendant . . . [and] granted only $500 for expert and investigative expenses" is in a much inferior position to be responsible for discovering and utilizing exculpatory evidence, as compared to "the other side with three prosecutors and an array of law enforcement agencies and expert witnesses."[135] Obviously there are pitfalls to having limited discovery, but a transition to open-file discovery would only serve to further burden public defenders while doing very little to cure malevolent prosecutors. The proper focus of prosecutorial reform is not the extent of the discovery available to defendants, but rather remedial oversight of bad-faith prosecutions. The occasional unjust convictions will continue, but assigning even more work to underfunded indigent defense counsel would only further diminish the adequacy of representation for indigent defendants.

135 Chhablani, *supra* note 94, at 386.